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Unwelcome Guests — Dealing with Uninvited Behavior

I. Introduction

Common misbehavior on commercial property can include: begging, loitering, drinking, selling or using drugs, passing out or being “on the nod” from drug use, graffiti, fighting, camping out, using bathrooms as a cleaning station, yelling, and even urinating and defecating openly. Bad and often criminal behavior scares customers away, distracts employees from their work and creates the risk of loss and injury to customers and employees. Discussion on practical ways to deal legally and effectively with uninvited behavior in restaurants, stores and shopping centers.

II. The Basic Legal Framework

The Invitation Businesses Make to Customers is Limited to Business Purposes

The legal framework for behind the concept of misbehavior on commercial property suggests the invitation made to customers is limited to business purposes. As a business owner you have the right and duty to several stakeholders including staff by providing a safe workplace, management support and training on how to deal with a various scenarios that may arise in dealing with the public. To business invitees, the store or restaurant has a duty to provide a safe and enjoyable place to shop/eat. For the community, the business needs to ensure engagement so that incidents are kept to a minimum and those off of premise are safe. With a heightened social awareness on discrimination after the Starbucks incident, businesses now more than ever have to be aware of being non-discriminatory due to the status of a guest to their premises. Insurance carriers need to be convinced that business are tracking the data, employing loss prevention and mitigation at the scene to prevent claims. An organization at large business need to protect its brand, its reputation and it must monitor social media.

Bad Behavior Always Exceeds the Scope of the Business’ Invitation

Bad behavior always exceeds the scope of the business’ invitation so it is important to understand the classification of people who come onto your premises and onto the premises of your insureds and clients. A person is trespassing when there is an invasion in the exclusive possession and physical condition of the land. Someone is considered a nuisance – the unreasonable interference with a right common to the general public. A battery occurs when someone knowingly, without legal justification, causes bodily harm to an individual or makes physical contact of an insulting or provoking nature with an individual. There are also threats of violence or disorderly conduct when a person knowingly makes any unreasonable or offensive act, utterance, gesture or display which, under the circumstances, creates

a clear and present danger of a breach of peace or imminent threat. Lastly, the business owner needs to know how to deal with harassment allegations - which are when intentional acts cause someone to be worried, anxious or uncomfortable and need not involve any over act of violence.

III. Common Scenarios

Outside the Doors

Scenarios on when this uninvited behavior occurs can be broken down by incident that occur inside the store or outside of the business owners' doors. For those that occur outside of the doors, these may involve trespassers who seek customer money: beggars, panhandlers, sham charity solicitors, candy scams, and uninvited canvassers for legitimate charities. There may be those seeking to get high: loiterers, drug dealers and drug users and drunkards. Especially in urban areas there is an issue of begging, canvassing, drug and loitering problems. Depending on the state or city ordinances, outside uninvited behavior may be those seeking shelter in parking lot and landscaping overnight campers. There are others that our simply seeking customer attention trying to obtain signatures for petition circulators. It is important for retail and restaurant business to know the federal, state or city laws and ordinances so that they understand how they need to respond to each of these types of uninvited behaviors. In turn, insurance and claims professionals must also understand these laws so they can properly guide their insureds and properly handle claims and complaints regarding these issues. For example, generally, petition circulators have no federal or state right to seek signatures in front of businesses large or small on private property. There is also case law that helps determine the course of action or inaction a business needs to take.

In *Publix Super Markets, Inc. v. Tallahassee Citizens and Political Actions Committee*, 2005 WL 3673662 (Florida), a grocery store chain brought suit against a citizens and political actions committee, seeking to establish its entitlement to exclude citizens from soliciting signatures for political petition on property owned or leased by the operator. The Appellate Court ruled Publix was entitled to exclude the defendants from going onto Publix's privately owned or leased properties where such persons sought to use the premises for any purpose other than shopping. The court also ruled the defendants were not entitled under the First Amendment or the Florida Constitution to solicit signatures or engage in political speech on Publix's privately owned or leased property without Publix's permission.

In *Trader Joe's Company v. Progressive Campaigns, Inc.*, 73 Cal.App.4th 425 (1999), the defendants attempted to obtain signatures for initiative petitions from Trader Joe's customers. The grocery store objected and stopped the petitioning activity from being conducted in front of its store entrance. The store ultimately initiated a trespass action and then filed a preliminary injunction banning the defendants from soliciting signatures at the store. The issue on appeal was whether the state constitutional right to engage in expressive activity on private property, which was recognized by the California Supreme Court, protected the challenged activity. The Court held Trader Joe's was likely to succeed on the merits of its claim that the challenged activity was not constitutionally protected and affirmed the preliminary injunction order.

In *Fred Meyer Stores, Inc. v. Garrett*, 191 Or.App.582 (2004), a store sought declaratory and injunctive relief against a signature gathering organization and others to stop the gathering of initiative petition signatures on the store's private property. The Circuit Court granted judgment for the store and the defendants appealed. The appellate court held the store did not have characteristics sufficient to

establish that the store owner had expressly or impliedly invited the public to use the store as a forum for public assembly, which was required to create right to gather initiative petition signatures on public property.

Inside the Store or Restaurant Premises

For behavior inside the store or restaurant, bathrooms is a common area where uninvited behavior takes place. There are drug addicts that use the bathroom as a shelter to get high, homeless use them as a place to wash and for drunk people it is a place to get sick. Many business use locks or codes as a way to end the misuse. Yet there are still plenty of claims and eventually court cases that occur due to bathroom allegations. In *Janice H. v. 696 North Robertson, LLC*, 1 Cal.App.5th 586 (2016), a customer filed suit against a bar and dance club and the bus boy for negligence and sexual battery after the bus boy allegedly sexually assaulted customer in the unisex bathroom stall within the club. The jury found in favor of the customer and the bar appealed. The court looked at reasonable foreseeability of the incident and noted the property holder only had a duty to protect against types of crimes of which it had notice and which were likely to recur if the common areas were not secure. The appellate court determined there was sufficient evidence the bar breached its duty for failing to post a security guard in the unisex restroom area and that breach was a cause of the attack.

In *Doe v. Wendy's Old Fashioned Hamburgers of New York, Inc.*, 19 Mass.L.Rptr. 663 (2005), a minor and her parents filed suit against Wendy's for an alleged sexual assault by a Wendy's employee while in the restaurant bathroom. To determine liability, the court had to determine whether the risk of harm was foreseeable or whether the defendant could have reasonably anticipated the risk of harm, considering all circumstances surrounding the injury. No evidence of reasonable foreseeability existed here so summary judgment was granted.

In *City of Hialeah v. Rehm*, 455 So.2d 458 (Florida 1984), the issue was whether officers had a justifiable reason to believe a minor plaintiff was guilty of loitering in a semi-public place contrary to usual behavior. The officers observed the minor plaintiff visiting the men's restroom four times in one hour, looking at individuals using facilities and peering into occupied stalls when there were vacant stalls available. The minor brought a suit against the police, seeking damages for false arrest, false imprisonment, malicious prosecution and intentional infliction of emotional distress. The Circuit Court entered a directed verdict for the defendants but the appellate court ruled the case was for the jury.

Often uninvited behavior results from customers who are irate, who are overstaying their welcome or perhaps they are just a patron that smells bad. In the age of free Wifi and endless cups of coffee, retailers and restaurants are seeing these types of behaviors on a daily basis. They need to understand when this behavior becomes loitering what potential social debates they may be up against and how to act appropriately given the situation at hand. Extreme cases of these people may have serious medical problems. The business may or may not have the right to refuse service. Businesses can rely on the refusal based on a violation of safety or welfare of other customers, rowdy behavior, overfill capacity, or closing time to assist in getting the person(s) removed.

These issues are relevant to the business and its employees, but also for its insurance and claim professionals because anyone who will be address customer claims and complaints will be addressing these issues and must be sensitive to the nature of these complaints. Many of these types of issues are

addressed at the insurance/claims level so it is imperative for those professionals to understand the impact their response can have on the business.

Harassment of Employees or Customers

Businesses need to mitigate the risk of harassment of their employees or customers by individuals who are behaving badly. Violence and the threat of violence require action and often utilizing local police to assist. Businesses can use criminal and civil court restraining orders such as Emergency Protective Orders (EPO) issued by peace officers may be in place under some circumstances, Harassment Restraining Orders or Criminal Stay-Away Orders as one of many measures to control this behavior. A few examples of cases where this has been done are as follows:

In *Davidson v. Webb*, 535 N.W.2d 822 (Minnesota 1995), a shopping center manager filed suit to obtain a harassment restraining order against a restaurant manager. The restraining order was issued and the issuance of it was upheld because: (1) evidence supported finding that the restaurant manager raised voice, yelled and swore at shopping center manager; (2) evidence supported finding that the restaurant manager had no legitimate business purpose for being on shopping center premises; (3) restaurant manager's acts and words during one incident with shopping center manager justified restraining order; (4) reasonable basis existed for believing the restaurant manager's harassing conduct would continue in future; and (5) district court found restaurant manager intended to adversely affect shopping center manager's safety, security or privacy.

In *Steps of Success Homes, LLC v. Dowell*, 2009 WL 5091936 (Minnesota 2009), a foster home for teen girls filed for and obtained a harassment restraining order (HRO) that forbid the defendant, a former employee, from contacting the facility and its employees and residents for two years. The HRO was obtained after the defendant contacted two residents of the foster home after the defendant had left her employment. The defendant argued the Home did not have standing to petition for the Order on behalf of the residents and that she did not engage in conduct that constituted harassment. The court ruled the Home had standing only to limit harassment against the company and it failed to prove her conduct was harassment. According to the evidence, the defendant merely posted on social media that she would miss the teens.

In *City of Montclair v. Beltran*, 2014 WL 5144734 (California 2014), the City sought a workplace violence restraining order based on a former employee's history of harassment and the future threat to city employees. The order was granted for a period of two years and the employee appealed. The appellate court ruled there was a history of threatening conduct toward City employees which showed that irreparable harm was reasonably likely to occur if the injunction was not issued so it was upheld.

IV. Avoiding Defamation While Dealing with Customers and Others

For all types of uninvited behavior, it is critical that the business and its insurance/claims professionals avoid defamation while dealing with customers and others. Communication with police about these chronic issues could lead to defamation. Defamation occurs when a statement is so obviously detrimental to one's good name that a jury may presume general damages, such as for loss of reputation or for mental anguish. An oral statement is "defamatory per se" only if it falls within one of the following categories: (1) imputation of a crime; (2) imputation of a loathsome disease; (3) injury to a person's office, business, profession, or calling; or (4) imputation of sexual misconduct.

Businesses and the insurance/claim handlers investigating these claims must realize defamation has the following five elements: (1) publication; (2) falsity; (3) actor must act with knowledge or reckless disregard as to the falsity on a matter concerning a public official, or at least negligently on a matter concerning a private person; (4) actual damages; and (5) statement must be defamatory.

In *K-Mart Corporation v. Washington*, 109 Nev. 1180 (1993), a store customer who was detained by a store employee because he was suspected of shoplifting. The customer filed suit against the store owner for false arrest, false imprisonment, assault and battery, defamation, and malicious prosecution. The Nevada Supreme Court ruled it was slander per se to walk a customer through the store in handcuffs and the store's loss retention manual was relevant to determine if the employee acted reasonably.

In *Boone v. Wal-Mart Stores, Inc.*, 680 So.2d 844 (Mississippi 1996), customers brought a defamation action against a store due to the store's accusations that the customers had engaged in shoplifting. The trial court entered judgment for the defendant store but the Mississippi Supreme Court reversed the decision because: (1) the customer should not have been required to prove actual malice by the store to maintain defamation claim, and (2) the store should have been required to establish that questioning of customers was reasonable, in order for the store to obtain immunity from defamation claim pursuant to state merchant immunity statute.

In *Simon v. Variety Wholesalers, Inc.*, 788 So.2d 544 (Louisiana 2001), customers who had been stopped by police officers on suspicion of shoplifting sued the store, alleging false arrest, malicious prosecution, and defamation. The trial court entered judgment for the store and it was upheld on appeal because the appellate court agreed (1) customers were not defamed by store, and (2) qualified privilege existed in favor of store. In order to maintain an action in defamation, the plaintiff must prove the following elements: (1) defamatory words; (2) publication; (3) falsity; (4) malice, actual or implied; and (5) resulting injury. The court explained that a qualified privilege existed whenever a defamatory communication is made: (1) in good faith, (2) on a matter in which the person making the communication has an interest or with regard to which he has a duty, or (3) to a person with a corresponding interest or duty.

In *Belcher v. Wal-Mart Stores, Inc.*, 211 W.Va 712 (2002), a customer filed suit for defamation and unlawful detention against a store and store managers, relating to events which occurred after the customer went to the store to return a computer he had purchased. The store suspected the item was stolen, called the police and would not provide the refund until the case was investigated. The plaintiff claimed the manager told him his receipt was a fake and a felonious receipt. Once it was determined the purchase was proper, the refund was provided. The trial court ruled for the store and the trial court affirmed, ruling: (1) store managers' statements were not defamatory; (2) the statements were privileged; and (3) evidence did not establish unlawful detention.

In *Kiray v. Hy-Vee, Inc.*, 716 N.W.2d 193 (Iowa 2006), a customer sued a grocery store for battery, defamation, false imprisonment, and racial discrimination. The customer purchased groceries and as she was leaving the store the alarm system/gates at the front sounded. The customer claimed she did not hear the alarm but employees heard it and approached the customer. The customer's person and bag had to be scanned and it was discovered one item's sensor had not been de-activated. The trial

court granted the store's motion to dismiss the discrimination claim and entered judgment on a jury verdict for the store on the other claims and the appellate court affirmed.

In *Rucker v. K-Mart Corp.*, 734 S.W.2d 533 (Missouri 1987), a customer brought action against a store for defamation involving statements in a store security manager's report to police regarding the customer's arrest for disturbing the peace. The trial court set aside the jury's verdict and directed the verdict for the store and the ruling was upheld by the appellate court because the security manager's report was qualifiedly privileged and could not serve as basis for defamation action, in absence of any evidence that manager acted with express malice or in bad faith.

Prevention

The best defense to any of the types of claims that comes from uninvited behavior is prevention. Businesses should follow corporate and local policy for dealing with misbehavior and train staff on how to respond to violent behaviors or threats. Aside from the injury risk, employees and insurance/claim professionals also need to be trained on how to deal with these situations to properly avoid a defamation claim. A businesses employees should also be trained about how to avoid problems of "implicit bias" when calling the police. They should also avoid using any force or threats of force to eject trespassers and should avoid any touching of trespassers, no matter how slight, unless it is truly necessary for self-defense or the defense of others. Understanding how and when to engage law enforcement is a necessary element is dealing with this exposure if there is a chronic issue at the store. In addition, insurance and claim professionals need to understand what type of action is allowed and not allowed during these events so the claims can be addressed properly.

Place moveable signs to reassure your customers and put up reminder patrons of the ground rules for their stay including how long and curtesy to others. It's important to make friends with the police and climb the escalation ladder when needed. Hire a reputable outside security firm with contractual indemnification language to limit your risk. On the property install lights, videos and cameras - instruct and document behavior with images to share with the police or for when a claim occurs. Claim handlers can demonstrate that the business took specific actions to prevent the behavior from occurring on their premises to help mitigate the amount they pay or when denying a claim.

When Prevention Fails –Police or Legal Involvement

When prevention fails and you are faced with uninvited behavior you need to consider brand protection and impact of social media. If you utilize arrest or trespass authorization letters this may likely become public knowledge which can have its plusses and minuses. This is typically more of a last resort move because you are forcibly ordering a customer to leave and not return, at least for a set period of time. This is more recommended if a manager feels the person is a potential violent threat because it gives the property more control to remove the person in the future. Obtain standard or civil restraining orders to those who own, lease, occupy or control the premises, and to those whose business is disrupted by disorderly behavior. These orders give the property complete authority to keep someone away from the property and the police will react more quickly if such an order is in place. However, be sure all employees are aware of the order and they have a picture of the person so know when and how to react if the person returns. Be *specific* when describing disorderly or aggressive conduct to a court and work with the police to enforce all orders.

For insurance/claims professionals, this is also something that can be utilized when resolving a claim as part of the release process, if agreed to by the business. If a person is considered a threat but they had a claim against the business, part of the claim resolution could be an agreement that the person can no longer frequent the business in person (allowing on-line shopping).

When Prevention Fails –Claims Management

As with the decision to engage law enforcement, the decision on how to react to a claim as a result of uninvited behavior needs to be carefully examined in conjunction with the carrier and/or insured realizing that the way they respond to a claim on uninvited behavior may set a precedent on how future claims are handled.

Liability claims handlers need to determine if there was a duty owed, a breach of duty and whether or not the breach was the proximate cause of the duty owed. Lastly claim handlers need to assess whether the claimant actually suffered any damages as a result of the incident. This may be in the form of physical, mental or emotional injury. Claim handlers should look to landlord tenant agreements in particular the indemnification and insurance requirements to determine if the claim can be tendered.

For workers' compensation claims generally speaking as long as the employee who is injured while performing his or her job duties it will likely be covered by the statute. Moreover if a co-employee is injured in an instance of workplace violence that results from an employer's improper hiring, inadequate security the injured worker will likely be able to make a workers' compensation claims as long as the assault was in some way related to a work situation. The injured worker could also file a third party claim against the co-worker or individual that injured them.

Claim handlers for any type of claim that arises from a uninvited behavior need to understand local ordinances and state laws as it relates to the behavior and should consult with counsel.

V. Conclusion

While businesses may not be able to completely eliminate uninvited behavior, they can take proper action to mitigate it and handle it appropriately when it does happen for the safety of its employees and customers. Keeping a safe environment will keep your worker working and your customers returning.