

ANATOMY OF A LAWSUIT: THE IMPORTANCE OF RISK MANAGEMENT AND AVOIDING LAWSUITS*

You work hard. You practice kindness. You are not a bigot. You have a big heart and have fully embraced the sharing economy. You could never get sued, right?

Sadly, anyone can be sued, and operating a business as a public accommodation makes owners responsible to follow all applicable laws, and to discharge common law duties of reasonable care toward their guests. And the law can make you responsible, no matter how careful you are or how good a person you are.

Many hosts are generally aware of the need for proper and adequate insurance, but don't fully understand why. The simple answer: insurance protects you from having to pay out of pocket costs in the event of a lawsuit arising from your business.

Here are some examples of things that could happen during a guest's stay, which could lead a guest or their family to sue you:

Physical Harm

- Injury from fire, and your smoke detectors or fire extinguishers were not working.
- Injury from a gas or carbon monoxide leak.
- Physical injury from unsafe or defective furnishings, appliances, or equipment available to guests.
- Physical injury from tripping or fall hazards on your property.
- Drowning or spa hazards (i.e., from staying too long in a hot tub).
- Injury from wild or domestic animals.

Personal Harm

- Someone with access places a webcam on your property that captures intimate or private photographs.
- Your words or interactions with a potential guest indicate discrimination (by race, gender, disability, LGBTQ status, familial status, etc.) in who you rent to and why.
- Your advertisement on Airbnb is construed to be discriminatory.

* This schematic and presentation expands on a presentation given 8/16/2017 to Airbnb Portland Host Meet up, Heather Brann and Julie Reading.

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Property Harm

- A thief breaks into the space, and steals your current guest's electronics.
- Another guest hacks your guest's banking information through your network.
- Your guest's car is part of a "smash and grab," and the guest contends you didn't warn about your "shady" neighborhood.

Some of these examples are easier than others. Your guest pays good money for your space, and they expect to be generally safe from harm in that space. In other circumstances, though, it might be more ambiguous whether you or your guest is "right" or "wrong," and who is ultimately responsible for the harm:

Physical Harm:

- Your contract provides instructions and safety warnings about how to operate a gas fireplace. Your guest ignores those instructions, and everyone in the house dies of gas inhalation.

Personal Harm:

- Your guest decides your property is the perfect site for her secret, budget wedding. The 30 guests arriving lead to neighbor complaints, and the Sheriff arrives and shuts down the wedding. The guest sues you because you ruined her wedding and never specified that daytime guests were limited.

Property Harm:

- Your rules warn every guest not to leave any valuables in a vehicle, and you provide secure storage for electronics. A guest ignores this, and has their laptop stolen from their car. The guest wants you to replace the laptop.

Regardless of the theory of liability, being involved in a lawsuit is no picnic. Guests are generally only motivated to sue if they have extraordinary anger or extraordinary harm. And a lawsuit being brought against a person can be one of the most stressful and financially draining events of that person's life.

What astonishes me on Host Community boards is how frequently Hosts blindly assume that Airbnb will "take care of them." "Host Guarantee" is vague, and few members attempt to read and understand the fine print. On the contrary, here are some excerpts from the Airbnb Terms of Service:

17. Liability[†]

17.1 Unless you reside in the EU, you acknowledge and agree that, to the maximum extent permitted by law, the entire risk arising out of your access to and use of the Airbnb Platform and Collective Content, your publishing or booking of any Listing via the Airbnb Platform, your stay at any Accommodation,

[†] Airbnb's Terms of Service, in effect as of January 2018.

participation in any Experience or Event or use of any other Host Service or any other interaction you have with other Members whether in person or online remains with you. . . . [Airbnb is not liable for] the provision or use of a Listing's Host Services, whether based on warranty, contract, tort (including negligence), product liability or any other legal theory, and whether or not Airbnb has been informed of the possibility of such damage, even if a limited remedy set forth herein is found to have failed of its essential purpose. . . .

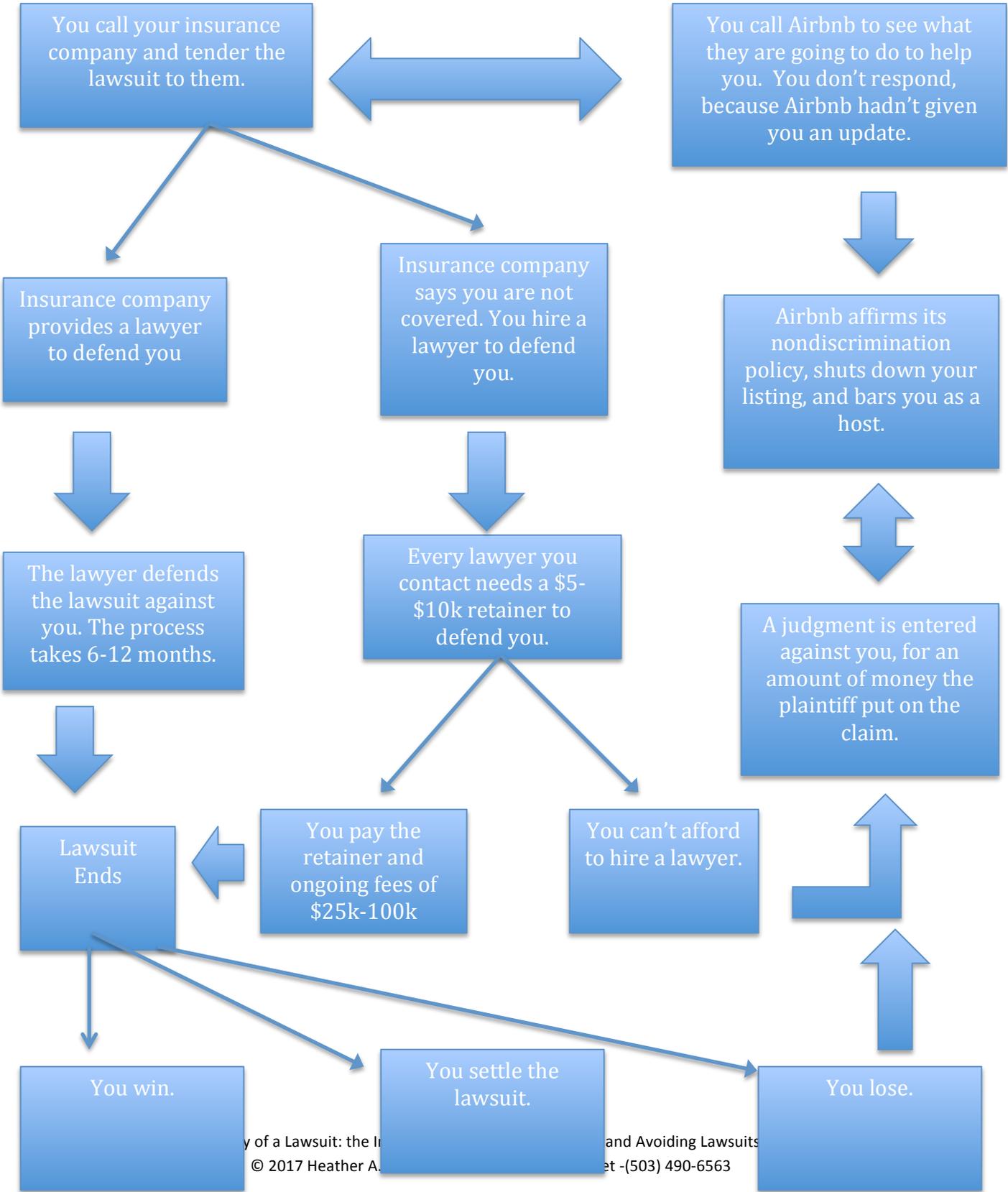
This is a massive, densely written section, full of legalese. Although every word has a reason to be there, here's the common sense, partial translation:

Hosts and guests: any disputes between you are not our problem. You can use the resolution center, you can ask for a host guarantee or a guest refund, but if something really, really bad happens, that's your problem. You can't sue Airbnb for something a host (or guest) did.

The terms of service, in general, are written to protect Airbnb *from* liability for things that hosts and guests may do to one another—and it is the responsibility of hosts and guests to protect themselves from any risks.

So imagine the worst-case scenario happens: You answer a knock at the door, and a process server hands you a summons for a lawsuit from a past Airbnb guest. What next? The schematic on the next page outlines the process.

ANATOMY OF A LAWSUIT:
A guest sues you for Discrimination, Personal Injury, or Property Damage



As you can see, this is not fun. And relying on Airbnb to “fix” something will only lead to a default judgment against you. Any outcome will consume your time, your money, and most likely, both. Even a dismissed lawsuit could result in legal fees that exceed your annual income as an Airbnb host.

The best possible outcome: (1) you have appropriate insurance, (2) the insurance covers the risk described in the lawsuit, and (3) the insurance policy pays for your lawyer to defend you, and also pays for any judgment or settlement made to your guest.

Note that many of the hypothetical guest lawsuits I describe above mention the host’s contract or rules. Employing a contract with guests can legally describe what the guest is responsible for, and what you are responsible for during the stay. Agreeing to terms before something bad happens, and getting it in writing, sets the expectations. A guest (or her lawyer) may read their contract and decide that they cannot sue you, because the harm was something the guest agreed to be responsible for under the contract.

While this is just a brief overview of lawsuits and a risk management strategy, here are some common-sense questions you can ask to improve your risk management:

Insurance for your Short Term Rental	Contract for your Short Term Rental
<ul style="list-style-type: none"> • Do you have short-term rental insurance (as opposed to a homeowners’ policy)? • Have you read all of the terms, conditions and exclusions of the policy? • Do you understand the conditions and exclusions? • Can your insurance agent explain the conditions and exclusions? • Does your contract specify that the guest is responsible for risks that you cannot insure (because they are excluded)? • Does your insurance provide “defense” (i.e., a lawyer) to protect you if you are sued? • Are your limits sufficient? • Does the cost of defense reduce the amount available to pay a claim? • Are you comfortable with your deductible (the amount you pay out of pocket before insurance pays)? 	<ul style="list-style-type: none"> • Do you have a signed contract for every reservation? • Does this contract allow you to verify and identify who your guest is, and what dates they stayed? • Does the contract warn the guest about safety and security issues? • Does the contract require the guest to give prompt notice when safety and security is an issue? • Does the contract require the guest to supervise children and pets that accompany them? • Does the contract require your guest to be responsible for risky behavior, unsafe behavior, or behavior that breaks your rules? • Does the contract set limits on time, place, number of people, and uses of your home? • Does the contract set reasonable limits on the host’s responsibilities and liability?