IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIRST DISTRICT

CASE NO. 1D17-4048
L.T. No. 16-2014-CA-1678

FERRIS L. BAKER, JR. AND
MELISSA L. BAKER,

Appellants,

vs.

AARON B. DOTTSON-PRUETT and
21ST CENTURY CENTENNIAL INS. CO.,

Appellees.
_____/

AMICUS BRIEF OF THE FLORIDA DEFENSE LAWYERS ASSOCIATION IN SUPPORT OF APPELLEE 21ST CENTURY CENTENNIAL INS. CO.

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PRELIMINARY STATEMENT

This amicus curiae brief is submitted by the Florida Defense Lawyers Association (FDLA) in support of Appellee 21st Century Centennial Ins. Co. ("21st Century").

STATEMENT OF IDENTITY AND INTEREST

The FDLA is a statewide organization of defense attorneys formed in 1967, and it has approximately 1,000 members. The goal of the FDLA is to "support and work for the improvement of the adversary system of jurisprudence in our courts." The FDLA maintains an active amicus curiae program in which members donate their time and skills to submit briefs in important cases pending in state and federal appellate courts which involve significant legal issues that impact the interests of the defense bar or the fair administration of justice. The FDLA has actively participated in amicus briefing in numerous appellate cases with statewide impact on tort and insurance issues.

Appellants seek to extend the dangerous instrumentality doctrine to hold an insurance company (which does not possess or have any right to possess rental cars) vicariously liable for an accident caused by a rental car driver. As discussed below, such an impermissible extension would prove catastrophic for insureds, insurers, and the auto and travel-related industries.

The FDLA has an interest in maintaining the viability of the insurance industry in Florida to the benefit of insurers and insureds. It has an interest in preventing the usurpation of Congress' authority to regulate commerce through circumvention of the Graves Amendment. And, it has an interest in preventing the creation of a cottage industry of tort litigation that would impose strict vicarious liability on the insurance, auto, and travel industries for rental car accidents.

SUMMARY OF ARGUMENT

The impact of extending the dangerous instrumentality doctrine to impose strict vicarious liability on insurers through a bailment theory cannot be overstated. First, doing so would usurp Congress' authority under the Commerce Clause by circumventing the Graves Amendment enacted to regulate commerce. Second, insurance premiums borne by insureds would skyrocket to account for the added risks associated with strict vicarious liability in rental car accidents. Third, a ruling in Appellants' favor may subject the Florida State government, insurance companies, and the auto and travel industries to strict vicarious liability for auto rental accidents. Fourth, it will subject insurers to risks not contracted for under their insurance policies, in contravention of longstanding insurance law. Finally, it will essentially punish insurers for affording insureds (and non-insureds) with quick, convenient, cost-efficient rentals vehicles in time of need.

ARGUMENT

I. IMPOSING STRICT VICARIOUS LIABILITY ON INSURERS AS "BAILEES" IN ACCIDENTS INVOLVING RENTAL CARS IS AN IMPROPER ATTEMPT TO CIRCUMVENT GRAVES AMENDMENT.

The Graves Amendment eliminates vicarious liability of vehicle rental companies by virtue of being the owner of a rented vehicle absent direct negligence or criminal wrongdoing. 49 U.S.C. § 30106(a). Appellants seek to circumvent the Graves Amendment by skipping over rental car companies (e.g., Enterprise) to impose strict vicarious liability on insurance companies (e.g., 21st Century Centennial Ins. Co.) when a person causes injuries while driving a rental car owned by a rental car company. This is an improper end-run around the Graves Amendment and unconstitutionally usurps Congress' authority to regulate commerce. Art. I, § 8, cl. 3, U.S. Const.

The purpose of the Graves Amendment, a tort reform statute, is to shield vehicle rental companies from vicarious liability claims. Garcia v. Vanguard Car Rental USA, Inc., 540 F. 3d 1242, 1244, 1248 (11th Cir. 2008). The commercial leasing of cars is "an economic activity with substantial effects on interstate commerce." Id. at 1252. The Graves Amendment deregulates the rental car market by "removing intrastate burdens and obstructions to it." Id. These burdens and

obstructions include the costs of strict liability against rental car companies, which may ultimately be borne by customers. Id. at 1253.

> It is plain that the rental car market has a substantial effect on interstate commerce. It is also apparent that Congress rationally could have perceived strict vicarious liability for the acts of lessees as a burden on that market. The reason it could have done so is that the costs of strict vicarious liability against rental car companies are borne by someone, most likely the customers, owners, and creditors of rental car companies. If *any* costs are passed on to customers, rental cars -- a product which substantially affects commerce and which is frequently an instrumentality of commerce -- become more expensive, and interstate commerce is thereby inhibited. Moreover, if significant costs from vicarious liability are passed on to the owners of rental car firms, it is possible that such liability contributes to driving less-competitive firms out of the marketplace, or inhibits their entry into it, potentially reducing options for consumers. We do not know with any certainty the incidence or effect of these costs, and we do not have to know. It is enough that Congress rationally could have perceived a connection between permissible ends, namely increasing competition and lowering prices in the rental car market, and the means it chose to effectuate them, preempting vicarious liability suits.

Id.

Imposing strict vicarious liability in the manner requested by Appellants would circumvent the Graves Amendment by passing on costs to customers and owners of rental car companies against Congress' intent. Cf. 540 F. 3d at 1253. The additional costs to protect against strict liability would necessarily flow from insurance companies or other businesses that contract with rental car companies, to the owners of rental car companies, to the customers of rental car companies. This

would substantially affect commerce in direct contravention to the intent behind the Graves Amendment. Any ruling imposing vicarious liability on insurance companies under the dangerous instrumentality doctrine for accidents involving rental cars would circumvent the Graves Amendment and its very intent. The Appellants' novel theory is simply a means to get to the only remaining deep pocket.

II. IMPOSING STRICT VICARIOUS LIABILITY ON INSURANCE COMPANIES WOULD LEAD TO INCREASED RATES OF INSURANCE AND HAVE A CATASTROPHIC EFFECT ON THE INSURANCE INDUSTRY.

A ruling that an insurance company can be held vicariously liable for a rental car driver's negligence under a bailment theory would catastrophically impact the auto insurance industry. It would necessarily impose much higher premiums on customers for auto insurance policies in direct contravention of the Florida Legislature's intent. The Florida Legislature set forth:

> **Chapter 627. Insurance Rates and Contracts.**
> **Part I. Rates and Rating Organizations.**
>
> **(1)** The purposes of this part are:
>
> > **(a)** To promote the public welfare by regulating insurance rates as herein provided to the end that they shall not be excessive, inadequate, or unfairly discriminatory;
> >
> > **(b)** To encourage independent action by, and reasonable price competition among, insurers;
> >
> > **(c)** To authorize the existence and operation of qualified rating organizations and advisory organizations and to require that

> specified rating services of such rating organizations be generally available to all authorized insurers; and
>
> **(d)** To authorize cooperation between insurers in ratemaking and other related matters.
>
> **(2)** It is the purpose of this part to protect policyholders and the public against the adverse effects of excessive, inadequate, or unfairly discriminatory insurance rates, and to authorize the office to regulate such rates. If at any time the office has reason to believe any such rate is excessive, inadequate, or unfairly discriminatory under the law, it is directed to take the necessary action to cause such rate to comply with the laws of this state.

§ 627.031, Fla. Stat.

In 2015, there were 6,296,000 police-reported motor vehicle traffic crashes in the United States.[1] Currently, there are over 2.1 million rental cars in the United States.[2] Thus, adopting Appellants' bailment theory would potentially impose strict vicarious liability in millions of circumstances each year involving millions of rental cars. Vastly increased premiums for auto insurance policies (borne by the insureds) would be necessary to cover these additional liability risks. See Northwestern Nat'l Casualty Co. v. McNulty, 307 F. 2d 432, 441 (5th Cir. 1962) ("[T]he added liability to insurance companies would be passed along to the premium payers."). This

[1] U.S. Department of Transportation, National Highway Traffic Safety Administration, 2015 Motor Vehicle Crashes: Overview (August 2016) https://crashstats.nhtsa.dot.gov/Api/Public/ViewPublication/812318 (last visited April 11, 2018).

[2] 2017 U.S. Car Rental Market Fleet, Locations and Revenue, www.autorentalnews.com/fileviewer/2689.aspx (last visited, April 11, 2018).

would excessively increase insurance rates in violation of the purpose of Chapter 627.

Simple economics dictate that the insurance industry would not be able to sustain such an influx of risk and liability. To be sure, the business of insurance, like most any other business, requires higher revenue than expenses/losses to stay viable.[3] Auto insurers make money off the premiums customers pay but lose money when they must cover damages and pay business-related expenses.[4] In insurance, this is known as the combined ratio.[5] It is calculated by adding losses and expenses then dividing by the total earned premiums.[6] The lower the ratio, the more profitable the insurance company. The insurer is losing money if its loss ratio is above 100%.

"The average combined ratio for the top 20 private auto insurers climbed to 106.62% for 2016 from 103.95% the year before, according to SNL Financial data."[7] Current losses experienced by insurance industry already result in increased

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[3] Why Auto Insurance Rates are Likely to Increase in 2018, https://www.valuepenguin.com/2017/05/auto-insurance-rate-hikes-also-likely-2018 (last visited, April 11, 2018).

[4] See n.3.

[5] Steven Nicholas, What is the difference between the loss ratio and combined ratio?, https://www.investopedia.com/ask/answers/042315/what-difference-between-loss-ratio-and-combined-ratio.asp (last visited, April 11, 2018).

[6] See n.5.

[7] Anup Parasuraman and Calvin Trice, Top Private Auto Insurers Saw Premiums, Costs Rise In '16, https://.snl.com/interactivex/article.aspx?KPLT=7&id=40392287 (last visited, April 11, 2018) (citing SNL Financial data).

premiums: "Deteriorating loss trends industrywide have resulted in premium growth in personal auto outpacing rate increases in other areas of property and casualty insurance[.]"[8]

> Also, personal auto underwriters continue to face adverse loss trends that drove higher claims costs over the last two years. They include claims frequency jumps from more miles driven, more distracted driving, higher physical damage losses because of more complex and sophisticated automobile parts, and higher bodily injury costs from more severe accidents.[9]

Imposing strict vicarious liability in the manner suggested by Appellants will necessarily add to this list. Economically, the only way to offset these "bailment" losses so that auto insurers can stay viable under the combined loss ratio is to substantially increase premiums. See Northwestern Nat'l Casualty Co., 307 F. 2d at 441. This will adversely affect consumers and may contribute to the further destabilization of the auto insurance industry.

[8] See n.7 (citing CFRA analyst Cathy Seifert).
[9] Personal Auto Rate Hikes Not Keeping Up with Losses: Fitch, Insurance Journal https://www.insurancejournal.com/news/national/2017/03/30/446206.htm (last visited, April 11, 2018).

III. APPELLANTS' "BAILEE" THEORY WOULD CREATE A SLIPPERY SLOPE BY IMPACTING THE INSURANCE INDUSTRY, THE GOVERNMENT, AND BUSINESSES OUTSIDE OF INSURANCE.

The devastating impact by adopting Appellants' bailment theory cannot be overstated. Notably, a ruling in favor of Appellants would not simply impact the Appellees here; it would likely impose strict vicarious liability anytime on *anyone* who helps secure a rental car. This would implicate hotels, resorts, travel agents, and travel companies who arrange rental cars for customers.

The trial court was keenly aware of this slippery slope:

> Plaintiffs contend that the contract between 21st Century and Enterprise, detailing the terms of the business agreement between the two, gives 21st Century "constructive possession" of the vehicle that Mr. Dottson-Pruett chose to rent from Enterprise and presumably, gives 21st Century constructive possession of *every* vehicle rented by Enterprise to a 21st Century insured or, as here, to a third-party whose vehicle, although not insured by 21st Century, was damaged by 21st Century's insured in an earlier, unrelated accident. These tenuous connections between insurer and vehicle do not give rise to constructive possession by 21st Century and do not make it a bailor of the vehicle.

(R. 609) (emphasis in original).

The trial court is correct. The contract between 21st Century and Enterprise encompasses all such rental vehicles; it is not limited to the vehicle rented by Mr. Dottson-Pruett. Therefore, adhering to Appellants' bailment theory would impose strict liability across the board to all vehicles rented by Enterprise to a 21st Century

insured or third party. This would necessarily render *all* insurers who contract with Enterprise or other rental car companies vicariously liable under like circumstances to this case.

This would prove catastrophic not only to the insurance industry but to other businesses in the travel industry as well. Indeed, rental car companies, such as Enterprise or National, enter into the same type of written volume-discount arrangements with other businesses as it does with insurers. These businesses include automobile dealerships, body shops, hotels, and travel companies, such as Expedia and Travelocity. These businesses can make reservations and pay for rental charges on behalf of an individual. Appellants' bailment theory against 21st Century is based on these written agreements. If these auto and travel-related businesses enter into the same type of agreements at issue in this case, they would also be deemed bailees of the vehicles being rented without having any possession, dominion, control, or any type of cognizable property interest in the vehicles.

Appellants' bailment theory could significantly impact the public sector as well. Both the United States government and the State of Florida offer rental vehicle services to government employees.[10] Florida contracted with the parent company of

[10] Florida Department of Management Services, Rental Vehicles, https://www.dms.myflorida.com/business_operations/state_purchasing/state_contracts_and_agreements/state_term_contracts/rental_vehicles (last visited, April 11,

Enterprise Rent-A-Car and National Car Rental to provide these services.[11] The United States has contracted with nearly every major rental car provider for these services.[12] Similar to the contract at issue in this appeal, where 21st Century helps secure rental vehicles at reduced rates, individuals qualified under these governmental programs can reserve rental cars through U.S. and State of Florida dedicated portals at discounted rates.[13] Thus, under Appellants' bailment theory, these rental agreements would render these governments bailees of the vehicles absent any control or interest in the vehicles.

2018); U.S. Government Rental Car Program, http://www.defensetravel.dod.mil/site/rentalCar.cfm ("The U.S. Government Rental Car Program is an excellent example of a very effective working relationship between government and industry to provide quality vehicles ant reasonable prices for federal travelers on official travel.") (last visited, April 11, 2018).

[11] See n.10.

[12] U.S. Government Rental Car Program Participants & Points of Contact Information Agreement Number 4, http://www.defensetravel.dod.mil/Docs/CRAgreementPOCs.pdf (last visited, April 11, 2018). See also n.10.

[13] Rental Procedures for State of Florida Renters, https://www.dms.myflorida.com/content/download/127110/789495/file/Enterprise-National%20Contact%20Information_3-10-2016.pdf (last visited, April 11, 2018); U.S. Government Rental Car Program Frequently Asked Questions, http://www.defensetravel.dod.mil/Docs/Rental_Car_FAQs.pdf (last visited, April 11, 2018).

Therefore, imposition of strict vicarious liability would harm not only the auto insurance industry, it would impact many other private auto and travel-related and the public sector. Such a result should not be countenanced by this Court.

IV. APPELLANTS' THEORY COULD SUBJECT INSURERS TO RISKS NOT CONTRACTED FOR UNDER THEIR INSURANCE POLICIES AND CREATE A COTTAGE INDUSTRY OF TORT LITIGATION.

No Florida Court has imposed strict vicarious liability against insurance companies in the manner Appellants request. Because insurance companies cannot currently be held liable under such a bailment theory, there is no need to have exclusions or limitations written in automobile insurance policies protecting against the risk.

Since at least the nineteenth century, the United States Supreme Court has recognized that insurers can only be liable for the risks they insure against. "The contract of insurance is a voluntary one, and the insurers have a right to designate the terms upon which they will be responsible for losses." Riddlesbarger v. Hartford Ins. Co., 74 U.S. 386, 390 (1896). The Supreme Court has reiterated this public policy over the years:

> The primary elements of an insurance contract are the spreading and underwriting of a policyholder's risk. It is characteristic of insurance that a number of risks are accepted, some of which involve losses, and that such losses are spread over all the risks so as to enable the insurer to accept each risk at a slight fraction of the possible liability upon it.

Group Life & Health Ins. Co. v. Royal Drug Co., 440 U.S. 205, 211 (1979) (internal quotations omitted).

Thus, insurers are only liable for the risks they contract for under policies. Insurance companies do not contract for the risk of strict vicarious liability as a "bailee" of rental cars. This is not surprising since insurance companies do not possess, control, or hold dominion over rental cars. Therefore, adhering to Appellants' bailment theory would go against hundreds of years of insurance law recognizing that insurers are only liable for those risks for which they contract.

If Appellants prevail, every auto insurance company in Florida would likely re-write their policies to guard against the risk by excluding coverage for rental vehicles in circumstances like the present. See O'Brien v. Halifax Ins. Co., 141 So. 2d 307, 309 (Fla. 1st DCA 1962) ("[E]xcept where controlled by statute or public policy, an insurance company is free to insert exemption clauses in its policies and an insurance company is not responsible under its liability policy for risks or causes which have been excepted.") (internal quotations omitted).

This would cause havoc in the interim: plaintiffs would only need to produce a contract between the insurer and the rental car company (similar to the present agreement) to potentially impose strict vicarious liability on the insurance company.

Given the millions of rental cars on the road and the millions of auto accidents each year, a ruling in Appellants' favor would create a cottage industry of tort litigation.

V. IMPOSING STRICT VICARIOUS LIABILITY WOULD PUNISH INSURERS FOR HELPING ACCIDENT VICTIMS.

Insurance contracts which allow for rental vehicles while the insured's or claimant's vehicle is being fixed are standard in the auto industry. This is intended to be a quick, convenient, and cost-efficient service made possible by a written contractual relationship between insurance company and rental car companies.

Adopting Appellants' bailment theory would punish insurance companies in the form of strict vicarious liability for helping insureds and claimants gain quick, convenient, and cost-efficient access to a rental car. It should not be adopted by this Court.

CONCLUSION

This Court should decline to accept Appellants' arguments that would impose strict vicarious liability upon insurance companies who merely facilitate the reservation and payment of rental vehicles for their insureds and claimants. Any decision to the contrary would have a far-reaching and catastrophic impact to the auto and travel industries. It would wholly circumvent Congress' intent with the Graves Amendment. This Court should affirm the well-reasoned Final Summary Judgment of the trial court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing was furnished via eDCA and email to: **Kevin Edward Jakab,** kjakab@jakablaw.com, 6277 Dupont Station Ct. E. Suite 3 Jacksonville, FL 32217-2567; **Thomas R. Brown,** tombrown@thebrownfirm.net, 6277 Dupont Station Ct. E. Suite 3 Jacksonville, FL 32217-2567; **Steven L. Brannock**, sbrannock@bhappeals.com, 1111 W. Cass Street, Suite 200, Tampa, FL 33606; **Rosemary B. Wilder and Karl Sturge**, rwilder@marlowadler.com, ksturge@marlowadler.com, alopez@marlowadler.com; tchowloon@marlowadler.com, Marlow Connell Abrams Adler, 4000 Ponce de Leon Blvd Ste 570, Coral Gables, FL 33146-1431; and **Rodolfo Sorondo, Jr.** and **Ilene L. Pabian**, rodolfo.sorondo@hklaw.com and Ilene.pabian@hklaw.com, Holland & Knight LLP, 701 Brickell Avenue, Suite 3300, Miami, Florida 33131; this 18th day of April, 2018.

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief was prepared in Times New Roman, 14-point font, in compliance with rule 9.210(a)(2) of the Florida Rules of Appellate Procedure.

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