

25TH IFTTA WORLDWIDE CONFERENCE & 7TH EUROPEAN WORKSHOP

CAR AND APARTMENT SHARING IN NEW YORK STATE

September 18, 2014

By Thomas A. Dickerson¹

If you own a car and own or rent a house or apartment you may have an asset which can be rented to others for short periods of time. What makes this simple concept so revolutionary and disruptive to the hotel and taxi industries, particularly, in New York and San Francisco is the connectivity between owners and renters provided by Internet "digital clearinghouses"¹ such (1) Airbnb [www.airbnb.com] which is a short-term home or apartment rental company that matches close to 350,000 hosts worldwide with

¹Thomas A. Dickerson is an Associate Justice of the Appellate Division, Second Department of the New York State Supreme Court. Justice Dickerson is the author of Travel Law, Law Journal Press, 2014; Class Actions: The Law of 50 States, Law Journal Press, 2014; ; Article 9 [New York State Class Actions] of Weinstein, Korn & Miller, New York Civil Practice CPLR, Lexis-Nexis (MB), 2012; Consumer Protection Chapter 98 in Commercial Litigation In New York State Courts: Third Edition (Robert L. Haig ed.) (West & NYCLA 2014); Dickerson, Gould & Chalos, Litigating Foreign Torts in United States Courts, Thomson-Reuters (West) 2014 and over 300 articles and papers on consumer law, class actions, travel law and tax certiorari and eminent domain issues, many of which are available at www.courts.state.ny.us/courts/ad2/justice_dickerson.shtml www.nycourts.gov/courts/9jd/taxcertatd.shtml www.classactionlitigation.com/library/ca_articles.html

rooms to let [15,000 hosts listed on Airbnb reside in New York City] with those tourists that want to rent them in 35,000 cities² and (2) Uber [www.uber.com] and Lyft [www.lyft.com] which allow customers to order car service by using a smartphone app which allows them to avoid hailing a taxi from a fixed location, locate an available Uber or Lyft³ vehicle while allowing the driver to find the customer, and rate the drivers who are licensed⁴, insured and may own the vehicle and pay less for short-term transportation⁵. Uber operates in 128 cities in 37 countries and "though it began as a dispatch network for professional chauffeurs in Town Cars and S.U.V.s, its most prominent offering is Uber X, where drivers use their own cars"⁶ This article reviews recent actions by the New York State Attorney General to control the onslaught of these Internet based companies.

Reacting To A Threat

Tourists love it⁷. Venture capitalists love it⁸. However, as Airbnb, Uber and Lyft have spread across the United States and beyond⁹, the hotel and taxi industries and local officials¹⁰ over-reacting, perhaps, have sought ways to require these innovative business models to comply with local statutes and regulations. Here in New York, the Attorney General seems to be leading the

charge¹¹ in an effort to control these innovative business models by issuing an investigatory subpoena¹² to Airbnb seeking information, *inter alia*, about Airbnb's New York City hosts and their alleged failure to pay hotel occupancy taxes and State and New York City sales taxes; seeking a restraining order to enjoin Lyft "from operating [in New York City, Buffalo and Rochester] an unlicensed for-hire livery service and insurance business in New York State in violation of state and local laws that protect the health, safety and financial well-being of New York residents"¹³; and seeking to prevent "price gouging" in violation of General Business Law § 396r by limiting Uber's use of its "surge pricing" model.

Airbnb Investigatory Subpoena

After a year of negotiations over scope of the investigatory subpoena Airbnb and the Attorney General¹⁴ reached an agreement to the effect that Airbnb will provide the Attorney General with "the information he is seeking about Airbnb hosts in New York City... The attorney general will have a year to use the data to identify bad actors - hosts who are renting out large blocks of rooms in violation of local laws."¹⁵

AIRbnb "Hosts" Versus Hotels

The legal face off between AIRbnb and the Attorney General involved much more than just seeking to identify potential tax evaders. It also pitted thousands of foreign tourists¹⁶ and their local AIRbnb "Hosts", who may offer a "'very cute and cozy' room in a retired police detective's apartment in Kew Gardens (\$35 a night) to a 'spacious mansion' on the Upper East Side (\$10,000 a night, but it's pet friendly)"¹⁷, against the Hotel Association of New York City, a spokeswoman for which noted that "AIRbnb remains a scofflaw company whose business model is at odds not just with multiple New York laws but with the basics of the New York City real estate markets"¹⁸.

Smart Tourists Versus Genteel Locals

An example of how unreceptive "genteel locals" may be to the sharing concept¹⁹ can be gleaned from the recent case, City of New York v. Smart Apartments LLC²⁰, in which New York City sought to enjoin the operation of an apartment sharing website claiming that defendant's placement of tourists in residential apartments for 'transient' stays of less than 30 days is illegal because they violate [Multiple Dwelling Laws, Housing Maintenance Codes, City Building Codes] and "they bother non-transient residents of

the buildings because the transient occupants host loud, late night parties; vomit, dump garbage and smoke in the hallways and generally do not conduct themselves in the civilized genteel manner of the locals". In granting a preliminary injunction the Court noted that "placing tourists in illegal, dangerous accommodations constitutes irreparable injury especially if there is a tragic fire".

Its All About Taxes

It is unlikely that State and local sales taxes will be imposed on Airbnb hosts or Uber and Lyft drivers. It is more efficient to tax Airbnb, Uber and Lyft directly. Certainly, Internet businesses should pay their fair share of taxes in those environments in which they sell their goods and services. It is also fair to subject Internet retailers and resellers to personal jurisdiction in the forums in which they transact business²¹. Developing fair and reasonable taxing methodologies for Internet businesses is a work in progress and started sometime ago with taxing Internet retailers or "resellers".

Taxing Internet Resellers

In *Overstock.Com v. New York State Department of Taxation*²²

the New York Court of Appeals rejected the facial challenge of online retailers (including Amazon.com) to the newly created Internet Tax as being unconstitutional "by subjecting online retailers, without a physical presence in the state, to New York sales and compensating use taxes". In so doing the Court noted that "The world has changed dramatically in the last two decades, and it may be that the physical presence test is outdated. An entity may now have a profound impact upon a foreign jurisdiction solely through its virtual projection via the Internet". The implementation of this reseller taxing methodology has led to consumer class actions alleging overcharges and the imposition of phony taxes²³.

New York City Hotel Taxes

In *Expedia, Inc. v. City of New York Department of Finance*²⁴ the New York Court of Appeals rejected a challenge by online retailers to the imposition of a local hotel tax to the fees collected from their customers. "This statute allows the City to tax up to six percent 'of the rent or charge per day' for each hotel room (and) authorizes the City to collect these taxes from the hotel operator or any 'person entitled to be paid the rent or charge for the hotel room'". In finding the hotel tax constitutional the Court noted that "Online travel

companies...have successfully reshaped the way people book travel".

Nassau County's Hotel Tax

In *County of Nassau v. Expedia, Inc*²⁵, Nassau County brought a class action on behalf of 51 other similar taxing authorities against many online travel retail sellers and "remarketers" of hotel accommodations seeking to enforce "the Nassau County Hotel and Motel Occupancy Tax. The online retailers purchase blocks of rooms from hotels at discounted rates and then resell those rooms over the Internet. The dispute is that the County wants the tax calculated as a percentage of the price the occupants pay to the resellers whereas the resellers only pay the tax based on the lower "wholesale" rate. In any event the Expedia Court certified this class action and found that Nassau County had standing to sue as a class representative on behalf of other counties.

Airbnb: Taxing The Sharing Economy

While Expedia, Priceline and Hotwire are best defined as retailers or resellers and, as such, can be controlled and taxed accordingly, it is much more difficult to find a comparable

taxing analogue for the Internet sharing economy. In addition, and as noted above, travel sharing companies such as Airbnb threaten traditional businesses such as hotels and rental car companies and may annoy the owners and residents of apartment buildings in which, for example, many Airbnb "hosts" reside. "As services like Airbnb (the apartment-sharing service) and Uber and Lyft (ride-sharing services), spread across the country, lawmakers and other officials in some cities have started seeking ways to curb their explosive growth and bring them into compliance with existing laws, written before the companies were ever imagined"²⁶

The Uber App

Uber operates its ridesharing business in 70 cities around the world²⁷, may have a transformative impact upon car ownership and the quality of urban environments²⁸ and has recently been the subject of the first ridesharing legislation in Colorado. "SB125 codifies our responsibility to the riding public and drivers by creating a new vehicle class called 'Transportation Network Companies'" providing for driver background checks, vehicle inspections and every trip must be insured up to \$1 million²⁹. However, some countries have not been so receptive as Colorado. "In Frankfurt, a state court banned Uber's low-cost UberPop

product, which connects drivers with potential customers, from operating in the country until a hearing this year on whether it unfairly competes with local taxis. A temporary injunction was ordered last week but became public on Tuesday...Uber, which allows people to use their smartphones to book rides with freelance drivers, said it would continue operating in Germany and would appeal the court's decision. But Uber could face fines in Germany of up to 250,00 euros, about \$330,000, or its local employees could be jailed for up to six months if the company violates the temporary injunction. The company's drivers, who are not employees, would not face direct penalties"³⁰

Uber Lawsuits

In addition, Uber has been the subject of, at least, two lawsuits, O'Connor v. Uber Technologies, Inc³¹, brought by drivers seeking tips who allege that Uber discourages passengers from tipping by falsely advertising that gratuity is included in the fare, even though the full gratuity is not passed along to the drivers and Boston Cab Dispatch v. Uber Technologies, Inc.³² in which plaintiffs allege that Uber "has gained an unfair competitive advantage over traditional taxicab dispatch services and license-holders because it avoids the costs and burdens of complying with extensive regulations designed to ensure that

residents of Boston have access to fairly priced and safe transportation”.

Price Gouging?

Back in New York, the Attorney General raised the issue of whether³³ Uber’s “surge pricing” model may violate General Business Law § 396-r which prohibits “price gouging” during “periods of abnormal disruption of the market caused by strikes, power failures, severe shortages or other extraordinary adverse circumstances”³⁴ An agreement reached between the Attorney General and Uber dated July 8, 2014 provides that “Uber will not exceed its normal range of prices during any ‘abnormal disruption of the market’ as defined by GBL § 396-r...Uber agrees that it will implement surge pricing, and set prices at multiples of the base fare, based solely on customer demand and the supply of available vehicles”.

Blocking Lyft

Lyft is similar to Uber and a vigorous competitor³⁵ and requires its cars to wear a distinctive fuzzy pink moustache. Lyft which evidently is operating in Buffalo and Rochester decided to enter the New York City by offering “free rides in

Brooklyn and Queens starting Friday evening (July 11, 2014)"³⁶. The day before the New York City Taxi & Limousine Commission posted a notice that (Lyft's) so-called ride share service had not complied with the commission's safety requirements and other licensing criteria. The Attorney General sought and obtained a TRO blocking Lyft from launching in New York City. "We are pro-innovation and pro-competition but allowing Lyft to flout dozens of different laws would, in addition to putting safety of New Yorkers at risk, put law-abiding competitors at a substantial disadvantage"³⁷. On July 28, 2014 Lyft and the Attorney General reached an agreement whereby "Lyft agreed to operate 'in full compliance' with existing laws and regulations and that it will start the new service in (New York City) with commercial drivers only (and) Lyft will suspend operations in Buffalo and Rochester August 1 while resolving regulatory issues there"³⁸.

Conclusion

Given the rising popularity of Airbnb, Uber and Lyft and the potential for new sources of tax revenues accommodations will, of course, be reached, taxes will be levied and paid and the traveling public will be better off for it.

ENDNOTES

1. See Geron, *Airbnb And The Unstoppable Rise Of The Share Economy*, *Forbes* (2013), “[A]n economic revolution that is quietly turning millions of people into part-time entrepreneurs, and disrupting old notions about consumption and ownership... Twelve days per month {X} rents his Marin County home on website [Airbnb] for \$100 a night, of which he nets \$97. Four nights a week he transforms his Prius into a defacto taxi vis the ride-sharing service [Lyft], pocketing another \$100 a night in the process”.

2. See Kleinfeld, *Airbnb Host Welcomes Travelers From All Over*, www.nytimes.com (4/25/2014).

3. See Manjoo, *Uber and Lyft Have Become Indistinguishable Commodities*, <http://bits.blogs.nytimes.com> (8/28/2014) (“If you need a ride, pull out your phone and load up the Lyft app. Or try Uber. Really, it doesn’t matter which you pick. Though the two ride-sharing giants have carried on like the bitterest of enemies recently, their services have become pretty mush indistinguishable. In many places, they both offer ubiquitous, cheap and mostly high quality service. They’ve become commodities”).

4. Ideally, both Uber and Lyft would like to have the owner of the car also be the licensed driver. For example, UberX recently “expanded the insurance coverage it offers ridesharing drivers ...UberX...allow(s) members of the public to hail rides at the touch of a smartphone app. Mom-and-pop rather than professionals typically answer their request, in regular cars rather than commercial vehicles” [McBride, *Uber expands insurance coverage for ridesharing drivers* (www.reuters.com (March 14, 2014))]. However, as an accommodation to some local authorities drivers with commercial licenses must drive the vehicles. This was the accommodation recently reached between Lyft and the Attorney General as discussed in fn. 26 and accompanying text.

5. Downes, *Lessons From Uber: Why Innovation And Regulation Don’t Mix*, *Forbes* (2/6/2013) (“Uber doesn’t provide its own vehicles or operators, but works with existing licensed drivers...to help keep already-rolling vehicles busy transporting customers”).

6. De La Merced, *Uber Attains Eye-Popping New Levels of Funding*, <http://dealbook.nytimes.com> (June 6, 2014).

7. See Kleinfeld, Airbnb Host Welcomes Travelers From All Over, www.nytimes.com (4/25/2014).

8. "In June 2014 Uber completed a round of funding valuing the company at \$18.2 billion" (Wikipedia (last visited June 19, 2014)).

9. See Scott, London Transport Regulator Says Uber Can Legally Operate (www.nytimes.com) (July 3, 2014).

10. See Issac, Airbnb Pushes to Modify San Francisco Housing Laws, <http://bits.blog.nytimes.com> (8/1/2014) ("The home-sharing start-up introduced a new lobbying effort this week aiming to change how San Francisco regulators treat local housing laws. The initiative, Fair to Share San Francisco, is being pushed by a coalition of local home-sharing advocate groups, including Airbnb, Peers and Homes Sharers of San Francisco. They have banded together to push for housing laws that would allow residents to rent out their homes without fear of retribution from local government agencies").

11. The City of New York has also sought to control apartment sharing. See *City of New York v. Smart Apartments LLC*, 39 Misc.2d 221 (N.Y. Sup. 2013), in which New York City sought to enjoin the operation of an apartment sharing website claiming that defendant's placement of tourists in residential apartments for 'transient' stays of less than 30 days is illegal because they violate [Multiple Dwelling Laws, Housing Maintenance Codes, City Building Codes] and "they bother non-transient residents of the buildings because the transient occupants host loud, late night parties; vomit, dump garbage and smoke in the hallways and generally do not conduct themselves in the civilized genteel manner of the locals". In granting a preliminary injunction the Court noted that "placing tourists in illegal, dangerous accommodations constitutes irreparable injury especially if there is a tragic fire".

12. The Attorney General's subpoena sought, *inter alia*, (1) "An Excel spreadsheet identifying all Hosts that rent accommodations(s) in New York State, including...© Address of the Accommodations(s) rented...(d) the dates of guest stay, and the rates charged for the rental...(e) method of payment to Host including account information and (f) total gross revenue per Host generated for the rental...through your website" and (2) "Documents sufficient to identify all tax-related communications your website has had with the Host".

13. See *People v. Lyft, Inc.*, N.Y.S. Sup. Ct., N.Y. County; A.G.'s Memorandum of Law In Support Of Motion For (TRO) And Priliminary Injunction, dated July 11, 2014.

14. See Wingfield, A Victory for Airbnb in New York, www.nytimes.com (May 13, 2014); Peterson, Airbnb is facing off against New York's Attorney General. Here's why., Washington Post (April 22, 2014); Streitfeld, New York's Case Against Airbnb Is Argued in Albany, N.Y. Times (April 22, 2014).

15. Streitfeld, Airbnb Will Hand Over Host Data to New York, www.nytimes.com (May 22, 2014).

16. See Kleinfield, Airbnb Host Welcomes Travelers From All Over, www.nytimes.com (4/25/2014) ("Over the past 10 months, Mr. X has had a parade of 72 strangers living with him, respondents to his overture of: 'Beautiful room for rent in Astoria' on the website Airbnb. They have drunk his beer and indulged in his muffins and dirtied his guest towels. They have come from Italy, Canada, India, South Korea, Belgium, France, New Zealand, the Czech Republic, Bulgaria...Members of this international bazaar, usually in pairs, have stayed from two nights to a month...This is life as a hyperactive New York City 'host' in that swelling substratum of the hospitality industry that unfolds in people's homes all part of the modern world's sharing economy, spinning by with serial comings and goings").

17. Streitfeld, Airbnb Will Hand Over Host Data to New York, www.nytimes.com (May 22, 2014); Stashenko, AG to Learn Names of 124 Airbnb Hosts, <http://www.newyorklawjournal.com> (8/27/2014); Stashenko, Suit Attempts to Block AG From Assessing Airbnb Ids, <http://www.newyorklawjournal.com> (9/3/2014) ("An 'informal, unincorporated association' calling itself New Yorkers Making Ends Meet In The Sharing Economy filed suit Monday in Manhattan Supreme Court (seeking) a preliminary injunction to prohibit Airbnb from making the disclosures to (Attorney General)").

18. See Streitfeld, Airbnb Will Hand Over Host Data to New York, www.nytimes.com (May 5, 2014) ("A spokeswoman for the Hotel Association of New York City hailed the deal. Liz Krueger, a state senator...is a determined Airbnb foe...'Despite today's settlement, Airbnb remains a scofflaw company whose business model is at odds not just with multiple New York laws, but with the basics of the New York City real estate market', Ms. Krueger said").

19. See Geron, *Airbnb And The Unstoppable Rise Of The Share Economy*, *Forbes* (2013) (“[A]n economic revolution that is quietly turning millions of people into part-time entrepreneurs, and disrupting old notions about consumption and ownership... Twelve days per month {X} rents his Marin County home on website [Airbnb] for \$100 a night, of which he nets \$97. Four nights a week he transforms his Prius into a defacto taxi vis the ride-sharing service [Lyft], pocketing another \$100 a night in the process...What [X] finds himself in is...a share economy, where asset owners use digital clearinghouses to capitalize the unused capacity of things they already have and consumer rent from their peers rather than rent or buy from a company... Over the past four years at least 100 companies have sprouted up to offer owners a tiny income stream out of dozens of types of physical assets, without needing to buy anything themselves”).

20. *City of New York v. Smart Apartments LLC*, 39 Misc. 2d 221 (N.Y. Sup. 2013),

21. See Dickerson, Chambers & Cohen, *Personal Jurisdiction and the Marketing of Goods and services on the Internet*, 41 *Hofstra L.R.* 31 (Fall 2012).

22. *Overstock.Com v. New York State Department of Taxation*, 20 N.Y. 3d 586 (2013).

23. See e.g., *Christe v. Hotels.com LP*, 756 F. Supp. 2d 382 S.D.N.Y. (2010) (“The crux of (the) allegations stem from what is not disclosed on this invoice [for the online purchase of hotel accommodations]...Plaintiffs allege that defendants are charging consumers a higher tax on the Retail Rate consumers pay Defendants rather than the Wholesale Rate Defendants pay the hotels. Instead of remitting the full amount of taxes collected to the hotels, Defendants keep the difference the tax collected and the amount remitted to the tax authorities...as a profit or fee without disclosing it”); *Sneddon v. Hotwire, Inc.*, 2005 WL 1593593 (N.D. Cal. 2005); *Marshall v. Priceline.com, Inc.*, 2010 WL 1068197 (Del. Sup. 2010); *Okland v. Travelocity.com, Inc.*, 2009 WL 1740076 (Tex. App. 2009); *Hotels. Com v. Canales*, 195 S.W. 3d 147 (Tex. App. 2006) (“By its own admission, Hotels.com neither charges nor collects taxes nor does it remit taxes directly to any taxing authority”).

24. *Expedia, Inc. v. City of New York Department of Finance*, 20 N.Y. 3d 904 (2012).

25. County of Nassau v. Expedia, Inc., 41 Misc. 3d 626 (N.Y. Sup. 2013).
26. See Geron, Airbnb And The Unstoppable Rise Of The Share Economy, Forbes (2013).
27. See Stone, Invasion of the Taxi Snatchers: Uber Leads an Industry's Disruption, Bloomberg Businessweek (February 20, 2014).
28. See Manjoo, With Uber, Less Reason to Own a Car, www.nytimes.com (June 11, 2014).
29. See <http://Blog.Uber.Com/Regsdoneright>
30. See Scott & Eddy, German Court Bans Uber Service Nationwide, <http://bits.blogs.nytimes.com> (9/2/2014).
31. O'Connor v. Uber Technologies, Inc., 2013 WL 6354534 (N.D. Cal. 2013).
32. Boston Cab Dispatch v. Uber Technologies, Inc., 2014 WL 1338148 (D. Mass. 2014).
33. See Virtanen, Uber Agrees to Put Brakes on Pricing During Emergencies, New York Law Journal (July 10, 2014). Uber's surge pricing is described as follows: "Uber does not set a single, fixed price for rides. Uber's rates are dynamic: they rise and fall as demand increases and decreases").
34. See People v. Two Wheels Corp., 71 N.Y. 2d 693 (1988)].
35. See Bilton, Lyft Says Uber's Recruitment Efforts Are Hurting Drivers, <http://bits.blogs.nytimes.com> (8/29/2014); Miners, Rivalry between Uber and Lyft gets ugly, <http://www.pcworld.com> (8/12/2014); MacMillan, Tech's Fiercest Rivalry: Uber v. Lyft, <http://online.wsj.com> (8/11/2014).
36. See AG Filed Lawsuit to Block Lyft Ride-Sharing Service, New York Law Journal, July 14, 2014.
37. See People v. Lyft, Inc., N.Y.S. Sup. Ct., N.Y. Cty; Attorney General Press Release July 11, 2014.
38. See Ride Sharing Service Lyft Resolves Dispute with AG, New York Law Journal, July 28, 2014.