

# State Specific Issues for Truck and Transportation Financing

**Lender Beware:  
50 States, 50 Sets of Requirements**



# State Specific Issues for Truck and Transportation Financing

- Commercial v. Consumer Lending
- Lender Licenses
- Financial Responsibility
- Additional Considerations



## Consumer v. Commercial

When the lease transaction is entered into, it is imperative to determine whether the purpose for the lease is commercial or consumer.

## Consumer v. Commercial

As a result of the Dodd-Frank Act, there have been changes to local and state laws, which requires scrutiny of the due diligence process before funding a lease transaction to ensure it is commercial and not consumer.

## Consumer v. Commercial

- Under Dodd-Frank, the Federal Reserve Board has broad and powerful latitude over finance companies in determining what constitutes a “Consumer Transaction.”
- In certain states, a Consumer Transaction is one where the lessee is an individual, single member LLC, sole shareholder corporation or a sole proprietorship.

## Consumer v. Commercial

If the Federal Reserve Board determines a matter to be a consumer transaction, then a lessor must comply with the Consumer Leasing Act.

The Act regulates personal property leases that are made for “primarily personal, family or household purposes.”



## Consumer v. Commercial

A leasing company must carefully examine a particular state's statutes governing consumers that apply to a lease transaction at the outset of the diligence process.

Considerations- Type of Equipment  
Financed, Anticipated Use

## Consumer v. Commercial

The term “Consumer Lease” means a contract in the form of a lease or bailment for the use of personal property by a natural person for a period of time exceeding four months, and for a total contractual obligation not exceeding \$50,000 primarily for personal, family or household purposes.



## Consumer v. Commercial

Cal. Civ. Code § 1751. Waiver; public policy-Any waiver by a consumer of the provisions of this title is contrary to public policy and shall be unenforceable and void.

# Consumer Legal Remedies Act

**Cal. Civ. Code § 1761(d) “Consumer” means an individual who seeks or acquires, by purchase or lease, any goods or services for personal, family or household purposes”**

- 1770(a)(2)-misrepresenting the approval or certification of goods, is unlawful
- 1770(a)(5)-fit for ordinary purpose
- 1770(a)(7)-goods are particular standard or quality
- 1770(a)(9)-Intent to sell them not as advertised.
- 1770(a)(14)-Confers Rights that does not have that are unlawful..

**1780 (a) Any consumer who suffers any damage as a result of the use or employment by any person of a method, act, or practice declared to be unlawful by Section 1770 may bring an action against that person to recover or obtain any of the following:**

- Actual damages, but in no case shall the total award of damages in a class action be less than one thousand dollars (\$1,000).
- An order enjoining the methods, acts, or practices.
- Restitution of property.
- Punitive damages.
- Any other relief that the court deems proper.

## Vehicle Leasing Act Civ. Code §2987.5, et. seq

- 2985.7(d)-Act applies to leases other than for agricultural, business or commercial purposes, or to a government or governmental agency or instrumentality.
- 2985.8-A lease contract shall be in writing, and the print portion of the contract shall be printed in at least 8-point type and shall contain in a single document all of the agreements of the lessor and lessee with respect to the obligations of each party.
- 2986.10-An assignee of the lessor's rights is subject to all equities and defenses of the lessee against the lessor, notwithstanding an agreement to the contrary.
- 2988.5-Damages, class action, attorney's fees, rescission

# New Jersey Consumer Protection Leasing Act (N.J. Stat. §56:12-60, et al)

- Applies not only to consumer transactions, but to commercial ones as well
- Unless one of the exemption invoked, the Leasing Act subjects lessors to onerous statutory requirements and exposes them to liability and defenses for failure to comply with such requirements.

## New Jersey Consumer Protection Leasing Act: Exemptions

- If the Leasing Act applies, lease documents must include many specific disclosures similar to those required under the federal consumer leasing laws, and must include a provision entitling the lessee to at least one opportunity to cure before the lessor may enforce its remedies.
- If a lessor enters into three or more applicable leases per year, the lessor also needs to be a licensed dealer in New Jersey. *See N.J. Stat. §56:12-61* (definition of “Leasing dealer”).



## New Jersey Consumer Protection Leasing Act: Exemptions

- Does **not** apply to a “fleet lease”, a “fair market value commercial lease”, a “TRAC lease”, or a lease with a nominal purchase option. *See N.J. Stat. §56:12-61* (where the definition of “Lease” excludes the foregoing)
- Thus applies to any commercial lease with an option for a sum greater than a nominal value, but less than fair market value, and which is not a fleet lease or a TRAC lease.



# Lender Licensing



States may require that a lessor be licensed to Lease Motor Vehicles

# Lender Licensing

Does the lessor need a lessor license in a specific state?

Certain states require a lessor obtain a used motor vehicle license to sell to lessees at lease termination.



# California Finance Lender's Law

## Who Must Be Licensed?

Any person engaged in the business of making consumer loans or making commercial loans. (Fin. C. §22009.)

# California Finance Lenders Law

## **Licensed Finance Lenders Are Exempt from Usury Laws**

In the absence of an exemption the Usury Rate is:

-10% for loans or forbearance of any money, goods, or things in action to be used primarily for personal, family or household purposes (consumer transactions)

OR

-the higher of 10% or 5% per annum plus the rate prevailing on the 25<sup>th</sup> day of the month preceding the earlier of the date of execution of the contract to loan or the date of making the loan as established by the Federal Reserve Bank of San Francisco on advances to member banks under Section 13 and 13a of the Federal Reserve Act for all other loans or forbearance of money, goods or things.

**Cal. Const. Article 15 § 1**

## Electronic Signatures on Vehicle Leases-AB380

- This bill would delete the Uniform Electronic Transactions Act (UETA) exemption for conditional sale and lease contracts for motor vehicles and require lessors to offer customers the option of signing electronically. It would mandate certain disclosures separate from a conditional sale or lease contract be signed at the seller's or lessor's place of business and "an exact copy of the executed contract to be furnished" to lessees.

## New York “Licensed Lender Law”

- Requires a license from the superintendent in order to be able to make loans, which could be at a higher interest rate than otherwise allowed under law. *N.Y. Banking Law § 340*
- Proposed Amendments to become effective January 2018 meant to target online predatory lending are much broader in scope



## New York's "Licensed Lender Law"

- Amendment would make the law applicable to:
  - (1) lenders without a physical location in New York,
  - (2) lenders who acquire loans from other lenders who do business in New York, and
  - (3) possibly lenders who make loans to corporate borrowers.
- Adds language to the statute that anyone “engaging in the business of making loans” of \$50,000 or less for **personal or commercial** purposes to any entity at any rate must have a license.

# New York Lender's License: NY DFS Application

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### Instructions: Licensed Lenders

Instructions for preparing and filing an application pursuant to the provisions of Article 9 of the Banking Law. There is a separate application that accompanies these instructions.

#### GENERAL APPLICATION PROCEDURE

1. The application for a license shall be made upon forms issued by the Superintendent of Financial Services of the State of New York. The application forms are available here on the Department's website.
2. The Application Form, Individual Questionnaires and other related forms shall be filed in under oath.
3. A separate application is required for each location at which an applicant will make loans under the provisions of this Article.
4. All forms are to be printed or typed and fully completed. Type "none" or "not applicable" where appropriate. If additional space is required to respond, prepare and annex a signed rider.
5. Full names and addresses must be given, including Zip Codes and Counties, where requested.
6. The completed application shall be submitted, accompanied by any required fees, to:



# Financial Responsibility: Graves Amendment

- In 2005, Congress passed Federal legislation known the Graves Amendment to the Federal Transportation Equity Act. 49 U.S.C. § 30106.
- Prior to the Graves Amendment, many states held the owner of a motor vehicle vicariously liable for the customer's negligent operation of the vehicle
- The Graves Amendment was intended to create uniformity among the states.

# Graves Amendment

- The Graves Amendment pre-empts state law and provides that a non-negligent lessor/owner of a motor vehicle is not liable for damages resulting from the operation or use of the vehicle during the lease term.
- Courts in Massachusetts, Connecticut, New York, Florida and the District of Columbia have ruled that the Graves Amendment preempts state vicarious liability laws.
- This exemption is only available so long as the lessor has not been negligent or acted criminally.
- The Graves Amendment will not protect a lessor under a full service lease who has failed to properly maintain a vehicle from liability for an accident caused by mechanical failure.

# Graves Not Applicable





# Graves Amendment

Graves Amendment provides that equipment finance companies that rent or lease motor vehicles in the United States are generally protected from vicarious liability arising from the use, operation or possession of the vehicle *provided that*:

1. The owner is engaged in the business of renting or leasing motor vehicles; and
2. There is no independent negligence or criminal act by the owner (or affiliate).



# Graves Amendment: Independent Negligence

- Viable theories against owners:
  - Negligent Maintenance
  - Negligent Entrustment
  - Failure to Supervise or Train Employees

# NY Exception: Owner/Affiliate

Stratton v. Wallace, 2014 U.S. District. LEXIS 105816, 8-9 (W.D.N.Y. July 31, 2014)

- Held that a tractor-trailer lessor can be vicariously liable for the negligence of a lessee, even when that owner is free of wrongdoing, by way of an “affiliate” lessee
- A company was set up to hold title to vehicles and then lease them to a related company. Both companies were wholly owned subsidiaries of the same parent company
- Not “run of the mill Graves Amendment Cases” where vehicle owner and vehicle operator are related only by an arm’s length contract,
- Court interpreted Graves as applying to bar liability only where both the owner and the affiliate are without negligence
- Court found the two companies to be “affiliated” for purposes of the Graves Amendment
- Thus, in order to obtain the protection of Graves Amendment, *Stratton* Court requires both owner and affiliate of the owner to be free from negligence.

## Savings Clause: State Financial Responsibility Laws

- The Graves Amendment contains a “savings clause” stating that it does not supersede state laws imposing “financial responsibility” on the owner for the privilege of registering and operating a motor vehicle. 49 USC § 30106(b)(1).
- The savings clause only “saves” state laws that impose “insurance-like requirements”; it does not “save” state laws that impose (or cap) vicarious liability on leasing companies — that is liability based solely upon ownership. See *Garcia v. Vanguard Car Rental USA, Inc.*, 540 F.3d 1242, 1247 (11th Cir. 2008)

## Example: New Jersey

- NJSA § 39:6A-1 et seq.;
  - Every owner or registered owner of an automobile registered or principally garaged in the state shall maintain automobile liability insurance coverage. (Minimum liability coverage is 15/30/5).
- NJSA 17:28-1-1
  - the coverage requirements - liability, personal injury protection, and optional uninsured and underinsured motorist coverage – are triggered by the place where the automobile is registered or principally garaged rather than by the identity of the policy holder.

## Example: California

- **Cal. Vehicle Code § 16500.5(a)(2):** Except as specified in subdivision (b), the owner of the following commercial vehicles shall maintain proof of financial responsibility in the amount required by the director:  
A vehicle having an unladen weight of over 7,000 pounds which is used in the transportation of property in the conduct of a business.
- **Cal. Vehicle Code § 16500.5(d)(1-4):** Proof of financial responsibility may be maintained by any of the following:
  - (1) Being insured under one or more motor vehicle liability policies against that liability.
  - (2) Obtaining a bond of the same kind, and containing the same provisions, as those bonds specified in Section 16434.
  - (3) By depositing with the department five hundred thousand dollars (\$500,000), which amount shall be deposited in a special deposit account with the Controller for the purpose of this section.
  - (4) Qualifying as a self-insurer under Section 16053.
- **Cal. Vehicle Code § 16430:** Proof of financial responsibility when required by this code means proof of financial responsibility resulting from the ownership or operation of a motor vehicle and arising by reason of personal injury to, or death of, any one person, of: 15/30/5.
- **Cal. Vehicle Code § 16053(a):** The department may in its discretion, upon application, issue a certificate of self-insurance when it is satisfied that the applicant in whose name more than 25 motor vehicles are registered is possessed and will continue to be possessed of ability to pay judgments obtained against him or her in amounts at least equal to the amounts provided in Section 16056.



# California Financial Responsibility Laws

Cal. Vehicle Code § 16020: California requires that all drivers and all owners of motor vehicles shall at all times be able to establish financial responsibility and shall at all times carry evidence of such.

A vehicle owner may be liable for the negligence of a “permissive driver” but the law limits the owner’s financial responsibility to \$15,000 for the death or injury to any one person and \$30,000 for the death or injury to more than one person. Cal. Veh. Code, § 17151(a) (2016).



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Cal. Vehicle Code § 16430: Proof of financial responsibility when required by this code means proof of financial responsibility resulting from the ownership or operation of a motor vehicle and arising by reason of personal injury to, or death of, any one person, of: 15/30/5.

## Special Considerations

- **Cal. Vehicle Code § 16053(a):** The department may in its discretion, upon application, issue a certificate of self-insurance when it is satisfied that the applicant in whose name more than 25 motor vehicles are registered is possessed and will continue to be possessed of ability to pay judgments obtained against him or her in amounts at least equal to the amounts provided in Section 16056.
- **Vargas v. FMI, Inc.**, 233 Cal.App.4th 638 (January 23, 2015) (holding that defendants had not established as a matter of undisputed fact that the tractor's owner is entitled to the protection of the Graves Amendment, 49 U.S.C. Section 30106, subdivision (a), which shields owners of leased vehicles “engaged in the business or trade of renting or leasing motor vehicles” from vicarious liability for the alleged negligence of their lessee's drivers.”)

# State Financial Responsibility Laws

- Rental and leasing companies (and their insurers) have been faced with various claims for insurance coverage for the state imposed minimum insurance requirements, No Fault (“PIP”) benefits, Uninsured Motorist coverage and/or Underinsured Motorist coverage.
- No court of record has held a lessor responsible for meeting minimum insurance requirements because most claims against lessors have been couched in the form of a claim for vicarious liability.
- Plaintiffs’ counsel may begin to rely upon the financial responsibility laws to argue that lessors should be liable for mandatory insurance obligations, including No Fault, UM, and Underinsured, or the obligation to provide a good faith legal defense to a lessee or driver.

# Additional Considerations

## Environmental Regulations

- Regulations, such as California Heavy-Duty Vehicle Greenhouse Gas Emission Reduction Regulation (“Cal GHG Reg”), may impact lessors to the extent the regulation applies to owners of vehicles.
- Under Cal GHG Reg, the lessor **MUST** provide the lessee with specific statements prescribed by CAL GHG Reg for the lessor not to be deemed the owner for purposes of the regulation.

## Additional Considerations- Installment Sales Contracts

- Is there an applicable state Motor Vehicle Installment Sales Act?
- Does the Act apply to commercial transactions?
- Is there a license required?
- State specific requirements.



# Additional Considerations- Installment Sales Contracts

## Is there an applicable state Motor Vehicle Installment Sales Act? Pennsylvania

“Installment sale contract.”(1) A contract for the retail sale of a motor vehicle, or a contract that has a similar purpose or effect, whether or not the installment seller has retained a security interest in the motor vehicle or has taken collateral security for a buyer's obligation, if:(i) all or part of the purchase price is payable in two or more scheduled payments subsequent to the making of the contract; or(ii) a buyer undertakes to make two or more scheduled payments or deposits that may be used to pay all or part of the purchase price.(2) The term includes any form of contract, however nominated, for the bailment or leasing of a motor vehicle, which contains both of the following, or any other arrangement having a similar purpose or effect:(i) The buyer contracts to pay as compensation a sum substantially equivalent to or in excess of the value of the motor vehicle.(ii) Ownership of the motor vehicle may be transferred to the buyer.(3) The term includes and applies to an extension, deferment, renewal or other revision of the installment sale contract.(4) The term excludes the following:(i) A sale or contract for sale upon an open book account, if both of the following conditions are met:(A) The installment seller has not retained or taken a security interest in the motor vehicle sold or a collateral security for the buyer's obligation.(B) The buyer:(I) is not required to pay a sum other than the purchase price of the motor vehicle sold in connection with the sale or extension of credit; and(II) is obligated to pay for the motor vehicle in full within 90 days from the time the sale or contract for sale was made.(ii) A right to acquire possession of goods under a lease, unless the lease:(A) constitutes a security interest as defined in 13 Pa.C.S. § 1201 (relating to general definitions); and(B) is subject to 13 Pa.C.S. Div. 9 (relating to secured transactions).12 Pa. Stat. and Cons. Stat. Ann. § 6202

## Additional Considerations - NY Security Deposit Law

- Applies to “money deposited or advanced on contract for the use or rental of personal property.” *NY GOB § 7-101*
- Deposits above \$750 for personal property must be deposited in an interest bearing account in a banking organization in the state of New York
- Exemption:
  - the contract must be govern by NY law AND
  - the lessee must be located in NY