

# INSURANCE AND CONFIDENTIALITY ISSUES IN THE HOSPITALITY INDUSTRY

### **PRESENTER**



#### THOMAS PATTERSON

- His book, "Handling the Business Emergency: Temporary Restraining Orders and Preliminary Injunctions," was published by the American Bar Association in 2009.
- Extensive experience trying lawsuits for businesses, professionals and entrepreneurs
   often on an emergency basis.
- Areas of practice include breach of contract, theft of trade secrets, breach of employee agreements, restrictive covenants, shareholder disputes, unfair competition and business torts.



### SCOPE OF ARTICLE



#### INSURANCE COVERAGE ISSUES

• We'll explore insurance coverage and how it relates to the hospitality and restaurant industries. We'll introduce four cases won for clients to establish a framework for analyzing insurance policies and practices, claim administration and litigation coverage.

### HOW TO KEEP TRADE SECRETS

• Are your clients' communications with you secret? Most people believe that their lawyer will keep their communications secret, but it is not always so. This paper will help you recognize the issues that pervade the attorney-client privilege—and thus help you keep your clients' secrets.



## **COVERAGE ISSUES**



- FOUR RECURRENT OR INTERESTING FACT PATTERNS
  - Burglary
  - Water Pipes Burst
  - Claims Against Security Guards and Bouncers
  - D&O Coverage and its Limitations



# **BURGLARY**



- The Coverage
- Payment Measure
- Lost Income
- Right to Investigate
- Policy Provisions Regarding Fraud
- Jury Instruction for Fraud
- Bad Faith



# YOUR PIPES BURST



#### IMPORTANT CLAUSE WE ENCOUNTERED

- Here is a paragraph from the insurance company's letter reducing the claim:
  - There are serious co-insurance issues relative to this loss. Our field adjuster, Richard, determined that the valuation of your building, utilizing the standard Marshall & Swift Valuation Service, resulted in a Replacement Cost for the structure of \$5,439,319 and a Depreciated Cost of \$4,045,588. However, you only maintained limits of \$1,000,000 subject to a 90% co-insurance requirement. \$4,045,588 x 90% = \$3,641,029. There was \$1,000,000 insurance in place although you needed limits of at least \$3,641,029. Applying the co-insurance penalty, you are entitled to 27.462% of the damages to the building.



# CLAIMS AGAINST SECURITY GUARDS AND BOUNCERS



### TYPICAL COMPLAINT WILL INCLUDE THESE ALLEGATIONS OF NEGLIGENCE:

- Failed to exercise ordinary reasonable care in the selection and hiring of their agents, servants and/or employees in that they hired persons who had a propensity toward violence
- Failed to provide adequate security with the result that agents and/or employees intended to and did commit a battery upon Plaintiffs
- Failed to adequately train and supervise their agents and/or employees; which failure of training and supervision proximately caused the battery that plaintiffs and each of them sustained
- As a direct and proximately result of the aforementioned assault and battery, Plaintiffs sustained injuries of a personal and pecuniary nature
- At said time and place, defendants falsely accused Plaintiffs of criminal trespass and criminal battery
- As a direct and proximate result of said false accusations, Plaintiffs were arrested and charged with battery and criminal trespass. Said Plaintiffs were falsely imprisoned by defendants.



# D&O COVERAGE/LIMITATIONS



#### THE BANKRUPTCY EXCLUSION

• The bankruptcy exclusion provided that "[i]n the event that a bankruptcy or equivalent proceeding is commenced by or against the Company, no coverage will be available under this Policy for any Claim brought by or on behalf of (a) the bankruptcy estate . . . or any trustee . . . appointed to take control of, supervise, manage or liquidate the Company . . ."

### INSURED V. INSURED (IVI)

• The Policy provided that coverage does not apply to "any Claim by or on behalf of, or in the name or right of, the Company or any Insured Person, . . ." (R. Vol. 1 at C48). But shareholder derivative actions are covered even though brought "on behalf of, or in the name or right of, the Company" as long as they are "brought and maintained independently of, and without the solicitation, assistance, participation or intervention of" an insured.



# HOW TO KEEP TRADE SECRETS



### THE ATTORNEY-CLIENT PRIVILEGE

- Purpose
- Differences Between State and Federal Government Definition of the Privilege
- Elements of the Privilege



# PURPOSE OF THE ATTORNEY-CLIENT PRIVILEGE



- The crux of the privilege is located between two opposite principles.
- 1. People will be encouraged to seek legal advice if they know they can do so in confidence; fully advised lawyers will provide accurate advice and promote adherence to the law; people who have fully confided in their lawyer will trust them, rely on their advice, and more laws will be adhered to as a result.
- 2. How can the truth be discovered if we conceal evidence? "The very integrity of the judicial system and public confidence in the system depend on full disclosure of all the facts, within the framework of the Rules of Evidence."

As a result of these competing policies, the attorney-client privilege is "strictly confined within the narrowest possible limits consistent with the logic of its principle."



# DIFFERENCES IN STATE AND FEDERAL DEFINITION



- You may have a choice of where to file your case, or whether to transfer a case filed against you. The choice of one state or another, or a state versus a federal court, usually depends on the reputation of the judiciary, the quality of the jury, and political judgments. If your opponent has most of the documents relevant to the dispute, or in-house counsel who are fact witnesses, and if you think such documents or the testimony of these witnesses will help you, one additional factor to consider in choosing venue is which jurisdiction has the more liberal disclosure rules with respect to the attorney-client privilege.
- Conversely, if you have significant documents that you would like to keep secret under the privilege, or if you have in-house attorney witnesses that you would prefer to keep silent, one additional factor for you to consider is which jurisdiction provides the most protection under the attorney-client privilege.





### **ELEMENTS OF THE PRIVILEGE**

- The Privilege proponent is, was or sought to be a client
- The Privilege attaches to communications made to and from the lawyer, or one of the lawyer's subordinates, or another agent acting on behalf of the lawyer
- The communication protected must relate to an opinion of law, legal services and/or assistance in a legal proceeding
- The communication must have been rendered under circumstances which show that they were intended to remain confidential
- The Privilege must be claimed by the client and not waived

