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GENERAL SESSION: LEGAL AND LEGISLATIVE UPDATE

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OVERVIEW

During the past year, several cases affecting the vehicle rental industry emphasized the importance of always providing clear and meaningful disclosure to renters, as well as paying attention to detail in drafting agreements and interacting with customers. The cases covered provide insight into issues encountered by the drafters of rental agreements and customer service agents, including Internet reservations, electronic agreements and signature pads, rental agreement content and format, and credit/debit card and deposit practices.

These are their stories . . .

I. Reservation Confirmations and Electronic Signature Pads

McKinnon v. Dollar Thrifty Auto. Group, Inc., No. 12-4457(SC), 2013 U.S. Dist. LEXIS 93882 (N.D. Cal. 2013)

On July 3, 2013, a federal judge ruled that a class action brought against Dollar Thrifty Automotive Group (DTAG) case may proceed to trial. In *McKinnon v. Dollar Thrifty Auto. Group, Inc., No. 12-4457(SC), 2013 U.S. Dist. LEXIS 93882 (N.D. Cal. 2013),* disgruntled renters Sandra McKinnon and Kristen Tool alleged that DTAG violated several California and Oklahoma consumer protection statues and breached their reservation "contracts" through an alleged nationwide scheme of "providing low reservation rates and then tricking customers into paying more [by adding optional products, like CDW] once they pick up their cars" in part by using electronic signature pads and "rely[ing] on the hustle and rush of airport to send their customers away without having reviewed their rental charges."

The court granted DTAG's motion to dismiss as to McKinnon for alleged violations of the California vehicle rental law, Cal. Civ. Code § 1936 (Deering), and the California False Advertising Law. Although McKinnon made her reservation online in California, the actual rental transaction occurred in Oklahoma. Therefore, the court found that Cal. Civ. Code § 1936 is inapplicable because Cal. Civ. Code § 1936 does not apply extraterritorially. The Court further found that Ms. McKinnon's broad complaint that DTAG engaged in "deceptive marketing and advertising in the state of

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California" was not specific enough to state a claim. **Note:** The opinion seems sympathetic to the argument that application of the statute "arguably does not match the expectations of the modern customer who probably begins the car-rental process online. But only the California legislature, not the Court may properly address this issue". (emphasis added).

The court denied DTAG's motion to dismiss on all other counts. The court determined that reserving a car in California based on a promised price and being "defrauded by a widespread scheme" to trick customers at the rental counter could be the basis of claim for an unfair and fraudulent business practice under California's Unfair Competition and Consumers Legal Remedies Laws. The court held that these California laws apply because DTAG's alleged conduct was part of a nationwide scheme and was not "'slight and casual.'"

The court further determined that confirmation of an online reservation ("Confirmation") was a contract of adhesion, and that DTAG's "refusal to honor the Confirmation in any way, and in fact to convince Plaintiffs of the price's validity and then alter it secretly, was a breach." The court also found that DTAG's alleged actions breached the implied covenant of good faith and fair dealing with respect to the Confirmation. Notably, the court did not discuss the effect of the actual rental agreement on the Confirmation, and whether the rental agreement would supersede the Confirmation.

PRACTICE TIPS: 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
- Include Disclaimers on Reservation Documents that clearly indicate that reservation fulfillment is subject to: (a) availability of vehicles; (b) renter meeting all qualifications at time of rental (including presentment of a valid driver's license); and (c) final rental agreement will be controlling
- 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!

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II. Rental Agreement Drafting

A. Incorporation by Reference

State ex rel. U-Haul Co. v. Zakaib, 752 S.E.2d (W. Va. 2013)

After three renters ("Renters") filed suit against U-Haul, alleging improper charges, U-Haul attempted to enforce an arbitration clause contained in the standard Rental Contract Addendum ("Addendum"). U-Haul alleged that the each Renter's complete rental agreement consisted of two separate documents: (1) a one-page, signed Rental Contract; and (2) the unsigned Addendum, which was a multi-color pamphlet made of cardstock and folded to resemble an envelope or folder. One of the outside panels of the Addendum folder included the title, "RENTAL CONTRACT ADDENDUM" followed by the line, "DOCUMENT HOLDER." Other outside panels referenced additional terms and conditions and instructions for returning equipment, along with advertisements for additional services offered by U-Haul.

The following statement appeared before the signature line of the Rental Contract: "I acknowledge that I have received and agree to the terms and conditions of this Rental Contract and the Rental Contract Addendum." Renters, however, did not have an opportunity to read the Addendum until **after** signing the Rental Contract (either manually or electronically). At that point, a rental agent would fold a copy of the signed Rental Contract in thirds and place it inside the Addendum folder. Then, the rental agent would hand the Addendum and Rental Contract to the customer, along with the keys to the vehicle, which was the first time that the renter saw the Addendum. U-Haul argued that the statement referencing the Addendum was sufficient to incorporate the Addendum and the Rental Contract into one agreement by reference – despite the fact that the Renters had not seen the Addendum before signing the Rental Contract.

The court found that parties may incorporate by reference separate writings to create one agreement, but that a general reference in one writing to another document is insufficient to incorporate the other document into the final agreement. To uphold the validity of terms that are incorporated by reference, the court ruled that:

(1) the writing must make a clear reference to the other document so that the parties' acceptance to the referenced terms is unmistakable;
(2) the writing must describe the other document clearly, so that its identity may be ascertained beyond doubt; and
(3) it must be certain that the parties had knowledge of and agreed to the incorporated document so that the incorporation will not result in surprise or hardship

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Applying this standard to the facts here, the court concluded that the Addendum was not incorporated because both the pre-printed and electronic Rental Contracts (the "writing") contained only an insufficiently brief mention of the Addendum (the "other document"), with no mention at all of the arbitration clause. The court also noted that the reference to the Addendum in the Rental Contract was too general and did not provide enough detail to ensure that customers were aware of the Addendum and its terms. In addition, the court found that the design of the Addendum looked more like a document folder advertising U-Haul services than a legally binding contractual agreement, which compounded the flaws of the insufficient description of the Addendum in the signature line. Finally, the court noted that U-Haul's practice of providing customers a copy of the Addendum **only after** the rental agreement had been signed was "most troubling." ***Note:*** *The U.S. District Court for the Northern District of California previously examined similar facts and found that two separate documents were incorporated by reference because the renter signed an agreement that stated that he agreed to the terms in both documents. (Lucas v. Hertz, 875 F. Supp. 2d 991 (N.D. Cal. 2012))*

***PRACTICE TIPS*:**

- When using multi-part documents, carefully define "Agreement" in the terms and conditions; ensure that the definition is clear in the signature authorization language; and clearly identify the separate documents by title, page number, or similar means;
- Give the renter the opportunity to review pre-printed forms (such as document jackets) that are included in the overall rental agreement, but that will not be separately signed, **before** the renter is asked to sign anything;
- For web-based or other paperless transactions, ensure that the process complies with the requirements of the Uniform Electronic Transactions Act (UETA) (or other similar state law) and the federal Electronic Signatures in Global and National Commerce Act (ESIGN). In addition, use either an "I agree" or other click-to-accept button that links to the electronic terms before permitting a potential customer to complete a transaction.

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B. <u>State-Required Disclosures: Font Size and Placement of Text</u>

St. Paul Fire & Marine Ins. Co. v. Hertz Corp., 31 Mass. L. Rep. 603 (Mass. Super. Ct. 2013)

In *St. Paul*, St. Paul Fire and Marine Insurance Company ("St. Paul") filed a declaratory judgment action to clarify its obligations concerning an auto accident in Boston involving a car rented by Luc Clement ("Clement") from Hertz at the Providence, Rhode Island Airport. Eric Maki ("Maki"), the driver of the other car involved in the accident suffered personal injuries. Clement's employer had an insurance policy with St. Paul, and both St. Paul and Hertz claimed that the other was obligated to provide primary liability coverage for Maki's injuries. Both Hertz and St. Paul cited the "Rental Agreement" that Clement had signed at the time of rental and Rhode Island law in support of their claims.

The Rental Agreement included the following statement on the fourth and final page of a long strip of paper:

> "If You have declined the optional Liability Insurance Supplement (LIS), Par. 10(b) of the Rental Terms will apply to this rental. Any valid collectible insurance or self-insurance that provides coverage or liability protection to You or to an Authorized Operator for any third party liability claims shall be primary and any insurance or self-insurance that provides coverage or liability protection to Hertz for any third party liability claims shall be excess."

Paragraph 10(b) of the Rental Terms and Conditions, which appeared on a document folder, also warned the renter that failure to purchase the Liability Insurance Supplement would cause the renter's insurance to be primary and explained the consequences in greater detail. Under Rhode Island law, a rental company may shift primary insurance coverage to the renter as long as the rental company includes a disclosure notifying the renter of the shift. The disclosure must be in at least 10-pt type on the "face" of the rental agreement. (*Note: Hertz argued that Massachusetts law should apply since the accident occurred in Boston – and Massachusetts does not require liability-shifting language to appear on the rental agreement at all. The court found that Rhode Island law applied since Rhode Island is the state where the rental occurred, the rental car was registered in Rhode Island, and Rhode Island had an interest in ensuring that drivers who rent cars in Rhode Island were notified of the liability shift.)*

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Hertz provided evidence showing that the company's computer system is internally programmed to print the liability-shifting language in 10-pt type. St. Paul submitted a printout of a Google search showing the conversion of computer points to millimeters in an attempt to show that the Hertz disclosure did not meet the Rhode Island law requirements. Hertz countered by typing the letter "x" in 10-pt font in several different font types to illustrate the variation in print size among font styles. The court rejected St. Paul's argument and found that the Hertz disclosure met the 10-pt size requirement.

On the other hand, after reviewing several other cases and Black's Law Dictionary, the court interpreted the word "face" literally, finding that the Rhode Island statute required the shifting language to appear on the **first page** of the agreement. Since the disclosure appeared on the fourth and final page of the Rental Agreement, the court held that it was ineffective to shift Hertz's responsibility from primary to excess in this case.

PRACTICE TIPS:

- Familiarize yourself with your state's rental agreement requirements
- Confirm that state-required language meets all font requirements (size, style, special characters, etc.)
- If the state does not specify a font size/type, we recommend using 10-pt bold or something else that is distinctive
- Include all state-required disclosures on the first page of the rental agreement – even if the state does not specify where to include it

III. Credit Card Practices and Damage Authorization

Capital One Bank U.S.A. v. Roman, No. A-6382-11T2, 2013 N.J. Super. Unpub. LEXIS 1761 (N.J. Super. Ct. App. Div. 2013)

Carmen Roman rented a car from a Budget franchisee (Budget Aguadilla) in Aguadilla, Puerto Rico in 2006. When she rented the car, her Capital One credit card was initially denied because it had only a $500 limit, so Carmen used a Commerce Bank credit card with a higher limit, which was accepted for the rental. During the rental, Carmen permitted her brother, Israel, to drive the car even though he was not an authorized driver under the rental agreement. While Israel was driving the car, he had an accident that caused significant damage to the car. Carmen's insurance denied the damage claim because she was not driving at the time of the accident.

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Budget sought reimbursement for the damage to the car from Carmen, and she agreed via letter to pay for the damage. Budget Aguadilla then charged $1,300 to Carmen's Commerce Bank card and almost $12,000 to her Capital One card (which had originally been denied). When Carmen fell behind in monthly payments on the $12,000 balance, Capital One sued her. Carmen counterclaimed against Capital One (and added Budget corporate to the lawsuit) for fraud and breach of contract based on an allegation that her Capital One credit card was wrongfully charged without her permission. The trial court dismissed Carmen's claims against Budget; however, the New Jersey appellate court reversed and noted that the fact that Budget charged almost $12,000 to Carmen's Capital One card – after initially rejecting it because of the low credit limit – raised "more than a scintilla" of evidence to support her claims.

PRACTICE TIPS:

- Remember that some states:
    - Limit the amount of a deposit or reserve
    - Prohibit damage deposits
    - Prohibit requiring a credit card as a condition of rental
- Do not process a credit card or debit card reserve or payment without disclosing the amount to the renter and obtaining the renter's consent.
- Let the renter know that processing the release of a hold or return of funds may take as long as 15-21 days, depending upon the financial institutions' policy.
- **Always** obtain a separate credit card authorization from a renter before charging for damages
    -

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