

## Products Liability in the Sharing Economy

By David Berke

“Law as an instrument for justice has infinite capacity for growth to meet changing needs and mores.”<sup>1</sup>

“The question in this case, broadly stated, is whether our law should follow these changes in the marketplace or reflect images of the past.”<sup>2</sup>

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### Introduction

Initially, the crash was reported as just another tragic accident. In the pre-dawn hours on Boston’s Hyde Park Avenue, a Honda Civic drifted across the median and slammed into an oncoming car.<sup>3</sup> The drifting driver, a young man by the name of Patrick Fortuna, died.<sup>4</sup> The four occupants of the other vehicle were rushed to the hospital with serious injuries, a painful litany of bone fractures, cuts and concussions.<sup>5</sup> Police reports indicated that the deceased driver was at

<sup>1</sup> Schipper v. Levitt & Sons, Inc., 207 A.2d 314, 324 (N.J. 1965).

<sup>2</sup> Perez v. Wyeth Labs. Inc., 734 A.2d 1245, 1247 (N.J. 1999).

<sup>3</sup> Christopher J. Girard, *24-Year-Old Killed in Hyde Park Car Crash Early This Morning*, BOSTON.COM (Feb. 5, 2012, 7:59 AM), <http://www.boston.com/2012/02/05/crashweb/fD5XZGvIwIZZYIWFv6vKhP/story.html>.

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*; Ron Lieber, *Fatal Collision Makes Car-Sharing Worries No Longer Theoretical*, N.Y. TIMES, Apr. 13, 2012, at B1.

fault.<sup>6</sup> Given the roughly thirty-three thousand killed and 2.3 million injured on U.S. roads each year,<sup>7</sup> this collision—though undoubtedly horrific for those involved—ostensibly did not warrant more than a few sentences in the local police blotter. Hyde Park Avenue was reopened to traffic by sunrise.<sup>8</sup>

But there was a legal complication. Mr. Fortuna did not own the car in which he died, and he was not leasing it long-term. It was not a rental from a company like Hertz or Avis, nor was Mr. Fortuna borrowing the car from a friend. He was doing something in between. That Civic had been rented through the so-called ‘sharing economy.’ Specifically, the car had been leased through RelayRides,<sup>9</sup> a peer-to-peer car-sharing service that allows individual car owners to rent out their vehicles when they themselves are not using it.<sup>10</sup> The Civic’s owner was an MIT undergraduate who rented out her car because she is “environmentally minded and want[s]...people to use [her] car rather than buy[]...their own.”<sup>11</sup> RelayRides provided the digital platform through which the undergraduate rented out her car to Mr. Fortuna, who was otherwise a total stranger.

The accident encapsulated the complicated tort issues that arise with such sharing transactions. Put crudely, who is on the hook? The injured victims needed compensation to pay their astronomical medical bills, and RelayRides’s generic insurance policy looked like it might

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<sup>6</sup> Lieber, *supra* note 5.

<sup>7</sup> NAT’L CTR. FOR STATISTICS AND ANALYSIS, NAT’L HIGHWAY TRAFFIC SAFETY ADMIN., 2013 MOTOR VEHICLE CRASHES: OVERVIEW 1-2 (2014).

<sup>8</sup> *Four Injured, One Killed in Early Morning Hyde Park Accident*, MYFOX BOSTON.COM (Feb. 5, 2012, 7:46 PM), <http://www.myfoxboston.com/story/17674184/four-injured-one-killed-in-early-morning-hyde-park-accident>; Girard, *supra* note 3.

<sup>9</sup> Lieber, *supra* note 5.

<sup>10</sup> See Farhad Manjoo, *Dude, Here’s My Car: Is Peer-to-Peer Car Sharing the Next Great Startup Idea?*, SLATE.COM (Mar. 6, 2012, 5:42 PM), [http://www.slate.com/articles/technology/technology/2012/03/relayrides\\_is\\_peer\\_to\\_peer\\_car\\_sharing\\_the\\_next\\_great\\_startup\\_idea\\_.html](http://www.slate.com/articles/technology/technology/2012/03/relayrides_is_peer_to_peer_car_sharing_the_next_great_startup_idea_.html).

<sup>11</sup> Lieber, *supra* note 5.

not provide sufficient coverage.<sup>12</sup> As such, this liability question was not hypothetical. The undergraduate owned the car, but she was, arguably, merely a consumer who handed her keys to the wrong stranger. RelayRides facilitated the transaction, but they were, also arguably, merely the digital platform for someone else's rental transaction. The police deemed Mr. Fortuna at fault, but his estate was seemingly insufficient to cover the liability. For good measure, the plaintiffs sued all of the potential defendants.<sup>13</sup>

As is the overwhelming norm in American tort law,<sup>14</sup> the parties settled for an undisclosed sum.<sup>15</sup> The answers to these tort questions are hidden behind a confidentiality agreement. Nevertheless, this fact pattern still invites an analysis of tort liability in the sharing economy. This Article undertakes part of that broader tort analysis. The Boston crash seemingly resulted from driver error,<sup>16</sup> but what would be the legal ramifications if a product defect had caused the crash? More generally, what role, if any, does products liability have in the sharing economy?

This unexplored question is important for three primary reasons. First, the sharing economy model upends the neat distinction between conglomerated producers/sellers and passive, atomized consumers. This distinction is impliedly (but deeply) embedded in products liability theory.<sup>17</sup> The crux of the sharing economy model is that individuals “offer and purchase

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<sup>12</sup> *Id.*

<sup>13</sup> M.P. McQueen, *Beware the Liability of Sharing Your Car with Strangers*, FORBES.COM (Oct. 15, 2013, 2:20 PM), <http://www.forbes.com/sites/investopedia/2013/10/15/beware-the-liability-of-sharing-your-car-with-strangers/>.

<sup>14</sup> See, e.g., Marc Galanter & Angela Frozena, *The Continuing Decline of Civil Trials in American Courts*, THE POUND CIV. JUSTICE INST. 3-5 (2011), <http://www.poundinstitute.org/sites/default/files/docs/2011%20judges%20forum/2011%20Forum%20Galanter-Frozena%20Paper.pdf>.

<sup>15</sup> Andre Haddad, *RelayRides Insurance Update*, RELAYRIDES BLOG (Nov. 13, 2013), <http://blog.relayrides.com/2013/11/relayrides-insurance-update/>.

<sup>16</sup> Lieber, *supra* note 5.

<sup>17</sup> See, e.g., *Escola v. Coca Cola Bottling Co. of Fresno*, 150 P.2d 436, 443 (Cal. 1944) (Traynor, J., concurring) (“As handicrafts have been replaced by mass production...the close relationship between the producer and consumer of a product has been altered. Manufacturing processes...are ordinarily either inaccessible to or beyond the ken of the general public.”); *McCown v. Int'l Harvester Co.*, 342 A.2d 381, 383 (Pa. 1975) (Pomeroy, J., concurring) (“Section 402A is founded in part upon the belief that as between the sellers of products and those who use them,

goods and services from each other through an online platform.”<sup>18</sup> Importantly, these private individuals are offering their own *personal* services or products,<sup>19</sup> and they are offering access, not ownership.<sup>20</sup> Thus, to use RelayRides as an example, a consumer who purchased a car for her personal use is, through RelayRides’s digital platform, renting that car out to another consumer looking for a one-off trip. RelayRides takes a cut of the proceeds; the lessor gets extra cash for letting others use the car when it would otherwise sit unused; and the lessee gets a flexible (and perhaps cheaper)<sup>21</sup> rental. This digital peer-to-peer system is far more sophisticated than the casual, among-friends sharing that “has historically been ignored or exempted by the legal system.”<sup>22</sup> However, this sharing economy model is nothing like the twentieth-century industrial production and distribution model in reaction to which strict products liability originally arose.<sup>23</sup>

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the former are the better able to bear the losses caused by defects in the products involved.”); Steven P. Croley & Jon D. Hanson, *Rescuing the Revolution: The Revived Case for Enterprise Liability*, 91 MICH. L. REV. 683, 706-15 (describing original justifications for strict products liability based on relative distinctions between producers and distributors on one hand and consumers on the other); Alan Schwartz, *The Case Against Strict Products Liability*, 60 FORDHAM L. REV. 819, 821-22 (1992) (describing the group assumptions about producers and consumers inherent in strict products liability).

<sup>18</sup> Sarah Cannon & Lawrence H. Summers, *How Uber and the Sharing Economy Can Win Over Regulators*, HARV. BUS. REV. (Oct. 13, 2014), <https://hbr.org/2014/10/how-uber-and-the-sharing-economy-can-win-over-regulators>. ‘Sharing economy’ is an imprecise “buzzword.” Sven Eberlein, *Sharing for Profit—I’m Not Buying It Anymore*, SHAREABLE (Feb. 20, 2013), <http://www.shareable.net/blog/sharing-for-profit-im-not-buying-it-anymore>. The term is also somewhat of a misnomer, since sharing—or at least the concept of sharing instilled during kindergarten playtime—is non-remunerative. However, it is the commonly-used term for this phenomenon, so I use it for purposes of this paper. See also Jenny Kassan & Janelle Orsi, *The Legal Landscape of the Sharing Economy*, 27 J. ENVTL. L. & LITIG. 1, 3 (2012). (“Although it is hard to encapsulate the qualities of this [sharing] economy, it generally facilitates community ownership, localized production, sharing, cooperation, [and] small scale enterprise....”).

<sup>19</sup> E.g., Kurt Matzler et al., *Adapting to the Sharing Economy*, MIT SLOAN MGMT. REV., Winter 2015, at 70, 72 (“The central conceit of collaborative consumption is simple: Obtain value from untapped potential residing in goods that are not entirely exploited by their owners.”); Danielle Sacks, *The Sharing Economy*, FAST COMPANY, May 2011, at 88, 90. (“The basic characteristic of these...sharing marketplaces is that they extract value out of the stuff we already have.”).

<sup>20</sup> E.g., Fleuera Bardhi & Giana M. Eckhardt, *Access-Based Consumption: The Case of Car Sharing*, 39 J. CONSUMER RES. 881, 881 (2012) (“Instead of buying and owning things, consumers want access to goods and prefer to pay for the experience of temporarily accessing them.”); Matzler et al., *supra* note 19, at 71 (“While individuals have traditionally often seen ownership as the most desirable way to have access to products, increasing numbers of consumers are paying to temporarily access or share products and services rather than buy or own them.”).

<sup>21</sup> Grayson Bell, *Peer-to-Peer Rental Agencies Throughout the U.S.*, RELAYRIDES BLOG (Dec. 20, 2013), <http://blog.relayrides.com/2013/12/peer-to-peer-rentals-beat-rental-agencies-throughout-the-us/>.

<sup>22</sup> Molly Cohen & Corey Zehngebot, *What’s Old Becomes New: Regulating the Sharing Economy*, BOSTON B. J., Spring 2014, at 34, 34; see RESTATEMENT (THIRD) OF TORTS: PROD. LIAB. § 1 cmt. c (1998).

<sup>23</sup> See sources cited *supra* note 17.

To consider products liability in the context of this business model is instructive, since it illustrates the doctrinal fault lines that appear when certain of products liability's market assumptions are challenged. It also calls into question the validity of these assumptions, as well as the broader points of doctrine that they undergird.

Second, the sharing economy is a creature of the Internet and digitization,<sup>24</sup> and so it invites consideration of products liability's role, if any, in digital commerce. Again, given the industrial context of its modern doctrinal birth, products liability is "geared to the tangible world."<sup>25</sup> To an almost shocking degree, the extent of products liability's relevance (or irrelevance) to digital products and transactions remains unclear. An analysis of products liability in the sharing economy will not provide a unified theory of digital products liability, but it does provide a helpful perspective on key issues related to these broader technological questions.

Lastly, products liability in the sharing economy is not just important to abstract points of doctrine. It is an immediately important policy question in itself. The aggregate 2013 value of sharing economy goods and services was estimated to be \$26 billion,<sup>26</sup> with individuals on sharing economy platforms receiving \$3.5 billion in revenue that year.<sup>27</sup> Some projections have the sharing economy growing to a sector with \$110 billion in annual revenue,<sup>28</sup> or perhaps even

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<sup>24</sup> See *All Eyes on the Sharing Economy*, ECONOMIST, Mar. 9, 2013, at 13, 13. ("The internet makes it cheaper and easier than ever to aggregate supply and demand. Smartphones with maps and satellite positioning can find a nearby room to rent or car to borrow. Online social networks and recommendation systems help establish trust; internet payment systems can handle the billing. All this lets millions of total strangers rent things to each other.") [hereinafter *All Eyes*]. Absent the Internet, the peer-to-peer transaction costs would be prohibitively high for nationwide sharing economy models.

See Matzler et al., *supra* note 19, at 72 ("The Internet has made sharing enormously simpler.").

<sup>25</sup> *Winter v. G.P. Putnam's Sons*, 938 F.2d 1033, 1034 (9th Cir. 1991).

<sup>26</sup> Naveen Jain, *Trust, Transparency and Shared Economy*, FORBES.COM (Dec. 3, 2013, 6:18 PM), <http://www.forbes.com/sites/naveenjain/2013/12/03/trust-transparency-and-shared-economy/>.

<sup>27</sup> Tomio Geron, *AirBnB and the Unstoppable Rise of the Share Economy*, FORBES.COM (Jan. 23, 2013, 7:00 AM), <http://www.forbes.com/sites/tomiogeron/2013/01/23/airbnb-and-the-unstoppable-rise-of-the-share-economy/>.

<sup>28</sup> Cannon & Summers, *supra* note 18.

more.<sup>29</sup> The peer-to-peer taxi network Uber is currently valued at a staggering \$40 billion.<sup>30</sup> The sharing economy is very much part of the current economic zeitgeist, so it is anyone's guess how much staying power the concept will have.<sup>31</sup> However, even if we are experiencing a startup bubble,<sup>32</sup> and even if the more messianic pronouncements about the sharing economy are gratingly hyperbolic,<sup>33</sup> it seems likely that at least some sharing economy companies will continue to grow into the economic mainstream.

As that Boston crash and other accidents<sup>34</sup> illustrate, we therefore must build an understanding of tort law—including products liability—in the sharing economy. This Article contributes to that project in two ways. First, it offers a descriptive analysis of if—and how—a products liability claim arising from a typical sharing economy transaction could proceed under current doctrine. This question is considered before the overlay of insurance<sup>35</sup> or forced arbitration,<sup>36</sup> which can be expected in this context. The hypothetical claim must be considered

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<sup>29</sup> *The Sharing Economy: How Will It Disrupt Your Business?*, PRICEWATERHOUSECOOPERS 2 (Aug. 2014), [http://pwc.blogs.com/files/sharing-economy-final\\_0814.pdf](http://pwc.blogs.com/files/sharing-economy-final_0814.pdf) (estimating \$335 billion in annual sharing economy revenue by 2025) [hereinafter *How Will It Disrupt*].

<sup>30</sup> Serena Saitto, *This Venture Capitalist Says We Have Entered a Tech Bubble*, BLOOMBERG.COM (Mar. 5, 2013, 8:00 AM), <http://www.bloomberg.com/news/articles/2015-03-05/this-venture-capitalist-is-willing-to-say-we-re-in-a-tech-bubble>.

<sup>31</sup> See Sacks, *supra* note 19, at 131 (“The sharing economy is at one of those interesting junctures where no one knows how big it might get or how many industries...it might affect.”).

<sup>32</sup> See, e.g., Yoree Koh & Rolfe Winkler, *Venture Capitalist Sounds Alarm on Startup Investing*, WALL ST. J. (Sept. 15, 2014, 3:17 AM), <http://www.wsj.com/articles/venture-capitalist-sounds-alarm-on-silicon-valley-risk-1410740054>; Andrew Leonard, *Bubble-Watch: The Dog-Sitting Sharing Economy Gets Frothy*, SALON.COM (Aug. 5, 2013, 4:20 PM), [http://www.salon.com/2013/08/05/bubble\\_watch\\_the\\_dog\\_sitting\\_sharing\\_economy\\_gets\\_frothy](http://www.salon.com/2013/08/05/bubble_watch_the_dog_sitting_sharing_economy_gets_frothy); Saitto, *supra* note 30.

<sup>33</sup> See, e.g., Kassin & Orsi, *supra* note 18, at 2 (extolling the sharing economy as “an epic reinvention of our economic system.”).

<sup>34</sup> See, e.g., Josh Constine, *Uber's Denial of Liability in Girl's Death Raises Accident Accountability Questions*, TECHCRUNCH (Jan. 2, 2014), <http://techcrunch.com/2014/01/02/should-car-services-provide-insurance-when-ever-their-driver-app-is-open/>; Ron Lieber, *Dog Bites Airbnb Guest. Who Pays?*, N.Y. TIMES, Apr. 11, 2014, at B1; Vauhini Vara, *Uber, Lyft, and Liability*, NEWYORKER.COM (Nov. 4, 2014), <http://www.newyorker.com/business/currency/uber-lyft-liability>.

<sup>35</sup> Jason Tanz, *What Makes or Breaks Startups in the Sharing Economy? Insurance Rates*, WIRED (Apr. 28, 2014), <http://www.wired.com/2014/04/sharing-economy-insurance/>.

<sup>36</sup> See, e.g., Michael L. Rustad & Maria Vittoria Onufrio, *Reconceptualizing Consumer Terms of Use for a Globalized Knowledge Economy*, 14 U. PA. J. BUS. L. 1085, 1146 (2012); *Terms of Service*, AIRBNB (Apr. 16, 2015), <https://www.airbnb.com/terms> (“You...agree that any...claim...arising out of...the Services...will be settled

before insurance and arbitration for the simple reason that the threshold question is what, as a matter of legal doctrine, is being insured or arbitrated. This descriptive analysis begins in Part I.A by evaluating the potential for products liability claims related to the web applications that intermediate the typical sharing economy transaction. This first issue directly addresses the role of products liability for digital products. Part I.B then turns to the potential for a products liability claim related to the shared physical product. The threshold issue, discussed in Part I.B.1, is again one of law in the digital age—whether the Communications Decency Act preempts and precludes a sharing economy products liability claim.<sup>37</sup> From there, in Part I.B.2 the analysis turns to the used nature of most sharing economy products and considers how prevailing used product doctrine impacts the analysis. Lastly, in Part I.B.3, this descriptive exploration considers the potential defendants in a sharing economy products liability suit, analyzing whether prevailing doctrine would allow for either or both of the individual product lessor and the sharing economy company itself as viable defendants. In its most general terms, Part I concludes that, under prevailing doctrine, a sharing economy products liability claim is conceivably possible but quite difficult. Given the judicial creativity required to permit such claims, they may be practically impossible.

Part II then provides a normative argument for the ideal products liability regime in the sharing economy. It argues that, from a policy perspective, the best approach diverges from Part I's descriptive conclusion. Products liability should apply to the sharing economy in such a way that its impact is felt evenly across traditional market transactions and sharing economy transactions. The best system to achieve this end is to allow certain products liability claims against the sharing economy platform itself, with conduct-based negligence as the standard for

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by binding arbitration.”); *Terms of Service*, UBER (Apr. 16, 2015), <http://www.uber.com/legal/usa/terms> (“You agree that any...claim...arising out of...the Services...will be settled by binding arbitration....”).

<sup>37</sup> 47 U.S.C. § 230 (2012).

individual lessors. As explained in Part II.A, this approach assures parity in the legal treatment of these two business models, and so it is the most economically efficient regime. Part II.A also argues that if one considers new, data-based methods for accident prevention, this approach imposes liability on market actors in proportion with their ability to efficiently reduce accidents costs.<sup>38</sup> Part II.B completes the analysis with a full description of the proposed products liability framework and by considering possible criticisms.

Throughout this analysis, I use the aforementioned car-sharing company RelayRides to illustrate various points of analysis and argument.<sup>39</sup> The focus on this company is borne of neither animus nor admiration, though I confess the latter for RelayRides's success.<sup>40</sup> Rather, RelayRides is an ideal illustrative subject simply because it just rents out a product (as opposed to services) and—even more on point—a product that is a common target of products liability litigation.<sup>41</sup> There are sharing economy companies like TaskRabbit that purely provide services, as well as others like Uber and Lyft that offer both product and services. This products liability analysis only covers product transactions, as well as the product component of hybrid transactions. However, more general observations about the descriptive and normative incidence of liability are also germane to service transactions.

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<sup>38</sup> See GUIDO CALABRESI, *THE COSTS OF ACCIDENTS: A LEGAL AND ECONOMIC ANALYSIS* 26 (1970) (“I take it as axiomatic that the principal function of accident law is to reduce the sum of the costs of accidents and the costs of avoiding accidents.”).

<sup>39</sup> This use of a single sharing economy company as an exemplar proves helpful in scholarly discussions. See, e.g., Molly Cohen & Arun Sundararajan, *Self-Regulation and Innovation in the Peer-to-Peer Sharing Economy*, 82 U. CHI. L. REV. DIALOGUE 116, 117 (2015) (using AirBnB as a running example in scholarly sharing economy analysis).

<sup>40</sup> See Andre Haddad, *RelayRides' 2014 Year in Review*, RELAYRIDES BLOG (Dec. 30, 2014), <http://blog.relayrides.com/2014/12/relay-rides-2014-year-in-review>.

<sup>41</sup> See 1 RICHARD M GOODMAN ET AL., *AUTO. DESIGN LIABILITY* § 1:1 (3d ed. 2014). RelayRides is also particularly relevant because of its size and searing growth. See Haddad, *supra* note 40; Andre Haddad, *Long-Duration Rentals Fuel 3X Growth at RelayRides in 2013*, RELAYRIDES BLOG (Sept. 30, 2013), <http://blog.relayrides.com/2013/09/long-duration-rentals-fuel-3x-growth-at-relayrides-in-2013/>. A car sharing company is also a good test subject because of the prominence of car sharing in the sharing economy. See Bardhi & Eckhardt, *supra* note 20, at 886.



## I. Descriptive Analysis of Products Liability Claims in the Sharing Economy

### A. Liability for the Digital Product: Application Software

In the typical sharing economy transaction, two products are involved—or, to avoid pre-judgment—two items that could potentially be deemed products for purposes of products liability: (i) the shared physical good itself and (ii) the application software that facilitates the sharing of that physical good.<sup>42</sup> This Part analyzes the potential products liability for that software. As will be discussed in Part I.B, the intermediating software potentially precludes liability for the shared physical good, so it is helpful to analyze the software first, given that importance to the shared good analysis.

Whether sharing economy software can generate products liability turns on a far more basic question. Is software a product for purposes of products liability? That question has been percolating among products liability theorists for at least thirty-five years.<sup>43</sup> The Ninth Circuit, in its iconic *Winter* opinion, mused that “computer software...fail[ing] to yield the result for which it was designed” could be a product for purposes of product liability.<sup>44</sup> However, when it comes to software cases, “[I]t is difficult to know how they should be classified.”<sup>45</sup> As a matter of academic and practitioner opinion, decades of commentary has predicted that software would (and asserted that it should) be deemed a product for purposes of products liability.<sup>46</sup> One early

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<sup>42</sup> See *All Eyes*, *supra* note 24, at 13-14. For brevity’s sake, I will use the term ‘software’ to describe the application interface. This term is the one most frequently used in the relevant products liability literature.

<sup>43</sup> Susan Nycum, *Liability for Malfunction of a Computer Program*, 7 RUTGERS COMPUTER & TECH. L.J. 1, 17 (1979) (“The policies underlying products liability seem fully relevant to defective computer programs.”).

<sup>44</sup> *Winter v. G.P. Putnam’s Sons*, 938 F.2d 1033, 1036 (9th Cir. 1991).

<sup>45</sup> 2 DAVID G. OWEN & MARY J. DAVIS, OWEN & DAVIS ON PRODUCTS LIABILITY § 17:30 (4th ed. 2014).

<sup>46</sup> See, e.g., L. Nancy Birnbaum, *Strict Products Liability and Computer Software*, 8 J. MARSHALL J. COMPUTER & INFO. L. 135, 144 (1988) (“[I]t...is only a matter of time before strict liability is imposed for defective computer software.”); Michael C. Gemignani, *Product Liability and Software*, 8 RUTGERS COMPUTER & TECH. L.J. 173, 203-04 (1981) (“The same policies that first gave rise to strict [products] liability seem to apply well to software.”); Nycum, *supra* note 43, at 17; Michael D. Scott, *Tort Liability for Vendors of Insecure Software: Has the Time Finally Come?*, 67 MD. L. REV. 425, 467 (2008) (“While...factors [that underlie products liability] may not argue in favor of finding all software to be products, they strongly favor finding software that is supposed to provide security for corporate and government computer systems to be a product.”); Frances E. Zollers et al., *No More Soft Landings*

software-law treatise predicted that “products liability...may one day be the most practical area of business knowledge” for the software industry.<sup>47</sup> Even if not that extreme, subsequent commentary has recognized the “lasting effect well into the next century” that would result from courts deeming (or not deeming) software to be a product.<sup>48</sup>

In the wake of this literature, the most recent Restatement created an opening for the software-as-product concept.<sup>49</sup> While the Restatement’s software discussion could be read as mere recognition of the aforementioned theoretical debate,<sup>50</sup> the reporters implicitly weigh toward deeming software as a product. As they note, “When a court...decide[s] whether to extend strict liability to...software, it may draw an analogy between the treatment of software under the Uniform Commercial Code and under products liability law. Under the Code, software that is mass-marketed is considered a good.”<sup>51</sup> Of course, that passage ostensibly defers to the relevant court to “decide whether to extend strict liability,”<sup>52</sup> but it is telling that the reporters offer the UCC analogy to support the product finding. They could just as easily have provided an analogy that counseled against that product determination.

Especially when compared against Section 402A of the second Restatement, the third Restatement appears even more receptive to the treatment of software as a product. The second Restatement provides no rigorous definition of what constitutes a product. However, the

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*for Software: Liability for Defects in an Industry That Has Come of Age*, 21 SANTA CLARA COMPUTER & HIGH TECH. L.J. 745, 768-69 (2005).

<sup>47</sup> JOHN C. LAUTSCH, AMERICAN STANDARD HANDBOOK OF SOFTWARE BUSINESS LAW 263, § 10.1 (1985).

<sup>48</sup> Charles E Cantu, *The Illusive Meaning of the Term “Product” Under Section 402A of the Restatement (Second) of Torts*, 44 OKLA. L. REV. 635, 657 (1991).

<sup>49</sup> RESTATEMENT (THIRD) OF TORTS: PROD. LIAB. § 19 cmt. d (1998) (“[N]umerous commentators have discussed the issue and urged that software should be treated as a product.”).

<sup>50</sup> See source cited *supra* note 46.

<sup>51</sup> RESTATEMENT (THIRD) OF TORTS: PROD. LIAB. § 19 cmt. d (1998).

<sup>52</sup> *Id.*

comments provide a non-exhaustive list of deemed products, all of which are firmly tangible.<sup>53</sup> This silence on intangible products could be read either as a purposeful, absolute omission or as one of many lacunae that Section 402A left to be filled through judicial experience. The third Restatement codifies the latter view. In its more rigorous definition, a product is “tangible personal property distributed commercially for use or consumption.”<sup>54</sup> However, tangibility is not a necessary condition, since “[o]ther items...are products when the context of their distribution and use is sufficiently analogous to [that]...of tangible personal property that it is appropriate to apply” strict products liability.<sup>55</sup> For this latter category, “it is for the court to determine...whether something is, or is not, a product.”<sup>56</sup> The third Restatement also codified the prevailing view that a product does not need to be sold outright. Among other transaction forms, the product can be leased,<sup>57</sup> so the licensing transaction model common for software does not present an obstacle to product liability claims.<sup>58</sup>

The third Restatement was not so much innovating with its more capacious definition as it was responding to judicial practice. Courts generally assumed a flexible definition of product, “reject[ing] a...dictionary definition [of product], and instead adopt[ing] a policy-based technique to determine whether [a] transaction...deserve[s] Section 402A protection.”<sup>59</sup> This

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<sup>53</sup> RESTATEMENT (SECOND) OF TORTS § 402A cmt. d (1965) (“The rule stated in this Section is not limited to the sale of food for human consumption, or other products for intimate bodily use....the rule stated [also] applies to an automobile, a tire, an airplane, a grinding wheel, a water heater, a gas stove, a power tool, a riveting machine, a chair, and an insecticide.”). The list reads like a Dada-ist consumer collage.

<sup>54</sup> RESTATEMENT (THIRD) OF TORTS: PROD. LIAB. § 19(a) (1998).

<sup>55</sup> *Id.*

<sup>56</sup> *Id.* § 19 cmt. a.

<sup>57</sup> *Id.* § 20(b).

<sup>58</sup> Zollers, *supra* note 46, at 776.

<sup>59</sup> Charles E Cantu, *A Continuing Whimsical Search for the True Meaning of the Term “Product” in Products Liability Litigation*, 35 ST. MARY’S L.J. 341, 347-48 (2004); e.g., *Lowrie v. City of Evanston*, 365 N.E.2d 923, 928 (Ill. App. Ct. 1977) (“[T]he policy reasons underlying...products liability...should be considered in determining whether something is a product...rather than...the dictionary definition of the word.”).

focus on “the underlying strict liability policy justifications”<sup>60</sup> for the product question is evident in cases considering products liability for blood,<sup>61</sup> electricity,<sup>62</sup> and buildings.<sup>63</sup> As such, the question is not whether courts will adopt the Restatement’s flexible definition of product, but whether this flexible definition—which has long been applied—encompasses software. The answer to that question will indicate the products liability exposure that sharing economy companies could potentially face through software-related accidents.

To divine a court’s likely approach to software products liability, it is best to turn to the courts themselves. The Restatement opines that “there are no cases on point” for the issue of whether software is a product,<sup>64</sup> but contrary to that assertion, there is enough case law related to software (and similar electronic products and processes) to sketch the outlines of a judicial response. It is true that no case provides a soaring declaration of principles—there is no *Escola*-type Tennis Court Oath of software products liability.<sup>65</sup> However, different cases cover various facets of the problem, and they can be pieced together into a coherent framework.

The easiest part of the answer is reached through subtraction: when software is definitely *not* a product. First, courts have found that software is not a product when it is custom-made.

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<sup>60</sup> David W. Lannetti, *Toward a Revised Definition of “Product” Under the Restatement (Third) of Torts: Products Liability*, 35 TORT & INS. L.J. 845, 873 (2000).

<sup>61</sup> *E.g.*, *Fisher v. Sibley Mem’l Hosp.*, 403 A.2d 1130, 1134 (D.C. 1979) (“In light of...policies of products liability law, characterizing blood plasma as a product...is...unnatural.”); *Brody v. Overlook Hosp.*, 296 A.2d 668, 672 (N.J. Super. Ct. Law Div. 1972) (“[P]olicy considerations are of the utmost importance.”), *rev’d on other grounds*, 317 A.2d 392 (N.J. Super. Ct. App. Div. 1974) *aff’d*, 332 A.2d 596 (N.J. 1975).

<sup>62</sup> *E.g.*, *Bryant v. Tri-Cnty. Elec. Membership Corp.*, 844 F. Supp. 347, 352 (W.D. Ky. 1994) (“[P]olicies of protecting consumers and spreading risk encourage the...appl[ication of] product liability standards to electricity.”); *Otte v. Dayton Power & Light Co.*, 523 N.E.2d 835, 838 (Ohio 1988) (determining that “the public policy reasons justifying strict liability are not viable with” electrical supply); *Bowen v. Niagara Mohawk Power Corp.*, 183 A.D.2d 293, 297-98 (N.Y. 1992) (declining to apply strict products liability to electricity based on “public policy considerations”); *Ransome v. Wisconsin Elec. Power Co.*, 275 N.W.2d 641, 650 (Wis. 1979) (weighing “relevant public policy considerations” in applying products liability to electricity).

<sup>63</sup> *E.g.*, *Calloway v. City of Reno*, 993 P.2d 1259, 1271 (Nev. 2000) (distinguishing “the policies underlying strict products liability from those involved” for housing defects); *Schipper v. Levitt & Sons, Inc.*, 44 N.J. 70, 82, 207 A.2d 314, 321 (N.J. 1965) (weighing “impelling policy considerations” in applying products liability to homes).

<sup>64</sup> RESTATEMENT (THIRD) OF TORTS: PROD. LIAB. § 19 cmt. d (1998).

<sup>65</sup> *Escola v. Coca Cola Bottling Co. of Fresno*, 150 P.2d 436, 440-44 (Cal. 1944) (Traynor, J., concurring).

When software is specifically created under contract for a single client, the provisioning of that software is a service. Services “even when provided commercially, are not products.”<sup>66</sup> A Wisconsin appeals court reached that conclusion in the case of a Milwaukee manufacturing client who refused to pay for “programmable controller” software that it had purchased.<sup>67</sup> The manufacturer “refused to pay” for software that failed to meet expectations.<sup>68</sup> One of the grounds on which the manufacturer defended its non-payment was a products liability-style implied warranty for the product.<sup>69</sup> The court deemed the software to be “professional services” and denied the claim.<sup>70</sup> To support its determination, the court focused on the form of the transaction. The contract at issue “provided that all...charges...would be on the basis of time, at stated rates, and materials.”<sup>71</sup> The contract also “sp[oke] in terms of ‘man-days,’ ‘development,’ ‘time,’ ‘design,’ etc.”<sup>72</sup> The parties negotiated their transaction in the language of professional services, and over ninety percent of the billed cost was for labor.<sup>73</sup> In a separate case with similar facts, an Indiana court reached almost an identical conclusion. In another non-payment claim, the Indiana appeals court focused on the “terminology used by...the parties,”<sup>74</sup> which construed the software as a service developed for the client’s “specific needs.”<sup>75</sup>

While sellers could attempt to exploit this focus on form to avoid products liability, the Wisconsin court’s holding makes good sense. A bespoke software program built at the behest of (and only for) a single client seems like a service. That transaction is analogous to an attorney

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<sup>66</sup> RESTATEMENT (THIRD) OF TORTS: PROD. LIAB. § 19(b) (1998).

<sup>67</sup> *Micro-Managers, Inc. v. Gregory*, 434 N.W.2d 97, 98 (Wis. Ct. App. 1988).

<sup>68</sup> *Id.*

<sup>69</sup> *Id.* at 101.

<sup>70</sup> *Id.* at 102.

<sup>71</sup> *Id.* at 100.

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> *Data Processing Servs., Inc. v. L.H. Smith Oil Corp.*, 492 N.E.2d 314, 318 (Ind. Ct. App.), *aff’d*, 493 N.E.2d 1272, 1273 (Ind. Ct. App. 1986).

<sup>75</sup> *Id.*

preparing legal documents for a client. The attorney is a service provider, not the manufacturer of personalized attorney work product.<sup>76</sup> The operative question, however, is when a transaction becomes customized enough to warrant this service treatment. The Wisconsin and Indiana cases are clear-cut. But consider that, when a user accesses the software of a sharing economy company, the software can personalize the interface based on user feedback and data. A company could argue that its customized interface is akin to the software in those service cases, tailored to the client's "specific needs."<sup>77</sup> At least in the context of the UCC, courts have applied a fairly stringent standard for when software customization moves the needle from good to service.<sup>78</sup> A unique user experience does not undo the product designation. Software should only be deemed a service in situations like *Micro-Managers, Inc.* and *Data Processing Services*, where the software is built under contract (and not just algorithmically customized through user data) for a specific client or small set of clients.

The second exception to when software can constitute a product is messier. Insofar as software conveys "ideas and expression" to a user,<sup>79</sup> that software falls into the traditional products liability exception for expressive content. For fear of "chill[ing] expression,"<sup>80</sup> courts generally refrain from attaching products liability to certain intangible ideas—like magazine articles,<sup>81</sup> how-to books,<sup>82</sup> and lessons in textbooks<sup>83</sup>—conveyed to consumers. This principle has its limits. It does not encompass all intangible products. This limit has been embodied in

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<sup>76</sup> See, e.g., *Denzer v. Rouse*, 180 N.W.2d 521, 525 (Wis. 1970).

<sup>77</sup> *Data Processing Servs.*, 492 N.E.2d at 318.

<sup>78</sup> E.g., *RRX Indus., Inc. v. Lab-Con, Inc.*, 772 F.2d 543, 546 (9th Cir. 1985) (deeming incidental training, repair services and upgrading as insufficient to classify software as services); *Neilson Bus. Equip. Ctr., Inc. v. Italo V. Monteleone, M.D., P.A.*, 524 A.2d 1172, 1173 (Del. 1987) (deeming alteration of software insufficient for classification as service under the UCC).

<sup>79</sup> *Winter v. G.P. Putnam's Sons*, 938 F.2d 1033, 1034 (9th Cir. 1991).

<sup>80</sup> *Jones v. J.B. Lippincott Co.*, 694 F. Supp. 1216, 1217 (D. Md. 1988).

<sup>81</sup> *Herceg v. Hustler Magazine, Inc.*, 565 F. Supp. 802, 803-04 (S.D. Tex. 1983); *Way v. Boy Scouts of Am.*, 856 S.W.2d 230, 232 (Tex. App. 1993).

<sup>82</sup> *Winter*, 938 F.2d 1033.

<sup>83</sup> *Lippincott*, 694 F. Supp. 1216.

cases involving technical aeronautical charts.<sup>84</sup> The contents of these charts have been deemed products for product liability purposes even though they convey intangible navigational concepts.<sup>85</sup> In terms of what distinguishes aeronautical charts from how-to books and other exempted content, the original aeronautical chart cases are silent. According to *Winter*, aeronautical charts are distinct in two ways: (i) they involve “technical, mechanical data” and (ii) they are analogous to a physical product, in this case a compass.<sup>86</sup> Fittingly or ironically depending on your worldview, it is impossible to provide a sufficiently technical definition of when an idea is “technical” enough to become a product.<sup>87</sup> Moreover, analogy is a boundless instrument, so it serves as no better a guide. It has been argued that aeronautical charts are distinguishable because they are “only functional and not literary or political,”<sup>88</sup> but that framework is too constrictive. A how-to article on autoerotic asphyxiation and a textbook’s enema instructions are both functional in their own way, and neither is likely to be literary or political in any cognizable sense. Yet both are exempted from products liability as expressive content.<sup>89</sup> Put mildly, the precise limit to the expressive idea exception is unclear. However, this doctrine must be clarified, for it most certainly applies to the electronic world.

In moving toward a workable framework for this exception as applied to digital products, a helpful starting point is *Wilson v. Midway Games, Inc.*<sup>90</sup> In that case, a parent made failure-to-warn and design defect claims against the creator of the video game *Mortal Kombat*.<sup>91</sup>

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<sup>84</sup> *Brocklesby v. United States*, 767 F.2d 1288, 1294-95 (9th Cir. 1985), *cert denied*, 474 U.S. 1101 (1986); *Salomey v. Jeppesen & Co.*, 707 F.2d 671, 676-77 (2d Cir. 1983); *Aetna Cas. & Sur. Co. v. Jeppesen & Co.*, 642 F.2d 339, 341-343 (9th Cir. 1981); *Fluor Corp. v. Jeppesen & Co.*, 216 Cal. Repr. 68, 71 (1985).

<sup>85</sup> See cases cited *supra* note 84.

<sup>86</sup> *Winter*, 938 F.2d at 1036.

<sup>87</sup> *Id.*

<sup>88</sup> *Zollers*, *supra* note 46, at 763.

<sup>89</sup> *Jones v. J.B. Lippincott Co.*, 694 F. Supp. 1216, 1217 (D. Md. 1988); *Herceg v. Hustler Magazine, Inc.*, 565 F. Supp. 802, 803-04 (S.D. Tex. 1983).

<sup>90</sup> 198 F. Supp. 2d 167 (D. Conn. 2002).

<sup>91</sup> *Id.* at 171-72.

Tragically, another boy—imitating the signature ‘finishing move’ of a *Mortal Kombat* character—murdered her son.<sup>92</sup> According to the plaintiff, this real-life homicide was a foreseeable risk of the violent, engrossing gameplay.<sup>93</sup> In dismissing the claims, the court presented an interesting framework for intangible ideas in products liability. It distinguished two categories: (i) “commercial intellect”<sup>94</sup> cases like both *Winter* and the aeronautical charts that involve specific how-to instructions and (ii) “inciting media speech”<sup>95</sup> like video games that allegedly inspire (rather than instruct) injuring acts. As exemplified through *Winter* and the chart cases, commercial intellect items can be included in or excluded from products liability depending on the particular circumstances.<sup>96</sup> Media speech, however, is never a product for products liability purposes.<sup>97</sup> Importantly for software, the *Midway* court found no reason to distinguish media speech that “is viewed passively...or is controlled by the viewer.”<sup>98</sup>

Applied to the software context, *Midway* provides two-thirds of a three-tiered framework for determining where the software-as-product ends and the expressive content begins. Furthest from potential products liability, there is the pure “media speech”<sup>99</sup> conveyed through the software—think news articles, games, or political advocacy. From a products liability perspective, this facet of the software is untouchable.<sup>100</sup> This hands-off approach is consonant with findings of potential first-amendment protection for software.<sup>101</sup> Moving closer to the province of products liability, there is how-to “commercial intellect” conveyed through the

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<sup>92</sup> *Id.* at 170.

<sup>93</sup> *Id.* at 171-72.

<sup>94</sup> *Id.* at 172.

<sup>95</sup> *Id.* at 173; *see also* Sanders v. Acclaim Entm’t, Inc., 188 F. Supp. 2d 1264, 1277-78 (D. Colo. 2002); James v. Meow Media, Inc., 90 F. Supp. 2d 798, 810-11 (W.D. Ky. 2000), *aff’d*, 300 F.3d 683 (6th Cir. 2002).

<sup>96</sup> *Midway*, 198 F. Supp. 2d at 172.

<sup>97</sup> *Id.* at 173.

<sup>98</sup> *Id.* at 174.

<sup>99</sup> *Id.*

<sup>100</sup> A subtle but important distinction is that this information cannot form the basis for a products liability claim, but it *can* facilitate a products liability claim based on another product. *See infra* Part I.B.1.

<sup>101</sup> *E.g.*, Universal City Studios, Inc. v. Corley, 273 F.3d 429, 447-49 (2d Cir. 2001).



software.<sup>102</sup> To illustrate with RelayRides, this information would include technical guides for car maintenance and repair. This information may or may not be a product for products liability purposes, depending on an imponderable mix of how intensely technical the information is, how analogous it is to a physical product, and whether it possesses any political or literary valence. Note that, for reasons discussed below,<sup>103</sup> if unaffiliated third-party web users generate content, that third-party content cannot itself produce a products liability claim against the sharing economy company, notwithstanding which of these two categories that user-generated content fits.

The third category in this framework—one that *Midway* does not supply—is the instrumental function of the software independent of its expressive content. This instrumental category is defined differently from the way in which aeronautical charts are “functional.”<sup>104</sup> This instrumentality is not the applied utility of expressive content. Rather, it is some programmed physical action that the software is created to execute or instigate. An example is helpful to illustrate the concept. Consider “the software-driven aspects of an automobile” like a software-integrated braking system.<sup>105</sup> The software controls the breaking system in the same way a hydraulic system could. The software either regulates the breaking process properly or it does not. Indeed, defects have arisen in just such braking-management software.<sup>106</sup> It can function or fail like any physical aspect of the system. This instrumental aspect of the software is not just analogous to a physical product; it functionally *is* a physical product in its self-executing physical effect on the world. If anything, the products liability argument seems stronger for this facet of software than for the tangible machinery that it is replacing. To an even greater degree,

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<sup>102</sup> *Midway*, 198 F. Supp. 2d at 172.

<sup>103</sup> *See infra* Part I.B.1.

<sup>104</sup> Zollers, *supra* note 46, at 763.

<sup>105</sup> *Id.* at 769.

<sup>106</sup> *Id.* at 753-54 (describing defects in Ferrari breaking-system software).

the software is “inaccessible to or beyond the ken of the general public” and beyond the “means or skill” of the consumer to “investigate.”<sup>107</sup>

In software products liability cases, courts have not probed too deeply into this issue of expression. However, numerous courts have quietly accepted, or at least not contested, that the instrumental elements of software qualify as products.<sup>108</sup> As such, insofar as a sharing economy company’s software has some instrumental function, products liability can accrue for injuries related to that function. However, a key limitation—one that is fatal to many such digital products liability claims—is the economic loss rule. As applied to products liability, the economic loss doctrine precludes recovery for intangible (i.e., economic) damages unless that damage results from physical harm to the plaintiff’s person, the plaintiff’s property (other than the product itself), or a person in whom the plaintiff has a protected interest.<sup>109</sup> This rule, intended “to keep products liability and contract law in separate spheres,”<sup>110</sup> is a bedrock products liability principle.<sup>111</sup>

One could write a book on the wisdom (or lack thereof) of the economic loss rule in the digital world,<sup>112</sup> but as a descriptive matter, the rule remains strong. As an intangible product, software is prone to producing non-physical injuries. Indeed, in many of the cited software-as-a-

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<sup>107</sup> *Escola v. Coca Cola Bottling Co. of Fresno*, 150 P.2d 436, 443 (Cal. 1944) (Traynor, J., concurring).

<sup>108</sup> *Wendorf v. JLG Indus., Inc.*, 683 F. Supp. 2d 537, 540 (E.D. Mich. 2010) (accepting, without discussion, that software can be a product); *Shema Kolainu—Hear Our Voices v. ProviderSoft, LLC*, 832 F. Supp. 2d 194, 206 (E.D.N.Y. 2010) (accepting that functional software can be a product); *Hardin v. PDX, Inc.*, 173 Cal. Rptr. 3d 397, 406 (Ct. App. 2014) (accepting, at least tentatively, functional software as a product), *as modified on denial of reh’g*, (July 21, 2014); *Sparacino v. Andover Controls Corp.*, 592 N.E.2d 431, 435 (Ill. App. 1992) (accepting software as a product); *ARCO Products Co. v. May*, 948 P.2d 263, 266 (Nev. 1997) (same); *Hou-Tex, Inc. v. Landmark Graphics*, 26 S.W.3d 103, 107 (Tex. App. 2000) (same); *Blaisdell v. Dentrax Dental Sys., Inc.*, 2012 UT 37, ¶¶ 11-13, 284 P.3d 616, 620-21 (same).

<sup>109</sup> RESTATEMENT (THIRD) OF TORTS: PROD. LIAB. § 21(b) (1998).

<sup>110</sup> *E. River S.S. Corp. v. Transamerica Delaval, Inc.*, 476 U.S. 858 (1986).

<sup>111</sup> See William L. Prosser, *The Fall of the Citadel (Strict Liability to the Consumer)*, 50 MINN. L. REV. 791, 822-23 (1966).

<sup>112</sup> See *infra* note 304.

product cases, the products liability claims were dismissed based on the economic loss rule.<sup>113</sup>

Precluded intangible harm is generally the prime risk for sharing economy software, which primarily processes and intermediates financial transactions and information. Purely financial losses—for example, from the RelayRides software overcharging for rentals due to a defect—would be unreachable through products liability. That is not to say that the products liability exposure for software is a null set. As the sharing economy integrates with the ‘internet of things,’<sup>114</sup> one can imagine relevant physical injuries from software. RelayRides, for instance, at one point attempted to institute a system whereby its mobile software could be used to unlock the rented car through vehicle hardware.<sup>115</sup> If that software malfunctioned and broke the car’s standard locking system, the owner would have a cognizable products liability claim based on the software. Similarly, if the unlocking software interfered with another internal car system and caused a renter to crash, that would also produce a viable products liability claim. As such, while software-based products liability exposure is probably limited for sharing economy companies, it can exist.

Before concluding this review of potential sharing economy products liability for software, it is worth advertent to an important problem in digital products liability. The traditional, three-pronged paradigm for products liability claims—manufacturing defect, design

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<sup>113</sup> *ProviderSoft*, 832 F. Supp. 2d at 206 (“Applying the economic loss doctrine...defendant is correct that plaintiff’s tort claims are barred.”); *ARCO*, 948 P.2d at 266 (determining that alleged product injury “is certainly a purely economic loss”); *Hou-Tex*, 26 S.W.3d at 107 (“[T]he fact of most import is that [plaintiff] suffered only economic damages.”); *Blaisdell*, 2012 UT 37, ¶ 7, 284 P.3d at 619 (affirming, though on other grounds, lower-court’s summary judgment against plaintiff based on economic loss rule); see also OWEN & DAVIS, *supra* note 45, at § 17:30 (“[C]ase law [on products liability for software] is so far is limited to commercial contexts involving claims for economic loss without physical harm.”).

<sup>114</sup> Nick Bilton, *Internet of Things May Soon Be Here*, N.Y. TIMES, May 19, 2014, at B8.

<sup>115</sup> Press Release, General Motors, GM Enters Carsharing Business; Teams Up with RelayRides (Oct. 5, 2011) (on file with author) (“RelayRides will leverage OnStar to allow RelayRides borrowers to unlock GM cars with their mobile phones. For vehicles that are not OnStar enabled, RelayRides must install a small device in the car to provide convenient access to borrowers.”).

defect, and failure to warn<sup>116</sup>—collapses in the digital world. Failure to warn remains untouched as a concept, but the other two categories of defect blur into one another since software is only ‘manufactured’ once.<sup>117</sup> Put differently, “Software can only fail for one reason: faulty design.”<sup>118</sup> In that sense, there are no manufacturing defect claims for software. The clearest analogue to a manufacturing defect is a bug, an unintended mistake in the underlying computer code, as opposed to a consciously-selected inferior design. However, should that distinction matter when there is no traditional manufacturing process at play? Some commentators advocate collapsing all claims into design defect, with the reasonable alternative design (RAD) for an injury-producing bug as the software without the bug.<sup>119</sup> However, in the negligence-type risk/utility framework for RADs, it is debatable whether bug-free software is truly a reasonable alternative. Eliminating all bugs in complex software may be impracticable.<sup>120</sup> Manufacturing defect is the only genre of products liability claim that is truly strict, so products liability becomes weaker in its absence. Given that concern, another framework is to differentiate “between the two senses of design.”<sup>121</sup> One is the design of the software in the abstract—its processes and function as conceived on the drawing board.<sup>122</sup> The second sense is the actual composition of the software, the code as written. These two concepts “may not [have] a great deal of light” between them,<sup>123</sup> but to preserve the strictness of manufacturing defects, this approach is the better one. Design

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<sup>116</sup> RESTATEMENT (THIRD) OF TORTS: PROD. LIAB. § 2 (1998).

<sup>117</sup> Thomas G. Wolpert, *Product Liability and Software Implicated in Personal Injury*, 60 DEF. COUNS. J. 519, 524-25 (1993) (“[S]oftware always performs in the manner in which it is programmed. It can do nothing else.”).

<sup>118</sup> Zollers, *supra* note 46, at 749.

<sup>119</sup> *Id.* at 779.

<sup>120</sup> Neil McAllister, *Bug-Free Software? Dream On*, INFOWORLD (Mar. 4, 2010), <http://www.infoworld.com/article/2628445/application-security/bug-free-software--dream-on.html>.

<sup>121</sup> Peter A. Alces, *W(h)ither Warranty: The B(l)oom of Products Liability Theory in Cases of Deficient Software Design*, 87 CAL. L. REV. 269, 300 (1999) (quotation marks omitted).

<sup>122</sup> *Id.* at 300-01.

<sup>123</sup> *Id.* at 301.

defect claims should accrue for that abstract design, while manufacturing defect claims should be directed at discrepancies between that abstract design and the actual execution of the software.

## **B. Liability for the Shared Product: The Hurdles to a Claim**

The second product in the typical sharing economy transaction is the shared physical product. In this Article’s running example, that is a car rented through RelayRides as opposed to software used to rent the car. Overall, this shared product analysis demonstrates that, under prevailing products liability doctrine, shared product claims are not impossible, but are practically quite difficult. This Part I.B examines, in turn, the major obstacles to making such a claim, either against the individual lessor or against the sharing economy company itself.

### **1. Sharing as Liability Shield: Implications of the Communications Decency Act**

To determine whether such a claim is possible, the first question that must be answered has nothing to do with that product. Rather, instead of the expected issues of state tort law, we first have to explore federal law on digital communications. It is an open question whether federal law preempts and precludes products liability claims against sharing economy companies for the shared physical product.

The relevant statute is § 230 of the Communications Decency Act (CDA).<sup>124</sup> Section 230 was enacted to address congressional concerns about liability that could accrue to internet service providers and internet platforms for “claims stemming from their publication of information created by third parties.”<sup>125</sup> In the statute’s conference report, Congress pointed specifically to the case of *Stratton-Oakmont v. Prodigy* as the type of state-law claims it aimed to preempt through the CDA.<sup>126</sup> In *Stratton-Oakmont*, internet service provider Prodigy was held

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<sup>124</sup> 47 U.S.C. § 230 (2012).

<sup>125</sup> *Doe v. MySpace, Inc.*, 528 F.3d 413, 418 (5th Cir. 2008).

<sup>126</sup> H.R. REP. NO. 104-458, at 194 (1996) (Conf. Rep.) (“One of the specific purposes of this section is to overrule *Stratton-Oakmont v. Prodigy* and any other similar decisions.”).

liable for libelous accusations—including a claim that brokerage firm Stratton-Oakmont was a “cult of brokers who...lie for a living”<sup>127</sup>—that an unknown third-party had posted to a Prodigy message board. Because Prodigy had a content screening policy for its message boards, the court reasoned that Prodigy had “editorial control” and faced tort liability as a publisher.<sup>128</sup> This logic threatened to open the door to crushing tort liability for internet companies.<sup>129</sup> Most relevant to *Stratton-Oakmont*, the CDA provided that no user or provider of “an interactive computer service” could face liability for good-faith action “to restrict access to or availability of material...consider[ed] to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable.”<sup>130</sup> In other words, internet companies cannot be held liable for “good-faith” attempts to police third-party content posted on its platforms.<sup>131</sup> However, the CDA went beyond immunity for policing. It also seemingly precluded *all* liability to internet companies for third-party content, not just liability related to policing that content. As the CDA states, “No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.”<sup>132</sup> To the benefit of internet companies, “interactive computer service” is defined broadly to include essentially anyone operating on the internet,<sup>133</sup> and “information content provider” likewise generously covers any third party that “creat[es] or develop[s]...information” through or on an “interactive computer service.”<sup>134</sup> Accordingly, for liability purposes, third-party content cannot be ascribed to internet

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<sup>127</sup> *Stratton Oakmont, Inc. v. Prodigy Servs. Co.*, No. 31063/94, 1995 WL 323710, at \*1 (N.Y. Sup. Ct. May 24, 1995). For what it’s worth, the accusations were on point. *See* Edward Wyatt, *Stratton Oakmont Executives Admit Stock Manipulation*, N.Y. TIMES, Sept. 24, 1999, at C3; *THE WOLF OF WALL STREET* (Paramount Pictures 2013).

<sup>128</sup> *Stratton Oakmont*, 1995 WL 323710, at \*4.

<sup>129</sup> *See* Anupam Chander, *How Law Made Silicon Valley*, 63 EMORY L.J. 639, 650 (2014).

<sup>130</sup> 47 U.S.C. § 230(c)(2) (2012).

<sup>131</sup> *Id.*

<sup>132</sup> *Id.* § 230(c)(1).

<sup>133</sup> *Id.* § 230(f)(2).

<sup>134</sup> *Id.* § 230(f)(3).

companies. Those companies are legally protected if they attempt to regulate that third-party information,<sup>135</sup> but they are likewise free to refrain from such regulation.

The literature on the CDA and related issues of internet torts is vast, controverted, and complex.<sup>136</sup> Rather than explicate those diverse general policy arguments, this Part I.B.1 aims to answer a very particular question about products liability under the CDA. For purposes of the sharing economy, the CDA presents two critical issues. One is how broadly this immunity sweeps in the types of claims that are preempted (and, in particular, whether some or all internet-intermediated products liability claims are preempted). The second issue is—if the CDA does preempt some products liability claims—where the line is drawn that demarcates the difference between immunized third-party content and original content, for which the CDA provides no immunity.<sup>137</sup> The relevance to the sharing economy is that, in the typical sharing transaction, the individual lessor provides information that is posted to the sharing economy platform. The lessee responds to that lessor-generated posting. The sharing economy company often defines the parameters and requirements for that user-generated content, and the platform also often contains substantive, transaction-relevant information that the sharing economy company itself generates. The inquiry is whether, due to that critical importance of user-generated digital content to the transaction, the CDA precludes products liability claims against the sharing economy

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<sup>135</sup> *Id.* § 230(c)(2).

<sup>136</sup> See, e.g., Jack M. Balkin, *The Future of Free Expression in a Digital Age*, 36 PEPP. L. REV. 427 (2009); Chander, *supra* note 129, at 650-657, 670-676; Jack L. Goldsmith, *Against Cyberanarchy*, 65 U. CHI. L. REV. 1199 (1998); H. Brian Holland, *In Defense of Online Intermediary Immunity: Facilitating Communities of Modified Exceptionalism*, 56 U. KAN. L. REV. 369 (2008); Michael L. Rustad & Thomas H. Koenig, *Cybertorts and Legal Lag: An Empirical Analysis*, 13 S. CAL. INTERDISC. L.J. 77 (2004); Michael L. Rustad & Thomas H. Koenig, *Rebooting Cybertort Law*, 80 WASH. L. REV. 335 (2005); Jonathan Zittrain, *A History of Online Gatekeeping*, 19 HARV. J.L. & TECH. 253 (2006); Note, *Badging: Section 230 Immunity in a Web 2.0 World*, 123 HARV. L. REV. 981 (2010).

<sup>137</sup> See *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 330 (4th Cir. 1997) (“None of this means...the original culpable party who posts...would escape accountability.”).

company.<sup>138</sup> This issue is distinct from the potential for products liability stemming from the platform itself, which has already been discussed.<sup>139</sup> Rather, the question is whether the immunized user-generated content creates a liability shield for the sharing economy company against claims arising from facilitated transactions.

To understand the scope of preemption, the first source is the statute itself. Section 230 of the CDA enumerates certain areas of law that it does not preempt. These areas—federal criminal law,<sup>140</sup> intellectual property law,<sup>141</sup> and some federal privacy law<sup>142</sup>—are irrelevant to this products liability inquiry. The statute also includes a combined savings/preemption clause for state law that declares nothing in § 230 “shall be construed to prevent any State from enforcing any State law that is consistent with this section. No cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section.”<sup>143</sup> The statute elaborates no further on what state laws qualify as “consistent” or “inconsistent.”<sup>144</sup> For purposes of products liability, this state law clause does not provide the solution; it merely defines the problem.

The next question is how courts have construed the reach of the preemption. In general, they have given a wide-sweeping interpretation to § 230 immunity.<sup>145</sup> Immunity is maintained

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<sup>138</sup> The products liability claim against the individual lessor would not be precluded. The issue of individual lessor liability is discussed below. *See infra* Part I.B.3.

<sup>139</sup> *See supra* Part I.A.

<sup>140</sup> 47 U.S.C. § 230(e)(1) (2012).

<sup>141</sup> *Id.* § 230(e)(2).

<sup>142</sup> *Id.* § 230(e)(4).

<sup>143</sup> *Id.* § 230(e)(3).

<sup>144</sup> *Id.*

<sup>145</sup> *Doe v. MySpace, Inc.*, 528 F.3d 413, 418 (5th Cir.2008) (“Congress provided broad immunity under the CDA.”); *Universal Commc’n Sys., Inc. v. Lycos, Inc.*, 478 F.3d 413, 419 (1st Cir. 2007) (“[W]e too find that Section 230 immunity should be broadly construed.”); *Carafano v. Metrosplash.com, Inc.*, 339 F.3d 1119, 1123 (9th Cir. 2003) (noting that § 230 immunity is “quite robust”); *Atl. Recording Corp. v. Project Playlist, Inc.*, 603 F. Supp. 2d 690, 699 (S.D.N.Y. 2009) (“Courts across the country have repeatedly held that the CDA’s grant of immunity should be construed broadly.”); *see also* *Green v. Am. Online (AOL)*, 318 F.3d 465, 471 (3d Cir. 2003); *Ben Ezra, Weinstein, & Co. v. Am. Online Inc.*, 206 F.3d 980, 984-86 (10th Cir. 2000); *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 330-31 (4th Cir. 1997); *Hinton v. Amazon.com.dedc, LLC*, No. 2:13CV237-KS-MTP, 2014 WL 6982628, at \*2 (S.D. Miss.



even when the internet service or platform has received notice of the tortious third-party content on its system.<sup>146</sup> The leading case law generally involves informational torts,<sup>147</sup> but importantly for products liability, CDA immunity has been interpreted to extend far beyond that context.<sup>148</sup> A New Jersey state court case—*Milgram v. Orbitz Worldwide, Inc.*<sup>149</sup>—is illustrative. In this New Jersey case, the state attorney general sued a ticket exchange website for “certain ticket selling practices for several...concerts.”<sup>150</sup> Third-party ticket sellers posted fraudulent listings to the site.<sup>151</sup> However, the court determined that CDA immunity was applicable to the ticket exchange website, since “[l]abeling defendants’ conduct as commercial, rather than as performed by publishers or speakers...does not remove defendants’ conduct from the reach of the CDA.”<sup>152</sup> Indeed, this view seems consonant with the statute itself, since the preamble states the goal of “preserv[ing] the vibrant and competitive free market that presently exists for the Internet.”<sup>153</sup> Accordingly, an overt profit motive should not, on its own, preclude § 230 immunity.<sup>154</sup>

*Milgram* and its ilk involve business transactions that—from an internet commerce perspective—most resemble the user-generated nature of a sharing economy transaction. The general principle is that a website that does nothing more than passively provide a user-populated forum for third-parties to exchange goods is immune from liability for those transactions. To

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Dec. 9, 2014). In dicta, the Seventh Circuit has proposed a narrower construction of the statute, but that view remains isolated. *See Doe v. GTE Corp.*, 347 F.3d 655, 659-60 (7th Cir. 2003).

<sup>146</sup> *E.g.*, *Zeran*, 129 F.3d at 332-33; *see also* *Barrett v. Rosenthal*, 146 P.3d 510, 518 (Cal. 2006) (“The *Zeran* court’s views have been broadly accepted, in both federal and state courts.”).

<sup>147</sup> *E.g.*, *Lycos*, 478 F.3d 413; *Carafano*, 339 F.3d 1119; *Green*, 318 F.3d 465; *Ben Ezra*, 206 F.3d 980; *Zeran*, 129 F.3d 327, 330-31 (4th Cir. 1997); *see also* *Barnes v. Yahoo!, Inc.*, 570 F.3d 1096, 1101 (9th Cir. 2009), *as amended*, (Sept. 28, 2009) (“[T]he cause of action most frequently associated with the cases on section 230 is defamation.”)

<sup>148</sup> *Barnes*, 570 F.3d at 1102-03.

<sup>149</sup> *Milgram v. Orbitz Worldwide, Inc.*, 16 A.3d 1113 (N.J. Super. Ct. Law. Div. 2010).

<sup>150</sup> *Id.* at 1116.

<sup>151</sup> *Id.* at 1116-17.

<sup>152</sup> *Id.* at 1121-22.

<sup>153</sup> 47 U.S.C. § 230(b)(2) (2012). The *Milgram* court also adverted to this clause. *Milgram*, 16 A.3d at 1122.

<sup>154</sup> *Goddard v. Google, Inc.*, No. C 08-2738JF(PVT), 2008 WL 5245490, at \*3 (N.D. Cal. Dec. 17, 2008) (“[T]hat a website elicits online content for profit is immaterial.”).

take the extreme of intermediary passivity, that is why Craigslist cannot be held civilly liable for claims related to goods sold on its website.<sup>155</sup> As such, we have a general resolution to the first critical issue: products liability claims can be preempted, since they fall into this bucket of claims related to commercial transactions. The inquiry now turns to the second issue—how much involvement a commercial intermediary must have to eliminate the immunity shield for product claims.

To find that triggering point, a string of lawsuits against eBay is instructive. In *Gentry v. eBay, Inc.*,<sup>156</sup> customers sued after allegedly receiving forged autographs from third-party sellers on the eBay platform.<sup>157</sup> Those sellers represented that the autographs were authentic.<sup>158</sup> To combat eBay's claimed CDA immunity, the plaintiffs pointed to eBay's active involvement in the transaction. They argued that the product listings were not entirely third-party creations. Instead, eBay created and made available to sellers "various product categories and subcategories."<sup>159</sup> eBay created product categories like "Sports: Autographs" and allowed third-party sellers to assign their products to those categories.<sup>160</sup> The plaintiff's argument was that—in doing nothing more than creating the categories to which defendants (and not eBay) choose to assign their products—eBay made an implied warranty that the products qualified for the category or categories to which they were assigned. The plaintiffs also pointed to eBay's customer feedback and endorsement system.<sup>161</sup> Specifically, eBay provided a "Feedback Forum" where buyers and sellers could rate each other (and see prior feedback), as well as a "Power

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<sup>155</sup> *Gibson v. Craigslist, Inc.*, No. 08 CIV. 7735 (RMB), 2009 WL 1704355 (S.D.N.Y. June 15, 2009).

<sup>156</sup> 121 Cal. Rptr. 2d 703 (Ct. App. 2002).

<sup>157</sup> *Id.* at 706.

<sup>158</sup> *Id.*

<sup>159</sup> *Id.* at 707.

<sup>160</sup> *Id.*

<sup>161</sup> *Id.* at 708.

Sellers endorsement” to designate respected sellers.<sup>162</sup> This “Power Sellers” designation and accompanying logo was awarded purely “based on the volume of sales and [p]ositive [f]eedback ratings.”<sup>163</sup>

The court found these indicia of eBay’s involvement insufficient to overcome the CDA.<sup>164</sup> As the court noted, the feedback ratings were themselves entirely third-party content, and the “Power Sellers” label was not an endorsement from eBay.<sup>165</sup> Rather, the label was merely a designation that appeared based on third-party ratings and sales—i.e., third-party content. The findings were much the same for the even weaker category argument. It was the fraudulent sellers, and not eBay, who “chose their own category description for the item offered for sale.”<sup>166</sup> The labels remained third-party content insofar as third parties chose to apply them.

Another eBay case—this one for facilitating the sale of bootleg music recordings—reached the same conclusion as *Gentry*, despite the plaintiff’s more comprehensive arguments about eBay’s involvement.<sup>167</sup> This earlier case is notable in that it considers additional ways in which eBay was actively involved in the transaction beyond “logos, category headings and seller ratings.”<sup>168</sup> The *Stoner* court also considered eBay’s “aggressive” advertising and promotion,<sup>169</sup> as well as eBay’s provision of “insurance for all auctioned items up to \$200” and “escrow and payment services.”<sup>170</sup> The plaintiff argued that these functions pushed eBay beyond the “bulletin board models” of online commercial exchanges that deserve CDA immunity.<sup>171</sup> The court disagreed and granted summary judgment to the defendant. These additional factors were not

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<sup>162</sup> *Id.* at 717.

<sup>163</sup> *Id.*

<sup>164</sup> *Id.*

<sup>165</sup> *Id.* at 717-18.

<sup>166</sup> *Id.* at 716.

<sup>167</sup> *Stoner v. eBay, Inc.*, No. 305666, 2000 WL 1705637 (Cal. Super. Ct. Nov. 1, 2000).

<sup>168</sup> *Id.* at \*1.

<sup>169</sup> *Id.* at \*2.

<sup>170</sup> *Id.*

<sup>171</sup> *Id.* at \*3.

enough to overcome the CDA. One imagines that the court would be willing to consider claims that alleged malfeasance with respect to some facet of eBay’s insurance program or payment systems. However, the product itself remained untouchable as a basis for claims against eBay.

The last eBay case worth considering for now is “the cleanest opinion rejecting a products liability attack on [§] 230’s immunity.”<sup>172</sup> In *Inman v. Technicolor USA, Inc.*,<sup>173</sup> the plaintiff sued eBay (among other defendants) for alleged injury from “vacuum tubes...which were defective due to the fact that they contained mercury.”<sup>174</sup> Unsurprisingly, the court granted eBay’s 12(b)(6) motion to dismiss since “the alleged sale...was facilitated by communication for which eBay may not be held liable under the CDA.”<sup>175</sup> In terms of analyzing eBay’s nexus to the transaction, the court did little more than cite *Gentry* and *Stoner*, so the court, in effect, deemed those same indicia of eBay’s involvement insufficient.<sup>176</sup> The case is notable, however, for its direct application of that precedent to the products liability context. Moreover, in analyzing the products liability claim, the court’s § 402A analysis echoed the passive facilitation logic of the CDA. As the court found,

[Plaintiff] has not alleged that eBay...had anything more than a fleeting connection to the allegedly defective products. He has not alleged that eBay ever had physical possession of the products, that they were moved or stored in a facility owned by eBay, or any other facts to suggest that holding eBay responsible would incentivize safety, that eBay is the only member of the marketing chain available, or that eBay is in a better position than *Inman* to prevent the circulation of such defective vacuum tubes.<sup>177</sup>

Ebay’s “fleeting” role thus fed both into the CDA analysis and the products liability analysis. As such, the opinion seems to doubt that eBay should face products liability, even absent the CDA.

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<sup>172</sup> Eric Goldman, *eBay Gets 47 USC 230 Dismissal of Products Liability Claim—Inman v. Technicolor*, TECH. & MARKETING L. BLOG (Nov. 23, 2011), [http://blog.ericgoldman.org/archives/2011/11/ebay\\_gets\\_47\\_us.htm](http://blog.ericgoldman.org/archives/2011/11/ebay_gets_47_us.htm).

<sup>173</sup> No. CIV.A. 11-666, 2011 WL 5829024, at \*1 (W.D. Pa. Nov. 18, 2011).

<sup>174</sup> *Id.* at \*1.

<sup>175</sup> *Id.* at \*7.

<sup>176</sup> *Id.*

<sup>177</sup> *Id.* at \*6.

Despite eBay’s digital nature, the court’s logic also focuses heavily on “physical possession” and physical distribution.<sup>178</sup> The door to products liability claims against eBay is thus firmly shut.

These eBay cases are important because sharing economy companies perform many of the same functions as eBay. They generally facilitate payments<sup>179</sup> and advertise.<sup>180</sup> They are also moving to insure their transactions,<sup>181</sup> and lessee-lessor reviews—along with trusted lessor designations generated from sales volume and positive feedback—are a mainstay of the sharing economy model.<sup>182</sup> The logic of these eBay cases may seem fatal to a products liability claim in the sharing economy. That conclusion is not unreasonable.

However, there are certain differentiating factors in the typical sharing economy model,<sup>183</sup> and additional case law indicates that, perhaps, these additional degrees of transactional involvement could be enough to overcome the CDA. The first is a difference in what sharing economy companies insure, as opposed to eBay. eBay’s policy insures for truth in advertising, not against liability in use.<sup>184</sup> Put differently, eBay’s insurance policy is there to compensate buyers if they pay for an advertised BMW and receive a Kia. If the eBay buyer drives that BMW into a pole, that is the buyer’s problem. Sharing economy companies like

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<sup>178</sup> *Id.*

<sup>179</sup> See Jason Tanz, *How AirBnB and Lyft Finally Got Americans To Trust Each Other*, WIRED (Apr. 25, 2014), <http://www.wired.com/2014/04/trust-in-the-share-economy>.

<sup>180</sup> See, e.g., AirBnB, *Airbnb Views*, YOUTUBE (May 14, 2014), [https://www.youtube.com/watch?v=\\_yfXzD7tnbM](https://www.youtube.com/watch?v=_yfXzD7tnbM); RelayRides, *Rent Your Car with RelayRides—TV Spot*, YOUTUBE (Nov. 12, 2012), <https://www.youtube.com/watch?v=48Ih0wDfC70>; e-mail of RelayRides, relayrides@email.relayrides.com, to potential lessors (Mar. 18, 2015) (on file with author); e-mail of Uber, Inc., email@et.uber.com, to potential customers (Mar. 25, 2015) (on file with author).

<sup>181</sup> See Tanz, *supra* note 35.

<sup>182</sup> See *All Eyes*, *supra* note 24, at 14.

<sup>183</sup> Arun Sundararajan, *The New ‘New Deal’? Sharing Responsibility in the Sharing Economy*, POL’Y NETWORK, (Oct. 30, 2014), [http://www.policy-network.net/pno\\_detail.aspx?ID=4762](http://www.policy-network.net/pno_detail.aspx?ID=4762) (noting that sharing economy “marketplaces are not mere clearing houses for matching and price-discovery. Rather, they are new market-firm hybrids that centralize certain activities...while decentralizing others....”).

<sup>184</sup> See *eBay Money Back Guarantee: What’s Covered*, EBAY.COM, <http://pages.ebay.com/help/policies/money-back-guarantee.html> (last visited Apr. 16, 2015).

RelayRides insure for use.<sup>185</sup> If a lessor drives that BMW into a poll, the RelayRides insurance policy should cover the damage. The sharing economy company is, from an insurance perspective, more intimately intertwined in the use of the product. The same is true of the typical sharing economy company in terms of its customer service to support product use.<sup>186</sup>

Sharing economy companies also tend to screen their lessors far more rigorously than eBay screens its sellers,<sup>187</sup> and often based on those screening processes, sharing economy companies make broad claims of safety and security in advertising and promotion.<sup>188</sup> These companies' nexus to the commercial actors is far more involved than eBay, and these companies often emphasize that fact to assuage customer concerns about risk in the sharing economy's frenzied hive of strangers serving strangers.<sup>189</sup> Any CDA inquiry into a products liability company would be highly fact-dependent, since all these practices may or may not be present with a given sharing economy company. However, any combination of these practices furthers the case that the CDA does not preclude products liability claims. The sharing economy companies are directly involved in each transaction, notwithstanding the intermediating user-generated content.

While not precisely on point, additional CDA case law supports this view. The Ninth Circuit *Roommates.com* case involved a controversy over where third-party content ends and

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<sup>185</sup> See *What Happens When There Is a Damage*, RELAYRIDES, <https://support.relayrides.com/hc/en-us/articles/203990640-What-happens-when-there-is-a-damage-claim> (last visited Apr. 16, 2015).

<sup>186</sup> See, e.g., Jason Kincaid; *AirBnB Rolls Out 24/7 Phone Support, Additional Safety Features*, TECHCRUNCH (Aug. 8, 2011), <http://techcrunch.com/2011/08/08/airbnb-rolls-out-247-phone-support-additional-safety-features/>; *Trust & Safety: Keeping You and Your Car Safe Is a Top Priority*, RELAYRIDES, <https://relayrides.com/trust-and-safety> (last visited Apr. 16, 2015).

<sup>187</sup> See, e.g., *Safety by Design*, UBER, <https://www.uber.com/safety> (last visited Apr. 16, 2015); *What Is Required To List My Car?*, RELAYRIDES, <http://support.relayrides.com/hc/en-us/articles/203991960-What-is-required-to-list-my-car> (last visited Apr. 16, 2015) [hereinafter *What Is Required*].

<sup>188</sup> See, e.g., Haddad, *supra* note 15 (“RelayRides is actually safer, better protected and better insured [than traditional commercial renting.]”); e-mail of Uber, Inc., email@et.uber.com, to potential customers (Mar. 25, 2015) (on file with author).

<sup>189</sup> See sources cited *supra* note 180.

original, company-generated content begins.<sup>190</sup> The particulars of the fact pattern are not relevant here, but the case stands for two important CDA principles. The first is that, even broadly interpreted, the CDA has its limits. As Judge Kozinski wrote, “The Communications Decency Act was not meant to create a lawless no-man’s-land on the Internet.”<sup>191</sup> As such, after a certain amount of transactional involvement, one would expect the liability shield of the CDA to crack. Second, the case makes clear that the presence of user-generated content does not preclude liability to an internet intermediary based on its own content and, presumably, other involvement in the underlying transaction.<sup>192</sup> This principle is important in the sharing economy context, where some measure of user-generated content is highly common.

A similar Tenth Circuit case<sup>193</sup> provides additional color about when an internet company can—beyond obvious, outright content creation—have content ascribed to it for CDA purposes. One becomes an “information content provider” when one “is responsible, on whole or in part, for the creation or development of information.”<sup>194</sup> As the Tenth Circuit elaborated, the term “development” necessarily, as a matter of sound statutory construction, must mean something broader than mere “creation” of information,<sup>195</sup> since the term “development” is otherwise superfluous in the statute.<sup>196</sup> In the court’s judgment, when the defendant “knowingly sought to transform virtually unknown information into a publicly available commodity” through its paid researchers, it was developing information for purposes of the CDA (and so was liable based on that information).<sup>197</sup> In that vein, one would expect such reasoning to prevent sharing economy

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<sup>190</sup> Fair Hous. Council of San Fernando Valley v. Roommates.Com, LLC, 521 F.3d 1157 (9th Cir. 2008).

<sup>191</sup> *Id.* at 1164.

<sup>192</sup> *Id.* at 1162-63 (“A website operator can be both a service provider and a content provider....[A] website may be immune from liability for some of the content it displays...but be subject to liability for other content.”).

<sup>193</sup> F.T.C. v. Accusearch Inc., 570 F.3d 1187 (10th Cir. 2009).

<sup>194</sup> 47 U.S.C. § 230(f)(3) (2012).

<sup>195</sup> *Id.*

<sup>196</sup> *Accusearch*, 570 F.3d at 1197-98.

<sup>197</sup> *Id.* at 1199-1200.

companies from claiming that their warranties about seller screening are third-party content since those warranties are based on collected compilations of third-party information like, in the case of RelayRides, driving records. If companies are paying to compile and review private records as part of their screening process, any conclusions from that process should qualify as company-generated information.

The last case that helps buttress a products liability claim is another link in the chain of eBay litigation. In *Mazur v. eBay, Inc.*,<sup>198</sup> a class action was brought based on alleged fraud in jewelry auctions run through an auction house other than eBay (but to which eBay steered customers).<sup>199</sup> The details of claims are complex and, in part, tread the ground covered in *Gentry* and *Stoner*.<sup>200</sup> However, the important takeaway is that the court declined to dismiss claims based on eBay's self-generated assertions about safety and reputability.<sup>201</sup> These claims were not mere aggregations of user-generated reviews and sales volume like the "Power Seller" designation.<sup>202</sup> Instead, "eBay unequivocally stated, of its own volition, that live auctions were 'safe' and involved 'floor bidders' and 'international' auction houses."<sup>203</sup> These independent statements constituted "actionable...affirmative misrepresentations."<sup>204</sup> This judgment is important given the common representations of safety and security that sharing economy companies similarly make. *Mazur* demonstrates that such assertions provide an avenue for liability even in the face of the CDA.

None of these additional cases indicate that a sharing economy products liability claim would coast past the CDA. One can only postulate as to the CDA impact based on case law, none

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<sup>198</sup> No. C 07-3967 MHP, 2008 WL 618988 (N.D. Cal. Mar. 4, 2008).

<sup>199</sup> *Id.* at \*1.

<sup>200</sup> *See id.* at \*9.

<sup>201</sup> *Id.* at \*10.

<sup>202</sup> *Gentry v. eBay, Inc.*, 121 Cal. Rptr. 2d 703, 717 (Ct. App. 2002).

<sup>203</sup> *Mazur*, 2008 WL 618988, at \*10.

<sup>204</sup> *Id.*



of which is precisely on point. Moreover, given that sharing economy customers skew young<sup>205</sup> and judges skew old,<sup>206</sup> one could imagine that a judge looking at eBay (and the aforementioned eBay case law) alongside a sharing economy company would see two zebras with indistinguishable legal stripes. Nevertheless, this analysis has shown that, while the CDA could be reasonably interpreted to preempt a products liability claim against a sharing economy company, the better interpretation may be that certain products liability claims should be allowed, based on a fact-intensive analysis of the company's operations. At least, it is plausible for such a products liability claim to overcome the CDA.

## 2. Used Product Issues with a Sharing Economy Claim

After clearing (or not) the hurdle of the CDA, a potential plaintiff must contend with the issue of whether the physical product is even one for which a products liability claim is possible. The problem, from plaintiff's perspective, is that many products in the sharing economy are used.<sup>207</sup> This is by design. A core efficiency argument for the sharing economy is that its model addresses asset underutilization.<sup>208</sup> Normally, a consumer uses her assets only part of the time. She drives her car one hour per day; it sits in the driveway for the other twenty-three.<sup>209</sup> She only uses two bedrooms in her three-bedroom apartment; the spare room's guest bed collects dust. The sharing economy remedies these inefficiencies through digital intermediation.<sup>210</sup> That

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<sup>205</sup> See *The Nielsen Global Survey of Share Communities*, NIELSEN (May 28, 2014), <http://www.nielsen.com/kw/en/press-room/2014/global-consumers-embrace-the-share-economy.html>.

<sup>206</sup> See RICHARD A. POSNER, *THE FEDERAL COURTS: CHALLENGE AND REFORM* 31 (1999); Albert Yoon, *Love's Labor's Lost? Judicial Tenure Among Federal Court Judges: 1945-2000*, 91 CALIF. L. REV. 1029, 1044 tbl.2 (2004); Admin. Office of the U.S. Courts, *Appointments of Magistrate Judges*, USCOURTS.GOV, <http://www.uscourts.gov/Statistics/JudicialBusiness/2012/appointments-magistrate-judges.aspx> (last visited Apr. 16, 2015).

<sup>207</sup> See RACHEL BOTSMAN & ROO ROGERS, *WHAT'S MINE IS YOURS: THE RISE OF COLLABORATIVE CONSUMPTION* 72 (2010).

<sup>208</sup> See sources cited *supra* note 19.

<sup>209</sup> See Manjoo, *supra* note 10.

<sup>210</sup> See sources cited *supra* note 24.

intermediation was too costly—in terms of time, money and counterparty risk—in the pre-digital world.

What should be apparent is that this model is built on products that that are already consumer-owned and consumer-used. The key efficiency gain for lessors is that they profit from their assets *and* retain their personal gain from those assets at the same time.<sup>211</sup> That is not to say that the sharing economy model completely loses its viability when lessors provide new products specifically purchased (and only used for) sharing economy transactions. However, in that situation, one would expect traditional, centralized businesses to be relatively more competitive, given their greater potential for economies of scale and scope. To illustrate the point through the car rental example, a centralized car rental company can probably achieve considerable cost-savings through bulk purchases of vehicles and related goods and services. The decentralized RelayRides model does not allow individual lessors to aggregate their purchasing power in the same way. Absent the above-described efficiency gain, the RelayRides model loses a valuable economic advantage to counter economies of scale and scope.

While used products are central to the sharing economy model, products liability traditionally accords far less protection to used-product purchasers.<sup>212</sup> This less protective approach is based on strong economic and sociological arguments. On the economic front, it has been argued that strict liability for used products would *increase* the overall number of accidents since “used products obtained from noncommercial sellers are highly substitutable for used products obtained commercially.”<sup>213</sup> Noncommercial sellers—i.e. casual sellers—are not directly

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<sup>211</sup> See sources cited *supra* note 19.

<sup>212</sup> See RESTATEMENT (THIRD) OF TORTS: PROD. LIAB. § 8 (1998). *But see* Turner v. Int'l Harvester Co., 336 A.2d 62 (N.J. Super. Ct. Law Div. 1975); Nelson by Hibbard v. Nelson Hardware, Inc., 467 N.W.2d 518 (Wis. 1991).

<sup>213</sup> James A. Henderson, Jr., *Extending the Boundaries of Strict Products Liability: Implications of the Theory of the Second Best*, 128 U. PA. L. REV. 1036, 1082 (1980).

reachable through strict liability<sup>214</sup> (and may even be judgment-proof for negligence purposes).<sup>215</sup> Accordingly, “a substantial risk tax upon commercial used-products sellers through strict products liability” would increase the relative price of commercially-sold used-products and drive consumers to readily substitutable noncommercial sellers.<sup>216</sup> Since products sold through noncommercial sellers “are riskier” than commercial products,<sup>217</sup> the net effect is greater risk to consumers. Indeed, bearing out at least part of this hypothesis, when Wisconsin “began requiring commercial used car dealers to inspect and repair their vehicles,” the “commercial share” of the used car market dropped from 56% to 45%.<sup>218</sup> In that vein, used product dealers are often “marginally profitable and lack the resources to insure themselves properly,”<sup>219</sup> so strict liability may simply shut them down.

Also on the economic front, “[T]he position of the used-goods dealer is normally entirely outside the original chain of distribution of the product,”<sup>220</sup> and so “[t]he dealer in used goods generally has no direct relationship with either manufacturers or distributors.”<sup>221</sup> The dealer has no line of communication through which it could push for changes to product design or manufacturing.<sup>222</sup> The risk reduction aim of products liability is doubly frustrated—net risk in the market increases, while those bearing liability are not empowered to alter the product engendering the risk. In addition, courts claim that, as a sociological matter, the used-goods

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<sup>214</sup> RESTATEMENT (THIRD) OF TORTS: PROD. LIAB. § 1 cmt. c (1998).

<sup>215</sup> Henderson, Jr., *supra* note 213, at 1083. The sharing-economy implications of the casual seller rule are discussed below. *See infra* Part I.B.3.

<sup>216</sup> *Id.* at 1082.

<sup>217</sup> *Id.* at 1083.

<sup>218</sup> David B. Goodwin, Note, *Protecting the Buyer of Used Products: Is Strict Liability for Commercial Sellers Desirable?*, 33 STAN. L. REV. 535, 536 (1981).

<sup>219</sup> *Id.* at 543.

<sup>220</sup> *Tillman v. Vance Equip. Co.*, 596 P.2d 1299, 1304 (Or. 1979). *Tillman* is a leading case in used products liability. Its reasoning “persuaded the majority of courts to reject strict liability” for used products. Antonio J. Senagore, *The Benefits of Limiting Strict Liability for Used-Product Sellers*, 30 N. ILL. U. L. REV. 349, 364 (2010); *see, e.g., King v. Damiron Corp.*, 113 F.3d 93 (7th Cir. 1997).

<sup>221</sup> *Tillman*, 596 P.2d at 1304; *see also Peterson v. Lou Bachrodt Chevrolet Co.*, 329 N.E.2d 785, 787 (Ill. 1975).

<sup>222</sup> *Tillman*, 596 P.2d at 1304.

market is understood to be an ‘as is’ market.’<sup>223</sup> That expectation, along with these economic factors, indicates that the implied warranty inherent in products liability should not apply (with contract instead controlling).<sup>224</sup>

In light of these rationales against strict used-products liability, the Restatement presents four limited avenues to liability for used products: (i) the harm is caused from a product defect that “arises from the seller’s failure to exercise reasonable care”<sup>225</sup>—in other words, traditional, conduct-based negligence, (ii) the harm (a) arises from a manufacturing defect<sup>226</sup> or a defect that can otherwise be inferred under product liability’s traditional *res ipsa loquitur* rules<sup>227</sup> and (b) “the seller’s marketing of the product would cause a reasonable person in the position of the buyer to expect the used product to present no greater risk of defect than if the product were new,”<sup>228</sup> (iii) the used product is “remanufactured,”<sup>229</sup> so fixed-up used products are subject to the same liability regime as new products, or (iv) a used product’s alleged design or warning defect violates a safety law or regulation.<sup>230</sup>

These avenues to used-product liability can be sorted into two categories: those bases for liability that exist in all used-product contexts and those bases that are contingent on particular circumstances. No matter what (aside from permitted contractual modifications), a plaintiff can make a negligence claim, as well as design or failure-to-warn claims based on statutory or regulatory non-compliance. That is not nothing. However, products liability was originally

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<sup>223</sup> See *Tillman*, 596 P.2d at 1303-04. This sociological argument may be somewhat circular, since it is valid insofar as judges decide it is valid. The law articulates norms as it codifies them. However, to the extent this sociological view accords with *ex ante* consumer expectations, it does carry some merit.

<sup>224</sup> *Id.*

<sup>225</sup> RESTATEMENT (THIRD) OF TORTS: PROD. LIAB. § 8(a) (1998).

<sup>226</sup> *Id.* § 2(a).

<sup>227</sup> *Id.* § 3.

<sup>228</sup> *Id.* § 8(b).

<sup>229</sup> *Id.* § 8(c); see, e.g., *Crandell v. Larkin & Jones Appliance Co.*, 334 N.W.2d 31 (S.D. 1983).

<sup>230</sup> RESTATEMENT (THIRD) OF TORTS: PROD. LIAB. § 8(d); see also *id.* § 4(a) (describing liability for such legal noncompliance).

instituted as a corrective to the inadequacy of conduct-based negligence.<sup>231</sup> As for non-compliance liability, if someone is selling a good—used or not—that violates a law or regulation through its defect, it would warrant an archly-raised eyebrow if an injured purchaser could not sue for injury from that defect. It would be extreme if that theory were not a viable basis for a claim.

As for the context-dependent avenues, we can dismiss “remanufactur[ing]”<sup>232</sup> for our purposes since sharing economy companies do not typically refurbish their products.<sup>233</sup> That leaves manufacturing and inferable defects contingent on consumer expectations of “no greater risk of defect than if the product were new.”<sup>234</sup> What should be consumers’ product expectations in the sharing economy? A lot of sharing economy consumers, commentators and companies struggle with that precise question.<sup>235</sup> It hard to give an answer for such a dynamic field that is enduring the public-relations growing pains of ascension to the economic mainstream.<sup>236</sup> The Restatement provides possible factors to consider in judicial construction of those expectations.<sup>237</sup> Perhaps most interesting for this analysis is whether the seller has made “any guarantees or warranties” with respect to the product. These messages may be particular to the current public relations environment for sharing economy companies, but as noted earlier, many sharing economy companies are publicly emphasizing the safety and security of their transactions.<sup>238</sup> Those public statements are, arguably, geared to generate consumer expectations that, for instance, a RelayRides transaction is just as safe as (or even safer than) a commercial car

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<sup>231</sup> See, e.g., *Escola v. Coca Cola Bottling Co. of Fresno*, 150 P.2d 436, 441 (Cal. 1944).

<sup>232</sup> RESTATEMENT (THIRD) OF TORTS: PROD. LIAB. § 8(c) (1998).

<sup>233</sup> Such physical work on products cuts against the decentralized nature of the business model.

<sup>234</sup> RESTATEMENT (THIRD) OF TORTS: PROD. LIAB. § 8(b) (1998).

<sup>235</sup> See, e.g., *Vara*, *supra* note 34.

<sup>236</sup> See sources cited *supra* note 34.

<sup>237</sup> RESTATEMENT (THIRD) OF TORTS: PROD. LIAB. § 8 cmt. h (1998).

<sup>238</sup> See, e.g., sources cited *supra* note 180.

rental.<sup>239</sup> At least for the time being, a sharing economy customer likely has a strong argument to make that consumer expectations have been set high enough to warrant claims for manufacturing or inferential defects.

However, having sketched the liability regime for used products, it is worth taking a step back to address a question that may seem too obvious to warrant consideration: what makes a product used? Do sharing economy products even count as used products? The self-evident answers are, ostensibly: (i) when someone has used the product beyond a *de minimis* amount and (ii) yes, of course. However, in the products liability context, the definition of ‘used’ involves more than those seemingly obvious answers. To qualify as a used product, the item “must not only have been used for some period of time prior to the used-product sale transaction...*but that use must have followed its sale to a buyer not in the chain of distribution.*”<sup>240</sup> The importance of this second prong is especially evident in the leasing context. As noted above, the Restatement follows the majority rule that extends products liability to leased products.<sup>241</sup> For a given leased product, every leased transaction (except for the first one) involves a product that has been ‘used,’ in the dictionary sense of the word. Indeed, in the pathfinding products liability case for lessors,<sup>242</sup> the leased truck at issue was a 1959 model in heavy commercial use,<sup>243</sup> and the alleged injury did not occur until mid-1961.<sup>244</sup> Cognizant of this tension, defendants in leased

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<sup>239</sup> See Haddad, *supra* note 15.

<sup>240</sup> RESTATEMENT (THIRD) OF TORTS: PROD. LIAB. § 8 cmt. d (1998) (emphasis added).

<sup>241</sup> *Id.* at § 20(b); see, e.g., Delaney v. Towmotor Corp., 339 F.2d 4 (2d Cir. 1964); Price v. Shell Oil Co., 466 P.2d 722 (Cal. 1970); see also § 20 cmt. c (“The most significant extension...of strict products liability is the inclusion of commercial product lessors in the category of suppliers held strictly liable for product defects.”); OWEN & DAVIS, *supra* note 45, at § 17:3 (“[M]ost modern courts have followed suit by routinely holding commercial lessors of new and like-new products subject to strict liability.” (footnotes omitted)).

<sup>242</sup> Cintrone v. Hertz Truck Leasing & Rental Serv., 212 A.2d 769 (N.J. 1965).

<sup>243</sup> *Id.* at 772.

<sup>244</sup> *Id.* at 773.

products liability cases have tried, generally unsuccessfully, to invoke the lower standard of used products for their commercial leasing.<sup>245</sup>

The all-important distinction between commercial lessors and used-products dealers—a basis for differentiation that is vexing in the sharing economy context—is their different relationships to the original chain of distribution. Because commercial lessors generally purchase through the original chain of distribution, they are “familiar with the characteristics and prior history of the products” and are “in a position to discover and correct defects.”<sup>246</sup> Unlike used product sellers, commercial lessors can cost-efficiently police and mitigate risk.<sup>247</sup> However, if a commercial lessor openly sells products that have left the original chain of distribution and passed through the hands of a consumer (or several consumers), the lessor is treated as a used product dealer, since its risk-mitigating advantage is lost.<sup>248</sup>

The sharing economy, by its nature, disrupts assumptions about the traditional chain of distribution.<sup>249</sup> The consumer is not a concept apart from the producer and seller.<sup>250</sup> Making matters more complicated, the chain of distribution is not itself, as a matter of products liability doctrine, a strictly defined concept.<sup>251</sup> One could parse the chain of distribution concept, as it relates to used products, based on whether the product has always been held subject to a

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<sup>245</sup> *E.g.*, Samuel Friedland Family Enters. v. Amoroso, 630 So. 2d 1067, 1070 (Fla. 1994) (“Lessors and the sellers of used goods are not necessarily analogous in light of the policies underlying strict tort liability.”); Kemp v. Miller, 453 N.W.2d 872, 879 (Wis. 1990).

<sup>246</sup> *Kemp*, 453 N.W.2d at 879.

<sup>247</sup> Richard C. Ausness, *Strict Liability for Chattel Leasing*, 48 U. PITT. L. REV. 273, 334 (1987) (“This ability to control risk distinguishes...lessors for [sic] used product sellers. Unlike...lessors, used product dealers seldom know their product’s prior history, and...must inspect...product[s] individually.”).

<sup>248</sup> See RESTATEMENT (THIRD) OF TORTS: PROD. LIAB. § 8 cmt. d, § 20 cmt. c (1998).

<sup>249</sup> *How Will It Disrupt*, supra note 29, at 3 (noting sharing economy model is “threatening to disrupt established organisations [sic] and ways of doing business, particularly in ‘post-materialist,’ developed economies”).

<sup>250</sup> ALEX STEPHANY, *THE BUSINESS OF SHARING: MAKING IT IN THE NEW SHARING ECONOMY* 43 (2015) (“We are no longer passive consumers but ‘prosumers’: producers *and* consumers who create value at the same time as getting what we want from those around us.”); Cohen & Sundararajan, supra note 39, at 122 (“A distinguishing feature of commercial activity in the sharing economy is the way in which the provision of services often blurs lines between the personal and the professional.”).

<sup>251</sup> Oscar Mayer Corp. v. Mincing Trading Corp., 744 F. Supp. 79, 84 (D.N.J. 1990) (“This Court is not aware of a precise definition of ‘chain of distribution’ for the purpose of attributing responsibility under strict liability in tort.”).

commercial aim. If a RelayRides lessor purchases a new car with the intent to begin leasing it (as well as driving it herself) immediately, then perhaps that keeps the car within the chain of distribution.<sup>252</sup> Following that logic, if a lessor purchased and personally used a car for two years before initiating her leasing business (or purchased a previously owned car for immediate lease), that product would be used, since it left the chain of distribution. However, this framework would—with its impenetrable questions about intent and provenance—be difficult to apply. As part of those previously mentioned safety-and-security campaigns, RelayRides makes representations about the screening and safety of its cars.<sup>253</sup> One could argue that this representations imply that all the cars are new or like-new (and so not used for products liability purposes). That argument may work for newer cars, but that seems like a less tenable legal theory with, for instance, rental options that are over a decade old. Such a framework would require a limiting principle.

Notwithstanding the Restatement’s formal, two-pronged definition for a used product,<sup>254</sup> its examples employ the relative amount of use as a heuristic to determine when a product has become ‘used.’<sup>255</sup> The Restatement gives the example of a year-old rental car with 8,000 miles, which it deems like-new.<sup>256</sup> The reporters contrast that example with older cars presented to the consumer as “obviously used” that have 35,000 to 75,000 miles (and that rent for less than the typical rental car fleet).<sup>257</sup> This heuristic—considered in tandem with pricing and messaging about reliability and safety relative to traditional commercial lessors—would provide a more transparent, predictable sense of when strict products liability would apply. The consumer

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<sup>252</sup> The validity of any claims about the product remaining in the chain of distribution may hinge on the casual seller issue. *See infra* Part I.B.3.

<sup>253</sup> *See, e.g.,* Haddad, *supra* note 15; *Which Cars Do You Accept?*, RELAYRIDES, <http://support.relayrides.com/hc/en-us/articles/203991940-Which-cars-do-you-accept> (last visited Apr. 17, 2015) [hereinafter *Which Cars*].

<sup>254</sup> RESTATEMENT (THIRD) OF TORTS: PROD. LIAB. § 8 cmt. d (1998).

<sup>255</sup> *Id.* § 8 cmt. j, illus. 19, 20.

<sup>256</sup> *Id.* § 8 cmt. j, illus. 19.

<sup>257</sup> *Id.* § 8 cmt. j, illus. 20.



renting a newer model in good condition—the type of car one would find on the Avis lot—probably has a more reasonable basis for a strict products claim than someone renting a late-nineties model with six figures on the odometer.

These frameworks are mere conjecture of what could be, based on related tenets of current law. Products liability assumes a clean, obvious line between the chain of industrial production/distribution and the consumer, but at least with sharing economy companies, that assumption is invalid. However, based on the above analysis, there are, broadly speaking, three ways that courts could approach the used products issue. The first approach is to adhere to a strictly traditional view of the chain of distribution and to deem the product at issue used in the most defendant-friendly sense, with the only permissible claims sounding in negligence or statutory/regulatory violation. The second approach would be to the same as the first, except a court would allow manufacturing and inferential-defect claims based on marketing and other atmospheric factors. The third approach would be to treat the products as new or like-new, with strict products liability in full effect. A comprehensive framework for sharing economic products could involve some measure of all three approaches. Newer products—defined according to whether they have left the chain of distribution, their relative amount of use, or some other metric—would fall into bucket three. More heavily used products would fall into buckets one or two. In any event, this used product issue is a thorny problem of doctrine with no easy answer. However, a determination of which approach applies could buttress or fatally undercut the viability of a sharing economy claim.

### **3. Who Is the Defendant?: More Problems in the Chain of Distribution**

Assuming all of the above issues are settled, a theoretical plaintiff would then have to decide whom to name as defendants. Subject to the above, the sharing economy context does not

seem like it should alter whether claims against the manufacturer are possible. The real open question, however, is whether the sharing economy company or the individual lessor (or both) can be named as defendants. Apart from who should face suit as a public policy matter,<sup>258</sup> a plaintiff must determine who *can* face suit under the law.

In response to a complaint, an individual lessor would be well-advised to invoke the casual seller rule. As the Restatement frames the rule, strict products liability applies “only to... *commercial* sellers...who are engaged in the business of selling...the...product that harmed the plaintiff.”<sup>259</sup> In contrast, a noncommercial seller—like one who “sells foodstuffs to a neighbor” or “the private owner of an automobile who sells it to another”<sup>260</sup>—is merely subject to a products-based duty “to warn the person to whom the product is supplied of known defects that are not obvious or readily discernible.”<sup>261</sup> Again, products liability, as applied to the sharing economy, founders on its assumption of a clear demarcation between the consumer and the producer, the commercial and the noncommercial. An individual lessor is more than a car owner who happens to sell off her vehicle when the time comes to buy a new one. The lessor is, digitally speaking, hanging out her shingle. This fact is evident in the idiom of entrepreneurship used to describe sharing economy lessors.<sup>262</sup> She is willing to provide her product to any reputable customer. She is undoubtedly something more than the Restatement’s vision of the casual seller. The question is whether that ‘something more’ is enough to justify the application of strict products liability.

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<sup>258</sup> See *infra* Part II.

<sup>259</sup> RESTATEMENT (THIRD) OF TORTS: PROD. LIAB. § 1 cmt. c (1998) (emphasis added); *e.g.*, *Elley v. Stephens*, 760 P.2d 768, 771-72 (Nev. 1988).

<sup>260</sup> RESTATEMENT (THIRD) OF TORTS: PROD. LIAB. § 1 cmt. c (1998).

<sup>261</sup> *Sukljian v. Charles Ross & Son Co.*, 503 N.E.2d 1358, 1362 (N.Y. 1986).

<sup>262</sup> *E.g.*, Andy Kessler, *The Weekend Interview with Brian Chesky: The ‘Sharing Economy’ and Its Enemies*, WALL ST. J., Jan 18, 2014, at A11. (quoting the founder of AirBnB: “I want to live in a world where people can become entrepreneurs or micro-entrepreneurs...this is the promise of the sharing economy.”).

To understand the likelihood that an individual lessor would or would not be deemed a casual seller, it is helpful to consider the rationale behind the rule, as well as certain other applications. The rationale for the circumscribed liability is similar to that for used-product dealers. The casual seller does not have “the opportunity” or the “the incentive” to mitigate risk like a commercial manufacturer or distributor.<sup>263</sup> Moreover, as a sociological matter, “[T]he public consumer does not have the same expectation when it buys from...a [casual] seller.”<sup>264</sup> As a practical matter, the casual seller cannot reduce risk, and the public does not expect her to do so. In addition, for casual sellers who are individuals, the loss-spreading function of products liability is inoperative. If an individual casual seller is held liable, the loss is just shifted from one layperson to another. There is no corporate bottom line to absorb the cost.

Most casual seller case law relates to businesses that, incidental to their operations, sell off old equipment or offer some one-off benefit to a customer.<sup>265</sup> Presumably, a full-on products liability claim against an individual person—who, for instance, made a one-off sale of a blender at a yard sale—so clearly falls into the exception that there is no point litigating it. Or perhaps more realistically, that person lacks the appetizing deep pockets of a business. The business-oriented casual seller cases can involve a high dollar amount of casual sales, but the business still fails to qualify for strict products liability. In *Jaramillo*, the defendant grossed “somewhere between \$7.5 million and \$8.5 million” from old-equipment sales in the year that the injuring

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<sup>263</sup> *Jaramillo v. Weyerhaeuser Co.*, 906 N.E.2d 387, 391 (N.Y. 2009) (quoting *Sukljan*, 503 N.E.2d at 1361); *see also* *Copp v. Corning Glass Works*, 114 A.D.2d 144, 146 (N.Y. App. Div. 1986) (“An occasional seller...is not in a position to insure the safe design or manufacture...or to create the economic pressure necessary to insure product safety.”).

<sup>264</sup> *Jaramillo*, 906 N.E.2d at 391.

<sup>265</sup> *E.g.*, *Galindo v. Precision Am. Corp.*, 754 F.2d 1212 (5th Cir. 1985); *Benjamin v. Fosdick Mach. Tool Co.*, No. 11-CV-00571 A M, 2012 WL 4959424, at \*4 (W.D.N.Y. Sept. 27, 2012), *report and recommendation adopted*, No. 11-CV-0571A, 2012 WL 4959417 (W.D.N.Y. Oct. 16, 2012); *Ridenhour v. Colson Caster Corp.*, 687 S.W.2d 938 (Mo. App. 1985); *Agurto v. Guhr*, 887 A.2d 159 (N.J. App. Div. 2005); *Jaramillo*, 906 N.E.2d 387; *Sukljan*, 503 N.E.2d 1358; *Copp*, 114 A.D.2d 144.

machine was sold,<sup>266</sup> yet the business still qualified as a casual seller.<sup>267</sup> The absolute size of these numbers could be read to indicate that an individual lessor who is making a few thousand dollars annually must be a casual seller. However, these numbers need to be considered in their context. For the business casual seller cases, the operative fact is that these casual sales are incidental to (and small relative to) core operations.<sup>268</sup>

Rather, the answer to this casual seller question in the sharing economy context is a fact-dependent tossup. Individual lessors often have varying levels of sales volume and involvement in their leasing.<sup>269</sup> A serial, higher-revenue lessor would have a more difficult time making the casual seller argument. While the *Jaramillo*-type business cases must be interpreted in context, they do evince a common judicial concern, as a general matter, with sales volume. Thus, an individual lessor whose product, on the first lease, malfunctions from a defect probably has a better chance of wearing the ‘casual seller’ label. This outcome may be counterproductive, since experienced lessors are generally the ones best self-regulated through the sharing economy’s traditional peer-to-peer review system.<sup>270</sup>

As for the underlying rationales of the casual seller rule, their impact in the sharing economy context could cut either way. It is true that individual lessors are not good targets for loss spreading.<sup>271</sup> However, as personal users of their products, individual lessors are intimately familiar with operation and maintenance, much more so than a corporation in relation to one

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<sup>266</sup> *Jaramillo*, 906 N.E.2d at 389.

<sup>267</sup> *Id.*

<sup>268</sup> *E.g., id.*

<sup>269</sup> See Natasha Singer, *In the Sharing Economy, Workers Find Both Freedom and Uncertainty*, N.Y. TIMES, Aug. 16, 2014, at BU1.

<sup>270</sup> See *All Eyes*, *supra* note 24, at 14.

<sup>271</sup> See, e.g., Samuel P. Fraiberger & Arun Sundararajan, *Peer-to-Peer Rental Markets in the Sharing Economy* 28 (March 18, 2015) (unpublished manuscript), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2574337](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2574337) (noting lower-income individuals are “more likely to contribute to [sharing economy] marketplace supply”); Jonathan Hall & Alan Krueger *An Analysis of the Market for Uber’s Driver-Partners in the United States*, UBER 18 tbl.2 (Jan. 22, 2015), [https://s3.amazonaws.com/uber-static/comms/PDF/Uber\\_Driver-Partners\\_Hall\\_Krueger\\_2015.pdf](https://s3.amazonaws.com/uber-static/comms/PDF/Uber_Driver-Partners_Hall_Krueger_2015.pdf); Singer, *supra* note 269.

piece of used machinery among many. As such, there may be a reasonable opportunity for risk-reduction.

In any case, the individual lessor is a less appealing litigation target than the sharing economy company itself. These companies are often flush with venture capital,<sup>272</sup> and their safety profile has become a prominent public relations concern.<sup>273</sup> A plaintiff attorney would probably be thrilled to bring a viable products liability claim against such a company, if the law permitted.

Along with the CDA issue,<sup>274</sup> the key conceptual obstacle to such a claim is whether the company can be deemed part of the chain of the distribution for the product. Plenty of people and entities involved with a product are deemed outside the chain of distribution, including, most of the time, “trademark licensors...franchisors...product endorsers...product certifiers, and trade associations,”<sup>275</sup> as well as financial lessors.<sup>276</sup> As noted previously, the chain of distribution is not a “precise” concept,<sup>277</sup> so adjudicating the boundaries of the distributive chain invites judicial discretion.

The best argument that sharing economy companies have against their inclusion in the distributive chain is that they are brokers. Their terms of service often describe their services as such.<sup>278</sup> For legal purposes, the sharing economy company is no more than a passive platform

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<sup>272</sup> See, e.g., Fraiberger & Sundararajan, *supra* note 271, at 17; Sacks, *supra* note 19, at 92; Singer, *supra* note 269.

<sup>273</sup> See, e.g., sources cited *supra* note 34.

<sup>274</sup> See *supra* Part I.B.1.

<sup>275</sup> 1 LOUIS R. FRUMER ET AL., PRODUCTS LIABILITY § 6.01 (Matthew Bender ed. 2015).

<sup>276</sup> E.g., *Abco Metals Corp. v. Equico Lessors, Inc.*, 721 F.2d 583, 584 (7th Cir. 1983).

<sup>277</sup> *Oscar Mayer Corp. v. Mincing Trading Corp.*, 744 F. Supp. 79, 84 (D.N.J. 1990).

<sup>278</sup> E.g., RelayRides Terms of Service, RELAYRIDES (Dec. 13, 2013), <http://relayrides.com/policies/terms-of-service> (“RelayRides provides a marketplace that enables car rental services between car owners and car renters. RelayRides does not provide car rental services and is not responsible for any of the acts or omissions of any of the users of its marketplace, the car manufacturer or any third party provider of services....” (capitalization omitted)); Uber Terms and Conditions, UBER (Apr. 13, 2015), <http://www.uber.com/legal/usa/terms> (“The services constitute a technology platform that enables users of Uber’s mobile applications or websites provided as part of the services...to arrange...transportation...services with third party providers....You acknowledge that Uber does not provide transportation or logistics services or function as a transportation carrier.” (capitalization omitted)).

that facilitates third-party transactions. Courts have often found that mere transaction-facilitating brokers—defined as “intermediar[ies]” who, on commission, “negotiate[e] contracts for others that relate to property of which [they] ha[ve] no concern”<sup>279</sup>—are outside the ambit of products liability. For instance, in *Massey v. Cassens & Sons, Inc.*,<sup>280</sup> a broker was deemed a “paper shuffler” who had no material nexus with the product at issue.<sup>281</sup> Broker status can be a silver bullet to products liability exposure.

To understand what constitutes a broker in products liability, a constellation of New Jersey decisions are instructive. In a late-seventies DES case, a defendant used the broker argument to escape liability.<sup>282</sup> The court looked to whether the broker “exercised control over the product.”<sup>283</sup> This control analysis turned on whether the broker had an “active” role in the transaction.<sup>284</sup> The court found that the broker “did nothing more than place the order” and so was a non-liable “facilitator.”<sup>285</sup> The broker had no role in choosing or evaluating the drug.<sup>286</sup> The broker earned a profit on the transaction, but given its passive role, that fact was irrelevant to the analysis.<sup>287</sup>

A subsequent case on defective food products—*Oscar Mayer Corp. v. Mincing Trading Corp.*<sup>288</sup>—extended this control analysis to focus attention on whether the broker “had title to” or “possession” of the product.<sup>289</sup> This broker had neither, and it also matched the passivity of the

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<sup>279</sup> *Mincing Trading*, 744 F. Supp. at 82 (citations omitted).

<sup>280</sup> No. 05-CV-598-DRH, 2007 WL 2710490 (S.D. Ill. Sept. 13, 2007).

<sup>281</sup> *Id.* at \*4; *see also* *Ames v. Ford Motor Co.*, 299 F. Supp. 2d 678 (S.D. Tex. 2003) (dismissing products liability claim against “customs broker”); *Balczon v. Mach. Wholesalers Corp.*, 993 F. Supp. 900 (W.D. Pa. 1998) (dismissing the same against deemed broker).

<sup>282</sup> *Lyons v. Premo Pharm. Labs, Inc.*, 406 A.2d 185, 192 (N.J. Sup. Ct. App. Div. 1979).

<sup>283</sup> *Id.*

<sup>284</sup> *Id.*

<sup>285</sup> *Id.*

<sup>286</sup> *Id.*; *see also* *Balczon*, 993 F. Supp. at 905 (noting broker “had no control or involvement”).

<sup>287</sup> *Lyons*, 406 A.2d at 192 (“[L]iability is not to be predicated on profit.”).

<sup>288</sup> 744 F. Supp. 79 (D.N.J. 1990).

<sup>289</sup> *Id.* at 81; *see also* *Balczon*, 993 F. at 902 (noting broker “never had physical possession of...[product] and...[product] was never moved to or stored in a facility controlled or owned by” broker).

broker in *Lyons*.<sup>290</sup> This combination of factors demonstrated that the broker “was not in a position to eliminate defects,”<sup>291</sup> and so summary judgment was entered for the defendant. Picking up on this decision in *Mincing Trading*, a later court then treated title as a dispositive factor in assessing whether the broker label applied.<sup>292</sup> Since the defendant took title, it was a fair target for products liability.<sup>293</sup> The court’s bright-line logic implied that possession could be dispositive as well.<sup>294</sup> These formal and physical questions of title and possession thus became central.

Two later New Jersey decisions seemed to, in turn, push back against and then reinforce this sharp focus on title and possession. The first court “reject[ed] the bright-line rule” that a party with title could not be deemed broker.<sup>295</sup> Just a few years later, another New Jersey court implied that “possession of goods” in itself would void the broker designation.<sup>296</sup>

In a sharing economy context, the resolution to the broker issue will hinge on whether a court takes a bright-line approach based on title and possession or instead employs a more thoughtful, searching analysis. Sharing economy companies do not take title or possession, nor do they generally exercise physical control.<sup>297</sup> They control the transaction through other means. They police the products, lessors, and lessees involved in the transaction.<sup>298</sup> They mandate

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<sup>290</sup> *Mincing Trading*, 744 F. Supp. at 81.

<sup>291</sup> *Id.*

<sup>292</sup> *Straley v. United States*, 887 F. Supp. 728, 744 (D.N.J. 1995).

<sup>293</sup> *Id.*

<sup>294</sup> *Id.*

<sup>295</sup> *Laidlow v. Hariton Mach. Co.*, 762 A.2d 311, 320 (N.J. Super. Ct. App. Div. 2000), *rev'd on other grounds*, 790 A.2d 884 (2002).

<sup>296</sup> *Agurto v. Guhr*, 887 A.2d 159, 163 (N.J. Super. App. Div. 2005).

<sup>297</sup> *See All Eyes*, *supra* note 24, at 13-14; Cody Barbierrri, *RelayRides Launches First Peer-to-Peer Carsharing Service*, VENTUREBEAT (Dec. 1, 2009), <http://venturebeat.com/2009/12/01/relayrideslaunchesfirstpeertopeercarsharing-service/> (“Unlike traditional car rental services, RelayRides neither owns the vehicles nor maintains them.”); Matzler et al., *supra* note 19, at 72; Sacks, *supra* note 19, at 130 (“Platforms like RelayRides...don’t own any cars—they simply enable the sharing of autos owned by individuals.”).

<sup>298</sup> *See, e.g.*, Haddad, *supra* note 15.

insurance and customer support.<sup>299</sup> In substance, these companies generally serve as something much more than a passive “intermediary.”<sup>300</sup> The case for the sharing economy company as a viable defendant is thus stronger than the case for individual lessors. However, a rigid, bright-line approach could deem these companies to be non-liable brokers.

## **II. Where the Liability Should Fall: A Normative Analysis**

### **A. Reasons for Strict Products Liability in the Sharing Economy**

Part I has demonstrated the numerous hurdles to a successful products liability claim in the sharing economy. Under prevailing doctrine, such a claim, while theoretically conceivable, is practically quite difficult. To allow a claim, a judge would have to move beyond superficial form and employ several creative interpretations of products liability law. As with, for instance, the different treatment of the eBay business structure as opposed to the sharing economy model,<sup>301</sup> these creative interpretations may have sound support. However, they are still new and so difficult. These claims thus do not fail because the underlying logic of that prevailing doctrine indicates that they should fail. Rather, the sharing economy model confounds certain implicit and explicit doctrinal assumptions. These claims do not fail the doctrinal test for lack of merit. They fail because that test is written in an outdated language, like if the SAT were in Old English.

This challenge—the sharing economy as “a new phenomenon that lies outside most existing regulatory schemes”<sup>302</sup>—is well recognized.<sup>303</sup> The question for products liability, as in

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<sup>299</sup> See, e.g., sources cited *supra* note 186.

<sup>300</sup> Oscar Mayer Corp. v. Mincing Trading Corp., 744 F. Supp. 79, 82 (D.N.J. 1990).

<sup>301</sup> See *supra* Part I.B.1.

<sup>302</sup> FTC Staff Comments to Alderman Brendan Reilly concerning Proposed Ordinance O2014-1367, 4 (Apr. 15, 2014), available at [https://www.ftc.gov/system/files/documents/advocacy\\_documents/ftc-staff-comment-honorable-brendan-reilly-concerning-chicago-proposed-ordinance-o2014-1367/140421chicagoridesharing.pdf](https://www.ftc.gov/system/files/documents/advocacy_documents/ftc-staff-comment-honorable-brendan-reilly-concerning-chicago-proposed-ordinance-o2014-1367/140421chicagoridesharing.pdf) (discussing sharing economy disruption in municipal transportation).

<sup>303</sup> See, e.g., Roberta A Kaplan & Michael L. Nadler, *Airbnb: A Case Study in Occupancy Regulation and Taxation*, 82 U. CHI. L. REV. DIALOGUE 103, 104 (2015) (noting sharing economy companies “operate in interstitial areas of the law...present[ing] new and fundamentally different issues that were not foreseen when the governing statutes



other regulatory domains, is whether and how regulatory structures should be altered to contend with this challenge. The normatively correct answer could be that the results in Part I are the solution, rather than a problem. In this line of reasoning, products liability should be, as a theoretical matter, a weak-to-non-existent presence in the sharing economy. If that is the normative answer, then the Part I analysis merely invites a reconsideration of certain doctrinal market assumptions in products liability (but the substantive result of products liability as applied to the sharing economy should remain unchanged). To continue the metaphor, the language of the test should be updated, but at least in this case, the outcome will remain the same.

However, the status quo explicated in Part I is *not* the normatively correct answer. Two lines of theoretical reasoning support a stronger role for products liability in the sharing economy. The first line of reasoning is relative, considering how products liability should apply given its applicability to other business structures. The second line of reasoning is internal to the sharing economy model. Once these general theoretical arguments are established, they can be used to sketch the particular shape that products liability should take in the sharing economy.<sup>304</sup>

For that first line of argument, the key fact is that sharing economy companies “exist in and parallel to a wide variety of well-established industries that are fundamentally disrupted by the sharing economy’s...innovative alternatives.”<sup>305</sup> Sharing economy companies are often in direct competition with established modes of business organization. A tourist can choose to stay

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and regulations were enacted.”); Alexandra Chang, *Regulation Won’t Kill the Sharing Economy. We Just Need New Rules*, POPULAR SCI., Aug. 2014, at 28, 28 (noting sharing economy companies “don’t fit established regulations.”); Cohen & Zehngbot, *supra* note 22, at 34-35; Kessler, *supra* note 262 (quoting the CEO of AirBnB: “There were laws created for businesses, and there were laws for people. What the sharing economy did was create a third category: people as businesses.”).

<sup>304</sup> It should be noted that this normative section discusses products liability for the shared physical product and not the intermediating software. A normative analysis of digital products liability and the digital-age wisdom of the economic loss rule requires a book in itself.

<sup>305</sup> Kaplan & Nadler, *supra* note 303, at 103-04.

at a hotel or an AirBnB apartment. A car renter can head to the Hertz desk or use RelayRides. Insofar as these established businesses provide products, they are likely subject to strict products liability. To continue with the RelayRides example, traditional car rental companies are subject to strict products liability for the vehicles that they lease.<sup>306</sup> If Hertz is subject to products liability while RelayRides is not, then Hertz effectively pays a tort tax because of its form of organization. The traditional model is penalized relative to the new sharing economy competitor.

This outcome is problematic and harmful for two reasons. First, it is inefficient as a matter of market competition. As the FTC has recognized the sharing economy context, “Regulations should not in purpose or effect favor one group of competitors over another or impose unnecessary burdens on...or...impede their ability to compete without any justification....”<sup>307</sup> The market (and not tort law) should determine which mode of business organization most efficiently serves customers. Indeed, one sees this competition between the sharing model and the conventional model playing out with various startups.<sup>308</sup> Disparate products liability treatment introduces a regulatory advantage to the sharing economy model, potentially buttressing its success when the market would otherwise favor the traditional model.<sup>309</sup> Products liability should be applied evenly across business models to allow the market to efficiently sort out winners and losers.

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<sup>306</sup> *E.g.*, *Cintrone v. Hertz Truck Leasing & Rental Serv.*, 212 A.2d 769 (N.J. 1965).

<sup>307</sup> FTC Staff Comments, *supra* note 302, at 4. The obvious counterargument here is that there is a compelling “justification” for disparate regulatory treatment. *Id.* That counterargument is addressed below. *See infra* Part II.B.2.

<sup>308</sup> *See, e.g.*, Sarah Needleman & Angus Loten, *Startups Want to Be the Next Airbnb, Uber—‘Sharing-Economy’ Ideas Are Hot, But Many Lead to Failure*, WALL ST. J., May 15, 2014, at B4 (describing poor economics for high-end car sharing business relative to traditional car lessor model).

<sup>309</sup> *See* Chang, *supra* note 303, at 28 (“[C]ritics argue that operating without regulation gives [sharing economy] start-ups an unfair advantage over highly regulated incumbents.”).

This disparate treatment creates a second related problem: “regulatory arbitrage.”<sup>310</sup> Regulatory arbitrage occurs when economic actors shift the formal organization of their business “to avoid taxes, accounting rules, securities disclosure, and other regulatory costs.”<sup>311</sup> This opportunity for avoidance arises because of “the legal system’s intrinsically limited ability to attach formal labels that track the economics of transactions with sufficient precision.”<sup>312</sup> If firms or actors following the traditional model want to avoid the “regulatory costs” of—among other things—products liability,<sup>313</sup> they will flip to the sharing economy model. Hertz, for instance, will still rent the same cars to the same customers, but it will sell title to its fleet and instead facilitate peer-to-peer rental.<sup>314</sup> Regulatory arbitrage is inefficient as a matter of market competition. Optimal efficiency is thwarted when a business flips to the sharing economy model due solely to disparate regulatory treatment. But beyond that, regulatory arbitrage can be a problem in itself, since it “undermines...regulatory competition, shifts the incidence of regulatory costs, and fosters a lack of transparency and accountability that undermines the rule of law.”<sup>315</sup> In the products liability context, when arbitrage occurs, plaintiffs who should have a valid claim are precluded from collecting the judgment they otherwise would be owed.

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<sup>310</sup> Victor Fleisher, *Regulatory Arbitrage*, 89 TEX. L. REV. 227, 229 (2010). Fleisher’s portrayal of the regulatory arbitrage concept focuses chiefly on business deals among and between large, established firms. *Id.* at 234. However, others have pointed to the relevance of the concept in other contexts. *See* Jordan Barry, *On Regulatory Arbitrage*, 89 TEX. L. REV. SEE ALSO 69, 71-73 (2010) (noting the relevance of regulatory arbitrage to intra-familial transactions).

<sup>311</sup> Fleisher, *supra* note 310, at 229.

<sup>312</sup> *Id.*

<sup>313</sup> *Id.*

<sup>314</sup> Within Fleisher’s broader framework of regulatory arbitrage, the issue here is “economic substance inconsistency.” *Id.* at 244. Within this arbitrage subcategory, parties are not exploiting the discrepancy between two different regulatory regimes—like bank holding company regulations and tax law, *id.* at 245—but are instead manipulating treatment within one regulatory regime, *id.* at 247. Here, that regulatory regime is products liability.

<sup>315</sup> *Id.* at 229.

Arbitrage within the sharing economy is a live issue. New York Attorney General Eric Schneiderman aggressively pursued AirBnB based, at least in part, on arbitrage suspicions.<sup>316</sup> In his report on AirBnB rentals in New York City, Schneiderman found that a group of what he termed “commercial users” had “dominated the platform...offering up to hundreds of unique units [and] accepting 36 percent of private short-term bookings.”<sup>317</sup> A core group of the largest commercial users each controlled ten or more units and collectively “accepted 47,103 private short-term reservations and earned \$59.4 million in revenue.”<sup>318</sup> In several buildings in Brooklyn and Manhattan, “60 percent or more of...units [were] used at least half the year as private short-term rentals, suggesting that the buildings were operating as de facto hotels.”<sup>319</sup> Similarly, around 200 NYC units seemed to use the sharing economy platform to avoid state regulations applicable to hostels.<sup>320</sup> While the vast majority of AirBnB users were truly using the platform for peer-to-peer rentals, a group of commercial users clearly flipped into the sharing economy model to avoid costs associated with hotel and hostel regulations. The San Francisco City Attorney sued two landlords over a similar problem. The landlords evicted rent-controlled tenants—two of them disabled—through use of the Ellis Act,<sup>321</sup> a California law that allows landlords to evict tenants when landlords wish to convert a unit to personal use.<sup>322</sup> The City Attorney alleged that the landlords then put the units up for short-term rental on sharing

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<sup>316</sup> *The Sharing Economy: Boom and Backlash*, ECONOMIST, Apr. 26, 2014, at 61, 61-62 [hereinafter *Boom and Backlash*].

<sup>317</sup> N.Y. STATE OFFICE OF THE ATT’Y GEN., AIRBNB IN THE CITY 2 (Oct. 2014), <http://www.ag.ny.gov/pdfs/Airbnb%20report.pdf>.

<sup>318</sup> *Id.* at 3

<sup>319</sup> *Id.* at 12. See also Gloria Goodale, *With Big Growth for the Sharing Economy, Has It Become Selfish?*, CHRISTIAN SCI. MONITOR (Mar. 21, 2015), <http://www.csmonitor.com/USA/Society/2015/0321/With-big-growth-for-the-sharing-economy-has-it-become-selfish> (noting concern over “landlords who take advantage of the Airbnb home-sharing model to run mini-hotels.”).

<sup>320</sup> *Id.* at 3.

<sup>321</sup> Bob Egelko, *S.F. City Attorney Sues 2 Landlords Over Short-Term Rentals*, S.F. CHRON. (Apr. 24, 2014, 6:52 AM), <http://www.sfgate.com/bayarea/article/S-F-city-attorney-sues-2-landlords-over-5425826.php>.

<sup>322</sup> CAL. GOV’T CODE § 7060 (West 2015).

economy platforms.<sup>323</sup> At least according to the lawsuit, the landlords had used the peer-to-peer rental model to avoid rent control regulations applicable to the traditional rental market.

This sharing economy arbitrage problem—as relates to products liability as well as other forms of regulation—can also arise in less blatant forms. Traditional businesses may invest in or restructure themselves based on the sharing economy model for other reasons, with regulatory arbitrage as an incidental benefit to the primary strategic goal of moving into the burgeoning sharing economy space. This trend is not nefarious. To the extent the market clamors for sharing economy innovation, it is for the good that traditional businesses respond. However, while the competitive distortions are less acute in such situations, the inherent negatives of regulatory arbitrage remain.<sup>324</sup>

This incidental arbitrage is also not theoretical.<sup>325</sup> RelayRides is an excellent example, at least of traditional players moving their capital into the sharing economy. RelayRides counts Avis<sup>326</sup> and General Motors<sup>327</sup> as investors. As *The Economist* noted of the sharing economy generally, “What looks like a disruptive new model will probably end up being mixed into existing models and embraced by incumbents, as has often happened before.”<sup>328</sup> Equalized application of products liability is necessary not only to preclude naked regulatory arbitrage, but also to avoid the incidental arbitrage that follows from this ongoing market shift.

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<sup>323</sup> Egelko, *supra* note 321.

<sup>324</sup> See Fleisher, *supra* note 310, at 229.

<sup>325</sup> See Rachel Botsman, *Sharing's Not Just for Start-Ups*, HARV. BUS. REV., Sept. 2014, at 23, 24 (noting the sharing economy “concept is being adopted by large companies”); Matzler et al., *supra* note 19, at 77 (“All told, the sharing economy offers companies numerous opportunities to adapt their business models to capitalize on the trend of collaborative consumption.”).

<sup>326</sup> Ryan Lawler, *RelayRides Acquires Wheelz To Boost Inventory and Improve Hardware for Its Peer-To-Peer Car Rentals*, TECHCRUNCH (May 14, 2013), <http://techcrunch.com/2013/05/14/relayrides-acquires-wheelz/>.

<sup>327</sup> Ucilial Wang, *Google-Backed RelayRides To Go National with Car-Sharing Service*, FORBES.COM (Mar. 5, 2012, 7:00 AM), <http://www.forbes.com/sites/uciliawang/2012/03/05/google-backed-relayrides-to-go-national-with-car-sharing-service/>.

<sup>328</sup> *All Eyes*, *supra* note 24, at 15.

This first line of reasoning is purely relative: strict products liability must have a presence in the sharing economy because of its presence in competing business models. With that relational argument established, we can move to the argument internal to the sharing economy as to why strict products liability should apply.

This internal argument can be boiled down to one word: data. Products liability theory often looks to assign liability to a given party, at least in part, because it has physical control of the product, either in design or distribution (or both).<sup>329</sup> There seems to be an implicit belief that physical dominion and inspection is the method that a seller must use to detect defects. In the sharing economy context, the company does not physically inspect the product. They never kick the tires or conduct a test run. The company does not even have a representative who sees the product in person. However, this focus on the physical ignores an evolving and improving way of seeing that can be far more effective than the human eye. Sharing economy companies are at the forefront of “the Big Data revolution.”<sup>330</sup> In a digitized world where more and more transactions and interactions are mediated through ever-advancing technology, “Everything is data.”<sup>331</sup> These data flows are “becoming bigger and more dynamic all the time.”<sup>332</sup> Data scientists can explore these unfathomably vast data collections using sophisticated analytical techniques, thereby discovering and creating new insights, predictions and monitoring systems.<sup>333</sup> For some businesses, their collected data may be “their greatest asset.”<sup>334</sup>

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<sup>329</sup> See, e.g., *Inman v. Technicolor USA, Inc.*, No. CIV.A. 11-666, 2011 WL 5829024, at \*6 (W.D. Pa. Nov. 18, 2011) (noting non-liable defendant never “had physical possession of the products” and that products “were [never] moved or stored in a facility owned by” defendant); *Balczon v. Mach. Wholesalers Corp.*, 993 F. Supp. 900, 902 (W.D. Pa. 1998) (noting broker “never had physical possession of...[product] and...[product] was never moved to or stored in a facility controlled or owned by” broker); *Lyons v. Premo Pharm. Labs, Inc.*, 406 A.2d 185, 188 (N.J. Sup. Ct. App. Div. 1979) (noting defendant held non-liable “never ha[d] physical control of the product.”).

<sup>330</sup> PHIL SIMON, *TOO BIG TO IGNORE: THE BUSINESS CASE FOR BIG DATA* 8 (2013).

<sup>331</sup> *Id.* at 29.

<sup>332</sup> *Id.*

<sup>333</sup> See MIN CHEN ET AL., *BIG DATA: RELATED TECHNOLOGIES, CHALLENGES AND FUTURE PROSPECTS* 1 (2014).

Sharing economy companies that lease products have an extraordinary potential to use their data to monitor product safety and soundness. It is truly staggering to consider the amount of data that larger sharing economy companies possess.<sup>335</sup> Consider how much RelayRides must know about its cars. As of mid-2014, RelayRides had tens of thousands of available cars and hundreds of thousands of users.<sup>336</sup> RelayRides knows the year, make, and model for each car rented.<sup>337</sup> For every rental—and as the number of participants indicates, there are a lot of rentals—RelayRides captures reviews from the lessor and lessee. If an incident requires a payout from their insurance policy, RelayRides presumably intakes all information from the insurance reports. They also have driving backgrounds for each lessor and lessee.<sup>338</sup> As RelayRides builds that data trove, it is astounding to consider the types of questions they can answer. What is the likelihood that the fuel injector will malfunction when a 2011 Honda Civic with thirty thousand miles is rented during winter in Central Connecticut? With the right analytics, RelayRides can probably generate a cogent answer.

Once they amass enough data, sharing economy companies can evaluate their products just like an in-person inspector at a brick-and-mortar lessor. If anything, data is becoming the superior approach to product monitoring, and “decisions will increasingly be based on data and

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<sup>334</sup> Simon, *supra* note 330, at 17 (emphasis omitted); see also *Building with Big Data*, ECONOMIST, May 28, 2011, at 74, 74 (“Data equity, to coin a phrase, will become as important as brand equity.”).

<sup>335</sup> Brishen Rogers, *The Social Costs of Uber* 82 U. CHI. L. REV. DIALOGUE 85, 86 (2015) (noting Uber’s “compilation of data on passenger and driver behavior”); Tanz, *supra* note 179 (discussing “the huge pile of data” that AirBnB possesses, as well as the sophisticated analytical tools it employs to use that data to monitor transactions).

<sup>336</sup> Yuliya Chernova, *Peer-to-Peer Car Rental Startup RelayRides Hopes To Escape Silicon Valley Bubble*, WALL ST. J.: VENTURE CAPITAL DISPATCH (June 24, 2014), <http://blogs.wsj.com/venturecapital/2014/06/24/peer-to-peer-car-rental-startup-relayrides-hopes-to-escape-silicon-valley-bubble/>. One can safely assume that these numbers have increased steadily, given RelayRides’s explosive growth. See Haddad, *supra* note 40.

<sup>337</sup> *Which Cars*, *supra* note 253.

<sup>338</sup> *How Do You Screen Renters?*, RELAYRIDES, <https://support.relayrides.com/hc/en-us/articles/203991680-How-do-you-screen-renters-> (last visited Apr. 21, 2015); *What Is Required*, *supra* note 187.

analysis rather than on experience and intuition.”<sup>339</sup> Data analytics can “improve decision making” and “minimize risks” in heretofore inconceivable ways.<sup>340</sup> It is more than reasonable to impose products liability on economic actors, like sharing economy companies, who can so use their data in product monitoring.

This reasoning is already implicit in existing state law. California, Oregon, and Washington have all passed similar insurance statutes to create a framework for car sharing businesses.<sup>341</sup> For each of these three laws—assuming the rental qualifies as a sharing transaction under the statute—when the car is being rented through or otherwise controlled by the car sharing program, *the car sharing program is considered the owner of the vehicle for all purposes*.<sup>342</sup> That is a dramatic legal move. As has been noted, these companies have neither title to nor physical possession of these vehicles. For the most part, company employees have never laid eyes on these cars. Still, for West Coast insurance purposes, the sharing companies own the vehicles. If car sharing companies could not mitigate risks associated with their vehicles, then these statutes would be absurd. It would be as if the law required a random stranger in California to bear the risk for a car-rental transaction in Connecticut. The answer is, of course, that these car-sharing companies *can* efficiently mitigate accident risks. Breaking down accident risk into its components, there is no reason why product risk would be less controllable in this framework than driver risk. If anything, the opposite would seem true, since machines are by nature more

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<sup>339</sup> Steven Lohr, *The Age of Big Data*, N.Y. TIMES, Feb. 12, 2012, at SR1; see also Andrew McAfee & Erik Brynjolfsson, *Big Data: The Management Revolution*, HARV. BUS. REV., Oct. 2012, at 61.

<sup>340</sup> James Manyika et al., *Big Data: The Next Frontier for Innovation, Competition, and Productivity*, MCKINSEY GLOBAL INST. 5 (2011), [http://www.mckinsey.com/insights/business\\_technology/big\\_data\\_the\\_next\\_frontier\\_for\\_innovation](http://www.mckinsey.com/insights/business_technology/big_data_the_next_frontier_for_innovation).

<sup>341</sup> CAL. INS. CODE § 11580.24 (West 2015); OR. REV. STAT. § 742.585-600 (2015); WASH. REV. CODE § 48.175.005-900 (2015).

<sup>342</sup> CAL. INS. CODE § 11580.24 (West 2015) (“[T]he personal vehicle sharing program shall assume all liability of the owner and shall be considered the owner of the vehicle for all purposes.”); OR. REV. STAT. § 742.595 (2015) (“[T]he [sharing] program shall assume all liability of the vehicle owner and shall be considered the vehicle owner for all purposes.”); WASH. REV. CODE § 48.170.090 (2015) (“[T]he [sharing] program shall assume all liability of the vehicle owner and shall be considered the vehicle owner for all purposes.”).



predictable that humans. Tellingly, all three statutes also focus on data collection and storage. California, Oregon and (to a slightly lesser extent) Washington require car sharing companies to collect and maintain comprehensive datasets about their sharing activity.<sup>343</sup> The statutes imply the importance of data to the car-sharing company's insurance and risk mitigation capabilities.

## **B. An Operational Framework: Proposal and Potential Counterarguments**

With these rationales established, it is possible to put forward a framework for products liability in the sharing economy. Put simply, strict products liability should apply to the product leasing activity of established sharing economy companies. Conduct-based negligence should remain the standard for truly non-commercial lessors on sharing economy platforms. This Part will describe this basic framework in greater detail. It then addresses potential arguments against the framework.

If this framework is to have any hope of implementation, the question is how to immediately operationalize it with minimal disruption to prevailing products liability doctrine. To this end, truly non-commercial lessors should be treated as casual sellers. That doctrinal move is a comfortable one. I use the term 'truly non-commercial' to exclude lessors who are effectively running a full-on business under the guise of peer-to-peer operation, the product

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<sup>343</sup> CAL. INS. CODE § 11580.24 (West 2015) (“A personal vehicle sharing program shall, for each vehicle that it facilitates the use of....(3) Collect, maintain, and make available...verifiable electronic records that identify the date, time, initial and final locations of the vehicle, and miles driven when the vehicle is under the control of a person...pursuant to a personal vehicle sharing program.”); OR. REV. STAT. § 742.590 (2015) (“For each vehicle that the program facilitates the use of, a personal vehicle sharing program shall....(3) Collect, maintain and make available...(a) Verifiable electronic records that identify the date and time, initial and final locations of the vehicle and miles driven when the vehicle is under the control of a person...pursuant to the program; and (b) Any information concerning damages or injuries arising out of personal vehicle sharing....”); WASH. REV. CODE § 48.175.010 (2015) (“For each vehicle that the program facilitates the use of, a program must....(3) Collect, maintain, and make available...(a) Verifiable records that identify the date and duration that the vehicle is under the control of a person...pursuant to the program. For vehicles with an electronic tracking device, verifiable electronic records of the time, initial and final locations of the vehicle, and miles driven when the vehicle is under the control of a person...pursuant to the program; and (b) In instances where an insurance claim has been filed, any and all information...concerning accidents, damages, or injuries arising out of personal vehicle sharing....”).

analogue to those “de facto hotels” in New York.<sup>344</sup> Non-commercial lessors do not have the data or business expertise to reduce product accidents or accident costs. They are also poor targets for loss spreading.<sup>345</sup> However, there are conduct-based sins that they can commit: failure to perform recommended maintenance on leased products, failure to fix or warn of known defects, etc. Negligence holds non-commercial lessors liable for the risks that they can (and should) control.

For sharing economy companies, the path through prevailing doctrine is not as simple. Section 230 of the Communications Decency Act can be deemed inapplicable for the reasons previously stated.<sup>346</sup> As for used product doctrine, courts should deemphasize (if not ignore) the obsolete chain of distribution concept. Instead, they should look to the relative use of the product, as well as advertising claims about product quality and the safety of leasing through the platform.<sup>347</sup> An obviously well-worn, un-maintained product may warrant the liability regime applicable to used products.<sup>348</sup> However, if that regime is applied and those advertising claims are indeed present, courts should allow used product claims for inferred defects and manufacturing defects.<sup>349</sup> On the broker issue, courts should adopt the more searching analysis of transaction involvement rather than those bright-line tests of title and possession followed in some case law.<sup>350</sup> In California, Oregon, and Washington—as well as any other states that enact similar car-sharing statutes—that move will be an easy one to make, since existing law provides the blueprint to ascribe product ownership to the sharing company.<sup>351</sup> Even where the product at issue is not a car, those insurance laws still provide the conceptual framework. States without such laws should not hesitate to look to those statutes as instructive and persuasive.

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<sup>344</sup> N.Y. STATE OFFICE OF THE ATT’Y GEN., *supra* note 317, at 12.

<sup>345</sup> *See* Fraiberger & Sundararajan, *supra* note 271, at 28.

<sup>346</sup> *See supra* Part I.B.1

<sup>347</sup> *See supra* Part I.B.2

<sup>348</sup> *See* RESTATEMENT (THIRD) OF TORTS: PROD. LIAB. § 8 (1998).

<sup>349</sup> *See id.* § 8(b); *supra* Part I.B.2.

<sup>350</sup> *See supra* Part I.B.3

<sup>351</sup> *See supra* notes 341-343.

Notably, this framework only assigns strict product liability to ‘established’ sharing economy companies. Strict liability should not apply to early-stage sharing startups. The rationales for products liability in the sharing economy do not fit them. Out-of-the-garage startups do not have sufficient scale to present meaningful arbitrage opportunities. They also have not amassed the requisite data for effective product monitoring. One can also ascribe a consumer expectations rationale to this exclusion of early-stage startups. Consumers who take a chance on the beta version of a platform are on notice as to the experimental nature of their experience. It is admittedly difficult to draw the line between the shoestring beginnings of a sharing startup and the pantheon of successful ventures like RelayRides, Uber and AirBnB. However, this exclusion can be administered on a facts-and-circumstances basis. This exclusion has the added benefit of supporting the innovation of early-stage companies,<sup>352</sup> since products liability will not cripple them because they are not yet sophisticated enough to defend themselves.<sup>353</sup>

Even with that protection for early-stage startups, one can expect certain counterarguments to strict products liability in the sharing economy. The first and most obvious criticism is that the regulation will kill innovation. Certain government entities—from municipalities to courts<sup>354</sup>—have employed regulation as a weapon to eliminate sharing economy companies because they disrupt the business models of entrenched, politically-connected interests.<sup>355</sup> One could argue that products liability merely furthers this regulatory

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<sup>352</sup> See Chander, *supra* note 129, at 642 (“Law played a far more significant role in Silicon Valley’s rise and its global success than has been previously understood. It enabled the rise of Silicon Valley....”).

<sup>353</sup> Cf. Richard B. Stewart, *Regulation, Innovation, and Administrative Law: A Conceptual Framework*, 69 CALIF. L. REV. 1256, 1293 n.104 (1981) (noting in the administrative and statutory context that “[c]ompliance...outlays may impose a relatively greater burden on small firms, because outlays...are not proportional to product sales or process size and because larger firms can benefit from economies of scale in coping with regulatory requirements.”).

<sup>354</sup> See, e.g., *Boom and Backlash*, *supra* note 316, at 61-62.

<sup>355</sup> Arun Sundararajan, *Why the Government Doesn’t Need to Regulate the Sharing Economy*, WIRED (Oct. 22, 2012, 1:45 PM), <http://www.wired.com/2012/10/from-airbnb-to-coursera-why-the-government-shouldnt-regulate-the->

assault that threatens to stifle sharing innovation.<sup>356</sup> Following this view, the better approach is to allow “[u]nregulated markets” that are “adept at accommodating new and innovative forms of competition,”<sup>357</sup> as opposed to “traditional regulatory frameworks” that “entrench” established models.<sup>358</sup> Indeed, by inhibiting the sharing economy, such regulation could push consumers back to less-safe, Craigslist-type transactions.<sup>359</sup>

These concerns about stifling, anti-competitive regulation are entirely valid. The response is that this products liability framework is not that type of regulation. Rather it is reasonable and low-touch. This potential tort liability is distinct from hard-to-follow “[c]ommand-and-control regulations” that “constrain the design and technical characteristics of the products or processes regulated.”<sup>360</sup> Especially when multiplied across jurisdictions, the command-and-control approach presents serious challenges to scaling a sharing economy business.<sup>361</sup> Products liability does not dictate how or where sharing economy companies can operate. It merely requires an accounting for fairly-assigned liability if and when it arises. If anything, products liability is pro-competitive in this context insofar as it evens the playing field between the traditional business model and the sharing economy model. Since a core value proposition is that the sharing economy model facilitates transactions that would not otherwise occur because of transaction

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sharing-economy/ (noting regulation of sharing economy companies may be used for “protecting entrenched businesses”).

<sup>356</sup> See Kaplan & Nadler, *supra* note 303, at 114 (“Because the threat of enforcement actions can have a chilling effect on start-ups and their users, state and local government officials should consider how their actions may affect burgeoning businesses.”); Sundararajan, *supra* note 355 (“Overly enthusiastic regulators could stifle the very exchange their intervention aims to facilitate.”).

<sup>357</sup> FTC Staff Comments, *supra* note 302, at 4.

<sup>358</sup> *Id.*

<sup>359</sup> See Henderson, Jr., *supra* note 213, at 1082-83.

<sup>360</sup> Stewart, *supra* note 353, at 1294; see also Beth Kregor, *Food Trucks, Incremental Innovation, and Regulatory Ruts*, 82 U. CHI. L. REV. DIALOGUE 1, 9 (“The more detailed and specified regulations are, the greater the challenge for any incremental innovators. If laws codify every detail of the business model that is prevalent when they are written, they set future innovators up for noncompliance.”).

<sup>361</sup> See *Regulation and the Sharing Economy*, A16Z PODCAST (Apr. 15, 2015), <http://a16z.com/2015/04/16/a16z-podcast-regulation-and-the-sharing-economy/>.

costs and trust problems, it seems unlikely that the imposition of products liability will incite a run back to Craigslist-type exchanges.

A second argument against products liability is that, even if it is not pernicious like other regulations can be in this context, the tort regime is inapposite because it is irrelevant. Sharing economy companies already have self-regulation systems that handle risk mitigation. Dual-review requirements and other trust and verification procedures “create norms” among users that sufficiently incentivize safety.<sup>362</sup> Users already act as safely as possible to protect the “social capital” embodied in reviews.<sup>363</sup> Out of the first ten thousand or so AirBnB rentals, for instance, “there have been no reports of theft.”<sup>364</sup> There are two responses here. First, products liability is not inapposite because fewer accidents occur; there will simply be fewer claims. Such is the elegance of tort law relative to ever-present command-and-control regulation. Second, this products liability framework is primarily concerned with sharing economy companies, not their users. These companies may likewise strive for safety to protect their own “social capital,”<sup>365</sup> but as a theoretical matter, so will any competitive business that aims to attract and retain customers. If that argument against products liability is insufficient for traditional businesses, it is certainly insufficient here.

Lastly, an interesting counterargument is that products liability is inappropriate because of the sharing economy’s considerable positive externalities. In this view, products liability should be stayed to compensate sharing economy platforms, at least in part, for the uncaptured social gains that they create. The sharing economy reduces carbon output and otherwise benefits

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<sup>362</sup> *All Eyes*, *supra* note 24, at 14.

<sup>363</sup> Cohen & Sundararajan, *supra* note 39, at 121.

<sup>364</sup> BOTSMAN & ROGERS, *supra* note 207, at xiii; *see also* Georgios Zervas et al., A First Look at Online Reputation on AirBnB, Where Every Stay Is Above Average (Apr. 12, 2015) (unpublished manuscript), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2554500](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2554500) (finding, based on reviews for hundreds of thousands of properties, higher average ratings for AirBnB properties relative to Trip Advisor-listed accommodations, potentially indicating, among other potential causes, superior quality for AirBnB relative to more traditional accommodations).

<sup>365</sup> Cohen & Sundararajan, *supra* note 39, at 121.

the environment through more efficient asset utilization.<sup>366</sup> This model also cultivates “grassroots entrepreneurship and innovation by allowing society to tap into individual abilities...that would otherwise not have been realized.”<sup>367</sup> I will accept as true—and, in fact, do believe—that the sharing economy produces considerable net positive externalities.<sup>368</sup> However, products liability is simply the wrong mechanism for internalizing those positive benefits. Such logic would place the burden on the harmed, maimed and killed in order to allow the sharing economy market to internalize its public benefits. Take the Boston car crash example from the introduction of this Article. Again imagine a product defect caused the accident. Now imagine knocking on the doors of those killed and injured to explain that they have no recourse against the sharing company. When pressed, you would have to explain that we are sacrificing their right to compensation to help multi-billion-dollar companies internalize their positive externalities. To the extent internalization is necessary, it must be accomplished in other ways—through taxes or subsidies, for instance. In the regulatory context, the best approach to promote internalization through regulation would be to de-weaponize inefficient command-and-control regulations and instead subject individual lessors to user-friendly regimes. That favorable regulatory treatment—if crafted and administered carefully to avoid arbitrage opportunities and outsized consumer risks—would go much further to decrease sharing economy costs without penalizing the most harmed.

## Conclusion

A products liability claim in the sharing economy is descriptively difficult, but the normative framework to allow such claims is itself simple, in substance if not implementation.

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<sup>366</sup> See Harald Heinrichs, *Sharing Economy: A Potential New Pathway to Sustainability*, 22 GAIA 228, 229 (2013); Cannon & Summers, *supra* note 18.

<sup>367</sup> Cohen & Sundararajan, *supra* note 39, at 129.

<sup>368</sup> Some commentators would disagree. See, e.g., Robert Reich, *The Share-the-Scraps Economy*, ROBERTREICH.ORG (Feb. 2, 2015), <http://robertreich.org/post/109894095095>. If such commentators are correct about sharing economy externalities, then this counterargument would fail because of that false premise.

As the sharing economy continues its growth into the mainstream, one would expect this products liability question—as with so many legal questions that surround this burgeoning business model—to become increasingly salient.

However, whether the sharing economy is an enduring movement or short-term trend, this Article provides more than a framework for products liability in this sharing economy context. Many points of this analysis are generalizable to products liability writ large, as well as other areas of law. For instance, tort law must come to recognize the staggering power of data science to manage risk. With the power of ‘Big Data’ comes the legal responsibility to employ that data to prevent and mitigate accidents. The scope of that responsibility needs to be explored in depth, with a greater focus on the particular technical methods and capabilities of data science.

Also, as this analysis has shown, the effects of digitization and technology on products liability doctrine is underdeveloped. This Article made glancing reference to the economic loss rule’s normative value (or lack thereof) in an increasingly intangible, digitized world. To the extent that products liability is to have continued twenty-first century relevance, this issue is vital.

In a similar vein, this Article’s blueprint to operationalize its proposed sharing economy framework purposefully aimed to displace prevailing doctrine as little as possible. However, these broader questions about digitization and market shifts will, at some point, require a theoretical reckoning. Products liability doctrine, as it stands, can only be massaged so much to address and incorporate social, economic, and technological change. At some point, the effects of these changes can no longer be shoehorned into existing doctrine. The doctrine itself will have to evolve more dramatically.

However large and complex these challenges may be, we can take heart in how courts and commentators have previously contended with such doctrinal evolution. This Article's epigraphs both come from cases that contended such questions of doctrinal change in products liability.<sup>369</sup> The two judges—sitting on the same state supreme court but separated by decades—both wrestled with difficult questions in products liability's doctrinal evolution. We should share their optimism for the law's "infinite capacity for growth,"<sup>370</sup> its ability to grow beyond "images of the past."<sup>371</sup> Sharing companies demonstrate how the market facilitates such creative change in the economy. It is the duty of the law to follow suit.

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<sup>369</sup> *Perez v. Wyeth Labs. Inc.*, 734 A.2d 1245 (N.J. 1999); *Schipper v. Levitt & Sons, Inc.*, 207 A.2d 314 (N.J. 1965).

<sup>370</sup> *Schipper*, 207 A.2d at 324.

<sup>371</sup> *Perez*, 734 A.2d at 1247.