

A photograph of a bedroom with a stone wall and a bed. The bed has white pillows and a patterned blanket. The room is lit with warm, ambient lighting.

AirBNB

A (Soon to Be) Victim of Its Own Success

By Andrew L. McNichol, Esq.

Introduction

When most people plan a trip, the first type of accommodation they think of is a hotel. The traveler may consider the hotel's price, amenities, and location and might research hotel reviews. A new sector of the tourism industry has recently emerged and challenged the traditional model: the option of staying in a stranger's home. While some may find this new type of accommodation disconcerting and creepy, many more have found it convenient, practical, and efficient. It is hard to argue with the results.

As the nascent "sharing economy" soars past its infancy, AirBNB (short for Air Bed 'n' Breakfast), Uber, WeWork, and a host of similar services have gained popularity among consumers at an extraordinary rate. Technological advances have allowed suppliers of services to connect with consumers with little more than a few taps of their smartphones. These services take advantage of unused capacity—an empty seat in a car, a vacant room in a house, or an opening at the kitchen table. Uber, the "ride sharing service," was recently valued at \$50 billion—a higher valuation than 72 percent of the companies on the Fortune 500 list. AirBNB, the "room sharing service," is just six years old but offers more than 1 million rooms in over 190 countries—more rooms than hotel titans Marriott and Hilton.¹

AirBNB is a service that connects people looking to rent out their homes and those seeking travel accommodations. AirBNB "hosts," as the company refers to them, offer almost every type of overnight accommodation imaginable: apartments, condominiums, houses, inns, mansions, castles, tents, teepees, and even yachts. AirBNB hosts use the service to rent out their home or just a portion of it, such as a guest room, and guests can leave feedback about their stay through AirBNB's website or mobile app. Most AirBNB rentals are short term: between one and four nights.² Some hosts rent out their homes, or rooms in their homes, on a regular basis. Others may use AirBNB to supplement their incomes by renting their homes only while on vacation or when prices soar when a big event comes to town, like the Super Bowl or the Olympics.³ AirBNB guests enjoy the experience of living like a local and staying in the heart of the city, often at better rates than a hotel.

Despite the broad acceptance and support among its users, AirBNB may be a victim of its own success. AirBNB's emergence and success have also been met with hostility and push back. As both leisure and business travelers migrate from traditional hotels to AirBNB rentals, hotels across the world have understandably been upset by the competition created by AirBNB.⁴ Hotels argue that they are placed at a competitive disadvantage relative to AirBNB because they must comply with zoning codes, fire codes, insurance requirements, safety inspections, and city and state occupancy taxes, while AirBNB hosts are under no such obligations or, as a practical matter, do not comply with the applicable laws and regulations.

Regulatory Issues

As is typical of new technology, the application of existing laws and regulations results in an imperfect fit. Regulation of AirBNB is difficult, in part, because it is difficult to define what AirBNB is and is not. AirBNB is not a hotel or landlord. In fact, AirBNB does not own a single room. AirBNB is a marketplace, like eBay, that serves as a clearinghouse between room suppliers and room consumers. AirBNB processes payments and takes a cut of between 9 percent and 12 percent per transaction.⁵ AirBNB therefore does not fit neatly into the heavily regulated hotel and accommodation industry.

AirBNB itself is generally not liable for the actions or postings of its users thanks to protections granted by section 230(c) of the Communication Decency Act.⁶ Section 230(c) provides that “no provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider. . . . No cause of action may be brought and no liability may be imposed under any state or local law that is inconsistent with this section.”⁷ Under section 230(c), a state, municipality, or private party cannot “sue the messenger” for postings that are in violation of local, state, or federal law.⁸ However, the immunity granted under section 230(c) applies only if the website is not responsible, in whole or in part, for the creation or development of the offending content.⁹ Although some have argued that AirBNB and similar services are liable for the violations of their users because they are facilitators rather than passive messengers, courts have generally been unreceptive to such claims.¹⁰ With lawsuits against AirBNB out of the question, enforcement actions for violations of state or local law have generally been filed against the individual AirBNB hosts rather than AirBNB itself. This presents a rather tedious task, given the large number of hosts.¹¹

For example, residential property rentals of fewer than 30 days are prohibited under many state laws and city codes.¹² Short-term guests are unlikely to treat the premises and the common areas with the same respect as a long-term tenant

because they have no risk of eviction and no financial stake in the premises beyond a security deposit, if any. Neighbors also complain that short-term rentals create noise, traffic, parking problems, and security and safety concerns. Short-term rentals also limit the supply of full-time housing and may drive up housing prices and rental rates.

To the extent short-term rentals are not barred by state law or city code, short-term rentals are generally subject to additional regulations and taxes. For example, under New York law, “transient residences [rentals of fewer than 30 days when the tenant is not present] must observe significantly higher safety standards than those of non-transient residences.”¹³ Short-term guests are less familiar with their surroundings such as open hazards and fire evacuation procedures than longer-term tenants.

Evading the Short-Term Rental Definition

One loophole savvy AirBNB hosts can use to get around laws prohibiting the short-term rental of residential housing is to rent only a portion of their home to guests. Generally, a person who hosts overnight guests, even for profit, is not considered to be re-renting the premises as long as the tenant himself simultaneously occupies the premises.¹⁴ Thus, AirBNB hosts who rent out an extra bedroom or a guest house while still residing in the home do not violate the law. Alternatively, renting out a home for more than 30 days is no longer a short-term rental and is not subject to state or city prohibitions against short-term rentals.

Taxes

Cities and states are also struggling to deal with the financial impact of AirBNB. Most large cities impose an occupancy tax on short-term rentals. Occupancy taxes are usually charged by hotels to their guests and then remitted to the city. AirBNB “encourages” its hosts to familiarize themselves with state and local laws, to collect any applicable

occupancy tax from their guests, and to remit the occupancy tax to the city or state. But a suggested tax is no tax at all, and cities have complained that few AirBNB hosts actually comply with the occupancy tax.¹⁵

AirBNB fires back that its members stimulate local economies by spending hundreds of millions of dollars at local businesses during their stays.¹⁶ While this is true, it offers cold comfort to cities facing declining revenue. Occupancy taxes are direct revenue to the city, while only a fraction of the money AirBNB guests spend in the city reaches the city itself. Further, a traveler who stays at a hotel pays the occupancy tax and spends money in the local economy. The cost and difficulty of pursuing individual AirBNB hosts for unpaid occupancy taxes, and the inability to collect such taxes from AirBNB itself thanks to section 230(c), means that cities are unlikely to collect any of the taxes they are owed. A recent report from the New York Attorney General estimated that AirBNB hosts owed over \$33 million to New York City in occupancy taxes for the years 2010 through 2014.¹⁷

Rent Stabilization

Many AirBNB hosts are tenants themselves rather than the property owners. These hosts sublet their home out to guests for short periods of time. The re-rental of a property by a tenant creates several problems. First, many leases include a provision prohibiting the tenant from subletting or otherwise re-renting the property. A tenant who violates the lease may face penalties under the lease, including eviction. Second, numerous large cities, such as New York City, Boston, and Chicago, provide rent-stabilized housing. Rent-stabilized housing—generally apartments—is leased to tenants for well below the market rate. The purpose of such laws is to make housing affordable for tenants that would otherwise be prohibitively expensive. The law may grandfather certain tenants in at favorable rates or may place a cap on the monthly rent a property owner can charge.¹⁸ However, rent stabilization invites arbitrage. A tenant in a rent-stabilized unit may pay,

say, \$1,500 per month for a unit that would otherwise lease for over \$3,000 per month.¹⁹ That tenant could, in turn, re-rent out the room on AirBNB for the market rate or higher if rented out on a nightly basis.²⁰

It is an understatement to say that landlords have unfavorable views toward rent control and rent stabilization laws.²¹ Landlords of rent stabilized units generally must lease the unit below market rate and must offer the tenant an annual renewal of the lease. Until a tenant leaves or decides not to renew a lease, the landlord is forced to lease the unit below market price. In New York, as in most large cities, the use of a rent-stabilized apartment as a hotel room and profiting from it by the tenant is grounds for eviction because it undermines the purpose of the Rent Stabilization Code.²² If a landlord discovers that a tenant is re-renting the premises through AirBNB, the landlord can file an action to evict the tenant.

Conclusion

Would-be AirBNB hosts should review state and local laws and carefully consider the risks before renting their homes. An unruly guest may damage the home or use it for nefarious purposes.²³ While AirBNB offers up to \$1,000,000 in insurance to cover damage to a host's property caused by a guest, most homeowners' insurance policies exclude coverage to those using their homes as a business.²⁴ Although enforcement actions by states and cities have been infrequent so far, more regulation is almost certainly around the corner as incumbent businesses are further displaced.



Andrew L. McNichol is an associate in the litigation department at the Scottsdale, Arizona, office of Kutak Rock. He can be reached at 480-429-7110 or Andrew.McNichol@kutakrock.com.

Endnotes

- 1 Julia Weed, *Airbnb Grows to a Million Rooms, and Hotel Rivals Are Quiet, for Now*, NY TIMES (MAY 11, 2015), www.nytimes.com/2015/05/12/business/airbnb-grows-to-a-million-rooms-and-hotel-rivals-are-quiet-for-now.html?_r=0.
- 2 NEW YORK ATTORNEY GENERAL, *Report on Airbnb in the City* (October 2014), available at www.ag.ny.gov/pdfs/Airbnb%20report.pdf.
- 3 Brian Anthony Hernandez, *With Hotels Full, Airbnb Hosts Win Big During Super Bowl*, MASHABLE (JAN. 30, 2015), <http://mashable.com/2015/01/30/airbnb-super-bowl-phoenix-hotels/>.
- 4 *Airbnb Grows*, supra note 1.
- 5 *What Are Host Service Fees?*, AIRBNB, www.airbnb.com/support/article/63; *What Are Guest Service Fees?*, AIRBNB, <https://www.airbnb.com/support/article/104>.
- 6 Codified at 47 U.S.C. § 230(c).
- 7 *Id.*
- 8 *Chicago Lawyer's Committee for Civil Rights Under Law, Inc. v. Craigslist, Inc.*, 519 F.3d 666, 672 (7th Cir. 2008).
- 9 *Fair Housing Council of San Fernando Valley v. Roommates.com, LLC*, 521 F.3d 1157, 1162 (9th Cir. 2008) (en banc).
- 10 See *Craigslist, Inc.*, 519 F.3d at 672; Brett Logiurato, *This is the One Law Airbnb's Opponents Desperately Want to Change*, BUSINESS INSIDER (Apr. 22, 2014), www.businessinsider.com/airbnb-illegal-law-case-2014-4.
- 11 See *About Us*, AIRBNB, www.airbnb.com/about/about-us.
- 12 See *Report on Airbnb*, supra note 2; Stephen Fishman, *Legal Restrictions to Renting Your Home on Airbnb or Other Rental Services*, NOLO, www.nolo.com/legal-encyclopedia/legal-restrictions-renting-your-home-airbnb-other-rental-services.html.
- 13 *City of New York v. Smart Apartments LLC*, 959 N.Y.S.2d 890, 893 (N.Y. Sup. Ct. 2013).
- 14 See *Brookford, LLC v. Penratt*, 47 Misc.3d 723, 732 (N.Y. App. Div. 2014).
- 15 A small number of cities, and one state, have reached agreements with AirBNB pursuant to which AirBNB collects and

remits the tax on behalf of the host. See *What Local Taxes Apply to my Listing and How do I Collect Them?*, AIRBNB, www.airbnb.com/support/article/653.

- 16 *Airbnb Economic Impact*, AIRBNB, <http://blog.airbnb.com/economic-impact-airbnb/>.
- 17 *Report on Airbnb*, supra note 2.
- 18 *NYC Rent Guidelines*, NEW YORK CITY RENT GUIDELINES BOARD (Jan. 31, 2014), www.nycrgb.org/html/resources/faq/rentstab.html.
- 19 See generally *West 148 LLC v. Yonke*, 11 Misc.3d 40, 41 (N.Y. App. 2006).
- 20 *Id.*
- 21 See generally Christine Haughney, *Vanishing Treasure: The Rent-Regulated Apartment*, NY TIMES, www.nytimes.com/2010/05/25/nyregion/25appraisal.html.
- 22 *42nd & 10th Assoc. LLC v. Ikezi*, 2015 WL 731616, at *6 (N.Y. Civ. Ct. Feb. 17, 2015).
- 23 See Gwen Breistein, *Airbnb Hosts Return Home to Find Their House Completely Trashed by the Renters*, YAHOO! NEWS (Apr. 30, 2015), <http://news.yahoo.com/blogs/trending-now/airbnb-hosts-return-home-to-find-their-house-completely-trashed-by-the-renters-180632402.html>.
- 24 See *Home Protection Insurance*, AIRBNB, www.airbnb.com/host-protection-insurance; Stephen Fishman, *Insurance Questions When Renting Out Your Home Short Term*, NOLO, www.nolo.com/legal-encyclopedia/insurance-questions-when-renting-out-your-home-short-term.html.