American Bar Association Panel Discussion
2019 Insurance Coverage Litigation Midyear Conference

Moderator: Joe Ramirez, Holland & Hart LLP
Panelists: Hillary Raimondi, Traub Lieberman Straus & Shrewsberry LLP; Katie Custer, Holland & Hart LLP; Andrea Sitar, Freeman Mathis & Gary, LLP

#MeToo
DEVELOPMENTS REGARDING WORKPLACE SEXUAL HARASSMENT FOR LITIGATORS AND INSURANCE PROFESSIONALS
THE #METOO MOVEMENT

Alyssa Milano
@Alyssa_Milano

If you’ve been sexually harassed or assaulted write ‘me too’ as a reply to this tweet.

Me too.

Suggested by a friend: "If all the women who have been sexually harassed or assaulted wrote 'Me too.' as a status, we might give people a sense of the magnitude of the problem."

1:21 PM - 15 Oct 2017
THE #METOO MOVEMENT

Milano reportedly received nearly 500,000 responses in the first 24 hours. According to a Pew Research study, by October 2018 the hashtag had been used over 19 million times.

“MeToo” started as a discussion among survivors of sexual violence and has become the slogan for the anti-sexual harassment movement.

High profile terminations and resignations across industries
- Allegations regarding Alex Kozinski, Kevin Spacey, Roy Moore, Luis CK, Matt Lauer, Al Franken, Mario Batali, to name just a few
- Harassing conduct was an “open secret”

Issues have arisen regarding wage inequality and systemic bias

Increased legislation and more pitfalls for employers

• Allegations regarding Alex Kozinski, Kevin Spacey, Roy Moore, Luis CK, Matt Lauer, Al Franken, Mario Batali, to name just a few
• Harassing conduct was an “open secret”
NY TIMES: #METOO BROUGHT DOWN 201 POWERFUL MEN

201 people lost jobs, major roles, or contracts.

53 women and 70 men replaced them.

NYTimes.com
Oct 29, 2018
**WHY #METOO?**

1 in 3

women ages 18 to 34 have been sexually harassed at work. 71% of those women said they did not report it. (Cosmopolitan survey of 2,235 full and part-time female employees, 2015)

Nearly half

of working women in the U.S. say they have experienced harassment in the workplace. (NBC News (2017))

Sexual harassment is pervasive across industries

especially in low-wage service jobs. More than 25% of sexual harassment charges filed with the EEOC in the last decade came from industries with service-sector workers. (Americanprogress.org)
WHY #METOO?

• Nearly 50% of men think women are well-represented in leadership in companies where only one in ten senior leaders is a woman. (womeninthe workplace.com)

1 in 10

• C-Suite leaders is a woman. Fewer than 1 in 30 is a woman of color. (LeanIn.org and McKinsey & Company, “Women in the Workplace,” 2017)

1 in 5

• 60% of survey respondents state that they were harassed by peers; 36% state they were harassed by their supervisor. Reasons victims cited for remaining silent included: Fear of being labeled a troublemaker (40%), it’s their word against the other person (22%) and fear of losing their job (18%). (CareerBuilder)

60% cite harassment
TIME'S UP Legal Defense Fund will help defray legal and public relations costs in select cases for those who have experienced sexual harassment or related retaliation in the workplace. The Fund is housed at and administered by the National Women’s Law Center, an established, national women’s rights legal organization. A network of lawyers and public relations professionals across the country will work to provide assistance to those who have experienced harassment or retaliation. Access to prompt and comprehensive legal and communications help will mean empowerment for these individuals and long-term growth for our culture and communities as a whole.

The National Women’s Law Center will connect individuals who have experienced sexual harassment in the workplace or related retaliation with attorneys who can provide legal assistance including a free initial consultation.

To request legal assistance, fill out this form. To join the Legal Network as an attorney, sign up here.
THE BACKLASH

- Claims of defamation by terminated employees and CEO’s, female complainants subjected to counter-accusations
- Men afraid to be alone with female co-workers or subordinates – boomerang effect because women still need men as mentors
THE ECONOMIST: AFTER A YEAR OF #ME TOO, AMERICAN OPINION HAS SHIFTED AGAINST VICTIMS
In March 2018, Congress increased EEOC budget by $16M which will be used to combat workplace harassment.

Victoria Lipnic, Acting Chair of EEOC:

• “People may not be, yet, going to the EEOC — and in fact we have not seen a huge surge in charges being filed with the EEOC — but what I’m hearing is, particularly from insurance carriers … they’re seeing a lot more demand letters.” (March 13, 2018)

• Lipnic recently advised that increased in sexual harassment claims “has not abated and I don’t think it will for awhile” (Oct. 2018)
In October 2018 EEOC reported a 12% increase in number of sexual harassment complaints. This was at same time overall discrimination changes decreased.

Claims (most often in the form of demand letters) are on the rise.

2018 data shows EEOC has stepped up enforcement activity in by suing business more frequently over alleged harassment.

50% jump in number of harassment cases filed in 2018.
THE EEOC, STATE AND LOCAL AGENCIES ARE PAYING ATTENTION

In June 2018, EEOC Select Task Force on Harassment Heard from Experts on How to Prevent Workplace Harassment

• EEOC reconvened a federal task force that had been formed to study harassment in the workplace under the previous administration.
• Stakeholders and officials gathered to discuss what Acting Chair Lipnic described as the “second and third generation” issues of harassment, including the legal sticking points that have come to the forefront and concrete, effective solutions to stopping harassment before it starts.”
LEGISLATION TARGETING SEXUAL HARASSMENT CLAIMS

Proposed State Legislation (constantly changing)

In 2018 at least 20 states introduced legislation on workplace sexual harassment and 16 of those states would limit or ban the use of non-disclosure agreements and/or forced arbitration under their proposals;


Proposed Federal Legislation

Ending Forced Arbitration of Sexual Harassment Act of 2017 - a bipartisan bill- was introduced in Congress on December 6, 2017 that would require employers to exclude sexual harassment claims from employee arbitration agreements.

However, will the Epic Systems decision invalidate bans on arbitration?
Impact of FAA and preemption – would new federal law resolve the tension
LEGISLATION TARGETING SEXUAL HARASSMENT CLAIMS: 2018 TRENDS

- **New York and Delaware** became the fourth and fifth states to mandate sexual harassment training by employers. California expanded existing requirements.

- **Washington, Tennessee** banned the use of nondisclosure agreements as a condition of employment or continued employment.

- **Arizona, New York and California** limited enforceability of nondisclosure agreements to various degrees.

- **Restriction on confidentiality provisions** (some permit if claimant agrees; freezing effect on settlements)

- **Training** (interactive, bystander, qualified trainers, respect)
NEW YORK’S MODEL POLICY AND TRAINING MODULE

- New York model policy employers must adopt or exceed, training videos including case studies available at: https://www.ny.gov/combating-sexual-harassment-workplace/employers#model-sexual-harassment-policy

Training Scenario:

Carla works as a licensed heavy equipment operator. Some of her male coworkers think it is fun to tease her. Some of Carla's other coworkers are strongly opposed to her presence in the traditionally all-male profession. These coworkers have sometimes said things to her like, “You're taking a job away from a man who deserves it,” “You should be home with your kids,” and “What kind of a mother are you?” Also, someone scratched the word “bitch” on Carla's toolbox.

Question 3.
- These behaviors, while rude, are not sexual harassment because they are not sexual in nature. True or False?

FALSE:
- The behaviors are directed at her because she is a woman and appear to be intended to intimidate her and cause her to quit her job. While not sexual in nature, this harassment is because of her sex and will create a hostile work environment if it is sufficiently severe or frequent.
LEGISLATION TARGETING SEXUAL HARASSMENT CLAIMS: 2018 TRENDS

- Expansion of the definition of “employee,” or non-employee workers specifically protected under anti-harassment laws
  - New York, Delaware and Vermont

- N.Y. Exec. Law § 296-d: “An employer may be held liable to a non-employee who is a contractor, subcontractor, vendor, consultant or other person providing services pursuant to a contract in the workplace or who is an employee of such contractor, subcontractor, vendor, consultant or other person providing services pursuant to a contract in the workplace, with respect to sexual harassment, when
  - the employer, its agents or supervisors knew or should have known that such non-employee was subjected to sexual harassment in the employer's workplace,
  - and the employer failed to take immediate and appropriate corrective action.
  - In reviewing such cases involving non-employees, the extent of the employer's control and any other legal responsibility which the employer may have with respect to the conduct of the harasser shall be considered.”
LEGISLATION TARGETING SEXUAL HARASSMENT CLAIMS: 2018 TRENDS

New York, Washington, Vermont and Maryland enacted laws to prevent employers from mandating confidential arbitration of sexual harassment claims.

Maryland’s “Disclosing Sexual Harassment in the Workplace Act of 2018”

Restriction on mandatory arbitration of sexual harassment claims

Mandatory reporting of settled claims

Changing corporate culture: California is the first state to require publicly traded companies to have at least one woman on their board of directors by the close of the 2019 calendar year

Changed legal standards- if a single incident is sufficient, is "severe or pervasive" on the way out?
CORPORATE AMERICA: AHEAD OF THE CURVE?

Private pressure to ban mandatory arbitration and confidentiality prior to legislative enactment

December 2017
• Microsoft ends mandatory arbitration of sexual harassment

May 2018
• Uber ends mandatory arbitration of sexual harassment
• Lyft follows suit

November 2018
• Google ends mandatory arbitration of sexual harassment
• Facebook follows suit

Harvard University students at the Pipeline Project pressure law firms by publicly identifying and threatening boycotts if mandatory arbitration is not banned
• Several firms announce end to mandatory arbitration of employment claims
PUBLIC PERCEPTION: PSA’S HAVE COME A LONG WAY
## EVALUATING A HARASSMENT CLAIM

<table>
<thead>
<tr>
<th>Who is the employer and what is the Company culture?</th>
</tr>
</thead>
<tbody>
<tr>
<td>• Effective anti-harassment/retaliation policies?</td>
</tr>
<tr>
<td>• Effective complaint procedure?</td>
</tr>
<tr>
<td>• Training?</td>
</tr>
<tr>
<td>• Leadership commitment?</td>
</tr>
<tr>
<td>• Claims history?</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Who is the alleged harasser? There may be differing standards for liability dependent on supervisor v. co-worker</th>
</tr>
</thead>
</table>
EVALUATING A HARASSMENT CLAIM

1. Who is the alleged claimant? Does poor performance come into play?
2. Nature of the allegations? Touching?
3. Did the claimant complain about harassment? What was the Company’s response?
4. Did the Company investigate? Was the investigation credible? Are there any issues with attorney/client privilege?
5. Are there any concerning emails/texts?
WHAT WE HAVE LEARNED OVER THE PAST 18 MONTHS:

Insured’s concerns might be of a different scope than the carrier

Insureds generally do not like publicity and do not want to litigate sex harassment claims

Insureds are more willing to settle early and at higher amounts to avoid public scrutiny, regardless of actual potential exposure and costs

We now routinely hear: “Get rid of the case as fast as possible”
WHAT WE HAVE LEARNED OVER THE PAST 18 MONTHS:

- Research from UCLA suggests that people tend to view a sexual harassment claim as a symptom of a culture that is hostile to women, not simply as a “bad apple” problem.
- Even a single allegation can decrease perceptions of gender equality, which can raise questions about company’s management capabilities.
- Compared to financial fraud accusation, which was more likely to be considered a “bad apple” problem, sexual harassment accusation more likely to carry larger reputational damage for the business as a whole.
TAX ISSUES FOR CONFIDENTIAL HARASSMENT SETTLEMENTS

Federal law currently in effect, passed on December 22, 2017 as part of the federal tax cut legislation, the 2017 Tax Cuts & Jobs Act

Prohibits deducting any settlement or payment related to sexual harassment or sexual assault if the settlement or payment is subject to an agreement to keep it confidential

Also cannot deduct attorneys’ fees related to a confidential sexual harassment settlement or payment

Considerations
• Paramount importance of settlements being confidential
• Reasonable allocation when there are non-sexual harassment claims in the case
WHAT SHOULD A COMPANY DO WHEN THEY FIND OUT?

- Inform Your Insurance Companies?
  - If investigation indicates complaint is valid or there is likely to be an EEOC complaint or lawsuit filed:

**“Claims Made” policies = Yes**
- Employment Practices Liability Insurance
- Professional Liability (E&O) Insurance
- Directors & Officers Insurance

**“Occurrence” policies = Possibly**
EMPLOYMENT PRACTICES LIABILITY INSURANCE (EPLI)

Liability insurance for “employment wrongful acts” arising from work-related incidents, e.g., discrimination, harassment, retaliation, wrongful discharge, defamation, etc.

Covers the company and its directors, officers, managers and employees.

May cover “third party” wrongful acts arising from claims by a non-employee, e.g., customer or client, against an employee for wrongful conduct, such as discrimination or harassment.

Covers defense expenses and costs of settlement or judgment for “covered” claims.
UNIQUE CONSIDERATIONS

“Claims-Made” policies
- Coverage limited to policy period
- Notification vital
- Retroactive date critical

Limits
- Depleted by defense expenditures
- Interrelated claims

Policy Application
- Part of the policy
- Breadth of Warranty statement
- Severability language
BARS TO COVERAGE

Three General Types of Exclusions

Federal & State wage, benefit & labor laws

Knowledge & Moral Hazards

Intentional or criminal/dishonest acts, prior knowledge, punitive damages

Risks covered by other types of insurance

Bodily injury and property damage

FLSA, NLRA, WARN, COBRA, OSHA, ERISA, SSDI, etc.
HARASSMENT VS. ASSAULT

Harassment

EEOC definition
• “unwelcome sexual advances, requests for sexual favors, and other verbal or physical harassment of a sexual nature.”

Examples
• Comments, non-intimate touching
• Quid pro quo

Criminal Assault
C.R.S. § 18-3-402

Sexual intrusion or penetration without valid consent

Examples
• Forceable assault
• Use of drugs or intoxication or other impairment
PROFESSIONAL LIABILITY COVERAGE

Sexual assault coverage can be purchased under certain types of PL coverage, e.g. incidental medical malpractice or educator’s liability

Broad warranty statement re: knowledge of any facts, circumstances, incidents, allegations that may result in a claim likely required

Separate sub-limit and “first-occurred” or non-cumulation provision possible
DIRECTORS & OFFICERS – THEORIES OF LIABILITY

Four Principal Theories:

1. Breach of Duties by Personal Conduct
2. Failure to Monitor Harassment by Others (Caremark theory- obligation to monitor)
3. Turning a Blind Eye or Enabling Harassment
4. Violation of Securities Laws by Misleading Statements about Company’s Status and Compliance with Laws
POSSIBLE D&O COVERAGE

- Breach of Fiduciary Duty – by Director or Officer
  - Personal Actions – individual harassment
  - Failure to Monitor or Correct Actions by Others

- Does the conduct at issue qualify as a “Wrongful Act”? (and is not subject to an exclusion)
“WRONGFUL ACT” UNDER D&O POLICIES

Many private company D&O policies exclude any employment related claims, so coverage will be dependent on EPLI coverage.

Many public company D&O polices include as part of a covered wrongful act actions that constitute sexual harassment.
D&O – OTHER COVERAGE CONCERNS

Is the claim “Insured v. Insured”

Is the underlying action an intentional or willful act or a criminal act?

Did the harassment or assault result in a “bodily injury”?

Did the harassment occur in the “course and scope” of actor’s employment?
OTHER - D&O COVERAGE CONCERNS

Claims Made Policy

- Failure to Disclose Circumstances- Often the accused is someone signing off on application and insurer will claim should have known or disclosed underlying conduct
- *Zion Christian Church v. Brotherhood Mutual Insurance Co.*, (6th Cir.) – CEO failed to disclose past misconduct, so no coverage for later claims
D&O LIABILITY – HIGH PROFILE CASES

**Wynn Resorts**
- Claims against founder Steve Wynn - stock price down 20%
- Multiple lawsuits - including new one filed in November 2018

**21st Century Fox**
- Eight figure settlements for claims against Roger Ailes and Bill Riley = $90 settlement with SH

**Signet Jewelers (Kay-Zales)**
- SH suit for failure to disclose arbitration involving claims by nearly 70,000 female employees
INTERESTING FACT

2017 “Tax Cuts and Jobs Act”

Provided that Corporations cannot deduct as business expenses

- Any settlement or payment that is subject to a non-disclosure agreement
- Any attorneys fees related to such settlements or payments
COMMERCIAL GENERAL LIABILITY (CGL)

Liability of company or employer for sexual abuse or misconduct is generally covered under CGL policies based on negligence against company/employer

• Will not provide coverage for individual offender
• Must meet definition of occurrence, generally requires bodily injury
CGL – WHAT COVERAGE IS AVAILABLE?

Increased incidence and use of CGL policies led insurers to start limiting or eliminating coverage through endorsements, such as sexual misconduct exclusions.

• If no exclusion, there is coverage
• If there is an exclusion, no coverage, unless you purchase available buy-back coverage
CGL – POTENTIAL COVERAGE ISSUES

- Number of occurrences
- Exclusions for intentional conduct, employer practices, or professional services
- Non-cumulation provisions
- Sub-limits and excess coverage
CGL – NUMBER OF OCCURRENCE EXAMPLES

Sandusky, Penn State Insurance Case


Duluth Archdiocese Priest Abuse Case

- Found each act of abuse was a separate occurrence and triggered multiple policy periods, but multiple instances of abuse of same victim by same priest in same year was a single occurrence for that year (Diocese of Duluth v. Liberty Mutual Group et al., case no. 16-05012 (Bankr. Dist. Minn. Mar. 30, 2017))
Generally, sexual misconduct or abuse does not fall within professional services exclusion

- Duluth Archdiocese priest abuse case found professional services exclusion did not bar coverage: “Even assuming that priests are professionals who occasionally provide professional services, in no world -- legal or religious -- would raping or sexually battering children be the rendering of professional service” (*Diocese of Duluth v. Liberty Mutual Group et al.*, 2017 WL 844129 (Bankr. D. Minn. Mar. 2, 2017)).

- Scientology narcotic treatment case found providing patients with alcohol and having sexual relations with patient is not the rendering of a professional service. (*Western World Ins. Co. v. Nonprofits Ins. Alliance of California*, 295 F.Supp.3d 1071 (N.D. Cal. 2018))

But Arizona has adopted “intertwined and inseparable from” test

- Where cardiologist fondled, cupped, or otherwise engaged in inappropriate touching of a patient’s breast, court found this was intertwined with professional services and excluded.

- But found issues of fact remained regarding whether other abuses (inappropriately touched and viewed other areas of their bodies including their hair, throat, vagina, and buttocks, and that he conducted examinations with an erection) were excluded (*Nat’l Fire Ins. Co. of Hartford v. Lewis*, 898 F. Supp. 2d 1132 (D. Ariz. 2012))
#MeToo And The Impact on Employers, State Laws, And Insurance

American Bar Association Panel Discussion
27th Annual Insurance Coverage Litigation Midyear Conference
February 21-23, 2019
Moderator: Joe Ramirez, Holland & Hart LLP
Panelists: Hillary Raimondi, Traub Lieberman Straus & Shrewsberry LLP; Alicia Garcia, AmTrust North America; Andrea Sitar, Freeman Mathis and Gary, LLP

I. Introduction

The #MeToo movement has changed public discourse, collective understanding of harassment and gender dynamics, and laws across the nation. While the movement started as a discussion by and between women who survived sexual violence, it has become the slogan of the anti-sexual harassment movement, and tackles issues including wage equality and systemic bias. As more local legislation is enacted, more potential pitfalls for employers emerge, along with associated insurance claims.

The #MeToo movement came to the forefront of American discourse after the New York Times published its first article about sexual misconduct by Harvey Weinstein on October 5, 2017. Public accusations against other high-profile individuals quickly followed. By December 29, 2017, the Los Angeles Times was reporting that a powerful person had been accused of sexual misconduct at a rate of nearly every 20 hours.¹

The earliest policy responses were seen in the business community and in state capitols. Laws impacting private employers began appearing in 2018 across the country. These new laws range from limitations on nondisclosure agreements in cases involving sexual harassment, increased sexual harassment training requirements, expansion of existing sexual harassment laws, and elimination of mandatory arbitration of sexual harassment claims. No federal legislation has passed yet.

This paper will look at a brief history and rapid ascent of #MeToo, a survey of major state legislation enacted in response to #MeToo, potential future federal legislation, and the #MeToo impact on insurance claims and costs.

II. The Rapid Ascent of #MeToo

In 2006 activist Tarana Burke coined the phrase “Me Too” to raise awareness of the pervasive nature of sexual abuse and assault in the U.S. On October 15, 2017, following the New York Time’s article on Harvey Weinstein, actress Alyssa Milano encouraged women to

tweet "Me Too" if they had experienced sexual harassment or assault. The hashtag was tweeted nearly 500,000 times in the first 24 hours.²

The movement swiftly gained momentum through the end of 2017. In the next two months alone, public allegations of sexual misconduct were levied against the head of Amazon Studios Roy Price, actor Kevin Spacey, Republican Senate nominee Roy Moore, comedian Luis C.K., “Today” show co-host Matt Lauer, public radio personality Garrison Keillor, music mogul Russell Simmons, U.S. Senator Al Franken, and chef Mario Batali.³ The allegations resulted in protracted media coverage and public falls from grace.

In early 2018 Hollywood awards shows like the Golden Globes and the Oscars featured the #MeToo movement and the anti-harassment coalition #TimesUp. At the Oscars ceremony, Ashley Judd, Annabella Sciorra and Salma Hayek, three of Harvey Weinstein’s accusers, spoke about the effects ushered in by the producer’s downfall and the changing landscape that allowed their stories of harassment and abuse to be heard and validated.⁴

Throughout 2018 public accusations of sexual misconduct by public and private individuals in positions of power were constantly in the news. On Sept. 25, 2018, comedian Bill Cosby was sentenced to three to 10 years in prison for sexually assaulting a woman, representing the first high-profile criminal conviction in the #MeToo era. During the highly publicized trial many speculated that the #MeToo movement could cut both ways for the entertainer. Jurors could be more hostile to him given the heightened public awareness of sexual assault, or jurors could be more inclined to believe men were being wrongly accused.⁵ The #MeToo movement featured heavily in coverage of Brett Kavanaugh’s confirmation hearings for the Supreme Court.⁶

The heart of the #MeToo movement is public discussion and acknowledgement of sexual misconduct and its effects on victims. It is therefore no surprise that the types of laws and policies enacted in response to the movement focus on transparency and preventing victims from being “silenced” through nondisclosure agreements or mandatory confidential arbitration agreements.

⁴ Id.
III. High-Profile Corporate Announcements End Mandatory Confidential Arbitration of Sexual Harassment Claims

Several high-profile tech companies have announced their commitment to ending sexual harassment in the workplace through public announcements on internal policy changes.

Microsoft was the first Fortune 100 company to publicly endorse the Ending Forced Arbitration of Sexual Harassment Act of 2017, a piece of bipartisan legislation introduced by Senators Kirsten Gillibrand and Lindsey Graham in December 2017. The bill, which has not been signed into law, prohibits mandatory arbitration for claims of workplace sexual misconduct. In the same press statement endorsing the bill, Microsoft announced it would end mandatory arbitration of sexual harassment claims as a company policy.7

In May 2018 Uber announced it would end mandatory arbitration of sexual harassment and sexual assault claims made by employees, riders and drivers. The company also eliminated nondisclosure agreements that prohibit individuals from speaking about these claims as part of a settlement. Shortly thereafter, competitor Lyft announced it was making similar changes to its policies.8

On November 8, 2018, Google announced arbitration was now optional for individual sexual harassment and sexual assault claims. The company reported it never requires confidentiality in the arbitration process and cited to additional steps it would take to increase transparency in its investigation and response to complaints of harassment, discrimination, and retaliation.9 This announcement was made a week after thousands of employees at Google campuses around the globe staged walkouts to protest inequitable treatment of female workers and huge payouts made by Google to executives credibly accused of sexual harassment.10 One day after Google’s announcement, Facebook announced it would also eliminate mandatory confidential arbitration of sexual harassment claims.11

These announcements are significant, as each company responded to public pressure brought about by the #MeToo movement to make specific, concrete changes to internal company

---

policy called for by #MeToo activists. To the extent this shows a change in corporate culture going forward, other high-value and high-profile employers may be asked why they haven’t moved their policies in line with this trend. Private companies could face push-back against arbitration agreements that do not specifically carve out sexual misconduct allegations, even where permitted by law.

IV. #MeToo Spurs State Legislation In 2018

While no federal legislation has been enacted in response to #MeToo, several states have enacted significant legislation to prevent sexual harassment and discrimination in the workplace. The trends in new laws follow the trajectory of increased transparency, limiting the use of nondisclosure agreements, expanding sexual harassment protections to apply to non-employees, expanding sexual harassment training requirements and eliminating mandatory arbitration for sexual harassment claims.

The following is a survey of notable new laws from 2018 showing how states are responding to #MeToo.

A. Laws Affecting The Use Of Non-Disclosure Agreements

In 2018 several states passed laws limiting or eliminating the use of nondisclosure agreements as a condition of employment, or as part of sexual harassment settlements. Washington and Tennessee banned the use of nondisclosure agreements as a condition of employment or continued employment. Arizona, New York, and California limited nondisclosure agreements to various degrees. Employers in these states must be cognizant of these prohibitions when negotiating and entering agreements pertaining to sexual harassment claims. In states where confidentiality is permitted in some but not all scenarios, employers that value confidentiality can expect to pay more for the privilege.

Washington. Washington’s statute banning nondisclosure agreements as a condition of employment states:

…an employer may not require an employee, as a condition of employment, to sign a nondisclosure agreement, waiver, or other document that prevents the employee from disclosing sexual harassment or sexual assault occurring in the workplace, at work-related events coordinated by or through the employer, or between employees, or between an employer and an employee, off the employment premises.12

The law does not prohibit a settlement agreement between an employer and employee or former employee from containing confidentiality provisions where sexual harassment has been alleged.13

13 Id. at subsection (4).
**Tennessee.** In Tennessee, a public or private employer shall not “require an employee … or a prospective employee to execute or renew a non-disclosure agreement with respect to sexual harassment in the workplace as a condition of employment.”

**Arizona.** Arizona explicitly protects disclosures to law enforcement where a nondisclosure agreement is in place. Arizona’s statute states in part that “[t]he terms of a nondisclosure agreement may not be used to prohibit a party to the agreement from… 1. [r]esponding to a peace officer's or a prosecutor's inquiry [or] 2. [m]aking a statement not initiated by that party in a criminal proceeding.” If a party to a settlement agreement containing nondisclosure provisions makes such statements to law enforcement, the party does not forfeit his or her settlement funds.

**New York.** Where the factual foundation involves sexual harassment for any claim or cause of action, “no employer, its officer or employee shall have the authority to include or agree to include in such resolution any term or condition that would prevent the disclosure of the underlying facts and circumstances to the claim or action unless the condition of confidentiality is the plaintiff's preference.”

**California.** California now prohibits settlement agreement provisions that prevent the disclosure of factual information related to a claim filed in a civil action or a complaint filed in an administrative action regarding an act of sexual assault, sexual harassment, workplace harassment or discrimination based on sex, or failure to prevent an act of workplace harassment or discrimination based on sex. The amount paid in settlement can be made confidential, and the agreement may contain “a provision that shields the identity of the claimant and all facts that could lead to the discovery of his or her identity” when requested by the claimant. California’s new statute does not preclude parties from entering nondisclosure agreements prior to the initiation of litigation or a complaint being filed with an administrative agency.

**B. Laws Expanding Sexual Harassment Protections for Non-Employees**

Several states, including New York, Delaware and Vermont expanded their sexual harassment laws to prohibit the harassment of non-employees, including interns, volunteers, and independent contractors. Employers in these states should consider revising their anti-harassment policies and updating their harassment training programs to reflect these changes.

**New York.** In 2018 New York expanded its sexual harassment protections for non-employees and expanded potential liability for employers. The new statute states:

> It shall be an unlawful discriminatory practice for an employer to permit sexual harassment of non-employees in its workplace. An

---

16 Id. at subsection (C).  
19 Id. at subsections (d) and (e).
employer may be held liable to a non-employee who is a contractor, subcontractor, vendor, consultant or other person providing services pursuant to a contract in the workplace. 20

**Delaware.** In 2018 Delaware broadened the categories of workers covered by the Delaware Discrimination in Employment Act's sexual harassment provisions to include state employees, unpaid interns, apprentices, job applicants, and joint employees. 21

**Vermont.** Vermont’s “An act relating to the prevention of sexual harassment” signed into law by Governor Phil Scott in May 2018 states that Vermont’s anti-harassment protections apply to all persons “hired to perform work or services,” thereby expanding protections to independent contractors and possibly unpaid interns as well. 22

C. Laws Expanding Sexual Harassment Training Requirements

In 2018 New York and Delaware became the fourth and fifth states to mandate sexual harassment training by employers. California enacted laws to expand existing training requirements. Maine made smaller changes, including requiring employers to use a checklist prepared by the Maine Department of Labor to develop their sexual harassment training programs and requiring employers to maintain training completion records. 23 Connecticut failed to pass a bill expanding the state’s sexual harassment training requirements.

**New York.** New York now requires all employers in the state to provide sexual harassment training to all employees once a year, with the initial training to be completed by October 9, 2019. New York’s training requirements are expansive and require training for all full-time and part-time employees, seasonal employees, temporary employees, and employees who are based in another state but will work a portion of their time in New York. 24 The state has enumerated minimum standards for the training and has issued guidance for employers on its website. 25 Trainings must be interactive, and include:

(i) an explanation of sexual harassment consistent with guidance issued by the department in consultation with the division of human rights; (ii) examples of conduct that would constitute unlawful sexual harassment; (iii) information concerning the federal and state statutory provisions concerning sexual harassment and remedies available to victims of sexual harassment; and (iv) information

concerning employees’ rights of redress and all available forums for adjudicating complaints.26

**Delaware.** An employer with 50 or more employees in Delaware, not including applicants or independent contractors, “shall provide interactive training and education to employees regarding the prevention of sexual harassment.”27 The training must include information regarding the illegality of sexual harassment, the definition of sexual harassment using examples, the legal remedies and complaint process available to the employee, directions on how to contact the Delaware Department of Labor, and information on the legal prohibition against retaliation.28 There are additional training requirements for supervisors. Trainings must be provided to new employees within 1 year of the commencement of employment and every 2 years thereafter, and to existing employees by January 1, 2020, and every 2 years thereafter.29

**California.** California expanded its training requirements to cover more employees in the state. California now requires employers with more than five employees to provide mandatory sexual harassment training to both supervisory and non-supervisory employees.30 Part-time and temporary employees, plus independent contractors count toward the minimum employee count of five employees. At least two hours of interactive training is required for supervisory employees, and non-supervisory employees must complete at least one hour of interactive training. Employees must complete initial trainings by January 1, 2020, and once every two years thereafter.

Additional new requirements apply for seasonal and temporary employees. “Beginning January 1, 2020, for seasonal and temporary employees, or any employee that is hired to work for less than six months, an employer shall provide training within 30 calendar days after the hire date or within 100 hours worked, whichever occurs first.”31

**D. Laws Prohibiting Mandatory Confidential Arbitration Of Claims**

In response to #MeToo, New York, Washington, Vermont and Maryland enacted laws to prevent employers from mandating confidential arbitration of sexual harassment claims. It is an open question whether these state laws are preempted by the Federal Arbitration Act (FAA), which has been interpreted to mean that courts must “rigorously … enforce arbitration agreements according to their terms, including terms that specify with whom the parties choose to arbitrate their disputes and the rules under which that arbitration will be conducted.” Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612, 1621 (2018).

**New York.** New York’s new statute recognizes the potential conflict with the FAA and states that “except where inconsistent with federal law” employers may not require “mandatory

---

26 N.Y. Lab. Law § 201-g(2)(a).
28 Id.
29 Id.
31 Cal. Gov't Code § 12950.1(h).
arbitration to resolve any allegation or claim of an unlawful discriminatory practice of sexual harassment.”

**Washington.** In 2018 Washington enacted a law that prohibits employment contracts and other agreements from containing provisions that require mandatory private dispute resolution for all discrimination claims.

**Vermont.** Vermont’s statute also recognizes possible federal preemption and states:

An employer shall not require any employee or prospective employee, as a condition of employment, to sign an agreement or waiver that does either of the following: (A) prohibits, prevents, or otherwise restricts the employee or prospective employee from opposing, disclosing, reporting, or participating in an investigation of sexual harassment; or (B) except as otherwise permitted by State or federal law, purports to waive a substantive or procedural right or remedy available to the employee with respect to a claim of sexual harassment.

**Maryland.** Maryland law states that “A provision in an employment contract, policy, or agreement that waives any future substantive or procedural right or remedy to a claim of sexual harassment, discrimination, or retaliation is null and void as being against the public policy of the state.”

### E. Other #MeToo Laws

In conjunction with its new training requirements, New York requires employers adopt specific written sexual harassment prevention policies. Every employer in the state must adopt a written sexual harassment prevention policy that meets certain enumerated, minimum standards. The policy must: be consistent with guidance issued by the New York Department of Labor; provide examples of prohibited conduct that would constitute unlawful sexual harassment; include information on federal and state statutory provisions constituting sexual harassment; include a complaint form and a procedure for the timely and confidential investigation of complaints; inform employees of their rights and all available forums for adjudicating sexual harassment complaints administratively and judicially; clearly state that sanction will be enforced against supervisors who knowingly permit misconduct to persist; and state that retaliation against individuals who complain of sexual harassment is unlawful.

Maryland is the only state to require companies to publicly report the number of sexual harassment claims they settle. Maryland’s “Disclosing Sexual Harassment in the Workplace Act of 2018” requires companies with 50 or more employees to report the number of sexual

---

34 21 V.S.A. § 495h(g)(1). Effective July 1, 2018.
36 N.Y. Lab. Law § 201-g(1). Effective Oct 9, 2018.
harassment claims they have settled to the Maryland Commission on Civil Rights in response to a survey provided by the Commission. The survey must include information on the number of settlements that contain a confidentiality provision, and the number of times the employer has paid a settlement to resolve a sexual harassment allegation against the same employee over the past 10 years of employment. The Commission will make the reports accessible to the public by publishing the response on its website.

California is the first state to require publicly traded companies to have at least one woman on their board of directors. A publicly held domestic or foreign corporation whose principal place of business is in California must have a minimum of one female director on its board by the close of the 2019 calendar year. This number increases the following year depending on the size of the board of directors.

V. Potential Future Federal Legislation Limiting Mandatory Arbitration

The “Ending Forced Arbitration of Sexual Harassment Act of 2017” was introduced as a bipartisan bill in the Senate in December 2017, and prohibits a predispute arbitration agreement from being valid or enforceable if it requires arbitration of workplace sex discrimination suits. In February 2018 all state Attorneys General signed a letter to congress urging legislation ending mandatory arbitration of these claims. Should an iteration of the bill become law, this would likely resolve the conflict between the FAA and state laws that already prohibit mandatory arbitration of sexual harassment claims.

VI. Employers and Insurers Should Anticipate Higher Frequency Of Claims

Because the #MeToo movement encourages victims to speak up loudly and has removed the stigma from doing so, employers should anticipate higher frequency of complaints and legal claims. The addition of various state laws across the country increases the possibility for employers to inadvertently find themselves out of compliance with new statutes, opening new avenues for claims.

The data is bearing this out. Preliminary data compiled by The U.S. Equal Employment Opportunity Commission (EEOC) for 2018 showed charges filed with the EEOC alleging sexual harassment increased by more than 12 percent in 2018 from fiscal year 2017. Overall, the EEOC recovered nearly $70 million for the victims of sexual harassment through litigation and administrative enforcement in fiscal year 2018, up from $47.5 million in fiscal year 2017.

37 Md. Code Ann., Lab. & Empl. § 3-715 Sec. 2. Initial reports must be provided on or before July 1, 2020.
38 Cal Corp Code § 301.3. Effective January 1, 2019.
39 Cal Corp Code § 301.3(b).
The insurance industry expects significantly higher claims activity, and the potential for significant claim losses. Because social perceptions have been changed by #MeToo, courts and juries may be more sympathetic to sexual harassment claimants and return higher verdicts. State laws prohibiting nondisclosure provisions in settlement agreements will make settlement of pre-litigation demands more expensive to the extent that confidentiality can be secured in these agreements and is of value to the employer.

Employment practices liability insurance (EPLI) policies are expected to see increased claims, as these cover in insured’s liability for wrongful acts in the employment process, including wrongful termination, sexual harassment, retaliation, and other related claims.43 Claims of sexual harassment brought by third parties that are not employees are typically not covered under EPLI policies. Directors and officers’ liability insurance (D&O) policies could then provide coverage for these and other related claims, as D&O policies cover the wrongful acts of directors and officers, and potentially the organization, for wrongful acts committed in the scope of their duties as directors and officers. Again, the industry expects increased claims here as well.

Insureds, especially those with repeated claims that indicate a culture of sexual harassment, may face more underwriting scrutiny, higher insurance rates, and possibly high retentions or a coinsurance requirement. Underwriters could shift their attention to assessing the culture controls in place at an organization to prevent and deal with sexual harassment and other scandal-driven litigation. Insureds could expect to see questions regarding the frequency with which they update their employee handbooks, implement sexual harassment training, and how sexual harassment policies are enforced by the company.44 The potential impact on insurance rates is yet another incentive for companies to be proactive in developing, training, and implementing thoughtful sexual harassment policies.

VII. Employers Can Limit Their Exposure With The Same Good Employment Practices They Have Always Used

Best practices in the #MeToo era are no different from those recommended prior to the movement. The major difference is that #MeToo has illuminated and heightened the risk to employers that are complacent or permissive of sexual misconduct in the workplace. Employers need to stay educated on new laws affecting them by jurisdiction. Whether required by local laws or not, employers should develop written sexual harassment policies that are acknowledged by employees and enforced by management. Whether required by local laws or not, employers should implement sexual harassment training and make it known that sexual harassment will not be tolerated in the workplace. Complaints should be investigated promptly and thoroughly, and the company’s response should be thoughtful and clear to the complainant. Companies that appear to sweep allegations under the rug may face higher costs down the road, embarrassing publicity, litigation costs, higher settlement demands, the potential for high adverse judgments, and even increased insurance premiums.

44 Id.
Emerging Insurance Risks and Products in the Sharing/GIG Economy

Tamara Smith Holtslag, Esq., J. Christopher Fox, II, Cheryl Vollweiler, Esq., Keith Schraad, Deborah Stalker, and Alex Kroeger
What is the Sharing/Gig Economy

- Strangers share their goods and/or services through a website or app.
- Third-party businesses facilitate that sharing by hosting the website/app.
- Smartphones allow the transactions to be conducted anywhere.
- Online payment services offer quick compensation.

Source: [www.naic.org/cipr_topics/topic_sharing_economy.htm](http://www.naic.org/cipr_topics/topic_sharing_economy.htm)
Characteristics of Sharing/Gig Economy

- Online platforms (the website or app) connect the workers with customers.
- Workers choose when they work.
- Customers pay a specific rate for the work.
- Payment is made through the online platform.
Examples of Sharing/GIG Economy

- Ride sharing
- Apartment/home lending
- Peer-to-peer lending
- Reselling of goods
Differences between Sharing Economy and GIG Economy

• “Gig Economy” involves independent workers contracting for short-term work.

  • Example: Drivers can connect to Uber or Lyft to offer rides.

• “Sharing Economy” involves the sharing or renting of goods or assets.

  • Example: Airbnb connects people looking for accommodations with people who have available property.
Prevalence of Sharing/GIG Economy

- According to 2015 PwC study, nearly 1/5 of American consumers then participated in some form of sharing economy activity.

- More recently, a 2018 article from Forbes stated that “16.5 million people now make up what is known as the ‘gig economy.’”

  - More than half of U.S. companies are now using flexible work forces (including remote workers and freelancers) to some degree.

- It is predicted that by 2020, **40 percent** of American workers will be independent contractors, rather than working for someone else or for a company.


Source: www.pwc.fr/fr/assets/files/pdf2015/05/pwc_etude_sharingeconomy.pdf
Ride Sharing Exposure

• Uber is sued more than any other sharing economy company (by a wide margin)
• As of August 2016, more than 70 pending federal lawsuit against Uber and its drivers in federal courts and even more in state courts
• In September 2016 alone, Law360 reported lawsuits and enforcement actions against Uber relating to employee benefits, discrimination, background checks, tortious interference, consumer misrepresentation and price fixing, on top of more traditional property damage/personal injury claims.
• Uber has increasingly (and successfully) sought to contractually require arbitration of disputes and preclude class actions.
Legal Issues

- Misclassification – employee or independent contractor
- Why does it matter
  - Wage and hour
  - Social security taxes
  - Benefits
  - Discrimination
  - Training
  - Arbitration versus litigation
Legal Issues Part II

Class action suits:

• HomeJoy (House cleaning) (CA)
• Handy (House cleaning and home repairs) (CA)
• TryCaviar; GrubHub; DoorDash (Restaurant delivery service) (CA)
• Washio (Laundry/Dry Cleaning) (CA)
• Instacart (Grocery delivery) (CA)
• Postmates (delivery service) (CA)
• Uber
• Lyft
Legal Issues Part III

• February 2018: *GrubHub* court held food delivery driver was an independent contractor under old standard

• *GrubHub* plaintiff now seeking reconsideration based on *Dynamex* arguing that new standard should be applied

• BUT, jurisdiction matters...
Legal Issues Part IV

• 3rd Circuit - *Donovan v. DialAmerica Marketing, Inc.*

• “Economic realities test” applies 6 factors:
  1. The employer’s right to control the work
  2. The employee’s opportunity for profit or loss
  3. The employee’s investment in materials required to do the task
  4. Whether the service rendered requires a special skill
  5. The degree of permanence of the working relationship
  6. Whether the service rendered is integral to the employer’s business

• If the worker is economically dependent on employer as a whole, then he/she is an employee
Legal Issues Part V


• Court granted SJ *in favor of Uber*

• Held that only two factors weighed in favor of employee status:
  • Uber only exercises control over drivers when logged into Uber app
  • Drivers have a lot of freedom about how when/how long to work
  • Drivers purchase their own vehicles
  • Replicating limousine experience, maintaining high level of customer service IS a special skill weighing in favor of employee status
  • Uber drivers can stop working for Uber at will, so low degree of permanence (despite evidence that many drivers worked for Uber for many years or many hours per week)
  • Integrality of service weighed in favor of employee status
Legal Issues Part VI

• *Door Dash* – November 2018
  • Misclassification suit by delivery truck driver for failure to pay minimum wage and business expenses (e.g., gas, insurance, phone bills)
  • CA federal trial court granted motion to compel arbitration
  • Pltf argued driver is “transportation worker” engaged in interstate commerce so arbitration clause preventing class actions is unenforceable under FAA
  • Court held pltf only drove locally, never crossed state lines so FAA applies and arb clause is enforceable
Insuring the Sharing Economy

- Limitations of Traditional Insurance (Auto/Home)
- Exclusions (Business/Rental)
- Coverage Gaps
- Overlapping Coverage/Other Insurance Issues
- Misrepresentation on Applications
- Interaction with state and local statutes (Guest/Innkeeper laws)/Illegality

- Coverage for Sharing Economy Providers
  - Limitations of Traditional Insurance Policies/Classifications
  - Difficulty Measuring Exposure (remuneration/revenue/TIV)
  - Employees vs. Independent Contractors
  - Policy Territory
Coverage Issues

• Potential Exposures/Impacted Coverages:
  • Auto Liability
  • General liability
  • Property damage
  • Personal injury (e.g., discrimination)
  • Products liability
  • Professional liability
  • Cyber
  • Workers Comp
  • Employment Practices
Coverage Issues Part II

- Exposure/Loss Scenarios
  - 1\textsuperscript{st} party:
    - Home sharing – damage to the host home (including business interruption) and personal property
    - Ride sharing – damage to service provider’s auto
  - 3\textsuperscript{rd} party:
    - Home sharing – BI to renter resulting from host home (“invitee”); PD to renter’s personal property; PI (discrimination)
    - Ride sharing – injury to passengers, other drivers, pedestrians
  - Cyber:
    - Data breach
    - Risk for all parties – platform company, provider, user
Coverage Issues Part III

• Personal lines leave gaps in coverage
  • Car sharing (Turo)
    • Personal auto policies typically exclude vehicle rental for a fee
  • Ride sharing (Uber, Lyft)
    • Personal auto policies generally exclude commercial use (livery use of auto)
  • Space sharing (e.g., AirBNB etc.)
    • Traditional homeowners typically excludes coverage for guests/renters
    • Landlord/rental property coverage typically excludes contents/valuables
Coverage Issues Part IV

• Other coverage options
  • Home sharing:
    • Business policy (for hotel or B&B)
    • Home sharing policy – offered month to month with limitations/exclusions
  • Transportation sharing:
    • Some TNCs and carriers offer coverage for various phases of service – still evolving
    • Phase 1 – app on: some contingent liability coverage available at nominal cost)
    • Phase 2 – match found
    • Phase 3 – passenger picked up: some TNCs provide liability and UM/UIM coverage at higher cost than Phase 1 (primary and excess available); may also provide contingent comprehensive/collision under certain circumstances

• Commercial policies
• Emerging products
The Interaction of Insurance and Commercial Innovation

• Lack of historical data creates uncertainty.
• New product development might first take the form of exclusions until risks are better understood.
• Coverage litigation exposes product strengths and weaknesses.
• Insurers develop endorsements or new policies to absorb that part of the risk deemed acceptable, exclude what is not.
• New products absorb risk and incentivize innovation.
• Coverage issues may be reduced but never eliminated due to infinite potential combination of facts, applicable law and policy contract language.
Home Sharing Background

- Home-sharing is the process of listing one’s home on an online forum for the purpose of renting out space.
- The host, landlord, home owners association, guests and their visitors all have potential exposures.
- The primary concerns are who provides coverage and what coverage options are available.
Home Sharing Response

- Homeowners Policy Programs historically included limited provisions relevant for home-sharing
- Products have been developed to accommodate growth in the home-sharing industry
- There are no financial responsibility laws to comply with and no legal precedent has been established
- The largest short-term rental companies offer some limited insurance options
Regulatory Response

• Consumer Outreach –
  • State Department issued bulletins and consumer alerts
  • Media attention
  • The NAIC published a white paper in March 2015 that described background information, regulatory concerns, common terminology and potential resolutions.

• Auto Policy Modifications
  • Specific exclusions added to personal auto policies
  • New products brought to market to fill gaps and add coverage

• Legislation
  • All but two states have passed TNC laws
Commercial Ride Sharing Legislation

States/Territories in Blue Have Signed Legislation
Regarding Transportation Network Companies
As of September 6, 2017
Scooter Sharing: The New Risk

Electric scooter sharing is a new phenomenon, joining ridesharing as an alternative mode of transportation. These rentals have led to a new entrant in major city traffic lanes. There are hundreds of scooters in some cities, and they have caused some headaches and have insurance implications for consumers, municipalities and insurance companies.

About Electric Scooter Sharing
In 2018, companies such as Lime, Bird and Spin have rolled out scooter rentals in major cities throughout the U.S. The battery-powered rental scooters reach speeds of 15-20 mph and may or may not require proof of a valid driver's license.
Scooters: Regulatory Response

There have been numerous reports of accidents on motorized scooter rentals in 2018. What's believed to be the first death of a person riding a scooter rental was reported in September. Before you decide to rent a scooter, you should understand the insurance implications and know whether you are covered.

- Some cities, like San Francisco, require scooter rental companies to obtain a permit from the city and provide proof of insurance before they can operate legally.
- Regulations and requirements vary by state — often depending on the engine size.
- Most scooter rental companies offer rentals with engines smaller than 50 cc. While most states do not require insurance for engines that small, they do recommend it.
- Automobile insurance generally omits liability coverage for motor vehicles with fewer than four wheels, and it's unlikely to apply to scooter rentals.
Wrap Up and Thank You
SHARING ECONOMY

Last Updated 12/13/18

Issue: The so called "sharing economy" involves individuals sharing goods and services with strangers, often through a third party's digital network. The idea of sharing has thrived and expanded tremendously over the past few years and is becoming an everyday feature in modern society. According to a 2016 Pew Research Center study, 72% of American consumers participate in some form of sharing economy activity. Data from Statista forecasts that adults in the sharing economy will reach 86.5 million participants by 2021. Advances in technology, changes in consumer expectations, along with the internet and social media, has brought about this economic and cultural shift. Uber and Lyft (ride-sharing) as well as Airbnb (accommodation-sharing) are among the most well-known and highest profile companies within the sharing economy. However, the sharing economy extends well beyond sharing homes and cars--entrepreneurs are using digital networks to lend office space, parking spots, boats, bicycles, cameras and more. While the rapid growth of the sharing economy offers opportunities and challenges, there are some consumer and regulatory issues that need to be carefully navigated. The primary concern for insurance regulators is; who is liable if something goes awry, the individual providing the good or service or the company who made the match?

Overview: The sharing economy--also referenced to as the gig economy, trust economy, peer-to-peer economy, demand economy or collaborate consumption--is a term used to describe a multitude of different companies that offer a variety of services. The basic concept is that anyone can make money off of their own goods and services. Companies at the forefront of the sharing economy follow the same basic model: strangers share goods or services, connecting through a website or an online application that is facilitated by a third party business. Smartphone apps allow people to conduct transactions anywhere with the convenience of their mobile phone, and online payment services offer quick compensation.

Committees Active on This Topic

Innovation and Technology (EX) Task Force

News Releases

Consumer Alert - Navigating Home-Sharing Rentals
January 2017

NAIC Adopts Home-Sharing White Paper
December 2016

Consumer Alert - Sharing a Ride, But Not Insurance: Ridesharing drivers may face insurance coverage gap
December 2015

Consumer Alert - Sharing a Ride, But Not Insurance: Protect yourself as a ridesharing passenger
December 2015

NAIC Adopts Ride-Sharing White Paper
March 2015

NAIC/CIPR Articles

The Sharing Economy: An Innovative Way to do Traditional Business (PDF)
NAIC/CIPR Article, November 2016

Sharing a Ride, Not the Risk CIPR Examines Commercial Ride-Sharing
The sharing concept has always existed, but what distinguish the modern sharing economy are digital platforms that easily match demand and supply. This ease and flexibility to conduct a trade anytime and anywhere from a smartphone has propelled the growth of the sharing economy. Cost-savings, entrepreneurship, and a community-like atmosphere are also factors pushing adoption of the sharing economy forward. For example, home sharing services are beneficial to travelers looking for more affordable options. In addition, the concept of the sharing economy is appealing to individuals seeking to earn additional income from underutilized assets. A 2018 study by Deloitte reports that wealth and income are key determinants in people's willingness to participate in the sharing economy. Across multiple countries, millennials are the most open to participating in the sharing economy, likely due to their comfort with technology and need for affordable ways to access goods.

**Transportation Network Companies** (TNCs) such as Uber and Lyft are the most highly publicized companies under the sharing economy umbrella. TNCs connect individual drivers with people who need rides. Passengers and drivers can screen each other, and any payment for services occurs electronically. The primary insurance concern with TNCs is over the potential gaps in insurance coverage in the unfortunate event of an accident or injury. While every personal auto insurance policy differs, most contain exclusions when a person uses their vehicle for livery services. TNCs only offer limited liability coverage while the driver has the application on but has not yet been matched with a passenger through the application. This creates a gap in coverage. The driver may be driving around looking for matches, they may even have multiple TNC applications on simultaneously, but their coverage would be limited to the highest liability limit offered by the TNCs for which they are driving. Several admitted insurers have developed products to fill gaps in coverage created by commercial ride-sharing and the common use of livery exclusions in personal auto insurance.

The NAIC developed a white paper in 2016 to recommend strategies to resolve the potential gaps in coverage. Recommendations include state legislation requiring insurance to be carried by the TNC or the driver at all times, consumer disclosures regarding the potential for gaps in coverage and the need for new products to be offered by admitted insurers. In response to the white paper, Uber and Lyft worked with several key insurers and industry associations to develop their own model law. The model legislation labeled, **TNC Insurance Compromise Model Bill**, became the basis of the National Council of Insurance Legislators model which has been used as the foundation for many new state laws.

Car sharing is another spin on sharing transportation. Car sharing companies match car owners willing to rent their vehicle to a
stranger with those seeking cars for rent. Many car sharing companies are owned by large car rental companies. Flexicar is owned by Hertz and Zipcar is owned by Avis. Car sharing companies often offer insurance coverage while the vehicle is being rented. This concept presents less opportunity for coverage gaps because the vehicle is either being used as a rental or it’s not.

Other types of companies popular within the sharing economy include **home** or accommodation-sharing. These companies match travelers with locals interested in renting out a room, apartment or house on a temporary basis. More and more people are using home-sharing companies to find vacation housing as well as rent out their homes. The most popular are Airbnb and HomeAway. Airbnb offers apartments or houses on a temporary basis. Airbnb offers two forms of protection—the Host Guarantee and Host Protection Insurance (HPI)—free to all of their hosts. Both forms offer liability coverage for Airbnb and its hosts as named insureds. The average also offers protection for landlords if the host rents the listed property and extends to home owners associations for common areas associated with the listed property. When a lawsuit is taken against the host or landlord, this coverage protects the individual against claims of up to $1 million in bodily injury or property damage. Airbnb does not provide injury to reputation coverage such as claims of libel or slander.

Goods-sharing is a smaller segment of the sharing economy that involves the lending of personal items for a fee. The interested party registers on sites like Zilok or Neighborgoods, enters into a contract and pays a fee to reserve the item of choice. Lender and borrower meet at a safe spot where they complete the transaction. If the item malfunctions and results in injury to the operator there may be some liability risk to the owner if they knew or should have known that the item was defective and could result in injury. In December 2016, the NAIC adopted a white paper on insurance coverage issues in the sharing economy for home rentals. The white paper, **Insurance Implications of Home-Sharing: Regulator Insights and Consumer Awareness**, discusses various coverage options for homeowners, unit-owners, dwelling and renters policies. Limitations of each type of coverage are discussed as well as legal restrictions. The paper also focuses on the need for consumer outreach and education regarding these new services.

On demand services like Task Rabbit and Zaarly connect freelancers willing to complete chores with those who are unable or unwilling to do it themselves. These services could be likened to typical household cleaning services like Merry Maids or contractor services like plumbers and electricians. The major difference is the company backing the people performing the work. If the sharing company presents itself simply as a match-making service then who is providing the insurance if the person cleaning your home breaks something, trips and falls, gets bitten by your dog or steals from you? Some incidents may be covered by your homeowners
insurance, others may be covered by the sharing company, but the reoccurring theme in the sharing economy is that it becomes the consumers’ responsibility to figure out what is and is not covered when the company is cut out of the transaction.

**InsurTechs** are working to meet a great deal of demand by offering **on-demand insurance** for participants of the sharing economy. Slice Labs, Inc., for example, allows Airbnb hosts to turn insurance coverage on and off through their app. This service also helps fill gaps that the Airbnb’s HPI does not cover, including loss of income. Slice Labs is also considering expanding into the ridesharing and cyber security market. The latter of which has shown to be a worldwide issue as users of various sharing platforms have been hacked while attempting to participate in the economy.

**Status:** An NAIC Sharing Economy (C) Working Group was formed in 2014 and charged to study and make recommendations about regulatory issues related to the sharing economy. It also tracked consumer reports and bulletins published by the states and developed documentation on best practices for states to address insurance coverage issues related to the sharing economy. While the working group disbanded in early 2018, regulatory issues related to the sharing economy will continue to be addressed within the **Innovation and Technology (EX) Task Force**.

---

**RESOURCES**

**Committees**
- Committee List (PDF)
- Committee Structure (PDF)
- Exposure Drafts
- Meetings

**Members**
- Member List (PDF)
- Members by Zone (PDF)
- Executive Committee (PDF)
- Insurance Dept. Directory

**Consumers**
- Consumer Information Source (CIS)
- Life Insurance Policy Locator
- Consumer Participation
- Glossary of Insurance Terms

**Education**
- Schedule
- Regulator Professional Designation Program Course Catalog (PDF)

**Industry**
- Financial Statement Filing
- Market Conduct Annual Statement (MCAS)
- Uniform Certificate of Authority Application (UCAA)

**Products**
- Publications
- Financial Statement Data
- Automated Valuation Service
- Account Manager

**PROGRAMS & AFFILIATES**
- Center for Insurance Policy & Research (CIPR)
- Insure U - Get Smart About Insurance
- National Insurance Producer Registry (NIPR)
- Interstate Insurance Product Regulation

**APPLICATIONS**
- System for Electronic Rate and Form Filing (SERFF)
- State Based Systems (SBS)
- OPTins Premium Tax Payment System
- myNAIC | iSite+

**ANALYSIS**
- Securities Valuation Office (SVO)
- Structured Securities Group (SSG)
- Capital Markets Bureau

**POLICY**
- Financial Health
- International | Fellows Application
The Sharing Economy

Consumer Intelligence Series
Contents:
Consumer Intelligence Series
“The Sharing Economy”

I. Research Methodology

II. A Snapshot of the Sharing Economy
• By the Numbers
• Perspective from Industry Specialists

III. Assessing the Sharing Economy

IV. The Business of Sharing
• Automotive
• Retail and Consumer Goods
• Hospitality
• Entertainment, Media and Communications

V. What the Sharing Economy Means for Your Business
I. Research Methodology
What we did and who we talked to

Around the world, a new wave of peer-to-peer, access-driven businesses is shaking up established categories. Whether borrowing goods, renting homes, or serving up micro-skills in exchange for access or money, consumers are showing a robust appetite for the sharing-based economy.

Consumers are showing a robust appetite for the sharing-based economy

We set out to explore how the sharing ethos will make its mark on the wider market—and to understand what incumbents and challengers must do to position themselves ahead of disruption and capitalize on new sources of revenue. By unlocking the sharing economy today, can companies transform today’s threat into tomorrow’s opportunity?

Can companies transform today’s threat into tomorrow’s opportunity?

To do this, we worked with BAV Consulting, a global leader in research and insights that is home to the largest and leading quantitative empirical study of brands and consumers, capturing decades of consumer perceptions.

Over the past four months, we’ve embarked on extensive research to comprehend consumer attitudes toward the sharing economy—surveying the general population, talking candidly with influencers, interviewing business executives and keeping a close ear tuned to the sharing economy chatter on social media. Collectively, this data gave us a holistic view of what’s unfolding across both business and consumer landscapes.
I. Research Methodology

In our survey, we defined the sharing economy as follows:

Sharing economies allow individuals and groups to make money from underused assets. In this way, physical assets are shared as services. For example, a car owner may allow someone to rent out her vehicle while she is not using it, or a condo owner may rent out his condo while he’s on vacation.

Some examples of the sharing economy include:

- **Hospitality and Dining:** CouchSurfing, Airbnb, Feastly, LeftoverSwap
- **Automotive and Transportation:** RelayRides, Hitch, Uber, Lyft, Getaround, Sidecar
- **Retail and Consumer Goods:** Neighborgoods, SnapGoods, Poshmark, Tradesy
- **Media and Entertainment:** Amazon Family Library, Wix, Spotify, SoundCloud, Earbits

### The Survey:

We sampled US consumers who have some familiarity with the sharing economy. This sample cut across age, income, region and gender.

- 25 minute online survey to consumer panelists
- Total sample: n=1000
- Incentive: Panel points

The bulk of our questions were asked of the 44% of respondents who are familiar with the sharing economy.

### Total US Adult Population:

- Not Familiar: 56%
- Familiar: 44%

### Collaboration with PwC’s Digital Services group:

To brainstorm the sharing economy future and the implications it could have on both enterprise and society, we sat down with PwC’s Digital Services group.

In this session, we focused our discussions around the following key questions:

- What are the keys to unlocking a better user experience through the sharing economy?
- What are the risks? For mature industries? For incumbent disruptors? For challengers?
- What ingredients are key to success in this business model?
- What are the uncertainties this industry faces—and what are the opportunities?
- How might sharing economy concepts be applied to existing business models across industries?
Conversations with industry specialists:

In a space as new and as ambiguously defined as the sharing economy, we wanted to hear from the people closest to it, those at the leading edge of technology and business who could offer nuanced views of what’s happening and why it matters. To do this, we held salons in two cities—New York and San Francisco—where we invited industry specialists to weigh in on the state of the sharing economy and the future it holds. Our panelists included:

**Shelby Clark**
CEO of Peers.org, founder of RelayRides and former Director of Kiva.org

**Chelsea Rustrum**
Co-author of It’s a Sharable Life and Sharing Economy Consultant

**Padden Guy Murphy**
Head of Business Partnerships, Getaround, a peer-to-peer car-sharing platform

**Barbara Pantuso**
Independent Consultant, Entrepreneur and founder of Hey Neighbor!, a local sharing site

**Jim (Griff) Griffith**
Dean of eBay Education, Host of eBay Radio, Author of The Official eBay Bible

**Allison Mooney**
Head of Trends and Insights, Google Marketing; Editor-in-Chief, Think with Google

**Brooke Moreland**
Founder, Fashism.com and Former Head of Marketing, Gett (GetTaxi USA)

**Kathryn Duryea**
Marketing Consultant, Former VP Marketing, Rocksbox, a premium jewelry subscription service

**Elisabeth Mouchy**
Co-founder at Daylighted, turn-key gallery that uses a digital canvas to bring art everywhere

**Arun Sundararajan**
Professor, New York University Stern School of Business

**Chelsea Rustrum**
Co-author of It’s a Sharable Life and Sharing Economy Consultant

**Padden Guy Murphy**
Head of Business Partnerships, Getaround, a peer-to-peer car-sharing platform

**Barbara Pantuso**
Independent Consultant, Entrepreneur and founder of Hey Neighbor!, a local sharing site

**Jim (Griff) Griffith**
Dean of eBay Education, Host of eBay Radio, Author of The Official eBay Bible

**Allison Mooney**
Head of Trends and Insights, Google Marketing; Editor-in-Chief, Think with Google

**Brooke Moreland**
Founder, Fashism.com and Former Head of Marketing, Gett (GetTaxi USA)

**Kathryn Duryea**
Marketing Consultant, Former VP Marketing, Rocksbox, a premium jewelry subscription service

**Elisabeth Mouchy**
Co-founder at Daylighted, turn-key gallery that uses a digital canvas to bring art everywhere

**Arun Sundararajan**
Professor, New York University Stern School of Business

**Chelsea Rustrum**
Co-author of It’s a Sharable Life and Sharing Economy Consultant

**Padden Guy Murphy**
Head of Business Partnerships, Getaround, a peer-to-peer car-sharing platform

**Barbara Pantuso**
Independent Consultant, Entrepreneur and founder of Hey Neighbor!, a local sharing site

**Jim (Griff) Griffith**
Dean of eBay Education, Host of eBay Radio, Author of The Official eBay Bible

**Allison Mooney**
Head of Trends and Insights, Google Marketing; Editor-in-Chief, Think with Google

**Brooke Moreland**
Founder, Fashism.com and Former Head of Marketing, Gett (GetTaxi USA)

**Kathryn Duryea**
Marketing Consultant, Former VP Marketing, Rocksbox, a premium jewelry subscription service

**Elisabeth Mouchy**
Co-founder at Daylighted, turn-key gallery that uses a digital canvas to bring art everywhere

**Arun Sundararajan**
Professor, New York University Stern School of Business

**Social Listening**

Chatter on social media can often reveal changes in consumer attitudes and perceptions. To capture this, PwC conducted software searches across “the social web”—including blogs, Twitter, Facebook, forums and online news outlets with comment boards—by creating a search of relevant key words, fine-tuning and optimizing this list based on results, and then analyzing the data against situational context.
A Snapshot of the Sharing Economy

- **Surfboard**: $7 a day
- **Boombox**: $5 a day
- **Roof Rack**: $8 a day
- **Mini-van rental**: $30 a day
- **Dress**: $4 a day
Trust, convenience and a sense of community are all factors in pushing adoption of the sharing economy forward. Thanks to consumer willingness to try mobile apps, there are lower barriers to entry when it comes to building brands and scaling up quickly—the innovation clock is now set to fast-pace, and will get even faster as consumers become more trusting of relationships tied to social sentiment and communities of users.

Of those consumers who have tried the sharing economy

57% agree “I am intrigued by companies in the sharing economy but have some concerns about them”

72% agree “I could see myself being a consumer in the sharing economy in the next two years”

Who is most excited about the sharing economy once they have tried it?

18 to 24 year olds

Households with income between $50k and $75k

Those with kids in the house under age 18
Among US adults familiar with the sharing economy, they perceive many benefits to it

- 86% agree it makes life more affordable
- 83% agree it makes life more convenient and efficient
- 76% agree it’s better for the environment
- 78% agree it builds a stronger community
- 63% agree it is more fun than engaging with traditional companies
- 89% agree it is based on trust between providers and users
- 81% agree it is less expensive to share goods than to own them individually
- 43% agree owning today feels like a burden
- 57% agree access is the new ownership

They are re-thinking the value of ownership

But they have some concerns

- 72% agree they feel that the sharing economy experience is not consistent
- 69% agree they will not trust sharing economy companies until they are recommended by someone they trust
Who’s providing in this new economy?

7% of the US population are providers in the sharing economy; they cut across age and household income.

II. A Snapshot of the Sharing Economy
On shared resources:
The sharing economy is actually our business model—we don’t own any of our own manufacturing, we effectively share facilities. We contract manufacture with partner companies who make products for others, often competitors. We do all of our own formulations but we share equipment and facilities. This is not the traditional definition of the sharing economy, but it’s certainly the way that we’ve built our business and it fits the definition of ‘efficiently utilizing excess capacity.’

Whenever we’ve investigated owning our own facilities, we keep coming back to the fact that it’s really not economically more attractive or environmentally more sustainable than sharing facilities through a contract manufacturing business model.

Similarly, when it comes to distribution, we use a Logistics Partner. They combine our brand with other brands to fill up a truck since we often wouldn’t fill up a truck ourselves. By sharing, we also utilize five to six distribution centers each closer to our markets, whereas if we tried to build our own facilities we’d have only one to two to supply the country. Our partners are professionally integrating the service, which is both financially and environmentally more sustainable. This is all about the efficient use of resource—obviously, the connective world we live in has made that more readily accessible. I think any place you can find inefficiency, that inefficiency will be eradicated in the not too distant future.

On shared ideas:
We don’t patent the technologies that we develop. The belief is that we’ll create a better world if more and more companies find plant-based solutions that perform as effectively as conventional brands, rather than using petroleum-based chemicals to accomplish the same task.

On social sharing:
15 years ago, one of the questions you would always ask is, where did you learn about this product for the first time? The first line of every research report was always ‘a friend recommended it.’ The frustrating thing at the time was that you couldn’t really do anything about it directly. Today, the preponderance of consumer reviews has filled that void. Before, you could never efficiently access a friend’s recommendation, today they are driving businesses. It’s a way to efficiently harness the power of everybody’s voice and it has a really clear and powerful effect on the business.

On launching Citi Bike:
It was a tremendous risk when we started this journey. At the time, there were a lot of questions—is it the right thing to do? Is it going to be successful? As a result, this was something that we thought about very hard before we got into it. And yet, it’s exceeded our expectations in what it’s delivered for us and our ability to reach and connect with our clients, our customers and the people we’d like to see become clients and customers.

From a brand perspective, it was very important that the brand was associated with a very environmentally friendly transportation model. Citi stands for progress, and we couldn’t think of a better way of representing this kind of progress in the new urban environment where people care about sustainability. We also saw the shift in consumer values—Citi Bike is providing tourists and native New Yorkers with a wonderful opportunity to get around.

On shared ideas:
We launched the Citi Mobile Challenge last year—we invited developers from around the world to help build innovative solutions based on the Citi digital platform. Last year, we brought 60 finalists to Silicon Valley, New York City and Miami to present these ideas to a panel of judges who could decide whether these were innovations that could benefit our clients. The finalists competed for an opportunity to take their idea to production, a share of $100,000 and other services to help get some of their ideas off the ground.

It’s an extraordinarily powerful initiative. We have the opportunities through these hackathons to reach people from around the world who have tremendous ideas, tremendous concepts, and actually see if we can help bring them to market. It’s good for them and it’s good for us.

The reality is that even as a company with 240,000 colleagues internally, today everybody around the world has new ideas and thoughts. The Citi Mobile Challenge is a very creative approach to unleashing the power of the tech community and developing fresh solutions. And our ultimate goal is to change the way innovation is traditionally approached.
Richard Steinberg, CEO of DriveNow at BMW

On rethinking marketplace positioning in the sharing economy:
We used to be the provider of premium cars and now we’re the provider of premium mobility services as well as premium cars. Mobility services was recognized by our board as something that we needed to be engaged in—that’s where DriveNow was born from. Millennials are not so much interested in spending their hard-earned money on buying a car. They’re not interested in parking, insurance, vehicle acquisition. But they still have mobility needs. Public transit, Uber, all the various sharing tools are at their disposal—but there’s not personal mobility. So that’s where we fit in.

On sharing and cannibalising sales:
I think there’s some inevitability to the equation. In many ways, the market BMW Group competes in is a premium market for our new car sales. And the younger generation that’s using car share and using our service is not necessarily in the market for a premium automobile. They might be interested in a base or a non-premium car or a used car, but not so much in the premium category. So, are we cannibalizing ourselves? No. Are we eating into some other automakers’ businesses? Perhaps.

On challenges to sharing:
The biggest challenge all of us have in the shared economy is insurance. And insurance—whether it’s your house, your car, your driver—is really a fragmented market. They don’t know how to deal with people occasionally using their asset. There are major issues around people who don’t understand the risks they’re taking on. So this is a real area for attention by the insurers—making sure that people know what they’re doing in terms of the risks they’re taking if they list their asset or use someone else’s asset in the sharing economy.

Daryl Weber, Global Director of Creative Strategy at the Coca-Cola Company

On new forms of checks and balances in the sharing economy:
It’s a matter of trust and familiarity. That takes a lot of getting used to. Usually big corporations are so conservative and careful, as they should be. For example, Wonolo is a company that tapped into the sharing economy by creating a means for on-demand staffing. It’s the sharing economy mentality where you don’t have to hire a permanent worker, but you can hire people quickly and part time. But you have to be careful with the people who are representing your company, you want them to have the right professionalism, and you background check to make sure you can trust that person.

The old way of doing it was background checks and interviews, but now the sharing economy has shown that people can build trust in other ways. With Airbnb, I think people thought it was crazy at first to let strangers into your house. But this ecosystem of having reviews and people really caring about their reviews and online reputation has shown that most of the time people are very careful and almost generous with their stuff. It’s been proving itself out that you can really trust that online review system to be a checks and balances. I think as that becomes more commonplace, big companies will be more familiar with it, but it is a big transition.

On reducing waste:
Anywhere where there is a lot of waste going on, like the kitchen space not being used or the car not being used, it feels like that’s an opportunity for sharing to come in and help reduce the waste. It’s an interesting mindset of millennials and new consumers, of not necessarily needing to own their own thing—everyone on the block doesn’t have to have their own snow blower or lawn mower, so why don’t we pool together and share it and reduce over-consumption in the world? There’s a really different mentality there—less consumerism, less materialism and more of a community building approach.

Amanda Havey, VP of On-Air and Brand Creative for an International Media Company

On how sharing is changing consumer attitudes toward entertainment and media:
We’ve definitely seen a shift in consumption habits, specifically as it pertains to music. People are feeling less of a need to own a track of music, which is where Spotify comes into play. Spotify has really gained strength as a driver to exposing listeners to new music. By seeing the public feed, music lovers are able to see what their friends are listening to—which just feels like a more authentic way to “sell” music. It’s the opposite of iTunes saying “if you purchased this, then you’ll like this…” Consumers just don’t want to feel sold to or hustled. The softer sell, the under-sell, or the NO-sell as seen in Spotify feels like a movement that consumers can really rally around.
Assessing the Sharing Economy
The name may be debatable—but the impact is huge

For the purposes of consistency in our reporting and research, we used the label “the sharing economy” to broadly define the emergent ecosystem that is upending mature business models across the globe.

As we spoke with industry specialists, it was clear that no single label can neatly encapsulate this movement. For some, the word “sharing” was a misnomer, a savvy-but-disingenuous spin on an industry they felt was more about monetary opportunism than altruism. For others, more apt titles included the Trust Economy, Collaborative Consumption, the On-Demand or Peer-to-Peer Economy.

Yet in between the haggling over the most-accurate moniker, there was uniform agreement that the so-called sharing economy is getting very big, very fast—and is something that business executives very much need to tune into.

Airbnb averages 425,000 guests per night, nearly 22% more than Hilton Worldwide

To grasp the scale of disruption posed by the sharing economy, consider that Airbnb averages 425,000 guests per night, totaling more than 155 million guest stays annually—nearly 22% more than Hilton Worldwide, which served 127 million guests in 2014. Five-year-old Uber operates in more than 250 cities worldwide and as of February 2015 was valued at $41.2 billion—a figure that exceeds the market capitalization of companies such as Delta Air Lines, American Airlines and United Continental. PwC’s projections show that five key sharing sectors—travel, car sharing, finance, staffing, and music and video streaming—have the potential to increase global revenues from roughly $15 billion today to around $335 billion by 2025.

Investors are increasingly intrigued by the potential of these sharing economy companies to radically upend both how we consume goods and how we work to afford them—whether it’s monetizing underutilized assets or forgoing purchase of those assets altogether. For comparison, look back to the rise of the mass market automobile, says Arun Sundararajan, a professor at New York University’s Stern School of Business.

“The way we lived, the way we consumed, this whole ownership economy much of it emerged out of driving our cars”, Sundararajan says. “We built a big house in the suburbs, we moved there, we acquired stuff. The direction of change here is probably different, but it’s comparable in how profound it was and the societal implications.”

At the heart of this change is, of course, the Internet—and with it, the rise of social, mobile, analytics and cloud computing. Our access to information has never been greater or more tailored to specific needs. Transactions are shifting more and more to real time by way of mobile and the cloud, and social is playing a huge role in driving increased trust in commerce. Tech pioneers like Amazon, eBay, Google, Apple and PayPal laid the foundation. For sellers with goods to unload, Amazon and eBay conjure up buyers. GPS-enabled smartphones point us toward the nearest provider, and online payment systems like PayPal cement the transaction.

As these companies softened the risks of peer-to-peer transactions, the economic downturn left many consumers rethinking the necessity of possessions. A 2011 survey by BAV Consulting showed that 66% of consumers (and 77% of millennials) preferred a pared down lifestyle with fewer possessions. And while the economy has rebounded, many recession-fueled values have stuck.

Today, only one in two consumers agree with the statement that “owning things is a good way to show my status in society.” Four in five consumers agree that there are sometimes real advantages to renting over owning, and adults ages 18 to 24 are nearly twice as likely as those ages 25 and older to say that access is the new ownership. Happiness studies show that experiences increase contentment far more than purchases do, and young people’s intrinsic understanding of this is fueling an experience economy.

III. Assessing the Sharing Economy

Nearly half of US adults are familiar with the sharing economy

Our survey showed that 44% of US adults are familiar with the sharing economy. 18% of US adults say they have participated in the sharing economy as a consumer, and 7% say they have participated as a provider. The more familiar they are with these services, the more excited they feel. Collectively, these business models are changing the way consumers think about value—assessing the impact of goods and services on their wallet, their time and the planet.

44% of US adults are familiar with the sharing economy

Our survey showed that 44% of US adults are familiar with the sharing economy. 18% of US adults say they have participated in the sharing economy as a consumer, and 7% say they have participated as a provider. The more familiar they are with these services, the more excited they feel. Collectively, these business models are changing the way consumers think about value—assessing the impact of goods and services on their wallet, their time and the planet.

Nearly half of US adults are familiar with the sharing economy
Sharing has, of course, been around forever—and many industries offer alternatives to ownership. But as a model, the sharing economy is distinguished by these core pillars:

Digital platforms that connect spare capacity and demand

Sharing economy business models are hosted through digital platforms that enable a more precise, real-time measurement of spare capacity and the ability to dynamically connect that capacity with those who need it.

- Airbnb matches spare rooms and apartments with travelers in need of lodging
- Zipcar matches spare cars with local demand

People have always bartered and traded services, but the usability of this process is unprecedented thanks to the growing number of digital devices that make matching demand and supply easier than ever.

Transactions that offer access over ownership

Access can come in a number of forms, but all are rooted in the ability to realize more choice while mitigating the costs associated with ownership:

- Renting
- Lending
- Subscribing
- Reselling
- Swapping
- Donating

More collaborative forms of consumption

Consumers who use sharing economy business models are often more comfortable with transactions that involve deeper social interactions than traditional methods of exchange:

- Airbnb and CouchSurfing provide travelers with the ability to connect with local hosts and receive travel tips in a personalized fashion
- Ride sharing services such as RelayRides and Lyft depend on users being comfortable trusting strangers to complete their journey safely

Branded experiences that drive emotional connection

Today, the value of a brand is often linked to the social connections it fosters. Managing these connections is fundamental to successful marketing. In the case of sharing, experience design is critical to engendering emotional connections. By providing consumers with ease of use and confidence in decision-making, a company moves beyond a purely transaction-based relationship to become a platform for an experience—one that feels more like friendship.
Understanding an economy built on trust

As nearly one-fifth of American consumers partake in some sharing economy activity, be it renting a driveway on JustPark, buying a dress from Poshmark or hitching a ride through Lyft, what is the attraction? Yes, convenience and cost-savings are beacons, but what ultimately keeps this economy spinning—and growing—is trust. It’s the elixir that enables us to feel reassured about staying in a stranger’s home or hitching a ride from someone we’ve never met.

And yet our fundamental trust in peers has not changed markedly over the years. In fact, only 29% of consumers we surveyed said they trust people more today than they did in the past. Nor is trust in brands any higher—62% of those consumers surveyed said they trust brands less today than they did in the past.

But if trust in individuals and institutions is waning or at best holding steady, faith in the aggregate is growing. More and more, peer-review systems are becoming arbiters of quality. According to Nielsen’s 2012 Global Trust in Advertising Survey, 92% of consumers in 56 different countries said they trusted word-of-mouth or recommendations from their friends and family above all other forms of advertising. In the US today, 64% of consumers we surveyed say that in the sharing economy, peer regulation is more important than government regulation. 69% say they will not trust sharing economy companies until they are recommended by someone they trust.

But if trust in individuals and institutions is waning or at best holding steady, faith in the aggregate is growing. More and more, peer-review systems are becoming arbiters of quality. According to Nielsen’s 2012 Global Trust in Advertising Survey, 92% of consumers in 56 different countries said they trusted word-of-mouth or recommendations from their friends and family above all other forms of advertising. In the US today, 64% of consumers we surveyed say that in the sharing economy, peer regulation is more important than government regulation. 69% say they will not trust sharing economy companies until they are recommended by someone they trust.

And yet, when brands provoke social sentiment and leverage it in their marketing, the conversion is often much higher. The same trend is driving growth in shared economy players. Rapid growth in mobile apps not only reflects greater trust, but also greater use of social sentiment to reinforce that trust.

There’s one big potential sticking point: for the sharing economy to continue to expand, the players within it will need to find ways to authenticate the identity of consumers. Some companies have already added identity verification to their platforms, but doing so is not always straightforward. In a peer-to-peer model, not everyone has government verified documents or social media profiles that can sometimes suffice instead. Identifying, and upholding, quality and trust metrics will be critical to success in this evolving model.

The importance of trust—and the hesitations around it—add fuel to the debate around how appropriate the sharing economy label is. Data shows that consumers are more interested in affordability and convenience than they are in building social relationships with providers or other consumers. So while the intimacy of peer-to-peer interaction can be a benefit—for example, getting the local scoop from an Airbnb host, or having an engaging conversation with a RelayRides driver—there are limitations and boundaries that need to be discerned. Companies that understand this are poised to have a competitive advantage.

For instance, Airbnb’s success is less because of the ‘people, places, love and community’ it espouses, and more because consumers want a better deal for their travel dollars. The majority of Airbnb consumers choose to rent the entire place, rather than sharing quarters or a meal with the owner. Here, as with other sharing economy platforms, trust prevails based on peer reviews, not on one-to-one peer interactions.

“I don’t want to know who owned the clothes before me or where they wore them. I want to know that they’ve been properly cleaned and cared for.”

— Kathryn Duryea, Marketing Consultant, Former VP Marketing, Rocksbox
Rethinking value exchange

The ability to monetize underutilized assets, or to forgo buying those assets altogether, has dramatically upended consumer purchase behavior, particularly when it comes to big ticket items.

According to our survey (among those familiar with the sharing economy), 51% say they could see themselves being providers in the sharing economy in the next two years—up from the 23% of those familiar with the sharing economy who identify as providers today. 72% say they could see themselves being consumers in the sharing economy in the next two years. On both sides of the coin, this impacts how consumers consider purchases.

A potential Uber or Lyft driver weighing the costs of a new car may choose to spend more for a higher quality, more luxurious vehicle, knowing that it can yield return on investment rather than simply being a depreciating asset. A prospective homebuyer may look into purchasing a 3-bedroom home rather than a 2-bedroom, mindful that rental income from a spare room can cover the additional mortgage payment.

On the flip side, an urban dweller with less dependence on vehicle transportation may opt-out of car-buying, preferring instead to use a car-sharing or on-demand taxi service. A shopper may decide against buying a new designer dress, potentially finding more choice and value in the offerings at Poshmark, Rent the Runway or Le Tote.

If market forces play out as expected, quality becomes less heavily juxtaposed against price—in fact, the durability and resale value of higher quality goods may make them a more economical investment in the long run. That shift, in turn, could put the squeeze on “cheap chic” and other mass market goods made to appeal on price point above all else. In the sharing economy, quality matters. Hardware will be as much about enduring function as it is about form. As the saying goes, “I don’t need a drill. I need a hole in my wall.”

Moreover, this shifting value paradigm has the ability to expand the category. On one hand, there’s the impact of losing volume due to lower consumption. But on the other, perhaps more significantly, there is a trade-up wherein existing users may be more willing to pay given their ability to recoup some value through sharing as providers—plus those who would not otherwise buy are now entering the category as sharers through a lower price point, be it collective “shared” bargaining or the ability to monetize the investment.

The push for less friction

43% of consumers agree that “owning today feels like a burden”

The phrase “frictionless” may be one of the most shopworn of 2015, but the buzzword should carry weight in the boardrooms across all industries. 43% of consumers agree that “owning today feels like a burden.” And the most compelling promise of the sharing economy is that it alleviates burden—the burden of cost, of maintenance, of choice (or lack thereof) and countless other variables.

Price will likely always be a factor, but as the sharing economy progresses and expands, creating a seamless experience will be imperative for success. Already, discerning consumers are factoring friction into the value equation. After all, time spent is time lost, and they’re looking to capitalize on both dollars and minutes. As a result, flawless digital tools, elegantly simple search and seamless transactions are not merely a nice-to-have for companies today—they are a requirement.

“That time you spent driving previously, now it’s downtime. You have an extra hour and a half in your day where you can be doing whatever you want.”

— Kathryn Duryea, Marketing Consultant, Former VP Marketing, Rocksbox
The Business of Sharing
Zipcar. RelayRides. Car2Go. Lyft. Uber. The sharing economy is quickly paving new roads in the automotive industry, establishing a web of transportation options. Hitchhiking, it seems, is back—in one form or another.

According to our data, 8% of all adults have participated in some form of automotive sharing. 1% have served as providers under this new model, chauffeuring passengers around or loaning out their car by the hour, day or week. Of all the categories we examined, this is the one in which consumers would most like to see the sharing economy succeed.

Consumer preference is not surprising given the trend in car ownership over the past decade. One-third of consumers we surveyed indicated that the automotive industry yields too much waste. Chief among them are millennials, who notably don’t drive as much as previous generations did at a comparable age. They are less likely to get drivers licenses, and their view of cars is more perfunctory than emotional—they largely see cars as transportation, not as status symbols.

Smartphones have also pushed up the relative costs of driving. A passenger can read email in transit and be “productive”—but a driver behind the wheel can’t, or shouldn’t. (Same goes for drinking: according to Uber, since the launch of UberX in California, drunk-driving crashes decreased by 60 per month for drivers under the age of 30.)

All of this has made sharing systems—be they car-sharing, ride-sharing or bike-sharing—far more appealing. And while the price of gas may be going down, the trend away from ownership isn’t likely to change considerably.

This is a big culture shift. And for those who figure out how to shift gears and get in the fast lane, it can be big business. What’s next? No one can say precisely—the rules are being rewritten every day. But here are a few considerations to keep in mind.

### The Sharing Economy: Automotive

Consumer preference is not surprising given the trend in car ownership over the past decade. One-third of consumers we surveyed indicated that the automotive industry yields too much waste. Chief among them are millennials, who notably don’t drive as much as previous generations did at a comparable age. They are less likely to get drivers licenses, and their view of cars is more perfunctory than emotional—they largely see cars as transportation, not as status symbols.

Smartphones have also pushed up the relative costs of driving. A passenger can read email in transit and be “productive”—but a driver behind the wheel can’t, or shouldn’t. (Same goes for drinking: according to Uber, since the launch of UberX in California, drunk-driving crashes decreased by 60 per month for drivers under the age of 30.)

### The Business of Sharing

The automotive industry is just a slice of the pie—today, it’s all about the mobility industry. More and more automotive companies today are rethinking their positioning—reframing themselves as providers of mobility, not merely manufacturers of vehicles. But as automotive expands into mobility, new players are surfacing as competitors: for instance, Apple, one of the mobility leaders, enters the category. In this context, legacy manufacturers must find ways to add unique value to consumers’ mobility day in and day out—perhaps becoming a purveyor of mobility at large, from selling cars for purchase to facilitating ride-sharing, or even partnering with public transportation in cities where systems are poorly run or underused.
Re-examine the consumer value equation. The target audience you’ve identified today may quickly shift under the sharing economy as consumers’ price/value equations get disrupted. Today, the economies of owning a car are more favorable if you can profit from use of it. This means different buyers are ponying up to purchase vehicles that otherwise might not have been in their consideration set, and they are entering new variables into the purchase equation. In the sharing economy, quality is taking on a new premium—consumers are thinking about resale and durability to a greater degree.

Examine your underutilized assets. Many large corporations have car fleets that sit unused for much of the time and garage spaces that sit empty. Under the sharing economy model, potential options abound. Could you mimic a car-sharing platform and replicate it for internal use so frequent business travelers can swap as they come and go? As for idle fleets and empty parking garages, consider time-sharing these assets with other companies, with employees—or even with everyday consumers. Done right, making better use of underutilized resources can generate new revenue streams and create goodwill with both employees and the local community.

Why consumers like automotive sharing economy models:

- **56%** Better pricing
- **32%** More choice in the marketplace
- **28%** More convenient access

Rethink your employment model. All of these business models are changing the nature of how we work. It’s contentious, raising big questions about the boundaries of contracting and freelancing and what the responsibilities of the employer and governments should be. Yet for all the buzz in the press about exploitation of workers, this was barely on the radar of those we surveyed—only 11% of consumers we surveyed felt this was happening. There are issues to be ironed out with this model, particularly around agency and the ability for contractors to set their own prices, but it’s clear that more and more workers are attracted to the flexibility that this approach offers. Among the sharing economy providers we spoke with, “flexibility” was a top two appeal of providing, close behind “a way to earn more money.” Savvy employers should consider these shifts in employee attitudes and values, and how they can make the business stronger.

Recognize that disruption is inevitable—and ongoing.
The narrative of disruption that sharing has caused in the transportation marketplace is applicable to every business: anyone and everyone can be disrupted in this age of fast-flowing technology and the internet of things. Self-driving cars could be a significant setback to the current set of both car manufacturing companies and car-sharing companies. But more likely, companies will find ways to smartly adapt and reduce friction, embrace new models of operational efficiency—and design experiences that work for business, employees and consumers. The question is: who will do this best?

“If you can make money off cars you’re going to buy, it means in theory, you can buy higher quality, cleaner and hybrid electric vehicles. So if you become a brand leader in that space, that’s really powerful.”

— Padden Guy Murphy, Head of Business Partnerships, Getaround
The recession may be over in the United States, but the values that emerged during it appear to be staying put—and the sharing economy is giving new weight to the axiom “less is more.” 78% of consumers we surveyed agreed that the sharing economy reduces clutter and waste—millennials and households with kids most strongly agreed. These attitudes are a growing threat to a retail industry that is struggling to buoy its numbers—in December 2014, waning holiday sales led consumer purchases to decline 0.9%

What’s the appeal? Besides a growing appetite for a more minimalist lifestyle, consumers say these sharing-based services offer better pricing, more convenient access, and more choice in the marketplace. There are some concerns, chiefly around uncertain quality (48% of consumers we surveyed listed this as a concern), and consumers say they are more likely to trust a leading department store than Poshmark, the emergent fashion darling of this new economy.

78% of consumers agree that the sharing economy reduces waste

despite economic growth and lower gasoline prices.

As a result of these shifts in cultural mores, a “new retail” is emerging under the umbrella of the sharing economy. Consider Yerdle, an app designed to enable people to give away their stuff in exchange for credits they can use to “buy” other people’s castoffs. The company has an ambitious goal in mind—reducing the things we buy by 25%. Or Poshmark, a fashion marketplace that lets people shop for items sold from others’ closets. There’s also Spinlister, a peer-to-peer marketplace for renting bikes, skis, surfboards and other sporting equipment; Kidizen, a mobile, peer-to-peer marketplace allowing parents to buy and sell their children’s clothing, toys, shoes; and Rocksbox, a subscription rental service for high-end jewelry. In every niche of retail, it seems a sharing alternative is popping up.

And yet, a threat to retail can just as easily be flipped into a tremendous opportunity. After all, while ecommerce is hollowing out the physical space, many retailers have adeptly adapted and now help curate a more engaging omnichannel experience for their shoppers. Similarly, the rise of borrowing doesn’t mean retail will be decimated—it’s simply a heads up for companies to take a fresh look at their brand, their product and their operations in this new ecosystem and weave sharing into the omnichannel experiences they are creating.
For those in the retail and consumer space—new entrants and incumbents alike—here are a few things to keep in mind:

Re-examine your business model and consider alternate avenues: Most retailers are in the business of selling, whether it’s out of a physical storefront or an online shop. But as the data shows, renting and sharing are becoming increasingly popular alternatives. Executives will be wise to assess the role of their product and brand in this model—are you squarely a purveyor of goods, or are you an enabler? Firms can carve out new revenue streams that are adjacent to their core capabilities by facilitating peer-to-peer or other likeminded marketplaces.

There are several advantages to this approach. By stepping in as a facilitator, a company can better manage the quality control aspects of its “shared” goods, ensuring consistency of the brand experience. A sharing marketplace can be a great opportunity to drive engagement and trial, allowing less active and prospective customers to experience the product firsthand. In this case, a retailer may also consider building a network of providers as a competitive advantage—a way to keep them loyal and sell through a pipeline of products.

Quality is the purchase consideration to beat: The sharing economy has opened up new avenues for monetizing investments in material goods—be it through rental income or resale revenue. As a result, quality becomes an even bigger factor in the purchase decision process, particularly on bigger ticket items. Durability of hardware matters—so too does brand name as those looking to rent or buy used goods will seek the reassurance that comes with brand recognition and corresponding caliber of goods. For marketers, it will be important to reassess core brand messaging and the role that a quality seal plays within it. Similarly, as goods get passed around the market, brands will need to figure out their role in upholding quality maintenance to protect the brand.

Boost brand goodwill through sustainability: 76% of consumers we surveyed say the sharing economy is better for the environment, and 79% say it’s good for society overall. For brands, there’s an opportunity to use the sharing economy to promote sustainability messaging and raise esteem in the minds of consumers who are growing more environmentally aware. Patagonia and Levi’s, for instance, have partnered with Yerdle to distribute unsold merchandise, thereby reducing waste by finding a marketplace for these goods instead of disposing of them in a landfill.

Patagonia has encouraged sharing on Yerdle with a free item from Patagonia’s pre-used Worn Wear collection in exchange for material donations to Yerdle, and by contributing excess Worn Wear products from its warehouses. Currently, Yerdle hosts nearly 1,000 Patagonia products, which are among the 10 most popularly exchanged goods on the site. This collaboration provides both Yerdle and Patagonia with significant market advantages. For Yerdle, Patagonia products add credibility and cache to Yerdle’s set of offerings, and they may be more likely to inspire consumers to list their own unused Patagonia products. For Patagonia, the collaboration allows the brand to highlight its commitment to high-quality products with a long life cycle. Yerdle and Patagonia are tapping the sharing economy in other ways, too, such as working with iFixit, a community in which people help fix used items in need of repairs.

Understand the shift from conspicuous consumption to experience consumption: Today’s consumers are finding more satisfaction and status in experiences, rather than static material possessions. For retailers, this means becoming purveyors of experience as an extension of product. Many brands already have an established presence on social media, which can be leveraged to facilitate sharing experiences and drive trial and engagement. Physical storefronts are another opportunity to build experiential cache, whether it’s lending the space to another vendor in a partnership effort or embracing the pop-up movement. Consider Warby Parker, whose retail presence runs the gamut from online shopping to “food truck” style mobile stores to brick-and-mortar shops, synching online and real-world commerce.

Re-assess retail space: Thanks largely to the shifting emphasis on experience, big and small brands alike are looking for flexibility in how they reach consumers. That means rethinking the channels they use—in particular, their physical footprint. Enter Storefront, a startup that enables retailers to set up pop-up shops or sell items in boutiques. The platform connects those who have shops or empty real estate in highly trafficked areas with merchants seeking to peddle their wares—in short, it’s an Airbnb for merchants, offering the benefits of both temporariness and uniqueness. Listings include full retail stores that can be used as pop-up shops as well as shelf space in boutiques, and locations range from neighborhood shops to subway stops to hotels.

The flexibility that Storefront offers can be a boon to brands looking to dial up their experience or pitch new products. So far, more than 1,000 merchants have used the platform to open up shop in New York and San Francisco. And for those providing the space, it’s an ancillary revenue stream—on average, most retail spaces are closed for 15 hours per week, time that could be otherwise monetized through new platforms.

“Gyms, event spaces, even restaurants that aren’t used during certain hours—all these have the potential to be opened up in the sharing economy.”

— Chelsea Rustrum, Curator at Collaborative Consumption
“Airbnb is the worst idea that ever worked,” said Brian Chesky, CEO of Airbnb, at a recent PwC Corporate Leadership event. When Chesky hatched the hospitality startup, enabling everyday homeowners and renters to rent out a spare room, it was so new that to assess the potential market size, he figured out the number of airbeds sold each year and used that as an estimate.

Today, Airbnb is reportedly valued at $13 billion, more than mature players such as Hyatt or Wyndham Worldwide. The company booked stays for 20 million travelers in 2014, operating with about 1,500 employees in 20 cities worldwide. It has helped pioneer a market that is radically changing consumer hospitality preferences and behaviors.

Our data shows that 6% of the US population has participated as a consumer in the hospitality sharing economy; 1.4% has served as a provider. The platforms are plentiful: on the lodging side, Airbnb, CouchSurfing and HomeAway are big contenders, and the food and dining industry is rapidly catching on, too. Feastly connects diners with chefs offering unique food experiences outside of restaurants; similarly, EatWith links diners and hosts, creating a social experience where guests get to know one another over a locally authentic, home-cooked meal.

Other likeminded models are popping up across the globe, as are businesses pegged to the hospitality sharing marketplace. Properly is a cleaning and key delivery service for Airbnb hosts. Guesthop provides support services for home sharers—from check-ins, key management and cleanings to full time, short-term rental management. Pillow handles all the details of hosting, including marketing, guest communications, booking and pricing optimization, cleaning, repairs and any troubleshooting.

These ancillary services are designed to capitalize on the growing popularity of hospitality sharing sites. Airbnb, for instance, now has 10 million bookings and is used by more than 50,000 renters per night. But they are also helping to close critical gaps in the sharing hospitality industry—namely, the issues of friction and trust. With management companies as intermediaries, there’s less hassle for the renter and rentee in sorting out the logistics of the arrangement, and, presumably, greater trust that the experience will be of consistent quality.

Mitigating the potential unreliability of strangers is still a challenge. The hospitality sharing economy is appealing because it offers better pricing, more unique experiences and more choice, but security, hygiene, and uncertain quality still loom as big concerns. For these reasons, our survey showed that consumers familiar with the sharing economy are 34% more likely to trust a leading hotel brand than Airbnb.

6% of the US population has participated as a consumer in the hospitality sharing economy; 1.4% has served as a provider.
“You can actually make more money from your home, self listing on sites like Airbnb, but you would place very little value on your time for that equation to actually make sense. And the friction there is not just time, it’s also social—you now have to deal with a potential stranger.”

— Evan Frank, Co-founder and President, Americas, onefinestay

For their part, the hospitality sharing economy players are trying to change this. Airbnb recently underwent extensive rebranding, moving away from the more pragmatic room-rental positioning toward one that emphasizes community: the company’s new credo is “We believe in a world where all seven billion of us can belong anywhere.” As Chesky said in a video on the Airbnb website, “At a time when we’ve been told to look at each other with suspicion and fear, you’re telling the world it’s O.K. to trust again.”

So what does all this mean for entrenched hospitality players? “The sharing economy effect is accelerating with internet and technology and is something that is impacting our business,” Christopher Nassetta, President and CEO of Hilton Worldwide, said in a recent interview with PwC’s CEO Survey. But, notably, he views it as additive to the business by making travel more accessible. “We’ve done a great job at our scale…to democratize travel, but I think this takes it to the next level…making travel more available to people that it may not have been available to and in ways it may not have been available. In a simplistic way, it’s making the pie bigger.”

As you consider what the sharing economy means for the future of hospitality and your business, here are a few things to keep in mind:

Customization and local flavor are at a premium: In terms of appeals of the sharing economy in hospitality, a “more unique experience” is second only to better pricing. More and more consumers are looking for local authenticity in their travels, and sites like Airbnb and EatWith are delivering it. “They’re introducing really incredible customization and local flavor. You get all these really micro experiences, all these different hosts,” says Shelby Clark, CEO of Peers.org. “Having that local flavor is something that is very difficult for any major brand to match, so I think that’s going to be a big challenge for the incumbents to deal with.”

At the same time, there’s a bifurcation of consumer types—those who are more prone to look for a unique experience, and those who seek the reassurance of consistency. The leisure traveler may become even more markedly different from the business traveler, meaning hotels have the opportunity to drive home even more amenities to appeal to specific segments.

Identify underutilized assets—and find ways to leverage and optimize them: As more and more workers become mobile, hospitality players are taking note. Today, the burgeoning startup LiquidSpace, which facilitates on-demand work space rentals at major hotel chains and individual boutique hotels, has a client roster that includes Marriott, Ritz-Carlton, Renaissance, Hilton and more.

These types of partnerships and product extensions not only open new revenue streams, they also drive trial. As consumers traffic through hotels for meeting spaces, they gain exposure to and build affinity for those hotels. In fact, Marriott offers some work spaces free of charge, outfitting lobby areas with free Wi-Fi and desks with electric outlets.

Solidify reputation management: “A huge space that has yet to be addressed adequately is the idea of online reputation,” says Jim Griffith, Dean of eBay Education, Host of eBay Radio and Author of The Official eBay Bible. To an extent, this is addressed by peer reviews, rating systems and sites like TripAdvisor and Yelp. Airbnb introduced a Verified ID program, designed to “build trust in our community,” according to the website—though it has been met with resistance from consumers wary of uploading sensitive information to the internet. For established hotels and restaurants, there is potential to drive key consumer-coveted attributes like “unique” and “authentic” by partnering with flavorful sharing economy providers, while simultaneously imbuing those providers with the credibility needed to be fully embraced by consumers.

Embrace your own disruption: “You’re not going to stop Airbnb—it’s its own rocketship,” says Shelby Clark, CEO of Peers.org. Instead, “figure out how you can benefit from this changing landscape.” Disruption, after all, typically doesn’t have an end in sight. Airbnb may eventually address all elements of the travel experience, from travel reservations to ticketing for local attractions and bookings at restaurants. For players who want to survive and thrive, this means sticking to core competencies—but also staying agile, nimble and open to new partnerships and new ways of thinking.

As Hilton’s Christopher Nassetta said of his strategy, “We are a hospitality company, and we should stick to what we do best. I view us as technology strategists that are trying to figure out how to connect what’s going on in the world of technology to the hospitality business... It is a human business that involves a lot of human interaction, and we don’t want to take that out. What we want to do is take the elements that are simpler and where we can be more efficient, and make those very easy and comfortable and fun for people to allow for the people in our hotels to really interact in a way that is more driving a customized experience.”
Without hesitation, the industry specialists we spoke with throughout our research said that the media, entertainment and communications industries have been the most impacted by the sharing movement—and view their actions as a cautionary tale of what not to do.

The ambiguity of the sharing economy is particularly evident in entertainment and media, where consumers are open to “sharing” products, but it’s less about the underutilization of assets and more about the intangibility of them. To that end, legal and contractual impediments may make it difficult to ramp up a formalized sharing model at the same speed as industries like automotive and hospitality have. Wavelength, a startup designed to let users freely stream the movies their friends own, ended just two weeks after it launched. In his closing statement, Wavelength’s founder wrote that “One of our goals in launching the wavelength.io beta was bringing to market legal movie sharing, wrapped around a great UltraViolet experience… Not surprisingly, what we have built has been controversial.”

And yet there are areas in which sharing, however loosely defined, is coming to life. Two decades ago, an aspiring artist needed a bundle of money to make a film; today there are alternate—and very viable—ways of making and monetizing music. Consider the artist Amanda Palmer, who in 2012 announced a Kickstarter campaign to raise funds for a new recording and pulled in nearly $1.2 million from her fans in exchange for pre-orders of the album. And just as artists are finding alternative ways to create, consumers are discovering alternative ways to consume. According to a survey conducted in December 2014 by the Consumer Reports National Research Center, 46% of American adults with streaming media accounts admitted to sharing log-in credentials with people living outside of their homes.

In our survey, this is the highest category for consumer participation—consumers are more engaged with entertainment and media sharing than they are with automotive, hospitality or retail. The most compelling benefits of sharing in this sector are better pricing, more choices, greater access, and more unique experiences.

And businesses are ultimately catching on. Spotify has popularized the act of listening to customized music without physically owning an asset. Sprint has tried to capitalize on consumer sharing preferences, most recently with its Sprint Family Share Pack.
The sharing space in entertainment, media and communications is, as Griffith put it, “a Wild West frontier,” and it will continue to be disrupted. Yet with this disruption comes great opportunities to differentiate and provide meaningful (and potentially profitable) services to consumers. For new entrants and incumbents alike, here are some things to keep in mind:

**Use sharing opportunities to drive engagement within the category:** Smart partnerships are smart business—especially in a sharing culture. There are potentially large untapped opportunities to create content sharing partnerships across categories. Media sites, after all, are hubs for like-minded people—and thus are well-poised to act as facilitators for peer-to-peer sharing. For instance, if HGTV is the go-to source for consumers with interests in home and gardening, it might establish a peer-to-peer network and partnership with a retailer in this category to drive those goods.

Increased sharing engagement can drive trial. For instance, HBO allows sharing of passwords, knowing that heavier users will want their own after they’ve had the experience firsthand. UltraViolet is a “digital locker” that gives consumers digital copies of movies they’ve purchased elsewhere, enabling sharing across channels—and with it, potentially, across friends. News media like the New York Times have created “freemium” models that allows readers to share some stories before hitting a paywall.

More viral and effective promotional models are another way in which sharing can boost engagement. Businesses want to expand their access—and if that access can be shared among several users, it could lower the cost of trial and raise consumers' willingness to pay. In entertainment, media and communications, there can often be large variances in marketing costs based on the scalability of the model and ease of discovery. And yet socially-oriented experiences can help keep marketing costs to the lower end of the range—for instance, both Uber and Airbnb soared in popularity without relying on big and costly marketing campaigns.

**Find the intersection of a physical-digital offering:** In part, the demise of “ownership” in the entertainment, media and communications space is due to the intangible nature of goods provided. Digital assets inherently feel less like a possession than physical ones. As a result, companies need to figure out how to shift from offering an item to offering a relationship—and then optimize that relationship accordingly.

Done right, relationships can create more perceived value, and command more money as a result. Subscriptions are one way to drive the relationship value exchange. Consumers can get greater access to content in exchange for a subscription commitment—and with sharing, the access is increased even further. For instance, a content providing service may enable two users to share endlessly, so long as both are committed subscribers.

**Understanding the appeal of on-demand:** It’s no surprise that the sharing economy is also dubbed the “access economy” or the “on-demand economy.” We are operating in a society that wants what it wants, at the exact moment it wants it. And often, they are willing to pony up for it. So, if consumers are willing to pay more to see something earlier, but these costs can be mitigated by sharing it with others—for instance, watching a new release in a home theatre setting with 10 other people—then there are new opportunities for a collective bargaining model to benefit both consumers and providers.

**Understand the appeal of sharing, and ways to make it work for your business:** One way or another, content sharing appears here to stay. Faced with that reality, media providers can either continue to fight the threat or explore the potential opportunity behind it. That is, sharing creates new platforms with greater reach and more highly engaged audiences—and with it, opportunities to move beyond one-to-one ownership models and explore new distribution models. Likewise, content creators will need to adopt metrics beyond linear sales and figure out how to monetize accordingly through new platforms, rather than blocking them altogether.

---

**IV. The Business of Sharing**
Whatever your organization looks like today, the sharing economy is too big an opportunity to miss—or too big a risk not to mitigate.

For incumbent players in mature industries, the immediate challenge is to avoid being disrupted. For a cautionary tale, look no further than traditional media, which once rested on the assumption that that ownership and rental models were the only ways to consume music or films. That is, until streaming came along to disrupt everything media executives thought they knew to be true. They underestimated the importance of connecting through social and shared playlists—and they failed to recognize that ownership and rentals would quickly become antiquated in digital media, trumped first by downloads and then by streaming.

By contrast, the automotive industry recognized the sharing economy as an early threat and adopted the model where it was applicable. Today, many car manufacturers now run their own car-sharing operations and others have made strategic investments in new entrants—such as Avis in Zipcar and BMW in JustPark.

Where a consumption model has prevailed in a sector for many years, it is often most at risk of disruption. At PwC, we often run a workshop with our clients called “How to design a company to beat yours”—an exercise that’s particularly relevant and effective in a sharing economy world. It may sound grim, but if your business can’t figure out how to disrupt itself, someone else out there will do it for you.

Here are some key disruptive levers that businesses should consider

Create marketplaces: Organizations need to assess the potential for consumers to band together in a peer network that can undermine their value proposition. These networks are most likely to emerge in categories where products and services are widely distributed, involve high fixed costs but low marginal costs and are often underutilized. The automotive and hospitality sectors were among the first to see peer networks, but this network effect is equally viable in industries that hold similar characteristics. High-end retail and utilities are susceptible to this model—in the communications sector, Fon already enables WiFi customers to share their connection with others in return for free access to other Fon hotspots around the world.

If this potential for a network effect exists—and for those in the automotive, hospitality, retail, entertainment and tech industries, it very likely does—then companies need to decide whether to be a player or an enabler. Will your business create and facilitate the marketplace? Or will you be a provider that feeds into a system that’s mediated by another entity?

Develop a mitigation strategy: Whether acquiring a new entrant, partnering or investing in them, companies can mitigate the risk of a sharing economy insurgency and even capitalize on sharing economy revenue to bolster their business. For instance, a manufacturer of high-end hardware goods could partner with a sharing economy network to circulate its wares, capitalizing on the growing appetite for higher quality, more durable goods that offer greater resale or longevity to buyers. This builds on current practice of providing a network of contractors, extending it to include shared economy providers who can ably supply their tools or labor.

Organizations can also develop their own sharing economy concepts—after all, innovation often starts with imitation. For instance, using a tried-and-tested approach in one industry and adapting it to your own (such as developing “access” options alongside traditional sales channels)—or reworking a consumer-to-consumer model to fit a business-to-consumer or business-to-business market.

Engage in sharing your own asset base: The sharing economy demands a sharing organization, one that monetizes spare capacity and improves business outcomes through sharing intangible assets. For many organizations, this is the low-hanging fruit in the imitation game—inducing instances within your own organization where underutilized assets can be more effectively shared across entities, both inside and outside the organization.

Begin with tangible assets. On average, today’s manufacturing facilities operate at 20% below capacity. Half of all desks in the average office go unused. A quarter of all trucks traveling in the US are empty. All of these are instances where sharing platforms could move companies much closer to maximum efficiency. Marriott, for instance, has partnered with the online platform LiquidSpace to convert empty conference rooms into rentable work spaces. The result is not just a new revenue stream, but also a way to increase exposure to Marriott properties. Pharmaceutical giant Merck recently signed an agreement to share Medimmune’s manufacturing facility, providing long-term utilization of excess capacity for Medimmune while giving Merck flexible access to manufacturing facilities as needed.

Another opportunity is to facilitate the sharing of intangible assets. That means intellectual property, brainpower and brand—which collectively make up around 80% of a global corporation’s value. In the US, the top five patent filers—IBM, Samsung, Canon, Sony, and Microsoft—collectively filed more than 21,000 in 2013 alone, but because of high investment costs, only a fraction of these resulted in products brought to market. By contrast, General Electric spearheaded a partnership with Quirky, an online inventor community. The $30 million deal gave Quirky’s inventors open access to GE’s patents and technology, resulting in joint-venture products such as a smartphone-controlled...
window air conditioner, a propane tank gauge with fuel sensors, and a home monitor that can be set to track motion, sound and light.

**Effectively tap talent:** One of the more controversial aspects of the sharing economy is the impact it has on the labor force, and the perceived shift toward contract-based employment that Trumps agency over regulation. For some, this is regarded as a benefit, enabling workers to earn wages on their own time and their own terms. For others, it heralds an era of depressed earnings and greater reliance on welfare and other government subsidies. 78% of adults said they expected that in 30 years, working multiple jobs would be the new normal for wage earners.

Companies need to be mindful of this tension and adapt their employment strategy accordingly. For starters, that means offering wages and benefits that attract good, reliable talent and project the values that today’s consumers seek. In many industries, flexibility can be as compelling as a higher salary—likewise, some employees prioritize variety of work and autonomy. At the same time, employers can assess the impact of “sharing” a larger portion of their talent base, be it with entrepreneurial activity, leisure or even another company. Google’s “20% time” initiative enables employees to pursue innovative ideas for an approved period of time, even if those ideas are outside their current job focus.

**Speak up in shaping regulatory and policy frameworks:** Regulatory flash-points are everywhere, and they are the most immediate impediment to sharing economy growth—a situation that’s relevant to both disruptors and to more mature players. In our survey, 59% of respondents said they will not trust sharing economy businesses until they are properly regulated. When regulation is solidified, these business models will be fully legitimized—not just by law, but also in the minds and hearts of consumers. This should motivate companies across all sectors to get ahead in carving out a place in the conversation with policymakers.

In this setting, companies can credibly measure the economic, fiscal, social and environmental impact of the sharing model in the communities in which they operate. There are tools available to do that—including PwC’s market-leading Total Impact Measurement and Management (TIMM) approach.

There is no question that the regulatory, legal and tax framework needs to be fit for a new age. The right balance of solutions need to be built from the bottom-up, where local authorities can quickly trial and experiment with new models. Not surprisingly, this is more easily done when both sides work together. For instance, Airbnb worked with Amsterdam’s local council to pass an “Airbnb-friendly law” in February of 2014 which permits residents to rent out their homes for up to 60 days a year, provided that the owner pays the relevant taxes.

**Expand the brand through shared economy experiences:** By design, the sharing economy disrupts the balance of the marketing mix for nearly every industry it touches. Price points are upended. Product has a new set of metrics—of which quality gets a new premium, and standardization and consistency can matter more or less, depending on the market. Place is reconsidered as new points of access emerge. And the very nature of promotion has shifted, with “sharing” engendering new means of trial and exposure.

Brand is still very relevant today—but companies need to reassess their brand pillars in light of these new marketplaces, new business models and new consumer values. Today’s fast-paced lifestyles leave little time to maintain expensive assets. One in two consumers agrees that owning things is a good way to reflect status in society. Social networks have also accentuated a shift in how we attain social status, raising the bar for experiences over material possessions.

As a result, forward-looking companies must re-examine what creates brand value and position themselves accordingly in the marketplace. For instance, many automotive companies now identify as “mobility providers” rather than automotive manufacturers, a reflection of shifting consumer preferences. Savvy brands are designing experiences that are mobile and social first—empowering users to share with each other and tap into greater trust fueled by a combination of content, social sentiment and improved functionality.

And for any company still toeing the line on corporate social responsibility, let the sharing economy be a wake-up call. Today, with new ways to effectively address resource scarcity, doing the right thing and doing the profitable thing are not incompatible.

> **“If the economics of car sharing can enable folks to afford a new hybrid or electric car, then sales objectives and sustainability objectives are now actually aligned. So CSR can actually be driven by profit motive, which is an incredibly powerful benefit of the sharing economy.”**

— Padden Guy Murphy, Head of Business Partnerships, Getaroud
Never settle for stable: If the sharing economy has proven anything, it’s that business models cannot be taken for granted in a highly connected, fast-changing world. Today’s disruptors can easily be disrupted tomorrow. The ride-sharing model could be obsolete when self-driving cars materialize—or these companies could adapt by purchasing their own fleet of self-driving cars, removing the cost-center of today’s drivers.

To stay nimble, companies need to continuously examine ways to bundle and unbundle the value exchange for maximum consumer benefit and maximum competitive advantage. They will need to capitalize on opportunities for expansion, assessing ways in which new models can be leveraged to reach untapped consumers. They will need to explore gaps in revenue management, finding cost-efficiencies and opportunities to free up capital that can be more effectively applied in other capacities.

The opportunities ahead are not without challenges. Effectively competing in the sharing economy requires sharp insight into the consumer mindset and competitive marketplace, as well as clarity into internal operations. Liability and security are concerns to be mitigated. But companies that willingly tackle these challenges will be the ones poised to survive—and the potential ahead will be constrained only by the imagination of decision makers. Whether the model is consumer-to-consumer, business-to-consumer or business-to-business, as companies create and utilize these exchanges efficiently and creatively, they will find more ways to profit and help their businesses—and the community at large—grow and sustain success.

How PwC and Strategy& Can Help

To have a deeper discussion about the sharing economy, please contact:

**Deborah Bothun**  
Entertainment, Media and Communications, PwC  
(213) 217-3302  
deborah.k.bothun@us.pwc.com

**Matthew Lieberman**  
Consumer Intelligence Series, PwC  
(213) 217-3326  
matthew.lieberman@us.pwc.com

**Matthew Egol**  
Digital, Strategy&  
(732) 208-5828  
matthew.egol@strategyand.pwc.com

**David Clarke**  
Digital, PwC  
(786) 552-3211  
clarke@us.pwc.com

**Joe Atkinson**  
Entertainment and Media, PwC  
(267) 330-2494  
joseph.atkinson@us.pwc.com

**Jennie Blumenthal**  
Hospitality, PwC  
(703) 918-4564  
jennie.blumenthal@us.pwc.com

**Brian Decker**  
Automotive, PwC  
(313) 394-6263  
brian.d.decker@us.pwc.com

**Matt Hobbs**  
Technology, PwC  
(206) 398-3326  
matthew.d.hobbs@us.pwc.com

**Sameer Shirsekar**  
Retail and Consumer, PwC  
(408) 817-5991  
sameer.shirsekar@us.pwc.com
Recently, the U.S. Bureau of Labor Statistics published a report on individuals in alternative work arrangements: 16.5 million people now make up with is known as the “gig economy.” And according to a Future Workforce Report from Upwork, 59% of U.S. companies are now using flexible work forces to some degree – remote workers and freelancers. These practices obviously save money and allow businesses to have leaner traditional work forces.
So, what will 2019 bring for the “gig economy” and freelancing? Here are five trends that will certainly surface.

1. **Changing concept of entrepreneurship**

Traditionally, entrepreneurs have been those individuals who have begun businesses, grown, employed staff, and joined the ranks of a standard business model – offering products and services, growing that business, adding staff and revenue.

Entrepreneurship is now taking on a wholly different additional meaning. A growing number of millennials and Gen Z’ers are becoming “solopreneurs,” that is taking their skills and selling them on the market to a variety of “buyers,” and simply working independently, or collaborating with one or two others to offer a variety of skill sets to established enterprises.

2. **Technology favors the gig economy**

There are two aspects to the role that technology will play in the gig economy, and these will be prominent throughout 2019.

**YOU MAY ALSO LIKE**

**Improvements in communication** between gig workers and their contracted clients now allow for face-to-face communication, digital meetings among major players, etc. Streamlining the communication process means that freelancers no longer have to use slower processes like email to get things done and decisions made. Gig workers can work faster, and clients can respond faster, allowing for more rapid deployment of products and services.
Freelancers who have high-demand skills will be able to “name their price.” Consider, for example, the new technology of data science – a growing need for companies that want to remain competitive. But hiring a full-time data scientist is a pricey proposition. The average salary of an employed data scientist is about $140,000 in the U.S. Small and medium-sized businesses that need to remain competitive must look outside for gig workers to provide data science services.

3. Collaborative work spaces

Gig workers are not introverts, holed up in their homes, isolated from social contacts. Most are outgoing, extroverted, and assertive individuals who go after gigs, marketing themselves, and actively engaging with their clients.

Working solo from home is not the best emotional environment for many freelancers. They need others around them. And the gig economy has brought forth an entire industry devoted to shared work space – physical facilities that house a number of freelancers.

Gig workers are independent, but they also crave collaboration and social opportunities at work. Collaborative work spaces serve that need.

4. Legislative action to support gig workers

Traditionally, gig workers have been “on their own” when clients fail to live up to their end of the bargain – primarily in terms of payment. They must either hire an attorney to enforce a contract agreement (which many can ill afford) or live with the loss of income.

In 2017, a new law in New York City, titled “Freelancing is not Free” went into effect. This law, while laying out requirements for contract agreements between freelancers and their clients, was more focused on ensuring that freelancers were paid for the work they did. It provided recourse for gig workers who were not paid and penalties for contractors who reneged on contracts.
Look for more of these types of laws throughout 2019 and beyond. It is the logical outgrowth of the rising gig economy.

5. **Freelancers will move toward incorporation**

Most freelancers begin as “self-employed.” This means that they and their businesses are one and the same. In the U.S., they receive 1099 tax forms from their clients, report that as personal income, and then pay taxes as necessary. But there are some major benefits of incorporating themselves as a business, and gig workers are beginning to understand those benefits. If only from a legal liability standpoint. Incorporation also allows many deductions from income that can be a huge savings.

These are just five trends that we are likely to see in the gig economy throughout 2019. Next year, when we look back on 2019, there may be trends that we did not anticipate but that were brought about by this rapidly changing workplace environment in which we are now living.

*Follow me on Twitter and visit my website for more resources to market and grow your business online.*

---

**Abdullahi Muhammed** Contributor

I am a writer, entrepreneur and the proud founder and CEO of Oxygenmat. I graduated summa cum laude from University of Ilorin with a degree in Law, winning the award of the Best Graduating Student in the Faculty of Law. I started writing in 2009 and honed my skills by enter... Read More
Future Workforce Report

How companies embrace flexible teams to get work done

PRESS RELEASE


RESULTS DECK


INFOGRAPHIC

(https://upwork.docsend.com/view/gqzku2i)
With 35% of the U.S. workforce freelancing, companies are thinking beyond traditional employment, to build more flexible teams. How are businesses tackling today’s hiring needs? And what’s ahead, for the future of work?

This report, conducted by an independent research firm and commissioned by Upwork, surveyed more than 1,000 U.S. hiring managers to show how businesses are adapting to keep up with the rapid pace of change. In just a few years, a third of the skills needed in our workforce will be brand new. Traditional models of hiring no longer provide the agility businesses need to get work done. See how businesses are thinking beyond archaic hiring approaches...

Ready to join the growing movement to freelancers?

Get Started (/signup/?dest=home)

Top-skilled freelancers and the essentials to find and work with them.

Learn more (/)

Personalized assistance to help you find premium, pre-vetted talent.

Learn more (/pro/?channel=footer)

Insurance Implications of Home-Sharing: Regulator Insights and Consumer Awareness

2016
The NAIC is the authoritative source for insurance industry information. Our expert solutions support the efforts of regulators, insurers and researchers by providing detailed and comprehensive insurance information. The NAIC offers a wide range of publications in the following categories:

**Accounting & Reporting**
Information about statutory accounting principles and the procedures necessary for filing financial annual statements and conducting risk-based capital calculations.

**Special Studies**
Studies, reports, handbooks and regulatory research conducted by NAIC members on a variety of insurance related topics.

**Consumer Information**
Important answers to common questions about auto, home, health and life insurance — as well as buyer’s guides on annuities, long-term care insurance and Medicare supplement plans.

**Statistical Reports**
Valuable and in-demand insurance industry-wide statistical data for various lines of business, including auto, home, health and life insurance.

**Financial Regulation**
Useful handbooks, compliance guides and reports on financial analysis, company licensing, state audit requirements and receiverships.

**Supplementary Products**
Guidance manuals, handbooks, surveys and research on a wide variety of issues.

**Legal**
Comprehensive collection of NAIC model laws, regulations and guidelines; state laws on insurance topics; and other regulatory guidance on antifraud and consumer privacy.

**Capital Markets & Investment Analysis**
Information regarding portfolio values and procedures for complying with NAIC reporting requirements.

**Market Regulation**
Regulatory and industry guidance on market-related issues, including antifraud, product filing requirements, producer licensing and market analysis.

**White Papers**
Relevant studies, guidance and NAIC policy positions on a variety of insurance topics.

**NAIC Activities**
NAIC member directories, in-depth reporting of state regulatory activities and official historical records of NAIC national meetings and other activities.

For more information about NAIC publications, visit us at:
http://www.naic.org//prod_serv_home.htm

© 2016 National Association of Insurance Commissioners. All rights reserved.
Table of Contents

Introduction ................................................................................................................................................... 2
Homeowners Policy Coverage Options and Limitations ................................................................. 2
Unit-Owners Policy Coverage Options and Limitations ................................................................. 4
Dwelling Policy Coverage Options and Limitations ................................................................. 4
Renter’s Policy Coverage Options and Limitations ................................................................. 5
Legal Restrictions ................................................................................................................................. 5
Coverage Options for Guests ............................................................................................................... 6
Coverage Options Available through Home-Sharing Companies ................................................... 7
Conclusion .................................................................................................................................................. 8
Introduction

Home-sharing companies like Airbnb and HomeAway offer consumers the ability to rent out an individual’s personal residence or vacation home. Stays can be booked for a room or the entire residence. Airbnb is marketed as a spin on the traditional hospitality industry whereby guests get the local experience by staying in someone’s personal residence. Airbnb has served more than 60 million guests in its more than 2 million listings worldwide in 191 countries.

Home-sharing has implications for all parties to the transaction: 1) the host, who may own or rent the listed property; 2) the host’s landlord, if the listed property is rented by the host; 3) the guest, who books a stay through the home-sharing site; and 4) the home-sharing company, which connects hosts with guests. Guests and hosts could incur costs if things go awry. Accidents can happen anytime, anywhere. Even if hosts take preventive measures, someone could trip over a rug or slip on a wet floor, causing injury.

Homeowners Policy Coverage Options and Limitations

Most homeowners policies provide liability coverage if a visitor falls and is injured in the home or on the premises. However, there may be no coverage if a paying guest falls on a property regularly being offered as a short-term rental. That is because homeowners or dwelling insurance policies are generally not designed to cover accidents arising from short-term property rental, except for “occasional” exposures. And, if specific home-sharing or rental exclusions are present in the policy, insurance companies may deny coverage for any resulting claims. Without liability insurance protection from the company facilitating the host agreement, or the ability of an individual to independently purchase coverage for short-term property rental, a person with a standard homeowners or dwelling insurance policy might be without coverage.

Homeowners policies vary, but they usually exclude or provide limited coverage for homeowners who are running a business in their home. If people decide to list their property via a short-term rental or home-sharing platform with any frequency, there is a good chance that activity will be defined in the policy as a home-based business. Many policies contain a business exclusion that generally eliminates liability coverage for bodily injury or property damage coverage for activities related to business activities. While the specifics of any individual insurer’s business exclusion may differ, one example may define business “to include a full-time, part-time, or occasional trade, profession, or occupation, or any other activity engaged in for money or other compensation, with exceptions, such as: 1) activities for which the insured received $2,000 or less during the year preceding the policy period, 2) volunteer activities, 3) home daycare services not involving compensation, but possibly involving an exchange of services, and 4) home daycare services rendered to a relative.” Based on this definition, renting property to others qualifies as a business as long as the income is above $2,000 on an annual
basis. The annual income limit used for the business exclusion varies by policy and can range from $2,000 to $15,000. There are three typical exceptions to the business exclusion that apply to rental of property: “1) rental of an insured location on an occasional basis is a covered loss exposure if the location is used only as a residence, 2) rental of part of an insured location as a residence is a covered loss exposure, as long as the occupying family takes no more than two roomers or boarders in a single-family unit, 3) rental of part of an insured location is a covered loss exposure if it is used only as an office or a school, studio, or private garage.”

It is typical for homeowners insurance policies to include language allowing owners to take in boarders on occasion, but the word “occasional” is generally not defined. Because of this, several insurers and insurer organizations have created endorsements to clearly exclude coverage for any losses that arise from home-sharing. The Insurance Services Office (ISO), an advisory organization that creates standard forms for many insurers, has developed endorsements for the standard homeowners program to address the exposures relative to home-sharing. Policy language has been added to reinforce existing exclusions in certain situations. Under this exclusion, losses due to theft, vandalism, liability coverage and personal injury related to home-sharing activities would be excluded. The home-sharing exclusion will not apply to property coverage unrelated to home-sharing, such as coverage for damage from fire, windstorm or hail. The ISO has also developed separate additional coverage options specific to home-sharing that would restore coverage excluded, broaden coverage to other structures on the property, enhance theft coverage and provide coverage for loss of rental income. Most likely, insurers would then charge their customers for the home-sharing coverage. The ISO product for home-sharing also includes property and liability coverage for the insured while traveling and using home-sharing services as a guest.

Depending on the policy language, property damage coverage for theft of personal property may be excluded when an insured enters into a home-sharing arrangement. The host may need to consider purchasing additional or separate theft coverage in order to protect themselves and their property. The guest may also need to secure additional or separate coverage to protect their personal property if involved in a sharing situation. Policies may exclude theft coverage from the area or room that is rented; for example, theft from a bedroom or apartment that is rented within the residence would not be covered, while theft from outside of that bedroom or apartment would be covered. Others may exclude theft coverage from the entire residence if any part of the residence is rented; therefore, theft from any part of the residence would not be covered if any part of the residence is rented. Optional coverage for theft may be available, depending on the extent of the policy exclusions, for those who rent their home or portions of their home.

Consumers considering listing their residence on a home-sharing site should speak with their insurance agent and ask about any endorsements or policies available to provide coverage. One

---

option may be purchasing a landlord policy, also known as landlord property insurance or rental coverage for landlords. A landlord insurance policy will cover the insured’s home, structures on the property, property contents (such as appliances and furniture), lost rental income due to building damage, legal fees and liability claims. Landlord policies may include broader coverage than a standard homeowners policy and would, therefore, cost more.

**Unit-Owners Policy Coverage Options and Limitations**

If the hosts own and reside in a condominium unit, they may have coverage under a unit-owners policy. A unit-owners policy is designed to provide property coverage for the insured unit, including alterations, appliances, fixtures and improvements within the insured unit. Unit-owners coverage also typically includes coverage for personal property based on limits selected by the insured.

Standard homeowners and unit-owners coverage typically includes personal liability coverage and loss assessments coverage, which provides indemnity for insureds assessed fees due to damage in common areas maintained by the homeowner association (HOA). However, if the policy excludes coverage for business use, and renting the property is deemed to be a business activity because the host is collecting a fee for use of the property, claims made by the insured may be denied or the policy may be canceled or nonrenewed. Condominium owners also need to review HOA agreements to determine if listing their unit on a short-term rental site violates the terms of their contract.

**Dwelling Policy Coverage Options and Limitations**

Dwelling policies may be used to cover owner and nonowner-occupied residences, including homes, apartment or condominium units, mobile homes in a fixed location, and even houseboats in some states. Dwelling policies are designed to insure the structure of the home or unit, as well as fixtures, appliances and equipment stored on the property for ordinary maintenance. Landlord furnishings or personal property is typically excluded under a dwelling policy, although it may be added back by endorsement.

Dwelling policies may even cover incidental business occupancies and indemnity for loss of fair rental value when the property becomes unfit for use due to a covered peril. Indemnity for loss assessment fees from an HOA is typically excluded under a dwelling policy, although it may be added back by endorsement in many cases.

Unlike a typical homeowners policy, personal liability and medical payments coverage is often excluded under a dwelling policy. However, both may be added through a personal liability supplement, depending on carrier and coverage option. Some carriers may include personal
liability coverage or offer it as an optional endorsement to the policy. Personal liability provides coverage for claims, including the cost of defending lawsuits against an insured because of bodily injury or property damage for which they may be deemed liable. Medical payments to others typically provide limited coverage for medical treatments incurred due to an accident on the insured property or caused by the insured without a prerequisite that the insured be found liable.

**Renter’s Policy Coverage Options and Limitations**

If the hosts are renting the property they intend to list on the site (for example, if the hosts rent an apartment) they should read and understand the terms and conditions of their rental agreement to determine if hosting will violate the terms and conditions of their lease agreement. Tenants should be aware that subleasing or renting their apartment for any length of time may violate the terms of their rental agreement with their landlord, and they should always check with the landlord before listing the property for rent. Tenants may choose to purchase a renter’s insurance policy if they do not own the place where they reside. A renter’s policy typically provides coverage for loss of personal property, but may contain exclusions for damage or theft of personal items in an apartment rented to a third party. Property damage for the structure or unit is typically excluded.

Renter’s policies often include liability coverage for bodily injury or property damage caused by the renter but not due to defects with the property. An example of a defect not covered is a loose step that gives way and causes a guest to fall down the stairs. A renter’s insurance policy is subject to the same exclusions as a homeowners insurance policy. Policy language varies, and policyholders should read and understand the limitations of coverage provided.

**Legal Restrictions**

Zoning laws may also place restrictions on the legal rights of hosts to list their property on short-term rental sites, including minimum length of stay. Hosts, regardless of whether they own the property listed, should be aware of local laws and restrictions for rental use of a personal residence. Several states and local municipalities have enacted legislation on home-sharing, restricting land or building use and requiring collection of a visitor tax.

Many municipalities are taking note of Airbnb’s growing market share of the travel industry and have begun requiring Airbnb to collect a visitor tax on behalf of hosts in a number of locales, including: Santa Monica, CA; Portland, OR; and Washington, DC. No state or territory in the U.S. currently requires people to have homeowners insurance, although most banks and financial institutions will require owners to maintain insurance on the property if they have a mortgage. Several states have considered legislation on home-sharing but generally include subject matter
on zoning laws and the collection of use or visitor taxes and do not generally address insurance requirements. In addition to state law, some HOA bylaws prohibit short-term rental of properties. If the property is part of an HOA, hosts should review the terms of their HOA bylaws to see if hosting would violate any restrictions from their HOA.

**Coverage Options for Guests**

Guests of short-term rental units should review their own insurance policies and the policies of the short-term rental company before booking a stay through the company’s site. If the short-term rental company does not offer medical payments coverage and guests are injured on the property, through no fault of the host or host’s landlord, guests may be reliant on their own personal health insurance to cover any unexpected medical treatments. Home-sharing guests also should read their own homeowners or renter’s insurance policy to understand if their policy would cover them if they were liable for damages to the rental property or the host’s personal items. Guests may have some coverage under their own homeowners, renter’s or personal liability insurance policy if they cause accidental damage to a host’s property. Some home-sharing companies may require the guest to sign a user agreement allowing the company to submit a claim under the guest’s own homeowners or renter’s insurance policy for any damage or loss they cause on the property or to an accommodation.

Optional coverage may be available to increase the limit for damage to property of others. Liability for property damage caused by the guest to the short-term rental property is typically limited or excluded under the guests’ homeowners policy. Homeowners policies often provide minimal liability coverage (e.g., up to $1,000) for damage to property of others. However, additional coverage may be available, depending on the company. This coverage would benefit guests who accidentally cause damage to the host’s personal property or rental unit, as they could seek coverage under their own homeowners policy for restitution to the host.

Guests also should check with the home-sharing company to ensure there is sufficient liability coverage in place on the property if something does go awry, such as a banister giving out during a guest’s stay. Guests should use extra precaution utilizing accommodations such as bikes or kayaks available for guests’ use while renting the property. These items may not be inspected for safety on a regular basis, and liability coverage for such items may be limited or nonexistent.
Anyone intending to list a property or book a vacation through a home-sharing company should read the policies and contracts offered by the company.

Airbnb currently offers a host protection insurance program to all of their hosts in the U.S., as well as landlords if the property is rented (and may also extend to any applicable HOAs). Coverage for this program is provided through a commercial general liability policy issued by a surplus lines carrier. The policy names the host as the insured, and provides liability coverage for third-party bodily injury or property damage. Each host is provided with $1 million in coverage. Coverage is considered primary and not contingent upon denial of coverage maintained by the host. Currently, Airbnb’s coverage does not include medical expense or personal liability. Medical expense coverage is typically used for minor injuries that occur on the premises through no fault of the named insured, owner or renter of the property. Personal liability would be used for things like slander or libel, which could be pertinent risks due to the customer rating system used by the online marketplace.

Airbnb also has a host guarantee that reimburses hosts for property damage caused by guests due to accident or fault, if the guest does not otherwise reimburse the host. Hosts must ask the guest for payment first. Guests could potentially make a claim under their own homeowners or renter’s insurance, which could provide coverage under the liability section. If the claim is not resolved between the host and the guest, Airbnb will reimburse the host for damages up to a limit of $1 million. Airbnb maintains an insurance policy as the named insured to cover losses incurred through its host guarantee. However, neither hosts nor guests are named insureds under the policy, and reimbursement is not contingent on claim approval under the policy.

HomeAway, a subsidiary of Expedia Inc., owns VRBO and VacationRentals.com, as well as many others operating outside of the U.S. HomeAway rents entire units only—not individual rooms or suites—and is marketed to investors in secondary homes or vacation properties. HomeAway does not provide insurance coverage automatically for hosts. It recommends that hosts purchase a customized policy through HomeAway Assure, which is a CBIZ Insurance Program. Policies offered through HomeAway Assure are specific to rental properties and may negate the need for a personal dwelling or homeowners policy for the listed property.3 Hosts should compare the cost of coverage against the income received from hosting their property for rent to determine if the costs outweigh the benefits.

---

2 The NAIC does not endorse or recommend the programs, services or insurance offered by or through the home-sharing companies described above. The programs offered may vary by state and may not be in accordance with state law.

Conclusion

The short-term rental community provides benefits to consumers by increasing the options and competition for vacation rentals. It also provides access to a revenue stream many may not have chosen, if not for the added convenience and ease of use. Home-sharing companies present an opportunity for consumers to do business with other consumers. The question remains how much liability the business facilitating the transaction retains. It is important for all parties to the transaction to know and understand the risks involved and to comply with all laws or other requirements.

Hosts, guests, landlords, HOAs and apartment building owners need to be aware of the shift in exposures presented by home-sharing and speak with insurers to determine the options available to address their coverage needs. Hosts should contact their insurer or insurance agent or broker to determine if they have coverage for rental use under their primary policy. If the insurer deems this activity more than occasional, it may drop coverage for the customer. Hosts who find themselves without coverage should work with the home-sharing company to determine if coverage can be secured through the home-sharing company for their home-sharing activities, or, if possible, on a full-time basis. If coverage is not provided on a full-time basis, the host will need to seek coverage elsewhere. Insurance may be available in the form of landlord policies or endorsements to a standard homeowners or dwelling policy.

Although the concept of providing room and board in one’s home may not be new, the frequency with which consumers are hosting and booking stays is increasing. The insurance industry is equipped to adapt to consumers’ changing economic preferences. The prevailing concern with short-term rental is one of consumer awareness and ensuring that all parties to the contract are compliant with the law, vigilant and knowledgeable about the potential risks involved.
Airbnb horror stories: Ten times things went seriously wrong for hosts or guests

Lorna Thornber · 13:13, May 22 2018
Nine-year-old Airbnb has changed the way many of us travel – in a good way.

But the recent story of the 14-year-old who booked a home on the popular accommodation site and threw a party for more than 100 teens serves as a reminder that hosts and guests alike need to be careful.

More than 100 teenagers were moved on by police in Dunedin, but left behind a trail of glass and vomit.

Here are 10 other times things went horribly wrong for hosts or guests – we're hoping they're worst-case scenarios.
Drug-induced orgy

Canadian couple Mark and Star King cut their holiday short after receiving calls from neighbours concerned about what was going on in their Sage Hill, northwest Calgary home. The couple returned to find destroyed furniture, smashed glasses, used condoms and underwear on the floor and mayonnaise and sauce smeared across the walls. Police said bodily fluids including urine, semen and vomit were found throughout the home. The damage to the two-storey house, which police attributed to a "drug-induced orgy", was estimated at between C$50,000 and C$75,000 (NZ$54,570 and NZ$81,857). Fortunately for the couple, they were covered by Airbnb's insurance policy for damage up to US$1 million (NZ$1.4 million). Neighbours said the guests had hosted a party for about 100 which was shut down by police after three noise complaints and reports of a fight.

READ MORE:
* Tenant forced to hand over Airbnb profits after angry landlord investigates
* The A to Z guide to Airbnb: How it works and what should you know
* Airbnb guide: Tips and advice on how to find the best place to stay on Airbnb
Guest turned squatter

San Francisco Bay Area woman Cory Tschogl rented out her Palm Springs condo to a man on an "extended business trip" only to have to hire a lawyer to evict him. The guest, who went by the name "Maksym", complained of "cloudy" tap water and the gated entry on day one and asked for a full refund, Business Insider reported. Tschogl said she only managed to get hold of Airbnb two days later and the site said in an email that it had asked the guest to leave. But, according to Tschogl, he would not. She decided to let him stay for the duration of his 44–day stay but when the time came for him to leave, he still hadn't paid for the trip in its entirety and Airbnb couldn't collect the money. When she she sent him a text message saying she'd cut off the utilities if he didn't get out, he threatened to sue her, saying his brother had got an ulcer because of the tap water and her actions had caused them both "a lot of stress and suffering". Tschogl hired a lawyer and discovered that officiating the guest could take three to six months and would require US$3000–US$5000 in legal fees.
Bad vibrations

Sharon Marzouk came home to what looked like a scene from a porn film gone horribly wrong in 2016 after renting a bedroom in her Menlo Park, California home to an Airbnb guest. Marzouk walked through the door to find water trickling through the ceiling from the upstairs bathroom, *SF Gate* reported. The guest claimed she'd forgotten to turn off the tap in the bath, resulting in what Marzouk estimated as more than US$10,000 in damage. In the bedroom she discovered a vibrator, a large box of condoms, a few pairs of high heels, a bag full of used tissues and a hand-written list of "pics" labelled as "bent over green Abercrombie" and "blue and white skirt vibrator".
Capsicum spray used by the police covers walls and window blinds.

**Australian horror story 1**

The trashing of a rented Airbnb house in Australia in December led to at least eight arrests. The Melbourne property, as well as neighbouring homes and cars, was extensively damaged after a party raged out of control. Police officers trying to break up the party were pelted with rocks and the public order response and critical incident response teams were called.
Australian horror story 2

Ramis Jonuzi packed up, loaded his ute and was ready to cut short his stay in a Melbourne Airbnb because of the bad "energy", but only made it as far as the front yard. Jonuzi, a 36-year-old bricklayer, died there in October 2017 – allegedly at the hands of three men he met through the accommodation website less than a week earlier. Craig Levy, Ryan Smart, and Jason Colton were all charged with his murder. Friends said Jonuzi, who had paid less than $30 a night for the room, had turned to Airbnb to find cheap and stable accommodation while he worked through some personal issues.
Michaela Scarrott, 23, and nine friends were left out of pocket when a scammer listed a luxury Whangarei on Airbnb that they didn't own.

**Scammed out of nearly $5000**

Auckland woman Michaela Scarrott booked a "beautiful" Whangarei home – described as a luxury apartment – for her and eight friends to stay in last summer through Airbnb. But when two of her friends knocked on the door, the owners told them they had never listed the home on Airbnb, and had only recently moved in. Sales executive Scarrott, 23, had reserved the listing six weeks out from their stay for a total $4800. When her payments wouldn't go through the Airbnb system, she eventually agreed to pay to an account in Sydney. Scarrott said she had no reason to believe the person she was talking to and site they were using was not legitimate. It looked like Airbnb: the typography and phrasing were the same, hyperlinks to Facebook, Instagram and Pinterest connected to official Airbnb accounts and the site appeared to be a secure connection, with the padlock icon displaying in the URL. Confirmation emails she was sent looked almost identical to ones she had received in the past. It wasn't until her two friends tried to check in that she realised she'd been duped. "I thought I had taken all the necessary precautions, but obviously it wasn't enough," she said. "It was just done so well."

**Pop-up brothel**
Two Stockholm women handed over the keys to their apartment only to return from a four-week holiday to find it had been used as a brothel, The Kernel reported. The owners were alerted to the fact by police, who had raided the place and caught two of the guests in bed with clients. According to the owners, the guests had looked "very high class, with business suits... it was strange that they would rent an apartment when they could clearly afford a hotel". Pubic hair and a plastic bag of used condoms had been left behind. Perhaps no surprise then that one of the owners said "We feel uneasy being in our own apartment after this".

Wayne Natt was charged with video voyeurism.

**Sex, lies and videotapes**

Derek Starnes and his wife thought they were getting away from all when they checked into their Airbnb room in the Florida town of Longboat Key. But they soon discovered their host Wayne Natt, who had received good reviews on the site, was intending to secretly film them. Starnes spied an unusual hole in the smoke detector and when he took it down to have a look he found a camera pointed directly at the bed. He went straight to police who arrested Natt, who had been letting his home on Airbnb for two years, on a charge of video voyeurism.
The Brooklyn, New York igloo was supposedly "dripping with ingenuity and alt-lifestyle aura".

**Garden igloo**

When a 2016 blizzard dumped record amounts of snow in New York, Patrick Horton and his roommates decided to build an igloo in their Brooklyn backyard and rent it out on Airbnb for US$200 a night. "Dripping with ingenuity and alt-lifestyle aura lays this snowpocalypse's most desirable getaway. Built completely by hand all natural. Come experience this chic dome-style bungalow with Bae," the listing said, referring to a hipster term for a significant other. Horton said he received three enquiries before Airbnb removed the igloo, which had been kitted out with blankets and waterproof pillows but was essentially just a hollowed out pile of snow, from its site, saying it failed to meet occupancy standards.

**Barcelona woman books her own place in desperation**

A Barcelona woman who sneakily booked her own apartment on Airbnb and barred herself inside said it was the only quick way to kick out her subletting tenants. Montse Perez said she had "no choice" but to reoccupy her 32 square apartment in the beachside suburb of Barceloneta and squat inside until the locks were changed. The problems had started roughly six weeks ago when she let the apartment to a 26-year-old man who said he was relocating to Barcelona. "He showed me a document saying his salary was €3000 (NZD$4621) a month, so l
Airbnb at up to $370 a night during the peak summer months.

**How to ensure it doesn't happen to you**

Airbnb has revolutionised travel but, as we've seen, it's not without its problems. Here's what to bear in mind if you're considering listing a place on the site or looking for somewhere to stay. As is so often the case, communication, common sense and trusting your gut instinct are often key.

*Have you stayed in an Airbnb? Share your experiences by emailing us at travel@stuff.co.nz*

Stuff
British girl shares terrifying Airbnb hostage ordeal

RAE Breakwell and her friend were looking forward to a relaxing holiday in Spain. Instead, they were robbed and kidnapped.

WE HAVE all heard of Airbnb horror stories before, but this British traveller’s nightmare experience is beyond horrific.

Rae Breakwell and her friend Paige Mitchell were looking forward to a relaxing holiday in Spain when they arrived at their Airbnb location in Marbella, a resort area on southern Spain’s Costa del Sol, on August 21. But what they were really in for was far from relaxing. The girls were allegedly robbed, threatened, assaulted and kidnapped.
In hindsight, red flags were raised early. When the pair went to check-in to their Airbnb room, they were told the host was out of the country and her cousin would be in charge.

Unable to get in contact with the cousin, the host told them where the spare key was located. What they eventually opened the door to was not what they expected.

“When we got in, the place stank of alcohol and the curtains were drawn. We were sitting on the sofa and then the cousin rang and got angry when we told him we were in the apartment,” Ms Breakwell told Unilad.

But it didn’t end there. They then found out that they were not the only ones staying in the apartment they believed they were renting to themselves.

“We asked him what room we were in and he said ‘the one by the bathroom’ so we went in.

In the room were two girls passed out, they didn’t even move when I opened the door. I rang the owner and she had no idea whether another room had been booked,” Ms Breakwell said.

“We think now that the cousin had been partying in the room with the girls the night before, and that’s why he was being shady.”

Determined not to let this ruin their Spanish vacation, the two girls unpacked in the unoccupied room and went out.

When they returned, they found their stuff tossed around the room, and most of their valuables allegedly missing.
“I rang my dad because he’s a police officer and he told me to politely knock on and ask whether they’d seen my stuff — so that’s what I did,” Ms Breakwell told Unilad.

“I could see my make-up bag in their [the girls’] room and I was getting really worked up but they got so aggressive and started shouting.”

After an altercation with the two girls, who had a knife, Ms Breakwell ended up locked out of the apartment while they allegedly held Ms Mitchell hostage inside.

Ms Breakwell told Unilad she called the police, who were unable to help over the phone because they didn’t speak English.

But Ms Mitchell eventually made it to the door and the two friends left immediately and checked into a hotel.

Luckily, Ms Breakwell’s family arrived in Marbella a few days later, and they were able to stay with them for the remainder of the trip. However, the pair estimate they have lost well over £1000 ($A1620) thanks to the theft and the hotel room.
Ms Breakwell posted about the nightmare ordeal on Facebook when she failed to get a response from Airbnb. She said the experience has left them “traumatised”.

“We are two young girls who were lead to believe we would be safe in Airbnb’s hands but instead we were left traumatised and our holiday was completely ruined,” Ms Breakwell wrote.

“The fact your company has done nothing about this is absolutely disgusting, we would not wish this is happen to anybody else.”

Airbnb eventually commented on Ms Breakwell’s post, saying a member of the team will be in contact soon.
Deaths at Airbnb rentals put spotlight on safety and security

Nancy Trejos, USA TODAY Published 11:04 a.m. ET Dec. 11, 2018

Since debuting in 2008, vacation rental website Airbnb ([https://www.airbnb.com/](https://www.airbnb.com/)) has grown to five million listings in 191 countries. It is in more than 81,000 cities.

Over the years, Airbnb has provided travelers with alternatives to hotel rooms, for the most part without incident.

But in recent weeks, a couple of deaths have raised questions about the safety of Airbnb rentals.

Last week, a security guard at a villa in Costa Rica was arrested for the murder of a Florida woman ([story/news/world/2018/12/05/body-found-costa-rica-thought-missing-florida-woman-carla-stefaniak/2212421002/](/story/news/world/2018/12/05/body-found-costa-rica-thought-missing-florida-woman-carla-stefaniak/2212421002/)) who traveled there to celebrate her 36th birthday. Carla Stefaniak’s body was found in the woods near her Airbnb rental with a blunt force wound to her head. Bismarck Espinosa Martinez, 32, has been arrested for the attack.

A family of four from Iowa died from suspected carbon monoxide poisoning while vacationing in Tulum, Mexico in March, though their rental was not through Airbnb.

Could Airbnb have done anything to prevent these deaths?

In the case of the carbon monoxide poisoning, Airbnb says that it requires its hosts to follow the laws of the city, state, and country in which it is located. It won’t list properties unless hosts agree to do this.

Mexico does not require smoke or carbon monoxide detectors in every household.

Airbnb distributes free smoke and carbon monoxide detectors to hosts who request them. The company also runs safety workshops with local fire and emergency services to advise hosts on keeping their homes safe.

All listings in the Airbnb Plus program, which gives those rentals higher visibility, are required to have smoke and carbon monoxide detectors in any location. Employees check to make sure they have complied.
“We are deeply saddened by this tragedy, and our thoughts are with Ed and Barbara’s families, loved ones and friends,” Airbnb said in a written statement regarding the Mexico carbon monoxide deaths. “We have reached out to their children to extend our full support to help them through this difficult time.”

Airbnb says that it advises guests when booking to carefully read the listing description, amenities, and reviews to find out about the home’s safety features. Rentals that have smoke and carbon monoxide detectors are noted. Potential guests can also ask questions of their hosts on Airbnb’s messaging system.

Anthony Roman, a risk management expert who runs his own firm Roman & Associates, recommends that travelers carry portable carbon monoxide detectors.

“There is a moral responsibility on the part of the website. There is also a personal responsibility that should be observed by the traveler and renter,” Roman says. “There is a responsibility that should be met by landlord and renter and website.”

Jordan Arnold, a former prosecutor in Manhattan and an executive managing director at security company K2 Intelligence, says that Airbnb is not breaking any laws but could consider changing some of its rules.

“It seems to me that requiring a smoke detector and carbon monoxide detector is not unreasonable,” he says. “These are not expensive investments.”

In the case of the Costa Rica murder, the rental was in Villa le Mas, a compound with seven apartments.

Traditional hotel companies have also had criminal acts happen, including Marriott International, with a serial rapist of hotel housekeepers being identified this year.

Outrage builds over MGM’s decision to sue Las Vegas victims

Airbnb reached out to the families of Carla Stefaniak, Edward Winders and Barbara Moller to assist in the investigations and has since removed the listings from its site.

Airbnb says its Trust and Safety department has offices in various cities such as San Francisco, Portland, Dublin and Singapore. It includes 24/7 response agents, data scientists, product managers, crisis managers, and victim-advocacy specialists, along with privacy, cybersecurity, insurance, and fraud experts, among others.

The team conducts risk scoring of each Airbnb reservation. It screens all hosts and guests against regulatory, terrorist, and sanctions watch lists.

Couple vacations at Mexico Airbnb dead from carbon monoxide

For U.S. residents, Airbnb runs background checks to see if there are prior felony convictions, sex offender registrations, and significant misdemeanors.

All Airbnb users have a profile page with relevant information about themselves. Hosts and guests have to provide a full name, date of birth, phone number, email address, and payment information. Hosts can require guests to provide Airbnb with a government ID before booking. The hosts have to provide the same. There is a messaging system on the site to allow questions to be asked between the host and guest.

All guests and hosts can publicly review each other. And there are customer service employees available to address issues.

Even so, Roman says there is no way to fully predict what may go wrong in an Airbnb, hotel or bed and breakfast.

“Even if the algorithm is very thorough in checking multiple sources and cross referencing those sources, it is still insufficient to be completely predictive of the risk,” he says.

The American Hotel and Lodging Association has lobbied to have Airbnb follow the same taxation and regulatory rules that they do. Many states have responded by looking into writing new regulations.

But so far, many have struggled to figure out how to regulate Airbnb. New York, San Francisco and Montgomery County, Maryland, outside of Washington, D.C. have taken steps to limit the number of days homes that can be rented out and how many guests are allowed, in response to residents’ complaints that vacation rentals can be disruptive.

Arnold says Airbnb or any other online travel agencies can do background checks and assess risks but it’s difficult to prevent all attacks.
Airbnb assures security after Mexico and Costa Rica deaths

"Airbnb or Marriott—no host can 100 percent eliminate risk for a guest," he says. "The only person to blame for this incident is the man charged with homicide. It's not the fault of the victim or Airbnb."

Roman recommends that travelers check reviews, not just on Airbnb but on other online travel agency sites such as TripAdvisor. He also recommends that they check public crime statistics for the destination.

And they should trust their instincts, he says.

"If you feel isolated or feel uncomfortable, you should remove yourself from that environment." he says. "In other words, don't take chances."

A first Uber ride ends in sexual assault charge

After an evening of cocktails in San Diego, a woman got into the back of an Uber for a ride home. She was so intoxicated she had to ask the driver to stop so she could vomit. She says she then passed out in the backseat.

When she regained consciousness, the Uber driver was on top of her, raping her, a block from her home, according to the police report and two sources familiar with the investigation.

She was able to escape and dial 911.

Police later arrested the Uber driver, John David Sanchez, 54. When they searched his computer, they found videos of Sanchez raping women and abusing young teenagers, dating back at least five years.

In November, Sanchez was sentenced to 80 years in prison for the rape of the Uber passenger and 33 other counts against him, including sexual assaults of at least nine other women and children. Sanchez drugged many of his victims.

A CNN investigation has found that Sanchez is just one of at least 103 Uber drivers in the U.S. who have been accused of sexually assaulting or abusing their passengers in the past four years. The drivers were arrested, are wanted by police, or have been named in civil suits related to the incidents. At least 31 drivers have been convicted for crimes ranging from forcible touching and false imprisonment to rape, and dozens of criminal and civil cases are pending, CNN found.
There is no publicly available data for the number of sexual assaults by Uber drivers or for drivers of other rideshare companies. CNN's analysis comes from an in-depth review of police reports, federal court records and county court databases for 20 major U.S. cities.

In another case examined by CNN, a woman from Miami left her kids with their grandmother and went to a bar with a friend. She took an Uber home. She says she passed out along the way and woke up the next morning with her pants and underwear on the floor.

The Uber driver allegedly carried her into her apartment, threw her onto the bed and sexually assaulted her. She is a plaintiff in a proposed class action lawsuit against Uber.

"You are pretty much hitchhiking with strangers," she told CNN. "How many people is it going to take to get assaulted before something is done?"

According to police, the driver told them he knew the victim had been drinking and was "wrong for what he did." He pleaded not guilty for sexual battery and awaits trial.

A woman in Long Beach, California, who alleges she fell asleep intoxicated in the back of an Uber in 2016, told CNN that she woke up with the driver assaulting her. The driver, 47, was found the next day with her phone and later arrested. He claimed the sex was consensual and the district attorney dropped the criminal case against him. She is suing Uber over the incident and for representing its services as "safe."

"You don't think it will happen to you," she told CNN. "I still feel ashamed ... that's why I'm here. I want a voice. [I'm] tired of being quiet."

**Uber: 'We want to be part of the solution'**

Uber, which launched in 2010 in San Francisco as "everyone's private driver," is the most valuable privately-held tech startup in the world. It is valued at $70 billion and operates in 630 cities worldwide. Uber provides 15 million rides a day.

The issue of sexual assault conflicts with Uber's brand messaging to provide a "safe ride home." Its print and digital ads show women taking Ubers for nights out, and a partnership with Mothers Against Drunk Driving includes a "designated rider" campaign urging users to take an Uber to
avoid driving under the influence. In 2015, Uber set up a popup kiosk in Toronto to offer free rides to those who blew into breathalyzers.

This is significant given many of the women raped or attacked by the 103 accused drivers uncovered as a part of CNN's investigation had been drinking, or were inebriated, at the time of the incidents.

The majority of the police reports reviewed by CNN involved incidents that took place in or near major cities across the country. Uber did not provide numbers on how many of its drivers have been accused of sexual assaults.

Five drivers across various states told CNN they were not provided any kind of sexual harassment or assault training. Drivers agree to the company’s community guidelines when they sign up to work for the service. Uber said it updated its standards in December 2016 to specify no sexual contact is permitted when using its platform.

Last week, the company posted a sexual assault prevention video on its website to inform drivers and riders "how to create a safer community." It also said it plans to host 50 community forums nationwide for advocates, leaders, drivers and riders across to talk about the issue. The changes came after CNN first contacted Uber about this story.

Uber was made aware of CNN's reporting for this story months ago but the company failed to make any executives available to speak on the record. It canceled an on-camera interview with an Uber executive earlier this month.

On a call with CNN last week for an unrelated story, Uber CEO Dara Khosrowshahi said cracking down on sexual assault is a "new priority for us."

"It is a priority that I expect to remain a priority for the foreseeable future," said Khosrowshahi, who joined the company in late August after cofounder Travis Kalanick stepped down.

In a recent statement sent to CNN, an Uber spokesperson said safety is the company's top priority this year and cited recent protocol updates such as rerunning driver background checks on an annual basis moving forward. The company also said it plans to roll out a dedicated "safety center" within the Uber app where riders can designate contacts they want to share trip details with while they ride; it will also have an emergency button allowing users to call 911 from inside the app.

"This is just a start and we are committed to doing more," the spokesperson said. "Sexual assault is a horrible crime that has no place anywhere. While Uber is not immune to this societal issue, we want to be part of the solution to end this violence forever."

Lyft, an Uber competitor that provides one million rides daily in the United States and Canada, is also dealing with sexual assaults by its drivers. A similar CNN review using the same methodology found 18 cases of Lyft drivers accused in the past four years. Four drivers have been convicted.

"The safety of the Lyft community is our top priority," said a Lyft spokesperson, adding it has "worked hard to design policies and features that protect our community."

It's common for Uber and Lyft drivers to work for both services. But each company performs its own background checks. Both companies mostly conduct digital background checks via a startup called Checkr.

Uber said it reviews the records of driver candidates that are surfaced to the company by its background check provider. It said any serious criminal convictions, like sexual assault, sex crimes against children and kidnapping, would disqualify candidates.
The company previously didn’t have a uniform policy on rerunning criminal background checks. But when pressed by CNN, a spokesperson said in January it started running screenings on drivers every two years in mid-2017. In addition to its recent announcement about annual background checks on drivers, Uber plans to monitor new criminal offenses (via public records or pending DUI charges) as they happen.

CNN found two instances in which drivers pleaded guilty to sexual assaults while working for both Uber and Lyft.

In one case, a Seattle driver began driving for Lyft after Uber discharged him, according to court documents. He later sexually assaulted a Lyft rider. In the other case, a driver pleaded guilty in San Diego to indecent exposure and the false imprisonment of an Uber passenger, as well as battery for a separate incident involving a Lyft passenger.

**Police are tracking reported crimes by drivers**

Of the 103 Uber drivers accused of sexual assault or abuse, for 18 of them, criminal cases did not move forward either because charges were dropped, cases were dismissed, or drivers were found not guilty.

The district attorneys and police officers who spoke to CNN said cases don’t move forward for several reasons, such as lacking a probable cause or witness cooperation.

In addition to finding the 103 drivers accused of crimes or named in a civil lawsuit, CNN contacted more than 20 police departments to obtain data on complaints that involved Uber or Lyft drivers and sexual assault. Four police departments -- Austin, Boston, Denver and Los Angeles -- tracked crimes involving rideshare drivers and shared their data on sexual assault complaints.

CNN did not include most of these complaints in its tally of cases, because they could not all be verified with incident reports.

However, the numbers suggest that there may be many more overall incidents of sexual assault than the 103 cases found in the CNN investigation.

The Boston Police Department received 24 complaints or reports of Uber drivers allegedly sexually assaulting passengers since 2016. The department received three assault-related complaints involving Lyft drivers during the same period.

Since 2016, the Los Angeles Police Department has received at least 13 similar complaints about Uber drivers, eight regarding Lyft drivers and more than a dozen about ride-share drivers whose companies were unclear in data shared with CNN. Only one of those cases led to an arrest.

In Austin, police have documented at least 16 sexual assault complaints about Uber drivers -- and at least ten about Lyft drivers -- since 2015.

Meanwhile, the Denver police department has recorded at least nine sexual assault or abuse complaints about Uber drivers and at least 12 about Lyft drivers since 2015, but only two of those complaints resulted in criminal charges. Most of the other Denver cases became inactive due to lack of witness cooperation or were refused by the district attorney for lack of evidence.

**Lawyer: Uber has been ‘keeping this story quiet’**
Jeanne Christensen, an attorney with law firm Wigdor LLP, has been pursuing Uber rape and assault cases since 2015 when her firm filed a lawsuit after a high-profile rape case in New Delhi. The Uber driver, who had a previous record that included rape and molestation, was sentenced to life in prison. The incident sparked protests and caused authorities to temporarily ban Uber from the city for six weeks.

That case, and questions about how Uber handled it, thrust the issue into the spotlight.

Most recently, Christensen’s firm represents a proposed class action against Uber on behalf of nine plaintiffs, including the Miami woman CNN interviewed, who said they were assaulted by Uber drivers.

Uber is trying to compel the women to carry out their case through arbitration per its legal terms of service. When users sign up for Uber, they agree to its terms, which includes resolving any claim "on an individual basis in arbitration."

Christensen and the women are pushing back. In a letter to Uber’s board, 14 women detailed their experiences and urged the company to remove its arbitration clause, saying it silences them and forces the issue underground.

"We trusted a company operating in the space of transportation for hire to mean what it says, and we never thought that Uber would perpetuate physical violence against women," they wrote.

Uber passenger alleging rape speaks

An Uber spokesperson previously issued a statement to CNN about forcing the case into arbitration, calling it the "appropriate venue for this case because it allows the plaintiffs to publicly speak out as much as they want and have control over their individual privacy at the same time."

Over the years, Christensen said she noticed a trend in those who’ve come to her firm for help: Victims tend to be female and petite, live alone, and were inebriated at the time of the alleged assault, she told CNN.

"If a driver is going to enter her home, he has [likely] asked her enough questions and knows she lives alone," she said.

Christensen -- who said she’s currently representing 16 women who alleged they’ve been been raped or attacked by Uber drivers -- will not say how many cases against Uber her firm has
handled, citing confidentiality.

Multiple attorneys across the country were similarly silent about their cases against Uber. Like many large companies, Uber requires all parties to sign a confidentially agreement when a case is settled.

"We aren't simply filing cases so Uber [can] pay women money and their lawyers to be quiet about it," she told CNN. "That was a conscious decision that we made. Uber has done a miraculous job at keeping this story quiet."

-- Additional reporting by CNN's Majlie de Puy Kamp, Collette Richards and Whitney Clegg.

If you have a confidential news tip for CNN Investigations, please email us at CNNTIPS@CNN.com

CNNMoney (New York)
First published April 30, 2018: 5:43 PM ET
Insuring the sharing economy

RISK + INNOVATION | PART 7 IN A SERIES
www.aig.com/innovativetech

Foreword by:
Jose Heftye, Managing Director, Marsh sharing economy Practice Leader
Robert Bauer, Managing Director, AIG Innovation and sharing economy Practice Group
Crowd-based capitalism. Collaborative consumption. The 1099, gig, or on-demand work force. Call it what you wish, the sharing economy is here to stay. An exciting new way to live and work is available to those who wish to participate. Millions of us do. And we love it.

But what about insurance in this new world?

We believe insuring sharing economy platforms and participants is one of the biggest puzzles the insurance industry will face over the next decade.

On one hand lies significant opportunity. To quantify, structure, and transfer risk by partnering with firms who may have significant insight about risk in real time is an insurance professional’s dream scenario. Trust is made more transparent. We could always rent a room in Bob’s house. But now there is a platform for Bob to tell us he’s willing to rent it, next weekend, at a specific rate. And we can see others who have rented from Bob tell us it’s not only safe, but that Bob cooks a delicious breakfast and is a great host. What can peer-to-peer rating systems tell us about risk?

On the other hand lie significant challenges. Pricing models are being constructed with loss history that is just beginning now. Some types of insurance remain highly regulated. Where the distinction between personal and commercial use of assets in the sharing economy is blurred, regulators view personal lines of insurance very differently than commercial.

In the end, we believe good partnerships, like those between brokers, insurers, and clients, will prevail.

Marsh and AIG are delighted to bring this joint perspective on the sharing economy to you. It is our attempt at putting many conversations together on paper. Our thinking evolves as quickly as the technology does. Please don’t hesitate to reach out and share your views. In the spirit of sharing, we’d love to hear from you!

jose.heftye@marsh.com  robert.bauer@aig.com
A NEW BUSINESS MODEL

The sharing economy is a business model gaining momentum as it challenges incumbents in nearly every industry. Companies embracing this model develop technology that allows supply to meet demand with less friction and fewer transaction costs. The sharing economy allows access to physical assets, rather than ownership. Firms essentially become matchmakers and facilitators of services; many workers become freelancers. Whether it’s a driver with extra seats in their vehicle (supply) meeting a passenger traveling in the same direction (demand), or a “pool” of passengers (supply) paying to fill seats across a fleet of vehicles in a ride-share service (demand), it may not matter who is on which side. Both gain efficiency. Each party is better off from a pure economic view. Quickly rising usage rates suggest all participants are more satisfied with the result:

• Uber has facilitated more than 5 billion rides around the world since 2010. Today Lyft completes 1 million rides a day, yet the companies do not own any cars.
• Dozr provides access to more than $50 million worth of construction equipment, but owns none of it.
• With 4 million listings worldwide, Airbnb gives users access to more rooms for rent than the top five hotel chains combined, but owns none of the apartments and homes on its marketplace.

Facilitating access without ownership allows the ultimate asset owners—drivers, construction equipment owners, and homeowners in the examples above—to become independent business owners.

It’s not just the new tech startups born in Silicon Valley; long-established companies are incorporating sharing economy principles into their business models, too. In 2017, Walmart announced that store employees could opt into a pilot program to deliver packages to customers who ordered goods online. In some markets, Amazon uses independent contractors as “delivery service providers” to fulfill Prime orders and courier packages. These and companies like them are practicing what digital media innovator Jay Samit says is required to thrive in the modern economy. “Rather than wait for the competition to steal your business,” Samit says, “every founder and employee needs to be willing to cannibalize their existing revenue streams in order to create new ones.”

Labor Shift Gives Rise to New Risk and Insurance Challenges

History has not seen a business model shift towards which so many workers have swarmed since the last Industrial Revolution. From 2000 through 2014, the number of independent contractors, some of them sharing economy workers, filing 1099 tax forms in the U.S. grew by 22 percent. In the same 15-year period, the number of traditional
employees filing W-2 forms dropped by 3.5 percent.\textsuperscript{vi} McKinsey estimates that 20 to 30 percent of the global population engages in independent work, with 15 percent of them using digital platforms.\textsuperscript{vii} The Freelancers Union estimates 35 percent of Americans—55 million people—are freelancing \textsuperscript{viii} and contribute $1 trillion to the U.S. economy.

On the one hand, this is good. When labor suppliers are treated as customers—as independent contractors, rather than as employees—this creates several benefits for workers. Individuals can work in the sharing economy while also holding down a full-time job, as 58 percent of respondents to our survey do, to supplement their income. Most freelancers surveyed—58 percent—report having two jobs. Another 18 percent report having three or more. They can make their own schedules and work as much or as little as they want.

On the other hand, sharing economy firms give rise to new risks, and unique insurance challenges. Who pays the medical bills of a driver who develops chronic back pain after driving for eight to ten hours a day? In a trucking fleet operating under a traditional business model, the company’s workers’ compensation insurance would cover it. In the independent model, it’s less clear. The protections that labor unions in the late 1800s and government-sponsored “social safety net” programs in the 1950s (UK National Health Service, 1948; U.S. Medicare, 1956) sought to stitch together, the sharing economy unravels. Either society tolerates the trade-offs of a more flexible work force—where it is sometimes unclear who pays the medical bills when a freelancer is injured, and where there is no such thing as “paid time off” for disability or bereavement—or a new social contract is constructed.

Without the benefits that government-mandated programs or employer-sponsored insurance typically provide, the business model that several sharing economy firms rely on is under attack from elected officials, regulators, and temporary workers themselves. For example, in the U.S., workers’ compensation is not mandatory if the freelancers are not employees. In France, ride-sharing drivers waged a “strike” in 2016 to protest working conditions,\textsuperscript{ix} and detractors in France and elsewhere have criticized companies for not offering drivers insurance coverage.\textsuperscript{x}

Asset Sharing Introduces Challenges and Opportunities

The asset sharing enabled by the sharing economy also creates new challenges for the owners of property that is lent or rented on a sharing platform. Who helps a home-sharing renter if they lose a key to their host’s residence while traveling in a foreign country? Renter’s insurance may cover the host for the cost of a new key; travel insurance may allow the traveler to receive a restitution check for their trouble once they return home. But a significant customer experience question remains if the renter is still sitting outside, waiting for a locksmith.

While insurance claims are part of the challenge today, they represent an opportunity tomorrow for companies that take an innovative approach to answering these questions. Insurance can help solve some of these challenges—if it evolves with the times. With developments that blur the lines between commercial and personal insurance, there are certainly unmet needs waiting to be fulfilled. This paper explores those opportunities, and how risks are evolving as quickly as business models themselves.
AIG surveyed 132 independent contractors in sharing economy settings in the top 15 metropolitan statistical areas in the United States. Although the sharing economy is a global phenomenon—for example, a greater percentage of people in Singapore regularly use ride-sharing than in the U.S. and UK combined—this paper focuses on the U.S. We will address global implications in later studies.

Before insurers can develop new products and services that could meet the needs of this evolving sector, we need to gain a strong understanding of the people and companies involved in the sharing economy. That is why AIG conducted its own survey of individuals active in the sharing economy, and partnered with Marsh to develop risk profiles for major stakeholders including freelancers, sharing-economy companies, and other companies that interact with the sector.

AIG surveyed 132 independent contractors working in sharing economies in the top 15 metropolitan statistical areas in the United States. Although the sharing economy is a global phenomenon—for example, a greater percentage of people in Singapore regularly use ride-sharing than in the U.S. and UK combined—this paper focuses on the U.S. We will address global implications in later studies. Here, respondents were asked a wide range of questions about their experiences in the traditional W-2 and 1099 sharing economy sectors. Although the sample is not reflective of the entire U.S. population, the results paint an indicative picture about their demographics, motivations and concerns.

**DEMOGRAPHIC PROFILE**

The typical sharing economy worker in our study is 30-49 years old, holds a four-year college degree, and has a full-time W-2 job. In fact, 55 percent of respondents had a full-time W-2 job, and an additional 14 percent had part-time W-2 work. A high majority (89 percent) of the respondents with W-2 jobs receive either health or disability benefits from their employers.

**ENGAGEMENT IN THE SHARING ECONOMY AND OTHER WORK**

The sharing economy is shaping up to be a part-time, temporary option for most participants. Sixty-four percent have worked in the sharing economy for less than a year, and 67 percent view their sharing economy role as a part-time or temporary job. Only 11 percent identified the sharing economy as a career they plan to pursue for an extended period of time.

According to our survey, delivery courier services are the most popular form of sharing economy work, with 57 percent of survey respondents working for delivery platforms such as Uber Eats, Postmates, or Doordash. Nearly half—48 percent—drive for a ride-sharing service such as Uber, Lyft, or Gett, and 33 percent perform task-based work such as cleaning or furniture assembly on platforms like TaskRabbit, Handy, and UrbanSitter.

The participation numbers by genre add up to more than 100 because many sharing economy freelancers are active on multiple platforms. The majority—58 percent—work two jobs including their sharing economy work. Another 18

The sharing economy is shaping up to be a part-time, temporary option for most participants. Sixty-four percent have worked in the sharing economy for less than a year, and 67 percent view their sharing economy role as a part-time or temporary job.
percent report working three or more jobs. Two-thirds work fewer than 15 hours per week in the sharing economy, and only seven percent work full-time hours of 35 hours or more per week.

**SHARING ECONOMY EARNINGS**

Despite a widening gap between W-2 and 1099 workers, 1099 earnings in the sharing economy have not reached levels comparable to “full employment.” In keeping with findings that most sharing economy workers work full-time W2 jobs and spend fewer than 15 hours per week working in the sharing economy, the survey also revealed that most workers earn only supplementary levels of income from gig platforms.

A plurality of respondents (39 percent) reported earning less than $5,000 from sharing economy work last year, with another 14 percent earning between $5,000 and $9,999. Just eight percent reported earning more than $50,000 on gig platforms last year.

However, a plurality of respondents (38 percent) also characterized the money they earned from digital platforms as “essential for basic needs,” with another 36 percent describing their earnings as “important but not essential.” Fewer than one in four took a more casual view of their sharing economy earning, describing the money as “nice to have.”

In general, sharing economy workers reported that their earnings aligned with their expectations. When asked if they make as much as they thought they would, 44 percent said they do. Nineteen percent reported making somewhat or much more than they expected, while 30 percent reported making somewhat or much less than anticipated.

**AUTOMOBILE USE IN THE SHARING ECONOMY**

An overwhelming majority of sharing economy workers use automobiles, either for their work or to get to gigs. Sixty-five percent of respondents use cars for their sharing economy work, either as ride-sharing drivers or to make deliveries. Another 14 percent use a car to commute to a gig job. Just 20 percent report not using a car at all related to their sharing economy work.
The survey results also suggested that sharing economy drivers may be more exposed to risk than the general public. Participants who use their cars for ride-sharing were most likely to drive between 1 p.m. and 8 p.m. or between 8 p.m. and midnight (35 percent), and 31 percent cited making an effort to drive during bad weather to earn higher fares. Sixty-three percent reported driving more than 200 miles per week. Driving in difficult weather or under fatigue conditions potentially means higher risks for those drivers.

**RISK AND ATTITUDES ABOUT INSURANCE**

Freelance survey respondents reported a wide range of negative experiences while on the job through gig platforms. The most common experiences related to personal property, with 11 percent reporting having had their personal property damaged and seven percent reported having personal property stolen while on the job.

Six percent of respondents reported suffering an injury while working in the sharing economy, twice as many injuries as suffered by full-time workers in private industry. The Bureau of Labor Statistics reports that three percent of full-time workers experienced a nonfatal workplace injury or illness in 2015, the most recent year for which data is available.iii

Additionally, four percent of sharing economy freelancers reported having injured someone else, and three percent reported causing accidental damage. Five percent of respondents have faced legal threats related to their sharing economy work.

Of the 65 percent of respondents who use cars for their sharing economy work, only 17 percent reported currently having commercial auto insurance. Eighty-seven percent of all respondents reported having personal auto insurance coverage, and when asked what they think would happen if they experienced an accident while working a gig job, 27 percent said their personal insurance would take care of it, and 20 percent said the digital platform would take care of it. Of the 28 percent who said they weren’t sure, nearly 40 percent reported worrying about it.

The survey found that sharing economy workers are generally open to the idea of purchasing insurance to protect themselves on the job. Forty-seven percent said they would likely or very likely remain on a platform that required them to buy insurance, while 28 percent said they would be unlikely or very unlikely to stay on the platform. Twenty-six percent were neutral.

This AIG-Marsh sharing economy survey sample is indicative, but not representative of the U.S. population, so certain comparisons may not be statistically significant.

For more, please download the report at www.aig.com/innovativetech.
THE SHARING ECONOMY AND RISK

Today, the sharing economy appears to be a part-time, temporary option for most participants. Sixty-four percent have worked in the sharing economy for less than a year, and 67 percent view their sharing economy role as a part-time or temporary job.

In exploring the potential earnings for sharing economy freelancers, analysts at Deloitte developed a profile of “Bob,” a 22-year-old aspiring architect and photography enthusiast working in the sharing economy to save for grad school.

Deloitte estimates that Bob’s average earnings in the sharing economy would total $1,060 per week, or $55,120 per year. For context, the federal minimum wage for a full-time worker amounts to $12,956 per year. The median U.S. wage worker earns $40,352 per year. Bob’s earnings come from a variety of sharing economy gigs:

- Bob rents his apartment on a home-sharing site two nights a week for $200 per night. He uses another home-sharing app to find a couch to crash on for the nights his apartment is occupied.
- On Mondays, Bob spends eight hours shopping for and delivering groceries, earning $16 per hour.
- Two times per week, Bob spends five hours driving for a ride-sharing service, earning $14 per hour.
- Two other times per week, Bob spends several hours completing assorted tasks such as assembling furniture or completing data entry, for $15 per hour.
- He sells photography services on a few different gig and raft sites.
- When he’s not using his car for his own work, Bob rents it out on a car-sharing platform for $8 per hour.

How much can you earn in the sharing economy?

Bob is a 22 year-old aspiring architect from San Francisco who is saving up for grad school, drives a Ford Focus, and lives in a studio apartment. He is a photography enthusiast. He makes $1060 per week in the sharing economy.

---

A sample work week for a single worker in the sharing economy is $1060, or:

- $55,120 a year
- $40,352 a year
- $22,440 a year
- $12,956 a year

Reprinted with permission from Deloitte
Our survey found that 87 percent of sharing economy freelancers have personal auto insurance and 48 percent have renters or homeowners insurance. However, there is a perceived gap in their coverage for the use of those assets on car-sharing or home-sharing platforms, for example. Just 19 percent of respondents reported having commercial auto insurance, but 55 percent said they are considering buying it.

<table>
<thead>
<tr>
<th></th>
<th>HAVE TODAY</th>
<th>CONSIDERING BUYING</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Personal Insurance</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Auto</td>
<td>87%</td>
<td>55%</td>
</tr>
<tr>
<td>Renters/ Homeowners</td>
<td>48%</td>
<td>33%</td>
</tr>
</tbody>
</table>

**Commercial Insurance**

<table>
<thead>
<tr>
<th></th>
<th>HAVE TODAY</th>
<th>CONSIDERING BUYING</th>
</tr>
</thead>
<tbody>
<tr>
<td>Auto</td>
<td>19%</td>
<td>14%</td>
</tr>
<tr>
<td>General Liability</td>
<td>26%</td>
<td>45%</td>
</tr>
<tr>
<td>Professional Liability</td>
<td>14%</td>
<td>45%</td>
</tr>
</tbody>
</table>

Just 26 percent and 14 percent reported having general liability insurance and professional liability insurance, respectively, with 33 percent and 45 percent considering those options.

**INDIVIDUAL RISK PROFILE**

While Bob’s earnings outpace those of the average U.S. wage worker, he faces a much more complex risk profile—one that also applies to scores of other sharing economy participants who share assets and work across a wide range of platforms. These risks generally fall into one of two buckets. The first contains risks associated with Bob’s work as a service provider in the sharing economy. The second contains risks associated with Bob renting out his apartment, car or other assets. Gig workers operating in the services bucket are exposed to general liability when they’re assembling someone’s furniture, and professional liability when they engage with other companies to conduct data entry or other tasks. While they are likely covered by a Transportation Network Company’s own (TNC) automobile liability when driving for ride-sharing services, other liability exposure exists when using personal cars for deliveries. Often there are multiple policies covering a vehicle—presenting a challenge in sorting out which applies. If a freelancer has multiple platforms running during the course of a day, the sharing of limits and coverage is complicated. There is a gap today in both personal and commercial policies which creates an opportunity to expand coverage that empowers individuals to participate in the sharing economy safely by bringing together risk expertise from what are traditionally known as the Personal and Commercial lines of business.

Across nearly all sharing economy gigs, real service providers like the fictional Bob are exposed to occupational accidents. A worker could injure their back assembling furniture, slip and fall while grocery shopping, or have their camera stolen during a photo shoot. As evidenced by the survey of sharing economy workers, they appear to be more exposed to on-the-job injuries than the average full-time, W-2 workers, and damage or theft of personal property is among the most common adverse events.

Participants in the sharing economy also often expose their personal assets to risk. In addition to direct damage to their personal property such as an apartment and car or even belongings such as televisions and furniture, etc., participants in the sharing economy are exposed to host liability when renting their apartments on home-sharing platforms, and to guest liability when they rent on home-sharing sites or crash on someone else’s couch. As the names suggest, host liability holds the property owner responsible for damages that might occur on their property as a result of their own actions or negligence. Guest liability holds a renter or couch-crasher responsible for damage they inflict during a stay in someone else’s home.

Most likely Bob and the real workers he represents are not aware that they are exposed to all these risks. If they were aware, as mostly part-time workers who set their own schedules, they’re not likely to want to pay for an annual policy. But it is hard to find an insurance market that currently offers a solution on a per-task or per-gig basis.

**CORPORATE RISK PROFILE**

As the platforms facilitating transactions between supply (assets and services provided by independent workers) and demand (companies and customers), sharing economy companies also face exposure to a wide range of risk.

Home-sharing platforms face contingent host and guest liability; TNCs and
Informed by the principle that “if you can digitize it, you can share it,” the progression of the sharing economy is growing exponentially, as more companies prioritize on-demand access over ownership, and as new technology connects businesses to unlock the highest and best use for their assets. This evolution is occurring across various sectors, including:

**WORKSPACE**

One of the fastest-maturing commercial sharing economies is office sharing through the use of digital platforms. Office sharing capitalizes on an estimated 12 percent vacancy rate in U.S. office space to enable flexible workspace usage for businesses that don’t need permanent space. Small startups previously stifled by isolation and strapped down with long-terms leases now share space with other companies, lowering costs and increasing collaboration. With the International Data Corporation estimating there to be 1.3 billion mobile workers worldwide, the answer to office space demand may not be new buildings, but unlocking previously unused space.

Office sharing is a perfect fit in the broader gig economy, which now comprises 34 percent of the work force, making flexible and on-demand workspace more essential to the office space industry. With 120,000 customers across over 198 buildings in 52 cities, along with recent capital funding, industry leader WeWork is now worth a projected $20 billion. Splacer and Peerspace are also enabling access to underutilized assets in a more digitally native manner than WeWork, and are also on the rise.

A similar idea is also transforming the hospitality industry, where since 2010, LiquidSpace has been linking previously idle space in hotels to businesses needing short- or long-term office space. LiquidSpace partnered with Marriott in 2012 to offer rent-by-the-hour space at over 430 hotels. Customers reserve space online as easily as booking a table at a restaurant.

**GLOBAL FREIGHT**

The sharing economy is also beginning to maximize efficiencies and reduce waste in the global freight market without driving any extra miles. The Environmental Defense Fund estimates that 15-25 percent of trucks on the road are empty, and non-empty trucks are 36 percent underutilized. The organization further estimates that “capturing just half of this under-utilized capacity would cut freight truck emissions by 100 million tons per year and reduce expenditures on diesel fuel by more than $30 billion a year.”

Technology has advanced to a
place where it’s now easier to identify under-used space in trucks and other freight containers, and to connect that under-used space with companies that need to move goods. A plethora of start-ups—such as Cargomatic, uShip, Freightos and ShipHawk—connect regional trucks with either partially filled or empty trailers to companies that need on-demand shipping.

Since 2015, Convoy has been connecting truckers with idle freight space to businesses in the Seattle area, with plans to expand after securing $16 million from investors.xviii Through a mobile app, customers can select carriers with similar routes and available space on demand, tracking all shipments by real-time GPS.

CONSTRUCTION

In the construction industry, the sharing economy enables companies to get more use out of equipment that may otherwise sit idle all but one or two days a month. Yard Club, established in 2013 by Colin Evran, connects companies with idle construction equipment to companies needing a particular piece of heavy machinery. It has over $200 million worth of equipment in its online marketplace,xix and facilitated $120 million in transactions in 2016 alone.xx Two years after investing in the start-up, Caterpillar bought Yard Club in 2016 in order to run the Yard Club platform as an internal machine-rental program. Once again, this demonstrates how traditional firms are looking to this new business model for organic evolution and inorganic growth.

WAREHOUSING

As more and more retail trends toward e-commerce, the sharing economy is making warehouse storage space more flexible, efficient and affordable. Online retail requires more storage space than traditional retail,xxi needing elbowroom to package a higher quantity of individual parcels instead of large pallets. Prologis is building the country’s first vertical warehouse that a 53-foot semi-trailer can navigate. This warehouse can store upwards of 1 million square feet of product in the San Francisco Bay Area.xxii

As a new player in the warehouse industry, since its founding by Karl Siebrecht in 2013, Flexe has created an online marketplace for companies to share excess storage space without the restrictions of a long-term lease, allowing companies to share space by the pallet. The company now has 550 partner warehouses with 25 million square feet of storage, with plans to add 10 million more this year.xxiii Flexe added online order fulfilment this past year, with the advantage over Amazon that companies can sell products from their own websites and ship packages in their branding the next day. In one example, Flexe unlocks all the excess leased storage space that Halloween stores have the other 11 months while the merchandise is in stores during October.

SUPPLY CHAIN

Nearly every stage of the commercial supply chain has opportunities for the sharing economy to transform. Floow2 casts a wide net, offering companies across Europe the opportunity to share idle assets and services at virtually every stage of the supply chain, ranging from vehicles and equipment to workers and office supplies. Users with idle assets post their available offerings online, enabling customers with needs to browse an online marketplace of over 25,000 available assets.xxiv After the booking, users leave reviews, maintaining both transparency and reliability.

Risk and Liability Considerations

- **A HOME**: Homes can be shared with visitors (RISK: Property damage/theft)
- **A WAREHOUSE**: Excess storage space is shared (RISK: Worker injury and property damage)
- **A TRUCK**: Empty space on a truck can be utilized (RISK: Damage to vehicles or goods)
- **A OFFICE BUILDING**: Office supplies, workspaces, and workers can be shared (RISK: Professional liability)
Office sharing is a perfect fit in the broader gig economy, which now comprises 34 percent of the workforce, making flexible and on-demand workspace more essential to the office space industry.

**Autonomous Vehicles**

The way we travel today is changing. We share rides. Cars park themselves. Driverless cars are being tested on public roads.

When artificial intelligence and automation take more control over the operation of vehicles, they upend our conventional wisdom about liability. Risks won’t disappear as much as they will shift -- from humans to the collection of machines that power mobility in the future.

AIG conducted a survey of 1,000 road users in the United States, 400 in Singapore, and 400 in the UK. We found that the new community of mobility operators includes:

- auto manufacturers
- the companies that develop the algorithms and software that comprise an autonomous vehicle’s “brain”
- manufacturers of various parts and systems (from traditional parts such as brakes, belts and fluid lines to new devices such as cameras, sensors and communication tools)
- the entities that develop, maintain and own infrastructure such as roadways and traffic lights
- the companies that build and maintain communications networks autonomous vehicles use to communicate with their networks and the cars around them
- suppliers of data such as mapping information
- and many more

**Risk and Liability Considerations**

In many cases, advancements in technology driven by the sharing economy are helping commercial enterprises reduce risk and increase efficiency. In warehousing, for example, atmospheric sensors are making it possible to monitor environmental conditions and prevent water or other weather-related damage.

At the same time, the changes that technology is enabling create new risks that companies need to address. In the warehousing example, technology is enabling more efficient use of vertical storage space, but the risks of worker injury or damage to stored items may increase when stacks get taller.

Many of the platforms enabling the commercial sharing economy today seem to take a “hands-off” approach to liability. They simply connect supply with demand. They sometimes provide a level of coverage, but largely leave commercial liability where it has always rested. Others, like those operating in the shared workspace sector or those that own the tools being rented out to construction companies, may be creating new exposures that need to be addressed with policies that recognize the fluidity of the sharing economy.

**Traditional Companies Engaging with the Sharing Economy**

Well-established companies also take on various kinds of risk when they interact with other companies, including those involved in the sharing economy.

If a company starts allowing its employees to use home-sharing apps for business travel rather than requiring them to use traditional hotels, for example, the decision affects the company’s risk profile and how it structures contracts.

In light of the changes being driven by the sharing economy, corporate risk managers will need to examine and re-design insurance programs, contracts and engagement with different vendors related to transportation, logistics, talent sourcing, food supply and occupational accident and worker compensation, among other issues.
When a component of the car, rather than the driver, is in control, risk shifts among the entities mentioned above. Exposure may shift as well for those responsible for building and maintaining roads, and the digital networks on which autonomous vehicles operate.

Consumers, too, sense the coming shift in liability. The general public expects autonomous features and driverless cars to continue presenting risk, and they see liability shifting as autonomous features take more control of the vehicle. Respondents were presented with several accident scenarios and asked to choose which entities they would consider most liable in each.

In cases where the respondent was the operator of a vehicle with autonomous features that struck a pedestrian in a crosswalk, they viewed themselves as most liable. In the United States, 54 percent cited “the driver” as most liable, compared to 33 percent selecting the manufacturer and 27 percent selecting the software programmer. In the UK, 57 cited “the driver” as most liable, compared to 30 percent selecting the software programmer and 25 percent selecting the manufacturer. In Singapore, 44 percent cited “the driver” as most liable, compared to 37 percent citing the manufacturer and 37 percent citing the software programmer.

In scenarios involving fully driverless vehicles, consumers do see risk shifting to other parties. When the U.S. respondent was an occupant of a driverless vehicle that strikes a child, 50 percent named the manufacturer as most liable, followed by 37 percent naming the software programmer, 23 percent naming the vehicle occupant and 23 percent naming the vehicle owner who, in the case of driverless vehicles, may be another individual or a corporation.

In the same scenario, UK drivers cited the manufacturer and software programmer equally, with 45 percent and 46 percent naming them most liable, respectively. Just 16 percent of Singapore adults cited the occupant and just 18 percent cited the owner of a driverless vehicle as among the most liable.

This sidebar is adapted from the January 2018 AIG study, “The Future of Mobility and Shifting Risk,” and cites data collected in AIG surveys of road users in the U.S., the UK and Singapore.

For more, please download the study at www.aig.com/innovativetech.
CONCLUSION: SOLVING INSURANCE MARKET CHALLENGES

The good news is that sharing economy platforms capture far more data than traditional companies do. Sharing economy companies may have a more accurate, real-time measure of the risk exposure looking forward.

In trying to meet the new demands of the sharing economy, the insurance industry faces a number of distinct challenges that will require new approaches to doing business.

Regulations are at best rapidly changing and often nonexistent. As a competitive advantage, some sharing economy firms do not make financial information public—which the insurance community could use to more fully evaluate their risk and exposure. Most startups allocate capital toward growth rather than devoting it to collateral that insurers typically use to validate credit exposure. Firms grow so quickly, there is little, if any, historical loss information with which to predict future losses and set rates for emerging risks.

The good news is that sharing economy platforms capture far more data than traditional companies do. Sharing economy companies may have a more accurate, real-time measure of risk exposure going forward than companies that use the traditional approach of reviewing several years’ worth of loss data to predict the future. The challenge is in opening up the sharing economy’s data sets to examination, and harnessing huge and complex stores of information to inform pricing decisions in real time.

For example, an insurer can look at 3 three years of historical loss data to predict future losses for a traditional limousine company. A modern ride-sharing company won’t have that kind of historical data, but with the telematics they are collecting, the right model could lead to a more accurate representation of the exposure through new loss correlations that had not previously been considered. This may ultimately lead to more precise rate making. Insurers need to be creative.

One significant challenge is the market and regulators that view personal and commercial lines of insurance as separate. In the sharing economy, lines are blurred. Creating new, innovative insurance products for these markets will require collaboration and risk expertise from across the personal and commercial areas.

Innovation in the sharing economy is inherently risky, but risk should not keep companies from innovating. This is a business model here to stay. Partnership is key for forward-looking insurers and brokers.
CITATIONS

American International Group, Inc. (AIG) is a leading global insurance organization. Founded in 1919, today AIG member companies provide a wide range of property casualty insurance, life insurance, retirement products, and other financial services to customers in more than 80 countries and jurisdictions. These diverse offerings include products and services that help businesses and individuals protect their assets, manage risks and provide for retirement security. AIG common stock is listed on the New York Stock Exchange and the Tokyo Stock Exchange.

Additional information about AIG can be found at www.aig.com | YouTube: www.youtube.com/aig | Twitter: @AIGinsurance www.twitter.com/AIGinsurance | LinkedIn: www.linkedin.com/company/aig. These references with additional information about AIG have been provided as a convenience, and the information contained on such websites is not incorporated by reference into this press release.

AIG is the marketing name for the worldwide property-casualty, life and retirement, and general insurance operations of American International Group, Inc. For additional information, please visit our website at www.aig.com. All products and services are written or provided by subsidiaries or affiliates of American International Group, Inc. Products or services may not be available in all countries, and coverage is subject to actual policy language. Non-insurance products and services may be provided by independent third parties. Certain property-casualty coverages may be provided by a surplus lines insurer. Surplus lines insurers do not generally participate in state guaranty funds, and insureds are therefore not protected by such funds.

© 2017 American International Group, Inc. All rights reserved.
As we discussed in our previous article, the sharing economy has brought about a cultural shift in the traditional insurance sector. Insurance providers are being prompted to offer more flexible insurance solutions, either through brokers or by creating new “off the shelf” products. In this article, we will explore the various players—both traditional and newcomers—that are offering
# The Sharing Economy Insurance Landscape - 2017

Full article at www.sharetribe.com/academy

<table>
<thead>
<tr>
<th>Geographic coverage</th>
<th>Sector</th>
<th>Key partnerships</th>
<th>Insurance for</th>
</tr>
</thead>
<tbody>
<tr>
<td>Global</td>
<td>US</td>
<td>EU</td>
<td>UK</td>
</tr>
<tr>
<td>Accommodation</td>
<td>Uber</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Transport</td>
<td>Airbnb</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Personal items</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Recruitment</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Ridesharing</td>
<td>BlaBlaCar</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Carsharing</td>
<td>SocialCar</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Homesharing</td>
<td>MyTwinPlace</td>
<td></td>
<td></td>
</tr>
<tr>
<td>All types, but focus on Ridesharing</td>
<td>Drivy</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Coworking spaces</td>
<td>Amorens</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Jobbing platforms</td>
<td>RideLink</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Crowdfunding</td>
<td>Car2Go</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>Simplinsurance</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Carsharing</td>
<td>Traity</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Homesharing</td>
<td>Bought by Many</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>Slice Labs</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>Trov</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Personal items</td>
<td>Munich RE</td>
<td></td>
<td></td>
</tr>
<tr>
<td>unknown</td>
<td>unknown</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Ridesharing</td>
<td>unknown</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Homesharing</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Ridesharing</td>
<td>Uber</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Homesharing</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Ridesharing</td>
<td>Munich RE</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Carsharing</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>Easycar</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>Rentacarlo</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Home sharing</td>
<td>Hiscox</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Personal items</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Storage</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Office space</td>
<td>Lloyd's</td>
<td></td>
<td></td>
</tr>
<tr>
<td>All types</td>
<td>Lloyd's</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
The global insurance industry is worth nearly $5 trillion and has been slow to modernize. Mark Wilson, CEO of Aviva, has said

"The industry is in the stone age"

putting itself at risk of losing a share of this lucrative market to new entrants. Observers agree that providing specific insurance for the sharing economy will be one of the largest growth areas for insurers in the next five years. According to the British Insurance Brokers’ Association (BIBA) Executive Director Graeme Trudgill, brokers
products. **Insurers and brokers who are able to react quickly to the market needs and produce flexible products could quickly steal a march on their competitors.** It’s also important for brokers to recognise that while the sharing economy may be developing more rapidly across personal lines, it could soon have a real impact on the SME space too.

According to a survey carried out by market research firm Marketforce in 2016, the vast majority of insurers have made little progress in delivering solutions for the sharing economy. Only 10% have a publicly available offer and another 35% are only at the pilot stage. Over half (55%) have taken no steps towards meeting these new insurance needs, potentially missing out on a significant new line of business as the sharing economy sector scales rapidly. The report recommends insurers to partner with sharing economy platforms in order to get a foothold in this fast-growing market. This has created an opportunity for insurtechs which aren’t just creating opportunity for themselves—they are also generating income for the traditional insurance industry through a range of partnerships. For example, SafeShare’s policies are underwritten by [Lloyd’s of London](https://www.lloydslondon.com), Tróv has partnered
partnerships rather than disruption. It is, indeed, extremely difficult for insurtechs to challenge the incumbents on various accounts: superficial knowledge of the insurance industry; lack of the required capital to underwrite insurance; and lack of the required resources to get involved in the cumbersome regulatory parts of insurance. On the other hand, insurtech startups have a better grasp of consumer expectations, and technology that helps the insurance industry increase efficiency and reduce costs. This is the reason why insurtechs are partnering with established global insurers who have capital and regulatory expertise as well as greater access to resources to help scale and expand across countries. Partnering with insurtech startups is ideal for large companies who do not have to take on the risk of developing an in-house startup.

Concurrently, insurtechs are raising millions of dollars from leading VC firms to help develop and scale their technology. According to KPMG and CB Insights, VC investments in insurtech has quadrupled since 2014. The global insurtech market is in its infancy but is expected to grow at an annual growth rate of over 10% between 2016 and 2020. Global insurers are also prioritizing heavy investment in technology: Axa, Allianz, Munich Re and
Lloyds.

We will now go over how some key traditional insurers are positioning themselves in the sharing economy and developing their thinking and products to tap into this growth environment. A recurrent theme seems to be one of learning for insurers, both because of potential future gains and because they want to be associated with the innovation that is taking place. We will then showcase some fast-growing insurtech startups that are making waves in the insurance space through technology innovation and savvy positioning. We will also mention some smaller, promising insurtechs which could also be of interest for local p2p marketplaces.

Traditional Insurers

Zurich

Zurich is a Swiss global insurer present in more than 170 countries. In 2015, the company established a ‘Sharing Economy Working Group’ to explore opportunities within
economy very closely, both in the EU and in the UK, and have been lobbying and sponsoring various initiatives to develop expertise and position themselves as a company that is tapping into emerging opportunities in this area. Zurich has also been a key contributor to the British Insurance Brokers’ Association (BIBA) 2014 Guide to the Sharing Economy.

Some of Zurich’s initiatives launched in the sharing economy space include:

- Agreement with Uber to extend drivers’ insurances (excess contingency liability) in the Asia-Pacific region.
- Partnership with Airbnb as part of its Host Protection Insurance.
- Cooperation with Spanish startup Relendo (rental of personal items, a marketplace built on top of Sharetribe’s open source).

Allianz

Munich-based Allianz is the world’s largest insurance company. Allianz has set up a unit dedicated to alternative
Below are some of the initiatives Allianz has launched in the sharing economy space:

- In July 2016, Allianz announced that it would provide comprehensive, third-party property, fire and theft insurance coverage for private car insurance customers providing ridesharing services in Australia. John Myler, Chief Market Manager, said “Allianz is committed to its customers and their changing insurance needs. We recognise that there has been a change in how customers use their cars in the sharing economy and we want to ensure they can continue to trust Allianz to protect them as their insurance needs change.”

- In 2016, Allianz signed partnerships with Drivy, (peer-to-peer car rental company), Amovens, (carsharing, p2p, and leasing), RideLink (p2p car rental) and Car2Go (carsharing)

- In July 2016, Allianz launched the Allianz X insurtech incubator. Allianz X is a key pillar of the digital transformation strategy of the Allianz Group and is designed to spot, build, and scale new global business models in the insurtech space. This new division will look for “strategic growth opportunities” in insurtech and adjoining areas like blockchain, artificial intelligence, and virtual reality.
coverage. The startup now distributes Allianz insurance products in 28 European countries through 1,500 online shops.

- Allianz Global Assistance USA established The Sharing Economy Index in 2015 to track consumer confidence in the sharing economy market for travel planning.

**AXA**

AXA is a French global insurer headquartered in Paris. In March 2016, the incoming chief executive, Thomas Buberl, announced the company would be focusing on its digital transformation. The CEO said that embracing the digital future will be crucial to stop Axa from being disrupted by potential new entrants into the market:

_Today our competition is Allianz and Generali, but tomorrow it could be Google and Facebook_
further opportunities in the digital domain. AXA’s innovation strategy includes the creation of an ecosystem of structures dedicated to investment and innovation: AXA Lab (emerging trends detector), Kamet (a technology innovation incubator), AXA Strategic Ventures (venture capital fund with a presence in San Francisco), and AXA Partners (business partnership facilitator). Between 2013 and 2016, Axa has made an investment in digital of €950 million, and has created a separate governance to foster innovation.

The sharing economy is one critical area of innovation for AXA in the short term. AXA sees the sharing economy and new customer behaviours as an opportunity, and is developing partnerships and products around this economy.

Some key partnerships in this space include:

- In May 2015, AXA announced its partnership with BlaBlaCar to offer its users in France an innovative insurance product that provides free additional insurance cover. The partnership was subsequently extended to Spain, Italy, Germany, UK, and Belgium.
Axa has developed partnerships in Spain with p2p carsharing company SocialCar, home exchange community MyTwinPlace, and with pioneer p2p insurer Friendsurance in Germany.

In 2016, AXA partnered with the Asian taxi hailing app Grab and launched AXA Pay-As-You-Grab (“AXA PAYG”). The plan is Asia’s first usage-based commercial motor insurance that allows the registered Grab driver to pay for a lower base premium. Policyholders can save up to 30% on commercial auto insurance when compared to traditional insurance models.

Admiral

Admiral, a UK car insurance specialist, has been developing its sharing economy strategy since 2015 when it set up a sharing economy team. The company is also a leading member of Sharing Economy UK, the trade body for the sharing economy.

In June 2016, the company launched host insurance as an option on all of its home insurance policies, becoming the first major UK insurer to offer specific cover for home-sharing. Customers with Admiral Host Insurance can rent out their property for up to 90 days during the policy term, providing cover for up to two adult guests per bedroom during each rental period. The policy is specifically aimed
sharing, but it also supports car-sharing through partnerships with easyCarClub (since 2015), the largest p2p car rental marketplace in the UK, and Danish car-sharing company Rentecarlo.

**Allstate**

The **Allstate Corporation** is the second largest personal insurer in the United States behind **State Farm**.

Allstate is the first major US insurer to position itself in the home-sharing sector, offering personal property protection tailored to home-sharers. Launched in August 2016, **HostAdvantage** can be added to a homeowner’s existing policy for about $50 a year. The policy is intended to fill some of the personal property protection gaps that may exist in a typical homeowner’s policy or in the Airbnb host protection scheme. Allstate currently offers this policy in a few states and is expected to make it more widely available in the US during 2017.

In 2016, Allstate launched a new insurance product called **Ride for Hire** that provides increased access to insurance coverage for people who drive for ridesharing companies.
activated and the driver is looking for a customer.

MAIF

MAIF is a leading French mutualist insurance company established in 1934 as a teachers’ cooperative. MAIF is ruled by a shared governance and strong values: solidarity, social responsibility, and human-centeredness. These chime very well with the sharing economy and its no intermediaries, peer-to-peer ethos. In January 2015, the company set up a team dedicated to the collaborative economy and emergent practices. Pascal Demurger, Director of the MAIF group, sums it up:

– By supporting their development and ambitions, MAIF intends to be the insurer of reference of the young actors of this new economy with which we share the foundations.

So far, MAIF has insured more than 150 French startups across the sharing economy, from home exchange to p2p delivery and foodtech. In this initial phase, MAIF is focusing on building tailor-made products for startups to gain a deeper expertise on the whole spectrum of sharing economy business models.
In July 2015, the mutualist launched MAIF Avenir as an investment fund dedicated to financing innovation, digital business, and the collaborative economy—all key investment priorities for MAIF. In practical terms, the fund invests in startups to enable MAIF to develop new services for members, gain access to new communities, innovate, better understand the digital economy, new technologies and new usage patterns, and take advantage of the energy that drives these startups to achieve greater agility. MAIF Avenir has an allocated budget of €125 million until 2018 and an average of €30 million per year.

So far, MAIF Avenir has invested in 19 start ups, including:

- **Peer-to-peer carsharing Koolicar** was the fund’s first investment back in 2014. Koolicar is based on a connected box that can be fitted on any type of vehicle, enabling keyless transactions, calculation of mileage and lease duration, and geolocation. In 2016, PSA Peugeot Citroën took part in the capital increase, becoming a shareholder alongside MAIF.

- In 2015, MAIF invested 4 million euros in peer-to-peer home exchange Guesttroguest to help reach its stated goal of 1 million members over 3 years.
• While MAIF currently only operates in France, it is now focusing on providing international solutions, both in the EU and US, for their key partners as they plan their international expansion.

Munich re

Munich re is a leading global reinsurance company—an insurance company that purchases insurance from other insurance companies to manage their risk.

Some of Munich re’s sharing economy initiatives launched in the sharing economy space include:

• In September 2016, Traity, the Madrid-based sharing economy online reputation aggregator, signed a partnership with DAS, a subsidiary owned by Munich re and leader in legal protection insurance services, to provide the first landlord income protection insurance to people with non-traditional forms of employment and no credit scorings. Traity has created a platform that finds correlations between reviews and ratings on social media and the person’s behavior, which can then be used by insurance companies to assess risk.
In 2016, Munich Re invested in Berlin-based Finleap, an incubator that helps launch ntech startups by investing money, linking experts with young entrepreneurs, and providing operational support. In 2016, the company established a new global venture with Digital Partners (DP). DP’s vision is to develop an ecosystem that allows disruptive insurance startups to flourish, to build profitable partnerships together, and enhance the insurance industry’s customer engagement.

In 2016, Digital Partners established partnerships with a number of startups. Some relevant ones include:

- **Bought By Many** – The startup enables individuals with specific insurance needs to obtain better insurance offers through collective buying power. Examples include pet insurance for rare breeds and travel insurance for people with medical conditions. The company attracts a membership of over 250,000 users and is enjoying year-on-year revenue growth of over 100%.

- **Simplesurance** – See above.

- **Slice Labs** – The startup has launched in the US to provide on-demand, pay-per-use insurance for the on-demand economy. An investment by Munich Re enables Slice to quickly expand to other global markets. Read more about Slice Labs below.

- **So-sure** – London-based So-sure is developing a peer-to-peer insurance called Social Insurance.

- **Trōv** – One of the leaders in the insurtech space, Trōv provides single-item coverage for loss, theft, accidental
Fast-growing insurtech startups

SafeShare

SafeShare is a UK-based insurtech that has developed the first blockchain-based insurance solution for the sharing economy. SafeShare offers usage-based coverage and is underwritten by Lloyd’s. The company was named Insurance Startup of the Year at The British Insurance Awards 2016.

SafeShare’s blockchain technology is used to both validate and facilitate transactions. This technology records accurate digital events and protects homeowners and customers by creating “an indisputable record of the insured through a distributed network of proof”. Alex Steinart, SafeShare’s co-founder, explains the company’s ethos:
between counterparties in near real-time and to radically cut the cost of this coordination.

SafeShare has partnered with Vrumi, an office space sharing startup, to launch a new product that protects property owners from losses relating to damage and theft caused by commercial tenants.

**Lemonade**

Launched in September 2016, Lemonade is the first p2p insurer to register as an actual insurance provider. It has its own license in New York and is applying for more licenses across the US. Insurance thought leader Rick Huckstep, argues “*the insurance industry will never be the same again*”. Industry observers are watching Lemonade very closely. If it succeeds, *it will be proof that partnership with traditional insurers is not the only route for insurtechs.*

Lemonade’s peer-to-peer product is based on small groups of policyholders that pay premiums into a claims pool. It has a novel business model in that is powered by artificial
founder Shai Wininger summarises the company’s approach as “challenging the way insurance companies work, with a peer-to-peer business model fuelled by self-servicing technology. We’ve seen this kind of combination breathe new life into other industries, and we’re determined to do the same for insurance”.

Lemonade has set up a feature that allows people to cancel their current policies with legacy providers, obtain a refund, and buy a new policy from Lemonade in one click. Many customers were willing to switch from their existing policies: in the first 48 hours after launch, of the people who switched, 22% came from major legacy providers. Switching providers is typically a lengthy and convoluted process, so eliminating this pain point is likely to provide Lemonade with a significant competitive advantage. Also, approximately 87% of customers bought their first home insurance product through Lemonade. The company broke a record in its first quarter in operation by handling a claim solely by AI, getting it approved and wired in 3 seconds!

Lemonade has raised a $13m seed round from Sequoia Capital and completed a $34 million Series B funding
Metromile

San Francisco-based Metromile launched its per-mile car insurance in 2013 to help low-mileage drivers pay a fairer rate. Rather than charging a flat monthly rate, Metromile bills only for the time a driver is actually driving. Metromile CEO Dan Preston says:

– *If you’re driving under 5,000 miles per year, you will save 40% to 50% on your car insurance by switching to Metromile.*

Metromile has developed a GPS telematics device called Metronome that plugs into the diagnostic port under the dashboard of your car, providing engine data plus insights to optimize driving. Metromile has also developed a mobile app that uses data from the Metronome to view the miles driven, compare trips, check the engine status, locate the car, etc.

In 2015, Metromile partnered with Uber to jointly develop the first technology solution that enables pay-per-mile, personal insurance coverage that complements Uber’s $1 million commercial liability and ensures a seamless
Outside of this time, the driver is covered by Uber’s commercial policy. The Metronome connects with Uber to recognize when drivers are working and are covered by Uber’s insurance so it only charges them for personal use miles.

Metromile has raised $191.5 million in funding and will use the money to acquire an insurance carrier called Mosaic Insurance and to expand to new states in the U.S. Metromile has acquired licenses to operate in all 50 U.S. states, although it is currently only underwriting policies in four.

**Trōv**

Founded in 2012, Trōv is an on-demand insurance platform that lets users buy insurance for specific products for a desired amount of time. Currently, no insurance carrier offers policies on specific devices, and most insurance is issued on an annual basis. Trōv was initially built to digitally store an inventory of your valuable possessions. However, the company recently received $25.5 million in Series C funding to launch on-demand insurance.
The CEO, Scott Walchek, explains the genesis of Trōv:

– There’s enormous value latent in the information about the things people own. That value isn’t being tapped by individuals because it’s hard to collect it. By reducing the friction around collecting the information, and giving people agency over it—we can curate really powerful ways for them to benefit from it. The first big opportunity to emerge is a new way to insure. On-demand protection for just those few things people care about—for as long as they’d like.

When a user inputs a certain product into the app, Trōv simply needs the make and model to generate all the metadata necessary to insure that item and generate a price for insurance. That user can then turn protection on and off for their various items through a simple swipe. Claims can also be filed through a swipe.

Thanks to a partnership with the insurer Suncorp, Trōv launched in Australia in 2016, where the product proved particularly popular with customers aged 18-34. The company launched in the UK at the end of 2016 in partnership with AXA insurance. Gareth Howell, managing director at AXA Insurance, states:

– The launch of Trōv in the UK heralds a new age of insurance, which will see millennials, the most
following this pilot launch. Regulations are part of the reason Tröv is not operating in the U.S. market until 2017, even though it is based in San Francisco. Munich Re will provide underwriting capital and insurance licensing for Tröv in the U.S. Australia and the UK have a single insurance regulatory body across the country, while in the U.S., each state regulates insurance independently within its boundaries.

Slice

Slice was established in 2015 and is based in New York. The company provides a smartphone-based solution to offer pay-per-use insurance for on-demand workers and providers. Slice is currently licensed to sell insurance in 49 US states.

Slice offers a policy for Uber and Lyft drivers that covers drivers from the time they turn on the rideshare application until they turn it off. It raised $3.9m (£2.75m) in growth capital at the end of 2016 and is backed by Horizons Ventures, XL Innovate, and Munich Re. The Slice digital platform will include automated underwriting rules agreed upon by Munich Re. Slice CEO Tim Attia says:
Slice launched its first Homeshare product in October 2016. Unlike the program coverage offered by Airbnb, Slice’s policy is a legal document with the host and is regulated by the state insurance commissioners that provide actual insurance for the host. It binds the insurer to pay for the replacement of damaged property and conforms to all state regulations. It is also primary coverage, meaning it pays first—there is no requirement to collect from the guest or claim against a homeowners policy.

Other insurance options to look out for

Guardhog

Guardhog is a UK-based underwriter with delegated authority from global insurer Hiscox. Guardhog creates their own products and insurance packages for the sharing economy. The cover is on-demand and pay per activity.
Guardhog. Guardhog works with a number of Sharetribe customers in the UK such as Share Our Style.

Their main products include:

- **Host Cover**: for people sharing their homes, including renting, swapping, sitting, storing or workspace.
- **Stuff Cover**: for people sharing their stuff, including, drones, handbags, etc.
- **Storage Cover**: for when people store their stuff in other people’s homes.

**Athos Insurance**

Athos is a US-based insurer that specializes in film production insurance. Athos has signed an exclusive partnership with Sharegrid, the camera-sharing marketplace powered by Sharetribe open source.

**Cover Genius**

Australia-based insurtech startup Cover Genius was nominated best Fintech in the Australian Startcon Awards.
Cover Genius is licensed and regulated for insurance distribution in all of Europe, USA, Canada, Latin America, Australia, New Zealand and some Asian countries.

Peer to peer insurance or online insurance grouping

Peer to peer insurance is a concept that illustrates how group mentality and transparency can be used to create an insurance policy that is fair and fit for purpose. The basic form of peer to peer insurance is as follows:

1. A group of friends hold a policy as a group online.

2. All members chip in to the policy, with some of the money going into a fund and the rest going to the insurer.

3. Damages are paid out of the group fund to group members who have accidents.

4. If the damages exceed the deductible limit, the insurer is called in.
A few existing companies already offer this type of service, like Friendsurance from Germany, Guevara from the UK, and long tail insurance Bought By Many.

Conclusion

We have done a quick rundown of insurance providers and other insurance options that are potentially available to sharing economy entrepreneurs. Our table summarizes the key players, geographies, and their offerings. Many more options exist, but having reviewed existing specialised literature and conducted a number of expert interviews, we have focused on the insurance providers that are best suited for Sharetribe online marketplace owners and your current needs. As we discussed in the previous article, depending on your needs, it may also be a good idea to approach a specialised insurance broker who can give you a 360 degree overview of the insurance landscape and design innovative solutions for you. In the UK, the British Insurance Brokers’ Association (BIBA) has listed a number
time-consuming and, at times, frustrating process for a budding entrepreneur. While we have drawn a rough picture of the current insurance and sharing economy landscape, it is very likely that any insurance product will need to be tailored to your specific marketplace business model and growth plan. We recommend that you set some time aside to reflect on your insurance needs.

We will wrap up this article with some questions that should help you figure out your insurance needs. Clarifying your needs is critical in finding the most suitable insurance product or solution for your platform and users.

1. Can you face the costs of self-insure i.e. paying for replacing/repairing your users’ items yourself? What is the average value of items exchanged?

2. What is the main trigger for providing insurance options to your users? Feedback from users? A horror story?

3. What are you trying to achieve by providing insurance to your users? Is it added value for the users or an additional revenue stream for you?
4. Are you looking to provide insurance to your platform (to cover potential legal liability for damage or injury to the users), the borrower, or the lender?

5. What is your roadmap and projection estimates? Do you think insurance may be critical to facilitating that expansion?

6. Where are you registered and where are your current and potential future users based?

7. What is your tolerance threshold and internal capacity for regulatory complexity and traditional insurance bureaucracy?

8. How much transaction data are you generating which could help pave the way to any negotiation with an insurer?

We will shed more light on the complex field of insurance and provide further clues in the next article. Read the previous article on insurance.
<table>
<thead>
<tr>
<th>Category</th>
<th>Insurers</th>
</tr>
</thead>
<tbody>
<tr>
<td>Ridesharing</td>
<td>Allianz, Munich RE, Lemonade</td>
</tr>
<tr>
<td>Coworking spaces</td>
<td>Munich RE</td>
</tr>
<tr>
<td>Jobbing platforms</td>
<td></td>
</tr>
<tr>
<td>Crowdfunding</td>
<td></td>
</tr>
<tr>
<td>Home-sharing</td>
<td></td>
</tr>
<tr>
<td>Personal items</td>
<td>Munich RE, Munich RE, Lemonade</td>
</tr>
<tr>
<td>Storage</td>
<td></td>
</tr>
<tr>
<td>Office space</td>
<td>Lloyd’s, Vrumi</td>
</tr>
<tr>
<td>New York, soon more states</td>
<td>All types, Lloyd’s</td>
</tr>
<tr>
<td>France, soon EU &amp; US</td>
<td>All types, but focus on mobility, Outshare, Kodicar, GuesttoGuest, Yescopa</td>
</tr>
<tr>
<td>LATAM: AUS, NZ</td>
<td></td>
</tr>
<tr>
<td>Parts of Asia</td>
<td></td>
</tr>
<tr>
<td>Unknown</td>
<td></td>
</tr>
<tr>
<td>Unknown</td>
<td></td>
</tr>
<tr>
<td>Unknown</td>
<td></td>
</tr>
<tr>
<td>Unknown</td>
<td></td>
</tr>
<tr>
<td>Unknown</td>
<td></td>
</tr>
</tbody>
</table>
Esther Val

Esther Val has over 15 years experience working in Brussels, London and Barcelona in the areas of International Relations, Public Policy & Regulation and Public Affairs for a wide spectrum of organisations. Her current work focus is on social innovation, sharing economy and corporate social responsibility (CSR). Esther loves to research and write on inspiring topics with significant social impact potential.

You might also like…

Insurance: The Next Frontier for Online…

How to choose the right business…

What you need to know before starting…
Transportation Network Company Insurance Principles for Legislators and Regulators
Transportation Network Company Insurance Principles for Legislators and Regulators

2015
The NAIC is the authoritative source for insurance industry information. Our expert solutions support the efforts of regulators, insurers and researchers by providing detailed and comprehensive insurance information. The NAIC offers a wide range of publications in the following categories:

**Accounting & Reporting**
Information about statutory accounting principles and the procedures necessary for filing financial annual statements and conducting risk-based capital calculations.

**Consumer Information**
Important answers to common questions about auto, home, health and life insurance — as well as buyer’s guides on annuities, long-term care insurance and Medicare supplement plans.

**Financial Regulation**
Useful handbooks, compliance guides and reports on financial analysis, company licensing, state audit requirements and receiverships.

**Legal**
Comprehensive collection of NAIC model laws, regulations and guidelines; state laws on insurance topics; and other regulatory guidance on antifraud and consumer privacy.

**Market Regulation**
Regulatory and industry guidance on market-related issues, including antifraud, product filing requirements, producer licensing and market analysis.

**NAIC Activities**
NAIC member directories, in-depth reporting of state regulatory activities and official historical records of NAIC national meetings and other activities.

**Special Studies**
Studies, reports, handbooks and regulatory research conducted by NAIC members on a variety of insurance-related topics.

**Statistical Reports**
Valuable and in-demand insurance industry-wide statistical data for various lines of business, including auto, home, health and life insurance.

**Supplementary Products**
Guidance manuals, handbooks, surveys and research on a wide variety of issues.

**Capital Markets & Investment Analysis**
Information regarding portfolio values and procedures for complying with NAIC reporting requirements.

**White Papers**
Relevant studies, guidance and NAIC policy positions on a variety of insurance topics.

For more information about NAIC publications, view our online catalog at:

http://store.naic.org

© 2015 National Association of Insurance Commissioners. All rights reserved.
<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>I. INTRODUCTION</td>
<td>2</td>
</tr>
<tr>
<td>II. COVERAGE ISSUES</td>
<td>3</td>
</tr>
<tr>
<td>III. INSURANCE COVERAGE ISSUES</td>
<td>7</td>
</tr>
<tr>
<td>A. Insurance Company Perspective</td>
<td>7</td>
</tr>
<tr>
<td>B. Driver Perspective</td>
<td>10</td>
</tr>
<tr>
<td>C. TNC Perspective</td>
<td>12</td>
</tr>
<tr>
<td>D. Other For-Hire Transportation Perspective</td>
<td>13</td>
</tr>
<tr>
<td>E. Passenger/Third-Party Perspective</td>
<td>13</td>
</tr>
<tr>
<td>IV. POTENTIAL SOLUTIONS TO COVERAGE ISSUES</td>
<td>13</td>
</tr>
<tr>
<td>A. Review Established Insurance Options</td>
<td>13</td>
</tr>
<tr>
<td>B. Potential for New Products/Coverage Options</td>
<td>14</td>
</tr>
<tr>
<td>C. Spreading the Insurance Burden between TNCs and TNC Drivers</td>
<td>16</td>
</tr>
<tr>
<td>D. Coverage Amounts and Types</td>
<td>16</td>
</tr>
<tr>
<td>1. Coverage Amounts</td>
<td>16</td>
</tr>
<tr>
<td>2. Coverage Types</td>
<td>17</td>
</tr>
<tr>
<td>V. PUBLIC COMMUNICATION, EDUCATION AND OUTREACH</td>
<td>18</td>
</tr>
<tr>
<td>VI. INDUSTRY ACTIVITY</td>
<td>18</td>
</tr>
<tr>
<td>VII. CONCLUSION</td>
<td>19</td>
</tr>
</tbody>
</table>
I. INTRODUCTION

Traditional ride-sharing, also known as carpooling, is covered by most personal auto policies (PAPs). But transporting passengers for a fee that exceeds the simple sharing of expenses is excluded in most PAPs. The coverage issues associated with transporting passengers in personal vehicles for a profit are the focus of this discussion of ride-hailing services, also known as transportation network companies (TNCs).

A TNC is an organization that arranges transportation for a fee using a technology platform such as mobile application (app) or website. TNCs create online apps that connect riders and drivers. Drivers use the online apps to sign up to provide rides for a fee. The TNC takes a portion of each fee. In order to open a TNC account, potential passengers first download the app and must provide credit card information for billing purposes and agree to the terms and conditions for use. The TNC terms and conditions generally indicate that the TNC is not the transportation provider and disclaims the safety of the driver among other disclaimers and notices. TNCs typically have driver requirements such as minimum age limits, valid driver’s license, current vehicle registration and insurance, at a minimum. Once the account is created, a potential rider simply logs onto the mobile app, enters his or her location and is matched with a driver in the vicinity.

The three most widely used TNCs are UberX (available in 53 countries and more than 140 U.S. cities), Lyft (available in at least 60 locations) and Sidecar (available in Boston; Charlotte, NC; Chicago; Long Beach, Los Angeles, Oakland, Marin and other San Francisco Bay Area cities; San Diego; Seattle; and Washington, DC).

Regulation of TNCs is in its infancy. The first step in regulating TNCs is to determine which state or local entity has authority over TNCs. Regulatory authority varies from state to state.

In California, TNCs are regulated on a statewide level by the California Public Utilities Commission (CPUC), while taxis are regulated by municipalities. The first government agency to impose standards for TNCs was the CPUC. Currently, many questions exist regarding proper regulation of this new service, as well as how to fill any insurance coverage gaps. Regulation of the traditional taxi or limousine service is much more developed. Historically, taxis and limousines are licensed by the state or municipal transportation authority. Taxis and limousines are required to be inspected, and drivers must be properly licensed typically through a commercial driver’s license. In addition, taxi operators are required to have commercial insurance in effect 24 hours a day, seven days a week that protects passengers and third parties (i.e., pedestrians or other drivers) in the event of an accident. Required insurance limits for taxis vary substantially by state and jurisdiction. Taxi drivers and their trade associations argue that TNCs are in the same business as taxis because they transport passengers for a fee and should be subject to the same insurance and licensing requirements.

TNCs have gained in popularity in dozens of U.S. cities over the past few years. However, new business ventures often come with new risks. In the case of TNCs, one of the main risks to consumers are coverage gaps such as those effecting the Liu family who were hit by a TNC
driver during Period 1, resulting in the death of 5 year old Sophia Liu and severe injuries to her mother and brother.

The insurance issues associated with TNC activities arise because TNC drivers use personal cars for that commercial activity but do not have commercial auto insurance. Drivers who are often new to the transportation business are transporting people they do not personally know. This activity has traditionally been the realm of commercial taxis. PAPs generally exclude this exposure by what is commonly called a “livery exclusion.” Livery exclusions were written because transporting passengers for a fee adds exposure and creates more risk than was contemplated by existing personal auto insurance rates or coverages. Personal auto insurers are concerned that they are experiencing losses from these additional exposures because their policyholders do not inform them that they drive for TNCs. From the personal auto insurer’s perspective, this activity may translate into increased risk of loss due to: 1) additional miles driven; 2) heightened geographic hazard caused because TNC drivers typically find matches in urban, high-traffic locations; 3) unfamiliar roads; 4) driver distraction caused by TNC apps; 5) more people in the car that can be injured; and 6) the additional risk caused as drivers rush to accept matches and pick up and deliver passengers in a timely manner.

II. COVERAGE ISSUES

Major coverage gaps will exist unless the TNC provides appropriate insurance coverage for TNC drivers during all TNC activities (i.e., from app on to app off), or the driver maintains appropriate coverage. For the driver to maintain coverage, either personal auto insurers would need to amend their livery exclusions, or a commercial coverage would need to be readily available along with a willingness of drivers to move to a commercial product.

Even though the largest TNCs provide commercial coverage, those TNC’s policies may not provide the same uninsured/underinsured motorist (UM/UIM) coverage, medical payments coverage, comprehensive coverage or collision coverage that the drivers had purchased in their personal auto policies. Drivers are often unaware of the extent of the livery exclusions. Other drivers are aware of the livery exclusions and simply hope for the best. The resulting gaps in coverage could affect the driver and his or her personal vehicle, any person suffering damages and also lienholders of vehicles used for TNC services. Auto lenders such as the California/Nevada Credit Union League are concerned that gaps in physical damage coverage could expose lenders to loss of collateral. Senate Bill 294 which is currently pending signature by the Governor in Utah provides that if a TNC vehicle has a lien, the TNC driver must notify the lienholder of their use of the vehicle for TNC services.

The common coverages in a PAP, all of which typically include exclusions for livery or carrying passengers for a fee, are: 1) liability coverage; 2) medical payments coverage; 3) uninsured/underinsured motorist coverage; and 4) physical damage coverages. Coverage gaps for TNC drivers may exist because TNCs do not require drivers to maintain commercial coverage. Instead, TNCs rely on a combination of the driver’s personal auto insurance and the TNC’s commercial insurance to cover the TNC activities. Many TNC drivers’ PAPs do not provide coverage when the driver is using his or her vehicle to transport passengers for a fee.
insurance provides coverage for bodily injury or property damage caused by an auto accident for which the insured is legally responsible. In addition to payment for bodily injury and property damage, PAPs typically provide defense costs such as legal fees. Most PAPs are written on a split-limits basis. Policies written on a split-limits basis are stated with three types of limits: 1) bodily injury per person; 2) bodily injury per accident; and 3) property damage per accident. For example, if the policy limits are stated as 100/300/50, the limit of liability for bodily injury per person is $100,000, with a cap of $300,000 for bodily injury due to the accident and a maximum payment for property damages of $50,000. The alternative is to write policies on a combined single-limit basis, where one limit potentially applies to all bodily injury and property damage per accident.

Medical payment coverage applies regardless of fault and covers bodily injury to the named insured as well as family members and any passengers in the auto at the time of the accident. Personal injury protection provides coverage for basic expenses such as medical costs that an insured and his or her family may incur in a no-fault state. Roughly one-fourth of states in the U.S. have a form of no-fault automobile laws, meaning they allow auto accident victims to collect benefits from their own insurers regardless of who was negligent.

Uninsured motorist coverage provides compensation to the insured and their family members when an uninsured driver causes losses. Underinsured motorist coverage pays the insured or their family members when a driver causes losses that exceed the negligent driver’s policy limits.

Physical damage coverages include collision coverage and comprehensive coverage. Both coverages are written with deductibles, typically ranging from $250 to $1,000. Collision coverage pays for damages to an insured’s own vehicle resulting in an accident with another vehicle or an inanimate object. Comprehensive coverage, also known as other than collision coverage, protects against direct physical damage not caused by a collision.

The largest TNCs have responded to the issue regarding the livery exclusions in PAPs by providing liability, UM/UIM and comprehensive/collision coverages while the vehicle is being used to transport passengers for a fee. However, an issue remains regarding the point at which the vehicle is being used for a livery service. The issue is compounded by the fact that livery exclusions vary between policies, making it impossible to conclusively state when personal driving stops and commercial driving begins for each driver. Nevada statute takes the position that if a TNC driver does not disclose to their personal auto insurer their occasional use of the vehicle for transportation network services the policy may be canceled or coverage denied at any time during the policy term based on material representation. The question that each TNC driver must answer, based on his or her own PAPs language and state law, is: When does his or her personal auto coverage stop and the TNC’s commercial policy begin?

There are three exposure periods in the TNC business model. Period 1 is characterized as the point when the driver logs into the TNC application but is not matched with a passenger. Period 2 is when a match is made and accepted, but the passenger has not yet entered the vehicle. Period 3 is when the passenger has been picked up and is occupying the TNC driver’s vehicle. Most livery exclusions do not explicitly address TNCs because the exclusions were written before TNCs came into use. If there is ambiguous language in a policy exclusion, it can cause confusion.
regarding which policy, commercial or personal, covers each period and may lead to coverage disputes over claim payments.

<table>
<thead>
<tr>
<th>TNC Coverage Periods</th>
<th>Definition</th>
</tr>
</thead>
<tbody>
<tr>
<td>Period 1</td>
<td>Pre-match</td>
</tr>
<tr>
<td>Period 2</td>
<td>Match accepted -&gt; passenger pick up</td>
</tr>
<tr>
<td>Period 3</td>
<td>Passenger occupying the vehicle</td>
</tr>
</tbody>
</table>

The California Department of Insurance held an investigatory hearing March 21, 2014, relating to insurance issues for TNCs. As a result of the hearing, Insurance Commissioner Dave Jones recommended TNCs provide $1 million in primary liability insurance that begins the moment the driver switches on the app. The final law adopted in California provides for $1 million primary commercial auto insurance in Periods 2 and 3, but in Period 1 allows the TNC, the driver or a combination of the two to carry 50/100/30, with the TNC providing $200,000 in excess coverage.

Several TNCs have attempted to resolve coverage issues by purchasing primary liability and UM/UIM coverage for exposure Periods 2 and 3. According to its website, UberX maintains a “commercial insurance policy for ridesharing with $1 million of coverage per incident.” The website also states that the “policy covers drivers’ liability from the time a driver accepts your trip request through the app until the completion of your trip. This policy is expressly primary to the driver’s PAP. An additional insurance policy covers drivers when they are logged into the UberX app but have not yet accepted a trip request.” UberX maintains “uninsured/underinsured motorist coverage (UM/UIM) of $1 million per incident for bodily injury in Period 2 and Period 3, in case another motorist causes an accident and doesn’t carry adequate insurance.” UberX also maintains contingent liability coverage for Period 1 but with much lower limits.

UberX maintains contingent comprehensive and collision coverage with limits that mirror the drivers’ PAP in Periods 2 and 3. Lyft carries contingent comprehensive and collision coverage with a $2,500 deductible and a $50,000 maximum for physical damage to your vehicle.” The chart below shows the insurance coverage provided by UberX, Lyft and Sidecar as described on their websites. Currently, the coverage provided by the largest TNCs during Period 1 is contingent coverage, meaning that it only pays claims if and when the claims are denied by the driver’s personal auto carrier.

There has been debate about the risk of driving (exposure) in Period 1 and whether it is similar to the risk of driving a personal vehicle without a TNC app being turned on. TNCs argue that Period 1 does not include any increased exposure caused by TNC activities. The reasoning behind this argument is that the driver does not yet have a passenger in the vehicle and is driving a known, rated vehicle. The contrary argument of most insurers and consumer groups is that Period 1 presents an increased exposure because drivers are distracted while looking at the TNC

© 2015 National Association of Insurance Commissions
app on their cellphone to find a passenger and may be rushing to locations that show passengers ready for pick-up. Few disagree that Period 2 and Period 3 include increased exposure due to having passengers in the car, loading and unloading passengers, and finding safe areas for pick-up and drop-off and perhaps driving unfamiliar routes. Others may argue that the exposure is increased in all three time periods because drivers-for-hire are more frequently in urban, often highly congested areas. For example, TNCs often provide rides to and from concerts and sporting events with increased congestion. Urban and highly congested areas are known for higher frequency of accidents and, therefore, are associated with higher insurance rates. Several states have identified the insurance coverage concerns and enacted legislation to fill some, but not all, of the coverage gaps.

<table>
<thead>
<tr>
<th>TNC</th>
<th>Insurer</th>
<th>Period 1</th>
<th>Periods 2 &amp; 3</th>
</tr>
</thead>
<tbody>
<tr>
<td>Raiser LLC/UberX¹</td>
<td>James River</td>
<td>Contingent Liability ($50,000 per person/$100,000 per accident/$25,000 property damage)</td>
<td>• Commercial auto liability and uninsured motorist/underinsured motorist coverage up to $1 million per occurrence</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>• Contingent collision and comprehensive equal to the amount maintained by the driver in his or her PAP ($1,000 deductible)</td>
</tr>
<tr>
<td>LYFT² (valid in all states except New York)</td>
<td>James River</td>
<td>Contingent Liability ($50,000 per person/$100,000 per accident/$25,000 property damage)</td>
<td>• Commercial auto liability and uninsured motorist/underinsured motorist coverage up to $1 million per occurrence</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>• Contingent collision and comprehensive up to $50,000 per accident ($2,500 deductible)</td>
</tr>
<tr>
<td>SIDECAR³ (liability limits differ for the state of Washington and for Chicago)</td>
<td>Nautilus Insurance Company</td>
<td>• Commercial auto liability and uninsured motorist/underinsured motorist coverage up to $1 million per occurrence</td>
<td>• Liability limits ($50,000 per person/$100,000 per accident/$30,000 property damage)</td>
</tr>
<tr>
<td></td>
<td></td>
<td>• Contingent collision $50,000 per accident ($500 deductible)</td>
<td></td>
</tr>
</tbody>
</table>


© 2015 National Association of Insurance Commissions
III. INSURANCE COVERAGE ISSUES

A. Insurance Company Perspective

The Insurance Services Office (ISO) countrywide PAP currently excludes liability coverage for any “insured,” or “for that insured’s liability arising out of the ownership or operation, of a vehicle while it is being used as a public or livery conveyance.” The ISO multistate exclusion currently exempts share-the-expense carpooling, meaning that the exclusion does not apply to share the expense of carpools. ISO state-specific endorsements may have additional exceptions to the livery exclusion. Non-ISO policy language may also contain exceptions such as operating an auto as a volunteer service for a nonprofit charitable organization or a governmental agency, or transporting physically or mentally handicapped persons or persons 60 years of age or older.

Other common livery exclusions exclude damages arising out of the ownership, maintenance, or use of a vehicle while it is being used: 1) to carry persons for a charge; 2) for commercial purposes; 3) for compensation; 4) for a fee; or 5) for hire.

Other policies exclude “any auto you are driving while available for hire by the public.” Livery exclusions commonly apply to: medical payments, personal injury protection, collision and comprehensive (other than collision), as well as UM/UIM coverage. The subtle nuances of the various livery exclusions are called into question as regulators, legislators, insurers and consumers attempt to identify coverage gaps between the personal auto policies owned by TNC drivers and the commercial policies owned by TNCs.

Generally, exclusions are used by insurers because the exposures are thought to be beyond those found in a typical policy for the type of property or activity being insured. Another reason for the exclusion may be that the coverage is associated with a rating plan for coverage of an alternate insurance product. Driving for a TNC fits both of those descriptions as it blurs the lines between personal and commercial risks and is considered extraordinary to the typical PAP. In order to include the risk in PAP, insurers would need to adjust their rating for the commercial exposure to ensure that all insureds were not subsidizing those additional risks for the small percentage of insureds actually driving for TNCs.

The general factors used to determine auto insurance rates are listed in the chart below. It should be noted that not all insurers use every factor and that some state laws prohibit or limit the use of some of the risk classification factors. Some of the reasons a TNC exposure may vary from a typical personal automobile exposure include:

- TNC drivers typically go to urban, congested areas in order to find matches. Urban areas are typically associated with a higher frequency of accidents and, therefore, command higher insurance rates.

---

5 Not all states allow such exclusion under personal injury protection (PIP).
© 2015 National Association of Insurance Commissions
• Normal use such as driving to work or school typically means fewer miles driven and results in lower rates, whereas commercial use such as TNC driving could mean more miles driven and higher frequency of loss.

• TNC drivers may be distracted as they are checking one or more applications on their mobile device for matches or using the GPS tracking to determine delivery routes.

• Additional passengers in the vehicle who may be injured in an accident could result in higher severity of loss.

<table>
<thead>
<tr>
<th>Factors That Affect Auto Insurance Rates</th>
</tr>
</thead>
<tbody>
<tr>
<td>Territory</td>
</tr>
<tr>
<td>Normal use of auto (to work or school)</td>
</tr>
<tr>
<td>Age</td>
</tr>
<tr>
<td>Gender</td>
</tr>
<tr>
<td>Marital status</td>
</tr>
<tr>
<td>Driving record</td>
</tr>
<tr>
<td>Driver education</td>
</tr>
<tr>
<td>If student – grade point average</td>
</tr>
</tbody>
</table>

A Pinnacle Actuarial Resources study on ride-hailing, commissioned by the Property and Casualty Insurers Association of America (PCI), found that “rideshare drivers who put in about 1,000 miles a year could expect to pay $100 to $200 a year to obtain coverage for Period 1. Full-time drivers in Colorado would pay $1,000 to about $1,500, and full-time drivers in San Francisco would pay an additional $3,000.”

Personal auto carriers are beginning to voice their concerns over ride-hailing services. Many believe that engaging in livery service is a material change to the insurance contract and, therefore, the insurer may legally cancel the policy at any time. Even if the insurer does not cancel the policy initially, it may choose not to renew the policy at the end of the contract term. Insurers are concerned about the increased risks not considered under a typical PAP that should be considered if the vehicle is used to transport passengers for hire.

The driver’s involvement in TNC activities may lead to:

• Confusion regarding which insurer has a duty to defend.

• Delays in the claims handling process.

• Increased legal and administrative costs.

---


© 2015 National Association of Insurance Commissions
Insurers are also concerned that TNC drivers will not disclose the fact that they drive for a TNC.\(^7\) The variances in language used for livery exclusions and the determination of which exposure period the accident took place create additional costs for the insurer that are ultimately passed on to all policyholders.

TNC-related claims affect the duty to defend, as well as the duty to indemnify. Under all standard personal auto policies, insurers have a duty to indemnify the insured for covered damages and also have a broader duty to defend. Because the duty to defend is broader than the duty to indemnify, an insurer may have to pay defense costs even if it can ultimately prove that the accident occurred during an excluded time period, such as Period 3. Some insurers argue that if a driver participated in TNC activity, the duty to defend should be placed on the TNC’s insurance instead of the driver’s PAP.

Regulators and legislators should consider the duty to defend issue and provide clear mandates regarding whether the driver’s PAP insurer, the TNC insurer or both have a duty to defend. In California, Assembly Bill 2293, effective in relevant part on July 1, 2015, made it clear that a PAP shall not provide any coverage for TNC activities unless the policy expressly provides for that coverage during the relevant time period. But other provisions of AB2293 are less clear and could require PAP insurers and TNC insurers to share the duty to defend when the PAP expressly provides coverage for a particular period. Colorado’s Senate Bill 14-125 did not include a duty to defend provision, but did include a pro-rata sharing provision.

While the duty to indemnify is more straightforward, it is also affected by TNC activities. Claims involving TNC drivers require more analysis to determine which insurer, personal auto or commercial, must indemnify the TNC driver. Insurers must determine the time period during which the accident occurred and in some cases analyze the livery exclusions to determine which insurer has the duty to indemnify. Insurers will need TNCs to provide data in a timely fashion in the event of a claim. Both the California and Colorado laws have provisions requiring TNCs to cooperate in the claims handling process.

Currently, the largest TNCs have obtained coverage through surplus lines producers. Surplus lines insurers are non-admitted companies not regulated to the extent of most personal auto insurers. Surplus lines carriers are not subject to state regulatory approval of their rates and forms nor are they generally covered by state guarantee funds. Surplus lines insurers frequently take on new types of risks or high risk activities because coverage is not available in the admitted market. They are experienced with using flexible rating plans involving large amounts of judgment in setting their pricing and in adapting policy language to more specifically contain the coverage they are willing to provide. Because the insurer is writing coverage for the TNC but covering losses resulting from the TNC drivers using their personal autos, it is important that the insurer’s claim process be clearly described to those drivers and passengers, including the process to submit claims.

Personal auto insurers should consider customer outreach to inform policyholders of their stance regarding ride-hailing and any available coverage options. Policyholder education campaigns should identify exposures created by ride-hailing not generally contemplated in standard personal auto policies. Companies should be able to answer policyholder questions regarding policy exclusions, exposure periods created by ride-hailing arrangements, coverage gaps and options for additional coverage. Companies should inform producers about their policies regarding ride-hailing and give them the tools they need to answer policyholder questions.

Education for policyholders and producers regarding ride-hailing could include:

- Definitions of terminology, such as ride-hailing, TNC and coverage periods.
- Court interpretations of common livery exclusions.
- Identification of any legal barriers to canceling policies due to the driver’s involvement in ride-hailing.
- Disclosure of state-mandated coverage for TNCs, including when the coverage begins and ends.
- Listing of the options for insurers to determine if consumers are participating in ride-hailing and whether the response qualifies as a warranty or a misrepresentation affecting possible rescission of the policy.
  - Potential options include listing a question on:
    - Initial application.
    - Survey or questionnaire.
    - Renewal form.

B. Driver Perspective

TNCs have provided drivers with a way to earn extra income in their spare time at the push of a button, but drivers seldom ask questions about potential liability or hidden risk exposures. TNCs attempt to limit their liability through disclaimers. One disclaimer on a TNC’s website states, “You agree that the entire risk arising out of your use of the services, and any third party good or services obtained in connection therewith, remains solely with you, to the maximum extent permitted by applicable law.” The disclaimer goes on to state, “This disclaimer does not alter

---

8 (DRAFTING NOTE: TNC drivers have filed lawsuits in California and other states alleging they are TNC employees instead of independent contractors. The outcome of those lawsuits will have no impact on the amounts or types of coverage that TNCs should be required to provide to protect passengers and the general public.)

© 2015 National Association of Insurance Commissions
your rights as a consumer to the extent not permitted under the law in the jurisdiction of your place of residence."9

The above disclosure reiterates the importance for regulators and legislators at the state and/or municipal level to put measures in place before accidents occur and consumers are left without coverage or recourse for losses.

Roughly 25 state insurance departments have issued bulletins cautioning consumers of the potential limitations of insurance coverage. Additionally, three states have passed legislation setting coverage requirements for TNCs to protect consumers. Several additional states are debating legislation setting clearer insurance coverage rules and standards. States may use NAIC software such as State Based Systems (SBS) to track consumer complaints and investigations concerning TNCs by keyword. The NAIC has published two consumer alerts to explain coverage issues and identify what consumers can do to protect themselves. The NAIC is also in the process of updating its NAIC Consumer Shopping Tool for Auto Insurance, as well as A Consumer’s Guide to Auto Insurance, to include information regarding the use of TNC services.

Driver awareness communications could include the following information:

- Standard personal auto policies often include exclusions for transporting passengers for a fee.
  - Drivers should read their PAP to determine if exclusions exist and if so, at what period the exclusion goes into effect.
  - Drivers should contact their insurer or agent to inform them of their decision to participate in ride-hailing arrangements as a driver and discuss the details of their policy to determine coverage options. Some insurers may cancel or non-renew insureds that drive for TNCs. If this happens, the driver will need to find an alternate insurer. It is illegal in most states to drive without proof of financial responsibility. In some states, this may result in fines, suspension of driving privileges or repossession of the vehicle.

- The availability of coverage through the TNC with which they intend to do business.
  - Drivers should read the TNC’s insurance policy to determine the period in which the TNC’s commercial auto policy begins and ends in the livery process.
  - Drivers should also determine the types and amounts of coverage is available through the TNC.
    - Drivers should ask about the liability limits, coverage for medical payments, personal injury protection in no-fault states, comprehensive (otherwise known as other than collision), collision coverage and UM/UIM coverage.

© 2015 National Association of Insurance Commissions
• Drivers should determine if defense costs are included in the TNC’s commercial auto policy or who would cover the cost of legal fees if they were to be sued.

• If coverage gaps exist between when the driver’s PAP ends and the TNC’s commercial auto policy begins, drivers should consider purchasing additional coverage. Additional coverage may be available as an endorsement to the driver’s PAP or as a separate commercial policy.

It is important to note that in some instances, a TNC driver may not be the named insured on the PAP. Standard personal auto policies are designed to provide coverage for the named insured and their family members. A family member is a person related to the named insured by blood, marriage or adoption and who resides in the named insured’s household. A child who lives away for college may also be covered under the standard policy. If the TNC driver is someone other than the named insured, the driver needs to make sure that he or she is covered under a policy that will provide coverage for any claims arising out of TNC activity.

C. TNC Perspective

Some TNCs argue against requiring the TNC to bear the primary insurance burden in Period 1. They argue that requiring the TNC to provide insurance for a driver during Period 1 creates a moral hazard because the driver who is on a personal drive may be tempted to turn on the TNC app for the sole purpose of obtaining insurance during Period 1. Some TNCs argue that drivers might drop PPA insurance altogether and turn the app on before any trip. Others argue that if the TNC’s insurance provides higher limits than the driver’s own policy, the driver will have an incentive to file a claim with the TNC’s insurance even if the driver was on a pleasure/commute trip at the time of a collision. Milliman (on behalf of UberX) studied the impact of ride-hailing drivers in Period 1 and determined that “the net result on the personal auto insurance market to all policies was $0.70/policy.”

Proponents of ride-hailing believe it will increase road safety due to fewer intoxicated drivers on the roadways and fewer personal vehicles due to the additional options for public transportation. TNCs also argue that many drivers are part-time. They argue that forcing these drivers to buy commercial livery insurance is too high a burden and that future development in on-board navigation and clear laws may turn many motorists into part-time TNC drivers.

TNCs further argue that many personal automobile insurers offer quasi-commercial coverage for purposes like real-estate agents and pizza delivery drivers and that providing coverage for TNC drivers is fairly straightforward.

10 (DRAFTING NOTE: Insurer representatives point out that TNC’s could quickly shut off drivers who were not accepting rides.)


© 2015 National Association of Insurance Commissions
TNCs argue that they should not be required to have higher limits than traditional for-hire transportation such as taxis. Regulators and legislators considering this concept should examine whether the limits for traditional for-hire transportation provide sufficient protection for the public in 2015.

D. Other For-Hire Transportation Perspective

Two stakeholders in this process, the R Street Institute and Taxi, Limousine and Paratransit Association (TLPA), argue that the insurance limits should be the same for all for-hire transportation services. The TLPA argues that if TNCs are allowed to have lower insurance limits when the vehicle is being used personally, or before it is matched to a passenger, similar lower insurance limits should also apply to taxis and limousines during the same time periods.

The TLPA also challenges the notion that many or most TNC drivers are part-time. They argue that many TNC drivers are full-time commercial drivers and should be required to have full-time commercial coverage just as taxis are required to do. Regulators and legislators considering this concept might consider drawing a distinction between part-time and full-time TNC drivers for insurance requirement purposes.

E. Passenger/Third-Party Perspective

Passengers see TNCs as a tool for increased mobility, a cutting-edge service that provides a popular alternative to taxi services. Passengers and third parties not involved in TNC transactions can be completely unaware of the hidden dangers but are not immune to damages caused by the increasing use of TNC applications. Seamless liability coverage in appropriate amounts without gaps properly covers passengers, third party drivers and pedestrians injured in a TNC accident caused by a TNC driver. In order to protect passengers, pedestrians and third party drivers, legislators and local regulators should make sure that: 1) the periods of TNC service are clearly defined; 2) there are no coverage gaps; and 3) the types and limits of coverage are appropriate. Liability and UM/UIM coverage are essential to protecting passengers and third parties. Regulators and legislators may also consider requiring medical payments coverage.

Consumer groups and attorneys advocating on behalf of pedestrians injured by TNC drivers during Period 1, including advocates for the Liu family who lost their 5 year old daughter in a Period 1 collision, reason that TNCs and TNC drivers should be required to carry the same liability limits in Period 1 as they do in Period 2 and Period 3. Passengers, pedestrians and other third parties also advocate for UM/UIM to protect them in the event they are in an accident involving a TNC caused by a third party with little or no insurance.

IV. POTENTIAL SOLUTIONS TO COVERAGE ISSUES

A. Review Established Insurance Options

While ride-hailing activities create many coverage issues, there are also a variety of solutions possible. The ideal insurance solution is for ride-hailing drivers to have coverage on a full time
basis available for all ride-hailing activities. To achieve that, the least complex approaches are that either the driver would purchase commercial coverage or the TNC would provide full coverage for all three TNC activity periods.

Commercial auto coverage purchased by the TNC driver does not appear to be a realistic option at this time. Commercial auto insurance for livery exposures typically costs between $5,000 and $7,000 per year, which some argue is too expensive for TNC drivers. To date, there has been no evident movement toward creating a commercial policy tailored to the TNC paradigm of part-livery-risk, part-personal auto-risk. If such a product were to be made available, it would require that the TNC driver be committed enough to the livery trade to buy commercial coverage. Also, it would need to be available at a price that is within reason compared to personal auto coverage.

So far, in unregulated environments, TNCs have been successful in explicitly or implicitly transferring some or all of the responsibility for buying insurance onto the driver. Thus, the personal auto insurer is engaged in sorting out which claims are covered and in creating a coverage response of its own.

New laws in California and Colorado impose important coverage mandates but still allow for coverage gaps, at least for UM/UIM and physical damage coverages. Unless the personal auto insurer acts to amend its coverages, coverage gaps will remain despite the new statutory requirements.

Unless TNCs change their business model and agree to provide full commercial coverage for TNC drivers, a more complex hybrid of coverage between the TNC and the PAP will need to be created.

B. Potential for New Products/Coverage Options

Policy endorsements are being developed for PAPs to fill coverage gaps. These endorsements will be a valuable tool to close gaps for TNC drivers willing to purchase them.

These hybrid insurance products, adding some level of coverage for TNC activities onto PAPs, are being developed as this paper is being written. They are being introduced by innovative insurers willing to take on the calculated risk and be the first to gain market share in an evolving and growing space.

Because the products are not being standardized but are being developed by different insurers, they will likely establish coverage via different methods for different time periods. The new products present many concerns for insurance regulators, including, but not limited to, the cost for the new hybrid coverage.
In California, Metromile, a managing general agent partnered with National General Insurance Company, began selling hybrid TNC/PAP insurance as of Feb. 18, 2015. That filing offers an endorsement to a PAP deleting the livery exclusion, but only during Period 1. With regard to cost, National General Assurance Company, a partner of Metromile, is implementing a vehicle use factor for TNC use. Farmers Insurance filed a TNC endorsement with California in mid-February, and review is pending. MetLife and GEICO products have also been mentioned in recent articles.

Outside of California, Erie Insurance Company offers an endorsement that makes the TNC driver’s PAP excess for TNC activity for any insured with a business classification on his or her personal auto. It covers all three time periods. As of Jan. 1, 2015, it is available only in Illinois and Indiana, but the company expects to eventually offer it in all 12 states in which it sells insurance.

According to the Insurance Journal, the United Services Automobile Association (USAA) plans to offer auto insurance coverage in Colorado that will protect TNC drivers from the moment their mobile apps are turned on until they are matched with a passenger. “The pilot program, which will begin in February, extends a member’s existing auto policy coverages and deductibles, and costs about $6 to $8 more per month, or roughly $40 to $50 more for a six-month insurance policy, according to the carrier.”

In developing these new hybrid insurance products, TNCs should share with insurers any statistical information they track regarding driver and passenger characteristics, delivery patterns, hours of operation and any other factors relevant for determining insurance rates. One way to accumulate information on TNC driver behavior may be the use of telematics installed in driver vehicles.

ISO plans to modify its Personal Auto Program in two ways: 1) by amending its public or livery exclusion to explicitly exclude personal auto coverage whenever an insured is logged into the TNC application as a driver; and 2) by offering TNC drivers new endorsements they can add to their PAP that expressly provide coverage, for an additional charge, for TNC activities while no passenger is in the car. Under ISO’s new program, TNC drivers may have the option to buy an endorsement that provides coverage during Period 1 or an endorsement that provides coverage

---

during both Periods 1 and 2. ISO currently does not plan to make available an endorsement to cover Period 3 – the time period while the passenger is in the car.

Consumer groups and the Rhode Island Department of Insurance both raised the issue that any absolute exclusion for Period 1 or Period 2 driving could harm drivers who forget to switch off the app. Regulators and legislators may want to consider whether an absolute bar to coverage for any claims that occur while the app is open is appropriate, or whether a driver who is no longer engaged in TNC services (but leaves the app on) should be provided coverage under the PAP or the TNC’s insurance. Regulators and legislators as well as TNCs and members of the public should be aware that drivers could sign up for multiple TNCs and be available for hire on several TNC apps at one time. This could be an issue particularly during Period 1 in determining who has a duty to provide coverage if the personal auto insurer has a TNC exclusion during all three periods. Insurance regulators will need to ensure that they devote adequate resources to provide for a timely review process for forms and rates related to these new products.

C. Spreading the Insurance Burden between TNCs and TNC Drivers

Assuming hybrid policies become readily available; regulators and legislators that chose to do so may be able to require TNCs and TNC drivers to share the burden of providing insurance for TNC activities. This can be accomplished in a number of ways. Regulators and legislators can require:

- TNC drivers to maintain coverage in Period 1 and TNCs to maintain coverage in Period 2 and Period 3.
- TNC drivers to maintain primary coverage up to a certain limit (for example, $100,000) while requiring TNCs to maintain excess coverage that pays for accidents resulting in damages above the primary limit.
- TNC drivers to maintain primary coverage in Period 1 up to a certain limit (for example, $100,000) while requiring TNCs to maintain excess coverage in Period 1 and primary coverage in Period 2 and Period 3.
- Various combinations of the above.

D. Coverage Amounts and Types

Regulators and legislators must also decide what amounts and types of insurance to require.

1. Coverage Amounts

It is crucial to determine coverage amounts high enough to protect persons and property injured or damaged in a TNC accident. Regulators and legislators can look to other states for guidance on the amounts of coverage to require. A provision in the Colorado legislature, Senate Bill 14-125, enacted June 6, 2014, required the Colorado Commissioner of Insurance to conduct a study regarding the limits of coverage provided during Period 1. The study, published in January 2015, was inconclusive due to a lack of credible loss data. However, it was determined that the liability limits ($50,000 per person/$100,000 per accident/$30,000 property damage) required in
Colorado during Period 1 are sufficient until additional data is developed to warrant a change. California requires $1 million in TNC insurance while a passenger is in a TNC vehicle (2014 Cal. Legis. Serv. Ch. 389, A.B. 2293). Regulators and legislators may also look at the amounts required for other transportation providers such as taxis and limousines for guidance. If those amounts were set in the distant past, they may need to be adjusted for inflation.

Regulators and legislators may also consider establishing coverage amounts by the defined TNC time period. Some legislation requires lower coverage amounts during Period 1 because there is no passenger in the vehicle at that time. However, this practice results in less coverage for a third party hit during Period 1. The San Francisco car accident in which an Uber-contracted driver struck and killed 6-year-old Sophia Liu and injured her mother and brother occurred during Period 1. Consumer groups argue that injury or death should not be worth less merely because it occurred in one period instead of another.

2. Coverage Types

- **Liability**—Liability coverage must be required to protect passengers and third parties injured by TNC drivers.

- **UM/UIM**—In order to adequately protect consumers, regulators and legislators should consider requiring UM/UIM in the same amount as liability coverage. While TNCs argue that some taxicabs are not required to provide UM/UIM, the better practice is to require TNCs to maintain this coverage. Otherwise, a passenger injured in an accident caused by an uninsured or underinsured motorist may be left without recourse.

- **Comprehensive and collision**—This coverage is necessary to protect the TNC driver’s car. While liability insurance provides coverage for an injured passenger, it does not provide coverage for damage to the driver’s car. Because the livery exclusion applies to comprehensive and collision coverages, drivers currently have no way to obtain comprehensive and collision coverage for TNC activities unless they separately purchase a commercial policy, which is currently cost-prohibitive.

- **Medical payments**—This provides first-party coverage for drivers and passengers, and is used to pay for medical expenses related to an accident, without allocating fault.

---

17 Colorado Department of Regulatory Services Division of Insurance. Commissioner Marguerite Salazar. (January, 2015).
V. PUBLIC COMMUNICATION, EDUCATION AND OUTREACH

Legislators and regulators should communicate with TNC drivers and passengers about the insurance issues.

Many regulators have found that media (TV, radio, newspaper and blogs) are very interested in the ride-hailing issue and a good avenue for presenting accurate, unbiased information to the public.

Because this is a new and rapidly changing industry, public education and outreach is critical to ensure that TNC drivers and passengers are aware of potential coverage gaps and limitations.

Public service announcements (PSAs) or consumer alerts can be a great tool in relaying information to both drivers and passengers. Unlike a news story, regulators and legislators can control the message, and provide detailed information.

TNC drivers and passengers, by definition, use smart phones. Information should be easily available, in a mobile-enabled format, on insurance department websites.

State insurance departments should post alerts on their websites informing consumers of potential coverage gaps and how to remedy them. This should include information about any newly available hybrid PAPs that expressly provide coverage for TNC drivers.

Regulators and legislators should require TNCs to:

- Prominently post their insurance policies on their websites along with disclaimers about any potential coverage gaps.
- Disclose to drivers whether damage to the drivers’ cars will be covered by the TNC’s policy in the event of an accident.
- Provide their drivers with insurance information, including the claims handling process.
- Revise their mobile apps to provide a link to insurance information, including claims handling information for all passengers.
- Electronically notify its mobile app users whenever it changes any coverage types or amounts on its insurance policy.
- Notify the driver’s personal auto carrier during the approval process to become a TNC driver.

VI. INDUSTRY ACTIVITY

UberX and multiple insurers worked together to draft a *TNC Insurance Compromise Model Bill* (Model Bill) released to the public March 26. The American Insurance Association (AIA), Farmers Insurance, Liberty Mutual, Lyft, the National Association of Mutual Insurance

© 2015 National Association of Insurance Commissions
Companies (NAMIC), the Property and Casualty Insurance Association of America (PCIAA), State Farm, UberX and USAA publicized their support of the Model Bill. AIA, NAMIC, PCI, UberX and USAA submitted comments on the white paper in February and the paper was revised pursuant to comments received.

The Model Bill outlines a plan to create coordination of coverage between personal coverage carried by TNC drivers and commercial coverage carried by TNCs. The Model Bill expressly permits personal auto policies to exclude coverage for TNC related driving and calls for mandatory primary coverage by the TNC, TNC driver or a combination of the two during Period 1 with liability limits of $50,000 per person, $100,000 per occurrence, and $25,000 or $30,000 for property damage depending on the state. The Model Bill also requires primary coverage during Period 2 and Period 3 with liability limits of at least $1 million. It includes reference to existing statutes mandating auto insurance coverage and intentionally excludes additional coverage options such as collision and comprehensive insurance. The Model Bill includes provisions regarding an insurer’s right to exclude coverage under an unendorsed PAP, disclosures required of TNCs regarding insurance matters to their drivers and a requirement for TNC drivers to carry proof of TNC insurance coverage. It also mandates cooperation between all parties involved in claim investigations.

The primary difference between the Model Bill and suggested legislation included in the white paper is relative to consumer protections provided through additional coverage options such as: uninsured motorist, underinsured motorist, medical payment, and comprehensive and collision coverage.¹⁸

**VII. CONCLUSION**

TNCs create a new option for peer-to-peer transportation. New technologies and business ventures often present risks not previously contemplated by state and local laws. Regulators and legislators can resolve risk exposure concerns by putting laws in place that require specific insurance coverage for TNCs and TNC drivers and eliminate coverage gaps. If not clearly defined, shifting coverage between personal auto and commercial coverage could be costly and inefficient, as well as leave gaps in coverage. TNC laws should clearly define the terminology and identify the insurance coverage and limits required during each period. The chart in Appendix A contains a list of local ordinances and state legislation currently in place regarding TNCs.

---

## APPENDIX A – OVERVIEW OF CURRENT LEGISLATION

<table>
<thead>
<tr>
<th>City</th>
<th>Date Passed</th>
<th>Office</th>
<th>Insurance Requirements</th>
</tr>
</thead>
</table>
| Austin, TX         | 9-14        | Austin City Council         | • Transportation network companies (TNCs) will provide commercial automobile liability insurance with a minimum combined single limit of $1 million for each occurrence of bodily injury and property damage for accidents involving TNC vehicles in transit, beginning with the time that the TNC driver accepts a trip request on the TNC’s digital network, or during the accepted trip, and ending when the rider departs the vehicle, naming the city of Austin as an additional insured.  
• The policy shall be accompanied by a commitment from the insurer that such policy will not be cancelled or coverage reduced without at least 30 days’ notice.  
| Baton Rouge, LA    | 6-14        |                             | • Transportation network application companies shall mean companies operating in the city of Baton Rouge and parish of East Eaton Rouge that use a digital network or software application to connect a passenger to transportation network services provided by a transportation network operator.  
• Such companies must maintain a commercial liability insurance policy that:  
  o Provides coverage of at least $1 million per incident for accidents involving a transportation network operator from the time the operator accepts a trip request until the completion of a trip, regardless of whether the operator maintains personal insurance adequate to cover any portion of a claim.  
  o Provides uninsured/underinsured motorist (UM/UIM) bodily injury coverage of at least $1 million per incident.  
  o During the time that a transportation network operator is available for service but not providing service, provides additional bodily injury coverage of at least $50,000 per person and at least $100,000 per accident, and coverage of at least $25,000 for property damage per accident, in the event that the operator's personal insurance policy does not pay.  
  o Provides that written notice shall be given the taxicab control board upon any cancellation or termination of the policy.  
[https://www.municode.com/library/lb/la/baton_rouge, east_baton_rouge_parish/codes/](https://www.municode.com/library/lb/la/baton_rouge, east_baton_rouge_parish/codes/) |
| Birmingham, AL     | 7-14        |                             | • TNCs must maintain $1 million for personal injury, property damage or advertising liability during all coverage periods.  
*The ordinance not available online at this time.*                                                                                                                                                                                                                                                                                                                                                                                                                                                      |
| Chicago, IL        | 5-14        | Chicago City Council        | • At least the following minimum coverage:  
  o (1) Commercial general liability insurance with limits of not less than
### APPENDIX A – OVERVIEW OF CURRENT LEGISLATION

<table>
<thead>
<tr>
<th>City</th>
<th>Date Passed</th>
<th>Office</th>
<th>Insurance Requirements</th>
</tr>
</thead>
<tbody>
<tr>
<td>Cincinnati, OH</td>
<td>11-14</td>
<td>City of Cincinnati</td>
<td>$1,000,000 per occurrence, for bodily injury, personal injury, and property damage.</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>(2) (i) Commercial automobile liability insurance with a combined single limit for bodily injury and property damage of $1 million per occurrence, covering liability resulting from any occurrence arising out of or caused by the operation of a transportation network vehicle (including owned, hired and non-owned vehicles) while the applicant's transportation network driver has accepted a ride until the completion of the ride; and (ii) automobile liability insurance with limits for bodily injury and property damage not less than the minimum amount required under Section 7-601 of the Illinois Vehicle Code, codified at 625 ILCS 5/7-601(20k/40k/15k), per occurrence, covering liability resulting from any occurrence arising out of or caused by the operation of a transportation network vehicle (including owned, hired and non-owned vehicles) while the applicant's transportation network driver is logged onto the transportation network provider's Internet-enabled application or digital platform showing that the driver is available to pick up passengers until such driver accepts a ride.</td>
</tr>
</tbody>
</table>
|               |             |                 | Chapter 9-115: [www.amlegal.com/nxt/gateway.dll/Illinois/chicago_il/municipalcodeofchicago?f=templates$f
|               |             |                 | n=default.htm$3.0$vid=amlegal:chicago_il](www.amlegal.com/nxt/gateway.dll/Illinois/chicago_il/municipalcodeofchicago?f=templates$f
<p>|               |             |                 | n=default.htm$3.0$vid=amlegal:chicago_il) |</p>
<table>
<thead>
<tr>
<th>City</th>
<th>Date Passed</th>
<th>Office</th>
<th>Insurance Requirements</th>
</tr>
</thead>
<tbody>
<tr>
<td>Columbus, OH</td>
<td>7-14</td>
<td>Columbus City Council</td>
<td>• TNCs are required to provide at least $1 million of commercial liability coverage, as well as uninsured and underinsured motorist coverage.</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>• TNCs must also match the driver’s personal auto coverage for collision and comprehensive (other than collision).</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>• No vehicle for hire owner's license shall be issued or renewed by the director without evidence of liability protection. It shall be unlawful to operate or permit the operation of any vehicle for hire until the owner of the vehicle has deposited and maintained on deposit with the director, evidence of liability protection. The liability protection limit shall not be less than the amount listed below for the specific vehicle for hire to be licensed for liability imposed by law for damages on account of bodily injuries, death or property damages (other than injuries, death or property damages of the owner or vehicle for hire driver) in any one accident resulting from the ownership, maintenance or use of each such vehicle for hire:</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>o $300,000 for taxicabs.</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>o $300,000 for pedicabs.</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>o $500,000 for livery vehicles.</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>o $300,000 for horse carriages.</td>
</tr>
</tbody>
</table>

| Dallas, TX   | 12-14       | Dallas City Council     | • From the time a driver indicates that the vehicle is available to accept a ride request, but before the driver has accepted a ride request, the vehicle and driver must be covered by contingent primary liability coverage for injury and property damage arising out of or caused by the operation of the vehicle in the amount of $50,000 per person; $100,000 per occurrence for bodily injury; and $25,000 in property damage. |
|              |             |                         | • From the time a driver accepts a ride request, either by being physically hailed or dispatched, to the time the passenger exits the vehicle, the vehicle and driver must be covered by primary commercial automobile liability coverage with a combined single limit of liability for injury and property damage arising out of or caused by the operation of the vehicle in the following amounts: |
|              |             |                         |   o For vehicles with a manufacturer’s rated seating capacity of one to eight |

© 2015 National Association of Insurance Commissions
22
### APPENDIX A – OVERVIEW OF CURRENT LEGISLATION

<table>
<thead>
<tr>
<th>City</th>
<th>Date Passed</th>
<th>Office</th>
<th>Insurance Requirements</th>
</tr>
</thead>
<tbody>
<tr>
<td>Dayton, OH</td>
<td>12-14</td>
<td></td>
<td>- The ordinance does not address insurance requirements for TNCs. Taxicab operators must carry $1 million for bodily injury and property damage. The ordinance is not available online at this time.</td>
</tr>
<tr>
<td>Houston, TX</td>
<td></td>
<td></td>
<td>- $1 million commercial automobile liability insurance is required with a combined single limit for bodily injury and property damage during Period 2 and Period 3.</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>- Commercial automobile liability insurance coverage no less than the minimum coverage amounts specified in the Texas Motor Vehicle Safety Responsibility Act ($30,000/$60,000/$25,000) during Period 1 is required.</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>- The insurance policy required must be available to cover claims regardless of whether a driver maintains insurance adequate to cover any portion of the claim, be disclosed on the permittee’s Internet-enabled application and website, and maintained in force all times that the TNC offers or provides TNC service.</td>
</tr>
<tr>
<td>Little Rock, AR</td>
<td>11-14</td>
<td>Milwaukee Common Council</td>
<td>- A commercial auto liability policy must be maintained in force at all relevant times with the following limits: $250,000 bodily injury per person/$500,000 bodily injury per occurrence/$50,000 property damage.</td>
</tr>
<tr>
<td>Milwaukee, WI</td>
<td>7-14</td>
<td>Milwaukee Common Council</td>
<td>- Minimum required policy limits are $50,000/$100,000/$10,000 during all periods.</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>- Uninsured motorist coverage with limits comparable to the respective liability limits for the vehicle are also required during all periods.</td>
</tr>
<tr>
<td>Minneapolis, MN</td>
<td>7-14</td>
<td>Minneapolis City Council</td>
<td>- TNCs are required to maintain at least $1 million of commercial liability coverage per occurrence, covering vehicles while they are &quot;active.&quot;</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>- TNCs or drivers maintain minimum liability limits of $50,000/$100,000/$30,000 while drivers are logged into a TNC’s digital network but not engaged in a prearranged ride.</td>
</tr>
</tbody>
</table>

© 2015 National Association of Insurance Commissions

23
## APPENDIX A – OVERVIEW OF CURRENT LEGISLATION

<table>
<thead>
<tr>
<th>City</th>
<th>Date Passed</th>
<th>Office</th>
<th>Insurance Requirements</th>
</tr>
</thead>
</table>
| Oklahoma City, OK     | 10-14       | Oklahoma City Council         | • Single limit coverage required for each accident or occurrence during Period 2 and Period 3:  
    o $100,000 involving six or fewer seating capacity.  
    o $750,000 involving seven to nine seating capacity.  
    o $1,000,000 for seating capacity for 10.  
• During Period 2 and Period 3, the TNC is required to provide coverage with minimum limits of ($50,000/$100,000/$25,000). [https://www.municode.com/library#!/ok/oklahoma_city/codes/] | Amended by Ordinance 25,002.                                                                                                     |
| San Antonio, TX       | 12-14       | San Antonio City Council      | • TNCs are required to carry minimum liability limits during Period 1 of $50,000/$100,000/$25,000 and excess coverage of $200,000. Liability coverage must be primary.  
| Salt Lake City, UT    | 7-14        | Salt Lake City Council        | • TNCs are required to carry the same liability insurance limits as other ground transportation companies (taxis and limousines). There is some debate remaining about when this coverage should begin and end.  
• Insurance coverage levels are set by determining the highest limits set by the Federal Motor Carrier Safety Administration, Utah Department of Transportation or U.S. Department of Transportation.  
• The required limits at the time ordinance was passed was $1.5 million per occurrence. [http://slcdocs.com/council/agendas/2014agendas/November/Nov25/112514A7D3.pdf] |                                                                                                                                                                                                                               |
| Seattle, WA           | 7-14        | Seattle City Council          | • TNCs are required to maintain no less than $100,000 per person and $300,000 per accident of liability coverage, as well as uninsured motorist coverage with the same minimums. Coverages are required when the for-hire vehicle is “operating,” which includes when there is a passenger in the vehicle, the office dispatch records show that the vehicle had been dispatched or the for-hire driver has offered transportation services to a passenger. [http://clerk.seattle.gov/~archives/Ordinances/Ord_124524.pdf] |                                                                                                                                                                                                                               |
# APPENDIX A – OVERVIEW OF CURRENT LEGISLATION

<table>
<thead>
<tr>
<th>City</th>
<th>Date Passed</th>
<th>Office</th>
<th>Insurance Requirements</th>
</tr>
</thead>
<tbody>
<tr>
<td>Tulsa, OK</td>
<td>8-14</td>
<td>Tulsa City Council</td>
<td>- The driver of the Transportation Network Vehicle (TNV) must maintain minimum liability limits of $25,000/$50,000/$25,000.</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>- TNCs must have a $1 million per incident excess policy, as well as step in to pay losses not covered by the driver’s personal auto coverage. [<a href="https://library.municode.com/index.aspx?clientID=14783%5C&amp;stateID=36%5C&amp;statename=Oklahoma">https://library.municode.com/index.aspx?clientID=14783\&amp;stateID=36\&amp;statename=Oklahoma</a></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>California</td>
<td>9-14</td>
<td>California Public Utilities Commission</td>
<td>- All TNC coverage amounts must be primary, and the TNC insurer maintains the duty to defend and indemnify in Period 2 and Period 3.</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>- TNC insurance shall maintain coverage in the amount of $1 million for death, personal injury and property damage.</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>- TNCs must also maintain $1 million UM/UIM coverage from the moment the passenger enters the vehicle until they exit.</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>- TNCs shall maintain primary liability coverage of at least $50,000 per person/$100,000 per incident/$30,000 property damage.</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>- TNCs shall maintain excess coverage for TNCs and drivers of at least $200,000 during Period 2 and Period 3.</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>- Coverage may be maintained by drivers or TNCs or any combination of the two.</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>- Drivers’ personal auto insurer is not required to defend or indemnify the insured while the driver is logged on to the TNC’s online-enabled application unless coverage is provided through an amendment or endorsement to their policy providing for such coverage. [<a href="http://www.naic.org/documents/committees_c_sharing_econ_wg_2014_cal_legis_serv_ch_389.pdf">www.naic.org/documents/committees_c_sharing_econ_wg_2014_cal_legis_serv_ch_389.pdf</a>]</td>
</tr>
<tr>
<td>Colorado</td>
<td>6-14</td>
<td>Colorado Public Utilities Commission</td>
<td>- TNCs or drivers must maintain primary liability insurance coverage for drivers for incidents involving drivers during a prearranged ride in the amount of at least $1 million per occurrence.</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>- While drivers are logged into a TNC’s digital network but are not engaged in a prearranged ride (Period 1):</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>- TNCs or drivers shall maintain primary liability limit equal to at least the state minimum ($50,000 per person/$100,000 per accident/$30,000 property damage)</td>
</tr>
</tbody>
</table>

© 2015 National Association of Insurance Commissions
<table>
<thead>
<tr>
<th>State/Territory</th>
<th>Enacted Date</th>
<th>Office</th>
<th>Insurance Requirements</th>
</tr>
</thead>
</table>
| District of Columbia                    | 12-14        | Council of the District of Columbia   | TNCs must maintain a commercial liability policy with at least $1 million per incident coverage from the time operators (drivers) accept a trip request until completion of the trip.  
TNCs must provide at least $1 million per incident of UM/UIM coverage.  
TNCs must provide contingent comprehensive and collision coverage of at least $50,000.  
Drivers or TNCs must provide primary liability coverage of at least $50,000 per person/$100,000 per accident/$25,000 property damage while operators (drivers) are available for service but not providing service in the event that operators’ personal auto insurance policy does not pay. |
| Illinois                                | 1-15         | Illinois General Assembly             | From the moment TNC drivers log onto the app until they either accept a ride request or they log off the app/digital network:  
- Auto liability insurance must be maintained for at least $50,000/$100,000/$25,000.  
- TNCs must maintain contingent liability insurance in the event a participating TNC driver’s own auto liability policy excludes coverage according to its policy terms or does not provide at least the limits stated above.  
From the moment drivers accept a ride request until they complete the transaction or ride is complete:  
- The TNCs, drivers or any combination of the two must maintain $1 million primary auto liability insurance for death, personal injury and property damage.  
- The insurer has the duty to indemnify and defend the insured.  
- Coverage is not contingent upon denial of claim by personal auto insurer. TNCs must provide coverage beginning with first dollar of a claim if TNC drivers do not maintain coverage or there is a lapse in coverage.  
From the moment a passenger enters the vehicle until the passenger exits the vehicle:  
- $50,000 of UM/UIM coverage is required |
## APPENDIX A – OVERVIEW OF CURRENT LEGISLATION

<table>
<thead>
<tr>
<th>State/Territory</th>
<th>Enacted Date</th>
<th>Office</th>
<th>Insurance Requirements</th>
</tr>
</thead>
</table>
| Virginia        | 2-15         | Virginia General Assembly | During Period 2 and 3:  
  - TNC required to maintain primary coverage with $1 million limit.  
  - TNC must provide uninsured and underinsured coverage with $1 million limit.  
  - Requirements may be satisfied by TNC maintained insurance, TNC partner insurance or any combination of the two. If the policy is maintained by TNC partner, it must be verified by the TNC.  
  - TNC Insurers have exclusive duty to defend and indemnify unless TNC partners insurance expressly provides otherwise.  
  - Coverage under TNC insurance policy shall not be dependent on a personal auto insurer first denying a claim. Nor is the personal auto insurer required to deny claim for TNC insurance to provide coverage.  
  - Personal auto insurers are not required to provide primary or excess coverage unless the policy expressly provides for that coverage including by amendment or endorsement.  
  - If the app fails en route to pick-up or drop-off of a passenger TNC insurance coverage is presumed to remain in force. 

  During Period 1:  
  - Until 1-1-2016: TNC insurance shall provide secondary liability coverage of at least $125,000 per person, $250,000 per incident, and $50,000 property damage.  
  - After 1-1-2016: TNC insurance shall provide secondary liability coverage of at least $50,000 per person, $100,000 per incident, and $25,000 property damage.  
  - Requirements may be satisfied by TNC maintained insurance, TNC partner insurance or any combination of the two. If the policy is maintained by TNC partner, it must be verified by the TNC.  
  - Requirements may be satisfied by TNC partner insurance, contingent TNC insurance or any combination of the two. If the policy is maintained by TNC partner, it must be verified by the TNC. |
## APPENDIX A – OVERVIEW OF CURRENT LEGISLATION

<table>
<thead>
<tr>
<th>State/Territory</th>
<th>Enacted Date</th>
<th>Office</th>
<th>Insurance Requirements</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td></td>
<td>verified by the TNC.</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>• Until 1-1-2016: If the TNC partner vehicle is insured under a personal auto insurance policy that does not exclude coverage then such policy shall provide primary coverage and an insurance policy maintained by the TNC shall provide excess coverage for up to at least $1 million.</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>• If TNC partner insurance ceases for any reason, TNC must provide primary coverage.</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>For all Periods:</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>• TNC must agree to disclose within 30 days of request receipt to any party involved in a TNC related incident, TNC partner’s use of app in claims investigation.</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>• Insurance coverage maintained by TNC may be placed with admitted insurer or surplus lines company specified in state statutes.</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>• TNC must file proof of insurance with State Department of Insurance.</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>• TNC must comply with alternative insurers in claims investigations regarding TNC partners.</td>
</tr>
</tbody>
</table>


---

The National Association of Insurance Commissioners (NAIC) is the U.S. standard-setting and regulatory support organization created and governed by the chief insurance regulators from the 50 states, the District of Columbia and five U.S. territories. Through the NAIC, state insurance regulators establish standards and best practices, conduct peer review, and coordinate their regulatory oversight. NAIC staff supports these efforts and represents the collective views of state regulators domestically and internationally. NAIC members, together with the central resources of the NAIC, form the national system of state-based insurance regulation in the U.S.

For more information, visit www.naic.org.
ORDER ON CROSS-MOTIONS FOR SUMMARY JUDGMENT

John C. Coughenour, UNITED STATES DISTRICT JUDGE

*1 This matter comes before the Court on the cross-motions for summary judgment by Daniil Trofimovich and Brittany Trofimovich (Dkt. No. 19) and Defendant Progressive Direct Insurance Company (Dkt. No. 15). Having thoroughly considered the parties’ briefing and the relevant record, the Court finds oral argument unnecessary and GRANTS Defendant’s motion (Dkt. No. 15) and DENIES Plaintiffs’ motion (Dkt. No. 19) for the reasons explained herein.

I. BACKGROUND

Plaintiff Daniil Trofimovich is a Lyft driver. (Dkt. No. 20-1 at 4.) At the time relevant to these motions, Trofimovich had “Platinum” status with Lyft, meaning he was entitled to certain benefits, including roadside assistance. (Id. at 188, 190.) Trofimovich also had automobile insurance coverage from Defendant Progressive Direct Insurance Company. (Id. at 193.) His plan excluded damages arising out of the use of the vehicle while “carry[ing] persons or property for compensation or a fee.” (Id. at 215.)

On the morning of June 17, 2016, Trofimovich received a fare request from non-party Taelor Dinson. (Id. at 8.) During the ride, Dinson told Trofimovich that she was in a tough financial situation and was worried about how to get home. (Id.) Trofimovich testified that she was in a tough financial situation and was worried about how to get home. (Id.) Trofimovich testified that she was in a tough financial situation and was worried about how to get home. (Id.)

About an hour after the accident, Trofimovich called Progressive to report it and make a claim. (Id. at 110.) He told the customer service representative that the police report said the accident occurred at 2:43 p.m. (Id. at 111.) He also stated, “I was working and I was driving for, uh, what’s it called, Lift [sic],” and he responded in the affirmative when asked if he was “working at the time.” (Id. at 113.) When asked if he had a passenger, he responded, “I did have a passenger.” (Id.) Trofimovich also turned down the representative’s offer to call him a tow, saying, “I’m trying to get Lift [sic] to do it ‘cuz they’re supposed to pay for it, like, or pay for a big chunk of it.” (Id. at 124.) The representative’s initial notes read: “IMMEDIATE CONCERNS: INSURED WAS DRIVING FOR LYFT AT THE TIME OF THE ACCIDENT. [GUEST PASSENGER] WAS A CUSTOMER.” (Id. at 232.)

The next day, when speaking with Progressive claims adjuster Amber Sandbergen, Trofimovich stated that Dinson was not a paying customer, but a passenger whom he had transported for free. (Dkt. No. 20-1 at 129.) Trofimovich said, “We had used [Lyft] earlier in the day ... because I was working ... and then I was just giving her a ride back home afterwards... [H]er mom’s got cancer or something.” (Id.) Trofimovich further stated that he was “trying to do a favor.” (Id.) He told Sandbergen that he...
clocked off an hour before he drove Dinson home. (Id.)
According to Trofimovich, he also provided Progressive a
screenshot of his ride history that day; however, the
evidence he submitted to the Court shows only a portion
of the day’s rides and contains no information about the
afternoon hours. (See id. at 270.)

*2 On June 30, 2016, Progressive sent a letter to
Trofimovich advising him that “there is no coverage for
this loss because [he was] driving for Lyft at the time of
the loss and coverage for this is excluded under [his]
policy.” (Dkt. No. 17-4 at 2.)

On July 20, 2016, Trofimovich sent Progressive an
Insurance Fair Conduct Act (IFCA) notice, indicating his
intent to sue Progressive. (Dkt. No. 17-5 at 2.)
Progressive contacted Trofimovich’s counsel regarding
the basis for the notice. (See Dkt. No. 17-6 at 3.)
On July 27, 2016, Counsel responded that Trofimovich had no
fare in his car at the time of the accident and that, because
Progressive ignored the supporting evidence he offered,
he would bring claims under IFCA, the Washington
Consumer Protection Act (WCPA), and common law. (Id.
at 3-4.)

On July 29, 2016, Progressive extended coverage for
Trofimovich’s loss. (Dkt. No. 17 at 3.) On September 30,
2016, Progressive issued Trofimovich payments for the
full amount of the damage to his vehicle. (See Dkt. No.
17-7 at 2-3.)

Meanwhile, on August 26, 2016, Trofimovich and his
wife, Brittany Trofimovich, filed suit against Progressive,
alleging that it “refused and continues to refuse to pay for
the full damages it caused Plaintiffs due to its wrongful
denial.” (Dkt. No. 1-2 at 5.)

Progressive now moves for summary judgment dismissal
of all claims, arguing that it accepted coverage and paid
for all damage to Trofimovich’s vehicle and that its
previous denial of coverage was reasonable based on
Trofimovich’s initial statements. (Dkt. No. 15 at 2.)

Plaintiffs bring a cross-motion for summary judgment,
arguing that they are entitled to consequential damages,
including lost wages and attorney fees, arising out of
Progressive’s initial denial of coverage. (Dkt. No. 19 at
3.)

II. DISCUSSION

A. Summary Judgment Standard
The Court shall grant summary judgment if the moving
party shows that there is no genuine dispute as to any
material fact and that the moving party is entitled to
judgment as a matter of law. Fed. R. Civ. P. 56(a). In
making such a determination, the Court must view the
facts and justifiable inferences to be drawn therefrom in
the light most favorable to the nonmoving party.
Once a motion for summary judgment is properly made
and supported, the opposing party must present specific
facts showing that there is a genuine issue for trial. Fed.
R. Civ. P. 56(e); Matsushita Elec. Indus. Co. v. Zenith
Radio Corp., 475 U.S. 574, 587 (1986). Material facts are
those that may affect the outcome of the case, and a
dispute about a material fact is genuine if there is
sufficient evidence for a reasonable jury to return a
verdict for the non-moving party. Anderson, 477 U.S.
at 248-49. Ultimately, summary judgment is appropriate
against a party who “fails to make a showing sufficient to
establish the existence of an element essential to that
party’s case, and on which that party will bear the burden
of proof at trial.” Celotex Corp. v. Catrett, 477 U.S.
317, 324 (1986).

B. Reasonable Denial of Coverage
The Court first considers a threshold question that informs
the legal questions discussed below: whether Progressive’s initial denial of Trofimovich’s claim was
reasonable. The Court concludes that it was.

*3 Reasonableness is typically a question of fact, but if
reasonable minds could not differ that an insurer’s denial
of coverage was reasonable, the Court may reach the
conclusion as a matter of law. See Smith v. Safeco Ins.
Co., 78 P.3d 1274, 1277 (Wash. 2003); see also Lakehurst
Condo. Owners Ass’n v. State Farm Fire and Cas. Co.,
486 F. Supp. 2d 1205, 1213 (W.D. Wash. 2007). “If the
insurer can point to a reasonable basis for its action, this
reasonable basis is significant evidence that it did not act
in bad faith and may even establish that reasonable minds
could not differ that its denial of coverage was justified.”
Smith, 78 P.3d at 1278.

Here, Progressive initially denied coverage because it
accepted Trofimovich’s first statements that he had a paying customer in his car at the time of the accident. Contrary to Trofimovich’s protestations otherwise, (see Dkt. No. 19 at 2), it was plainly reasonable to interpret his statements as such. He stated that he was a Lyft driver, that he was working at the time, and that he had a passenger. He also told the Progressive representative that he expected Lyft to pay for him to tow the car. The Court rejects Trofimovich’s suggestion that Progressive had a duty to further inquire as to whether his passenger was a paying customer.

The Court acknowledges that Trofimovich subsequently clarified—or, in Progressive’s view, amended—his statement. According to Kevin Rehmke, the claims supervisor assigned to Trofimovich’s claim, “[w]hen people report losses from the scene, they don’t generally get the initial facts of the loss wrong.” (Dkt. No. 20-1 at 58.) Progressive made the choice to reject one of two apparently conflicting statements, something that cannot be uncommon in claims adjusting. This alone does not render Progressive’s denial unreasonable. And, while Trofimovich alleges that the screenshot of his ride history “confirms no paid rides at or near the time of the collision,” (Dkt. No. 19 at 10), the evidence before the Court does not actually confirm this.2

Thus, the Court concludes as a matter of law that Progressive’s initial denial of coverage was reasonable.

C. Breach of Contract

Plaintiffs fail to identify a contractual duty that Progressive breached. Plaintiffs’ motion notes that “[w]ithout a paying passenger, coverage applies under the terms of the insurance contract” and that “Progressive promised [to] insure [Trofimovich] subject to all the terms, conditions and limitations of this policy.” (Dkt. No. 19 at 13.) Plaintiffs further allege that “Progressive’s denial of all coverage ... constitutes a breach of the Policy, a contract, and its commitment to its insureds.” (Id. at 14.) However, Plaintiffs do not dispute that Progressive paid for the total damage to the automobile covered by Plaintiffs’ policy. The fact that Progressive allegedly did so as a “business decision,” (see id.), is irrelevant.

*4 Plaintiffs’ breach of contract claim is DISMISSED with prejudice.

D. Bad Faith

The Court analyzes insurance bad faith claims by applying the same principles as any other tort: duty, breach, and damages proximately caused by any breach of duty. Smith, 78 P.3d at 1277. To succeed on a bad faith claim, a policyholder must show that the insurer’s breach of the insurance contract was unreasonable, frivolous, or unfounded. Id. As noted above, the Court concluded that Progressive’s denial of coverage was reasonable.

Plaintiffs’ bad faith claim is DISMISSED with prejudice.

E. Washington Insurance Fair Conduct Act

Under IFCA, an insured who is “unreasonably denied a claim for coverage or payment of benefits by an insurer may bring an action in the superior court of this state to recover the actual damages sustained, together with the costs of the action, including reasonable attorneys’ fees and litigation costs.” Wash. Rev. Code § 48.30.015(1). Again, the Court has concluded that Progressive’s denial of coverage was not unreasonable.

Plaintiffs’ IFCA claim is DISMISSED with prejudice.

F. Washington Consumer Protection Act

Plaintiffs base their WCPA claim on a number of alleged violations of the Washington Administrative Code (WAC). (See Dkt. No. 19 at 16-18.) However, “an incorrect denial of coverage does not constitute an unfair trade practice if the insurer had reasonable justification for denying coverage.” Keller v. Allstate Ins. Co., 915 P.2d 1140, 1145 (Wash. Ct. App. 1996) (internal quotations omitted). The Court has concluded that Progressive was reasonably justified in initially denying coverage.

Plaintiffs’ WCPA claim is DISMISSED with prejudice.

III. CONCLUSION

For the foregoing reasons, Defendant’s motion (Dkt. No. 15) is GRANTED and Plaintiffs’ motion (Dkt. No. 19) is DENIED. The Court ENTERS summary judgment in
Defendant’s favor. Plaintiffs’ claims are DISMISSED with prejudice. This ruling nullifies the Court’s previous order directing Dinson to appear for a deposition (Dkt. No. 33).

Footnotes

1 Because Plaintiff Brittany Trofimovich does not have an active role in the events leading to this lawsuit, the facts section will largely refer to Daniil Trofimovich alone.

2 Both parties include the same single page of the screenshot in their evidence submissions. (Dkt. No. 20-1 at 270; Dkt. No. 17-3 at 2.) The ride history goes in reverse chronological order, showing an 11:26 a.m. ride as his latest. However, it also appears that Trofimovich told Sandbergen he had passengers after his noon lunch break: “I had like one or two passengers, and then I was meeting a friend for lunch and then I had ... to pick up some stuff at the store, and on the way back I picked them up.” (See Dkt. 20-1 at 129.) This statement is admittedly unclear, but to the extent it adds any confusion, this tends in Progressive’s favor, not Trofimovich’s. Moreover, the screenshot is taken at 1:07 p.m. on an unspecified date. From a subpoena to Lyft, Progressive obtained further records showing that Trofimovich logged onto Lyft at 1:51 p.m., off at 2:18 p.m., and back on again at 2:42 p.m. (Id. at 12-13.) This suggests that the screenshot was taken at 1:07 p.m. on the day of the accident, before it occurred. In sum, Trofimovich’s evidence does not show that Progressive acted unreasonably.
Workers’ Compensation and the Independent Contractor

Industry Insights (/insights) > Workers’ Compensation and the Independent Contractor

9 min read

Introduction

In today’s gig economy individual workers seek to maximize their income and manage their own careers. This trend is expected to grow well into the future. Companies that want to compete need to shift and embrace these workers and the special regulations that govern them.

This whitepaper dives into the world of workers’ compensation from its inception to the present day with a focus on how independent contractors fit into the workers’ compensation scheme.

What’s Workers’ Compensation?

Traditional workers’ compensation provides medical and wage replacement benefits for injured employees. When an employee is injured in the course of employment, they are generally covered by an employer’s workers’ compensation insurance subject to a few exceptions. If the injured worker is not an employee but an independent contractor, traditional workers’ compensation may not apply unless the contractor purchased their own workers’ compensation insurance.

History & Purpose of Workers’ Compensation

Prior to the enactment of workers’ compensation, employees were forced to sue their employer for negligence to collect damages. The negligence standard is a high bar for an employee to prove, so the process was ineffective. Many employees could not win their cases and ended up relying on
states began passing workers’ compensation legislation throughout the 20th century to create a balance between worker and employer rights.

Wisconsin passed the first comprehensive workers’ compensation law in 1911, while Mississippi was the last state in 1948. These early laws require employers to provide medical and wage replacement benefits for injured on-the-job workers. If the injured employee accepted these benefits, they forfeit their right to sue the employer – what is referred to as an “exclusive remedy.” In other words, an injured worker who seeks workers’ compensation gives up their right to recover tort damages for negligence or other claims for a “lesser” recovery of workers’ compensation.

Basic Workers’ Compensation Requirements

In the majority of states, coverage under the workers’ compensation statute is required for private and public employment. Each state enacts their own statutes, rules and regulations, and vary on what thresholds of coverage are required. States also offer exceptions to workers’ compensation. Many states provide exceptions for sole proprietors—people who own their own business— or casual employees such as seasonal workers.

There are two ways to ensure workers’ compensation is administered—by private insurance or collective funding. Most states allow for private insurance while some states/jurisdictions are monopolistic fund states such as North Dakota, Ohio, Washington, Wyoming, Puerto Rico, and the U.S. Virgin Islands. In these jurisdictions, the states’ administers exclusively fund the workers’ compensation program. To determine what each state requires, look to each state’s statutes (https://www.insureon.com/products/workers-compensation/state-laws).

Workers’ Compensation and the Gig Economy

Workers’ compensation functioned as planned when a conventional employer-employee relationship existed. But, the 21st century brought about a new relationship for workers. Technology created a new type of on-demand workforce – what industry experts call the gig economy.

Instead of traditional nine-to-five jobs, workers began turning to software platforms to find well-paying jobs that provide the worker with flexibility. Companies retain a worker to do a one-time assignment or task instead of hiring a W2 employee. This helps companies reduce costs and allows workers to pick up work when and where they need it.

Companies find that the gig economy is more efficient and helps reduce operating costs associated with full-time employees. As a result, there are a growing number of workers who are not participating in the traditional workers’ compensation system. This is partly due to many
Workers no longer qualify as an “employee” under state statutes, so they are not covered by a company's workers' compensation requirements.

Relationship of Gig Workers and Independent Contractors with Workers' Compensation

To avoid buying workers' compensation coverage, some companies – especially in high-risk occupations – sought to retain independent contractors to avoid paying the high workers' compensation rates. This practice became pervasive within the long haul trucking industry.

Most states allow sole proprietors to “opt out” of the workers' compensation system. Some trucking firms allowed (encouraged) their drivers to declare themselves “independent contractors” and opt out of the workers' compensation system. The drivers would lease the tractor from the trucking company who would arrange for each load, instruct the driver where to go and when, and contract them to the trucking company on a full-time basis. By using independent contractors the trucking firms reduced their personnel costs by 20% (the workers' compensation rate). The independent contractor driver would receive slightly higher pay and everyone was happy...until a driver had a claim.

As an employee of the trucking firm, the driver would have received workers' compensation benefits including wage replacement and medical costs. But by opting out, the driver commonly had no wage replacement and relied upon their personal health insurance plan for medical costs. If the driver was providential, the accident was caused by a third party, who had adequate automobile liability and the driver could recover/sue for damages. The problem was that it often took years for a lawsuit to be concluded, meanwhile, the driver would file bankruptcy and end up relying upon the social welfare safety net programs of the state.

The second problem was that after an injury the independent contractor would attempt to renounce their independent contractor status and assert employee standing if they did not have medical and disability insurance. In addition to the contractor or the contractor’s family, the assertion may come from third parties subrogated to the workers' compensation benefits such as health insurers, governmental entities who fund the social safety net. These risks were likely not contemplated by the organization that contracted with the independent contractor.

States soon took action to avoid the “independent contractor” scheme and enacted rules to determine if a person really was a “de facto” employee or a bona fide independent contractor.

Independent Contractor or Employee: The Control Issue

As more companies hired independent contractors, legislators had growing concerns about tax payments, misclassification, health insurance requirements and workers' compensation requirements. So, states created a framework to include people who may classify themselves as an
The degree of control one party has the right to exert over another has become the primary factor to consider and is the prime indication the individual is an employee and not an independent contractor.

To analyze the control factor in a particular situation, courts weigh multiple factors such as: if the worker is required to comply with instructions such as when, where and how the work is to be done; if the person was trained by the employer; if there is a continuing relationship; if the employer pays for travel, supplies, or tools; if the relationship is sporadic or frequent; if the worker is required to report to the employer, and so forth.

For example, Minnesota developed a five factor test to determine if a worker is an employee or independent contractor. The test involves analyzing the following five factors:

1. The right to control the means and manner of performance;
2. The mode of payment;
3. The furnishing of tolls and materials;
4. Control over the premises where the work was done;
5. The right of discharge.

The Internal Revenue Service (IRS) also published guidelines concerning what is or what is not an independent contractor. The general rule is that an individual is an independent contractor if the payer has the right to control or direct only the result of the work and not what will be done and how it will be done. However, whether a work relationship is considered to be an independent contractor or de facto employee depends on the facts in each case.

**Alternate Employer: Hiring Contractors through Third Parties**

Companies can also retain the independent worker through a third party, who acts as a contractor and subsequently subcontracts with the on-demand worker. Albeit, slightly more of a risk, the worker obtains an occupational accident insurance policy (wage replacement program), and the
A third party has a workers’ compensation policy that provides a certificate of insurance along with an alternate employer endorsement naming the company as an insured. In the rare occasion the worker attempts to bring a workers’ compensation claim to the purchasing company, the third party contractor workers’ compensation coverage would provide the protection.

The alternate employer endorsement is an important element in the risk management program. The alternate employer endorsement affords the alternate employer both workers’ compensation and Employers’ Liability coverages. Workers compensation coverage protects the alternate employer in the event it is required to pay benefits to an injured on-demand worker. Employers’ liability coverage insures the alternate employer against lawsuits brought by injured workers.

**Election and Termination of Workers’ Compensation Coverage**

A company can elect to provide workers’ compensation coverage for individuals who would otherwise automatically be excluded under the law. When workers’ compensation coverage is elected, the insured person becomes a “covered employee” as defined in the statute. The company may also terminate coverage of individuals for whom they had elected to provide coverage. When coverage is elected or terminated, the company must give written notice to the insurer. Coverage becomes effective the day after the insurer receives notice, or on the date stated in the notice. The person for whom coverage is elected will be listed on the workers’ compensation insurance policy.

If a business functions as a general contractor or otherwise contracts with subcontractors, a general contractor is liable to the injured employee of the subcontractor if the subcontractor does not have workers’ compensation insurance. Therefore, when a business analyzes its insurance needs, it needs to consider its potential exposure for injuries to subcontractors’ employees, even if the business is exempted and not otherwise required to have workers’ compensation insurance. The business itself must provide workers’ compensation for its employee regardless if the owner of the business can opt-out.

**Workers’ Compensation Premium Audits**

For companies who use independent contractors and issue 1099s, they encounter another issue. Workers’ compensation insurance companies routinely undertake a workers’ compensation premium audit to determine all persons who may be entitled to file a claim under the policy to be contemplated in the workers’ compensation insurance premium.

Understandably, insurers want to collect premium for those who may give rise to a claim. Companies, on the other hand, equally fervent in minimizing their costs do not want to include those who should not be covered.
Standard payroll audit rules are any independent contractor without evidence of workers’ compensation the contract price is included as payroll in the carriers workers’ compensation payroll audit.

But, look to the rules in each state regarding opt-out provisions for sole proprietors or partners. In some states, the independent contractor may formally opt out of coverage requirements or include a certificate of insurance for employers to avoid being charged for the exposure.

What is the Workers’ Compensation Solution for Hiring Temporary Workers?

The past ten years have reinvented a number of occupations into independent workers who control when and how they work. Increasing amounts of jobs are not location dependent, completed at home or with a worker’s own tools. Local taxi services have been revolutionized with companies like Uber and Lyft. Other industries are also undertaking a transformation on how business is conducted such as Airbnb or TaskRabbit.

The insurance community, insurance regulators and state legislatures are adapting laws and regulations to address “gig economy” workers to reduce the adverse effect of an injured worker not having adequate wage replacement and medical coverage for an on the job injury.

While insurance companies and regulations catch up with the by-the-job worker, what can companies do to mitigate the risk of hiring such workers? There are essentially three approaches companies can take to minimize work-related injury costs.

1. **Low Risk**: Require independent workers to purchase workers’ compensation for themselves and not “opt-out” of the workers’ compensation system even if eligible, before work begins.

2. **Medium Risk**: Retain the independent worker through a third party, who acts as the contractor and subsequently sub-contracts with the on-demand worker.

3. **High Risk**: Contract with an on demand worker and either not require any indication of workers’ compensation or “opt-out” arrangement. If the on demand worker has any employee or attempts to pursue renouncing their independent contractor status, the company may be required to provide the worker with workers’ compensation benefits. In addition, the workers’ compensation premium auditor may include the 1099 compensation as workers’ compensation payroll in the company’s audit.

**Conclusion**
The contingent workforce and use of independent contractors is becoming the regular course of business. As the gig economy continues expanding, companies that want to compete need to shift and embrace contingent workers and the special regulations that govern them.

Disclaimer

Field Nation does not provide legal, tax or accounting consultation, or advice. Field Nation has provided you with this information or material strictly for purposes of understanding and using its platform. This material is designed to be accurate and informative, but should not be considered to constitute legal advice. It is Field Nation's recommendation that you seek appropriately specialized professional consultation regarding the information contained herein.

Download PDF  

(/wp-content/uploads/2018/03/1035-01_MKG_workers-comp-whitepaper_r02v01.pdf)

Related Reads

Why Data Privacy Matters for Businesses (/insights/why-data-privacy-matters)


2018 Year-End Stats (/insights/2018-year-end-stats)

The On-Site Contingent Workforce: Key Trends (and Strategies) for 2019 (/insights/evolution-onsite-contingent-workforce)

5 Ways to Improve Your Field Service Operations in 2019 (/insights/improve-field-service-2019)
About Us
Our Story (/our-story)
Careers (/careers)
Contact Us (/contact)

Connect With Us
+1-877-573-4353
733 Marquette Avenue S, #800
Minneapolis, MN 55402

Be the first to know about news and features:

Your Email*
Subscribe with your email

SUBMIT

Synopsis

Background: Apartment owners and operators brought a putative class action against online housing marketplace asserting state law causes of action alleging that the rentals of their properties on the online marketplace’s website purportedly violated their own lease agreements with their tenants. Online marketplace moved to dismiss.

Holdings: The District Court, Dolly M. Gee, J., held that:

[1] marketplace was not an information content provider so that it was not precluded from asserting the Communications Decency Act’s (CDA) grant of immunity, and

[2] owners and operators’ claims treated marketplace as a publisher or speaker of the information that tenant users provided on its website, and thus the CDA’s grant of immunity preempted the claims.

Motion granted.

Procedural Posture(s): Motion to Dismiss for Failure to State a Claim.

West Headnotes (8)

[1] TelecommunicationsPersons and entities liable; immunity

For the Communications Decency Act (CDA) to shield a party from liability, the party must be (1) a provider or user of an interactive computer service (2) whom a plaintiff seeks to treat, under a state law cause of action, as a publisher or speaker (3) of information provided by another information content provider. Communications Act of 1934 § 230, 47 U.S.C.A. §§ 230(c)(1), 230(f)(3).

Cases that cite this headnote

[2] TelecommunicationsPersons and entities liable; immunity

The Communications Decency Act’s (CDA) grant of immunity to providers of interactive computer services against liability arising from content created by third parties precludes liability that treats a website as the publisher or speaker of information users provide on the website. Communications Act of 1934 § 230, 47 U.S.C.A. § 230(c)(1).

Cases that cite this headnote

[3] TelecommunicationsPersons and entities liable; immunity

The Communications Decency Act’s (CDA) grant of immunity to providers of interactive computer services against liability arising from content created by third parties applies only if the interactive computer service provider is not also an information content provider, which is defined as someone who is responsible, in whole or in part, for the creation or development of the offending content. Communications Act of 1934 § 230, 47 U.S.C.A. § 230(c)(1).

Cases that cite this headnote
It was not premature for the district court to consider whether the Communications Decency Act (CDA) preempted a putative class action based on state law grounds while considering a motion to dismiss for failure to state a claim; the court was not faced with such a scant record that it was premature to decide whether the CDA barred the plaintiffs’ claims based on the allegations in the class action. Communications Act of 1934 § 230, 47 U.S.C.A. § 230 et seq.; Fed. R. Civ. P. 12(b)(6).

Immunity under the Communications Decency Act’s (CDA) grant of immunity to providers of interactive computer services against liability arising from content created by third parties is not foreclosed simply because a website offers more than a bulletin board service, or an online site on which internet subscribers post comments and respond to comments posted by others. Communications Act of 1934 § 230, 47 U.S.C.A. §§ 230(c)(1), 230(f)(3).

Online housing marketplace was not an information content provider as would preclude application of the Communications Decency Act’s (CDA) provision which granted immunity to providers of interactive computer services in putative class action brought by apartment owners and operators who alleged that rentals of their units by tenants on the marketplace violated their leases, even though marketplace did more than just post the listings and knew some lease violations occurred; marketplace did not materially contribute to the lease violations as tenants were responsible for creating listings, and owners and operators did not explain how marketplace’s failure to cease engaging in rental transactions with tenants whom it learned were violating leases transformed it into an information content provider. Communications Act of 1934 § 230, 47 U.S.C.A. §§ 230(c)(1), 230(f)(3).

The correct test under Communications Decency Act (CDA) grant of immunity to providers of interactive computer services against liability arising from content created by third parties is not whether a challenged activity merely bears
some connection to online content, but whether the claim inherently requires the court to treat the interactive computer service as a publisher or speaker of information provided by another. Communications Act of 1934 § 230, 47 U.S.C.A. § 230(c)(1).

Cases that cite this headnote

Attorneys and Law Firms

*1099 Richard C. Harlan, Robert C. O’Brien, Larson O’Brien LLP, Los Angeles, CA, Allison R. McLaughlin, Pro Hac Vice, Kathryn A. Reilly, Pro Hac Vice, Michael N. Mulvania, Pro Hac Vice, Michael T. Williams, Pro Hac Vice, Wheeler Trigg O’Donnell LLP, Denver, CO, for La Park La Brea A LLC.

Brad Dennis Brian, Haiylin J. Chen, Jonathan H. Blavin, Jordan Dentell Segall, Munger Tolles and Olson LLP, Los Angeles, CA, Joshua Patashnik, Munger Tolles and Olson LLP, San Francisco, CA, for Airbnb, Inc., et al.

Proceedings: IN CHAMBERS—ORDER RE DEFENDANTS’ MOTION TO DISMISS AND MOTION TO STRIKE [16, 17, 23, 41]

DOLLY M. GEE, UNITED STATES DISTRICT JUDGE

I.

PROCEDURAL BACKGROUND

Currently before the Court is Defendants Airbnb, Inc.’s and Airbnb Payments, Inc.’s (collectively, “Airbnb”) motion to dismiss (“MTD”) [Doc. # 16] or, in the alternative, motion to strike (“MTS”) [Doc. # 17].1

Plaintiffs La Park La Brea A LLC, La Park La Brea B LLC, La Park La Brea C LLC, and Aimco Venezia, LLC’s (collectively, “Aimco”) first amended putative class action complaint (“FAC”) raises several state law causes of action related to short-term rentals of Aimco properties on Airbnb’s website that purportedly violate Aimco’s lease agreement with its tenants. [Doc. # 1–1.]

Airbnb seeks dismissal of the FAC in its entirety on the following grounds: (1) all *1100 claims are barred by the Communications Decency Act (“CDA”), 47 U.S.C. § 230 et seq.; and (2) the FAC fails to state a claim upon which relief may be granted. In the alternative, Airbnb seeks to strike the FAC’s class definition.2

While the MTD and MTS were pending, Aimco filed a motion for preliminary injunction and a motion for expedited discovery. [Doc. # 23, 41.]

For the reasons set forth below, the motion to dismiss is GRANTED. In light of the Court’s ruling on the motion to dismiss, the Court DENIES as moot the motion to strike, motion for preliminary injunction, and motion to expedite discovery.

II.

FACTUAL BACKGROUND

A. Aimco

Aimco owns and operates apartment buildings in Los Angeles County. FAC at ¶¶ 1–4, 24. It qualifies each prospective tenant through a lease application process and requires each approved tenant to execute a standard form lease. Id. at ¶ 26. Every tenant’s lease includes an anti-subleasing clause. Id. at ¶ 27. Aimco’s standard form lease provides:

ASSIGNMENT. Resident shall not sublet the Apartment or assign this
Lease for any length of time, including, but not limited to, renting out the Apartment using a short term rental service such as Airbnb.com, VRBO.com or homeaway.com. Any purported assignment or sublet of this Lease or the Apartment Home without the prior written consent of Landlord is null and void.

Id. at ¶ 27.

B. Airbnb

Airbnb provides an online marketplace for both short-term and long-term housing accommodations wherein “hosts” lease or sublease their living space to “guests.” Id. at ¶¶ 5, 10–12. Prospective hosts must “sign up” with Airbnb and create a listing for the available space that then becomes publicly viewable to prospective guests. Id. at ¶ 12. The listings usually do not disclose hosts’ real names or apartment numbers, which makes it hard for Aimco to enforce lessees’ anti-assignment clause. Id. at ¶ 44.

Rather than charge fees for publishing hosts’ listings, Airbnb collects commissions from both hosts and guests for booked accommodations. Id. at ¶¶ 13–14. To encourage and facilitate booking, Airbnb verifies personal profiles and listings; maintains a messaging system for hosts and guests; collects and transfers booking payments; offers free professional photography to hosts; calculates, collects, and remits local occupancy taxes on hosts’ behalf in some jurisdictions; offers a “smart pricing” tool that automatically adjusts prices to match demand; provides a $1,000,000 “host guarantee” in the event of property damage; provides “Host Protection Insurance” for third-party claims against hosts and landlords for both property damage and bodily injury; and reimburses guests in the event of a “travel issue” such as hosts’ failure to provide guests reasonable access to the accommodation. Id. at ¶¶ 15–20.

Airbnb generally refuses property owners’ requests that Airbnb cease engaging in rental transactions with tenants whom Airbnb learns are violating their leases by engaging in short-term rentals. Id. at ¶ 23. “Aware of growing concerns among property owners and residential communities regarding illegal subleasing activity and disruptive guest behavior,” Airbnb launched the “Friendly Buildings Program,” which is directed at homeowner’s associations (“HOAs”) and owners of multi-unit residential buildings. Id. In exchange for being “friendly,” i.e., allowing rentals through Airbnb, the program provides participating HOAs and multi-unit property owners a commission on Airbnb activity within their communities, as well as tools to oversee and manage those rentals, none of which is available to non-participants. Id. at ¶ 23.

C. Subleasing Activities and Their Effects

Short-term subleasing activities “brokered by Airbnb” have increased at Aimco’s properties. Id. at ¶ 37. Aimco alleges that “Airbnb has brokered hundreds of unlawful subleases at [its properties] during the past several years.” Id.

Aimco’s tenants complain about unwanted noise, disturbances, property damage, and unspecified “other concerns” stemming from Airbnb guests, in breach of the Aimco lease. Id. at ¶ 28. As a result, Aimco incurs costs related to increased security patrols; evicting Airbnb guests, as well as tenants violating their leases by hosting through Airbnb; repairing property damage caused by Airbnb guests; providing customer service resolutions to tenants disturbed by Airbnb guests; and legal proceedings involving both Airbnb guests and tenants violating their leases by hosting through Airbnb. Id. at ¶ 29. Tenants frustrated with the Airbnb activity have left Aimco properties, and Aimco also alleges that Airbnb activities have caused Aimco and its properties “reputational harm.” See id. at ¶ 43.

Because Airbnb listings provide host anonymity, Aimco contacted Airbnb to obtain information about how, through Airbnb’s booking or payment processing services, it could prevent “unlawful subleasing” at Aimco’s properties. Id. at ¶ 45. “Recognizing that policing buildings and evicting tenants for violating their leases by subletting through Airbnb ‘is an expensive proposition,’ ” Airbnb responded with information about the Friendly Buildings Program. Id. at ¶ 46. Airbnb also advised that, even outside the Friendly Buildings Program, it could “definitely” help Aimco remove unwanted listings for Aimco properties. Id. at ¶ 47.

Aimco subsequently informed Airbnb that it was aware of several Airbnb listings violating its standard lease agreement and asked how to initiate the process for removing those listings and further precluding subleases
breaching its lease agreements. *Id.* at ¶ 48. Airbnb requested, and Aimco provided, a copy of Aimco’s lease agreement as well as copies of the pertinent listings and identification numbers. *Id.* at ¶¶ 48–49. Airbnb then “reversed course” and advised Aimco that it does not review lease agreements or mediate disputes between hosts and property owners regarding leases. *Id.* at ¶ 49.

Thereafter, Aimco notified Airbnb that any listings for its properties were in violation of Aimco’s standard lease, requested that Airbnb cease and desist its “unlawful activities” and “tortious interference” with Aimco’s lease agreements, and provided a list of every street address associated with Aimco’s properties so that Airbnb could cease engaging in such rental transactions. *Id.* at ¶ 50. Airbnb reiterated that “[a]lthough [it is] unable to evaluate private contract terms and cannot arbitrate these disputes, [it] will share [Aimco’s] letter with the user[s] responsible for the listing[s],” and stated that Airbnb is merely an “online platform” that “does not own, operate, manage or control accommodations” but “requires hosts to represent that they have all the rights to list their accommodations.” *Id.* at ¶ 51.

Airbnb allegedly “continues to actively promote, participate in, and receive compensation for” subleasing of apartments at Aimco’s properties despite “know[ing] that all hosts who rent [Aimco’s] apartments are not authorized to sublet their apartments to Airbnb guests and do not have [Aimco’s] permission to do so.” *Id.* at ¶¶ 52, 54; see also *id.* at ¶ 59 (“[W]hen it learns that a host is not the property owner and does not have the property owner’s permission to rent or sublet the property,” Airbnb “continues to allow the rental listing to persist” and “continues to contract with hosts they know to be in violation of the host’s lease agreement.”).

III.

LEGAL STANDARD

Pursuant to *Federal Rule of Civil Procedure 12(b)(6)*, a defendant may seek to dismiss a complaint for failure to state a claim upon which relief can be granted. *Fed. R. Civ. P. 12(b)(6)*. To survive a *Rule 12(b)(6)* motion, a complaint must articulate “enough facts to state a claim to relief that is plausible on its face.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007). Although a pleading need not contain “detailed factual allegations,” it must contain “more than labels and conclusions” or “a formulaic recitation of the elements of a cause of action.” *Id.* at 555, 127 S.Ct. 1955 (citing *Papasan v. Allain*, 478 U.S. 265, 286, 106 S.Ct. 2932, 92 L.Ed.2d 209 (1986)). “A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009). In evaluating the sufficiency of a complaint, courts must accept all factual allegations as true. *Id.* (citing *Twombly*, 550 U.S. at 555, 127 S.Ct. 1955). Legal conclusions, in contrast, are not entitled to the assumption of truth. *Id.*

*Federal Rule of Civil Procedure 12(f)* allows the Court to strike from a pleading any “redundant, immaterial, impertinent, or scandalous matter.” *Fed. R. Civ. P. 12(f).* Motions to strike are generally disfavored. *Petrie v. Elec. Game Card, Inc.*, 761 F.3d 959, 965 (9th Cir. 2014); see also *Holmes v. Elec. Document Processing, Inc.*, 966 F.Supp.2d 925, 930 (N.D. Cal. 2013) (“Motions to strike are generally disfavored and ‘should not be granted unless the matter to be stricken clearly could have no possible bearing on the subject of the litigation ... ’ ”) (quoting *Platte Anchor Bolt, Inc. v. III, Inc.*, 352 F.Supp.2d 1048, 1057 (N.D. Cal. 2004)). “Ultimately, whether to grant a motion to strike lies within the sound discretion of the district court.” *Holmes*, 966 F.Supp.2d at 930; see also *Fantasy Inc. v. Fogerty*, 984 F.2d 1524, 1528 (9th Cir. 1993), rev’d on other grounds, 510 U.S. 517, 114 S.Ct. 1023, 127 L.Ed.2d 455 (1994).

IV.

DISCUSSION
A. Motion to Dismiss
Airbnb sets forth several grounds for dismissal. The Court first addresses the contention that the CDA preempts Aimco’s state law claims.

*1103 [*1] Under Section 230(c)(1) of the CDA, “No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.” 47 U.S.C. § 230(c)(1). Section 230’s preemption provision further states that “[n]o cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section.” 47 U.S.C. § 230(e)(3). For the CDA to shield a party from liability, the party must be “(1) a provider or user of an interactive computer service (2) whom a plaintiff seeks to treat, under a state law cause of action, as a publisher or speaker (3) of information provided by another information content provider.” Barnes v. Yahoo!, Inc., 570 F.3d 1096, 1100–01 (9th Cir. 2009).

[2] [*2] Notably, “section 230(c)(1) precludes liability that treats a website as the publisher or speaker of information users provide on the website.” Doe v. Internet Brands, Inc., 824 F.3d 846, 850 (9th Cir. 2016). “This grant of immunity applies only if the interactive computer service provider is not also an ‘information content provider,’ which is defined as someone who is ‘responsible, in whole or in part, for the creation or development of the offending content.’” Fair Hous. Council of San Fernando Valley v. Roommates.Com, LLC, 521 F.3d 1157, 1162 (9th Cir. 2008) (en banc) (quoting 47 U.S.C. § 230(f)(3)).

Aimco challenges the preemption defense, arguing that Airbnb is an information content provider and that the FAC does not seek to treat Airbnb as a publisher or speaker but to hold Airbnb liable for its own conduct. Aimco also argues that it would be improper for the Court to dismiss the action at this early stage of litigation.

1. Propriety of Dismissal of Pleadings
[4] First, insofar as Aimco argues that it would be premature for the Court to decide the CDA preemption issue at this stage of the litigation, the Court rejects that argument. See Kimzey v. Yelp! Inc., 836 F.3d 1263, 1266 (9th Cir. 2016) (holding that district court properly granted motion to dismiss based on the CDA); Barnes, 570 F.3d at 1105–06 (same). Unlike the District Court in Pirozzi v. Apple Inc., cited by Aimco, the Court here is not faced with such a “scant record” that it is “premature to decide whether the CDA bars Plaintiff’s claims” based on the allegations in the FAC. 913 F.Supp.2d 840, 849 (N.D. Cal. 2012).

2. Information Content Provider[4]
[5] Aimco argues that Airbnb is an “information content provider” that “contributes materially to the alleged illegality of the conduct”—lease-violating short-term rentals—and thus falls outside of the CDA’s grant of immunity. Opp’n at 32 (quoting Roommates.Com, 521 F.3d at 1168). In support, Aimco asserts that Airbnb’s “conduct includes more than posting listings.” Id.

*1104 [*6] First, the mere fact that Airbnb’s conduct “includes more than posting listings” does not per se mean that section 230 immunity is unavailable. Opp’n at 32. Immunity is not foreclosed simply because a website offers more than a “bulletin board” service, or an online site “on which Internet subscribers post comments and respond to comments posted by others.” Kimzey, 836 F.3d at 1266 (quoting FTC v. Accusearch Inc., 570 F.3d 1187, 1195 (10th Cir. 2009)); see, e.g., Carafano v. MetroSplash.com, Inc., 339 F.3d 1119, 1124 (9th Cir. 2003) (“[S]o long as a third party willingly provides the essential published content, the interactive service provider receives full immunity regardless of the specific editing or selection process.”). “While the majority of cases addressing CDA immunity may fit the bulletin board description, nothing in those cases or in the statutory language so limits the CDA’s application.” Stoner v. eBay, Inc., No. 305666, 2000 WL 1705637, at *3 (Cal. Super. Ct. Nov. 1, 2000).

The conduct alleged in the FAC, to which Aimco points in support of its content provider argument, consists of (1) requiring prospective hosts to include specific information about the property and themselves; (2) collecting payments and commissions; and (3) offering ancillary services, such as user information verification, messaging systems, photography, local occupancy tax collection and remittance, a pricing tool, host insurance, and a guest refund policy. See FAC at ¶¶ 12–20. The FAC also alleges conduct that includes operation of the “Friendly Buildings Program” and continued rental transactions with tenants whom Airbnb learns are violating their lease agreements by engaging in short-term rentals. Id. at ¶ 23. Finally, the FAC alleges that Airbnb offers an
autocomplete search function and complains to Aimco properties when Airbnb guests are denied access to such reserved properties. Id. at ¶¶ 54–56.

This conduct does not make Airbnb an information content provider. As stated above, an information content provider is statutorily defined as “any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service.” Hy Cite Corp. v. badbusinessbureau.com, L.L.C., 418 F.Supp.2d 1142, 1148 (D. Ariz. 2005).

Finally, liability based on “information content provider” status necessarily requires “information content.” Aimco does not explain how Airbnb’s failure to cease engaging in rental transactions with tenants whom Airbnb learns are violating their lease agreements, or Airbnb’s complaints to Aimco when Airbnb guests are denied access to Aimco’s properties, transforms Airbnb into an information content provider. Aimco would be hard-pressed to do so.

Consequently, the Court concludes that Airbnb is not an information content provider under the CDA.

3. Treatment as Publisher or Speaker of User–Provided Information

The parties dispute the second and third elements of the test for CDA immunity. Airbnb argues that the FAC treats Airbnb as the publisher or speaker of information (Airbnb listings) that users (Airbnb hosts) provide on its website. See MTD at 32–34. Aimco counters that the FAC is not premised on the Airbnb listings, but on Airbnb’s own misconduct—contracting with Aimco’s tenants (or failing to refrain from contracting with Aimco’s tenants) and processing payments for rentals of Aimco-owned apartments. Opp’n at 32–33; see also, e.g., FAC at ¶ 63 (“Information posted by prospective hosts on Airbnb’s website is not the basis for Airbnb’s liability here. Plaintiffs do not seek to hold Airbnb liable as a publisher or speaker of any such information generated by third parties.”). Aimco’s argument fails, and its “creative pleading” does not place this case outside the CDA’s purview. Kimzey, 836 F.3d at 1266.

Airbnb bases its argument on Airbnb’s profit from listings that violate Aimco’s lease agreements. See Opp’n at 32 (listing alleged misconduct as “intentionally encouraging and profiting from breaches of Plaintiffs’ leases, trespasses, and nuisance and interfering with Plaintiffs’ and their 1106 tenants’ contractual relationships”). This does not foreclose CDA protection. Courts have granted CDA protection to websites that process payments and transactions in connection with third-party listings, including Airbnb. In Donaher, III v. Vannini, for example, plaintiff property owners alleged that tenants
violated their lease agreement by renting their property through Airbnb's website. No. CV-16-0213, 2017 WL 4518378 (Me. Super. Ct. Aug. 18, 2017). The plaintiffs' complaint alleged that co-defendant Airbnb "facilitate[d] 'the posting of rental opportunities at the host's property, by providing the means for guests to locate and book host properties, and by processing payments from guests to hosts, from which Airbnb derive[d] revenue.' " Id. at *1 (quoting the complaint). The Maine state court held that "the processing or receipt of payments associated with posts does not strip a provider or user of an interactive computer service of immunity under the CDA" and granted Airbnb's motion to dismiss. Id. at *3, *4.

In Hill v. StubHub, Inc., upon which Donaher relied in part, purchasers brought an action against an online marketplace that acts as an intermediary between buyers and sellers of tickets to events. 219 N.C. App. 227, 229–30, 727 S.E.2d 550 (2012). Just as Airbnb charges a commission when a rental occurs, StubHub charges a commission when a sale occurs. Id. at 229, 727 S.E.2d 550. The Hill plaintiffs alleged that they purchased tickets sold unlawfully, in "excess of face value." Id. at 230, 727 S.E.2d 550. Noting that the website "assumed responsibility for handling the mechanics required to complete the transaction," the trial court determined that StubHub was not entitled to take advantage of § 230 immunity. Id. at 245–46, 727 S.E.2d 550. Reversing the trial court's decision on the basis that the website was "entitled to immunity," the appellate court held that the website's payment processing responsibilities were "irrelevant for purposes of determining the extent to which Defendant was entitled to immunity" because the ticket seller using the website had complete control over the content at issue—the ticket price. Id. at 245–46, 249, 727 S.E.2d 550.

Aimco cites two cases—Chicago v. StubHub!, Inc., 624 F.3d 363, 366 (7th Cir. 2010), and NPS LLC v. StubHub, Inc., No. 06-4874-BLS1, 2009 WL 995483, at *13 (Mass. Super. Jan. 26, 2009)—to argue that Hill is contrary to persuasive authority. See Opp’n at 33 n.10. Yet, Aimco fails to explain why these cases support its position, or to address the Hill Court’s reason for declining to follow both cases. See Hill, 219 N.C. App. at 247, 727 S.E.2d 550 ("In [NPS], although denying that it had acted on the basis of an improper motive, the defendant ‘essentially concede[d]’ that it had knowingly induced season ticket holders to breach their contract with the plaintiff, a professional football team. Aside from the fact that the evidentiary and procedural context present in NPS is substantially different from that before the Court in this case, we simply do not find the reasoning employed by NPS persuasive, believe that it is inconsistent with the decisions concluding that knowledge of unlawful content does not strip a website of the immunity from liability granted under 47 U.S.C. § 230, and decline to follow it in deciding the present case."); id. at 247 n.4, 727 S.E.2d 550 ([Chicago v. StubHub] has no real bearing upon the proper resolution of this case given that the issue before the Seventh Circuit in that case was the extent, *1107 if any, to which Defendant was required to remit certain taxes rather than the extent, if any, to which Defendant was liable for allegedly unlawful third party content.").

This Court agrees with Hill’s reasoning. Moreover, the “information content provider” prong of the CDA immunity analysis is irrelevant to the “publisher or speaker” prong. Assuming arguendo that it is relevant, the NPS Court’s reliance on the existence of a genuine issue of material fact as to whether StubHub “encourage[d] others to violate“ the law is contrary to this Circuit’s CDA precedent. NPS, 2009 WL 995483 at *11. In the Ninth Circuit, “if the alleged content provider is not a creator of the challenged content, it must have done more than merely ‘encourage[d]’ the creation of the challenged conduct; the alleged provider must have required another to create that content.” Opperman v. Path, Inc., 84 F.Supp.3d 962, 987 (N.D. Cal. 2015) (emphasis added) (discussing the Ninth Circuit’s reasoning in Roommates.Com).

Several other courts considering the issue at bar have come out the same way with respect to the CDA’s coverage on analogous facts. See, e.g., Inman v. Technicolor USA, Inc., No. 11-666, 2011 WL 5829024 at *6–7 (W.D. Pa. Nov. 18, 2011) (CDA barred plaintiff’s suit against defendant eBay relating to the purchase of defective vacuum tube products and parts from a third-party, despite plaintiff’s attempt to hold eBay responsible for its “conduct” not its online “communications”) (discussing and citing Doe v. MySpace, Inc., 528 F.3d 413 (5th Cir. 2008); Green v. Am. Online, Inc., 318 F.3d 465 (3d Cir. 2003); Gibson v. Craigslist, Inc., No. 08 Civ. 7735(RMB), 2009 WL 1704355 (S.D.N.Y. June 15, 2009); Gentry v. eBay, Inc., 99 Cal.App.4th 816, 121 Cal.Rptr.2d 703 (2002); Stoner, 2000 WL 1705637, at *2 (rejecting plaintiff’s argument that eBay’s facilitation of third-party sales of sound recordings—which may not be lawfully sold—was independent conduct subject to the CDA’s immunity exception, and noting specifically that eBay’s advertising and commissions do not strip eBay of section 230
immunity).

Here, as in the above-cited cases, Airbnb hosts who use Airbnb’s website have complete control over the content at issue—listing rentals in violation of Aimco's leases. See FAC at ¶ 12 (prospective hosts create the listing, including the location and description of the accommodations being offered to prospective guests). Thus, it is with Airbnb’s publication of this content that Aimco takes issue. Aimco’s “apparent[,] hope[,] to plead around the CDA to advance the same basic argument that the statute plainly bars[—]that [Defendant] published user-generated speech that was harmful to [Plaintiff]”—fails. Kimzey, 836 F.3d at 1266.  

4. **Airbnb, Inc. v. City and County of San Francisco**

One last point deserves discussion. Aimco relies almost entirely on *1108 Airbnb, Inc. v. City and County of San Francisco*, 217 F.Supp.3d 1066 (N.D. Cal. 2016), in urging the Court to find that section 230 immunity does not apply here. That case is readily distinguishable.

There, Airbnb challenged San Francisco’s ordinance that made it a misdemeanor to “provide, and collect a fee for, [b]ooking [s]ervices in connection with short-term rentals for [r]esidential [u]nits” within San Francisco city and county when those residential units were not registered with the San Francisco Office of Short-Term Residential Rental Administration. * Airbn, 217 F.Supp.3d at 1071. Airbnb sought to enjoin the ordinance and argued in part that section 230 of the CDA preempted the law because, according to Airbnb, the ordinance “‘inherently require[s] the court to treat’ [it] as the ‘publisher or speaker’ of content provided by another.” * Id. at 1072 (quoting * Barnes, 570 F.3d at 1102); see * id. at 1072 (“In [Airbnb’s] view, the threat of a criminal penalty for providing and receiving a fee for [b]ooking [s]ervices for an unregistered unit requires that [it] actively monitor and police listings by third parties to verify registration,” which “is tantamount to treating [Airbnb] as a publisher because it involves the traditional publication functions of ‘reviewing, editing, and deciding whether to publish or to withdraw from publication third-party content.’ ” (quoting * Roomates.Com, 521 F.3d at 1170–71)).

The Court rejected Airbnb’s argument, concluding that the ordinance “does not regulate what can or cannot be said or posted in the listings,” “creates no obligation on [Airbnb’s] part to monitor, edit, withdraw or block the content supplied by hosts,” and “holds [Airbnb] liable only for [its] own conduct, namely for providing, and collecting a fee for, [b]ooking [s]ervices in connection with an unregistered unit.” * Id. at 1072–73; see also * id. at 1073–74 (“[Airbnb] [is] perfectly free to publish any listing [it] get[s] from a host and to collect fees for doing so—whether the listing is lawfully registered or not—without threat of prosecution or penalty under the Ordinance. ... The challenged Ordinance regulates [Airbnb’s] own conduct as [a] [b]ooking [s]ervice provider[ ] and cares not a whit about what is or is not featured on [its] website[ ].”).

* Here, by contrast, Airbnb’s website features are central to Aimco’s claims, as this Order makes clear. See also FAC at ¶¶ 48–51 (To prevent unauthorized subleases, Aimco contacted Airbnb about removing listings for Aimco-owned properties, and when Aimco did not do so, Aimco sued to prevent the unauthorized subleases.), 59 (alleging that when Airbnb learns a host is not a property owner, Airbnb, *inter alia*, “continues to allow the listing to persist”). As the * Airbnb Court explained, the correct test under section 230 “is not whether a challenged activity merely bears some connection to online content” but whether the claim “‘inherently requires the court to treat the ‘interactive computer service’ as a publisher or speaker of information provided by another.” * 217 F.Supp.3d at 1074 (quoting * Barnes, 570 F.3d at 1102. Here, Aimco’s claims do so require.

Given this analysis, as well as Congress’ goal of “promot[ing] the development of e-commerce,” the Court concludes that the CDA’s section 230 immunity preempts Aimco’s claims as a matter of law. * Batzel v. Smith*, 333 F.3d 1018, 1027 (9th Cir. 2003). The Court therefore must grant the MTD.

*1109 B. Motion to Strike*

Given the Court’s ruling on the MTD, Airbnb’s request to strike the class definition in the FAC is **DENIED** as **moot**.
CONCLUSION

For the foregoing reasons, the Court **GRANTS with prejudice** Airbnb’s motion to dismiss [Doc. # 16]. Airbnb’s motion to strike [Doc. # 17] is **DENIED as moot**. The pending motions for preliminary injunction [Doc. # 23] and expedited discovery [Doc. # 41] are also **DENIED as moot**.

**IT IS SO ORDERED.**

Footnotes

1 Airbnb also requests that the Court take judicial notice of two certified transcripts of hearings in other cases. [Doc. # 26.] The first is a transcript of a case management conference in a parallel action that Aimco filed in Florida state court. The second is a hearing transcript from Aimco’s principal authority in support of one of its arguments. The Court **DENIES as moot** Airbnb’s request because the Court did not and need not rely on the requested documents in reaching its conclusion.

2 Although Airbnb made separate motions to dismiss and strike, it states that its motion to strike is made “in the alternative” to its motion to dismiss. MTS at 3 n.2. All page references herein are to page numbers inserted in the header of the document at the time of filing in the CM/ECF filing system.

3 The FAC refers to the clause as both an “anti-subleasing” and “anti-assignment” clause. See, e.g., FAC at ¶¶ 27 (“anti-subleasing clause”), 28 (“anti-assignment clause”). For the purpose of ruling on this motion, the Court makes no distinction between the two terms.

4 “The broad construction accorded to section 230 as a whole has resulted in a capacious conception of what it means to treat a website operator as the publisher or speaker of information provided by a third party. Courts have recognized that ‘many causes of action might be premised on the publication or speaking of what one might call “information content.” ’ ” Jane Doe No. 1 v. Backpage.com, LLC, 817 F.3d 12, 19 (1st Cir. 2016) (quoting Barnes, 570 F.3d at 1101). “[C]ourts have invoked the prophylaxis of section 230(c)(1) in connection with a wide variety of causes of action.” Id.

5 The parties do not dispute that Airbnb is an interactive computer service.

6 Additionally, continued rental transactions with tenants whom Airbnb learns are violating their lease agreements does not disqualify Airbnb from Section 230 immunity. “[S]everal courts have held that immunity is not vitiated because a defendant fails to take action despite notice of the problematic content.” Black v. Google Inc., No. 10-02381 CW, 2010 WL 3222147, at *3 (N.D. Cal. Aug. 13, 2010), aff’d, 457 Fed.Appx. 622 (9th Cir. 2011) (collecting cases); see also Zeran v. Am. Online, Inc., 129 F.3d 327, 333 (4th Cir. 1997) (rejecting notice-based liability in the interactive computer service context); Stoner, 2000 WL 1705637 at *3 (“The courts have recognized that imposing liability based on notice of content in the interactive computer service context would create an incentive for providers to restrict speech and abstain from self-regulation, thereby defeating the purposes of section 230.”). Here, as in Black, “Plaintiffs offer no persuasive argument that their theory presents an exception.” Black, 2010 WL 3222147 at *3.

7 The appellate court also held that “knowledge of unlawful content does not strip a website of the immunity from liability granted under 47 U.S.C. § 230.” id. at 247, 727 S.E.2d 550.

8 Tellingly, in Aimco’s original complaint it was the “listings that appeared on Airbnb’s platform” that were in violation of Aimco’s lease agreement. Exhibit C to Notice of Removal at ¶ 28 (“Original Complaint”) [Doc. # 1–3]; see also id. at ¶ 51 (“listing apartments” was a “wrongful act[ ] that disrupted the relationship between [Aimco] and their tenants”); id. at ¶ 65 (requesting a declaration that “Airbnb shall not participate in, or assist Plaintiffs’ tenants ... in subletting apartments in [Aimco’s] Properties,” which implicitly includes listing Aimco-owned apartments). Only when Aimco
became aware of the CDA did it amend its complaint to shift its focus to payment and transaction processing. Compare Original Compl. (silent regarding the CDA), with FAC at ¶¶ 62–67 (discussing the CDA).

San Francisco enacted the ordinance out of concerns over the loss of affordable permanent housing due, in part, to increased tourist or transient rentals. Airbnb, 217 F.Supp.3d at 1070.
No.: 18-55113  
D.C. No.: 2:17-cv-04885-DMG-AS  
Short Title: La Park La Brea A LLC, et al v. Airbnb Inc., et al

Dear Appellant/Counsel

A copy of your notice of appeal/petition has been received in the Clerk's office of the United States Court of Appeals for the Ninth Circuit. The U.S. Court of Appeals docket number shown above has been assigned to this case. You must indicate this Court of Appeals docket number whenever you communicate with this court regarding this case.

Please furnish this docket number immediately to the court reporter if you place an order, or have placed an order, for portions of the trial transcripts. The court reporter will need this docket number when communicating with this court.

The due dates for filing the parties' briefs and otherwise perfecting the appeal have been set by the enclosed "Time Schedule Order," pursuant to applicable FRAP rules. These dates can be extended only by court order. Failure of the appellant to comply with the time schedule order will result in automatic dismissal of the appeal. 9th Cir. R. 42-1.
The parties shall meet the following time schedule.

**Fri., February 2, 2018**
Mediation Questionnaire due. If your registration for Appellate ECF is confirmed after this date, the Mediation Questionnaire is due within one day of receiving the email from PACER confirming your registration.

**Tue., March 27, 2018**
Appellant's opening brief and excerpts of record shall be served and filed pursuant to FRAP 32 and 9th Cir. R. 32-1.

**Thu., April 26, 2018**
Appellee's answering brief and excerpts of record shall be served and filed pursuant to FRAP 32 and 9th Cir. R. 32-1.

The optional appellant's reply brief shall be filed and served within 21 days of service of the appellee's brief, pursuant to FRAP 32 and 9th Cir. R. 32-1.
Failure of the appellant to comply with the Time Schedule Order will result in automatic dismissal of the appeal. See 9th Cir. R. 42-1.

FOR THE COURT:

MOLLY C. DWYER
CLERK OF COURT

By: John Brendan Sigel
Deputy Clerk
Ninth Circuit Rule 27-7
MEMORANDUM RE: DEFENDANTS’ MOTION FOR SUMMARY JUDGMENT

Baylson, District Judge

I. INTRODUCTION

*1 This case is the first to grant summary judgment on the question of whether drivers for UberBLACK are employees or independent contractors within the meaning of the Fair Labor Standards Act (“FLSA”) and similar Pennsylvania state laws.

More specifically, Plaintiffs Ali Razak (“Razak”), Kenan Sabani (“Sabani”), and Khaldoun Cherdoud (“Cherdoud” and, together with Razak and Sabani, “Plaintiffs”) have brought individual and representative claims against Uber Technologies, Inc. and its wholly-owned subsidiary Gegen, LLC (“Gegen,” and collectively, “Uber”) for violations of the federal minimum wage and overtime requirements under the FLSA, 29 U.S.C. § 201 et seq., the Pennsylvania Minimum Wage Act (“PMWA”), and the Pennsylvania Wage Payment and Collection Law (“WPCL”). Before the Court is Uber’s Motion for Summary Judgment (ECF 144, “Uber Mot.”) on the question of whether Plaintiffs, drivers for UberBLACK, qualify as “employees” of Uber under the FLSA and PMWA.¹

In general, under the FLSA, employers must pay employees the applicable minimum wage for each hour worked, and, if an employee works more than forty hours in a given week, the employer must pay one and one half (1½) times the regular rate for each hour subsequently worked. 29 U.S.C. §§ 206-07. Thus, among other things, Plaintiffs seek back pay for their work driving passengers using the Uber app.

For the following reasons, Uber’s Motion for Summary Judgment will be GRANTED. As a matter of law, Plaintiffs have not met their burden to show that they are employees and that Uber is their employer.

II. PROCEDURAL HISTORY

Plaintiffs commenced this action on January 6, 2016, by filing a Complaint in the Court of Common Pleas of Philadelphia County. (ECF 1, Ex. A). On February 4, 2016, Defendants removed the action to this court, citing federal question and diversity jurisdiction. (Id.).

A. Prior Motion Practice

On March 22, 2016, Uber moved for the first time to dismiss this case and compel arbitration, and, in a separate motion, to stay this action. (See ECF 15, 18). In those motions, Uber argued that an order issued by Judge Chen in the Northern District of California in related cases had “nullified” the arbitration provision in Uber’s Service Agreement, thereby raising a “threshold question
of arbitrability” that had to be decided by an arbitrator. Finding that Judge Chen’s order had no such effect, this court concluded that Plaintiffs had complied with the arbitration opt-out procedures allowed by the Service Agreement. The Court denied both motions. (ECF 37); Razak v. Uber Techs., Inc., No. 16-cv-573, 2016 WL 3960556, at *1 (E.D. Pa. July 21, 2016).

On August 19, 2016, Uber moved for Judgment on the Pleadings, (ECF 38), which, on October 7, 2016, this Court granted in part, and denied in part. See Razak, 2016 WL 5874822, at *1. Importantly, the Court found that Plaintiffs had alleged sufficient facts that they qualified as “employees” rather than “independent contractors,” under the “economic realities” test, such that judgment on the pleadings was not warranted. Id. at *4-5. Accordingly, the Court permitted Plaintiffs’ minimum wage claims to proceed as pled. The Court dismissed Plaintiffs’ breach of fiduciary duty claim with prejudice, but Plaintiffs’ FLSA and PMWA overtime claims without prejudice, and with leave to file an amended complaint. Plaintiffs then filed an Amended Complaint on October 13, 2016. (ECF 47, “AC”).

On October 31, 2016, Uber moved to dismiss Plaintiffs’ Amended Complaint in its entirety, as well as to strike certain portions of it. (ECF 48). The Court found that Plaintiffs’ allegations that they were “Online” the Uber App for more than 40 hours in a given week was sufficient— at the pleading stage—to state a claim for overtime pay under the FLSA. However, the Court further found that the question of whether Plaintiffs’ time spent Online the Uber App was actually compensable work time, within the meaning of the FLSA, was “an important, potentially dispositive one in this case.” Id. Accordingly, “notwithstanding the Court’s conclusion that Plaintiffs ha[d] sufficiently alleged FLSA overtime violations,” the Court designated the issue of compensability of Plaintiffs’ Online time for expedited discovery. Id.

After substantial discovery, including depositions of Plaintiffs and certain third parties, as well as other filings, Uber filed its Motion for Partial Summary Judgment on the limited issue of the compensability of Plaintiffs’ Online time. While maintaining its position that Plaintiffs are independent contractors rather than employees, Uber moved “on the limited question of whether—assuming, for purposes of [that] Motion only, that Plaintiffs qualify as ‘employees’ and Uber as an ‘employer’ under the FLSA—the time they spent Online the Uber App is compensable work time under the FLSA, and by extension, the PWMA.”

On September 6, 2017, the Court held Oral Argument. (See Transcript of 9/6 Oral Argument (“Tr.”) ECF 91). The Court ultimately denied the Motion for Partial Summary Judgment, focusing especially on four undisputed factual issues which indicated that the time drivers spent logged into the Uber App could be considered “‘predominantly’ for the benefit of the employer rather than the employee”:

1. Drivers have at most 15 seconds to accept a trip request from a rider which, if not accepted, will be deemed rejected.
2. If a driver does not accept three trip requests in a row, the Uber App automatically switches the driver from Online to offline. While offline, drivers are not eligible to accept ride requests.
3. The rider’s destination is not disclosed to the driver until the rider’s trip begins. Thus, in considering whether to accept a request, the driver has no knowledge whether it will be a short ride or very long—which affects driver compensation and may also restrict personal activities.
4. Drivers may only advance in the queue at the Airport or 30th Street Train Station if within a certain zone, and may only accept trip requests at the Airport if inside the west parking lot.

The Court also surmised that “the compensability question” at issue in that motion “may be inextricably intertwined with the threshold employee versus independent contractor question.” Id., at *15. Therefore, the Court’s denial of partial summary judgment was without prejudice to refile at the completion of discovery. See id., at *16.

B. The Present Motion for Summary Judgment

After additional discovery, Uber filed its Motion for Summary Judgment on the present question of whether Plaintiffs are employees or independent contractors (ECF 114), to which it attached a statement of undisputed facts. (ECF 114-3, “Uber SOF”). Plaintiffs filed a Response on February 26, 2018 (ECF 117), together with a statement...
of facts (ECF 117-3, “SOF Response”). Uber then filed a
Reply on March 12, 2018 (ECF 118), together with a
“Reply to Statement of Facts” (ECF 118-3). Plaintiffs
were previously granted leave to file a sur-reply (ECF
110), which they filed on March 19, 2018 (ECF 119).

Plaintiffs then filed a Motion to Strike the Defendants’
Reply to Plaintiffs’ Statement of Facts, on March 19,
2018 (ECF 120), asserting that the Plaintiffs’ Reply
Statement of Facts violated this Court’s practice and
procedural order. The Court granted the Motion to Strike
(ECF 121) and Defendants’ filed an amended Reply to
Statement of Facts on April 4, 2018. (ECF 123, “Reply
SOF”).

III. STATEMENT OF FACTS
The following is a fair account of the factual assertions at
issue in this case, as taken from, inter alia, Uber’s
Statement of Undisputed Facts in Support of Defendants’
Motion for Summary Judgment (Uber SOF, ECF 114-3),
and not genuinely disputed by Plaintiffs.

A. How UberBLACK Works
Plaintiffs are Pennsylvania drivers participating in the
Uber ride-sharing service who bring this action on behalf
of a putative class of “all persons who provided
limosine services, now known as UberBLACK, through
Defendants’ App in Philadelphia, Pennsylvania.” (ECF
47, AC ¶ 106). Plaintiffs are certified limousine drivers
who provide services as drivers through a mobile
smartphone application (the “Uber App”) furnished by
Uber. (Id. ¶¶ 2, 22, 63). The Uber App “provid[es]
on-demand car services to the general public,” including
through the UberBLACK platform. (Id.).

Gegen is a wholly-owned subsidiary of Uber that holds a
certificate of public convenience from (and is licensed by)
the Philadelphia Parking Authority (“PPA”) to operate a
limousine company. (Uber SOF ¶ 41). Because
transportation companies and individual transportation
providers who wish to provide Black car services in
Philadelphia are required to hold a PPA certificate of
public convenience (or associate with an entity that holds
such a certificate) (Id. ¶ 42), some UberBLACK
transportation providers operate under the PPA certificate
held by Gegen. (Id. ¶ 45). Approximately 75% of drivers
also use Gegen’s automobile insurance. (Id. ¶ 96)

Plaintiffs each own and operate transportation companies
Luxe Limousine Services, Inc. (“Luxe”), Freemo Limo,
LLC (“Freemo”), and Milano Limo, Inc. (“Milano”). (Id.
¶ 1).

*4 To access the Uber App, drivers open the App on their
mobile device and log in using their usernames and
passwords. (SOF ¶ 156). After logging on, to be eligible
to receive a trip request from a prospective rider, drivers
must tap a button, at which point the driver is online
(“Online”). (Id. ¶ 157). If a driver chooses to accept a trip
request, the driver taps “accept.” (Uber SOF to Motion for
Partial SJ, ECF 66-3 ¶ 25). If a driver does not press the
“accept” button within 15 seconds of the trip request, it
will be deemed rejected by the driver by default. The
Uber App will then automatically route the trip request to
the next closest driver, until a driver accepts the request.
If, however, no other driver accepts the trip, the trip
request goes unfulfilled, as Uber cannot require any driver
to accept a trip. (Id. ¶ 26, 28).

Drivers are free to reject trip requests for any reason,
aside from unlawful discrimination. (Id. ¶¶ 22, 24, 50-51).
If a driver ignores three trip requests in a row, however,
the Uber App will automatically move the driver from
Online to offline, such that he will not be eligible at that
time to accept trip requests. (Id. ¶ 29). Uber refers to this
as a system integrity measure since, as described above, a
trip request is sent to only one UberBLACK driver at any
given time, and having drivers who do not intend to give
rides Online slows down the process of connecting riders
and drivers, and leads to a poorer user experience for
riders. Drivers who have been automatically transitioned
offline, however, may go back Online at any point,
including immediately after going offline, if they wish to
do so. (Id. ¶ 30).

Uber also has regulations under which it logs off drivers
for a period of six hours if the driver reaches Uber’s
12-hour driving limit. (See Uber Drowsy Driving Policy,
ECF 117-31).

Uber also has regulations under which it reserves the right
to deactivate drivers for “accepting trips without the
intention to complete, including provoking riders to
cancel.” (Uber’s Driver Deactivation Policy, ECF 68-6).

B. Drivers’ Physical Location
Trip requests via the Uber App are generally sent to the
driver closest to the requesting rider. (Uber SOF to
Motion for Partial SJ, ECF 66-3 ¶ 35). Drivers have no
way of knowing from the Uber App, what the “demand” is at any given time; namely, whether, or how many, other drivers are Online. (Id. at 6). Uber may, from time to time, send drivers information about rider demand that may be of interest to them (e.g., a concert at the Wells Fargo Center, etc.), specifically dates or times of high rider demand. (Uber SOF to Motion for Partial SJ, ECF 66-3 ¶¶ 57, 58). However, ultimately drivers independently decide where to go to offer rides while Online. (Id. ¶¶ 34, 59, 60).

One exception to drivers’ ability to accept trip requests from anywhere, so long as they are Online, is at Philadelphia’s major transportation hubs, namely 30th Street Train Station and Philadelphia International Airport (the “Airport”). There is a “queue” system at both locations that routes trips to the next driver in the queue, (Id. ¶ 36), and a driver can only enter, or advance in, the queue while inside a designated zone. (Id. ¶ 37). Additionally, at the Airport, drivers can only receive trip requests if located inside the “west parking lot.” Drivers, including Plaintiffs, sometimes try to evade this requirement by, for instance, leaving their phones inside the designated zone at the Airport (but outside the west parking lot), such that they can advance in the queue without having to be physically with their phone. (Id. ¶¶ 55-56).

C. Drivers’ Activities While Online
*5 Uber places no restrictions on drivers’ ability to engage in personal activities while Online, and Plaintiffs here, in fact, engaged in a range of personal activities while Online. The undisputed facts in the record reflect that, while Online, Plaintiffs, inter alia, accepted rides from private clients, slept, did personal errands, smoked cigarettes, took personal phone calls, rejected trips because they were tired, and conducted business for their independent transportation companies. (Uber SOF ¶ 181). Drivers also sometimes forget to go offline, such that they remain in the Online mode on the Uber App despite having no intention of completing trips. (Uber SOF to Motion for Partial SJ ¶ 46). Drivers are allowed to use software applications other than the Uber App and to provide transportation services to others “outside of” the Uber App. (Uber SOF ¶¶ 123, 141-143).

The Court accepts, for purposes of this motion, Plaintiffs’ assertion that (1) Razak spent an average of 7 hours and 17 minutes Online each day, receiving an average of over 10 fare requests each day and completing more than 6 trips; (2) Sabani spent an average of 12 hours Online each day, receiving an average of more than 5 requests per day and completing 4 trips; and (3) Cherdoud spent an average of 9 hours, 16 minutes Online each day, receiving over 7 ride requests and completing over 5 trips. (Plaintiffs’ Response SOF to Motion for Partial SJ, ECF 68 ¶ 68 (citing ECF 68-10, 11, 12)). These figures reveal that Plaintiffs spent a large portion of their time Online not actually completing trips, and engaged, for at least some of the time, in these various personal activities.

D. Written Agreements Among the Relevant Parties
Independent transportation companies (“ITC’s”) who wish to provide transportation services using the UberBLACK platform must first enter into a Software License and Online Services Agreement, or similar agreement such as a Technology Services Agreement. (Uber SOF ¶ 19). Then, drivers engaged by ITC’s who have entered into such agreements may also use the Uber App, once they agree to the terms of the Driver Addendum to the Services Agreement. (Uber SOF ¶ 23).

The Services Agreement setting forth the relationship between Uber and companies using the Uber App states, among other things:

• “Customer [defined by the agreement as “an independent company in the business of providing transportation services”] acknowledges and agrees that Uber is a technology services provider that does not provide transportation services, function as a transportation carrier, nor operate as a broker for the transportation of passengers.”

• “Customer shall provide all necessary equipment, tools and other materials, at Customer’s own expense, necessary to perform Transportation Services.”

• “Uber does not, and shall not be deemed to, direct or control Customer or its Drivers generally or in their performance under this Agreement specifically, including in connection with the operation of Customer’s business, the provision of Transportation Services, the acts or omissions of Drivers, or the operation and maintenance of any Vehicles.”

*6 • “Customer and its Drivers retain the sole right to determine when, where, and for how long each of them will utilize the Driver App or the Uber Services.”
With the exception of any signage required by local law or permit/license requirements, Uber shall have no right to require Customer or any Driver to:
(a) display Uber’s or any of its Affiliates’ names, logos or colors on any Vehicle(s); or (b) wear a uniform or any other clothing displaying Uber’s or any of its Affiliates’ names, logos or colors...."

“In consideration of Uber’s provision of the Driver App and the Uber Services for the use and benefit of Customer and its Drivers hereunder, Customer agrees to pay Uber a service fee on a per Transportation Services transaction basis.”

“Customer agrees to maintain during the term of this Agreement workers’ compensation insurance for itself and any of its subcontractors as required by all applicable laws in the Territory.”

“Except as otherwise expressly provided herein with respect to Uber acting as the limited payment collection agent solely for the purpose of collecting payment from Users on behalf of Customer, the relationship between the parties under this Agreement is solely that of independent contracting parties.”

“The parties expressly agree that: (a) this Agreement is not an employment agreement, nor does it create an employment relationship, between Uber and Customer or Uber and any Driver; and (b) no joint venture, partnership, or agency relationship exists between Uber and Customer or Uber and any Driver.”

E. How UberBLACK Drivers get Paid
Uber sets the financial terms of all UberBLACK fares, and riders have their credit cards linked to the Uber App. Upon completion of the ride, charges the rider’s credit card for the fare. The money then (eventually) goes into the transportation company’s Uber account, with a commission taken out by Uber. The transportation company may then distribute the proceeds, and, for example, in the case of Luxe, such money is distributed to the driver who provided the ride.

Although some expenses are borne by Uber, the transportation companies who contract with Uber incur many expenses in supplying and maintaining vehicles, including finance payments, insurance, oil changes and repairs, towing expenses, maintenance and car washes.

IV. PARTIES' CONTENTIONS
Stated briefly, Uber’s principal contention on its motion for summary judgment is that Plaintiffs are not employees as a matter of law, and therefore their putative class action on behalf of all UberBLACK drivers must be dismissed. In Uber’s briefs, Plaintiffs are portrayed as entrepreneurial business-owners who use UberBLACK as a means of acquiring trip requests, with their primary competition coming from other limousine-for-hire companies. Uber contends that Plaintiffs are not
employees of Uber because Plaintiffs are not restricted from working for other companies, pay their own expenses (which are substantial), invest in their own companies, advertise and market for their own companies, engage workers for their own companies, work using UberBLACK as much or as little as they want, reject work from UberBLACK as much as they want, and use business acumen to attain their own profits (and losses). In Uber’s view, UberBLACK is simply a source of “lead generation,” like a “modern-day Yellow Pages,” rather than an “employer” under the FLSA.

In opposition to the motion, Plaintiffs contend that they are “employees” under the FLSA, and therefore entitled to overtime pay and other benefits, because they are extensively controlled by Uber when they are online, they exercise stamina rather than managerial skill to determine profit or loss, they must provide certain types and colors of car to drive for Uber, they do not have special skills requiring long training or apprenticeship, they have driven for Uber for years and for many hours per week, and they perform an integral role for Uber’s business.

V. DISCUSSION OF LEGAL FRAMEWORK

A. Determining Employee Versus Independent Contractor Status of Workers

1. FLSA and PMWA Statutory Language

The minimum wage, regular payday, payday notification, and overtime wage provisions at issue in this case all require that Plaintiffs prove they are “employees.” See 29 U.S.C. §§ 203, 206-07; 43 P.S. § 333.104. On this, the parties wisely agree. See, e.g., Tourscher v. McCullough, 184 F.3d 236, 242 (3d Cir. 1999) (The relevant portions “of the FLSA [] apply only to workers who are ‘employees’ within the meaning of the Act.”); Crump v. HF3 Constr., Inc., 14-cv-4671, 2016 WL 6962532, at *2 (E.D. Pa. Nov. 29, 2016) (“Each of these claims depends on the determination that Plaintiffs were employees of Defendants: as Plaintiffs implicitly acknowledge, Defendants could not have violated the law if Plaintiffs were not their employees.”).


*8 The FLSA itself is circular in its definitions of “employers” and “employees.” “Employer” is defined as “includ[ing] any person acting directly or indirectly in the interest of an employer in relation to an employee,” and an “employee” is defined as “any individual employed by an employer.” 29 U.S.C. § 203(d), (e)(1). Thus, courts have been left to fashion standards for determining whether an individual is an employee.

2. Third Circuit Guidance in Donovan

The seminal case in this Circuit for determining whether a worker is an employee under the FLSA is Donovan v. DialAmerica Marketing, Inc., 757 F.2d 1376 (3d Cir. 1985). Donovan makes clear that “Congress and the courts have both recognized that ‘of all the acts of social legislation, the Fair Labor Standards Act has the broadest definition of ‘employee.’ ‘” Id. at 1382 (citing 81 Cong. Rec. 7657 (remarks of Senator Hugo L. Black) and E.F.O.C. v. Zippo Mfg. Co., 713 F.2d 32, 37 (3d Cir. 1983)).

The Donovan court also set forth six factors for determining whether a worker is an employee:

(1) the degree of the alleged employer’s right to control the manner in which the work is to be performed;
(2) the alleged employee’s opportunity for profit or loss depending upon his managerial skill;
(3) the alleged employee’s investment in equipment or materials required for his task, or his employment of helpers;
(4) whether the service rendered requires a special skill;
(5) the degree of permanence of the working
relationship; and

(6) whether the service rendered is an integral part of the alleged employer’s business.

Id.

Consistent with the Supreme Court’s guidance in Rutherford Food Corp. v. McComb, 331 U.S. 722 (1947) (determining “employee” status under the FSLA), the Donovan court instructed that “neither the presence nor absence of any particular factor is dispositive,” and thus, “courts should examine the circumstances of the whole activity” with a consideration, “as a matter of economic reality,” of whether “the individuals are dependent upon the business to which they render service.” Id. at 1382-83 (citations omitted). This “economic-dependence aspect” “examines whether the workers are dependent on a particular business or organization for their continued employment.” Id. at 1385; see also Bartels v. Birmingham, 332 U.S. 126, 130 (1947).

Applying its standard, the Third Circuit considered two groups (the “home researchers,” and the “distributors”) of alleged employees working for the defendant, a telephone marking firm. A “major aspect” of the firm’s business was the “sale of magazine renewal subscriptions by telephone to persons whose subscriptions have expired or are near expiration.” Donovan, 757 F.2d at 1379. To locate subscribers’ phone numbers, the marketing firm used at least three methods: (1) a computerized telephone-number search operation; (2) in-house researchers; and (3) a home research program. Id. The third method, at issue in Donovan, accounted for 4%-5% of all numbers sought, whereas the first two methods combined for a total of 70% of all numbers sought. Id. Roughly 25% of the numbers were never sought. Id.

The defendant sought researchers for the home research program through advertising in newspapers. Prospective “home researchers” then contacted the defendant, and those who remained interested in the work met with an officer of the defendant to learn how to properly do the required work. Also during that meeting, the researchers were asked to sign a document labeled an “Independent Contractor’s Agreement.” From that point forward, each home researcher was given 500 or more phone numbers to research, with periodic appointments at defendant’s office to deliver their research results and retrieve more phone numbers to research. The defendant paid five cents for each successfully researched phone number.

As for the distributors, the Third Circuit agreed with the district court’s holding that they were not employees for purposes of the FLSA because: (1) “the defendant exercised little control over the distributors’ delivery of cards,” and they “were permitted to recruit their own distributees,” (2) “the distributors risked financial loss if they did not manage their distribution network properly,” as they “were responsible for paying all of their expenses” and “had the authority to set the rate at which its distributes would be paid,” (3) “had to make an investment in their business” and “used paid advertising in an effort to gain more distributees,” (4) “needed to possess some degree of managerial skill to ensure that their revenues exceeded expenses,” and, (5) merely delivered telephone-number search cards, which is

As for the distributors, the Third Circuit initially noted that the trial court had correctly assessed three of the six factors as weighing in favor of “employee” status of the home researchers when it found “that, for the most part, the investment of these workers was not great, the opportunity for profit and loss was small and the skills required were few.” Id. at 1383. As for the “right-to-control” factor, the Third Circuit found that the trial court had misapplied and overemphasized the factor, because working from home inherently involves some freedom from, among other things, direct supervision and strict working hours. Lastly, the appellate court noted that the district court had not applied the remaining two factors, i.e., the degree of permanence of the working relationship and whether the service rendered is an integral part of the alleged employer’s business. Both of these also weighed in favor of employee status, according to the Third Circuit, because (1) “[t]he working relationship between the home researchers and [defendant] was, for the most part, not a transitory one,” and (2) “the home researchers were engaged in the location of phone numbers[,] an integral part of the defendant’s business” in light of the fact that “the primary work of the defendant is locating phone numbers of various people and calling them to sell particular products.” Id. at 1385. Therefore, because the factors on the whole weighed in favor of “employee” status, the Third Circuit reversed the district court and found that the home researchers were “employees” of the defendant under the FLSA.

*9 Also as part of the home research program, the defendant hired six or seven “distributors” to pick up and deliver phone number cards of other home researchers. In some cases, the distributors also recruited new home researchers and trained them. By the end of the program, defendant paid distributors a flat fee per phone number, with distributors independently negotiating the payment per phone number for the home researchers to which they distributed number cards.
“incident to defendant’s business [of locating and calling numbers to sell products], rather than an integral part of it.” Id. at 1386-87. Notably, despite all of the above factors weighing in favor of “independent contractor” status, the Third Circuit stated that they were providing “appropriate deference” to the district court’s fact-finding in deciding the question, which they described as “admittedly close.” Id. at 1387.

In applying the six-factor test, and parsing the differences between the employment status of the “home researchers” and the “distributors” under the FLSA, the Third Circuit provided substantial guidance to aid this Court’s determination as to the employment status of Plaintiffs.

3. Relevant Cases in Other Circuits

a. Cases Involving Non-Uber Drivers For Hire

*10 Although the test applied in other circuits differs somewhat from the Donovan test described above, a number of circuit courts have considered the employment status of Black car and other drivers under the FLSA. Although these cases have not addressed the fact-specific circumstances applicable to the present dispute regarding Plaintiff UberBLACK drivers, their analysis is clearly relevant.

In Saleem v. Corp. Transportation Grp., Ltd., 854 F.3d 131 (2d Cir. 2017), the closest analog to the present motion before this Court, the Second Circuit applied its five-factor FLSA test in concluding that the trial court had not erred in granting summary judgment for the defendants (“CTG”) because the plaintiffs could not be considered “employees.” Judge Livingston, writing for a unanimous panel, stated:

“the record here does not permit the conclusion that Plaintiffs were employees, but instead establishes that they were in business for themselves [because] Plaintiffs independently determined (1) the manner and extent of their affiliation with CTG; (2) whether to work exclusively for CTG accounts or provide rides for CTG’s rivals’ clients and/or develop business of their own; (3) the degree to which they would invest in their driving businesses; and (4) when, where, and how regularly to provide rides for CTG clients.

Id. at 140.

In the opinion’s conclusion, Judge Livingston pointed to the “narrow compass” of the decision, finding that “[i]n a different case, and with a different record, an entity that exercised similar control over clients, fees, and rules enforcement in ways analogous to the Defendants here” might be an “employer” under the FLSA. Id. at 149. Indeed, the panel found it relevant, although insufficient to raise a material issue, that “the Defendants provided Plaintiffs with a client base, that Defendants charged fees when Plaintiffs utilized Defendants’ referral system, [and] that Defendants had some involvement [ ] in rule enforcement.” Id. Nonetheless, the Court affirmed the trial court’s grant of summary judgment and found the plaintiffs “to be independent contractors as a matter of law.” Id.

Although somewhat less analogous to the present motion, in Chao v. Mid-Atlantic Installation Servs., Inc., 16 Fed.Appx. 104 (4th Cir. 2001), the Fourth Circuit considered a lawsuit brought by the U.S. Department of Labor (“DOL”) against M/A Telecommunications (“MAT”), alleging that MAT, a broker providing cable installment services for Comcast, improperly characterized cable installer drivers (“Installers”) as “independent contractors” under the FLSA. Again, the trial court had found that as a matter of law, the workers in question were independent contractors not covered by the FLSA, and the appellate court affirmed the finding. In Chao, however, the Fourth Circuit utilized the same six-factor test that courts in the Third Circuit use post-Donovan, finding that:

(1) defendants did “not exercise the type of control over the manner in which the work is to be performed necessary to characterize the relationship [ ] as one of employee/employer,”

(2) the Installers had “an opportunity for profit or loss that is indicative of independent contractor status.”

(3) “the Installers” “investment in equipment and their right to employ workers weigh strongly in favor of concluding that they are independent contractors,”

(4) “the degree of skill required to install and repair cable equipment favors independent contractor status.”

*11 (5) “establish[ing] a long-term relationship [ ], implying employment [ ] is not necessarily the norm,
nor is it required,” such that the permanence of relationship “factor is neutral,” and,

(6) “because MAT is in the business of brokering cable installation to cable providers, the Installers are integral to MAT’s business,” but “this factor, standing alone, does not create an employment relationship.”

Id. at 106-107 (internal citations and quotation marks omitted).

Thus, although the sixth factor weighed in favor of employee status for the Installers, the Court concluded that, in light of the “totality of the circumstances” and the fact “that no single factor in the ‘economic reality’ test is dispositive,” the Installers were independent contractors under the FLSA. Id.

In Herman v. Express Sixty-Minutes Delivery Servs., Inc., 161 F.3d 299 (5th Cir. 1998), the Fifth Circuit considered a DOL lawsuit against a courier delivery service company alleging that the defendant (“Express”) had improperly characterized the courier delivery drivers as “independent contractors” under the FLSA. As with the two other circuit court opinions discussed above, in Herman, the appellate court affirmed the trial court’s conclusion that the workers in question were independent contractors. In reaching its conclusion, the Fifth Circuit compared the courier driver plaintiffs to a group of four employee drivers who worked for Express and who, unlike the plaintiffs:

(1) Report for work at a specified time;
(2) Are paid by the hour;
(3) Work a set number of hours that are determined by Express;
(4) Are required to wear a uniform;
(5) Are provided with a company vehicle and all of the necessary tools of the trade;
(6) Are reimbursed for expenses;
(7) Are not allowed to turn down deliveries; and
(8) Are under the control and supervision of Express.

Id. at 302.

Ultimately the Court concluded that Express “had minimal control over its drivers,” the drivers’ “profit or loss [was] determined largely on his or her skill, initiative,

ability to cut costs, and understanding of the courier business,” “the majority of drivers work for Express for a short period of time,” and “the Drivers are able to work for other courier delivery companies,” which considered all together, demonstrated that the courier drivers were independent contractors rather than employees.

b. Other Relevant Cases

In addition to “driver” cases, federal courts have also considered employment status of workers in other, closely-related fact patterns.

In Karlson v. Action Process Serv. & Private Investigations, LLC, 860 F.3d 1089 (8th Cir. 2017), a process server sued the company for which he worked under the FLSA, and the case proceeded to a jury verdict that plaintiff was an independent contractor. On appeal, the Eighth Circuit affirmed the decision, finding that the evidence at trial supported the jury finding, because Plaintiff: (1) decided which assignments to accept; (2) was paid a flat rate per job completed; (3) used his own car, phone, and computer to complete service of process; (4) did not report for work, punch a time clock, or otherwise report his hours to the alleged employer; (5) was not told when to work; (6) left for vacation without permission; and (7) accepted assignments from other companies. Id. at 1094-95.

*12 In Lawson v. GrubHub, Inc., 15-cv-05128, 2018 WL 776354 (N.D. Cal. Feb. 8, 2018), the plaintiff restaurant delivery driver alleged that he was improperly classified by Grubhub as an independent contractor under California employment laws. Following a bench trial, the district court applied California’s common law test (called the Borello test) to find that the defendant, “an internet food ordering service that connects diners to local restaurants,” could not be considered an employee. Id. at *2. Unlike the present case, the California common law test places the burden on the defendant to prove that the plaintiff is an independent contractor rather than an employee. Id. at *10. Also unlike the present case, California’s test has a “principal” factor—“whether the person to whom service is rendered has the right to control the manner and means of accomplishing the result desired”—as well as “secondary factors.” Id. at *11. The court ultimately found that while:

WESTLAW © 2019 Thomson Reuters. No claim to original U.S. Government Works. 9
some secondary factors favor an employee/employer relationship[,] ... [t]he other factors favor a finding that Mr. Lawson was an independent contractor. Of primary significance, Grubhub did not control the manner or means of Mr. Lawson’s work, including whether he worked at all or for how long or how often, or even whether he performed deliveries for Grubhub’s competitors at the same time he had agreed to deliver for Grubhub. Grubhub also did not provide Mr. Lawson with any of the tools for his work (other than a downloadable mobile app) and neither Grubhub nor Mr. Lawson contemplated the work to be long term or regular, but rather episodic at Mr. Lawson’s sole convenience.

Thus, even with the burden on the defendant (as opposed to the present case where the burden is on the plaintiff) (see supra), the court found after trial that Grubhub had met that burden and demonstrated that the plaintiff was an independent contractor, as opposed to an employee.

In O’Connor v. Uber Techs., Inc., 82 F. Supp. 3d 1133 (N.D. Cal. 2015), another case decided under California’s Borello test, the court stated that, “because a number of facts material to the employee/independent contractor determination in this case remain in dispute, the Court denied Uber’s summary judgment motion.” Id. at 1135. The court began by analyzing the “principal” factor under the Borello test, i.e., “whether the person to whom service is rendered has the right to control the manner and means of accomplishing the result desired.” Id. at 1149. The court found that this “critical fact” remained “in dispute” because Uber and the plaintiffs, drivers for UberX, disputed, among other things, the extent to which: (1) Uber can fire drivers at will; (2) drivers not accepting trips is considered a “performance issue”; and (3) drivers must dress professionally, send text messages to riders, play certain types of music during trips, and otherwise conform to Uber’s quality control “suggestions.”

A district court should grant a motion for summary judgment if the movant can show “that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a). A dispute is “genuine” if “the evidence is such that a reasonable jury could return a verdict for the nonmoving party.” Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). A factual dispute is “material” if it “might affect the outcome of the suit under the governing law.” Id.

A party seeking summary judgment always bears the initial responsibility for informing the district court of the basis for its motion and identifying those portions of the record that it believes demonstrate the absence of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). Where the non-moving party bears the burden of proof on a particular issue at trial, the moving party’s initial burden can be met simply by “pointing out to the district court ... that there is an absence of evidence to support the nonmoving party’s case.” Id. at 325. After the moving party has met its initial burden, the adverse party’s response must, “by citing to particular parts of materials in the record” set out specific facts showing a genuine issue for trial. Fed. R. Civ. P. 56(c)(1)(A). “Speculation and conclusory allegations do not satisfy [the non-moving party’s] duty.” Ridgewood Bd. of Educ. v. N.E. ex rel. M.E., 172 F.3d 238, 252 (3d Cir. 1999) (superseded by statute on other grounds as recognized by P.P. v. West Chester Area Sch. Dist., 585 F.3d 727, 730 (3d Cir. 2009)). Summary judgment is appropriate if the non-moving party fails to rebut by making a factual showing “that a genuine issue of material fact exists and that a reasonable factfinder could rule in its favor.” Id. Under Rule 56, the Court must view the evidence presented on the motion in the light most favorable to the opposing party.

VII. PRELIMINARY ANALYSIS

The Court notes, before approaching the legal distinction between employees and independent contractors, that these two categories are not the only two types of business relationship that exist under law, even if they may be the only relationships relevant to the present motion. Transportation network companies (“TNCs”), such as Uber and its most frequent U.S. competitor, Lyft, present a novel form of business that did not exist at all
ten years ago, available through the use of “apps” installed on smart phones. With time, these businesses may give rise to new conceptions of employment status.17

*14 Relatedly, the undersigned has recently adjudicated a dispute by several hundred Philadelphia taxicab companies against the Philadelphia Parking Authority (“PPA”), asserting that the taxicab companies were entitled to damages because the PPA, which is authorized under Pennsylvania law to license and regulate taxicabs and TNCs, failed to regulate TNCs for a substantial period of time, to the economic detriment of taxicabs. Checker Cab Philadelphia v. Philadelphia Parking Auth., No. 16-cv-4669, 2018 WL 587298 (E.D. Pa. Jan. 29, 2018). Although the opinion does not specifically concern limousine services or UberBLACK, it extensively discusses the differences between taxicabs and TNCs. Moreover, in the opinion, the Court had occasion to discuss the methodology by which TNCs operate, which can be briefly summarized as follows:

TNCs are a business model through which customers must use a smartphone app to arrange transportation from a driver, who picks up and transports a passenger, usually in the driver’s personal vehicle. Compensation is handled by requiring the customer to “register” a credit card with the TNC’s website, which then makes a charge for the ride on the customer’s credit card. No cash is accepted unless the customer voluntarily gives the driver a gratuity.

Id. at *10.

VIII. ANALYSIS
In this case, we start with the fundamental proposition that, notwithstanding Plaintiffs’ argument based on New Jersey and California state law, the burden lies with Plaintiffs to prove that they are employees. See, e.g., Anderson v. Mt. Clemens Pottery Co., 328 U.S. 680, 686–87 (1946) (A plaintiff “who brings suit under the [FLSA] has the burden of proving that he performed work for which he was not properly compensated.”); Schaffer v. Weast, 546 U.S. 49, 56 (2005) (“[T]he ordinary default rule [is] that plaintiffs bear the risk of failing to prove their claims.”) (citing C. Mueller & L. Kirkpatrick, Evidence § 3.1, p. 104 (3d ed. 2003) (“Perhaps the broadest and most accepted idea is that the person who seeks court action should justify the request, which means that the plaintiffs bear the burdens on the elements in their claims.”)).

As mentioned above, the Donovan factors drive this Court’s analysis. Therefore, each of the six Donovan factors is addressed in detail below.

A. Employer Control—Factor #1
The first Donovan factor is “the degree of the alleged employer’s right to control the manner in which the work is to be performed.”

At the outset, the Court notes that the written agreements entered into by the Plaintiffs and their transportation companies point to a lack of control by Uber.19 For example, the Services Agreement states, “Uber does not, and shall not be deemed to, direct or control Customer or its Drivers generally or in their performance under this Agreement.” (Uber SOF ¶ 22). These agreements, however, go beyond merely characterizing the extent to which Uber can control drivers. They also specifically detail the many ways that Uber is not entitled to control UberBLACK drivers. (See, e.g., id. (“Customer and its Drivers retain the sole right to determine when, where, and for how long each of them will utilize the Driver App or the Uber Services”; “Uber shall have no right to require Customer or any Driver to [ ] display Uber’s or any of its Affiliates’ names, logos or colors on any Vehicle(s)[,] or [ ] wear a uniform or any other clothing displaying Uber’s or any of its Affiliates’ names, logos or colors.”)). As Plaintiffs themselves point out, “[a]ctual control of the manner of work is not essential; rather it is the right to control which is determinative.” (ECF 117, “Response to MSJ,” at 16). See Drexel v. Union Prescription Ctrs., 582 F.2d 781, 785 (3d Cir. 1978); Williams v. Jani-King of Phila. Inc., 837 F.3d 314, 321 (3d Cir. 2016) (“It is the existence of the right to control that is significant, irrespective of whether the control is actually exercised.”).

*15 Nonetheless, Plaintiffs contend that, although the above-referenced agreements disclaim Uber’s control, “Uber exercises extensive control over UberBLACK
drivers when they are online with the Uber app.’” (Plaintiffs’ Response, at 12). Specifically, Plaintiffs assert, among other things, that Uber has the right to exercise substantial control over drivers because Uber can, pursuant to its contracts: terminate a driver’s access to the Uber App, deactivate a driver for canceling trips, “block” drivers manipulating lines at major transportation hubs, deactivate drivers for failing its background check policy, deactivate drivers who fall short of the required 4.7-star driver rating, make deductions against a driver’s earnings, deactivate drivers who solicit payments outside of the Uber App, and limit the number of consecutive hours that a driver may work. 

On the other hand, there are significant indications in this case that Uber does not exercise substantial control over Plaintiffs.

For example, as business owners, Plaintiffs are permitted to hire sub-contractors or other “helpers” to drive for UberBLACK using their vehicles, and it is Plaintiffs’ businesses that are paid as a result, not the “helpers.” (See, e.g., Response SOF ¶ 63 (“The money, pursuant to Uber’s rules, goes into Luxe’s Uber account, and then is distributed to the individual who performed the fare.”)). See Chao, 16 Fed.Appx. at 107 (affirming independent contractor status for cable television installers in part based on the fact that it was the “Installer’s decision whether to hire his own employees or to work alone,” to try to increase profits);

Additionally, Plaintiffs and their helpers are permitted to work for competing companies. This is well-established as a leading indicator that a worker is an independent contractor. See Saleem, 854 F.3d at 141 (“The fact that Plaintiffs could (and did) work for [ ] business rivals and transport personal clients while simultaneously maintaining their franchises without consequence suggests ... that [Defendant] exercised minimal control over Plaintiffs.”); Keller v. Miri Microsystems LLC, 781 F.3d 799, 807 (6th Cir. 2015) (“If a worker has multiple jobs for different companies, then that weighs in favor of finding that the worker is an independent contractor.”); Herman v. Express Sixty-Minutes Delivery Serv., Inc., 161 F.3d 299, 303 (5th Cir. 1998) (noting fact that “[t]he drivers can work for other courier delivery systems” supported independent contractor status); Kirsch v. Fleet Street, Ltd., 148 F.3d 149, 171 (2d Cir. 1998) (affirming finding of independent contractor status when, inter alia, the worker “was allowed to sell merchandise on behalf of other companies”).

*16 Defendants also point out that Plaintiffs are basically completely free to determine their working hours. (Uber SOF ¶ 186). Plaintiffs do not have to report to work at specific places, at specific times, or on specific days to “punch the clock.” (Id. ¶ 185) They are permitted to go Online as little or as much as they want, subject to some limitations for drivers who fail to meet quality or safety standards, who may be “blocked” or deactivated. (Id.) However, such limitations only apply while Plaintiffs are Online. Plus, the limitations are generally geared towards ensuring safety and quality control, such as forcing a break upon drivers who have been driving without any rest for twelve straight hours. (See Uber Drowsy Driving Policy, ECF 117-31). See, e.g., Jacobson v. Comcast Corp., 740 F.Supp.2d 683, 690 (D. Md. 2010) (“[D]etailed instructions and a strict quality control mechanism will not, on their own, indicate an employment relationship.”); Lepkowski v. Telatron Mktg. Grp., Inc., 766 F. Supp. 2d 572, 579–80 (W.D. Pa. 2011) (“[T]hese measures reflect precisely the type of quality control and customer service supervision that courts have consistently held to be ‘qualitatively different’ from the control exercised by an employer over an employee.”) (citing, among other cases, Zheng v. Liberty Apparel Co. Inc., 355 F.3d 61 (9th Cir. 2003)).

Moreover, Uber’s decision to deactivate Plaintiff Razak as a result of his conviction for Driving While Intoxicated does not suggest “control” but rather, a sense of responsibility for the safety of passengers who use the Uber App, even if Mr. Razak were remained legally allowed to drive under state law. See, e.g., Moreau v. Air France, 356 F.3d 942, 951 (9th Cir. 2004) (“Any airline that is concerned about its passengers’ safety would be remiss to simply delegate a task to another party and not double-check to verify that the task was done properly.”); Jacobson, 740 F.Supp.2d at 391 (“It is [ ] significant that the control Comcast does exercise is in part designed to protect Comcast customers.”).

Given the unique business model which TNCs, such as Uber, have created, and their applicability to Uber BLACK drivers, the fact that Uber does exercise some control when UberBLACK drivers are Online does not convert UberBLACK drivers into employees. The Court likens this situation to a carpenter, or a plumber, who is engaged to complete a renovation project for a homeowner. Very often, the exact date and time that the plumber/carpenter will come to the home is negotiated, but if the contractor is late or cancels, there is little the homeowner can do. The homeowner may impose certain requirements while the carpenter/plumber is in the house, such as not permitting certain fumes, footwear, music, or
other conditions—but all of these conditions apply only while the carpenter/plumber is in the home—and they certainly do not suffice to conclude that the carpenter/plumber is an employee.

Thus, the Court concludes that, on the whole, the first Donovan factor—“the degree of the alleged employer’s right to control the manner in which the work is to be performed”—weighs heavily in favor of “independent contractor” status.

B. Employee Opportunity for Profit or Loss—Factor #2

The second Donovan factor is “the alleged employee’s opportunity for profit or loss depending upon his managerial skill.”

It is undisputed that UberBLACK drivers are permitted to work as much or as little as they would like, subject to certain limitations, discussed earlier. (Uber SOF ¶ 186 (“Uber does not require drivers to be online on the Uber App at any time.”)). They are also permitted to work during whichever hours they choose, and to drive (within territorial limits) wherever they choose. They can concentrate their efforts around certain “high times” of the day, week, month, or year, in order to capitalize on “surge” pricing. (See, e.g., ECF 117-26 (“Surge Pricing Article”) (In “cases of very high demand, fares may increase to help ensure those who need a ride can get one,” thereby increasing the rates that drivers receive for each ride.). UberBLACK drivers can also—and indeed actually do—choose to work for competitors when they believe the opportunity for profit is greater by doing so. (Reply SOF ¶ 181 (“While online, Plaintiffs [ ] accepted rides from private clients.”); ¶ 179 (“While online, transportation providers are free to run a personal transportation company and distributed trips to other drivers.”)).

In fact, Plaintiffs themselves have taken advantage of such opportunities through their own respective companies, named Luxe, Freemo, and Milano. (Reply SOF ¶ 1; see id. ¶ 147 (“Freemo advertised ... and that advertising generated phone calls for trip requests,”) ¶ 82 (“Luxe advertised [and] developed an internet presence ... so that its drivers could receive trip requests,”) ¶ 181 (“While online, Plaintiffs, inter alia, accepted rides from private clients [and] conducted business for their independent transportation companies.”)). In other words, where the opportunity for profit was greater by choosing not to accept trip requests, Plaintiffs were free to make money elsewhere (even while actively remaining Online the Uber app to assess whether, for example, there was any “surge” pricing). These facts strongly indicate that Plaintiffs are independent contractors pursing their own entrepreneurial opportunities in search of profit. See Saleem, 854 F.3d at 144 (“By toggling back and forth between different car companies and personal clients, and by deciding how best to obtain business from [Defendant]’s clients, drivers’ profits increased through their initiative, judgment, or foresight—all attributes of the typical independent contractor.”) (citations and quotation marks omitted); Donovan v. DialAmerica Mktg., Inc., 757 F.2d at 1387 (finding independent contractor status where workers exercised “managerial skill to ensure that their revenues exceeded expenses”); Brock v. Mr. W. Fireworks, Inc., 814 F.2d 1042, 1047 (5th Cir. 1987) (Under the economic reality test, “it is not what [Plaintiffs] could have done that counts, but as a matter of economic reality what they actually do that is dispositive.”).

Plaintiffs contend that there remain disputed issues of material fact with respect to this “profit and loss” factor because, for example, Uber’s app determines whether each driver receives any given trip request (based on proximity, among other factors), and because Uber retains the right to determine how much to charge passengers. However, these assertions do not create any material dispute, because the “profit and loss” factor does not require that Plaintiffs be “solely in control of their profits or losses.” Chao, 16 Fed.Appx. at 107 (holding that cable installers were “no less in control of their net profits ... than typical independent contractors,” where the installers contended they could not “unilaterally determine how many Comcast customers they will service on a given day or the rate at which they are paid for each job.”).

The Court discussed some of the above issues in its opinion dated September 13, 2017 (ECF 93) denying summary judgment on the issue of compensability. However, it bears emphasis that, unless the UberBLACK driver is Online, he or she will not be earning any money. It is only once the driver goes Online, which is completely in control of the driver, that the opportunity to earn profits begins. See, e.g., Chao, 16 Fed.Appx. at 107 (affirming the district court’s holding, which held that cable television installers can control their own profits “by agreeing to work more or fewer hours”); Herman, 161 F.3d at 304 (affirming independent contractor status for courier drivers because, “[a]lthough [plaintiff] maintains that [defendant] controls customer volume and the amount charged to customers, the drivers had the ability to choose how much they wanted to work.”).

In sum, this factor strongly favors a conclusion that UberBLACK drivers are not employees.28

C. Employee Investment—Factor #3
The third Donovan factor is “the alleged employee’s investment in equipment or materials required for his task, or his employment of helpers.”

The major investment here is that UberBLACK drivers must purchase (or lease) their own expensive vehicles. Plaintiffs basically concede that this factor is strong evidence that they are not employees, instead stating that the “control” factor “moots” this factor. (see Response to MSJ, ECF 117-1, at 20 (“At first glance this is arguably the only Donovan factor favoring independent contractor status ... [but] the legal significance of the Plaintiffs’ investments is mooted by Uber’s control over those investments.”)). Although Plaintiffs are correct insofar as they acknowledge that the Court is tasked with a holistic assessment of the “economic realities” of the alleged employment relationship, it remains unclear how Plaintiffs’ extensive personal investments are “mooted” by the “control” factor.

*18 For example, Plaintiffs contend—and Uber concedes—that “Uber deducts money” from Plaintiffs for “vehicle finance payments.” (Reply SOF, ¶ 95). What Plaintiffs do not emphasize is that Plaintiffs have chosen to undertake this financing arrangement, which is not required of drivers for UberBLACK. (Id.) The fact that Uber presents this option, as well as insurance and incorporation referrals, (Id. ¶ 244), does not convert Uber into an employer under the FLSA.30 Furthermore, the fact that Plaintiffs receive financing for some of their companies’ vehicles does not somehow minimize that it was Plaintiffs, rather than Uber, that made significant capital investments which remain in their possession even if they choose to work for another company or individual. See United States v. Silk, 331 U.S. 704, 719 (1947) (“where the arrangements leave the driver-owners so much responsibility for investment and management as here, they must be held to be independent contractors”); Saleem, 854 F.3d at 144-46 (“large capital expenditures—as opposed to ‘negligible items, or labor itself’—are highly” indicative of independent contractor status); Freund v. Hi-Tech Satellite, Inc., 185 Fed.Appx. 782, 784-85 (11th Cir. 2006) (cable installer “drove his own vehicle and provided his own tools and supplies”); Browning v. CEVA Freight, LLC, 885 F.

D. Special Skills—Factor #4
The fourth Donovan factor is “whether the service rendered requires a special skill.”

It is generally accepted that “driving” is not itself a “special skill.” See, e.g., Alexander v. FedEx Ground Package Sys., Inc., 765 F.3d 981, 995 (9th Cir. 2014). However, this case does not involve solely the ability to drive. UberBLACK drivers replicate the limousine experience, and drivers are expected to maintain a high level of customer service. In fact, Plaintiffs themselves extensively emphasize the fact that drivers are subject to a number of “requirements” and “limitations” that they must navigate to start driving for UberBLACK as well as find success while doing so. (See, e.g., Response to MSJ, at 13 (“Uber requires all drivers to maintain a ‘driver rating’ of at least 4.7 out of 5 stars.”)) Thus, although perhaps not strictly rising to the level of “special skills,” UberBLACK drivers are not comparable to, for example, the delivery driver in Grubhub. 2018 WL 776354, at *16 (“[A]nyone with a means of delivery can contract to deliver for Grubhub—no special skills are needed.”). Instead, UberBLACK drivers bolster their earnings by managing when, where, and how to perform their task of transporting passengers. (See, e.g., ECF 117-26 (In “cases of very high demand, fares may increase to help ensure those who need a ride can get one,” thereby increasing the rates that drivers receive for each ride.)).

Thus, while this factor weighs in favor of finding that Plaintiffs are “employees,” it does not carry much weight in establishing Plaintiffs’ burden.

E. Relationship Permanence—Factor #5
The fifth Donovan factor is “the degree of permanence of the working relationship” between the worker and the alleged employer.
Generally, independent contractors have variable or impermanent working relationships with the principal company because they “often have fixed employment periods and transfer from place to place as particular work is offered to them, whereas ‘employees’ usually work for only one employer and such relationship is continuous and indefinite in duration.”

*Baker v. Flint Eng’g & Constr. Co., 137 F.3d 1436, 1442 (10th Cir. 1998) (internal quotation marks omitted); see also Keller v. Miri Microsystems LLC, 781 F.3d 799, 807 (6th Cir. 2015) (same). This factor, once again, relates to the fact that UberBLACK drivers have basically complete freedom regarding how long they wish to serve in this capacity and the hours in which they serve. In other words, there is no permanence of the working relationship whatsoever, unless the driver wants it.

*19 Plaintiffs contend that, because Plaintiffs have driven for Uber for years, and for “many hours per week” (Response to MSJ, at 21), there is “relationship permanence.” Although facially persuasive, this “fact” reflects Plaintiffs’ choices rather than Uber’s necessity. It is also simply untrue. (Uber SOF ¶ 184 (“Plaintiff Razak testified that he left on vacation for two months in 2017, but did not have to ask permission from Uber to go offline for that long.”)). Plaintiffs sought profits as they saw fit, during hours and on days that they chose with no advance notice as to when, where, or for how long they would work. In other words, just as in the case of the black-car drivers in Saleem, Plaintiffs used this freedom to, at times, work many hours per week, but this does not weigh in favor of “employee” status:

[T]his case resembles those in which we and other Circuits have recognized independent contractor status. In Kirsch v. Fleet Street, for example, [the Second Circuit] upheld a jury finding that the plaintiff was an independent contractor when, inter alia, he “was not required to spend time in the company’s offices [and] was free to set his own schedule and take vacations when he wished.” 148 F.3d at 171. Likewise, in Herman v. Express Sixty-Minutes Delivery Service, Inc., the Fifth Circuit concluded that a courier service “had minimal control over its drivers” such that they were independent contractors because, inter alia, “[t]he drivers set their own hours and days of work.” 161 F.3d at 303. Similarly here, Plaintiffs’ freedom in choosing when, where, and with what regularity to drive CTG clients shows the extent of their economic independence—that they operated their “business organization[s]” on their own terms, and as they saw fit. Rutherford, 331 U.S. at 730, 67 S.Ct. 1473.

Because UberBLACK drivers can work as little or as much as they want—the hallmark of a lack of “relationship permanence” with an alleged employer—this factor weighs heavily in favor of Plaintiffs’ independent contractor status.

F. Integrality of Service—Factor #6
The sixth Donovan factor is “whether the service rendered is an integral part of the alleged employer’s business.”

As noted elsewhere in this opinion, and in other cases, Uber drivers are an essential part of Uber’s business as a transportation company. See, e.g., O’Connor, 82 F. Supp. 3d at 1141 (“Uber simply would not be a viable business entity without its drivers.”). Indeed, it seems beyond dispute that if Uber could not find drivers, Uber would not be able to function. Similarly, Uber’s drivers depend on Uber’s technology in getting jobs. However, it is worth noting that UberBLACK is only one of the many services that Uber provides through its Uber app.

Nevertheless, the Court finds that this factor tends to support the Plaintiffs’ burden of proof that they are employees. This is only the second factor that supports such a conclusion, but only to a slight degree.

IX. CONCLUSION
Plaintiffs have had a full opportunity to present all relevant facts bearing on the question of whether they are employees under the FLSA. Accepting that there are some disputes of fact, the Court viewed all evidence in the light most favorable to Plaintiffs, as required by Anderson v. Liberty Lobby, Inc. See 477 U.S. at 255. Nonetheless, given the “totality of the circumstances” and the fact “that no single factor in the economic reality test is dispositive,” Chao, 16 Fed.Appx. at 107, Plaintiffs have not brought to the record sufficient proof to meet their burden of showing that they are employees.

For the foregoing reasons, Uber’s Motion for Summary Judgment (ECF 66) will be GRANTED.

*20 An appropriate Order follows.
Footnotes

1. Unlike the FLSA and PMWA, “[t]he WPCL does not create a right to compensation ... rather it provides a statutory remedy when the employer breaches a contractual obligation to pay earned wages.” De Asencio v. Tyson Foods, Inc., 342 F.3d 301, 309 (3d Cir. 2003).

2. Throughout this opinion, the capitalized term, “Online,” refers to drivers who are logged into the Uber App and eligible to receive trip requests from prospective UberBLACK riders.

3. This case only pertains to UberBLACK drivers, and therefore, the Court uses the term “Uber driver” only to mean “UberBLACK driver.” UberBLACK is one of several services (or what Uber calls “platforms”) that Uber provides through the UberApp. Drivers for UberBLACK provide “Black car” service, meaning that they exclusively drive vehicles approved by Philadelphia for limousine livery services. (Reply SOF, ¶ 248).

4. A certificate of public convenience permits a “common carrier operating a luxury limousine service” to “transport persons on an exclusive basis between points as authorized by the certificate, if the order for service is received in advance of the actual rendering of service and not by street hail.” 52 Pa. Code § 1053.22(a). Only three categories of individuals may provide limousine services under Gegen’s certificate of public convenience: “(1) The owner, if the owner is a limousine driver[,] (2) An employee of the certificate holder who is a limousine driver[,] and (3) A limousine driver who leases the limousine directly from the certificate holder.” See 52 Pa. Code § 1051.8(a).

5. The driver exclusively determines when to go “Online” to seek trip requests, and Uber permits drivers to stay offline for as long as they want. (SOF ¶ 161 ( undisputed)).

6. Plaintiffs dispute this paragraph on the grounds that it runs contrary to two previously-filed items in this case: the sworn declaration of Michael Coleman (ECF 15-1) and Uber’s Brief in Support of its Motion to Dismiss (ECF 15). Neither of the two filings contradicts paragraph 19 of Uber’s Statement of Undisputed Facts, as neither states that individuals may gain access to UberBLACK without an ITC first entering into an agreement with Uber.

7. Plaintiffs also claim this paragraph is disputed, on the same grounds as above. Again, neither of the filings cited by Plaintiffs contradicts Uber’s Statement of Undisputed Facts and thus, there is no genuine dispute as to this sentence. Wherever this Opinion references a “fact” that Plaintiffs contended in their submissions was “disputed,” the Court found that such dispute was either not “genuine,” or not “material,” or both.

8. This particular contention—that drivers are restricted to certain vehicle makes and models—will not be addressed in any detail, because the PPA sets the list of vehicles that limousine drivers may use in the City of Philadelphia, and Uber only restricts transportation providers from using a single model otherwise approved by the PPA (Toyota Avalon). (Reply SOF, ¶ 248).

9. Like the Second Circuit, the Fifth Circuit also uses a five-factor test.


11. The secondary factors are: (1) whether the one performing services is engaged in a distinct occupation or business; (2) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the principal or by a specialist without supervision; (3) the skill required in the particular occupation; (4) whether the principal or the worker supplies the instrumentalities, tools, and the place of work for the person doing the work; (5) the length of time for which the services are to be performed; (f) the method of payment, whether by the time or by the job; (6) whether or not the work is a part of the regular business of the principal; and (7) whether or not the parties believe they are creating the relationship of employer-employee. Lawson v. Grubhub, Inc., No. 15-cv-05128, 2018 WL 776554, at *11 (N.D. Cal. Feb. 8, 2018).

12. According to the court’s final opinion, “Mr. Lawson worked for other so-called ‘gig economy’ companies” prior to performing Grubhub deliveries, “including Lyft, Uber, Postmates, and Caviar,” because “these companies, including
Unlike the present case, the question of whether a worker is an employee or independent contractor under California law is a mixed question of law and fact and thus a question "for the jury." **Verma v. 3001 Castor, Inc., No. 13-cv-21**, 3001 Castor, Inc. v. Hana Bank, 135 S. Ct. 907, 910 (2015); compare **Borello, 48 Cal. 3d at 349, with Verma, 2014 WL 2957453, at *5, and Martin v. Seiker Bros., 949 F.2d 1286, 1292 (3d Cir. 1991)** (Stating that, in the Third Circuit, "[t]he employment status of the station operators is a legal conclusion.").


Two last cases bear at least a brief mention.

On November 10, 2017, the United Kingdom’s Employment Appeal Tribunal issued a judgment affirming that, under English law, Uber drivers are employees. **See Nov. 10, 2017 U.K. Employment Appeal Tribunal J. (Appeal No. UKEAT/0056/17/DA) (ECF 117-51).** However, the case was decided under four U.K. statutes, and the decision does not even mention UberBLACK drivers. Instead, it discusses drivers for UberX, UberXL, UberEXEC, UberLUX, UberTAXI, and UberWAV.

Although not specifically relevant to the present case, less than two weeks ago, the Supreme Court decided a case regarding the "car dealership exemption" to the overtime provisions of the FLSA. **Encino Motorcars, LLC v. Navarro, 138 S.Ct. 1134 (2018).**


In considering what business model Uber has presented, which has proven greatly popular with consumers, the Court notes that it shares some characteristics in common with a joint venture: Uber has provided the technology by which passengers can receive transportation, and drivers (or more precisely, the companies for which they work) can earn money from providing rides. For example, the Pennsylvania Supreme Court stated in **McRoberts v. Phelps, 391 Pa. 591 (1958):**

To constitute a joint venture certain factors are essential:

(1) each party to the venture must make a contribution, not necessarily of capital, but by way of services, skill, knowledge, materials or money;
(2) profits must be shared among the parties;
(3) there must be a ‘joint proprietary interest and right of mutual control over the subject matter’ of the enterprise;
(4) usually, there is a single business transaction rather than a general and continuous transaction.

**Id. at 599.**

These agreements are not determinative, but they are clearly relevant. "Though an employer’s self-serving label of workers as independent contractors is not compelling, such a designation in the franchise agreement is pertinent to the parties’ beliefs about the nature of the relationship." **Saleem, 854 F.3d at 141** (citations and parentheses omitted).

This refers to the Services Agreement, at section 12 (see Def. MSJ, Ex. 11), which allows both parties to the contract (the transportation company and Uber—not any driver) to terminate the agreement with seven days’ prior notice without cause, or without notice if there is, (1) material breach by the other party, (2) bankruptcy, insolvency, or suspension of payment, or (3) if the transportation company or its driver no longer qualifies under applicable law or the standards and policies of Uber to provide transportation services (e.g., if the driver could not pass Uber’s background check or if the driver's license is suspended as a result of a serious moving violation or crime).

Uber does not dispute that it reserves such a right. (See Uber Reply SOF ¶¶ 249, 251-52).

For support, Plaintiffs reference an email from Uber to Plaintiff Cherdoud on February 18, 2016 (see ECF 117-32), which states that Mr. Cherdoud would be "blocked from airport pickups for one week" because he violated Uber’s "empty sleeper policy, which states: “Partners are not permitted to leave their phones in the airport zone overnight if they are not present with their own phone.”
Uber does not dispute that Uber “deactivated” Plaintiff Razak pursuant to Uber’s background policy. According to Plaintiffs, Plaintiff Razak was convicted of a “DWI” in New Jersey on February 26, 2008. (ECF 117-50).

Uber does not dispute that Uber “deactivated” Plaintiff Sabani because of a low rider rating. (Uber Reply SOF ¶ 258).

Uber makes deductions from checks issued to transportation providers for various items, including insurance costs associated with Gegen, vehicle payments associated with financing arrangements, and PPA dues. (ECF 117-14).

“[S]oliciting payment of fares outside the Uber system” can lead to deactivation. (See Uber’s Driver Deactivation Policy, ECF 68-6).

Pursuant to Uber’s Drowsy Driving Policy, drivers who drive for Uber for twelve straight hours are automatically switched from Online to Offline for six straight hours, after which they may go Online again to receive trip requests. (ECF 117-31)

Several of the cases in this paragraph arise under the question of “joint employment,” to which courts apply a distinct but heavily related inquiry. Such cases are particularly relevant here, because UberBLACK’s written agreements are entered into by corporations for which individual drivers then work, which is precisely the relationship involved in each of the “joint employment” cases cited above.

Although the extent of Plaintiffs’ investments in their own companies will be discussed infra, Plaintiffs’ capital investments are also relevant to the “profit and loss” factor, and weigh heavily in favor of “independent contractor” status. Herman, 161 F.3d at 308 (“If the workers have sizeable capital investments at stake, they are more akin to independent entrepreneurs seeking a return on their risky capital investments, than to employees.”) (citations omitted).

Whether Uber’s participation in such financing arrangements requires it to comply with other statutory or regulatory law is beyond the scope of the present case.

For example, Plaintiffs submitted a U.K Employment Appeal Tribunal Decision regarding the employment status of drivers for UberX, UberXL, UberEXEC, UberLUX, UberTAXI, and UberWAV. (ECF 117-51).
April 27, 2018

Jeremy E. Abay
John K. Weston
Sacks Weston Diamond
1845 Walnut Street
Suite 1600
Philadelphia, PA 19103

Case Number: 18-1944
District Case Number: 2-16-cv-00573

PACER account holders are required to promptly inform the PACER Service Center of any contact information changes. In order to not delay providing notice to attorneys or pro se public filers, your information, including address, phone number and/or email address, may have been updated in the Third Circuit database. Changes at the local level will not be reflected at PACER. Public filers are encouraged to review their information on file with PACER and update if necessary.

To All Parties:

Enclosed is case opening information regarding the above-captioned appeal filed by Khaldoun Cherdoud, Kenan Sabani, Ali Razak, docketed at No. 18-1944. All inquiries should be directed to your Case Manager in writing or by calling the Clerk's Office at 215-597-2995. This Court's rules, forms, and case information are available on our website at http://www.ca3.uscourts.gov.

On December 1, 2009, the Federal Rules of Appellate and Civil Procedure were amended modifying deadlines and calculation of time. In particular those motions which will toll the time for filing a notice of appeal under Fed.R.App.P. 4(a)(4), other than a motion for attorney's fees under Fed.R.Civ.P. 54, will be considered timely if filed no later than 28 days after the entry of judgment. Should a party file one of the motions listed in Fed.R.App.P 4(a)(4) after a notice of appeal has been filed, that party must immediately


inform the Clerk of the Court of Appeals in writing of the date and type of motion that was filed. The case in the court of appeals will not be stayed absent such notification.

Counsel for Appellant

As counsel for Appellant(s), you must file:
1. Application for Admission (if applicable)
2. Appearance Form
3. Civil Information Statement
4. Disclosure Statement (except governmental entities)
5. Concise Summary of the Case
6. Transcript Purchase Order Form.
These forms must be filed within fourteen (14) days of the date of this letter.

Failure of Appellant(s) to comply with any of these requirements by the deadline will result in the DISMISSAL of the case without further notice. 3rd Circuit LAR Misc. 107.2.

Counsel for Appellee

As counsel for Appellee(s), you must file:
1. Application for Admission (if applicable)
2. Appearance Form
3. Disclosure Statement (except governmental entities)
These forms must be filed within fourteen (14) days of the date of this letter.

Parties who do not intend to participate in the appeal must notify the Court in writing. This notice must be served on all parties.

Attached is a copy of the full caption in this matter as it is titled in the district court. Please review the caption carefully and promptly advise this office in writing of any discrepancies.

Very truly yours,

s/ Patricia S. Dodzuweit
Clerk

By: Case Manager/tmm
267-299-4953

cc: Sophia Behnia
    Wendy S. Buckingham
    Paul C. Lantis
    Robert W. Pritchard
    Niloy Ray
    Andrew Spurchise
    Joshua Vaughn
I. (a) **PLAINTIFFS**  
Airbnb, Inc.

(b) **County of Residence of First Listed Plaintiff**  
San Francisco County, CA  
(Except in U.S. Plaintiff Cases)

(c) **Attorneys (Name, Address, and Telephone Number)**  
Howard M. Cooper, Todd & Weld LLP, 1 Federal St., 27th Floor  
Boston, MA 02110

---

II. **BASIS OF JURISDICTION**  
(Place an “X” in One Box Only)

1. U.S. Government Plaintiff  
   - Federal Question  
     - U.S. Government Not a Party

2. U.S. Government Defendant  
   - Diversity  
     - (Indicate Citizenship of Parties in Item III)

---

III. **CITIZENSHIP OF PRINCIPAL PARTIES**  
(For Diversity Cases Only)  
(Place an “X” in One Box for Plaintiff  
and One Box for Defendant)

- [ ] Citizen of This State
- [ ] Citizen of Another State
- [ ] Subject to the Jurisdiction of the Court

---

IV. **NATURE OF SUIT**  
(Place an “X” in One Box Only)

- [ ] PERSONAL INJURY
  - 310 Airplane
  - 315 Airplane Product Liability
  - 320 Assault, Battery, or Slander
  - 330 Federal Employers’ Liability
  - 340 Marine
  - 345 Marine Product Liability
  - 350 Motor Vehicle
  - 355 Motor Vehicle Product Liability
  - 360 Other Personal Injury
  - 362 Personal Injury - Medical Malpractice

- [ ] PERSONAL INJURY - Product Liability
  - 365 Personal Injury - Product Liability
  - 367 Health Care/Pharmaceutical Liability
  - 368 Asbestos/Personal Injury Product Liability
  - 370 Other Fraud
  - 371 Truth in Lending Act
  - 380 Other Personal Injury
  - 385 Property Damage
  - Other:

- [ ] FORFEITURE/ PENALTY
  - 625 Drug Related Seizure
  - 690 Other

- [ ] BANKRUPTCY
  - 422 Appeal 28 U.S.C 158
  - 423 Withdrawal
  - 490 Cable/Sat TV

- [ ] OTHER STATUTES
  - 375 False Claims Act
  - 376 Qui Tam (31 USC 3729(a))
  - 400 State Reapportionment
  - 410 Antitrust
  - 430 Banks and Banking
  - 450 Commerce
  - 460 Deportation
  - 470 Racketeer Influenced and Corrupt Organizations
  - 480 Consumer Credit
  - 483 Labor/Management Relations
  - 484 Employee Retirement Income Security Act
  - 485 Telephone Consumer Protection Act
  - 490 Cable/Sat TV
  - 550 Civil Rights Act
  - 558 Fair Housing Act

---

V. **ORIGIN**  
(Place an “X” in One Box Only)

1. Original Proceeding
2. Remanded from Appellate Court
3. Remanded from Lower Court
4. Reinstated or Reopened
5. Transferred from Another District
6. Multidistrict Litigation - Transfer
7. Multidistrict Litigation - Direct File

---

VI. **CAUSE OF ACTION**  
(Cite the U.S. Civil Statute under which you are filing. Do not cite jurisdictional statutes unless diversity):

- [ ] 42 U.S.C. § 1983
- [ ] 42 U.S.C. § 1985
- [ ] 42 U.S.C. § 1986
- [ ] 18 U.S.C. § 2255
- [ ] 18 U.S.C. § 2252

---

VII. **REQUESTED IN COMPLAINT:**

- [ ] CHECK IF THIS IS A CLASS ACTION
- [ ] DEMAND
- [ ] CHECK YES ONLY if demanded in complaint:
  - JURY DEMAND:  
    - [ ] Yes
    - [ ] No

---

VIII. **RELATED CASE(S)**

(See instructions):

- [ ] IF ANY
  - Case Number
  - DateFiled
  - Judge

---

SIGNATURE OF ATTORNEY OF RECORD

/s/ Howard M. Cooper

FOR OFFICE USE ONLY

RECEIPT #   AMOUNT   APPLYING IFP   JUDGE   MAG. JUDGE
Plaintiff Airbnb, Inc. (“Airbnb”) brings this action to enjoin and declare unlawful the enforcement against Airbnb by the City of Boston (“Boston” or the “City”) of its Ordinance Allowing Short-Term Residential Rentals in the City of Boston, Docket #0764 (the “Ordinance”), set forth in Chapter IX of the City of Boston Code. This action is brought under 42 U.S.C. § 1983, 47 U.S.C. § 230, 18 U.S.C. § 2707, the Court’s equitable powers, and the Declaratory Judgment Act, 28 U.S.C. § 2201. This action is both an as-applied and a facial challenge against the Ordinance. It is an as-applied challenge because it seeks only to prohibit the City from enforcing certain provisions of the Ordinance against Airbnb; and it is a facial challenge because certain provisions, on their face, violate the law and cannot be enforced against any hosting platform in any set of factual circumstances.

1. This is a case about a city trying to conscript home-sharing platforms into enforcing regulations on the city’s behalf, in a manner that would thwart both federal and Massachusetts law. The City of Boston has enacted an Ordinance limiting short-term residential rentals by hosts. But it goes much further than that. The Ordinance also enlists home-sharing
platforms like Airbnb into enforcing those limits under threat of draconian penalties, including $300-per-violation-per-day fines and complete banishment from doing business in Boston. Airbnb believes that home-sharing may be lawfully regulated, and it has worked with dozens of cities to develop the tools they need to do so without violating federal or state law. Boston’s heavy-handed approach, however, crosses several clear legal lines and must be invalidated.

2. The Ordinance, for example, compels Airbnb to enter into undefined so-called “agreements” with the City that will require Airbnb to take down listings posted by third-parties and prevent whatever scope of listings in whatever manner Boston dictates—or else be barred from Boston altogether. The Ordinance also forces home-sharing platforms like Airbnb to actively police third-party content on their websites by penalizing the design and operation of their platforms and restricting and imposing severe financial burdens on protected commercial speech. And it requires Airbnb to disclose to the City confidential information about its users without any legal process or precompliance review. This regime violates the Communications Decency Act (47 U.S.C. § 230), the Stored Communications Act (18 U.S.C. §§ 2701 et seq.), the First, Fourth, and Fourteenth Amendments of the U.S. Constitution, and the Massachusetts Declaration of Rights.

The City Ignored Applicable Federal Laws and the U.S. Constitution

3. Boston’s Ordinance to limit and regulate short-term rentals: (i) forces home-sharing platforms like Airbnb to sign agreements with the City requiring them to remove and bar from publication allegedly unlawful listings; (ii) compels the platforms to disclose confidential user information to the City without legal process; and (iii) imposes significant civil liability on the platforms for publishing third-party listings that advertise allegedly unlawful short-term rentals.
4. Boston passed its Ordinance without regard to preemptive federal laws, the U.S. Constitution, and the Massachusetts Declaration of Rights.

5. Through Section 230 of the Communications Decency Act ("CDA"), 47 U.S.C. § 230, Congress sought to protect and nurture the Internet as a forum for communication, expression, and e-commerce. The CDA prohibits "treat[ing]" websites that host or distribute third-party content, like Airbnb, "as the publisher or speaker of any information provided by another information content provider," immunizing them from liability under any "inconsistent" state or local law. 47 U.S.C. § 230(c)(1), (e)(3). Courts "have generally interpreted Section 230 immunity broadly, so as to effectuate Congress's 'policy choice . . . not to deter harmful online speech through the . . . route of imposing tort liability on companies that serve as intermediaries for other parties' potentially injurious messages." Universal Commc'n Sys., Inc. v. Lycos, Inc., 478 F.3d 413, 418 (1st Cir. 2007) (quoting Zeran v. Am. Online, Inc., 129 F.3d 327, 330–31 (4th Cir. 1997)). "This preference for broad construction recognizes that websites that display third-party content may have an infinite number of users generating an enormous amount of potentially harmful content, and holding website operators liable for that content 'would have an obvious chilling effect' in light of the difficulty of screening posts for potential issues." Jane Doe No.1 v. Backpage.com, LLC, 817 F.3d 12, 18–19 (1st Cir. 2016) (quoting Zeran, 129 F.3d at 331). Embodied in Section 230 is "Congress's avowed desire to permit the continued development of the internet with minimal regulatory interference." Id. at 19; see Batzel v. Smith, 333 F.3d 1018, 1027 (9th Cir. 2003) ("Congress wanted to encourage the unfettered and unregulated development of free speech on the Internet, and to promote the development of e-commerce.").
6. Airbnb is a realization of Congress’s goals. It is a classic intermediary: Airbnb operates an online platform that allows hosts and guests to find each other and arrange their own transactions for overnight accommodation. Hosts control the relevant content of their listings and publish them; hosts and guests alone, not Airbnb, decide whether and on what terms to enter into transactions. This brings Airbnb squarely within the protections of the CDA.

7. The Ordinance is inconsistent with the CDA because it (i) requires Airbnb to remove (and prohibits the publication of) certain third-party rental advertisements; (ii) directly regulates the structure and operation of Airbnb’s platform; and (iii) requires Airbnb to monitor, review, and verify that third-party content. By imposing these obligations and duties on Airbnb, and costly liability for failure to comply, the Ordinance impermissibly treats Airbnb as the publisher or speaker of third-party content. The CDA therefore preempts the Ordinance.

8. The Ordinance apparently attempts to evade the preemptive effects of the CDA by requiring Airbnb to enter an “agreement” to undertake the offensive monitoring and removal activities. That is not an “agreement”—it is compulsion.

9. The Ordinance also violates the First and Fourteenth Amendments of the U.S. Constitution and Article 16 of the Massachusetts Declaration of Rights because it is an impermissible content-based regulation of speech.

10. The Ordinance also violates the Stored Communications Act, 18 U.S.C. §§ 2701 et seq. (the “SCA”), the Fourth Amendment, and Article 14 of the Massachusetts Declaration of Rights by requiring Airbnb to turn over personal, non-public information about its hosts. The City cannot obtain this data without legal process and precompliance review. In attempting to do so, the Ordinance breaches critical privacy protections.
PARTIES

11. Plaintiff Airbnb, Inc. is a corporation organized and existing under the laws of the state of Delaware, with its principal place of business in San Francisco, California. It maintains a website that provides an online marketplace for people to list, explore, and book both short-term and long-term housing accommodations.

12. Defendant City of Boston is an incorporated municipality located in Suffolk County, Massachusetts.

JURISDICTION AND VENUE


14. The Court may declare the legal rights and obligations of the parties in this action under 28 U.S.C. § 2201 because the action presents an actual controversy within the Court’s jurisdiction.

15. Venue is proper under 28 U.S.C. § 1391 because the Defendant is located and resides in this judicial district, and because a substantial part of the events giving rise to Airbnb’s claims for relief occurred in this judicial district.

FACTUAL ALLEGATIONS

Airbnb Is a Leading Internet Platform for Responsible Home-Sharing

16. Founded in 2008, Airbnb provides an Internet platform through which persons desiring to book accommodations (“guests”), and persons listing unique accommodations

---

1 These facts concern properties on the Airbnb website (www.airbnb.com) in the United States, and do not extend to Luxury Retreats (www.luxuryretreats.com), which is a subsidiary of Airbnb, Inc.
available for rental ("hosts"), can locate each other and contract directly to reserve and book travel accommodations on a short- or long-term basis.

17. Airbnb’s website, at www.airbnb.com, allows interested parties to advertise their accommodations, enables hosts and guests to locate and connect with each other, provides a platform for hosts and guests to communicate and message one another directly to determine the material terms for their bookings. Airbnb also provides electronic storage on its platform for communications between users. Airbnb designed its platform to allow users to book rental transactions on the same website (or app) where they view rental listings. To do so, it provides payment processing services that permit hosts to receive payments electronically.

18. Airbnb does not charge hosts any upfront fees when they post their listings. Not charging hosts an upfront fee for listing their rentals removes barriers to entry and makes it more likely hosts will post their listings on Airbnb. Instead, in consideration for use of the platform services, including its publication and booking services, Airbnb receives a service fee from both the guest and the host, which is determined as a percentage of the accommodation fee set solely by the host. Airbnb is compensated for and able to provide its services, including its publishing, listing, and booking services, through such service fees, which help cover the costs associated with running Airbnb’s website and services.

19. Airbnb has no possessory interest in the property or accommodations that third-party hosts may list on the Internet platform. Airbnb therefore is not a proprietor, owner, or operator of accommodations offered by hosts on the Internet platform. As Airbnb’s Terms of Service state, Airbnb “does not own, create, sell, resell, provide, control, manage, offer, deliver, or supply any Listings or Host Services.”
20. Hosts, and not Airbnb, decide whether to list their properties and with whom and when to transact, describe their rentals, set their own lengths of stay, and determine their prices. Airbnb’s Terms of Service state that hosts “alone are responsible for their Listings and Host Services.” Hosts also input the minimum and/or maximum days of stay for a particular rental. Airbnb does not control the content that hosts create and is not responsible for it.

21. As a general matter, Airbnb does not review the hundreds of thousands of third-party listings before the listings appear on Airbnb’s marketplace. Rather, the process for listing properties is automated, and once the host provides listing information, the listing appears on the Airbnb marketplace almost immediately.

Airbnb Is Committed to Responsible Home-Sharing

22. Hosts who post listings on Airbnb are often everyday people using the powerful tools afforded by the Internet to engage in home-sharing to supplement their incomes. At present, there are approximately 6,300 listings for rentals in Boston on Airbnb’s marketplace. An average Boston host earns $8,600 per year from hosting on Airbnb, and many hosts say that the extra income earned from hosting has allowed them to stay in their homes.

23. As part of the Airbnb Community Compact, the company is committed to helping promote responsible home-sharing to make cities stronger. Airbnb has routinely cooperated with cities to increase host compliance with municipal laws, including through host-outreach efforts and by providing online tools for improved tax collection. Airbnb has worked with other cities to develop regulations that do not run afoul of Section 230 or the Constitution.

24. Airbnb also advises its hosts and guests to be aware of and comply with local laws in listing and renting units listed on Airbnb. The Airbnb Terms of Service state that “Hosts alone are responsible for identifying, understanding, and complying with all laws, rules and
regulations that apply to their Listings and Host Services.” Airbnb also maintains a “Responsible Hosting” section on the Airbnb website. Airbnb provides a variety of general information for hosts about laws and regulations they should follow, including safety guidelines and property regulations.

25. Airbnb has a specific page on its “Responsible Hosting” website for Boston that provides information about Boston’s laws and regulations. The page notes that the “City of Boston requires that individuals or organizations doing business in the City of Boston apply for and obtain a business certificate every four (4) years from the Office of the City Clerk.” It also points potential hosts to the Boston Zoning Code “to determine whether your listing might implicate any zoning definitions.” And it links to information about the Inspectational Services Department’s requirement that a property be registered if it is to be occupied without the owner of the property present.” Finally, the page refers potential hosts to the City’s Licensing Board rules and Room Occupancy Tax Guide so they can ascertain whether additional regulations apply to their residences.

Airbnb Protects Private Information

26. Airbnb is one of a number of competitors that offer platforms for potential hosts to list properties for rent. As a competitor in this marketplace, Airbnb considers that its confidential business information is extremely important for Airbnb’s ability to maintain its business success, and therefore takes various measures to guard its business information from unwanted disclosure.

27. Airbnb also takes various steps to protect the privacy of its hosts and guests. For example, although both hosts and guests complete profiles to participate on the site, personal information, including contact details and even last names, is not revealed until a booking has
been completed. These measures provide both security and privacy for hosts and guests, and indicate the importance of privacy to the users of the Airbnb platform. This, in turn, encourages hosts and guests to have confidence in Airbnb's platform, which is crucial for Airbnb's business success.

**Boston’s Regulations Conscript Platforms into Impermissible Compelled Enforcement**

28. On June 13, 2018, the City enacted Docket #0764, *an Ordinance Allowing Short-Term Residential Rentals in the City of Boston*. The City Council reported that the Ordinance would “provide a framework to allow and regulate short-term rentals in the City through a registration process under the jurisdiction of the City’s Inspectional Services Department (‘ISD’).” Boston City Council, Committee on Government Operations, Report of Committee Chair (June 13, 2018). The stated purpose of the Ordinance “is to provide a process through which certain dwelling units may be registered with the City of Boston for use as short-term rental units under the stipulations laid out within the Ordinance.” Ordinance § 9-14.1.

29. In general, the Ordinance restricts which types of residential units in the City may be offered as “Short-Term Rentals.” *Id.* § 9-14.3, 9-14.4AA-B. A “Short-Term Rental” is defined as “[t]he use of a Residential Unit for residential occupancy by a person or persons for a period of fewer than twenty-eight consecutive calendar days for a fee.” *Id.* 9-14.2.

30. The Ordinance makes only some units eligible as Short-Term Rentals (“Eligible Residential Units”): (i) “Limited Share” units, which are part of an Operator’s primary residence and are offered for rental while the Operator is present; (ii) “Home Share” units, which are part of an Operator’s primary residence (but apparently can be offered whether or not the Operator is present); and (iii) “Owner-Adjacent” units, which are units in two- or three-family buildings where the Operator lives in one unit but rents out another unit. *Id.* § 9-14.2.
31. The Ordinance makes other types of units ineligible as Short-Term Rentals ("Ineligible Residential Units"), including units that are (i) income-restricted or below market rate, (ii) not allowed to be leased or subleased based on state or federal law, (iii) deemed "Problem Properties" by the Mayor’s office, or (iv) found to have violated municipal regulations more than three times in a six-month period. Ordinance § 9-14-4A. The City will maintain an "Ineligible Units List" that catalogs all "Residential Units deemed ineligible for use as Short-Term Rental Units subject to the provisions of Section 9-14.4A." Id. § 9-14.2.

32. The Ordinance sets forth certain residential units not subject to the Ordinance. Id. § 9-14.4B.

33. The Ordinance also creates a Short-Term Rental Registry, a database ISD maintains in conjunction with the City of Boston Department of Innovation and Technology ("DoIT"), "that includes information on Operators who are permitted to offer their Residential Units as Short-Term Rentals." Id. § 9-14.2.

34. The Ordinance imposes requirements on "Operators" of Short-Term Rentals, defined as "[a] natural person who is the owner of the Residential Unit that he or she seeks to offer as a Short-Term Rental." Id. Operators must, among other things, register their Short-Term Rentals and include the registration number on any listing or advertisement for the unit, id. §§ 9-14.2, 9-14.5(j)(i); comply with all applicable federal, state, and local laws and codes, id. § 9-14.5(h); and maintain written records demonstration compliance with the Ordinance, id. § 9-14.5(i). The Ordinance thus creates classes of Short-Term Rentals that are either "Eligible Residential Units" or "Ineligible Residential Units."

35. The Ordinance also significantly alters the duties of online home-sharing platforms. It does so by imposing several requirements on "Booking Agents," which the
Ordinance defines as, “[a]ny person or entity that facilitates reservations or collects payment for a Short-Term Rental on behalf of or for an Operator.” *Id.*

36. First, the Ordinance requires Booking Agents to aid the City’s enforcement efforts by screening advertisements: “The Commissioner *shall* enter into agreements with Booking Agents for assistance in enforcing the provisions of this section, including but not limited to an agreement whereby the Booking Agent agrees to remove a listing from its platform for exceeding the maximum number of days a Residential Unit may be offered as a Short-Term Rental, whereby the Booking Agent agrees to remove a listing from its platform that is deemed ineligible for use as a Short-Term Rental under the provisions of this Ordinance, and whereby the Booking Agent agrees to prohibit a host from listing any listing without a valid registration number from the City.” *Id.* § 9-14.10.b (emphasis added).

37. Second, the Ordinance prohibits Airbnb and similar online platforms from providing reservation or payment services for a fee for third-party rental listings that advertise properties that are ineligible for short-term rental. Specifically, it provides that no Booking Agent may “accept[] a fee for booking a unit as a Short-Term Rental, where such unit is not an eligible Residential Unit.” *Id.* § 9-14.9.a.

38. Third, the Ordinance requires home-sharing platforms like Airbnb to disclose to the City their business records and confidential information about their clients. Booking Agents must “provide the City, on a monthly basis, an electronic report, in a format determined by the City . . . of the listings maintained, authorized, facilitated or advertised by the Booking Agent within the City of Boston for the applicable reporting period.” *Id.* § 9-14.11. The report must include “a breakdown of where the listings are located, whether the listing is for a room or a whole unit, and shall include the number of nights each unit was reported as occupied during the
applicable reporting period.” *Id.* This forced data disclosure is a tool for the City to impose penalties.

39. The Ordinance imposes significant penalties for non-compliance. To begin, the Ordinance gives the City carte blanche to issue violation notices and fines for *any* violation of *any* provision of the regulations, providing that “[a]ny person who fails to comply with any notice of violation or other order issued pursuant to this section by the Commissioner or a designee for a violation of any provision of this section shall be fined one hundred dollars ($100) per violation per day. Each day’s failure to comply with a notice of violation or any other order shall constitute a separate violation.” *Id.* § 9-14.9.c.

40. The provisions specifically regulating Booking Agents impose additional penalties:

a. As to the Ordinance’s requirement that home-sharing platforms like Airbnb police the content of third-party listings, the Ordinance provides: “Any Booking Agent that fails to enter into such agreements to actively prevent, remove or de-list any ineligible listings shall be prohibited from conducting business in the City.” *Id.* § 9-14.10.b.

b. As to its ban on Airbnb and like platforms’ ability to provide their services for a fee, the Ordinance provides: “Any person who offers a unit as a Short-Term Rental, or any Booking Agent who accepts a fee for booking a unit as a Short-Term Rental, where such unit is not an eligible Residential Unit, shall be fined three hundred dollars ($300) per violation per day. Each day’s failure to comply with a notice of violation or any other order shall constitute a separate violation.” *Id.* § 9-14.9.
c. As to the Ordinance’s requirement that Airbnb disclose confidential business records and third-party information, the Ordinance makes violations punishable under the City’s general power to enforce, and assess fines for violations of, municipal laws. The Ordinance states: “The provisions of this section may be enforced in accordance with the noncriminal disposition process of M.G.L. c. 40, s. 21D and, if applicable, by seeking to restrain a violation by injunction. The provisions of this section may also be enforced according to M.G.L. Chapter 40U as accepted by the City of Boston, also known as the ‘Green Ticket’ law.” Id. 9-14.10.a.

Compliance with the Ordinance Would Impose Substantial Burdens on Airbnb and Harm the Public

41. Airbnb’s platform allows a rental transaction to be completed on the same website once the host and guest agree to it. But the Ordinance’s provisions regulating Booking Agents would require Airbnb to fundamentally change the operation and design of its website, monitor every listing prior to allowing a booking transaction, and remove or reject certain third-party advertisements prior to publication. These requirements would force fundamental modifications to Airbnb’s intermediary service, introduce delays in the booking process, erode customer goodwill, and require Airbnb to expend significant financial and technical resources.

42. First, the requirement that Airbnb enter into agreements with the City to remove (or prohibit prior to publication) postings for units that are not in compliance with the Ordinance’s requirements for Short-Term Rentals or that are Ineligible Residential Units would force Airbnb to continually monitor, and withdraw from publication, third-party advertisements.

43. Specifically, to comply just with the agreements enumerated in Section 9-14.10.b, Airbnb would have to verify whether each listing exceeds the maximum number of booking days
permitted for a Short-Term Rental under the Ordinance, whether it is “ineligible for use as a Short-Term Rental” under the Ordinance, and whether it lists a valid registration number. Ordinance § 9-14.10.b. Airbnb could not comply with this provision simply by looking at a third-party listing. Rather, Airbnb would have to review each listing to, at the very least, (1) compare the number of days the listing advertises to the number of days permitted under the Ordinance; (2) ascertain whether the unit falls into one of the four categories that are “not eligible to be offered as Short-Term Rentals,” including units that are below market rate or income-restricted, units that are subject to any other law that prohibits their leasing, units that are designated as “Problem Properties” by the Mayor, and units that have been subject to 3 or more findings of violations of the Ordinance within a 6-month period, id. § 9-14.4A; (3) if the advertisement contains a registration number, compare that number to the Short-Term Registry to ensure that it is valid, id. § 9-14.5(j)(i); and (4) if the advertisement does not contain a registration number, compare the information in the listing to the information in the Short-Term Registry to determine whether the unit is validly registered, § 9-14.2.

44. These onerous review requirements cannot be completed with an automated click of a button. Indeed, much of the information Airbnb would require to comply, such as whether a property has been designated a “Problem Property” by the Mayor, would not even be readily available to Airbnb, and certainly would not be included in the listing itself.

45. The burden to Airbnb of reviewing third-party content to prohibit and remove postings would not be measured solely by the static number of listings at a single point in time, but would be an ongoing and expanding burden. There are at present approximately 6,300 Airbnb listings in Boston. In the normal course of business, hosts can add new listings, change the status of listings, and deactivate listings every day. Airbnb then, too, would have to monitor
for every change constantly. The Ordinance’s express content-removal requirement thus would cause a significant disruption to Airbnb’s operations and impose substantial personnel and other costs on Airbnb (particularly because other cities have attempted to enact, and may continue to attempt, similar regulatory requirements). It also would injure the significant business goodwill that Airbnb has generated from the hosts and guests who have come to rely on its platform.

46. Airbnb also does not know what additional agreements it will be forced to enter with the City. By using the phrase “including but not limited to,” the Ordinance suggests that the City could require Airbnb to enter all manner of agreements. Because this requirement is backed by a steep penalty—a complete ban on doing business in Boston for failure to enter such an agreement—the City has vast discretion to impose as-yet undefined agreements on Airbnb.

47. Second, the ban on Airbnb’s accepting a fee for a rental booking that does not comply with the Ordinance would require Airbnb fundamentally to change the operation and design of its platform. Airbnb provides booking, calendaring, and payment processing services in connection with advertisements on its website. Airbnb’s key innovative design feature is that it enables booking transactions between hosts and guests on the same website—with one click. Airbnb provided a technological step forward from a “[‘bulletin board’ service, or an online site ‘on which Internet subscribers post comments and respond to comments posted by others.’]” La Park La Brea A LLC v. Airbnb, Inc., 285 F. Supp. 3d 1097, 1104 (C.D. Cal. 2017) (quoting Kimzey v. Yelp! Inc., 836 F.3d at 1263, 1266 (9th Cir. 2016)). The Ordinance’s ban on accepting fees for certain transactions based on their content would force Airbnb to eliminate this key design feature. Common sense explains why: Airbnb could not risk allowing an automatic booking before reviewing the content of the listing to ensure that it complies with the Ordinance. Accordingly, Airbnb would have to undertake a fundamental redesign of its platform.
48. Such a change would harm users. Hosts and guests greatly value using Airbnb’s services to facilitate payment and calendaring of rentals for listings published on Airbnb’s site. In the modern world of e-commerce, users expect to immediately enter into transactions online for goods and services advertised on home-sharing platforms like Airbnb. They do not expect to view listings they cannot book. Were Airbnb no longer able to offer its booking services, many hosts and guests likely would be confused and angered by the change (of not being able to book a listing on the site) and may stop using Airbnb’s platform altogether.

49. The ban on taking fees for certain third-party listings also would necessarily require Airbnb to monitor and remove such listings. Specifically, Section 9-14.9.a penalizes Airbnb for accepting a fee for the booking of a unit that “is not an eligible Residential Unit.” \textit{Id.} § 9-14.9.a. This provision does not define what “not eligible” means. At the very least, as with Section 9-14.10.b, Airbnb would have to review each listing to determine whether the unit it advertised fell into one of the four categories deemed “not eligible” under the Ordinance. Again, this would require detailed information that the advertising third-party would not include in the listing. And if “not eligible” in this provision is defined more broadly to mean unlawful under the Ordinance, then Airbnb would have to review each listing to determine whether it is \textit{in any way in violation} of the Ordinance. For the same reasons described above, therefore, Airbnb could not achieve compliance with simple automation. Instead, it will have to monitor and review third-party content before the final stage of the booking process occurs to ensure that the fee it accepts is not connected to an ineligible listing and remove third-party content from its website so that its platform is not cluttered with listings that are unbookable or that create a substantial risk of liability if booked.
50. The third-party advertisements for properties on Airbnb’s website are not unlawful on their face because they do not indicate whether a property complies with the Ordinance. An advertisement’s inclusion of a registration number would not rectify this problem. See Ordinance § 9-14.5(j)(i) (requiring Operators to include a registration number in a listing). If the listing did not include a registration number, the underlying rental may still be lawful, as the property may be registered during booking even if it was not at the time of publication. And if the listing did include a registration number, Airbnb still would have to verify the registration number is valid by comparing the information in the advertisement with the information in the Short-Term Rental Registry in order to minimize the risk of liability. As a result, Airbnb cannot know merely by looking at listings whether they propose illegal transactions. Given the prospect of significant penalties, if Airbnb has any doubt about the lawfulness of a particular listing, it will likely have to remove the listing, even if the Operator has complied with the Ordinance.

51. Enforcement of the Ordinance will cause Airbnb harm because Airbnb faces the threat of substantial penalties under a preempted law that violates its constitutional rights and will substantially disrupt its business and erode customer goodwill.

CLAIMS FOR RELIEF


52. Airbnb incorporates all of the preceding paragraphs as if fully set forth herein.

53. Airbnb is a provider of an interactive computer service within the meaning of the Communications Decency Act, 47 U.S.C. § 230, because it operates the interactive online
platform Airbnb.com. Airbnb provides information to multiple users by giving them computer access to a computer server within the meaning of 47 U.S.C. § 230(f)(2).

54. The third-party hosts that create listings on Airbnb.com are persons responsible for the creation or development of information provided through Airbnb, within the meaning of 47 U.S.C. § 230(f)(3).

55. The Ordinance violates and conflicts with 47 U.S.C. § 230, and Airbnb’s rights thereunder, because it imposes duties and obligations on Airbnb that treat Airbnb as the publisher or speaker of information provided by another information content provider and derive from Airbnb’s status as a publisher or speaker of third-party content, all in a manner prohibited by Section 230.

56. First, Section 9-14.10 requires Airbnb to enter into agreements with the City “including but not limited to an agreement whereby the Booking Agent agrees to remove a listing from its platform for exceeding the maximum number of days a Residential Unit may be offered as a Short-Term Rental, whereby the Booking Agent agrees to remove a listing from its platform that is deemed ineligible for use as a Short-Term Rental under the provisions of this Ordinance, and whereby the Booking Agent agrees to prohibit a host from listing any listing without a valid registration number from the City.” Code of Boston, Ch. IX, Sec. 1, § 9-14.10.b.

57. Section 230 of the CDA unambiguously bars efforts “to hold a service provider liable for its exercise of a publisher’s traditional editorial functions—such as deciding whether to publish, withdraw, postpone or alter content.” Jane Doe, 817 F.3d at 18 (internal quotation marks omitted). An agreement with the City compelled under Section 9-14.10.b would require Airbnb to make decisions to remove content and to decline to publish content. This provision
treats Airbnb as a publisher of third-party rental listings on its website and therefore violates and conflicts with the CDA.

58. Second, Section 9-14.9.a imposes significant penalties on Airbnb if it accepts fees for booking transactions associated with listings that do not comply with the Ordinance. Facilitating these transactions between hosts and guests automatically and immediately is a key design feature of Airbnb’s platform.

59. Section 230 of the CDA protects an online service provider’s “decisions regarding the ‘construct and operation’ of its websites.” Lycos, 478 F.3d at 422. By requiring that Airbnb verify that a listing complies with the Ordinance before completing a booking transaction, the ban on fees compels Airbnb to review listings prior to processing booking transactions or to cease processing booking transactions altogether. This direct regulation of the design and operation of Airbnb’s website violates and conflicts with the CDA.

60. Section 9-14.9.a also effectively requires Airbnb to monitor and remove content associated with third-party rental advertisements. Specifically, Airbnb must verify whether the content of a listing complies with the Ordinance at or prior to the time it receives a fee for completing a booking transaction. Monitoring and removing content associated with third-party listings are protected editorial acts, and treating Airbnb as a publisher or speaker of third-party content violates and conflicts with the CDA.

61. The Ordinance is also preempted because it would “stand as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.” Franklin California Tax-Free Trust v. Puerto Rico, 805 F.3d 322, 343 (1st Cir. 2015) (quoting Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm’n, 461 U.S. 190, 204 (1983)). The Ordinance stands as an obstacle to the CDA’s core goals of protecting innovative online
platforms like Airbnb from liability based on the illegal activities of third parties, promoting the development of e-commerce, and preserving the vibrant free market for the Internet with minimal government regulation.

62. The Ordinance is a “State or local law that is inconsistent with” Section 230, in violation of 47 U.S.C. § 230(e)(3).

63. The enforcement of the Ordinance against Airbnb violates and is preempted by 47 U.S.C. § 230.

64. The Ordinance interferes with or impedes the accomplishment of the full purposes and objectives of federal law, violates the Supremacy Clause, U.S. Const. art. VI, cl. 2, and is invalid and preempted.

65. Pursuant to 42 U.S.C. § 1983 and the Court’s equitable powers, Airbnb seeks injunctive relief against the City to prevent its enforcement of the Ordinance, which would conflict with and violate the CDA.


(Content-Based Restrictions on Speech)

66. Airbnb incorporates all of the preceding paragraphs as if fully set forth herein.

67. The Ordinance violates the First Amendment and Article 16 of the Massachusetts Declaration of Rights because it imposes content-based restrictions on commercial speech by requiring online platforms like Airbnb to monitor, remove, and prohibit the publication of advertisements that are not illegal on their face to avoid severe penalties.

68. The Ordinance requires Airbnb to agree to remove or prohibit the publication of third-party content on its website; if it does not so agree, the City may prohibit Airbnb from
operating in Boston. Ordinance § 9-14.10.b. The Ordinance also imposes significant monetary penalties on Airbnb if it “accept[s] a fee for booking a unit as a Short-Term Rental, where such unit is not an eligible Residential Unit.” Id. § 9-14.9.a.

69. A law is “presumptively inconsistent with the First Amendment if it imposes a financial burden on speakers because of the content of their speech.” Simon & Schuster, Inc. v. Members of New York State Crime Victims Board, 502 U.S. 105, 115 (1991). Whether that financial burden taxes speech itself or speech-derived income, “[b]oth forms of financial burden operate as disincentives to speak.” Id. at 117. For that reason, “[l]awmakers may no more silence unwanted speech by burdening its utterance than by censoring its content.” Sorrell v. IMS Health Inc., 564 U.S. 552, 566 (2011). Article 16 provides the same protections for speech as the First Amendment to the federal Constitution. See, e.g., Bulldog Investors General Partnership v. Commonwealth, 953 N.E.2d 691, 703 (Mass. 2011). Because the Ordinance both compels Airbnb to agree to remove and prohibit the publication of third-party listings based on their content, and places a financial burden on speech-derived income by requiring Airbnb to police speech on its platform before accepting fees for booking transactions, it targets protected commercial speech and disproportionately burdens online home-sharing platforms like Airbnb.

70. The Ordinance constitutes a content-based restriction on speech because it applies solely based on the content of published rental listings on Airbnb’s platform.

71. The Ordinance’s burden on speech is not narrowly or appropriately tailored to promote a compelling or substantial interest by the City, and is not likely to achieve any such interest in a direct and material way. For example, the City can directly enforce its short-term rental ban on hosts. The City has not shown, and cannot show, that less-speech-restrictive alternatives would not be an adequate means of achieving the City’s policy goals.
72. The enforcement of the Ordinance against Airbnb therefore violates the First Amendment of the United States Constitution, as applied to the City by the Fourteenth Amendment, and Article 16 of the Massachusetts Declaration of Rights.

73. Pursuant to 42 U.S.C. § 1983 and the Court’s equitable powers, Airbnb seeks injunctive relief against the City, whose enforcement of the Ordinance would conflict with and violate the First Amendment and Article 16 of the Massachusetts Declaration of Rights.


74. Airbnb incorporates all of the preceding paragraphs as if fully set forth herein.

75. The Ordinance violates the due process guarantees of the Fourteenth Amendment and Article 12 of the Massachusetts Declaration of Rights because it is unconstitutionally vague.

76. The Ordinance confers standardless discretion on the City to force Airbnb to enter into an “agreement” with the City to enforce the Ordinance, through whatever means the City demands, under threat of being banned from conducting business in the City of Boston if Airbnb refuses to comply. Ordinance § 9-14.10.b.


78. The Ordinance gives the City unlimited authority to require Airbnb to sign agreements “including, but not limited to” the three agreements enumerated in the provision requiring Airbnb to remove and prohibit publication of content. Ordinance § 9-14.10.b. The Ordinance provides no standards or limits on what the City can require, and there is nothing in the text of the Ordinance to constrain Boston’s discretion. *Id.*

79. The enforcement of the Ordinance against Airbnb therefore violates the Fourteenth Amendment and Article 12 of the Massachusetts Declaration of Rights.

80. Pursuant to 42 U.S.C. § 1983 and the Court’s equitable powers, Airbnb seeks injunctive relief against the City, whose enforcement of the Ordinance would conflict with and violate the Fourteenth Amendment and Article 12 of the Massachusetts Declaration of Rights.


81. Airbnb incorporates all of the preceding paragraphs as if fully set forth herein.

82. Under the SCA, “a provider of remote computing service or electronic communication service to the public shall not knowingly divulge a record or other information pertaining to a subscriber to or customer of such service . . . to any governmental entity,” without a subpoena or other legal process, absent an applicable exception, none of which apply here. 18 U.S.C. §§ 2702(a)(3), (c)(1); 2703(c).

83. Airbnb is a provider of an “electronic communication service” within the meaning of the SCA, as it provides to its users “the ability to send or receive wire or electronic communications.” 18 U.S.C. § 2510(15). Airbnb also is a provider of a remote computing
service within the meaning of the SCA, as it provides to users “computer storage or processing services by means of an electronic communications system.” 18 U.S.C. § 2711(2).

84. The City is a “governmental entity” under the SCA. See 18 U.S.C. § 2711(4) (defining “governmental entity” as “a department or agency of the United States or any State or political subdivision thereof”).

85. The Ordinance requires a Booking Agent to “provide to the City, on a monthly basis, an electronic report, in a format determined by the City . . . of the listings maintained, authorized, facilitated or advertised by the Booking Agent within the City of Boston for the applicable reporting period. The report shall include a breakdown of where the listings are located, whether the listing is for a room or a whole unit, and shall include the number of nights each unit was reported as occupied during the applicable reporting period.” Ordinance § 9-14.11.

86. The enforcement of this provision violates and conflicts with the SCA, and Airbnb’s rights thereunder, because it requires Airbnb to “divulge a record or other information pertaining to a subscriber to or customer of such service” to a “governmental entity,” without a subpoena or other form of legal process. 18 U.S.C. §§ 2702(a)(3), (c)(1); 2703(c).

87. This provision also interferes with or impedes the accomplishment of the full purposes and objectives of federal law, violates the Supremacy Clause, U.S. Const. art. VI, cl. 2, and is invalid and preempted.

88. Pursuant to 18 U.S.C. § 2707(a)-(b), 42 U.S.C. § 1983, and this Court’s equitable powers, Airbnb seeks injunctive relief against the City to prevent its enforcement of the Ordinance, which would conflict with and violate the SCA.
CLAIM 5: VIOLATION OF THE FOURTH AMENDMENT OF THE U.S.
CONSTITUTION AND ARTICLE 14 OF THE MASSACHUSETTS DECLARATION OF
RIGHTS AND CLAIM FOR INJUNCTIVE RELIEF, PURSUANT TO 42 U.S.C. § 1983
AND THE COURT’S EQUITABLE POWERS

89. Airbnb incorporates all of the preceding paragraphs as if fully set forth herein.

90. The Ordinance requires a Booking Agent to “provide to the City, on a monthly
basis, an electronic report, in a format determined by the City . . . of the listings maintained,
authorized, facilitated or advertised by the Booking Agent within the City of Boston for the
applicable reporting period. The report shall include a breakdown of where the listings are
located, whether the listing is for a room or a whole unit, and shall include the number of nights
each unit was reported as occupied during the applicable reporting period.” Ordinance § 9-
14.11.

91. The enforcement of this provision against Airbnb violates the Fourth Amendment
of the Constitution, as applied to the City by the Fourteenth Amendment, and Article 14 of the
Massachusetts Declaration of Rights, because it constitutes an unreasonable search and/or
seizure by compelling Airbnb to disclose to the City sensitive, private business records and/or
other information in which Airbnb has a reasonable expectation of privacy, without prior judicial
authorization or precompliance review.

92. Pursuant to 42 U.S.C. § 1983 and this Court’s equitable powers, Airbnb seeks
injunctive relief against the City to prevent enforcement of the Ordinance, which would violate
the Fourth Amendment and Article 14 of the Massachusetts Declaration of Rights.

CLAIM 6: DECLARATORY RELIEF PURSUANT TO 28 U.S.C. § 2201

93. Airbnb incorporates all of the preceding paragraphs as if fully set forth herein.
94. This action presents an actual controversy between Airbnb and the City concerning the validity of the Ordinance and its enforceability against Airbnb and other online Booking Agents.

95. Based on the foregoing allegations, Airbnb is entitled to a declaration, pursuant to 28 U.S.C. § 2201, that the Ordinance cannot be enforced against Airbnb because such enforcement would violate the CDA, 47 U.S.C. § 230; the Supremacy Clause, U.S. Const. art. VI, cl. 2; the SCA, 18 U.S.C. §§ 2701 et seq.; the First, Fourth, and Fourteenth Amendments of the United States Constitution, and Articles 12, 14 and 16 of the Massachusetts Declaration of Rights.

**PRAYER FOR RELIEF**

WHEREFORE, Plaintiff Airbnb respectfully requests that the Court:

96. Declare that, as applied to Airbnb, the Ordinance violates 47 U.S.C. § 230 and the Supremacy Clause because it would permit the imposition of civil penalties on Airbnb for its publication-related activities and impose duties on Airbnb regarding its protected editorial acts concerning third-party rental listings and its protected editorial decisions regarding the structure and organization of its website.

97. Declare that, as applied to Airbnb, the Ordinance violates the First and Fourteenth Amendments of the U.S. Constitution and Article 16 of the Massachusetts Declaration of Rights because it would place content-based restrictions on protected commercial speech by imposing severe penalties on Airbnb, and the restrictions the Ordinance would impose are not sufficiently tailored to promote a compelling or substantial interest by the City.
98. Declare that, as applied to Airbnb, the Ordinance violates the Fourteenth Amendment of the U.S. Constitution and Article 12 of the Massachusetts Declaration of Rights because it is unconstitutionally vague and therefore violates due process.

99. Declare that, as applied to Airbnb, the Ordinance violates 18 U.S.C. §§ 2701 et seq. and the Supremacy Clause because it would compel Airbnb, an electronic communication service provider and remote computing service provider, to divulge information pertaining to a subscriber or to a customer of such service to the City, a governmental entity, without a subpoena or any other form of legal process.

100. Declare that, as applied to Airbnb, the Ordinance violates the Fourth Amendment of the United States Constitution and Article 14 of the Massachusetts Declaration of Rights because the Ordinance compels Airbnb to disclose to the City sensitive, private business records in which Airbnb has a reasonable expectation of privacy, without prior judicial authorization or precompliance review.

101. Preliminarily and permanently enjoin the City; its officers, agents, servants, employees, and attorneys; and those persons in concert or participation with them from taking any actions to enforce Sections 9-14.9.a., 9-14.10.b., and 9-14.11 of the City of Boston Code, and the other portions of the Code providing for enforcement and penalties that would penalize Airbnb—including any investigation, arrest, prosecution, or penalty—for: (a) the completion of booking transactions for rental advertisements published by third party hosts or the publication of other information provided by third-party hosts on Airbnb’s platform; (b) failing to remove or prohibit from publication any short-term rental listing that does not comply with the Ordinance; (c) failing to disclose to the City each listing in the City and the names of the persons responsible for the listings, the addresses of the listings, the content of the listing—including whether the
listing is for a room or a whole unit, and the number of nights each listing was reported as occupied—and length of stay and price information associated with the listings; or (d) failing to monitor and/or verify whether any short-term rental listing complies with the Ordinance.

102. Award Airbnb its reasonable costs and attorneys’ fees pursuant to 42 U.S.C. § 1988; and

103. Award Airbnb such other and further relief as the Court deems just and proper.

Respectfully submitted,

AIRBNB, INC.,

By its attorneys,

/s/ Howard M. Cooper
HOWARD M. COOPER (BBO #543842)
hcooper@toddweld.com

CHRISTIAN G. KIELY (BBO #684308)
ckiely@toddweld.com

TODD & WELD LLP
One Federal Street, 27th Floor
Boston, MA 02110
Tel: (617) 720-2626
Fax: (617) 227-5777

CHAD GOLDER (Pro hac vice pending)
chad.golder@mto.com

ADELE M. EL-KHOURI (Pro hac vice pending)
adelle.el-khouri@mto.com

MUNGER, TOLLES & OLSON LLP
1155 F Street NW, 7th Floor
Washington, DC 20004-1361
Tel: (202) 220-1100
Fax: (202) 220-2300

JONATHAN H. BLAVIN (Pro hac vice pending)
jonathan.blavin@mto.com

MUNGER, TOLLES & OLSON LLP
560 Mission Street, 27th Floor
San Francisco, CA 94105-4000
Tel: (415) 512-4000
Fax: (415) 512-4077
Dated: November 13, 2018
Transportation Network Company (TNC) Legislation

Transportation Network Companies (TNCs) such as Uber and Lyft have provided app-based ride-sourcing services in U.S. cities since 2012. In 2014, Colorado enacted the first state-level legislation to authorize and regulate TNC operations. As of June 2017, 48 states and the District of Columbia have passed some sort of TNC legislation. The first map below summarizes the approved legislation from each of those states and will be updated regularly with new developments nationwide.

TNC regulation is also being introduced at the city level in some states. Between 2014 and 2016, 20 Texas cities approved some sort of TNC regulations. In some cities, regulations on taxis have also been amended. In May 2017, Texas lawmakers passed HB 100 (https://legiscan.com/TX/bill/HB100/2017), a statewide TNC bill that, among other things, nullified all local TNC regulations. The second map on the next tab summarizes the now-defunct legislation in Texas cities. Data for this map was collected through May 2017. Subsequent action by the 85th Texas Legislature, Regular Session, supersedes this information.

Link to Policy Implications of Transportation Network Companies final report (2017), (https://policy.tti.tamu.edu/congestion/policy-implications-of-transportation-network-companies/)

Link to Policy Implications of Transportation Network Companies policy brief (2016), (technology/prc-report-policy-implications-of-transportation-network-companies/)
PARIS, France - Officials and Parisians in the French capital are becoming increasingly wary of vacation rentals made popular by platforms like Airbnb.

Residents living in buildings where Airbnb apartments are being rented out complain of customers being disruptive to local communities. Such online platforms are hollowing cities out and driving away locals. One district has lost 3,000 locals in the past four years. As a result, the district's schools have shut three classes.

Related Headlines
COMMERCIAL RIDE-SHARING

Last Updated 1/8/19

**Issue:** Commercial ride-sharing companies, or transportation network companies (TNCs), have gained in popularity in dozens of U.S. cities over the past few years as a new option in the public transportation market. TNCs use mobile technology to connect potential passengers with drivers who use their personal vehicles to provide transportation for a fee. TNCs demonstrate how technological advances can lead to new business models that hold the potential to lessen traffic congestion, improve the environment, and enhance social connection.

However, the risks associated with participating in ride-sharing services are not yet completely understood and do not fit neatly into insurers current risk-pooling models, raising numerous insurance related questions. Specifically, there is increasing concern over the potential gaps in insurance coverage in the unfortunate event of an accident or injury. While every personal auto insurance policy differs, most contain exclusions when a person uses their vehicle for livery services. Several insurers have developed products to fill gaps in coverage created by commercial ride-sharing and the common use of livery exclusions in personal auto insurance.

**Overview:** A TNC is an organization offering prearranged transportation services for compensation using an online application or platform to connect passengers with drivers willing to transport them. Instead of hailing a cab or calling for a car service, consumers in need of a lift can download the app and connect with drivers who use their personal vehicles to pick up passengers. The app also allows users to get a price quote, track the driver's location and pay their fare using a credit card on file. The three most popular TNCs are Uber, Lyft and Via.

Ride-sharing is different, however, than taking a traditional taxi or limousine. Taxis and limousines have been licensed by the state and/or local transportation authority. The vehicles are required to be inspected and drivers must be properly licensed. In addition, taxi operators are required to have commercial insurance that protects a passenger and third parties (i.e., pedestrians or other drivers) in

Committees Active on This Topic

- Property and Casualty Insurance (C) Committee
- Auto Insurance (C/D) Working Group
- Innovation and Technology (EX) Task Force

Additional Resources

- [Map of state-level ridesharing laws](https://2016-r-street.com/ridesharing/
- [Sharing a Ride, Not the Risk](https://www.naic.org/cipr_topics/topic_commercial_ride_sharing.htm)
- [Transportation Networking Companies Coverage Report (PDF)](https://www.naic.org/cipr_topics/topic_commercial_ride_sharing.htm)
- [Sharing a Ride, But Not Insurance: Protect yourself as a ridesharing passenger](https://www.naic.org/cipr_topics/topic_commercial_ride_sharing.htm)
- [Sharing a Ride, But Not Insurance: Ridesharing drivers may face insurance coverage gap (PDF)](https://www.naic.org/cipr_topics/topic_commercial_ride_sharing.htm)
- [Commercial Ride-Sharing and Car-Sharing Issues](https://www.naic.org/cipr_topics/topic_commercial_ride_sharing.htm)

https://www.naic.org/cipr_topics/topic_commercial_ride_sharing.htm
the event of an accident. TNCs may not be subject to the same stringent requirements that apply to taxis and limousines. Additionally, there are issues surrounding the insurance coverage provided through these programs.

The largest insurance coverage issue surrounds the driver’s personal auto insurance policy. The Personal Auto Policy typically excludes coverage for livery. As a result, a TNC driver’s personal auto insurance policy may not provide coverage when the driver is using his car to transport people in a ride-sharing arrangement for a fee. This applies to liability insurance, personal injury protection coverage in no-fault states, comprehensive coverage and collision, and UM/UIM.

Another significant concern is determining at what point in time a driver is operating the vehicle for hire. There are three periods in the ride-sharing business model: Period 1: App on, waiting for ride request; Period 2: Ride request accepted, no ride-share passengers in the vehicle; and Period 3: Passenger in vehicle. Most state laws regarding TNCs include similar language. Several state laws combine Period 2 and Period 3 as described above and require higher limits of insurance while the driver is actively engaged in a ride.

The largest TNCs have policies on their drivers that include commercial auto, liability, and collision coverage, with several offering $1 million single limit on primary liability coverage. Primary coverage typically applies only to periods 2 and 3, when a ride request is accepted or a passenger is in the vehicle. Some of the large TNCs say they have filled the insurance gap with extended excess policies, although such policies are mostly secondary and lack first party coverages such as comprehensive and collision. Additionally, insurers are beginning to respond to recently enacted legislation by offering new insurance products. The coverage types and limits vary by insurer, but many of these emerging products provide coverage through an endorsement for livery services particularly during period 1 when limited contingent coverage is provided by the largest TNCs. On-demand insurance startups, such as Slice Labs, are also creating products to give consumers that ability to quickly switch between being a commercial or personal driver through an app on their phone. More information on insurance issues surrounding TNCs can be found by reviewing the materials from CIPR’s Commercial Ride-Sharing and Car-Sharing Event, held on August 16, 2014.

**Status:** Insurance regulators oversee insurance companies and insurance agents, not TNCs. The insurance laws and regulations apply to the insurance company and the insurance producer issuing the insurance policy to the TNC or the individual driver. However, as TNCs have gained in popularity, state insurance regulators are taking action and working with the TNCs to ensure consumers are
adequately covered. The NAIC and at least 25 state insurance departments have issued bulletins cautioning consumers of the potential limitations of insurance coverage. Additionally, at least forty-six states and territories have enacted legislation to set insurance coverage rules and standards for TNCs.

Uber X worked with several personal lines insurers and trade associations to develop a TNC insurance compromise model bill (TNC Model Bill). The TNC Model Bill includes express permission of personal auto policies to exclude coverage for TNC-related driving, mandatory primary liability coverage during Period 1 of at least $50,000 bodily injury per person, $100,000 bodily injury per incident and $25,000 property damage depending on state law, and mandatory primary liability coverage during Period 2 of at least $1 million. Coverage may be maintained by the TNC, the TNC driver or a combination of the two. TNC coverage is not contingent upon a denial of claim payment from the person's personal auto policy (PAP). Under the TNC Model Bill, personal auto insurers are granted a statutory right of contribution against TNCs for erroneously paid claims. The TNC Model Bill does not require coverage for medical payments, personal injury protection, collision and comprehensive (other than collision), as well as uninsured motorist (UM) and underinsured motorist (UIM) coverage.

The National Conference of Insurance Legislators (NCOIL) adopted a model act based off of the TNC Model Bill to regulate insurance requirements for TNCs and their drivers. The NCOIL model includes a couple of modifications from the TNC Model Bill. The modifications include language requiring disclosure if there is a lien on the vehicle to be used for TNC services and adding to the section on rating agencies used to determine which surplus lines insurers are eligible to provide coverage for TNCs.

To study regulatory issues related to insurance coverage for transportation sharing and other emerging sharing economy products, the NAIC Property and Casualty Insurance (C) Committee appointed the Sharing Economy (C) Working Group in 2014. The Working Group developed a white paper regarding commercial ride-sharing, *Transportation Network Company Insurance Principles for Legislators and Regulators (PDF)*. The white paper was adopted at the NAIC 2015 Spring National Meeting. The Working Group disbanded in 2018, but the Innovation and Technology (EX) Task Force, the Auto Insurance (C/D) Working Group, and the Property and Casualty Insurance (C) Committee continues to monitor these issues.
Commercial Ride-Sharing

Resources:

Committees
- Committee List (PDF)
- Committee Structure (PDF)
- Exposure Drafts
- Meetings

Members
- Member List (PDF)
- Members by Zone (PDF)
- Executive Committee (PDF)
- Insurance Dept. Directory

Consumers
- Consumer Information
- Source (CIS)
- Life Insurance Policy Locator
- Consumer Participation
- Glossary of Insurance Terms

Education
- Schedule
- Regulator Professional Designation Program
- Course Catalog (PDF)

Industry
- Financial Statement Filing
- Market Conduct Annual Statement (MCAS)
- Uniform Certificate of Authority Application (UCAA)

Products
- Publications
- Financial Statement Data
- Automated Valuation Service
- Account Manager

Programs & Affiliates
- Center for Insurance Policy & Research (CIPR)
- Insure U - Get Smart About Insurance
- National Insurance Producer Registry (NIPR)
- Interstate Insurance Product Regulation Commission (Compact)

Applications
- System for Electronic Rate and Form Filing (SEROFF)
- State Based Systems (SBS)
- OPTins Premium Tax Payment System
- myNAIC | iSite+

Analysis
- Securities Valuation Office (SVO)
- Structured Securities Group (SSG)
- Capital Markets Bureau

Policy
- Financial Health
- International | Fellows Application

Permissions/Requests
- Request permission to link to NAIC web content
- Request permission to reprint NAIC content
- Request an NAIC Speaker for an Event

Help
- Hours: 8 a.m. - 4 p.m. CT Monday - Friday (closed holidays)
- Submit Help Request
- Email help@naic.org
- Phone: (816) 783-8500

© 1991 - 2019 National Association of Insurance Commissioners. All rights reserved.

℠ Insure U and Stop. Call. Confirm are registered service marks of the National Association of Insurance Commissioners.

https://www.naic.org/cipr_topics/topic_commercial_ride_sharing.htm
Recently, the U.S. Bureau of Labor Statistics published a report on individuals in alternative work arrangements: 16.5 million people now make up with is known as the “gig economy.” And according to a Future Workforce Report from Upwork, 59% of U.S. companies are now using flexible work forces to some degree – remote workers and freelancers. These practices obviously save money and allow businesses to have leaner traditional work forces.
So, what will 2019 bring for the “gig economy” and freelancing? Here are five trends that will certainly surface.

1. **Changing concept of entrepreneurship**

Traditionally, entrepreneurs have been those individuals who have begun businesses, grown, employed staff, and joined the ranks of a standard business model – offering products and services, growing that business, adding staff and revenue.

Entrepreneurship is now taking on a wholly different additional meaning. A growing number of millennials and Gen Z’ers are becoming “solopreneurs,” that is taking their skills and selling them on the market to a variety of “buyers,” and simply working independently, or collaborating with one or two others to offer a variety of skill sets to established enterprises.

2. **Technology favors the gig economy**

There are two aspects to the role that technology will play in the gig economy, and these will be prominent throughout 2019.

**YOU MAY ALSO LIKE**

**Improvements in communication** between gig workers and their contracted clients now allow for face-to-face communication, digital meetings among major players, etc. Streamlining the communication process means that freelancers no longer have to use slower processes like email to get things done and decisions made. Gig workers can work faster, and clients can respond faster, allowing for more rapid deployment of products and services.
Freelancers who have high-demand skills will be able to “name their price.” Consider, for example, the new technology of data science – a growing need for companies that want to remain competitive. But hiring a full-time data scientist is a pricey proposition. The average salary of an employed data scientist is about $140,000 in the U.S. Small and medium-sized businesses that need to remain competitive must look outside for gig workers to provide data science services.

3. Collaborative work spaces

Gig workers are not introverts, holed up in their homes, isolated from social contacts. Most are outgoing, extroverted, and assertive individuals who go after gigs, marketing themselves, and actively engaging with their clients.

Working solo from home is not the best emotional environment for many freelancers. They need others around them. And the gig economy has brought forth an entire industry devoted to shared work space – physical facilities that house a number of freelancers.

Gig workers are independent, but they also crave collaboration and social opportunities at work. Collaborative work spaces serve that need.

4. Legislative action to support gig workers

Traditionally, gig workers have been “on their own” when clients fail to live up to their end of the bargain – primarily in terms of payment. They must either hire an attorney to enforce a contract agreement (which many can ill afford) or live with the loss of income.

In 2017, a new law in New York City, titled “Freelancing is not Free” went into effect. This law, while laying out requirements for contract agreements between freelancers and their clients, was more focused on ensuring that freelancers were paid for the work they did. It provided recourse for gig workers who were not paid and penalties for contractors who reneged on contracts.
Look for more of these types of laws throughout 2019 and beyond. It is the logical outgrowth of the rising gig economy.

5. **Freelancers will move toward incorporation**

Most freelancers begin as “self-employed.” This means that they and their businesses are one and the same. In the U.S., they receive 1099 tax forms from their clients, report that as personal income, and then pay taxes as necessary. But there are some major benefits of incorporating themselves as a business, and gig workers are beginning to understand those benefits. If only from a legal liability standpoint. Incorporation also allows many deductions from income that can be a huge savings.

These are just five trends that we are likely to see in the gig economy throughout 2019. Next year, when we look back on 2019, there may be trends that we did not anticipate but that were brought about by this rapidly changing workplace environment in which we are now living.

*Follow me on Twitter and visit my website for more resources to market and grow your business online.*

---

**Abdullahi Muhammed** Contributor

I am a writer, entrepreneur and the proud founder and CEO of Oxygenmat. I graduated summa cum laude from University of Ilorin with a degree in Law, winning the award of the Best Graduating Student in the Faculty of Law. I started writing in 2009 and honed my skills by enter... [Read More](https://www.forbes.com/sites/abdullahimuhammed/2018/12/28/5-predictions-for-the-gig-economy-and-freelancing-in-2019/#7f0f3bb99001)
Ethical Implications of Bias in the Legal Profession

Presented By:

Gary L. Gassman, Moderator

Lynnette Espy-Williams, Cozen O’Connor
Michelle Lafferty, Gallagher
Kristine Tejano Rickard, Fuzion Analytics
Overview

• Definition and Understanding Implicit Bias

• The Impact of Implicit Bias on the Legal Profession

• How the Model Rules Address Implicit Bias

• Learn to Recognize Some Behaviors that May Suggest Bias or Differential Treatment

• Learn Best Practices of Combat Implicit Bias
DEFINING AND UNDERSTANDING IMPLICIT BIAS
The Unconscious Mind

• Our brains are capable of processing 11 million bits of information every second

• Due to tremendous amount of information, humans use shortcuts to process information

• Daniel Kahneman, in *Thinking, Fast and Slow*, divides our mental processing into two parts: System 1 and System 2
The Unconscious Mind

• System 1 handles cognition that occurs outside of conscious awareness

• Operates automatically and extremely fast

• No conscious or effortful thought

• For example, System 1 thinking lets an experienced driver stop at a red light or proceed through the intersection when the light turns green
The Unconscious Mind

• System 2 handles conscious processing

• Mental tasks that require concentration

• Effortful, deliberate concentration

• For example, completing a tax form
The Unconscious Mind

• The vast majority of human cognition relies on System 1

• System 1 helps us understand that many of the mental associations that affect how we perceive and act operate implicitly or unconsciously

• Thus, System 1 is responsible for associations known as implicit bias
Definition of Implicit Bias

“Attitudes or stereotypes that affect our understanding, decision making, and behavior without our even realizing it.”

Definition of Implicit Bias

• **Attitudes** are associations between concepts and positive or negative feelings
  – A negative attitude is what we described as “prejudice”

• **Stereotypes** are associations between concepts and a trait
Understanding Implicit Bias

- Conventional wisdom was that attitudes and stereotypes about social groups are **explicit**
  - i.e., “they are both consciously accessible through introspection and endorsed as appropriate by the person who possesses them”

- However, System 1 thinking shows that attitudes and stereotypes can be **implicit**

- **Result**: unintentional and unknown discrimination
Understanding Implicit Bias

• Implicit biases can be activated by identities we perceive in others such as race, ethnicity, sexual orientation, gender, disability or age

• These associations are part of our System 1 processing

• Everyone has implicit biases, regardless of race, ethnicity, sexual orientation, gender, disability or age

• No one is immune
Understanding Implicit Bias

• We develop our generalized social categories and characteristics from many sources, including parents, friends and the media
  – Do not always align with declared beliefs
  – Can be favorable or unfavorable to both in-groups and out-groups
  – Tend to have preferences for those who share similar characteristics
  – Malleable = can change over time
The Stroop Test

- Tests how your unconscious mind works
- Can you read this list of colors?

<table>
<thead>
<tr>
<th>RED</th>
<th>GREEN</th>
<th>BLUE</th>
<th>YELLOW</th>
<th>PINK</th>
</tr>
</thead>
<tbody>
<tr>
<td>ORANGE</td>
<td>BLUE</td>
<td>GREEN</td>
<td>BLUE</td>
<td>WHITE</td>
</tr>
<tr>
<td>GREEN</td>
<td>YELLOW</td>
<td>ORANGE</td>
<td>BLUE</td>
<td>WHITE</td>
</tr>
<tr>
<td>BROWN</td>
<td>RED</td>
<td>BLUE</td>
<td>YELLOW</td>
<td>GREEN</td>
</tr>
<tr>
<td>PINK</td>
<td>YELLOW</td>
<td>GREEN</td>
<td>BLUE</td>
<td>RED</td>
</tr>
</tbody>
</table>
The Stroop Test

- Now read this list of colors:
The Stroop Test

- Scientists have used this technique to find other unconscious associations:
  - Black men with weapons
  - Asians with foreigners
  - Fat people with laziness
  - Men with science
IMPLICIT BIAS
AND THE MODEL RULES
ABA Model Rule 8.4(g)

It is professional misconduct for a lawyer to engage in conduct that the lawyer knows or reasonably should know is harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status in conduct related to the practice of law.
ABA Model Rule 8.4(g)

- Adopted by ABA House of Delegates in 2016
- Goal is to eliminate bias in the legal profession
- 38 states have adopted similar or even broader antidiscrimination rules
ABA Model Rule 8.4(g)

• Rule intended to broadly address “conduct related to the practice of law”

• Covers discrimination when:
  – Representing clients
  – Interacting with witnesses, coworkers, court personnel and other lawyers
  – Operating or managing a law firm
  – Participating in bar associations, business or social activities
ABA Model Rule 8.4(g)

Model Rule 8.4(g) and similar anti-discrimination rules adopted by states put an ethical obligation on law firms to ensure that they are combating both explicit and implicit bias.
THE IMPACT OF IMPLICIT BIAS ON THE LEGAL PROFESSION
Implicit Bias in the Legal Profession

• What are some of the ethical implications of implicit bias?

• The potential influence of bias on the legal profession and access to and delivery of justice in the U.S. is wide-ranging

• The affects of implicit bias are especially dramatic, and troubling, with respect to juries
Implicit Bias in the Legal Profession

• A study asked participants to group together photos of Black and White men with the words representing Guilty and Not Guilty

• Study participants had strong implicit associations between Black men and guilty verdicts

• Scores on the test also predicted how study participants would evaluate ambiguous evidence
Implicit Bias in the Legal Profession

- Participants read about an armed robbery of a mini-mart by two armed men and were asked to evaluate ambiguous pieces of evidence presented at trial.

- Some participants were shown a dark-skinned perpetrator and others were shown a light-skinned perpetrator.

- Participants who saw the dark-skinned perpetrator were more likely to evaluate evidence as indicating guilt.
Implicit Bias in the Legal Profession

• The Ideal Litigator study had participants evaluate two video depositions where the lawyer was off-screen.

• The two video depositions were identical, except at the beginning of the deposition participants were shown a picture of the lawyer conducting the deposition where the lawyer appeared either Caucasian or Asian American.
Implicit Bias in the Legal Profession

• Participants had more favorable evaluations of the “Caucasian” lawyer in terms of his competence, likeability and hire-ability

• The study shows there is an implicit stereotype associating litigators with “whiteness”
Implicit Bias in the Legal Profession

• Law firm partners were asked to evaluate a brief from a hypothetical third year associate and NYU grad, Thomas Meyer

• Half were told the associate is African American and the other half were told he is Caucasian

• The brief had 22 different errors that were deliberately inserted – 7 spelling/grammatical errors, 6 substantive writing errors, 5 errors in fact and 4 analytical errors
Implicit Bias in the Legal Profession

- The “Caucasian” Thomas Meyer’s brief was evaluated to be better in analysis and had less critical comments from law firm partners than the “African American” Thomas Meyer.

- An average of 2.9/7 spelling/grammar errors found in “Caucasian” Thomas Meyer’s brief v. 5.8/7 in “African American” Thomas Meyer’s brief.

- An average of 4.1/6 writing errors were found in “Caucasian” Thomas Meyer’s brief v. 4.9/6 writing errors in “African American” Thomas Meyer’s brief.

- An average of 3.2/5 errors of fact were found in “Caucasian” Thomas Meyer’s brief v. 3.9/5 in “African American” Thomas Meyer’s brief.
Effects of Bias on Legal Profession

• Center for Talent Innovation’s report, *Disrupt Bias, Drive Value*, there are three major costs that companies experience when employees perceive bias:
  – Burn outs – increased sense of alienation, reduced sharing of ideas, reduced sense of pride in work
  – Bust outs – attrition
  – Blow ups – increased expression of negative views of employer, intentional failure to follow through on important tasks
Effects of Bias on Legal Profession

• Surveys show that women and minorities often feel that they are held to a higher standard than white men.

• Studies show that this is often true.

• Women attorneys held to a higher ethical standard than male counterparts:
  – Women had a 35% chance of being disbarred in any given case.
  – Men had a 17% chance.
Effects of Bias on Legal Profession

• Data shows that LGBT individuals are underrepresented in the legal profession

• While 3.8% of Americans self-identify as LGBT, National Association of Law Placement data shows that 1.9% of lawyers in law firms identify as LGBT

• 2.8% of summer associates and 2.4% of associates identify as LGBT, while 1.4% of law firm partners identify as LGBT

• Only 4 federal judges are openly LGBT
Effects of Bias on Legal Profession

• Top reasons women and minorities are leaving law firms or the legal profession:
  – Lack of mentorship/sponsorship
  – Unsatisfying upward mobility
  – Limited meaningful work
  – Wage gap
  – Vague feedback
  – Lack of work-life balance

• All of these can be traced to biases or discrimination
BEST PRACTICES FOR COMBATING BIAS – COMPLIANCE WITH RULE 8.4(G)
Best Practices

Step One:

Encourage individuals within the organization to become aware of their implicit biases and take action to combat them
Best Practices

• Awareness of existence of disparities in treatment helps eliminate disparities in decision making

• For example, doctors who learned of racial disparities in treatment showed changed behavior

• Motivation to be fair has a significant impact on expressions of bias
Best Practices

• Self-Assessment
  – Acknowledge your personal biases and understand what triggers them
  – Take the Implicit Association Test at Project Implicit
  – Tests on race, gender, age, and more
Best Practices

• Identify and dismantle barriers to inclusion:
  – Mindfulness of who/how often you engage in conversation
  – Be suspicious of automatic responses, use higher level processing
  – Try to override automatic responses in favor of an explicit response
  – Develop a strong motivation to avoid prejudice
  – Interact with people that provide experience that counter your implicit preferences
De-Biasing Tips

Recognize
• Unconscious Selves at Work
• Who am I?
• Who’s like me?
• Confirmation Bias
• Micro-Affirmations
• Micro-Inequities
• Where am I getting my information?

Overcome
• Acknowledge/value differences (perspectives, backgrounds, cultures, experiences, ideologies)
• Encourage connections
• Provide clear & constructive feedback
• Build relationships
• Practice effective communication
• Be mindful
De-Biasing Tips

• Be Mindful
  – How do I select team members for a project?
  – Who do I like to work with on projects?
  – Who do I tend to bond with more?
  – Do I generally converse only with the same people?
  – How do I identify candidates for promotion and succession?
  – Am I creating opportunities for those less extroverted to demonstrate their capabilities equally?
  – Who do I tap for the lead role?
  – Are locations disability accessible?
Best Practices

Step Two:

Identify areas where implicit bias has an institutional effect and work to combat the effects of bias
Best Practices

• Be aware of areas where bias can impact institutional decision making
  – Hiring
  – Evaluation
  – Assignments
  – Exposure to clients
  – Advancement pay
  – Work-life balance
  – Leaves of absence
  – Promotion
Best Practices

• Examples of de-biasing procedures:
  – During hiring, remove any references to gender and/or race from resumes.
  – During the hiring process, consider using voice modulation to mask gender during first round of interviews.
  – To increase retention of women and minorities, encourage matching with sponsors.
  – To increase retention of women and minorities, offer clear and constructive feedback with clear steps for career advancement.
  – To increase retention of women and minorities, create a succession plan that is inclusive.
Best Practices

• Train supervisors to make fair personnel decisions

• Adopt clear standards for decision makers

• Review decisions for possible bias

• Discussions with management regarding diversity and sensitivity training

• Create mentoring programs

• Champion someone who does not look like you
Best Practices

• Create affinity groups to promote a more inclusive environment
  – Some larger firms have created disability affinity groups to help recruit, retain and advance attorneys with disabilities
  – The ABA Commission on Disability Rights has urged organizations to sign its Disability Diversity in the Legal Profession: A Pledge for Change to create disability affinity groups, mentor disabled law students and conduct workshops to eliminate bias
Best Practices

• In courtrooms across the country, judges are reading specialized jury instructions intended to minimize expressions of implicit bias in juror’s judgment of criminal defendants.

• The theory is that by raising juror’s awareness of their implicit biases, they will resist those biases in evaluating the case.

• Judge Mark W. Bennett (N.D. Iowa) is a leader in this area.
Overcoming Bias

• What does this all mean?

• What are the most effective means of attack?
Overcoming Bias

Why does it matter? What is the value?

• Inclusion – seeing yourself as welcome, invited, valued

• Political climate

• Our profession – benefits from diversity/detriments without differences in backgrounds and ideas = thorough analysis, consideration and evaluation

• Client interests and concerns

• Shrinking world
Overcoming Bias

• Host events at locations which may build awareness of diversity issues (e.g. African-American heritage museum)

• Keep accessibility in mind for any disabled attendees

• When designing programs, consider incorporating how diversity may impact a practice area or topic at hand

• Remember how important it is for people to see others like themselves in attendance, in leadership, as speakers, etc.
  • comfort level, inclusiveness, invited to the party, welcome at the event
Overcoming Bias

• Even if you are not diverse – think about exclusion in your own life and how it feels

• Exercise awareness of bias, diversity & inclusion in your personal life

• Make civility and inclusion part of who you are every day

• Take steps to raise awareness of bias with those in your daily life
Parting Thoughts

• Top recommendations/words of advice

• We all have personal experiences that define who we are and how we approach our profession and personal life – use your experiences

• Exercise awareness of bias, diversity & inclusion in your personal life – outside of your business and bar association activities – make it part of who you are

• Remember – even if you are diverse, you have implicit biases too

• Be someone’s champion – one of the most important tools you have
QUESTIONS?
Ethical Implications of Implicit Bias in the Legal Profession

By Gary L. Gassman and Jonathan R. Walton

The problem of overt discrimination has received much attention from lawyers, judges, academics and policymakers. Explicit bias and over discrimination, however, are only part of the problem. Scientific research has shown that even well-meaning people operate with implicit biases – that is, stereotypes and attitudes of which they are not aware but which nonetheless shape their understanding, actions and decisions.

The United States Supreme Court recently addressed how implicit or unconscious biases manifest in the legal profession. The issue in *Williams v. Pennsylvania*\(^1\) was whether a justice on the Pennsylvania Supreme Court could decide a death penalty case where, thirty years earlier, he was the district attorney who had authorized capital charges against the defendant. While the court concluded that recusal was necessary to protect the defendant’s constitutional rights from unfair bias, the Court did not focus on any actual or explicit biases that the justice may have harbored against the defendant. Instead, the Court was most concerned that implicit or unconscious biases may affect the justice’s review of the case in an unconscious manner. Writing for the majority, Justice Kennedy noted that bias is “difficult to discern in oneself” and, therefore, there is a “serious question” whether the justice could set aside any bias or prejudice “even with the most diligent effort.”

As Justice Kennedy acknowledged, implicit biases operate outside of our conscious awareness and can cause well-intentioned and egalitarian-minded individuals to act in ways that do not necessarily align with their explicit intentions. In this paper, we seek to briefly shed light

---

on how implicit bias impacts the legal profession, including on peoples’ access to justice and how it affects recruitment, retention and promotion within corporations and law firms. We will also discuss ways to combat implicit biases and mitigate their effects.

The Unconscious Mind

To understand how implicit biases operate, it is important to understand how we as humans process information. Psychologists estimate that our brains are capable of processing approximately 11 million bits of information every second. Given this massive amount of information that inundates our brains, it is no surprise that humans have developed shortcuts to process information. In *Thinking, Fast and Slow*, Daniel Kahneman divides our mental processing into two parts: System 1 and System 2.

System 1 handles cognition that occurs outside of conscious awareness, operating automatically and extremely fast. For example, System 1 thinking allows an experienced driver to stop at a red light or proceed through the intersection when the light turns green with no conscious or effortful thought. System 2 handles conscious processing, and is used to complete mental tasks that require concentration. This would include filling out a complex form, for example. System 2 processing involves effortful, deliberate concentration.

Due to the large amount of information humans process at any moment, the vast majority of human cognition relies on System 1. System 1 is notable because it helps us to understand that many of our mental associations that affect how we perceive and act implicitly or unconsciously. Thus, System 1 is responsible for the associations known as implicit bias.
Understanding Implicit Bias

Implicit biases are “attitudes and stereotypes that affect our understanding, decision-making, and behavior, without our even realizing it.” An attitude is an association between a social group and an evaluative valence, either positive or negative. A negative attitude is often described as a “prejudice.” A stereotype is an association between a social group and a trait. The historic conventional wisdom was that attitudes and stereotypes about social groups are explicit in the sense that “they are both consciously accessible through introspection and endorsed as appropriate by the person who possesses them.”

However, our understanding of System 1 thinking shows that these attitudes and stereotypes may also be implicit, in that they are not consciously available through introspection. As a result, attitudes and stereotypes regarding social groups can operate automatically, including in ways that the person would not endorse as appropriate if he or she did have conscious awareness. The result of implicit biases may be unintentional and unknown discrimination.

Moreover, because implicit biases arise outside of conscious awareness, they do not necessarily align with our explicit beliefs and stated intentions. This means that even individuals who have good intentions and explicit egalitarian beliefs can still unknowingly act in ways that reflect their implicit, rather than explicit, biases. Most importantly, no one is immune from implicit bias.

The ABA Model Rule of Professional Conduct 8.4(g)

ABA Model Rule 8.4(g) provides that it is professional misconduct for a lawyer to:

engage in conduct that the lawyer knows or reasonably should know is harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status in conduct related to the practice of law.

---

3 Kang, et al.
This rule was adopted in 2016 by the ABA’s House of Delegates for the purpose of eliminating bias in the legal profession. While the model rule does not directly address implicit bias, given the goal of the model rule, it could be applied as seeking to eliminate not only explicit biases but those which are implicit and have a discriminatory effect.

**Ethical Implications of Implicit Bias in the Legal Profession**

The potential influence of implicit biases on the legal profession is wide-ranging, and can have particularly dramatic and troubling effects on the access to and delivery of justice. In one study, participants were asked to group together photos of African-American and Caucasian looking men together with the words “Guilty” and “Not Guilty.”\(^4\) Study participants had strong implicit associations between African-American men and guilty verdicts. The study participants’ scores were also predictive of how they would evaluate ambiguous evidence and potential bias against African-American defendants.

In another study, participants viewed a timed slideshow of photos from a crime scene, including one image that displayed security camera footage showing the perpetrator’s arm.\(^5\) Half of the participants saw a dark-skinned perpetrator in the photo, whereas the other half saw a light-skinned version of the same image. Although many participants could not recall the race of the perpetrator, participants who viewed the dark-skinned version were more convinced of the guilt and considered ambiguous evidence more supportive of this verdict than participants who saw the light-skinned perpetrator.

---


Implicit biases also have a strong effect on how attorneys are viewed in terms of competence, likeability and hire-ability. A study asked participants to evaluate two identical video depositions where the lawyer taking the deposition was not visible in the video. The difference between the two video depositions was that one showed a picture of a Caucasian lawyer at the beginning of the deposition and the other showed a picture of an Asian-American lawyer, and the names of the lawyers were frequently visible on screen. Participants gave more favorable evaluations of the “Caucasian” lawyer in terms of his competence, likeability and hire-ability, suggesting that there is an implicit stereotype associating a litigator with “whiteness.”

In another study, law firm partners were asked to evaluate a brief from a hypothetical third-year associate, Thomas Meyer. Half were told Mr. Meyer was African-American and the other half were told he was Caucasian. Various grammatical errors, substantive writing errors and analytical errors were inserted into the brief. The brief written by the “Caucasian” author was evaluated much better in terms of analysis and had less critical comments from the law firm partners than the brief submitted by the “African-America” author.

The implicit biases revealed by these studies have a strong effect on the practice of law, leading to increased burns outs, attrition and negative views of employment. Many argue that the top reasons that women and minorities leave law firms or the legal professional can be traced to biases and discrimination.

Surveys show that women and minorities often feel that they are held to a higher standard than white men, and studies have demonstrated that this is often true. Women attorneys have also been found to be held to a higher ethical standard than their male counterparts. In fact, women had

---

a 35% chance of being disbarred in any given case while men have been shown to only have had a 17% chance of suffering the same consequences.

Data also shows that LGBT individuals are underrepresented in the legal profession. While 3.8% of Americans self-identify as LGBT, National Association of Law Placement data shows that 1.9% of lawyers in law firms identify as LGBT. Moreover, 2.8% of summer associates and 2.4% of associates in U.S. law firms identify as LGBT, while only 1.4% of law firm partners identify as LGBT. Further, only 4 U.S. federal judges are openly LGBT. It’s important to recognize that individuals must self-identify for statistics to be accurate but, even so, these numbers seem extremely low.

Biases have a significant stifling effect on diversity in the legal profession shown by empirical evidence. Studies have shown that women and minorities are leaving law firms or the legal profession due to lack of mentorship/sponsorship, unsatisfying upward mobility, receipt of limited meaningful work, continuing wage gap issues, vague feedback from leadership and peers, and a lack of work-life balance. All of these issues can be traced to biases or discrimination. And the lack of diversity in the ranks of lawyers and judges means that the viewpoints of many individuals are not adequately represented in the courtroom. It also further perpetuates the implicit biases of jurists in the decision making process, with significant adverse effects on diverse individuals.

**Best Practices for Combating Bias**

Studies have shown that awareness of the disparities in treatment of individuals helps to eliminate disparities in decision making. For example, one such study showed that doctors who learned of racial disparities in treatment exhibited changed behavior. Accordingly, it appears that motivation has a significant impact on expressions of unconscious bias. Thus, individuals should
focus on how they can change their implicit associations—in effect “reprogram” their mental associations so that unconscious biases better align with explicit convictions.

One way to identify our implicit biases is to take and assess responses to the Implicit Association Test (IAT), which is designed to tap into our System 1 associations and measure our implicit biases. Taking the IAT will enable you to become consciously aware of some of your unconscious associations and allow you to then take steps to combat them. One approach identified by researchers is intergroup contact. This requires meaningfully engaging with individuals whose identities (e.g., race, ethnicity, religion) differ from your own. By getting to know people who are different from you on a real and personal level, you begin to build new associations. Another approach is exposure to counter-stereotypical exemplars: individuals who contradict widely held stereotypes.

In the institutional setting, it is also important to be aware of how implicit bias can effect decision making in hiring, evaluation, assignments, exposure to clients, and work-life balance. One approach to removing bias from hiring involving removing any references to gender or race from a resume or using voice modulation to mask gender during the first round of interviews. To increase the retention of women and minority employees, a company many consider matching employees with mentors or sponsors, offering clear and constructive feedback with well-defined steps for career advancement or a succession plan that is inclusive. Supervisors should be trained to make fair personnel decisions.

Finally, we note that steps are being taken by courtrooms across the country to mitigate the negative results of implicit and unconscious biases in the courtroom. Judges across the country are reading jury instructions to jurors in criminal cases intended to raise their awareness of their implicit biases and take affirmative steps to avoid those biases during deliberations.
In the legal profession, the real-life implications of implicit biases can create invisible barriers to carrier advancement or hinder people’s access to justice. Thus, it is critical for lawyers, judges and anyone in contact with the legal profession to identify any discrepancies that may exist between their conscious ideals and unconscious biases so that they can mitigate the effects of implicit biases, thereby improving the legal profession for all.
Exhaustion of Underlying Insurance - - A Tale of Two Cases
James M. Fischer*

1. First Case: *Montrose Chemical Corp. v. Superior Court*, 14 Cal. App. 5th 1306, 222 Cal Rptr. 3d 748 (Ct. App 2017), (2d Dist., Div.3), Rev. granted, November 29, 2017 per Cal. Rules of Court 8.1105 and 8.115

A. Procedural Status.

Superior Court granted summary adjudication to excess insurers that all underlying insurance needed to be exhausted before the next overlaying layer of coverage could be accessed (Horizontal Exhaustion). The insured sought a writ from the Court of Appeal, which was denied. The insured then petitioned the California Supreme Court for a hearing. The Supreme Court granted review and transferred the case back the Court of Appeal with directions to issue an OSC why the relief sought by the petition should not be granted.

B. Factual Background.

The insured (Montrose Chemical Corp.) purchased CGL policies from various insurers to cover operations at its Torrance California facility between 1960 to 1986. The coverage purchased was layered with multiple layers of excess insurance over an underlying primary or working layer.

Montrose was sued for environmental contamination arising out of its Torrance facility. Montrose represented that it has settled (entered into a partial consent decrees) the environmental litigation and, not surprisingly, sought money from its insurers to cover its (Montrose’s) obligations.

C. Questions Presented.

This phase of the dispute between Montrose and its insurers involved the manner in which Montrose could access its excess layers of coverage. The problem arose because in previous decisions Montrose has been able to persuade the court to adopt a continuous trigger theory that allowed Montrose to claim that all insurance on the risk between 1960 to 1986 was triggered and, therefore, coverage was in place unless it was specifically found that the policy did not cover the loss, i.e., the risk was not covered by the terms of the policy. Whether a particular policy or policies actually provided coverage for Montrose’s losses was not before the court. Montrose was seeking declaratory relief only as to the manner it (Montrose) could access its insurance coverage. 222 Cal. Rptr. at 753.

* Professor of Law, Southwestern Law School
D. Arguments.

Montrose’s primary argument was that it could “electively stack” its excess insurance policies. By this Montrose envisioned that it could access any excess policy issued in any policy year as long as the underlying policies for that same policy year had been exhausted, regardless of whether other lower level policies in other policies year were exhausted. This approach is commonly known as “vertical exhaustion” and it is unclear how “elective stacking” differs from vertical exhaustion. In any event, Montrose lost this argument before the trial court and in the Court of Appeal. Both courts required that the issue of access be determined by policy language. However, the Court of Appeal did not endorse the trial court’s broad adoption of horizontal exhaustion as a perquisite to accessing overlying layers (or levels) of insurance. 222 Cal Rptr. at 758-59. Rather, the Court of Appeal held that the proper exhaustion approach would be determined by policy language, not public policy. 222 Cal Rptr. at 760-63.

The Court of Appeal held that policy coverage language expressly making an excess insurance policy superior to all underlying insurance would require exhaustion of all of the underlying insurance (horizontal exhaustion). For example, policy language that states that the excess insurance policy “is excess of [referenced policies] and any other underlying insurance providing coverage to the insured” would require horizontal exhaustion. In Montrose the Court of Appeal held that the following language would support horizontal exhaustion: “[T]he insurer agrees to pay on behalf of the insured the ultimate net loss in excess of the retained limit hereinafter stated.” The Retained Limits Clause specified that the insurer’s liability was excess of the listed underlying coverage and the applicable limits of any other collectible underlying insurance available to the insured. 222 Cal. Rptr. 3d at 763 (discussing the American Centennial excess policies).

The Court of Appeal also held that language in the policies “Other Insurance” provision would support horizontal exhaustion making the policy excess when the insured has “other insurance” with respect to the covered loss. The sample language provided by the Court of Appeal stated:

‘If, with respect to a loss covered hereunder, the insured has other insurance, whether on a primary, excess or contingent basis, there shall be no insurance afforded hereunder as respects such loss; provided, that if the applicable limit of liability of this policy is greater than the applicable limit of liability provided by the other insurance, this policy shall afford excess insurance over and above such other coverage afforded by this policy, a total limit of liability equal to the applicable limit of liability afforded by this policy. This provision does not apply with respect to the underlying insurance or excess insurance purchased specifically to be in excess of this policy.

222 Cal. Prtr. 3d at 764-65 (parentheses deleted). The Court of Appeal concluded that this language “expressly states that [excess] policies shall not cover losses for which the
insured has other insurance.” *Id.* at 765 (brackets added). The court reached this conclusion even though the policy language directly stated that it did not apply to policies expressly designed as excess insurance.

In reaching its decision that the “Other Insurance” provision could support the adoption of horizontal exhausted, the Court of Appeal distinguished *Dart Indus., Inc. v. Commercial Union Ins. Co.*, 28 Cal. 4th 1059, 52 P.3d 79 (Cal. 2002). In *Dart Indus Inc.*, the California Supreme Court stated that an “Other Insurance” provision has no bearing upon the insurers’ obligations to the policy holder.” 52 P.3d at 159. The Court of Appeal held that the Supreme Court’s statement was made in the context of a dispute between multiple primary layer insurers and, thus, was distinguishable from a case involving multiple excess insurers where exhaustion of underlying coverage is a prerequisite to coverage. 222 Cal. Rptr. 3d at 767.

E. **Summary.** While *Montrose* rejects the automatic application of an across-the-board horizontal exhaustion requirement as a prerequisite to accessing the overlaying coverage, its willingness to read policy language broadly to find that coverage is dependent (under the terms of the policy) on exhaustion of all underlying insurance means that in most continuous trigger coverage disputes, horizontal exhaustion will be required to access the overlaying coverage.


A. **Procedural Status.**

This case involves the continuing saga of insurance coverage regarding the clean up cost for the Stringfellow site. It is the same dispute that the California Supreme Court decided when it adopted is “all sums” “stacking” “uber policy” approach. *State v. Continental Ins. Co.*, 55 Cal. 4th 186, 281 P. 3d 1000 (Cal. 2010). This iteration of the dispute raised the issue of exhaustion in the context of the right to prejudgment interest on unpaid policy proceeds. More particularly, when did the excess policies attach so that the running of prejudgment interest could be determined?

B. **Factual Background.**

The State was self-insured for the first $1, $2, or $5 million in liability on the Stringfellow site, except for one policy period (1963-64). The State had a series of policies for liability above that SIR. The policies at issue in this case were above an underlying retention of $16 million (1970-73) or $25 million (1973-76).

If vertical exhaustion applied, the excess policies would attach once the underlying retention was met in the specific policy period; if horizontal exhaustion applied, all lower layers of coverage and retentions had to be exhausted. As described by the Court of Appeal:

Assuming horizontal exhaustion applies, Continental’s policies would not attach
until the State’s covered losses reach either $101 million (as to the two policies with a $16 million retention) or $155 million (as to the one policy with a $25 million retention). Moreover, Continental’s policies would not be fully exhausted until the State’s covered losses reach $307 million. Continental has described horizontal exhaustion as the “rising bathtub” approach.

223 Cal. Rptr. 3d at 724.

C. Argument.

As in Montrose, the Court of Appeal noted that the “exhaustion issue, like all other insurance cases, look first to first to the terms of the policy.” 223 Cal. Rptr. 3d at 726. But that appears to be the end of any agreement with the Montrose approach.

The Court of Appeal stated that the “Limits of Liability” clause provides that “Continental’s liability attaches upon an ‘Ultimate Net Loss’ that is excess of the specified ($16 or $25 million) retention…, [which] seems to be the very definition of vertical exhaustion.” 223 Cal. Rptr. at 726 (brackets added).

The Court of Appeal then rejected the insurers’ efforts to broaden the inquiry by looking at other policy terms to determine whether horizontal or vertical exhaustion should be applied, more specifically the “Ultimate Net Loss” and “Other Insurance” provisions. Both of these provisions basically provide the Continental’s policy was excess to any other insurance.

First: The Court of Appeal stated the provisions do not specifically relate to the lower layers coverage, but purport to exclude liability as long as there is any other unexhausted insurance, including policies in the same layer. The Court of Appeal said the policy language did not support Continental’s position. 223 Cal. Rptr. 3d at 727.

Second: The Court of Appeal rejected application of “Other Insurance” provisions to disputes between uninsureds and insurers, stating that the provisions are designed to allocate losses among insurers. 223 Cal. Rptr. 3d at 767. The court relied on Dart Indus. Inc., which the Montrose court had distinguished. The Montrose court emphasized the facts of Dart Indus. Inc., to distinguish the decision. The Continental Ins. Co. court emphasized the language of Dart Indus. Inc., and the duty of lower courts to abide by Supreme Court dictum as reasons to apply the language of Dart Indus. Inc., that “Other Insurance” provisions should not affect the insured’s access to coverage. 223 Cal. Rptr. 3d at 767-68

Third: The Continental Ins. Co. court implicitly accepted the complexity argument (rejected in Montrose) that under Continental’s horizontal exhaustion approach, in continuous trigger cases to determine “what any insurer owes” you need to determine “what every insurer” owes. 223 Cal. Rptr. 3d at 767. According to the Continental Ins. Co. court this would effectively deprive the insured of the indemnity the insured bargained for and the insurer promised. 223 Cal. Rptr. 3d at 768

The *Continental Ins. Co.* court distinguished *Community Redevelopment Agency* on the ground that the latter decision involved clearly differentiated primary and excess insurers. In *Continental Ins. Co.*, however, with one negligible exception, all the insurers were excess. The *Continental Ins. Co.*, court emphasized the differing obligations of primary and excess insurers, particularly the primary insurer’s duty to defend, as a basis for not following *Community Redevelopment Agency*’s adoption of horizontal exhaustion. 223 Cal. Rptr. 3d at 729. Instead, the *Continental Ins. Co.* court followed *Montgomery Ward & Co. v. Imperial Cas. & Sur. Co.*, 81 Cal. App. 4th 356, 97 Cal. Rptr. 2d 44 (Ct. App. 2000), which held that in continuous trigger coverage disputes involving SIRs (Self Insured Retentions), vertical exhaustion was more appropriate than horizontal exhaustion. The *Montrose* court has used the fact that *Montgomery Ward & Co.* involved SIRs to distinguish it and find it inapplicable to a dispute involving true insurance. 222 Cal. Rptr. 3d at 766 M.6.

D. **Summary.**

*Continental Ins. Co.* takes a very different approach to addressing the exhaustion issue than *Montrose*. On the other hand, *Continental Ins. Co.*, on its facts, involves SIRs, rather than underlying true insurance.
Mass Shootings and Insurance

ABA TIPS ICLC Midyear Meeting

February 2019
Mass Shootings in the US

- US experiences epidemic levels of gun violence compared to other countries, claiming over 30,000 lives annually.
- The number of mass shootings depends upon how you count, but no question they are increasing.
- Nearly half of the incidents from 2000 to 2016 took place in an education, retail, or government/military setting.
- Targets included schools, workplaces, religious sites, shopping malls, theaters, supermarkets, restaurants, concert venues, nightclubs, nursing homes, airports, government buildings, carwash, coffee shop, and downtown areas (See Mother Jones' Investigation: US Mass Shootings 1982-2018)
- In a study of 92 mass killings from 1982 to 2017, only 15 percent of the perpetrators had any known previous contact with mental health professionals.
Mass Shootings in the US

Mass Shootings in the US

Washington Post review of 161 public mass shootings since 1966 (Jan 2019)

- 1148 persons killed
  - Deadliest was Las Vegas – 58 killed and 851 injured
  - Thousands more left with devastating injuries, shattered families and psychological scars.
- 42 states and D.C.
  - “Shootings in schools and houses of worship tend to stand out in our minds, but they make up a relatively small portion of public mass shootings. More common are those in offices and retail establishments such as restaurants and stores.”
  - California had more of the public mass shootings than any other state, with 25.

Mass Shootings in the US

Washington Post report (Jan 2019)

- 165 shooters
  - Some were known to have violent tendencies or criminal pasts. Others seemed largely fine until they attacked. All but 3 were male. More than half died at or near the scene of the shooting, often by killing themselves.

- 308 guns used
  - Shooters often carried more than one weapon; Las Vegas shooter was found with 24.
  - At least 172 of mass shooters’ weapons were obtained legally and 58 were obtained illegally; unclear how other 78 weapons were acquired.
  - Semiautomatic rifles have been used in some of the deadliest shootings, such as those in Newtown, Orlando, San Bernardino and Las Vegas.
  - 9mm semiautomatic handguns show up more than any other weapon.

Researchers estimate that gun violence costs the US economy at least $229 billion every year, including $8.6 billion in direct expenses such as for emergency and medical care. Half of these costs are born by U.S. taxpayers.

Man-made disaster costs for insurers totaled $7.8 billion worldwide in 2016 (Swiss Re).

2007 Virginia Tech shooting caused an estimated $48.2 million in litigation and recovery costs. Building replacement alone has cost more than that following other mass shooting events.

Workplace shootings result in millions of dollars in workers compensation-related costs.

Las Vegas massacre in 2017 predicted to result in over $1 billion of insured claims and losses.

Stigma damages are real consideration.
Difficulty Predicting Mass Shootings

- Insurers have plenty of experience trying to predict natural disasters, but predicting the motives and actions of perpetrators behind mass shootings incidents is a much greater challenge for the industry.

- Gun violence research and data collection in the US has been significantly curtailed, contributing to the lack of data necessary to better understand and model risk.

- Recently, a trauma research team has developed a profile of commonalities among communities where mass shootings have occurred. It includes a shortage of mental health professionals, a relative lack of socialization opportunities, higher rates of income inequality, and relatively high housing costs, according to findings presented at the American College of Surgeons Clinical Congress 2018.
Insurers Approach to Mass Shootings

- Exclusions limit coverage for actions of perpetrator
- Statutory and common law limits liability of secondary actor insureds (no duty to protect or warn against acts of assailant; not foreseeable, no causation)
  - But, still owe a duty to defend.
- Gun industry immunity
- Exclusivity laws in some states limit employer’s liability to workers comp benefits
- First party coverage traditionally limited to direct physical damage - no contingent BI or stigma damage recognized
- Emphasis on pre-incident loss control/risk management/training
- SAFETY Act – assumes insurance will respond to claims
Insurance Regulation and Gun Violence

- Following the tragic event at Sandy Hook Elementary School in Connecticut, insurance requirements for gun ownership were introduced in at least seven states and the District of Columbia, but no law was passed.
- Can insurance regulators mandate gun owners to have liability insurance as a precondition to the purchase of guns?
  - Pros and cons
    - States legal authority to mandate coverage
- Can States require insurers to offer coverage for intentional harm caused by a gun?
New York State Department of Financial Services (‘DFS’)

The NRA did not have a license to conduct insurance in New York and in 2017 the DFS commenced an investigation into the NRA “Carry Guard” insurance program, which provided liability insurance to gun owners for certain acts of intentional wrongdoing, and provided insurance coverage for criminal defense for any act of self-defense covered under the policy for gun owners and their resident family members who may be charged with a crime involving a legally possessed firearm.

On May 2, 2018, Lockton Cos., LLC and its affiliate Lockton Affinity, LLC agreed to pay a $7 million fine as part of a consent order with the DFS for serving as the administrator of the National Rifle Association-branded “Carry Guard” insurance program, through Lockton Affinity, in violation of New York Insurance Law.

On May 2, 2018, Chubb Ltd. and Chubb’s subsidiary, Illinois Union Insurance Company, have agreed to pay a $1.3 million fine as part of a consent order with the DFS for underwriting the National Rifle Association-branded “Carry Guard” insurance program, through Lockton Affinity, in violation of New York Insurance Law.
On December 20, 2018, 10 Lloyd’s of London underwriters agreed to pay $5 million as part of a consent order with the DFS for underwriting fire arms liability insurance programs branded by the National Rifle Association (NRA).

In May, 2018, Lloyd’s of London had directed its underwriters to terminate any programs with the NRA and not to write any new policies.

Washington Insurance Department ban on sale of NRA-Related Insurance

Washington is the 2nd state to fine Lockton Affinity L.L.C. and Illinois Union Insurance Company, for a total of $177,000 for the sale of “illegal insurance policies branded by the NRA” because they insure unlawful activity in the state.
New York vs. National Rifle Association (‘NRA)

- Following the Mass Shooting in Parkland, FL, on April 19, 2018 Governor Andrew M. Cuomo today directed the DFS to urge insurance companies, New York State-chartered banks, and other financial services companies licensed in New York to review any relationships they may have with the National Rifle Association and other similar organizations. “Upon this review, the companies are encouraged to consider whether such ties harm their corporate reputations and jeopardize public safety”.

- Following Gov. Cuomo’s directive, the DFS immediately issued “Guidance on Risk Management Relating to the NRA and Similar Gun Promotion Organizations” to all insurers doing business in the State of New York, which encouraged insurers to “continue to evaluate and manage their risks, including reputational risks, that may arise from dealings with the NRA or similar gun promotion organizations” and further to “take prompt actions to manage these risks and promote public health and safety.”
NATIONAL RIFLE ASSOCIATION OF AMERICA, Plaintiff, -against- ANDREW CUOMO, both individually and in his official capacity; MARIA T. VULLO, both individually and in her official capacity; and THE NEW YORK STATE DEPARTMENT OF FINANCIAL SERVICES (1:18-cv-00566)

On the Motion to Dismiss, Judge McAvoy rejected most of the NRA’s causes of actions, but he refused to dismiss the claims that Cuomo, Vullo and the DFS “interfered with the NRA’s right to advance its agenda.” The Judge stated that “The allegations of direct and immediate threats to insurers and financial institutions because of these entities’ links with the NRA, and the allegations of resulting harm to the NRA’s operations, are sufficient to make out plausible First Amendment freedom-of-speech claims.”
Regulatory Landscape

Terrorism Risk Insurance Act (TRIA)

- TRIA (H.R. 3210, Pub.L. 107–297), initially enacted in 2002, created a federal "backstop" for insurance claims related to acts of terrorism. The Act has been reauthorized twice and is due to expire in Dec. 2020.

- TRIA established a partnership between the US federal government, private insurers, and all commercial enterprises doing business in the United States. The TRIA program requires insurers to offer terrorism insurance to commercial policyholders. Generally, under state insurance laws, commercial policyholders may opt out of terrorism coverage.

- The term "act of terrorism" is defined in the Act as: any act certified by the Secretary of the Treasury, in concurrence with the Secretary of State and Attorney General, to be an act that is dangerous to human life, property, or infrastructure and to have resulted in damage within the U.S. (or outside the U.S. in the case of a U.S.-flagged vessel, aircraft or premises of a U.S. mission).
The definition of “terrorism” includes both foreign and domestic terrorists.

FBI Definition of Domestic Terrorism — “perpetrated by individuals inspired by or associated with primarily U.S.-based movements that espouse extremist ideologies of a political, religious, social, racial or environmental nature.

- Ex: June 8, 2014 Las Vegas Shooting, during which 2 police officers were inside a restaurant were killed by a married couple who held anti-government views and who intended to use the shooting to start a revolution.

- Was the Pittsburgh synagogue shooter a terrorist?
- Was the Las Vegas mass shooting an act of terrorism?
- Why is it important to distinguish between mass shootings and acts of terrorism?
Support Anti-Terrorism by Fostering Effective Technologies Act ("SAFETY Act")

- Provides legal liability protections for providers of qualified anti-terrorism technologies that could save lives in the event of a terrorist attack.
- Benefits of designation include a cap on liability tied to the amount of liability insurance coverage specified and reasonably available for each qualified technology.
- DHS Secretary must declare an act of terrorism for Act to apply.
- DHS has certified hundreds of security systems, software programs, equipment, and services, ranging from unarmed guards at shopping malls to flight deck doors.
- Certification also has been obtained by stadiums, corporate buildings and facilities that draw crowds and have strengthened security to prevent terrorist acts.
Damages from Mass Shootings

Economic losses can include:

- Property damage (including repair and replacement of buildings)
- Clean up/Extra Expense
- Additional security/security upgrades
- Crisis Management
- Business Interruption/Event cancellation and refunds/Contingent BI
- Workers Comp – injury/rehab, survivor benefits, mental health/PTSD (varies state-by-state)
- Medical costs/Funeral expenses
- Mental health counseling
- Fines/Penalties
- Litigation/defense costs
Who will be sued?

- Owners and operators of businesses or facilities where the shooting occurs
- Event planners and promoters
- Security firms
- Law enforcement
- Parents/relatives of the shooter
- Mental health providers
- Retailers and pawn shops where assailant acquired weapons (if acquired illegally)
- Straw purchasers
- Organizations that fail to report disqualifying information to authorities
- Anyone in a position to know of/intervene in the shooter’s plan
- Media outlets/content providers that encourage or incite violence
Traditional Coverages

- Personal Lines (Homeowners/Auto, Life and Health)
- Commercial General Liability
- Professional Liability
- Commercial Property
- Workers Comp
- Governmental Liability
New Insurance Products

- Insurers have responded with named-perils policies for mass shooting events that straddle the traditional divide between first party and third party coverage.

- Coverages go by different names and may be sold as standalone policy or endorsement
  - Workplace Violence
  - Active Shooter/Active-Assailant
  - Deadly Weapon Protection

- Features include loss control/risk management, hostage response, crisis management, loss of earnings, enhanced PD coverage (stigma), temporary additional security measures

- Underwriters reporting significant increases in demand for these types of coverages.

- Some companies offer as endorsement with no additional premium

- Potential coverage issues with these policies
Coverage Scenarios

- Workplace shooting
- Aurora, CO theater shooting
  - Theater owner
  - University/Mental health professional
- Las Vegas shooting
  - Hotel
  - Concert promoter
  - Bump stock manufacturer
- Sutherland Springs, TX church shooting
- Law firm in office building where shooting occurs
Questions
MEMORANDUM

TO: The Chief Executive Officers or Equivalents of All Insurers Doing Business in the State of New York

FROM: Maria T. Vullo, Superintendent of Financial Services

DATE: April 19, 2018

RE: Guidance on Risk Management Relating to the NRA and Similar Gun Promotion Organizations

The New York State Department of Financial Services is issuing this guidance in the wake of several recent horrific shootings, including in Parkland, Florida that left 17 students and staff members at Marjory Stoneman Douglas High School dead. This was only one of many prior gun violence tragedies, including those in Columbine High School, Sandy Hook, Pulse night club, and the Las Vegas music festival, that left many innocent people dead.

While the social backlash against the National Rifle Association (the “NRA”), and similar organizations that promote guns that lead to senseless violence, has in the past been strong, the nature and the intensity of the voices now speaking out, including the voices of the passionate, courageous, and articulate young people who have experienced this recent horror first hand, is a strong reminder that such voices can no longer be ignored and that society, as a whole, has a responsibility to act and is no longer willing to stand by and wait and witness more tragedies caused by gun violence, but instead is demanding change now.

Our insurers are, and have been, vital to the communities they serve for generations and are guided by their commitment to corporate social responsibility, including public safety and health. Insurers’ engagement in communities they serve is closely tied to the business they do with their clients and customers and its impact on such communities. Often insurers report to their stakeholders that their performance is based on both their strategic business vision as well as on a commitment to society as a whole. There is a fair amount of precedent in the business world where firms have implemented measures in areas such as the environment, caring for the sick, and civil rights in fulfilling their corporate social responsibility. The recent actions of a number of financial institutions that severed their ties with the NRA after the AR-15 style rifle killed 17 people in the school in Parkland, Florida is an example of such a precedent.

The tragic devastation caused by gun violence that we have regretfully been increasingly witnessing is a public safety and health issue that should no longer be tolerated by the public and there will undoubtedly be increasing public backlash against the NRA and like organizations.

Our insurers are key players in maintaining and improving public health and safety in the communities they serve. They are also in the business of managing risks, including their own reputational risks, by making risk management decisions on a regular basis regarding if and how
they will do business with certain sectors or entities. In light of the above, and subject to compliance with applicable laws, the Department encourages its insurers to continue evaluating and managing their risks, including reputational risks, that may arise from their dealings with the NRA or similar gun promotion organizations, if any, as well as continued assessment of compliance with their own codes of social responsibility. The Department encourages regulated institutions to review any relationships they have with the NRA or similar gun promotion organizations, and to take prompt actions to managing these risks and promote public health and safety.

Maria T. Vullo
Superintendent of Financial Services
Mass Shootings and Insurance Coverage

Michael Steinlage, Larson King LLP
Timothy Thornton, Gray Duffy LLP
Christopher Mosley and Will Reed, Sherman & Howard
Francine L. Semaya

This paper provides background and context for the issues to be covered in the Mass Shootings and Insurance Coverage Panel at the 27th Annual ABA/TIPS Insurance Coverage Litigation Midyear Conference.

I. Introduction

When it comes to gun ownership and shootings, insurers have traditionally relied on the low incidence of such events, favorable liability laws, and their ability to selectively exclude such risks to justify a hands-off approach to assessing and managing such risks. However, with the increasing number of mass shooting incidents in recent years and the significant and unique impacts and liability they spawn, insurers are placing greater emphasis on recognizing and addressing these types of risks.

II. Insurers' Historical Approach to Guns

In Liability Insurance and the Regulation of Firearms, the authors examined the insurance industry's treatment of gun risks as a form of de facto regulation. They concluded that liability insurers generally do not inquire whether an applicant owns or possesses guns in the home and, as a result, do not engage in the regulation of guns through underwriting, pricing, education or loss control. Instead, personal lines liability insurers have historically adopted selective exclusion as their main approach to gun-related injuries and liability, through the application of the intentional act exclusion and other limitations on coverage.

The primary reason that insurers do not inquire and account for gun ownership in most types of insurance is due to the inability of actuarial science to reliably correlate gun ownership with increased liability exposure or risk of loss. While statistical analysis may be capable of predicting, for instance, the increased risk associated with guns in the hands of convicted felons, those risk factors cannot be applied to the general population of law-abiding gun owners. This lack of reliable data, coupled with the low incidence of firearm accidents in the home relative to other causes of loss (see Appendix, Comparative Risk Table), is the reason that insurance does not traditionally recognize or price for an increased risk of injury and liability exposure associated with guns in the home.

A second factor behind the insurance industry’s traditional “hands off” approach to gun possession and ownership in underwriting lies in the recognition that linking guns to increased risk and higher insurance costs would disincentivize gun ownership, which gun rights groups are vigilant to prevent. The NRA has consistently opposed requiring liability insurance for gun owners, claiming such requirements economically discriminate against gun ownership (i.e. “you don’t have to carry insurance to exercise any other constitutional right.”). These groups would undoubtedly take a similar view of underwriting practices that target lawful gun ownership. Such concerns (among others) are behind the insurance industry’s historical opposition to proposals to impose insurance requirements on gun ownership.3

III. Limits on Tort Liability for Criminal Acts of Third Parties

Another factor limiting insurers’ focus on liability for shootings is the fact that, in most jurisdictions, a business owner is not liable to a person injured by the criminal acts of a third party unless the criminal act was foreseeable. Restatement (Second) of Torts § 344, Comment f (1965)4; Colorado Revised Statute § 13-21-115(3)(c)(1) (“[A]n invitee may recover for damages caused by a landowner’s unreasonable failure to exercise reasonable care to prevent against dangers of which he actually knew or should have known.”); Commonwealth of Virginia v. Peterson, 749 S.E.2d 307 (Va. 2013) (As a general rule, a person does not have a duty to warn or protect another from the criminal acts of a third person. “This is particularly so when the third person commits acts of assaultive criminal behavior because such acts cannot reasonably be foreseen.”); Delorenzo v. HP Enterprise Services, LLC, 2016 WL 6459550 (D.D.C. Oct. 31, 2016) (“[w]here an injury is caused by the intervening criminal act of a third party, … liability depends upon a more heightened showing of foreseeability than would be required if the act was merely negligent,” but holding lower standard of foreseeability applies to claims of negligent supervision and retention); McKown v. Simon Prop. Grp. Inc., 344 P.3d 661 (Wash. 2015).5

---

4 Section 344 of the Second Restatement of Torts provides in relevant part:

Since the possessor is not an insurer of the visitor’s safety, he is ordinarily under no duty to exercise any care until he knows or has reason to know that the acts of the third person are occurring, or are about to occur. He may, however, know or have reason to know, from past experience, that there is a likelihood of conduct on the part of third persons in general which is likely to endanger the safety of the visitor, even though he has no reason to expect it on the part of any particular individual. If the place or character of his business, or his past experience, is such that he should reasonably anticipate careless or criminal conduct on the part of third persons, either generally or at some particular time, he may be under a duty to take precautions against it, and to provide a reasonably sufficient number of servants to afford a reasonable protection.

Restatement (Second) of Torts § 344, Comment f (1965).

5 In McKown, a store employee in a shopping mall who was injured in a shooting rampage by a third party brought a negligence action against the mall owner and contractor that provided security services at the mall. The district court granted summary judgment for defendants. The Ninth Circuit certified questions to the Washington Supreme Court, including whether Washington adopted Restatement Second of Torts § 344 and Comments d and f as controlling law in limiting the nature and scope of the duty owed by a business to protect its invitees from harm by third persons. McKown v. Simon Property Group Inc., 689 F.3d 1086 (9th Cir. 2012). The court noted that the Washington Supreme Court seemed to follow a broad view of the foreseeability of third-party criminal conduct,
Similarly, most courts do not impose a special duty on an employer to protect an employee against criminal actions on the employer’s premises unless the act is foreseeable. *Wiener v. Southcoast Childcare Ctrs., Inc.*, 32 Cal. 4th 1138, 88 P.3d 517 (2004) (California law); *A.H. v. Rockingham Pub. Co., Inc.*, 495 S.E.2d 482, 486 (Va. 1998) (an employer has no duty to protect an employee from third party criminal acts unless the danger is “known or reasonably foreseeable” as a matter of law and concluding that knowledge of similar assaults in the preceding five years was not sufficient); *Circle K Corp. v. Rosenthal*, 118 Ariz. 63, 574 P.2d 856 (1977) (“An employer in Arizona has a duty to provide its employees with a reasonably safe place to work and may be liable for mere failure to act to protect its employees from reasonably foreseeable criminal conduct.”)

Historically, courts have found the threat posed by mass shooters to be so unexpected and remote that, as a matter of law, no rational juror could find that a landowner should have foreseen or known about it. A prime example of this is *Lopez v. McDonald’s Corp.* 6 – a case arising out the 1984 mass shooting at a McDonald’s restaurant in San Ysidro, California, where an assailant, armed with a rifle, a handgun, and a shotgun, indiscriminately shot patrons and employees, leaving 21 persons dead and 11 others injured. Survivors and surviving family members sued McDonalds, arguing that the restaurant was in a high-crime area; that it had considered but ultimately declined to retain a private security company; and that McDonalds should be liable on theories of negligence and premises liability. McDonalds countered that, as a matter of law, the incident was so unlikely as to fall outside the boundaries of a restaurant’s general duty to protect patrons from reasonably foreseeable criminal acts. The court agreed with McDonalds that its general duty to its patrons did not include protection against a “once-in-a-lifetime” massacre. *Id.* at 504.

On appeal, the court of appeal held that the attack was not foreseeable as a matter of law:

[T]he likelihood of this unprecedented murderous assault was so remote and unexpected that, as a matter of law, the general character of McDonald’s nonfeasance did not facilitate its happening. Huberty’s deranged and motiveless attack, apparently the worst mass killing by a single assailant in recent American history, is so unlikely to occur within the setting of modern life that a reasonably prudent business enterprise would not consider its occurrence in attempting to satisfy its general obligation to protect business invitees from reasonably foreseeable criminal conduct.

*Id.* at 509-10. In affirming the trial court’s grant of summary judgment, the court of appeal agreed that “the theft-related and property crimes of the type shown by the history of its operations, or the general assaultive-type activity which had occurred in the vicinity bear no relationship to purposeful homicide or assassination.” *Id.; accord, Sigmund v. Starwood Urban Inv.*, 475 F. Supp. 2d 36 (D.D.C. 2007) (foreseeability requirement cannot be satisfied through generic information such as local crime rates or evidence of a criminally active environment.)

whereas the Washington intermediate appellate courts had refined the foreseeability inquiry in a way that seemed to narrow the duty owed. *Id.* at 1092.

As mass shooting incidents become more commonplace, it is possible that the perception of whether such events are foreseeable may begin to shift. There were signs of this in *Axelrod v. Cinemark Holdings, Inc.* – a case that arose from the shootings at the movie theater complex in Aurora, Colorado in July 2012. There, the court described its view of the foreseeability issue as follows:

To establish that an incident is foreseeable, it is not necessary that an owner or occupier of land held open for business purposes be able to ascertain precisely when or how an incident will occur. Rather, foreseeability includes whatever is likely enough in the setting of modern life that a reasonably thoughtful person would take account of it in guiding practical conduct... Simply because something has not yet happened does not mean that its happening is not foreseeable. Instead, foreseeability is based on common sense perceptions of the risks created by various conditions and circumstances.

65 F.Supp.3d at 1100 (quoting *Taco Bell, Inc. v. Lannon*, 744 P.2d 43 (Colo.1987)). The court noted its agreement with the holding in *Lopez*, but observed that “what was ‘so unlikely to occur within the setting of modern life’ as to be unforeseeable in 1984 was not necessarily so unlikely by 2012.” Id. at 1099. Based on “the grim history of mass shootings and killings that have occurred in more recent times,” together with evidence of warnings that Homeland Security issued to theaters before the shooting and other policies the theater had in place, the *Axelrod* court denied the theater owner’s motion for summary judgment, finding that plaintiffs had presented enough evidence to create a genuine dispute of fact as to whether defendants knew or should have known of security risks. Id. at 1102.

Still, in most jurisdictions, imposing liability on business owners for the criminal acts of third party shooters remains a difficult case for victims to make. Even the theater owner in *Axelrod* was ultimately granted summary judgment on the issue of causation, after the court found that a reasonable jury could not plausibly find that Cinemark’s actions or inactions were a substantial factor in causing the harm. *Nowlan v. Cinemark Holdings, Inc.*, 2016 WL 4092468 (D. Colo. June 24, 2016). Citing prior decisions involving the Columbine school shooting, the court held that even if defendant’s omissions in failing to provide certain safety and security measures contributed in some way to the injuries and deaths, the gunman’s premeditated and intentional actions were the predominant cause of plaintiffs’ losses. *Id.*

---

7 65 F.Supp.3d 1093 (D. Col. 2014)
8 The release issued by the United States Department of Homeland Security to Cinemark and other theater chains in May 2012 entitled “Terrorists’ Interest in Attacking Theaters and Similar Mass Gatherings” notified the theaters of two incidents of concern: an April 4, 2012 suicide bombing of the National Theater in Mogadishu, Somalia during a speech by the Somali prime minister; and a communication from an al-Qaida-linked extremist advocating attacks on U.S. theaters. *Id.* The document states, “[a]lthough we have no specific or credible information indicating that terrorists plan to attack theaters in the United States, terrorists may seek to emulate overseas attacks on theaters here in the United States because they have the potential to inflict mass casualties and cause local economic damage.” It concludes, “[t]hese recent instances demonstrate that mass gatherings such as those associated with theaters likely remain attractive terrorist targets. We encourage facility owners and operators, security personnel, and first responders to remain vigilant and report suspicious activities and behaviors that may indicate a potential attack.” *Id.*
In Commonwealth of Virginia v. Peterson, 749 S.E.2d 307 (Va. 2013) – a case arising out of the 2007 slayings of 32 people on the Virginia Tech campus - the Virginia Supreme Court held that even if there was a special relationship between the University and its students, under the facts of the case, there was no duty for the University to warn students about the potential for criminal acts by third parties. The Virginia Supreme Court began from the “general rule” that a person does not have a duty to warn or protect another from the criminal acts of a third person unless a special relationship exists. After reviewing numerous cases where no duty to warn was found to exist, and considering the information known to the university at the time of the shootings, the Supreme Court concluded that even under the less stringent standard of “know or have reasonably foreseen,” there were not sufficient facts from which the court could conclude that the duty to protect students against third party criminal acts arose as a matter of law.

A. Gun Manufacturer Immunity

Another significant factor that limits the types of claims that arise out of mass shootings is the immunity granted to gun manufacturers and sellers. In the late 1990s and early 2000s, gun manufacturers, dealers and distributors faced a deluge of lawsuits by cities and counties across the United States seeking to recover costs associated with the manufacture, marketing, promotion, and sale of firearms. See, e.g. City of New York v. Beretta U.S.A. Corp., 315 F.Supp.2d 256 (E.D.N.Y. 2004); In re Firearm Cases, 126 Cal. App. 4th 959, 24 Cal. Rptr. 3d 659 (2005). The lawsuits generally alleged that the firearms manufactured and sold by the defendants are unreasonably dangerous and constituted a public nuisance, that the defendants were negligent in marketing and selling the firearms, and that their marketing of the firearms is deceptive.


Eventually, Congress got involved. In 2005, Congress enacted the Protection of Lawful Commerce in Arms Act (“PLCAA”) which sought to ensure that manufacturers and sellers of

---

9 Id. at 311.
10 The Supreme Court summarized its understanding of the facts as follows:

In this case, the Commonwealth knew that there had been a shooting in a dormitory in which one student was critically wounded and one was murdered. The Commonwealth also knew that the shooter had not been apprehended. At that time, the Commonwealth did not know who the shooter was, as law enforcement was in the early stages of its investigation of the crime. However, based on representations from three different police departments, Virginia Tech officials believed that the shooting was a domestic incident and that the shooter may have been the boyfriend of one of the victims. Most importantly, based on the information available at that time, the defendants believed that the shooter had fled the area and posed no danger to others. (emphasis in original)
firearms and ammunition would not “be liable for the harm caused by those who criminally or unlawfully misuse firearm products … that function as designed and intended.” Ileto v. Glock, Inc., 565 F.3d 1126, 1135 (9th Cir. 2009) (quoting 15 U.S.C. § 7901(a)(5)). The statute provides that federal courts shall dismiss any civil liability action “brought by any person against a manufacturer or seller of a qualified product … for damages … or other relief, resulting from the criminal or unlawful misuse of a qualified product by the person or a third party.” Id. §7903(5)(A). The PLCAA was held to apply retroactively to actions pending at the time of the Act's effective date, effectively ending most litigation threats to the industry.

PLCAA has proved to be an effective and reliable fire wall against most claims or lawsuits that plaintiffs have mounted against the gun industry arising out of mass shootings. Most recently, in Prescott v. Slide Fire Solutions, LP, 2018 WL 4409369 (D.Nev. Sept. 17, 2018) - a case arising out the 2017 Las Vegas shooting - the court found that PLCAA immunity extended to the manufacturer of the bump stocks used by the shooter to increase the fire rate and resulting harm inflicted on the victims. The court specifically found that the bump stocks are not an accessory, but are “component parts” of a firearm, and therefore “qualified products” under the PLCAA. Id. at *8-9.

PLCAA immunity is subject to certain enumerated exceptions. The most commonly invoked exceptions in mass shooting situations involve claims of “negligent entrustment” and claims that a manufacturer or seller knowingly violated a state or federal statute applicable to the sale or marketing of the product. Both of these exceptions are currently under review by the Connecticut Supreme Court in Soto v. Bushmaster Firearms, in connection with efforts to impose liability on the manufacturer, distributor and seller of the AR-15 assault rifle used by the gunman in the Sandy Hook Elementary massacre.

V. Modern Mass Shootings and the Harm They Cause

Researchers estimate that gun violence costs the American economy at least $229 billion every year, including $8.6 billion in direct expenses such as for emergency and medical care. Half of these costs are born by U.S. taxpayers.

The number of mass shootings depends upon how you define them. But there is no question they are increasing in number and impact. According to data from the FBI and the Advanced Law Enforcement Rapid Response Training (ALERRT) Center at Texas State University, between 2000 and 2008, the U.S. experienced an average of seven active shooter events per year. From 2009 to 2016 there were 153 such events, or about 19 per year. Of the 220 incidents that occurred from 2000 to 2016, nearly half (107) took place in an education, retail, or government/military setting.

12 15 U.S.C.A. § 7903 (West)
13 Soto et al. v. Bushmaster et al., Case Nos. 19832 & 19833 (Connecticut Supreme Court) (oral argument heard on Nov. 24, 2017)
Regardless of where they occur, mass shootings cause a wide range of damage, loss and expense to victims and impacted businesses. The economic losses can include:

- Property damage (including repair and replacement of buildings)
- Clean up/Extra Expense
- Additional security/security upgrades
- Crisis Management
- Business Interruption/Event cancellation
- Workers Comp - injury, death benefits, mental health (varies state-by-state)
- Medical costs
- Mental health counseling
- Funeral expenses
- Fines/Penalties

Mass shooting incidents can also lead to significant and unique litigation exposures. The types of businesses that could be targeted for liability in a mass shooting event depends upon the circumstances, but can potentially include:

- Owners and operators of businesses or facilities where the shooting occurs
- Event promoters
- Security firms
- Law enforcement\textsuperscript{16}
- Parents/relatives of the shooter
- Employers
- Mental health providers
- Retailers or gun shops where the assailant acquired weapons (if acquired illegally)
- Straw purchasers
- Organizations that fail to report disqualifying information to authorities
- Anyone in a position to know of/intervene in the shooter’s plan
- Media outlets/content providers that encourage or incite violence

In the wake of the 2002 Columbine school massacre, victims even tried to sue video game makers and movie producers and distributors alleging that violent movie and video games were the cause of the shootings.\textsuperscript{17} The United States District Court in Colorado held that: (1) defendants owed no duty of care to shooting spree victim; (2) students’ intentional violent act were not foreseeable and were the superseding cause of teacher’s death; (3) under Colorado law,\textsuperscript{16} [Andrade v. City of Somerville, 92 Mass. App. Ct. 425, 87 N.E.3d 108 (2017) (alleging that gun used to shoot victim had been wrongly returned to shooter by city’s police department); Chen v. County of Santa Barbara, 2015 WL 1262150 (C.D.Cal.) (alleging law enforcement “created a dangerous condition by failing to reasonably investigate, reasonably perform any background check, and reasonably investigate the online postings of [mass murderer] as part of ‘wellness check’ despite the fact that they had been made aware of [his] online postings and violent intentions.”)]

\textsuperscript{17} [Sanders v. Acclaim Entertainment, Inc., 188 F.Supp.2d 1264 (D. Colo. 2002)]
as predicted by the district court, intangible thoughts, ideas, and expressive content contained in movies and video games are not “products” as contemplated by the strict liability doctrine; and (4) movie and games were protected under the First Amendment.18

More recently, victims and family members of deceased victims of the 2016 mass shooting at the Pulse Night Club in Orlando, Florida, brought an action against providers of three social media platforms, which plaintiffs alleged were used to spread messages of violence and hate that motivated the shooter to perpetrate the shooting.19 The plaintiffs claimed that the access that the defendants furnished to the Islamic State of Iraq and Syria (ISIS), which apparently allowed the gunman to hear its messages via the Internet and become radicalized, triggers liability for the shooting. The plaintiffs brought claims under federal statutes that create causes of action for aiding acts of international terrorism and providing material support to terrorists and foreign terrorist organizations. They also alleged claims under state law.

Summaries of the recent mass shootings in Aurora, Colorado, Las Vegas, Nevada, and Sutherland Springs, Texas, illustrating the different types of lawsuits that such incidents can spawn are included in the attached Appendix.

**SAFETY Act Immunity**

The music festival massacre in Las Vegas last year has also seen the first attempt by a defendant to claim immunity under the Support Anti-Terrorism by Fostering Effective Technologies (SAFETY) Act. Congress enacted the SAFETY Act as part of the Homeland Security Act of 2002. The law was intended to ensure that companies would not let the considerable liability risks associated with a potential terrorist attack deter them from creating or using technologies that could help protect the public.20 It provides certain liability limitations for providers of “qualified anti-terrorism technologies” that could save lives in the event of a terrorist attack. Protections apply only to claims arising out of, relating to, or resulting from an act of terrorism when such qualified technologies have been deployed.

The SAFETY Act applies to a broad range of technologies, including any product, equipment, service (including support services), device, or technology (including information technology) designed, developed, modified, or procured for the specific purpose of preventing, detecting, identifying, or deterring acts of terrorism or limiting the harm such acts might otherwise cause, that is designated as such by the Secretary. The U.S. Department of Homeland Security has certified hundreds of security systems, software and equipment, and services, ranging from unarmed guards at shopping malls to flight deck doors. Certification under the statute also has been obtained by stadiums, corporate buildings and facilities that draw crowds and have strengthened security to prevent terrorist acts. The list does not appear to include hotels, hospitals or schools. Homeland Security does not disclose what companies have sought approvals and were denied.

---

18 Id. at 1272-73, 1276.
20 See Regulations Implementing the Support Anti-terrorism by Fostering Effective Technologies Act of 2002 (the SAFETY Act), 71 FR 33147-01, 2006 WL 1547230 (June 8, 2006).
The Safety Act comes into play only when an act of terrorism has occurred. Under the law, the DHS secretary can declare an act of terrorism based on whether the attack was (1) unlawful; (2) caused harm to persons, property, or other entity within the United States; and (3) the attack used or attempted to cause mass destruction, injury or other losses. The secretary has the authority to further refine what terms such as "mass destruction" actually mean. It remains unclear whether mass shooting acts perpetrated by lone gunmen will be recognized as coming within the definition.

In the case of the Las Vegas mass shooting, the party invoking the SAFETY Act is the owner of the hotel from which the shooter staged his assault. Interestingly, however, the hotel itself was never certified under the SAFETY Act. Instead, the hotel seeks to piggy-back off of the certification obtained by the security provider for the concert, Contemporary Services Corp., which had years earlier received DHS designation and certification under the SAFETY Act. The hotel owner, MGM Resorts International, claims that it is protected under the umbrella of Contemporary's designation and has filed lawsuits against survivors seeking a declaration to this effect. There is some basis for this claim, as the SAFETY Act protections appear to extend to users of Qualified Anti-Terrorism Technology under the statute and implementing regulations, which state: “Such cause of action …may not be brought against the buyers, the buyers’ contractors, downstream users of the Qualified Anti-Terrorism Technology, the Seller’s suppliers or contractors, or any other person or entity….”

The potential benefits to MGM, and companies in general, from the designation are significant. They include a cap on liability tied to the amount of liability insurance coverage specified and reasonably available for each qualified technology; the right to exclusive jurisdiction in federal court, insulation from joint and several liability for noneconomic damages,

---

21 Id.
22 Regarding the insurance requirement, the regulations further state:

The SAFETY Act provides that the Secretary will examine the amount of liability insurance the Seller of the technology proposes to maintain for coverage of the anti-terrorism technology at issue. Under section 864(a), the Secretary must certify that the coverage level is appropriate “to satisfy otherwise compensable third-party claims arising out of, relating to, or resulting from an act of terrorism when qualified anti-terrorism technologies have been deployed.” § 864(a)(1). While the Act provides the Secretary with significant discretion in this regard, the Secretary may not require the Seller to obtain liability insurance of more than the maximum amount of liability insurance reasonably available from private sources on the world market. Likewise, the Secretary may not require a Seller to obtain insurance, the cost of which would unreasonably distort the sales price of Seller's anti-terrorism technologies. § 864(a)(2). Although the Secretary may permit the Seller to self-insure, he may not require the Seller to self-insure if appropriate insurance is unavailable. § 864(a)(2).

The inquiry will be specific to each application and may involve an examination of several factors, including without limitation the following: (i) The amount of insurance the Seller has previously maintained; (ii) the amount of insurance maintained by the Seller for other related technologies or for the Seller's business as a whole; (iii) the amount of insurance typically maintained by Sellers of comparable technologies; (iv) data and history regarding mass casualty losses; and (v) the particular technology at issue.

Id.
and immunity from punitive damages or prejudgment interest. In certain circumstances, a company may also be entitled to assert a Government Contractor Defense that further immunizes sellers of qualified anti-terrorism technologies from liability. For MGM, the resolution of its SAFETY Act immunity claims will hinge on whether the DHS Secretary officially declares the Las Vegas attack an act of terrorism, or defers that determination to the courts.

VI. Insurance Response to Mass Shootings

A. Coverage Under Liability Policies

Individual coverage for non-occupational liability risks is traditionally provided as part of standard residential insurance policies (such as homeowners' and renters' policies) and umbrella policies. Homeowners’ and umbrella policies universally include an exclusion for intentional harm, which eliminates coverage for the vast majority of gun-related injuries committed by an insured. Insurers have applied such exclusions to accidental injuries involving firearms and, on the whole, courts have upheld this approach. Some insurers have adopted an even more restrictive version of the intentional harm exclusion that excludes coverage for harm resulting from criminal acts, which could include owning an unlicensed firearm. Finally, many policies do not cover liability between family members, which further limits potential insured liability exposure arising from the discharge of a gun in the home.

1. Intent Issues: Caused by an Occurrence, Expected and Intended Injury Exclusion, Statutory and Public Policy Considerations

Since 1986, standard form CGL and homeowner’s policies have defined an “occurrence” as “an accident, including continuous or repeated exposure to substantially the same general harmful conditions.” Older occurrence definitions include the language “neither expected or intended from the standpoint of the insured.” This language is now more commonly incorporated in a separate intentional acts exclusion.

Coverage in shooting cases most often comes down to a question of intent: was the injury or damage caused by an occurrence or accident? Does the exclusion for injury or damage expected or intended by the insured apply, and to whom? Do any statutes apply, or does public policy affect the outcome of the coverage analysis?

Coverage for Perpetrators

In mass shooting situations, courts generally do not hesitate to find intent to injure from the assailant’s actions and deny coverage on that basis. Germantown Ins. Co. v. Martin, 595 A.2d 1172 (Pa. Super. Ct. 1991) (injuries caused by a shooting spree were expected or intended and, thus, were not covered under the policy; insured’s intent to shoot and kill “everyone” in a house could be transferred to a victim whose identity or presence was unknown to the insured at the time); Donegal Mut. Ins. Co. v. Baumhammers, 938 A.2d 286 (Pa. 2007) (finding no coverage for insured who went on two hour shooting spree, killing 5 people in three different townships); Allstate Ins. Co. v. Neal, 304 Ga. App. 267, 696 S.E.2d 103 (2010) (insured's action
of shooting police officer while the officer was attempting to serve arrest warrant was not a covered “accident.”); Cal. Ins. Code § 533 (West 1972) (“[a]n insurer is not liable for a loss caused by the willful act of the insured”); *Couch on Insurance* § 101:22 (3d ed.2006) (“In general, it is against public policy for an insurance contract to provide coverage for the intentional or willful misconduct of an insured.”)

Because the purpose of intentional act exclusion is to exclude insurance coverage for wanton and malicious acts by an insured, most states recognize that the Court may, absent a finding of actual intent to injure, infer intent to injure as a matter of law. *Allstate Ins. Co. v. Pond Bar*, No. 3-97-cv-1310, 1995 WL 568399, at *9 (D. Minn. May 19, 1995) (intent inferred as a matter of law where the insured engaged in a “shooting rampage” resulting in the death of several individuals); *Allstate Ins. Co. v. Roelfs*, 698 F. Supp. 815, 818 (D. Alaska 1987) (intent to injure is established as a matter of law from the intent to commit acts of sexual assault and molestation); *State Farm Fire & Cas. Co. v. Bomke*, 849 F.2d 1218, 1219 (9th Cir. 1988) (finding intent to harm inherent in the actions on an accomplice). Courts will look to the nature of the insured’s actions and other circumstances in determining whether intent can be inferred.

Even where the shooting is indiscriminate, courts may infer intent as a matter of law. *Woida v. North Star Mut. Ins. Co.*, 306 N.W.2d 570, 572–74 (Minn. 1981) (intent inferred where the insured was involved in shooting a gun at a truck with the knowledge that the truck was occupied, resulting in injury to the occupant, despite the insured’s insistence that he did not mean to injure anyone); *Safeco Ins. Co. of America v. Butler*, 118 Wash.2d 383 (Wash. 1992) (injuries caused by insured firing pistol into truck, striking its driver, were not caused by an “accident” within the meaning of the policy).

Questions of whether the assailant harbored the requisite intent are sometimes informed by reference to related statutes. For instance, in *Allstate Ins. Co. v. Pond Bar*, No. 3-97-cv-1310, 1995 WL 568399, at *9 (D. Minn. May 19, 1995), the Court noted that the act of intentionally pointing a gun at a person was regarded as a “crime of violence” under Minnesota law. With that in mind, the Court found, as a matter of law, that the act of pointing a gun at a victim’s chest in the midst of a shooting rampage supported an inference of intent to injure.

Evidence of the insured’s conviction of a shooting-related crime will generally be determinative of intent. However, the question may still come down to the elements of the crime on which the insured is convicted, and whether they match with the exclusion. Compare *Amica Mut. Ins. Co. v. Edwards*, 8:10-CV-1143-GRA, 2011 WL 2971935 (D.S.C. 2011) (insured's murder conviction forecloses a finding that the actions giving rise to this claim were not intentional, even if the resulting bodily injury is of a different kind, quality, or degree than intended) and *Allstate Ins. Co. v. Zuk*, 574 N.E.2d 1035 (N.Y. 1991) (conviction for second-degree manslaughter did not establish as matter of law that insured reasonably expected victim's death to result from criminal act, within meaning of exclusionary clause in policy). Even in situations where the insured’s conviction of a crime is determinative of coverage, non-shooter insureds may still be entitled to coverage.

Finally, jurisdictions and policy forms differ regarding the impact that an insured’s mental illness may have on the existence of intent under the policy. In *State Farm Fire & Cas. Co. v. Wicka*, 474 N.W.2d 324 (Minn. 1991), the Minnesota Supreme Court held that the
insured's acts were unintentional for purposes of the intentional act exclusion in the policy where the insured, because of mental illness or defect, either does not know the nature or wrongfulness of his act, or is deprived of the ability to control his conduct regardless of any understanding of the nature of act or its wrongfulness. Compare Auto-Owners Ins. Co. v. Churchman, 489 N.W.2d 431 (Mich. 1992), where the Michigan Supreme Court held that an insane or mentally ill person can intend or expect the results of his actions within the meaning of the policy’s exclusionary clause.

**Coverage for Other Insureds/Secondary Actors**

Expected and intended injury exclusions have wording differences that can affect coverage for insureds other than the perpetrator. Generally if the exclusion applies to injury or damage expected or intended by “the” insured, courts analyze the intent of each insured separately. Pawtucket Mut. Ins. Co. v. Lebrecht, 104 N.H. 465 190 A.2d 420 (1963) (policy excluded injury “caused intentionally by or at the direction of the Insured”; the insured parents’ child assaulted another; the exclusion did not apply to them for their negligence). Thus, in Donegal Mutual Insurance Company v. Baumhammers, 938 A.2d 286 (Pa. 2007), the Supreme Court affirmed a duty to defend the parents of a gunman who went on a two hour shooting spree, holding:

> The extraordinary shooting spree embarked upon by Baumhammers resulting in injuries to Plaintiffs cannot be said to be the natural and expected result of Parents alleged acts of negligence. Rather, Plaintiffs' injuries were caused by an event so unexpected, undesigned and fortuitous as to qualify as accidental within the terms of the policy. Because the alleged negligence of Parents resulted in the tragic accidental injuries to the individual plaintiffs, Donegal is therefore required to defend Parents. Id. at 293.

But if the exclusion applies to injury or damage expected or intended by “an” or “any” insured, courts often find that intent to injure on the part of one insured results in exclusion of coverage for all insureds. Allstate Ins. Co. v. Freeman, 432 Mich. 656, 443 N.W.2d 734 (1989) (holding that a husband who negligently made a gun available to his wife was not covered where the intentional act exclusion referred to "an insured.")

Some courts apply the separation of insureds provision in this context to avoid the loss of coverage for innocent co-insureds. Minkler v. Safeco Ins. Co. of America, 49 Cal.4th 315, 110 Cal.Rptr.3d 612, 232 P.3d 612 (2010) (husband sued for molesting little leaguer he was coaching; policy excluded injury expected or intended by an insured; the policy contained a separation of insureds clause; the court held that the exclusion of coverage for injuries arising from "an" insured's intentional acts did not preclude coverage for the wife’s liability, if any, arising from the molestation for the sole reason that the husband, another insured under the policies, had committed intentional, and thus excludable, acts; the wife's coverage must be analyzed on the basis of whether she herself committed an act or acts that fell within the intentional act exclusion). Minkler noted a split nationwide on this issue. And it suggested that an exclusion for injury expected or intended by any insured would have provided a defense to coverage here.
Finally, courts generally find that intent is not imputed to innocent secondary actors. In *Nationwide Mutual Fire Ins. Co. v. Pipher*, 140 F.3d 222 (3d. Cir.1998), the insured owned a rental unit. He failed to install doors on the second floor apartment of the property before leasing it to a tenant. The tenant was murdered in the apartment. Nationwide sued for a declaratory judgment that because the victim's death was caused by the intentional acts of a third party, no "accident" or "occurrence" had occurred and therefore Nationwide had no duty to defend or indemnify its insured. The Third Circuit held that Nationwide had a duty to defend its insured against complaints alleging negligent conduct on the part of the insured and that although a third party may have intentionally injured or killed the plaintiff, the death or injury may still be deemed to be an accident under the terms of the policy. *Id.* at 225-26.

2. **Criminal Act Exclusions**

Homeowners and commercial liability policies may also contain a “criminal acts” exclusion. This exclusion typically bars coverage for bodily injury or property damage resulting from “a criminal act or omission.” The exclusion is often stated to apply regardless of (1) whether the insured person possessed the mental capacity to appreciate the criminal nature or wrongfulness of the act or omission or to conform his or her conduct to the requirements of the law or to form the necessary intent under the law; or (2) whether the insured person is actually charged with, or convicted of, a crime. Injury resulting from a criminal act invokes the criminal act exclusion and precludes coverage as a matter of law. *Liebenstein v. Allstate Ins. Co.* 517 N.W.2d 73, 75 (Minn. App. 1994). Intent to injure is immaterial to the applicability of the criminal acts exclusion. *Id.*

See also *Slayko v. Sec. Mut. Ins. Co.*, 98 N.Y.2d 289, 774 N.E.2d 208 (N.Y. 2002) (holding criminal activity exclusion did not violate public policy); *Auto Club Group Ins. Co. v. Booth*, 797 N.W.2d 695 (Mich. Ct. App. 2010) (defendant pleaded no contest to a misdemeanor charge of careless, reckless, or negligent discharge of a firearm resulting in injury; Court of Appeal held that the trial court erred when it granted summary disposition to defendant concerning the applicability of the criminal act exclusion contained in homeowner's insurance policy, and ordered summary judgment in favor of insurer.)

3. **Assault and Battery Exclusions**

Assault and battery exclusion typically exclude bodily injury arising out of “actual or alleged assault or battery.” Sometimes such exclusion also exclude injury arising out of “physical altercation” or acts or omissions in connection with the prevention or suppression of such acts, or failure to provide adequate security.

In *Geovera Specialty Ins. Co. v. Hutchins*, 831 F. Supp. 2d 1306, 1309 (M.D. Fla. 2011) the insured’s grandson shot the decedent in the neck, resulting in decedent's death. At the time of the shooting, the grandson was living with the insured. The insurer brought an action seeking a declaration that it had no duty to defend or indemnify the wrongful death action against the grandson by the survivors of the decedent. All parties moved for summary judgment, and the court awarded summary judgment to the insurer, stating that the policy’s exclusion for bodily
injury arising out of assault or battery absolved the insurer of any duty to defend or indemnify the insured.

More recently, in *Nautilus Ins. Co. v. EJII Dev. Co.*, U.S.D.C. N.D. Ga. July 19, 2018, 1:17-cv-2048-TCB, Martin shot and killed Mosley at a Waffle House. EJII provided security to the Waffle House. Martin was a Waffle House employee, allegedly acting within the course and scope of employment at the time of the shooting. Waffle House was sued for negligent training, employment, supervision and training, and for failure to maintain a safe premises. EJII was sued for negligent failure to provide or properly train security guards, failure to implement adequate security policies, failure to identify hazards, failure to warn patrons.

Nautilus insured EJII. That policy provided standard general liability coverage for bodily injury caused by an occurrence. It was endorsed with a Security and Patrol Agency Professional Liability coverage extension which provided coverage for sums the insured became legally obligated to pay as damages because of the rendering of or failure to render “professional services” in providing “security and patrol agency services.” This endorsement added this coverage to the bodily injury and property damage coverage part. The policy also contained an assault and battery exclusion that excluded bodily injury arising out of “actual or alleged assault or battery,” “physical altercation” or “any act or omission in connection with the prevention or suppression of such acts, including the failure to provide adequate security.”

Nautilus defended EJII under a reservation of rights and then sued for declaratory relief. The court found it “pretty clear” that the suit arose from an alleged assault and battery or physical altercation. EJII and Waffle House did not contest this point but instead argued that the professional liability endorsement overrides and negates the assault and battery exclusion. The court rejected this argument, finding that the exclusion was clear and unambiguous. The professional liability endorsement was added to the bodily injury and property damage coverage part, and the assault and battery exclusion was written to exclude coverage for that coverage part. Therefore the assault and battery exclusion applied to the professional liability endorsement.

Note that assault and battery exclusions are much more limited in use. They are not, for instance, part of the standard ISO CGL language. But in certain classes of risks, such as bars, they are in frequent use.

4. **Number of Occurrences**

In most jurisdictions, there is a relationship between the intent analysis and the number of occurrences. If the event is viewed from the perspective of the perpetrator, there is a strong argument for no coverage based on intentional conduct, but an argument for many more occurrences. Alternatively, if the event is viewed from the perspective of another party – a business entity or a family member - there is a stronger argument to avoid intentional conduct exclusions, but also a stronger argument for a single occurrence.

In *Koikos v. Travelers Ins. Co.*, 849 So. 2d 263 (Fla. 2003), Koikos rented his restaurant to a fraternity for a graduation party. During the party Bell and Anderson tried to enter the restaurant. They were turned away after a heated exchange with fraternity members who were
charging admission. Bell and Anderson returned in a few minutes and a fight broke out between Anderson and some fraternity members. Anderson was knocked to the ground. Bell brandished a handgun and began firing as he helped Anderson up. Bell fired two separate but nearly concurrent rounds. Armstrong and Harris were each hit by separate bullets, both from the first round of shots. Three other guests were injured.

Armstrong and Harris sued Koikos for failing to provide security. Koikos sued Travelers for declaratory relief. Travelers provided coverage with a limit of $500,000 per occurrence, subject to a $1,000,000 general aggregate. The policy defined occurrence as an accident, including continuous or repeated exposure to substantially the same general harmful conditions. Travelers argued there was one occurrence – Koikos’ alleged negligence. Koikos argued that each shot was a separate occurrence.

On a certified question from the Eleventh Circuit, the Florida Supreme Court found that there was more than one occurrence. The court rejected Travelers reliance on the “continuous or repeated exposure” language, and found that this was a mismatch for this type of circumstance, citing a number of decisions concerning coverage for clergy sexual abuse. Thus the number of occurrence came down to the definition of accident, a term not defined in the policy, but defined in case law.

The court found that the “cause” analysis did not answer the question of the number of occurrences because there were two possible causes: Koikos’ failure to provide security and failure to warn, and the intruder’s gunshots. The court focused on the immediate injury producing act – the shooting which was the act that caused the damage – rather than the underlying tortious omission – the insured’s negligence, the basis on which it is being sued.

In RLI Ins. Co. v. Simon’s Rock Early College, 54 Mass. App. Ct. 286 (2002) Lo, a student, went on a shooting spree for 18 minutes, spanning a quarter mile, resulting in two killed and four injured. College policy prohibited weapons on the property. When the school received a package addressed to Lo from an arms store, the Dean advised the residence directors to allow the package to be delivered to Lo, followed by prompt inquiry to determine the contents. A residence director asked Lo to show her the contents. He refused, relying on college policy that required a dean to authorize a search and that the search be in the presence of one other college staff member. The residence director obtained authorization from the dean and returned with another college staff member. They found empty black plastic boxes, a black plastic rifle stock, and empty metallic army surplus cartridge box but no ammunition or gun. Lo had explanations for all of this, and was calm and not defensive, when interviewed by the residence director and by the dean. Later that day he traveled to a sporting goods store and bought an assault rifle. Later than night an unidentified caller warned the residence director. She called a provost and went with her family to the provost’s house. They were calling the dean as they heard shots nearby.

American provided primary coverage, RLI provided excess coverage. RLI filed suit seeking a declaration that the aggregate limit of $3,000,000 applied. American counterclaimed arguing that a single per occurrence limit of $1,000,000 applied. The court found a single occurrence. “In this case, where the underlying claims against the school and its employees are for negligence, it is their allegedly negligent acts or omissions in failing to prevent Lo from using
his gun that constitute the occurrence for purposes of determining general liability coverage provided by American’s policy. [Citation omitted.” Id. at 291. Since the policy is intended to insured the college for its liabilities, the occurrence should be an event over which is had some control. Id. at 293. Occurrence must be defined in such a way as to given meaning to the insured’s connection to liability. Id.


Edward Abrams, Jr. was the son of insured homeowners, Edward Abrams, Sr. and Joyce Abrams. He resided with them. They had a homeowners’ insurance policy with State Farm with a limit of $100,000 per occurrence. The policy defined occurrence as an accident including exposure to conditions; “Repeated or continuous exposure to the same general conditions is considered to be one occurrence.”

State Farm deposited a single limit of $100,000 into court, and the plaintiffs then filed a declaratory judgment action against Mr. and Mrs. Abrams and State Farm. State Farm argued a single occurrence – that the claimed negligence of the parents in permitting their adult son to have access to a gun was the one occurrence. Plaintiffs argued each gunshot was a separate occurrence. The court found that there was one occurrence here – the negligence of the gunman’s parents in permitting him to have access to the firearms in their home.

In Donegal Mut. Ins. Co. v. Baumhammers, 938 A.2d 286 (Pa. 2007), where the son of the insureds went on a two hour, three township shooting spree, targeting different people in each town, the court rejected an argument that there were six occurrences, finding but one occurrence.

Parents’ liability in the instant case is premised on their negligence in failing to confiscate Baumhammers' weapon and/or notify law enforcement or Baumhammers' mental health care providers of his unstable condition. Because coverage is predicated on Parents' inaction, and the resulting injuries to the several victims stem from that one cause, we hold that Parents' alleged single act of negligence constitutes one accident and one occurrence. Id. at 295.

In Travelers Indem. Co. v. Olive’s Sporting Goods, Inc. 2997 Ark. 516 (1989), the insured store sold pistol and shotgun to a would be assailant, who used the weapons to shoot a police officer and kill and wound several others, before committing suicide. The court found the sale of the weapons was the occurrence.
Some cases involve claims by the shooters or others seeking coverage for the shooter, and that analysis is different. See State Farm Lloyds, Inc. v. Williams, 960 S.W. 2d 781, 785 (Tex. App. 1997) (insured shooter was covered under a homeowners policy; insured’s liability arose out of the shootings, and more than one per occurrence limit applied); American Indem. Co. v. McQuaig, 435 So. 2d 414 (Fla. Dist. Ct. App. 1983) (insured, who claimed insanity, fired three shotgun shots in a two minute period, injuring two different people; court held that there were three occurrences); New Hampshire Ins. Co. v. RLI Ins. Co., 807 So.2d 171 (Fla. 3d Dist.Ct.App. 2002) (held that three gunshots fired by a condominium resident, each of which injured a different person, constituted three occurrences under the condominium association's insurance policy).

The exposure created by multiple occurrence holdings is tempered in general liability coverage by the use of aggregate limits. But aggregate limits are generally not a feature of personal liability coverages like homeowners policies, and multiple occurrence holdings could conceivably greatly increase exposure under these policies.

5. Property Damage

The focus in mass shooting cases is on bodily injury. But there can be property damage. Property damage claims can be subject to a number of the same exclusions discussed below. One interesting case on property damage was recently released by a California Court of Appeal.

In Thee Sombrero, Inc. v. Scottsdale Ins. Co., Cal. App. 4th DCA, No. E067505, the insured, Sombrero, owned commercial property. Its lessees operated that property as a nightclub pursuant to a conditional use permit (CUP). One condition of the conditional use permit was that the city had to approve the floor plan, which then could not be modified without city approval. Part of that floor plan included a single door with a metal detector.

On night, a patron shot and killed another patron. After that Sombrero learned that CES has converted a storage area into a “VIP entrance” with no metal detector. The gun used in the shooting was brought in through that entrance.

CES provides security guard services at the nightclub. The CUP was revoked after a fatal shooting at the nightclub. The CUP was replaced with a permit that only allowed operation as a banquet hall.

Sombrero sued CES for negligence alleging that this caused revocation of the permit which caused diminution in the value of the property. Sombrero obtained a default judgment against CES. At the default prove-up Sombrero submitted an affidavit that the property value with the modified permit was $923,078 less than before. Judgment was entered for that amount.

Sombrero then sued CES’s general liability insurer, Scottsdale, in a direct action on the judgment under Insurance Code 11580 section 11580 (b)(2). Scottsdale argued that the loss was an economic loss and not “property damage”. The trial court ruled for Scottsdale. The Court of Appeal reversed. It held that Sombrero’s loss of the ability to use the property as a nightclub constituted loss is use of tangible property and thus was “property damage”.

17
The court held that “The loss of the ability to use the property as a nightclub is, by definition, a ‘loss of use’ of ‘tangible property.’” The court agreed that a liquor license is intangible property, but it reasoned that loss of license lead to a loss of use of the premises. Scottsdale argued that this was a “mere economic loss” and so it was not a loss of use of tangible property. The court stated the rule regarding “strictly economic losses” not being “property damage”. But it reasoned that diminution in value is accepted as a method of measuring any property damage that may have been sustained. It can be an alternative measure of any property damage actually sustained.

The correct principle is not that economic losses, by definition, do not constitute property damage. Rather, the correct principle is that losses that are exclusively economic, without any accompanying physical damage or loss of use tangible property, do not constitute property damage.

B. Coverage Under First Party Policies

Apart from the individual victims of mass shooting events, the commercial or public settings of many of these events suffer distinct and direct damages. For these types of damages, an organization may look for coverage in policies for commercial property, business interruption, workers’ compensation, or even directors and officers. Organizations that may be most interested in reviewing active shooter coverage include schools, churches, local governments, shopping mall operators, senior care facilities, and hotels.

Some of the damages these organizations suffer are straightforward, such as a bullet hole in a wall. Other damages are more subtle or more substantial and may present more nuanced coverage questions -- the stigma of an event may create the need or desire to replace facilities; an organization will need crisis management, ranging from a public relations firm to counseling for stakeholders. In the wake of some mass shooting events, particularly at churches or schools, there has been an outpouring of community giving. While such giving reduces the overall damage from the event, it necessitates a response, including secretarial help to process mail and legal help to establish a foundation for donations.

As noted above, categories of damages insureds have faced include property damage, clean up/extra expense, additional security/security upgrades, crisis management, business interruption/event cancellation, workers comp, medical costs, mental health counseling, and funeral expenses. Three recurring areas that present thorny coverage questions under existing policies are (1) preventative risk assessment, (2) replacement of buildings, and (3) upgraded security systems.

Traditional policies adapt to changing needs, but most were not designed with the particular circumstance of a mass shooting event in mind. Invariably there are gaps even after combining coverages for liability, property, business interruption, and workers’ compensation.

23 See, e.g., 11 No. 4 In-House Def. Q. 58, “The Insurance Coverage Aftermath of Mass Shooting Events (Fall 206) (noting possible workers comp claims, business interruption, property damage, and business interruption for nearby businesses).
That has led to specially designed named-perils policies for mass shooting events that straddle the traditional divide between first party and third party coverage. One underwriter reported that demand for his insurance company’s Deadly Weapon Protection policy doubled from 2017 to 2018. That burgeoning area of coverage is discussed in more detail below.

1. The Scope of the Risk

One of the obvious questions a risk manager must face is how widespread mass shooting events have become. The answer, however, is not so obvious. The number of mass shooting events depends on the definition and nomenclature used. Although there is no settled legal definition, the most widely used definitions range from at least four victims killed in a public setting (the most restrictive) to at least four victims injured in any setting (the most inclusive). For example, the Congressional Research Service reported 4.5 “mass public shootings” per year from 2010 to 2013; whereas, the Gun Violence Archive reports 336 mass shooting events in 2018 alone.

For organizations trying to plan coverage, it makes sense to rely on more inclusive definitions because an event with multiple injuries can cause significant damage, even if the victims survive. Although factors such as geographic distribution of mass shooting events and most likely settings for attacks will play a role in risk assessment, the sheer number of mass shooting events drives the need to review coverage. As more insurance companies offer policies specifically designed for mass shooting events, which is discussed below, it is important to review the specific language of the policy to determine what definition is being used for coverage. A casualty threshold in the named-perils policy may preclude coverage for an active shooter event that involves one or two victims.

The costs of such an event can be devastating. The 2007 Virginia Tech shooting caused an estimated $48.2 million in litigation and recovery costs, and building replacement alone has cost more than that following other mass shooting events. The Las Vegas shooting could cost insurers more than $1 billion.

2. Preventative Risk Assessment

By its nature, most insurance coverage is reactive. But, unlike an earthquake or a hurricane, a mass shooting event is a man-made disaster and steps can be taken to reduce the

---

25 See, Mass Murder with Firearms: Incidents and Victims, 1999-2013, William J. Krouse and Daniel J. Richardson, Congressional Research Service, published July 30, 2015, https://fas.org/sgp/crs/misc/R44126.pdf (explaining that after Newtown Congress defined “mass killings” as three or more killings in a single incident; the FBI uses the term “mass murder” for a single incident in which four or more victims are killed; and the report examined “mass public shootings,” in which at least four victims are murdered by firearms, in a single event, in one or more public locations); https://www.gunviolencearchive.org/ (threshold of four victims injured).
likelihood it will occur. Coverage for risk assessment and training is not available under most traditional commercial property or business interruption policies.

Perhaps that is why coverage for prevention is quickly becoming one of the hallmarks of mass shooting event policies. Insurance companies have reported that one of the most sought-after aspects of the new coverage is preventative risk assessment and training services. After the Parkland attack, Florida’s Palm Beach County School District acquired active shooter coverage specifically because it wanted the risk assessment and training service, according to Dianne Howard, the district’s director of risk and benefits management.

3. Replacement of Facilities

Although mass shooting events typically do not destroy buildings, the tragedies that unfolded within often do destroy the value of those facilities for the survivors and the community. While perhaps not strictly necessary, many of the communities in which these tragedies occur have decided it is worth the investment to demolish or renovate the building where the attack happened. Whether characterized as stigma damage or property damage (loss of use), it is difficult to find coverage for replacement of a building that is being replaced for primarily emotional reasons. Not even active shooter policies would typically cover this cost.

The communities replacing buildings seem to be paying for replacement through means other than insurance coverage. The Newtown, Connecticut community voted in 2013 to demolish the elementary school attacked and build a new school, funding the $50 million cost with taxpayer money; in Parkland, Florida, a school safety law passed in March 2018 allocated more than $25 million to tear down and rebuild parts of Marjory Stoneman Douglas High School. Yet, determined risk managers are working with insurers to develop new products that at least offer matching funds for the cost of rebuild triggered by “emotional duress.”

4. Upgraded Security Systems

Another expense that has fallen on the locations where shootings occur (or locations taking preventative measures) is the cost of upgrading security systems. Understandably, risk managers want to do everything possible to decrease the chances of another mass shooting event.

---

28 12 No. 4 In-House Def. Q. 56, “Business Owners’ Duty to Protect Invitees from Violent Crimes (Fall 2017).
29 See Risk & Insurance, Graham Buck, Oct. 15, 2018. http://riskandinsurance.com/removing-the-target-for-mass-shooters/ (underwriter Chris Parker of Beazley reported that the company’s Deadly Weapon Protection offers benefits that may be lacking in traditional policies, such as pre- and post-event crisis management coverage).
30 https://www.cbsnews.com/news/schools-are-now-buying-insurance-against-mass-shootings/ http://riskandinsurance.com/after-a-mass-shooting-what-happens-to-the-building/ (“A typical active shooter policy would be focused on medical expenses, funeral costs, public relations firms, security firms and the like. It would not cover the demolition or rebuild of the building.”)
But upgrading security is a category of expense that does not typically fall within traditional property coverage. First, the security system itself may not have been damaged in the attack; rather than being destroyed, it is deemed to be insufficient. Second, even if the security system is damaged, most property policies are designed to replace damaged property with new property of similar quality. A substantially upgraded system may fall outside this coverage and be characterized as a betterment rather than a reasonable replacement.

VII. Conclusion

As the above cases demonstrate, even if an insured entity is not ultimately found liable for the actions of a mass shooter, the cost of defending businesses, employers and building owners from claims arising out of mass shooting incidents is a significant exposure. Moreover, a time may come when general perception, institutional awareness and practices, and public policy converge to place greater duties and responsibilities on businesses, institutions, professionals to affirmatively act to intervene and prevent mass shootings. Until then, count on insurance companies to continue responding to insureds’ concerns with new coverages and endorsements designed to help entities prepare for and respond to active assailant and mass shooting events.
APPENDIX

Comparative Risk Table$^{35}$

Average loss of life expectancy [in days] due to different causes

<table>
<thead>
<tr>
<th>CAUSE</th>
<th>DAYS LOST</th>
</tr>
</thead>
<tbody>
<tr>
<td>Being male and unmarried</td>
<td>3500</td>
</tr>
<tr>
<td>Cigarette smoking (male)</td>
<td>2250</td>
</tr>
<tr>
<td>Heart disease</td>
<td>2100</td>
</tr>
<tr>
<td>Being female and unmarried</td>
<td>1600</td>
</tr>
<tr>
<td>Being 30% overweight</td>
<td>1300</td>
</tr>
<tr>
<td>Being a coal miner</td>
<td>1100</td>
</tr>
<tr>
<td>Cancer</td>
<td>900</td>
</tr>
<tr>
<td>Being 20% overweight</td>
<td>900</td>
</tr>
<tr>
<td>Cigarette smoking (female)</td>
<td>800</td>
</tr>
<tr>
<td>&lt; 8th grade education</td>
<td>850</td>
</tr>
<tr>
<td>Dangers job, accidents</td>
<td>300</td>
</tr>
<tr>
<td>Consuming additional 100 Cal/day</td>
<td>210</td>
</tr>
<tr>
<td>Motor vehicle accidents</td>
<td>207</td>
</tr>
<tr>
<td>Pneumonia or flu</td>
<td>141</td>
</tr>
<tr>
<td>Drinking alcohol (US average)</td>
<td>130</td>
</tr>
<tr>
<td>Accidents in home</td>
<td>95</td>
</tr>
<tr>
<td>Suicide</td>
<td>95</td>
</tr>
<tr>
<td>Diabetes</td>
<td>95</td>
</tr>
<tr>
<td>Homicide</td>
<td>90</td>
</tr>
<tr>
<td>Legal drug misuse</td>
<td>90</td>
</tr>
<tr>
<td>Average job, accidents</td>
<td>74</td>
</tr>
<tr>
<td>Drowning</td>
<td>41</td>
</tr>
<tr>
<td>Occupational radiation exposure</td>
<td>40</td>
</tr>
<tr>
<td>Accidental falls</td>
<td>39</td>
</tr>
<tr>
<td>Safe job, accidents</td>
<td>30</td>
</tr>
<tr>
<td>Fire, burns</td>
<td>27</td>
</tr>
<tr>
<td>Energy generation</td>
<td>24</td>
</tr>
<tr>
<td>Illicit drug use (US average)</td>
<td>18</td>
</tr>
<tr>
<td>Poison</td>
<td>17</td>
</tr>
<tr>
<td>Firearm accidents</td>
<td>13</td>
</tr>
<tr>
<td>Natural radiation</td>
<td>11</td>
</tr>
<tr>
<td>Medical x-rays</td>
<td>7</td>
</tr>
<tr>
<td>Drinking coffee</td>
<td>6</td>
</tr>
<tr>
<td>Bicycle accident</td>
<td>5</td>
</tr>
<tr>
<td>All catastrophes combined</td>
<td>4</td>
</tr>
<tr>
<td>Diet drinks</td>
<td>2</td>
</tr>
<tr>
<td>Nuclear reactor accident</td>
<td>1</td>
</tr>
</tbody>
</table>

The attack on the First Baptist Church in Sutherland Springs, Texas, on November 5, 2017, was the deadliest mass shooting in Texas and, at the time, the deadliest shooting in an American place of worship in modern history. The gunman entered the church during Sunday services and opened fire on the congregation, killing twenty-six people and injuring twenty others. The gunman was shot by a male civilian as he exited the church, and after a high-speed chase, was found dead with multiple gunshot wounds, including a self-inflicted shot to the head.

The gunman was a former Air Force service member who had received a bad-conduct discharge after being court-martialed and convicted of assault against his wife and stepson. The general court-martial guilty plea made it illegal for him to own, buy, or possess a firearm or ammunition. Despite this prohibition, he was able to purchase the semi-automatic rifle used in the shooting from a Texas sporting goods store by falsifying the required ATF Form, indicating that he did not have a disqualifying criminal history. It was later learned that the Air Force failed to relay the court-martial convictions to the FBI for inclusion in the National Crime Information Center (NCIS) database, which would have preventing him from making the purchase.

We are not aware of any lawsuits against the church where the shooting occurred, likely due to the strong Texas law holding that criminal acts of this nature are not foreseeable and therefore the church had no legal duty to anticipate or prevent the attack.

Some survivors did sue the sporting goods retailer that sold the gun used in the attack, claiming that the gun and magazine was purchased illegally and negligently sold in violation of federal law. Specifically, the lawsuit claims that, while the firearm was legal in Texas, the shooter was a resident of Colorado, where it is illegal to sell or possess a magazine that holds more than 15 rounds. The suit accuses the retailer of gross negligence and seeks damages of more than $1 million per plaintiff for physical and mental anguish disfigurement and medical expenses. Experts disagree on whether the lawsuit has merit. However, a prior Texas appellate court ruling involving the same retailer in 2017, upheld the dismissal of claims relating to the sale of a gun to a “straw buyer” that was later used in a homicide, suggesting that such claims are difficult to win.

Families of persons injured or killed in the church attack also sued the Air Force and Defense Department, alleging that the government was negligent in failing to report the gunman’s prior criminal conviction to the FBI background check system. These lawsuits have been consolidated and are working their way through the court, but face a significant hurdle in the federal government’s sovereign immunity.\footnote{The Department of Defense and various branches of the military also face lawsuits by several cities requiring them to fully report disqualifying criminal convictions to the agency that compiles the NCIS database. That lawsuit is currently on appeal before the United States Court of Appeals for the Fourth Circuit.}
ROUTE 91 HARVEST FESTIVAL SHOOTINGS IN LAS VEGAS, NEVADA

On October 1, 2017, a gunman opened fire on a concert crowd at the Route 91 Harvest Music Festival in Las Vegas. The attacker fired from a hotel room on the thirty-second floor of the Mandalay Bay hotel across the street from the festival. In the span of barely ten minutes, the attacker unleashed hundreds of rounds of ammunition, killing 58 people and injuring more than 850, making it the deadliest mass shooting in the modern era. The shooter used semiautomatic rifles modified with devices known as “bump stocks,” which enabled rapid fire approaching the rate of a fully automatic machine gun.

The owner of Mandalay Bay (MGM), the concert promoter (Live Nation) and the security firm at the concert face potentially hundreds of lawsuits for failing to employ adequate security measures with respect to its hotel operations and management of the concert venue that allegedly could have prevented the shooting. The lawsuits question, among other things, how the gunman was able to bring more than 20 rifles into his room without being detected.

MGM claims that it has received pre-litigation hold letters from at least 63 attorneys on behalf of 2,462 individuals. In re Route 91 Harvest Festival Shootings in Las Vegas, Nevada, on Oct. 1, 2017, No. MDL 2864, 2018 WL 4905479, at *2 (U.S. Jud. Pan. Mult. Lit. Oct. 3, 2018). As of October 2018, only 38 negligence actions have been filed against MGM, and of those, 34 were voluntarily dismissed, presumably following settlements. Id. The remaining negligence actions are pending in the Central District of California and Nevada federal court.

MGM has also incurred significant and unique first party losses, from losses from cancelled bookings following the incident to loss of use of the room and floor where the shooting occurred due to investigations and in the longer term due to the stigma associated with the attack.

As previously discussed, MGM preemptively filed nine declaratory judgment actions against nearly 2000 individuals who either previously sued or have threatened to sue MGM. In these actions, MGM seeks a declaration that any state-law claims arising against MGM from the Harvest Festival Shooting are barred by the SAFETY Act of 2002, 6 U.S.C. §§ 441-444, and that MGM has no liability to plaintiffs under the Act.

Victims and their families have also filed lawsuits against the police over the response to the Las Vegas massacre, and in particular why they didn't act more quickly to stop the gunman. The lawsuit claims six minutes passed without a police response from the time the gunman strafed a hallway of the hotel with 200 rounds until he started firing on people at the concert.

Early estimates suggest that between life and health insurance, workers comp, and property and liability claims the insurance industry may end up paying more than $1 billion related to the massacre. MGM has publically stated that it expects its insurance to cover its liabilities.

AURORA, COLORADO THEATER SHOOTINGS

On July 20, 2012, during a midnight premiere of the movie the “The Dark Knight Rises,” a 24 year old gunman entered a propped open emergency exit to the crowded theater with a cache of weapons he had retrieved from his car and opened fire on the audience, killing twelve people and injuring seventy others. The gunman had purchased a ticket and entered the auditorium through the normal patron entrance. After the theater was dark and the movie began the gunman left his seat and exited the theater to the outside parking area through a door located at the right, front side of the movie screen, leaving the door ajar so that it would remain open. The gunman made one or more trips from his car through the open exterior door to the auditorium, with his firearms, ammunition and tear gas. This took an extended period of time, but he was not monitored, deterred or contacted by theater personnel.

Predictably, the theater owner faced numerous lawsuits by victims and surviving family members alleging premises liability, negligence, and wrongful death claims under Colorado law for failing to prevent the attack. Traynom v. Cinemark USA, Inc., 940 F.Supp.2d 1339 (2013); Axelrod v. Cinemark Holdings, Inc., 65 F.Supp.3d 1093 (2014). The cases were consolidated before a single federal judge, who early on denied defendants’ motions to dismiss and for summary judgment on the issue of whether defendants owed a duty and whether the harm was foreseeable. However, after three years of litigation, the federal district court ultimately granted defendants summary judgment, finding that their alleged actions and omissions in failing to prevent the attack were not the proximate cause of the plaintiffs’ losses. Nowlan v. Cinemark Holdings, Inc., 2016 WL 4092468, at *3 (D. Colo. June 24, 2016).

Parents of the victims also sued gun shops who sold the gunman ammunition and equipment used in the shootings, asserting claims for negligence, negligent entrustment, and public nuisance, and injunctive relief. Phillips v. Lucky Gunner, LLC, 84 F.Supp.3d 1216 (2015). The United States District Court for the District of Colorado dismissed the claims, holding that the sellers were immune from liability under the Colorado immunity statute and that claimed exceptions to the federal immunity law (PLCAA) did not apply. The court observed that even in the absence of immunity, the sellers did not owe a duty to prevent the plaintiffs’ death from a mass shooting, and that sales of ammunition and tear gas grenades, both online and face-to-face, were not the proximate cause of the plaintiffs’ losses.

Survivors and victims of the Aurora shooting also sued a psychiatrist who worked for the University of Colorado, where the gunman attended school, and the university, for failing to act on statements the gunman allegedly made to the psychiatrist less than a month before the shooting – including “that he fantasized about killing a lot of people.” The lawsuit claimed that the psychiatrist had alerted the university’s threat assessment team regarding the statements, but when campus police asked the psychiatrist if they should apprehend the assailant and place him on a psychiatric hold, she rejected the idea. The suit was stayed during the pendency of the criminal trial (where the psychiatrist was a witness) and ultimately resolved out of court. Commentators questioned whether the plaintiffs would be able to overcome the significant

38 The court also found that the PLCAA, which provides multiple exceptions to immunity from liability for sellers or manufacturers of firearm and weapons products for harm caused by acts of third parties, did not preempt the Colorado statute that expressly prohibited cause of actions that were excepted under the federal statute.
causation issues presented by the claims. The claims were similar to claims made following the Virginia Tech massacre, where the gunman had numerous contacts with the school’s counselling center a year before the incident, demonstrated bizarre and troubling behavior, including suicidal and homicidal thoughts, and was even ordered by a judge to receive involuntary outpatient treatment, which the center never acted upon.
Pursuant to RCW 48.02.080 and RCW 48.17.063 [unlicensed activities], the Insurance Commissioner of the state of Washington ("Insurance Commissioner") orders the above-named Respondent, and its officers, directors, trustees, employees, agents, and affiliates to immediately cease and desist from:

A. Engaging in or transacting the unauthorized business of insurance in the state of Washington;

B. Seeking, pursuing and obtaining any insurance or service contract business in the state of Washington;

C. Soliciting Washington residents to sell any insurance issued or to be issued by an unauthorized insurer;

D. Soliciting Washington residents to induce them to purchase any insurance contract.

BASIS:

1. National Rifle Association ("NRA" or "the Respondent") does not hold a state of Washington producer's license.

2. On November 22, 2017, a consumer filed a complaint with the Insurance Commissioner alleging that NRA was soliciting Washington consumers to purchase "Carry Guard" insurance on its website without being properly licensed to do so. She claimed NRA had been using internet, emails, commercials, and videos to promote the NRA Carry Guard product.
She also indicated that NRA’s website had four (4) different levels of policies offered between $155 and $550 per year.

3. The Insurance Commissioner’s Investigations Unit ("Investigations") contacted a representative for NRA using the phone number listed on the NRA Carry Guard website. The representative affirmed that the product was available to Washington consumers. Investigations also discovered on the NRA website that the Carry Guard product is liability insurance for a gun owner if the gun owner faces litigation or charges as the result of injuring a person in self-defense. The Carry Guard product is administered by Lockton Affinity, LLC ("Lockton"), and underwritten by Chubb Insurance ("Chubb"), with whom Lockton is appointed. A search of the National Association of Insurance Commissioners ("NAIC") database showed the NRA Carry Guard Insurance Program is licensed only in Georgia.

4. Investigations received a written response from a Lockton representative who stated Carry Guard is a program developed by NRA for the benefit of Carry Guard members, and membership includes both insurance and non-insurance components. The Carry Guard program was designed so the insurance solicitations would be handled by Lockton, and the non-insurance aspects of the membership would be handled by NRA.

5. According to the Lockton representative, the Carry Guard program first became available in April 2017. Lockton, NRA, and Chubb recently reviewed the structure of the Carry Guard program, and refinements were made to avoid the appearance that NRA may be soliciting insurance sales. The refinements included changing the website so that it contains no references to insurance or any suggestion that a person purchase insurance. The website addresses only the non-insurance benefits of the Carry Guard program. After the changes, the only reference to insurance on the website is a Lockton advertisement that indicates the availability of insurance coverage, without any details or affirmative recommendation by NRA. If a consumer wishes to obtain information concerning insurance coverage, they are redirected to a Lockton website. Additionally, all direct mail and other forms of advertising relating to NRA are to contain no references to Carry Guard insurance, other than Lockton advertisements regarding its availability to Carry Guard members.

6. The Respondent’s actions described herein violate Insurance Code provisions that include RCW 48.17.060. Any violation of the terms of this Order by the Respondent will
render the violator subject to the full penalties authorized by RCW 48.02.080, 48.17.063, and other applicable sections of the Insurance Code of the state of Washington.

The Respondent has the right to demand a hearing in accordance with RCW 48.04.010, WAC 284-02-070, and WAC 10-08-110.

This Order shall remain in effect subject to the further order of the Insurance Commissioner.

THIS ORDER IS EFFECTIVE IMMEDIATELY AND IS ENTERED at Tumwater, Washington, this day of April, 2018.

MIKE KREIDLER
Insurance Commissioner

By and through his designee

GREG SANDOZ
Insurance Enforcement Specialist
Legal Affairs Division
CERTIFICATE OF MAILING

The undersigned certifies under the penalty of perjury under the laws of the state of Washington that I am now and at all times herein mentioned, a citizen of the United States, a resident of the state of Washington, over the age of eighteen years, not a party to or interested in the above-entitled action, and competent to be a witness herein.

On the date given below I caused to be served the foregoing ORDER TO CEASE AND DESIST on the following individual in the manner indicated:

National Rifle Association (NRA)
11250 Waples Mill Rd
Fairfax, VA 22030

Courtesy copy provided to:
Martha B. Stolley
John M. Maloy
Attorneys at Law
Morgan, Lewis, & Bockius LLP
101 Park Avenue
New York, NY 10178-0060
Martha.stolley@morganlewis.com
John.maloy@morganlewis.com

By email and by depositing in the U.S. mail via state Consolidated Mail Service with proper postage affixed.

Dated this 3rd day of April, 2018, in Tumwater, Washington.

[Signature]

JOSH PACE
Legal Assistant
Legal Affairs Division

ORDER TO CEASE AND DESIST
ORDER NO. 18-0109

State of Washington
Office of Insurance Commissioner
PO Box 40255
Olympia, WA 98504-0255
IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK

NATIONAL RIFLE ASSOCIATION OF AMERICA,

Plaintiff,
v.

ANDREW CUOMO, both individually and in his official capacity; MARIA T. VULLO, both individually and in her official capacity; and THE NEW YORK STATE DEPARTMENT OF FINANCIAL SERVICES,

Defendants.

NATIONAL RIFLE ASSOCIATION OF AMERICA’S ORIGINAL COMPLAINT AND JURY DEMAND

Plaintiff the National Rifle Association of America (the “NRA”) files this Original Complaint and Jury Demand (“Complaint”) against defendants New York Governor Andrew Cuomo (“Cuomo”), both individually and in his official capacity; Maria T. Vullo (“Vullo”), both individually and in her official capacity; and the New York State Department of Financial Services (“DFS”) (collectively, “Defendants”), upon personal knowledge of its own actions, and upon information and belief as to all others matters, as follows:

I.

PRELIMINARY STATEMENT

This case is necessitated by an overt viewpoint-based discrimination campaign against the NRA and the millions of law-abiding gun owners that it represents. Directed by Governor Andrew Cuomo, this campaign involves selective prosecution, backroom exhortations, and public threats
with a singular goal – to deprive the NRA and its constituents of their First Amendment right to speak freely about gun-related issues and defend the Second Amendment.

The foundation of Defendants’ selective-enforcement and retaliation campaign is a series of threats to financial institutions that DFS, an agency created to ensure the integrity of financial markets after the 2008 credit crisis, will exercise its extensive regulatory power against entities that fail to sever ties with the NRA. To effect their sweeping agenda, Defendants issued public demands that put DFS-regulated institutions on notice to “discontinue[] their arrangements with the NRA” and other “gun promotion organizations” if they planned to do business in New York.

At the same time, Defendants engaged in back-channel communications to reinforce their intended purpose. Simply put, Defendants made it clear to banks and insurers that it is bad business in New York to do business with the NRA.

As a direct result of this coercion, multiple firms have succumbed to Defendants’ demands and entered into consent orders with DFS that compel them to terminate longstanding, beneficial business relationships with the NRA, both in New York and elsewhere. Tellingly, several provisions in the orders bear no relation to any ostensible regulatory infraction. Instead, the orders prohibit lawful commercial speech for no reason other than that it carries the NRA brand.

Absent injunctive relief, Defendants’ blacklisting campaign will continue to damage the NRA and its members, as well as endanger the free speech and association rights guaranteed by the constitutions of the United States and the State of New York. It is well-settled that viewpoint discrimination applied through “threat[s] of invoking legal sanctions and other means of coercion, persuasion, and intimidation” violates the Constitution where, as here, such measures chill
protected First Amendment activities. Defendants’ *de facto* censorship scheme cannot survive judicial scrutiny. Nor should it.

II.

PARTIES

1. Plaintiff the National Rifle Association of America is a nonprofit corporation organized under the laws of the State of New York with its principal place of business in Fairfax, Virginia. The NRA is America’s leading provider of gun-safety and marksmanship education for civilians and law enforcement. It is also the foremost defender of the Second Amendment to the United States Constitution. The NRA has over five million members, and its programs reach millions more.

2. Defendant New York State Department of Financial Services is an agency of the State of New York that regulates financial services firms operating in New York in order to guard against financial crises and to protect New York consumers and markets from fraud. DFS has a regional office at One Commerce Plaza, Albany, New York 12257. Its main office is located at One State Street, New York, New York 10004-1511. It regulates more than 1,400 insurance companies with assets in excess of $4.3 trillion, including 200 life insurers, 1,100 property casualty insurers, and 100 health insurance companies. DFS also regulates over 1,900 banking and other financial institutions with assets over $2.9 trillion.

3. Defendant Maria T. Vullo is the Superintendent of the New York State Department of Financial Services and, at all times relevant to the Complaint, was acting under color of state law. Her principal place of business is One State Street, New York, New York 10004-1511. Vullo is sued in her individual and official capacities.

---

4. Defendant Andrew Cuomo is the Governor of the State of New York and, at all times relevant to the Complaint, was acting under color of state law. His principal place of business is The State Capitol Building, Albany, New York 12224. Cuomo is sued in his individual and official capacities.

III.

JURISDICTION AND VENUE

5. Pursuant to 28 U.S.C. § 1331, the Court has subject matter jurisdiction over the claims asserted in this action because this action involves claims based on the First and Fourteenth Amendments to the United States Constitution (U.S. Const. amend. I, XIV), and because the action seeks to prevent state officials from interfering with federal rights. Further, subject matter jurisdiction is conferred on this Court by 28 U.S.C. § 1343(a)(3) because this action is brought to redress deprivations under color of state law of rights, privileges, and immunities secured by the United States Constitution. This Court has supplemental jurisdiction over all state-law claims asserted in this action under 28 U.S.C. § 1367.

6. Pursuant to 28 U.S.C. § 1391(b), venue is properly vested in this Court because defendant Cuomo resides in this judicial district.

7. There is a present and actual controversy between the parties.

IV.

STATEMENT OF RELEVANT FACTS

A. The NRA: History Of Dedicated Support For Gun Safety And A Commitment To Core Political Speech.

9. After the Civil War, two Union Army officers created a private association to promote marksmanship among the citizenry. The officers believed that the war would have ended significantly sooner if the northern troops had been able to shoot as well as the Confederate soldiers. They obtained a charter from the State of New York in November of 1871; thereafter, the National Rifle Association built a proud legacy in the State of New York.

10. From the NRA’s inception, it received praise from the State of New York for its many public contributions. In 1872, the New York State legislature and the NRA jointly dedicated funds for the creation of a rifle range on Creed Farm, in what is now Queens Village, Queens, New York. For many decades, the NRA partnered with the State to advance firearms safety, education, conservation, and other laudable public policy goals. For example, when New York City public schools sought to educate boys in marksmanship and gun safety, NRA co-founder Gen. George Wingate designed and headed the resulting Public Schools Athletic League (PSAL) marksmanship program.² Likewise, in 1949, the NRA worked with the State of New York to create the nation’s first hunter education program. Similar courses were subsequently adopted by state fish and game departments across the country and in Canada, and make hunting among the safest sports in existence.

11. First among the “Purposes and Objectives” contained in the NRA’s bylaws is “[t]o protect and defend the Constitution of the United States.” Accordingly, political speech is a major purpose of the NRA. The NRA engages in extensive legislative advocacy to promote its purposes, as well as to vindicate the rights of its members and all Americans.

12. The NRA spends tens of millions of dollars annually distributing pamphlets, fact sheets, articles, electronic materials, and other literature to advocate for its view of the Second Amendment and to assist NRA members engaging in national, state, and local firearm dialogue. The NRA’s direct mail, television, radio, and digital communications seek to educate the public about issues bearing on the Second Amendment, defend the NRA and its members against political and media attacks, and galvanize participation in the political process by NRA members and supporters.

13. To its critics, the NRA is best known as a “superlobby – one of the largest and most truly conservative lobbying organizations in the country,” able to mobilize its millions of members in concerted efforts to protect the Second Amendment rights of all Americans. ³ Of course, the NRA’s letter-writing campaigns, peaceable public gatherings, and other grassroots “lobbying” activities constitute precisely the type of political speech which rests “[a]t the core of the First Amendment.”⁴


B. **Cuomo’s Political Vendetta Against The NRA.**

14. Andrew Cuomo has criticized the political speech and influence of “Second Amendment types” generally, and the NRA specifically, for decades. Moreover, Cuomo has a history of abusing his regulatory power to retaliate against his political opponents on gun control issues.

15. The son of former Governor Mario Cuomo, Andrew Cuomo is a political opportunist who has consistently sought to gain political capital by attacking the NRA. During his tenure as Housing and Urban Development (“HUD”) Secretary in the 1990s, Cuomo coordinated a campaign of lawsuits (nearly all dismissed) against gunmakers that purported to hold them liable for crimes committed in public housing projects using illegally obtained firearms. Cuomo admitted that his real aim was to coerce, via settlement, the “voluntary” industrywide adoption of certain equipment and sale restrictions, and warned that any manufacturer who refused to settle would suffer “death by a thousand cuts.”

5 On February 15, 2018, Cuomo appeared on the MSNBC program “The Beat,” where he discussed championing legislation that some believed “trampled the Second Amendment.” YOUTUBE, Gov. Andrew Cuomo On Background Checks: “Bunch Of Boloney” | The Beat With Ari Melber | MSNBC, https://www.youtube.com/watch?v=Tz8X07fZ39o (last visited May 7, 2018). However, Cuomo lamented that his “favorability rating” had dropped thereafter due to “backlash from conservatives and Second Amendment types.” *Id.*

an abuse of agency authority, the Cuomo campaign failed after the NRA and other pro-gun groups organized legislative and grassroots opposition.

16. Cuomo blamed “gun lobby extremists” for the collapse of his efforts at HUD. At a press conference on June 20, 2000, he referred to gun-rights supporters as “the enemy,” and announced a blueprint for defeating the NRA and its allies that would emphasize the use of state and municipal retaliatory authority: “If we engage the enemy in Washington we will lose. They will beat us in this town. They are too strong in this town. Their fortress is within the Beltway. We're going to beat them state by state, community by community.”

17. As governor of New York, Cuomo has loudly supported the enactment of some of the nation’s harshest gun-control laws. But rather than debate opponents of his anti-gun

7 In an editorial dated December 17, 1999, the Washington Post described the Cuomo campaign as “disquieting even for those who, like us, strongly support rigorous controls on handguns.” The HUD Gun Suit, THE WASHINGTON POST (Dec. 17, 1999), https://www.washingtonpost.com/archive/opinions/1999/12/17/the-hud-gun-suit/48ee0a45-18da-4e8d-9b86-b9512172ae09/?utm_term=.9a74ce83f538. Anticipating themes that would continue to characterize Cuomo’s gun-control efforts over the next nineteen years, the editorial board stated that “it ... seems wrong for an agency of the federal government” to put “pressure on an industry ... to achieve policy results the administration has not been able to achieve through normal legislation or regulation.” Id.


9 HUD Archives: News Releases, HUD No. 00-150, COMMUNITIES FOR SAFER GUNS COALITION JOINS CUOMO IN CRITICIZING EFFORT IN CONGRESS TO KILL THE COALITION, U.S. DEP’T OF HOUS. AND URBAN DEV. (June 27, 2000, archived Dec. 13, 2009).


11 See, e.g., Teri Weaver, Judge: NY must release Safe Act stats from assault weapons registry, SYRACUSE (May 7, 2015, 9:09 PM),
initiatives, he declared that conservative firearms advocates “have no place in the state of New York.” In particular, Cuomo has sought to banish “the enemy” from public discourse altogether, and remains dissatisfied with what he perceives to be the excessive political influence of “conservatives and the Second Amendment types.”

18. In truth, Cuomo bears distinct animus toward the NRA, which he accuses of exerting a “stifl[ing] . . . stranglehold” over national gun policy. For Cuomo, weakening the political advocacy of the NRA is a career strategy.

C. Defendants Attempt To Chill The NRA’s Political Speech In Support Of Americans’ Second Amendment Rights.

19. Against the backdrop of recent tragedies and a polarized public gun-control debate, Cuomo and the other Defendants have abused their authority in an effort to stifle the NRA’s political advocacy and to retaliate against the NRA for the effectiveness of that advocacy.

20. Together with DFS Superintendent Vullo, Cuomo has used, and continues to use, state power to chill the political speech of the NRA and other “gun promotion” organizations by punishing financial institutions which do “business with NRA.” To achieve this, Defendants draw


upon the formidable regulatory powers of DFS—an agency charged with ensuring the stability and integrity of New York’s financial markets.

21. At Cuomo’s behest, Vullo and DFS have threatened, and continue to threaten, regulated institutions with costly investigations and penalties should they fail to “discontinue[. . .] their arrangements with the NRA.”15 And Defendants have already carried out some of these threats. Within a single week, DFS levied multi-million dollar fines against two insurance-industry firms that dared to do business with the NRA. Under intense scrutiny, both firms were coerced to terminate their business arrangements with the NRA and its members—including arrangements having nothing to do with the allegedly unlawful conduct cited by DFS.

22. A DFS press release publicizing one recent enforcement action makes clear the gravamen of Defendants’ campaign: financial institutions regulated by DFS must refrain from “[e]ntering into any . . . agreement or arrangement,” which “involv[es] the NRA, directly or indirectly”16—or face the consequences.


16 DFS FINES LOCKTON COMPANIES $7 MILLION FOR UNDERWRITING NRA-BRANDED “CARRY GUARD” INSURANCE PROGRAM IN VIOLATION OF NEW YORK INSURANCE LAW, N.Y. STATE DEP’T OF FIN. SERVS. (May 2, 2018), https://www.dfs.ny.gov/about/press/pr1805021.htm; see also DFS FINES CHUBB SUBSIDIARY ILLINOIS UNION INSURANCE COMPANY $1.3 MILION FOR UNDERWRITING NRA-BRANDED “CARRY GUARD” INSURANCE PROGRAM IN VIOLATION OF NEW YORK INSURANCE LAW, N.Y. STATE DEP’T OF FIN. SERVS. (May 7, 2018), https://www.dfs.ny.gov/about/press/pr1805071.htm.
1. DFS And Its Regulatory Mission.

23. In 2011, as part of his state budget, Cuomo announced the merger of the New York State Insurance Department and the Banking Department to create DFS. The mandate of the new agency, which consolidated supervisory and enforcement powers previously vested in separate departments, is to “reform the regulation of financial services in New York to keep pace with the rapid and dynamic evolution of these industries, to guard against financial crises and to protect consumers and markets from fraud.”

24. DFS has broad regulatory powers, which encompass the ability to initiate civil and criminal investigations and enforcement actions. In addition, pursuant to Financial Services Law, Article 3, § 301, the DFS superintendent has the power to refer matters to the attorney general for criminal enforcement. The creation of an agency with such expansive prerogatives and capabilities “grab[bed] power and headlines,” and the New York Times reported in 2015 that the first DFS superintendent, Benjamin Lawsky, was popularly caricatured as “the new sheriff of Wall Street” and an all-powerful monarch (“King Lawsky”).

25. New York Financial Services Law, Article 2, § 201, provides the superintendent of DFS with formidable authority to, among other things, “ensure the continued solvency, safety, [and] soundness” of banks and insurance companies. Accordingly, DFS directives regarding


“risk management” must be taken seriously by financial institutions—as risk-management deficiencies can result in fines of hundreds of millions of dollars.

26. DFS’s regulatory mandate does not include setting gun-control policy. Nor does any statute or other authority empower DFS to blacklist, from receipt of insurance or banking services, speakers with political viewpoints objectionable to the governor or DFS superintendent. In addition, DFS has no authority to engage in unlawful viewpoint discrimination with respect to commercial speech.

2. **NRA Member Insurance Programs.**

27. Like many affinity groups and organizations nationwide, the NRA seeks to make life, health, and other insurance coverage available to its members on affordable, tailored terms. To this end, the NRA contracted with multiple insurance-industry firms to develop, market, and underwrite insurance policies endorsed by the NRA. Pursuant to these arrangements, the NRA performs none of the functions of an insurer. It does lend its valuable logos, marks, and endorsements to insurance policies brokered and serviced by others. Such “affinity insurance plans” are common, and believed by many to be a suitable substitute for employer-based coverage.20

28. From 2000 onward, the NRA contracted with affiliates of the world’s largest privately-held insurance broker, Lockton Companies, LLC (collectively with pertinent affiliates, “Lockton”),21 for affinity-program brokerage and administration services. Lockton has provided

---


21 In particular, the NRA contracted with Lockton Affinity Series of Lockton Affinity, LLC (f/k/a Lockton Risk Services, Inc.) (“Lockton Affinity”) and Kansas City Series of Lockton Companies, LLC (“Lockton KC”).
services in the affinity-insurance market for decades, and caters to a wide array of industries and clients including franchises, professional and trade organizations, fraternal organizations, and common-cause groups such as the NRA. For roughly seventeen years, Lockton entities administered and marketed NRA-endorsed insurance in New York State and across the nation without incident.

29. The NRA-endorsed insurance programs administered by Lockton consist primarily of life, health, property, and casualty insurance that resemble policies offered by Lockton to other affinity groups. In addition, Lockton administers certain products, including a product known as “Carry Guard,” that provide coverage for expenses arising out of the lawful self-defense use of a legally possessed firearm. Illinois Union Insurance Company (“Illinois Union”), a subsidiary of Chubb Ltd., underwrote Carry Guard while doing business under the name “Chubb.”

30. In 2017, Cuomo conspired with DFS and Vullo to initiate an investigation into Carry Guard in an attempt to collaterally attack the NRA and stifle its gun-rights advocacy (the “DFS Investigation”). From the outset, it was clear that the investigation was meant to advance Cuomo’s political agenda by stifling the NRA’s speech and retaliating against the NRA based on its viewpoint on gun control issues. DFS did not announce inquiries regarding any self-defense insurance products apart from the ones endorsed by the NRA. The DFS Investigation was chronicled in the national media before official notice was provided to the NRA or its principals.

31. In fact, the DFS Investigation was orchestrated by anti-gun activists. The day after the investigation became public, a non-governmental activist organization known as Everytown for Gun Safety (“Everytown”) took credit for instigating the DFS Investigation, explaining that it previously undertook its own “investigation and legal analysis” of Carry Guard which it “shared”
with regulators in New York and elsewhere.22 Notably, Everytown’s explicit political mission is to oppose the NRA.23

32. Many other membership organizations in New York endorse to their members affinity-type insurance programs similar to those endorsed by the NRA. These organizations include, inter alia, the National Association for the Self-Employed, the New York State Bar Association, the New York City Bar, the New York Association of Professional Land Surveyors, and the New York State Psychological Association. However, the DFS has not announced similar inquiries concerning any of these other membership organizations, even though their affinity programs involve most, if not all, of the practices and features that were the subject of DFS’s investigations into the NRA’s affinity programs. Instead, Defendants selectively targeted the NRA because of the NRA’s legislative and grassroots advocacy activities. Defendants specifically intend to undermine the NRA’s ability to conduct its affairs in New York—and to advance Cuomo’s anti-NRA political agenda.

4. Over The Course Of The Investigation, Cuomo And DFS Exhort Firms To Sever Ties With The NRA.

33. Throughout its purported investigation of Carry Guard in late 2017 and early 2018, DFS communicated to banks and insurers with known or suspected ties to the NRA that they would

---


face regulatory action if they failed to terminate their relationship with the NRA. These exhortations extended far beyond Carry Guard (the policy purportedly raising regulatory concerns), indicating that any business relationship whatsoever with the NRA would invite adverse action.

34. Cuomo directed DFS to publicly “urge insurers and bankers statewide to determine whether any relationship they may have with the NRA or similar organizations sends the wrong message to their clients and their communities who often look to them for guidance and support.”

35. Accordingly, on April 19, 2018, Vullo, as Superintendent of DFS, issued a pair of ominous “guidance” letters (the “April 2018 Letters”) directed at the chief executive officers, or equivalents, of all New York State chartered or licensed financial institutions and all insurers doing business in New York. The April 2018 Letters urged recipients to sever ties with the NRA and other “gun promotion organizations.” The directive was packaged in a sharply worded media advisory meant to generate headlines – and apply maximum public pressure on the NRA and those with whom it associates.


36. The April 2018 Letters are suffused with political concerns far afield from DFS’s mandate to prevent financial crises and financial fraud. For example, they urge banks and insurers to heed “the voices of the passionate, courageous, and articulate young people” speaking out in favor of gun control, and to reconsider any business relationships with “the [NRA], and similar organizations that promote guns and lead to senseless violence.” However, the April 2018 Letters do not merely express Defendants’ own political opinions: they invoke the “risk management” obligations of recipients, and direct banks and insurers to “take prompt actions to manage” purported “reputational risks” arising from “dealings with the NRA or similar gun promotion organizations.”

37. Read in the context of the preceding months’ private communications—as well as disclosures that would soon follow concerning consequences imposed on firms doing business with the NRA—the April 2018 Letters were threats that deliberately invoked DFS’s “risk management” authority to warn of adverse action if institutions failed to support Defendants’ efforts to stifle the NRA’s speech and to retaliate against the NRA based on its viewpoint.

38. Importantly, the April 2018 Letters contain no language clarifying that DFS would forebear from directly enforcing the letters’ terms. Nor do the April 2018 Letters provide regulated institutions with any objective criteria for measuring the “reputational risks” imposed by dealings with entities that “promote guns that lead to senseless violence.” This is because Defendants intend the April 2018 Letters to intimidate institutions into acceding to a political blacklisting campaign, and have nothing to do with the types of market “risks” properly regulated by DFS.

39. To further dispel any ambiguity surrounding the April 2018 Letters, Cuomo and Vullo issued the contemporaneous press release, containing and endorsing a statement by Vullo
that directly “urge[s] all insurance companies and banks doing business in New York to join the companies that have already discontinued their arrangements with the NRA.”

40. Likewise, on April 20, 2018, Cuomo publicly tweeted: “The NRA is an extremist organization. I urge companies in New York State to revisit any ties they have to the NRA and consider their reputations, and responsibility to the public.”

41. The intended and actual effect of the April 2018 Letters, and the actions by Cuomo and Vullo, is to coerce insurance agencies, insurers, and banks into terminating business relationships with the NRA that were necessary to the survival of the NRA as a charitable organization.

D. The Damage Done.

1. DFS Permanently Restricts Lockton From Doing Business With The NRA In New York.

42. On May 2, 2018, two weeks after Vullo issued the April 2018 Letters, Lockton entered into a consent order Under Articles 21, 23, and 34 of the Insurance Law (the “Lockton Consent Order”) with DFS—signed by Vullo—which imposes a civil monetary penalty of $7 million. Although the Lockton Consent Order ostensibly addresses discrete violations by specific Lockton entities of New York’s Insurance Law, its provisions go much further. Most notably, the Lockton Consent Order purports to restrict Lockton’s participation in any NRA-
endorsed insurance programs in New York State, irrespective of whether such programs comply with the Insurance Law.

43. Specifically, the Lockton Consent Order requires that Lockton agree “not to participate in . . . any other NRA-endorsed programs with regard to New York State.” Nor may Lockton “enter into any agreement or program with the NRA to underwrite or participate in any affinity-type insurance program involving any line of insurance to be issued or delivered in New York State or to anyone known to Lockton to be a New York resident.” As a result, Lockton is prohibited from selling NRA affinity insurance outside New York to any individual who maintains a New York residence.

44. DFS and Vullo have no legal basis to restrict Lockton’s involvement with insurance programs that do not violate New York’s Insurance Law; nor do they have authority to regulate insurance transactions outside of New York. Nevertheless, DFS mandated that Lockton never enter into any future agreements with the NRA for legitimate and fully compliant insurance programs in New York.

45. Furthermore, Lockton would violate the Lockton Consent Order if it markets an ordinary property, casualty, or life insurance policy in the State of New York that was accompanied by an NRA logo or endorsement—notwithstanding that a comparable logo or endorsement referencing any other affinity or common-cause organization is permissible. This provision of the Lockton Consent Order is deliberate and intended to impair the NRA’s ability to negotiate insurance benefits for its members, damage the NRA’s goodwill among its membership, and unconstitutionally restrict the NRA’s commercial speech on the basis of political animus.

46. Several of the purported “violations” assessed pursuant to the Lockton Consent Order concern programs commonly engaged in by numerous additional affinity associations that
do not publicly advocate for Second Amendment rights and, therefore, are not targets of Defendants’ unconstitutional conduct. Several such organizations are clients of Lockton—yet the Consent Order does not compel Lockton to discontinue its purportedly unlawful conduct with respect to these clients.

47. For example:

- DFS claims that Lockton Affinity violated Insurance Law § 2122(a)(1) by referring to the insurer’s AM Best rating. Yet, in reference to Lockton Affinity’s affinity program for the American Optometric Association through AOAExcel (“AOAExcel”), Lockton Affinity states that it has the “backing of a carrier that is rated A+ (Superior) by A.M. Best.” Similarly, Lockton Affinity currently advertises that coverage for the affinity programs designed for the Veterans of Foreign Wars (“VFW”) and Moose International Inc. (“Moose”) is through companies “rated ‘Excellent’ or higher by A.M. Best.”

- DFS claims that Lockton Affinity violated Insurance Law § 2324(a) by giving or offering to give no cost insurance to NRA members in good standing. Yet, Lockton Affinity currently makes that same offer to members of both the Professional Photographers of America (“PPA”) and the VFW.

- DFS claims that Lockton Affinity violated Insurance Law § 2116 by compensating the NRA based on actual premiums collected. Yet, Lockton Affinity paid AOAExcel, Moose, the VFW, and the PPA in the same or similar manner.


48. Even if such conduct does violate insurance law, DFS’s selective enforcement of such offenses as to NRA-endorsed policies—but not as to other policies marketed by Lockton in an identical fashion—constitutes impermissible viewpoint discrimination and a denial of equal protection under the law.

2. **DFS Purports To Prohibit Chubb From Doing Business With The NRA Anywhere.**

49. On May 7, 2018, Chubb Group Holdings, Inc. and Illinois Union (together, “Chubb”) entered into a Consent Order Under Sections 1101 and 3420 of the Insurance Law (the “Chubb Consent Order”) with DFS—signed by Vullo—which imposes a civil monetary penalty of $1.3 million.\(^{33}\) Similar to the Lockton Consent Order, in the Chubb Consent Order, DFS overextends its authority and purports to restrict Chubb’s participation in any affinity-type insurance program with the NRA, irrespective of whether such programs comply with the Insurance Law.

50. Although DFS restricts Lockton from participating in any affinity-type insurance programs with the NRA in New York or with New York residents, Defendants’ restrictions in the Chubb Consent Order contain no geographic constraint whatsoever. Instead, the Chubb Consent Order purports to limit Chubb’s involvement with the NRA anywhere, and everywhere, in the world.

51. Nevertheless, DFS allows Chubb to continue to underwrite affinity-type insurance programs with other affinity or common-cause organizations that do not publicly advocate for Americans’ Second Amendment rights, so long as Chubb undertakes “reasonable due diligence to

\(^{33}\) The Chubb Consent Order is attached hereto as Exhibit E.
ensure that any entity involved . . . is acting in compliance with the Insurance Law.” 34 The only plausible explanation for the DFS’s complete exclusion of NRA-endorsed policies, even those “in compliance with the Insurance Law,” is that Defendants seek to misuse DFS’s power to deprive the NRA of insurance and financial services, on the sole ground that Defendants disapprove of the NRA’s viewpoint regarding gun control.

3. **Defendants’ Actions Are Causing Other Financial Institutions To Re-Evaluate Their Relationships With The NRA For Fear Of Significant Adverse Action By Defendants.**

52. Defendants’ concerted efforts to stifle the NRA’s freedom of speech and to retaliate against the NRA based on its viewpoints are causing other insurance, banking, and financial institutions doing business with the NRA, such as Lloyd’s of London (“Lloyd’s”), to rethink their mutually beneficial business relationships with the NRA for fear of monetary sanctions or expensive public investigations. 35 Indeed, Lloyd’s announced on May 9, 2018, that it would “terminate all insurance offered, marketed, endorsed, or otherwise made available” through the NRA in light of the DFS Investigation. 36 Moreover, Defendants have impaired the NRA’s ability to engage in lawful, truthful commercial speech in connection with affinity-insurance endorsements.

53. The NRA has suffered tens of millions of dollars in damages based on Defendants’ conduct described above. Such damages include, without limitation, damages due to reputational harm, increased development and marketing costs for new NRA-endorsed insurance programs,

34 Exhibit E (Chubb Consent Order), at 7.

35 See, e.g., Lloyd’s Underwriters Told to Stop Insurance Linked to NRA, THE NEW YORK TIMES (May 9, 2018), https://www.nytimes.com/reuters/2018/05/09/business/09reuters-lloyds-of-london-nra.html, attached hereto as Exhibit F.

36 Id.
and lost royalty amounts owed to the NRA, as well as attorneys’ fees, legal expenses, and other costs.

V.

CLAIMS

A. Count One: Violation Of The NRA’s First And Fourteenth Amendment Rights Under 42 U.S.C. § 1983, And Article 1, Section 8 Of The New York Constitution By The Establishment Of An Implicit Censorship Regime (As To All Defendants).

54. The NRA repeats and re-alleges each and every allegation in the preceding paragraphs as though fully set forth herein.

55. The First Amendment, which applies to Defendants by operation of the Fourteenth Amendment, and Section Eight of the New York Constitution secure the NRA’s right to free speech, including its right to express its viewpoints and political beliefs regarding the constitutionally protected right to keep and bear arms.

56. The NRA has a longstanding history of political advocacy advancing the Second Amendment rights of all Americans. Although Cuomo and Vullo disagree with and oppose the NRA’s political views, the NRA’s freedom to express its views with respect to the gun-control debate is a fundamental right protected by the First Amendment.

57. Defendants have regulatory authority over financial institutions and insurance entities that have done or are doing business with or are otherwise associated with the NRA, including Chubb, Lockton, and Lloyd’s.

58. Defendants’ actions—including but not limited to the issuance of the April 2018 Letters and the accompanying backroom exhortations, the imposition of the Consent Orders upon
Chubb and Lockton, and the issuance of the press release dated April 19, 2018—established a “system of informal censorship” designed to suppress the NRA’s speech.37

59. Defendants’ actions were for the purpose of suppressing the NRA’s pro-Second Amendment viewpoint. Defendants undertook such unlawful conduct with the intent to obstruct, chill, deter, and retaliate against the NRA’s core political speech.

60. Defendants’ unlawful exhortations to New York insurance companies, banks, and financial institutions that they, among other things, “manag[e] their risks, including reputational risks, that may arise from their dealings with the NRA . . ., as well as continued assessment of compliance with their own codes of social responsibility[,]” as well as “review any relationships they have with the NRA[,]” and “take prompt actions to managing these risks and promote public health and safety[,]” constitute a concerted effort to deprive the NRA of its freedom of speech by threatening with government prosecution services critical to the survival of the NRA and its ability to disseminate its message. Defendants’ actions constitute an “implied threat[ ] to employ coercive state power” against entities doing business with the NRA, and they are reasonably interpreted as such.38

61. Defendants’ concerted efforts to stifle the NRA’s freedom of speech caused financial institutions doing business with the NRA to end their business relationships, or explore such action, due to fear of monetary sanctions or expensive public investigations. For example, Defendants caused Lockton and Chubb to cease their participation in NRA-endorsed insurance programs, regardless of whether the insurance programs met all legal qualifications under New


38 Okwedy v. Molinari, 333 F.3d 339, 342 (2d Cir. 2003).
York’s Insurance Law. Defendants’ implied threats also caused Lloyd’s to cease doing insurance business with the NRA.

62. Furthermore, Defendants’ unlawful and intentional restriction on the use of the NRA’s logo or endorsement in marketing efforts for insurance products—notwithstanding that a comparable logo or endorsement referencing any other affinity or common-cause organization is permissible—is a deliberate attempt to unconstitutionally restrict the NRA’s commercial speech on the basis of political animus.

63. Defendants’ unlawful and intentional actions are not justified by a substantial or compelling government interest and are not narrowly tailored to serve any such interest.

64. Absent an injunction against Defendants, the NRA will suffer irrecoverable loss and irreparable harm if it is unable to acquire insurance or other banking services due to Defendants’ actions.

65. Defendants’ intentional actions resulted in significant damages to the NRA, including but not limited to damages due to reputational harm, increased development and marketing costs for new NRA-endorsed insurance programs, and lost royalty amounts owed to the NRA. The NRA is also entitled to an award of attorneys’ fees and costs pursuant to 42 U.S.C. § 1988 and New York Civil Practice Law and Rules § 8601.

66. In addition to the above-described damages, the NRA seeks an order preliminarily and permanently enjoining Cuomo and Vullo (in their official capacities) and DFS—including its officers, agents, servants, employees, and all persons in active concert or participation with them who receive actual notice of the injunction—from threatening or encouraging insurance companies, banks, or financial institutions to sever ties with or discontinue services to the NRA.
B. **Count Two: Violation Of The NRA’s First And Fourteenth Amendment Rights Under 42 U.S.C. § 1983 And Article 1, Section 8 Of The New York Constitution By Retaliating Against The NRA Based On Its Speech (As To All Defendants).**

67. The NRA repeats and re-alleges each and every allegation in the preceding paragraphs as though fully set forth herein.

68. The First Amendment, which applies to Defendants by operation of the Fourteenth Amendment, and Section Eight of the New York Constitution, secures the NRA’s right to free speech, including its right to express its viewpoints and political beliefs regarding the constitutionally protected right to keep and bear arms.

69. The NRA has a longstanding history of political advocacy advancing the Second Amendment rights of all Americans. Although Cuomo and Vullo disagree with and oppose the NRA’s political views, the NRA’s freedom to express its views with respect to the gun-control debate is a fundamental right protected by the First Amendment.

70. Defendants’ actions—including but not limited to the issuance of the April 2018 Letters and the accompanying backroom exhortations, the imposition of the Consent Orders upon Chubb and Lockton, and the issuance of the press release dated April 19, 2018—were in response to and substantially caused by the NRA’s political speech regarding the right to keep and bear arms. Defendants’ actions were for the purpose of suppressing the NRA’s pro-Second Amendment viewpoint. Defendants undertook such unlawful conduct with the intent to obstruct, chill, deter, and retaliate against the NRA’s core political speech.

71. Defendants’ actions have concretely harmed the NRA by causing financial institutions doing business with the NRA to end their business relationships, or explore such action, due to fear of monetary sanctions or expensive public investigations. For example, Defendants caused Lockton and Chubb to cease their participation in NRA-endorsed insurance programs in New York and elsewhere, regardless of whether the insurance programs met all legal
qualifications under New York’s Insurance Law. Defendants’ implied threats also caused Lloyd’s to cease participating in affinity insurance programs with the NRA.

72. Defendants had discretion in deciding whether and how to carry out their actions, including but not limited to the types of demands imposed on Chubb and Lockton in the Consent Orders, whether to issue the press release dated April 19, 2018, and the type of guidance provided in the April 2018 Letters. They exercised this discretion to harm the NRA because of the NRA’s speech regarding the Second Amendment.

73. Defendants’ unlawful and intentional actions are not justified by a substantial or compelling government interest and are not narrowly tailored to serve any such interest.

74. Absent an injunction against Defendants, the NRA will suffer irrecoverable loss and irreparable harm if it is unable to acquire insurance or other financial services due to Defendants’ actions.

75. Defendants’ intentional actions resulted in significant damages to the NRA, including but not limited to damages due to reputational harm, increased development and marketing costs for new NRA-endorsed insurance programs, and lost royalty amounts owed to the NRA. The NRA is also entitled to an award of attorneys’ fees and costs pursuant to 42 U.S.C. § 1988 and New York Civil Practice Law and Rules § 8601.

76. In addition to the above-described damages, the NRA seeks an order permanently enjoining Cuomo, Vullo, and DFS—including its officers, agents, servants, employees, and all persons in active concert or participation with them who receive actual notice of the injunction—from threatening or encouraging insurance companies, banks, or financial institutions to sever ties with or discontinue services to the NRA.
C. **Count Three: Violation Of The Equal Protection Clause Of The Fourteenth Amendment Under 42 U.S.C. § 1983, And Article 1, Section 11 Of The New York Constitution (As To All Defendants).**

77. The NRA repeats and re-alleges each and every allegation in the preceding paragraphs as though fully set forth herein.

78. Defendants knowingly and willfully violated the NRA’s equal protection rights by seeking to selectively enforce certain provisions of the Insurance Law against Lockton’s affinity-insurance programs for the NRA. Meanwhile, other affinity-insurance programs that were identically (or at least similarly) marketed by Lockton, but not endorsed by “gun promotion” organizations, have not been targeted by DFS’s investigation.

79. Defendants’ selective enforcement of the Insurance Law against the NRA and its business partners has been knowing, willful, arbitrary, capricious, unreasonable, discriminatory, and undertaken in bad faith and without a rational basis. Defendants’ conduct does not further any legitimate government interest.

80. Defendants’ selective enforcement of the Insurance Law against the NRA and its business partners is based on the NRA’s political views and speech relating to the Second Amendment. These considerations are impermissible bases for an enforcement action.

81. Defendants’ unlawful conduct inflicted, and threatens to continue to inflict immediate, irreparable harm on the NRA. Additionally, Defendants’ actions have resulted in significant damages to the NRA, including but not limited to damages due to reputational harm, increased development and marketing costs for new NRA-endorsed insurance programs, and lost royalty amounts owed to the NRA. The NRA is also entitled to an award of attorneys’ fees and costs pursuant to 42 U.S.C. § 1988 and New York Civil Practice Laws and Rules § 8601.

82. In addition, the NRA seeks an order preliminarily and permanently enjoining Cuomo and Vullo (in their official capacities) and DFS—including its officers, agents, servants,
employees, and all persons in active concert or participation with them who receive actual notice of the injunction—from selectively enforcing the Insurance Law by requiring Lockton or Chubb, through their respective consent orders, to forbear from doing business with the NRA which they could otherwise permissibly conduct with other affinity organizations.


83. The NRA repeats and re-alleges each and every allegation in the preceding paragraphs as though fully set forth herein.

84. Cuomo and Vullo, acting under color of state law, agreed with each other, and with others known and unknown, to deprive the NRA of rights secured and guaranteed by the First and Fourteenth Amendments to the United States Constitution and Sections Eight and Eleven of the New York Constitution.

85. In furtherance of these objectives, Cuomo directed Vullo to issue statements targeted at New York insurance and financial institutions to cause them to sever existing relationships with the NRA. Vullo subsequently released the April 2018 Letters, implicitly threatening DFS-regulated entities with potential prosecutorial action should they fail to sever ties with the NRA.

86. Less than two weeks after the April 2018 Letters, Vullo signed the Lockton Consent Order, imposing a monetary sanction of $7 million against Lockton Affinity and Lockton Companies, and requiring them to never again participate in any lawful NRA-endorsed insurance program in New York. Shortly thereafter, Vullo signed the Chubb Consent Order imposing a monetary sanction of $1.3 million against Chubb, and requiring them to never again participate in any lawful NRA-endorsed insurance program no matter where in the world the insured is located.
87. Cuomo’s and Vullo’s conspiracy was chiefly motivated by discriminatory animus against the NRA on account of its political speech, beliefs, and associations—in particular, its advocacy on behalf of Second Amendment rights. Vullo, at Cuomo’s direction, issued the April 2018 Letters in an apparent effort to silence, intimidate, and deter those possessing a particular viewpoint from participating in the debate with respect to gun control. This effectively prevents, or at a minimum chills, the NRA’s enjoyment and exercise of its right to freedom of speech. Cuomo’s and Vullo’s intentional actions spawned by the conspiracy were motivated by an unlawful motive or intent and involved a reckless or callous indifference to, or disregard of, the NRA’s protected constitutional rights.

88. Cuomo’s and Vullo’s unlawful actions, undertaken separately and jointly under color of state law, resulted from a concerted and malicious conspiracy to abridge the NRA’s freedom of speech under the First and Fourteenth Amendments to the United States Constitution and Section Eight of the New York Constitution and the NRA’s right to equal protection under the Fourteenth Amendment to the United States Constitution and Section Eleven of the New York Constitution.

89. Cuomo’s and Vullo’s conspiracy to stifle the NRA’s speech and induce a boycott of the NRA has caused, and continues to cause, significant damages to the NRA. For example, the NRA is entitled to compensatory damages resulting from the loss of insurance program revenues. The NRA is also entitled to an award of attorneys’ fees and costs pursuant to 42 U.S.C. § 1988 and New York Civil Practice Law and Rules § 8601.

E. Count Five: Violation Of The NRA’s Fourteenth Amendment Due Process Rights Under 42 U.S.C. § 1983, And Article 1, Section 6 Of The New York Constitution (As To All Defendants).

90. The NRA repeats and re-alleges each and every allegation in the preceding paragraphs as though fully set forth herein.
91. Defendants’ actions have deprived the NRA of its constitutionally protected interests in engaging in core political advocacy and pursuing revenue opportunities free from unreasonable government interference by coercing financial institutions to cease providing essential services to the NRA and other “gun promotion” organizations.

92. For decades, the NRA has contracted with insurance-industry firms and professionals to create affinity-insurance programs providing life, health, property, casualty, and other similar types of insurance to NRA members, as well as club and business affiliates. The NRA has invested significant time, money, and effort into these insurance program in order to provide a valuable benefit to its members. Accordingly, the NRA has a property interest in the NRA-endorsed insurance policies, as well as a liberty interest in being able to endorse insurance products to its membership.

93. Defendants’ April 2018 Letters, backroom exhortations during the DFS Investigation, and public statements caused, at a minimum, Lockton Affinity, Lockton Companies, and Chubb to discontinue their NRA-endorsed insurance options in New York or (in Chubb’s case) nationwide and to never again participate in such programs, thus depriving the NRA of its property interest without due process of law.

94. Defendants, in their April 2018 Letters and in other public pronouncements, have made stigmatizing statements, including that the NRA represents a potential reputation risk to insurance companies and financial institutions, that the NRA is responsible for “senseless violence,” and that the NRA is a threat to the public health and safety, that call into question the NRA’s good name, reputation, honor, and integrity.

95. As evidenced by the actions multiple insurance companies have taken to terminate their business relationships with the NRA, Defendants’ public statements and other unlawful
conduct have impugned the NRA’s reputation in such a fashion as to materially obstruct and hinder
the NRA’s ability to carry its affinity insurance programs.

96. Defendants made these stigmatizing statements publicly, both through the release
of the April 2018 Letters and in other public pronouncements.

97. Defendants made these statements concurrently with, or in close temporal
relationship to, the decision by each of Lockton and Chubb to terminate one or more key business
relationships with the NRA; those termination directly resulted from the coercion applied by
Defendants to Lockton and Chubb.

98. Defendants’ violation of the NRA’s due process rights and deprivation of the
NRA’s interest in its NRA-endorsed insurance programs, as well as its other property and liberty
interests, has resulted in significant damages to the NRA, including increased development and
marketing costs for new NRA-endorsed insurance programs. The NRA is also entitled to an award
of attorneys’ fees and costs pursuant to 42 U.S.C. § 1988 and New York Civil Practice Law and
Rules § 8601.

99. The NRA also seeks an order preliminarily and permanently enjoining Cuomo and
Vullo (in their official capacities) and DFS—including its officers, agents, servants, employees,
and all persons in active concert or participation with them who receive actual notice of the
injunction—from engaging in any conduct or activity which has the effect of interfering with,
terminating, or diminishing any of the NRA’s contracts and/or lawful business relationships with
any organizations.

VI.

DEMAND FOR JURY TRIAL

100. The NRA hereby demands a trial by jury on all issues so triable.
VII.

REQUEST FOR RELIEF

WHEREFORE the NRA respectfully requests that the Court enter judgment in the NRA’s favor and against Defendants, as follows:

a. Declaring, pursuant to 28 U.S.C. § 2201, that Defendants have violated the NRA’s rights to free speech, due process, and equal protection under both the Federal and New York Constitutions;

b. Granting a preliminary and permanent injunction, pursuant to 28 U.S.C. § 1651 (a), 42 U.S.C. § 1983, and Rule 65 of the Federal Rules of Civil Procedure, ordering DFS, its agents, representatives, employees and servants and all persons and entities in concert or participation with it, Cuomo (in his official capacity), and Vullo (in her official capacity):

   (1) to immediately cease and refrain from engaging in any conduct or activity which has the purpose or effect of interfering with the NRA’s exercise of the rights afforded to it under the First and Second Amendment to the United States Constitution and Section 8 to the New York Constitution;

   (2) to immediately cease and refrain from engaging in any conduct or activity which has the purpose or effect of interfering with, terminating, or diminishing any of the NRA’s contracts and/or business relationships with any organizations;

   (3) to immediately cease and refrain from further selective enforcement of the Insurance Laws to the NRA endorsed policies; and

   (4) to enjoin or preclude the enforcement of the provisions of the Lockton and Chubb Consent Orders purporting to prohibit Lockton and Chubb from doing business with the NRA;
b. Granting such other injunctive relief to which the NRA is entitled;

c. Awarding the NRA actual damages, including compensatory and consequential damages, in an amount to be determined at trial;

d. Awarding the NRA exemplary or punitive damages;

e. Awarding the NRA pre-judgment and post-judgment interest at the highest lawful rates;

f. Awarding the NRA such costs and disbursement as are incurred in prosecuting this action, including reasonable attorneys’ and experts’ fees; and

g. Granting the NRA such other and further relief as this Court deems just and proper.

Respectfully submitted,

By: __/s/ William A. Brewer III__

William A. Brewer III (Bar No. 700217)
wab@brewerattorneys.com
Sarah B. Rogers (Bar No. 700207)
sbr@brewerattorneys.com
Stephanie L. Gase (Bar No. 700205)
sgage@brewerattorneys.com

BREWER, ATTORNEYS & COUNSELORS
750 Lexington Avenue, 14th Floor
New York, New York 10022
Telephone: (212) 489-1400
Facsimile: (212) 751-2849

Charles J. Cooper (Bar No. 103729)
ccooper@cooperkirk.com
Michael W. Kirk (pro hac vice to be filed)
mkirk@cooperkirk.com
J. Joel Alicea (pro hac vice to be filed)
COOPER & KIRK, PLLC
1523 New Hampshire Ave., NW
Washington D.C., 20036
Telephone: (202) 220-9660

ATTORNEYS FOR THE NATIONAL RIFLE ASSOCIATION OF AMERICA
NEW YORK STATE DEPARTMENT
OF FINANCIAL SERVICES

In the Matter of

LOCKTON AFFINITY, LLC and
LOCKTON COMPANIES, LLC

CONSENT ORDER UNDER
ARTICLES 21, 23 AND 34 OF THE INSURANCE LAW

Lockton Affinity, LLC, on behalf of each of its separate operating series, one of which, Lockton Affinity Series of Lockton Affinity, LLC, is the successor entity to Lockton Risk Services, Inc. (“Lockton Affinity”), Lockton Companies, LLC, on behalf of each of its separate operating series (“Lockton Companies”) (together, Lockton Affinity and Lockton Companies, “Lockton”), and the New York Department of Financial Services (the “Department”) (collectively, the “Parties”) are willing to resolve the matters described herein without further proceedings.

THE DEPARTMENT’S FINDINGS FOLLOWING INVESTIGATION

1. Lockton, together with its affiliates, is the world’s largest privately owned, independent insurance brokerage firm, offering customers risk management, insurance and employee benefits services. At least one Lockton affiliate has been licensed by the Department since approximately 1987, and Lockton Affinity has been licensed by the Department to act as an insurance producer, including as an excess line broker, since at least 2013.

2. Illinois Union Insurance Company (“Illinois Union”) is an unauthorized insurer eligible to write excess lines insurance in New York State. It is a subsidiary of Chubb Ltd., and
in connection with the “Carry Guard” program discussed herein, Illinois Union held itself out to
the public simply as “Chubb” (hereinafter, “Chubb”).

3. Lloyd’s of London is an insurance market encompassing more than 50 insurance
companies, over 200 registered brokers, and global network of over 4,000 local agents who
manage these arrangements, known as “coverholders.” The Lloyd’s market is backed by the
Lloyd’s Corporation (hereinafter, together with Lloyd’s of London, collectively referred to as
“Lloyd’s”).

4. The National Rifle Association of America (“NRA”) is a New York not-for-profit
corporation incorporated in 1871. The NRA describes its mission as “firearms safety, education,
and training and advocacy on behalf of safe and responsible gun owners.” The NRA is not
licensed by the Department.

The Carry Guard Program

5. From approximately April through November 2017, Lockton Affinity and the
NRA offered an insurance program to new and existing NRA members in New York and
elsewhere called “Carry Guard.” During that time, the NRA’s website described the program as
follows:

_NRA Carry Guard is a two-pronged program. It was created to provide dynamic,
state-of-the-art insurance protection to those who legally defend themselves with a
firearm, and to offer an elite, one-stop training option. The insurance provides a
cutting edge set of features that will help gun owners mitigate the potentially costly
financial and legal consequences flowing from armed encounters, even if they did
everything right._

6. The NRA website further described the Carry Guard program as “the only
membership carry program developed and supported by the National Rifle Association, the

---

1 A “coverholder” in the Lloyd’s syndicate is an insurance intermediary authorized by a managing agent to enter into
contracts of insurance to be underwritten by the members of a syndicate managed by it, in accordance with the terms
of a binding authority. See https://www.lloyds.com/lloyds-around-the-world/europe/switzerland/becoming-an-
intermediary-and-coverholder.
most powerful civil rights organization in American history.” The website further stated that Carry Guard was “created by the NRA.”

7. Additional promotional materials disseminated by the NRA stated:

**Why do I need Carry Guard?** Although millions of Americans are prepared to use a firearm in self-defense, very few families can withstand the financial consequences that may come next. The legal fees to clear your good name could be enormous. Likewise, the costs of defending and potentially losing a civil lawsuit could cripple your finances for the rest of your life. *And many homeowners’ policies have severe limitations or exclusions related to intentional acts such as self-defense.*

These materials stated at the bottom of the page: “NRA CARRY GUARD™ Insurance Program Administered by Lockton Affinity, LLC • D/B/A/ Lockton Affinity Insurance Brokers, LLC.”

8. Pursuant to written agreements with Chubb and the NRA, Lockton Affinity served as the administrator for the Carry Guard program, carrying out such functions as marketing the insurance, binding the insurance, collecting and distributing premiums, and delivering policies to insureds.

9. Pursuant to written agreements with Lockton Affinity, Chubb -- through its Illinois Union subsidiary -- served as the underwriter for the Carry Guard insurance program, providing insurance policies to individuals who purchased Carry Guard insurance. According to the marketing and promotion website for the Carry Guard program, www.nracarryguard.com (in effect from April to mid-December 2017), the Carry Guard insurance program “is backed by insurance leader Chubb” and is underwritten by a “group within Chubb the world’s largest publicly traded property and casualty insurance company.” The Carry Guard insurance program is referred to herein as the “Carry Guard Program.”

10. The Carry Guard Program tied insurance to free NRA membership, in violation of the New York Insurance Law (the “Insurance Law”). When purchasing Carry Guard insurance, members would also receive one year of free NRA membership. The NRA membership benefit
was not specified in the insurance policy, and one year of membership exceeded $25 in market value. The NRA directly managed the membership aspect of the Carry Guard program.²

11.  Lockton Affinity placed these insurance policies through New York’s excess line market. Excess line coverage offers policyholders an opportunity to obtain insurance that could not be procured from an authorized insurer. An “authorized insurer” is an insurance company that has received a license from the Department to provide specified types of insurance to customers in New York. Authorized insurers are fully regulated by the Department in order to ensure solvency and adherence to consumer protection standards.

12.  Excess line insurers are not licensed or authorized by the Department, but are permitted to do business in New York through an excess line broker. Unless another exemption applies, an insurance policy may be procured from an excess line insurer only after an excess line broker has obtained declinations of coverage from three authorized insurers.

13.  The Carry Guard insurance program, as underwritten by Chubb and administered, solicited and marketed by Lockton Affinity, provided insurance coverage that may not be offered in the New York State excess line market, specifically: (a) defense coverage in a criminal proceeding that is not permitted by law; (b) liability coverage for bodily injury or property damage expected or intended from the insured’s standpoint in an insurance policy limited to use of firearms and that was beyond the use of reasonable force to protect persons or property; and (c) coverage for expenses incurred by the insured for psychological counseling support.

14.  Moreover, although it did not possess an insurance producer license from the Department, the NRA nonetheless engaged in aggressive marketing of and solicitation for the Carry Guard Program. For example (and without limitation):

² In the event the purchaser was already an NRA member, the Carry Guard program allowed the member to carry a credit for a free one year membership forward, or allowed a transfer of the credit to a family member for use in obtaining NRA membership at no cost.
The NRA broadcasted NRA-produced videos promoting the Carry Guard Program on YouTube;

The NRA solicited participation in the Carry Guard Program through mass e-mail marketing, direct mail, banner ads, and articles in NRA publications;

The NRA heavily promoted the Carry Guard Program at its 2017 “Carry Guard Expo” and its annual meetings;

The NRA operated the website “www.nracarryguard.com,” which was an important marketing portal for the Carry Guard Program and linked to a website operated by Lockton Affinity (www.lockton.nracarryguard.com), which provided additional information about the Carry Guard Program;

The NRA promoted Carry Guard insurance on its main website, www.nra.org, which, among other things, featured an NRA spokesperson making claims such as, “We're proud to have developed the one carry membership program that stands above all others – NRA Carry Guard”; and “I will never carry a gun without carrying this.”

“Pop-up” internet advertising for the Carry Guard Program that featured one or more NRA spokespersons.

Other NRA-Endorsed Programs

15. From approximately January 2000 through March 2018, Lockton Affinity and the NRA together offered at least 11 additional insurance programs to new and existing NRA members in New York and elsewhere, including:

a. “Retired Law Enforcement Officer Self-Defense Insurance,” which provided coverage for criminal and civil defense costs, and bodily injury and damage caused by the use of a firearm;

b. “ArmsCare Plus Firearms Insurance,” which provided coverage for legal firearms and attached accessories against loss, damage, flood, fire, and theft (including theft from a locked vehicle);

c. “No Cost ArmsCare Firearms Insurance,” which provided free coverage to NRA members in good standing for legal firearms and their attached accessories, up to $2,500 in value, against loss, damage, flood, fire, and theft (including theft from a locked vehicle);

d. “Firearms Instructor Plus Liability Insurance,” which provided coverage for injuries or damage the insured causes while acting as an instructor during a lesson, medical expenses up to $5,000, legal expenses from lawsuits related to the injuries or damage;
and professional liability coverage that protects the member from allegations of negligent training;

e. “Personal Firearms Protection Insurance,” which provided coverage for any unintentional injuries or damage an insured causes while hunting or trapping on public or private land, shooting in competitions, or shooting at private shooting ranges, with a firearm, air gun, bow and arrow, or trapping equipment, and coverage for lawsuit defense costs;

f. “Gun Collector Insurance,” which provided coverage for certain firearms and their attached accessories against loss, damage, fire, and theft (including theft from a locked vehicle);

g. “Gun Club Insurance,” which provided coverage for loss or damage to any assets the gun club rents, leases or owns, coverage for general liability plus medical payments, coverage for claims of false advertising, and optional coverage for business income, boiler and machinery, glass, computers, valuable papers and records, and accounts receivable;

h. “Hunt Club Insurance,” which provided coverage for hunt clubs and the landowners to protect against injury and damage, provides host liquor coverage, and provided hired and non-owned auto coverage. In addition, an insured could select coverage for “personal and advertising,” products/completed operations, and medical expenses up to $5,000 for any one person;

i. “NRA Business Alliance Insurance,” which provided coverage for a firearms-related business, including coverage for loss or damage to any assets the insured business rents, leases or owns, coverage for general liability plus medical payments, coverage for claims of false advertising, gunsmith coverage, and optional coverage for business income, boiler and machinery, glass, computers, valuable papers and records, and accounts receivable;

j. “Gun Show Insurance,” which provided coverage for the insured’s liability arising out of the insured’s occupation as a gun show promoter; and

k. “Home-Based Federal Firearms License Insurance” for gun dealers and gunsmiths, which provided coverage for the insured’s business location, equipment and tools, and gear entrusted to the insured by the insured’s clients, against theft, damage and other loss, and provides general liability coverage, including products/completed liability to insure the insured’s finished work against later claims.

Together, these Lockton Affinity-administered Lloyd’s insurance programs (and for a brief period, Lockton Affinity-administered Alea London Ltd. (“Alea”) insurance programs), are referred to herein as the “Other NRA Programs.”
16. Pursuant to written agreements with Lloyd’s and the NRA, Lockton Affinity served as the administrator for the Other NRA Programs, carrying out such functions as marketing the insurance, binding the insurance, collecting and distributing premiums, and delivering policies to insureds.

17. Pursuant to written agreements with Lockton Affinity, Lloyd’s and Alea served as the underwriters for the Other NRA Programs, providing insurance policies to individuals who purchased NRA-sponsored insurance. Lockton Affinity also placed these insurance policies through New York’s excess line market.

**Lockton Affinity’s NRA Programs Violated New York Laws and Regulations**

18. In violation of the Insurance Law, the Carry Guard Program, as brokered, administered, solicited and marketed by Lockton Affinity, provided insurance coverage that may not be offered in the New York State excess line market, specifically: (a) defense coverage in a criminal proceeding that is not permitted by law; (b) liability coverage for bodily injury or property damage expected or intended from the insured’s standpoint in an insurance policy limited to use of firearms and that was beyond the use of reasonable force to protect persons or property; and (c) coverage for expenses incurred by the insured for psychological counseling support.

19. Similarly, the NRA Retired Law Enforcement Officer Self-Defense Insurance Program provided insurance coverage that may not be offered in the New York State excess line market, specifically: (a) defense coverage in a criminal proceeding that is not permitted by law; and (b) liability coverage for bodily injury or property damage expected or intended from the insured’s standpoint in an insurance policy limited to use of firearms and that was beyond the use of reasonable force to protect persons or property.
20. Additionally, the Carry Guard insurance program, as administered by Lockton Affinity, failed to comply with Section 3420 of the Insurance Law, which sets forth minimum requirements for liability insurance policies.

21. Lockton Affinity also violated the Insurance Law by giving or offering to give: (a) the No Cost ArmsCare Firearms Insurance for free to NRA members in good standing; and (b) free NRA membership, which the insured could use him or herself, or transfer to a family member, if a person purchased the Carry Guard insurance, when the free NRA membership was not specified in the insurance policy and exceeded $25 in market value.

22. Lockton has represented to the Department that, between approximately April and November 2017, 680 Carry Guard insurance policies were issued to New York residents. Lockton has further represented to the Department that no claims have been submitted under the New York Carry Guard insurance policies to date.

23. Lockton has also represented to the Department that, for the period January 2000 through March 25, 2018, 28,015 insurance policies were issued to New York residents under the Other NRA Programs.

24. Under written agreements between Lockton Affinity and the NRA, as of March 25, 2018, Lockton has represented that the NRA received royalties on the Carry Guard Program in the amount of about $21,198, an amount based on a percentage of the actual premiums collected by Lockton Affinity under the Carry Guard Program from New York residents, in violation of the Insurance Law. Similarly, under written agreements between Lockton Affinity and the NRA, the NRA received additional royalties under the Other NRA Programs based on a percentage of premiums collected by Lockton Affinity from New York residents, similarly violating the Insurance Law.
25. Lockton has represented to the Department that revenue to the NRA from the Carry Guard Program and the Other NRA Programs in New York totaled approximately $1,872,737 for the period January 2000 through March 25, 2018. Under written agreements between Lockton Affinity and the NRA, the NRA also received profit-sharing disbursements from Lockton Affinity based on a schedule agreed to by the parties in conjunction with the Other NRA Programs.

26. Between January 2000 and March 25, 2018, Lockton has represented to the Department that Lockton Affinity collected premiums from the Carry Guard Program and the Other NRA Programs in New York amounting to approximately $12,056,627. Lockton has also represented that it collected approximately $785,460 in administrative fees from insureds under the Carry Guard Program and the Other NRA Programs in New York during this time period.

**Lockton Affinity Submitted Inaccurate Affidavits Required By the Insurance Law Pertaining to Excess Lines Insurance Coverage**

27. Lockton Affinity, through one or more of its sublicensees, submitted affidavits to the Excess Line Association of New York ("ELANY") required by Insurance Law § 2118 in connection with the Carry Guard Program and the Other NRA Programs. As set forth below, those affidavits contained inaccurate information concerning compliance with the Insurance Law and regulations promulgated thereunder.

28. As noted above, an authorized insurer is an insurance company that is licensed by the Department to write certain kinds of insurance in New York, as specified in Insurance Law § 1113(a). Authorized insurers are fully regulated by the Department in order to ensure solvency and adherence to consumer protection standards. An unauthorized insurer is an insurer not licensed by the Department to write insurance in New York, and may be an insurer that provides “excess line” insurance only under prescribed rules.
29. Under the Insurance Law, unless another exemption applies, an excess line broker like Lockton Affinity that seeks to procure excess line insurance must first approach three separate authorized insurers to determine if any one of those insurers will write coverage for the risk. If all three authorized insurers decline to provide the requested coverage, only then may the excess line broker place the insurance with an unauthorized insurer like Chubb. An excess line broker must seek three declinations for each insured; the broker may not rely upon declinations obtained with respect to other insureds.

30. In placing the Carry Guard Program and Other NRA Program insurance policies, Lockton Affinity only obtained declinations from three authorized insurers once annually for a single policy for each of these insurance programs, and then relied upon the single annual declination with respect to all other insureds who received policies under these programs. At least one Lockton Affinity sublicensee affirmed that, to the best of his knowledge and belief, every policy procured by the sublicensee on behalf of Lockton Affinity was in full compliance with the Insurance Law and regulations promulgated thereunder, when, in truth and in fact, the sublicensee had not secured such declinations in compliance with the Insurance Law.

**The Department’s Investigation**

31. Since October 2017, the Department has been conducting an investigation of the involvement of Chubb, Lloyd’s, Lockton and the NRA in the Carry Guard Program, the Other NRA Programs, and other matters, including review of thousands of pages of documents obtained from Chubb, Lockton and the NRA, and review of other information obtained from investigative resources (the “DFS Investigation”).

32. Lockton has represented to the Department that, following initiation of the DFS Investigation in October 2017, which included information requests sent to Lockton in October
2017, Lockton Affinity suspended the Carry Guard Program on or about November 17, 2017, no longer making Carry Guard policies available for New York residents to purchase.

33. **NOW THEREFORE**, to resolve this matter without further proceedings, pursuant to Articles 21, 23 and 34 of the Insurance Law, Lockton Affinity, Lockton Companies, and the Department hereby stipulate and agree as follows:

**VIOLATIONS OF LAW AND REGULATIONS**

34. Lockton Affinity compensated the NRA based on actual premium collected when the NRA was acting as an unlicensed insurance broker by selling and soliciting insurance in New York, in violation of Insurance Law § 2116.

35. Lockton Affinity acted for and aided an unauthorized Chubb insurer, Illinois Union, in connection with Illinois Union’s issuing or delivering policies in New York State, or otherwise issuing policies covering New York State residents, which provided insurance coverage that may not be offered in the New York State excess line market, specifically: (a) defense coverage in a criminal proceeding that is not permitted by law; (b) liability coverage for bodily injury or property damage expected or intended from the insured’s standpoint in an insurance policy limited to use of firearms and that was beyond the use of reasonable force to protect persons or property; and (c) coverage for expenses incurred by the insured for psychological counseling support, in violation of Insurance Law § 2117.

36. Lockton Affinity gave, or offered to give, a free one-year NRA membership if a person purchased the Carry Guard Program insurance policy, when the NRA membership benefit was not specified in the policy and exceeded $25 in market value, in violation of Insurance Law § 2324(a).
37. Lockton Affinity gave, or offered to give, the No Cost ArmsCare Firearms Insurance at no cost to NRA members in good standing, in violation of Insurance Law § 2324(a).

38. Lockton Affinity advertised the financial condition of a Chubb insurer by referring to the insurer’s AM Best rating, in violation of Insurance Law § 2122(a)(1).

39. Lockton Affinity called attention to an unauthorized Chubb insurer by advertising Chubb’s participation in the Carry Guard Program on the Carry Guard website, in violation of New York Insurance Law § 2122(a)(2).

40. Lockton Affinity failed to properly secure declinations from authorized insurers for each insured, in violation of Insurance Law § 2118.

**SETTLEMENT PROVISIONS**

**Civil Monetary Penalty**

41. Lockton Affinity shall pay a civil monetary penalty to the Department pursuant to Articles 21, 23 and 34 of the Insurance Law in the amount of $7,000,000. Lockton Affinity shall pay the entire amount within ten days of executing this Consent Order. Lockton Affinity agrees that it will not claim, assert, or apply for a tax deduction or tax credit with regard to any U.S. federal, state, or local tax, directly or indirectly, for any portion of the civil monetary penalty paid pursuant to this Consent Order. Lockton further agrees that it will not claim, seek, or receive indemnification of the civil monetary penalty from any other person or entity. This provision is not intended, and shall not be construed, to prohibit Lockton affiliates from funding inter-company transfers to Lockton Affinity.

**Prohibition on NRA-Endorsed Insurance Programs**

42. Lockton agrees not to participate in the Carry Guard Program, any similar programs, or any other NRA-endorsed programs with regard to New York State, including,
without limitation, (a) by agreeing not to provide Carry Guard or other insurance policies specific to firearm usage that provides liability coverage for bodily injury or property damage from use of a firearm, whether they are written or issued in New York State or elsewhere; and (b) by agreeing not to provide liability coverage for bodily injury or property damage expected or intended from the insured’s standpoint in general liability policies that is not limited to those occasions where bodily injury results from the use of reasonable force to protect persons or property, whether they are written or issued in New York State or elsewhere; provided, however, that Lockton Affinity may provide runoff administration for any in-force policies not cancelled pursuant to Paragraph 46. Furthermore, Lockton agrees not to issue or deliver any Carry Guard or similar insurance policies in New York State, regardless of the residence of the insured. For the avoidance of doubt, Lockton shall not be prohibited from procuring homeowners, renters or general liability insurance in New York State or for New York residents that includes personal injury liability insurance or property damage liability insurance for loss, damage, or expense that results from the negligent use of a firearm.

43. Lockton agrees that it shall not enter into any agreement or program with the NRA to underwrite or participate in any affinity-type insurance program involving any line of insurance to be issued or delivered in New York State or to anyone known to Lockton to be a New York resident; provided, however, that Lockton may assist the NRA in procuring insurance for the NRA’s own corporate operations.

44. Lockton confirms and represents to the Department that, between approximately April and November 2017, 680 Carry Guard insurance policies were issued to New York residents. Lockton confirms and hereby represents to the Department that no claims have been submitted under the New York Carry Guard insurance policies to date.
45. Lockton confirms and represents to the Department that:

a. for the period January 2000 through March 25, 2018, 28,015 insurance policies were issued to New York residents under the Other NRA Programs;

b. Under written agreements between Lockton Affinity and the NRA, as of March 25, 2018, the NRA received royalties from the Carry Guard Program in New York in the amount of approximately $21,198;

c. Total revenue to the NRA from the Carry Guard Program and the Other NRA Programs in New York totaled approximately $1,872,737 for the period January 2000 through March 25, 2018;

d. Lockton Affinity collected premiums from the Carry Guard Program and the Other NRA Programs in New York amounting to approximately $12,056,627 for the period January 2000 through March 25, 2018;

e. Lockton Affinity collected approximately $785,460 in administrative fees from insureds under the Carry Guard Program and the Other NRA Programs in New York during the period January 2000 through March 25, 2018.

46. Lockton agrees to fully cooperate with Chubb, Lloyd’s and Alea (the “Underwriters”) to effect any cancellation initiated by an Underwriter of Carry Guard insurance policies issued to New York residents, NRA Retired Law Enforcement Officer Self-Defense Insurance policies issued to New York residents, and any other NRA-related insurance policies issued to New York residents that provide coverage for intentional acts or legal services insurance that were procured by Lockton Affinity, such cancellation to be effective 90 days from the date of such notice. Lockton agrees to cooperate with the Underwriters in submitting any such draft notices to the Department for the Department’s review and approval prior to the
mailing or delivery of such notices by the Underwriters. Lockton Affinity also agrees to fully cooperate in refunding the insurance premiums for the cancelled policies. Thereafter, Lockton Affinity shall promptly file a certification with the Department that sets forth its compliance with this Paragraph 46.

47. Lockton Affinity agrees not to procure from an unauthorized insurer any insurance policy to be issued or delivered in New York State, or to anyone known to Lockton Affinity to be a New York resident, in the New York State excess line market that provides: (a) defense coverage in a criminal proceeding; (b)(i) liability coverage for bodily injury or property damage expected or intended from the insured's standpoint in an insurance policy limited to use of firearms and that is beyond the use of reasonable force to protect persons or property, or (ii) liability coverage for bodily injury or property damage expected or intended from the insured's standpoint in general liability policies that is not limited to those occasions where bodily injury results from the use of reasonable force to protect persons or property; and (c) coverage for expenses incurred by the insured for psychological counseling support. For the avoidance of doubt, Lockton shall not be prohibited from procuring homeowners, renters or general liability insurance in New York State or for New York residents that includes personal injury liability insurance or property damage liability insurance for loss, damage, or expense that results from the negligent use of a firearm.

**Full and Complete Cooperation of Lockton**

48. Lockton commits and agrees to fully cooperate with the DFS Investigation and all terms of this Consent Order. Such cooperation shall include, without limitation:
a. producing all non-privileged documents and other materials to the
   Department, as requested, wherever located in Lockton’s possession, custody,
   or control;

b. requiring employees or agents to appear for interviews, at such reasonable
   times and places, as requested by the Department;

c. responding fully and truthfully in a prompt manner to all inquiries when
   requested to do so by the Department; and

d. testifying at hearings, trials and other judicial, administrative or other
   proceedings, when requested to do so by the Department, in connection with
   its investigation of matters relating to any NRA-endorsed insurance program.

Compliance Review

49. Lockton agrees to fully and completely cooperate with the DFS Investigation by
    providing a truthful, accurate and complete report to the Department, within 60 days of the
    execution of this Consent Order (the “Compliance Review”), that reports on:

   a. any additional violations of the Insurance Law, or regulations promulgated
      thereunder, that Lockton has identified;

   b. any actions undertaken by Lockton to identify any violations of the Insurance
      Law, or the regulations promulgated thereunder; and

   c. a plan for remediation of any violation of the Insurance Law, or regulations
      promulgated thereunder, identified in connection with the Carry Guard
      Program, the Other NRA Programs, or any other insurance program or
      conduct that violates the Insurance Law, or regulations promulgated
      thereunder.
The Department may, in its sole regulatory discretion, accept, reject, or modify any plan of remediation submitted by Lockton.

**Breach of Consent Order**

50. If the Department believes Lockton or Lockton Affinity to be in material breach of this Consent Order, the Department will provide written notice to Lockton and/or Lockton Affinity and Lockton and/or Lockton Affinity (as the case may be) must, within ten business days of receiving such notice, or on a later date if so determined in the Department’s sole discretion, appear before the Department to demonstrate that no material breach has occurred or, to the extent pertinent, that the breach is not material or has been cured.

51. The Parties understand and agree that Lockton’s and/or Lockton Affinity’s failure to make the required showing within the designated time period shall be presumptive evidence of such party’s breach. Upon a finding that Lockton and/or Lockton Affinity has breached this Consent Order, the Department has all the remedies available to it under the New York Insurance and Financial Services Laws and may use any evidence available to the Department in any ensuing hearings, notices, or orders.

**Waiver of Rights**

52. The Parties understand and agree that no provision of this Consent Order is subject to review in any court or tribunal outside the Department.

**Parties Bound by the Consent Order**

53. This Consent Order is binding on the Parties, as well as any successors and assigns. This Consent Order does not bind any federal or other state agency or any law enforcement authority.
54. No further action will be taken by the Department against Lockton in connection with the Carry Guard Program and the Other NRA Programs for the period January 1, 2000 through March 31, 2018, provided that Lockton complies fully with the terms of this Consent Order, including Paragraphs 48 and 49 above.

55. Notwithstanding any other provision contained in this Consent Order, the Department may undertake action against Lockton for transactions or conduct that Lockton did not disclose to the Department in the written materials that Lockton submitted to the Department in connection with this matter, including, without limitation, any transactions or conduct that Lockton identifies to the Department pursuant to the Compliance Review that it will undertake as set forth in Paragraph 49 of this Consent Order.

Notices

56. All notices or communications regarding this Consent Order shall be sent to:

For the Department:

For the Department:

Hadas Jacobi
Assistant Deputy Superintendent
for Enforcement
New York State Department of Financial Services
One State Street
New York, NY 10004

Megan Prendergast
Deputy Superintendent for Enforcement
New York State Department of Financial Services
One State Street
New York, NY 10004

Connor Mealey
Excelsior Fellow
New York State Department of Financial Services
One State Street
New York, NY 10004
For Lockton Companies, LLC:

William Humphrey  
Secretary  
Lockton Companies  
444 West 47th Street  
Kansas City, MO 64112

Scott A. Edelman  
Milbank, Tweed, Hadley & McCloy  
28 Liberty Street  
New York, NY 10005

Andrew R. Holland  
Sidley Austin  
787 Seventh Avenue  
New York, NY 10019

For Lockton Affinity, LLC:

William Humphrey  
Secretary  
Lockton Affinity  
444 West 47th Street  
Kansas City, MO 64112

Scott A. Edelman  
Milbank, Tweed, Hadley & McCloy  
28 Liberty Street  
New York, NY 10005

Andrew R. Holland  
Sidley Austin  
787 Seventh Avenue  
New York, NY 10019
Miscellaneous.

57. Each provision of this Consent Order shall remain effective and enforceable until stayed, modified, suspended, or terminated by the Department.

58. No promise, assurance, representation, or understanding other than those contained in this Consent Order has been made to induce any party to agree to the provisions of the Consent Order.

IN WITNESS WHEREOF, the parties have caused this Consent Order to be signed this 2nd day of May, 2018.

LOCKTON COMPANIES, LLC, on behalf of each of its separate operating series,

By: William Humphrey
Secretary

NEW YORK STATE DEPARTMENT OF FINANCIAL SERVICES

By: Maria Vullo
Superintendent of Financial Services

LOCKTON AFFINITY, LLC, on behalf of each of its separate operating series,

By: William Humphrey
Secretary

By: Matthew L. Levine
Executive Deputy Superintendent for Enforcement
Outside the Lines: Practical and Strategic Considerations in Avoiding, Prosecuting and Defending Against the Bad Faith Claim

Jason R. Donovan, Member, Foster Pepper
Harry Lee, Partner, Steptoe & Johnson, LLP
John Reitwiesner, VP Head of Casualty Claims, StarStone Insurance
Jennifer H. Thiem, Partner, K&L Gates

Moderator:
Craig E. Stewart, Senior Counsel, White and Williams LLP
CASE STUDY I: TROLLEY STOP

Coverage Determination/Multiple Insureds

Jay Donovan / Jennifer Thiem
John Reitwiesner / Harry Lee
THE BAR FIGHT
CLAIMANT SEAN’S ALLEGED INJURIES

- Concussion
- Closed head injury
- Constant vertigo
- Loss of employment
- Permanent physical impairment
CLAIMANT SEAN FILES

CLAIMS AGAINST BOTH
TROLLEY SHOP RESTAURANT AND BARTENDER BILL:

(a) negligent service of alcohol to patron Jones;
(b) continuing to serve Patron Jones while intoxicated;
(c) providing alcohol in a large bottle which defendant knew or should have known could be used as a weapon;
(d) violating rules and regulations of the Liquor Control Board; and
(e) four other claims all relating to service or consumption of alcohol.
CLAIMS AGAINST TROLLEY SHOP RESTAURANT ONLY:

- (a) failing to protect business visitors;
- (b) failing to provide adequate security;
- (c) negligently failing to isolate and/or remove the assailant from the premises prior to the above-described assault;
- (d) negligently allowing assailant to remain on the premises after it knew or should have known assailant was displaying aggressive propensities;
- (e) failing to train and instruct servers, bartenders, bounders to remove patrons likely to present a danger to other;
- (f) failing to remove assailant from the premises after it knew or should have realized that assailant represented a danger to himself or others.
Alleged damages in excess of the $1 million for bodily injury, loss of employment, and permanent impairment
• Policy limits: $1M per occurrence/general aggregate
• Employees are “insureds” under the Policy when acting within the scope of their employment
• Insurer’s duty to defend or indemnify ends when the limit of insurance has been exhausted by payments of judgments or settlements
• Assault and Battery Exclusion: excludes coverage for bodily injury caused by or resulting from the physical assault or battery of any patron.
• Liquor Liability Exclusion: excludes coverage for (1) causing or contributing to intoxication of any person; (2) illegal furnishing of alcoholic beverages; (3) violation of any ordinance or regulation relating to liquor
SCENARIO ONE: Insurer Denies Coverage

• The Insurer refuses to defend or indemnify Insured Trolley Stop Restaurant or Bartender Bill against the lawsuit.

• The Insurer fails to file a declaratory judgment actions seeking a declaration that the Insurer has no duty to defend or indemnify Insured Trolley Stop Restaurant or Bartender Bill.

• Insured Trolley Stop Restaurant and Bartender Bill sue Insurer for (1) breach of contract; (2) bad faith; and (3) statutory consumer protection act claims.
The Insurer is providing a defense to both Insured Trolley Stop Restaurant and Bartender Bill.

They are represented by separate counsel.
Claimant Sean has asserted economic damages of $1.5 M and makes an opening demand of $3.5 M to settle the claims against both Insured Trolley Stop Restaurant and Bartender Bill.

At the last round of the mediation, Claimant Sean makes a final offer to settle claims against Bartender Bill for $500K, and claims against Insured Trolley Stop Restaurant for $1M.
• To protect his valuable collection of antique cars and avoid bankruptcy, Bartender Bill demands that insurer settle claims against him within policy limits.

Insurer is optimistic that the only probable claims against Bill will involve negligent service of alcohol, and that there will be no coverage for any judgment against him because they will be excluded by the liquor liability endorsement.

Bill tells Insurer that it if doesn’t pay the $500K he will sue Insurer for bad faith if there is an excess judgment and will seek punitive damages because Insurer is putting its own interest over his: (a) possibility of no coverage; and (b) not wanting to alienate the Named Insured for business reasons.
• Demands that insurer settle the claims against it within policy limits.

Trolley Stop points out that there may be no coverage for the claims against Bartender Bill, and that by paying $500K to settle the claim against Bill, the insurer is pursuing its own interests in exhausting the policy so it doesn’t have to pay more of Bartender Bill’s defense costs, above those of Trolley Stop.
Case Study II:
SUPREME HOME BUILDERS

Long Tail Bad Faith Issues

Jay Donovan  /  Jennifer Thiem
John Reitwiesner  /  Harry Lee
THE RADON ISSUE
• Loss of Use
• Loss of Value
• Installation Costs
• Fear of Cancer
• Medical Monitoring
HOMEOWNERS FILE SUIT IN 2015

CLAIMS AGAINST SUPREME BUILDERS:

(a) Negligent Construction;
(b) Breach of Warranty;
(c) Misrepresentation;
(d) Personal Injuries and Property Damage.
• Supreme Builders purchased CGL insurance policies over the years;
• It cannot find a copy of its 1989 CGL policy, when the houses were built, because 15 years have passed and policy may be destroyed;
• Supreme Builders tenders the homeowners’ complaint to the Insurer it believes issued the 1989 policy, when homes were built;
• In the 1980’s, the Insurer used only one type of standard form for occurrence-based policies, although on occasion it manuscripted a few endorsements to that form.
  – *The Insurer does not advise Supreme of this fact.*
• Most of the Insurers’ 1980’s policies provided a $10 million per-occurrence limit, although there were a few exceptions.
  – *The Insurer does not volunteer this fact, either.*
• The Insurer denies any duty to defend or indemnify.
• The Insurer gives the following reasons:
  – the lack of any 1989 policy, and
  – the fact that a Total Pollution Exclusion would have been included in any of its policy forms as of 1989.
• No other specific denial or reservation grounds are identified, but the denial letter includes a general reservation of the Insurer’s rights.
Supreme Builders Agrees to a Consent Judgment for $100 million and Assigns its Rights to Homeowners
HOMEOWNERS’ INSURANCE CLAIM

• Homeowners demand that Insurer pay the $100 million consent judgment.
• Their written demand attaches an executed copy of a 1988 (prior year) CGL occurrence policy issued by the Insurer to Supreme Builders. The policy contains:
  – a $10 million per occurrence limit with a duty to defend
  – It cover bodily injury, including “mental anguish”
  – It provides coverage only for injury during the Policy Period
  – It has a “Total” pollution exclusion
  – It requires the Insurers “consent” to any settlement
• Insurer again denies any duty to defend or indemnify.
  – Reiterates its prior grounds (no policy and application of the pollution exclusion)
  – Adds new grounds:
    • Lack of any bodily injury
    • Coverage only for damage associated with the 1989 year (pro-rata allocation)
    • Unauthorized and unreasonable/collusive settlement
• Homeowners sue the Insurer for breach of contract and bad faith.
  • They allege that a 1989 policy with a $10 million limit must have existed, because
    – the Insurer issued a similar policy to Supreme the year before, and
    – Supreme Builder’s risk manager “recalls” the 1989 policy.
• Complaint seeks $100 million, plus punitive damages, because of the Insurer’s:
  – Failure to fully/properly investigate the claims
  – Failure to disclose certain information, including the customary policy forms/limits
  – Unreasonable/negligent grounds for denial because:
    • the 1989 policy and its policy terms were reasonably certain,
    • the release of Radon is not “traditional” pollution, and
    • all other denial grounds were waived when not included in the initial denial letter.
• During discovery, Homeowners learn that Insurer previously agreed with other
  policyholders that where the law is silent as to whether the pollution exclusion applies
  beyond “traditional” pollution, the Insurer will cover “non-traditional” pollution despite the
  existence of the “total” pollution exclusion. The Insurer never volunteered this
  information.
ISSUES

• What are the bad faith ramifications if an Insurer does not “volunteer” facts or positions potentially relevant to coverage?
• What types of information have to be volunteered?
  – Policy forms/provisions
  – Custom and practice regarding underwriting
  – Views on how the coverages work?
• Is there a difference between factual information and positions?
• What are the sources of any duty to speak?
• What are the bad faith ramifications for an Insurer that does not specifically identify all known, knowable or potential denial or reservation grounds in a claim response letter?
• How “debatable” do the bodily injury, trigger and pollution positions need to be to avoid “bad faith?”
  – How debatable are they here?
• In the CGL insurance context, as distinct from the personal lines context, are their “practical” differences in the bad faith standard to which an insurer is held when it denies a duty to defend or indemnify based on a fact or legal principle later determined to be incorrect?
Signs of Insurer’s Bad Faith Conduct

- Delay in investigating a claim and making a coverage decision
- Withholding undisputed amounts because of disputed amounts
- Taking unreasonable coverage positions
- Refusal to defend a claim
- Inadequate defense of a claim
- Failure to accept a reasonable settlement offer within policy limits
- Attempting to exhaust policy limits by tendering policy limits when there is a continuing duty to defend
I. Introduction

When a policyholder tenders a potentially-disputed insurance claim, the ensuing information exchange and communication process will be central to whether the claim can be resolved quickly and amicably. Relevant information obviously includes the insurance policy and basic claim facts, but this is usually just the start, particularly when a claim is a “close call.” In difficult claim situations, the parties’ communications sometimes devolve into a series of carefully-worded, one-sided questions and answers, with each exchange less informative than the last. When the claim then erupts into coverage litigation and the relevant information is obtained through discovery, one or both parties often find themselves asking, “if I had only known that, we could have resolved this claim without a fight.”

No one would argue that either side can affirmatively deceive the other during insurance claim processing. Indeed, policyholders are subject to express written warnings that require them to be truthful and complete when submitting policy applications and claim forms. But it is far less clear to what extent parties involved in an insurance claim are required to “volunteer” information useful to the resolution of the claim without being asked. This is particularly so when it comes to insurers. For example, is an insurer required to inform the policyholder about

---

1 This paper has been prepared as part of the American Bar Association, Tort Trial and Insurance Practice Section, Insurance Coverage Litigation Committees’ mid-year meeting. It has been prepared collaboratively by Jay Donovan, Jennifer Thiem, Craig Stewart, John Reitwiesner and Harry Lee, who will be presenting at the meeting on the following topic: “Outside the Lines: Practical and Strategic Considerations in Avoiding, Prosecuting and Defending Against the Bad Faith Claim.” The views expressed in this paper are those of the authors alone, and do not necessarily reflect the views of their employers or clients.

2 The “Conditions” section of many policies states, for example, that coverage is precluded if an insured (1) intentionally conceals or misrepresents any material fact or circumstance, (2) engages in fraudulent conduct, or (3) makes any false statements.
coverages that may better fit the claim or afford a benefit more lucrative than the one the policyholder has requested? Is an insurer obligated to remind the policyholder of conditions that, if not satisfied, will vitiate coverage under the insurance contract? Must an insurer reveal its internal views or opinions about policy language without being asked?

This article will focus on the extent to which the courts have wrestled with assertions that an insurer has a legal duty to volunteer information, including the legal theories on which that duty is arguably premised, such as the common law duty of good faith and fair dealing, the tort of “bad faith,” and/or statutory and regulatory obligations imposed by various state legislatures. It is our hope that by addressing this issue, insurers and policyholders will gain a better understanding of how best to interact when a tough claim comes along.

II. Legal Theory No. 1 — The Common Law Duty of Good Faith and Fair Dealing

A covenant of good faith and fair dealing is implicit in every insurance contract. The duty to act in good faith can be central to the insurer-policyholder relationship, which is often viewed as “special,” with high expectations for diligence and trustworthiness on each side.

As noted above, the policyholder’s duty to be forthright and informative is generally embodied directly in policy language and/or associated forms. This language makes clear the policyholder’s obligation to provide all information that bears on a claim—whether favorable or not. By contrast, most insurance policies say nothing about whether an insurer must provide information during the claim process, including the insurer’s view of how the policy operates in any given claim situation. Cases often teach that when it comes to understanding an insurance

---

policy, for example, the insurer and/or its agents have no duty to explain policy terms.4 Rather, the insured is bound by the policy terms even if they are not fully explained.5 And courts have found that there is no general duty on the insurer or its agents to ensure that an insurance policy provides coverage adequate for the policyholder’s needs.6 In the words of one Pennsylvania court, the insurer-policyholder relationship “is not so unique as to compel … an insurer to explain every permutation possible from an insured's choice of coverage.”7

While there does not appear to be a general duty to explain an insurance policy at any point during the insurance relationship, some courts have found that unique circumstances contractually require that an insurer volunteer certain information. For example, in Dercoli v. Pennsylvania National Mutual Insurance Co.,8 a married couple was involved in an automobile accident caused by the husband, who died in the accident. At the time of the incident, Pennsylvania law recognized inter-spousal immunity, which limited the injured wife’s ability to recover from her husband’s estate, including their liability insurance policy.9 Approximately one year after the accident, the Pennsylvania courts abolished inter-spousal immunity.10 The insurer was aware of this change in the law, but waited several years to inform the wife of her ability to sue her husband’s estate and access their joint insurance.11 The delay prejudiced her claim, so the wife brought suit against the insurer for breach of the duty of good faith and fair dealing, as well as tortious bad faith.

---

5 Id.
9 Id. at 474.
10 Id.
11 Id.
Ruling for the wife, the Supreme Court of Pennsylvania found that once the law had changed, a conflict of interest arose. The court explained that, “Consistent with the obligation of fair dealing and good faith the [insurer] had a duty to inform the [wife] of their conflict of interest, and of her apparent right to damages against her deceased husband's estate which ultimately would be payable under the liability provisions of the policies that insured the decedent.” In essence, the insurer was held to have an affirmative duty, long-after-the-fact duty to volunteer to one of its insureds that coverage had been expanded by a change in the law.

Tough facts often make the resulting decision unsuitable to other contexts. And so it is with Dercoli, which the Supreme Court of Pennsylvania subsequently narrowed. In Miller v. Keystone Insurance Co., the court explained Dercoli by noting that, “the insurer's knowing and purposeful misrepresentation was critical to this Court's determination that the insurers were bound to disclose all of the benefits to which the claimant was entitled.” The court made clear that it would be “incorrect [to hold] that Dercoli imposes an affirmative duty upon an insurer to advise and inform an insured of all potential claims when the insurer assumes the responsibility for processing the claim.” The court found instead that Dercoli created an affirmative duty to provide an insured information, without being asked, only when three conditions are met: “(1) the insurer has assumed the responsibility for processing its insured's claims; (2) the insurer knows that the insured is relying exclusively on its advice and counsel; and, (3) the insurer has

12 Id. at 478.
13 Id.
15 Id. at 536.
16 Id.
knowledge regarding an additional claim for benefits to which the claimant is potentially entitled.\textsuperscript{17}

Policyholders have also argued that the duty of good faith and fair dealing requires an insurer to volunteer information during the claims process when the terms of the policy are so obscure or ambiguous that a failure to inform would amount to misrepresentation or concealment. For example, in \textit{Nardelli v. Metropolitan Group Property and Cas. Ins. Co.},\textsuperscript{18} a policyholder brought suit against an automobile insurer for breach of the duty of good faith and fair dealing. The policyholder’s car had been stolen and severely damaged, but the insurer refused to recognize the damage as a total loss, and thus paid a lesser amount.\textsuperscript{19} The policyholder later argued that the insurer had not mentioned two policy provisions that would have allowed him to obtain a payout greater than originally sought.\textsuperscript{20} After reviewing the policyholder’s complaint, the court held that sufficient evidence might exist for a jury to consider whether the insurer breached its duty to the policyholder.\textsuperscript{21} The court reasoned that, “While … [a]n insurer is not required to explain every fact and provision without limitation … the duty of good faith encompasses some obligation to inform the insured about the extent of coverage and his or her rights under the policy and to do so in a way that is not misleading.”\textsuperscript{22}

In fact, sometimes insurers create a duty to volunteer through expressions of their own business practices, including so-called claim-related “codes of conduct.” In \textit{Travelers Insurance Co. v. Buffalo Reinsurance Co.},\textsuperscript{23} for example, an insurer justified its claim for reinsurance

\begin{itemize}
\item \textsuperscript{17} Id. at 535.
\item \textsuperscript{18} \textit{Nardelli v. Metropolitan Group Property and Cas. Ins. Co.}, 230 Ariz. App. 592 (2012).
\item \textsuperscript{19} Id. at 596-97.
\item \textsuperscript{20} Id.
\item \textsuperscript{21} Id. at 601-602.
\item \textsuperscript{22} Id. at 603.
\item \textsuperscript{23} 86 C.V. 3369 (JMC) (Sept. 26, 1988).
\end{itemize}
benefits by arguing that it had an “ethical” duty to disclose available coverage to its policyholder even though the policyholder had expressed its belief during the claim handling process that certain losses were excluded or subject to deductibles. The insurer explained that "it was bound by ethical claims-handling practices to apprise its insured . . . that indemnity coverage might exist," because once it “receives notice of claims that are potentially covered under its policies -- even where the insured may not recognize that coverage is available,” its business practices give rise to “an ethical obligation to advise its insured.”  

But the duty to speak discussed in the cases above is, generally speaking, limited, as illustrated by Love v. Fire Ins. Exchange, a California appellate decision. There, homeowners, after discovering cracks in their home’s foundation, sought coverage from their homeowners’ insurance policy. The insurer denied the claim on the grounds that the damages resulted from an “act of god.” The homeowners did not continue to pursue the denied claim, even though they had been told that the cracked foundation may have been the result of builder negligence. Years later, when the homeowners learned that other nearby homes had suffered the same problem, they resubmitted the claim, but the insurer again denied it. The homeowners sued for breach of the covenant of good faith and fair dealing and violation of certain statutory duties. The trial court concluded that the action was barred by limitations.

The appellate court affirmed, despite the homeowners’ assertion that the insurer should be estopped from raising limitations given its “fiduciary” status—a status that required the insurer to disclose voluntarily that an otherwise excluded loss would become a covered loss if third-party negligence was a cause of the injury. The appellate court refused to accept the

24 Id.
homeowners’ premise, however, noting that insurers do not have the duties of “fiduciaries,” even if their relationship with an insured is a “special” one. The appellate court went on to reject the homeowners’ estoppel argument because the homeowners knew all of the operative claim facts, did not argue that they lacked knowledge of the relevant policy provisions, and were told that their claim was denied for lack of coverage. As a result, there was no misrepresentation or concealment.

A Washington appellate court has also discussed the degree to which a “special” relationship exists between an insurer (and its agent) and an insured during the policy procurement process, and thus whether has any duty to volunteer information. The court explained that if: “(1) the agent holds himself out as an insurance specialist and receives additional compensation for consulting and advice, or (2) there is a long-standing relationship, some type of interaction on the question of coverage, and the insured relied on the agent’s expertise to the insured’s detriment, a special duty to inform can arise.” However, where “the insured never consulted with the agent about the adequacy of coverage and the agent never gave any advice, courts have held that no special relationship exits.”

III. Legal Theory No. 2 — Bad Faith

Insurance “bad faith” claims have grown into a major source of litigation. Previously limited to contractual claims for breach of the implied duty of good faith and fair dealing—claims that did not permit punitive or exemplary damages—insureds gained additional rights

27 Id. at 1221.
29 Id. at 1480.
after *Comunale v. Traders & General Insurance Co.*,[^30] where the Supreme Court of California ruled that insurance bad faith claims arise in tort.[^31] A number of other states have followed California’s lead and now recognize insurance bad faith as a separate and distinct tort claim.

“Bad faith” claims based on an insurer’s failure to volunteer sometimes arise as a result of what happened during the underwriting process. In *Thomas v. Northwestern National Insurance Co.*,[^32] an insurer was found liable for insurance bad faith when it failed to inform the policyholder of changes to its policy during the renewal process, prior to a claim being filed.

The insured, a plumbing and heating contractor, purchased a commercial general liability policy through a local independent insurance agency in 1989.[^33] The contractor renewed the policy with the same insurer via the same agency on an annual basis through 1993.[^34] The original policy excluded liability for certain types of pollution incidents. During one of the renewal periods, however, the insurer changed the exclusion’s language, converting it to a “total” pollution exclusion.[^35] The substantially reduced pollution coverage ultimately resulted in the contractor not being covered for an oil spill.

When the contractor sued its insurer for bad faith, discovery demonstrated that the renewed policy expressly warned the contractor that the new total pollution exclusion endorsement “CHANGES THE POLICY. PLEASE READ IT CAREFULLY.” But the Montana Supreme Court found that this was not enough to avoid an insurance bad faith claim.[^36] The court reasoned that, “a renewal policy is a contract. As with any contract, the parties must necessarily

[^31]: *Common Sense*, at 1483-85.
[^33]: *Id.* at 359.
[^34]: *Id.*
[^35]: *Id.*
[^36]: *Id.* at 364.
agree on the terms of the renewal coverage. Certainly the insured has a reasonable expectation that his insurance policy will not be renewed on less favorable terms unless the insurer affirmatively notifies him of the changes.”\textsuperscript{37} While acknowledging that the contractor had a duty to read its policy, the court found that the insured’s duty to read renewal language “may be less than the insured’s duty to read the original policy,” and thus in this instance the insurer was required to affirmatively notify the insured of any significant changes.\textsuperscript{38}

As the \textit{Thomas} case suggests, bad faith claims tend to be very fact specific. The question at the core of each bad faith suit is the degree to which the insurer acted “unreasonably” in the context of the specific facts at issue.\textsuperscript{39} The policyholder must show more than a breach of the insurance contract. It must generally show that the insurer acted intentionally or recklessly when addressing the claim.\textsuperscript{40} This can include, arguably, a showing that the insurer intentionally or recklessly failed to provide the policyholder with pertinent information. Stated another way, the courts will consider whether no reasonable insurer would have failed to provide the necessary information during the claims process.

The “bad faith” failure to volunteer information during the claims process often occurs in the context of an offer to settle. For example, in \textit{Berges v. Infinity Insurance Co.},\textsuperscript{41} an insured brought a bad faith action against his automobile liability insurer for failing to settle an accident claim involving the death of the other driver and severe injuries to a minor passenger. The insurer not only refused to settle the claim for policy limits,\textsuperscript{42} it failed to advise the insured of the policy limits settlement demand prior to the acceptance deadline. The subsequent judgment far

\begin{footnotes}
\item[37] Id. at 363.
\item[38] Id.
\item[40] Id. at 63.
\item[41] \textit{Berges v. Infinity Ins. Co.}, 896 So.2d 665 (Fla. 2004).
\item[42] Id. at 669-72.
\end{footnotes}
exceeded the policy limits.\textsuperscript{43} When the insurer was sued for bad faith, the trial court granted the insurer summary judgment, but the Supreme Court of Florida reversed, holding that, “Where the insured reasonably relies on the insurer to conduct settlement negotiations, and the insurer fails to disclose settlement overtures to the insured, the jury may find bad faith.”\textsuperscript{44}

Similarly, in \textit{Wallace Mosley v. Progressive American Ins. Co.}, 2018 U.S. Dist. LEXIS 199078 (S.D. Fla. Nov. 25, 2018), a court recently denied an insurer’s summary judgment motion in a bad faith case because the insurer did not sufficiently communicate to its policyholder that if he failed to provide an affidavit attesting to his poor personal financial condition, the claimant would refuse to accept a policy limits offer, thereby exposing the policyholder to a judgment. The policyholder apparently resisted submitting the affidavit because of certain religious and moral beliefs. The court acknowledged that the insurer had informed the policyholder that the financial affidavit was needed, but found that fact issues existed because the insurer did not voluntarily explain “in any discernable detail the gravity of the situation,” including the likelihood of a huge excess verdict.

Other courts reject the breadth of the duty to disclose suggested by the cases discussed above. In \textit{Wedzeb Enterprises, Inc. v. Aetna Life & Cas. Co.},\textsuperscript{45} for example, the court ruled that there is not a good faith duty to determine that an insured is aware of all policy terms and conditions before the insured settles its claims and signs a release. When a fire destroyed the insured’s warehouse, the products stored there released toxins into the environment. The insurer disputed coverage for the necessary remediation, and the policyholder sued for coverage. The court found for the insured, after which the insurer paid $474,326 in exchange for a release from

\begin{itemize}
\item \textsuperscript{43} \textit{Id.} at 671.
\item \textsuperscript{44} \textit{Id.} at 680.
\item \textsuperscript{45} 570 N.E.2d 60 (Ind. Ct. App. 1991).
\end{itemize}
the insured. When the state later sued the insured for failing to remove the fire debris, the
policyholder again sought coverage, this time under the debris removal portion of the policy.
Citing the release, the insurer declined coverage. The policyholder brought suit again, but this
time the court found for the insurer, despite the policyholder’s claim that the insurer had
concealed in bad faith "potential coverage rights" under the policy. The court found that the
insurer had no duty to advise the policyholder about all potential coverage under the policy,
given that the insurer was represented by counsel and had been engaged in litigation with the
insurer.

Similarly, in Schoonover v. Am. Family Ins. Co., an Illinois court held that an insurer's
duty of good faith does not require an insurer to provide a copy of a policy absent a specific
request. After Schoonover purchased his homeowner’s policy, his house was destroyed by fire.
He filed an insurance claim which the insurer denied because the claim was not submitted within
one year of the fire, a condition to coverage. Schoonover hired an attorney and later sued for bad
faith. The trial court refused to grant the insurer’s motion for summary judgment because
Schoonover said he did not have a copy of the policy. The decision was reversed on appeal
because the appellate court ruled that the insurer was not obligated to provide a copy of the
policy unless asked. The appellate court noted that, "[t]he insured cannot blame the insurance
company for his failure to read the policy to discover the requirements for bringing suit. It is not
the duty of the insurer to inform the insured of his duties." The court also observed that
"numerous courts have determined that representation by an attorney precludes an insured from

46 Id. at 62.
47 Id. at 63.
48 572 N.E.2d 1258 (Ill. App. Ct. 1991) (overruled sub silentio on other grounds in Faier v. Ambrose & Cushing,
P.C., 609 N.E.2d 315 (Ill. 1993)).
49 Id.
alleging that he was misled by the terms of a policy or was ignorant of certain provisions in the policy.”

IV. Legal Theory No. 3 -- Unfair Claim Settlement Practices Acts

Most states have an insurance code section that prescribes to some extent the manner in which insurers must handle claims. These statutes are usually referred to as “unfair claims settlement practices” acts. They are generally fashioned after a model law drafted by The National Association of Insurance Commissioners. The NAIC model law defines unfair claim practices to include, *inter alia*, failing to adopt or implement reasonable standards for prompt investigation and settlement, not attempting in good faith to effectuate a fair and equitable settlement, and refusing to pay claims without a reasonable investigation.

Some states have added statutory language stronger than the model law in an effort to provide policyholders with greater protections. For example, certain state legislatures have added a provision that makes it a statutory violation to “misrepresent to claimants pertinent facts or policy provisions relating to any coverages at issue.” California courts have interpreted this provision to prohibit any “implied misrepresentations,” arguably including where an insurer fails to inform a policyholder of its rights under the insurance contract.

For example, in *Davis v. Blue Cross of Northern California*, a group of policyholders brought suit against an insurer for denying coverage. The insurer attempted to compel arbitration under the terms of the insurance agreements at issue, but the policyholders argued that

---

50 Id. at 1266.
51 *See* National Association of Insurance Commissioners' Model Unfair Property/Casualty Claims Settlement Practices Regulation, §§ 5(a), 5(b), 6(d).
52 CA INS CODE § 790.03(h)(1); MD INSURANCE CODE § 27-303(1).
the insurer had waived its right to arbitration and/or misrepresented the arbitration provision under California’s unfair claims settlement practices act.\textsuperscript{54} They asserted that the insurer had situated the arbitration clause within an obscure portion of the contract and had used vague wording for the purpose of concealing that part of the policy.\textsuperscript{55} The trial court agreed, and its ruling was affirmed by the California Supreme Court, which found that the insurers had engaged in an “implied misrepresentation.”\textsuperscript{56} The court found went so far as to find that the insurers had placed the arbitration clause “for the purpose of inducing subscribers to give up their rights” under the contract.\textsuperscript{57} It held that the insurers not only engaged in misrepresentation in violation of the unfair claims settlement practices act, but had also violated the contractual duty of good faith and fair dealing, thereby waiving any right to compel arbitration under the agreement.\textsuperscript{58}

Several states have gone even farther than California to statutorily require insurers to volunteer or explain information during that process. For example, Arizona’s unfair claim settlement practices act prohibits insurers from failing to “to fully disclose to first party claimants all pertinent benefits, coverages or other provisions of an insurance policy or insurance contract under which a claim is presented.”\textsuperscript{59} The Louisiana courts have gone even further. In \textit{Kelly v. State Farm Fire & Casualty Co.},\textsuperscript{60} the Louisiana Supreme Court was asked by a federal court whether the state’s unfair claims practices statute created a duty to disclose facts beyond those strictly-related to the insurance policy’s coverage. The pertinent statutory language prohibited: “Misrepresenting pertinent facts or insurance policy provisions relating to any coverages at

\begin{footnotesize}
\begin{enumerate}
\item Id.
\item Id. at 422.
\item Id. at 426-27.
\item Id.
\item Id.; See also Ramírez v. USAA Cas. Ins. Co. 234 Cal. App. 3d 391 (1991) (insurer obligated to reveal potential uninsured motorist benefits).
\item AZ ADC R20-6-801(D)(1).
\item 169 So.3d 328 (La. 2015).
\end{enumerate}
\end{footnotesize}
issue.” Relying on the use of the word “or,” the state court found that an insurer can be liable for failing to reveal “pertinent facts,” whether or not those facts “relat[ed] to any coverages at issue.” The insurer had communicated to its policyholder that he might face personal liability and that he should therefore consider seeking independent counsel, but the insurer failed to volunteer that the medical bills at issue exceeded the policy limits, nor did it volunteer that it had made a settlement offer that had been rejected by the injured third party. The court found that the insurer was obligated to disclose these facts because they were necessary for the policyholder to determine what was “in his best interest.”

V. Conclusion

While contract, tort and statutory law create certain duties on insurers to comport themselves within certain norms during the claims process, whether and when those norms require an insurer to affirmatively volunteer information without being asked is a tricky question. The courts tend to find that the duty to volunteer exists when a failure to do so would have the effect of affirmatively misrepresenting or concealing information so as to unreasonably deny the policyholder of allegedly “hidden” benefits. The courts are also more likely to find the existence of this duty when the policyholder is not sophisticated and/or is not represented by counsel. Insurers should be wary of these situations and be cognizant of the relevant standards so as to avoid any potential liability failing to volunteer information. Policyholders should also be aware that insurers are not their fiduciaries and, depending on the facts, may not be obligated to volunteer information during the claims process. As a result, they should not wait to be told what is in their best interest; instead, they should ask all questions necessary to obtain a favorable claim outcome.