

VEHICLE RENTAL LAWS: ROAD BLOCKS TO EVOLVING MOBILITY MODELS?

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I. INTRODUCTION

The laws and regulations governing mobility are inconsistent and antiquated and should be modernized to encourage innovation as we prepare for an autonomous car future. The National Highway Traffic Safety Administration (“NHTSA”) has concluded that Autonomous Vehicles, or Highly Automated Vehicles (“HAVs”) may “prove to be the greatest personal transportation revolution since the popularization of the personal automobile nearly a century ago”.¹ Preparation for a HAV world is underway as the mobility industry evolves and transforms itself at a remarkable pace. New mobility platforms are becoming more convenient, more automated and

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1. FEDERAL AUTOMATED VEHICLES POLICY, NHTSA 5 (2016), <https://www.transportation.gov/sites/dot.gov/files/docs/AV%20policy%20guidance%20PDF.pdf>.

more data driven—all of which will facilitate the evolution to HAVs. However, that mobility revolution is hindered by an environment of older laws and regulations that are often incompatible with new models and platforms.

Although there are a number of different mobility models, this article will focus on carsharing, peer-to-peer platforms, vehicle subscription programs, and rental car businesses (yes, car rental is a mobility platform). All of these mobility models face a host of inconsistent legal, regulatory and liability issues, which create operational challenges that can stifle innovation. For example, incumbent car rental, a mobility platform that has been in place for over 100 years, is regulated by various state and local laws that address everything from driver's license inspections to use of telematics systems. Although physical inspection of a customer's driver's license at the time of rental is commonplace and expected in a traditional, face-to-face transaction, complying with the driver's license inspection for a free-floating carsharing or other remote access mobility model becomes more problematic.

Part B of this article will review current federal and state vehicle rental laws and regulations that may apply to incumbent rental car companies and other mobility models around the country, including federal laws preempting rental company vicarious liability and requiring the grounding of vehicles with open safety recalls, as well as state laws regulating GPS tracking, negligent entrustment, and toll service fees. Part C poses a series of hypotheticals to illustrate the challenges that the existing patchwork of laws creates for the mobility industry.² For instance, whether a mobility operator can utilize GPS or telematics to monitor the location of a vehicle is subject to inconsistent state laws (permitted in Texas, but not California, for example). And vehicle subscription programs are currently prohibited in Indiana, but permitted in most other states. Similarly, peer-to-peer car rental programs currently are prohibited in New York, but permitted in most other states. Finally, Part D of the article will offer some suggested uniform rules for the mobility industry.

First, however, we offer the following working definitions for this article:

- “*Carsharing*” – a membership-based service that provides car access without ownership. Carsharing is mobility on demand, where members pay only for the time and/or distance they drive.³

2. Note: This article focuses on existing laws applicable to short-term rentals of vehicles, rather than long-term leases (including the federal Consumer Leasing regulations, known as “Regulation M,” which are set forth in 12 C.F.R., Part 213). For a more detailed discussion of long-term vehicle leasing laws, see THOMAS B. HUDSON AND DANIEL J. LAUDICINA, *The Consumer Leasing Act and Regulation M*, in F&I LEGAL DESK BOOK (6th edition 2014).

3. *About the CSA*, CARSHARING ASS'N., <https://carsharing.org/about/> (last visited

- “Peer-to-peer Carsharing” or “Rentals” – the sharing of privately-owned vehicles in which companies, typically for a percentage of the rental charge, broker transactions among car owners and renters by providing the organizational resources needed to make the exchange possible (i.e., online platform, customer support, driver and motor vehicle safety certification, auto insurance and technology).⁴
- “Subscriptions” – a service that, for a recurring fee and for a limited period of time, allows a participating person exclusive use of a motor vehicle owned by an entity that controls or contracts with the subscription service.⁵ Typically, the subscriber is allowed to exchange the vehicle for a different type of vehicle with a certain amount of notice to the operator. This is a developing model with a number of variations, including whether the subscription includes insurance, maintenance, a mileage allowance, or other features and services.
- “Vehicle Rental” – a customer receives use of a vehicle in exchange for a fee or other consideration pursuant to a contract for a period of time less than 30 days.⁶

May 7, 2019).

4. *Car Sharing State Laws and Legislation*, NAT’L CONF. OF ST. LEGISLATURES (Feb. 16, 2017), <http://www.ncsl.org/research/transportation/car-sharing-state-laws-and-legislation.aspx>. Since most personal auto policies do not cover commercial use of personal vehicles, if the peer-to-peer platform does not provide liability and physical damage coverage, there likely will be no coverage if the vehicle is involved in an accident during the rental period. As noted above, peer-to-peer carsharing platforms currently do not operate in New York, based, in part, on the New York Department of Insurance’s findings that a peer-to-peer platform operator’s insurance practices (including sale of group liability coverage to vehicle owners and renters) constituted unlicensed insurance producing. *See* RelayRides, Inc. Consent Order (N.Y. Dep’t of Fin. Serv., 2014). Although a detailed discussion of insurance-related issues is beyond the scope of this article, the Relay Rides experience in New York illustrates the need for the insurance industry and insurance laws to evolve to accommodate new mobility models. *See* Part B.2.d. for a discussion of legislative approaches that several states have taken to address the insurance issues implicated by the peer-to-peer model (including a 2019 New York bill).

5. *See* IND. CODE § 9-32-11-20(e) (2018). The prohibition on vehicle subscription services in Indiana originally expired on May 1, 2019, but was recently extended for another year through May 1, 2020. The Indiana definition also provides that “[Subscription] does not include leases, short term motor vehicle rentals, or services that allow short terms sharing of a motor vehicle.” A bill pending in North Carolina uses similar language to define “vehicle subscription” for purposes of determining highway use tax rates. *See* H.B. 537 (N.C. 2019). As further discussed in Part C below, it is not clear whether other states would take the same approach and classify a subscription model as distinct from rental or leasing instead of applying existing laws.

6. *See* CAL. CIV. CODE § 1939.01 (Deering 2019). Although for purposes of this article, we use a traditional 30-day period to define short-term rentals, we note that the time period for rentals varies by state (or even by statute for a particular state) with some defining a short-term rental for periods as long as 6 months or even one year. *See, e.g.*, MD. CODE ANN., TRANSPORTATION § 18-101 (LexisNexis 2019) (defining “rent” as a

- “*Mobility Operators*” – any person or entity that provides access to a vehicle to another person whether by an in-person transaction, an app-based or online platform, or any other means and whether the entity providing the access is the owner, lessee, beneficial owner, or bailee of the vehicle or merely facilitates the transaction.

II. EXISTING LAWS: LACK OF UNIFORMITY AND CERTAINTY

As noted above, a patchwork of federal, state (and in some cases city or county) laws regulate short-term car rentals (in addition to generally applicable laws affecting all businesses, such as privacy and data security laws,⁷ the Americans with Disabilities Act (“ADA”), employment law, and zoning laws). Car rental laws have developed over time and typically address:

- (1) State and local taxes and surcharges;
- (2) Licensing and operational requirements, including airport concessions and permits for picking-up and dropping-off passengers;
- (3) Public policy issues, such as liability insurance and safety recalls; and
- (4) Consumer protection matters, like rental agreement disclosures, restrictions on the sale of collision damage waivers, prohibitions on denying rentals based on age or credit card ownership, and restrictions on mandatory fees.⁸

As is often the case with regulated industries, state and local vehicle rental laws vary considerably, which can lead to uncertainty and inefficiency. For

period of 180 days or less). *Compare* 35 ILL. COMP. STAT. 155/2 (2019) (defining “rent” as a period of one year or less for purposes of the Illinois Automobile Renting Occupation and Use Tax), with 625 ILL. COMP. STAT. 27/10 (defining “rental company” as one that rents vehicles to the public for 30 days or less for purposes of the Illinois damage waiver law).

7. In addition to general privacy and data security concerns applicable to all businesses, the advent of HAVs and connected vehicles may trigger additional privacy and data security issues for mobility operators. For example, issues surrounding the control, access, and use of vehicle-generated data is still unsettled and the subject of much debate. *See, e.g.* Ayesha Bose, Leilani Gilpin, et al., *The Vehicle Act: Safety and Security for Modern Vehicles*, 53 WILLAMETTE L. REV. 137 (2017) for additional information on this topic.

8. *See, e.g.*, Final Report and Recommendations of the National Association of Attorneys General Task Force on Car Rental Industry Advertising and Practices, 56 Antitrust & Trade Regulation Report No. 1407 (March 1989) at S-3 (“NAAG Report”). The NAAG Report includes “guidelines,” which were intended for use by states in providing guidance to car rental companies on compliance with state unfair and deceptive practice laws, *Id.* at S-5.

example, a multi-state operator may need to vary product offerings and pricing, customer disclosures, and agreement forms, depending upon the state in which the rental commences.⁹ The uncertainty and inefficiency increases dramatically when considering whether and how existing vehicle rental laws apply to new mobility platforms and services since many of the existing laws do not address or even contemplate modern technology like self-service, keyless access to vehicles, digital agreements, or telematics fleet management.

The following paragraphs provide a brief overview of some of the existing laws.

A. Federal Law

1. Graves Amendment

The federal Graves Amendment,¹⁰ passed in 2005, preempts any portion of state law that creates vicarious liability for a vehicle rental company based solely on ownership of a vehicle. Specifically:

An owner of a motor vehicle that rents or leases the vehicle to a person . . . shall not be liable . . . by reason of being the owner of the vehicle . . . for harm to persons or property that results or arises out of the use, operation, or possession of the vehicle during the period of the rental or lease, if-- (1) the owner . . . is engaged in the trade or business of renting or leasing motor vehicles; and (2) there is no negligence or criminal wrongdoing on the part of the owner . . .¹¹

Determining whether the Graves Amendment applies to a particular case involves an analysis of both factual and legal issues. The factual issues include a determination of whether:

9. Typically, a state law will apply to a transaction if the renter accepts delivery of the vehicle in that state, regardless of where the rental company's physical offices are located, where the vehicle is typically parked, or where the vehicle is returned. *See, e.g.*, 24 VA. CODE ANN. § 20-100-10 (2019) ("The term [rental in this State] applies regardless of where the rental agreement is written, where the rental terminates, or where the vehicle is surrendered.").

10. 49 U.S.C.S. § 30106 (LexisNexis 2019).

11. Before passage of the Graves Amendment, many car leasing and renting companies ceased activities in states with unlimited vicarious liability laws based solely on ownership, such as New York. *See Graham v Dunkley*, 852 N.Y.S.2d 169 (App. Div. 2008); *see also* Susan Lorde Martin, *Commerce Clause Jurisprudence and the Graves Amendment: Implications for the Vicarious Liability of Car Leasing Companies*, 18 U. FLA. J.L. & PUB. POL'Y 153, 162 (2007).

- (A) the claim involves a “motor vehicle”;
- (B) the individual or entity is the “owner” of the motor vehicle (which may be a titleholder, lessee, or bailee) or an affiliate of the owner;
- (C) the individual or entity is “engaged in the trade or business of renting or leasing motor vehicles”;
- (D) the accident occurred during the rental period.¹²

The legal issues include:

- (A) whether the owner is being sued in its capacity as owner (as opposed to the employer or other principal of another party); and
- (B) whether there are allegations that the owner was negligent or criminal.¹³

Perhaps not surprisingly, the Graves Amendment has been highly litigated, from early challenges to its constitutionality,¹⁴ to later assertions that it does not apply to a particular case because the vehicle’s owner was not “engaged in the business of renting or leasing,”¹⁵ or that an accident did not occur during the “rental period.”¹⁶

Two New York cases are instructive to operators of newer mobility models. In *Minto v. Zipcar New York, Inc.*¹⁷ and *Moreau and Duverson v. Josaphat, et al.*,¹⁸ a New York court examined whether carsharing company Zipcar was “engaged in the trade or business of renting or leasing motor vehicles” for purposes of the Graves Amendment – despite the fact that it touted itself as an alternative to car rental.

In the 2010 *Minto* case (which the *Moreau* case closely followed), the court stated that Zipcar’s advertising, which contrasted the company to “‘traditional car rental cars’, d[id] not foreclose the possibility that it is nevertheless also in the rental car business, although not of a traditional sort.”¹⁹ The court then noted that the Graves Amendment did not define

12. Johnke v. Espinal-Quiroz, No. 14-CV-6992, 2016 WL 454333 (N.D. Ill. 2016).

13. *Id.*

14. See, Rosado v. Daimlerchrysler Fin. Servs. Trust, 112 So. 3d 1165 (2013); Garcia v. Vanguard Car Rental USA, Inc., 540 F.3d 1242 (2008); Rodriguez v. Testa, 993 A.2d 955 (Conn. 2009); Vargas v. Enter. Leasing Co., 60 So. 3d 1037 (Fla. 2008).

15. See e.g., *Minto v. Zipcar New York, Inc.*, No. 15401/09 (N.Y. Sup. Ct., Queens County Mar. 17, 2010); *Moreau v. Josaphat, et al.*, 975 N.Y.S.2d 851 (N.Y. Sup. Ct. 2013).

16. Currie V. Mansoor, 71 N.Y.S.3d 633 (App. Div. 2018); Chase v. Cote, 2017 Conn. Super. LEXIS 3533 (2017); Marble v. Faelle, 89 A.3d 830 (R.I. 2014).

17. See *Minto v. Zipcar New York, Inc.*, No. 15401/09.

18. See *Moreau*, 975 N.Y.S.2d 851.

19. See *Minto v. Zipcar New York, Inc.*, No. 15401/09 at 2.

“trade or business of renting or leasing motor vehicles.”²⁰ As a result, it analyzed the “constituent terms” of “renting” and “leasing” to determine whether Zipcar was a rental company for purposes of the Graves Amendment²¹ and concluded that the key features of a “lease” or rental” were the “transfer of the right to possession and use of goods for a term in return for consideration.”²² With these definitions in mind, the court focused on the requirement that Zipcar members pay fees in exchange for the right to use Zipcar vehicles, which it found to be “little different from ‘traditional rental car’ companies, notwithstanding Zipcar’s marketing statements that contrast it with those companies” and held that Zipcar was covered by the Graves Amendment.²³ As further support of its conclusion, the *Minto* court noted that the Zipcar marketing “shows that the company competes with traditional car-rental companies and serves a similar consumer need.”²⁴

2. Safe Rental Car Act

The Raechel and Jacqueline Houck Safe Rental Car Act of 2015 (“Safe Rental Car Act”)²⁵ places limits on the rental, sale, or lease of “covered rental vehicles.”²⁶ A “covered rental vehicle” is one that: (A) has a gross vehicle weight rating (“GVWR”) of 10,000 pounds or less; (B) is rented without a driver for an initial term of less than 4 months; and (C) is part of a motor vehicle fleet of 35 or more motor vehicles that are used for rental purposes by a rental company.²⁷ A “rental company” is any individual or company that “is engaged in the business of renting covered rental vehicles,” and “uses, for rental purposes, a motor vehicle fleet of 35 or more covered rental vehicles, on average, during the calendar year.”²⁸

Under the Safe Rental Car Act, after receiving notice by electronic or first class mail of a NHTSA-approved safety related recall, a rental car company may not rent, sell, or lease an affected vehicle in its possession at the time of notification, until the defect has been remedied. The rental car company must comply with the restrictions on rental/sale/lease “as soon as practicable,” but no later than 24 hours after the receipt of the official safety recall notice (or

20. *Id.*

21. *Id.* See also *Moreau*, 975 N.Y.S.2d at 855-856.

22. See *Minto v. Zipcar New York, Inc.*, No. 15401/09 at 2-3.

23. *Id.* at 3.

24. *Minto v. Zipcar New York, Inc.*, No. 15401/09 at 4.

25. Raechel and Jacqueline Houck Safe Rental Car Act of 2015, S. 1173, 114th Cong. (2015) (codified as amended in scattered sections of 49 U.S.C.).

26. 49 U.S.C.A. § 30120(i) (2017).

27. 49 U.S.C.A. § 30102(a)(1) (2017).

28. 49 U.S.C.A. § 30102(a)(11) (2017).

within 48 hours if the notice covers more than 5,000 vehicles in its fleet).²⁹ If the safety recall notice indicates that a remedy is not immediately available, but specifies interim actions that an owner may take to alter the vehicle and eliminate the safety risk, the rental company may continue to rent (but not sell or lease) the vehicle after taking the specified actions.³⁰

Despite the federal recall legislation, several states have introduced bills for similar legislation with California passing a law in 2016 that extends the restrictions on rental, sale, and lease to fleets of any size, as well as to cars loaned by dealers while a customer's own vehicle are being repaired or serviced.³¹ Effective January 1, 2019, the California prohibitions on the rental, lease, sale, or loan of vehicles subject to safety recalls also apply to "personal vehicle sharing programs," which are defined as legal entities qualified to do business in the State of California that are "engaged in the business of facilitating the sharing of private passenger vehicles for noncommercial use by individuals within the state."³²

B. State Law

Several states, including California,³³ Hawaii,³⁴ Illinois,³⁵ Nevada,³⁶ and New York,³⁷ have comprehensive vehicle rental laws that regulate a variety of issues, including minimum age requirements; sales of damage waivers; limitations on amounts recoverable from renters, fees that a vehicle rental company may charge; recordkeeping practices; general licensing or permit requirements;³⁸ imposition of short-term rental taxes and surcharges; airport

29. 49 U.S.C.A. § 30120(i)(1) and (3) (2017). The 24-hour/48-hour time requirement applies only to vehicles in the possession of the rental company when the safety recall is received, and does not require rental companies to locate and recover vehicles that are on rent at that time.

30. 49 U.S.C.A. § 30120(i)(3)(C) (2017). Once a permanent remedy becomes available, the rental company may not rent affected vehicles until those vehicles have been repaired.

31. CAL. VEH. CODE § 11754 (Deering 2019).

32. CAL. VEH. CODE § 11752 (West 2019); CAL INS. CODE § 11580.24(b)(2) (West 2011).

33. CAL. CIV. CODE §§ 1939.01 – 1939.37 (West 2017).

34. HAW. REV. STAT. ANN. § 437D (West 2019).

35. 625 ILL. COMP. STAT. 27 (West 2019); 625 ILL. COMP. STAT. 5/6-305 (West 2019).

36. NEV. REV. STAT. ANN. §§ 482.295–482.3159 (West 2019).

37. N.Y. GEN. BUS. LAW § 396-z (McKinney 2019).

38. *See, e.g.*, CONN. GEN. STAT. ANN. § 14-15 (West 2018); D.C. CODE § 50-1505.03 (2019); DEL. CODE ANN. TIT. 21 § 6102 (West 2019); HAW. REV. STAT. ANN. § 251-3 (West 2019); MINN. STAT. ANN. § 168.27 (West 2019); NEV. REV. STAT. ANN. § 482.363 (West 2019); N.J. STAT. ANN. § 45:21-12 (West 2019); OKLA. STAT. tit. 47, § 8-101 (2004); 31 R.I. GEN. LAWS ANN. § 31-5-33 (West 2019); W. VA. CODE ANN. § 17A-6D-1 (West 2019); WIS. STAT. ANN. § 344.51(1m) (West 2018).

concession and permit requirements; limitations on the use of telematics; deposit and credit card restrictions; required display of counter signs; and required disclosures on rental agreements (including specified language, font size/style, and placement on written agreements). California even requires rental companies to warn their customers that operation of a passenger vehicle can expose individuals to certain chemicals that are known to cause cancer and birth defects, and therefore the customers should avoid breathing exhaust and take other precautions. Other states regulate one or more of these issues, with most states varying the specific requirements. For example, approximately 21 states regulate the sale of damage waivers with states taking different approaches on several key issues, including the permissibility of selling partial or deductible waivers, customer disclosures, and the permissible bases for invalidation of a waiver.³⁹

In addition to the issues noted above, most states prohibit rental of a vehicle without first inspecting the renter's driver's license to confirm that it is "facially valid" and (1) comparing the signature on the license with the renter's signature written at the time of rental; and/or (2) comparing the photo with renter.⁴⁰ Moreover, case law from various states provide guidance on what may or may not constitute negligent entrustment (which is excluded from the Graves Amendment). Finally, some states have begun to recognize the emergence of new mobility models and have either amended existing laws or passed new legislation to address the new models.

The paragraphs below summarize typical state laws (and how they vary) on several of these issues, including use of telematics systems; tolls and other fees, negligent entrustment, and peer-to-peer car sharing programs.

1. Telematics Systems and Vehicle Technology

Many mobility operators equip their rental vehicle fleet with global positioning systems (GPS) or other telematics systems (collectively

39. The typical damage waiver statute requires vehicle rental companies to disclose the optional nature of the waiver on the front of the rental agreement form and/or signs at the rental counter. Some statutes also regulate the content of the waiver and its exclusions. *See, e.g.*, CAL. CIV. CODE § 1939.09 (Deering 2019). Hawaii, Illinois, Maryland, New York, and Wisconsin require the distribution of brochures summarizing the damages waiver and its terms, and rental companies selling damage waivers in Louisiana and Minnesota must file a copy of the rental agreement before using it. HAW. REV. STAT. ANN. § 437D-10 (LexisNexis 2019); 625 ILL. COMP. STAT. ANN. 27/20 (LexisNexis 2019); LA. STAT. ANN. § 22:1525 (2018); MD. CODE ANN. COM. LAW § 14-2101 (LexisNexis 2019); MINN. STAT. ANN. § 72A.125 (West 2019); N.Y. GEN. BUS. LAW § 396-z(4) (Consol. 2019); and WIS. STAT. ANN. § 344.576 (West 2018).

40. *See, e.g.*, FLA. STAT. ANN. § 322.38(1-2) (LexisNexis 2018); 625 ILL. COMP. STAT. ANN. 5/6-305(b) (LexisNexis 2019); NEV. REV. STAT. ANN. § 483.610 (LexisNexis 2019); MD. CODE ANN. TRANSP. § 18-103(a), (b) (LexisNexis 2019); WASH. REV. CODE ANN. § 46.20.220 (LexisNexis 2019); W. VA. CODE ANN. § 17B-4-6 (LexisNexis 2019).

“Telematics Systems”) to track vehicles for a variety of purposes, including fleet management; locating and recovering vehicles that are not returned by the due-in date (or that have been reported missing); calculating information related to the use of the vehicle, such as mileage, location, and speed; and providing services to renters, such as roadside assistance, maintenance, and navigation. Connected cars and HAVs will provide even more data that mobility operators can use to manage their fleets and enhance the user’s experience.⁴¹

At the same time, mobility operators that use Telematics Systems to impose fees related to vehicle use (e.g., fees for traveling outside a geographic area or excess speeding), may face customer complaints or even litigation. For example, rental companies have been subject to suit in the past when they used GPS to collect location or speed information about a vehicle while on rent and impose additional fees on customers who violated geographic limitations of the rental agreement or state speed limits.⁴²

Four states, including California, Connecticut, Montana, and New York, currently have laws that specifically regulate “rental company” use of Telematics Systems. Specifically:

California – California generally prohibits rental companies from using, accessing, or obtaining information about a renter’s use of a rental vehicle that was obtained from “electronic surveillance technology” (“a technological method or system used to observe, monitor, or collect information, including telematics, . . . GPS, wireless technology, or location-based technology”), including for the purpose of imposing fines or surcharges. However, electronic surveillance technology may be used if:

- (1) The rented vehicle is missing or has been stolen or abandoned;
- (2) the vehicle is 72 hours past the due-in date (and the company notifies the renter and includes required disclosures in the rental agreement);
- (3) the vehicle is subject to an AMBER Alert; or
- (4) in response to a specific request from law enforcement pursuant to a subpoena or search warrant.⁴³

41. See, e.g., *Avis Budget Group Boosts Fleet of Connected Cars with 75,000 In-Vehicle Telematics Units From I.D. Systems*, AVIS BUDGET GROUP (Dec. 17, 2018), <https://avisbudgetgroup.com/avis-budget-group-boosts-fleet-of-connected-cars-with-75000-in-vehicle-telematics-units-from-i-d-systems-2/>. (last visited May 8, 2019).

42. See *Turner v. American Car Rental* 884 A.2d 7 (Ct. App. Ct. 2005); Proposed Judgement, *People v. Acceleron Corp.*, (Cal. Super. Ct. 2004), https://oag.ca.gov/system/files/attachments/press_releases/04-129_settle.pdf.

43. See CAL. CIV. CODE § 1939.23(a) (West 2019).

Rental companies that use electronic surveillance technology for any of the reasons identified above also must maintain certain records of each such use for one year from date of use.⁴⁴ Rental companies may also use telematics at the request of renters, including for roadside service, navigation assistance, or remote locking/unlocking – as long as the rental company does not use, access or obtain information related to the renter’s use of the vehicle beyond that which is necessary to render the requested service.⁴⁵ Like most of the other provisions of the California Vehicle Rental law, customers cannot waive these requirements.⁴⁶

Connecticut – Connecticut’s non-uniform version of UCC Article 2A,⁴⁷ (which applies to both short-term and long-term consumer and commercial leases) regulates the use of “electronic self-help,” including the use of GPS devices to track and locate leased property to repossess the goods (or render them unusable without removal, such as remotely disabling the ignition of a vehicle). Before resorting to electronic self-help, a lessor must give notice to the lessee, stating:

- That the lessor intends to resort to electronic self-help as a remedy on or after 15 days following notice to the lessee;
- The nature of the claimed breach which entitled the lessor to resort to electronic self-help; and
- The name, title, address and telephone number of a person representing the lessor with whom the lessee may communicate concerning the rental agreement.

In addition, the lessee must separately agree to a term in the lease agreement that authorizes the electronic self-help. A commercial lease requires only that the authorization is included as a separate provision in the lease, which implies that a consumer lease requires

44. *Id.* The records must include any information relevant to the activation of the GPS, including: (1) the rental agreement; (2) the return date; (3) the date and time the electronic surveillance technology was activated; and (4) if relevant, a record any communication with the renter or the police. The record must be made available to the renter upon request, along with any explanatory codes necessary to read the record.

45. *See* CAL. CIV. CODE § 1939.23(b) (West 2019). In addition, rental companies may obtain, access, or use information from electronic surveillance technology for the sole purpose of determining the date and time of the start and end of the rental, total mileage, and fuel level.

46. *See* CAL. CIV. CODE § 1939.29 (West 2019). The only provisions of the California vehicle rental law that a customer may waive are those related to business rentals, rentals of 15-passenger vans, and driver’s license inspection exceptions for remote access programs.

47. CONN. GEN. STAT. § 42-2A-702 (2013).

the express, affirmative consent of the lessee.⁴⁸

Montana – Montana requires a “rental vehicle entity” providing a rental vehicle equipped with a GPS or satellite navigation system to disclose in the rental agreement (or written addendum) the presence and purpose of the system.⁴⁹ If the GPS or satellite navigation system is used only to track lost or stolen vehicles, disclosure is not required.

New York – New York prohibits a “rental vehicle company” from using information from “any” global positioning system technology to determine or impose fees, charges, or penalties on an authorized driver’s use of the rental vehicle.⁵⁰ The limitation on use of GPS, however, does not apply to the rental company’s right to recover a vehicle that is lost, misplaced, or stolen.

More recently, vehicle infotainment systems, which may include Telematics Systems like GPS, have come under scrutiny. In a putative class action filed against Avis Budget Group in December 2018, the plaintiff asserted that:

- (a) a customer’s personal information may be collected and stored automatically by a vehicle each time the customer pairs his or her personal mobile device to the vehicle infotainment system to access navigation, music streaming, voice dialing/messaging, or other services; and
- (b) failure to delete the customer data after each rental violated customers’ right to privacy under the California constitution, as well as the California rental law electronic surveillance technology provisions.

As of the date of this article, the defendant had removed the case

48. CONN. GEN. STAT. § 42-2A-702(e)(2)-(3) (2013). Lessees may recover damages, including incidental and consequential damages, for wrongful use of electronic self-help (even if the lease agreement excludes their recovery). CONN. GEN. STAT. § 42a-2A-702(e)(4). In addition, a lessor may not exercise electronic self-help if doing so would result in substantial injury or harm to the public health or safety or “grave harm” to third parties not involved in the dispute – even if the lessor otherwise complies with the statute. CONN. GEN. STAT. § 42a-2A-702(e)(5).

49. See MONT. CODE ANN. 61-12-801(1)(a) (2019). For purposes of the Montana law, a “rental vehicle entity” is a business entity that provides the following vehicle to the public under a rental agreement for a fee: light vehicles, motor-driven cycles, quadricycles, or off-highway vehicles. MONT. CODE ANN. 61-12-801(2)(b)-(c) (2019). A “rental agreement” is a written agreement for the rental of a rental vehicle for a period of 90 days or less. MONT. CODE ANN. 61-12-801(2)(a) (2019).

50. N.Y. GEN. BUS. LAW 396-z(13-a). New York defines a “rental vehicle company” as “any person or organization . . . in the business of providing rental vehicles to the public from locations in [New York]. NY GEN. BUS. LAW 396-z(1)(c).

to federal court and filed a motion to compel arbitration based on the terms and conditions of the rental agreement.⁵¹

2. Tolls and Other Fees

Several states, including California, Nevada, and New York, limit the types and even the amounts of fees that rental companies can charge. For example, California prohibits additional driver fees, and Nevada and New York cap those fees. In other states, a fee that appears to be excessive or punitive may be unenforceable. Generally, a fee is more likely to be enforced if it is fully disclosed, and the customer can avoid paying it by either not selecting a particular product or service (such as supplemental liability insurance or an additional driver) or not engaging in a particular behavior (such as returning the car late or with an empty gas tank).⁵²

Although disgruntled customers may complain about any fee that they believe is excessive or “hidden,” over the past several years, toll program charges have been among the most disputed in the car rental industry. Indeed, several class action claims have been filed against rental companies alleging inadequate disclosure of toll payment terms, failure to disclose use of third parties, unauthorized charges to the customer’s credit card, breach of contract, and similar claims.⁵³ State and local attorneys general have also investigated or filed civil claims against rental companies based on similar allegations.⁵⁴

The increase in customer complaints and litigation likely stems from innovations in both toll collection methods and rental car toll payment processing (both of which seem likely to become an integral part of the connected car/HAV ecosystem). For example, an increasing number of toll roads and bridges are all-electronic. At the same time, many rental

51. *See* Complaint, *Kramer v. Avis Budget Group, Inc.*, Case No. 37-2018-00067024-CU-BT-CTL (Ca. Super. Ct., San Diego County 12/31/2018). The federal case number is 3:19cv421 (S.D. Cal.). Similar claims have been filed against other companies in California and all were initially removed to federal court, however, one of the cases has been remanded to state court.

52. *See, e.g.*, *Blay v. Zipcar, Inc.*, 716 F. Supp. 2d (D. Mass. 2010); *Reed v. Zipcar, Inc.*, 883 F. Supp. 2d 329 (D. Mass. 2012). *Cf.* *Bayol v. Zipcar, Inc.*, 78 F.Supp.3d 1252 (N.D. Cal. 2015).

53. *See* *Doherty and Simonson v. Hertz*, No 10-359 (NLH/KMW) 2014 WL 2916494 (D.N.J. Jun. 25, 2014) (approving over \$11 million settlement of class action case based on assertions that inadequate disclosure of a rental company’s toll program violated consumer protection laws and breached the rental agreement); *see also* *Mendez v. Avis Budget Group, Inc.*, No. 11-6537(JLL), 2012 WL 1224708 (D. N.J. Apr. 10, 2012); *Readick v. Avis Budget Group, Inc.*, No. 12 Civ. 3988(PGG), 2013 WL 3388225 (S.D. N.Y. Jul. 3, 2013); *Sallee v. Dollar Thrifty Automotive Group, Inc., et al.*, 2015 WL 1281518 (N.D. Okla. Mar. 20, 2015); *Maor v. Dollar Thrifty Automotive Group, Inc.*, 303 F.Supp.3d 1320 (S.D. Fla. 2017).

54. *See infra*, note 55.

companies have introduced optional toll service products that permit renters to use electronic toll roads and lanes during the rental, some of which are provided by third parties. Often, a renter who declines to purchase the toll service at the time of rental will be subject to higher fees if he or she incurs toll charges by driving on an all-electronic road or lane during the rental.

The typical complaint focuses on alleged lack of or inadequate disclosure of the toll payment-processing program. For example, in recent settlement agreements with the Florida Attorney General, Avis Budget Group, Inc., and Dollar Thrifty Automotive Group, Inc. both agreed to disclose that Florida has cashless tolls, along with details about the rental company's toll service options, and how the toll service charges can be avoided (such as by paying in cash, programming a GPS to avoid toll roads, contacting local authorities for other payment options, or using a personal transponder that is accepted on the toll road).⁵⁵

Finally, state legislatures are taking notice of the tolling issues with several states proposing new legislation to regulate rental company toll programs and fees. As of January 1, 2019, Illinois became the first state to directly regulate toll programs by establishing maximum daily fees for toll programs if the rental company fails to notify the customer of the option to use a transponder or other device before or at the beginning of the rental.⁵⁶

3. Negligent Entrustment.

As noted above, the federal Graves Amendment protects "rental" or "leasing" companies from vicarious liability for their customers' accidents based solely on ownership of the vehicle; however, the rental or leasing company is still liable for its own negligence or criminal wrongdoing. As a result, one common challenge to a rental or leasing company's assertion of the Graves Amendment as an affirmative defense is a claim that the rental or leasing company somehow negligently entrusted the vehicle to the customer.

A vehicle owner may be liable for negligent entrustment if: (1) it provides

55. In February 2019, Hertz settled a case with the City Attorney of San Francisco for \$3.65 million. The case alleged that the Hertz toll fee program as applied to the Golden Gate Bridge (an all-electronic toll road) failed to adequately disclose the fees or to provide customers the ability to opt-out. See Julia Cheever, *Hertz Reaches \$3.65 Million Settlement with SF over Golden Gate Bridge Tolls*, SAN FRANCISCO EXAMINER (Feb. 19, 2019), <http://www.sfexaminer.com/hertz-reaches-3-65-m-settlement-sf-golden-gate-bridge-toll-fees/>. See also Office of the Att'y Gen. of Fla. v. Dollar Thrifty Automotive Group, Inc., No. 16-2018-CV-005938 (Fla. Cir. Ct Jan. 7, 2019), [https://myfloridalegal.com/webfiles.nsf/WF/TDGT-B8NT5W/\\$file/Final+Signed+DT+AG+Settlement+Agreement+1+1+19.pdf](https://myfloridalegal.com/webfiles.nsf/WF/TDGT-B8NT5W/$file/Final+Signed+DT+AG+Settlement+Agreement+1+1+19.pdf); In re Investigative Subpoena Duces Tecum to Avis Budget Group, Inc. and Payless Car Rental System, Inc., No 2017 CA 000122 (Fla. Cir. Ct. Jul. 7, 2017), [http://myfloridalegal.com/webfiles.nsf/WF/JMAR-AP6LZQ/\\$file/Settlement+Agreement+Avis.pdf](http://myfloridalegal.com/webfiles.nsf/WF/JMAR-AP6LZQ/$file/Settlement+Agreement+Avis.pdf).

56. See 625 Ill. Comp. Stat. 5/6-305.

a vehicle to a person it knows, or should know, is incompetent or unfit to drive; (2) the driver is in an accident or otherwise causes injury; and (3) that injury is caused by that person's incompetence.⁵⁷ To be found liable for negligent entrustment in the vehicle renting or leasing context, the rental or leasing company generally must have some special knowledge concerning a characteristic or condition peculiar to the renter that renders that person's use of the vehicle unreasonably dangerous. Plaintiffs' counsel typically allege that negligent entrustment is at issue where the driver appears to be intoxicated at the time of the rental or has a known substance abuse problem; where a renter is known by the rental company and its agents to be a reckless driver; or where the rental company has *reason to know* that the renter may cause injury to others.

On the other hand, courts around the country have found that the following circumstances did not constitute negligent entrustment:

- (1) failure to research the renter's driving record;⁵⁸
- (2) failure to recognize the signs of habitual drug use (when renter was not under the influence at the time of rental);⁵⁹
- (3) renting to an individual whose license had been suspended, but who had not yet received notification of the suspension;⁶⁰
- (4) failure to administer a driving test or to ensure that the driver is capable of actually operating the vehicle;⁶¹
- (5) renting to an individual who does not speak English fluently;
- (6) renting to an individual with an arm splint who did not indicate that the splint would interfere with his ability to drive;⁶² and
- (7) renting to a former customer who previously reported an accident in a rental car and also allegedly returned a car with illegal drugs left behind.⁶³

4. State Laws Addressing New Mobility Platforms

More recently, some states have begun to recognize the emergence of new mobility models and have amended existing laws or passed new laws to address some of the issues. For example:

57. See *Osborn v. Hertz Corp.*, 205 Cal.App.3d 703, 708-709 (1989).

58. See *Flores v. Enterprise Rent-A-Car Co.*, 116 Cal. Rptr. 3d 71, 78 (2010).

59. See *Weber v Budget Truck Rental*, 254 P.3d 196 (Wash. Ct. App. 2011).

60. See *Young v. U-Haul*, 11 A.3d 247 (D.C. Cir. 2011).

61. See *Reph v. Hubbard*, No. 07-7119, 2009 WL 659910 at *3 (E.D. La. 2009).

62. See *Mendonca v. Winckler and Corpat, Inc.*, No 1-5007-JLV, 2014 WL 1028392 (D.S.D. 2014).

63. See *Maisonette v. Gromiler*, No. FSTCV176031477S, 2018 WL 3203887 (Conn. Super. Ct. 2018).

- In 2011, California amended its insurance code to include a “personal vehicle sharing” statute, which regulates insurance aspects of “personal vehicle sharing programs” that facilitate sharing of private passenger vehicles (i.e., vehicles that are insured under personal automobile policies insuring a single individual or individuals residing in the same household) for non-commercial purposes, as long as the annual revenue received by the vehicle’s owners from the personal vehicle sharing does not exceed the annual expenses of owning and operating the vehicle (including the costs associated with personal vehicle sharing).⁶⁴
- In 2012, California amended its driver’s license inspection statute to exempt membership programs permitting remote, keyless access to vehicles from driver’s license inspection requirements.⁶⁵ As of the date of this article, a similar draft bill is pending in Massachusetts.⁶⁶
- In 2015, Florida and Hawaii amended their laws to impose modified car rental surcharges on “carsharing organizations” (i.e., membership programs providing self-service access to vehicles on an hourly or other short-term basis).⁶⁷
- Maryland passed the first comprehensive “Peer-to-Peer Car Sharing Program” law in 2018. The Maryland law defines a “peer-to-peer car sharing program” as, “a platform that is in the business of connecting vehicle owners with drivers to enable the sharing of motor vehicles for financial consideration”⁶⁸ and extends a number of vehicle rental law requirements, including those related to safety recalls,⁶⁹ collision damage waiver sales,⁷⁰ limited lines licensing in connection with the sale of car rental insurance,⁷¹ airport concession agreements,⁷² and

64. See CAL. INS. CODE 11580.24 (West 2018). Oregon and Washington have similar laws.

65. CAL. CIV. CODE § 1939.37 (Deering 2019).

66. H.D. 4139 (Mass. 2019). A similar bill came into effect in Florida on July 1, 2019. See FLA. STAT. ANN. § 322.38 (West 2019).

67. FLA STAT. ANN. § 212.0606 (LexisNexis 2019); HAW. REV. STAT. ANN. § 251 (LexisNexis 2019).

68. MD. CODE ANN., INS. § 19-520(a)(9) (LexisNexis 2019). Illinois also passed a peer-to-peer car sharing/rental law in 2018, but that law was vetoed by then-Governor Rauner. Michael J. Bologna, *Illinois Governor Pumps the Brakes on Car-Sharing Taxes*, BLOOMBERG; DAILY TAX REPORT: STATE (August 31, 2018), <https://www.bna.com/illinois-governor-pumps-n73014482161/> (last visited May 15, 2019).

69. MD. CODE ANN., TRANSP., § 18.5-109 (LexisNexis 2019).

70. MD. CODE ANN., COM. LAW, § 14-2101 (LexisNexis 2019).

71. MD. CODE ANN., INS., § 10-6A-02 (LexisNexis 2019).

72. MD. CODE ANN., Transp. § 18.5-106 (LexisNexis 2019).

recordkeeping requirements, to peer-to-peer car sharing programs.⁷³ It also exempts the Peer-to-Peer Car Sharing Program operator and the shared vehicle's owner from vicarious liability based solely on vehicle ownership in accordance with the Graves Amendment.⁷⁴

As of June 2019, the following states have pending, or have passed, peer-to-peer car sharing/car rental (or personal motor vehicle sharing) legislation: Arizona, California, Colorado, Georgia, Hawaii, Indiana, Iowa, Massachusetts, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, Washington, and West Virginia.⁷⁵ The scope of the pending bills ranges from extension of rental tax obligations to peer-to-peer rentals to more comprehensive schemes similar to that passed in Maryland in 2018.

III. THE CHALLENGE OF COMPLIANCE

As demonstrated in the brief survey of existing rental laws above incumbent vehicle rental companies (especially those that operate in several states) must navigate numerous and often-inconsistent federal and state laws in their day-to-day operations. In addition to the challenges created by inconsistencies in the substantive requirements of the laws, not all of the laws use the same definition of "vehicle rental company" (which may vary depending upon the length of the transaction and the type of vehicle rented), so it is possible for an entity or transaction to be considered a "rental" in some, but not all, states or for some, but not all, purposes.⁷⁶

In recent years, the challenge of compliance with existing laws – most of which did not contemplate anything other than a face-to-face handover of vehicle and keys -- has increased as new entrants and incumbent operators attempt to innovate and take advantage of new technology to improve operations and customer experience. For example, use of kiosks, keyless access and GPS fleet management are all innovations that can improve the customer experience, which existing vehicle rental laws fail to facilitate. Enter the newer mobility operators, and things become even more interesting, with a close analysis of the definition of "rental company,"

73. MD. CODE ANN., Ins. § 19-520 (LexisNexis 2019).

74. MD. CODE ANN., Ins. § 19-520(e) (LexisNexis 2019).

75. Arizona H.B. 2559 (Ariz. 2019) and S.B. 1305 (Ariz. 2019); A.B. 1263 (Cal. 2019); S.B. 090 (Colo. 2019); H.B. 378 (Ga. 2019); H.B. 241 HD2 SD 1 (Haw. 2019) and S.B. 662 SD2 (Haw. 2019); Pub. L. No. 253 (Ind. 2019) (to be codified at IND. CODE § 9-25-6-3); H.F. 779 (Ia. 2019); H.D. 4139 (Mass. 2019); L.B. 349 (Neb. 2019); S.B. 478 (Nev. 2019); H.B. 274 (N.H. 2019); A.B. 5092 (N.J. 2019); S.B. 556 (N.M. 2019); S.B. 5995 (N.Y. 2019); H.B. 2071 (Wash. 2019); H.B. 2762 (W. Va. 2019).

76. See *Minto v. Zipcar New York, Inc.*, No. 15401/09 (N.Y. Super. Ct., Queens County Mar. 17, 2010).

“rental vehicle,” and other key terms becoming even more important. To provide some context, consider a few hypotheticals:

Hypothetical 1 – A 26-year old driver with a facially valid, but recently suspended driver’s license, rents a car in Arizona and is involved in an accident injuring a third party. Under Arizona law and indeed the law of all states, the rental car operator meets its statutory obligations by inspecting the driver’s license and confirming that it is facially valid. There is no duty to conduct any further investigation into the status of the driver’s license or the driving record of the prospective renter. Under this simple fact pattern, the rental car company has no liability to the injured third party for the negligence of the renter (beyond any state mandated minimum financial responsibility limit). Should the outcome be the same for a carsharing operation where the user accesses the vehicle through an app without any direct in-person contact with personnel of the operator? What about an owner of small fleet of cars who “rents” his vehicles through a peer-to-peer rental platform? How about a subscription program where an employee delivers a vehicle to a “lessee” or “renter” who has elected to switch the model of car being used?

Hypothetical 2 – A California carshare member has had possession of a vehicle for three days and the operator receives notice that the member’s credit card is expired. The member has not responded to inquiries from the operator. If the carsharing transaction is considered to be a rental, as noted above, in California and a few other states, the mobility operator is precluded by statute from utilizing the vehicle’s GPS to locate the vehicle (at least until certain time periods have expired). Should that same limitation apply to the carshare operator? What if the purpose was to make sure that vehicles are properly distributed around a region so that it can serve its members’ anticipated demands? What about the renter of a peer-to-peer vehicle who is late with the car – can either the owner of the car or the peer-to-peer platform assist in locating the car via the vehicle’s GPS system? Can the operator of a subscription program utilize GPS to track the location of vehicles?

Hypothetical 3 – A 30-year old renter with a valid license rents a vehicle through a peer-to-peer platform and two days later causes an accident resulting in substantial property damage and injuries. Pursuant to the federal Graves Amendment, if a peer-to-peer rental is characterized as a car rental transaction, the vehicle owner might argue there is no vicarious liability for the actions of the driver (assuming there was no negligence in how the transaction was handled). It is possible the arguments would vary if the owner of the

vehicle operated a small fleet of cars, which it placed on a peer-to-peer platform. A few courts have concluded that the Graves Amendment protection extends to carshare operations.⁷⁷ Should that protection extend to the individual or small fleet owner that utilizes a peer-to-peer platform? Is there any basis to extend the Graves Amendment protection to the platform operator given that it typically does not own the vehicles?

Currently, the answers to many of the questions raised above are unclear with scant guidance from state legislatures or courts. As a result, a mobility operator generally must look to the definition of “rental company” to determine whether its model is or may be covered by a particular law. And that inquiry may lead an incumbent car rental operator to argue that it should no longer be subject to the outdated vehicle rental laws and regulations either.

IV. PROPOSAL

There is an ongoing debate in the mobility industry as to the extent that some models need to comply with existing laws and regulations related to the rental car industry. In particular, some peer-to-peer companies resist the application of those rules to their operations and argue that they are merely a technology company providing a platform to connect drivers with cars, and therefore are not subject to taxes, licensing requirements, or consumer protection laws governing incumbent rental companies.⁷⁸ However, others urge that if all mobility operators are offering essentially the same services (use of a non-owned vehicle), then it seems more accurate to consider all mobility operators in the same business – mobility. As the New York Supreme Court noted in the Zipcar cases discussed in Part B, the services provided by a carsharing company (Zipcar) served a similar consumer need and were “little different from ‘traditional rental car’ companies, notwithstanding marketing statements that contrast it with those companies.”⁷⁹

Setting aside those differences, there is some value to the mobility industry as a whole in consistent laws and regulations on some issues across the country and, of course, in protecting the safety and privacy of users. What

77. *See id.*

78. *See* Turo, Inc. v. City of Los Angeles, 2019 U.S. Dist. LEXIS 6532 (C.D. Cal. 2019) (dismissing as unripe a peer-to-peer platform provider’s claim that it is immune from liability for state law violations under Section 230 of the Communications Decency Act and denying motions to dismiss claims that the City of Los Angeles misclassified the peer-to-peer platform provider as a rental company).

79. *See* Minto v. Zipcar New York, Inc., No. 15401/09; *see also* Orly Lobel, “*The Law of the Platform*,” 101 Minn. L. Rev. 87, 112 (November 2016).

follows are a few recommendations that could form the basis for a set of uniform laws applicable to the mobility industry.⁸⁰

A. *Standardized Terms and Definitions*

Mobility operators, consumers, and regulators would benefit if federal and state laws used more consistent definitions for key terms and phrases. The definitions of the different platforms at the beginning of this article could be a starting point (which we repeat here without citations for ease of reference):

- “*Carsharing*” – a membership-based service that provides car access without ownership. Carsharing is mobility on demand, where members pay only for the time and/or distance they drive.
- “*Peer-to-Peer Carsharing or Rentals*” – the sharing of privately-owned vehicles in which companies, typically for a percentage of the rental charge, broker transactions among car owners and renters by providing the organizational resources needed to make the exchange possible (i.e., online platform, customer support, driver and motor vehicle safety certification, auto insurance and technology).
- “*Subscriptions*” – a service that, for a recurring fee allows a participating person exclusive use of a motor vehicle owned by an entity that controls or contracts with the subscription service. Typically, the subscriber is allowed to exchange the vehicle for a different type of vehicle with a certain amount of notice to the operator. The term of the subscription can vary, but should be subject to a periodic renewal by the subscriber (user).
- “*Vehicle Rental*” – a customer receives use of a vehicle in exchange for a fee or other consideration pursuant to a contract for an initial period of time less than 30 days.
- “*Mobility Operators*” – any person or entity that provides access to a vehicle to another person whether by an in-person transaction, an app-based or online platform, or any other means and whether the entity providing the access is the owner, lessee, beneficial owner, or bailee of the vehicle or merely facilitates the transaction.

In addition, standard definitions for the terms, “rental” and “rental company” would provide additional clarity for all mobility operators, and to

80. The authors are unaware of any existing model laws for car rental or the broader mobility industry. Although the National Association of Attorneys General issued the NAAG Report on car rental practices and “guidelines” in 1989, those Guidelines were not intended to serve as model and uniform law, but rather guidance on compliance with state unfair and deceptive trade practice laws. *See supra* note 8. In addition, the NAAG Guidelines are now 30 years’ old and somewhat outdated in light of the changes in technology and the evolution in the mobility industry discussed in this article.

the extent feasible, the more narrow term “rental” and its derivatives should be replaced with “mobility.”

“Rental” should focus on the service provided and be distinguished from long-term leases (which are subject to additional laws and regulations, including federal Regulation M). As a starting point, “rental” could be defined as the right to use and possess a vehicle in exchange for a fee or other consideration for an initial period of less than 90 days.⁸¹

“Rental Company” or “Mobility Company” should be defined as “any corporation, sole proprietorship or other entity or person who is engaged in the business of facilitating vehicle rental transactions.”⁸² A *de minimis* exemption for *individuals* renting private vehicles through a peer-to-peer or other private vehicle program could apply (*e.g.*, no more than X vehicles available for rent during a 12-month period).⁸³

A more uniform definition for “Rental Vehicle” or “Mobility Vehicle” also could produce more consistency across or even within states since some existing vehicle rental laws currently apply only to “private passenger vehicles,” while others apply more broadly to “motor vehicles.” Before proposing model language, however, we believe that regulators and industry experts need to consider several important (and somewhat thorny) issues.

For example, consider the rental of a pick-up truck to a contractor for use at a construction site. If a law applies only to rentals of “private passenger vehicles,” then the pick-up truck likely would not be subject to the law. On the other hand, if the law applies more broadly to “motor vehicles,” then the pick-up truck rental likely would be covered. The policy argument for covering our hypothetical pick-up truck rental may be weaker for consumer protection statutes, like required disclosures for sales of damage waiver or child safety seat rules. On the other hand, using a broader definition of “rental vehicle,” which would include the hypothetical pick-up truck, may better serve the general public policy goals of the Graves Amendment, the Safe Rental Act, and laws related to liability and insurance.

B. *Use of GPS and Telematics Technology*

The use of this technology for locating and monitoring vehicles for a legitimate business, operational, maintenance or safety purpose should be permitted. Those states that have restricted the use of GPS tracking have done so to protect the privacy of renters. Operators in states where there is

81. Although the definition of “consumer lease” is a transaction for a period exceeding 4 months, we note that other federal laws, such as Graham-Leach-Bliley impose additional requirements on leases of at least 90 days. *See* 12 C.F.R. § 213.2(e)(1) (2011); 16 C.F.R. § 313.3(k)(2)(iii) (2000).

82. *See, e.g.*, H.B. 2762 (W. Va. 2019).

83. *See id.*

no statutory limitation often provide a full disclosure to users that vehicle location and other data may be monitored. We believe there are certain mobility models and circumstances where location and other data should be monitored – as long as there is full disclosure. For example, a free-floating carshare operator should be allowed to monitor vehicle location for the purpose of serving anticipated demand. Similarly, an operator of an EV fleet should be allowed to monitor a vehicle’s battery charge and location to ensure an adequate charge level for the next user. Finally, mobility operators should have the right to use GPS or other technology to locate vehicles that have not been returned on time or when the operator otherwise has reason to believe that the vehicle has been abandoned or stolen, or to track mileage driven or fuel used for purposes of charging associated fees (provided there is appropriate notice and full disclosure to the user). On a broader scale, uniform regulation that permits some vehicle monitoring, as long as done in a manner to protect the privacy of a user and with full disclosure, should be adopted across all mobility platforms.

C. *Vehicle Access*

Provided there is an initial verification of a driver’s license, a mobility operator that either allows access to vehicles without in-person contact or does not require signing of a rental agreement at the time of rental should be subject to a provision similar to the following:

If a motor vehicle rental company or private vehicle rental program provider facilitates rentals via digital electronic, or other means that allow customers to obtain possession of a vehicle without in person contact with an agent or employee of the provider, or where the renter does not execute a rental contract at the time of rental, the provider shall be deemed to have met all obligations to physically inspect and compare a renter’s driver license pursuant to this article when such provider:

- i. At the time a renter enrolls, or any time thereafter, in a membership program, master agreement, or other means of establishing use of the provider’s services, requires verification that the renter is a licensed driver; or
- ii. Prior to the renter taking possession of the rental vehicle, the provider requires documentation that verifies the renter’s identity.⁸⁴

D. *Graves Amendment*

The Graves Amendment, by its language, applies to the business of “renting or leasing” vehicles. A few state court cases have confirmed that

84. *Id.*

Graves applies to carsharing. That application should be expressly adopted on a national basis and extended to all mobility models that involve a vehicle “owner’s” grant of the right to possess and use a vehicle in exchange for a fee or other consideration (including loaner vehicles).

Similarly, subscription programs which operate somewhere between incumbent car rental and vehicle leasing programs, at their core involve the short-term use of a vehicle in exchange for payment. Provided the subscription program complies with state rental car laws or applicable subscription legislation, the operation should be subject to the Graves Amendment. For that reason, we recommend that state legislatures either refine the Indiana/North Carolina definition of “subscription” to clarify that the model is a rental or lease for purposes of the Graves Amendment or simply state that subscription models are exempt from state vicarious liability laws based on vehicle ownership.

Peer-to-Peer platforms raise some issues when considering the Graves Amendment. On the one hand, an end-user is paying money to use a vehicle that belongs to someone else much like an incumbent rental car operation. On the other hand, a true “peer”-or individual- who occasionally lists his or her personal vehicle for rent when not using it may not really be in the business of renting cars. Much of the recent Peer-to-Peer legislation addresses this and related issues. Our suggestion is that Peer-to-Peer be subject to express state legislation and that such legislation impose sufficient operational, safety and economic obligations on operators, including required insurance coverage. In the absence of Peer-to-Peer legislation, an operator should have to comply with existing state rental car regulations especially if the operator somehow claims it is subject to the Graves Amendment.

E. Americans with Disabilities Act

Compliance with and exceptions to the ADA is complex. However, we propose that all mobility operators with fleets above a certain size must provide adaptive driving devices for selected vehicles, as long as the customer provides advance notice (which may vary depending upon the operator’s location and fleet size) and the adaptive driving devices are compatible with vehicle design and do not interfere with the vehicle’s airbag or other safety systems.

F. Disclosure Requirements

All operators must provide sufficient disclosures to users regarding the following matters: fees, charges, damage waivers, added insurance, and vehicle technology. However, typical requirements in the existing state rental laws, including specified placement and font size for disclosures and

in-person acknowledgment of receipt of those disclosures, simply do not contemplate modern technology, including digital agreements and remote access. We propose the 2018 amendment to the New York vehicle rental law as the model for addressing required disclosures and formatting in electronic and/or master, membership agreements. That amendment provides:

- (a) Notwithstanding any other provision of this section, any notice or disclosure of general applicability required to be provided, delivered, posted, or otherwise made available by a rental vehicle company pursuant to this section shall also be deemed timely and effectively made where such notice or disclosure is:
 - (i) provided or delivered electronically to the renter at or before the time required provided that such renter has given his or her expressed consent to receive such notice or disclosure in such a manner; or
 - (ii) included in a member or master agreement in effect at the time of rental.
- (b) . . . Notices and disclosures made electronically pursuant to this subdivision shall be exempt from any placement or stylistic display requirements, including but not limited to location, font size, typeset, or other specifically stated description; provided such disclosure is made in a clear and conspicuous manner.⁸⁵

G. *Other Issues*

There are, of course, other issues the industry can consider. For example, some states (New York and Michigan) have laws requiring rental car companies to make vehicles available to younger drivers, subject to certain conditions. Some uniformity on the ability of mobility operators to set minimum age requirements would reduce risk. Additionally, there are inconsistent laws across the country regarding the amount of time a rental car company must wait after a renter fails to return a car before it can notify law enforcement. Appropriate and consistent rules as to when an operator can start to recover a valuable (and mobile) asset would help promote growth in the industry.

The mobility revolution involves a number of different players with disparate and sometimes competing interests. Not all the participants will agree on all the issues, however, we offer the above suggestions to encourage discussion and to advance some level of consistency on a few points.

85. N.Y. Gen. Bus Law § 396-z(16).