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Proposition 22 and Transportation Network Carriers

THE EFFECT OF PROP 22 ON TNCs' LIABILITY FOR THE NEGLIGENCE OF THEIR DRIVERS

I am often contacted with questions concerning Uber and Lyft, their insurance requirements, and issues related to proving vicarious liability. I am asked whether delivery services such as Uber Eats, DoorDash, Grubhub and other app-based delivery services have insurance requirements and coverage in the event that their drivers cause injury while engaged in deliveries.

With the recent passage by voters of Proposition 22, in November of 2020, which classified drivers as "Independent Contractors," a closer look at the implications of Proposition 22 is necessary. My goal is to provide these answers to benefit all of our clients and to unmask the dishonesty of these mega corporations and the sleight of hand they engage in by trying to limit their liability to the statutory *minimums* set forth in the Public Utilities Code ("PUC").

How did we get to Proposition 22?

First, a bit of background on how we got here. On New Year's Eve, 2013, seven-year-old Sophia Liu was killed, and her mother and brother seriously injured by a driver who was logged on to the Uber app. As I had been writing about the dangers of these new companies, Uber, Lyft and Sidecar, and the fact that they possessed no insurance, in my weekly San Francisco Examiner column, "Know Your Rights," the Liu Family contacted me, and I filed the first wrongful death action in the nation against this industry. Uber claimed that it was not liable because it was merely an "application" and not a transportation provider, and that the driver was solely liable so that the Lius were limited to that driver's personal insurance. The Uber driver only carried the \$15,000.00/\$30,000.00 statutory minimum. That did not sit well with me.

In many of my lectures, I have spoken on the importance of case selection and shared my requirements for a case to be accepted by my office. A case must have one or more of the 3 Ps: 1) it must affect a policy change; and/or 2) it must make the firm a profit; and/or 3) it pisses me off. While as a businessman, I prefer that a case fulfill the second criteria, I routinely take cases to change a policy and make new law or, simply, because the conduct of the defendant simply pisses me off. In the Liu case, all 3 Ps collided, and I took the case.

I told the Lius I would represent them if they would work with me to create new law to hold Uber, Lyft and the other similar companies accountable for the harms their drivers caused. The Lius agreed. Then, as the 2010 Past President of the Consumer Attorneys of California (CAOC), I approached CAOC and pitched a bill requiring these companies to have insurance to cover injuries caused by their drivers. CAOC agreed and Nancy Peverini, CAOC's Legislative Director and one of the most talented lobbyists in Sacramento, and I set out on a mission



which resulted in the passage of AB 2293, in 2014. AB 2293 requires Uber, Lyft and the others to provide up to one million dollars in insurance and underinsured motorist coverage depending on which phase of the process the driver is in, i.e., app on, request accepted and driver en-route, pickup made through destination.

The role of the PUC

What is lesser known is that I joined the California Public Utilities Commission's (CPUC) rulemaking process, as a Party, as it developed the regulatory framework for this "nascent industry" in Rulemaking Procedure 12-12-011 (opened in 2012). I was the only trial lawyer amid transportation companies, tech lobbyists, municipalities, disability rights advocates, and others. I was the only party looking out for the injured consumer.

The CPUC process is a public process whereby regulations are considered, publicly debated, and ultimately issued. The CPUC has jurisdiction pursuant to Article XII of the California Constitution and the Charter-Party Carriers' Act, Public Utilities Code section 5351 et seq. PUC section 5360 states, in part:

Subject to the exclusions of Section 5353, "charter-party carrier of passengers" means every person engaged in the transportation of persons by motor vehicle for compensation, whether in common or contract carriage, over any public highway in this state.

PUC section 5381 states, in part, that: "[...] the commission may supervise and regulate every charter-party carrier of passengers in the State and may do all things [...] necessary and convenient in the exercise of such power and jurisdiction."

The CPUC created a new class of charter-party carrier called a Transportation Network Carrier (TNC). Do not refer to them as "rideshare companies" as that is a very different kind of arrangement (See Veh. Code, § 522 and Pub. Util. Code, § 5553). Of critical importance, I stressed during the proceedings that TNCs (Uber, Lyft and not just the drivers) be clearly defined as common carriers. Decision 13-09-045, issued in Rulemaking 12-12-011, on September 19, 2013, states that "A TNC is defined as an organization whether a corporation, partnership, sole proprietor, or other form, operating in California that provides prearranged transportation services for compensation using an online-enabled application (app) or platform to connect passengers with drivers using their personal vehicles." (Emphasis added.)

TNCs as common carriers

This language brought TNCs squarely under the definition of a common carrier, thereby requiring that they exercise the "utmost care and diligence." (Civ. Code, § 2100.) The importance of TNCs being declared, as a

matter of law, as common carriers and charter-party carriers, cannot be understated and will be more fully discussed below under vicarious liability. This forms the basis for Uber's and Lyft's liability above and beyond the statutory minimum insurance requirements for TNCs notwithstanding Prop 22.

In 2014, AB 2293 was passed and is now codified as PUC section 5430 et seq., establishing, in sections 5433 and 5434, TNCs' responsibility to provide insurance covering injuries caused by their drivers. To learn about the insurance obligations of TNCs, read PUC sections 5333 and 5334.

Does Proposition 22 affect Uber's and Lyft's liability?

Against this backdrop, I have analyzed the impact of Prop 22 on Uber's and Lyft's liability for harms caused by their TNC drivers. Uber and Lyft are telling lawyers that Prop 22 limits their liability to the insurance minimums set forth in PUC sections 5433 and 5434 (\$1,000,000 in coverage). But is this true? *The answer is no.* Prop 22 has no bearing or impact on the issues of TNC liability for harms caused by TNC drivers or the availability of insurance.

The "driving factor" behind Proposition 22

Prop 22 was designed to overturn legislation passed in 2019, AB 5, which codified the decision reached in *Dynamex Operations W. Inc. v. Superior Court* (2018) 4 Cal.5th 903. AB 5 codified a presumption under the Labor Code and Unemployment Insurance Code that a person providing labor or services for remuneration "shall" be considered an employee rather than an independent contractor. AB 5 was codified in California Labor Code Section 2750.3. AB 5 was clearly designed to address inequities in the "gig economy" posed by such emerging trends as app-based drivers (think Uber, Lyft, DoorDash, Grubhub and friends) to classify those drivers as employees so they could benefit from protections such as overtime, meals

and rest breaks, reimbursement of expenses, workers' compensation and unemployment benefits to name a few.

Many plaintiffs' lawyers celebrated, thinking that AB 5 resolved the issue of whether TNCs could be held vicariously liable for the acts of TNC drivers as they now would be presumed to be employees. However, this was a simplistic and false assumption. By its terms, AB 5 created a presumption of employee status solely for "purposes of the provisions of the Labor Code, the Unemployment Insurance Code, and the wage orders of the Industrial Welfare Commission." As such, AB 5 dealt with compensation, not liability. It was an understandable assumption as liability law has traditionally followed labor law when employee status was established.

The goal of Proposition 22

Prop 22 was motivated to limit the benefits that TNCs would be required to provide their drivers. Uber, Lyft, Door Dash, Grubhub and other app-based driver and delivery services saw AB 5's "employee" classification of drivers as an existential threat to their business model and their very existence. They made their profit by externalizing most of the costs of their services onto their drivers. They did not want to have to follow wage and hour rules, reimburse expenses, pay into the unemployment system, or provide workers' compensation to their drivers. They had learned that their political clout, millions in lobbying, and obscene campaign contributions could not sway the legislature, so they went to the ballot box to pass a proposition which is nothing other than direct legislation through the ballot box. They spent over \$200,000,000 to qualify and pass Prop. 22, so they obviously thought that AB 5 would cost them much more should they be bound to provide those employee benefits to their drivers.

Prop 22 has no effect on a TNC's liability

A simple read of Prop 22 reveals that it has *no bearing on the determination of*

liability. Its title makes that point clear: “Prop 22: Exempts App-Based Transportation And Delivery Companies From Providing Employee Benefits To Certain Drivers. Initiative Statute.” If that is not clear enough, the summary of Prop 22 provides further illumination on this fact:

Classifies drivers for app-based transportation (rideshare) and delivery companies as “independent contractors,” not “employees,” unless company: sets drivers’ hours, requires acceptance of specific ride or delivery requests, or restricts working for other companies. Independent contractors are not covered by various state employment laws – including minimum wage, overtime, unemployment insurance, and workers’ compensation. Instead, independent-contractor drivers would be entitled to other compensation – including minimum earnings, healthcare subsidies, and vehicle insurance. Restricts certain local regulation of app-based drivers. Criminalizes impersonation of drivers.

(See <https://vig.cdn.sos.ca.gov/2020/general/pdf/top1-prop22.pdf>.)

When a proposition passes, it is enacted through changes to various codes. While TNC regulation is codified in the PUC, the bulk of Prop 22’s law was codified in the Labor, Business, and Unemployment Codes. It enacted Business & Professions Code section 7448 et. seq. Business & Professions Code section 7448 identifies the new law as the “Protect App-Based Drivers and Services Act.” Business and Professions Code section 7450: Statement of Purpose reads as follows:

The purposes of this chapter are as follows:

(a) To protect the basic legal right of Californians to choose to work as independent contractors with rideshare and delivery network companies throughout the state.

(b) To protect the individual right of every app-based rideshare and delivery driver to have the flexibility to set their own hours for when, where, and how they work.

(c) To require rideshare and delivery network companies to offer new protections and benefits for app-based rideshare and delivery drivers, including minimum compensation levels, insurance to cover on-the-job injuries, automobile accident insurance, health care subsidies for qualifying drivers, protection against harassment and discrimination, and mandatory contractual rights and appeal processes.

(d) To improve public safety by requiring criminal background checks, driver safety training, and other safety provisions to help ensure app-based rideshare and delivery drivers do not pose a threat to customers or the public.

There is no provision which addresses a TNC’s liability for a driver’s conduct.

Prop 22 increased a TNC’s insurance obligations to its drivers

As far as insurance is concerned, Prop 22 *increased* a TNC’s insurance obligations to its drivers including: 1) occupational accident insurance to cover medical expenses and lost income resulting from injuries suffered while the app-based driver is online, with a network for medical expenses incurred up to at least one million dollars (\$1,000,000); 2) disability payments equal to 66 percent of the app-based driver’s average weekly earnings *from all network companies* as of the date of injury; and 3) accidental death for the benefit of spouses, children, or other dependents of app-based drivers’ insurance for injuries suffered while the driver is online with the network company’s online-enabled application or platform that result in death (considered amounts payable under workers’

compensation law). (See Bus. & Prof. Code, § 7455.)

Prop 22 compensates TNC drivers assaulted by passengers

I am frequently asked whether a driver has any cause of action against a TNC when they are attacked by a passenger. This is an all too frequent occurrence. Up until now, that answer depended on what the TNC knew, or should have known, about the passenger’s previous violent propensities. While some have posited that the TNC had a duty to do a background check on the TNC users/passengers to see if they had a record of criminal violence, such a claim has yet to mature, and there is no statutory duty for a TNC to do so. Now, finally, with the passage of Prop 22, those injured drivers harmed by users/passengers have a workers’ compensation benefit under Business & Professions Code section 7455.

Prop 22 mandates \$1 million liability coverage

Prop 22 created the classification of “Delivery Network Company” (DNC) – not to be confused with one of my favorite political organizations – defined as: “a business entity that maintains an online-enabled application or platform used to facilitate delivery services within the State of California on an on-demand basis, and maintains a record of the amount of engaged time and engaged miles accumulated by DNC couriers. Deliveries are facilitated on an on-demand basis if DNC couriers are provided with the option to accept or decline each delivery request and the DNC does not require the DNC courier to accept any specific delivery request as a condition of maintaining access to the DNC’s online-enabled application or platform.” (Bus. & Prof. Code, § 7463, subd. (f).)

Prop 22 also created a new class of driver, the “Delivery Company Courier” defined as “an individual who provides

delivery services through a DNC's online-enabled application or platform." (*Id.* at § 7463, subd. (g).) Pursuant to Business & Professions Code section 7455, subdivision (f)(1), "For the benefit of the public, a DNC as defined in Section 7463 shall maintain automobile liability insurance of at least one million dollars (\$1,000,000) per occurrence to compensate third parties for injuries or losses proximately caused by the operation of an automobile by an app-based driver. . ."

TNCs are strictly liable as a matter of statutory law

Proposition 22 does not change the fact that TNCs are strictly liable for the harms caused by their drivers as a matter of statutory law. The issue of vicarious liability is established outside of the sideshow of Prop 22. An understanding of the CPUC's role in regulation and creation of statutory law is required. As stated previously, the CPUC has jurisdiction over TNCs pursuant to Article XII of the California Constitution and the Charter-party Carriers' Act, PUC section 5351 et seq. and as set forth above, the CPUC has expressly determined that TNCs are "Charter Party Carriers." (Pub. Util. Code, § 5360.)

The CPUC, In Rulemaking Procedure 12-12-011, September 19, 2013, issued Decision 13-09-045 which, in the "Findings of Fact" stated that: "It is reasonable to conclude that TNCs are charter party passenger carriers, and therefore we will exercise our existing jurisdiction over these services. . . ." (*Rulemaking Procedure 12-12-011, Decision 13-09-045 September 19, 2013, Finding of Fact No. 16, at p. 66-67.*) The CPUC also stated TNCs are Charter Party Carriers as a Conclusion of Law. (*Id.*, Conclusion of Law No 6, at P 71.) Pursuant to PUC section 5354, Permit or certificate holder, responsibility for acts and omissions of officers, agents and employees, Charter-Party Carriers are strictly liable for the negligence of their drivers. Section 5354 states: "In construing and enforcing the provisions of this chapter relating to the

prescribed privileges and obligations of the holder of a permit or certificate issued hereunder, *the act, omission, or failure of any officer, agent, or employee, or person offering to afford the authorized service with the approval or consent of the permit or certificate holder, is the act, omission, or failure of the permit or certificate holder.*" (Emphasis added). Uber is the TNC Certificate Holder (TCP 38150) for Uber's TNC activities, and Lyft is the TNC Permit Holder (TCP 32513) for Lyft's TNC activities. Accordingly, Uber, Lyft, and all other TNC permit or certificate holders are strictly liable for the acts, omissions, or failures of their drivers.

Should there be any remaining doubt, a review of Decision 13-09-045 makes the intent of the CPUC clear: "Uber by its name alone is selling a type of car service. Because Uber is profiting from this service it should also be held responsible if the driver is negligent or not applying Uber safe practices." (Decision 13-09-045 at pp. 16-17.)

Proposition 22 does not change the fact that TNC drivers and TNC permit holders are common carriers

Civil Code section 2168 defines a common carrier as follows: "Everyone (sic) who offers to the public to carry persons, property, or messages, excepting only telegraphic messages, is a common carrier of whatever he thus offers to carry." Pursuant to Civil Code section 2100, "A carrier of persons for reward must use the utmost care and diligence for their safe carriage, must provide everything necessary for that purpose, and must exercise to that end a reasonable degree of skill." This includes a duty to provide vehicles "safe and fit for the purposes to which they are put and is not excused for default in this respect by any degree of care." (Civ. Code, § 2101.)

Public Utilities Code section 5431 defines a TNC as follows: "Transportation network company" means an organization, including, but not limited to, a corporation, limited liability company, partnership, sole proprietor, or

any other entity, operating in California that *provides prearranged transportation services for compensation using an online-enabled application or platform to connect passengers with drivers using a personal vehicle.* (Pub. Util. Code, § 5431, subd. (c) (emphasis added).)

Based on the foregoing, the TNCs and the TNC drivers are common carriers and, when looking at what standards apply, TNCs, as charter-party carriers, are held strictly liable for harms caused by their driver's negligence, and TNCs owe a higher duty of "utmost care and diligence."

Conclusion – embrace Prop 22

Neither *Dynamex*, AB 5, Prop 22 or any other recent development in the law resolves in favor of the TNCs the issue of whether TNCs are liable for the harms caused by TNC drivers. Rather, the CPUC's decisions, findings and conclusions of law, much of which are embodied in the PUC, set that ruse to rest. Likewise, the insurance requirements set forth in PUC sections 5433 and 5434 are minimums and neither the PUC nor Prop 22 create a cap on recovery in any way. Rather than seeing Prop 22 as a threat, embrace it, as it now provides some protections for the poor drivers who many of us represent when they are hurt in periods one and two by providing them with workers' compensation-type benefits.

Chris Dolan is the owner of the Dolan Law Firm with offices in San Francisco, Oakland and Los Angeles. He has been widely recognized for his excellence in trial advocacy, receiving the Consumer Attorneys of California Trial Lawyer of the Year Award, the Edward Pollock Award for service to the Plaintiff's Bar, the SFTLA Trial Lawyer of the Year Award, The Chief Justice's Award for Contribution to the Courts, and the SFTLA Civil Justice Award. Chris is rated AV Preeminent by Martindale Hubble, has been designated as one of the Top 100 Lawyers in California by the Daily Journal, is named as one of the Best Lawyers in America, and has been a Top 100 Super Lawyer for over a decade. He currently serves as president-elect of the San Francisco Trial Lawyers Association.