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Practice Update

Five Facts Foreign Hotel Operators Should Know About U.S. Law

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The United Nations World Tourism Organization estimates that international tourist arrivals (overnight visitors) worldwide increased 7 percent in 2017, representing the strongest growth since 2010. The Americas alone welcomed 207 million international tourists in 2017. In South America, Central America and the Caribbean, South America led growth, followed by Central America and the Caribbean (in spite of the heavy hitting hurricane season), with Mexico also seeing an increase in tourist arrivals.

Tourism is vital to the economies of Latin America and the Caribbean. Due to several factors including proximity, cruise port locations, and certainly the beautiful landscapes, U.S. tourists are drawn to Latin American and Caribbean destinations. This U.S. business is paramount to the survival of the regions' tourist economy. By way of example, take the Bahamas, with statistics approximating 75 to 80 percent of its visitors as hailing from the United States. Or Mexico, which attributes the vast majority of its tourists from its neighbors to the north, the United States and Canada, with the U.S. visitors outranking Canadians almost 5 to 1.

Why should hotels be concerned with where their guests are originally from? Hotel operators are in the

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business of recognizing profits by providing quality amenities and experiences to their guests. Some costs cannot be avoided; however, litigation costs can — and should. Knowing some of the litigation risks associated with American tourists and preparing in anticipation can vastly reduce exposure and grow that profit margin.

The U.S. provides great opportunity for marketing to and attracting tourists to a property or facility offering forms of entertainment, dining and lodging. But with that opportunity comes litigation risk. Litigation is expensive, time-consuming and has ramifications that exceed the four corners of a complaint. This article highlights five things to know about American tourists and identifies everyday best practices that are relatively easy to implement and that can save thousands — if not millions — in legal fees and costs each year.

1. The United States is the most litigious country in the world.

An astounding 80 percent of the world's lawyers live in the United States. It should come as no surprise then that the U.S. not only has the highest spending in the world when it comes to lawsuits, but also the highest percentage of GDP associated with tort costs compared with the rest of the world. Roughly $250 billion dollars is spent each year on tort costs in the United States. The next leading country after the United States does not even come close.

2. The United States authorizes contingency fee arrangements for legal services.

While the remainder of the world typically outlaws such types of arrangements and some jurisdictions even require that a plaintiff post a bond before instituting suit, an attorney in the United States may take on a client free of charge. Unless and until the client succeeds at receiving a damages award at trial or collects a settlement, an attorney in the U.S. can fund the lawsuit and does not have to charge the

client in the process. This is referred to as a contingency fee arrangement, and most such contingency fees provide that the attorney take 33 to 40 percent of the total award or settlement figure, which incentivizes attorneys to file suit on behalf of clients. In sum, it is easier to sue in the United States than in any other jurisdiction in the world, so do not be surprised when guests sue. Rather, be prepared.

3. The United States recognizes a party's right to a trial by jury.

Unless expressly waived, litigants are entitled to have their cases decided by a jury of their peers. Juries are notoriously heavy-handed in doling out awards to plaintiffs to supposedly compensate them for their alleged injuries. Often, cases are prolonged by years on appeal solely on the basis of the amount of the ultimate award.

4. In the United States, typically, the loser does not pay.

The "American Rule" generally does not require the loser to pay the prevailing party's fees (unless there is a contractual obligation to do so or a specific statutory requirement). Each party must bear their own fees and costs. Therefore, even in the event a plaintiff files suit and the defendant prevails, there are limited or no mechanisms by which the defendant can recover the costs associated with defending the suit. As a result, there is very little risk for attorneys and their clients when filing frivolous lawsuits in the United States.

5. In the United States, a plaintiff usually has 3-4 years within which to file a suit for negligence.

Negligence-based suits (i.e., premises liability and/or personal injury cases) can be filed years after the occurrence of the alleged incident, which can wreak havoc on a defense. While the plaintiff is preserving evidence and amassing piles of bills from various medical providers in order to bolster their case, by

the time a hotel becomes aware of the claim or suit years later, surveillance videos, key card entry logs and documentation related to the event can be difficult to locate or may have been written over due to customary business practices, and key witnesses are no longer employed at the hotel due to turnover typical of the hospitality industry.

What Are Some Practices An Operator Can Employ To Avoid Exposure?

- Include a mandatory forum selection clause in reservations and check-in paperwork, setting forth the preferred choice of law and venue for a suit that may arise out of the guest's hotel stay. This is usually the locale in which the hotel is located. With the right language and the proper presentation to the guest, if a guest sues a Latin American or Caribbean hotel in the U.S. and the hotel property had the guest execute that forum selection clause, U.S. courts will likely enforce the forum selection clause and dismiss the matter. Historically, if guests are forced to file suit in a foreign venue as opposed to the U.S., they are less likely to pursue that course of action.
- Establish protocols for gathering information and responding to incidents when they occur so as not to find yourself at a disadvantage years later when suit is filed. Update — or in some instances, create — forms, procedures and systems for easy implementation and execution. Make it simple for personnel tasked with collecting reports, records, statements, photos, data and other useful information to do their job quickly and efficiently. Help employees identify and record relevant information.
- Maintain files in a centralized database and properly preserve all relevant data and documentation. Most electronically stored data (ESI) is automatically lost after a certain amount of time. Ensure that photos, surveillance, key card entry logs and other potentially useful ESI is saved with the remainder of the file compiled

after an incident occurs. Centralized storage is key to ensuring all information is properly collected and maintained, efforts are not duplicated or undermined, and records are accessible when needed.

- Train and retrain your employees. There is much room for improvement when it comes to employee retention rates in the hospitality industry. Hotels face extremely high and costly turnover — especially in entry and midlevel positions. However, it is these employees who are often the first responders, boots on the ground, or front lines when an incident occurs. These employees can make or break a case with a single act or statement. It is therefore these employees who require training in how to respond to incidents involving guests, which has the added benefit of acknowledging their value to the team, engendering loyalty and potentially reducing turnover costs.
- Involve counsel to maintain attorney-client privilege. Certain incidents may lead to negative publicity or involve a sympathetic plaintiff, such as a child or the elderly. Some incidents result in serious bodily injury or death, or include allegations of criminal misconduct. The involvement of counsel at an early stage, who can assist with evidence collection and retaining third-party experts if need be is of paramount importance. Be proactive. Do not wait for a demand letter or summons to start dealing with a matter. This reactive approach ends up costing a lot more money.

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