

Food & Beverage Litigation Survey



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Elizabeth DeConti

Presenter – Elizabeth A. DeConti, Esq.



- 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.

Elizabeth DeConti

Food Liability Fact Patterns

- Product Liability
- Foreign Objects
 - Why is there a bug in my food?
 - Why is there a bone in my food?
- Allergens/Cross-Contamination
- Bacteria/Viruses

Product Liability - Negligence and Strict Liability: Example of the Hot Beverage Cases

- *Colbert v. Sonic Restaurants, Inc.*, 2010 WL 3769131 (W.D. La. Sept. 21, 2010)
 - Failure to warn
 - Failure to keep cups in safe condition
 - Plaintiffs as sophisticated users who should know better.



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

Case Examples

- *Cotter v. McDonald's Rest. of Mass., Inc.*, 887 N.E. 2d 313 (Mass Ct. App. 2008)



- *Burns v. McDonald's Corp.*, 2010 WL 4226278 (Mass. App. Div. Oct. 20, 2010)

Emotional Distress Claims Arising from Foreign Objects in Food

- *Bylsma v. Burger King Corp.*, 2010 WL 4902296 (D. Or. Sept. 3, 2010)
 - Cop finds phlegm on a hamburger
 - Based on state law, Plaintiffs may not be able to prevail on emotional distress claim if they do not suffer physical injury or if they do not eat product.

Allergens

- *Anderson v. Real Mex Restaurants, Inc.*, 2010 WL 457522 (D. Md. Feb. 3, 2010).
 - Dairy allergy; how do you handle common allergies?
 - Res Ipsa Loquitur
 - What representations do you make about your food products on menus, websites, and other company literature?
 - How do you train servers to respond when a customer announces an allergy?



Bacteria / Food Poisoning Focus on Salmonella



- These are fact-based cases dependent on expert testimony
- *Corbi v. Harrah's Hotel & Casino*, 2010 WL 4226523 (D. N.J. Oct. 21, 2010)
- *Griffin v. Wilcohes, LLC*, 2010 WL 3803695 (D. S.C. Sept. 23, 2010)
 - Inspection reports are critical pieces of evidence.

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



Was the Accident or Injury Foreseeable?

- *Centerfield Bar, Inc. v. Gee*, 930 N.E.2d 622 (In. Ct. App. 2010)
 - Assault case inside bar
 - Evidence included training, employment policies, and a barred customer list



Assault Cases Generally

- What if an alcohol-related assault occurs off your property – are you responsible?
- *Dugan v. Olson*, 74 A.D. 3d 1131, 906 N.Y.S.2d 277 (N.Y. Ct. App. 2010)
 - Connection between sale of alcohol and injury must be reasonable



The Employee Problem

- Vicarious liability and respondeat superior
- Fact patterns include company parties, off-site meetings within the scope of employment and servers “breaking the rules” for customers they know.
- Example of: *Gray v. D&G, Inc.*, 2010 WL 4913264 (Ind. Ct. App. Dec. 3, 2010)

Employee Issues, Cont'd

- *Lev v. Beverly Enter. Massachusetts, Inc.*, 929 N.E. 2d 303 (Mass 2010)
- Employee drank with his work supervisor while discussing work matters
 - Application of the “going and coming rule”
 - Role of a company policy prohibiting substance abuse

Employee Issues, Cont'd

- Compare with *Hicks v. Korean Airlines Co.*, 2010 WL 3834881 (Ill. Ct. App. Sept. 29, 2010)
- Employee attended business entertainment dinner where alcohol was served
 - Does it matter if the employer pays for the drinks?
 - Issue of whether a dram shop statute preempts a respondeat superior claim

Insurance Issues

- Have you read your policy?
- Do you understand the exclusions?
 - Dram Shop/Liquor Liability
 - Assault and Battery
- Have you obtained a rider for liquor liability?



Insurance Coverage Disputes

- *Rizzi v. U.S. Liability Ins. Co.*, 2010 WL 3174008 (Conn. Super. July 13, 2010)
- Outrageous facts and employee behavior → insurance company refuses to defend or indemnify
- How plaintiff's claims are styled may impact insurance company's duty under relevant policy

Conclusion

- Food Liability
 - Consider warnings
 - Understand the chain of distribution for the food you serve
 - Adopt good policies for employee behavior and follow them
- Liability arising from the Sale and Service of Alcoholic Beverages
 - Understand your insurance policy
 - Adopt good policies for employee behavior and follow them

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