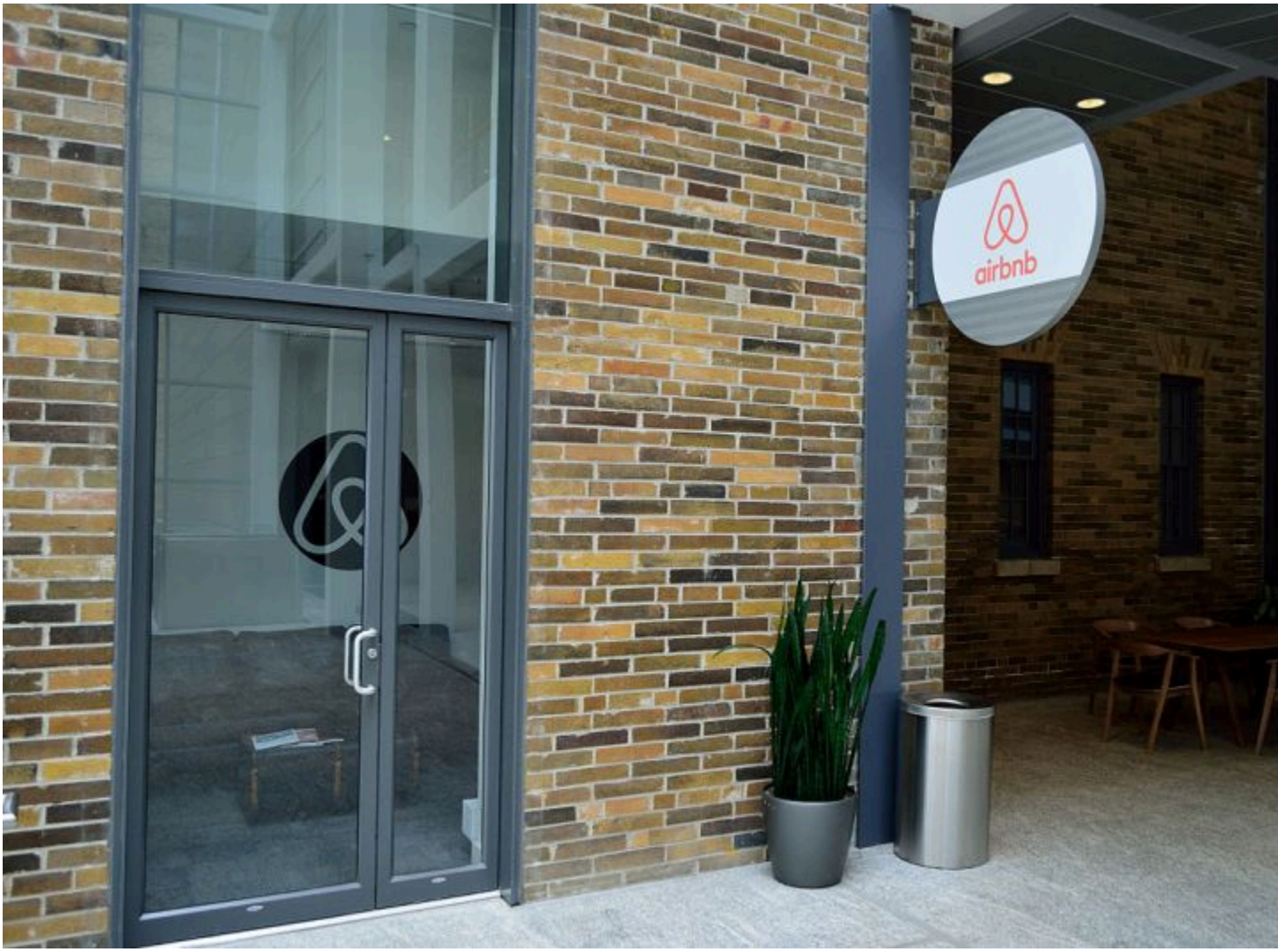
The Sharing Economy: A New Frontier in Management Liability?



The press has been aflutter the past few years with news of yet another force disrupting traditional business norms and institutions: the sharing economy. But what exactly is the sharing economy?

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Professional, D&O, and Fiduciary Liability

July 2016

The sharing economy (also known as the "gig economy") is the term given to markets in which individuals rent assets and obtain services directly from each other, coordinated via technology, both mobile and Web-based. Just as peer-to-peer businesses like eBay, Amazon, and the newer Etsy.com allow individuals to act as retailers, sharing sites allow individuals to act as taxi drivers, hoteliers, etc., as and when it suits them.

The Players

The major players most familiar to Americans are Uber, the ride-sharing service, and Airbnb, the Web-based real estate rental concern. Ironically, both Uber and Airbnb demonstrate why the term "sharing economy" doesn't really capture the essence of these business models, which leverage the global connectivity engendered by the proliferation of the mobile applications to empower individuals to create and participate in their own micro-market economies.

The Risks and Coverage

At this point in time, management-specific risks faced by sharing economy companies are only beginning to be understood. Most of the major companies currently in the sharing economy space, such as Airbnb and Uber, are closely held entities with no near-term plans for public offerings, so securities class actions naming these entities and their executives have not yet come to pass. Thus, to date, the insurance most likely to respond to the litigation risks that these businesses face arising from their business model and management decisions is private company directors and officers (D&O) liability insurance.

Unlike public entity D&O coverage, which typically limits entity coverage to "securities claims," private company D&O coverage usually affords entity coverage for a broad spectrum of claims. Such policies often exclude claims for bodily injury or professional services, although the breadth of such exclusions may vary. As sharing economy business models are so disruptive, they may be exposed to much greater litigation risk, which may present higher exposure for private company D&O insurers than businesses of comparable size in more traditional industries.

In this regard, these new business models may give rise to a host of interesting new liability insurance coverage issues in the private company D&O arena, some predictable and some

unforeseen. As Iain Boyer, a partner at Y-Risk LLC, an underwriting management company focused on sharing economy-related risks explains:

> The sharing/gig economy is changing traditional relationships between parties. Individuals are engaging with tech-enabled platforms to participate either as a provider or user of excess asset or service capacity. Traditional two-party relationships are being replaced with multiple parties, all with different rights, obligations, and expectations. As a result, there is a blurring of the long-established lines between which policy responds, for whom, and when.

The Lawsuits

One prominently reported claim is the class-action lawsuit against Uber, *O'Connor v. Uber Techs.,* 2015 U.S. Dist. LEXIS 116482, 80 Cal. Comp. Cases 852 (N.D. Cal. 2015), involving 385,000 drivers in California and Massachusetts. In that case, it was claimed that Uber misclassified its drivers as independent contractors rather than employees in order to avoid providing drivers with employee benefits. The suit alleged that, because the drivers are required to follow a litany of detailed requirements imposed on them by Uber and are subject to termination based on the failure to adhere to those requirements, they should be classified as employees, entitled to protections such as minimum wage, Social Security and health benefits, and reimbursement of various expenses.

The $100 million settlement was considered a win for Uber, as its premise is that it operates a technology platform connecting drivers and passengers, rather than a taxi service that owns cars and employs drivers. The settlement does not require Uber to reclassify its drivers as employees. Uber, however, still faces litigation about driver status in other states, including similar lawsuits in Florida, Arizona, and Pennsylvania.

Uber has also been sued by taxi companies in several states (and their foreign analogues in England, Germany, and France) for unfair competition and tortious interference with contractual relationships with their drivers. Uber has received coverage for some of these suits from its professional liability insurers pursuant to a settlement of coverage actions instituted by those insurers.[1] Many other sharing economy startups face similar lawsuits challenging their unconventional business practices.[2]

On the management liability front, Uber and its directors and officers have also been the subject of class-action suits challenging Uber's business practices, for example, for failing to distribute gratuities to drivers[3], operating an illegal scheme to evade taxicab regulations[4], and false

advertisements to customers[5]. And, most notably, Uber's cofounder and CEO, Travis Kalanick, is the sole named defendant in a class-action lawsuit in New York alleging that Kalanick designed Uber to fix prices among competitors in violation of antitrust laws—a lawsuit that has survived the motion to dismiss phase and proceeded into discovery.[6]

Interestingly, it appears from comments in the briefing in the price-fixing litigation that Uber was not named as a defendant in order to circumvent the Uber user agreement, which, not surprisingly, has a mandatory arbitration provision. Because the agreement is between Uber and its customers, the court noted that the agreement would not control a dispute between Uber's executives and its customers, because the executives were not party to the user agreement. Thus, the price-fixing case represents an example of executive-focused exposure faced by a sharing economy's management, although one that certainly may not be sharing economy specific.

As a general matter, these cases filed against Uber represent a species of management liability claims faced by the most prominent of the sharing economy companies, and demonstrate how existing laws can be applied to create exposures for these emerging businesses.

Similarly, Airbnb has been the subject of various class-action lawsuits, most notably alleging that it illegally operates as a real estate broker without proper licensing.[7] Airbnb has also received requests for information from various state governmental entities about its hosts, in efforts to crack down on tax evasion and "illegal hotels," which could give rise to coverage issues concerning whether such requests for information constitute "claims." Airbnb's compliance with these requests has, in turn, resulted in lawsuits against it by its hosts for breaching their privacy by providing such information.[8]

Lawsuits by tenant-advocacy groups have also arisen against Airbnb and various landlords, claiming that tenants are being evicted because more money can be made via short-term rentals on Airbnb.[9] While it is not known whether any of these lawsuits might fall within any private company D&O liability policy that Airbnb might have purchased, the breadth of the entity coverage under standard private D&O policies certainly raises the possibility that some of these lawsuits might fall within the scope of that coverage. In this connection, in the privacy suit referenced above, the plaintiffs—Airbnb "hosts"—claimed that Airbnb owed them a fiduciary duty, and that by releasing their personal information in response to an attorney general's subpoena, Airbnb failed to discharge those duties. While the privacy suit did not name Airbnb's management, it may be only a matter of time before such lawsuits attempt to encompass Airbnb's management as well.

In addition, plaintiffs' attorneys have begun searching for ways to tap into the deep corporate pockets of the sharing sites (and their liability insurers) for personal injury suits arising out of the provision of services obtained through sharing sites. For example, in 2013, the family of a pedestrian

that was struck and killed by a driver while he was logged-in to the Uber application brought suit against the driver and against Uber.[10] The family asserted causes of action in negligence and products liability, and alleged that Uber was negligent in requiring its drivers to use a smartphone that can be distracting on the road.

In another action, a driver that struck and injured an individual while allegedly responding to an Uber call filed a cross-complaint against Uber, seeking indemnity for any damages awarded against him. Uber's business auto policy has accepted defense of these suits.[11] Airbnb has also been named as a defendant in several suits by renters who have been injured by the actions of the home owners, on the grounds that Airbnb failed to conduct a proper background check of its hosts.[12] These suits are currently framed as arising out of bodily injury and usually would be excluded from typical D&O liability coverage. However, one could foresee similar claims packaged as breaches of management duties that may fall within a private company D&O policy depending on the breadth of applicable exclusions, such as the bodily injury exclusion.

Conclusion

While public company D&O liability risks appear largely theoretical for sharing economy companies at this juncture, one can foresee the types of problems that management may face when the biggest of the sharing economy players eventually go public. Both Uber and Airbnb operate in spaces which are highly—and locally—regulated. Their profitability is tied to the scalability of their operations, which are intended to be global in reach. However, in the United States alone, the myriad of regulatory frameworks (municipal, state, federal) that Uber and Airbnb must operate within present an exceedingly challenging compliance environment for these entities. One wonders, for instance, whether issues relating to statutorily required public disclosures concerning such complicated regulatory compliance could mean that, as publicly traded entities, sharing economy participants—and their management and boards—may face greater than average liability exposure under the federal securities laws, both in the initial public offering (IPO) and post-IPO contexts.

In short, the host of new liability issues for large companies participating in the sharing economy gives rise to interesting and unpredictable risks and exposures for management liability insurers. Because of the broad entity coverage afforded by private company D&O liability policies, sharing economy participants may present a greater litigation risk than similarly sized concerns in traditional lines of business. While little detail is known publicly about the impact on these entities' professional liability programs, they may be afforded broad entity-based claims coverage for many of these claims. The most recent lawsuit against Uber's CEO in his personal capacity attacking the very

essence of Uber's business model also suggests that it is only a matter of time before plaintiffs' attorneys begin trying to reach individual D&Os of sharing economy entities.

As sharing economy industry underwriter Iain Boyer explained:

The essential coverages required remain unchanged. What is new, however, is how and to whom those coverages apply. The new products that are emerging must address the blurring of the long-established lines between traditional coverages.

Clearly, the coming years will continue to pose new challenges for insurance professionals involved in the professional liability underwriting and claims management of sharing economy risk.

Acknowledgment

The author would like to acknowledge his coauthors for this article, Edward Carleton, principal, and Sarah Voutyras, associate, at Skarzynski Black LLC. Their practice is focused on directors and officers liability, and professional liability insurance coverage and related litigation.

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[1] See, e.g., *Landmark Am. Ins. Co. v. Uber Tech.,* No. 1:13–cv–02109 (N.D. Ill. Mar. 19, 2013)

[2] See, e.g., *Cobarruviaz v. Maplebear, Inc.*, No. 15–00697 (N.D. Cal. Feb. 13, 2015) (misclassification class action suit against Instacart, a provider of grocery delivery services via a mobile phone application); *Singer v. Postmates, Inc.*, No. 15–1284 (N.D. Cal. Mar. 19, 2015) (misclassification class action suit against Postmates, a provider of delivery services that connects users with couriers who can be hailed and dispatched through a mobile phone application to deliver goods and other items to customers at their homes and businesses).

[3] See, e.g., *Lavitman v. Uber*, No. 13–10172 (D. Mass. Jan. 28, 2013)

[4] See, e.g., *Checker Cab Philadelphia, Inc. v. Uber*, No. 14–07265 (E.D. Pa. Dec. 23, 2014)

[5] See, e.g., *Sabatino v. Uber*, No. 15–00363 (N.D. Cal. Jan. 26, 2015)

[6] *Meyer v. Kalanick*, No. 15–9796 (S.D.N.Y. Dec. 16, 2015)

[7] See, e.g., *Plazza v. Airbnb*, No. 16–1085 (S.D.N.Y Feb. 11, 2016) (suit against Airbnb by a New York firm offering luxury short-term rentals around New York City alleging that Airbnb acts as an unlicensed real estate broker).

[8] See, e.g., *New Yorkers Making Ends Meet in the Sharing Economy v. Airbnb*, No. 158526/2014 (N.Y. Sup. Ct. Sep. 2, 2014) (seeking preliminary injunction preventing Airbnb from producing personal information to the Office of the Attorney General of the State of New York in response to subpoena).

[9] See, e.g., *Kirshman v. Airbnb*, No. BC 604504 (Cal. Sup. Ct. Dec. 16, 2015).

[10] *Liu v. Uber*, No. CGC 14 536979 (Cal. Sup. Jan. 27, 2014)

[11] *Evanston Ins. Co. v. Uber*, No. 15–03988 (N.D. Cal. Sep. 1, 2015)

[12] See, e.g., *Schumacher v. Airbnb et al.*, No. 15–05734 (N.D. Cal. Dec. 14, 2015) (alleging that the home owners illegally placed a video camera in their home and recorded the renters without their consent and that Airbnb failed to conduct a proper background check or evaluate the home owners prior to posting their property on its site for rental); *Solovyova v. Airbnb*, No. 503968/2016 (N.Y. Sup. Ct. Mar. 17, 2016) (alleging that plaintiff was injured in a home she rented through Airbnb).
