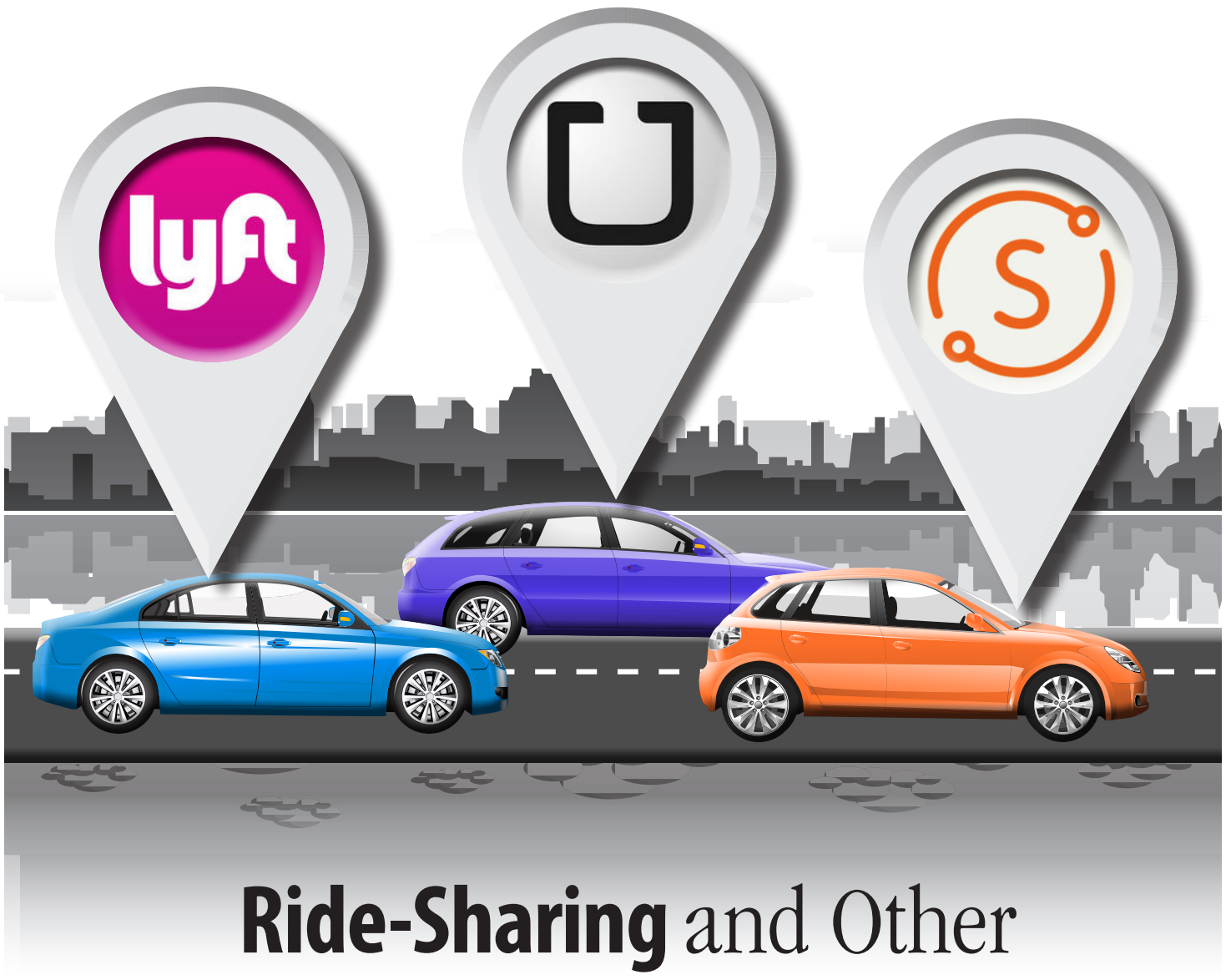
Commercial Litigation



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Ride-Sharing and Other 'Connector' Companies Face Novel Liability Questions

BY JOHN L. EWALD AND DAVID FUAD

The emergence of ride-sharing companies like Uber, Lyft and Sidecar represent a new kind of business model that delivers on-demand services to consumers through mobile applications. Ride-sharing companies are unlike traditional transportation companies—they do not own any vehicles or directly employ drivers. Instead, they have developed mobile applications that connect drivers with passengers and provide payment processing services for trips arranged on the application.

This business model is rapidly spreading into other service industries while fundamental legal questions remain unanswered as courts struggle to fit these new "connector" companies into existing laws and regulations. Courts are currently wrestling with questions as basic as whether a ride-sharing driver is a customer, employee or independent contractor of the ride-sharing company. The answer to that and related questions will have far-reaching consequences for the ride-sharing companies and other connector companies as they face an increasing number of tort claims, consumer class actions, and wage-and-hour class actions.

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Who Is at Fault?

A key threshold question remains largely unanswered for ride-sharing companies: Who is responsible when something goes wrong? In late 2013, a driver using the Uber application struck and killed a six-year-old girl in a San Francisco crosswalk. The family filed a wrongful death suit against Uber and the driver, alleging various theories of liability, including that Uber is negligent in its hiring, training, and supervision of it drivers, and that the Uber application is a defective product.[1] In its answer, Uber denied liability and asserted that its drivers are independent contractors. Uber explained that its drivers license the Uber application from a wholly-owned subsidiary of Uber under an agreement in which they acknowledge that they are independent contractors and "not an employee, agent, joint venturer or partner of [Uber] for any purpose." Thus, Uber's position is that the driver was not providing transportation services on the Uber system during the time of the accident because he was not carrying a passenger, on his way to pick up a passenger, or receiving a request through the Uber application. The case remains pending in the early stages of discovery.

> Ride-sharing companies contend that their drivers do not actually provide a service to the companies. Instead, companies like Uber and Lyft **license their mobile applications to drivers** to allow them to find passengers.

Last year, a judge in the Western District of Oklahoma dismissed a passenger's tort claims against Uber, ruling that Uber was not responsible for its driver's actions.[2] The case appears to be an outlier based on its facts. In granting Uber's motion to dismiss, the court sidestepped the issue of whether the driver was an independent contractor or employee. The court ruled that even if the driver was an employee, Uber could not be liable under a theory of respondeat superior because the driver left the vehicle to assault the passenger and therefore did not act to protect or further the interests of his employer. The court also held that the plaintiff had not plead sufficient facts to support a claim for negligent hiring, supervision, or retention because there were no allegations demonstrating that Uber had knowledge of the driver's violent tendencies.

If courts decline to hold ride-sharing companies liable for their drivers' actions, it is not certain that the injured party will be able to rely on insurance to cover the liability. Many drivers' personal insurance policies do not cover accidents that occur while the insured is engaged in a commercial activity.[3] Uber provides $1 million of commercial insurance coverage; however, this coverage only applies after a passenger has accepted a ride.[4] This leaves a coverage "gap" where a driver has the Uber application turned on, but is not currently driving with, or to, a passenger.

Certain states have tried to fill this gap. The California legislature recently promulgated new regulations for "transportation network companies" (TNCs) like Uber, Lyft, and Sidecar.[5] These rules require that TNCs must provide insurance not only when a driver is carrying passengers, but also "from the moment" a driver logs on to the TNC's application.

New York, by contrast, has folded ride-sharing companies into its existing regulations for licensed commercial drivers. Whereas UberX[6] and Lyft drivers outside New York use their personally owned vehicles and standard drivers' licenses, New York requires that all ride-sharing drivers be commer- » Page 10

Avoiding Contract Disputes That Arise In Disaster Aftermath

BY PETER S. BRITELL AND SUSAN GOLDEN

In the immediate aftermath of a fire, flood or other disaster, property owners and managers face daunting clean-up and restoration tasks, made more difficult in area-wide disasters in which neighboring property owners are undertaking the same work. Many articles and studies now deal with advance planning for disaster recovery. Yet few, if any, deal with ways to minimize disputes and litigation that can arise from the hiring of emergency or post-disaster contractors—or from procurement rules that inhibit the hiring of such contractors.

This article discusses that topic, providing a sampling of the issues and initial thoughts about legal preparedness by commercial, nonprofit and government property owners. The ideas we discuss are equally applicable to property management firms with portfolios of properties.

What type of contract issues can arise in the disaster response context? They include, among others: (1) selection of contractors without following applicable procurement rules, including those needed to qualify for government funding or insurance reimbursement after-the-fact; and (2) engaging vendors in an emergency without a contract or with an open-ended contract, with no agreement as to price, scope, or other terms. These issues may affect not only government agencies issuing contracts for emergency or remediation work, but also non-governmental property owners (from commercial and residential landlords to nonprofit institutions to utilities), as well as insurers and lenders.

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There are two usual phases of disaster recovery: First, the emergency work needed to address the immediate clean-up and restoration of safe access and services, and second, the work needed to restore and rebuild after the disaster has run its course. The contract issues discussed in this article can affect both phases, but are most critical for the emergency situation when there is a need for immediate interventions for health, safety, access and protection of the property.

Initial Issues

The first issue a property owner faces when disaster strikes is finding the right contractor to handle the immediate emergency (e.g., securing a collapsed building and/or doing emergency demolition). This issue can be especially complicated for government agencies and larger commercial entities that are subject to legally-imposed or self-imposed contractor procurement requirements.

When repairs and improvements are needed in the normal course, a property owner has the luxury of comparing contractor qualifications and seeking multiple bids to obtain the best quality of work and pricing. For government agencies and government-funded entities, contractor procurement rules govern this process. These may include, for example, statutory requirements for competitive bidding, targets for use of minority- and women-owned businesses (MWBE), pre-approval of the scope of work and form of contract, and imposition of wage and bonding requirements.[1] Private owners are, of course, free to contract for services at will. However, some private owners have internal policies that require the use of a competitive bidding process or consideration of MWBE contractors to achieve cost savings, diversity and » Page 11

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Commercial Arbitration: Expeditious Resolution, Or Wormhole of Unpredictability?

BY DANIEL GOLDBERG

It is a common view, amongst business people anyway, that arbitration is an expedited and cost-effective way to resolve commercial disputes. In exchange for various procedural protections (rules of evidence, appeals, etc.), a private arbitration allows the parties to avoid the inevitable delays and burdens associated with a public litigation.

Similarly, the parties get a person with relevant expertise to decide their dispute, and so they can expect a fair and informed decision. Those certainly are laudable goals consistent with the motivation behind arbitration generally. And in practice, sometimes it works out that way. All too often, however, the parties are confronted with the unexpected and disconcerting reality that their supposedly streamlined arbitration takes on the form of a typical commercial litigation with all the trimmings of discovery, delay and cost. And to boot, they may have arbitrators who do not understand their issues, yet render significant decisions not subject to appeal or any meaningful review.

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The good news is that parties have substantial control over how their arbitration can look. The bad news is that the opportunity occurs so early in their relationship and at a time when parties rarely focus on such nitty-gritty things as arbitration procedure, which means the chance often is missed. In short, as pop star Meghan Trainor might say, it's all about that arbitration clause. In the majority of cases, the scope and contours of an arbitration is predetermined before the first harsh word is sent in that email missive decrying that someone is not living up to their promise, and long before anyone involves counsel experienced in handling commercial arbitrations.

Unlike traditional litigation, which is governed by statutes, procedural rules, and decades of case law, all of which is taught to first-year law students, arbitration is a creature of contract. For sure there are limited statutes addressing arbitration in the most rudimentary manner, but they focus on the enforceability of awards, rather than arbitration procedure. For that, the parties must think ahead and include in their contract how they want their arbitration to look. The market for arbitration, like all markets, has provided consumers with options. Parties can elect to employ "canned" arbitration rules from a variety of organizations that specialize in administering arbitrations. While helpful, it is not quite as simple as merely selecting one of these organizations and leaving it at that. By way of example, in the United States, the American Arbitration Association (AAA) has a dominant role and often is selected as the arbitration forum. But it would be insufficient simply to say in a contract that, "In the event of a dispute, the parties will arbitrate under the auspices of the AAA." That is because even at the AAA there is no one set of talismanic rules that apply to everything. It has "Consumer Arbitration Rules," "Commercial Arbitration Rules and Mediation Procedures (Including Procedures for Large, Complex Commercial Disputes)," "Optional Appellate Arbitration Rules," and the list goes on. And even within each set of rules there are choices, such as the number of arbitrators, whether the award will be "reasoned" (a written decision explaining the outcome, rather than stating only that one side won), » Page 11

Inside

Advancement of Attorney Fees Is Alive and Well In the **Commercial Division**

BY MICHAEL CARDELLO III
AND STEPHEN J. GINSBERG

The cost of litigating complex commercial cases can quickly become very significant for the parties involved in the process. Under most circumstances, each party will have to bear its own attorney fees and costs absent a contractual right (an attorney fees provision in a contract) or a statutory provision (anti-discrimination laws) that provides otherwise. However, in some cases, a party may not have to bear its own attorney fees and costs of litigation.

Statutory provisions of the New York Business Corporation Law (BCL) (§§722, 723, and 724) govern the advancement of attorney fees and costs to one party from another party under the right circumstances. In addition, a relatively recent decision in the New York Supreme Court, Nassau County Commercial Division, *Schlossberg v. Schwartz*, 43 Misc.3d 1224(A), 992 N.Y.S.2d 161 (Sup. Ct., Nassau Co., 2014) (J. DeStefano), ultimately granted a party's motion for advancement of legal fees and costs.

Advancement, Indemnification

Before delving into advancement rights, it is imperative to distinguish between advancement and a closely-related concept—indemnification. Indemnification for attorney fees and damages under the BCL is addressed at the conclusion of the case and necessarily involves the ultimate determination of whether a corporate officer and/or director "acted in good faith for a purpose which he reasonably believed to be in, or … not opposed to, the best interests of the corporation … ." BCL §§722, 723, and 724. As a result, the right to indemnification must await the outcome of the case.

Advancement, on the other hand, refers to payment of legal fees and expenses during the pendency of the action and does not depend on any ultimate determination of liability. See *Kliger v. Drucker*, No. 003304/11, 2011 N.Y. Misc. LEXIS 6704, *20, (Sup. Ct., Nassau Co. 2011). The right to advancement is not dependent on the ultimate outcome of an action. Id. The overall purpose of advancement is to "provide[] corporate officials with immediate interim relief from the personal out-of-pocket financial burden of paying the significant on-going expenses inevitably involved with investigations and legal proceedings." *SEC v. FTC Capital Mkts.*, 09 Civ. 4755, 2010 U.S. Dist. LEXIS 65417, *14 (S.D.N.Y. June 29, 2010) (citing *Homestore v. Tafeen*, 888 A.2d 204, 213 (Del. 2005)).

BCL §§721-724

BCL §721 addresses the non-exclusivity of statutory provisions for indemnification and advancement of directors and/or officers. BCL §721 provides, in relevant part:

> The indemnification and advancement of expenses granted … shall not be deemed exclusive of any other rights to which a director or officer seeking indemnification or advancement of expenses may be entitled, whether contained in the certificate of incorporation or the by-laws … .

Indemnification of officers and directors of a corporation is addressed in BCL §722(a) and (c). Section 722(a) deals with indemnification of a party to an action, other than a derivative action in the name or right of the indemnifying corporation, "by reason of the fact that [such party] was a director or officer of the corporation … if such director or officer acted, in good faith [or], for a purpose which he reasonably believed to be in … the best interest of the corporation." Section 722(c) contains identical provisions for indemnification of officers and directors in derivative actions when the lawsuit has been brought against such persons "by or in the right of the corporation to procure a judgment in its favor." In both §722(a) and §722(c), indemnification includes "reasonable expenses [and] attorney fees actually and necessarily incurred" in defense, settlement or on appeal.

BCL §723 also incorporates by reference the bases for indemnification under §722, but unlike §722, no distinction is made between individual and derivative actions. Section 723(a) states:

> A person who has been successful on the merits or otherwise, in the defense of a civil or criminal action or proceeding of the character described in Section 722 shall be entitled to indemnification as authorized in such section.

As succinctly stated by Judge Timothy Driscoll in *Kliger v. Drucker*, "if a corporation provides for indemnification to its directors and officers consistent with BCL §722, BCL §723 binds the corporation to its promises to indemnify." 2011 N.Y. Misc. LEXIS at *20. Section 723(c) provides:

> Expenses incurred in defending a civil … action or proceeding may be paid by the corporation in advance of the final disposition of such action or proceeding upon receipt of an undertaking by or on behalf of such director or officer to repay such amount as, and to the extent, required by paragraph (a) of section 725.


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Unlike §§722 and 723(c), which depend on a certificate of incorporation, corporate by-laws or some other corporate act to provide indemnification and/or advancement, a party to an action or proceeding may seek indemnification and/or advancement rights pursuant to BCL §724. Section 724(a) of the BCL provides that when indemnification of directors and officers would otherwise be permitted under §§722 and 723 of the BCL, a party seeking indemnification or advancement may make application therefore either in the action or in a separate proceeding. With regard to advancement, §724(c) states:

> Where indemnification is sought by judicial action, the court may allow a person such reasonable expenses including attorney fees, during the pendency of the litigation as are necessary in connection with his defense therein, if the court shall find that the defendant has by his pleadings or during the course of the litigation raised genuine issues of fact or law.

Before Advancement

Prior to the advancement of a corporate director and/or officer's attorney fees and costs for the defense of an action or proceeding, that person must provide the corporation with an undertaking. BCL §723(c). However, unlike such an "undertaking" as covered within the CPLR, an "undertaking" within the provisions of the BCL is simply an unconditional, unsecured promise by the officer or director to repay the advancement to the corporation. No cash deposit, bond or surety is required as the officer or director making the undertaking acts as his own surety. See *Spitzer v. Soundview Health Ctr.*, No. 401432/04, 2005 N.Y. Misc. LEXIS 3249, at *9 (Sup. Ct., New York Co. Jan. 27, 2005).

> Statutory provisions of the New York Business Corporation Law (§§722, 723 and 724) **govern the advancement of attorney fees and costs** to one party from another party under the right circumstances.

Advancement Rights

On May 14, 2014, Judge Vito M. DeStefano of Supreme Court Commercial Division issued a decision granting a party's request for advancement of legal fees in a case entitled *Schlossberg v. Schwartz*, 43 Misc.3d 1224(A), 992 N.Y.S.2d 161 (Sup. Ct., Nassau Co. 2014). In *Schlossberg*, the plaintiff-counterclaim defendant, a shareholder, director and former officer of Steuben Sales, commenced an action in both his individual capacity and derivatively on behalf of the corporation. The defendants-counterclaim plaintiffs interposed a litany of counterclaims, including counterclaims based upon allegations that the plaintiff-counterclaim defendant misappropriated corporate confidential information, converted corporate assets, breached his fiduciary duty and wasted corporate assets. The plaintiff-counterclaim defendant then moved for an award of expenses, including reasonable legal fees, pendent lite, in connection with the defense of counterclaims made by Steuben.

In his detailed and well-reasoned decision, DeStefano first conducted an analysis of §§721-724, tracing their roots to before the 1941 and 1945 amendments to the General Corporation Law (GCL) and before the BCL was enacted. In that discussion, the court noted that prior to 1941 there was no right of indemnification to a corporate official in New York in a direct suit brought against him by the corporation. Id. at *17.

However, in 1941, the New York legislature enacted §§27-a and 61-a of the GCL to permit a corporation to grant corporate officials the right of indemnification through the certificate of incorporation, by-laws, or a shareholder resolution and provide mandatory indemnification to a corporate official that is successful in his defense of a direct or derivative suit brought by or on behalf of the corporation. Id. at *17-18. In 1961, the BCL was enacted, and then amended in 1986, to further enlarge indemnification rights to directors and officers sued by third parties. Id. at *23-24.

Based upon the court's review of the history of indemnification and Steuben's by-laws, DeStefano concluded that the plaintiff-counterclaim defendant was "not prohibited" from seeking indemnification for the defense of direct counterclaims brought by Steuben against him "by reason of the fact that he is or was a director or officer of the Corporation" and that "although ultimate resolution of the indemnification issue must await the conclusion of the action, it is sufficient to note that an advancement of fees pursuant to BCL §724(c) may also properly be sought." *Schlossberg*, at *28.

The court followed this by directly addressing whether there exist "genuine issues of fact or law" that the counterclaims against the plaintiff-counterclaim defendant were made "by reason of the fact … that he is or was a director or officer of the corporation." Id. The court then stated that, not surprisingly, there is little case law or commentary on the subject, although the Delaware courts have addressed it on occasion and found the Delaware cases to be instructive. The Delaware case law indicates that a "broad interpretation of that phrase [genuine issues of fact or law], which would include a wide array of claims that might be asserted against a director or officer, is warranted." Finding Delaware case persuasive, the court held:

> Considering the nature of the counterclaims asserted against Plaintiff, all of which involve conduct alleged to have been based on Plaintiff's status as an officer or director of Steuben, the court concludes that the counterclaims, *as pleaded*, involve issues and claims made by reason of the fact that Plaintiff was an officer or director of Steuben. That some of the counterclaims might have been asserted differently—and more specifically, in a manner that did not invoke the Plaintiff's status as director or officer, or, that evidence could have been presented in opposition to the motion conclusively establishing the absence of any nexus between the counterclaims and the Plaintiff's 'official corporate capacity', is speculative and cannot defeat the instant application." Id. at *30.

Accordingly, the court granted the plaintiff-counterclaim defendant's application for advancement of legal fees and expenses relating to the defense of the counterclaims asserted against him.

Conclusion

Overall, advancement is an important concept that counsel should always contemplate before setting forth claims against an officer and/or director of a corporation. Without proper thought and contemplation, unintended adverse consequences may occur, which could be detrimental to the prosecution of claims, as demonstrated in *Schlossberg*. From the perspective of the defense, advancement can be a very significant factor when developing a litigation strategy to effectively defend claims brought against an officer and/or director of a corporation.

Forethought and an understanding of advancement are strongly suggested before commencing an action against a corporate officer and/or director as well as when defending an action on behalf of a corporate officer and/or director. With the proper understanding of advancement under the BCL, counsel may be able to successfully mitigate against the risk of an unfavorable decision granting an adversary's motion for an advancement award or utilize advancement as a weapon in defense of claims.

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Ride-Sharing

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cially licensed and register their vehicles with the Taxi and Limousine Commission.[7] Lyft initially resisted this requirement, causing the Taxi and Limousine Commission to issue a press release in July 2014 declaring Lyft unauthorized to operate in New York City and warning TLC-licensed drivers working for Lyft that they risked losing their TLC licenses.[8] Eventually, Lyft capitulated to the TLC's regulatory scheme in order to compete with Uber in New York.

Who Is the Customer?

Uber and Lyft are currently facing multiple class action lawsuits from drivers that turn on the question of whether the drivers are employees of the companies. Plaintiffs are alleging that the companies misclassify them as independent contractors, thereby violating wage and hour laws by improperly skimming tips, failing to pay overtime or provide breaks, and not reimbursing business expenses.

The primary factor in determining whether a worker is an employee or an independent contractor is the level of control exerted over the work performed. Other factors include whether the individual provides his or her own equipment, how he or she is paid, and whether taxes are withheld from payments.[9] Consistent with other states, New York law generally provides that an employer is not liable for the torts or negligent conduct of their independent contractor.[10] The many exceptions to this rule include the employer's negligence in hiring or training the contractor, "inherently dangerous" work, and specific non-delegable duties.

In response to these employment class action suits, ride-sharing companies contend that their drivers do not actually provide a service to the companies. Instead, companies like Uber and Lyft license their mobile applications to drivers to allow them to find passengers. In a recent filing in a Northern District of California class action case against Uber, Uber argued that it provides "lead generation and payment processing services" via its application to its drivers for a fee.[11] Thus, Uber argues, because drivers pay Uber to use its application, they are neither independent contractors nor employees of Uber—they are customers, just like its passengers.

In the alternative, Uber argued that even if its drivers do provide a service to Uber, they do so as independent contractors. Emphasizing its lack of control, Uber noted that its drivers are unsupervised, supply their own cars, and that either the driver or Uber can cancel the working relationship at any time. Uber cannot tell its drivers whether, when, or where to work. In fact, because a ride-sharing driver can work for Uber and Lyft at exactly the same time by running both applications simultaneously, if drivers were held to be employees, it is not clear who would be required to provide the required overtime pay or meal breaks.

Plaintiffs, on the other hand, argue that Uber and Lyft have all the hallmarks of an employer: They screen, hire, and train their drivers and provide comprehensive "guidelines" for their appearance and conduct. They set and collect the fares imposed, and then pay a percentage of those funds back to their drivers (without deducting income taxes). In addition, Uber and Lyft exert control over the quality of the services rendered by compiling numerous statistics on their drivers, and can terminate drivers for falling below certain standards, such as low customer ratings, failing to arrive on time, and cancelling rides.

In a similar class action against Lyft, also pending in the Northern District of California, Lyft advanced many of the same arguments as Uber, including that its drivers could use multiple ride-sharing platforms simultaneously, and can choose when and where to work. One distinction between Lyft and Uber is that Lyft has a system for drivers to "reserve" hours ahead of time. While drivers can theoretically turn on the application whenever they would like to work, if the supply of drivers at a particular time outstrips demand, Lyft can prevent drivers from using the system if they have not reserved their hours ahead of time. Lyft also gives priority during popular times to its highest-rated drivers. Thus, at least part of the time, Lyft arguably imposes a schedule on its drivers.

Both courts issued their rulings on the same day earlier this month, denying summary judgment in both cases and holding that the question of whether the drivers are employees or independent contractors must be resolved by a jury.[12] Neither court was persuaded by the threshold argument that the drivers do not provide any services for the companies. The court in *Lyft* called the argument "obviously wrong," while the court in *Uber* noted that Yellow Cab is not a "technology company" merely because it uses CB radios instead of smartphones to dispatch its cars.[13] Turning to the question of whether or not the drivers are independent contractors, both courts concluded that the most important factor—the right of control—probably pointed in favor of an employee relationship. In particular, the court in *Lyft* emphasized the ability of Lyft to terminate its drivers at any time, for any reason. Additionally, while Lyft and Uber emphasize the freedom afforded their drivers, both courts expressed deep skepticism at the companies' argument that the lengthy list of instructions given to their drivers are not requirements, but mere "suggestions." Both courts, however, also found that many other factors cut in favor of Uber and Lyft, including that the drivers signed contracts agreeing that they were independent contractors, enjoy greater scheduling flexibility than typical employees, and provide their own vehicles. Ultimately, the Lyft court found that the factors "provide[d] nothing remotely close to a clear answer."[14]

The courts also commented on the inaptness of the existing tests for determining whether a ride-sharing driver is an employee or independent contractor, with the court in *Lyft* lamenting that "the jury in this case will be handed a square peg and asked to choose between two round holes."[15] But both courts recognized that their hands were tied, and that "absent legislative intervention, [the] outmoded test for classifying workers will apply in cases like this."[16]

How Much Control Is Enough?

Within the last two months, Uber has been hit with a number of consumer class action lawsuits alleging that Uber has made misrepresentations related to the safety of their drivers.[17] While the wage-and-hour class actions emphasize the level of control the ride-sharing companies exert over the drivers, these consumer class actions seek to hold Uber liable for its alleged lack of control over the drivers. These cases contend that Uber has made false claims regarding the rigorousness, efficacy, and "industry-leading" nature of its background checks. The complaints allege that while Uber markets itself as having the "safest ride on the road," there are no measures taken to confirm the identity of the applicant, such as an in-person meeting or a fingerprint requirement.

Regardless of the merits of these cases, they highlight the need for companies in similar situations to strike an appropriate balance between advertising their safety policies and unintentionally binding themselves to an impossible standard. The cases also illustrate a significant tension. Before getting into a stranger's car, consumers want to know that the ride will be a safe one. The most effective way for ride-sharing companies to ensure the rider's safety is to exercise more control over the selection and training of its drivers. But the more control that Uber, Lyft and others exert (or appear to exert) over their drivers, the more likely it is they will be found to be employers of the drivers.

Conclusion

Ride-sharing companies are just now learning how courts will rule on a number of issues that should have a large impact on their potential liability. Courts that have been presented with the employee/independent contractor issue are skeptical of the arguments made by the ride-sharing companies and concluded that the issue could not be resolved as a matter of law.

The court rulings on this issue will not just affect ride-sharing companies. A recent article estimated that venture capitalists in 2013 invested over $1.5 billion in on-demand companies.[18] The profitability of these new companies will likely be significantly impacted by whether the individuals providing the on-demand services are considered to be employees or independent contractors of the companies. The answer will likely not be the same for every company or every service industry. A key consideration for each company is how to strike a balance between exerting control over the individuals providing the services while maintaining enough of a distance to establish an independent contractor relationship. Of course, if the skepticism expressed so far by certain courts of the independent contractor argument is indicative of what turns out to be the prevailing view, companies may end up with the worst of both worlds and find themselves with employees over whom they exert little control. If experience shows that courts will likely conclude that a service provider is an employee, on-demand companies may be better off focusing their efforts on exerting more control over the service providers to minimize liability in that fashion. Legal rulings on these issues over the next few years should be very important in shaping the future of these "connector" companies.

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Arbitration

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scope of discovery, hearing location, and more. And that is just the AAA. There are ICC arbitrations, UNCITRAL, JAMS, and many others. The parties even are free to employ their own rules that do not conform to any pre-packaged organization, known as "ad hoc" arbitrations. Clearly, having an effective, and predictable, arbitration takes some thought, and that thought must occur at the time the parties enter into their contract. If they brush it aside, either because they do not want to think about the divorce while planning the wedding, they cannot agree on the specifics, or they simply lack the experience to craft an effective clause, they could live to regret it. For members of the arbitration bar, it may sound like heresy, but the parties are better off having no arbitration at all and resort to litigation in court, rather than deal with an arbitration based on a weak clause.

Why, one might ask? What manner of disaster will befall the parties if they "just agree to arbitrate" and worry about the details later? The answer is unpredictability, time and cost. Precisely the things arbitration is designed to avoid. And the bonus is they still will bear the drawbacks of arbitration, such as lack of appellate review. If the arbitration clause does not clearly spell out what happens and when, then surely the parties will reach an impasse once they are in the mode of fighting with each other. They will dispute how arbitrators are selected, where the hearing will occur, whether there will be depositions, and everything else if they believe they would be disadvantaged by agreeing to whatever it is the other side wants. As the saying goes, they will fight over the shape of the table. Parties and lawyers failing to agree in a commercial dispute hardly is newsworthy, but in court there are defined rules, and there is a judge to employ them who generally has a track record, so the parties can predict how she will react. Not so in arbitration.

> Parties are better off having **no arbitration at all** and resort to litigation in court, rather than deal with an **arbitration based on a weak clause.**

A good illustration stems from the one example of parties failing to provide for arbitrator selection. If that is not spelled out, either in the arbitration clause itself or by reference to a set of rules that clearly define how the panel is to be selected, the parties may find themselves having to go to court to seek an order compelling arbitration, and appointing a panel. Assuming the applicable jurisdiction allows for judges to appoint arbitrators upon application of the parties, the parties now are faced with the prospect of having to start a lawsuit. Obviously that costs money, is public, and takes time. Whereas the parties can by agreement impose on an arbitrator a deadline for issuing a decision, the same is far from true with a judge, who is not paid to cater to these specific litigants, and has many other cases. More importantly, however, the identity of the arbitrator has just become a bit of crapshoot. Going in, the parties may have anticipated they would hand their fate to a panel with particular expertise. But the judge who now is deciding how the arbitration will operate may not feel compelled to appoint an unknown person with the expertise desired by the parties. It is not uncommon for judges to refer such matters to people they know, such as their former partners, colleagues, or retired judges looking for work as mediators or arbitrators, and that person may have absolutely no experience with the applicable industry or issues. By failing to sculpt the shape of the arbitration at the outset, the parties now have lost a fair bit of control over how the dispute is going to be resolved, which is perhaps the core benefit of choosing to arbitrate in exchange for forgoing some of the procedural protections of litigation.

At this point, one might be wondering why any rational businessperson would choose to insert an arbitration clause in their important contracts at all, but that would be missing the point. Arbitration can be an excellent way to resolve disputes quickly, efficiently, and in private. But that can happen only if the parties include an effective arbitration clause in their contract. Delineating every aspect of an effective arbitration clause is beyond the scope of this article, but there are key concepts that should be considered, and they include the following.

Arbitrator Selection. This cannot be overstated. If the arbitration has any hope of being successful, the parties *must* provide a specific mechanism for selecting their panel. There is no doubt that once the bullets start to fly, the parties will agree on precious little. In terms of a process, it can be as simple as following the AAA rules for arbitrator selection, though that does cede control from the parties in picking their arbitrator. Or, the parties can identify criteria and create their own process. Typical criteria include requiring a certain number of years' experience in a particular industry, having a law degree, having practiced in a certain area for a period of time, or having been a judge. The parties even can pre-determine a specific list of people from whom the panel must be drawn, though there are pitfalls with this approach if such people prove unavailable when a dispute arises, potentially years later. The limits are bound only by the parties' creativity and the nature of the contract at issue. For instance, if the contract concerns a particularly technical and obscure matter, then it probably is more important to have a panel with specific expertise in the subject matter. If it is a generic sales contract, then a lawyer with UCC experience could be ideal.

Included in the process is deciding whether there will be a single arbitrator, or a panel of some other number, often three. Employing a single arbitrator has the advantage of speed, less cost and less complexity (e.g., scheduling, persuading only one person you are correct). A multi-person panel has the advantage of hedging against an arbitrary or palpably wrong decision, because consensus is required to decide the case. There is no right answer, but a choice must be made, otherwise the parties will spend time and money fighting about it.

In terms of picking the actual people, the parties have many options. They can use the default rules for whatever organization they have chosen to administer the case. For instance, under the AAA, for three-arbitrator panels, each side picks one person and then those two people choose the "chair" of the panel. Another option is for the parties to exchange lists of candidates until the requisite number of people appear on both lists. This could take more time, but it has the virtue of the parties choosing the same people, which increases the level of confidence in the decision.

Truly, selection of solid arbitrators is of paramount importance. Once installed, the panel will have plenary control over the proceedings, and absent exceedingly rare situations (fraud, collusion) there will be no review or overturning anything the arbitrator does within the confines of the case. This is not limited to the final decision on the merits, but things like the scope of discovery, scheduling, nature of submissions, admission of evidence and every other aspect of case administration will be in the hands of the panel. So choose your arbitrators wisely!

Discovery. A hotly contested aspect of commercial arbitration is the scope of discovery, which is often the most expensive and time consuming portion of litigation, and hence a motivator to arbitrate. That said, it is the rare case where both sides do not want some modicum of disclosure. Exchanging documents, conceptually, is not usually a contentious issue. But the scope of that discovery can be. Parties should give thought to whether they want to limit the scope of document discovery, either by limiting the number of requests or the types of documents to be produced (because of its volume and explosive potential, email often is a hot-button issue). Or perhaps a cost-shifting provision that makes a requesting party think twice before requiring the other side to engage in an arduous process to search for and produce voluminous documents of marginal relevance.

But document discovery is not usually where the fight is most intense. The main event focuses on depositions. If the arbitration clause sets the scope of deposition discovery, then there will be a fair bit more predictability to the proceedings. One straightforward and easy way to handle it is to provide that each side will depose the other's hearing witnesses, plus some additional modest number. But most clauses do not address the issue. Imagine a scenario where the parties have not provided for how deposition discovery will occur, and compounds that by failing to provide for how their arbitrator will be selected. Further, imagine the court or arbitration body overseeing the case selects a single arbitrator, someone neither side knows. Now, one side will argue that it needs 25 depositions, and the other will say there should be none, or at most one or two. The look and feel of this arbitration, both in terms of cost and time, will be affected in a fundamental way by the resolution of this issue, yet neither side will be able to predict the outcome, and it will be decided by someone they did not choose themselves. That scenario undermines the main benefits of arbitration, and could have been cured if the parties had included in their arbitration clause something about how depositions will work, or at least select a set of rules that is clear on depositions (most canned sets of rules are not).

Schedule. Lawsuits can go on forever, and the dirty little secret is that arbitrations can too. If the panel does not take control of the case and force it forward on a reasonable schedule (bearing in mind that arbitrators are paid by the hour), it is far from unusual for arbitration proceedings to drag on for over a year, and sometimes a fair bit longer. And the final hearings themselves can continue for extended periods of time, often not on consecutive days, so the parties may find themselves being forced to come back again and again for continued hearings over a very long period of time. Obviously that is disruptive to any business.

Thankfully, the schedule is entirely in the parties' control, but only if they address it in their arbitration clause. Set an amount of time for discovery, how many days the hearing will take, specify that the hearing will be on consecutive days. Or simply set the amount of time that will run from when the arbitration is filed until a final decision; such clauses focus arbitrators on compressing the case, as the more time taken for discovery and hearings, the less the panel has to render its decision and write the opinion.

Drafting exhaustive arbitration clauses obviously cannot and should not be the focus of negotiations on significant business transactions. But parties choosing to lob in an incomplete and generic arbitration clause into the "miscellaneous" section of their key contracts do so at their peril. If a company has a general form of contract it uses repeatedly, it would be well-advised to consult experienced counsel to draft a cogent arbitration clause covering the issues important to that company. As to the more bespoke deals, parties at least should run the clause by the lawyers at their firms who have experience in such matters. That very small investment could pay huge dividends later, if even one sour deal ends up being resolved quickly and inexpensively due to an effective arbitration clause.

Contract

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quality work. Private owners may also be contractually-bound to comply with specified procurement rules and pre-approvals (such as by the owner, a lender or an insurer).

In an emergency—particularly an emergency that impacts more than one building, such as a major flood—owners must scramble to find a contractor with the right qualifications and immediate availability. They need to engage the contractor before he or she accepts other jobs. There is no time for comparison-shopping, bidding and pre-approvals.

Likewise, the last thing anyone thinks of in an emergency is negotiation of a contract. Yet failure to have a contract may lead to post-emergency disputes about price and liability.

The usual contract for building repairs and improvements would at a minimum specify the scope of the work, the contract price and the contractor's responsibility for the work. Government agencies and larger private owners have lengthy contract provisions to address everything from compliance with law to wage and hour reporting to remedies in the event of a default. These contract protections cannot fall by the wayside during an emergency.

A simple case illustrates the problem: A storm floods the below-ground levels of an office building where electric switching and boilers are located. The owner is able, on short notice, to hire a contractor to deactivate the electric and boiler facilities and another contractor to pump out thousands of gallons of water. The contractors then present their bills, which are substantially higher than the "back of the envelope" oral estimates the owner received during a few frantic telephone conversations about getting the contractors on site as soon as possible. The owner also claims that the contractors damaged portions of the electric system that were not impacted by the flood and the contractors point fingers at each other. The owner's gratitude for emergency assistance turns to anger and possible litigation over the amount due and possible negligence. As construction lawyers know, construction litigation is highly detail-intensive, often with hundreds of separate issues of fact and/or law—and it is very expensive.

Preparation

How can you avoid the issues described above? Just as property owners are now making physical improvements that will help their buildings withstand a future disaster (such as moving the emergency generator out of the basement), so should they consider making legal preparations so they are ready to respond in an emergency.

One strategy is to have emergency contractors on stand-by retainer with pre-negotiated contracts. This arrangement allows the property owner time for a thorough and competitive contractor selection process, including consideration of contractor qualifications and pricing, MWBE status, and other contract terms. The property owner can use its working knowledge of the building and prior disaster situations, as well as consultation with advisors and contractors, to determine the possible types of emergency work that might be required in different disaster scenarios. The pre-negotiated form of stand-by emergency contract would describe the scope of the emergency services available, the mechanism for activation (e.g., two-hour notice by phone or email), the pricing mechanism, and the parameters of liability for the owner and contractor.

For most emergencies the pricing mechanism will be time and materials because the extent of necessary services cannot be sufficiently pre-determined to allow for a lump sum price. However, the contract can include agreed hourly rates and/or unit prices so that the cost is auditable and not entirely open-ended. For example, the price might be keyed to gallons of water pumped out.

Defining liability is both easy and difficult. An emergency contractor is somewhat like a Good Samaritan. Work done in emergencies—especially in peril of flood, fire, wind, or explosion—should not be subject to the same standard of care as would apply in normal cases. At the same time, no one should be excused from willful misconduct or patently gross negligence. (Indeed, in New York, one cannot contract away such liability.) The contract can say this. The contract might also describe typical means and methods that would be agreed *not* to be negligent. Such a "for the avoidance of doubt" provision would clarify the expectations of both parties.

There are also potential complications arising under environmental laws. Emergency contractors will typically ask to be indemnified against legal risks arising out of pre-existing or disaster-caused environmental conditions. This may be fair under the circumstances. However, if the contractor is expert in such matters, the contractor should be responsible for actions specifically within the area of its expertise. Regardless of the allocation of liability, the contractor should be responsible for compliance with the requirements of environmental laws (e.g., with respect to transport and disposal of contaminated debris) and the cost of compliance built into the contract price.

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An emergency stand-by contract could have a multi-year term, or it can be renewable year-to-year or terminable on specified notice. Typically, however, it would provide for periodic adjustment of hourly rates or other price terms to follow the vendor's standard price adjustments.

For contract costs expected to be paid with government funds or insurance proceeds, this type of advance arrangement can have the benefit of complying with standard procurement requirements, such as competitive bidding, and thus being more likely to qualify for reimbursement. Having pre-qualified emergency contractors on stand-by would also address one other important issue: The prepared owner will receive a priority response by its contractor, while other owners affected by the disaster are competing to find an available contractor.

Address the Unexpected

Many government procurement regulations have "emergency" exceptions to their usual rigid application. It is worth examining a few examples, which are illustrative of another approach to post-disaster contracting by government agencies and private owners. These exceptions create narrowly-defined carve-outs from the usual rules, providing leeway for emergency response with carefully calibrated levels of risk. These exceptions can be critical for government agencies—and sometimes owners seeking government funding reimbursement—after previously entering into an emergency contract.

One way these provisions limit risk is to the limit the term of an emergency procurement. The U.S. Department of Homeland Security (DHS) offers an example. The Secretary of DHS is authorized to promulgate regulations for emergency contracts with a time limit of up to 150 days "to meet the urgent and compelling requirements of the work to be performed" before the agency must "enter into another contract for the required goods or services through the use of competitive processes."[2]

Another way these provisions limit risk is to require some element of competition for the emergency procurement, although less than a traditional competitive request for proposals process. The New York City Charter provides an example: "In the case of unforeseen danger to life, safety, property or a necessary service, an emergency procurement may be made with the prior approval of the comptroller and corporation counsel, provided that such procurement shall be made with such competition as is practicable under the circumstances … ."[3]

It is worth noting that many legal requirements imposed on government contracts and funding are *not* waived, despite emergency conditions. For example, New York State Labor Law hour and wage requirements for public works projects have an exception permitting longer work hours in an emergency, but no exception to the prevailing wage requirement.[4] In 2013, the New York State Office of the Attorney General successfully recovered back wages from a contractor that paid its employees below the prevailing wage for work done in the aftermath of Superstorm Sandy.[5] Likewise, the New York State Finance Law does not provide an emergency exception to bonding requirements that apply to public improvements.[6] Therefore, government agencies, as well as owners and contractors who may be paid with government funds, should be aware of and comply with applicable requirements unless there are express exceptions.

Be Informed

Certainly for larger recovery projects, and those with special requirements (such as health care facilities, laboratories, any building with special IT facilities, etc.) the pre-selected team should include licensed engineers and perhaps code expediters. The simple reason is that all emergency repairs will need to comply with code, which may involve multiple and complex filings and sign-offs in a particular case. Engineers may also be needed to evaluate and document the damage. Delay in finding qualified engineers for these tasks can mean delay in re-occupancy of a building, with significant revenue impact (both lost revenue and lost rent), business inefficiencies, employee hardship, and so on. Adding to these complications may be "grandfathering" issues (for example, where an older damaged building was not in compliance with current code requirements). Indeed, for larger institutions with older facilities, disaster planning might include pre-consideration of whether and how grandfathering issues may be problematic in the event of damage after a major disaster event. Addressing such questions now may avoid later delays during which a facility cannot be reoccupied after a disaster.

Best Practices

Procurement issues can also impair or prevent recovery from insurance after a loss. It is risky for an insured to engage a contractor for emergency work after a disaster *before* the insurance adjustment process. The insurer may second-guess both the scope of work and the fairness of the contract price. This can lead either to diminished recovery or no recovery at all, depending on the terms of the policy. (At a minimum, the insurer should be notified of the claim before the work begins.)

Sometimes, of course, the insured must sign a contract before or outside the adjustment process. To mitigate the risk of problems in such cases, the insured should take care to follow best contracting practices to the extent possible under the circumstances. For optimal preparedness, this would mean following the same pre-disaster procedures and precepts outlined above. To handle the immediate emergency response, insureds should have a pre-qualified, competitively-selected list of responsible vendors and emergency contracts with pre-agreed rates, unit prices and other standard terms. Where work is not for an immediate emergency response and after-the-fact competitive bids can be obtained, this would include getting the best prices available under the circumstances. It might also mean having termination rights or short-term contracts that can be replaced as soon as practical with contracts procured according to the insurer's requirements.

Plan Now to Avoid Litigation

Disaster preparedness often invokes theoretical interest but little action. Many property owners are disinclined to devote time, let alone money, in readying for a 2 to 5 percent risk. Yet taking time and spending money now to prepare for the worst can result in geometric financial savings, as well as huge savings in business operations and human resources. It can also minimize the risk of after-disaster litigation resulting from failure to address the contract and planning issues outlined in this article. And to make the point again, litigation of this type is often construction litigation, which construction lawyers and other litigators know is among the most complex, tedious, and expensive types of litigation.

Finally, this article is not intended as a comprehensive discussion. Rather, it outlines a sampling of issues and ideas to provoke discussion. An owner considering disaster preparedness should use this article as a starting point and then consider what the specific ramifications of the issues discussed might be for that owner's own disaster profile characterization.

1. See, e.g., New York City, N.Y., Charter §312 (competitive bidding); N.Y. State Fin. Law §137 (McKinney 2014) (bonding); N.Y. Comp. Codes R. & Regs. tit. 5, §142.7 (2015) (MWBE); N.Y. Lab. Law §220 (McKinney 2014) (wage and hour).
2. 6 U.S.C.A. §794 (West 2014).
3. New York City, N.Y., Charter §315.
4. N.Y. Lab. Law §220 (McKinney 2014).
5. Press Release, N.Y. State Office of the Att'y Gen., A.G. Schneiderman Announces General Contractor To Pay More Than $500k To Workers For Hurricane Sandy Cleanup Work At New York City Hospitals (Sept. 19, 2013), http://www.ag.ny.gov/press-release/ag-schneiderman-announces-general-contractor-pay-more-500k-workers-hurricane-sandy.
6. N.Y. State Fin. Law §137 (McKinney 2014); 11 N.Y. Jur. 2d Bonds §68.

Ride-Sharing

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1. *Liu v. Uber Technologies*, Case No. CGC-14-536979 (San Francisco Super. Ct.).
2. *Mazaheri v. Doe*, Case No. 14-cv-225 (W.D. Ok.).
3. Letter from Jennifer McCune, Cal. Dept. of Insurance to Marzia Zafar, Cal. Public Utilities Commission (Sept. 9, 2013), available at http://www.scribd.com/doc/184030223/Calif-Dept-of-Insurance-letter-on-TNCs-ride-share-services.
4. See http://blog.uber.com/ridesharing-insurance.
5. A.B. 2293, Chap. 389 (approved Sept. 17, 2014), available at http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201320140AB2293).
6. Uber offers several car services; unless otherwise noted, this article refers only to UberX, in which drivers use their personal vehicles. Under Uber's other services, such as "UberBLACK," the driver is a commercially licensed black car and covered under the standard insurance policies for commercial livery services.
7. See http://www.driveubernyc.com/tlc-overview; see also http://www.nyc.gov/html/tlc/html/about/column_2014_08.shtml.
8. Press release from New York City Taxi and Limousine Commission (July 9, 2014), available at http://www.nyc.gov/html/tlc/downloads/pdf/industry_notice_14_30.pdf.
9. *Gfeller v. Russo*, 45 A.D.3d 1301, 1302 (2007).
10. *Kleeman v. Rheingold*, 81 N.Y.2d 270, 273 (1993).
11. *O'Connor v. Uber Technologies*, Case No. 13-cv-3826 (N.D. Cal.) Dkt. No. 211 at 16-17.
12 See Order Denying Defendant Uber Technologies' Motion for Summary Judgment, *O'Connor v. Uber Technologies*, Case No. 13-cv-3826 (N.D. Cal.) Dkt. No. 251 (Uber Order); Order Denying Cross-Motions for Summary Judgment, *Cotter v. Lyft*, Case No. 13-cv-4065 (N.D. Cal.) Dkt. No. 94 (Lyft Order).
13 Lyft Order at 14; Uber Order at 10.
14 Lyft Order at 19.
15 Id.
16 Lyft Order at 19.
17. See, e.g., *Sabatino v. Uber Technologies*, Case No. 15-cv-363 (N.D. Cal.); *Philliben v. Uber Technologies*, Case No. 14-cv-5615 (N.D. Cal.); *Pappey v. Uber Technologies*, Case No. 15-cv-64 (N.D. Cal.).
18. "There's An App For That," The Economist (Jan. 3, 2015), available at http://www.economist.com/news/briefing/21637355-freelance-workers-available-moments-notice-will-reshape-nature-companies-and.