Duff on Hospitality Law

Dram Shop Laws: What You Need to Know

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Our latest post comes from Malcolm Seymour, a member of our New York office who specializes in commercial litigation and regulatory enforcement actions. His post discusses the ins and outs of Dram shop laws, and how they vary from state to state. -Greg

“A guy walks into a bar and orders a drink": these words usually foreshadow some benign if tasteless joke. But these same words are increasingly found prefacing legal complaints based on laws known as dram shop statutes. And for businesses that sell or serve alcohol, these lawsuits are no laughing matter.

Under dram shop laws, businesses that sell alcohol can face civil liability for injuries that their intoxicated patrons inflict on third parties - even after those patrons have left their premises, and (in some states) even when the injury caused is intentional. Despite the anachronistic name, more states enact dram shop laws every decade, under political pressure from groups like M.A.D.D. These laws vary significantly from state to state, and their severity in certain jurisdictions can come as an unwelcome surprise. Any hotel, restaurant or bar that sells or serves alcohol, especially one with operations in multiple states, would do well to familiarize itself with these laws and their jurisdictional differences.

Take New York City - a nightlife capital and global destination for travelers - which happens to fall under the reach of one of the nation's harshest dram shop laws. New York State's Dram Shop Act allows private plaintiffs injured by intoxicated individuals to sue anyone who may have "unlawfully" sold those individuals alcohol. This would not be so vexing if New York used a clear standard to define what sales are considered unlawful. Legally prohibited sales include sales to minors, habitual drunkards and - most problematically for those on the receiving end of a dram shop complaint - anyone who is "visibly intoxicated."

Visible intoxication cannot be objectively measured or verified, and is instead usually proven through eyewitness testimony. Because of this, it can be difficult for a defendant to fight a dram shop claim in New York without taking a case through trial, or at least completing extensive discovery. The slippery parameters of liability under New York's dram shop law can make these cases expensive to defend.

Dram shop defendants in New York face further perils. Under New York law, if a plaintiff proves that the individual who caused her injury was "visibly intoxicated" when purchasing alcohol from the defendant, the defendant is held strictly liable regardless of other circumstances. Because New York's Dram Shop Act provides for strict liability, a business that serves alcohol may be held liable:

- Even if it implemented employee training programs or other precautionary measures to prevent over-service of alcohol;

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- Even if the plaintiff cannot prove that the drinks served by the defendant caused or contributed to the plaintiff's injury;
- Even if the plaintiff's injury was unforeseeable to the defendant; and
- Even if the plaintiff was injured in an intentional assault or attack.

As a *coup de grace*, a plaintiff may recover punitive or exemplary damages from any defendant found liable under New York's dram shop law.

The difficulty of obtaining pre-discovery dismissal, the availability of punitive damages, and the presence of strict liability rules can make dram shop claims quite frustrating for defendants faced with such litigation in New York. These features also make the New York Dram Shop Act a beacon of opportunity for plaintiffs - or more precisely for plaintiffs' lawyers, who are often the ones engineering these lawsuits and locating the deep pocket defendants to level them at.

As dram shop laws go, New York's is an outlier, an exceptionally pro-plaintiff specimen. But the dram shop laws of other states are far from uniform. It is the variance and unpredictability of these laws that makes them so nettlesome for national chains in the hospitality sector. For the sake of comparison, consider the dram shop laws of just three other states:

- Oregon has enacted a dram shop statute (ORS § 471.565), but it does not create strict liability - the plaintiff must still prove that the defendant's sale or service of alcohol was a substantial factor in the plaintiff's injury, and that the injury was foreseeable;
- California has a law on the books that expressly precludes most forms of dram shop liability (BPC § 25602), except for cases based on sales of alcohol to visibly intoxicated minors. The California statute does not create strict liability;
- Washington State does not have a dram shop statute, but it does have laws prohibiting the sale of alcohol to individuals "apparently under the influence of liquor" (RCW § 66.44.200). A violation of this statute is treated as evidence of negligence that may support a judgment against the seller or server of alcohol under common law rules of negligence. Washington State does not follow a rule of strict liability, and has held that sellers of alcohol cannot be held liable for assaults or other intentional injuries caused by their over-served patrons.

Because no two states follow quite the same rules, businesses that sell or serve alcohol cannot rely on best practices that work in one state to adequately protect them from liability elsewhere. In jurisdictions like New York, where the risk of dram shop liability is impossible to fully mitigate, other measures may be necessary to limit losses in the event of legal action.

Some practices recommended for adoption in more stringent jurisdictions like New York may include: incorporation of discrete business entities to oversee any alcohol service operations; procurement of insurance policies that provide express coverage for dram shop liability; employee training programs that familiarize servers of alcohol with applicable dram shop rules; and maintenance of service logs that permit

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supervisors to monitor and/or discipline employees who routinely over-serve patrons.

For more information, feel free to contact me or Malcolm at any time.

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