Case Comment:

Rent-a-Defendant: Current Developments Concerning Vicarious Liability Statutes in the Motor Vehicle Rental and Leasing Industry

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On August 10, 2005, President Bush signed into law the Transportation Equity Act of 2005, 49 USC § 30106, which effectively provided that in the absence of negligence or criminal wrongdoing, motor vehicle rental and leasing companies would no longer be liable for the negligence of their customers.[1] At the time 49 USC § 30106 went into effect, 15 states had laws that threatened non-negligent companies with unlimited vicarious liability for the negligence of their customers.[2]

In *Graham v. Dunkley*, the New York State Supreme Court, Queens County, addressed the constitutionality of 49 USC § 30106, and whether it preempted a New York state law that provided that the owner of a motor vehicle was liable for the negligence of any person using the vehicle with the owner's permission.[3] The court held that Congress had ex-

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1. *New Federal Statute Protecting Vehicle Leasing Companies From Vicarious Liability*, F & P Liability Dispatch (Franklin and Prokopik, Baltimore, MD), November 7, 2006.

2. *Id.*

3. Graham v. Dunkley, 827 N.Y.S.2d 513, (N.Y. Sup. Ct. 2006).

ceeded its commerce power by passing 49 USC § 30106, and therefore the New York state law was not preempted.

In *Graham*, the plaintiff alleged that she was injured in an automobile accident and filed suit against the driver, Rayon S. Dunkley, and "Nissan Infinity, LT," the registered owner and lessor of the vehicle at the time of the accident. The plaintiff's suit against NILT, Inc. was based on New York State Vehicle and Traffic Law § 388 ("§ 388"), which provides that a motor vehicle owner will be liable for the negligence of any person who operates the vehicle with the implied or express permission of the owner. NILT, Inc. filed a pre-answer motion for dismissal for failure to state a cause of action. NILT, Inc. argued that Article VI of the Constitution ("the Supremacy Clause") declares that federal law "shall be the supreme law of the land," and therefore dictated that 49 USC § 30106 preempted § 388, and the plaintiff was left with no state cause of action.[4]

Pursuant to the Supremacy Clause, federal law may preempt state law when: 1) a federal law contains express preemption language; 2) federal law completely occupies a field leaving no room for state law to supplement it; and 3) state law conflicts with a federal law. For federal law to preempt a state law, the federal law must be constitutional. 49 USC § 30106 contained express statutory language declaring that the owner of a motor vehicle who rents or leases the vehicle shall not be liable under "the law of any State or political subdivision thereof" for the damages to persons or property during the period of the rental or lease, directly conflicting with New York State Vehicle and Traffic Act § 388.[5]

Prior to the *Graham* decision, the case law concerning 49 USC § 30106 had not looked beyond the Supremacy Clause in its analysis, leaving unaddressed the issue of whether Congress had exceeded its commerce power in passing the law. Only months before the *Graham* decision, in *Infante v. U-Haul*, the New York State Supreme Court, Queens County, held that 49 USC § 30106 preempted § 388.[6] The *Graham* court went beyond the Supremacy Clause, however, declaring that there is a strong presumption against preemption, especially when a federal law affects "the States' historic police powers over the health, safety and welfare of its residents."[7] If a federal law is unconstitutional, a preemption analysis becomes unnecessary.

State and federal courts have concurrent jurisdiction on federal constitutional issues unless Congress expressly precludes jurisdiction for state courts. The *Graham* court determined that since no federal legislation had withdrawn its power to do so, it had jurisdiction to pass upon the

4. *Id.* at 517.
5. *Id.* at 516.
6. Infante v. U-Haul Co. of Florida, 815 N.Y.S.2d 921 (N.Y. Sup. Ct. 2006).
7. *Graham*, 827 N.Y.S.2d at 517.

constitutionality of 49 USC § 30106. The court also noted that the plaintiff's case did not fall within the exclusive federal question jurisdiction of the federal courts because NILT, Inc. had merely raised a federal defense to a state cause of action. For a case to arise under federal law, a right or immunity created by a federal law must be an essential element of the plaintiff's cause of action, and here the plaintiff was pursuing a state cause of action.

The Tenth Amendment provides that "the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."[8] In order for Congress to pass a law, the Constitution must give it the power to do so.

The power of Congress to pass 49 USC § 30106 was ostensibly based on its power under Article I, § 8 of the Constitution (the "Commerce Clause"). The Commerce Clause gives Congress the ability to "regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."[9] The Supreme Court has held that in regards to commerce "among the several States," Congress may regulate: 1) the channels of interstate commerce; 2) the instrumentalities (persons or things) of interstate commerce; and 3) activities that "substantially affect" interstate commerce. Since the removal of vicarious liability for those in the business of renting or leasing vehicles is neither a channel nor instrumentality of interstate commerce, the discussion focused on Congress's ability to regulate activities "substantially affecting" interstate commerce.[10]

The *Graham* decision refers to three "guiding principles" of contemporary Commerce Clause jurisprudence: 1) Congress can regulate all activities, including *intrastate* activities, which have a "substantial effect" on interstate commerce; 2) effects on commerce that seem individually trivial may be deemed "substantial" when aggregated; and 3) courts should defer to a congressional finding that an activity "substantially affects" interstate commerce if there is any "rational basis" for such a finding.[11]

Recent Supreme Court interpretation of Congress's power to regulate "activities that substantially affect" interstate commerce was addressed by the *Graham* court, most notably the Supreme Court's decisions in *United States v. Lopez* and *Gonzalez v. Raich*.[12] In *Lopez*, the Supreme Court found that Congress had exceeded its commerce power by passing a law that made the possession of a firearm in a school zone a federal offense. The Court rejected as too attenuated the government's argument that crime "substantially affected" the functioning of

8. *Id.* at 519-20 (quoting U.S. CONST. amend. X).
9. *Id.* at 520 (quoting U.S. CONST. art. I, § 8).
10. *Id.* at 521.
11. *Id.* at 522 (citing Unites States v. Lopez, 514 U.S. 549, 558 (1995)).
12. Gonzales v. Raich, 545 U.S. 1 (2005); *Lopez*, 514 U.S. 549.

the national economy, noting that if it were to accept the government's position, there would be little activity that Congress could not regulate.

Likewise, in *Gonzalez*, the Court rejected the government's argument that gender violence had a "substantial effect" on interstate commerce. The Court held that congressional findings that led to the passage of a law that provided a federal civil remedy for the victims of gender-motivated violence were based on a "but-for causal chain from initial occurrence of violent crime . . .to every attenuated effect upon interstate commerce."[13] The Court held that if such reasoning were accepted, Congress would soon be able to venture into realms traditionally controlled by the States, such as using the aggregate effects of divorce and marriage to be able to regulate family law.

The *Graham* decision employed similar reasoning in holding that 49 USC § 30601 exceeded Congress's commerce power. The court found that since § 388 is a statute that defines the scope of *vicarious liability*, it was not an activity that had a substantial effect on interstate commerce, nor was there any "rational basis" for 49 USC § 30106. The court reasoned that like the effects of gender violence on the national economy, the effects of imposing vicarious liability on the rental car industry were too attenuated to "substantially affect" interstate commerce. The court declared that finding a rational basis for 49 USC § 30106 would require piling "inference upon inference in a manner that would bid fair to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the states."[14]

Furthermore, like family law, the substantive law of torts has traditionally been regarded as an area left to the determination of the respective States. In *Erie R. Co. v. Tompkins,* the Supreme Court held that Congress had "no power to declare substantive rules of common law be they a commercial law or part of the law of torts," and since then federal courts have looked to the States for the substantive law of torts.[15] The *Graham* court found that Vehicle and Traffic Law § 388 was part of New York State's substantive law of torts, codifying the imputed liability substantive tort doctrine of vicarious liability attributable to motor vehicle owners. The court pointed to three instances in which the Court of Appeals for the Second Circuit certified questions to the New York State Court of Appeals concerning § 388, speaking to its recognition as an important part of New York State's substantive law of torts.

While the *Graham* decision arguably overlooks the contention that the threat of vicarious liability may lead to higher costs in areas such as

13. *Graham*, 827 N.Y.S.2d at 520 (*quoting* United States v. Morrison, 529 U.S. 598, 615-16 (2000) and H. R. Conf. Rep. No. 103-711, at 385).

14. *Id.* at 523 (*quoting Lopez*, 514 U.S. at 567).

15. *Id.* at 522 (*quoting* Erie R.R. v. Tompkins, 304 U.S. 64, 78 (1938)).

the transportation of goods, which might therefore "substantially affect interstate commerce," it does provide an interesting model for jurisdictions that wish to retain their imputed liability statutes. The constitutionality of 49 USC § 30106 remains far from settled, however, as evidenced by a recent decision subsequent to *Graham* in which 49 USC § 30106 was held to be a permissive exercise of Congress' commerce power.[16] It is apparent that this issue will continue to be litigated, and it may be some time before the reach of preemption and the validity of 49 USC § 30106 is finally determined.

16. In Garcia v. Vanguard Car Rental USA, Inc., a federal district court judge found 49 USC § 30106 to be within Congress' commerce power, and that it therefore preempted vicarious liability claims under the relevant Florida state statute. Garcia v. Vanguard Car Rental USA, Inc., 2007 WL 686625 (M.D. Fla. March 5, 2007).