

Dangerous Details in the Fine Print: How Uber, Lyft and Sidecar Are Shifting Risk and Avoiding Responsibility

By Pagel, Davis & Hill, P.C., Houston, Texas

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I. INTRODUCTION

This memo is meant as a brief primer on the attempts by unlicensed transportation companies to avoid liability and regulation, and the dangers such attempts impose on passengers, drivers and the community at large. As discussed herein, the “unlicensed transportation companies” are defined generally as transportation companies utilizing wireless smartphone applications to connect riders/customers with drivers, rather than using a computer dispatch or two-way radio dispatch system. Examples of unlicensed transportation companies include UberBlack, uberX, Lyft, and Sidecar, among others.

Passengers, whether they know it or not, are blindly accepting all of the risk while using these companies’ services. Meanwhile, these companies are making massive profits by taking none of the responsibility for what happens when something goes wrong. The recent death of a six-year-girl in San Francisco who was killed by an uberX driver has made that painfully clear. More tragic accidents will occur and more pain will be inflicted on innocent passengers and pedestrians if the loopholes in coverage and responsibility, many of which are addressed in this report, are not fixed.

II. EXECUTIVE SUMMARY

The risks of public transportation are exacerbated by the way in which unlicensed transportation companies conduct business. Risks to passengers, drivers and third-parties are greatly increased due to the lack of regulation and failure to follow minimum standards of safety and quality for services provided.

At the same time as they operate at a greater risk to all involved, unlicensed transportation companies have taken considerable efforts to avoid responsibility for their actions, even thwarting the most minimal standards of accountability to the public when the risks come to fruition and injuries and damages occur. These efforts are seen in (1) their actions to avoid regulatory oversight and public responsibility; (2) their use of terms and conditions designed to disclaim liability for the actions of their drivers; and (3) their use of overbroad release, waiver, and indemnification provisions to pawn off any liability they do have onto unsuspecting customers.

If this was the Airline industry, imagine an unlicensed airline company operating outside the FAA regulations. A person would book a ticket through the unlicensed airline. The unlicensed airline would set the rate. The unlicensed airline would get you a ride on a plane with no maintenance oversight or insurance, with an unlicensed pilot. If the plane were to crash, the unlicensed airline would have no liability. This is what the unlicensed transportation companies are doing in ground transportation. The public needs to be protected.

As long as unlicensed transportation companies continue to stay one step ahead of regulators and avoid oversight designed to minimize risks they create, while at the same time shirking responsibility to those they harm, the public at large will suffer.

III. TOPIC ANALYSIS

A) **Dangers of Transportation, Exacerbated by Unlicensed Transportation Company Business Models**

There are risks associated with every means of transportation. Public transportation is not without its own inherent dangers, and as anyone who has ever been in a vehicle accident can tell you, sometimes an accident is simply unavoidable. However, these inherent risks of transportation are exacerbated by the way in which unlicensed transportation companies conduct business. Yet, it is the hope (strengthened by the explicit, purposeful actions) of the unlicensed transportation companies that these heightened risks are shifted away from themselves, and onto passengers, drivers and third parties.

i) **Risks to Passengers**

The primary risk to passengers of an unlicensed transportation company is the business model itself, which is primarily based on the theory that the present regulations do not govern their actions, i.e. the loophole defense. While unlicensed transportation companies certainly fall under the same regulations governing current transportation providers, it has been the heavily defended position of the unlicensed transportation companies that they are not subject to any governmental regulation whatsoever because they are not a “transportation company” but rather a “technology company” that simply provides a platform for transportation to occur. Though the argument is specious at best, the risks are real.

The first risk of an unlicensed transportation company is the heightened risk created by their drivers. Unregulated drivers simply cannot provide passengers with the same level of quality, care or safety that is found in a licensed and regulated transportation service. The lack of mandatory driver training, lack of full-time commercial auto liability insurance at mandated levels, lack of police-conducted criminal background checks and driver screening, lack of drug and alcohol testing, and the equally important ability, and obligation of taxicab permit holders, to pull drivers off the street who fail to comply with training, screening, testing, or other applicable regulatory requirements are significant differences between regulated and unregulated drivers.

Next, the use of unregulated/unlicensed non-commercial vehicles increases the risk of injury to passengers using unlicensed transportation companies. The lack of regulations on the types of vehicles allowed in service (i.e. age and mileage restrictions), coupled with a lack of independent vehicle inspections (and mandated maintenance) makes riding in a vehicle provided by an unlicensed transportation company more dangerous than using properly licensed transportation services. Further, as some unlicensed transportation companies propagate towards unmarked and unidentifiable public transportation vehicles, a false sense of trust by the general public in such vehicles increases the risk of crime against unsuspecting passengers who may presume the person driving them is subject to some minimal amount of oversight.

Finally, if the risk of personal injury from unregulated/unlicensed drivers and vehicles is not enough, a lack of regulation over the pricing and service levels of the unlicensed transportation companies subjects passengers to the potential threats of

predatory pricing structures and discrimination towards persons with disabilities and protected minorities.

ii) Risks to Drivers

Passengers are not the only people who may bear the brunt of unlicensed transportation companies. Taxicab drivers have one of the highest risks of occupational homicide in the United States. This is why regulators in numerous jurisdictions require taxicab companies to equip vehicles with safety equipment designed to increase driver safety, for example digital security cameras, concealed alarms, vehicle integrated GPS (not a discardable iPhone), identified color schemes, etc. – all tend to improve safety and assist law enforcement in identifying and tracking criminal activities. Some jurisdictions also require crime prevention training for drivers. Unlicensed entities who fail to prepare their drivers appropriately are unnecessarily increasing an already hazardous occupational risk for drivers.

iii) Risks to 3rd Parties

The dangers of unlicensed transportation company drivers and vehicles on public roads are not just a risk to the drivers and passengers of those vehicles, but also to drivers and passengers of other vehicles on the road, as well as pedestrians and property owners who may be harmed. The increased risk of accidents created by a lack of oversight, as discussed above, means that additional drivers and vehicles may be on the road who would not otherwise be there if they were subject to minimal requirements and regulation. As many of the unlicensed transportation companies utilize vehicles that are unmarked, the general public may not report them to authorities (thus losing the benefit of continuous oversight of their driving and actions), and such third parties are deprived of being able to easily identify the correct entity to pursue.

B) Unlicensed Transportation Company Efforts to Avoid Responsibility

Unlicensed transportation companies have taken considerable efforts to avoid responsibility for their actions, even thwarting the most minimal standards of accountability to the public. These efforts are seen in (1) their actions to avoid regulatory oversight and public responsibility; (2) their use of terms and conditions designed to disclaim liability for the actions of their drivers; and (3) their use of overbroad release, waiver, and indemnification provisions to pawn off any liability they do have onto unsuspecting customers.

i) Unlicensed Transportation Companies Eschew Regulatory Oversight To Avoid Laws Which Impose Responsibility and Which Require Public Disclosure/Record Keeping.

Unlicensed transportation companies avoid licensing or permitting in many jurisdictions. Regulators' efforts to set even minimal standards for safety, insurance and nondiscriminatory transportation are met with brazen disregard for existing laws and a social media blitz attacking the laws and those who seek to enforce the law. Unlicensed transportation companies doth protest too much. Without permitting and

public filings, there is no public accountability. Persons who find themselves victims of an unlicensed transportation company are victimized a second time by the mystery and circular reasoning the unlicensed transportation companies perpetuate in order to avoid responsibility for dispatching trips to unqualified drivers.

A recent example of these issues can be found in the tragic case of young girl Sofia Liu. On New Year's Eve in downtown San Francisco, Sofia and her brother and mother were crossing the street at the crosswalk when they were struck by what media reports said was an uberX driver who was allegedly inattentive/distracted and actually logged into Uber's application on his cell phone at the time of the accident. The Uber driver had been previously convicted of reckless driving. Accidents can happen, but Uber has unleashed a plethora of on-demand quasi-taxi drivers, cruising the streets looking for trips, enabling those Uber drivers to avoid taxi driver licensure requirements or regulatory oversight. Absent regulatory oversight through licensure and permitting, who will take responsibility for preventing reckless drivers from continuing to transport the public? The unlicensed transportation companies?

To further avoid regulatory oversight and responsibility, many of these unlicensed transportation companies have threatened local officials and regulators by claiming Federal immunity through preemption under 47 U.S.C. §230(c). This statute is part of the Communications Decency Act of 1996 ("CDA"). The immunity section relied on by the unlicensed transportation companies was plainly intended to protect computer service providers from civil liability for good faith censoring of material it considered "obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable". See 47 USC 230(c)(2). The other provision cited by unlicensed transportation companies provides "No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider." See 47 USC 230(c)(1). This provision is equally inapplicable to the unlicensed transportation company business model. "Courts engage in a three part inquiry when determining the availability of immunity under the CDA, *i.e.*, (i) whether Defendant is a provider of an interactive computer service; (ii) if the postings at issue are information provided by another information content provider; and (iii) whether Plaintiff's claims seek to treat Defendant as a publisher or speaker of third party content." *Doctor's Assocs., Inc. v. QIP Holder LLC*, No. 06 Civ. 1710, 2010 WL 669870, at *23 (D. Conn. Feb. 19, 2010). Claims of immunity for dispatching unqualified or unlicensed drivers, and/or utilizing faulty vehicles, to transport passengers on a revenue shared basis with such unlicensed transportation companies is not only misplaced, but unusually arrogant. After rejection of the CDA Federal immunity claim by every jurisdiction who has thoughtfully considered the issue, the unlicensed transportation companies have asserted this preemption less often and usually only to the less informed regulators and locally elected officials. However, upon information and belief, the unlicensed transportation companies have retained high powered Washington lobbyists to pursue legislation which would expand Federal immunities in an effort to once again avoid local regulation or responsibility for public harm caused by their business model.

- i) Unlicensed Transportation Companies Advertise as Transportation Providers, even "Partnering"; But Then Disclaiming Liability through Outrageous Waivers Buried in Their Boilerplate Terms and Conditions.

Consider the following excerpt from Uber's Terms and Conditions:¹

THE COMPANY DOES NOT PROVIDE TRANSPORTATION SERVICES, AND THE COMPANY IS NOT A TRANSPORTATION CARRIER. IT IS UP TO THE THIRD PARTY TRANSPORTATION PROVIDER, DRIVER OR VEHICLE OPERATOR TO OFFER TRANSPORTATION SERVICES WHICH MAY BE SCHEDULED THROUGH USE OF THE APPLICATION OR SERVICE. THE COMPANY OFFERS INFORMATION AND A METHOD TO OBTAIN SUCH THIRD PARTY TRANSPORTATION SERVICES, BUT DOES NOT AND DOES NOT INTEND TO PROVIDE TRANSPORTATION SERVICES OR ACT IN ANY WAY AS A TRANSPORTATION CARRIER, AND HAS NO RESPONSIBILITY OR LIABILITY FOR ANY TRANSPORTATION SERVICES PROVIDED TO YOU BY SUCH THIRD PARTIES.

Similar language claiming the entities do not provide transportation services and are not responsible for the service provided to customers is found in both Sidecar's and Lyft's terms and conditions.² Full copies of the current terms and conditions for Uber, Sidecar and Lyft are attached in an appendix to this memo.

Each of the selected term sheets disclaim the clear fact that they are transportation service providers (in fact, as advertised to the unsuspecting public), and further disclaim (as will be discussed more below) that they have any responsibility for the services provided. The legitimacy of these disclaimers is determined by the various state and local regulations encountered by the unlicensed transportation companies throughout the country. For example, in California, the Public Utilities Commission adopted rules in September of 2013 attempting to protect public safety in the wake of expanding services by unlicensed transportation companies. Within that decision the Commission explained:

Parties have raised a number of concerns regarding the Terms & Conditions used by certain TNCs [Transportation Network Company], which include general disclaimers of liability. No Term & Condition in a TNC's Terms of Service or elsewhere, can be inconsistent with this decision. Nor can any Term & Condition in a TNC's Terms of Service be used or relied on by the TNC to deny insurance coverage, or otherwise evade the insurance requirements established in this decision. Moreover, the Terms of Service does not absolve the TNC of its responsibilities to comply with the stated regulations in this decision to ensure safety of the public.³

The California PUC also noted their right to revisit the issue and consider adopting uniform Terms and Conditions for all Transportation Network Companies.

- ii) Unlicensed Transportation Companies Require The Download Of Adhesive, Overbroad Release/Waiver/Indemnification Provisions Within Their iPhone Contract, Largely Undiscovered To the Unsuspecting Public.

Consider the following excerpts from Uber's Terms and Conditions:⁴

¹ <https://www.uber.com/legal/usa/terms>; All the terms and conditions cited in this memo reflect the current version of the referenced documents as of the date this memo was authored. Subsequent changes and amendments may alter these terms and conditions.

² <http://www.side.cr/terms>; <http://www.lyft.me/terms>

³ CPUC decision 13-09-045, September 19, 2013.

⁴ <https://www.uber.com/legal/usa/terms>

LIMITATION OF LIABILITY

IN NO EVENT SHALL THE COMPANY AND/OR ITS LICENSORS BE LIABLE TO ANYONE FOR ANY... ..DAMAGES OF ANY TYPE OR KIND (INCLUDING PERSONAL INJURY.... ..THE COMPANY AND/OR ITS LICENSORS SHALL NOT BE LIABLE FOR ANY LOSS, DAMAGE OR INJURY WHICH MAY BE INCURRED BY YOU... ..IN ANY WAY CONNECTED WITH THE SERVICE OR APPLICATION, INCLUDING... ..AS A RESULT OF ANY RELATIONSHIP OR TRANSACTION BETWEEN YOU AND ANY THIRD PARTY SERVICE PROVIDER....

THE COMPANY MAY INTRODUCE YOU TO THIRD PARTY TRANSPORTATION PROVIDERS FOR THE PURPOSES OF PROVIDING TRANSPORTATION. WE WILL NOT ASSESS THE SUITABILITY, LEGALITY OR ABILITY OF ANY THIRD PARTY TRANSPORTATION PROVIDERS AND YOU EXPRESSLY WAIVE AND RELEASE THE COMPANY FROM ANY AND ALL ANY LIABILITY, CLAIMS OR DAMAGES ARISING FROM OR IN ANY WAY RELATED TO THE THIRD PARTY TRANSPORTATION PROVIDER... ..WE WILL NOT ASSESS THE SUITABILITY, LEGALITY OR ABILITY OF ANY SUCH THIRD PARTIES AND YOU EXPRESSLY WAIVE AND RELEASE THE COMPANY FROM ANY AND ALL LIABILITY, CLAIMS, CAUSES OF ACTION, OR DAMAGES ARISING FROM YOUR USE OF THE APPLICATION OR SERVICE, OR IN ANY WAY RELATED TO THE THIRD PARTIES INTRODUCED TO YOU BY THE APPLICATION OR SERVICE... ..THE QUALITY OF THE TRANSPORTATION SERVICES SCHEDULED THROUGH THE USE OF THE SERVICE OR APPLICATION IS ENTIRELY THE RESPONSIBILITY OF THE THIRD PARTY PROVIDER.. ... BY USING THE APPLICATION AND THE SERVICE, YOU MAY BE EXPOSED TO TRANSPORTATION THAT IS POTENTIALLY DANGEROUS, OFFENSIVE, HARMFUL TO MINORS, UNSAFE OR OTHERWISE OBJECTIONABLE, AND THAT YOU USE THE APPLICATION AND THE SERVICE AT YOUR OWN RISK.

...

INDEMNIFICATION

By entering into this Agreement and using the Application or Service, you agree that you shall defend, indemnify and hold the Company... ..harmless from and against any and all claims, costs, damages, losses, liabilities and expenses (including attorneys' fees and costs) arising out of or in connection with:... ..your use or misuse of the Application or Service.

These lopsided provisions are just a small sample of the attempts by three different unlicensed transportation companies to avoid all responsibility for their actions to passengers, drivers, and third-parties.⁵ Another significant provision included in each of their respective terms is the arbitration provision which also includes a jury waiver and class action waiver. It is evident that legal counsel for each of these companies recognized the inherent dangers in providing transportation services. They further understood the increased risks associated with dispatching drivers circumventing regulatory oversight. The unlicensed transportation companies met this increased risk with truly

⁵ See also similar terms of Sidecar and Lyft: <http://www.side.cr/terms>; <http://www.lyft.me/terms>

outrageous disclaimers and risk shifting indemnification provisions. Combine these lengthy, complex and legalistic term sheets with the fact that most persons who sign up for unlicensed transportation companies are doing so using a mobile phone with a 3-5 inch screen, and the result is a large number of consumers who are forced into agreements they have neither read nor understood.

IV. Summary/Conclusion

Regulators and publicly elected officials must not let social media hype overturn long established principles to protect the public. Those principles include reasonable regulatory oversight to prevent harm, as well as financial responsibility by the wrongdoers when harm occurs. Unlicensed transportation companies' efforts to avoid this oversight and responsibility must be thwarted by those who have been given the public trust to do so.

The Taxicab, Limousine & Paratransit Association (TLPA), formed in 1917, serves as the national organization that represents the owners and managers of taxicab, limousine, sedan, airport shuttle, paratransit, and non-emergency medical fleets. TLPA has over 1,000 member companies that operate 100,000 passenger vehicles. TLPA member companies transport well over 2 million passengers each day — more than 900 million passengers annually.

The taxicab, limousine, and paratransit industry is an essential part of public transportation that is vital to this country's commerce and mobility, to the relief of traffic congestion, and to improving the environment. The private taxicab, limousine, and paratransit industry transports 2 billion passengers annually, compared with the 10 billion passengers transported by public transit; provides half of all the specialized paratransit services furnished to persons with disabilities; serves as a feeder service to major transit stations and airports; and provides about half of its service to transportation disadvantaged people, such as the elderly, who are either not able to drive or do not have a car.