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Commissioners on Uniform State Laws
National Conference of Commissioners
on Uniform State Laws
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Re: Consumer Leasing and Proposed UCC 2A-206

To the Commissioners:

I am writing to you on behalf of The Hertz Corporation to comment on the sweeping proposal to change the law concerning consumer leasing contracts, UCC 2A-206. Compare UCC 2-206 (sales), and contrast UCC 2B-308 (licenses). The Commissioners might consider how this Proposal would affect daily rent-a-car operations and consumer leases of automobiles and other personal property.

I. BACKGROUND

Hertz is the world's largest rent-a-car company. Founded in 1918, we are a subsidiary of Ford, with over 1600 locations (95% of them corporately-owned), leasing over a quarter million rental cars in the United States alone. Our business utilizes a standard form Hertz rent-a-car lease. About 60% of our customers rent for business use, while about 40% are individual "leisure" consumers that rent for personal (not commercial) use. Other rent-a-car companies typically have higher percentages of "leisure" consumer lessees (e.g., Alamo has 70% leisure, 30% business lessees). Our world-wide operations at Hertz encompass more than a half million rental cars.

II. THE CONSUMER LEASING PROPOSAL

Overruling existing law, new proposed UCC 2A-206 (July 25-August 1, 1997 Draft) attacks the validity of "non-negotiated terms" in a consumer lease that the consumer has signed. Under the Proposal, such "non-negotiated terms" are excluded from the lease if "a reasonable consumer" in a transaction of the same type "would not reasonably expect" them to be in the deal, unless the lessor shoulders the burden to show that the specific consumer/lessee "had

knowledge" of the terms before signing.[1] Under Proposed 2A-206, a surprising term would be excluded from the deal, even when the term is neither unconscionable nor induced by unconscionable conduct, the contract was designed to call attention to the term, the consumer had an opportunity to read the provision, and the consumer signed the contract.

III. CRITIQUE OF THE PROPOSAL

We strongly oppose Proposed 2A-206. It should be striken. Our views are supported by responsible academic writers and Committees of the American Bar Association [ABA], all of which object to the Proposal as fomenting meritless and costly litigation, creating economic inefficiencies, and raising transaction costs (i.e., increasing the cost of leasing automobiles and other goods) to the injury of all consumers.

Where leases are concerned, the Proposal is particularly ill-considered. Because of the greater economic vulnerability of a lessor over the term of a lease (as opposed to a sale), and the greater number of terms subject to the Proposal in a typical consumer lease (as opposed to a sale), proposed 2A-206 would impact on lessors more severely and unfairly than it would impact on sellers. The impact of the Proposal on Hertz illustrates the violence to common sense that is entailed by the Proposal.

A. The sweeping proposal for new 2A-206 has come under fire from the American Bar Association [ABA]: The Proposal, said the ABA, "would have disasterous consequences for consumer leasing, which relies almost entirely on standard form contracts, since any consumer could litigate whether he or she could have 'reasonably expected' a contract term, and thus could practically avoid the efficient enforcement of nearly any provision he or she chooses. Such an incongruous measure should be deferred for more careful consideration of its merits in connection with the Model Consumer Leasing Act." Comments (p.3) of ABA Working Group on revision of UCC Article 2A (September 6, 1996).

The import of these ABA comments, and actual experience in Arizona (discussed below), shows that the Proposal is subject to

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[1] The statutory text of Proposed 2A-206(a) reads: "In a consumer lease, if a consumer agrees to a record by authentication or affirmative conduct, any non-negotiated term that a reasonable consumer in a transaction of this type would not reasonably expect to be in the record is excluded from the lease, unless the consumer had knowledge of the term before agreeing to the record."

manipulation and overreaching claims.[2] The costs of these overreaching claims will inevitably be passed on to all consumers. When we say consumers, we mean the vast class that includes virtually everyone. For everyone is potentially a consumer in some transactions. There is no special reason to think that the huge class of consumers-- encompassing all of us-- has a claim to be more honest or less litigious than any other class of people. "Consumers" encompasses the full range of the clay of humanity.

B. There is nothing in any existing U.S. law that supports proposed 2-206/2A-206. See Appendix. Though the Proposal is new, it appears to extrapolate from the old "reasonable expectations" doctrine (which was confined to the special context of insurance contracts),[3] mushrooming that old doctrine to apply across-the-board to all consumer sales and lease transactions. This is unsound.

The old "reasonable expectations" doctrine, in its several variants, has been criticized as inconsistent and unworkable by commentators and the courts. See, e.g., Allen v. Prudential Prop., 839 P.2d 798, 801-807 (Utah S.Ct. 1992) (court rejects "reasonable expectations" doctrine, finding that consumers are adequately protected by traditional doctrines of unconscionability, estoppel, waiver, good faith, and the rule that ambiguous language is to be construed against the drafter) ("Today after more than twenty years of attention to the doctrine in various forms by different courts, there is still great uncertainty as to the theoretical underpinnings of the doctrine, its scope, and the details of its application."); Ware, A Critique of the Reasonable Expectations Doctrine, 56 U.Chi.L.Rev. 1461 (1989) (urging rejection of the doctrine). As stated in note 8 of UCC 2B-308 (licenses), on p.145 of the 2B draft now before the Commissioners' 1997 Annual Meeting in Sacramento:

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[2] Our statement about the Proposal being "subject to manipulation" is supported by the actual experience of the Arizona courts. See, e.g., Gordinier v. Aetna Casualty & Surety, 742 P.2d 277 (Ariz.S.Ct. 1986), discussed in White, Form Contracts under Revised Article 2, 75 Wash.L.Q. 315, 333-335 (1997). By contrast, there is nothing-- other than bald assertion-- to support the strained speculation of advocates for the Proposal that a test taking the perspective of the lessor or seller (like the Restatement 2d §211 or UCC 2B-308) is subject to manipulation. See Hillebrand, The UCC Drafting Process, 75 Wash.L.Q. 69, 98 (1997).

[3] There is a special problem about surprising terms in the insurance contract cases, where "the likelihood [is] that the insurance purchaser will not receive the actual contract, the insurance policy, until after offering to buy insurance and perhaps paying the first premium." Ware, A Critique of the Reasonable Expectations Doctrine, 56 U.Chi.L.Rev. 1461, 1463-1464 (1989).

> As applied outside of the arena of insurance contracts and divorced from the insurance law concepts that influence the test in that setting, a broad "reasonable expectations" test finds little support and is rejected here.

Years ago, the old "reasonable expectations" doctrine was superceded by the very different approach taken in the Restatement (2d) of Contracts §211, which is picked up in UCC Article 2B.

The unreasonableness of Proposed 2A-206 is shown by contrasting it with proposed UCC Article 2B-308 (licenses). First, building on the Restatement (2d) of Contracts §211(3), UCC 2B-308 addresses the special problem of "surprising terms" in "shrinkwrap licenses" where the terms of the license may not be seen until after a purchase is made. This special problem of "shrinkwrap licenses" does not exist for sales or leases. Second, under Proposed 2-206/2A-206 the basic trigger for excluding a term is that the term is surprising or "not reasonably expected." By contrast, the trigger for excluding a term under UCC 2B-308 (licenses) is that the surprising term must be a "deal killer" that is so fundamental that it would cause an ordinary reasonable buyer to reject the entire deal. Third, UCC 2B-308 focuses on the perspective of the drafter of the consumer contract (not the consumer). This is appropriate since sound public policy should encourage compliance by the drafter, rather than simply encourage litigation in a game of "gotcha." The standard in UCC 2B-308(b)(1) talks about both "the party proposing the form" and the other party that signs or approves the form. By contrast, Proposed 2A-206 talks about only the consumer signer. This is one-sided and unfair.

We agree with Professor White that Proposed 2-206/2A-206 would create inefficiencies, "give many sympathetic and well-coached consumers deals for which they did not pay," and "stimulate new litigation."[4] The vagueness of the Proposal-- and its potential

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[4] Professor White makes six predictions about proposed new UCC 2-206/2A-206: (1) New UCC 2-206/2A-206 would be "much more influential" than 211(3) of Restatement (Second) has been. Nearly every lawyer would learn of new UCC 2-206/2A-206 through law school contracts courses. (2) New UCC 2-206/2A-206 would have "much greater influence than the unconscionability doctrine has had." A survey of Arizona cases invoking Restatement 211(3) shows the Arizona courts (led by Justice Feldman) invalidating standard terms that are neither substantively nor procedurally unconscionable. Thus the "use of Section 211(3) in the Arizona courts tells us that the doctrine is something more than and different from unconscionability." (3) New UCC 2-206/2A-206 would "foreclose summary judgment against consumers in form contract cases." (4) New 2-206/2A-206 would "grant trial and appellate judges grand discretion to uphold or overturn form contracts." In the mine-run case, where there is no affidavit or oral testimony, "the

to cause mischief in vastly increased, costly litigation-- is striking.[5] To bring home the vague, open-ended, and unworkable nature of Proposed 2A-206, the Commissioners might ask themselves: Would any of you recommend that any of your own clients (in any conceivable line of business) offer customers a contract that contained the language of Proposed 2A-206(a)?[6] "Because the section attacks the very mechanism by which parties allocate loss (form contracts), it is unclear how these costs of litigation and of unbargained deals-- now to be put on the backs of the honest

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reasonable expectation that is fulfilled by the Court is in truth the expectation of the appellate judge." (5) "The courts will disagree on the question whether the expectations of the particular plaintiff consumer-- or those of some hypothetical consumer-- are to be considered." (6) New 2-206/2A-206 would "be resistant to the traditional cures of corporate lawyers," since any and all terms drafted by a corporate lawyer are targeted for potential attack by both 211(3) and new proposed 2-206/2A-206. See James J. White, Form Contracts under Revised Article 2, 75 Wash.L.Q. 315, 345-356 (1997).

[5] Three points illustrate the vagueness of the Proposal. First, 2A-206 provides no definition of "non-negotiated terms." The UCC Article 2-Sales Drafting Committee could not agree on precisely what "non-negotiated" means. Second, though 2A-206(a) states that "consumer knowledge" is an affirmative defense, presumably for the lessor to show, "knowledge" means "actual knowledge" of the lessee (see 1-201(25)). Information about the lessee's actual knowledge is uniquely in the possession of the lessee and would be difficult for any lessor to show. Moreover, given the standard of actual "consumer [lessee] knowledge," if a lessee ever lost on this ground, it would seem the lessee would have a malpractice claim against his or her attorney. Cf. Hawkland & Miller, UCC Series 2A-108:07 at n.8 (Art.2A). In short, the defense of "consumer [lessee] knowledge" is a sham. Third, the "assurances" in 2A-206(b) are illusory: It fails to provide for summary judgment. To the contrary, this latest hastily-drafted-fig-leaf-covering-a-bad-idea simply underlines the point that a triable issue is presented under the Proposal whenever a consumer fails to read the contract.

[6] What do the phrases in Proposed 2A-206(a) mean and how would any business administer such a contract? The marketplace does not offer such contracts because no one with any sense thinks that informed consumers would want such a deal. Why force all consumers to pay higher prices -- specifically, the extra costs of making all lessors offer the "legally imposed contract" that would be mandated by Proposed 2A-206 -- to "dumb down" commerce and reward a few careless or overreaching consumers? We submit that Proposed 2A-206 flunks its own test: It is a surprising term, tucked away in the middle of statutory verbiage, profoundly injurious to consumers, and it ought to be striken. It is a "deal killer" term for UCC 2A.

majority of the consumer class-- can be moved elsewhere." Our view is that advocates for proposed new 2-206/2A-206 have not justified this radical proposed change in the law. See James J. White, Form Contracts under Revised Article 2, 75 Wash.L.Q. 315 (1997).

C. Our daily-rent-a-car business at Hertz is based upon traditional legal principles validating our standard form rent-a-car contracts. Until now, there has never been any serious question that our standard form contracts are reasonable and valid, as are standard form contracts generally, in the absence of some unconscionable misconduct (high pressure sales tactics, or deceptive language in the rental agreement). Hertz's standard "rental counter" style of business is similarly reasonable and valid, and is practiced by all daily rent-a-car companies the world over. Indeed, it seems fair to say that "counter" service and standard form consumer rent-a-car agreements are a widely-accepted part of modern everyday life.

All this would change under the new regime of proposed new 2A-206. The court granted us summary judgment in Hertz v. Stogsdill (USDC, ND Ind., Civil No.96-300) (February 26, 1997), where we withheld accident insurance coverage because an under 25-year-old co-worker (an unauthorized operator) was driving our Hertz rental car at the time of the accident. The court rejected the renter's claim that our standard form rental agreement was invalid because the terms were never explained to him. Under proposed new 2A-206, the Stogsdill case might well come out the other way, since the renter claimed he was surprised by the terms of the standard form rental contract that he signed. Similarly, some courts might overthrow the result in Lewis v. Hertz Corp., 181 A.D.2d 493, 581 N.Y.S.2d 305 (N.Y.A.D. 1 Dept. 1992), motion for leave to appeal dismissed, 80 N.Y.S.2d 893, 600 N.E.2d 636, 687 N.Y.S.2d 909 (N.Y.Ct.App. 1992), and find that a renter did not "expect" and is therefore not bound by Hertz's standard terms on optional gasoline service, insurance, or hourly late return charges.

Taking the time to explain all the terms of a daily rental agreement to each consumer is not a viable option in our business.[7] In today's modern world, consumers expect and demand fast, convenient and efficient rent-a-car service. If car rental companies forced customers to stand in line, while a tedious mandatory explanation of the rental agreement was given to each customer, many of those customers will (as they well can) find

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[7] Nor, as Professor White points out, is it possible to satisfy proposed 2-206/2A-206 by making certain standard terms conspicuous. There is no comprehensive safe harbor in proposed new 2-206/2A-206. Proposed 2-206/2A-206 aims a scattergun at any and all standard form terms, and if too many provisions in a form contract are highlighted, none of them stands out "conspicuously" from the others.

other means of transportation when they travel.[8]

There is nothing in law, or equity, or common experience that justifies the mischievous impact on our industry that is threatened by proposed new 2A-206. Without sufficient thought or care for the practical impact of their Proposal, advocates of proposed new 2A-206 threaten the daily rent-a-car industry with vexatious, harassing litigation and unwarranted liability.

Taking all this into account, it seems fair to say that proposed 2A-206 needlessly raises transaction costs, to the injury of all consumers. It encourages litigation rather than compliance with reasonable rules. It stands in sharp contrast to the modern approach to regulation of

> working to help people comply, not playing a game of "gotcha."

More Benefits Fewer Burdens: Creating A Regulatory System that Works for the American People, A Report to the President on the Third Anniversary of Executive Order 12866 (OIRA, OMB, December 1996).

IV. OBJECTIONS TO THE PROPOSAL ARE PARTICULARLY STRONG FOR LEASES (AS OPPOSED TO SALES)

The origins of the Proposal for leases in 2A-206 show that it is intellectually bankrupt. Though leases are different from sales-- indeed, sufficiently different that they are covered in a separate Article 2A of the UCC-- proposed 2A-206 does not even consider this point. It simply "slavishly conforms" leasing law (UCC 2A-206) to proposed sales law (UCC 2-206). We disagree.

Overlooked by advocates of Proposed 2A-206 are the important differences between leases and sales. First, as the ABA has pointed out, "[b]ecause the lessor depends upon lessee performance of lease obligations so that the lessor can realize the residual value of the equipment, it is even more exposed than a seller or a secured lender to economic loss from any documentary uncertainties, and hence is far less able to tolerate the situation which proposed section 2A-206 would create." Second, a sale often has only two terms: price and quantity. By contrast, typical leases are more

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[8] One of the many questions left unanswered by advocates of proposed new 2-206/2A-206 is exactly how Hertz and other daily rent-a-car operations are supposed to function under the brave new world that would be ushered in by their radical proposal. If advocates of proposed new 2-206/2A-206 would sweep away the standard form contract/"rental counter" method of renting cars, observed the world over, they should suggest another, better way of doing business. Yet they suggest no such alternative.

complex, with more on-going obligations than a sale (e.g., typical consumer leases may contain restrictions on geographical and physical use, as well as provisions on return of the residual, maintenance and repair, taxes, fines, and insurance). For these reasons, the vague standards of Proposed 2A-206 would impact on lessors more severely and unfairly than it would impact on sellers.

V. UNIFORMITY AND ENACTABILITY

The slogan of "conformity" fails to support Proposed 2A-206. There is no good reason why 2A-206 should "conform" to the radical and unsound provisions of 2-206 (never enacted in any U.S.jurisdiction) rather than 2B-308 (which is based on the Restatement (2d) of Contracts §211, with adjustments to try to compensate for defects shown by the Arizona experience).

Though it masquerades as a "pro-consumer" measure, Proposed 2A-206 is in fact profoundly hostile to consumers' interests. It would raise the cost of leasing goods for all consumers, harass lessors, and burden the courts, all for no good reason. This is vexatious and harassing legislation at its worst. We will vigorously oppose and defeat this Proposal wherever we can. Though it is difficult to predict the outcome of political strife, we will do everything we can to ensure that this utterly perverse Proposal is scuttled so that it never becomes the uniform law of our country. Cf. White, Comments at 1997 AALS Annual Meeting: Consumer Protection and the UCC, 75 Wash.L.Q. 219 (1997).

VI. CONCLUSION

Our conclusion is that proposed new UCC 2A-206 is ill-advised, and contrary to the public interest. It should be striken.

Thank you for considering our views. We ask the Commissioners to reject the ill-considered Proposal on consumer lease contracts in Proposed UCC 2A-206.

Sincerely,

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cc: Commissioners on Uniform State Laws

Charles Alan Wright
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APPENDIX

Two distinguished law professors, Raymond Nimmer, the Reporter for UCC Article 2B (Licenses), and James J. White, co-author of White & Summers' UCC Treatise, have pointed out that there is nothing in any existing U.S. law that supports proposed 2-206/2A-206. See Reporter's Note 5 to UCC 2B-308 (Licenses) (January 20, 1997 Draft); James J. White, Form Contracts under Revised Article 2, 75 Wash.L.Q. 315, 319-320 (1997).

1. Traditionally, one who signs a contract is bound by it whether he read it or not. See, e.g., Godfrey, Bassett & Kuykendall Architects, Ltd. v. Huntington Lumber & Supply Co., 584 So.2d 1254, 1257 (Miss. 1991); Gaunt v. John Handcock Mut.Life Ins., 160 F.2d 599, 602 (2d Cir. 1947) (L.Hand,J.). Thus the "standard terms" in Hertz' auto rental contracts have been consistently held valid, where they were signed by the consumer lessee. See, e.g., Hertz v. Stogsdill (USDC, N.D.Ind., Civil 96-300)(February 27, 1997) (court grants summary judgment and upholds Hertz' denial of insurance coverage because of a contract violation-- i.e., the rental car was involved in an accident when it was driven by an under-25-year-old co-worker, an unauthorized operator-- rejecting claim that Hertz had duty to inform consumer of contents of standard form rental agreement that he signed); Lewis v. Hertz Corp., 181 A.D.2d 493, 581 N.Y.S.2d 305 (N.Y.A.D. 1 Dept. 1992), motion for leave to appeal dismissed, 80 N.Y.S.2d 893, 600 N.E.2d 636, 687 N.Y.S.2d 909 (N.Y.Ct.App. 1992) (court upholds standard form Hertz rental agreement-- specifically its terms on optional gasoline service, collision damage and personal accident insurance, and hourly late return charges-- finding it not unconscionable absent any evidence of high pressure sales tactics, or deceptive language in rental agreement); Hertz Corporation v. Home Insurance Co., 14 Cal.App.4th 1071, 18 Cal.Rptr.2d 267 (Cal.Ct.App. 1993) (court holds that, where indemnity provisions of standard form Hertz rental agreement contained clear language, "it matters not that the insured in fact failed to read it"). See also Super Glue Corp. v. Avis, 159 A.D.2d 68,72, 557 N.Y.S.2d 959, 961 (N.Y.A.D. 2 Dept. 1990) ("Given the optional character of the service and the disclosures contained on the rental agreement, we find that no coercion is placed upon the customer who chooses to return the vehicle with less gasoline than was present when it was rented and is therefore charged for gas.")

2. The sweeping Proposal for new 2-206/2A-206 goes beyond the analogous provision in Section 211(3) of the Restatement (Second) of Contracts. That provision reads in full as follows:

> (3) Where the other party has reason to believe that the party manifesting such assent would not do so if he knew that the writing contained a particular term, the term is not part of the agreement.

This Restatement formulation is not as solicitous of signers as

proposed new UCC 2A-206. Restatement 211(3) focuses on the perspective of the drafter of the form (not the signer). It upholds the validity of a standard term unless the drafter had "reason to believe" that the particular term would kill the whole deal (i.e., that the signer would not agree to the deal "if he knew that the writing contained a particular term").