

# **TRAVEL LAW: RENTAL CAR COMPANIES: BEHAVING BADLY**

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## **REVISION #4**

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Travelers rent cars for short periods of time from rental car companies which, with the exception of the recently created Zipcar concept [and in sharp contrast to the "pro-consumer" sentiments expressed at this year's Car Rental Show [see *Not just renting cars-providing mobility and mobility keeps the world moving* [ETN (April 7, 2014) ("future innovation and growth in the car rental industry...depend on staying in close touch with the changing wants and needs of the consumer")]] have, on occasion, used very questionable business tactics [*Travel Law* § 3.04[4]].

### **Deceptive Business Practices**

Over the last 25 years or so rental car customers have alleged a variety of deceptive and unfair business practices by some rental car companies to include (1) excessive charges for

collision damage waivers (CDW) [see *Weinberg v. The Hertz Corp.* (\$1,000 deductible on insurance which consumer could circumvent by paying \$6.00 per day for (CDW) which extrapolated over one year amounted to \$2,190 for \$1,000 worth of collision damage insurance allegedly unconscionable); *Truta v. Avis Rent A Car System, Inc.* (\$6.00 per day CDW charge that on an annualized basis, the rates charged were more than double the amount of "insurance" provided and allegedly were unreasonably high)] and failing to disclose that CDW may duplicate the renter's own insurance [see *Super Glue Corp. v. Avis Rent A Car System, Inc.*], (2) overcharging in providing replacement gasoline after a rental car is returned [see *Roman v. Budget Rent-A-Car System, Inc.* (\$5.99 per gallon); *Oden v. Vanguard Car Rental USA, Inc.* (\$4.95 per gallon)], (3) excessive charges for personal accident insurance (PAI) [see *Weinberg v. The Hertz Corp.* (allegation that a daily charge of \$2.25 for (PAI) was allegedly excessive and unconscionable since the daily rate equaled an annualized rate of \$821.25)], (4) excessive charges for the late return of a vehicle [see *Boyle v. U-Haul International, Inc.*, ("There is a common pattern and practice of charging for an extra 'rental period' despite the absolute failure of any contractual terms to define the rental period, the clear implication in extensive advertising that the vehicle can be rented for a set rate for an entire day and the failure of any contract document to establish any rate

for 'coverage' due to failure to return the equipment at the designated time"), (5) adhesion contracts [see *Votto v. American Car Rental, Inc.* (car rental company can not limit vehicle damage waiver with clause on reverse side of contract; "The agreement in this case is a classic example of a contract of adhesion (which) 'involve[s] contractual provisions drafted and imposed by a party enjoying superior bargaining strength-provisions which unexpectedly and often unconscionably limit the obligations and liability of the party drafting the contract'")], (6) imposition of improper surcharges [see *Cotchett v. Avis Rent-A-Car System* (consumers challenge the legality of one dollar surcharge imposed on all rental vehicles to cover parking violations for which rental car companies were being held responsible under recently enacted city ordinance)], (7) overcharging for the cost of actually repairing damaged vehicles [see *People v. Dollar Rent-A-Car Systems, Inc.* (lessor charged retail prices for wholesale costs of doing repairs to damaged vehicles by using false invoices)], (8) illegal sale of insurance [see *People v. Dollar* (rental car company liable for false and misleading business practice; \$100,000 civil penalty assessed); *Truta*, supra (CDW is not insurance)], (9) unconscionable penalty and lease provisions [see *Hertz Corp. v. Dynatron*], (10) unconscionable disclaimers of warranty liability [see *Hertz Corp. v. Transportation Corp.*], (11) undisclosed out-of-state drop off charges [see *Garcia v. L&R*

*Realty, Inc.* (customer not required to pay \$600 fee imposed after rental car returned to out of state location; attorneys fees and costs awarded)], (12) imposition of phony taxes [see *Commercial Union Ins. Co. v. Auto Europe* (customers alleged that they were forced to pay "a foreign 'sales tax' or 'value added tax'...when no such tax was actually due and (car rental company) retained such 'tax'")], (13) improper CDW coverage exclusions [see *Danvers Motor Company, Inc. v. Looney* (exclusion not enforced)], (14) failure to reveal avoidable charges [see *Schnall v. Hertz Corp.* ("Authorization Of avoidable charges for optional services hardly amounts to permission to mislead customers about such charges")], (15) failure to disclose license and facility fees [see *Rosenberg v. Avis Rent A Car Systems, Inc.* (customers allege that Avis "'engaged in a pattern and practice of deceiving customers by charging a \$.54 per day vehicle license fee and a \$3.95 per day customer facility fee charge' without disclosing the charges'")] and (16) unfair claims procedures [see *Ressler v. Enterprise Rent-A-Car Company* (alleged improper handling of a claim under a (PAI) policy)].

### **Hotwire Not So Hot**

Implicit in many of these allegedly deceptive business practices are claims of misrepresentations of material fact. For

example, in a 2013 case, *Shabar v. Hotwire, Inc. and Expedia, Inc.*, a rental car customer alleged that he "used Hotwire's website to rent a car from a car rental agency at the Ben Gurion airport in Tel Aviv, Israel. Shabar alleges that his contract with Hotwire set out, among other terms, a daily rental rate (\$14), a rental term (5 days), a list of the estimated taxes and fees (\$0) and an estimated trip total amount (\$70). Shabar alleges that when he picked up the car, the rental agency required him to pay the \$70.00 estimated price Hotwire had stated, plus an additional \$60.00 for mandatory third-party liability insurance and \$20.82 in taxes. In total Shabar alleges he "paid \$150.91, rather than \$70.00 estimated by Hotwire". In refusing to dismiss the *Shabar* complaint the Court ruled that "Shabar sufficiently alleges that Hotwire's affirmative statement pertaining to the total estimated price was false or misleading to a reasonable person. First, the estimate was false because Hotwire intentionally omitted significant and mandatory additional charges readily available and which it knew Shabar would have to pay to rent the car. Second, the price quoted for estimated taxes and fees was false because Hotwire knew that these costs would not be \$0.00".

## **A Cozy Relationship**

Perhaps, the most alarming example of the alleged cooperation between some state governments and the rental car industry to the detriment of car rental customers is set forth in the California case of *Shames v. Hertz Corporation* 2012 WL 5392159 and its Nevada analogues *Sobel v. The Hertz Corporation* 291 F.R.D. 525 and *Lee v. Enterprise Leasing Company*, 2012 WL 3996848.

## **The California Case**

As noted in *Shames* "In 2006, the passenger rental car industry (RCD) proposed changes to California law which were subsequently enacted...In exchange for this increased funding (payments to California Travel and Tourism Commission (the Commission)) the RCD were allowed to 'unbundle' fees charged to customers and itemize such fees separately from the base rental rate. Significantly, the adopted changes allowed the companies to 'pass on some or all of the assessments to customers'. Plaintiffs allege this led to the imposition of two specific fees on leisure rental car customers...a 2.5% tourism assessment fee was added to the cost of a car rental which, in turn, helped fund the Commission. Plaintiffs allege that the Commission then colluded

with RCDs fixing rental car prices by passing on the 2.5% tourism assessment fee to customers. Second, the RCDs 'unbundled' the already-existing airport concession fee charged to customers to pay airports for the right to conduct business on airport premises...9% of the rental price...renters (allege they) paid a higher total price for the rental of a car at California airports than they would have otherwise".

### **The Nevada Cases**

While the California *Shames* class action was settled the Nevada class action [*Sobel v. Hertz Corporation*] involving the pass along of "airport concession recovery fees" went to trial on, *inter alia*, whether this pass along practice violated Nev. Rev. Stat. (NRS) § 482.31575 and Nevada Deceptive Trade Practices Act (NDTPA) with "Over \$42 million...at stake". In certifying the class and finding statutory violations the Court noted that "The rental car industry of the late eighties was embroiled in an intense price war, a war in which '[car rental] companies ha[d] been springing traps of additional charges on unsuspecting renters and have used the various advertising media to so'". The Court also found that "in order to recover under the remedial statute for violation of the rate statute, Plaintiffs need not demonstrate a reliance or reliance-type element. Rather,

Plaintiffs must show that (1) Hertz violated the rate state statute and that (2) this violation caused an unlawful payment to pass from Plaintiffs to Hertz". The Court provided for an award of restitution and prejudgment interest at the statutory rate. [see also *Lee v. Enterprise Leasing Company*].

### **Zipcar Concept**

Although Zipcar has been the subject of, at least, two customer class actions [see *Reed v. Zipcar, Inc.* (challenge to late fee policy) and *Sigall v. Zipcar, Inc.* (challenge to failure to submit damage repair documentation), both were dismissed). Here's how it works. Once approved by filing out an application form, "Zipsters" may reserve Zipcar vehicles or 'Zipcars' at particular locations by the hour or the day. The rental price includes the costs of gas and insurance. When the member arrives at the vehicle, the Zipcar recognizes the member's Zipcard and unlocks the doors. At the end of the reservation period, the member must return the Zipcar to its designated parking space and use the Zipcard to lock the doors". The Zipcar concept is quite interesting and may serve as an ethical model for the rest of the rental car industry

## Conclusion

The last 25 years or so have highlighted the questionable marketing practices of some rental car companies. Whether this type of behavior will ever change without vigorous federal and state regulation is problematic, at best [see 7 Rental Car 'Gotchas' and How to Avoid Them at [www.moneytalksnews.com](http://www.moneytalksnews.com) (March 26, 2014)]. Whether the Zipcar concept has wider application and can serve as an ethical model for rental car companies behaving badly remains to be seen. Of course one might well argue that the "unbundling" and often nondisclosure of fees and surcharges is here to stay as evidenced by the charging of a host of fees for previously thought to be "bundled" services by airlines and hotels [see Litvan, *Transparent Airfares? Anything But, Consumer Groups Say*, [www.bloomberg.com/news](http://www.bloomberg.com/news) (April 21, 2014) ("House Transportation and Infrastructure Committee unanimously approved a bill April 9 that would allow carriers to resume their former practice of most prominently featuring base fares rather the total price. Taxes, baggage fees and other costs that can make up a substantial portion of what consumers pay can be displayed through links or pop-ups")].

Justice Dickerson been writing about *Travel Law* for 38 years including his annually updated law books, *Travel Law*, Law Journal

Press (2014) and *Litigating International Torts in U.S. Courts*, Thomson Reuters WestLaw (2014), and over 300 legal articles many of which are available at

[www.nycourts.gov/courts/9jd/taxcertatd.shtml](http://www.nycourts.gov/courts/9jd/taxcertatd.shtml).

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