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THEME ARTICLE

SAME ROADS, NEW RULES: DON'T GET REROUTED BY RIDE-SHARES

February 2019 - Ram Fletcher

Ride-share companies have transformed transportation systems across the country, and newer, nontraditional shared vehicles such as electric scooters promise even more changes—and risks. When representing people injured by these vehicles and services, knowing how to stay on track can help you get justice for your clients and ensure the public is protected.

Over the last decade, Uber and Lyft have transformed the transportation landscape by creating the “ride-sharing” industry: People driving their own vehicles are connected via a company’s mobile app to those seeking transit, the passenger pays for the ride through the app, and the company splits a portion of the fee with the driver. In 2017, Uber had 75 million riders, 3 million drivers, and provided 15 million rides per day worldwide; Lyft’s 1.4 million drivers provided approximately 1 million rides per day to its 23 million riders in the United States and Canada.¹ Uber is reportedly valued at \$48 billion and Lyft at \$15.1 billion.²

The ride-sharing explosion has made auto crash cases involving Uber and Lyft commonplace. Between 2014 and 2016, more than 9,000 claims were filed against transportation network companies (TNC)—which include ride-shares—in California for incurred insurance losses exceeding \$185 million.³ The frequency of auto collisions involving Uber and Lyft drivers is not surprising given ride-sharing’s increasing prevalence and tendency for ride-share drivers to engage in unsafe driving behaviors such as looking at their smartphones to use the app or driving while fatigued.

But despite these risks, Uber and Lyft have sought to maximize profits while avoiding responsibility for injuries associated with their operations. Specifically, they have attempted to distinguish themselves from other common carriers subject to an elevated standard of care (such as taxis and buses). Uber and Lyft allege that they are not in the transportation business at all and are not TNCs, arguing instead that they are tech companies providing an app to connect drivers and riders.⁴ As part of this argument, these companies assert that their drivers are independent contractors, not employees, so their insurance protection for people injured in ride-share incidents is often limited. Fortunately, such efforts have proven largely unsuccessful thus far.⁵ With Uber and Lyft operating nationwide, plaintiff attorneys must be prepared to address the special challenges these ride-sharing cases present.

Terms of Service

As a prerequisite for downloading the app, drivers and riders alike must consent to the terms of service (TOS), which detail the rights and responsibilities of the ride-share company, its drivers, and its riders. Typically, the TOS are available on Uber’s and Lyft’s websites, but your client (if a driver or rider) also should be able to provide a copy by logging into the app. Always obtain the TOS, which will be instrumental even if your client is not a driver or rider and you need to argue the ride-share company is vicariously liable. The language in the TOS changes frequently, so get the version applicable on the date of the incident. Request it in discovery, or sometimes you can find old versions by date by searching web archives on [archive.org](https://www.archive.org).

Jurisdiction. Companies like Uber and Lyft are primarily regulated by state and local governments. When reviewing the TOS, do not overlook the sections that govern jurisdiction since both state and local laws often significantly modify critical portions of the general terms. Differences may affect driver eligibility, licensing requirements, vehicle qualifications, limits on how many hours drivers can work, insurance coverage requirements, and service area restrictions. For example, in California, among other requirements, a ride-share driver must have a standard driver’s license, have proof of basic auto insurance, and pass a vehicle inspection.⁶



Credit: WEEDEZIGN / Getty Images

Conversely, in New York City (but not all of New York state), driver eligibility requires obtaining a special license issued by the Taxi and Limousine Commission (TLC) and purchasing specific auto insurance with limits designed for commercial drivers.⁷ Vehicle inspections also must be completed by the TLC in New York City.⁸ In other jurisdictions, only inspection by a certified mechanic is needed.⁹ The additional requirements that ride-share companies place on their drivers can be helpful in establishing liability, particularly when asserting that Uber or Lyft is vicariously liable for its driver's negligence.

Forced arbitration. Uber and Lyft have gone to great lengths to force into arbitration virtually every claim their "users" (drivers and riders but not passengers who did not request the ride) might assert against them. The TOS also includes waivers of rights to participate in almost any form of class civil action or class arbitration. While limited exceptions exist and the broad waivers might ultimately prove unenforceable in your jurisdiction, you'll likely be faced with the prospect of arbitration.

Take for example *Mohamed v. Uber Technologies, Inc.*: In 2016, the Ninth Circuit held that the district court erred in denying Uber's motion to compel arbitration and that the issue of arbitrability must be decided by an arbitrator under the TOS.¹⁰ Then in 2018, citing *Mohamed*, the Ninth Circuit ruled in *O'Connor v. Uber Technologies, Inc.* that the broad arbitration language in Uber's TOS remained enforceable despite its inclusion of class action waivers.¹¹

If your client is not subject to the TOS and is injured by a negligent ride-share driver, arbitration is not required. This would include other motorists or pedestrians (assuming they are not using the ride-share application at the time of the incident) and passengers who did not use the app to request the transportation but are injured.

For instance, imagine your client's friend used Uber to order them a ride home from a restaurant. If the Uber driver runs into a tree, causing injury, the friend's claim likely would be subject to forced arbitration under Uber's TOS, but your client's would not. This example illustrates the importance of distinguishing *riders* or *customers* who are considered users subject to the TOS from *passengers* who are not.

Similarly, if your case involves a collision between two vehicles operating for different ride-share companies, and your client was not the at-fault driver or the rider or passenger in that driver's vehicle, arbitration is not required because your client was not a party to the at-fault driver's TOS. Assuming uninsured motorist and underinsured motorist (UM/UIM) claims aren't involved, if you aren't a party to the at-fault driver's TOS, you can't be required to arbitrate claims against him or her.

Finally, regardless of your client's status as driver, rider, or passenger, when pursuing a claim for recovery under a ride-share company's UM/UIM coverage, arbitration will be required. This results not from the TOS but from the terms of UM/UIM policies that specify how claims must be adjudicated.

Insurance Coverage Levels

The availability and extent of auto insurance is always important. Mainly due to recent state and local government regulation, Uber and Lyft now generally are required to provide auto insurance coverage for their drivers and passengers (both liability and UM/UIM coverage).¹² The coverage issue is complicated by factors such as whether the ride-share application is activated, what the driver is doing when the collision occurs, and any jurisdiction-specific requirements. The discussion below pertains to coverage for bodily injuries only (different rules apply to property damage coverage).

"Period 0": Application turned off. If Uber or Lyft drivers cause a collision when the app is turned off, their individual auto insurance policy applies. In this scenario, the ride-share company does not provide coverage.

"Period 1": Application on, waiting for ride request. Ride-share drivers activate the app to indicate they are accepting rides but have yet to be matched with a prospective rider. During this period, Uber and Lyft typically provide third-party liability coverage of \$50,000 per person and \$100,000 per incident but no UM/UIM coverage.

Notably, in some states, the third-party liability coverage can be "contingent" or "excess," meaning negligent ride-share drivers must submit the claim to their personal auto insurer before the ride-share coverage applies.¹³ This carries the risk that the driver's personal auto policy will be canceled (resulting in denial of coverage) because most individual policies do not cover ride-sharing unless special coverage has been purchased. Fortunately, most major insurers now offer ride-sharing coverage or ride-sharing endorsements that can be added to existing policies.

Consequently, you must determine whether the driver's personal auto policy will cover the loss and whether any ride-share coverage applies. Also, if you represent a ride-share driver injured during Period 1 by an uninsured or underinsured third party, your client will only be able to use any UM/UIM coverage on his or her personal auto policy, provided that coverage is not denied on the ground that the incident occurred during ride-sharing.

"Period 2": Application on, ride accepted. The app is on and a ride has been accepted, but the rider has not entered the car. This period spans the moment the app matches a ride to the moment before the rider enters the vehicle. During this period, Uber and Lyft generally provide \$1 million per person or incident third-party liability coverage and \$1 million of UM/UIM coverage for the ride-share driver.

"Period 3": Application on, passenger in vehicle. The ride-share app is activated and a passenger is in the vehicle. During this period, Uber and Lyft generally provide \$1 million per person or incident third-party liability coverage, as well as \$1 million per person or incident UM/UIM coverage for anyone in the ride-share vehicle (including drivers, riders, and non-user passengers).

Know the coverage requirements in your jurisdiction. Uber and Lyft publicize the basics of how their insurance covers users and unaffiliated passengers on their websites. But familiarize yourself with the ride-share coverage requirements in your jurisdiction, as well as the company's insurance policy for jurisdiction-specific language. Some information about coverage requirements applicable to your city or state is often available on Uber's and Lyft's websites. Insurance coverage terms that might be substantially modified by state or local laws include

- whether the ride-share auto coverage is primary, excess, or contingent
- minimum policy limits that ride-share companies must provide
- individual driver coverage requirements (such as minimum individual policy limits for ride-share drivers, special ride-share policies or endorsements, or commercial insurance).

The type of service requested also impacts the extent of available insurance coverage, Uber, for example, offers premium services such as UberBLACK (the standard service is called UberX). UberBLACK drivers are professional drivers with commercially registered vehicles who must carry commercial policies with higher coverage limits.

Inadequate insurance. Various scenarios—typically in Period 0 or 1— may make coverage for your client's losses at best insufficient and at worst nonexistent. If your client is severely injured, even an incident occurring during Period 2 or 3 could create a policy limits problem. When coverage is insufficient, your likely best remaining option is to file a claim against the ride-share company.

So before litigating, always confirm: whose insurance is primary or excess (whether individual or ride-share company); the individual driver's policy limit (it may be more than the applicable Period 1 ride-share coverage); whether your client used a premium ride-share service requiring the driver to have commercial coverage; and whether your client has UM/UIM coverage on his or her individual policy, which may make it preferable to seek UM/UIM recovery instead.

Employee v. Independent Contractor

The principal liability issue in dispute when plaintiffs assert auto claims against ride-share companies is whether the negligent driver is considered an independent contractor or an employee—vicarious liability only attaches in the latter case. You need to argue that the company has the right to exert so much control over the drivers that they are employees. In recent years, Uber and Lyft have agreed to pay hundreds of millions to settle cases nationwide over the classification of their drivers.¹⁴ Although much of this litigation involved wage-and-hour or employee benefits claims, there have been injury claims too. Of significance was a 2014 case involving a negligent Uber driver in San Francisco who killed a six-year-old girl during Period 1. The case resolved confidentially before trial and prompted California to enact laws that included requiring TNCs to provide additional insurance coverage.¹⁵

Know the applicable labor laws in your jurisdiction. Generally, whether a worker is an employee or an independent contractor depends on the extent of control the employer has the right to assert over the worker (not how much it does assert).¹⁶ Although Uber's and Lyft's TOS classify drivers as independent contractors, such language is not dispositive because most courts look at the nature of the parties' relationship.¹⁷ As reflected in Uber's and Lyft's TOS and websites, they assert extensive control over their drivers through mandated driver qualifications, vehicle requirements, inspections, insurance requirements, operational restrictions, driver dress code and hygiene standards, in-car driver behavior, and more.

Currently, no appellate court has specifically defined the legal status of ride-share drivers. However, several lower courts and administrative bodies have recently confronted the issue, reaching opposing conclusions.¹⁸ In addition to labor laws governing worker classification, "ostensible" or "apparent" agency is another area to research when pursuing vicarious liability claims against Uber and Lyft for their drivers' negligence.¹⁹

Worker classification debates will almost certainly require you to oppose a summary judgment motion. But if you defeat the motion, there is a good chance that Uber or Lyft will be motivated to resolve the case. For the time being, they seem to have decided that it is usually preferable to settle cases before a judge or jury gets to decide the issue of whether one of their drivers qualifies as an employee (assuming forced arbitration is avoided).

However, given the recent O'Connor decision, the increased likelihood that an arbitrator will be deciding this issue could make the pathway to establishing vicarious liability more difficult. As the law tries to catch up with—and adapt to—changes brought about by the expansion of ride-sharing, litigation about whether drivers are employees or independent contractors likely will continue.²⁰

Tailor Your Discovery

If you decide to file, some crucial documents and information will help guide your case.

Terms of service. As previously mentioned, obtaining a copy of the TOS applicable at the time of your client's incident is critical. The TOS will bolster your argument that these companies do far more than merely connect drivers and riders via a digital platform and that they are directly involved with the delivery of transportation services while retaining substantial control over their drivers.

The TOS is essential if you seek to hold the ride-share company vicariously liable. For example, the TOS likely will contain information on mandated driver qualifications, vehicle requirements and inspections, insurance requirements, operational restrictions, driver dress code and hygiene, in-car driver behavior, interaction with customers, driver ratings systems, speech restrictions, and disciplinary rights that ride-share companies may assert against their drivers. In addition to the TOS, review Uber's and Lyft's websites for more information about the extent to which they control drivers.

GPS data. Ride-share companies keep location and route data on all drivers while the mobile app is activated, including which direction a driver was traveling, what route was taken, or when the driver was at a particular location. This data can help establish unsafe driving, for example, if drivers covered a certain distance faster than they could have at the speed limit.

Trip information. Ride-share companies retain data reflecting app use. This includes when the app is turned on or off, when a ride is accepted, when a rider is picked up, the requested destination, text and email communications between drivers and riders, pick-up and drop off locations and times, and charges for rides. This information could be crucial, especially when what insurance coverage period applies is disputed.

Driver and vehicle history. Uber and Lyft mandate that drivers meet various eligibility requirements before offering rides. This includes driver background checks, criminal background checks, annual vehicle inspections, proof of insurance, special licensing (in some jurisdictions), and more. Find out if the at-fault driver followed these requirements or if the company allowed the driver to offer rides without complying.

Ride-share companies also evaluate their drivers, including whether they decline ride requests and what kind of reviews riders give them. This results in a driver rating they use to consider whether to deactivate an account. Whether a driver had a history of driving unsafely or violating company policy, or has had their access to the platform revoked or suspended, is discoverable. Request all rider reviews and ratings for the responsible driver, as well as any disciplinary action taken by the ride-share company. Finally, request any communication between drivers and the ride-share companies, most of which is done digitally through the app.

The insurance policy. It may be obvious, but you should request a copy of the ride-share company's insurance policy as soon as possible. In addition to coverage, it often contains jurisdiction-specific modifications that can be important when your client is the driver and is seeking UM/UIM recovery, as well as when there is a question of whether your client's coverage or the ride-share company's coverage is the primary one. Sometimes, ride-share companies are hesitant to produce their insurance policies, claiming that they contain proprietary information, so you may need to agree to a stipulation of confidentiality or limited protective order to obtain a full copy of the policy.

At least for now, ride-share cases as a sub-genre of auto claims remain a more complex and legally unsettled environment than standard auto cases. To achieve the best results, we must do what plaintiff attorneys have always done when faced with new challenges: Educate ourselves, think creatively, and advocate passionately.

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Notes

1. Uber, *Company Info*, www.uber.com/news-room/company-info/; Biz Carson, *Lyft Doubled Rides in 2017 As Its Rival Uber Stumbled*, Forbes (Jan. 16, 2018), www.forbes.com/sites/bizcarson/2018/01/16/lyft-doubled-rides-in-2017/#6f44bf5a7d6b.
2. Trefis Team & Great Speculations, *Breaking Down Uber's Valuation: An Interactive Analysis*, Forbes (Feb. 22, 2018), www.forbes.com/sites/greatspeculations/2018/02/22/breaking-down-ubers-valuation-an-interactive-analysis/#2fd1b9c54785; Kirsten Korosec, *Lyft Valuation Hits \$15.1 Billion After Fresh \$600 Million in Funding*, Tech Crunch (June 27, 2018), <https://techcrunch.com/2018/06/27/lyft-15-billion-600-million-funding-round/>.
3. Cal. Dep't of Ins. & Cal. Pub. Utils. Comm'n, *Joint Study of Transportation Network Company (TNC) Insurance Coverage Requirements in California* (Dec. 31, 2017), www.cpuc.ca.gov/uploadedFiles/CPUC_Public_Website/Content/Licensing/Transportation_Network_Companies/TNC_REPORT_AS_OF_010518.pdf. The study appears to include both lawsuits and insurance claims, but it does not specifically distinguish.
4. Order Denying Motion for Summary Judgment, *O'Connor v. Uber Tech., Inc.*, No. 13-CV-03826-EMC (N.D. Cal. Mar. 11, 2015); Order Denying Motion for Summary Judgment, *Cotter v. Lyft, Inc.*, No. 13-CV-04065-VC (N.D. Cal. Mar. 11, 2015); *Berwick v. Uber Tech., Inc.*, No. 11-46739 (Cal. Labor Comm'n); *Aleksanian v. Uber Tech., Inc.*, No. 016-23858 (N.Y. Dep't of Labor).
5. *See id.*
6. Cal. Pub. Utils. Comm'n, Order Instituting Rulemaking on Regulations Relating to Passenger Carriers, Ridesharing, and New Online-Enabled Transportation Services (Nov. 9, 2017).
7. Uber, *How to Get TLC Plates, For-Hire Vehicles in NYC*, www.uber.com/drive/new-york/get-started/tlc-plates.
8. Uber, *Vehicle Inspections, New York City*, www.uber.com/drive/new-york/inspections.
9. Ridesharing Driver, *Will Your Car Pass the Uber (or Lyft) Vehicle Inspection?* (Sept. 20, 2018), www.ridesharingdriver.com/will-your-car-pass-the-uber-or-lyft-vehicle-inspection/.
10. 848 F.3d 1201 (2016) (exception for claims brought under California's Private Attorneys General Act).
11. 904 F.3d 1087 (9th Cir. 2018). The court also reversed the district court's denial of Uber's motion to compel arbitration and overruled its order granting class certification.
12. *See, e.g.*, Cal. Pub. Util. Code §5433 (2015); Fla. Stat. §627.748 (2018).
13. Cal. Pub. Util. Code §5434 (2017).
14. For example, in *Cotter*, the judge approved a \$27 million settlement. In *O'Connor*, Uber offered \$100 million, but the court rejected that as too little even though the plaintiff class had accepted it (before the class was recently decertified).
15. Davey Alba, *California Forces Uber and Its Rivals to Bolster Insurance*, Wired (July 1, 2015), www.wired.com/2015/07/california-forces-uber-rivals-bolster-insurance/.
16. *Dynamex Operations W., Inc. v. Super. Ct. of Los Angeles*, 232 Cal. Rptr. 3d 1 (Cal. 2018); *see also* Vincent Cheng, *A Jigsaw of Worker Classifications*, Trial 20 (Sept. 2018).
17. *Id.*
18. *O'Connor v. Uber Tech., Inc.*, 82 F. Supp. 3d 1133 (N.D. Cal. 2015); *Cotter v. Lyft, Inc.*, 60 F. Supp. 3d 1067 (N.D. Cal. 2015); *Berwick*, No. 11-46739; *Aleksanian*, No. 016-23858; *Lawson v. Grubhub, Inc.*, 302 F. Supp. 3d 1071 (N.D. Cal. 2018); *Razak v. Uber Tech., Inc.*, 2018 WL 1744467 (E.D. Pa.

Apr. 11, 2018). The *O'Connor* ruling may be less significant now following the recent Ninth Circuit ruling that the matter must be arbitrated. However, the order denying summary judgment gives an excellent road map of the arguments that ride-share companies make on this issue and is an indicator of how courts may receive such arguments.

19. See, e.g., Cal. Civ. Code §§2300 and 2334 (West 2018).
20. For instance, after *Dynamex* (232 Cal. Rptr. 3d 1), which articulated a new test for analyzing whether workers are employees or contractors, the San Francisco city attorney's office issued subpoenas to Uber and Lyft for documents as part of an investigation into driver misclassification. City Attorney of San Francisco, *Herrera Investigates Uber, Lyft Over Driver Pay and Benefits* (May 29, 2018), www.sfcityattorney.org/2018/05/29/herrera-investigates-uber-lyft-driver-pay-benefits. And *Razak* (2018 WL 1744467) has been appealed to the Third Circuit and could impact the classification question.

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