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Regulating Rideshare Without Stifling Innovation: Examining the Drivers, the Insurance “Gap,” and Why Pennsylvania Should Get on Board

Catherine Lee Rassman*

INTRODUCTION

Though the sharing economy owes much of its success to advances in peer-to-peer technology, the premise of the sharing economy is nothing new. It is rooted in the allocation of underutilized space, skills, and goods by “matching providers who have specific assets or skills with the people who need them.”¹ As a result, innovative “sharing” companies are revolutionizing the way we travel (AirBnB), fundraise (KickStarter), pay (Venmo), multitask (TaskRabbit), and commute (Lyft, Uber). Sharing companies “encourage people—and businesses—to use resources more efficiently and to share non-product assets (like time) as well as conventional ‘stuff,’”² thereby “dramatically expanding the possibilities for private commercial exchange of services between consenting entities.”³ These companies have capitalized on technology to create new opportunities in old markets—supplanting archaic systems with more responsive, affordable, and personalized goods and services.

Unfortunately, consumer protections have failed to keep pace with advances in peer-to-peer technology. Nowhere is this problem more apparent than “rideshare” or “car-share,”⁴ facilitated by fast-growing companies like Lyft and

* J.D. candidate, University of Pittsburgh School of Law, May 2016.

¹ Arun Sundararajan, *Why the Government Doesn't Need to Regulate the Sharing Economy*, WIRED (Oct. 21, 2012, 1:45 PM), <http://www.wired.com/2012/10/from-airbnb-to-coursera-why-the-government-shouldnt-regulate-the-sharing-economy/>.

² Molly Cohen & Corey Zehngbot, *What's Old Becomes New: Regulating the Sharing Economy*, 58-SPG B. B.J. 6 (2014).

³ Sundararajan, *supra* note 1.

⁴ John G. Browning, *Emerging Technology and Its Impact on Automotive Litigation*, 81 DEF. COUNS. J. 83, 83 (2014) (“The area of automotive litigation provides perhaps the best demonstration of the uneasy relationship between new technology and traditional legal concepts of duty.”).

Uber.⁵ Cities worldwide are being challenged to develop rideshare policies that protect consumers without stifling innovation. This Article seeks to contribute to the Pennsylvania Public Utility Commission’s (“PUC”)⁶ effort by examining the legal consequences of classifying drivers as independent contractors and the consequences of assigning liability during the “gap” insurance period. This Article also considers policies adopted by other states, with particular attention paid to California’s recently-adopted rideshare legislation.

Ultimately, this Article will argue that Pennsylvania can and should serve as a model for other jurisdictions by embracing, yet closely regulating, rideshare’s drivers, cars, and insurance responsibilities. After all, “though technology may change the way services are delivered, it should not change the fundamental principles of law that have provided safety, security, and accountability for generations.”⁷

I. HOW RIDESHARE WORKS

Lyft and Uber⁸ provide digital platforms that connect passengers with independent drivers in real-time through an “app” on a mobile device.⁹ The apps allow a passenger to view a car’s location, a driver’s photograph, and customer ratings before choosing whether to accept a driver’s offer for a ride.¹⁰ Moreover, the apps feature GPS-enabled maps that accurately predict fare estimates and

⁵ As of September 2014, Lyft operated in 63 U.S. cities and Uber operated in over 100 U.S. cities and 45 countries. See <https://www.lyft.com/cities>; see also <https://www.uber.com/cities>.

⁶ Pennsylvania Public Utility Commission, Taxi Complaint Form (“As of April 10, 2005, taxicab and limousine service in Philadelphia falls under the jurisdiction of the Philadelphia Parking Authority.”), https://www.puc.state.pa.us/consumer_info/transportation/motor_carrier/limos_taxis_movers/taxi_complaint_form.aspx.

⁷ Christopher Dolan, *The Sharing Economy*, PLAINTIFF MAGAZINE (Mar. 2014), http://www.plaintiffmagazine.com/Mar14/Dolan_The-Sharing-Economy_Plaintiff-article.pdf.

⁸ John Patrick Pullen, *Everything You Need to Know About Uber*, TIME (Nov. 4, 2014), <http://time.com/3556741/uber/>. Uber currently offers five tiers of service, ranging from UberX, the most affordable option, to Uber Lux, the most expensive option. This Article focuses solely on UberX, because it is currently the only Uber service available in Pittsburgh. UberX passengers are transported in drivers’ personal cars. “Uber Black is the company’s original service, costing a bit more but running in high-end town cars with professional drivers.” Uber SUV charges a premium for transporting a group of passengers in larger vehicles. “Uber LUX is the top-of-the-line option, operating in posh rides like Porsche Panameras and BMW 7 series sedans.”

⁹ E3 Media, *Uber and Lyft Come to Pittsburgh* (2013), <http://e3ngage.com/news/uber-and-lyft-come-to-pittsburgh/>.

¹⁰ Paul Nussbaum, *Fight over ride sharing comes to Philadelphia* (July 24, 2014), http://articles.philly.com/2014-07-24/news/51956654_1_uber-and-lyft-transportation-network-companies-uberx.

arrival times, and send passengers a text message alert upon their driver's arrival.¹¹ Passengers then pay for the service, tip the driver, and receive a receipt—all through the touch of a smartphone.¹²

Lyft and UberX are able to keep operating costs low due to the fact that drivers operate their own cars and dictate their own hours by logging into the apps whenever they want to work.¹³ Rideshare companies assert that such driver independence distinguishes their companies from being classified as “common carriers,” the label traditionally ascribed to taxis and “passenger for hire” companies.

II. RIDESHARE HITS LEGAL POTHOLES

Whereas taxis require a permit, inspection, maintenance, insurance, and their drivers screened and trained, critics scoff that rideshare drivers need only “a car, some gas, a smartphone, and a bank account.”¹⁴ Though this accusation oversimplifies the requirements Lyft and Uber impose upon their drivers, the taxi lobby remains outraged nonetheless. Opponents argue that rideshare companies essentially provide a “passenger for hire” service and, therefore, should be subjected to the same fees, commercial licensing, and insurance regulations as taxi drivers.¹⁵ In contrast, Lyft and Uber insist that they merely provide a digital marketplace that connects voluntary consumers with voluntary drivers, who, they emphasize, are independent contractors driving their own cars and setting their own schedules.¹⁶

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ Browning, *supra* note 4, at 2. See *Safety*, LYFT.COM, <https://www.lyft.com/safety>; see also Lane, *Driving Screening*, UBER BLOG (Apr. 25, 2014), <http://blog.uber.com/driverscreening>; see also *Safety*, UBER.COM, <https://www.uber.com/safety>. Lyft and Uber drivers must be at least 21 years old and hold a driver's license that has been active for at least one year, though it need not be a commercial driver's license. Drivers must have a clean driving record and pass extensive local, state and federal background checks. Neither Lyft nor Uber will hire drivers who have been convicted of a violent crime, felony, sexual offense, drug offense, or DUI, among other things. Moreover, Uber will not hire a driver who has been cited for driving without insurance or a suspended license in the past three years. Similarly, Lyft will not hire a driver with more than three moving violations in the past three years. To maintain Lyft's customer service standards, drivers are no longer able to drive on the Lyft platform if their average customer rating falls below 4.6 out of 5 stars. As of September 2014, Lyft requires cars to be model year 2000 or newer, and pass a 19-point vehicle inspection. Uber, on the other hand, boasts an average model year of 2008 with no cars older than a 2004 model.

¹⁵ Browning, *supra* note 4, at 84.

¹⁶ Stephanie Francis Ward, ‘App’ Me a Ride, 100 JAN-A.B.A. J. 13 (2014).

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Recognizing this escalating tension, many states have frantically, but futilely, attempted to regulate rideshare under existing laws intended for the traditional taxi system.¹⁷ Yet, many states have come to realize that just because rideshare provides “new leverage for old behaviors” does not mean that past methods of regulation will prove effective.¹⁸ As states explore varied policies, many rideshare proponents argue it still remains somewhat “unclear whether a shared model [will] require the same permits and/or licenses as traditional operators.”¹⁹ “One thing is certain,” says Ray Mundy, Director of the Center for Transportation Studies at the University of Missouri-St. Louis. “Simply to come in and say, ‘We’re not going to have to abide by the regulations here because we’re an app,’ isn’t going to fly.”²⁰

As a result, Uber and Lyft have faced lawsuits and cease-and-desist notices across the United States and around the world, in jurisdictions such as Virginia, Seattle, Boston, Pittsburgh, California, Chicago, Houston, and New York, as well as a countrywide ban in Germany.²¹ The taxi lobby has filed the majority of these lawsuits, in which they target the companies directly. Recently, however, a group of Chicago taxi drivers took an alternative approach by suing the City of Chicago itself for not doing more to regulate rideshare.²² This represents the first time “cab drivers have tried suing a city in their escalating war with the new wave of

¹⁷ Browning, *supra* note 4 (quoting Emily Badger, *The Strange Tale of an Uber Car Crash and What It Means for the Future of Auto Insurance*, ATLANTIC CITIES (Sept. 10, 2014), <http://www.theatlanticcities.com/commute/2013/09/real-future-ride-sharing-may-all-come-down-insurance/6832/> (last visited Sept. 23, 2013) (“Rideshare companies are essentially 21st century businesses operating within 20th century laws.”)).

¹⁸ Sundararajan, *supra* note 1.

¹⁹ *Id.*

²⁰ Michael Farrell, *Taxi fleet in Boston sues over app that hails rides*, BOSTON GLOBE, Mar. 13, 2013, <https://www.bostonglobe.com/business/2013/03/12/local-cab-companies-sue-smartphone-car-service/EwiFU51exsklc5vbFzCGjL/story.html>.

²¹ Ben Popken, *States Warn of Rideshare Risks for Passengers*, NBC NEWS (May 28, 2014), <http://www.nbcnews.com/business/consumer/states-warn-rideshare-risks-passengers-n116736> (“California, Connecticut, the District of Columbia, Idaho, Kansas, Maryland, Michigan, Minnesota, Nebraska, New Jersey, New Mexico, Ohio, Rhode Island, Tennessee and Utah have all issued warnings about possible insurance risks from using rideshare services.”); *see also* Georgina Prodhon, Harro ten Wolde & David Clarke, *German court upholds ban on Uber ride-share service*, UK REUTERS (Sept. 26, 2014, 6:58 PM), <http://uk.reuters.com/article/2014/09/26/us-uber-germany-bans-idUKKCN0HL23320140926>.

²² Emily Badger, *Taxi Drivers Miffed Over Uber and Lyft Just Sued the City of Chicago*, CITYLAB (Feb. 6, 2014), <http://www.citylab.com/commute/2014/02/taxi-drivers-miffed-over-uber-and-lyft-just-sued-city-chicago/8328/>.

companies providing taxi-like services without the literal taxis,” potentially setting a precedent for future litigants seeking to hold regulators accountable.²³

As the Chicago lawsuit suggests, regulators are under increasing pressure to develop rideshare legislation that protects consumers *and* satisfies the traditional taxi industry.

III. RIDESHARE DRIVERS: EMPLOYEES OR INDEPENDENT CONTRACTORS?

Any legal analysis of rideshare begins with this threshold question: Should rideshare drivers be considered employees or independent contractors? The answer to this question is critical because it directly affects insurance responsibilities.²⁴ In a traditional employee-employer relationship, an employer is vicariously liable for the actions of an employee who, in the course and scope of his or her employment, negligently causes bodily injury or property damage.²⁵ In contrast, an employer is *not* liable for the negligent acts of an independent contractor.²⁶ Traditionally, independent contractors are *personally* liable for any property damage and bodily injury they cause.²⁷

Lyft and Uber declare their drivers to be independent contractors, thereby insulating the companies from liability for driver negligence.²⁸ Specifically, Lyft and Uber claim to lack control over their drivers and the cars they operate.²⁹ Common law dictates that the degree of employer-exerted control is the most important factor to consider when determining whether someone is an employee or an independent contractor.³⁰

²³ *Id.*

²⁴ Chrystal Tomblyn, *The Hidden Costs of Rideshare*, N.C. J. L. & TECH. (Sept. 30, 2014), <http://ncjolt.org/the-hidden-cost-of-ridesharing/>.

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

²⁹ Tomblyn, *supra* note 24.

³⁰ IRS, *Independent Contractor (Self-Employed) or Employee?*, IRS.GOV (last updated Oct. 2, 2014), <http://www.irs.gov/Businesses/Small-Businesses-&-Self-Employed/Independent-Contractor-Self-Employed-or-Employee>.

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In 2013, UberX drivers in California filed a class action lawsuit, alleging that they had been “misclassif[ied] as independent contractors.”³¹ The plaintiffs claim to be employees because they are required to follow a “litany of detailed requirements imposed on them by Uber,” and because “[t]he drivers’ services are fully integrated” into Uber’s business of “providing car service to customers.”³² These requirements include satisfying background and criminal record checks, drug tests, vehicle inspections, and insurance requirements, and adhering to rules regarding in-car behavior.³³ Among other demands for relief, plaintiffs seek reimbursement for employment-related expenses, such as gas money and repairs of general vehicle wear and tear.³⁴ Uber drivers in Boston filed a similar lawsuit in June 2014.³⁵

In confronting this issue, Pennsylvania courts are likely to consult several cases. First and foremost, *Beacon Flag Car Co. v. Unemployment Compensation Board of Review* provides numerous factors to consider when distinguishing between an employee and an independent contractor, although the case arose in the context of unemployment compensation.³⁶ In *Beacon*, the Commonwealth Court of Pennsylvania determined that a group of flag car³⁷ drivers were self-employed as independent contractors and were *not* employees of their respective dispatchers.³⁸ The lead claimant was a driver for Beacon Flag Car (“BFC”), a company that acted as a “dispatch center” by providing claimant with leads on rides.³⁹ In circumstances almost identical to those of Lyft and UberX drivers, the flag car driver was not provided a vehicle or route by BFC, did not report to BFC’s office or attend meetings, never received training, received mileage-based—instead of hourly—wages, and was free to accept or decline any trip without repercussion.⁴⁰ The

³¹ Michael B. Farrell, *New lawsuit claims Uber exploits its drivers*, BOSTON GLOBE (June 26, 2014), <http://www.bostonglobe.com/business/2014/06/26/uber-hit-with-class-action-lawsuit/JFITJLMuBoXuEmMU3elTAI/story.html>.

³² *Id.*; see also Compl. ¶¶ 22–24. No. 4:13CV03826 (filed Aug. 16, 2013).

³³ *Id.*

³⁴ As of late October 2014, the United District Court for the Ninth Circuit had denied Uber’s motion to dismiss and the suit remains unsettled.

³⁵ Farrell, *supra* note 31.

³⁶ *Beacon Flag Car Co. (Doris Weyant) v. Unemployment Comp. Bd. of Review*, 910 A.2d 103, 108 (Pa. Commw. Ct. 2006).

³⁷ *Id.* Flag cars are escort cars that accompany clients with oversized loads on trips.

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*

court’s classification of the claimant as an independent contractor was based on the fact that “BFC did not control, or have authority to control, claimant’s day-to-day operations” because “the client, not BFC, determine[d] the time, place and destination of the trip.”⁴¹ The court gave great weight to the drivers’ freedom “to refuse any client or trip without repercussions.”⁴² Likewise, rideshare drivers not only have the freedom to accept or reject any ride request without penalty, but they also have the freedom to decide whether or not to log in to the app in the first place.⁴³

To reinforce the concept that one need not bear the entire financial risk of an enterprise in order to be considered an independent contractor, the *Beacon* opinion cites to *Danielle Viktor, Ltd. v. Department of Labor & Industries, Bureau of Employer Tax Operations*.⁴⁴ In *Viktor*, the Supreme Court of Pennsylvania held that limousine drivers were independent contractors because they were free to accept and reject assignments, determine their own schedules, and “were customarily engaged in an independently established . . . business” even though drivers did not own the limousines they drove or the [PUC] licenses necessary to transport passengers for hire.⁴⁵

Applying the factors set forth in *Beacon* and *Viktor* to Pennsylvania’s rideshare drivers leads to the conclusion that rideshare drivers are independent contractors, rather than employees.⁴⁶ Classifying their drivers as independent contractors allows Uber and Lyft to maintain low overhead costs because they need not provide overtime compensation, pay certain taxes and benefits, or reimburse work-related expenses (e.g., gas and tolls), which they would be obligated to do if

⁴¹ *Id.*

⁴² *Id.* at 108.

⁴³ A rideshare driver who is not logged into the app will not receive any ride requests.

⁴⁴ *Danielle Viktor, Ltd. v. Dep’t of Labor & Indus., Bureau of Employer Tax Operations*, 892 A.2d 781 (Pa. 2006).

⁴⁵ *Id.* at 791.

⁴⁶ Patrick Hoge, *Independent contractor ruling on FedEx drivers could affect “Sharing Economy”* (Aug. 28, 2014), SAN FRANCISCO BUSINESS TIMES, <http://www.bizjournals.com/sanfrancisco/blog/techflash/2014/08/independent-contractor-ruling-fedex-uber-lyft.html?page=all>. (Whether rideshare drivers are classified as independent contractors or employees may also be affected by a September 2014 lawsuit in which the Ninth Circuit Court of Appeals held that over 2,000 California FedEx drivers were employees, *not* independent contractors. A three-judge panel ruled that FedEx may be liable for “shifting certain costs to workers, including obtaining and operating FedEx branded trucks, FedEx branded uniforms, FedEx scanners. . . The company may also have to pay for missed meal and rest period pay and overtime compensation.” However, “whether this decision [will] apply to smartphone dispatching applications, like UberX and Lyft remains to be seen.”).

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rideshare drivers were considered employees.⁴⁷ However, classifying rideshare drivers as independent contractors emboldens serious concerns regarding insurance.

IV. THE INSURANCE “GAP” AND THE TRAGIC CASE OF SOFIA LIU

The issue of insurance has proved the most troublesome for rideshare companies, largely due to livery exclusions in personal auto insurance policies.⁴⁸ Livery exclusions bar coverage when an otherwise insured driver’s vehicle is in commercial use, such as when drivers transport passengers “for hire” or “for a charge.”⁴⁹ “Personal auto insurers base their coverage and premiums on assumptions about the expected use of the personal vehicle, and the ‘for a charge’ exclusion ensures that insurers are not assuming additional, unintended, commercial risks.”⁵⁰

Particularly controversial is determining who should be responsible for providing insurance during the “gap” period. The “gap” refers to the time period when a rideshare driver is not transporting a passenger, but is logged into the app and is available to receive a trip request.⁵¹ The insurance industry asserts that rideshare drivers are providing a commercial service any time they are logged into a ridesharing app and are available to transport passengers.⁵² Until recently, Uber and Lyft argued they should not be responsible for insuring drivers who are logged into the app but who are not transporting passengers.⁵³ Thus the lack of commercial insurance during the “gap” period left the driver and third-party victims exposed and without coverage for expensive medical bills.⁵⁴

Tragically, the Liu family of San Francisco experienced this devastating circumstance firsthand. Around 8:00 p.m. on December 31, 2013, an UberX driver struck and killed six-year-old Sofia Liu as she used a crosswalk with her mother

⁴⁷ See *Danielle Viktor, Ltd.*, 892 A.2d 781 (Pa. 2006).

⁴⁸ Burke Coleman, *The New Importance of “For Hire” Exclusions in Personal Auto*, CLAIMS JOURNAL (June 30, 2014), <http://www.claimsjournal.com/columns/burkes-law/2014/06/30/250763.htm>.

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.* It is also referred to as the “app on, no match” period.

⁵² Don Jurgler, *Uber, Lyft, Sidecar, toe-to-toe with insurers state by state*, INSURANCE JOURNAL (June 27, 2014), <http://www.insurancejournal.com/news/national/2014/06/27/332942.htm>.

⁵³ *Id.*

⁵⁴ *Id.*

and five-year-old brother, who also suffered injuries in the accident.⁵⁵ Sofia's parents filed a lawsuit against Uber and the UberX driver alleging wrongful death, negligent hiring and supervision, negligence with a motor vehicle, and infliction of emotional distress.⁵⁶ Sofia's mother recalls the driver's face being oriented downward and illuminated by a screen immediately before he struck her family.⁵⁷ The Lius also assert that the app "runs afoul of California's distracted-driving laws" because UberX drivers "must respond quickly to a user request for service by physically interfacing with the app, thereby leading to distraction."⁵⁸ Compounding the Lius' despair was the discovery that the driver was within the gap period at the time of the accident; he was logged into the UberX platform, but had neither accepted nor received a ride request.⁵⁹

Uber immediately deactivated the driver following the accident, but has continued to deny responsibility or provide any insurance coverage to the Lius.⁶⁰ Asserting a total of 22 defenses, Uber maintains that it had no responsibility to insure the driver until he had *accepted* a ride request and was either driving to pick up a passenger or was carrying a passenger at the time of injury.⁶¹ In keeping with its argument that it is a software company, not a transportation provider, Uber refers to the driver as a "former licensee of the Uber software platform" who was not and has never been an employee of the company.⁶² Uber's rejection of responsibility demonstrates the dangerous degree to which drivers and third-parties may be exposed during the gap period unless state law mandates coverage.⁶³

Following this tragic accident, Uber became the first company to "cover the gap" when it announced its new insurance policy in March 2014.⁶⁴ According to

⁵⁵ Kale Williams & Kurtis Alexander, *Uber sued over girl's death in S.F.*, SFGATE (Jan. 28, 2014, 12:42 PM), <http://www.sfgate.com/bayarea/article/Uber-sued-over-girl-s-death-in-S-F-5178921.php#photo-5637154>.

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ Dolan, *supra* note 7, at 2.

⁶² See Uber's filed Answer and Affirmative Defenses, available at http://www.sfbg.com/politics/2014/05/05/uber-files-defense-new-years-eve-death-driver-was-not-our-employee#.U2hMIj-E6_4.twitter.

⁶³ *Id.*

⁶⁴ *Eliminating Rideshare Insurance Ambiguity*, UBER BLOG (Mar. 14, 2014), <http://blog.uber.com/uberXridesharinginsurance>.

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Uber, the new policy provides “contingent coverage for a driver’s liability at the highest requirement of any state in the U.S.: \$50,000/individual/incident for bodily injury, \$100,000 total/incident for bodily injury and \$25,000/incident for property damage.”⁶⁵ The policy is activated “when a driver’s personal policy is no longer in effect, after a driver has turned on the Uber app, and before Uber’s \$1 million commercial policy is in place, which covers drivers en route to make a pick up and when drivers have passengers.”⁶⁶

In other words, Uber will cover a claim, but only if the driver’s personal insurance does not cover it first.⁶⁷ The Insurance Federation of Pennsylvania, Inc. filed an opinion with the PUC in September 2014, stating, “[T]his process will create uncertainty, confusion and delay while the contingency issues get resolved.”⁶⁸ The Federation also expressed its belief that Lyft and Uber’s failure to educate drivers and the public about potential exposure “is a disservice to unsuspecting drivers and passengers.”⁶⁹

The Fifth Circuit’s recent opinion in *State Farm Mutual Automobile Insurance Co. v. Logisticare Solutions* provides insight into how courts may view the insurance issue.⁷⁰ In *Logisticare*, a passenger was injured during a ride with a “volunteer” driver who transported patients for a non-emergency medical transportation service.⁷¹ Following the accident, the driver’s insurance company denied coverage, citing policy language excluding coverage “for damages arising out of the ownership, maintenance or use of a vehicle while it is being used to carry persons for a charge.”⁷² The Fifth Circuit sided with the insurance company by plainly interpreting the livery exclusion as excluding coverage of the “volunteer” driver who received “payment amounting to more than reimbursement of expenses.”⁷³ Importantly, the court assigned greater weight to the “substance of the

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ Dan Packel, *Lyft, Uber Ridesharing Bids Fall Short, Pa. Insurers Say*, LAW360 (Sept. 16, 2014), <http://www.law360.com/articles/577690/lyft-uber-ridesharing-bids-fall-short-pa-insurers-say>.

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *State Farm Mut. Auto. Ins. Co. v. Logisticare Solutions, L.L.C.*, 2014 U.S. App. LEXIS 9664 (5th Cir. May 23, 2014).

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.*

payments” than to the form of the arrangement.⁷⁴ “According to the court, Logisticare’s reimbursement system allowed drivers to profit in certain circumstances,” and the livery exclusion in the driver’s insurance “clearly and plainly barred coverage ‘where the driver receives payment . . . that amounts to more than reimbursement.’”⁷⁵

This case is especially relevant to Lyft, which has claimed that drivers are paid “donations,” rather than fares, during Lyft’s initial “roll out” period in a city.⁷⁶ Lyft should take heed of the *Logisticare* opinion because other jurisdictions will likely subscribe to the rationale that a driver’s pay is more determinative than the driver’s relationship with its dispatcher—even where the driver is, admittedly, not an employee. Regardless of whether rideshare drivers are held to be independent contractors or employees, the analysis employed in *Logisticare* suggests that courts will view them as transporting passengers for hire because they receive payment that grossly exceeds reimbursement.

V. STATE EFFORTS TO REGULATE RIDESHARE

States regulators have responded to rideshare with many types of legislation. In September 2013, California became the first state to legalize peer-to-peer ridesharing services when the California Public Utilities Commission (“CPUC”) created a distinct category for any “transportation network company” (“TNC”).⁷⁷ TNCs are defined as “a company or organization operating in California that provides transportation services using an online-enabled platform to connect passengers with drivers using their personal, non-commercial vehicles.”⁷⁸ California requires TNCs to obtain a license from the CPUC, carry a minimum of \$1 million in insurance, undergo vehicle inspections, provide driver training programs, maintain a zero-tolerance policy on drugs and alcohol, and conduct

⁷⁴ *Id.*

⁷⁵ Williams & Alexander, *supra* note 55 (citing *Logisticare Solutions, L.L.C.*, *supra* note 70).

⁷⁶ Taylor Soper, *Lyft ditches donation-based payment system in Seattle, now charges \$6 minimum*, GEEKWIRE (Mar. 14, 2014, 2:29 PM), <http://www.geekwire.com/2014/lyft-ditches-donations-seattle/>.

⁷⁷ Tomio Geron, *California Becomes First State To Regulate Ridesharing Services Lyft, Sidecar, UberX*, FORBES (Sept. 19, 2013, 3:40 PM), <http://www.forbes.com/sites/tomiogeron/2013/09/19/california-becomes-first-state-to-regulate-ridesharing-services-lyft-sidecar-uberx/>.

⁷⁸ CAL. P.U.C., OVERVIEW OF LIMOUSINE AND TRANSPORTATION NETWORK COMPANY REGULATIONS, http://www.cpuc.ca.gov/NR/rdonlyres/208D6DD5-F4A3-4A66-8B7C-65CDB0F4265E/0/TNCLimoRegulation_v1.pdf.

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criminal background checks.⁷⁹ The CPUC also requires TNCs to “check each driver’s driving record prior to allowing a driver on the platform, and quarterly thereafter.”⁸⁰

California bill AABB 2293 sets forth new insurance requirements that have earned the support of Lyft and Uber.⁸¹ The proposed bill would establish a “personal insurance firewall to ensure personal insurance auto policyholders will no longer cover the commercial activity of TNCs.”⁸² The bill would also lower the primary insurance coverage during the gap period, ensure CPUC oversight of TNCs, and expedite the approval process for new TNC insurance products.⁸³ In late August 2014, the California State Senate voted 30-4 to approve AB 2293, and the California State Assembly voted 67-0 in favor of the bill.⁸⁴ If signed by California Governor Jerry Brown, the bill will go into effect on July 1, 2015.⁸⁵ Meanwhile, Los Angeles Mayor Eric Garcetti applauds the bill for providing “new, cost-effective solutions while protecting public safety through common-sense regulations,” and has expressed his desire to “to revisit [Los Angeles’s] existing franchise agreements to adopt similar innovations.”⁸⁶

Similarly, Colorado began formally regulating rideshare companies as TNCs in June 2014, when Governor John Hickenlooper signed the Transportation Network Company Act.⁸⁷ Unlike California, however, Colorado’s rideshare drivers are exempt from the fingerprinting and criminal background checks required of taxi drivers.⁸⁸ Colorado’s policy closes the “insurance gap” by requiring, by January 2015, that either the driver carry a rider on their personal insurance policy that acknowledges TNC activity or that the rideshare company provides “primary

⁷⁹ *Id.*

⁸⁰ Farrell, *supra* note 31.

⁸¹ Uber, Lyft, Legislature Give Nod to California Rideshare Bill, INSURANCE JOURNAL (Aug. 28, 2014), <http://www.insurancejournal.com/news/west/2014/08/28/339001.htm>.

⁸² *Id.*

⁸³ *Id.*

⁸⁴ Nicole Mahrt Ganley, *California Legislature Approves AB 2293: Bill Balances Consumer Protection and Responsible Innovation* (Aug. 28, 2014), PROPERTY CASUALTY INSURERS ASSOCIATION OF AMERICA, <http://www.pciaa.net/pciwebsite/Cms/Content/ViewPage?sitePageId=38685>.

⁸⁵ Uber, Lyft, Legislature Give Nod to California Rideshare Bill, *supra* note 81.

⁸⁶ *Id.*

⁸⁷ Andy Vuong, *Colorado first to authorize Lyft and Uber’s ridesharing services*, DENVER POST (June 5, 2014, 5:06 PM), http://www.denverpost.com/business/ci_25907057/colorado-first-authorize-lyft-and-ubers-ridesharing-services.

⁸⁸ *Id.*

insurance coverage, with maximum payouts of up to \$100,000 per incident” during the gap period.⁸⁹ The bill’s drafter, Senator Ted Harvey, believes these requirements “probably will be the template . . . that most states will look to in finding a good compromise.”⁹⁰ Lyft spokeswoman Chelsea Wilson also applauded Colorado’s efforts, stating, “By creating a common-sense regulatory framework for ridesharing that prioritizes public safety and consumer choice, Colorado has stepped up as [a] leader in welcoming innovative, community-powered transportation options and forging a path for other jurisdictions to follow.”⁹¹

Oregon and Washington have enacted the most “rideshare-friendly” laws.⁹² In both states, individuals “have an explicit right to legally rent out their private vehicles,” and insurance companies are prohibited from dropping a policyholder simply because he or she is renting out a personal vehicle.⁹³ However, rideshare companies must still retain commercial insurance policies to cover personal vehicles while in commercial use.⁹⁴

In contrast to Oregon and Washington’s rideshare-friendly laws, some states, like Illinois, have shied away from broad, statewide regulations on rideshare. In August 2014, Illinois Governor Pat Quinn vetoed legislation that would have imposed statewide regulations because it “would have mandated a one-size-fits-all approach to a service that is best regulated at the local level.”⁹⁵ Governor Quinn emphasized, “[T]he principle of home-rule is an important one,” and underscored that transportation services are traditionally regulated at the local government level.⁹⁶ The veto disappointed insurers, who would have been authorized to deny coverage to its customers during the gap period and during the transport of passengers.⁹⁷ The bill “also would have required that commercial rideshare drivers

⁸⁹ Patrick Hoge, *Colorado becomes first state to pass law embracing Uber, Lyft et al.*, SAN FRANCISCO BUSINESS TIMES (June 5, 2014, 7:47 AM), http://www.bizjournals.com/sanfrancisco/morning_call/2014/06/colorado-uber-lyft.html?page=all.

⁹⁰ Vuong, *supra* note 87.

⁹¹ Hoge, *supra* note 89.

⁹² Browning, *supra* note 4.

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ Stephanie Jones, *Illinois Rideshare Bills Vetoed; Insurance Groups Urge Override*, INSURANCE JOURNAL (Aug. 27, 2014), <http://www.insurancejournal.com/news/midwest/2014/08/27/338672.htm>.

⁹⁶ *Id.*

⁹⁷ *Id.*

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and vehicle owners be made aware of that provision.”⁹⁸ Rideshare advocates argue the bill reached too far by requiring rideshare drivers who work more than 36 hours every two weeks to take classes, purchase a chauffeur license, and obtain a \$350,000 commercial insurance policy.⁹⁹

Pennsylvania has the advantage of applying the lessons learned from these legal battles and compromises as it develops its own regulations.

VI. WHY AND HOW PENNSYLVANIA SHOULD GET ON BOARD WITH RIDESHARE

Lyft and UberX arrived in Pittsburgh in early 2014, seeking to fill a void in Pittsburgh’s transit market.¹⁰⁰ Pittsburgh’s large student population was especially attractive to the companies, which target college towns to serve the increasing number of millennials who do not own a car.¹⁰¹ Though Pittsburgh’s college population has generally embraced rideshare, not everyone shares in the enthusiasm.¹⁰² The taxi lobby protests that rideshare operators have blatantly exempted themselves from the PUC’s regulations.¹⁰³ PUC regulations define “common carrier” as one “who or which holds out or undertakes the transportation of passengers . . . by motor vehicle for compensation.”¹⁰⁴ A common carrier providing transportation services must maintain a Certificate of Public

⁹⁸ *Id.*

⁹⁹ Ellyn Fortino, *After Quinn Vetoes Illinois Ride-Sharing Legislation, Supporters & Opponents Sound Off*, PROGRESSILLINOIS.COM (Aug. 25, 2014, 3:54 PM), <http://www.progressillinois.com/posts/content/2014/08/25/quinn-vetoes-statewide-ride-sharing-legislation>.

¹⁰⁰ Kim Lyons, *Citing public safety, judges grant PUC’s request for ride-share cease-and-desist orders*, PITTSBURGH POST-GAZETTE (July 2, 2014, 11:26 PM), <http://www.post-gazette.com/business/businessnews/2014/07/01/Judges-grant-PUC-s-request-for-ride-share-cess-and-desist-orders/stories/201407010206>.

¹⁰¹ Nenad Tadic, *Uber Lyft: Car services target universities*, USA TODAY (Sept. 13, 2013, 9:58 AM), <http://www.usatoday.com/story/news/nation/2013/09/11/lyft-uber-for-university-students/2800477/>.

¹⁰² Kim Lyons & Moriah Balingit, *Pittsburgh cab firms try to cut off newcomers*, PITTSBURGH POST-GAZETTE (Feb. 12, 2014, 11:26 PM), <http://www.post-gazette.com/news/transportation/2014/02/13/Local-cab-firms-try-to-cut-off-newcomers/stories/201402130204>.

¹⁰³ *Id.*

¹⁰⁴ Public Utility Code § 1, 66 PA. C.S. § 102.

Convenience, which Lyft and Uber are currently working to secure.¹⁰⁵ Furthermore, 66 Pa. C.S. § 2501(b) defines “broker” as:

any person or corporation, not included in the term “motor carrier” . . . which, as principal or agent, sells or offers for sale any transportation by a motor carrier . . . or procuring of facilities therefor, or negotiates for, or holds out by solicitation, advertisement, or otherwise, as one who sells, provides, furnishes, contracts, or arranges for such transportation [emphasis added].¹⁰⁶

In turn, a broker must be licensed by the PUC and cannot broker transportation with motor carriers who do not hold a Certificate of Public Convenience or permit.¹⁰⁷ However, even if Lyft and Uber could be classified as “brokers,” Pittsburgh Mayor William Peduto and Councilman Dan Gilman believe the PUC’s regulations would still be too onerous.¹⁰⁸

Just months after rideshare made its Pittsburgh debut in early 2014, regulators and politicians alike recognized loopholes and “inadequacies in current law that do not apply directly to this new service.”¹⁰⁹ On July 1, 2014, two administrative judges granted the PUC’s request to issue a letter ordering Lyft and Uber to immediately cease operations.¹¹⁰ The complaint alleged that the companies, through their digital software, act as “broker[s] of transportation services for compensation without appropriate authority from the Commission.”¹¹¹ While the

¹⁰⁵ Kim Lyons, *PUC grants Uber license to operate experimental service* (Nov. 13, 2014, 11:43 PM), <http://www.post-gazette.com/business/2014/11/13/Uber-gets-license-approval-from-Pennsylvania-PUC/stories/201411130305>.

¹⁰⁶ Public Utility Code § 25, 66 PA. C.S. § 2501(b).

¹⁰⁷ Public Utility Code § 25, 66 PA. C.S. § 2505(a). Where Lyft and UberX hold themselves out to Pittsburgh as facilitators that “arrange for such transportation” and help procure the “facilities therefor,” they could, arguably, be classified as brokers.

¹⁰⁸ Kim Lyons, *Peduto asks for rule change on ride-sharing operations*, PITTSBURGH POST-GAZETTE (Feb. 19, 2014, 5:47 AM), <http://www.post-gazette.com/business/2014/02/18/Peduto-asks-for-rule-change-on-ride-sharing-operations/stories/201402180175> (“The regulations in place are too onerous,” Mr. Gilman said, “They’re structured to what cab companies looked like in the 1980s.”).

¹⁰⁹ Kim Lyons, *Ride-share companies Lyft and Uber may get boost in Harrisburg*, PITTSBURGH POST-GAZETTE (Sept. 14, 2014, 12:00 AM), <http://www.post-gazette.com/business/2014/09/14/Ride-share-companies-may-get-boost-in-Harrisburg/stories/201409140060>.

¹¹⁰ Lyons, *supra* note 100.

¹¹¹ Order on Interim Emergency Relief, Public Utility Commission, Docket No. P-2014-2426847 (July 1, 2014), <https://s3.amazonaws.com/s3.documentcloud.org/documents/1211737/emergency-order->

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judges cited genuine public safety concerns, they also acknowledged the growing public support for rideshare in Pittsburgh, where “the transportation needs of many are not adequately met by currently certificated carriers.”¹¹² Only three weeks after issuing the cease-and-desist letter, the PUC granted emergency temporary approval to allow Lyft and Uber to operate in Pittsburgh while they work to secure their Certificates of Public Convenience.¹¹³

On November 13, 2014, the PUC “voted 4-1 to approve an experimental license to allow ride-sharing company Uber to operate across most of Pennsylvania.”¹¹⁴ However, the order does not apply to Philadelphia, where the Philadelphia Parking Authority regulates taxi service.¹¹⁵ The approval came with conditions that must be met within 30 days, including driver background checks and insurance requirements.¹¹⁶ To ensure that drivers do not unintentionally operate without insurance, UberX drivers in Pennsylvania will be required to “agree, in writing, to report their ride-sharing activity to their insurance companies.”¹¹⁷ PUC Commissioner Gladys Brown explained, “This commission is certainly not against new and innovative services, but we have a responsibility to uphold the laws as they are currently written.”¹¹⁸ Pending Uber’s fulfillment of the requirements by December 14, 2014, the experimental authority will be valid for two years.¹¹⁹

granted-lyft.pdf (“Petition of the Bureau of Investigation and Enforcement of the Pennsylvania Public Utility Commission for an Interim Emergency Order requiring Lyft, Inc. to immediately cease and desist from brokering transportation service for compensation between points within the Commonwealth of Pennsylvania”).

¹¹² *Id.* (“We are not blind or deaf to the public opinion, at least in the Pittsburgh area, that the transportation needs of many individuals are not adequately met by currently certificated carriers,” the judges wrote in their decision. “However, the Commission is charged with a higher duty than just the public convenience. The Commission is also charged with ensuring the public safety.”).

¹¹³ Justine Coyne, *PUC grants emergency approval for Lyft, Uber*, PITTSBURGH BUSINESS TIMES (July 24, 2014, 10:50 AM), <http://www.bizjournals.com/pittsburgh/news/2014/07/24/puc-grants-emergency-approval-for-lyft-uber.html?page=all>.

¹¹⁴ *Id.* The approval went against the September 2014 recommendation by two PUC administrative judges that Uber’s application be denied.

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ Justine Coyne, *PUC grants emergency approval for Lyft, Uber*, PITTSBURGH BUSINESS TIMES (July 24, 2014, 10:50 AM), <http://www.bizjournals.com/pittsburgh/news/2014/07/24/puc-grants-emergency-approval-for-lyft-uber.html?page=all>.

¹¹⁸ *Id.*

¹¹⁹ *Id.*

Lyft expects its application for an experimental license will be decided at the PUC's December 2014 meeting.¹²⁰

VII. THE PUC URGENTLY SEEKS NEW REGULATIONS

In crafting new regulations, the PUC should emulate California and Colorado's approach by amending Chapter 29 of the PUC Code to create a discrete category of "transportation network companies."¹²¹ Creating a TNC category will dispel the question of whether rideshare fits within existing PUC categories because it will explicitly capture organizations that "provide transportation services using an online-enabled platform to connect passengers with drivers using their personal, non-commercial vehicles."¹²² Such a narrowly tailored category will increase the PUC's ability to respond to future changes within this fast-evolving industry, and is the approach most supported by the Peduto administration.¹²³

TNCs should be required to carry sufficient commercial liability coverage per incident, approximately \$1 million, to cover injuries and property damage caused by TNC drivers engaged in transportation provider services.¹²⁴ The PUC must reserve the right to reasonably adjust the amount of insurance coverage required over time. Rideshare drivers must disclose their participation in rideshare to their personal automobile insurers; a condition stipulated by the PUC in Uber's experimental license. The PUC must also "close" the insurance gap by requiring that a rideshare driver's personal insurance policy contain a rider provision acknowledging the driver's participation in a TNC, and hold TNCs responsible for providing reasonable coverage during the gap period when a driver is actively awaiting a ride request.¹²⁵

¹²⁰ *Id.*

¹²¹ Coyne, *supra* note 113. ("It was expected the state Legislature might take action to amend the PUC code and introduce transportation network companies as a new category of service that would cover ride-sharing companies. But several proposed bills in both the House and Senate have failed to gain traction. And the UberX service, which is the version of Uber in place in Pittsburgh, remains in limbo in Philadelphia, after staunch resistance from its parking authority, which went so far as to impound cars being used in UberX service.")

¹²² Packel, *supra* note 67.

¹²³ Lyons, *supra* note 109.

¹²⁴ *Eliminating Rideshare Insurance Ambiguity*, UBER BLOG (Mar. 14, 2014), <http://blog.uber.com/uberXridesharinginsurance> (Currently Uber's gap period insurance meets the highest requirement of any state in the U.S.: \$50,000/individual/incident for bodily injury, \$100,000 total/incident for bodily injury, and \$25,000/incident for property damage.).

¹²⁵ *Id.*

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However, it is critically important that the PUC carefully articulate the behavior that constitutes “awaiting a ride request” or “job-related activity.” If the PUC’s definitions are overly broad, rideshare drivers may be tempted to take advantage of a TNC’s gap insurance coverage by logging into the app anytime they drive, even when they do not intend on transporting passengers.¹²⁶ On the other hand, there are risks to defining “job-related activity” too narrowly. An unnecessarily specific definition may create loopholes that enable TNCs to deflect liability or, similarly, create ways for drivers to manipulate their behaviors to trigger the protection of TNC insurance coverage. Joseph Lavitt, a Professor of Law at the University of California Berkeley School of Law, cautions that “a rule should sufficiently address those ambiguities” because the issue in court will often “come down to a factual dispute about what the driver was doing.”¹²⁷ For these reasons, PUC regulations must strike a balance between providing reliable guidance to the TNC community while also advising that “job-related activities” are to be assessed on a case-by-case basis.

Any law adopted by the PUC must also ensure that rideshare drivers are rigorously vetted and trained, which will serve to better protect drivers *and* passengers. TNCs should be required to train their drivers regarding traffic laws and road safety, educate drivers about their potential exposure to liability, maintain a zero-tolerance policy on drugs and alcohol, conduct criminal background checks, and require thorough vehicle inspections.¹²⁸ Of course, rideshare drivers must also comply with all other driving laws in Pennsylvania. Current law prohibits rideshare drivers from sending or receiving texts, emails, or messages of any kind while driving.¹²⁹ Therefore, rideshare drivers must pull over to accept, deny, or review ride requests. Ideally, rideshare companies will provide drivers with a hands-free version of their apps in the near future. In addition, the Pittsburgh Airport Authority should permit TNCs to meet consumer demand by dropping off and picking up passengers at the airport.¹³⁰ These exhaustive regulations will help level the playing field, better

¹²⁶ Williams & Alexander, *supra* note 55.

¹²⁷ *Id.*

¹²⁸ The PUC should dictate how frequently background checks and vehicle inspections are conducted. I suggest annually for the former and semiannually for the latter.

¹²⁹ PA. DEPT. OF MOTOR VEHICLES, *Safety Laws in Pennsylvania*, <http://www.dmv.org/pa-pennsylvania/safety-laws.php#Cell-Phone-Laws-in-PA>.

¹³⁰ Kim Lyons, *Lyft, Uber still face pick-up restrictions at Pittsburgh Airport*, PITTSBURGH POST-GAZETTE (Aug. 13, 2014, 12:00 AM), <http://www.post-gazette.com/business/2014/08/13/Picking-up-at-Pittsburgh-airport-still-not-allowed-for-Lyft-Uber/stories/201408130009>. Rideshare drivers are currently prohibited from picking up passengers at the airport. “In order to legally pick up passengers at the commercial curb at the airport, Uber drivers would also need a permit from the airport authority.”

protect passengers and drivers, and ensure PUC oversight of TNCs as they exist now and as they evolve in the future.

CONCLUSION

With the proper regulations in place, rideshare will bring innumerable benefits to Pittsburgh. As a city without late-night public transit and a large university population, rideshare can help dramatically decrease drunk driving.¹³¹ Fatalities from drunk driving occur most frequently at night and on weekends after “last call” at the bar, when Uber ride requests in Pittsburgh peak.¹³² PUC Chairman Robert Powelson agrees that “there are societal benefits from DUI reduction to overall environmental benefits.”¹³³

Institutions can survive sweeping industry changes if they choose to adapt along with technology and consumer taste.¹³⁴ Rideshare’s growing consumer base demonstrates that it is, at least for the foreseeable future, here to stay. Insurance companies have begun to recognize this as well, and are developing insurance products that more effectively address rideshare’s liabilities.¹³⁵ Rideshare has responded to consumer demand in a long-stagnant market, and, as an emerging hub of technology, Pittsburgh must embrace this innovation. If the PUC amends its regulations to incorporate a “TNC” category, closes the insurance gap, and requires that TNCs vigorously vet their drivers and vehicles, the PUC will succeed in

¹³¹ Catherine, *Making Pennsylvania Safer: As Uber Use Goes Up, DUI Rates Go Down*, UBER BLOG (July 21, 2014), <http://blog.uber.com/Pittsburgh-DUI-Rates-Decline>; see also Nate Good, *DUI Trends and Ride Sharing* (June 21, 2014), <http://bl.ocks.org/nategood/5868e870b1c668c660f1>.

¹³² *Id.*

¹³³ Justine Coyne, *PUC weighs changing regulations after Uber, Lyft cruise into market*, PITTSBURGH BUSINESS TIMES (Aug. 28, 2014, 2:26 PM), <http://www.bizjournals.com/pittsburgh/blog/techflash/2014/08/puc-weighs-changing-regulations-after-uber-lyft.html?page=all>.

¹³⁴ E3 Media, *supra* note 9; see also Kim Lyons, *Yellow Cab readies its own app for Pittsburgh ride shares*, PITTSBURGH POST-GAZETTE (July 22, 2014, 9:47 PM) (In fact, Yellow Cab Company, one of Pittsburgh’s largest taxi companies, has already beta-tested its own app, “Yellow Z,” which is modeled after Lyft and UberX. “Once Yellow Z launches, which Mr. Campolongo expects will be in mid-August, drivers who have been vetted by Yellow Cab, and their vehicles inspected, will log on to the system when they want to work. ‘Yellow Cab’s insurance will go into effect as soon as a driver logs in,’ Mr. Campolongo said, which has been a point of contention for the ride-sharing companies.”).

¹³⁵ Paul Tetrault, *States, cities start tackling ride-share insurance issues*, PROPERTY CASUALTY 360 (Sept. 11, 2014), <http://www.propertycasualty360.com/2014/09/11/states-cities-start-tackling-ride-share-insurance> (“The very concept of insurance, in fact, is an innovation, and the industry is constantly developing new products and ways of doing business to meet the needs of a modern society. NAMIC’s own position statement on ride sharing specifies that we support innovation and are not opposed to the concept.”).

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protecting consumers without stifling innovation, and Pittsburgh will be better for it.