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A Newsletter for the Clients of RSR&M, L.L.C.

Liability & Coverage Decisions

Federal Judge Upholds “Graves Amendment” in Maryland, Bars Claims Against Leasing Companies

On August 10, 2005, the federal legislation commonly known as the “Graves Amendment” was signed into law. Representative Samuel Graves, (R) Missouri, sponsored the portion of legislation that bears his name within the “Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users” (or SAFETEA-LU), which was a multi-billion dollar transportation appropriations bill. Although the Graves Amendment is, at its core, based on the regulation of interstate commerce, the practical effect is that of tort reform. The ultimate goal of the Amendment is to protect consumers and decrease significant costs incurred nationwide by eliminating vicarious liability lawsuits against rental companies that rent vehicles to drivers who are involved in motor vehicle accidents.

The Graves Amendment provides that “[a]n owner of a motor vehicle that rents or leases the vehicle to a person...shall not be liable under the law of any State...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.” 49 U.S.C.A. § 30106 (2005). In other words, vicarious liability lawsuits against leasing companies are now barred unless it can be shown that the leasing company is also liable by way of its own direct negligence or criminal wrongdoing.

Although the Graves Amendment has been challenged on constitutional grounds in a number of jurisdictions throughout the United States at various levels, the vast majority of the courts to consider *Graves* have upheld the Amendment as being within Congress’s Commerce Clause power. Until recently, the Graves Amendment has remained conspicuously absent from published opinion in Maryland, at both the federal and state level.

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Neither the U.S. Supreme Court, nor the Court of Appeals for the 4th Circuit, has addressed the Amendment on appeal. And, to date, only one recent unpublished opinion exists that discusses *Graves* as applied in the context of a suit in Maryland. That opinion was written by the Honorable William Quarles of the U.S. District Court for the District of Maryland (Northern Division) in the case of *Robert L. Kersey, Jr., et al. v. Tsukasa Hirano, et al.*, Slip Op., 2009 WL 2151845 (D. Md.).

The Complaint in that case alleges that in April of 2005, Robert Kersey, a Maryland State employee, was performing highway maintenance in his truck and stopped to the side of a partially closed roadway when his vehicle was struck by a vehicle driven by Tsukasa Hirano. The vehicle driven by Hirano had been rented from a Hertz rental car affiliate. Kersey and his wife brought suit for negligence and loss of consortium against Hirano and several Hertz entities in the Circuit Court for Baltimore City. The suit was removed to federal court based on diversity jurisdiction.

The Hertz Defendants, represented by Patrick Cullen and John Adams of Rollins, Smalkin, Richards & Mackie, L.L.C., moved to dismiss the claims against them on the grounds that the claims were precluded under the *Graves* Amendment. The Plaintiffs opposed the motion, arguing (1) that *Graves* was unconstitutional, and (2) that discovery was necessary to determine whether the Hertz Defendants were negligent.

In his opinion, Judge Quarles rejected the argument that the Amendment is unconstitutional. Citing the “vast majority of courts to consider it [that] have held that the Amendment [to be] constitutional,” Judge Quarles held that “its enactment was a permissible exercise of the Congressional authority to regulate commerce.” Slip Op., 2009 WL 2151845, at 2.

The Plaintiffs’ second argument against dismissal, that discovery was necessary to determine whether the Hertz Defendants were somehow directly negligent, was also discounted by the court. Specifically, Judge Quarles, stated that the “issues of direct negligence raised in their opposition are insufficient,” and that “[t]heir claim, construed liberally, alleges only vicarious liability against the Hertz Defendants; thus, it must be dismissed.” *Id.* at 3. In short, because the Plaintiffs did not allege any direct negligence on the part of the Hertz Defendants in their Complaint, those claims were dismissed pursuant to the *Graves* Amendment.

Although Judge Quarles’s opinion is certainly consistent with the vast majority of jurisdictions to consider *Graves*, it raises an interesting question: will plaintiffs’ attorneys in future actions begin grafting “boiler plate” direct negligence language against would-be leasing companies, in an effort to avoid the application of *Graves* at the early stages of the suit? And, even if they do, will such language, by itself, be enough to avoid dismissal?

Defending Landlords in Carbon Monoxide Cases

Defense of a landlord in a carbon monoxide exposure case may be resolved by a motion for summary judgment.

The Court of Appeals, in *Hemmings v. Pelham Wood*, 375 Md. 522, 826 A.2d 443 (2003) held that a landlord's liability with respect to a dangerous or defective condition in the tenant's property depends on three factors:

- (1) the landlord controlled the dangerous or defective condition;
- (2) the landlord had knowledge or should have had knowledge of the injury causing condition; and
- (3) the harm suffered was a foreseeable result of that condition.

Hemmings, 375 Md. at 537.

Control over the defective or dangerous condition must involve a close reading of the lease. The Maryland Court of Appeals, in *Kane v. Board of Appeals of P.G. County*, 390 Md. 145, 158, 887 A.2d 1060 (2005), found sufficient control where a lease retains to the landlord the right to enter the property for good cause. See *Kane*, 390 Md. at 158 (the Court found the requisite degree of control where a lease provision "requir[ed] [tenants] to comply with all laws and reserv[ed] the landlord's right to enter the premises if he or she ha[d] 'good cause to believe the Tenant may have damaged the premises or may be in violation of county, state or federal law.'")

Actual or constructive knowledge is a factual question, but in a carbon monoxide case unless there was a prior event with documented levels of carbon monoxide, it will be difficult for a plaintiff to prove knowledge. See *Reitzick v. Ellen Realty*, 30 Md.App. 273, 277-78, 352 A.2d 327, 330 (1976) ("In the absence of any evidence tending to show a prior icing condition, or a dangerous physical attribute of the accident scene which might create such a condition, the plaintiff (appellant) did not meet the obligation to offer proof to establish that the landlord had actual or constructive knowledge of the icing condition.")

Foreseeability is also a factual question, but in a carbon monoxide case, which involves a colorless, odorless gas, it seems difficult for a plaintiff to show the emission was foreseeable. For example, it is arguably foreseeable that if a furnace or boiler were inoperable, plaintiffs would have a cold house or lack hot water, but the fact that a furnace emitted carbon monoxide, an odorless, colorless gas, would likely not be foreseeable by a person of ordinary prudence. *Hemmings*, 375 Md. at 541 ("A particular harm is foreseeable, for purposes of establishing that a landlord owes a duty to tenant with respect to defective or dangerous condition on landlord's premises, if a person of ordinary prudence should realize that the condition of which he or she has notice enhances the likelihood that

the harm will occur.") The *Hemmings* Court stated that in order for a plaintiff to establish foreseeability they must show that the defendant, "equipped with the knowledge of the dangerous condition, should realize the danger posed by that condition."

Additional arguments include: (1) landlords are not insurers for all injuries to their tenants; (2) landlords are under no duty to inspect; and (3) even assuming arguendo, a duty to inspect, landlords are not obligated to discover latent defects.

The Maryland Court of Appeals, in *Scott v. Watson*, 278 Md. 160, 165, 359 A.2d 548, 552 (1976), held that a landlord is not a tenant's insurer and, therefore, cannot be liable for all injuries sustained by a tenant while living in the rental property.

A Landlord owes no special duty to their tenant by virtue of their relationship as landlord/tenant. A landlord is not strictly liable for all harm to the tenant. *Scott*, 278 Md. at 165. A plaintiff will have a difficult case proving the landlord violated a duty owed where the landlord kept the property reasonably safe by promptly repairing and/or responding when the tenant reported problems and lacked control over the property or the furnace area. Furthermore, a landlord has no duty to inspect a furnace or boiler on the property. See *Ward v. Hartley*, 168 Md.App. 209, 895 A.2d 1111 (2006) ("A landlord does not have a duty to inspect equipment where the lease does not give the landlord control over the area of the property in which the equipment is located").

Even assuming arguendo a landlord has a duty to inspect the furnace, such an inspection would not realistically result in the discovery of the alleged hidden defect of carbon monoxide, a colorless, odorless gas, being emitted into the home. A landlord must only do what is reasonable under the circumstances and is not required to discover unforeseen latent defects that are not apparent until an actual adverse event occurs. *Matthews*, 351 Md. at 555 ("Landlord is not ordinarily liable to tenant or guest of tenant for injuries from hazardous condition in the leased premises that comes into existence after tenant has taken possession.")

The successful defense of a landlord in a carbon monoxide case involves proving the (1) landlord lacked control over the dangerous or defective condition; (2) landlord lacked knowledge or could not have known of the injury causing condition; and (3) harm suffered was not a foreseeable result of that condition. Furthermore, it should be argued that the landlord is not an insurer for all injuries to the tenants; the landlord is not under a duty to inspect the premises; and even assuming arguendo, a duty to inspect, a landlord cannot discover latent defects.

New Associates

I. DeAndrei (Dee) Drummond joined Rollins, Smalkin, Richards & Mackie, L.L.C. as an associate in 2009. His practice consists primarily of insurance defense and general negligence cases.

Mr. Drummond began his legal career as an Associate at Gordon, Feinblatt, Rothman, Hoffberger & Hollander before becoming an Assistant State's Attorney in Prince George's County, Maryland from 2001 to 2005. Immediately prior to joining RSR&M, Mr. Drummond served as a Captain in the U.S. Army Judge Advocate General Corps from 2005 to 2009 and continues to serve in the U.S. Army Reserves.

Mr. Drummond is a member of the American Bar Association and the Young Lawyers Division Committee Liaison to the Legal Assistance for Military Personnel Standing Committee. He is also a member of the Maryland State Bar Association and the Baltimore City Bar Association.

When not working, Mr. Drummond enjoys fishing and sports, including basketball, running, football and golf. He also enjoys spending time with his wife and two children.



Thomas E. Neary is a 1997 graduate of Hofstra University School of Law. His practice includes general civil litigation, with an emphasis on personal injury, general negligence, insurance defense and professional negligence matters. Mr. Neary joined the firm as an associate in 2009.

Prior to joining the firm, Mr. Neary was a trial attorney for the Travelers Insurance Company litigating personal and commercial civil actions throughout Maryland. In this capacity, Mr. Neary defended the rights of corporate and individual

clients in a wide variety of complex legal matters. Mr. Neary also has significant experience representing hospitals and health care providers in medical malpractice claims and other related proceedings.

Mr. Neary is a member of the Maryland State Bar Association, Baltimore County Bar Association and the District of Columbia Bar Association. He is admitted to practice in Maryland, the District of Columbia and New York.

Mr. Neary is an avid reader and enjoys sports, including basketball, football and golf. He also enjoys spending time with his wife and three children.

Medicare Secondary Payor Act & the Maryland Workers' Compensation Commission's Settlement Process

The process of getting settlements approved by the Maryland Workers' Compensation Commission ("Commission") now involves compliance with the requirement that Medicare's interests are adequately and expressly considered in settlement agreements.

Under the Medicare Secondary Payor Act ("MSPA"), Medicare acts as a secondary payer in workers' compensation cases. Additionally, Medicare is authorized to make conditional payments if the primary plan (workers' compensation insurer or self-insured employer) does not promptly pay. MSPA creates a private cause of action against the primary plan if it fails to reimburse Medicare.

New regulations are aimed at enforcing MSPA by creating settlement reporting requirements, including a requirement that workers' compensation insurers must report workers' compensation settlements to the Center for Medicare & Medicaid Services ("CMS") if the following thresholds are met:

- (1) Total settlement equals \$25,000 or more and the claimant is a Medicare recipient; OR
- (2) Total settlement equals \$250,000 or more and there is a reasonable expectation the claimant will be Medicare-eligible within 30 months of the date of the settlement.

If your proposed settlement meets the CMS thresholds, you must obtain CMS approval with a formal Medicare Set-Aside allocation. Once the parties have obtained CMS approval and the set-aside has been allocated, the settlement agreement may be submitted to the Commission. The Commission will no longer approve settlements where CMS approval is pending.

If your proposed settlement does not meet the CMS thresholds, the settlement agreement must contain:

- (1) An express statement that Medicare's interests have been considered, AND EITHER
- (2)(a) A statement identifying the amount of the proposed settlement apportioned to future medical costs, supported by a medical opinion or evaluation (even if no amount of the settlement is apportioned for future medical costs), OR
- (2)(b) A statement identifying the amount of the proposed settlement that is set-aside for future medical expenses through a formal set-aside allocation.

The Commission has removed its template settlement form from its website and will not be providing an updated version to reflect the newly implemented requirements.

Of course, if your proposed settlement leaves future medical care open and only closes out the indemnity portion of a claim, these requirements are not applicable.

For additional information, please visit the Commission's website or contact an attorney at RSRM.

*PLEASE NOTE THE FOLLOWING
CHANGES TO BENEFIT RATES
FOR MARYLAND WORKERS'
COMPENSATION CLAIMS FOR 2010*

**Maryland Workers' Compensation
Benefit Rates for 2010**

State Average Weekly Wage	\$920.00
First Tier PPD	\$142.00
Second Tier PPD	\$307.00
Serious Disability	\$690.00

ROLLINS,
SMALKIN,
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MACKIE, L.L.C.
Attorneys At Law

Rollins, Smalkin, Richards & Mackie, L.L.C. has been a Maryland-based litigation firm for over eighty years. The firm's main office is a historic four story building in Baltimore's center city. Please contact Andrew T. Nichols at (410) 727-2443 if you require any clarification or additional information concerning the contents of this newsletter.

This newsletter is provided for informational purposes only. Every effort has been made to ensure accuracy, but the contents of the newsletter should not be construed as legal advice, which, of necessity, must relate to specific advice, which, of necessity, must relate to specific factual situations and claims. You are urged to consult with counsel concerning your situation and any specific questions that you may have.

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