

AIRBNB AND UBER IN NEW YORK CITY: FROM REVOLUTION TO INSTITUTION

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In two previous articles¹ we examined the emerging apartment [Airbnb²] and ride hailing car service [Uber³ and Lyft⁴] sharing economy in New York City. During the last year, Uber, Lyft and Airbnb have had a significant economic impact upon New York City's car service industry⁵, inspiring both opposition from the yellow taxi industry and competition from new ride sharing companies such as "Chariot for Women"⁶, and the hotel industry which recently issued a report⁷ discussing a wide range of New York City lodging industry impacts that exist due to the existence of the Airbnb and estimated a \$2 billion negative impact⁸. Uber may now have the market power to drive its competitors out of business⁹ by dramatically reducing its driver's fees although not without protest from drivers¹⁰.

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Lawsuits & Settlements

While Airbnb, Uber and Lyft are immensely popular with consumers¹¹ worldwide their existence in any given locale is problematic. In some cities these sharing economy juggernauts are banned¹², in others they are limited and subject to an occasional riot¹³ and in others they are welcomed with open arms¹⁴. As Airbnb, Lyft and Uber have evolved from revolutionaries of the sharing economy to nearly accepted transportation and short term rental institutions, so too have the number and scope of lawsuits brought against them. These lawsuits, primarily, brought in federal Courts in the Northern District of California¹⁵ and the Eastern District of New York¹⁶ have generated substantial legal fees and most recently significant settlements¹⁷. This article reviews recent antitrust litigation involving Uber's pricing algorithm and ongoing actions by the New York State Attorney General to monitor Uber and Airbnb in New York City.

Price Fixing Conspiracy

In Meyer v. Kalanick¹⁸, a price fixing class action, the plaintiffs allege that Mr. Kalanick (Uber Technologies, Inc. CEO and co-founder and occasional Uber driver) is stifling price competition amongst Uber drivers to the detriment of Uber riders

in violation of Section 1 of the Sherman Antitrust Act and New York's antitrust statute, General Business Law 340 (Donnelly Act). The Meyer Court noted that Uber, founded in 2009...produces an application for smartphone devices (the Uber App) that matches riders with drivers (call 'driver-partners"). Uber states that it is not a transportation company and does not employ drivers... Through the Uber App, users can request private drivers to pick them up and drive them to their desired location. Uber facilitates payment of the fare by charging the user's credit card or other payment information on file. Uber collects a percentage of the fare as a software licensing fee and remits the remainder to the driver.

Resale Price Maintenance

In a technologically modern variation of resale price maintenance the Court noted that drivers using the Uber app do not compete on price and cannot negotiate fares with drivers for rides. Instead, drivers charge the fares set by the Uber algorithm. Though Uber claims to allow drivers to depart downward from the fare set by the algorithm, there is no practical mechanism by which drivers can do so. Uber's 'surge pricing' model, designed by Mr. Kalanick, permits fares to rise up to ten times the standard fare during times of high demand. Plaintiff

alleges that the drivers have a 'common motive to conspire' because adhering to Uber's pricing algorithm can yield supra-competitive prices and that if the drivers were acting independently instead of in concert, 'some significant portion' would not agree to follow the Uber pricing algorithm. Plaintiff further claims that the drivers 'have had many opportunities to meet and enforce their commitment to the unlawful agreement.

The Relevant Market

The Court also found that "Plaintiff alleges that Uber competes in the 'relatively new mobile app-generated ride-share service market' of which Uber has an approximately 80 percent market share...Lyft has only a 20 percent market share... Although, plaintiff contends, neither taxis nor traditional cars for hire are reasonable substitutes for mobile app-generated ride-share service, Uber's own experts have suggested that in certain cities in the U.S. Uber captures 50 percent to 70 percent of business customers in the combined market of taxis, cars for hire and mobile-app generated ride-share services.

Horizontal Price Fixing

Antitrust law distinguishes between Horizontal and vertical

price restraints. As noted by the U.S. Supreme Court in *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*¹⁹ "Restraints that are per se unlawful include Horizontal agreements among competitors to fix prices" while "[v]ertical price restraints are to be judged according to the rule of reason". In *Meyer* the "plaintiff alleges that Uber drivers agree to participate in a conspiracy among themselves when they assent to the terms of Uber's written agreement (and) agree to collect fares through the Uber App which sets fares for all Uber drivers according to the Uber pricing algorithm". As such, it is alleged, Uber drivers forgo competition in which they would otherwise have engaged because they 'are guaranteed that other Uber drivers will not undercut them on price'". Hence, it is alleged Uber drivers have a "common motive to conspire". Defendant argues, however, that "drivers' individual decisions to enter into contractual arrangements with Uber constitute mere independent action and does not rise to the level of a conspiracy.

Hub-And-Spoke Conspiracies

As noted by the Second Circuit in *United States v. Apple, Inc.*²⁰ "Courts have long recognized the existence of 'hub-and-spoke' conspiracies in which an entity at one level of the market structure, the 'hub' coordinates an agreement among competitors

at a different level, the 'spokes'. These arrangements consist of both vertical agreements between the hub and each spoke and a Horizontal agreement among the spokes to adhere to the [hub's] terms, often because the spokes would not have gone along with [vertical agreements] except on the understanding that the other [spokes] were agreeing to the same thing". Based upon this standard the Meyer Court found that plaintiffs have plausibly alleged a conspiracy (motivated by) the "drivers' ability to benefit from reduced price competition with other drivers by agreeing to Uber's Driver Terms.

Vertical Price Fixing

Noting that the allegations were "sparse" the Meyer Court still found that a vertical conspiracy between Mr. Kalanick and Uber drivers was adequately alleged in that "[a]ll of the independent driver-partners have agreed to charge the fares set by Uber's pricing algorithm' and that Mr. Kalanick designed this business model"

Uber Privacy Probe

The New York State Attorney General (NYAG) has continued to vigorously monitor the activities of Airbnb, Uber and Lyft in New

York City. Recently, Uber and the AG entered into an Assurance Of Discontinuance (Assurance)²¹ wherein it was noted that the NYAG "commenced an investigation pursuant to, inter alia, Executive Law 63(12) and General Business Law (GBL) 349(b). **The Assurance ends the AG's investigation into allegations "that Uber displayed riders' personal information in an aerial view internally known as 'God View' and into a data breach where drivers' names and license numbers were accessed by an unauthorized third party... Uber must (henceforth) encrypt rider's GPS information and adopt authentication measures before any employee can access riders' sensitive personal information"**²². Uber will also pay a \$20,000 penalty for not providing timely notice to drivers of the data breach.

Identifying Airbnb Hosts

As for Airbnb the NYAG has repeatedly sought data identifying hosts in an effort to determine whether and to what extent "Airbnb (is) a platform for so-called illegal hotel operators, who use it to skirt local housing and hotel restrictions to regularly rent properties to travelers"²³. **It has been noted**²⁴ **"While short-term rental transactions via Airbnb provide clear financial benefit for both sides of the**

transaction, further analysis reveals another inescapable fact: most Airbnb transactions involving New York City residential apartments appear to violate the law. The most significant law implicated by short-term rentals in New York City residential apartments via Airbnb is Multiple Dwelling Law (MDL) 4(8)(A)... Most Airbnb transactions in New York City-72 percent of booking between 2010 and June 2014, according to the Attorney General Report²⁵ appear to have violated the law, in so far as they involved the rental of an entire apartment for less than 30 days in violation of MDL 4(8)''

Airbnb Trove Of Data

In December of 2015 Airbnb released a "trove" of home-sharing data seeking to demonstrate "that a majority (75%) of New York City hosts do not have large numbers of properties to rent out...The typical annual host income is roughly \$5,100, according to the data"²⁶. **By releasing this data Airbnb sought to demonstrate that it is doing its best to prevent illegal hotels from using its rental platform, a major concern of the AG. The average annual host income implies that most hosts are individual homeowners, coop owners and apartment dwellers.** Although Airbnb's data dump has been subject to some criticism²⁷, it still

represents an effort to accommodate the NYAG in his efforts to protect the public.

Conclusion

Airbnb, Uber and Lyft and the sharing economy in New York City have been enthusiastically received by consumers and are here to stay. On the other hand regulators and the NYAG are needed to monitor the continuing development of these newly created and innovative institutions.

ENDNOTES

1. See Dickerson & Hinds-Radix, *Apartment and Car Sharing: A Disruptive Internet Revolution*, N.Y.L.J., August 12, 2014 and Dickerson & Cohen, *Taxis and Ride-Sharing: Meeting New York City's Car Service Needs*, N.Y.L.J., July 30, 2015.
2. Airbnb is a short-term home or apartment rental company that matches 2 million hosts worldwide with tourists who want to rent them in 34,000 cities in 190 countries.
3. Uber offers car services and pays drivers to supply and drive their own cars. Passengers order car service by using a smartphone app to locate an available Uber vehicle.
4. Lyft competes with Uber and dresses its cars with a distinctive pink moustache.
5. See Joshi, *supra* ("The existing car service industry in New York City consists of approximately 70,000 for-hire vehicles including black and livery cars; of these, some 26,000 are

provided by Uber and of those, some 19,000 are Uber black cars or about 65 percent of vehicles in the black car industry". In addition, there are some 13,000 yellow taxis).

6. See Mintzer, A "Women-Only Uber Is About to Launch, But Is It Legal?", www.corpcounsel.com (4/14/2016).

7. See *Airbnb and Impacts on the New York City Lodging Market and Economy* issued by the Hotel Association of New York City (2015).

8. See *New York hotels: Airbnb's \$2 billion negative impact on NYC lodging industry, economy*, www.eturbonews.com (10/31/2015).

9. See Furfano, *Uber cuts rates in escalating NYC cab wars*, <http://nypot.com> (1/28/2016).

10. See Feuer, *Uber Drivers Up Against the App*, www.nytimes.com (2/19/2016).

11. See Roberts, *Our Year of Living Airbnb*, <http://nyti.ms/1HntmBC> (11/25/2015).

12. For example, Uber is banned in St. Louis, Missouri. As a result Uber filed an "antitrust lawsuit [*Wallen v. St. Louis Metropolitan Taxicab Commission* (E.D. Mo. 2015)] against the St. Louis Metropolitan Taxicab Commission (MTC), the organization's commissioners and a number of St. Louis taxi companies alleging defendants conduct constitutes an illegal combination in violation of Section 1 of the Sherman Antitrust Act"[Goldfein & Keyte, *Uber Seeks Antitrust Scrutiny of Taxicab Commission*, N.Y.L.J. (11/10/2015)].

13. See Steinmetz, *Violent massive street fighting in Jakarta over Uber and Grab taxi services*, www.eturbonews.com (3/22/2016); *Nairobi's taxi drivers turn to violence to halt Uber*, www.eturbonews.com (1/28/2016).

14. See Huston, *The best and worst cities for Airbnb*, www.marketwatch.com (3/18/2016) ("Homeowners looking for extra income without added risk might do well to live in Galveston, Texas or Savannah, Ga. These two cities scored highest-netting 97 out of 100 possible points-in a study of regulations for short-term rentals on Airbnb and rivals across 59 U.S. cities"); Scott, *What Uber Can Learn From Airbnb's Global Expansion*, www.nytimes.com (7/7/2015) ("Last week, the home-sharing service Airbnb had more than 40,000 listings in Paris, making the French capital the company's most popular destination for travelers

looking to rent a room or an entire apartment. Paris officials applaud it for bringing innovation to the city's hotel industry").

15. See e.g., *O'Connor v. Uber Technologies, Inc.*, 2015 WL 5138097 (N.D. Cal. 2015) (Uber drivers presumptive employees; class certification granted); *Ehret v. Uber Technologies, Inc.*, 2015 WL 7759464 (N.D. Cal. 2015) (withholding gratuities; class certification granted).

16. See e.g., *Meyer v. Kalanick*, 15 Civ. 9796, J. Rakoff (S.D.N.Y. 3/31/2016) (antitrust price fixing conspiracy; motion to dismiss complaint denied)..

17. See e.g., *Philliben v. Uber Technologies, Inc.*, Case No. 3-14-cv-05615-JST, Stipulation of Settlement (N.D. Cal.) (safe ride fees class action proposed settlement of \$28.5 million); *People of California v. Uber Technologies, Inc.*, Case No. CGC-14-543120 (April 7, 2016), Stipulation For Entry Of Judgment And Permanent Injunction (safe ride fees; \$25,000,000 civil penalty); *Cotter v. Lyft, Inc.*, Case No. 13-cv-04065-VC (N.D. Cal.) (drivers claim they are employees; rejection of proposed \$12.25 settlement); and *Kendall, Uber Settles Suit Over Airport Fees*, www.therecorder.com (11/20/2015) (proposed \$1,785,913 settlement to "reimburse riders for 'airport fee tolls'").

18. *Meyer v. Kalanick*, 15 Civ. 9796, J. Rakoff (S.D.N.Y. 3/31/2016).

19. *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 551 U.S. 877, 877 (2007).

20. *United States v. Apple, Inc.*, 791 F. 3d 290, 314 (2d Cir. 2015), cert. denied March 7, 2016.

21. See *In the Matter of the Investigation by Eric T. Schneiderman, Attorney General of the State of New York (NYAG), of Uber Technologies, Inc. (Uber)*, Assurance No: 15-185 (1/5/2016). See also: *Orzeck, Uber, NYAG Strike Deal Ending Privacy Probe Over Rider Data*, www.law360.com (1/6/2016)]

22. See *Orzeck, Uber, NY AG Strike Deal Ending Privacy Probe Over Rider Data*, www.law360.com (1/7/2016).

23. See *Isaac, Airbnb Release Trove of New York City Home-Sharing Data*, www.nytimes.com (12/1/2015).

24. See Estis & Lycoyannis, *Airbnb Encounters Legal Barriers in NYC*, www.nywyorklawjournal.com (4/6/2016).

25. See New York State Office of the Attorney General, *Airbnb In The City* (October 2014) at <http://www.ag.ny.gov/pdfs/airbnb%20reportpdf>

26. Id.

27. See Bromwich, *Airbnb Purged New York Listings to Create a Rosier Portrait, Report Says*, www.nytimes.com (2/11/2016).