COVERAGE ISSUES IMPACTING AUTOMOBILE LITIGATION: RENTAL/TEMPORARY SUBSTITUTE, LATE NOTICE, & THE GRAVES AMENDMENT

by

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Coverage Issues Impacting Automobile Litigation:

Rental/Temporary Substitute, Late Notice, & the Graves Amendment

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RENTAL COVERAGE

1. Vicarious Liability

a. New York State imposes vicarious liability for an unlimited amount of damages on car owners and lessors pursuant to New York Vehicle and Traffic Law § 388.

b. "Every owner of a vehicle used or operated in this state shall be liable and responsible for death or injuries to person or property resulting from negligence in the use or operation of such vehicle, in the business of such owner or otherwise, by any person using or operating the same with the permission, express or implied, of such owner." N.Y. Veh. & Traffic Law § 388 (1).

2. The Graves Amendment

a. The Graves Amendment (attached as **Appendix 1**) is a federal statute enacted in 2005 to limit liability of the owners of motor vehicles that are rented or leased and result in injury to person or property. 49 U.S.C. § 30106 (a). However, the owner will not be afforded this protection if there is negligence or criminal wrongdoing on the part of the owner. Id. § 30106 (a)(2).

b. Therefore, the vicarious liability argument against a rental car company is no longer valid. Clarke v. Hirt, 46 Misc.3d 571, 574 (Sup. Ct. 2014). See Pedroli v. Mercedes-Benz USA, LLC, 94 A.D.3d 842, 843–44 (2d Dep't 2012).

c. This does not supersede State laws from imposing financial responsibility, insurance standards, or liability on the motor vehicle owners for failing to meet financial or insurance requirements. Id. §§ 30106 (b)(1), (2). In New York, such requirements can be found at 11 N.Y.C.R.R. 60-1.1 (a); N.Y. Veh. & Traffic Law §§ 345, 370. It can be argued that N.Y. Veh. & Traffic Law § 370 imposes a first layer of liability on the rental car company since it is required by state law to carry insurance on the vehicle. Therefore, the insurer of the driver would be responsible for any excess.

d. As of now, the constitutionality of the Graves Amendment has been questioned several times and has been upheld in various trial and intermediate courts in New York, including federal district courts. Therefore, the preemption of N.Y. Veh. & Traffic Law § 388 stands. Green v. Toyota Motor CreditCorp, 605 F.Supp.2d 430 (E.D.N.Y. 2009); Berkan v. Penske Truck Leasing Canada, Inc., 535 F.Supp.2d 341, 345 (W.D.N.Y. 2008); Hall v. Elrac, Inc., 52 A.D.2d 262, 262–63 (1st Dep't 2008); Graham v. Dunkley, 50 A.D.3d 55 (2d Dep't 2008);

3. Practical Application of the Graves Amendment

a. Serfess v. Becker, Coniber, and Jeff Coniber Trucking, LLC, No. 4149/2010 (Orange County Supreme, April 8, 2011). Attached as **Appendix 2**.

b. In a case of ours, venued in Orange County, plaintiff sued our client Coniber in his personal and business capacities after plaintiff was injured while riding

his motor cycle. It was alleged that a block of wood fell off the trailer that our defendant had rented to co-defendant. The block of wood [a parking chock] was jarred off of the trailer and into plaintiff's path causing plaintiff to dump his motorcycle and sustain severe injuries.

c. Our original answer did not contain an affirmative defense regarding the Graves Amendment. In fact, we first learned that defendant had from time to time rented/leased trucks, trailers and other machinery at his deposition taken just prior to the motion to amend the answer.

d. After a failed attempt to procure a stipulation from opposing counsel to amend the answer (over a year after serving the original answer), we sought leave to amend from the Court which was granted.

e. Opposing counsel argued that our client, through his business, was not a rental/leasing company that the Graves Amendment intended to protect—arguing that it contemplated only large companies like Avis, Hertz, etc. We showed that our client owned several trucks, trailers and machinery that he rented for $75/day, each time issuing an invoice.

f. Most importantly, we argued that the plain language of the Graves Amendment was not as limited as the opposition suggested and that no legislative materials suggested to the contrary. [Contrary to common understanding].

g. In granting our motion to amend the answer to include the affirmative defense of the Graves Amendment, the Court found that there was a question as to

whether the Graves amendment applied to the benefit of Coniber, finding no law to the contrary. .

SPECIAL NOTE*** In New York, all insurance companies must provide coverage for damage to rental vehicles leased by their insureds. N.Y. Ins. Law § 3440 (b). *See* 1997 Ops Atty Gen 5. Rental vehicle companies who enter into rental agreements for less than thirty (30) days are not permitted to hold an authorized driver liable for damages to, or loss of, the rental vehicle, with rare exceptions. General Business Law §§ 396-z (7), (9); 1997 Ops Atty Gen 5.

TEMPORARY SUBSTITUTE

Also known as "the loaner" vehicle, New York courts have held that loaner vehicles fall outside of the purview of the Graves Amendment, so N.Y. Veh. & Traffic Law § 388 applies. This is commonly seen where a dealership or other automobile repair shop lends their customers vehicles to operate while the vehicle the customer owns is in the dealership for repair. The driver of the loaner car would be considered a permissive user, so the company's insurance policy that owns the car would be primary.

In Motors Ins. Corp. v. Africk, 55 A.D.3d 571 (2d Dep't 2008), Arroway Chevrolet loaned a vehicle to the defendant while it was servicing his vehicle. The defendant was involved in a one-car accident and damaged the loaner vehicle. Arroway submitted the claim to its carrier, which paid the first-party claim. The carrier then commenced a subrogation action against the defendant seeking to recover the amounts paid. In disallowing the claim, the Appellate Division stated that a permissive user of an

insured's vehicle is treated no differently than a named insured. Therefore, the vehicle owner is liable for the damages caused by the permissive user. Comment: To hold otherwise would violate basic anti-subrogation standards.

LATE NOTICE

Policies of insurance, whether personal or commercial, auto or homeowners, include a condition requiring an insured to provide notice of an occurrence or loss to the insurer as soon as practicable or as soon as reasonably possible. Absent an excuse for the delay, notice provided by the insured more than a month after the loss is typically held to be untimely. See Juvenex Ltd. v. Burlington Ins. Co., 63 A.D.3d 554, 554 (1st Dep't 2009) (discussing the insured's delay of two months as unreasonable delay). Forty (40) days has also been considered an unreasonable delay. Young Israel Co-Op City v. Guideone Mut. Ins. Co., 52 A.D.3d 245 (1st Dep't 2008).

Prior to 2009, New York had a "No Prejudice" rule that allowed an insurer to deny coverage under certain policies based on late notice. If the insured did not notify the insurer of the claim "as soon as practicable" after an occurrence, claim, or suit, the insurer could disclaim coverage on the ground of late notice without having to demonstrate that it was prejudiced by the delay. *E.g.*, Sec. Mut. Ins. Co. of New York v. Acker-Fitzsimons Corp., 31 N.Y.2d 436 (1972). The absence of timely notice of an occurrence is a failure to comply with a condition precedent which, as a matter of law, vitiates the contract. Argo Corp. v. Greater New York Mut. Ins. Co., 4 N.Y.3d 332, 339

(2005) (citing Security Mut. Ins. Co. of N.Y. v. Acker–Fitzsimons Corp., 31 N.Y.2d 436, 440–43 (1972)).

The Prejudice Rule

- January 17, 2009 marks the date the Prejudice Rule came into effect and any insurance policies incepted on or after that date are subject to its protection, including automobile insurance policies.
- This does away with the No Prejudice Rule, or at least partially, or perhaps more accurately, begins to phase it out.
- Effective January 17, 2009, the New York Legislature amended New York Insurance Law § 3420.
- N.Y. Ins. Law § 3420 (a)(5) states that failure to give required notice to an insurer within the time prescribed in the insurer's policy shall not invalidate the claim unless the insurer can demonstrate prejudice.
    - Caution: a claims-made policy may provide that the claim shall be made within the policy period, renewal, or extension. N.Y. Ins. Law § 3420 (a)(5).
- In this context, "prejudice" means material impairment of the insurer's ability to investigate or defend the claim. N.Y. Ins. Law § 3420 (c)(2)(C).
- If the insured submits a claim to its insurer within two years of the time required under the policy, the insurer bears the burden of establishing

prejudice. If the claim is submitted outside that two year period, the insured bears the burden that the insurer was not prejudiced.

N.Y. Ins. Law § 3420(c)(2)(A)

Untouched by the Prejudice Rule

- Policies Issued Prior to January 17, 2009:
    - Section 3420(a)(5) became effective on January 17, 2009, and it does not apply retroactively to policies before that date. Indian Harbor Ins. Co. v. City of San Diego, 972 F. Supp. 2d 634, 648 (S.D.N.Y. 2013) *aff'd*, 586 Fed. Appx. 726 (2d Cir. 2014) (citing Sevenson Envtl. Servs., Inc. v. Sirius Am. Ins. Co., 64 A.D.3d 1234 (4th Dep't 2009)). Thus, the no prejudice rule governs policies that were issued and delivered prior to January 17, 2009.
    - Note: Although you may not encounter this circumstance, carriers previously were not required to provide notice.
- Notice to Insurer Required:
    - Notice to an insured's broker who lacks authorization to bind the insurer (no written agency agreement) is not adequate notice to the insurer; rather notice should be to an insurer's authorized agent. Purcell v. M.L. Bruenn Co., Inc., 125 A.D.3d 739 (2d Dep't 2015); Rosier v. Stoeckeler, 101 A.D.3d 1310, 1312 (3d Dep't 2012) (citing Security Mut. Ins. Co. of N.Y. v. Acker–Fitzsimons Corp., 31 N.Y.2d 436, 442 n. 3 (1972)).

- Timely disclaimer has been required where a letter to the insurer on the insured's behalf by the insurer's own claims administrator, seeking coverage for the insurer, as the letter constituted timely notice to the insurer. Indus. City Mgt. v Atl. Mut. Ins. Co., 64 A.D.3d 433, 433 (1st Dep't 2009). This satisfies the insured's obligation to provide written notice.

Insurer's Notice of Disclaimer

- Length of Time for Disclaimer
  - An insurer must give written notice of a disclaimer of coverage "as soon as is reasonably possible" after "it first learns of the accident or of grounds for disclaimer of liability or denial of coverage". N.Y. Ins. Law § 3420 (d)(2). *See* Continental Cas. Co. v. Stradford, 11 N.Y.3d 443 (2008) (citing Hartford Ins. Co. v. Nassau County, 46 N.Y.2d 1028 (1979)). This applies to both the primary and excess insurers. Reyes v. Diamond State Ins. Co., 35 A.D.3d 830 (2d Dep't 2006). In general, if the disclaimer is made within thirty (30) days, it is timely.
  - An insurer's denial of coverage and disclaimer was sufficient as although the notice was provided as soon as reasonably possible which was twenty-six (26) days after the insured's notice of intention to make a claim. N.Y. Cent. Mutual Fire Ins. Co. v. Gonzalez, 34 A.D.3d 816 (2d Dep't 2006)

- Denial of coverage after three weeks, despite the denial being based on late notice, was **timely as a matter of law** as the insurer did not have a readily apparent basis for disclaimer until it conducted an investigation into the underlying accident. Magistro v. Buttered Bagel, Inc., 79 A.D.3d 822, 825 (2d Dep't 2010).

- Untimely Disclaimer
  - In George Campbell Painting, the court determined that the defendant's disclaimer was untimely under Insurance Law § 3420(d). The court found that the delayed disclaimer on a ground fully known to it until it had completed its investigation (however diligently conducted) into different, independent grounds for rejecting the claim was improper and inconsistent with the statute. *Stated otherwise, the statute mandates that the disclaimer be issued, not "as soon as is reasonable," but "as soon as is reasonably possible."* George Campbell Painting v. Natl. Union Fire Ins. Co. of Pittsburgh, PA, 92 A.D.3d 104, 111 (1st Dep't 2012) (overruling DiGuglielmo v. Travelers Prop. Cas., 6 A.D.3d 344 (1st Dep't 2004). Here, the court explicitly declined to replace the Court of Appeals' rule with a rule that measures the timeliness of a notice of disclaimer from the point in time when the insurer has completed its investigation of any and all possible grounds for rejecting the claim, regardless of when the insurer had sufficient

knowledge to disclaim on the particular grounds relied upon. *Therefore, the insurer cannot delay disclaimer of coverage on a ground it knows of while it investigates other and additional grounds to disclaim.*

- The "timeliness of an insurer's disclaimer is measured from the point in time when the insurer first learns of the grounds for disclaimer of liability or denial of coverage". When "the basis for denying coverage was or should have been readily apparent before the onset of the delay [of disclaimer]," the insurer's explanation is insufficient as a matter of law. N.Y. Cent. Mut. Fire Ins. Co. v. Aguirre, 7 N.Y.3d 772, 774 (2006) (quoting First Fin. Ins. Co. v. Jetco Contr. Corp., 1 N.Y.3d 64, 67 (2003)).
- It has been held that a disclaimer letter was ineffective when provided over *two months* after receiving notice of a negligence action filed against its insured. *See* Nat'l Cas. Co. v. Levittown Events, Inc., 191 A.D.2d 543 (2d Dep't 1993).
- Insurer's failure to promptly notify the insured of its intent to assert an untimely notice defense may operate as a *waiver* of such defense. Rockland Exposition, Inc. v. Great Am. Assur. Co., 746 F Supp 2d 528, 544 (S.D.N.Y. 2010) *aff'd*, 445 Fed. Appx. 387 (2d Cir 2011) (citing Gen. Accident Ins. Group v. Cirucci, 46 N.Y.2d 862 (1978).

- An insurer who disclaims coverage on certain grounds but not on others is deemed to have intentionally waived the un-asserted grounds. State of N.Y. v AMRO Realty Corp., 936 F.2d 1420 (2d Cir 1991).
- Crocodile Bar, Inc. v. Dryden Mut. Ins. Co., 61 A.D.3d 1361, 1362, (4th Dep't 2009) (62–day delay was not timely where insurer failed to establish the delay was "reasonably related to the completion of a necessary, thorough, and diligent investigation").

Commencement of Time for Disclaimer

- Again, N.Y. Ins. Law § 3420 (d) requires that if "under a liability policy issued or delivered in this state, an insurer shall disclaim liability or deny coverage for death or bodily injury arising out of a motor vehicle accident . . . it shall give written notice as soon as reasonably possible . . . ."
- "Reasonableness of the delay is measured from the time when the insurer has sufficient knowledge of facts entitled it to disclaim, or knows that it will disclaim coverage." Delphi Restoration Corp. v. Sunshine Restoration Corp., 43 A.D.3d 851, 852 (2d Dep't 2007) (quoting First Fin. Ins. Co. v. Jetco Contr. Corp., 1 N.Y.3d 64 (2003)); Schoenig v. N. Sea Ins. Co., 28 A.D.3d 462, 462 (2d Dep't 2006); Sigma Contr. Corp. v. Everest Nat. Ins. Co., 26 Misc.3d 1231(A) (Sup Ct 2010).
- N.Y. Ins. Law § 3420 (d)(2), however, is limited to accidental death and bodily injury claims and is not for the court to extend the statute's prompt

disclaimer requirements beyond those bounds to include claims outside that context. KeySpan Gas E. Corp. v Munich Reins. Am., Inc., 23 N.Y.3d 583, 591 (2014) (discussing an insurer's ability to disclaim coverage for a delay in the insured's notice when the issue was an environmental contamination claim).

- "When the basis for denying coverage was or should have been readily apparent before the onset of the delay of disclaimer, the insurer's explanation is insufficient as a matter of law." N.Y. Cent. Mutual Fire Ins. Co. v. Aguirre, 7 N.Y.3d 772 (2006) (internal quotations omitted)
- When there is a delay in disclaiming coverage, the burden is on the insurer to demonstrate that the delay in disclaiming coverage was reasonable. Okumus v. Nat'l Specialty Ins. Co., 112 A.D.3d 797, 798 (2d Dep't 2013). It has been ruled that thirteen (13) days elapsing between the date that the insurer first learned of the subject accident and the date that it issued its disclaimer of coverage on the ground of late notice was sufficient time to disclaim. Roules v. State Farm Ins. Companies, 59 A.D.3d 514, 515 (2d Dep't 2009). Moreover, during that 13–day interval, State Farm investigated the matter, reviewed its file, and unsuccessfully attempted to contact its insured. Id.

Grounds for Denial of Coverage

- THERE IS NO COVERAGE WHERE NONE EXISTS. Courts cannot create coverage where none exists. Zappone v. Home Ins., 55 N.Y.2d 131

(1982). When an insurer seeks to disclaim coverage on the further basis of an exclusion, the insurer will be required to provide a defense unless it can demonstrate that the allegations of the complaint cast that the allegations *solely and entirely within the policy exclusions* and that the allegations are subject to no other interpretation. In addition, exclusions are subject to strict construction and must be read narrowly. Auto. Ins. Co. of Hartford v. Cook, 7 N.Y.3d 131, 137 (2006).

- THERE IS NO COVERAGE FOR CRIMINAL ACTS. As a general principle, "it is contrary to public policy to insure against liability arising directly against an insured from his violation of a criminal statute." Litrenta v. Republic Ins., 245 A.D.2d 344, 345 (2d Dep't 1997).
- THERE IS NO COVERAGE WHERE INSURED FAILS TO COOPERATE. Insured's failure to fulfill its obligation to act with the utmost honesty and in good faith in rendering the required assistance to the insurer in the defense of the claims. E.g., Am. Sur. Co. of N.Y. v. Diamond, 1 N.Y.2d 594 (1956).

Specificity

- The test established by the Court of Appeals is that "notice of disclaimer must promptly apprise the claimant with a high degree of specificity of the ground or grounds on which the disclaimer is predicated." Gen. Acc. Ins. Group v. Cirucci, 46 N.Y.2d 862, 864 (1979).

- The disclaimer notice must state the ground or grounds upon which the insurer disclaims liability and the insurer is precluded from asserting as a basis for its disclaimer grounds not raised in its original disclaimer notice. U.S. Liab. Ins. Co. v. Young, 186 A.D.2d 644, 645 (2d Dep't 1992).
- While an insurer may not advance a new ground in a subsequent disclaimer notice, it may set forth additional facts to support its initial disclaimer. Abreu v. Chiung Huang, 300 A.D.2d 420, 420 (2d Dep't 2002).

Timing of Disclaimer

- A sufficient reason for the delay will be established if the insurance company can show that "the delay was reasonably related to the completion of a necessary, thorough and diligent investigation by the insurer into issues that would affect the decision on whether to disclaim." Id. (citing Quincy Mut. Fire Ins. Co. v. Uribe, 45 A.D.3d 661, 661 (2d Dep't 2007). Therefore, while case law remains unsettled, Court's may determine that an insurer's delay in disclaiming coverage is justified where the insurer is investigating based on late notice by its insured.

ANY QUESTIONS?

APPENDIX 1

United States Code Annotated
Title 49. Transportation (Refs & Annos)
Subtitle VI. Motor Vehicle and Driver Programs
Part A. General
Chapter 301. Motor Vehicle Safety (Refs & Annos)
Subchapter I. General

49 U.S.C.A. § 30106

§ 30106. Rented or leased motor vehicle safety and responsibility

Effective: August 10, 2005

Currentness

(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 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).

(b) Financial responsibility laws.--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.

(c) Applicability and effective date.--Notwithstanding any other provision of law, this section shall apply with respect to any action commenced on or after the date of enactment of this section without regard to whether the harm that is the subject of the action, or the conduct that caused the harm, occurred before such date of enactment.

(d) Definitions.--In this section, the following definitions apply:

(1) Affiliate.--The term "affiliate" means a person other than the owner that directly or indirectly controls, is controlled by, or is under common control with the owner. In the preceding sentence, the term "control" means the power to direct the management and policies of a person whether through ownership of voting securities or otherwise.

(2) Owner.--The term "owner" means a person who is--

(A) a record or beneficial owner, holder of title, lessor, or lessee of a motor vehicle;

(B) entitled to the use and possession of a motor vehicle subject to a security interest in another person; or

(C) 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.

(3) Person.--The term "person" means any individual, corporation, company, limited liability company, trust, association, firm, partnership, society, joint stock company, or any other entity.

CREDIT(S)

(Added Pub.L. 109-59, Title X, § 10208(a), Aug. 10, 2005, 119 Stat. 1935.)

Notes of Decisions (27)

49 U.S.C.A. § 30106, 49 USCA § 30106
Current through P.L. 113-296 approved 12-19-2014

End of Document

APPENDIX 2

SUPREME COURT-STATE OF NEW YORK
IAS PART-ORANGE COUNTY

COPY

Present: HON. ROBERT A. ONOFRY, A.J.S.C.

SUPREME COURT : ORANGE COUNTY

----------X

MICHAEL G. SERFESS,

Plaintiff,

- against –

DAVID G. BECKER, JEFF CONIBER and JEFF CONIBER TRUCKING, LLC,

Defendants.

----------X

To commence the statutory time period for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

Index No. 4149/2010

Motion Date: April 8, 2011

The following papers numbered 1 to 6 were read and considered on this motion by defendants, Jeff Coniber and Jeff Coniber Trucking, LLC, for an order, pursuant to CPLR 3025, granting them leave to amend their answer.

Notice of Motion - Smith Affirmation - Exhibits 1-8 – Memorandum of Law 1-3
Affirmation in Opposition- Sichol- Exhibits A and B 4-5
Reply Affirmation- Smith 6

Upon the foregoing papers, it is hereby,

ORDERED that the motion is granted, and the amended answer appended to the motion papers is deemed served.

Introduction

Plaintiff Michael Serfess alleges that he was seriously injured while riding his motorcycle when he lost control after striking a block of wood that fell off a trailer owned by the defendants Jeff Coniber (hereinafter "Coniber") and/or Jeff Coniber Trucking, LLC (hereinafter "Coniber

Trucking") that was being towed by the defendant David Becker. Coniber and Coniber Trucking (hereinafter referred to collectively as the "Coniber Defendants") move for leave to amend their answer to assert a defense pursuant to the so-called "Graves Amendment" (49 USC § 30106). The Graves Amendment protects certain lessors/renters of vehicles from liability under stated circumstances. The Coniber Defendants allege that they only recently determined that the trailer at issue was actually rented to Becker as part of the business of Coniber Trucking. The plaintiff opposes the amendment as without merit and as prejudicially late. For the reasons hereinafter enumerated, the motion is granted.

Factual and Procedural Background

Plaintiff commenced this action by the service of a summons and verified complaint dated April 15, 2010 (Motion Exh. A). Issue has been joined.

At an examination before trial, held January 20, 2011, Jeffrey Coniber testified, *inter alia,* that he owned a trucking business (Coniber Trucking), that he had full-time employees and owned nine (9) trucks and thirteen (13) trailers (Motion Exhibit 4, pp. 4-5). Coniber rented both the trucks and the trailers from time to time, as well as other equipment, *e.g.*, "ag tractors, a small utility dump truck [and] a small trailer for like a pick-up truck" (T 59). At the time of the subject accident (October 10, 2009), he had rented the defendant David Becker a 2002 Talbert Lowboy Trailer to haul a log truck (T 7-8). He had known Becker for about six years, and had leased him the trailer on at least one prior occasion (T 7). The charge was $75 per day (T 10). The invoice for the rental at issue was dated November 5, 2009, which was after Coniber learned of the accident (T 10, 54). Three or four days after Becker borrowed the trailer, Coniber called him to ask why he had not

returned it (T 25-27). Becker told him that he had damaged the trailer off-loading the log truck, and that he needed to replace a hydraulic cylinder (T 27). Becker did not mention that he had been stopped by the police for the accident at issue and ticketed for uncovered cargo (T 28). When Becker returned the trailer approximately three days later, he told Coniber about the accident (T 29). In or around March of 2010, Coniber received a telephone call from an insurance company advising him that this suit had been filed (T 34). This was the first time Coniber learned that the plaintiff had been seriously injured (T 39). The night before his examination before trial, Coniber saw police photographs of the trailer after the accident that showed various loose items and metal tanks. Coniber testified that there was no loose wood or metal tanks on the trailer when it was rented to Becker (T 18-25). Becker told him that the police had shown him a block of wood that they said fell off the trailer, but that he did not recognize it (T 38). Coniber testified that it was a standard practice to use wood blocks to secure a load (T 57). Coniber further testified that since the accident, Becker had neither asked to rent any additional trailers, nor had he rented Becker any (T 51).

Coniber's testimony further revealed that Coniber Trucking was the registered owner of the trailer at issue (T 51). Coniber could not remember if Coniber Trucking was an LLC or a d/b/a the last time that Becker rented a trailer, or whether Becker was billed for the same, he did recall that Becker did pay the $75 rental fee and that Becker had previously worked for Coniber (T 54-55).

At an examination before trial, David Becker testified that, in October 2009, he was employed by BOCES as a bus driver trainer (Exhibit 6, p 5). For five or six years prior to the accident, he had driven trucks for Coniber and his brother on the weekends on an "as needed" basis (T 7-8). In 2009, he had driven for Coniber on at least 10 occasions prior to the accident (T 7) and had leased a trailer from Coniber on at least one or two occasions, each time paying $75 although

he couldn't recall if he had received invoices for the rentals (T 9). Coniber did not require any documents from him to rent the trailer (T 10). When he went to pick up the trailer, no one was at the yard and could not recall whether any wood blocks or other loose items were on the trailer when he picked it up (T 15). In fact, until he was advised by the police, Becker was completely unaware that a block of wood had fallen off of the trailer (T 38). However, when they walked around the trailer, he noticed that a 4" x 4" x 1' block of wood missing (T 40). When he was at the police barracks, an officer "flashed" a piece of wood at him, but he didn't see it long enough to identify it as the piece missing from his trailer (T 41). At one point on the day in question, just prior to entering a work zone, a group of motorcyclists was split by his truck, with some in front and some behind (T 45). After they left the work zone, two cars and a motorcycle that were behind him, passed him, but he saw no accident (T 52). When he encountered Coniber while returning the trailer, he told him that a motorcyclist had been injured by a block of wood, but that he wasn't sure if it was a block of wood off the trailer (T 69). In fact, when he had inspected the trailer, the chains holding the load were still tight (T 69).

Based upon the foregoing, the Coniber Defendants now move to amend their answer to assert an affirmative defense of the Graves Amendment. In support of the motion, the Coniber Defendants submit an affirmation from counsel, Jay Smith. Smith asserts that he first became aware that Coniber Trucking was in the business of renting vehicles and trailers on January 19, 2011, during the course of preparing his client for his examination before trial. Indeed, he notes, the details of the rental arrangement were explored during the testimony of both Coniber and Becker. Consequently, on February 4, 2011, he wrote to opposing counsel requesting that he accept an amended answer asserting the Graves Amendment defense. Counsel refused. The instant motion thus ensued; a

motion filed as soon as signed transcripts of the EBT were received. In essence, Smith argues that the plaintiff cannot claim prejudice because he alleged the separate ownership of the trailer by Coniber Trucking in his complaint.

In opposition, counsel for plaintiff, William Sichol, argues that the delay of almost one year between the service of the Coniber Defendants' answer and its proposed amended answer constituted "gross delay." In any event, he asserts, that the plaintiff will be prejudiced by the delay in that there has already been extensive discovery and "important decisions made by counsel". Moreover, permitting the amendment will require "further, lengthy and expensive discovery." Counsel further contends that, there has been no explanation for the delay and, therefore, it is reasonable to assume that it is unjustified. In any event, he argues, the Graves Amendment only applies when the owner is in the "trade or business of renting or leasing motor vehicles," such as Hertz, Avis, etc. Finally, he asserts, here, it is clear that the trailer was actually borrowed, not rented– that is, none of the formalities or paperwork typically associated with a rental are present, and Coniber did not generate an invoice until 26 days after the accident. Thus, he opines, that the claims of a rental are "tongue in cheek."

In reply, Smith argues that not only has he explained the delay but that plaintiff has failed to demonstrate any real prejudice. Indeed, Smith notes that, the issue of the rental was explored in detail during the examinations before trial. Finally, he argues, at a minimum, there is a question of fact as to whether the Graves Amendment applies.

Discussion/Legal Analysis

CPLR §3025(b) allows for the amendment of pleadings or supplemental pleading "at any

time by leave of court" and also provides that such leave "shall be freely given upon such terms as may be just . . .". Leave to amend pleadings is therefore to be freely granted absent prejudice or surprise directly resulting from the delay in seeking leave, unless the proposed amendment is palpably insufficient or patently devoid of merit; prejudice being the controlling consideration. *Sinistaj v Maier, 82 AD3d 868, 918 NYS2d 196 (2nd Dept. 2011); McCaskey, Davies and Associates, Inc. v. New York City Health & Hospitals Corp., 59 NY2d 755, 463 NYS2d 434 (1983); Boxhorn v. Alliance Imaging, Inc., 74 AD3d 1735, 901 NYS2d 891 (4thDept.2010); Edenwald Contracting Co. v. New York, 60 NY2d 957, 471 NYS2d 55 (1983).* Prejudice, however, is not found in the mere exposure to greater liability. Rather, there must be some indication that the opposing party has been hindered in the preparation of his or her case, or has been prevented from taking some measure in support of his or her position. *Loomis v Civetta Corinno Const. Corp., 54 NY2d 18, 444 NYS2d 571 (1981); RCLA, LLC v 50-09 Realty, LLC, 48 AD3d 538, 852 NYS2d 211 (2nd Dept. 2008).*

Here, the plaintiff has not demonstrated prejudice or surprise warranting denial of the motion. Further, the plaintiff has not demonstrated that the motion should be denied as palpably insufficient or patently devoid of merit.

Pursuant to the Graves Amendment (49 USC § 30106):

> 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 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).

Here, Coniber testified that the business of Coniber Trucking included renting trucks and trailers, and that it in fact rented the trailer at issue to Decker. *Castillo v Amjack Leasing Corp., 84 AD3d 1297, 924 NYS2d 277 (2nd Dept. 2011).* Plaintiff has not cited, nor has research revealed, any case law or legislative history that would support his contention that the Graves Amendment was intended to reach only large commercial renters such a Hertz, Avis, etc. Indeed, research has not revealed any judicial or legislative attempt to define the phrase "engaged in the trade or business of renting or leasing motor vehicles" *see e.g., Luperon v North Jersey Truck Center, Inc., – FSupp2nd – , 2009 WL 1726340 (SDNY 2009); Kersey v Hirano, – FSupp2nd – , 2009 WL 2151845 (D.Md. 2009).* Indeed, the courts that have analyzed the legislative history of the amendment have concluded that it sheds no light on the same. *Luperon v North Jersey Truck Center, Inc., – FSupp2nd – , 2009 WL 1726340 (SDNY 2009); Kersey v Hirano, – FSupp2nd – , 2009 WL 2151845 (D.Md. 2009).* Otherwise, words in a statute are to be given their plain meaning without resort to forced or unnatural interpretations. *Castillo v 711 Group, Inc., 10 NY3d 735, 853 NYS2d 273 (2008); Castro v United Container Machinery Group, Inc., 96 NY2d 398, 736 NYS2d 287 (2001).* Here, applying the plain meaning of the words used in the statute, Coniber Trucking was engaged in the business of renting or leasing motor vehicles. *cf., Graham v Dunkley, 50 AD3d 55, 852 NYS2d 169 (2nd Dept. 2008)(assignee of lease fell under protection of statute).* Moreover, the court declines to find, as urged by the plaintiff, that the testimony elicited from defendants is incredible as a matter of law. Further, the plaintiff has not demonstrated, as a matter of law, that the testimony was false or that no true rental arrangement existed. Rather, on the record presented, this merely raises a question of fact. Thus, the motion is granted.

Further Scheduling

Based upon the foregoing, the parties are directed to, and shall through respective counsel, appear for a Status Conference, such Conference to be held on Wednesday, March 21, 2012 at 9:15 A.M. at the Orange County Surrogate Court House, 30 Park Place, Goshen, New York.

The foregoing constitutes the decision and order of the court.

Dated: February 9, 2012
Goshen, New York

ENTER

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