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Exposing the Airbnb Black Market

BY MICHAEL A. PENSABENE | NOV. 18, 2015



ILLUSTRATION OF MICHAEL A. PENSABENE BY CHRIS MORRIS

IN THE OCT. 7, 2015 ISSUE OF COMMERCIAL OBSERVER, AN, article entitled “Con Air” discussed whether or not laws are actually being broken as a result of the short-term rentals booked on the Airbnb website, and whether or not the government should be more assertive in issuing violations. As a lawyer who has litigated Airbnb cases, I believe we need to take a step back to see the Airbnb problem from a broader perspective. Lawmakers must recognize that Airbnb is actively undermining public policy, frustrating urban planning and disrupting our communities.

Let us not be fooled. Airbnb users who have rooms to rent—known as “hosts”—are opportunists who are able to capitalize on this market because they happen to reside in areas where the short-term housing demand is high. While Airbnb collects a fee for the introduction, under its terms of use, it disclaims any responsibility for the transaction that it fostered. This practice is akin to “cyber-brokerage,” but without any regulation, accountability or consequences.

An Airbnb host whom I cross-examined at trial admitted that any meaningful background check on potential guests is impossible, because Airbnb does not publish the parties’ full identities in order to prevent the parties from going around Airbnb’s back to make deals. And if a host is a rent-regulated tenant in a hot neighborhood, they have little interest in publicizing that they might be violating lease and tenant laws.

Airbnb users may prefer to espouse notions of a “sharing economy” to the less flattering term “black-market,” but that debate is it just a matter of nomenclature; the underlying principle is constant.

New York City is probably one of the heaviest targeted Airbnb markets; it is also a city challenged by many public policy issues. For better or for worse, the city is deeply entrenched in a residential rent regulatory system.

The legislature intended rent-regulated tenants to receive the benefit of low rent to ensure that they would have permanent housing. However, Airbnb has now provided these tenants with a means to monetize their entitlement. As a landlord’s attorney, virtually all of my clients have experienced Airbnb use in their buildings, but none is more egregious than the use by rent-regulated tenants. By way of example, I represented the owner of a building with a rent-controlled tenant in possession of a four-bedroom apartment overlooking Central Park. The tenant lived in the apartment alone, but regularly rented all three additional bedrooms on Airbnb, making approximately ten thousand dollars per month in profit, while paying a mere fraction of that amount in rent. The tenant admitted that she used Airbnb to rent these rooms because she was otherwise unemployed and could not afford to keep the apartment. So faced with the choice of finding work and living within her means, which may have required her to move into a smaller apartment without a view of Central Park, or staying on Central Park by anonymously renting three rooms on Airbnb and making

substantial money, it is to no one’s surprise that she chose the latter.

Cases such as this now plague the rent regulation system in New York, and exacerbate the disparity in rent-regulated rent with the fair-market. These effects clearly undermine the public policy behind rent regulation.

Airbnb use in the fair-market has similar consequences, which, again, is driven by profiteering. I have often come across cases where an individual would rent many apartments in several different buildings, solely for the purpose of renting them as a host on Airbnb. In the aggregate, the host is not renting apartments, but is rather running a single, noncontiguous hotel business. The overnight rates the host charges may be less than ordinary hotels, but they are significantly higher than the pro-rata fair-market rent that the host is otherwise paying, resulting in huge margins and substantial profits.

In New York City, a certificate of occupancy to operate a hotel requires higher fire-safety standards than that of an ordinary residential building, including fire suppression, signage and egress requirements. Although the city has issued Airbnb hosts violations for egregious disregard of safety protocols, once the host is caught, he will simply surrender that one apartment and rent another elsewhere. It is a seamless transition, and the host is able to use a property owner’s building in a manner that the property owner would otherwise not be permitted to do himself, for higher profits.

This all undermines public policy in a multitude of ways: property owners are deprived of profits, resources and incentives to reinvest in the city’s housing, and the city and state are certainly at a net loss given the uncollected sales tax, hotel tax and occupancy tax assessments that guests would otherwise pay if they had stayed at a hotel. As a result, the lawful taxpayers are burdened with paying more tax in order to maintain tax revenues.

Aside from the disruption of numerous guests coming and going, the fact that these guests are unregulated presents a danger in and of itself. If Airbnb hosts are unable to vet their guests before they arrive—who may come from out of the country and speak little English—and Airbnb completely disavows itself of any responsibility for their stay, a family cannot feel safe living next to a residence used for Airbnb. In one of my cases, an Airbnb host was regularly renting four rooms in one building, which had a Montessori school on the first floor. Neither the school, nor the parents of the children in the school, were aware of this practice. The guests could have been registered sex offenders, pedophiles or other felons, and no one was the wiser.

This, at its root, is a black market, which needs to be closed. Until then, these economic motivators will continue to undermine public policy, frustrate urban planning and continue to disturb our communities. Studying the extent of this harm and the size of its ripple effects is immaterial, since more individuals are negatively affected by each instance of Airbnb use in an urban environment than the parties to the transaction themselves. We need a public policy on Airbnb itself.

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