



## The Ride-Sharing Economy: Keeping Liability in the Rearview

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In large cities the world over, passengers have stopped reaching into the air to hail a cab and have begun reaching into their pockets for their smartphones. Companies such as Uber, Lyft and Sidecar represent a cross-section of the transportation sector of a rapidly growing marketplace: the so-called “sharing economy.”[1] The sharing economy delivers products, places, rides and various other perks to consumers through the use of modern technology. Dog owners can turn to DogVacay rather than finding a kennel for Fido.[2] The elderly can now hire someone to clean their gutters using TaskRabbit instead of dealing with the snotty kid next-door.[3] Loan seekers can avoid the bank by booting up their PC and heading over to Lending Club.[4] The sharing economy exploded on the scene across various sectors seemingly overnight. Almost twenty years after Ebay began, the peer-to-peer model has expanded to the exchange of innumerable tangible assets. [5] However, not all people seem happy about the advent of the direct exchanges spurred on by innovative minds equipped with modern technology. Some heavy-hitters of the sharing economy, such as Airbnb, already face uphill battles in cities that seem less than eager to begin sharing the economy with everyday homeowners.[6]

Recently the transportation sector of the sharing economy has found itself under the proverbial microscope. Facing potential legal obstacles from several fronts, Uber and its fellow ride-sharing companies might have to pump the breaks before they lose millions. Robert Woods, a *Forbes* contributor, posits, “[T]he biggest legal exposure by a wide margin is accident liability.”[7] The simple response to such an argument would be that the companies could not be

liable to victims because the drivers are not agents of the companies. The Restatement (Third) of Agency defines an agency relationship as when a principal “manifests assent to another person (an ‘agent’) that the agent shall act on the principal’s behalf and subject to the principal’s control” with the corresponding consent of the agent to the same terms.[8] For the moment, the insinuation that courts would find ride-sharing companies liable for tortious conduct of drivers seems unlikely for two reasons: 1) the drivers would likely be considered independent contractors, and 2) the Communications Decency Act may prevent liability.[9]

Turning first to the independent contractor theory, a clarification must be mentioned. Although “independent contractor” has entered colloquial speech, the Restatement (Third) of Agency has dispensed with its use because “some termed independent contractors are agents while others are nonagent service providers.”[10] So, the question here boils down to whether drivers are agents or nonagent service providers.

Drivers act as nonagent services providers when they are operating “within an independent course of conduct not intended...to serve any purpose” of the companies facilitating the transactions.[11] Although the phrase “to serve *any* purpose” may give pause to some interpreters of the Restatement, the comment on § 7.07 indicates that the work completed by the drivers would not fall under the agent-employer relationship. If tortious conduct on the part of the drivers is not within “work assigned or...a course of conduct that is subject to...control,” ride-sharing companies will not likely be held accountable.[12] Uber and its fellow service providers do not assign passengers to drivers nor control the conduct of the drivers. Rather, ride-sharing companies purport only to provide an “interactive computer service” through which a driver and a passenger may engage in a direct deal.[13] If courts believe the ride-sharing companies fall outside the agency relationship, the companies will be in a favorable position because the Communications Decency Act could further insulate them from liability.

The Communications Decency Act provides for protection from civil liability for providers of an interactive computer service. The Act defines an interactive computer service as “any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet.”<sup>[14]</sup> Given the definition of a service, some have argued that the Act only protects Internet Service Providers.<sup>[15]</sup> However, courts have disagreed with this argument.

Instead, courts have read the Act to “cover[] ‘any’ information services or other systems, as long as the service or system allows ‘multiple users’ to access ‘a computer server.’”<sup>[16]</sup> Uber, Lyft and Sidecar operate in just such a manner. The GPS data of drivers and passengers are saved on the servers of the companies and accessed by users. In exchange for the service, the companies charge a percentage of the fare resulting from the agreement entered into between drivers and passengers. Judging by the lack of a clear agent-employer relationship and the apparent protection afforded by the Communications Decency Act, many people may assume that ride-sharing companies can rest easily. However, regulations based on decades of policy consideration ought to affect ride-sharing companies in the same manner as other transportation suppliers.

Regulations on taxicab drivers, livery services and other types of transportation providers exist to prevent harm to the population at large. “The bus company must expect that sooner or later its buses will cause harm, even if drivers are invariably careful. In this sense, bus companies impose risks that are materially greater than or different from the risks that we all impose upon one another by occasional use of motor vehicles.”<sup>[17]</sup> Ride-sharing companies present the same types of risks to the public through the delivery of their service. Each of the three major players in the peer-to-peer ride-sharing economy, Uber, Lyft and Sidecar, offer \$1,000,000 in liability

coverage.[18] However, the coverage for each company is limited to the times between picking up and dropping off of a passenger.[19] Coverage does not extend to the period during which a driver logs into an application but has yet to procure a passenger. If not for the service provided by these companies, the drivers would have no purpose in driving around town.

The issue hit home on New Year's Eve of last year when a driver struck and killed a six-year-old girl in San Francisco.[20] The driver of the car had not picked up a passenger yet, but was actively awaiting one. The driver had logged into his application, but due to the policies of the company, will be fully liable for any damages resulting from the accident due to the lack of a passenger in the vehicle.[21] Seeing this as a major issue, California passed legislation in September 2014 that will require ride-sharing companies to carry liability insurance for drivers during any period they are logged into the ride-sharing application.[22] While the legislation may prove to be an important step in the regulation of this new sector of the economy, the current laws on the books do not go far enough. An earlier version of the bill passed in September called for drivers to carry \$1,000,000 in liability coverage.[23] In a subsequent version, the number was lowered to \$750,000.[24] The law that finally passed required only \$180,000 in total coverage.[25]

The sharing economy has evolved in a short period of time. Growth of a new industry inevitably requires that the law, from a legislative and judicial perspective, change with it. Legislators have the advantages of drafting new laws and repealing others. Judges, however, must wait for such changes in the statutes or apply old-world precedents to modern issues. Judges cannot control the effectiveness or timing of the former option, but through the latter option, they can extend vicarious liability to the sharing economy thereby forcing ride-sharing companies to take responsibility for the conditions they have created.

The road to legal legitimacy will be fraught with litigation. Los Angeles and San Francisco district attorneys have notified Uber, Lyft and Sidecar that they are operating outside the conventions of the legal system.[26] The ride-sharing companies may operate in this manner for a time, but dramatic changes in both the legislatures of the country and the courts must be implemented. Absent swift action from the government, the ride-sharing movement will undercut decades of regulation designed to benefit drivers, passengers and the public at large. Regulated taxicabs operate in a manner that requires accountability, oversight and a premium on public safety. Without similar restrictions and penalties imposed on the ride-sharing economy, Uber, Lyft and Sidecar will profit, while the drivers, the government and the public are left in the dust.

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[1] <https://hbr.org/2014/10/how-uber-and-the-sharing-economy-can-win-over-regulators/>

[2] <http://www.forbes.com/pictures/eaji45emgkh/neighborgoods/>

[3] Id.

[4] Id.

[5] See <http://www.businessinsider.com/the-success-of-the-sharing-economy-2014-2>

[6] See <http://www.law.illinois.edu/bljournal/post/2014/01/21/Hotel-Conglomerates-and-AirBnB-The-Tale-of-lobbyists-thwarting-a-cheap-stay-in-the-Big-Apple.aspx>

[7] <http://www.forbes.com/sites/robertwood/2014/01/08/big-liabilities-for-uber-sidecar-and-lyft/>

[8] Restatement (Third) Of Agency § 1.01 (2006)

[9] See <http://www.forbes.com/sites/robertwood/2014/01/08/big-liabilities-for-uber-sidecar-and-lyft/>

[10] Restatement (Third) Of Agency § 1.01 (2006)

[11] Restatement (Third) Of Agency § 7.07 (2006)

[12] Id.

[13] See <http://www.forbes.com/sites/robertwood/2014/01/08/big-liabilities-for-uber-sidecar-and-lyft/>

[14] 47 U.S.C. § 230(f)(2)

[15] See Barrett v. Fonorow, 799 N.E.2d 916, 922 (2003)

[16] Batzel v. Smith, 333 F.3d 1018, 1030 (9th Cir. 2003)

[17] Dan B. Dobbs, Paul T. Hayden & Ellen M. Bublick, *The Law of Torts* § 426 (2d ed. 2014)

[18] <https://www.lyft.com/safety>; <http://www.side.cr/policies/insurance/>; <https://support.uber.com/hc/en-us/articles/202347808-In-the-US-what-insurance-is-available-if-there-s-an-accident->;

[19] Id.

[20] <http://www.newyorker.com/business/currency/uber-lyft-liability>

[21] Id.

[22] <http://www.reuters.com/article/2014/09/18/us-california-lawmaking-ridesharing-idUSKBN0HD01420140918>

[23] Id.

[24] Id.

[25] Id.

[26] <http://www.sfgate.com/bayarea/article/S-F-L-A-threaten-Uber-Lyft-Sidecar-with-5781328.php>