Assessing the Risk of Takeout Alcohol Under the Pa. Dram Shop Law

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It has become cliché to discuss the way that society has changed since the COVID-19 pandemic struck in early 2020. However, of all the industries impacted, hospitality may have taken the hardest hit. It is no surprise that the legislature moved quickly to offer whatever relief it could to restaurants, particularly given the aggressive restrictions placed on the in-person service of alcohol.

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The law provides that, in the context of the COVID-19 pandemic and the associated shutdown/recovery periods, restaurants are permitted to sell prepared alcoholic beverages for off-premises consumption, assuming certain conditions are met.

As with any change in policy, this should cause any responsible restaurant or bar owner to consider the risk of taking part in such an offering. To evaluate the risk, there are typically two areas that warrant consideration. The first is to determine what the bar's responsibilities are under the law and what legal risk they face. The second is whether taking part in the new program has any effect on the liquor liability insurance coverage that they already have in place.

In other words, bar owners need to know what the governor says is OK, but they also need to know what their insurance carrier says is OK. Just because service of "to go" pre-mixed drinks is now legal, that doesn't mean that a bar owner shouldn't check with their broker or agent to make sure that they will be covered in the event of a liability claim.

Insurance policies, and particularly liquor policies, can vary widely in their terms. Unfortunately, the question of whether a risk would be covered isn't an appropriate topic for an article such as this.

However, the good news is that from a legal perspective, the sale of alcohol for consumption off premises should be considered a substantially lower risk for responsible restaurants and bars than service for consumption on premises would be.

A lot of these reasons are simple common sense. If someone takes home a couple of

prepared drinks, they are likely to drink them at home. There is significantly less worry about people driving after drinking, which immediately lowers the risk to the patron and the bar—as the most serious dram shop/liquor liability claims arise out of motor vehicle accidents.

It also stands to reason that if people are taking drinks home, they are less likely to get into an altercation with any other patrons of the bar/restaurant, which is the second most common issue that arises in the dram shop/liquor liability context. They are also less likely to trip, slip or otherwise injure themselves. It is further worth noting that the liquor code itself places, in some ways, less responsibility on bars and restaurants for what people do with take-out alcohol.

The Pennsylvania Liquor Code has pages upon pages of regulations, and violation of any one of these provisions can result in a citation, fine or could place a business's license in jeopardy. However, when we talk about liquor liability or "dram shop" liability, we are talking only about those violations which can give rise to civil liability. In Pennsylvania, this means the service of alcohol to a minor or to a visibly intoxicated patron (VIP)—which are the only two liquor code violations that can result in a lawsuit filed by an injured party.

Our law places the responsibility on the bartender to evaluate the age and condition of each patron who orders a drink. If the patron is underage, they can't be served. If the patron is "visibly intoxicated," they must be cut off.

In the "on-premises" consumption scenario, this evaluation must take place each time that a patron orders a drink. In the "off-premises" scenario, this evaluation must take place once.

Therefore, in the situation where a patron consumes five martinis on premises, a bartender would likely face questions about the state of the patron after the fourth, but they are not likely to face those same questions if someone buys four or five martinis to go. The evaluation that is required is to determine the state of the patron at the time of the service of the drinks; nothing more, nothing less.

Similarly, in the "on-premises" consumption scenario, an argument can be made that the bar is responsible for what the patrons in the bar are drinking, regardless of who ordered it. If someone is cut off or underage and their friend orders them a drink, the bartender may have some responsibility for knowing where that drink goes. This is not practical in the "off-premises" consumption analysis. Unless the bartender is actually aware that someone is taking drinks home to minors (or visibly intoxicated patrons), it is a real stretch to argue that he/she "furnished" drinks to a minor or a VIP in violation of the dram shop law.

There are some additional limitations that come with taking part in this program. For example, bars are required to scan IDs for all patrons who appear to be under 35. Responsible bar and restaurant owners may already be doing this. Moreover, there is a limitation of 64 ounces per transaction for mixed drinks to go, and these sales must cease at 11 p.m. However, nothing in the law appears to give rise to civil liability for breach of these provisions. While selling 70 ounces in a transaction could result in disciplinary action from the liquor board, nothing in the

law suggests that such a violation would result in civil liability.

All things being equal, I think that every bar and restaurant would agree that they would rather have the revenue back from in-person dining and on-premises alcohol consumption. However, to the extent that some bar owners are hesitant to take part in the off-premises consumption program, it shouldn't be out of a fear of legal liability. As long as bars and restaurants follow the rules and check with their brokers/carriers, there is no need to be hesitant to avail themselves of the potential revenue from selling mixed drinks or other alcohol "to go" for as long as the commonwealth allows.

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