IN THE SUPREME COURT OF FLORIDA

TALLAHASSEE, FLORIDA

CASE NO. SC09-390

ALEJANDRO ROSADO

Petitioner,

-vs-

DAIMLERCHRYSLER FINANCIAL SERVICES TRUST, ETC., ET AL.

Respondents.
_____/

REPLY BRIEF OF PETITIONER ON THE MERITS

On certified question from the Second District Court of Appeal of Florida

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PREFACE

This case is on review from a question certified to be of great public importance by the Second District Court of Appeal. The parties will be referred to as Rosado (or "Plaintiff") and DCFS Trust (or "Defendant"). The following designation will be used:

"AB" - Answer Brief.

ARGUMENT

CERTIFIED QUESTION

DOES THE GRAVES AMENDMENT, 49 U.S.C. §30106, PREEMPT SECTION 324.021(9)(b)(1), FLORIDA STATUTES (2002)?

In its brief on the merits, Respondent has basically just cited Vargas v. Enterprise, 60 So.3d 1037 (Fla. 2011), and several lower court and federal court decisions which preceded Vargas, and encouraged this Court to simply follow the analysis of the short-term lease statute involved in those cases (AB7-11). Many of the decisions cited not only discuss short-term lease statutes, but are not even considering Florida law at all. Respondent has ignored the clear differences between § 324.021(9)(b)(2), Fla. Stat. (regarding short-term rentals) and subsection (1) (regarding long-term leases). DaimlerChrysler Financial Services Trust ("DCFS Trust") cannot just magically make the words of the statute disappear by ignoring them. Section 324.021(9)(b)(1), Fla. Stat., does not define the lessor as the owner as was done in § 324.021(9)(b)(2), Fla. Stat.

Respondent has also invented the idea that Congress intended to wipe out all vicarious liability as to all lessors by citing to one member of Congress' argument encouraging other members to not vote for the amendment. There is no way that Congress intended lessors to be immune from all liability when the Graves Amendment very clearly states that it does not preempt state laws imposing

liability for failing to secure the required insurance. The argument of a single member is hardly legislative history, and does not describe the will of the entire Congress.

Contrary to Respondent's argument, Alejandro Rosado ("Rosado") is not attempting to hold DCFS Trust liable as the "owner." Respondent is liable for failing to obtain the insurance required by § 324.021(9)(1), Fla. Stat., a liability which is specifically provided for in the Graves Amendment. The issue in this case is not "solely" whether § 324.021(9)(b)(1), Fla. Stat., is a financial responsibility statute (AB11). It is more accurate to state that the issue in this case is whether § 324.021(9)(b)(1), Fla. Stat., is a law "imposing liability on business entities engaged in the trade or business of renting or leasing motor vehicle for failure to meet the financial responsibility or insurance requirements under State law." Although DCFS Trust chastises Petitioner for not citing any authority other than the statute for support of his analysis that Florida's long-term lease statute imposes an insurance requirement other than the statute itself, no other authority is needed because the analysis must begin and end with legislative intent. If one reads and applies the terms of both the Graves Amendment and § 324.021(9)(b)(1), Fla. Stat., there can be no preemption.

By reading § 324.021(9)(b)(1), Fla. Stat., one can easily understand the legislature intended to force lessors to obtain insurance on leased vehicles, either

through the lease contract and the lessee, or through the lessor directly. The only question is one of economics and efficiency; would the lessor prefer to require the lessee to obtain the insurance and police compliance throughout the contract period, or just purchase the insurance directly and add it to the cost of the lease. Respondent has brushed aside the words used with no analysis or authority, and concluded that the use of the word "require" twice in the statute means nothing. Respondent's analysis would provide a third option; to obtain no insurance through either source and have no consequences except to save money and hoist the burden of the losses caused by the vehicle on the victim and the State. In other words, Respondent reads the words of § 324.021(9)(b)(1), Fla. Stat., as saying "We'd like you to get insurance, but it doesn't really matter." The legislature does not create statutes to merely request action as a favor. It commands, it directs, it requires. In terms of the circumstances here, the legislature obviously intended to force the lessor to insure the vehicle. It did not, as argued by DCFS Trust, merely give the lessor the option to obtain insurance if the lessor wanted to be a good citizen (AB15-16).

Respondent's notion that the "business decision" to obtain insurance is "not even remotely close to any traditional notion of financial responsibility" misses the true meaning of financial responsibility (AB16). A review of several other statutes indicates that the "traditional notion" of the term "financial responsibility" used by

Congress is always more than a requirement that someone obtain insurance. In 10 U.S.C.A. § 2110, regarding private businesses which provide logistical support to the Department of Defense, the statute provides:

> [The] Secretary may accept a bond without surety if the institution to which the property is issued furnishes to him satisfactory evidence of its financial responsibility.

In 38 U.S.C.A. § 7317(e), regarding contractors who provide hazardous research, the statute provides (emphasis added):

> Each contractor which is a party to an indemnification agreement under subsection (a) shall have and maintain financial protection of such type and in such amounts as the Secretary shall require to cover liability to third persons and loss of or damage to the contractor's property. The amount of financial protection required shall be the maximum amount of insurance available from private sources, except that the Secretary may establish a lesser amount, taking into consideration the cost and terms of private insurance. Such financial protection may include private insurance, private contractual indemnities, self-insurance, other proof of financial responsibility, or a combination of such measures.

In 33 U.S.C.A. § 2716, regarding the financial responsibility of any party responsible for a vessel over 300 tons, the statute provides:

> Financial responsibility under this section may be established by any one, or by any combination, of the following methods which the Secretary (in the case of a vessel) or the President (in the case of a facility) determines to be acceptable: evidence of insurance, surety bond, guarantee, letter of credit, qualification as a self-insurer, or other evidence of financial responsibility.

Finally, in 42 U.S.C.A. § 2210, regarding financial responsibility of licensees authorized to produce atomic energy or transport nuclear fuel, the statute provides (emphasis added):

> Such primary financial protection may include private insurance, private contractual indemnities, self-insurance, other proof of financial responsibility, or a combination of such measures and shall be subject to such terms and conditions as the Commission may, by rule, regulation, or order, prescribe.

In each of these examples, voluntary personal liability (such as self-insurance) is an acceptable method of proving financial responsibility.

Like the federal statutes cited above, Florida law recognizes that "financial responsibility" may involve insurance but is not limited to insurance. In §324.031, Fla. Stat., the legislature has permitted owners of vehicles other than taxicabs to prove their financial responsibility by obtaining insurance, posting a bond, being self-insured, or depositing cash. Similarly, § 458.320, Fla. Stat. (2004), permits a physician to prove "financial responsibility" by several different methods, including liability insurance, maintaining an escrow account, or maintaining an irrevocable letter of credit. These federal and state statutes show that the common meaning of a "financial responsibility law" is any law which ensures that someone is able to pay for the damage he or she causes.

In the framework of § 324.021(9)(b)(1), Fla. Stat., the lessor has the option of providing financial responsibility by: 1) having the lessee purchase insurance, 2) purchasing insurance which insures the lessee's use of the vehicle, or 3) voluntarily choosing to be personally liable by failing to do either of the above. It is no different than self-insurance. More importantly, it is the voluntary acceptance of personal liability for failing to procure insurance, just as is described in the Graves Amendment.

Respondent has argued that this section is not a "liability" imposed for failing to obtain insurance because it is not a penalty. This Court will immediately notice that DCFS Trust has changed the word used in the statute from the word used by Congress ("liability"), to the word "penalty," which is the same thing the court did in Garcia v. Vanguard Car Rental USA, Inc., 510 F. Supp. 2d 821 (M.D. Fla. 2008). Respondent follows the word change with a reference to a Florida statute which exacts a penalty of suspending registration for the registrant's failure to maintain insurance. The cited provision is, no doubt, a penalty but that is not the word Congress used. Congress used the word "liability," and the loss of a registration or license is not liability; it is a penalty. Respondent has changed the word used to bring about the result it wanted, not the result intended by Congress. Respondent's analysis concludes in a circuitous argument which says that Florida law would only be exempt from preemption by the Graves Amendment if it

imposed liability for failing to obtain insurance, but that any such liability would be preempted by the Graves Amendment. It only makes sense to a company which is desperately trying to escape both the responsibility of procuring insurance and the liability imposed for the failure to procure insurance.

However, § 324.021(9)(b)(1), Fla. Stat., very clearly imposes liability for failure to obtain the insurance required, just as is described by Congress in the Graves Amendment. Even though the legislature did not use the words DCFS Trust would have liked to see, the intent of the statute is clear. The legislature intended to force the lessor to have insurance on the leased vehicle. This was precisely the conclusion reached by Judge Altenbernd in his dissent in the court below, and his opinion has now been adopted by Judge Griffin in her dissent in Maerz v. Daimler Chrysler Fin. Trust, 37 Fla. L. Weekly D314 (Fla. 5th DCA February 3, 2012).

This Court should adopt Judge Altenbernd's analysis in this case because it follows the intent of both Congress and the Florida Legislature, and avoids the pitfalls of an overly technical interpretation. Judge Altenbernd has also reached his conclusion within the bounds of federal preemption law which requires Congress to clearly state its intent to preempt state law. The words chosen by Congress do not clearly preempt § 324.021(b)(1), Fla. Stat. The only way DCFS Trust can

make the analysis work is to change the words used by Congress and rewrite the Graves Amendment.

CONCLUSION

The certified question should be answered in the negative. The Graves Amendment does not preempt § 324.021(9)(b)(1), Fla. Stat.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY a true copy of the foregoing was furnished to MICHAEL B. BUCKLEY, ESQ. and ERIC W. NEILSEN, ESQ., 150 2nd Ave. North, Ste. 1600, St. Petersburg, FL 33701; LOUIS J. WILLIAMS, ESQ., 59 Lake Morton Drive, P.O. Box 2836, Lakeland, FL 33806; ROBERT D. ADAMS, ESQ., 101 E. Kennedy Blvd., Tampa, FL 33602; and DANIEL E. DIAS, ESQ., 2002 N. Lois Ave., Ste. 510, Tampa, FL 33607, by mail, on March 5, 2012.

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CERTIFICATE OF TYPE SIZE & STYLE

Petitioner hereby certifies that the type size and style of the Reply Brief of Petitioner on the Merits is Times New Roman 14 pt.

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