

The Electric Motor Scooter - A New Horizon for Product Liability Litigation

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Spring is right around the corner and if you find yourself in and around central Ohio or a major metropolitan area it is impossible to ignore the influx of electric motorized scooters dotting the cityscape. Lime (formerly LimeBike) and Bird are the two-flagship motorized electric scooter companies which dominate the national market share. Manufactured by Segway, Inc. and Xiamoi USA, respectively, Lime and Bird scooters are the newest kids on the block in the Sharing Economy¹ movement and indications are they are here to stay.

Background

Arriving on the central Ohio scene in the summer of 2018, the rise in popularity of the scooters both locally and nationally, is grounded in their ease of use and affordability. The consumer downloads an app on their smart phone, inserts credit card information, uses the app to scan a bar code on the scooter and begin the trip. Generally, a rental cost \$1.00 to start and 15 cents per mile thereafter. Typically, the electric scooters are regulated to a top speed of 15 miles per hour but may exceed this speed if on a downhill grade. After reaching your final destination, you park the scooter in a public space, tap your app and walk away. Lime requires the user to take a picture of the scooter parked in an upright position before ending your ride.

At the behest of Columbus, Ohio Mayor Andrew Ginther, the City of Columbus Department of Public Service promulgated rules and regulations that require any operator of “shared mobility devices” to share a significant amount of data with the City of Columbus including daily and monthly usage summaries. From July through December 2018 Bird reported over 287,000 total rides in Columbus. Lime reported over 126,000 rides.^{2 3} These figures exclude rides on The Ohio State University’s campus as they are not subject to the disclosure requirements. The total combined rides for Lime and Bird scooters would clearly surpass the 500,000 mark in this six-month period if The Ohio State University figures were included in the overall computation. In short, this niche market is exploding.

Potential Basis for Recovery

Despite their popularity, the electric motorized scooter sector is devoid of any real parameters relative to product safety and regulation. This void, coupled with the popularity of the scooters, yields a breeding ground of potential product liability litigation. Below is an illustrative list of potential product defects which will may lead to litigation:

- **Brake Malfunction:** Malfunctioning brakes on electric motorized scooters that can reach speeds in excess of 15 mph can clearly lead to severe injury.

¹ “Shared” or “Sharing Economy” describes an economy based on the sharing of goods and services.

<https://www.forbes.com/sites/bernardmarr/2016/10/21/the-sharing-economy-what-it-is-examples-and-how-big-data-platforms-and-algorithms-fuel/#5d8089bf7c5a>

² Lime only began sharing data after legislation was passed in September of 2018 by the Columbus City Counsel, truncating the its reporting period as compared to Bird.

³ <https://www.columbusunderground.com/scooter-numbers-bw1>

- **Bad Batteries:** Overheating batteries which have potential to catch on fire.
- **Fault in Electronics:** If not properly maintained, software and hardware issues can lead to sudden scooter malfunction, which in turn can lead to injury.
- **Tire Issues:** Improperly filled or flat tires may cause loss of control.
- **Defective Throttle:** Throttle may stick leading to operator being unable to stop.
- **Damaged Footboard:** Cracked footboards lead to instability of the scooter potentially causing operator to lose control due to sudden imbalance.
- **Broken or Bent Handlebars:** Often times scooters are found lying on the ground due to forces of nature or improper parking. This can potentially lead to damaged handle bars resulting in handling difficulties for the operator.
- **Failure to Warn:** Failure to warn of hidden dangers associated with the use of these unique electric motorized scooters.

Lime has provided some insight as to some equipment malfunctions with its scooters. In October of 2018, The Washington Post reported that Lime had pulled 2,000 scooters out of active use due to battery malfunction⁴. From Lime’s perspective, the primary concern centered on the fact that a manufacturing defect in the batteries “could result in the battery smoldering, or in some cases catching fire.”⁵ With respect to this specific battery defect Lime indicated this specific scooter was manufactured by Segway Ninebot.⁶ The Washington Post also reports that a Lime spokesman indicated that it is possible for the scooters to “crack or break if ridden off a curb at a high speed.”⁷

Bird Attempts to Protect its Nest

As expected, Bird employs a strongly worded Rental Agreement, Waiver of Liability and Release in an effort to thwart potential product claims. Specifically, the waiver states all riders in exchange for the use of “Bird Services, [v]ehicles, and other equipment...[,] agree[] to fully release, indemnify, and hold harmless Bird . . . from liability for all ‘Claims’ arising out of or in any way related to . . . use of Bird Services, [v]ehicles, or related equipment . . .[,] except for [c]laims based on . . . gross negligence or willful misconduct.”⁸ The waiver goes further, “as to the Rider’s use of any Bird Services, Vehicles or related equipment, Bird and all other Release Persons disclaim all express and implied warranties, including warranties of merchantability and fitness for a particular purpose.”⁹

In addition to the wavier and release provisions above, Bird institutes a binding arbitration provision for those claims which are related to the use of the electric motorized scooters in an obvious attempt to shutter court house doors to would be plaintiffs¹⁰. Moreover, the Rental Agreement, Liability Waiver and Release includes a class action waiver with respect to any claims brought in arbitration, “YOU AND BIRD AGREE THAT EACH MAY BRING CLAIMS AGAINST THE OTHER ONLY IN YOUR OR ITS INDIVIDUAL

⁴ https://www.washingtonpost.com/technology/2018/10/30/electric-scooter-giant-lime-recalled-scooters-amid-fears-that-some-could-catch-fire/?utm_term=.5e996fb5ea10

⁵ *Id.*

⁶ Ninebot is a company headquartered in Beijing, China. Acquired in 2015 by Segway, Inc., its investors include Xaiomi, Corp.

⁷ *Id.* at fn. 4.

⁸ <https://www.bird.co/agreement/>

⁹ *Id.*

¹⁰ *Id.*

CAPACITY, AND NOT AS A PLAINTIFF OR CLASS MEMBER IN ANY PURPORTED CLASS OR REPRESENTATIVE PROCEEDING.¹¹”

There is an arbitration and class action opt-out provision in the Rental Agreement, Liability Waiver and Release. However, in order to opt-out one must send written notice of your decision to opt-out to Bird Rides, Inc. in Santa Monica, California within 30 days of the effective date or the first use of the service. Not exactly a user friendly opt-out provision.

Despite the terms of the ostensibly iron clad terms of Bird’s Rental Agreement, Waiver of Liability and Release a class action was filed in the Los Angeles County Superior Court in October of 2018. This particular litigation is styled *Borgia v. Bird Rides, Inc. et al.*, Superior Ct. State of Cal., Cnty. of Los Angeles, Case No. 18-STCV-0146. Naming Bird, Lime and manufacturers Xiaomi USA, Inc. and Segway, Inc. amongst others as defendants, this class actions sounds in strict products liability, negligence, negligence *per se*, breach of implied warranties of fitness and merchantability. The allegations center on manufacturing defects, design defects and inadequate user warnings.

At present, this case is fresh off remand from the United States District Court of Central California. As a result, its procedural posture is in its infant stages. Nevertheless, many hurdles remain for the Plaintiffs in this action. Notwithstanding the terms of Bird’s Rental Agreement, Liability Waiver and Release, the reality of proving up this type of product claim appears to be an uphill battle (not unlike most products liability claims). For instance, in many cases scooters are left at the scene where the injuries were suffered leaving a would be plaintiff without physical evidence of the defect which led to the injury. Further, establishing the proximate cause link is troublesome insofar that differentiating between manufacture/design defect and user error could present significant problems.

As the calendar flips to spring, electric motorized scooters will again become a constant in everyday life for many city dwellers. What is equally as clear is that product liability claims against Bird, Lime and their manufacturers remain untested and fraught with difficulties. Nevertheless, given the popularity of these devices, the safety of the consumer should be at the forefront of operators like Lime and Bird as well as the manufacturers they utilize to put these scooters to market. It is up us to hold them accountable.

¹¹ *Id.*