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## Technology, Travel Companies & Taxation: Should Expedia Be Required to Collect and Remit State Occupancy Taxes on Profits from Facilitating Hotel Room Rentals?

Kerra J. Melvin

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TECHNOLOGY, TRAVEL COMPANIES & TAXATION:  
SHOULD EXPEDIA BE REQUIRED TO COLLECT AND  
REMIT STATE OCCUPANCY TAXES ON PROFITS FROM  
FACILITATING HOTEL ROOM RENTALS?

*Kerra J. Melvin* \*  
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ABSTRACT

*Online travel companies (“OTCs”) like Expedia and Hotels.com facilitate discounted hotel room rates for customers by contracting with hotels at a wholesale rate and then allowing customers to book rooms on their websites at a marked-up rate that is above the wholesale rate but below the market rate. Many states allow cities and counties to assess an occupancy or bed tax upon persons reserving hotel rooms, with the collections typically used to promote state and local tourism. Such statutes generally require the hotel operator to collect and remit the tax. OTCs have traditionally remitted the wholesale rate and the occupancy tax on that rate to the hotels, which in turn remit the tax to the city or state. This practice has recently come under scrutiny, however, with cities and counties arguing that OTCs should collect and remit the tax on the full retail amount paid to OTCs by the consumer. OTC litigation is occurring in state and federal courts across the country, and courts are split on whether the tax can be assessed on OTC profits. This Article will analyze recent decisions, examine the reasons why courts*

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*are split, and then briefly discuss potential resolutions for the OTCs and local governments.*

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#### INTRODUCTION

Online travel companies (“OTCs”) like Expedia and Hotels.com facilitate discounted hotel room rates for customers by contracting with hotels at a wholesale rate and then allowing customers to book rooms on their websites at a marked-up rate that is above the wholesale rate but below the market rate. Many states allow cities and counties to assess an occupancy or bed tax upon persons reserving hotel rooms, with the collections typically used to promote state and local tourism. Such statutes generally require the hotel operator to collect and remit the tax. OTCs have traditionally remitted the wholesale rate and the occupancy tax on that rate to the hotels, which in turn remit the tax to the city or

state. This practice has recently come under scrutiny, however, with cities and counties arguing that OTCs should collect and remit the tax on the full retail amount paid to OTCs by the consumer. OTC litigation is occurring in state and federal courts across the country, and courts are split on whether the tax may be assessed on OTC profits.

Determining whether an OTC is required to collect and remit occupancy tax on its profit margin is a question of statutory interpretation. While the various state and local occupancy tax statutes have the unified purpose of raising revenue for tourism promotion, the language used in these statutes is inconsistent. As discussed in the analysis below, OTC liability essentially hinges upon a court's interpretation of slight differences in occupancy tax statutes. While the Sixth Circuit Court of Appeals determined that the Kentucky occupancy tax statute it recently considered did not require the OTCs to collect the tax, other courts analyzing slightly different statutory language have reached the opposite conclusion. These differing interpretations have led the OTCs to seek a federal exemption from collection of any and all state and local occupancy tax on profit margin.

While the OTCs are garnering varied success in litigation, these victories will not insulate the OTCs from eventual liability to collect and remit on the full retail amount, since states and cities can and likely will amend their statutes to include OTCs. If OTCs hope to avoid collecting in the future, they must continue to seek concrete resolutions through state exemptions, a federal exemption, or by arguing that statutes requiring OTCs to collect and remit on the full retail amount are violative of the state or federal constitution. This Article will discuss three recent decisions, each reaching different conclusions on the ultimate issue of whether OTCs are required to collect and remit the occupancy tax on their profit margin.<sup>1</sup> The Article will then analyze these

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<sup>1</sup> There are a number of ancillary issues addressed in OTC litigation that are outside the scope of this Article and will not be addressed here. These include claims of consumer protection violations, conversion, unjust enrichment, and false and misleading business practices. Some cases discuss other issues such as exhaustion, improper jurisdiction, standing, statute of limitations, and equitable defenses such as laches, estoppel, and waiver. Still others address

disparate results and summarize what each decision means for OTCs and local governments. Finally, the Article will propose potential long-term occupancy tax solutions for both OTCs and local governments.

## I. HISTORY OF ONLINE TRAVEL COMPANIES AND OCCUPANCY TAXES: AGENCY MODEL VS. MERCHANT MODEL

### A. *Occupancy Tax Statutes*

Many states enacted occupancy tax<sup>2</sup> statutes “for the purpose of promoting convention and tourist activity.”<sup>3</sup> These statutes may include a state occupancy tax, or may authorize counties and municipalities to assess local occupancy taxes.<sup>4</sup> The taxes are typically assessed on the person renting the hotel room, and are collected and remitted by the hotel to the taxing authority.<sup>5</sup>

The occupancy tax statute considered in *Louisville/Jefferson County Metro Government v. Hotels.com*,<sup>6</sup> is fairly representative of the various state statutes. The Kentucky statute authorizes counties to impose occupancy tax on “the rent for every occupancy

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constitutional defenses, where the OTCs allege any occupancy tax assessed upon them would violate the Equal Protection Clause or the Dormant Commerce Clause of the United States Constitution, or similar clauses in state constitutions. While not addressed in this Article, these types of arguments should be considered when litigating the applicability of occupancy taxes to OTCs.

<sup>2</sup> Some state and local statutes use terms such as “bed tax,” “transient room tax,” or “tourism development tax.” See, e.g., LOUISVILLE/JEFFERSON CNTY, KY., CODE OF ORDINANCES § 121.01(A); LEXINGTON–FAYETTE URBAN CNTY, KY., CHARTER OF CODE OF ORDINANCES § 2–172(a) (using the term “transient room tax”).

<sup>3</sup> See, e.g., *Louisville/Jefferson Cnty. Metro Gov't v. Hotels.com, L.P.*, 590 F.3d 381, 383 (6th Cir. 2009).

<sup>4</sup> See *id.* at 383.

<sup>5</sup> In some cases the tax is assessed upon the hotel operator rather than the consumer. In cases where the tax is assessed upon the consumer and collected by the operator, the question is whether the OTC is responsible to collect and remit. In cases where the tax is assessed upon the operator, the issue is whether the OTC is required to pay the tax on its profit margin. The statutory analysis is essentially the same in both cases.

<sup>6</sup> 590 F.3d 381.

of a suite, room, or rooms, charged by all persons, companies, corporations, or other like or similar persons, groups or organizations doing business as motor courts, motels, hotels, inns or like or similar accommodations businesses.”<sup>7</sup> The majority of these statutes were enacted before consumers began booking hotel rooms online and do not specifically address OTCs.

### B. OTC Pricing Models

Many occupancy tax opinions focus on the pricing models used by OTCs. Originally most OTCs used the “agency model,” which is similar to the model employed by traditional travel agents.<sup>8</sup> Under the agency model, an OTC would act as a broker so that the third party purchaser avoided dealing directly with the hotel owner.<sup>9</sup> In return, the OTC would receive a facilitation fee.<sup>10</sup> The amount of occupancy tax remitted by the hotel was calculated based on the entire amount paid by the consumer, including the amount retained by the OTC as a facilitation fee.<sup>11</sup>

Over time, most OTCs transitioned away from the agency model and adopted the more profitable “merchant model.”<sup>12</sup> Under the merchant model, an OTC contracts with hotels for the right to broker or facilitate the reservation of hotel rooms at a discounted or wholesale rate.<sup>13</sup> The OTC then advertises and offers the rooms for sale to the public on its website. When the customer books a hotel room reservation through the OTC’s website, the OTC charges the customer an amount that is greater than the wholesale rate, referred to as the “marked-up rate,” which represents the total amount paid by the consumer.<sup>14</sup> The difference between the marked-up rate and the wholesale rate is the OTC’s profit margin.

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<sup>7</sup> *Id.* at 383.

<sup>8</sup> *See* *City of Goodlettsville, Tenn. v. Priceline.com, Inc.*, 605 F. Supp. 2d 982, 985 (M.D. Tenn. 2009).

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> *See* *Expedia, Inc. v. City of Columbus*, 285 Ga. 684, 684 (2009), reconsideration denied (June 30, 2009).

The majority of OTC litigation focuses on tax treatment of the merchant model. Under the agency model, it is clear that the amount earned by the OTC is rightfully classified as a commission not subject to occupancy tax. The tax waters become muddier, however, when OTCs list and sell hotel rooms at a markup and rent the rooms directly to customers. The primary issue in all OTC litigation is whether occupancy tax should be assessed on the marked-up amount. The cases below examine this issue in detail.

## II. STATUTORY INTERPRETATION: A COMPARISON OF OTC OCCUPANCY TAX CASES

Courts are split on whether occupancy tax should be collected and remitted on OTC profit margin. Because occupancy taxes are assessed pursuant to state and/or local statute or ordinances, opinions are primarily devoted to the interpretation of the relevant statute. A court's conclusion generally hinges on whether an OTC is included in the definition of persons or businesses required to collect and remit the tax. This section will discuss three recent opinions that highlight the kaleidoscope of decisions resulting from OTC litigation. In the first case, *Expedia, Inc. v. City of Columbus*,<sup>15</sup> the Georgia Supreme Court concluded that while the statute in question did not encompass OTCs, OTCs voluntarily subjected themselves to the tax via contracts with hotels and were therefore required to collect and remit the tax. In contrast, in *Louisville/Jefferson County Metro Government v. Hotels.com*,<sup>16</sup> the Sixth Circuit Court of Appeals found OTCs were not encompassed by the statute and not required to collect and remit on profit margin. Finally, in *County of Monroe, Florida v. Priceline.com, Inc.*,<sup>17</sup> the court held the Florida statute at issue was broad enough as written to encompass OTCs.

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<sup>15</sup> *Id.*

<sup>16</sup> 590 F.3d 381 (6th Cir. 2009).

<sup>17</sup> 09-10004, 2009 WL 4890664 (S.D. Fla. Dec. 17, 2009).

A. *Expedia, Inc. v. City of Columbus: OTCs Are Contractually Obligated to Collect and Remit Occupancy Taxes on Marked-up Rate Even if Not Statutorily Required to Do So*

In *Columbus*, the city petitioned for declaratory judgment against Expedia, alleging that under Expedia's merchant model, hotel occupancy taxes were to be calculated using the marked-up rate or "charge to the public," rather than the negotiated wholesale rate.<sup>18</sup> Columbus enacted its city occupancy tax ordinance pursuant to the Georgia Enabling Statute, which allowed municipalities to impose an excise tax "at the applicable rate on the lodging charges actually collected."<sup>19</sup> Columbus' occupancy tax ordinance imposed "an excise tax in the amount of *seven percent of the charge to the public* upon the furnishing for value of any room or rooms or lodging or accommodations furnished by any person licensed by or required to pay business or occupation taxes to Columbus for operating a hotel . . . ."<sup>20</sup> The tax was imposed upon the guest and required the person or entity "collecting the tax from the hotel or motel guest" to remit the tax to the local government.<sup>21</sup>

Based on these facts, the trial court determined as a matter of law that "charge to the public" and "lodging charges actually collected" included the marked-up rate that Expedia charged its customers, and not the wholesale rate.<sup>22</sup> The trial court also concluded that any service or facilitation fees "separately disclosed" to Expedia's customers were not taxable. The court then granted the city permanent injunctive relief, requiring Expedia to "collect the hotel occupancy tax based on the total amount it discloses to the consumer as the room rate, room charge or other comparable term . . . ."<sup>23</sup> The injunction also required Expedia to separately disclose both the room rate and all hotel occupancy taxes to the consumer either online or at the hotel.<sup>24</sup>

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<sup>18</sup> 285 Ga. at 686.

<sup>19</sup> *Id.* at 685 (citing GA. CODE § 48-13-51(a)(1)(B)(i) (2009)).

<sup>20</sup> *Id.* (citing COLUMBUS CODE § 19-110 et seq.) (emphasis added).

<sup>21</sup> *Id.* at 685-86 (citing GA. CODE § 48-13-51(a)(1)(B)(ii) (2009)).

<sup>22</sup> *Id.* at 686.

<sup>23</sup> *Id.* at 686-87.

<sup>24</sup> *Id.*



Expedia appealed the trial court's decision, presenting four main arguments.<sup>25</sup> First, it argued the trial court erred as a matter of law in interpreting the statute and ordinance to require Expedia to collect the tax. The Georgia Supreme Court rejected this argument, stating that the trial court did not conclude as a matter of law that Expedia must collect the tax, but instead, that Expedia in fact collected the occupancy taxes pursuant to a private contractual agreement irrespective of any statutory obligation.<sup>26</sup>

Second, Expedia argued that it was not obligated to collect and remit the tax on its profit margin either under the statute or pursuant to contract.<sup>27</sup> The Supreme Court similarly rejected this argument, stating that Expedia "rendered itself duty-bound" to remit the taxes when it contracted with hotels to collect the occupancy tax.<sup>28</sup> It found that whether Expedia was a hotel, motel, or innkeeper was "inapposite" for the purpose of remitting taxes it actually collected from consumers.<sup>29</sup> The Court stated in summation that because the statute "unequivocally require[d]" the taxes to be remitted by the entity who collected them, Expedia was required to remit the tax payments to the city.<sup>30</sup>

Expedia's third argument was that the statutory terms "lodging charges actually collected" and "charge to the public" were misinterpreted by the trial court to encompass the marked-up rate charged by Expedia to its customers, and that the terms instead applied to the wholesale rate Expedia paid to the hotels.<sup>31</sup> The Court determined that a plain reading of the statute made it clear that the tax was to be assessed and collected on the full marked-up amount, and not the wholesale amount.<sup>32</sup> The Court stated that, "Expedia is not the end-consumer, is not a member of the public at large, and is not the occupant of the hotel room."<sup>33</sup> For these reasons, the court concluded that the wholesale rate paid by

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<sup>25</sup> *Id.* at 687-89

<sup>26</sup> *Id.* at 688.

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> *Id.* at 689.

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> *Id.* at 690.

Expedia as a “non-occupant” could not be the rate upon which the tax was based.<sup>34</sup>

Finally, Expedia argued that its “undisclosed facilitation fee” was not taxable.<sup>35</sup> According to the record, Expedia was not separately listing the tax and the amount for the facilitation fee, but instead listed a total room rate, which included a disclaimer that some of the amount paid was for occupancy taxes and some was a “facilitation fee” to be retained by Expedia.<sup>36</sup> The court also rejected this argument, concluding Expedia’s disclaimer to the customer that the room rate was a combination of cost and fees was “insufficient to inform the taxpayer of his true tax liability.”<sup>37</sup> Because of this, the Court determined that the trial court did not err when it held the taxable amount, including any undisclosed fee, was the marked-up rate charged by Expedia to its customers.<sup>38</sup>

*B. Louisville/Jefferson County Metro Government v. Hotels.com: OTCs Not Subject To Occupancy Tax Under Kentucky Statute*

In *Louisville*, two county governments in Kentucky brought a suit against Hotels.com and other OTCs, alleging the OTCs were violating local occupancy tax ordinances by failing to remit occupancy tax on OTC profits earned under the merchant model.<sup>39</sup> Each of the plaintiff counties had enacted occupancy tax ordinances<sup>40</sup> pursuant to the Kentucky Enabling Act, which

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<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> *Id.* See also *City of Findlay v. Hotels.com*, 441 F. Supp. 2d 855 (N.D. Ohio 2006). In *Findlay*, the court concluded that although OTCs had no direct taxable duty under the City’s occupancy tax ordinance to collect and remit the tax, because the OTCs undertook to charge and collect a sales tax on transactions with their customers, they assumed the responsibility for such collections and the duty to remit them. 441 F. Supp. 2d at 861 (citations omitted).

<sup>39</sup> *Louisville/Jefferson Cnty. Metro Gov’t v. Hotels.com, L.P.*, 590 F.3d 381, 383 (6th Cir. 2009).

<sup>40</sup> See LOUISVILLE/JEFFERSON CNTY, KY., CODE OF ORDINANCES § 121.01(A); LEXINGTON–FAYETTE URBAN CNTY, KY., CHARTER OF CODE OF CODE OF ORDINANCES § 2–172(a).

authorized counties to assess a “transient room tax” on “the rent for every occupancy of a suite, room, or rooms, charged by all persons, companies, corporations, or other similar persons, groups or organizations doing business as motor courts, motels, hotels, inns or like or similar accommodations businesses.”<sup>41</sup>

Once a room was rented, the OTCs would remit the wholesale rate and the occupancy tax, calculated based on the wholesale rate, to the hotel operator.<sup>42</sup> The counties noted that the OTCs included an amount for “tax recovery charges and fees” in the marked-up amount charged to consumers.<sup>43</sup> The district court granted the OTCs’ motion to dismiss, concluding that the OTCs were not “like or similar” to “motor courts, motels, hotels, or inns” because they “have neither ownership, nor physical control, of the rooms they offer for rent.”<sup>44</sup> The counties appealed the decision to the Sixth Circuit.

The Sixth Circuit upheld the district court’s grant of the OTCs’ motion to dismiss. Interpreting the statute using the framework developed by Kentucky state courts, the court concluded that the OTCs were not “like or similar” entities to those targeted by the tax. The court first reasoned that it could not determine whether OTCs constituted “like or similar business accommodations” under a plain meaning analysis.<sup>45</sup> Upon further statutory interpretation, the court concluded the district court had correctly applied the interpretative canon of *ejusdem generis*<sup>46</sup> when it determined that “like or similar accommodations businesses” should be restricted by the four types of businesses listed immediately prior to the phrase, “motor courts, motels, hotels, and inns.”<sup>47</sup> Based on this interpretation, the district court reasoned OTCs were not similar to

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<sup>41</sup> 590 F.3d at 383 (citing KY. REV. STAT. § 91A.390(1) (2009)).

<sup>42</sup> *Id.* at 383-84.

<sup>43</sup> *Id.* at 383.

<sup>44</sup> *Id.* at 384.

<sup>45</sup> *Id.* at 387.

<sup>46</sup> *Ejusdem generis* is a canon of construction holding that when a general word or phrase follows a list of specifics, the general word or phrase will be interpreted to include only items of the same class as those listed. BLACK’S LAW DICTIONARY 236 (3d pocket ed. 2006).

<sup>47</sup> *Louisville*, 590 F.3d at 388.

the businesses listed in the statute because OTCs had neither ownership nor physical control over the hotel rooms.<sup>48</sup>

The court rejected the counties' argument that the district court's interpretation would lead to the "absurd result" where a county would receive less tax money if a consumer books a hotel room through an OTC than if the room is booked directly with a hotel.<sup>49</sup> The court concluded it was for the Kentucky legislature, not the court, to close any "loophole" that resulted from the interpretation.<sup>50</sup>

Importantly, the court distinguished the Kentucky statute before it from the Georgia statute considered in *Columbus* on the basis that the Georgia statute was a tax "on the charge to the public" for a room.<sup>51</sup> The Sixth Circuit agreed that such conclusive language would result in the tax being calculated using the marked-up amount, but stated that such clarity was "sorely lacking" in the Kentucky statute.<sup>52</sup> Relying on the principle that doubts or ambiguities in tax statutes must be construed strictly and in favor of the taxpayer and against the taxing powers, the court held that the counties' ordinance did not encompass the OTCs and affirmed the district court's grant of the OTCs' motion to dismiss.<sup>53</sup>

#### C. County of Monroe, Florida v. Priceline.com, Inc.: *Occupancy Tax Ordinance Broad Enough to Encompass OTCs*

In *Monroe*,<sup>54</sup> the county brought an action against Priceline and other OTCs alleging the OTCs had failed to remit the proper

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<sup>48</sup> *Id.* at 388. *See also* Pitt Cnty. v. Hotels.com, L.P., 553 F.3d 308, 313 (4th Cir. 2009) (concluding OTCs were not encompassed by the North Carolina occupancy tax statute at issue, relying on the principle of *ejusdem generis* to determine that OTCs were not "similar type businesses" to hotels because they did not "provide lodging to patrons on site").

<sup>49</sup> *Louisville*, 590 F.3d at 388-89.

<sup>50</sup> *Id.*

<sup>51</sup> *Id.* at 389.

<sup>52</sup> *Id.*

<sup>53</sup> *Id.* (citing *George v. Scent*, 346 S.W.2d 784, 789 (Ky.1961)).

<sup>54</sup> *Cnty. of Monroe, Florida v. Priceline.com, Inc.*, 09-10004, 2009 WL 4890664 (S.D. Fla. Dec. 17, 2009).

amount of occupancy tax owed to the county.<sup>55</sup> Pursuant to a Florida statute, the county imposed a three percent tax on “each dollar of the total rental charged every person who rents, leases or lets for consideration any living quarters or accommodations in any hotel, apartment hotel, motel, resort motel, apartment motel, roominghouse, tourist or trailer camp or condominium for a term of six months or fewer.”<sup>56</sup> The county ordinance further provided the tax “*shall be charged by the person receiving the consideration for the lease or rental*, and it shall be collected from the lessee, tenant or customer at the time of payment of the consideration for such lease or rental.”<sup>57</sup>

The OTCs filed a motion to dismiss. The question considered by the court was whether the OTCs “rent, lease or let for consideration” hotel rooms, and whether the OTCs were “the person[s] receiving the consideration for the lease or rental” such that they were subject to the county’s occupancy tax.<sup>58</sup>

The court analyzed Florida’s Enabling Statute, which stated, “[E]very person who rents, leases, or lets for consideration any living quarters or accommodations in any hotel, apartment hotel, motel, [or] resort motel . . . is exercising a privilege which is subject to taxation under this section . . . .”<sup>59</sup> Based on the broad language of the statute and the ordinance, the court denied the OTCs motion to dismiss. The court specifically distinguished this case from *Louisville*, stating that the county’s occupancy tax and Florida’s Enabling Act “swe[pt] more broadly” than the statutory language considered in *Louisville* and cases similarly decided.<sup>60</sup> It stated that, “[t]he statutory terms at issue here are not limited to those ‘operating’ hotels or engaged in a particular line of business, but rather apply expressly to ‘every person’ who rents rooms for consideration . . . .”<sup>61</sup> Unlike the Kentucky statute at issue in

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<sup>55</sup> *Id.* at \*1.

<sup>56</sup> *Id.* (citing MONROE CNTY CODE § 23–197(a)).

<sup>57</sup> *Id.* (citing MONROE CNTY CODE § 23–197(c)).

<sup>58</sup> *Id.*

<sup>59</sup> *Id.* at \*2 (citing FLA. STATUTES § 125.0104(3) (2009)).

<sup>60</sup> *Id.* at \*4.

<sup>61</sup> *Id.*

*Louisville*, the Florida law was so clear and unambiguous the court easily concluded OTCs were encompassed by the provision.

### III. SUMMATION OF COURT DECISIONS AND OTC OCCUPANCY TAX OUTLOOK

*Louisville*, *Columbus*, and *Monroe* fairly represent the array of decisions resulting from OTC litigation. While some courts have adopted the *Louisville* reasoning and held that OTCs are not subject to ambiguous occupancy tax ordinances that do not contemplate OTCs specifically,<sup>62</sup> others find *Columbus*' conclusion highly persuasive—that is, regardless of whether the OTCs are *statutorily* obligated to collect and remit the tax on profit margin, contractual agreements under the merchant model require them to do so.<sup>63</sup> *Monroe* stands for the proposition that some ordinances are broad enough as adopted to encompass the OTCs.

Attorneys litigating these cases should carefully analyze state enabling statutes and local ordinances enacted pursuant to the statutes. As noted by the court in *Monroe*, terms such as “operator” and “vendor” indicate that the provision specifically encompasses the physical hotel,<sup>64</sup> whereas a phrase such as “person receiving the consideration for the lease or rental” seems to more readily encompass all persons in the business of renting rooms for consideration, including OTCs.<sup>65</sup> Ambiguity with respect to the amount to be collected is also relevant. In *Louisville*, the statute simply discussed “rent charged,” without giving much substance to the term,<sup>66</sup> whereas the *Monroe* statute called for the tax to be collected on “each dollar of the total rental charged.”<sup>67</sup> The statutory language in these cases was central to the courts' conclusions—the definite terms of the Florida provision made the

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<sup>62</sup> See, e.g., *Pitt Cnty. v. Hotels.com, L.P.*, 553 F.3d 308 (4th Cir. 2009).

<sup>63</sup> See, e.g., *City of Findlay v. Hotels.com*, 441 F. Supp. 2d 855 (N.D. Ohio 2006).

<sup>64</sup> *Cnty. of Monroe*, 09-10004, 2009 WL 4890664, \*3.

<sup>65</sup> *Id.* at \*4.

<sup>66</sup> *Louisville*, 590 F.3d at 383 (citing KY. REV. STAT. § 91A.390(1) (2009)).

<sup>67</sup> *Cnty. of Monroe*, 09-10004, 2009 WL 4890664, \*1 (citing MONROE CNTY CODE § 23-197(a)).

decision for the *Monroe* court much easier than the ambiguous terms of the Kentucky provision considered in *Louisville*.

Where the provisions of the occupancy tax statute in question are ambiguous enough to result in a *Louisville* decision, the potential that a court will reach a conclusion similar to the Georgia Supreme Court's decision in *Columbus* must be acknowledged. If OTCs are contractually agreeing to collect and remit the tax, either to the hotel or the taxing authority, the court may conclude they are contractually obligated to collect and remit the tax on the full marked-up amount even if the statute does not encompass the OTCs or those amounts. The *Columbus* court indicated that its decision rested at least in part on the fact that the OTCs did not itemize the amounts collected at the time of sale.<sup>68</sup> Thus, an OTC may be able to avoid a *Columbus* result by itemizing the amounts collected as "facilitation fees," which would then presumably exempt those amounts from the tax.

Such changes may only be temporary fixes, however, since state legislatures can simply amend their enabling statutes to include OTCs and require the tax be collected on the full marked-up amount. All is not lost for the OTCs in this respect, however. Just as states can amend statutes to specifically include OTCs, the OTCs can lobby state legislatures for an exclusion or exemption. In *St. Louis County v. Prestige Travel, Inc.*,<sup>69</sup> the Missouri Supreme Court dismissed the county's occupancy tax case against OTCs after the Missouri State Legislature passed a bill specifically exempting the OTCs from occupancy tax. This is a plausible and somewhat concrete solution for OTCs if they can persuade state legislatures to follow in Missouri's footsteps. The viability of this solution seems less and less realistic, however, as state and local governments face budget shortages and search for ways to fill their coffers (which is why the majority of this litigation is initiated in the first instance).

OTCs are also seeking a federal resolution through passage of legislation either exempting the OTCs from any state or local occupancy tax<sup>70</sup> or prohibiting state taxation of "amounts charged

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<sup>68</sup> *Columbus*, 285 Ga. at 690.

<sup>69</sup> *St. Louis Cnty. v. Prestige Travel, Inc.*, 344 S.W.3d 708 (Mo. 2011).

<sup>70</sup> Grace Gagliano, *Online Travel Companies, Hoteliers at Odds*,

or retained for facilitating the booking of . . . hotel accommodations . . . .”<sup>71</sup> The appeal of a federal solution is twofold: it saves the OTCs from having to lobby 50 state legislatures, and more importantly, it is a more permanent fix because the OTCs would no longer be at the mercy of the state legislatures, who may change their minds about an exemption when money runs short.

Another option for OTCs is to litigate collection of the tax as either a state or federal constitutional issue, arguing, for example, that the taxes unduly burden interstate commerce and violate the the Dormant Commerce Clause.<sup>72</sup> Expedia had little luck with this argument in *Columbus*, where the court refused to consider the constitutional issue since it concluded that the OTCs had voluntarily submitted themselves to taxation via contracts with the hotels.<sup>73</sup> OTCs have been equally unsuccessful with this argument in other courts, even when courts substantively examine the constitutional issues.<sup>74</sup>

#### CONCLUSION

Case-by-case litigation perpetuates ambiguity and further complicates the OTC occupancy tax issue. While each case is an exercise in statutory interpretation, slight differences in statutory language or interpretative inclination will assure differing judicial conclusions. In this time of fiscal deficiency, counties are unlikely to back down from this potential revenue source. To reach a more concrete resolution, OTCs and counties can circumvent the judicial

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BRADENTON HERALD (Feb. 23, 2011), <http://www.bradenton.com/2011/02/23/2978845/online-travel-companies-hoteliers.html>.

<sup>71</sup> S. 1934, 112th Cong. § 3 (2011).

<sup>72</sup> For a thoughtful examination of the Dormant Commerce Clause issue, see Jennifer Rothschild, *Pitt County v. Hotels.com: The Dormant Commerce Clause and State Taxation of Online Travel Companies*, 64 TAX LAW. 223 (2010) (concluding that the Dormant Commerce Clause would not prohibit state and local governments from requiring OTCs to collect and remit occupancy tax).

<sup>73</sup> *Expedia, Inc. v. City of Columbus*, 285 Ga. 684, 690-91 (2009), reconsideration denied (June 30, 2009).

<sup>74</sup> See, e.g., *City of Charleston, S.C., v. Hotels.com, LP*, 586 F. Supp. 2d 538, 544-45 (D.S.C. 2008).



process and instead seek legislative intervention—with OTCs seeking an exemption from the tax and counties seeking an express inclusion of OTCs in their states' occupancy tax statutes. OTCs can also continue to pursue a federal exemption. Regardless of the eventual outcome, both parties are likely better served by legislative resolution rather than the costly and time-consuming exercise of litigating the interpretation of every occupancy tax statute in the country.

#### PRACTICE POINTERS

- Because of the importance of statutory language, and the variances between occupancy tax statutes, it is important to compare the language of the statute at issue in your case with statutes considered in prior cases to determine whether a particular court holding or conclusion will be persuasive in your case.
- Terms such as “operator” and “vendor” indicate that the provision specifically applies to the physical hotel, whereas a phrase such as “person receiving the consideration for the lease or rental” seems to more readily encompass all persons in the business of renting rooms for consideration, including OTCs.
- With respect to the amount to be collected, ambiguous terms undefined by statutory language are more favorable for OTCs than definite terms such as those in *Monroe*, where the statute called for the tax to be collected on “each dollar of the total rental charged.”
- OTCs should itemize the amounts collected as “facilitation fees.” This should exempt the fees from occupancy tax and also help to avoid a *Columbus* result, where the court found OTCs had a contractual duty to collect and remit regardless of statutory language.
- In addition to statutory arguments, OTCs should develop any federal constitutional arguments when seeking to avoid a duty to collect and remit occupancy taxes.
- OTCs and counties can circumvent the judicial process by seeking legislative action. OTCs can seek state or federal

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exemptions from occupancy tax statutes, and counties can seek to have OTCs specifically included in their state's occupancy tax statute.

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