

NEW YORK UNIVERSITY
JOURNAL OF LAW & BUSINESS

VOLUME 13

WINTER 2017

NUMBER 2

THE NEW SHARING ECONOMY: THE ROLE OF
PROPERTY, TORT, AND CONTRACT LAW FOR
MANAGING THE AIRBNB MODEL

CHAD MARZEN,* DARREN A. PRUM,**
AND ROBERT J. AALBERTS***

INTRODUCTION	296
I. THE AIRBNB MODEL: THE ROLE OF PROPERTY, TORT, AND CONTRACT LAW	298
A. <i>The Airbnb Model</i>	298
B. <i>The Airbnb Model and Traditional Liability Issues</i>	301
1. <i>Premises Liability</i>	304
2. <i>Nuisance</i>	307
3. <i>Right to Privacy: Intrusion on Seclusion</i> ...	311
4. <i>Property Damage or Loss</i>	313
a. <i>Conversion</i>	314
b. <i>Negligence</i>	315
II. INSURANCE AS A PROPOSED SOLUTION	316
A. <i>Introduction</i>	316
B. <i>The “Business Pursuits” and Rental Exclusion</i> ..	319
C. <i>The Airbnb “Host Guarantee” Program</i>	323
D. <i>The Airbnb Host Protection Insurance Program</i> ..	326
E. <i>Other Homesharing Insurance Options</i>	327

* Copyright © 2017 by Chad Marzen, Darren A. Prum, & Robert J. Aalberts. Chad Marzen is an Assistant Professor, Florida State University.

** Copyright © 2017 by Chad Marzen, Darren A. Prum, & Robert J. Aalberts. Darren A. Prum is an Assistant Professor, Florida State University.

*** Copyright © 2017 by Chad Marzen, Darren A. Prum, & Robert J. Aalberts. Robert J. Aalberts is a Clinical Professor of Business Law, Pennsylvania State University.

F. <i>State Legislative Activity</i>	328
1. <i>Massachusetts House Bill 2618</i>	329
2. <i>California Senate Bill 1092</i>	330
3. <i>Florida Senate Bill 1298</i>	331
G. <i>Solutions to Mitigate Risk</i>	332
CONCLUSION	335

INTRODUCTION

A new world of property sharing has dawned.¹ As exemplified by the Airbnb model,² more property owners are now sharing their homes and apartments with others through technological platforms.³ The economic motivations are clear: with a dearth of affordable housing, many are struggling to pay their notes and rents. On the demand side, many tourists cannot afford or don't wish to pay for pricey hotels, particularly in expensive yet popular destinations, such as New York and San Francisco.

1. Real estate is not the only kind of property sharing now occurring. For example, Uber and Lyft operate by sharing car services with those needing transport, thereby reducing the need for taxis. Such uses of property are enabled by applications on consumers' cell phones that let them easily and efficiently fulfill their needs. Other examples of the peer-to-peer approach include Taskrabbit (for odd jobs, handymen, etc.), Vayable (designed tours), Tutorspre (linking people to tutors), and Getaround (for driving and sharing another's car).

2. For the purposes of this Article, we will use the Airbnb brand when discussing the peer-to-peer real estate sharing model, since it is arguably the most widely recognized. Competing brands include HomeAway and FlipKey. Alexa Tsotsis, *Will Airbnb Ever Be "The Airbnb for X?"*, TECHCRUNCH (June 5, 2011), <http://techcrunch.com/2011/06/05/will-airbnb-ever-be-the-airbnb-for-x/> (discussing how Airbnb is generating such publicity and investment capital that writers now use its name as a stand-in for the best company providing a certain product or service—for example, the "Airbnb of Office Space"). Due to its undeniable success, there are numerous but distinguishable competitors to Airbnb, including VRBO, HomeAway, Flipkey, Couchsurfing, Wimdu, 9Flats, House Trip, and Roomorama.

3. It is noteworthy that home sharing in the United States is not new. Americans seeking shelter in others' homes, better known as boarding houses, began with new American settlements, such as New York City. See PAUL FAFLICK, *BOARDING OUT: INHABITING THE AMERICAN LITERARY IMAGINATION, 1840–1860* (2012); see also Jamila Jefferson-Jones, *Airbnb and the Housing Segment of the Modern "Sharing Economy": Are Short-Term Rental Restrictions an Unconstitutional Taking?* 42 HASTINGS CONST. L.Q. 557, 561 (2015) (discussing the history of home sharing in the United States).

The legal reaction to home sharing has been palpable. New and existing laws in some locations are challenging the model.⁴ Policymakers argue that the laws protect the public from unsafe lodging conditions and are required to collect needed tax revenue. Still, the laws, particularly the older ones, were written to regulate a vertical business model in which hotel and motel lodgers are protected from a more distant and diffused corporate ownership; a model quite distinguishable from the new peer-to-peer Airbnb model which, as we will discuss, might be better served by private legal arrangements.

Existing regulatory ordinances and statutes cover wide-ranging legal categories. In general, they limit property sharing by usage,⁵ number limitations,⁶ operations,⁷ and licensing

4. See generally Sofia Ranchordas, *Does Sharing Mean Caring? Regulating Innovation in the Sharing Economy*, 16 MINN J.L. SCI. & TECH. 413 (2015) (discussing the clash between those who innovate in the new sharing economy, the economic and societal problems that sometimes result from these clashes, and possible solutions).

5. For example, New York City provides that residential “class A multiple dwelling” housing “shall only be used for permanent housing purposes.” N.Y. MULTIPLE DWELLING LAW, § 4.8(a) (McKinney 2011). Some have pointed out that New York City’s “all or nothing” approach has done little to stop home sharing, but instead has driven it underground, thereby creating a black market. See Dylan Love, *Airbnb Is Declared Illegal in New York*, BUS. INSIDER (May 21, 2013), <http://www.businessinsider.com/airbnb-illegal-in-new-york-city-2013-5>; see also Catherine Yang, *Illegal Hotel Operator Made Nearly \$7 Million Using Airbnb*, EPOCH TIMES (Oct. 16, 2014), <http://www.theepoch-times.com/n3/1024373-illegal-hotel-operator-made-nearly-7-million-using-airbnb/> (discussing how these illegal businesses exist in some of New York City’s wealthiest neighborhoods).

6. See, e.g., SANTA FE, N.M., Ordinance § 14–6.2(A)(6)(a)(i) (2011). (limiting short-term rentals to 350 rental units, with some exceptions for accessory unit, owner-occupied, or units within a development that contain resort facilities). By comparison, Amsterdam allows homeowners to rent to up to four tourists for a maximum of three months. See Jarl van der Ploeg, *Amsterdam Akkoord Met Huis Verhuren aan Toeristen*, DE VOLKSKRANT (Feb. 15, 2014), <http://www.volkskrant.nl/vk/nl/2686/Binnenland/article/detail/3597693/2014/02/15/Amsterdam-akkoord-met-huis-verhuren-aan-toeristen.dhtml>.

7. SONOMA COUNTY, CAL., ORDINANCE § 26–88–120(f)(2) (2010). This ordinance limits overnight stays based on how the septic tank is designed for the handling of more occupants.

requirements.⁸ In some of these cases, property owners are finding it difficult to stay in business.⁹

The purpose of this Article is three-fold. In Part I, we will first describe how the Airbnb model works, and discuss the private laws of property, tort, and contract to demonstrate how these traditional laws might serve well the task of defining the respective rights and duties for both hosts and guests. In particular, we discuss possible liabilities arising under tort law, which is arguably where the greatest legal risks reside. In Part II, we will broaden our discussion of tort law in the context of protecting both hosts and guests from personal and property losses. In our Conclusion, specific recommendations will be offered with a focus on how insurance can provide a private solution to these losses.

I.

THE AIRBNB MODEL: THE ROLE OF PROPERTY, TORT, AND CONTRACT LAW

A. *The Airbnb Model*

We begin with a short discussion of Airbnb itself and its operational model. This is to better present and understand the legal issues involved. Simply put, Airbnb is a website that property owners or hosts employ to find guests who are seeking short-term lodging.¹⁰ To register the host's premises on the Airbnb site, a potential host must create a personal profile. If the profile is accepted, the host can then begin renting to guests. To ensure ongoing accountability once the renting be-

8. TILLAMOOK COUNTY, OR., ORDINANCES §§ 6 & 9.A.B (2012). These ordinances require that property owners be inspected for fire extinguishers, smoke detectors, escape standards, and structural requirements to gain a license. *Id.*

9. See, e.g., Ron Lieber, *A \$2,400 Fine for an Airbnb Host*, N.Y. TIMES: BUCKS (May 21, 2013), <http://bucks.blogs.nytimes.com/2013/05/21/a-2400-fine-for-an-airbnb-host/> (discussing how a host in New York City was fined for renting his apartment on Airbnb).

10. Vanessa Grout, *How to Use Airbnb to Profit from Your Second Home*, FORBES (Nov. 4, 2013) <http://www.forbes.com/sites/vanessagrout/2013/11/04/how-to-use-airbnb-to-profit-from-your-second-home/#2aefeca72f1d>. See generally HOW DO I BOOK A PLACE ON AIRBNB?, <https://www.airbnb.com/help/article/380/how-do-i-book-a-place-on-airbnb#> (last visited June 23, 2016) (this webpage explains the rules and guidelines for hosts and how to book reservations on Airbnb.com).

gins, the site also provides recommendations from former guests, a response rating, and a private messaging system.¹¹ Hosts do not pay for their listing page, but will be charged a three percent “service fee” once the guest’s reservation has been confirmed.¹² Airbnb provides a \$1 million “Host Guarantee” with considerable conditions, limitations, and exclusions if a guest damages a host’s property, an event that Airbnb claims is “rare.”¹³

The Airbnb model is relatively simple and appears to be user friendly for both hosts and guests.¹⁴ For these reasons as well as price, space, kitchen facilities, WIFI connections, locations in residential as opposed to business districts or suburbs, lack of rigid check-in and check-out rules, and even information on what to do locally from knowledgeable hosts, the site has grown dramatically since its 2008 inception. By 2015, the company’s website claimed to have hosts in 34,000 cities and 190 countries.¹⁵ Indeed, according to Techcrunch, Airbnb is seeking additional funding of \$1 billion to give it a potential \$20 billion market capitalization. This would rank it third after Hilton and Marriott.¹⁶

As discussed, there are some urban areas in which Airbnb hosts are being regulated in various ways ostensibly to protect their guests and collect taxes.¹⁷ Many of the laws were created

11. See EARN MONEY AS AN AIRBNB HOST, <https://www.airbnb.com/host/homes> (last visited June 23, 2016) (listing the requirements for new hosts).

12. See WHAT ARE HOST SERVICE FEES?, <https://www.airbnb.com/help/article/63/what-are-host-service-fees> (last visited June 23, 2016).

13. THE \$1,000,000 HOST GUARANTEE, <https://www.airbnb.com/guarantee> (last visited June 23, 2016) [hereinafter AIRBNB HOST GUARANTEE]. Protected property includes “cash and securities, pets, personal liability and shared or common areas.” See *infra* notes 187–210 (discussing the Airbnb Host Guarantee in detail).

14. Robert J. Aalberts, *Airbnb: Will It Become the Next Battle Ground over Property Rights?* 44 REAL EST. L.J. 1 (2015); see also *8 Great Airbnb Advantages*, MCCOOL TRAVEL, <http://www.mccooltravel.com/2015/08/8-great-airbnb-advantages> (last visited March 2, 2017).

15. AIRBNB OPEN 2015 WILL WELCOME 6000 HOSTS IN PARIS, FRANCE, <https://www.airbnb.com/press/news/airbnb-open-2015-will-welcome-6000-hosts-in-paris-france> (last visited June 23, 2016).

16. Jason Clampet, *Airbnb’s New \$1 Billion Funding Would Value It at \$20 Billion*, SKIFT (Feb. 28, 2015), <http://skift.com/2015/02/28/airbnbs-new-1-billion-funding-would-value-it-at-20-billion/>.

17. See *supra* text accompanying notes 5–8 (discussing types of regulatory laws being imposed upon Airbnb).

to control traditional hotels, motels, and bed and breakfasts, while some are quite frankly, according to popular press sources, in place to protect these businesses from Airbnb's competition.¹⁸ Yet, the Airbnb model's peer-to-peer setup together with its other advantages, is distinguishable from the traditional lodging model, the whole package and brand of which was made possible by the power of the internet. Indeed, without the internet it almost certainly would not exist today. It is not an understatement to say that many of these regulations are arguably a serious challenge to traditional property rights.¹⁹ In fact, this model might be better regulated by applying existing common law legal rights and duties, including the private laws of tort, contract, and property, which have for centuries been adapted to meet the legal needs of the time.

In economic terms, the imposition of unduly burdensome regulatory laws is important to many. The Airbnb model has enabled thousands worldwide to transform their property into an important source of personal wealth.²⁰ Allowing cumbersome and sometimes irrelevant laws to impinge on wealth formation, when the risks can be better controlled by well-established private laws, is an economic and societal mistake.²¹

18. The hotel industry in New York City has been particularly aggressive in fighting the Airbnb model, and lobbies for laws to outlaw it. See Lisa Fickenscher, *Hotels Girding for a Fight Against Airbnb*, CRAIN'S N.Y. BUS. (Aug. 19, 2013), http://www.craigslist.com/article/20130819/HOSPITALITY_TOURISM/130819909/hotels-girding-for-a-fight-against-airbnb.

19. See Jefferson-Jones, *supra* note 3, at 560 (discussing how laws regulating the Airbnb model might arguably be a regulatory taking).

20. See Jefferson-Jones, *supra* note 3, at 560–61 (“[S]uch [Airbnb] exchanges can help to preserve property values by providing income to homeowners that can be used to offset mortgage and maintenance costs—in other words, *sharing* the burden of ownership. If homeowners are able to do so, they are more likely to be able to maintain their homes in the short-term and, in the long-term to maintain ownership.”); see also Ron Klain, *Airbnb's Biggest Disruption: America's Laws*, FORTUNE (Sept. 10, 2014), <http://fortune.com/2014/09/10/airbnbs-biggest-disruption-americas-laws/> (criticizing the regulatory burdens being placed on Airbnb and Uber, the car sharing company, by comparing their development to the deregulation of the airline industry in the 1970s, which resulted in the price of airfares plummeting seventy-five percent in real dollars and the rise of cheaper airlines like Southwest).

21. See Ranchordas, *supra* note 4, at 438–39; see also Jefferson-Jones, *supra* note 3, at 561 (arguing that those who share and make more to maintain their homes improve the entire municipality).

B. *The Airbnb Model and Traditional Liability Issues*

When considering a torts claim in relation to the Airbnb model, hosts and guests both face the prospect of liability for personal and property losses suffered by one another as well as other individuals affected by a home sharing event. As a starting point, we will begin with an evaluation of the premises liability, and then turn to other issues such as nuisance, invasion of privacy, and property damage.

Depending on the specific circumstances, many of the different causes of action will occur on a primary basis, while some may follow on a secondary basis.²² For purposes of this Article, we will focus on a few of the primary torts that are likely to occur out of the Airbnb arrangement.

In addition, many of the liability issues may result with one of the parties raising the cause of action invoking the special body of law that applies to innkeepers. Since the courts may find precedent in either landlord–tenant or the laws that apply to innkeepers, we will consider the tort claims with respect to both sets of doctrines. The Supreme Court of Alabama articulated in 1923 that a basic definition of the terms hotel, inn, and tavern “are all used to describe a house where travelers or others are entertained and furnished with food and lodging, and sometimes other conveniences”²³ Subsequently, a New Jersey court further clarified in 1955 that as progress occurred with regard to transportation along with a change in customs, the requirement that a hotel or inn provide food, drink, and stabling accommodations ceased to be pertinent.²⁴ As such, the possibility exists that a court may consider applying the innkeeper laws to a liability claim arising out of an Airbnb transaction.

22. For example, a situation may occur where the tortfeasor commits negligence, but the recklessness of the action also manifests as emotional distress. For purposes of this discussion, we will consider the negligence claim as primary and emotional distress as secondary because the subsequent allegation would not occur but for the first action. This does not mean that a potential plaintiff may not claim the secondary tort, but for the sake of brevity we will limit our discussion to those torts we believe are mainly primary in nature.

23. *City of Birmingham v. Bollas*, 209 Ala. 512, 514 (1923).

24. *Schermer v. Fremar Corp.*, 114 A.2d 757, 760 (N.J. Super Ct. Ch. Div. 1955).

However, it is noteworthy that as far back as the common law courts of the 17th century in England actually grappled with whether a person who rents their vacation home to families or persons who might contact them for lodging fits within the definition and meaning of an innkeeper.²⁵ In an English case from 1698 regarding the lodging of soldiers at a vacation home, the court applied the applicable statutes that allowed constables to quarter military personnel at inns, alehouses, and livery stables.²⁶ This court pointed out that the property owner in this case required reservations to stay at the home, whereas an inn accepts *all* travelers regardless of prior arrangements, along with other distinguishing factors like a duty to protect guests and to charge a reasonable rate.²⁷ These factors allowed the court to make the distinction between providing hospitality towards a guest and general hospitality, and found the quartering of soldiers lawful.²⁸

Applying the same statute in a King's Bench case from 1699, the court considered the identical issue.²⁹ The court explained that the statutes exempted private houses from the quartering of soldiers, and that an innkeeper runs afoul of the law if he refuses lodging to strangers but a public house does not.³⁰ The court further noted that even though the property owner furnished meat for purchase and stables for horses, the vacation home did not fit within the four statutory requirements necessary to receive consideration as an inn or public house.³¹

Bringing this doctrine to the United States as applicable precedent, the Georgia Supreme Court considered the innkeeper issue on another vacation home that was rented seasonally under a claim against an adjacent landowner for a private nuisance.³² After reviewing the ample English precedent and the appropriate statutes, the court held that a landlord-tenant

25. *See, e.g.*, *Parker v. Flint* (1698) 88 Eng. Rep. 1303 (K.B.); *Parkhurst v. Foster* (1699) 91 Eng. Rep. 337 (K.B.).

26. *Parker*, 88 Eng. Rep. at 1303.

27. *Id.*

28. *Id.*

29. *Parkhurst*, 91 Eng. Rep. at 337.

30. *Id.*

31. *Id.*

32. *Bonner v. Welborn*, 7 Ga. 296 (1849).

relationship existed after classifying the vacation home as a private boarding house.³³

More specifically, a New York appellate court clarified that,

The distinction between an inn and a boarding-house has been held to be, that in a boarding-house, the guest is under an express contract, at a certain rate, for a certain period of time, while at an inn the guest being on his way, is entertained from day to day, according to his business, upon an implied contract. The innkeeper is bound to receive every one who applies, if in a fit condition to be received, while the boarding-housekeeper is not bound to receive any one, except upon special contract.³⁴

The court continued to review a statute that required every hotel, restaurant, boarding house, or inn to conspicuously post in a public place a copy of the statute in conjunction with policies for changing lodging rates along with meals and items furnished.³⁵ In recognizing that the legislature could have included private residences in the statute but did not, the court held the relationship in question as one of a private housekeeper who entertained a boarder, and not within the jurisdiction of the statute.³⁶

Recently, another court elected to ignore common law definitions and based its approach entirely on a state's statutory definition for a tort claim that occurred at a beach cottage rental.³⁷ This court determined that the arrangement did not qualify as a hotel or an inn within the statute because of a requirement for ten rooms, so it held that a landlord-tenant relationship existed for the case at hand.³⁸

Given that the courts continue to revisit on a case-by-case basis whether a particular factual situation may apply landlord-tenant or innkeeper precedent, a jurisdiction may decide to distinguish centuries old decisions when considering the

33. *Id.* at 309.

34. *Cady v. McDowell*, 1 Lans. 484, 486 (N.Y. Gen. Term 1869).

35. *Id.* at 487.

36. *Id.*

37. *Williams v. Riley*, 289 S.E.2d 102 (N.C. Ct. App. 1982).

38. *Id.* at 104-05.

Airbnb model. Accordingly, we will present both options when examining some of the possible tort liability claims.

1. *Premises Liability*

As part of the doctrine of negligence, premises liability sets forth the fundamental standards that concern the duties owed by an owner or occupier of land to protect those entering it from suffering an injury due to a dangerous condition or defect.³⁹ Unless a landowner acts negligently, the mere ownership of a parcel will not support liability for injuries that occur on the property.⁴⁰ To further underscore this point, the occurrence of an injury on a particular parcel will not suffice as evidence of negligence nor provide even the inference of this tort.⁴¹ As such, the defendant in an action must adhere to the negligence requirements by having to meet a duty towards the plaintiff whereby a breach occurs that proximately causes damages.⁴²

With this in mind, a court begins by determining whether the defendant owes a duty of care to the plaintiff.⁴³ Traditionally, many jurisdictions look to the status of the entrant upon the land to determine the duty owed by the owner or occupant of the premises.⁴⁴ In electing to categorize the entrant's status,

39. LOUIS A. LEHR, JR., 2 PREMISES LIABILITY 3D § 36:1 (2016 ed). Generally, the discussion of premises liability solely pertains to real property, but the courts in Indiana decided to extend it to a large houseboat used by its owners as a weekend getaway and equipped with a kitchen and bathroom. See *Harris v. Traini*, 759 N.E.2d 215, 221–22 (Ind. Ct. App. 2001). Given the diversity of listings on Airbnb, it is possible that this type of precedent may become applicable.

40. See LEHR, *supra* note 39.

41. *Id.*

42. See W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 30 (5th ed. 1984).

43. *Id.* at § 57.

44. See LEHR, *supra* note 39, at § 38:1. A minority of jurisdictions decided to reject the traditional approach as “harshly mechanical, unduly complex, and overly protective of property interests at the expense of human safety.” See KEETON ET AL., *supra* note 42, at § 62. England elected to statutorily change the duty imposed upon the owner or occupier to a “common duty of care” concerning all lawful entrants of the premises in 1957. Occupiers’ Liability Act 1957, 5 & 6 Eliz. 2 c. 31 (Eng.).

In 1958, the Supreme Court sparked the movement in the United States when it declined to apply the traditional distinctions in an admiralty case. *Kermarec v. Compagnie Generale Transatlantique*, 358 U.S. 625 (1959). A

the majority of jurisdictions distinguish between licensees, invitees, and trespassers, along with an examination as to whether the injury emanated out of an artificial condition, a natural condition, or active operations.⁴⁵

Under the traditional approach, an owner or occupant of land or building maintains a duty to warn of or make safe any known conditions that are nonobvious and dangerous to any licensee,⁴⁶ which includes social guests.⁴⁷ Similarly, an owner or occupant of land or building maintains a duty to undertake reasonable inspections to discover nonobvious dangerous conditions and provide warnings or take appropriate actions that make the premises safe for any invitee, which includes business visitors or members of the public.⁴⁸ In both the licensee and invitee categories, the previously articulated general rule applies to any artificial or natural conditions, but only turns into a duty of reasonable care when the circumstances change to active operations on the premises.⁴⁹

In contrast, the traditional approach towards adult trespass separates the entrant into the two separate subcategories of undiscovered trespasser and discovered or anticipated trespasser.⁵⁰ With the lowest standard of duties owed to an entrant, the landowner of the premises owes nothing to the undiscovered trespasser, regardless of whether the condition occurs artificially or naturally, or if it emanates out of active

decade later, the California Supreme Court initiated the change in approach at the state level by replacing the three categories with ordinary negligence principles of foreseeable risk and reasonable care, which also found traction within the courts in Hawaii, Colorado, District of Columbia, Rhode Island, New York, New Hampshire, Louisiana, Alaska, and Missouri. *See KEETON*, *supra* note 42, at § 62 nn.4, 5. Other jurisdictions such as Minnesota, Massachusetts, Wisconsin, North Dakota, and Maine decided to remove the distinctions between licensees and invitees while keeping the traditional approach with trespassers. *See id.* at § 62 n.6.

45. *See KEETON ET AL.*, *supra* note 42, at § 57.

46. *See LEHR*, *supra* note 39, at § 38:1; *KEETON ET AL.*, *supra* note 42, at § 60.

47. RESTATEMENT (SECOND) OF TORTS § 330 cmt. 3 (AM. LAW INST. 1965).

48. *See LEHR*, *supra* note 39, at § 38:1; *KEETON ET AL.*, *supra* note 42, at § 61.

49. *See KEETON ET AL.*, *supra* note 42, at §§ 60–61.

50. *See id.* at §§ 58–59. A third subcategory for child trespassers exists at common law, but it is not included in this discussion because a child cannot enter into an Airbnb contract.

operations.⁵¹ However, with the knowledge of a trespasser's presence, an elevation in the landowner's duty towards the entrant occurs for nonobvious and highly dangerous artificial conditions such that the landowner must post warnings or take remedial measures for these known conditions, or take reasonable actions when active operations become the issue.⁵²

Based on the traditional approach in a majority of jurisdictions, a guest under the Airbnb model holds the legal status of an invitee regardless of whether the laws of an innkeeper or landlord-tenant apply. This occurs because the guest came to the host's property at the invitation of the landowner or occupant, which also furthers any business objective to use an existing asset towards generating revenue. As such, the guest is entitled to the highest legal duty owed to any party on the host's premises: the duty to keep the guest safe from unreasonable risks and dangers that the host knows about or "should have known about." Accordingly, a host would face liability if she failed to exercise reasonable care to discover dangerous risks in a situation where guests would not be expected to identify or protect themselves from that risk, and where the landowner or occupant failed to exercise reasonable care to protect the guest from the danger.

Moreover, these liability issues may emanate from a third party rather than from the owner or occupier of the premises. In these situations as applied to innkeepers, the plaintiff must follow the same negligence standard previously stated,⁵³ but the innkeeper must be put on notice of an offending party's vicious or dangerous propensities by some act or threat, must have adequate opportunity to protect the injured patron, must fail to take reasonable steps to protect injured guest, and the injury must be foreseeable.⁵⁴

For example, ESPN reporter Erin Andrews sued a hotel in Nashville for negligence and other claims following an incident in which a stalker recorded and subsequently distributed nude videos taken of her in her hotel room without her knowledge. The premises liability in connection with a third-party

51. *See id.* at § 58.

52. *Id.*

53. *See supra* text accompanying note 42.

54. *See Boone v. Martinez*, 567 N.W.2d 508, 510 (Minn. 1997).

action became an issue for the courts to decide.⁵⁵ A jury held the hotel liable, in part, because the staff granted the stalker's request to receive a room adjacent to hers—which enabled him to film her through a peephole—and acknowledged her room reservation at their property.⁵⁶ While the stalker's action ultimately ended in a criminal conviction and sentencing,⁵⁷ the liability imposed by the jury in the civil case demonstrated that an owner or occupier of a premise who allows others to stay for a short duration maintains a duty to protect her guests from dangers, such as the one in Ms. Andrews' case.

Should a court apply the laws of an innkeeper to the Airbnb model, Andrews' case demonstrates the expansion of premises liability doctrine upon hosts to include the recognition and placement of guests by the owner or occupier of the property, along with the need to recognize that an unreasonable risk or danger may come from other invitees and their actions. Hence, hosts using Airbnb to attract guests to stay on their premises must account for numerous different possibilities that may create a dangerous condition and attach liability.

2. Nuisance

In some instances, the landowners of an adjoining parcel may pursue a nuisance claim due to repeatedly having guests present or due to their conduct on the host's property that causes a disturbance. Over time, the courts elected to draw a distinction between the two types of nuisance.⁵⁸ A "public" nuisance is one that affects an entire neighborhood or community, whereas a "private" nuisance disturbs only a single parcel of land.⁵⁹

55. See Fourth Amended Complaint, *Andrews v. Marriott Int'l, Inc.*, No. 11C-4831, 2016 WL 915595 (Tenn. Cir. Ct. Mar. 4, 2016).

56. See Verdict Form, *Andrews v. W. End Hotel Partners, LLC*, No. 11C-4831, 2016 WL 915534 (Tenn. Cir. Ct. Mar. 8, 2016).

57. See Alex Johnson, *Erin Andrews Settles Stalking Suit Against Nashville Hotel*, NBC NEWS (Apr. 25, 2016), <http://www.nbcnews.com/news/us-news/erin-andrews-settles-stalking-suit-against-nashville-hotel-n562036>.

58. See KEETON ET AL., *supra* note 42, at § 86.

59. *Id.* Even though private nuisance and public nuisance both fit within the description of nuisance actions, Prosser and Keeton explain that "[t]he two have almost nothing to do with one another, except that each causes inconvenience to someone, and it would have been fortunate if they had been called from the beginning by different names." *Id.*

More specifically, “an unreasonable interference with a right common to the general public” defines a public nuisance.⁶⁰ For instance, an unreasonable interference with a public right includes conduct that significantly inhibits public health, public safety, public peace, or public convenience.⁶¹

A private nuisance, on the other hand, may occur due to actions of the guest on the host’s property that disturb an adjoining parcel. This tort is often tricky to define because it can become confused with trespass.⁶² As such, a private nuisance focuses on the interference with the right to use and enjoy the land, whereas a trespass deals with the exclusive possession of the property.⁶³

Accordingly, a private nuisance covers a state of affairs whereby another person interferes with a landowner or occupier’s use and enjoyment of the land.⁶⁴ The courts further clarify this definition to describe the activity or condition as “unreasonable,” along with the need for it to “substantially” or “unreasonably” interfere with the use and enjoyment of the land.⁶⁵ This means that the injured parties must suffer a personal injury to themselves or their property beyond a mere inconvenience, whereby a person in the community of normal sensitivity would be seriously bothered.⁶⁶

Generally, the intentional interference requirement manifests due to a condition caused by the defendant that creates or continues to cause the hindrance with complete awareness that the injury to the plaintiff will most likely occur or

60. RESTATEMENT (SECOND) OF TORTS § 821B (AM. LAW INST. 1979).

61. *Id.*

62. Page Keeton, *Trespass, Nuisance, and Strict Liability*, 59 COLUM. L. REV. 457, 466 (1959).

63. *Id.* at 464–65.

64. ROGER A. CUNNINGHAM ET AL., *THE LAW OF PROPERTY* § 7.2 (2d ed. 1993).

65. *Id.*

66. See KEETON ET AL., *supra* note 42, at § 88. In an ongoing debate between the authors of the Restatement of Torts, the courts, and other commentators on whether strict liability applies to a private nuisance, liability tends to depend upon the nature of the conduct and the extent and amount of the damage caused. See Keeton, *supra* note 62, at 474. This requires that the plaintiff demonstrate that the defendant’s conduct was negligent, intentional, or abnormally dangerous. See CUNNINGHAM ET AL., *supra* note 64, at § 7.2. For a defendant’s conduct to meet the intentional standard, the tort only requires proof that the defendant knew with substantial certainty that the interference will occur. See KEETON ET AL., *supra* note 42, at § 88.

already occurred.⁶⁷ There is no question that a nuisance occurs when the interference affects the material condition of the land, but when the disturbance involves physical discomfort or annoyance, a recovery for damages faces difficulties.⁶⁸

Furthermore, the mere fact that a parcel of land falls within an articulated governmental zoning scheme will not preclude a court from granting relief based on a nuisance claim.⁶⁹ The Pennsylvania Supreme Court stated, “[a]cts of municipal officers under zoning legislation permitting the use of property for what is or may be a nuisance, do not oust the jurisdiction of equity to determine whether a nuisance in fact exists and should be restrained.”⁷⁰ As such, a court retains the ability to offer injunctive relief as an equitable remedy despite applicable governmental regulations permitting a defendant’s existence and activity.

With these rules in mind and considering the application of public and private nuisance, the courts do not appear to distinguish innkeepers from other property owners.⁷¹ An appellate court in Indiana found persuasive authority and joined the following two opinions to develop a rule of law from the courts in the District of Columbia (D.C.) and Pennsylvania to determine a nuisance claim in a tavern.⁷² Using common law, the D.C. appellate court explained that the duty a landowner owes is the same as that owed to the public with respect to unruly crowds at a retail store.⁷³ This court turned to the previously articulated rules of negligence as applied to those entering someone else’s land for guidance.⁷⁴ The court explained that while “the public assume the ordinary risks of ordinary crowds,” the storekeeper must use due care or risk liability

67. See KEETON ET AL., *supra* note 42, at § 87.

68. *Id.* Prosser and Keeton suggest that a good guideline for determining damages should focus on whether the interference results in a depreciation in the property’s market or rental value. *Id.*

69. See *Mazeika v. Am. Oil Co.*, 383 Pa. 191, 195 (1955).

70. See *Perrin’s Appeal*, 305 Pa. 42, 51 (1931).

71. See *e.g.*, *Ember v. B.F.D., Inc.*, N.E.2d 764, 773 (Ind. Ct. App. 1986).

72. *Id.*

73. See *Schwartzman v. Lloyd*, 82 F.2d 822 (D.D.C. 1936). It may seem far reaching to cite a case on crowd control liability that gets incorporated into conduct surrounding a tavern as applied to the Airbnb model, but the laws of innkeepers extended to include taverns and bars as well. See *Bonner v. Welborn*, 7 Ga. 296 (1849); *Parker v. Fling*, (1698) 88 Eng. Rep. 1303 (K.B.).

74. See *supra* text accompanying notes 75–84.

when a crowd is kept or controlled in a manner likely to cause injury.⁷⁵

Providing additional precedent pertaining to the innkeeper application, the Supreme Court of Pennsylvania upheld an injunction to cease operations against a tavern whose unruly patrons were responsible for the deteriorating conditions in the immediate area surrounding the bar.⁷⁶ Although the offensive conduct of the patrons primarily occurred outside the bar, the manner in which bar operated bore responsibility for the offensive conduct.⁷⁷

In another case, the Indiana appellate court considered both public and private nuisance claims against a motel after a guest discharged a pistol that injured the plaintiff in another room.⁷⁸ This court followed earlier precedent that the plaintiffs needed to show an interference with their property rights, rather than a personal injury, in order to claim a private nuisance.⁷⁹

In addition, the court considered a public nuisance claim based on the motel's voluntary and habitual acceptance of high-risk guests.⁸⁰ This court held that a lower court's summary judgment decision in favor of the motel was proper because the defendant's business operations were not in a manner that would cause injury to the general public and allow recovery under a public nuisance claim.⁸¹

Given this precedent and the Airbnb model, a host will need to consider whether or not the frequency of guests will trigger a public nuisance claim. Neighbors may take issue with the constant comings and goings of guests or with their activities. Should the activity deteriorate the neighborhood with undesirable behaviors and impede traffic or parking, the host may face claims from adjoining landowners, especially if the

75. See *Schwartzman v. Lloyd*, 82 F.2d at 827.

76. See *Commonwealth v. Graver*, 461 Pa. 131 (1975). The court found persuasive the testimony that the patrons engaged in boisterous and violent conduct, urinated, and littered on the adjacent property, and even attacked a resident on one occasion. *Id.*

77. *Id.*

78. See *Hopper v. Colonial Motel Props.*, 762 N.E.2d 181, 184 (Ind. Ct. App. 2002).

79. *Id.* at 186.

80. *Id.*

81. *Id.* at 187.

activity lowers the value of their property. An occasional loud guest will probably not constitute a nuisance.

Thus, the person who casually hosts guests on a less regular basis probably avoids most of these issues and any potential claims. Accordingly, for an Airbnb host, it will be unlikely that she will see a nuisance claim unless the rental business operates in a manner that will likely injure the public or an adjacent landowner.

3. *Right to Privacy: Intrusion on Seclusion*

Privacy sometimes becomes a liability issue for a host, often serving as the primary tort claim.⁸² More specifically, an intrusion upon seclusion occurs when an unreasonable and highly offensive unlawful entry upon someone's privacy takes place.⁸³ This may include disturbing someone's physical solitude or entering a home or other quarters, yet some courts extend the reach of this tort to embrace electronic eavesdropping of private conversations, looking closely into a window of a home, and continually receiving unsolicited telephone calls.⁸⁴

In an innkeeper setting, any interference with the guest's peace and quiet enjoyment without reasonable cause will trigger liability.⁸⁵ This means that a guest has a right to privacy and to occupy her guestroom without intrusion from any unauthorized person.⁸⁶ However, situations like routine house-

82. Interestingly, the proposition that "The Right to Privacy" is actionable as a tort only began after Samuel Warren and Louis Brandeis published their *Harvard Law Review* article in 1890 making their arguments based on their review of case law. Samuel Warren & Louis Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 205 (1890). While the courts were initially reticent to adopt the proposition, Professor Prosser developed a quadripartite model that separated the tort into intrusion, public disclosure, false light, and appropriation in 1960. William L. Prosser, *Privacy*, 48 CALIF. L. REV. 383, 389 (1960). The American Law Institute eventually adopted it in the 1976 version of The Restatement (Second) of Torts. See DAVID A. ELDER, *PRIVACY TORTS* § 1.1 (2016).

83. See KEETON ET AL., *supra* note 42, at § 117.

84. *Id.*

85. L. W. B., Annotation, *Liability of Innkeeper for Interference with Guest*, 17 A.L.R. 139 (1922).

86. *Theftford v. City of Clanton*, 605 So. 2d 835, 838 (Ala. 1992).

keeping and maintenance, nonpayment, unauthorized stayover, or imminent emergency do not trigger liability.⁸⁷

Clarifying this doctrine, the Alabama Supreme Court addressed a case with these issues when a guest sued a hotel after discovering holes in the wall of their room at the same level as scratches in the back of a mirror that allowed for someone to secretly watch their activities without any notice.⁸⁸ The court explained that a guest pretty much maintains an absolute right to privacy and need not demonstrate that they saw someone's eyes watching them through the mirror in order for a claim to be successful under intrusion on seclusion.⁸⁹ The actual proof that someone watched goes to the amount of damages they will be entitled to recover, but is not a prerequisite for liability to attach.⁹⁰

In contrast, the application of this tort to a landlord-tenant situation occurs infrequently.⁹¹ The courts tend to eschew giving relief for trivial intrusions, yet cases that involve highly unusual events that cause genuine mental anguish beyond hurt feelings achieve success.⁹² Hence, the courts will apply intrusion on seclusion in the landlord-tenant situation and impose liability when the facts dictate that the actions created an unreasonable and highly offensive unlawful entry.⁹³

Considering both the landlord-tenant and the laws of innkeeper applications, the courts appear to uniformly attach liability to instances where the privacy of the guestroom can be invaded on an ongoing basis without the perpetrator physically entering the space, especially with the proliferation of cell phone and security cameras along with other portable or miniature video devices. Thus, an Airbnb host faces potential liability for those situations where a guest feels that an unrea-

87. See L.W.B., *supra* note 85.

88. See *Carter v. Innisfree Hotel, Inc.*, 661 So. 2d 1174 (Ala. 1995).

89. *Id.* at 1179 (stating, further, that even if a third party caused the scratches to the mirror and hole in the wall, the hotel still maintained an affirmative duty to prevent and block unauthorized parties from gaining access to the guest rooms).

90. *Id.*

91. George E. Stevens, *Intrusion into Solitude and the Tenant's Right to Privacy*, 16 REAL EST. L.J. 324, 327 (1988).

92. *Id.* at 330.

93. See generally *id.*

sonable and highly offensive unlawful entry violates her privacy.

4. *Property Damage or Loss*

In turning to claims for property damage or loss, both the host and guest may each face their own liability issues. For instance, a host may bear responsibility for a loss of personal property that a guest might incur due to theft should a court decide to apply the laws applicable to innkeepers.⁹⁴ Under common law, the courts follow the well-established precedent that an innkeeper practically insures the goods of any guest, as long as an act of god does not occur and the guest does not act negligently.⁹⁵ Should a court classify a guest as a boarder, then the inquiry shifts to the previously described negligence standard⁹⁶ when attempting to hold a host liable for a loss of personal property.⁹⁷

Conversely, the guest may incur liability for any actions that may injure or destroy the host's property. While Airbnb allows a host to require a security deposit during the guest's booking process, it also comes with some conditions.⁹⁸ These conditions include the requirement that a host notify Airbnb of a claim within fourteen days of the checkout date or before the next guest checks in, whichever is earlier.⁹⁹

Should a host elect to file a claim, Airbnb will only mediate and collect the payment from the guest.¹⁰⁰ This means that if either party to the claim refuses to alter their position with regard to liability for the property damage or loss, the mediation will fail to resolve the dispute.¹⁰¹ Therefore, the security

94. *See* Fisher v. Bonneville Hotel Co., 188 P. 856, 859–60 (Utah 1920); *see also* Kerr v. Hudson Hotel Co., 37 So. 2d 630, 631 (Miss. 1948).

95. *See* Fisher, 188 P. 856 at 859–60; *see also* Kerr, 37 So. 2d at 631.

96. *See supra* text accompanying notes 74–75.

97. *See* Manning v. Wells, 28 Tenn. 746, 748 (1849).

98. *See* HOW DOES AIRBNB HANDLE SECURITY DEPOSITS?, <https://www.airbnb.com/help/article/140/how-does-airbnb-handle-security-deposits> (last visited Sept. 22, 2016) [hereinafter AIRBNB SECURITY DEPOSITS].

99. *Id.*

100. *Id.*

101. *See generally* FRANK B. CROSS & ROGER LEROY MILLER, WEST'S LEGAL ENVIRONMENT OF BUSINESS: TEXTS AND CASES 66 (6th ed. 2007). Interestingly, Airbnb elected to mediate any dispute rather than placing itself as an arbitrator to determine a final resolution. AIRBNB SECURITY DEPOSITS, *supra* note 98.

deposit option offers very little protection for a host, and creates situations whereby the only option for recovery comes through the pursuit of a legal claim for either conversion or negligence against the guest.

a. Conversion

From its early beginnings as part of the tort of trover, a conversion occurs when “an intentional exercise of dominion or control over a chattel which so seriously interferes with the right of another to control it that the actor may justly be required to pay the other the full value of the chattel.”¹⁰² Nonetheless, the amount a plaintiff will recover depends on the duration or severity of the damage, so a minor injury will only offer a diminished value, whereas complete destruction will call for full value.¹⁰³

In determining whether a conversion occurred, the defendant must wrongfully acquire possession of the plaintiff’s chattel and not merely change its location.¹⁰⁴ The taking, detaining, or disposal of the chattel will complete the conversion, which will allow for the recovery of the property’s value.¹⁰⁵

Taking into account the reality of the Airbnb model, the host places a great number of personal belongings located within the property offered to guests at risk. Should a guest affirmatively or inadvertently acquire possession of the host’s chattels when departing, the elements of conversion would be satisfied. This would provide the foundation for a host to move forward with a conversion claim against the guest.

102. RESTATEMENT (SECOND) OF TORTS § 222A (AM. LAW INST. 1975). In essence, conversion is analogous to a forced judicial sale where the defendant receives title to the chattel and pays for it. *Id.* at cmt c. The extent of the interference with the chattel owner’s property rights provides the distinction between conversion and trespass to chattels. *See* KEETON ET AL., *supra* note 42, at § 15.

103. *See* KEETON ET AL., *supra* note 42, at § 15.

104. *Id.* According to Keeton and Prosser, three jurisdictions require that the owner must demand the other party return the chattel as a prerequisite to acquiring possession, while the remainder of the country views the acquisition as complete when custody of the item occurs.

105. *Id.* The converter may not try to undo the acquisition by forcing the chattel back on the owner in an effort to mitigate damages or as a means to bar the legal action.

b. Negligence

In addition, a guest may cause damage to the host's property during a stay. In these types of situations, a host may look to recover any out-of-pocket costs through a negligence claim against the guest. As previously explained, the courts will begin the negligence inquiry by determining whether the guest owes a duty towards the host's real and personal property used in the transaction.¹⁰⁶ This standard will apply regardless of whether the court classifies the guest as a licensee under the innkeeper laws or finds that a landlord-tenant relationship exists.

Furthermore, under a landlord-tenant relationship, the guest's present possessory estate followed by the host's reversion would invoke the rules against waste, along with the affirmative duty to abstain from causing specific damage to the premises intentionally or negligently.¹⁰⁷ In turn, any breach in the affirmative duty under either classification will most likely fulfill the required elements necessary for negligence when a guest damages the host's property, resulting in the opportunity to put forward a claim to recover damages.

Consequently, a guest may face liability for any actions that cause a loss to the host's property through conversion or negligence. While Airbnb appears to offer a solution through a security deposit, the fact that the company only mediates a claim and doesn't arbitrate it only increases the likelihood of legal action by an aggrieved host or guest to obtain a final resolution and the appropriate damages. Hence, the liability issues between hosts and guests will also become a major concern in need of a solution as Airbnb continues to grow and events occur. The courts maintain ample precedent on how to treat the Airbnb model, but have yet to determine the type of relationship and law that applies when resolving a liability claim.

Accordingly, the Airbnb model creates a whole host of liability issues that arise out of property, tort, and contract law. While some attempts to use property law to reign in the Airbnb model will compete with the rights of the owners and

106. See *supra* text accompanying note 74.

107. See CUNNINGHAM ET AL., *supra* note 64, at § 6.23 (The rules against waste basically restrict the holder of a present estate from permanently damaging the land or the improvements on it when a reversion interest is held).

occupiers of the land and attract the attention of government regulators, the liability issues continue to quietly exist and need solutions before they become a financial impediment to the concept and future growth. Nonetheless, private industry may offer mechanisms, such as risk management and insurance, outside the traditional legal system to address and mitigate many of the issues discussed while we wait for guidance from a court.

II.

INSURANCE AS A PROPOSED SOLUTION

A. Introduction

Amidst the liability risks posed by the Airbnb model, insurance stands as a private market solution to risk mitigation.¹⁰⁸ Insurance not only serves the function of spreading and aggregating risks to the insurer,¹⁰⁹ but also insurance policies and contracts provide insureds the peace of mind and promise of security that the financial (and often emotional and psychological) pain of a catastrophic loss will be lessened in the event of an unforeseen occurrence.¹¹⁰ Academic commentators have focused on a number of issues raised by the

108. See generally Jeffrey W. Stempel, *The Insurance Policy as Social Instrument and Social Institution*, 51 WM. & MARY L. REV. 1489 (2010) (discussing generally the role of insurance policies to serve a risk management function, among others).

109. See Sean B. Hecht, *Climate Change and the Transformation of Risk: Insurance Matters*, 55 UCLA L. REV. 1559, 1564 (2008) (“Insurers are able to bear risks that other individuals and businesses are unable to bear, by aggregating those risks to make the insurer’s overall risk predictable. Policyholders pay a relatively small, certain amount (called a premium) in order to avoid the risk of a larger payout later. This enables policyholders to use their capital rather than hold it in reserve in case a risk materializes.”).

110. See Jay M. Feinman, *The Law of Insurance Claims Practices: Beyond Bad Faith*, 47 TORT TRIAL & INS. PRAC. L.J. 693, 711 (2012) (“The individual insurance relation bears a promise of security, and each individual relation is an instance of the process of providing collective security through insurance. The purpose of insurance is to ameliorate the financial consequences of risk that come to pass among the members of the group. More broadly, insurance provides a social safety net for individuals and businesses. Most Americans are only a car accident, a fire in the home, a lawsuit, or an injury away from having the wealth, the comfort, and the lifestyle accumulated over a lifetime of work wiped out. Insurance does not remove all of the consequences of a catastrophic loss, but it can make it something other than a catastrophe.”).

Airbnb model, such as how states may regulate the sharing economy,¹¹¹ the potential for race discrimination in the sharing economy,¹¹² how the example of Europe can inform Airbnb regulations,¹¹³ municipal legislation,¹¹⁴ and tort liability,¹¹⁵ including a recent article which focused on insurance for both the ride sharing and home sharing sectors.¹¹⁶

A key hurdle in the home sharing economy is that the typical homeowner's insurance policy excludes liability coverage for the "business pursuits" of any insured.¹¹⁷ The "business pursuits" and rental exclusions pose a distinct hurdle to private insurance coverage for the Airbnb model. Over the past

111. See Gregory E. Lines, Note, *Hej, Not Hej då: Regulating Airbnb in the New Age of Arizona Vacation Rentals*, 57 ARIZ. L. REV. 1163 (2015); Brittany McNamara, Note, *Airbnb: A Not-So-Safe Resting Place*, 13 COLO. TECH. L.J. 149 (2015); Joseph Shuford, Note, *Hotel, Motel, Holiday Inn and Peer-to-Peer Rentals: The Sharing Economy, North Carolina, and the Constitution*, 16 N.C. J.L. & TECH. 301 (2015).

112. See Michael Todisco, Essay, *Share and Share Alike? Considering Racial Discrimination in the Nascent Room-Sharing Economy*, 67 STAN. L. REV. ONLINE 121 (2015).

113. See Johanna Interian, Note, *Up in the Air: Harmonizing the Sharing Economy Through Airbnb Regulations*, 39 B.C. INT'L & COMP. L. REV. 129 (2016).

114. See Roberta A. Kaplan & Michael L. Nadler, *Airbnb: A Case Study in Occupancy Regulation and Taxation*, 82 U. CHI. L. REV. DIALOGUE 103 (2015); Dayne Lee, Note, *How Airbnb Short-Term Rentals Exacerbate Los Angeles's Affordable Housing Crisis: Analysis and Policy Recommendations*, 10 HARV. L. & POL'Y REV. 229 (2016); Dana Palombo, Comment, *A Tale of Two Cities: The Regulatory Battle to Incorporate Short-Term Residential Rentals into Modern Law*, 4 AM. U. BUS. L. REV. 287 (2015).

115. See Talia G. Loucks, Note, *Travelers Beware: Tort Liability in the Sharing Economy*, 10 WASH. J.L. TECH. & ARTS 329 (2015).

116. See Alexander B. Traum, *Sharing Risk in the Sharing Economy: Insurance Regulation in the Age of Uber*, 14 CARDOZO PUB. L., POL'Y & ETHICS J. 511 (2016).

117. See Roger O. Steggerda, Note, *Watching Your Neighbor's Child: Is Babysitting Really a Business Pursuit? A Comment on Dwello v. American Reliance Insurance Company*, 1 NEV. L.J. 323, 327 (2001) ("Several types of personal liability policies, and the liability sections of virtually all homeowners insurance policies, contain a business pursuit exclusion. Commonly, the business pursuits provision is fairly broad, stating that personal liability and medical payments to others do not apply to bodily injury or property damage 'arising out of business pursuits of any insured' Often, the exclusion carries with it an exception almost equally broad, which states that the exclusion does not apply to 'activities which are ordinarily incident to non-business pursuits'").

several years, Airbnb has affirmatively taken steps in attempting to ameliorate home sharing risks. The trend over the past several years has been a movement toward steadily increasing coverage for liability risks through the private mechanism of insurance-like coverage. First, in 2012 Airbnb launched a “Host Guarantee” program, discussed more fully in Section II.C, to address property damage risks.¹¹⁸ In early 2015, Airbnb expanded beyond the Host Guarantee program and mere property damage coverage, and began providing coverage for third-party claims of both bodily injury and/or property damage through a Host Protection Insurance program.¹¹⁹ However, the Host Protection Insurance program initially only offered secondary coverage.¹²⁰ Later in 2015, the Host Protection Insurance program was amended to offer primary coverage.¹²¹ Most recently, in May 2016, a major insurer, Allstate, announced plans to offer a “Host Advantage” personal property insurance protection endorsement in several states (starting in mid-August 2016).¹²²

While Airbnb and other companies have already implemented a number of steps to incorporate insurance into risk mitigation of the liability risks posed by the Airbnb model, much work is left to be completed to fully incorporate insurance. No states currently require home sharing companies to offer minimum personal property and liability insurance coverages for home sharing hosts. Also, no states require that home sharing sites provide disclosures to home sharing hosts concerning insurance coverages on their websites. Significant coverage gaps remain for home sharing hosts, and states are in a position to enact legislation to promote wider insurance coverage to mitigate home sharing risks.

118. See AIRBNB HOST GUARANTEE, *supra* note 13.

119. See Ron Lieber, *The Insurance Market Mystifies an Airbnb Host*, N.Y. TIMES (Dec. 19, 2014), http://www.nytimes.com/2014/12/20/your-money/the-insurance-market-mystifies-an-airbnb-host.html?_r=0.

120. *Id.*

121. See Steven Musil, *Airbnb Beefs up Liability Insurance Offering for Hosts*, CNET (Oct. 22, 2015), <http://www.cnet.com/news/airbnb-beefs-up-liability-insurance-offering-for-hosts/>.

122. See *Allstate Debuts Insurance Coverage for Homeowners Sharing Their Homes*, INS. J. (May 25, 2016), <http://www.insurancejournal.com/news/national/2016/05/25/409819.htm> [hereinafter INSURANCE JOURNAL].

B. *The “Business Pursuits” and Rental Exclusion*

Traditional homeowner’s insurance policies cover losses to the home and its physical contents, as well as provide coverage for liability claims by third persons visiting the home.¹²³ While homeowner’s policies provide a great degree of insurance coverage for the insured, there are a number of exclusions, including losses due to flood damage,¹²⁴ ordinance or law,¹²⁵ losses due to earth movement,¹²⁶ and war.¹²⁷ In addition, standard policies typically exclude losses for property

123. See Jay Feinman, *Fragmented Risk: An Introduction*, 11 RUTGERS J.L. & PUB. POL’Y 1 (2013) (“Most homeowners have only the vaguest sense of the extent of coverage provided by their homeowners’ insurance policy, particularly the breadth of coverage it provides. Using as an example the HO-3 policy, the most widely used policy, most homeowners would not be surprised to know that it covers physical damage to their home and its contents and their tort liability for accidents to visitors to their home.”).

124. See Christopher C. French, *Insuring Floods: The Most Common and Devastating Natural Catastrophes in America*, 60 VILL. L. REV. 53, 61 (2015) (“[B]y the 1960s, insurers had seen enough of flood losses, and they decided that insuring losses due to flooding generally was not a risk they wanted to accept. Almost uniformly, they have refused to insure flood losses for non-commercial entities despite selling ‘all risk’ homeowners property policies.”).

125. See Scott G. Johnson, *Insurance Coverage for Building Code Upgrades*, 44 TORT TRIAL & INS. PRAC. L.J. 1031, 1039 (2009) (“Policy provisions limiting coverage for building code upgrades have been in insurance policies for more than one hundred years. The 1896 New York Standard Policy, for example, included such a limitation. The limitation has remained in every subsequent version of the standard fire policy. Today, many other policy forms also exclude or limit coverage for the costs of complying with building laws or ordinances.”).

126. See Robert P. Dahlquist, *Perspectives on Subsidence Exclusions and the Role of Concurrent Causation in Earth Movement Cases*, 37 TORT & INS. L.J. 949, 953 (2002) (“The most commonly used types of earth movement exclusions include: (1) exclusions for damage caused by earth movement regardless of the cause of the earth movement; (2) exclusions for earth movement caused by the operations of the insured or the operations of others for whose acts the insured may be held liable; (3) exclusions for earth movement caused by the operations of the insured but not the operations of others; and (4) exclusions for specific earth movement events.”).

127. See Lucien J. Dhooze, *A Previously Unimaginable Risk Potential: September 11 and the Insurance Industry*, 40 AM. BUS. L.J. 687, 728 (2003) (“‘Acts of war’ have long been an excluded peril from various forms of insurance coverage. War exclusions generally consist of those included in standard policy forms developed by industry associations and nonstandard forms drafted by individual insurers based upon the language contained within the standard forms.”).

damage and personal injury arising out of the “business pursuits” of an insured.¹²⁸ The “business pursuit” exclusion has been applied by courts in cases such as operating a business out of a home,¹²⁹ providing child care services in a home,¹³⁰ the activities of a limited partnership in buying and selling real estate investments,¹³¹ and agricultural activities such as driving a tractor to haul hay for a profit.¹³²

The question often arises as to what exactly constitutes a “business pursuit.” Courts generally utilize a two-part test to determine a business pursuit—first, if there is continuity in the insured’s activity,¹³³ and second, the presence of a profit motive.¹³⁴ It is arguable in the case with home sharing in the Airbnb model that an insured under a homeowner’s insurance policy who rents out the home through Airbnb or another home sharing service, that a court would find “continuity” if the insured rents the home multiple times in a given time period. The “profit motive” element is much easier to establish, as it is likely that the primary motivation of those listing their homes on Airbnb and similar home sharing websites is to earn extra money.

An additional exclusion which some homeowner’s insurance policies contain is the “rental exclusion.” A rental exclusion typically will exclude bodily injury or property damage “arising out of the rental or holding for rental of any part of any premises by an insured.”¹³⁵ However, there is typically an

128. See *Personal Umbrella Insurance Policy: The “Business Pursuits” Exclusion*, SETNOR BYER INS. & RISK (Oct. 18, 2010), <https://www.setnorbyer.com/risk-briefs/post/Personal-Umbrella-Insurance-Policy-The-Business-Pursuits-Exclusion.aspx>.

129. See, e.g., *Welch v. Gulf Ins. Co.*, 190 S.E.2d 101 (Ga. Ct. App. 1972).

130. See, e.g., *Stanley v. Am. Fire & Cas. Co.*, 361 So. 2d 1030, 1033 (Ala. 1978) (“Supervising children on a regular basis for compensation is ordinarily a business pursuit.”).

131. See, e.g., *Vallas v. Cincinnati Ins. Co.*, 624 So. 2d 568 (Ala. 1993).

132. See, e.g., *LeBlanc v. Broussard*, 396 So. 2d 535 (La. Ct. App. 1981).

133. See *Springer v. Erie Ins. Exch.*, 94 A.3d 75, 87 (Md. 2014). The court defined continuity as “a continued or regular activity for the purpose of earning a livelihood.” *Id.*

134. *Id.* The court defined a profit motive as “the showing that the activity was undertaken for monetary gain.” *Id.*

135. See, e.g., *Citizens Prop. Ins. Corp. v. Wise*, 926 So. 2d 403, 403 (Fla. Ct. App. 2006).

exception for the rental or holding for rental of an insured location on an “occasional basis.”¹³⁶

Courts have struggled to find consistent results on a clear bright-line interpretation of an “occasional basis.” In *State Farm Fire and Cas. Co. v. Piazza*, two parents and their daughter purchased a house which the daughter occupied for two years.¹³⁷ After two years, the daughter left the home to attend school in Scotland.¹³⁸ The mother’s property management company rented out the house to two different groups of tenants over the course of twenty-six months.¹³⁹ The second group of tenants, a couple, alleged they contracted an illness caused by mold in the home and filed a liability claim against the homeowners.¹⁴⁰

The homeowners’ liability insurer sought a declaratory judgment and contended they did not have a duty to defend the homeowners on the basis of the rental exclusion in the homeowner’s policy.¹⁴¹ In examining the facts surrounding the rentals of the home, the Washington Court of Appeals held the “occasional basis” exception to the rental exclusion did not apply and thus the insurer did not have a duty to defend the homeowners in the underlying liability case.¹⁴² The court noted that “a continuous rental arrangement of over twenty-six months cannot be called ‘occasional’ under any definition of the term,” and that both the absence of the homeowners from the home as well as long-term rental arrangements are more typical of a landlord–tenant relationship than a rental made on an “occasional basis.”¹⁴³

Courts sometimes have found coverage in a rental situation. For example, in *Villanueva v. Preferred Mut. Ins. Co.*, the plaintiffs leased their summer home to two individuals in a five-month “ski season” lease.¹⁴⁴ During the lease, the home

136. *Id.* at 404.

137. *See* *State Farm Fire & Cas. Co. v. Piazza*, 131 P.3d 337 (Wash. Ct. App. 2006).

138. *Id.*

139. *Id.* at 337–38.

140. *Id.* at 338.

141. *Id.*

142. *Id.*

143. *Id.*

144. *See* *Villanueva v. Preferred Mut. Ins. Co.*, 48 A.D.3d 1015, 1016 (N.Y. App. Div. 2008).

was destroyed in a fire and the plaintiffs incurred \$121,000 in damages.¹⁴⁵ The insurer offered to pay only \$2500, which was a limited coverage amount for personal property used for business purposes.¹⁴⁶ The “business purposes” exclusion in the policy at issue in the case included the “rental of property to others” in the definition of “business.”¹⁴⁷

The insurer contended that it would be unreasonable for the plaintiffs to expect coverage in a situation where they relinquished the property to the renters for five months.¹⁴⁸ Despite this argument, the New York Appellate Division of the Supreme Court cited¹⁴⁹ the Illinois Court of Appeals case of *State Farm Fire & Cas. Co. v. Wonnell*, which stated that “the purpose behind the ‘occasional’ rental exception was to allow the insured to rent his or her residence while living elsewhere temporarily, but with the intention to return there to live.”¹⁵⁰ In examining the purposes of the “occasional” rental exception, the New York Appellate Division of the Supreme Court held that a one-time rental of a summer home for five months fell within the “occasional rental” exception of the “business purposes” exclusion, and thus the exclusion did not apply.¹⁵¹ It also emphasized that other courts examining the “occasionally rented,” “occasional rental,” or “occasional basis” language found that it applied to vacation rentals.¹⁵²

Although an insured who lists her home on Airbnb or another home sharing service may be able to find insurance coverage if a court finds an ambiguity in her policy, the likely scenario is that coverage will not exist for the Airbnb model through the traditional homeowner’s insurance policy. Some insurance companies may be more generous than others with regard to the “business purposes” and rental exclusions. For instance, a representative of USAA has indicated that liability coverage may be available for insureds who “very occasionally” rent a room out, and Chubb provides coverage to insureds

145. *Id.*

146. *Id.*

147. *Id.* at 1016–17.

148. *Id.* at 1017.

149. *Id.*

150. See *State Farm Fire & Cas. Co. v. Wonnell*, 533 N.E.2d 1131, 1133 (Ill. App. Ct. 1989).

151. See *Villanueva*, 48 A.D.3d at 1017–18.

152. *Id.* at 1017.

who earn up to \$15,000 annually in rental income.¹⁵³ Ultimately, however, the presumption is likely in the majority of cases that there would be no coverage through the typical homeowner's insurance policy. Likely with these limitations in mind, Airbnb began offering a "Host Guarantee" program to cover certain property damage risks incurred by hosts.

C. *The Airbnb "Host Guarantee" Program*

In early 2012, Airbnb announced it would provide coverage for up to \$1 million for hosts who incur property damage in their home during guest Airbnb stays through a "Host Guarantee" program.¹⁵⁴ The coverage provides up to \$1 million in coverage for not only personal property, but for real property as well.¹⁵⁵ Significantly, the "Host Guarantee" is not traditional insurance and Airbnb represents that it is not meant to "replace your homeowner's or renter's insurance."¹⁵⁶

As a condition precedent to filing any claim under the Host Guarantee program for property damage caused by guests, a host is required to contact and to try to resolve the property damage concern with the guest within fourteen days of discovery of the physical loss or damage.¹⁵⁷ If resolution of the issue is unsuccessful, then the host must complete and file an Airbnb Host Guarantee Payment Request Form within thirty days, the earlier of fourteen days after the guest's end of booking, or the date on which the host's next booking occurs.¹⁵⁸ In addition, if property damage is incurred as a result of a crime or other violation of law, a host is required to file a police report as a condition precedent to recovery under the

153. See Ron Lieber, *A Liability Risk for Airbnb Hosts*, N.Y. TIMES (Dec. 5, 2014), https://www.nytimes.com/2014/12/06/your-money/airbnb-offers-homeowner-liability-coverage-but-hosts-still-have-risks.html?_r=0.

154. See Chenda Ngak, *Airbnb Will Insure up to \$1 Million in Property Damage*, CBS NEWS (May 23, 2012, 3:58 PM), <http://www.cbsnews.com/news/airbnb-will-insure-up-to-1-million-in-property-damage/>.

155. See HOST GUARANTEE TERMS AND CONDITIONS, https://www.airbnb.com/terms/host_guarantee (last visited June 26, 2016) [hereinafter AIRBNB HOST GUARANTEE TERMS AND CONDITIONS].

156. See WHAT'S THE DIFFERENCE BETWEEN AIRBNB'S HOST GUARANTEE AND HOST PROTECTION INSURANCE?, <https://www.airbnb.com/help/article/938/what-s-the-difference-between-airbnb-s-host-guarantee-and-host-protection-insurance> (last visited June 26, 2016).

157. See AIRBNB HOST GUARANTEE TERMS AND CONDITIONS, *supra* note 155.

158. *Id.*

Host Guarantee program.¹⁵⁹ Within thirty days, a host must also submit a sworn proof of loss.¹⁶⁰ Any recovery under the Host Guarantee program is reduced by collateral sources, including any payments made by the responsible guest, the security deposit received by the host, and any indemnity under an applicable insurance policy.¹⁶¹

There are a number of provisions in the Host Guarantee program terms and conditions that potentially may be problematic for a host filing a property damage claim. First, in the terms and conditions, Airbnb specifically reserves the right to terminate or modify the provisions of the contract “at any time, in its sole discretion, and without prior notice.”¹⁶² Pursuant to this provision, at essentially any time, Airbnb can announce elimination of the program without any notice given to hosts. While Airbnb has a strong presence in the State of California,¹⁶³ hosts outside of the State of California may be surprised to learn that any dispute under the terms and conditions would be interpreted in accordance with California law.¹⁶⁴ While the terms and conditions of the Host Guarantee program provide that payment for any loss will be in U.S. currency, and a host may reasonably expect such payment in U.S. currency, the program also provides Airbnb the sole discretion to make payment in a different currency if it so wishes.¹⁶⁵ Finally, as most commercial contracts today contain arbitration clauses,¹⁶⁶ the terms and conditions of the Host Guarantee program also provide that any disputes are subject to arbitration.¹⁶⁷ The arbitration provision provides that if a property damage claim for damages does not exceed \$75,000, then

159. *Id.*

160. *Id.*

161. *Id.*

162. *Id.*

163. See Tim Logan, Emily Alpert Reyes & Ben Poston, *Airbnb and Other Short-Term Rentals Worsen Housing Shortage, Critics Say*, L.A. TIMES (Mar. 11, 2015), <http://www.latimes.com/business/realestate/la-fi-airbnb-housing-market-20150311-story.html>.

164. See AIRBNB HOST GUARANTEE TERMS AND CONDITIONS, *supra* note 155.

165. *Id.*

166. See Anjanette Raymond, *It Is Time the Law Begins to Protect Consumers From Significantly One-Sided Arbitration Clauses Within Contracts of Adhesion*, 91 NEB. L. REV. 666 (2013) (generally discussing arbitration clauses in adhesion contracts).

167. See AIRBNB HOST GUARANTEE TERMS AND CONDITIONS, *supra* note 155.

Airbnb will cover the filing, administrative, and arbitrator fees of the arbitration.¹⁶⁸ In addition, the provision provides that the arbitration will take place in the country of the host's residence and it allows recovery of a host's attorney's fees and expenses if the host prevails in the arbitration.¹⁶⁹

In addition to all of the requirements, to submit a claim under the Host Guarantee program, hosts are also subject to a number of limitations and exclusions. Perhaps the most significant limitation is that it covers only property damage and does not cover personal liability or injury suffered by guests or other third persons.¹⁷⁰ While the Airbnb "Host Protection Insurance" program discussed later in this Article covers certain liability and personal injury claims of third persons, the Host Guarantee program does not cover any personal liability or injury claims. Another significant limitation is that the guarantee does not cover ordinary wear and tear of the host's property as a result of guest bookings.¹⁷¹ Thus, the host who repeatedly rents out property for home sharing or short-term rentals may face denial of a Host Guarantee claim if Airbnb were to make the determination that the loss was due to ordinary wear and tear.

There are also a number of other significant exclusions in the Host Guarantee program. The Host Guarantee program doesn't cover the loss of currency, money, precious metal in bullion form, notes, securities, watercraft, and vehicles.¹⁷² Most fine art, which typically can be covered by endorsements and specialized insurance policies,¹⁷³ also would not be covered under the Host Guarantee program.¹⁷⁴ The program also does not cover any loss after a booking period expiration,¹⁷⁵

168. *Id.*

169. *Id.*

170. *Id.*

171. *Id.*

172. *Id.*

173. See Rebecca Woan, *What Can Be Covered, What Sometimes Can Be Covered and What is Almost Never Covered*, 13 DEPAUL BUS. & COM. L.J. 479 (2015) (generally discussing fine art insurance policies).

174. See AIRBNB HOST GUARANTEE TERMS AND CONDITIONS, *supra* note 155. The Host Guarantee Terms and Conditions provide the following exclusion: "in the case of Fine Arts, losses or damages if the Fine Arts cannot be replaced with other of like kind and quality and any loss or damage from any repairing, restoration or retouching process." *Id.*

175. *Id.*

and losses due to identity theft and fraud, which resulted in approximately \$15.4 billion in damages in 2014,¹⁷⁶ are specifically excluded from coverage.¹⁷⁷

D. *The Airbnb Host Protection Insurance Program*

In January 2015, Airbnb expanded upon the Host Guarantee program and offered a Host Protection Insurance program to hosts for personal injury claims.¹⁷⁸ The coverage is considered insurance and covers liability claims filed by guests and third persons who are injured on the host's premises during a booking.¹⁷⁹ It currently provides up to \$1 million in coverage per occurrence for personal injury and property damage claims, with a cap of \$1 million per listing location.¹⁸⁰

Originally, the Host Protection Insurance program only offered secondary insurance coverage.¹⁸¹ Through the terms of the first iteration of the Host Protection Insurance program, a host with a claim would first have to file a claim with the host's home insurance company for a coverage determination on the claim as a condition precedent to filing a claim with Airbnb's Host Protection Insurance.¹⁸² As one commentator notes, filing such a claim may potentially lead to the home insurer canceling the host's primary homeowner's insurance for utilizing the property for "business purposes."¹⁸³ Another significant risk faced by a host is that through filing a homeowner's insurance claim, not only will the claim subject the host to a possible cancellation of coverage, but the filing of the claim may very well lead to a rise in the host's annual homeowner's insurance premium. CNBC reported in late 2013 that the average homeowner's insurance premium increased by ap-

176. Andrew Blake, *Identity Theft Affected 17.6M, Cost \$15.4B in 2014: Justice Dep't*, WASH. TIMES (Sept. 28, 2015), <http://www.washingtontimes.com/news/2015/sep/28/identity-theft-affected-176-million-cost-154-billi/>.

177. See AIRBNB HOST GUARANTEE TERMS AND CONDITIONS, *supra* note 155.

178. See HOST PROTECTION INSURANCE, <https://www.airbnb.com/host-protection-insurance> (last visited June 27, 2016) [hereinafter AIRBNB HOST PROTECTION INSURANCE].

179. *Id.*

180. *Id.*

181. See Galen Hayes, *The Scary Insurance Reality for Airbnb Hosts*, PROPERTY CASUALTY 360° (Jan. 5, 2016), <http://www.propertycasualty360.com/2016/01/05/the-scary-insurance-reality-for-airbnb-hosts?slreturn=1467043407>.

182. *Id.*

183. *Id.*

proximately nine percent following the filing of an insurance claim, with double digit increases in premiums in states such as Minnesota, Connecticut, Maryland, California, and Oregon.¹⁸⁴

The expansion of programs from the Host Guarantee program to the Host Protection Insurance program has indicated a trend of increasing coverage of liability risks in the home sharing economy. In October 2015, Airbnb extended this trend with an announcement that the Host Protection Insurance program would provide primary insurance coverage, helping to negate the potential negative consequences for a host who files a claim with only secondary coverage.¹⁸⁵

Although there is generally a trend of increased insurance coverage, the Host Protection Insurance program includes a number of key exclusions in its coverage. Airbnb notes that the following liability items are not included in the coverage: “(1) Intentional Acts including (i) Assault and Battery or (ii) Sexual Abuse or Molestation—by the host or any other insured party; (2) Loss of Earnings; (3) Personal and Advertising Injury; (4) Fungi or Bacteria; (5) Chinese Drywall; (6) Communicable Diseases; (7) Acts of Terrorism; (8) Product Liability; (9) Pollution; and (10) Asbestos, Lead, or Silica.”¹⁸⁶

E. *Other Homesharing Insurance Options*

Beyond Airbnb, there are other entities that have entered the homesharing liability insurance market to provide even expanded insurance coverage. One entity that has entered the homesharing liability insurance market is Peers, which is an organization dedicated to the promotion of the sharing economy.¹⁸⁷ Peers offers a \$1 million commercial general liability insurance policy, which covers bodily injury or property damage to a guest for a \$36 monthly premium.¹⁸⁸ Peers notes that

184. See Herb Weisbaum, *Think Carefully Before Filing a Homeowners Claim*, CNBC (Oct. 22, 2013, 7:44 AM), <http://www.cnbc.com/2013/10/21/filing-a-homeowners-claim-can-raise-your-rate-9-percent.html>.

185. See AIRBNB HOST PROTECTION INSURANCE, *supra* note 178.

186. *Id.*

187. See MAKING THE SHARING ECONOMY WORK FOR THE PEOPLE WHO POWER IT, <http://www.peers.org/about/> (last visited June 27, 2016) (“Peers’ mission is to make the sharing economy work for the people who power it.”).

188. See HOMESHARING LIABILITY INSURANCE FAQ, <http://www.peers.org/homesharing-liability-insurance-faq/> (last visited June 27, 2016).

Airbnb is the only company which provides liability insurance to their hosts, and contends that its product is ideal for hosts who place their property listing on multiple homesharing sites.¹⁸⁹ The homesharing liability policy, which is underwritten by United Specialty Insurance Company, can be activated for month-by-month utilization for hosts who only rent their property during specific months.¹⁹⁰ While the policy limits of the Airbnb Host Protection Insurance program and Peers policy are the same at \$1 million, the Peers policy does provide a reimbursement for ninety days lost rental income (up to a limit of \$5000) in the event a guest causes damages in excess of \$10,000.¹⁹¹

Most recently, in May 2016 Allstate announced plans to offer a homesharing insurance product endorsement to hosts in six states, starting in mid-August 2016.¹⁹² Allstate plans to offer the product initially in Arizona, Colorado, Illinois, Michigan, Tennessee, and Utah with plans to make it available in more states in 2017.¹⁹³ The endorsement will provide coverage on personal property for up to \$10,000 per rental period, and will cost approximately \$50 per year.¹⁹⁴

F. *State Legislative Activity*

As the above developments indicate, the general trend increasingly in industry practice is for an extension of coverage in the forms of guarantees and insurance to cover a host's liability exposure with the Airbnb model. Insurance regulatory offices in at least several states (Arkansas,¹⁹⁵ Louisiana,¹⁹⁶

189. *Id.*

190. *Id.*

191. *Id.*

192. *See* INSURANCE JOURNAL, *supra* note 122.

193. *Id.*

194. *Id.*

195. *See*, ARK. INS. DEP'T, *Navigating Home-Sharing Rentals*, <http://www.insurance.arkansas.gov/Consumers/Alerts/Home-Sharing.html> (last visited June 27, 2016).

196. *See Official Press Release: Department of Insurance Offers Tips on Navigating Risks of Home-Sharing Rentals*, LA. DEP'T OF INS. (May 6, 2015), <http://www.ildi.la.gov/news/press-releases/5-6-15-home-sharing-rentals>.

Rhode Island,¹⁹⁷ and Vermont¹⁹⁸) and the former Insurance Commissioner of the State of Florida,¹⁹⁹ have expressed caution on the risks associated with home sharing. With the explosive growth of the home sharing economy, there have been efforts in at least three states (Massachusetts, California, and Florida) to regulate the aspects of home sharing that deal specifically with insurance coverage through legislation.

1. *Massachusetts House Bill 2618*

In early 2015, House Bill Number 2618 was introduced in the Massachusetts House of Representatives to establish a licensing system for short-term residential rentals in the State of Massachusetts.²⁰⁰ The bill seeks to require all home sharing hosts to obtain a “Short-Term Residential License” from their city or town.²⁰¹ It would also establish a “Short-Term Residential Rental Registry” managed by the Massachusetts Department of Housing and Community Development, which would include the names of all hosts who are licensed in the state.²⁰² The bill also would implement a state tax of five percent on renters who rent through home sharing services,²⁰³ and allow cities and towns in the state to impose a local tax of up to six percent on rentals (with Boston permitted to impose a tax of up to 6.5%).²⁰⁴

A unique component of the Massachusetts legislation is that it includes safety requirements for short-term residential rentals. The bill mandates that the home sharing host’s unit and property in which it is located cannot be subject to “any

197. See *Consumer Alert 2015-8: Navigating Home Sharing Rentals*, R.I. DEP’T OF BUS. REGULATION INS. DIV. (July 14, 2015), <http://www.dbr.state.ri.us/documents/divisions/insurance/consumers/ConsumerAlert2015-8.pdf>.

198. See *Be Aware Before You Share*, VT. DEP’T OF FIN. REGULATION, <http://www.dfr.vermont.gov/insurance/insurance-consumer/be-aware-you-share> (last visited June 27, 2016).

199. See Kevin McCarty, *Caution on Home-Sharing Rentals*, TAMPA TRIB. (June 1, 2015), <http://www.tbo.com/list/news-opinion-commentary/kevin-mccarty-caution-on-home-sharing-rentals-20150601/>.

200. See H.R. 2618, 189th Gen. Court (Mass. 2015).

201. *Id.* § 7(a). The provision also notes that a short-term residential license is valid for a time period of two years and can be obtained and renewed for a \$50 fee. *Id.*

202. *Id.* § 6(f)(1)(iv).

203. *Id.* § 2.

204. *Id.* § 3.

outstanding building, electrical, plumbing, mechanical, fire, health, housing, police or planning code enforcement, including any notices of violation, notices to cure, orders of abatement, cease and desist orders, or correction notices.”²⁰⁵ In addition, the legislation requires hosts to post a sign within the front door of the property which provides information on the locations of all fire extinguishers, gas shut-off valves, fire exits, and pull fire alarms.²⁰⁶

Finally, the legislation requires all hosts in the State of Massachusetts to carry at least \$500,000 in liability insurance coverage for home sharing guests, or to conduct transactions through a home sharing platform that carries at least that amount in insurance coverage.²⁰⁷ The legislation mandates that the insurance coverage defend and indemnify the host, named additional insured(s), any tenant(s), and also any owner(s) in the building for bodily injury or property damage incurred during a short-term residential use.²⁰⁸

To date, Massachusetts House Bill 2618 has not been enacted into law.²⁰⁹

2. *California Senate Bill 1092*

In February 2016, California State Senator Bill Monning introduced legislation intended to mandate certain disclosures by home sharing platforms to hosts. Essentially, the disclosures encourage hosts to review their insurance policies and try to ascertain if there is appropriate insurance coverage in the event the host incurs property damage or if the situation in which a guest or third party files a liability claim arising out of a booking were to arise.²¹⁰ The bill states that the following specific disclosure must be made in the home sharing platform: “You should review any restrictions on coverage under your homeowner’s or renter’s insurance policy related to short-term rental activities to ensure that there is appropriate insurance coverage in the event that a person sustains an in-

205. *Id.* § 6(f)(1)(vii).

206. *Id.* § 6(f)(1)(viii).

207. *Id.* § 6(f)(1)(iii).

208. *Id.*

209. *See Bill H. 2618*, THE 189TH GENERAL GEN. COURT OF THE COMMONWEALTH OF MASS., <https://malegislature.gov/Bills/189/House/H2618> (last visited June 28, 2016).

210. *See S. 1092*, Cal. Leg. 2015–2016 Reg. Sess. (Cal. 2016).

jury or loss for which you are responsible, a person damages or causes loss to your personal or real property, or a claim or lawsuit is made against you or otherwise arises out of activities related to this hosting platform.”²¹¹ The legislation recently passed both chambers of the California legislature and it may possibly be enacted into law later in 2017.²¹²

3. *Florida Senate Bill 1298*

In early 2015, Florida State Senator David Simmons introduced Senate Bill 1298 in the Florida Senate.²¹³ The legislation has been described as “benchmark” in the area of insurance and the home sharing economy.²¹⁴ Senate Bill 1298 includes the most extensive proposed home sharing insurance requirements of any state legislation to date. It would have required short-term rental network companies to provide at least \$1 million in liability insurance coverage for participating hosts to cover potential liability claims of guests and third parties, and also would have required providing coverage for physical property damage to hosts which are equal to or greater than the underlying homeowner’s insurance coverage the host maintains on the property.²¹⁵ The liability and property insurance called for by the bill must be primary, not secondary or excess, and it also would be barred from including a condition precedent that any other insurance policy must first deny a claim.²¹⁶

Similar to the Massachusetts legislation, Florida Senate Bill 1298 also included disclosure requirements. The bill required short-term rental network companies to disclose in writing to hosts the insurance limits of liability and coverages the company is providing during short-term rentals.²¹⁷

211. *Id.*

212. *See id.*

213. *See* S. 1298, 2015 S., Reg. Sess. (Fla. 2015), <https://www.flsenate.gov/Session/Bill/2015/1298>.

214. *See* G. Donovan Brown, *National Association of Insurance Commissioners’ Sharing Economy Working Group Reviews Home-Sharing Issues, Benchmark Florida Legislation*, MARTINDALE (Aug. 5, 2015), http://www.martindale.com/insurance-law/article_Colodny-Fass-PA_2212436.htm.

215. *See* Fl. S. 1298.

216. *Id.*

217. *Id.*

Finally, Florida Senate Bill 1298 also would have imposed a statutory duty upon short-term rental companies and their insurers to cooperate with claims investigations.²¹⁸ It would have required short-term rental companies and their insurers to work with other insurers to exchange information, and specifically to provide the number and duration of all short-term rentals in the prior twelve months with regard to the property where a loss occurs.²¹⁹ Senate Bill 1298 passed through the Florida Senate in 2015, but it did not receive a vote in the Florida House of Representatives that year.²²⁰

G. *Solutions to Mitigate Risk*

While the home sharing economy has expanded rapidly in the past several years, states have not yet followed as quickly in implementing legislation intended to reduce risk. Despite the efforts of Airbnb and other entities to expand insurance coverage, significant coverage gaps remain for home sharing hosts. States are in a prime position today to enact legislation to promote broader insurance coverage requirements to address home sharing risks. States can implement a number of requirements, described below, which can have the effect of mitigating risk.

(1) Bar any home sharing company or host to list for short-term rental any unit or property that is subject to any outstanding federal, state, and city/municipal building, electrical, plumbing, mechanical, fire, health, housing, police, or planning code enforcement, including any notices of violation, notices to cure, orders of abatement, cease or desist orders, or correction notices.

This requirement tracks almost exactly the language of Massachusetts House Bill 2618 in its intent to ensure that all units and properties offered for short-term rental meet minimum safety standards. State legislation can encompass federal, state, and city/municipal safety requirements.

(2) Require hosts to ensure that any unit or property being utilized as a short-term rental has at least one functioning

218. *Id.*

219. *Id.*

220. See *Bill History, CS/CB 1298: Minimum Insurance Requirements*, FLA. SENATE, <https://www.flsenate.gov/Session/Bill/2015/1298> (last visited Jan. 27, 2017).

and operating smoke detector, fire extinguisher, carbon monoxide detector, and first-aid kit in the unit or property.

This requirement addresses several risks associated with a home sharing situation. Fire loss is a significant risk. A National Fire Protection Association report indicated that in 2014, approximately 367,500 fires occurred in homes (which includes one and two family homes, apartments, and manufactured homes).²²¹ Carbon monoxide poisoning also presents a risk,²²² and the requirement of a carbon monoxide detector is intended to mitigate that risk. Additionally, the requirement of a first-aid kit in the unit or property can address situations where a smaller injury of a guest or third party may occur, such as a small laceration or insect bite.

(3) Require hosts to provide guests with written information on the locations of fire extinguishers, carbon monoxide detectors, smoke detectors, first-aid kits, gas shut-off valves, fire exits, and/or fire pull alarms.

This requirement closely tracks Massachusetts House Bill 2618, with the exception that it adds carbon monoxide detectors, smoke detectors, and first-aid kits to the required disclosures. In addition, this particular requirement does not necessarily require that the information be provided on a clearly printed sign, but rather in a disclosure generally in writing.

(4) Require hosts to provide guests with the telephone numbers and street address of the nearest hospital to the unit or property, in writing.

This requirement is intended to address the situation where a guest or third party is in a situation where immediate professional medical attention is required.

(5) Require short-term rental network companies to provide for hosts at least \$1 million in liability insurance coverage for guests and third parties. In addition, the required liability insurance must be primary and cannot be excess, secondary, or require a denial of a claim for other insurance as a

221. See HYLTON J.G. HAYNES, NAT'L FIRE PROT. ASS'N, FIRE LOSS IN THE UNITED STATES DURING 2014 at iii (2015).

222. See Will Melehani, *Chapter 19: Requiring a Carbon Monoxide Detector in Every Home*, 42 MCGEORGE L. REV. 628, 628 (2011) ("The Centers for Disease Control and Prevention estimate that each year carbon monoxide poisoning is responsible for 15,200 injuries and 480 deaths nationally.").

condition precedent to trigger the liability insurance coverage furnished.

These requirements closely track the requirements of Florida Senate Bill 1298. Massachusetts House Bill 2618 would have only required \$500,000 in liability coverage, and Florida Senate Bill 1298 would have required \$1 million. The \$1 million figure suggested is also in line with Airbnb's current Host Protection Insurance program and the emerging industry standard for home sharing insurance coverage.

(6) Require short-term rental network companies to provide for hosts at least \$1 million in property insurance coverage.

Airbnb's current Host Guarantee Program currently guarantees for up to \$1 million in property damage that a host may suffer, but is not considered insurance. This requirement ensures that \$1 million of actual property insurance coverage is furnished to hosts. While closely resembling Florida Senate Bill 1298, this would not require short-term rental network companies to furnish property insurance coverage up to the limits of the underlying homeowner's insurance policy.

(7) Require short-term rental network companies to disclose in writing to hosts information concerning the insurance coverages provided for home sharing. In addition, disclosure is required to be made that the insurance coverages provided may be insufficient to cover any loss or judgment that may result out of a rental.

The first requirement is similar to the requirements imposed by Florida Senate Bill 1298. The additional required disclosure is intended to specifically warn hosts of the situations where insurance may be insufficient to cover the costs of a property loss (in excess of \$1 million) or a liability judgment by a guest or third party resulting out of bodily injury or property damage (in excess of \$1 million).

(8) Require short-term rental network companies to cooperate in claims investigations with all insurers and to keep records of the time and duration of guest stays at a host's unit or property.

These requirements essentially track the requirements of Florida Senate Bill 1298 in imposing an affirmative statutory duty to cooperate with claims investigations and to keep records which may assist in claims investigations.

(9) *Bar any property insurance company from canceling a host's underlying homeowner's property insurance coverage for participating in home sharing.*

One of the concerns addressed within the Sharing Economy Working Group of the National Association of Insurance Commissioners during the summer of 2015 was that Florida Senate Bill 1298 did not include any protections for homeowners in the event a homeowner's insurance company cancels coverage due to the insured's participation as a host in home sharing.²²³ Depending upon the state and type of insurance product, an insurance company may not be able to cancel coverage in certain situations.²²⁴ This requirement would address the concern of cancellation of homeowner's insurance for home sharing activity, and at the same time, the suggestions in general ensure that at least minimum levels of insurance coverage are present to address property and liability risks that may arise.

CONCLUSION

As the sharing economy has quickly expanded over the past decade, the Airbnb model's foothold in the short-term home rental market looks to possibly expand beyond just short-term rentals for leisure travelers, and progress as well into the lucrative business travel market.²²⁵ Despite the possible expansion of the model, Airbnb and companies like it face headwinds such as the 2016 attempt in New York to bar the posting of listings of short-term rentals of less than thirty days.²²⁶ The presentation of future legislation concerning

223. See SHARING ECON. (C) WORKING GRP., NAT'L ASS'N OF INS. COMM'RS, *Attachment A (Draft Minutes to July 22, 2015 Conference Call)*, in 2015 SUMMER NATIONAL MEETING MATERIALS 1, 4 (2015).

224. See generally Ronen Avraham, Kyle D. Logue & Daniel Schwarcz, *Towards a Universal Framework for Insurance Anti-Discrimination Laws*, 21 CONN. INS. L.J. 1, 15 (2015).

225. See Kieron Monks, *Airbnb: Budget Luxury for Business Travelers?*, CNN (Aug. 28, 2015), <http://www.cnn.com/2015/08/28/travel/airbnb-for-business-travelers/> (discussing the possibility of Airbnb's expansion into the \$300 billion market in business travel).

226. See Michelle Starr, *New York Passes Bill Banning Entire Home Short-Term Rentals on Airbnb*, CNET (June 20, 2016), <http://www.cnet.com/news/new-york-passes-bill-banning-short-term-rentals-on-airbnb/> (discussing a bill in New York passed by the New York State Senate which would bar the posting of listings in New York of short-term rentals).

short-term rentals through the Airbnb model in cities and states throughout the country appears likely in the next several years as regulation of the Airbnb model catches up to the explosive growth of the sharing economy. The resolution of how the traditional areas of property, contract, and tort law affect the Airbnb model will evolve through the courts and become clearer in time.

As legislation concerning Airbnb in states throughout the country is considered, a significant way to address the liability risks posed by the expansion of the Airbnb model and the home sharing economy is to mandate a corresponding expansion of insurance coverages for hosts. As coverage gaps remain for home sharing hosts, states are in a position to enact legislation to promote wider insurance coverage to mitigate home sharing risks. The implementation of such legislation should only make the Airbnb experience even more safe and consumer-friendly to both hosts and guests alike.