



The “Sharing Economy”

I take the money – you take the risk

BY CHRISTOPHER DOLAN

The rapid growth of social networking and computer applications, “apps,” has created a new economy, the sharing economy. In its purest form, the sharing economy is the process by which underutilized assets are capitalized upon by letting them out to others, or by the sharing of expenses for a common activity. When I was in college, there was a cork board that people would place index cards on stating they would be driving from Boston to Connecticut and they would offer a ride in exchange for sharing the cost of gas. Now, that board is your smartphone, the exchange is for cash, and the cork board is getting 20 percent.

Three models

The three developing areas in which this model presents currently are ride sharing, car sharing, and the short-term letting out of extra rooms to itinerant guests.

Ride sharing is the provision of point-to-point, pre-arranged, transportation in exchange for a “donation” or a pre-determined price. Think Uber, Uber X, Lyft or Sidecar.

Car sharing is the rental of your car, by the hour, or day, through Getaround, Relay Rides, etc.

The big transient apartment share provider is Airbnb.

This all sounds great, right? A little extra money on the side, what’s the harm in that? Each of these enterprises uses a computer app or platform, to broker the connection. The app owner takes a share of the money, yet they seek to escape all liability, proclaiming that they do not provide transportation services, are not car rental companies, or do not provide lodging. Instead, they merely provide a platform upon which the sharing economy

I recently filed what may be the first wrongful death action against a ride sharing application provider, Uber. I will share the strategic approaches being employed to assure that technology companies fostering these new economies will not escape accountability.

— Chris Dolan

can create greater utilization of under-used resources.

In this new economy, the market-maker wants to share; they take the money, you take the risk. They eschew any responsibility for making sure that the transaction embodies the public safeguards that are incumbent upon common carriers and inn keepers. While technology may change the way that services are delivered, it should not change the fundamental principles of law that have provided safety, security and accountability for generations.

Uber

Uber launched its app in 2010, linking unoccupied, private livery vehicles with those seeking transportation. Uber owns no cars of its own. Uber functioned as an automated dispatch service linking professional, regulated and insured, livery vehicles with passengers. Drivers, in between prescheduled appointments, could go on to the app and make their services immediately available. Passengers, instead of waiting for – or in some instances praying for – a taxi to come by, could now use their smartphone to summon the nearest available town car. The passenger subscribed to Uber by placing their credit card on file. The drivers enrolled with their vehicle and account information; no enrollment fee necessary. Uber made the market and processed the

transaction, making its money on transaction fees.

New players

In 2012, Lyft and Sidecar were launched, providing app-based transportation transaction services between private passengers and private vehicle owner/drivers in exchange for a suggested “donation” so as to try to evade common carrier liability. Unlike taxis that can be randomly hailed, rideshare drivers must have been requested through the app (prearranged) prior to picking up the passenger. Uber, seeking to cash in on the phenomena, used its snazzy application and brand to launch Uber X, similar in design and concept to Lyft and Sidecar. All these companies were born in San Francisco, the Wall Street of the new sharing economy.

Uber X, Lyft, Sidecar and other ridesharing enterprises sought to differentiate their business from, and avoid the regulations applicable to, the taxi industry. The Taxi and Limousine Commission, the industry regulator, in addition to controlling the number of cabs allowed on the road, sets the permissible tariff and heavily regulates vehicle safety, driver training, scheduled maintenance, disability access and anti-discrimination practices.

If it looks like a common carrier...

At first, Uber’s business went unaddressed by regulators. This, largely because the vehicles were, for the most part, regulated and insured as Charter Party Carriers. (See Cal. Pub. Util. Code, §§ 5351, 5360 & 5360.5.) But when Lyft, Sidecar and Uber X started flooding the city with unlicensed, unregulated, private passenger vehicles, the taxi concession and its lobbyists became justifiably concerned. These vehicles had overcome the



MARCH 2014

barriers to entry into the passenger transportation sector by simply ignoring them. Where taxis had to be permitted, inspected, maintained, insured and their drivers screened and trained, all these rideshare drivers had to do was have a car, some gas, a smartphone and a bank account.

In mid-2012 the California PUC issued a cease-and-desist order to these operations, fining them each day that they continued operations. In December 2012, the PUC opened a Rulemaking Procedure to determine how online-enabled apps might affect public safety.

During the Rulemaking Procedure, Uber, Lyft and the others insisted that the PUC did not have the authority to regulate them because they were nothing more than information services rather than part of the transportation industry. The PUC rejected the argument and created a new transportation category, the Transportation Network Carrier (TNC).

Uber, as part of its effort to avoid accountability, stated in its contract with users and to the PUC that it was not a common carrier because it didn't actually transport people. In comments submitted by my office on behalf of the Consumer Attorneys of California (CAOC), we argued that this was a business involved in the transportation of persons for hire and, therefore, was a common carrier. (See comments at cbdla.com/cpuc-comments/)

The PUC agreed, declaring not only that TNCs were common carriers but prohibiting them from trying to obtain a waiver of their responsibilities as such. (See CPUC Rulemaking 12-12-011 @ cbdla.com/cpuc-rulemaking/.)

Where's the insurance?

Another major issue which threatened public safety was the absence of insurance to cover losses caused by TNC drivers. Uber, Lyft, and their cohorts



Photo courtesy Christopher Dolan

proclaimed that the public was protected by the drivers' private insurance. Taxi and charter party carriers are required to maintain commercial policies. Charter Party Carriers are required to maintain \$750,000 insurance for vehicles carrying seven or fewer passengers, \$1.5 million for eight to 15 passengers, and \$5 million for 16 or more passengers. Uber X, Sidecar and other rideshare drivers only had to provide the State's minimum \$15,000 in coverage. Even this was put into question as the insurance companies declared that they would deny coverage to rideshare drivers as they were engaging in commercial activity.

Again, CAOC and others, including the taxi lobby, weighed-in and the PUC required that TNC's carry a minimum of \$1 million in commercial insurance to cover injuries caused by TNC drivers while providing transportation services.

An untenable risk of harm

Uber works because both the passenger and driver have simultaneous access to a GPS system embedded in the app. Users can see the type and location of the nearest empty/available cars. The passenger selects a car and instant messages their request and, immediately, the driver's smartphone flashes. The driver has only seconds to accept that request or

they can lose the fare. The driver accepts via instant messaging back to the passenger by tapping the app screen. Drivers are encouraged to call or text the passenger while they use the GPS to navigate to the pickup location. Drivers position their smartphones directly in their field of view on the window or dash so that they can see and respond to it promptly.

Drivers get "rated" by the passengers. Fear of negative ratings may compel drivers to engage in risky activity. A driver who is slow in getting to the pickup, refuses to carry numerous passengers, or does not drive as fast as the passenger

wants is subject to negative feedback, injuring their relationship with Uber and deterring future riders.

The tragic case of Sophia Liu

On New Year's Eve 2013 at 8:00 p.m., Sophia Liu was killed and her mother and brother seriously injured, when they were struck in a crosswalk by a vehicle being driven by an Uber X driver who was making a right turn. The last thing Sophia's mom remembers is seeing the driver looking down and his face being illuminated by the light of a cell phone.

Despite the driver telling the police he was driving for Uber, Uber denies any responsibility (and coverage under their insurance policy). Their position is that the driver was not an employee and, even though he was logged on to the app and appearing as open and available, he did not have a passenger in his car so he was not engaged in business for Uber. Uber's position is that they have no responsibility and provide no coverage unless the driver has accepted a ride request and is either driving to the pickup or carrying the passenger.

In this tragedy, where a child has died in front of the mother, herself gravely injured, and where the City of



San Francisco has already paid over \$500,000 in medical bills, the defendant driver has only a \$15,000/30,000 policy. Uber, in denying coverage, would leave the taxpayers and family to bear all of the risk and loss associated with their business. This cannot be tolerated.

Liu et.al. v. Uber Technologies et.al

As this appears to be the first rideshare fatality case in the world (Uber provides services in many countries worldwide), I have had to develop a legal strategy to obtain accountability. The complaint alleges legal theories never before advanced. Consider it my app for fighting the callous barons of the sharing economy (the complaint can be found at cbdlaw.com/cpuc-complaint/).

I confront the “no passenger in the car” defense by pointing out the obvious; Uber’s value comes from showing passengers *empty and available* nearby cars. Full cars do not appear on the app. Uber attracts business by selling empty cars; it gets paid when one gets filled. It follows that as soon as a driver is signed on to the app, they are providing an economic benefit to Uber and Uber must bear the costs arising out of their enterprise.

I plead that Uber is negligent in its hiring, training and supervision. Their

rules, regarding the use of the app and GPS, require drivers to engage in distracted driving in violation of the law; that Vehicle Code sections 23123.5 (no instant messaging or texting) and 26708 (restricting use and placement of GPS) are, by the very nature of the app, violated by drivers who are logged on whether trawling for, driving to, or carrying a passenger. In essence, they train drivers to be negligent. I also use these same facts to plead negligence per se.

I further plead that the app is a dangerous and defective product, thereby invoking the strict product liability doctrine. The known and intended use of the product/app, by design, requires driver distraction: Watching for an instant-message request, having to respond immediately, texting or calling the passenger, and use and placement of the GPS, by design cause foreseeable harm and damage secondary to distracted driving. It is applicable to my clients as strict liability and extends not only in favor of the users and consumers, but also in favor of bystanders such as pedestrians. (*Elmore v. American Motors Corp.* (1969) 70 Cal.2d 578, 585-587; *Baker v. Chrysler Corp.* (1976) 55 Cal.App.3d 710, 715; *Preissman v. Ford Motor Co.* (1969) 1 Cal.App.3d 841, 855.)

Conclusion

The law has always adapted with technology and the development of new markets. Every mode of transportation, whether it be the horse, trolley, train, car or plane has its associated risks. Our active and timely participation in the development of consumer protections, through regulation, legislation and litigation is essential as technology evolves. In deciding what strategies to employ *now*, we must think about transportation changes in the not-so-distant future. Soon technology companies such as Google will be operating driverless vehicles. As they are developing the technology, we must be developing the law so as to provide justice to those who, inevitably, will be harmed.

Christopher Dolan is the owner of the Dolan Law Firm with offices in San Francisco, Oakland and Sacramento. He is a past president of the Consumer Attorneys of California, an Executive Board Member of the San Francisco Trial Lawyers Association and a Board Member of the American Association of Justice. He has been selected as one of the “Top 100” lawyers in California and is a past recipient of the CAOC Consumer Attorney of the Year award, SFTLA Trial Lawyer of the Year Award, and Civil Justice Award.



Dolan