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UNDERSTANDING UBER-TRANSPORTATION NETWORK COMPANIES

Purpose and Scope

The issues raised by the entrance into the marketplace of Uber Technologies, Inc. ("Uber") and their app-based transportation network platform have indeed proven to be extreme, commanding the attention of governments throughout the United States and the world to regulate same in the interest of public convenience and safety. Uber states it is not a transport or taxi service; it is a technology company whose product is not car rides but the phone application used to arrange them. Its UberX service relies on partnerships with thousands of persons who use their own vehicles. Drivers find passengers by using Uber's phone app and then remit a percentage of the fare to the company.

The scope and purpose of this short article is to address these issues in the context of events, developments, and law in the United Sates.

Background

The Virginia Experience

When Uber was told by an official of Virginia's Department of Motor Vehicles (DMV) that its fast-growing ride for hire company was illegal and that the firm needed to immediately cease all operations in the state, Uber sent a notice to its ever-growing list of smartphone-wielding customers containing the e-mail address and phone number of the official in charge of the decision and instructing the company's supporters to demand that the DMV "stand up for you."

Hundreds of e-mails came into the inbox of the DMV Commissioner, and after Uber's lobbyists agreed to meet in the ensuing days with aides to Gov. Terry McAuliffe of Virginia, the state's transportation secretary instructed the DMV not to interfere with Uber drivers. Then, seeking a longer-term fix, Uber lobbyists submitted a draft of a proposed temporary operating permit for Uber. State officials granted a revised version several weeks later permitting Uber as well as Lyft, a smaller company, to continue normal operations for the time being.

Temporary Authority

The Code of Virginia provides, inter alia, that to enable the provision of services for which there is an immediate need to a point or between points in Virginia when certified carriers are unable to perform the service, the Department of Motor Vehicles may grant temporary authority for such services by a carrier that would other be required to obtain a certificate under the applicable Code chapter. Va. Code §46.2-2011.1.

Pursuant to this authority, the DMV granted temporary authority to Rasier, LLC, a subsidiary of Uber Technologies, Inc., to operate as a Transportation Network Company or TNC.

In addition, Virginia DMV led a study at the request of the General Assembly to develop a long-term legislative solution that addresses services provided by Uber, Lyft, and similar companies, while also ensuring a level playing field for taxicabs and all other passenger transportation services. The study was completed in time for the 2015 legislative session.

DMV Study and Legislation

In its study, DMV extensively reviewed regulation of transportation network companies (TNCs) by the State of California, the State of Colorado, the City of Seattle, and the City of Chicago.

After its study of numerous issues arising out of the business practices involved, and after meetings with interested stakeholders, DMV made recommendations in many areas for the regulation of TNCs in Virginia. These recommendations by and large found their way into DMV's proposed legislation.

While it is beyond the scope of this article to discuss in great detail the proposed legislation, and the uncertainties about any provision addressing these issues being enacted into law, it is noteworthy that Uber found fault with and contested a number of the proposed provisions. It is noteworthy also that Uber maintained its position that it is a technology company that does not provide transportation services.

The General Assembly of Virginia in its 2015 session enacted legislation in response to the DMV proposed legislation, with some changes.

Driver screening and insurance constituted two important issues.

Space and scope limitations in this article do not allow for an extensive discussion of the new legislation related to insurance issues. However, suffice it to say, at this point, that legislation passed in other states, to be subsequently discussed, was similar to that passed in Virginia. Va. Code §46.2-2000 et seq.

Transportation network companies have been the subject of legislation in other states, for example:

TNC Legislation

California

California regulates transportation network companies through CA Pub. Util. Sec 5430 et seq. (California code (2016 Edition)).

As particularly pertinent, it is provided that a transportation network company ("TNC") must disclose in writing to its driver the insurance coverage and limits of liability that the TNC provides while the driver uses a vehicle in connection with a TNC's online enabled platform, and shall advise a participating driver in writing that the driver's personal automobile insurance policy will not provide coverage because the driver uses a vehicle in connection with a TNC's online-enabled platform. Section 5432(a), supra.

The legislation further provides a TNC and any participating driver shall maintain TNC insurance as follows, inter alia.

The TNC insurance shall be in effect from the moment a driver accepts a ride request on the TNC's platform until the driver completes the transaction on the platform or until the ride is complete, whichever is later; TNC insurance shall be primary and in the amount of $1,000,000 for death, personal injury and property damage. Section 5433. These coverage requirements may be satisfied by insurance maintained by a driver, a TNC or a combination of both. Id. In addition, TNC insurance coverage shall provide for uninsured motorist coverage and underinsured motorist coverage in the amount of $1,000,000 from the moment a passenger exits the vehicle while the passenger exits the vehicle. Id. The insurer provided is insurance coverage shall have the duty to defend and indemnity. Id.

While nothing in the legislation shall be construed to require a private passenger automobile insurance policy to provide primary or excess coverage, a personal automobile insurer may offer a liability policy, or an endorsement to an existing policy, that covers a private passenger vehicle while being used in connection with a TNC's online-enabled application. Section 5434, supra.

Texas

The State of Texas has enacted similar legislation as set forth above found at 2015 Tex. RS HB 1733 (Texas session Laws (2015 Edition)). Constraints as to the length of this article do not permit, at this time, a detailed discussion of such.

The Uber Contract

Marketing

The following salient marketing provisions are found in the Uber App. Space limitations prevent discussion here of all salient aspects of these marketing efforts. However, as will be subsequently discussed, a number of important legal issues are raised.

Under BACKGROUND CHECKS YOU CAN TRUST, it is represented that every ridesharing and livery driver is thoroughly screened through a rigorous process Uber has developed using "constantly improving standards," which include a three-step criminal background screening for the U. S. – with county, federal and multi-state checks that go back as far as the law allows – and ongoing reviews of drivers' motor vehicle records throughout their time on Uber.

Under a section of Uber's published self-description captioned END-TO-END INSURANCE, WE HAVE YOU COVERED, it is provided that from the moment the rider gets into any Uber product (e.g. UberX, UberBLACK) to the moment the rider is dropped off, the ride is covered by commercial liability insurance, and that goes for every trip in every city around the world. It is also represented that in the U. S. specifically, ridesharing has become a popular choice – and Uber is the first company to ensure true end-to-end insurance coverage for ridesharing with drivers on UberX protected by liability coverage even between trips.

Litigation by Taxi Companies

Taxi companies have not been passive to the challenge made by TNCs.

In L.A.Taxi Coop., Inc., v. Uber Techs, Inc., (N.D. Cal., 2015) California taxi companies sued Uber alleging that Uber's representations about the safety of its rides (found in its marketing materials) are false and misleading because the taxi plaintiffs offer safer rides than Uber. Plaintiff's alleged their drivers must submit to a scan which is considered the gold standard of background checks, and that their drivers, unlike Uber drivers, are required to take a safety course and other safety training and to pass a written examination before transporting passengers.

The plaintiffs' lawsuit was framed on theories that Uber engaged in false advertising and unfair business competition. The Court rejected Uber's motion to dismiss in full the complaint because the Court concluded Uber's statements as to the safety of its rides incorporate assertions that a reasonable consumer might rely upon as fact, and found that a reasonable consumer could conclude that Uber's "best in class safety" representation is an objective fact, rather than as "puffery" or an "aspirational statement" as argued by Uber.

Texas has also seen litigation brought by taxi companies.

In Greater Houston Transp. Co. v. Uber Techs., Inc. (S.D. Tex., 2015), taxicab permit holders sued Uber and Lyft alleging tortious interference with business relations, unfair competition, and false advertising. Plaintiffs claimed that the TNCs are unfairly competing with the taxicab industry by failing to comply with local regulations and misrepresenting the nature of their services to consumers. Defendant TNCs moved to dismiss the case as an impermissible attempt by private parties to enforce local ordinances. The Court declined to dismiss the case in whole, holding that the plaintiffs had adequately pled a cause of action for false advertising, including statements by Lyft regarding insurance, and had adequately pled a cause of action of unfair competition.

Contract

In Uber's self-description of the business model at work here, there is also an additional specific written contract document entitled LEGAL. The following provisions all come from that document. Regrettably, space limitations do not here allow for any expansive discussion of same.

Under 1. CONTRACTUAL RELATIONSHIP, it is provided that the rider's access and use of the services constitutes his or her agreement to be bound by these terms, which establish a contractual relationship between the rider and Uber.

Under 2. THE SERVICES, it is stated that the services constitute a technology platform that enables users of Uber's mobile application or websites provided as part of the services to arrange and schedule transportation with third party providers of such services, including independent third party transportation providers under agreement with Uber.

It is further provided in block type that the customer assumes the risk of the ride, and agrees to indemnify Uber from any claim arising thereunder.

It is further provided thereunder that Uber shall not be liable to the rider for any damages, including for personal injury. Later, it states these limitations do not purport to limit liability that cannot be excluded under the law in the jurisdiction of the rider's place of residence.

Under 7. OTHER PROVISIONS, it is stated under CHOICE OF LAW that these contract terms are governed by the laws of the State of California.

A number of legal issues are raised, including the following.

Choice of Law

California has no public policy against the enforcement of choice-of-law provisions contained in contracts of adhesion where they are otherwise appropriate; safeguards will be applied to protect contracting parties, including consumers, against choice-of-law agreements that are unreasonable or in contravention of a fundamental California policy. Brinkley v. Monterey Fin. Services, Inc. (Cal. App 2015).

Florida law appears to be of the same basic effect, that it is the duty for the court to decide whether contract provisions violate Florida public policy. Shotts v. OP Winter Haven, Inc.,. (Fla. 2011).

Texas law is similar to the above: in a contact with an express choice of law, decision on what state's law applies is governed by the law chosen by the parties unless, inter alia, applying the chosen law would contravene a fundamental policy of that state. Chesapeake Operating v. Nabors Drilling USA, 94 S.W. 3d 163 (Tex. App., 2002).

There thus appears legal precedent that comity does not require the application of another state's substantive law if it is contrary to the public policy of the forum state.

Insufficient space exists here for a major discussion of subsidiary corporation issues between Uber and its subsidiary which was granted the certificate to operate it, to address any statute of frauds issue, to discuss the vulnerability of the Uber contract, or to discuss in great detail how the law describing the duty of a common carrier would apply to Uber, but the following authorities are noted.

Subsidiary Corporation Issue

In some states, including Virginia, authority to operate has been granted to an Uber subsidiary. Do any rights and protections apply to Uber, the subsidiary or both?

California law holds that with respect to agency or alter ego theories, there is a presumption of corporate separateness between parent and subsidiary that must be overcome by clear evidence that the parent, in fact, controls the activities of the subsidiary. Cigna Corporation v. Superior Court of San Diego County (Cal. App. 2003).

Florida law is to the same effect: different corporations usually are distinct entities in law, and it is only when the corporation is a sham, or is used to perpetuate deception to detect a public policy, that it can be disregarded. Unijax, Inc., v. Factory Ins. Ass'n., 328 So. 2d 448 (Fla. App. 1 Dist., 1976).

Accord, Villagomez v. Rockwood Specialties, Inc., 210 S.W. 3d 720 (Tex. App., 2006).

Duty of Common Carrier

Does Uber assume at law the duty of a common carrier?

In Gomez v. Superior Court, 113 P. 3d 41, 35 Cal. 4th 1125, 29 Cal. Rprt. 3d 352 (Cal. 2005), the Court recognized the California statutory scheme (Section 2100) providing that a carrier of persons for reward, as was true at common law, is subject to a heightened duty of care.

California recognizes the nondelegable duties doctrine, another exception to the common law rule on hirer nonliability for acts even of independent contractors which prevents a party that owes a duty to others from evading responsibility by claiming to have designated that duty to an independent contractor hired to do the necessary work. The rule was applied to a motor carrier Vargas v. F.mi, Inc., 82 Cal Reptr. 3d 803, 233 Cal. App. 4TH 638 (Cal. App. 2015). The
Court noted the duty owed by motor carriers to safely operate a vehicle on public highways is nondelegable. The extent to which it would apply to Uber is unknown.

In Florida, by standard jury instruction, the reasonable care of a common carrier for the safety of a passenger is the highest degree of care that is consistent with the type of transportation used as the practical operation of the business of a common carrier of passengers. 35 So. 3d 666 (Fla. 2010), Standard Jury Instruction 401.6, "Negligence of a Common Carrier."

Invalid Contract

Courts in various jurisdictions have discussed the issues of legislation impairing contracts. That is, can Uber's contract with its customers absolving itself of liability be upheld?

It has been recognized in California that while no law can be passed impairing the obligation of contracts, the Contract Clause of the U.S. Constitution does not operate to obliterate the police power of the States. Mendly v. County of Los Angeles, 28 Cal. Rptr. 822, 23 Cal. App. 4th 1193 (Cal. App 2d Dist. 1994).

A similar rule obtains in Florida, where it has been held a limitation of attorneys' fees in a private claims bill is a constitutionally permissible exercise of legislative authority and does not constitute an impairment of contractual obligation as proscribed by the Florida Constitution. Searcy, Denney, Scarola, Barnhart & Shipley, P.A. v. State (Fla. App. 2015).

However there is legal authority in Texas that the police power of the State cannot prevail over the Texas constitutional requirement that the legislature may not exercise any process that is expressly or implied forbidden to it by the State constitution, including the impairment of contracts Travelers' Ins. Co. v. Marshall, 76 S.W. 2d 1007 (Tex., 1934).

Courts have also addressed contracts which attempt to exempt common drivers from liability.

Under California's nondelegable duty doctrine, a carrier who undertakes an activity which can be lawfully carried on only under a public franchise or authority and which involves possible damage to the public, is liable to a third person caused by the negligence of the carrier's independent contractor. Castro v. Budget Rent-a-Car System, Inc. 65 Cal. Rptr. 3d 430, 154 Cal. App. 4th 1162 (Cal. App. 2007).

In Texas, by statute, a common carrier cannot exempt itself from liability for property damage by an indemnity agreement. CMA-CGM (Am.), Inc. v. Empire Truck Lines, Inc., 416 S.W. 3d 495 (Tex. App., 2014) (citing Texas Code Section 623.0155). It is unclear how this would apply to Uber.

As previously posited, it is possible that any Uber effort to contract away its responsibilities would be deemed invalid.

Respondeat Superior

There is fertile ground, under the circumstances, for argument that Uber's drivers are employees, rather that independent contractors, and that Uber potentially faces liability for the drivers' acts or omissions.

In California, the scope of employment has been interpreted broadly under the respondeat superior doctrine, and it is well-settled that an employer's vicarious liability may extend to willful and malicious torts of an employee as well as negligence. Farmers Ins. Group v. County of Santa Clara, 11 Cal. 4th 992, 27 Cal. Rpt. 428, 906 P.2d 440 (Cal., 1995).

Employee or Independent Contractor?

A very important issue is whether TNC drivers are employees or independent contractors.

In California, whether a common law employer-employee relationship exists turns foremost on the degree of a hirer's right to control how the end result is achieved. Ayala v. Antelope Valley Newspapers, Inc., 59 Cal. 4th 522, 322 P. 3d 165, 173 Cal. Reptr. 3d 332 (Cal. 2014). Class certification status in that case was denied because to determine employee status would necessitate unmanageable individual inquiries into the hirer's rights vis-à-vis each putative class member. The Court continued that, under the common law, the principal test of an employment relationship is whether the person to whom service is rendered has the right to control the manner and means of accomplishing the result desired. What matters is whether the hirer retains all necessary control over its operations and the employer must maintain general supervision and control over the work.

Florida employs a similar common law test: the right of control as to the manner of doing work is the principal test; if the employee is subject to the control or direction of the owner only as to the result of the work, he is an independent contractor. Edwards v. Caulfield, 560 So. 2d 364 (Fla. App. 1 Dist., 1990)

Accord, Critical Health Connection, Inc., v. Tex. Workforce Comm'n., 338 S.W. 3d 758 (Tex. App., 2011).

It is submitted that under a number of legal authorities to be discussed a case could be made that a TNC's drivers could be considered its employees.

California has been a fertile jurisdiction for class actions against transportation network companies.

In Yucesoy v. Uber Techs., Inc. (N.D. Cal., 2016), plaintiffs, former and current drivers who drove for Uber in Massachusetts, sought class action certification alleging, inter alia, that Uber misclassified drivers as independent contractors and failed to remit to drivers the total proceeds of gratuities and pay required by minimum wage and overtime laws. In denying Uber's motion to dismiss, the Court found that the plaintiffs' allegations were sufficient at the pleading stage to put Uber on notice of plaintiffs' claims in such fashion, that Uber was able to defend itself and respond to the complaint.

Similarly, in O'Connor v. Uber Techs., Inc. (N.D. Cal., 2015), plaintiffs, who were current or former drivers for Uber in the State of California, sought class certification of a putative class of approximately 160,000 other drivers. They contended that they are Uber's employees, rather than independent contractors, and accordingly are eligible for various protections codified for employees in the California Labor Code. Specifically, plaintiffs sought reimbursement for all necessary expenses or losses incurred by the employee in direct consequence of his or her duties and for the entire amount of any tip or gratuity left for an employee by a patron.

The request to certify for reimbursement of expenses and losses under the California Labor Code. The Court found, applying California law, that the drivers could make out a case they were employees, rather than independent contractors, the Court finding particularly important Uber's right to control the drivers, particularly in control over the drivers' schedules, control over driver routes and territories, pay set unilaterally by Uber, use of third party applications for employment, star ratings, monitoring of drivers' performance and compliance with Uber's training "requirements" or "suggestions", and Uber's right to terminate a driver without cause.

Another transportation network company, Lyft, Inc., was the defendant in Cotter v. Lyft, Inc., (N.D. Cal., 2015). The issue was whether drivers were employees or independent contractors. The Court noted the answer was of great importance to the drivers, because the California Legislature has conferred many protections on employees while independent contractors receive virtually none, and was of great import to Lyft because its business model assumes the drivers are independent contractors. No issue was then presented as to class certification. The Court applied reasoning similar to that of the O'Connor Court, and held that a reasonable jury could conclude that the plaintiff Lyft drivers were employees.

It is significant that in Cotter the court dismissed Lyft's argument that it was an uninterested bystander, merely providing a platform that allows drivers and riders to connect. The Court noted that argument was obviously wrong, in that Lyft concerns itself with far more than simply connecting random users of its platform. It markets itself as an on-demand ride service, it actively seeks out customers, and it gives drivers detailed instructions as to how to conduct themselves, even mentioning in its own drivers' guide and FAQs that drivers are driving for Lyft.

Insurance Issues

Uber maintains that it offers insurance coverage above a driver's own personal insurance. It is possible there are loopholes that could land drivers in trouble and leave victims with nowhere to turn if they are injured, due to insurance coverage issues. As noted previously, legislation has sought to deal with this.

As previously noted by the extensive legislation on the insurance issues, it is evident that there is a heightened interest in the insurance coverage issues from a public safety standpoint.

There are significant liability issues dealing with drivers and the possible liability of the TNCs which hire them.

Prior Trouble With Uber Drivers

Negligent Hiring

California recognizes the torts of negligent hiring and retention. C.A. v. William S. Hart Union High School Dis., 12 Cal. Daily Op. Serv. 2817, 53 Cal. 4th 861, 138 Cal. Rptr.31, 270 P. 3d 699 (Cal., 2012). The general rule is that the public entity is vicariously liable for any injury which its employee causes to the same extent as a private employee.

Florida recognizes the tort of negligent hiring, under which the plaintiff must demonstrate (1) that the employer was required to make an appropriate investigation of the employee and failed to do so; (2) an appropriate investigation would have revealed the unsuitability of the employee for the particular duty to be performed; and (3) it was unreasonable for the employer to hire the employee in light of the information he knew or should have known. Malicki v. Doe, 814 So. 2d 347 (Fla., 2002).

Accord, Thi of Tex. At Lubbock I LLC v. Perea, 329 S.W. 2d 548 (Tex. App.2010).

There have been many instances reported of harm to passengers caused by TNC drivers. Space here does not allow discussion in detail regarding same.

It is here offered that a TNC may well face the potential of lawsuits due to acts and omissions of its drivers based on either negligent hiring or negligent retention.

Conclusion

Much activity looms on the claims and legal horizon in the formation, application and interpretation of the legislation and common law, as to shedding light on resolution of the above issues, but it is apparent that the TNCs have generated a number of important issues.