

Uber Defense Falls Flat in Driver Rape Case

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U.S. District Judge Susan Illston, Northern District of California

Jason Doiy / The Recorder

SAN FRANCISCO — A federal judge caught lawyers for Uber Technologies Inc. by surprise on Friday, digging up precedent from the mid-20th century that could undercut a key part of its defense in a sexual assault case.

The ride-hailing company is facing a lawsuit by two unnamed women who say they were sexually assaulted by Uber drivers in 2015. One of Uber's chief arguments is that the drivers aren't employees, and thus it cannot be held liable for their conduct.

Both sides claim to have case law on their side. But at a hearing Friday, U.S. District Judge Susan Illston of the Northern District of California cited a 1956 California appeals court decision that neither side had argued—or even appeared to be aware of. *Berger v. Southern Pacific Co.* would seemingly favor the plaintiffs. The decision found that The Pullman Company, a passenger rail service provider, was liable for the rape of a passenger by one of its porters because it was a "common carrier."

"For me, that's the starting point," Illston said, adding that it showed the nature of an employment relationship does not necessarily get a company "off the hook." Illston indicated that she is likely to let the bulk of the claims against Uber go forward.

Central to the *Berger* decision is the idea that as a "common carrier," Pullman was responsible for a higher standard of care under law, and liable for the actions of individuals carrying out that duty. Uber contends that the label "common carrier" does not apply to its business model. But if it loses on that point, the case could be detrimental to its attempt to shake off liability.

The [allegations](#) against the Uber drivers in question are serious. One of the alleged victims, "Jane Doe 1," claims that Uber driver Abderrahim Dakiri began groping her and kissing her during a ride late at night on Feb. 8, 2015, in Boston. She says he then pulled over the car and climbed on top of her, but that she managed to escape.

The woman identified as "Jane Doe 2" in the complaint claims to have been "viciously" raped by Uber driver Patrick Aiello on August 9, 2015, in Charleston, South Carolina. Aiello allegedly drove the victim to a secluded parking lot after dropping off her friend.

Uber's lawyer, Josh Cohen of Clarence Dyer & Cohen, argued Friday that the "common carrier" label does not apply because the company arranges the transportation of people from one place to another—similar to a broker—but is not actually responsible for providing the transportation.

Plaintiffs attorney Jeanne Christensen of Wigdor said that to the contrary, when Uber drivers are using the company's app, the company is responsible for the safe care of their passengers.

Christensen, however, seemed to concede that this is not the case when drivers are not actively driving for Uber. That could be important for one of the unnamed plaintiffs, "Jane Doe 2," as it's disputed whether the ride during which he allegedly raped her was initiated through the Uber app.

Cohen tried to poke holes in Christensen's theory. "The notion that Uber is sometimes a common carrier and not a common carrier at other times I think exposes the flaw in the argument," he said.

"It could make sense," Illston shot back. The common carrier statutes were drafted at a time when Uber's business model did not exist, but that doesn't necessarily mean the company completely falls outside their scope, she said.

As in the various other cases against Uber, the plaintiffs in the sexual assault case are arguing that the accused drivers are Uber employees, while the company argues they are independent contractors. If the plaintiffs fail on this issue, the "common carrier" argument could serve as a backstop.

The suit accuses Uber of negligence and fraud, and seeks to hold the company liable for assault, battery, false imprisonment and intentional infliction of emotional distress by the drivers. The fraud claims broadly hinge on the argument that the company misrepresented its ability to ensure that passengers are kept safe during a trip.

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