

ARE YOU LIABLE FOR SERVING ALCOHOL AT HOLIDAY PARTIES? DOES YOUR INSURANCE POLICY COVER YOU? *By Michael R. Kelley*

Let's say that you are having a holiday party (with alcohol served) at your home, or you are a business owner and have a voluntary "company" party for your employees. If someone becomes "visibly intoxicated" at your party, are you as the host of the party liable if the visibly intoxicated guest leaves your party and injures himself or someone else? Does your homeowners or commercial liability policy cover you for defense costs and for a settlement or judgment if you get sued? What about worker's comp coverage for your employees? The answers are complicated, I'm afraid.

In Pennsylvania, the courts have ruled that the Dram Shop Act (which covers alcohol-related liabilities) limits liability for serving intoxicated persons to only those who serve for money, unless the servee is under 21. So, social and business hosts that are not in the business of providing alcohol for money can definitely be civilly liable for serving persons under 21 years of age. However, social and business hosts are generally not liable under the Dram Shop Act for serving alcohol to those 21 and older. But, courts leave open the possibility of a common law action for negligence if a social or business host serves a visibly intoxicated person and knows or should know that the person will be driving, or engaging in some other dangerous activity.

Thankfully, the answer to the insurance coverage question is a little clearer. In many cases, your homeowners and commercial liability policies will cover you if you are sued under either the Dram Shop Act or the common law and you are not a liquor licensee. Check your insurance policy. Some policy forms still

exclude coverage for liquor liability. We recommend having insurance for liquor liability claims if you plan to spike the eggnog this holiday season. If you are a liquor licensee, you must specifically purchase liquor liability coverage.



If an employee becomes intoxicated and is subsequently injured after attending a "voluntary" company party, there is a question as to whether your worker's comp policy will cover it. If the party is truly voluntary, the claim may not be covered. If, despite being "voluntary," employees are expected to attend the party and it is seen by employees as having an impact on their employment status, worker's comp coverage likely will cover the injuries. Based on the experience's of the McNees Insurance Recovery group, courts look to find worker's comp coverage in these scenarios and only deny coverage if employees clearly were not required to attend and attendance had no bearing on employment status.

So what is a good social or business host to do? Make sure that your guests don't have too much to drink this holiday season, and, if they do, make sure that they have a safe ride home. It's not only good sense, it's good insurance sense too. Also make sure you have liquor liability coverage on your homeowners or commercial liability policy – just in case. ■

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HOW WELL DOES DIRECTORS & OFFICERS COVERAGE PROTECT OFFICERS AND DIRECTORS FROM CLAIMS? *By Geoffrey B. Fehling*

Many McNees Wallace & Nurick attorneys and clients sit on for-profit and not-for-profit boards of directors. Most of these board members take some comfort in the fact that Directors and Officers (“D&O”) insurance coverage will protect them if they are sued based upon any decisions and actions as directors or officers. But if a director or officer is in the unfortunate situation of being named in a lawsuit, how well does D&O coverage protect that individual against claims?

The answer in many cases is not very well.

In the recent case of *Federal Insurance Company v. Uni-Marts* (M.D. Pa. August 17, 2012), operators of Uni-Mart convenience stores had filed a lawsuit against Uni-Marts alleging that the company misrepresented the true costs and expenses of operation of the stores to induce more buyers. Uni-Marts submitted the claim to its insurer, Federal, which denied that the claims were covered. Like most D&O policies, the Uni-Marts’ policy covered a seemingly broad array of alleged “wrongful conduct.” But, like most policies, it excluded claims arising from contracts. The court found that the gist of the operators’ claims were based upon breach of contract and, therefore, denied coverage.

But this is just one case, you might say. True, but a review of all D&O coverage cases adjudicated in the last ten years in Pennsylvania state and federal courts shows that more than 90% of the claims for D&O coverage were denied. This mirrors the McNees Insurance Recovery group’s experience with D&O coverage issues presented to us through our clients. One party in one reported case was so frustrated that it argued that D&O coverage was essentially “illusory,” in that while it purported to cover a wide variety of claims, the exclusions were so extensive that coverage became practically worthless.

So what does D&O coverage do? For publically traded companies, shareholder derivative claims are usually covered.

Claims brought by third parties, who are not past, present, or future officers, directors, managers, employees or even volunteers (in some cases), alleging non-contract based wrongdoing, will likely be covered. In one recent example, the Insurance Recovery group helped obtain D&O coverage for a professional counseling organization that was sued by the family of a victim who was killed by a patient of the counseling organization. Recent cases have required D&O insurers to cover costs of government investigations into corporate decisions, as long as a formal investigation has been initiated.

One insurance industry survey noted that the growth of the D&O insurance business was limited by the poor coverage offered in most forms. So what’s an officer or director to do? Here is some practical advice:

- 1) Tell your broker or agent that the scope of coverage offered by the D&O policy is not good enough to cover the most typical kinds of claims and demand that the insurer do better. Especially in closely held companies, most claims are brought by former, present, or future officers, directors, managers, employees or volunteers; and these claims are uniformly denied under the “insured v. insured” exclusion. A blanket exclusion is not necessary.
- 2) For most policy holders, the insured v. insured exclusion and the contract exclusion will eliminate coverage in the vast majority of lawsuits; talk to the broker or agent about “manuscripting” these common exclusions to increase the number of covered claims.
- 3) Shop around not only for a reasonable price, but for better coverage too. If the market demands better coverage, insurers will have to respond. ■

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