2019 Midwest Conference
June 20 -21, 2019
Chicago, IL

Riding Ahead of Electric Scooter Liability & Coverage Issues

I. Background of Electric Scooter Litigation

Types of Claims

We all had or saw small scooters as children. These devices were typically a single board or platform with two small wheels; one in the front and one in the rear. There was a short handle that steered the front wheel. By placing one foot on the platform the other foot could be used to propel the scooter down the sidewalk.

In recent years, this child's toy has been advanced by installing a chargeable electric motor to drive the scooter, creating an electric scooter. Electric scooters are an emerging trend in larger cities across the United States; they are becoming a popular method of transportation for students on college campuses, professionals in busy downtown areas, and everyone in between. Companies such as Lime and Bird are expanding transportation options by offering a cheap and convenient replacement for short trips in a personal vehicle, or via a ride-sharing service such as Uber or Lyft.

The scooters in this application are not purchased by the user rather the users have access to the scooter from an App. The user downloads the App, provides credit card information and then can use any scooter from the fleet. This trend includes a feature where the scooter is picked up at random places and left wherever the user prefers then being accessed by the next user from that location.

Electric scooters were also intended to clear congestion on roads, but some cities are complaining that streets and sidewalks have become the "Wild West," as a result of the

wayward use of this up and coming mode of transportation. A study of recent claims can be broken down into the following categories:

- Riders and pedestrians
- "Scoot and Run"
- Catastrophic Claims
- Class actions

Number of Claims

Currently, electric scooters are not regulated on a consistent basis. They fall under the jurisdiction of the Consumer Product Safety Commission (CPSC) rather than NHTSA. Most major electric scooter providers advise the product is not to be driven on sidewalks but significant use in in fact on sidewalks. This divergency in use lead to issues with respect to regulation.

As a result, they are largely regulated on a local basis. Similarly, there are limited standards that address these vehicles or their use. The CPSC tracking and reporting of incidents related to electric scooters is inconsistent.

Michigan recently adopted regulations that permit off-road vehicles that prior to 2018 were not permitted on public roadways to be used on road pending local approval. Will electric scooters be the next to be permitted to be driven on roads with limited restrictions? (CITE)

The use of electric scooters continues to rise and expand into new cities; but with every new product, comes new litigation. This is why we can't have nice things:

- In California alone, there were approximately 250 reported cases of scooter-related injuries between September 2017 and August 2018;
- In Fort Lauderdale, Florida, there have been 35 reported scooter-related injuries, including four cases involving serious trauma
- Recent reports identify issues with use of electric scooter and related safety issues on docks in Miami
- Claims in other states are still bring reported and examined
- States considering legislation to regulate electric scooter use

Specific Case Examples

We are seeing a higher number of reported incidents in warmer weather states. Claimants are also reporting a lack of understanding on whether riders are supposed to be on the street or sidewalk.

- A Florida woman in her late 20’s was injured when she ran a stop sign and was struck by an oncoming vehicle. She suffered broken bones, rib fractures, a fractured skull and brain injury
- A district court judge in Florida reported injuries to her Achilles after being struck by a scooter while running

II. Electric Scooter Product Liability Issues

Failure to Warn

Most reported injuries are not attributable to any defect in the design of electric scooters. Rather, case studies have shown a general lack of adherence to traffic laws or warnings by the scooter companies, failure to wear helmets, or riders simply falling off scooters.

So, the question becomes, what are scooter companies required to warn against, if anything?

On occasion, the alleged defect in a product cannot be eliminated through the design process. In those cases, a manufacturer may have a duty to warn the user of that defect.

For example, the Michigan Supreme Court held that “[m]anufacturers have a duty to warn purchasers or users of dangers associated with the intended use or reasonably foreseeable misuse of their products, but the scope of the duty is not unlimited.” *Glittenberg v Doughboy Recreational Indus* , (*On Reh’g)*, 441 Mich 379, 387–388, 491 NW2d 208 (1992). The court described the duty to warn in the context of product liability as “an exception to the general rule of nonrescue, imposing an obligation on sellers to transmit safety-related information when they know or should know that the buyer or user is unaware of that information.” *Id.* at 386.

However, there is generally no duty to warn against obvious dangers. MCL 600.2948(2). This includes “a specific type of injury that could result from a risk.” *Greene v AP Prods, Ltd*, 475 Mich 502, 509; 717 NW2d 855 (2006).

The Sixth Circuit has held that “[a] company does not have a duty to warn of all theoretically possible dangers.” *Mitchell v City of Warren*, 803 F3d 223, 231 (6th Cir 2015).

Rides are purchased using an app, which requires users to accept the company's terms of service, containing various warnings. Warnings are also found on the scooters themselves. Generally, it appears that the obvious danger theory would be upheld as a viable defense to a failure to warn claim in cases involving scooter litigation.

Assumption of the Risk

Restatement (Second) of Torts § 496B provides, "The risk of harm from the defendant's conduct may be assumed by express agreement between the parties. Ordinarily such an agreement takes the form of a contract, which provides that the defendant is under no obligation to protect the plaintiff and shall not be liable to him for the consequences of conduct which would otherwise be tortious." "A plaintiff who by contract or otherwise expressly agrees to accept a risk of harm arising from the defendant's negligent or reckless conduct cannot recover for such harm, unless the agreement is invalid as contrary to public policy." Id.

Courts in many jurisdictions place strict limits on the use of assumption of risk agreements in order for them to be used as a complete defense. For example, courts hold that the agreement must clearly and explicitly express it is the intent of the parties that the drafting party be held free from liability for its own future negligence. See, e.g., Saenz v. Whitewater Voyages, Inc., 226 Cal. App. 3d 758, 276 Cal. Rprt. 672 (1st Dist. 1990); Hyson v. White Water Mountain Resorts of Connecticut, Inc., 265 Conn. 636, 829 A.2d 827 (2003); Scott By and Through Scott v. Pacific West Mountain Resort, 119 Wash. 2d 484, 834 P.2d 6 (1992); Murphy v. North American River Runners, Inc., 186 W. Va. 310, 412 S.E.2d 504 (1991). Courts also hold that the party assuming the risk must make a conscious choice to accept the consequences of the other party's negligence. See, e.g., Hague v. Summit Acres Skilled Nursing & Rehab., 2010-Ohio-6404, 2010 WL 5545386 (Ohio Ct. App. 7th Dist. Noble County 2010).

Usually the assumption of risk is limited to negligence and can only be extended to reckless or intentional misconduct if there is specific language in the agreement so stating. Restatement (Second) of Torts §469B comment d. Generally, courts require the assumption of risk clause to be conspicuous. See, e.g., Hewitt v. Miller, 11 Wash. App. 72, 78, 521 P.2d 244, 247, review denied, 84 Wash. 2d 1007 (1974).

The Lime User Agreement specifies the user agrees he or she is "solely responsible and liable for any misuse, consequences, claims, demands, causes of action, losses, liabilities, damages, injuries, fees, costs and expenses, penalties, attorney's fees, judgments, suits, and/or disbursements of any kind, or nature whatsoever, whether foreseeable or unforeseeable, and whether known or unknown, as a result of using any of the services." The User Agreement states the user acknowledges and agrees that the use of any services or products is at the user's sole and individual risk and that Lime is not responsible for any consequences, claims, liabilities, etc. The user also agrees he or she fully understands the risks associated with the use of services and products and that he/she assumes such risk.

The Bird Rental Agreement similarly states the user "assumes all responsibilities and risks for any injuries or medical conditions", and if the weather or other conditions make it dangerous to operate a product. It also states the user assumes full and complete responsibility for all related risks, dangers and hazards.

Generally, it would appear these assumption of risk clauses would be upheld as precluding liability against the electric scooter provider. Both Bird's and Lime's assumption of risk language would probably be determined sufficiently conspicuous based on the all-caps font used. Neither specifies the assumption extends to reckless or intentional conduct on the part of Bird or Lime, so a court may hold such conduct is not protected by the assumption of risk clause.

As for public policy, California courts have found that express assumption of risk agreements are invalid to protect a product supplier from strict liability in tort for injuries caused by a defective product. See Westlye v. Look Sports, Inc., 17 Cal. App. 4th 1715, 1747, 22 Cal. Rprt. 2d 781, 800 (1993). Thus, the Lime or Bird assumption of risk clauses may be deemed invalid in California where the electric scooter has a defect causing injury.

Other states' courts have set forth multi-pronged tests to determine whether an assumption of risk agreement violates public policy. See, e.g., Wagenblast v. Odessa Sch. Dist. No. 105-157-166J, 110 Wash. 2d 845, 851, 758 P.2d 968, 971 (1988). The electric scooter assumption of risk language would have to be compared to the state's test to determine whether it would operate to bar liability against the electric scooter provider.

Waiver

To date, many electric scooter companies have successfully relied on liability waivers to limit the number of cases. For example, leading electric scooter company, Bird Rides, Inc.'s robust liability waiver has so far limited the number of cases plaintiffs' lawyers are willing to take. The waiver provides that all riders, in exchange for the use of:

> ***"Bird Services, [v]ehicles, and other equipment… [,] agree [ ] to fully release, indemnify, and hold harmless Bird…from liability for all 'Claims' arising out of or in any way related to … use of the Bird Services, [v]ehicles, or related equipment… [,] except for [c]laims based on … gross negligence or willful misconduct."***

Nonetheless, the class-action lawsuit filed in Los Angeles County Superior Court on October 19, 2018 – case number 18-STCV-01416 – has garnered enough attention from the public and media that an influx of claims should be expected. The particular analysis and impact of a waiver defense will depend on the law of the particular state you matter is venued. For example, in California, a contract in which a party expressly assumes a risk of injury is, if applicable, a complete defense to a negligence action. *Knight v. Jewett* (1992) 3 Cal.4th 296, 308, fn. 4; Sweat v. Big Time Auto Racing (2004) 117 Cal.App.4th 1301, 1304; Allan v. Snow Summit, Inc. (1996) 51 Cal.App.4th 1358, 1372." The result is that...being no duty, [defendant] cannot be charged with negligence." Paralift, Inc. v. Superior Court (1993) 23 Cal.App.4th 748, 755. Courts have long recognized that a written release is sufficient to exculpate a tortfeasor from future ordinary negligence or misconduct. *Benedek v. PLC Santa Monica* (2002) 104 Cal.App.4th 1351, 1356; *Bennett v. United States Cycling Federation* (1987) 193 Cal.App.3d 1485, 1490. In general," a written release extinguishes any obligation covered by the release's terms, provided it has not been obtained by fraud, deception, misrepresentation, duress, or undue influence." *Skrbina v. Fleming Companies* (1996) 45 Cal.App.4th 1353, 1366. When a person capable of reading and understanding such a release signs it, she, in the absence of fraud and imposition, is bound by its provisions and estopped from claiming they are contrary to her intentions or understanding. Id.

In the context of recreational activities, agreements between private parties that release, indemnify, or exculpate one party from liability are generally upheld as not being against public policy because such activities do not involve an essential public service. *Platzer v. Mammoth Mountain Ski Area* (2002) 104 Cal.App.4th 1253, 1259 [snow skiing*]; Hulsey v. Elsinore Parachute Center* (1985) 168 Cal.App.3d 333, 343 [parachute jumping].) To be valid, a release "must be clear, unambiguous and explicit"

in expressing the intent of the parties. Paralift, 23 Cal.App.4th at 755. The Court in Paralift continued as follows: Not every possible specific act of negligence by the defendant must be spelled out in the agreement or discussed by the parties...Where a release of all liability for any act of negligence is given, the release applies to any such negligent act, whatever it may have been...It is only necessary that the act of negligence, which results in injury to the releasor, be reasonably related to the object or purpose for which the release is given." (Id., citations omitted; See also *Madison v. Sup. Ct.* (1988) 203 Cal.App.3d 589.)

Illinois law on the application of a waiver defense is slightly different compared to California. Under Illinois law, Exculpatory clauses do not violate public policy as a matter of law. *Scott & Fetzer Co. v. Montgomery Ward & Co.,* 112 Ill.2d 378, 395, 493 N.E.2d 1022, 98 Ill. Dec. 1 (1986); *Reuben H. Donnelley Corp. v. Krasny Supply Co.,* 227 Ill.App.3d 414, 419, 592 N.E.2d 8, 169 Ill. Dec. 521 (1st Dist. 1991). To be valid and enforceable, an exculpatory agreement must contain clear, explicit, and unequivocal language referencing the type of activity, circumstance, or situation that it encompasses and for which the plaintiff agrees to relieve the defendant from a duty of care. *Harris v. Walker,* 119 Ill.2d 542, 547, 519 N.E.2d 917, 116 Ill. Dec. 702 (1988); Garrison v. Combined Fitness Centre, Ltd., 201 Ill.App.3d 581, 585, 559 N.E.2d 187, 147 Ill. Dec. 187 (1st Dist. 1990).

Broad exculpatory language does not render the agreement inoperable so long as the injury may have been reasonably contemplated by the parties when the agreement was executed. *Platt v. Gateway Int'l Motorsports Corp*., 351 Ill.App.3d 326, 332, 813 N.E.2d 279, 286 Ill. Dec. 222 (5th Dist. 2004).

Design Defect

As noted above, many of us had similar appearing scooters that were "leg powered" as children. So, what is the difference?

The primary difference is use with independent power and use by adults. These differences include higher speeds, use in an environment other than our neighborhood sidewalks and, higher center of gravity…. we are bigger now then we were at age 4.

Design issues include stability, the steer angle of the front wheel, and interaction with traffic as well as ground obstacles on sidewalks and roadways. The tires are small, the rake is steep and interaction with minor potholes and quick steering can lead to a disaster!

Another key issue relates to training of operators. Pushing a leg powered scooter down the sidewalk involved minimal decisions and concern for traffic. After all, dad or mom were there to reprimand our behavior and make us practice in the confines of our driveways. With modern electric scooters we are now on our own, left to deal with traffic, pedestrians, and all the world has to offer. There is no requirement for a motorcycle or motor-scooter license and no states have bicycle requirements for adults. Operating electric scooters does require some level of balance, hand/eye coordination and adult responsibility.

The issue of stability and control should be obvious to any user during the first seconds of their use of the device. However, greater stability is achieved with greater speed, just like our bicycles. At greater speeds, minor control inputs and/or path obstacles can result in disturbances that can lead to loss of control and overturn/falling. Like with any rider active device, once the user gets the "hand of it' operation becomes easier and more institutive. The learning curve is not yet defined and is not the same for all users. As a result, the design issues provide a strong interrelationship between basic mechanics and human factors. This creates a closed loop back to the warnings and rider acceptance of the risk.

III. Insurance Coverage Issues

Coverage Implications

Most users would look first to their personal auto insurance policy for coverage. The user would not find coverage there. The ISO standard personal auto insurance policy provides liability coverage for an insured for use of any auto or trailer, or while using "your covered auto," which would not include an electric scooter the insured rents.

The standard ISO personal auto insurance policy precludes liability coverage for any property damage to property rented to, used by, or in the care of any insured. This would apply to any property damage to the scooter. The ISO standard personal auto insurance policy also excludes liability coverage liability arising out of the ownership or operation of a vehicle being used as a public or livery conveyance. This exclusion could apply to an electric scooter offered for public conveyance that the insured rents.

Also, the ISO standard personal auto insurance policy excludes liability coverage for use of a vehicle with fewer than four wheels. Electric scooters have two wheels. Thus, coverage is excluded under the auto insurance policy.

A user would also not have coverage under a homeowners' insurance policy. The standard ISO homeowners' policy broad form excludes coverage for "motor vehicle liability", which includes operation of a motor vehicle rented to others or used to carry persons for a charge. The policy defines "motor vehicle" as "a self-propelled land or amphibious vehicle". An electric scooter is indeed self-propelled. Therefore, there would be no coverage under the homeowners' policy.

Some people carry personal liability umbrella insurance. Personal liability umbrella insurance policies generally do not exclude liability for use of motor vehicles with less than 4 wheels. The ISO standard personal liability umbrella policy does include an exclusion for bodily injury or property damage arising out of the operation of an "auto" while it is being used as a public or livery conveyance. The policy defines "auto" as including a private passenger motor vehicle, motorcycle, moped or mobile home. It is unlikely this would be interpreted to include an electric scooter. An electric scooter is more likely to be found to fall within the "recreational motor vehicle" definition, which includes "any other motorized land vehicle which is designed for recreational use off public roads." The standard ISO personal liability umbrella insurance policy includes an exclusion for recreational motor vehicle liability, but that exclusion does not apply to any recreational motor vehicle the insured or a family member does not own. Accordingly, there may be coverage under the personal liability umbrella insurance policy.

As for coverage from the electric scooter company itself, in most instances the company does not provide insurance. The Bird Rental Agreement, to which a user must agree to sign up for use of an electric scooter, states twice, in all-caps font, "YOUR AUTOMOTIVE INSURANCE POLICIES MAY NOT PROVIDE COVERAGE FOR ACCIDENTS INVOLVING OR DAMAGE TO THIS VEHICLE. TO DETERMINE IF COVERAGE IS PROVIDED, YOU SHOULD CONTACT YOUR AUTOMOTIVE INSURANCE COMPANY OR AGENT." It has no clause by which it provides insurance to the customer.

The Lime User Agreement, to which a user must agree when he or she signs up for the service, merely states, "Lime will carry all necessary insurance associated with the Vehicles as required by applicable law." The vast majority of jurisdictions in the United States do not require Lime or any other scooter company to provide any insurance to its customers at this time.

However, that may soon change. San Francisco, California's Municipal Transportation Agency Board of Directors recently issues a resolution that electric scooter companies must have "adequate insurance" for each scooter in order to receive a permit to operate in the city. This resolution does not specify whether the scooter company is required to provide liability coverage to an end user, so it remains to be seen whether San Francisco, or other cities, will enact such a requirement.

Applicable State Regulations

If someone using an electric scooter is injured, the applicable city or state regulations may determine whether the company providing the scooter should provide insurance coverage to the user. In most cities, the company renting you the scooter probably won't cover your liability – that's part of the multipage user agreement you endorse by clicking the 'I Agree' button. This may change, though, as scooting sharing spreads. San Francisco's new permitting process, for example, requires these companies to have "adequate insurance" for each of their users.

States also have different requirements for the use of electric scooters and whether users must wear a helmet. In Denver, for example, electric scooters are classified as "toy vehicles" that must be ridden on sidewalks. But across California, that's a crime, and riders can only travel in bike lanes or on city streets. Although many companies recommend that riders wear helmets, few actually do, and California recently abandoned a law requiring riders to wear them on scooters. Individual cities, however, may still require them.

The City filed its lawsuit in Milwaukee County Circuit Court on July 6, 2018. It asserts two causes of action. The first is for "imposition of forfeiture for consenting to the operation of unregistered motor vehicles on a highway." The City alleges that Bird's scooters must be registered as motor vehicles but have not been Wisconsin law provides for a $200-per-instance forfeiture if a person consents to the operation of an unregistered motor vehicle.; Wis. Stat. § 341.04(1). Of course, Bird's business model is based on its consent to its customers' use of the scooters. The City further alleges that owner of Bird should be held personally liable for the forfeitures if Bird fails to pay "because the legal fiction of a corporation may not be used to shield its officers from responsibility for the corporate officers' law violations."

The City's second cause of action is for public nuisance. It alleges that Bird was asked to cease its business operations in Milwaukee but refused to do so. The City claims that Bird's business harms the public by obstructing sidewalks, creating noise, causing users to unknowingly violate the law by using the scooters, and by failing to ensure that users have a valid driver's license. City of Milwaukee v. Bird Rides Inc., No. 18-CV-1066-JPS, 2018 WL 5775920, at *2 (E.D. Wis. Nov. 2, 2018)