The Transportation Network Company Litigation Explosion

By Matthew Daus and Jasmine Le Veaux



The introduction of new transportation network companies (TNCs) has had a game-changing impact on the traditional transportation industry. TNCs offer smartphone applications which provide free online booking for for-hire transportation and/or ridesharing services.[1] Passengers request rides through an app from either (1) a private passenger vehicle driven by a non-commercially licensed driver; (2) a commercially licensed vehicle and a commercially licensed driver; or (3) some other configuration of licensed/unlicensed vehicles and/or drivers. Passengers generally pay for such services through a credit card, the information for which is saved electronically in the passenger's online profile on the app.

The fact that anyone may pick-up a passenger, in any type of vehicle, when the app communicates the passenger's location to a driver, has resulted in an onslaught of potential legal violations of local, state, and federal law. As a result, several public safety and consumer protection issues have been raised and are currently being litigated in lawsuits across the nation. There are a panoply of claims, incorporating a broad spectrum of overlapping causes action. They include the following: (i) personal injury litigation and insurance coverage issues; (ii) labor law violations and worker misclassification claims; (iii) contractual claims; (iv) false advertising, unfair business practices and consumer protection lawsuits; (v) racketeering; (vi) antitrust violations; (vii) disability discrimination; (viii) tortious interference with business; (ix) government actions; (x) constitutional challenges; (xi) environmental law violations; and (xii) other legal claims and forms of relief such as requests for injunctions and/or temporary restraining orders.

Notwithstanding the spectrum of claims asserted, the lawsuits fall into three main categories (1) injured passenger/bystander suits; (2) driver/industry suits; and (3) government actions.

All of the cases discussed in this article are active and have not reached a final ruling. However, they are nonetheless having a direct impact on public opinion, policy and legislation throughout the country.

Personal Injury Suits: There are currently several suits pending in California Superior Court in which a TNC and affiliated TNC driver are being sued due to injuries incurred during the course of TNC services.

The case that has gained the most notoriety, and which precipitated much of the national discussion regarding insurance coverage issues, is *Jiang Liu, et al. v. Uber Technologies, Inc.*, a personal injury case pending in San Francisco.[2] On December 31, 2013, an UberX driver was cruising through San Francisco when he struck a family of three (Mother, Huan Kuang, 39, her son, Anthony Liu, five, and daughter, Sofia Liu, five), killing the seven year old, and severely injuring her mother and brother. Uber very quickly denied any involvement in the accident, but has since admitted that the driver arrested and charged in the accident, was in fact an UberX partner. However, Uber emphasizes that the driver was not on an Uber call at the time of the accident. Uber has since terminated the services of the driver, and although the company has expressed its condolences to the family on its blog, it is distancing itself from the accident or any liability for same.

The Liu family suit alleges that, at the time of the crash, the Uber driver was logged onto the UberX smartphone app and was available to provide rides. As such, Uber is alleged to have breached its duty of care by entrusting the driver to provide transportation

services for the company, and by failing to learn, through background checks, that the driver might cause a danger to the public. Further, because he was allegedly in the course of providing such services for Uber when the accident occurred, and Uber requires its drivers to use a smartphone to pick-up trips, such requirements may have distracted the Uber driver and resulted in injury to the family. As such, Uber is alleged to be liable for the accident involving the driver.

The *Liu* case, though still in the early stages, has had a huge influence on the national conversation regarding TNCs. In particular, since *Liu* was filed in January 2014, twenty-one states and the District of Columbia have issued insurance advisories to officially warn the public and potential TNC drivers that one's personal insurance policy may not cover commercial TNC trips.[3] Additionally, recent regulations enacted in Colorado to implement the state's new TNC law have required that TNCs post a notice to drivers and passengers that personal vehicle insurance may be insufficient to cover for any injuries or damage caused during the course of a TNC trip.[4] Moreover, on September 17, 2014, the governor of California signed AB 2293, the insurance bill which officially recognized TNCs as a new category of passenger carriers in the state. This new law will require TNCs to provide primary commercial insurance coverage for drivers and passengers during TNC services. In an effort to address one of the specific issues raised in the *Liu* lawsuit (i.e., whether the driver was providing TNC services at the time he was operating the vehicle - with the app on - but no passenger in the car), AB 2293 requires TNC insurance to be primary and in the amount of one million dollars for death, personal injury and property damage from the moment a participating driver accepts a ride request on the app until the driver completes the transaction. TNC insurance coverage must also provide for uninsured motorist coverage and underinsured motorist coverage in the amount of one million dollars from the moment a passenger enters the vehicle of a participating driver until the passenger exits the vehicle. A lesser amount of coverage is required when a TNC driver logs onto the TNC app, but no match to a passenger has been made.

Adequate insurance coverage is just one issue among many that will be explored and addressed through the many lawsuits commenced around the United States and abroad.

The impact of the *Liu* case on the TNC debate illustrates the influence that lawsuits already have and will have on policy and legislation in the future. Adequate insurance coverage is just one issue among many that will be explored and addressed through the many lawsuits commenced around the United States and abroad. Judges will soon decide whether TNCs have exerted control over their drivers sufficient to classify them as employees rather than independent contractors. Rulings will be issued to determine if TNC services are anti-competitive and whether some TNCs themselves are liable for operating a national enterprise of illegality.

Labor Law Violations and Worker Classification Claims: In addition to the personal injury and wrongful death lawsuits like the *Liu* case, drivers have initiated legal action against TNCs for labor law violations particularly with respect to wage and hour issues. In many of these cases, drivers are seeking damages in the form of wages and/or overtime that went unpaid due to their misclassification as independent contractors rather than employees and/or unpaid gratuities that were pocketed by the TNC rather than the drivers. [5]

Breach of Contract Claims by Drivers: As an extension of the foregoing, drivers have also sued TNCs for failure to comply with terms of their driver agreements concerning wages and gratuities. The breach of contract suits also include claims that the TNCs have been unjustly enriched by the conversion of drivers' gratuities as well as the equitable claims of *quantum meruit* and promissory estoppel, which allow for a claimant to ask the court to enforce a promise, or an offer that was made to and accepted by the claimant, even if the specific agreement at issue does not satisfy the required elements of a legally enforceable contract.

False Advertising, Deceptive Trade Practices and Misrepresentations: In addition, plaintiffs have invoked federal statutes such as the Lanham Act, and similar state corollary statutes, to assert, *inter alia*, claims of false advertising. These claims allege that TNCs have made false statements regarding their compliance with the law, which has deceived or has the tendency to deceive the public, thereby resulting in damages in the form of commercial injuries, or money spent to purchase TNC services. The false statements alleged include misrepresentations TNCs have made regarding insurance coverage and proper licensing of the vehicle and/or drivers with the governing agency.

Unfair Competition and Consumer Protection Law Violations: Cases also have been brought by passengers as well as members of the transportation industry – trade associations, competing taxicab companies and black car/limousine companies– alleging unfair business practices and consumer protection violations. There are numerous state and federal statutes which serve to protect the consumer and to promote fair competition, thus the theories upon which several of these claims are based are varied and broad. Many of the state claims are based on state common law or consumer protection statutes. However, federal consumer protection stat-

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utes, such as the Telephone Consumer Protection Act, have also been used to challenge the unscrupulous business practices of some TNCs.

The District Attorneys for San Francisco and Los Angeles have both recently filed consumer protection lawsuits against Uber alleging that the company misleads the public about the safety of its service and overcharges passengers.[6] Lyft, which was also being investigated by the San Francisco and Los Angeles DA's settled similar allegations and agreed to pay up to $500,000 in civil fines. Similarly, a class-action complaint filed in Suffolk County, Boston alleges that Uber has been adding a fictitious "Logan Massport Surcharge & Toll" in the amount of $8.75 to the fares of tens of thousands of Logan Airport-bound and outbound passengers and continues to do so.[7]

Antitrust Law Violations and Price Fixing: Antitrust laws, also referred to as "competition laws," are designed to protect consumers from unfair business practices. State and federal laws prohibit: (i) conduct that unreasonably restrains trade or commerce; (ii) attempts to monopolize a particular market; (iii) price discrimination; and (iv) exclusive dealing agreements which may have anticompetitive effects. At least one case has been filed which charges a TNC with violating state antitrust laws. The alleged illegal activity includes (i) charging mandatory prices that have not been approved by the state; (ii) charging fares that are below cost with which reputable transportation companies are unable to compete (predatory pricing); and (iii) charging uniform rates which restrain trade and constitute an effort to monopolize the industry and destroy competition.[8]

Racketeering – Civil RICO Claims: The federal Racketeer Influenced and Corrupt Organizations Act, commonly referred to as "RICO," was originally intended to impose criminal penalties for acts performed as part of an ongoing criminal organization. However, RICO has been used in the context of TNC litigation as a means to assert a civil cause of action for damages to businesses caused by the TNCs' vast commercial enterprise which flouts for-hire vehicle regulations throughout the world.[9]

Disability Discrimination: TNCs are also being brought to court for allegedly discriminating against passengers on the basis of disability in violation of the Americans with Disabilities Act, for refusing to provide service to individuals with disabilities, refusing to have accessible vehicles, and refusing to assist with the stowing of mobility devices.[10]

Interference with Business Relationships: Tortious interference with a business is the intentional, damaging intrusion on another's potential or existing business relationship. The interference is usually alleged when a defendant induces a contracting party to break a contract or steals customers away from a third party by unlawful means. Within the context of TNC litigation, this claim has been asserted when disruptive TNCs are illegally operating taxicab services without proper permits or insurance, and are stealing drivers and taking passengers away from legitimate taxicab companies.

Government Lawsuits to Stop Unlicensed For-Hire Activity: Several lawsuits are pending which involve municipalities or government agencies in which the government is seeking a restraining order or an injunction against TNCs to cease operations because they have failed to comply with local regulations. All government agencies and municipalities have enforcement procedures they must follow to punish those that violate the law. However, when it is part of a company's *modus operandi* to "shoot first and ask questions later", as has been the case with several disruptive TNCs, cities have sought to shortcut enforcement protocol, that may only momentarily curb unlawful TNC operation, by seeking judicial assistance to permanently shut down such unlawful and dangerous business operations.[11]

Constitutional Law Violations – Denials of Equal Protection and Regulatory Takings: There are also a number of lawsuits in which government agencies or municipalities are being sued for violating state and/or federal constitutional rights that require laws to be enforced equally amongst similarly-situated persons or businesses. Plaintiffs in these cases believe that the government is not adequately or equitably enforcing its laws against TNCs. For instance, having different levels of insurance, criminal background checks and other licensing requirements for TNCs as compared to limousines and taxicabs, all of which are engaging in the same exact activity of transporting passengers for hire, raises equal protection concerns: what is the rational basis for maintaining two separate license classifications? Also, Fifth Amendment actions have been commenced alleging regulatory takings of private property (medallion values) without just compensation, due to the government's failure to regulate unlicensed ridesharing or TNC services, leading to the devaluation of medallion values.

Environmental Law Violations: In additional to constitutional requirements, governments must comply with their own administrative procedures when initiating new rulemaking and/or implementing new regulations/legislation. In many cases, an environmental assessment of new legislation is required before such laws are implemented. At least one state lawsuit is asking a court to review the procedures by which new TNC legislation was passed in order to ensure that the government agency followed state law procedures for rulemaking and if not, to strike the law as void for failing to comply with the requirement to conduct an environmental quality assessment.[12]

What Will Happen Next? How to regulate TNCs is no longer a question for only local regulators. High-profile politicos and lobbyists are being retained to influence policy and public perception. However, because the review of TNCs is taking place in our halls of justice, federal judges who are required to be impartial and fair will begin to weigh-in on the matter. There is no question that it is highly unlikely that either side will win all of the lawsuits. Time will soon reveal how such an objective review will impact the TNC movement. The regulatory clock is ticking for TNCs - and although the court system's wheels of justice turn slow – this is clearly one factor that is ongoing litigation is clearly influencing

the mad race among TNCs to quickly acquire as much market share, and pass as much legitimizing legislation as they can. The TNCs are motivated, in part, by the progression and increasing number of lawsuits; as they have become even more aggressive over the last year in expanding and operating outside the law. This is also due in part to the proactive response of many regulators who have issued cease and desist letters, commenced administrative and enforcement actions, and/or adopted or followed the spirit of the Model Regulations for Smartphone Applications issued by the International Association of Transportation Regulators (IATR) (of which one author of this article serves as President). The TNCs responded to the IATR's Model Regulations by creating and seeking passage of their own model regulations in the form of "light regulation" TNC laws being introduced and passed around the country. Thanks to the efforts of the IATR and various other opponents and stakeholders, at least the debate is no longer about "whether to be licensed," but instead that "TNCs will be licensed, and what should the requirements be?" The race to deregulate by TNCs is motivated by a desire to become an essential or permanent part of the for-hire transportation system before the court decisions either put an end to these light or inconsistent new regulations, or otherwise modify the scope of these new TNC laws consistent with existing constitutional provisions, federal and/or state laws. The TNCs are looking to become "too big to fail" or are taking a "you can't get rid of us, we are here to stay!" approach. Well, we will see about that!

(Windels Marx recently released a report which summarizes the *Liu* case and several other lawsuits in which TNCs are being sued or TNC legislation is being challenged. This report, entitled "The Disruptive Transportation Technology Movement – A Litigation Primer & Roadmap" outlines the major and/or novel legal claims that have been asserted in TNC litigation across the U.S., including an explanation of potential legal theories upon which TNC and disruptive app litigations may be based. This Litigation Report is available at the following link for downloading and distribution: http://www.windelsmarx.com/resources/documents/The%20Disruptive%20Transportation%20Technology%20Movement%20(10990519).pdf.[13] The authors recommend the Report for review by government and private lawyers, legislators and legislative staff, as well as regulators around the country and beyond. It is critical that those making and influencing these important regulatory decisions be aware of the many claims and lawsuits that may completely declare illegal or modify in some way the many new pieces of TNC legislation that are being introduced and passed around the country. Windels Marx has and will continue to make its staff available to assist those who are looking to understand the panoply of new and existing laws and lawsuits as regulatory experts. *Please feel free to contact Matthew Daus at mdaus@windelsmarx.com or 212-237-1106, or Jasmine Le Veaux at jleveaux@windelsmarx.com or 212-237-1112).*

Notes

1. For purposes of this report, we refer to "ridesharing", although we neither concede nor endorse the proposition that such apps are providing ridesharing services as may be defined by local regulation.
2. Case No. CGC-14-536979 pending in the Superior Court of the State of California, County of San Francisco.
3. http://www.whosdrivingyou.org/insurance-warnings.html
4. *See* Temporary Rules Regulating Transportation Network Companies at http://cdn.colorado.gov/cs/Satellite?blobcol=urldata&blobheadername1=Content-Disposition&blobheadername2=Content-Type&blobheadervalue1=inline%3B+filename%3D%22Temporary+Rules+Regulating+Transportation+Network+Companies.pdf%22&blobheadervalue2=application%2Fpdf&blobkey=id&blobtable=MungoBlobs&blobwhere=1252008491858&ssbinary=true
5. O'Connor v. Uber Technologies, Inc., No. 3:2013-cv-03826 (N.D. Cal., filed Aug. 16, 2013).
6. *See* http://www.latimes.com/business/technology/la-fi-tn-uber-lyft-20141209-story.html
7. *See* http://www.boston.com/news/local/massachusetts/2014/11/26/uber-faces-class-action-suit-for-mysterious-logan-massport-surcharge/QIaqx1hW9sIoSn6ReuIKHP/story.html
8. *See, e.g., The Yellow Cab Company v. Uber Technologies, Inc.*, No. 24C14004064 (Cir. Ct. Md., City of Baltimore Cir., filed July 3, 2014).
9. Greenwich Taxi, Inc. v. Uber Technologies, Inc., No. 3:14-cv-733 (D. Conn., filed May 21, 2014); Boston Cab Dispatch Inc. v. Uber Technologies, Inc., No. 13-10769-NMG (D. Mass., filed Apr.3, 2013); Greater Houston Transportation Company v. Uber Technologies, Inc., No. 14-941 (S.D. Tex., filed April 8, 2014).
10. *See, e.g., Ramos v. Uber Technologies, Inc. and Lyft, Inc.*, Case No. 5:14-cv-00502-XR (W.D. Tex., filed June 2, 2014).
11. *See, e.g., City of St. Louis Metropolitan Taxicab Commission v. Lyft, Inc.*, Case No.1422-CC00890 (22d Jud. Cir. Ct. Mo., St. Louis Cir., filed Apr. 18, 2014).
12. *See, e.g., Taxicab Paratransit Association of California v. Public Utilities Commission of the State of California*, Case No. S218427 (Cal., filed May 9, 2014).
13. http://www.windelsmarx.com/practice_detail.cfm?id=20

