

Prop 22 and vicarious liability

An appellate update and an explanation of why Prop 22 does not and cannot control vicarious liability for companies such as Uber and Lyft

By Christopher B. Dolan

In June of 2020, I wrote in these pages about the newly passed Proposition 22 and its effect on Transportation Network Carriers' liability for the negligence of their drivers. Three years later, the issue of whether TNCs (Uber, Lyft, etc.) are vicariously liable for the acts of TNC driver negligence remains yet to be fully resolved.

A recent appellate court decision, *Castellanos v. State of California* (2023) 89 Cal.App.5th 131, pending Supreme Court review, has ruled Prop. 22 valid with limited exception, and, therefore, the argument that Prop. 22's classification of app-based drivers as independent contractors still looms large in the minds of the plaintiffs' bar. In this article I will address some common, frivolous arguments raised by Uber and Lyft, update the reader as to the status of Prop. 22 appellate review and provide my analysis/opinion as to why Prop. 22 does not affect the issue of vicarious liability.

Uber's and Lyft's frivolous argument that they are just "tech platforms"

My colleagues who frequently contact me regarding all matters pertaining to Lyft and Uber relate that, unbelievably, Lyft and Uber continue to claim that they are just "technological platforms" and are not engaged in the provision of transportation services. Back in 2013, the CPUC, the administrative body charged with regulating common carriers and utilities, published Decision 13-09-045, issued in Rulemaking 12-12-011, stating that "[a] TNC is defined as an organization whether a corporation, partnership, sole proprietor, or other form, operating in California that provides prearranged transportation services for compensation using an online-enabled application (app) or platform to connect passengers with drivers using their personal vehicles."

Numerous appellate decisions, both state and federal, have unambiguously rejected the "I don't provide transportation"

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defense. In *People v. Uber Techs., Inc.* (2022) 56 Cal.App.5th 266, the court lays out the litany of cases where both Uber's and Lyft's arguments to this point have been held to be without merit and in some instances, downright frivolous. Citations include *Cotter v. Lyft, Inc.* (N.D.Cal. 2015) 60 F.Supp.3d 1067, 1070 ["[T]he argument that Lyft is merely a platform, and that drivers perform no service for Lyft, is not a serious one."]; *Rogers v. Lyft, Inc.* (N.D.Cal. 2020) 452 F.Supp.3d 904, 911, ["Lyft drivers provide services that are squarely within the usual course of the company's business, and Lyft's argument to the contrary is frivolous"]; *O'Connor v. Uber Technologies, Inc.* (N.D.Cal. 2015) 82 F.Supp.3d 1133, 1142 ["Even more fundamentally, it is obvious drivers perform a service for Uber because Uber simply would not be a viable business entity without its drivers. Uber's revenues do not depend on the distribution of its software, but on the generation of rides by its drivers"]; and *Namisnak v. Uber Technologies, Inc.* (N.D.Cal. 2020) 444 F.Supp.3d 1136, 1143 ["Uber's claim that it is 'not a transportation company strains credulity, given the company advertises itself as a 'transportation system'"]. These cites will allow the reader to dispossess any court or arbitrator of any inclination to accept these deceitful arguments.

A brief history of Proposition 22

In 2018, the California Supreme Court, in *Dynamex Operations W. Inc. v. Superior Court* (2018) 4 Cal.5th 903, laid out a three-part (ABC) test to determine if an individual was an employee or independent contractor. The Court ruled that "unless the hiring entity establishes (A) that the worker is free from the control and direction of the hiring entity in connection with the performance of the work, both under the contract for the performance of the work and in fact, (B) that the worker performs work that is outside the usual course of the hiring entity's business, and (C) that the worker is customarily engaged in an independently established trade, occupation, or business, the worker should be considered an employee and the hiring business an employer under the suffer-or-permit-to-work standard in wage orders. The hiring entity's failure to prove any one of these three prerequisites will be sufficient in itself to establish that the worker is an included employee, rather than an excluded independent contractor, for purposes of the wage order." (*Dynamex* 4 Cal.5th at 964.)

In 2020, to address the "gig economy" market creators' arguments that "gig workers" were independent contractors and, therefore, not entitled to established worker protections, AB5 was passed, thereby enacting California Labor Code section 2775. Section 2775 codified *Dynamex's ABC test* into state law. (The 9th Circuit has ruled that *Dynamex*'s ABC test applies only in matters pertaining to cases involving interpretation of Industrial Welfare Commission (IWC) wage-orders. (*Hill v. Walmart Inc.* (9 Cir. 2022) 32 F.4th 811, 820.)

In passing AB5, the Legislature stated: "If a court of law rules that the three-part test in paragraph (1) cannot be applied to a particular context based on grounds other than an express exception to employment status as provided under paragraph (2), then the determination of employee or independent contractor status in that context shall instead be governed by the California Supreme Court's decision in *S. G. Borello & Sons, Inc. v. Department of Industrial Relations* (1989) 48 Cal.3d 341." To put it colloquially, Uber and Lyft "freaked out." Their current and expanding operations (into delivery services) were, by statute, employment-employee relationships and drivers were employees.

To the ballot box we go

Aware that section 2775 would cost them billions over time if they were forced to conform to generations of worker-rights law enshrined in the Labor Code, Uber, Lyft and their cohorts decided to take the old-fashioned route in California: If you can't buy the politicians off and get the legislative result you want, buy the law you want through the initiative process in the form of a ballot measure. More often than not, the initiative process has shifted the power from the electors to powerful corporate interests who can spend hundreds of millions of dollars in deceptive advertising to circumvent the will of the people as expressed through their elected representatives. Hence, the hatching of Prop. 22.

Proposition 22 had the following title and summary: EXEMPTS APP-BASED TRANSPORTATION AND DELIVERY COMPANIES FROM PROVIDING EMPLOYEE BENEFITS TO CERTAIN DRIVERS.

A YES vote on this measure means: App-based rideshare and delivery companies could hire drivers as independent contractors. Drivers could decide when, where, and how much to work but would not get standard benefits and protections that businesses must provide employees.

A NO vote on this measure means: App-based rideshare and delivery companies would have to hire drivers as employees if the courts say that a recent state law makes drivers employees. Drivers would have less choice about when, where, and how much to work but would get standard benefits and protections that businesses must provide employees.

Proposition 22 was California's most expensive initiative campaign, exceeding the expenditure of both sides of the several initiative campaigns launched by gambling concerns. According to the Secretary of State, $205,365,283.05 was spent by the proponents of Prop. 22. All but $275.00 came from a committee called "Yes on 22 – Save App-Based Jobs and Services: A Coalition of On-Demand Drivers and Platforms, Small Businesses, Public Safety and Community Organizations" comprised primarily of Lyft, Uber, DoorDash, InstaCart, and Postmates. To show you the inequity of the proposition

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process, the opposition, led by "No on Prop 22, sponsored by Labor Organizations," spent $15,896,808.00.

Prop. 22 received 9,957,858 yes votes and 7,027,467 no votes, passing by a 59% margin.

Post-initiative legal proceedings

Following the passage of Prop. 22, various organizations and individuals, including SEIU, filed a petition for writ of mandate in the Alameda County Superior Court seeking an injunction against Proposition 22 claiming it was invalid. (Alameda County Superior Court Case No. RG21088725.) The Hon. Frank Roesch granted the petition, ruling that the proposition (1) was invalid in its entirety because it intrudes on the Legislature's exclusive authority to create workers' compensation laws; (2) was invalid to the extent that it limits the Legislature's authority to enact legislation that would not constitute an amendment to Proposition 22; and (3) was invalid in its entirety because it violates the single-subject rule for initiative statutes. The matter was appealed to the California Court of Appeal, First District, where it was argued in Division 4.

On March 13, 2022, the Court of Appeal handed down its decision in *Castellanos v. State of California* (2023) 89 Cal.App.5th 131, ruling that: [1] the initiative did not intrude on the Legislature's workers' compensation authority under the State Constitution; [2] the initiative did not violate single-subject rule; [3] separation-of-powers challenge was ripe; and [4] the initiative's definition of what constituted a legislative amendment to the initiative violated separation-of-powers principles. In short, the initiative was found to be valid in all respects but one, a separation-of-powers argument that two discrete provisions of the Proposition, as enacted in Business and Professions Code section 7465 (3) & (4), was invalid based on separation-of-powers grounds as the statute's definition of what future legislation would constitute an amendment requiring approval of seven-eighths of the legislature (concerning limitations on services performed by rideshare and delivery drivers and collective bargaining) infringed on the authority of the judiciary to determine what constituted an amendment.

Where we are now

On June 28, 2023, at the request of the original plaintiffs/petitioners, SEIU, etc., the California Supreme Court took *Castellanos* under review but, in doing so, pursuant to California Rules of Court, rule 8115(e)(1), allowed the holding to be cited not only for persuasive value, but also for the limited purpose of establishing the existence of a conflict in authority that would in turn allow trial courts to exercise discretion under *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 456, to choose between sides of any such conflict. (2023 WL 4241634.) So, the Court seems to be inviting other cases to be brought to establish a conflict in authority to help it frame the issue for ultimate determination. As of now, the issue is yet to be finally resolved and the validity of Prop. 22 and whether it violated the single subject rule as well as the separation of powers remains an open question.

The big fear

Many of my concerned colleagues have contacted me stating that Uber, Lyft, DoorDash, et al., are thumping their chests and saying that "Prop. 22 clearly states that drivers are independent contractors and, therefore, claims of vicarious liability are dead in their tracks." I say, "Take a breath, they have been saying this since the first day that they 'disrupted' (hijacked) the passenger transportation industry."

Before accepting the Kool-Aid from our colleagues on the defense bar, many already three drinks in, let's remember we are in California and our labor relations concerning who is an employee and who is an independent contractor are matters still left to the State to decide. Unlike our U.S. Supreme Court, the current composition of the California Supreme Court continues to recognize the rights of ordinary individuals and consumer protections.

The Court didn't have to accept review in *Castellanos*; the fact it chose to suggests that it recognizes the critical importance of the decision and the need for more thoughtful review of the arcane jurisprudence surrounding the initiative process. I will not address the merits of the *Castellanos* ruling because that will be resolved by the Supreme Court and I think regardless of the decision, Prop. 22 doesn't affect the ultimate outcome of employee/independent contractor relating to the issue of vicarious liability. I believe the distinction within Prop. 22, as a matter of construction, is confined to the area of wages and benefits.

The initiative process

There are two ways for the voice of the electorate to be transformed into law, indirectly through the voices of the representatives they elect following debate and signature by the governor, and directly, through Article II Section 8 of the California Constitution. The function of the initiative under the California Constitution is to enact (or repeal) statutes. The statute may declare policy as well as provide for its implementation. Indeed, it is common for statutes, including initiative statutes, to contain a section which declares policy and provides a guide to the implementation of the substantive provisions of the measure. (*Am. Fed'n of Lab. v. Eu* (1984) 36 Cal.3d 687, 713-14.) The initiative must have a "clear statement of purpose." "Prior to circulating a referendum petition for signatures, proponents must submit it to the attorney general for preparation of a 'title and summary' of the chief purpose and points of the proposed measure which may not exceed 100 words. The summary must be included in the petition to be circulated in 12-point type. The attorney general is required to provide an impartial statement in language that "shall neither be an argument, nor be likely to create

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prejudice, for or against the proposed measure." "The main purpose of [the title and summary] requirement is to avoid misleading the public with inaccurate information." (*Zaremberg v. Superior Ct*. (2004) 115 Cal.App.4th 111, 116 (citations omitted).)

In interpreting a voter initiative, the court's task is simply to interpret and apply the initiative's language so as to effectuate the electorate's intent. (*Robert L. v. Superior Court* (2003) 30 Cal.4th 894 (as modified, rehearing den.).) The opinion of drafters or legislators who sponsor an initiative is not relevant to its construction since such opinion does not represent the intent of the electorate and the court cannot say with assurance that the voters were aware of the drafters' intent. (*Id*. at 904.) To determine the electorate's intent in passing an initiative, it is best to look at the language of the initiative itself. (*Yoshioka v. Superior Court* (1997) 58 Cal.App.4th 972 (as modified).) In interpreting a voter initiative, a reviewing court may look to a ballot's legislative analysis to determine voter intent. (*Robert L*. at 906.) Finally, as a reviewing court is directed to look at the arguments contained in the official ballot pamphlet to ascertain voter intent, it is well settled that such an analysis necessarily includes the arguments advanced by both the proponents and opponents of the initiative. (*Id*. at 906.)

Prop 22 is not about vicarious liability

Applying this analysis to Prop. 22, it is clear that Prop. 22 is about wages and benefits, not vicarious liability. The title and summary, EXEMPTS APP-BASED TRANSPORTATION AND DELIVERY COMPANIES FROM PROVIDING EMPLOYEE BENEFITS TO CERTAIN DRIVERS is entirely devoid of any reference to the liability of app-based transportation companies. The proposition's statements regarding what a yes and no vote means states, in common, that the impact will be on drivers being able to determine when, where, and how much to work and the benefits they will be entitled to recover. (For the complete text of Prop. 22, Google "text of ballot initiative California proposition 22.") Prop. 22 enacted numerous statutes including Business and Professions Code section 7448, "Title. This chapter shall be known, and may be cited, as the Protect App-Based Drivers and Services Act." Business and Professions Code section 7449 contains the "findings and declarations" and speaks of "flexibility," "extra income," "convenient and affordable transportation," protecting "freedom to work independently," "minimum earnings guarantee of 120% more than minimum wage," a "healthcare subsidy," "compensation for vehicle expenses," "occupational accident insurance to cover on-the-job injuries," and "protection against discrimination and harassment." Nowhere is liability reflected.

The "Statement of Purpose" enacted in Business and Professions Code section 7450, lists the following as the purpose of the statute: "(a) [t]o protect the basic legal right of Californians to choose to work as independent contractors with rideshare and delivery network companies throughout the state; (b) [t]o protect the individual right of every app-based rideshare and delivery driver to have the flexibility to set their own hours for when, where, and how they work; (c) [t]o require rideshare and delivery network companies to offer new protections and benefits for app-based rideshare and delivery drivers, including minimum compensation levels, insurance to cover on-the-job injuries, automobile accident insurance, health care subsidies for qualifying drivers, protection against harassment and discrimination, and mandatory contractual rights and appeal processes; and (d) To improve public safety by requiring criminal background checks, driver safety training, and other safety provisions to help ensure app-based rideshare and delivery drivers do not pose a threat to customers or the public." Again, there is no reference to liability for harm caused to consumers.

Article 2 of Prop. 22, codified in Business and Professions Code section 7541, "Protecting Independence" states that "[n]otwithstanding any other provision of law, including, but not limited to, the Labor Code, the Unemployment Insurance Code, and any orders, regulations, or opinions of the Department of Industrial Relations or any board, division, or commission within the Department of Industrial Relations, an app-based driver is an independent contractor and not an employee or agent with respect to the app-based driver's relationship with a network company if the following conditions are met: (a) [t]he network company does not unilaterally prescribe specific dates, times of day, or a minimum number of hours during which the app-based driver must be logged into the network company's online-enabled application or platform; (b) [t]he network company does not require the app-based driver to accept any specific rideshare service or delivery service request as a condition of maintaining access to the network company's online-enabled application or platform; (c) The network company does not restrict the app-based driver from performing rideshare services or delivery services through other network companies except during engaged time (time between accepting the assignment to pick up the deliverable and when the delivery is complete); (d) The network company does not restrict the app-based driver from working in any other lawful occupation or business." Of note is the absence of any case law concerning the issue for the purposes of determining liability.

Prop. 22 was reviewed by the California Legislative Analyst's Office and the published result highlights the fact that the proposition makes app-based drivers independent contractors and precludes new state laws limiting the ability of companies to hire independent contractors from applying to be drivers and enumerates the new benefits being provided to app-based drivers. (https://lao.ca.gov/BallotAnalysis/Proposition?

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number=22&year=2020) Of particular interest is the LAO's "Fiscal Analysis" which concluded that the fiscal effects of the passage of Proposition 22 were "lower costs and higher profits for rideshare and delivery companies" and "drivers and stockholders would pay more income taxes" with the Summary of Fiscal Effects being "[m]inor increase in state income taxes paid by rideshare and delivery company drivers and investors."

This analysis stands in stark contrast to the analysis of Proposition 213 (1996), which eliminated general damages for individuals who were uninsured drivers. The Analysis for Prop. 213 states: "FISCAL EFFECT – Restricting the ability of people to sue for injury losses in the above situations would reduce the number of lawsuits handled by the courts. This would reduce annual court-related costs to state and local governments by an unknown but probably minor amount. These restrictions would also result in fewer lawsuits filed against state and local governments. Thus, there would be unknown savings to state and local governments as a result of avoiding these lawsuits. In addition, the restrictions placed on uninsured motorists and drunk drivers could result in somewhat lower costs, or 'premiums,' for auto insurance. Under current law, insurance companies doing business in California pay a tax of 2.35 percent of 'gross premiums.' This tax is called the gross premiums tax and its revenues are deposited in the state's General Fund. Any reduction in insurance premiums would also reduce gross premiums tax revenue to the state. We estimate that any revenue loss would probably be less than $5 million annually." (https://vigarchive.sos.ca.gov/1996/general/pamphlet/213analysis.htm)

Prop. 22 didn't, can't and won't determine the issue of vicarious liability

In addition to the analysis above showing that Prop. 22 did not address, as part of its "*single*" subject, vicarious liability, the law pertaining to initiatives precludes it from being interpreted and expanded to settle the question of whether app-based drivers render the apps themselves vicariously liable. "[A] statute may declare policy as well as provide for its implementation. Indeed, it is common for statutes, including initiative statutes, to contain a section which declares policy and provides a guide to the implementation of the substantive provisions of the measure.

But an initiative that seeks to do something other than enact a statute – which seeks to render an administrative decision, adjudicate a dispute, or declare by resolution the views of the resolving body – is not within the initiative power reserved by the people." (*Am. Fed'n of Lab. v. Eu* (1984) 36 Cal.3d 687, 714, emphasis added). The app-based driver-dependent defendants pushing the idea that Prop. 22 decides the issue of vicarious liability fail to recognize that this issue has been reserved for administrative and judicial decision makers. As stated in my previous article, the CPUC, an administrative agency, established within the executive branch, has issued numerous decisions and regulations on TNCs that endure even if Prop. 22 is ultimately upheld by the Supreme Court. These arguably address the issue of vicarious liability.

The decision of whether vicarious liability rests is, likewise, the province of the California courts. The court in *Castellanos*, in finding a small part of Prop. 22 unconstitutional, did so based on a violation of the separation-of-powers clause holding that Prop. 22's attempts to define what constitutes an amendment infringed on the authority of the courts to do so.

Vicarious liability is unambiguously a common-law doctrine. There is no express pronouncement in Prop. 22 addressing vicarious liability and, therefore, the general rule is that "[u]nless expressly provided, statutes should not be interpreted to alter the common law and should be construed to avoid conflict with common law rules. A statute will be construed in light of common law decisions, unless its language 'clearly and unequivocally discloses an intention to depart from, alter, or abrogate the common-law rule concerning the particular subject matter.'" (*California Assn. of Health Facilities v. Department of Health Services* (1997) 16 Cal.4th 284, 297; see also *McMillin Albany LLC v. Superior Court* (2018) 4 Cal.5th 241, 249 ["To the extent possible, we construe statutory enactments as consonant with existing common law and reconcile the two bodies of law. [Citations.] Only 'where there is no rational basis for harmonizing' a statute with the common law will we conclude that settled common law principles must yield."]; *Presbyterian Camp & Conf. Centers, Inc. v. Superior Ct.* (2021) 12 Cal.5th 493, 505.) Accordingly, clear and unequivocal legislative intent would be necessary to conclude that Prop. 22 eliminated that basis of liability. As there is no such language in Prop 22, vicarious liability remains a matter for the courts to determine.


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