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Darden Copeland
*University of Richmond School of Law*

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# ELECTRIC SCOOTERS: A NEW FRONTIER IN TRANSPORTATION AND PRODUCTS LIABILITY

By: Darden Copeland*

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* J.D. Candidate, 2020, University of Richmond School of Law; B.A., 2017, Hampden-Sydney College; incoming associate attorney at Kaufman & Canoles in Norfolk, Virginia. I would like to thank Professor Carl Tobias for his outstanding recommendation to examine electric scooters through the lens of products liability law. Professor Tobias' support and guidance throughout the writing process was critical to this article's publication. I would also like to thank all of the editors of the Richmond Journal of Law and Technology for their dedicated attention to detail. In addition, I would like to extend appreciation to my family and friends for their continuous support of me in pursuit of my education, achievement, and growth.

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## I. INTRODUCTION

[1] What lies at the intersection of cutting-edge technology and transportation? Electric scooters. In September of 2017, Birds flocked to their first city.[1] In Santa Monica, California, hundreds of electric scooters suddenly appeared on sidewalks and street corners, ready to take a shot at more efficient transportation, while also ruffling a few feathers.[2] Ridesharing applications such as Uber and Lyft are manifestations of the profound impact that technology has had on transportation in the recent past. This same technology has further influenced transportation through micro-mobility scooter-sharing systems. Companies, such as Bird and Lime, allow users to rent their electric scooters for a single use to navigate short distances around cities.[3] Electric scooters have generated criticism within the municipalities in which they are being used, and they pose a host of legal questions, especially with regard to liability.[4] At law, this is

[1] *See* Andrew J. Hawkins, *The Electric Scooter Craze is Officially One Year Old—What's Next?*, THE VERGE (Sept. 20, 2018), https://www.theverge.com/2018/9/20/17878676/electric-scooter-bird-lime-uber-lyft [https://perma.cc/HYM9-LRPC].

[2] *See id*.

[3] *See generally* Roomy Khan, *Electric Scooters: Last-Mile Mobility, Thrill Rides, Public Nuisance or Hazard*, FORBES (Dec. 24, 2018), https://www.forbes.com/sites/roomykhan/2018/12/24/electric-scooters-last-mile-mobility-thrill-rides-public-nuisance-or-hazard/#4fac1c873ccb [https://perma.cc/3TED-RDEM] (explaining that scooters offered by Bird, Lime, and others offer a quick, convenient, and inexpensive transportation source for riders to reach urban destinations).

[4] *See* Tamara Kurtzman, *Dockless Scooter Cos. Rewarded for Bad Behavior*, LAW 360 (Sept. 14, 2018), https://advance.lexis.com/document/?pdmfid=1000516&crid=1e246981-95c3-414d-9fa6-be1a5fc493d&pddocfullpath=%2Fshared% 2Fdocument%2Fanalytical-aterials%2Furn%3AcontentItem%3A5T88-6BV1-JW09-M1XJ-00000-00&pddocid=urn%3AcontentItem%3A5T88-6BV1-JW09-M1XJ-00000-00&pdcontentcomponentid=122100&pdteaserkey=sr0&pditab=allpods&ecomp=5pkLk&earg=sr0&prid=a685e3ba-a50e-48d0-8d8a-4acb78cee448 [https://perma.cc/XL9S-4H6V].

an issue of first impression. It is my conclusion that a court would likely impose liability through multiple theories of tort law on the micro-mobility scooter companies in the event of injuries to riders or third parties.

[2] This article will provide a detailed background on electric scooters, their proliferation, and how they work. It will then lay out a brief background on products liability law, setting out the various theories of recovery. The article will proceed by discussing electric scooters' implications and the consequences of their companies' actions. Ultimately, the goal of this article is to tie scooters and their implications to relevant theories of products liability law in an attempt to map out how courts will categorize this issue of first impression.

## II. BACKGROUND ON SCOOTERS

### A. Scooter Proliferation

[3] The two main micro-mobility scooter-sharing platforms are Lime and Bird Rides, Inc, (Bird), although several other startup brands such as Spin, Voi, and Bolt have also joined the party along with several automobile manufacturers.[5] Still considered startups, most of these companies are relatively new, but some of them, namely Bird and Lime, have been richly funded by venture capitalists to the tune of a collective $255 million.[6] Bird and Lime have proliferated through the United States

[5] *See* Mark Bergen & Joshua Brustein, *Almost Every Electric Scooter in the World Comes from This Chinese Company*, BLOOMBERG (Dec. 5, 2018, 6:00 A.M.), https://www.bloomberg.com/news/features/2018-12-05/almost-every-electric-scooter-comes-from-this-chinese-company [https://perma.cc/MB85-TXVG].

[6] *See* Mike Murphy & Alison Griswold, *Rebranded Chinese Scooters Are Taking over San Francisco*, QUARTZ (Apr. 19, 2018), https://qz.com/1257198/xiaomi-makes-the-bird-and-spin-scooters-taking-over-san-francisco/ [https://perma.cc/NP9T-DF6Z].

and overseas into Europe, and they are valued at over $1 billion each.[7] Travis VanderZanden, the founder of Bird, contends that electric scooters are part of "the biggest revolution in transportation since the dawn of the jet age."[8] In its first fifteen months, Bird was able to facilitate 10 million scooter rides.[9] For comparison, Lyft, the well-known automobile ridesharing application, was only able to accomplish 1 million automobile rides in the same amount of time.[10]

[4] The idea and purpose behind electric scooter sharing platforms is to facilitate close, "last mile" transportation.[11] In other words, scooters are not designed to take riders across town, but instead they are designed to carry them short distances within cities.[12] The concept is designed to fill

[7] *See* Tom Huddleston Jr., *Uber and Alphabet Just Invested $335 Million in Lime—Here's Why Scooter Start-ups Are Suddenly Worth Billions*, CNBC MAKE IT (July 13, 2018, 12:47 PM), https://www.cnbc.com/2018/07/11/lime-bird-spin-why-scooter-start-ups-are-suddenly-worth-billions.html [https://perma.cc/VM3S-QEKH].

[8] George Hostetter, *Future of Transportation: Bird Scooters in Fresno & Flying Cars?*, SAN JOAQUIN VALLEY SUN (Sept. 18, 2018, 2:25 PM), http://sjvsun.com/news/fresno/future-transportation-bird-scooters-fresno-flying-cars/ [https://perma.cc/P8Q8-EREG]; *see* Mike Murphy (@mcwm), TWITTER (Apr. 18, 2018, 12:39 PM), https://twitter.com/mcwm/status/986690773214224385 [https://perma.cc/R6AK-9ECR].

[9] *See* Hawkins, *supra* note 1.

[10] *See id.*

[11] *See* Khan, *supra* note 3.

[12] *See id.*; *see also* Jon-Patrick Allem & Anuja Majmundar, *Are Electric Scooters Promoted on Social Media with Safety in Mind? A Case Study on Bird's Instagram*, 13 PREVENTIVE MED. REP. 62, 62 (2018) (explaining that people use scooters for distances that are too short to drive but too strenuous to walk). *See generally How to Bird*, BIRD RIDES INC., https://www.bird.co/how/ [https://perma.cc/7K8G-3F6V] (indicating how Bird scooters are intended to be used).

gaps in municipal transit, to offer a more accessible way of moving around in cities with severe traffic congestion, and to provide a cheaper, more environmentally-friendly alternative to taxis and other ridesharing platforms.[13]

### B. Scooter Use

[5] Can you just pick up one of these scooters on the street and ride it? It's not quite that simple, but it's close. Each scooter is connected to the internet, allowing it to show up on a map on users' smartphones.[14] Scooters are unlocked by scanning a QR code, which then typically charges the user with a base fee of approximately one dollar.[15] Now able to ride the scooter, the user will be charged a smaller fee for every mile (or per minute for some brands, such as Bolt) that he or she rides.[16] Riders are instructed to use the kickstand when parking the scooters after use, and some apps require a photo to be taken showing the scooter in a non-disruptive location.[17] Scooters are dockless, so riders are able to drop them virtually anywhere.[18] This is the beauty, and also the demise of this

[13] *See* Murphy & Griswold, *supra* note 6.

[14] *See* Allem & Majmundar, *supra* note 12.

[15] *See* Khan, *supra* note 3.

[16] *See* Ethan May, *Here's Everything You Need to Know About Bird and Lime Electric Scooters*, INDIANAPOLIS STAR (June 21, 2018), https://www.indystar.com/story/news/2018/06/21/bird-electric-scooters-rental-costs-hours-charging-locations/720893002/ [https://perma.cc/GX8Q-2DRJ].

[17] *See id.*

[18] *See id.*; *see also* Kurtzman, *supra* note 4.

technology in some critics' eyes.[19]

[6] After riders reach their destinations and discard the scooters onto sidewalks, street corners, or other safe and compliant areas (in theory), the scooters will lock and this cycle continues until the scooters run out of battery power.[20] This presents another component of the system: charging. As I will explain later in the section on scooter hardware, scooters typically have a range of about 18 miles per charge.[21] Scooter companies hire members of the community as independent contractors to charge the scooters; Bird calls their independent contractors "Chargers," and Lime refers to theirs as "Juicers."[22] Both operating on an independent contractor basis, they are not employees, so they do not act as agents of the scooter companies.[23] The charging personnel log in to their smartphone apps each evening and are paid to retrieve the scooters, use the electricity in their own homes to charge them, and release the scooters by 7:00 in the morning in areas specified by the scooter company.[24] There is a bit of sport and competition associated with scooter charging.[25] A Bird Charger

[19] *See* Kurtzman, *supra* note 4.

[20] *See How to Bird*, *supra* note 12.

[21] *See* May, *supra* note 16.

[22] *See Charger Agreement*, BIRD RIDES INC. (Sept. 25, 2019), https://www.bird.co/charger-agreement/ [https://perma.cc/V64C-2W5G]; Pat, *Working as a Lime Scooter Charger*, RIDESTER (Aug. 7, 2019), https://www.ridester.com/lime-charger/ [https://perma.cc/GL5H-H9NV].

[23] *See Charger Agreement*, *supra* note 22; Pat, *supra* note 22.

[24] *See* Pat, *supra* note 22.

[25] *See* Lucinda Shen, *Inside the Wild West of Scooter Chargers*, FORTUNE (Oct. 19, 2018), http://fortune.com /2018/10/19/electric-scooters-lime-uber-chargers/ [https://perma.cc/YT42-QHER].

once explained, "You have to watch the Birds, see where they go, and see where they have congregated. Then I strategize what my night is going to look like."[26]

### C. Scooter Hardware

[7] If you live in a city where these electric scooters are being used, you may have noticed that almost all of them are strikingly similar in appearance regardless of the brand name affixed to the front of the scooter. This is because nearly all of them are manufactured by a single Chinese company called Xiaomi.[27] Xiaomi has a subsidiary company called Ninebot, which is the direct manufacturer of the electric scooters used by Bird, Spin, and Lime.[28] Ninebot is also the manufacturer of the popular Segway Personal Transporter that debuted in 2001, and many of the same scooters that the other micro-mobility scooter companies use are even branded as Segway scooters.[29] With the ridesharing scooter's introduction in late 2017, Xaoimi's scooter sales grew six-fold in 2018, and the company is now the largest supplier of electric scooters.[30]

### D. Scooter-Related Injuries and Fatalities

[8] The use of electric scooters in our nation's most populous cities comes with inherent safety concerns. Cities such as Atlanta, Austin, and

[26] *Id.*

[27] *See* Murphy & Griswold, *supra* note 6.

[28] *See id.*

[29] *See id.*; Matt McFarland, *Segway Was Supposed to Change the World. Two Decades Later, It Just Might*, CNN (Oct. 30, 2018, 1:04 PM), https://www.cnn.com/2018/10/30/tech/segway-history/index.html [https://perma.cc/E7LD-DVC7].

[30] *See* Bergen & Brustein, *supra* note 5.

Nashville have all reported spikes in severe accidents associated with scooters.[31] A February 2019 article noted that "there have been at least 1,545 accidents in the [U.S.] involving electric scooters over the past year."[32] A study found the electric scooter injury rate to be 2.2 accidents per 10,000 miles.[33] This is far higher than the national average for motorcycles, which is 0.05 accidents per 10,000 miles, and for cars, which is 0.1 accidents per 10,000 miles.[34] In addition to the uptick in injuries, there have been several fatalities resulting from electric scooters.[35] Fatalities often occur when riders fall off of the scooters or when they collide with traffic.[36]

## III. BACKGROUND ON PRODUCTS LIABILITY LAW

[9] Products liability is a broad term referring to the liability of a

[31] *See* Peter Holley, *Scooter Use Is Rising in Major Cities. So Are Trips to the Emergency Room.*, WASH. POST (Sept. 6, 2018, 8:17 PM), https://www.washingtonpost.com/business/economy/scooter-use-is-rising-in-major-cities-so-are-trips-to-the-emergency-room/2018/09/06/53d6a8d4-abd6-11e8-a8d7-0f63ab8b1370_story.html?utm_term=.01ae9e0e861c [https://perma.cc/K99X-KDSK].

[32] Isobel A. Hamilton, *Electric Scooters Were to Blame for at Least 1,500 Injuries and Deaths in the US Last Year*, BUSINESS INSIDER (Feb. 6, 2019, 8:15 AM), https://www.businessinsider.com/minimum-of-1500-us-e-scooter-injuries-in-2018-2019-2 [https://perma.cc/69X3-AQDW].

[33] *See id.*

[34] *See id.*

[35] *See* Cindy Widner, *Austin Electric-Scooter Death Sheds Light on Injury Reporting*, CURBED AUSTIN (Feb. 11, 2019, 11:06 AM), https://austin.curbed.com/2019/2/6/18214119/austin-electric-scooter-death-fatalities-injuries [https://perma.cc/3HQ3-K3M4].

[36] *See id.*

manufacturer or distributor of products to a consumer or third party who suffers a harm caused by that product.[37] There are three avenues by which a plaintiff can impose liability: negligence, warranty, and strict liability.[38] Strict liability prevailed as the leading form of recovery in products liability cases as it gained recognition in the American Law Institute's (ALI) drafting of the *Restatement Second of Torts* in 1965, and then later as it was adopted in the *Restatement Third of Torts* in 1998.[39] It is important to note that the federal government has never adopted legislation with regard to products liability, which left the development of the doctrine of products liability law to state governments, so there is an inherent level of variation of legal doctrine state to state.[40] This should be taken into account when reading this article, as one theory that applies in one state may not apply in another, and with an issue of first impression like electric scooters, there could be even more disparity among states' treatment of the scooters.

[10] Although strict liability has become the most prevalent theory of recovery in products liability law, there is still a strong possibility of recovery under the theory of negligence for scooter-related actions.[41] Recovery on the basis of negligence is couched within the basic negligence tort principles, which are as follows: a duty owed by the manufacturer; the manufacturer's breach of that duty; a proximate causal connection between that breach and the plaintiff's injury; and the

[37] *See* VICTOR E. SCHWARTZ ET AL., PROSSER, WADE, AND SCHWARTZ'S TORTS: CASES AND MATERIALS 767 (13th ed. 2015).

[38] *See id.*

[39] *See id.*

[40] *See id.* at 768.

[41] *See id.* at 767.

plaintiff's suffering of damages as a result of the breached duty.[42] Some states (namely Delaware, Massachusetts, Michigan, North Carolina, and Virginia) do not recognize strict liability in tort for products liability cases, so plaintiffs *must* use negligence principles or warranty theories.[43] It is also widely recognized that cases of negligence are more jury-friendly than cases of strict liability because it is often easier for a jury to find malfeasance on the part of a person (as required in a negligence action), than something inherently wrong or defective with a product (as required in a strict liability action).[44] For this reason, almost every products liability complaint (which may allege strict liability claims), also alleges claims of negligence.[45]

[11] The third and final theory of recovery is through a warranty claim. Warranty claims arise out of a hybrid of tort and contract law, as they are claims for damages coupled with a breach of contract.[46] Breach of warranty actions arise almost completely out of contract law, but they retain several tort law tropes, such as their treatment by statutes of limitations as well as the application of both comparative and contributory negligence to warranty claims.[47] Although a germane warranty claim may be one that arises between two parties who have privity of contract, courts have held that the tortious nature of breaches of warranty allows for

[42] *See id.* at 140.

[43] *See* VICTOR E. SCHWARTZ ET AL., *supra* note 37, at 784.

[44] *See id.* at 770.

[45] *See id.*

[46] *See id.* at 770, 771.

[47] *See id.*

additional third-party plaintiffs' recovery absent privity of contract.[48] Similar to negligence, plaintiffs in states where strict liability in tort is not observed can also assert products liability claims through breach of warranty.[49]

## IV. AFFIRMATIVE CAUSES OF ACTION APPLIED TO SCOOTERS

### A. Negligence

#### 1. Scooter Companies' Negligent Conduct

[12] Imagine walking outside one morning and suddenly seeing hundreds of electric scooters zipping down your city's streets and congregating in piles on sidewalks and street corners; this was a reality for many people of our nation's cities.[50] Instead of first reaching out to local governments, some scooter companies, namely Bird and Lime, deployed hundreds of electric scooters unannounced overnight.[51] Micro-mobility scooter companies used this tactic of asking for forgiveness after the fact instead of asking for permission before dumping the scooters in many United States cities over the course of the last year.[52] According to Bird's founder and CEO, Travis VanderZanden, the company targets

[48] *See* Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 379 (1990); VICTOR E. SCHWARTZ ET AL., *supra* note 37, at 771.

[49] *See* VICTOR E. SCHWARTZ ET AL., *supra* note 37, at 770.

[50] *See* City of Milwaukee v. Bird Rides Inc., No. 18-CV-1066-JPS, 2018 U.S. Dist. LEXIS 187996, at *1 (E. Dist. Wis. Nov. 2, 2018).

[51] *See id.*; Kurtzman, *supra* note 4.

[52] *See* Kurtzman, *supra* note 4.

municipalities with no scooter laws.[53] He said, "We don't go to New York because it's technically illegal to use a scooter at the state level . . . [w]here there's no laws, that's where we go in."[54] This approach caused backlash from localities where it was employed.

[13] Scooter companies' actions have raised concerns in many of our nation's communities; in California, a class action complaint was filed against several scooter companies alleging negligence, among other claims.[55] The suit is still pending in the California court system.[56] In the complaint, Plaintiffs alleged that the scooter companies knew or should have known that their scooters' inherent use and cluttering of sidewalks would result in "a dangerous 'public nuisance.'"[57] It is conceivable that scooter companies would know or should have known that their products create a risk for not only scooter riders but also third-party city inhabitants, which supports a finding of negligence on their part.[58] Such a

[53] Dara Kerr, *Bird Scooters CEO: 'Where There's No Laws, That's Where We Go in'*, CNET (Oct. 9, 2018), https://www.cnet.com/news/bird-scooters-ceo-where-theres-no-laws-thats-where-we-go-in/ [https://perma.cc/S9V5-ZFEF].

[54] *Id.*

[55] *See* Complaint, Labowitz, et al. v. Bird Rides, Inc., et al., Case 2:18-cv-09329 (C.D. Cal. Oct. 31, 2018).

[56] *See* Labowitz v. Bird Rides, Inc., No. CV 18-9329-MWF (SK), 2019 U.S. Dist. LEXIS 195982, at *44 (C.D. Cal. Oct. 29, 2019).

[57] Peter Holley, *Class Action Lawsuit Accuses E-Scooter Companies of 'Gross Negligence',* WASH. POST (Oct. 20, 2018), https://www.washingtonpost.com/technology/2018/10/20/class-action-lawsuit-accuses-e-scooter-companies-gross-negligence/?noredirect=on&utm_term=.a3d6e42c4827 [https://perma.cc/22YJ-TENU]; *see* Complaint at 23–24, Labowitz, et al. v. Bird Rides, Inc., et al., Case 2:18-cv-09329 (C.D. Cal. Oct. 31, 2018).

[58] *See* Janet Lorin, *E-Scooter Riders Bang Heads and Break Bones, but Lawyers Say Suits Are Hard*, BLOOMBERG (Jan. 25, 2019), https://www.bloomberg.com/news/articles/2019-

finding would likely impose on the scooter companies a duty of reasonable care owed to the general public including all who may be at risk of injury because of the scooters' presence.[59] It is foreseeable that injuries could arise from riding the scooters themselves and from scooters inhibiting foot traffic by blocking sidewalks and entryways for residences and businesses, especially when scooters are dumped in cities where there are no laws in place to regulate their use.[60]

[14] The City of Milwaukee filed a lawsuit with two causes of action against Bird.[61] They first argued that Bird's unannounced dumping in Milwaukee constituted a public nuisance and contended that the continued operation of Bird's scooters constituted a violation of Wisconsin law.[62] The claims were based on Milwaukee's request that Bird stop conducting business there, but Bird refused to do so; the complaint alleged that their business "harms the public by obstructing sidewalks, creating noise, causing users to unknowingly violate the law by using the scooters, and by failing to ensure that users have a valid driver's license."[63] Wisconsin law

01-25/electric-scooter-injuries-pile-up-but-lawsuits-are-hard-to-make [https://perma.cc/G9BG-CT74].

[59] *See* Macpherson v. Buick Motor Co., 111 N.E. 1050, 1051 (N.Y. 1916) (explaining that there must be knowledge that in the usual course of the product's use, that danger will be shared by others than the immediate user, and that if a manufacturer or distributor acts negligently when a duty is to be foreseen, there will be liability on that manufacturer).

[60] *See* Kurtzman, *supra* note 4.

[61] *See* City of Milwaukee v. Bird Rides Inc., No. 18-CV-1066-JPS, 2018 U.S. Dist. LEXIS 187996, at *1, 3–4 (E. Dist. Wis. Nov. 2, 2018).

[62] *See id.*

[63] *See id.* at *4.

provides that motorists of unregistered vehicles could face a fine of not more than $500; in this case, the amount is $200 per instance.[64] Bird's business model depends on the operation of unregistered scooters, and with hundreds of scooters deployed and each one being used multiple times per day, the forfeitures exceed $1 million.[65] The City of Milwaukee initially filed an injunctive motion to compel Bird to remove all of its scooters, but the city subsequently removed that motion.[66] There are no other available proceedings or subsequent opinions relating to this case, which could indicate that a settlement was reached.

[15] Scooter companies' election to operate in cities where laws exist that prohibit aspects of the scooters' use is likely to be seen by a court as *per se* negligence.[67] A defendant's violation of a statute that would have protected plaintiffs or prevented their injury constitutes enough evidence on its face to support a finding of negligence on the part of the defendant.[68] Micro-mobility companies' deploying of hundreds of electric scooters in cities implicates a multitude of laws and regulations aimed at maintaining public safety.[69] For example, under California law, riders of dockless scooters are required to wear helmets, have a valid drivers' license, and are prohibited from riding on sidewalks and roads where the speed limit is more than 25 miles per hour, unless the scooter riders are using a bike lane.[70] It is also a violation of California law to leave scooters

[64] *See* WIS. STAT. § 341.04(3) (2019).

[65] *See City of Milwaukee*, 2018 U.S. Dist. LEXIS 187996, at *5.

[66] *See id.* at *1–2.

[67] *See* Osborne v. McMasters, 41 N.W. 543, 543 (Minn. 1889).

[68] *See id*.

[69] *See* Kurtzman, *supra* note 4.

lying on their side, or in any other manner that obstructs pedestrians' path on sidewalks.[71] Typical use of electric scooters violates several of these laws, which could constitute a finding of *per se* negligence on the scooter companies.[72]

[16] A class action lawsuit was filed in California by several physically disabled members of the community on behalf of the rest of the disabled community against the City of San Diego and a host of scooter companies.[73] The complaint alleged discrimination against people with disabilities due to the city's failure to maintain passable sidewalks.[74] Plaintiffs contended that, "persons with mobility impairments, including people who use wheelchairs or walkers, and people with significant visual impairments are . . . denied their right to travel freely and safely on our public walkways."[75] The complaint employed the Americans with Disabilities Act (ADA), a federal mandate to states and localities to ensure that people with disabilities have the right to full and equal enjoyment of all aspects of public utilities, services, or programs.[76] The complaint

[70] *See id.*

[71] *See id.*

[72] *See* Osborne v. McMasters, 40 Minn. 103, 105 (1889).

[73] *See* Complaint at 3, Montoya v. City of San Diego, No 3:19-cv-00054-JM-BGS (S.D. Cal. 2019) [hereinafter Montoya Complaint] (indicating when the case was filed, the parties, and the motivation and intention behind the suit); Andrew Bowen, *Disability Lawsuit Targets San Diego Over Dockless Scooters*, KPBS (Feb. 19, 2019), https://www.kpbs.org/news/2019/feb/19/disability-ada-lawsuit-dockless-scooters-lime-bird/ [https://perma.cc/YTC7-GQYQ].

[74] *See* Montoya Complaint, *supra* note 73, at 3.

[75] *Id.*

[76] *See* 42 U.S.C. §12101 (2019); *see also* Montoya Complaint, *supra* note 73, at 3.

alleged that the scooters were improperly and unlawfully left blocking sidewalks and were being ridden on sidewalks resulting in a detriment to public safety and mobility.[77] Unique compared to other complaints filed against scooter companies, this one also named the City of San Diego as a co-defendant in an attempt to hold the municipality liable for its acquiescence of the scooters' unregulated presence within the city.[78] To date, this complaint is still being litigated in the United States District Court for the Southern District of California.[79] In the wake of this lawsuit, the city has taken the likely remedial measure of designating "scooter parking zones" along streets to cut down on the number of scooters left on sidewalks.[80]

### 2. Negligent Duty to Warn

[17] In the realm of negligence, the majority rule for a manufacturer's duty to warn consumers is as follows:

> The manufacturer of a chattel will be subject to liability when he (a) knows or has reason to know that the chattel is or is likely to be dangerous for the use for which it is supplied, and (b) has no reason to believe that those for whose use the chattel is supplied will realize its dangerous condition, and (c) fails to exercise reasonable care to

[77] *See* Montoya Complaint, *supra* note 73, at 3.

[78] *See id.* at 3–4.

[79] *See generally* Montoya v. City of San Diego, No 3:19-cv-00054-JM-BGS (S.D. Cal. 2019) (The docket is still open with no order dismissing it), https://www.courtlistener.com/docket/8494933/montoya-v-city-of-san-diego/ [https://perma.cc/84AG-SGJ2].

[80] *See* Andrew Nomura, *New Regulations for Dockless Scooters, Bikes Take Effect*, FOX 5 NEWS (Jul. 1, 2019, 2:11 PM), https://fox5sandiego.com/2019/07/01/new-regulations-for-dockless-scooter-bikes-take-affect/ [https://perma.cc/W7BU-E2HK].

> inform them of its dangerous condition or of the facts which make it likely to be dangerous.[81]

Although the rule states that the "manufacturer" can be held liable, that liability is also imputed to distributors of products, thus including micro-mobility scooter companies like Bird and Lime even though they are not the manufacturers of the scooters.[82] Lessors of products are also considered distributors.[83] However, the scooter manufacturers can also be held liable for defective products, especially in the case of a design defect.[84] Companies' duty to warn consumers stems from the concept that manufacturers and distributors (and lessors) are better situated than consumers to know of the risks and dangers posed by their products, therefore they have a duty to warn of danger when it exists in association with the use of their product.[85] Companies are required to provide warning when a particular risk is known or generally recognized by the scientific or medical community.[86]

[18] How do these rules apply in the context of electric scooters? First, a court is more likely to impose a general duty to warn on the micro-mobility scooter distribution companies (i.e. Bird and Lime) instead of the

[81] Featherall v. Firestone Tire & Rubber Co., 252 S.E.2d 358, 366 (Va. 1979); RESTATEMENT (SECOND) OF TORTS §388 (AM. LAW INST. 1965).

[82] *See* Anderson v. Owens-Corning Fiberglas Corp., 810 P.2d 549, 552-53 (Cal. 1991).

[83] *See* Galluccio v. Hertz Corp., 274 N.E. 2d 178, 181–183 (Ill. App. Ct. 1971).

[84] *See generally* Barker v. Lull Engineering Co., Inc., 573 P.2d 1153 (Cal. 1972) (illustrating that a lessor may be held liable for a design defect in their product).

[85] *See Featherall*, 252 S.E.2d, at 366–367.

[86] *See Anderson*, 810 P.2d, at 550.

scooter manufacturer, Xiaoimi.[87] Xiaomi makes scooters for private sale *and* for sale to the micro-mobility companies, so they are not as privy to the knowledge of how the scooters will be used after they are sold to the micro-mobility scooter companies; whereas Bird *knows* it will be distributing scooters all throughout our nation's cities for the general public's use, and Bird has the opportunity to inspect the scooters before distributing them.[88] Xiaomi is not in as good of a position as Bird and Lime to know how the scooters will be used because the relationship between the consumer and the manufacturer is attenuated.[89] A long, attenuated line of production makes it harder for plaintiffs to prove the casual link between the manufacturer's action or omission, therefore this attenuation typically makes plaintiffs' cases harder to prove.[90] For this reason, plaintiffs in electric scooter cases are more likely to sue the micro-mobility companies instead of the Xiaomi.[91]

[19] One of the main factors taken into account by courts in deciding whether to impose liability for negligent omission of warning is the

[87] *See generally* Friedman v. General Motors Corp., 331 N.E. 2d 702 (Ohio 1975) (demonstrating an automobile manufacturer being held liable for defects in their product).

[88] *See* MacPherson v. Buick Motor Co., 111 N.E. 1050, 1053 (N.Y. 1916); *Galluccio*, 274 N.E.2d at 182; *see also Mi Electric Scooter Pro*, MI GLOBAL, https://www.mi.com/global/mi-electric-scooter-pro [https://perma.cc/8N5A-2AKZ] (illustrating the statistics and private use of Xiaomi scooters); Murphy & Griswold, *supra* note 6 (explaining that Bird purchases scooters from Xiaomi, therefore giving the company an opportunity to inspect scooters purchased from the manufacturer, Xiaomi).

[89] *See generally* Murphy & Griswold, *supra* note 6 (comparing the companies behind the Bird and Lime scooters and their scooters, as well as the comparing the companies with the scooter manufacturer Xiaomi).

[90] *See* Friedman, 331 N.E. 2d at 17–18 (Stern, J., dissenting).

[91] *See id.* at 16–18.

familiarity of the consumer to the product.[92] A Texas court held that a tractor manufacturer had no duty to warn an experienced tractor user of the risk of falling out or off of a tractor with no seat belts.[93] The Seventh Circuit found no duty to warn of injuries sustained in a rollover crash due to a convertible's open and obvious lack of a roof.[94]

[20] The issue of whether courts would impose a duty to warn on electric scooter companies is one of first impression. As such, it is uncertain since there is no jurisprudence to date with regard to the specific issue of a duty to warn for electric scooter companies. It could be interpreted that injuries sustained from riding electric scooters helmetless is an open and obvious risk, thus no duty to warn would be found.[95] Conversely, a court could also plausibly find that, due to the newness of electric ridesharing scooters, the general public is neither familiar with the risks of riding a scooter nor how to use them. Because scooters are powered by electricity, they accelerate almost immediately upon the throttle's engagement.[96] This results in much faster acceleration than a gasoline motor is capable of producing, which could result in an unexpected 'lurch.' This 'lurch' could create a sufficient level of unfamiliarity to require a duty to warn on the part of the scooter companies.[97]

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[92] *See* Norris v. Excel Indus., 139 F. Supp. 3d 742, 755 (W.D. Va. 2015), *aff'd*, 2016 U.S. App. LEXIS 12385 (4th Cir. 2016).

[93] *See id.* at 757 (citing Allen v. W.A. Virnau & Sons, Inc. 28 S.W.3d 226, 234–35 (Tex. App. 2000)).

[94] *See id.* (citing Delvaux v. Ford Motor Co., 764 F.2d 469, 474 (7th Cir. 1985)).

[95] *See* Durkee v. Cooper of Can., 298 N.W.2d 620, 621 (Mich. Ct. App. 1980).

[96] *See* May, *supra* note 16.

[97] *See* Davis v. Avondale Indus., Inc., 975 F.2d 169, 172 (5th Cir. 1992).

[21] Some scooter companies, namely Bird and Bolt, are promoting helmet use for riders.[98] Bird's website provides that it will cover the cost of helmets, but users must pay shipping.[99] Bolt will do the same.[100] Though these companies are promoting helmet use, their 'encouragement' does not amount to an adequate warning if a duty to warn users of risks associated with riding helmetless were to be imposed.[101] Courts have provided that a company has a duty to give adequate warnings of the hazards involved in the use of the product and instructions for its safe use if the company or its distributor knows or has reason to know that the product is likely to be dangerous.[102] On Bird's app, there is a safety tab which, when tapped, redirects users to Bird's website where the first prompt states "wear a helmet."[103] As mentioned above, it is unclear whether a duty to warn would be imposed on Bird (or other scooter companies), but if one were to be imposed on Bird specifically, its warning is likely be found inadequate because it does not warn riders of the hazard (head injury from being thrown off of the scooter), which might result in a finding of negligence on the part of Bird.[104]

[22] A federal court in Florida debated the existence of a duty to warn

[98] *See How to Bird*, *supra* note 12.

[99] *See Safety First*, BIRD RIDES INC., https://www.bird.co/safety-mobile/ [https://perma.cc/2TH6-SGVS].

[100] *See Safety*, BOLT, https://www.micromobility.com/safety/ [https://perma.cc/37C8-H24J].

[101] *See* Burch v. Amsterdam Corp., 366 A.2d 1079, 1084 (D.C. 1976).

[102] *See id*.

[103] *See Safety First*, *supra* note 99.

[104] *See* Burch, 366 A.2d at 1084; *Safety First*, *supra* note 99.

for a cruise line where patrons were able to make use of a scooter rental company (not an electric ridesharing scooter) upon landfall.[105] In this case, plaintiffs argued that the cruise line should have had a duty to warn their patrons of the dangers associated with the scooters that were being rented at one of the cruise destinations.[106] The court disagreed, suggesting that there was no evidence that the cruise line did not know, nor should have known, the dangers associated with the scooters because the scooters were not supplied by the cruise line and because the cruise line was not put on notice by prior claims of injuries.[107]

[23] While this case does not involve the type of electric ridesharing scooters to which this article is devoted, it can be used to illuminate an otherwise murky area of how the law could deal with electric ridesharing scooters. Electric scooter companies are the direct vendors, so a higher level of knowledge is inferred on their part than the cruise line.[108] In addition, the electric scooter companies have been put on notice, in some cases, by way of legal complaints, and in other cases, by the news and other media outlets; injuries arising from electric scooters are widely known.[109] Conversely, because injuries from scooters are in fact widely

[105] *See* Rojas v. Carnival Corp., 93 F. Supp. 3d 1305, 1309 (S.D. Fla. 2015).

[106] *See id.* at 1307.

[107] *See id.* at 1309.

[108] *See Bird Platform*, BIRD RIDES INC., https://www.bird.co/platform/ [https://perma.cc/55VT-786Z]; *see generally Rojas*, 93 F. Supp. 3d (holding that the plaintiff did not allege facts to support their argument that the cruise line knew or should have known of dangers associated with the scooters).

[109] *See generally* City of Milwaukee v. Bird Rides Inc., No. 18-CV-1066-JPS, 2018 U.S. Dist. LEXIS 187996, at *1 (E.D. Wis. Nov. 2, 2018) (discussing the city's complaint that Bird scooters are a public nuisance); Ed Leefeldt, *Electric Scooters Are Igniting New Laws, Liability Concerns and Even "Scooter Rage"*, CBS NEWS (July 2, 2019, 5:42 PM), https://www.cbsnews.com/news/electric-scooter-backlash-leads-to-new-laws-and-

known, this could also cut against the argument that scooter companies should be held liable, because defendants could raise the open and obvious or assumption of risk defenses.[110] Again, this is an issue of first impression, so these postulations only attempt to map out how a court could deal with these issues—it is not a hard and fast guide as to how they would, in fact, be treated.

### B. Strict Liability

[24] A claim of negligence is one that is conduct-oriented, as it claims that the defendant's *actions* were not reasonable, whereas a strict liability claim is product-oriented, as it claims that the defendant's *product* was not safe for the particular purpose for which it was marketed or was otherwise defective.[111] The dangerousness of the product could stem from a defect in the product's design, where the entire product line is defective, or the danger could come from a manufacturing defect, where a single product on an assembly line is defective because it was constructed improperly.[112]

#### 1. Strict Liability Imposed on Lessors

[25] Courts have recognized that lessors of consumer goods have a duty to guard against defective products.[113] The leased product in possession of the lessor results in a bailment, and the bailor (lessor) is liable if: "(1) he

scooter-rage-july-2019/ [https://perma.cc/DN4A-TEPG] (referencing news and media discussions of scooter injuries).

[110] *See* Leefeldt, *supra* note 109.

[111] *See* Beshada v. Johns-Manville Prod. Corp., 447 A.2d 539, 544 (N.J. 1982).

[112] *See id.* at 543–44.

[113] *See* Galluccio v. Hertz Corp., 274 N.E. 2d 178, 182 (Ill. App. Ct. 1971); Cintrone v. Hertz Truck Leasing & Rental Serv., 212 A.2d 769, 781 (N.J. 1965).

supplied the chattel in question; (2) the chattel was defective at the time it was supplied; (3) the defect could have been discovered by a reasonable inspection; and (4) the defect was the proximate cause of the injury."[114] Therefore, a lessor placing a vehicle in the stream of commerce with a defect discoverable by a reasonable inspection results in that lessor being held strictly liable.[115]

[26] At law, electric scooter companies such as Bird and Lime could be treated as lessors, analogous to how courts have treated the lessors of automobiles. In the automobile cases, the courts viewed the transaction between the rental car company (car owner) and the lessee (car renter) as a transfer of ownership in the form of a bailment for hire, because it "transfers possession in exchange for the rental and contemplates eventual return of the article to the owner."[116] Scooter companies own the scooters, therefore the relationship between them and their consumers is analogous to the rental cars.[117]

[27] Ambiguity arises with regard to the scooter companies' opportunity to conduct a reasonable inspection on their scooters. For

[114] *Galluccio*, 274 N.E. 2d at 182.

[115] *See id.*; VICTOR E. SCHWARTZ ET AL., *supra* note 37, at 833 (quoting dissent from Justice Goldenhersh in Peterson v. Lou Bachrodt Chevrolet Co., 329 N.E.2d 785 (Ill. 1975)).

[116] *See Cintrone*, 212 A.2d at 766.

[117] *See generally* Andrew J. Hawkins, *How Bird Plans to Blanket the World With Electric Scooters Without Going Bankrupt*, VERGE, (May 7, 2019, 9:00 AM), https://www.theverge.com/2019/3/7/18253522/bird-platform-scooter-new-zealand-canada-latin-america [https://perma.cc/9L6Q-HQFV] (discussing Bird's plans to sell scooters to other operators and make money off of the rental fee those operators charge); *Bird Platform*, *supra* note 108 (discussing Bird's plans to sell scooters to independent operators and focus on the Bird platform).

example, rental cars rented from Hertz come from a Hertz facility and are returned to a Hertz facility.[118] Because scooters 'live' on the streets of cities and not at a Bird scooter facility, a court may find that scooter companies are not in the same position as rental car agencies to inspect their goods.[119] It should be noted that because the scooter companies *initially* distribute them into the stream of commerce and have an opportunity to conduct a reasonable inspection at that time, injuries arising out of this *first* distribution could likely result in the scooter companies being held strictly liable, given that the injuries would have arisen from scooter defects that could have been detected by a reasonable inspection.[120]

[28] However, as you might imagine, the odds of such an injury occurring right after the scooter company dropped the scooter in the city is unlikely given the short amount of time before the scooter is picked up by another user.[121] After the scooters have been picked up by chargers and mechanics (which occurs daily), a court could find that the scooter companies are no longer in a position to conduct inspections of their scooters because the scooters do not return to a facility made up of agents of the company where inspections may be conducted.[122] The hired chargers and mechanics are independent contractors, so they are not agents of the scooter companies. Therefore, their actions do not impute liability on the scooter companies through the doctrine of respondeat

[118] *See Start Your Reservation*, HERTZ, https://www.hertz.com/rentacar/reservation/ [https://perma.cc/D47S-PLH7].

[119] *See* Allem & Majmundar, *supra* note 12, at 62.

[120] *See Galluccio*, 274 N.E. 2d at 181–182.

[121] *See* May, *supra* note 16.

[122] *See id.*

superior[123] unless the court were to find that they were in-fact employees or that the contracting scheme violated public policy.[124] This concept will be discussed further in section VI of this article.

### 2. Strict Liability Duty to Warn

[29] The strict liability analysis for the scooter companies' duty to warn differs slightly from the analysis used for negligence: "when a plaintiff sues under strict liability, there is no need to prove that the manufacturer knew or should have known of any dangerous propensities of its product – such knowledge is imputed on the manufacturer."[125] This is because courts have reasoned that product manufacturers should inherently know and therefore warn of risks associated with their products.[126]

[30] With regard to strict liability, courts look to the commonly used risk-utility test to find if the risk would still exist if an alternative design could have been used without hindering the product's utility.[127] However, with warning cases, courts have held that if a product is unsafe because it

[123] *See generally* VICTOR E. SCHWARTZ ET AL., *supra* note 37 at 705–06 (explaining respondeat superior and the policy reasoning behind it).

[124] *See generally* Dynamex Operations W. v. Superior Court, 4 Cal. 5th 903 (Cal. 2018) (explaining that courts will look into the relationship of independent contractors to determine whether they are in fact independent contractors or instead employees); Aaron Gordon, *Bird Sued for Classifying Workers Who Charge Scooters as Independent Contractors*, JALOPNIK (May 7, 2019, 11:00 AM), https://jalopnik.com/bird-sued-for-classifying-workers-who-charge-scooters-a-1834580218 [https://perma.cc/7SLE-YD3L] (discussing whether Bird's chargers are employees or contractors).

[125] Beshada v. Johns-Manville Prod. Corp., 447 A.2d 539, 544 (N.J. 1982) (quoting Freund v. Cellofilm Properties, Inc., 432 A.2d 925, 930 n.1 (N.J. 1981)).

[126] *See id.*

[127] *See, e.g.*, Mikolajczyk v. Ford Motor Co., 901 N.E.2d 329, 345 (Ill. 2008).

lacks a proper warning, strict liability is usually imposed because a warning could have been added at minimal cost and typically without hindering the product's utility.[128] Scooter companies have already printed QR codes and other instructions for payment onto the scooter handlebars in an easy-to-read location.[129] This particular label presents several problems. It does not include the necessary warning language.[130] It instead includes the words "Ride Anywhere," which directly contradicts Bird's claims that they encourage users to stay away from sidewalks, roads without bike lanes, and other pedestrian-heavy areas.[131] Furthermore, some localities have even banned Bird scooters from areas with heavy foot traffic.[132]

[31] As mentioned above, this clear and easy-to-read label located on the handlebars does not include a warning label.[133] There is a much

[128] *See* Beshada, 447 A.2d at 545.

[129] *See* Aparna Narayanan, *Auto Giants Rev up Electric Scooter Stampede but Sidewalk Rage Intensifies*, INVESTOR'S BUS. DAILY (Nov. 7, 2018), https://www.investors.com/news/electric-scooter-companies-electric-bike-companies/ [https://perma.cc/C5KH-CMBA].

[130] *See, e.g.*, East Penn Mfg. Co. v. Pineda, 578 A.2d 1113, 1118 (D.C. 1990); *see also* Hawkins v. Waynesboro Coll., 2008 U.S. Dist. LEXIS 131103, at **2–4 (W.D. Pa. 2008).

[131] *See generally* Hawkins, *supra* note 1 (explaining Bird's company policy of staying away from pedestrian-heavy locations for pedestrian and rider safety and "geo-speed limiting" in pedestrian areas, such as the beach bike path of Santa Monica).

[132] *See* Stacey Parker, *Virginia Beach Bans Electric Scooters on Most of the Oceanfront*, THE VIRGINIAN PILOT (Aug. 20, 2019), https://www.pilotonline.com/government/local/vp-nw-scooter-ban-approved-0822-20190821-fp4flonsjvh7hfwb2urz5y6ede-story.html [https://perma.cc/L33F-FBHE].

[133] *See* Narayanan, *supra* note 129.

smaller and harder-to-read label located near where users place their feet, which informs users that helmets are required, and that double riding is prohibited.[134] It is likely that a court would find this warning label inadequate because warnings must provide users with instructions of how to use the product properly *and* advise them of the attendant risks.[135] Also, warning labels must be conspicuous.[136] This warning label does not inform users of the attendant risks; it merely provides instructions, which is only one of the necessary prongs.[137] Secondly, the label's small size, poor location, and grey coloring on a black background is not conspicuous enough to catch users' eyes.[138] Courts have found warning labels similar to those on Bird scooters as insufficiently conspicuous.[139]

[32] In determining whether a company is held strictly liable in a products liability claim, courts have evaluated how the product was marketed.[140] In the case of scooters, much of the scooter companies' marketing is through social media platforms, such as Instagram.[141] A case

[134] *See* Ryan Hagen, *Bird and Lime Scooters – Banned Elsewhere – Arrive in Riverside to Mixed Reviews*, THE PRESS ENTERPRISE (Nov. 3, 2018), https://www.pe.com/2018/11/03/bird-and-lime-scooters-banned-elsewhere-arrive-in-riverside-to-mixed-reviews/ [https://perma.cc/VFP8-4BMD].

[135] *See*, e.g., East Penn Mfg. Co., 578 A.2d 1113, at 1118.

[136] *See* Waynesboro Coll., 2008 U.S. Dist. LEXIS 131103, at *2–4.

[137] *See* Hagen, *supra* note 134; *see also* East Penn Mfg. Co., 578 A.2d 1113, at 1118.

[138] *See* Waynesboro Coll., 2008 U.S. Dist. LEXIS 131103 *2–4.

[139] *See id.* at 3.

[140] *See* Emerson Elec. Co. v. Johnson, 2018 Tex. App. LEXIS 8586, *12–13 (2d Ct. App. 2018).

[141] *See* Allem & Majmundar, *supra* note 12.

study on Bird's Instagram account revealed that of the posts containing people riding scooters, only 6.17% of those posts also featured people wearing some sort of protective gear, and only 1.54% of those posts mentioned protective gear in the post's caption.[142] These data point to the conclusion that Bird could be marketing its electric scooters as safe, even without helmets.[143] This would likely weigh in favor of a court finding Bird, or other scooter companies exhibiting similar practices, strictly liable for failing to adequately warn against the risks of helmetless riding, and could even result in the imposition of punitive damages on the scooter company for willfully marketing their dangerous products as safe.[144]

[33] Products liability law has long recognized the principle that manufacturers of consumer products have a duty to prevent reasonably foreseeable misuses, and are therefore held strictly liable for unintended uses of their products that were reasonably foreseeable.[145] Although our nation's courts have not heard a case against an electric scooter manufacturer or micro-mobility scooter ridesharing company in this context, there are several examples that can be used by way of analogy.[146] A court could reasonably find that riding the scooters without a helmet is a foreseeable misuse, since a helmet is not part of the scooter transaction.[147]

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[142] *See id.*; Peter Holley, *Bird Says Safety Is Its 'Top Priority.' So Why Is the E-Scooter Company's Instagram Page Nearly Devoid of Helmets?*, WASH. POST (Dec. 21, 2018), https://www.washingtonpost.com/technology/2018/12/21/bird-says-safety-is-their-top-priority-so-why-is-e-scooter-companys-instagram-page-nearly-devoid-helmets/?noredirect=on&utm_term=.45b020110298 [https://perma.cc/9ZGF-SFZ5].

[143] *See* Allem & Majmundar, *supra* note 12.

[144] *See* Karlsson v. Ford Motor Co., 140 Cal. App. 4th 1202, 1230 (2006).

[145] *See* Ford Motor Co. v. Matthews, 291 So. 2d 169, 174–175 (1974).

[146] *See id.*

A case study found that only 4.4% of injured scooter riders wore helmets.[148] Other dangerous misuses could be tandem riding, or the risk of kids doing tricks with the scooters.[149]

### C. Warranty

[34] Warranty claims arise when the seller of a consumer product violates a warranty, expressed or implied, owed to the buyer of the product or a third-party user.[150] Regarding scooters, express warranties are not likely to be at issue here, because there is no evidence to date of the scooter companies expressing any warranties about the durability of their scooters.[151] Implied warranties, such as the warranty of merchantability and fitness for particular purpose, apply in the sale of consumer goods unless they are modified or disclaimed in accordance with the Uniform Commercial Code.[152] Initially, this warranty relationship was exclusively

[147] *See generally Safety – Bird*, BIRD RIDES, INC. (2019), https://www.bird.co/safety/ (last visited Mar. 5, 2020) (encouraging but not requiring all riders to bring a helmet).

[148] *See* Tarak K. Trivedi et al., *Injuries Associated with Standing Electric Scooter Use*, JAMA NETWORK (Jan. 25, 2019), https://jamanetwork.com/journals/jamanetworkopen/fullarticle/2722574 [https://perma.cc/9V55-QD4W].

[149] *See* Robin Abcarian, *Column: Bird Scooters—So Much Fun, So Damn Dangerous*, L.A. TIMES (Jul. 6, 2018, 3:00 AM), https://www.latimes.com/local/la-me-abcarian-bird-scourge-20180706-story.html [https://perma.cc/MNM7-A5C5]; Leefeldt, *supra* note 109.

[150] *See* VICTOR E. SCHWARTZ ET AL., *supra* note 37, at 770 (noting that warranty is a useful theory of recovery in states where strict liability in tort has not been adopted).

[151] *See Bird Rental Agreement, Waiver of Liability and Release*, BIRD RIDES, INC. (Apr. 30, 2019), https://www.bird.co/agreement/ (last visited Dec. 3, 2019); *see also User Agreement*, LIME (Oct. 28, 2019), https://www.li.me/user-agreement [https://perma.cc/63Q8-KXVF] (demonstrating Lime's lack of an express warranty regarding the durability of their scooters).

between the consumer and the seller as there was a requirement for privity of contract.[153] Courts eliminated this as a requirement, but they still recognize it as indicia of a consumer relationship that would normally include implied warranties.[154] Because the requirement of privity of contract is no longer a necessity, warranties run with the product and their protection is extended to third parties.[155]

[35] The electric scooter companies have disclaimed their implied warranties of merchantability and fitness for particular purpose.[156] Although courts have recognized that manufacturers of consumer products do not have an implied duty to guard against their products' normal wear over the life of the product,[157] the application of the implied warranties of merchantability and fitness for particular purpose to the scooter companies' business models requires such a duty and is important due to the inherent danger of riding a possibly defective scooter on the road. Their business models could require such a duty because there *is* privity of contract established between the scooter company and the scooter user every time the user rents a scooter,[158] and a court could find that there

[152] *See* U.C.C. §§ 2-314–316; *see, e.g.*, Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358 (1960).

[153] *See Henningsen*, 32 N.J. at 378–80.

[154] *See id.* at 379–380.

[155] *See id.* at 414–415.

[156] *See Safety – Bird*, *supra* note 147.

[157] *See generally* Friedman v. General Motors Corp., 331 N.E. 2d 702, 708–709 (Ohio 1975) (outlining the potential causes eliminating any supposed implied warranty on automobile manufacturers).

[158] *See* Khan, *supra* note 3; Murphy and Griswold, *supra* note 6.

should be an implied warranty that the scooter will (1) be merchantable, and (2) be fit for its particular purpose because the consumer expects the scooter to be in working order at the time of rental.[159] Further application of *Henningsen* on scooters also provides that third parties injured by scooters that are not fit for merchantability or are unsafe to ride are likely able to recover under a warranty theory of recovery.[160]

[36] In addition, a court could find some scooter companies' disclaimed implied warranties unenforceable for lack of conspicuousness.[161] An adequately conspicuous disclaimer is one that contains language such that a reasonable person would notice it against a page of similar text.[162] Factors taken into account include the disclaimer's size, location on the page, heading, typeface, or any other contrasting element.[163] It is possible that the disclaimer used by Bird on its website may not be adequately conspicuous, as it does not contain a number of the factors listed above that are used by courts in determining conspicuousness.[164]

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[159] *See* 15 U.S.C. §2308 (providing that warranties can be disclaimed, but only for limited duration, and cannot be disclaimed at the time of sale).

[160] *See* Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 379–380 (1990) (explaining that foreseeable third parties' injuries are also protected by the implied warranty of merchantability).

[161] *See id.*; U.C.C. §2-316(2).

[162] *See* Cate v. Dover Corp., 790 S.W.2d 559, 560 (Tex. 1990).

[163] *See* Hoffman v. Daimler Trucks N. Am., LLC, 940 F. Supp. 2d 347, 356 (W.D. Va. 2013).

[164] *See id*; *Bird Rental Agreement, Waiver of Liability and Release*, BIRD RIDES, INC., https://www.bird.co/agreement/ (last visited Dec. 3, 2019).

## V. DEFENSES

[37] This section of the article will present possible defenses that could be raised by defendants in scooter-related actions.

### A. Contributory Negligence

[38] Contributory negligence is typically a bar to recovery in states that observe the contributory negligence regime, but this is not the case in situations of strict liability.[165] While a plaintiff's use of a product for its intended purpose in a careless manner may amount to contributory negligence in states where it is recognized, such negligent conduct is not a bar to plaintiffs' recovery under strict liability as it would be under the theory of negligence, because it is seen as an issue of foreseeability.[166] In *Ford Motor Co. v. Matthews*, the court upheld a verdict for an injured plaintiff when it found that it was foreseeable that an individual may crank the engine of a tractor before being certain that it was not in gear, even though the owner's manual specified that this should be checked.[167] This 'careless use' could be equated to the case of a scooter rider who was injured while riding without a helmet or other similarly careless use, which will not bar a plaintiff from recovery in a strict liability action.[168]

[39] However in an action for negligence, a finding of contributory negligence on the part of the plaintiff would bar plaintiff's ability to recover damages, as it would serve as a valid defense for the defendant, unless the plaintiff was aggrieved by willful or wanton misconduct by the

[165] *See* Ford Motor Co. v. Matthews, 291 So. 2d 169, 174 (Miss. 1974).

[166] *See id*.

[167] *See id*.

[168] *See id*. at 175.

defendant.[169] Scooter companies have seen legal complaints alleging negligence.[170] If such complaints were to allege willful or wanton misconduct, a scooter user's conduct of riding helmetless, double riding, or even disobeying traffic rules would likely not serve as a bar to his or her recovery.[171]

### B. Misuse

[40] The misuse defense for products liability cases comes into play when a plaintiff has been injured by using a product in a manner that was unintended by the manufacturer (or distributor).[172] This defense is rooted in the notion that the *plaintiff's* conduct was the proximate cause of the injury, not the defendant's conduct by means of a defective product distributed by the defendant.[173] Courts have construed the concept of foreseeable misuse broadly.[174] When applying this concept to scooters, the usual injuries associated with them are typically within the realm of foreseeability because it is reasonable that a scooter company could foresee traffic injuries when it instructs riders against riding on sidewalks,

[169] *See* Li v. Yellow Cab Co., 532 P.2d. 1226, 1241–42 (Cal. 1975).

[170] *See* Barker v. Bird Scooters, Inc., No. 18STCV01504 (Super. Ct. Cal. filed Oct. 19, 2018).

[171] *See* Li v. Yellow Cab Co., 13 Cal.3d at 825–826 (Cal. 1975).

[172] *See* VICTOR E. SCHWARTZ ET AL., *supra* note 37, at 828.

[173] *See* Campbell Hausfeld/Scott Fetzer Co. v. Johnson, 109 N.E.3d 953, 957 (Ind. 2018).

[174] *See* VICTOR E. Schwartz ET AL., *supra* note 37, at 828–29; *see also* Larue v. Nat'l Union Elec. Corp., 571 F.2d 51 (1st Cir. 1978) (upholding a verdict for child plaintiff whose genitals were injured when he was riding a vacuum cleaner as if it were a toy car).

for example.[175] For these reasons, the misuse defense is not likely to be of much help for defendant scooter companies in products liability suits against them.

### C. Assumption of Risk

[41] In suits against scooter companies, defendants may assert the assumption of risk defense. This applies "when plaintiff voluntarily confronts a known hazard" and typically mitigates plaintiffs' ability to recover damages.[176] It should be noted that some states, namely Virginia, recognize the open and obvious defense, which is very similar to the assumption of risk.[177] Open and obvious and the assumption of risk defenses substantially disfavor plaintiffs in cases where the hazard is one that the plaintiff knew or should have known existed.[178] For scooters, the risk of head injury from riding without a helmet *could* be considered an open and obvious or assumed risk, therefore no duty to warn would be necessary.[179]

## VI. SUGGESTIONS

### A. How to Regulate Scooters

[42] This section will provide information regarding cities' current regulation of electric scooters, as well as suggestions on how

[175] *See How to Ride*, BIRD RIDES, INC., https://www.bird.co/how/ (last visited Dec. 3, 2019) (showing that scooter companies instruct riders not to use sidewalks).

[176] *See* VICTOR E. SCHWARTZ ET AL., supra note 37, at 826.

[177] *See* Austin v. Clark Equip. Co., 48 F.3d 833, 836 (4th Cir. 1995).

[178] *See* Norris v. Excel Indus., 139 F. Supp. 3d 742, 756 (7th Cir. 2015).

[179] *See* Austin, 48 F.3d at 836.

municipalities should regulate them in the future.

### 1. Current Regulation

[43] Municipalities have scrambled to regulate the use of dockless scooters within their jurisdictions after the scooters' abrupt arrival.[180] Some cities have ordered the removal of the scooters until official permit programs and regulations have been implemented.[181] Other cities have resorted to merely seizing the scooters and impounding them until regulations and permits are in place, or indefinitely.[182]

[44] Richmond, Virginia saw its first electric scooters when Bird initiated an impromptu dispersal of hundreds of scooters in Richmond's most populated areas.[183] Richmond's immediate response was to impound the scooters until a pilot regulation scheme could be instituted.[184] The

[180] *See* Selina Cheah, *City of Milwaukee Files Lawsuit Against Dockless Scooter Company Bird*, ARCHITECT NEWSPAPER (July 10, 2018), https://archpaper.com/2018/07/milwaukee-files-lawsuit-against-bird/ [https://perma.cc/YTY7-LNKW].

[181] *See id.*; Aria Bendix, *Toppled Scooters, Sidewalk Riding, and Illegal Parking: Electric Scooters Have Returned to San Francisco After Being Banned*, BUS. INSIDER (Oct. 16, 2018), https://www.businessinsider.com/electric-scooters-return-to-san-francisco-after-a-citywide-ban-2018-10 [https://perma.cc/SLN3-NWW2].

[182] *See* Luz Lazo, *Norfolk Says No to Scooters, Impounds 560 and Fines Start-up Bird $93,000*, WASH. POST (Nov. 16, 2018), https://www.washingtonpost.com/transportation/2018/11/16/norfolk-says-no-scooters-impounds-fines-startup-bird/ [https://perma.cc/M3MH-M4WY]; Bendix, *supra* note 181.

[183] *See* Mark Robinson, *Dockless Scooter Pilot Program Gets Green Light from Richmond City Council*, RICHMOND TIMES-DISPATCH (Jan. 28, 2019), https://www.richmond.com/news/local/city-of-richmond/dockless-scooter-pilot-program-gets-green-light-from-richmond-city/article_50c77896-dba5-50e6-b43b-356c67c83e71.html [https://perma.cc/UM55-2CGR].

[184] *See id.*

later-enacted regulations, aimed at safety and notice, prohibit the scooters from being used on sidewalks, only on roads and in bike lanes.[185] The regulations also require the scooters to operate under speed governors with a limit of around 15–20 miles per hour.[186] The pilot program also provides that scooter companies must apply for permits before dropping their scooters, at the tune of $1500 per permit application.[187] The micro-mobility companies will also be charged an annual fee based upon the number of scooters each one operates within the City of Richmond, ranging from $20,000 for zero–100 scooters, $30,000 for 101–200 scooters, and $45,000 for 201–500 scooters.[188]

[45] Many cities across the United States have implemented similar regulatory schemes. Los Angeles initiated one analogous to that of Richmond, but it also required scooter companies to have a "24-hour contact person available for the emergency removal of scooters."[189] Our nation's capital has instated similar regulations which allow for scooter companies to apply for permits and then deploy scooters within the District of Columbia.[190] While most cities have passed regulations to

[185] *See id.*

[186] *See* Mark Robinson, *First City-Sanctioned Scooters to Hit Richmond Streets Next Week*, THE RICHMOND TIMES-DISPATCH (May 30, 2019), https://www.richmond.com/news/local/first-city-sanctioned-electric-scooters-to-hit-richmond-streets-next/article_44b50b97-e227-5a69-9435-6876f6334caa.html [https://perma.cc/R44M-QRBY].

[187] *See id*.

[188] *See id*.

[189] Kate Mancuso, *The Rise of Electric Scooter Regulations*, REGULATORY REVIEW (Jan. 3, 2019), https://www.theregreview.org/2019/01/03/mancuso-electric-scooter-regulations/ [https://perma.cc/5EJ6-T2CT].

[190] *See id*.

allow the scooters, New York City's stalwart prohibition on scooters remains.[191]

[46] It may seem that cities like Richmond that have allowed scooter companies to operate within their cities under their regulations are embracing the new micro-mobility trend, but this could also be indicia of cities trying to economically stomp out the new and somewhat fragile technology.[192] Several studies show that the costs associated with maintaining, charging, placing, and procuring the scooters result in a cost of $2.55 per scooter mile, while Bird only brings in $2.43 of revenue per mile.[193] These numbers reveal an unsustainable disparity if business were to continue at that rate, and this study fails to take into account the permits and fees imposed by many cities.[194] Scooter companies are definitely feeling the pain from the regulations.[195] Smaller companies such as Spin

[191] *See* Alexandra S. Levine, *New York Today: Are Electric Scooters Legal?*, N.Y. TIMES (July 19, 2018, 10:38 AM), https://www.nytimes.com/2018/07/19/nyregion/new-york-today-are-electric-scooters-legal.html [https://perma.cc/78GZ-MBVF].

[192] *See* Andrew J. Hawkins, *Electric Scooters May Not Be Around for Long*, VERGE (Apr. 12, 2019, 10:00 AM), https://www.theverge.com/2019/4/12/18307591/electric-scooter-sharing-bird-lime-uber-economics-big-picture?fbclid=IwAR35Xjo-hm7DMj-IHsmWg8ZWh8EUeoaNAy4WPqAHqOAxtR5t271MCFREySY [https://perma.cc/4Z5Y-E89D].

[193] *See* Sam Korus, *Electric Scooters: The Unit Economics May Spell Trouble*, ARK INVEST (Feb. 19, 2019), https://ark-invest.com/research/electric-scooters [https://perma.cc/TV53-XAYK].

[194] *See id*.

[195] *See* Luz Lazo, *Dockless Bike, Scooter Firms Clash with U.S. Cities over Regulations*, WASH. POST (Aug. 4, 2018, 5:44 PM), https://www.washingtonpost.com/local/trafficandcommuting/dockless-bike-scooter-firms-clash-with-us-cities-over-regulations/2018/08/04/0db29bd0-9419-11e8-a679-b09212fb69c2_story.html [https://perma.cc/WX2E-JW7N].

and Ofo have had to pull out of markets due to the high regulatory costs.[196]

[47] Arriving unannounced in an effort to flood markets with scooters may have resulted in positive short-term effects in attracting investors and attention, but overall this move was a poor long-term strategy because it resulted in a wave of dissatisfied citizens, retail store owners, and government officials.[197] After the San Francisco scooter ban was lifted, the city received applications for permits from ten different scooter companies, but it chose two different companies that did not employ the tactic of dropping scooters in the city unannounced (Skip and Scoot).[198] This prompted Lime, one of the largest scooter companies with the initially invasive strategy, to sue the City of San Francisco for bias and favoritism.[199] These plaintiff scooter companies sought an injunction to stop the rollout of Skip and Scoot scooters, but they were unsuccessful.[200]

### 2. Suggested Regulation

[48] The current regulations being implemented by localities are largely the correct way to deal with this new trend of micro-mobility. I would

[196] *See id.*

[197] *See* Korus, *supra* note 193.

[198] *See* Brock Keeling, *Scooter Company Sues San Francisco*, CURBED: SAN FRANCISCO (Oct. 12, 2018, 10:03 AM), https://sf.curbed.com/2018/10/12/17968228/scooter-company-sues-san-francisco-lime [https://perma.cc/B3RQ-4TVG].

[199] *See* Bendix, *supra* note 181; *id.*

[200] *See* Megan Rose Dickey, *SF Judge Denies Lime's Request to Block Electric Scooter Deployment*, TECHCRUNCH (Oct. 12, 2018, 10:08 AM), https://techcrunch.com/2018/10/12/sf-judge-denies-limes-request-to-block-electric-scooter-deployment/ [https://perma.cc/48RE-LACU].

argue that regulations should be implemented on the state and federal level by way of federal or state executive agencies, *solely* to the extent of mandating that scooter companies only enter localities which have implemented scooter regulations, or imposing the requirement that scooter companies consult with and receive approval from localities that have not implemented regulations before the scooters' arrival. These federal and state regulations, albeit minimal, would ensure that scooters do not enter cities unannounced and unregulated, but would also grant the localities autonomy to regulate the scooters in ways that work best for each municipality. It appears that the majority view is that regulating scooters is good;[201] however, there has been some push-back on individual neighboring cities instating their own regulations for fear that a lack of consistency will result in riders not knowing what is allowed and what is not allowed in each jurisdiction.[202]

### B. Suggestions for Scooter Companies

#### 1. Eliminate the Unannounced Arrival of Scooters

[49] One of the main changes electric scooter companies should make to avoid liability and comply with law and public policy is to eliminate their approach of dumping scooters in cities unannounced. The controversial move of asking for forgiveness rather than permission is a familiar one in the transportation industry's recent history as ridesharing services Lyft and Uber did the same thing in many United States cities.[203]

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[201] *See Editorial: Regulating E-Scooters Calls for Regional Consistency*, THE VIRGINIAN-PILOT (Oct. 27, 2019, 12:15 AM), https://www.pilotonline.com/opinion/vp-ed-editorial-scooters-1027-20191027-5zdzhyhnlbgafcb7eoeebok7ge-story.html [https://perma.cc/K7LN-DN3X].

[202] *See id.*

[203] *See* Kerr, *supra* note 53; Olivia Solon, *How Uber Conquers a City in Seven Steps*, GUARDIAN (Apr. 12, 2017, 4:19 PM), https://www.theguardian.com/technology/2017/apr/12/why-everyone-hates-uber-seven-step-playbook [https://perma.cc/2WH8-L5RU].

It is no surprise that Bird employed this same strategy with its scooters because Bird's founder and CEO, Travis VanderZanden, previously earned his wings as the Chief Operating Officer of Lyft, and prior to that position he served as the Vice President of Growth at Uber.[204] Although Uber and Lyft did receive some pushback from their 'bulldozer' approach of entering markets without first asking for permission, they received less criticism than the scooters have even though they employed an equally as intrusive approach.[205] This could be because there are fewer permit systems and regulations necessary for automobile ridesharing services, such as Uber and Lyft, because they are inherently less dangerous, and they facilitate virtually the same service as taxicabs, which have existed in society for many years.[206]

[50] Not only government officials but also city residents are among those dissatisfied with the unannounced micro-mobility trend.[207] Some California residents in Santa Monica and Beverly Hills are "taking matters into their own hands" by "waging a guerilla war against the devices."[208] Scooters in Santa Monica and Beverly Hills were found lit on fire, in the

[204] *See* Laura Newberry, *Fed-up Locals Are Setting Electric Scooters on Fire and Burying Them at Sea*, L.A. TIMES (Aug. 10, 2018, 4:00 AM), https://www.latimes.com/local/lanow/la-me-ln-bird-scooter-vandalism-20180809-story.html [https://perma.cc/2FKC-N2G8]; *see* Solon, *supra* note 203.

[205] *See* Solon, *supra* note 203.

[206] *See* Kurtzman, *supra* note 4.

[207] *See* Harsimran Julka, *Why Vandalism Is the Biggest Threat to Success of E-Scooter Startups*, MEDIUM (Mar. 15, 2019), https://medium.com/@HarsimranJulka/why-vandalism-is-the-biggest-threat-to-success-of-e-scooter-startups-f8c1763155fb [https://perma.cc/Y9WK-794D].

[208] Newberry, *supra* note 204.

ocean, and in trash cans.[209] Scooter mechanics frequently encounter clipped power lines and destroyed brakes.[210] Scooter vandals have also taken to social media to proliferate their dissatisfaction through an account on Instagram called "Bird Graveyard."[211] With over 24,000 followers, the account depicts "photos and videos of scooters that have been set aflame, tossed into canals, smeared with feces and snapped into pieces."[212]

[51] As I discussed above in the regulations section of this paper, many cities are not opposed to the scooters once regulations have been implemented.[213] Most of the anger and disapproval came from the scooters being dropped unannounced.[214] Scooter companies can easily fix this by complying with local laws, and reaching out to municipalities where no laws are in place to reach an agreement before blindsiding them with scooters. This alternate approach would also help to avoid liability by eliminating many plaintiffs' claims of negligent deployment of scooters.

### 2. Eliminate or Overhaul the Chargers and Mechanics Scheme

[52] As mentioned in the background section, electric scooter

[209] *See id.*

[210] *See id.*

[211] *See* Peter Holley, *The Life of an Electric Scooter: Nasty, Brutish and Often Short*, WASH. POST (Jul. 27, 2018, 1:07 PM), https://www.washingtonpost.com/technology/2018/07/27/life-an-electric-scooter-nasty-brutish-sometimes-short/ [https://perma.cc/P7V9-ZFS2].

[212] *See* Newberry, *supra* note 204.

[213] *See* Lazo, *supra* note 182.

[214] *See id.*

companies contract out to the general public to charge and service their scooters,[215] and this is a public policy issue for more reasons than one. Scooter companies should eliminate or overhaul this entire scheme to avoid liability and comply with public policy.

### a. Waiver of Negligence

[53] The agreement to which Bird Chargers and Mechanics assent states that, "indemnity shall be applicable without regard to the negligence of any party."[216] This language appears to be robust and fail-safe for the electric scooter company, but it is not likely to hold up in states like Virginia where waivers of negligence are void.[217] In addition to the principle that Virginia courts have not honored contracts which violate public policy for this reason, the court also provided that it holds high this notion especially with regard to companies in the business of transporting people: "nothing is better settled, certainly in this court, than that a common carrier cannot by contract exempt himself from responsibility for his own or his servants' negligence in the carriage of goods or passengers for hire."[218]

[54] The scooter companies are likely to be found as common carriers.[219] Uber and Lyft have been found to be common carriers in multiple jurisdictions, so the similarity of the automobile ridesharing

[215] *See Charger Agreement*, *supra* note 22.

[216] *Id.*

[217] *See* Johnson's Adm'x v. Richmond & D. R. Co., 11 S.E. 829, 829–30 (Va. 1890).

[218] *Id.*

[219] *See generally* Kevin Werbach, *Is Uber a Common Carrier?*, 12 I/S: A J. OF L. & POLICY FOR THE INFORMATION SOCIETY POLICY 135 (2015) (discussing whether Uber can be classified as a common carrier); *see* May, *supra* note 16.

business model to that of scooters is likely to result in scooters receiving the same treatment.[220] If a court were to find Bird to be a common carrier by way of it facilitating public transportation, and if an injury of a scooter rider (or third-party pedestrian) were to result from the negligence or misconduct of a Bird Charger or Mechanic, a Virginia court would likely hold Bird's agreement to be void for being at odds with public policy, at least on the principle of waiving the independent contractors' negligence.[221]

### b. Classification of the Workforce

[55] Electric scooter companies employ the general public in an independent contractor capacity to charge and repair their scooters.[222] This characterization has received backlash, and courts could consider it to be improper.[223] A complaint was filed against Bird in a California state court alleging that Bird classified its workers as independent contractors to cut costs when they should have been considered employees.[224] The complaint's main grievance is improper pay.[225] The case is still pending in the California state courts.[226]

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[220] *See* Werbach, *supra* note 219, at 146–47.

[221] *See id.* at 151–52.

[222] *See Charger Agreement*, *supra* note 22; Gordon, *supra* note 124.

[223] *See* Gordon, *supra* note 124.

[224] *See id.*

[225] *See* Complaint at 2–3, Frank v. Bird Rides, Inc., No. 19STCV14983 (Cal. Super. Ct. Apr. 30, 2019).

[226] *See Nicholas Frank vs. Bird Rides, Inc., a Corporation*, DOCKET ALARM, https://www.docketalarm.com/cases/California_State_Los_Angeles_County_Superior_C

### i. Diversion of Liability

[56] The Bird Charger Agreement also runs afoul of public policy and the law by attempting to hold its Chargers and Mechanics liable for any and all injuries of third parties by characterizing them as independent contractors.[227] The agreement to which they assent ultimately attempts to impute Bird's potential for liability onto Chargers and Mechanics.[228] In Bird's Charger Agreement, Chargers agree to "be solely responsible for the consequences of any damage to . . . third parties."[229] These third parties include scooter riders as well as pedestrians.[230] Chargers also agree to indemnify Bird, holding it harmless for any and all liabilities arising out of the agreement.[231] Because scooters are charged daily, they are in the hands of one of Bird's independent contractors on a daily basis, so it could be relatively easy for Bird to argue that a defect or problem with the scooter which caused injury arose in the hands of the Charger or Mechanic. Furthermore, speculatively, Bird Chargers and Mechanics, earning only around $5–9 per scooter charge and $15 per repair are typically not deep-pocketed defendants with assets (much less insurance) available to cover a tort suit against them, nor are they typically insured.[232]

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ourt/19STCV14983/NICHOLAS_FRANK_VS_BIRD_RIDES_INC._A_CORPORATION/ [https://perma.cc/Y34B-2ZKF].

[227] *See* Phillip Morris, Inc. v. Emerson, 368 S.E.2d 268, 278 (Va. 1988); *See generally* Gordon, *supra* note 124 (describing a time when the characterization of independent contractor caused backlash).

[228] *See* Charger Agreement, *supra* note 22.

[229] *Id.*

[230] *See id.*

[231] *See id.*

Thus, Bird is effectively attempting to divert its liability onto a group of people with no ability to pay for settlements or judgments against them, all while cutting its own operational costs.[233]

### c. Under-qualified Mechanics

[57] The scooter mechanic scheme is plagued by yet another problem; the real and dangerous possibility of mechanics' incompetence.[234] Although one news article reported that Bird has begun to open its own in-house repair shops, it appears that many scooters are still repaired by the general public on an independent contractor basis.[235] According to Bird's Services Agreement, the only requirement that relates to the mechanic's ability to fix the scooters is that he or she must "provide mechanic services," or in other words, have *some* experience doing so.[236] These "services" could be for an employer, or the requirement could be satisfied by someone merely completing freelance mechanic services, with no requirement for certification or formal training; the agreement merely requires the mechanic to have at least one other client for whom he or she

[232] *See* Harry Campbell, *Bird Charger: The Ultimate Guide for Charging Electric Scooters*, THE RIDESHARE GUY (May 1, 2019), https://therideshareguy.com/i-signed-up-to-be-a-bird-electric-scooter-charger-heres-what-its-like-2/ [https://perma.cc/6VVY-F4DJ].

[233] *See* Charger Agreement, *supra* note 22; Gordon, *supra* note 124; Newberry, *supra* note 204.

[234] *See* Holley, *supra* note 57.

[235] *See* Joshua Brustein & Josh Eidelson, *Scooter Start-up Bird Ditches Its Gig Economy Mechanics*, L.A. TIMES (Mar. 8 2019, 11:45 AM), https://www.latimes.com/business/la-fi-bird-scooter-mechanics-20190308-story.html [https://perma.cc/8XXT-QTDA].

[236] *See* Charger Agreement, *supra* note 22.

performs similar services.[237] This is a far too easy threshold for virtually anyone to satisfy. For example, an individual could volunteer to fix something mechanical for someone else for payment and that would satisfy the requirement.[238] The agreement does not inquire into the skill level of the mechanic or how *well* the previous job or jobs were completed.[239]

[58] Scooter companies often resort to listing services such as Craigslist in order to find mechanics to hire, and "[ads] posted by Bird, say applicants need only [have] a vehicle and a smartphone to qualify for a position."[240] An example of a Craigslist ad for a Bird Mechanic from the Tampa, Florida area is shown in Appendix One.[241] Note that the "Responsibilities" and "Requirements" sections are boxed in red and do not contain any language about the mechanic's qualifications, with the exception of the "ability to use tools."[242]

[59] The problem of incompetent mechanics is an obvious one. Scooters with mechanical issues have a great propensity to be hurled back into the stream of commerce with dangerous defects, and this is not only a problem for the general public, but also for scooter companies.[243] The law has recognized "liability for physical harm to third persons caused by . . .

[237] *See id.*

[238] *See* Brustein & Eidelson, *supra* note 235.

[239] *See id.*

[240] Holley, *supra* note 31.

[241] *See infra* Appendix One.

[242] *Id.*

[243] *See* Philip Morris, Inc. v. Emerson, 368 S.E.2d 268, 278 (Va. 1988).

failure to exercise reasonable care to employ a competent and careful contractor . . . to do work which will involve a risk of physical harm unless it is skillfully and carefully done."[244] With serious problems, such as throttles sticking and malfunctioning brakes, and the uptick in scooter-related injuries, the life and limb of the general public is certainly at risk if scooter mechanics are not held to a higher standard.[245] The Virginia Supreme Court in *Philip Morris, Inc. v. Emerson* held that an employer was negligent for his failure to exercise reasonable care to hire a competent contractor and also provided that if a defendant is liable for negligently employing contractors, that defendant may not obtain indemnification from any other defendants.[246] This is another reason why Bird's Services Agreement is likely to be held void by the courts, not only for running afoul of public policy, but also on the basis of the scooter company's negligent hiring of independent contractors.[247]

### 3. Rectify Uninsured Riders

[60] A sticky issue arises when a scooter rider is at fault in a collision with a third party. Because the electric scooter trend is most popular in our nation's biggest cities, the odds of a collision between a scooter rider and a pedestrian are relatively high.[248] Collisions could also occur between a scooter and a parked car, for example, which would likely result in property damage to the parked car. Because scooter companies do not

[244] *Id.* (quoting RESTATEMENT (SECOND) OF TORTS §411 (AM. LAW INST. 1965)).

[245] *See* Hamilton, *supra* note 32 (providing evidence for the high propensity of scooter-related accidents).

[246] *See Philip Morris, Inc.*, 368 S.E.2d at 278, 285.

[247] *See id.* at 278.

[248] *See* Hawkins, *supra* note 1.

require riders to carry insurance, "uninsured scooter riders tend to take off after they run into pedestrians."[249] Injured parties are also left without recourse when they trip and are injured by scooters that are left blocking sidewalks or drive into parking spaces blocked by a scooter.[250] Rental car companies require those who use their cars to carry their own insurance, or opt in to a temporary insurance plan through the rental car company.[251] Because scooter companies do not have this requirement, a scooter rider is liable for any damages that occur at his or her fault.[252] Scooter companies could rectify this issue by requiring riders to pay a small membership fee to join the app that would include or offset the cost of insurance.

## VII. **CONCLUSION**

[61] Electric scooters may be the hottest trend at the intersection of technology and transportation, but they have generated a host of concerns, both legal and non-legal. Regardless of criticism, the general phenomenon of emerging technology will not go away. Some individuals believe that it is up to governments and municipalities to wrestle with and adapt to new

[249] Martina Barash, *Bird, Lime Class Suit Result of Scooter Users Skedaddling (2)*, BLOOMBERG L. NEWS (Oct. 24, 2018), https://news.bloomberglaw.com/product-liability-and-toxics-law/bird-lime-class-suit-result-of-scooter-users-skedaddling-2 [https://perma.cc/UGP3-EC5B].

[250] *See id*.

[251] *See* Susannah Snider, *Your Guide to Purchasing Rental Car Insurance*, U.S. NEWS & WORLD REP.: MONEY (Feb. 7, 2019), https://money.usnews.com/money/personal-finance/spending/articles/your-guide-to-purchasing-rental-car-insurance [https://perma.cc/493L-LSMC]

[252] *See* Kurtzman, *supra* note 4; *Scooters Are Everywhere, but Who Is Responsible in an Accident?*, FOX 13 SALT LAKE CITY (Oct. 4, 2018, 2:51 PM), https://fox13now.com/2018/10/04/scooters-are-everywhere-but-who-is-responsible-in-an-accident/ [https://perma.cc/W9YC-W6R9].

technology.[253] This is correct at least in some sense, as there is a requisite degree of unity that must be struck between scooter companies and the government; there should be a uniform regulatory scheme administered to prevent the unannounced dumping of scooters in cities that are not prepared for such an influx, and the individual localities should promulgate regulations that fit their locality. It is important to note that the negative feedback from cities stemmed more from scooter companies dropping scooters in their cities unannounced, and not as much from the scooters themselves as a medium of transportation.[254]

[62] There are many unanswered questions with regard to electric scooters and liability, and until the courts begin to weigh in on this new technology, the questions will remain. That being said, many of the scooter companies' practices that were discussed in this article certainly do raise an eyebrow or two, and some of those practices may result in the scooter companies' liability. We must remember how Justice Cardozo referred to an automobile at the dawn of its inception as a "thing of danger," and how that description weighed heavily on his finding of liability.[255] That 1916 case arose when automobiles were the newest form of transportation among a lot of skeptics.[256] I believe that courts today could carry a similar outlook toward electric scooters, resulting in impositions of liability on scooter companies, but as time goes on this new

[253] *See* Lazo, *supra* note 195.

[254] *See* Kurtzman, *supra* note 4.

[255] MacPherson v. Buick Motor Co., 111 N.E. 1050, 1053 (N.Y. 1916).

[256] *See id*.; Alexander Winton, *Get a Horse! America's Skepticism Toward the First Automobiles*, SATURDAY EVENING POST (Jan. 9, 2017), https://www.saturdayeveningpost.com/2017/01/get-horse-americas-skepticism-toward-first-automobiles/ [https://perma.cc/ESE5-D62G].

form of mobility may morph into a staple of city transportation, much like automobiles did in the 20th Century, and how Uber and Lyft have done in the recent past. Technology is ever changing; will we adapt, or will we pound it out with the hammer of liability?

# Appendix One

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**Full-time Mechanic Position with Bird Electric Scooter. $15.50/HOUR**

Job Overview: Field Team Technician
Bird is a last-mile electric vehicle sharing company dedicated to bringing safe, low-cost, environmentally-friendly transportation solutions to communities across the world. We provide a fleet of electric, shared scooters that can be accessed via smartphone. Bird is headquartered in Venice, California and is rapidly expanding across the country and the world.
As a high quality mechanic for Bird, you will assist us in keeping our Birds on the road and to ensure the best rider experience. Each mechanic works closely with technology to maintain our vehicles in the field to ensure a safe, available ride is always nearby. It is a dynamic role that offers a breadth of activities and responsibilities that shift based on the fluid needs of each city we serve. This role is key to helping grow and maintain our fleet and directly impacts millions of riders who rely on our service. Please note that this position requires you to work out of our service center in the market which you are applying for.

This position is a Full-time opportunity; weekday and some weekend shifts.

NOTE: Target CW is solely responsible for handling any and all payments and questions regarding payment. Target CW will also be responsible for any and all information regarding employment, benefits, and enforcing consequences/punishments.


(google map)

compensation: **$15.50/Hour**

employment type: **full-time**

Responsibilities:

- Execute skills in repair and diagnosis to aid in upkeep of the fleet.
- Perform extensive repairs on vehicles that are unable to be repaired in the field.
- Maintain a high level of communication and responsiveness with your supervisor to advise of successes and challenges in your service center
- Collaborate with other teammates as well as work autonomously

Requirements:

- Desire to work with Bird in a high growth environment.
- A passion for technology and vehicles.
- Problem solving mentality.
- Ability to learn quickly and adapt.
- Ability to use tools and lift 40 pounds up to 3 feet off the ground.
- Excellent time management, communication, and organization skills
- Flexible availability and willingness to regularly work on weekends
- Ability to be both self-directed and work well in a team environment
- Keep work station clean and organized.

Click here to apply!
https://docs.google.com/forms/d/e/1FAIpQLSdZWITkVKGT7zCgq5MFMCERNxtywTQBd8r4L-9eVTLdL8mT2g/viewform?usp=sf_link

- Principals only. Recruiters, please don't contact this job poster.
- do NOT contact us with unsolicited services or offers