Food & Beverage Litigation Survey

Vibe Beverage Conference March, 2010
Las Vegas, Nevada

Prepared by Elizabeth A. DeConti, Esq.
in support of the presentation
Ensuring Responsible Service at the Bar….and at the Table
By Elizabeth A. DeConti, Esq. and Stephen Barth

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

Stephen Barth
HospitalityLawyer.com
Conrad N.Hilton College, University of Houston
(713) 963-8800
sbarth@hospitalitylawyer.com

PREFACE

Every year, literally thousands of liability claims are filed against food and beverage providers. These claims include allegations of improper service of alcohol, inappropriate preparation techniques for food items, and the failure to properly warn consumers of a potential circumstance, such as an ingredient that a reasonable person would not usually expect to find in a food or beverage product.

The vast majority of these claims will be resolved before they ever reach the trial level (it is estimated that 95% of all claims are resolved prior to trial). Of those that are tried, a small percentage of those will be appealed. It is the cases that are appealed (also referred to as "reported cases" that become significant to attorneys to help guide them and their clients on the best ways to avoid potential liability.

The following paper includes a description of major reported lawsuits (cases that went to trial and for one reason or another were appealed) that were decided in 2009. These cases were selected because of their potential significance to the industry. Every attempt was made to explain the concepts, facts and decisions without the use of legalese. If you need clarification or have questions please contact either of the presenters.

TABLE OF CONTENTS

I. SCOPE OF ARTICLE

A. FOOD LIABILITY: PRODUCT LIABILITY AND MORE

Food liability cases are based in tort law. Many are product liability cases including claims in negligence, breach of warranty and strict liability. 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 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. 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. In these cases plaintiffs usually allege that the seller of the food handled or prepared the food in a negligent manner (negligence cause of action) and/or that the food product in and of itself was defective and unreasonably dangerous (strict liability cause of action). In addition, plaintiffs may allege more sophisticated complaints arising out of illness or injury from a foreign object in the food, allergens, or food poisoning (usually an e-coli or other bacteria claim).

A. THE PRODUCT LIABILITY CASE INVOLVING FOOD: NEGLIGENCE AND STRICT LIABILITY

Foods sold in restaurants, bars, hotels, and other venues are considered "products" like any other for the purpose of product liability litigation. Common causes of action are negligence, breach of warranty, and strict liability. As with most product liability cases, all companies, entities, or persons in the chain of distribution and sale of the product to the ultimate consumer may be added as defendants to the case. Therefore, if you operate a restaurant or bar, conceivably any "defective" food product which you serve your customers could be the cause for a product liability suit against you under appropriate circumstances. *Tedone v. H.J. Heinz Co.,* 2009 WL 4042764 (S.D.N.Y. Nov. 23, 2009) is such a suit. The *Tedone* case involved a

situation where the plaintiff was injured when a miniature bottle of Heinz ketchup served to her by room service at the Borgata Hotel and Casino shattered in her hand.

The facts of the *Tedone* case are as follows. Hotel guest Tedone and a friend ordered room service. When Tedone picked up the 2.25 oz. glass bottle of Heinz ketchup that the Borgata Hotel served with her room service meal, and twisted it, the bottle broke apart and cut her hands. In addition to the cuts, Tedone was diagnosed by a hand surgeon as having nerve damage in her left hand. *Id.* at *1 and 2. She sued in strict liability and negligence. The defendant Borgata Hotel moved for summary judgment.

The Borgata Hotel argued that the plaintiff's strict liability claim should fail. Borgata argued that it was a non-seller of ketchup or at least a mere casual seller of ketchup bottles. However, the court disagreed, and found the following arguments made by the Borgata unpersuasive. First, Borgata claimed that it did not actually sell the ketchup bottle to the plaintiff because the ketchup was provided as a free part of a room service meal. Second, the Borgata argued that any sale of ketchup was incidental to its true business of running a casino and operating a hotel. *Id.* at *12. In response to these two arguments, the court found that because the Borgata sold the plaintiff a meal that included a ketchup bottle, the hotel could not plausibly claim that the sale of ketchup was not part of its regular business practices. In fact, the court noted that the hotel regularly provided condiments with its room service meals, and potentially served as many as three hundred (300) miniature bottles of ketchup per day. Second, the court found that the ketchup bottle was not a mere amenity, but was an important part of the room service meal. Based on this evidence, the court denied Borgata's motion for summary judgment as applied to the strict liability claim. *Id.* at *13. With regard to the negligence claim, the court rejected Borgata's motion as well, finding that a jury could infer that Borgata negligently handled the bottle, reused it, or failed to properly inspect is before it reached the plaintiff. *Id.* at *15.

The *Tedone* case also raises an important issue regarding spoliation of evidence and the handling of accidents at hotels. Tedone had also filed a motion with the court that she should be entitled to a spoliation of evidence instruction at trial. The facts supporting Tedone's motion were that the entire bottle was not preserved by the hotel staff after her initial injury. Moreover, some of the remaining fragments of the bottle were thrown away some time after the defendant glassmaker's counsel reviewed the fragments.[1] The evidence further revealed that after Tedone's accident, she went to receive medical treatment at a local medical center. During this time, hotel security officers entered Tedone's room and retrieved all the pieces of the ketchup bottle that they could find. The security officers stored the pieces in a cup and brought them to the hotel's security office for storage, in the event that a claim would be made. Although the security officer who handled the storage testified that he did not discard any pieces of the bottle, two years later when Tedone filed her law suit the Bogata only could produce three pieces of the original bottle. Ultimately, the court found that it was premature to decide what sanctions, it any, should result from the Borgata's alleged loss of the bottle fragments. However, the court deferred consideration of any sanctions for spoliation to trial, and left the issue open. *Id.* at *10.

[1] In addition to the Borgata, Tedone had also sued Heinz as the manufacturer of the ketchup, and the manufacturer of the glass bottles used by Heinz.

Another "hot" area for food related liability claims is the hot beverages market. We see an increasingly large number of verdicts associated with these hot beverages cases. *Moltner v. Starbucks Coffee Co.,* 2009 WL 3573190 (S.D.N.Y. Oct. 23, 2009), involved a strict liability claim arising from injuries from a cup of hot tea.

The facts of *Moltner* are as follows. Plaintiff purchased a large sized tea from Starbucks which was double cupped. She attempted to remove the lid to put sugar in the tea and the tea spilled on to her sneaker, and she was burned. She sued for $3,000,000 in damages based on her accident. The plaintiff alleged various product liability causes of action including strict liability with regard to the tea, negligent preparation of the tea, and failure to warn that the tea could spill. Starbucks moved for summary judgment.

In response to plaintiff's claim that the tea's heat was a dangerous defect in the beverage, Starbucks argued that the plaintiff could not show that she did not understand that the tea was a very hot beverage. Starbucks argued that the evidence revealed that the plaintiff admitted that she intended to purchase a cup of hot tea. In addition, the tea contained a warning on the cup which stated "Careful, the beverage you are about to enjoy is extremely hot." Furthermore, the evidence reflected that the plaintiff had ordered hot tea from Starbucks on a weekly basis for approximately six months prior to her accident, and that therefore, she understood that the tea would be very hot. Plaintiff's negligence claim alleged that the tea's excessive heat was a breach of Starbucks' duty of reasonable care. However, the court found that plaintiff produced no evidence to support this conclusion. Finally, the court found the plaintiff's strict liability failure to warn claims unpersuasive, because of the warning on the cup. Plaintiff had also argued that the double cupping of the tea was dangerous in and of itself and that Starbucks should have warned about the possibility that the tea might rise or overflow upon her removal of the lid. The court also found this claim to be meritless, finding "[e]ssentially, Plaintiff would have Starbucks warn that the tea poses a risk of spilling if it is opened. But the fact that a cup of liquid may spill when its lid is removed is entirely within the realm of common knowledge. It thus calls for no special warning." Based on all of the above, the court granted Starbuck's motion in its entirety and the plaintiff's case was dismissed. *Id.* at *10.

B. 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*, l 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*., 873 N.Y.S. 2d 234 (N.Y. City Civ. Ct. Sept. 19, 2008).

C. ALLERGENS

Allergen cases are another genre of food liability case. In re *McDonalds French Fries Litigation* 257 F.R.D. 669 (N.D. Ill. 2009) is instructive of some of the issues which arise in these cases. This case involves a proposed class of consumers who had been diagnosed with celiac disease, galactosemia, autism, and various other wheat, gluten, or dairy allergies. The consumers sued McDonald's for violations of all fifty states' consumer fraud and deceptive trade practices acts, breach of warranty, and unjust enrichment. They claim that McDonald's made false representations that their potato products were gluten, wheat, and dairy-free on menus, websites, and other literature. Notably, the consumers do not claim that they were physically injured, but rather claim that they would not have purchased the potato products but for the alleged misrepresentations and claim economic harm. *Id.* at 670-671.

The court denied the consumers' motion for class certification on the basis that the proposed class was overinclusive and unmanageable. *Id.* at 673. Notwithstanding this conclusion, this case raises profound questions about ingredient lists and menus. In a time when allergies and other food sensitivities may be diagnosed with greater and greater precision by the medical profession, these types of cases are likely to increase. Furthermore, because consumers are demanding more information about the ingredients in the food they buy, pressures on food sellers to make additional disclosures will increase.

D. BACTERIAL AND VIRAL INFECTIONS

Frequently litigation arises as a result of the plaintiff having become ill from a bacterial or viral infection he or she contracted directly from food or from an infected restaurant worker. The following cases are examples of these problems.

In *Emberton v. GMRI, Inc.,* 2009 WL 3517562 (Ky. Oct. 29, 2009), the plaintiff sued the parent company of Red Lobster after he contracted Hepatitis A. The plaintiff sued GMRI for

negligence, product liability and breach of warranty. The facts of the case were as follows. Shortly after visiting a Red Lobster restaurant in Bowling Green, Kentucky with his family for a birthday celebration, the plaintiff began exhibiting symptoms of hepatitis. The record revealed that a server at Red Lobster was infected with Hepatitis A while working. The restaurant company had a hand washing policy in effect at the restaurant, which was available to servers and other workers through a training tape. However, the employee had not been shown the training tape. Approximately twelve days after the plaintiff had visited the restaurant, the server arrived at work sick and vomiting. She was sent home by her manager and later diagnosed with Hepatitis A. The local health department was notified of the server's illness as required by law. When investigated by the local health department, GMRI assured the health department's team that the server's hygiene was good and did not disclose reports from fellow employees that the affected server had been seen touching food with her bare hands, eating from the ice cream containers, and drinking directly from a milk carton. Nearly three years after plaintiff's dinner at the restaurant, he was contacted by a plaintiff's attorney who had been representing another Bowling Green resident who had become ill with Hepatitis A a week after the plaintiff. Plaintiff's attorney discovered that plaintiff Emberton was one of about thirteen different health department patients who had eaten at the restaurant during the same time period. *Id.* at *1-2.

The *Emberton* decision from October, 2009, addresses whether the plaintiff's lawsuit was untimely filed and thus barred by the statute of limitations. The court held that GMRI actively concealed plaintiff's cause of action, and therefore held that plaintiff's suit was indeed timely filed. *Id.* at *1. There likely will be further opinions flowing from this case which will be worth following in the coming year.

Rudy's Country Store, Inc. v. D'Angelo's Sandwich Shops, Inc. 2009 WL 3334851 (Mass. App. Ct. Oct. 19, 2009) is another case from the past year involving an employee with Hepatitis A. The plaintiff in this case, Rudy's, is a sandwich shop business. The facts of the case were that an employee from D'Angelo's, another sandwich shop, passed the Hepatitis A virus to some of D'Angelo's customers, including two employees of Rudy's. After D'Angelo's learned of the employee's infection it notified the Massachusetts Department of Public Health as it was required to do; however, the agency did not order D'Angelo's to inform its customers of the Hepatitis A infection and therefore D'Angelo's did not do so. Within a month, thirty-three (33) persons had contracted Hepatitis A. When two employees of Rudy's were diagnosed with the Hepatitis A virus, Rudy's also informed the Massachusetts Department of Public Health. The agency found several violations at Rudy's with respect to food handling, and also ordered Rudy's to give notice to the public that two of its employees had tested positive for Hepatitis A. As a result, a number of patrons announced that they would no longer patronize Rudy's. Rudy's experienced a sharp decrease in business and was forced to close. Rudy's sued D'Angelo's alleging public nuisance, negligence, and product liability. Because Rudy's was a corporate entity and did not sustain personal injuries and could not recover for personal injuries sustained by its employees, the court found that the sandwich shop could not recover because its claims damages were solely economic. *Id.* at *1.

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

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"?[2]

Many licensees ask how much responsibility they have for making sure patrons leave the 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? The cases below from the past year address this issue.

1. INTERVENING AND SUPERSEDING CAUSES

When courts address causation and foreseeability, the issue usually is what a restaurant or bar should have been able to anticipate. In the case of *Oursler v. Brennan,* 2009 WL 2636522 (N.Y. A. D. 4 Dept. Aug. 28, 2009), a New York court addressed this question. Oursler was a widower who sued the licensee bowling alley for negligence and violations of New York dram shop statutes. Although the primary issue analyzed by the court in its opinion was what actions constitute "guilty participation" on the part of the plaintiff husband so as to preclude his recovery, the case is more interesting as it relates to the intervening and superseding cause question.

The bizarre facts of the case are as follows. Plaintiff and his decedent wife attended a Halloween costume party at the bowling alley. The wife was dressed as a witch and was dressed entirely in black clothing. Throughout the evening the plaintiff husband purchased the wife several drinks, thus giving rise to the defense's guilty participation theory. During the course of the evening, the decedent wife began to argue with another costumed individual. The couple left

[2] 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)

the party but before they had left the parking lot, the plaintiff was injured. The police arrived at that time and determined that the decedent was intoxicated. She was taken to the hospital in an ambulance and a police officer drove her to her mother's home. About an hour after the police left the decedent with her mother, the decedent left the house on foot in search of her husband whom she erroneously believed to be at the police station. As she was walking along the dark road, still in her witch's costume, a man in a car hit her with the driver's side mirror of his vehicle as he was entering his driveway. The man continued into his driveway and called 911 from his house. A few minutes later, a police officer responding to calls about a suspicious person walking down the road, ran over the decedent in his patrol car as she lay on the side of the road. *Id.* at *1.

The bowling alley filed a motion for summary judgment addressing, among other issues, causation. Specifically, the bowling alley contended that the plaintiff's complaint should be dismissed because there was no plausible connection between the dram shop act and the decedent's death. Specifically, the bowling alley argued that several intervening events, *i.e.,* the decedent wandering away from her mother's house, the arrival of the man with the side view mirror, and the accident with the police car were intervening events that broke the chain of causation between the alleged unlawful sale of alcohol and the decedent's death. The court disagreed, and found that factual issues existed as to whether there was a reasonable or practicable connection between the bowling alley's alleged unlawful sale of alcohol to the decedent and her resulting death. *Id.* at *5.

2. DOES A LICENSEE HAVE A DUTY TO DETERMINE HOW PATRONS ARE GETTING HOME?

Hoff v. The Elkhorn Bar, 613 F. Supp. 2d 1146 (D. N. Dakota 2009) involved a situation where a man was kicked out of a bar, slipped and fell, and died from his resulting head injuries. His family members sued the bar asserting a wrongful death claim and a claim under North Dakota's dram shop law. The record revealed that the decedent Hoff was disruptive in the bar and was kicked out. After some period of time he was allowed by staff to come back in. After he re-entered the bar, Hoff was served additional alcoholic beverages. However, when he again became disruptive, the staff kicked him out of the bar for the second time. They then locked the doors to the bar to keep him from re-entering. As decedent Hoff was walking away from the bar, he fell, struck his head on the pavement, and died as a result of the injuries he sustained. *Id.* at 1148.

In addition to their dram shop claims, the plaintiffs proceeded on a theory of negligent eviction, *i.e.*, they claimed that the staff of the The Elkhorn Bar kicked Hoff out in a negligent manner under circumstances which they should have known to be dangerous. The court considered the question of whether North Dakota's dram shop statute superseded other common law negligence claims such that the dram shop law would be the exclusive remedy available to the plaintiffs. The court found that North Dakota's dram shop statute was in fact not an exclusive remedy, and therefore the plaintiffs could proceed on their negligent eviction claim. Following North Dakota's statutes on general negligence law, the court found that the bar assumed a duty to act with due care when its employees physically ejected Hoff from the bar. *Id.* at 1157. Although the court granted the bar's motion for summary judgment on its dram shop

claim, the court denied the motion with regard to the plaintiff's negligence claims. In so doing, the court found that the finding of a duty when ejecting a patron from a bar is supported by § 314A of the Restatement (Second) of Torts. That section governs special relations giving rise to a duty to aid or protect, and provides in pertinent part: "A possessor of land who holds it open to the public is under a similar duty to members of the public who enter in response to his invitation." Although the court noted that different state courts addressing cases involving intoxication differ on whether a duty is created pursuant to § 314A, the North Dakota court elected to apply the rational of § 314A, so as to find that a duty could exist in the Hoff case. Specifically, the court stated:

> The proposition of Section 314A(3)) said a possessor of land who holds it open to the public is under a duty to its invitees to one of human decency, and the court is persuaded that Section 314A(3) applies to the defendants. Pursuant to Section 314A(3), the defendants were under a duty to exercise reasonable care and to take reasonable action as to their patrons, including a general duty to exercise reasonable care in ejecting Randall Hoff from The Elkhorn Bar in the mist of winter.

Id. at 1160.

In other jurisdictions, this same type of fact pattern may have turned out quite differently. For example in *Rodriguez v. The Primadonna Company, LLC,* 2009 WL 3151167 (Nev. Oct. 1, 2009), the Supreme Court of Nevada held that a hotel did not have an affirmative duty to prevent an injury to an intoxicated patron subsequent to his eviction from the hotel property. This case involved injuries to a seventeen year old boy who had accompanied his two adult step-uncles to a casino, and who later was injured when one of the intoxicated step-uncles drove the group away from the property.

A short summary of the lengthy facts of this case is as follows. The seventeen year old and his two step-uncles engaged in some disruptive behavior on the premises of the defendant casino. The record reflected that the three were involved in at least two fights with hotel guests and also disturbed other guests by kicking and knocking on hotel room doors. During one of these encounters, one of the step-uncles punched another guest in the face. The property's security team confronted the group and they voluntarily agreed to leave the property. There was some testimony from witnesses that the group discussed "sleeping it off" in their car prior to driving away from the property. The security officers escorted the three men to their car which was located in the hotel's parking lot. One of the adults drove the car out of the parking lot, and caused the vehicle they were driving in to roll over at approximately eighty miles an hour causing serious injuries to the seventeen year old which rendered him a quadriplegic. *Id. at *1 and 2*.

Plaintiff's case focused on an allegation that the casino had negligently evicted the group in their intoxicated condition. The court analyzed whether the casino's employees behaved reasonably under the circumstances. In so doing, the court concluded that as long as a proprietor does not use unreasonable force in evicting a patron, the proprietor is not required to consider the individual's level of intoxication to prevent speculative injuries that could occur off the premises.

Id. at *5. Specifically, the court held that the moment that the men left the parking lot, the eviction had completed, and the casino did not have any further duty to insure the young man's safety. The court went so far as to state that although the casino may have had knowledge that the driver of the car was intoxicated and could not safely drive, as a matter of law the casino did not have the duty to arrange safer transportation or to otherwise prevent the intoxicated driver from driving, or prevent the young man from riding with the drunk driver. *Id.* at *6.

The case of *Bourgeois v. Vanderbilt,* 2009 WL 2323088 (W.D. Ark. July 28, 2009), also involved a casino and had a similar result. This case also involved negligent eviction, although the precise cause of action was styled by the plaintiff as negligent entrustment of an automobile. Plaintiff was a bus driver who was hit by an intoxicated driver who was returning home from a trip to a Harrah's casino located in Shreveport, Louisiana. Plaintiff argued that the casino caused the driver's intoxication, and failed to make any effort from stopping him from operating his car in an intoxicated and exhausted condition. The record revealed that the intoxicated driver had been at Harrah's at least fourteen hours that evening. In support of her negligent entrustment claim, the plaintiff argued that the valets employed by the casino acted negligently by observing that the driver was intoxicated and giving him his keys anyway. The court focused on the question of whether the casino knew or should have known that the driver was incompetent to drive because of his consumption of alcohol prior to his operation of the vehicle. The court concluded that there was no evidence that the casino knew or should have known that the driver was intoxicated when he left the casino on the night of the accident. The court's conclusion appears to be based on an absence of evidence. There were no witnesses remembering any contact with the driver on the night of the accident. The valet who dealt directly with the driver was not identified, and there is no testimony from anyone in the record observing the driver in a state of obvious or clear intoxication. Based on the lack of evidence, the court granted the casino summary judgment on the plaintiff's negligent entrustment claim. *Id. at *5.*

In spite of the defense victories obtained in the two casino cases, the outcome in *Hoff* may cause licensees to 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. ALTERNATIVE CAUSES OF ACTION: THE DRAM SHOP CASE AS THE WOLF IN SHEEP'S CLOTHING

In general dram shop statutes limit an alcohol beverage licensee's liability to certain specified conditions or situations (*e.g.,* sale to a minor or the obviously intoxicated). As a result, plaintiffs often attempt to recast dram shop cases into other causes of action, such as negligent hiring, negligent supervision, negligent eviction, or wrongful death.

An example of this trend is *Johnson v. Brunswick Riverview Club,* 2009 WL 4506580 (Ala. Dec. 4, 2009). The plaintiff's son was killed in a one-car accident after he became intoxicated at a bowling alley. The Plaintiff sued the bowling alley under Alabama's dram shop statute, and also alleged causes of action for negligent hiring, training, and/or supervision.

The evidence revealed that bowling alley employees sold Plaintiff's son four sixty ounce pitchers of beer in an approximately four hour period. The bowling alley had an internal alcoholic beverage service policy for employees which prohibited employees from selling pitchers of beer to single individuals. The policy also contained guidance for the employees and managers on obtaining alternative transportation for any intoxicated patrons. *Id.* at *1. In support of her negligent hiring, training, and/or supervision claim, Plaintiff alleged that the bowling alley should be liable because its employees failed to follow the alcohol beverage policy.

The Supreme Court of Alabama disagreed and granted summary judgment for the bowling alley on all counts. The court held that Plaintiff's negligence claims were not distinguishable from her dram shop claims:

> In the present case, Johnson recognizes that she cannot pursue a claim of negligent dispensing of alcohol outside the Dram Shop Act. Instead, she alleges that her claim is "clearly" not a claim alleging the negligent dispensing of alcohol. Johnson's brief, at 23. However, the merit of such an allegation is untenable. Concerning this claim, Johnson's complaint alleges that Brunswick negligently hired, trained, and/or supervised its employees "regarding serving visibly intoxicated patrons with alcoholic beverages." Such an allegation seeks a remedy directly related to the alleged unlawful dispensing alcohol, and it attempts to do so outside the Dram Shop Act, which this Court's prior decisions do not allow. Furthermore, Johnson has failed to present substantial evidence indicating that the proximate cause of her alleged injury was an act committed by Brunswick that is outside the scope of the Dram Shop Act, rather than her son's acts of consuming alcohol and subsequently driving a motor vehicle. Therefore, the trial court properly entered a summary judgment in favor of Brunswick on Johnson's claim alleging the negligent hiring, training, and/or supervision of employees.

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.

C. THE EMPLOYEE PROBLEM

When alcohol beverage licensees consider dram shop issues, they usually imagine a fact pattern where a patron comes into their establishment, becomes intoxicated, and leaves and causes injury to a third party. However, because of the access to alcohol that employees have in restaurants, bars, and other establishments holding alcohol beverage licenses, another fact pattern involves the licensee's own employees, rather than a guest. The cases in this section address problematic situations which were ultimately caused by the retailer's employees.

In *Owens v. Hooters Restaurant,* 2009 WL 2997515 (Ala. Sept. 18, 2009), the Supreme Court of Alabama considered a case where a plaintiff was injured following a post-work celebration at a Hooters Restaurant. The plaintiff's car was struck by an employee, who had been celebrating a promotion in his job with co-workers at the Hooters Restaurant. The accident happened 6/10ths of a mile from the restaurant. The police report reflected that the employee had a blood alcohol content of .16. The plaintiff sued Hooters for the activity of its employee, and specifically alleged that Hooters violated Alabama's dram shop statute by serving alcoholic beverages in a visibly intoxicated condition. Hooters moved for summary judgment on the basis that there was no evidence that Hooters had served the employee while he was visibly intoxicated. Despite overwhelming evidence that the employee was intoxicated at the scene of the accident, the record contained no evidence that any employee of Hooters served the defendant while he was visibly intoxicated. Therefore, the court granted Hooters' motion for summary judgment. *Id.* at *2.

Lev v. Beverly Enterprises Massachusetts, Inc., 74 Mass. App. Ct. 413, 907 N.E. 2d 1114, (Mass. Ct. App. 2009), involved the issue of employer host liability. *Lev* involved an employee of a nursing home company who became intoxicated at a restaurant where he had been drinking alcoholic beverages during a meeting with his work supervisor. The plaintiff sued the Beverly Enterprises Company under the theory that the company sponsored the driver's intoxication during a work related event. Though the employer in this case is not an alcohol beverage licensee, this case is analogous to any situation where an employee is drinking in the course his or her employment. For example, a holiday party, a convention, or an after-hours meeting on or off the premises.

The plaintiff in *Lev* based her argument for liability on a company policy maintained by Beverly which prohibited Beverly employees from drinking alcohol on the company premises or while conducting business off the company premises. The plaintiff's theory was that the violation of this policy indicated liability on behalf of the company. The court did not find this persuasive, and to the contrary, opined that finding liability on this basis would discourage businesses from adopting responsible alcohol prohibition policies for employees. *Id.* at 1119.

Secondarily, the plaintiff also claimed that Beverly was liable under the doctrine of respondeat superior. The court also rejected this contention. The court found that there is no liability for employee travel back and forth to home for a fixed place of employment, and the court interpreted the employee's time at the restaurant as a work related activity, and therefore analogous to this principle. *Id.* at 1120 and 1121.

D. INSURANCE COVERAGE ISSUES

Every year we see cases related to insurance coverage disputes arising from cases involving dispensing of alcoholic beverages and/or violent behavior resulting from consumption of alcoholic beverages. Many licensees have general liability insurance policies for their establishments, but do not understand the scope and limits of those policies. It is important to work with your insurer to understand the scope and limits of your policy and to understand whether you need to purchase additional coverage, such as a dram shop or liquor liability rider. The cases below illustrate problems arising from two common insurance policy exclusions: the liquor liability exclusion and the assault and battery exclusion. Many times these two exclusions go hand in hand.

Marina Grand, Inc. v. Tower Insurance Company of New York, 63 A.D.3d 1012, 882 N.Y.S. 2d 435, (N.Y. Ct. App. 2009), involved a fight in a bar. The two women involved argued and the plaintiff was hit in the face by a glass. The plaintiff filed a personal injury law suit against the licensee, Marina Grand, and alleged that the Marina Grand's employees negligently maintained, controlled, and operated the premises in violation of New York's dram shop statutes. In turn, the licensee requested its insurer to provide defense and indemnification in the case. The insurer, however, cited an endorsement on the policy excluding any injury caused by an assault or battery committed by any patron or customer of the licensee. Marina Grand then filed a third party complaint against its insurer. The insurer was successful on its motion for summary judgment and established conclusively that the exclusion was applicable to the claims asserted against the bar. The court found that the evidence in the case reflected that the plaintiff was

injured by another patron who, in an intoxicated state, intentionally threw the glass at plaintiff's face, and that this activity was covered by the exclusion.

The case of *Russell v. Burlington Insurance Company,* 2009 WL 2901205 (D. Minn. Sept. 3, 2009), addressed a similar issue. In this case, the plaintiff alleged that the bar's insurance company breached the terms of its liability insurance policy by not providing coverage. The plaintiff was a patron at a bar called Captain Black's. When she left the bar at approximately 2:00 a.m., she noticed that a fight had erupted outside of the entrance. As she attempted to walk around the fighting individuals, she was knocked down a flight of stairs and was seriously injured. The insurer denied coverage for the incident pursuant to its insurance policy's assault and battery exclusion. As noted by the court, the exclusions stated that the policy did not cover injuries: "[a]rising out of assault or battery, or out of any act or omission in connection with the prevention or suppression of an assault or battery". *Id.* at *1. The issue before the court was whether the assault and battery exclusion should apply to plaintiff's injuries because she was not involved in the fight herself. The court found that plaintiff expressly alleged that her injuries were caused by or arose out of the assault and battery at the bar. Therefore, her claims clearly fell outside the scope of the policy. *Id.* at *3.

IV. CONCLUSION

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

In the food area, restaurants and other food sellers should review menus, websites, and other literature to determine if additional warnings or disclosures are needed. Restaurants should understand and document their supply chain for the food they serve so that in the event of an injury, causation may be more easily identified. Finally, employee policies on food handling and hygiene should be drafted and enforced.

Alcoholic beverage licensees should have familiarity with applicable state dram shop statutes and their limitations. They should also be knowledgeable about the scope of their insurance policies and any applicable exclusions, so as to ensure that coverage is sufficient. Finally, having policies in place about responsible service of alcohol beverages and how to handle intoxicated patrons is critical.

1902282 v1