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FEBRUARY 10th - 12th, 2014

# FOOD & BEVERAGE LITIGATION UPDATE

Elizabeth A. DeConti, GrayRobinson

# Elizabeth A. DeConti - Shareholder



- Elizabeth is a shareholder with the Tampa office of GrayRobinson where she focuses her practice on litigation and compliance matters related to the rules, regulation and business practices that govern the marketing, sale, and consumption of malt beverages, wine, distilled spirits, and other regulated products. She also handles food law issues.
- Elizabeth's trial experience includes commercial, dram shop, franchise, intellectual property, and ADA cases litigated on behalf of major breweries, alcohol suppliers, wholesalers, retailers, and other members of the hospitality industry in state and federal courts and administrative agencies throughout the United States. In addition to her court experience, she represents many clients in alternative dispute resolution.
- She also advises clients on issues pertaining to trade regulation and marketing practices in the food and beverage industry, and concentrates on regulatory compliance, as well as advertising and promotional law. Elizabeth also drafts contracts related to advertising, distribution, importation, and related issues associated with the food and beverage industry.

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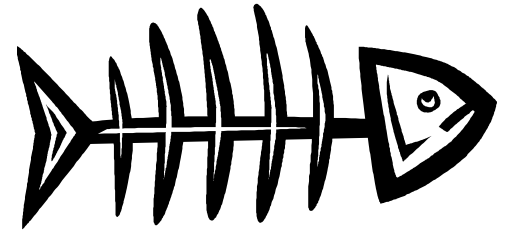
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# FOOD & BEVERAGE LITIGATION UPDATE

# Food Liability Fact Patterns

- Product Liability
- Foreign Objects
  - *Why is there a bone in my food?*
  - *Why is there a plastic fork in my food?*
- Emotional Distress
- Food poisoning



# Foreign Objects In My Food

- Cases usually involve mouth/throat injuries, allergic reactions and food poisoning/gastric distress.
- Causes of action are strict liability, negligence, breach of express/implied warranty.

# Legal Analysis

Foreign/Natural Test: *Does the substance naturally occur in my food?*

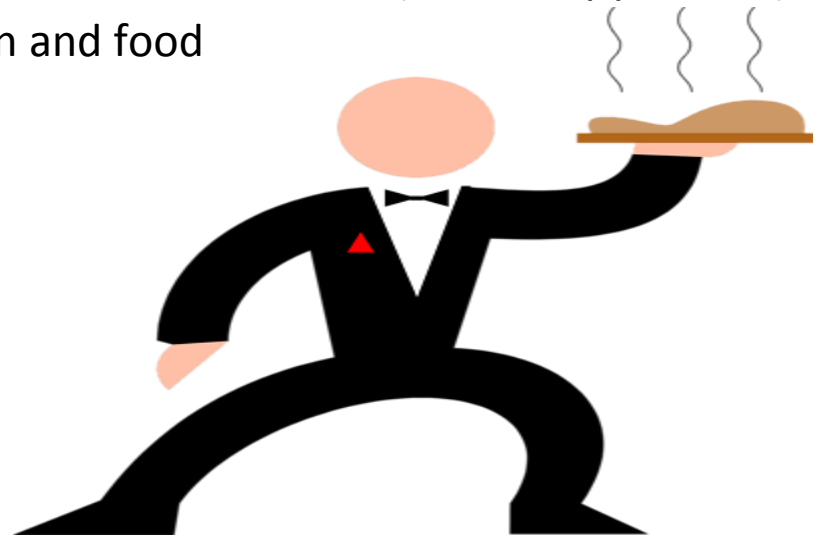
OR,

Reasonable Expectation Test: *Should the eater reasonably be on notice that the substance may be in the food?*

- Reasonable Expectation Test is Majority Rule

# Evidentiary Issues

- Res Ipsa Loquitur as a theory when the case is circumstantial
  - Could there have been another cause of the injury other than
    - Restaurant's negligence?
    - Was the item [food] which caused the injury in the defendant's exclusive control?
  - *Brumberg v. Cipriani USA, Inc.*, 110 A.D. 3d 1198 (NY Ct. App. 2013)
    - Exclusive control over location and food



# Emotional Distress Cases

- *Bylsma v. Burger King, Corp.*, 676 F. 3d 779 (9th Cir. 2012)
  - Cop finds phlegm on burger
  - Lower court decision held that plaintiff could not prevail on emotional distress claim without actually eating product
  - Federal appellate court certified question to Washington Supreme Court
  - State courts rules that plaintiff may recover for emotional distress without physical injury, only if the reaction is reasonable and “manifest by objective symptomatology





# Bacteria / Food Poisoning

These are fact-based cases dependent on expert testimony

- *E-Coli 0157:H7*
- *SMR v. McDonald's Corp. et al.*, 404 S.W. 3d 369 (Mo. Ct. App. 2013)



# Bacteria and Bad Oysters

- “Eggshell Plaintiffs”
- *Trans v. Spitale’s Bar, Inc.*, 122 So.3d 1118 (La. Ct. App. 2013)
  - *Vibrio vulnificus*
  - Signs and their locations
  - Warnings



# Alcohol Beverage Liability: Dram Shop Cases and Other Tort-Based Claims

- The “Common Law Rule” vs. State Statutes
- Limitation of liability for licensees
- Liability Usually Limited to Certain Situations/Varies by State
- Plaintiffs may try other causes of action if dram shop law is not exclusive remedy



# Using Dram Shop Laws to Limit Liability

- Common “Bars”
- Actions by Intoxicated plaintiffs usually excluded
  - *Schultz v. La Costita, III, Inc.*, 302 P.3d 460 (Or. Ct. App. 2013)
  - Variations: Plaintiff’s decedent purchased alcohol for driver of car:
    - *Ruiz v. Safeway, Inc.* 147 Cal. Rptr. 3d 809 (Cal. Ct. App. 2013)
- Assault and Battery Cases generally excluded
  - *Whitfield v. Tequila Mexican Rest., No. 1*, 748 S.E. 2d 218 (Ga. Ct. App. 2013)



# FORESEEABLE CRIMINAL ACTS MAY BE A BASIS FOR LIABILITY

- *Carver v. P.J. Carney's et al.*, 103 A.D. 3d 447 (NY Ct. App. 2013)
  - a “reasonable or practical connection” between the sale of alcohol to a visibly intoxicated person and the resulting injuries
- *Lee v. Hee Woong Kim*, 2013 Il. App. (1<sup>st</sup>) 123720-U (Dec. 18, 2013)
  - Duty to provide reasonably safe means of ingress and egress
  - Glass bottles



# Standards of Intoxication

- “Visible,” “Noticeable,” “Apparent to the Provider” are a few
- *Ft. Mitchell Country Club v. LaMarre*, 394 S.W. 3d 897 (Ky. 2013)
- Volume of alcohol served, in and of itself, not enough evidence of intoxication
- Liquor license violation did not deprive club of protections of dram shop act



# Standards of Intoxication (cont'd)

- *Privett v. QSL-Milford, LLC*, 2013 WL 5372900 (Oh. Ct. App. Sept. 23, 2013)
  - Multiple service points including a beer booth in the parking lot
  - No evidence of defendant's actual knowledge of intoxication following depositions of several witnesses



# Negligent Training/Supervision

- *Brown v. Gunchie 's Inc.*, 834 N.W. 2d 871 (Iowa Ct. App. 2013)
  - Bartender had no training for identifying intoxication
  - She knew her bar had an eviction policy, but she did not know what it was and did not know if she had the authority to use it
- *Groh v. Westin Operator, LLC*, 2013 WL 3989289 (Colo. Ct. App. Mar. 28, 2013)
  - Negligent eviction
  - When does the special duty to an evicted guest end?





# Conclusion

- **Food liability**
  - Evidence is key
  - Understand when warnings may be required
  - Adopt good policies for employee behavior and follow them
- **Liability arising from the Sale and Service of Alcoholic Beverages**
  - Understand the duties you owe to your guests
  - Develop good policies for handling the obviously intoxicated and for ejecting patrons
- **Questions?**

Elizabeth A. DeConti, Esq.

GrayRobinson, PA

Ph: (813) 273-5159

E-mail: [elizabeth.deconti@gray-robinson.com](mailto:elizabeth.deconti@gray-robinson.com)



*Elizabeth DeConti*