Hospitality Case Review: The Top 100+ Cases That Impacted Us This Past Year

Seventh Annual Hospitality Law Conference

February 9-11, 2009
Houston, Texas

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Karen Morris is Town Justice in Brighton New York, a Professor of Law at Monroe Community College (MCC), and an author. She was recently elevated to the title of Distinguished Professor, awarded by the Chancellor of the State University of New York.

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. She writes a column for Hotel and Motel Management Magazine entitled, *Legally Speaking.*

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 was named Kiwanian of the year for 2008.

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.) in Trade Regulation from New York University. She was previously an Assistant District Attorney, an attorney in private practice and in-house counsel for Macy's Department Stores. She has participated in several Macy's Thanksgiving Day parades as a clown make-up artist, Captain of the Bugs Bunny and Tortoise-and-the-Hare Floats and balloon handler for Clifford, the Big Red Dog.

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Diana S. Barber, J.D., CHE, is a full-time Lecturer at the Cecil B. Day's School of Hospitality Administration in the J. Mack Robinson Business College at Georgia State University, Atlanta, Georgia; where she has taught since the summer of 2003. She teaches hospitality law and an introductory course in hospitality. She was recently appointed the Director of the Study Abroad program and will take 20-24 students to France, Italy, Switzerland and Germany in May for an 11 day course on European International Hospitality.

In addition, Ms. Barber is also a hospitality legal consultant 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, event planning companies and clubs. She has over twenty years of legal hospitality experience.

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 then spent over fourteen years as vice president and associate general counsel for The Ritz-Carlton Hotel Company, LLC. She is a member of the State Bar of Georgia, The Florida Bar, G.A.H.A., and the Georgia Hotel & Lodging Association.

Ms. Barber has given numerous presentations for hospitality related associations and hotel companies and has written many articles for hotel/motel security periodicals, meeting planner periodicals, the Georgia Restaurant Forum, Hotel-Online and the American Hotel & Lodging Association. In 2007, Ms. Barber was added to the editorial board of Hospitality Law monthly newsletter. In addition, she has served as a litigation industry expert. She also writes a monthly column for the Georgia Hotel & Lodging Association newsletter.

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

Her hobbies include active participation in the Boys Scouts of America program as a Cub Scout Pack Committee Chairperson, a den leader and serving as team coordinator for little league baseball games.

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James O. Eiler is a partner of the firm **Kaiser, Swindells & Eiler**. He is also Chair of the Hospitality Law Practice Group. Mr. Eiler represents hotels, restaurants and recreation industry businesses in all phases of general civil litigation and operational matters.

Mr. Eiler's experience includes:

- Serving as national litigation counsel, managing and monitoring all litigation for a major hotel group.
- Acting as regional litigation counsel for a national restaurant company.
- Representing hospitality clients in a broad range of matters including franchise and management agreement litigation, third party criminal assaults, premises liability, environmental and toxic tort claims, Americans with Disabilities Act and civil rights matters, boating and/or recreational watercrafts, and food borne illness.
- Assisting clients with crisis and risk management issues.
- Over 10 years of operational experience in the hospitality industry.

Mr. Eiler is also an Adjunct Professor of Hospitality Law for the William F. Harrah School of Hotel Management at the University of Nevada at Las Vegas, and publishes and speaks regularly on a wide range of issues related to Hospitality Law. As an active participant in several key trade industry associations, he helps shape regulations and legislation affecting the hospitality industries on an ongoing basis.

EDUCATION
J.D., Western States University College of Law, 1986
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MEMBERSHIPS
Academy of Hospitality Industry Attorneys
American Bar Association, Hotel and Restaurant Subcommittee
Asian American Hotel Owners Association
California Hotel & Lodging Association, Governmental and Legal Affairs Committee
California Restaurant Association
Global Alliance for Hospitality Attorneys
National Restaurant Association
Defense Research Institute
Association of Southern California Defense Counsel
Los Angeles County Bar Association
Long Beach Bar Association

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Abuse of Process

1. *Best Western International, et al. v. James Furber, et al.*, 2008 WL 2045701 (D.Ariz. 05/12/08). The Plaintiff filed an action against several John Doe defendants, claiming that they posted anonymous messages on an Internet Web site that defame, breach contracts, reveal confidential information and constitute unfair competition against the company. The court said that even if Plaintiff's motive for filing the claim was improper, it could not support an abuse of process claim because it "requires some act beyond the initiation of a lawsuit." Best Western thereafter amended its complaint to add the names of defendants, some of whom were members of plaintiff. The court thereafter dismissed the claim for breach of contract for disclosing confidential information because the membership contract does not include a confidentiality agreement, and the integration clause prevents the existence of an implied confidentiality provision. On the issue of defamation, many of the statements were not actionable and at least some of them are protected by the common interest privilege. Issues of interference with contractual relations and calculation of damages were also addressed. *Best Western International, Inc. v. James Furber, et al,* 2008 WL 4182827 (D.Ariz., 9/5/ 2008)

ADA/Facility

2. *Alice Camarillo v. Carrols Corp., Magliocca Stores, et al*., 518 F.3d 153 (2nd Cir. 02/08/08). Plaintiff, who is legally blind, brought a complaint against several fast food restaurants for failing to effectively communicate their menu selections to her, in violation of the Americans with Disabilities Act. The trial court dismissed the complaint for lack of standing. On appeal, the appellate court found that Plaintiff adequately pleaded that she has standing and that the defendants violated the ADA. The court said that while it does not disagree with the trial court that "legislation such as the ADA cannot regulate individuals' conduct so as to ensure that they will never be rude or insensitive to persons with disabilities," it found that a reasonable inference can be drawn from her complaint that the restaurants failed to adopt policies or procedures to effectively train their employees on how to deal with individuals with disabilities.

3. *Kenneth Munson v. Del Taco Inc.*, 522 F.3d 997 (9th Cir. 04/14/08). Plaintiff, who uses a wheelchair, visited a Del Taco location in California, and encountered architectural barriers that denied him access to the parking area and restrooms. He filed a lawsuit against the

company alleging violations of the ADA and California Unruh Act. The district court granted partial summary judgment in favor of Plaintiff on the ground that no issue of fact existed that an architectural barrier existed and that the restroom doorway widening was readily achievable. Defendant argued on appeal that it is entitled to summary judgment because intent is required under the Unruh. The court noted though that no California state appellate court had addressed what a showing of "intentional discrimination" requires. Therefore, the 9th Circuit asked the California Supreme Court to certify several questions to lead to the resolution of this disability case.

4. *Doran v. 7-Eleven, Inc.* 524 F.3d 1034 (9th Cir. 05/02/08). Plaintiff, confined to a wheelchair, encountered several architectural barriers in a convenience store approximately 550 miles from his home. At deposition, plaintiff specifically identified 9 alleged barriers encountered on his visit or of which he had knowledge. During discovery, plaintiff was permitted to and did discover additional claimed barriers. The lower court granted defendant's motion for summary judgment on the ground that plaintiff did not have standing to pursue claims based upon barriers he had not personally encountered and of which he had no personal knowledge, and, as to the nine plaintiff claimed to have encountered, defendant had removed them and/or plaintiff failed to prove that they violated the ADA. The appellate court affirmed in part, reversed in part and remanded. In doing so, the court held that a disabled person had Article III standing to bring a claim for injunctive relief under the ADA because of at least one alleged barrier encountered and may thereafter conduct discovery to determine the existence of others that existed, even though not previously encountered. In addition, the court held that plaintiff could only challenge or present a claim for damages for alleged barriers that burden or restrict his alleged disability.

5. *D'Lil v. Best Western Encina Lodge & Suites* 538 F.3d 1031 (9th Cir. 2008). Plaintiff D'Lil, a disabled person and accessibility expert, encountered numerous architectural barriers when she traveled from her home in Sacramento, California to defendants' hotel in Santa Barbara, California. Plaintiff filed suit seeking injunctive relief under Title III of the ADA, damages under California's Civil rights laws, and attorney's fees, costs and expenses. After three years of litigation, the parties entered into a consent decree which resolved all issues regarding injunctive relief and damages, but reserved the issues of attorney's fees, expenses and costs for future resolution. The district court denied plaintiff's subsequent motion for those fees and costs, concluding that plaintiff lacked standing under Article III of the ADA to assert her claims and, thus, that it had no jurisdiction over the motion. In concluding that she lacked standing, the district court focused upon (1) whether plaintiff had a legitimate intent to return to the subject hotel and (2) her long history of ADA claims. The district court concluded that plaintiff had failed to present evidence demonstrating that intent, and that her substantial ADA litigation history undermined any suggestion that she had such intent. Preliminarily, the appellate court rejected plaintiff's contention that the issue of standing had been resolved or waived by virtue of the consent decree, holding that the issue of standing cannot be waived. However, the appellate court went on to reverse the ruling below finding, in part, that the district court's focus upon her extensive ADA litigation history was improper. In fact, the court noted that her extensive background demonstrated that plaintiff

traveled frequently and broadly would tend to corroborate plaintiff's claim that she intended to return to the subject hotel.

6. *Bradley et al v. Royal Atlantic Corp.*, __F.3d__, 2008 WL 4249368 (2nd Cir., 9/18/2008). Plaintiffs, disabled guests most of whom require a wheelchair for mobility, sued defendant resort because the rooms and facilities are not wheelchair-accessible. The court discussed at length when a modification constitutes an alteration under the ADA, triggering accessibility requirements. If plaintiffs convince the court that a particular modification is an alteration under the ADA, the court must then decide whether the alteration was made readily accessible and usable by the disabled to the "maximum extent feasible." The court remanded the case to the district court for further proceedings.

ADA/Whistleblowing

7. *Lupu v. Wyndham El Conquistador Resort,* 2008 WL 1886635 (P.R., 2008). . Plaintiff was a probationary Director of Engineering at the Wyndham El Conquistador Resort in Puerto Rico. His position was terminated at the end of the probationary period. After being advised of this, he spoke with a supervisor of concerns he had about mismanagement at the hotel and lack of proper maintenance that might lead to non-compliance with government regulations. In this lawsuit plaintiff claims his termination was in retaliation for whistleblowing. The court denied the claim for two reasons. First, the discussion about perceived deficiencies at the resort did not occur until after Plaintiff was advised that he would not be retained. Second, the relevant law protecting whistleblowers applies only to information provided to a governmental forum (legislative, administrative or judicial) and not to an in-house manager.

Anti-Trust

8. *Tunica Web Advertising, Inc. v. Barden Mississippi Gaming, LLC,* 2008 WL 3539731 (N.D.Miss., 8/11/2008). Casino operators in Tunica, Mississippi and the Tunica Casino Operators Association agreed among themselves to refrain from doing any business with a designated advertising firm that had cyber-squatted the domain names of tunicamiss.com and tunicamississippi.com. The firm sued the casinos and Association claiming antitrust violations and concerted action. The court denied defendants' motion for summary judgment.

Condemnation

9. *State v. Dunn, 888* NE2d 858, 2008 WL 2514461 (Ind. App., 6/25/2008). The state constructed a roadway median that cut off direct access to a hotel entrance from the southbound lane of the highway. To reach the hotel required a circuitous route that resulted in loss of business. The hotel sued the state and won a jury verdict of $3,650,000. On appeal the court reversed, holding that the construction of a median that makes access to a property inconvenient does not constitute a taking under eminent domain law because the property owner does not have a right to the flow of traffic past his land.

Contract/Arbitration Provisions

10. *Jamie Liebrand v. Brinker Restaurant Corporation, et al*., 2008 WL 2445544 (App. Cal. 06/18/08). A year after being employed plaintiff told her employer that she was pregnant and requested a leave of absence and was subsequently terminated. She sued for pregnancy discrimination, intentional infliction of emotional distress and failure to provide pregnancy leave. Defendant filed a motion to compel binding arbitration. Plaintiff did not recall signing an arbitration agreement and that if she did sign an agreement, it was void for substantive unconscionability. The trial court agreed with Plaintiff because the clause constituted an adhesion contract that mandated arbitration to occur in Texas and that the employee share the costs. The trial court also found that the arbitration agreement was void because it was procedurally unconscionable since Plaintiff had to sign the agreement "to even be considered for employment". The appellate court said it agreed with the trial court since the Defendant failed to ensure its pre-employment arbitration agreements complied with California laws.

11. *Elaine Shelton v. The Ritz-Carlton Hotel Company, LLC,* 550 F.Supp.2d 74 (D.D.C. 05/08/08). Plaintiff, an African American woman, was employed as a cook at the Ritz-Carlton Hotel in Washington, D.C. She was subsequently promoted and after five years in the new job she applied for another position. A Hispanic male was selected instead of her. Six months later she applied for another job for which a white male was hired. Plaintiff, through the EEOC, alleged race and gender discrimination. Defendant pleaded that both parties are bound by an arbitration agreement. The court found that the contract was not in effect yet, and said the agreement had no language indicating it was meant to apply retroactively.

12. *David W. Rutter v. Darden Restaurants Inc., et al*., 2008 WL 4949043 (C.D.Cal. 11/18/08). Plaintiff was employed at Red Lobster restaurants. In a booklet, the company had outlined a dispute resolution process that required employees to waive all rights to bring a civil court action in favor of mediation or, for state and federal claims, arbitration. Plaintiff argued that arbitration was optional and the court disagreed finding that the language was clear that arbitration was mandatory. The court dismissed Plaintiff's claims without prejudice. The decision contains a good discussion about both procedural and substantive unconscionability vis-à-vis arbitration clauses.

13. *Bapu Corp. v. Choice Hotels International, Inc.,* 2008 WL 2559306 (USDC NJ, 2008). Contract provisions requiring disputes to be submitted to arbitration are enforceable. Likewise enforceable is a contract provision limiting the time within which the arbitration should be commenced. The parties had a franchise contract requiring a Quality Inn to renovate the premises by a specified date per Choice Hotels specifications. The agreement also required breach of contract claims to be submitted to arbitration within three years of the breach. Plaintiff breached the franchise contract with Choice Hotels by failing to complete required renovations. Choice waited six years to pursue a breach of contract claim in arbitration. The court vacated an award in favor of the franchisor and dismissed the claim, holding the arbitrator lacked jurisdiction over the dispute.

Contract/Breach/Room Reservations

14. *Alex Guillard v. Copeland's of New Orleans, Inc*., 971 So.2d 451 (App.La. 12/5/07). Copeland's of New Orleans appealed a trial court's judgment awarding Plaintiff damages for Copeland's breach of a three-year employment contract. In May 2005, Copeland's closed the restaurant because it was not meeting its performance expectations and said it no longer needed Plaintiff's services. In August, Guillard filed a lawsuit for damages against Copeland's for breach of contract. Hurricane Rita hit the area on September 24. The court rejected Copeland's argument that Hurricane Rita was a fortuitous event that made Copeland's performance impossible because the restaurant had defaulted on the contract several months before the hurricane.

15. *Marriott Hotel Services, Inc. v. National Vacation Resorts,* 2008 WL 2690060 (Cal.App. 07/10/08). In a multi-year group sales contract dispute, the trial court entered judgment in Marriott's favor. Defendant contends that the trial court abused its discretion by ignoring the language of one of the contracts, claiming that the room attrition clause only applied to a revised room block, and that defendant was not obligated to pay kosher food vendors because the contract said that Marriott would supply food and beverages for the event. The appellate court agreed with the trial court that the attrition clause applied even if, as here, no revision was made to the room block. Concerning defendant's argument about the kosher vendor, defendant failed to raise it at trial; doing so on appeal was too late.

16. *Onyx Acceptance Corp. v. Trump Hotel & Casino Resorts, Inc.*, 2008 WL 649024 (N.J. Super., 3/12/08). Trump Hotel and Casino in Atlantic City was liable in breach of contract and misrepresentation for overbooking. It had assured party host of adequate rooms but was unable to deliver due to overbooking. The hotel had guaranteed the rooms but had not removed them from available inventory. The hotel staff was very unaccommodating to guests stranded without rooms, and the hotel sought to assign such guests to hotels with inferior amenities. When the party host expressed discontent emphasizing she had prepaid nearly $30,000, the desk clerk responded, "Ma'am, we have people who spend $30,000 a hand." Treble damages and counsel fees were awarded to plaintiff.

Contract/Sale of Hotel

17. *Pianeta Miami, Inc. v. Liberman*, 990 So.2d 551, 2008 WL 2435663 (Fla. App.,6/18/ 2008). Purchasers of a hotel dealt with a seller who was fraudulently posing as the hotel's president. The true owner realized what had occurred after purchasers took possession. The true owner sued the buyers for ejectment and quieting of title. A jury granted judgment determining title belonged to the original owner and ejecting buyer. The jury also granted the would-be buyer's claim for unjust enrichment covering expenses they paid for upkeep including property taxes, rezoning expenses, and an architect's plan for the property.

Contract/Joint Venture to Build Casino

18. *Lauth Indiana Resort & Casino, LLC. v. Lost River Development, LLC,* 889 NE2d 915, 2008 WL 2737058 (Ind.App., 7/15/ 2008). Three gaming companies and a developer formed a joint venture to submit a proposal for construction and management of a casino project. Gaming commission rejected the proposal and issued a second request for proposals. One of the joint venturers joined another company to submit a proposal in response to the second solicitation. The other two companies involved with the original proposal sued, claiming breach of joint venture agreement and usurpation of a corporate opportunity. The court rejected the claim, holding that a joint venture without a termination date remains in force until its purpose is accomplished or that purpose becomes impracticable. Here the joint venture ended when the Gaming Commission did not select the joint venture's proposal.

Contracts/Indemnity Agreements/Duty to Defend

19. *Kirk Crawford, et al., v. Weather Shield Mfg., Inc.* 44 Cal.4th 541, 79 Cal.Rptr.3d 721, 187 P.3d 424 (2008). A group of homeowners brought suit for construction defects against the developer and various subcontractors. The developer cross-complained against the subcontractors for indemnity, including express contractual indemnity. After trial, a subcontractor was found not liable to the homeowners, and not liable to the developer for breach of contract or express indemnity. However, the subcontractor was found in a declaratory relief claim to have had an obligation to defend the developer. In affirming that determination, the California Supreme Court concluded that the express language of the contractual provision at issue obligated the subcontractor to defend the developer with regard to any suit or action "founded upon a claim" of injury, loss or damage. Thus, the subcontractor was obligated to defend developer with regard to any action containing a claim or allegation of injury without regard to and prior to the determination of said subcontractor's actual negligence.

Discrimination/Racial

20. *A/Jean Woolford, Al-Lyn Woolford, et al. v. Restaurant Concepts II, LLC a/b/a Applebee's Neighborhood Bar and Grill,* 2008 WL 217087 (S.D. Ga. 01/23/08). Five African-American teens went to a local Applebee's restaurant where they said they were discriminated against by the Defendant's employees when refused service because of complaints from other patrons about their "loud and obnoxious behavior". The manager asked them to leave because their presence violated two policies of the restaurant – the right to refuse service to loud and disruptive customers, and to patrons under age 16 present without a parent or guardian. The court found that the students failed to show that they were subject to a real or immediate threat of future discrimination by the restaurant. The students also admitted that there were other black patrons dining at the restaurant the night they were refused service. The court granted the restaurant's motion for summary judgment and dismissed the complaint with prejudice.

21. *Sayed v. Hilton Hotels, Corp.,* 2008 WL 3362828 (S.D.N.Y., 8/7/2008). Plaintiff is a naturalized US citizen who is a Muslim of Egyptian and Arabic descent. He was employed

by Hilton Hotels as an assistant to the housekeeping director. He claimed he was referred to by his supervisor as "Muslim Taliban" and was "verbally harangued". He filed an employment discrimination complaint with the State Division of Human Rights. It ruled in favor of defendant hotel, finding that defendants articulated legitimate, non-discriminatory reasons for the termination. Plaintiff then sued for violation of the state and New York City human rights laws. The court dismissed them because defendant elected his remedies - Once an action is brought before the Division of Human Rights, it may not be brought again as an action in violation of state or city human rights laws. However, defendant's federal Title VII and 1982 claims can proceed.

22. *Feacher v. Intercontinental Hotels Group,* 563 F.Supp.2d 389, 2008 WL 2331435 (NDNY, 6/13/08). Plaintiffs, two people of color, alleged they were denied entrance into a restaurant located in a hotel and were told "We're closed for you" while two Caucasian couples were seated. The court found that a reasonable fact finder could conclude that denial of service was motivated by plaintiffs' race. Defendant restaurant failed to offer evidence of a legitimate reason for the denial. This constituted a prima facie case for a violation of 42 U.S.C. Section 1981. However, allegations that the plaintiffs were served the next morning but seated in the back of the restaurant (without complaint) is insufficient to conclude that the seating location was selected for a discriminatory reason. Plaintiffs further alleged that on the following morning they were subjected to racial slurs in the restaurant, and after obtaining omelets at the omelet station a hotel employee took the plates out of their hands and threw the food in the garbage. If proven these circumstances establish a prima facie case of discrimination.

Employment/ADA

23. *EEOC v. Lee's Log Cabin,* 546 F.3d 438 (7th Cir. 10/06/08). Ms. Stewart applied for a job at Defendant's restaurant and was aware that the job description required her position to lift between 25 and 30 pounds multiple times during a shift. She wrote on her application that she had a lifting restriction of 10 pounds, and claimed that it was temporary. After a month, Stewart went to the restaurant to inquire about her application status and noticed that the word "HIV+" was written on the front. She was not hired, and was told that it was because of her lifting restriction and lack of experience. The EEOC filed suit against the restaurant, claiming it violated the Americans with Disabilities Act when it refused to hire Stewart because she was HIV-positive. The court held the EEOC failed to show either that: 1) Ms. Stewart was a "qualified individual with a disability" under the ADA because it had not produced evidence that being HIV-positive substantially limited one or more of Stewart's major life activities as required to satisfy the ADA's definition of "disability."; or 2) Ms. Stewart was a "qualified individual" because on her application, when asked whether accommodations could be made to overcome her lifting restriction, she answered "no".

24. *Madeleine Stodola v. Finley & Co., et al., 2008 WL 3992237* (N.D. Ind. 03/24/08). Plaintiff with a visual disability was hired by Defendant to work in one of Defendant's Wendy's Hamburger restaurants. . After substantial training, Plaintiff performed poorly, receiving five Notices of Needed Improvement, which are forms that document employee

shortcomings. Plaintiff blamed her sub-par work on the lack of accommodations to assist her in performing her job. In plaintiff's lawsuit for disability discrimination, the court granted summary judgment for Defendant.

Employment/Discrimination/Age

25. Richard Roeben v. BG Excelsior Limited Partnership, d/b/a The Peabody Little Rock, 545 F.3d 639 (8th Cir., 11/6/08). . Plaintiff was hired as the director of purchasing for Defendant's hotel at age 67. Less than four years later, the hotel became aware that his home contained many items that appeared to belong to the hotel, including commercial steaks and cleaning supplies, blankets, lobby furniture, and Peabody-labeled washcloths, towels, shampoos and conditioners. As a result plaintiff was terminated from employment. He claimed that he was discharged because of his age. The court disagreed and found that he set forth no evidence that he was terminated due to his age, and the hotel had proffered a nondiscriminatory reason for the termination.

Employment/Discrimination/National Origin

26. Tamer Mamou v. Trendwest Resorts Inc., et al., 81 Cal.Rptr.3d 406 (App. Cal. 07/30/08). Plaintiff, of Middle Eastern decent, was a sales representative for Defendant timeshare company. He was terminated for not following his supervisor's orders to make sure people on medical leave did not come back to work or if they were to come back, to make their lives so miserable that they would quit. Plaintiff refused to cooperate and was subsequently terminated. He sued and the district court granted summary judgment for Defendant. The appellate court reversed stating that summary judgment should not have been granted because evidence does show that company officials may have acted with bias against people of Middle Eastern or Arabic descent.

Employment/Discrimination/Race

27. Magsanoc v. Coast Hotels & Casinos, Inc. 2008 WL 3862052 (Crt. App. Nev., 7/17/08). Plaintiff, a Filipino-American, was a shift manager at a hotel and casino. He was terminated and sued for violation of Title VII of the Civil Rights Act of 1964, claiming discrimination on national origin and race. Without providing factual details the court held that plaintiff established a prima facie case for racial discrimination and the casino offered a legitimate, nondiscriminatory reason for the termination. Plaintiff then sought to prove the casino's proffered explanation was a pretext. The court rejected plaintiff's claim that a few inappropriate comments prove pretext. Said the court, "Stray remarks not tied directly to plaintiff's termination are insufficient to create a triable issue of fact." Further, nothing in the record established that defendant's English-only policy was adopted to discriminate against foreign nationals, or that it was enforced selectively.

28. Fumbanks v. Harrods Hotel, LTD d/b/a/ Holiday Inn of Victoria, 2008 WL 2713932 (S.D.Tex., 7/9/2008). Plaintiff was hired as a maintenance worker at defendant hotel. Ten months later his job changed to that of a van driver. He complained the change was a demotion but his hourly pay was not decreased and his hours were increased. Seven months

later he was fired for withholding information about on-the-job drug use of another employee and for his own suspected use of illegal drugs. Prior to the termination he had been warned several times about his job performance. He sued claiming discrimination on race and retaliation. He could site no specific instances of discrimination except the "demotion" and the firing. The court determined plaintiff failed to establish a prima facie case and granted summary judgment to defendant.

Employment/Discrimination/Religion

29. *Mohammed Muhibur Rahman v. Smith & Wollensky Restaurant Group, et al.,* 2008 WL 161230 (S.D. N.Y. 01/16/08). Plaintiff, a Muslim of South Asian descent who worked as a waiter at the Park Avenue Café owned by Defendant. He claimed he was subjected to hostility from supervisory personnel because of his religion and ethnicity and filed a charge of discrimination with the EEOC. The agency found that there was reasonable cause to believe Plaintiff was subjected to harassment and that he may have been terminated based on his race, national origin or religion. Plaintiff unsuccessfully attempted to represent a class action of all past, present and future employees of Defendant who are Muslim, non-whites and/or of South Asian descent working at any of the 16 Smith & Wollensky restaurants. The court found that because the EEOC did not investigate any of the Defendant's restaurants other than Park Avenue Café, claims concerning those restaurants have not been exhausted and class allegations must be limited to the Park Avenue Café.

Employment/FLSA

30. *Connley Davidson v. Orange Lake Country Club Inc., Orange Lake Country Realty Club,* 2008 WL 254136 (M.D. Fla. 01/29/08). Motion to reargue denied, 2008 WL 596120 (M.D.Fla. 2/29/08). Plaintiff worked for a time share company and was denied overtime pay by the Defendants, who were affiliated companies. One of the defendants claimed that it was a retail or service establishment exempt from overtime pay requirements. The court stated that a timeshare company is similar to a real estate company under the FLSA and denied Defendants' motion for summary judgment. Defendant also argued that the outside salesperson exemption of the FLSA should apply. However Plaintiff was required to stay within the confines of the resort to perform his job and so was not an outside salesperson within the exemption.

31. *John Wajcman and Charles Ashmore v. Investment Corporation of Palm Beach d/b/a Palm Beach Kennel Club, 2008 WL 783741, (S.D.Fla. 03/20/08).* Plaintiffs were employees of the Palm Beach Kennel Club and were card dealers. They filed a lawsuit claiming that Defendant illegally took a "tip credit" to distribute to card room floor supervisors. Summary judgment for Defendant was denied as the court concluded that a genuine issue of material fact remained as to whether card room floor supervisors are traditionally the subject of tipping and thus whether Defendant improperly took a tip credit.

32. *Yu G. Ke, et al., v. Saigon Grill Inc, et al.* __Fed Supp.2d__, 2008 WL 5337230(S.D.N.Y., 10/21/08). Thirty-six food deliverymen filed a complaint claiming they were denied minimum wage and overtime under federal and New York State laws and retaliation.

Defendants, who destroyed records, were found to have created a false paper record of payments indicating they were paying their deliverymen more than they actually were paying them. The Restaurant Workers Union assisted the Plaintiffs. An administrative law judge with the NLRB found that Defendants had committed unfair labor practices. On the retaliation claim, the court awarded the deliverymen $4.6 million in back pay and damages.

33. *Abel v. Southern Shuttle Services, Inc.*, 2008 WL 2385490 (USDC, SD Fla., 2008). The provision of the Fair Labor Standards Act requiring overtime pay for hours worked in excess of forty per week includes an exception for taxicab drivers. The exception applies equally to drivers of shuttle vans that take multiple passengers and parties of passengers to and from airports.

Employment/Retaliation

34. *Randy Harris v. Surrey Vacation Resorts Inc. d/b/a Grand Crowne Resorts and Lisa Frank*, 2008 WL 2906737 (W.D. Mo. 07/24/08). Plaintiff, an ex-con, was terminated from his employment as a telemarketer with Defendant's company after numerous outbursts at work. Plaintiff also acknowledged that he falsified his employment application about his conviction status. Prior to termination, Plaintiff alleged that an administrative assistant employed by Defendant sexually harassed Plaintiff. The court found that the behavior was not pervasive enough to create a hostile work environment. The court also noted that there was no evidence of retaliation since Defendant had an independent reason for termination – falsifying the employment application. .

35. *Judy Hughes v. Hollywood Casino Corp*, 2008 WL 2164570 (N.D.Miss. 05/22/08). Plaintiff was terminated from her employment with the Defendant's casino allegedly due to falling asleep on the job, failing to notify her manager about a romantic relationship with her boss and making discriminatory comments about an employee. Plaintiff filed a charge with the EEOC claiming hostile work environment and retaliation for reporting harassment from her supervisor. The court denied the summary judgment request of Defendant stating that although the Plaintiff was terminated for her behavior, there may have been reasons that were pretexual and she may have suffered adverse employment actions due to her alleged sexual harassment by her supervisor.

36. *Debra Brockington v. Circus Circus Mississippi Inc. d/b/a Gold Strike Casino Resort*, 2008 WL 2079130 (N.D. Miss., 05 /15 /08). Plaintiff, a bartender, was disciplined for giving out free drinks and subsequently terminated from Defendant's casino for allegedly violating the attendance policy. Plaintiff claimed she was fired for retaliation after reporting sexual harassment by two employees. Other employees stated that other bartenders had worse attendance records and often gave out free drinks without consequences. The court found that the alleged harassment was neither severe nor pervasive; however, the court stated that on the retaliation claim, it was close enough in time to establish a prima facie case.

37. *Gregory R. Henderson v. OS Restaurant Service Inc. d/b/a Cheeseburger in Paradise*, 2008 WL 216581 (S.D. Ind. 01/24/08). Plaintiff, a black male, was hired at Defendant' restaurant

as a prep cook. He was the only black employee. Plaintiff claimed that his supervisor used the "n-word" in Plaintiff's presence when referring to the supervisor's former roommate, and hung a noose in the kitchen. Plaintiff complained and his hours were subsequently reduced, allegedly due to slow business. Altercations occurred between Plaintiff and his supervisor, and Plaintiff was terminated for insubordination. The court found that enough circumstantial evidence exists to allow a jury to conclude racial discrimination and retaliatory discharge. The court thus denied the summary judgment motion brought by Defendant.

38. *Scott Jones v. The Lodge at Torrey Pines et al., 177 P3d 232 72 Cal.Rptr.3d 624* (Cal. 03/03/08*).* Plaintiff sued his employer for sexual orientation discrimination, harassment and retaliation and was awarded a jury verdict against Defendant and his supervisor. The California Supreme Court reversed the judgment stating that non-employer individuals are not personally liable for their roles in retaliation.

Employment/Sexual Harassment

39. *Deanna Puebla v. Denny's Restaurant, 2008 WL 687186 (E.D. La. 03/10/08).* Summary judgment granted to Denny's on a claim for sexual battery, retaliation and sexual harassment when Plaintiff claimed she was sexually battered by her manager. The court found that Defendant demonstrated reasonable care to prevent and promptly remedy the harassment and that Plaintiff failed to use the remedial opportunities afforded her by Defendant.

40. *Amanda Schoenfeld v. U.S. Resort Management Inc. and Strategic Outsourcing Inc*., 2008 WL 53275 (W.D. Mo. 01/03/08). Plaintiff was a dispatcher in a security office and claimed she was sexually harassed when her supervisor made inappropriate comments about her weight and gender when applying to be a road officer. The court affirmed the arbitrator's decision that Plaintiff did not present enough evidence to establish a case for gender discrimination.

41. *Gwendolyn Donaldson v. CDB Inc., d/b/a Popeye's* 2008 WL 2704829 (S.D. Miss. 07/08/08). Plaintiff sued for gender discrimination based on a hostile work environment, retaliation, constructive discharge, negligent infliction of emotional distress and negligence. Summary judgment was granted in favor of defendant because plaintiff failed to show the existence of any genuine issue of material fact.

42. *Anne M. Daigle v. Jameson Tavern LLC, No. CV-06-663* (Maine 2/8/08). Plaintiff, a waitress in Defendant's tavern, alleged that her supervisor sexually harassed her. There was a sign in the kitchen that said, "The soup is not free, but the harassment is." After Plaintiff filed her complaint, her supervisor filed a complaint against her for sexual harassment. Disputed evidence showed that Defendant did not provide anti-harassment training for employees nor did Defendant have any policies governing investigations. The court said that a jury may find that the harassment was in fact severe and pervasive so the court declined to award summary judgment in favor of Defendant.

43. *Shannon Laymon v. Lobby House, Inc.*, 2008 WL 1733354 (D. Del. 04/14/08). Plaintiff alleged that her manager, the owner and a fellow bartender, sexually harassed her and other female employees. When she brought this to the attention of her manager, he allegedly said it was the owner's business and he could do what he wanted. The manager suggested reducing Plaintiff's hours so she didn't have to work in the owner's presence. Plaintiff objected and he told her she could leave. The court found that there is a factual dispute but what Plaintiff experienced could be offensive to a reasonable woman so summary judgment for Defendant was denied.

44. *Christina Howington v. Quality Restaurant Concepts LLC and Tyler Kirk*, 2008 WL 4659652 (6th Cir., 10/20/08). Plaintiff, an Applebee's employee, alleged that her supervisor began sexually harassing her shortly after she started working with him. Three days after Plaintiff's first complaint, she parked her car in the front of the restaurant, against policy, because she was worried someone might vandalize it. She was directed by her supervisor to move it but declined and was fired. The district court granted summary judgment to Defendant; however, the appellate court found that a jury could infer she was disciplined for refusing her supervisor's advances. The court therefore reversed the district court's grant of summary judgment and remanded the case for trial.

45. *Jazmine Fenton v. Portillo's Hot Dogs, Inc*., 2008 WL 4899533 (N.D. Ill. 11 / 13/08). Plaintiff, a 16-year-old employed at Defendant's restaurant, claimed that one of her two managers sexually harassed her repeatedly. Six weeks after a touching incident, Plaintiff reported the conduct to her other manager and said she did not report it immediately because she was scared. Plaintiff resigned a few weeks later. During an investigation of the alleged conduct, the company found that the harassing manager had been written up and terminated while working for another store. Plaintiff claimed she was constructively discharged, but the court disagreed because Defendant repeatedly assured Plaintiff she would suffer no retaliation and immediately began a full investigation while adjusting schedules to minimize her contact with the alleged harasser. The court held that Defendant exercised reasonable care in preventing harassment through its written policy, corporate assistance phone number and training.

Employment/Testing

46. *Starbucks Corp. v. Superior Court*, __Cal.Rptr.3d__, 2008 WL 5159210 (Cal. App., 12/10/08). California law prohibits employers from asking about marijuana-related convictions that are more than two years old. Starbuck's uses nationwide the same two-page job application form. The first page contains the following question: "Have you been convicted of a crime in the last seven (7) years?" On the reverse side, directly above the signature line, is a special note to "CALIFORNIA APPLICANTS ONLY". It advises, "Applicant may omit any convictions for the possession of marijuana . . . that are more than two (2) years old, . . .". Applicants who were denied employment sued claiming Starbuck's illegally asked about marijuana convictions more than two years old. The court granted summary judgment for the coffee company.

Employment/Tips and Service Charges/Tip Sharing

47. *Daniel Baldonado and Joseph Cesarz, et al., v. Wynn Las Vegas LLC*, 194 P.3d 96 (Nev. 10/09/08). Plaintiffs worked as table game dealers at the Wynn Las Vegas. The casino's policy was to count all dealer tips every 24 hours and distribute them among dealers based on hours worked. Further, the policy provided that the casino could change the policy. The casino modified the policy to share tips with others who were earning less, such as pit manager and floor supervisor. Nevada law does allow tip pooling. Plaintiffs filed a class-action complaint; d the court found no private cause of action existed and so granted summary judgment in favor of Defendant.

48. *Samiento v. World Yacht, Inc*., 10 NY3d 70 (NY, 2008). . Plaintiff restaurant servers worked on boats that provided banquet cruises in New York harbor. For some cruises the employer collected 20% of the bill as a service charge, informing patrons that the money was distributed to servers as a gratuity. For other cruises, the ticket price was advertised as including gratuities. As a result tips were seldom received by servers directly from the patrons. The employer remitted to the servers a gratuity of only 4 - 7%. The court held these facts constituted a violation of Labor Law Section 196-d, which forbids an employer from retaining any part of a worker's gratuities. The facts constitute the violation even though payment of the fees by customers was mandatory.

Employment/Unemployment Benefits

49. *Condor v. Board of Review, Department of Labor,* 2008 WL 2699782 (N.J. Super., 2008). Casino denied to a dealer unemployment benefits, claiming he was terminated for gross misconduct (the specifics were not provided). The dealer appealed but did so beyond the ten day statutory period. He claimed "good cause" for the delay which was an exception recognized by the statute. Claimant's tardiness was caused by his failure to read the section of the notice of denial that explained his rights to appeal. The court determined the reason the dealer did not file a timely appeal was because he neglected to read the entire notice, and this did not constitute good cause.

50. *Knighten v. Review Board of Indiana,* 879 N.E.2d 1232 (Ind., 2008); *Johnson v. Sky Ventures LLC,* 2008 WL 495698 (Minn., 2008). An employee's willful disregard of reasonable directives, plus complaining to a supervisor in an escalating voice while moving within inches of the supervisor, constitutes misconduct rendering the employee ineligible for unemployment benefits.

51. *Alexis v. G2 Secure Staff, LLC,* 2008 WL 853344 (Minn., 2008). A restaurant chef who had been warned about an unexcused absence was terminated when he missed work a second time on a day when the restaurant was catering an event. He was the only chef qualified to manage the kitchen in preparation for the event. This constituted employment misconduct disqualifying him from eligibility for unemployment benefits.

52. *Theelke v. Maucieri, Inc.,* 2008 WL 1799862 (Minn., 2008). A Kentucky Fried Chicken (KFC) assistant manager was terminated because she made numerous calls to a customer-

survey line intended for use by patrons to rate their experience at KFC restaurants. This too was determined to be employment misconduct; the employee was denied unemployment benefits.

Employment/Uniform Issues

53. *Douglas O'Conner v. Starbucks Corporation*, 2008 WL 2761586 (N.D. Cal. 07 / 14 / 08). Plaintiff, a barista at Starbucks, was responsible for laundering his own green apron. Plaintiff dry cleaned the apron even though the apron's tag stated that it was machine washable, because his dry cleaner told him it would fade and bleed colors onto other laundry. Plaintiff filed suit against Defendant claiming that Defendant should reimburse him for the dry cleaning, and the court disagreed. Summary judgment for Defendant.

Employment/Unions

54. *Robert Bishop, et al. v. Hotel and Allied Services Union Local 758, et al*., 2008 WL 136362 (S.D. N.Y. 01/14/08). Plaintiffs were bellman at the New York Palace Hotel. When the hotel lost one of its diamonds under the AAA award, the standards for operation shifted and managers began evaluating employees based on AAA standards. Plaintiffs allege that this shift in operations was a unilateral change of work practices and filed suit against the hotel and the union. The case was sent to arbitration since the group failed to exhaust the administrative remedies of the collective bargaining agreement. The arbitrator found the AAA standards not new standards and denied the union's grievance. The Second Circuit court granted the hotel's motion to confirm the arbitration award and dismissed the complaint.

55. *Ruben S. Cortina, et al., v. Hotel and Restaurant Employees Union, Local 1 and City Front Hotel Associates Limited Partnership d/b/a The Sheraton Hotel and Towers, 2008 WL 857165* (N.D. Ill. 03/31/08). Plaintiffs were members of the union covered by a collective bargaining agreement for banquet servers. The hotel had an "A list" and a "B list" of servers and "A list" servers had priority for work. Plaintiffs claimed that calling "A-listers" first was in violation of the seniority provisions of the union agreement. The breach of contract claim was time-barred and the servers failed to meet the legal requirements to properly state a cause of action. The court dismissed the servers' complaint in its entirety.

Employment/Wage & Hour

56. *Brinker Restaurant Corp. v. Superior Court of San Diego and Adam Hahnbaum, et al.*, 165 Cal.App.4th 25, 80 Cal.Rptr.3d 781, rev. granted (Cal. App. 07/22/08). Employees of Defendant's restaurants unsuccessfully attempted to certify a class of more than 59,000 employees for a lawsuit addressing Defendant's failure to provide rest periods every four hours, to provide appropriate meal breaks, and for "early lunching" (requiring employees to take a meal break at the start of their shift). The court said employers cannot discourage or impede employees from taking a break but need only to provide, not ensure, that the breaks be taken.

57. *Boucher v. Shaw*, __P3d__, 2008 WL 5046844 (Nev., 11/26/08). Plaintiffs were employees of a hotel and casino. The corporate owner of the facility went bankrupt and eventually ceased operations. Plaintiffs sued the CEO, CFO and Human Resource Manager for unpaid wages. Nevada law requires that "employers" pay employee wages. The court held that individual managers of corporations cannot be held liable as employers for unpaid wages under Nevada law. This is true even when, as here, the managers are the sole shareholders in the corporate employer's parent company.

Employment/Workers Compensation

58. *M&B Inn Partners Inc. v Workers' Compensation Appeal Board*, 940 A.2d 1255 (Pa. 01/18/08). Plaintiff sought worker's compensation benefits as a result of anxiety and depression after being physically and verbally accosted by a guest of the Host Inn where Plaintiff worked as an administrative assistant. The judge ruled that she was entitled to benefits; however, the hotel argued that the claim should be dismissed under the "personal animus" exception because her injuries were the result of a guest's alleged harassment. The guest did not intend to harm the Plaintiff. The Worker's Compensation Board, on appeal, disagreed with the hotel's argument stating that the injury occurred and arose in the course of employment and was not the result of intentional acts of third parties. The award of benefits to Plaintiff was affirmed.

59. *William Davis v. Harrah's Cherokee Casino and Legion Insurance Company*, 362 N.C. 133, 655 S.E.2d 392 (N.C. 01/25/08). Plaintiff, an employee of Defendant's casino, injured his back on the job. He acknowledged that he fell at home and Defendant argued that the fall at home broke the chain of causation related to his original injury. The commission disagreed and said that the original injury had more of a propensity to develop further injuries over time and awarded benefits to Plaintiff. On appeal, the court affirmed. The Supreme Court of North Carolina also affirmed the lower rulings stating that there was enough medical evidence to establish that the slip and fall at home was an aggravation of the original injury at work.

60. *Prushi v. Hyatt Corp.*, 2008 WL 2852899 (Ky. App., 2008). To collect compensation benefit an employee must establish that an injury was work-related. The trier of fact is not required to accept the word of the employee as credible if evidence and circumstances establish otherwise. Likewise, the trier of fact can reject the opinion of a physician on causation of an injury where it is based solely on the history provided by the patient. Thus rejection of the claim by a cook at the Hyatt Regency Hotel in Louisville that he hurt his back lifting a heavy pan of cooking oil into the deep fryer was upheld where the worker's testimony contained contradictions and discrepancies. Likewise the court was justified in rejecting the testimony of the cook's doctor where the physician's statements as to the cause of the injury were based solely on input from the cook.

61. *Hampton Holiday Inn v. Pearson,* 2008 WL 2497282 (Va.App., 2008). To qualify for unemployment benefits claimant must prove by a preponderance of evidence that the injury arose "out of and in the course of the employment." Plaintiff was an employee of the

Hampton Holiday Inn in Virginia who fell at work. The hotel did not dispute that the injury occurred at work but claimed it did not arise of her employment. At the time of her fall, she was stepping outside from a dimly lit hallway inside the hotel. The time was night and outdoors was dark. She lost her balance on "rough, jagged" concrete. At the time she was hurrying to serve a customer and avoid leaving a new employee alone at the front desk. Given these facts the court determined the employee's fall arose out of her employment.

False Imprisonment

62. *Richard Wilmshurst v. Marriott of San Francisco, et al*., 2008 WL 80947 (N.D. Cal. 01/07/08). Plaintiff alleged he was attacked by five law enforcement officers during his attendance at a group function dinner at the hotel He sued Marriott for conspiracy to arrest and for participating in his removal from the Marriott hotel. The charges against Plaintiff were later dropped by the court. Marriott argued that the claims should be dismissed as they were barred by the statute of limitations. Plaintiff argued that the two year statute of limitations starts when the arrest charges were dropped and not when the false arrest was made. The court disagreed and granted the hotel's motion to dismiss.

63. *Ferrell et al., v. Miluka et al.,* ___ S.E. 2d ___ 2008 WL 4980903 (Ct. App. Ga. 11/25/08). Plaintiffs sued Ruby Tuesday and its manager for false imprisonment, intentional infliction of emotional distress, negligent hiring and training. After dining in the restaurant, Plaintiffs drove away and were pulled over by a police officer for failure to pay their bill at the restaurant. Prior to Plaintiffs leaving the restaurant, another table of two left without paying their bill. After speaking with the Ruby Tuesday manager, the officer realized that the Plaintiffs did not meet the description of the two who left the restaurant without paying. The court granted summary judgment to Ruby Tuesday on all claims, however on appeal, the court found that the trial court erred in granting summary judgment to Ruby Tuesday. The court stated that malice was not necessary to show false imprisonment as the Plaintiffs were detained without a warrant.

Franchise

64. *Atlanta Bread Company Intl., v. Lupton-Smith et al.,* 292 Ga.App. 14, 663 S.E.2d 743 (App. Ga., 06 / 04 / 08). Defendant owned five franchises of Atlanta Bread Company restaurants. The agreements were terminated after Plaintiff discovered that Defendant was operating a competing business contrary to the restrictions in the franchise agreements. The trial court found that two of the restrictions were not enforceable. One restriction did not specify the nature of the business activities in which Defendant was forbidden to engage in and the court found that restriction unreasonable and unenforceable. The second restriction contained shifting and expanding territorial restrictions which was also found to be unenforceable. A jury will determine if trade secrets were disclosed which would be a violation of Defendant's contractual duties.

65. *Coffee Beanery Ltd., et al., v. WW LLC, Deborah Williams and Richard Welshans*, 2008 WL 4899478 (6th Cir., 11/14/08). Plaintiffs purchased a franchise coffee house from the

Defendant Coffee Beanery. Defendant acknowledged that they violated the Maryland Franchise Act by making misrepresentations and for not giving Plaintiffs a prospectus. Plaintiffs brought suit and the court found that Defendant failed to disclose a prior felony conviction for grand larceny and that the Plaintiffs should not be bound by arbitration provisions in the agreement.

66. *Raymond Bonanno, et al., v. The Quizno's Franchise Company LLC, et al.,* 2008 WL 638367 (D. Colo. 03/05/08). Several franchise owners sued Defendant for fraudulent inducement of franchise agreements and breach of implied covenant of good faith. Under the Colorado Consumer Protection Act, Plaintiffs were able to demonstrate Defendant's fraudulent scheme and denied Defendant's motion to dismiss.

Franchise/Arbitration

67. *Choice Hotels International v. S.M. Property Management LLC, et al*., 519 F.3d 200 (4th Cir. 02/28/08). Choice Hotels brought suit against franchise owners for not meeting standards of quality. Choice filed an action in district court and Defendants moved to dismiss based on the arbitration resolution requirement in the franchise agreement. Arbitration was decided in favor of Plaintiff, however Defendant's designated representative never received notice of arbitration. The circuit court upheld the lower court's decision to vacate the arbitration award.

Franchisor/Franchisee Liability

68. *Ellison v. Burger King Corporation* ___ S.E.2d ___, 2008 WL 4885021 (Ga. App. 2008). Customer brought action against restaurant franchisor, restaurant franchisee, franchisee president and restaurant manager for injuries arising from an alleged battery. Defendants prevailed upon summary judgment, and plaintiff appealed. The appellate court reversed, in part, and affirmed, in part. In affirming judgment in favor of the franchisor, the court noted that the critical issue was the right to control and/or the control exerted by a franchisor over the franchisee. The court, however, acknowledged that a franchisor is faced with a difficult problem of exercising sufficient control over a franchisee to protect the franchisor's national identity and professional reputation, while at the same time foregoing such a degree of control that would make it vicariously liable for the acts of the franchisee and its employees. The court went onto to point out that the evidence was insufficient to establish that the Burger King Corporation had exercised sufficient control to warrant imposition of liability.

69. *Toppel v. Marriott International, Inc.*, 2008 WL 2854302 (S.D.N.Y., 2008). In a slip and fall case occurring at a franchisee hotel the court refused to grant the franchisor's motion to dismiss. The court reviewed the franchise contract. It provided that the franchisee must comply with the franchisor's operating systems for renovations, staffing and training, food and beverage operations; advertising, marketing, promotional and public relations and sales programs; quality assurance program; signs; maintenance of the hotel and building. Other areas included are guest safety, light bulb wattage, marketing communications display; uniforms; cash handling procedures; check in/check out procedures; approval of items sold

including food and beverages; Christmas trees and decorations; soiled linen handling; and flag display. The manual provided by the franchisor included 90 "detailed topics and procedures" of the franchisor that the franchisee is expected to follow. The franchisor enforces the agreement by periodic inspections and mandated curing of any noncompliance. Further, various documents received by the plaintiff guest included the franchisor's logo including letterhead, receipt given at the restaurant, and check-in card. The question of whether the franchisor retained sufficient control to render it vicariously liable for a guest's injury is reserved for the trier of fact. Language in the agreement stating the franchisee is an independent contractor is not, said the court, dispositive.

Land use/Zoning

70. Citizens for Responsible Zoning v. Common Council of Albany, __NYS2d__, 2008 WL 4998781 (3rd Dept, 11/26/08). Rezoning of a parcel of land to permit use as, inter alia, a restaurant, was upheld where approved proposals for the same block included a McDonald's restaurant, a tavern and two hotels. The nearby residences are separated by a steep change in elevation covered in vegetation, blocking the homes from sight. The court found the "rezoning of this parcel was part of a thoroughly considered plan calculated to best serve the community, . . ."

Franchise/Contract – Liquidated Damage Provisions

71. Country Inns and Suites by Carlson v. Interstate Properties, 2008 WL 2782683 *(*M.D.Fla., 2008). A clause in a franchise contract requiring the franchisee to pay liquidated damages in the event of early termination of the agreement is enforceable provided actual damages are hard to prove and the amount specified is reasonably related to the actual loss. A Country Inn and Suites franchisee with a 15 year franchise contract sold the hotel to a buyer who opted for a Holiday Inn Express franchise rather than Country Inn and Suites. This triggered the liquidated damage clause in the seller's franchise contract. The clause required payment of *three times* the royalty (4.5% of daily gross room revenues) and marketing fees (2.5% of daily gross room revenues) for the 12 months immediately preceding the date of termination of the franchise agreement. The court upheld the clause and awarded franchisor $341,675.49. The court noted that if the franchisee could transfer to anyone without consequence, the 15 year agreement "would be gutted".

Franchise/Termination

72. LaQuinta Corp. v. Heartland Properties, LLC, 2008 WL 2742965 (W.D.Ky., 2008). Defendant hotel had a franchise agreement entitling it to use the name La Quinta. Due to disagreements between the franchisor and franchisee, the franchisor notified defendant that its franchise rights were terminated. Defendant continued to use the franchisor's name for almost a year. Franchisor seeks treble damages for willful unauthorized use of its trademark. An appropriate measure of damages for trademark infringement under the Lanham Act is the royalty the franchisor would have received from defendant. The license agreement defined the royalty as "5% of gross revenues attributable to rentals of guest rooms and meeting

rooms at the Inn" which in this case was $39,288.72. Given the willful violation, the court, per the Lanham Act, trebled damages and awarded franchisor $178,875.99. Beware – the license agreement also required the breaching franchisee to pay attorney's fees. Franchisor sought $398,045.06. The court reserved on the issue and sought additional written justification.

Licenses/Liquor

73. *Boom Town Saloon, Inc. v. City of Chicago, 892* N.E.2d 112, 2008 WL 2796081 (Ill. App., 7/14/2008). Liquor licenses are subject to suspension or revocation if the premises permit illegal gambling. An undercover officer observed a patron playing a video poker machine for 38 minutes. The customer than approached the bartender and beckoned toward the machine. In response the bartender entered a storage area behind the bar for 15 seconds and then handed money to the patron. The officer could not determine how much was paid. The officer charged the bar with permitting illegal gambling. The bar claimed that the machine in issue had been malfunctioning for a week. If a customer complained about a malfunction, the servers generally accepted the customer's word and made a refund to the player. The bar's financial records for the date in question evidenced two $10 refunds made to customers. The local liquor control commissioner found against the bar which decision was affirmed by the License Appeal Commission. The court on appeal reversed, finding the evidence insufficient. Of particular weight was the fact that the bartender did not verify the score on the machine before handling the patron money, nor did the bartender scroll the score on the machine down to zero after payment.

Licenses/Casino - Gambling

74. *In Re Admar of New Jersey, Inc.,* 50 A2d 231, 2008 WL 2572543 (NJ Super., 2008). A state legislature has unlimited power to regulate gaming based on the state's concern for public health, safety, morals and general welfare. The Casino Control Commission refused to renew the casino and alcohol licenses of Tropicana Casino and Resort Atlantic City, and the denial was upheld on appeal. The reasons included the following: "massive layoffs" leaving mandated positions and needed security jobs unfilled; cleanliness issues resulting from inadequate housekeeping personnel; high turnover of senior executives replaced with personnel with less extensive casino management experience; many regulatory violations; failure to appoint an independent audit committee and intransigence of ownership's failure to follow regulations for this important body; and refusal to cooperate with regulatory officials.

Negligence/Alcohol

75. *Mulligan's Bar & Grill v. Stanfield* 294 Ga.App. 250, 668 S.E.2d 874 (2008). Patron sued bar and its owners after sustaining injuries as a result of being struck in the face with a beer bottle during a fight between two other patrons. Bar and its owners appealed from a jury verdict in favor of plaintiff, contending that Georgia's Dram Shop Act and common law barred plaintiff's claims. In affirming the verdict for plaintiff below, the appellate court held that Georgia's Dram Shop Act did not preclude plaintiff's action since there was on evidence

in the record that plaintiff ever alleged that defendants liability was premised upon the sale, furnishing, or service of alcohol or that his damages were the result of a person's intoxication caused by defendants' sale, furnishing, or service of alcohol. The State's Dram Shop Act was not intended to and did not pertain to premises liability claims like the instant action. In addition, the court noted that under Georgia common law, although not the insurers of plaintiff's safety, the defendants had a duty to exercise reasonable care to protect plaintiff from unreasonable risks of which defendants had superior knowledge. In the regard, plaintiff had presented sufficient evidence from which a jury could have concluded that the fight was foreseeable and could have been avoided.

Negligence/Bed Bugs

76. Gary Prell, et al., v. Columbia Sussex Corp., d/b/a Radisson Lake Buena Vista, 2008 WL 4646099 (E.D. Pa., 10 / 20 / 08). Plaintiff encountered bed bugs at Defendant's hotel in Orlando on several consecutive occasions during his stay and he informed the front desk. He returned home to Pennsylvania and brought the bed bugs home with him and hundreds of bugs then infected his beds, linens and carpeting, as well as causing injuries to his wife and son. A lawsuit was filed and the court allowed the personal property claims and the personal injuries claims of the son, however, the court disallowed the personal injury claims of the Plaintiff and his wife due to lack of medical evidence, since they didn't go to the doctor for their bed bug bites.

77. Grogan v. Gamber Corp., 2008 WL 802261 (N.Y., 2008). A guest at the Milford Plaza Hotel in New York City awoke "from a deep sleep by something biting at her" which she later discovered was bed bugs. In the resulting lawsuit, the hotel argued that it satisfied its duty to provide a reasonably safe room free of pests because it hired an exterminator and referred all complaints to it. Further, the hotel had empowered the exterminator to take whatever steps were necessary to rid the hotel of bugs. However the exterminator was authorized to treat only rooms about which complaints were received; it was not empowered to check for bugs in adjacent or adjoining rooms, or rooms on the same floor. The court denied the hotel's request for summary judgment (this means judgment without the need for a trial) but dismissed the plaintiffs claim for punitive damages (money in excess of the amount needed to compensate the plaintiff; the purpose of punitive damages is to punish for egregious conduct).

Negligence/Duty

78. L. A. Fitness International, LLC, et al., v. Julianna T. Mayer, et al. 980 So.2d 550 (D.C.A. Fl., 4th District 2008). Daughter of man who died of cardiac arrest while using a stepping machine at defendant's club brought action for damages. The club appealed from a judgment in favor of plaintiff. On appeal, the club argued that it discharged its duty to plaintiff's decedent by promptly summoning professional medical assistance for its member, and that it had no duty to perform "skilled treatment", such as CPR or provide and have available an automatic external defibrillator ("AED"). In reversing the judgment below, the appellate court agreed. It concluded that, although there may be a duty to render "first aid" to business

invitees, "first aid" does not include skilled treatment such as CPR. Furthermore, the court held that defendant's employee did not voluntarily assume the duty to render such treatment by coming to assist decedent and checking his pulse. Finally, the court found that defendant's duty expressly did not include the obligation to have an AED on the premises for use on the decedent.

79. *Salo v. Mill Ring Restaurant Partners,* 2008 WL 2444895 (Cal.App., 2008). Plaintiffs' mother was eating in defendant's restaurant when a piece of meat became lodged in her throat. Her dining companion yelled for assistance. No one at the eatery administered first aid but employees of the restaurant called 911 and requested medical assistance. Paramedics arrived and attempted unsuccessfully to resuscitate plaintiffs' mother. She died a few days later due to lack of oxygen during the chocking incident. Plaintiffs claim the restaurant had a duty to administer first aid. The court affirmed a long standing rule that the only duty owed by a restaurant to a choking patron is to summon medical assistance. Summary judgment for the restaurant was thus upheld.

80. *Martinez v. MJKL Enterprises, LLC,* 2008 WL 2580739 (Ariz.App., 2008). To be successful in a negligence case, the plaintiff must establish that the defendant breached a duty of care. A plaintiff was injured while using playground equipment at a restaurant when her head struck an apparently protruding bolt or screw on a slide. She claimed the restaurant negligently maintained the premises. Plaintiff presented no evidence as to how long the screw or bolt may have been exposed or that restaurant employees were aware that the screw or bolt was protruding. The court differentiated between the condition of the bolt or screw and a deteriorating sidewalk, rejecting the argument that the nature of the defect alone allows the inference that the bolt or screw had protruded for a sufficient period of time that the restaurant should have become aware of it and fixed it.

Negligence/Exculpatory Clauses/Releases

81. *Barbara L. Tayar v. Camelback Ski Corporation, Inc.* 957 A.2d 281 (09/04/08). Plaintiff sustained multiple injuries when, after completing a successful snow tubing run, she was struck by another snow tube as she stood up at the bottom of the run. Defendants moved for summary judgment, pointing to a liability release signed by the plaintiff prior to purchasing her lift ticket. The appellate court reversed, rejecting the effectiveness of release language upon the back of her lift ticket and a form release signed by plaintiff. The language upon the lift ticket did not shield defendants from liability as it was inconspicuous, barely legible and not received until after plaintiff paid her entry fee. The language upon the release form, which expressly referred to injuries arising from "negligence or other improper conduct", was insufficient to shield defendants from injuries caused by recklessness or intentional conduct.

Negligence/Food Borne Illness

82. *Alexis Sarti v. Salt Creek Ltd.* 167 Cal.App.4th 1187, 85 Cal.Rptr.3d 506 (2008). In a sharply-worded opinion, California's Fourth Appellate District took issue with the reasoning and conclusion of a case decided by the Second Appellate District over 30 years earlier, *Minder v. Cielito Lindo Restaurant* 67 Cal.App.3d 1003, 136 Cal.Rptr. 915 (1977). Plaintiff Sarti became severely ill after eating raw ahi tuna, avocado, cucumbers and soy sauce at defendant's restaurant, and filed suit for damages thereafter. Defendant's motion for summary judgment was granted, based largely upon the reasoning and holding of the court in *Minder*, which held that the plaintiffs' evidence of illness, unsanitary conditions observed by a health inspector and expert opinion testimony was insufficient to meet their burden of showing that the probable cause of their illness was contaminated food eaten at the restaurant. The *Sarti* court criticized the analysis and holding of *Minder*, declining to follow it. "Food poisoning cases", the court noted, are not entitled to special or unique treatment under the law so as to justify the abnormally "heightened" standard of causation applied by the *Minder* court. To the contrary, food poisoning cases are and should be governed by the same basic rules of causation that govern all other tort cases. Reasonable inferences are entitled to be drawn from substantial evidence so as to show causation. In reversing the decision below and reinstating the judgment for plaintiff, the Court of Appeal concluded that the inferences drawn from the evidence present by Sarti were appropriate and sufficient to support the judgment.

83. *Fabrique v. Choice Hotels International, Inc.*, 183 P.3d 1118 (Wash.App.2008). Plaintiff became ill after eating at a hotel banquet where she was exposed to salmonella. The Health Department determined that the egg wash used in fried ice cream served that evening was improperly prepared. As a result several of the banquet attendees, including plaintiff, contracted salmonella. Plaintiff's doctor diagnosed plaintiff with psoriatic arthritis but could not determine whether the cause was the salmonella exposure or an existing genetic predisposition. Plaintiff was thus unable to establish proximate cause between the salmonella and the arthritis, justifying summary judgment for the restaurant.

84. *Cornish v. Harrah's Entertainment,* 2008 WL 1948030 (Tenn. App. 2008). Another case worth mentioning has related, interesting facts although the issue was forum non conveniens and not on the merits. The plaintiff had breakfast in the Horseshoe Hotel and Casino Tunica. After taking a final sip of his cranberry juice he noticed a dead "housefly" in his glass. Within three weeks thereafter he suffered 36 hours of vomiting and a "constantly sick stomach", and the doctor wanted him to be periodically tested and evaluated over the following six to twelve months.

Negligence/Foreseeability

85. *Barshay v. 273 Brighton Beach Ave Restaurant,* 20 Misc.3d 1116(A), 2008 WL 2677535 (NY Sup., 2008). Plaintiff was injured on the porch of a bar when he was attacked by a group of males who had been drinking and exchanging heated words inside the bar for 20 minutes prior to the assault. Plaintiff sued the bar. It sought summary judgment contending that the fight was sudden and expected. Given the escalating situation prior to the attack, the

court determined an issue of fact existed whether the altercation was foreseeable and referred the case to trial.

Negligence/Insurance

86. Gateway Hotel Holdings Inc., et al., v. Lexington Insurance Co., ___ S.W. ___, 2008 WL 4205055 (E.D. Mo. 09 / 16 / 08). A lawsuit resulted from the insurance companies' denial of paying a claim due to exclusions in the policy for assault and battery. The underlying claim is one where a boxing match occurred at Gateway's hotel resulting in severe brain damage for the boxer who sued and won $13.7 million due to the hotel and promoter's failure to provide ambulatory services and medical personnel to monitor the boxer's condition. The court said the exclusionary provisions of the insurance policies do apply and the insurance companies do not have to cover the claim.

Negligence/Liquor Liability

87. Ryan T. Simmons, et al., v. John D. Homatas (On Stage Productions, Inc., d/b/a Diamonds Gentlemen's Club) ___ N.E.2d ___, 2008 WL 5105278 (Ill.App. 2d Dist. 2008). Decedent's representatives sued an adult entertainment club for damages after club, which actively encouraged and facilitated patron's consumption of his own alcohol while at the club, ejected "obviously intoxicated" patron who was thereafter involved in fatal motor vehicle collision with car carrying decedent. After denying in part defendant's motion to dismiss, the trial court certified the question of whether plaintiffs had asserted viable negligence claims against defendant for review. In concluding that viable negligence claims against defendant had been asserted in the pleadings, the appellate court noted that Dram shop laws were inapplicable since the club neither served nor sold the alcohol to the patron (the adult entertainment club was prohibited from selling or serving alcohol). In addition, the court noted that the club encouraged the patron to drink to an extreme state of intoxication and thereafter ejected the patron from the club due to his intoxication, effectively requiring him to drive off the premises and onto the public roadways. It was that conduct which was the legal cause of the alleged injuries.

Negligence/Negligent Hiring/Supervision

88. Dowdell v. Krystal Co., 2008 WL 1776990 (Ga., 2008). A cashier at a restaurant was contending with an overflow crowd when an impatient customer complained. The cashier uttered a homosexual epithet at the diner. The customer responded in kind prompting the employee to reach across the counter and strike the customer. A fight ensued. The customer thereafter sued the restaurant for, among other claims, battery and negligent hiring. The court concluded that the employee was acting outside the scope of his employment and so the restaurant was not liable for battery. The cause of action for negligent hiring is not defeated by the fact the employee is acting outside the scope. However the plaintiff presented no evidence to show that the restaurant knew or should have known that the employee had violent tendencies or was likely to harm customers. Therefore the negligent hiring claim was

dismissed. Further, since there had been no similar incidents or aggressive action by the employee during his three month tenure, the employer was not liable for negligent retention.

Negligence/Product Liability

89. *Susana Ontiveros v. 24 Hour Fitness Corporation* ___ Cal.App.4th ___, ___ Cal.Rptr.3d ___, 2008 WL 5265208 (2008). Plaintiff was injured while using a stair step machine at defendant's club. She filed her action against defendant seeking damages for premises liability and strict product liability. Defendants prevailed on motion for summary judgment and plaintiff appealed as to her cause of action for strict product liability only. The court of appeal affirmed, holding that the undisputed evidence showed that the dominant purpose of plaintiff's membership with the club was for the provision of fitness services. As a result, defendant club could not be strictly liable to the plaintiff under a product liability theory of recovery.

Negligence/Security

90. *Marilyn L. Trask-Morton v. Motel 6 Operating LP*, 534 F.3d 672 (7th Cir. 07/17/08). Plaintiff claimed to have been sexually assaulted in her motel room but can't remember many of the details. Summary judgment granted for motel on the inadequate security claim since there was a complete lack of evidence connecting the alleged poor security with the sexual assault Plaintiff alleges happened in her motel guest room.

91. *Rose Barton, individually and as representative of the estate of Christopher Dean v. Whataburger, etc.,* ___ S.W.3d ___, 2008 WL 2930114 (App. Tex. 07/31/08). Dean, a mentally impaired employee of Whataburger, was shot and killed during a robbery attempt at the restaurant. One of the managers was connected to the robbery and is serving a life sentence. Dean's estate sued the restaurant for negligence and the court stated that it was unforeseeable and therefore the restaurant should not be held responsible. A claim for negligent hiring of the manager was also dismissed as the rogue manager's criminal past did not make his participation in the robbery leading to murder foreseeable.

92. *Mauyad "Mike" Alqasim v. Capitol City Hotel Investors LLC d / b / a Hampton Inn North and Security One, Inc*., 989 So.2d 488 (App. Miss. 08 / 26 / 08). Plaintiff was shot in the left leg in the parking lot of a Hampton Inn and sued the hotel for negligent lack of security. Summary judgment was granted for Defendant. Plaintiff claimed that the one of the hotel's door locks was faulty thus showing inadequate security. The court stated that the faulty door lock was not the proximate cause of Plaintiff's injury that occurred in the parking low. The appellate court agreed.

Negligence/Snow Tubing

93. *Dmitriy Mavreshko, et al., v. Resorts USA, Inc., d / b / a Fernwood Hotel and Resort,* 2008 WL 4813102 (3rd Cir. 11 / 06 / 08). A 13-year old boy suffered severe brain damage while snow tubing. Plaintiff's argued that the resort's employee was in the snow lane and their son

collided with the employee causing the injuries and therefore the resort was negligent. The district court disagreed citing the inherent risks of snow tubing which caused the accident. On appeal, the circuit court found that the record supports the jury's conclusion that although the resort may have been negligent, it did not cause the accident.

Negligence/Suicide

94. La Quinta Inns Inc., et al., v. Carol Leech et al., 289 Ga.App. 812, 658 S.E.2d 637 (App. Ga. 01/25/08). John Leech had been staying at La Quinta for six months during a separation from his wife. Mr. Leech was given a second room on the seventh floor, a smoking floor. His son came to visit and spoke with Mr. Leech, was concerned for Mr. Leech's safety and demanded to know his father's motel room number. The front desk refused due to the guest privacy policies, then called 911. Mr. Leech's body was found on the ground from an apparent suicide. Mrs. Leech filed a claim for negligence against the motel for failure to timely intervene to prevent Mr. Leech's suicide and summary judgment for the motel was denied on this theory.

Negligence/Vicarious Liability/*Respondeat Superior*

95. Briles v. Cooper, 881 N.E.2d 1120 (Ind., 2008). A van driver for a Marriott Hotel drove a non-guest in the van despite being told several times by his supervisor not to do so. On the return trip the driver was in an accident, rear-ending another vehicle causing injury to the other driver. In that driver's lawsuit against the hotel based on respondent superior (the employer is liable for the negligent acts of its employees), Marriott denied liability because the driver was not authorized to make the trip. The court denied summary judgment to the hotel noting that an employer may be vicariously liable even for wrongful acts of its employees if the acts were committed in the service of the employer. Said the court, "Even though an employee violates the employer's rules, orders or instructions, or engages in expressly forbidden actions, an employer may be held accountable for the wrongful act if the employee was acting within the scope of employment

Premises Liability/Negligence

96. Sandra Gallo, et al., v. Buccini/Pollin Group, et al., 2008 WL 836020 (Sup. Del. 03/28/08) (unpublished opinion). Plaintiffs suffered hot-tub folliculitis and had severe abdominal pain due to the hotel's untreated water in the hot tub spa. Plaintiffs sued for negligence in failing to warn the guests that the spa water was untreated and the court awarded $150,000. A motion for new trial was denied since a jury could reasonably conclude that untreated water could contain high levels of bacteria.

97. Mike Foradori, et al., v. Garious L. Harris, et al., 523 F.3d 477 (5th Cir. 04/01/08). Off duty teenage employees and Plaintiff, a teenage customer, were arguing at Defendant's fast food restaurant which ended up in a fight outside in the parking lot where Plaintiff was struck from behind, suffered severe spine injury and a broken neck. A jury verdict in favor of Plaintiff in the amount of $20.8 million was awarded. On appeal, Defendants argue that they did not have a duty to supervise off-duty employees and the court disagreed stating that the

manager failed to control the off duty employees and to take other precautions to prevent the foreseeable risk of harm to its customers.

98. *David Allen v. Marriott Worldwide Corporation, et al.* ___ A.2d ___, 2008 WL 5122283 (Md.App. 2008). Plaintiff, a guest of the hotel, slipped and fell on black ice while traversing the hotel's asphalt parking lot and thereafter filed suit for damages related thereto. Plaintiff appealed after defendants were successful in moving for summary judgment based upon the defense of assumption of the risk. On appeal, Plaintiff contended that the doctrine was inapplicable because the ice which caused his fall was "black ice" (as opposed to white ice) which he did not see and, thus, lacked the requisite knowledge element for application of assumption of the risk. The appellate court noted that appreciation of the presence of ice is not limited to that which is seen, thus the fact that plaintiff did not see the "black ice" was not dispositive of the issue of application of the doctrine of assumption of the risk. The court then pointed out that ample evidence such as plaintiff's prior awareness of the black ice phenomenon and his knowledge/appreciation that the subject lot was icy and slippery. The judgments were thus affirmed.

99. *Mario Lomedico, et al. v. Joseph Cassillo, et al. 56 A.D.3d 1271, 868 N.Y.S.2d 835 (2008).* Plaintiffs sought damages after their son was injured during a fight with other high school students in a parking lot leased to defendant Wal-Mart Stores, Inc. and Wal-Mart Real Estate Business Trust. In affirming summary judgment in favor of defendants, the appellate court concluded, in part, that plaintiffs' action was barred by the doctrine of the primary assumption of the risk. The court noted that the doctrine bars claims for damages arising from the voluntary participation in nonsporting activities, both proper and improper, which involve an elevated risk of danger. In applying the doctrine to the instant action, the court noted that defendants established that plaintiffs' son, himself a high school student, was a knowing and voluntary participant in the fight and thus assumed the risks that were known, apparent or reasonably foreseeable, including physical injury to the combatants.

100. *Carl Kindrich III v. The Long Beach Yacht Club* 167 Cal.App.4th 1252, 84 Cal.Rptr.3d 824 (2008). Boat passenger sustained personal injuries when he attempted to jump or step from boat to dock. He filed an action against yacht club, boat pilot and owner of boat for injuries. His wife also sued for loss of consortium. Their son filed a claim for emotional distress arising from his alleged contemporaneous awareness of his father's injury. Plaintiffs' appealed after defendants successfully moved for summary judgment, in part, upon the doctrine of primary assumption of risk. In reversing the summary judgment, the court of appeal noted that earlier decisions had drawn a distinction between primary and secondary assumption of the risk, and that only primary assumption of the risk provided a complete defense in California cases. The court went onto explain that primary assumption of the risk shifted the focus from a plaintiff's "subjective knowledge and awareness" of the risk to the nature of the activity in question. In primary assumption of the risk, a defendant owes no legal duty to protect the plaintiff from the particular risk of harm that caused the injury by virtue of the nature of the activity and the parties' relationship to the activity. Turning to the fact before it, the court concluded that the doctrine of primary assumption of the risk did not apply to bar plaintiff's claims as he was merely a passenger upon a boat, not an active participate in an activity.

Premises Liability/Open and Obvious Danger

101. Pagel v. Marcus Corp., 2008 WL 22435734 (Wis.App., 2008). Plaintiff was injured on a water park attraction located in a hotel. The "Lily Pad Walk" consisted of large floating cushions in a pool underneath a cargo-style net. The lily pads were chained to the bottom of the pool but loosely so they could float around. They were insufficiently secure to hold up even a small child. Plaintiff used the walk twice and was injured the second time when his foot slipped from a lily pad, he lost his grip on the cargo net ropes above the water and fell in. Plaintiff claimed the hotel was negligent for not warning of the dangers. The court held the risks were open and obvious to a reasonable person negating any need for the hotel to warn.

102. McDonald v. Marbella Restaurant, 2008 WL 2836157 (Ohio. App. 2008). A judgment was entered in favor of a restaurant where plaintiff fell in an area of a restaurant that was dark. She testified that she did not know where she putting her foot because of the darkness. The court held that darkness is an open and obvious condition.

Premises Liability/Security

103. Alex Zivojinovich, et al., v. Frank Barner, et al., 525 F.3d 1059 (11th Cir. 04/23/08). Plaintiff, during a New Year's Eve party at the hotel, became loud and boisterous. The night manager of the hotel called police who escorted Plaintiff off the property, but not before roughing up the Plaintiff, and Plaintiff was arrested for resisting arrest. Plaintiffs sued the hotel and the night manager for failing to provide accurate information to law enforcement. The court said that even though Plaintiff's behavior was inappropriate, the alleged lies of the night manager may in fact have put Plaintiff at greater risk of physical injury as the deputies would use force in removing the Plaintiff from the hotel.

104. Janet Hirst and David Hirst v. Inverness Hotel Corp., d/b/a Chenay Bay Beach Resort, et al., 544 F.3d 221 (3rd Cir. 09 / 19 / 08). Plaintiff was raped while at Defendant's hotel and sued the resort and the independent security company for negligence. Summary judgment was granted for the resort and the case proceeded against the security company. The jury found that although the security company was negligent, it was not the proximate cause of the rape. The decision was affirmed on appeal.

105. Jocelyn Chrobak v. Hilton International, et al., 2008 WL 4444111 (S.D. N.Y. 09/29/08). Plaintiff was raped by a hotel employee while at the Costa Caribe hotel, using the "Coral by Hilton" brand name. Hilton successfully argued that Hilton does not exert day to day control over the security policies of the hotel and therefore it is not responsible for the hotel's negligence in hiring, training or supervising the hotel staff. The court agreed and will allow Plaintiff to pursue claims against Costa Caribe for negligence but not Hilton.

Premises Liability/Slip and Fall

106. Peggie Hunter v. Morton's Seafood Restaurant & Catering and XYZ Insurance Company, 992 So.2d 1078 (La. App. 1 Cir. 07/03/08). Plaintiff was injured when she fell

outside of Defendant's restaurant. Plaintiff filed a petition via fax and the clerk of the court transmitted a receipt of the fax and followed up with an original petition sent through the postal system. Defendant argued that the petition was not timely filed and the court agreed dismissing the suit. On appeal, the court decided that the term "forward" as in the original petition must be forwarded within a five day period, meant the fax filing was valid. A dissent in this case argues that interpreting the term "forward" as "send" could lead to a Pandora's Box of litigation.

107. Wong v. Marriott Hotel Services, Inc., 2008 WL 222555 (N.Y., 2008). As part of a hotel upgrade, a one-time power outage was planned from midnight until 4:00 a.m. at a Marriott Hotel. Notices were delivered to the rooms telling guests of the anticipated outage and advising that glow sticks would be placed in their rooms for use during the blackout. A bag with two glow sticks was timely placed outside plaintiff's room. She forgot about them as the designated time neared. When she was in the bathroom at midnight the lights did indeed go out. She stumbled while trying to find her way and suffered serious injuries. In the resulting lawsuit the hotel claimed it took adequate precautions. Plaintiff identified safer alternatives including scheduling the blackout during the daytime. The court refused to grant summary judgment for the hotel and referred the matter to the jury.

Search and Seizure

108. State v. Sibbitt, 2008 WL 2738602 (Wash. App., 2008). Police executed an arrest warrant in the front room of a restaurant suite. They then searched the back bedroom of the suite, which is separated from the front room by a hallway, and found evidence of criminal activity including syringes, baggies and drugs. The evidence was suppressed because the search of the back bedroom was not necessary to execute the arrest warrant or protect the safety of those at the arrest scene.

Tax Issues/Internet Travel Companies

109. Orange County v. Expedia and Orbitz, 985 So.2d 6222, 2008 WL 2387991 (Fla.App., 6/13/2008). A dispute arose between Orange County Florida and various internet travel companies including Expedia and Orbitz. The latter negotiate with hotels for a discounted or wholesale price for which the internet companies purchase room nights. They then re-sell the rooms to guests at a marked up or retail rate. Orange County, Florida levies a tourist development tax (TDT) on hotel accommodations. The internet companies pay TDT on the wholesale price for the rooms; the county asserts the payment should be based on the retail price. The county commenced this declaratory judgment action seeking a court ruling on the issue. The internet travel companies claimed a declaratory judgment action was not the proper court procedure. The court determined a declaratory judgment action was applicable and remanded the case for determination of the issue.

Trademarks/Copyrights/Infringements

110. Happy Sumo Sushi, Inc., v. Yapona Inc., et al., 2008 WL 3539628 (D. Utah 08/11/08). Two competing sushi bar restaurants were involved in a lawsuit over trade dress issues. Happy Sumo sued Defendant Yapona as Yapona opened up a restaurant in the same geographic location as Happy Sumo. Plaintiff said it had a direct 12% drop in sales and that 10 of its customers have remarked how similar Yapona's appearance is to Happy Sumo's restaurants. The court held in favor of the Plaintiff stating that the total image, design and appearance of the Happy Sumo creates a protectable trade dress and injunctive relief was granted for Plaintiff.

111. Patsy's Italian Restaurant, Inc. v. Anthony Banas d/b/a/ Patsy's, Patsy's Pizzeria, 575 F.Supp2d 427 (E.D. N.Y. 09/09/08). Historic trademark dispute between two companies using the name Patsy's. A third restaurant using the Patsy's trademarks entered the New York area and a lawsuit was filed for infringement. The court found that trademarks should not have been issued since they were confusingly similar to those held by others. Plaintiffs were entitled to injunctive relief.

112. Sinhdarella Inc. v. Kevin Vu d/b/a The Boiling Crab, et al., 2008 WL 410246 (N.D. Cal. 02/12/08). Plaintiffs started their restaurant The Boiling Crab in 2003 and Defendant opened his restaurant with the same name in 2006. Menus and food items were the same. Plaintiff sued for trademark infringement and the court agreed that the slight differences invite confusion. Plaintiff's mark has the "The" in blue and "Boiling Crab" in red and Defendant's mark has "The Boiling" in red and "Crab" in blue. Defendant was enjoined from using the name "The Boiling Crab" in combination with a sea-water crustacean in connection with the operation of any restaurant or restaurant services.

113. Brackett v. Hilton Hotels Corp., 2008 WL 2632675 (N.D. Cal, 2008). A hotel that buys a copyrighted work of art cannot make copies of the work for display in franchised hotels, absent permission from the artist or other copyright owner. A Hilton Hotel was accused of making more than 900 copies of a copyrighted painting for use by other franchise hotels. If proven, this conduct constitutes copyright infringement.

Transient Occupancy/Tenancy Re Eviction

114. Greene and Days Inn v. Hren, __P3d__, 2008 WL 5071973 (Or. App., 4/29/08). Hotel guest's arrangement with the hotel did not meet all the characteristics of a transient occupancy per the relevant state statute and thus guest was entitled to notice requirements for eviction under the Oregon Residential Landlord and Tenant Act. Defendant occupied the hotel room for 52 continuous days which exceeded the statutory 30-day maximum, and the hotel collected rent more than six days in advance.