CAR RENTAL SHOW 2013
LEGAL AND LEGISLATIVE UPDATE

OVERVIEW

A new challenge facing car rental companies today is how to comply with the existing maze of regulations in the face of changing technology, such as electronic signature pads and automatic toll payment services. The following recent headlines illustrate some of the key issues that rental companies face in this changing landscape:

- "For Car Renters, Signing on the Electronic Tablet May be Trouble" (*New York Times*, April 5, 2013)
- "Don't Get Broadsided by the Car Rental Industry's Double Standards" (Christopher Elliott Consumer Blog, February 20, 2013)
- "Be on the Lookout for Hidden Rental Car Fees" (*Atlanta Journal-Constitution*, November 15, 2012)
- "Tolls Trip Rental Car Customers" (*USA Today*, November 7, 2012)

The paragraphs below discuss how rental companies can address these and other issues while adapting to changes in technology and customer service standards.

I. Electronic Rental Agreements – Do They Really Mean "Trouble" for Renters?

Rental agreements always have taken many forms from the simple, double-sided 8 ½ x 11 form to multi-part agreements with pre-printed jackets, "rental records," inspection reports, equipment addenda and the like. In recent years, many rental companies have moved all or part of the rental agreement to an electronic format and now capture customer signatures on an electronic signature pad. Electronic agreements eliminate the need to store voluminous paper copies and also expedite the rental process. The following cases and developments illustrate, however, electronic agreements can add new wrinkles to the age-old customer argument of "I didn't agree to that."

a. Recent Articles Argue "Trick" Customers Into Purchasing Collision Damage Waiver and Other Optional Products Through The Electronic Signature Process

Recent press reports, and an April 5, 2013 *New York Times* article, "For Car Renters, Signing on the Electronic Tablet May be Trouble," discuss customer complaints about rental companies using the electronic signature pad process to confuse or "trick" renters into accepting optional products that they did not wish to purchase. According to the article, "Rental customers might say out loud that they want to decline coverage, but then they may see

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something on the electronic screen that asks them if they agree to the loss damage 'waiver.' You can't blame a tired or inexperienced traveler for thinking that by clicking to accept the 'waiver' they are waiving insurance . . ." Thus, despite the many benefits that electronic signature pads and agreements provide to both the customer and the rental company (e.g., shorter processing time, reduction of paper files, administrative savings), rental companies should be aware that traditional customer complaints about the sales process have not been eliminated.

PRACTICE TIP: Whether you use electronic signature pads or manual rental agreements, consider the following:

- Make sure that websites are consistent with actual location practices
- Remember to display state-required signage in a prominent place at the rental counter
- Instruct counter agents to verbally disclose to renters that CDW, SLI, PAI, PEC, Roadside Assistance, and other additional products are **optional**, and that CDW and optional insurance products may duplicate a renter's other coverage
- Ensure that there is a manual copy of terms and conditions and other pre-printed forms for renters to review before they sign a rental agreement if they wish to do so
- Review total charges and optional product selections with the renter, identify all parts of the rental agreement at the close of the transaction and have renters initial the total estimated charges
- Careful attention to the procedures and policies is even more important when using electronic signature pads– courts pay attention (as seen in the next case)!

The next case illustrates the importance of carefully incorporating all parts of the rental agreement and making sure that the fine print is not too fine.

b. Folder Jackets, Font Sizes, and Arbitration. The U.S. District Court for the Northern District of California has spelled out exactly how counter practices and the way rental agreements are drafted can really determine what happens if a dispute ensues down the line. In *Lucas v. Hertz Corporation*, 2013 U.S. Dist. LEXIS 86140, it meant that the plaintiffs would be compelled to travel all the way from California to Costa Rica to resolve their differences with Hertz!

After renting a car from Costa Rica Rent a Car (a licensee of Hertz Corporation) in the city of Alajuela, Mr. Martin and his traveling companion, Ms. Lucas headed to the home of the U.S. Ambassador to Costa Rica to attend a social gathering. Once inside the gated property, Mr. Martin headed down a steep driveway intending to park near the house. Instead, the brakes on the rental car failed and he ended up parking "in" the ambassador's house, crashing the car into

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the wall. Both Mr. Martin and Ms. Lucas were injured. After Mr. Martin and Ms. Lucas filed a claim against Hertz for strict liability and negligent maintenance in U.S. Federal District Court in California, Hertz countered that the rental agreement required the parties to arbitrate in Costa Rica. The court in this case agreed with Hertz and sent the parties packing for a return trip to Costa Rica based on its ruling that the arbitration clause in the rental agreement was a valid part of the contract. The court based its decision on several points, including:

1. The Folder Jacket is Part of the Rental Agreement – The arbitration clause of the rental agreement in this case was located on the paper folder jacket that should have been given to Mr. Martin at the rental counter. Mr. Martin said he never got the jacket (or if he did it was after the fact) and did not clearly agree to the arbitration provision in the agreement. The court noted that, regardless of what actually happened at the counter, "Mr. Martin signed the car rental agreement that included language stating that he read and accepted the terms and conditions as set forth in the folder jacket." Since "the car rental agreement specifically referenced the folder jacket … and required Mr. Martin to acknowledge that he read and understood them" whether or not he ever had them in his hand did not matter. The court sided with Hertz and found that arbitration agreement was incorporated by reference into the car rental agreement.
2. An Agreement Compelling the Parties to Arbitrate Could Be Unenforceable if it was "Hidden" in the Terms and Conditions – In their final attempt to keep this case in court in California, rather than be subject to the rules of a Costa Rican arbitration, plaintiffs argued that the arbitration clause is "unconscionable." To succeed on such a claim, they had to prove that the arbitration clause was unfair to enforce BOTH in its form and its substance. The U.S. District Court actually agreed with the plaintiffs regarding the form of the clause. The Court found that the fact that the 3000 - 4000 words on the folder jacket were in all caps and very difficult to read resulted in the arbitration clause being "hidden in the prolix," which rendered the form of clause "moderately unconscionable." Unfortunately for plaintiffs, they could not surmount the second hurdle on this argument with regard to the substance. On this point, the court found that a line of cases that interpreted the Federal Arbitration Act dictated that the language in the clause was fair and square. So, the parties were headed back to Costa Rica.

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PRACTICE TIP:

- Carefully define "Agreement " when using multi-part rental documents, clearly identify the separate documents, and ensure that the definition is clear in the signature authorization block (for both manual and electronic agreements)
- Give the renter the opportunity to read pre-printed forms (that are not separately signed) before signing the signature page.
- Minimize the use of bold-faced, capitalized type and avoid condensing the type. Otherwise, the document will be difficult to read, and the special disclosures will no longer be highlighted.

The following shows that at least one state is moving in to the 21st century and understands that existing law does not always contemplate or even apply to changed practices.

c. California Driver's License Inspections. As of January 1, 2013, rental companies in California are **not** required to inspect the license of a rental if the rental is subject to the terms of a membership agreement that allows the renter to gain physical access to a car without a key through use of a code, key card, or by other means that allow the car to be accessed at a remote location or at a business location of the rental company outside of that location's regular hours of operation. *Cal Civ Code § 1936.5.* California also amended the previous requirement that a counter representative compare a renter's driver's license signature with the renter's signature at the time of rental. As of January 1, 2013, rental companies may either compare signatures or the driver's license photograph with the renter's appearance. *Cal. Veh. Code §§ 14604, 14608(b).*

II. Charges and Counter Practices

Claims that rental companies have "double standards" for a variety of practices ranging from refueling requirements to optional roadside assistance as described in both a recent blog by Christopher Elliott and an article in the *Atlanta Journal-Constitution* are nothing new for the industry. The typical consumer complaint is that "unsuspecting" renters are victims of "common rip-off fees that the car-rental agencies like to push." *See* Clark Howard, "Be on the Lookout for Hidden Rental Car Fees," *Atlanta Journal-Constitution* (November 15, 2012). As noted above, the use of electronic agreements, Internet reservations, and other technological innovations requires rental companies to be more vigilant about implementing sales and disclosure practices to ensure that all fees are fully disclosed to renters. At the same time, it is

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important to keep in mind a few principles that likely will always apply to rental transactions as further described below:

a. Additional Fees for Optional Items

i. ZipCar's Fee Structure Challenged Again. In *Blay v. ZipCar* (716 F. Supp. 2d 115 (D. Mass. 2010), the U.S. District Court for Massachusetts considered and dismissed Ryan Blay's claims against ZipCar for unfair trade practices based on ZipCar's late fees, lost and found policy, parking ticket administrative fees, and telephone reservation fee. A subsequent case challenging only ZipCar's late fee policy yielded a similar result. In *Reed v. ZipCar*, 2012, 883 F. Supp. 2d 329 (D. Mass. 2012), Naomi Reed argued that ZipCar's late fee policy of charging an escalating fee beginning at $50, regardless of whether another reservation was booked was an unfair, unconscionable penalty that violated the Massachusetts Consumer Protection Act. Ms. Reed claimed that the fact that competitors charged lower late fees than ZipCar proved that the $50 fee was not proportional to ZipCar's harm. Ms. Reed also contended that ZipCar could implement a new procedure to automatically extend a late renter's rental when there is no reservation immediately after the scheduled return. The court rejected these claims and granted ZipCar's motion to dismiss based on its finding that it is difficult to determine the precise cost of late returns, including reputational harm, to ZipCar. The court further opined that Ms. Reed already had a remedy -- if the competitors offered better deals than ZipCar, she could terminate her relationship with ZipCar and join another company's program.

PRACTICE TIP: Both *ZipCar* decisions are based on the principle that additional fees that a renter could have easily avoided paying by taking an alternative action are permissible so long as the fees are reasonable.

ii. **Refueling Fees**. In *Salling v. Budget Rent-A-Car*, 672 F.3d 542 (6th Cir. 2012), a renter was charged a refueling fee of $13.99 even though he returned his car with a full tank of gas. At the conclusion of the rental, he paid all charges (including the refueling fee). He then attempted a class action case against Budget based on claims of breach of contract and fraud arising from the refueling fees. Budget argued that because the renter drove under 75 miles, he was required to return the car with a full fuel tank, as well as to submit a receipt to Budget. Because Salling failed to produce the receipt, he was assessed a refueling fee. The U.S. Court of Appeals for the 6th Circuit upheld the district court's decision and did not rule on the merits because of the "voluntary payment" doctrine. In other words, because the renter voluntarily paid the refueling fee, he was foreclosed from challenging it.

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Although *Salling* was decided in favor of the rental company, the question of the refueling policy is still open. Take note that the New York legislature once again has a pending bill that would limit refueling fees to the highest retail rate within a half-mile radius of the rental location. *See* N.Y. S.B. 452.

PRACTICE TIP: Pre-paid fuel options and refueling fees must be fully and clearly disclosed to renters. In addition, the rates used should be reasonably related to the cost of fuel and refueling to avoid claims of "price gouging." Stay tuned on additional court challenges.

b. Counter Practices and Training - Rental Agent's Misunderstanding and Faulty Explanation of Optional Products Can Negate Express Language in Policy Summary. In *Republic Western Insurance Co. v. West, et al.* (2012 Ky. App. Unpub. LEXIS 775), the Court of Appeals of Kentucky affirmed a jury decision in favor of renters who claimed that a U-Haul agent had negligently represented that a personal effects coverage ("PEC") product would cover them for theft of their possessions. The PEC policy specifically excluded loss due to theft or burglary, and the renters admitted that they had not read the policy summary.

U-Haul and Republic West (the insurer) argued that they could not be responsible for negligent representation about the policy coverage because the renter had insurance documents that clearly explained the coverage and exclusions, and therefore could not have justifiably relied on the misrepresentation. Citing a 1990 case, the court noted that, "an 'insured's failure to read and comprehend the policy has no legal effect: it may not serve as a sword for the insured nor as a shield for the agency.'" (*Republic Western Insurance Co. v. West, et al.*, 2012 Ky. App. Unpub. LEXIS 775 (citing *Grisby v. Mountain Valley Ins. Agency, Inc.*, 795 S.W. 2d 372 (Ky. 1990)). The court found that the issue of whether the renters justifiably relied on the misrepresentation was one for the jury, and was supported by substantial evidence, including the fact that the rental agent had worked as a U-Haul agent for 24 years, had never received training on the PEC product, and had never read any insurance literature during his tenure.

PRACTICE TIP: The *Republic Western* case illustrates the need for rental companies to develop, implement, and document training procedures to ensure that all rental agents have a basic understanding of the optional products and services offered. In addition to being a best practice, implementation of a training program is generally a requirement of state limited license statutes.

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III. Toll Collection Practices

New technology developed by third parties to track and pay for tolls and toll violations can substantially ease the administrative burden on rental companies by enabling them to shift collection efforts to the third parties. At the same time, charges of unfair practices and "toll conspiracies" have been leveled against the rental industry based on renter's concerns about lack of disclosure of third party vendors, toll fees payable, daily service or convenience fees for use of the toll services, and post-rental charges to the renter's credit card account. These complaints have also resulted in litigation and legislative activity as illustrated below.

- **More Class Action Activity in New Jersey Regarding Electronic Toll Services.** In, *Mendez v. Avis Budget Group*, 2012 U.S. Dist. LEXIS 50775 (D. N.J. 2012), the U.S. District Court for the District of New Jersey considered claims similar to those in *Doherty v. Hertz, et al.* based on automatic toll system, "e-Toll" used in connection with Avis Budget's rentals. Jose Mendez reserved a vehicle for use in Florida with his credit card from his home state of New Jersey. The "Rental Agreement" that Mr. Mendez signed was comprised of a pre-printed rental document jacket ("Rental Jacket") setting forth the "Terms and Conditions" applicable to the rental; a "Rental Document" and a "Return Record." Section 5 of the Terms and Conditions (Rental Charges) obligated the renter to pay for all tolls incurred during the rental and "all related fees, charges and penalties." Section 21 of the Terms and Conditions (Collections) set forth the actual toll fees and included an authorization to share credit and debit card information with third parties.

Neither the Rental Agreement nor any other document signed by Mr. Mendez stated that the specific vehicle he rented was pre-equipped and pre-enrolled with e-Toll, and Highway Toll Authority ("HTA") was not identified by name anywhere on the Rental Agreement. During the rental, Mr. Mendez passed through a toll lane in Orlando, Florida at some point. When he returned the car, he was advised that there were no additional charges. About a month after the rental, however, Mr. Mendez received a Visa credit card statement with a charge for $15.75, which included $0.75 for a toll charge and a $15 convenience fee payable to HTA.

Mr. Mendez filed a class action complaint against Avis-Budget and HTA based on the claim that he was not informed – before, during, or after the rental – that: his rental car might be equipped with an automated toll device; his rental car was pre-enrolled and activated for the toll service; renting a car from Budget would automatically result in fees payable to Avis Budget or the third party; and that he would be required to pay more than the actual toll charge incurred rather than the non-discounted rate. He also claimed that Avis-Budget provided his

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credit card information to the third party without his consent. Mr. Mendez argued, in part, that the charges described in the Terms and Conditions did not apply in his case because they were not included in the "Rental Charges" section. As such, Mr. Mendez claimed that those charges would only apply if he had failed to pay his toll fees.

The court denied Avis-Budget's motion to dismiss and found that Mr. Mendez had sufficiently stated claims for: (1) breach of contract based on the argument that the Rental Agreement did not permit Avis-Budget to charge: administrative fees unless the renter failed to pay tolls; toll fees in excess of the amount actually paid; or fees on days that he did not use the electronic toll payment service since those provisions were included in the "Collections" section of the Rental Agreement rather than the "Rental Charges" section; (2) breach of implied covenant of good faith and fair dealing based on Avis-Budget's alleged lack of notice regarding the fees, failure to specify the fees in the right part of the rental agreement, representation that no additional charges were owing upon return of the vehicle; and failure to inform him upon pick-up of the rental vehicle of the fees; and (3) violations of the New Jersey Consumer Fraud Act ("NJCFA"). (The court denied Avis-Budget and HTA's motion for reconsideration of the denial of the motion to dismiss the NJFCA and found that New Jersey law was properly applied even though the rental took place in Florida. *Mendez v. Avis Budget Group*, 2012 U.S. Dist LEXIS 75227).

PRACTICE TIP: Rental companies must fully disclose the relationship between the rental company and third-party vendors, including whether rental and credit card information will be shared with the third party – preferably on the front page of the agreement and signature block. In addition, rental companies must either accurately integrate the contracts of multiple vendors into the rental agreement, or permit the other vendors to independently contract with renters.

- **New Jersey Legislature Takes Action.** A new bill regulating toll collection transponders in rental vehicles (for rentals of 90 days or less) was introduced in the New Jersey Assembly on April 4, 2013. A. 3968 would make it unlawful for rental companies to rent vehicles containing electronic toll transponder without disclosing: (a) that the vehicle contains the transponder, along with the "precise information" used to identify the specific transponder; and (b) whether the renter will be responsible for charges incurred via the specific electronic transponder." Violations of the bill would be considered unlawful practices under the New Jersey Consumer Fraud Act subject to fines of $10,000 - $20,000 per offense, as well as cease and desist orders, punitive damages, and treble damages to injured parties.

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IV. **Other Recent Developments**. Other recent developments during the past year include:

a. **Discrimination**

- Offering a reduced rate to groups based on gender, race, ethnicity, religion, sexual orientation or another class protected by federal or state law may be subject to claims of discrimination – even if the alleged discriminatory practice favors a traditionally disadvantaged group. *Evenchik v. Avis Rent A Car System*, 2012 U.S. Dist. LEXIS 132561

- Practices, such as requiring a credit check or income verification of prospective renters who do not have a major credit card, are not discriminatory as long as they are applied equally to all similarly-situated customers. *Petrovic v. Enterprise Leasing Company of Chicago*, 2013 U.S. App. LEXIS 6271

b. **Pending Car-Sharing Legislation**. The car-sharing industry is expanding, and state legislatures are taking note. Hawaii and Florida may join California, Oregon and Washington with special laws for the car-sharing industry.

- Hawaii has two car-sharing related bills pending as of April 2013 – H.B. 551 would pro-rate the rental motor vehicle surcharge tax for car-sharing organizations at 12.5 cents per hour for rentals of less than six hours and at existing per day rates at or longer than six hours; S.B. 726 would exempt car-sharing organizations from the rental vehicle surcharge tax.

- Florida also has two car-sharing related bills pending as of April 2013 - FL H.B. 647 and S.B. 140 would exempt car-sharing services from rental car sales and use tax surcharges.

c. **Negligent Entrustment –Reaffirming an Old Principle – but Beware**

- In *Ferraro v. Reid*, 2012 N.Y. Misc. LEXIS 4709, the Supreme Court of New York made it clear that rental car companies in New York are not required to conduct any more research on their customers' driving records than verifying the expiration date and photograph on the driver's license before permitting them to rent.

- In *Short v. Ross, et al.*, 2013 Conn. Super. LEXIS 422, the Connecticut Superior Court reaffirmed the principle that Connecticut does not require a rental company to investigate a prospective renter's driving history or proposed usage of a rental vehicle. Despite this ruling, the Superior Court denied the rental company's motion to strike the claim for negligent entrustment based on an allegation that the rental company had actual knowledge that the renter intended to use the vehicle in an unsafe environment.

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