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Alcohol Server Liability Law Suits Result From Dram Shop Statutes

James M. Goldberg
Abrams, Westermeier and Goldberg, P.C.

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Abstract
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by
James M. Goldberg
Abrams, Westermeier & Goldberg, P.C.
Washington, D.C.

The country is experiencing a trend of alcohol server liability law suits resulting from dram shop statutes and common law liability, relatively recent developments in the field of tort law. The author, an expert on liquor liability law, explores the meaning of this trend for the hospitality industry.

- In Michigan, a tavern's insurance company settles a claim with the relatives of two deceased parties for $10.8 million, including a $3 million cash payment.
- In Ohio, a bar and its owner are sued for $24 million by the widows of two men killed in a head-on automobile collision.
- In Pennsylvania, a judge refuses to dismiss a suit against a Catholic church which hosted a one-day festival after which an intoxicated attendee killed two men in a car crash.
- In Indiana, a jury cites the University of Notre Dame for $53,000 in damages for failure to exercise crowd control at a football game, after which a drunken fan assaulted another fan in the stadium parking lot.

These are but a few instances of what many are convinced is a growing trend of alcohol server liability law suits being brought all across the country.[1]

Increased media attention and public awareness of drunk driving and its consequences, plus the "megabucks" damages being awarded by juries and in settlements by insurance companies, are probably at the root of the trend. Though no definitive statistics are available, some knowledgeable observers peg the growth rate of alcohol server liability litigation at 300 percent per year!

And it's not just commercial providers — i.e., hotels, restaurants, bars, and taverns — which are being hit with litigation. Social hosts, too, are facing the attack. In the last 18 months alone, appellate-level courts in nearly a dozen states considered the question of whether to hold a non-commercial provider of alcoholic beverages liable for the damages caused by someone to whom he served intoxicating beverages.

Dram shop statutes and common law liability are relatively recent developments in the field of tort law. Prior to the temperance movement

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of the early 19th century, the common law principle of "proximate cause" was universally applied; this held that a tavern owner or other liquor dispenser could not be liable for any damage because the "proximate cause" of the damage was the drunk, with the tavern owner's contribution too far removed to be considered the "proximate cause."

This principle of law still holds in many states — although a decreasing number — generally prohibiting recovery of damages against the supplier of drinks, even if he supplied liquor to a minor or an obviously intoxicated person.

In nearly two dozen states, the old common law has given way to a doctrine of common law liability. In the absence of a specific statute, common law liability permits recovery for damages against a tavern owner, and, in some states, a social host, by inferring liability due to the violation either of a state law making it illegal to serve alcohol to a minor or an intoxicated person, or of a duty to protect the general public against harm. Common liability assumes that the server could reasonably be expected to foresee damages resulting from the actions of the intoxicated person, and thus owed a duty to protect against that probability.

The first "modern" decision establishing common law liability was the landmark *Rappaport v. Nichols* case, in which the New Jersey Supreme Court awarded the plaintiff's family compensation from a tavern owner for damages arising from the illegal sale of alcohol to a minor who was later involved in an automobile accident.

But even the 1959 *Rappaport* decision had its roots in an opinion rendered more than 110 years earlier by the South Carolina Supreme Court, which ruled against a merchant who had provided liquor to a slave in violation of law. The slave drank too much, stayed out all night, and died of exposure, leaving his master without what was then a valuable property right. The master sued the merchant — and won.

While common law — i.e., rulings made by courts in the absence of statute — is one way of holding alcohol servers liable, legislatures in more than 20 states, including some of the same states where common law liability exists, have adopted statutes specifically holding licensed alcoholic beverage servers (and, in some cases, social hosts) responsible for the actions of the patrons who drink too much.

Laws Date Back A Century Or More

Again, much attention has been focused on legislative activity in recent years, but the first statute of this type was passed in Wisconsin in 1849. It required tavern owners to post a bond conditioned that they "support all paupers, widows and orphans, and pay the expenses of all civil and criminal prosecutions growing out of or justly attributable to...traffic in alcoholic beverages."

An Indiana statute passed in 1953 (though repealed two years later) was the first prototype of the present-day dram shop statute. Ohio and Pennsylvania followed with statutes in 1854; New York passed a law in 1957, and Maine adopted a liability statute in 1858.

The temperance movement, which was responsible for the passage of these laws, was temporarily sidetracked by the events which led to the Civil War, but it resumed activity after the conflict. By the mid-1870s,

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11 states had dram shop liability laws in force. Connecticut, Indiana (which readopted a law after repeal of the earlier statute), Maine, and New Hampshire each had statutes which conditioned liability only on the unlawful sale of alcoholic beverages. The laws of Illinois, Iowa, Kansas, Michigan, New York, Ohio, and Wisconsin were much broader, being written in such a manner as to cover the giving (without sale) of alcoholic beverages. Although these laws could be read to cover social hosts, there is no evidence of early cases so interpreting these statutes.

Either through statutory enactment or common law judicial decree, 38 states now impose some form of liability on commercial (i.e., licensed) servers of alcoholic beverages for the actions of their patrons. Only in Arkansas, Delaware, Georgia, Kansas, Maryland, Montana (though a federal court decision found liability on the government), Nebraska, Nevada, and South Dakota is the current law such that there is no liability on licensed alcoholic beverage dispensers. In three other states, Oklahoma, Texas, and West Virginia, there is neither a statute nor any reported cases, so that the status of dram shop liability is unclear at best.

In the states where a commercial provider of alcoholic beverages can be held liable, there are generally only two instances in which this liability — whether imposed by statute or common law — will be found: where the licensed establishment serves a minor (i.e., someone under the legal drinking age) or where a patron is intoxicated.

Although none of the statutes or court decisions makes a distinction among the kind of licensed establishments, it is clear from the cases that the on-premises establishment — i.e., the restaurant, hotel, bar, or tavern — has the greater exposure to litigation than does the off-premises establishment or package store. There are few, if any, cases involving the sale of alcoholic beverages to a sober adult who later becomes intoxicated at another location and subsequently causes damages.

Liability Coverage, Costs Are A Problem

Add to the growing number of law suits and the increased number of states which hold alcohol servers liable for damages caused by their customers the fact that many insurance companies which formerly offered liquor liability coverage are now sharply escalating their premiums or dropping coverage altogether, and it's easy to understand why the commercial alcohol beverage service industry considers dram shop liability a "crisis."

The insurance cost/availability question is a problem in many states. Liquor liability coverage was a specialty of many small companies to begin with — most large insurers do not write this specialized coverage — and even though these companies may not have gotten hit with large awards, several have decided to either get out of the business altogether or up the premium cost substantially.

In at least three states — New Hampshire, Massachusetts, and Minnesota — there are state-operated insurance "pools" which are an attempt to divide the risks among participating companies and make necessary liability coverage available to all commercial servers. It's too early to tell, however, whether these state-encouraged pools will be successful.

Another approach to the dram shop liability problem, particularly if

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the size of damage awards continues to escalate, may be to impose a legislated ceiling on the amount of damages which can be awarded. There is precedent for this type of action in the medical malpractice area, and the Supreme Court of the United States recently upheld a California statute which imposes a dollar cap on such verdicts.

However, such solutions take time and, in the interim, many commercial servers are groping for programs and methods to cut their exposure to financially crippling law suits, while at the same time not sacrificing the profitable service of alcoholic beverages.

One step is relatively simple: an aggressive program to ascertain whether customers are of lawful drinking age. For example, the Dallas-based Southland Corp., operator of the 7-Eleven convenience stores, has put in place a highly visible "Come of Age" program under which customers and store employees alike are advised that it's company policy to require identification of anyone who appears to be under age 25. New store employees are given specific training in recognizing younger customers and in handling the sometimes delicate question of asking for identification.

Somewhat more complicated is a program to spot potential intoxicated customers and to refuse service to anyone who appears to have had "one too many."

Urged on by state liquor regulatory agencies, many commercial servers are eliminating "happy hours" which in the past have featured reduced-price drinks, two-for-one specials, or other promotions. In their place, the "happy hour" has been recast to feature free food on the notion that scientific evidence indicates that intoxication is slowed when alcohol is ingested with food, as contrasted to drinking without eating.

Staffing Patterns, Training Should Be Reviewed

It's also a good idea to review physical conditions and staffing of alcohol service areas like cocktail lounges and bars. For example, a dimly-lighted room is thought to be conducive to good conversation and alcohol consumption. But it's also a fact that a skilled plaintiff's attorney can use to his advantage, pointing out to a jury that the lighting was so low that the establishment and its employees couldn't possibly watch the drinking habits of the customers.

Staffing, too, can be used in litigation. For instance, if one bartender serves many patrons, or one waiter or waitress is responsible for a large area, it's again questionable whether the employee can keep an eye on the drinking habits and patterns of all customers. And, if they can't, a "picture" of a non-caring management can be painted to the jury in a dram shop liability case.

Employees should be urged to report all possible intoxication incidents to management at the time they occur so that a potential drinking driver can perhaps be taken off the road by an establishment which would prefer to shell out a couple of dollars for taxi fare than run the risk of a multi-million- dollar law suit later.

Then, too, there is employee training in the controversial issue of alcohol equivalence. The giant distiller Seagram's has upset many of its colleagues with its "A drink is a drink is a drink" campaign, which stresses

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that there is an equal amount of alcohol in standard-sized servings of distilled spirits, wine, and beer. The theme is to increase customer awareness that wine and beer are not less intoxicating than "hard liquor," as many would believe. The Seagram's theme matches one sounded earlier by the National Alcoholic Beverage Control Association, which distributed a "Sobering Facts About Alcohol" poster to several thousand retail liquor outlets in the 18 "control" states, those which directly control the distribution and sale, either at wholesale or retail, of alcoholic beverages.

There are also informational posters and brochures on how alcohol consumption affects blood alcohol content level which is the standard law enforcement and measurement for determining when someone is legally drunk. This material indicates that a specific number of cocktails or glasses of wine or beer converts into a specific BAC level, thus enabling bartenders and servers to better ascertain when a customer has had too much.

Of course, some establishments aren't as prone to potential liability as others. For example, a high traffic bar in a downtown office building setting which caters to the "after work" crowd could face a problem more so than a hotel which caters to large numbers of business travelers since the business traveler doesn't drive home from the cocktail lounge; he or she merely takes the elevator to a room, but the patrons of the downtown bar mostly drive home after consuming their post-5 p.m. cocktail.

Hotels and restaurants which rent out private rooms for private functions also may face a problem, if the sponsoring party overserves a guest, who later causes injury. It's a good idea, therefore, for the establishment's attorney to review existing function contracts to ensure that "hold harmless" and insurance clauses are inserted in the rental agreement; such provisions will not stop law suits, but they can reduce the cost of defending them.

Dram shop liability is an escalating and costly problem which won't go away by itself. What is needed are some innovative management approaches to reduce possible exposure to damaging law suit, and a coordinated — that is, a joint effort by all segments of the alcohol beverage production, distribution, and retailing segments — approach to legislative solutions.

Editor's Note: [1]The author is a partner in the law firm of Abrams, Westermeier & Goldberg, P.C.; general counsel for the National Alcoholic Beverage Control Association (which represents the 18 states which directly control the distribution of alcoholic beverages pursuant to the 21st Amendment); author of an annual compilation of state dram shop statutes and relevant court decisions for NABCA; and co-author of a treatise on liquor liability law to be published soon.

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