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It Hertz to Be Number One: The Collision Damage Waiver Is Being Attacked on Multiple Fronts

I. INTRODUCTION

In a popular advertisement of the 1980's, former professional football star O.J. Simpson would hurdle suitcases while going to his Hertz rental car at the airport. Nowadays, he would probably hurdle the collision damage waiver (CDW), which is undergoing a siege of legislative, bureaucratic, judicial, and public pressure for its regulation. The attacks on the waiver come from the United States Congress, several state legislatures, state attorneys general, state insurance officials, state and federal courts, as well as consumer groups and advocates. As a result, even some rental car companies are now supporting CDW regulation.

1. The term "collision damage waiver" is also known as a “loss damage waiver” or a “physical damage waiver.” Taylor, Insuring Against Trip Cancellation, L.A. Times, Apr. 24, 1988, § 7, at 8, col. 1. While filling out car rental forms, a lessee can elect or decline to obtain the collision damage waiver which is the lessor's waiver of its right to look to the lessee for payment of collision-type damage. If the lessee accepts the waiver, the risk of any collision-type loss is shifted from the lessee to the lessor. Hertz Corp. v. Corcoran, 137 Misc. 2d 403, 520 N.Y.S.2d 700 (1987).


3. See H.R. 4855, 100th Cong., 2d Sess., 134 CONG. REC. E2045-46 (daily ed. June 16, 1988); see also infra notes 206-08, 224-26, 254, and accompanying text.


6. In September and December of 1985, a task force from the National Association of Insurance Commissioners met and developed a model state bill to regulate collision damage waivers. The bill was drafted by Tony Schrader, Iowa's deputy insurance commissioner. Sturken, Officials Move Forward on Bill Regulating Collision Damage Waivers, TRAVEL WEEKLY, Sept. 23, 1985, at 4.

7. The California State Automobile Association, which represents 2.6 million drivers, urged legislators to inform and protect lessors about the CDW and supported a bill that would regulate the CDW. Calif-Auto-Ass'n: Consumer Protection Notice for California Motor Vehicle Renters Urged by CSAA, BUS. WIRE, July 2, 1986.

8. The Hertz Corporation was the first rental company to ask for regulation of the CDW. Magenheim, Car Firms Back Move to End CDW, TRAVEL WEEKLY, May 19,
Initially, this comment will present a brief background to help explain the reasons behind the attack on the CDW. It will then examine four separate issues that confront proposed regulation of the CDW: whether the CDW is itself insurance and therefore subject to insurance regulation; whether the CDW is an unconscionable provision in the rental contract; whether the CDW plays a part in deceptive rental car advertising; and whether coverage provided by the CDW is duplicated by one’s own car insurance. Included within this discussion will be an analysis of proposed legislation on both federal and state levels which calls for either regulation or abolition of the CDW.

II. BACKGROUND

Throughout the 1970’s, the cost of the CDW for a daily car rental was only two dollars. If a lessee declined the CDW protection and damaged the vehicle, the lessee became liable to the lessor only for the first $100 worth of damage. On the other hand, if a lessee purchased the CDW for two dollars per day and was involved in a collision, the lessor waived its rights to hold the lessee liable for the $100 deductible. As such, there was only a minor expense if the CDW was purchased and only a minor risk if it was declined.

However, the CDW’s price and its potential for liability have risen dramatically since the seventies. By 1981, the CDW cost about five dollars a day to eliminate a $500 deductible. By 1985, the cost of the average CDW had grown to eight dollars a day. If this eight dollar

1988, at 1. However, firms like Avis and National prefer self-regulation to state intervention. Id.
9. See infra notes 48-139 and accompanying text.
10. See infra notes 140-213 and accompanying text.
11. See infra notes 214-31 and accompanying text.
12. See infra notes 232-58 and accompanying text.
14. Grimes, supra note 13, at 3, col. 1. It should be noted that holding the lessee liable for the first $100 in damages is equivalent to requiring an automobile owner who collides with another vehicle to pay the $100 deductible before the insurance company will pay for remaining damages.
15. Murphy, supra note 13, at 6.
16. Furthermore, some rental car companies are expanding the scope of the lessee’s liability by making the lessee liable for damages arising out of theft or vandalism in addition to the current responsibility for collision-type damages. Fritz, Rent-a-car Runaround, FORBES, Jan. 11, 1988, at 280.
17. Diamond, supra note 2, at 1, col. 1.
18. Id.
fee was declined, the customer was facing a $2,500 deductible, which represented an increase of $2,000 in customer liability in only four years. By 1986, the average cost of the CDW ranged from nine to thirteen dollars a day; and, if the CDW was declined, some rental car companies extended the lessee's liability to include the vehicle's entire repair cost or replacement value. Consequently, the decision to purchase the CDW has been transformed from a low cost/limited liability choice into a high cost/unlimited liability choice.

Meanwhile, the marketing strategies of the rental car companies have changed over the past fifteen years. During the 1970's, the four major rental car companies were continually cutting their prices on rental vehicles in an attempt to capture even greater shares of the industry's market. As a result, lessees benefited financially at the expense of the companies via low rental rates. The policy behind pursuing greater market share instead of higher profits was related to the tax incentives in the rental car industry. Leading rental car companies, which often have a fleet of over 100,000 vehicles, generated huge investment tax credits and accelerated depreciation, providing valuable offsets to profits earned elsewhere by their conglomerate owners. Thus, any loss of profit was to some extent recaptured by the tax advantages the rental car industry enjoyed.

However, these advantages were eradicated by the Tax Reform Act of 1986, which repealed the tax credit, tightened allowances for

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19. Id.
20. Id.
21. Id.
22. "The purchase of the CDW can currently increase the price of a rental by $17 per day or $119 per week." Hertz Calls for Regulation of Damage Waiver Sales Practices, Bus. Wire, Mar. 15, 1988.
24. The four companies are Hertz, Avis, National, and Budget. Taylor, Why Car Rentals Drive You Nuts, FORTUNE, Aug. 31, 1987, at 75. These companies account for 95% of the rental car industry market. Hinds, The High, and Secret, Cost of Car Rental, N.Y. Times, July 16, 1988, at 54, col. 3.
25. Taylor, supra note 24, at 75.
26. An example of the price-reduction wars occurred in Houston, Texas, where Budget cut its rental car rate to $1.05 a day, only to be undersold by Hertz at $1.00 a day. Id.
27. Id.
28. Id.
30. Section 49(a) of the Internal Revenue Code states in pertinent part: "For purposes of determining the amount of the investment tax credit determined under section 46, the regular percentage shall not apply to any property placed in service after December 31, 1985." I.R.C. § 49(a) (West 1988).
deductions, and lengthened the depreciation schedule on rental cars. Without these tax shelters, a rental car company suffers a drain on its cash flow and an inability to increase rental prices without suffering a resulting loss in market share. Consequently, most rental car companies sought other methods of producing revenue and began to offer additional coverage options, including the CDW; these additional offerings have since become tremendous money makers.

The emphasis on increased profits is reflected by the five to seven billion dollars in revenue the car rental industry was expected to harvest in 1987. This amount represents a twelve to fifteen percent increase from the previous year. Also, the industry’s average profit margin has doubled in the last two years to reach ten to twelve percent. A vital contributor to the industry’s success is the sales revenue from the CDW, which is estimated to top one billion dollars in 1988 as approximately thirty to forty percent of all rental customers are expected to purchase the CDW. Thus, the industry has successfully shifted from concentrating on market share to gaining profit share.

Along with the blessings of success, however, rental firms have also recently become targets for attack. A glaring example is the Hertz Corporation which admitted to charges by the Justice Depart-

34. See, e.g., Fried, Car Rentals: How to Avoid Getting Taken for a Ride, MONEY, Apr. 1988, at 201-02, 204. The new revenue producers include the following: mileage charges that can inflate the lessee’s bill for each mile in excess of a maximum amount; charges for additional drivers which can range up to $10 a day; extra charges for renting outside of airport locations; extra charges for dropping a vehicle off at a site which is different from the place of purchase; and refueling charges whereby the lessee pays for gasoline to refuel the tank at a price that doubles the retail price.
35. See, e.g., McGrath, The Trap That Awaits Car Renters, U.S. NEWS & WORLD REP., Nov. 10, 1986, at 73. Some of the available options include the following: personal accident insurance on a per diem basis which insures the lessee against accidental death and a portion of any medical expenses; optional personal effects coverage which would insure against the loss of luggage and personal effects; and a liability insurance supplement which, if taken, would supplement the lessee’s liability insurance coverage to provide greater coverage.
36. See infra note 39 and accompanying text.
37. Taylor, supra note 24, at 75.
38. Id.
40. This figure is estimated by Gerry Entman who is Budget’s executive vice-president of marketing. Bennett, To Buy or Not to Buy: That’s the Issue Over Car Collision Damage Waivers, CRAIN’S CHI. BUS., Aug. 29, 1988, at T13.
41. See Wolff, supra note 39, at 7, col. 1. Dollar was accused of “[using] a contract that was misleading and deceptive, and prepar[ing] false repair forms,” and Avis admitted to “routinely mark[ing] up its repair charges.” Id.
ment that it had overcharged its customers and their insurance companies for repairing damaged vehicles. The company estimated that it accumulated an additional thirteen million dollars over a seven-year period by charging its customers retail prices for repair work done at wholesale prices.

Besides surcharging its customers, Hertz was also accused of deceptive practices, such as forging and altering documents related to estimates and bills for repair. Hertz surcharged those customers who declined the CDW as much as two or three times what it actually paid for the repairs. Thus, it seems Hertz profited from the CDW whether it was purchased or declined. Furthermore, on January 1, 1988, Hertz changed the name and use of its own CDW by renaming it a “loss damage waiver” which now makes the lessee responsible if the vehicle is stolen or vandalized.

Because of the tremendous notoriety from increased industry profits, expanding consumer liability, and deceptive practices, the escalating attacks on the CDW will likely culminate in regulation.

III. COLLISION DAMAGE WAIVER AS INSURANCE

The leading controversy currently associated with the CDW is whether the CDW falls under the purview of a state’s insurance law, thus exposing the rental car companies to insurance regulation. The rental car companies claim that the CDW is not insurance and that, instead, it is a contractual “waiver of the rental unit’s right to go after the renter if a car is damaged.” Nevertheless, consumers, state attorneys general, and insurance commissioners are now attacking

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43. Id.
44. Id.
45. Obviously, those customers who did purchase the CDW and were involved in a collision were waived from being held liable and therefore were not subject to repair surcharges.
46. Levine, supra note 42, § B, at 6, col. 1.
47. Wada, Hertz Redefines Damage Waivers to Shift Liability, TRAVEL WEEKLY, Jan. 4, 1988, at 5.
48. But see Diamond, Car Rental Firms Drive a Hard Insurance Deal, L.A. Times, May 28, 1985, § 4, at 1, col. 1. Avis puts its vice president for insurance in charge of the CDW, and National’s “Pocket Guide” for consumers places the explanation of the waiver in the section entitled “What about insurance?” Id.
49. This statement was made by Allyson Fedler who is the press liaison for Budget. Bennett, supra note 40, at T18.
the CDW as insurance. These attacks have been most significant in New York and California.

A. New York

1. 1977 Attorney General Opinions

In 1977, the New York Attorney General offered a formal opinion \(^{50}\) to the state superintendent of insurance, \(^{51}\) declaring that the sale of the CDW was not subject to the insurance laws of New York. \(^{52}\) The opinion stated that, to constitute an insurance contract, the "agreement must contain an obligation to confer a benefit upon the party dependent on a fortuitous event." \(^{53}\)

The attorney general agreed with rental car firms by holding that the CDW was only a contractual waiver of rights and that such a waiver is not insurance. \(^{54}\) The waiver does not fit the statutory definition \(^{55}\) because it does not depend on a fortuitous event, \(^{56}\) i.e., the damaging of the rental vehicle. \(^{57}\) Instead, the CDW commences after the option has been selected on a signed rental contract and continues regardless of whether an accident occurs. Furthermore, the CDW does not involve the dangers of inadequate coverage, excessive premiums, and fiscal responsibility, all of which have been the focus of insurance law. \(^{58}\) Consequently, the selling of the CDW was not "doing an insurance business" under the insurance statute, \(^{59}\) and therefore, could not be regulated.

However, nine years later, the New York Attorney General \(^{60}\) over-

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51. The attorney general who wrote the opinion was Louis J. Lefkowitz, and the insurance superintendent at the time was John F. Lennon. Id.
52. See section 1101(a) of the New York Insurance Law which, in the 1977 opinion, was cited as section 41 of the Insurance Law. Section 1101(a) states in relevant part:
   (1) "Insurance contract" means any agreement or other transaction whereby one party, the "insurer," is obligated to confer a benefit of pecuniary value upon another party, the "insured" or "beneficiary," dependent upon the happening of a fortuitous event in which the insured or beneficiary has, or is expected to have at the time of such happening, a material interest which will be adversely affected by the happening of such event.
   (2) "Fortuitous event" means any occurrence or failure to occur which is, or is assumed by the parties to be, to a substantial extent beyond the control of either party.
53. Id.
54. See N.Y. Ins. Law § 1101(a).
55. See id. (emphasis added).
57. Id.
58. Id.
59. Id.
ruled the preceding opinion61 and held that the selling of the CDW was subject to insurance regulation.62 The opinion, addressed to the New York Superintendent of Insurance, held that the waiver was subject to insurance regulation for several reasons.

The opinion compared the CDW to the collision damage insurance offered by insurance companies and found several similarities between these types of coverage, including the need for regulation.64 The opinion also held that the recent and rapid increase in the CDW's cost gave rise to the need for regulation to protect the public against excessive premiums, thus contradicting the prior attorney general's opinion.66 The opinion also refuted the argument that the CDW is only incidental to the main rental agreement67 and not sub-

61. Id.
62. Id.
63. Hertz later brought suit against James Corcoran, the New York Superintendent of Insurance, seeking a declaratory judgment that the selling of the CDW was not doing business as insurance. Hertz Corp. v. Corcoran, 137 Misc. 2d 403, 404, 520 N.Y.S.2d 700, 700-01 (1988).
64. The opinion stated:
In a contract for collision damage insurance, there is a legal obligation to pay the cost of repairs for damages to the insured's car, in the event it is damaged. This obligation occurs at the moment the agreement is completed. Similarly, the lessor becomes obligated at the time of the CDW agreement to waive any right to recover from the lessee in the event of damage to the rented car. Like the obligation in the collision damage insurance contract, this is but one component of the statutory definition of insurance. In both instances, upon the occurrence of a "fortuitous event," i.e., damage to the vehicle, the insurer on the one hand and lessor on the other, is obligated to confer a benefit on the insured and lessee. The collision damage insurance and the CDW agreement protect the insured and the lessee, respectively, in relation to a fortuitous event in which they have "a material interest which will be adversely affected." Without collision damage insurance, the insured would have to pay the cost of repairs to the insured vehicle. Similarly, without the CDW agreement, the lessee would be liable to the lessor for damages to the leased vehicle. In both cases, in return for a premium, the insurer and the leasing company, respectively, are assuming the risk that the vehicle will be damaged. Both transactions are "insurance contract(s)" under the statutory definition.
65. Id.
66. The 1986 opinion stated that the two dollar cost in 1976 represented eight percent of the total rental cost. However, this figure had increased to eight dollars in 1986, which represents thirteen percent of the rental cost. As such, excessive premiums have become an issue with regulation since the formal attorney general opinion in 1977. Id.
67. Id. (citing Kramer v. Avis Car Leasing, Inc., No. 23343/82 (Super. Ct. N.Y. County Apr. 11, 1983); see also Truta v. Avis Rent A Car Sys. Inc., 193 Cal. App. 3d 802, 814, 238 Cal. Rptr. 806, 813 (1987) (holding that the primary purpose of car rental agreement is to rent an automobile and that the CDW option is peripheral to the primary purpose); Transportation Guar. Co. v. Jellins, 29 Cal. 2d 242, 174 P.2d 625 (1946) (holding that a contract provision wherein a contractor agreed to insure the vehicles
ject to regulation. The cost of the CDW has increased,\textsuperscript{68} thereby making the CDW more than just ancillary to the rental contract.\textsuperscript{69} Finally, the opinion held that the CDW was insurance because the CDW fees are pooled to pay for the cost of the lessor's risk which consists of repairs to damaged rental vehicles and that this pooled risk is essentially the same in the insurance industry.\textsuperscript{70}

2. Attack on the 1986 Attorney General's Opinion

The latter opinion, holding that the CDW is insurance, caused rental car companies to bring legal action asking the court to declare that the CDW should remain separate from insurance regulation. In \textit{Hertz Corp. v. Attorney General},\textsuperscript{71} Hertz was successful in quashing a subpoena from the New York Attorney General, who was seeking books and records pertaining to the CDW.\textsuperscript{72} The attorney general had commenced an investigation of the CDW pursuant to statute,\textsuperscript{73} charging that its cost was excessive.\textsuperscript{74}

However, the court quashed the summons for several reasons: the burden on Hertz to produce millions of files and documents would be extensive;\textsuperscript{75} an alleged excessive price charged to the public did not vest absolute authority in the attorney general to investigate Hertz without an additional showing that the CDW was unconscionable,

\begin{itemize}
\item for the owner did not constitute a contract of insurance, and that insurance laws should not be extended to cover every contract involving an assumption of risk or indemnification of loss).
\item 68. \textit{See supra} note 66.
\item 70. \textit{Id.}
\item 71. 136 Misc. 2d 420, 518 N.Y.S.2d 704 (1987).
\item 72. \textit{Id.} at 420-21, 518 N.Y.S.2d at 705. The subpoena sought records and books which would disclose the following:
\begin{itemize}
\item (1) the amount of CDW charges collected from each customer in New York State who rented a car on a short-term basis;
\item (2) the total number of CDW charges;
\item (3) the total number of cars on which CDW charges were collected;
\item (4) the number of such cars involved in collisions and all collision reports, repair bills and other documents disclosing the type, extent and costs of repairs to these cars.
\end{itemize}
\textit{Id.} at 422, 518 N.Y.S.2d at 706.
\item 73. \textit{See New York Executive Law}, section 63(12), which states in pertinent part:
\begin{quote}
Whenever any person shall engage in repeated fraudulent or illegal acts or otherwise demonstrate persistent fraud or illegality in the carrying on, conducting or transaction of business, the attorney general may apply . . . to the supreme court of the state of New York . . . for an order enjoining the continuance of such business activity or of any fraudulent or illegal acts, directing restitution and damages . . . .
\end{quote}
N.Y. EXEC. LAW § 63(12) (McKinney 1982).
\item 74. \textit{Hertz}, 136 Misc. 2d at 421, 518 N.Y.S.2d at 705. It should be noted that the court, on the issue of the CDW's cost, assumed its cost to be $2.50 per day. \textit{Id.} This figure is far below what the average cost of the CDW was in 1987. \textit{See supra} notes 20 and 66 and accompanying text.
\item 75. \textit{Hertz}, 136 Misc. 2d at 423-24, 518 N.Y.S.2d at 707.
\end{itemize}
fraudulent, or deceptive;\textsuperscript{76} the attorney general did not allege fraud or illegality;\textsuperscript{77} the insurance department declined to hold that CDW was insurance;\textsuperscript{78} and finally, any price regulation is under the purview of the legislature and/or proper regulatory agency and is not within the powers of the attorney general.\textsuperscript{79}

The court reached a similar conclusion in \textit{Hertz Corp. v. Corcoran},\textsuperscript{80} wherein it held that the CDW was not a contract of insurance.\textsuperscript{81} Hertz sought a declaratory judgment to determine the issue of whether the CDW is "insurance" within the meaning of the applicable insurance statute,\textsuperscript{82} thereby requiring Hertz to be licensed by insurance law.\textsuperscript{83}

The court distinguished between indemnification, which is the basis of insurance law, and the CDW.\textsuperscript{84} Indemnification, as interpreted by the court, occurs when the "insured is compensated for the actual property loss sustained by him as a result of the perils insured against . . . ."\textsuperscript{85} Meanwhile, a waiver occurs when there is a "voluntary abandonment or relinquishment of a known right"\textsuperscript{86} which, in the context of the CDW, is the waiver of the lessor's right to seek indemnification from the lessee for collision damage.\textsuperscript{87} In order for an entity to be subject to insurance regulation, its customers must have an insurable interest in the vehicle;\textsuperscript{88} therein lies a primary dif-

\textsuperscript{76} \textit{Id.} at 426-27, 518 N.Y.S.2d at 709.

\textsuperscript{77} \textit{Id.} at 423, 518 N.Y.S.2d at 707.

\textsuperscript{78} \textit{Id.} at 427, 518 N.Y.S.2d at 709. Note that the court is referring to the 1977 attorney general's opinion which was issued to the superintendent of insurance. \textit{See supra} notes 50-59 and accompanying text.

\textsuperscript{79} \textit{Hertz}, 136 Misc. 2d at 428, 518 N.Y.S.2d at 710.


\textsuperscript{81} \textit{Corcoran}, 137 Misc. 2d at 407, 520 N.Y.S.2d at 703.

\textsuperscript{82} \textit{See} \textit{N.Y. INS. LAW § 1101(a)(1)} (McKinney 1985) \textit{(defines an "insurance contract").}

\textsuperscript{83} \textit{Corcoran}, 137 Misc. 2d at 404, 520 N.Y.S.2d at 700.

\textsuperscript{84} \textit{Id.} at 404-05, 520 N.Y.S.2d at 701.


\textsuperscript{86} \textit{Corcoran}, 137 Misc. 2d at 404-05, 520 N.Y.S.2d at 701 (quoting Jefpaul Garage Corp. v. Presbyterian Hosp., 61 N.Y.2d 442, 446, 462 N.E.2d 1176, 1177, 474 N.Y.S.2d 458, 459 (1984)).

\textsuperscript{87} \textit{Corcoran}, 137 Misc. 2d at 405, 520 N.Y.S.2d at 701.

\textsuperscript{88} \textit{Id.} (citing \textit{N.Y. INS. LAW § 3401} (McKinney 1985)). \textit{Section 3401 states:}

\textit{No contract or policy of insurance on property made or issued in this state, or made or issued upon any property in this state, shall be enforceable except...}
ference between indemnity and waiver. While an owner of a vehicle has an interest in insuring his vehicle against collision damage, theft, vandalism, etc., a lessee of a vehicle does not have the same insurable interest. As such, the court held it improper to equate indemnification with the CDW; therefore, regulation of the CDW was inappropriate.

The court in Corcoran gave little deference to the recent attorney general's opinion for three reasons. First, although an administrative agency's opinion is entitled to great weight, "the attorney general is not the agency administering the regulatory portions of the insurance law . . ." Second, the recent attorney general's opinion contradicts his predecessor's opinion that the CDW is insurance, and the court, therefore, did not feel compelled to adopt this present interpretation of insurance law. Finally, the Corcoran court held that it was bound by precedent to follow the principal that the CDW is not insurance as set forth in Kramer v. Avis Car Leasing Inc.

B. California

1. Truta v. Avis: CDW is Not Insurance in California

In Truta v. Avis Rent A Car System, a class action suit was filed against Avis, Hertz, Budget, and National, the four largest rental car

for the benefit of some person having an insurable interest in the property insured. In this article, "insurable interest" shall include any lawful and substantial economic interest in the safety or preservation of property from loss, destruction or pecuniary damage.

In this context, an owner of a vehicle includes rental car companies which, by virtue of owning a fleet of rental vehicles, insures its vehicles similar to an individual owner of a vehicle.

Corcoran, 137 Misc. 2d at 405, 520 N.Y.S.2d at 701. If the lessee is involved in a collision while driving the rental vehicle, the lessor may be sued as the owner of the vehicle, thereby necessitating the need for insurance. The lessee is subsequently liable to the lessor or its insurance company for the damage to the vehicle via indemnification if the CDW is declined. Id. at 404-05, 520 N.Y.S.2d at 701.

If the lessee is involved in a collision while driving the rental vehicle, the lessor may be sued as the owner of the vehicle, thereby necessitating the need for insurance. The lessee is subsequently liable to the lessor or its insurance company for the damage to the vehicle via indemnification if the CDW is declined. Id. at 404-05, 520 N.Y.S.2d at 701.

Furthermore, the court stated:

[I]t is irrational . . . to say that Hertz, for a [CDW] fee paid by the customer, is indemnifying Hertz from damage to Hertz' property. But one cannot indemnify himself—he merely accepts his own loss—and an agreement whereby Hertz accepts its own loss is not an agreement of indemnification and therefore is not a contract of insurance.

However, the court also noted that Hertz would be subject to insurance regulation if, after purchasing collision damage insurance for its rental vehicle, it then resold this insurance to its customers.

Id. at 406, 520 N.Y.S.2d at 702 (citing Matter of Howard v. Wyman, 28 N.Y.2d 434, 438, 271 N.E.2d 528, 529, 322 N.Y.S.2d 683, 685-86 (1971)).


The first cause of action in the complaint alleged that the rental car companies were engaged in the business of insurance in violation of section 700 of the California Insurance Code, and as such, were engaged in unlawful business practices constituting unfair competition within the meaning of California Business and Professions Code section 17200. The second cause of action alleged that the defendants were engaged in unlawful business practices because they were charging excessive rates in violation of the California Insurance Code. As a result, the plaintiff sought an injunction, restitution, and damages in connection with the sale of the CDW.

In their defense, the rental car companies claimed that the CDW was only ancillary and incidental to the rental contract, and therefore was not insurance. To support this contention, the defendants submitted, from different jurisdictions, four trial court opinions, three insurance department opinions, and two attorney general opinions.

99. Id. at 807, 238 Cal. Rptr. at 807-08.
100. Id. at 807-08 n.2, 238 Cal. Rptr. at 808 n.2 (citing section 700(a) of the California Insurance Code). Section 700(a) states:
A person shall not transact any class of insurance business in this State without first being admitted for such class. Such admission is secured by procuring a certificate of authority from the commissioner. Such certificate shall not be granted until the applicant conforms to the requirements of this code and of the laws of this State prerequisite to its issue. CAL. INS. CODE § 700(a) (West 1972 & Supp. 1988).
101. Truta, 193 Cal. App. 3d at 807-08 n.3, 238 Cal. Rptr. at 808 n.3 (citing section 17200 of the California Business and Professions Code). Section 17200 states: "As used in this chapter, unfair competition shall mean and include unlawful, unfair or fraudulent business practice and unfair, deceptive, untrue or misleading advertising and any act prohibited by Chapter 1 (commencing with section 17500) of Part 3f Division 7 of the Business and Professions Code." CAL. BUS. & PROF. CODE § 17200 (West 1987).
102. Truta, 193 Cal. App. 3d at 808, 238 Cal. Rptr. at 808 (citing section 1852 of the California Insurance Code). Section 1852 states: "[N]o rate shall be held to be excessive unless . . . such rate is unreasonably high for the insurance provided and . . . a reasonable degree of competition does not exist in the area with respect to the classification to which such rate is applicable." CAL. INS. CODE § 1852 (West 1972).
103. Truta, 193 Cal. App. 3d at 809, 238 Cal. Rptr. at 809.
104. Id.
106. Opinions from the North Carolina Insurance Department, the Texas State Board of Insurance, and the Insurance Department of Iowa were included. Truta, 193 Cal. App. 3d at 809 n.5, 238 Cal. Rptr. at 809 n.5.
107. Opinions from the Florida Attorney General and the New York Attorney Gen-
California Department of Insurance which concluded that the CDW did not provide insurance.\textsuperscript{108}

In determining the insurance issue, the court first looked to the statutory definition of insurance embodied in the insurance code which states that "insurance is a contract whereby one undertakes to indemnify another against loss, damage, or liability arising from a contingent or unknown event."\textsuperscript{109} This statute has basically two elements.\textsuperscript{110} The first element, according to the California Supreme Court, involves "a risk of loss to one party and a shifting of that risk to another party."\textsuperscript{111} The CDW meets this element because the lessee could be liable to the lessor for any collision damage to the rental vehicle; but, because of the waiver purchase, the risk of loss is transferred to the lessor.

The second element of an insurance contract is "a distribution of risk among similarly situated persons."\textsuperscript{112} The CDW fulfills this element because the risk of loss can rest upon either the lessee or the lessor, depending on whether the CDW is declined or purchased. However, the court in \textit{Truta} refused to limit its inquiry to the elements listed above\textsuperscript{113} and referred to other criteria to determine whether the CDW was subject to insurance regulations.\textsuperscript{114}

2. Arguments Against Insurance Regulation

The \textit{Truta} court, aside from the statutory definition of insurance, alluded generally to three related arguments favoring insurance regulation of the CDW: the CDW is only a peripheral part of the rental agreement; it does not involve the same risks protected against by insurance law; and insurance law was not formulated to encompass every situation involving risk-transferring.

\textsuperscript{108} Truta, 193 Cal. App. 3d at 811, 238 Cal. Rptr. at 811.
\textsuperscript{109} Id. at 812, 238 Cal. Rptr. at 811 (citing \textit{CAL. INS. CODE} § 22 (West 1972)); cf. \textit{N.Y. INS. LAW} § 1101(a) (McKinney 1985) whose "fortuitous event" definition is similar to the language provided in the California Insurance Code. For text of section 1101(a), see \textit{supra} note 52.
\textsuperscript{110} Truta, 193 Cal. App. 3d at 812, 238 Cal. Rptr. at 811.
\textsuperscript{111} Id. (citing Metropolitan Life Ins. Co. v. State Bd. of Equalization, 32 Cal. 3d 649, 654, 652 P.2d 426, 428, 186 Cal. Rptr. 578, 580 (1982)).
\textsuperscript{112} Id.
\textsuperscript{113} Truta, 193 Cal. App. 3d at 812, 238 Cal. Rptr. at 811. The court stated: [T]he mere fact that . . . [the CDW] contains these two elements does not necessarily mean that the agreement constitutes an insurance contract for purposes of statutory regulation. A statute designed to regulate the business of insurance . . . is not intended to apply to all organizations having some element of risk assumption or distribution in their operations.
\textsuperscript{114} See infra notes 115-36 and accompanying text.
In deciding whether a peripheral part of any contract can render its maker subject to insurance regulation, the Truta court referred to two California decisions. In California Physicians' Service v. Garrison, the supreme court looked at the principle purpose of the contract to determine whether or not it was insurance and formulated a test to decide this issue. The test is “whether, looking at the plan of operation as a whole, ‘service’ rather than ‘indemnity’ is . . . [the company’s] principal object and purpose.” Accordingly, if the company’s principle purpose is service, and not indemnity, it should not be subject to insurance regulation.

This logic was also found in Transportation Guarantee Co. v. Jellins. In Jellins, the court held that an incidental provision of the contract, which has an element of risk distribution or assumption, should not outweigh all other factors in determining consideration; “the line between insurance or indemnity and other types of legal arrangement and economic function becomes faint, if not extinct.” The Jellins court, as in Garrison, looked beyond the risk factor involved, and instead, focused on the company’s principal purpose of the contract in determining insurance regulation.

The Truta court applied this “principal purpose” standard to the rental car industry and held that the principal object and purpose of the rental car contract was the rental of the automobile and that the CDW is only a peripheral item in the contract. The court followed the Jellins decision and stated that the CDW, as a secondary consideration involving risk allocation, should not change the defendants from contracting lessors “into insurers subject to insurance

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115. Truta, 193 Cal. App. 3d at 813, 238 Cal. Rptr. at 812.
116. 28 Cal. 2d 790, 172 P.2d 4 (1946). In Garrison, medical services were rendered to patients who paid monthly membership dues to a nonprofit corporation. Id. The payments made to the physicians for these services were from a fund created from the dues received by the nonprofit corporation. Id. The court ultimately held that the organization was not involved in the insurance business. Id. at 811, 172 P.2d at 17.
117. Id. at 809-10, 172 P.2d at 16.
118. Id. at 809, 172 P.2d at 16.
119. 29 Cal. 2d 242, 174 P.2d 625 (1946). For a brief synopsis of Jellins, see supra note 68.
121. Jellins, 29 Cal. 2d at 249, 174 P.2d at 629 (quoting Jordan v. Group Health Ass'n, 107 F.2d 239, 247-48 (D.C. Cir. 1939)).
122. Id. The court stated: “The question turns, not on whether risk is involved or assumed, but on whether that or something else to which it is related in the particular [contract] is its principal object and purpose.” Id.
123. Truta, 193 Cal. App. 3d at 814, 238 Cal. Rptr. at 813.
124. Id.
regulation."\textsuperscript{125}

A second argument against insurance regulation considered by \textit{Truta} is that the sale of the CDW does not involve the risks against which insurance law was designed to protect. The court made an inquiry into the extent to which the CDW and the rental car industry itself were involved in the perils for which insurance regulation was fashioned.\textsuperscript{126} Policies such as maintaining minimum reserves, and regulating investment and financial operations are designed to protect the insured or the public from the insurer.\textsuperscript{127} Regulation should not apply "where no risk is assumed and no default can exist."\textsuperscript{128} The \textit{Truta} court held that there was no public interest to protect because with the CDW the lessor does not pay out money to anyone, but instead, agrees not to hold the lessee liable.\textsuperscript{129} Consequently, the CDW does not create the risks that insurance regulation seeks to monitor because there is no need to require accumulated reserves to pay off claims, and the solvency of the lessor does not affect the provisions of the CDW.\textsuperscript{130}

The final argument against insurance regulation of the CDW is that insurance was not formulated to encompass every situation of risk-transferring.\textsuperscript{131} Nearly every business venture entails some risk,\textsuperscript{132} including the rental car industry which operates with the constant risk of damage to its vehicles by its customers and the public alike. However, the small risk involved with the CDW does not conclusively demonstrate that it should be subject to insurance regulation.\textsuperscript{133} If viewed otherwise, insurance regulation would engulf every contract that included some degree of assumption or distribution of risk.\textsuperscript{134} Accordingly, the rental contract, with its limited amount of risk from the CDW, should not be subject to insurance regulation.\textsuperscript{135}

The court in \textit{Truta}, for the above-stated reasons, held that the CDW contained in rental car agreements is not an insurance contract for purposes of statutory regulation.\textsuperscript{136} Consequently, since the de-

\begin{itemize}
  \item \textsuperscript{125} Id.
  \item \textsuperscript{126} Id. at 812-13, 238 Cal. Rptr. at 812 (citing R. \textsc{Keeton}, \textsc{Insurance Law} § 8.2(c) (1971).
  \item \textsuperscript{127} California Physicians' Serv. v. Garrison, 28 Cal. 2d 790, 810, 172 P.2d 4, 17 (1946).
  \item \textsuperscript{128} Id.
  \item \textsuperscript{129} \textit{Truta}, 193 Cal. App. 3d at 815, 238 Cal. Rptr. at 813 (discussing the California Department of Insurance's interpretation of the insurance law).
  \item \textsuperscript{130} Id.
  \item \textsuperscript{131} \textit{Truta}, 193 Cal. App. 3d at 812, 238 Cal. Rptr. 811-12 (citing \textsc{Keeton, supra} note 126, at 552).
  \item \textsuperscript{132} \textit{Truta}, 193 Cal. App. 3d at 813, 238 Cal. Rptr. at 812.
  \item \textsuperscript{133} Id. at 812, 238 Cal. Rptr. at 811, 812 (citing \textsc{R. \textsc{Keeton, supra} note} 126, at 552).
  \item \textsuperscript{134} Transportation Guar. Co. v. Jellins, 29 Cal. 2d 242, 249, 174 P.2d 625, 629 (1946) (citing Jordan v. Group Health Ass'n, 107 F.2d 239, 247-48 (D.C. Cir. 1939)).
  \item \textsuperscript{135} \textit{Truta}, 193 Cal. App. 3d at 815, 238 Cal. Rptr. at 813.
  \item \textsuperscript{136} Id.
\end{itemize}
fendants were not involved in the business of insurance, no cause of action could be stated under sections 700137 and 1852138 of the California Insurance Code.139

Although the attack on the CDW as an insurance contract has failed so far in both New York and California courts, future attacks based on this issue are likely. As with the New York Attorney General's opinion in 1986, which reversed his predecessor's opinion and held that the CDW was insurance, it would not be surprising to see judges and legislators find that the CDW is subject to insurance regulation if its price continues to increase along with the lessee's liability when the CDW is declined.

IV. COLLISION DAMAGE WAIVER AS UNCONSCIONABLE

The second area of attack against the CDW is predicated on the ground that it is an unconscionable term of the rental car contract. Unconscionability has been defined as "a contract which no man in his senses, not under delusion, would make, on the one hand, and which no fair and honest man would accept on the other."140 The Uniform Commercial Code (UCC) includes a provision invalidating unconscionable terms in contracts for the sale of goods.141 However, article two of the UCC does not directly apply to the CDW in rental contracts because renting a car involves a service. Consequently, one must look to case law to determine the unconscionability of the CDW.

Courts have identified several factors in determining whether a term or the whole contract is unconscionable: inequality of bargain-

138. See CAL. INS. CODE § 1852 (West 1972). For text of section 1852, see supra note 102.
139. Truta, 193 Cal. App. 3d at 816, 238 Cal. Rptr. at 814.
141. Section 2-302 of the Uniform Commercial Code states:

   (1) If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.

   (2) When it is claimed or appears to the court that the contract or any clause thereof may be unconscionable the parties shall be afforded a reasonable opportunity to present evidence as to its commercial setting, purpose and effect to aid the court in making the determination.

ing power between the parties; excessive price; fraud, deception, or coercion; oppression; standardized agreement executed by parties of unequal bargaining strength; lack of opportunity to read or become familiar with the document before signing it; use of fine print in the portion of the contract containing the provision; absence of evidence that the provision was commercially reasonable or should reasonably have been anticipated; the terms of the contract, including substantive unfairness; the relationship of the parties; and finally, all other circumstances surrounding the formation of the contract, including its commercial setting, purpose, and effect.

Charges of unconscionability concerning CDW have fallen within two general areas of litigation. First, unconscionability is used as a sword in an attempt to get damages or other types of relief. Second, unconscionability is used as a shield against lessors who attempt to hold the lessee liable for damages to the rental vehicle.

A. The Sword of Unconscionability

1. Applicable California Statutes

In Truta, the plaintiff charged that the CDW was unconscionable on five separate theories and sought injunctive relief, restitution,


143. See Hertz, 136 Misc. 2d at 425, 518 N.Y.S.2d at 708.

144. See id.

145. See id. at 426, 518 N.Y.S.2d at 709.


147. See, e.g., Williams v. Walker-Thomas Furniture Co., 350 F.2d 445 (D.C. Cir. 1965); Steven, 58 Cal. 2d at 877-78, 377 P.2d at 294-95, 27 Cal. Rptr. at 182-83; Davis, 712 P.2d at 991; Steinhardt, 422 So. 2d at 892.


149. See, e.g., A & M Produce, 135 Cal. App. 3d at 488, 186 Cal.Rptr. at 123; Davis, 712 P.2d at 991; C & J Fertilizer, 227 N.W.2d at 181.

150. See, e.g., Williams, 350 F.2d at 449-50; Davis, 712 P.2d at 991; Steinhardt, 422 So. 2d at 893-94; C & J Fertilizer, 227 N.W.2d at 181.

151. See, e.g., A & M Produce, 135 Cal. App. 3d at 486-87, 186 Cal.Rptr. at 122; Davis, 712 P.2d at 991; C & J Fertilizer, 227 N.W.2d at 181.

152. See, e.g., Williams, 350 F.2d at 450; A & M Produce, 135 Cal. App. 3d at 489-90, 186 Cal. Rptr. at 123-24; Davis, 712 P.2d at 991; C & J Fertilizer, 227 N.W.2d at 181. For a discussion on factors relevant to unconscionability, see generally RESTATEMENT (SECOND) OF CONTRACTS § 208 (1981); Annotation, Doctrine of Unconscionability as Applied to Insurance Contracts, 86 A.L.R. 3d 862 (1972); Annotation, "Unconscionability" as Ground for Refusing Enforcement of Contract for Sale of Goods or Agreement Collateral Thereo, 18 A.L.R. 3d 1305 (1968).

and damages. The defendants demurred to the charge of unconscionability on the premise that it can be used only as a defense to enforcement of the CDW and not as a ground for affirmative relief.

The court first looked to the applicable California statutes which govern unconscionable provisions in contracts. Section 1770 of the California Civil Code provides that inserting an unconscionable provision in a contract is an unlawful method of competition and an unlawful act or practice in a sale or lease to consumers. Also, section 1780 allows a consumer who is harmed by an unconscionable contract to recover actual damages, obtain an injunction, receive restitution, and be awarded punitive damages. Furthermore, section 1670.5, enacted by the legislature in 1979, contains the exact language of section 2-302 of the UCC and has been applied to all contracts rather than just consumer contracts.

The five separate theories were summarized by the court as follows:

[T]he CDW . . . provides no protection for most circumstances, a fact which the defendants concealed; its cost is excessive within the meaning of the California Insurance Code and far in excess of a price that would be determined in a competitive business environment; the CDW has misleading language; the manner in which the rental contracts are printed, worded, packaged and presented disguises the existence of a major portion of the contractual provisions; and defendants obtained unfair advantage by use of their superior bargaining position.

Id. at 808, 238 Cal. Rptr. at 809 (numbers omitted).

154. Id. at 809, 238 Cal. Rptr. at 809.

155. Id. at 817-18, 238 Cal. Rptr. at 815-16.

156. Id.

157. See California Civil Code section 1770(s) which states: "The following unfair methods of competition and unfair or deceptive acts or practices undertaken by any person in a transaction intended to result or which results in the sale or lease of goods or services to any consumer are unlawful: . . . [s] Inserting an unconscionable provision in the contract." CAL. CIV. CODE § 1770(s) (West Supp. 1989) (emphasis added).

158. See California Civil Code section 1780(a) which states:

Any consumer who suffers any damage as a result of the use or employment by any person of a method, act, or practice declared to be unlawful by section 1770 may bring an action against such person to recover or obtain any of the following:

(1) Actual damages, but in no case shall the total award of damages in a class action be less than one thousand dollars . . . .

(2) An order enjoining such methods, acts, or practices.

(3) Restitution of property.

(4) Punitive damages.

(5) Any other relief which the court deems proper.

CAL. CIV. CODE § 1780(a) (West Supp. 1989) (italics indicate changes or additions by amendment).

than being limited to sales transactions. Therefore, the defendant's contentions that unconscionability can only be used as a shield is negated by the legislature's approval of allowing damages and injunctive relief when a consumer has been injured by an unconscionable contract. The test to be applied in such circumstances is whether "the clauses involved are so one-sided as to be unconscionable under the circumstances existing at the time of the making of the contract." 

2. Procedural and Substantive Aspects of Unconscionability

The Truta court next focused its attention on the procedural and substantive aspects of unconscionability in a contract setting. The procedural aspects of unconscionability relate to the following: deficiencies in the contract formation because "of deception or a refusal to bargain over contract terms"; oppression, which "arises from an inequality of bargaining power"; "an absence of meaningful choice"; and surprise, which involves the extent of allegedly agreed-upon terms that are hidden in a form contract drafted by the party seeking to enforce the contract provision. On the other hand, the substantive aspect of unconscionability involves the actual contract provisions themselves and whether they are unreasonably favorable to one party, such as "[u]nexpectedly harsh terms manifested in the form of price disparity."

The Truta court then applied the procedural and substantive elements of unconscionability to the plaintiff's five separate allegations of unconscionability. The plaintiff's first theory was a substantive allegation that the CDW provides no protection in most circumstances—a fact which the defendants concealed. However, the court held that this was an insufficient claim as a matter of law. The plaintiff's second allegation of unconscionability was based on

162. Id. at 819, 238 Cal. Rptr. at 816.
163. Id. (citing 15 J. WILLISTON, A TREATISE ON THE LAW OF CONTRACTS § 1763A (3d ed. 1972) (footnotes omitted).
165. Id.
166. Id. (quoting J. WILLISTON, supra note 163, at 213-15.)
167. Id. at 820, 238 Cal. Rptr. at 817-18. For a synopsis of the five separate theories, see supra note 153.
168. Id. at 817 n.11, 238 Cal. Rptr. at 815 n.11.
169. Id. at 820, 238 Cal. Rptr. at 817. The court had already ruled that the plaintiffs' third cause of action for fraud did not state a cause of action and, as such, this allegation of unconscionability was meritless. Id.
two elements, the latter of which was that the price of the CDW was excessive relative to what it would be in a competitive business environment. The court held that this allegation was sufficient to raise an actionable claim of substantive unconscionability because of the price disparity between the CDW and the amount of potential loss as well as the excessive price being unreasonably favorable to the lessor. Consequently, this allegation of unconscionability, based on excessive price, was sufficient to survive the defendant's general demurrer.

The third allegation of substantive unconscionability, that the CDW contained misleading language, was held to be without merit because the court had already denied a cause of action for misrepresentation based on this same misleading language premise. The final two allegations were based on procedural unconscionability, and one of these allegations had to be proven to coexist with the substantive aspect for the cause of action to survive. The allegations that the defendants obtained unfair advantage by use of their superior bargaining position and the contract's nonnegotiable terms provided a sufficient basis to afford the plaintiff affirmative relief.

The impact of the Truta holding is that the defendants may be held liable for actual monetary damages by having an unconscionable provision in the rental contract, to wit, the CDW. Such a finding could establish severe liability upon the rental car firms since they receive

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170. Id. at 817 n.11, 238 Cal. Rptr. at 815 n.11. The first element was based on an excessive price within the Insurance Code. However, since the court held that the CDW was not subject to insurance regulation, this allegation failed to state an actionable claim. Id.

171. Id.

172. Id. at 820-21, 238 Cal. Rptr. at 817. The court stated:

[Plaintiff paid $6 per day for a waiver for collision or upset damage or loss up to $1,000; that on an annualized basis the rates charged are more than double the amount of "insurance" provided and are unreasonably high; that no competition exists with respect to the "insurance" provided by each defendant since each is the sole supplier of the CDW for its rentals.

173. Id. at 821, 238 Cal. Rptr. at 817.

174. Id.

175. Id. at 821, 238 Cal. Rptr. at 818.

176. Id. The court cautioned that it was not holding that the CDW was in fact unconscionable. Rather, it merely found that the allegation was sufficient to survive a general demurrer. Id. As such, this cause of action was remanded to the trial court to determine whether the CDW was unconscionable under California Civil Code section 1670.5(b). Id.
over one billion dollars per year from the CDW sale. Furthermore, a finding of unconscionability could lead courts to enjoin the rental car companies from selling the CDW. However, the Truta decision was based on a statute which expressly granted affirmative recovery in cases of unconscionability and did not limit its use as only a defense against enforcement of the contract.

B. The Shield of Unconscionability

In Super Glue Corp. v. Avis Rent A Car System, Inc., a class action was brought seeking damages, and declaratory and injunctive relief for unfair trade practices, including the sale of the CDW. The plaintiff alleged that the charges of the CDW and the methods by which they were computed were unconscionable and thus in violation of section 2-302 of the UCC.

However, the court quickly denied this claim because section 2-302 does not create a cause of action allowing a party subject to an unconscionable contract to recover damages. Furthermore, the court stated that under the UCC and common law a court can only refuse enforcement of the unconscionable contract or clause. As a result, the court affirmed the lower court's dismissal of the unconscionability claim.

As stated in Super Glue, a plaintiff may use the doctrine of unconscionability as a shield against lessors who try to enforce certain provisions of an unfair rental car agreement. Such was the case in Automobile Leasing & Rental, Inc. v. Thomas, wherein the plaintiff rental car company sought to recover for damage to the rental car due to the defendant lessee's negligence. The lessee purchased the...
CDW which waived all liability claims against her, “provided that the
car was used in conformity with [the] rental agreement.”187 After
the lessee's accident, the lessor sought recovery alleging that the
lessee violated the terms of the contract by not returning the vehicle
in the same condition as when received and by driving it in an unlawful
manner as evidenced by the traffic citation, thereby nullifying the
CDW.188

However, the Nevada Supreme Court viewed the lessor's interpre-
tation as limiting the effectiveness of the CDW to apply only in those
instances where damage was caused by a third party, especially be-
cause this limitation was not apparent from either the face of the
rental agreement or from the reverse side.189 Furthermore, the court
stated that the test to be applied in determining the scope of the
CDW was not what the insurer intended by his words, but rather
what the ordinary reader and purchaser would have understood
them to mean.190 Consequently, the court held that upon purchasing
the CDW the ordinary consumer would believe that he was absolved
from liability, regardless of fault.191

A similar conclusion was reached in Davis v. M.L.G. Corp.,192
wherein the plaintiff lessor sought to recover for damage to the
rental vehicle from the defendant lessee who had driven the car into
a utility pole while intoxicated.193 The lessee had purchased the
CDW194 which also had a number of restrictions that limited its ap-
PLICABILITY, including driving under the influence of drugs or
intoxicants.195

The Colorado Supreme Court looked at the limiting language of
the contract versus the lessee's reasonable understanding of the
scope of the CDW.196 The court reversed the appellate court decision
and held that the CDW in the rental contract “was significantly re-

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187. Id.
188. Id.
189. Id. at 263, 679 P.2d at 1270-71.
190. Id. at 263, 679 P.2d at 1271 (quoting Elliot Leases Cars, Inc. v. Quigley, 118 R.I.
321, 326, 373 A.2d 810, 812 (1977)).
191. Thomas, 100 Nev. at 263, 679 P.2d at 1271.
193. Id. at 987.
194. Id. at 986. Actually, the lessee purchased a “physical damage waiver” which is
analogous to the CDW. See supra note 1.
195. Id. at 986-87.
196. Id. at 989.
stricted in an unconscionable manner." In doing so, the court cited numerous factors which displayed the unconscionable limitation upon the scope of the CDW. Other cases are in accord in using unconscionability as a defense to enforcement of contract terms which severely limit the scope of the CDW because "[t]he exceptions swallow the protection."

C. Legislation Aimed at the Unconscionability Aspect of CDW

Aside from statutes which prohibit unconscionability in general, legislation has been aimed at requiring the lessor to make the provisions of the rental agreement more distinct. For example, language contained in a New Mexico insurance statute, which became effective on June 19, 1987, requires that "[a]ny rental car company offering for sale insurance coverage or collision damage waivers shall state clearly on the front page of the rental contract that the purchaser of the . . . [CDW] may be covered . . . on his personal motor vehicle insurance policy . . . ." A similar provision is found in a Minnesota automobile statute which states that when a vehicle is rented in Minnesota, "the rental contract . . . must contain a separate written notice in at least 10-point bold type, if printed, or in capital letters, if typewritten . . . ."

In June of 1988, Representative Charles Schumer of New York in-

197. Id. at 992.
198. Id. The following factors led the court to view the contract as unconscionable: (1) the contract was offered on a take-it-or-leave-it basis; (2) the lessee's intention of relieving himself from all liability when purchasing the CDW; (3) a normal person purchasing the CDW would believe that he is covered for a collision regardless of being under the influence of alcohol; (4) the lessor's agent had never seen any customers read the reverse side of the agreement; (5) the limiting exceptions to the CDW were never brought to the lessee's attention; (6) the combination of the color and size of print inhibits reading the back side of the contract; and (7) the small print and type of form was evidence that the lessor was trying to discourage persons from reading the back of the form. Id.
200. Id. at 652.
203. Id. (emphasis added).
205. Id.
troduced a bill\textsuperscript{206} in the United States House of Representatives which was generally aimed at the abuses associated with the CDW. Section one of the bill, entitled "Disclosure of Information Concerning Collision Damage Waivers," contains the following language: "Any commercial lessor of automobiles shall, verbally and in prominent writing on the face of the rental agreement, inform any lessee or prospective lessee of . . . [1] (1) the optional nature of any collision damage waiver offered under the terms and provisions of the agreement . . . ."\textsuperscript{207} Furthermore, any violation of the bill could bring about private civil actions, civil penalties, and injunctive relief.\textsuperscript{208}

In California, a bill to add section 1936 to the Civil Code was introduced to govern the rental of passenger vehicles and to limit the liability incurred by the renter of a passenger vehicle.\textsuperscript{209} One section of the proposed bill is specifically aimed at the unconscionability aspect of the CDW which provides that "every [CDW] shall provide or . . . be deemed to provide that the renter has no liability for any damage, loss, loss of use, or any cost or expense incident thereto."\textsuperscript{210} Furthermore, the bill states, "every limitation, exception or exclusion to any damage waiver is void and unenforceable."\textsuperscript{211} Much like the New Mexico and Minnesota statutes, the California bill provides for more distinct language and type face in the selling of the CDW.\textsuperscript{212} If any provisions in the bill are violated, the customer is afforded a private cause of action for recovery of damages, appropriate equitable relief, and the prevailing party is entitled to attorney's fees and costs.\textsuperscript{213}

As one can see from the recently enacted and proposed legislation,

\begin{itemize}
  \item \textsuperscript{206} H.R. 4855, 100th Cong., 2d Sess., 134 CONG. REC. E2045-46 (daily ed. June 16, 1988).
  \item \textsuperscript{207} Id. at E2046 (emphasis added).
  \item \textsuperscript{208} Id.
  \item \textsuperscript{210} Id. § 1(e)(1).
  \item \textsuperscript{211} Id. § 1(e)(2) (emphasis added) (subsection (f) lists the exception to this rule).
  \item \textsuperscript{212} Id. § 1(g)(1).
  \item A rental company which offers or provides a damage waiver for any consideration in addition to the rental rate shall clearly and conspicuously disclose the following information in the rental contract or holder in which the contract is placed and, also, in signs posted at the place, such as the counter, where the renter signs the rental contract: (A) the nature of the renter's liability, e.g., liability for all collision damage regardless of cause, (B) the extent of the renter's liability, e.g., liability for damage or loss up to a specified amount . . . (E) the renter may purchase an optional damage waiver to cover all liability subject to . . . [the] exceptions permitted under subdivision (f), and (F) the charge for the damage waiver.
  \item Id.
  \item \textsuperscript{213} Id. § 1(m).
\end{itemize}
the procedural and substantive aspects of the CDW have come under attack, and its reform in this area is imminent.

V. THE DECEPTIVE ASPECT OF THE COLLISION DAMAGE WAIVER

Another attack upon the CDW charges that the low rates are advertised to lure consumers into renting a car, only to have this low rate increased by hidden charges such as the CDW. The blame for hidden charges in the total rental cost is placed upon smaller rental companies who, needing a competitive edge, advertise irresistibly low rates which are later supplemented by allegedly incidental charges like the CDW.\textsuperscript{214} Without advertising the superficially low rates, promoting the actual rental cost of a vehicle, with all of the extras, would cause a company to lose business in the extremely competitive rental car industry.\textsuperscript{215}

Nineteen states have enacted or are considering laws that would make it mandatory to include all hidden or optional charges when advertising a rate.\textsuperscript{216} Also, in 1988 the National Association of Attorneys General, in a preliminary report, found that many companies' advertised rates do not reflect extra rental fees.\textsuperscript{217} The report recommended that all mandatory charges be included in advertising rates.\textsuperscript{218} The attorneys general task force is expected to recommend state enforcement guidelines which will outline acceptable business behavior and alert potential violators that they will be sued under state commercial law.\textsuperscript{219} The report stated that companies make their rates seem lower by breaking down their rates into components such as the CDW.\textsuperscript{220}

The Better Business Bureau in New York estimated that the actual cost of renting a car for one week in New York City was $49 to $145 more than the advertised price.\textsuperscript{221} The bureau said the problem is nationwide and that many rental car companies, including the industry leaders, do not fully disclose surcharges and various contract limitations in their advertising.\textsuperscript{222} As an example, a recent Hertz special, advertised at $99 for a weekly rental, would actually cost $230.95 for

\begin{itemize}
\item \textsuperscript{214} Diamond, \textit{supra} note 2, at 1, col. 1.
\item \textsuperscript{215} Wolff, \textit{supra} note 39, at 7, col. 1.
\item \textsuperscript{216} Taylor, \textit{Travel and You: Rental-Car Protection Under Fire}, L.A. Times, July 24, 1988, \S 7, at 19, col. 1.
\item \textsuperscript{217} Hinds, \textit{supra} note 24, at 54, col. 3.
\item \textsuperscript{218} Id.
\item \textsuperscript{219} Id.
\item \textsuperscript{220} Id.
\item \textsuperscript{221} Fried, \textit{supra} note 34, at 201. The bureau checked out advertised rates which ranged from $59 to $295 a week. However, after the additional charges, including the CDW, the actual rental cost ranged from $108 to $439.65. \textit{Id.}
\item \textsuperscript{222} Wolff, \textit{supra} note 39, at 7, col. 1.
\end{itemize}
full protection, an increase of 133% over the advertised price.\textsuperscript{223}

A. Legislation Aimed at Halting Deceptive Practices

The surcharges and hidden costs in rental car contracts have caught the attention of the United States Congress and Representative Schumer who proposed House Resolution 4855.\textsuperscript{224} Section 1(b) of the Resolution states: "If . . . [a] lessor advertises any . . . rental, the advertisement shall include . . . and (2) if the advertisement specifies the cost of the automobile rental, specific reference to the cost of any collision damage waiver."\textsuperscript{225} Any violation of this provision could bring about private civil actions, civil penalties, and injunctive relief.\textsuperscript{226}

In California, Assembly Bill 3006 is designed to curb deceptive practices by limiting the daily cost of the CDW to nine dollars\textsuperscript{227} and to provide that "[a] rental company which disseminates in this state an advertisement containing a rental rate shall include in that advertisement a clearly readable statement of the charge for damage waiver and a statement that damage waiver is optional."\textsuperscript{228} Furthermore, the bill states: "A rental company shall only advertise, quote, and charge a rental rate that includes the entire amount except taxes and mileage charge, if any, which a renter must pay to hire or lease the vehicle . . . ."\textsuperscript{229} If any provisions in the bill are violated, the customer is afforded a private cause of action for recovery of damages, appropriate equitable relief, and the prevailing party is entitled to attorney's fees and costs.\textsuperscript{230}

The thrust of the legislation against surcharges is to require rental car companies to utilize "all-inclusive" pricing which is a price that is set to include all of the extra costs like the CDW.\textsuperscript{231}

\textsuperscript{223} Rudolph, \textit{Hitting 'Em Where It Hertz; Is Rental Car Coverage a Rip-off?}, \textit{Time}, Feb. 15, 1988, at 84.
\textsuperscript{224} H.R. 4855, 100th Cong., 2d Sess., 134 CONG. REC. E2045-46 (daily ed. June 16, 1988). Representative Schumer, while introducing the bill, stated: "Rental agents frequently pressure unknowing vacationers into accepting the unnecessary expense. To make matters worse, the cost of the collision damage waiver is often obscured by advertised super low daily rental rates." \textit{Id.} at E2045.
\textsuperscript{225} Id. at E2046 (emphasis added).
\textsuperscript{226} Id. at E2046. Section 2 is entitled "Enforcement Provisions."
\textsuperscript{228} Id. § 1(i) (emphasis added).
\textsuperscript{229} Id. § 1(1)(i) (emphasis added).
\textsuperscript{230} Id. at § 1(m).
\textsuperscript{231} Taylor, \textit{supra} note 216, at 19, col. 1.
VI. COLLISION DAMAGE WAIVER AS UNNECESSARY COVERAGE

A. Other Available Options

Critics of the CDW charge that agents at rental car companies often pressure its customers into purchasing the CDW without informing them that their own personal automobile insurance may provide the same coverage as the CDW. A survey of twenty-seven rental car companies revealed that only four of them indicated to their customers that the CDW was optional and that the renter's own insurance might provide equal coverage. Furthermore, an estimated sixty percent of all insured motorists are already covered by their own policies for collision damage to the rental vehicle, although many are unaware of this fact. Even if a renter does have duplicative personal insurance, his driving record may be affected if he gets into an accident with the rental vehicle, possibly causing his personal insurance premiums to rise.

Insurance companies charge the equivalent of $1.30 a day for coverage comparable to the CDW which is often priced at $9 to $13 per day. The annualized cost of the CDW can range anywhere from $1,080 to $3,600, which far exceeds conventional automobile insurance to cover similar damage. As a result, the cost of the CDW is often ten times higher than the cost of what collision coverage should be. Since only a couple of dollars of the CDW pays for the lessor's insurance, the remaining cost serves to raise the rental rate.

Lessees who do not have personal automobile insurance, or whose insurance does not cover rental car damage, may still be protected because many credit card companies provide supplementary coverage if they use their credit cards for the rental. However, with the

233. Taylor, supra note 24, at 74 (quoting a survey done by the Consumer Affairs Committee of Americans for Democratic Action).
234. Fried, supra note 34, at 201 (quoting J. Robert Hunter, President of the National Insurance Consumer Organization); Rudolph, supra note 223, at 84.
236. Rudolph, supra note 223, at 84.
237. See supra note 20 and accompanying text.
238. Taylor, supra note 24, at 74.
239. Fried, supra note 34, at 201.
240. Gould, supra note 23, § 3, at 11, col. 1 (quoting Sean F. Mooney, Senior Vice President and economist with Insurance Information Institute).
241. Magenheim, supra note 235, at 36. The American Express Gold card covers the full value of cars rented anywhere in the world. The Diners Club card provides up to $25,000 coverage in the United States and Canada. Mastercard and Visa Gold cards provide full coverage everywhere up to the limit of the credit the lessor has on the card. Hinds, supra note 24, at 54, col. 1.
Lessees who have a Visa or Mastercard issued by Chase Manhattan Bank get $3,000 worth of collision coverage on rental vehicles. Grimes, supra note 13, § 10, at 3, col. 1. American Express platinum cards will provide coverage up to $50,000. Fritz, supra
lessee's liability being increased to cover the full value of the rental vehicle, a credit card with a $3,000 limit would not provide enough coverage for its holder. Nevertheless, the CDW can be ignored if the lessee's own insurance provides rental car coverage or if the lessee pays with a credit card that offers such coverage.

Many auto insurance companies use a standard policy devised by the Insurance Services Office which provides full coverage for rental car damage that is the lessee's fault. Conversely, some personal insurance policies will not cover a rental car at all unless it is being used as a replacement vehicle. Furthermore, in Massachusetts, the insurance commissioner issued a statement that automobile insurance policies written in the state did not provide comprehensive coverage for a rental vehicle unless it was being substituted while the owned car was inoperable.

B. Legislation Aimed at Informing Lessees of Duplicative Insurance Coverage

As a result of the confusion regarding whether one's personal auto insurance or credit card will provide coverage in a collision damage of the rental vehicle, several legislatures have enacted or proposed laws that require rental car companies to disclose the possibility that one's personal insurance may duplicate the CDW's coverage. For example, a law in Minnesota was passed in 1987 which requires that rental car customers be informed at the rental counter about a law in that state which provides that any personal automobile insurance must also cover the rental of a vehicle. As such, the customer must also be informed that the CDW may be unnecessary. Furthermore, the law requires that the CDW cannot be sold unless the lessee is provided with a written acknowledgment that this consumer protection notice has been read and understood.


243. Hinds, supra note 24, at 54, col. 3.
244. Grimes, supra note 13, § 10, at 3, col. 1.
245. Id.
248. Id.
249. Id.
250. Id.
A similar consumer protection notice law\textsuperscript{251} was enacted in 1987 in New Mexico. This statute requires that any rental car company offering the CDW for sale shall clearly notify the lessee on the front of the rental contract that he may be covered under his own personal motor vehicle insurance policy.\textsuperscript{252} Furthermore, if such personal coverage does exist, the lessee can require that the lessor submit any claims directly to the lessee's personal insurance carrier, which is regarded as the lessee's agent.\textsuperscript{253}

The bill proposed by Representative Schumer in Congress would require that the lessor of any vehicle inform the consumer both verbally and in prominent writing on the face of the rental contract that coverage under the CDW may be duplicative of the lessee's automobile insurance policy.\textsuperscript{254} In California, Assembly Bill 3006 provides that if any rental car company sells the CDW it must conspicuously disclose on the face of the rental contract, and in signs posted at the rental counter, information which notifies the customer that his personal insurance may provide coverage for all or a portion of the lessee's liability, and that the renter should consult with his insurer to determine the scope of his insurance coverage.\textsuperscript{255} Furthermore, this bill forbids lessors from recovering any portion of a damage claim to a rented vehicle from the lessee's credit card, nor may it place any debit on the lessee's card.\textsuperscript{256}

Another bill in California,\textsuperscript{257} effective January 1, 1989, requires that any rental car company that leases or rents a motor vehicle cannot enter into a contract unless it is disclosed to the customer that the CDW offered may duplicate the customer's own insurance policy.\textsuperscript{258}

VII. CONCLUSION

The CDW is in danger of being heavily regulated, through either new legislation specifically aimed at curbing its abuses or by subjecting it to current law which will deter its use. The rental car industry has been unsuccessful in efficiently monitoring both the CDW's price and marketing tactics which has left consumers paying money for an option that is discreetly expensive, limited in its coverage, or useless.

\textsuperscript{252} Id.
\textsuperscript{253} Id.
\textsuperscript{256} Id. § 1(k)(1).
\textsuperscript{257} S. 2464, 1988 Cal. Adv. Legis. Serv. 466 (Deering).
\textsuperscript{258} Id.
altogether. Consequently, regulation seems imminent, whether it be through insurance regulation, contractual rights for the consumer, or measures aimed at preventing the deceptive nature overshadowing the CDW.

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