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FOOD & BEVERAGE LITIGATION SURVEY

PRESENTER

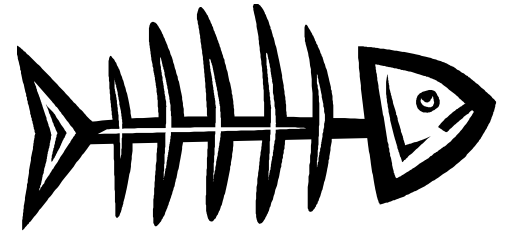


Elizabeth A. DeConti, Esq.

- Elizabeth is a shareholder with the Tampa office of GrayRobinson where she focuses her practice on litigation and compliance matters related to the rules, regulation and business practices that govern the marketing, sale, and consumption of malt beverages, wine, distilled spirits, and other regulated products. She also handles food law issues.
- Elizabeth's trial experience includes commercial, dram shop, franchise, intellectual property, and ADA cases litigated on behalf of major breweries, alcohol suppliers, wholesalers, retailers, and other members of the hospitality industry in state and federal courts and administrative agencies throughout the United States. In addition to her court experience, she represents many clients in alternative dispute resolution.
- She also advises clients on issues pertaining to trade regulation and marketing practices in the food and beverage industry, and concentrates on regulatory compliance, as well as advertising and promotional law. Elizabeth also drafts contracts related to advertising, distribution, importation, and related issues associated with the food and beverage industry.

Food Liability Fact Patterns

- Product Liability
- Foreign Objects
 - *Why is there a bone in my food?*
 - *Why is there a plastic fork in my food?*
- Emotional Distress
- Food poisoning



Foreign Objects In My Food

- Cases usually involve mouth/throat injuries, allergic reactions and food poisoning/gastric distress.
- Causes of action are strict liability, negligence, breach of express/implied warranty.

Legal Analysis

Foreign/Natural Test: *Does the substance naturally occur in my food?*

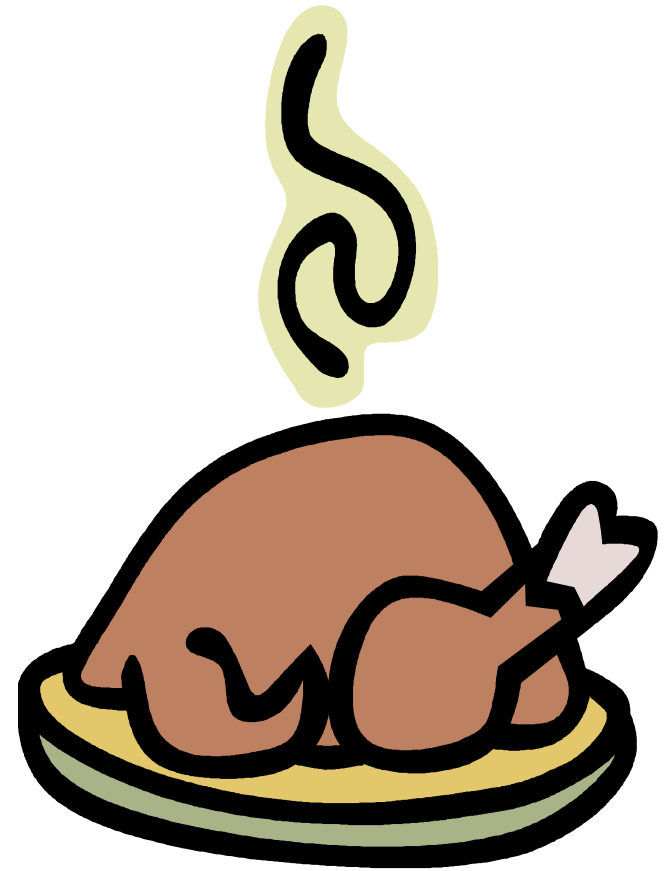
OR,

Reasonable Expectation Test: *Should the eater reasonably be on notice that the substance may be in the food?*

- Reasonable Expectation Test is Majority Rule

Case Examples

- *Pinkham v. Cargill, Inc.*,
55 A. 3d 1 (Me. 2012)
- “Boneless” hot turkey sandwich
- Maine adopts reasonable expectation test with this case



Emotional Distress Cases

- *Bylsma v. Burger King, Corp.*, 676 F. 3d 779 (9th Cir. 2012)
 - From last year's update: cop finds phlegm on burger
 - Lower court decision held that plaintiff could not prevail on emotional
 - distress claim without actually eating product
 - This year federal appellate court certifies question
- *Agnesini v. Doctor's Assoc., Inc.*, 2012 WL 5873605 (Nov. 13, 2012)
 - Fear of fast food!
 - Mental anguish must be documented



Who are the proper defendants in these cases?

- *Is a franchisor a proper defendant?*
 - *Chambers-Johnson v. Applebee's Rest.*, 101 So. 3d 473 (La. Ct. App. 2012)
 - The role of the franchisor's company manual
 - Does the franchisor have a role in daily operations?
- *May an owner be liable when a manager handles on-site operations?*
 - *Capps v. The Bristol Bar and Grille, Inc.*, 2012 WL 1067908 (W.D. Ky. Mar. 29, 2012)
 - What if the owner handles some issues and not others
 - (e.g., provides food but does not serve it)

Evidentiary Issues

- Res Ipsa Loquitur as a theory when the case is circumstantial
 - *Currie v. The Big Fat Greek Rest., Inc.*, 2012 WL 6738381
 - (Oh. Ct. App. Dec. 27, 2012).
 - *Could there have been another cause of the injury other than*
 - *Restaurant's negligence?*
 - *Was the item [food] which caused the injury in the defendant's exclusive control?*
 - *Manley v. Doe*, 849 F. Supp. 2d 594 (E.D. N.C. 2012)
 - The case of the plastic fragment utensil
 - Stacking inference upon inference may not be enough, even if
 - circumstantial evidence is strong

Bacteria / Food Poisoning

These are fact-based cases dependent on expert testimony

- *Williams v. O'Charley's, Inc.*, 728 S.E. 2d 19 (N.C. Ct. App. 2012)
- *Johnson v. ConAgra Foods, Inc.*, 2012 WL 1139079 (Tx. Ct. App. Apr. 3, 2012)



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



Using Dram Shop Laws to Limit Liability

- Assault and Battery Cases generally excluded
 - *Kranenburg v. TKRS Pubs, Inc.*, 99 A.D. 3d 767 (N.Y. Ct. App. 2012)
 - Injury was not foreseeable, BUT, issue remained as to duty to care
 - for plaintiff
- Actions by Intoxicated plaintiffs usually excluded
 - *Pineda v. Javar Corp.*, 96 A.D. 3d 731 (N.Y. Ct. App. 2012)
 - Variation here: plaintiff purchased alcohol for driver of car



How far does a licensee's duty extend?

- *Does your establishment have a policy about how to evict?*
- The duty of care to the public when they are your invitees and when they leave
- *Forsman v. Blues, Brews, and Bar-B-Ques*, 820 N.W. 2d 748 (N.D. 2012)
- *Olle v. C House Corp.*, 967 N.E. 2d 886 (Il. Ct. App. 2012))

Unique Defendants



- Owner of real property: *Carruthers v. Edwards*, 2012 WL 3236604 (Ky. Ct. App. Aug. 10, 2012)
- Valet company: *Weber v Marino Pkg. Sys., Inc.*, 2012 WL 5373438 (Fla. 2d DCA Nov. 2, 2012)
- Bar owner as social host: *Rooker v. Flanagan Corp.*, 817 N.W. 2d 31 (Iowa Ct. App. 2012)

Conclusion

- **Food liability**
 - Evidence is key
 - Understand the chain of distribution for the food you serve
 - Adopt good policies for employee behavior and follow them
- **Liability arising from the Sale and Service of Alcoholic Beverages**
 - Understand the liabilities which may flow from your corporate relationships
 - Develop good policies for handling the obviously intoxicated and for ejecting patrons
- **Questions?**

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