5/23/2007

Vicarious Liability Reform Approved in British Columbia

VANCOUVER, BRITISH COLUMBIA - The British Columbia Legislative Assembly eliminated unlimited liability without fault for vehicle renting and leasing with the May 16 passage of a bill to revise current law. British Columbia's Lieutenant Governor Iona Campagnolo is expected to sign the legislation into law before June 1.

Current BC law exposes non-negligent owners of rented and leased vehicles operating in the province to unlimited liability based solely on ownership. Under the TRALA-sponsored legislation passed this week, vicarious liability imposed against vehicle renting and leasing companies will be capped at one million. This liability protection applies to owners of cars and trucks under short-term rental or long-term lease agreements of either a commercial or consumer nature.

When enacted, the new law will remove the threat of multi-million awards against non-negligent companies. TRALA is also continuing to work with the BC Minister of Public Safety and Solicitor General John Les, as well as with the government-owned Insurance Corporation of British Columbia, to clarify the bill's impact on insurance primacy. TRALA is pushing for a solution similar to last year's successful vicarious liability reform in Ontario that makes the lessee's policy primary. Under the 2006 Ontario reform, the lessor is vicariously liable only for the difference between the lessee's coverage and the $1 million cap in place in the province.

TRALA worked with an international coalition of organizations and companies involved in vehicle renting and leasing in seeking vicarious liability reform in British Columbia.

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B.C. Law Could Limit Insurance for Rental Cars

May 22, 2007

A law recently proposed in British Columbia, Canada could limit vehicle leasing and rental companies' liability to $1 million for injury and property damage claims, the Trial Lawyers Association of B.C. reports.

The rental and leasing companies within the province currently face unlimited liability for accidents caused by their customers.

It is estimated that one-third of the vehicles on B.C. roads are leased.

The government said the changes were needed to bring B.C. in line with other jurisdictions and that the proposed law will help keep key businesses like car rental companies in the province to support major industries such as tourism, according to B.C. officials in a press release.

The U.S. eliminated vicarious liability for leasing and rental companies in 2005, and Ontario passed similar legislation last year.

Some B.C. drivers reportedly still carry only the basic minimum third-party liability coverage of $200,000.

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Canadian Underwriter, 10/17/2006

Insurance lobby secures changes to Bill 18 in Ontario (vicarious liability)

Answering the lobby of several insurance groups and associations, the Financial Services Commission of Ontario (FSCO) has announced it is amending the Ontario Automobile Policy (OAP 1) and a number of related forms as a result of Bill 18, which deals with vicarious liability.
"Changes to these forms have been developed in consultation with stakeholders, including the Insurance Bureau of Canada, the Insurance Brokers Association of Ontario and rental and leasing groups," FSCO announced in a statement on its Web site.
FSCO said "changes have been made to the OAP 1 to clarify that there is coverage for liability for an insured person (i.e., a person who has their own automobile insurance policy) in situations where the person rents or leases an automobile and is vicariously liable for the negligence of another person who drives the automobile.
"This situation can arise where an insured person rents or leases a car and then lends the vehicle to a friend, who is negligent in an accident while driving the car.
"If a liability claim is made against a driver, renter/lessee or owner of a rented or leased vehicle, coverage may be available from more than one automobile insurance policy. The OAP 1 has been amended to provide additional guidance on the order in which these policies will respond."
Changes have also been made to the OPCF 2, OPCF 5, OPCF 5C and OPCF 27 forms.
According to FSCO, these changes include:
• changes to the title and contents of some of the forms to reference rented or leased vehicles;
• clarification that certain policies are issued to the lessee and not lessor;
• amendments to reflect the new sub-limits for excess liability; and
• clarification of the exclusion of liability coverage for excluded drivers.
"Please note that where the OPCF 5C is used in connection with a policy insuring a vehicle (e.g., a commercial vehicle) that is required by law to carry third-party liability coverage in excess of $1 million, the form provides for the ability to stipulate the appropriate third-party liability coverage amount."
The revised OAP 1 and amended OPCF 2, 5, 5C and 27 are effective for new business and renewals effective on or after Jan. 1, 2007.
It is expected that changes to the OAP 1 and the endorsements will also be read-in to all policies in force on or after Mar. 1, 2006 – the date the vicarious liability amendments in the Budget Measures Act, 2005 (No. 2) became effective.
Copies of the revised OAP 1 and OPCF 2, 5, 5C, and 27 are available on FSCO's Web site at: www.fsco.gov.on.ca. The OAP 1 will also be published in a forthcoming edition of The Ontario Gazette.

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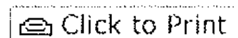

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Vicarious Liability For Lessors In British Columbia

Just When You Thought It Was Safe To Lease Vehicles In Canada

Recent legislation in both the United States and Ontario has addressed the concerns of the leasing industry with respect to vicarious liability. In both jurisdictions, specific legislation has been introduced to either eliminate (United States) or contain (Ontario) lessors' vicarious liability.

Lessors lobbied for these changes to ensure that leasing a motor vehicle would not expose the lessor to unexpected costs, and to provide an efficient economic mechanism for consumer and commercial users to acquire the use of motor vehicles without incurring significant obligations. Previously, the potential exposure to vicarious liability had a dampening effect on both motor vehicle sales and financing of these vehicles. Until May 3, 2006 certain lessors in British Columbia were also exempt from vicarious liability, but all this changed with the recent decision of Yeung (Guardian ad litem of) v. Au, 2006 BCCA 217.

Prior to the Court of Appeal's decision in Yeung, leases with an option to purchase were considered, for the purposes of the Motor Vehicle Act (British Columbia), conditional sales contracts. Based on the 1996 decision of the British Columbia Court of Appeal in Schoenbach v. Troung, (1996) 19 B.C.L.R (3d) 313, the purchaser of the motor vehicle under a conditional sales agreement would be liable as the owner of the motor vehicle and the seller would be exempt from vicarious liability.

The Court of Appeal held that a lease with an option to purchase constituted a conditional sales contract. Accordingly, under the predecessor provision to Section 86(3) of the Motor Vehicle Act, the lessor was provided with the same protections as a seller under a conditional sales contract. Yeung overruled this finding.

The court, in Yeung, held that a lease with an option to purchase was different than a conditional sales contract and found by this reasoning that a lessor was not afforded the same protections as a conditional sale vendor. The result of this finding was to cause the lessor of the motor vehicle to be liable for damages caused by the lessee under lease.

What makes this decision even more disquieting is that the lease the court reviewed may have actually been a financing (or security) as opposed to a true lease. The court could have reached such a conclusion if a proper analysis of the economic reality had been conducted. Instead, the court simply looked at the fact that the instrument was entitled "lease,"
contemplated payment of "rent," and provided an option to purchase the vehicle at the end of the term of the lease.

The court did not analyze whether the standard indicia of a secured credit arrangement were present including whether it was likely that the lessee would or would not exercise its option. The mere fact that the lessee could walk away from the purchase of the motor vehicle was sufficient for the court to determine that the contract under

consideration was not in the nature of a conditional sales contract but a lease. This reasoning is very much a form-over-substance analysis and one that does not necessarily follow legal analysis of other statutes (including section 2(1) of the BC
PPSA) or accounting principles.

The distinction between a true lease and financing lease has long been litigated, particularly in Ontario, where there is a distinction for PPSA purposes that a lease intended as security is a different legal instrument than a true lease. Under the Court of Appeal's decision, this distinction, at least for purposes of the Motor Vehicle Act, is not seen to be significant.

This is a disturbing development for lessors in British Columbia and consideration should be given by lessors who enter into financing leases to restructure these transactions into conditional sales contracts. In many situations, lessors, or more properly, financiers of motor vehicles, often are ambivalent as to whether they should document their particular finance transaction as a conditional sales contract or a lease where there is going to be either a bargain purchase price or trac lease. Based on this recent decision, it now appears that in these circumstances, a conditional sales contract should prevail.

In situations where the transaction will be a true lease, the lessor needs to be vigilant that the lessee continues to maintain appropriate insurance. This insurance amount will likely now have to be higher than traditionally has been requested as a lessor will be unwilling to assume any risk. More problematic will be the systems required by lessors to ensure these insurance policies do not lapse. Lessors can obtain excess liability insurance but this excess cost will be passed on to the lessee in higher costs. Given the recent success by lessors in the United States and Ontario to cause changes to governing statutes, it is strongly recommended that British Columbia lessors initiate similar activities. The case could easily be made to British Columbia legislators that costs in British Columbia will be higher than in other parts of Canada and cause both consumers and commercial companies to be less competitive than their Canadian and U.S. counterparts.

Article prepared by Financial Services Group at Cassels Brock, Toronto, Ontario.