

## THE SUBROGATION TELEGRAPH

### Rental Car Companies Now In Drivers Seat

The vicarious liability statute found in California's vehicle code is no longer "in the drivers seat" as far as the liability of rental car companies is concerned. The United States Court of Appeals for The Eleventh Circuit issued an opinion interpreting a little-known portion of a highway bill passed in 2005. The Act, SAFETEA-LU (Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users), contains a statute (49 U. S. C. Section 30106) which the court was required to interpret for the first time. This section is also known as The Graves Amendment.

The code section contains the following language:

"(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".

The court determined, after a lengthy discussion, that the purpose of the Graves amendment was to eliminate vicarious liability for rental car companies. The court concluded its opinion, with the following statement "in sum, the Graves Amendment preempts the tort claims on appeal, and is within the boundaries of Congressional power in so doing. Accordingly, the claims cannot proceed."

It must be noted that the Graves Amendment does not eliminate all liability for a rental car company. They would still be liable for negligently maintaining the rented vehicle, as well as for the negligence of their own employees and/or agents. Additionally they will still

Spring 2009



**Remember when? Now they are in the drivers seat and we're just along for the ride.**

### Newsletter Spotlight

It is no secret that many businesses are affected by the economy. We have some suggestions on how to cut costs and increase recoveries.

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be liable for renting the vehicle to an impaired driver or a known negligent driver. At this time it appears that many companies are simply not aware of this decision but we anticipate that rental and leasing companies will soon be raising this statute as a defense to your claims on a regular basis.



# No more snail mail

A simple method of cutting costs is to reduce the amount of paper mailed from your office. Both Microsoft Word and WordPerfect have the ability to convert documents created in them into a PDF document. Once the PDF is created it can be sent as an attachment to an email and, due to the to the sophistication of Adobe's Reader software, can be opened and read on any computer. Since the Post Office is planning *another* postage increase this year, this simple method of sending letters may result in some substantial savings. It also eliminates the cost of printing and PDF's can be stored electronically on your computers reducing the costs associated with the filing of folders and documents.

Many copiers today have the ability to scan a document and store the image. Once an imaged document is created it can also be emailed as an attachment, once again saving postage and printing costs. In our office we now provide court filed documents to opposing counsel by emailing the scanned image. Any document can be transmitted in this method, for instance, repair bills and police reports. The less paper printed the lower your costs.



## What do you do with the Uninsured?

The Insurance Research Council reports on its website that one in six drivers across the United States may be driving without insurance. The Wall Street Journal reported in it's December 17, 2008 edition that several hundred thousand drivers

dropped their insurance in the last year as the jobless rate climbed. The questions this raises are several. How does this effect subrogation recovery rates? What should be the approach to subrogating uninsured motorist cases? If an asset report confirms the potential defendant is unemployed should the file be closed? How long can or should a carrier wait after obtaining a judgment to close a file?

Many analysts caution against trying to predict a top or a bottom in the stock market and I suppose the reason is that by engaging in such an exercise you are trying to predict the future. Usually the success rate is pretty low. Much the same advise may apply to predicting what will happen to a defendant in the coming years. There is no doubt that an economic recovery is coming. Those that have lost jobs will be gainfully employed and will be able to pay off their debts in large measure in the not to distant future.

Today's uninsured motorist may not be able to pay today but, most likely, will be able to pay tomorrow. It can also be assumed that the uninsured motorist may not respond to being served with a lawsuit and, quite likely, will allow the case to go by



default. We believe this is so based on past experience with uninsured motorist cases.

California Code of Civil Procedure Section 685.010 states that interest accrues at the rate of 10% per year on a money judgment. Currently this is a fairly high rate of return. It can't really be called a "rate of return" due to the uncertainty of collection. However it does suggest that uninsured motorist cases should be pursued knowing that it may very well be collectable in two or three years plus 10% interest. The economy isn't doing well now but that won't last. Pundits differ but many are saying that it will begin turning around in 2010. Today's loss plus 10% is going to look pretty good in two years.

### **Costs Are Recoverable From an Excess Insurer**


There exists a little known portion of Insurance Code Section 11580.9(g) that may be helpful to our clients. It provides that an *automobile insurer* (a primary insurer), is allowed to recover a pro-rata share of the defense costs it incurs when their insured is also covered by an *umbrella policy*.

This isn't exactly a subrogation issue, but it is a recovery issue. Often, an automobile insurer will learn that their insured has an umbrella policy. Traditionally, once the defense of the insured ensues, the umbrella carrier will demand all kinds of things from the primary insurer and the primary insurer does these things because the law imposes a duty upon it. However the umbrella insurer has no duty to pay for any of the defense costs and fees. Thus the entire burden falls on the primary insurer.

The Legislature of California determined that costs would be reduced and settlements hastened if the umbrella carrier had an incentive to participate in the settlement of the case instead of sitting on the sidelines denying payment of any settlement. As we know the primary carrier bears the responsibility of paying for the defense in a case.

This little known code section requires that "*Each insurer shall pay its share of the defense costs. Each insurer's share of the defense costs shall be the percentage of the total defense costs equal to the amount of damage paid by that insurer as a percentage of total damages paid by all insurers whose policies apply to that motor vehicle.*"

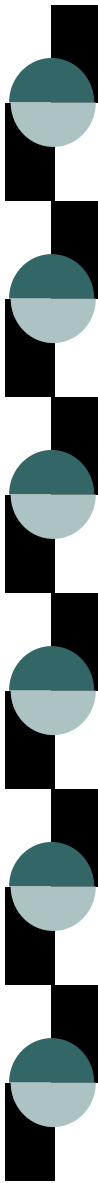
The code section is specific in stating that two policies must be involved. One must be an *automobile policy* and the other must be an *umbrella policy*. The other policy must not be an automobile policy which has become excess by operation of law. The code specifically applies to umbrella policies. The pro-rata is based on the total amount of damages paid by each insurer. Whenever an automobile insurer defends and the insured is covered by an umbrella policy, you may be entitled to recover a pro-rata share of your costs and in the current climate no one wants to pay more than they should. Please call us if you have questions in this area or wish to discuss your specific situation.



*Don't tell people how to do things, tell them what to do and let them surprise you with the results.*

*George S. Patton, Jr.*





### **A LIST OF SOME USEFUL WEBSITES**

- California's statutes are found here:
  - <http://www.leginfo.ca.gov/calaw.html>
- The California Department of Insurance:
  - <http://www.insurance.ca.gov/>
- California Department of Motor Vehicles:
  - <http://www.dmv.ca.gov/>
- The Courts of the State of California:
  - <http://www.courtinfo.ca.gov/courts/>
- California Secretary of State, searchable for corporation names and agents for service of process:
  - <http://kepler.ss.ca.gov/list.html>
- Federal site to confirm if someone is in the military:
  - <https://www.dmdc.osd.mil/scra/owa/home>
- The State Bar of California:
  - [http://www.calbar.ca.gov/state/calbar/calbar\\_home.jsp](http://www.calbar.ca.gov/state/calbar/calbar_home.jsp)

These are just some sites that we find useful throughout the day.

If you have any questions or wish to engage in a rousing game of *Stump the Lawyer* please call us at the numbers noted below or e-mail us at LandN@CalifSubro.com.



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