

3-2020

Could the Rise of Dockless Scooters Change Contract Law?

John Kendall

Follow this and additional works at: https://digitalcommons.law.mercer.edu/jour_mlr



Part of the [Contracts Commons](#), and the [Torts Commons](#)

Recommended Citation

Kendall, John (2020) "Could the Rise of Dockless Scooters Change Contract Law?," *Mercer Law Review*.
Vol. 71 : No. 2 , Article 6.

Available at: https://digitalcommons.law.mercer.edu/jour_mlr/vol71/iss2/6

This Comment is brought to you for free and open access by the Journals at Mercer Law School Digital Commons. It has been accepted for inclusion in Mercer Law Review by an authorized editor of Mercer Law School Digital Commons. For more information, please contact repository@law.mercer.edu.

Could the Rise of Dockless Scooters Change Contract Law?*

I. INTRODUCTION

Dockless scooters have been revolutionizing the way individuals in highly populated towns and cities commute on a day-to-day basis across the country.¹ Instead of riding the bus, individuals now have the option to pay money to ride scooters short distances and save themselves the hassle of riding on crowded buses.² Among the many issues and questions this creates for lawyers and lawmakers, one particularly noteworthy issue is whether the electronic waivers and arbitration clauses scooter companies require riders to sign before operating the scooters can shield the scooter companies from liability when the unexpected occurs.³ Currently, the top dockless scooter companies only require riders to submit pictures of their driver's licenses and credit cards or enter alternate payment methods in order to have access to the app.⁴ These companies do not require, however, riders to submit a picture of them wearing a helmet or other protective gear in order to increase safety.⁵ Yet, the companies do require the riders to accept a

* I would like to thank Michael C. Kendall of Kendall-Mandell, LLC. for his support and instruction on choosing this topic to write on. I would also like to thank my family for always supporting me in my educational career. Finally, a special thanks to Professor Michael Sabbath for advising me and proofreading my Comment throughout this long and rewarding process.

1. Jonathan Ringel, *In Scooter Litigation, Courts Will Have to Negotiate Waivers and Other Bumps in the Road*, DAILY REPORT (Feb. 22, 2019), <https://www.law.com/dailyreportonline/2019/02/22/in-scooter-litigation-courts-will-have-to-negotiate-waivers-and-other-bumps-in-the-road/>.

2. *Id.*

3. *Id.*

4. Don Pritchett, *Quickstart Guide To Bird Scooters: How To Rent And Charge*, RIDE SHARE CENTRAL (July 9, 2018), <https://ridesharecentral.com/quickstart-guide-to-bird-scooters-how-to-rent-and-charge>.

5. *Id.*

terms and conditions statement that waives the scooter companies' liability and generates an arbitration agreement in many cases.⁶

The scooters from most companies can reach speeds up to about fifteen miles per hour.⁷ However, a small study recently carried out in California reported that only five percent of users actually wear helmets.⁸ In that same study, the report found that about 40% of those riders suffered head injuries as a result of not wearing a helmet.⁹ Many riders also reported broken bones and other injuries as a result of falling off the electric scooters while traveling.¹⁰ Shortly after the scooter companies began ramping up business in popular millennial areas, lawsuits began to flood in against the scooter companies for ordinary negligence and "gross negligence."¹¹ One such complaint alleged that the scooter companies "knew and/or should have known that their scooters are, would become and would continue to be an unsafe, dangerous and damaging public nuisance."¹²

Lawyers and lawmakers should be aware of the types of lawsuits and claims that may be brought by individuals injured on these dockless scooters for a variety of reasons. However, it is important to note which types of lawsuits will be brought and the reasoning behind them at the start. In a recent article published on the American Association for Justice website, author Ira Leesfield and Justin Shapiro generally touch on this subject.¹³ To begin with, the three important claims to be aware of are: (1) failure to warn, (2) negligent maintenance, and (3) failure to provide necessary equipment.¹⁴ While this Comment will focus primarily on the waiver provisions of these claims, it is important to understand what the waivers protect the scooter companies from.

6. Bird, *Rental Agreement* (2019), <https://www.bird.co/agreement/> [hereinafter *Rental Agreement*].

7. Janet Lorin, *E-Scooter Riders Bang Heads and Break Bones, But Lawyers Say Suits Are Hard*, BLOOMBERG (Jan. 25, 2019, 2:31 PM), <https://www.bloomberg.com/news/articles/2019-01-25/electric-scooter-injuries-pile-up-but-lawsuits-are-hard-to-make>.

8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.*

13. Ira Leesfield and Justin Shapiro, *Same Roads, New Rules: Make Way For E-Scooters*, AMERICAN ASSOCIATION FOR JUSTICE (Feb. 2019), <https://www.justice.org/what-we-do/enhance-practice-law/publications/trial-magazine/same-roads-new-rules-make-way-e-scooters>.

14. *Id.*

The failure to warn argument primarily stems from the idea that the scooter companies have failed to warn riders of the possible dangers and risks associated with operating the scooters regardless of if they are wearing a helmet or not.¹⁵ There is likely an assumption of the risk argument against this liability theory; however, that will be discussed in more detail later in the Comment. The next main argument is the scooter company's negligent maintenance of the scooters.¹⁶ Assuming something malfunctioned on the scooter, it will be the scooter company's duty to produce evidence that the company properly inspected and maintained the scooters on a regular basis.¹⁷ Lastly, an important legal argument will be the failure of the scooter companies to provide necessary equipment to operate the dockless scooters.¹⁸ Head injuries will continue to occur on these scooters, and this argument may prove effective when trying to prove the scooter companies' liability.¹⁹

After examining the general types of claims, the issue is that the main defenses scooter companies raise are that the individual riders have waived any claims against the scooter companies by agreeing to the terms of service.²⁰ Moreover, the scooter companies have included arbitration clauses in the agreements riders must accept before being allowed to operate the dockless scooters.²¹ Many jurisdictions interpret these clauses in different ways, and depending on where you are, scooter companies will be more protected.²² This Comment will focus mainly on how states in the Southeast, particularly Georgia, are likely to interpret these clauses and protect individual riders against the scooter companies. After discussing the contract principles of arbitration and waiver liability, this Comment will delve into when and how these issues arise, and what that means for the legal side of things in the future.

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.* See Brannon Arnold, Proceed With Caution: How E-Scooter Companies Can Protect Riders and Themselves, July 11, 2019, <https://www.law.com/dailyreportonline/2019/07/11/proceed-with-caution-how-e-scooter-companies-can-protect-riders-and-themselves/>.

21. *Id.*

22. *Id.*

II. THE DOCKLESS SCOOTER AGREEMENT

To begin with, this Section will go through the important terms and clauses found in the user agreements that will be the crux of litigation when things go wrong while operating dockless scooters. The relevant “Binding Arbitration” clause can be found within the terms of services or rental agreements for various scooter companies.²³ For the scooter company known as Bird, the arbitration clause reads as follows:

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.²⁴

This arbitration clause essentially requires individuals to go through the dockless scooter company customer support system in the event of an accident no matter what. If that proves unsuccessful, then either of the parties can initiate arbitration, which will result in a binding settlement.

The Bird rental agreements go onto explain that individuals may only sue in an individual capacity and may not bring a class action against the company.²⁵ Furthermore, the relevant “waiver” clause states as follows:

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

23. See *Rental Agreement*, *supra* note 6.

24. *Id.*

25. *Id.*

(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.²⁶

Other dockless scooter companies have similar language; however, for practical purposes this Comment will consider only the language found in Bird’s terms of services and agreements.²⁷

III. ARBITRATION CLAUSE ENFORCEABILITY

One of the biggest obstacles in scooter litigation is that dockless scooter companies require users to e-sign boilerplate arbitration provisions before allowing them to operate the scooters.²⁸ This proves to be detrimental to individuals harmed on the scooters as well as to third parties injured on roads and sidewalks as a result of a scooter rider’s negligence.²⁹ Because these claims are decided pursuant to the arbitration clauses, most of the time big scooter companies are protected from a court of law finding the large company liable.³⁰

The relevant statutory law can be found in O.C.G.A. § 9-9-2³¹ under Georgia law. That code section provides that arbitration clauses are generally enforceable under Georgia law.³² However, the code section specifically holds that there is an exception when an arbitration clause discusses any future personal injury claims.³³ Specifically, Georgia’s Arbitration statutes do not apply to “[a]ny agreement to arbitrate future claims arising out of personal bodily injury or wrongful death based on tort.”³⁴ Moreover, when arbitration clauses come into question

26. *Rental Agreement*, *supra* note 6.

27. See Lime, *User Agreement* (2019), <https://www.li.me/user-agreement>; Jump, *Terms of Service* (2019), <http://www.jump.com/us/en/terms-of-service/>; Lyft, *Terms of Service* (2019), <https://www.lyft.com/terms>.

28. *Id.*

29. Neama Rahmani, *INSIGHT: Rental Scooter Lawsuits—Insurance Industry Is Missing a Golden Opportunity*, BLOOMBERG (Nov. 9, 2018), <https://news.bloomberglaw.com/class-action/insight-rental-scooter-lawsuitsinsurance-industry-is-missing-a-golden-opportunity>.

30. *Id.*

31. O.C.G.A. § 9-9-2 (2019).

32. *Id.*

33. *Id.*

34. *Id.*

between two parties, Georgia courts have historically held that “the construction of an arbitration agreement, like any other contract, presents a question of law.”³⁵

To better understand how these arbitration clauses will likely be enforced, it is important to understand that the Federal Arbitration Act (FAA)³⁶ preempts any state law insofar as state law speaks to an issue addressed in the Act.³⁷ “The FAA preempts any state law that conflicts with its provisions or undermines the enforcement of private arbitration agreements.”³⁸ In *Davidson v. A.G. Edwards & Sons, Inc.*,³⁹ the Georgia Court of Appeals allowed for the arbitration clause to apply to personal injury claims by finding that “[a]lthough this Court has not previously addressed whether the FAA preempts OCGA § 9-9-2(c)(10), insofar as it exempts from arbitration ‘personal bodily injury’ claims, we find no reason why there should not be preemption in this regard as well.”⁴⁰

The Court of Appeals of Georgia further illustrated Georgia’s viewpoint on the validity of arbitration clauses in *Summerville v. Innovative Images, LLC*⁴¹ by dealing with the issue in a malpractice case.⁴² In *Summerville*, Innovative Images, LLC sued James Summerville and his law firm for legal malpractice. Prior to Summerville representing Innovative in the matter, which resulted in the present one, both parties signed an arbitration clause in which they agreed to arbitrate any matter that arose during Summerville’s representation.⁴³ Innovative later opposed a motion to compel arbitration and argued that the agreement would be “unconscionable” under Georgia law because Summerville had not advised them of the possible disadvantages of arbitration.⁴⁴ The trial court agreed with Innovative and denied the motion to compel on the grounds of unconscionability.⁴⁵

The court of appeals began its analysis by explaining that “[a]n unconscionable contract is one abhorrent to good morals and conscience.

35. *Davidson v. A.G. Edwards & Sons, Inc.*, 324 Ga. App. 172, 173, 748 S.E.2d 300, 302 (2013).

36. 9 U.S.C. § 1 (2019).

37. 9 U.S.C. § 2 (2019).

38. *Davidson v. A.G. Edwards & Sons, Inc.*, 324 Ga. App. 172, 748 S.E.2d 300 (2013).

39. 324 Ga. App. 172, 748 S.E.2d 300.

40. *Id.*

41. 349 Ga. App. 592, 826 S.E.2d 391 (2019).

42. *Id.* at 594, 826 S.E.2d at 395.

43. *Id.* at 593–94, 826 S.E.2d at 394–95.

44. *Id.*

45. *Id.*

It is one where one of the parties takes a fraudulent advantage of another. It is an agreement that no sane person not acting under a delusion would make and that no honest person would take advantage of.”⁴⁶ More importantly, the court discussed that

contracts will not be avoided by the courts as against public policy, except where the case is free from doubt and where an injury to the public interest clearly appears. Absent a limiting statute or controlling public policy, parties may contract with one another on whatever terms they wish[,] and the written contract defines the full extent of their rights and duties.⁴⁷

The court also noted that arbitration clauses will not be held unconscionable for the sole reason that the parties have different levels of sophistication and understandings of what arbitration is.⁴⁸ Anytime a party or individual in the state of Georgia signs a contract “containing an arbitration clause, the party is presumed to have read and understood the clause.”⁴⁹ The court ends its analysis with some important language on contract enforceability and public policy, which will be discussed in depth for the remainder of this Comment. The court unequivocally stated that “the legislature is empowered by the Constitution to decide public policy . . . [and] the power of the courts to declare a contract provision void for being in contravention of a sound public policy is a very delicate and undefined power that should be exercised cautiously.”⁵⁰

This public policy concern as it pertains to contracts will be the main argument when individuals are trying to get out of the arbitration and waiver provisions found in the dockless scooter agreements. Anytime an individual unknowingly enters into all of these contract agreements by simply e-signing with a button on their phone, they will argue that it is against public policy to enforce these types of agreements. In addition to arbitration clauses, liability waiver provisions will also present a challenge to Georgia courts.

IV. WAIVER PROVISION ENFORCEABILITY

This Section will discuss general Georgia contract principles and how they may be applied to electronic scooter agreements as litigation

46. *Id.* at 595, 826 S.E.2d at 395. (quoting William J. Cooney, P.C. v. Rowland, 240 Ga. App. 703, 704, 524 S.E.2d 730 (1999)).

47. *Id.* at 595, 826 S.E.2d at 396.

48. *Id.* at 595–96, 826 S.E.2d at 396.

49. *Id.*

50. *Id.* at 597, 826 S.E.2d at 397.

begins to grow. Moreover, this Section will look at how other jurisdictions are dealing with dockless scooter litigation as public policy arguments start to challenge common legal principles.

In Georgia, courts have historically held that it is of the utmost importance that individuals should be free to contract with other parties in ways that are unencumbered by the legislature and courts.⁵¹

The general rule in Georgia is that a contractual waiver of liability for simple negligence is valid, the exception being where the waiver violates public policy. ‘A contract cannot be said to be contrary to public policy unless the General Assembly has declared it to be so, or unless the consideration of the contract is contrary to good morals and contrary to law, or unless the contract is entered into for the purpose of effecting an illegal or immoral agreement or doing something which is in violation of the law.’⁵²

As such, the main arguments made in Georgia courts will be to convince a judge that the waivers in these agreements to use dockless scooters are against public policy.

The Court of Appeals of Georgia has recently made this clear by synthesizing Georgia contract law in an opinion discussing the enforceability of an exculpatory clause.⁵³ The court affirmed that “[i]t is the paramount public policy of this state that courts will not lightly interfere with the freedom of parties to contract” and that a party “may waive or renounce that which the law has established in his or her favor, when it does not thereby injure others or affect the public interest.”⁵⁴ Moreover, the court stated that the courts must “exercise extreme caution in declaring a contract void as against public policy, and should do so only when the case is free from doubt and an injury to the public interest clearly appears.”⁵⁵

Moreover, many courts have held that exculpatory clauses relieving one party of liability from damages caused during the contract term are generally valid and binding unless public policy concerns weigh heavily against the enforcement of the contract.⁵⁶ An informative case on the enforceability of exculpatory and waiver clauses is *2010-1 SFG Venture*

51. *Carrion v. Smokey, Inc.*, 164 Ga. App. 790, 790, 298 S.E.2d 584, 584–85 (1982).

52. *Id.*

53. *Warren Averett, LLC v. Landcastle Acquisition Corporation*, 349 Ga. App. 479, 825 S.E.2d 864 (2019).

54. *Id.* at 483, 825 S.E.2d at 868.

55. *Id.*

56. *2010-1 SFG Venture LLC v. Lee Bank & Trust Co.*, 332 Ga. App. 894, 775 S.E.2d 243 (2015).

*LLC v. Lee Bank & Trust*⁵⁷ when the court dealt with a real estate loan.⁵⁸ The facts of the case are quite complex; however, the issue as to whether an exculpatory clause is valid is clear cut and advantageous to the discussion of contract enforceability. The case arose out of a commercial real estate loan initiated by SFG Venture in which Lee Bank bought a 3.36% interest in the loan. The sale of this interest in the loan was memorialized in a “Participation Agreement” which the Lee Bank president signed personally. Specifically, the participation agreement contained a limitation on liability provision which stated SFG would not be liable for any action taken or omission by any employees, members, officers, managers, contractors, or agents. The provision ended with language that allowed an action to be sustained in the event of gross negligence or willful misconduct by SFG Venture.⁵⁹

During litigation, the trial court denied SFG Venture’s motion for summary judgment on the claims because the limitation of liability provision “was not prominently displayed in the agreement” and, as a result, was unenforceable.⁶⁰ The court of appeals reviewed the trial court’s decision “de novo” and held that the exculpatory clause was in fact enforceable under Georgia law.⁶¹ The court noted that “because exculpatory clauses may amount to an accord and satisfaction of future claims and waive substantial rights, they require a meeting of the minds on the subject matter and must be explicit, prominent, clear and unambiguous.”⁶² Importantly, the court held that

[i]n determining whether a limitation of liability clause or an exculpatory clause is sufficiently prominent, courts may consider a number of factors, including whether the clause is contained in a separate paragraph; whether the clause has a separate heading; and whether the clause is distinguished by features such as font size.⁶³

One notable case cited by the majority is *Grace v. Golden*⁶⁴, which illustrated the court’s holding.⁶⁵ In *Grace*, the court found that although an exculpatory clause was placed after the legal description and in the same font of a security deed, the clause would still be valid and

57. *Id.*

58. *Id.*

59. *Id.* at 894–95, 775 S.E.2d at 246.

60. *Id.* at 897, 775 S.E.2d at 247.

61. *Id.* at 897, 775 S.E.2d at 247–48.

62. *Id.* at 898, 775 S.E.2d at 248.

63. *Id.*

64. 206 Ga. App. 416, 425 S.E.2d 363 (1992).

65. *Id.*

enforceable because the entirety of the contract was only two pages.⁶⁶ There was never an issue of whether a reasonable party would understand the limitation of liability provision because a party signing and reviewing the document would have easily seen it.⁶⁷

The court of appeals in *SFG Venture LLC* ultimately held that the limitation of liability clause was valid and enforceable because it was contained in its own paragraph, had a clear heading, and was not unreasonably hidden in the contract.⁶⁸ The court also noted that the contract was signed by the president of the bank who had over three decades of business experience and extensive experience in signing similar contracts for business.⁶⁹ The court also made it clear that “Lee Bank [had] not demonstrated that declaring the clause unenforceable clearly serve[d] [a] public interest.”⁷⁰

The court of appeals again dealt with the validity of exculpatory and waiver clauses in *Herren v. Sucher*⁷¹ by dealing with a gym membership contract.⁷² In that case, Joey Herren was a health club member at a gym owned and operated by Gregory Sucher, Nonstop Fitness Incorporated, and Club Management.⁷³ Sucher suffered a stroke after an exercise session with a personal trainer who was employed and worked at the gym. Prior to his work out sessions, Herren took an exercise supplement called R.A.G.E. that was supplied to him by the gym in order to get more in shape and reach fitness goals. In the complaint, Herren alleged that taking R.A.G.E. and over-exercising at the fitness sessions caused him to suffer a stroke under theories of ordinary and gross negligence.⁷⁴

Herren signed three separate agreements with the gym prior to beginning his workouts at the personal trainer sessions. In the membership agreement, there was a section entitled “WAIVER AND RELEASE LIABILITY.”⁷⁵ The relevant language in the section read “the Club shall not be liable to member for any claims, demands, injuries, damages, or actions arising due to injury to member’s person or property arising out of or in connection with the use by member of

66. *Id.* at 417–18, 425 S.E.2d at 365.

67. *SFG Venture LLC*, 332 Ga. App. at 899, 775 S.E.2d at 248–49.

68. *Id.* at 899, 775 S.E.2d at 249.

69. *Id.*

70. *Id.* at 900, 75 S.E.2d at 249.

71. 325 Ga. App. 219, 750 S.E.2d 430 (2013).

72. *Id.*

73. *Id.*

74. *Id.* at 219, 750 S.E.2d at 431–32.

75. *Id.* at 220–21, 750 S.E.2d at 432–33.

the services, facilities, and premises of the Club.”⁷⁶ The other two agreements signed by Herren contained similar provisions that clearly state the gym and owners shall not be liable for any injuries that arise from the member’s use of property and gym services.⁷⁷ Herren argued that these provisions were ambiguous and unenforceable.⁷⁸ The court ultimately held that the contractual provisions were clear and express waivers of liability understood by Herren and that “it is well established in this state that the inclusion of exculpatory clauses in a health or fitness club contract does not render the contract unenforceable as against public policy.”⁷⁹

On the contrary, Georgia courts have found two different types of liability waivers unenforceable because the clauses were found to be against sound public policy. To begin with, *Ellerman v. Atlanta American Motor Hotel Corp.*⁸⁰ is a fairly straightforward case that illustrates how a liability waiver can be against public policy when a statute is involved.⁸¹ In that case, a contract existed between an innkeeper and his guest. The contract limited the innkeeper’s liability to a lesser amount than is authorized by a Georgia statute.⁸² Specifically, the innkeeper limited his liability by giving the plaintiff a claim check after parking his vehicle on company property that stated “[c]ars parked at owner’s risk. Articles left in car at owner’s risk.”⁸³ When the plaintiff checked out of the hotel, he was informed that his car was missing. Plaintiff alleged that the car was stolen because of the defendant’s negligence and that the innkeeper should be liable for the damages.⁸⁴

The court held that the liability waiver could not be enforced because there was a special statute that considered the relationship between innkeeper and guest to be “professional.”⁸⁵ Normally, a “professional” bailee is “precluded from limiting by contract liability for his own negligence as violative of public policy.”⁸⁶ “The reasoning utilized is that the public, in dealing with innkeepers, lacks a practical equality of

76. *Id.* at 221, 750 S.E.2d at 433.

77. *Id.*

78. *Id.* at 222.

79. *Id.* at 222–23, 750 S.E.2d at 434.

80. 126 Ga. App. 194, 191 S.E.2d 295 (1972).

81. *Id.* at 195–96, 191 S.E.2d at 296.

82. *Id.*

83. *Id.*

84. *Id.* at 195, 191 S.E.2d at 296.

85. *Id.*

86. *Id.*

bargaining power and may be coerced to accede to the contractual conditions sought by the innkeeper or else be denied the needed services.”⁸⁷ Moreover, the court recognized that when the General Assembly enacts a special statute on a subject, the courts are “constrained to hold that the legislative preemption cannot be avoided by a special contract.”⁸⁸

This case is important because future litigation and problems with dockless scooters may prompt the legislature to enact special litigation on the subject. If this were to happen, courts may be flooded with lawsuits against the scooter companies for injuries sustained by riders due to the ordinary negligence of the scooter companies. Many cities and towns are struggling on how to regulate dockless scooters and deciding what types of regulations and laws will be most beneficial to the public as a whole. Until then, it is important to understand that riders voluntarily get on scooters and have other modes of transportation to choose from. In *Ellerman*, the court was clear that one of the deciding factors for holding that the contract was unenforceable against public policy is the fact that the guest lacks the “practical equality of bargaining power” when dealing with the innkeeper because there is a threat for the guest to be coerced or denied needed services.⁸⁹

More recently, the court of appeals determined that a waiver liability clause was against public policy in the case of a dental malpractice lawsuit.⁹⁰ In *Stockbridge Dental Group, P.C. v. Freeman*,⁹¹ Myrtle Freeman was a patient at Stockbridge Dental Group. Prior to being treated at the dental office, Freeman signed a release form that stated Freeman agrees “to this covenant not to sue the corporation that employs the dentist or its shareholders regarding [her] dental care and associated financial matters.”⁹²

During the dental procedure, Freeman was injured and decided to sue the dentist and the dental group for her injuries. In response, the dental group filed a motion stating Freeman violated her covenant not to sue and that the dental group could not be held liable for the actions of the dentist during the procedure. The dental group argued that since the liability waiver was only a limited release provision as to the dental group, and not a global release clause as to all individuals and

87. *Id.*

88. *Id.* at 196, 191 S.E.2d at 296–97.

89. *Id.* at 196, 191 S.E.2d at 296.

90. *See* *Stockbridge Dental Group, P.C. v. Freeman*, 316 Ga. App. 274, 728 S.E.2d 871 (2012).

91. 316 Ga. App. 274, 728 S.E.2d 871.

92. *Id.* at 274–75, 728 S.E.2d at 872.

companies involved, that the provision is enforceable under Georgia law.⁹³ Freeman subsequently argued that it was against public policy for the dental group to be free from liability when there was a duty to exercise reasonable care owed to her as a patient.⁹⁴

The court ultimately held that “[the dental group] was under a duty to exercise reasonable care and skill in the performance of dental services. And SDG cannot relieve itself from that duty via the exculpatory clause used in this case.”⁹⁵ The court went on to say that the clause was against sound public policy because the clause essentially “purported to preclude legal action against SDG entirely, thereby eliminating its duty of care.”⁹⁶ Here, the court found that allowing the dental group to completely discharge its duty of reasonable care owed to patients would be against public policy. This weighed against Georgia’s public policy favoring the party’s freedom to contract, and the court made an exception to the general rule.⁹⁷ Lastly, there are some concerns that these dockless scooters should have some established warranties when the scooter malfunctions at no neglect of the operator.

V. WARRANTIES UNDER THE UNIFORM COMMERCIAL CODE

This Section will briefly discuss the waiver of warranties commonly found in these dockless scooter companies’ terms of service agreements. However, the argument for the waiver of this provision is closely identical to the argument which will be used against enforcing the liability waiver provisions. The Uniform Commercial Code, Section 2A-214⁹⁸ discusses the exclusion or modification of warranties for leased consumer goods.⁹⁹ Under that code section, “to exclude or modify the implied warranty of merchantability or any part of it the language must mention ‘merchantability’, be by a writing, and be conspicuous” and “to exclude or modify any implied warranty of fitness the exclusion must be by a writing and conspicuous.”¹⁰⁰

This may be an alternate way for a plaintiff to hold the dockless scooter companies liable under a theory of breach of warranty. The rental agreements waive these warranties, and the language is not very

93. *Id.* at 275, 728 S.E.2d at 872–73.

94. *Id.* at 276, 728 S.E.2d at 873.

95. *Id.*

96. *Id.* at 276, 728 S.E.2d at 873–74.

97. *Id.* at 277, 728 S.E.2d at 874.

98. U.C.C. § 2A-214 (AM. LAW INST. & UNIF. LAW COMM’N 2019).

99. *Id.*

100. *Id.*

conspicuous because most users do not scroll through the contract on their phones.¹⁰¹ This would arise in the context of a scooter malfunction because the scooter was not merchantable or fit for its ordinary purpose. It may pave the way for a plaintiff who was injured when the brakes malfunction even if the plaintiff signed the terms of service agreement waiving the company of all liability.

VI. ANALYSIS

For this Section of the Comment, I will discuss possible implications and outcomes for various factual scenarios based on the case law I have discussed above. Moreover, this Section will delve into the many issues that may arise while dockless scooters are becoming more popular in cities. It will end by discussing some possible solutions to the various problems inherent with the business models of these scooter companies.

At the moment, no court has recognized that it is against any public policy to allow the scooter companies to impose waivers against riders of electric scooters in cities. Given past Georgia precedent, the argument against these waivers in favor of riders is an uphill battle. However, an argument can be made, and some courts may find it unconscionable and against public policy to prevent an injured rider from seeking relief from giant scooter companies. Moreover, the pertinent contract signed by riders in these electronic agreements are extremely long.¹⁰² When these agreements are condensed down to phone screens, it takes a substantially long time to swipe through each page and read the terms. Most riders are not going to read through the entire contract and make sure they understand to what they are agreeing. Instead, the waiver contract is buried in the agreements and almost never seen by any of the riders. There is a strong argument that the waiver may be invalid under Georgia law because it is not easily found and understood by the rider.

On the other hand, there is a strong public policy argument in Georgia that parties are free to contract with one another however they please. In this case, individual riders are signing up and paying scooter companies for a service that they seek out themselves to take advantage of. It is not required to use dockless scooter companies for transportation in cities and towns. There are multiple ways to get around and move short distances. Not to mention, there are much safer ways to do so. Cities today have Uber, Lyft, public transportation, and a plethora of other modes of transportation that do not require riders to

101. *Rental Agreement*, *supra* note 6.

102. *See supra* notes 6, 27.

expose themselves to the harm of a two-wheeled electric scooter. The scooter companies may argue that it would be against public policy to allow each individual rider to file a lawsuit against the company each time an injury occurs from the use of scooters. However, even if this were the case in Georgia, these liability waivers are incredibly broad as written in the agreement. The waivers seem to completely release the scooter companies from any and all claims riders may have regardless of the cause. There may be an issue here if the scooter companies fail to properly maintain the scooters on a regular basis and people begin to get injured as a result. This type of injury would likely result not from the fault of the rider; but instead, because the scooter malfunctioned. These types of claims may be barred by the waiver liability agreements.

There is also a strong argument here that it would be against public policy for the scooter companies to waive their duty to maintain the scooters in reasonable working condition. If that were the case, scooter companies would be completely free from any and all liability even if the scooter company actually was at fault for the injuries. Moreover, the rider who was injured would not be able to seek an appropriate remedy in a court of law in Georgia. On the other hand, there may be an assumption of the risk argument by the scooter companies to combat the notion that these agreements are against public policy for that reason. Riders, as said before, voluntarily agree to the terms in the agreements and choose to ride the scooters as opposed to other modes of transportation.

In terms of the arbitration agreements, the best argument will be to maintain that these arbitration clauses are unconscionable and should not be enforceable against the users of dockless scooters for obvious reasons. To begin with, dockless scooter users are unaware that they are signing an arbitration clause. However, that argument is without merit because Georgia has held that arbitration clauses will be enforceable even if the user has not noticed or read the arbitration clause.

A. General Fact Pattern (Ricky Rider)

Ricky Rider is an individual who lives in the city and owns no mode of transportation. Historically, Ricky utilized Uber and Lyft car services to get to and from locations around the city. However, Ricky has been getting tired of how bad traffic has been on the roadways and no longer wants to pay for an Uber to go sit in traffic. Today, Ricky decided it was finally time to try one of the new dockless scooters he sees all the young people using in the city nowadays. After a quick Google search, Ricky discovered that all he needed to do to ride one of the scooters was to download an app and find a vacant scooter on the sidewalk.

Subsequently, Ricky downloaded the app and found a scooter to ride to his destination. When he downloaded the app on his phone, he was prompted to enter his email address to continue. In fine print beneath the email field, there was a sentence which said something along the line of “by clicking to continue, you confirm that you agree to the company’s terms of service and privacy policy.” Like most users, Ricky did not bother to actually click on the terms of service, or the privacy policy hyperlinks. If he had clicked on the terms of service link, Ricky would have been redirected to the app’s home website which lays out the entire terms of service policy. He would have learned that the scooter company has a binding arbitration policy, a complete liability waiver, waivers of all consumer warranties, and a plethora of other clauses that prevent Ricky from recovering damages in the event of an accident. However, Ricky is in a hurry and could care less about an extremely long contract with clauses he does not understand. Why would he waste his time and go out of his way to read the terms of service anyways?

Now that Ricky has downloaded the app, all he must do is put his credit card in and find a scooter on the sidewalk. Ricky found a scooter on the sidewalk that looked like it had some normal wear and tear on it and decided to use it for his journey. Ricky’s destination was about two miles away. To get there, he would have to ride the scooter on a very busy road in the city. Moreover, Ricky lives in a city that has recently required dockless scooters to be used only in the bike lanes of the roads because the city decided the scooters were a hazard to be operated on the sidewalks. This city, like many others, is struggling on how to regulate and monitor dockless scooter operations. However, many scooter users do not abide by these regulations and still ride the scooters on sidewalks in the city where Ricky lives. Also, nothing in the app demanded that Ricky wear a helmet before operating the scooter that can travel at speeds upwards of fifteen miles per hour.

For the next Section of this analysis, the prior general fact pattern will apply. However, there will be different scenarios that I will break down and talk about in light of the case law cited above as well as what Georgia courts will be struggling with in the near future.

1. Ricky injures an innocent bystander.

Ricky commenced his journey on a sunny afternoon during the rush hour period in his city. When he approached the busy road on the scooter, Ricky decided to begin riding on the sidewalk to reduce his chances of getting hit by a car. While he was getting on the sidewalk, Ricky ran into an innocent pedestrian who was walking the opposite way. Ricky suffered minor injuries, however, the pedestrian was

severely injured and needed extensive medical attention. The pedestrian subsequently hired an attorney and sued Ricky. Ricky unfortunately has no money, and the pedestrian cannot directly recover from him. Moreover, Ricky does not have a separate insurance policy for scooter use which means the pedestrian also cannot recover from his insurance company. Lastly, the scooter company is not in privity with the pedestrian and has also required Ricky to waive all liability the company may possibly have in the event of an accident. Georgia courts are not likely to find the pedestrian to be a third-party beneficiary of the contract regardless of the enforceability of the terms of service. As a result, a pedestrian has been seriously injured by the scooter company's product and has no recourse to recover for the injuries suffered.

This is the obvious scenario where it makes more sense for courts to not hold the scooter companies liable. The scooter companies did not have a contract with the pedestrian, and the pedestrian could have sued Ricky if Ricky had more money. It is unfortunate that the pedestrian cannot get more money for his/her damages, however, the accident was not the scooter company's fault. This may be an issue that cities will have to address as dockless scooter companies become more prevalent. It would be an important public policy argument for legislators to make that pedestrians need to be protected from being injured and having no legal recourse to get damages other than suing the scooter driver. Scooters are operated like cars are on roadways and sidewalks, and Georgia is a state that requires owners and operators of cars to have their own car insurance policies in the event of an accident. For this Comment's purpose, assume that the pedestrian has no uninsured motorist coverage for this type of accident.

2. Ricky is injured by a scooter malfunction.

In this scenario, Ricky decided to skip the busy road and take some back sidewalks through the blocks to get to his destination. The sidewalks he was going to take were in decent condition and only had minimal wear and tear with the occasional pothole. While Ricky was riding down one of the sidewalks, one of the wheels came loose and fell off the scooter. Ricky subsequently flew over the handlebars and abruptly landed on the sidewalk in front of him. The fall caused serious injuries to Ricky, including severe brain damage because Ricky did not wear a helmet.

Here, there are multiple arguments that Ricky could make to hold the scooter company liable. However, let's begin with the general arguments that the scooter company is likely to make. For starters, the terms of service agreement specifically stated that the operator waives the scooter company from any and all liability as a result of accidents

which arise out of the scooter's operation. Moreover, the terms of service specifically waived out of any warranties that would normally be recognized in a consumer good under the UCC. These warranties include a warranty that the good is fit for its ordinary purpose and the warranty of merchantability. If Ricky had read the terms of service, he would know that the scooter company specifically waived out of these warranties. However, there may be an argument that the scooter company cannot waive out of certain warranties under the UCC because the scooter is a lease of a consumer good. This analysis, however, will not delve into that issue in depth.

The main argument for Ricky will be in tort. Theoretically, Ricky could allege that the scooter company should be liable for failing to maintain the scooters in good working condition. For this analysis, assume that Ricky has a valid theory of negligence against the scooter company and can prove all of the elements. However, the issue is whether a Georgia court will allow a plaintiff to sue a company after the plaintiff has signed a waiver of liability with the scooter company. The plaintiff will also have to prove that the arbitration clause is against public policy in order for the court to hear the case. In Georgia, some courts have historically held that a waiver clause cannot be enforceable if the clause was not open and obvious to the person signing the contract.¹⁰³ In Ricky's case, he was not even aware there was a waiver of liability. The terms of service were at least twenty phone screen pages long, and Ricky was not even required to diligently read through all twenty pages.

The liability waiver clause is not even the first clause you would see when reading the terms of service. It is buried down in the terms of service text in the same font and color as all the other clauses in the contract. There is no reason for Ricky to have read the liability waiver because most people would not have noticed it. Here, there is a good argument that the clause should not be enforceable because a reasonable person would never have read the clause in the terms of service. If the clause was open and obvious, the individual may have chosen not to ride the scooter because he or she is not keen on signing away their legal rights.

Generally, courts in Georgia have upheld the tradition that individuals are free to contract in whichever way possible.¹⁰⁴ However, allowing these liability waivers to be enforceable against individuals injured on dockless scooters goes against public policy in many ways. Here, the individuals do not even know what they are agreeing to when

103. *2010-1 SFG Venture LLC*, 332 Ga. App. 894, 775 S.E.2d 243.

104. *Warren Averett, LLC*, 349 Ga. App. 479, 825 S.E.2d 864.

they agree to the terms of service. Signing a complete liability waiver is a major endeavor. The users are not just simply signing a waiver for accidents caused by their own negligence. They are signing a waiver that theoretically allows the scooter companies to contract out of an identified legal duty. Allowing these waivers to be enforceable will, theoretically, make it possible for all companies and individuals to contract out of traditional and well-established legal duties.

VII. CONCLUSION

In sum, injuries stemming from the use and operation of dockless scooters is bound to increase in the following years. The issue of whether these behemoth companies should be held liable for injuries, whether due to their own negligence or the negligence of others, will likely be litigated in every big city across America. In Georgia, the issue will be distinctive and different from other states because Georgia has a history of favoring the unencumbered ability for individuals and businesses to contract freely. While the answer is hard to determine at the moment, plaintiffs will most definitely have an uphill battle in attempting to hold dockless scooter companies liable for personal injuries. Moreover, this is an issue that has already been dealt with by cities through regulations and ordinances. Many cities clearly recognize the danger of these dockless scooters and are trying to prevent innocent pedestrians and users from being injured. The future of dockless scooter regulation will be an interesting area of law to follow in the coming years to see how cities will begin to grow as technology evolves in the consumer marketplace.

John Kendall

