

RENTAL CAR COMPANIES BEHAVING BADLY

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The recent decision of the 11th Circuit Court of Appeals in *Venerus v. Avis Budget Car Rental, LLC*, No. 16-16993 (January 25 2018) reminds me once again, after 40 years of writing about travel law that the worst, by far, violators of consumer rights in the travel industry are some U.S. rental car companies. From the 1987 consumer class action, *Weinberg v. The Hertz Corp.*, 116 A.D. 2d 1 (1st Dept.), aff'd 69 N.Y. 2d 979 (1987) (excessive gasoline charges; class certification granted; 2.8 million consumers) to the *Venerus* case and beyond, the Courts have had to deal with the consequences of misleading, deceptive, unfair and unconscionable marketing behavior of some U.S. rental car companies, typically within the context of nationwide class actions.

Nonexistent SLI/ALI: The Venerus Case

In *Venerus*, involving a class of foreign rental car insurance purchasers alleging, inter alia, breach of contract and violation of Florida Deceptive and Unfair Trade Practices Act, the 11th Circuit reversed the District Court's denial of class certification and

stated that "The case arises out of... Avis/Budget('s) business practice of selling Supplemental Liability Insurance or Additional Liability Insurance (SLI/ALI) to rental customers from countries outside the United States. Heather Venerus alleges...that Avis/Budget promised SLI/ALI coverage as a policy provided through Ace American Insurance Company (ACE) an insurer authorized to provide such coverage in Florida. Venerus alleges that despite Avis/Budget's contractual obligation to do so, neither an ACE policy nor any other SLI/ALI insurance policy was ever purchased for, or provided to, the foreign renters who purchased the optional coverage. Instead, Avis/Budget, which is not an insurance company, purported to insure the foreign renters itself with contractual liability coverage that had no policy or written terms. Lacking the authority to transact such insurance in Florida, Avis/Budget allegedly left the renters without the legally valid insurance coverage they were promised and had purchased". In addition the Court noted that "Avis/Budget does not dispute that it did not obtain SLA/ALI insurance policies from ACE".

Undisclosed E-Tolls: The Mendez Case

In Mendez v. Avis Budget Group, Inc., Civil Action No. 11-6537 (JLL) (D.N.J. November 17, 2017), a class action on behalf of consumers of rental car services whose rental cars "were equipped with and charged for use of, an electronic system to pay tolls known

as 'e-Toll'", the Court certified a nationwide class and noted that "Plaintiff alleges that before, during and after his rental...he was not advised that the vehicle: 1) could be equipped with an e-Toll device; and 2) was indeed pre-enrolled and activated for e-Toll (and further) that he was not informed that (his rental vehicle) was equipped with an e-Toll device, that he would be obligated to pay more than the actual toll charge incurred". During plaintiff's trip in Florida he was, unbeknownst to him, charged by his rental vehicle's e-Toll device \$15.75 which included the \$.75 toll and a "convenience fee" of \$15.00 "even though he was told...when he returned the vehicle that he had incurred no additional charges". See also: *Olivas v. The Hertz Corporation*, Case No. 17-cv-01083-BAS-NLS (S.D. Cal. March 18, 2018) (customers challenge administrative fees charged in connection with use of toll roads; mandatory arbitration clause enforced).

Unfair Currency Conversions: The Margulis Case

In *Margulis v. The Hertz Corporation*, Civil Action No. 14-1209 (JMV) (D.N.J. February 28, 2017), a class action on behalf of customers who rent vehicles abroad, the Court in resolving a discovery dispute noted that "Plaintiff...commenced this putative class action...alleging that Hertz is conducting a broad-ranging currency conversion scheme, labeled 'dynamic currency conversion' (DCC) to defraud its customers who rent vehicles abroad. Plaintiff

alleges that Hertz quotes customer rates for vehicle rentals without including any currency conversion fee, charges the fee directly to customer's credit card and then falsely claims the customer specifically chose the currency conversion and subsequent overcharge. Plaintiff claims the he was the victim of Hertz's DCC practices in connection with car rentals (in the United Kingdom and Italy) and alleges breach of contract, unjust enrichment, fraud and violations of New Jersey Consumer Fraud Act.

Undisclosed Frequent Flyer Fees: The Schwartz Case

In *Schwartz v. Avis Rent A Car System, LLC*, Civil Action Nos. 11-4052 (JLL), 12-7300 (JLL) (D.N.J. June 21, 2016) granted final approval of a proposed settlement [choice of cash or a 10 percent discount on future vehicle rentals] of a class action earlier certified [*Schwartz v. Avis Rent A Car System, LLC*, Civil Action No. 11-4052 (JLL) (D.N.J. August 28, 2014)] on behalf of a class of Avis customers [alleging breach of contract, breach of covenant of good faith and fair dealing and violation of New Jersey Consumer Fraud Act] who were charged a \$0.75 surcharge for earning frequent-flyer miles and other rewards by participating in Avis's Travel Partner Program. In granting class certification the Court noted that "Plaintiff argues that Defendants engaged in two different types of unlawful conduct: intentional omissions and unconscionable commercial practices... (by) knowingly omitt(ing) the fact that Avis

charged \$0.75 a day for participating in its Program 'by both failing to include [this fact] in a place where Plaintiff and other reasonable renters would expect to see them and by instead (to the extent that any disclosure was made at all) hiding these facts in obscure places with the intention that neither Plaintiff nor other reasonable renters ever see the,' The unconscionable commercial practices alleged...are premised on this omission".

Unlawful Fees And Charges: Arizona AG

In State of Arizona v. Dennis N. Saban, Case No: CV2014-005556 (Arizona Super. February 14, 2018) J. Contes rendered a \$1.85 million verdict after a five week trial finding that Phoenix Car Rental and Saban's Rent-A-Car violated Arizona's Consumer Fraud Act (A.R.S. 44-1522 et seq) by imposing unlawful charges and fees on at least 48,000 consumers to include "\$3.00 for PKG, \$11.99 for service and cleaning, \$2.50 for s/c", mandatory taxes, charges for drivers under a specific age, charges for paying with cash or debit cards, charges for lack of proof of valid insurance, charges for additional drivers, charges for out-of-state travel, charges for international driver's licenses, charges for after-hours drop off and charges for shuttle, taxi and other transportation charges.

But That's Not All

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) [Weinberg v. The Hertz Corp., supra (\$1,000 deductible on insurance which consumer could circumvent by paying \$6.00 per day for CDW which extrapolated over year amounted to \$2,190 for \$1,000 worth of collision damage insurance allegedly unconscionable); Truta v. Avis Rent A Car System, Inc., 193 Cal. App. 3d 802 (Cal. App. 1989) (\$6.00 per day CDW charge that on an annualized basis, the rates charged were more than double amount of "insurance" provided and allegedly were unreasonably high)] and failing to disclose that CDW may duplicate the renter's own insurance [Super Glue Corp. v. Avis Rent A Car System, Inc., 132 A.D. 2d 604 (2d Dept. 1987)], (2) **overcharging in providing replacement gasoline after rental vehicle is returned** [Roman v. Budget Rent-A-Car System, Inc., 2007 WL 604795 (D.N.J. 2007) (\$5.99 per gallon); Oden v. Vanguard Car Rental USA, Inc., 2008 WL 901325 (E.D. Tex. 2008) (\$4.95 per gallon)], (3) **excessive charges for personal accident insurance** (PAI) [Weinberg v. The Hertz Corp., supra (allegation that a daily charge of \$2.25 for PAI was allegedly excessive and unconscionable since the daily rate equaled an annualized rate of \$821.24)], (4) **excessive charges for the late return of a vehicle** [Boyle v. U-Haul International, Inc., 2004 WL 2979755 (Pa. Com. Pl 2004) ("There is a common pattern and practice of charging for an extra 'rental period' despite the absolute failure of an 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 contract document to establish any rate for 'coverage' due to failure to return the equipment at the designated time")], (5) adhesion contracts [Votto v. American Car Rentals, Inc., 2003 WL 1477029 (Conn. Super. 2003) (**car rental company cannot 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** [Cotchett v. Avis-A-Car System, 56 F.R.D. 549 (S.D.N.Y. 1972) (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** [People v. Dollar Rent-A-Car Systems, Inc. 211 Cal. App. 3d 119 (Cal. App. 1989) (lessor charged retail prices for wholesale costs of doing repairs to damaged vehicles by using false invoices)], (8) **illegal sale of insurance** [People v. Dollar, supra (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** [Hertz Corp. v. Dynatron, 427 A. 2d 872 (Conn. 1980),

(10) unconscionable disclaimer of warranty liability [Hertz v. Transportation Corp., 59 Misc. 2d 226 (N.Y. Civ. 1969)], (11) undisclosed out-of-state drop off charges [Garcia v. L&R Realty, Inc., 347 N.J. Super. 481 (2002) (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 [Commercial Union Ins. Co. v. Auto Europe, 2002 U.S. Dist LEXIS 3319 (N.D. Ill. 2002) (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 'tax')], (13) improper CDW coverage exclusions [Danvers Motor Company, Inc. v. Looney, 78 Mass. App. Ct. 1123 (2011) (exclusion not enforced)]. (14) failure to reveal avoidable charges [Schnall v. Hertz Corp., 78 Cal. App. 4th 114 (Cal. App. 2000) ("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 [Rosenberg v. Avis Rent A Car Systems, Inc., 2007 WL 2213642 (E.D. Pa. 2007) (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 [Ressler v. Enterprise Rent-A-Car Company. 2007 WL 2071655 W.D. Pa. 2007) (alleged improper handling of a claim under a PAI policy)].

Conclusion

The U.S. rental car industry has a negative attitude about its responsibility to consumers. If its services can be avoided or replaced, consumers are well advised to do so. Try Uber or Lyft next time.

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