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APR 23 2010

OPINION COMMITTEE



FILE # ML-46444-10
I.D. # 46444

The State of Texas
House of Representatives

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Tuesday, April 20, 2010

The Honorable Greg Abbott
Attorney General
Price Daniel Building
Attn: Opinions Committee
P.O. Box 12548
Austin, Texas 78701-2548

RQ-0883-GA

RE: Whether a Loss Damage Waiver Associated with A Rental Agreement of Personal Property Constitutes the Business of Insurance

Dear General Abbott:

As Chair of the House Committee on State Affairs, I formally request an opinion from you on whether a loss damage waiver as part of an agreement for the rental of equipment or property is insurance under the Texas Insurance Code.

In 2003, I authored HB 1494 regulating rental-purchase agreements. House Bill 1494 made it clear that a contract for loss damage waiver in a rental purchase agreement is not insurance. This was codified at TEX. BUS. & COMM. CODE §35.721(a), which read as follows:

(a) In addition to other charges permitted by this subchapter, a consumer may contract for a loss damage waiver. **A loss damage waiver is not insurance.** (Emphasis added).

In 2007, TEX. BUS. & COMM. CODE §35.721 was replaced by TEX. BUS. & COMM. CODE §92.151 AND 92.157 in a nonsubstantive recodification.

Chapter 91, Texas Business and Commerce Code, regulates auto rental agreements and provides that collision damage waivers in auto rental agreements are not insurance. TEX. BUS. & COMM CODE, §91.052 also requires auto rental companies to include a notice to the renter which states, in part, that the waiver is not insurance.

These statutes do not apply to transactions involving only the "rental" of equipment or property.

In 2009, I filed HB 1851, which applied to *rental only* agreements and included language that a loss damage waiver was not insurance. One reason for filing HB 1851 was the fact that the Texas Department of Insurance ("Department") had taken the position that loss damage waivers in *rental only* contracts were insurance because there was no statutory exception similar to that for *rental purchase* agreements. This same issue arose a few years ago for *rental-purchase* agreements and the Department took the position

that loss damage waivers were insurance in *rental-purchase* agreements. Numerous retailers and insurers disagree with the legal position of the Department.

It was my belief that legislation would have helped avoid the possibility of these transactions being discouraged or treated as illegal acts if the Department's interpretation of the Insurance Code was correct. If a loss damage waiver is insurance, many vendors across this state, including Home Depot, HEB, Lowe's, and others who rent or lease equipment or property, would have to obtain a license to conduct the business of insurance if they offered loss damage waivers to their customers as part of a rental agreement. Further, although I received some assurances that the Department has not recently sought to enforce their view of the law on this issue against lessors, retailers and others still run the risk of facing an accusation of violating the Insurance Code. More importantly, the state has many retailers and other vendors who may be unknowingly and/or unintentionally violating the law if the Department's interpretation was enforced and is correct.

Unlike the rental-purchase agreement issue, there are no specific provisions in either the Business and Commerce Code or Insurance Code regarding loss damage waivers in "equipment or property rental only" agreements. HB 1851 would have applied to "rental only" agreements. HB 1851 did not pass, in part, due to a legal dispute as to whether such legislation was necessary because numerous businesses and entities contend that a loss damage waiver in a "rental only" contract is not insurance.

Department staff has verbally advised my office that they do not intend to enforce their interpretation of the Insurance Code on any equipment or property rental business offering loss or physical damage waivers as part of an equipment or property rental agreement, but will continue to disapprove policy forms unless there is a change in the Insurance Code or there is an Attorney General opinion that loss damage waivers in *rental only agreements* are not insurance.

The following background information was developed during hearings on the 2009 legislation filed and may assist you in providing your formal opinion.

BACKGROUND

A loss damage waiver is sometimes referred to as either a loss or physical damage waiver. A physical or loss damage waiver is usually defined as an agreement whereby the lessor of property or equipment agrees, in advance and in exchange for consideration, not to have the lessee of that property pay for any damage to the leased property that occurs while it is in the possession of the lessee. If damage or loss to the property occurs when a lessee has possession of the rented property, the lessee that leases or rents the property could be liable for the loss of the property unless the lessee has elected to include the loss or physical damage waiver as part of the rental agreement. If the lessee elects the loss or physical damage waiver, the lessor of the property is releasing any claim against the person who rented the property for loss or damage of the rented property. If there is loss or damage to the property, the lessor would suffer the loss.

In 2008, a licensed insurer filed a policy form that would have provided coverage to the property or equipment owner (lessor) if the property was lost or damaged *and the lessee elected to obtain the property damage waiver*. Testimony was presented during the hearing on HB 1851 that this coverage has been filed and approved in 48 other states. It is my understanding that the Department would not approve the policy filing in Texas because coverage only applied when a loss damage waiver was chosen by the lessee and a loss damage waiver is unauthorized insurance. Even though the Department would not approve this policy form because of the coverage for a lessor where the lessee elected to obtain loss damage waiver, it was also clear from testimony in support of HB 1851 that the Department intended to apply this interpretation only to insurers making similar policy form filings and did not intend to enforce

this interpretation on businesses engaged in the rental of property and equipment and offering loss damage waivers.

It is my understanding that the Department's position is not included in any adopted rule or specific statute but is based on staff's interpretation of the broad provisions defining the business of insurance in Chapter 101, Insurance Code. The Department has taken this position in at least one reported case involving a lessor, as will be discussed below. If this legal position is correct, literally thousands of retailers, hardware stores, and other businesses that only lease or rent personal property or equipment may have been and are currently engaged in unauthorized insurance unless they were licensed as insurance agents or insurers.

In litigation in 1999 involving the Department, this issue of whether a "loss damage waiver" was insurance arose in the "U-Haul" case involving the rental of trucks and other equipment. The trial court ruled, in part, that loss damage waivers are not insurance. The State did not appeal this particular issue. See, *Republic Western Ins. Co. v. State of Texas*, 985 S.W.2d 698 (see specifically note 1, page 699). The State did not appeal the portion of the trial court ruling that collision damage waivers are not insurance.

The *Republic Western* case involved Article 9026, Texas Revised Civil Statutes, which provided for loss damage waivers on private passenger automobiles in rental situations. U-Haul offered collision damage waivers as part of its rental contracts.

My office has been made aware of cases in other jurisdictions that have considered the issue of whether a loss damage waiver is insurance. In *Automotive Funding Group v. Garamendi*, 114 Cal. App. 4th 846, 7 Cal. Rptr. 3d 912 (Cal. Ct. App. 2003), the California Appellate Court held that a loss damage waiver as part of the financing of an automobile was not the business of insurance under the California Insurance Code as asserted by the California Commissioner of Insurance.

In *Hertz v. Corcoran*, 520 N.Y.S. 2d 700 (N.Y. Sup. Ct. 1987), a New York court held that a collision damage waiver was not insurance within the meaning of the New York Insurance Code as asserted by the New York Commissioner of Insurance. However, in *Luc Leasing Corp. v. Muhl*, 659 N.Y.S. 2d 422 (N.Y. Sup. Ct. 1997), a New York distinguished the *Hertz* case and held that a lease completion waiver ("LCW") option that the car leasing company proposed to offer to its customers in New York for a fee over above the monthly lease payment was insurance. The LCW provided that the leasing company would waive all further monthly lease payments in the event the lessee dies or becomes disabled during the term of the lease and was insurance because it was not tied to the property itself.

The reasoning generally is that a collision or loss damage waiver constitutes a change in the contract of bailment and is not insurance. See, *Chabraja v. Avis Rent-A-Car Sys., Inc.*, 549 N.E.2d 872 (Ill. App. Ct. 1989); *Hearty v. Harris*, 574 So. 2d 1234 (La. 1991); *Hertz Corp. v. Corcoran*, 520 N.Y.S.2d 700 (Sup. Ct. 1987).¹

Each day in this state there are likely thousands, if not hundreds of thousands, of equipment or property rental or lease transactions. Loss damage waivers are used in most if not all rental agreements in Texas and other states. Typically, the consumer has a choice as to whether or not to agree to contract for the waiver.

¹ Different results were reached in *Grand Rent-A-Car Corp. v. 20th Century Ins. Co.*, 31 Cal. Rptr. 2d 88 (Cal. Ct. App. 1994) (collision damage waiver is insurance); and *Passamano v. Travelers Indem. Co.*, 882 P.2d 1312 (Colo. 1994) (collision damage waiver is insurance).

QUESTION PRESENTED

I would ask that you provide a formal opinion on the following specific legal question:

Is a loss damage waiver in a *rental only* lease agreement, whereby the lessor of equipment agrees in advance and in exchange for consideration not to have the lessee of that equipment pay for any damage to the leased equipment that occurs while it is in the possession of the lessee, an act that constitutes the business of insurance as defined in TEX. INS. CODE §101.051?

Thank you in advance for your attention in this matter.

Yours truly,



Burt Solomon

CC: Texas Department of Insurance
Texas Association of Rental Agencies
Gardere Wynn Sewell
Thompson Coe