

VICARIOUS LIABILITY

When was the last time your agent mentioned vicarious liability when discussing your garage package? Never? That's not surprising because the term just doesn't come up often when we discuss garage liability with our clients. But the world of independent auto dealers is changing.

Operations are often larger, multi-location and offer a variety of services in addition to selling used cars. Some of my clients have over one hundred employees, and many have more than twenty-five. Add to the employee count our litigious society and you have the birthplace of vicarious liability claims.

Courts uphold the premise that an employer is responsible for the actions of employees while carrying out their assigned tasks. Similarly, they support the theory that ignorance is no excuse under the law. Employers are expected to know something about their employees – not just work habits or technical ability, but personally. Background checks –or lack of them—can play a large part in a claim. An example might be a security guard who exhibits excessive and unnecessary force while performing his job. Someone gets hurt, sues the employer and the alert personal injury attorney discovers that security guard had twice been arrested for assault. It doesn't matter if the charges were dropped or that he was found to be not guilty, the smudge is there on his record...and now well advertised to the jury. His employer will pay the price of not being fully informed.

Vicarious liability can occur regardless of the job being done. I have a client currently experiencing the headache of claim based on just that supposition. He sold a car, and the buyer brought it back a few days later for some repairs. Some repairs were made, but others were not. My client is completely innocent in this case, and I believe his mechanic is equally free of guilt. However, the plaintiff asserts that she and the mechanic discussed the areas left untouched. Her case is that the mechanic told her not to worry about those items. Everything would be fine until the following week when he had time to make the adjustments.

As luck would have it, she had an accident involving injuries the following day, and now we are months into discovery and the expense of trying to prove a he-said-she said case. In the end, there is going to be a settlement made of some sort, and the size of that settlement is going to weigh heavily upon the mechanic's reputation and prior acts. Have there been problems in the past? How long has he worked for my insured? Is he ASE certified? What sort of operation does my insured run? What about fellow employees? Does my insured check references? And the list goes on.

Another claim involved an employee who hit a pedestrian. The employee was only going three blocks to gas up a car, and the pedestrian crossed the street in the middle of the block. The injuries to the pedestrian were minor, and there was no damage to the insured's vehicle. When the auto liability insurance responded and paid the medical bills, both the insured and the agent thought the case was over. Not so! A couple of weeks later the insured received suit papers alleging loss of time, mental stress, emotional trauma, etc. The employer was sued based on vicarious liability. Someone had done a bit of investigation to learn the employee had a DWI on his MVR, as well as two speeding tickets. This employer learned his lesson too late to avoid the cost of a vicarious liability claim.

Of course, it is the insurance companies who pay the damages, but it is the employers who pick up the tab for all the hassle involved, as well as increased future insurance premiums. Protecting yourself and your business completely is impossible, but there are some basic employment practices every prudent employer should follow.

- Take advantage of the free background checks found on the Internet. Use this information not necessarily to disqualify an employee, but rather to know who you have working for you and be cognizant of the responsibilities given to that employee..
- Always ask your insurance agent to run a motor vehicle record check for every new employee –both driver and non-driver of dealer owned autos.
- Think twice about asking your agent to get an exception for a driver with an ‘iffy’ driving record. It may feel good in the beginning, but be completely aware of the exposure you are accepting.
- Be clear in defining each employee's area of responsibility, and be sure your managers are in tune with your instructions. For instance, if you have an employee who you do not want to make a bank run, be sure your manager knows that before the deposits start to come up short. While this loss may be covered under your employee dishonesty bond, be prepared for your insurance company to make vicarious liability a subject during settlement negotiations. *after they run the background check on that employee.*

The bottom line is that you cannot protect yourself completely from vicarious liability claims, but you can narrow the odds in your favor by clear communication, careful background screening and proper insurance coverage for the ones that slip through the cracks.

Happy Holidays!!

On a personal note, thanks again for another year of allowing me to work with and for your Association in providing our monthly HIADA Insurance Corner. My wish for you and your family is a safe and joyous Holiday Season and prosperous New Year.

Please call, e-mail or fax to me your insurance questions and concerns. This column belongs to you and it is a pleasure to work with and for you. annmullen@mulleninsurance.com; amullen@mulleninsurance.com; or www.mulleninsurance.com.

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