

Raising the Bar—The Liquor Liability Exclusion in the CGL

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Considering our collective fascination with saloons, taverns, and pubs, it is little wonder that those organizations regularly selling or serving liquor need special liability insurance.

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How ingrained in our culture is the idyllic bar? Top billing in the first World Series scorecard in 1903 (then known as the World's Championship Games) was secured by Michael 'Nuf 'Ced McGreevey, to promote his famous "Third Base" saloon, so named because "it was the last stop on the way home."¹ First broadcast by NBC in 1982, the highly popular television situation comedy, "Cheers," featured a local bar "where everyone knows your name." And more recently, the compelling characters so vividly depicted in J.R. Moehringer's best selling memoir *The Tender Bar: A Memoir* were revealed largely as patrons of Publicans restaurant and bar of Manhasset, Long Island.²

Those organizations that are not engaged in selling or serving of alcohol often think of risk in terms of its employees consuming alcohol (or using other substances) before or during working hours. While this risk should not be minimized, all organizations must also have an appreciation for other risks that involve alcohol—such as the occasional serving or furnishing of alcohol to others or renting to tenants who sell or serve alcohol. All of this should lead to several questions, including what is the extent of coverage provided in the commercial general liability (CGL) policy for claims related to selling, serving, or furnishing of alcoholic beverages?

The Liquor Liability Exclusion

The third exclusion of the standard Insurance Services Office, Inc. (ISO) CGL policy applies to "liquor liability." Unchanged since the mid-1980s, the liquor liability exclusion wording contains three main parts, none of which apply *at all unless* you [a named insured on the policy] are in the *business* of manufacturing, distributing, selling, serving, or furnishing alcoholic beverages. What does "in the business" mean? More on that later.

Host Liquor

It is plain by the "in the business" exception that the liquor exclusion is not meant to apply to all persons or organizations. The result is the so-called host liquor liability coverage found in the CGL. Host liquor liability coverage, which used to be a separate express coverage grant provided as part of the Broad Form CGL Endorsement added to the 1973 ISO comprehensive general liability policy, is intended to provide coverage for a person or organization for certain functions or events that are incidental to the named insured's business.

A company picnic or an open house for customer appreciation at which beer, wine, or other alcohol is served or furnished are examples of the types of events for which host liquor protection is provided. Should an employee at the picnic or a customer at the open house overindulge and consequentially injure others (non-employees) due to their intoxication, the *unendorsed* CGL will protect the insured from claims made by persons injured by the overserved employee or customer.

Distilling the Liquor Exclusion

For those who treasure a grasp of the obvious, the liquor exclusion applies only to bodily injury (including medical payments) or property damage. Of course, this fact is only meaningful if a claim is made against an insured for a personal or advertising injury offense.

For example, if the local restaurant contributes to the intoxication of a person who later attends a meeting in which the intoxicated person slanders everyone in the room, the restaurant's CGL would not exclude coverage against allegations that the restaurant was, at least in part, responsible for the slanderous remarks.

Causing or Contributing. The first clause of the liquor liability exclusion is expansive—causing *or contributing* to the intoxication of any person is excluded. Said differently, this exclusion applies even if it is alleged that Tommy's Tavern (the named insured) served *only* the *first* drink to an absolutely sober patron—who then leaves Tommy's and visits numerous other establishments, becomes intoxicated, and injures a pedestrian with his automobile. While Tommy's Tavern may not ultimately be liable for the pedestrian's injuries, its CGL insurer will not provide a defense for the claim.

Underage or Under the Influence. No coverage applies to liability that results from serving an underage person or serving a person who is already under the influence.

There is no requirement in the above two clauses, as is sometimes mistakenly believed, that that liquor exclusion applies only to *statutorily* imposed liability—a dram shop or alcohol control statute. While dram shop or alcohol control statutes may ultimately determine liability, the first two clauses of the exclusion apply whether liability is imposed by common law or statute.

The notion of excluding coverage regardless of the source of liability is illustrated by the second clause of the exclusion. Furnishing alcohol to a minor or to someone who is obviously under the influence would likely be considered failure to exercise reasonable care and thus constitute negligence and result in the liability of the server even in the absence of any statutorily imposed liability. In other words, the liquor exclusion is intended to apply even if dram shop or alcohol control statutes do not.

Statute or Ordinance. The last of the three exclusionary clauses specifically addresses liability that results from violation of statutes, ordinances, or regulations that relate to selling, (including gifts), distributing, or use of alcoholic beverages.

If an insured is liable for bodily injury or property damage because of alcoholic beverage statutes, ordinances, or regulations, no coverage applies in the ISO CGL. Here is where the CGL liquor exclusion follows the dram shop or alcohol control statutes. If liability is imposed by such statutes, even if the insured is not liable under the common law principles of negligence or other tort liability, no coverage is provided.

Held Liable by Reason of. Generally, courts have found the liquor liability exclusion to be unambiguous when applied to a *for-profit* organization that sells alcohol. Generally, attempts to craft allegations to avoid the liquor exclusion, such as characterizing the claim as a negligent failure to train and supervise staff, have been rejected by the courts. The reach of the exclusion may be limited, however, even for organizations that do not dispute being "in the business."

For example, in *Interstate Fire & Casualty v. 1218 Wisconsin, Inc.*, 136 F.3d 830 (D.C. Cir. 1998), the federal circuit court of appeals found the liquor exclusion did not apply to one of four allegations made against a D.C. bar, the Third Edition, by a patron who was attacked at the bar by another intoxicated patron. Although the bar was found to have negligently contributed to the intoxication of the attacker, the court found the liquor exclusion did not apply to the allegation that the bar failed to protect the injured person from the attack. The court reasoned that the duty to protect patrons was not contingent on the bar's "causing or contributing" to the intoxication of the attacker. The insurer was required to defend the bar against the "failure to protect a patron" allegation despite the liquor exclusion in the CGL.

Landlords and Tenants

In some limited circumstances, dram shop statutes may impose liability for the serving or furnishing of liquor on the landlord *for the acts of their tenants*. If a landlord has purchased an ISO CGL policy (1986 edition or later), the landlord will be covered on its policy (the liquor exclusion does not apply to the landlord), provided the landlord was not also engaged in the business of selling, serving, furnishing, or distributing alcoholic beverages.

Caveat. Commercial real estate leases often require the tenant to add the landlord to the CGL policy of the *tenant* as an additional insured as well as hold harmless and indemnify the landlord for liability arising out of the tenant's acts or omissions in connection with the leased premises.

While this approach to risk shifting clearly has benefits, insurance protection from liquor related claims is not among them. If a tenant is a tavern, the *tenant's* CGL policy will not protect the landlord as an additional insured for liquor related claims. The liquor exclusion in the tenant's CGL policy applies to *any insured*, including those added to the policy as additional insureds.

It is irrelevant that the landlord is not in the liquor business. The tenant's CGL excludes claims against *any insured* if the *tenant* [the named insured] is in the liquor business. Similarly, while the tenant is still obligated by the indemnity agreement to the landlord, the contractual liability coverage included in the tenant's CGL policy will not respond to the tenant's obligation to indemnify the landlord due to the liquor liability exclusion.

In the Business

The unendorsed ISO CGL policy does not, within the liquor exclusion, attempt to define what constitutes being "in the business" of manufacturing, distributing, selling, serving, or furnishing alcoholic beverages. For certain organizations, such as not-for-profit entities (whose activities may range from one-day fundraisers at which liquor is sold to organizations that have fully stocked cash bars open to the public several days per week), the exact meaning of "in the business" has proved elusive at best.

Court Interpretations. In the above circumstances, several courts have interpreted "in the business" to mean a commercial enterprise with a profit motive, resulting in the inapplicability of the liquor exclusion. For example, in *American Legion Post No. 49 v. Jefferson Ins. Co.*, 485 A.2d 293, 294 (N.H. 1984), the court found the phrase "in the business of" to be ambiguous because "it may be defined as any regular activity that occupies one's time or activity with *direct profit objective*." [Emphasis added]

A similar result came out of *Newell-Blais Post No. 443, Veterans of Foreign Wars of the United States, Inc. v. Shelby Mut. Ins. Co.*, 487 N.E.2d 1371, 1373 (Mass. 1986), in "deciding an organization's nonprofit character prevented application of the exclusion."

A more recent case, *Mutual Serv. Cas. Ins. Co. v. Wilson Twp.*, 603 N.W.2d 151 (Minn. App. 1999), involved a Minnesota township's beer sales at a 1-day fundraising event. Specifically, on July 23, 1996, the Wilson Township Volunteer Fire Department sponsored a 1-day festival called Wilson Daze, with activities such as tractor pulls, children's games, silent auctions, raffles, soft drinks, beer (Wilson had a temporary license to sell the beer), and food sales. While at the town festival, an attendee was served alcohol while obviously intoxicated and caused an auto accident, injuring another motorist and the motorist's passenger, both of whom sued Wilson Township.

The CGL insurer for Wilson Township denied coverage, contending Wilson Township was engaged in the business of selling alcoholic beverages because they had a license to sell. Following a review of several other cases (including the two cited above), the Minnesota appeals court concluded that meaning of "in the business" was not ambiguous, and meant engaging in a commercial enterprise. After examining "the insured's activities and the character of organization," the court ruled:

Wilson Township is a nonprofit governmental organization selling beer at Wilson Daze for fundraising purposes. The township's sale of beer was a temporary, one-day-per-year occurrence rather than a permanent, ongoing operation. Moreover, the township did not generate substantial profits from the beer sales. Given these facts, we conclude the insured was not in the business of selling, serving, or furnishing alcoholic beverages for the purposes of the liquor liability exclusion.

Some Dissent. Not all courts adopted the "not in the business" definition for the purpose of applying the liquor exclusion. For example, in *Spangers v. Greatway Ins. Co.*, 498 N.W.2d 858 (Wis. App. 1993), the court ruled the liquor exclusion *did* apply to a "VFW operated bar open to the public 3 nights a week, employed 8 people, including 6 bartenders, and occasionally realized profits." Similarly, in *McGriff v. U.S. Fire Ins. Co.*, 436 N.W.2d 862-63 (S.D. 1989), the court decided that a "nonprofit fraternal order that operated a bar at significant profit, allowed nonmembers, paid sales tax, and held a liquor license was in the business of selling alcohol."

ISO Responds: Amendment of Liquor Liability Exclusion

To avoid providing coverage for organizations, whether nonprofit or otherwise, which many believed were justly considered to be in the business of selling or serving liquor, ISO introduced two optional endorsements to further sharpen the liquor liability exclusion.

Two Versions

The Amendment of Liquor Liability Exclusion (CG 21 50 09 89) and its companion Amendment of Liquor Liability Exclusion—Exception for Scheduled Activities (CG 21 51 08 89) both completely replace exclusion c. of Coverage A of the CGL policy. The only difference between the two endorsements is that CG 21 51 allows the option of not applying the exclusion to the specific activities that the policyholder and insurer agree to schedule on the endorsement.

Effect of Amended Exclusion

Removed entirely by the amended liquor liability exclusion is the phrase "in the business." Instead, the amended liquor exclusion applies if the named insured [You]:

- Manufacture, sell, or distribute alcoholic beverages; or
- Serve or furnish alcoholic beverages for a charge, whether or not the activity requires a license or is for the purpose of financial gain or livelihood; or
- Serve or furnish alcoholic beverages without a charge, if a license is required.

The last two clauses broaden the exclusion significantly—with the Amendment of Liquor Liability Exclusion attached, no coverage is afforded for serving or furnishing alcoholic beverages if a charge is made or if a license is required. While the amended exclusion clearly eliminates coverage for American Legion Halls or VFW Posts that have fully stocked bars, the exclusion also removes coverage for what may reasonably be expected to be a "host liquor" risk.

An illustration of what might be considered an incidental "host" exposure for which the CGL likely does not provide coverage due to the amended liquor exclusion may help make the matter a bit more clear. The local Chamber of Commerce sponsors a "Taste of the Town" event at a local restaurant. Other area restaurants are invited to set up a table and display their creations, providing samples to those who attend, including one table at which a wine tasting is offered. The admission fee to the event is \$20 and is payable to the Chamber of Commerce, a nonprofit organization.

While the event is almost exclusively food, and the wine tasting does not require a liquor license, the admission fee may be construed as a charge for the furnishing of liquor: the wine tasting. Thus, the Chamber would not be covered by their CGL for any claims that arise out of the wine tasting due to the amended liquor exclusion.

Similar events sponsored or arranged by a wide variety of organizations, from for-profit businesses to youth sports organizations, which may include in the cost of a fundraiser dinner a ticket(s) for an alcoholic beverage, i.e., serving alcohol for a charge. All these events would not be covered under that organization's CGL policy due to the breadth of the amended liquor exclusion. Another example may be fundraiser golf tournaments in which the sponsor sells to persons or groups a single price admission to the golf tournament, which includes not only the greens fee but a golf cart and some cold beer for the foursome.

Of course, had the CGL for the Wilson Township been endorsed with the amended liquor exclusion, no coverage would have been provided for their Wilson Daze fundraiser for two reasons—they charged for beer and the event required a license.

Use of Amendment of Liquor Liability Exclusion

While it was originally intended that the amendment to the liquor exclusion was to be used mostly with nonprofit organizations, today insurers routinely use the amendment on virtually *every CGL policy issued* (a few states approved for use only the second version of the amendment CG 21 51 08 89). Agents and brokers and others advising policyholders need to be aware of implications of the amended liquor exclusion and the likelihood that their CGL policy has attached to it the amendment.

Conclusion

As serving alcohol is so much a part of our culture, it is of great importance for organizations of all types to carefully consider the liability to which they are exposed in serving or furnishing alcohol and whether their CGL insurance provides them coverage for their activities or events. Put another way, simply assuming their liability insurance will respond to claims because of the serving or furnishing of alcohol may result in a very unwelcome surprise. Once aware, advisers can now work with insurers, who may be willing to use the Amendment of Liquor Liability Exclusion—Exception for Scheduled Activities (CG 21 51 08 89) endorsement and negotiate as an exception to the exclusion scheduled activities for which the insurer is willing to provide coverage.

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¹Glenn Stout and Richard A. Johnson, *Red Sox Century—100 Years of Red Sox Baseball* (Houghton Mifflin Company, New York, NY: 2000), p. 31.

²J.R. Moehring, *The Tender Bar: A Memoir* (Hyperion, New York, NY: 2005).