

Vicarious Liability Primer:

**Common Issues in Matters Involving the
Application of Vehicle and Traffic Law § 388**

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INTRODUCTION

It is well established that Vehicle and Traffic Law § 388 (1) imputes to the owner of an automobile the negligence of one who uses that vehicle with the owner's permission (see *Murdza v Zimmerman*, 99 NY2d 375, 379 [2003]). Section 388 provides, in relevant part, as follows:

“Every owner of a vehicle used or operated in this state shall be liable and responsible for death or injuries to person or property resulting from negligence in the use or operation of such vehicle . . . by any person using or operating the same with the permission, express or implied, of such owner.”

For liability to accrue pursuant to Vehicle and Traffic Law § 388, a plaintiff must establish compliance with each of the conditions set forth in that statute. In other words, the plaintiff must show that the party against which an assessment of vicarious liability is sought (1) *owned* the automobile in question, that the plaintiff's loss arose out of the (2) *use or operation* of a (3) *vehicle* in (4) *New York State*, and that those injuries occurred because of (5) *negligence* arising out of the (6) *permissive use* of that vehicle (see Vehicle and Traffic Law § 388 [1]).

Absent “substantial evidence” to the contrary, Vehicle and Traffic Law § 388 gives rise to a “strong presumption” that a vehicle is operated with the permission of its owner (*Murdza*, 99 NY2d at 379, citing *Leotta v Plessinger*, 8 NY2d 449, 461 [1960]). The operation of the vehicle need

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not be a proximate cause of the plaintiff's injury for liability to attach (see *Argentina v Emery World Wide Delivery Corp.*, 93 NY2d 554 [1998]).

Under Vehicle and Traffic Law § 388, liability is imposed without regard to the fault of the owner (see e.g. *Morris v Snappy Car Rental*, 84 NY2d 21, 27 [1994]). Because liability of the owner is both joint and several, the driver and owner of a particular automobile in a matter involving the application of section 388 may be sued separately (see *Sullivan v Spandau*, 186 AD2d 641 [2d Dept 1992]).

To that end, it follows that as long as the owner may be shown to bear some responsibility, whether actual or vicarious, for the plaintiff's injuries such that the plaintiff could have joined the owner in a timely-commenced action, the other defendants may seek contribution from that owner (see *Sommer v Federal Signal Corp.*, 79 NY2d 540, 559 [1992]; see also *Mowczan v Bacon*, 92 NY2d 281 [1998]). Likewise, the vehicle owner may, in certain circumstances discussed more fully at page 48 of this publication, seek indemnity from the negligent operator of the owner's vehicle (see *D'Ambrosio v City of New York*, 55 NY2d 454 [1982]).

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Summary Judgment and Vehicle and Traffic Law § 388

Because many of the issues considered herein arise most frequently in motion practice, a rudimentary of overview of the burdens borne by each of the moving and responding parties in an application for summary judgment is provided.

The manner in which a motion for summary judgment is prosecuted is best described by the decision of the Court of Appeals in *Alvarez v Prospect Hospital* (68 NY2d 320, 324 [1986]):

“[T]he proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact. Failure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers. Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action” (*Alvarez*, 68 NY2d at 324).

Issue finding, rather than issue determination, is the key to procedure on such an application (see *e.g. Pugh v Jeffrey*, 289 AD2d 946, 947 [4th Dept 2001]).

Once the moving plaintiff establishes entitlement to judgment as a matter of law as to his Vehicle and Traffic Law § 388 claim, the burden shifts to the defendant-owner to establish an issue of fact as to whether

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compliance with the aforementioned statutory conditions has been achieved (*see generally Alvarez*, 68 NY2d at 324).

In turn, should a moving defendant establish entitlement to judgment as a matter of law as to the application of any of the conditions set forth in Vehicle and Traffic Law § 388, the burden necessarily shifts to the plaintiff to produce proof in admissible form sufficient to establish a material question of fact as to whether the disputed component of section 388 applies to the alleged accident (*see generally Alvarez*, 68 NY2d at 324).

Absent a showing of good cause and leave of the court, a motion for summary judgment must be brought within 120 days of the filing of the note of issue (*see Brill v City of New York*, 2 NY3d 648, 652 [2004] [interpreting CPLR 3212 (a)]; *compare Wanamaker v VHA, Inc.*, 19 AD3d 1011, 1012 [4th Dept 2005]).

Reverse Summary Judgment

An often underutilized component of motion practice in this state is that of reverse summary judgment.

Pursuant to CPLR 3212 (b), “[i]f it appears that any party other than the moving party is entitled to summary judgment, the court may grant such judgment without the necessity of a cross-motion.” That concept is commonly referred to as “reverse summary judgment.”

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In short, courts of this state are empowered to grant reverse summary judgment where (1) the proof submitted by the moving party does not preclude an issue of fact as to the question considered by the motion; and (2) the proof offered in opposition to the subject application eliminates any question of fact as to the issues considered by the motion and compels judgment in favor of the non-moving party. Although both trial and appellate courts may award reverse summary judgment (see *Maheshwari v City of New York*, 2 NY3d 288, 293 n 2 [2004]), trial courts are often reluctant to grant reverse summary judgment unless so petitioned.

LIABILITY

The Purpose and Intent of Vehicle and Traffic Law § 388

The purpose of Vehicle and Traffic Law § 388 is easily discerned: that statute was intended to protect motorists by encouraging compensation for those injured in motor vehicle collisions and discouraging the careless lending of an automobile by its owner.

The immediate remedial intent of Vehicle and Traffic Law § 388 was to abrogate the common law rule that an absentee owner of an automobile is not liable for the negligent operation of that vehicle by a third person (see *Murdza*, 99 NY2d at 379; *Morris*, 84 NY2d at 27). Distilled to its

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essence, “section 388 was designed to remove the hardship which the common-law rule visited upon innocent persons by preventing an owner from escaping liability by saying that his car was not used without his authority or not in his business” (*Morris*, 84 NY2d at 27 [internal quotations omitted]). “That statute created liability where none previously existed, that liability being vicarious and its predicate statutory” (*Morris*, 84 NY2d at 27).

“An equally important policy reflected in [Vehicle and Traffic Law § 388] is the heightened degree of care owners are encouraged to exercise when selecting and supervising drivers permitted to operate their vehicles” (*Murdza*, 99 NY2d at 379). Section 388 thus “simultaneously increases the likelihood of compensation for those injured in motor vehicle accidents and decreases the probability of such accidents by encouraging [the] prudent selection of drivers” (*Murdza*, 99 NY2d at 379).

The Accrual of Liability Under Vehicle and Traffic Law § 388

As noted above, for liability under Vehicle and Traffic Law § 388 to accrue, it must be shown that the accident giving rise to the injuries of which the plaintiff complains comes within the ambit of that statute. Therefore, the plaintiff must demonstrate that (1) the party against which an assessment of vicarious liability is sought *owned* the automobile in question, that the

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plaintiff's loss arose out of the (2) *use or operation* of a (3) *vehicle* in (4) this *state*, and that those injuries because of (5) *negligence* related to the (6) *permissive use or operation* of that vehicle (see Vehicle and Traffic Law § 388 [1]).

Naturally, to determine whether a particular claim meets the criteria set forth in Vehicle and Traffic Law § 388 and the purview of that statute, it is necessary to establish the meaning of the words and phrases that constitute the factors contained in that section. For that reason, the meaning of each of the italicized words and phrases set forth above is discussed herein.

The Term “Owner”, as Incorporated in Section 388

The first condition to liability contained in Vehicle and Traffic Law § 388 is that of ownership. For liability to accrue under that statute, a plaintiff must establish that the party alleged to have vicarious responsibility was the “owner” of the vehicle involved in the plaintiff's accident.

Section 128 of the Vehicle and Traffic Law establishes the following meaning of the term “owner” as incorporated in Vehicle and Traffic Law § 388¹:

¹ Vehicle and Traffic Law § 128 provides the definition of “owner” in the vicarious liability statute pursuant to the grant of authority contained in Vehicle and Traffic Law § 388 (3). Subdivision (3) of Section 388 provides, in relevant part, as follows:

“A person, other than a lien holder, having the property in or title to a vehicle or vessel. The term includes . . . any lessee or bailee of a motor vehicle or vessel having the exclusive use thereof, under a lease or otherwise, for a period greater than thirty days.”

As a derogation of common law, Vehicle and Traffic Law § 388 should be construed narrowly to avoid making any innovation on the common law other than that intended by the statute itself (see *Morris*, 84 NY2d at 28). However, in keeping with the general protective intent of the Vehicle and Traffic Law, courts of this state have typically afforded a broad definition to the term “owner” as set forth in Section 388.

A Rebuttable Presumption of Ownership Rests with the Holder of Documents of Title

Generally, then, ownership is deemed to be in the registered owner of the vehicle or one holding the documents of title (*Fulater v Palmer's Granite Garage*, 90 AD2d 685, 685 [4th Dept 1982], *appeal dismissed* 58 NY2d 826; see *Potter v Keefe*, 261 AD2d 864, 864 [4th Dept 1999]). That inference is not, however, conclusive and “and may be rebutted by

“As used in this section, “owner” shall be as defined in section one hundred twenty-eight of this chapter and their liability under this section shall be joint and several. If a vehicle be sold under a contract of sale which reserves a security interest in the vehicle in favor of the vendor, such vendor or his assignee shall not, after delivery of such vehicle, be deemed an owner within the provisions of this section, but the vendee, or his assignee, receiving possession thereof, shall be deemed such owner notwithstanding the terms of such contract, until the vendor or his assignee shall retake possession of such vehicle. A secured party in whose favor there is a security interest in any vehicle out of his possession, shall not be deemed an owner within the provisions of this section.”

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evidence which demonstrates that another individual owned the vehicle in question” (*Aronov v Bruins Transp.*, 294 AD2d 523, 524 [2d Dept 2002] [internal quotations omitted]).

By way of example, a rebuttable presumption of ownership will arise where the defendant sought to be held vicariously liable is, among other things,

- an **administrator** of a vehicle **lease** (*Taughrin v Rodriguez*, 254 AD2d 735 [4th Dept 1998]);
- an **assignee** to a vehicle **lease** (*Hoadley v Banc One Acceptance Corp.*, 16 AD3d 1157 [4th Dept 2005]; *Alexander v Radix*, 12 AD3d 544 [2d Dept 2004]; *Ryan v Sobolevsky*, 4 AD3d 222, 223 [1st Dept 2004]);
- a **lessee** or **bailee** of a motor vehicle having the exclusive use thereof, under a lease or otherwise, for a period of greater than 30 days (*GE Capital Auto Lease, Inc. v Allstate Ins. Co.*, 281 AD2d 456, 457 [2d Dept 2001], *lv dismissed* 97 NY2d 654, 98 NY2d 671; *LaPlant v Cutlip*, 258 AD2d 769, 771 [3d Dept 1999], *lv denied* 93 NY2d 811);
- the **long-term lessor** of the subject vehicle (*Chilberg v Chilberg*, 13 AD3d 1089, 1092 [4th Dept 2004]; *Litvak v Fabi*, 8 AD3d 631, 632 [2d Dept 2004]);
- **named on the vehicle** that produced the injury (see *Demongenes v Village Carting Co.*, 44 AD2d 155, 156 [1st Dept 1974]);
- one who has intentionally **registered a vehicle in his name** (*Shuba v Greendonner*, 271 NY189 [1936]; *Ferris v Sterling*, 214 NY 249, 252 [1915]);

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- the **titleholder to a particular vehicle** (see *Them-Truck Chung v Pinto*, 26 AD3d 428 [2d Dept 2006]);
- the **owner of transporter plates** affixed to a vehicle involved in an accident (*Mitchell v Auto Buyers, Inc.*, 43 AD2d 830 [2d Dept 1974]); or
- a **vehicle rental company** that owns the subject vehicle² (see *Morris*, 84 NY2d 21).

That presumption may be rebutted where, among other things, it is demonstrated that the party against which an assessment of vicarious liability is sought

- is a **bank which retains only a security interest in a vehicle** (see *Ryan*, 4 AD3d at 223; *Levine v Brooks*, 291 AD2d 481, 482 [2d Dept 2002]; *Kelly v Fleet Bank*, 271 AD2d 654 [2d Dept 2000], *lv denied* 96 NY2d 702);
- **completes a police report and request for arbitration indicating that party did not own** the vehicle involved in the injury-inducing accident (*Castro v Liberty Bus Co.*, 79 AD2d 1014 [2d Dept 1981]);
- is a parent corporation that **lacks a property interest** in or title to a vehicle (see *Ahkenazi v Hertz Rent A Car*, 18 AD3d 584, 586 [2d Dept 2005]; see also Vehicle and Traffic Law § 388 [3]);
- **left blank** the name of the purchaser on **the bill of sale so the driver could insert her name** (see *Duger v Carey*, 307 AD2d 675, 676 [3d Dept 2003]);

² It bears noting that, as is discussed more fully at pages 39-41 of this publication, Congress has, by operation of 28 USC § 30106 (a) (1), essentially prohibited the imposition of vicarious liability on the owners and lessors of motor vehicles.

- is a **lienholder** of the subject vehicle (*Property Clerk v Molomo*, 179 AD2d 210 [1st Dept 1992], *affd* 81 NY2d 936);
- is **mistakenly referred to as the owner of the medallion of a taxicab** by the lease between the driver of the subject taxicab and the medallion owner (*Piaseczny v Bartolo*, 271 AD2d 267, 268 [1st Dept 2000]);
- only **owns stock** in a **corporation** that **owns the vehicle** (see *Bank v Rebold*, 69 AD2d 481 [2d Dept 1979]);
- **paid for the insurance** to the subject vehicle, **but did not own title** to that automobile or register that car (*Van Wart v Robert Van Wart, Inc.*, 221 AD2d 624 [2d Dept 1995], *lv denied* 87 NY2d 811; *Fulater*, 90 AD2d at 685); or
- intended for **title to a transferred vehicle to pass** at the time of delivery and **prior to the subject accident**, even though the plates to that vehicle had not been surrendered to the Department of Motor Vehicles at the time of loss (*Pearson v Redline Motor Sports, Inc.*, 271 AD2d 222, 222-223 [1st Dept 2000]).

Certain Deceptive Activity May Estop a Party From Denying Ownership

It also bears noting that where a party engages in certain illegal and fraudulent activity designed to create confusion as to the identity of the true owner of an automobile, that party may be estopped from denying ownership of a particular vehicle. This rule, though harsh, is intended to

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encourage compliance with the laws governing the registration of motor vehicles in this state.

By way of example, a party may be estopped from denying record title where that party, among other things,

- **fails to comply with a statutory mandate regarding vehicle registration procedures** requiring verification that a purchaser obtained the requisite insurance before issuing temporary registration (*see e.g. McCabe v Competition Imports*, 307 AD2d 576 [3d Dept 2003], *lv dismissed* 2 NY3d 813; *Brown v Harper*, 231 AD2d 483, 484 [2d Dept 1996]);
- knows the **purchaser's liability policy had lapsed**, but unlawfully **registers the subject vehicle** in the purchaser's name (*see Taylor v Botnick Motor Corp.*, 146 AD2d 81 [3d Dept 1981]);
- who **negligently gives dealer plates** to its repair shop **without instructions to limit use of the plates** (*see Ciatto v Lieberman*, 1 AD3d 553, 556 [2d Dept 2003]); and
- **transfers a vehicle without removing the license plates** (*see Dairylea Coop. v Rossal*, 64 NY2d 1, 10 [1984]; *Switzer v Aldrich*, 307 NY 56, 61 [1954]).

Importantly, the estoppel of record title is effective against only the record owner and does not prevent the injured party or the insurer of that owner from establishing that the vehicle was owned by an entity other than the estopped party (*see Dairylea Coop.*, 64 NY2d at 10).

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The Term “Vehicle”, as Incorporated in Section 388

The second predicate to liability contained in Vehicle and Traffic Law § 388 is that which limits application of that statute to injuries arising from the use of a vehicle. Liability cannot accrue under section 388 unless the accident giving rise to the injuries of which the plaintiff complains involved a “vehicle” as defined in that section 388.

Pursuant to Vehicle and Traffic Law § 388, a “vehicle” within the meaning of that section includes, among other things, a semi-trailer, a trailer and any vehicle coming within the definition of the term “motor vehicle” set forth in Vehicle and Traffic Law § 125 (see Vehicle and Traffic Law § 388[2]).

Section 125 of the Vehicle and Traffic Law, in turn, characterizes a “motor vehicle” as:

“[e]very vehicle operated or driven upon a public highway which is propelled by any power other than muscular power, except (a) electrically-driven mobility assistance devices operated or driven by a person with a disability, (b) vehicles which run only upon rails or tracks, (c) snowmobiles³ . . . , and (d) all terrain vehicles⁴”

³ Vehicle and Traffic Law § 2221 defines a “snowmobile” as “[a]ny self-propelled vehicle designed for travel on snow or ice, steered by skis or runners and supported in whole or in part by one or more skis, belts or cleats.”

⁴ An “all terrain vehicle” is, in turn, characterized as “any self-propelled vehicle which is manufactured for sale for operation primarily on off-highway trails or off-highway competitions and only incidentally operated on public highways providing that such vehicle does not exceed seventy inches in width, or one thousand pounds dry weight” (Vehicle and Traffic Law

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Excepted from the scope of the term “vehicle” as incorporated in Vehicle and Traffic Law § 388 are fire and police vehicles, and certain machines and equipment used in farming and construction (see Vehicle and Traffic Law § 388 (2)).

Therefore, for the purposes of Vehicle and Traffic Law § 388, a “vehicle” is any automobile or similar device used on a public highway. Section 388 will also consider otherwise exempt farm equipment that is not used exclusively for agricultural purposes (*Palmer v Rouse*, 232 AD2d 909, 910 [3d Dept 1996]).

It bears further noting that statutes similar to Vehicle and Traffic Law § 388 have been created for the following devices:

- **all-terrain vehicles** (see Vehicle and Traffic Law § 2411);
- **boats** (see Navigation Law § 48); and
- **snowmobiles** (see Parks, Recreation and Historic Preservation Law § 25.23).

The Term “State”, as Incorporated in Section 388

The third condition to liability contained in Vehicle and Traffic Law

§ 2281 [1] [a]). A “snowmobile” does not come within the definition of “all terrain vehicle” under the Vehicle and Traffic Law (see Vehicle and Traffic Law § 2281 [1] [b]).

§ 388 that is the geographic limitation inherent in the incorporation of the work “state.” Typically, for liability under section 388 to attach, the injury-inducing accident must have either occurred in New York State or involved an automobile with significant contacts to this state.

As noted above, Vehicle and Traffic Law § 388 was designed to provide additional protection from loss arising out of the use or operation of motor vehicles “in this state.” Therefore, any motor vehicle accident occurring in New York State, may, at least as an initial matter, be subject to the provisions that section (*see Harrison v Malcolm*, 186 AD2d 502 [1st Dept 1992]).

Implicit in the construction of Vehicle and Traffic Law § 388 is the conclusion that vicarious liability may also be imposed relative to accidents which occur in other jurisdictions and which involve motor vehicles used or operated in New York State.

For example, in *Farber v Smolack* (20 NY2d 198 [1967]), the Court of Appeals determined that Vehicle and Traffic Law § 388 applied where the one-car accident that precipitated that lawsuit occurred in another jurisdiction. There, although the injury-inducing event occurred in North Carolina, the vehicle had been registered in New York and was on its way back to New York at the time of the subject accident. Because that

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accident arose entirely out of New York relationships, and because that accident would have been governed by New York law even if the application of section 388 was not in question, the *Farber* Court found that New York's vicarious liability law controlled that matter (see *Farber*, 20 NY2d at 202-203).

Vehicle and Traffic Law § 388 and Choice of Law Analysis

Courts resolve questions regarding the application of Vehicle and Traffic Law § 388 to out-of-state accidents that become the subject of lawsuit in this state, such as in *Farber*, through an inquiry commonly referred to as "choice of law analysis." That complicated analysis may be accomplished by application of three rules that neatly distill the common law of this area.

Rule 1: Where the conflicting rules are loss-allocating⁵ and the parties to the lawsuit share a common domicile, the loss allocation rule of the common domicile will apply (see *Neumeier v Keuhner*, 31 NY2d 121, 129 [1972]; *J.B.*

⁵ By way of background, loss allocating rules are those which prohibit, assign or limit liability after the tort occurs, such as Vehicle and Traffic Law § 388. Where the conflicting rules are loss allocating and the parties to the lawsuit share a common domicile, the loss allocation rule of the common domicile will, as set forth in the first rule following this footnote, apply (see *Padula v Lilarn Props. Corp.*, 84 NY2d 519, 522 [1994]).

Conduct-regulating rules, on the other hand, have the effect of governing conduct to prevent injuries from occurring. If a conduct regulating law is at issue, the law of the jurisdiction where the tort occurred will generally apply because that jurisdiction has the greatest interest in regulating behavior within its borders. Statutes deemed to be conduct-regulating include Labor Law § 240 (1) (see *Padula*, 84 NY2d at 522, 523).

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Dorsey v Yantambwe, 276 AD2d 108, 110 [4th Dept 2000] [Wisner, J.].

Example: Where the parties to the lawsuit are domiciled in New York, and the car central to the lawsuit is registered in New York, New York law will typically apply, even if the accident occurs in another jurisdiction.

Rule 2: Where the parties to the lawsuit are domiciled in different states with conflicting loss-distribution rules and the accident occurs in a state in which one of the parties is domiciled, the law of the place of injury will control (see *Neumeier*, 31 NY2d at 129; *Yantambwe*, 276 AD2d at 110).

Example: Where one of the parties to the lawsuit is domiciled in New York, the other party to that lawsuit is domiciled in Colorado, and the accident occurs in Colorado, the law of Colorado, as the place of the accident, will control.

Rule 3: Where the parties to the lawsuit are domiciled in different states, and the accident occurs in a third state in which neither of the parties are domiciled, the governing law will be that of the place where the accident occurred, unless displacing the normally applicable rule will advance the relevant substantive law principles without impairing the working of the multistate system or producing great uncertainty for litigants (see *Neumeier*, 31 NY2d at 129; *Yantambwe*, 276 AD2d at 110).

Example: Where the first party to the lawsuit is domiciled in New York, the second party to the lawsuit is domiciled in Oklahoma, the accident occurs in New Mexico, New Mexico has a vicarious liability rule that is different than that of New York State and the automobile involved in the accident has never been in New York, New Mexico law will apply. Under that scenario, there

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would be no justification for disturbing the public policy of New Mexico governing vicarious liability for motor vehicle accidents.

The Phrase “Used or Operated”, as Incorporated in Section 388

The fourth predicate to liability under Vehicle and Traffic Law § 388 is the requirement that the subject loss arise out of the “use or operation” of a motor vehicle. Although the operation of the vehicle need not be a proximate cause of the plaintiff’s injury for liability to attach (see *Argentina*, 93 NY2d 554), the accident must, in some form or fashion, involve an activity incidental to the control or use of a motor vehicle.

As noted above, because Vehicle and Traffic Law § 388 is in derogation of common law, that section should be construed narrowly to avoid making any modification to the common law beyond that which was intended by the Legislature (see *Morris*, 84 NY2d at 28-29; *B & F Bldg. Corp. v Liebig*, 76 NY2d 689, 693 [1990]). Here, again, though, courts have interpreted the phrase “used or operated,” as incorporated in section 388, in a broad manner consistent with the intent to protect injured motorists.

As a result, the phrase “used or operated” has been found to include, in the prescient observation of a trial court of this state, “all activities necessarily part of driving a car” (*Fireman’s Fund Am. Ins. Cos. v*

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Olin of New York, Inc., 84 Misc 2d 504, 505 [Sup Ct, Nassau County 1975]). Those activities include, among other things,

- **assigning a vehicle for use** (*Elfeld v Burkham Auto Renting Co.*, 299 NY 336 [1949]);
- **entering a car** (*Fireman's Fund*, 84 Misc 2d at 504);
- **the loading and unloading** of a vehicle (*Argentina*, 93 NY2d 554; *Perrin v Chase Equipment Leasing, Inc.*, 9 AD3d 839 [4th Dept 2004]; *Northern Ins. Co. of N.Y. v TIG Ins. Co.*, 2 AD3D 422, 423 [2d Dept 2003]; *Smith v Zink*, 274 AD2d 885, 886 [3d Dept 2000]; *compare Frontuto v Ray Burgun Trucking Co., Inc.*, 78 NY2d 938, 939 [1991] [injury occurring in preparation for the loading of a truck fell outside the ambit of section 388]).
- **negligently parking the automobile** (*Bouchard v Canadian Pacific Ltd.*, 267 AD2d 899 [3d Dept 1999]);
- **opening the vehicle door** (*Cohn v Nationwide Mut. Ins. Co.*, 286 AD2d 699, 700 [2d Dept 2001]; *Epstein v Kernon*, 68 Misc 2d 29 [NY City Civ Ct 1971]);
- **renting a vehicle** and allowing a third-party to operate that vehicle, despite the lessee's absence from that automobile at the time of the accident (*Hertz Corp. v Government Empls. Ins. Co.*, 250 AD2d 181 [1st Dept 1998], *lv dismissed* 93 NY2d 1040);
- **repairing the vehicle** (*Eckert v G.B. Farrington Co.*, 262 AD2d 9 [4th Dept 1941]);
- **a permissive user's act of riding in an automobile** (*Arcara v Moresse*, 258 NY 211 [1932] [concluding that an injury occurring while the permissive operator rode in a vehicle and allowed a party whom the vehicle owner had forbidden to drive the vehicle to operate that

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automobile arose out of the “use or operation” of vehicle”]);

- the **towing of an inoperable vehicle**, both respect to the tow truck and the non-functional vehicle (*Alcalay v Fleetmark, Inc.*, 266 AD2d 118 [1st Dept 1999]).

The Term “Permission”, as Incorporated in Section 388

The fifth condition to liability set forth in Vehicle and Traffic Law § 388 that is subject to frequent judicial inquiry is that of permission. For liability to accrue under that section, the vehicle involved in the subject accident must have been operated with the consent of the owner at the time of that incident.

It is well established that Vehicle and Traffic Law Section 388 “creates a strong presumption that the driver of a vehicle is operating it with the owner's permission and consent, express or implied, and that presumption continues until rebutted by substantial evidence to the contrary” (*Lewis v Caldwell*, 236 AD2d 896, 896 [4th Dept 1997] [internal quotations omitted]). In short, “proof of ownership of a motor vehicle creates a rebuttable presumption that the driver was using the vehicle with the owner’s permission, express or implied” (*Murdza v Zimmerman*, 99 NY2d 375, 380 [2003] [internal quotations omitted]). “In granting permission for the use of a vehicle, an owner may restrict such use to a

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specific area or purpose. Use of the vehicle beyond such area or for another purpose would then be without the owner's permission, and in the event the owner may not be held responsible for the user's negligence" (PJI 2:246 [2007]).

Express Permission

The most obvious form of permission which a vehicle owner may provide is "express"—where the vehicle owner grants unequivocal oral or written permission to use the motor vehicle (see *e.g. Farber*, 20 NY2d at 200-201). That form of permission requires little explanation beyond that provided by the Civil Pattern Jury Instructions of this state. Those instructions provide, in relevant part, that:

“ ‘Express’ permission may consist of direct statements or acts by or on behalf of the owner that clearly show consent to such operation or use” (NY PJI 2:245 [2007]).

Implied Permission

The second form of consent through which to establish permission is that of implied permission. That form of permission may be established by more general or circumstantial evidence demonstrating a course of conduct between the parties implying or suggesting consent to the use of the particular vehicle on the occasion in question (see *Schulman v*

Consolidated Edison Co. of N.Y., 85 AD2d 186, 188 [1st Dept 1982]; see also *Atwater v Lober*, 133 Misc 654 [Cayuga County Ct,1929]).

Implied permission to operate a particular vehicle may be found where, among other things,

- the owner of the vehicle **abandons** that car **in the middle of a street**, thereby requiring that the vehicle be moved (see *Coons v Massachusetts Bonding & Ins. Co.*, 9 NY2d 994 [1961]);
- the permissive user had been **allowed to operate the vehicle on prior occasions** (see *Murphy v Carnesi*, 30 AD3d 570, 572 [2d Dept 2006]; *Stewart v Town of Hempstead*, 204 AD2d 431 [2d Dept 1994]; compare *Hamilton v Hunt*, 288 AD2d 86, 87 [1st Dept 2001]).
- the **vehicle is co-owned**, as evidence of co-ownership creates a presumption of consent to operate (*Payne v Payne*, 28 NY2d 399, 403 [1971]);
- the **vehicle is left double-parked** and therefore must be moved (*Winnowski v Polito*, 294 NY 159, 162 [1945]);
- a vehicle is left in **the unrestricted control of a second person** by the vehicle owner, and a **third person operates that vehicle** with the permission of the second person (*May v Heiney*, 12 NY2d 683 [1962]; *Bernard v Mumuni*, 22 AD3d 186, 188 [1st Dept 2005], *affd* 6 NY3d 881);
- the owner of the vehicle leaves that car for **repairs requiring road testing** as an incident thereto (*Celani v Interstate Motor Freight Sys., Inc.*, 30 AD2d 772 [4th Dept 1968]); and

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- the vehicle was left **unattended** and was subsequently operated by an otherwise **unauthorized user** (*Johnson v Manhattan & Bronx Surface Transit Operating Auth.*, 71 NY2d 198 [1988]).

Constructive Permission

The third form of consent through which to establish permission is that of constructive permission. That form of permission is similar to implied permission in that consent will be found in the absence of an express grant of authority to operate, and is generally limited in its application to those engaged in the business of renting automobiles.

It is well established that where a vehicle lessor “knew or should have known of the probabilities of the car coming into the hands of another person [are] exceedingly great,” that lessor deemed to have constructively consented to the operation of that vehicle (*Motor Vehicle Acc. Indem. Corp. v Continental Natl. Am. Group Co.*, 35 NY2d 260, 264 [1974]). The vehicle lessor may not avoid the application of constructive permission by restricting the use of a particular automobile, as those limitations have been found to violate public policy (see *Murdza*, 99 NY2d at 380-381). So long as the lessee permitted the negligent operator to use the subject vehicle, the lessor of that automobile will be found to have given

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constructive consent to the negligent operator's use of that device (see *Murdza*, 99 NY2d 376). (See also PJI 2:247 [2007]).

Importantly, though, the doctrine of constructive consent is limited in its application outside the lessor/lessee context.

In *Murdza v Zimmerman* (99 NY2d 375 [2003]), the Court of Appeals refused to find an employer liable pursuant to Vehicle and Traffic Law § 388 under a constructive consent theory. There, a pedestrian sustained injury as a result of the negligent operation of a motor vehicle operated by the boyfriend of the employee of the owner of that vehicle. Because the vehicle owner explicitly forbade the boyfriend from operating the subject vehicle, the *Murdza* Court concluded that the presumption of permissive use had been rebutted.

In so doing, the Court of Appeals determined that the bailor of a vehicle was not subject to the same scrutiny as the lessor of a vehicle, as bailment relationship was markedly different than the quasi-ownership rights created by the vehicle lease (see *Murdza*, 99 NY2d at 381). To that end, the *Murdza* Court agreed that the owner of a motor vehicle may, as noted above, avoid liability pursuant to Vehicle and Traffic Law § 388 where that owner explicitly denied permission to use or operate his vehicle in the manner giving rise to the injuries of which the plaintiff complains.

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Constructive permission may, however, arise outside the context of a lessor/lessee relationship where, among other things, a vehicle owner is aware that his vehicle has been taken or used by another, but fails to take affirmative steps to recover or otherwise restrict the use of that automobile.

By way of example, in *Burke v Elmendorf* (30 AD3d 553 [2d Dept 2006]), the Appellate Division, Second Department found a triable issue of fact as to whether the owner of the subject vehicle provided constructive consent to the use and operation of that automobile. Because the vehicle owner knew that the vehicle had been taken by the offending driver, but, for no apparent reason, delayed in reporting that vehicle as stolen until after the accident giving rise to the injuries of which the plaintiff complained, the Second Department found a question of fact as to whether that owner gave constructive permission to the offending driver to operate the subject automobile (see *Burke*, 30 AD3d 553; compare *Sargeant v Village Bindery, Inc.*, 296 AD2d 395, 396 [2d Dept 2002]; *Delgado v Sikora*, 227 AD2d 176 [1st Dept 1996]; *Guerreri v Gray*, 203 AD2d 324, 325 [2d Dept 1994]).

In short, then, the lesson to be derived from the line of authority created by the Appellate Division, Second Department is that the ability of an owner of a motor vehicle who is not engaged in

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business of renting or leasing motor vehicles to escape vicarious liability for loss occurring after the theft of that vehicle may be impaired if the owner does not know of the theft and promptly report that theft of that automobile.

Permissive Use Rebutted

As noted above, the strong presumption of permissive use may be rebutted upon the offer of substantial evidence that consensual operation did not occur (*Lewis*, 236 AD2d at 896).

Typically, plausible, uncontradicted statements by both the vehicle's owner and its driver that the driver operated the vehicle without the owner's express or implied permission will constitute substantial evidence that rebuts the presumption of permissive use (see e.g. *Britt v Pharmacologic Pet Servs., Inc.*, 36 AD3d 1039, 1040 [3d Dept 2007], citing *Country-Wide Ins. Co. v National R.R. Passenger Corp.*, 6 NY3d 172, 177 [2006]; compare *Lewis*, 236 AD2d at 896 [mere denial of defendant-owner that permission was given, without more, is insufficient to rebut presumption of permissive use]). Importantly, to successfully rebut the presumption of permissive use, a vehicle owner must offer proof that the operator had *neither* express nor implied permission to use that automobile at the time of the accident (see *New York Cent. Mut. Fire Ins*

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Co. v Dukes, 14 AD3d 704 [2d Dept 2005]; *Liberty Mut. Ins. Co. v General Acc. Ins. Co.* [appeal No. 1], 277 AD2d 981 [4th Dept 2000]; *Headley v Tessler*, 267 AD2d 428 [2d Dept 1999], *lv denied* 95 NY2d 755).

By way of an example, a vehicle owner may rebut the presumption of permissive use where it is demonstrated that the owner, among other things,

- specifically **denied** a negligent operator **permission to use that vehicle prior to the accident** (*Jiminez v Regan*, 248 AD2d 510 [2d Dept 1998]; *compare Arcara*, 258 NY 211 [finding that an accident which occurred while the permissive operator was a passenger in a vehicle operated by a non-permissive user arose out of the permissive use of that automobile and therefore came within the ambit of section 388]);
- **forbade passengers** to occupy that car (*Conca v Cushman's Sons, Inc.*, 277 App Div 360 [1950]);
- while **intoxicated, gave the keys** to his vehicle **to another to prevent himself from driving**, but did not grant express or implied permission to drive that vehicle (*New York Cent. Mut. Fire Ins. Co. v Nationwide Mut. Ins. Co.*, 307 AD2d 449, 450 [3d Dept 2003]);
- **limited the use** of his vehicle to a **specific area** or for a **specific function** (*Murdza v Zimmerman*, 99 NY2d 375, 382 [employee's use of vehicle outside permissible scope of use rebutted presumption of liability]; *Aetna Cas. & Sur. Co. v Brice*, 72 AD2d 927, 928 [4th Dept 1979], *affd* 50 NY2d 598; *Padilla v Felson*, 28 AD3d 530 [2d Dept 2006]; *Somma v Castellano*, 17 AD3d 568, 569 [2d Dept 2005]; *Aetna Cas. & Sur. Co. v Brice*, 72 AD2d 927, 928 [4th Dept 1979]; *compare Power v*

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Hodge, __ AD3d __, 2007 NY Slip Op 00797 [4th Dept, Feb. 2, 2007]);

- **restricted operation** to daylight hours (*Rachon v Cheuvant*, 37 AD2d 911 [4th Dept 1971]; *compare e.g. Conte v Aprea*, 23 AD3d 225, 227 [1st Dept 2005]); or
- demonstrated that his vehicle was **stolen and subsequently operated** (*Manning v Brown*, 91 NY2d 116, 122 [1997]; *Harris v Jackson*, 30 AD3d 1027, 1029 [4th Dept 2006]; *Stevens v Calspan-Corp.*, 292 AD2d 809, 810 [4th Dept 2002]).

The Problem of the Unattended Key

A unique form of what is essentially implied permission has been created by section 1210 of the Vehicle and Traffic Law.

Subdivision (a) of Vehicle and Traffic Law § 1210 imposes a duty to secure and unattended motor vehicle. That subdivision provides, in relevant part, that:

“No person driving or in charge of a motor vehicle shall permit it to stand unattended without first stopping the engine, locking the ignition, removing the key from the vehicle, and effectively setting the brake thereon [T]he for removing the key from the vehicle shall not require the removal of keys hidden from sight about the vehicle for convenience or emergency”
(Vehicle and Traffic Law Section 1210[a]).

Given the longstanding policy of protecting the public from injury arising from the use and operation of motor vehicles, courts of this state have found that the failure to remove the key from the ignition of a vehicle

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will render that automobile's owner liable for subsequent injuries and property damage caused to a third party by a thief if the theft of that vehicle was foreseeable (*see e.g. Guaspari v Gorsky*, 36 AD2d 225, 228 [4th Dept 1971], *appeal dismissed* 29 NY2d 891). An owner may be found vicariously liable for the loss arising out of operation of his or her automobile pursuant to Vehicle and Traffic Law § 1210 (a) where, among other things,

- that owner removed his keys from the ignition and **placed those keys under a "desirable article" in his automobile** before that vehicle was stolen (*Banelis v Yackel*, 69 AD2d 1013 [4th Dept 1979]);
- **that owner left his keys unattended in the vehicle** at the **time of the theft** of that automobile (*State Farm Mut. Auto Ins. Co. v Fernandez*, 23 AD3d 480, 481 [2d Dept 2005]);
- an unlocked vehicle was operated by use of a **spare ignition key** kept in that automobile by one who had previously operated that vehicle in such a manner (*DiConstanzo v Hughes*, 172 Misc 2d 368 [Albany City Ct, 1997]);
- an **unattended bus** was started by an unauthorized operator using a **push button starter** (*Johnson*, 71 NY2d 198).

The Limit of Liability Arising From the Unattended Key

It also bears noting that liability arising out of the use of a vehicle facilitated by the failure to remove the key from that vehicle is not without

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limit. There is a judicial hesitation to impose vicarious liability upon a motor vehicle owner who stores his or her automobile on private property, and who removes stores the ignition key to his vehicle outside of plain sight in that car.

By way of example, vicarious liability for the operation of an automobile will not be imputed to the owner of an unattended vehicle pursuant to Vehicle and Traffic Law § 1210 (a) where, among other things,

- an **able-bodied adult** remains within that vehicle (*Burke v City of New York*, 279 AD2d 381 [1st Dept 2001]);
- the **key** to that stopped vehicle is **hidden from sight** (*Manning*, 91 NY2d at 122; *Banellis v Yackel*, 49 NY2d 882, 884 [1980]; *Gore v Mackie*, 278 AD2d 879 [4th Dept 2000]);
- that vehicle was **left** at a **service station pump** (*Carpenter v Miller*, 132 AD2d 859 [3d Dept 1987]);
- that vehicle was **stolen from a fenced and guarded property** (*Stevens.*, 292 AD2d at 810);
- that vehicle was **stolen from a locked garage on private property** (*Epstein v Mediterranean Motors*, 109 AD2d 340 [2d Dept 1985], *affd* 66 NY2d 1018); and
- that vehicle was **stolen from a private driveway** (*Albouyeh v Suffolk County*, 62 NY2d 681, 683 [1984]).

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The Term “Negligence”, as Incorporated in Section 388

The statutory predicate to Vehicle and Traffic Law § 388 liability is that of negligence.

As noted above, Vehicle and Traffic Law § 388 imputes liability to a vehicle owner only when a person other than the vehicle owner operates the subject automobile in a *negligent* manner. The vicarious liability imposed by section 388 will not, therefore, render the owner liable for the unforeseeable *intentional* acts of the driver.

For that reason, courts of this state will not hold a vehicle owner vicariously liable when the tortuous act is shown to be unforeseeable and *intentional*, rather than *negligent*. By way of example, vicarious liability pursuant to Vehicle and Traffic Law § 388 will not be imposed upon a vehicle owner where, among other things,

- the driver **intentionally drove onto the sidewalk** to injure a pedestrian (*Gomez v Singh*, 309 AD2d 620, 621 [1st Dept 2003]; *Beddingfield v LaBarbera*, 276 AD2d 575 [2d Dept 2000]);
- the driver of motor vehicle **intentionally ran down a** pedestrian (*Marchetti v Avis Rent A Car Sys.*, 249 AD2d 518 [2d Dept 1998]); and
- the injury of which the plaintiff complained arose from a **stabbing occurring within the subject vehicle** (*Olin v Moore*, 178 AD2d 517 [2d Dept 1991]; compare *Gaige v Kepler*, 303 AD2d 626 [section 388 liability will not

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accrue following a road rage assault in which there was no contact between the subject motor vehicles, or between the owner's vehicle and the plaintiff]).

Also included within the ambit of actions falling outside the purview of Vehicle and Traffic Law § 388 are those deeds of the permissive user that give rise to punitive damages. Because the vehicle owner is under no liability for the operator's negligence other than that which is imposed upon him by the Vehicle and Traffic Law, that owner is not subject to punitive damages engendered by the negligent actions of the permissive operator (see *Poulard v Papamihlopoulos*, 254 AD2d 266, 267-268 [2d Dept 1998]).

Statutory Immunity and Vehicle and Traffic Law § 388

A question relevant to Vehicle and Traffic Law § 388 that is infrequently addressed by courts of this state is whether that section may impose liability on a vehicle owner even though the negligent driver cannot be held liable because of statutorily-conferred immunity.

In *Tikhonova v Ford Motor Co.* (4 NY3d 621 [2005]), the Court of Appeals addressed the issue whether the owner of a vehicle was subject to liability pursuant to Vehicle and Traffic Law § 388 even though the driver of that automobile, a Russian diplomat, was protected from liability by statutory diplomatic immunity. There, the *Tikhonova* Court concluded that the federal diplomatic immunity statute that protected the diplomat did not preclude an

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assessment of derivative liability against the vehicle's owner and allowed the action against the vehicle owner to proceed (*see Tikhonova*, 4 NY3d at 625-626; *compare Gaines v City of New York*, 8 Misc 3d 968, 973-974 [Sup Ct, Bronx County 2005] [interpreting *Tikhonova* and finding that the City of New York is not exempt from liability as an "owner" under section 388]).

In contrast, Vehicle and Traffic Law § 388 will not render the owner of an automobile lent to an emergency responder vicariously liable where the negligent driver is immune from suit under General Municipal Law § 205-b. Section 205-b provides, in relevant part, that

“[m]embers of . . . volunteer fire companies in this state shall not be civilly liable for any act or acts done by them in the performance of their duty as volunteer firefighters” (Gen Mun Law § 205-b; *see Nelson v Garcia*, 152 AD2d 22, 24 [4th Dept 1989]).

Because the owner's vicarious liability could derive only from a finding of negligence against the driver, and because that result could discourage volunteers from responding to emergencies by reducing the number of people willing to lend their vehicle to those volunteers, vicarious liability pursuant to Vehicle and Traffic Law § 388 will not attach to the owner of a vehicle lent to an emergency worker relative to loss arising from the use of that vehicle in an emergency situation (*see Tikhonova*, 4 NY3d at 625, citing *Sikora v Keillor*, 13 NY2d 610 [1963], *affg* 17 AD2d 6, 8 [2d Dept 1962]).

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Likewise, Vehicle and Traffic Law § 388 will not apply where the plaintiff's suit against the driver is barred by Workers' Compensation Law § 29 (6). Section 29 (6) provides, in relevant part, that

“[t]he right to compensation or benefits under this chapter, shall be the exclusive remedy to an employee . . . when such employee is injured or killed by the negligence or wrong of another in the same employ.”

Because the system of remedies provided by that statutory language and the Workers' Compensation Law supplants all other remedies (see *Naso v Lafata*, 4 NY2d 585, 589 [1958]), an employee suffering injury arising from the use of an automobile and in the course of his employment by as a result of the negligence of a co-employee may not recover from the owner of the subject vehicle (see *Naso*, 4 NY2d at 589-590; *Chiriboga v Ebrahimoff*, 281 AD2d 353, 354 [1st Dept 2001]; *Allen v Blum*, 232 AD2d 591, 592 [2d Dept 1996]).⁶

It bears noting, though, that Workers' Compensation Law § 29 (6) will not bar an action against a third person guilty negligence occurring with

⁶ It bears noting that the decision of the Court of Appeals in *Tikhonova* may be reconciled with the ruling in *Naso* on the ground that Workers' Compensation Law provides an exclusive remedy for an employee injured as a result of the negligence of a co-employee, while federal law, although protecting a diplomat from civil action, allows for the insurer of the diplomat to be sued in federal district court (see 28 USC § 1364). This distinction is important because the vicariously liable owner of an automobile may have recovery over against the actively negligent operator. Should the vicariously liable owner have recovery over and against a co-employee otherwise protected by Workers' Compensation Law § 29 (6), that statute would, in this context, be eviscerated. Although recovery may not be had directly against an actively negligent diplomat under 28 USC § 1364, that diplomat's insurer may be the proper subject of a third-party claim.

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negligence by a plaintiff's co-employee (see e.g. *Caulfield v Elmhurst Contr. Co.*, 268 AD 661, 664 [2d Dept 1945], *affd* 294 NY 803; *Nunez v Jenkins*, 8 AD3d 151 [1st Dept 2004]; *Christiansen v Silver Lake Contr. Corp.*, 188 AD2d 507, 508 [2d Dept 1992]). Therefore, by way of example, where the failure of a vehicle owner that is not the plaintiff's employer to properly equip a vehicle contributes to the injuries of which the plaintiff complains, action may be maintained against that vehicle owner, even though a claim may not be asserted against the co-employee of the plaintiff that operated the subject vehicle (see e.g. *Christiansen*, 188 AD2d at 508).

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**The Application of Vehicle and Traffic Law § 388 to Vehicle Lessors
and Vehicle Rental Companies**

It is well established that the common law of this state renders vehicle lessors and vehicle renter companies responsible as “owners” under Vehicle and Traffic Law § 388 (see e.g. *Hassan v Montouri*, 99 NY2d 348, 353 [2003]; *Morris v Snappy Car Rental*, 84 NY2d 21, 29-30 [1994]; *Davis v Hall*, 233 AD2d 906, 907 [4th Dept 1996]).

To the extent that it applies to companies that lease and rent vehicles, however, Vehicle and Traffic Law § 388 has been preempted by the federal Transportation Equity Act, which applies to actions commenced on or after August 10, 2005. Section 30106 of that Act provides, in relevant part, that a non-negligent owner of a motor vehicle

“engaged in the trade or business of renting or leasing motor vehicles [that rents or leases a vehicle to a person] 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 that arises out of the use, operation, or possession of the vehicle during the period of the rental or lease” (28 USC § 30106 [a] [1]).

In sum and substance, in enacting the Transportation Equity Act, Congress prohibited vicarious liability against the owners considered by Section 30106 and preempted laws, such as Vehicle and Traffic § 388, that previously permitted assessment of that responsibility. There are,

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however, at least three important points relative to the Transportation Equity Act worth noting:

First, the protection of that Act is limited to owners of motor vehicles who rent or lease those devices. That Act does not protect finance companies or banks that retain title (*compare Ryan*, 4 AD3d 222).

Second, that Act does neither precludes state laws from imposing liability upon vehicle lessor their own negligence nor preempts state statutes requiring that vehicle lessors satisfy minimum liability insurance standards (*see Ryan*, 4 AD3d 222).

Third, and perhaps most importantly, the constitutionality of that Act has been challenged by the opinion of Supreme Court, Queens County (Thomas V. Polizzi, J.), in *Graham v Dunkley* (13 Misc 3d 790, 2006 NY Slip Op 26358 [Sup Ct, Queens County, Sept. 11, 2006]). There, in short, Justice Polizzi opined that the Transportation Equity Act does not preempt Vehicle and Traffic Law § 388 because section 30106 of that Act “is an unconstitutional exercise of congressional authority under the Commerce Clause of the United States Constitution, Article I, § 8” (*Graham*, 13 Misc 3d at 806).

The weight of the opinion in *Graham*, at least at this juncture, seems limited. Within the past two weeks, the Appellate Division, Fourth

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Department has spoken on this issue and found that section 30106 preempts section 388 and bars claims against a motor vehicle leasing company for vicarious liability arising out of the use of a vehicle owned by that company (*see Williams v White*, __ AD3d __, 2007 NY Slip Op 02227 [4th Dept, Mar. 16, 2007] [Centra, J.]). In short, the Fourth Department agreed that Congress has essentially prohibited this state and other states from imposing vicarious liability on the owners and lessors of motor vehicles.

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COVERAGE

Pursuant to Vehicle and Traffic Law § 388 (4), all policies of automobile insurance issued in New York State must contain a provision “guaranteeing indemnity against liability arising from permissive operation of the owner’s vehicle” (*DePascale v Wolkoff*, __ AD3d __, 2007 NY Slip Op 01068 [2d Dept, Feb. 6, 2007], citing 11 NYCRR 60-1.1 [a]; see *Paul M. Maintenance, Inc. v Transcontinental Ins. Co.*, 300 AD2d 209, 211 [1st Dept 2002]). The Mandatory Provisions for Automobile Liability Insurance Policies promulgated by the Insurance Department Superintendent further require automobile insurance policies issued in this state contain a provision “insuring as an insured” any person using the motor vehicle with the permission of the named insured or the spouse of the named insured provided his actual operation of that vehicle is within the scope of such permission (11 NYCRR 60-1.1 [c] [2]; see *Progressive Cas. Ins. Co. v Baker*, 290 AD2d 676, 678 [3d Dept 2002]).⁷

To that end, courts regularly address questions pertaining to the circumstances in which an insurer must protect a permissive operator of a

⁷ Parenthetically, it should be noted that Vehicle and Traffic Law § 388 and 11 NYCRR 60-1.1 do not vitiate a “no liability” clause commonly found in garage liability policies. In sum and substance, policy language removing customers of the named insured/garage owner from the scope of coverage under those policies does not violate public interest because those customers are only removed from coverage only if those customers have full legal coverage (see *David v DeFrank*, 27 NY2d 924, 927 [1970]; *State Farm Mut. Auto Ins. Co. v John Deere Ins. Co.*, 288 AD2d 294, 296 [2d Dept 2001]).

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covered auto, as well as the capacity of a vehicle owner to recover from a negligent permissive user. The law of this state considering those questions is briefly recited below.

The Duty to Defend the Permissive User of a Covered Auto

The Insurer of Vehicle Usually Must Defend the Permissive User of that Automobile

First, it bears noting that the insurer of a vehicle is generally required to defend the operator of an insured vehicle who is alleged to have driven that vehicle with its owner's consent.

It is axiomatic that the duty of an insurer to defend "is exceedingly broad and an insurer will be called upon to provide a defense whenever the allegations of the complaint suggest a reasonable possibility of coverage (*Automobile Ins. Co. of Hartford v Cook*, 7 NY3d 131, 137 [2006] [internal quotations and punctuation omitted]). "If, liberally construed, the claim is within the embrace of the policy, the insurer must come forward to defend its insured no matter how groundless, false or baseless the suite may be" (*Ruder & Finn v Seaboard Sur. Co.*, 52 NY2d 663, 670 [1981]).

It is equally axiomatic that the duty to defend remains "even though facts outside the four corners of [the] pleadings indicate that the claim may be meritless or not covered" (*Fitzpatrick v American Honda Motor Co.*, 78

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NY2d 61, 63 [1991]). When a policy represents that it will provide the insured with a defense, it actually constitutes “litigation insurance” in addition to liability coverage (*Seaboard Sur. Co. v Gillette Co.*, 64 NY2d 304, 310 [1984]). For that reason, an insurer may be required to defend under the contract even though it may not be required to pay once the litigation has run its course (*Cook*, 7 NY3d at 137).

Typically, an astute plaintiff’s counsel will allege that the accident giving rise to the injuries of which plaintiff complains arose out of the operation of a motor vehicle by a negligent permissive user. Therefore, in most cases implicating Vehicle and Traffic Law § 388, the insurer of a vehicle must defend both the owner of that vehicle and the driver of that automobile.

The Insurer of a Vehicle has no Obligation to Defend the Driver of that Automobile where Permissive Use is not Alleged

It also bears noting that the insurer of a vehicle has no obligation to defend the driver of that automobile where the complaint is bereft of allegations of permissive use.

As intimated above, the insurer of a vehicle has no duty to defend the driver of that automobile where the complaint does not allege that the subject accident arose out of the permissive use of that automobile. Under

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those circumstances, no portion of the complaint could potentially bring the operator of the covered auto within the scope of coverage afforded by the insurer of that vehicle (*see generally Allstate Indem. Co. v Nelson*, 285 AD2d 545 [2d Dept 2001]).

So too is an insurer relieved of its obligation to timely disclaim coverage for an operator of the covered auto where that operator is not an insured under the subject policy and the complaint lacks allegations of permissive use.

Briefly, by way of background, Insurance Law § 3420 (d) requires that an insurer disclaim liability or deny coverage for death or bodily injury arising out of a motor vehicle accident occurring within this state.

Disclaimer pursuant to Insurance Law § 3420 (d) is unnecessary when a claim falls outside the scope of coverage afforded by the policy (*see Worcester Ins. Co. v Bettenhauser*, 95 NY2d 185, 188 [2000]; *New York Mut. Underwriters v Baumgartner*, 19 AD3d 1137, 1140 [4th Dept 2005]). Where the policy does not include coverage in the first instance, requiring payment of a claim upon failure to timely disclaim would have the impermissible effect of creating coverage where it never existed (*see Bettenhauser*, 95 NY2d at 188-189).

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Therefore, where an owner's policy does not provide coverage because the owner's vehicle was operated without the owner's consent, the owner's insurer need not disclaim coverage for the non-permissive user, as the claim against that person necessarily falls outside the scope of the policy's coverage portion (see *Bettenhauser*, 95 NY2d at 188-189).

Recovery by an Insured Vehicle Owner Against a Negligent Permissive User

An Insured Vehicle Owner May Not Recover From a Permissive User Covered Under the Vehicle Owner's Policy for a Judgment Within the Policy Limits

Initially, it should be noted that an insured vehicle owner may not recover from a permissive user protected under the vehicle owner's policy of insurance to the extent that any judgment does not exceed the limit of the vehicle owner's policy.

It is well established that the equitable doctrine of subrogation entitles an insurer to "stand in the shoes" of its insured to seek indemnification from third parties whose wrongdoing has caused a loss for which the insurer is bound to reimburse. Subrogation allocates responsibility for the loss to the person who in equity and good conscience out to pay for it _ i.e., the wrongdoer (see *North Star Reinsurance Corp. v Continental Ins. Co.*, 82 NY2d 281, 294 [1993]).

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An insurer does not, however, have a right of subrogation against its own insured for a claim arising from the risk for which the insured was covered. As a matter of public policy, an insurer is prevented from passing the incidence of loss to its own insured (*see North Star*, 82 NY2d at 294).

The application of the *North Star* rule to matters involving Vehicle and Traffic Law § 388 is therefore relatively straightforward. Because a driver operating a motor vehicle with the vehicle owner's permission is an "insured" under the terms of the owner's standard automobile liability policy, and because payment of any verdict would be made in accordance with the provisions of that owner's liability policy, the owner's insurance company cannot recover from the permissive user the amount of any judgment paid within the policy limits (*see e.g. ELRAC, Inc. v Ward*, 96 NY2d 58, 75-76 [2001]; *Snorac, Inc. v Skura*, 273 AD2d 886, 886 [4th Dept 2000]).

A Insured Vehicle Owner May, However, Recover From a Permissive User Covered Under the Vehicle Owner's Policy for a Judgment Beyond the Policy Limits

It also bears noting that an insured vehicle owner may recover from a covered permissive user the portion of any judgment that exceeds the limit of the vehicle owner's policy.

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Here, as noted above, the anti-subrogation rule bars recovery from a permissive operator covered under the vehicle owner's policy only to the extent that a judgment is rendered within the limits of that insurance. It necessarily follows that the permissive user may, as a general rule, be indemnified by a negligent user (see e.g. *ELRAC*, 96 NY2d at 75-76; *Morris v Snappy Rent-A-Car*, 189 AD2d 115 [4th Dept 1993], *affd* 84 NY2d 21; *Ciatto*, 1 AD3d at 556).

Therefore, to the extent that a judgment against a vicariously liable vehicle owner exceeds the limits of the vehicle owner's policy, that owner may seek indemnification from the permissive user for the amount of any award not covered by insurance (see *D'Ambrosio*, 55 NY2d 454).

Permissive Use and the Ethical Obligations of Defense Counsel

Finally, it should be noted that, in instances of permissive use, the inherent conflict between the permissive user—potentially an insured party under the vehicle owner's policy—and the insurer of the vehicle owner requires the employment of separate counsel for the permissive user.

It is well established that an attorney retained by an insurance company for the defense of an insured represents only the insured and

owes no duty to the insurance company (see e.g. *Feliberty v Damon*, 72 NY2d 112 [1988]; *Treiber v Hopson*, 27 AD2d 151 [3d Dept 1967]).

Where a complaint contains allegations of permissive use, an attorney retained on behalf of the alleged permissive user may uncover information damaging to that party's interests. For example, the permissive user's attorney may learn of facts rebutting the presumption of permissive use or indicating that the permissive user may have acted *intentionally*, as opposed to *negligently*. Should the insurer learn of such information, the entitlement of the permissive user to coverage under the policy of the vehicle owner could be imperiled. As a result, counsel engaged in the dual representation of the named insured and of the permissive user may owe a conflicting duty to the insured to disclaim coverage, and to the permissive user to conceal such information.

Therefore, given allegations of permissive use, separate counsel should be retained to avoid any potential conflict between the permissive user, the insurance company and the primary insured.

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