

Food & Beverage Litigation Survey

The Hospitality Law Conference
February 8-10, 2012
Houston, Texas

Presented by:

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Presenter



- 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, food liability, 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?
- Emotional Distress
- Allergens/Cross-Contamination
- Bacteria/Viruses

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

Legal Analysis

Precedent:

- *Mexicali Rose v. Superior Court*, 1 Cal 4th 617, 822.P.2d 1292 (Cal. 1992)
 - Chicken bone in chicken enchilada
 - Reasonable expectation analysis may be based on foreign/natural test

Compare:

- *Foor v Amici's East Coast Pizzeria*, 2011 WL 3854818 (Cal. Ct. App. Aug. 31, 2011)
 - Olive pits in olives in antipasto salad.

Legal Analysis

Are there limits to *Mexicali Rose*?

- *Harris v Costco Wholesale Corp.*, 2011 WL 198154 (N.D. Ca. Jan. 20, 2011)
- Question of whether preparation of food was natural to the item vs. whether something in it was natural to the item

Emotional Distress Claims Involving Food

- From Foreign Objects:
 - *Stebbins v. Funderburk Mgmt Co.*, 2011 WL 5117784 (Tenn. Ct. App. Oct. 26, 2011)
 - Plaintiff finds crowned tooth in biscuits and gravy.
 - Based on state law, Plaintiff could not prevail on deceptive practice/misrepresentation claim.
- Involving the “Zone of Danger”
 - *Gunn v. KFC U.S. Properties, Inc.*, 2011 WL 3780091 (Ala. Ct. App. Aug. 26, 2011)
 - *Gupta v. Asha Enter., LLC* 27 A. 3d 953 (N.J. Ct. App. 2011)

Allergens



- *Rumm v. The Shack Restaurant*, 2011 WL 1468361 (Conn. Super. Mar. 25, 2011)
 - Child's peanut allergy
 - Contributory Negligence



Bacteria / Food Poisoning

- These are fact-based cases dependent on expert testimony
- *Crosby v. Wal-Mart Stores, Inc.*, 67 So 3d 1695 (La. Ct. App. 2011)
- Plaintiff loses because physician cannot commit to diagnosis

Bad Oysters –A subgenre of cases

- *Bergeron v. Pacific Food, Inc.*, 2011 WL 1017872 (Conn. Super. Feb. 14, 2011)
 - Adequacy of warning
- *Bergeron v. Argonaut Great Central Ins. Co.*, 64 So 3d 255 (La. Ct. App 2011), 2011 WL 1017872 (Conn. Super. Feb. 14, 2011)
 - Visibility and location of warning

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



Dram Shop Law and Federal Preemption

Airline Cases

- Balance between federal and state legislation on alcohol service/liability

Cruise line Cases

- Federal and maritime law, state tort and criminal law, and international law

Casinos

- Tribal immunity issues



US Airways, Inc. v. O'Donnell 627 F.3d 1318 (10th Cir. 2010)

Federal Aviation Act preempts state law on alcohol service, but Twenty-first Amendment requires balancing of core powers of state and federal interests.

- Facts: Following a car accident caused by an intoxicated airline passenger, among other state liquor law violations, state regulators filed a cease-and-desist order instructing airline to refrain from serving alcohol in the state of New Mexico without the proper license. After airline applied for the public service license the state regulators declined to issue the license at which point the airline filed this action claiming that that FAA preempts the New Mexico Liquor Control Act.
- “Based on the FAA’s purpose to centralize aviation regulation and the comprehensive regulatory scheme promulgated pursuant to the FAA, we conclude that federal regulation occupies the field of aviation safety to the exclusion of state regulations.”
- “Thus, even though NMLCA represents the exercise of a core state power pursuant to the Twenty-First Amendment, a balancing of state and federal interests must be conducted.”

Tribal Immunity

- *Furry v. Miccosukee Tribe of Indians of Florida*, 2011 WL 2747666 (S.D. Fla. July 13, 2011)
 - Casino owned by tribe violates Florida's dram shop law
 - Intoxicant subsequently causes accident
 - Tribe maintains sovereign immunity even though it is licensed by the Florida Division of Alcoholic Beverages and Tobacco and avails itself of significant profits from alcohol beverage sales

Was the Accident or Injury Foreseeable?

- *Kiely v. Benini*, 89 A.D. 3d 807, 932 N.Y.S. 2d 181 (N.Y. Ct. App. 2011)
 - Assaults not foreseeable without more facts
- *Flores v. Exprezit! Stores-98 Georgia, LLC*, 713 S.E. 2d 368 (Ga. 2011)
 - Foreseeable that customer would drive
- *In Build It And They Will Drink, Inc. v. Strauch*, 253 P.3d 302 (Colo. 2011)
 - Foreseeability not required for liability

What Constitutes “Visibly Intoxicated?”

- *Robinson Prop. Group Ltd. Partnership v. McCalman*, 51 So. 3d 946 (Miss. 2011)
 - Casino environment
 - Role of the “battle of the experts”
- *Nokes v. HMS Host USA, LLC*, 2011 WL 4025450 (Mo. Ct. App. Sept. 13, 2011).
 - Airport lounge
 - Circumstantial evidence raised genuine issues of material fact

What Constitutes “Visibly Intoxicated?”

- *Caplinger v. Korrzan Rest. Mgmt., Inc.*, 2011 WL 5831320 (Oh. Ct. App. Nov. 21, 2011)
 - Precedents require actual knowledge of intoxication, not just constructive knowledge
- *Mancision v. Hyatt Hotel Corp.*, 2011 WL 5101565 (S.D. N.Y. Oct. 26, 2011)
 - No evidence that hotel saw any signs of intoxication

Conclusion

- Food Liability
 - Consider warnings
 - Understand the chain of distribution for the food you serve
 - Use common sense when making representations about food
- Liability arising from the Sale and Service of Alcoholic Beverages
 - Understand what law applies
 - Adopt good policies for employee behavior and follow them

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