Food and Beverage Litigation Update

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I. SCOPE OF ARTICLE

A. FOOD LIABILITY: PRODUCT LIABILITY AND MORE

Food liability cases are based in tort law. Many are product liability cases including claims in negligence, breach of warranty and strict liability. 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. The outcomes of these cases vary widely by jurisdiction.

B. ALCOHOL BEVERAGE LIABILITY: DRAM SHOPS CASES AND OTHER TORT-BASED CLAIMS

"Dram Shop Liability" refers to causes of action brought against sellers and other providers of alcohol beverages resulting from injuries to consumers of alcohol beverages and third parties harmed by such persons. Dram shop liability is the most common type of liability that licensees of alcohol beverages are exposed to, and any party holding a liquor license may be subject to this kind of liability. Courts analyzing these cases decide how to apportion responsibility for the injury between the server and the drinker. The traditional common law rule in most United States jurisdictions was that the consumption of alcohol, rather than the furnishing of it, was the proximate cause of alcohol-related accidents. In many contexts, this is still the rule. Today, all fifty states have a statutory scheme to address these issues. Courts must balance the common law and these liquor liability statutes in order to assess liability.

II. FOOD LIABILITY

Food liability claims can involve restaurants, hotels/motels, food distributors, and food suppliers. In these cases plaintiffs usually allege that the seller of the food handled or prepared the food in a negligent manner (negligence cause of action) and/or that the food product in and of itself was defective and unreasonably dangerous (strict liability cause of action). In addition, plaintiffs may allege more sophisticated complaints arising out of illness or injury from a foreign object in the food, allergens, or food poisoning (usually an e-coli or other bacteria claim).

A. CAUSES OF ACTION IN THE PRODUCT LIABILITY CASE INVOLVING FOOD

Foods sold in restaurants, bars, hotels, and other venues are considered "products" like any other for the purpose of product liability litigation. Common causes of action are negligence, breach of warranty (merchantability or fitness for a particular purpose), and strict liability (particularly failure to warn claims), and plaintiffs usually allege these in combination. As with most product liability cases, all companies, entities, or persons in the chain of distribution and sale of the product to the ultimate consumer may be added as defendants to the case. Therefore, if you operate a restaurant or bar, conceivably any "defective" food product which you serve your customers could be the cause for a product liability suit against you under appropriate circumstances.

B. FOREIGN OBJECTS IN FOOD

Traditionally, courts have used two tests to determine the existence of liability in such cases: the foreign/natural test and the reasonable expectation test. Today, most jurisdictions use some version of the reasonable expectation test. Historically, the common law foreign/natural test was used to evaluate food injury cases. Later, the test was modified by the judicially-created reasonable expectation test. In *Porteous v. St. Ann's Cafe & Deli*, 713 So. 2d 454 (La. 1998), the Louisiana Supreme Court summarized the two tests:

> Under the foreign-natural test, the outset determination is whether the injurious substance is "foreign" or "natural" to the food. As this test evolved nationally, the cases held that if an injurious substance is natural to the food, the plaintiff is denied recovery in all events. *Goodwin v. Country Club*, 323 Ill. App. 1, 54 N.E. 2d 612 (Ill. App. 1944); *Brown v. Nebiker*, 229 Iowa 1223, 296 N.W. 366 (Iowa 1941); *Mix v. Ingersoll Candy Co.*, 6 Cal. 2d 674,59 P.2d 144 (Cal. 1936), overruled by *Mexicali Rose v. Superior Court*, l Cal. 4th 617, 822 P.2d 1292 (Cal. 1992). But if the injurious substance is foreign, the restaurant is strictly liable. .....
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> In time, the foreign-natural test was widely criticized and rejected by many states in favor of the reasonable expectation test. Under the reasonable expectation test, the query to determine liability is whether a reasonable consumer would anticipate, guard against, or expect to find the injurious substance in the type of food dish served. *O'Dell v. DeJean's Packing Co., Inc.*, 585 P.2d 399 (Okl. Ct. App. 1978); *Jim Dandy Fast Foods, Inc. v. Miriam Carpenter*, 535 S.W. 2d 786 (Tex. Civ. App. 1976); *Matthews v. Campbell Soup Co.*, 380 F. Supp. 1061 (S.D. Tex. 1974); *Wood v. Waldorf System, Inc.*, 79 R.I. 1, 83 A.2d 90 (R.I. 1951); *Zabner v. Howard Johnson's Inc.*, 201 So. 2d 824 (Fla. Dist. Ct. App. 1967). Whether the injurious substance is natural or foreign is irrelevant. Rather, liability will be imposed on the restaurant if the customer had a reasonable expectation that the injurious substance would not be found in the food product On the other hand, if it can be shown that the customer should reasonably have expected the injurious substance in his food, that customer is barred from recovery.

(Quotations omitted; citations omitted); *id.* at 456.

The reasonable expectation test is the majority rule in the United States.

C. EVIDENTIARY ISSUES

Food liability cases are very fact intensive and the presence or absence of a small fact could be dispositive of the entire case. This group of cases addresses the role of circumstantial evidence, and in turn, whether the doctrine of res ipsa loquitur should apply.

In *Currie v. The Big Fat Greek Rest., Inc.*, 2012 WL 6738381 (Oh. Ct. App. Dec. 27, 2012), the plaintiff alleged that he broke his tooth as a result of chomping on something in his gyro platter. The plaintiff admitted that he did not know what broke his tooth. Furthermore, the

restaurant manager inspected the plaintiff's food following his injury and did not find any hard objects in the food.

Given that the plaintiff only had circumstantial evidence of his injury, he claimed that the restaurant should be liable on a res ipsa loquitur theory. The court described the doctrine as follows:

> The doctrine of res ipsa loquitur is an evidentiary rule which permits, but does not require, a finder of fact to draw an inference of negligence when the logical premises for the inference are demonstrated. *Jennings Buick, Inc. v. Cincinnati,* 63 Ohio St.2d 167, 169 (1980). The doctrine originated by necessity when the true cause of an occurrence was known by or could be determined by the defendant but not by the plaintiff. *Fink v. New York Cent. R. Co.,* 144 Ohio St. 1, 5 (1944). The doctrine of res ipsa loquitur does not alter the nature of the plaintiff's claim in a negligence action; it is merely a method of proving the defendant's negligence through the use of circumstantial evidence. *Jennings Buick* at 170.
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> To warrant application of the rule a plaintiff must adduce evidence in support of two conclusions: (1) That the instrumentality causing the injury was, at the time of the injury, or at the time of the creation of the condition causing the injury, under the exclusive management and control of the defendant; and (2) that the injury occurred under such circumstances that in the ordinary course of events it would not have occurred if ordinary care had been observed. *Id.,* quoting *Hake v. Wiedemann Brewing Co.,* 23 Ohio St.2d 65, 66–67 (1970).

Currie v. The Big Fat Greek Rest., Inc., 2012-Ohio-6168

In this case, the plaintiff was unable to show either that (1) the gyro was in the exclusive control of the restaurant, or (2) that ordinary care was not observed. Thus, the court found that the doctrine of res ipsa loquitur did not apply. *Id*. at *3.

Res ipsa loquitur was one of the theories used by the plaintiff in *Brumberg v. Cipriani USA, Inc.*, 110 A.D. 3d 1198 (N.Y. Ct. App. 2013). The Plaintiff ate hors d'oeuvres at a fundraising event and thirty minutes later experienced severe abdominal pain. After various medical tests, doctors found a wooden shard during an endoscopy two weeks after the event, which they identified as the cause of plaintiff's injuries.

The plaintiff became ill right after the fundraiser, but any evidence connecting the wooden chard to the defendant caterer was circumstantial. Therefore, plaintiff pursued res ipsa loquitur theory. In order to prevail on this theory plaintiff would have to show (1) the injury would not ordinarily occur in the absence of someone's negligence; (2) the injury was caused by an agency or instrumentality within the exclusive control of the defendant; and (3) it must not have been due to any voluntary action or contribution by the plaintiff.

The defendant focused on the second prong of the test and argued that the food served at the event was not in its exclusive control. The record revealed otherwise. The defendant operated the banquet hall where the fundraiser took place. The defendant prepared and brought all the food, and food was not allowed at the premises from other sources. In addition,

defendant's employees served all the food. All of these facts taken together defeated defendant's motion for summary judgment on the res ipsa loquitur claim.

D. EMOTIONAL DISTRESS CASES

Cases involving foreign objects in food frequently involve claims centered upon emotional distress, although prevailing on these claims may prove quite difficult. A stomach turning example is *Bylsma v. Burger King Corp*., 2010 WL 4702296 (D. Or. Sept. 3, 2010). In this case, discussed in the 2011 case review, Plaintiff Bylsma, a sheriff's deputy, sued Burger King for the physical injuries and emotional distress he suffered when he found a glob of human saliva on the hamburger he ordered. He filed a complaint alleging product liability, negligence, and vicarious liability based on respondeat superior.

The evidence revealed that Bylsma was uneasy following his encounter with a Burger King employee at the drive-thru, and pulled over to examine his hamburger before he ate it. He saw the phlegm on the burger, and took a photo and video of it. Later, local police analyzed the burger in a crime lab and conclusively determined that the substance Bylsma saw was indeed human saliva. Based on these test results, search warrants were obtained for two Burger King employees and oral swabs were obtained. These tests showed a DNA match to the saliva of one of the employees, who was arrested for felony assault. *Id*. at *1.

After performing a conflict of laws analysis of what state's law should apply to the case, the court reviewed the case under Washington state's product liability statute. The statute was designed to preempt previously existing common law remedies, including negligence, in favor of creating a single cause of action for product-related harms. *Id*. at *2. Therefore, Bylsma's claims would be confined to remedies allowed by the statute.

The court began with an analysis of whether Bylsma could claim emotional distress based on his "proximity to a contaminated hamburger" when he did not eat the hamburger and did not suffer harmful physical contact with the offensive product. The court found that the state's product liability act was silent on this issue. *Id.* at *5. Furthermore, the court found that Bylsma's complaint did not allege intentional conduct by the Burger King employee, thus weakening his claim. Finally, the court held that Bylsma's other claims for negligence and vicarious liability failed as a matter of law because they were preempted by the state product liability statute. Therefore, the court denied Bylsma's claims and granted Burger King's motion for judgment on the pleadings. *Id*. at *6.

Plaintiff Bylsma appealed to the U.S. Court of Appeals for the Ninth Circuit, which certified the following question to the Supreme Court of Washington: "…whether the Washington Product Liability Act permits relief for emotional distress damages, in the absence of physical injury to the plaintiff purchaser, caused by being served and touching, but not consuming, a contaminated food product." *Bylsma v. Burger King Corp*., 676 F. 3d 779 (9th Cir. 2012). The state court resolved this question by determining that a plaintiff may recover for emotional distress without physical injury, only if the reaction is reasonable and "manifest by objective symptomatology."

E. BACTERIA

Cases involving bacteria and food poisoning are a source of liability for restaurants and other food providers. *S.M.R. v. McDonald's Corp. et al*., 404 S.W.3d 369 (Mo. Ct. App. 2013), involved claims for negligence and breach of warranty against a McDonald's franchisee brought by the parents of a minor who ate a cheeseburger contaminated with E Coli.

The plaintiffs sought to introduce evidence that other individuals became ill after they consumed meat purchased at nearby McDonald's restaurants who purchased meat from the same supplier as the restaurant where they ate. The trial court excluded this evidence and plaintiffs appealed. The defendants argued that notwithstanding that the meat did all come from the same supplier, there was not sufficient evidence that the meat was the cause of the illnesses of the guests. The evidence reflected that the individuals involved became ill within different periods of time after eating the meat, and this led to the question of whether they were actually suffering from the same bacterial infection. In the end, the appellate court found that the plaintiffs' offer of proof about the meat supplier was not sufficiently probative to outweigh the undue prejudice that the introduction of the evidence might cause. 404 S.W. 3d at 378.

Liability cases involving illnesses arising from consumption of raw seafood are also prevalent. Raw oysters are a common risk, particularly for individuals suffering from compromised immune systems. In *Travis v. Spitale's Bar, Inc.*, 122 So. 3d 1118 (La. Ct. App. 2013), the plaintiff, who suffered from hepatitis, ate raw oysters at the bar and became ill from *vibrio vulnificus* bacteria, and eventually needed a kidney transplant.

Louisiana requires restaurants serving raw oysters to have posted warnings in the restaurant area. On the day Travis visited the restaurant, there were no posted warnings in the restaurant area. In addition, the menus did not contain any warnings. There was a warning in the bar area, away from where Travis was seated. The court applied a comparative fault analysis and allocated 33% of the fault to the restaurant. Travis' testimony revealed that he did not know that he could become ill from raw oysters because of his illness. Furthermore, he said he had walked through the bar area where the warning was the day he ate the oysters. The court allocated 27% of fault to Travis.

III. DRAM SHOP LAW UPDATE

Determining a licensee's liability exposure in a situation where someone, either the person who consumed alcoholic beverages, or a third party, is injured in an accident involving alcohol begins with an analysis of what law applies. Depending upon the facts, common law and state statutes may both apply.

Once a court determines what body of law applies, dram shop cases encompass common questions. Was the accident foreseeable by the licensee? Is the case more of a "premises liability" case rather than a liquor liability matter? Does a state standard apply in order for liability to attach, such as "service to the visibly intoxicated" and if so, does the evidence meet

that standard? The courts which reviewed the cases below respond to these questions and more.

A. DRAM SHOP LEGISLATION'S ROLE IN LIMITING LIABILITY FOR COMMERCIAL SELLERS OF ALCOHOL

Most dram shop laws are written to reinforce the notion that the consumption of alcohol is the proximate cause of alcohol-related injuries, not the sale or furnishing of alcohol. For that reason, most state laws impose liability only under certain circumstances. Moreover, most place limits on that liability. The following cases address some common bars-no pun intended- to the imposition of liquor liability.

1. First Party Actions

Dram shop liability is based on the concept that the consumption of alcohol – not the serving of alcohol – is the proximate cause of alcohol-related accidents. Therefore, plaintiffs who injure themselves as a result of their own intoxication rarely recover. For example, in *Schutz v. La Costita III, Inc.*, 302 P.3d 460 (Or. Ct. App. 2013), the plaintiff drank "past the point of intoxication"; *id* at 575; and was severely injured when she entered an interstate highway driving in the wrong direction. She claimed that the bar knew she was drunk and should have prevented her from driving, and/or should have provided her alternate transportation. The bar's defense relied on a provision of Oregon's dram shop act which bars recovery in a case with "voluntary intoxication." *See* Or. Rev. Stat. §471.565(1). The court agreed and found that the dram shop act barred the case. *Id*. at 575.

When a licensee is sued for selling alcohol beverages to one person, who provides those beverages to another who causes an accident, the first party bar rule can also come into play. *Gutierrez v. Devine*, 103 A.D. 3d 1185 (N.Y. Ct. App. 2013), involved a group of minors who purchased alcohol from a liquor store using a fake i.d. The purchaser gave the alcohol to one of the other minors, who subsequently drove the group's car into a tree, injuring the plaintiff.

Upon review, the court found that there was no evidence that the liquor store knowingly sold or furnished alcohol beverages to the driver of the car. The court reasoned: "[n]othing in the General Obligations Law imposed upon defendant a duty…to investigate possible ultimate consumers in the parking lot beyond its doors." *Id*. at 568.

2. Assault and Battery

One area where dram shop liability is usually limited is the assault and battery context, *e.g.,* plaintiff who gets in bar fight claims that bar could not control patrons' alcohol consumption and therefore could not maintain a safe atmosphere. For example, in *Whitfield v. Tequila Mexican Rest. No. 1,* 748 S.E. 2d 281 (Ga. Ct. App. 2013), the plaintiff was injured in the restaurant's parking lot by a fellow customer who was ejected from the restaurant for being intoxicated. The Plaintiff, who was stabbed, claimed that the restaurant had continued to serve the assailant even though he was intoxicated, had negligently hired and supervised its employees, and had failed to provide adequate security.

The record revealed that the assailant had been verbally abusive to other patrons in the

restaurant, was slurring his speech, and had refused to pay his bill. After the assailant was outside, two women in the outside area of the restaurant called the police out of concern, and once the assailant saw this he began to berate them. The plaintiff went outside in the hope of assisting the women, and then was injured. Notwithstanding these facts, the plaintiff did not introduce any evidence that the assault was foreseeable by the restaurant or its employees, and the court found that the restaurant was not liable for the intervening criminal act of the assailant. *Id*. at 286.

A licensed establishment may be liable for injuries arising from an alcohol-related assault if it can be proven that the licensee and/or its employees should have foreseen that assault. For example, in *Carver v. P.J. Carney's et al.*, 103 A.D. 3d 447 (N.Y. Ct. App. 2013), the plaintiff tavern patron was struck in the face by a visibly intoxicated patron on the sidewalk outside the tavern. The trial court denied the tavern's motion for summary judgment and the tavern appealed. Three witness statements described the assailant as unsteady, aggressive, and boisterous, and there was further evidence that the bartender had to intervene in an altercation between the parties inside the bar before the assailant was asked to leave. As a result of these facts, the court found that a genuine issue of material fact existed as to whether the assault outside was foreseeable by the tavern. *Id*. at 448.

B. STANDARDS OF INTOXICATION

Various states recognize different standards of intoxication that licensed establishments should be trained to identify, e.g., "noticeable intoxication", "visible intoxication," and "apparent to the provider" to name a few. It can be challenging for plaintiffs to meet the burdens of proof to show that a tortfeasor exhibited behavior consistent with one of these standards, and that the licensed establishment had a duty to recognize that behavior.

Ft. Mitchell Country Club v. LaMarre, 394 S.W. 3d 897 (Ky. 2013) involved a golf cart accident following an evening of dining and drinking at the country club. The two couples involved were members of the club and rode to dinner that evening in the golf cart. The evidence revealed that one of the members requested two bottles of champagne to be removed from his wine locker. In addition, a bottle of red wine was also removed from the locker. At some point during the evening, one of the members left the rest of the group to take a to go meal to his son at home, and when he returned, he brought back another bottle of wine he had taken from home. At the end of the evening, the wine bottles and one of the champagne bottles were consumed, and the members took the unopened champagne bottle with them in the cart. Later, after leaving the club, the members opened the champagne bottle and consumed it in the golf cart on the way to a neighbor's house. When attempting to leave the neighbor's house, one of the gentleman members fell out of the golf cart and sustained serious head injuries.

The injured member and his family sued the other couple and the country club, and alleged that the club should have stopped serving alcohol to the intoxicated member. The only evidence of the member's intoxication, however, was the volume of alcohol consumed by the group during the evening. Five club employees were interviewed and none of them thought the

member was intoxicated. In addition, a police officer called to the scene of the golf cart accident did not think any of the members were intoxicated. The court found that even if the driver of the golf cart was intoxicated, there was no evidence that any of the club employees knew it, and therefore the club was protected from liability under the state dram shop act. *Id*. at 901.

In *Privett v. QSL-Milford, LLC*, 2013 WL 5372900 (Oh. Ct. App. Sept. 23, 2013), the court reviewed an actual knowledge standard for noticeable intoxication. The defendant operated a Quaker State & Lube restaurant, which held a "Bike Night." The festivities included a band and several vendors selling motorcycle paraphernalia. In addition to the bars in the interior of the restaurant and on the restaurant patio, there was a "beer booth" in the parking lot which served beer in 24-ounce plastic cups and only accepted cash.

On the evening in question, Jason Carpenter attended the Bike Night with friends and the record revealed that he had between five and seven beers in a period of three hours and fifteen minutes. Carpenter also ate, and possibly consumed beer from the beer booth while he looked around at the motorcycle gear for about thirty to forty-five minutes. After leaving, Carpenter lost control of his motorcycle about a half mile away from the property, and collided with the plaintiff, who was also riding a motorcycle en route to the Bike Night. The plaintiff sustained serious injuries and Carpenter died in the accident. Carpenter's blood alcohol content at the time of his death was .169.

The plaintiff sued under the Ohio dram shop act and the trial court entered summary judgment in favor of the restaurant. Ohio's dram shop act imposes liability on a licensee who sells or furnishes alcohol beverages to an intoxicated person; *see* Oh. Rev. Stat. §4301.22(B); and case law interpreting this section holds that actual knowledge of intoxication is necessary for liability to attach under this section. *See, e.g., Gressman v. McClain*, 533 N.E.2d732 (Oh. 1988). Applying this standard, the appellate court held that there was no genuine issue of material fact as to whether Carpenter was noticeably intoxicated and therefore whether the restaurant had actual knowledge of his intoxication. *Id*. at *2. The record revealed that Carpenter's friends could not remember exactly how much he drank and did not recall any indications that he was intoxicated. A bartender who served Carpenter, who had received training in identifying intoxication, recalled serving Carpenter and did not notice anything unusual about his behavior so as to suggest he was intoxicated. Furthermore, other waitstaff were interviewed and could not identify or remember Carpenter. On this record, the appellate court affirmed.

C. NEGLIGENT TRAINING/SUPERVISION

A common variation in dram shop cases is the claim that the injury was caused by an employee failing to exercise due care toward a patron. These claims usually fall under the cause of action of negligent training or supervision.

One such recent case is *Brown v. Gunchie's, Inc*., 834 N.W. 2d 871 (Ia. Ct. App. 2013). This case has a cast of characters. At the center of the action was Diana Hardin, the bartender. The plaintiff was her "on again off again" boyfriend of ten years, and the record reflects the

couple was "on again" at the time of the incident in question. The plaintiff arrived at the bar to find Diana working and a former boyfriend of hers, Jimmy Siem, at the bar area. Siem was a regular. Diana and the plaintiff got into an argument. Diana's brother was called, came to the bar, and asked the plaintiff to leave. When the plaintiff did not leave, Diana's brother punched him, and then Siem joined the fight and punched the plaintiff also.

The plaintiff sued the bar under negligence and dram shop theories. He claimed that the bar failed to have the police remove Diana's brother and Siem from the bar, and also that the bar's employees were not properly trained in this regard. Based on testimony elicited from Diana, the court concluded that the trial court was correct in denying the bar's motion for directed verdict.

The bar's owner testified that the bartenders were responsible for security. Diana testified that she had been trained not to call 911, but was not trained in how to identify intoxicated people. A witness who was a patron at the bar the night of the fight also testified that Diana did nothing while it was going on. Furthermore, Diana testified that she knew her brother was a fighter and had been involved in other fights at the bar before; she further stated that she knew that the bar had an eviction policy, but she did not know what it was and did not know if she had the authority to invoke it. *Id*. at *3.

Another version of negligent training is negligent eviction, where a licensee employee negligently forces out an intoxicated guest with the end result that the guest or a third party is injured. Such was the case in *Groh v. Westin Operator, LLC,* 2013 WL 3989289 (Colo. Ct. App. Mar. 28, 2013).

The plaintiff reserved a room at the defendant hotel in anticipation of an evening of clubbing. She had two friends in the room who checked in with her and were given keys. Later, eight additional friends joined them in the room and it was something of a party. A security guard heard noise coming from the room, and confronted the group. After a series of conversations, which included the manager, the guard asked the group to leave. They complained that they could not leave because they were drunk. The manager asked the plaintiff to stay because she was a registered guest, but she decided to leave with her friends. The group wanted to stay in the hotel lobby to wait for a cab because it was cold, but the security guard would not allow it. Eventually the group got into a car with one of the friends driving. They got into an accident and the plaintiff was seriously hurt.

The appellate court analyzed whether the hotel's eviction of the plaintiff was reasonable. The court found based on the record that although the hotel certainly had the right to evict the plaintiff and her friends, it did not act reasonably because the hotel exposed her to a foreseeable risk of injury given her intoxication and the cold. In addition, the hotel could have called the police for assistance, and/or could have allowed the plaintiff to wait in the lobby for a taxi. *Id*. at *4.

IV. CONCLUSION

Liability arising out of the sale and service of food and alcoholic beverages should be of concern to all in the food and beverage business. The cases discussed in this annual review are helpful in illustrating some best practices for your operations, as well as some common mistakes.

In the food area, restaurants and other food sellers should adopt training programs which include attention to food safety. Restaurants should understand and document their supply chain for the food they serve so that in the event of an injury, causation may be more easily identified.

Alcoholic beverage licensees should have familiarity with applicable state dram shop statutes and the circumstances under which they can be liable. Licensees should provide adequate training to their employees on responsible alcohol beverage service, so that they do not serve the visibly intoxicated, minors, and others to whom regulated products should not be sold.

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