

BUSINESS LAW NEWSLETTER

RESTAURANTS AND THE LAW

As a means of responding to some of many inquires, Bean, Kinney & Korman is pleased to devote this newsletter to issues effecting our clients in the restaurant and hospitality industry. As always, we remind you that these comments are intended as general guidelines and that the application of the law to given circumstances depends upon the specific facts of the case. We encourage you to seek specific guidance on the issue or issues that apply to your particular business.

PREMISES LIABILITY

By James V. Irving, Esq.

A business invitee is one who is extended an express or implied invitation to enter upon commercial premises. In Virginia, restaurant and hotel owners have a limited but significant duty to provide for the safety of their invitees.

Restaurant and hotel owners are not insurers of their invitee's safety. However, an owner has a duty to maintain the premises in a reasonably safe condition. What is "reasonably safe" is a question of fact, generally understood as a condition in which an ordinary prudent person would keep the premises with knowledge that the area is subject to use by invited members of the public. Thus, a restaurant or hotel owner has a duty to inspect for potentially dangerous conditions on his property and either remedy the condition or warn his customers of the danger. While the warning may not be required if the condition is "open and obvious," a careful business owner errs on the side of caution.

In cases where a customer is injured due to an unsafe condition and no warning has been provided, the injured party must prove that the business owner knew or should have known of the unsafe condition in order to recover damages.

The law imputes knowledge to a restaurant or hotel owner in any of the following situations: 1) where "an ordinary prudent person, given the facts and circumstances that he knew or should have known, could have foreseen the risk of danger resulting from such circumstance"; 2) by showing that "a defective condition had been present long enough that the owner ought to have known of its presence"; or 3) where there is evidence that "the defect was noticeable and had existed for a sufficient length of time to charge its possessor with notice of its defective condition." For example, the case of Memco Stores, Inc. v. Yeatman, 232 Va. 50 (1986) held that a store owner should have foreseen the possibility of a patron slipping on fallen plant leaves after he moved the plant from an outside patio display to an inside furniture display.

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RETAIL FRANCHISING

By James V. Irving, Esq.

It is reliably reported that as many as 50% of all retail franchisors fail. Because many of the rest of them are extremely lucrative, the establishment of a successful franchising entity is a long-term goal of many an entrepreneur.

Among the many difficulties confronting the potential franchisor are complex regulatory schemes imposed on both the state and federal levels. In Virginia, new franchisors must comply with the Retail Franchising Act (Code of Virginia §13.1-557 et seq.), with the regulations of any jurisdiction in which they intend to locate a franchisee, as well as with the overriding federal structure.

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ABC

By James V. Irving, Esq.

The Virginia Department of Alcohol and Beverage Control (“ABC”) maintains a website at www.abc.state.va.us. This site provides a great deal of helpful information regarding issues of compliance and risk avoidance.

On October 7, 2002, the ABC board met and adopted a new schedule of penalties for violation of the law prohibiting the sale of alcoholic beverages to minors. That schedule is printed below.

You should also be aware that the board expressed its belief that there must be a “improvement in compliance” which may result not only in greater penalties to repeat offenders, but in increased vigilance on behalf of ABC and local police departments.

ABC’s website provides answers to certain frequently asked questions. Among them are two points that should be of interest to all holders of ABC licenses. Section 3VAV 5-70-100 prohibits holders of ABC licenses from offering alcoholic beverages “on the house”. Additionally, the Code of Virginia establishes that even if a customer’s I.D. is checked at the door, the bartender or waiter is still responsible for making certain that a person served alcoholic beverage is at least twenty-one (21) years of age. The “responsibility for age verification is at the point of service”.

Offense	Suspension	To Be Lifted After	Upon Payment of a Civil Penalty of
1 st Offense of sale to someone under the legal age or allowing consumption by underage person	25 days	0 days	\$2,000
2 nd Offense within 3 yrs.	30 days	10 days	\$3,000
3 rd Offense within 3 yrs.	60 days	15 days	\$5,000
3 rd Offense, if all 3 offenses occur within a 1-year period	60 days	30 days	\$5,000

PREMISES LIABILITY

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Since children accompanying invitee-parents are also considered business invitees, restaurant and hotel owners must be aware of additional risks arising from the presence of children on their premises. Children are often attracted to or make use of structures or facilities that were not intended for their use. The “attractive nuisance” doctrine refers to machinery, materials, or natural or man-made structures that are naturally attractive to children and that are left accessible. A restaurant or hotel may be exposed to risk if their business property contains potentially dangerous structures or facilities that may attract children.

Business owners should regularly check their premises for conditions that may lead to customer injury. Frequently checking the floors for food or drink spills, periodically checking to make sure that tables and chairs are in good maintenance and repair, ensuring that entry and exit ways are clear of debris and maintained in proper condition are all critical business practices. In cases where a dangerous condition may not be immediately remedied, the restaurant or hotel owner should provide clear notice of warning to customers to avoid possible injuries. Finally, if customers make use of any area of the business premises in a manner not in accord with the invited use, the restaurant owner should post an appropriate notice of the potential dangers of the disallowed use. Providing notice should be a fall back position to actively reminding customers of the permitted uses of the property.

RETAIL FRANCHISING

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Since 1979, the Federal Trade Commission has required franchisors to provide specific information to potential franchisees. Today, federal law requires the disclosures in the form of a standardized document called the Uniform Franchise Offering Circular (“UFOC”). Additionally, at least fourteen states currently require franchisors to register their UFOCs or, at a minimum, to notify the state that they intend to offer franchises before they can begin the process. Both Maryland and Virginia are included among these states.

Among the UFOC’s twenty-three areas of disclosure are essential information about the franchisor, its key staff, its management experience, and its economic and litigation history. Additionally, the UFOC identifies the required investment and other necessary purchases, as well as the territory to be granted to each franchisee. Needless to say, a careful review of the UFOC is a critical preliminary step before obtaining a franchise. Preparing a complete and attractive UFOC is an equally essential first step for the budding franchisor.

Frequently, business people turn to licensing as a means of establishing a series of related businesses without the red tape that the franchise model entails. While a business is not prohibited from licensing its “trade dress” to companies or individuals who may thereby use that trade dress in their own business enterprise, such desirable benefits as their right to approve the lease, to control relocation, and to collect management fees may not be available to the licensor. All are hallmarks of a franchisor/franchisee relationship. Like many states, Virginia imposes potentially severe sanctions on *de facto* franchisors.

Franchising is a complex and expensive process. Licensing may provide a reasonable alternative, but is itself fraught with difficulties, in no small part because of the risk that the licensor may lose control of its intellectual property, or be deemed a franchisor under existing state law.



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About Our Organization...

For over four decades, Bean, Kinney & Korman has been a leading Northern Virginia law firm that has continuously grown and diversified to meet the needs of its expanding community of clients and their increasingly complex legal needs. While we have grown in size and greatly expanded the depth and breadth of our capabilities, we have remained committed to those fundamental elements of value that are integral to our practice philosophy: experience, versatility, dedication to service, flexibility and efficiency.

Our responsive and exceptional quality service, coupled with our sensitivity to client needs, has established a professional reputation in which we take great pride. We are dedicated to achieving exceptional results for our clients in every matter we are entrusted to handle, mindful of each client's resources and unique circumstances. Delivering greater value to our clients day in and day out is how we will continue our reputation as one of the most highly regarded law firms in the Washington metropolitan region.

This paper was prepared by Bean, Kinney and Korman, P.C. as a service to clients and friends of the firm. The purpose of this paper is to provide a general review of current issues. It is not intended as a source of specific legal advice. © Bean, Kinney and Korman, P.C. 2003



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