

HOSPITALITY & LEISURE NEWS

RESOURCE FALL 2011

PREPARING THE MODERN HOTEL MANAGER FOR THE MIDNIGHT RAID*

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There is a virus infecting the luxury hotel industry. Some over-extended hotel owners with illusions that the grass is greener believe the answer to their financial troubles is to ditch their current managers and either self-manage (eliminating third-party management fees) or replace them, with managers willing to pay the owners to pitch their flag at the hotel.

WOOLLEY AND ITS PROGENY

Relying on the 1991 *Woolley v. Embassy Suites* case and its meager progeny, owners believe they can terminate their hotel management agreements at any time, regardless of the terms of any agreements between them and the hotel manager. In *Woolley*, the court allowed an owner to terminate a long-term hotel management agreement without any contractual basis for terminating, relying on the common law concept that a principal (here, a hotel owner) has the power to terminate an agent (a hotel manager) at any time, regardless of the terms of any agreement between them, subject only to payment of damages for wrongful termination.

Recently, some hotel owners have resorted to the surprise midnight raid, effectively, ousting their hotel managers in the middle of the night, rather than follow the dispute resolution process stipulated in their agreements. For example, the owner of the Aviara Resort and its security guards and locksmiths descended upon the former Four Seasons Resort Aviara for an attempted midnight takeover. In late August, the owner of the Waikiki Edition took over the hotel early on a Sunday morning, the same day that the Turnberry owners and their guards took over the Fairmont Turnberry Resort. In each case, the owner attempted to oust the current manager without notice, seeking to remove high-level employees of the existing management company (sometimes forcibly), install their own managers, and change the branding of the hotel. Two of the raids -- Waikiki Edition and Turnberry -- were successful; the attempted Aviara takeover was not.

These midnight raids seek to create a new *status quo* that "outlawyers" hope courts will be reluctant to undo, rather than bringing the matter to court or, preferably, arbitration in the first instance to determine whether removal of the manager is appropriate and if so, under what conditions. Practically, these midnight raids create confusion and disorder in the hotel, undermine guest expectations, threaten hotel managers' relationships with vendors, travel agents, meeting planners, guests, and other stakeholders, and expose managers' trade secrets and other proprietary information to unauthorized pilfering by the owners and their cohorts—all to the detriment of the hotel managers and their brand.

LESSONS LEARNED

In all attempted takeovers, the most critical path for the hotel manager is to stay in possession. This allows for three things. First, on any motion in court for a preliminary injunction to remove the manager, the owner would have the burden of satisfying the stringent preliminary injunction standard (likelihood of success, irreparable harm, no adequate remedy at law) and should have to post a bond. Second, if the management agreement has an arbitration provision, the management company can go to court to prevent the owner from taking any action that would interfere with the arbitrator giving complete and effective relief. Third, in the event that it is determined that the owner may remove the hotel manager, the transition will occur in an orderly fashion that protects the interests of the various stakeholders in the hotel. Importantly, under most state laws, arbitrators are

not required to follow “dry law,” but are required to follow the parties’ agreement. If an arbitrator refused to follow the parties’ agreement, the arbitrator would be acting in excess of his or her authority and the award would be subject to being vacated under either state law or the Federal Arbitration Act.

In addition to staying in possession of the premises, there are several lessons a management company can learn from recent takeovers to protect itself from breaches not only of management agreements, but also breaches of the peace.

- Most hotel management agreements contain covenants of quiet enjoyment. In most cases, they also provide that the manager cannot be removed without an arbitrator or a court making the determination. Every front desk manager—especially those on the night shift—should understand these important rights and have copies of these provisions at hand at all times.
- A management company should have, for each hotel, a private security company with a close relationship with the police that can be called and that will respond quickly if a midnight raid should occur. Every front desk manager should have this number easily accessible. The security company should be instructed that under the hotel management agreement, the manager has a right of quiet enjoyment that makes unauthorized entry by the owner and its minions a trespass. If a midnight raid occurs, the security company should be quickly summoned and the police called. During the Aviara Resort raid, the police were called, and did not allow the ouster of Four Seasons.
- The front desk manager of a hotel under an owner siege should demand that the police remove the trespassers or be subject to arrest.
- Following the attempted takeover at the Aviara Resort, Four Seasons also went into court to obtain a temporary restraining order against the owner’s efforts to remove it as manager. The court prevented the takeover and sent the matter to arbitration. Every desk manager should have at hand to call – after the security company is called – the management company’s general counsel and outside counsel. He or she should have several names to insure that one is reached, even at three in the morning.

RETURN TO RATIONALITY

Even in cases decided in court rather than arbitration, at some point, a rational judge will see that sophisticated hotel management agreements, which comprise the principal assets of both private and public hotel management companies, are not trumped by common law ideas originating with the owner of a cow hiring another to care for it. At some point a rational judge will recognize that just as ordinary Americans can waive the most sacred constitutional rights, such as the right to a jury or to an attorney, so sophisticated parties can waive common law principles and agree that their agreements mean what they say. But in order to even reach such a rational judge—or enforce a contractual right to have an arbitrator resolve the dispute—management companies in today’s world have to prepare for the outlaw, the outrage, and the disorder of the midnight raid.

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