



## SAME ROADS, NEW RULES

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As popular sharing services make electric scooters and other nontraditional vehicles widely available, open questions remain about how to prove liability when injuries occur. Here are some ways to approach this developing area of litigation.



# Make Way for E-Scooters

By || IRA H. LEESFIELD AND JUSTIN B. SHAPIRO

**A** part of the “vehicle sharing” revolution, hundreds of thousands of pay-per-minute bicycles, electric bicycles, and electric scooters now populate streets, sidewalks, and pedestrian walkways.<sup>1</sup> The growth of sharing services for transportation other than cars has been staggering. Since 2010, the bike share industry alone has offered users more than 123 million paid trips in the United States.<sup>2</sup>

But as this type of sharing has increased, so have reports of users and others being injured or even killed.<sup>3</sup> Although related litigation can offer some direction, attorneys representing people injured by electric scooters and nontraditional vehicles can pave the way in this emerging area.

## Holding Sharing Services Accountable

Vehicle sharing has transformed communities so suddenly that most state and local governments have not yet been able to regulate it. For now, traditional legal principles will dictate the litigation certain to follow this dangerous industry.<sup>4</sup> Most cases against the major vehicle sharing services—including Lime, Spin, Bird, and Citi Bike—likely will include claims that fall into three broad categories: failure to adequately warn, instruct, and qualify users; negligent maintenance of vehicles; and failure to provide necessary safety equipment, such as helmets.

**Failure to warn.** Vehicle sharing services do not mention in their literature that users need any special skills or prior experience. However, electric vehicles such as scooters run at high speeds and require proper body weight distribution at each turn to stay upright. But instead of warning users or offering training and instruction, the service’s app interface is designed to put users on the road as quickly as possible. Once users download the correct smartphone app and add payment information, a scooter is unlocked and a user can immediately start to ride it. If it is dockless, the user can discard it virtually anywhere he or she sees fit, such as the sidewalk.

Because they are supplying a new transportation method that must coexist alongside cars, trucks, and pedestrians, service providers should have a duty to offer, at a minimum, reasonable warnings, instructions, and training.<sup>5</sup> Similar causes of action for failure to warn have been brought successfully in cases involving jet ski rentals,<sup>6</sup> ATV rentals,<sup>7</sup> and Segway rentals.<sup>8</sup>

**Negligent maintenance.** Each major provider is responsible for thousands of unsupervised vehicles, and typically, vehicles may be operated by dozens of users before undergoing a safety inspection to catch common maintenance problems such as malfunctioning brakes or damaged tires. Sharing services should be held responsible for failing to reasonably inspect and maintain their vehicles.<sup>9</sup> Liability can be established by the service’s failure to follow the manufacturer’s maintenance recommendations, adopt and enforce maintenance procedures for its fleets, and meet industry standards for vehicle maintenance.<sup>10</sup>

**Failure to provide necessary equipment.** In cases involving head injuries, find out whether the service offered or provided helmets or other head protection. No regulations currently require vehicle sharing services to offer helmets, but some companies offer free or discounted helmets or on-site helmet dispensers, so consider arguing that an industry standard is already taking form.<sup>11</sup> Given the unique, inherently dangerous characteristics of vehicle sharing and the amorphous industry standards, consider arguing that reasonable care requires services to make helmets mandatory.

## Anticipate Defenses

Some vehicle sharing services require users to click through service agreements that contain forced arbitration clauses. The services’ handpicked arbitrators are likely to enforce any liability waiver, and with no possibility of review, it may be critical to show that the forced arbitration clause is unconscionable





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or otherwise unenforceable to obtain justice for your client.<sup>12</sup>

Users are generally required to sign liability waivers when renting sharing services' equipment, so be prepared for the services to point to these as a defense. Each jurisdiction has its own legal framework that can be used to attack the enforceability of these waivers. Some states such as Louisiana and Virginia refuse to enforce liability waivers altogether due to public policy considerations.<sup>13</sup> Other states such as California, Florida, Montana, New Jersey, and Pennsylvania will not enforce liability waivers in favor of a commercial entity that fails to comply with any safety regulation associated with the activity.<sup>14</sup>

Another way to defeat the liability waiver is to include a cause of action for

gross negligence.<sup>15</sup> As a matter of public policy, courts in most jurisdictions refuse to enforce exculpatory provisions when gross negligence is alleged due to the aggravated nature of the conduct. This principle has been used nationwide to invalidate liability waivers in the context of jet ski rentals,<sup>16</sup> aircraft simulations,<sup>17</sup> gym memberships,<sup>18</sup> ski resort activities,<sup>19</sup> and marina storage contracts.<sup>20</sup>

Vehicle sharing cases should be no different. When discovery exposes multiple reports of collisions and injuries caused by lack of training and inexperience with the vehicles, allege that the services' decision to continue exposing the public to known perils without a meaningful effort to train, instruct, or qualify users amounts to gross negligence. Such allegations should create

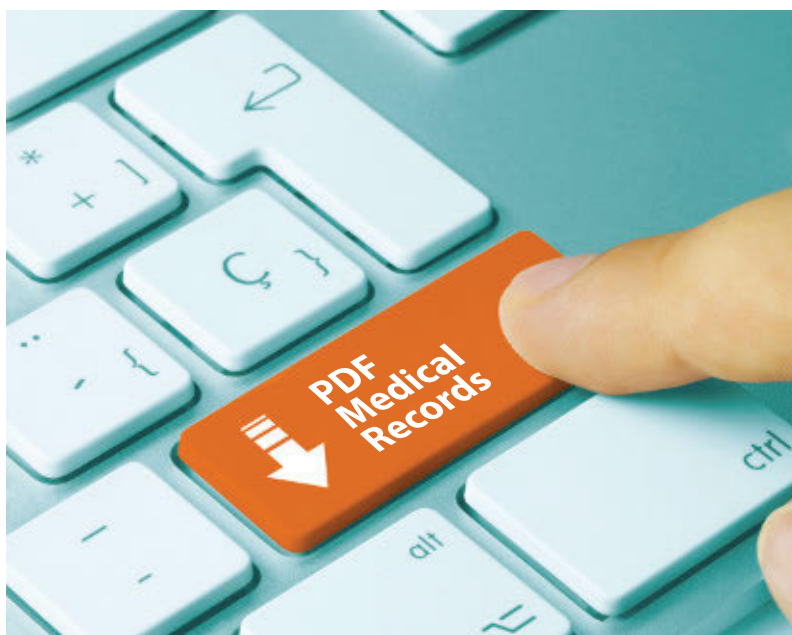
a material issue of fact, precluding summary judgment and allowing the case to proceed to a jury.

Of course, liability waivers are unenforceable against individuals who are never party to the waiver and will have no effect in cases brought by members of the public injured by collisions with shared vehicle users.<sup>21</sup>

### Identifying Additional Defendants

A host of other potential defendants in the zone of your client's injury may be liable.<sup>22</sup> The most likely example is a motorist colliding with a shared vehicle, in which case you would pursue the typical automobile claim. Shared vehicle users may also be injured by non-motorists such as bicyclists, scooter

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users, and even pedestrians.

**Municipalities.** Roadway design and maintenance defects could also play a large role in injuries. Municipalities have a duty to perform reasonable inspections and maintenance of their streets and sidewalks, subject to applicable sovereign immunity provisions.<sup>23</sup> It can be argued that their duty should be greater in the vehicle sharing age when even the slightest pothole, defect, or crack poses greater risks. This is especially true when municipalities have expressly approved of or even solicited funds from sharing services.<sup>24</sup>

Send subpoenas and public record requests to establish the municipality's relationships with sharing services and the number of rides that occurred near the defect. If you can demonstrate the city knew of large numbers of shared rides in the area, you can then argue that the city should have known the importance of quickly identifying and repairing defects.

Discovery may also reveal dangerous roadway designs that leave users especially vulnerable. Municipal liability will arise when the design of any roadway, sidewalk, or parking lot creates an unreasonably dangerous condition for shared vehicles.<sup>25</sup> Regardless of the mechanism of the incident, consider all potential roadway factors, including

- bike lanes that are too narrow or end too abruptly
- uneven asphalt on roadways
- visibility obstructions due to inadequate sight distances at intersections
- visibility obstructions due to foliage or signage
- poorly marked crosswalks
- inadequate roadway medians or railings
- improper maintenance of traffic in work zones
- failure to warn of known dangerous roadways and surfaces.

Review all roadway standards enforced by the applicable department of transportation and any other state and local authority to ensure the roadway design was lawful and appropriate. Your case may extend to the city and also to a series of construction contractors and engineers who created the hazardous conditions causing your client's injury.

### **Private businesses and property.**

Consider whether any private businesses and property owners who are located where shared vehicles are expected were negligent. For example, shopping centers and college campuses should have signs forbidding shared vehicles from accessing narrow pedestrian walkways when a high risk of collision exists.<sup>26</sup> Commercial property owners may be liable for allowing shopping carts, wheel stops, and other equipment to obstruct vehicle paths or for allowing defective or excessively slippery parking lot surfaces.<sup>27</sup> In cold weather states, consider claims against property owners for failing to remove snow and ice from paths used by shared vehicles.<sup>28</sup>

### **Building Your Case**

Start your investigation as soon as possible, and immediately preserve any video footage where the incident took place.<sup>29</sup> Visit the scene to identify relevant cameras at intersections or private businesses or residences.

**Preservation letters.** You may need to send preservation letters to multiple parties, depending on the circumstances of your client's injuries and the nature of the incident. Always send them without delay to the appropriate entities responsible for maintaining the area where the incident occurred because the cameras typically "loop record" and automatically delete footage after a short time period.<sup>30</sup> Remember to subpoena any witness cell phone camera footage if the identity of that witness becomes

available via police reports or independent investigation.

Also send preservation letters to the vehicle sharing service. Demand that the subject vehicle be taken out of service immediately and preserved for inspection. Even in cases when the user's identity is unknown, the vehicles' integrated GPS and Bluetooth technology may allow the service to identify any vehicle in a reported incident based on time and location. Your letter should also include a demand to preserve all maintenance and inspection records, GPS data, and electronically stored information (ESI) relating to the vehicle, which may shed light on the precise locations, speed, and condition of the vehicle.

A similar preservation letter should be sent to any motorists (and their insurers) involved in the incident. Motorists often repair their vehicles as soon as they obtain authorization from their insurer, and this could prevent your experts from reconstructing the incident with a level of precision that photographs do not allow.


In roadway or construction defect cases, also send preservation letters to any entity that may own or control the area. Your letter should demand that the conditions not be modified until a formal inspection is completed. Most important, request advance notice of any repairs so that an immediate inspection can be arranged if necessary. This will allow you to move for spoliation sanctions if the property owner makes quick repairs without notice.

**Experts.** Once all evidence is preserved, consider retaining experts who can assist a jury with the nuances of the vehicle sharing industry, especially in cases involving nontraditional vehicles. Electric bicycles and electric scooters, for example, have unique operational characteristics relating to speed, visibility, steering, and collision avoidance, so it may be beneficial to hire an accident



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reconstruction expert to recreate the scene with these factors incorporated and explained. Most reconstruction experts are also skilled in extracting information from vehicle event data recorders and should be able to obtain any ESI in the vehicle's GPS system. Also consider using a human factors expert to educate jurors on any environmental factors and their effects on the users' capabilities—both what they were physically able to do and what they were perceiving or sensing in the moments before the collision.

Plaintiff attorneys play a critical role in helping people injured by nontraditional shared vehicles, and at the same time, they can raise social awareness of a risky industry. 



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### NOTES

- Nat'l Ass'n of City Transp. Officials, *Bike Share in the U.S.: 2017* (2018), <https://nacto.org/bike-share-statistics-2017/>; Will Kubzansky, *The Secret Life of Teen Scooter Outlaws*, *The Verge* (Sept. 23, 2018), [www.theverge.com/2018/9/23/17882996/teens-electric-scooter-age-requirement-bird-lime](http://www.theverge.com/2018/9/23/17882996/teens-electric-scooter-age-requirement-bird-lime).
- Nat'l Ass'n of City Transp. Officials, *supra* note 1; see also Michael S. Keating, *Bike Share Roadblocks*, *Trial* 47 (April 2018).
- See, e.g., Connie Loizos, *A Lime Scooter Rider Died in Washington, D.C., Marking the Second Fatality This Month*, *Tech Crunch* (Sept. 21, 2018), <https://techcrunch.com/2018/09/21/a-lime-scooter-rider-died-this-morning-in-washington-d-c-marking-the-second-fatality-this-month/>; Jane Morice, *Woman Riding Electric Scooter Hit by Car, Killed in Downtown Cleveland*, *Cleveland.com* (Aug. 19, 2018), [www.cleveland.com/metro/index.ssf/2018/08/woman\\_riding\\_electric\\_scooter.html](http://www.cleveland.com/metro/index.ssf/2018/08/woman_riding_electric_scooter.html).
- See, e.g., Jenni Bergal, *Electric Scooters Have Been Burned, Buried and Butchered. They're About to be Regulated.*, *Pew Trusts Stateline* (Nov. 13, 2018), [www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2018/11/13/electric-scooters-have-been-burned-buried-and-butchered-theyre-about-to-be-regulated](http://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2018/11/13/electric-scooters-have-been-burned-buried-and-butchered-theyre-about-to-be-regulated).
- A recent class action alleges that two major electric scooter sharing services, Lime and Bird, failed to adequately warn users of the associated dangers and to provide adequate instructions. *Complaint, Borgia v. Bird Rides, Inc.*, No. 18STCV01416, 14 (Cal. Super. Ct. Oct. 19, 2018).
- Tassinari v. Key West Water Tours, L.C.*, 2007 WL 1879172 (S.D. Fla. June 27, 2007).
- Gilley v. LTMX Enters., Inc.*, 2009 WL 4924010 (S.D. Ill. Dec. 14, 2009).
- Mero v. City Segway Tours of Washington DC, LLC*, 826 F. Supp. 2d 100, 105 (D.D.C. 2011).
- See Restatement (Second of Torts) §408 (1965) ("One who leases a chattel as safe for immediate use is subject to liability to those whom he should expect to use the chattel, or to be endangered by its probable use, for physical harm caused by its use in a manner for which, and by a person for whose use, it is leased, if the lessor fails to exercise reasonable care to make it safe for such use or to disclose its actual condition to those who may be expected to use it.>").
- No written industry standards have been created yet. The standards we refer to are based on expert testimony on what similar companies do for their customers—if all major companies provide certain instructions and one does not, then that one has violated the industry standard.
- See *Bird, Safety First*, [www.bird.co/safety/](http://www.bird.co/safety/); Gordon Gottsegen, *Lime's \$3M Safety Push Reminds Riders to Wear a Helmet, Park Responsibly*, *CNET* (Nov. 5, 2018), [www.cnet.com/news/limes-3m-safety-push-reminders-rider-to-wear-a-helmet-park-responsibly/](http://www.cnet.com/news/limes-3m-safety-push-reminders-rider-to-wear-a-helmet-park-responsibly/); CitiBike, *Participating Bike Shops*, [www.citibikenyc.com/helmets/bike-shops](http://www.citibikenyc.com/helmets/bike-shops) (offering new members a \$10 coupon to buy a helmet at participating stores).
- Forced arbitration is a broad topic that has been heavily discussed in national publications in recent years and is therefore not addressed in this article.
- La. Civ. Code Ann. art. 2004 (1985); *Hiett v. Lake Barcroft Community Assoc.*, 418 S.E.2d 894, 895–96 (Va. 1992).
- Cal. Civ. Code §1668 (West 2018); *Torres v. Offshore Professional Tour, Inc.*, 629 So. 2d 192, 194 (Fla. Dist. Ct. App. 1993); *Stelluti v. Casapenn Enters., LLC*, 203 N.J. 286, 304 (N.J. 2010); *Mont. Code Ann. §28-2-702* (West 2017); *Warren City Lines, Inc. v. United Refining Co.*, 287 A.2d 149 (Pa. Super. Ct. 1971).
- Peter Holley, *Class Action Lawsuit Accuses E-Scooter Companies of Gross Negligence*, *Wash. Post* (Oct. 20, 2018), [www.washingtonpost.com/technology/2018/10/20/class-action-lawsuit-accuses-e-scooter-companies-gross-negligence/?noredirect=on&utm\\_term=.e27476720b02](http://www.washingtonpost.com/technology/2018/10/20/class-action-lawsuit-accuses-e-scooter-companies-gross-negligence/?noredirect=on&utm_term=.e27476720b02).
- Jerome v. Water Sports Adventure Rentals & Equip., Inc.*, 2013 WL 692471, at \*8 (D.V.I. Feb. 26, 2013).
- McFann v. Sky Warriors, Inc.*, 603 S.E.2d 7, 14 (Ga. Ct. App. 2004).
- Seigneur v. Nat'l Fitness Inst., Inc.*, 752 A.2d 631, 637 (Md. Ct. Spec. App. 2000).
- Tayar v. Camelback Ski Corp.*, 47 A.3d 1190, 1196 (Pa. 2012).
- Dominici v. Between the Bridges Marina*, 375 F. Supp. 2d 62, 68 (D. Conn. 2005).
- See generally *Philippine Airlines, Inc. v. McDonnell Douglas Corp.*, 189 Cal. App. 3d 234, 239 (Cal. Ct. App. 1987); *F.O. Bailey Co., Inc. v. Ledgewood, Inc.*, 603 A.2d 466, 469 (Me. 1992).
- The vehicle sharing industry is certain to result in products liability litigation as it continues to introduce novel, electrified vehicles, but this article focuses on issues unique to vehicle sharing and therefore does not address these claims.
- See *Spechtenhauser v. City of Dubuque*, 391 N.W.2d 213 (Iowa 1986); *Slade v. City of Montgomery*, 577 So. 2d 887 (Ala. 1991); *Singleton v. City of Jacksonville*, 107 So. 2d 47 (Fla. Dist. Ct. App. 1958); N.Y. Pattern Jury Instruction 2:225B ("A [county, city, town, village] owes to the public a duty to keep its streets and highways in a reasonably safe condition.>").
- Noelle Walker, *Coming Fees Have Bike Share Companies Evaluating Fleets in Dallas*, *NBC Dallas-Ft. Worth* (July 9, 2018), [www.nbcdfw.com/news/local/Coming-Fees-Have-Bike-Share-Companies-Evaluating-Fleets-in-Dallas-487709341.html](http://www.nbcdfw.com/news/local/Coming-Fees-Have-Bike-Share-Companies-Evaluating-Fleets-in-Dallas-487709341.html).
- See *Tayar*, 47 A.3d 1190.
- See *Olenick v. City of New York*, 56 Misc. 3d 389 (N.Y. Sup. Ct. 2017).
- See *Fuller v. Powers Funeral Home*, 214 A.D. 2d 1045 (N.Y. App. Div. 1995).
- See *Papadopoulos v. Target Corp.*, 457 Mass. 368 (Mass. 2010).
- See Allegra C. Carpenter, *Spoilation in the Digital Age*, *Trial* 16 (Jan. 2019).
- Most public cameras are operated by the state department of transportation or the city police department.