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Litigating scooter injury and death cases

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LITIGATING SCOOTER INJURY AND DEATH CASES

May 19, 2020

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LITIGATING SCOOTER INJURY AND DEATH CASES

Agenda



- 8:30 A.M. Registration & Coffee
- 8:55 A.M. Welcome and Course Objectives
- Roy T. Tabor, Program Chair
- 9:00 A.M. Considerations and Investigations of Scooter Collisions
and Injuries
- Jeffrey S. Tabor
- 9:30 A.M. Who to Sue When Scooter Injury Occurs
- Carol A. Townsend
- 10:00 A.M. Theories of Liability in Scooter Collisions
- Bryan L. Bradley
- 10:45 A.M. Coffee Break
- 11:00 A.M. Defenses Commonly Raised in Scooter Collisions
- Thomas E. Rosta
- 11:45 A.M. Coverage Issues in Scooter Cases
- Richard K. Shoultz
- 12:30 P.M. Adjourn

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LITIGATING SCOOTER INJURY AND DEATH CASES

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GETTING TO KNOW

ROY TABOR

Indiana University School of Law
Indianapolis, Indiana

Vanderbilt University '75
Magna Cum Laude



For more than 40 years, Roy Tabor has focused on life-changing events resulting from personal injuries or wrongful death.

Roy has helped hundreds of families navigate the legal system and has obtained substantial settlements and verdicts to help try to compensate them for their losses. Roy is a member of the Indianapolis Bar Association, the Indiana State Bar Association, the Indiana Trial Lawyers Association and the American Association for Justice.

He has received numerous honors and distinctions, including his being selected to the list of the Nation's Top One Percent of attorneys by the National Association of Distinguished Counsel and named one of the Top 100 Trial Lawyers by the American Trial Lawyers Association. He is a member of the Bar Register of Preeminent Lawyers, the Million Dollar Advocates, and the Multi-Million Dollar Advocates Forum, of which there are less than 1% of U.S. lawyers. For years, Roy has been listed as a Super Lawyer by Indianapolis Magazine. Roy has also been named to Best Lawyers and Best Lawyers in America.

He also serves with distinction as a Board Member Emeritus of the Indiana Trial Lawyers Association and is a Fellow in the Indiana College of Advocacy. Because of his success and leadership in representing families who suffer tragic losses from semi-tractor trailer collisions, he is one of few members of the National Advisory Board of the Association of Plaintiff Interstate Trucking Lawyers. He also is a member of the Academy of Truck Accident Attorneys. He speaks frequently across the nation on topics including how to successfully handle commercial motor vehicle cases.

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"With compassion and genuine concern for clients' well-being, **Tabor Law Firm** did more than expected to get the best possible outcome."

Bryan L. Bradley

Kenneth J. Allen Law Group, LLC, Valparaiso



Bryan L. Bradley is a senior partner in the personal injury law firm of KENNETH J. ALLEN LAW GROUP, LLC. Mr. Bradley focuses his practice on heavy truck and bus crash litigation and catastrophic personal injury and wrongful death. He obtained his Bachelor of Arts degree from the University of Illinois at Urbana-Champaign in 1991 and Juris Doctorate from Valparaiso University School of Law in 1994.

A sustaining member of the American Association for Justice, Mr. Bradley is strong advocate for the rights of those injured and in the interests of improving safety whether on the nation's highways or elsewhere. He is a sustaining member of the Indiana Trial Lawyer Association where he also serves on the Board of Directors.

Mr. Bradley was recognized in *The Best Lawyers in America 2018*, in the areas of Plaintiff's Personal Injury Litigation and also in Product Liability Litigation. Mr. Bradley received the AV Preeminent Peer Review Rating from Martindale Hubbell, and has an AVVO Superb 10.0 rating in the areas of Trucking Accidents, Wrongful Death, and Brain Injury. Mr. Bradley has been selected as an Indiana Super Lawyer in multiple years. Mr. Bradley is also a member of the Illinois Trial Lawyer Association; Million Dollar Advocates Forum Life Member; a Life Fellow of the Indiana Bar Foundation; and an Advocate Attorney member of the Academy of Truck Accident Attorneys. Mr. Bradley is a contributing author to *Truck Accident Litigation*, Second and Third Editions, published by the American Bar Association and is a frequent speaker on topics relating to jury trials and truck crash litigation.

Mr. Bradley is retired from the United States Army Reserve Judge Advocate General Corps and is a graduate of the Army Command and General Staff College. He has spent his entire 24 year career representing those who have been injured or killed due to the negligence of others. Mr. Bradley has never represented companies or corporations in defense of those parties.

Thomas E. Rosta

Metzger Rosta LLP, Noblesville



Thomas E. Rosta is a founding partner at the firm of Metzger Rosta LLP and practices in the areas of insurance defense law, including expertise in the following areas: automobile and trucking defense, construction defects, products liability, premises liability, medical malpractice, fraud, errors and omissions, insurance coverage, declaratory judgment actions, and bad faith litigation. He was born in East Chicago, Indiana, on March 20, 1970.

He earned his B.A. in Government and International Relations, cum laude, from the University of Notre Dame in 1992 and his J.D., magna cum laude, from Indiana University School of Law – Indianapolis in 1995. He was admitted to the Indiana bar in 1995.

He is a member of the Indiana State Bar Association and Defense Research Institute. He has tried in excess of 150 trials to verdict in his career as lead counsel, including several cases involving traumatic brain injuries, paraplegic/quadriplegic claims, and wrongful death. Mr. Rosta has served as an arbitrator in matters related to his field of practice. He has also handled matters in front of the Indiana Equal Employment Opportunity Commission and Real Estate Licensing Board.

He has given numerous presentations on trial techniques, updates in tort law, for insurance companies on an in-house basis and at the following continuing legal education seminars: Hardball Litigation – Trial Techniques and Tactics (2001); Should there be a new Exclusion for Diminished Value of Automobiles? (2005) Updates in Tort Law – Defense Perspective (2005-2008).

Richard K. Shoultz

Lewis Wagner, LLP, Indianapolis



Rick provides clients with skilled and responsive representation in the areas of fire loss, insurance, construction, product liability and commercial litigation. Over the years, he has represented clients in courts of almost every Indiana county, the Indiana appellate courts, and the Seventh Circuit federal court.

Since 1990, Rick has represented companies, insurers and insureds in fire litigation matters. He has litigated fire cases involving defective products, gas and propane explosions, fire suppression systems and suspected arson. His clients frequently engage him to assist in securing the fire scene and evidence, determining the cause and origin of the fire, and working with government officials and experts during their investigations. He is familiar with the intricacies of fire litigation including NFPA guidelines and code regulations.

Rick also represents clients on insurance litigation matters. Clients frequently ask Rick to analyze and litigate complex insurance coverage questions relating to commercial general liability, automobile, property and homeowner policies. He represents clients in insurance coverage disputes including declaratory judgment actions, bad faith defense and suspected insurance fraud claims. Rick is a frequent author and lecturer on insurance law and trial tactics and co-authors an electronic newsletter highlighting significant Indiana court decisions in the field of insurance law.

Rick is a former collegiate baseball player, and enjoys following his favorite sports teams, studying the Civil War, and traveling.

GETTING TO KNOW

JEFFREY TABOR

**Indiana University School of Law
Indianapolis, Indiana**

**Indiana University '86
Bloomington, Indiana**



For almost 30 years, Jeff's practice has focused exclusively on representing victims injured by negligence and families who have lost loved ones due to the carelessness of others.

Jeff has represented thousands of injured victims and families who have lost loved ones due to motor vehicle collisions, semi-tractor trailer collisions, motorcycle accidents, train/grade crossing collisions, slip, trip and fall occurrences and construction site fatalities.

As a result of his hard work and dedication to the practice of law, he has received numerous awards and commendations, including being selected to the Nation's Top One Percent of attorneys; being named one of the Top 100 Trial Lawyers in America; and being named to the Indiana Super Lawyers List.

His Community Involvement includes the Gary Dudley Memorial Scholarship Fund and the Andrew P. Winzenread Scholarship Fund.

Jeff has also been active in the Indiana Continuing Legal Education Forum, where he has served as a frequent lecturer and author on current issues and new developments in personal injury/insurance litigation, including how-to handle uninsured and underinsured motorist cases, special issues in automobile cases and how to handle a Wrongful Death estate in Indiana.

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"Tabor Law Firm's
ability to handle the
most difficult personal
injury claims is
unparalleled in the
industry."

GETTING TO KNOW

CAROL TOWNSEND

Indiana University School of Law
Indianapolis, Indiana

Indiana University '01
Bloomington, Indiana



Carol Townsend is a third generation trial lawyer, raised and educated in Indiana.

She joined Tabor Law Firm in 2014, bringing with her a wealth of experience. She began her career litigating personal injury cases in State and Federal Court and argued before the 7th Circuit Court of Appeals in 2007. In 2009, Carol joined the Marion County Prosecutor's Office as a Deputy Prosecutor. As Deputy Prosecutor she prosecuted domestic abusers and drug dealers. She also spent two years litigating civil forfeiture cases for the Prosecutor's Office where she litigated the seizure of illegally gained assets from drug dealers and corrupt businesses.

Carol Townsend received her high school education at Park Tudor School and her undergraduate degree from Indiana University with a double major in History and Political Science and a minor in Spanish. She received her JD from Indiana University School of Law, Indianapolis.

Carol lives in Carmel, Indiana, and is married to a Hamilton County Deputy Prosecutor. Together they have two daughters and a dog named "Elsa." Carol enjoys swimming, snow skiing, cooking and taking the family dog to the dog park.

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"At the most difficult time of my life **Tabor Law Firm** was more helpful than I could have ever imagined. Professional, compassionate, & patient."

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Section One

Considerations & Investigations of Scooter Collisions & Injuries

Jeffrey S. Tabor
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Section One

Considerations & Investigations of Scooter Collisions & Injuries..... Jeffrey S. Tabor

PowerPoint Presentation



CONSIDERATIONS & INVESTIGATIONS
——— OF ———
SCOOTER COLLISIONS & INJURIES

CONSIDERATIONS



- Defining an electric foot scooter in Indiana

IC 9-13-2-49.4 ELECTRIC FOOT SCOOTER

- Weighing not more than 100 pounds;
- Not more than 3 wheels in contact with the ground;
- Handlebars and floorboard that rider can stand upon; and
- Electrically powered with or without human propulsion at 20mph or less

CONSIDERATIONS

IDENTIFY THE SHARED E-SCOOTER MANUFACTURER

- Bird
- Lime
- Spin



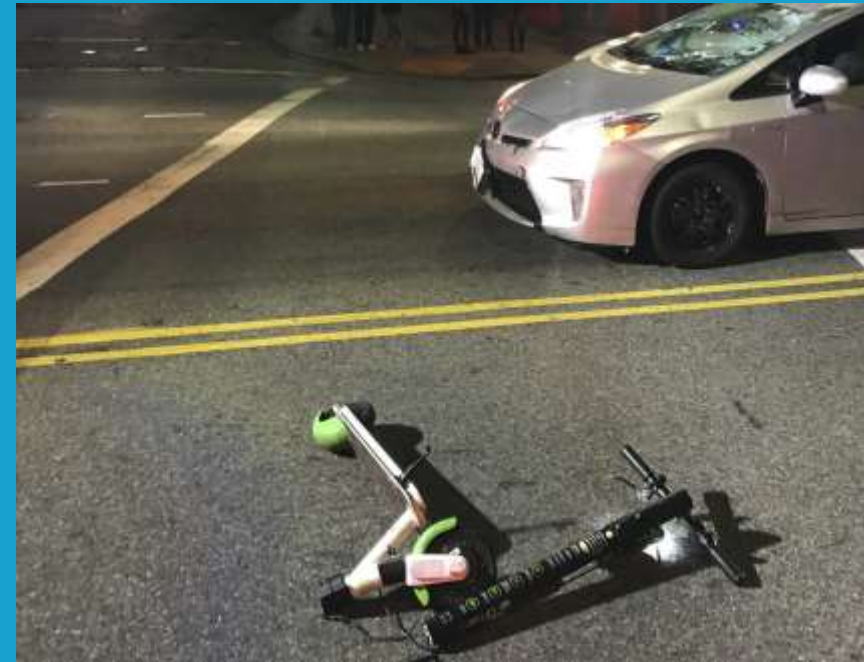


HOW TO RIDE A **LIME-S** ELECTRIC SCOOTER



CONSIDERATIONS

- WHY SO DANGEROUS?
 - HIGH CENTER OF GRAVITY
 - ROAD WEARY
 - ROAD MAINTENANCE
 - NOVICE USERS
 - SCOOTER DESIGN
 - SCOOTER MAINTENANCE
 - VANDELISM



U.S. Experiences Surge In E-Scooter Accidents

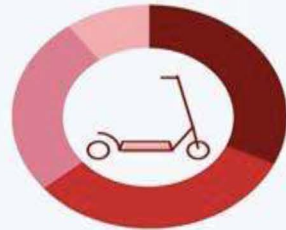
E-scooter injury rate and type of injuries recorded in the U.S.





Age adjusted e-scooter injury cases per 100,000 inhabitants in the U.S.

% Change (2014-2018)  +222%



Type of e-scooter injuries recorded in 2018



-  **32%** Head
-  **32%** Lower extremity
-  **26%** Upper extremity
-  **10%** Torso

Source: JAMA Network



CONSIDERATIONS



Austin Texas Study:

Most injuries age 18-39 years;

Most were on first time rides

One half of injuries were 'serious'

--BUT--

75+% Just fell off the scooter

Less than 10% were hit by moving vehicle/another rider



**Do Not Carry
Passengers**



CONSIDERATIONS/INVESTIGATIONS



BirdTwo

The power is in the details.

- Our safest battery to date**
With over 50% more capacity than Bird One.
- Self-reporting damage sensors**
Send alerts when vehicles need attention.
- Self-sealing tires**
Higher traction and decreased vibration.
- Dual anti-tipping kickstand**
This Bird stands on its own two feet.
- Enhanced anti-theft encryption**
Keeps our rides safe and helps deter theft.
- Seamless design**
With the absence of exposed screws.

CONSIDERATIONS/INVESTIGATION



- ASSEMBLE YOUR TEAM AND GO TO THE SCENE
- RETAIN EXPERTS AND SECURE THE E-SCOOTER
 - Investigator
 - Mechanical engineer
 - Accident reconstructionist
 - Human factors expert

CONSIDERATIONS



- NOTICE AND SPOILIATION LETTER TO MANUFACTURER
 - Preserve the e-scooter
 - Preserve the parts that may have been removed
 - All service records
 - All receipts and instructions given to the rider
 - All contracts with other individuals or corporations (i.e. municipality)
 - Services they agreed to provide
 - Maintenance they agreed to provide
 - Obligations took upon themselves

INVESTGATIONS



- GET TO WORK AT THE SCENE:
 - Find the scooter
 - Test lights, etc. on scooter
 - Crash report (if applicable)
 - Photograph/preserve the scene?
 - Surveillance video?
 - 911 audio?
 - Witnesses?
 - Other potential at-fault parties?





CONSIDERATIONS & INVESTIGATIONS
————— OF —————
SCOOTER COLLISIONS & INJURIES

Section Two

Who to Sue When a Scooter Injury Occurs


Carol A. Townsend
Tabor Law Firm, LLP
Indianapolis, Indiana

Section Two

Who to Sue

When a Scooter Injury Occurs..... Carol A. Townsend

PowerPoint Presentation



WHO TO SUE WHEN A SCOOTER INJURY OCCURS

Carol A. Townsend

Types of Crashes

- As e-scooter legislation and case law is being developed, common negligence theories of liability are the best place to start when identifying potential negligent parties
- In order to identify potentially liable parties, determine how the scooter injury occurred. There are multiple ways for an e-scooter user to be injured and to cause injury.

Falls

- Falls are the most common type of injury inducing events for e-scooter users
- There are many different potential causations for an e-scooter fall
- Determine what caused an e-scooter rider to fall to identify potential liable parties



Collisions



- Scooter vs. Pedestrian
 - We have all seen scooter operators on busy sidewalks zipping around pedestrians
 - Operator striking pedestrian
 - Pedestrian walking in operator's path
- Scooter vs. Bicyclist
 - Scooter and bicyclists share designated bike lanes
- Scooter vs. Motor Vehicle
 - Scooter operators are also sharing the road with motor vehicles
- Scooter vs. Bus or Public Transportation

Road Defects

- The tiny front wheel of a scooter cannot traverse a small pothole or road defect that even a bicycle could handle
- Road Construction
- Uneven asphalt
- Speed bumps
- Road hardware
 - Manhole covers, street plates, ramps

Inexperienced riders will struggle to control a scooter over minor road defects



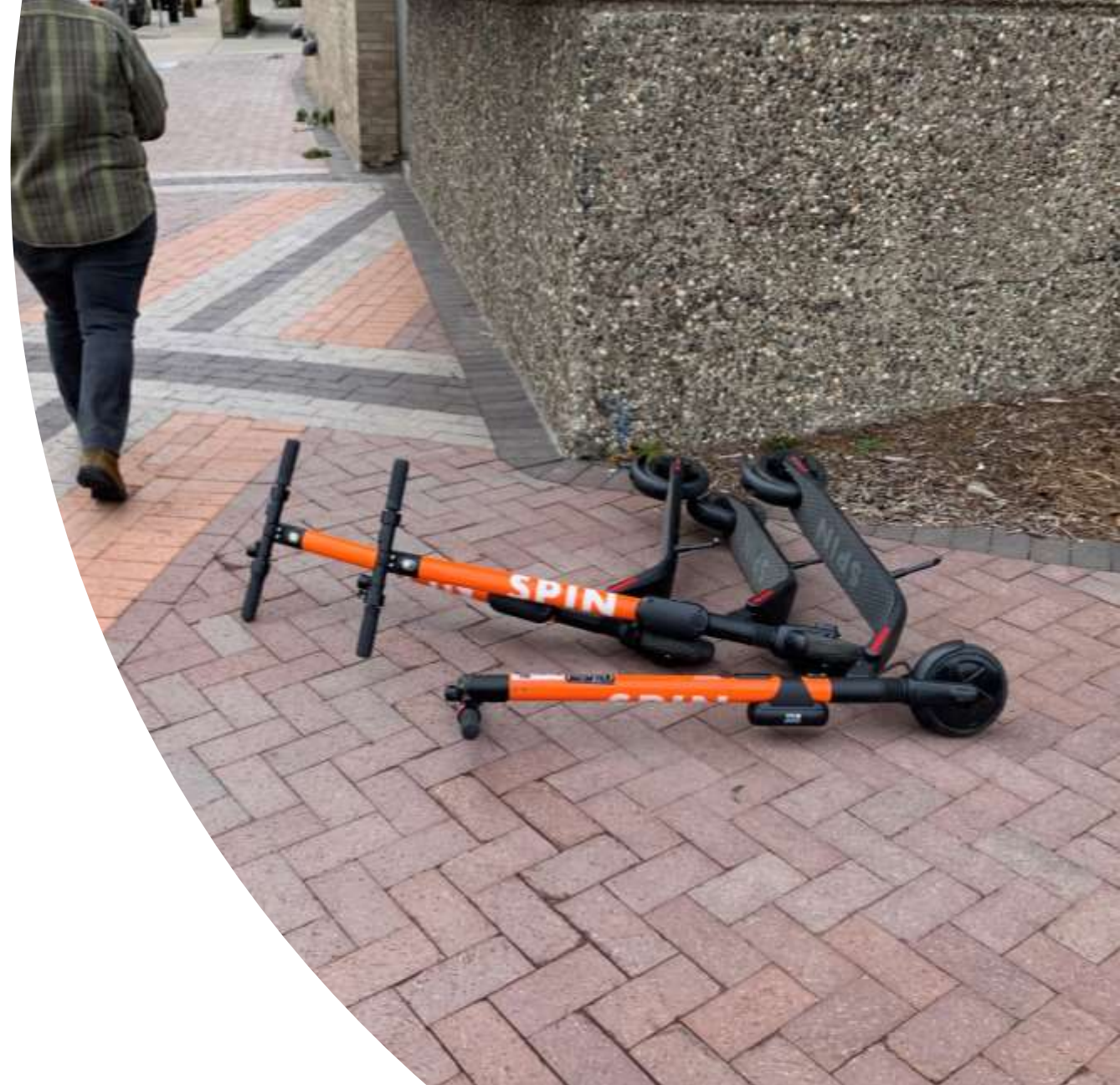
Scooter Malfunction



- Scooters are often not designed for heavy commercial use and being left out in the elements
- The average life expectancy for a scooter has been reported to be about 28 days. With such a short life-span, scooter companies have little incentive to inspect and repair them. They are essentially disposed of when they break
- There are instances of software defects in scooters, causing brakes to fail
- Scooters are dropped on the ground by users and generally treated roughly which can lead to malfunctions

Trip and Falls

- As you have all seen, scooter operators tend to just drop a scooter on the ground when they are done with it, resulting in obstructions on sidewalks and streets that can cause pedestrians or other scooter operators to trip and fall



Identifying Negligent Parties



- Scooter Operator
- Pedestrians and Bicyclists
- Scooter Companies
- Motor Vehicle Operators
- Municipalities
- Premises Owners
- Dram Shop

Scooter Operators



- Scooter operators are liable for injuries they cause to other people when they negligently operate the scooter causing a collision resulting in injuries
 - Whether there is an applicable insurance policy in this scenario must be investigated
 - Typical automobile insurance policies do not extend coverage to e-scooters
 - Scooter operators should contact their insurance agent to determine if they have liability coverage for e-scooters

Pedestrians and Bicyclists

- Pedestrians and bicyclists who walk or bike into the path of a scooter may be liable for causing a collision with an e-scooter operator
 - These cases are similar to scenarios where bicyclists strike pedestrians on trails or roadways
 - Like scooter operators, determine whether there is applicable insurance must be determined early in an investigation



Scooter Companies



- Scooter companies are potential defendants in scooter injury cases
- There are various theories of liability against the scooter company
 - Since e-scooters are still new, and there is no case law for guidance, traditional legal principals can provide some guidance
- Scooter companies usually make the operators sign a waiver of liability before the operator can use the scooter, however, these waivers do not extend to third parties who are injured when a scooter malfunctions, causing the operator to strike and injury a pedestrian, for example

Motor Vehicle Operators

- Collisions between motor vehicle operators and scooter users can be litigated similarly to cases involving motor vehicles and bicyclists
 - Types of collision between motor vehicles and scoots
 - Conflicts at intersections
 - Vehicles exiting driveways, parking lots, parking garages
 - Lane changes
 - Entering protected lanes
 - “Doorings”



Municipalities



- Road Defects
 - Many scooter users are injured when they fall off of their scooter. If a defect or poor design in the road, sidewalk or trail caused the scooter rider to fall off of the scooter and become injured, the municipality in control of the defective area is a potentially liable defendant
- Public Transportation – bus vs. scooter collision
- Premises
 - For example, school campuses that allow scooter users to zip around their crowded campuses after they have been put on notice of incidents of pedestrians being injured by scooters on campus, may create liability for the school

Premises Owners

- Private businesses and property owners located where scooters are expected can be potential defendants
 - Businesses should prohibit scooters in areas with narrow pedestrian walkways
 - Parking lots with surface defects that can cause a scooter operator to fall
 - Failing to remove ice and snow from paths used by scooters
 - Allowing discarded scooters to create tripping hazards on the premises



Dram Shop



- Scooters are located all around downtown city centers where bars, nightclubs, restaurants, sports venues and all kinds of business that serve alcohol are located. Intoxicated patrons that have been overserved can leave the bar or restaurant and easily find and operate a scooter in an intoxicated state, seriously injuring themselves or others
- The same Dram Shop theories of liability apply to establishments that overserve an intoxicated patron that operates a motor vehicle and causes injuries should apply to overserving patrons who go on to cause injuries while operating and e-scooter

Who to Sue When Scooter Injury Occurs



- Scooter Operator
- Pedestrians and Bicyclists
- Scooter Companies
- Motor Vehicle Operators
- Municipalities
- Premises Owners
- Dram Shop

Section Three

Theories of Liability in Scooter Collisions

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Section Three

Theories of Liability in Scooter Collisions..... Bryan L. Bradley Ryan D. O'Day

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THEORIES OF LIABILITY IN SCOOTER COLLISIONS

By: Ryan D. O'Day and Bryan L. Bradley

E-scooters are becoming more prevalent, as are injuries resulting from the use of E-scooters. Those injured by accidents involving E-scooters may argue several theories of liability depending on the target defendant and the negligent conduct. Attorneys should be familiar with the applicable statutes, laws, and regulations, common law negligence, product liability, government tort liability, and premises liability when analyzing a scooter case.

A. Statutory Negligence Based on Indiana Statutes

Like auto, bicycle, pedestrian, or other crash cases, attorneys should review any applicable statutes, ordinances, and regulations for negligence *per se*. Under this doctrine, a violation will render the defendant negligent and will help you argue that the defendant is more than 50% at fault. Indiana's motor vehicle, pedestrian, and other laws will regulate who has the right-of-way, the reasonable speed, or prohibit acts, like texting, that frequently lead to crashes. The investigating officer's crash or incident report may identify specific violations and resulting citations, and is also a good starting point for finding potential violations.

In addition, due to the increasing use of electric scooters, Indiana has codified the rights and duties of scooter riders. Ind. Code § 9-21-11-13.6. Scooter riders have all the rights and duties applicable to bicyclists. The Indiana Code also requires scooters to be

equipped with appropriate lamps and brakes. Ind. Code § 9-21-11-13.6(b), (c). And it regulates where scooters may be parked, absent a conflicting local law. Ind. Code § 9-21-11-13.6(d), (e). The below statute will be helpful against scooter rental companies, such as Bird or Lime, or other scooter riders who fail to park a scooter appropriately.

IC 9-21-11-13.6 Electric foot scooter; rights and duties; operation; equipment; parking

Sec. 13.6. (a) A person operating an electric foot scooter has all the rights and duties under this chapter that are applicable to a person riding a bicycle, except the following:

- (1) Special regulations of this chapter.
- (2) Those provisions of this chapter that by their nature have no application, including section 3 of this chapter.

(b) An electric foot scooter operated on a highway from one-half (1/2) hour after sunset until one-half (1/2) hour before sunrise must be equipped with the following:

- (1) A lamp on the front exhibiting a white light visible from a distance of at least five hundred (500) feet to the front.
- (2) A lamp on the rear exhibiting a red light visible from a distance of five hundred (500) feet to the rear or a red reflector visible from a distance of five hundred (500) feet to the rear.

(c) An electric foot scooter must be equipped with a brake that will enable the person who operates the electric foot scooter to make the braked wheels skid on dry, level, clean pavement.

(d) Except as provided in subsection (e), an electric foot scooter may be parked on a sidewalk in a way that does not impede the normal or reasonable movement of pedestrians or vehicle traffic.

(e) A local authority may prohibit the parking of an electric foot scooter on a sidewalk if the local authority provides an adequate alternative parking location in a public right-of-way that is proximate to the prohibited area.

(f) Subject to any ordinance, rule, or regulation adopted by a local authority to the contrary, an electric foot scooter may be operated where a bicycle may be operated.

(g) Notwithstanding any other law or provision, an electric foot scooter may not be operated on an interstate highway.
As added by P.L.142-2019, SEC.8.

However, attorneys must also be cognizant of municipal codes, which may further regulate scooters. For example, the Indianapolis Municipal Code prohibits anyone from operating scooters on sidewalks, greenways, or any pedestrian or multimodal paths. Indianapolis, IN, Code Title II, § 441-320.1. It requires scooter rental companies to maintain their scooters in a reasonably clean and working condition, to post that users are encouraged to wear helmets and shall follow all traffic laws, and to remove any unsafe or inoperable scooters from the public right-of-way within two hours of notice. Indianapolis, IN, Code Title IV, § 905-106-07.

Sec. 441-320.1. - Electric foot scooters.

- (a) It shall be unlawful for any person to operate an electric foot scooter on:
 - (1) A sidewalk,
 - (2) A greenway, or
 - (3) Any pedestrian or multimodal path that is paved or unpaved in the city.
- (b) Multimodal path, for purposes of this chapter, shall not mean a path set aside for the exclusive use of bicycles.

(G.O. 48, 2019, § 2)

Editor's note— G.O. 48, 2019, § 2, passed July 15, 2019, amended the Code by adding provisions designated as § 441-321. Inasmuch as there were already provisions so designated, the provisions have been redesignated as § 441-320.1 at the discretion of the editor.

Interestingly, the Indianapolis Municipal Code also requires scooter rental companies to carry liability insurance to protect the city and to indemnify, hold harmless,

and defend it as a condition of a license to operate. Indianapolis, IN, Code Title IV, § 905-105. And a scooter rental company “shall be jointly and severally liable for all violations of this chapter, including the violation of any traffic laws and parking restrictions, relating to a user’s use of a shared mobility device.” Indianapolis, IN, Code Title IV, § 905-106(k). Accordingly, municipal ordinances can be more helpful when establishing liability against scooter rental companies. And certainly will be helpful when proving a common law negligence claim too.

B. Common Law Negligence: Driver or Scooter

Under the common law, injured scooter riders may hold others accountable for not acting as a reasonable and prudent person would have under a negligence theory. This theory would require the scooter rider to prove (1) a duty was owed; (2) a breach of that duty; and (3) an injury proximately caused by the breach.

Often, a scooter rider will be hit by an automobile so the theory of liability will be similar to a car crash case. Indiana drivers have a duty to use care and caution while driving and to avoid crashing into other vehicles, including scooters. A breach, for instance, may be that the at-fault driver failed to keep a proper lookout, to maintain a proper following distance, or to make a reasonable evasive measure to avoid a collision. Of course, Indiana attorneys are not required to plead a specific breach so one could simply plead the failure to use the same care or caution that a reasonably prudent person would have.

In addition, if there is any alcohol involved, then counsel should evaluate a potential dram shop claim. Under this theory, one must show that a third party furnished alcohol to someone it knew was intoxicated. And also prove that the intoxication proximately caused the injury. Although dram shop claims are often against bar or restaurant owners, social hosts can also be liable.

Similarly, another scooter rider who causes a crash would have the same duties as an automobile driver. Therefore, attorneys should conduct a similar analysis when evaluating a crash caused by another scooter rider. But, as noted above, local ordinances may render the scooter rental company jointly and severally liable for another scooter rider's negligence so that must be considered too.

Although not always a collision, scooters that are not reasonably parked can lead to a negligence claim. First, the scooter rider has a duty to park a scooter in a safe manner and location to avoid creating a trip hazard. Second, the scooter rental company may be liable for failing to provide a location to park scooters, for encouraging users to leave scooters wherever they choose, or for not timely correcting an improperly parked scooter. Scooter rental companies can track scooter locations through GPS, which is used to collect them to charge low batteries, so they can locate and remove obstructing and dangerously parked scooters. But the majority of cases against scooter rental companies may be product liability claims.

C. Product Liability

Product liability actions in Indiana are governed by the Indiana Products Liability Act. *See* Ind. Code § 34-20-1, *et seq.* The Act covers actions by a user or consumer against a manufacturer or seller for physical harm caused by a product. Ind. Code § 34-20-1-1. A product may be defective if it is unreasonably dangerous to the expected user when used in reasonably expectable ways or if the seller fails to provide reasonable warnings or instructions. Ind. Code § 34-20-4-1-2.

IC 34-20-4-1 Products considered defective

Sec. 1. A product is in a defective condition under this article if, at the time it is conveyed by the seller to another party, it is in a condition:

- (1) not contemplated by reasonable persons among those considered expected users or consumers of the product; and
- (2) that will be unreasonably dangerous to the expected user or consumer when used in reasonably expectable ways of handling or consumption.

[Pre-1998 Recodification Citation: 33-1-1.5-2.5(a).]

As added by P.L.1-1998, SEC.15.

IC 34-20-4-2 Failure to provide adequate warnings or instructions

Sec. 2. A product is defective under this article if the seller fails to:

- (1) properly package or label the product to give reasonable warnings of danger about the product; or
- (2) give reasonably complete instructions on proper use of the product;

when the seller, by exercising reasonable diligence, could have made such warnings or instructions available to the user or consumer.

[Pre-1998 Recodification Citation: 33-1-1.5-2.5(b).]

As added by P.L.1-1998, SEC.15.

To establish a *prima facie* product liability claim, one must show that: (1) the product is defective and unreasonably dangerous; (2) the defect existed when it left the defendant's control; and (3) the defect proximately caused plaintiff's injuries. *Natural Gas Odorizing, Inc. v. Downs*, 685 N.E.2d 155, 160 (Ind. Ct. App. 1997). Further, manufacturers may be strictly liable under the Indiana Products Liability Act. Ind. Code § 34-20-2-1.

Regarding scooter companies, a product liability claim may encompass a defective motor, braking system, or other component parts or a defective design. These claims should be pursued against the scooter rental company, such as Bird and Lime, and the manufacturer or designer, such as Segway and Ninebot. However, claims may also be based on negligent maintenance, failure to warn or instruct, or failure to provide necessary equipment. Ira H. Leesfield & Justin B. Shapiro, *Same Roads, New Rules: Make Way for E-Scooters*, The American Association for Justice, Feb. 2019.

The largest scooter rental companies have deployed thousands of scooters, which are unsupervised and may be used by dozens of riders between inspections. Leesfield & Shapiro, *Same Roads, New Rules: Make Way for E-Scooters*. Consequently, common maintenance problems, such as malfunctioning motors, brakes, or tires, go undetected and place defective scooters into the hands of unknowing riders. *Id.* Further, injured riders may argue that the scooter rental company failed to follow the manufacturer's maintenance recommendations, to adopt and enforce reasonable maintenance procedures, or to meet industry maintenance standards.

Scooter rental companies may also fail to warn or instruct their users about the potential dangers and best practices before use. Leesfield & Shapiro, *Same Roads, New Rules: Make Way for E-Scooters*. Their apps are often focused on speed to get users onto the road as soon as possible. Leesfield & Shapiro, *Same Roads, New Rules: Make Way for E-Scooters*. For example, injured riders may argue that the scooter rental company failed to warn them that the scooter requires proper body weight distribution to avoid falling while turning or at higher speeds. Or injured riders may argue that the company failed to explain what traffic laws apply, where scooters may be lawfully operated, that the riders should inspect for defective equipment, or that the riders should have some experience or particular fitness to ride.

The Indianapolis Municipal Code requires some of these warnings but scooter rental companies may not include them in other municipalities. Indianapolis, IN, Code Title IV, § 905-106(i). However, some scooter rental companies have improved their warnings and now offer training to first time riders. For example, Lime has a First Ride Program that offers small group, in-person training to teach proper balance, parking, and safety. Lime's warnings and instructions can be used against other rental companies to show that they did not follow an industry standard.

Injured riders also may argue that scooters are defective when the rental company does not offer reasonable safety equipment, particularly helmets. Some companies offer free or discounted helmets or on-site helmet dispensers while others offer nothing.

Leesfield & Shapiro, *Same Roads, New Rules: Make Way for E-Scooters*. Although Indiana and other states do not require companies to offer helmets, injured riders can argue that the company did not follow an industry standard that is taking form. Leesfield & Shapiro, *Same Roads, New Rules: Make Way for E-Scooters*. Injured riders also cannot hold Indiana liable for failing to mandate helmet usage, but they can under other theories.

D. Government Tort Liability

State or local governmental entities may be liable for negligently maintained or designed roadways. However, before instituting a claim against a governmental entity, attorneys must review the Indiana Tort Claims Act. The ITCA provides immunity to governmental entities based on twenty-four theories. Ind. Code § 34-13-3-3. For example, governmental entities are immune if the loss results from the temporary condition of a public thoroughfare due to weather, the condition of an unpaved road that provides access to a recreation or scenic area, and the design of a highway after twenty years. Ind. Code § 34-13-3-3(3), (4), (18). It requires claimants to provide notice within 180 days. Ind. Code § 34-13-3-8. And it limits any potential recovery. Ind. Code § 34-13-3-4.

Despite their immunities, governmental entities have a duty to perform reasonable inspections and maintenance of their streets and sidewalks. And, given the increased risk of harm for scooter riders, one can argue that the duty should be greater because a minor pothole, defect, or crack poses additional risk. Leesfield & Shapiro, *Same Roads, New Rules: Make Way for E-Scooters*. To support a heightened duty argument, use subpoenas and

public record requests to show that the governmental entity was aware of the significant amount of scooter riders and maybe even lobbied for the scooter rental company to offer its services.

Governmental liability arises when the entity unreasonably fails to maintain its streets and sidewalks or when the design creates an unreasonably dangerous condition.

A poor design may not be immediately apparent so attorneys should evaluate these in every case. Some examples include:

1. Bike lanes that are too narrow or end too abruptly
2. Uneven asphalt on roadways
3. Visibility obstructions due to inadequate sight distances at intersections
4. Visibility obstructions due to foliage or signage
5. Poorly marked crosswalks
6. Inadequate roadway medians or railings
7. Improper maintenance of traffic in work zones
8. Failure to warn of known dangerous roadways and surfaces

Further, a theory based on a negligently designed roadway may extend to construction contractors and engineers, who do not have damage caps. Additionally, theories based on negligent maintenance of streets or sidewalks can be applied to non-governmental premises owners too.

E. Premises Owner

When evaluating a potential premises liability claim, first determine your status on the property, which will affect the duty owed by the premises owner. Injured individuals fall into three categories under Indiana law: invitees, licensees, and trespassers. Invitees are invited onto the property for the owner's gain, licensees have

express or implied permission to enter the property for mutual benefit, and trespassers have illegally entered private property without permission.

Property owners owe invitees the highest duty of care, owe licensees a lesser duty, and do not owe trespassers a duty. For invitees, the owner must make the property safe and clear or correct any known hazards or adequately warn about the known hazard. For licensees, the owner must take steps to warn of or fix known, concealed dangers. For trespassers, the owner has no duty but must not willfully or maliciously inflict harm.

After establishing a duty of care, you will need to show that the owner knew about or should have reasonably known about the hazard that caused the injury. And, of course, you will need to prove a causal link between the owner's negligence and the injury.

Attorneys should consider whether a nearby premises owner contributed to or caused the crash. For example, investigate whether the premises owner failed to remove or treat snow and ice from a path used by scooters or failed to maintain its parking lot or other surfaces in a safe condition. Additionally, a premises owner may have allowed shopping carts or other equipment to obstruct paths or failed to post signs prohibiting scooter riders from accessing narrow paths or walkways where collisions are likely to occur.

Section Four

Defenses Commonly Raised in Scooter Collisions

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Section Four

Defenses Commonly Raised in Scooter Collisions..... Thomas E. Rosta

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DEFENSES COMMONLY RAISED IN SCOOTER COLLISIONS

Thomas E. Rosta – Metzger Rosta LLP

“You get on your bad motor scooter and ride

Up over to my place and stay all night

First thing in the morning we'll be feeling all right, all right, all right, all right

Get on your bad motor scooter and ride”

Sammy Hagar/Montrose, 2007

Discussion

Rentable, dockless, electric scooters are a new emerging mode of transportation. Austin Public Health initiated this investigation with the assistance of others in an effort to advance the knowledge on the public health impact of e-scooter use. Interviewing the e-scooter riders was an important contribution to furthering this knowledge. This study is believed to be the first to conduct interviews with injured e-scooter riders.

This study likely underestimates the prevalence of e-scooter related injuries. The number and characteristics of injured riders seeking medical care at an urgent care center or physician's office were not determined. This study was limited to investigating only those injured e-scooter riders and non-riders who sought care at a hospital emergency department or had care provided by emergency medical services. These riders are believed to experience more severe injuries compared with injured e-scooter riders whose injuries did not require care from a hospital emergency department or EMS.

Almost half of the injured riders in this study sustained an injury to the head. A traumatic brain injury was experienced by 15%. These injuries may have been preventable. Only one of 190 injured scooter riders was wearing a helmet. Studies have shown that bicycle riders reduce the risk of head and brain injuries by wearing a helmet. Helmet use might also reduce the risk of head and brain injuries in the event of an e-scooter crash.

Perceptions may be that most e-scooter riders are injured because of collisions with motorized vehicles. The findings of this study does not support that perception. While more than half of the interviewed riders were injured while riding a scooter in the street, few (10%) riders sustained injuries by colliding with a motor vehicle. Nevertheless, continuing education for motorized vehicle drivers and e-scooter riders is needed to prevent collisions. Another perception is that excessive e-scooter speed contributes to injuries. This perception may be true. More than one-third (37%) of injured riders reported that excessive e-scooter speed contributed to their injury.

A key finding is a third of the interviewed riders were injured during their first e-scooter ride. Overall, 63% of the injured riders had ridden an e-scooter nine times or fewer before injury. While most (60%) of the riders in this study received training on using the e-scooter via a phone application, additional training may be necessary.

Dockless Electric Scooter-Related Injuries Study, Centers for Disease Control and Prevention (CDC) and Austin Public Health (APH), April 2019.

It is clear that the area of scooter-related claims and injuries is on the rise throughout the country, as evidenced by the arrival of scooters in larger cities, including Indianapolis. Companies such as Bird, Jump, Lime, Lyft, OjO, Razor, Skip, Spin VeoRide, and Wind Mobility have obtained permits throughout the nation to have their scooters placed and ridden on their streets and sidewalks. As claims increase due to the increased use of these scooters, companies have raised numerous defenses to actions brought against them, and I discuss a number of those defenses below.

EXCULPATORY LANGUAGE/WAIVER OF LIABILITY IN USER AGREEMENTS

It is clear that most operators of electric scooters must create an account (most often on their smartphones), and then the user must navigate through a series of steps on the agreement to review and accept the terms of the Rental Agreement. The initial language, for example, of the Lime Rental Agreement states the following:

THANKS FOR CHOOSING LIME!

These terms ("Terms") govern your use of our various products and services in the country where you live (collectively, our "Services"). They are provided to you by Neutron Holdings, Inc. dba Lime. By using our Services (including using our App or creating a user account, for example), you are agreeing to these Terms, including that you are of legal age to enter into binding contracts, so please read them carefully. You are also agreeing that you have authority to agree to these Terms, whether personally or on behalf of an entity you've included in your user account registration.

If you don't agree to these Terms, you may not use our Services. We may amend these Terms from time to time, and the revised version will be effective when posted on this website or otherwise made available to you. The revised Terms supersede any previous versions. While we will provide you advance notice of any important revisions, we do recommend that you regularly review these Terms because your continued use of our Services after we make any changes to them constitutes your agreement to those changes. These Terms also expressly supersede any prior agreements or arrangements we may have with you. You may of course stop using our Services at any time, and we may terminate these Terms or your use of any Services, or generally cease offering or deny access to any portion of the Services, at any time in our sole discretion.

The Rental Agreement then provides the following clauses which it argues disclaims liability for negligence of any type:

8. Limitation of Liability

WHEN PERMITTED BY LAW, THE RELEASED PARTIES WILL NOT BE RESPONSIBLE FOR LOST PROFITS, REVENUES, DATA, FINANCIAL LOSSES OR INDIRECT, SPECIAL, CONSEQUENTIAL, EXEMPLARY OR PUNITIVE DAMAGES. TO THE EXTENT PERMITTED BY LAW, THE TOTAL LIABILITY OF THE RELEASED PARTIES FOR ANY CLAIMS UNDER THESE TERMS, INCLUDING FOR ANY IMPLIED WARRANTIES, IS LIMITED TO US\$100. IN ALL CASES, THE RELEASED PARTIES WILL NOT BE LIABLE FOR ANY LOSS OR DAMAGE THAT IS NOT REASONABLY FORESEEABLE.

OUR PRODUCTS ARE MACHINES AND THERE IS INHERENT RISK ASSOCIATED WITH USING THEM, INCLUDING DUE TO MALFUNCTION NO MATTER HOW WELL THEY ARE MAINTAINED. THESE RISKS ARE NOT ALWAYS OBVIOUS, AND THEY MAY CAUSE PROPERTY DAMAGE, INJURY OR EVEN DEATH TO YOU OR OTHERS. BY USING OUR SERVICES, YOU AGREE THAT YOU UNDERSTAND THESE RISKS, THAT IT IS YOUR RESPONSIBILITY TO USE OUR SERVICES SAFELY AND THAT THE ENTIRE RISK ARISING OUT OF YOUR USE OF THE SERVICES IS YOURS AND YOURS ALONE. YOU ARE RESPONSIBLE FOR ANY HARM YOU CAUSE TO OTHER PEOPLE OR PROPERTY.

YOU HEREBY WAIVE ANY AND ALL CLAIMS, INCLUDING THOSE IN CONTRACT, TORT (INCLUDING NEGLIGENCE), STATUTORY AND/OR ANY OTHER GROUNDS, EVEN IF ANY OF THE RELEASED PARTIES HAVE BEEN ADVISED OF THE POSSIBILITY OF SUCH CLAIMS.

THE PROVISIONS IN THIS SECTION 8 APPLY TO THE MAXIMUM EXTENT ALLOWED BY LAW.

When we use the term "Released Parties" in these Terms, we mean (i) us and our affiliates and subsidiaries and our and their respective owners, managers, officers, employees, directors, agents, representatives, successors, assigns, licensees, distributors, vendors and third parties with whom we authorize or otherwise partner with to distribute, market or otherwise commercialize the Services, (ii) municipalities and public entities (including all of their respective elected and appointed officers, officials, employees and agents) which authorize us to operate any of the Services, (iii) owners and ground lessees of the property (including all of their respective elected and appointed officers, officials, employees and agents) which authorize us to operate any of the Services on its premises, and (iv) to the extent you access the Services using a third party application, website, content, product or service, that third party and all of its affiliates and subsidiaries and each of their respective owners, managers, officers, employees, directors, agents, representatives, successors and assigns.

Indiana courts have stated that the interpretation of a written contract, including a waiver or release, is a question of law for the court to determine. *Avant v. Community Hosp.*, 826

N.E.2d 7, 10 (Ind.Ct.App. 2005), *trans. denied*. When reviewing a contract, the courts should examine the language used to express the parties' rights and duties to determine their intent. *Id.* Words should be given their usual meaning unless it is clear from the context that another meaning was intended. *Id.* Words, phrases, sentences, paragraphs, and sections of a contract cannot be read out of context; if possible, the entire contract must be read together and given meaning. *Id.*

Courts have stated that an exculpatory clause in a release or waiver must both specifically and explicitly refer to the negligence of the party seeking release from liability. *Powell v. Amer. Health Fitness Center of Fort Wayne, Inc.*, 694 N.E.2d 757, 760 (Ind.Ct.App. 1998). However, more recent courts have also determined and held that "an exculpatory clause need not include the word 'negligence' so long as it conveys the concept specifically and explicitly through other language". *Moore Heating & Plumbing, Inc. v. Huber, Hunt & Nichols*, 583 N.E.2d 142, 146 (Ind.Ct.App. 1991). In fact, courts have concluded that releases that contain language or terms associated with negligence, such as "claims", "causes of action", "acts", "damage", "responsibility", and "injury", are sufficient to bar an individual executing the release from recovery. *Avant*, 826 N.E.2d at 11.

In the *Avant* case, the relevant facts were that Community Hospital owned and operated Fitness Pointe Health Club in Lake County, Indiana. Prior to working out at the facility, Avant was required to execute a "Member/Participant Waiver and Release from Liability" agreement, which stated in pertinent part:

"I promise and agree on behalf of myself, my heirs and assigns, not to sue and agree to release, discharge, and hold harmless and indemnify the Fitness Pointe, its agents, employees, members and all other personal [sic] or entities acting on its behalf from all claims, demands, rights and causes of action of any kind, whether arising from my own acts or those of Fitness Pointe. I hereby waive all claims for personal injury or property damage arising from my activities or use of the facilities and equipment at

Fitness Pointe, and I accept, assume and incur all responsibility for the risk of injury from such activity and exercise.”

Avant subsequently claimed injuries due to the actions of a personal trainer who was an employee at Fitness Pointe, and he filed a negligence lawsuit against Fitness Pointe. After some procedural issues in the case, Fitness Pointe filed a motion for summary judgment on the basis of the executed waiver/release, and the motion was granted by the trial court. Avant appealed the trial court’s decision, contending that there were genuine issues of material fact surrounding the language of the executed release.

The Court of Appeals affirmed the decision of the trial court, stating that in the absence of legislation to the contrary, it is not against public policy in Indiana to enter into a contract that exculpates one from the consequences of his own negligence. *Marshall v. Blue Springs Corp.*, 641 N.E.2d 92, 95 (Ind.Ct.App. 1994). The Court further stated that “an exculpatory clause may be found sufficiently specific and explicit on the issue of negligence even in the absence of the word itself”. *Moore*, 583 N.E.2d at 146. The Court reviewed the entire language of the waiver and release executed by Avant, and determined that applying the plain meaning of the words included in the contract, it is clear that the negligent design and implementation of a fitness program by a Fitness Pointe employee is an “act” for which Avant knowingly and willingly agreed to provide indemnification. Thus, the language of the release barred Avant’s claims against the company.

Similarly, in the case of *City of Hammond v. Plys*, 893 N.E.2d 1 (Ind.Ct.App. 2008), the Court of Appeals dealt with the language in a release to determine whether it barred a negligence claim filed by Plys. Plys joined the Hammond Fitness Center, and she was required to sign a release regarding her participation at the center, which stated:

“I, MARTHA PLYS, accept full responsibility and assume the risk for my use of

any and all apparatus, appliance, facility privilege or service, of any nature, which is owned or operated by the Hammond Parks and Recreation Department, the Hammond Civic Center, or the City of Hammond, Indiana. While engaging in any contact, game, function, exercise, competition, or any other activity operating, organized, arranged, or sponsored by the Hammond Parks and Recreation Department, the Hammond Civic Center, or the City of Hammond, either on or off their premises. I shall do so at my own risk, and hold the Hammond Parks and Recreation Department, the Hammond Civic Center, or the City of Hammond, Indiana, its employees, representatives and agents, forever harmless from any and all loss, claim, injury, damage, or liability sustained or incurred by me resulting therefrom. I specifically agree to indemnify and hold harmless Hammond Parks and Recreation Department, the Hammond Civic Center, or the City of Hammond, Indiana as to any loss, cost, claim, injury, damage or liability, sustained or incurred by using the facilities or equipment of the Hammond Parks and Recreation Department, the Hammond Civic Center, or the City of Hammond, Indiana which is caused by an act or omission, whether negligent, intentional, or otherwise, of an employee, representative, or agent of the Hammond Parks and Recreation Department, the Hammond Civic Center, or the City of Hammond, Indiana. Reading of the above rules and my signature below constitutes my full acceptance of this waiver.”

Plys slipped and fell on a pool ladder at the Hammond Fitness Center and suffered injuries to her foot. She then filed a negligence action against the Hammond defendants, and the defendants moved for summary judgment, arguing that Plys waived any claims against them by signing the release/waiver. The trial court denied the defendants’ motion for summary judgment, finding that the express waiver involved failed to specifically state that Plys was waiving the specific negligence of the defendants and thus did not relieve defendants from liability. The defendants appealed the trial court’s denial of their motion for summary judgment.

Both the appellate court in the Avant case as well as the Court of Appeals in Plys reviewed the prior appellate decision in Powell, which required that negligence be specifically mentioned in the terms of the release or waiver at issue. Both courts determined that Powell was too narrowly decided in terms of the language of the release, and instead the courts reviewed the specific language to determine the primary purpose of the release. The Court thus determined that the release signed by Plys “demonstrates that she assumed the risk, that she held the

Hammond defendants harmless ‘from any and all loss, claim, injury, damage or liability’, she agreed to indemnify them, and she held them harmless for any injury sustained while using the facilities caused by a negligent act or omission.” *Id.* at 9. Thus, the Court reversed the decision of the trial court and held that summary judgment should have been granted to the Hammond defendants.

Thus, on the defense side, the very first thing that should be reviewed and argued is the exculpatory clause to determine (a) the strength and clarity of the wording of the agreement, and (b) whether the language excludes for the rider’s own negligence. The Rental Agreement from Bird is even a little stronger and clearer, in my opinion, than that included in the Lime agreement:

In exchange for Rider being allowed to use Bird Services, Vehicles, and other equipment or related information provided by Bird, Rider agrees to fully release, indemnify, and hold harmless Bird and all of its owners, managers, affiliates, employees, contractors, officers, directors, shareholders, agents, representatives, successors, assigns, and to the fullest extent permitted by law any Municipality (including its elected and appointed officials, officers, employees, agents, contractors, and volunteers) in which Rider utilizes Bird Services, and every property owner or operator with whom Bird has contracted to operate Bird Services and all of such parties’ owners, managers, affiliates, employees, contractors, officers, directors, shareholders, agents, representatives, successors, and assigns (collectively, the “Released Persons”) from liability for all “Claims” arising out of or in any way related to Rider’s use of the Bird Services, Vehicles, or related equipment, including, but not limited to, those Claims based on Released Persons’ alleged negligence, breach of contract, and/or breach of express or implied warranty, except for Claims based on Released Persons’ gross negligence or willful misconduct. Such released are intended to be general and complete releases of all Claims.

MANDATORY ARBITRATION CLAUSE

Again, prior to actually getting into the meat of the underlying case, defense counsel handling these claims should next attempt to argue that these cases should not be heard in state or federal trial courts, but should be settled or determined by a binding arbitration. Obviously, whether or not a particular claim related to the use of an electric scooter depends on who is bringing the claim and the type of claim being made. Typically, the companies will include the following language in their respective Rental Agreements:

9.2 Binding Arbitration

If the parties do not reach an agreed upon solution through the support process, then either party may initiate binding arbitration as the sole means to resolve claims, subject to the terms set forth below. Specifically, all claims arising out of or relating to use and rental of a Vehicle, this Agreement, and the parties' relationship with each other shall be finally settled by binding arbitration administered by JAMS, or alternatively a mutually agreed upon arbitrator or arbitration service, under the applicable commercial arbitration rules for JAMS or the mutually agreed upon arbitration service, excluding any rules or procedures governing or permitting class actions.

The arbitrator, and not any federal, state or local court or agency, shall have exclusive authority to resolve all disputes arising out of or relating to the interpretation, applicability, enforceability or formation of this Agreement, including, but not limited to any claim that all or any part of this Agreement are void or voidable, or whether a claim is subject to arbitration. The arbitrator shall be empowered to grant whatever relief would be available in a court under law or in equity. The arbitrator's award shall be written, and binding on the parties and may be entered as a judgment in any court of competent jurisdiction.

Bird Rental Agreement.

Under Indiana contract law, the party seeking to compel arbitration has the burden of demonstrating the existence of an enforceable arbitration agreement. *Showboat Marina Casino P'ship v. Tonn & Blank Constr.*, 790 N.E.2d 595, 597-598 (Ind. Ct. App. 2003). A party seeking

to compel arbitration must satisfy a two-pronged burden of proof. *Mislenkov v. Accurate Metal Detinning, Inc.*, 743 N.E.2d 286, 289 (Ind. Ct. App. 2001). First, the party must demonstrate the existence of an enforceable agreement to arbitrate the dispute. *Id.* Second, the party must prove that the disputed matter is the type of claim that the parties agreed to arbitrate. *Id.* Once the court is satisfied that the parties contracted to submit their dispute to arbitration, the court is required by statute to compel arbitration. *Id.*

When determining whether the parties have agreed to arbitrate a dispute, courts apply ordinary contract principles governed by state law. *Showboat Marina*, 790 N.E.2d at 598; *Mislenkov*, 743 N.E.2d at 289. In addition, when construing arbitration agreements, every doubt is to be resolved in favor of arbitration, and the parties are bound to arbitrate all matters, not explicitly excluded, that reasonably fit within the language used. *Showboat Marina*, 790 N.E.2d at 598. However, parties are only bound to arbitrate those issues that by clear language they have agreed to arbitrate; arbitration agreements will not be extended by construction or implication. *Id.* The court should attempt to determine the intent of the parties at the time the contract was made by examining the language used to express their rights and duties. *Id.* at 597. Words used in a contract are to be given their usual and common meaning unless, from the contract and the subject matter thereof, it is clear that some other meaning was intended. *Id.*

Generally, only those who are parties to a contract or those in privity with a party have the right to enforce the contract. *Mislenkov*, 743 N.E.2d at 289. Privity has been defined as "mutual or successive relationships to the same right of property, or an identification of interest of one person with another as to represent the same legal right." *Id.* (quoting *Riehle v. Moore*, 601 N.E.2d 365, 371 (Ind. Ct. App. 1992), *trans. denied*).

The Federal Arbitration Act (“FAA”) mandates that an arbitration provision in a contract evidencing a transaction involving commerce “shall be valid, irrevocable, and enforceable”, save only when grounds exist for revocation of the contract. 9 U.S.C. § 2. Pursuant to the FAA and the Indiana Uniform Arbitration Act, codified at I.C. § 34-57-2-1 *et. seq.*, once a court is satisfied that a contract provides for arbitration, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement. If arbitration is ordered, the trial court must also stay the proceedings until the arbitration occurs.

As referenced above, the key for defense counsel to determine whether to argue that a claim should be determined through arbitration and not through the courts depends on (a) the person making the claim; and (b) the type of claim presented. For example, this is a decent list showing what may or may not be subject to arbitration:

eScooter Accident Claims that *May* Be Subject to Mandatory Arbitration

As a general rule, mandatory arbitration clauses apply to claims that eScooter riders have against the rental companies. So, examples of claims that may be subject to mandatory arbitration [include](#):

- ▶ Claims related to scooter malfunctions (such a brake failure or the throttle getting stuck in the open position).
- ▶ Claims related to dangerous scooter functionalities (such as programs that automatically reduce your speed in “geo-fenced” areas and then immediately increase your speed once you pass through the area without warning).
- ▶ Claims related to inadequate eScooter maintenance (such as failure to replace work brake pads or broken standing platforms).

eScooter Accident Claims that are *Not* Subject to Mandatory Arbitration

Claims that eScooter riders have against third parties are not subject to mandatory arbitration. Likewise, if you were injured and you did not agree to mandatory arbitration (i.e. if you were injured as a pedestrian), then you can take your case to court. Examples of claims that are not subject to mandatory arbitration include:

- ▶ Scooter riders’ claims against negligent motor vehicle drivers.
- ▶ Scooter riders’ claims against other negligent scooter riders.
- ▶ Scooter riders’ claims against public entities and contractors responsible for creating dangerous road or sidewalk conditions.
- ▶ Pedestrians’ claims against negligent eScooter riders (including claims related to eScooter parking violations).
- ▶ Pedestrians’ claims against electric scooter rental companies.

<https://www.escooter-crash.com/escooter-arbitration-vs-lawsuit/>

SCOOTER ITSELF AT FAULT FOR ALLEGED INJURIES

There may be occasions or claims made by riders of electric scooters that the scooter itself caused injury to the rider, whether through some mechanical issue or malfunction of the scooter. Again, the respective companies have included language in their Rental Agreements addressing the rider's responsibilities when it comes to a "system check" of the scooter, as follows:

BIRD:

3.1 Safety Check. Before each use of a Vehicle, Rider shall conduct a basic safety inspection of the Vehicle, which includes inspecting the following: (i) trueness of the wheels; (ii) safe operation of all brakes and lights; (iii) good condition of the frame; (iv) sufficient battery charge power; and (v) any sign of damage, unusual or excessive wear, or other open and obvious mechanical problem/maintenance need. Rider agrees not to ride the Vehicle if there are any noticeable issues, and to immediately notify customer service to alert Bird of any problems.

LIME:

We do our best to keep each Product in good condition, but you should still perform a safety check on the Product before you use it, including all of these:

- **Did you check its general condition (wheels, tires, etc.)?**
- **Do its brakes and lights work?**
- **Are the seat, pedals and basket properly attached if it's a bike?**
- **Is the battery charged if it's electric?**
- **Is there any other sign of damage, unusual or excessive wear or is maintenance needed?**

Something could have happened to the Product since its condition was last checked, and we need you to tell us if something isn't working properly if you notice it before we do. If you notice any of these or other issues in a Product before your use, don't use it. Reserve another one instead. If you notice something during use, stop your trip as safely as you can and as soon as possible. If you don't report these issues, we may have to attribute them to you, including holding you responsible for any associated costs, so please tell us if anything you see doesn't look right.

There have been lawsuits filed throughout the country against the electric scooter companies alleging that issues as to the scooter itself caused an accident, and thus the companies are negligent. Companies have been arguing that these clauses which require a purported rider to examine the scooter prior to riding it provide them with some immunity or defenses, which leads to the next section of claims and defenses

PRODUCTS LIABILITY CASES – DEFECTS WITH THE SCOOTERS

While certainly not meant to be an exhaustive list, electric scooter companies have been presented with defective product claims involving the following:

- (a) Failed brakes – At 15 miles per hour, functioning brakes are essential to riders and pedestrians. And, the 15 mile-per-hour maximum speed does not account for scooters going downhill. The scooters can reach even higher speeds and, consequently, create a higher risk of serious injury or death.
- (b) Stuck throttles – Likewise, riders and pedestrians face an increased risk of injury when throttles get stuck, making the rider unable to slow down.
- (c) Exploding batteries
- (d) Flat tires
- (e) Inoperative lights
- (f) Broken tubes – If the tubes that transmit power within the vehicle suddenly break, riders risk being thrown off
- (g) Defective handlebars
- (h) Failure to warn of hidden dangers associated with the use of this unique electric vehicle

Under the Indiana Products Liability Act (IPLA), a plaintiff must prove that a product was placed into the stream of commerce in a defective condition unreasonably dangerous to the user and that plaintiff's injuries were caused by this dangerous product. Ind. Code § 34-20-2-1. A product can be defective within the meaning of the Act because of a manufacturing flaw, a defective design or a failure to warn of dangers while using the product. *Baker v. Heye-Am.*, 799 N.E.2d 1135, 1140 (Ind. Ct. App. 2003).

“[I]n an action based on an alleged design defect in the product or based on an alleged failure to provide adequate warnings or instructions regarding the use of the product, the party making the claim must establish that the manufacturer or seller failed to exercise reasonable care under the circumstances in designing the product or in providing the warnings or instructions.”

Ind. Code § 34-20-2-2.

The IPLA provides three non-exclusive defenses to a products liability action: incurred risk (Ind. Code § 34-20-6-3); misuse of the product (Ind. Code § 34-20-6-4); and modification or alteration of the product (Ind. Code § 34-20-6-5). Additionally, comparative fault principles apply in products liability cases. (Ind. Code § 34-20-8-1).

When the IPLA was enacted in 1978, it provided four statutory defenses: 1) incurred risk; 2) product misuse; 3) product alteration; and 4) conformity with state-of-the-art. Ind. Code § 33-1-1.5-4(b) (1975). Three of these defenses—incurred risk, product misuse and product alteration—were retained with the 1995 amendments and remain in effect today. See Ind. Code § 33-1-1.5-4(b) (1978); Ind. Code § 33-1-1.5-4(b) (1995); Ind. Code §§ 34-20-6-3 through 34-20-6-5 (2018).

When it comes to use of electric scooters, it is obvious that the defenses of incurred risk and product misuse are central to the defenses of these claims. The Rental Agreements also utilize specific language on these defenses, as follows:

Rider agrees that he/she is responsible and liable for any misuse, consequences, claims, demands, causes of action, losses, liabilities, property or fire or other damages, injuries, costs, and expenses, penalties, attorney's fees, judgments, suits, or disbursements of any kind or nature whatsoever related to Rider charging or attempting to charge the Vehicle. By choosing to charge a Vehicle, Rider assumes full and complete responsibility for all related risks, dangers, and hazards, and Rider agrees that Bird and all other Released Persons (defined below in Section 15) are not responsible for any injury, damage, or cost caused by Rider with respect to any person or property, including the Vehicle itself, directly or indirectly related to the charging of the Vehicle.

Bird Rental Agreement

Misuse of the scooter transitions well into the next area of defense to these claims – comparative fault of the operator of the scooter.

COMPARATIVE FAULT OF THE SCOOTER OPERATOR/CONTRIBUTORY NEGLIGENCE OF A GOVERNMENTAL ENTITY

If a savvy Plaintiff or Plaintiff's lawyer has been able to traverse through the procedural potholes and product liability defenses, it is likely that a claimant/Plaintiff may still be unable to recover for injuries while riding a scooter based on the comparative fault of the scooter operator himself/herself. Many recent studies, including studies in cities in Portland, Austin, and San Francisco, have shown that 83% of injuries to operators of electric scooters are not due to collisions with pedestrians or motor vehicles, but due to operator inexperience or misuse of the scooter resulting in the individual falling off of the scooter. In Indiana, obviously, if it is proven

that the operator was more than 50% at fault for his or her own injuries due to failure to operate the scooter in a proper manner, he or she would be barred from recovery.

Again, the respective Rental Agreements even reference user error with examples, as in the Lime Agreement, as follows:

- **You must be able to operate our Products in a competent manner. You know how to use them and are physically able to do so. You understand that adverse weather conditions can impact safety and you are able to respond accordingly (like adjusting your braking distance in the rain, for example). This may also mean not using certain Products at all. Also note that we don't provide routing directions or advice, so the route you choose is up to you.**

Or, in the Bird Agreement, it lists numerous examples of things that should not be done while operating the scooters:

1.8 Prohibited Acts. Rider agrees to the following:

- Bird recommends against operation of a Vehicle while carrying or holding a briefcase, backpack, bag, or other item that can alter balance, add extra weight, or impair safe operation of the Vehicle. If You choose to use such an item, You do so at your own peril; Bird recommends that You ensure the item fits snugly to Your body and does not impede Your ability to operate the Vehicle safely.
- You must not place any objects on the handlebar of the Vehicle, such as backpacks or bags.
- While riding a Vehicle, You must not use any cellular telephone, text messaging device, portable music player, or other device that may distract You from operating the Vehicle safely.
- You must not operate a Vehicle while under the influence of any alcohol, drugs, medication, or other substance that may impair Your ability to operate a Vehicle safely.
- You must not carry a second person or child on a Vehicle.

There are any number of examples that can be given showing how user error has led to injuries, and attorneys on the plaintiff side who want to take a claim involving an e-scooter need to be mindful that there are procedural and evidentiary issues which likely will preclude recovery.

There have been some cases throughout the country where an operator of an electric scooter has sued a city, town, or state due to a pothole or some other impediment on the street or sidewalk which led to the injuries of the operator. Obviously, the injured party in that situation not only needs to be mindful of the applicable Tort Claims Notice requirements but also would have to prove complete fault on the part of the entity due to pure contributory negligence laws which would bar recovery for even 1% fault on the part of the scooter operator.

APPLICABLE INDIANAPOLIS LAWS ON SCOOTERS

Indianapolis recently passed a city ordinance which provides, in short:

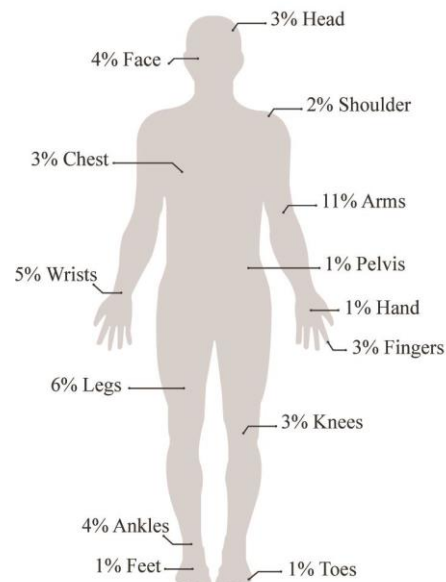
- Most importantly, you CANNOT ride an electric scooter on the sidewalk, Cultural Trail or any of the Greenways.
- You must ride the electric scooter on the street, following all normal traffic laws, including:
 - You can ride in the bike lane;
 - You cannot travel the wrong way on a one way street; and
 - Like a car, you must ride with the flow of traffic. You cannot ride the electric scooter in the oncoming traffic lane;
- Helmets are recommended but not yet required.
- The electric scooters must be parked leaving four feet of clearance on the sidewalk.

The rest of the Indianapolis electric scooter laws are aimed more at the financial and regulatory side:

1. Electric scooter companies must have a license to operate in Indianapolis. Those companies have to pay a \$15,000/year fee and \$1/day in order to pay for law enforcement and bike lane maintenance;
2. Electric scooters have to be equipped with lights, a pedometer, and either a bell or a horn;
3. Electric scooter companies have to provide Indianapolis with usage figures and scooter serial numbers;
4. Electric scooter companies have to carry liability insurance to protect the city, if the City would be liable for any accidents

MITIGATION OF DAMAGES/HELMET USAGE

According to the CDC study noted at the beginning of this section, the location of bone fractures are as follows:



Almost half (80) of the injured riders noted in the study had a severe injury. The severe injury for these riders included:

1. bone fractures (excluding nose/fingers/toes) (84%),
2. nerve, tendon, or ligament injuries (45%),
3. spending more than 48 hours in the hospital (8%),
4. severe bleed (5%), and
5. sustained organ damage (1%).

Traumatic brain injuries include concussions and other forms of altered mental status or bleeding such as subarachnoid hemorrhage and subdural hematoma. Fifteen percent of riders had evidence suggestive of a traumatic brain injury. **Less than one percent of individuals was wearing a helmet at the time of injury.** Eighty-eight percent of injured riders were seen at an emergency department. Fourteen percent of all injured riders were hospitalized. None of the injured riders died during the study period.

It is clear in Indiana that for operators of a motorcycle over the age of 18, evidence of the failure to use a helmet would be inadmissible in court. This is because courts have determined that lack of a helmet is not the “proximate cause” (i.e. reason for) the accident. This is the same principle that has been developed for seatbelts though the Indiana seatbelt law applies to all people of all ages and specifically states that fault cannot be attributed to someone not wearing a seatbelt. The Indiana Court of Appeals has noted that “in a majority of jurisdictions, evidence of a motorcyclist’s failure to wear protective equipment is inadmissible in the absence of a statutory duty. See 7A Am.Jur.2d. Automobiles and Highway Traffic § 629.” *State v. Eaton*, 659 N.E.2d 232, 236 (Ind. Ct. App. 1995). That same court found that the motorcyclist in the case had no duty to wear a helmet or other protective eyewear, and thus the trial court did not err in prohibiting the state from introducing evidence of motorcyclist’s failure to use protective eyewear in motorcyclist’s action for injuries sustained in accident.

It is likely that any attempts on the part of defense counsel to argue that the operator of an electric scooter who was injured due to lack of wearing a helmet will also face the same uphill battle. This remains troubling due to the negligence *per se* arguments and what will still require defense counsel to bring an expert witness to court to provide sufficient expert testimony causally linking the injuries to the lack of wearing a helmet. This remains an area of the law that needs to be changed.

I LOVE THESE ENVIRONMENTALLY CONSCIOUS
E-SCOOTER DRIVERS! THEY PAID FOR
MY NEW SUV!

Dr. Crackle
TRAUMA
SURGEON



Section Five

After the Scooter Accident, Where is the Insurance Coverage?

Richard K. Shultz
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Indianapolis, Indiana

Section Five

After the Scooter Accident, Where is the Insurance Coverage?.....Richard K. Shoultz

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After the Scooter Accident, Where is the Insurance Coverage?

Richard "Rick" Shoultz
Lewis Wagner, LLP

The use of electronic scooters is a fairly new phenomenon within our cities. However, since its introduction, its use has flourished. Scooters are everywhere within the cities with riders zipping in and out of traffic. As a result, accidents are happening. Once the accident occurs, the injured scooter riders and the motorists who may be involved in the accident, search for insurance coverage. However, what they are finding, is that coverage is not available. This paper will discuss the insurance policies where most people look and the language that addresses whether coverage is available.

Because the introduction of scooters into city life is new, there simply is no reported case decisions that discuss insurance coverage. The author has found a few recently filed personal injury cases, but court decisions interpreting policy language and application to scooter accidents is lacking. Additionally, as explained below, insurance policy language is pretty clear in establishing that no coverage exists for the major types of policy coverages.

What is considered a "scooter?"

This article will focus upon "e-scooters" which are scooters where the rider stands and are generally battery-powered or "kick" powered by the operator. Typically, they can reach speeds of 15 to 20 mph. In this article, we are not referring to mopeds or "Vespa-like" scooters where the operator can sit. Unlike the sit down version, the e-scooters do not require any drivers licenses or age requirement for the rider to operate.

Who are the major suppliers of scooters?

There are primarily two major scooter companies that operate in most cities – Lime and Bird. Because of the proliferation of scooters throughout cities, these companies have grown. As of January 31, 2019, Lime was reportedly valued at \$2 billion.¹ Similarly, Bird raised capital of \$2 billion when it started operation.²

Is there coverage through the scooter suppliers?

These scooter companies have clearly shielded themselves from responsibility for the rider's operation of the scooter. Before the operator can use the scooter, he or she must agree to the terms of the rental agreement which clearly place responsibility for any accidents from use of the scooter upon the operator. The Bird Rental Agreement outlines this obligation by stating:

Rider agrees that he/she is responsible and liable for any misuse, consequences, claims, demands, causes of action, losses, liabilities, property or fire or other damages, injuries, costs, and expenses, penalties, attorney's fees, judgments, suits, or disbursements of any kind or nature whatsoever related to Rider charging or attempting to charge the Vehicle. By choosing to charge a Vehicle, Rider assumes full and complete responsibility for all related risks, dangers, and hazards, and Rider agrees that Bird and all other Released Persons (defined below in Section 15) are not responsible for any injury, damage, or cost caused by Rider with respect to any person or property, including the Vehicle itself, directly or indirectly related to the charging of the Vehicle.

The agreement also specifically advises renters that their insurance likely does not provide insurance for the use of the scooter:

**YOUR AUTOMOTIVE INSURANCE POLICIES MAY NOT PROVIDE
COVERAGE FOR ACCIDENTS INVOLVING OR DAMAGE TO THIS VEHICLE.**

¹ Spotlight on: e-scooters and insurance, www.iii.org/article/spotlight-on-e-scooters-and-insurance

² The Scooter Craze and Insurance, www.insurancethoughtleadership.com/the-scooter-craze-and-insurance/

TO DETERMINE IF COVERAGE IS PROVIDED, YOU SHOULD CONTACT YOUR AUTOMOTIVE INSURANCE COMPANY OR AGENT

The agreement also contains extensive language releasing Bird from any responsibility associated with the operator's use of the scooter:

15. RELEASES; DISCLAIMERS; ASSUMPTION OF RISK.

In exchange for Rider being allowed to use Bird Services, Vehicles, and other equipment or related information provided by Bird, Rider agrees to fully release, indemnify, and hold harmless Bird and all of its owners, managers, affiliates, employees, contractors, officers, directors, shareholders, agents, representatives, successors, assigns, and to the fullest extent permitted by law any Municipality (including its elected and appointed officials, officers, employees, agents, contractors, and volunteers) in which Rider utilizes Bird Services, and every property owner or operator with whom Bird has contracted to operate Bird Services and all of such parties' owners, managers, affiliates, employees, contractors, officers, directors, shareholders, agents, representatives, successors, and assigns (collectively, the "Released Persons") from liability for all "Claims" arising out of or in any way related to Rider's use of the Bird Services, Vehicles, or related equipment, including, but not limited to, those Claims based on Released Persons' alleged negligence, breach of contract, and/or breach of express or implied warranty, except for Claims based on Released Persons' gross negligence or willful misconduct. Such releases are intended to be general and complete releases of all Claims.

"Claims" means, collectively, any and all claims, injuries, demands, liabilities, disputes, causes of action (including statutory, contract, negligence, or other tort theories), proceedings, obligations, debts, liens, fines, charges, penalties, contracts, promises, costs, expenses (including attorney's fees, whether incurred at trial, on appeal, or otherwise), damages (including but not limited to, for personal injury, wrongful death, property damage, and injury to rider or to third parties, consequential, compensatory, or punitive damages), or losses (whether known, unknown, asserted, unasserted, fixed, conditional, or contingent) that arise from or relate to (a) any of the Bird Services, including any of the Vehicles, placement, equipment, maintenance, related information, this agreement or (b) Rider's use of any of the foregoing.

To the fullest extent permitted by law, and as to Rider's use of any of the Bird Services, Vehicles, or related equipment, Bird and all other

Released Persons disclaim all express and implied warranties, including warranties of merchantability and fitness for a particular purpose. All of the Bird Services, Vehicles, and related equipment are provided “as is” and “as available,” and Rider relies on them at Rider’s own risk.

Rider is aware that Rider’s use of any of the Bird Services, Vehicles, and related equipment involves obvious and not-so-obvious risks, dangers, and hazards that may result in injury or death to Rider or others and damage to property, and that such risks, dangers, and hazards cannot always be predicted or avoided. Risks, dangers, and hazards, include, but are not limited to:

- **vehicles and other objects;**
- **pedestrians;**
- **traffic;**
- **Vehicle or component malfunction;**
- **road conditions;**
- **weather conditions;**
- **failure to follow applicable laws regarding use and/or operation of the Vehicle pursuant to Section 1.7;**
- **commission of any of the prohibited acts listed in Section 1.8;**
- **failure to perform the required safety check pursuant to Section 3.1;**
- **failure to wear a helmet where required by law; and**
- **negligent acts or omissions by Bird, any other Released Person, Rider, or third party.**

Rider is solely and fully responsible for the safe operation of Vehicle at all times. Rider agrees that Vehicles are machines that may malfunction, even if the Vehicle is properly maintained and that such malfunction may cause injury. Rider assumes full and complete responsibility for all related risks, dangers, and hazards.

To the fullest extent permitted by law, this release and hold harmless agreement includes any and all Claims related to or arising from the sole or partial negligence of Bird, the Released Parties, any Municipality or any other party. Rider hereby expressly waives any claims against the Released Parties, any Municipality or any other party which Rider does not know or suspect to exist in his or her favor at the time of use of Bird Services, and expressly waives Rider’s rights under any statutes that purport to preserve Rider’s unknown claims.

(Bird Rental Agreement).

While the agreement clearly places responsibility for the scooter operation upon the renter, the scooter suppliers do have insurance coverage to protect themselves from defects associated with the scooter equipment. It has been reported that Bird has at least \$1 million in insurance coverage per claim if an accident happens because of a faulty scooter.³ Because of the increased value of scooter companies like Bird and Lime, I am sure there is more insurance coverage available to them for accidents from defective scooters.

It is surprising that the scooter companies do not consider offering liability and/or equipment insurance coverage to operators at the time of the rental. The companies could undertake an underwriting analysis to assess the risk and costs, and offer the insurance coverage at the time of the rental as many rental car companies do. There are likely difficulties in outlining the scope of coverage that would be available considering how scooters are rented. Similarly, because the risk of serious injuries from a scooter accident are high, the companies may not want to assume that risk. The companies may also not want to discourage renters by the increased price that would be associated with adding an insurance premium charge onto the rental cost. Nevertheless, considering the number of times scooters are rented, it potentially could be a huge revenue producer if done correctly.

Homeowners Insurance Policy

³ Scooter Riders Advised to Avoid Insurance Pothole,
www.insurancejournal.com/news/national/2019/06/28/530715/htm

If a scooter operator injures another and is sued, one of the first places the operator would look for insurance coverage is his or her own homeowners insurance policy. The key provisions of that policy include the “insuring agreement” which states:

If a claim is made or a suit is brought against an “insured” for damages because of “bodily injury” or “property damage” caused by an “occurrence” to which this coverage applies, we will:

1. Pay up to our limit of liability for the damages for which an “insured” is legally liable. . . .
2. Provide a defense at our expense by counsel of our choice, even if the suit is groundless, false or fraudulent. . . .⁴

From this “insuring agreement” language, coverage would appear to be available. However, all insurance policies have exclusions which must be examined.

The most pertinent exclusion that must be reviewed is the “Motor Vehicle Liability” exclusion which provides:

- A. “Motor Vehicle Liability”
 - a. Coverages E [Personal Liability] and F [Medical Payments to Others] do not apply to any “motor vehicle liability” if, at the time and place of an “occurrence”, the involved “motor vehicle”:
 - a. Is registered for use on public roads or property;
 - b. Is not registered for use on public roads or property, but such registration is required by a law, or a regulation issued by a governmental agency, for it to be used at the place of the “occurrence”; or
 - c. Is being:
 - 1) Operated in, or practicing for, any prearranged or organized race, speed contest or other competition;
 - 2) Rented to others;
 - 3) Used to carry persons or cargo for a charge; or
 - 4) Used for any “business” purpose except for a motorized golf cart while on a golfing facility.
 - b. If Exclusion A.1. does not apply, there is still no coverage for “motor vehicle liability”, unless the “motor vehicle” is:

⁴ Miller’s Standard Insurance Policies Annotated, Seventh Ed. (“Millers”), Homeowners Form

A trailer not towed by or carried on a motorized land conveyance:

- a. In dead storage on an "insured location";
- b. Used solely to service a residence;
- c. Designed to assist the handicapped an, at the time of an "occurrence", it is:
 - 1) Being used to assist a handicapped person; or
 - 2) Parked on an "insured location";
- d. Designed for recreational use off public roads and:
 - 1) Not owned by an "insured"; or
 - 2) Owned by an "insured" provided the "occurrence" takes place:
 - a) On an "insured location" as defined in Definition B.6.a., b., d., e. or h.; or
 - b) Off an "insured location" and the "motor vehicle" is:
 - i. Designed as a toy vehicle for use by children under seven years of age;
 - ii. Powered by one or more batteries; and
 - iii. Not build or modified after manufacture to exceed a speed of five miles per hour on level ground;
- e. A motorized golf cart. . . .⁵

From the above language, there were a couple of defined terms that must be reviewed.

These include:

"Motor Vehicle Liability" means:⁶

- a. Liability for "bodily injury" or "property damage" arising out of the:
 - 1) Ownership of such vehicle or craft by an "insured";
 - 2) Maintenance, occupancy, operation, use, loading or unloading of such vehicle or craft by any person;
 - 3) Entrustment of such vehicle or craft by an "insured" to any person;
 - 4) Failure to supervise or negligent supervision of any person involving such vehicle or craft by an "insured";
 - 5) Vicarious liability, whether or not imposed by law, for the actions of a child or minor involving such vehicle or craft.
- b. For the purpose of this definition:

⁵ *Id.*

⁶ The definition of "Motor Vehicle Liability" is also included in the policy definitions with "Aircraft Liability" "Hovercraft Liability" and "Watercraft Liability."

4) Motor vehicle means a “motor vehicle” as defined in 7. Below.

7. “Motor Vehicle” means:
- a. A self-propelled land or amphibious vehicle; or
 - b. Any trailer or semitrailer which is being carried on, towed by or hitched for towing by a vehicle described in a. above.⁷

Indiana has few cases addressing this exclusion. Most of the cases have dealt with accidents involving golf carts or ATVs. Here is a summary of the pertinent cases:

Wicker v. McIntosh, 938 N.E.2d 25 (Ind.Ct.App. 2010)

“Liability coverage for golf cart passenger’s injury in accident away from named insured’s property while named insured’s son was driving was barred by motor vehicle exclusion of HO policy, despite exception making the exclusion inapplicable to motorized land conveyance designated for recreational use off public roads and on ‘insured location’”⁸

McCoy v. American Family Mut. Ins. Co., 898 N.E.2d 1237 (Ind.Ct.App. 2008)

“ATV on which visitor was injured and which named insured’s cohabitant owned and kept on insured’s property was not loaned to insured within meaning of exception to vehicle exclusion from liability coverage under HO’s policy,”⁹

While this exclusion may not be artfully worded, the purpose appears to address whether a scooter is covered. Clearly, the scooter is a “self-propelled land vehicle” to fall within the definition of “motor vehicle.” That fact alone is likely sufficient to show that coverage is excluded and does not fall within any of the exceptions to the exclusion. Quite

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

simply, almost all commentators agree that no coverage is available under the homeowners policy.¹⁰

Commercial-General Liability (“CGL”) Policy

The CGL policy provides liability coverage to an insured who is engaged in business operations. However, similar to the homeowners policy, it specifically excludes coverage for liability arising from the use of an “auto” –

2. Exclusions

This insurance does not apply to:

g. Aircraft, Auto or Watercraft

“Bodily injury” or “property damage” arising out of the ownership, maintenance, use or entrustment to others of any aircraft, “auto” or watercraft owned or operated by or rented or loaned to any insured. Use includes operation and “loading or unloading.”¹¹

The CGL policy defines “auto” to mean:

- a. A land motor vehicle, trailer or semi trailer designed for travel on public roads, including any attached machinery or equipment; or
- b. Any other land vehicle that is subject to a compulsory or financial responsibility law or other motor vehicle insurance law where it is licensed or principally garaged.¹²

In assessing the language of the CGL policy, there might be an avenue in which coverage could be available for an employee operating a scooter within the scope of his or her employment (an example could be city messenger delivering documents). The standard Insurance Services Organization (“ISO”) form CGL policy was last updated in 2013, before

¹⁰ Grant, “Electric Scooters Present Interesting Insurance Issues: Sharing Programs are Like Those with Bikes, Not Renting a Vehicle,” Pittsburgh Post-Gazette, November 25, 2018,

¹¹ Millers, CGL Policy

¹² *Id.*

scooters were so prevalent. In reviewing the “auto” definition above, there is a question on whether it is applicable to scooters.

First, there is some question on whether scooters are “designed for travel on public roads.” Scooter operators use the scooters on both public roads and sidewalks. Because of their recent prevalence, the passage of laws on their operation has been lagging in whether they are to be used on roads or sidewalks or both.

Second, unlike cars which require drivers to be financially responsible with appropriate insurance, no such regulations exist for scooters. Thus, there is a significant question about whether the “auto” definition required to trigger the auto exclusion is satisfied. Anticipate that the ISO will soon clarify the auto exclusion to specifically include scooters in the near future.

Automobile Policy

The “insuring agreement” for the automobile or auto policy generally provides as follows:

- A. We will pay damages for “bodily injury” or “property damage” for which any “insured” becomes legally responsible because of an auto accident.¹³

However, auto coverage also includes exclusions which restrict the coverage. The one that is applicable to scooters provides:

- B. We [the insurer] do not provide Liability Coverage for the ownership, maintenance or use of:
 - 1. Any vehicle which:
 - a. Has fewer than four wheels; or
 - b. Is designed mainly for use off public roads.

¹³ Millers, Personal Auto Policy.

This exclusion (B.1.) does not apply:

- 1) While such vehicle is being used by an “insured” in a medical emergency;
- 2) To any “trailer”; or
- 3) To any non-owned golf cart.¹⁴

The “four wheel” exclusion clearly appears to apply to most scooters on the road, and would exclude auto policy coverage for most scooters. However, if the two wheel scooter was used in a “medical emergency” coverage could be found.

Motorcycle Policy

This is probably the policy that most folks would consider that coverage would likely be available. The terms of motorcycle policies are not uniform unlike the policies put forth by the ISO. Thus, reading each policy to determine the coverage is important. One policy form providing motorcycle coverage in Indiana, provided:

INSURING AGREEMENT

We will pay damages for which an insured person is legally liable because of bodily injury or property damage resulting from the ownership, maintenance, or use of your insured motorcycle.¹⁵

The bold terms are defined. “Motorcycle” is also a defined term as –

(6) **Motorcycle** means a motor vehicle with motor power having a seat or saddle for the use of the rider, designed to travel on not more than three wheels in contact with the ground.¹⁶

¹⁴ *Id.*

¹⁵ www.Rider.com/documents/policies/Rider-Indiana-Policy-Eff-July15-2018.pdf, p. 3

¹⁶ *Id.*, p. 2

The key portion of the “motorcycle” definition focuses upon the requirement that the vehicle has a “seat or saddle for the use of the rider.” The electric scooters in most cities clearly lack a seat, which takes them out of the definition of a motorcycle to be afforded coverage.

Conclusion

The main types of liability insurance policies do not afford coverage to scooter operators. Thus, to be afforded liability insurance coverage, an insured would need to obtain a special endorsement that specifically provides coverage for electric scooters. Such coverage is available¹⁷ at a relatively inexpensive cost, if the operator seeks to obtain it. However, commentators also suggest that an umbrella policy may also afford coverage as it does not have as many exclusions from coverage.¹⁸

For personal injuries sustained while operating a scooter, the only definitive recourse the injured person has is coverage under his or her health policy. Motorists who negligently collide with scooters should have liability coverage under their personal or commercial auto policies, as striking a scooter operator is no different than an accident with a pedestrian or bicyclist.

¹⁷ Grant, *supra*.

¹⁸ Cathy Bussewitz, “When electric scooters crash, who ends up paying the bills?” [\[Dubuque, IA\] Telegraph Herald](#), July 7, 2019.



LITIGATING SCOOTER ACCIDENTS SEMINAR

Insurance Coverage

**Indiana Continuing Legal Education Forum
Richard Shoultz, Lewis Wagner, LLP**

SCOOTERS ARE EVERYWHERE

- ▼ Volume of scooters = Accidents
- ▼ Accidents = Injuries/Lawsuits
- ▼ Injuries/Lawsuits = Search for Insurance



SCOOTERS ARE EVERYWHERE



- ▼ Search reveals insurance coverage not available
- ▼ Why?
 - Prevalence of scooters is new
 - Little insurance coverage litigation reaching appellate courts



What is a “scooter?”

- Focus upon electric scooters (“e-scooters”)
 - ▶ Rider stands
 - ▶ Battery-powered or “kick” powered by operator
 - ▶ Reach speeds of 15 to 20 mph
 - ▶ E-scooters do not require driver’s license or registration



Scooter Companies

- Lime - \$2 billion valuation
- Bird - \$2 billion initial capitalization



▼ Scooter Rental Agreement

- Rider Assumption of Risk

Rider agrees that he/she is responsible and liable for any misuse, consequences, claims, demands, causes of action, losses, liabilities, property or fire or other damages, injuries, costs, and expenses, penalties, attorney's fees, judgments, suits, or disbursements of any kind or nature whatsoever related to Rider charging or attempting to charge the Vehicle. By choosing to charge a Vehicle, Rider assumes full and complete responsibility for all related risks, dangers, and hazards, and Rider agrees that Bird and all other Released Persons (defined below in Section 15) are not responsible for any injury, damage, or cost caused by Rider with respect to any person or property, including the Vehicle itself, directly or indirectly related to the charging of the Vehicle.

▼ Scooter Rental Agreement

- Rider's Auto Coverage Likely Not Applicable

**YOUR AUTOMOTIVE INSURANCE POLICIES
MAY NOT PROVIDE COVERAGE FOR
ACCIDENTS INVOLVING OR DAMAGE TO THIS
VEHICLE. TO DETERMINE IF COVERAGE IS
PROVIDED, YOU SHOULD CONTACT YOUR
AUTOMOTIVE INSURANCE COMPANY OR
AGENT**

▼ Scooter Rental Agreement

- Release Language

In exchange for Rider being allowed to use Bird Services, Vehicles, and other equipment or related information provided by Bird, Rider agrees to fully release, indemnify, and hold harmless Bird and all of its owners, managers, affiliates, employees, contractors, officers, directors, shareholders, agents, representatives, successors, assigns, and to the fullest extent permitted by law any Municipality (including its elected and appointed officials, officers, employees, agents, contractors, and volunteers) in which Rider utilizes Bird Services, and every property owner or operator with whom Bird has contracted to operate Bird Services and all of such parties' owners, managers, affiliates, employees, contractors, officers, directors, shareholders, agents, representatives, successors, and assigns (collectively, the "Released Persons") from liability for all "Claims" arising out of or in any way related to Rider's use of the Bird Services, Vehicles, or related equipment, including, but not limited to, those Claims based on Released Persons' alleged negligence, breach of contract, and/or breach of express or implied warranty, except for Claims based on Released Persons' gross negligence or willful misconduct. Such releases are intended to be general and complete releases of all Claims.

▼ Scooter Rental Agreement

- Indemnify Language

In exchange for Rider being allowed to use Bird Services, Vehicles, and other equipment or related information provided by Bird, Rider agrees to fully release, indemnify, and hold harmless Bird and all of its owners, managers, affiliates, employees, contractors, officers, directors, shareholders, agents, representatives, successors, assigns, and to the fullest extent permitted by law any Municipality (including its elected and appointed officials, officers, employees, agents, contractors, and volunteers) in which Rider utilizes Bird Services, and every property owner or operator with whom Bird has contracted to operate Bird Services and all of such parties' owners, managers, affiliates, employees, contractors, officers, directors, shareholders, agents, representatives, successors, and assigns (collectively, the "Released Persons") from liability for all "Claims" arising out of or in any way related to Rider's use of the Bird Services, Vehicles, or related equipment, including, but not limited to, those Claims based on Released Persons' alleged negligence, breach of contract, and/or breach of express or implied warranty, except for Claims based on Released Persons' gross negligence or willful misconduct. Such released are intended to be general and complete releases of all Claims.

▼ Scooter Rental Agreement

- Indemnity Language

In exchange for Rider being allowed to use Bird Services, Vehicles, and other equipment or related information provided by Bird, Rider agrees to fully release, indemnify, and hold harmless Bird and all of its owners, managers, affiliates, employees, contractors, officers, directors, shareholders, agents, representatives, successors, assigns, and to the fullest extent permitted by law any Municipality (including its elected and appointed officials, officers, employees, agents, contractors, and volunteers) in which Rider utilizes Bird Services, and every property owner or operator with whom Bird has contracted to operate Bird Services and all of such parties' owners, managers, affiliates, employees, contractors, officers, directors, shareholders, agents, representatives, successors, and assigns (collectively, the "Released Persons") from liability for all "Claims" arising out of or in any way related to Rider's use of the Bird Services, Vehicles, or related equipment, including, but not limited to, those Claims based on Released Persons' alleged negligence, breach of contract, and/or breach of express or implied warranty, except for Claims based on Released Persons' gross negligence or willful misconduct. Such releases are intended to be general and complete releases of all Claims.

▼ Scooter Rental Agreement

- Release Language – Warranties

Released Persons disclaim all express and implied warranties, including warranties of merchantability and fitness for a particular purpose. All of the Bird Services, Vehicles, and related equipment are provided “as is” and “as available,” and Rider relies on them at Rider’s own risk.

▼ Scooter Rental Agreement

- Release Language
- ▼ **Rider is aware that Rider's use of any of the Bird Services, Vehicles, and related equipment involves obvious and not-so-obvious risks, dangers, and hazards that may result in injury or death to Rider or others and damage to property, and that such risks, dangers, and hazards cannot always be predicted or avoided. Risks, dangers, and hazards, include, but are not limited to:**
 - **vehicles and other objects;**
 - **pedestrians;**
 - **traffic;**
 - **Vehicle or component malfunction;**
 - **road conditions;**
 - **weather conditions;**
 - **failure to follow applicable laws regarding use and/or operation of the Vehicle pursuant to Section 1.7;**
 - **commission of any of the prohibited acts listed in Section 1.8;**
 - **failure to perform the required safety check pursuant to Section 3.1;**
 - **failure to wear a helmet where required by law; and**
 - **negligent acts or omissions by Bird, any other Released Person, Rider, or third party.**

▼ Scooter Rental Agreement

- Rider Assumption of Risk

Rider is solely and fully responsible for the safe operation of Vehicle at all times. Rider agrees that Vehicles are machines that may malfunction, even if the Vehicle is properly maintained and that such malfunction may cause injury. Rider assumes full and complete responsibility for all related risks, dangers, and hazards.

▼ Scooter Rental Agreement

- Release Language

To the fullest extent permitted by law, this release and hold harmless agreement includes any and all Claims related to or arising from the sole or partial negligence of Bird, the Released Parties, any Municipality or any other party. Rider hereby expressly waives any claims against the Released Parties, any Municipality or any other party which Rider does not know or suspect to exist in his or her favor at the time of use of Bird Services, and expressly waives Rider's rights under any statutes that purport to preserve Rider's unknown claims.

Coverage through Scooter Suppliers

- Scooter companies do have liability insurance
- Reported that have at least \$1 million in liability coverage for claim of defective scooter
- Likely have much more coverage out there



- Question – Why do the scooter companies not offer liability/property damage insurance coverage to renters like a rental car company does?
 - ▶ Pros
 - Likely would produce significant revenue
 - Could be option on rental agreement
 - ▶ Cons
 - How do you outline the scope of coverage
 - Significant risk of injuries
 - Increased cost of adding premium charge to rental



“Dude, there is a bike lane there.”



▼ Insuring Agreement

- If a claim is made or a suit is brought against an “insured” for damages because of “bodily injury” or “property damage” caused by an “occurrence” to which this coverage applies, we will:
 - ▶ 1. Pay up to our limit of liability for the damages for which an “insured” is legally liable. . . .
 - ▶ 2. Provide a defense at our expense by counsel of our choice, even if the suit is groundless, false or fraudulent. . .

Exclusions

▼ “Motor Vehicle Liability”

a. Coverages E [Personal Liability] and F [Medical Payments to Others] do not apply to any “motor vehicle liability” if, at the time and place of an “occurrence”, the involved “motor vehicle”:

1. Is registered for use on public roads or property;
2. Is not registered for use on public roads or property, but such registration is required by a law, or a regulation issued by a governmental agency, for it to be used at the place of the “occurrence”; or
3. Is being:
 - a) Operated in, or practicing for, any prearranged or organized race, speed contest or other competition;
 - b) Rented to others;
 - c) Used to carry persons or cargo for a charge; or
 - d) Used for any “business” purpose except for a motorized golf cart while on a golfing facility.

Exclusions

b. If Exclusion A.1. does not apply, there is still no coverage for “motor vehicle liability”, unless the “motor vehicle” is:



A trailer not towed by or carried on a motorized land conveyance:

- 1) In dead storage on an “insured location”;
- 2) Used solely to service a residence;
- 3) Designed to assist the handicapped an, at the time of an “occurrence”, it is:
 - a) Being used to assist a handicapped person; or
 - b) Parked on an “insured location”;
- 4) Designed for recreational use off public roads and:
 - a) Not owned by an “insured”; or
 - b) Owned by an “insured” provided the “occurrence” takes place:
 - 1) On an “insured location” as defined in Definition B.6.a., b., d., e. or h.;or
 - 2) Off an “insured location” and the “motor vehicle” is:
 - a. Designed as a toy vehicle for use by children under seven years of age;
 - b. Powered by one or more batteries; and
 - c. Not build or modified after manufacture to exceed a speed of five miles per hour on level ground;
- 5). A motorized golf cart.

Definitions

- ▼ “Motor Vehicle Liability” means:
 - a. Liability for “bodily injury” or “property damage” arising out of the:
 1. Ownership of such vehicle or craft by an “insured”;
 2. Maintenance, occupancy, operation, use, loading or unloading of such vehicle or craft by any person;
 3. Entrustment of such vehicle or craft by an “insured” to any person;
 4. Failure to supervise or negligent supervision of any person involving such vehicle or craft by an “insured”;
 5. Vicarious liability, whether or not imposed by law, for the actions of a child or minor involving such vehicle or craft.
 - b. For the purpose of this definition:
 4. Motor vehicle means a “motor vehicle” as defined in 7. below

Definitions

7. “Motor Vehicle” means:
 - a. A self-propelled land or amphibious vehicle; or
 - b. Any trailer or semitrailer which is being carried on, towed by or hitched for towing by a vehicle described in a. above.

Indiana has few cases interpreting the exclusion.

- Most dealt with accidents involving golf carts or ATVs

▼ Wicker v. McIntosh, 938 N.E.2d 25 (Ind.Ct.App. 2010)

- “Liability coverage for golf cart passenger’s injury in accident away from named insured’s property while named insured’s son was driving was barred by motor vehicle exclusion of HO policy, despite exception making the exclusion inapplicable to motorized land conveyance designated for recreational use off public roads and on ‘insured location’”

▼ McCoy v. American Family Mut. Ins. Co., 898 N.E.2d 1237 (Ind.Ct.App. 2008)

- “ATV on which visitor was injured and which named insured’s cohabitant owned and kept on insured’s property was not loaned to insured within meaning of exception to vehicle exclusion from liability coverage under HO’s policy,”

Homeowners Insurance Policy

- No Homeowners Insurance Coverage
 - Policy language not artfully worded
 - Scooter is “self-propelled land vehicle” which satisfies definition of “motor vehicle”



Ron Jeremy on Scooter



- ▼ Exclusion for liability for use of “auto”
- ▼ 2. Exclusions
- ▼ This insurance does not apply to:
 - ▶ g. Aircraft, Auto or Watercraft
 - ▶ “Bodily injury” or “property damage” arising out of the ownership, maintenance, use or entrustment to others of any aircraft, “auto” or watercraft owned or operated by or rented or loaned to any insured. Use includes operation and “loading or unloading.”

Definition of “auto”

- a. A land motor vehicle, trailer or semi trailer designed for travel on public roads, including any attached machinery or equipment; or
- b. Any other land vehicle that is subject to a compulsory or financial responsibility law or other motor vehicle insurance law where it is licensed or principally garaged.

Is there coverage available?

- Possibly

- Standard Insurance Services Organization form CGL policy last updated in 2013 before scooters were prevalent
- Questionable if “auto” definition is applicable to scooters
 - Scooters are used for both public roads and sidewalks.
 - Delay in regulation on whether used on roads, sidewalks or both
 - Unlike cars which have financial responsibility requirements, no such requirements exist for scooters



Scooter v. Scooter



▼ Insuring Agreement

- We will pay damages for “bodily injury” or “property damage” for which any “insured” becomes legally responsible because of an auto accident

▼ Exclusions

B. We [the insurer] do not provide Liability Coverage for the ownership, maintenance or use of:

1. Any vehicle which:
 - a. Has fewer than four wheels; or
 - b. Is designed mainly for use off public roads.

This exclusion (B.1.) does not apply:

- 1) While such vehicle is being used by an “insured” in a medical emergency;
- 2) To any “trailer”; or
- 3) To any non-owned golf cart.

▼ Exclusions

B. We [the insurer] do not provide Liability Coverage for the ownership, maintenance or use of:

1. Any vehicle which:
 - a. Has fewer than four wheels; or
 - b. Is designed mainly for use off public roads.



NO INSURANCE

Motorists will have liability coverage for accident with scooter rider

“George, watch out for that curb!”



Motorcycle Policy Terms = Not Uniform

▼ INSURING AGREEMENT

- **We** will pay damages for which an **insured person** is legally liable because of **bodily injury** or **property damage** resulting from the ownership, maintenance, or use of **your insured motorcycle**.

▼ “Motorcycle” definition

- (6) **Motorcycle** means a motor vehicle with motor power having a seat or saddle for the use of the rider, designed to travel on not more than three wheels in contact with the ground.



Motorcycle Policy Terms = Not Uniform

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▼ “Motorcycle” definition

- (6) **Motorcycle** means a motor vehicle with motor power **having a seat or saddle for the use of the rider**, designed to travel on not more than three wheels in contact with the ground.



NO INSURANCE

Main types of liability insurance policies



Special Endorsement Necessary

- Cost is relatively inexpensive

Motorists have liability insurance

Umbrella policy may provide coverage

WHERE IS THE COVERAGE?

Only definitive insurance coverage
Health insurance



Skilled Advocacy. Practical Solutions.™



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