

HOSPITALITYLAWYER.COM PRESENTS
**THE 2010 HOSPITALITY LAW
CONFERENCE**
FOCUSING ON WORLDWIDE LEGAL, SAFETY & SECURITY SOLUTIONS
FEBRUARY 3-5, 2010 • HOUSTON, TEXAS

Food & Beverage Litigation Survey

Presented by:

Elizabeth A. DeConti, Esq.
elizabeth.deconti@gray-robinson.com
(813) 273-5159

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.

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

- *Tedone v. H. J. Heinz Co.*, 2009 WL 4042764 (S.D.N.Y. Nov. 23, 2009)



- *Moltner v. Starbucks Coffee Co.*, 2009 WL 3573190 (S.D.N.Y. Oct. 23, 2009)



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)



- *Kaplan v. American Multi-Cinema, Inc.*, 21 Misc. 3d 1103 (A) (N.Y. City Civ. Ct. Sept. 19, 2008)



Allergens

- In re *McDonald's French Fries Litigation*, 257 F.R.D. 669 (N.D. Ill. May 6, 2009)
 - Motion for class certification
 - Consumers allege that McDonald's falsely claimed that its potato products are gluten, wheat and dairy free
 - Claim of economic harm, no physical injury
 - What representations do you make about your food products on menus, websites, and other company literature?

Bacteria Cases – Focus on Hepatitis A

- Do you have a policy in the event of an outbreak?
- *Emberton v. GMRI, Inc.*, 2009 WL 3517562 (Ky. Oct. 29, 2009)
- *Rudy's Country Store, Inc. v. D'Angelo's Sandwich Shops, Inc.*, 2009 WL 3334851 (Mass. Ct. App. Oct. 19, 2009)

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

Intervening, Superseding Causes

- *Oursler v. Brennan*, 2009 WL 2636522 (N.Y. A.D. Aug. 28, 2009)
 - The story of Mom, the Early Riser, and the Policeman



Should you assume the duty of getting your customer home safely?

- Negligent eviction is claim
- Does your establishment have a policy?
- The duty of care to the public when they are your invitees and when they leave
- Where does your duty begin and where does it end? Restatement (Second) of Torts 314A.
- *Hoff v. The Elkhorn Bar*, 613 F. Supp. 2d 1146 (D. N.D. 2009)

Do you have a duty to find transportation for intoxicated guests?

- *Rodriguez v. Primadonna Co.*, 2009 WL 3151167 (Nev. Oct. 1, 2009)
- *Bourgeois v. Vanderbilt*, 2009 WL 2323088 (W.D. Ark. Jul. 28, 2009)
- Special Issues of Concern to Casinos and Other Large Establishments



Other Causes of Action Appearing in Dram Shop Complaints

- Negligent hiring, negligent supervision, and other employment-related claims.
- *Johnson v. Brunswick Riverview Club*, 2009 WL 4506580 (Ala. Dec. 4, 2009) – the role of the internal alcoholic beverage policy.
- *Marotta v. Palm Mgmt. Corp.*, 2009 WL 497568 (S.D.N.Y. Feb. 25, 2009).

Other Causes of Action Appearing in Dram Shop Complaints (Continued)

- Negligent Security
- *Aristory v. Marine Dist. Dev. Co.*, 2009 WL 971423 (D.N.J. April 9, 2009).

Employee Issues

- *Owens v. Hooters Rest.*, 2009 WL 2997515 (Ala. Sept. 18, 2009) – problem of conducting after hours fun at the establishment.
- *Lev v. Beverly Enter. Massachusetts, Inc.*, 907 N.E. 2d 1114 (Mass. Ct. App. 2009) – work related drinking away from the premises

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 Cases Involving the Assault and Battery Exclusion

- Assault and Battery facts are fights in the parking lot, broken beer bottles, flying stools, and trampling
- *Marina Grand, Inc. v. Tower Ins. Co. of NY*, 882 N.Y.S. 2d 435 (N.Y. Ct. App. 2009)
- *Russell v. Burlington Ins. Co.*, 2009 WL 2901205 (D. Minn. Sept. 3, 2009)

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

Questions?



Help!

What does it all mean?

What should we do?

Contact me: (813) 273-5159

elizabeth.deconti@gray-robinson.com