

Duff on Hospitality Law

## **OTA & Travel Distribution Update - Feb. 3rd, 2017**

By Greg Duff on 2.17.17 | Posted in OTA Update

Our weekly client OTA & Travel Distribution Update for the week ended February 3, 2017 is below. Nothing too important to report this week, though a report from our December 19, 2016 Update seems particularly relevant and worth repeating given recent developments in Southern California.

Back in December, we reported on the California Supreme Court's decision **not** to impose on net rate OTAs operating in the state the obligation to pay local lodging taxes on amounts collected and retained by the OTAs over and above the applicable net rate. As part of our Update, we noted that never-before-seen language contained in the Court's decision suggested that local jurisdictions could pursue hoteliers directly for the unpaid taxes. A copy of our update is below. We have now learned from several of you that at least two California cities (Anaheim and San Diego) are now using the decision to assert claims for unpaid taxes. Apparently, both AH&LA and many of the large brands are currently involved in efforts to resolve these claims either with the cities themselves or through the OTAs (in reliance on the indemnity protections contained in many of the larger OTA distribution contracts). If you have questions about these claims or the industry's coordinated response to the claims, please let us know.

**California Supreme Court Issues a Potentially Troubling Opinion [OTA / Tax].** Although I don't often comment on the multitude of OTA tax decisions issued across the country, I felt that the recent California Supreme Court decision finding (once again) in favor of OTAs warranted some discussion. Although the California Court, like so many courts before it, based its decision on the rather uncontroversial conclusion that the OTAs were not "Operators" (the party expressly obligated to collect the occupancy tax under the applicable San Diego Municipal Code) of the subject hotels, language found elsewhere in the decision caught our attention. Specifically, in at least three sections of the Court's decision, the Court indicates that California hoteliers (not OTAs) could be held liable for occupancy taxes calculated on the full sell rate (as opposed to the net rate) to the extent that hoteliers set the sell rate (e.g. via mandatory markups or margins added to the net rate). In other words, hoteliers that seek to control the ultimate sell or retail rate for their rooms could be opening themselves up to tax liability on that sell or retail rate. While language found in most negotiated OTA contracts requiring the OTA to indemnify the hotelier for claims regarding unpaid tax liability would appear to protect California hoteliers from the effects of this recent decision, it may be time to take a close look at your contract's

indemnity provision.

*Now for this week's update...*

- **California Lawmakers Continue to Struggle with Short-Term Rentals [Short-Term Rentals].** In an interesting tug of war between the old (labor unions) and new (sharing economy darlings and their users), California remains a hodgepodge of local approaches to regulating short-term rentals without any real near term state-wide solution in sight. Unlike New York, which passed state-wide legislation last year in furtherance of local laws adopted in New York, the California legislature has yet to decide on an appropriate state-wide approach. Stay tuned for more developments in this area for the foreseeable future.

**California lawmakers can't figure out what to do with Airbnb.**

In San Francisco, tumult at the ballot box, with the Board of Supervisors and in the courtroom has defined the city's relationship with Airbnb and other short-term rental sites. In Los Angeles, regulating Airbnb is a top issue at City Hall.

LA Times - Orange County on Feb 3, 2017