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## **Claims and the Great Outdoors**

### Retail/Restaurant/Hospitality Outdoor Environments from Conception to Inception

Whether at a hotel, restaurant, or bar, many patrons enjoy dining and "al fresco" time in an outdoor seating area. That seating area may also be by a fire pit, at the Tiki bar, or outdoor deck, patio, and/or lounge. For that reason, many premises owners are now incorporating that type of environment into their outdoor spaces or making room for that type of environment in their current space. In doing so, many premises owners may not be consulting with an architect, engineer, and/or designer. Whether it is implementing a new space or current space, there may be different codes, regulations, or ordinances that may govern certain features.

For instance, will this area be near traffic for which barriers may be needed? Some considerations may need to go into how wide the walk space and/or sidewalks are. Will the design include certain landscaping or similar features? Some codes or ordinances may regulate the size and placement of planter boxes or other barriers. Once the space is designed and/or implemented, other things that will or may come into play include the arrangement of tables, chairs, decorations, umbrellas, outdoor heaters, fountains, signs, ramps, stairs, stages or dance floors.

Some municipalities may regulate how these spaces are designed and require the establishment to submit an application along with a detailed design plan and proof of insurance. All of these issues become important because of the need to either avoid future risks or make sure that all anticipated risks are covered by an applicable policy of insurance.

For those familiar with personal injury claims, many of the features described above either have been or undoubtedly will be considered "unreasonably dangerous conditions" following an incident where a patron sustained personal injury on the premises. If the establishment serves or sells alcohol and/or alcohol is involved in the accident, then the establishment will likely experience two types of personal injury claims: dram shop liability and premises liability. For that reason, not being familiar with any required codes, regulations, or

ordinances may increase the chance for liability or even perhaps decrease the chance for adequate insurance coverage.

### Insurance Coverage for Outdoor Environments

Commercial general liability policies should cover most premises liability accidents that occur on the premises; however, not all insurance policies are the same. If the establishment sells or serves alcohol, it will likely need a separate liquor liability policy with adequate limits. Many liquor liability policies can be sold separately or bundled with a general liability policy.

Liquor liability insurance provides coverage in the event of an accident or other event involving someone who was sold or served alcohol at an establishment. More specifically, liquor liability insurance has been defined as coverage for bodily injury or property damage caused by an intoxicated person who was served liquor by the policyholder. Traditionally, this type of insurance is associated with bars or restaurants but are now just as common for hotels, malls, outdoor shopping venues, and neighborhood grocery stores.

The types of claims that may be covered include injuries involving a drunk driver that left the premises or injuries arising out of an assault, slip and fall, trip and fall, or other personal injury accident. Generally speaking, this type of insurance may not cover underage drinking or claims that are not either property damage or bodily injury (slander, libel, etc.). There also may not be coverage if the establishment is a “BYOB” establishment rather than one that sells or serves alcohol to its patrons.

Liquor liability policies may cost, on average, several thousand dollars per year. Of course, the cost will depend on a number of factors such as venue, size of the business, and the amount of coverage needed. Other issues that may affect cost could include total alcohol sales, whether a stand-alone or bundled policy is being purchased, local and/or state laws, the frequency and size of any prior claims made on that policy, or any prior complaints or citations with the applicable authorities.

### Investigating Claims in a Retail/Restaurant/Hospitality Setting

Most establishments follow all the rules and regulations in designing and implementing a safe and comforting outdoor space as well as obtaining all required policies of insurance with appropriate coverage. Despite all the planning and preparation, unfortunately it is only a matter of time before someone is injured because of an “unreasonably dangerous condition” on the premises, being overserved alcoholic beverages, or perhaps a combination of both unfortunate scenarios.

Once a personal injury claim is turned over to the insurance company, a coverage determination will be made, and the claim investigation will commence. That investigation will be guided by whatever laws or regulations govern the particular jurisdiction or venue. Obviously, premises liability and dram shop liability laws will vary from state to state. Compounding matters

is that many counties within each state will vary greatly in terms of being a “plaintiff friendly” venue or perhaps known for higher jury verdicts. This will factor into how aggressive of an investigation is needed and ultimately how much a claim may be worth.

At the very least, the investigation should include identifying and interviewing all potential witnesses, securing and preserving video surveillance within a reasonable timeframe, securing and preserving receipts, tickets, and/or invoices for the food and alcohol sold and/or consumed, taking witnesses statements and photographs as needed, and identifying any past similar incidents, complaints, or claims. If the claim involves a hired vendor on the premises or a structure/feature that was recently constructed, is there a contract in place for which the premises owner might be entitled to a defense or indemnity under some other policy of insurance and ultimately shift the risk to someone else? All of this information will be vital in determining whether there is the potential for liability, and whether the claim should be resolved early or defended.

### Litigating Claims in a Retail/Restaurant/Hospitality Setting

Despite best efforts to investigate a claim early in order to resolve, a certain percentage of claims will always proceed to litigation. As mentioned earlier, depending on the circumstances involved in the claim, there may be a premises liability claim, dram shop liability claim, or both.

Although every state is different, generally speaking, in order to recover under a premises liability theory, an invitee on the premises must prove: 1) a condition posed an unreasonable risk of harm; (2) actual or constructive knowledge of that condition on the premises; 3) failure to exercise reasonable care to reduce or eliminate the risk of harm; and 4) such failure proximately caused injury to the invitee. However, often times, there is no duty owed to an invitee when the condition complained of is open, obvious and/or known to the invitee. Of course, a duty of care could also be discharged where there is an adequate warning of any such danger or the condition complained of is naturally occurring (accumulation of precipitation, snow, ice or mud).

If the alleged dangerous condition violates certain ordinances or codes (steepness of a ramp or stairs as an example), then it may likely be presumed to be dangerous for which the premises owner knew or should have been aware of. Unlikely dangers may also lurk in seemingly normal or natural environments. For instance, do certain decorations or features invite potentially dangerous behavior for which an accident may occur? One example is having an open fire pit where patrons may sit by and warm up. Mix in some inattentiveness, alcohol, and/or both, and a patron could suffer serious personal injury. Another example may include patrons posing for pictures near stairs, ledges, barriers or decorations, or patrons frequenting areas outside or elevated that may be dark or not adequately illuminated. All of these situations can present any establishment with its next slip/trip and fall claim.

If the claim involves the sale or service of alcohol, the claimant may also bring a dram shop liability claim. Again, generally speaking, in order to prevail under this cause of action, a claimant must prove: 1) the establishment sold or served an alcoholic beverage to an adult

patron; 2) the establishment provided the alcoholic beverage to the patron when it was apparent the patron was obviously intoxicated; and 3) the patron's intoxication proximately caused the injury. Keep in mind that the claimant may be an innocent third party (injured in a car crash or altercation) or they could be the intoxicated patron. The "obvious intoxication" of a patron analysis usually involves visible evidence that is easily observable. This analysis may likely hinge on the evidence that was considered earlier and preserved, such as videos, statements, receipts, and invoices. Matching video surveillance with an audit of the sales data can allow someone to create a timeline of events wherein you can summarize a minute-by-minute account of what drinks (or food) were ordered and when, along with visual evidence of people's behaviors or the staff's adherence with policies and procedures.

Assuming liability exists as to the sale or service of alcohol, some jurisdictions provide for a type of trained server/safe harbor defense. More specifically, an establishment may be immune from liability if they can show that it required employees to attend a commission-approved seller-training program and their employees attended that training program. Logically, the establishment would also need to show that the employees on duty at the time of the incident had received that training. However, this defense may not apply where there is evidence that the establishment's employees were encouraged to violate the law with respect to selling or providing alcoholic beverages (free drinks, drink sales competition, or minimum drink sales quotas). Of course, whether the claim is premises liability or dram shop liability, most states allow a claimant's recovery to be limited by his or her percentage of liability, or the percentage of liability that may be assessed on a known responsible third party or perhaps an unknown criminal actor.

In summary, these popular and inviting outdoor settings may not be quite as relaxing for the premises owners, claims adjusters, or attorneys involved in these types of claims. Rather, these types of environments and unique claims can have a real effect on the total cost of risk for restaurants and other hospitality settings, from the inception of an idea for an outdoor space all the way to a potential jury verdict.