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Food & Beverage Liability

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I. SCOPE OF ARTICLE

A. Alcohol Beverage Liability: Dram Shop Cases

Dram shop liability refers to the body of law that governs the liability of bars, taverns, restaurants, hotels, or any other establishment that sells alcohol beverages. There are two types of dram shop cases: first-party and third-party lawsuits. A first-party lawsuit occurs when a person enters a retail establishment, is over-served, leaves and injures only himself. A third-party lawsuit occurs when a person enters a retail establishment, is over-served, gets in car accident or causes some other incident that injures another person. The injured third party may sue the retail establishment for damages, claiming that the retail establishment should have known it was serving somebody who obviously was intoxicated and likely to commit this injury.

There are a wide variety of dram shop statutes throughout the fifty states. These statutes vary in that they may impose little to no liability or limit liability to illegal alcohol sales, such as serving minors or known alcoholics; yet some states permit recovery simply when the defendant knew or should have known that the customer was intoxicated. Despite the varying statutory schemes, most courts ultimately find that it is the consumption of the alcohol, rather than the furnishing of it, that is the proximate cause of alcohol-related accidents.

B. Food Liability: Allergy Cases and Foreign Products

Food liability cases are based in tort law. Black's Law Dictionary defines a tort as "[a] civil wrong for which a remedy may be obtained, usually in the form of damages; a breach of a duty that the law imposes on everyone in the same relation to one another as those involved in a given transaction." Black's Law Dictionary (2d Pocket Edition 2001). Included in the tort law definition are negligent torts, intentional torts, and strict liability. Strict liability is liability that does not depend on actual negligence or intent to harm, but is based on the breach of an absolute duty to make something safe. Black's Law Dictionary (2d Pocket Edition 2001).

Restaurants and other food retailers may be liable for the injuries and damages sustained by their patrons as a result of the restaurant or food manufacturer's behavior, food preparation, or other activity that was the proximate cause of the plaintiff's injuries. Similar to the outcomes of alcohol liability cases, the outcomes of food liability cases vary widely.

II. DRAM SHOP LAW UPDATE

The courts that analyze dram shop cases must decide how to apportion responsibility for the injury between the retailer that served the alcohol beverages and the consumer. All fifty states have a statutory scheme that addresses dram shop liability; however, most state statutes attempt to limit the alcohol beverage retailer's liability. The legal issues in the forefront over the past year included breaking the legal causation chain, minor's dram shop liability claims, social host liability, and mass audience venues.

A. Fluctuations in Liability Standards

Dram shop liability is state-specific. Past judicial surveys reflect developing and continuing fluctuations in liability standards. Some states adhere to statutory standards. However, in other states, courts continue to push and expand the dram shop liability restrictions adopted by the legislatures. In 2007, U.S. courts analyzed a number of cases, addressing legal causation, a minor's dram shop claim, and a parent company's potential liability.

1. Breaking the Chain of Legal Causation

In *Patterson v. Thunder Pass, Inc.*, 153 P.3d 1064 (Ariz. App. Ct. 2007), the patron went to the defendant's tavern, where she drank alcohol beverages and was observed to be intoxicated. As the patron tried to leave the premises, she backed into another parked vehicle and then drove over a parking block. The defendant's employee confiscated the patron's keys and called her a cab. The cab did not arrive, and as a result another employee drove the patron home and returned her keys to her. After an hour, the patron returned to the parking lot to get her vehicle. On her way home, the patron collided head-on with another vehicle. The driver of the other vehicle filed a negligence lawsuit against the tavern owner, alleging that the plaintiff had sustained damages as a result of the defendant serving alcohol beverages to the patron, who later caused the accident that injured the plaintiff.

Defendant filed a motion for summary judgment arguing that it had fulfilled any duty owed because the patron had been safely driven home. The defendant further argued that the patron's decision to return to retrieve her vehicle was an unforeseeable and a superseding, intervening event that negated any alleged negligence on the defendant's part.

The trial court granted the defendant summary judgment. The plaintiff appealed. The Arizona Court of Appeals upheld the trial court's ruling. Thus, a plaintiff suing an alcohol beverage retailer for injuries caused by an intoxicated patron must show causation, and "actual causation," or "causation-in-fact," exists if a defendant's act contributed to the final result and if that result would not have occurred but for the defendant's conduct. However, a tavern owner may be relieved of liability for an injury to which the owner has in fact made a substantial contribution if a plaintiff's injury occurs due to a later, intervening event of independent origin for which the owner is not responsible.

To constitute a cause relieving the tavern owner of liability, the intervening event must have also been superseding. That is, it must have been unforeseeable by a reasonable person in the position of the tavern owner, and when looking back after the event, the intervening event must appear extraordinary. The intoxicated tavern patron's act of returning to the tavern to retrieve her car after tavern employees drove her home was superseding intervening cause that relieved tavern owner of any liability for injuries suffered by plaintiff in the subsequent traffic collision with the patron.

In *Osborne v. Twin Town Bowl, Inc.*, 730 N.W.2d 307 (Minn. App. Ct. 2007), the court found insufficient probative evidence of a direct causal relationship between the patron's intoxication and his drowning. A bowling alley patron, after drinking at the bowling alley with his friends, left the bowling alley and was stopped by a state trooper for driving seventy-four

miles per hour in a fifty-mile-per-hour zone. The bowling alley patron was pulled over by the state trooper near a bridge across from the Minnesota River. The state trooper smelled alcohol on the patron's breath and conducted a field sobriety test, as well as a preliminary breath test. The breath test indicated the bowling alley patron's alcohol concentration was .18. The state trooper advised the patron that he was going to place him under arrest for driving while intoxicated. The state trooper turned to put away the breathalyzer equipment and when he turned back he saw the bowling alley patron jump from the bridge barrier into the Minnesota River. The bowling alley patron's body was recovered several months later.

The plaintiffs, the patron's surviving relatives, filed a civil damage complaint against the bowling alley alleging that the bowling alley caused the patron's death. Under Minnesota's Civil Damages Act a "spouse, child, parent….or other person injured in person, property, or means of support, or who incurs other pecuniary loss by an intoxicated person or by the intoxication of another person, had a right of action in the person's own name for all damages sustained against a person who caused the intoxication of that person by illegally selling alcoholic beverages." Minn. Stat. § 340A.801. The issue before the appellate court was whether the trial court erred in ruling the patron's intoxication was not the proximate cause of his drowning. The Minnesota Court of Appeals held that events that occurred between the patron's intoxication at the bowling alley and his drowning precluded the conclusion that the intoxication caused the drowning. The court reasoned that absent evidence that the bowling alley patron's intoxication was the reason for his speeding, the trooper's stop, or the patron's fleeing arrest, these actions constituted breaks in the chain of causation between the patron's intoxication and his drowning.

Although the bowling alley patron's intoxication may have been occasion for the patron's decision to jump off the bridge into river in an attempt to avoid arrest for driving while intoxicated after he was initially stopped for speeding, the patron's intoxication from having been over-served was not proximate cause of patron's death, thus, precluding liability for the patron's death against the bowling alley under the Civil Damages Act.

2. Minor's Dram Shop Claims

In *Nunez v. Carrabba's Italian Grill, Inc*., 859 N.E.2d 801 (Mass. 2007), the plaintiff was eighteen years old and a former employee of the restaurant. The plaintiff ate dinner at the restaurant and consumed six alcohol beverages. The plaintiff was not asked to pay for the drinks or the dinner. The plaintiff drove home, vomited, showered, and went back out to a nightclub. While at the nightclub, the plaintiff consumed one or two alcohol beverages. On his way home that night, as the plaintiff approached an intersection he saw a green traffic light and accelerated to fifty-five or sixty miles per hour to get through the light before it turned red. As the plaintiff entered the intersection, his vehicle was struck by another car that had failed to stop at the red light for the opposite direction. The plaintiff sustained serious injuries. His blood alcohol level was .13. A police accident reconstruction team concluded that at the time of impact, the plaintiff was traveling at forty-seven miles per hour, and the vehicle that hit him had been traveling at eleven miles per hour. The speed limit in the vicinity of the intersection was thirty miles per hour. Therefore, the police concluded that although the plaintiff was not the cause of the accident, his excessive speed may have contributed to the seriousness of his injuries.

The plaintiff sued the restaurant and the nightclub for negligence and strict statutory liability, alleging defendants served alcoholic beverages to him as an intoxicated underage adult and that defendant's negligence was a contributing cause of his injuries in the automobile collision. The defendants moved for summary judgment, asserting that the plaintiff had presented no evidence that the defendants had engaged in willful, wanton, or reckless disregard for whether he was intoxicated as required by Massachusetts dram shop statute. The Massachusetts Supreme Judicial Court held that the state's dram shop statute, which requires the injured patron to prove willful, wanton, or reckless conduct on the part of a licensed commercial establishment, does not apply when alcohol is furnished to an underage adult patron. The patron may prevail on a showing that the establishment was negligent in serving alcohol beverages to an underage adult patron, *i.e*., the establishment served alcoholic beverages to the patron knowing, or having reason to know, that the patron was under 21 years of age, and as a consequence, the patron was injured.

Unlike the duty of licensed taverns to refrain from serving obviously intoxicated adults, the duty to refrain from serving alcohol to youths does not depend on whether they are or appear to be intoxicated. A breach of a licensed tavern's duty to refrain from serving alcohol to youths occurs when the establishment knew or reasonably should have known that it was furnishing alcohol to a person under the age of 21 years.

3. Parent Company's Liability

In *Penn Nat. Gaming, Inc. v. Ratliff*, 954 So.2d 427(Miss. 2007), an injured motorist brought a negligence action against the operator of a casino, the operator's parent company, and a casino employee, alleging violations of Mississippi's dram shop law. The Supreme Court of Mississippi held that the casino operator's retail alcohol permit could not be attributed to the operator's parent company, and thus parent company was not liable under the dram shop law, which only created liability for the permit holder and the employees of the permit holder.

Plaintiff's allegation that the parent company of the casino operator owned the casino was not sufficient to state a viable claim to pierce the corporate veil of the parent company, so as to hold the company liable for the operator's alleged violations of the dram shop law; there was no assertion that the operator was a mere corporate shell or alter ego of the parent company, or that the parent company had disregarded corporate formalities or had used the corporate form to commit misfeasance.

Dram shop statutes and case outcomes will vary by state. It is important to know the liquor law and liability standards for your location(s). Restaurants and other alcohol beverage retailers should coordinate their operating policies on screening minors, identifying intoxicated customers, and what to do when you find them. Further, all alcohol beverage retailers should consider documentation protocols (*e.g*., measures to extend attorney-client privilege to Alcohol Incident Reports) to use as a defense to a dram shop case.

B. Social Host Liability

*Vitale v. Kowal***,** 923 A.2d 778 (Conn. App. Ct. 2007), found that the Connecticut Dram Shop Act does not authorize a private cause of action for damages. Conn. Gen. Stat. Ann. § 30-

86. A university student, who had been drinking beer with a nineteen year old motorist in the student's dormitory room, did not owe a duty to motorist who subsequently left dorm room intoxicated, drove, and lost control of the automobile he was operating and was killed; student had not invited motorist to his dormitory room that evening, student did not know that motorist had been invited to the dormitory room, student did not bring alcohol to the dormitory room that evening, he did not retrieve alcohol from refrigerator for motorist and he did not provide or serve alcohol to motorist that evening.

*Barry v. Gorecki***,** 833 N.Y.S.2d 329 (N.Y.A.D. 2007) was a slightly more complicated case. The party guest's mother, individually and as guardian for the guest, brought a personal-injury action against the landowners, their son who hosted the party, and liquor store that sold liquor to the party host, seeking to recover for injuries sustained by guest when he fell off cliff on landowners' property after drinking alcohol at the party. The court held that: (1) the landowners did not owe legal duty to party guest; (2) no reasonable or practical connection existed between liquor store's sale of beer to party host and guest's resulting injuries, as required for liability under Dram Shop Act; and (3) the host's alleged failure to supervise or control partygoers did not proximately cause guest's injuries.

A Delaware court concluded that there is no social host liability. *Shea v. Matassa***,** 918 A.2d 1090 (Del. 2007). In *Shea*, the wife of a motorist, who was involved in a fatal car crash with an intoxicated driver, filed a negligence complaint against home owner and tavern, where the intoxicated driver had consumed alcohol before the crash. The Delaware trial court granted the tavern's motion for judgment on the pleadings and granted the home owner's motion for summary judgment. The wife of the motorist appealed. The Delaware Supreme Court held that the tavern was not liable to the wife of the motorist who was killed in the crash involving the intoxicated driver, who was served alcohol beverages at the tavern and then left the tavern and drove his vehicle while intoxicated.

Delaware does not recognize a common law dram shop cause of action, and the court determined that the establishment of a dram shop cause of action presented a social policy issue for the legislature, not the courts, and the legislature had the power to license and regulate the sale of alcohol. Likewise, the home owner was not liable to the wife of a motorist who was killed in a crash involving an intoxicated driver, who was served alcohol beverages at home owner's residence and later drove vehicle while intoxicated; the state lacked any legislation imposing social host liability.

C. Mass Audience Venues

*Verni ex rel. Burstein v. Harry M. Stevens, Inc***.,** 387 N.J.Super.160, 903 A.2d 475 (N.J.Super.A.D., 2006). New Jersey Giants Stadium litigation hit Aramark with a $135 million state court judgment (actual + $75M punitive damages) in a personal injury case where an intoxicated football fan, who was served several beers at the game, was ultimately arrested for DUI after hitting another car and paralyzing a young girl for life. The defense argued that Aramark did nothing wrong. Witnesses said that the company had a two-beer limit and trained its employees to spot problems and refuse to serve those who are intoxicated. The plaintiffs responded to that argument by calling a toxicologist to testify that, with a blood alcohol level that was twice the legal limit at the time of the accident, there was little doubt the fan would have

showed signs of intoxication when he bought the beers at halftime. In fact, the fan himself testified that he was slurring his speech by halftime, and his brother and sister-in-law testified that they noticed he was showing signs of being intoxicated at halftime.

Similar personal injury and wrongful death lawsuits are pending across the U.S., as plaintiff's counsel challenge responsible vending practices used at mass audience venues. Plaintiffs in Phoenix, Arizona, are suing the stadium concessionaire where Arizona Diamondbacks play, after a baseball fan had a few beers, subsequently went to a bar for more drinking, then got behind a wheel and killed several people. Despite the dram shop laws on the books, Arizona Supreme Court has ruled that the retailer can be sued if it acted "negligently." *See Andrews ex rel. Woodard v. Eddie's Place, Inc.*, 16 P.3d 801 (Ariz. App. Ct. 2000) citing *Ontiveros v. Borak*, 667 P.2d 200 (1983) ("[T]hose who furnish liquor have an obligation or "duty" to exercise care for the protection of others. This is an obligation imposed upon tavern owners for the benefit of those who may be injured by the tavern owners' patrons, whether such injury occurs on or off the premises. We find that duty both as a matter of common law and of statute.")

Mass audience stadiums and arenas pose unique problems. Alcohol beverage vendors and concessionaires should work with stadium and arena representatives to: (1) establish written guidelines on alcohol beverage services; (2) reassess how alcohol is served (stationary taps vs. in-the-aisle hawkers – "Beer Guys"); (3) limit the number of drinks per purchase; and (4) review pricing structures to avoid claims that the venue is pushing "quantity discounts" for larger size purchases (the "Bucket O' Beer").

III. FOOD LIABILITY

Food liability claims can involve restaurants, hotels/motels, food distributors, and food suppliers. Generally, plaintiffs bring food-related lawsuits that involve illness claims (*i.e.*, food poisoning) or product claims (*i.e.*, bone in the burger). The claims may be brought to court based on a number of actions, including strict liability, negligence, breach of implied warranty, and misrepresentation or nondisclosure. As noted in the cases discussed herein, a retailer's liability exposure may be minimized if the retailer implements its written standardized food handling practices and if it prints warning labels on menus.

A. Liabilities in Allergy Cases

There are approximately 12 million Americans with food allergies. According to the Food Allergen Labeling and Consumer Protection Act of 2004, section 202, regarding Congress' findings, each year approximately 30,000 Americans require emergency room treatment and approximately 150 individuals die because of an allergic reaction to food. During an allergic reaction, the body's immune system recognizes a reaction-provoking substance, or allergen, in the food — usually a protein — as foreign and produces antibodies to halt the "invasion." As the battle rages, symptoms appear throughout the body. The most common sites are the mouth (swelling of the lips), digestive tract (stomach cramps, vomiting, diarrhea), skin (hives, rashes or eczema), and the airways (wheezing or breathing problems). People with allergies must avoid the offending foods altogether. *Food Allergies Rare But Risky* http://vm.cfsan.fda.gov/~dms/wh-alrg1.html (last visited September 2, 2007).

Due to the immediate allergic reaction, which often leaves little doubt regarding the cause of the allergic reaction, most food allergen claims are settled out of court. However, there have been some recent food allergen lawsuits involving cross contamination of food allergens. *Moore v. P.F. Changs China Bistro, Inc*., 2007 WL 2121240 (Cal. App. 2d Dist., unpublished) involved this specific issue.

In *Moore*, the plaintiff informed the waitress that she was allergic to lobster and shrimp. The plaintiff ordered two chicken dishes and a beef dish for herself. Her dining companion ordered the shrimp special. As soon as the plaintiff started to eat the beef dish, she noticed her mouth began to tingle although there was no shrimp or lobster in her food. The restaurant called paramedics and they rushed the plaintiff to the hospital, where she was intubated to keep her airway open. At the hospital, the plaintiff denied being exposed to any known allergens. Four hospital physicians diagnosed the plaintiff as suffering from angioedema.[1] Of the four physicians, one was unable to diagnose the reason for the condition, but the other three concluded that the angioedema was caused by her blood pressure medication. The plaintiff was not able to test the beef dish for the shellfish allergen because her dining companion took the plaintiff's food home with her and ate the leftovers.

The plaintiff brought an action against the restaurant alleging breach of warranty, negligence, negligence *per se*, and strict liability. The plaintiff contended that the restaurant had served her food tainted with shrimp and had caused her to suffer a serious reaction and injury. In support of its motion for summary judgment, the restaurant set forth the physicians' conclusions regarding the cause of the allergic reaction. Furthermore, the restaurant presented evidence that established its general food handling practices.[2] In opposition, the plaintiff introduced the declaration from a board certified physician in the field of allergy and immunology. The plaintiff's expert concluded that her angioedema was caused by exposure to shellfish. The plaintiff did not contest the restaurant's evidence regarding its normal food-handling practices. The trial court granted the restaurant's motion for summary judgment. The plaintiff appealed.

The California Court of Appeal affirmed the trial court's ruling. The court explained that to support a claim for strict liability/failure-to-warn based on allergic reaction to a food product the plaintiff must establish, in addition to causation and damages, that: (1) the food product contained an ingredient to which a substantial number of the population are allergic; (2) the ingredient is one whose danger is not generally known or, if known, is one that the consumer would reasonably not expect to find in the food product; and (3) the defendant knew or should have known of the presence of the ingredient and the danger. *Id*. at *3. Therefore, the plaintiff had to prove the presence of the allergen shellfish in the beef dish.

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[1] Angioedema is a swelling similar to hives, but the swelling is beneath the skin rather than on the surface. The swellings are called welts. Angioedema may be caused by an allergic reaction. It is associated with the release of histamine and other chemicals into the bloodstream. The body releases histamine when the immune system detects a foreign substance called an allergen. Sometimes the cause of angioedema is never found. Medline Plus Medical Encyclopedia, http://www.nlm.nih.gov/medlineplus/ency/article/000846.htm (lasted visited September 2, 2007).

[2] The restaurant presented evidence regarding how beef, chicken, and fish are delivered, stored, cleaned, and prepared in separate areas and color coded pots, pans, dishes, and utensils. The restaurant also presented evidence on how the pots, pans, dishes, and utensils are cleaned.

A plaintiff cannot prove the allergen presence merely by showing that the plaintiff became sick after eating the food product. However, circumstantial evidence may be used to show the presence of the injury-causing ingredient. There are five categories of evidence helpful in proving the injurious nature of the food ingested at a restaurant where the food is not available for scientific analysis: (1) evidence the food was outward deleterious; (2) evidence that others who ate the same food at approximately the same time became ill; (3) evidence that others who did not become ill ate everything but the suspect item; (4) evidence tending to exclude other causes of plaintiff's illness; and (5) evidence of unsanitary conditions in the restaurant's kitchen. *Id*. at *4. Here, the court reasoned that the restaurant's evidence regarding its food handling practices, along with the restaurant's evidence that three physicians concluded that the angioedema was caused by high blood pressure medication, were sufficient to demonstrate that the plaintiff would not be able to prove the presence of the shellfish.

1. Mislabeled Food Products

Recently there have been several lawsuits involving undisclosed or mislabeled food products. Most notably are the ongoing McDonald's French Fries Litigation cases. The plaintiffs are individuals that cannot or chose not to consume gluten, milk, or wheat because of food allergies or other dietary issues. The plaintiffs claim that on numerous occasions they consumed the restaurant's french fries, relying on the restaurant's product listing and its claims that the french fries were gluten-free and safe for consumption. Then in February of 2006, the restaurant revised its product listing and listed gluten, milk, and wheat products in its french fries. The plaintiffs are suing the restaurant on a number of tort theories, arguing that the fast food restaurant failed to disclose that its french fries contained gluten, milk, and wheat, and that the restaurant misled the plaintiffs by claiming its french fries were gluten-free. These cases are ongoing, but they currently serve to show the risks that restaurants take when posting information about the food content.

2. Warnings on Menus

In *Woeste v. Washington Platform Saloon & Restaurant*, 836 N.E. 2d 52 (Ohio App. Ct. 2005), the court granted summary judgment to a restaurant after finding that the restaurant's warning concerning the risks associated with consuming raw oysters was adequate. Restaurant patron, who had a weakened immune system due to Hepatitis C and cirrhosis of the liver, contracted bacteria vibrio vulnificus[3] after eating raw oysters and died one week later. The restaurant's menu contained a warning regarding the dangers of eating raw shellfish. The plaintiff argued that the warning was not adequate because it did not warn of the possibility of

[3] *Vibrio vulnificus* is a Gram-negative, motile curved bacterium found in marine and estuarine environments. It has been isolated from seawater, sediments, plankton, and shellfish (oysters, clams and crabs) located in the Gulf of Mexico, the Atlantic Coast as far north as Cape Cod, and the entire U.S. West Coast. The bacterium thrives in warm seawater and is part of a group of vibrios that are "moderate halophiles," meaning they require salt for growth. The vibrios are frequently isolated from oysters and other shellfish in warm coastal waters during the summer months. This correlates with the peak incidence of disease caused by the bacterium. *Vibrio vulnificus* is an emerging pathogen of humans. It causes wound infections, gastroenteritis, or a syndrome known as primary septicemia. *Todar's Online Textbook of Bacteriology*, http://textbookofbacteriology.net/V.vulnificus.html (last visited September 2, 2007).

death. The court held that the restaurant was not liable because the menu contained the warning, and the warning adequately put the patron on notice of the risks associated with eating raw shellfish. *Id*. at 57.

B. Retailer's Liability for Hazardous Foreign Products and Ingredients

Our food industry is becoming a fully global system. While the global network of the supply chain grows, so does the risk that foreign, and possibly unregulated, food suppliers could contaminate the food supply. For example, according to the U.S. Food and Drug Administration and U.S. Inspection record that date from the Fall of 2006 to Summer of 2007, China has flooded the United States with foods unfit for human consumption. These adulterated foods include everything from sardines coated in putrefying bacteria to apples preserved with cancer-causing chemicals. Both the retail tier and the ultimate consumer are beginning to feel more vulnerable to the increasing numbers of contaminated food products that are slipping through the inspection system. The food industry must work closely with public and private trade partners to reduce the risk of injurious or even deadly contaminations. Even with the implementation of preventative measures, such as supply chain verification, restaurants and other food retailers may remain dangerously vulnerable to food liability claims.

Although it is too early to determine the extent of the litigation that may follow the recent scandal, litigation will likely involve allegations of food contamination or food borne illness. These claims can be brought under strict liability pursuant to Section 402(a) of the Food, Drug and Cosmetic Act,[4] negligence *per se*, or breach of warranty. The types of claims that restaurants and other retailers may face are similar to the ones at issue in *Anderson v. Piccadilly Cafeteria, Inc*, 804 So. 2d 75 (La. Ct. App. 2001). The plaintiff ordered a fruit salad and after just a few bites began to notice that the dish did not taste as usual and that it was discolored. The plaintiff finished her salad. Within five to ten minutes of finishing the salad the plaintiff felt nauseous, had stomach cramps and began vomiting. The plaintiff went home, where she suffered severe diarrhea and continued vomiting. The plaintiff went to the emergency room the next day and was diagnosed with a Mallory-Weiss tear in the lower esophageal.[5]

The plaintiff filed suit against the restaurant alleging breach of warranty or, alternatively, negligence. The restaurant set forth evidence of its food safety practices. Further, restaurant employees testified that the restaurant served approximately 45 fruit salads that day and no one else complained of feeling sick. The trial court held that the restaurant had served a fruit salad that was in a deleterious condition and that the taste, smell, and the discolored state of the fruit salad had caused the injuries and damages sustained by the plaintiff. The restaurant appealed, claiming that the plaintiff had failed to prove by a preponderance of the evidence that the fruit salad was unwholesome or deleterious and that eating the food had caused plaintiff's illness.

The Louisiana appellate court held that, absent any proof of contamination, the finding

[4] Section 402 of the Act, 21 U.S.C. **§** 342, provides in pertinent part: "[a] food shall be deemed to be adulterated…if it consists in whole or in part of any filthy, putrid, or decomposed substance, or if it is otherwise unfit for food; or … if it has been prepared, packed, or held under unsanitary conditions whereby it may have become contaminated with filth, or whereby it may have been rendered injurious to health…."

[5] This condition usually results from severe vomiting.

that the fruit salad was in a deleterious condition was erroneous. *Id*. at 77-78. The court noted that in a food product case, the traditional duty risk analysis will determine the restaurant's liability. Under this type of analysis, "a plaintiff must show that: (1) defendant owed a duty of care to the plaintiff; (2) the risk of harm was within the scope of protection afforded by the duty; (3) defendant breached that duty; and (4) the conduct in question was a cause-in-fact of the harm." *Id*. at 77. The court reasoned that absent a statute addressing a restaurant's duty to its patrons, the restaurant must act as a reasonably prudent man skilled in the culinary art when selecting, preparing, and cooking food. *Id*. Then, the court analyzed whether the duty of care extended in scope to the plaintiff and concluded that the trial court erred in holding that the fruit salad was deleterious if there was no proof of contamination. The plaintiff's mere perception that the food was discolored and not tasting as usual is an emotional response, and the restaurant had no duty to protect the consumer from an emotional response to her own negative perceptions.

IV. CONCLUSION

As demonstrated in the cases presented herein, any review of alcohol beverage and food liability case law will run the gamut of different types of tort liability. It is clear that there is no national consensus in alcohol beverage or food liability cases. Therefore, industry members must be mindful of the most recent law in any state where they conduct business.

FOOD & BEVERAGE LIABILITY

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ALCOHOL BEVERAGE LIABILITY

- Dram Shop: Breaking the Chain of Legal Causation
- Minors and Dram Shop Liability
- Parent Company's Liability
- Social Host Liability
- Mass Audience Venues

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FOOD LIABILITY

- Allergens
- Mislabeled Food Products
- Warnings on Menus
- Retailer's Liability for Hazardous Foreign Products and Ingredients

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DRAM SHOP & PERSONAL INJURY

- Past Judicial Surveys reflect developing (and continuing) fluctuations in liability standards.
- Some states adhere to statutory standards.
- But in other states, courts continue to push and expand dram shop liability restrictions adopted by legislatures.

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BREAKING THE CHAIN OF LEGAL CAUSATION

- *Patterson v Thunder Pass, Inc.* (AZ)
- *Osborne v. Twin Town Bowl* (MN)

DRAM SHOP & MINORS

Nunez v. Carrabba's Italian Grill, Inc. (MA)

PARENT COMPANY'S LIABILITY

Penn Nat. Gaming, Inc. v. Ratliff (MS)

SOCIAL HOST LIABILITY

- *Vitale v. Kowal* (CT)
  - Connecticut Dram Shop Act does not authorize a private cause of action for damages. C.G.S.A. § 30-86.
- *Barry v. Gorecki* (NY)
  - Landowners did not owe legal duty to party guest.
  - No reasonable or practical connection existed between liquor store's sale of beer to party host and guest's resulting injuries, as required for liability under Dram Shop Act.
  - Host's alleged failure to supervise or control partygoers did not proximately cause guest's injuries.

SOCIAL HOST LIABILITY

- *Shea v. Matassa* (DE)
  - Delaware Supreme Court held tavern was not liable to wife of motorist who was killed in crash involving an intoxicated driver who was served alcohol beverages at tavern and then left tavern and drove vehicle while intoxicated.
  - Delaware does not recognize a common law dram shop cause of action, and the court determined that the establishment of a dram shop cause of action presented a social policy issue for the legislature, not the courts, and the legislature had the power to license and regulate the sale of alcohol.

SOCIAL HOST LIABILITY

- *Shea v. Matassa*
  - Likewise, home owner was not liable to wife of motorist who was killed in crash involving intoxicated driver, who was served alcohol beverages at home owner's residence and later drove vehicle while intoxicated; state lacked any legislation imposing social host liability.

DRAM SHOP & PERSONAL INJURY

WHAT TO DO?

Responsible Vending Program is KEY.

- Look for "certified" programs.
- Preferably interactive…to assure user comprehension.
- Online availability so that lateral hires can receive training anytime.

DRAM SHOP & PERSONAL INJURY

WHAT TO DO?

WORK WITH LIQUOR LIABILITY COUNSEL

- Know the liquor law and liability standard for your location(s).
- Coordinate operating policies on screening minors, identifying intoxicated customers, AND what to do when you find them.
- Consider documentation protocols.

MASS AUDIENCE VENUES

- Why "Traditional" Defendants Need to Understand the Special Issues in these Cases
  - You are a co-defendant with a non-traditional defendant.
  - You are considering a business relationship with the operator of a large venue.
- *Verni v. Lanzaro (NJ)*

MASS AUDIENCE VENUES

- Compliance Issues
  - Nearly impossible for servers to monitor individuals in such large, crowded places.
  - Difficult to enforce limitations on quantity sales.
  - No way to know how, when, and with whom patron will leave event.

MASS AUDIENCE VENUES

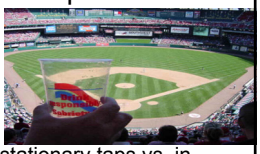
Plaintiffs in Phoenix, Arizona are suing the stadium concessionaire where Arizona Diamondbacks play, after a baseball fan had a few beers, subsequently went to a bar for more drinking, THEN got behind a wheel and killed people.

Despite the dram shop laws on the books, Arizona Supreme Court has ruled that the retailer can be sued if it acted "negligently."

See *Andrews ex rel. Woodard v. Eddie's Place, Inc.*, 16 P.3d 801 (Ariz.App. Div. 2, 2000) citing *Ontiveros v. Borak*, 667 P.2d 200 (1983) ("[T]hose who furnish liquor have an obligation or "duty" to exercise care for the protection of others. This is an obligation imposed upon tavern owners for the benefit of those who may be injured by the tavern owners' patrons, whether such injury occurs on or off the premises. We find that duty both as a matter of common law and of statute.")

MASS AUDIENCE VENUES

Mass audience venues face a special challenge.



WHAT TO DO?

WORK WITH LIQUOR LIABILITY COUNSEL

- Reassess how alcohol is served (stationary taps vs. in-the-aisle hawkers – "Beer Guys").
- Limits on number of drinks per purchase.
- Review pricing structures to avoid claims that the venue is pushing "quantity discounts" for larger size purchases (the "Bucket O' Beer")

FOOD ALLERGENS

- 12 million Americans have food allergies.
- Approximately 150 individuals die because of an allergic reaction to food.
- Most common food allergens are milk, eggs, soy, wheat (gluten), fish, shellfish, peanuts, and tree nuts.

FOOD LIABILITY

- *Moore v. P.F. Changs China Bistro, Inc.*
- McDonald's French Fries Litigation cases
- *Woeste v. Washington Platform Saloon & Restaurant*

RETAILER'S LIABILITY FOR HAZARDOUS FOREIGN PRODUCTS AND INGREDIENTS

- Global supply chain increases the risk of contamination.
- Plaintiffs may bring number of claims, including strict liability, negligence, or breach of warranty.
- *Anderson v. Piccadilly Cafeteria, Inc.*

FOOD LIABILITIES

WHAT TO DO?

- Know what items on your menu contain a common allergen and train staff.
- Use care to avoid cross contamination of food allergens.
- Avoid placing advertisements, signage, etc., that contain misleading information about food content.
- Document food handling practices and train staff.

FOOD & BEVERAGE LIABILITY

QUESTIONS?

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