

# New York Law Journal

## Real Estate Trends

WWW.NYLJ.COM

VOLUME 258—NO. 32

An **ALM** Publication

WEDNESDAY, AUGUST 16, 2017

### HOSPITALITY LITIGATION

# Settlement Agreements With Airbnb Violate Separation of Powers



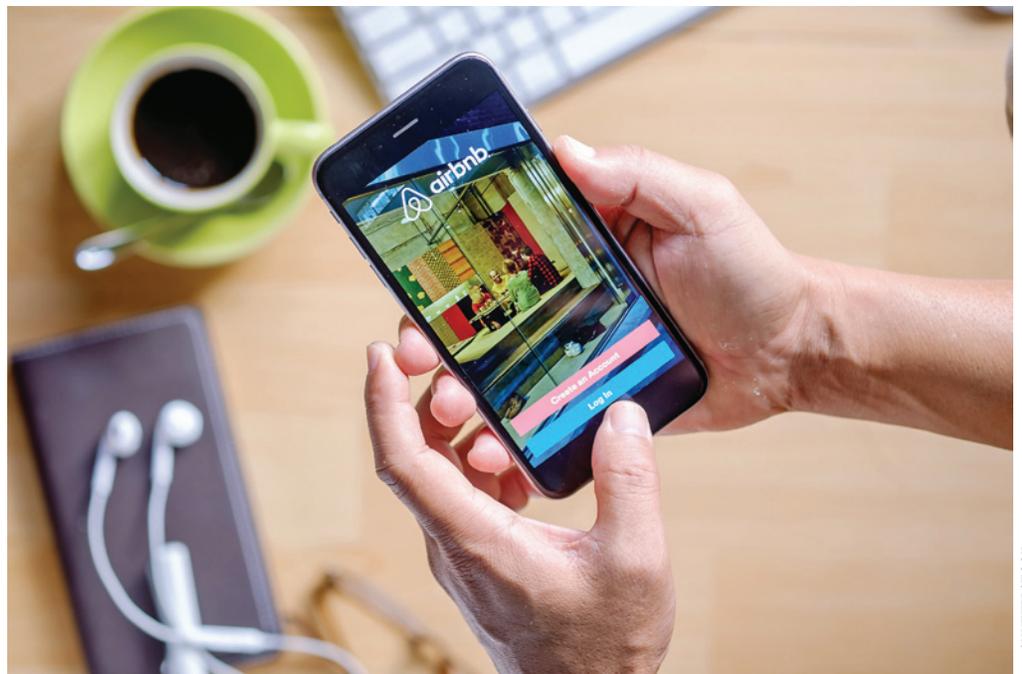
By  
**Todd E.  
Soloway**



And  
**Bryan T.  
Mohler**

Depending on who you ask, Airbnb either poses a significant threat to cities across the country—to residents, hotel owners, and hotel employees alike, or is a innovative disruptor to the lodging market. Home sharing is proving to be wildly popular, but it is not without risks and legal issues. Aside from health, security and life safety concerns raised by the illegal short-term rental of apartments and homes to transient guests, the use of apartments for short-term rental use is damaging the available stock of affordable housing, driving up rents, forcing residents from their neighborhoods, and taking significant business away from hotels, in turn threatening the jobs of hotel employees.

These issues are particularly significant in New York City, where lack of affordable housing is a constant issue and tens of thousands make their



SHUTTERSTOCK

TODD E. SOLOWAY and BRYAN T. MOHLER are partners at Pryor Cashman. JASON S. MENCHER, an associate at the firm, assisted in the preparation of this article.

livelihoods in the tourism industry. To address those concerns, in early 2016, an Act was introduced in the New York State Senate and Assembly to curtail the advertisement of short-term rentals in New York, and drafted to amend both New York state and New York city law to allow for the punishment and fining of offenders for the advertisement of illegal, short-term rentals. That act passed the Assembly and the Senate in June 2016, and was signed into law by

Governor Andrew Cuomo on Oct. 21, 2016.

However, in settling subsequent litigation with Airbnb, Governor Cuomo and Mayor Bill de Blasio have, in an effort to protect Airbnb, undercut the express language of the statute. In so doing, the executive branch has usurped the power of New York's legislature, in direct violation of the separation of powers doctrine. This article explores this situation and potential avenues for

aggrieved parties to enforce the law against Airbnb.

### The New Law

Under New York's Multiple Dwelling Law §120, it is illegal to rent out an apartment in a Class A multiple dwelling (nearly all residential apartments fit into this category) for less than 30 days without the owner being present. N.Y. Mult. Dwell. §120 (2011). For various reasons including fire and life safety concerns, this law recognizes that apartments are not to be used like hotels.

The recently passed law supplements and amends New York Multiple Dwelling Law Section 121 and New York City Administrative Code Section 27-287.1 making it "unlawful to advertise occupancy or use of dwelling units in a class A multiple dwelling for occupancy that would violate [the Multiple Dwelling Law's definition of] a 'class A' multiple dwelling as a multiple dwelling that is occupied for permanent residence purposes." N.Y. Mult. Dwell. §121(1) (2016); N.Y.C. Admin. Code. §27-287.1(1). The law defines "advertise" to include, among other avenues, "websites [such as Airbnb]...intended or used to induce, encourage or persuade the public to enter into a contract for goods and/or services," and provides for the enforcement of fines up to \$7,500 for violations, assigning the responsibility for that enforcement to the Mayor's Office of Special Enforcement. *Id.*

When the legislation was presented in the New York State Senate in January 2016, the justification was, among other things, that:

While it is already illegal to occupy a class A multiple dwelling for less than 30 days, this legislation would clarify that it is also illegal to advertise units for occupancy that would violate New York law. However, online home sharing platforms still contain advertisements for use of units that would violate New York law.

N.Y.S. Senate Bill S6340A, Jan. 6, 2016, available at [www.nysenate.gov/legislation/bills/2015/s6340/amendment/a](http://www.nysenate.gov/legislation/bills/2015/s6340/amendment/a).

By agreeing to be permanently enjoined from enforcing the law against Airbnb, the executive branch has attempted to amend the law to exempt Airbnb, the greatest offender in the advertisement of illegal short-term rental listings.

[www.nysenate.gov/legislation/bills/2015/s6340/amendment/a](http://www.nysenate.gov/legislation/bills/2015/s6340/amendment/a).

Thus, on its face, the law applies to Airbnb.

On the very same day Cuomo signed the legislation into law, Airbnb filed suit in the Southern District of New York to enjoin and declare unlawful the enforcement of the law against Airbnb by the state of New York and the city of New York. See *Airbnb v. Schneiderman*, Case No. 1:16-cv-08239-KBF (S.D.N.Y.). Airbnb filed this lawsuit

to leverage its resources and curtail the enforcement of the law against Airbnb, without regard to the detriment its advertising is causing to the New York City housing market.

Less than one month after the law was enacted and Airbnb initiated its action, on Nov. 18, 2016 the state of New York entered into a settlement agreement with Airbnb. The settlement provided, among other things, that:

[I]n consideration of the act's express provision that any enforcement shall be carried out by the mayor's OSE [Office of Special Enforcement], defendant Eric Schneiderman, attorney general of the state of New York (AG), sued herein in his official capacity, *hereby agrees that he, and his agents, servants, employees, officers or attorneys, will refrain from taking any action to enforce the act, including retroactively and/or under any theories of direct or secondary liability, as against Airbnb.*

Stipulation of Settlement and Dismissal as Against Defendant Eric Schneiderman, *Airbnb v. Schneiderman*, Case No. 1:16-cv-08239-KBF (S.D.N.Y. Nov. 22, 2016), ECF No. 28 (emphasis added).

New York City soon followed suit. On Dec. 5, 2016, Airbnb entered into a settlement with the city of New York and Mayor de Blasio, which provided, among other things, that:

The city [and Bill de Blasio], and its agents, servants, employees,

officers and attorneys, will *permanently refrain from taking any action to enforce the Act*, including retroactively and/or under any theories of direct or secondary liability, *as against Airbnb*.

NY Stipulation of Settlement and Dismissal, *Airbnb v. City of New York* (*Airbnb v. Schneiderman*), Case No. 1:16-cv-08239-KBF (S.D.N.Y. Dec. 5, 2016), ECF No. 32 (emphasis added).

This settlement is tantamount to a permanent injunction, barring the enforcement of the law against Airbnb.

### Separation of Powers

“The constitutional principle of separation of powers, implied by the separate grants of power to each of the coordinate branches of government, requires that the Legislature make the critical policy decisions, while the executive branch’s responsibility is to implement those policies.” See *Bourquin v. Cuomo*, 85 N.Y.2d 781, 784 (1995) (citing N.Y. Const., art. III, §1; art IV, §1).

It is well-settled that “[w]hile the doctrine of separation of powers does not require the maintenance of three airtight departments of government, it does require that no one branch be allowed to arrogate unto itself powers residing entirely in another branch.” *Under 21 v. City of New York*, 65 N.Y.2d 344, 355-56 (1985) (citations and internal quotations omitted). The settlement agreements are clear violations of the separation of powers of the

executive and legislature branches of New York State. By agreeing to be permanently enjoined from enforcing the law against Airbnb, the executive branch has attempted to amend the law to exempt Airbnb, the greatest offender in the advertisement of illegal short-term rental listings, whose online platform not only hosts but also provides content for illegal short-term rentals across New York City. This is not a matter of interpretation. MDL §121, duly passed by the Legislature and signed into law, clearly applies to Airbnb.

---

Through the settlements, New York’s executive branch officials have, in no uncertain terms, given Airbnb a “free pass” to do whatever it wishes, allowing Airbnb to continue advertising listings for illegal short-term rentals across the city in direct violation of the law as drafted by the legislature.

In a case also concerning short-term illegal rentals of New York City apartments, Justice Albert Rosenblatt of the Court of Appeals explained: “By refusing to enforce a duly enacted law of New York city’s legislative branch, the mayor assumes a legislative authority he does not possess. When the executive acts inconsistently with the legislature or usurps its exclusive powers, the doctrine of separation of powers is violated.” *Council of City of New York*

*v. Bloomberg*, 6 N.Y.3d 380, 403 (2006) (in dissent). Here, the mayor’s entry into the settlement—which is in effect a permanent injunction—violates the separation of powers doctrine and usurps the exclusive power of the Legislature to prescribe the law.

### A Potential Workaround?

In the face of these settlements, how can those affected by the city’s non-enforcement of the law (which affected parties include, among others, individual residents, hotel owners, and hotel employees) seek enforcement of the law against Airbnb? One possibility is for the aggrieved parties to enforce the law through a private right of action.

Though the law does not explicitly provide for a private right of action, one may be implied if it “is consistent with the legislative intent.” *Rhodes v. Herz*, 920 N.Y.S.2d 11, 17 (1st Dept. 2011); *Burns Jackson Miller Summit & Spitzer v. Lindner*, 59 N.Y.2d 314, 329 (1983).

“A private right of action will be implied if: (1) the plaintiff is a member of the class for whose benefit the statute was enacted; (2) the recognition of such right promotes the legislative purpose which undergirds the statute; and (3) the creation of such right is consistent with the legislative scheme for the statute.” *Rhodes*, supra, 920 N.Y.S.2d at 17.

In *Rhodes*, the court applied this three-prong test, examining the analysis required under each prong. According to the court, the

first prong “is usually manifest from the language [of the statute] itself.” *Id.* at 17-18. Here, the language of the law demonstrates its design is to protect all those affected by the advertising (and subsequent rental of) illegal short-term rentals.

The second prong “is a two-part inquiry, requiring determination of (1) what the Legislature was seeking to accomplish in enacting the statute; and (2) whether a private right of action promotes that objective.” *Id.* at 18. The statute’s legislative history and memoranda submitted during the legislative process is often informative in resolving this part of the inquiry. *Id.* Here, as set out in the justification presented to the New York state senate, the law was designed to “protect communities and existing affordable housing stock by prohibiting advertisements that violate the law,” including those illegal listings hosted by Airbnb.

The third prong is “the most critical” and the “relevant inquiry is whether the private right of action coalesces smoothly with the legislative goal, in particular with its enforcement mechanism, or whether it is completely at odds with the same.” *Id.* Here, the legislative goal is to protect communities, the affordable housing stock in New York, and those impacted by illegal short-term rentals. The law is limited in explaining its enforcement mechanism, only stating that it “shall be enforced by the mayor’s office of special enforcement.” N.Y.C.

Admin. Code. §27-287.1(1). By abrogating its responsibilities to enforce the law against Airbnb, the enforcement mechanism is rendered moot against Airbnb.

In this case, an implied private right of action “coalesces smoothly with the legislative goal” and the “enforcement mechanism,” as allowing private citizens or hotel owners to seek enforcement of the law promotes the stated legislative goal, and since the enforcement mechanism is rendered moot against Airbnb by way of the settlements, the implied private right of action can serve as the means to enforce the law against Airbnb. In totality, a court may be inclined to find an implied private right of action, permitting those affected by the non-enforcement against Airbnb, including hotel owners, to seek enforcement.

An alternative path for hotel owners to seek justice against Airbnb for its advertising of illegal rentals could be under NY General Business Law §349. That law prohibits a party from engaging in deceptive practices in the conduct of its business or furnishing of a service. It has been held to be “intentionally broad,” covering “virtually all economic activity...[in order to] provide needed authority to cope with the numerous, ever-changing types of false and deceptive business practices which plague consumers in [New York] state.” *Lonner v. Simon Prop. Group*, 57 A.D.2d 100, 109-110 (2d Dept. 2008). Corporate competitors (such as hotel owners)

have standing to assert claims under N.Y. GBL §349. See *Gristede’s Foods v. Unkechaug Nation*, 532 F. Supp. 2d 439, 451 (E.D.N.Y. 2007); *Securitron Magnalock v. Schnabolk*, 65 F.3d 256, 264 (2d Cir. 1995).

## Conclusion

Through the settlements, New York’s executive branch officials have, in no uncertain terms, given Airbnb a “free pass” to do whatever it wishes, allowing Airbnb to continue advertising listings for illegal short-term rentals across the city in direct violation of the law as drafted by the Legislature. This non-enforcement has an adverse impact on both citizens and businesses across the city, undermines the Legislature’s stated purpose in passing the law, and thereby usurps the role of that branch. Impacted parties should consider alternative methods to hold Airbnb to account.