

Taming The Digital Wild West
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1. Introduction:

The internet is the latest frontier that the law is trying to tame. In fact, I stole my title from an April 23, 2014 *New York Times* article by Eric Schneiderman. He noted that the marketplace is now moving online from the brick and mortar world, but most of the goods and services have not changed. His point was that many of the companies claim that because their goods and services are provided online somehow makes them “immune” from regulation and the law itself.

These new companies (e.g., Airbnb, VRBO and Uber) are self proclaimed “cyberlibertarians” who profess to be above the law and have little or no interest in protecting consumers. They are money-making machines. For example, Airbnb is a company valued at close to \$10 billion. The regulators have had a difficult time dealing with these companies but there is no reason why plaintiffs’ lawyers should not attempt to hold them accountable to legal standards to which all other citizens and corporations have to abide.

The owners of these new companies profess that they are nothing more than hosts for online platforms like Craig’s List that allow people to communicate with other people. The new companies do not own or control property or services they are advertising and they make no representations regarding the fitness of goods, property or services. They are stepping back to the days of caveat emptor (let the buyer beware) and rely on comprehensive and lengthy releases to protect them. They also rely on primary assumption of risk to protect them where recreational activities are in issue.

The legal means for taming these rich online outlaws is well-established in many states, including California. The State of California mandates that there is an implied “social contract” binding everyone which is also known as the standard of care. This is codified in Civil Code sections 1708 and 1714(a):

“Every person is bound, without contract, to abstain from injuring the person or property of another, or infringing upon any of his or her rights.”
(Civil Code, Section 1708).

“Everyone is responsible not only for the result of his or her willful acts but also for an injury occasioned to another by his or her want of ordinary care in the management of his or her property or person.” (Civil Code, Section 1714[a]).

These principles are also echoed in CACI 401 (basic standard of care):

“...A person is negligent if he or she does something that a reasonably careful person would not do in the same situation or fails to do something that a reasonably careful person would do in the same situation...”

The unsuspecting online consumer may assume that the same rules that apply to brick and mortar businesses apply to the online companies. After all, the consumer is paying for services

(usually in the form of a subscription or fee) and he/she also may assume that someone has investigated the safety of the goods, property and services or at least has made others who are offering goods, property or services meet minimum safety standards. In most cases those assumptions are not well founded. There is little or no protection for online consumers.

More and more injuries are associated with online companies and many trial lawyers are deterred from suing them due to concerns about online releases, insurance coverage and protracted legal battles including motions for summary judgment. Your clients may discover that their only recourse is against the online company so you should not be afraid to pursue them.

2. Don't Let the Outlaws Hide Behind their Online Releases and Indemnity Agreements.

The online outlaws put their releases right up front to deter anyone from suing them. The fact that the release is online does not make the release invalid. See Exhibit 1 to this article which is part of another presentation Abramson Smith Waldsmith made to the CAOC Hawaii Seminar in December 2013.

This presentation is not one on how to overcome a release but there are several approaches for doing so. One is establishing gross negligence (*City of Santa Barbara v. Superior Court* [2007] 41 Cal. 4th 747) which also is discussed in Exhibit 1 to this article. Other approaches include ambiguity, the breadth and scope of the release (maybe it does not cover everyone), conspicuity (if the exculpatory provision is not readable due to size or location), unconscionability (an adhesion contract), illegality (using the fact that in many jurisdictions local law makes short-term rental illegal) or misrepresentation (fraud and concealment).

VRBO (Vacation Rentals by Owner aka Home Away) specializes in listing vacation properties to compete with hotels. VRBO makes money by selling subscriptions to users. It makes its subscribers agree to a 21 page "User Agreement" which includes a clause shifting responsibility to abide by local regulations to the renter and contains several extensive exculpatory provisions. It also stipulates that suit be filed in Travis County, Texas.

VRBO makes it clear in its agreement that it does not provide liability insurance protection for anyone. Users are "solely responsible" for obtaining sufficient insurance coverage.

Airbnb specializes in providing a platform and online marketplace for short-term rentals directly competing with the hotel industry which is heavily regulated in terms of safety and sanitation. Airbnb has a 14 page "Terms of Service" agreement, including an elaborate release of liability and multiple statements that the hosts and users assume all risks and are fully responsible for adhering to local laws. The agreement also obligates a plaintiff to binding arbitration pursuant to the rules of the American Arbitration Association and provides that the venue will be where the claimant resides. These terms apply to hosts and users when they create an Airbnb account and become a "member."

Airbnb on the first page of its Terms of Service makes the following statement all in caps: "THE SITE, APPLICATION AND SERVICES COMPRISE AN ONLINE PLATFORM THROUGH WHICH HOSTS MAY CREATE LISTINGS FOR ACCOMMODATIONS AND GUESTS MAY LEARN ABOUT AND BOOK ACCOMMODATIONS DIRECTLY WITH THE HOSTS. YOU UNDERSTAND AND AGREE THAT AIRBNB IS NOT A PARTY TO ANY AGREEMENTS ENTERED INTO BETWEEN HOSTS AND GUESTS, NOR IS AIRBNB A REAL ESTATE BROKER, AGENT OR INSURER. AIRBNB HAS NO CONTROL OVER THE CONDUCT OF HOSTS, GUESTS AND OTHER USERS OF THE SITE, APPLICATIONS AND SERVICES OR ANY ACCOMMODATIONS, AND DISCLAIMS ALL LIABILITY IN THIS REGARD TO THE MAXIMUM EXTENT PERMITTED BY LAW." Airbnb makes its money by acting as the "limited authorized payment collection agent of the host for the purpose of accepting payments from guests, including cleaning, other fees and/or taxes." Airbnb collects guest fees from guests for using the online platform which is a percentage of the host's accommodation fees. Airbnb collects host fees from hosts for using the online platform which is a percentage of the accommodation fees. Airbnb collectively calls these two fees "service fees." It also requires credit card information for a user account that it charges for guest property damage.

Airbnb includes a broad hold harmless and indemnification paragraph in its release, as well. It also recommends that hosts obtain "appropriate insurance" and to make sure that they are familiar with and understand any exclusions or deductibles that may apply to guests.

Despite these burdensome user or service agreements, some litigants have and will pursue these online providers and this may be their only option for adequate compensation. Cities like New York City and San Francisco have tried to regulate them and this is in process. San Francisco, the home of Airbnb, is trying to balance public safety with a desire to encourage business. Legislation is pending in San Francisco to regulate short-term rentals by having hosts register with the City to insure accountability for compliance with tax laws and safety ordinances. Only permanent residents would be allowed to do this as a way of helping them pay their rent and bills. Secondary or vacation homes that do not have long-term residents would not be given permission for short-term use to protect the City's stock of housing. If passed, the law

would require Airbnb to collect and remit hotel or transient occupancy taxes and notify users about all local short-term rental laws before accepting a posting.

3. Three Recent Fact Situations Requiring Legal Action.

A. Airbnb and Carbon Monoxide Detectors.

Airbnb and VRBO consistently publicly deny any serious injuries or lawsuits but two pending cases are examples of what can happen. The first involves Airbnb arising out of the wrongful death of a 35 year old woman who used Airbnb to book a room in Taiwan for a wedding. The decedent booked the room for three nights to be near her friends who were staying in an adjacent room. On December 30, 2013, she was found dead from carbon monoxide poisoning. The building was not equipped with a carbon monoxide alarm which would have cost about \$20 if purchased at Costco.

According to local Chinese authorities, Airbnb was not licensed to engage in short-term rental; therefore, the rental was illegal. Apparently, carbon monoxide detectors were not required by local law but as a result of this incident, Airbnb announced in February 2014 that it was "requiring" its hosts to confirm that smoke and carbon monoxide detectors are present. Airbnb even went so far as to distribute free detectors to their U.S. hosts. Phil Cardenas, Airbnb's head of trust and safety, wrote: "We want to do more. By the end of 2014, we'll require all Airbnb hosts to confirm that they have these devices installed in their listing."

Airbnb will rely on its hosts to update their listings to include this information and, if it is not present, it will suspend the listing. The problem is that Airbnb is relying on its hosts and intends to do nothing to police the issue.

Airbnb's website has a trust and safety section where several questions are posed. One is, "What is Airbnb doing to help hosts make their homes safer for guests?" They answer by mentioning three things:

- (1) Emergency Safety Cards,
- (2) First Aid Kits and
- (3) Smoke and Carbon Monoxide Detectors.

Airbnb obviously realizes that its hosts may not have the knowledge nor experience to deal with these issues so its website says it will send Emergency Safety Cards to every guest who requests one. It also says that starting February 21, 2014 it will distribute 10,000 free first aid kits to eligible hosts in the U.S. Furthermore, as mentioned above, by the end of 2014 it will require all hosts to confirm that they have "working smoke and carbon monoxide detectors installed in their listing" and it will give away free detectors to U.S. hosts who request them. It says it is

working to expand this initiative around the world. Remember that Airbnb does business in 192 countries.

Airbnb's website also asks "What can I do to make my space safer for guests?" It is reaching out to be involved in occupant safety. It has created a list of "Hospitality Standards" and "Responsible Hosting Guidelines" which includes making sure that the property meets government safety regulations for the area, clearly marking a fire escape route, removing any hazards that might cause guests to trip or fall, child-proofing the home and making sure that all safety precautions are up to date and in accordance with local safety laws and regulations. The problem is that in many jurisdictions, short-term home rental is illegal so there are no applicable regulations or standards. It is obvious that homeowners do not have the expertise to properly identify "hazards" or determine what is "safe."

Airbnb also has created a verified ID program to let users feel more comfortable renting a room in a strange area from unknown people. It is its Verified ID program.

Furthermore, Airbnb has initiated a Host Guarantee Program which protects hosts up to \$1,000,000 for property damage caused by users. This is excess coverage over the owner's insurance as set forth in Airbnb's 25 page Host Guarantee Terms and it requires that the host also pursue the guest before making a claim. This also raises the question whether a host's existing insurance coverage will apply when his premises are being used for commercial purposes. Many policies exclude this usage. If this were the case, a host would have to pursue the guest before making a claim to Airbnb. A host can purchase a landlord insurance policy to cover renters and that may be the only source of insurance coverage.

What is missing is any promise by Airbnb for insurance coverage for personal injuries or wrongful death. However, in the case involving the death of the 35 year old woman, Airbnb already has offered her heirs \$2,000,000 to resolve the wrongful death case while telling the family that there is no basis for liability (relying on its release) and it is being offered only for humanitarian reasons. It is unknown at the time of writing this article whether or not Airbnb has liability insurance that applies to injuries or to the death of users caused by their hosts. Nevertheless, it is a big company with a team allegedly dedicated to trust and safety. Airbnb obviously has gotten the message that it cannot ignore public safety and, although some of its steps are laudable, it changes very little. It is making a lot of money with its platform when it knows that what it is doing is illegal in many of its venues and a reasonable person would know that it cannot rely exclusively on hosts for safety. It has to do a better job or it will be held liable under the simple negligence standards outlined above.

In California, one has to consider the application of primary assumption of risk since the California Supreme Court's decision of *Nalwa v. Cedar Fair* (2012) 55 Cal. 4th 1148. *Nalwa* extended primary assumption of risk to "recreational activities." Would the rental of a room for a

vacation or for a sports event or for a bachelor party be considered a "recreational activity"? This seems to be a stretch but it remains to be seen.

B. VRBO and Premises Defects.

The second case involves VRBO, a competitor of Airbnb. The case arises out of a retreat for east coast Google employees in San Francisco in 2014. Google arranged for the group to stay in a house in San Francisco rather than a hotel for apparent bonding purposes. The house was relatively new but was equipped with an elevator that was non-functioning. Instead of sealing off the shaftway doors which looked like any other door with a knob, it simply put a very small transparent sign on the door warning of the danger.

On his first evening at the house, a Google employee got up in the darkness of early morning to go to the bathroom. He saw a door that he thought led to the bathroom and instead it led to the open elevator shaftway. He stepped into the shaftway looking for a bathroom light and fell one or more stories onto a nonfunctioning elevator car. He was seriously injured in the fall.

Obviously, the property owner never should have left the shaftway doors open. In a handout it provided to the renters, the owner made the following statement at the bottom of the next to last page: "Do not attempt to open the elevator doors. This is very dangerous and will break the elevator. The elevator is not for guest use and has been disabled." The guest was not attempting to open the elevator doors and had no idea that a door with a handle led to an open shaftway with no elevator present at the floor.

This is a new case at the time of writing this article and plaintiff is faced with the same hurdles as with Airbnb. This is a case of clear gross negligence so overcoming the release should be easy. There also will be issues re the scope of the release and illegality San Francisco does not allow residential apartments to be rented out for fewer than 30 days under its Administrative and Planning codes.

It is unknown if VRBO has applicable liability coverage but that will soon be revealed in the pending litigation.

C. UBER and Its Liability for the Acts and Omissions of Drivers.

UBER's ride sharing concept has become a very popular alternative to the regulated taxicab industry. UBER sees itself as a tech communication company simply offering a mobile online platform for people to arrange shared rides. The vehicle drivers are considered independent contractors by UBER, despite efforts by plaintiffs' lawyer to establish that UBER exerts a good bit of control over the drivers. Several personal injury cases and a San Francisco death case are pending at the time of writing of this article.

In September 2013 the California PUC announced that it has jurisdiction over UBER and other similar ride sharing companies like Lyft and SideCar. It created a new category of regulation called Transportation Network Company and required a minimum of one million dollars per incident liability insurance coverage for such vehicles and drivers in transit to or during a trip, regardless of whether personal insurance allows for coverage.

Like the Airbnb and VRBO cases, ride sharing is in its infancy. Public entities have an interest in regulating this new industry because they make money selling medallions to it. On the positive side, the new model provides more service at a discounted price. The cases will rise and fall on their facts and one may be able to distinguish cases where a passenger is injured (assumption of risk argument) from injuries to bystanders or pedestrians who have no legal arrangement with the driver at all. The outcome will depend on the work of plaintiffs' lawyers who will have to muster the facts, win motions for summary judgment and try a good case.

4. Conclusion.

The internet outlaws are no different from many other defendants before them. Negligence has been replaced by strict liability in tort in the products field. Franchisors and employers of independent contractors have been found liable. It is just a matter of time before profitable internet businesses also are subject to the law. The regulators and the competitors of these companies will assist in holding these businesses accountable because, otherwise, it is a very unlevel playing field. Consumers may temporarily benefit from discounted rooms and cheap quick rides, but the ultimate price of losing all guarantees of safety and responsibility is not worth it in the long run.

Plaintiffs lawyers' should aggressively pursue these outlaws when presented with a case. Sooner or later these companies will purchase adequate liability insurance or risk going out of business with claims. Participation in the unregulated rental of property that could be laced with hazards or could subject renters to risks of disease, molestation or death cannot be tolerated especially when the company is making a lot of money doing it. The law requires that these companies act reasonably and what they are doing clearly is unreasonable. It is time for the sheriff to be willing to face these outlaws on main street.