

Insert tab here:

Liability Trends

(Arial Narrow)



Course Evaluation

Liability Trends in the Hospitality Industry
 Paul Osowski - *Nelson Mullins Riley & Scarborough*

For each question circle the answer that comes closest to your opinion

1-strongly disagree 2-disagree 3-neutral 4-agree 5-strongly agree

⤴ This program was presented in a lively, stimulating way	1	2	3	4	5
⤴ The content was interesting and informative	1	2	3	4	5
⤴ The information presented will be useful to me	1	2	3	4	5

⤴ **What other topics in this area should we consider for next year?**

⤴ **Other Comments?**

Your comments will ensure a successful program next year. Thank you.
 Please place this form in the designated box located in each session.

THE HOSPITALITY LAW CONFERENCE
February 9-11, 2009

Liability Trends in the Hospitality Industry

Presented by:

Paul J. Osowski
Nelson Mullins Riley & Scarborough, L.L.P.
100 North Tryon Street, Suite 4200
Charlotte, North Carolina 28202
Phone: (704) 417-3000
e-mail: paul.osowski@nelsonmullins.com

Contributing Authors:

Julia Bright
Jay Thompson

Janis Kerns
Sarah Eibling

Leslie Mize
Luke Kurtz

PAUL J. OSOWSKI

Paul J. Osowski is a partner of Nelson Mullins Riley & Scarborough LLP who practices in Charlotte, North Carolina in the areas of business litigation and premises liability. Throughout his career, he has handled a variety of cases for hotels and resorts. He has tried more than 30 cases to verdict and has also successfully argued cases before the North Carolina Supreme Court and North Carolina Court of Appeals.

Mr. Osowski was named a 2008 "Top Lawyer" for Business and Trial/Litigation by the *Charlotte Business Leader*. He is a member of the American Bar Association, the Defense Research Institute, the Mecklenburg County Bar Association, the North Carolina Association of Defense Attorneys, and the North Carolina Bar Association.

In 1996, Mr. Osowski earned a Juris Doctor, *cum laude*, from the Norman Adrian Wiggins School of Law at Campbell University where he was Business Editor of the Campbell Law Review. He was a member of the Order of Barristers. Mr. Osowski was named regional champion and received the best brief award at a competition of his National Moot Court Team. He received the Calhoun Advocacy Award for best performance in trial and advocacy programs. He earned a Bachelor of Science in Business and Accountancy from Wake Forest University in 1990.

Paul J. Osowski, Partner
Nelson Mullins Riley & Scarborough LLP
100 North Tryon Street, 42nd Floor
Charlotte, North Carolina 28202
Phone: (704) 417-3114
Fax: (704) 417-3212
e-mail: paul.osowski@nelsonmullins.com

NELSON MULLINS RILEY & SCARBOROUGH, L.L.P.

Nelson Mullins has more than 400 attorneys in 10 offices along the east coast from Atlanta to Boston, servicing clients on both a national and international basis.

Website: www.nelsonmullins.com
Toll free: (800) 237-2000

TABLE OF CONTENTS

I.	SCOPE.....	4
II.	PRICE GOUGING.....	4
III.	POOLS.....	5
IV.	BED BUGS.....	7
V.	MENU LABELING LIABILITY.....	9
VI.	DRAM SHOP LAWS.....	10
VII.	SLIP AND FALLS	12
VIII.	VIDEO SURVEILLANCE.....	14
IX.	IDENTITY THEFT RED FLAG RULES.....	16

I. SCOPE – With claims and lawsuits mounting every year, this presentation and paper will focus on recent and emerging liability trends identified in the hospitality industry. Any proposed or recently enacted legislation pertinent to these trends will also be discussed, along with practice tips aimed at reducing exposure to liability.

II. PRICE GOUGING

A. Introduction

1. Hotels and motels should not unfairly take advantage of the people's need for shelter and fear during a time of disaster or emergency
2. State deceptive trade practice laws prohibit businesses from selling fuel, food, lodging, medicine or other necessities at an exorbitant price during times of disaster

B. State Laws

1. The Texas Deceptive Trade Practices Act
 - a. When victims of price gouging are 65 years old or younger, Texas law allows for penalties up to \$20,000 per each violation
 - b. When victims of price gouging are over the age of 65 the penalty may be up to \$250,000 per violation
2. Texas Attorney General Greg Abbott reported that his office investigated hundreds of price gouging complaints after Hurricane Ike, mainly for lodging and gasoline
3. Oklahoma's Emergency Price Stabilization Act prohibits artificially raising room rates during a declared state of emergency
4. In December 2008 La Quinta Inn and Suites reached an agreement with the state of Oklahoma and refunded more than \$2,200 to guests in connection with a price gouging case stemming from ice storms occurring in 2007

B. State of Emergency

1. Price gouging only comes into play when there is a state of emergency
2. Price gouging laws do not apply to social events such as super bowls and presidential inaugurations

3. Hotels can charge, charge, charge during social events
4. Inauguration week rentals
5. Virginia three-bedroom reportedly rented for \$57,000
6. Maryland four-bedroom was listed for \$60,000
7. One-bedroom apartment in Arlington, Va. with a "luxurious air mattress" was listed for \$25,000

C. Structuring Rates during a State of Emergency

1. Trigger: Governor declares an emergency
2. Hotels should not raise their rates to levels that are higher than the rates the hotel would normally charge at full occupancy
3. When setting rates during a declared state of emergency hotel operators should review prior rate history for comparable rooms at full occupancy
4. State Attorney General may subpoena these records when evaluating complaints

III. POOLS

A. Tragedy

1. Graeme Baker, grand-daughter of former US Secretary James Baker III, died as a result of a powerful spa drain sucking her down and entrapping her underwater
2. Her death led to federal legislation passed in 2007 that requires all public pools to install and maintain Anti-Vortex / Anti-Entrapment Drains before opening in 2009
3. Vortex and Entrapment Drain lawsuits have been filed
 - *Taylor v. Sta-Rite Industries, LLC and Minneapolis Golf Club*

B. Federal Regulation

1. Virginia Graeme Baker Pool and Spa Safety Act ("Act")
15 U.S.C. §§ 8001-8004 (2007)

2. Congressional Finding- drowning is the second leading cause of injury-related deaths in children aged 1 to 14
15 U.S.C. § 8001 (2007)
3. Purpose of the Act: promote the safe use of pools, spas and hot tubs by imposing requirements for suction entrapment avoidance
4. Pool and Spa drain cover standard established
5. Safety device equipment requirements enacted
6. The Act also establishes a grant program for states with laws that promote safe use of pools, spas and hot tubs
7. The Act requires all public pools to have an Anti-Vortex or Anti-Entrapment drain to prevent tragedies such as Graeme Baker's
 - a. A Public Pool is any pool or spa that is...
 - open to the public generally (whether for a fee or free of charge);
 - open exclusively to members of an organization and their guests (such as residents of an apartment building); OR
 - operated by the federal government.
 - b. As of December 19, 2008 all U.S. public pools and spas must be equipped with drain covers conforming to the American National Standard ASME 112.19.8- 2007 Suction Fittings for Use in Swimming Pools, Wading Pools, Spas, and Hot Tubs published by the American Society of Mechanical Engineers (ASME)
 - *This will require many pools to replace the main drain grate/cover*
 - c. U.S. public pools and spas with a blockable single main drain must be equipped with one of the following:
 - Safety vacuum release system (SVRS);
 - Suction limiting vent system;
 - Gravity drainage system;
 - Automatic pump shutoff system;

- Drain disablement; OR
- Any other system determined by the Consumer Product Safety Commission to be equally effective in preventing suction entrapment
 - Many newer pools are already equipped with one of these safety features*

C. State Regulation

1. Arizona, California, Connecticut, Minnesota and New York have enacted state legislation pertaining to the Act
2. LOOK OUT.... other states will follow in 2009
3. More Information
 - a. Consumer Product Safety Commission is the authorized enforcement agency
 - b. The Association of Pool & Spa Professionals (APSP)
 - c. Your State's Department of Health

D. More Liability for Beachfront Hotels

1. In 2008 the Four Seasons Resort Palm Beach was sued for not warning guests of dangerous rip currents.
2. A hotel guest drowned after the national Weather Service advisory warned of a "high risk of very dangerous rip currents"
3. The plaintiff's claimed that they did not see any warning signs or flags and that any signage that was on the premise was "completely inadequate"
4. Protect Against Liability - Listen to daily weather advisories and post a notice near the beach explaining beach conditions

IV. BED BUGS

A. Introduction

1. Exterminators have a difficulty killing bed bugs

2. It often takes several visits to find and destroy all of the bugs and their eggs
3. Eradicating full-blown infestations throughout a building often costs over \$50,000
4. In some extreme cases, hotels are requesting that guests take showers before entering a room or replacing its guests' luggage with new suitcases

B. Lawsuits

1. Many hotels are preparing for bed bug lawsuits
 - a. Some hotels budget for bed bug lawsuits
 - b. Hotel rates are often raised in order to cover the added expense
2. Most property owners settle bed bug claims out of court to avoid the negative publicity
3. Recent Cases
 - a. 2003: \$382,000 punitive and compensatory damages awarded to two Chicago plaintiffs
 - b. 2004: 45% rent abatement for six-months was given to a New York apartment tenant
 - c. 2007: A woman sued for "pain and mental anguish, embarrassment and humiliation, medical bills and expenses" after an alleged bed bug incident
 - d. 2007: Plaintiffs claimed that bed bug pesticide spraying at Wichita State University made them ill
 - e. 2008: An opera singer initiated a lawsuit against the Hilton Corporation for \$6 million alleging over 150 bed bug bites

C. Legislation

1. On May 16, 2008 H.R. 6068: Don't Let the Bed Bugs Bite Act of 2008 was referred to the Subcommittee on Commerce, Trade and Consumer Protection

2. The bill would establish a grant program to assist States in inspecting hotel rooms for bed bugs and authorizes \$50,000,000 in each fiscal year 2009 through 2012
3. Sponsors:
 - North Carolina democrat George Butterfield
 - New York democrat Edolphus Towns
 - New Jersey democrat Donald Payne
 - California democrat Doris Matsui
 - Tennessee democrat Steve Cohen
 - Arkansas republican Donald Young
 - Ohio democrat Betty Sutton
 - Louisiana democrat William Jefferson

V. MENU LABELING LIABILITY

- A. Can arise for claims of inaccurate nutritional information listed with 'guiltless' and many low fat menu items
- B. Lawsuits
 1. Class-action lawsuits have been filed in Washington state, California and Texas
 2. Plaintiff's contend that fat and calorie contents of several diet-oriented items were double or triple the amount the restaurants were advertising
 3. Allegations include misrepresentation, false advertising and the violation of deceptive trade practice laws
 4. Questions of Law and Fact
 - Whether representations were false, misleading or deceptive
 - Whether the defendants were aware of the inaccuracy
 - Whether the advertisements breached an implied warranty
 - Whether the defendants should be ordered to stop advertising these items in this manner
 5. Defendants include Applebee's, Brinker International Inc. – owned by Chilli's, Romano's Macaroni Grill and On the Border
 6. Restaurant operators fear there could be a wave of copy-cat litigation if the courts validate the class-action complaints
 7. Plaintiffs are seeking:
 - Return of customer's payments for these items
 - Attorney fees

- Order stopping the defendant's actions

C. Legislation

1. More liability for restaurants
2. NYC was the first municipality to enact a menu-labeling requirement
3. Later this year San Francisco and Seattle will begin requiring some chain restaurants to post nutrition information
4. Chicago, Philadelphia and Washington, D.C. are considering food labeling proposals
5. California and New York are considering statewide mandates
6. In 2008, a Mississippi state representative proposed that, "Any food establishment [required to obtain a permit from the State Department of Health] shall not be allowed to serve food to any person who is obese"
House Bill 282

VI. DRAM SHOP LAWS

A. Introduction

1. A license to serve alcohol is a privilege bestowed by the government
2. That privilege comes with certain responsibilities attached
3. Dram shop laws serve two purposes
 - a. Reinforce the statutory prohibition against providing liquor to an intoxicated person (Punitive)
 - b. Create a basis of liability which permits an injured person to recover against the liquor seller
Pierce v. Albanese, 129 A.2d 606 (1957)
4. Forty-two states and the District of Columbia impose dram shop liability on liquor licensees
5. Delaware, Kansas, Louisiana, Maryland, Nebraska, Nevada, South Dakota and Virginia have not passed dram-shop laws
6. "[A]ny person who shall be injured...by reason of the intoxication of any person...shall have a right of action against any person who shall, by

unlawfully selling or unlawfully assisting in procuring liquor for such intoxicated person, have caused or contributed [to] such intoxication."
Mazurkiewicz v. Queen of Heart Cruises, Inc., 2008 WL 954160 (E.D.N.Y 2008)

7. Unlawful selling includes "sell[ing], deliver[ing], or giv[ing] away or caus[ing] or permit[ting] or procur[ing] to be sold, delivered or given away any alcoholic beverages to...any visibly intoxicated person."
Queen of Heart Cruises, Inc., 2008 WL 954160 (E.D.N.Y 2008)

B. Minors

1. Florida's Dram Shop Act is not a strict liability statute
Hetherly v. Sawgrass Tavern Inc., 975 So. 2d 1266 (Fla. Dist. Ct. App. 2008)
2. Liability is possible only if the tavern willfully served alcohol to the minor
Hetherly v. Sawgrass Tavern Inc., 975 So. 2d 1266 (Fla. Dist. Ct. App. 2008)

C. 7 Steps to Limit Liquor Liability

1. Make sure that your vendors are licensed and insured
2. Specify that servers should be trained in safe alcohol service
3. Develop an official policy for safe alcohol consumption
4. Create guidelines for handling intoxicated guests
5. Purchase a liquor-liability insurance policy
6. Put an indemnification clause in contracts with the facility and caterer providing and serving the alcohol
7. Prevent your guests from becoming intoxicated

Meetingsnet.com, Nicole Brudos Ferrara (September 1, 2005)

D. Casinos and Creative Dram Shop Claims

1. The Third Circuit has declined to expand dram shop liability to make casinos responsible for the gambling losses of intoxicated patrons
Hakimoglu v. Trump Taj Mahal Ass'n, 876 F. Supp. 625 (D.N.J. 1994)

2. The Third Circuit also refused to adopt a new doctrine akin to dram shop liability in which casinos would have the duty to identify and exclude gamblers exhibiting compulsive tendencies

- Plaintiff was attempting to recoup gambling losses
Taveras v. Resorts Int'l Hotel, Inc., 2008 WL 4372791 (D.N.J. 2008)

E. Valuable Evidence

1. Surveillance video that may show the actions of the intoxicated patron
2. Credit card receipts can show: (1) excessive number of drinks ordered at one time; (2) excessive tipping; and (3) inappropriate completion of the receipt (writing the tip or total or signing the receipt in the wrong place)

3. Public Records

- The state's liquor control board can often provide a bar's liquor license application, renewals, violations, and citations
- Police reports from prior disturbances at the bar

F. Defending Against Dram Shop Liability

1. Due to the dual punitive and remedial purposes of dram shop laws, assumption of the risk is not an absolute defense
Blondin v. Meshack, 2008 WL 4635882 (Conn. Super. Ct. 2008)
2. Comparative fault is an available defense where the plaintiff actively procured or caused the inebriated patron's intoxication
3. Here it is not enough for the plaintiff to merely participate in the drinking activities, rather he or she must be actively involved in bringing about the inebriated patron's intoxication
Blondin v. Meshack, 2008 WL 4635882 (Conn. Super. Ct. 2008)

VII. SLIP AND FALLS

A. The Cost of Negligence

1. In May 2007 a Hampton, Virginia jury awarded a Williamsburg woman more than \$12.2 million in a slip-and-fall case. There, the plaintiff slipped on a small puddle caused by a leaky awning and the owners admitted that they had known that the curb was dangerous.

2. In February 2007 a plaintiff obtained nearly \$2 million in restitution after a slip-and-fall accident outside of a Super Eight Motel. There, the plaintiff, who fell on ice outside the motel, alleged that the motel's owner and manager had known of the icing problem for four years but had never taken action to remedy the problem or warn pedestrians of the hazard.

B. Unexpected Liability – Poop and Vomit

1. In December 2007 a plaintiff who went flying down the steps at a Bronx subway station after slipping on pigeon poop was awarded \$7.67 million in damages. There, the plaintiff's award was reduced 20% because he failed to avoid the poop, which he had noticed earlier in the day.
2. In October 2008 a Texas jury returned a \$193,500 verdict against the Texas Roadhouse restaurant. There the plaintiff alleged that she fractured her left knee cap when she slipped and fell on a peanut shell dropped on the floor (the award was cut in half after the jury assigned 50% of the liability for the injury to plaintiff, who was wearing high heels at the time of the accident.
 - This \$193,500 verdict is almost eight times higher than a similar 1996 slip and fall case against Brown Derby Roadhouse.
3. Both Wal-Mart and the Trump Taj Mahal Casino Resort have been sued after patron slipped in.....vomit.

C. Judges Weigh-in on Slip and Falls

1. Judges and prominent government officials have even brought slip and fall cases against their employers.
2. In May 2008, Robert Bork, acting Attorney General under President Nixon, nominee for the Supreme Court under Reagan, and tort reform advocate, settled a \$1 million lawsuit he filed against the Yale Club after he fell stepping onto a platform to speak.
 - According to the Complaint, Bork claimed the Yale Club failed to provide steps and handrails to climb onto the dais.
3. In April 2008 a Brooklyn judge, who is a part of a subgroup of judges whose work consists heavily of hearing claims against the City of New York, filed a Notice of Claim against the city after slipping on a just-mopped floor in his own courthouse.

D. Combating Slip and Fall Cases

1. Efforts are being made to fight the surmounting unrealistic standard of care surrounding slip and fall cases.
 - a. The U.S. Chamber Institute for Legal Reform (ILR) is including slip and fall cases in their nationwide public awareness campaign designed to show that abusive lawsuits affect real people in very real ways.
 - b. In December 2007 a Montgomery County, Maryland jury rejected a negligence lawsuit brought by a woman who claimed she fell in a shopping center plaza after being attacked by a goose.

VIII. VIDEO SURVEILLANCE

A. Loss Prevention

1. Property owners are fighting fraudulent slip and fall claims through evidence provided by video surveillance equipment
2. Video surveillance is also being used to watch the trash
 - a. As oil prices soared in the summer of 2008, fryer grease became gold
 - b. On May 29, 2008 yellow grease was trading for almost \$2.50 a gallon
 - c. Now restaurant grease thefts are on the rise
 - d. Some security cameras and night watchmen have begun monitoring grease storage containers

B. Premises Liability for Third-Party Criminal Act

1. A business may be held liable for criminal acts if the act was foreseeable and the business did not act reasonably to prevent the foreseeable act
2. Video surveillance may often help to determine whether the business attempted to prevent the criminal act
3. Elements of Premises Liability For Third-Party Criminal Acts
 - a. The business had a duty to use reasonable care to protect against harm caused by the criminal act
 - b. The business failed to use reasonable care

- c. The business' failure to use reasonable care was the proximate cause of the plaintiff's harm
 - d. The plaintiff has suffered legally cognizable damages
4. A criminal act is foreseeable if the business knows or has reason to know the act is going to occur

a. Factors considered in South Carolina

- Prior similar incidents in the recent past, either on the actual premises or in the surrounding area.

Miletic v. Wal-Mart Stores, Inc., 529 S.E.2d 68, 70 (Ct. App. 2000);

Jeffords v. Lesesne, 541 S.E.2d 847, 851 (Ct. App. 2001)

- Whether the business is situated in a “high crime area.”
Jeffords, 541 S.E.2d at 851
- Whether the “place and character” of the business is such that it provides a climate for criminal activity.
Miletic, 529 S.E.2d at 70
- Whether the business should have been on notice due to reasonable warnings or incidents in the immediate time frame before the criminal act.

Miletic, 529 S.E.2d at 70; *Munn v. Hardee’s Food Systems, Inc.*, 266 S.E.2d 414, 415 (1980) (per curiam)

- Whether the business’ own actions indicate knowledge that some type of criminal activity might occur on their premises.
Daniel v. Days Inn of America, Inc., 356 S.E.2d 129, 135 (Ct. App. 1987)
- Whether the business had knowledge of the individual criminal’s prior misconduct, regardless of the history of similar crimes on the premises.
Dalon v. Golden Lanes, 466 S.E.2d 368, 371 (Ct. App. 1996)

5. Innkeepers and hotel operators may be held to a greater legal duty to protect its patrons from third party criminal conduct

“[A]lthough a proprietor of a hotel is not an insurer of the safety of his guests against improper acts of other guests or third persons, he is bound to exercise reasonable care in this respect for their safety, and may be held liable on grounds of negligence for failure to do so.”

Days Inn of America, Inc., 356 S.E.2d at 132

6. Many states have enacted hotel security statutes

- In South Carolina hotel and motel rooms must be furnished with deadbolts, security chains, or other “state of the art” security systems and “view ports” in the door so that the guests can see who is outside.

S.C. Code Ann. § 45-1-90(A) (Supp. 2005)

- Noncompliance may lead to a finding of negligence *per se*

IX. IDENTITY THEFT RED FLAG RULES

- A. Issued by the Federal Trade Commission ("FTC") under 2003 amendments to the Fair Credit Reporting Act
- B. Covered entities must develop written policies and procedures to (1) identify and detect red flags and (2) respond to red flags by preventing or mitigating potential identity theft
- C. FTC will begin enforcing the new Red Flag Rule on May 1, 2009
- D. Who and What Are Covered
 1. Creditors who maintain "covered accounts" for consumers as a creditor
 2. Creditor – individuals or entities who arrange for the extension, renewal or continuation of credit
 3. Credit – the right to defer payment for services
 4. Covered Account – an account primarily for personal, family, or household purposes that involves or is designed to permit multiple payments or transactions, or an account for which there is a reasonable foreseeable risk of identity theft to the accountholder

NOTE: An account where payment is deferred but required to be paid in full when paid is not a covered account

2009 HOSPITALITY LAW CONFERENCE

Liability Trends in the Hospitality Industry



Presented By:
Paul J. Osowski, Partner

Contributing Authors:
Julia Bright
Jay Thompson

Janis Kerns
Sarah Eibling

Leslie Miza
Luke Kurtz


Presenter



PAUL J. OSOWSKI, Partner


Nelson Mullins Riley & Scarborough LLP
100 North Tryon Street, 42nd Floor
Charlotte, North Carolina 28202
Phone: (704) 417-3114
paul.osowski@nelsonmullins.com

- Mr. Osowski practices in the area of business litigation with significant experience representing resorts and hotels
- He has tried more than 30 cases to verdict in state and federal courts
- He has successfully argued cases before the North Carolina Supreme Court and the North Carolina Court of Appeals





Topics

- Price Gouging
- Pools
- Bed Bugs
- Menu Labeling Liability
- Dram Shop Laws
- Slip and Fall Cases
- Video Surveillance
- Identity Theft Red Flags Rules




Price Gouging



Price Gouging

- State of Emergency
- Structuring Rates During a State of Emergency



HospitalityLawyer.com

Price Gouging

- Hotels and motels should not unfairly take advantage of the people's need for shelter and fear during a time of disaster or emergency
- State deceptive trade practice laws prohibit businesses from selling fuel, food, lodging, medicine or other necessities at an exorbitant price during times of disaster

HospitalityLawyer.com

Price Gouging

The Texas Deceptive Trade Practices Act

- When victims of price gouging are 65 years old or younger, Texas law allows for penalties up to \$20,000 per each violation
- When victims of price gouging are over the age of 65 the penalty may be up to \$250,000 per violation
- Texas Attorney General Greg Abbott reported that his office investigated hundreds of price gouging complaints after Hurricane Ike, mainly for lodging and gasoline

HospitalityLawyer.com

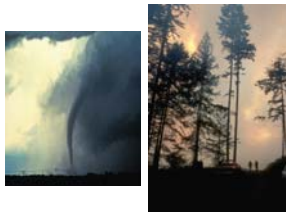
Price Gouging

- Oklahoma's Emergency Price Stabilization Act prohibits artificially raising room rates during a declared state of emergency
- In December 2008 La Quinta Inn and Suites reached an agreement with the state of Oklahoma and refunded more than \$2,200 to guests in connection with a price gouging case stemming from ice storms occurring in 2007

HospitalityLawyer.com

State of Emergency

- Price gouging only comes into play when there is a state of emergency
- Price gouging laws do not apply to social events such as super bowls and presidential inaugurations
- Hotels can charge, charge, charge during social events
- Inauguration week rentals
 - Virginia three-bedroom reportedly rented for \$57,000
 - Maryland four-bedroom was listed for \$60,000
 - One-bedroom apartment in Arlington, Va. with a "luxurious air mattress" was listed for \$25,000



HospitalityLawyer.com

Structuring Rates During a State of Emergency

- Trigger: Governor declares an emergency
- Hotels should not raise their rates to levels that are higher than the rates the hotel would normally charge at full occupancy
- When setting rates during a declared state of emergency hotel operators should review prior rate history for comparable rooms at full occupancy
 - State Attorney General may subpoena these records when evaluating complaints

HospitalityLawyer.com

Pools



HospitalityLawyer.com

Pools


1. Tragedy
2. Federal Regulation
 - Definition of a "Public Pool"
3. State Regulation
4. More Liability for Beach Front Hotels

HospitalityLawyer.com





Tragedy

- Graeme Baker, grand-daughter of former US Secretary James Baker III, died as a result of a powerful spa drain sucking her down and entrapping her underwater
- Her death led to federal legislation passed in 2007 that requires all public pools to install and maintain Anti-Vortex / Anti-Entrapment Drains before opening in 2009
- Vortex and Entrapment Drain lawsuits have been filed
 - *Taylor v. Sta-Rite Industries, LLC and Minneapolis Golf Club*



Federal Regulation

- Virginia Graeme Baker Pool and Spa Safety Act ("Act")
15 U.S.C. §§ 8001-8004 (2007)
- Congressional Finding- drowning is the second leading cause of injury-related deaths in children aged 1 to 14
15 U.S.C. § 8001 (2007)


Suction Entrapment Avoidance


- Purpose of the Act: promote the safe use of pools, spas and hot tubs by imposing requirements for suction entrapment avoidance
 - Pool and Spa drain cover standard established
 - Safety device equipment requirements enacted
- The Act also establishes a grant program for states with laws that promote safe use of pools, spas and hot tubs
- The Act requires all public pools to have an Anti-Vortex or Anti-Entrapment drain to prevent tragedies such as Graeme Baker's

What is a Public Pool?

- Any pool or spa that is...
 - open to the public generally (whether for a fee or free of charge);
 - open exclusively to members of an organization and their guests (such as residents of an apartment building); OR
 - operated by the federal government.





 Required Equipment 15 USC 8001 §1403 (2007)

As of December 19, 2008...

1. Drain Covers for Public Pools

- All U.S. public pools and spas must be equipped with drain covers conforming to the American National Standard ASME 112.19.8- 2007 Suction Fittings for Use in Swimming Pools, Wading Pools, Spas, and Hot Tubs published by the American Society of Mechanical Engineers (ASME)
- This will require many pools to replace the main drain grate/cover*

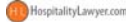



 Required Equipment 15 USC 8001 §1403 (2007)

As of December 19, 2008...


2. Drain Systems for Public Pools


- U.S. public pools and spas with a blockable single main drain must be equipped with one of the following:
 - Safety vacuum release system (SVRS);
 - Suction limiting vent system;
 - Gravity drainage system;
 - Automatic pump shutoff system;
 - Drain disablement; OR
 - Any other system determined by the Consumer Product Safety Commission to be equally effective in preventing suction entrapment
 - Many newer pools are already equipped with one of these safety features*




 State Regulation


- Arizona, California, Connecticut, Minnesota and New York have enacted state legislation pertaining to the Act

 LOOK OUT....
other states will follow in 2009



 More Information

- Consumer Product Safety Commission is the authorized enforcement agency
- The Association of Pool & Spa Professionals (APSP)
- Your State's Department of Health



More Liability for Beachfront Hotels

- In 2008 the Four Seasons Resort Palm Beach was sued for not warning guests of dangerous rip currents
- There a hotel guest drowned after the national Weather Service advisory warned of a "high risk of very dangerous rip currents"



HospitalityLawyer.com

More Liability for Beachfront Hotels

- The plaintiffs claimed that they did not see any warning signs or flags and that any signage that was on the premise was "completely inadequate"


Protect Against Liability

- Listen to daily weather advisories
- Post a sign near the beach explaining beach conditions, rip currents and what a swimmer should do if caught in a rip current
 - WARNING: this may increase liability if the accuracy of the information is disputed

HospitalityLawyer.com

Another Issue to Monitor


Little Bugs Can Be Big Problems




HospitalityLawyer.com

Bed Bugs

- Exterminating bed bugs is a costly killing bed bug
- It often takes multiple treatments to find and destroy a bed bug colony and their eggs
- Eradicating bed bugs through multiple treatments costs over \$50,000




HospitalityLawyer.com




Extreme Precaution

- Some hotels request guests to take showers before entering a room
- One Las Vegas hotel replaces its guests' luggage with new suitcases





Lawsuits

- Many hoteliers are initiating bed bug lawsuit plans
 - Some hotels budget for bed bug lawsuits
 - Hotel rates are often raised in order to cover the added expense
- To avoid lawsuits and negative publicity, most property owners settle bed bug claims out of court

Recent Cases

- 2003- \$382,000 punitive and compensatory damages awarded to two Chicago plaintiffs
- 2004- 45% rent abatement for six-months was given to a New York apartment tenant
- 2007- A woman sued for “pain and mental anguish, embarrassment and humiliation, medical bills and expenses” after an alleged bed bug incident




Recent Cases

- 2007- Plaintiffs claimed that bed bug pesticide spraying at Wichita State University made them ill
- 2008- An opera singer initiated a lawsuit against the Hilton Corporation for \$6 million
 - The alleged injuries involve over 150 bed bug bites




Insurance

- Insurance often fails to cover total litigation costs
- Punitive damages are not insurable
- If managers have been negligent in dealing with bed bug infestations, many insurers won't pay claims

 HospitalityLawyer.com

Legislation

- On May 16, 2008 **H.R. 6068: Don't Let the Bed Bugs Bite Act of 2008** was referred to the Subcommittee on Commerce, Trade and Consumer Protection
- Sponsors:
 - North Carolina democrat George Butterfield
 - New York democrat Edolphus Towns
 - New Jersey democrat Donald Payne
 - California democrat Doris Matsui
 - Tennessee democrat Steve Cohen
 - Arkansas republican Donald Young
 - Ohio democrat Betty Sutton
 - Louisiana democrat William Jefferson
- The bill would establish a grant program to assist States in inspecting hotel rooms for bed bugs and authorizes \$50,000,000 in each fiscal year 2009 through 2012

 HospitalityLawyer.com

Menu Labeling Liability




 HospitalityLawyer.com

Menu Labeling Liability


- Inaccurate nutritional information listed with 'guiltless' and many low fat menu items
 1. Lawsuits
 2. Legislation



 HospitalityLawyer.com

Lawsuits

- Class-action lawsuits have been filed in Washington state, California and Texas
- Plaintiff's contend that fat and calorie contents of several diet-oriented items were double or triple the amount the restaurants were advertising



HospitalityLawyer.com

Lawsuits

- Allegations include misrepresentation, false advertising and the violation of deceptive trade practice laws
- Questions of Law and Fact
 - Whether representations were false, misleading or deceptive
 - Whether the defendants were aware of the inaccuracy
 - Whether the advertisements breached an implied warranty
 - Whether the defendants should be ordered to stop advertising these items in this manner

HospitalityLawyer.com

Lawsuits

- Defendants include Applebee's, Brinker International Inc. – owned by Chilli's, Romano's Macaroni Grill and On the Border
- Restaurant operators fear there could be a wave of copy-cat litigation if the courts validate the class-action complaints

HospitalityLawyer.com

Lawsuits

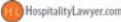
Plaintiffs are seeking:

1. Return of customer's payments for these items
2. Attorney fees
3. Order stopping the defendant's actions

HospitalityLawyer.com

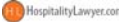
Legislation

- More liability for restaurants
- NYC was the first municipality to enact a menu-labeling requirement
- Later this year San Francisco and Seattle will begin requiring some chain restaurants to post nutrition information
- Chicago, Philadelphia and Washington, D.C. are considering food labeling proposals
- California and New York are considering statewide mandates



More Legislation

- In 2008, a Mississippi state representative proposed that....
"Any food establishment [required to obtain a permit from the State Department of Health] shall not be allowed to serve food to any person who is obese"
- House Bill 282



Dram Shop Laws








Dram Shop Laws


1. Introduction
2. Minors
3. Avoiding Liability
4. Creative Dram Shop Claims
5. Valuable Evidence
6. Defending Against Dram Shop Liability







Dram Shop Laws

- A license to serve alcohol is a privilege bestowed by the government
- That privilege comes with certain responsibilities attached
- Dram shop laws serve two purposes
 1. Reinforce the statutory prohibition against providing liquor to an intoxicated person (Punitive)
 2. Create a basis of liability which permits an injured person to recover against the liquor seller
Pierce v. Albanese, 129 A.2d 606 (1957)



Dram Shop Laws

- Forty-two states and the District of Columbia impose dram shop liability on liquor licensees
- Delaware, Kansas, Louisiana, Maryland, Nebraska, Nevada, South Dakota and Virginia have not passed dram-shop laws

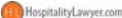
Dram Shop Laws


- "[A]ny person who shall be injured...by reason of the intoxication of any person...shall have a right of action against any person who shall, by unlawfully selling or unlawfully assisting in procuring liquor for such intoxicated person, have caused or contributed [to] such intoxication."
Mazurkiewicz v. Queen of Heart Cruises, Inc., 2008 WL 954160 (E.D.N.Y. 2008)
- Unlawful selling includes "sell[ing], deliver[ing], or giv[ing] away or caus[ing] or permit[ing] or procur[ing] to be sold, delivered or given away any alcoholic beverages to...any visibly intoxicated person."
Queen of Heart Cruises, Inc., 2008 WL 954160 (E.D.N.Y. 2008)

Minors

- Florida's Dram Shop Act is not a strict liability statute
Hetherly v. Sawgrass Tavern Inc., 975 So. 2d 1266 (Fla. Dist. Ct. App. 2008)
- Liability is possible only if the tavern willfully served alcohol to the minor
Hetherly v. Sawgrass Tavern Inc., 975 So. 2d 1266 (Fla. Dist. Ct. App. 2008)







7 Steps to Limit Liquor Liability

1. Make sure that your vendors are licensed and insured
2. Specify that servers should be trained in safe alcohol service
3. Develop an official policy for safe alcohol consumption
4. Create guidelines for handling intoxicated guests
5. Purchase a liquor-liability insurance policy
6. Put an indemnification clause in contracts with the facility and caterer providing and serving the alcohol
7. Prevent your guests from becoming intoxicated



Meetingsnet.com, Nicole Brudos Ferrara (September 1, 2005)

Preventing Guests From Becoming a Liability



1. Serve drinks to guests rather than offering a self-serve bar
2. Provide a range of low- and alcohol-free drinks to your guests
3. Close your bar well before the scheduled end of the party
4. Station the bar in a spot where people aren't always passing it
5. Do not raffle alcohol or hold contests that involve buying, drinking, or winning alcoholic drinks

Meetingsnet.com, Nicole Brudos Ferrara (September 1, 2005)


Avoidance

Issue training manuals or handbooks outlining the responsibilities of bartenders, waiters and waitresses

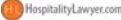
Casinos and Creative Dram Shop Claims

- The Third Circuit has declined to expand dram shop liability to make casinos responsible for the gambling losses of intoxicated patrons
Hakimoglu v. Trump Taj Mahal Ass'n, 876 F. Supp. 625 (D.N.J. 1994)
- The Third Circuit also refused to adopt a new doctrine akin to dram shop liability in which casinos would have the duty to identify and exclude gamblers exhibiting compulsive tendencies
 - Plaintiff was attempting to recoup gambling losses
Taveras v. Resorts Int'l Hotel, Inc., 2008 WL 4372791 (D.N.J. 2008)



Valuable Evidence

- Training manuals
- Surveillance video that may show the actions of the intoxicated patron
 - Plaintiff's attorneys should send a letter to all potential defendants at the investigation's outset, advising them that surveillance videos are critical evidence and should be preserved
- Credit card receipts
 - Evidence of intoxication: (1) excessive number of drinks ordered at one time; (2) excessive tipping; and (3) inappropriate completion of the receipt (writing the tip or total or signing the receipt in the wrong place)
- Public Records
 - The state's liquor control board can often provide a bar's liquor license application, renewals, violations, and citations
 - Police reports from prior disturbances at the bar




Defending Against Dram Shop Liability

- Due to the dual punitive and remedial purposes of dram shop laws, assumption of the risk is not an absolute defense


Blondin v. Meshack, 2008 WL 4635882 (Conn. Super. Ct. 2008)
- Comparative fault is an available defense where the plaintiff actively procured or caused the inebriated patron's intoxication
 - Here it is not enough for the plaintiff to merely participate in the drinking activities, rather he or she must be actively involved in bringing about the inebriated patron's intoxication

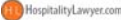
Blondin v. Meshack, 2008 WL 4635882 (Conn. Super. Ct. 2008)



Slip and Fall Cases


- [YouTube - My son slip and fall at the bowling alley](#)





Slip and Fall Cases


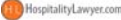
1. The Cost of Negligence
2. Unexpected Liability – Poop and Vomit
3. Judges Weigh-in on Slip and Falls
4. Combating Slip and Fall Cases





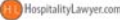
The Cost of Negligence

- In May 2007 a Hampton, Virginia jury awarded a Williamsburg woman more than \$12.2 million in a slip-and-fall case. There, the plaintiff slipped on a small puddle caused by a leaky awning and the owners admitted that they had known that the curb was dangerous.

The Cost of Negligence

- In February 2007 a plaintiff obtained nearly \$2 million in restitution after a slip-and-fall accident outside of a Super Eight Motel. There, the plaintiff, who fell on ice outside the motel, alleged that the motel's owner and manager had known of the icing problem for four years but had never taken action to remedy the problem or warn pedestrians of the hazard.



Unexpected Liability – Poop and Vomit

- In December 2007 a plaintiff who went flying down the steps at a Bronx subway station after slipping on pigeon poop was awarded \$7.67 million in damages. There, the plaintiff's award was reduced 20% because he failed to avoid the poop, which he had noticed earlier in the day.
- [POOP AND \\$COOP - New York Post](#)




Unexpected Liability – Poop and Vomit

- In October 2008 a Texas jury returned a \$193,500 verdict against the Texas Roadhouse restaurant. There the plaintiff alleged that she fractured her left knee cap when she slipped and fell on a peanut shell dropped on the floor (the award was cut in half after the jury assigned 50% of the liability for the injury to plaintiff, who was wearing high heels at the time of the accident).
- » This \$193,500 verdict is almost eight times higher than a similar 1996 slip and fall case against Brown Derby Roadhouse.
- Both Wal-Mart and the Trump Taj Mahal Casino Resort have been sued after patrons slipped in..... vomit.






Judges Weigh in on Slip and Falls

- Judges and prominent government officials have even brought slip and fall cases against their employers.
- In May 2008, Robert Bork, acting Attorney General under President Nixon, nominee for the Supreme Court under Reagan, and tort reform advocate, settled a \$1 million lawsuit he filed against the Yale Club after he fell stepping onto a platform to speak.
- According to the Complaint, Bork claimed the Yale Club failed to provide steps and handrails to climb onto the dais.



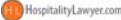
Judges Weigh in on Slip and Falls

- In April 2008 a Brooklyn judge, who is a part of a subgroup of judges whose work consists heavily of hearing claims against the City of New York, filed a Notice of Claim against the city after slipping on a just-mopped floor in his own courthouse.



Combating Slip and Fall Cases

- Efforts are being made to fight the surmounting unrealistic standard of care surrounding slip and fall cases.
 - The U.S. Chamber Institute for Legal Reform (ILR) is including slip and fall cases in their nationwide public awareness campaign designed to show that abusive lawsuits affect real people in very real ways.
 - In December 2007 a Montgomery County, Maryland jury rejected a negligence lawsuit brought by a woman who claimed she fell in a shopping center plaza after being attacked by a goose.
[Faces of Lawsuit Abuse.org](http://FacesofLawsuitAbuse.org)



Video Surveillance










Video Surveillance

1. Loss Prevention
2. Defending Against Liability for Third Party Criminal Acts


Loss Prevention

- Property owners are fighting fraudulent slip and fall claims through evidence provided by video surveillance equipment
[YouTube - Slip n Fall Scam](#)


Loss Prevention


- Video surveillance is also being used to watch the trash
 - As oil prices soared in the summer of 2008, fryer grease became gold
 - On May 29, 2008 yellow grease was trading for almost \$2.50 a gallon
 - Now restaurant grease thefts are on the rise
 - Some security cameras and night watchmen have begun monitoring grease storage containers

Premises Liability For Third-Party Criminal Acts


- A business may be held liable for criminal acts if the act was foreseeable and the business did not act reasonably to prevent the foreseeable act
- Video surveillance may often help to determine whether the business attempted to prevent the criminal act




 Premises Liability For Third-Party Criminal Acts


Elements


1. The business had a duty to use reasonable care to protect against harm caused by the criminal act
2. The business failed to use reasonable care
3. The business' failure to use reasonable care was the proximate cause of the plaintiff's harm
4. The plaintiff has suffered legally cognizable damages




 Premises Liability For Third-Party Criminal Acts

- A criminal act is foreseeable if the business knows or has reason to know the act is going to occur
- "Reason to know" is a fact-sensitive question







 Premises Liability For Third-Party Criminal Acts

Factors considered in South Carolina

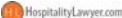
1. Prior similar incidents in the recent past, either on the actual premises or in the surrounding area.
Miletic v. Wal-Mart Stores, Inc., 529 S.E.2d 68, 70 (Ct. App. 2000);
Jeffords v. Lesesne, 541 S.E.2d 847, 851 (Ct. App. 2001)
2. Whether the business is situated in a "high crime area."
Jeffords, 541 S.E.2d at 851
3. Whether the "place and character" of the business is such that it provides a climate for criminal activity.
Miletic, 529 S.E.2d at 70




 Premises Liability For Third-Party Criminal Acts

Elements


4. Whether the business should have been on notice due to reasonable warnings or incidents in the immediate time frame before the criminal act.
Miletic, 529 S.E.2d at 70; *Munn v. Hardee's Food Systems, Inc.*, 266 S.E.2d 414, 415 (1980) (per curiam)
5. Whether the business' own actions indicate knowledge that some type of criminal activity might occur on their premises.
Daniel v. Days Inn of America, Inc., 356 S.E.2d 129, 135 (Ct. App. 1987)
6. Whether the business had knowledge of the individual criminal's prior misconduct, regardless of the history of similar crimes on the premises.
Dalton v. Golden Lanes, 466 S.E.2d 368, 371 (Ct. App. 1996)



 Premises Liability For Third-Party Criminal Acts

- Innkeepers and hotel operators may be held to a greater legal duty to protect its patrons from third party criminal conduct
- “[A]lthough a proprietor of a hotel is not an insurer of the safety of his guests against improper acts of other guests or third persons, he is bound to exercise reasonable care in this respect for their safety, and may be held liable on grounds of negligence for failure to do so.”

Days Inn of America, Inc., 356 S.E.2d at 132



 Premises Liability For Third-Party Criminal Acts

- Many states have enacted hotel security statutes
- In South Carolina hotel and motel rooms must be furnished with deadbolts, security chains, or other “state of the art” security systems and “view ports” in the door so that the guests can see who is outside.

S.C. Code Ann. § 45-1-90(A) (Supp. 2005)

- Noncompliance may lead to a finding of negligence *per se*



 Identity Theft Red Flags Rules





 Identity Theft Red Flags Rules

- Issued by the Federal Trade Commission ("FTC") under 2003 amendments to the Fair Credit Reporting Act
- Covered entities must develop written policies and procedures to (1) identify and detect red flags and (2) respond to red flags by preventing or mitigating potential identity theft
- FTC will begin enforcing the new Red Flag Rule on May 1, 2009





Who and What Are Covered

- Creditors who maintain "covered accounts" for consumers as a creditor
- Creditor – individuals or entities who arrange for the extension, renewal or continuation of credit
- Credit – the right to defer payment for services
- Covered Account – an account primarily for personal, family, or household purposes that involves or is designed to permit multiple payments or transactions, or an account for which there is a reasonable foreseeable risk of identity theft to the accountholder

- NOTE: An account where payment is deferred but required to be paid in full when paid is not a covered account