# Food and Beverage Litigation Survey

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### A. FOOD LIABILITY: FOREIGN OBJECTS, ALLERGENS, AND E. COLI

Food liability cases are based in tort law. Black's Law Dictionary defines a tort as "[a] civil wrong for which a remedy may be obtained, usually in the form of damages; a breach of a duty that the law imposes on everyone in the same relation to one another as those involved in a given transaction." Black's Law Dictionary (2d Pocket Edition 2001). Included in the tort law definition are negligent torts, intentional torts, and strict liability. Strict liability is liability that does not depend on actual negligence or intent to harm, but is based on the breach of an absolute duty to make something safe. Black's Law Dictionary (2d Pocket Edition 2001).

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 common law rule in most United States jurisdictions, prior to the enactment of any statutes or the hearing of any cases on the subject, 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. In most cases, the statutes attempt to limit the licensed provider of alcohol's liability to certain delineated situations.

## II. FOOD LIABILITY

Food liability claims can involve restaurants, hotels/motels, food distributors, and food suppliers. Generally, plaintiffs bring food-related lawsuits involving illness or injury from a foreign object in the food, allergens, or food poisoning (usually an e-coli or other bacteria claim). The claims may be brought to court based on a number of theories, including strict liability, negligence, breach of implied warranty, and misrepresentation or nondisclosure.

In the strict liability context, issues raised tend to concern whether the food product in and of itself was so dangerous as to require a warning to potential consumers of the product. In breach of implied warranty causes of action, the plaintiff claims that the food is not reasonably fit for human consumption. *See, e.g., Clime v. Dewey Beach Enter.*, 831 F. Supp. 341 (D. Delaware 1993). This is also true of allergen cases, although they usually involve a failure to warn component as well. Cases involving injury arising from foreign objects in food can be the

most difficult to deal with because courts in different jurisdictions may apply different standards to determine the retailer's liability.

## A. 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*, 1 Cal. 4th 617, 822 P.2d 1292 (Cal. 1992). But if the injurious substance is foreign, the restaurant is strictly liable. .....
>
> 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.

Ironically, although *Porteous* is frequently cited to explain the difference between the foreign/natural and reasonable expectation tests, the *Porteous* court declined to adopt either test, and instead held that the appropriate analysis is the duty risk tort analysis. This continues to be the law in Louisiana today. *See Williams v. A&M Operating Co., Inc.*, 2007 WL 4246001 (La. Ct. App. Dec. 5, 2007).

Notwithstanding the vagaries of the Louisiana cases, the reasonable expectation test is the rule in most jurisdictions. Two recent cases in the Northeast demonstrate the trend.

It seems that the hamburger fact pattern dominates this area more than any other scenario. Plaintiff orders hamburger, plaintiff bites on something strange in hamburger, plaintiff breaks tooth (or worse)! The outcome of these cases, however, depends on what the plaintiff bit into and whether he or she can prove it. The latest example of this is *Cotter v. McDonald's Rest. Of Mass., Inc.*, 887 N.E. 2d 313 (Mass. Ct. App. 2008). The plaintiff purchased a meal at a McDonald's drive thru, and proceeded to eat his burger as he drove. He bit down on something hard, which he estimated to be the size of a BB. He tried to move the object around in his mouth to determine what it was, when he began to choke on the large mouthful. He spit the large mouthful out the window, and continued driving. He continued with his plans for the day, which included a fishing trip with his boss. The next day the plaintiff was in pain, and went to the dentist. He was diagnosed with a cracked wisdom tooth that needed extraction by an oral surgeon.

The plaintiff notified McDonald's by letter of his injuries. The parties were unable to resolve the matter, and so the plaintiff sued for negligence and breach of warranty. The trial judge granted McDonald's "no evidence" motion for summary judgment on the basis that there was no way to determine that the object plaintiff bit came from the hamburger (for example, it could have been a piece of his own tooth) and the plaintiff could offer no information about what the product was, other than its approximate size. The appellate court affirmed, because in order for the plaintiff to overcome McDonald's motion, he would have had to show that the object in the hamburger was something that a consumer would not reasonably expect to find therein. Id. At *1. Given the minimal amount of information plaintiff could offer, the jury would not be able to apply the reasonable expectation test.

Late last year, a New York City trial court analyzed popcorn under the reasonable expectation test. The setting was a movie theater. In a humorous unreported opinion, the court assessed whether moviegoers have the right to expect a "perfect bag free from unpopped kernels" or whether they should expect unpopped shells. The plaintiff was eating popcorn in the dark theater without inspecting the kernels, and broke his tooth on an unpopped or partially popped kernel. The court found that the plaintiff should have reasonably anticipated the unpopped kernels because "there is no such thing as a bag, a tub, or a bucket where all kernels have fully popped. *See Kaplan v. American Multi-Cinema, Inc.*, 2008 WL 4355434.

## B. ALLERGENS AND CONTAMINATED FOOD

Many food allergen lawsuits involve cross contamination. The recent case of *Moore v. P.F. Changs China Bistro, Inc.*, 2007 WL 2121240 (Cal. App. 2d Dist., unpublished) involved this specific issue.

In *Moore*, the plaintiff informed the waitress that she was allergic to lobster and shrimp. The plaintiff ordered two chicken dishes and a beef dish for herself. Her dining companion ordered the shrimp special. As soon as the plaintiff started to eat the beef dish, she noticed her mouth began to tingle although there was no shrimp or lobster to be seen in her food. The restaurant called paramedics and they rushed the plaintiff to the hospital, where she was intubated to keep her airway open. At the hospital, the plaintiff denied being exposed to any

known allergens. Four hospital physicians diagnosed the plaintiff as suffering from angioedema.[1] Of the four physicians, one was unable to diagnose the reason for the condition, but the other three concluded that the angioedema was caused by plaintiff's blood pressure medication. The plaintiff was not able to test the beef dish for the shellfish allergen because her dining companion took the plaintiff's food home with her and ate the leftovers.

The plaintiff brought an action against the restaurant alleging breach of warranty, negligence, negligence *per se*, and strict liability. The plaintiff contended that the restaurant had served her food tainted with shrimp and had caused her to suffer a serious reaction and injury. In support of its motion for summary judgment, the restaurant set forth the physicians' conclusions regarding the cause of the allergic reaction. Furthermore, the restaurant presented evidence that established its general food handling practices.[2] In opposition, the plaintiff introduced the declaration from a board certified physician in the field of allergy and immunology. The plaintiff's expert concluded that her angioedema was caused by exposure to shellfish. The plaintiff did not contest the restaurant's evidence regarding its normal food-handling practices. The trial court granted the restaurant's motion for summary judgment. The plaintiff appealed.

The California Court of Appeal affirmed the trial court's ruling. The court explained that to support a claim for strict liability/failure-to-warn based on allergic reaction to a food product the plaintiff must establish, in addition to causation and damages, that: (1) the food product contained an ingredient to which a substantial number of the population are allergic; (2) the ingredient is one whose danger is not generally known or, if known, is one that the consumer would reasonably not expect to find in the food product; and (3) the defendant knew or should have known of the presence of the ingredient and the danger. *Id.* at *3. Therefore, the plaintiff had to prove the presence of the allergen shellfish in the beef dish.

A plaintiff cannot prove the allergen presence merely by showing that the plaintiff became sick after eating the food product. However, circumstantial evidence may be used to show the presence of the injury-causing ingredient. There are five categories of evidence helpful in proving the injurious nature of the food ingested at a restaurant where the food is not available for scientific analysis: (1) evidence the food was outwardly deleterious; (2) evidence that others who ate the same food at approximately the same time became ill; (3) evidence that others who did not become ill ate everything but the suspect item; (4) evidence tending to exclude other causes of plaintiff's illness; and (5) evidence of unsanitary conditions in the restaurant's kitchen. *Id.* at *4. Here, the court reasoned that the restaurant's evidence regarding its food handling practices, along with the restaurant's evidence that three physicians concluded that the angioedema was caused by high blood pressure medication, were sufficient to demonstrate that

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[1] Angioedema is a swelling similar to hives, but the swelling is beneath the skin rather than on the surface. The swellings are called welts. Angioedema may be caused by an allergic reaction. It is associated with the release of histamine and other chemicals into the bloodstream. The body releases histamine when the immune system detects a foreign substance called an allergen. Sometimes the cause of angioedema is never found. Medline Plus Medical Encyclopedia, http://www.nlm.nih.gov/medlineplus/ency/article/000846.htm (lasted visited September 2, 2007).

[2] The restaurant presented evidence regarding how beef, chicken, and fish are delivered, stored, cleaned, and prepared in separate areas and color coded pots, pans, dishes, and utensils. The restaurant also presented evidence on how the pots, pans, dishes, and utensils are cleaned.

the plaintiff would not be able to prove the presence of the shellfish.

When we hear the terms contamination and cross-contamination, we think of allergen cases such as the one against P.F. Chang's. However, an allergy situation is not the only risk of cross-contaminated food, as illustrated by the case of *Siegel v. Ridgewells, Inc.*, 511 F. Supp. 2d 188 (D.D.C. 2007). *Siegel* involved a Kosher wedding. The wedding parties and the rabbi who performed the wedding sued Ridgewells, a catering service, for ruining the wedding by serving non-Kosher food when the bride's family had specifically ordered Kosher food for their guests. The plaintiffs sued for breach of contract, battery, negligent infliction of emotional distress, and violation of the District of Columbia Consumer Protection Act.

The Siegels negotiated a contract with Ridgewells with the assistance of an employee of Ridgewells who represented that she had experience as a mashgiach.[3] Initially the Siegels planned to request a Kosher catering contract which would have involved using all kosher food, having all preparations made in a Kosher kitchen, and having the entire process overseen by a practicing mashgiach. However, for cost reasons and because the Ridgewells employee had prior experience in this area, the Siegels elected a semi-Kosher contract instead. Specifically, Ridgewells represented that it would use kosher meat and would use no dairy or shrimp in preparing the food. Also, the sushi was to be "made to order" and was to contain salmon and yellow fin tuna. *Id.* at 191. Unfortunately, problems occurred and the food at the reception did not go as planned. There were shrimp, octopus, and eel (non-Kosher foods) in the sushi and the canapés contained dairy products. *Id.*

The most compelling claims raised by the plaintiffs here are those they brought for negligent infliction of emotional distress and for battery. The emotional distress claim was based on a line of cases about the fear of eating contaminated food. However, the court found that the unhappiness imposed upon plaintiffs did not rise to this level. In reaching this conclusion, the court relied upon testimony from the rabbi that he did not specifically recall eating any of the non-Kosher sushi, and when he recognized the shrimp, did not eat any of it. According to the court, this testimony shows that the rabbi was not in the zone of danger. *Id.* at 194.

The battery claim also focused on the rabbi's testimony. He alleged that he was a victim of offensive contacts with non-Kosher food. Again, however, because there was no evidence that the rabbi actually came into contact with the non-Kosher food, the battery claim could not survive summary judgment. *Id.* Though the plaintiffs did not prevail, this case illustrates that food providers and preparers may be liable for not being able to comply with dietary restrictions related to religious practices and observances.

### C. BACTERIAL AND VIRAL INFECTIONS

Frequently litigation arises as a result of the plaintiff having become ill from an bacterial or viral infection he or she contracted directly from food or from an infected restaurant worker.

[3] A mashgiach is an individual who monitors food preparation to prevent violations of Jewish dietary laws. 511 F. Supp. 2d at 191.

The following cases are examples of these problems.

*Kallas v. Carnival Corp.*, 2007 WL 1526699 (S.D. Fla. May 23, 2007) is worthy of note if only to highlight the continuing problem of Norwalk Virus contamination on cruise ships. Plaintiffs filed this case against Carnival Cruise lines after they claimed that they contracted the Norwalk Virus. One member of the family died. The complaint contained claims for Strict Liability, Breach of Implied Warranties, Breach of Express Warranties, Negligence, and Breach of Contract.

The cruise line filed a motion to dismiss Plaintiffs' claims. As for the breach of express warranty count, Plaintiffs claim that the cruise line expressly warranted that their food would be fit for human consumption and would not be contaminated with the Norovirus. Furthermore, plaintiffs claimed that the cruise line breached its contract with them by selling them food or beverages that were contaminated and by "failing to adequately clean, sanitize and disinfect the subject vessel." *Id.* at *2. The cruise line responded by arguing that the ticket contract is the entire agreement between Carnival and its customers and it does not warrant the food and beverages to be served. Plaintiffs claimed that the "Welcome Aboard" booklet published by the cruise line was part of the ticket contract and did warrant the food. Viewing the facts most favorably to Plaintiffs at the motion to dismiss stage of the case, the court held that they had properly alleged a claim for breach of warranty. *Id.*

These type of cases frequently deal with viruses contracted by Plaintiffs arising from contact with raw or undercooked seafood products. *Foster v. Legal Sea Foods, Inc.*, 2008 WL 2945561 (D. Md. July 25, 2008) involved one such situation. Plaintiffs, a husband and wife, alleged that they contracted Hepatitis A after eating undercooked mussels at a Legal Seafood Restaurant in Baltimore, and sued the restaurant for negligence, strict liability, and breach of warranty. Plaintiffs also sued the seafood supplier used by the restaurant, GEMF, and claimed that GEMF supplied Legal Seafood with contaminated mussels harvested from polluted water.

The facts were as follows. Plaintiffs ordered a steamed mussels appetizer and shared it. They ate about half of the portion when they saw that some of the mussels appeared to be closed and therefore undercooked. They informed the waitress, who took the mussels back to the kitchen for further cooking, and then brought back what appeared to be the same batch. Thirty-three days later, the husband became severely ill, was admitted to the hospital, and was diagnosed with acute Hepatitis A ("HAV"). Three weeks later, his wife became ill and also had to be hospitalized, and she was diagnosed with secondary HAV. Plaintiffs' expert concluded that the husband's HAV was caused by consumption of the undercooked mussels, and his wife's was caused by her consumption, and/or ordinary household transmission from her husband.

Following a classic "battle of the experts" the Court found that plaintiffs' experts could not link conclusively plaintiffs' consumption of the mussels to their illnesses, and therefore the plaintiffs failed to prove causation. Defense experts presented evidence on the lack of epidemiological evidence linking seafood to HAV, largely because of the long incubation period for the disease. A period of thirty-three days passed between the time plaintiffs ate at Legal Seafood and the onset of the husband's illness; moreover, the plaintiffs returned to their

hometown of Houston, Texas, during this time, and defense experts presented evidence that HAV-infected food handlers are the most common cause of the virus, and that HAV is most common in the southwestern U.S. where plaintiffs lived. In addition, the court noted that there was no triable issue of fact with regard to GEMF; the supplier presented evidence that it purged mussels in closed water without any history of contamination, and also that there is a very low incidence of contamination in any water regardless. Finally, the extended timing of the plaintiffs' illnesses, combined with the fact that there were no other complaints during the same period against Legal Seafood or in the Baltimore area generally, convinced the court that causation could not be proved. *Id* at 14.

### D. EVIDENTIARY ISSUES–WATCH OUT FOR THOSE HEALTH INSPECTIONS

Plaintiffs in food liability cases frequently rely on circumstantial evidence because they have to relate their illness to a particular food product and rule out other causes. The two instructive cases below involved reports from health inspections which were introduced as evidence. These cases highlight the importance of having the retail premises in good condition for these inspections.

*Evans v. MIPTT, LLC*, 2007 WL 1716443 (Tex. Ct. App. June 14, 2007) is a case from the Houston area involving an incident at the East Coast Buffet. This is a case of the "seafood buffet" genre. Plaintiff consumed two plates of crab from a buffet and was apparently waiting to serve herself a third when she became very ill at the restaurant. She went to the hospital in an ambulance and was diagnosed there with acute gastritis; her personal physician diagnosed food poisoning a few days later. Plaintiff sued in negligence and strict liability. The restaurant filed a "no evidence" motion for summary judgment.

In an effort to defeat the defense motion, the Plaintiff claimed that because she became ill immediately upon consuming the crab, this was evidence that the restaurant was to blame for her illness. The court held that this standing alone was insufficient to overcome the no-evidence motion. The Plaintiff further argued that that she did not know of anyone else who had eaten the crab, but the court found this to be a self-serving allegation because she did not know for certain that she was the only person who had consumed the crab. *Id.* at *4.

Plaintiff also relied on City of Houston inspection reports, which, according to her, "showed serious and general health violations, each of which could have been the cause of the unwholesomeness of the food she consumed." *Id.* The violations cited included a temporary quarantine of the dishwasher because of inadequate concentration of bleach for sanitizing, and food debris found on the can-opener roller. The Court, however, in reviewing the complete report of the city inspector, found that the report indicated that the food on the buffet was the proper temperature and that there was no wrongdoing in the handling of food. The Court was not convinced by Plaintiff's counter argument that the report was not conclusive because the remaining allegedly tainted crabmeat could have been thrown out before the inspection, and concluded that plaintiff could only raise surmise or suspicion, and could not proffer any real evidence to defeat the no evidence motion for summary judgment. *Id.* at *5.

Although the health inspection reports did not help the plaintiff in *Evans*, they certainly were relevant, and this likely will be the finding in most cases despite restaurants' desire to keep these reports out of evidence. This was one of the issues in *Corkern v. Outback Steakhouse of Florida, Inc.*, 2007 WL 1772031 (E.D. La. June 18, 2007). In that case, one of the issues considered by the court was whether inspection reports should be excluded from evidence as being more prejudicial than probative.

The Court considered a motion in limine from Outback to exclude certain health inspection reports from the time period 2003-2006 on the basis that they were not relevant as to time as related to the incident which gave rise to the Plaintiff's alleged injuries, which occurred in October of 2004. Outback also claimed that the reports were prejudicial.

The court disagreed with Outback and allowed the reports to be introduced into evidence. As for the timing issue, the court held that the reports spread over a wide range of dates which included the date of the incident in question, and that they therefore bore on a consequential fact – the existence of foodborne illness – and so were relevant. As to the prejudice argument, the court found that the reports were not more prejudicial than probative because Outback would have the opportunity to question witnesses about the frequency of the inspections and the validity of the items noted on the reports. *Id.* at *2.

## III. DRAM SHOP LAW UPDATE

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, will depend on several factors, including but not limited to the state law where the accident occurred. The degree to which the accident was foreseeable by the licensee is always an issue. Of particular significance is the sub-issue of how much responsibility a licensee should have for getting a patron safely home. Recently courts also considered some interesting legal issues raised by plaintiffs in an attempt to go beyond the limitations imposed by dram shop statutes. These included expanding the range of possible defendants and dressing the dram shop claim in the clothing of another cause of action.

### A. THE FORESEEABILITY QUESTION - DOES A LICENSEE HAVE A DUTY TO DETERMINE HOW PATRONS ARE GETTING HOME?

When judges and attorneys use the term "foreseeability" in dram shop cases, they are discussing whether a particular injury or event was predictable in advance by the licensee. Put in more colloquial terms: should the licensee have seen the accident or injury coming? Should the licensee have "known better"?[4]

Many licensees ask how much responsibility they have for making sure patrons leave the

[4] Black's Dictionary defines "forseeability" as: "[t]he quality of being reasonably anticipatable. Foreseeability, along with actual causation, is an element of proximate cause in tort law." (8th ed., 2004)

premises safely and do not get behind the wheel of a car in an intoxicated condition. More specifically, licensees ask what duty they have to do any of the following: (1) call a taxi for the patron or otherwise find a designated driver to escort the patron off the premises; (2) follow the patron to the parking lot to make sure he or she does not get behind the wheel of a car; (3) attempt to keep the patron on the premises until he or she is ready to drive; (4) serve the patron food or non-alcohol beverages until such time as the patron is able to drive away safely. Once these duties have been assumed, how far do they go? For example, does the licensee actually have a duty to make sure that the patron actually goes home?

In *Filberto v. Herk's Tavern*, 37 A.D. 3d 1007 (N.Y. App. Div. 2007) a New York appellate court focused on the foreseeability issue. After consuming numerous alcohol beverages at the tavern, Filberto went out to eat with his friend, Phillip Bracchi, who happened to be the bartender, sole officer, employee, and owner of the tavern. Apparently Filberto was a regular at the bar and the two went out to eat after drinks frequently. Bracchi drove the pair to a diner where they ordered hot roast beef sandwiches. Filberto choked on his sandwich and died.

Filberto's estate sued Bracchi as an individual and his tavern for dramshop violations and negligence. Plaintiff claimed that Bracchi voluntarily assumed a duty to take Filberto home, and breached that duty. Plaintiff further argued that Bracchi was negligent by permitting Filberto to order a meal which would be difficult for him to chew in his intoxicated condition.

The lower court found that Bracchi had assumed a duty to take care of Filberto and take him home. However, the appellate court reversed on this point, finding that there was no proof that Bracchi intended to take Filberto home. Bracchi's record testimony indicates that their normal custom was to drive to the restaurant together to avoid taking two cars, and that his intention was to return Filberto to the bar parking lot to retrieve his car after the meal. Therefore, the court held that Bracchi's carpooling to the restaurant did not amount to taking charge of Filberto and was not a voluntary undertaking of a duty toward him. *Id.* at 1009. The Court further held that choking on a piece of unchewed meat was not a foreseeable risk of going out to eat, and that Bracchi did not have a duty to protect Filberto from this remote possibility. *Id.*

*Patterson v. Thunder Pass, Inc.*, 153 P.3d 1064 (Ariz. Ct.. App. 2007), also addressed the issue of how far a licensee's duty extends to see a patron safely off the premises once the licensee assumes this duty. In this case, the patron went to the defendant's tavern, where she drank alcohol beverages and was observed to be intoxicated. As the patron tried to leave the premises, she backed into another parked vehicle and then drove over a parking block. The defendant's employee confiscated the patron's keys and called her a cab. The cab did not arrive, and as a result another employee drove the patron home and returned her keys to her. After an hour, the patron returned to the parking lot to get her vehicle. On her way home, the patron collided head-on with another vehicle. The driver of the other vehicle filed a negligence lawsuit against the tavern owner, alleging that the plaintiff had sustained damages as a result of the defendant serving alcohol beverages to the patron, who later caused the accident that injured the plaintiff.

Defendant filed a motion for summary judgment arguing that it had fulfilled any duty owed because the patron had been safely driven home. The defendant further argued that the

patron's decision to return to retrieve her vehicle was an unforeseeable and a superseding, intervening event that negated any alleged negligence on the defendant's part.

The trial court granted the defendant summary judgment. The plaintiff appealed. The Arizona Court of Appeals upheld the trial court's ruling, finding that the plaintiff had not shown "causation-in-fact," and that the tavern owner was relieved of liability because plaintiff's injury occurred due to a later, intervening event of independent origin for which the owner is not responsible. *Id.* at 1069.

To constitute a cause relieving the tavern owner of liability, the intervening event must have also been superseding. That is, it must have been unforeseeable by a reasonable person in the position of the tavern owner, and when looking back after the event, the intervening event must appear extraordinary. The intoxicated tavern patron's act of returning to the tavern to retrieve her car after tavern employees drove her home was superseding intervening cause that relieved tavern owner of any liability for injuries suffered by plaintiff in the subsequent traffic collision with the patron. *Id.*

In spite of the defense victories obtained in these recent decisions, licensees may wonder whether taking steps to assist patrons off the premises actually exposes them to more liability. After all, if plaintiff's counsel is only going to turn around and use the bar's prevention procedures to argue that it should be liable, are such measures worth the trouble? Despite the plaintiff's arguments in the cases above, the answer is still yes.

First, although no licensee can control everyone and although no one has a crystal ball, by taking steps not to serve the intoxicated and to escort patrons safely off the premises, you may be able to prevent an accident. If you can show that you have a pattern and practice of good safety and compliance, in the event there is an accident, you can show it to be an anomaly (and therefore not your fault). Second, many state licensing authorities now require TIPS training and other preventive training for employees, and not keeping current may jeopardize your license. Finally, by showing that you have a company policy and employee training, you may be able to secure a lower insurance premium for your establishment.

## B. EXPANDING THE ROSTER OF DEFENDANTS

Most dram shop actions are brought against traditional on premises establishments such as restaurants, bars, and hotels and motels. Dram shop statutes place limitations on the kinds of actions plaintiffs can bring against immediate sellers of alcohol, and also place monetary limits on recovery. To compensate, the plaintiffs' bar is reaching beyond immediate sellers of alcohol to other parties. Below is a sampling of cases brought against other kinds of liquor licensees, including alcohol beverage manufacturers, parent companies, and liquor stores selling to social hosts.

### 1. Cases Against Manufacturers and Wholesalers

Although Anheuser-Busch prevailed in the case of *Rogers v. Anheuser-Busch, Inc.*, 491 F.3d 1165 (10th Cir. 2007), the case shows that manufacturers of alcohol beverages may be forced to

defend dram shop claims when they sponsor events where alcohol beverages are served to the public.

*Rogers* concerned an accident which followed an annual event called the Calf Fry. The Calf Fry is a concert hosted by the Tumbleweed Bar in Stillwater, Oklahoma, near Oklahoma State University. Anheuser-Busch and a private promoter sponsored the event by paying for publicity. Anheuser-Busch also provided its products for the event on a non-exclusive basis. Its employees were on hand to keep kegs refrigerated in trucks and to instruct the Tumbleweed's employees on proper use of the kegs.

The plaintiff's decedent, Krystle Rogers, was killed, and her two passengers were injured when an intoxicated Randall Albright, who was leaving the Calf Fry, collided with their car. The plaintiffs argued that Anheuser-Busch was liable under negligence and wrongful death causes of action because its employees had served Albright despite his obvious intoxication at an event sponsored by Anheuser-Busch where its beer was served.

Anheuser-Busch argued that it could not be liable because as a manufacturer, it had not actually served any beer to Albright. Plaintiffs argued that Anheuser-Busch was liable under three theories: (1) negligence per se; (2) dram shop violations for serving an obviously intoxicated person; and (3) as a joint venturer of Tumbleweeds. Anheuser-Busch filed a motion for summary judgment, which was granted by the district court.

Plaintiffs claimed that Anheuser-Busch was negligent per se by violating Oklahoma's dram shop statute which states: "no holder of a retail license or permit to sell...beer, or an employee or agent of a holder of such a license or permit, shall knowingly, willfully, and wantonly sell, deliver, or furnish...beer to an intoxicated person." Okla. Stat. tit. 37, § 247. Plaintiffs argued that the statute applied because Anheuser-Busch has a "permit." The Court disagreed with Plaintiffs' argument, finding both that "permit" meant a retail permit, and that Anheuser-Busch did not do any selling at the event.

In the alternative, Plaintiffs argued that Anheuser-Busch was liable in ordinary negligence. Again, the court found Plaintiffs' claims unconvincing because Anheuser-Busch did not deal with retail consumers during the event. It did not do any serving. It did not make decisions about whom to serve or how much.

Finally, Plaintiffs argued using a joint venturer theory that it did not matter if Anheuser-Busch did not serve the alcoholic beverages, because it should be liable for the actions of its joint venturer, Tumbleweed. However, in order to have been joint venturers, Tumbleweed and Anheuser-Busch would have needed to share profits from the event, and this did not occur. Rather, their relationship was simply supplier and retailer, where Anheuser-Busch sold its products at regular prices to the local distributor, who sold them to Tumbleweed, who in turn used them for the event. Because the Court of Appeals found the joint venture argument unconvincing as well, it affirmed the summary judgment entered by the district court. 491 F. 3d at 1173.

## 2. Suits Against Parent Companies and Lessors

In a situation where the immediate seller of alcohol may not have deep pockets, plaintiffs attorneys frequently will attempt to bring in other more attenuated actors as defendants in a dram shop lawsuit. Such was the case in *Phoung Luc v. Wyndham Management Corp.*, 496 F. 3d 85 (1st Cir. 2007). The plaintiff and his pregnant wife were pulled over on the break down lane of the highway when they were hit by an intoxicated driver. The wife's injuries were serious and she lost the baby. Plaintiffs sued the intoxicated driver, Roberto Madruga, and the bar he had visited, the Roxy, which was housed inside the Tremont Hotel. The hotel and the Roxy were separate entities owned by different companies. Plaintiffs also sued some eight other corporate defendants, all of which had some role in the ownership or management of the hotel. Plaintiffs raised two claims against the Roxy for its "method of operations" as well as for dram shop violations, and filed some thirteen claims against the hotel. Eventually, the lower court dismissed all of the claims against the defendants at the motion to dismiss and summary judgment stages of the case.

Plaintiff appealed to the First Circuit Court of Appeals. Plaintiffs contended the district court erred in dismissing their "method of operation" claim against the Roxy. This was a new theory of law that Plaintiffs were urging the lower court to adopt. Massachusetts law imposes dram shop liability on licensees if they knew or reasonably should have known that their patron was intoxicated. *Cimino v. Milford Keg, Inc.*, 431 N.E. 2d 920, 924 (Mass. 1982). In order to make a case, the plaintiff has to show that the patron's intoxication was apparent to the provider. Plaintiffs in *Phoung Luc* looked to take this a step further by introducing circumstantial evidence to show that the Roxy's "method of operation" was conducive to serving intoxicated patrons because the bar was managed so as to ensure maximum alcohol sales with minimal knowledge on the part of the bartenders about the level of intoxication of any particular patron. Plaintiffs highlighted the following conditions at the Roxy in support of their theory: (1) low ratio of servers to customers (one server for every sixty customers); (2) a dark, loud, and crowded atmosphere; (3) multiple sales points that the patrons could go to in order to avoid being seen by the same server repeatedly. Plaintiffs contended that these conditions made it nearly impossible for the servers to apply responsible vendor training. Finally, plaintiffs argued that the Roxy should have been on notice of the problems these conditions were causing, because the bar had been cited for alcohol-related incidents five times in the five months before the plaintiffs' accident.

Despite the logic of plaintiff's theory, the federal court was forced to reject it. According to Massachusetts state law, licensees may only be liable for serving the already intoxicated. Any alteration to that rule would have to come from the state courts or the state legislature. Therefore, the federal court affirmed the district court's dismissal of the claim against the Roxy. 496 F. 3d at 91.

The appellate court also addressed plaintiffs' many claims against the hotel. A couple of these claims were based on the hotel's role as the lessor of the space to the bar, under the theory that the hotel knew when the lease was signed that the Roxy would serve alcohol and that there was an unreasonable risk of the bar over serving patrons. In conjunction with this argument, plaintiffs also argued that the hotel exercised control over the Roxy's business practices. The

problem with these arguments, the court held, was that they require negligence on the part of the bar itself, and, as the court found with regard to the claims against the Roxy, this element could not be met. In the absence of a finding of negligent conduct by the Roxy, the hotel could not be liable under these theories. 496 F. 3d 94.

### 3. Suing a Liquor Store in a Social Host Case

*Barry v. Gorecki*, 38 A.D.3d 1213 (N.Y. App. Div. 2007) is another example of a plaintiff attempting to widen the net of defendants. Plaintiff was the mother of a party guest who became intoxicated and was injured. Plaintiff's son had been drinking at the party when a fight broke out in the house. The host of the party asked guests to move outside. Neighbors called police and the guests began to scatter. Plaintiff's son ran through the backyard, and did not realize that the edge of the property was a cliff, and fell. Plaintiff sued the owners of the land, their son who hosted the party, and the liquor store which sold the host the alcohol for the party. The host was a minor and the beverages were purchased illegally.

Plaintiff argued that the unlawful sale contributed to the intoxication of the party host, which caused him not to be able to control his own party, and thus caused Plaintiff's son's injuries. In addition, Plaintiff claims that the unlawful sale contributed to the host's failing to warn Plaintiff's son about the cliff.

The court found that there was no proximate cause between the failure to supervise the partygoers and the injuries at issue, and that there was no practical connection between the unlawful sale and the resulting injuries. *Id.* at 1215-1216.

## C. STYLING A DRAM SHOP CASE AS NEGLIGENT HIRING/SUPERVISION

Another trend being used to circumvent the limitations contained in dram shop statutes is a restyling of the dram shop case into other causes of action, especially negligent hiring, and negligent supervision. These claims are used almost as "catch-alls" if and when the dram shop cause of action gets dismissed.

In *Henning v. Montecini Hospitality, Inc.*, 172 P.2d 430 (Ariz. Ct. App. 2007), the Plaintiff was the guardian of a young man who was seriously injured in an automobile accident after he and a friend, the driver, had been drinking at a bar known as Famous Sam's. At the time of the incident, Famous Sam's was owned by the defendant Montecini Hospitality, Inc., but was being operated by another company, Zimbow Enterprises, Inc. At the time, Zimbow was in the process of purchasing the bar. The plaintiff's case against Montecini was based on a claim that Montecini was liable under the dram shop law because it negligently trained its employees to serve alcohol beverages to obviously intoxicated or underage patrons. Montecini won a summary judgment motion in the lower court on the basis that it did not exercise sufficient control over the bar any longer so as to be responsible for negligent supervision of the employees.

The accident underlying the case occurred in January of 2005. The initial purchase

agreement between Montecini and Zimbow was signed in late 2004. The agreement provided that Zimbow would be responsible for all employees' salaries as of December 29, 2004, and would also transfer all utilities on the property as of that date. The agreement further provided that Zimbow would be responsible for all franchise fees due to the owner of the Famous Sam's brand on January 1, 2005. Notwithstanding this, the sale to Zimbow was not ratified by the franchisor until February 3, 2005. The Arizona Department of Liquor Licenses and Control issued a temporary liquor license to Zimbow on December 30, 2004. Given these facts, the lower court determined that the January, 2005, accident occurred after Zimbow took possession of the bar but before ownership had passed fully from Montecini. The plaintiff settled its claims against Famous Sam's and Zimbow, but proceeded to summary judgment against Montecini. After originally denying the motion, the court granted summary judgment to Montecini on a motion to reconsider, and decided that Montecini did not owe a duty of care because it did not have possession and control of the bar on the night of the incident and did not employ the servers at that time.

On appeal, the plaintiffs argued that Montecini owed a duty of care under the state dram shop law simply because it still owned the bar at the time of the accident. The court disagreed, finding that a party who is merely associated with a licensee, but who does not control the sales, service, or furnishing of alcohol by the licensee, cannot be liable. The court made this finding despite evidence introduced by Plaintiffs that Montecini may have advised Zimbow on serving practices, such as when to cut off customers.

The appellate court also affirmed the lower court's dismissal of the negligent training count. Plaintiff's argument was that the employees Montecini had originally hired and who now were employed by Zimbow were negligently trained by Montecini on alcohol service. While acknowledging that there may be some circumstances where an employer may be liable for the acts of its former employee, the court declined to apply this concept in the dramshop setting because the former employer no longer has the ability to train, supervise, discipline or terminate. To hold otherwise, the court found, would mean that an employer could never escape potential liability for the acts of a former employee.

*Kupec v. Classic Rock Café, Inc.*, 2007 WL 4577380 (Conn. Super. Nov. 28, 2007), is another example of a plaintiff trying to use a negligent supervision claim to circumvent the limitations of dram shop law. This Connecticut trial court decision involved a first party action by a plaintiff who was injured in a one car accident following an evening of drinking at the Classic Rock Café. Because Connecticut does not recognize first party dram shop claims, the plaintiff's negligence claims against the bar were dismissed. However, he also filed a negligent supervision claim, and argued that the bar's failure to supervise its employees led to an unsafe business environment and to his injuries.

The court found that the negligent supervision claim was a disguise for what was really a claim for the negligent sale of alcohol. The court noted that these claims have only been allowed in situations involving alcohol where the plaintiff was assaulted by another patron on the premises. In cases like *Kupec*, where the claim is really based on the negligent sale of alcohol and on the alleged failure of the defendant's employees to keep the plaintiff from driving, the negligent supervision claim is rejected. *Id* at *4.

*Marotta v. Palm Mgmt. Corp.*, 2009 WL 497568 (S.D.N.Y. Feb. 25, 2009) involved a New Year's Eve attack at a Palm Restaurant. The plaintiff alleged common law claims for premises liability, negligent hiring, and a statutory claim under New York's dram shop law after he was injured by another patron attending a New Year's Eve party. The defendant moved to dismiss all the plaintiff's claims, and the Court granted the motion to dismiss as to the negligent hiring and supervision claim, but denied it as to the dram shop and premises liability claims. On the negligent hiring and supervision claim, the Court found that the plaintiff's claim that the employees served the assailant while he was visibly intoxicated did not constitute negligent hiring because the activity of serving was not outside the scope of their employment. Furthermore, the Court found that the plaintiff properly alleged the elements of the dram shop claim, because "there is nothing inherently implausible about a restaurant patron getting drunk on [New Year's Eve]." *Id* at *4.

Whereas the negligent hiring and supervision claim in Marotta focused on employee training, another variation focuses on lack of security. Such was the case in *Aristory v. Marine Dist. Dev. Co.*, 2009 WL 971423 (D. N.J. April 9, 2009). Plaintiff, who had not been drinking, was at the Borgata casino in a club with friends. Somehow he got into the middle of a fight and was injured when he was struck in the face with a broken glass bottle. He sued the casino, alleging violations of New Jersey's dram shop law and several negligence claims related to alleged inadequate security and failure to train employees.

The Court granted a defense motion on the dram shop claim, because Plaintiff could not present any evidence establishing that his assailant was visibly intoxicated when served. *Id* at *3. However, the court denied the portion of the motion for summary judgment based upon the plaintiff's presentation of evidence that a melee went on for thirty to forty-five minutes before security became involved. *Id.* As such the case is exemplary of one where the dram shop case may fail, but plaintiff may be able to recover on the negligent security claims.

## IV. CONCLUSION

In the food liability area, fact patterns which we see repeatedly are foreign objects in food, allergic reactions, and bacterial and viral infections. *Siegel v. Ridgewells, Inc., supra,* however reminds us that contaminated food is not limited to the allergen context. As with most litigation, lawsuits in the food liability area are extending to new classes of defendants.

Foreseeability continues to be a determinative issue in dram shop cases. The specific issue of how and whether to assume the duty of sending patrons home is a popular topic. As with the food liability cases, the trend in dram shop litigation is to expand the list of possible defendants, and to expand the available causes of action.

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