The risks of being a host in the sharing-economy

A look at short-term rentals and the liability and public-policy problems they present

By Mark Hooshmand

The "sharing economy" is in full swing in the San Francisco Bay Area; indeed, in many countries around the world. Due to advances in technology, Web-based and mobile apps give individuals the ability to turn dormant investments like cars and houses into money-generating assets. These platforms and apps allow companies to monetize these assets and for consumers to operate businesses and generate income by sharing everything from rides and cars, to rooms and houses. While there are benefits to creating efficiencies in the marketplace, there are also significant risks and harms. These risks are too often ignored by the major players in the sharing-industry, many of whom appear willing to flaunt the law while embracing the mantra "it is better to beg forgiveness than to ask permission."

A prime example of the implementation of technology in the sharing economy is in the home-sharing sector. Companies such as AirBnB, Homeaway, VRBO and Flipkey have grown quickly by creating platforms to facilitate home-sharing while generating revenues from their customers and the communities in which they operate. In some instances, the companies appear to acknowledge that the short-term rentals they facilitate are not allowed in certain jurisdictions. Until recently some platforms even

refused to pay taxes that had been assessed against them. While cities like San Francisco have made efforts to regulate these businesses in recent months, the proposed regulations place the bulk of the responsibility for compliance and the penalties for violations on the individual host.

The risks of room-sharing

The risks created by transforming a home into a hotel can be significant. Some of the risks and effects include inadequate insurance coverage, nuisance, premises liability, and a host of community impacts. In other words, home-sharing can have a detrimental impact on the individual unit or building that is being "shared" as well as on other tenants, neighbors and on the neighborhood, city, and county in which the "home-sharing" takes place.

• Insurance

A major problem caused by renting one's home or apartment for short term rentals is that most insurance policies are invalidated by the use of residential property for a commercial purpose. The same is likely true of using one's car for Uber or Lyft.[1] This invalidation of insurance is not surprising since the operation of a commercial enterprise is contrary to the purpose of a homeowner's policy or renter's policy. These issues have been widely covered by news outlets like the *New York Times*, and the stories document tales of individual hosts that were either denied coverage or dropped by their insurance company altogether.[2]

While some of the platforms attempt to provide solutions in the form of secondary coverage, a review of their guidelines appears to make it very difficult to obtain any recovery in the event of serious damages. Typically coverage is only triggered for damages above and beyond the host's policy limits, or when the primary insurance provider denies the host's claim. It is still unclear whether the platforms' insurance policies will provide any coverage if and when a serious catastrophe happens such as fire, flood or other damage.

• Quiet enjoyment of residents and neighbors

Civil Code section 1955 provides:

> [O]ne who leases personal property must deliver it to the lessee, secure his or her quiet enjoyment thereof against all lawful claimants, put it into a condition fit for the purpose for which he or she leases it. . . .

Civil Code section 1927 provides:

> An agreement to let upon hire binds the letter to secure to the hirer the quiet possession of the thing hired during the term of the hiring, against all persons lawfully claiming the same.

Not only are landlords obligated to provide quiet enjoyment to their tenants, but the tenants who rent in a building have an expectation of quiet enjoyment. This expectation is based in part on the expected use of a limited number of residents. Renting out one's unit on a platform transforms a building into a hotel, with a constant stream of visitors with the attendant noise and disruption that accompanies them.

This renting is directly counter to the expectations and protections that long-term renters have of their homes. Additionally, in rent-controlled buildings, many of the renters are elderly or disabled and these disruptions have a greater effect on them. As with every situation, there is a balancing, and home sharers are not entitled to place their interest of making money ahead of all others who have an interest in living in an apartment building rather than a hotel.

•The inherent conflict with rent control

Short-term rentals in residential units often run afoul of long-standing zoning ordinances and laws intended to preserve affordable housing and other neighborhood characteristics. In many cities around the country, short-term rentals of residential units are prohibited. For instance, in San Francisco and New York it is generally illegal to rent a residential unit for tourist or transient use. The purpose of these laws is to protect one of these cities' most scarce resources – residential housing.

The short-term rental market, however, is lucrative and often more appealing to landlords than renting to long-term tenants who are entitled to rent control, just-cause evictions, and relocation benefits. As a result many hosts choose to rent to short-term visitors rather than to tenants on a long-term basis. This increasingly common decision results in the removal of these units from the housing stock. Many of these units are in rent-controlled apartments which creates further harm since the units are no longer available to lower- and moderate-income individuals.

The loss of affordable housing stock could not have come at a worse time as rental prices are at their historical high in the Bay Area. A recent position paper by the San Francisco Apartment Association (SFAA) put it starkly: "In 2013, we lost more housing to travel websites than to every other type of eviction combined."[3] Much is being done by local governments to address these problems and the platforms are being asked to assist in the process. Unfortunately, most have chosen to stay silent on their broader impact on local communities, while significant housing stock continues to be lost.

As discussed below, San Francisco recently passed an amendment to the Administrative Code, dubbed the "AirBnB Law," that allows limited rentals, but places the bulk of the tax and legal responsibility on hosts. Worse yet, the law has no real enforcement mechanism, while allowing the hosting platforms to continue to collect revenue streams from short-term rentals that violate the law.

• ***Nuisance***

A public or private nuisance involves a substantial and unreasonable interference. (*People ex rel. Gallo v. Acuna* (1997) 14 Cal.4th 1090, 1105.) What constitutes nuisance cannot be determined by any fixed general rule; it depends upon the facts of each particular case, such as nature of the use, the extent and frequency of the injury, the effect upon the enjoyment of health and property, and other similar factors. The gravity of the harm must be weighed against the utility of the defendant's conduct. (*Shields v. Wondries* (1957) 154 Cal.App.2d 249, 255.) Liability for nuisance does not hinge on whether the defendant owns, possesses, or controls the property, nor on whether they are in a position to abate the nuisance; the critical question is whether the defendant created or assisted in the creation of the nuisance. (*County of Santa Clara v. Atlantic Richfield Co.* (App. 6 Dist. 2006) 137 Cal.App.4th 292. rehearing denied, review denied.)

Many local and state rules prohibit the operation of a business in contravention of zoning and planning codes.

Operating a business without a proper permit in a prohibited zone could be considered negligence per se. Whether the use of one's apartment or home as a short-term rental constitutes a nuisance is actively being analyzed and litigated. At first glance, changing the use of an apartment or home into a commercial enterprise could constitute both a private and public nuisance due to the effect on the other occupants and neighbors. Lawsuits have been filed in San Francisco concerning this very issue.

• ***Safety concerns***

Short-term rentals can create several safety concerns for property owners and neighbors. For example, short-term renters are often unknown and barely screened. These short-term renters can create nuisances, inflict injuries, and damage property. In many instances, those renting out the units throw parties and invite additional guests. With a constant stream of additional individuals in the building who do not have any long-term ties to the unit, break-ins and other thefts may occur.

Additionally, in states that retain the traditional common law division of visitors to land invitee, licensee, and trespasser, the short-term renters are likely considered "invitees" to the property, which implies that the owner or possessor has taken reasonable steps to assure the safety of the premises. It is often uncertain, however, whether the premises are actually safe. What happens when the invitee who booked the unit brings their own invitees back to the unit? The answers are unclear, but the ultimate risk falls on homeowners, landlords, and tenants, who are generally ill-equipped to deal with this type of responsibility.

Furthermore, it is not only tenants and other occupants of a building who complain about the constant stream of guests that rent units through hosting-platforms. Neighbors also express significant concern about a hotel or bed and breakfast springing up in their neighborhood because these establishments cause increased traffic and noise.

Local government response to home-sharing platforms

In an October 2014 report, the New York State Attorney General found that most of the short-term rentals booked in New York City violated state and local laws that prohibit residential rentals of less than 30 days unless the landlord or tenant lives in the same unit during the rental period.[4] The report also stated that commercial units accounted for a disproportionate share of short-term rentals by volume and revenue, with 94 percent of hosts offering at most two units and the remaining 6 percent of hosts offering hundreds of units each. All of this resulted in the loss of thousands of potential residential units in New York City and millions in potential tax dollars from transient occupancy taxes.

As a result of the report, AirBnB removed some hosts from its Website. AirBnB's opponents, however, claim that thousands of additional prohibited hosts have since appeared on the site. Though AirBnB is violating New York laws and displacing thousands of long-term residential units, the New York City Council is still in the process of determining how to regulate these rentals.

Home-sharing platforms faced similar issues in Portland, Oregon. In July 2014, the Portland City Council approved the legalization of limited short-term rentals where residents rent out one or two bedrooms in their homes after receiving a permit from the Portland Bureau of Developmental Services. The permit is granted after a payment of $178, an inspection of the home, and notification to the host's neighbors. To protect against the loss of long-term rental housing, permits are not issued to entire homes. In January 2015, Portland was the first city to add teeth to its home-sharing law. In response to the sparse compliance with its regulations, Portland added a $500 penalty per violation that can be levied against either the host, the platform, or both. Whether that will be effectively and actively enforced, however, remains to be seen.

San Francisco's response to these violations of local laws mirrors Portland's initial efforts, and, like those efforts, lacks an effective penalty provision for non-compliance. San Francisco passed an ordinance in October 2014 to legalize limited short-term hosting. The new law legalizes vacation rentals in private homes. Hosts must register in person with the San Francisco Planning Department and may only rent out an entire home for ninety days a year, assuming the host lives in the unit for the remainder of the year. Rentals are unlimited for individual rooms in a house

where the host lives year-round. The law also requires hosts to display their city registry numbers on their online listings, though there is no enforcement mechanism in place.

Hosting-platforms have no responsibility to monitor the postings and face no penalties for violations. To date only about 130 hosts out of the 5,000 listings in San Francisco have set up appointments to register with the San Francisco Planning Department. The Planning Department has not yet been able to develop a process to enforce the law against hosts and Websites that continue to offer rentals without the proper registration.

Sharing the burden

The "sharing economy" is a big industry with powerful allies. Companies like AirBnB and Homeaway are capitalized in the billions of dollars and many debate how these companies have used their contributions to further their business. This is why piecemeal regulations with illusory enforcement mechanisms fail to go to the heart of the problem, which lies in large part with the hosting platforms themselves.

In the absence of effective legislative action, the Hooshmand Law Group has filed class-action lawsuits against AirBnB and Homeaway for violations of the San Francisco administrative code and state law. The lawsuits allege that short-term rental Websites knowingly and actively facilitate short-term rentals in prohibited areas thereby removing scarce housing from the already depleted housing market. The complaints seek to address both categories of risk posed by these hosting platforms – prohibited short-term rentals and potential dangers to homeowners and neighbors.

The lawsuits target these short-term rental Websites, alleging that their level of participation in the process while being aware of the extent of the problem is significant. The lawsuit claims that these websites could easily filter out the prohibited listings and ensure compliance with local housing ordinances.

Conclusion

Despite its allure, home sharing poses significant risks to all involved. Hosts are not adequately protected due to the lack of adequate insurance. Landlords are at risk to the extent they are aware of the activity and do not act quickly to address it. Other tenants and neighbors are affected by the noise and disruption the rentals cause. What is necessary is a smart and comprehensive approach to addressing the risks and concerns caused by short-term rentals.

Hooshmand

Mark Hooshmand is a partner with the Hooshmand Law Group, *a tenant and consumer rights litigation and class action firm. Hooshmand has over 15 years of experience representing clients in consumer matters, tenant matters and business litigation. Contributing to the article: Ian Hansen, Stephanie Foster, Tyson Redenbarger, Eric Kim, and Idin Kashefipour; associates with the Hooshmand Law Group.*

Endnotes

[1] Carolyn Said, "Leaked transcript shows Geico's stance against Uber, Lyft" SFGate (November 23, 2014).

[2] Ron Lieber, "A Liability Risk for Airbnb Hosts" New York Times (December 5, 2014); Ron Lieber, "The Insurance Market Mystifies an Airbnb Host" New York Times (December 19, 2014); Jason Notte, "This Is How Much Insurance You'll Need Before Renting Out a Vacation Home" Main Street (March 6, 2015).

[3] "SFAA Position Paper: Short-Term Rental Websites and the Illegal Conversion of Our Residential Rent-Controlled Housing Stock", available at: http://www.sfaa.org/pdf/SFAA-Position-Paper-Short-Term-Rentals.pdf.

[4] Eric T. Schneiderman, "Airbnb in the city" (October 2014), available at: http://www.ag.ny.gov/pdfs/Airbnb%20report.pdf.