Sorry, but Uber Isn't Conspiring to Fix Ridesharing Prices

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Uber CEO Travis Kalanick faces a lawsuit for violating federal antitrust law by supposedly conspiring with the company's hundreds of thousands of drivers to drive up prices. Though Kalanick filed a motion to dismiss the case, and in a win for conspiracy theorists everywhere, U.S. District Judge Jed Rakoff allowed the suit to move forward.

The class-action lawsuit seeks to establish a nationwide plaintiff class of Uber riders who paid extra because of the company's "surge pricing" mechanism. Surge is a form of dynamic pricing that increases the rate for Uber rides when demand exceeds supply. Lyft, Uber's main competitor, has a similar dynamic pricing tool known as "prime time."

It is important to note that Judge Rakoff's decision does not say that Uber is engaging in anticompetitive behavior, but that the plaintiff has made a prima facie case so that moving to the next phase of the trial process is appropriate. Indeed, all Rakoff's opinion says is that the plaintiff has met the low standard of "plausibility."

However, the plaintiff in this case, Spencer Meyer (no relation to the authors, who are also unrelated), alleges that by signing up to use Uber's pricing algorithm, Uber drivers—who are categorized as independent contractors—are engaging in a massive, global conspiracy to fix the price of mobile ride sharing services. To Meyer, "each and every driver-partner joined a single 'horizontal' agreement—that is, an agreement between direct competitors—to fix prices when using the Uber App."

Under antitrust common law and the Sherman Antitrust Act, a "horizontal" agreement to fix prices between competitors (such as all steel producers agreeing to sell their product for the same price) is *per se*, or inherently, illegal—a category that requires invalidation of the agreement regardless of its "reasonableness" as a restraint on trade.

Yet, the Supreme Court has been retreating from a hard *per se* rule since 1979, instead choosing to examine the reasonableness of the trade restraint. The Court has declined to apply *per* *se* treatment to innovative business arrangements when it "ha[s] never examined a practice like this one before," (such as Uber's business model) and directed lower courts to examine the market conditions' reasonableness in such cases, applying the full "rule of reason."

Moreover, it is easy to argue that Uber's price structure is not a "naked price restraint," but an ancillary restraint to the agreement between Uber and its drivers that the company will provide a platform to connect them with riders. Ancillary restraints are not *per se* illegal, and are analyzed under the "rule of reason." This point about what rule applies is critical to Uber's case. As long as the *per se* rule does not apply, the court must actually examine market conditions and apply reason to its decision.

Since the market conditions created by Uber's pricing are relevant for the lawsuit, as Uber's business model is clearly innovative, it is important to realize the benefits of dynamic pricing. This policy not only benefits drivers, it also benefits customers. Because of dynamic pricing, people can usually get an Uber or Lyft within ten minutes, even in times of high demand. It is simple economics.

Dynamic pricing encourages people who do not really need a ride to postpone their trip or take another form of transportation, lowering demand. At the same time, the increased earning incentive gets more drivers on the road. Far fewer drivers would want to risk working during a snowstorm, or late at night when they could be asleep at home, if the option for higher fares was off the table.

In the case complaint, Meyer defines Uber's marketplace as the "mobile app-generated ride-share service [market]," with a "relevant sub-market of Uber car service." He needs this self-serving definition to sustain his claim that competitors in the market are agreeing to a price-fixing scheme.

Meyer claims that the relevant market is Uber and Lyft—and completely ignores competition and the effect of other ridesharing services, traditional taxi services, private car ownership, and public transit. Uber correctly maintains that Meyer's "market definition is facially inadequate to satisfy a rule of reason analysis."

For example, there was an average of 150,000 daily Uber rides in January 2015 in New York City. Out of the total daily rides in New York City from yellow taxis (360,000), Boro "green" taxis (68,000), Lyft (11,000), city buses (2,500,000), and the subway (5,600,000), Uber holds a market share that is under two percent—and this ignores private car ownership. A market share under two percent is a far cry from monopoly status and shows how difficult it would be for Uber to implement an effective price-fixing scheme.

This question was not substantively decided by Judge Rakoff, and remains an open issue in the case. It is likely that at trial or on appeal, a court will find for Uber that "driver-partners, traditional taxi services, and public transit are reasonably interchangeable such that the change in price for one service would affect demand in the others." Thus, the relevant market is not "mobile app-generated ride-share service[s]," but transportation services generally.

There is also a significant factual question that remains over whether there even is an agreement to fix prices considering that Uber drivers "are free to provide competing services as taxi drivers or by using competing platforms, and they frequently do." Simply put, it is difficult to prove a conspiratorial agreement to fix prices if each "co-conspirator" is free to switch to another ridesharing application's pricing mechanism or to provide traditional taxi services that compete with Uber itself. This means that Uber may not even have the concert of action required for a conspiracy when its own co-conspirators can and do engage in actions directly affecting the allegedly "fixed" price.

That argument is reinforced by Uber's business model: The drivers are independent while Uber merely provides a connection app. Drivers are free to use other apps or provide traditional services, and Uber is competing for drivers' business.

Recently released court documents from a settled class-action employment lawsuit against Lyft reveal that over half of the company's drivers drove with another ridesharing company. Out of these drivers, 83 percent drove with another ridesharing company at the same time that they were driving with Lyft. There is no comparable public data on Uber drivers, but it is likely that a similarly large percentage switch between various ridesharing platforms, and perhaps also taxis, while working—and Uber has asserted as much in court filings.

Dynamic pricing is critical to ridesharing's ability to provide transportation options whenever they are needed. Passengers value the ability to get rides promptly, and the benefits of pricing that adjusts with real-world supply and demand cannot be overlooked. Unless we want to go back to the era of waiting (often fruitlessly) for an open for-hire vehicle, dynamic pricing must be maintained. Sorry, conspiracy theorists, but there is nothing to uncover here.

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