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AN ANALYSIS OF CURRENT HOSPITALITY & RETAIL CHALLENGES THROUGH A CAMERA LENS
2024 HOSPITALITY & RETAIL PRACTICE GROUP SEMINAR

**LIQUOR LIABILITY AND
RESPONSIBILITY
FOR 3RD PARTY CRIMINAL ACTS
IN THE
HOSPITALITY INDUSTRY**



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LIQUOR LIABILITY INSURANCE



Liquor Liability Coverage – Statistics

- Texas does not require alcohol providers to carry LL coverage. In 2015, the legislature considered a bill that would have required it (if sold more than 50% alcohol) – but bill did not become law.
- Difficult to get reliable statistics, but less than half of Texas alcoholic beverage license holders carry LL coverage.
 - Most sources estimate around 50%
 - 2015 - Texas Restaurant Association – 45%
 - 2015 – Claimsjournal.com less than 1 in 3
 - 2023 – Grossman firm website – around 35%
- Larger, more expensive corporate type bar/restaurants just about always. Establishments that serve mainly food and less than 50% alcohol.
- Numbers low on smaller bars.

Liquor Liability Coverage



Liquor Liability Coverage – why not?

- Cost
- Need
- Perception that lawyers don't like dram shop claims
- Bad advice from agents / Lack of understanding of insurance
- Strategic decision – Target for focusing litigation.

Liquor Liability Coverage – umbrellas, exclusions, limits, etc.

- Umbrella or excess coverage
 - Large or very profitable establishments tend to have additional coverage
 - Small establishments usually don't carry it
- Liability limits – usually \$1M/\$3M
- Exclusions –
 - Exemplary damages
 - Assault / battery
 - Weapons
- Other limited liability protections –
 - Establishment usually incorporated or is organized with limited liability.
 - Owners shielded from personal liability except in unusual situations.
 - Effective use of leases.
 - Texas Property Code protects most personal property interests – except for the wealthy.

Liquor Liability Coverage – Weapons Exclusion

- Texas Penal Code § 46.03(a)(7) prohibits carrying firearm, knife, or other prohibited weapon “on the premises of a business that has a permit or license ... if the business derives 51 percent or more of its income from the sale or service of alcoholic beverages for on-premises consumption”
 - Texas Penal Code § 46.035(d) prohibits the carrying and use of a handgun while intoxicated
 - So, can carry in restaurant less than 51 % alcohol
- Texas permitless carry law allows restaurant owners to put up signage banning guns

Liquor Liability Coverage – Punitive Damages Excl

- Trend in Texas is to exclude punitive damages
- *Fairfield v. Stephens Martin Paving* - “Considerations may weigh differently when the insured is a corporation or business that must pay exemplary damages for the conduct of one or more of its employees”
- NDTX – void as against public policy
 - *Farmers Tex. Cty. Mutual Ins. Co. v. Zuniga* - policy, under which insurer agreed to “pay damages for bodily injury,” did not provide coverage for claim for punitive damages, even though policy did not expressly exclude punitive damages
 - “Absence of an exclusion cannot confer coverage.” *Schaefer*, 124 S.W.3d at 160.
- To be safe, just include an exclusion...
- Dram Shop – *Borneman* case



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LIQUOR LIABILITY IN TEXAS



TEXAS DRAM SHOP LIABILITY

- Texas first regulated “dram shops” as early as **1895**. No civil or administrative liability or sanction.
- In **1911** the first Texas Dram Shop act was enacted. It was then repealed in **1919**.
- There was no “dram shop” liability under common law or statutory law from **1919** until **1987**. Two reasons:
 - *The consumption, not the sale or service of alcohol, was viewed as the **sole proximate cause** of intoxication and later injury to a third party. An able-bodied person was responsible for his or her own actions.*
 - *Even if the sale were a proximate cause of the intoxication, **injury to a third person was an unforeseeable result** of the patron's intoxication.*

TEXAS DRAM SHOP LIABILITY

- El Chico v. Poole **(6/3/1987)**
- MODERN DRAM SHOP ACT - TABC 2.02 **(6/11/1987)**
- Parker case – reinvented “safe harbor”



El Chico v. Poole



Snake show face for Australian supermarket shelf



El Chico v. Poole, 732 S.W.2d 306 (Tex.1987)

- Re-established liability for bar owner's negligent provision of alcohol.
- An intoxicated person is "*by definition is not an able-bodied nor able-minded person.*" and reasoned that drunk driving accidents are no longer unforeseeable consequences of the sale of alcohol. "*The risk and likelihood of injury from serving alcohol to an intoxicated person whom the licensee knows will probably drive a car is as readily foreseen as injury resulting from setting loose a live rattlesnake in a shopping mall.*"

El Chico v. Poole

- **Held** – *“an alcoholic beverage licensee owes a duty to the general public not to serve alcoholic beverages to a person **when the licensee knows or should know the patron is intoxicated.**”*
- **STANDARD FOR INTOXICATION**: *“Furthermore, no precise point exists for determining when a person goes from an unintoxicated state to an intoxicated state. **Intoxication refers to a condition when, due to the consumption of alcoholic beverages, a person suffers impaired mental or physical faculties and a resulting diminution of the ability to think and act with ordinary care.** Thus, the duty to discontinue serving alcohol arises once, through the observation of a patron's demeanor, conduct or appearance, a licensee knows or should know the patron is intoxicated.”*



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THE TEXAS DRAM SHOP ACT



Texas Dram Shop Act: Texas Alcoholic Beverage Code 2.01 – 2.03

- Creates a private cause of action for damages
- Primarily applies to licensed providers – social hosts are immune
- Different standards, depending on whether person served is adult or minor
- Unusual definition of proximate cause
- Includes “Safe Harbor”
- Exclusive remedy
- No exemplary damages

TABC -- 2.01 (1)(2) – “Provider”

- (1) “Provider” means a person who sells or serves an alcoholic beverage under authority of a TABC license or otherwise sells an alcoholic beverage to an individual.
- (2) “Provision” includes, but is not limited to, the sale or service of an alcoholic beverage.
- Broadly construed to avoid creative sidestepping of legislature’s intent. Includes:
 - Any establishment selling/serving under TABC license or permit.
 - Someone who is not licensed but **otherwise “sells”** alcohol to an individual.
 - “Person” includes the establishment as well as individual servers of alcohol. (Important in Safe Harbor evaluation)
- Legitimate social hosts considered immune - **unless recipient is a minor** and provider not parent.

TABC 2.02 (c) Minors – (social host liability)

- An adult of 21 or older is liable for damages proximately caused by the intoxication of a minor under the age of 18 if:
 - The adult is not the minor's parent, guardian or spouse
 - The adult knowingly served or provided to the minor any of the alcoholic beverages that contributed to the minor's intoxication. Or allowed the minor to be served or provided alcohol on premises owned/leased by the adult
- No requirement of obvious intoxication
- Social host immunity still extends to parents that provide alcohol to their own children – even if they end up injuring someone else
- Providing alcohol to drinkers between 18-21 is per 2.02 (b) – adult statute

TABC 2.02 (b)(1) – actionable standard

At the time the provision occurred it was apparent to the provider that the individual being sold, served or provided with an alcoholic beverage was obviously intoxicated to the extent that he presented a clear danger to himself and others ...

“sold, served or provided ...”

- Broadly and liberally construed
- Includes TABC licensee or permit holder that gives the alcohol away for free
- Includes other individual or establishment that has no TABC license/permit but still “sells” alcohol - cover charge, entry fee, or other fee – and alcohol is complimentary or “free”
- Straight social hosts still immune
- Clavillo v. Frazier - **“I’m a lady, and men buy ladies drinks.”** Implies that bar is not considered to have “sold, served or provided” alcohol to a customer when a different customer buys a drink and then independently gives it to the customer that is at issue in the case

2.02 (b) (1) – Time of relevant analysis ...

- ***At the time the provision occurred it was apparent to the provider that the individual being sold, served or provided with an alcoholic beverage was obviously intoxicated to the extent that he presented a clear danger to himself and others ...***
- Evidence of obvious intoxication **at the scene of the accident** alone is not sufficient evidence of obvious intoxication earlier; while being sold, served or provided alcohol. *Calvillo v. Frazier* 511 S.W. 3d 194 (Tex. App. – Dallas 2015)
- *JD Abrams v. McIver* - the court emphasized the lack of testimony evidencing obvious intoxication or presentation of a clear danger **at the time he was provided alcohol at the club.**
- Subsequent (or prior) obvious intoxication is circumstantial evidence of obvious intoxication at time of service.

2.02 (b) (1) - Obviously intoxicated ...

- **At the time the provision occurred it was *apparent to the provider* that the individual being sold, served or provided with an alcoholic beverage was *obviously intoxicated to the extent that he presented a clear danger to himself and others***
 - Supposed to be higher burden than *El Chico* but has been liberally interpreted
 - Objective standard
 - Does not require direct evidence of obvious intoxication; circumstantial evidence can be enough
 - Actual perception by server not required
 - “*visible, evident and easily observed*” – large number of drinks ...
 - Must extrapolate back to time of service
 - High BAC extrapolated back can be enough

2.02 (b) (2) - Intoxication - proximate cause

- ***“The intoxication of the recipient of the alcoholic beverage was the proximate cause of the damages suffered.”***
 - Duenez case -
 - Causal link is between intoxication and damages – not between service of alcohol and damages
 - Doesn't matter if the alcohol provided contributed very little (or none at all) to overall level of intoxication
 - Actual consumption of alcohol not required???

Dram Shop Act not limited to drunk driving injuries

Injury/damages must be reasonably foreseeable result of intoxication; and not the result of a **superseding or intervening cause**.

- Bar fight on premises = OK (Coverage might be excluded, but Dram Shop Act still applies)
- Fight taken off premises = sometimes OK
- Drunk injured riding mechanical bull operated by drunk = OK
- Plaintiff shot and killed at club by drunk ex-BF = NO
- Plaintiff stabbed by drunk in parking lot = NO

2.03 - Preemption (exclusive remedy)

- Liability under Dram Shop act for actions of employees, customers, members or guests who become intoxicated is *in lieu of* any common law or statutory law warranties or duties of alcohol providers.
- Dram shop act is *exclusive cause of action* for providing alcoholic beverage to person **over 18 years of age**.
- Limited to “damages suffered” - No punitive damages.
- Parker, Last and Love cases ... very limited exceptions on specific facts.

Steak & Ale v. Borneman – Fort Worth C.A. (2001)



- Texas Dram Shop Act doesn't mention gross negligence or punitive damages.
- Only allows recovery of "the damages suffered" – (not defined in statute)
- Fort Worth Court of Appeals held that doesn't include exemplary damages because those are intended to punish – not compensate injured for damages they actually suffered.
- No gross negligence claim. No punitive damages
- CAVEAT – Not Texas Supreme Court. No other decisions either support or criticize it. Not binding on any courts (other than those in Tarrant County).
- BUT – usually followed by most trial courts.



Legislative purpose of “safe harbor”

- To induce employers to mandate the attendance of their employees at a TABC approved training program.
- TABC wants bar owners to allow the State to train alcohol service employees on how to recognize an intoxicated customer and on safe alcohol service practices ...
- In return, they give **the employer** a “safe harbor” from civil liability and TABC administrative action for employee violations

TABC 106.14 – Safe Harbor

- Administrative and litigation defense.
- To judge in MSJ and/or to jury at trial.
- An employer is not vicariously liable for the actions of his employee in providing alcohol to minor or intoxicated person – if ... (employee remains personally liable).
 1. The employer requires its employees to attend a commission approved seller training program;
 2. The employee has actually attended such a program; and
 3. The employer has not directly or indirectly encouraged the employee to violate such a law. (Now = Plaintiff's BOP – negligence based standard).

TABC's criteria for safe harbor (administrative cases)

- Person selling is not owner or officer of the company.
- Person selling has current TABC certificate.
- All employees engaged in sale, service or delivery of alcohol (and their managers) are certified w/in 30 days of hire date.
- Employer has written policies for responsible alcohol service and ensures that each employee has read and understands the policies.
- No direct or indirect encouragement to violate law.
- No more than 3 violations in 12 month period.

20801, Inc. v. Parker 249 S.W.3d 392 (Tex. 2008)

- Once Defendant proves first 2 elements, Plaintiff has BOP on encouragement element.
- Encouragement does not require knowing conduct. Provider must act (or fail to act) at least negligently to encourage its employees to violate TABC laws. Negligence = ordinary prudence under the circumstances.
- The relevant comparison will be to a reasonable provider of the defendant's type.
- Plaintiff may prove encouragement by direct evidence (knowingly ordered or rewarded over service) or circumstantial evidence that provider engaged in behavior that a reasonable provider should have known would constitute encouragement.
 - Modeling inappropriate behavior – provider themselves overserving
 - **Failing to punish overservice**
 - Excessively high minimum sales quota
- Not required to demonstrate enforcement on the night in question.

Other Safe Harbor issues in litigation

- **Coverage of alcohol service employees in liability policy effectively eliminates benefit of Safe Harbor in litigation. Safe Harbor only removes vicarious liability of the bar – bartender/server still responsible.**
- **Potentially makes EVERYTHING related to alcohol service, or the supervision and management of alcohol service employees, discoverable and admissible at trial. This results in a trial on the bar's historical compliance with TABC laws and its own policies, rather than on the specific incident.**
- Probably need a TABC compliance and industry standards expert – someone who can testify that:
 - They are familiar with what other reasonable bars/restaurants similar to Defendant do or do not do in terms of management and supervision of alcohol service employees,
 - In comparison --- Defendant's management, supervision etc. was reasonable.

Proportionate responsibility

- Duenez case ...
- Unless there are significant extenuating circumstances **almost** everyone believes the drunk driver bears the majority of the responsibility for injuries and damages in an alcohol related MVA.
- First party cases – drunk driver/Plaintiff's % responsibility is submitted to the jury and deducted from recovery. **51%+ is complete bar to recovery.**
- Third Party cases – both, the drunk driver's % responsibility as well as the injured person's % is submitted to the jury and deducted from the recovery.
- **However, if alcohol provider is 51%+, they are jointly and severally liable.**



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**RESPONSIBILITY
FOR 3RD PARTY CRIMINAL ACTS**



RESPONSIBILITY FOR 3RD PARTY CRIMINAL ACTS

- Independent contractor / “third-party” security personnel uses excessive force and injures customer
- Criminal acts of others over whom you have no control

Independent contractors

- Employee v. Independent contractor – Several factors ... most important is right to control the details of their work.
 - Can instruct without control details
 - How paid is important
- Negligent retention or hiring of “third party” security with propensity for violence.
- Negligent or improper training or instruction of “third party” security.

- General rule – a party is not responsible for the criminal acts of persons over whom they have no control.
- Timberwalk Apartments v. Cain – premises liability theory. Exception to general rule when criminal conduct on the premises is “foreseeable”. Factors to consider:
 - Proximity of previous crimes to the premises,
 - How recently previous crimes occurred,
 - How often previous crimes occurred,
 - Similarity of previous crimes,
 - Publicity surrounding previous crimes
- Del Lago case – criminal acts are imminent and preventable.