

## The Graves Amendment

by Mark K. Hellie

Recently the Minnesota Supreme Court granted review of a case where the District Court and Minnesota Court of Appeals held that rental-vehicle owners are not vicariously liable under Minnesota law because the Minnesota statute authorizing vicarious liability was preempted by the Graves Amendment.

### Minnesota Law

In Minnesota, a vehicle owner is liable for damages arising from an accident that occurs while a permissive user of the vehicle is driving. See Minn. Stat. § 169.09, subd. 5a (2008).

The relevant state law provides:

Whenever any motor vehicle shall be operated within this state, by any person other than the owner, with the consent of the owner, express or implied, the operator thereof shall in case of accident, be deemed the agent of the owner of such motor vehicle in the operation thereof.

Based on this statute, all owners of vehicles are liable under the theory of respondeat superior for damages resulting when a permissive user of the vehicle is involved in an accident. Under the plain language of the statute, vehicle-rental companies would also be liable for accidents involving their rental vehicles that are driven by rental customers.

### The Graves Amendment

In 2005, Congress enacted the Graves Amendment as a part of a comprehensive transportation bill. The Graves Amendment is codified at 49 U.S.C. § 30106 (2006). Unlike Minnesota law, the Graves Amendment specifically states that rental-vehicle owners are not vicariously liable for accidents involving their customers. See 49 U.S.C. § 30106(a) (2006).

The relevant federal law provides:

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.

The Graves Amendment plainly prevents state laws from holding rental-vehicle owners vicariously liable for the accidents involving their rental customers.

### *Meyer v. Nwokedi*

Based on the statutory language above, Minnesota law and federal law appear to be in conflict with regard to rental-vehicle owners. So how is this conflict resolved? In January 2009, the Minnesota Court of Appeals was confronted with this exact question in the case, *Meyer v. Nwokedi*, 759 N.W.2d 426, 428 (Minn. Ct. App. 2009), review granted (Minn. March 31, 2009).

On June 4, 2004, Maboko Mphosi rented a sport utility vehicle (SUV) from Enterprise Rent-A-Car Company in Fargo, North Dakota. The

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*Comments or inquiries may be directed to Shannon Banaszewski.*

## Independent Contractor Exemption Certificates

by Thomas L. Cummings

Legislation effective January 1, 2009 places new burdens on Minnesota employers in the construction industry with respect to subcontractors. Its biggest impact will likely be in the extension of workers' compensation coverage to certain so-called independent contractors.

Under Minnesota Rule 5202, et seq., individuals working as independent contractors in the residential and commercial construction industry are required to obtain an independent contractor exemption certificate ("ICEC") from the Department of Labor and Industry. Individuals performing residential and commercial construction work without an ICEC will be considered employees of the contractor for whom they are working for purposes of workers' compensation coverage, unemployment insurance, wage and hour requirements, occupational safety, and health laws.

The ICEC is required only for subcontractors who are sole proprietorships (i.e., individuals). Businesses that are registered as any other business entity with the Minnesota Secretary of State are not required to have an ICEC. In fact, they will not qualify. Other business entities include corporations, LLCs, and partnerships.

Residential and commercial construction contractors who employ individual subcontractors must obtain the subcontractor's ICEC. If they do not, the contractor could face civil penalties if they do not provide workers' compensation insurance coverage and unemployment insurance coverage to those subcontractors. Furthermore, penalties may be imposed if state and federal taxes are not properly withheld.

The ICEC allows individuals to work as independent contractors. However, whether an ICEC permit holder is working as an independent contractor or as an employee will depend on the circumstances. In the construction industry, the determination of whether or not a subcontractor is an independent contractor or an

application of the nine factor test set forth in Minn. Stat. § 176.042, subd. 2. Generally, Minn. Stat. § 176.042, subd. 2, requires the individual to meet all of the following conditions to be considered an independent contractor:

1. maintains a separate business with the independent contractor's own office, equipment, materials and other facilities;
2. holds or has applied for a federal tax identification number or has filed business or self-employment income tax returns with the federal Internal Revenue Service based on that work or service in the previous year;
3. operates under contracts to perform specific services or work for specific amounts of money and under which the independent contractor controls the means of performing the services or work;
4. incurs the main expenses related to the service or work that the independent contractor performs under contract;
5. is responsible for the satisfactory completion of work or services that the independent contractor contracts to perform and is liable for a failure to complete the work or service;
6. receives compensation for work or services performed under a contract on a commission or per-job or competitive bid basis and not on any other basis;
7. may realize a profit or suffer a loss under contracts to perform work or service;
8. has continuing or recurring business liabilities or obligations; and
9. the success or failure of the independent contractor's business depends on the relationship of business receipts to business expenditures.

The application process for an ICEC will require individuals to document that they meet the nine factors set forth in Minn. Stat. § 176.042, subd. 2. Nevertheless, holding an ICEC will not be dispositive of whether an individual is an independent contractor, and it will be looked at on a case-by-case basis.

The Department of Labor and Industry maintains a list of individuals who hold ICECs. The information is available on their

web site at <https://secure.doli.state.mn.us/licensing>. Residential and commercial contractors can access the site to verify an individual's status as an independent contractor. Contractors will be required to maintain copies for five years of the ICECs for the individuals with whom they subcontract.

Workers' compensation insurers should be educating their insureds who operate as residential and commercial construction contractors. The contractors must obtain ICECs for all "individuals" with whom they enter into subcontract agreements. Otherwise, the individual will be treated as an employee. As an employee (as opposed to an independent contractor), the individual will be entitled to workers' compensation benefits if injured while working. •

### News Flash

#### Wisconsin Law Hit-and-Run Insurance Coverage

In a February 18, 2009 decision, the Wisconsin Court of Appeals held that under Wis. Stat. § 632.32(4)(a), a "hit-and-run" occurs when the claimant can sustain the burden of proof to show that an unidentified motor vehicle leaves the scene of an accident without providing identifying information.

Reaching their decision, the Court found that a twelve-year-old bicyclist did have coverage under his parents' insurance policy where, while the driver of the car stopped and asked if the bicyclist was okay, he did not leave identifying information. The Court rejected the insurance company's position that since the driver stopped and checked on the victim, it was not a "hit-and-run" as per the insurance policy. As "hit-and-run" was not defined in the insurance policy, the Court considered Wisconsin statutory language and multiple dictionary definitions to definitively decide the meaning of "hit-and-run" in Wisconsin, providing more protection to hit-and-run victims under their own automobile insurance policies.

*Zarder v. Humana Ins. Co., et al.*, 2009 WL 385414 (Wis. Ct. App. February 18, 2009).

The Firm welcomes **Jason Schellack** and **Allison Walsh** as the most recent additions to our team of Law Clerks. Jason is a second year law student at William Mitchell College of Law. Allison is in her first year at William Mitchell College of Law.

The Firm also welcomes **Dahrim Kang** as a summer law clerk through the Minnesota State Bar Association. She is in her first year at the University of Minnesota School of Law.

**Congratulations** to **Darwin S. Williams** who has recently been appointed Alumni Advisory Board President for the University of St. Thomas School of Law. He was also recently made a member of the Board of Governors for the University of St. Thomas Law School.

**Congratulations** to **James G. Golembeck** and **Elisa M. Hatlevig** on their recent Court of Appeals victory. In *Minnesota Commercial Ry. Co. v. Rice Creek Watershed District*, 2009 WL 748951 (Minn. Ct. App. March 24, 2009), the Court affirmed the lower court finding that the District Court did not err in finding Plaintiff failed to meet its burden that the Watershed District's conduct caused damage to their bridge.

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following day, while Mphosi's companion, Bibian Nwokedi, was driving the SUV, the vehicle left its lane of travel and rolled over into a ditch. Two passengers were killed and others were injured.

Nancy M. Meyer, as trustee for the two passengers who were killed and Guardian Ad Litem for two injured minors, sued Nwokedi and Enterprise for wrongful death and personal injury. Meyer claimed that Enterprise was vicariously liable under Minnesota law. Enterprise moved for summary judgment, arguing that the Graves Amendment prevented it from being liable. The District Court agreed and dismissed the vicarious liability claims against Enterprise.

**Minnesota Court of Appeals Decision**

Meyer appealed the District Court's decision to the Minnesota Court of Appeals. The Court of Appeals affirmed the District Court's ruling that the Graves Amendment prohibits Meyer from suing Enterprise under a theory of vicarious liability. The Court of Appeals held that "[t]he plain text of the Graves Amendment preempts Minn. Stat. § 169.09, subd. 5a, as it applies to rental-vehicle owners."

Although the Graves Amendment broadly preempts vicarious liability for rental-vehicle owners, there are two types of state laws that are excluded from preemption: (1) state laws that impose financial responsibility or insurance standards on the rental-vehicle owner for the privilege of operating a motor vehicle, and (2) state laws that impose liability on businesses that rent or lease vehicles for their failure to meet the financial responsibility or liability insurance requirements.

Meyer argued that Minn. Stat. § 169.09, subd. 5a fit into one of these two exceptions. The parties agreed that certain financial responsibility laws - mainly the minimum no-fault insurance requirements - were preserved. The parties further agreed that the Graves Amendment did not affect the minimum no-fault benefits of \$60,000 for this accident.<sup>1</sup> Rather, the focus of this case was on Enterprise's liability allowed by Minn. Stat. § 169.09, subd. 5a above and beyond the statutory no-fault requirements.

The Court of Appeals held that the plain language of Minn. Stat. § 169.09, subd. 5a did not impose liability for a rental-vehicle owner's privilege to register and operate the vehicle. The Court of Appeals also held that the plain language of Minn. Stat. § 169.09, subd. 5a did not impose liability for failing to meet a financial responsibility or liability insurance requirement. Comparing the plain language of the state and federal statutes, the Court of Appeals concluded that Minn. Stat. § 169.09, subd. 5a did not fit into either of the two narrow exceptions to the Graves Amendment's preemption of vicarious liability for rental-vehicle owners. The Court further stated that any other interpretation would allow the exception to "swallow the entire statute."

The Court of Appeals also found that the "vicarious liability cap" contained in Minn. Stat. § 65B.49, subd. 5a(i)(2) (2008), did not create vicarious liability for rental-vehicle owners, but only provided a cap on an owner's vicarious liability. The Court held that because Enterprise was not vicariously liable, the statutory cap was not applicable. The Court observed that "because vicarious liability is preempted, the cap in the statute is without effect." The Court of Appeals

affirmed the District Court's ruling and dismissal of Enterprise.

**Minnesota Supreme Court**

Meyer subsequently sought the Minnesota Supreme Court's review of the Court of Appeals decision. On March 1, 2009, the Minnesota Supreme Court granted review. Given that the Supreme Court grants review only about 10% of the time,<sup>2</sup> it is clear that this is a significant issue. In addition to the parties' briefs, the Minnesota Association for Justice,<sup>3</sup> the Truck Renting and Leasing Association, Inc., and the State of Minnesota have all petitioned to file amicus briefs, which are briefs discussing the statewide impact of the decision. Both the State of Minnesota and the Minnesota Association for Justice have filed briefs supporting Meyer's argument. The Truck Renting and Leasing Association, Inc. will file an amicus brief supporting Enterprise's argument. Oral argument has not been scheduled, and the case is still in the briefing stage. We anticipate oral argument sometime late this year. For updates about this case, please check future *legal•ease* editions or contact one of our attorneys. •

<sup>1</sup> After the District Court granted Enterprise summary judgment, Enterprise deposited its per-accident no-fault limit of \$60,000 into the District Court.

<sup>2</sup> Diane B. Bratvold and Sam Hanson, Appeals to the Minnesota Supreme Court, *Bench & Bar of Minnesota*, p. 27 (Apr. 2009).

<sup>3</sup> Formerly the Minnesota Trial Lawyers Association, a group of attorneys who primarily represent injured individuals.

**Jardine, Logan & O'Brien, P.L.L.P.**, is a mid-sized civil litigation law firm that has handled some of the region's largest and most difficult disputes with outstanding results for clients. Litigation has always been our primary focus. With trial attorneys admitted in Minnesota, Wisconsin, North Dakota, South Dakota, and Iowa, our firm has the ability and expertise to manage cases of any size or complexity. We are trial lawyers dedicated to finding litigation solutions for our clients.

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If you have any questions about the subject matter of the articles in this newsletter, please feel free to contact the authors.

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