Imposing Liability on Renter Deters Theft

Douglas J. Del Tondo of REVOLT describes the effect of CDW laws regarding theft in California, New York, and Illinois and urges lobbying or court action to void these laws.

The automobile rental industry is caught right now in the middle of a fight for its very survival. However, most operators — both large and small — are unaware of how the recent legislation in California, New York, and Illinois affect them by taking away their property rights for customers' loss of their vehicles under the law of bailment (rentals). And if the industry does not wake up soon, and frankly take aggressive action to attack this particular aspect of these new laws, as they spread throughout the country and have their pernicious influence, the rental car industry will realize that it is out of business and has uninsurable losses that will force a collapse.

To explain this situation, let us start simply. When you lease a vehicle to a renter, you are exchanging typically a $15,000 vehicle for a promise that the renter will safeguard the vehicle from damage or theft, pay the daily rate, and return the vehicle on the date promised. In law, we call this "bailee" liability of the renter; the lease is called a bailment. There are many other bailment relationships such as when you leave your car in a parking lot, or you borrow a VHS tape from a video store, or even check out a library book.

In legalese, we say that a bailment for mutual benefit requires the bailee, in event of a loss, to explain the loss. Because the bailee was in the best position to safeguard the property and had custody at the time of loss, the courts put the burden of proof on the bailee (renter/borrower) to establish the lack of negligence. This was a well-known exception to the burden of proof being put on the plaintiff in a tort case (the owner). The owner of property is also allowed to enforce a contract of liability of the bailee for loss due to theft. These laws of bailment come from English common law and are part of every state's law.

As a matter of policy, the law has recognized that imposing liability on the bailee (such as a renter) is an important deterrent against loss due to negligence or theft. For example, when provisions on ticket stubs from parking lot attendants — who are bailees just like your renters — said they were not liable for theft of an owner's car, the courts voided them. The courts reasoned that freeing the bailee — the parking attendant — of liability for negligence only encourages negligence. And reading between the lines, the court knew the attendants would get wise if the ticket stubs were deemed enforceable in court and they could risk stealing the cars themselves. Sensibly, the courts recognize that the bailee — parking attendant or renter — must have exposure for negligent loss of the owner's car or otherwise the law is encouraging negligence.

Then the Attorneys General of numerous states were concerned about the abuses that some rental operators were committing. They meant to only deal with inflated damage charge-backs, pressure tactics on customers to take Colli-

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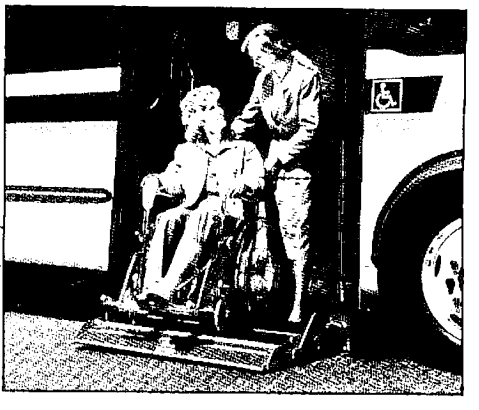

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sion Damage Waiver, as well as the bait (low prices) and switch (high add-ons) schemes of a few. The Attorneys General had passed laws in the leading states of New York, California and Illinois to deal with these problems. The laws in each state differ but all essentially limit the right to collect CDW charges, add-on charges, and repair costs.

However, by accident or overzealousness, the Attorneys General added one other provision in these laws dealing with liability for theft which actually went beyond the problems that prompted the legislation. In New York, the legislature put a cap for any damage or theft of only $100. Mr. La Placa of the Car Rental Coalition, which is fighting H.R. 1293 — a proposal in Congress to enact this type of legislation throughout the country — pointed out recently that the New York law has led to a rapid escalation in reports of car thefts. He says in his editorial "Everything is Not Okay," (*Auto Rental News*, December/January 1992), "Customers call to say that 'the car must have been stolen, just bill my credit card $100.'" Obviously, since the customers have so little incentive to safeguard the cars or so little consequence from stealing the cars, the law works directly to encourage losses to your fleets.

In 1989 the California legislature put in effect a law, Civil Code Sec. 1936, which altered the bailment relationship of auto rental customers. This law provides that the rental company cannot ask the renter to be liable for theft if the renter returns the car key or the "authorized driver establishes that the ignition key furnished by the rental company was not in the vehicle at the time of the theft" and the driver reports the theft to the police within 24 hours as well as cooperates in an investigation of the loss. The only means of shifting liability back to the renter is if "the rental company ... establish(es) that an authorized driver committed or aided and abetted the commission of the theft."

So far in California, there are strong signs that car thefts are occurring because of an awareness of car thieves about this three-year-old law. One of our REVOLT members in Los Angeles reveals that in the three years after the law, thefts have tripled where the car keys were returned by the customer. (A thief aware of the law would be expected to return the keys). And those where car keys were returned before the enactment of this law appeared to be honest thefts. Pre-January 1989, all the vehicles in this category were recovered and had popped ignitions. However, after this legislation, circumstances tend to show that the customers were dishonestly returning the car keys and declaring a theft occurred. Only 33 percent of the vehicles where car keys were returned ended up being recovered (compared to 100 percent pre-1989). This means the evidence was more frequently now being carefully destroyed in some chop shop. And of this small recovered group, 33 percent showed a popped ignition, meaning only rarely was there reason to believe that the renter was not in on it. However, these circumstances are insufficient to prosecute anyone for auto theft. It is a virtually hopeless situation to create customer liability. Even if anything could be proven, the expedient of charging a credit card is gone. The rental car operator is simply stuck. He needs customer responsibility for loss of the car to deter theft and losses, but now the owner is left without recourse.

In another recent example, the police pulled over a women for having plates belonging to a car reported stolen from a rental company. The women then called her boyfriend to bail her out of jail. When he arrived, the detective checked the boyfriend's plates and found they belonged to a recently-stolen rental vehicle that were now switched. It turns out the women had previously rented the vehicle that matched her boyfriend's plates and reported it stolen. These people have gotten wise to the law's quirks. They were targeting rental companies for theft and hiding it by switching plates.

The proponents of these CDW laws inside and outside the industry need to be made aware of this negative impact. By destroying bailee liability for renters of automobiles they must recognize they have created a dangerous situation of, in effect, legalizing negligence and theft. And advocates of this legislation must be reminded that this part of the legislation was inserted without any particular reason to support it.

The situation now for the rental car industry in California and New York is precarious. While national companies may be able to shift their income around on a national basis to sustain losses in California and New York, those operators who try to survive only in California or New York are being crushed. Yet, everybody loses for no purpose. And raising prices is an insufficient answer for anyone.

One of our REVOLT members who leases expensive show vehicles has in the past eight months sustained hundreds of thousands of dollars in losses of vehicles which each renter reported stolen. In each case, the renter handed the keys back and reported the theft to the police within 24 hours. If the California law blocks recovery, what chance does this operator have to stay in business? And a business insurance broker advises me that the industry will not place insurance for these kind of losses without a self-insured retention which ends up equaling in effect the payout. It is thus not real insurance, but a savings plan to cope with the losses on a cash-basis. In the parlance of security analysts, these

losses are known as uninsurable losses. And part of the reason is that the law makes paying the losses unattractive to an insurer because there appears to be no one to subrogate back against.

The rental car business simply cannot sustain the type of losses that stem from laws that encourage theft of their stock in trade. It cannot be made up in prices or by insurance. And it has a multiplying effect. Every stolen car reduces the average rental income and puts a burden on the operator to replace the same car to keep fleet income up. This means every theft is like a double hit. And the majors will soon learn what the small operators are already experiencing, particularly if H.R. 1293 is passed.

What REVOLT represents is a group of rental car operators who are interested in fighting this single aspect of the law in California as unconstitutional. And if we establish that here, maybe the move will spread back across the land to correct this error in the law. We have had more than 60 rental car companies, including seven majors, sign a petition to protest this portion of the California statute. It was presented to Assemblyman Connelly, the author of this statute. He favors correction of this statute. He and Senator Beverly coauthored SB 1759 (introduced February 20, 1992) which now returns the law to common law standards. The renter has the burden to prove that he exercised reasonable care, which requires at minimum that the renter report the theft within 24 hours, cooperate with the police and rental agency, as well as sign a declaration of non-involvement in the theft. It is crucial that this piece of legislation passes. Contact your representatives and let them know how you feel. ■

The author of this guest editorial is Douglas J. Del Tondo, a partner in Nelson, Sheehan, Del Tondo & Guggenheim in Los Angeles which specializes in defending claims against rental car companies. Mr. Del Tondo is also General Counsel of REVOLT.