

PUBLICATION

Short-Term Rentals and Long-Term Considerations: Examining Short-Term Rental Liability During the Opioid Crisis

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Many may have recently seen sensational headlines like "Family of toddler sues Airbnb after child dies from fentanyl" and "Baby killed by fentanyl exposure in Florida Airbnb," and were left questioning whether such a lawsuit could have merit. The answer is not as simple as you might expect. While it is doubtful that online platforms exert enough control over properties, or are otherwise engaged in negligent conduct, both owners and property managers may face the possibility of jury trials under various circumstances. That is because, at least in Florida, those who *own* or *control* properties may be assigned non-delegable duties to invitees and guests under the legal construct known as premises liability. This article discusses some of those duties and their implications for property owners, property managers, and short-term rental e-Commerce websites.

I. The Lawsuit

Illicit fentanyl is a synthetic opioid with potency sometimes *50 to 100 times stronger than morphine*. There have been occasional reports that some illegal opioids are even potent enough to cause unintended toxicity through touch alone. Overdoses and deaths brought on by illicit fentanyl are not always confined to consenting adults. There are also examples of young children who inadvertently stumbled across and ingested an illicit fentanyl-containing drug, which then may have caused them to get sick or die.

Indeed, according to a recently filed lawsuit, one of those children was Enora Lavenir, a 19-month-old baby girl from France who was vacationing with her family in South Florida. According to the complaint, Enora was put down for a nap after spending one night in their Airbnb, but never woke up. Mrs. Lavenir later found the baby unresponsive and foaming at the mouth. The medical examiner concluded that, based on the swiftness of her death, Enora died from acute opioid toxicity that she could only have come into contact with while in the short-term rental.

On December 6, 2022, Mrs. Lavenir (the Plaintiff) brought suit against Defendants (i) Airbnb, Inc. (Airbnb); (ii) Ronald M. Cortamilia, the owner of the property; (iii) Yulia A. Timpy, the property manager; and (iv) the person who stayed at the property immediately preceding the Lavenirs' stay. Although the complaint nominally alleges "wrongful death" against all Defendants, the claim is actually grounded in the theory of premises liability because the Plaintiff alleges the Defendants "owed a duty to take reasonable care for the safety of [their] guests" and "owed a duty to provide sufficient warning to guests, especially those with children and infants, that lethal drugs may have been used in the premises by other guests prior to their arrival."

II. Premises Liability in Florida

While some may be generally familiar with the fact that owners or property managers owe certain duties to those whom they invite onto the premises, the test for who would actually owe this duty under Florida law has been described as one who is in "possession or control" of a premise. These "possessors" are often the owners of the property, but as discussed below, can arguably be designated as managers or operators instead.

In Florida, possessors can be assigned non-delegable duties to keep premises safe from latent hazards. For a Plaintiff to prevail on a premises liability claim against a possessor, a plaintiff must prove that:

- (i) The plaintiff was authorized to be on the premises; and
- (ii) A person who was in actual possession or control of the premise failed to use reasonable care to either maintain a reasonably safe premise, or warn or exclude invitees and licensees from dangerous areas that are known or should be known to the possessor.

Indeed, the current Florida Standard Jury Instructions provide examples of questions that a jury may be asked to answer in a trial on premises liability. Specifically, whether the defendant negligently failed to:

1. Maintain the premises in a reasonably safe condition;
2. Correct a dangerous condition about which the defendant either knew or should have known, by the use of reasonable care; and
3. Warn the [plaintiff] of a dangerous condition about which the defendant had, or should have had, knowledge greater than that of the [plaintiff].

Notwithstanding who is deemed to be in possession of the property for purposes of premises liability, managers and operators may still be found responsible under theories of general negligence.

III. Implications to Property Managers and Owners for Premises Liability

As mentioned, one of the threshold issues a plaintiff must prove under premises liability is whether a defendant was "in actual possession or control" of the property. A fairly recent Florida case, *Bechtel Corporation v. Batchelor*, examined this issue more closely. The court confirmed that the analysis of actual possession does not turn on whether a defendant owned the property, but rather, whether the defendant had the right to control access to the property, or in other words, the right to exclude access to the property. Ultimately, the court found that Bechtel Corp did not possess or control the premises because there was no direct evidence showing that the property owner surrendered to, or otherwise offered to jointly possess it, with Bechtel Corp. However, we have seen examples of plaintiff's attorneys arguing that property managers exercise possession and control of properties for the purposes of subjecting them to premises liability claims.

Non-delegable duties cannot be shifted to another party, even though a possessor may contract with a party to take on the responsibility of ensuring a safe premises. In other words, while another party may have contractual responsibility for maintaining the premises, a possessor may always be found to have legal responsibility to keep a premise reasonably safe.

In contrast, property owners may often have a more difficult time avoiding premises liability. Property owners, especially those owners who are out of the state and rely entirely on a local property manager, may believe their property manager is the only entity legally responsible for keeping a premise clean and safe. But this assumption may not always be correct, depending on the circumstances. While owners may task property managers with cleaning, maintaining, and controlling access to the premises, this alone may not be enough to entirely avoid liability should a guest become injured while visiting the premises, depending on the owner's level of involvement with the property, among other things.

IV. Implications for Platforms

In the *Lavenirs*' case and other premises liability cases, allegations against Airbnb may be difficult to sustain. Airbnb is an online platform that allows users to advertise or book lodgings and experiences in exchange for a fee. Airbnb expressly disclaims ownership of the properties listed on its platforms in its terms of service and further clarifies that it does not possess any right or ability to control the conduct of guests or hosts. Moreover, while Airbnb allows hosts to use the platform, the hosts are entirely in control of the "price, availability, and

rules for each listing." Further, the owners and managers enter into contracts with the guests, which notably exclude Airbnb as a party.

While the court has yet to substantively rule on the merits in the Lavenir case, it does not appear that Airbnb exerts the type of control of the property necessary to establish a premises liability claim. Under such circumstances, bringing a premises liability claim against an online aggregator of lodging options that does not have ultimate control over who may come and go on the property, such as Airbnb, could be analogous to a hotel patron bringing a premises liability claim against Expedia for getting injured while on the premises of the hotel that happened to be booked through that particular website. Without ownership or management responsibilities, and according to their terms and conditions, most e-Commerce sites should have strong defenses to liability in Florida for overdose premises liability claims.

V. Conclusion

Property managers and owners of short-term rentals can take this lawsuit as one example of some of the unexpected risks in the short-term rental sector. While neither short-term rental owners nor managers will ever be able to completely remove all potential risks and hazards from a rental property, lawsuits like this one might provide valuable insight into possible trends in the tort litigation realm, which can then help guide policies, protocols, and terms of use.

If you have any questions about this topic, please contact [Jason B. Bloom](#), [Kirstin M. Grice](#), or other members of Baker Donelson's [Hospitality team](#).