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Emerging Issues in the Litigation and Coverage of Liquor Liability Cases

I. BACKGROUND ON DRAM SHOP LIABILITY

A. DRAM SHOP STATES

Dram shop acts give individuals a civil right of action against alcohol providers when they are injured or their property is damaged through the actions of an intoxicated person or a minor. The dram shop acts of different states vary in that some narrowly define causes of action and damages while others do not. These variances result in some inconsistent results in cases which interpret the dram shop acts.

B. COMMON LAW STATES

Some states (e.g. California, Alaska, Colorado) have enacted legislation to codify the common law principle that it is the **consumption**, and not the sale or furnishing, of liquor that is the legal cause of liquor-related incidents and damage. This puts the responsibility for damage on the intoxicated person, and not on the person furnishing the liquor. Exceptions, however, are commonly recognized where liquor is furnished to a minor or visibly intoxicated person.

II. VISIBLE INTOXICATION

When it comes to liquor liability litigation, the threshold for many states is whether there is evidence that an individual was served alcohol while showing signs of visible intoxication. In the absence of eye-witness testimony, an emerging trend among Plaintiffs is to try to establish visible intoxication through a toxicologist who extrapolates or "back-tracks" what an intoxicated individual's blood alcohol content was at the time of the collection to what it would have likely been while at a Defendant's establishment. The expert will then offer opinions of visible intoxication based upon the BAC even when there are no witnesses to testify to visible intoxication. This discussion addresses the emergence of backtracking, its affect on liquor liability litigation, and policies and procedures establishments can utilize to limit its application as it relates to various State and Federal Courts **nationwide**.

The issue is: Does visible intoxication really mean visible?

A. Most states Liquor Liability/Dram Shop Statutes generally premise liability upon:

1. A sale to a minor, or
2. A sale to a visibility/obviously intoxicated adult.

B. Use of a toxicologist to prove visible intoxication.

1. Dubowski Chart

2. Survey of how various states respond to this proof:

a. *Alaniz v. Rebello Food & Beverage*, L.L.C., 165 S.W.3d 7 (Tex. App. 2005)

b. *Ex parte Setterstrom*, 28 So. 3d 37 (Ala. 2008)

c. *Owens v. Hooters Restaurant*, 41 So.3d 743 (Ala. 2010)

d. *Johnson v. Harris*, 615 A.2d 771 (Pa. Super. Ct. 1992)

e. *Davis v. Rpoint5 Ventures, LLC*, 2013 WL 5947981(Tex. App. 2013)

f. *Northside Equities v. Hulsey*, 567 S.E.2d 4 (Ga. 2002)

g. *Sorensen v. Denny Nash Inc.*, 249 A.D. 2d 745 (NY. App. Div. 3d Dep't 1998).

h. *Caplinger v. Korrzan Rest. Mgmt.* ,2011 WL 5831320(Ohio Ct. App., Butler County Nov. 21, 2011)

i. *Johnson v. R.E.N., Inc.*,2004 Mass. Super. LEXIS 32 (Mass. Super. Ct.2004)

j. *Schaffield v. Abboud*, 1993 Cal. App. LEXIS 526 (Cal. App. 4th Dist.1993)

k. *Reed v. Breton*, 718 N.W.2d 770 (Mich.2006)

III. Applicability of Commercial General Liability ("CGL") and Liquor Liability ("LLC") Coverage in a Personal Injury Lawsuit Arising out of the Illegal Sale of Alcohol.

In general, a CGL policy's liquor liability exclusion is designed to preclude coverage for bodily injury or property damage for which any insured may be held liable **by reason of**: (1) causing or contributing to the intoxication of any person; (2) the furnishing of alcoholic beverages to a person under the legal drinking age or under the influence of alcohol; or, (3) any statute, ordinance or regulation relating to the sale, gift, distribution or use of alcoholic beverages.

Why is there liquor liability exclusion in the first place? The risk of exposure relating to sales/furnishing of alcohol is better served and priced through a policy specifically designed to cover the furnishing of alcohol (LLC coverage). Because individuals and entities that serve alcohol are the exception, not the norm. The CGL is designed to address the types of risk to which the majority of insureds may be exposed.

The exclusion can be difficult to apply and enforce because it can be challenging to prove that the liability is "by reason of" serving alcohol, as opposed to the fact that alcohol is on the premises, a fact which, by itself can lead to personal injury.

A. Assault and Battery – Claimant injured at insured's bar/restaurant by intoxicated patron. How do states approach whether the LLC or CGL coverage is triggered?

1. *Essex Ins. Co. v. Way Jose Enterprises*, No. 13-233 (W.D. Ok. Sept. 30, 2013).

2. CGL's liquor liability exclusion – not applicable for negligent failure to call police after an assault. *Penn-America Ins. Co. v. Peccadillos, Inc.*, 27 A.3d 259 (Pa. Super. Ct.2011).

   The underlying complaint, which was brought by the survivors' and decedents' estates, alleged that Peccadillos acted negligently in continuing to serve alcohol to a patron (Latta) and ejecting him from the premises after the physical altercation rather than taking him in charge or summoning the police. Plaintiffs claimed Defendant Peccadillos knew or should have known the patron would attempt to operate a motor vehicle in his intoxicated condition. The court found that the tavern's alleged liability was not premised on its causing or contributing to Latta's intoxication, but on its ejecting Latta from the premises when it knew or should have known that he was in no condition to drive. These allegations in the underlying action constituted a **potentially covered** claim under the Penn-America policy that triggered the broad duty to defend.

3. *Interstate Fire & Casualty v. 1218 Wisconsin, Inc.*, 136 F.3d 830 (D.C. Cir. 1998) – CGL liquor exclusion did not apply to "failure to protect a patron" allegation despite the liquor exclusion in the CGL. The court reasoned that the duty to protect patrons was not contingent on the bar's "causing or contributing" to the intoxication of the attacker.

4. *North East Ins. Co. v. Masonmar, Inc.* 2014 U.S. Dixt. Lexus 40381 (E.D. Cal. March 24, 2014) - "Lack of security" claim related to bar fight after alcohol sale does not trigger liquor liability policy. The Claimants alleged Masonmar was negligent for failing "to provide adequate security measures" and for failing to protect Plaintiffs from two patrons who stabbed and attacked them. They contended Masonmar was negligent because it "continued to serve and/or allowed consumption and/or possession of alcoholic beverages" by the attackers when it should not have done so. A controversy arose as to the amount of the applicable policy. This case discusses the interplay between the CGL with its liquor liability and assault and battery exclusions – and the separate LLC.

   The Claimants alleged Masonmar was negligent for failing "to provide adequate security measures" and for failing to protect Plaintiffs from two patrons who stabbed and attacked them. They contended Masonmar was negligent because it "continued to serve and/or allowed consumption and/or possession of alcoholic beverages" by the attackers when it should not have done so. A controversy arose as to the amount of the applicable policy. This case

discusses the interplay between the CGL with its liquor liability and assault and battery exclusions - - and the separate liquor liability policy.

The policy says: North East "will pay those sums that the insured becomes legally obligated to pay as injury' is imposed on the insured **by reason of the selling, serving or furnishing of any alcoholic beverages."**

THE CARRIER'S ARGUMENTS:

a. Coverage under LLC only applies when the liability arises directly out of the sale of alcohol.

This interpretation has led courts from other jurisdictions to conclude that liability for failure to protect is a form of general negligence and does not arise directly out of the furnishing of alcohol. (*e.g. Mount Vernon Fire Ins. Co. v. Olmos*, 808 F.Supp.2d 1305, 1308 (D. Okla. 2011) *Capitol Indem. Corp. v. Blazer*, 51 F. Supp. 2d 1080, 1088-89 (D. Nev. 1999).

b. Masonmar is immune from liability under Cal. Bus. & Prof. Code section 25602 which abolished tort liability for furnisher's of alcohol unless provided to an intoxicated minor. Thus, the $1,000,000 liquor liability policy did not apply.

c. The "failure to protect" is nothing more than a "garden variety premises liability theory." In California there has to be direct and proximate causation between the furnishing of alcohol and the duty of the tavern keeper to protect the patron. The Duty to Protect may arise regardless of whether anyone has been served alcohol. Here, the duty to protect was not related to the provision of alcohol. Wherefore, the $1,000,000 liquor liability policy did not apply. The inadequate security claim falls under the CGL and the ABL limit.

INSURED'S ARGUMENTS:

a. LLC coverage includes claims that involve a breach of a duty tied particularly to a furnisher of alcohol.

The California Supreme Court, in a case called *Delgado* v. Trax Bow & Grill (2005 36 Co. 4th 224), recognized that when customers for consumption are on the premises, the tavern keeper must "exercise reasonable care to protect his patrons from injury at the hands of fellow guests." This duty arises when one or more of the following circumstances exists:

(1) a tavern keeper allowed a person on the premises who has a known propensity for fighting;

(2) whose conduct had become obstreperous and aggressive to such a degree the tavern keeper knew or ought to have known he endangered others;

(3) the tavern keeper had been warned of danger from an obstreperous patron and failed to take suitable measures for the protection of others;

(4) the tavern keeper failed to stop a fight as soon as possible after it started;

(5) the tavern keeper failed to provide a staff adequate to police the premises; and

(6) the tavern keeper tolerated disorderly conditions.

An Illinois federal court, however, interpreting materially identical LLC language held there was no coverage for claims involving a tavern keeper's failure to protect patrons from one another. *See Capitol Specialty Ins. Corp. v. Whitaker*, 2009 U.S. Dist. LEXIS 82528 (S.D. Ill. Sept. 10, 2009).Based on Illinois law, the *Whitaker* court explained "the liability at issue stems from the duty of a business owner to protect his business invitees, not the duty of a seller, server or furnisher of alcohol to protect others from his intoxicated patrons." Id. at *14

b. Plain reading of the LLC shows it applies. Coverage provisions are interpreted BROADLY; exclusions are interpreted NARROWLY. The LLC applies when liability is "by reason of" alcohol provision. A lay person would read "by reason of" as the equivalent of "arising out of."

THE COURT:

The Court did a thorough comparison of the policies and exclusions and held the insurer did not have a duty to defend the negligent security claim under the liquor liability policy. Claimants' failure to protect claim is not covered. Any liability for failure to protect would not "by reason of/because of" selling alcohol.

4. *Clinch v. Generali-U.S. Branch*, 980 A.2d 313 (Conn.2009) - Even though the words "assault and battery" were not specifically alleged in Complaint, the nature of the Complaint was "inexplicably tied to assault and battery," and therefore the exclusion applied.

5. *Gregory v. Western World Insurance Co*., 481 So.2d 878 (Ala. 1985) - Assault and battery at a bar in Alabama fell within the LLC policy's exclusion.

6. As of April 2013, the CGL policy Liquor Exclusion was amended. It now specifically states that the exclusion applies even when a claim alleges negligence or any other wrongdoing in the: 1) supervision, hiring, training or mentoring of employees or any other party; and/or 2) providing or failing to provide transportation when any person is or is suspected of being under the influence of alcohol.

B. The Effect of Being a Liquor Liability Licensee (usually not the determining factor, but was considered by the court in *KSPED LLC*).

1. The Kentucky Rule – Darned if you do, darned if you don't. *KSPED LLC v. Va. Sur. Co.*, 567 Fed. Appx. 377 (6th Cir. 2014).

   a. *Auto-Owners Ins. Co. v. JC KC, Inc.*, 1998 WL 766695 (Ohio Ct. App., Summit County Nov. 4, 1998) where an employee of a bar places an intoxicated patron into a vehicle he or she knows will be driven by another intoxicated patron, coverage for such act is not barred by the liquor liability exclusions of the insurance policy. The duty owed to the intoxicated patron arises by virtue of the bar's status as holder of the premises and the patron's status as a business invitee, not by virtue of the bar's status as a liquor permit holder.

   b. *Atlantic Mut. Ins. Co. v. Nicoletti Beer Distribs.*, 1995 U.S. Dist. LEXIS 16048 (E.D. Pa. Oct. 26, 1995) Alcohol Exclusion in CGL policy also applied to "silent partner" who argued she was only a co-owner of the premises. The court found she had the right to control distributions and sales and was also a co-licensee on the liquor license.

2. Is the vendor "in the business?"

   a. In Kentucky, being in the business is "regularly engaging in ongoing coordinated activity of sale of alcohol as a lessor or premise owner." In the *KSPED LLC* case, the racetrack had control over alcohol sales; wherefore, the CGL exclusion applied.

      i) *Auto Owners Mut. Ins. Co. v. Sugar Creek Mem. Post No. 3976*,123 S.W.3d 183 (Mo. Ct. App.2003)

      ii) *Fraternal Order of Eagles v. General Acci. Ins. Co.*, 792 P.2d 178 (Wash. Ct. App.1990)

      iii) *Grain Dealers Mut. Ins. Co. v. Lower*, 979 F.2d 1411, 1412,1992 U.S. App. LEXIS 30131 (10th Cir. Okla.1992) Case against the American Legion for serving an allegedly intoxicated patron who later caused an automobile accident, killing the other driver. This was a case of first impression in OK. The Court held that the American Legion was in the business of selling alcohol despite its non-profit status.

      iv) *McGriff v. United States Fire Ins. Co.*,436 N.W.2d 859 (S.D.1989)

v) *Aetna Casualty & Surety Co. v. Barboursville American Legion Post 177, Inc.*, 1992 U.S. App. LEXIS 14128 (4th Cir. W. Va. June 17, 1992)

vi) *Mustard v. Owners Ins. Co.*, 6 N.E.3d 1235 (Ohio Ct. App. 2014)

b. Conversely, two Courts have deemed the definition of "non-profit" takes an entity outside an alcohol exclusion that requires one to be "in the business."

i) *American Legion Post # 49 v. Jefferson Ins. Co*.,485 A.2d 293 (N.H.1984) (Non-profit association which operated a bar was not "in the business of" selling alcoholic beverages for purposes of clause in insurance policy which excluded from coverage injury resulting from sale of alcoholic beverages by an organization engaged in the business of selling alcoholic beverages, where the association did not have a direct profit motive in operating its bar, but rather used its bar revenues to meet its operating expenses, to provide benefits to its members and to fund its social, civic, and community activities.)

ii) *Newell-Blais Post #443, Veterans of Foreign Wars, Inc. v. Shelby Mut. Ins. Co.*, 487 N.E.2d 1371 (Mass. 1986) (The Court found that the term "Business" is defined as "a usually commercial or mercantile activity customarily engaged in as a means of livelihood." "Business," as commonly understood, is thus an activity engaged in for the purpose of gain or profit. As a nonprofit organization incorporated for charitable purposes, the insured was not engaged in the "business" of selling or serving alcoholic beverages within the clear meaning of the applicable exclusion.)

iii) The fix: Amended Liquor Liability Exclusion CG 21 50 04 13; CG 21 51 04 13.

c. *Picard v. E. Cas. Ins. Co., 1994 Mass. Super.* LEXIS 492 (Mass. Super. Ct.1994) Courts can find that management companies which only provide supervisory employees of alcohol related activities to be "engaged in the business of selling and serving alcoholic beverages".

d. *Zurich Ins. Co. v. Uptowner Inns*, 740 F. Supp. 404 (S.D. W. Va. 1990) "Host Liquor Liability Coverage" is typically read to apply to liability arising from the giving or serving of alcohol at social functions which are incidental to the insured's business - so long as they are not engaged in the business of selling or serving such beverages. The Court noted the provision, in essence, provides coverage when an insured hosts Christmas parties for customers, social functions pursuant to solicitation of business for its business, and like functions.

i) However, a "Social Host" that charges an entrance fee for some guests can even been deemed to be in the business. *Ennabe v. Manosa,* 319 P.3d 201 (Cal.2014).

e. Bring Your Own Bottle (BYO) club held to be liable, although it did not have a liquor liability license. *Simmons v. Homatas*, 236 Ill. 2d 459

(2010). Hence, the April 2013 CGL Liquor Liability Exclusion was amended to clarify BYO Club's coverage.

The April 2013 CGL policy's liquor exclusion has been amended to expressly state that permitting alcohol to be brought on the premises for consumption on the premises is not considered to be in the business of selling, serving, or furnishing alcoholic beverages, even if a fee is charged (such as a "corking fee") or a license is required for BYO.

Thus, the CGL policy now expressly provides coverage for liability arising out of BYO. CAUTION: The insurer may remove the BYO coverage by attachment of a liquor exclusion endorsement.

f. Businesses have to be proactive in securing coverage for alcohol-related claims

i) *DeJonge v. Mutual of Enumclaw*, 800 P.2d 313 (Ore. App. 1990). The insureds argued that they requested full coverage and the insurance agent knew the business involved the sale of liquor. Nonetheless, the Liquor Liability Exclusion in their CGL was given full force in denying coverage for damages arising out of the sale of alcoholic beverages. The court stated, "All that the agent did was to take an order for insurance. Liability for the negligent sale of alcohol is a risk for which a commercial establishment would likely want to be insured. However, an insurance customer has the responsibility to make specific insurance needs known to the insurance company."

ii) *Sprangers v. Greatway Ins. Co.*, 514 N.W.2d 1 (Wis.1994) The court held the Liquor Liability Exclusion valid against an argument that the insurance agent had a duty to point out the exclusion in a general liability policy. The court held the agent had no such duty to advise the insured about the exclusions in the absence of a request that he/she do so.

C. The Effect of a Negligence Claim in the Complaint

The ethical dilemma created for the carriers/attorneys by Plaintiffs including negligence allegations in a Complaint involving the furnishing of alcohol.