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Alcohol Beverage Liability: Legal Update and Best Practices

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ALCOHOL BEVERAGE LIABILITY: DRAM SHOP 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.

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.

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.

Many state dram shop laws limit liability by limiting the class of possible plaintiffs who may trigger a lawsuit. For example, in Florida, the protections of the dram shop statute only break when the intoxicated party is a minor or a "habitual drunkard"(*see* Fl. Stat. §768.125); in California only if the intoxicated party is in fact an intoxicated minor (*see* Cal. Bus & Prof. Code §25602.1). Moreover, other states only attach liability when the server can appreciate some level of intoxication; several standards exist such as "visibly intoxicated" (Pennsylvania; *see* 47 Pa. Stat. §4-493), "obviously intoxicated" (Arkansas; *see* Ark. Code §16-126-104), or "apparent to the provider" (Texas; *see* Tex. Alco. Bev. Code Ann. §2.02(b)) to name a few. Finally, many jurisdictions bar "first party actions" or cases brought by intoxicated individuals themselves as opposed to innocent third parties.

LIMITING THE PARTIES
The First Party Bar

Most states prohibit a plaintiff who injures himself in an alcohol related accident from recovering against a commercial licensee. In the case of *Encompass Ins. Co. v. Stone Mansion Restaurant*, 2017 WL 664318 (W.D. Pa. Feb. 16, 2017), the insurance company brought suit against the restaurant after its insured visited the restaurant and was allegedly served while visibly intoxicated. The insured later became involved in an automobile accident which killed him and injured his passenger, and Encompass tried to recover on behalf of both men. The court ruled that because Pennsylvania's dram shop law only provides a cause of action for third party injuries, Encompass stood in the shoes of its insured and could not recover. *Id*. at *6.

The first party suit prohibition is incredibly hard to overcome, unless a plaintiff can meet his or her state's burden for the doctrine of the "last clear chance." Where the first party bar holds that a plaintiff cannot sue someone else for his own contributory negligence, the doctrine of the last clear chance applies when the license holder's negligence was gross and exceeded the contributory negligence of the plaintiff. In other words, the defendant was the plaintiff's "last clear chance" to avoid injury, and the defendant should have known it! Nevertheless, this standard is very difficult to meet, even in cases with very compelling facts. In *Davis v. Hulsing Enter., LLC*, 783 S.E. 2d 765 (N.C. Ct. App. 2016), the plaintiff and his wife checked into the defendant's hotel in order to celebrate their anniversary. They dined in the hotel restaurant and over a four and a half hour period were served twenty-four alcoholic drinks by the hotel staff. The wife consumed at least ten of these drinks. After dinner, the wife could not walk back to the couples' room and she fell down on the floor and was not able to get up on her own. The hotel staff put her in a wheelchair and wheeled her back to her room where she was accompanied by her also intoxicated husband. The next morning when the plaintiff woke up, he found his wife dead on the floor, and it was later determined that she died of acute alcohol poisoning. *Id.* at 770-771.

The husband argued, among other things, that the he could recover notwithstanding his contributory negligence (and notwithstanding that of his wife) because the hotel's negligence in failing to avoid the accident introduced a new element into the case and thus became the direct and proximate cause of the accident. The allegation was that the hotel had the "last clear chance" to avoid the injury from happening, and a prudent person in a like position would have behaved differently.

Whether a defendant's behavior constitutes the "last clear chance" seems to be highly dependent on the plaintiff's pleading and how the court interprets the facts. Notwithstanding the clear negligence on the part of the hotel employees related to serving the alcohol beverages, the court found here that the plaintiff's allegations related to leaving his wife in the room with him alone despite her obviously impaired condition did not constitute the "last clear chance" because the allegations in the complaint did not establish that the hotel employees would have known that she would not be able to escape injury when she was left with the husband. *Id.* at 773.

Notwithstanding the dismissal of the "last clear chance" argument, the *Davis* case illustrates numerous failures by the licensee, including: (1) overservice in the restaurant; (2) mishandling of Mrs. Davis' fall; and (3) ultimately abandoning her without medical attention. Mrs. Davis' tragic death might have been avoided at any number of points in the evening. It is unclear from the published opinion whether the restaurant personnel were concerned about calling for medical help when Mrs. Davis fell, but certainly any adverse consequence they would suffer from making that call would not compare to the alternative result.

Special Classes of Plaintiffs and Defendants

As seen with the first party bar, dram shop laws reduce alcohol liability cases by reducing the number of eligible plaintiffs who may bring such cases. Furthermore, these laws as well as common law interpretations reduce the number of liable defendants.

One of the more confusing limitations on dram shop plaintiffs is the so-called "fireman's rule." The "fireman's rule" assumes that a fireman, police officer, or other public safety officer understands the risks of entering a liquor licensed establishment for the purpose of responding to a call and therefore cannot then sue the owner of the establishment if he or she is injured in the line of duty. *See, e.g., Pottebaum v. Hinds*, 347 N.W. 2d 642 (Iowa 1984).

Most, but not all, jurisdictions follow the "fireman's rule." For example, in *Juszczyszyn v. Taiwo*, 113 A.2d 853 (Pa. Super. Ct. 2015), the plaintiff police officer responded to a call from the defendant's licensed establishment regarding an unruly patron. The patron assaulted the police officer. The court held that the police officer could not bring a claim under the state dram shop act because he responded to a call in the course of his professional duties, and under the circumstances, the defendant's duty was limited to warning the plaintiff of dangerous hidden conditions. Given that the patron was behaving in a confrontational manner which was obvious to all, no such hidden conditions existed here. *Id.* at 857-858.

In contrast, some courts have found that the "fireman's rule" does not apply and have permitted dram shop cases brought by safety officers in limited circumstances. *See, e.g., Olle v. C House Corp.*, 967 N.E. 2d 2886 (Il. Ct. App. 2012) (off-duty sheriff could maintain action against bar after he was injured breaking up an altercation); *Tull v. WTF, Inc.*, 706 N.W. 2d 439 (Mich. Ct. App. 2005) (police officer could maintain action against bar when facts of case brought complaint outside delineated statutory circumstances where fireman's rule would apply).

Plaintiffs' counsel are well aware of the limitations dram shop statutes bring and so they will cast their nets as wide as possible in order to reach any number of possible defendants in addition to the licensed establishment. Common additional defendants include landlords, property managers, investors, valet companies, and more. Frequently, however, if these entities are not on the liquor license and therefore are not involved in serving alcohol beverages, then they may be dismissed quickly.

For example, in *Schneider v. Paragon Realty, LLC*, 55 N.E. 2d 374 (Ind. Ct. App. 2016), a bar patron sued the bar, the bar's landlord, and the property manager hired by the landlord after she left the bar in a car as the passenger of an intoxicated driver. The plaintiff alleged that the property manager, Paragon, owed her a duty of care as a result of its maintenance of the property where the bar is located. Following review of the defendants' contractual agreements, the court found that Paragon's duty was limited to maintaining the common areas where the bar was located (such as the parking lot) but did not extend to protecting invitees like the plaintiff from riding off with intoxicated drivers. *Id*. at 380.

In *Rams v. Cordish Operating Ventures, LLC*, 2017 WL 833054 (W.D. Ky. Mar. 2, 2017), the plaintiff was injured when he fell from a two story balcony after consuming alcohol beverages at the defendant bar. In addition to suing the liquor licensed entity, plaintiff also sued two other companies on an alter ego theory of corporate law. Plaintiff argued that the two other companies shared common officers and directors, and were controlled by the same person who controlled the bar entity, even though the other

companies did not hold liquor licenses. The court ruled that the Plaintiff could not satisfy the standard for alter ego liability, and could not show that the additional companies were not separate from the liquor licensed defendant bar. *Id*. at *3.

LIMITING THE CLAIMS

Eviction

Davis v. Hulsing Enter., LLC, supra, raised questions about how a licensee should respond when there is a need to evict a patron because that patron appears to be a danger to himself or to others. Waitstaff may recognize that someone needs to be "cut off", but they may not know the best way to do it. For example, it is hard to get inside the minds of the hotel employees involved in *Davis*, but it is not hard to imagine that they may have felt a false sense of security, assuming the couple would "sleep it off" and knowing that the Davises would not be driving off the property because they had a room for the night. This begs the question of how far licensees need to go to insure that the guest will not hurt himself or others. The following cases attempt to answer this question.

A well pled case for negligent eviction can remove the protections of a state dram shop law, as illustrated in *Simmons v. Homatas*, 925 N.E. 2d 1089 (Ill. 2010). In Simmons, two men spent the evening at a strip club in DuPage County, Illinois. The club did not serve alcohol, but patrons were permitted to bring their own while watching the entertainment. One of the men became visibly intoxicated and was found vomiting in the mens' room by the club employees. The employees promptly brought the drunken man to the front of the club where the valets had brought around his car; they then opened the driver's side door for him and directed him to leave. Fifteen minutes later, he became involved in an automobile accident which killed three people.

The plaintiffs argued that the club was not protected by the dram shop act because it was not engaged in selling alcoholic beverages. The court, however, focused on the notion that regardless of the club's license status, it had taken actions which led to the third parties' injuries, outside of the service of alcohol. The court found that the club assumed a duty of care for its guest the moment they found him vomiting in the restroom, and they breached that duty when they ejected him into his car. *Id*. at 1099.

Westin Operator, LLC v. Groh, 347 P.3d 606 (Colo. 2015) considered the duty of care that a hotel owes its guest when conducting a lawful eviction. The facts of the case are particularly compelling. Ms. Jillian Groh rented a room at the Westin Hotel in Denver; she did not actually pay for the room but instead obtained her reservation using her sister's employee discount. She invited several friends over and the group went clubbing. Later that evening, the hotel security guards confronted the group in the room about their noise level and proceeded to evict them from the hotel. Groh advised the guards that the group was drunk and would not be able to drive. In addition, one member of the group asked if they could wait inside for a taxi because it was freezing outside. The guard blocked the door and said "[n]o, get the f*** out of here." *Id.* at 608. Ultimately the group squeezed seven people into Groh's car, and they became involved in a crash that killed one person and left Groh in a persistent vegetative state. *Id.*

Groh's parents sued the hotel for negligent eviction. The court held that a hotel that evicts a guest has a duty to exercise reasonable care while doing so. The court further held that the duty encompasses refraining

from evicting an intoxicated guest into a foreseeably dangerous environment, and the factors weighing on foreseeability could include the time, the state of the individual, and the weather. *Id.* at 609. Based on the

facts here, the Supreme Court of Colorado concluded that the hotel was not entitled to summary judgment on the plaintiffs' negligent eviction claim. *Id.* at 618.

There is no question that the Westin security guards lost this case for the hotel. Notably, the plaintiffs' decedent and her friends became intoxicated off of hotel property. The case emphasizes how important it is to educate outside companies working on a licensed premises to identify and understand the signs of intoxication and to develop appropriate and safe responses.

Notwithstanding these case results, some courts have ruled that some injuries are so disconnected from the underlying eviction that they were not foreseeable by the defendant licensees. In *Pittman v. Rivera et al.*, 879 N.W. 2d 12 (Neb. 2016), the Supreme Court of Nebraska found that a tavern was not liable when a customer it had evicted returned to the premises and struck another patron with his vehicle. The defendant tavern had evicted the driver earlier that evening when he became belligerent; he went away from the premises in a car with a designated driver. The tavern considered the incident handled and did not call the police. Later, the driver attempted to return to the tavern to finish what he started and was driving his own car. He sped into a crowd of people standing outside near the tavern, and the plaintiff could not avoid being hit. The court granted summary judgment for the tavern because the evicted guest's return and then injury to the plaintiff were not foreseeable. *Id.* at 13.

In *Rausch v. Barlow Woods, Inc.*, 204 So. 3d 796 (Miss. Ct. App. 2016), the plaintiff was a passenger in the car of an intoxicated nightclub patron. A group which included the plaintiff went to the defendant nightclub for drinks. The group was asked to leave because of one woman's belligerent behavior. The group left in a truck, with two men in the front seat, and the plaintiff and the belligerent woman in the back. The two women fought, and at some point the plaintiff fell out of the vehicle and was run over by the rear wheels. The plaintiff claimed that her injuries were foreseeable because the nightclub overserved the driver of the truck and he was visibly intoxicated; however, this argument was unsuccessful because the court found that the plaintiff's specific injuries, *i.e.*, falling out of the truck and being run over, were not foreseeable. *Id.* at 800.

What Constitutes a "Sale" of Alcohol?

Other types of injuries may not be deemed foreseeable because the injured plaintiff cannot connect his or her injuries to a direct sale of alcohol to the party who caused the injury. In *Calvillo v. Frazier*, 2015 WL 154032 (Tex. Ct. App. 2015), the plaintiff was injured in an automobile accident by a woman who had been a guest at a birthday celebration at the defendant's club. The evidence revealed that the woman had never actually purchased a drink from the club; the drinks were purchased for her by gentlemen customers as well as by her daughter. The court affirmed the trial court's summary judgment order because there was no evidence to show that the plaintiff was actually served by the defendant club. *Id.* at *2. As an aside, the court noted that the facts of this case were distinguishable from a situation where the licensee serves a group of people a large format drink such as a bottle of wine or pitcher of beer to share. *Id.*

Similarly, in *Ruiz v. Safeway, Inc.*, 209 Cal. App. 4th 1455 (Cal. Ct. App. 2013), plaintiffs sued the grocery store chain for selling alcohol to the passenger of a drunk driver. The drunk driver later consumed the beer in the car and caused the accident which killed the plaintiffs' son. The court held that Safeway could not be liable because the store did not sell alcohol to the person whose negligence caused the accident. *Id.* at 1462.

Notwithstanding the above case results, there are some circumstances where liability may attach for an indirect sale of alcohol. Such was the case in *Sanford v. Fillenwarth*, 863 N.W. 2d 286 (Iowa 2015). The defendant operated a resort which offered a boat cruise to paying guests as a resort amenity. The cruise included alcohol beverages as part of the cruise amenity without additional charge. Plaintiffs were injured in an altercation on the cruise, and sued the resort under the state dram shop law. The resort argued that the law did not apply because it had not sold alcoholic beverages to the plaintiffs or other cruise passengers. The Supreme Court of Iowa disagreed and found that the drinks were indirectly sold; the cruise was advertised as a hotel amenity and only paying resort guests could go on the cruise. *Id.* at 294.

CONCLUSION

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

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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