

Legislative History for Connecticut Act

Act Number: 091	2003
Bill Number: 1112	
Senate Pages: 2275-2280	6
House Pages: 3296, 3449-3451	4
Committee: General Law: 586-602, 621, 623, 634-638, 639-642, 658-662, 663-679	50
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Transcripts from the Joint Standing Committee Public Hearing(s) and/or Senate and House of Representatives Proceedings

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CONNECTICUT
GEN. ASSEMBLY
SENATE

PROCEEDINGS
2003

VOL. 46
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2237-2567

002275

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Senate

May 15, 2003

Senator Herlihy. Senator Aniskovich. Senator Hartley. Have all Senators cast their votes? The machine will be closed. The tally will be announced.

THE CLERK:

Motion is on passage of H.B. 6085.

Total number voting, 34; necessary for passage, 18. Those voting "yea", 22; those voting "nay", 12. Those absent and not voting, 2.

THE CHAIR:

The bill is passed. Mr. Clerk. And Mr. Clerk assures us that copies of the Cantata will be available at the Cantina (LAUGHTER) immediately following adjournment.

THE CLERK:

Calendar Page 6, Calendar 367, File 606, Substitute for S.B. 1112 An Act Concerning The Dram Shop Act. Favorable Report of the Committee on General Law and Judiciary.

THE CHAIR:

Senator Colapietro.

SEN. COLAPIETRO:

Thank you, Mr. President. I move the Joint Committee's Favorable Report and passage of the bill.

THE CHAIR:

Motion is for acceptance and passage. Will you

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Senate

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remark? Senator Colapietro.

SEN. COLAPIETRO:

Thank you, Mr. President. To increase, the reason for this bill is to increase the recovery limits under the Dram Shop Act and to provide an action under the Act as the exclusive remedy against the seller of alcoholic liquor by a person injured by an intoxicated person to whom such seller sold alcoholic liquor.

THE CHAIR:

Thank you, Senator. Will you remark further on the bill? Senator Roraback.

SEN. RORABACK:

Thank you, Mr. President. Through you, if I may, some questions to the proponent of the bill.

THE CHAIR:

Please proceed, Senator.

SEN. RORABACK:

Thank you, Mr. President. Recently, the Connecticut Supreme Court decided a case called Craig vs. Driscoll and through you, Mr. President, in that case the court concluded that the issue of whether to recognize a common law cause of action in negligence is a matter of policy for the court to determine, based on the changing attitudes and needs of society.

And through you, Mr. President, my question to the

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proponent of the bill is, is it the intention of this bill to reserve to the legislative branch of government, the determination as a matter of policy whether or not to permit a cause of action in negligence when this statute is on the books. Through you, Mr. President.

THE CHAIR:

Thank you, Senator. Senator Colapietro, do you care to respond?

SEN. COLAPIETRO:

Through you, Mr. President. I would ask to yield to the other Andrew in the Senate because he's more well versed than I am on this subject.

THE CHAIR:

Senator McDonald, do you accept the yield?

SEN. MCDONALD:

I do, Mr. President. Through you, Mr. President, I believe that this legislation would narrow the scope of the Craig decision and to answer your question, Senator Roraback I believe it is well within the prerogatives of this body to pass legislation dealing with this issue.

THE CHAIR:

Thank you, Senator. Senator Roraback.

SEN. RORABACK:

And through you, Mr. President to Senator McDonald if I may for purposes of legislative intent. Senator

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Senate

May 15, 2003

McDonald, do we mean to say what we say in lines 24 through 26 of the bill? Are we using words which we would hope that the court would give their plain meaning should they ever be called upon to construe these words? Through you, Mr. President.

THE CHAIR:

Senator McDonald.

SEN. MCDONALD:

Thank you, Mr. President. Through you, as I have said before, I think we mean what we say and we say what we mean and I hope that the judicial branch will always in the first instance, give meaning to the plain language of our statutes.

THE CHAIR:

Thank you, Senator McDonald. Senator Roraback.

SEN. RORABACK:

And one final question, through you, Mr. President.

THE CHAIR:

Proceed.

SEN. RORABACK:

Should the judicial branch choose to find a common law cause of action for negligence in these cases, through you, Mr. President, to Senator McDonald, would that represent a derogation of what we're intending to do here tonight? Through you, Mr. President.

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THE CHAIR:

Senator McDonald, do you care to respond?

SEN. MCDONALD:

Thank you, Mr. President. Through you, I believe it is the specific intent of this legislation to preclude a claim for a simple negligence against an individual if the person is 21 years of age or older and I believe this legislation would preclude such a cause of action.

THE CHAIR:

Thank you, Senator. Senator Roraback.

SEN. RORABACK:

Thank you, Mr. President. I thank Senator McDonald for his answers.

THE CHAIR:

Thank you very much. Will you remark further on the bill? Senator Colapietro.

SEN. COLAPIETRO:

Thank you, Mr. President. And thank you, Andrew and Andrew. And if there is no further discussion, I would move this item to the Consent Calendar.

THE CHAIR:

Senator McKinney, I believe, wishes to be recognized.

SEN. MCKINNEY:

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Senate

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Actually, Mr. President, I was rising to object to moving to Consent Calendar.

THE CHAIR:

Senator McKinney has objected. Therefore, be prepared on a roll call for this. If so, the Clerk will open the machine. A roll call will be announced.

THE CLERK:

An immediate roll call has been ordered in the Senate. Will all Senators please return to the Chamber.

An immediate roll call has been ordered in the Senate. Will all Senators please return to the Chamber.

THE CHAIR:

Have all members voted? Senator Herlihy. Senator Peters. Senator Newton. If all members have voted, the machine will be closed. The Clerk will announce the tally.

THE CLERK:

Motion is on passage of Substitute S.B. 1112.

Total number voting, 34; necessary for passage, 18. Those voting "yea", 33; those voting "nay", 1. Those absent and not voting, 2.

THE CHAIR:

The bill is passed.

THE CLERK:

Calendar 377, File 535, Substitute for S.B. 6634 An

H-895

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46 003296

House of Representatives

Tuesday, May 20, 2003

REP. GODFREY: (110TH)

They would be -- and this is a slight change from the Go-List. So there's one change.

Calendar number 317, Substitute for H.B. 6623;
Calendar 472, H.B. 5612; Calendar 488, S.B. 553;
Calendar 490, S.B. 966; Calendar 496, S.B. 1062;
Calendar 508, Substitute for S.B. 948; Calendar 509,
S.B. 973; Calendar 512, Substitute for S.B. 1112.

And just for the Chamber, Calendar 361 was marked as a potential consent item, but has been pulled off because of an amendment that's coming.

So I move all those other items to the Consent Calendar for action later today.

DEPUTY SPEAKER FRITZ:

Seeing no objections, so ordered.

REP. GODFREY: (110TH)

Madam Speaker.

DEPUTY SPEAKER FRITZ:

Yes, Representative Godfrey.

REP. GODFREY: (110TH)

And one last item. I would like to remove from the foot of the Calendar and restore it to the regular Calendar, Calendar number 202, H.B. 5685.

DEPUTY SPEAKER FRITZ:

Hearing no objection, so ordered.

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GEN. ASSEMBLY
HOUSE

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199 003449

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House of Representatives

Tuesday, May 20, 2003

The Clerk will announce the tally.

CLERK:

H.B. 6486, as amended by House Amendment Schedule "A"

Total Number Voting	145
Necessary for Passage	73
Those voting Yea	145
Those voting Nay	0
Those absent and not Voting	5

DEPUTY SPEAKER HYSLOP:

The bill, as amended passes.

Clerk, please call Calendar 317.

CLERK:

On page 5, Calendar 317, Substitute for H.B. 6623, AN ACT CONCERNING TECHNICAL REVISIONS TO ENVIRONMENTAL PROTECTION STATUTES. Favorable Report of the Committee on Environment.

DEPUTY SPEAKER HYSLOP:

Representative Godfrey.

REP. GODFREY: (110TH)

Good afternoon, Mr. Speaker.

DEPUTY SPEAKER HYSLOP:

Good afternoon, sir.

REP. GODFREY: (110TH)

Mr. Speaker, ladies and gentlemen, we're about to

HB 6623
HB 5612
SB 553
SB 966
SB 1062
SB 948
SB 973
SB 1112

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House of Representatives

Tuesday, May 20, 2003

move today's Consent Calendar, which as you see on the board, consists of items Calendar numbers 317; 472; 488; 490; 496; 508; 509; and 512.

Mr. Speaker, I move passage of the bills on today's Consent Calendar.

DEPUTY SPEAKER HYSLOP:

Staff and guests to the Well of the House. The machine will be opened.

CLERK:

The House of Representatives is voting by roll call. Members to the Chamber. The House is voting today's Consent Calendar by roll call. Members to the Chamber.

DEPUTY SPEAKER HYSLOP:

Have all members voted? If all members have voted, please check the machine to make sure your vote is properly recorded.

Representative Villano. If all members have voted, the machine will be locked and the Clerk will take a tally.

The Clerk will announce the tally.

CLERK:

On today's Consent Calendar

Total Number Voting	146
Necessary for Passage	74

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House of Representatives

Tuesday, May 20, 2003

201 003451

Those voting Yea	146
Those voting Nay	0
Those absent and not Voting	4

DEPUTY SPEAKER HYSLOP:

The Consent Calendar passes.

Clerk, please call Calendar 380.

CLERK:

On page 31, Calendar 380, H.B. 5352, AN ACT
CONCERNING THE SUSPENSION OF MOTOR VEHICLE OPERATOR'S
LICENSES. Favorable Report of the Committee on
Transportation.

DEPUTY SPEAKER HYSLOP:

Representative Lawlor.

REP. LAWLOR: (99TH)

Good afternoon, Mr. Speaker.

DEPUTY SPEAKER HYSLOP:

Good afternoon, sir.

REP. LAWLOR: (99TH)

Mr. Speaker, I move acceptance of the Joint
Committee's Favorable Report and passage of the bill.

DEPUTY SPEAKER HYSLOP:

The question is on acceptance and passage. Will you
remark further?

REP. LAWLOR: (99TH)

Thank you, Mr. Speaker. This bill has been around

JOINT
STANDING
COMMITTEE
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CHUCK APPLBY: (inaudible, mike off)

REP. METZ: And what are the retailers going to say?
What's Sears going to say about this?

ROGER STALTING: (inaudible, mike off)

REP. FOX: Okay, thank you, sir. Thank you very much.
We're going to move on to SB1112, the Dram Shop
Act. First speaker is Bob Adelman. Good
afternoon.

BOB ADELMAN: Good afternoon, Senator Colapietro,
Representative Fox and members of the Committee, my
name is Bob Adelman and I am here on behalf of the
Connecticut Trial Lawyers Association to speak
against RSB1112, AN ACT CONCERNING THE DRAM SHOP
ACT.

The Connecticut Trial Lawyers Association opposes
this bill because it will cost lives and severely
limit the recoveries of people severely injured or
killed by intoxicated drivers.

This bill, we believe, is a response to a recent
Supreme Court decision, Valerie versus Trade
Persons, Driscoll and it totally preempts the field
of liquor liability in the state of Connecticut.

It's a vast, leaping bill. A bit of history, under
ancient common law, a liquor seller was not held
liable for serving alcohol to intoxicated persons
because decisions held that the cause of the
accident was not the selling of the liquor but the
consumption of the alcohol.

That changed in 1980 when the Supreme Court for the
first held a liquor seller liable when they
recklessly served a person with alcohol. That was
the Kowal versus Hofher case. It's in my written
materials.

The first thing this bill does is it would
eliminate liability for those that recklessly serve
alcohol to intoxicated people. Then, in 1998,
eight years later, the Connecticut Supreme Court

went a step further and held social hosts liable for the selling of -- for the negligent selling of alcohol to minors.

This decision would eliminate that. It would no longer be -- and I'm sorry. In 1996, that was extended to commercial sellers. Again, the cases are cited in my written materials. This bill would insulate the seller of alcohol to a minor, whether negligently done or recklessly done and in fact, the sellers of alcohol would have greater protections than social hosts, those that serve in their own homes.

My understanding of the impetus behind this bill is to protect sellers of alcohol who, in many cases, run the important small businesses that are an integral part of our communities and of our social fabric and that goal is understandable and laudable.

So, the benefits of that all will have to be weighed against it's costs which are primarily, two. The first is it will cost lives. It cannot be seriously questioned that sellers of alcohol who no longer face liability for negligently or recklessly serving intoxicated people or minors cannot be seriously questioned that insulating them from that liability will make them less vigilant in not serving minors and intoxicated people. They will then go out on the road and they will kill someone and second, it will deprive the people most seriously injured by intoxicated drivers, from meaningful recovery.

Therefore, for those two reasons we believe what people are trying to do here is understandable. The cost is just too high.

REP. FOX: Would the Trialers Association support the bill if the cap was higher?

BOB ADELMAN: No they wouldn't.

REP. FOX: No.

BOB ADELMAN: No, we would not.

REP. FOX: That's the official position?

BOB ADELMAN: No. Our feeling is, that it would be wrong to cap the recoveries of the families who've lost loved ones and left people crippled and brain-damaged. Caps, I think, the position of the Trial Lawyers Association are wrong whether it's in the medical malpractice context, to answer your earlier question, or in this context and the right to jury trial, we have to depend upon our juries to make common sense and reasonable decisions on what is fair compensation.

REP. FOX: Do the Trial Lawyers keep statistics in terms of the number of cases that have been brought and the number of verdicts rendered in this type of litigation?

BOB ADELMAN: Well, again, up until now we couldn't sue for the negligence for serving alcohol. We can only sue for the reckless serving alcohol or the serving to minors and we don't have statistics but I can just tell you from personal experience, very few cases fit that category and there have not been a lot of cases. Whether there will be significantly more cases for negligently serving alcohol, I cannot tell you.

REP. FOX: Questions? Peter.

REP. METZ: Thank you, Mr. Chairman. Do you -- there really are two aspects to this bill. One is the cap and the other is the lumping together of negligence wanton and recklessness conduct and gross incidents. Do you have an objection to a cap in the instance of simple negligence or do you just think in every instance there should be unlimited ability to recover, even for the simplest and --

BOB ADELMAN: I think that we believe that the Supreme Court's evolution in finally recognizing the cause of action for the negligence (inaudible) should not be reversed. To put a cap just on negligence serving but leave it for reckless in minors, will have reversed Craig versus Driscoll access and our key lead is that the purpose involved since the

80's and this is the logical step to take a last -- towards discouraging the serving of intoxicated drivers and minors and that it will discourage that and so, yes, we oppose caps even for that.

REP. METZ: Thank you.

REP. FOX: Thank you, sir --

BOB ADELMAN: I just want -- because she's never spoken before, and she's a little nervous I want to tell you that your next speaker here is Valerie Craig. She's the mother of the girl killed and the subject of Craig versus Bristol.

REP. FOX: Ms. Craig, thank you for coming.

VALERIE CRAIG: (mike off) -- my name is Valerie Craig. I'm the mother of Sarah Craig, the case that was brought and decided before the Supreme Court which ultimately brings us here today, concerning SB1112.

I'm here to represent my daughter. Sarah was a child having just turned 18, just finishing her first year at Harvard, was accepted early at Harvard at the age of 16, at MIT, Stamford and Brown as well.

In other words, she was an exceptional Connecticut child. On a spring evening in 1996, a local man was drinking at a local bar and he left the bar at that time with over twice the legal limit of alcohol in his system.

In less than a half mile, perhaps a three minute drive, he ran down four girls, walking. He went off the road and killed my daughter. Later, the police reports brought out that this bar owner had been warned before serving intoxicated patrons.

Further, he'd been warned about this particular man. This wasn't the first death from the bar. Our information is, she wasn't even the second. I'm here today, hoping to impress you with study after study, statistical facts that prove that imposing strict tort liability on commercial servers reduces drunk driving deaths.

And no other regulatory intervention seem to do as well. This law, our law, the law that stands right now will save lives. The bill that's before you will reverse that. I care about this law because I know what a mother goes through, on the next drunk driving victim and the statistics don't even bring up those that are maimed. The father I met whose seven year old son will be a vegetable for the rest of his life.

I can't think of a single, socially redeeming reason why Connecticut should legally protect bar owners, exclusively, of all businesses in Connecticut, why bar owners? I know you brought up the question just previously about medical liability and we want as many doctors as we can get. I can understand their concerns but I can't understand why, historically, Connecticut has protected bar owners.

The result of all that is that there's no -- there was no incentive for negligent bar owners to be responsible. Connecticut was pretty much alone in New England in this regard. Most New England states have unlimited liability. New York -- even New York next to us has unlimited liability under their Dram Shop and gentlemen, I don't see any lack of bars in New York, nor do I see that they don't have insurance policies to cover them.

I'm going to ask you to vote against this bill. Think of us, the victims and the family and friends and neighbors of the victims, but more than that, think about the victims that are going to happen and their families and friends. Let all of us weigh heavily in your decision. Thank you.

REP. FOX: Mrs. Craig, thank you very much. I'm sure that's not an easy process for you to go through to come here today. We appreciate it.

VALERIE CRAIG: I appreciate being heard.

REP. FOX: Next speaker we have is Tim Adams.

TIM ADAMS: Good afternoon. Senator Colapietro,

Representative Fox, members of the General Law Committee. My name is Tim Adams. I'm a partner at J. Timothy's Restaurant in Plainville, Connecticut. We've been in business for over 23 years and have over 70 employees. Our restaurant business is a difficult one with small profit margins and many issues.

It has been particularly difficult over the last few years with many of my fellow restaurateurs struggling to survive. I'm here today to speak in support of SB1112, AN ACT CONCERNING THE DRAM SHOP.

If it is the intent of the Legislature to raise the current limits for awards, this bill will accomplish that and importantly, will return the Dram Shop to the exclusive remedy for injuries claimed to have resulted from the sale or furnishing of alcoholic beverages.

Our industry truly represents the last vestige of small business and the recent legislative activism of the state Supreme Court has effectively removed any limit on potential awards and has thereby created a situation that will directly affect my business and every restaurant in Connecticut, by punishing restaurateurs for the actions of those who abuse alcohol.

In the very least, I am told my insurance costs will double. Some of the information I've received from my agent indicates that I may not be able to afford insurance at all, which is the decision I would have to make.

I can continue to sell alcohol, risking loosing my life's work, or I can stop serving alcohol which means I would dramatically reduce my work force and affect the earnings of my wait staff, neither of which is a very palatable situation for myself or for Connecticut.

Restaurateurs as a whole, we don't want people that abuse alcohol in our businesses. We don't even want them around. Unfortunately, restaurants, because they're small, generally not that well organized have become a scapegoat for accidents and

things that result as a result of alcohol abuse.

We've become a feeding trough for the trial lawyers. We're tired of being at end of it. We have great difficulty, at times, fulfilling our mission to not serve people who are drunk -- not drunk -- who shouldn't be served.

If we don't have a Dram Shop, I'm afraid that many of the smaller bars and I'm not necessarily speaking of restaurants at this point, but smaller bars will be forced to or will choose to go without insurance which will basically eliminate the possibility of recovery when recovery is deserved and should be rewarded.

The last thing I would want to see is people out there without a way to get compensation should they deserve it. Thank you.

REP. FOX: (mike off)

ANGELO FAENZA: Good afternoon, Senator Colapietro, Representative Fox and members of the General Law Committee. My name is Angelo Faenza. I'm the vice-president of Governmental Affairs for the Connecticut Restaurant Association representing the views of its membership.

I am a restaurant, too, who until recently was a proud owner of Faenza's on Main and am now involved with my two sons at the Prospect Café. The Connecticut Restaurant Association represents some 88,000 employees and 3.8 billion dollar food service industry in Connecticut where every dollar spent in a restaurant results in two dollars being spent on the economy.

Clearly, we are important to Connecticut's economic well-being. Unfortunately, our industry which is already struggling is threatened by a recent action of the Connecticut Supreme Court when it overturned the Dram Shop Act and effectively created a floor with no ceiling.

We strongly agree with the dissenting opinion of Chief Justice William Sullivan when he accused the

majority of the Judicial lawmaking and stated, I believe that the radical change in law brought by the majority usurps the function of the Legislature and is unwarranted on its merits.

We ask the Connecticut Legislature to take its rightful role in passing appropriate legislation on the Dram Shop. We ask the Legislature to reaffirm the interests of this legislative body by reaffirming the Dram Shop Act intent and its limits.

We do intend to sit down with representatives of the Trial Lawyers Association if they would and try and come up with a remedy for this problem. Short of any action by the Legislature, it will take years before the case law defines limits.

The result will be a very fragile climate for the restaurant industry. The unstable insurance market that we now face will make it worse by delay. We ask the Connecticut Legislature to act on this very important issue. Thank you. Any questions?

REP. FOX: (mike off)

TODD HALLEK: Good afternoon, Senator and Representative and members of the General Law Committee. My name is Todd Hallek and I've worked for insurance companies for over 15 years and over the last six or seven years, have specialized in providing insurance for restaurants in the state of Connecticut.

We work with about 500 restaurants. I would say about 95 percent of them serve alcohol and probably 100 percent of them are purchasing some form of liquor liability insurance.

I've been asked to testify a little bit about what's happening in the insurance industry and the general impact that this law may have on the industry.

Historically, the insurance companies are willing to provide insurance in the state of Connecticut because of the caps under the Dram Shop law and the

loop hole regarding negligence has been something that has been wrestled with but for the most part, insurance companies have retained the limit of insurance, internally.

In other words, they haven't gone outside to seek reinsurance to pass off some of the risk. As a result, they've been able to control the costs of insurance and offer the product.

Up to about two years ago, we had as many as 10 or 12 insurance companies readily offering liquor liability insurance and insuring restaurants. We're down to probably a half a dozen -- three good primary companies that are offering that product.

Historically, they've offered a better rate for the insurance in Connecticut than in other negligence-based states and those rates vary sometimes as much as 10 or 15 times, in other words, we could have a five dollar rate here, we could have a \$50 rate outside of the state.

What's happening right now, currently, is that most of the carriers have put a moratorium on providing the insurance to new accounts. They are seeking reinsurance because they're not sure what the limit's going to be and the reinsurers are not in a position right now to offer the reinsurance.

So, we have most of the carriers either not offering the liquor liability or limiting the liquor liability to 20-50 even though the exposure goes beyond that or potential is beyond that.

The knee jerk reaction has been to immediately increase the rates, two, three, four times -- a couple of the carriers have already done that. A couple are holding back and waiting to see what's going to happen.

In discussing this issue with the core carriers that we deal with, and when I say, core carriers, I'm not talking about the excess markets, the surplus markets that are excessively high and I'd have to add that most of the restaurants and small bar owners can't afford to go to those markets and

purchase that, but the carriers who are the primary carriers right now are looking at the law in a couple of different ways.

If the law is passed as it stands, these carriers should still be able to retain the limit of exposure internally or within their current -- their existing treaties of reinsurance and offer the insurance to restaurant owners.

If the loophole still exists with negligence then we have a situation where you have no availability of reinsurance or limited availability of reinsurance and will have insurance companies pulling out of the market place or offering the same insurance for three or four times the amount that they currently offer it at.

Just to finish, I have a number of clients, as many as 20 clients over the last three weeks have called our office looking for higher limits of insurance in order to protect themselves against the potential liability and we have been successful in placing some of them but for a majority, we have not been able to provide excess limits of insurance, at all.

So, we have a lot of restaurants out there that are waiting to see what's going to happen here so they can get insurance.

REP. FOX: Let me ask you one question, if I could. One of the arguments that we have heard with respect to putting a cap on a malpractice case, that if in fact we had the cap, and the rates incurred by the doctors would be less, more doable, more affordable. You seem to be suggesting that in this industry in spite of the fact that there has been a statutory cap, that the rates continue to rise and then insurance is becoming less available. Am I led to believe that the argument that we're hearing in the area of malpractice may not be as accurate as one may initially perceive it to be?

TODD HALLEK: The issue that we're facing with the restaurants is that number one, the restaurant and bar industry is one that's very difficult to insure

and we've got carriers pulling away from that industry altogether. The problem that we're having with the liquor liability is that most carriers have looked at the current limits, the current caps and set their standards based on the caps without really having any serious consideration to the potential for piercing those caps because of negligence issues. They're --

REP. FOX: So, in spite -- I'm sorry --

TODD HALLEK: -- so, at this time, they have been looking at that and looking at the potential for the liquor liability claims to go higher and they're fearing that they don't have the controls, currently, that they thought they had in Connecticut or that they were relying on.

They're seeing cases in other states and in Connecticut where the potential is to pierce that limit and they're beginning to adjust their rates already to reflect that.

REP. FOX: So, in spite of the fact that up until this decision was rendered, there were in fact statutory caps in this area. I realize that it's different for malpractice view but we have had caps in spite of that. The availability of insurance and the cost of insurance, the availability has become less and the cost has gone up. Is that an accurate portrayal?

TODD HALLEK: Not based solely on the caps. Not based solely on the liquor liability. Keep in mind --

REP. FOX: Based on what?

TODD HALLEK: Keep in mind what I'm trying to say is it's a difficult market in the insurance industry for restaurants and bar owners and it's been restricting as the market has tightened over the last couple of years. There are several classes of businesses and one of them being restaurants, bar owners, taverns, inns where there's a general restriction in availability of insurance and in increasing of the rates, overall, including the liquor liability rates. Now, the key here is that

the companies are looking for stability.

They're looking for whatever it may be. Whatever the law may end up being that it's something that they can set their rates on, that they have an idea of where the potential is.

It's either based on proving negligence and there's no limit, just as a liability claim would happen, or that there is a particular cap and there's some control on the negligence. Without the controls, they have no idea where to set their rates and without the ability to increase their rates, they're pulling out of the marketplace.

REP. FOX: Let me ask you another question. Mrs. Craig raised an interesting point. I'm assuming her information is accurate and we'll take a look at that but she seemed to suggest that in surrounding states there were no caps on recoveries in that kind of a situation or at least they weren't what we have in this state. New York, I think she mentioned.

I think she mentioned some of the New England states but in spite of that, there doesn't seem to be any problem with having that type of facility having bars throughout their jurisdictions, and would not appear to be any problem with getting insurance in those jurisdictions. Do you have a response to that?

TODD HALLEK: There is insurance available in other states. Now, keep in mind we have to discern whether or not we're talking about a negligence-based claim. If somebody walks into a restaurant and falls down on the stairs and there's nothing wrong with the stairs and there's no negligence and there's no fault on the part of the business owner, there's no negligence and there's no claim against the business owner.

If you have that same condition in other states for liquor liability, then you've got to prove that these facilities are doing the right thing -- or that they're doing the wrong thing, that they're negligent. So, the importance of -- and this

brings up a very important issue, the importance of liquor awareness training, proper response to situations described here where you have an individual who was known to be drunk and known to be a problem.

The kind of training that takes place internally with the management procedures have a real impact with the underwriters. That same issue has had an impact in the state of Connecticut. Right now, what we're seeing when I present a client to an insurance company, even though they have that training today, it makes no difference.

REP. FOX: You lost me a little bit. Tell me why that insurance is available in other jurisdictions --

TODD HALLEK: It doesn't matter if the bar owner or the restaurant did anything wrong --

REP. FOX: What doesn't matter?

TODD HALLEK: -- under the Connecticut statutes, they can still be sued.

REP. FOX: Pick another jurisdiction and I assume that you were --

TODD HALLEK: What I'm trying to say is in other jurisdictions, you have to prove negligence.

REP. FOX: Okay.

TODD HALLEK: So, when they've done the right thing, to control the exposure, they've done what a reasonably prudent man should do.

REP. FOX: So, that in your mind is the distinction?

TODD HALLEK: To a great extent and that's what I'm hearing from the underwriters. Now, I was an underwriter for a long period of time with a number of companies and that's exactly what we would look at.

SEN. COLAPIETRO: I just have a couple of quick questions. One is, let me try to get this

straight. The only recourse that the restaurant owner has is if this doesn't pass or it does pass, is that you are either going to set the rates accordingly, whatever passes, no matter what they say or think or do or whatever happens? You are going to use that to set your rates for the insurance premium. Is that correct?

TODD HALLEK: Keep in mind I'm testifying here as an agent. I place the business with the companies.

SEN. COLAPIETRO: Right, and you're a representative of the insurance companies --

TODD HALLEK: Right. I can tell you is happening to us when we place it with the companies. The rates will be based on the insurance company's ability to measure a specific exposure.

SEN. COLAPIETRO: Whether this passes or not.

TODD HALLEK: Right, because they set rates in every state regardless of the type of law that's there but they look at what the potential is. There are some states that I can't get liquor liability for.

SEN. COLAPIETRO: So, are you saying that your insurance premiums for the restaurants would be cheaper if this law is passed than some of the other states that don't have the limits on it?

TODD HALLEK: Yeah.

SEN. COLAPIETRO: Would that --

TODD HALLEK: Yeah, absolutely.

SEN. COLAPIETRO: -- could you take that as a bad of the record?

TODD HALLEK: Two things. It would be cheaper and it would be available.

SEN. COLAPIETRO: Well, I mean, that's the recourse -- that's the other recourse. I said they had two. One was to pay or get out. That's what you're giving now, providing what passes, but you're going

to set the rates according to whatever passes, no matter what.

TODD HALLEK: I won't set the rates. The insurance company will set the rates and if primary carriers pull out and I have to take J. Timothy's restaurant and place it in the excess market, his liquor liability insurance -- he said it might double. I would say, go up by maybe four, five, six, eight times.

SEN. COLAPIETRO: Might even be the same insurance company that's covered in the other insurance policy, correct?

TODD HALLEK: Right. I didn't understand. No, this would be the excess markets.

SEN. CAPPIELLO: Thank you for your testimony. Would you suggest if it were up to you, besides placing a cap on liability, also making Connecticut a state where you'd have to prove negligence against the restaurant or bar?

TODD HALLEK: I'm not here to testify what I think. I was -- I am here to testify what's going on in the marketplace. I'm trying to give you some idea of what the reaction is. I can say that if there is -- if the Dram Shop laws exist without -- with the continued loophole for negligence, then you have the worst of both worlds for the insurance companies.

SEN. CAPPIELLO: So, would you testify then that besides placing caps, making Connecticut a state where you have to prove negligence, would that make the insurance for the establishments less expensive?

TODD HALLEK: I'm not sure I understand where you're going with that. You're saying it's --

SEN. CAPPIELLO: You said that other states, you have to prove negligence on behalf of the bar or the restaurant.

TODD HALLEK: Right.

SEN. CAPPIELLO: Connecticut, there's no -- it doesn't matter if they're at fault or not. If we were to make Connecticut a state where you have to prove that the bar or the restaurant were at fault, would that --

TODD HALLEK: And had caps.

SEN. CAPPIELLO: -- possibly lower the insurance rates for these establishments?

TODD HALLEK: And have caps at the same time.

SEN. CAPPIELLO: And have caps.

TODD HALLEK: It would not -- nothing that we do today is going to lower the insurance rates.

SEN. CAPPIELLO: Make them rise more stably.

TODD HALLEK: They will make them more stable and it will make the product available in a stable market, yes.

SEN. CAPPIELLO: Do you know off the top of your head, approximately how many states have to, where restaurants or so would have to prove negligence for the restaurant or bar?

TODD HALLEK: It's been my general understanding, and this is -- I didn't research this but for several years it's been my general understanding that there's only a handful of Dram Shop states that are not negligence-based and my understanding is, three.

SEN. CAPPIELLO: And, one of my last questions, what would you think would be more important? To keep rates as low as possible, having caps or making Connecticut a negligence-proof state?

TODD HALLEK: I'm not sure what would be more effective. The issue of not proving negligence in Connecticut is one that is difficult if you don't have adequate caps. So, if you have that without caps, it's the worst condition for the insurance companies.

SEN. CAPPIELLO: And one final question. You had stated that there are some restaurants and bars who are unable to get insurance -- oh, no -- that new establishments would not be able to get insurance now. Is that since the day of the decision by the Supreme Court?

TODD HALLEK: When I say, new, what I mean is a new business or any business that's trying to seek out alternatives for their insurance. I consider that a new client being presented to an insurance company. New to me or to any --

SEN. CAPPIELLO: Has that been since -- like, just about the same exact time of the decision?

TODD HALLEK: Yes, when that decision happened, things changed.

SEN. CAPPIELLO: Correct. Thank you.

SEN. COLAPIETRO: Go ahead. Next, Everett Barber. Any questions -- further questions? Thank you, sir.

TODD HALLEK: Thank you.

SEN. COLAPIETRO: Everett Barber on SB1114 AN ACT CONCERNING SOLAR WORK. Good afternoon.

EVERETT BARBER: Good afternoon, Committee Chairs and fellow members. I'm here to testify in favor of RSB1114. The bill concerns the definition and expansion of the term, solar work, in the Connecticut statutes.

The solar thermal work as now defined is limited to solar domestic water heating. There are a number of other applications of solar energy that have been going on since this was made law in the early 80's and I feel laws should be included.

For example, solar house heating, solar industrial process heating, solar pool heating and air type systems which aren't addressed at all. In addition, there's an omission from the wording from the raised bill which I'd like to draw your attention to and recommend that it be added.

well, well. Okay. First bill. I'm Grace Nome. I represent the Connecticut Food Association, representing 80 percent of the retail business in Connecticut. Speaking against this whole list, here.

REP. METZ: Everything?

GRACE NOME: Everything.

SEN. COLAPIETRO: That's job security for you guys, you know that?

GRACE NOME: Well, as far as minors at 18 or people under 18 selling beer, we've been selling beer since Prohibition and teenagers have been selling in grocery stores since Prohibition.

Are there occasions when they're sold to a minor? Yes. Are they caught? Yes. We have very, very, very stringent rules on our liquor and when it comes through the checkout, it beeps and stops where you're supposed to be asking for a license and your age and the whole business.

There are violations in package stores where they have to be over 18. There are violations to minors in convenience stores where most of them are over 18. I don't think the question is under 18 or over 18. None of us want to sell to minors and if we do sell to minors, they are immediately fired.

And is it -- does it ever happen? Yes, it does. But certainly, it's not because we're not working hard and it has nothing to do, nothing to do with whether they're 17, 18 or 25. It really doesn't. Some of it is just pure laziness. Some of it is stupidity. I mean, sometimes they'll ask for a license and the person will show it and I guess they think, well, since they've shown it, I guess they must be overage or they wouldn't have just shown to me, right? And then they let it through without really looking at it.

So, I mean, there are many, many reasons why that takes place, so I oppose that bill. That would be very hard for us. I mean, now if we were selling

SB 1108
SB 1109
SB 1110
SB 1112
HB 6647

in that area is so keen because you now have four stores on a corner, that they're fighting to get you in, that believe it or not, the price would be low.

So, I mean, when you do a buy one get one free and it's in all the flyers that go out through the whole state, it would be an extraordinarily -- I don't think we could offer it to the consumer if we had to change every single flyer depending upon the area because the price, for instance, I'd like to use an example.

Suppose you had buy one mayonnaise and get the other one, free. That mayonnaise may be a different price in one part of the state than it is from another. So, depending upon the area and where it is. So, that would be sort of an expensive thing for retailers and if this bill passed, I think they would have to do away with the buy one get one free.

Now, if you said they have to prominently display the price in the store, I have absolutely no problem with that but they should be doing that anyway. But, I mean, if you wanted to say that, I think that's fair. I mean, they should be and you should certainly know what you're paying for an item.

So, the Dram Shop will be other people here talking on the Dram Shop bill. We really believe that we have to recodify with they have in. We are going to be trying to sit down with the Trial Attorneys who said they would sit with us to see if we can't work out some kind of language because we do believe people need protection.

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Food stores are not quite in the same position as restaurants and a restaurant person will be speaking here today but we're not quite in the same liability area as restaurants. Package stores or food stores are in a slightly different liability isn't probably quite the same.

HB 2647

Now, we go all the way down to AN ACT CONCERNING SELL BY DATES FOR MEAT, POULTRY OR FISH. This bill

we find that someone is doing that, there should be something in place that says, hey, you can't do that and now we've got you and we're not going to let you do it and we're going to punish you so I don't necessarily think because we haven't caught anyone yet, I don't even know what's been looked at, frankly, that we shouldn't look at putting a date on it especially if the reputable stores, and I do believe you 100 percent, they don't do this.

They don't repackage at a later date, so I don't know why it would be such a concern if they don't repackage with a later date on that. I understand some of your concerns about when you get it in the box and it's being packaged or it might be chopped up and made into something else, but they don't ever put a later date on there. So, I don't know that this would be such a concern for the supermarkets if they're already abiding by this rule.

GRACE NOME: Well, I have to look at the language of what you're saying. I just -- it just seems like there's a law and another law and another law, it gets to a point after awhile, you know? But, I will look at the language.

SEN. COLAPIETRO: All set? Thank you, Grace.

GRACE NOME: Thank you.

SEN. COLAPIETRO: Peter Berden.

PETER BERDON: Good afternoon. My name is Peter Berdon. I am General Counsel to the Wine and Spirits Wholesalers. Representative Fox, Senator Colapietro, members of the Committee. I'm here to testify concerning RSB1112, AN ACT CONCERNING THE DRAM SHOP ACT.

Let me start out -- I'm not going to track my written testimony but I do want to, for the benefit of those of you who are not lawyers on the Committee, talk a little bit about the Dram Shop and a little bit about Craig versus Driscoll which has brought about this legislation.

Let me start out by saying that with respect to Craig versus Driscoll, the facts of that case and the death of Sarah Craig is certainly tragedy. Let me also say, however, that that case is one of the cases in which bad facts in a bad case make for bad law.

The situation in Craig versus Driscoll, although the case hasn't been tried yet, I would submit to you that quite honestly, Sarah Craig probably would be able to recover under the then-current law, prior to the Supreme Court's decision.

Prior law was that a seller of alcoholic beverages that was reckless or wanton in their conduct or their service of alcoholic beverages would be liable and I would submit to you that the facts of Craig versus Driscoll certainly would rise to that level.

Let me talk a little bit briefly about different causes of action. There are basically four different kinds of causes or action in tort. There is an intentional tort. There is a negligent tort. There's wanton and reckless negligence and then there are intentional -- excuse me, then there's strict liability causes of action.

The Dram Shop Act is a strict liability cause of action. No need not prove any fault on the part of the seller of alcoholic products in order to recover under the Dram Shop.

What the Court did in Craig versus Driscoll, however, is it opened up a second avenue of recovery and this is important to remember because somebody brought up the issue of caps and I'm going to talk about caps in a second, but what the Court did in Craig versus Driscoll, is they opened up the second means of recovery and that is a means of recovery in negligence.

Prior case law going back to the 1800's basically said that a negligence cause of action can not be brought against the seller of alcoholic beverages because what we call the proximate cause or the chain of causation, was broken by the consumer's

intentional act of consuming alcoholic beverages and what the Court basically said is, well, as a matter of law we're no longer going to consider the chain of causation to be broken.

We're going to leave it up to the jury to decide where the cause of -- where the chain of causation should end. Should it be at the person who consumed alcoholic beverages or can you reach the seller of alcoholic beverages or perhaps maybe even the manufacturer of alcoholic beverages.

The Dram Shop Act, just by way of history, was enacted in order to soften that common law rule. You -- well actually, probably not you, but your predecessors back in the beginning of this century saw fit to soften that common law rule and afford a source of recovery which is a strict liability source of recovery in nature.

And that's the genesis of the Dram Shop Act. Let me jump back to this issue of caps in medical malpractice which some of you have brought up before. The caps with respect to medical malpractice cases differ with respect to the quote, unquote, caps that have been bandied around in some of the testimony here today with respect to Dram Shop.

The caps in a medical malpractice case concern limiting the amount of damages that can be recovered in a negligence cause of action which is an entirely separate cause of action from the strict liability cause of action that is afforded under the Dram Shop.

One reason, from a public policy standpoint to allow a limit of liability for a strict liability cause of action is that it is a much easier standard to achieve and to prove, in court. One need only to come into court, show that an individual was served who was intoxicated, who subsequently went out and caused injury, in order to recover under the Dram Shop.

No fault need to be proved on behalf of the seller of alcoholic beverages. Under current law, after

Craig versus Driscoll, the situation you now have is you have a bar owner that is exposed to a negligence cause of action. In discussing this issue with some legislators, they've said, well, what about the guy who's sitting on the bar stool, he's drunk out of his mind, falling off the bar stool and the bartender continues to sell?

And my response to that legislator is, that is not negligence. That is reckless and wanton conduct and that person was liable before Craig versus Driscoll was decided, just as they are now liable after Craig versus Driscoll.

What is negligence? Let me give you a couple of examples. Representative Fox, I don't mean to pick on you, but assuming your size and your weight, perhaps as a server I'd have to judge your weight and based upon your weight make a calculation as to the number of drinks that I could serve you during the course of your dinner, before I would have to stop serving you.

Or, perhaps --

SEN. CAPPIELLO: (mike off)

PETER BERDON: About the same as you, Senator Capiello. About a hundred and fifty pounds. Which is about three drinks. Or perhaps I need to bring out my portable breathalyzer and serve you one glass of wine at a time, wait approximately a half an hour for the alcohol to be consumed into your system and then give you a breathalyzer before I give you your next glass of wine.

What this -- what I'm getting at is, the standard of care -- because the Court did not spell this out in Craig versus Driscoll, but what is the appropriate of standard of care with respect to a negligence cause of action under Craig versus Driscoll, is going to be very difficult to determine, particularly when you're dealing with an attenuated chain of causation.

And so what I would submit to you is really the following. And this is just by way of conclusion

that what we should do is we should go back to what the law was prior to Craig versus Driscoll. The bill as it is currently drafted needs some revisions. I think it is too broad and too wide-sweeping in the exclusiveness provision that is set forth in the statute and also I think there needs to be some revision with respect to the limits that are set forth under the Dram Shop Act.

If, however, you're not willing to make the Dram Shop Act the exclusive remedy, then there's no need to have the Dram Shop Act. Do away with it. Repeal it. Somebody can now bring a cause of action, let me prove the seller of alcoholic beverages is at fault.

Don't give them both a home run and then also a chance to get unlimited recovery by a negligence cause of action. Thank you.

SEN. COLAPIETRO: (mike off)

PETER BERDON: If I may, just very quickly, Senator, we feel that the limits set forth and this has to do with HB6646, concerning personal importation, we feel that the limits set forth in the current statute are appropriate.

I want you to be mindful of the fact that there are 1,300 package stores in the state of Connecticut. Approximately 3,500 restaurants in the state of Connecticut and those folks are taxpaying folks. They pay the Excise tax and the sales tax on their alcoholic beverages.

Quite frankly, there is a permitted exception under 12-436 which does allow an individual to import up to four gallons, currently, and they want to raise this limit up to -- I believe, it's eight in the bill, without paying any excise taxes or state sales and use taxes and quite honestly, I think that the limits that are proposed here go beyond limits that are required for an individual consumer.

The limits that are set forth in the statute are entirely appropriate and I also want to just

mention, I think our package stores really do a fine job of distributing alcoholic beverages here in the state.

They offer a wide variety of different products and for somebody who wants to go to California to get that oddball product, they have the ability to do that under current law and that's all I really have to say about the bill. Thank you.

SEN. COLAPIETRO: (mike off)

PETER BERDON: Thank you, Senator. Appreciate it.

SEN. COLAPIETRO: (mike off)

CARROLL HUGHES: I'm Carroll Hughes, Connecticut Package Store Association. Josh also works for Connecticut Package Stores Association, does some of our legal and staff work. We're concerned -- we have a little different situation. Obviously, Grace started a little to it before -- Grace Nome from Food Services Association, because we've all been paying the same level of Dram Act coverage over the years.

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It's a difficult coverage to get. I don't know what the insurance rates now are on it. We figure they're somewhere around three to six dollars a hundred for gross sales. That's what you have to pay for Dram Act.

It's probably, for the average package store that has five, six hundred thousand dollars in sales which is kind of average these days, if you're below that you're really probably making only 70-80 thousand dollars gross in a package store.

At 600 you're maybe making around 110-120. Most of the stores have self-insured over the years with \$50,000 limit. They've actually paid the claim. You're talking about a charge that probably goes anywhere from \$20,000 to \$30,000 to buy Dram Act insurance.

Once you buy the second year, you know it's like self-insuring at that particular point, so -- and

the stores are all owner-operated. They're in the owners names. They're not a shell corporation like some bar-bars are, you know? Where they're just a drinking place, which we all pay for the finer restaurants, end up subsidizing them. We do, and so forth. So, we're very concerned about -- that's what this is all about.

That's what that court case was about. That's what every court case has been about. The drinking places where they drink. It's primarily alcohol related. Once in awhile, somebody else gets involved but we all pay for that.

We've been self-insuring, to my knowledge, all the time I've ever represented them which has been, right now, about 26 years. They essentially -- some have other forms of insurance. We're concerned -- and again, this has been at the same time where you didn't even have to prove negligence.

They could have had a receipt in the car, the guy goes drinking in a bar. He may have had three cans of beer that he bought that night somewhere at a package store. Then he goes out and he's drinking all night at a on-premise facility and drinking all night and then they didn't have to prove it.

They didn't know where he was and they could prove he was drunk and he hit someone and they find the receipt from a package store in the car. They'd actually affixed the package store for the up to \$50,000. They didn't have to prove anything. Just go there and present the bill.

That's basically what's happening. The insurance -- the people that are insured, they go to the insurance company and I'm told by the insurance companies and insurance agents and everybody, they just pay the bill.

You give the claim, you say you were in an accident, I have the receipt here, it says the package store. There's \$20,000 bill for somebody's car that they hit. They just pay it. That's -- there's no question about it. Don't have to prove

anything. There's not negligence or whatever.

So, I think what Peter Berdon was talking about is somehow getting -- if you're leaving the caps here, if you're doing the Dram Act, let's set up some kind of a standard whereby you have to prove negligence even on the Dram Act and just feel a little bit with them, I don't think \$100,000 puts it really out of reach for package stores. I'd just as soon keep the same limit.

You know, if there's gross negligence here, if somebody is in our stores and we've started to review this whole thing -- Josh has a paper he's been putting together for teaching package stores what to do and you know, as somebody said, we've have to be serving drinks and drinking in the package store to get under gross negligence or somebody is in a tasting in a package store and they're there for the entire day and they've tasted almost everything in the store, or if they come back and they come in for like three hours or in three hours they come in, three times and buy a pint of liquor and they leave and we keep giving them the pint and they put it on their charge card.

I mean, things like that could happen but other than that, I mean, I'm not the same exposure but yet, I'm treated almost like the same exposure here with the courts, today, to a certain extent. So, you may have to refine this in some fashion. I really wanted to present our issue to it because you can't put -- and all do -- our great -- I haven't made plans.

I know everybody here is going to sit down with the Trial Lawyers. I haven't made such plans. Maybe I can get in on this at some point but I want to give you all the firm impression here that we are very different from what everybody's looking at, what people always testify against, all the court cases that take place.

We're not the same entity, here. We have owner-operators. We do server training. Very few part-time employees. The owner is on the premise all

the time and we only sell alcoholic beverages. We don't sell food. We don't sell groceries. We don't sell cigars and never will. Just to let you know that and so, we're very concerned about the whole issue and we're probably, most of us are probably going to self-insure and even if you leave it the way it is, they're still going to come to us with claims but there's less chance of that being done even if you put some comparative standard here for which they have to access that self-insurance that we're providing or if we do get insurance that insurance covers.

So, we're concerned about the issue but it's probably something that you haven't heard exactly as to the way we look at this issue and again, I don't want to go up to \$100,000 just to go up to \$100,000 because you know what? We'll be paying the insurance to help subsidize the number of huge sellers that are out there.

We're looked at differently and in a few years -- I did sit down with a trial lawyers and I think a couple of you were here. Yes, I know you were here and we had two bills that came out. At that point, it was out of Judiciary Committee and it was on-premise and it was an off-standard -- there was an off-premise standard and we left the Dram Act at the same level for the off-premise, increased the one for the on-premise.

So, there's lots of tinkering you can do here but we've a very different situation and we don't want to pay any more money out for what we're not responsible for in most situations. So, thank you for your time. We can answer any questions you might have.

SEN. COLAPIETRO: (mike off)

REP. GREENE: (mike off)

CARROLL HUGHES: Okay, yes. Not his brother. Tom.
Okay. Okay, thank you.

SEN. COLAPIETRO: (mike off)

000658

TESTIMONY

**In OPPOSITION of Raised Bill 1112
AN ACT CONCERNING THE DRAM SHOP ACT**

**Submitted to the General Law Committee
Public Hearing
March 20, 2003 – 2:00 PM**

**By State Senator Edith Prague
19th Senatorial**

I am here to oppose Bill 1112. For years there has been an effort to increase the liability of bar owners and the industry has always been successful in killing the legislation.

Finally, in January of this year (citing the horrors that result from drinking and driving), the Supreme Court ruled that bar owners may be held liable with no limit on the size of the judgment against them if they negligently serve intoxicated patrons who injure others.

In 1978 my 21 year-old niece was killed by a drunk driver who had been drinking at a bar on Route 32 in Windham. Last year there were 16,653 people in this country who died in alcohol-related accidents including 158 here in Connecticut.

This legislation is unbelievably damaging to the effort to stop drunk drivers. If there is a concern in this committee to protect the people of this state, then this bill should die.

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TESTIMONY OF BOB ADELMAN REGARDING
RAISED BILL NO. 1112 BEFORE THE GENERAL LAW COMMITTEE ON
MARCH 20, 2003

My name is Bob Adelman and I am speaking on behalf of the Connecticut Trial Lawyers Association. I am here today to speak against Raised Bill No. 1112, An Act Concerning the Dram Shop Act. The Connecticut Trial Lawyers Association opposes this Bill because it will cost lives and it severely limits the rights of people severely injured or killed by intoxicated drivers.

Raised Bill No. 1112 totally preempts the field of liability for the sellers of alcohol and limits their liability to \$50,000 under any circumstances. Since 1980 sellers of alcohol have been held liable for recklessly serving alcohol to intoxicated people. Kowal v. Hofher, 181 Conn. 355 (1980). This Bill would eliminate the liability of alcohol sellers for recklessly serving intoxicated persons.

Since 1988, Connecticut courts have held even a social host liable for negligently providing alcohol to a minor. Eli v. Murphy, 207 Conn. 88 (1988). In 1996 this holding was extended to commercial sellers of alcohol. Bohan v. Last, 236 Conn. 670 (1996). This Bill would preclude the holding of a seller of alcohol fully liable for recklessly or negligently serving a minor, affording greater protection than that afforded to social hosts.

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The impetus behind this Bill is to protect the sellers of alcohol who in many cases run small businesses which are an integral part of our communities. This goal is understandable.

However, the benefit of this goal must be weighed against its costs.

First, insulating the sellers of alcohol from liability for the negligent or reckless serving of alcohol to intoxicated persons and minors will cost many lives. It cannot seriously be questioned that sellers of alcohol who face liability for negligently and recklessly serving alcohol to intoxicated persons and minors will be more vigilant in refusing to serve these people.

Second, this Bill will deprive those people who are most seriously injured and the families of those killed by intoxicated drivers from any meaningful recovery against negligent or even reckless sellers of alcohol.

It is the position of the Connecticut Trial Lawyers Association that these costs, the injuries and deaths which will be caused by insulating alcohol sellers for negligent and reckless conduct; and denying the families of those seriously injured and killed of fair compensation, outweigh the benefits.

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WINE AND SPIRITS WHOLESALERS OF CONNECTICUT, INC.

GEORGE J. MONTANO
EXECUTIVE DIRECTOR
PRESIDENT

PETER A. BERDON, ESQ.
GENERAL COUNSEL

TESTIMONY OF
WINE AND SPIRITS WHOLESALERS OF CONNECTICUT
CONCERNING

Raised Bill 1120, An Act Concerning the Dram Shop Act; and Raised Bill 6646, An Act
Concerning The Limits on Importation on Alcoholic Beverages for Personal Consumption

The Wine & Spirits Wholesalers of Connecticut, Inc. is a trade association of licensed Connecticut wine and spirits wholesalers within the state of Connecticut.

An Act Concerning Dram Shop, Raised Bill 1112. The Wine & Spirits Wholesalers support raised bill 1112 which amends the Dram Shop Act by: (i) increasing the limits of liability from \$20,000 to \$50,000 per person and amount of \$50,000 to \$100,000 per occurrence; and (ii) clarifies that the Dram Shop Act is the exclusive remedy against the seller of alcoholic beverages. Prior to the recent Connecticut Supreme Court decision in the matter of Craig v. Driscoll, (2003) 262 Conn. 312 (2003) the court's interpreted C.G.S. § 30-102 (The "Dram Shop Act") as the exclusive remedy against the seller of alcoholic beverages, with some limited exceptions, for one to pursue a seller of alcoholic beverages. The common law rule was, that as a matter of law, a claimant could not establish proximate cause against the seller of alcoholic beverage for service of alcoholic beverages because the intentional and intervening act of the individual consuming the alcoholic beverages served to sever the chain of proximate causation. The Dram Shop Act was enacted to soften this common law rule and afford a source of recovery without proof of fault.

As stated by our Connecticut Supreme Court:

"The average reason given for the rule was that the proximate cause of intoxication was not the furnishing of the liquor, but the consumption of it by the purchaser or donee. The rule is based on the obvious fact that one could not become intoxicated by reason of liquor furnished to them if he did not drink it."

Dolan v. Morell, 154 Conn. 432, 436-437 (1967). The Connecticut Supreme Court, however, in Craig v. Driscoll abandoned this long standing legal principle of common law. However, as discussed by Attorney DeConti, in the attached paper, when examining the "top ten" law jurisdictions, the trend in law and public policy in other states is in the opposite direction of that recently taken by the Connecticut Supreme Court, to one of limiting liability rather than expanding liability. Accordingly, the Wine & Spirits Wholesalers believe that it is appropriate that the legislature makes its intention clear to the Connecticut Supreme Court that the Dram Shop Act as previously interpreted is intended to be the exclusive remedy for injured persons against sales of alcoholic liquor. One must remember that, a person injured by one who has consumed alcoholic beverages, has other causes of action against that person, be it in

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negligence or otherwise. One should not, by expanding liability to sellers, relieve the individual consumer from liability. The Wine & Spirits Wholesalers, however, acknowledge that the statutory limits set forth in C.G.S. § 30-102 are antiquated and should be increased. In considering increasing the limits set forth in C.G.S. § 30-102 the legislature must recognize that § 30-102 does not provide the sole source of recovery for an injured person. Other available causes of action for an injured person may be brought directly against the tortfeasor. Since most of the cases in which serious injuries are involved concerning automobile accidents, certainly the tortfeasor automobile liability policy is available as an additional source as recovery to an injured party. The Wine & Spirits Wholesalers believe that this places the appropriate burden of responsibility on the individual who is consuming the alcoholic beverages to ensure that they drink within their limits.

An Act Increasing the Limits of Importation of Alcoholic Beverages For Personal Consumption, Raised Bill 6646. The Wine & Spirits Wholesalers opposes Raised Bill 6646 because the Wine & Spirits Wholesalers believe that the provisions that are currently provided for personal importation in C.G.S. § 12-436 are appropriate. Under sub-section (2) an individual can import five gallons every sixty days which is equivalent to approximately two cases of wine. This provision is for quantities of alcohol that are shipped to an individual. There is an additional exception provided in C.G.S. § 12-436(3) which provides that an individual can, in any single trip, personally bring into the state 4 gallons (approximately 1½ cases of wine). Alcoholic beverages brought into the state pursuant to sub-section (3) are not subject to state taxation. This provision is unlimited to the number of trips or total gallonage in any given year. The Wine & Spirits Wholesalers believe that these limits are appropriate for individual consumers of alcoholic beverages. There are 1,300 package stores within the state of Connecticut which buy and sell alcoholic beverages and pay the appropriate Connecticut taxes on those alcoholic beverages. The current system ensures that the excise taxes and sales & use taxes due to the state of Connecticut are collected. One should remember that 23% of a typical Connecticut wine & spirits wholesaler's gross profit goes to pay state excise taxes. Wouldn't it be great if they could avoid that expense, like the individual who desires to import alcoholic beverages into the state under C.G.S. § 12-436. Current law provides appropriate relief to import limited amounts of alcoholic beverages which might not be available within this state. Expanding this exception, however, will merely erode the state's regulation of alcoholic beverages and its tax collection system.

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SB 1112

EMERGING TRENDS IN DRAM SHOP
LIABILITY LAW

Hospitality Law Conference
January 24, 2003
Houston, Texas

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I. INTRODUCTION: WHAT IS DRAM SHOP LIABILITY?

The phrase "dram shop" originally referred to bars, saloons, and any other establishments where alcoholic beverages were sold to the public. Today, statutes and case law which refer to "dram shop liability" refer to causes of action which arise after a tortfeasor has consumed alcoholic beverages at a much wider range of venues, including bars and restaurants, but also including private homes. This distinction has given rise to two types of dram shop liability under dram shop laws: commercial host liability and social host liability. All fifty states have different laws regarding liability depending on whether the server was a commercial or social host.

This article focuses on commercial host liability only. The statutes and cases analyzed in this article govern situations where someone, either the person who consumed alcoholic beverages, or a third party, is injured in an accident involving alcohol. The common law rule in most United States jurisdictions, prior to the enactment of any statutes or the hearing of any cases on the subject, was that the consumption of alcohol, rather than the furnishing of it, was the proximate cause of alcohol-related accidents.

According to the Twenty-first Amendment to the United States Constitution, each individual state may enact its own laws regarding the sale and distribution of alcoholic beverages. As this article demonstrates, those laws vary widely in the field of dram shop law. Some states have abided by the common law rule, either by express legislation, or by case law. Many, however, in response to a great number of drunken driving injuries and fatalities, have enacted dram shop statutes that impose liability on different classes of persons upon the occurrence of certain conditions.

This article is intended to be an introduction to some of the issues commonly involved in dram shop liability cases against commercial hosts. The article is divided into two sections: (1) a discussion of dram shop statutes and cases in the "top ten" jurisdictions, and (2) a compliance guide for retailers. The article does not discuss social host liability except as it interrelates with commercial host liability in some jurisdictions.

II. THE TOP TEN

This portion of the article discusses dram shop statutes and cases in the "top ten" states: California, Colorado, Florida, Illinois, Michigan, Nevada, New York, Ohio, Pennsylvania, and Texas. The "top ten" were selected on the criteria of geographic diversity, population density, number of retail outlets, and interesting laws. This is certainly not to say that laws in states not included here are

uninteresting. However, to give proper attention to all fifty states would be an endeavor that would far exceed the time and space limitations of this conference presentation. Even for the "top ten", there are numerous cases not cited here worthy of attention. The discussion for each state below is not meant to be exhaustive, but rather to give the reader an overview of each state's dram shop laws and to highlight trends.

A. CALIFORNIA

Following significant legislative amendments in 1978, California now has three statutes relating to dram shop liability, which provide nearly complete immunity for commercial hosts. The three statutes which govern dram shop liability in California are Cal. Bus. & Prof. Code § 25602, Cal. Bus. & Prof. Code § 25602.1, and Cal. Civ. Code § 1714.

Section 25602 provides blanket immunity to commercial hosts who sell or furnish alcohol to drunken persons. Both §§ 25602(b) and 1714(b) state the legislature's intent to abrogate holdings in three cases which previously had conferred liability on commercial vendors. Prior to the 1978 amendments, these decisions were the seminal cases in dram shop law in California.¹

Selling or furnishing alcohol to an obviously intoxicated person is a misdemeanor in California; see § 25602(a); however § 25602(b) does not create any civil liability based on this criminal offense.

No person who sells, furnishes, gives or causes to be sold, furnished or given away any alcoholic beverage pursuant to subdivision A of this section shall be civilly liable to any injured person or the estate of such person for injuries inflicted on that person as a result of intoxication by the consumer of such alcoholic beverage.

Based on this section, California does not recognize civil liability for commercial hosts for injuries caused to third-parties due to the consumption of alcohol.

The only exception to dram shop immunity in California is in § 25602.1. That section imposes liability upon anyone who sells or causes to be sold any alcoholic beverage to a obviously intoxicated minor. A commercial host may be liable where the sale of the beverage to the minor is a proximate cause of a personal injury or death to that minor. The statute does not explicitly provide for the situation where

¹ See *Coulter v. Superior Court of San Mateo County*, 21 Cal. 3d 144; 577 P.2d 669; 145 Cal. Rptr. 534 (1978); *Bernhard v. Harrah's Club*, 16 Cal. 3d 313; 546 P.2d 719; 128 Cal. Rptr. 215 (1976); *Vesely v. Sager*, 5 Cal. 3d 153; 486 P.2d 151; 95 Cal. Rptr. 623 (1971).

an intoxicated minor injures a third person. The statute also leaves ambiguous the question of whether there is liability for a commercial host to serve alcohol to a sober minor.

California case law explains that wide immunity for commercial hosts is based on the common law principle that injuries due to alcohol are due to the consumption rather than the provision of alcohol. See *Cole v. Rush*, 289 P.2d 450 (Cal. 1955); *Cardinal v. Santee Pita, Inc.*, *supra*, *Cantor v. Anderson*, 126 Cal. App. 3d 124, 178 Cal. Rptr. 540 (1981).

Despite the California legislature's efforts to create only one situation where a commercial host may be liable--providing alcohol to an intoxicated minor--the exception has been the subject of much litigation. First party actions are available to obviously intoxicated minors for personal injury or death sustained by the minor him or herself. In *Chalup v. Aspen Mine Co.*, 175 Cal. App. 3d 973; 221 Cal. Rptr. 97 (1985), the Fourth Appellate District of California held that a minor can bring a claim for injury sustained as a first-party action.

Note, however, that there is no liability for an accident which follows furnishing alcohol to a sober minor. See *Strang v. Cabrol*, 37 Cal. 3d 720; 691 P.2d 1013; 209 Cal. Rptr. 347 (1984). In *Strang*, the defendant licensee sold alcoholic beverages to a minor who was not obviously intoxicated. The minor provided the alcohol to a second minor, who became intoxicated and was driving the car that the Plaintiff was riding in when she sustained injury as a result of the second minor's negligent driving while intoxicated. The court held that although it was foreseeable that one minor would provide alcoholic beverages to another, this foreseeability was not sufficient to confer liability on the licensee when the California legislature specifically provided for liability only in cases where intoxicated minors were served. *Id.* at 728.

California courts have been unwilling to create any further common law exceptions to the statutory immunity contained in the dram shop law. In *Cardinal v. Santee Pita, Inc.*, 234 Cal. App. 3d 1676, 286 Cal. Rptr. 275 (Cal. App. 4th 1991) a California appellate court considered whether a bar could be liable for severe injuries suffered by a disabled and mentally incompetent man who was continually served by the bar even though he was in an obviously intoxicated condition. The Court held that the incompetent man's claim failed as a matter of law because the legislature expressly rejected even limited liability for commercial sellers of alcohol to anyone other than intoxicated minors. *Id.* at 279.

B. COLORADO

Colorado has a dram shop law which is embodied in two statutes, COLO. REV. STAT. § 12-47-801 and COLO. REV. STAT. § 13-21-103. Section 12-47-801 generally

prohibits dram shop liability. Under the statute, there may be no common law causes of action, and statutory causes of action are allowed only in very specific situations.² Commercial licensees are not liable unless they willfully and knowingly sell alcoholic beverages to a minor or a visibly intoxicated person. The statute's other notable provisions are that there is a statute of limitations of one year and no first party actions are available, including actions by estates, legal guardians or dependents.

Colorado's other relevant statute, "Damages for Selling Liquor to Drunkard" codified at § 13-21-103, is not often cited. It provides that any dependent, including a spouse, child, parent, guardian, employer or any other person injured in property or means of support by an intoxicated person who is a habitual drunkard, has a cause of action against any person who provided the habitual drunkard with alcohol. A cause of action shall only lie if written notice has been provided such that the person, his agents or employees, are on notice to sell or give away any intoxicating liquors to the drunkard.

Colorado's statutes have faced several constitutional challenges. In *Sigman v. Seafood Ltd. Partnership One*, supra, the plaintiff claimed that Colorado's dram shop law was unconstitutional because it was vague and violated due process. Specifically the plaintiff referred to the statutory language "[I]n certain cases the consumption of alcoholic beverages rather the sale, service, or provision thereof is the proximate cause of injuries or damages inflicted upon another by an intoxicated person." (Emphasis added.) The plaintiffs argued that the phrase "certain cases" is vague because it fails to specify in which situations the consumption of alcoholic beverages, rather than the sale, is the proximate cause of the injury sustained. The Supreme Court of Colorado did not agree, and found that the statute makes clear the exceptions to the general rule. The court focused on the "willfully and knowingly" language in the sections discussing serving alcohol to a minor or to a patron who is intoxicated. The "certain cases" are the ones where it is the serving or provision of the alcohol rather than the consumption which is the proximate cause of the injury. Based on this distinction, the court found that the law was not unconstitutionally vague. *Id.* at 531-532.

The dram shop law's statute of limitations was challenged on constitutional grounds in *Estate of Allen T. Stevenson v. The Hollywood Bar & Cafe, Inc.*, 832 P.2d 718 (Colo. 1992). In this case, the plaintiffs missed the statute of limitations for

² In *Sigman v. Seafood Limited Partnership One*, 817 P.2d 527 (Colo. 1991), the heirs of the decedent brought a cause of action against a restaurant. They alleged various common law claims, and did not allege any statutory claims. The restaurant claimed that Colorado's dram shop law barred the action because the plaintiffs were first parties. The Supreme Court of Colorado agreed, and held that dram shop liability is still strictly a creature of statute in Colorado. *Id.* at 530. The crux of plaintiff's claim in this case was wrongful death. Because Colorado forbids first-party actions, wrongful death claims based on the dram shop law are not successful.

bringing a dram shop action by one year. They filed a claim under the dram shop statute but asserted that the statute of limitations violated the open courts clause of the Colorado Constitution as well as the Colorado Constitution's clauses prohibiting special legislation and the constitutional guarantee of equal protection of the laws. The court did not uphold any of these claims.

The court rejected the plaintiff's claim that the statute violates the access to courts clause because the Colorado Constitution provides that if a right accrues under the law, then there is a guaranteed judicial forum to effect that right. The court found that statutes of limitations do not bar the filing of claims but instead establish time limitations within which claims may be filed. *Id.* at 721. The court rejected the plaintiff's claim that the statute violates the constitution's guarantee against the irrevocable grant of special privileges and immunities. The court found that the statutes of limitation do not grant liquor licensees any perpetual or exclusive privilege but merely condition the filing of claims. *Id.* at 722. As for the plaintiff's equal protection claim, the court found that there was a rational relationship between the legitimate government interest of regulating the provision, sale and consumption of alcoholic beverages and the distinctions made between negligent liquor licensees and other tortfeasors and between persons negligently injured by the conduct of liquor licensees and people negligently injured by other tortfeasors. *Id.* at 723.

C. FLORIDA

Florida has one statute that limits the liability of commercial hosts who sell alcohol to people of lawful drinking age. Florida Statute § 768.125 provides for liability for commercial hosts under two limited exceptions.

A person who sells or furnishes alcoholic beverages to a person of lawful drinking age shall not thereby become liable for injury or damage caused by or resulting from the intoxication of such person, except that a person who willfully and unlawfully sells or furnishes alcoholic beverages to a person who is not of lawful drinking age or who knowingly serves a person habitually addicted to the use of any or all alcoholic beverages may become liable for injury or damage caused by or resulting from the intoxication of such minor or person.

In *Ellis v. N.G.N. of Tampa, Inc.*, 586 So. 2d 1042 (Fla. 1991), the Supreme Court of Florida held that a plaintiff need only show that a vendor knowingly sold alcoholic beverages to a person who is a habitual drunkard. *Id.* at 1048. The plaintiff need not show that there was any kind of written notice on file that the consumer was indeed a habitual drunkard. *Id.* Cases following *Ellis* suggest that a plaintiff invoking this part of the statute may need to present evidence that the intoxicated person was a "regular" at the defendant licensee's establishment, was

known by the staff, or has received alcoholism counseling. *See, e.g., Fleuridor v. Surf Café*, 775 So. 2d 411 (Fla. 4th DCA 2001).

When the intoxicated tortfeasor is a minor, a plaintiff must show both that the licensee violated § 768.125 by knowingly serving a minor, and § 562.11, the statute that criminalizes serving alcohol to a minor. *Ellis, supra* at 1047. The distinction made in the *Ellis* case requires a case involving a minor to be based on negligence per se, whereas a case involving a habitual drunkard may be based solely on common law negligence. The plaintiff's action will fail unless he or she can show that the sale of the alcoholic beverage to a minor was willful. *See Armstrong v. Munford, Inc.*, 451 So. 2d 480 (Fla. 1984).

Section 768.125 has also been the basis for wrongful death actions relating both to habitual drunkards and to minors. In *Fritsch v. Rocky Bayon Country Club, Inc.*, 799 So. 2d 433 (Fla. 1st DCA 2001), the court considered a wrongful death action filed by a plaintiff whose father was killed by an alleged habitual drunkard. The court held that by serving the intoxicated party too much alcohol, the licensee created a "zone of danger" in which some injury could be anticipated. *Id.* at 433. It was not necessary for the plaintiff to prove that the exact kind of injury suffered was foreseeable for liability to attach under § 768.125, only that injury would result. *Id.*

The court in *Sipes v. Albertson's, Inc.*, 728 So. 2d 1243 (Fla. 5th DCA 1999), addressed a similar foreseeability issue in a wrongful death case that arose from service to a minor. In *Sipes*, the plaintiff alleged that her minor son purchased alcohol at the defendant's grocery store, and later became involved in an altercation that led to his being fatally shot. The court held that it was foreseeable that the sale of alcohol to a minor could result in the minor becoming dangerously aggressive toward another person who could injure him in self-defense. *Id.* at 1245. The court stated that this type of wrongful death injury is the type of injury the dram shop statute is intended to prevent. *Id.*

D. ILLINOIS

Illinois' dram shop law, codified at 235 ILCS 5/6-21, imposes commercial host liability when the person or property of a third party is damaged by an intoxicated person. First party actions are not available.³ Any action under the dram shop

³ By extension, a driver sued in negligence by an intoxicated person who was hit while wandering in the road may not obtain contribution from the dram shop based on Illinois' dram shop and contribution statutes. *See Jodelis v. Harris*, 118 Ill. 2d 482, 517 N.E. 2d 1055, 115 Ill. Dec. 369 (Ill. 1987).

statute must be brought within one year of the date the cause of action occurred. *See Morales v. Fail Safe, Inc.*, 724 N.E. 2d 174 (Ill. App. Ct. 1999)⁴

Unlike dram shop legislation in many other states, the Illinois statute creates expanded jurisdiction on its face. Any person who is injured within the state's borders may avail himself of the law, regardless of whether the intoxicated person became intoxicated within the state of Illinois, and consequently, whether the licensee that served the intoxicated person is licensed by Illinois or any other state. Case law confirms that the statute applies to licensees located outside of Illinois if it is found that their action was the proximate cause of a tort which occurred in Illinois. *See Dunaway v. Fellous*, 155 Ill. 2d 93, 610 N.E.2d 1245, 183 Ill. Dec. 1 (Ill. 1993).

The dram shop law has very specific provisions regarding damages, particularly those which relate to actions for loss of society or means of support. Actions may lie for either loss of society or means of support but not both. 235 ILCS 5/6-21(a). The damages to be awarded for these claims are jury questions; however, the jury is not to be made aware of the damage caps provided by the statute in awarding damages. The statute establishes separate damages caps for injuries resulting from injury, death and property damage and those resulting from loss of society or support. For actions arising after July 1, 1998, for damages for injury, death, or property damage, damages are not to exceed \$45,000 for each person incurring damages. Damages arising from loss of society or support for actions arising after July 1, 1998 are not to exceed \$55,000. Beginning in 1999, these liability limits will be reevaluated as of January 20 of each year, and will be proportionately increased in accordance with the Consumer Price Index. Once the figures are established by the State Comptroller, they are provided to the chief judge of each judicial circuit. Despite these limits on recovery, Illinois allows dram shop plaintiffs to recover from collateral sources. In *Muranyi v. Frisch - Auf*, 719 N.E. 2d 366 (Ill. App. Ct. 1999) the plaintiff wife sued the tavern where her husband had been drinking after he was involved in an automobile accident as a result of his intoxication. The wife sought recovery for the husband's medical expenses even though the husband's insurance covered these expenses. The court held that the application of the collateral source rule to the dram shop law was not a double recovery, and that the tavern could not deduct the insurance proceeds the wife received as a set-off on its liability. *Id.* at 372.

The dram shop act is the exclusive remedy for dram shop liability. *See Charles v. Siegfried*, 651 N.E. 2d 154 (Ill. 1995). The statute imposes liability only upon those licensees who "cause" the injury. *See Caruso v. Kazense*, 20 Ill App. 3d 695, 313 N.E.2d 689, 691 (Ill. Ct. App. 1974). The licensee may assert the defenses

⁴ The *Morales* court held that the one year requirement was not merely a statute of limitations, but a condition precedent to recovery under the dram shop act. *Id.* at 176.

of provocation; see *Gilman v. Kessler*, 192 Ill. App. 3d 630, 548 N.E.2d 1371, 139 Ill. Dec. 657 (Ill. Ct. App. 1989); and complicity; see *Walter v. Carriage House Hotels*, 164 Ill. 2d 80, 646 N.E.2d 599, 207 Ill. Dec. 33 (Ill. 1995). In order to avail itself of the complicity defense, a licensee must plead and prove by a preponderance of the evidence that the plaintiff's conduct actively contributed to or procured the inebriated person's intoxication. See *Graham v. United Nat'l Investors, Inc.*, 745 N.E. 2d 1287 (Ill. App. Ct. 2001). This is not to be confused with the defense of contributory negligence, which is also available to Illinois licensees. Contributory negligence relates to the plaintiff's role in causing his own injury, whereas complicity relates to the plaintiff's roles in causing the inebriated person's intoxication. *Graham, supra*, at 1291.

E. MICHIGAN

Michigan's dram shop statute, MICH. COMP. LAWS § 436.1801, was enacted in 1998 when the Michigan legislature revised the liquor control act and enacted the Michigan Liquor Control Code of 1998. The statute is similar to its predecessor, § 436.22, and many cases relying on the now repealed provisions are still good law.

The "dram shop act" (§ 436.1801) is comprehensive. Those injured by an intoxicated minor or obviously intoxicated individual may bring suit for personal injury or property damage against a retail licensee who unlawfully furnished alcohol to a minor or visibly intoxicated person and whose conduct was the proximate cause of the injury. § 436.1801(3). The statute of limitations for bringing such actions is two years, and notice must be given to the defendants within 120 days of entering the attorney client relationship. The right of action survives the death of the plaintiff. § 436.1801(4). The statute contains a named and retained provision that requires the minor or intoxicated person to be a named defendant until the action is concluded by trial or settlement;⁵ in addition, the licensee has a right of indemnification against this person. § 436.1801(5)(6). A licensee sued under this statute may present proof of age verification as a defense for serving to a minor. § 436.1801(7). Furthermore, the statute contains a rebuttable presumption that any licensee other than the last licensee to serve the intoxicated person has not unlawfully furnished alcohol in violation of the statute; § 436.1801(8). Finally, the statute is the exclusive remedy against licensees for money damages arising out of the selling, giving, or furnishing of alcoholic liquor. § 436.1801(10).

⁵ The Supreme Court of Michigan considered the policy behind the named and retained provision in *Green v. Wilson*, 565 N.W. 2d 813 (Mich. 1997). In *Green*, the plaintiffs could not obtain personal jurisdiction over the intoxicated driver. The court concluded that the plaintiffs' failure to retain the driver was a jurisdictional defect that they could not avoid, and that their action should not be frustrated because of it. *Id.* at 814. Although the general purpose of the named and retained provision is to prevent collusion between the dram shop and the person who causes the accident; *id.* at 818; the *Green* court concluded that the possibility of collusion was remote, and that dismissing the plaintiffs' action would be too harsh in light of the fact that the dram shop law would be their only remedy. *Id.* at 819.

The former dram shop statute did not address clearly whether first party actions are available; however, the courts clarified this issue in *Jackson v. PKM Corp.*, 422 N.W.2d 657 (Mich. 1988) where the court held that an intoxicated person could not bring a first party action pursuant to the statute. The 1998 legislation clarified this further by prohibiting first party actions directly. Furthermore, the statute also prohibits causes of action for loss of financial support, services, gifts, parental training, guidance, love, society, or companionship of a visibly intoxicated person. § 436.1801(9).

Despite the fact that Michigan's dram shop law is quite detailed and specific, plaintiffs have recently initiated litigation that has tested the statute's boundaries. In *Madejski v. Kotmar, Ltd.*, 633 N.W. 2d 429 (Mich. Ct. App. 2001), the Court of Appeals analyzed the statute's exclusive remedy provision. The plaintiff's nineteen year old daughter was employed by the defendant bar as an exotic dancer. The record revealed that the bar had a practice of allowing customers to furnish underage dancers with alcoholic beverages in order to diminish the dancers' inhibitions. After work one evening, the daughter was killed when her car struck a tree. An autopsy indicated that the daughter's blood alcohol level was more than twice the legal limit. *Id.* at 431.

The plaintiff filed a complaint for negligence, gross negligence, inherently dangerous work activity, breach of contract, and, in the alternative, dram shop liability. The court considered whether the plaintiff's causes of action were precluded by the "exclusive remedy" clause in the statute. The court held that a claim cannot be barred merely because it involves alcohol. If the claim asserts a breach of a duty arising from the common law, the claim will not be barred because the facts involve alcohol. *Id.* at 433. The dram shop statute does not confer on liquor retailers additional protections not provided to others. *Id.* at 434. The court further held that the defendant was not absolved of a breach of duty as an employer, as a retainer of an independent contractor, or as a premises owner, and remanded the case to the trial court for consideration of the plaintiff's claims. *Id.*

The indemnification provision of Michigan's dram shop law has also been the subject of litigation. Under the statute, licensees may "have the right to full indemnification from the alleged visibly intoxicated person for all damages awarded against the licensee." § 436.1801(6). Courts have interpreted the phrase "damages awarded" to mean the damages that result from a judgment against the licensee determining its liability. See, e.g., *Johnson v. Heite*, 624 N.W. 2d 738 (Mich. Ct. App. 2000); *Miller v. Hoover Corners, Inc.*, 584 N.W. 2d 385 (Mich. Ct. App. 1998). *Johnson, supra*, was a case involving an automobile collision where the estates of the two persons killed sued the driver in negligence and the licensee under the dram shop act. The licensee settled its claim with the plaintiff at a pre-trial mediation, and then brought an indemnity claim against the driver. The trial court granted the driver's motion for summary judgment, because there was no judgment

of liability against the licensee, and therefore no "damages awarded." In what the appellate court acknowledged was a strange result, it reluctantly affirmed the trial court's ruling, and remanded for further proceedings at the request of the licensee, which wanted the opportunity to establish its liability. *Id.* at 745. The court noted that in cases such as this, the statute discourages licensees from settling dram shop cases, because doing so will prohibit them from bringing an indemnity action against the intoxicated person. *Id.* at 744.

F. NEVADA

Nevada enacted its dram shop immunity statute, Nev. STAT. § 41.1305, in 1995. The statute provides for complete immunity from liability for any person who serves or sells alcoholic beverages. The statute specifically states that the service of alcoholic beverages is not the basis for a liability as the proximate cause of injuries inflicted by an intoxicated person upon himself or another person. The statute also specifically states that the violation of any statute, regulation or ordinance that prohibits selling beverages to a minor intoxicated person is not negligence per se in Nevada. According to this section, the server or seller cannot be liable for injuries inflicted by the intoxicated person upon himself or another person. There are no cases in Nevada which cite the 1995 statute. However, the statute is consistent with Nevada's prior case law which holds that it is the consumption, not the furnishing of the alcoholic beverage which is the proximate cause of alcohol related injuries. *See generally Synder v. Viani*, 110 Nev. 1339, 885 P.2d 610 (Nev. 1994); *Hinegardner v. Marcor Resorts, LPV*, 108 Nev. 1091, 844 P.2d 800 (Nev. 1992); *Hamm v. Carson City Nugget, Inc.*, 85 Nev. 99, 450 P.2d 358 (Nev. 1969).

G. NEW YORK

New York's Dram Shop law is found in N.Y. GEN. OBLIG. §§ 11-100 and 11-101. Section 11-100 provides for compensation for injury or damage caused by the intoxication of a person under age 21. This section allows a cause of action against a commercial host that unlawfully furnishes or unlawfully assists in procuring in alcoholic beverages for a minor. Plaintiffs can recover for damage to person, property, or means of support under this section.

Section 11-101 is the general dram shop law provision that provides for compensation for injury caused by the illegal sale of intoxicating liquors. It grants a cause of action to anyone who is injured in person, property, or means of support by any intoxicated person. The cause of action is valid against any person who, by unlawfully selling or unlawfully assisting in procuring liquor for an intoxicated person, causes damage.

New York case law is fairly straightforward with a few peculiarities relating to minors. For example, a minor can be held liable for providing alcoholic beverages to another minor, and for the damages that result. *See Schrader v. Carney*, 180

A.D. 2d 200, 586 N.Y.S.2d 687 (N.Y. App. Div. 1992). There are no first-party actions available for minors, however. See *Sheehy v. Big Flats Community Day, Inc.*, 73 N.Y. 2d 629, 541 N.E.2d 18, 543 N.Y.S. 2d 18 (N.Y. 1989). *Sheehy* involved an underage girl who was killed while crossing the highway. She was intoxicated at the time, having come from a tavern where she had presented a fake i.d. in order to obtain alcoholic beverages. The *Sheehy* court, relying on a policy argument of not rewarding those who misrepresent their ages and are then injured by their own folly, dismissed the suit against the tavern. *Sheehy* at 636, 543 N.Y.S. 2d 18, 541 N.E. 2d 18.

Parental actions for loss of support are common in New York because the parent cannot sue for the pain and suffering of the intoxicated child, or for medical expenses. *Dunphy v. J & I Sports Enter., Inc.*, 297 A.D. 2d 23, 748 N.Y.S. 2d 595 (N.Y. App. Div. 2002). It is possible for a parent of a minor to maintain a cause of action based both on §§ 11-100 and 11-101. See *McCauley v. Carmel Lanes, Inc.*, 178 A.D. 2d 835, 577 N.Y.S.2d 546 (N.Y. App. Div. 1991). The *McCauley* court also delineated the types of damages that are available to a parent of a minor. Punitive damages are available under the dram shop law if the plaintiff shows that the defendant's provision of alcohol to the minor was wanton, willful, and reckless. Furthermore, the plaintiff may recover actual damages for loss of future support and for funeral expenses. In order to recover for loss of support, the plaintiff parent has the burden of showing that the decedent child had a legal duty or had undertaken an obligation to support his parent. *Gigliotti v. Byrne Dairy, Inc.*, 249 A.D. 2d 973, 974, 672 N.Y.S. 2d 172 (N.Y. App. Div. 1998). The plaintiff may not, however, recover for damages resulting for loss of services, affection, and companionship. *McCauley, supra* at 548.

H. OHIO

Ohio's dram shop statute applies to commercial licensees only. It is unusual because it makes a distinction between injuries sustained on the premises and those sustained off the premises, and by doing so, creates a higher standard of proof for cases involving injuries sustained in drunk driving accidents.

OHIO REV. CODE ANN. § 4399.18 provides that licensees may be liable if the plaintiff's injury by an intoxicated person occurred on the licensee's premises, and the plaintiff proves that the injury was proximately caused by the licensee or its employee. If the injury occurred off the premises, the plaintiff must prove both that the permit holder or its employee knowingly sold alcohol to a minor, a "black-listed person"⁶, or an intoxicated person, and that the intoxication was the proximate

⁶ The Ohio Division of Liquor Control maintains a list of persons, who, due to habitual drunkenness, are not to be served alcohol. Such persons are referred to as "black-listed." See *Stillwell v. Johnson*, 76 Ohio App. 3d 684, 602 N.E. 2d 1254, 1257 (Oh. Ct. App. 1991).

cause of the injury. No causes of action may be maintained against owners or lessors of buildings where alcoholic beverages are consumed, unless the owner or lessor is also the permit holder.

Ohio courts have interpreted § 4399.18 such that it is difficult for a plaintiff to recover if the accident occurs off the premises. In *Smith v. 10th Inning, Inc.*, 49 Oh. St. 3d 289, 551 N.E.2d 1296 (Oh. 1990), the Ohio Supreme Court found that the intoxication of the patron, not the service of the alcohol, is the proximate cause of such injuries. *Smith* effectively prohibited first party actions. In *Klever v. Canton Sachsenheim, Inc.*, 715 N.E. 2d 536 (Ohio 1999), the Ohio Supreme Court extended the holding of *Smith* to "underage adults" and held that there is no cause of action by a plaintiff eighteen years of age or older against the licensee for injuries resulting from the underage adult's intoxication. *Id.* at 540.

Third party actions are permitted; however, the standards for plaintiffs are high. It is most difficult for a plaintiff injured by an obviously intoxicated person to recover. The plaintiff must prove that the defendant licensee had "actual knowledge" that the drinker was obviously intoxicated. Plaintiffs suing for injuries resulting from the negligence of intoxicated minors however, have a lesser burden of proof, and need only show that the defendant "knew or had reason to know" that the drinker was a minor. See generally, *Lesnan v. Andate Enter., Inc.* 756 N.E. 2d 97 (Ohio 2001).

L PENNSYLVANIA

Sections 4-493 and 4-497 of the Pennsylvania statutes constitute "the Dram Shop Act" under Pennsylvania law. See *Miller v. The Brass Rail Tavern, Inc.*, 541 Pa. 474, 664 A.2d 525 (Pa. 1995). Section 4-497 creates a cause of action against licensees who serve alcohol to intoxicated customers who subsequently cause injury to others. This section does not address service of liquor to minors, and is silent on the question of whether third parties could sue a licensee for damages caused by intoxicated minors. Section 4-493 prohibits any licensee or any other person from selling, furnishing or giving any alcoholic beverage to any person visibly intoxicated, any insane person, any minor, any habitual drunkards or any persons of known intemperate habits.

Pennsylvania's case law addresses some of the issues that its statutes do not. In *Matthews v. Konieczny*, 515 Pa. 106, 527 A.2d 508 (Pa. 1987), the Supreme Court of Pennsylvania considered whether a commercial licensee of alcoholic beverages could be liable to a third party injured as a result of service of alcohol to a minor. This was a question of first impression since § 4-497 addresses visibly intoxicated persons, but does not address minors. Part of the issue in *Matthews*, therefore, was also whether statutory immunity is effective when sale of alcohol was to a minor. The Supreme Court of Pennsylvania, relying on its blanket prohibition against

serving alcohol to minors, found that there would be no statutory immunity, even though the statute does not specifically refer to minors. In a prior decision, *Congini by Congini v. Portersville Valve Co.*, 504 Pa. 157, 470 A. 2d 515 (Pa. 1983), the state's highest court had held that a social host who serves alcohol to a minor could be held liable for injuries proximately resulting from the minor's intoxication. *Congini* at 518. Based on *Congini*, the *Matthews* court could not find any rational basis for holding licensees to a lower standard of care than social hosts. *Id.* at 511. The cause of action for damages caused by an intoxicated minor against a licensed seller of alcohol, therefore, is a negligence action, and can be pursued as negligence per se as a violation of § 4-493. *Id.*

J. TEXAS

Texas has a dram shop law that creates an exclusive statutory cause of action against licensees. TEX. ALCO. BEV. CODE ANN. § 2.02. The statute imposes liability if the licensee served alcohol to a person intoxicated "to the extent that he presented a clear danger to himself and to others," and if the intoxication was the proximate cause of injuries sustained. Section 2.02 does not affect the injured party's right to bring a common law action against the intoxicated person. The Texas dram shop law is the only remedy against licensees for providing alcoholic beverages to one eighteen years of age or older. See § 2.03; *Southland Corp. v. Lewis*, 940 S.W. 2d 83 (Tx. 1997).

The Texas statutes do not address the availability of first party actions; however, the Texas Supreme Court concluded that such actions are available in *Smith v. Sewell*, 858 S.W. 2d 350 (Tx. 1993). The court also held that first party claims are subject to Texas' comparative negligence statute; an intoxicated person suing a licensee for his own injuries will not be able to recover damages if his percentage of responsibility is greater than fifty percent. Otherwise, his recovery will be adjusted based on his percentage of responsibility. *Id.* at 356. In contrast, a licensee in a third party action is vicariously liable for the negligence of the intoxicated person, and cannot offset its liability to the injured party by the intoxicated person's percentage of liability. See *F.F.P. Operating Partners, L.P. v. Duenez*, 69 S.W. 3d 800 (Tex. Ct. App. 2002). However, when the injured party's case has concluded and liability has been established, the licensee may bring an indemnity action against the intoxicated person. *Id.* at 807-808.

The test for whether a recipient of an alcoholic beverage was obviously intoxicated is an objective one. *Steak & Ale of Texas, Inc. v. Borneman*, 62 S.W. 2d 898, 902 (Tex. Ct. App. 2001). The test is whether it was "apparent to the provider" that the patron was obviously intoxicated. This standard does not require evidence that the provider actually witnessed the intoxicated behavior, or a subjective intent on the part of a provider to continue serving an intoxicated patron. See generally, *Perseus, Inc. v. Canody*, 995 S.W. 2d 202 (Tx. Ct. App. 1999).

III. COMPLIANCE REVIEW: STEPS RETAILERS CAN TAKE TO AVOID BECOMING A DEFENDANT IN A COMMERCIAL DRAM SHOP CASE

Unfortunately, there is no foolproof way for a licensed seller of alcohol beverages to fully insulate itself from dram shop liability, unless it is located in a jurisdiction where retail licensees have legislative immunity. However, retailers can take several precautionary steps to minimize their exposure to liability. Retailers will always be defendants in dram shop actions, but taking these precautionary steps can mitigate damages, and may even eliminate liability in some cases.

A. KNOW THE LAW IN YOUR JURISDICTION

If you have not already done so, consult an attorney to find out what the laws are in your jurisdiction. Find out, for example, whether your state follows the common law rule, or whether a state statute grants intoxicated persons and/or those injured by them the ability to sue a retailer for injuries caused by intoxication. As this presentation demonstrates, dram shop laws vary widely from state to state, and so retailers owning establishments in multiple states should not assume the rules are the same everywhere. Once you know what laws apply to your premises, educate your employees. As servers, they are on the front lines and need to be aware of what the standards are for liability.

B. INVEST IN RESPONSIBLE SERVER TRAINING

Many states now require retail employees to undergo periodic responsible server training. Even if your state does not have this requirement, there is no substitute for giving your employees the comprehensive training they need before they begin serving alcoholic beverages in what can be loud, busy, and distracting settings. Many retailers choose TIPS ("Training for Intervention Procedures"), but several other comparable courses are available. TIPS certification or certification from a similar training course is usually admissible to show the experience of the server.

C. TAKE SPECIAL PRECAUTIONS TO AVOID SERVICE TO MINORS

The importance of avoiding alcoholic beverage service to minors and checking for identification cannot be overemphasized. Many states have criminal penalties for service to minors for both retailers and their employees (as individuals) separate and apart from any civil liability that may attach as a result of dram shop laws. Service to a minor may also jeopardize the good standing of the retail licensee's liquor license.

There are several affirmative steps retailers and their employees can take to avoid service to minors. Although the list below is not exhaustive, it is a good start for any licensee.

1. **Establish a checks and balances system**

Implement an identification check point at both the door and the bar. Relying on wristbands or hand stamps put on at the door is a recipe for trouble.

2. **Asking age vs. asking for identification**

Remember that asking someone their age is not the same as asking for photo identification. Unfortunately, you cannot always rely on a customer to tell you the truth. Furthermore, in many states, evidence that a licensee checked a photo i.d. will relieve the licensee of liability, even if it turns out that the i.d. was fake.

3. **Be on the lookout for the fake i.d.**

Most jurisdictions do not impose the burden of identifying fake i.d.'s on retailers. Nonetheless, it does not hurt to be vigilant. Take a close look at out-of-state drivers licenses that may not be familiar to you. Remember to look at the photograph and not just the birth date.

4. **Take your time**

Everyone has had the experience of waiting in a grocery store line ten people long, or waiting for a drink at a bar counter ten people deep. Do not let these huffy consumers distract you from checking for identification. Do not rush when you read the birth date on the license. Some states now have very retailer friendly drivers licenses that say "Not 21 until [date]." If your state does not have a drivers license of this type, take the time to do the math correctly.

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