

THE DAILY RECORD

WESTERN NEW YORK'S SOURCE FOR LAW, REAL ESTATE, FINANCE AND GENERAL INTELLIGENCE SINCE 1908

CivilLITIGATION

'Graves' raises new conflict concerns

Everyone knows all too well the current state of our economy. One of the worst job markets in history and a considerable decrease in the amount of the average American's disposable income has affected the travel industry significantly.

Rental car companies, an integral part of that industry, have taken a significant hit as a result. Before the downturn, however, the industry scored a major victory that should serve to improve its members' bottom lines and future viability.

President Bush on Aug. 10, 2005, signed into law the Safe, Accountable, Flexible, Efficient, Transportation Equity Act: A Legacy for Users — SAFETEA-LU, codified at 49 U.S.C. §30106. The legislation primarily was a multi-billion dollar highway appropriations bill, but buried within was what has come to be known as the "Graves Amendment," which pre-empted state laws and eliminated vicarious liability for rental car and leasing companies (in the absence of criminal wrongdoing or independent negligence).

Backed heavily by the transportation industry, Republican Sam Graves of Missouri sponsored the legislation, which received a grand total of 20 minutes of debate in the House of Representatives. No hearings were held.

Since its enactment, the Graves Amendment has been litigated extensively throughout the country and has saved rental car and leasing companies millions of dollars they otherwise would have paid out in settlements or judgments for the negligent operation of their vehicles by renters.

The Graves Amendment may have brought to light a long-standing issue regarding conflicts of interest in insurance defense litigation.

In July 2008, Kings County Supreme Court Justice Wayne P. Saitta issued a decision in *Graca v. Krasnik et al.*, 872 N.Y.S.2d 690, which held that at the moment a defense attorney (while representing both the owner of the vehicle and the driver) recognizes that the owner may have a Graves Amendment defense, a conflict of interest exists. The basis for the decision was that if the case against the owner is dismissed, full liability for the claims is shifted entirely onto the driver. Judge Saitta reasoned that type of conflict rises to a level that even full disclosure of the conflict and consent to joint representation does not cure because the driver has the right to independent counsel who will

investigate and assess the applicability of the Graves Amendment, and oppose the defense, if necessary. Interestingly, Judge Saitta raised the conflict issue *sua sponte*.

A year later, another Kings County judge, Justice Leon Ruchelsman, issued a conflicting decision — no pun intended — to *Graca*. In *Pasternak et al. v. Enterprise et al.*, No. 5716/07 (July 27, 2009), counsel for Enterprise, the owner — who also was counsel for the driver — moved to dismiss the claims against Enterprise based on Graves. Instead of the court raising the conflict issue, it was raised in this case by counsel for the plaintiff via a motion to disqualify. The court noted, quite succinctly, that the burden of proof is on the party seeking disqualification of another party's counsel. Because Judge Ruchelsman already had determined there was no evidence of any independent negligence by Enterprise, he determined counsel cannot harm the driver of the Enterprise vehicle by dismissing Enterprise because no liability could be imposed as a matter of law. In stark contrast to *Graca*, this court held that counsel merely was complying with the law by seeking to dismiss an improper party, therefore no conflict of interest was created.

In an apparent response to Judge Ruchelsman's decision two weeks later, Judge Saitta issued an order in *Meigel v. ELRAC Inc. et al.*, 24 Misc. 3d 1242A, that was wholly consistent with his prior decision in *Graca*. Again, the court raised the conflict issue *sua sponte*, but additional factors were in play this time that supported the position that no conflict existed.

Counsel for the owner, ELRAC Inc. (Enterprise), also represented the driver and secured an affidavit from the driver stating there was no defect in the rental car — an attempt to eliminate the possibility of independent negligence by ELRAC. Counsel further argued there had been full disclosure of the potential for a conflict and consent was obtained from both clients.

Judge Saitta, however, used the same reasoning used in *Graca* to order that a conflict existed and new counsel must be appointed for the driver. In fact, the court reasoned that "while there are cases where representation of joint defendants is permissible based on full disclosure and consent, where the defendants[] interests are in fact adverse, the conflict can not be waived."



By **MATTHEW D. MILLER**

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Columnist

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On Jan. 25, U.S. Magistrate Judge Jeremiah McCarthy of the Western District of New York issued an order in *Drake v. Wells Fargo et al.*, 2010 U.S. Dist. LEXIS 5703, which distinguished the facts at issue from *Graca* and *Meigel*.

The dispositive motion in *Drake* was brought after discovery was completed, but the plaintiff never alleged or sought to prove any independent negligence by the vehicle leasing company and owner, Wells Fargo. As a result, no conflict arose with the assertion of the Graves Amendment defense.

There are two distinct schools of thought on the long-debated issue of conflicts and joint representation. One believes that when an attorney represents both the insurer and the insured, an inherent conflict exists that cannot be waived — such as in the context of the Graves Amendment —

even with full disclosure.

The other school sees no conflict when there is no possibility for the imposition of liability on the rental car or leasing company in light of the Graves Amendment.

We will watch closely for a decision from an appellate court on the issue, as it could significantly affect insurance defense litigation and how cases are assigned by insurers to counsel. A decision along the lines of *Graca* and *Meigel* could significantly increase defense costs for insurers by requiring the retention of multiple firms to defend actions — one for the vehicle owner and one for the driver.

Matthew D. Miller is an associate in Underberg & Kessler's Litigation Practice Group. He concentrates his practice in civil litigation, with an emphasis on commercial, employment and municipal litigation.