Click for Outline

Click for Power Point Presentation

Hospitality Liability Update

Fourth Annual Hospitality Law Conference
February 2-3, 2006
Houston, Texas

Karen Morris, Esq.
2670 Highland Avenue
Rochester, NY 14610

Diana S. Barber, Esq.
5925 Masters Club Drive
Suwanee, GA 30024

© - Copyright 2006, Karen Morris, Esq. and Diana S. Barber, Esq.

KAREN MORRIS

2670 Highland Avenue
Rochester, NY 14610
(585) 256-0160
Judgekaren@aol.com

Karen Morris is Town Justice in Brighton New York, a Professor of Law at Monroe Community College (MCC), and an author.

She has written several textbooks including Hotel, Restaurant and Travel Law and New York Cases in Business Law. She also co-authors Criminal Law in New York, a treatise for lawyers.

Among the courses she has taught are Hotel and Restaurant Law, Business Law I and II, Constitutional Law, Movies and the Law, "The Michael Jackson Trial" and "O.J. Simpson 101; Understanding Our Criminal Justice System." Her course offerings include some in traditional classroom settings and others online. She won the Excellence in Teaching Award in 1994, having been selected by her peers, and the Chancellor's Award for Teaching Excellence in 2002, conferred by the Chancellor of the State University of New York.

Judge Morris writes newspaper commentaries on various legal issues and penned a monthly column for the Greater Rochester Track Club entitled, "The View from the Back of the Pack."

Professor Morris is a past president of the Greater Rochester Association for Women Attorneys, Alternatives for Battered Women, Inc, the Northeast Academy of Legal Studies in Business, and Text and Academic Authors Association, a national organization that advances the interests of academic authors. She also is a recent past Dean of the Monroe County Bar Association Academy of Law and past president of Brighton Kiwanis. She is a member of the governing board of the union for MCC faculty and professional staff.

Her favorite volunteer activities include being a Big Sister in the Big Brother program which she has done for twelve years, and a Girl Scout leader.

She received her Juris Doctor degree from St. John's University and earned a Masters of Law (LL.M.) from New York University. She previously was in-house counsel for Macy's Department Stores, an Assistant District Attorney in Monroe County, and an attorney in private practice.

DIANA S. BARBER

Barber Law Associates, P.C.
5925 Masters Club Drive
Suwanee, GA 30024
(770) 813-9363
diana.barber@lodge-law.com
dsbarber@gsu.edu

Diana S. Barber, Esq. is the president of LodgeLaw, a Division of Barber Law Associates, P.C., a hospitality law firm specializing in providing education to hospitality companies on preventative measures to reduce legal exposure, as well as a full range of legal services to hotels, motels, restaurants and clubs. She has over seventeen years of legal hospitality experience and is the former vice president and associate general counsel of The Ritz-Carlton Hotel Company, L.L.C. During her employment with Ritz-Carlton, Ms. Barber provided a full range of in-house counsel legal services to all Ritz-Carlton hotels, restaurants, condominiums and dining clubs worldwide.

Ms. Barber began her law practice as an associate attorney at King & Spalding in Atlanta, Georgia after graduating cum laude from Walter F. George School of Law at Mercer University in Macon, Georgia. She is a member of the State Bar of Georgia, The Florida Bar, The American Bar Association, the Georgia Hotel & Lodging Association and Georgia State University's School of Hospitality Industry Board.

Ms. Barber has given numerous presentations for hospitality related associations and has written many articles for hotel/motel security periodicals, meeting planner periodicals, Hotel-Online and the American Hotel & Lodging Association. In addition, she is on the editorial advisory board of a hospitality security related newsletter called Hotel/Casino/Resort Security Report and has served as a litigation industry expert.

Diana Barber is also "Of Counsel" with a hospitality law firm in Atlanta, Georgia known as Berman Fink Van Horn, PC, which is also the general counsel to the Georgia Restaurant Association and the Georgia Hotel & Lodging Association.

Ms. Barber is the Visiting Lecturer, a full-time faculty position, at Cecil B. Day's School of Hospitality Administration in the J. Mack Robinson Business College at Georgia State University; where she has taught since the summer of 2003. She teaches hospitality law, hotel management and perspectives in the hospitality industry.

In addition, Ms. Barber is actively involved with the Boys Scouts of America program as a Cub Scout Webelos Patrol Leader.

Hospitality Liability Update

Fourth Annual Hospitality Law Conference
February 2-3, 2006
Houston, Texas

ADA/Facility

1. *Kratzer v. Gamma Management Group, Inc.,* No. 04-6031 (E.D. Pa. 10/12/05). Plaintiff, disabled from cerebral palsy and required a wheelchair at all times, was able to pursue her claim against Defendant's hotel even though Plaintiff had never been an overnight guest in the hotel. Court held that Plaintiff had visited the hotel and was able to describe specific violations in detail and that she had a desire to hold future conventions at the property.

2. *Hospitality Law Newsletter* (August 2005*).* Prior to opening a new Marriott hotel in Hartford, Conn., a building inspector discovered that the bathrooms in 15 of the 17 disabled accessible guest rooms did not comply with state law. The developer was ordered to rebuild the rooms making 30 of the hotel's 409 rooms affected by the unanticipated work. Prior to construction, the developer asked the Dept. of Justice to review their plans to ensure the project's compliance with the ADA. Once approved by the U.S. Dept of Justice, construction commenced. Accessibility is defined not by the ADA but by state code.

3. *Pickern v. Best Western Timber Cove Lodge Marina Resort, et al.,* No. C047356 (Cal. Ct. App. 05/25/05). Plaintiff, who uses a wheelchair, stayed at Defendant's resort and upon checking out she told management about the many access problems she encountered. Two years later, the same problems were there and Plaintiff assumed the hotel had done nothing to make the facilities more accessible. Plaintiff sued and the court dismissed her claim because the hotel was able to show that before the suit, the hotel had begun upgrading its facilities to comply with the ADA requirements. Two years later, Plaintiff sued again and the hotel settled the claim for $50,000 but agreed to let the court decide about attorney's fees. The court decided that Plaintiff was not entitled to attorney's fees since the hotel had begun the improvements prior to the lawsuit and the lawsuit was not the reason for the remedial action.

4. *Spector, et al v. Norwegian Cruise Line Ltd.,* No. 03-1388 (06/06/05). The U.S. Supreme Court ruled that the ADA applies to passengers with disabilities who board foreign flagged cruise ships in the U.S. The decision was a 5-4 decision that expanded the scope of the ADA's Title III protections.

5. *Laird v. Redwood Trust LLC, et al.,* No. 03-2005 (4th Cir. 12/21/04). Plaintiff, who had spina bifida, visited Defendant's nightclub, renovated from an old bank building, and was not able to access the basement or the mezzanine levels because there was no elevator. Plaintiff sued alleging the ADA required an elevator be installed in its three level

restaurant. The trial court disagreed and granted summary judgment in favor of Redwood. ADA requires that a building with three or more levels have an elevator. The appellate court focused on the second level which was a mezzanine in that it had a portion of the floor open to the level below, and did not qualify as a story. Because the ADA guidelines specifically exclude mezzanines from being counted as a story, the court concluded that the nightclub did not need to install an elevator.

6. *Hospitality Law Newsletter* (March 2005). Hotel agreed to pay $405,000 to settle a charge of negligence that arose out of its failure to install accessible showers as required by the ADA. Male guest was injured when the plastic pool chair he used while showering collapsed. The hotel denied liability.

Bailment

7. *Don-Lin Jewelry Co. v. Westin Hotel Co.,* No. 2004-153-Appeal (R.I. 06/30/05). Plaintiff left two boxes of jewelry samples at the Westin front desk asking that the boxes be delivered to representatives of Dillard's department store, who were registered guests. Hotel delivered boxes as instructed. When the Dillard's personnel were finished, they notified Plaintiff that the jewelry was ready for pick up, but didn't say where. Plaintiff could not locate packages in storage at hotel. During trial, judge granted hotel's motion to dismiss as the judge was satisfied that delivering the boxes to Dillard's satisfied the legal obligation the hotel had to the Plaintiff. Appellate court confirmed. Damages occurred after the bailment had occurred. Because Plaintiff was not a guest, the bailment was gratuitous.

Casinos

8. *Cowsert v. Greektown Casino, LLC*, 2005 WL 1633725 (Mich. App., 2005). Plaintiff alleged that he won a slot machine jackpot of $13,757,317.37 but Defendant refused to pay claiming the machine had malfunctioned. Defendant turned the slot machine over to the Michigan Gaming Control Board (MGCB). Plaintiff filed a claim with the MGCB and, while that matter was pending, filed an action in court. The court action was dismissed because Plaintiff is required to first exhaust all administrative remedies. Said the court, MGCB has the resources and legal authority to investigate complaints involving the casino industry, conduct proceedings to resolve claims, and impose disciplinary action.

9. *Rush v. MGM Grand Detroit, LLC,* 2005 WL 356307 (Mich App., 2005). Plaintiff requested $5000 credit limit from Defendant casino. Three weeks later he requested that his credit be cancelled. The cancellation form provided by the casino read as follows, "I understand that it is the policy of the MGM Grand Hotel/Casino that when I cancel my line of credit, I may not have it re-established for thirty (30) days. If I reduce my line of credit, I may not have it raised for three (3) days. I also understand that if MGM Grand Detroit/Casino fails to follow such policies, I will still be liable for satisfying whatever debt is outstanding." Over a two year period, Plaintiff was able to modify his credit status within the specified blackout periods. Plaintiff (apparently having lost considerable sums) sued the casino for negligence for allowing him to do so. Defendant contested the suit

based on the language of the form advising Plaintiff of his continued responsibility for payment even if Defendant failed to follow its policy. The trial court dismissed the complaint based on the wording of the form and the appellate court affirmed. Said the latter court, "[D]efendant did not breach the agreement wherein it retained the right to engage in discretionary action."

10. *Croft v. Grand Casino Tunica, Inc.,* 910 So.2d 66, 2005 WL 43770 (Miss. App., 2005). Plaintiff was a former employee of Defendant casino. After working there for seven months he was terminated and arrested relating to the taking of a $100 token. Plaintiff was a member of a "hard count team." As such it was his duty to service slot machines by removing the coin buckets from the machines, replacing them with empty bins, placing the removed buckets on a cart and taking them to the hard count room for counting. He worked with a team of eight plus four security guards. The guards cleared patrons away from the machines as the money was removed and observed the counting team members do their work. During the count the team members dressed in jumpsuits without pockets to prevent stealing. On the day in question a fellow team member opened the slot machine door on a $100 machine and a $100 token fell into the tray. When Plaintiff came by to scan the machine he saw the $100 token. It was undisputed that the coin was the property of the casino notwithstanding it was in the tray and not the bucket. "[Plaintiff] knew when he saw the token fall into the tray that it wasn't finder's keepers." Instead of collecting the token for the count or alerting the security guard standing nearby, Plaintiff told a patron about the location of the coin. The patron retrieved the token and cashed it. After finishing the count Plaintiff sought out the patron. The latter thanked Plaintiff by shaking his hand and passing in the shake a $20 bill. Casino security surveillance team members became suspicious. They reviewed the tapes and inquired of Plaintiff and the co-worker. When the facts became known Plaintiff was arrested for petit larceny. The charges were eventually dismissed prompting this action for malicious prosecution and false arrest. Probable cause to arrest is a defense to both causes of action. The court reviewed the referenced facts and determined that the casino had probable cause for the arrest. Plaintiff's lawsuit was thus dismissed.

11. *Seminole Tribe of Florida v. McCor,* 903 So.2d 235 (Fla App.). Plaintiff was a patron at Defendant Indian casino and allegedly suffered injuries when she was "struck by a chair". (No further details were provided.) She sued the Indian tribe that owns the casino. The tribe moved to dismiss the action based on tribal immunity. The Tribe was formally organized in accordance with the Indian Reorganization Act of 1934 by a Tribal Ordinance. The Ordinance states, "[T]he Seminole Tribe of Florida . . . is immune from suit brought by any third-party in any state or federal court without the clear and unequivocal consent of the Seminole Tribe of Florida. . . This immunity shall apply whether the Tribe is engaged in a private enterprise or governmental function." The Ordinance further identifies the means of accomplishing a waiver of the Tribe's immunity – a resolution of the Tribal Council. No such resolution was passed. Nonetheless Plaintiff filed an amended complaint stating that the Tribe had purchased liability insurance and by doing so had waived its sovereign immunity to the extent of the policy coverage. The court disagreed noting that no Tribal Council resolution had been adopted. Said the court, "[T]he purchase of insurance may simply be a measure to provide protection for the

Tribe's assets against the possibility that the Tribe's immunity will be abrogated or ignored."

12. *Romanski v. Detroit Entertainment, LLC., et al,* No. 04-1354 (6th Cir. 10/28/05). Casino patron picked up an abandoned nickel in a slot machine while joining friends for lunch at the casino buffet. Four security guards, one in uniform, detained Plaintiff for "slot-walking" against casino policy, which was not posted. Plaintiff sued for violation of civil rights and jury awarded her $875,000 in punitive damages. Defendant appealed and the court reduced the award to $600,000 stating that the casino's conduce was "significantly reprehensible" and that the casino acted with malice.

13. *Thompson v. Dover Downs, Inc.,* No. 40, 2005 (Del. 11/03/05). Plaintiff was denied access to the casino when accompanied by his 4 month old dog. Plaintiff contended the dog was a support animal but refused to answer the casino's questions about support animal training. The casino contacted the ADA hotline (800) 514-0301 and learned that they could deny the dog entry into the casino if the Plaintiff refused to answer their questions concerning the dog's training. The ADA hotline also mentioned that it takes 1-2 years to train an animal and since the dog was only 4 months old, it was doubtful the animal had been trained. The state human rights commission awarded Plaintiff $5000 in damages for embarrassment and assessed a $5,000 fine against the casino. The Delaware Supreme Court overturned the decision stating that the Plaintiff's refusal to answer questions and the dog's age gave support to the casino do doubt the status of the dog as a support animal.

Contracts/Agency

14. *D.L.S. v. Maybin, et al.,* No. 53537-4-I (Wash.Ct.App. 09/16/05, unpublished). Fifteen-year old restaurant employee and father of minor sued McDonald's corporation for negligent hiring, supervision and retention of franchisee's manager. Franchisee's restaurant manager provided minor with drugs, alcohol and became intimate with her prior to her 16th birthday. Trial court dismissed claim against the corporation due to no apparent agency relationship, however, Plaintiff could pursue claim against employer. Plaintiff alleged she worked for the corporation as McDonald's logo is on uniform but court said minor knew she worked with franchisee and not McDonald's as employment application acknowledged that the employee understood that her employer was an independent operator of a McDonald's franchise not the corporation.

Contracts/Breach/Punitive Damages

15. *Jordon. v. Holt,* 362 SC 201, 608 SE2d 129 (SC Sup. Crt., 2005). An award of punitive damages was upheld on appeal in a case involving a restaurant operated as a limited liability company. Plaintiff members proved Defendant members excluded Plaintiffs from management of the business, ignored requests for financial information and meetings, used LLC monies for payment of personal debts, engaged in self-dealing (formed a separate business to buy video games that were installed in the restaurant yet paid no rent to the

LLC), and sold LLC property without the knowledge and consent of the LLC, and then pocketed the money.

Contracts/Group Sales

16. *Hospitality Law Newsletter* (August 2005). The American Institute of Aeronautics & Astronautics reserved 290 of the 307 rooms at the Radisson hotel in Arizona. Six weeks prior to the conference, the hotel notified the client that it had missed a deadline for paying a deposit and wasn't going to honor the reservation. Prior to giving notice, the hotel had an opportunity to book another piece of business which was more lucrative. The client sued the hotel for breach of contract. The parties settled the matter and the hotel had to supply air-conditioned shuttle buses to transport the attendees from another hotel to the convention center, nonalcoholic beverages for attendees and welcome baskets as well as pay for attorney's fees.

17. *Marriott Corp. v. Lerew*, 2005 WL 2467055 (Crt. App. Oh, 2005). Defendants, trade show planners, contracted with the Marriott for a block of 1,560 rooms. The agreement did not contain a guarantee or an attrition or "slippage" provision which would have imposed liability on Defendant for lack of reservations. Many rooms were not used and Marriott sent Defendant an invoice for $202,791. This action seeks to collect that amount. One of several alleged grounds for liability was negligence, apparently in not sufficiently promoting the show. The court noted that a prerequisite to liability for negligence is a duty owed to protect another from injury. Here Defendants did not owe such a duty to Marriott and thus the cause of action was dismissed.

Contracts/Insurance

18. *San Carlo Restaurant v. St. Paul Fire & Marine Insurance Co., et al.,* No. 04-CV-4624 (E.D. Pa. 09/27/05). Intoxicated patron attended a wine tasting event at restaurant, drove away and struck pedestrian causing severe injuries. Pedestrian sued restaurant. Restaurant contended that patron consumed alcohol brought to the premises by patron and others at wine tasting event. Restaurant notified insurance carrier claim and insurer stated that policy's liquor liability exclusion applied. Restaurant argued that since restaurant didn't serve or furnish alcohol, the exclusion does not apply. Case remanded to determine if exclusion applies.

19. *IMT Insurance Co. v. Crestmoor Golf Club,* No. 65/04-0904 (Iowa 08/19/05). Former employee of golf club sues club for sexual harassment by supervisor. Insurer asked court to determine whether it was required to defend golf club under general liability policy terms. Iowa Supreme Court ruled that insurer was not required to defend the golf club against the employee's claims. Policy exclusion for misconduct of employee of club stands and insurer is not required to defend the club.

20. *Proshee v. Shree, Inc., d/b/a Southerner Motel,* No. 04-1145 (La. Ct. App. 02/02/05). Plaintiff was a guest of motel and was injured as a result of an assault and battery in the parking lot. Plaintiff sued motel for failure to maintain safe premises. Defendant asked

the court to force its insurance provider to defend it against Plaintiff's claim and pay for any damages it might be held liable for at trial. Insurance carrier argued that policy excluded claims based on assault and battery, and the trial court granted summary judgment in favor of the insurance carrier. The appellate court upheld the decision stating it was appropriate to deny coverage due to the strict interpretation of the language in the policy. Defendant argued the language was ambiguous because it didn't state whether the exclusion applied to the insured or a third party. The court rejected the Defendant's argument.

Contract/Language Interpretation

21. *Terra Cotta's Café, LLC v. Poole,* No. 05-0191 (La. Ct. App. 06/01/05). Defendant sold café to Plaintiff and buyers requested that Defendants sign a noncompete agreement. The agreement limited the Defendants ability to sell specialty baked goods to other businesses but retained the right to engage in the business of catering. Plaintiff sued the Defendants for breach of contract alleging that they sold baked good to certain customers which violated the agreement. According to the appellate court, the trial court inappropriately defined what the business of catering means and failed to hear industry expert testimony as to the term "catering". Defendants did not violate the terms of the agreement.

Contracts/Liability to Maintain Premises

22. *O'Rourke v. Days Inn New Orleans*, 2005 WL 1399252 (La. App., 2005). Plaintiff was an employee of Nora's Creole Café located at a Days Inn hotel in New Orleans. Plaintiff fell at the eatery due to condensation on the floor caused by a defective air conditioning system." She sued the Days Inn hotel for her injuries. The restaurant leases space from Days Inn New Orleans. That lease provides that "LESSEE shall, at her own expense and at all times, maintain the premises in good and safe condition including . . . plumbing and heating installations and any other system or equipment upon the premises . . . Lessee shall be responsible for all repairs required, excepting the roof, exterior walls, and structural foundations, which shall be maintained by Lessor." Said the court, "It is clear that the responsibility for maintenance of the air conditioning unit rested squarely on the Lessee. As such, [the Lessee] is solely responsible for any negligence based upon a faulty or inoperable air conditioning system on [the restaurant's] premises."

Contracts/Trade Secrets

23. *Magistro v. J. Lou, Inc., et al,* No. S-04-138 (Neb. 09/30/05). Plaintiff owned trade name and family recipes. He licensed the use of the trade name to Gregory Nolan who opened a restaurant under the trade name in another part of Omaha. A year later, Nolan changed the name of restaurant and Plaintiff sued Nolan for continuing to use family recipes. Evidence supports that Nolan no longer used family recipes of Plaintiff. Agreement failed to state provisions regarding termination. Plaintiff was unable to show that Nolan continued using family recipes after the name change of restaurant and therefore there was no breach of contract.

Criminal Acts of Third Parties

24. *Vetrone v. Ha Di Corp.,* 22 AD3d 835, 803 NYS2d 156 (2nd Dept, 2005). Plaintiff was hired as a security guard for a New Year's Eve party at Defendant restaurant. Approximately 200 tickets were sold; the facility had a maximum capacity of 150. Exacerbating this problem, non-ticket holders were admitted at the door. At 11:30 p.m. the restaurant was overcrowded and Plaintiff attempted to close the doors. The crowd grew agitated, a scuffle ensued, and Plaintiff was injured. The court held that the restaurant owed a duty to Plaintiff not to expose him to an angry crowd of ticket holders denied entry because of overbooking. Further, the aggression of would-be revelers denied access was a foreseeable consequence of overbooking, and therefore was not a superseding cause of Plaintiff's injury. The attack against Plaintiff thus did not break the causal connection between the restaurant's negligence and Plaintiff's injuries.

25. *Wallace v. Wyner*, 2001 WL 3214689 (Tex. Crt. App., 2005). Plaintiffs, minor boys, were attacked and injured while leaving a Six Flags amusement park. At the time of the assault Plaintiffs had exited the front gate, passed the drop-off area, and were on sidewalk abutting the highway. Summary judgment for the park was affirmed. The court observed that the park had never owned, occupied or controlled the site of the attack. Therefore it had no duty to protect its former invitees on that property against criminal acts of third parties.

Defamation

26. *McPherson v. Red Robin International, Inc.,* No. 8:04CV51 (D. Neb. 10/19/05). Hostess at a restaurant wearing the restaurant's mascot costume was groped by a patron, the Plaintiff. Plaintiff alleged that hostess' comments to police and others through media coverage injured his reputation and sued the restaurant. Plaintiff also alleged that restaurant failed to train employees how to deal with dangerous or inappropriate guests. Court dismissed claim stating that conduct of the Plaintiff should not be promoted and customers who treat restaurant staff in an offensive manner should not be allowed to profit from customer's own misconduct.

27. *Owner's Insurance Co. v. Clayton, et al.,* No. 25986 (S.C. 05/23/05). Clayton, a business manager, was terminated for allegedly embezzling funds from the Lands Inn motel. Clayton was arrested but the charges were dropped. A motel employee answered the phone twice and said that Clayton was fired for stealing company funds. Clayton sued motel for defamation and the jury awarded $1.25 million in damages. The Plaintiff in this case defended the motel on the defamation claim but said its insurance policy excluded injuries from defamation. The court stated the exclusion only applied to employment matters and in this case the comments were not made to potential employers of Clayton but to a former guest and an acquaintance, so the exclusion does not apply and Plaintiff was required to repay the motel for the loss.

28. *Themed Restaurants, Inc. v. Zagat Survey*, *LLC,* 21 AD3d 826, 801 NYS2d 38 (NY App. Div, 1st Dept, 2005). This is an appeal of a decision discussed at last year's Hospitality Law Conference. Plaintiff restaurant, which sports a drag queen cabaret theme, complained about

its review in Zagat's Survey of New York City Restaurants. The evaluation was an edited summary of multiple anonymous consumer opinions. As such the comments are constitutionally protected opinion. The appellate court affirmed the dismissal of the complaint.

Discrimination/ADA

29. *Hospitality Law Newsletter (October 2005).* EEOC sued Hardee's Food Systems Inc. who in turn agreed to pay $34,000 to settle a claim for Hardee's failure to hire an applicant who had Treacher Collins syndrome – a birth defect that causes a malformed cranial bone structure. The job applicant repeatedly applied for an entry-level job and was refused employment despite being qualified. The settlement also required the chain to apologize to the applicant in writing and provide ADA training to its managers and human resources employees.

30. *Soone v. Kyo-Ya Co.,* No. CV 03-00687 DAE-BMK (D. Hawaii 01/26/05). Plaintiff injured his back while working as a bartender at Defendant's hotel. After receiving worker's compensation for a year, Plaintiff was allowed to return to work with restrictions. Plaintiff requested a light-duty position and hotel did not have such positions available at that time. Plaintiff sued for violation of the ADA alleging the hotel failed to accommodate him by not removing another employee from a light-duty position for him. The hotel requested court to dismiss claim stating that the accommodation request was unreasonable. The court agreed with the hotel stating that the reassignment was not meant to force employers to eliminate other workers or to create openings for a disabled employee.

Discrimination/Age

31. *Hospitality Law Newsletter (*June 2005). Hyatt hotel in Sarasota, Florida refused to rent rooms to students for their upcoming prom night. Local youth activist group called Mobilize Youth, stood outside hotel for an hour holding signs to boycott hotel. The youth's position is that not catering to legal adults due to their age is age discrimination.

Discrimination/Employment

32. *Wright v. Bennett et al*, No. 2004 CA 1944 (La. Ct. App. 09/28/05). Hotel's chef investigated irregularities at the restaurant due to high food costs. Plaintiff and seven other employees sued hotel for racial discrimination after being terminated. Jury found in favor of hotel stating that the terminations were based on nondiscriminatory reasons and Plaintiff appeals. Jury verdict stands even with no direct evidence of stealing. Employer did not have the burden of proving it did not discriminate.

33. *Hospitality Law Newsletter (December 2005)* Tuscon Holiday Inn Express settled charges that it discriminated against a former front-desk clerk who was discharged days after telling her manager that she was pregnant. Hotel is to pay $9,500 in back pay, prohibits hotel from discriminating against any employee based on sex. If hotel violates the provision during the next three years, it will be fined $20,000 for first offense and $25,000

for additional violations. Training also required and the repayment of fees for Attorney General monitoring compliance efforts in the amount of $1,500.

34. *Bellings v. Peninsula Gaming Co., LLC d/b/a Diamond Jo Casino,* No. C03-1039 (N.D. Iowa 02/02/05). Plaintiff worked as a security dispatcher at the casino. His job description stated that he had to be able to lift 30 pounds with one arm and restrain unruly patrons. Plaintiff took leave under the FMLA. The casino terminated him when he failed to return after his leave expired. Plaintiff claimed he was fired in violation of the ADA because of his back injury. The casino argued that his back injury prevented him from performing the essential function of his job. The court agreed with the casino after reviewing the written job description prepared by the casino when Plaintiff was first employed. Plaintiff could not proceed with his claim since he was unable to establish that he was qualified to restrain others and therefore could perform his essential job functions.

35. *Loughman v. Malnati Organization, Inc.,* 395 F.3d 404 (7th Cir., 2005). Plaintiff, a "food runner" and cashier at Defendant's restaurant, filed an action for sexual harassment based on several incidents. In one, a fellow employee put his arm around her waist, pushed her into a room and tried to kiss her, and when she resisted, blocked her path for several minutes before relenting. In another two employees followed her into the cooler, turned out the light, closed the door, grabbed her, pinned her against the wall, grabbed her chest and tried to put his hands down her pants. The third incident involved another employee walking up behind her, running his hands through her hair, sliding one hand up her skirt, wiggling his fingers on her stomach, giggling, and running away. Plaintiff reported all three incidents to her boss. The perpetrators were threatened with loss of their job. No shift changes or job assignments were made. The court refused to grant the restaurant's motion for summary judgment noting that a jury could determine that "simply talking to the people involved in the aggressive incidents was not a sufficient response" and that Plaintiff believed her work environment was offensive.

36. *De Brasi v. Plaza Hotel,* 2005 WL 1107058 (SDNY, 2005). Plaintiff, employee of Defendant hotel was born in Brazil and spoke Portuguese as her native language. She claimed she was sexually harassed based primarily on three incidents. In one, she claimed to have overhead co-workers using the Portuguese term for "breast". In fact they were using the Croatian word for chicken (pronounced "petal") which sounds very similar to the Portuguese word for breast – "peito". In another incident she claims an employee gave her the finger while no one else was looking. She also overheard employees using profanity or sexually explicit language although the comments were not addressed to her. She further asserted that the cashier at the hotel newsstand recommended a magazine that had an article about breast implants marked by a folded page. Investigation revealed that Plaintiff did not read the magazine or see that the page was folded for three days and acknowledges that someone other than a Plaza employee may have folded the page. The court found these incidents to be isolated, indirect and too speculative to constitute sexual harassment. Defendant's motion for summary judgment was thus granted.

Discrimination/Gender

37. *Angelucci, et al.., v. Century Supper Club,* No. B173281 (Cal .App. Ct. 06/28/05). Patron frequented club seven times over a two-month period and observed that female patrons paid a lower admission price than male patrons. He sued and the court said that he could not proceed with his claim as during his visits he did not ask for equal treatment from the club. The law states that there cannot be discrimination or a denial of services unless services are requested. Patron never asked for equal treatment from the club so he was unable to show he was discriminated against.

38. *Jespersen v Harrah's Operating Co.,* No. 03-15045 (9th Cir. 12/28/04). Plaintiff bartender at Harrah's sued casino for its policy on requiring female employees to wear makeup. The court dismissed her claim and she appealed. Plaintiff argued that Defendant's "Personal Best" program imposed a greater burden on women than on men. The court found that Plaintiff failed to present sufficient evidence for the court to evaluate the burden on men vs. women and stated she could not go to trial on her sex discrimination claim.

Discrimination/National Origin

39. *Mercado v. Ritz-Carlton San Juan Hotel, Spa & Casino,* No. 04-1630 (1st Cir. 05/31/05). Plaintiff was an employee at the hotel and resigned claiming he was a victim of national origin discrimination. Four years later he sues for employment discrimination. District court dismissed as the filing was not within the deadline. Plaintiff appealed arguing the time period for filing should be tolled stating that the hotel failed to post EEOC informational notices and he did not learn of his legal rights until he consulted with an attorney. Hotel stated that notices were posted and employment handbook contained information about its policies. Appellate court agreed with Plaintiff and said more information was needed about the Plaintiff's assertion. Case remanded and lower court to investigate whether Plaintiff had actual or constructive knowledge of his legal rights.

40. *Hospitality Law Newsletter* (July 2005*).* Fairmont Hotel Management LP agreed to pay $525,000 to compensate a dozen Muslim, Arab and South Asian employees of the Plaza Hotel following an EEOC charge that the hotel subjected the employees to a hostile work environment after 9/11. The 12 employees were called offensive and derogatory names by coworkers and high level managers.

41. *Hospitality Law Newsletter (*January 2006). The 9th U.S. Circuit of Appeals in San Francisco recently affirmed a jury verdict that found the Defendant, Gray Young, the CEO of BJY Inc. liable for employment discrimination based on ethnic backgrounds because he continuously referred to Mr. Mamdouh El-Hakem as "Manny". Employers should not use nicknames for employees as it could lead to litigation.

Discrimination/Pregnancy

42. *Taylor v. Bigelow Management, Inc., et al* No. 0-04-CV-1554-BD (N.D. Tex. 04/06/05). Plaintiff informed manager of Budget Suites of America that she was pregnant and

manager appeared upset. Four days later Plaintiff was demoted to a subordinate position and subsequently demoted again. She sued and hotel claimed she was demoted for poor performance. Hotel asked court for summary judgment and it was denied. The court found that the substance and timing of the remarks made by the manager were sufficient to raise a fact issue as to discriminatory intent. Plaintiff was permitted to pursue her claim.

Discrimination/Racial

43. *Gennell v. Denny's Corp.,* No. DKC 2004-0441 (D.Md. 07/26/05). Patron was the only African-American in her group of six and alleged she received poor and slow service. She stated that neither the manager nor the server were responsive to her complaints. When the Plaintiff and her party started to leave the manager became threatening. The restaurant stated that the service was slow for other customers too since there was only one cook on duty. Plaintiff was not allowed to proceed with her case since she was unable to show racial discriminatory intent nor to refute the restaurant's position.

44. *Lloyd v. Waffle House, Inc.,* No. 1:03CV237 (W.D.N.C. 12/10/04). Plaintiffs arrived at Waffle House for an early breakfast around 1:15 am. The mixed-race couple claimed they were ignored by several waitresses who serviced other customers during the 45 minutes that Plaintiffs waited. Plaintiffs left the restaurant without being served. Cashier was very rude. Plaintiffs sued and restaurant requested claim be dismissed due to an inexperienced waitress overlooking the other servers on a busy night. Plaintiffs stated the restaurant was not busy and the court concluded that the Plaintiffs' observations created a legitimate question about whether the restaurant's reason for slow service was a cover for discrimination. The court denied the restaurant's motion to dismiss.

45. *Charlie Crist, Attorney General, State of Florida et al vs Raj Patel, The Southern Inn et al.,* (Case No.: 04-CA-1269 (2nd Cir. Leon County, FL 2005). First lawsuit brought under the 2003 Dr. Marvin Davies Civil Rights Act which allows the Attorney General in Florida to bring a civil rights action against those who engage in a pattern or practice of discrimination. Raj Patel, owner of the Southern Inn, allegedly placed African-American guests in less desirable rooms in a different wing of his motel and told these families they were not welcome in the swimming pool. Patel is required to pay $40,000 to compensate victims and he is also prohibited from owning or operating a motel or any other form of pubic lodging anywhere in the U.S.

46. *Baptiste v. The W Hotel, et al.,* 04 Civ. 5544 (DLC) (S.D.N.Y. 04/27/05). Plaintiff, an African-American woman, went to visit a friend at the W Hotel. While the front desk was verifying that the person she wanted to see was a hotel guest, Plaintiff walked to the elevators. The clerk stopped Plaintiff and told her she had to sign in at the front desk. An altercation developed and the clerk forcibly removed Plaintiff from the premises. Plaintiff sued claiming she was discriminated against because of her race. Court dismissed claim because Plaintiff failed to show that the hotel's actions were racially motivated.

Dram Shop

47. *Hayes v. Caspers, Ltd., et al.,* No. AC25400 (Conn.App.Ct. 08/16/05). Minor was served alcohol in a bar and subsequently took a chemical drug known as Invigorate (GHB) which made him collapse and later that night he died. The administrator of the minor's estate sued the bar owner and the jury found in favor of the bar. The appellate court upheld the jury verdict stating that it was not foreseeable that when it served the minor that he would subsequently take a drug when mixed with alcohol, could be deadly. The court said that the bar did not expose itself to unlimited liability by negligently serving beer to a minor.

48. *Sugarloaf Café v. Willbanks, et al.,* 279 Ga. 255 (Ga. 04/26/05). Patron went to Buffalo's Café where she consumed 10 glasses of wine in a five hour time period. A coworker drove the patron back to her car at her work which was only two minutes away. Patron got in her vehicle and drove away. She crossed the center line of the highway and hit a vehicle injuring Willbanks and another passenger. Georgia dram shop law requires the injured party to demonstrate that the bar served alcohol to a noticeably intoxicated person, knowing that the intoxicated person will be soon driving a vehicle. Willbanks did not show that the bartender knew she would soon be driving when he served her. The Georgia Supreme Court declined to place a burden on the bar to determine the method by which its patrons would leave the bar.

49. *Sluder v. Steak & Ale of Little Rock, Inc., d/b/a Bennigan's Grill & Tavern of Texarkana,* No. 03-1138 (Ark. 03/31/05). Plaintiff was injured in a car accident on his drive home from a bar incurring $250,000 in medical damages. Plaintiff sued bar stating that the bar employees negligently served Plaintiff and his friends when they were clearly intoxicated. Arkansas Dram Shop does not allow the person who voluntarily drinks too much to sue the bar for his own self-inflicted injuries. The Arkansas Supreme Court rejected the Plaintiff's argument that even though the drinks were served to him, the bar sold the alcohol to an intoxicated friend and this resulted in injuries to the Plaintiff. Plaintiff's complaint failed to allege that his intoxicated friend caused his injuries and his claim was therefore dismissed.

50. *Jiggens v. Batten et al.,* No. 53595-1-I (Wash. Ct. App. 01/18/05). After drinking all night, a patron drove his car into oncoming traffic and died. The blood alcohol level was .31. His widow, the Plaintiff, sued the bar alleging they negligently over served alcohol to her husband and caused his wrongful death. The trial court granted the bar's motion to dismiss stating that an intoxicated patron is responsible for his own acts. Plaintiff appealed stating that a surviving spouse is not precluded from suing the bar, and the appellate court disagreed with the Plaintiff. The court stated that no duty arises when intoxicated adults harm themselves so a surviving spouse is not entitled to a wrongful death claim.

51. *Miller v. Gastronomy, Inc.,* 110 P.3d 144, 2005 Ut. App. 80 (Utah App., 2005). Decedent dined at Defendant restaurant, consuming four glasses of wine in 40 minutes. He proceeded to the bar next door, owned by the same party, and drank five additional glasses of wine in the next hour and a half. He was served while visibly intoxicated. While driving home he was in a one-car accident which caused his death. His BAC was .22.

Since the person injured was the imbiber, the appeals court upheld summary judgment for the Defendant. Said the appellate court, "[P]roximate causation is the fatal flaw in a first-party action against a dram shop. The proximate cause of the intoxicated person's injuries is the drinking of the alcohol, not the furnishing of it. . . . Furthermore, the majority of jurisdictions that have addressed this issue resolved that no first-person cause of action against an alcohol provider exists at common law."

52. *Estate of White v. Rainbow Casino,* 910 So.2d 713, 2005 WL 589882 (Miss. App., 2005), Decedent was a patron at Defendant casino. While playing shot machines she was served six eight-ounce complimentary glasses of beer. The issue subsequently arose whether she was visibly intoxicated when she was served. The evidence from "transcripts of the casino's security cameras" was as follows: throughout the time she was served she was ambulatory and conversational, she visited the restroom a number of times, she alternated her gambling among several slot machines, and conversed with her husband throughout the day. Said the court, "[T]here is no indication that [decedent] was visibly intoxicated."

53. *Reese v. Siera (West Cover Seafood Restaurant),* 17 AD3d 439, 792 NYS2d 629 (App. Div. 2nd, 2005). Plaintiff was injured in a one-car car accident. The vehicle was driven by his friend who was later found guilty of driving while intoxicated. Prior to the accident Plaintiff purchased alcoholic drinks for the driver at two different bars. Plaintiff's lawsuit against the bars based on the Dram Shop Act was dismissed. A Plaintiff who procures an alcoholic beverage for the person whose intoxication caused the accident has no cognizable cause of action based on Dram Shop Act.

54. *Delta Airlines, Inc. v. Townsend*, 2005 WL 1405825 (Sup. Crt. Ga 05). Plaintiff was injured when his car was struck head-on by a vehicle driven by a man who was driving home from the Atlanta airport, having just arrived on a Delta Airlines flight from Milwaukee. He was intoxicated by the consumption of wine served to him while on the flight. Plaintiff sued the airline based on Georgia's Dram Shop Act which states that a person who furnishes alcohol to a noticeably intoxicated person, "knowing that such person would soon be driving a motor vehicle", is liable in tort to a third person injured by the negligence of the intoxicated person. The issue of whether an airline was liable under the act was a question of first impression. The court held Delta was not liable, noting that the airline has no way of knowing whether its passengers will soon be operating a vehicle or, in the alternative, will remain at the airport, take another flight, or depart by some other means of transportation. Further, those who will leave the airport may be delayed by such factors as customs and baggage claim. The trial court had granted Delta's motion to dismiss; the appellate court reversed; the Supreme Court reversed again and reinstated the trial court's dismissal of the complaint.

Employment/Arbitration Agreements

55. *Walker, et al. v. Ryan's Family Steak House, Inc.,* No. 03-6468 (6th Cir. 03/09/05). Plaintiffs sued their former employer, Ryan's, under the Fair Labor Standards Act for wage violations. Ryan's argued that the former employees had to arbitrate first. Court said the agreements were not enforceable and the appellate court agreed. Managers hired Plaintiffs

quickly without mentioning the arbitration requirement. The court reasoned that an employer's promise to consider an application was not enough consideration for a promise to arbitrate. The court said the employees did not voluntarily agree to waive their right to a trial when they signed the arbitration agreements.

56. *Jones v. FS Hotel, Inc.,* 2005 WL 3508659 (Cal. App. Crt, 2005). This case resolved a factual issue whether an employee had signed the "opt-out" option of an employment agreement that mandated arbitration. While the case has little precedent value, it underscores the importance by the employer of obtaining employees' signatures on employment documents and of carefully maintaining records in employee files.

Employment/Retaliation/FMLA

57. *Banks v. CBOCS West, Inc.,* No. 01C795 (N.D. Ill. 05/09/05). Plaintiff, who had Crohn's disease, worked as a general manager at a Cracker Barrel. After returning from a leave of absence, Plaintiff was assigned to another restaurant as an associate manager. He filed a complaint under the Family and Medical Lease Act. He received negative performance evaluations and was written up for policy violations. Plaintiff left a "harassing and potentially threatening voice mail" message on supervisor's phone, and was subsequently terminated. Plaintiff sued restaurant operator claiming termination was in retaliation for FMLA claim. Court held that despite Plaintiff's frustration, it did not entitle him to act in the manner that he did knowing he was facing a risk of being terminated. No other employees were treated more favorably for promotion. The phone message provided Defendant with a legitimate reason to fire Plaintiff.

Equal Protection

58. *1064 Old River Road., Inc., d/b/a The Beach Club v. City of Cleveland, et al.,* No. 04-3541/3716 (6th Cir. 06/02/05). City of Cleveland's task force to crack down on unsafe places closed down Plaintiff's club as well as another club. The clubs sued the city alleging the inspections were unconstitutional, claiming they were singled out for inspection which infringed on their equal protection rights. The trial court dismissed the claim and clubs appealed. Appellate court rejected Plaintiff's argument and said that history of violations of the clubs gave the city an ample and rational explanation for initially choosing them to inspect the clubs. Both clubs had histories of police involvement.

Exculpatory Clause

59. *Hanks v. Powder Ridge Restaurant Corp*., 276 Conn. 314, 885 A.2d 734 (Conn. Sup. Crt., 2005). Plaintiff was snow tubing at Defendant's facility when his foot became caught between the snow tube and manmade bank of the snow tubing run. Defendant requires that all patrons sign an exculpatory agreement, described by the court as "well-drafted" that clearly states, in language understandable by an "ordinary person of reasonable intelligence", that the facility will not be liable for negligence. However the court further found such clause violates public policy and is therefore unenforceable.

False Imprisonment/False Arrest

60. *Miller v. Lewis, et al.,* 381 F. Supp. 2d 773 (N.D. Ill. 2005). When exchanging his winning for markers and cash, Plaintiff received $500 in excess at Harrah's riverboat casino. Cashier promptly notified her manager that Plaintiff had received too much. Casino supervisor handcuffed Plaintiff and held him for 30-45 minutes stating that video surveillance confirmed the overpayment. Plaintiff paid the overpayment. Court found that Harrah's had reasonable grounds to believe Plaintiff committed theft and detention was necessary as Plaintiff attempted to walk away from casino.

61. *Blue v. Harrah's No. Kansas City, LLC,* Nos. WD63948 and WD63975 (Mo. Ct. App. 06/07/05). Guest in casino reported that $90 worth of chips were missing from her table. Surveillance tapes identified the thief with a vague description. Plaintiff was arrested for the theft by a Missouri Gaming Commission officer. The next day, a closer look at the tapes showed it was not the Plaintiff. Plaintiff sued for false arrest. Jury awarded Plaintiff $250,000 in punitive damages only and judge threw out award. On appeal, court found that Plaintiff did not establish entitlement to punitive damages as the casino's conduct was not outrageous and the casino did not act in bad faith.

62. *Kennedy v. Sheriff of East Baton Rouge and Jack in the Box,* No. 2004CA 0574 (La. Ct. App. 03/24/05). Plaintiff and four others drove up to Jack in the Box drive-thru and used a $100 bill to pay for food. Cashier suspected it was counterfeit and notified the police. Police handcuffed Plaintiff and drove him to the police station. The bill was legitimate and Kenney was released. Plaintiff sued for false arrest. Trial court dismissed claims and the appellate court remanded back to the trial court for a trial. The court stated that neither the cashier nor the sheriff was able to show that their employees had sufficient training to recognize counterfeit money. Neither had access to counterfeit detection markers, which are readily available.

Franchises/Agency

63. *Williams v. Chick-Fil-A, Inc.,* 2005 WL 1562946 (Ga. App., 2005). Plaintiff administrator represented a motorist killed in a collision with Defendant driver. Defendant subleased and operated a Chick-Fil-A fast food restaurant pursuant to an "independent Contractor's Agreement." In a sales contest sponsored by the franchisor, Defendant won the right to use a Ford truck for one year. The vehicle was painted with signs promoting Chick-Fil-A restaurants. The franchisor owned and held title to the truck, paid for some operating costs and provided insurance coverage. The franchisor did not retain the right to restrict or otherwise control Defendant's operation of the vehicle. The accident occurred while Defendant was on a "purely personal mission". Plaintiff sought to include the franchisor as a Defendant on an agency basis. The appeals court affirmed the trial court's grant of summary judgment for the franchisor on the grounds that the franchisee was not an agent or partner of the franchisor, and the latter did not control the operation of the franchisee's restaurant or the truck. The fact that the franchisor received some advertising benefit from the signs on the vehicle does not render it liable for the franchisee's negligence.

Fire/Restitution

64. *State of Washington v. Lohr,* __P.3d__, 2005 WL 3470594 (Wash. Crt. App., 2005). Defendant lit a candle in her hotel room, left the room for 20 minutes, and upon her return found a "rapidly spreading fire that damaged the hotel and several cars." She pled guilty to the crime of first degree reckless burning. The court ordered restitution in the amount of $1,355,266.97 (!), to be paid in monthly installments of $250. The court rejected Defendant's claim of contributory negligence in part on a factual basis and in part because a criminal Defendant "takes their victim as they find them."

Independent Contractors

65. *Greco v. United States, Internal Revenue Service,* No. 3:CV-02-0417 (M.D. Pa. 08/04/05). Restaurant and bar owners retain 24 workers as bouncers, hosts and hostesses and a coat checker, and classify them as independent contractors. The IRS notified Plaintiff that it owed more than $150,000 in unpaid taxes for improperly classifying the employees. Plaintiff challenged the assessment and the U.S. District Court said that only the coat checker was an independent contractor, and the jury would have to decide if the others were properly classified. At least one of the bouncers had signed the employee rules of conduct which subjected the bouncer to being terminated for failure to comply.

66. *Matthews v. Horseshoe Casino*, No. 2004-CA-000911-COA (Miss. Ct. App. 09/06/05). Plaintiff, an independent contractor working at the casino, was injured when a fire broke out while he was working on an electrical device. Trial court dismissed stating that the casino did not exercise control over the project he was working on when injured. Plaintiff argued that casino representative periodically discussed the progress of work and coordinated certain issues with subcontractor. Under contract, contractor assumed full responsibility for hiring its employees and for the work to be performed, therefore casino not responsible.

67. *Binder v. Benchwarmers Sports Lounge,* No. 71A03-0503-CV-130 (Ind. Ct. App. 08/24/05). Plaintiff was injured while working at the lounge attempting to break up a fight and filed for worker's compensation. Several years into the claim, Defendant disclosed that Plaintiff was working as an independent contractor on that evening and not the bar. Plaintiff sued Defendant and Defendant attempted to have the claim dismissed based on the fact that the statute of limitations had passed. The trial court dismissed the claim and the appellate court disagreed. The appellate court ruled that the Plaintiff could pursue its claim because the Defendant had misrepresented the employment status of the Plaintiff.

68. *Hertz Motel v. Ross Signs,* No. 23381 (S.D. 06/08/05). Plaintiff hired Defendant as an independent contractor to remove and reinstall neon lighting. Motel was 50 years old and had undergone numerous repairs to neon lighting. Four days after Defendant's work, a fire caused over $100,000 in damage to motel. Trial court ruled in Plaintiff's favor prior to trial having found that Defendant's work did not comply with national standards. Supreme Court reversed and required a trial to determine if negligence, if it did occur, was the cause

of the fire. Defendant's failure to follow codes was an indication of negligence, however, the case should go to trial to determine the cause of the fire.

Interference with Business

69. *Cheung v. Wambolt, et al.,* No. 04-127-B-W (D. Me. 07/05/05). Plaintiff closed his Chinese restaurant and karaoke business after a long dispute with the Defendant landlords. Defendant operated a motel next to Plaintiff's business and claimed excessive noise and disorderly patrons from the restaurant hurt their business. Police were called several times. Plaintiff sued his landlords and the town claiming a pattern of discriminatory harassment that interfered with his ability to operate the restaurant. Plaintiff argued that the town intimidated him by rescinding his license and the landlords also intimidated customers. Court ruled that Plaintiff could not pursue his claim as none of the conduct he mentioned was threatening or designed to place anyone in fear.

Jurisdiction/Energy Surcharge

70. *Snowney v. Harrah's Entertainment, Inc., et al.,* No. S124286 (Cal. 06/06/05). Plaintiff reserved a Nevada hotel room from his California home and was quoted a rate of $50 per night plus tax. At checkout, Plaintiff's bill contained a $3 energy surcharge which he was not aware of before or during his stay. Plaintiff sued the Nevada hotel in California claiming that by marketing the hotel to residents of California through the website and other marketing activities, the hotel was doing business in the State of California. The California Supreme Court agreed with Plaintiff and allowed the claim in California.

Jurisdiction/Long Arm Statute

71. *Unger v. The Cheesecake Factory Restaurants, Inc.,* 2005 WL 1846536 (Oh. App., 2005). Plaintiff, a resident of Ohio, tripped and fell in a Cheesecake Factory Restaurant in Florida. She filed a complaint for negligence in Ohio. The trial court dismissed the complaint for lack of personal jurisdiction. On appeal Plaintiff claimed the long arm statute applies because the corporation that owns the restaurant in Florida also owns three in Ohio, employs Ohio citizens, pays taxes in Ohio, is licensed to do business in Ohio, and appointed a statutory agent for the service of process in Ohio. The appellate court affirmed the trial court because Plaintiff's claim did not arise out of any transactions, tortious conduct, or interest in property by Defendant in Ohio.

Negligence/Bed Bugs

72. *Hospitality Law Newsletter (*July 2005). Helmsley Park Lane Hotel was sued after a guest and a companion were bitten numerous times by bed bugs while staying at the property. According to Orkin Inc., bed bug related complaints increased 20 percent in 2004.

Negligence/Duty to Seek Medical Assistance

73. *White v. Rainbow Casino,* No. 2003-CA-01947 COA (Miss. Ct. App. 03/15/05). Plaintiff's wife consumed 12 beers over the course of a day at Defendant's casino and passed out, striking her head as she fell down. Plaintiff's wife appeared fine after the fall and went home but died that evening. Plaintiff sued casino for negligence, specifically that casino failed to call for an ambulance or dial 911, claiming that despite his wife's refusal for assistance, the casino should have required her to seek medical assistance. Case was dismissed prior to trial and the appellate court affirmed stating that unless the Plaintiff can show that the casino had a duty to require his wife to seek attention against her wishes, he could not proceed with his claim.

Negligence/Emotional Distress

74. *Popovitch vs. Denny's Restaurant*, No. B177296 (Cal. Ct. App. 08/12/05). Plaintiff ordered a vegetable omelet at Defendant restaurant. Plaintiff is a strict vegetarian and told the server that she did not want any meat in the omelet. When half way through her meal, Plaintiff discovered that there was pork sausage in the omelet. Plaintiff began to feel dizzy and nauseous and later vomited. The appellate court stated that the Plaintiff had insufficient grounds to sue since she didn't suffer a physical injury. The court said that even if vomiting was considered a physical injury, the Plaintiff did not show that the meat in the omelet had caused the vomiting.

Negligence/Evidence

75. *American Hospitality Management Co. of Minnesota v Hettiger,* No. 4D03-2001 (Fla. Dist. Ct. App. 06/01/05). Hettiger, a service technician, borrowed a ladder from the operator of a Holiday Inn to repair its air conditioner. He fell from the ladder and was injured. The same day, the hotel destroyed the ladder. Hettiger sued the hotel for negligence and asked the court to hold the hotel accountable for destroying the ladder before having a chance to examine the ladder. The hotel was not aware that Hettiger would be filing a claim. The trial court instructed the jury should presume the ladder was defective placing the burden on the hotel. The appellate court disagreed and ordered a new trial. The jury should not be told to assume the ladder wad defective and the hotel will have to argue its reason for disposing of the ladder.

Negligence/Failure of Brakes

76. *Speidel v. Sodexho, In., et al.,* No. 03 Civ.3100 (LTS)(HBP) (S.D.N.Y. 07/05/05). Plaintiff was a guest of a Manhattan Marriott hotel and was injured while loading luggage into his trunk. An employee was moving a guest's vehicle when it struck the Plaintiff pinning him between the two cars. Plaintiff asked the court to decide in his favor rather than going to trial contending that the hotel was responsible for the negligent acts of its employees. The court denied his motion because the hotel employee raised the possibility that the accident may have been caused by defective brakes rather than negligence.

Negligence/Failure to Protect Pedestrians

77. *Rosas v. O'Donoghue, et al.,* No. 03-5071 (E.D. Pa. 08/17/05). Patron, a minor, was hit by a car when on foot she crossed a four lane state highway after leaving a Burger King. The Burger King was located at an intersection with a traffic light but no pedestrian crosswalks. Minor's guardian sued Burger King Corp, the franchisor alleging that the franchisor was responsible for failing to provide a safe crosswalk and warning signs to protect patrons. The court stated that the guardian could not pursue her claim because the intersection was within the exclusive responsibility of the Commonwealth, not private landowners. The Pennsylvania Supreme Court agreed and said the restaurant did not have duty to warn Ms. Bradley of the dangerous condition of the intersection.

Negligence/Food Cases

78. *Foster v. AFC Enterprises, Inc.,* No. 04-1014 (La.Ct.App. 03/02/05). Plaintiff ate lunch at Church's Fried Chicken restaurant and seven hours later had severe abdominal pain, nausea and vomiting. Physician at emergency room and Plaintiff's own doctor said it appeared to be food poisoning. Plaintiff sued and trial court decided in Plaintiff's favor awarding him $9,000 in damages. Appellate court affirmed. Plaintiff was able to eliminate any other causes of the injury and the restaurant did not introduce evidence to refute the Plaintiff's physician's testimony, or announce any policies or procedures designed to prevent food contamination.

79. *Woeste v. Washington Platform Saloon & Restaurant, et al.,* No. C-050030 (Ohio Ct. App. 09/09/05). Thomas Woeste contracted bacteria after eating a dozen raw oysters and died one week later. Woeste had hepatitis C. The restaurant menu stated the warning about eating raw shellfish, but Woeste ordered without opening the menu. His widow sued restaurant for negligence stating the warning was defective because it did not warn of the possibility of death. Court said the warning was adequate and was in the most reasonable location (rather than being displayed throughout the restaurant as Plaintiff asserted). Court dismissed the Plaintiff's claim.

80. *Arenas v. Cheesecake Factory,* 907 So.2d 1184 (Fla. Crt. App., 2005). Plaintiff, a diner at a Cheesecake Factory restaurant was injured when she bit in to a Tex-Mex egg roll containing a piece of shish kabob stick. Judgment for Plaintiff was affirmed on appeal.

81. *Vargas v. Continental Cuisine, Inc.,* 900 So.2d 208 (La.App.4 Cir., 2005). Plaintiff, a patron at Defendant restaurant, had been diagnosed with severe liver failure. He became very ill after consuming raw oysters served by Defendant restaurant. After settling with the restaurant, Plaintiff sued the Department of Health and Hospitals (DHH) alleging that it was negligent in enforcing Louisiana law that requires restaurants to post sufficient warnings regarding the ingestion of raw oysters at the point of sale. Plaintiff claimed that the warnings on the restaurant's menu and at the bar were insufficient because they stated only "there may be a risk associated with consuming shellfish" and should have warned of special dangers associated with ingesting raw oysters by people who suffer from liver disease. Plaintiff stated that he was a regular at the restaurant, had a few favorite items he

usually ordered (shrimp po'boy or seafood platter) and so he never looked at the restaurant's menu. He was prompted to purchase the oysters from an advertising flier which did not contain the warnings. The court stated that the DHH "clearly failed in its duty under the Sanitary Code to ensure that the restaurant posted adequate warnings on its menus and above the bar. " Nonetheless, since Plaintiff did not read the menu he would not have seen the warning had it been there. Thus, Defendant DHH's breach of duty was not the proximate cause of Plaintiff's injury and so the case against DHH was dismissed.

82. *Bussey v. ESC Restaurants, Inc.,* No. 050358 (Va. 11/04/05). Plaintiff ate spoiled meat at a Golden Corral restaurant and complained to the manager that the meat smelled bad. The manager replied, "The meat is bad… I just told that guy five minutes ago not to cut that piece of meat up in the back; it's no good." Plaintiff suffered food poisoning as per her doctor's analysis and sued. The jury returned a verdict in her favor of $111,765 for damages and the trial judge granted a judgment notwithstanding the verdict in favor of the Defendant. The Virginia Supreme Court reinstated the award stating that a jury's verdict can be overturned only where it is plainly wrong or there is no credible evidence. Also, food poisoning cases must rely on circumstantial evidence and since the evidence presented was not speculative, the Plaintiff's award stands.

Negligence/Foreign Object

83. *Schafer v. JLC Food Systems, Inc.,* No. A03-779 (Minn. 04/28/05). Plaintiff ordered and took one bite of a pumpkin muffin and was injured by a sharp object and a choking sensation in her throat. The emergency room doctor said there was a cut on her throat. The muffin had been discarded. Plaintiff sued for negligence and the court stated that Plaintiff's inability to identify the foreign object did not prevent her from pursuing her claim. Court adopted the reasonable expectation test as the standard for determining defective food products and not the foreign-natural test, which is more likely to yield a more equitable result.

84. *Thomas v. HWCC-Tunica, Inc*., __So.2d__, 2005 WL 3163508 (Miss. Crt. App., 2005). While at Defendant restaurant Plaintiff ate a small bite of prime rib sandwich described by her as one-half inch by one-half inch. After swallowing the food she felt a "catch in her throat". A few days later she went to the hospital complaining of abdominal pain. Surgery was performed during which a toothpick was removed from her small intestine that was approximately one-and-a-half inches long. Plaintiff never saw a toothpick in the sandwich or on her plate. She produced no evidence that the toothpick was ingested during her meal at Defendant's eatery. Nor was she able to explain how a one-and-a-half-inch toothpick could be concealed in a piece of prime rib one-half inch by one-half inch. Because no evidence was presented that a defect existed in the prime rib when it was served, the case was dismissed

Negligence/Hepatitis

85. *Hospitality Law Newsletter (*June 2005). Class action that arose from hepatitis outbreak in 2003 at Chi Chi's restaurant has been settled for $800,000. Four people died and more than 650 patrons became ill after eating tainted green onions served at the restaurant. Chi

Chi's filed for Chapter 11 bankruptcy protection shortly before the outbreak and has sued three food wholesalers to recoup some of its losses.

Negligence/Hot Beverage

86. *Hospitality Law Newsletter (*March 2005*). A* Florida jury awarded $668,000 to a 33 year old male who suffered burns to his genitalia when an employee of a Disney resort spilled hot coffee in his lap. The resort did admit liability.

Negligence/Use for Hire

87. *Prudential Property and Casualty Insurance Company v. Sartno, et al,* 874 A2d 85 (Superior Crt Penn., 2005). Defendant was a driver who delivered pizza for a restaurant. He earned $6.00 per hour and plus tips. The restaurant did not charge customers a delivery fee. While exiting the restaurant parking lot en route to delivering pizzas, Defendant hit a mother carrying an infant daughter, causing injury. In the ensuing lawsuit the driver's insurance company disclaimed liability based on a "use for hire" exclusion provision which read, "We will not pay for bodily injury or property damage caused by anyone using a car covered under this policy to carry people or property for a fee." The insurance company argued that at the time of the accident the driver was delivering property (pizzas) for a fee (wages and tips). The driver claimed the provision was ambiguous because no fee for delivery was charged. The court held that the "use for hire" exclusion was applicable noting that Defendant delivered pizza and was paid to do so. The obvious intent of the contractual provision was to eliminate coverage when the car was used in a commercial environment to carry property.

Premises Liability/Actual or Constructive Notice

88. *Miller v. Chateau Club*, 2005 WL 501285 (Oh. App. 2, 2005). Plaintiff attempted to use the first stall in the women's restroom at Defendant restaurant and bar. As she pulled on the handle of the stall door, the door came off its hinges and struck her on the head above her left eye, knocking her to the floor. An employee of the restaurant entered the restroom soon after Plaintiff was hit and stated that the employee had previously told the manager to fix the problem or something like that would happen. The employee had worked at Defendant eatery for six years and was the Assistant Manager/Bar Manager. Plaintiff sued to recover for her resulting injuries, asserting that Defendant had notice based upon the employee's statement and also the fact that the hinges were very old. The trial court granted summary judgment for Defendant. On appeal the court reversed, concluding that the employee's statement raised a genuine issue of material fact as to whether Defendant had actual or constructive notice of a problem with the stall doors. Said the court, "Although a business is not an insurer of its invitees' safety, it must warn them of latent or concealed dangers if it knows or has reason to know of the hidden dangers."

Premises Liability/Bathroom Equipment

89. *Marx v. Huron Little Rock, LLC,* (JV No. 432759). Hotel was held responsible for injuries that a female guest suffered when she slipped off the lid of a commode while putting on her stockings. The court held that the hotel failed to remedy or warn of a known dangerous condition. The hotel paid the guest $1,198 for pain and suffering.

90. *Gonzales v. Bill Miller Bar-B-Que Enterprises Ltd. (* JV No. 427629). Plaintiff female patron fell to ground when the toilet seat broke at Defendant's restaurant. The accident caused Plaintiff to suffer ongoing headaches. The jury award of $104,000 included $59,000 for past and future medical expenses.

91. *Gould v. Motel 6 Operating L.P., et al,* No. 53843-8-I (Wash. Ct. App. 02/07/05). Plaintiff was injured when a fold down shower seat collapsed causing her to fall in the tub. The guest room had been recently renovated as a handicap-accessible room. The trial court granted summary judgment for the Plaintiff stating it was close to strict liability. The appellate court disagreed stating strict liability does not apply as a motel owner cannot be held liable for a guest's injuries if the injury causing defect couldn't be discovered using reasonable care such as inspections. Plaintiff must proceed to trial in order to determine if the motel's maintenance practices were sufficient to uncover the defect or if there was another cause other than the motel's negligence.

Premises Liability/Defective Furniture

92. *Frederickson v. Bertolino's Tacoma, Inc.,* 2005 WL 3389652 (Wash. App., 2005) (Unpublished). Plaintiff, a police detective, was injured when a chair on which he was seated at a coffee shop broke. The owner and an employee testified he inspected the chairs daily, both visually and physically (by sitting in them). Further, whenever a customer reported that a chair was wobbly or needed to be fixed, he removed it from service and repaired or replaced it. He had the ability to make repairs as he was a skilled woodworker who also owned a construction business and occasionally built homes. No customer had ever complained of being injured by a chair. Since no evidence existed that Defendant had actual or constructive notice of a problem with the chairs, no duty was owed so the case was dismissed.

Premises Liability/Design

93. *Roe v. McDonald's Corp.,* No. G032638 (Cal. Ct. App. 05/27/05). Plaintiff was sexually assaulted in Defendant restaurant's restroom during a visit. The restroom was isolated from the restaurant and located too close to an outside door. Plaintiff sued claiming the design and maintenance of the premises was negligent and created an unreasonable risk of injury to patrons. Trial court dismissed saying the expert's opinions were speculative and Plaintiff appealed. Appellate court affirmed stating that the expert's report was "woefully inadequate" to establish that any design changes would have prevented the assault. Plaintiff failed to present evidence that the restaurant design caused her injuries.

94. *Marshall v. Burger King Corp.,* No. 2-04-0429 (Ill. App. Ct. 03/04/05). Patron was killed while sitting in a Burger King eating when a car came crashing through the wall. Plaintiff sued alleging the restaurant failed to properly construct the building and sidewalk or install protective barriers around the building to prevent an accident's deadly consequences. Defendant argued they had no duty to protect patrons from runaway cars and the trial court agreed dismissing the claims. The appellate court reversed stating that no matter how rare the occurrence may be, the restaurant still had a duty to protect its' patrons, and the Plaintiff was allowed to take his claim to trial. Defendant may have been negligent in failing to take certain precautions.

95. *Fuller v. Marcello,* 794 NYS2d 218 (AD 4th, 2005). A motorist inadvertently drove his car into the pedestrian area of a restaurant parking lot, knocking over a pole that supported the restaurant's awning. The pole fell and hit Plaintiff who in turn sued the restaurant. An expert for Plaintiff testified that the restaurant was maintained in a deficient manner because it lacked sufficient barriers such as wheel blocks or stops to protect pedestrians from inadvertent vehicle traffic. The court held the absence of such barriers raised an issue of fact for trial and denied summary judgment. The court distinguished this case from others where cars penetrated a front window or jumped a curb and summary judgment was granted because in those cases the restaurants had installed some type of impediment to protect diners and pedestrians from cars.

96. *Brown v. Classic Ventures Food Division, Inc. (Arby's),* 2005 WL 78122 (Ohio App., 2005). Plaintiff was driving his vehicle, made a right turn into an Arby's parking lot, and drove over a concrete parking curb to the right of the entrance drive. His car became stuck on the curb and he suffered injuries. The curb is described as a concrete slab that extends the length of a parking space. The end of the slab has a six-foot section painted bright yellow. The slab was about curb height but wider. Plaintiff said he did not see the curb because his view was obscured by his vehicle. Photographs indicated that the curb would have been plainly visible to motorists entering the parking lot from either direction. Said the court, "[T]he fact that a Plaintiff or others may not have actually seen a danger that caused harm is insufficient to demonstrate that the hazard was latent rather than open and obvious."

Premises Liability/Fireman's Rule

97. *Lewis, et al v. Champion,* No. A05A1267 (Ga.Ct. App. 09/01/05). Fireman's rule prevents police and fire fighters from holding landowners responsible for injuries that occur on their premises during the course of performing their duties. Officer Champion was dispatched to Dairy Queen to assist the local fire marshal. Fire marshal was working as an employee of a fire protection company and not performing his duties as a fire marshal. While cleaning a hood, Champion injured his hand. Champion sued the fire marshal and the Dairy Queen and the Court of Appeals held that while the fireman's rule prevented Champion from recovering his injuries he may recover from acts of negligence other than that which occasioned his professional presence to begin with. Champion's aid was outside the scope of his employment as he was permitted to pursue his claim.

98. *McKim v. Forward Lodging, Inc.,* No. 251498 (Mich. Ct. App. 05/10/05). Plaintiff, a paramedic, responded to an emergency call at the Quality Inn. A hotel guest and an employee had slipped in an icy parking lot. Plaintiff also slipped and suffered head injuries, then sued the hotel. The hotel asked the court to extend the fireman's rule to paramedics to limit her recovery. The rule protects business owners by limiting liability for injuries that occur at times and areas of the premises that are not open to the public. The court said the statute was clear and unambiguous that it only applies to firefighters and police officers that the Plaintiff's injuries occurred in an area of the premises open to the public and the Plaintiff could proceed with her claim.

99. *Hart v. Shastri Narayan Swaroop, Inc.,* 870 A2d 157 (Md. Crt. App., 2005). Firefighter responded to a fire alarm at Defendant hotel. He suffered injuries when he fell into an open stairwell while attempting to rescue guests from areas of the hotel engulfed in dense smoke. He sued the hotel for negligence; it asserted as a defense the "fireman's rule" which generally prevents firefighters from recovering tort-based damages inflicted by a negligently created fire that required their presence on the scene in their professionally capacity. While some exceptions exist, the court said, "[T]he accumulation of smoke during a fire and the resulting limitation of visibility for a responding firefighter is a type of hazard faced by firefighters in their ordinary duties. . . . This is the kind of injury that the fireman's rule is meant to bar." Judgment dismissing the complaint was thus affirmed. Note: Despite changes to gender-neutral language for other legal terms originally referring to men (example: the "reasonable man" rule has become the "reasonable person" rule), the court retains the term "fireman's rule" despite the general acceptance of the term "fire fighter" to describe the job.

Premises Liability/Forseeability

100. *Adams v. Starwood Hotels and Resorts Worldwide, Inc.* No. 54418-7-I (Wash.Ct.App. 10/17/05). Plaintiff was injured by an intoxicated banquet guest on the hotel property and once again outside the hotel and argued that the hotel had an inadequate number of security guards. Court dismissed the claim stating that the connection between the hotel's conduct and the injury is too speculative and indirect. Even if action was foreseeable, Plaintiff didn't show that the hotel's actions caused the harm to Plaintiff.

101. *Lienhart v. Caribbean Hospitality Services, Inc., et al.,* No. 04-10288 (11th Cir. 09/27/05). Plaintiff, asleep on a lounge chair on the beach at Defendant's hotel, was injured when tenant of resort (boat services) used a pickup and backed into the lounge chair. Trial court dismissed claim and appellate court reversed stating that the resort controlled the property and had an obligation to warn the Plaintiff and other guests about trucks driving along the beach.

102. *Commonwealth v. Karetny,* Nos. 55&56 EAP 2004 (Pa. 08/15/05). Owners of pier ignored warning signs that pier's condition had deteriorated significantly. Owner's instructed employees to cover crack to conceal it. Entire night club and a portion of the ballroom building fell into the river killing three patrons and injuring 43 others. Owners argue that they didn't do anything to cause the collapse. Court said they allowed the structural

soundness of the pier to decline for over 5 years to avoid high repair costs. In addition, they promoted night club business without warning to patrons. Charges against owner stand.

103. *Hall v. Sonic Drive-In of Angleton, Inc., et al.,* No. 01-03-01281-CV (Tex. Ct. App. 08/31/05). Plaintiff injured herself at work on a metal freezer cover that the manager left lying on the floor in the middle of a walkway. Plaintiff sued restaurant for premises liability. Evidence showed that Sonic knew of dangerous situation so Plaintiff may proceed to trial.

104. *DeMarco v.Ouellette, et al.,* No. 04 Civ. 0440 (RJH) (S.D.N.Y. 09/09/05). Plaintiff injured herself on Defendant's dance floor when another patron fell on Plaintiff and broke her ankle. Plaintiff used the night club alleging that overcrowding and the club failure to control the patrons caused her injury. Defendant maintained he had 14-18 security personnel stationed at various locations in the club. Court said the incident was not foreseeable and the night club was not made aware that the patron who fell on the Plaintiff was a danger. No one had reported the falling patron was a threat. Court also pointed out that the club did not have a history of similar accidents or other dangerous activity on its premises.

105. *Patton v. Strogen, et al.,* No. 39,829-CW (La.Ct.App. 08/17/05). Shamocus Patton was shot and killed in a parking lot of a shopping center that also contained a popular teen night club. The club had a history of calls to police for fighting, disorderly conduct and drive-by shootings. Patton's mother sued the club stating the club was responsible for her son's death. The club requested that the court dismiss the charge. The trial court denied the request and the appellate court agreed. It would be inappropriate to dismiss the case prior to trial because of the history of criminal activity directly outside the club.

106. *Delgado v. Trax Bar & Grill, et al.,* No. S117287 (Cal. 06/30/05). Patron at a bar was injured by other patrons in the Defendant's parking lot. Bouncer observed hostile behavior of patrons and sensed that a fight was imminent. Jury awarded $81,400 stating that the incident was foreseeable as the bar had actual notice of an impending assault but didn't try to stop it from happening.

107. *Proctor v. Sports Restaurant, Inc.,* No. A04-1907 (Minn. Ct. App. 06/07/05). Patron arrived at Defendant's bar after drinking heavily at another bar. First bar called Defendant's bar to warn him that the patron had been cut off and is on his way to the Defendant's bar. Defendant's bartender asked intoxicated patron to leave and a fight broke out injuring the Plaintiff who was sitting nearby. Trial court dismissed action saying the injuries were not foreseeable. Appellate court disagreed and allowed Plaintiff to take his claim to trial. When an intoxicated guest causes a disturbance, the bar has an obligation to do something more than request the guest to leave.

108. *Haupt v. Sharkey,* No. 2-04-1146 (Ill. App. Ct. 06/16/05). Plaintiff was thrown out of Defendant's bar for fighting along with the person he was fighting with and was injured once outside the bar. Plaintiff claimed that by ejecting them both at the same time, it

created more harm. Defendant argued that assault happened on sidewalk and was beyond bar's premises. Trial court agreed with Defendant and appellate court reversed. The assault took place on the public sidewalk but did not relieve the bar from its duty to protect patrons from harm. Plaintiff was entitled to take his claim to trial.

109. *Durham v. HTH Corp., et al.,* No. 04-550 (Me. 04/12/05). Plaintiff tripped down a flight of stairs and injured her head. She stated that the heel of her boot had been caught on a metal strip at the top of the stairs. The strip had been replaced three years earlier and it wasn't known to the restaurant that it was faulty. Plaintiff sued and court dismissed her claims. The Maine Supreme Judicial Court agreed with the trial court stating that although two other patrons had fallen down the stairs, there was no evidence that in those other cases that the metal strip was involved. Plaintiff failed to establish that the condition of the metal strip caused her accident.

110. *Weston v. Chicken Box Restaurant, Inc*., 65 Mass. App. 1107, 838 NE2d 623, 2005 WL 3312298 (Mass. App., 2005). Plaintiff was a patron at Defendant's bar. During a three and a half hour period, Defendant's staff served Plaintiff eight to twelve run and Coke drinks. Defendant then "got into an altercation" with the doorman and staff of the restaurant and was "escorted outside and into the parking lot." While in the parking lot Plaintiff was run over by an unidentified vehicle causing a broken leg. On appeal, the court affirmed summary judgment for Defendant finding no proximate cause between Plaintiff's injury and Defendant's action. Said the court, "There is no evidence that the character or location of the restaurant made criminal or tortious activity in the parking lot reasonably foreseeable. . . .there is no evidence that the Plaintiff's intoxication, if any, played any part in the accident."

Premises Liability/Lighting Inadequate

111. *Bonner v. Southern Restaurant Group, Inc. et al,* 271 B. App. 497 (02/03/05). Plaintiff ate dinner at a TGI Friday's restaurant and when leaving around 10:00 pm, she stepped off the curb, fell and injured her ankle. Plaintiff sued for negligence alleging poor lighting in the parking lot prevented her from safely navigating the curb. Trial court granted summary judgment for the restaurant stating that she failed to show that there was a defective condition in the parking lot. Plaintiff appealed arguing that the restaurant knew or should have known about the inadequate lighting. Appellate court disagreed with the Plaintiff stating her allegations were insufficient to take her claim to trial. The restaurant demonstrated that lighting was not an issue.

Premises Liability/Open and Obvious Danger

112. *Brown v. Twins Group,-PH, LLC. et al.,* No. 2004 CA 59 (Ohio Ct. App. 08/12/05). Plaintiff tripped on mat at Pizza Hut when leaving the restaurant. Manager apologized and said "The rugs do that." And "I trip over them all the time myself." Plaintiff sued restaurant. Court said the restaurant was not required to protect the Plaintiff from an open and obvious danger that she should have been able to discover on her own. Her frequent visits to the restaurant alerted her to the existence of the mats so Plaintiff claim did not proceed.

113. *Matuszewski v. Central Michigan Inns, Inc.,* No. 253252 (Mich. Ct. App. 08/16/05). Plaintiff visited a night club in a Holiday Inn and was waiting with a friend for a ride home. Plaintiff sat on a large decorative planter which leaned forward injuring her foot. She sued the hotel's operator and the hotel argued that it was unreasonable for the Plaintiff to sit on a planter not designed for seating. Trial court dismissed the claim stating it was an open and obvious danger. The appellate court disagreed and reversed saying the Plaintiff could take her claim to trial. A jury must decide if the danger was open and obvious. Others were resting on other planters and saw nothing that suggested they were not capable of holding her weight. Plaintiff may proceed with her case.

114. *Hamilton v. Wendetroit, Ltd.,* No. 251842 (Mich. Ct. App. 05/03/05). Plaintiff was injured when she slipped and fell in the ladies' room at a Wendy's restaurant. Two other customers had recently complained to the management of the condition of the restroom. The restaurant argued that the condition of the floor was open and obvious. The danger was effectively unavoidable for female patrons who used the restroom. The court stated that a jury must decide whether a special aspect made this situation unreasonably dangerous and thus bar Wendy's open and obvious defense.

115. *Norris v. Waterford Big Boy, Inc.,* No. 250020 (Mich. Ct. App. 02/17/05). Plaintiff stepped in a pothole in the parking lot outside the Big Boy restaurant and was injured. Restaurant argued open and obvious danger even in dimly lit parking lot. Court of appeals affirmed the trial court's decision to dismiss the case. The evidence showed that Plaintiff was aware of the potholes in the parking lot. Because Plaintiff failed to show that the potholes had an unusual characteristic that made it unreasonably dangerous, she was not able to proceed to trial.

116. *Altvater v. LaBranche Properties, Inc.,* 901 So.2d 584 (La. App. 4 Cir., 4/20/05). Caution signs fulfill their objective of alerting the public of dangerous conditions only if they are properly placed as to be clearly visible prior to patrons encountering the risky circumstance. A sign warning about the presence and height of a step was not in the line of vision, resulting in liability.

117. *Sisson v. Metromedia Steakhouses, Inc.,* 17 AD2d 855, 749 NYS2d 138 (AD 3rd, 4/14/05). Plaintiff, a pest control technician, suffered injuries when a refrigerator fell against him while working at a Ponderosa Steakhouse. The accident occurred after hours while Plaintiff was working alone. Noticing food and debris behind the refrigerator that created a potential "harborage for cockroaches", he sought to move the appliance. Its legs or casters had been removed and replaced by six-inch stainless steel pans. Plaintiff had observed this condition on a prior visit and noted it in a report, stating that it hindered proper cleaning behind the appliance facilitating pest infestation. When he sought to move the refrigerator a short distance to enable cleaning, one of the pans broke causing the refrigerator to fall against him. In his lawsuit against the restaurant, the latter argued that the condition was known to Plaintiff (open and obvious) and therefore he was negligent in attempting to move the appliance. The court held that the fact Plaintiff knew of the condition does not relieve the restaurant of all potential liability. Instead, assuming the

jury determines the restaurant created an unsafe condition, comparative negligence could apply.

118. *Oliver v. Leaf & Vine,* 2005 WL 937928 (Ohio App, 2005). Plaintiff restaurant guest was seated in a raised dining area located 10.75 inches above the main eating area. Upon stepping down after the meal Plaintiff fell, severely injuring her ankle. The court granted summary judgment to the restaurant noting that Plaintiff was familiar with the step having ascended it prior to eating. The court rejected Plaintiff's claim of the existence of a question of fact notwithstanding she asserted that the lighting conditions made it difficult for her to judge the step's height, there was no artificial lighting to mark the change in elevation, and the step violated the building code. Concerning Plaintiff's claim of negligence per se, the court held that the code violation did not preclude the application of the open and obvious doctrine.

119. *Rothwax v. Mount Sinai Hospital*, 6 Misc.3d 1034(A), 2005 WL 545178 (Sup. Crt. NYCo, 2005). The outside step leading into a restaurant was graded to offset the natural uphill incline of the ground in the area. Plaintiff fell on the step and sued. The court granted summary judgment to the restaurant on the ground that the graded step was open and obvious. The court noted that there was no evidence of prior accidents on the step and no complaints received prior to Plaintiff's fall. Further, Plaintiff had entered the restaurant 5 to 10 times prior to the accident and had no difficulty and did not complain about the step.

120. *Barbato v. Hollow Hills Country Club,* 14 AD3d 522, 789 NYS2d 199 (NY App Div, 2nd Dept, 2005). Plaintiff is an experienced golfer who had played on Defendant's golf course on numerous occasions. He was injured when he slipped and fell on wet grass while descending a green. When he was teeing off at the hole he admittedly observed a manually-operated sprinkler adjacent to the green watering the area. As he approached the green the sprinkler was turned off. He ascended a slight slope in front of the green to take his stroke. On his way down the side of the green he slipped and fell. The court dismissed his case saying that, by voluntarily participating in a sport or recreational activity, a person consents to risks that are "commonly appreciated" and arise out of the nature of the sport. Here, the wet grass was open and obvious; Plaintiff was fully aware of the condition. Therefore, by playing on the wet surface, he voluntarily assumed the risk of injury.

121. *Ai Uddin v. Embassy Suites Hotels*, 2005 WL 3416144 (Oh. App., 2005). Plaintiff's decedent, a ten-year old child, drowned in an indoor pool at Embassy Suites Hotel while attending a birthday party. The water was allegedly "murky" precluding observers from seeing below the surface. The appellate court reversed the trial court's grant of summary judgment for the hotel, rejecting the application of the open and obvious rule, finding instead that "duties owed to children are different from [and greater than] duties owed to adults." An additional issue in the case was whether violation of an administrative rule (versus a statute) constitutes negligence per se. The court held that the violation of an administrative rule does not constitute negligence per se but is admissible as evidence of negligence. The court further found that the attractive nuisance doctrine did not apply because Plaintiff's deceased was not a trespasser.

122. *Caravella v. Holiday Inn,* 2005 WL 3484604 (Oh. App., 2005). The appellate court affirmed dismissal of Plaintiff's slip and fall case based on the open and obvious doctrine. Plaintiff was the employee of a vendor and staffed a booth at a trade association in Defendant hotel. While exiting the building he slipped on wet tile as he walked through the breezeway toward an exterior door. In his response to interrogatories Plaintiff admitted that the floor was "noticeably" wet and that he was aware that it was wet and rainy outside. He presented no evidence that the water on the breezeway floor was concealed from his view.

123. *Naslund v. Dave & Buster's of California, Inc.,* 2005 WL 2249580 (Ca. Crt. App., 2005). Plaintiff, a diner at Defendant's restaurant seated at a raised booth, was injured while en route to the restroom when she fell on the single step leading down from her table. Plaintiff claimed negligence per se, arguing that the step violated the applicable building code which prohibited the use of single steps in a building's egress system. The court determined the code was inapplicable because the step in question was not part of the building's exit system. The court, noting Plaintiff was heading to the bathroom at the time of the fall and not outdoors, ruled that Plaintiff was not within the class of persons the code sought to protect and therefore Plaintiff could not assert a claim based on negligence per se.

124. *Salinas v. Omar's Mexican Restaurant, Inc.,* 2005 WL 3481440 (Mi. Crt. App., 2005). Plaintiff fell on a single concrete step used to enter and exit Defendant's restaurant. In this negligence action Plaintiff claimed Defendant failed to warn of an unsafe condition. The court held the step was open and obvious, noting that steps are encountered "as an everyday occurrence", a reasonably prudent person is obliged to watch where he is going and use reasonable caution for his own safety, Plaintiff had used the door and so encountered the step on numerous occasions before the accident, and had entered the door minutes before and was distracted at the time of the fall by other patrons entering. Given these circumstances, no duty to warn existed. The appeals court affirmed the trial court's grant of summary judgment for the restaurant.

Premises Liability/Revolving Door

125. *Willis v. Besam Automated Entrance Systems, Inc., et al.,* No. 04-CV-0913 (E.D. Penn. 11/03/05). Plaintiff, while using her cane, injured herself in the revolving door of a Marriott hotel. The Plaintiff had used the door several times without incident. She was truck by one of the door panels and fell. Hotel's service technician, independent contractor, had performed a scheduled maintenance shortly before and after the accident and the doors were working fine. Plaintiff argued that the service technician had issued a checklist for the hotel to do self-checks on a daily basis. The court held that Plaintiff could not pursue her claim even if the hotel failed to do daily checks as there was no indication that the cause of Plaintiff's injuries were caused by the revolving door.

Premises Liability/Security

126. *Corinaldi v. Columbia Courtyard,* No. 1165 Sept. Term, 2004 (Md. Ct. Spec. App. 05/03/05). Guest at Marriott Courtyard hotel rented adjoining rooms for a party and a fight broke out between two male attendees. The guest reported to the front desk clerk that one

of the attendees had a gun. The clerk, a new employee, directed maintenance to call 911 but the call was not placed for approximately 10 minutes. Corinaldi was shot and killed by one of the attendees. His parents sued the hotel for negligence. Court held that since the front desk was notified that an attendee had a gun, it required the hotel to foresee harm to its guests. The harm to Corinaldi was foreseeable and preventable.

127. *Stafford v. Drury Inns, Inc.,* No. ED84555 (Mo. Ct. App. 02/15/05). Plaintiff was robbed and stabbed by two men when he voluntarily opened his guest room door at the Drury Inn. Plaintiff sued the Inn alleging that the Inn failed to provide a safe place and did not provide the proper security. Inn argued it had no duty to rescue a guest unless it had knowledge of a situation. Trial court agreed and dismissed the claim, however, the appellate court disagreed saying that the duty of an innkeeper is broader than a duty to rescue. The court said an innkeeper may not have a duty to rescue but it does have a duty of care to make its premises safe. Plaintiff was able to proceed to trial.

128. *Garcia v. Fifth Club*, No. 03-03-00697-CV (Tex. Ct. App. 02/03/05). Plaintiff was involved in an altercation at a club and the bouncers ejected the harasser. Forty-five minutes later, Plaintiff left the club and was shot six times by an unknown assailant in the parking lot of the club. Plaintiff sued the club for inadequate security. The trial court granted summary judgment for the club and Plaintiff appealed. The appellate court reviewed the evidence to see if the shootings were foreseeable. The club had a history of violent crimes, at least one incident per month. The court allowed the Plaintiff to take his claim to trial.

129. *Daneshard v. Century Supper Club LP,* No. B172241 (Cal. Ct. App. 01/04/05). Plaintiff was attacked on the dance floor at Defendant's club. There were no security guards in the area while he was being physically beaten by other patrons. Plaintiff sued for lack of adequate security and Defendant argued that there were 23 security guards on staff that night. The trial court granted summary judgment for the club and Plaintiff appealed. Plaintiff failed to show that the security measures of the club were inadequate and therefore responsible for his injury. The court denied the appeal.

Premises Liability/Slip and Fall

130. *Heggs v. Wilson Inn Nashville-Elm Hill, Inc.,* No. M2003-00919-COA-R3-CV (Tenn. Ct. App. 08/25/05). Plaintiff slipped on a wet tile floor and injured her ankle and sued the Inn stating that the lighting in the foyer was too low to see the wet floor. The Inn had placed yellow warning signs. The trial court dismissed the claim stating the Inn had sufficiently warned guests about the dangerous condition by placing the yellow signs out. The Inn's chief engineer admitted that the Inn's personnel sometimes would hand-dry tiled areas after mopping when the Inn was very busy. The appellate court disagreed and allowed the claim to proceed stating that although a sign will usually be sufficient, in this case a jury should decide if the Inn should have done more to prevent the accident.

131. *Easter v. Galloway Investments, Inc.,* (JV No. 434798). A sheet metal worker was injured when he slipped and fell on ice at the restaurant's entrance. A Missouri jury awarded the

Plaintiff $250,000 as he was able to prove that the restaurant failed to routinely inspect and maintain the premises.

132. *Irwin v. Oceanaire Restaurant Co., Inc.,* No. A04-1043 (Minn. Ct. App. 03/29/05). Plaintiff slipped and fell on a polished hardwood floor at Defendant's restaurant. She noticed a wet spot on her pant leg after her fall. Server had dropped a relish tray in the same area just prior to Plaintiff's fall and the area was near where an oyster bar which is sometimes wet on the floor. Jury decided restaurant was at fault, and judge disregarded the verdict. Plaintiff appealed and the appellate court reinstated the verdict stating that it was not unreasonable for the jury to have received the verdict it reached. The court said that the Plaintiff was not required to show the exact manner and reason for her injury.

133. *Fox v. Watermill Enterprises, Inc*, 796 NYS2d 697 (App Div 2nd, 6/6/2005). Plaintiff was injured when he tripped and fell on a step while descending a stairway at Defendant's restaurant. At a deposition, Plaintiff said he did not know what caused him to trip and fall. An affidavit from an engineering expert containing his opinion that the accident was proximately caused by Defendant's negligence, without more, was conclusory and insufficient to establish a triable issue of fact concerning Defendant's lack of liability. Complaint was dismissed.

134. *Dauer v. Hyatt Corp*., 2005 WL 1111240 (Cal. App. 2, 2005). Plaintiff was attending a continuing legal education program at the Hyatt Regency Hotel in Los Angeles. He fell in the lobby while en route to his course. Nearby was a piece of lettuce, believed to be the culprit in the fall. Evidence established that Defendant did not maintain inspection records for the lobby during the day; while employees were generally trained to look for and remedy hazardous conditions, there was no evidence of how long before the Plaintiff's injury any hotel employee had done so. Said the court, "A rational trier of fact could infer that Hyatt took no action to ascertain the condition of its premises between 7:00 a.m. when its night cleaning service left and Plaintiff's fall soon after 1:00 p.m." The court noted that the lobby was adjacent to hotel restaurants and a food court, and said whether this six hour interval without inspection satisfies the duty of care is a question for the jury. It thus reversed the trial court and denied summary judgment.

135. For cases where Plaintiff failed to meet its burden to establish that Defendant's premises, on which Plaintiff fell were defective see *Fowler v. CEC Entertainment*, 2005 WL 927507 (Ala. App, 4/22/05) (Plaintiff tripped on stairs); *Durham v. HTH Corp.*, 870 A2d 577 (Sup. Crt. Maine, 2005) (Plaintiff fell on steps with a metal strip on the top); *Webber v. Miller,* 17 AD3d 352, 793 NYS2d 105 (App Div 2nd, 2005).

136. *Jung v. Kum Gang, Inc.,* 22 App.Div.3d 441, __NYS2d__, 2005 WL 2438398 (NY App. Div, 2nd Dept, 2005). Plaintiff sued Defendant restaurant for negligence as a result of injuries she suffered when she fell on stairs. She testified she had a "feeling" that the stairs were "not normal" but she could not articulate what, if anything, caused her to fall. At her deposition she testified that the stairs were not cracked or unstable, had no water or other foreign substance on them, and the lighting in the area was adequate. Since no evidence existed that the steps were defective, the complaint was dismissed.

Premises Liability/Ventilation Inadequate

137. *Lawson, et al. v. Edgewater Hotels, Inc., et al.,* No. E2003-0303930-COA-R3-CV (Tenn. Ct. App. 11/30/04). Plaintiff's son was injured when he inhaled chlorine due to pool attendant's failure to turn on the ventilation system and open the windows in the pool area. The chlorine became concentrated in the air. The appellate court rejected the claim of excessive chlorine but stated that Plaintiff could go to trial on whether the area was properly ventilated. Hotel argued that since Plaintiff's injuries were not foreseeable, hotel should not be responsible. Court stated that hotel had burden to show Plaintiff's injuries were not foreseeable. Hotel failed to meet its burden.

Premises Liability/Video Surveillance

138. *Page v. Choice Hotels International, Inc., et al.,* No. 2:04-CV-13 (W.D. Mich. 04/18/05). Guest died while in swimming pool at Defendant's Comfort Suites Inn. Plaintiff, guest's widow, sued for negligence arguing that the hotel assumed a duty to supervise the pool area because one of the cameras was aimed at the pool. Michigan law did not require constant monitoring of its video equipment to ensure guest safety. Hotel stated it installed cameras to deter crime, but were not monitored constantly. Court stated that property owners are not legally required to supervise a pool area. Warning signs were posted for swimmers that no lifeguard was on duty. Cameras were not visible to guests and so the guests could not assume they were being watched. Plaintiff was not able to proceed to trial as the presence of a video system did not impose a duty on hotel.

Procedural Legal Issues

139. *Price v. AAC Sports Café,* 2004 Mass App. Div 17, 2005 WL 351261 (Mass. App. Div., 2005). Plaintiff was injured at a sports bar when he was allegedly attacked and struck in the face and head with glass bottles. The attacker obtained the bottles from the floor. Patrons regularly left their bottles in the dance floor area. The bottles were not promptly removed by servers. Plaintiff sued the bar claiming it was negligent for failing to remove the bottles. Whether this circumstance constitutes negligence will be an issue for the jury. Bottles and other debris on dance floors create hazards to dancers. Bars are reminded to manage the collection of empty bottles, cans and other waste.

140. *Huszar v. Greate Bay Hotel & Casino, Inc.,* 375 NJ Super 463, 868 A2d 364 (NJ App., 2005). Plaintiff suffered head and knee injuries when a hotel elevator door closed on her, knocking her to the floor. Cases involving malfunctioning automatic doors are not unusual. Regular inspections are a must.

141. *Elgandy v. Boyd Mississippi, Inc.,* 909 So.2d 1202, WL 147732 (Miss. App., 2005). Plaintiff hotel guest was bitten numerous times by ants that crawled into her room and onto her bed. Medical personnel from the resort were called and she was taken by ambulance to the hospital. She testified she was allergic to ant bites and suffered serious, permanent injuries. A hotel must exercise reasonable care to prevent ants, insects, and other critters

from entering guests' rooms. The necessary precaution will vary depending on the prior known incidents of bug and animal sightings and bites and the proximity of the hotel to their habitats.

142. *Bell v. Gold Rush Casino, LLC.,* 893 So.2d 969 (La. App., 2005). This case identifies numerous issues that can result in liability when a guest falls on stairs. Plaintiff alleged she fell because a "piece of bolt protruded from the stairs" which caught on her pants causing her to fall. Additionally she alleged the absence of handrails and inadequate light. Stairs are the venue of numerous trips and fall cases. Hotels and restaurants need to inspect them regularly and exercise care to ensure no conditions exist that will increase the chances of an accident.

143. *Elston v. Circus Circus Mississippi, Inc.,* 908 So.2d 771, 2005 WL 351320 (Miss. App., 2005). Plaintiff was injured when she slipped on a puddle of water next to some live plants in the lobby of Defendant hotel. The accident occurred on the day the plants were regularly watered. At the time of her fall the bellman was escorting Plaintiff to her hotel room and pointing out the various attractions in the casino. If plants are maintained on the floor of a hotel or restaurant, precautions must be taken to ensure water from them does not spill onto the floor, causing slippery spots.

Res Ipsa Loquitur/Causation/Falling Sink

144. *Wallace v. Pomegranate Mediterranean Restaurant Cuisine and Catering,* 2005 WL 318750 (Cal. App.1, 2005). The facts in this case were disputed. Plaintiff, an 8 year old boy, was injured when either he slipped in the bathroom of Defendant restaurant and grabbed the sink for support which then fell out of the wall, or he was jumping on the sink attempting to sit on it when it fell. The judge refused to charge the jury with res ipsa loquitur and it returned a verdict for the restaurant. On appeal Plaintiff alleged the failure to charge res ipsa was error. The court noted that while Plaintiff presented evidence that Defendants never conducted a reasonable inspection of the bathroom, he did not show that an inspection would have or should have revealed a problem with the sink. The court then listed several other reasons which may have resulted in the sink falling including a manufacturing defect, improper installation not observable in a routine inspection, or misuse by Plaintiff or some other customer using the bathroom shortly before Plaintiff. Plaintiff thus failed to present sufficient evidence that the negligent inspection or maintenance of the restroom was the probable cause of the sink falling or that Defendant had exclusive control of it. Said the court, "Res ipsa cannot be applied where there are several possible causes and no cause can be excluded or included by the evidence.

Trademarks/Copyright Infringement

145. *Design Tex Group, Inc. v. U.S. Vinyl Manufacturing Corp.,* 2005 WL 1020436 (SDNY, 2005). Plaintiff had the exclusive right to distribute a wallpaper design. The pattern's total sales exceeded $400,000. Thousands of samples of the pattern were distributed to designers and potential customers. Several sales of the design were made to Marriott International for hotels. Thereafter Marriott passed over Plaintiff's design in favor of one

submitted by Defendant which was “strikingly similar” to Plaintiff’s. The two patterns were similar in color and design, plus both obtained elongated diamonds of precisely the same shape (124-egree obtuse angles and 56-degree acute angles). While no evidence of copying was available, the court held when a Defendant’s work is strikingly similar to a copyrighted work, no more evidence is necessary to establish copyright infringement. The court noted also that Defendants had access to Plaintiff’s design; Defendant’s design was created under “highly suspicious” circumstances, and Defendant was unable to produce any witnesses who could attest that their pattern was independently created.

146. *Galiano v. Harrah's Operating Company, Inc*., 416 F.3d 411 (5th Cir., 2005). Plaintiff designed uniforms for employees of Harrah's Casino including "uniform style shirts, blouses, vests, jackets, pants, shorts, ensembles, elaborate masquerade-type costumes and unique head gear". After termination of the parties' relationship, Harrah's continued to order from a manufacturer costumes designed by Plaintiff. The latter sued for copyright infringement. The court, acknowledging that the "conceptual separation [between art and utility in clothing] continues to flummox federal courts," dismissed the copyright claim. It determined that all of Plaintiff's design features lacked intrinsic value as a work of art independent of the uniform wearing apparel. Said the court, "Sometimes we must favor what might be a sub-optimal prophylactic rule because it is more determinate than the theoretically superior but hopelessly subjective one.”

Trademarks/Cybersquatting

147. *Venetian Casino Resort, LLC v. Venetiangold.com, et al.,* No. 04-118 (E.D. Va. 07/28/05). Venetian Resort owned 15 trademark registrations. Unrelated to the resort, Vincent Coyle registered “venetiangold.com” and 6 other domain names including the word “Venetian”. The resort sued Coyle under the Anti-Cybersquatting Consumer Protection Act alleging the domain names were confusingly similar to his trademarks. The court held for the casino as the names used by Coyle bore a visual resemblance to the casino’s trademarks that Internet users could mistakenly assume the names were endorsed by the casino/resort. The court said it was clear that Coyle intended to divert customers from the resort’s online location.

148. *Manshantucket Pequot Tribe v. Redican*, __F.Supp.2d__, 2005 WL 3310266 (USDC, Conn., 2005). Plaintiff, owner of Foxwoods Casino, asserted that Defendant's website titled www.foxwood.com constituted trademark infringement, dilution and a violation of the Anticybersquatting Consumer Protection Act. The court dismissed Plaintiff's trademark infringement claim, ruling that use of a trademark in a website address is not the equivalent of using a mark in commerce on goods or services, as required by the Lanham Act, 15 USC § 1127. The dilution claim was also dismissed for failure to prove actual dilution. Plaintiff succeeded on the anticybersquatting claim, having established that "Foxwoods" is a famous mark, Defendant's website's name is confusingly similar, and Defendant had demonstrated a bad faith intent to profit from Plaintiff's mark.

Trademarks/Franchise Context

149. *The Quizno's Master v. Kadriu*, 2005 WL 948825 (USDC, Ill., 2005). Defendant was a franchisee of Plaintiff. The franchisee informed the franchisor that it was closing its restaurant. Per the terms of the franchise agreement, the franchisor terminated the franchise after the Defendant closed for five consecutive days. Defendant continued thereafter to use the franchise name. The franchisor sought to enjoin the franchisee from using the name and to mandate return of items bearing the trademark (signs, etc.). The franchisee counterclaimed for fraudulent inducement for concealing the franchisor's plans to open two additional franchise outlets within walking distance of Defendant's. The court rejected Defendant's claim of right to use the trademark while the dispute to rescind the franchise was resolved and granted the preliminary injunction.

150. For additional cases favorable to the franchisor following termination of a franchise under protest by the franchisee, see *McDonalds Corp. v. Underdown*, 2005 WL 1745654 (M.D. Pa., 2005) and *Papa John's International, Inc. v. Specktacular Pizza, Inc*. (2005 WL 3132337 (W.D. Ky., 2005).

Trademarks/Infringement

151. *Starbucks Corp. v. Lundberg*, 2005 WL 3183858 (USDC. Ore., 2005). Defendant's use of the name "Sambuck's Coffeehouse" for a business that sells coffee and coffee-related products infringes Plaintiff's trademarked name "Starbucks". In so holding the court noted the similarity of the names, the fact that the two businesses sell competitive products, both sell through the same marketing channels, Defendant adopted her name knowing of Plaintiff's trademark and intending to mislead the public and consumers exercise limited attention to the business-of-origin for purchases of inexpensive products like coffee. On the issue of customer confusion, the court discussed "initial interest" confusion and held that "Infringement occurs even if the likelihood of confusion terminates before a sale is made by the Defendant."

152. *Lamberti v. Positano Ristorante,* 2005 WL 627975 (E.D. Pa, 2005). Plaintiff sought a declaratory judgment that the name of his restaurant, "Positano Coast by Aldo Lamberti" does not infringe on Defendant's restaurant, "Positano Ristorante". Plaintiff renamed his restaurant in August, 2003 after a million dollar redesign that included giant photographs of Positano, Italy and Italian flooring, fixtures, and furniture. Defendant operated his eatery since 1985 although he never registered his name. The two restaurants are located approximately nine miles apart. The court granted the declaratory judgment noting that the term Positano is geographic and therefore descriptive; Defendant had not developed a secondary meaning given evidence of very limited advertising; twenty other restaurants across the country use the term "Positano"; only vague, limited anecdotal evidence of customer confusion existed; Defendant had experienced no loss of his repeat customers who constitute 90% of his business.

153. See also *Kangadis, Inc. v. Euphrates, Inc.,* 378 F.Supp.2d 162 (EDNY, 2005) in which the court determined that the term "traditional" used on the label of feta cheese was a descriptive term which had not acquired secondary meaning.

Miscellaneous

154. Cheeseburger lawsuits: U.S. House of Representatives pass the Personal Responsibility in Food Consumption Act on October 19, 2005. Waiting on Senate approval.

155. Energy surcharges: At least two class actions have been filed in California against lodging facilities for charging extra energy costs to guests without notice. Attorney General in Florida investigated Starwood and they agreed that its 14 properties will not impose any automatic charges except to guest who agree to pay the charges in a contract negotiated prior to the effective date of the settlement. Starwood also agreed to pay $75,000 to reimburse the Attorney general for the investigation costs and to donate $175,000 to the Attorney General's Seniors vs. Crime program.

156. Borgata Hotel Policy: Policy says all costumed servers must be weighed to establish a baseline body weight and anyone who exceeds that weight by more than 7 % will be suspended for up to 90 days. If server fails to lose weight, he or she could be terminated.

157. Breach of Contract Defense: Haunted restaurant is tenants excuse for breaching lease agreement.

158. Turnover costs tool: www.hotelschool.cornell.edu/chr/research/tools.html to help with assessing the turnover costs associated with a number of line, supervisory and managerial positions.

159. Asbestos violations: Marie Callender's restaurant chain in Utah was fined $50,000 by the EPA for the removal of asbestos by its contractor without following federal guidelines.

Hospitality Liability Update

Diana Barber, Esq.
Karen Morris, Esq.

Discrimination; Contracts; Liability for Acts of Third Parties

- Discrimination
  - Americans with Disabilities Act/Public accommodation
    - Wheelchairs
    - Support animals
- Bailment
- Contracts
- Liability for criminal acts of third parties

Employment Discrimination; Dram Shop Act

- Employment Discrimination
  - Americans with Disabilities Act
  - Gender
  - Race
- Dram Shop Act
  - Injury to wrongfully-served patron
  - Liability of airline

Nuisance; Torts; Food Issues

- Nuisance As Grounds to Close A Hotel
- Torts
  - False arrest
  - Exculpatory clause
- Food Issues
  - Emotional injury
  - Sufficiency of the evidence
  - Raw food
  - Foreign objects

Premises Liability

- Notice
- Bathroom equipment
- Building design
- Furniture
- Foreseeability
- Pothole
- Open and obvious
- Security
- Ventilation

Copyrights and Trademarks

- Work uniforms and costumes
- Cybersquatting
- Franchise application

Hospitality Liability Update

- Diana S. Barber, Esq.
- Karen Morris, Esq.