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Alcoholic Beverage Server Liability and the Reduction of Alcohol-Related Problems: Evaluation of Dram Shop Laws

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16. Abstract

The project was an evaluation of the potential for the legal liability of alcoholic beverage servers to stimulate preventative serving practices and thus reduce alcohol-involved traffic problems. Legal analyses of judicial and legislative actions within individual states determined that states could be ranked according to their relative level of liability exposure. Utilizing both cross-sectional and longitudinal designs, the project found that in states ranked highest in server liability there was more publicity about such liability, greater awareness and concern among licensed establishment owner/managers, and differential serving practices compared to states with lowest liability exposure. A time series analysis in one state, Texas, which had experienced a dramatic change in server liability (from relatively little to relatively high) and significant accompanying publicity had a statistically significant drop in alcohol-involved traffic crashes as a result. The project concluded that server liability with incentives for preventative serving practices had more potential for reducing alcohol-involved traffic problems than strict liability alone.

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Project Staff

Harold D. Holder, Ph.D., Principal Investigator

Kathleen Janes, J.D.
James Mosher, J.D.
Robert Saltz, Ph.D.
Alexander C. Wagenaar, Ph.D.

Toni S. Clifton, M.P.H., Project Administrator

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CHAPTER I

PROJECT OVERVIEW

A. Introduction

The goal of this project was to evaluate the contribution of alcoholic beverage server liability (dram shop liability)[1] to preventative alcohol beverage serving practices and thus to reductions in alcohol-involved traffic problems. The basic empirical design for this project was both cross sectional and longitudinal.

The first phase was a legal analysis including legal data inventory and selection of Case Study States, review of legislative and case law history for these states, evaluation of tort reform, and review of liability insurance issues. The inventory consisted of the collection of extensive available data on dram shop liability law in the 51 United States jurisdictions.[2] The dimensions along which state server liability laws differ were identified using a wide variety of secondary data sources. These data produced a composite description of exposure to dram shop liability in each state. Next, an expert (Delphi) panel of dram shop legal experts rated these factors describing liability exposure in order to develop a score for each state in terms of overall liability exposure. Results were used to select a set of high and low liability and change case study states for further legal and empirical analysis.

Once case study states were selected, a review of their legislative and case law history was completed on each state. In addition, an legal assessment of recent tort reform proposals and actions was undertaken to determine implications for server liability in general. An important aspect of server liability is insurance to cover liability exposure, and reviews of insurance availability, costs, and other matters were conducted.

The second phase of the research program included cross-sectional analyses to examine relationships among dimensions of dram shop liability, publicity about such liability, server awareness, and serving practices. Using survey data collected by a major national

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[1] *Dram shop is used here in an historical sense. A dram was a unit of measure for serving alcohol in Colonial times, and thus establishments which sold alcohol were called "dram shops". (Mosher, 1979d)*

[2] *Fifty states plus the District of Columbia*

trade journal and a professional trade association, differences in perceptions and actions by licensed establishments in high and low liability states were examined. In addition, a content analysis of major newspapers and state trade journals in each of these states provided information about dram shop publicity. Two states with significant changes in server liability were used in a longitudinal design. In one state, Texas, a time-series quasi-experimental design was used to evaluate changes in aggregate alcohol-involved traffic crashes after major changes in dram shop liability and/or litigation occurred. Box-Jenkins time-series analyses of longitudinal crash data were used to test the hypothesized causal relationship between state dram shop characteristics and alcohol-involved crash levels.

A unique advantage to the overall research design is that cross-sectional and longitudinal analyses permitted cross-validation, i.e., we were able to see whether an effect discovered in the cross-sectional analysis also appeared when looking at the impact of dram shop liability over time. The project was organized according to the conceptual model below and research questions approved by the National Highway Traffic Safety Administration, (letter, August 30, 1988).

B. Questions

There were 16 research questions which guided the project as shown below:

RESEARCH QUESTIONS

1. What states have enacted dram shop liability laws or recognize common law dram shop claims?

2. What are the provisions and limitations of such laws?

3. Which states have eliminated or restructured existing dram shop laws within the last 5 years?

4. What elements of statutory and common law contribute to a retailer's dram shop liability exposure?

5. What is the distribution of dram shop liability by state?

6. What is the level of report and publicity concerning dram shop litigation and cases within case study states?

7. What is known about dram shop liability insurance availability and coverage costs?

8. What are servers' perceptions of risk of dram shop litigation within a study state?

9. What is the relationship of dram shop liability and litigation to legislation which mandates or encourages server training?

10. What is the relationship of dram shop liability and litigation to server training?

11. What is the relationship of dram shop liability and litigation to retail serving practices?

12. What kinds of server training programs are offered by states?

13. What are differences in server training between dram shop and non-dram shop states?

14. What is the effect on alcohol-involved traffic crashes (if any) of a significant change in dram shop liability exposure?

15. What are the potential effects of the four recommended tort reforms on dram shop liability and highway safety?

16. What are the factors which increase or decrease the preventive aspects of dram shop liability?

C. Research Model

Figure I-1 shows a conceptual model of the complex set of factors which are postulated to interact together to link (or mediate) between dram shop liability for alcoholic beverage servers with traffic safety outcomes. First, the model incorporates several key factors which are crucial in understanding the possible impact of dram shop liability laws on alcohol-involved traffic problems.

Second, the model provides a means to consider a total systems approach in addressing the prior 16 questions that could be lost in addressing the research questions one by one. Third, the model facilitated the ability of the research team to integrate past and current research, thus enlarging the scope and depth of findings and maximizing the validity and generalizability of conclusions drawn from these findings. Figure I-1, in laying out a system of the relationship of dram shop liability to alcohol-impaired driving, illustrates that the liability law is but one potential influence on serving practices. The numbers in parenthesis on Figure I-1 identify the research questions which addressed a specific factor or a relationship between two or more factors in the model.

The left most element of the model is DRAM SHOP LIABILITY (described in Research Questions 1-5) which is a function of both existing legislation and case law as well as the degree of litigiousness in the state (the tendency of persons to enter such suits).

Conceptual Model of Dram Shop Liability, Server Practices, and Alcohol-Involved Traffic Problems

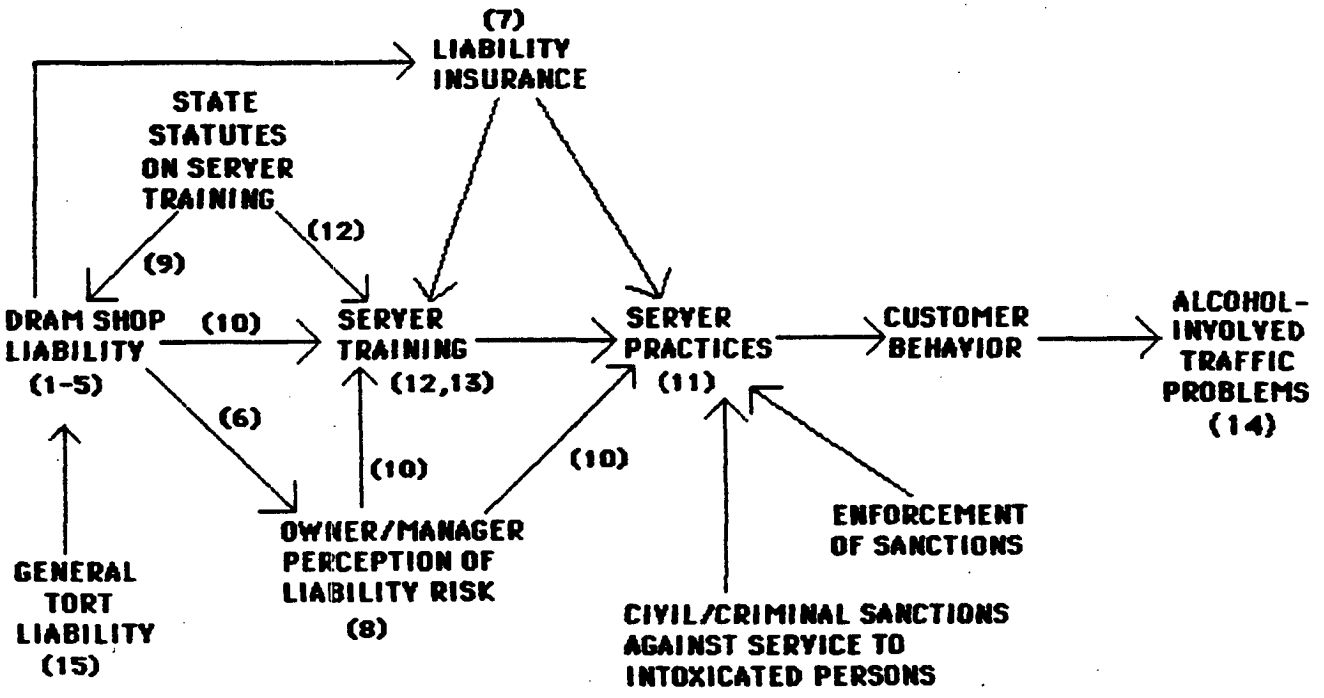

FIGURE I-1

NOTE: Numbers indicate research questions which will provide information on a model element and/or a relationship between two or more model elements.

The project explored the influences of GENERAL TORT LIABILITY (Research Question #15) and STATE STATUTES ON SERVER TRAINING (Research Question #9) on DRAM SHOP LIABILITY.

The nature and extent of SERVER TRAINING (Research Question #13) and OWNER/MANAGER PERCEPTION OF LIABILITY RISK (Research Question #8) were independently determined. In turn, the influence or impact of DRAM SHOP LIABILITY on both SERVER TRAINING (Research Question #10) and OWNER/MANAGER PERCEPTION OF LIABILITY RISK (Research Question #6) were examined.

The model postulates that OWNER/MANAGER PERCEPTION OF LIABILITY RISK can influence the nature and extent of SERVER TRAINING as well as SERVER PRACTICES (both addressed by Research Question #10). SERVER TRAINING was addressed by Research Question #13 and SERVER PRACTICES by Research Question #11. DRAM SHOP LIABILITY may affect the cost and availability of LIABILITY INSURANCE (as described by Research Question #7) for licensed establishments which might, in turn, influence SERVER TRAINING and SERVER PRACTICES. Recently there has been increased interest among state legislative bodies in mandating server training. Clearly, the intent of such laws would be to directly affect server behavior. More important, the call for mandated server training may very well be the result of exposure to dram shop liability or costly liability insurance or both.

An additional aspect of liability that must be accounted for in understanding the effectiveness of dram shop liability is existing state-established CRIMINAL AND CIVIL SANCTIONS AGAINST SERVICE TO INTOXICATED PERSONS as well as underage persons. Service of alcoholic beverages to intoxicated persons is illegal under the law provided that a server knew or should have known that the person being served was intoxicated. Such service is illegal in most states.[3] In addition to criminal sanctions, there can be civil sanctions such as license revocation or suspension or probation for service to intoxicated persons depending upon the type and severity of the offense.

Violation of a criminal statute prohibiting service to an intoxicated person can be used to establish a negligence cause of action against a licensee. If the statute is found by the courts to be intended to protect the public, violation may be considered negligence per se in a civil action brought by an injured party.

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[3]*As of mid-1988, only Alabama, Florida and Nevada lack laws against service to intoxicated persons. Most states make such service a misdemeanor. Only Oklahoma cites such service as a felony. (Source: Prevention Research Center, Berkeley, CA. Legal file on state regulations)*

While the nature and extent of such existing criminal and civil sanctions are important to an understanding of the environment of dram shop liability, it is also important to understand the structure and enforcement of such sanctions as well as enforcement of mandated server training.

In each state an Alcoholic Beverage Control (ABC) agency or organization enforces existing laws and written administrative provisions involved in state intervention in alcohol marketing and explicitly directed at the regulation of the retail sale of alcohol. Each state adds its own set of regulations of retail beverage outlets, thereby establishing one of fifty-one potentially unique sets of rules for the retail distribution of alcohol, usually enforced by the Alcohol Beverage Control agency of that state.

A simple regulatory perspective assumes a universal implementation of formal laws and regulations as written by the executive branch. One must instead ask whether, for example, the state funding process provides for the financial support and personnel required for active enforcement of each regulation. Without funding and employees, many control laws remain merely symbolic. Both variables are shown in the model as CIVIL/CRIMINAL SANCTIONS -- AGAINST SERVICE TO INTOXICATED CUSTOMERS and ENFORCEMENT OF SANCTIONS.[4] Minimum age laws exemplify formal regulations which, were it not for enforcement, or fear of enforcement, might well be virtually ignored as under-age individuals pursue drinking careers.

To complete the model, SERVER PRACTICES (influenced by perception of liability, insurance availability, server training laws, formal

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[4]*Only rarely has the alcohol research literature addressed how overall ABC enforcement influences consumption and alcohol-related problems (Saltz, 1985, 1986, and Wagenaar, 1986). However, a great deal of literature outside the alcohol field suggests that effectiveness of a law is related to the efficacious implementation of the law by control agents. Studies from the traffic safety and crime prevention literature indicate that variations in enforcement activities affect compliance with policy enactments (Rosenbaum, 1979; Wyatt and Hassan, 1985; Shapiro and Votey, 1984; DeBartolo et al., 1978; Chaiken et al, 1974; Pestello, 1984). This work has been extended to work on alcohol impaired driving to show that compliance with a law will be absent unless the public perceives the law is being enforced (Ross, 1984; Ross, 1985). The deterrence literature, especially that concerned with civil measures, suggests that compliance follows efforts at enforcement (Ferrence and Whitehead 1975; and Ross and McCleary 1983). The implication of this research is that server behavior and thus alcohol-related traffic problems may <u>not</u> simply follow from the passage of legislation or the publication of regulations. Instead, the practices of ABC agencies make operational formal legislation and agency orders or regulations. ABC agency structures and functions, their resources at hand, and their practices or activities mediate formal laws and regulations.*

dram shop liability law, and ABC statutes) affect CUSTOMER BEHAVIOR (the likelihood of customer intoxication or driving while intoxicated), which finally affects the rate of ALCOHOL-INVOLVED TRAFFIC PROBLEMS. Question 14 addressed whether a direct relationship between DRAM SHOP LIABILITY and ALCOHOL-INVOLVED TRAFFIC PROBLEMS can be statistically documented.

Of course, additional environmental factors such as economic forces including unemployment, disposable income, and general retail sales are also operating to affect both server and customer behavior. However, these are operating in all states (high and low dram shop liability) and are not uniquely affected by dram shop litigation. Such factors are left out of the conceptual model for simplicity of discussion.

In general, the data developed by each of the prior questions coupled with other research provided a comprehensive evaluation of the conceptual structure, the relevant variables, and the nature and strength of relationships. This model aids in determining if server liability (expressed as dram shop liability) makes a significant contribution to reductions in alcohol involved traffic problems, given the mediating contributions of other factors in the causal chain. The time series analysis of alcohol-involved traffic crashes in one state could not determine the specific contribution of other factors. Therefore, information about other factors in the model can aid our understanding of the mediating role of these factors (which may detract or mediate the direct affect of law itself).

In the final analysis, this conceptual model is a means to integrate the results from each of the separate research components in addition to the best available other research. This permitted a documentation of the respective role of factors in the conceptual model and identification of factors which have a significant effect (negative or positive) on the overall model in general and thus potentially on traffic problems related to alcohol-impaired driving. It will be used in the Summary and Conclusions chapter as a means to integrate the numerous findings of this project.

CHAPTER II

ALCOHOLIC BEVERAGE SERVER LIABILITY

A. Introduction

The purpose of this chapter is to summarize the findings of a number of legal analyses of server liability. Following a brief history of dram shop liability, this chapter describes results of a documentation of server liability in each state and the use of these data by a panel of experts to develop a liability score for each state. These sources were used to identify case study states for further in depth analyses. Following the selection of case study states, a review of the legal and legislative history of each high and low liability case study state and change state was completed. This chapter concludes with a review of legislative action to restrict server liability as part of tort reform efforts and the potential effect of such action on traffic safety.

B. Brief Summary of Dram Shop Liability History

Dram shop liability refers to the civil liability faced by both commercial servers and social hosts for the injuries or damage caused by their intoxicated or underage patrons and guests. A typical dram shop liability scenario involves bar A, which serves obviously intoxicated or underage patron B. Patron B leaves the establishment and, while intoxicated, crashes into citizen C on a public highway. Dram shop liability law permits, within certain guidelines, citizen C to sue both bar A and patron B for losses associated with the crash.

Dram shop liability can be imposed on retailers by either state courts or state legislatures. Courts can create a cause of action, even without clear legislative direction, through interpretation of common law principles of negligence. Legislatures may enact legislation that imposes liability, which may or may not be based on principles of common law negligence. Legislatures have the power to modify common law, provided that the modifications do not violate due process or some other aspect of constitutional law.

Thus, the state legislature is the final arbiter regarding the nature and extent of dram shop liability law in a given state. In many states, there is both a court-based and legislative-based dram shop liability cause of action because the legislation does not clearly modify or supersede the common law action established in the state courts. Because of the concurrent powers of state legislatures and courts, the United States has a patchwork of dram

shop laws, with each state having its own particular characteristics. This makes the study of the impact of dram shop law on traffic safety particularly difficult and challenging to the research community.

The retail alcohol beverage industry has experienced dramatic changes in the last two decades, particularly regarding its role in preventing alcohol-related motor vehicle crashes. Until the early 1970s, policy makers and opinion leaders did not view commercial servers or social hosts as having any responsibility for the harm caused by their patrons or guests. Responsibility was placed solely on the drinker, and the server was viewed as playing a passive, largely irrelevant role. This lack of responsibility was reflected in the old common law rule of torts that a drinker's actions are the sole, proximate cause of any crash or damage. Consequently, the server was absolved of any legal responsibility. The old rule, which was recognized by virtually all state courts, applied even if the retailer blatantly violated state alcohol laws prohibiting sales to obviously intoxicated or underage persons.

In this earlier period, which was adhered to by most state courts up to 1975 and even 1980, only a handful of legislatures had enacted dram shop statutes, many of those dating back to a pre-Prohibition period. These early statutes did impose liability on retailers for serving intoxicated or underage persons, or "habitual drunkards." Many of the provisions did not rest on common law interpretations of negligence. In general, they were considered relics of an earlier era.[5]

The citizen's movement to prevent drinking-driving in the 1970s dramatically changed the legal landscape. Increasingly, state courts refused to accept the old common law rule, finding instead that retailers could be held liable for serving alcohol to obviously intoxicated or underage persons who subsequently injured others. This "new common law rule" of third-party liability is based on general concepts of negligence law.

Under the new common law rule, both the drinker and the retailer are viewed as potential defendants in a dram shop case (in legal terminology potential "tortfeasors"). The potential harm is clearly foreseeable, and the imposition of legal responsibility on

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[5]*For discussion, see J. Mosher, Dram shop law and the prevention of alcohol-related problems, Journal of Alcohol Studies 40 (9): 773-798/September 1979; J. Mosher et al. Liquor Liability Law (Matthew-Bender Inc., NY(1987); G. Rinden, Proposed prohibition: erosion of the common law rule of non-liability for those who dispense alcohol, 34 Drake L. Rev. 937 (1987). Dram shop laws, as with other areas of tort law, are applied primarily at the state level, with each state establishing its own set of rules and procedures. There are no federal laws which directly impact this state prerogative regarding dram shop liability.*

the server is designed to protect those likely to be harmed. Since this liability is predicated on common law principles of negligence, the state courts had the power to adopt the new common law rule as part of their inherent powers without the need for legislative directives. Support for the new common law rule came from many quarters -- legal scholars, policy advisory bodies, and citizen's action groups. They viewed these liability principles as an integral part of the effort to prevent alcohol-related traffic crashes as well as other alcohol-related problems[6].

C. Selection of Case Study States

The selection of case study states involved: (1) documentation of the state server liability law in all states and the District of Columbia, (2) a rating of the most important legal factors in determining liability by an expert panel, and (3) calculating liability scores for all states and the District of Columbia.

(1) Documentation of State Liability Law

The first step in documenting and assessing state liability law was to establish a set of key variables. Areas of the law reviewed included all basic areas of negligence law as it pertains to dram shop liability: who could sue, what actions could lead to a suit, what kind of behavior (standard of care) was required on the part of a licensee, what issues could be raised in defense, and what restrictions on suits were present in dram shop statutes.

Key references consulted for this task included Mosher, Liquor Liability Law (New York: Matthew Bender, 1987) and Goldberg, Alcohol Server Liability (Washington, D.C.: National Alcoholic Beverage Control Association, 1988), the Model Dram Shop Act, and related research.[7] The list of key variables was revised numerous times during the course of the legal research, leading to a list of 27. These variables are grouped into five categories: 1) acts giving rise to liability; 2) liability standard; 3) standing to sue; 4) procedural and recovery restrictions; and 5) defenses. These categories reflect all the aspects of the law which could

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[6] *Id.*

[7] *"The Model Alcoholic Beverage Retail Licensee Liability Act of 1985, 12 Western State Law Review 442-517 (Spring 1985). Mosher, Colman, Roth and Janes were principal authors of the Model Act, which was funded by Grant #RO1AA0621-01 from the National Institute on Alcohol Abuse and Alcoholism. The Model Act project involved the analysis of every dram shop statute and over 1,000 court opinions, key variables of which were analyzed with the aid of a specially designed computer program. This research experience and data base provided a sound basis for establishing the key variables for the present project.*

affect the ability of a potential plaintiff to successfully bring a suit and are described below:

Category 1: Acts Giving Rise to Liability:

Acts Giving Rise to Liability refer to the kinds of actions or failures to act which are defined in liquor liability acts, or in court decisions, which may be the basis of a suit involving service of alcohol. Though illegal acts such as serving minors or serving intoxicated persons are the most common causes of suits against licensees, several other acts, usually more limited in scope, are listed under particular statutes.

Nine factors were identified under Category 1 as necessary to describe the unique legal situation in each state:

1. Serving Minors. This is illegal in all states. Since minors are presumed to be incapable of dealing with alcohol's intoxicating effects they are considered a protected group under most liquor liability laws and alcohol control laws.

2. Serving minors in violation of notice. This is a more limited provision of some old-fashioned dram shop statutes. A licensee who serves a minor despite notice not to serve or who was chargeable with notice of minority may face liability.

3. Serving an obviously intoxicated minor. This is the sole cause of action allowed under California's liability statute. Illegal service to a minor whose intoxication was not obvious is not a valid cause of action under this statute.

4. Serving a person who becomes intoxicated. This is sometimes referred to as strict liability. A licensee who serves any alcohol to a person who subsequently becomes intoxicated may face liability, regardless of the customer's condition at the time of service.

5. Serving an obviously intoxicated person. This is the most common act leading to liability, along with serving minors. Liability usually rests on whether intoxication was obvious, apparent or some similar standard.

6. Serving a drunken person. This is the only act allowed under Alaska's statute. The definition of "drunken" is unclear.

7. Serving a habitual drunkard. This is the act typical of Temperance era liquor liability statutes. Liability potential exists because a licensee may be more aware of intoxication if it is habitual.

8. Serving habitual drunkard in violation of notice. This is another Temperance era provision. A licensee who ignores written notice from a family member or an alcohol control agency not to serve a habitual drunkard may face liability.

9. Occupier's liability. The various categories of common law negligence for which a licensee could be held accountable were grouped under the category of occupiers' liability for failure to maintain safe premises. Common law actions relating to licensee behavior on premises include: physical condition of premises, those who are allowed to enter and remain; activities allowed on the premises; management of intoxicated persons; assumption of affirmative duty and subsequent breach or omission.

Category 2: Liability Standard

Liability Standard refers to the standard of care by which a licensee's behavior will be judged. Violation of a standard of care shows fault on the part of the person whose actions are being judged. For each of the nine causes of action enumerated in Category 1, one of the following standards of care may apply, depending on the statutory provisions or the common law precedents of the state.

1. Strict liability refers to a standard of care which allows liability for service of alcohol without regard to the defendant's fault. In the dram shop setting, this means that a licensee may face liability if he serves a sober person whose later intoxication leads to injury.

2. Negligence per se refers to liability based on a criminal statute prohibiting sale to minors or intoxicated persons. The criminal standard sets the standard of care to which a licensee's behavior must conform.

3. Negligence is based on the common law principle of foreseeability of injury applied to service of alcohol to a minor or service of alcohol to obviously intoxicated persons.

4. The reckless, willful or wanton standard means that licensee behavior must go beyond "mere" negligence before liability will attach.

5. Criminal negligence is the statutory requirement of standard of care in Alaska's liquor liability statute. "Negligence" is not defined in the statute.

6. Under a criminal conviction standard, a plaintiff must show that a defendant has been convicted of violation of criminal laws prohibiting sale to a minor or an intoxicated person prior to initiation of civil suit.

7. No liability is a standard whereby a statute or supreme court case precludes liability no matter how egregious the licensee's conduct.

8. The liability standard is uncertain where it is not defined by statute or case law.

Category 3: Standing to Sue

Standing to Sue refers to the classes of people who are allowed to sue a licensee for injuries resulting from consumption of alcohol. The larger the number of potential plaintiffs, the greater the risk of liability.

1. Minor Drinker: Since minors are presumed to be less able to handle effects of alcohol than are adults, they may be considered persons intended to be protected by laws prohibiting sale and, thus, allowed to bring suit against licensees who serve them.

2. Adult Drinker: Adult drinkers are frequently precluded from bringing suit against those who serve them as a matter of law. A jurisdiction which allows the drinker to sue presents a greater risk of liability to licensees.

3. Innocent Third Party: Third parties with no previous relationship with the drinker who are injured as a result of service to minors or intoxicated persons are the most common plaintiffs in liquor liability suits.

4. Complicitous Third Party: Third parties who participate in the drinking event by buying drinks for or drinking with the intoxicated tortfeasor and who are subsequently injured may be precluded from suit by the doctrine of complicity. (Though this issue interacts with contributory negligence, it is frequently treated by courts as a standing issue.)

5. Family Members of Drinker: If the drinker is precluded from suit, family members may not be allowed to bring wrongful death or survival suits.

6. Family Members of Third Party: Statutory provisions regarding recoverable damages may preclude family members from seeking certain damages, such as loss of support. Also if the injured party's suit is precluded by complicity, family member suits may also fail.

CATEGORY 4: Procedural and Recovery Restrictions

Procedural and Recovery Restrictions refer to limits which are

placed on an otherwise allowable suit:

1. Recovery Cap: Statutory recovery caps limit the amount of damages which a successful plaintiff may receive. This limits a licensee's risk.

2. Notice Provision: Some statutes require that the plaintiff notify defendant licensees of a pending suit within a certain number of days after the injury. Those statutes which require notice specify 60 days, 120 days, or 180 days. Failure to comply with the notice provision will preclude a suit.

3. Statute of Limitations: Some liquor liability statutes restrict liability by specifying a statute of limitations shorter than the state's normal tort statute of limitations. Those statutes which specify require that a suit be initiated either 1 year or 2 years after the incident.

4. Name and Retain Requirement: Some statutes require that the intoxicated tortfeasor be named as a defendant and retained as a real party to the proceeding until its conclusion. This provision is intended to prevent collusion between a plaintiff and the tortfeasor.

5. Joint but not Several Liability: This doctrine limits defendant's potential liability to his portion of fault for plaintiff's injury.

6. Standard of Proof: If a liability statute requires a standard of proof higher than proof by a preponderance of the evidence (the standard in most negligence cases), the plaintiff's burden of proof will be harder to meet. Proof by clear and convincing evidence is an example of such a higher standard of proof.

7. State Immunity: Statutory provisions may protect a government entity which sells alcohol from being sued. (Note: This factor was removed from consideration by the panel because a) state liquor stores are immune because they are not licensees; and b) state Tort Claims Acts would control.)

CATEGORY 5: Defenses

Defenses include theories which can be used by a defendant licensee to show that his conduct conformed with the required standard of care, or that the plaintiff is not entitled to sue.

1. Contributory Negligence: Under common law, contributory negligence on the part of the plaintiff is a bar to recovery by a plaintiff whose own negligence played some part in his injury.

2. Comparative Negligence: A modern rule modifies contributory negligence and allows a negligent plaintiff to recover for that portion of his injuries caused by another's negligence.

3. Responsible Business Practice Defense: Some recent liquor liability statutes codify this provision of the Model Dram Shop Act of 1985 which allows defendants to enter evidence of their adherence to responsible business practices and server training principles. State alcohol control statutes which mandate or allow voluntary server training may also set a standard of care to which licensees may adhere. In jurisdictions which consider evidence of licensees' normal business practices to be relevant, and thus admissible, in a liquor liability suit, licensees may be able to successfully defend.

4. Presumption of Responsible Behavior: Statutory provision of Texas 106.14. Voluntary participation in server training programs approved by state ABC leads to presumption of responsible behavior in suit premised on negligence in service of alcohol. (This variable was added by the Delphi Panel during deliberations replacing number 23, state immunity. See Appendix II-A for summary of final variable list and definitions lists.)

Each state's law was documented with a coding procedure for the list of 27 variables as a protocol. One protocol was prepared for each state, coding each variable for its presence or absence in statute or case law. For each variable 1 through 9 (acts giving rise to liability) any state can have one of eight liability standards for each variable. These are categorized as letters "a" through "h" (see Appendix II-A). Code "1" was used if the factor is present in a state's law and Code "0" was used if the factor is not present in a state's law. If the status of the law was uncertain, the factor was coded as "i". In some states two independent causes of action are possible, either under common law or statute, where the statute does not preempt common law. In those states the cause of action which creates the greatest exposure to liability was coded.

States were coded according to the current status of the law as of 1988. Thus current statutes and cases were consulted. In cases where a factor was unclear, earlier cases were consulted to find decisions which are still valid which addressed that issue. In general, information from 1970 to the present was used to determine each state's law. (See Appendix II-B for coded variables for each state.)

In Category 1, Acts giving rise to liability, each factor was coded independently since more than one cause of action may be possible in a given state. For Category 2, Liability standard, the most liberal standard was chosen. That is, if both negligence and reckless behavior were possible standards, negligence was chosen as the standard to apply to the factors in Category 1. In Category 3,

codes were inferred from other factors. Thus, if an adult drinker has standing to sue, minor drinker was also coded as having standing to sue.

In Category 4, recovery caps, notice provisions, and statutes of limitations were coded according to groupings. Recovery caps were grouped into three categories: less than $100,000, $100,000 to $200,000, and greater than $200,000. If a recovery cap was present, one of the three groups was coded 1; otherwise all three groups were coded 0. Similarly, notice provisions were grouped into 60 days, 120 days, and 180 days. If any notice provision was present, its group was coded 1. Otherwise all three groups were coded 0.

Since contributory negligence and comparative negligence are frequently defined outside liquor liability law, these variables were coded using information from Prosser and Keeton on Torts, Fifth edition (1987 Supp.)

Project staff entered the descriptive data on each state's dram shop law into machine readable format using the 26 variables described above. These data were then used in a spreadsheet analysis procedure described below.

The key variables list coded in this manner provided a basis for comparing the liability exposure in each of the fifty states and the District of Columbia. However, this provides no basis for ranking the states in terms of their estimated relative level of liability. Therefore, it was necessary to construct a single summary score for each state. A relative weight was assigned to each variable based on the Delphi panel's evaluation of its importance. States with dram shop laws that include a particular variable would be assigned a score based on the variable's weight. The sum of a state's scores would result in a summary score, comparable to the summary scores of other states, with higher scores representing greater risks of liability.

(2) Rating of Legal Factors in Server Liability by an Expert Panel

As each state establishes its own conditions and standards for server liability, states differ in their level of potential liability and litigiousness (ease of establishing liability and encouragement for litigation). Several factors must be considered in establishing an overall estimated level of server liability in each state. The relative importance of each factor must be numerically weighted. To develop weights or values for factors, a panel of server liability experts was created. A methodology to utilize expert judgment, the Delphi Panel process, was chosen due to the inherent subjectivity of any liability exposure scale, as numerous variables must be assessed before an overall exposure value can be assigned. The Delphi Panel process, which relies on expert opinion to assess inherently subjective variables and is an

appropriate methodology in these circumstances.[8] The process employed involved a one-day meeting in which consensus was desired, but not required. Several iterations of voting by individual members on the numerical value to be assigned to each factor were planned. The average score of the group was shown to the group as well as an anonymous listing of all votes. The Panel's objective was to assess the relative risk of liability in each of the 50 states and the District of Columbia for commercial alcohol servers as a result of state dram shop liability statutes and case law (termed "liability exposure"). A liability exposure score could then be developed for each state. The Panel's deliberations resulted in weights for each legal fact that reflected the consensus of the participants.

The Delphi Panel was assembled during the months of October and November, 1988, and included leading legal experts regarding dram shop liability law. The members include a defense expert from the Steak & Ale Restaurant Corporation (Schmoker); a plaintiff attorney (Sabbeth); a Canadian scholar on the topic (Solomon); an attorney who publishes an annual guide to U.S. dram shop law, and is a recognized expert on the topic (Goldberg); a scholar and practitioner who has conducted extensive dram shop research (Colman); and two Project staff members (Mosher and Janes). Efforts to include an insurance expert failed three days before the meeting.[9] (See Appendix II-C for list of members with relevant background.)

Prior to the meeting, each Delphi Panel Member was sent a memorandum regarding the tasks of the Panel, a description of the Delphi Panel methodology, and the tasks to be performed prior to the meeting (see Appendix II-D). The meeting occurred on December 5, 1988, and began with a discussion of these topics and a review of variables. During the course of the Panel, one variable was dropped ("State Immunity") which was judged to be irrelevant to a state's liability exposure (thus all states were coded "0") and one variable was added, which involved a unique defense applicable only in Texas. In addition, the Failure to Maintain Safe Premises variable (in the "Acts giving Rise to Liability" category) was enlarged to include all common law causes of action relating to occupiers' liability and negligence apart from service of alcohol. Values for this variable were changed to unknown for all states

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[8]*See Masser, I. and Foley, P., "Delphi Revisited: Expert Opinion in Urban Analysis" Urban Studies, 24:3, 217-225 (June 1987); Rinaldi, R., Steinder, E., Wilford, B., Goodwin, D., "Clarification and Standardization of Substance Abuse Terminology," Journal of the American Medical Association 259:4, 555-557 (1988).*

[9]*The invitee was unable to attend because of the proprietary nature of his information on dram shop liability law.*

without case law addressing the issue. Thus, the final list included 27 variables, whose definitions were agreed to by all Panel members.

An initial rating for each of the variables plus 8 liability standards was assigned by Delphi Panel members. Discussion followed to determine areas of agreement and disagreement. Each variable was given a numerical rating of -10 to +10. This scale was intended to show grades of severity from no impact (0) to the most severe impact (10). Judges were instructed to assign weights which reflected their estimation of the importance of each factor in successful pursuit of a liquor liability claim.

Since defenses and procedural restrictions limit a plaintiff's potential success, such factors were assigned a negative status because they act to reduce liability potential. In addition the panel assigned numerical weights to uncertain scores, since judicial or legal uncertainty could have an influence on success in bringing a suit.

A computer-based spreadsheet program was developed to display votes for each round of rating and average scores for each factor. The program made it possible to enter the weights for each separate judge, calculate an average for each variable, and then calculate an individual score for each state. This score was the sum of the weighted attributes (reflected in the state codes). Figure II-1, Flow Chart of Liquor Liability Law Analysis, shows the steps in establishing each state's score. This made it possible to print out in descending order the scores for the fifty states and the District of Columbia for the Delphi Panel to review prior to further discussion and another round of assigning or revising weights, based on the previous outcome. Categories 1 and 2 of the law were combined in a matrix that permitted a rating of from 1 to 20. The weight for the liability standard which applied to each cause of action possible in a state (coded positively) was multiplied by the weight assigned to the cause of action.

Round 2 involved a review of the results of the first rating and discussions of each factor to insure a common understanding of each and to attempt to reach consensus as to its relative weight. A private ballot was again taken, although, in virtually every case, members announced their vote to the group.

Following Round 2, the Panel reviewed in detail the results of the ratings in terms of the relative state scores. Several anomalies were noted and discussed. Based on the collective knowledge of the Panel, several states were judged to be misplaced in the ordering of state liability. These problems resulted in changes in the ratings of the variables. Most notably, the Panel discussed at length what value should be assigned for those variables determined to be "uncertain" under current law. For Rounds one and two, the Panel had assigned a .8 value: that is, a variable determined to be

uncertain in a given state would receive .8 of the variable's value as assigned by the Panel. The .8 value represented the ratio between weights for the negligence standard and uncertain liability standard, as determined in Category 2. Members decided that this was too high a value for uncertainty in other variables, and discussed several alternative methods for assessing the uncertain category. The Panel agreed after numerous trials to assign a .5 value. That is, an uncertainty was given half of the value which a positive variable would receive. The Texas defense variable was added at this time.

Round 3 balloting occurred in an open process, with a strong consensus reached. Subsequent rounds represented minor changes in specific variable weights, adjusting the scale based on the Panel's determination that particular states were misplaced in the tally of scores. The scoring finally agreed to by the Panel represents a strong consensus. The standard deviation never rose above 1.4 (one variable), and was 1.0 or less in 30 of 34 cases (see Table II-1).[10]

Prior to adjourning the Panel, members noted that modifications would be needed in the cataloging of certain state variables. For example, the Louisiana case law had been misinterpreted to permit liability despite statutory language to the contrary. Research conducted on the defenses of contributory and comparative negligence had been based solely on dram shop law even though general negligence law in a given state would be applicable. The Panel therefore agreed to have Project staff members, Mosher and Janes, review state variables based on the Panel's discussion. The proposed changes and a new, revised liability exposure scale were circulated to Panel members for final review in early February 1989. All Panel members agreed to the proposed changes. (See Appendix II-E for memorandum regarding modifications.)

(3) State Liability Rankings

Table II-2 provides the liability exposure scores of each state in rank order (see Appendix II-F for detailed breakdown of scores by variable). The final liability exposure score provides an empirical basis for comparing the relative severity of each state's dram shop law. Because many states are separated by only a small number of points, and because of the inherent imprecision of the rating process, each score should be viewed as providing a

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[10]*The standard deviation measures how far individual scores are from the average of all scores. The smaller the standard deviation, the closer the agreement among the individual raters. A standard deviation of 1.0 means that two-thirds of the raters gave a rating within one point, plus or minus, of the average score, which was used as the variable's weight.*

FIGURE II-1

FLOW CHART OF LIQUOR LIABILITY LAW ANALYSIS

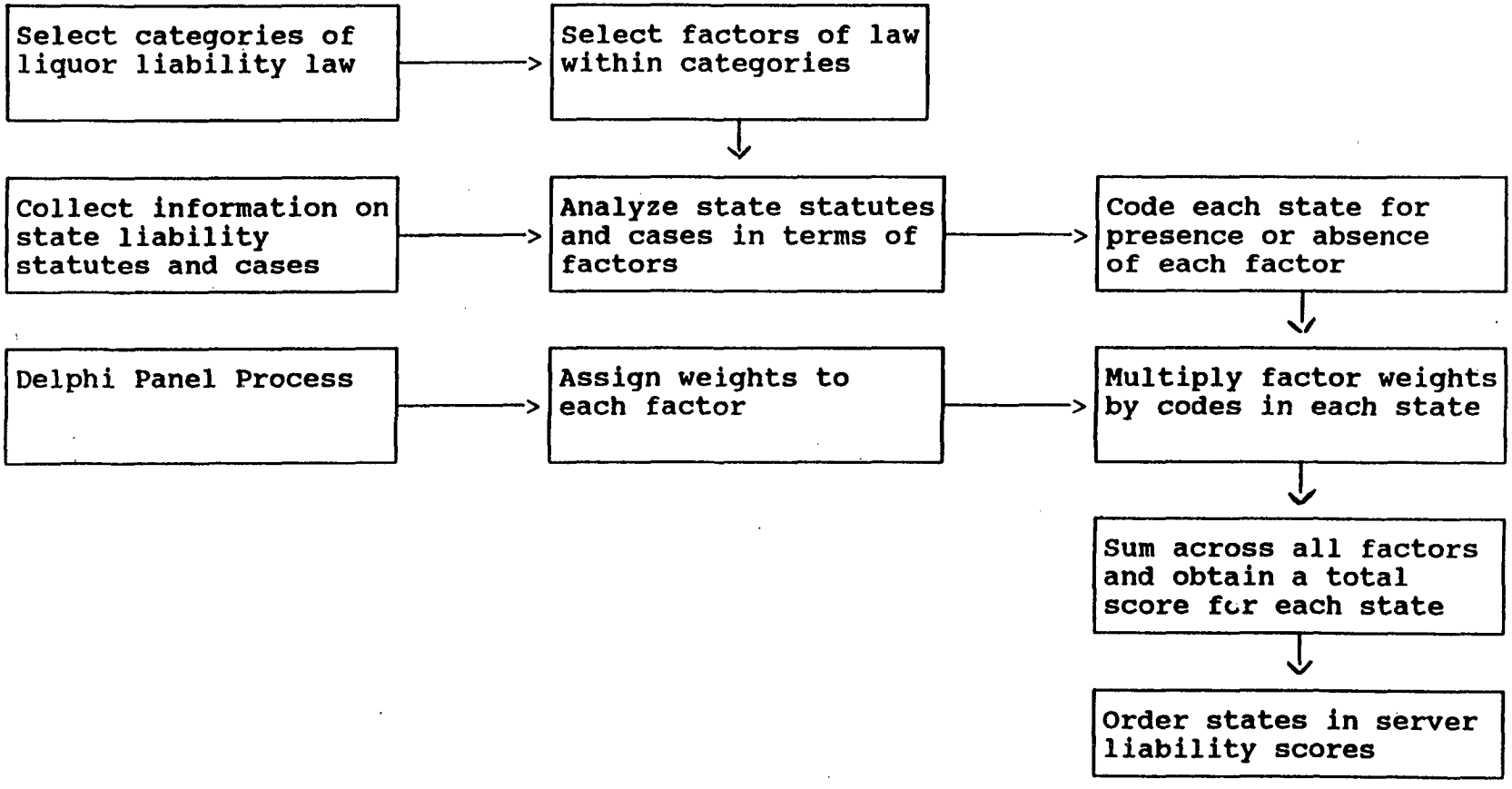

Table II-1 Server Liability Factors and Assigned Weights

WEIGHT JUDGEMENTS & CALCULATIONS	Judge #1	Judge #2	Judge #3	Judge #4	Judge #5	Judge #6	Judge #7	Judge #8	Avg	SDev
CATEGORY #1: Acts Giving Rise to Liability										
1. Serving Minor (no notice required)	9.0	9.0	9.0	8.0	9.0	8.0	7.0		8.4	0.8
2. Serving Minor in Violation of Notice	1.0	1.0	1.0	2.0	3.0	1.0	1.0		1.4	0.8
3. Serving Obviously Intoxicated Minor	5.0	5.0	6.0	5.0	5.0	5.0	5.0		5.1	0.4
4. Serving Person who Becomes Intoxicated	10.0	10.0	10.0	10.0	10.0	10.0	10.0		10.0	0.0
5. Serving Obviously Intoxicated Person	7.0	7.0	7.0	7.0	8.0	9.0	8.0		7.6	0.8
6. Serving Drunken Person	8.0	8.0	7.0	6.0	6.0	5.0	8.0		6.9	1.2
7. Serving Habitual Drunkard (no notice requ	4.0	3.0	3.0	3.0	4.0	4.0	3.0		3.4	0.5
8. Serving Habitual Drunkard in Violation of	1.0	1.0	1.0	1.0	2.0	1.0	1.0		1.1	0.4
9. Other Common Law Liability Theories	10.0	7.0	7.0	6.0	7.0	9.0	7.0		7.6	1.4
CATEGORY #2: Liability Standard (appl to abov										
a. Strict Liability	9.0	10.0	9.0	10.0	10.0	10.0	10.0		9.7	0.5
b. Negligence per se	8.0	8.0	8.0	8.0	7.0	8.0	8.0		7.9	0.4
c. Negligence (common law)	7.0	7.0	6.0	7.0	8.0	7.0	7.0		7.0	0.6
d. Reckless, Willful or Wanton	3.0	3.0	3.0	3.0	2.0	5.0	4.0		3.3	1.0
e. Criminal Negligence	2.0	2.0	2.0	2.0	1.0	4.0	4.0		2.4	1.1
f. Criminal Conviction	1.0	1.0	1.0	1.0	1.0	1.0	1.0		1.0	0.0
g. No Liability	0.0	0.0	0.0	0.0	0.0	0.0	0.0		0.0	0.0
h. Uncertain	6.0	6.0	6.0	6.0	5.0	4.0	5.0		5.4	0.8
CATEGORY #3: Standing to Sue										
11. Minor Drinker	7.0	8.0	8.0	7.0	6.0	8.0	7.0		7.3	0.8
12. Adult Drinker	8.0	7.0	10.0	9.0	8.0	9.0	9.0		8.6	1.0
13. Innocent Third Party Only (no complicity	9.0	9.0	9.0	9.0	10.0	8.0	9.0		9.0	0.6
14. Complicitous Third Party	4.0	4.0	5.0	4.0	4.0	6.0	4.0		4.4	0.8
15. Family Members of Drinker	7.0	6.0	5.0	6.0	6.0	6.0	6.0		6.0	0.6
16. Family Members of Third Party	8.0	6.0	5.0	7.0	6.0	6.0	6.0		6.3	1.0
CATEGORY #4: Procedural/Recovery Restrictions										
17. Recovery Cap: Less than $100,000	8.0	9.0	10.0	8.0	7.0	8.0	10.0		-8.6	1.1
$100,000-$200,000	7.0	7.0	8.0	6.0	5.0	7.0	7.0		-6.7	1.0
$200,000-$500,000	2.0	3.0	2.0	2.0	2.0	4.0	3.0		-2.6	0.8
18. Notice Provision: 60 days	8.0	8.0	8.0	7.0	7.0	7.0	7.0		-7.4	0.5
120 days	7.0	6.0	5.0	6.0	6.0	6.0	6.0		-6.0	0.6
180 days	5.0	4.0	3.0	4.0	5.0	4.0	5.0		-4.3	0.8
19. Statute of Limit. shorter: 1 year	3.0	2.0	3.0	2.0	3.0	3.0	3.0		-2.7	0.5
2 years	1.0	1.0	2.0	1.0	1.0	1.0	1.0		-1.1	0.4
20. Name and Retain Requirement	3.0	4.0	4.0	4.0	4.0	5.0	4.0		-4.0	0.6
21. Several but not Joint Liability	8.0	8.0	8.0	6.0	7.0	7.0	8.0		-7.4	0.8
22. Standard of Proof	7.0	8.0	8.0	7.0	8.0	7.0	8.0		-7.6	0.5
23.	0.0	0.0	0.0	0.0	0.0	0.0	0.0		0.0	0.0
CATEGORY #5: Defenses										
24. Contributory Negligence	7.0	7.0	7.0	7.0	7.0	7.0	7.0		-7.0	0.0
25. Comparative Negligence	0.0	0.0	0.0	0.0	0.0	0.0	0.0		0.0	0.0
26. Responsible Business Practices Defense	5.0	7.0	5.0	6.0	6.0	5.0	6.0		-5.7	0.8
27. Presumption of Responsibility (Ser. Tr)									-9.0	

I-by-II Matrix

	a	b	c	d	e	f	g	h
1	16.4	13.2	11.8	5.5	4.1	1.7	0.0	9.2
2	2.8	2.2	2.0	0.9	0.7	0.3	0.0	1.6
3	10.0	8.1	7.2	3.4	2.5	1.0	0.0	5.6
4	19.4	15.7	14.0	6.6	4.9	2.0	0.0	10.9
5	14.7	11.9	10.6	5.0	3.7	1.5	0.0	8.2
6	13.3	10.8	9.6	4.5	3.3	1.4	0.0	7.4
7	6.7	5.4	4.8	2.3	1.7	0.7	0.0	3.7
8	2.2	1.8	1.6	0.8	0.6	0.2	0.0	1.2
9	14.7	11.9	10.6	5.0	3.7	1.5	0.0	8.2

'Uncertain' Wt.
0.5

TABLE II-2
STATE SERVER LIABILITY RISK SCORES
(Delphi Panel Scores in parentheses)

VERY HIGH	
Indiana	(70.3)
Pennsylvania	(70.0)
South Carolina	(65.0)
HIGH	
Mississippi	(61.8)
Oklahoma	(61.3)
Massachusetts	(60.3)
New Jersey	(59.5)
Wyoming	(59.0)
Montana	(59.0)
District of Columbia	(58.3)
Alabama	(57.3)
Washington	(55.4)
Utah	(55.3)
North Carolina	(55.0)
Hawaii	(54.5)
MEDIUM	
Texas	(53.0)
Kentucky	(52.6)
New York	(51.9)
Alaska	(51.8)
Iowa	(51.3)
New Mexico	(50.3)
Ohio	(48.8)
Rhode Island	(48.3)
LOW MEDIUM	
Connecticut	(46.7)
West Virginia	(46.4)
New Hampshire	(45.4)
North Dakota	(45.0)
Tennessee	(44.5)
Florida	(44.4)
Wisconsin	(44.2)
Oregon	(43.5)
Illinois	(43.4)
California	(43.2)
Arizona	(42.5)
Minnesota	(41.8)
Vermont	(41.3)
LOW	
Louisiana	(38.7)
Idaho	(38.5)
Michigan	(38.2)
Georgia	(36.2)
Missouri	(32.8)
Maine	(32.5)
Colorado	(28.4)
Delaware	(17.7)
VERY LOW	
Arkansas	(8.2)
Kansas	(8.2)
Nebraska	(8.2)
Nevada	(8.2)
South Dakota	(8.2)
Maryland	(1.2)
Virginia	(1.2)
AVERAGE	(42.9)

relative score rather than distinct, objective scaling for each state.

As shown in Table II-2, six groups were delineated -- very high, high, medium, low medium, low, and none. There are 3 very high and 12 high liability states (scores of 54.5 or above). High and very high liability states recognize most forms of common law liability, either by statute or by case law, put few or no restrictions on the right to sue, and have few if any procedural barriers. 12 high liability states (scores of 54.5 or above). High and very high liability states recognize most forms of common law liability Even the highest liability states, with scores of 70, represent a relatively moderate approach to dram shop liability, however, since the maximum score could be substantially higher.

Twenty-one states fall in the medium and low medium range, (scores between 40 and 53). Eight states have medium scores (48 - 53); thirteen states have low medium scores (40 - 47). These states have a mixture of restrictions in some, but not all categories. Finally, fifteen states have low or no liability. Eight states, with scores between 10 and 40, have severely restricted liability standards coupled with procedural barriers; seven states have scores below 9, which means, in essence, that liability is not recognized in any form. In general, states with statutes tend to be lower on the liability score than states with liability based on case law. This is to be expected, since many statutes have been enacted to restrict common law liability standards and procedural guidelines. These preliminary findings should be interpreted cautiously. The Delphi Panel analysis focuses exclusively on the 27 variables that were assessed and the resulting liability exposure scale therefore does not address other factors that may influence the actual experience with dram shop liability law in a given state. Such factors as state court rules and procedures, public opinion, and availability of insurance coverage (which may in turn influence whether a lawsuit is filed), will affect a licensee's actual risk of facing a dram shop lawsuit.

The liability score provides a relative ranking of potential liability for each state but does not reflect the actual number and type of suits filed. Figure II-2 shows the ratio of Dram Shop Liability cases[11] which reached the State Appellate Courts from 1980-1987 to the total numbers of alcohol licenses for each state. While many liability cases are settled before trial and never reach appeals level, this calculation provides a rough index of relative litigiousness for each state. Information about the number of settled liability cases is very difficult to find in a systematic manner. Jury awards are reported but the reports are not

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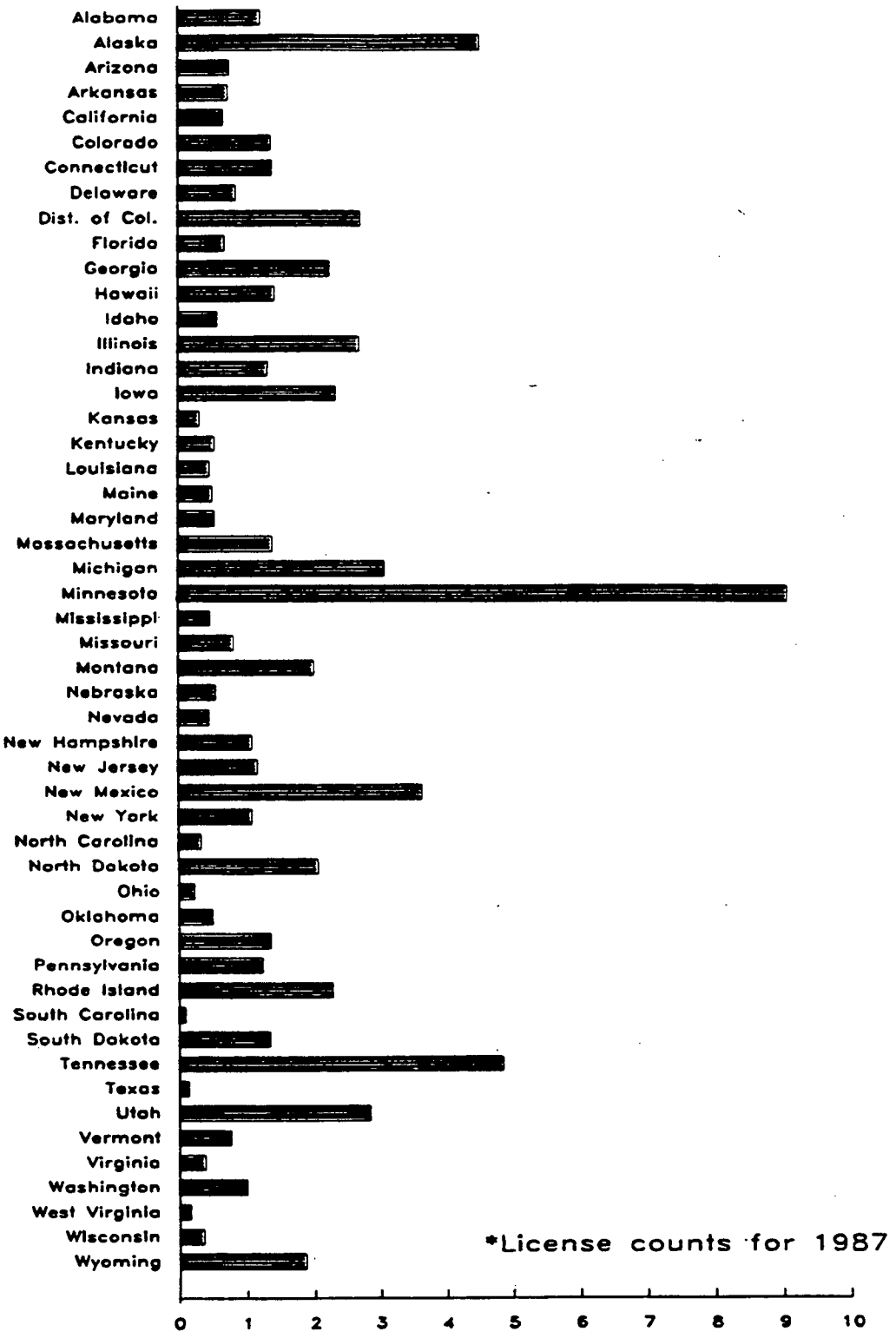
[11]*Counts of appellate cases were taken from the computer-based files of the Model Dram Shop Act Project, Prevention Research Center, Berkeley, CA.*

FIGURE II - 2

Total Dram Shop Liability Cases in State Appellate Court per 1,000 Alcohol Licenses 1980–1987*



classified by the nature of the cause of action and are often unavailable at the state level (requiring expensive data gathering at each county in each state). These reported awards, moreover, do not necessarily represent the amount of the final settlement. Information on settlements is not available in the legal literature and is usually not reported in case law. In some cases, settlements are sealed and not available to the public by court order.
While these data must be interpreted cautiously, they suggest that in general the number of cases per 1,000 licenses in a state do not necessarily reflect the liability scores developed. However, later research does demonstrate a difference in perceived liability exposure by managers of licensed establishments and whether the state of their residence was a "high" or "low" liability state.

(4) Selection of Case Study States

One objective of this development of state liability scores was to identify case study states. Three categories of case study states are required, with geographic diversity desirable: (1) high liability states with high possibility for liability which have not experienced major changes in the law during the last ten years, (2) low liability states which have little to no liability risk and which have not had significant changes in liability over the past ten years, and (3) "change" states -- states where there was a sudden change in the liability law during the last ten years. The change needed to have occurred suddenly, either by a new statute or by a new court case. Based on these criteria, the following alternative case study states were identified:

High Liability States (no major changes in past 10 years)

Indiana -- Midwest
Pennsylvania -- East
Massachusetts - Northeast
South Carolina - South

Alternates:
Alabama - South
Montana - Midwest
Washington - Northwest
Hawaii - West

No or Low Liability (no major changes in status in past 10 years)
Nevada - West
Arkansas - South
Kansas - Midwest
Maryland - South
Delaware - Northeast (low liability)

Alternates:
Nebraska - Midwest

Virginia - South

Candidate Change States

Colorado: No liability in 1974; high liability in 1981; low liability in 1987.

Texas: No liability until 1984; high liability 1984-1988; special protection which encourages server training in 1988 (a medium liability state currently).

New Mexico: Unknown until 1982; high in 1982; special limitations placed, 1985 (a medium liability state currently).

North Carolina: No liability until 1983; high liability in 1983.

South Dakota: No liability until 1982; high liability 1982-1985; no liability since 1985.

California: High liability from 1972-1979; low liability from 1979.

Idaho: Undetermined liability before 1980; liability for service to minors from 1980; statute allowing liability for service to minors or intoxicated persons, but limiting class of plaintiffs from 1986 (a low liability state currently). Idaho was considered to be marginal as a change state, since the changes have not been dramatic.

D. Legislative and Case Law Histories of Case Study States

(1) Introduction

This section provides legislative and case law histories for case study states.

(2) Low Liability States

Five states -- Arkansas, Delaware, Kansas, Nevada, and Maryland -- were finally selected as low liability case study states. Their risk exposure scores are all under 18 and constitute five of the bottom eight scores among states. Delaware was classified as having a "low" exposure score by the delphi panel; the remaining four were all classified as having "very low" scores. For the four states with very low scores, the state legislature and courts have clearly established that dram shop liability is not recognized in their state. The status of dram shop liability in Delaware is somewhat uncertain because of a recent case by its Supreme Court allowing for liability in a very limited social host situation that might have some application to a commercial server (see below for details). Its inclusion reflects the very limited exception this case may provide as well as the need for

greater geographic diversity (Delaware has by far the lowest score among states in the Northeast).

ARKANSAS

Statute: Before Prohibition Arkansas had a statute which required a saloon keeper to post a bond to pay for damages that might arise from liquor sold at his house of business. This statute was repealed at Prohibition and has never been replaced with another liability statute in Arkansas.

Case Law: Arkansas case law has consistently upheld the common law rule that drinking is the proximate cause of injuries caused by an intoxicated person, not sale of the liquor. The first case to so hold was Carr v. Turner, 238 Ark. 889, 385 S.W.2d 656 (1965). The plaintiff was a passenger in a parked taxi which was struck by a driver who had just left the defendant club. The Arkansas Supreme Court rejected a cause of action based on negligence per se for violating alcohol control statutes prohibiting sale of open packages, and service to an intoxicated person. Since these statutes applied to "any person" selling alcohol, not just licensees, the Court was reluctant to create liability which might extend to private hosts as well as licensees. The Court stated that adoption of dram shop liability should be the result of legislative action rather than judicial interpretation.

This ruling was the basis of the holding in Milligan v. County Line Liquor, Inc., 289 Ark. 129, 709 S.W.2d 409. (1986). In Milligan, a minor purchased six bottles of beer from the defendant licensee. As he was driving away he lost control of his vehicle while attempting to open one of the bottles. In the absence of any claim that the minor consumed the alcohol the Court refused to reconsider its twenty year old holding.

The Court also declined to reverse its opinion in subsequent cases involving sale to an intoxicated minor (Vancey v. Beverage House of Little Rock, 291 Ark. 217, 723 S.W.2d 826 (1987)), an intoxicated patron who consumed a dozen drinks at a happy hour (First American Bank of North Little Rock v. Associated Hosts, 292 Ark. 445, 730 S.W.2d 496 (1987)), and service to a minor by a fraternity (Alpha Zeta Chapter of Pi Kappa Alpha Fraternity v. Sullivan, 293 Ark. 576, 740 S.W.2d 127 (1987)). In the absence of legislation establishing liquor liability, Arkansas remains a jurisdiction in which licensees are well protected from liability for negligence in service of alcohol.

DELAWARE

Statute: Delaware has never had a statute which addresses licensee liquor liability.

Case Law: The issue of licensee liability for negligence in service of alcohol first arose in Delaware in the case of Taylor v. Ruiz, 394 A.2d 765 (Del.Super. 1978). This was a suit brought by a pedestrian who was injured by an intoxicated patron who was driving away from defendant licensee's establishment. The plaintiff charged the licensee with negligence in serving alcoholic beverages at a time when it knew or should have known that the patron was intoxicated. The defendant moved for summary judgment on the basis that there was no common law or statutory duty under which it could be held liable.

The Superior Court (trial court) denied the motion for summary judgment based on the statute which forbids a licensee to sell or serve alcohol to a person who is intoxicated or appears to be intoxicated. This decision was based on a finding that the injured third person was within the class of persons the statute was intended to protect. Thus the plaintiff's suit was allowed to proceed to trial on the merits.

Since this decision was rendered by a trial court, it could not be used as precedent to bind other courts of the state.

In 1981 the Supreme Court of Delaware refused to follow the reasoning of Taylor. In Wright v. Moffit, 437 A.2d 554 (Del. 1981), an intoxicated person was injured crossing the street leaving the defendant's establishment. The Court ruled that the class of persons intended to be protected by the alcohol control laws did not include the intoxicated person. The court also reviewed the legislative history of the alcohol control law prohibiting sale to intoxicated persons and found that the General Assembly had not intended to create a civil cause of action. In the absence of a dram shop statute, the Court deferred to the General Assembly to determine what the state's policy should be regarding liquor liability.

In 1988 the Delaware Supreme Court opened the possibility of liability for negligence in serving alcohol in DiOssi v. Maroney, 548 A.2d 1361. Though the case involved a social host, the possibility that the reasoning might be extended to licensees was not precluded by the Court. A parking valet employed by the hosts of a debutante party was injured by an intoxicated minor driver leaving the party. The Court held that despite the rule of Wright, a property owner owes a duty to a business invitee to exercise reasonable care in providing a safe workplace. The fact that furnishing of alcohol was involved does not preclude liability under Wright. This duty is heightened by the known risk of underage drinking. In attempting to reconcile its decision with the Wright decision, the Court in DiOssi emphasized that it had never ruled that a tavern owner is not liable for the tortious acts of an intoxicated patron, or minor, directed against third parties on the premises. Thus this decision involving a social host may lead to increased liability for licensees based on theories of safe premises.

KANSAS

Statute: Between 1859 and 1949 Kansas had a civil damage statute which provided a cause of action against the seller, barterer or giver of intoxicating liquor for damage or injury caused by any intoxicated person or in consequence of intoxication. The right to sue extended to every wife, child, parent, guardian or employer, or other person who was injured in person, property, or means of support. This statute was repealed in 1949 when the Kansas legislature repealed some alcohol control laws which had been rendered moot under the Constitutional amendment the previous year which ended prohibition. Since that time Kansas has had no dram shop liability statute.

Case Law: Following repeal of the liability statute, the Kansas Supreme Court adopted the common law rule of nonliability for a liquor vendor in Stringer v. Calmes, 167 Kan. 278, 205 P.2d 921 (1949).

The first appellate case in Kansas which addressed liquor liability since Stringer was Ling v. Jan's Liquors, 703 P.2d 731 (1985). In Ling, the plaintiff was struck while standing next to her car by an intoxicated minor driver. Her injuries resulted in amputation of both legs. Because the defendant which allegedly sold alcohol to the minor was in Missouri, the case addressed several procedural issues before addressing the issue of vendor liability. In the absence of legislation creating a cause of action the Kansas Supreme Court refused to impose liability on the defendant licensee, either under negligence or negligence per se theories.

The Ling holding was upheld in Fudge v. City of Kansas City, 720 P.2d 1093 (1986). In Fudge, an intoxicated tavern patron was allowed by police to drive away from the tavern, and he was involved in a fatal car crash not long afterwards. Plaintiffs sued the city and various police officers, as well as the tavern. In the portion of the decision dealing with the claim against the tavern, the Supreme Court reaffirmed its decision in Ling, holding that the common law does not recognize any liability on the part of liquor vendors to victims of intoxicated patrons.

MARYLAND

Statute: Maryland has never had a statute which addresses licensee liquor liability.

Case Law: In State v. Hatfield, 197 Md. 249, 78 A.2d 754 (1951), Maryland's highest court, the Court of Appeals, adopted the early common law rule that an innocent third party did not have a cause of action against a vendor of alcoholic beverages for injuries suffered as a result of a patron's intoxication. In that case a licensee was accused of selling intoxicating liquors to a minor in violation of a criminal statute, of continuing to serve the minor after he became intoxicated, and of allowing the intoxicated minor to leave the premises and drive. The Court of Appeals upheld the defendant's demurrer, based on the common law rule that the act of selling alcohol

is too remote to be a proximate cause of an injury caused by the negligent act of the purchaser of the drink.

Thirty years later, the Court of Appeals reviewed the Hatfield decision in Felder v. Butler, 292 Md. 174, 438 A.2d 494 (1981). In Felder, plaintiffs sued a tavern owner for injuries suffered in a head-on collision, as a result of intoxication of a tavern patron. The trial court sustained the defendant's demurrer without leave to amend; on appeal the Court of Appeals granted certiorari on its own motion. After a lengthy discussion of decisions in other jurisdictions in which courts had recognized the possibility of licensee negligence, the Court upheld the lower court decision and refused to overturn Hatfield. The Court suggested that the legislature should determine whether the public policy of Maryland should continue to follow the old common law rule.

In Fisher v. O'Connors, Inc., 53 Md.App. 338, 452 A.2d 1313 (1982), a lower court held that the Felder rationale bars a cause of action by a person who is injured as a result of his own intoxication.

The Court of Special Appeals continued Maryland's trend of limiting liability when it refused to extend liability to an employer which hosted a Christmas party in Kuykendall v. Top Notch Laminates, Inc., 70 Md.App. 244, 520 A.2d 1115 (1987). In Kuykendall, two employees who had spent over five hours drinking at a company Christmas party engaged in an automobile race after leaving the party. The race resulted in a head-on crash in which the plaintiff's decedent was killed. Plaintiff's suit against Top Notch was based on theories of negligence in permitting an employee to become intoxicated on the employer's premises during business hours and then allowing the employee to drive away.

The Court found that the facts of this case mirrored those in the landmark case of Kelly v. Gwinnell, 96 N.J. 538, 476 A.2d 1219 (1984), in which the New Jersey Supreme Court allowed an injured third party to sue the social host who had served alcohol to the driver who caused the accident. The Maryland Court refused to adopt the Kelly holding, stating that Felder v. Butler and Fisher v. O'Connors, Inc., made clear that Maryland has no dram shop cause of action in the absence of specific legislation.

NEVADA

Statute: Nevada has never had a statute allowing or prohibiting liquor liability.

Case Law: The Supreme Court of Nevada first considered the issue of licensee liability for negligence in selling alcohol to an intoxicated person in Hamm v. Carson City Nugget, Inc., 85 Nev. 99, 450 P.2d 358 (1969). After reviewing conflicting case law from other jurisdictions which had considered the issue of negligence, the Court refused to extend liability to licensees, in the absence of legislation. The

Court also rejected the claim based on negligence per se by ruling that the alcohol control laws are merely a regulatory scheme which were not intended to impose liability.

The issue of liability for illegal service to a minor was addressed in Yoscovitch v. Wasson, 98 Nev. 250, 645 P.2d 975 (1982). In this case a motorcycle passenger was injured when she was hit by an automobile driven by a drunken teenager. The passenger's suit against the convenience store which had sold alcohol to the minor was thrown out on defendant's motion to dismiss. The Supreme Court upheld the dismissal based on its holding in Hamm that proximate cause of the injury is consumption, not the sale of the alcohol, in the absence of a statute. Furthermore the Court refused to uphold a theory of negligence per se based on violation of a criminal statute prohibiting sale to minors.

Since 1982 there have been no cases, which indicates that there is little likelihood that Nevada's Supreme Court will change its stand of nonliability for licensees unless the legislature acts.

(3) High Liability States

Indiana, Massachusetts, Pennsylvania, and South Carolina were finally selected as case study high liability states. Indiana, Pennsylvania, and South Carolina are the three states described as having "very high" liability exposure scores by the delphi panel. The panel rated Massachusetts as a "high liability" state, one of twelve states in this category, but with one of the highest scores among this group. All four have established a very broad degree of dram shop liability with no major restrictions present in most other states. They also have a very stable legal history. Massachusetts has recognized a common law-based cause of action since 1967. Pennsylvania's dram shop statute was enacted in 1965 in response to successful cases based on negligence per se. Indiana has had broad liability since 1967, although a recent statute does place one possible restriction on future lawsuits. South Carolina is the most recent to recognize dram shop liability -- in 1985. These states do provide geographic diversity, although no western state was chosen because none were found with the necessary high liability exposure score combined with a relatively stable recent legislative and case law history.

INDIANA

Statute: Indiana Code section 7.1-5-10-15.5 (1988) Liability of person furnishing alcoholic beverage to intoxicated person. (a)As used in this section, "furnish" includes barter, deliver, sell, exchange, provide, or give away.

(b) A person who furnishes an alcoholic beverage to a person is not liable in a civil action for damages caused by the impairment or intoxication of the person who was furnished the alcoholic beverage unless:

(1) the person furnishing the alcoholic beverage had actual knowledge that the person to whom the alcoholic beverage was furnished was visibly intoxicated at the time the alcoholic beverage was furnished; and

(2) the intoxication of the person to whom the alcoholic beverage was furnished was a proximate cause of the death, injury, or damage alleged in the complaint.

[Note: The act does not apply to action accruing before April 1, 1986.]

Comment: This statute, passed in 1988, is an attempt to limit previous liability under common law by requiring that the person serving have "actual knowledge" that the person served was visibly intoxicated. What evidence will be sufficient to prove "actual knowledge" has not yet been interpreted by the courts.

An earlier Temperance-era civil liability statute, (Acts of 1875 (Special Session), Ch. 13, section 20), was repealed when the entire alcohol control code was repealed during Prohibition.

Case Law: Despite the absence of a dram shop statute, Indiana was among the earliest states to recognize a common law action for negligence in serving alcohol. In Elder v. Fisher, 247 Ind. 598, 217 N.E.2d 847 (1966), a case involving a passenger injured by a minor drunk driver, the Supreme Court of Indiana found that the statute forbidding furnishing alcohol to a minor creates a duty on the part of the licensee to the class to which the plaintiff passenger belonged, and that breach of that duty by illegally selling alcohol to a minor constitutes negligence per se. In Brattain v. Herron, 159 Ind.App.663, 309 N.E.2d 150 (1974), the Court of Appeals extended the holding of Elder to social hosts. In Brattain, the adult sister of a minor drunk driver had allowed her brother and a friend to consume large quantities of beer and liquor taken from her refrigerator. The Court saw no distinction between one who sells alcohol to a minor and one who gives alcohol to a minor since the Legislature had not limited the alcohol control statute to sellers.

The right of the intoxicated person to a cause of action was determined in Parrett v. Lebamoff, 408 N.E.2d 1344 (1980). The estate of an intoxicated driver who was killed in an automobile accident sued the tavern owners who had illegally served him while allegedly visibly intoxicated. The tavern owners raised the defense of contributory negligence based on the drinker's actions in becoming voluntarily intoxicated and then operating his automobile.

After reviewing decisions from other jurisdictions and the Restatement of Torts, 2nd, section 483, the Appeals Court concluded that contributory negligence could be raised as a defense to a charge of negligence based on violation of a statute. However, since Indiana

precedent holds that a plaintiff's negligence will not bar recovery where a defendant's actions are willful, wanton, or reckless, the trial court's dismissal of the complaint was reversed.

The recent case of Picadilly, Inc. v. Colvin, 519 N.E.2d 1217 (1988), held that a common law negligence action could be brought for negligent service of alcohol to an intoxicated person, apart from a violation of the statute prohibiting sales to an intoxicated person. This case involved the prohibition on sale to intoxicated person, now codified at Ind. Code section 7.1-5-10-15(a), and the facts of the case predated the effective date of the statute limiting licensee liability (7.1-5-10-15.5). The Supreme Court specifically said it was not attempting to review or construe the validity of the liability section. However, if a common law action, apart from of existence of a statute, is possible, the protection offered by the new liability statute may be limited

MASSACHUSETTS

Statute: Massachusetts has no statute allowing or prohibiting liquor liability. An earlier dram shop act (St.1879, c. 297, section 2) was repealed at the end of the prohibition era (St.1933, c. 376 section 2).

Case Law: The early case of Adamian v. Three Sons, Inc., 353 Mass. 498, 233 N.E.2d 18 (1967) established potential liquor liability for on-premises licensees in Massachusetts. Adamian was an action for personal injuries and wrongful death brought by the victims of a drunk driver. The defendant was the bar where the driver had become intoxicated prior to the accident. The bar and restaurant "solicited the patronage of the motoring public and provided a large parking facility for their convenience." (233 N.E.2d at 19). The plaintiff's theory of negligence was based on violation of a criminal statute forbidding sale of alcohol to an intoxicated person. The Supreme Judicial Court of Massachusetts held that violation of a criminal statute could be used as evidence of negligence as to all consequences the statute was intended to prevent. The Court found that the statute was intended to safeguard not only the intoxicated person himself, but members of the general public as well. In overturning the defendant's demurrer, the Court held that the proximate cause of plaintiff's injuries might go beyond the drinker's actions and include the defendant bar's actions.

Adamian spawned subsequent litigation to determine the obligations of the bar's general liability insurer to defend and indemnify the bar. The issue in Three Sons, Inc. v. Phoenix Insurance Company, (357 Mass. 271, 257 N>E> 2d 774 (1970)) was whether a clause excluding indemnification for liability imposed by reason of statute applied to a negligence per se action. The Supreme Judicial Court held that public policy would not be advanced by depriving the insured of the benefits of the policy, despite the fact that the insurance company

had not participated in the insured's defense and was now faced with an adverse ruling.

Cimono v. Milford Keg, Inc., 385 Mass. 323, 431 N.E.2d 920 (1982) addressed the issue of what evidence can be used to show that the patron was intoxicated at the time of service.

In this case, the drunk driver had spent the afternoon drinking in defendant's establishment. His behavior was described as drunk, loud and vulgar. He had been ejected from the same bar some months earlier for boisterous behavior. After leaving the defendant bar on the day in question, the drunk driver drove to a second bar where he was observed to be "totally drunk." He was not served at the second bar. After fifteen minutes he drove away, drove onto a sidewalk and struck the plaintiff and killed plaintiff's nine year old son. The trial court found for plaintiff on counts of wrongful death and negligent infliction of mental distress.

On appeal the defendant argued there was insufficient evidence to support the verdict that defendant had violated any duty owed to the plaintiff. The Court stated that a tavern keeper does not owe a duty to refuse to serve liquor to an intoxicated patron unless he knows or reasonably should have known that the patron is intoxicated and the plaintiff must introduce some evidence to that effect. (431 N.E.2d at 924) Here the plaintiff introduced evidence that the drinker was loud and vulgar. Furthermore the defendant's service of a large number of strong drinks was sufficient to put the defendant on notice that it was serving someone who could potentially endanger others. Therefore the court upheld the trial verdict of liability.

In Wiska v. St. Stanislaus Social Club, Inc., 7 Mass.App.Ct. 813, 390 N.E.2d 1133 (1979) an appeals court extended the holding of Adamian to include violation of statutes prohibiting sales to minors. In Michnik-Zilberman v. Gordon Liquors, Inc., 390 Mass. 6, 453 N.E.2d 430 (1983) that theory was used successfully for the first time against an off-premise licensee who sold beer to a minor. The Appeals Court held that the statute prohibiting sales to minors is intended to protect the general public as well as the inexperienced minor purchaser. Furthermore the Court found no distinction between tavern keepers and retail sellers (off-premise) which requires a different verdict. The Court held that the question whether a sale of alcoholic beverages to a sober minor by a retail seller is the proximate cause of a plaintiff's injury is for a jury to decide.

In a case which tested the limits of a retailer's duty, it was held that, in the absence of a sale, there was no duty to exercise care, Dhimos v. Cormier, 400 Mass. 504, 509 N.E.2d 1199 (1987). In Dhimos, the lessor and lessee of a convenience store were sued for negligently permitting a motorist to drink and take drugs in their parking lot. The parking lot was habitually used as a gathering place by local youth. The Supreme Judicial court held that no relationship existed between the defendants and the drunk driver because no sale of alcohol

took place. In the absence of a relationship, no duty of care could be imposed on the retailer, and therefore no actionable negligence could be found.

PENNSYLVANIA

Statute: In 1854 the Pennsylvania legislature passed the Act of May 8, P.L. 663, Pennsylvania's first dram shop Law, which in section 3 provided:

"That any person furnishing intoxicating drinks to any other person in violation of any existing law, or of the provisions of this act, shall be held civilly responsible for any injury to person or property in consequence of such furnishing, and anyone aggrieved may recover full damages against such person so furnishing ...."

This liability section was specifically repealed by the legislature in 1951 in a recodification of the liquor control act. The recodification reenacted earlier provisions prohibiting the sale of furnishing of liquor or malt or brewed beverages to visibly intoxicated persons, any insane person, any minor, habitual drunkards, or persons of known intemperate habits. 47 PS section 4-493.

Following several Pennsylvania Supreme Court decisions allowing negligence per se cases against licensees, based on illegal service under section 4-493, the legislature passed section 4-497 in 1965 to limit licensee liability. This statute provides: "Liability of licensees: No licensee shall be liable to third persons on account of damages inflicted upon them off of the licensed premises by customers of the licensee unless the customer who inflicts the damages was told, furnished or given liquor or malt or brewed beverages by the said licensee or his agent, servant or employee when the said customer was visibly intoxicated. 47 PS section 4-497."

By adding the requirement that the person served be visibly intoxicated when served before a licensee could be charged with negligence, section 4-497 limited liability for illegal service to otherwise sober minors. When the entire Liquor Code was subject to "sunset" review in 1987, section 4-497 was reenacted without change.

Section 4-497 remains in effect, limiting actions brought under its jurisdiction to cases in which the person served was visibly intoxicated. Thus actions for serving non-intoxicated minors would seem to be precluded. However, the Pennsylvania Supreme Court has been very willing to apply common law negligence principles to allow liability beyond the provisions of the statute, both for serving minors, and for injuries to the intoxicated person, not just injured third persons. The leading cases are described below.

Case Law: After repeal of Pennsylvania's old liability statute in 1951, the Pennsylvania Supreme Court allowed several suits against licensees based on negligence per se, that is on the violation of section 4-493 of the Liquor Code prohibiting sale to minors and intoxicated persons. In Schelin v. Goldberg, 146 A.2d 648 (1958) the Court said "When an act embodying in expressed terms a principle as it existed at common law is still in force" it can be the basis for a cause of action (146 A.2d at 651). Thus repeal of the liquor liability statute did not protect a licensee from liability where he had served an obviously intoxicated person who injured the plaintiff.

In Jardine v. Upper Darby Lodge, 413 Pa. 626, 198 A.2d 550 (1964), the Supreme Court held that an action based on negligence per se for a statutory violation could proceed, affirming Schelin. Jardine involved a pedestrian who was struck by a motorist who had been served while intoxicated at the defendant's bar. The Court noted that intoxication must be the proximate cause of the accident in order to impose liability.

The first case which allowed liability for service to a minor involved a social host defendant, not a licensee. In Congini v. Portersville Valve Co., 470 A.2d 515 (1983), a minor was injured in an automobile accident following a party at which he was served alcohol and became intoxicated. His suit against the party's hosts, based on violation of the criminal statute prohibiting service of alcohol to minors, was allowed. The Pennsylvania Supreme Court held that the defendants were negligent per se for violating the Crimes Code section prohibiting service to minors, because that section applies to all citizens of Pennsylvania, not just to licensees. Furthermore, the minor drinker was considered a proper plaintiff since he was a member of a class protected by the statute. The Congini rationale was applied to a defendant licensee for the first time in Matthews v. Konieczny, 527 A.2d 508 (1987). In Matthews, persons injured by minor drunk drivers who had drunk beer illegally purchased from off-premise beer licensees sued the licensees. The defendant licensees argued that they were immune from liability because the state's dram shop statute allowed liability to attach only if they were proven to have served visibly intoxicated persons. The Supreme Court disagreed, holding that the statutory immunity from third-party liability suits against licensees did not insulate sellers from common law negligence claims. The Court said that to hold otherwise, given the Congini decision allowed such liability against social hosts, "would be to condone the analogous situation whereby persons who sell alcohol are held to a lesser standard of care than the public at large." (527 A.2d at 511)

Thus licensees in Pennsylvania now face both statutory liability for service to visibly intoxicated persons and common law liability

based on violation of the criminal code for service to minors.

SOUTH CAROLINA

Statute: South Carolina has never had a statute allowing or prohibiting liquor liability.

Case Law: The Court of Appeals of South Carolina first considered the issue of licensee liability for negligence in selling alcohol to an intoxicated person in Christiansen v. Campbell, 285 S.C. 164, 328 S.E.2d 351 (1985). In that case the plaintiff became intoxicated in the defendant's bar. The bar continued to serve the plaintiff after he had become visibly intoxicated. After the plaintiff left the bar he was struck by a motor vehicle while attempting to cross the street. The South Carolina Court had no hesitation in finding that the plaintiff's claim against the bar based on negligence principles could proceed. The Court held that violation of a statute prohibiting sale could be the basis of a valid cause of action because the plaintiff, an intoxicated patron, was among the class protected by the statute. Thus South Carolina law is more liberal than many states in allowing intoxicated persons to maintain common law actions against licensees for their injuries.

However, the Court refused to extend that liability to social hosts in Garren v. Cummings & McCrady, 239 S.C. 348, 345 S.E.2d 508 (1986). In Garren, a guest at defendant's party became intoxicated and drove his automobile across the center line of the highway and collided with the plaintiff's car. Plaintiff's suit against the hosts was based on negligence for serving alcohol to the guest knowing that he could become intoxicated and that he would be driving his car on the highway. The trial court overruled the defendant's demurrer for failure to state a valid cause of action.

The Court of Appeals overruled the trial court and refused to extend the Christiansen holding to a social host. In this case the alcohol was furnished gratuitously, not sold. Also, no statute imposed a duty to third parties on the host who serves alcohol to his guests. Therefore the Court held that the demurrer should have been sustained. The Court of Appeals was less reluctant to extend liability based on negligence principles against a fraternity in Ballou v. Sigma Nu General Fraternity, 352 S.E.2d 488 (1986). This was a wrongful death action in which a fraternity pledge died during an initiation with a blood alcohol content of 0.46%. The Court held that a duty existed to exercise care to protect the fraternity's pledges from harm, and that by failing to render the decedent assistance after he had become excessively intoxicated, the fraternity violated its duty of care. The Court held further that the decedent's intoxication was involuntary.

Garren, the social host case, was distinguished because there was

no injured third party and because evidence showed that the party furnishing the alcohol promoted its excessive consumption by the injured party.

(4) Change States

Three states -- North Carolina, Oregon, and Texas -- were chosen as candidate change states. Change states are a particularly important aspect of the study, as they provide the opportunity for assessing the impact of major changes in dram shop liability. The selection was based on: (1) a dramatic shift in dram shop liability and related legal status in within the last seven years; and (2) available data on alcohol-related motor vehicle crashes.

North Carolina had no recognized dram shop liability prior to 1982. As discussed in detail below, a 1982 federal appeals court, confirmed by a state appellate court in 1983, clearly established a broad dram shop liability standard, which still exists today. North Carolina thus represents a single, dramatic change in dram shop liability status during the study period.

Oregon has been chosen as a case study state primarily due to the imposition of mandatory server training in that state in 1985. This statutory requirement was enacted as a response to the very broad dram shop liability standard that has been present in Oregon since 1979. Oregon was the first state to enact mandatory training, and sufficient time has elapsed to allow for widespread training throughout the state. Oregon has had a broad dram shop liability standard throughout the study period, with a minor restriction (regarding the burden of proof standard) enacted in 1985. Oregon was later dropped as a change state for further analysis.

Texas has experienced dramatic changes in dram shop liability status in the last three years. Prior to 1986, Texas did not recognize dram shop liability as a tort. A state appellate court permitted two law suits against a licensee to go forward in 1986, decisions which were affirmed in 1987 by the Texas Supreme Court. These cases established a broad liability standard. The legislature responded in 1987 by enacting a unique and strict statute that greatly mitigated the potential liability of licensees, provided the licensees obtained server training.

All three proposed case study states have traffic crash data readily available, and their selection was based in part on this criterion.

NORTH CAROLINA

Case Law: Prior to 1982 North Carolina had no statutes or legal precedents under which a server of alcohol could be sued for

negligence in serving intoxicated persons or minors. The first case which raised this issue was Chastain v. Litton Systems, Inc. (694 F.2d 957 (1982)), in which an employer who had sponsored a workplace Christmas party was sued for injuries caused by an intoxicated employee after he drove away from the premises.

The United States Court of Appeals held that, under North Carolina law, Litton could be sued for illegally furnishing alcohol to an intoxicated person under common law negligence principles, even though it was not a licensed seller of alcohol. This decision was not binding on state courts, since it was issued by a federal court, but it demonstrated the federal court's interpretation of how the North Carolina Supreme Court would have decided the issue. This decision was issued on December 2, 1982.

In June 1983, the Court of Appeals of North Carolina issued the first state opinion regarding liability of a licensed vendor in Hutchens v. Hankins (303 S.E.2d 584 (1983)). In this case, a drunk driver who caused a fatal automobile crash had drunk "a large number of beers over several hours" in defendant licensee's establishment prior to the accident. Plaintiffs sued under common law negligence theories. Holding that this was a case of first impression, the Court of Appeals ruled that the alcohol control law prohibiting sale of alcohol to intoxicated persons gives rise to a duty to protect not only the intoxicated person, but also the general public. Thus a person who is injured as a result of a licensee's violation of that duty may bring suit against the licensee.

This case was followed in December 1983 by Freeman v. Finney (309 S.E.2d 531 (1983)). The plaintiffs had been injured and killed in automobile accidents caused by intoxicated minors who had been sold beer by defendants. The Court of Appeals held that the defendant package stores could be sued under common law negligence principles for violating a statute which prohibited sale of beer or wine to minors under eighteen years of age. In Brower v. Robert Chappell & Associates, Inc., (328 S.E.2d 45 (1985)) the North Carolina Court of Appeals held that an intoxicated patron's contributory negligence in consuming sufficient alcohol to become intoxicated may be used as a defense to bar his negligence suit based on violation of a statute against a licensee who serves him.

Statute: North Carolina's Alcoholic Beverage Control Act was amended in 1983 by the Safe Roads Act of 1983 to include statutory dram shop liability for negligent sales of alcoholic beverages to underage persons for injuries proximately caused by the underage driver's negligent operation of an automobile while impaired by alcohol. To bring a successful suit under this statute, a plaintiff must show that a licensee sold or furnished alcohol to an underage person, that the consumption of that alcohol caused or contributed to the intoxication of an underage driver who was legally impaired at the time of the accident, and that the injury

was proximately caused by the underage driver's negligent operation of a vehicle while so impaired.

As originally proposed, the Act included a provision creating dram shop liability for sales to intoxicated persons also. However that provision was omitted during legislative consideration of the bill. Section 41.1 of the Safe Roads Act of 1983 states that the original inclusion and ultimate deletion of statutory liability for those who serve intoxicated persons does not reflect any legislative intent with respect to civil liability for such negligence.

Thus, this statute does not preclude common law liability suits for service to intoxicated persons. Furthermore, section 18B-128 states that common law rights are not abridged by the statute, so common law suits for illegal service to minors are also possible. This may be an important limitation of the statute is protection, since the cause of action outlined above is quite limited.

Damages recoverable under this statute are limited to $500,000. Another interesting feature of this statute is that it contains the first statutory provision for admissibility of evidence regarding a licensee's "good practices", such as training of employees or evidence that the minor presented false identification.

TIME LINE
NORTH CAROLINA

1979
December: Chastain accident

1980
December: Freeman accident #1

1981
March: Hutchens accident
October: Chastain trial decision for defendant
November: Freeman accident #2

1982
April: Freeman 1 trial decision for defendant
December: Chastain Appellate decision for plaintiff:
Non-licensee employer may be sued for negligence in serving alcohol and allowing intoxicated employee to drive away.

1983
February: Freeman 2 trial decision for defendant
June: Hutchens Appellate decision for plaintiff: Licensee may be sued for illegally serving intoxicated person.
October: Dram Shop Statute in effect for injuries occurring after October 1, 1983.
December: Freeman Appellate decision for plaintiffs:

Suits alleging negligence against licensees for service to minors state a cause of action.

1985
April: Brower decision holds that drinker's contributory negligence may be bar to his suit against licensee.

OREGON

Case Law: Prior to 1979 Oregon had a dram shop statute, O.R.S. 30.730, which limited causes of action for damage from intoxicated persons or habitual drunkards to spouses, parents and children of those served. In 1971 the Oregon Supreme Court went beyond the limited statute for the first time and allowed a third party injured by a drunken minor to recover from the host fraternity which had served him under common law negligence principles, Wiener v. Gamma Phi Chapter, 258 Or. 632, 485 P. 2d 18 (1971). Though the defendant in this case was not a licensee, this case marked the beginning of increased potential liability. The court also said there were some circumstances in which a social host could be held liable to third persons for reasonably foreseeable damages.

In 1977, Campbell v. Carpenter, 279 Or. 237, 566 P. 2d 893 (1977), established a common law negligence action against a licensee for serving a visibly intoxicated person. In this case a patron who had been served beer after becoming visibly intoxicated caused an automobile accident in which two people were killed. The Oregon Supreme Court quoted extensively from Rappaport v. Nichols, 31 N.J. 188, 156 A. 2d 1 (1959), regarding negligence and foreseeability in adopting a negligence standard for Oregon tavern keepers:

"... a tavern keeper is negligent if, at the time of serving drinks to a customer, that customer is "visibly" intoxicated because at that time it is reasonably foreseeable that when such a customer leaves the tavern he or she will drive an automobile." Campbell v. Carpenter, 279 Or. 237, 242, 566 P. 2d 893, 897.

A further development occurred in 1978 when the Oregon Supreme Court held that tavern owners who illegally sold beer to minors could be held liable for negligence per se for violation of the statute prohibiting sale to minors. Davis v. Billy's Con-Teena, 284 Or. 351, 587 P.2d 75.

New Dram Shop Statute: Following Campbell v. Carpenter and Davis v. Billy's Con-Teena, the Oregon Restaurant and Beverage Association attempted to have the Oregon legislature limit licensee liability to cases involving gross negligence. However the gross negligence standard was deleted from the bill, and the new dram shop statute, O.R.S. Section 30.950 (which replaced the old limited statute) codified the Campbell standard of liability for serving "visibly intoxicated" patrons. Sager v. McClendon, 59 Or. App.

157, 650 P.2d 1002, 1004, (1982) (Richardson, J., dissent).

Section 30.960, which limits liability of both commercial and private servers for service to minors, was adopted to limit the holding in Davis v. Billy's Con-Teena, which had allowed a negligence per se cause of action for violation of a statute requiring servers to request ID from suspected minors. Section 30.960 now allows liability for service to minors only if a reasonable person would have determined that ID was required or was falsified.

Thus it seems that the Retail Association's attempt to limit liability backfired insofar as it resulted in codification of previous court rulings and even extended liability for private hosts, an area which had not been clear, even under Wiener.

Cases Under New Dram Shop Statute: The Oregon Supreme Court determined in Sager v. McClendon, 296 Or 33, 672 P2d 697 (1983) that the new statute does not give rise to a cause of action by a person who is injured as a result of his own intoxication. Discussion of legislative intent when the new statute was adopted shows that the legislature intended to create a remedy only in favor of a third party injured by an intoxicated patron. This ruling represents a limitation on the kinds of plaintiffs who can sue licensees, somewhat limiting potential liability.

Punitive damages under Section 30.950 were allowed for the first time in 1985, in the appellate case of Blunt v. Bocci, 74 Or.App. 697, 704 P.2d 534 (1985). The court held that the evidence was sufficient to allow the jury to consider awarding punitive damages. The evidence included statements by the defendant's bartender that the drunk driver had appeared "high" when he had entered the bar, and the manager's statement that the driver was "on drugs and alcohol" when she served him, knowing he had "a drug and alcohol problem." Punitive damages increase the financial risk of liability to a licensee.

Statutory Modifications: In 1985 the Oregon Legislature passed a statute, O.R.S. Section 471.542, which mandates server education for all on-premise employees who serve alcohol. This legislation had originally been sponsored by the Oregon Restaurant and Beverage Association in another attempt to limit liquor liability. However their efforts were turned against them once again, because the provisions limiting liability were dropped and the mandatory training requirement was passed.

Mandatory training began in January 1987. The liability statute, Section 30.950, was modified in 1987 to require proof by clear and convincing evidence that the person served had been visibly intoxicated. This change makes it more difficult for a plaintiff to prove a case against a licensee because the evidence must meed a higher standard in order for a jury to hold a licensee liable.

TIME LINE
OREGON

1930's
O.R.S. 30.730: Dram shop statute which limited suits to spouses, parents, and children of habitual drunkards.

1971
Wiener v. Gamma Phi Fraternity: third party allowed to sue fraternity (non--licensee) for serving drunken minor.

1977
Campbell v. Carpenter established common law negligence against licensee for serving visibly intoxicated person.

1978
Davis v. Billy's Con-Teena establishes common law negligence per se liability for selling to minor in violation of statute.

1979
July: O.R.S. 30.950 passed, codifying holdings of Campbell and Davis, establishing statutory liability for serving visibly intoxicated persons and O.R.S. 30.960 for serving minors without requesting identification. O.R.S. 30.730 repealed.
November: Sager v. McClendon death occurs.

1980
September: Blunt accident occurs.

1983
November: Sager v. McClendon ruling, precluding intoxicated person from suing under dram shop act. Only injured third parties may sue.

1985
Summer: Mandatory serving training bill (S.B. 726) passed by legislature.

August: Blunt v. Bocci allowed punitive damages under 30.950, thus increasing licensee financial risk for liability.

1987
January: Beginning of mandatory server training.

Summer: O.R.S. 30.950 modified to require proof by "clear and convincing evidence" that patron was visibly intoxicated when served. (Limitation on liability.)

TEXAS

Case Law: Two cases involving service to intoxicated persons have defined the liquor liability situation in Texas. These cases, El Chico Corporation v. Poole and Joleemo v. Evans, made their way through the courts of Texas during the mid 1980's and resulted in the landmark Texas Supreme Court decision (732 S.W.2d 306, Tex. 1987) which allowed common law actions against licensees to proceed.

In El Chico v. Poole, an admitted alcoholic arrived at defendant's establishment after work, around 5:00 p.m. Shortly after leaving the restaurant at 7:45 p.m. he caused an automobile crash in which plaintiff's decedent was killed. A breath alcohol test given at the scene of the accident resulted in a .18 reading. The dead driver's parents sued the restaurant for negligently selling drinks to an intoxicated person.

An appellate court overturned the trial court's summary judgment in favor of the restaurant. (Poole v. El Chico, 713 S.W.2d 955, Tex. App. 1986). The Court of Appeals held that the bar operator owed a duty to the motoring public to not knowingly sell alcohol to an intoxicated person. In Joleemo v. Evans, a motorcycle rider was killed after being hit by a drunk driver at an intersection after midnight. The driver who hit the motorcycle had been drinking the previous evening and early morning at a restaurant which offered free and cheap drinks. The suit against the restaurant which served the drunk driver alleged negligence in serving alcohol when the motorist was intoxicated, when the owners and agents knew or should have known he was intoxicated, and negligence in failing to provide taxi or limousine service.

The Court of Appeals held that the trial court had erred in dismissing causes of actions based on negligent service of alcohol to an intoxicated person and negligence in failing to provide alternative transportation. (Evans v. Joleemo, 714 S.W.2d 391, Tex. App. 1986).

The Texas Supreme Court ruled on the combined cases in El Chico v. Poole and Joleemo v. Evans, 732 S.W.2d 306 (Tex. 1987). The court clearly established a duty on the part of licensees to the general public not to serve alcoholic beverages to a person when the licensee knows or should know the patron is intoxicated.

Statute: Prior to 1987, Texas had no statutory provisions allowing or prohibiting liability for negligent service of alcoholic beverages. However in 1987, two statutes were passed which altered the status of common law actions which were allowed in the El Chico case.

In 1987 a liability statute was passed which limits licensee liability for service to persons 18 years and older. Under this statute (Texas Alcohol Beverage Code ch. 2, section 2.01-2.03 (1987)), a licensee may only be sued for selling, serving or

providing alcoholic beverages to a person who is obviously intoxicated to the extent that he presented a clear danger to himself and others. This statute provides the exclusive remedy for serving adults (18 years and older) and precludes common law suits such as those upheld in El Chico.

The 1987 liability statute does not preclude common law suits against licensees who serve minors under the age of 18. Thus suits for illegal service to minors under 18 are still possible, though they will probably be affected by new section 106.14, described below. The status of liability for illegal service to minors between the ages of 18 and 20, who do not evince the "clear danger" required by the liability statute, is unclear.

Another statute passed in 1987 may offer licensees more protection from liability than the liability statute described above. Effective September 1, 1987, a licensee will be immune from liability for the acts of its employees who illegally serve minors or intoxicated persons if the employer requires its employees to attend ABC-commission approved "seller training", and the employee has actually attended such a training program, and the employer has not directly or indirectly encouraged the employee to violate such law.

"Seller training" programs which are approved by the Texas ABC Commission may solicit training business from licensed establishments. Though seller training is not mandatory under this statute, the incentive for licensees to take advantage of its provisions is high, because the protection from liability covers both service to minors and to intoxicated persons. Although it is widely believed that this statute is intended to protect licensees from common law actions, the statute's language refers to "this chapter and any other provision of this (ABC) code relating to sales, service," etc. of alcohol. No appellate cases have yet interpreted this statute.

TIME LINE
TEXAS

1983
January: El Chico v. Poole accident

1984
November: Joleemo v. Evans accident

1986
June: El Chico v. Poole appellate decision allowed suit to proceed against licensee.

June: Joleemo v. Evans appellate decision allowed suit to proceed against licensee.

1987
June: El Chico v. Poole and Joleemo v. Evans decision by Texas Supreme Court upholding appellate decisions that an alcoholic beverage licensee owes a duty to the general public not to serve alcoholic beverages to an obviously intoxicated person.

September: Effective date of liability statute limiting cause of action for service to person 18 years or older to cases in which the person served was obviously intoxicated to the extent that he presented a clear danger to himself and others.

September: Effective date of statute which protects licensed employer from liability for acts of its employees if employer mandates server training for its employees and employees undergo training.

E. Legal Restrictions on Dram Shop Liability Statutes:

(1) Overview

In recent years, state legislatures have placed four specific legal restrictions on dram shop liability law: (1) stricter evidentiary standards; (2) stricter liability standards; (3) elimination of joint and several liability; and (4) limitations on recovery (damage caps). In general, the restrictions have not been analyzed from a public policy standpoint and have gone largely unnoticed by policy makers concerned with the prevention of alcohol-related traffic crashes. This section addresses and reviews the major legislative restrictions on dram shop liability law and analyzes them from a traffic safety perspective.

The section is divided into five substantive parts. First is a review of recent developments in dram shop law, the role of state courts and legislatures in these developments, and the origins of the proposed legislative restrictions. Second is a discussion of the relationship of dram shop law to traffic safety and the criteria to be used in evaluating these legal restrictions. In the third section, each legal restriction is described and its impact on traffic safety analyzed. The fourth section reviews the history of dram shop laws in Canada, drawing lessons from that experience that may be relevant to the United States. The fifth and final section contains conclusions and recommendations.

(2) Origin and Purpose of Legislative Restrictions

Despite the support and sound legal grounding for the new common

law rule, many state legislatures have begun to limit them[1]. Legislatures can, through their legislative powers, modify common law rules and court interpretations of those rules. These restrictions have taken many forms and evidence a fundamentally different approach than that taken by the state courts. Because of the legislative power to modify common law, state courts have respected these legislative restrictions[2].

Supporters of legislative restrictions argue that they are merely a part of a larger tort reform movement. According to this view, tort law has created an unfair, arbitrary, and highly inflated system of compensating victims of negligent activities of others.[3] Plaintiff attorneys are purportedly benefiting unfairly, and defendants are increasingly being held liable when they are not, in fact, at fault. Moreover, defendants face shockingly high damage awards that hamper free enterprise. Of particular concern are steep increases in insurance premiums to cover the risk of tort claims. There is no shortage of critics of the current tort system. Nevertheless, there is no consensus on whether the escalating premiums actually reflect increased liability costs or, instead, other economic forces that are wholly independent of the tort system.[4]

Indeed, various groups have proposed reforms to the tort system and related insurance practices. However, the proposed legislative restrictions on dram shop liability have not been part of these broader efforts. Rather, they should be seen as piecemeal enactments generated by the intense lobbying efforts of the retail alcohol industry.[5]

Some present these restrictions on recovery as "tort reforms". However, before characterizing them as "reforms", it is essential

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[1]*See Rinden, supra note 5.*

[2]*See, e.g., Cory v. Shierloh, 29 Cal. 3d 430, 629 P.2d 8, 174 Cal. Rptr. 500 (1981). For discussion, see Rinden, supra note 5.*

[3]*See,e.g. G. Priest, The current insurance crisis and modern tort law, 96 Yale L.J. 1521 (1987).*

[4]*For discussion, see Priest, supra note 7; Habush, R., The tort system under fire: don't fix what ain't broke 34 Fed B. News and J. 119 (1987).*

[5]*See Mosher, supra note 2; R. Roth, Oregon's Experience with Mandatory Alcohol Server Education: A Case Study. (Report submitted to the National Institute of Alcohol Abuse and Alcoholism, Grant # R01AA06741-01). Trauma Foundation: San Francisco, CA (1988).*

to examine their impact. What public interests, if any, are served by the proposed legislative restrictions on dram shop liability?

As a matter of public policy, it may be appropriate to restrict recovery in some areas of tort law, but not others. For example, limits on medical malpractice claims may be justifiable if the current law is driving up the costs of health care, forcing doctors out of important areas of practice, denying patients access to needed medical procedures, and distorting treatment decisions with extraneous legal considerations. However, just because piecemeal reform of medical malpractice law may be appropriate, it does not mean that piecemeal reform of dram shop liability is warranted. We are not so much concerned that the proposed restriction on dram shop liability would greatly benefit the industry and severely hamper injured plaintiffs. Rather, our focus is on the impact that these proposals will have on traffic safety.

(3) Dram Shop's Impact on Retail Server Practices

The relationship among dram shop liability, traffic safety, and public health has been analyzed in depth elsewhere.[6] Research has demonstrated the importance of alcohol availability in the incidence and severity of alcohol-related traffic crashes.[7] More specifically, the serving and selling practices of commercial retail establishments can have a dramatic impact on the drinking

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[6]*See Mosher, supra, note 2; J. Mosher "Legal liabilities of licensed alcoholic beverage establishment: Recent developments in the United States," pp. 235-256 in E. Single and T. Storm (eds.), Public Drinking and Public Policy: Proceedings of a Symposium on Observation Studies held at Banff, Alberta, Canada, April 26-28, 1984 Toronto, Canada: Addiction Research Foundation, 1985.; V. Colman, B. Krell, J. Mosher, Preventing Alcohol-related Injuries: Dram Shop Liability in a Public Health Perspective, 12 Western State L. Rev. 417-517 (Spring 1985); R. Solomon and E. Single, Civil Liability for the Conduct of the Intoxicated: A Review of the Law and Recommendations for Reform. Paper prepared for the Ontario Advisory Committee on Liquor Regulation, 1986.*

[7]*For review, see M.J. Ashley and J. Rankin, "A public health approach to the prevention of alcohol-related health problems", pp. 233-273 in L. Breslow, J. Fielding, and L. Lave, eds., Annual Review of Public Health, Vol. 9. Annual Reviews Inc.: Palo Alto, CA (1988); J. Moskowitz, "The primary prevention of alcohol problems: a critical review of the research literature" Journal of Studies on Alcohol 50:1, pp. 54-88 (1988); A. Wagenaar and S. Farrell, "Alcohol beverage control policies: their role in preventing alcohol-impaired driving" pp. 1-14 in Surgeon General's Workshop on Drunk Driving: Background Papers. U.S. Department of Health and Human Services: Washington, D.C. (1988).*

and driving behavior of patrons.[8] A wide variety of programs to reform retail practices and thereby reduce the risk of intoxicated patrons driving from establishments now exist, and many are now being evaluated.[9]

Dram shop liability laws serve as a powerful incentive to the retail industry to adopt serving and selling practices that reduce the risk of patrons becoming intoxicated and then driving. These practices are collectively termed "responsible business practices".[10] As such, they are an important public policy tool for modifying an environmental variable that contributes to drinking and driving. Since approximately 50% of all drinking-driving incidents originate from licensed premises, they hold considerable promise as a new prevention strategy in the traffic safety field.[11]

A major feature in current dram shop law has been the lack of attention on prevention. The primary rationale for the new common law rule has been to provide victim compensation. Courts have not examined the initiative that retailers could take to reduce drinking and driving among their patrons. Nor have the courts used the law to encourage retailers to reduce drinking and driving.

The Model Dram Shop Act, which has been adopted in whole or in part in five states, was developed pursuant to a federal grant from the National Institute on Alcohol Abuse and Alcoholism.[12] The Model Act gives retailers incentives to adopt responsible business practices -- specific business policies which reduce the risk of service to underage and intoxicated persons.

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[8]*See, e.g., R. Saltz, The role of bars and restaurants in preventing alcohol-impaired driving: an evaluation of server training , Evaluation and the Health Perspectives 10(1): 5-27 (March 1987).*

[9]*See, e.g. J. Mosher, Monterey-Santa Cruz Responsible Beverage Service Project: Final Report. Marin Institute: San Rafael, CA 1989; R. Saltz, Server intervention and responsible beverage service programs. Surgeon General's Workshop on Drunk Driving: Background Papers. Rockville, MD, Office of the Surgeon General (1989).*

[10]*Mosher, Liquor Liability Law, supra note 5; J. Peters, Risk assessment: evaluating risk Bulletin on Responsible Beverage Service, 5(2): 3-6 (October 1988); Prevention Research Group, Model Dram Shop Act of 1985, 12 Western State L. Rev. 442-517 (1985).*

[11]*M. O'Donnell, "Research on drinking locations of alcohol-impaired drivers: implications for prevention policies. Journal of Public Health Policy 6:2, pp. 510-525 (1985).*

[12]*Model Dram Shop Act, supra n.21; Colman, Krell and Mosher, supra n.17.*

Thus, dram shop liability can contribute to traffic safety by potentially inducing retailers to reduce the risk of serving minors and intoxicated patrons who may be driving from their establishments. This incentive will generally increase as the risk of liability increases. If the liability rules are viewed by licensed establishments as arbitrary and not related to specific business policy reforms, they may have little impact on actual retail behavior. Thus, the specific preventive provisions of a dram shop law, such as those found in the Model Act, may be more effective in preventing alcohol-related crashes than broad liability rules that lack a close tie to serving policy reform.

(4) Criteria for Evaluating Legislative Restrictions on Dram Shop Liability Laws

The primary purpose here is to evaluate four specific legislative restrictions on dram shop liability law: (1) stricter evidentiary standards; (2) stricter liability standards; (3) elimination of joint and several liability; and (4) limitations on recovery (damage caps). The evaluation was based on two major criteria: (1) the potential impact of the restriction on responsible business practices; and (2) the appropriateness of the legal restriction within the existing state tort law.

Dram shop laws will be effective in reducing alcohol-related motor vehicle crashes if they create an incentive for alcohol retailers to adopt safe server and management practices. A central question then is whether the proposed legislative restrictions increase or decrease the retailers' incentive to adopt such practices.

(5) The Appropriateness of the Legal Restriction Within the Existing State Legal Framework

This criterion involves three separate questions, developed by Solomon and Single in their analysis of the Canadian law[13], that assess the restriction's fairness, consistency, and clarity. First, does the restriction contribute to an equitable burden of liability on the parties (i.e. is it fair)? Second, is it consistent with other provisions of dram shop law, and is it compatible with the related principles found in the states' Alcoholic Beverage Control Acts? Finally, is the restriction clear? Dram shop law is relevant to the daily activities of thousands of workers in the hospitality industry as well as the public at large. If the restrictions are to serve a preventive function, they must be clear and readily understood by the

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[13]*Solomon and Single, supra n. 17. The authors' analysis involved the assessment of a dram shop law in its entirety rather than specific elements of that law, as is being done here. Therefore, their fourth criteria -- the comprehensive of the dram shop law -- is not relevant to our discussion.*

constituency they govern.

The two criteria are interrelated. A dram shop law that is fundamentally unfair or inconsistent with the ABC law will undercut the incentive to adopt responsible business practices, even if it creates a very high risk of liability.

The proposed legal restrictions have been enacted as part of specific state dram shop law, and not part of a broader set tort law reform. While our analysis will focus on the restriction's impact on dram shop law, we believe that dram shop law should not create a unique system of liabilities or protection that are applicable to alcohol servers, but not to other tortfeasors. General tort law reform measures deserve in depth analysis on their own merits. If reforms are instituted, they should be comprehensive and internally consistent, applying to all aspects of tort law, including dram shop liability. Our goal is more modest and that is to examine the potential of dram shop laws to prevent alcohol-related traffic crashes given the current structure of tort law.

(6) Analysis of Legislative Restrictions

a. Stricter Evidentiary Standards

The evidentiary standard is a critical part of a dram shop or other civil liability case; it provides the standard by which the jury assesses the evidence presented. Virtually all civil liability cases (including dram shop cases) are governed by the common law standard of "the preponderance of the evidence," the least restrictive evidentiary standard in the law. When the jury weighs the evidence under this standard, it must decide in favor of the party that has over 50% of the evidence in its favor.

The "beyond a reasonable doubt" standard, used in criminal law, is the strictest evidentiary standard. It stands in stark contrast to the "preponderance" standard. Under the "reasonable doubt" standard the jury must decide in defendant's favor, even if the vast majority of the evidence suggests his or her guilt, if any evidence raises a reasonable doubt regarding the defendant's guilt. Thus, the evidentiary standard is critical in dram shop cases because, under a strict standard, the plaintiff must develop a much stronger case to convince the jury in his or her favor.

Two states -- Oregon and Tennessee -- have enacted legislative restrictions regarding the evidentiary standard in dram shop cases:

Oregon: Oregon's dram shop statute was amended[14] as part of Oregon's 1987 tort reform legislation,[15] to increase the standard of proof required in dram shop cases from "preponderance of the evidence" to "clear and convincing evidence." Although enacted as part of a broader tort reform package, the change in evidentiary standard applies only to dram shop cases and punitive damage awards. "Clear and convincing evidence" has no precise definition, but the Oregon Supreme Court has stated that it means something more than "preponderance of the evidence" and something less than the "beyond a reasonable doubt."[16]

Prior to the amendment, the Oregon Supreme Court had recognized three causes of action in dram shop cases:[17] (1) common law right of recovery, established in Campbell v. Carpenter[18]; (2) negligence per se, established in Davis v. Billy's Con-Teena, Inc.,[19] for violation of ORS 471.130(1) (selling beer to a minor without requiring proof of age); and (3) statutory tort, established in Chartrand v. Coos Bay Tavern, Inc.,[20] in which the court imposed a form of strict liability on a tavern owner who had served alcohol to a visibly intoxicated patron, in violation of ORS 30.950.

Responding to intense pressure from professional and business associations and the insurance industry, the Oregon legislature concluded that dram shop liability had expanded to the point that commercial alcohol vendors were finding it difficult or impossible

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[14] *ORS Section 30.950. For a discussion of the proposals for reform of Oregon's Dram Shop Law, see Note, Liquor Liability: An Oregon Perspective, 23 Willamette L. Rev. 93 (1987); Roth, supra n.16.*

[15] *Graham, 1987 Oregon Tort Reform Legislation: True Reform or Mere Restatement?, 24 Willamette L. Rev. 283 (1988).*

[16] *Willbanks v. Goodwin, 709 P.2d 213, 217 (Or. 1985).*

[17] *Note, Liquor Liability: An Oregon Perspective, 23 Willamette L. Rev. 93, 99-105 (1987); Note, Chartrand v. Coos Bay Tavern, Inc.: Dram-Shop and the Statutory Tort, 22 Willamette L. Rev. 175, 177-182 (1986).*

[18] *566 P.2d 893 (Or. 1977).*

[19] *587 P.2d 75 (Or. 1978).*

[20] *696 P.2d 513 (Or.1985).*

to obtain liability insurance.[21] Consequently, the legislature twice repealed and/or amended parts of the Dram Shop Act, first in 1979,[22] and again in 1987. The recent change in the standard of proof, as well as the restrictions in the new laws, was apparently motivated by a desire to limit the Court's broad interpretation of dram shop liability principles.[23] However, the new evidentiary standard applies to all dram shop liability cases, including those based on common law and negligence per se principles.

Tennessee: The Tennessee courts, in a series of decisions, established common law dram shop liability claims for serving obviously intoxicated or underage patrons.[24] In 1986, under pressure from the alcoholic beverage industry and the insurance companies,[25] the legislature enacted Tenn. Code Ann. Section 57-10-101(2). It prohibited awards against any person who has sold alcohol to a minor or an obviously intoxicated person unless a jury of twelve persons finds beyond a reasonable doubt that the alcohol sale was the proximate cause of the injury or death caused by that minor or obviously intoxicated person. The use of this "beyond a reasonable doubt" standard is unique to Tennessee.

Tennessee courts have not yet ruled on the constitutionality of Tenn. Code 57-10-101(2), and there are no cases analyzing its impact or rationale. At the time the law was enacted, the

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[21] *See, e.g., Sager v. McClenden, 672 P.2d 697, 700 (Or. 1983) (antidram-shop legislation was "proposed by Oregon Restaurant and Beverage Association, and supported by various commercial alcoholic beverage servers," who "testified at hearings... that they were concerned about the expansion of their liability" and that it had become "much more difficult and expensive to obtain" liability insurance).*

[22] *Sager v. McClendon, 672 P.2d 697, 700 (Or. 1983); Gattman v. Favro, 757 P.2d 402, 404-407 (Or. 1988).*

[23] *Gattman v. Favro, 757 P.2d at 408-409.*

[24] *Brookins v. The Round Table, Inc., 624 S.W.2d 547 (Tenn. 1981); Kirksey v. Overton Pub, 739 S.W.2d 230 (Tenn. App. 1987); Mitchell v. Ketner, 393 S.W.2d 755 (Tenn. App. 1964).*

[25] *See Humphrey, Tenn. Sharply Cuts 'Dram Shop' Liability, National Law Journal, April 7, 1986, p.3, col.1 (Tennessee law was "approved at the urging of lobbyists for alcoholic-beverage industry, hotels, restaurants, and insurance companies" who argued that "bars and restaurants may be forced out of business soon by high insurance rates brought on by successful 'dram shop' suits.")*

Executive Director of the Tennessee Trial Lawyers Association stated that "without question" the law would be challenged in court. He asserted that the best hope for a constitutional attack "is that there is no reasonable basis for creating a separate standard of proof in cases involving the sale of alcoholic beverages."[26]

Analysis of Impact on Traffic Safety -- The Delphi Panel determined that restrictions on the evidentiary standard constitute a substantial reduction in a retailer's exposure to liability, thereby reducing the retailer's overall incentive to adopt responsible business practices.[27] This reduction in exposure is not counterbalanced by any provisions that encourage safer practices, in spite of the reduction in overall liability risk. In fact, the opposite is clearly the case. In both Oregon and Tennessee, retailers know that, even if they do serve intoxicated or underage patrons who later injure others, a successful lawsuit is unlikely because the level of proof imposed on plaintiffs is so severe. This is particularly true in Tennessee, which requires evidence beyond a reasonable doubt before liability can be imposed.

The "clear and convincing" and "beyond a reasonable doubt" standards thwart the purpose of related state law and create an unfair burden on plaintiffs. The ABC Acts of both Tennessee and Oregon, mirroring other state alcohol laws, are based primarily in civil, rather than criminal, law and are intended to protect public safety, health, welfare and morals. The rights and responsibilities of retailers are based in licensure law, which, in general, does not require strict evidentiary standards of proof. Further, in both Tennessee and Oregon the new evidentiary standard stands in marked contrast to other civil liability law. In both cases, a special legal exception, which contradicts settled aspects of civil law, has been created in response to the short-term and parochial interests of retailers, obtained through political pressure. Thus, the new, restrictive standards have been enacted even though they are inconsistent with settled principles of both

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[26] *Id.*

[27] *The Delphi Panel assessed a negation 7.6 score to Oregon and Tennessee due to their restriction evidentiary standard, a substantial reduction in these states overall exposure to liquor liability risk score. Both states were ranked as having a "low-medium" ranking, or the fourth highest of six categories. The evidentiary standard score dropped both states from the "medium", or third, category.*

The panel did not distinguish between "clear and convincing" and "beyond a reasonable doubt" standards in its analysis. The latter is far more restrictive than the former and probably deserved a larger negative score.

civil and regulatory law.

The new standards also create an unfair burden on plaintiffs in dram shop cases. The courts and legislatures in both states have recognized a fault-based negligence standard applicable to retailers. Yet the new restrictions absolve them from most responsibility even if a claim is brought by an innocent third party who is harmed as a result of the retailer's actions. In effect, the new standards are redistributing the social cost of alcohol-related traffic crashes, as well as other alcohol-related problems, to those who suffer the harm and who have the fewest resources to absorb the harm.

b. More Restrictive Liability Standards

Liability standards have basically the same impact on dram shop claims as evidentiary standards, but the two are conceptually distinct. Evidentiary standards affect the level of proof that is needed to establish common law negligence. Liability standards maintain the level of proof, but change the degree of fault that must be established. The change can be either favorable or unfavorable to the alcohol retailer. In some states, a "strict" liability standard is adhered to, whereby a plaintiff can collect from a retailer for serving alcohol to an intoxicated patron who later causes harm, even if there is no other fault on the retailer's part.[28] The reforms to be analyzed involve the opposite situation, where the legislature has required that the plaintiff establish an increased fault standard. Nine state legislatures have taken such action:

Missouri -- the Criminal Conviction Standard -- V.A.M.S. Section 537.053(3) provides that a cause of action may be brought against an alcohol retailer on behalf of any person who has been injured or killed by an intoxicated person, only if the retailer has been convicted of selling alcohol to a minor or an obviously intoxicated person. Moreover, the sale must be the proximate cause of the personal injury or death. The Missouri legislature specifically overruled previous state court decisions which had adopted the new common law rule.[29]

Although the Missouri law is couched in liability standard language, it has a more severe impact than the Tennessee law. Both states, in effect, require proof beyond a reasonable doubt.

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[28] *See, e.g., Ill. Rev. Stat. ch. 43 sec. 135.*

[29] *Andres v. Alpha Kappa Lambda Fraternity, 730 S.W. 2d 547, 552 (Mo. banc 1987); Ernst v. Dowdy, 739 S.W. 2d 571, 573 n.1 (Mo. App. 1987); Carver v. Schafer, 647 S.W. 2d 570 (Mo. App. 1983); Nesbitt v. Westport Square, Ltd., 624 N.W. 2d 519 (Mo. App. 1981); Sampson v. W. F. Enterprises, 611 S.W. 2d 333 (Mo. App. 1980).*

However, Missouri requires that the prosecutor bring criminal charges against the retailer. This is a discretionary decision on the prosecutor's part, subject to various political and practical circumstances beyond the control of the plaintiff who has been injured as a result of the retailer's action. In effect, Missouri has created a formidable barrier to dram shop liability, taking the ability of the plaintiff to seek compensation for losses caused by retailers out of the plaintiff's hands.

The need for an actual prosecution raises potential constitutional issues, including a potential violation of the separation of powers, violations of equal protection and due process, and impermissible obstruction to the courts. The Missouri Supreme Court dismissed these claims, ruling that the statute was constitutional. The Court held that the criminal conviction is not a precondition to access to the courts, but rather is a condition to the existence of a cause of action[30].

Alaska -- the Criminal Negligence Standard -- AS 04.21.020 provides that a retailer may not be held civilly liable unless he or she serves a "drunken person" with "criminal negligence" (per AS 04.16.030). Prior to the enactment of AS 04.16.30 in 1980, the plaintiff was required to prove only ordinary negligence.[31] Under AS 04.21.080(a) (1), acting with "criminal negligence" is defined as "fail[ing] to perceive a substantial and unjustifiable risk that the result will occur or that the circumstance exists; the risk must be of such a nature and degree that the failure to perceive it constitutes a gross deviation from the standard of care that a reasonable person would observe in that situation." Whether the defendant acted with criminal negligence is a question for the jury.[32] This definition is similar to the Model Penal Code's definition of criminal negligence.[33] One commentator has described "criminal negligence" as "civil negligence plus."[34]

Commentators have criticized the use of criminal negligence standard in civil law. Criminal punishment (i.e., deprivation of liberty and/or the stigma that accompanies a criminal conviction) without evidence of subjective fault is antithetical to the modern

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[30] *Simpson v. Kilcher, 749 S.W. 2d 386 (Mo. banc 1988).*

[31] *Nazareno v. Urie, 638 P.2d 671, 673 & n.1 (Alaska 1981).*

[32] *Kavorkian v. Tommy's Elbow Room, Inc., 694 P.2d 160, 164 (Alaska 1985).*

[33] *MPC Section 2.02(2) (d) ("Negligence").*

[34] *J. Dressler, Understanding Criminal Law, 101 (1987).*

idea that "to be guilty of a crime, a person must voluntarily perform an act that causes social harm (the actus reus) with a mens rea, or guilty mind.... [T]he existence of mens rea [is generally considered] a prerequisite to criminal responsibility..." [35]

The Alaska dram shop statute, which uses the criminal negligence standard in civil liability law, creates additional problems. As discussed below, it is difficult to define, and includes an element of criminality that is antithetical to civil law. The Alaska courts have not yet defined the criminal negligence standard in the context of the dram shop statute.

Colorado, Florida, Georgia, Maine, New Mexico, Ohio, and Rhode Island -- Reckless, Willful or Wanton Standards -- Seven states impose a variant of the "reckless, willful, or wanton" liability standard in dram shop actions. In general, this involves the retailer's knowledge of the patrons' intoxication or underage status, the retailers intention, and the retailer's conscious disregard of obvious and substantial risks of harm to others.

Under an ordinary negligence standard, the retailer can be held liable if he, as a reasonably prudent commercial alcohol vendor, should have known that the patron he served was intoxicated or was a minor. The service may have been inadvertent, and the retailer should have known that the service involved risks to others. However, a retailer will only be found to be reckless, willful, or wanton if he or she is shown to have had actual knowledge that the patron was intoxicated or a minor, intentionally served the patron in spite of this knowledge, and consciously disregarded an obvious and substantial risk to others.[36] It is far more difficult for a plaintiff to establish actual knowledge and intention. A retailer can act imprudently or can ignore ordinary signs of intoxication without necessarily having actual knowledge.

In Colorado (Sections 12-46-112.5 and 12-47-128.5), Georgia (OCGA Section 51-1-40), and Ohio (Section 4399.18), the standard applies to the serving of alcohol to both minors and intoxicated persons. In Florida (FSA Section 768.125), the willful standard applies only to serving minors. In New Mexico (41-11-1 NMSA), a "gross negligence and reckless disregard" standard applies to the serving of alcohol to intoxicated persons only. This is likely to be interpreted in the courts as similar or identical to the "wanton,

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[35] *Id. at 95.*

[36] *See Model Dram Shop Act, supra n.21*

willful or reckless" standard[37].

The Maine and Rhode Island dram shop Acts (28A MRSA Section 2501 et seq; R.I. Gen. Laws Section 3-11-1 et seq.) use two standards of liability, drawing from the Model Dram Shop Act.[38] To collect punitive damages, "reckless" conduct must be shown. This reflects the law regarding punitive damages in many states, some of which require proof of criminal negligence rather than recklessness. The Model Act and the Maine and Rhode Island statutes provide specific examples of reckless conduct to help guide the court's interpretation.

Analysis of Impact on Traffic Safety -- The Delphi Panel determined that stricter liability standards (except in the two-tier approach used in Maine and Rhode Island, and the Model Act) substantially reduce a retailer's exposure to dram shop liability claims, thereby decreasing their incentive to adopt responsible business practices. The panel rated the "criminal conviction" standard used in Missouri the most restrictive, the "criminal negligence", the next most restrictive, and "wanton, willful and reckless" standard, the least restrictive. All categories were judged to be far more strict than a common law negligence standard.[39]

None of the standards have specific provisions that would increase a retailer's likelihood of adopting responsible business practices. Particularly in the case of Missouri, the opposite is far more likely. As a practical matter, criminal prosecutions are seldom brought against retailers for serving obviously intoxicated or underage patrons. Even civil actions to suspend or revoke the retailer's license, which are far easier to establish, are relatively rare.

A legal analysis of these liability restrictions bolsters this conclusion. As with the evidentiary standards, the provisions are generally as clear as the liability standards which were replaced. However, the standard remains vague, particularly in the case of the Alaska statute, which injects a reference to criminality. This may confuse a jury, by suggesting that the retailer must be judged

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[37]*See Mosher et al., supra n.5, for further details on these states' laws.*

[38]*Model Dram Shop Act, supra n.21.*

[39]*The Delphi Panel assessed a common law negligence standard a score of 7.0. The criminal conviction standard, in contrast, was given a score of 2.0, criminal negligence a score of 2.4, and reckless, willful and wanton, a score of 3.3. The variation is sufficient to drop all these states by one category. The two-tier approach used in Maine and Rhode Island did not affect these states' exposure to risk score.*

to have acted in a criminal manner. More explicit definitions and terms -- whether it be negligence, criminal negligence, willfulness, wantonness or recklessness -- are needed to fulfill the clarity goal discussed above.[40]

The standards are also inconsistent with other, related provisions, and place an unfair burden on plaintiffs. The Missouri and Alaska statutes suffer the same inconsistency as the Tennessee statute, discussed above. Essentially criminal provisions are used in a civil matter, creating confusion and inconsistent provisions. A willful, wanton and reckless standard is less problematic, since it is often used in civil law, although it remains far more restrictive than other aspects of negligence law. With the exception of the Maine and Rhode Island statutes, the new liability standards place a substantial additional burden on plaintiffs, forcing them to shoulder the losses even if free from fault and even if the damage was caused in part by a negligent retailer. Thus, as with evidentiary restrictions, these new liability standards give retailers unique protection, not generally available to other negligent tortfeasors. Based on our criteria for analysis, this protection undermines traffic safety.

The Maine and Rhode Island statutes provide a good example of how to use a stricter liability standard to improve, rather than jeopardize, traffic safety. By developing two separate standards, one applicable to ordinary damage recovery and the other for recovery for punitive damages, the legislature has increased the retailer's incentive to adopt responsible business practices. The statutes provide clear definitions of the liability standards. They also provide a clear benefit for retailers who adopt safe practices but do so imperfectly, namely protection from punitive damages. The statutes' explicit connection between punitive damages and recklessness in serving practices may be inferred in other states. However, the clear definitions and explicit link to responsible business practices are useful in persuading retailers that business practice reforms will have practical benefits. This was the intent of the Model Dram Shop Act, as discussed in the relevant commentaries to the Act.[41]

c. Elimination of Joint and Several Liability

Under the doctrine of joint and several liability, two or more defendants (termed "multiple negligent defendants") who are partly and independently responsible for damage caused to the plaintiff

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[40]*See Model Dram Shop Act, supra note 21 for an example of more explicit definitions of the liability standard imposed.*

[41]*Id.*

are all equally liable to the plaintiff.[42] The plaintiff may collect all of his or her damages from any one of the defendants. In other words, each defendant found negligent is potentially responsible for all damages, and the plaintiff, at his or her option, may sue all, some or one of the defendants for recovery. The concept is quite broad. Modern authority generally allows the imposition of joint and several liability "where the independent tortious acts of two or more persons supplement one another and concur in contributing to and producing a single indivisible injury... notwithstanding the absence of concerted action."[43]

A corollary to the joint and several doctrine is the doctrine of contribution. A defendant may join another defendant in an action and require him or her to contribute an appropriate share to plaintiff's recovery. The two doctrines result in the following scenario. B and C are both 50% at fault in injuring the plaintiff A. Plaintiff A sues defendant B for the entire recovery. B joins defendant C as a codefendant for contribution of 50% of the award. As a result, A collects 100% of his recovery from B, and B receives 50% from C.

Taken together, the two doctrines place the burden on the defendants -- the wrongdoers -- to pay in relation to their fault. The plaintiff, as the innocent party, is assured of full compensation by enabling him or her to collect from the defendants with the most resources. If one or more defendants is insolvent and unable to pay, the loss is borne by the other tortfeasors, rather than the innocent plaintiff.[44]

The joint and several liability doctrine has a major role in dram shop cases, which by definition involve at least two potential defendants -- the intoxicated patron and the negligent retailer. In many cases the driver who is usually judged as the primary wrongdoer is insolvent or has very limited resources. The retailer therefore becomes a target for plaintiffs as a "deep pocket" -- a potential defendant who has substantial resources, in the face of an insolvent primary defendant.
Since 1985, over half the states have modified or completely abolished joint and several liability, usually in response to

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[42]*Multiple negligent defendants should be distinguished from joint defendants, where the defendants' liability is based on the fact that they acted in concert pursuant to a common plan.*

[43]*74 Am. Jur. 2d Torts, Section 62; see also Prosser, Joint Torts and Several Liability, 25 Cal. L. Rev. 413, 435-439 & 442 (1937.)*

[44]*Id. See also Mosher et al. supra n.5.*

lobbying efforts from various business interests.[45] In many cases, the plaintiff must establish at least a 50% fault in order to collect the entire damage award from a particular defendant. Typically, the legislative action is defended as a means to address the insurance crisis.[46] Two states -- Maine and New Jersey -- have placed severe restriction on the doctrine in their dram shop statutes:

Maine -- MRS 17 Section 2002 (repealed in 1985) provided that a person who illegally sold alcohol, the intoxicated patron, and the owner of the building would all be jointly and severally liable for injuries inflicted on third parties. The building owner's liability was conditioned on proof that he or she had actual knowledge that alcohol was being sold therein contrary to law. In 1987, the Maine legislature enacted MRS 28-A Section 2512. It provides that the intoxicated person and the retailer are each severally, but not jointly, liable for the percentage of the plaintiff's damages for which each is at fault.

New Jersey -- Similarly, the New Jersey statute, N.J. Stat. Ann. 2A:22A-6(b), enacted in 1987, provides that a licensed server determined to be a tortfeasor under 2A:22A-5 (providing for dram shop liability) is responsible for no more than that percentage share of the damages which is equal to his or her percentage of negligence. In addition, the New Jersey legislature included in 2A:22A-2 its finding that "licensed alcoholic beverage servers face great difficulty in obtaining liability insurance coverage. .." because the "incidence of liability" is so unpredictable. The legislature stated that the abrogation of joint and several liability was designed to address this insurance crisis and to provide a balanced and reasonable procedure for allocating responsibility for such losses.

The impact on insurance coverage, the primary justification for the restrictions by the legislature, is problematic. There are no

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[45] *See Pope and Freveletti, Tort Reform Act, 18 Loy. U. Chi. L. Rev. 839, 843-846 (1986); Steenson, Recent Legislative Responses to the Rule of Joint and Several Liability, 23 Tort and Insurance Law Journal 482 (1988); Graham, 1987 Oregon Tort Reform Legislation: True Reform or Mere Restatement?, 24 Willamette L. Rev. 283, 312-314 (1988); Granelli, The Attack on Joint and Several Liability, 71 A.B.A.J. 61 (July 1985); American Medical Association, Summary of State Tort Reforms Enacted in 1986, August 11, 1986.*

[46] *1986 Wash. Legis. Serv. ch. 305 Section 100 (West); see also N.J. Stat. Ann. 2a:22A-2 ("[L]icensed alcoholic beverage servers face great difficulty in obtaining liability insurance coverage...")*

studies establishing a relationship between the legal restrictions and insurance coverage availability or costs. Moreover, other insurance reforms to address these concerns directly are readily available, although less politically attractive to legislatures. A detailed analysis of this issue is beyond the scope of this paper.[47]

Analysis of Impact on Traffic Safety -- The Delphi Panel determined that the abrogation of joint and several liability substantially reduced a retailer's exposure to dram shop liability, thereby reducing his or her incentive to implement responsible business practices. Furthermore, the legislative measures do not include any provision that would otherwise increase a retailer's likelihood to establish safe practices[48]. On the basis of this first criterion for review -- the impact on responsible business practices -- the restriction of the joint and several liability doctrine is inadvisable.

The legal analysis involved in the second criterion is less clear, although it results in the same general, although possibly qualified, conclusion. There is no issue of clarity when analyzing the legal restrictions. However, they may be inconsistent with other tort law within a state if they apply only to dram shop litigation and not other tort claims. As argued by Solomon and Single[49]:

> "it would be difficult to justify creating a special exemption to the joint and several liability provision for alcohol providers . . .. Why should this particular group of defendants be treated differently than doctors, lawyers, drivers, manufacturers, employers and other defendants?"

The issue of fairness is also complex. On the one hand, it appears fair to require a defendant to pay for only that proportion of the damages which he or she causes. This is particularly true in cases where a defendant is only incidentally responsible or where the plaintiff is contributorily negligent. On the other hand, restrictions on the doctrine move the cost of nonrecovery from a party partially at fault to an innocent party. As stated by

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[47]*See Chapter III for discussion of dram shop liability insurance coverage.*

[48]*Delphi Panel assessed a negative 7.4 score for these two states which abrogated the joint and several doctrine. This dropped New Jersey from a "very high" to "high" state and Maine from a "low medium" to "low" state.*

[49]*Supra n.17 at 42.*

Solomon and Single: "[A]s between a purely innocent plaintiff and even a minor negligent cause, the loss should be borne by the negligent party and not his victim."[50]

In sum, restrictions on the doctrine of joint and several liability as it applies to dram shop liability should be enacted with caution, given the potential to lower retailer vigilance in service of underage and/or intoxicated patrons. Such lowered vigilance is likely to have an adverse impact on traffic safety. Restrictions should be considered only after careful study and only in the context of broader tort reform that is not limited to dram shop liability. Abrogation of the doctrine appears unjustified from both legal and traffic safety perspectives. Limitations on the doctrine applied to incidental defendants (assessed 5-10% of fault or less) or applied in cases when the plaintiffs are contributorily negligent can be argued to increase the fairness of the law.

d. Limitations on Recovery (Damage Caps)

Legislatures in eight states -- Colorado, Connecticut, Illinois, Maine, Minnesota, New Mexico, North Carolina and Utah -- have limited the monetary damages which a plaintiff can recovered from an alcohol retailer in actions brought pursuant to the state's dram shop law. The limitations vary widely.

Colorado -- Colorado Code Sections 12-46-112.5 and 12-47-128.5 limit the liability under the dram shop law to $150,000. As part of its tort law reform, Colorado has also limited recovery of non-economic damages in all civil actions to $250,000. The Colorado courts have apparently not yet ruled on the constitutionality of either damage limit.

Connecticut -- CGSA Section 30-102 imposes a limit of $20,000 recovery for injury to one person, and $50,000 total for the injury to more than one person. The Connecticut Supreme Court has ruled that the Dram Shop Act is not a common law negligence action, and has upheld the constitutionality of both the statute and its limit on damages.[51]

Illinois -- I.R.S. ch. 43, paragraph 135 provides that recovery for each injury is limited to $30,000. Each person injured, however, may claim more than one injury.[52] All persons claiming loss as to means of support are limited to an aggregate recovery of $40,000. Illinois courts have repeatedly emphasized that the Dram Shop Act

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[50] *Id.*

[51] *Sanders v. Officers' Club of Connecticut, Inc., 493 A.2d 184 (Conn. 1985).*

[52] *Darzugas v. Robinson, 515 N.E. 2d 451 (Ill. App. 1987).*

is a statutory remedy only, not existing at common law and have upheld the constitutionality of the Act, including the damage cap provision.[53]

Maine -- 28A MRSA Section 2509 provides that the claim for all losses, except medical care and treatment, may not exceed $250,000 for all claims arising out of a single incident or occurrence. Where there are multiple claimants with claims aggregating more than the maximum, the court will divide the amount available among the claimants. Maine courts have not ruled on the validity of any of their portions of the Dram Shop Act.

Minnesota -- Minnesota is one of two states in which the damage cap in its dram shop law has been declared unconstitutional. In McGuire v. C&L Restaurant,[54] the Minnesota Supreme Court invalidated as unconstitutionally discriminatory a statute which imposed a $250,000 liability limit on damages against a vendor of intoxicating liquor, but imposed no limit on the liability of a vendor of 3.2 beer.

New Mexico -- New Mexico's damage cap was also found to be unconstitutional.[55] NMSA 41-11-1 provided for a limit of $50,000 recovery for the bodily injury or death of two or more, in actions brought pursuant to the dram shop law. The statute also limited recovery for property damage to $20,000 for "each transaction or occurrence."

North Carolina -- G.S. Section 18B-123 limits the total recovery to all parties to $500,000 per occurrence. The provision does not apply to common law actions, which may be brought separate from the statutory cause of action. The North Carolina courts have not ruled on the constitutionality of this provision.

Utah -- Utah Code Section 32A-14-1 provides that the amount which may be awarded to one person is limited to $100,000. The aggregate which may be awarded to all persons as the result of one occurrence is $300,000. As part of the reform of its tort laws, Utah also limited recovery in medical malpractice actions to $300,000 for non-economic damages. The Utah courts have not ruled on the

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[53] *Hopkins v. Powers, 497 N.E. 2d 757 (1987); Mulhern v. Talk of the Town, 486 N.E. 2d 383 (Ill. App. 1985) (citing Wright v. Central Du Page Hospital, 347 N.E. 2d 736, 742 (1976); Thoreson v. City of Chicago, 392 N.E. 2d 716, 725 (Ill. App. 1979) (finding valid legislative intent to limit damage awards).*

[54] *346 N.W. 2d 605 (Minn. 1984).*

[55] *Richardson v. Carnegie Library Restaurant, 763 p.2d 1153 (N.M. 1988)*

constitutionality of either damage limitation.

Analysis of Impact on Traffic Safety -- As with the other restrictions, the Delphi Panel determined that limitations on dram shop recovery substantially reduce a retailer's exposure to dram shop liability and thus reduce a retailer's incentive to enact responsible business practices. The panel found that the level of the damage cap was critical. Caps of $100,000 or less (such as that found in Illinois) were found to be extremely restrictive, undercutting the impact of the state's dram shop law. Caps of $200,000 (such as the Maine cap) were found to have much less impact.[56] No other provision of the damage cap legislation tends to encourage responsible business practices. Based on our first criteria, damage caps, especially low damage caps, are inadvisable from a traffic safety perspective.

Our second criterion for analysis bolsters this conclusion. The statutory language is clear and easily applied. However, there are serious issues of fairness and consistency with other laws. As illustrated in the Minnesota case, damage caps may be found to be inconsistent with basic principles of constitutional law. This is a developing area of law, with no clear consensus. A detailed analysis is beyond the scope of this report.[57] At a minimum, the potential for constitutional challenge suggests that any damage cap should be enacted with caution and in the context of broader tort

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[56]*The Panel assessed caps of $100,000 or less a negative 8.6 score; caps from $100,000 to $200,000 a negative 6.7 score, and caps of $200,000 to $500,000 a negative 2.6 score. States with caps of $200,000 or less experienced a substantial lowering of their overall exposure to risk score.*

[57]*Compare Kenyon v. Hammer, 688 P.2d 961 (Ariz. 1984) and White v. Montana, 661 P.2d 1272 (Mont. 1983) (both holding damage caps unconstitutional) to Fein v. Permanente Medical Group, 38 Cal. 3d 137 (1985) (finding that California statute was rationally related to legislative purpose of responding to insurance crisis in state); Florida's Patient Compensation Fund v. Von Stetina, 474 So. 2d 783 (Fla 1985) (damage cap upheld because "legislature could reasonably find that increasing costs of medical malpractice insurance posed a threat to the continued availability and adequacy of health-care services"); Indiana-Johnson v. St. Vincent Hospital, Inc., 404 N.E. 2d 585 (Ind. 1980) (finding that limitation was not arbitrary and was reasonably related to legislative purpose of preserving health care services for community); State ex rel. Strykowski v. Wilkie, 261 N.W. 2d 434 (Wis. 1978) (economic rights not considered suspect class or fundamental right, and statute was reasonably related to legislative purpose). For discussion, see Farrell, Virginia's Medical Malpractice Cap and the Doctrine of Substantive Due Process, 23 Tort and Insurance Law Journal 684 (1988); and Smith, Medicine and Law: AIDS, Constitutional Challenges to Tort Reform, and Medical Malpractices, 23 Tort and Insurance Law Journal 370, 391 (1988).*

reform.

Damage caps also raise issues of fundamental fairness. Particularly in the case of very low caps, defendant retailers are provided a unique protection, not available to other tortfeasors. Innocent third parties are provided only a small fraction of recovery, while those contributing to the damage are protected. These considerations have given rise to the constitutional challenges.

The most frequent defense for the caps is the unjustifiable size of tort awards. If this is the case, reform is needed in the assessment of damage awards, an issue that cuts across all aspects of tort law. Damage caps do not address these underlying causes, and can become obsolete quickly, given the rapid increases in medical and property damage costs.[58] None of the damage caps analyzed here provide any adjustment for increases in these costs. Increased insurance costs are also cited as a justification for damage caps. As discussed, there are more direct ways of addressing the insurance crisis, and there are no studies to determine the impact of damage caps on insurance costs or availability.

In summary, damage caps, particularly if established at levels of $200,000 or less, significantly reduce the impact of dram shop statutes on traffic safety and fail to address the concerns used to justify them. If a damage cap is imposed, it should be established at a relatively high rate and should be enacted in the context of a broader tort reform package rather than as a unique provision of dram shop liability law.

(7) Dram Shop Liability and Reform in Canada

The Current State of Canadian Law[59] -- Until the 1970's, it was uncommon for individuals to be held liable for the conduct of their intoxicated guests or patrons. However, societal concerns about drinking and driving, as well as independent developments in Canadian tort law, fueled increases in the number and kinds of such suits. These liability claims have not been limited to commercial licenced establishments, but rather extend to social hosts, universities, beer and liquor stores, service clubs, and others.

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[58] *Solomon and Single, supra n.17.*

[59] *This summary is drawn from Solomon, R. "Canadian Dram Shop Liability Law; Chapter 20 in Mosher, J., ed. Liquor Liability Law, Matthew Bender Co., Inc., NY (1987). R. Solomon and S. Usprich, "Civil liability for the conduct of the intoxicated across Canada". Toronto: Proceedings of the National Server Intervention Symposium Sponsored by the National Department of Health and Welfare, Canada, March 1-2, 1989 (in press).*

Moreover, the courts have recognized additional bases of liability for transporting intoxicated persons, sponsoring potentially dangerous activities, supervising intoxicated persons, and using excessive force.

There has been a marked trend towards expanding the liability of those who sell, supply or provide alcohol to others. Common law liability applies in all jurisdictions, except Quebec. It arises from providing alcohol to a person past the point of intoxication or to a person who is apparently intoxicated. The courts have interpreted these principles broadly. Alcohol providers have been held liable even though they had no knowledge of the patron's susceptibility to alcohol, had no actual knowledge of the patron's intoxication, and had not served the patron all or even most of the alcohol causing his or her intoxication.

Statutory dram shop liability has been enacted in Manitoba, Nova Scotia, Ontario and the Northwest Territories. There are reported cases only under the Ontario statute, and the courts in that province have not clearly distinguished between statutory and common law dram shop liability. Liability in Quebec is based on the Civil Code and the scope of liability is somewhat narrower than under the common law principles that apply in the remainder of Canada.

In addition to whatever liability individuals may incur as alcohol providers, they may also be held liable in their capacity as "occupiers" for alcohol-related injuries that occur on their property. There are three separate bases of occupiers' liability in Canada. An occupier can be held liable for alcohol-related injuries under the Civil Code in Quebec, and under common law in New Brunswick, Newfoundland, Nova Scotia, the Northwest Territories, Saskatchewan, and the Yukon. In the remaining jurisdictions -- Alberta, British Columbia, Manitoba, Ontario, and Prince Edward Island -- the common law principles have been replaced by provincial occupiers liability acts.

Liability under the Quebec Civil Code and the common law is narrow in scope. In the majority of cases, the occupier must have actual knowledge of the danger. In contrast, the occupiers' liability legislation imposes a broad general duty on all occupiers to take "reasonable steps" to ensure that the premises are "reasonably safe" in all of the circumstances.

In the end result, dram shop liability is more expansive in Canada than in the United States. The Canadian principles of providers' and occupiers' liability appear to be broader in scope and apply well beyond the confines of commercial licenced establishments. The trends in Canada suggest that the number of such suits will increase dramatically in the near future. As in the United States, the Canadian hospitality industry has responded by attempting to

develop and implement risk minimalization programs.

Reform of Dram Shop Liability in Ontario -- Concerns about the provincial alcohol law led Ontario to establish an Advisory Committee on Liquor Regulation in 1986. As part of its mandate, the Committee commissioned a review of dram shop liability in Ontario. As in the United States, the insurance, hospitality and retail alcohol industry expressed grave concerns about their expanding liability.

Single and Solomon[60] were asked to prepare a detailed study of the existing law and make recommendations for its reform. In preparing the report, they reviewed a number of legislative restrictions including stricter evidentiary standards, stricter liability standards, elimination of joint and several liability, and limitations on recovery.

Single and Solomon recommended fundamental changes to dram shop liability that would simplify the law and ensure an equitable burden of responsibility for alcohol-related mishaps. They were also concerned that their proposals be consistent with the provincial alcohol law and compatible with the general principles of tort liability. Finally, they were most anxious to ensure that dram shop liability principles contributed to, rather than undermined traffic safety. The Advisory Committee accepted most of their major recommendations. As stated in the executive summary (pp. iv-v)[61]:

> In the complex area of civil liability related to service of alcohol, the Committee recommends that the existing section (53) in the Liquor Licence Act, which applies to the sale of beverage alcohol, be replaced with a section providing an exclusive statutory remedy for liability pertaining to over-service of alcohol and service to underage persons. The new section should be fault-based, requiring that the alcohol provider be found to have knowingly or negligently served a person to impairment or served a person under the age of 19 years. The new section should encompass death or injury to the alcohol consumer or third parties, and should cover all providers of beverage alcohol for sale, and all providers of alcohol in a public place. The concept of intoxication in this and other sections of the Act should be replaced by the concept of impairment.

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[60]*Solomon and Single, supra n.17.*

[61]*Report of the Advisory Committee on Liquor Regulation, (S. Offer. Chair), Toronto: Ontario Province Ministry of Consumer and Commercial Relations (1987).*

In the area of education, the Committee recommended a mandatory training program for all beverage alcohol servers in licenced establishments in the province to ensure that they are aware of their responsibilities under the law and the importance of preventing over-service of alcohol or service to persons under the legal drinking age. The Committee also proposes that a proportion of Liquor Control Board of Ontario (LCBO) revenues be designated to provide significant additional funds for an effective and continuing alcohol education program, targeted particularly at the young.

Perhaps more importantly for present purposes, the Advisory Committee accepted Single and Solomon's recommendation to reject piecemeal changes in dram shop liability that simply created unique protection for the hospitality and insurance industries. The Committee rejected these changes because they were inconsistent with general principles of tort law, only serviced special interests, unfairly allocated the burden of responsibility, and were inconsistent with public safety goals of the provincial alcohol legislation. Two of the proposals which the committee rejected, limitation on awards and abrogation of the doctrine of joint and several liability, are relevant here:

> It has been argued that there should be a limit set on the size of damage awards in cases of liability for the intoxicated. The Committee sees no need to set a financial limit on awards at this time. Any review of the principles of assessment of damages related to this kind of liability suit should be carried out by an agency conducting a review of general assessment of damages on all of tort law. We understand this is being done by the Ontario Law Reform Commission.
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> The Committee has also looked at the issue of "joint and several liability". Where fault is apportioned among defendants, the plaintiff can enforce the entire judgment against any of the defendants, and the one who pays may then try to collect appropriate shares for his or her co-defendants. It has been proposed that alcohol providers should be exempt from the principle of joint and several liability. The Committee could see no obvious reason why this particular group should be exempt and we do not feel this matter should be resolved on an ad hoc basis. It should be examined in the broader context of the Ontario Negligence Act and all tort law.[62]

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[62] *Id. at 90.*

As in the United States, there has been a dramatic rise in dram shop liability in Canada. In general, the principles of recovery in Canada are far broader than those in the United States. In both jurisdictions, the insurance, hospitality and retail alcohol industries have called for "reform".

At least in Ontario, the government has proposed sweeping changes to dram shop liability. Of equal importance, the government specifically resisted the lobbying efforts of special interests, who sought to limit recovery by carving out unique protection for themselves. Such legislative restrictions on recovery were rejected as being unfair, inconsistent with general principles of tort law and incompatible with general concerns about traffic safety.

(8) Summary and Recommendations

This section examines four restrictions on dram shop liability law that have recently been enacted by state legislatures in the United States: (1) stricter evidentiary standards; (2) stricter liability standards; (3) elimination of joint and several liability; and (4) limitations on recovery (damage caps).

The restrictions represent a new trend in the law that limits the ability of plaintiffs to recover from retailers who are negligent in the service of alcoholic beverage. This trend is in response to the tendency of state courts, since the mid 1970's, to adopt the "new common law rule" of dram shop liability, which expands the retailers' exposure to lawsuits. Supporters of the restrictions argue that they are part of a broader tort "reform" effort and are necessary to protect retailers from unfair damage awards and inflated insurance costs.

Evaluation of the restrictions was based on two criteria.

(1) The potential impact on Responsible Business Practices: Dram shop liability contributes to traffic safety by inducing retailers to reduce the risk of serving minors and intoxicated patrons who may be driving from their establishments. This incentive will generally increase as the risk of liability increases, particularly if it is tied to specific responsible business practices.

(2) The appropriateness of the legal restriction within the existing state legal framework: To be effective, dram shop liability law needs to be: (a) fair, equitably distributing the burden of liability; (b) consistent with related legal provisions, particularly those found in the Alcoholic Beverage Control Acts; and (3) clear, so that it is readily understood by the constituency it governs.

Analysis based on these criteria shows that the four restrictions represent a setback for traffic safety. They reduce the incentive

of retailers to adopt and adhere to responsible service practices, are inconsistent with related legal provisions, and unfairly distribute the burden of liability. The restrictions are not part of a broader tort reform effort. Rather, they have been enacted in piecemeal fashion in response to political pressure from the alcohol retail industry and serve short term and parochial interests. Their public policy implications have not been clearly examined as part of the legislative process.

Particularly troubling are those restrictions that add criminal law elements to the civil liability process. Tennessee requires a criminal law standard of proof ("beyond a reasonable doubt"); Missouri requires as part of the cause of action proof that the retailer was actually convicted of the crime of serving an intoxicated person; and Alaska requires proof of "criminal negligence". Damage caps, particularly those of $200,000 or less, and the abrogation of the doctrine of joint and several liability also seriously jeopardize the public's interest in traffic safety.

Our conclusions are tempered in only two instances. First, Maine and Rhode Island have both created a two-tier liability standard. Ordinary negligence must be established for a finding of liability; recklessness must be established for punitive damages. This system, drawn from the Model Dram Shop Act, increases a retailer's incentive to adopt safe practices, particularly given the clear definitions and explicit ties to such practices found in the legislation. Second, a review of the doctrine of joint and several liability may be justified to insure fairness. The review should assess the advisability of applying the doctrine to incidental defendants and in cases where the plaintiff is found to be contributorily negligent. Any modification should occur in the context of its application to tort law generally and not just to dram shop liability cases.

Dram shop liability law provides a potentially important tool for protecting the public from alcohol-related motor vehicle crashes. To be effective, it needs to be based in negligence law, with the standard of care expected of retailers clearly delineated. Incentives for adopting and adhering to specific responsible business practices should be included. The legislation needs to be clearly drafted, consistent with related legal provisions, particularly those found in the state Alcoholic Beverage Control Codes, and fair, such that the costs of injury and other damage among the various parties is equitably distributed. Clearly, current laws are imperfect and require review from a public policy perspective. As the Canadian experience and the Model Dram Shop Act demonstrate, appropriate reform measures are available. Unfortunately, the restrictions reviewed here fail to meet these basic criteria.

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CHAPTER III

SERVER LIABILITY INSURANCE

A. Introduction

This chapter concerns the civil liability of commercial vendors who have sold alcoholic beverages to a drinking driver and the insurance for such liability. The first part of this chapter summarizes available information from public sources and the second part reports the results of a survey conducted by the Responsible Hospitality Institute. Available evidence on the magnitude of recent increases in dram shop liability and in premiums for liquor liability insurance is reviewed. This chapter reviews the arrangements which have been made recently in various states to collect data on dram shop claims. The chapter also explores the manner in which insurance companies set premiums, the various methods used by insurers to classify risks, and the impact of state regulation. The structure of the market for server liability insurance is examined and the degree of competition in this market is assessed. Legal and economic issues concerning 'insurers of last resort' such as assigned risk plans and subsidized pools are discussed. Finally the chapter concludes with an assessment of available data for premium determination based on documentation of actual risk.

B. Evidence of the Increase in Dram Shop Liability

Reliable data on increases in liability which have been experienced by liquor retailers is not available. However, the fragmentary evidence available suggests that this increase has been substantial. One source, without citing data, reports that in 1985 the number of liquor liability lawsuits based on either dram shop statutes or common law increased by 300 per cent.[74] This increase has been reflected in insurance premiums. A Gallup poll conducted by the National Restaurant Association found that in fiscal 1985-1986, the average premium increase for responding members of the Association was 110 per cent, while the average premium was $39,500.[75] Testimony before the New Jersey Legislature in 1985 indicates that after an increase in litigation against New Jersey tavern owners, premiums increased by amounts ranging from 300 to 1000 per cent over a period of five years;

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[74] *Braxton (1986).*

[75] *Bain (1986).*

in addition, insurance companies became 'highly selective' about which businesses they would insure.[76]

A recent report by the Tort Policy Working Group states that: "Coverage for liquor liability is still a severe problem in some areas of the United States. A recently concluded NAIC [National Association of Insurance Commissioners] survey of liquor liability coverage concluded that there is an availability problem, but it varies significantly among the States and by type of liquor establishment. Demand for liquor liability coverage has increased as more liquor vendors who previously were uninsured have sought to obtain coverage. As demand has increased, capacity, particularly in excess lines, has diminished." See "An Update on the Liability Crisis" (1987).

There is available some direct evidence on the frequency and severity of dram shop claims. The Oregon Liquor Control Commission has prepared a "Summary of Liquor Liability Claims Filed or Settled in 1987" which is shown in Appendix III-A. This table classifies the defendants according to the type of liquor license held and, in the fifth column, shows the total number of licenses issued for each class. In this table the symbol "DA" stands for Dispenser of Class A, which means the retailer can serve any alcoholic beverage for consumption on the premises. "RMB", which stands for Retail Malt Beverage, means the retailer can serve beer and wine on the premises, and malt beverages at retail, for consumption off the premises. "PS" stands for Package Store, which can sell beer and wine for consumption off the premises. The table shows, for example, that there have been only eight liquor liability claims based on incidents occurring in establishments with a "DA" license, i.e., bars, in 1987; these claims were filed against 5 out of a total of 1200 bars in Oregon. There were no 1987 claims filed against the 1459 establishments with a retail malt beverage license in Oregon. It is also apparent that dram shop claims are large claims. The mean recovery from all claims listed in the table for all years (excluding those yielding no recovery) is $129,092.[77] It is interesting to note that for many of these claims there was 'other indemnity' provided by additional coverage such as health insurance or automobile insurance policies.

The increase in the cost of insurance has given rise to a number of schemes designed to assist firms to pool their risks. In at least three states - New Hampshire, Massachusetts, and Minnesota there are

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[76]*Conaway (1988), at n. 67, 191 and 197, citing (Public Hearing Before Assembly Law, Public Safety & Defense Committee on Assembly Bill 43 and Assembly Bill 347, New Jersey General Assembly (April 4, 1985).*

[77]*The sample standard deviation is $164,887. If claims which yielded no recovery are included in the computation, the sample has a mean of $79,914 and a standard deviation of $142,965.*

state-operated insurance pools that attempt to divide the risk among participating firms,[78] and make liability coverage available to all commercial servers.[78] The firm of Joseph E. Seagram & Sons recently organized an insurance group to provide alcohol liability insurance coverage to licensed retailers such as package stores, taverns, and restaurants who have had difficulty obtaining satisfactory insurance.[79] Licensed beverage retailers[80] will be eligible to join this group, which is called the Consortium of Licensed Beverage Retailers Association (COLBRA). Members of COLBRA will be entitled to purchase insurance from a new company called the Beverage Retailers Insurance Company - A Risk Retention Group (BRICO). An application has been filed with the Vermont Department of Banking and Insurance for approval and licensing of BRICO. In addition, the National Club Association has developed a liquor liability and umbrella liability insurance program for the benefit of its member clubs.[81]

Another type of response to the increased cost of insurance is for liquor retailers to 'go bare', i.e., to operate without any liquor liability insurance.[82] However, this alternative is not viable in states such as Minnesota, which requires each retailer to submit proof of insurance coverage in order to maintain a liquor license.[83] Iowa and Michigan also require licensees to carry liability insurance.[84]

C. Insurance Data Collected By The States

Some states require further insurance information as a guide for state policy. They have enacted statutes which require reports concerning

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[78]*Goldberg (1987), at 86.*

[79]*Risk Management (1987).*

[80]*Members of major trade associations which represent licensed beverage retailers will be eligible to join COLBRA. These associations include the National Licensed Beverage Association, the National Liquor Stores Association, Inc., the Wine & Spirits Guild of America, and the National Restaurant Association.*

[81]*Risk Management (1987) cites A.M. Best Co. as reporting that premiums for commercial liability insurance rose an average of 79 per cent in 1985 and about 72 per cent in 1986.*

[82]*Bain (1986).*

[83]*Vol. 22, Sec. 340A.409, Minnesota Stat. Ann.*

[84]*Sec. 123.92, Iowa Alcoholic Beverage Control Act, amended by Acts 1988, Ch. 1158, Sec. 30; Sec. 436.22a, Michigan Compiled Laws Ann.*

dram shop claims, or the market structure of the insurance industry, or both.

Perhaps the richest data set on dram shop claims will be collected in Oregon. A statute enacted in 1987 requires liquor liability insurers to file extremely detailed annual reports with the Oregon Liquor Control Commission. For each claim made against an insurer, these reports must include, for example:

(a) the name and address of the insured;
(b) location of the premises where the service occurred;
(c) the date of occurrence which created the claim;
(d) a summary of the occurrence that created the claim;
(e) name of party who served the alcohol or liquor;
(f) date and amount of judgment or settlement, if any, the number of parties involved in the distribution of such judgment or settlement and the amount received by each, and the amount of any economic, noneconomic and punitive damages awarded, if known, stated separately; . . . .[85] With respect to disclosure, the statute provides that, "The commission shall make the reports required under this section available to the public in a manner that does not reveal the names of any person, server, or seller involved."[86]

It is noteworthy that at least three of the States which have enacted provisions of the Model Dram Shop Act have statutes that require periodic detailed reports by liquor liability insurance companies.[87] For example, the Rhode Island statute provides:

(1) The Commissioner of Insurance shall keep records and shall collect and maintain records on the following statistics concerning liquor liability insurance in Rhode Island:

(A) the number and names of companies writing liquor liability insurance, either as a separate line or in a larger policy;

(B) the number and dollar amount of premiums collected for liquor liability insurance policies; and

(C) the number and dollar amount of claims paid out under liquor liability insurance".

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[85]*Sec. 731.500(3), Oregon Rev. Statutes.*

[86]*Sec. 731.500(6), Oregon Rev. Statutes.*

[87]*Vermont. Stat. Ann., title 8, Sec. 3567 (1987); Maine Rev. Stat. Ann., title 28-A, Sec. 2517 (1987); Rhode Island Gen. Laws, Sec. 3-14-14 (1986).*

(2) The commissioner of insurance shall make records available. The commissioner of insurance shall make available to the legislature the information collected and maintained under subsection (1) of this section.

Subsection (2) seems to indicate that these data would be made available to the public. The Maine and Vermont statutes are virtually identical with respect to the data which are to be collected, but have slightly different provisions concerning the availability of these records; both these statutes provide only that the commissioner of insurance shall make this information available to the state legislature.[88]

A 1987 New Jersey statute requires the state's Department of Insurance to "gather information and statistics on the number of insurers . . . issuing alcoholic beverage insurance policies, the number of policies issued, the premiums for such policies, the number of civil actions filed . . ., the amount of damages awarded . . . and any other information . . . necessary in order to determine the effect of this act on the alcoholic beverage insurance market." The Department is required to issue reports to the Governor and the legislature.[89]

In Massachusetts, any court which enters judgement for a plaintiff on a claim based on serving alcohol to a minor or an intoxicated person is required to report the judgement to the alcoholic beverages control commission.[90]

In Michigan, the Commissioner of Insurance is required to make an annual report, which must include a determination whether liquor liability insurance is 'available at a reasonable premium'.[91] In making this determination, the commissioner is required to consider a number of factors, including (a) 'the extent to which any insurer

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[88]*"The Superintendent of Insurance shall make available to the Legislature the information collected and maintained under Subsection 1."28-A, Sec. 2517, Maine Rev. Stat. "The commissioner of banking and insurance shall make available to the general assembly the information collected and maintained under this section. The commissioner shall report to the general assembly the number of companies writing liquor liability insurance." Title 8, Sec. 3567(b), Vermont Stat. Ann. The Maine statute, like the Rhode Island statute, provides that there is to be an evaluation of the effectiveness of the liquor liability law within two years of its enactment.*

[89]*An initial report is to be filed within two years after the effective date of the Act, and a final report within three years. Sec. 2A:22A-7, New Jersey Stat. Ann.*

[90]*C. 231, Sec. 60J, Ann. Laws of Massachusetts, effective 90 days after July 31, 1985.*

[91]*Sec. 500.2409b(1), Michigan Compiled Laws Ann.*

controls the liquor liability insurance market in this state, or any portion thereof', and (c) 'the disparity among liquor liability insurance rates'.[92]

The Vermont Department of Banking and Insurance must issue an annual report on liquor liability insurance in that state (see example in Appendix III-B). This report is required as part of recent dram shop legislation. The report identifies companies writing insurance in Vermont, and provides written/paid and earned/incurred reports. Details on premiums written and earned, policies written, claims paid, incurred, claim count, loss ratio, and average paid and incurred claims are provided. Reports on these same variables are provided for the companies listed, not only for Vermont, but also for their activities nationwide. The Vermont report suggests that this is a highly profitable line of insurance for the companies reporting, with a very favorable loss ratio of .36 in Vermont and .52 nationally. This means the companies have a high ratio of premiums earned ($2.02 million) to claims incurred ($.73 million). "Claims incurred" include not only actual paid losses, but also the insurance company's reserve funds. This ratio is therefore particularly dramatic. A more typical loss ratio is .70.[93]

The data described above could be used to measure the effect of differences in dram shop laws on recoveries, or on premiums, which reflect the expected liability from dram shop claims. Referring to the Rhode Island statute, it should be noted that the data described in the above paragraph (1)(B), the amounts paid for premiums, would reflect the impact of changes in dram shop law much sooner than that described in paragraph (1)(C), the amounts paid for claims. Insurance companies set premiums on the basis of expected liability, while there is often a considerable lag between the filing of an action and its judgement or settlement. The lag is likely to be particularly long for dram shop claims, since these claims tend to be large, and the average lag between filing and settlement increases with the value of the legal claim.

However, one should not assume that a substantial change in the law will have an immediate impact on liability insurance premiums.

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[92]*Sec. 500.2409b(2), Michigan Compiled Laws Ann.*

[93]*Such reports may have limited significance. Robert Gilmore of New York, a retired insurance executive,was asked to review the Vermont report. He observed that: (1) there is no way to determine whether the state list is complete; thus, some less profitable carriers may not be included; (2) one year of data is insufficient to assess the significance of loss ratios reported; (3) the sample of companies is simply too small. (Source: Personal Communication with Robert Gilmore, June 22, 1989)*

Consider, for example, the situation in Tennessee. On the one hand, in 1983 the legislature enacted extremely severe criminal penalties for drunk driving. On the other hand, a Tennessee statute enacted in 1986 provides that a plaintiff in a dram shop suit must prove 'beyond a reasonable doubt' that the defendant furnished alcohol to a person who was already obviously intoxicated, or who was known by the seller to be under the legal drinking age of 21.[94] This statute was viewed as a major setback for plaintiffs with dram shop claims. Should one assume that passage of the 1986 statute brought about an immediate and sharp decline in the premiums for liquor liability insurance paid by Tennessee retailers? Not necessarily. Insurance companies may well be uncertain as to whether this statute will be held unconstitutional,[95] or subsequently repealed in response to another swing of the political pendulum. Clearly the same considerations apply to other types of legislative changes, such as statutory ceilings on recoveries in dram shop cases.[96] Consequently one should not expect that changes in tort law will immediately be reflected in insurance rates. Conversely, the fact that rates do not change immediately should not be taken as proof that they are unaffected by legislation. Evidence from the area of medical malpractice indicates that major changes in tort law do have a significant impact on insurance premiums.[97]

D. How Insurance Premiums are Determined

The basic premium is determined by the insurer's view of the general level of liquor liability arising under the law of the state of the retailer. For example, under the advisory rates published by the Insurance Services Office until 1987, states were divided into four categories: Group A, consisting of states which had neither a dram shop statute nor common law liability; Group B, states where there is

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[94]*Humphrey (1986). This standard of proof seems to be quite unusual in dram shop laws. In 1985 Missouri adopted a law requiring that there be a criminal conviction for illegal sale of alcohol to an intoxicated person before a civil suit could be filed.*

[95]*Before the law became effective, the Executive Director of the Tennessee Trial Lawyers Association stated that, "I think without question [the act] will be challenged in court and there's a good probability it will be held unconstitutional".*

[96]*Such ceilings have been imposed in Connecticut, Illinois, and North Carolina. Conn. Gen. Stat. Sec. 30-102 (West 1971); Illinois Ann. Stat. Ch. 43, Sec. 135 (Smith- Hurd 1971); North Carolina Gen. Stat. Sec. 18B-123 (1983).*

[97]*The Report of the Task Force on Medical Liability and Malpractice (hereinafter referred to as "Malpractice Report") cites evidence that substantial changes in the tort law of California reduced the rate of growth of medical malpractice premiums there, between 1980 and 1986, in comparison with states which enacted less sweeping reforms. Malpractice Report (1987), pp. 176-77; See also An Update on the Liability Crisis (1987), pp. 88-96.*

a relatively restricted type of liability, based for example on a statute or case law prohibiting the sale of alcohol to minors or intoxicated persons; Group C, states with general dram shop statutes or clear common law liability; and Group D, states regarded as having very strict laws.

The premium paid by a given retailer will be based on the firm's annual gross sales of alcoholic beverages; rates are quoted as an amount per $100 of annual gross receipts, for example, 53 cents per $100 of gross liquor sales. In Michigan before 1988, risk classifications used in setting premium rates were typically based on six or seven classes of retail liquor licenses. Appendix III-C contains a report by the Michigan Commissioner of Insurance, dated March 1989, concerning 'the availability and pricing of liquor liability insurance' in Michigan. Table III-C of this report sets forth eight different types of liquor license and the range of premiums charged to each type of licensee. In general, insurers offered the lowest rates to package stores selling beer, wine, or both for consumption off premises, and quoted the highest rates to bars serving or selling beer, wine and liquor from a barrier or counter.

Recently, many insurers have refined their risk classifications by subdividing these classes according to certain designated characteristics of the retailers.[98] For example, many insurers now divide the restaurant and bar/ tavern categories into subgroups based on the ratio of food sales to liquor sales, or on the type and amount of entertainment offered. One foreseeable consequence of the trend toward smaller classes is an increase in the variability of premiums. With small classes, a large loss by any one retailer will quickly be reflected in a premium increase for other members of the class. Small classes tend to have greater variation in aggregate losses, and therefore premiums, than large classes.[99]

At this time there are substantial differences among insurers in the methods used to classify risks. Some insurers offer a single rate for bars, while others offer as many as eight. To take another example, there is considerable variety in the treatment of clubs: some insurers place clubs, bars and taverns in the same class; others have a separate category for clubs, and still others put clubs in the same class as restaurants. Hotels are generally treated as either restaurants or taverns, depending on the ratio of liquor sales to food sales. Many insurers offer territorial rates by class, in which case rural rates are usually somewhat higher than city rates.

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[98]*Presumably this trend toward increasingly detailed categories of risk could be observed in other lines where the liability has experienced rapid growth, e.g., medical malpractice and products liability.*

[99]*Malpractice Report (1987), at 152.*

There is no evidence which would indicate whether insurers have gone beyond class ratings, to make adjustments based on a retailers individual loss experience. This kind of rating is known as 'experience' or merit rating. With experience rating, premiums are determined in part by the number of claims made against the insured party in previous years. The term was first used by workers' compensation insurers, which set premiums on the basis of the individual claims experience of an employer and its employees.[100] Insurers who use this method impose surcharges against insured parties who are the subject of repeated claims. These surcharges may take the form of higher premiums, larger deductibles, or broader exclusions from coverage.

Alcohol retailers have sought to reduce their insurance premiums by modifying their serving and selling practices. A commercial training program created in 1984 teaches persons who serve and sell alcohol - waitresses, bartenders, concessionaires, liquor store clerks, etc., how to prevent a customer from getting drunk.[101] This program, which is called TIPS, for Training for Intervention Procedures by Servers of Alcohol, is administered by a firm called Health Communications, Inc. It is reported that eight insurance companies will reduce their liquor liability rates from 10 to 25 per cent for businesses which maintain TIPS certification for 75 per cent of their servers and sellers of alcohol.[102]

Many insurers require a minimum premium payment for each class. Table III-C of the Michigan Report[103] (Appendix III-B shows the average of the minimum premiums quoted by the companies surveyed in 1987.) The average minimum premium was $700 for package stores, the lowest risk class, and $3000 for bars, in the highest risk class. The staff of the Michigan Insurance Bureau found that these minimum premiums were 'unfairly discriminatory' to small businesses, and asked insurers to reduce them. Most insurance companies complied with this request, and reduced these premiums substantially, as shown in the third column of Table III-C. The Bureau brought administrative actions against those

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[100]*Malpractice Report (1987), at 151.*

[101]*Mulcahy (1986).*

[102]*Mulcahy (1986), and Rodda (1987). See, e.g., News Release, Bartenders Against Drunk Driving (BADD) (1987). When 100 per cent of an establishment's staff is trained with this program, Alexander & Alexander, Inc. of Washington, D.C. will deduct 15 per cent from its liquor liability premium. Details are available from BADD National Headquarters, Box 5, Hudson, New Hampshire 03051, (800) 227- 0300.*

[103]*"The Availability and Pricing of Liquor Liability Insurance", Report by the Michigan Commissioner of Insurance (March 1989) (hereinafter referred to as "Michigan Report").*

who did not comply.[104] Presumably the economic reason for a minimum premium is that there are 'economies of scale', i.e., there are certain fixed costs entailed in writing a policy for a business regardless of the amount of the policy. Thus in each case the insurance agent may have to interview the client, review the application, open a file, etc. whether the premium is $200 or $2 million. If there are such fixed costs, a regulation which forces insurers to reduce the minimum premium below the amount they would like to offer is really a subsidy of low-volume retailers. That is, this type of regulation prevents insurers from setting rates in a way which accurately reflects the costs incurred in selling to different firms. To maintain a competitive rate of return the insurer must charge a higher rate to the high-volume retailer, so that in effect these retailers are subsidizing low-volume firms.

Some insurers offer 'claims-made' rather than 'occurrence' policies. An occurrence policy covers the insured party for any claim based on an action which occurred during the period of the policy, regardless of when the claim is filed. For example, if a tavern had an occurrence policy in effect in 1982 and was sued in 1984 on account of an accident which occurred in 1982, the tavern would be covered by the 1982 policy. The scope of the risk assumed by an insurer who issues an occurrence policy obviously depends on the interval which may elapse between the action creating liability and the filing of the claim. This length of time is determined by the statutory period of limitations and perhaps also case law, which may indicate, for example, when the period of limitations begins to run.

In contrast, a claims-made policy covers only claims which are filed during the policy period, for events occurring during the policy period. However, the policy period includes the initial term and all renewal periods. A claims-made policy first written in 1986 will cover claims filed in 1986 for events occurring in 1986, but will not cover claims filed in 1986 for events occurring in prior years. If the same policy is extended from 1986 through 1989, a claim filed in 1989 for an accident occurring in 1986 would be covered. If one desires to obtain coverage for events occurring during a policy period, after the policy period has ended, one must purchase insurance known as reporting endorsement or 'tail' coverage. Claims-made policies are often used when there may be a substantial lag between the action which gives rise to liability and the filing of the claim. In these situations the use of claims-made policies may enable the insurer to determine its losses with more precision. Most insurers of medical malpractice claims switched from occurrence to claims-made policies during the late 1970's in order to make their loss exposure more

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[104]*Michigan Report (1989), at 9.*

predictable.[105] For a general description of claims made coverage, see Huebner, Black and Cline (1982), at 357-358.

E. The Structure of the Insurance Industry

The business liability policy of a tavern or liquor store normally excludes liability under the dram shop laws. Historically, most liquor liability policies have been written by specialized companies, that is, companies which do not provide a full line of property and casualty insurance.[106] A full line insurer is likely to provide such coverage only as an accommodation to the insured, in order to obtain other insurance business. In many states, much of the liquor liability insurance is written by insurers which are not licensed to do business in the state; these are known as 'surplus lines' insurers. For example, in 1986 surplus lines insurers collected 96 per cent of premiums in Michigan, and 77 per cent of premiums in Maine.

As indicated previously, in several states the insurance departments are required to keep records on the amount of premiums collected by each of the insurance companies. The justification offered for this regulation is that it will enable state officials to determine the degree of competition in the liquor liability insurance market. The idea is to use some measure of concentration to measure the competitiveness of the market - for example, the total market share of premiums of the four largest insurers.

If one intends to measure concentration by the total market share of the leading firms, one must first be sure the market has been correctly defined. Now it is not at all clear that each state should be considered a separate market; it might be a better approximation to view the United states, or North America, as a single market. The usual rule is that two ostensibly different commodities, for example insurance in Michigan and insurance in Illinois, should be considered as being in the same market if they are close substitutes in consumption, production, or both.[107] One would suspect that insurance contracts are very good substitutes in production. The question of

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[105] *Malpractice Report (1987), at 152.*

[106] *Huebner, Black, and Cline (1976), at 377.*

[107] *In the jargon of economics, two allegedly different products should be combined if their cross-elasticities of demand or supply are high. Thus a high cross-elasticity of supply implies that a small change in the relative prices of the products would lead to large changes in the relative quantities that are produced. See Stigler and Sherwin (1985), at 566.*

real interest is whether insurers in Michigan have the market power to raise premiums substantially above their costs.[108] Thus a widely used measure, the Lerner Index, measures market power in percentage terms as the excess of price over marginal cost.[109] It would seem that companies now insuring retailers in other states could rather easily enter Michigan in response to such a premium increase. If this response were substantial in relation to a small premium increase, Michigan insurance contracts have excellent substitutes in production, which implies that the geographic extent of the market is greater than the State of Michigan. Thus the fact that two companies collected 96 per cent of the premiums for liquor liability insurance in Michigan is not necessarily reliable evidence that these firms have substantial market power.[110] The Antitrust Division of the United States Department of Justice recently carried out an investigation to determine the scope of the market for various lines of property and casualty insurance. This investigation was motivated by the idea that any property-casualty insurer in the United States should be considered a competitor in any specific line of insurance, such as liquor liability, if it could easily offer coverage in that line, even if it did not currently do so. This investigation consisted of telephone interviews with executives of a number of insurance companies. The Division found that,

> "[there are] strong indications that insurers can, quickly and easily, acquire the necessary licenses and expertise to either begin selling their existing lines of insurance in new states or to provide new lines in the states in which they are already licensed. . . These facts suggest that, even though at any one time only a small number of firms may be observed writing a specific line in a particular state, all firms in the property-casualty industry in the United States should be included in the relevant market for any particular type of property-casualty insurance." An Update on the Liability Crisis: Appendix (1987).

Thus, to the Justice Department, the market should be defined not as 'sellers of liquor liability insurance in the United States', but rather as 'sellers of property or casualty insurance in the United States'. Having so defined the market, the Division applied to it a

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[108] *Such costs include not only compensation of claimants but also costs for processing, investigating, and preparing claims for judicial review. These costs are referred to as allocated loss adjustment expenses. Malpractice Report (1987), at 168.*

[109] *i.e.,* $\frac{\text{Price - Marginal Cost}}{\text{Price}}$

[110] *Michigan Report (1989), at 6.*

measure of market concentration, the Herfindahl-Hirschman Index (HHI). The HHI is calculated by summing the squares of the market shares of all firms in the market. It varies from near 0 (extremely unconcentrated) to 10,000 (total monopoly). The HHI was computed for all property-casualty insurers in the United States from 1979 to 1985. The highest HHI turned out to be 229, for the year 1985. This is a low HHI value. For example, the 1984 merger guidelines of the Department of Justice provide that mergers which increase the HHI to a level below 1000 are not a cause for concern about competition. Accordingly, the Division found that collusion in this industry was 'highly unlikely'.

It should be noted that there is a widely held view that there is an 'insurance industry cycle' which is characterized by successive periods of increasing and declining profitability. The industry uses capital, which is obtained from premiums and reserves, to accept risk. According to this view, when there is little capital in the industry insurers raise premiums and earn abnormal profits. These profits attract into the industry new entrants who bring in additional capital. Eventually, there is excess capital or capacity, which results in increased competition, generally in the form of premium reductions. Lower premiums reduce profits and capital, and eventually result in the departure of marginal firms from the market. Once the industry has contracted, the firms which survive raise their premiums again, and a new cycle begins.[111] It would be interesting to learn the extent to which historical data support this cyclical pattern.

In the absence of evidence of barriers to entry or collusion, one would think that the market for this type of insurance is reasonably competitive. After reviewing various financial data on the property-casualty insurance industry, the Tort Policy Working Group found the industry to be competitive.[112]

F. Insurers of Last Resort

When insurance coverage is mandatory, as it is in Michigan and Minnesota, there must be a mechanism to assure that such coverage will be available to all applicants. In Minnesota, an applicant who has been refused coverage can apply for assistance to a program which has been established to assist holders of liquor licenses to obtain insurance coverage. If the applicant does not succeed in obtaining coverage through the 'market assistance' program, the Commissioner of Commerce can set up an assigned risk plan. If the assets of an assigned risk plan are insufficient to meet its obligations, the Commissioner can make up the deficit by making assessments against all

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[111] *Malpractice Report (1987), at 158.*

[112] *An Update on the Liability Crisis: Appendix (1987), at 10.*

admitted insurers in proportion to each insurer's premium volume.[113]

In Michigan, the Commissioner of Insurance is required to make an annual study to determine whether liquor liability insurance is 'available at a reasonable premium' in Michigan.[114] If the Commissioner finds that such insurance is not available, he can waive the financial responsibility requirement for any affected retail licensees. In 1986 the Commissioner did determine that liquor liability insurance was not available at a reasonable premium, and issued an order allowing the formation of limited liability pools.[115] Two such pools were in operation by 1987. In 1987 the Insurance Bureau found that conditions had changed, so that insurance was available at a 'reasonable premium'. It should be noted that limited liability pools are not required to meet the same financial requirements as those imposed on admitted insurers, and that members of such pools are protected by an insolvency fund.[116] If the pool is declared insolvent, a guaranty association levies an assessment on insurance companies operating in the state, in proportion to each insurer's premium volume.[117]

Parenthetically, one can certainly question the wisdom of creating 'insurers of last resort' such as the assigned risk plan or the limited liability pool. Apparently the effect of these arrangements is to enable the high-risk customers to be subsidized by the low-risk customers. Those who apply to the assigned risk plan are the high-risk customers. If, as seems likely, they are provided insurance at less than the market rate, they are not bearing the full expected cost

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[113]*Vol. 22, Minnesota Stat. Ann., Sec. 340A.409, Subd. 2 and 3.*

[114]*Sec. 500.2409b, Michigan Compiled Laws Ann.*

[115]*Michigan Report (1989), at 1.*

[116]*See Opinion No. 6553 of the Michigan Attorney General (December 16, 1988).*

[117]*It should be noted that groups organized under the Federal Liability Risk Retention Act, 15 U.S.C. Sec. 3901, are excluded from guaranty fund protection: "The Committee observes that Section 3(a)(2) of the Act provides that a risk retention group is exempt from any State law that would require or permit a risk retention group to participate in any insurance insolvency guaranty association to which an insurer licensed in the state is required to belong. Consistent with this, it is the Committee's intent that States be precluded from requiring or permitting risk retention groups to participate either directly or indirectly in an insurance insolvency guaranty association to which an insurer licensed in the state is required to belong." 1986 U.S. Code Cong. and Adm. News 5303, 5314 (legislative history of P.L. 99-563).*

of their actions.[118] In the jargon of the economist, there is a 'moral hazard'. Since the retailer is not being charged a premium which accurately reflects the expected damages resulting from its activities, the retailer will not have the appropriate incentive to take preventive measures which would reduce such damages.[119]

G. Effort to Obtain Information About Insurance Companies, Premiums, and Other Data

Insurance trade associations were contacted to determine which companies offer server liability insurance. The survey confirmed earlier findings using public reports that "surplus line" or "excess line" carriers are very prevalent in server liability coverage. These companies are often not required to be licensed in the states in which they do business, nor do they belong to the traditional insurance associations. Since they may not be licensed, state insurance commissioners often do not collect data regarding their activities. In addition, there is no national data bank to supplement state data, so that, in many cases, no government is monitoring the activities of these carriers.

Obtaining a list of surplus line carriers that carry server liability coverage was not possible from any of the sources contacted as part of the preliminary survey, including: the Insurance Information Institute, the American Insurance Association, and the National Association of Insurance Commissioners. Representatives of public agencies or groups in each state were contacted including: Insurance Commissioners, Hotel Associations, Restaurant Associations, Licensed Beverage Associations, Office on Highway Safety, Alcoholic Beverage Control Commissions, and State Independent Insurance Agents Associations.

A total of 267 surveys was sent by the Responsible Hospitality Institute on December 27, 1988, with a follow-up letter sent in February 1989 and follow-up phone calls in March 1989 to those who did not respond to the letters. The surveys requested respondents to fill out a form identifying insurance companies in their state and

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[118]*This report makes the assumption that the damage resulting from a vehicle accident should be viewed as a cost of operating the retail establishment. It could be argued that a law creating dram shop liability is inefficient, since (arguably) the drinking driver could avoid an accident at a lower cost than the retailer who serves him. If dram shop liability reduces the expected liability of the driver, he would not have the correct incentive to take sufficient precautions to avoid the accident. See, e.g., Conaway (1988), at 431-444. An evaluation of this argument is beyond the scope of this paper. Note, however, that this problem is mitigated if the retailer has the right to be indemnified by the negligent driver.*

[119]*See, e.g., Finsinger and Pauly (1986), at 11.*

requested information regarding server training programs in their state. Appendix III-D summarizes the information on liability insurance by state as received by the Responsible Hospitality Institute. Rarely did the hospitality trade associations and independent insurance agents associations have complete information on insurance topics for their members and clients and few state agencies maintained such data.

H. Summary

This chapter examined available data on dram shop claims, preliminary evidence on the recent growth of this type of liability, and statutes which have recently been enacted in various states to require the collection of data on dram shop claims and premiums. Changes in tort law may have a significant impact on the frequency and severity of dram shop claims even if these changes are not immediately reflected in insurance premiums.

The methods used by insurers to determine their rates were analyzed. There is a trend toward more detailed classifications of risk on the part of insurers.

An important recent development is the willingness of many insurers to provide discounts to retailers who have had their employees undergo training in prevention programs. After examining the market for liquor liability insurance, a tentative conclusion was that, in the absence of evidence of barriers to entry or collusion, this market appears to be reasonably competitive. The fact that in some states most of the premiums are collected by one or two insurers does not require a different conclusion. After examining issues concerning insurers of last resort, such as assigned risk pools and limited liability pools, it was concluded that the effect of these arrangements is to enable the high-risk retailers to be subsidized by those of low risk. These pools therefore dilute the incentives to adopt preventive measures, for precisely those retailers whose operations are most likely to cause serious injuries and deaths.

This analysis suggests the need for further research on a number of subjects. One such subject is the extent to which retailers have 'gone bare' by operating without liquor liability insurance. It would be important to learn whether retailers which are operating without insurance have taken additional measures to avoid catastrophic liability. For example, someone who owns several taverns might attempt to circumvent dram shop laws by incorporating each tavern separately, and arranging for each corporation to hold assets of little value, for example by having the corporation lease its premises, furniture and equipment from another legal entity.

Now there are legal principles which can be used to foil this type of maneuver; for example, in some cases a court will 'pierce the corporate veil' and allow a tort victim to reach the assets of the corporate shareholders.

However, such countermeasures do not always succeed. If this sort of practice became widespread, those retailers which did not avoid liability in this manner would be at a competitive disadvantage, since they would be bearing the cost of insurance. Moreover, dram shop liability could not have much of a deterrent effect on firms which insulated themselves from liability in this way. In general, when businesses are insured, insurance companies often reduce accidents by requiring those insured to follow certain practices designed to minimize risks. If many retailers were to go bare, this important channel of information from insurer to retailer would be lost, and the number of accidents would increase. Of course this sort of subterfuge would not be possible if each retailer were required to submit a bond or proof of insurance coverage to maintain its liquor license. Proof of financial responsibility should be considered an essential component of any state's dram shop law.

Another issue concerns the long-run consequences of the enactment of state statutes which require reports on dram shop claims. After there has been more time for these data to accumulate, they could be used to determine the effects of differences in dram shop laws on recoveries and on premiums. These statutes differ on the matter of whether the data are made available to the public. Parenthetically, if a state has a statute which requires the reporting of such data, it is difficult to think of any reason why the data should not be provided to the public, including researchers.

In some situations there are good economic reasons for not disclosing information to the public, but those reasons do not seem applicable here. If these data are made available to insurers, there might well be important effects on the premiums which they quote and the methods of classifying risks which they use. Information on the settlement and litigation of claims is often considered proprietary by insurers, because it is quite valuable; an insurer which has more information can determine expected losses more accurately, and thus can better determine premiums, required reserves, and the best scheme of risk classification. If data on the disposition of all claims from a number of states were made available to all insurers, the result might be, for example, less dispersion of premiums, or less variation in methods used to classify risk.

Final observations concerning insurance for server liability were:

1. **Information on liquor liability insurance is notably unavailable.** This project was unable to determine even which companies write server liability insurance. A limited number of states do collect extensive data, but it is insufficient to conduct comparative studies across several states.

2. **The necessary data can be collected.** As shown in the Vermont and Michigan data reports and the Oregon statute, insurance commissioners

can obtain very detailed information regarding liquor liability insurance practices in their states.

3. **Statutes mandating data collection and limited liability pools can dramatically affect insurance practices in a given state.** Mandated data collection will have benefits beyond the needs of research. As shown in Michigan, an active Insurance Commissioner can enhance competition within the market and lower insurance rates. When the market is dominated by surplus line carriers, loss ratios are unjustifiably low. By spurring competition and reporting rates and loss ratios, competitors can effectively enter the market and rates can be adjusted to reflect relative risk more accurately. These results cannot be obtained without an adequate data collection process.

4. **Insurance premium rates can be determined based on the actual relative risk of dram shop claims but, because of the structure of liquor liability insurance coverage, current rates do not reflect relative risk.** A few insurance companies provide discounts on a limited basis for licensees who train their staff in responsible beverage service, but they do not conduct a risk assessment of the licensee, relying only on whether particular training programs have been conducted. Insurance regulators can provide guidelines for determining relative risks that is related to the rate structures of the industry.

CHAPTER IV

PUBLICITY OF SERVER LIABILITY: CONTENT ANALYSIS OF BEVERAGE TRADE JOURNALS AND LOCAL NEWSPAPERS

A. Introduction

This Chapter describes the results of a content analysis of beverage industry trade journals and local newspapers to determine the level of publicity concerning dram shop liability within high and low liability case study states. This analysis provides an estimate of the level of exposure to information about liability/and or civil cases involving licensed establishments and other related activities. In short, how much publicity has been given to the extent of liability and server training and intervention within the case study states?

Two sources of data were used: (1) licensed beverage trade journals and (2) major newspapers in each high and low liability case study state. The major alcohol beverage trade journals were reviewed for each study state over 1984-1988, to identify and analyze the content of articles which refer to dram shop liability awards, server response to liability, and related matters. Each state has at least one licensed beverage journal that provides regular news updates to that state's licensees, and thus includes reports on state dram shop liability developments. A high percentage of licensees in each state subscribe to and read their state's beverage journals. Since licensees are more aware of and concerned about dram shop liability than the general public, these trade publications provide information about current suits, court and legislative activity, and related activities such as server training, targeted to licensed establishments. The presence of liability articles in such journals provides a good indicator of licensee exposure and thus potential awareness.

B. Coding

For each article identified, the content of article and its prominence in the journal (page number and column inches) or newspaper were recorded. The detailed coding instructions for the content analysis are shown in Appendix IV-A. In general, for server liability, four categories of content were coded:

(1) Legal liability of alcohol servers--articles which address server liability in legislation, court actions, legal suits, or server liability insurance. See example in Appendix IV-D.

(2) Server Training, server policy, and serving practices--articles which covered actions by servers to reduce the risk of violating

(2) Server Training, server policy, and serving practices--articles which covered actions by servers to reduce the risk of violating the law and risk of liability such as through service to underage persons or to intoxicated persons.

(3) Enforcement--actions against licensed establishments for violation of ABC law.

(4) Other--any other relevant subjects about server liability, but none of the above three categories.

C. Beverage Trade Journals

All available back copies of the relevant trade publications (magazines, newspapers, and newsletters) from each of the high and low liability case study states were obtained. Most trade journals are private publications which do not always maintain full-time staffs for such matters, and their attention to retain complete archives of all past issues varies considerably. In many states, extensive negotiation and costs were involved in obtaining such issues. In no cases did public or university libraries maintain back issues of these journals. An inventory of the trade publications for each state studied and the available back issues is shown in Appendix IV-B. As shown, every back issue for each journal was not available for the period January 1984 through December, 1985. For the four high and five low liability case study states, the following journals, number of years and number of issues available are shown below:

Journal	Years	Publication	Issues
LOW LIABILITY			
Arkansas State Bev. J.	1984-88	Monthly	60
Delaware Res. Assoc. News	1983-88	Monthly	31
Kansas Ed. Beverage News	1984-88	Monthly	58
Maryland Ed. Beverage News	1986-88	Monthly	16
Nevada Beverage Index	1984-88	Monthly	59
HIGH LIABILITY			
Indiana Beverage Journal	1983-88	Monthly	67
Massachusetts Beverage J.	1984-88	Monthly	53
Penn. Rest. Assoc. Journal	1984-88	Monthly	39
Penn. Inside the Council	1986-88	Monthly	27
Penn. Observer	1986-88	Bi-weekly	78
S. Carolina Beverage J.	1984-88	Monthly	60

As there were differences in frequency of publication and publication years available, we developed an index of issues per available publication to provide a standard for comparison across journals. Even with some missing issues, there is a high correlation between total issues coded and number of years of publication. By adjusting for the number of years of publication and the number of back issues

available we were able to develop a standard measure of article counts per available journal year.

Figure IV-1 shows the number of articles per journal year for each state within the low and high liability groups. The mean number of articles for each group is 7.97 per state per journal year for low liability and 33.06 per state per journal year for high liability. Figure IV-2 shows square inches of text devoted to these articles for each state per journal year. The mean for low liability is 210 and 576 for high liability. As enforcement of ABC regulations is one of the categories used to code articles, we believed that this produced a potential distortion in the results. This distortion is produced for such states as Massachusetts where the state journal gives detailed descriptions of ABC infractions and enforcement action.

Figures IV-3 and IV-4 give similar article count and space count for each state with ABC enforcement articles excluded. This reduces the gap between the high and low liability states, but high liability states continue to have more server liability and server intervention publicity in their trade journals per year over the years of this study than low liability states. This is reflected in the average number of articles per journal year for low liability (7.83) and for high liability states (11.34). The difference is further confirmed in Figure IV-4 with the total inches per journal year for liability and server behavior publicity.

These results also suggest an association between liability and enforcement publicity. All high liability states had more publicity about enforcement on the average than low liability. A general environment of liability, server responsibility, and enforcement may co-exist more often in high liability states than low liability states.

D. Local Newspapers

To supplement this content analysis of beverage industry publications, it was possible to analyze the content of major newspapers in each of the case study states for reports of dram shop liability and related subjects. This content analysis which used the same procedures as in trade publications utilized computer-based searches of contents where available as well as published indexes of subjects for state newspapers. The inventory of newspapers searched for high and low liability states is shown in Appendix IV-C.

The purpose of content analysis would be to obtain a frequency count of articles using the same categories as for trade publications.

In addition, to article identification, other descriptions used were:

(1) length of article

(2) location/placement of the article in paper, and

(3) Prominence/display (including size and length of headline) of the article.[120]

Three sources of newspaper search or indexing were used:

(1) NewsBank -- most regional newspapers not covered by computer-based searching systems, (2) Vutext -- a computer-based searching system, (3) Washington Post Online -- a computer-based search system for the Washington Post, (4) UMI Newspapers Abstract, and (5) National Newspaper Index.

NewsBank (58 Pine Street, New Canaan, Con. 06840) is a current awareness reference service providing access to the articles from the newspapers of over 450 U.S. cities. Full-text articles of research value are selected from the newspapers and reproduced on microfiche each month. A printed index to the microfiche is published monthly, and cumulated quarterly and annually. Information specialists from NewsBank select articles using NewsBank's criteria for both subject and content significance. The articles are then indexed by subject specialists. Articles on a topic are grouped together on each month's microfiche. Articles are frequently assigned several subject headings to permit retrieval from more than one point of view. If an article is appropriate to more than one NewsBank category, it will appear on the microfiche for each category. NewsBank indexes are available in most university libraries.

Vutext is a fee-for-search commercial service which conducts full-text searches for 40 newspapers. The collection available for search goes back up to 10 years on some newspapers. **Washington Post Online** is a computer-based version of the morning daily and Sunday Washington Post. The records cover April, 1983, to present and are continuously updated. **UMI Newspaper Abstract ON LINE** is a PC computer-based newspaper abstract system for searching. It covers the N.Y. Times, Atlanta Constitution, Boston Globe, Chicago Times, Christian Science Monitor, L.A. Times, and Wall Street Journal. It covers the period January 1985-December, 1988.

Figure IV-5 shows a plot of the number of articles over the five year period 1984-1988 by state for all four content categories. This result demonstrates that the high liability states have a higher average number of articles (21.5) over the study period, than the low liability states (6.6). However, there is considerable variation within each liability category. Both South Carolina (a high liability state) and Arkansas (a low liability state) had no articles

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[120]*Examples of techniques which were used in this data collection are described in a NHTSA-sponsored content analysis project report (Luckey, et al, 1985).*

FIGURE IV - 1

High and Low Server Liability States

Trade Journal Coverage -- All Articles

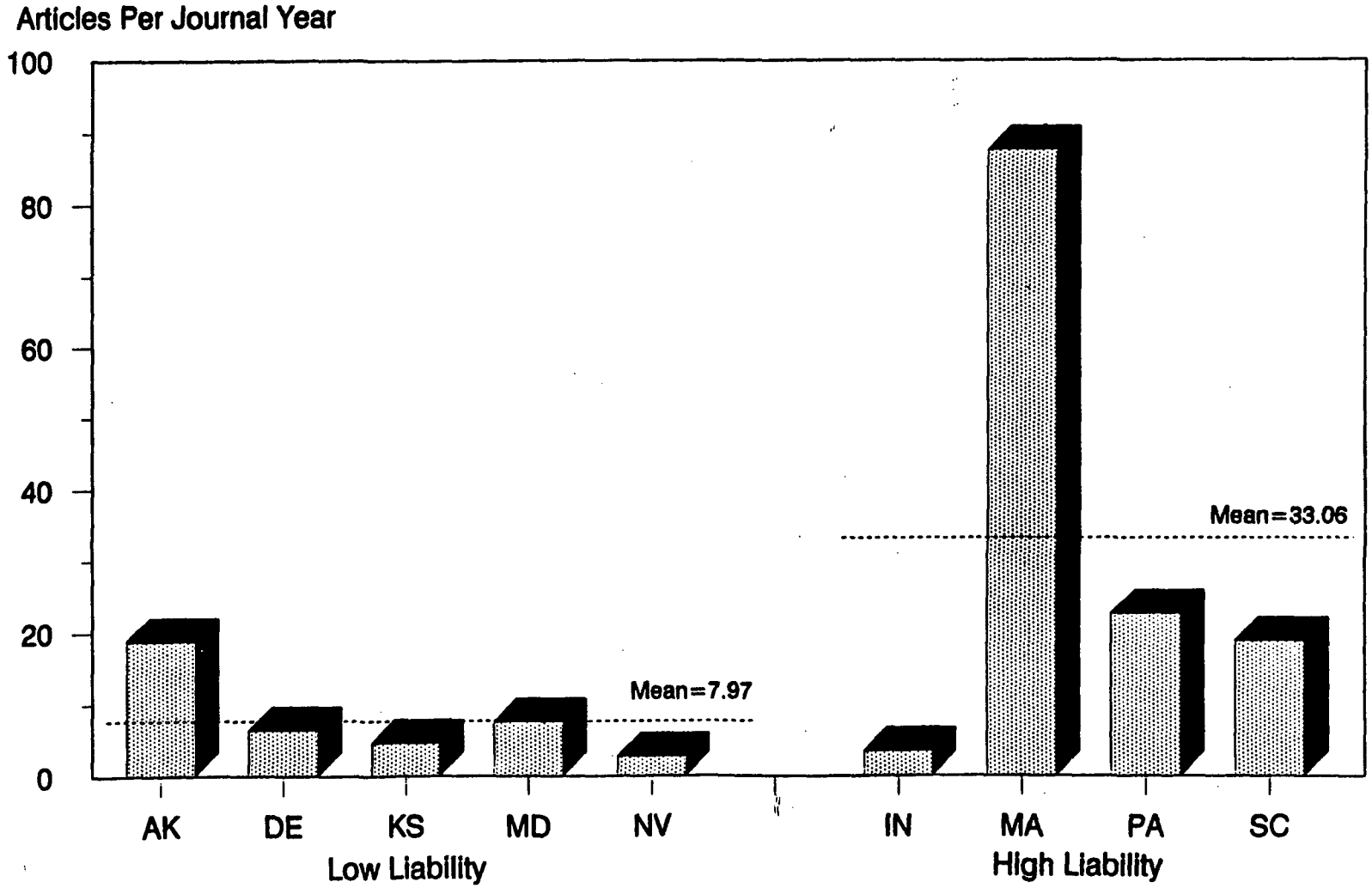


FIGURE IV - 2

High and Low Server Liability States

Trade Journal Coverage -- All Articles

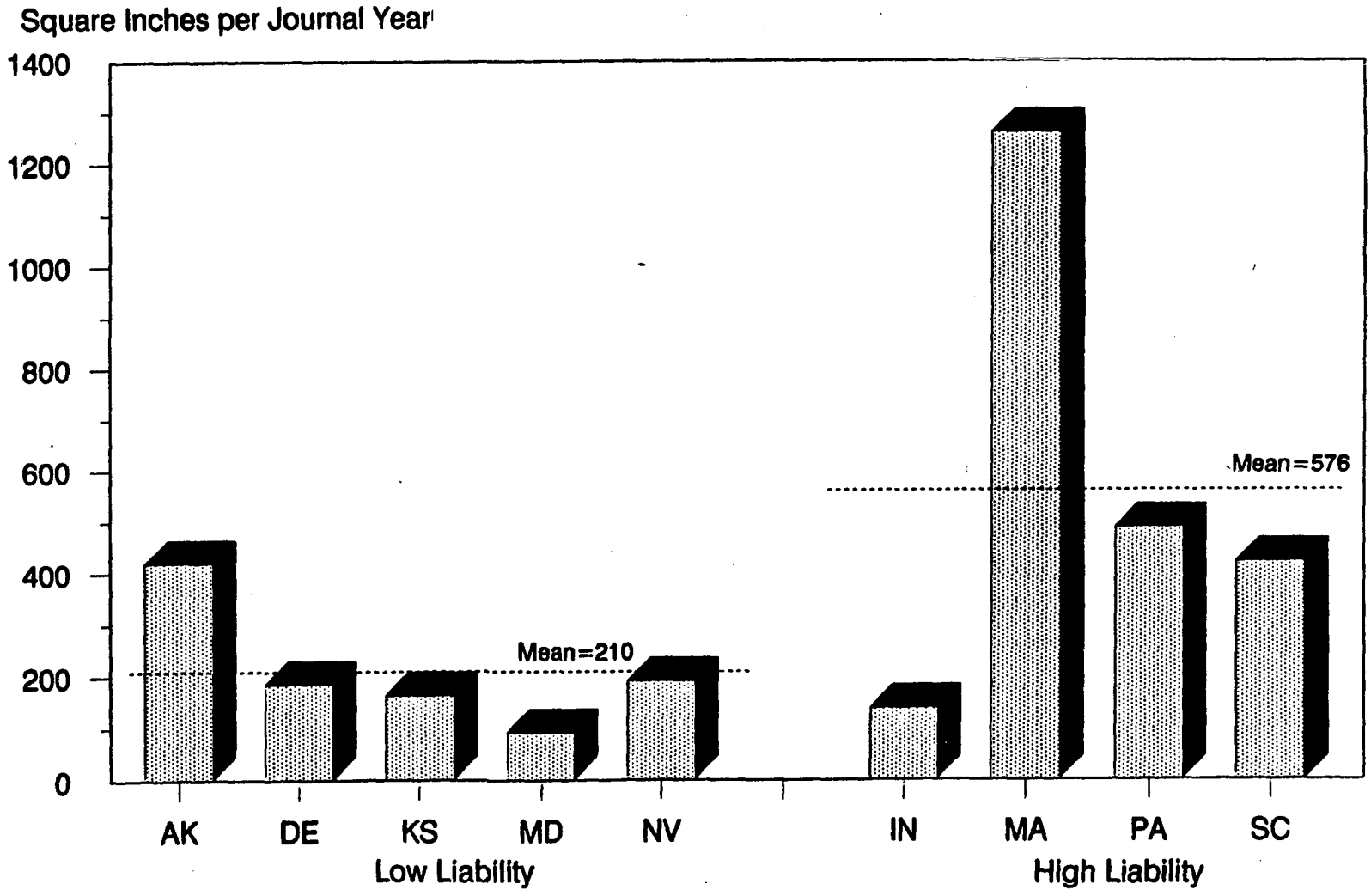


FIGURE IV - 3

High and Low Server Liability States

Trade Journal Coverage Excluding Enforcement

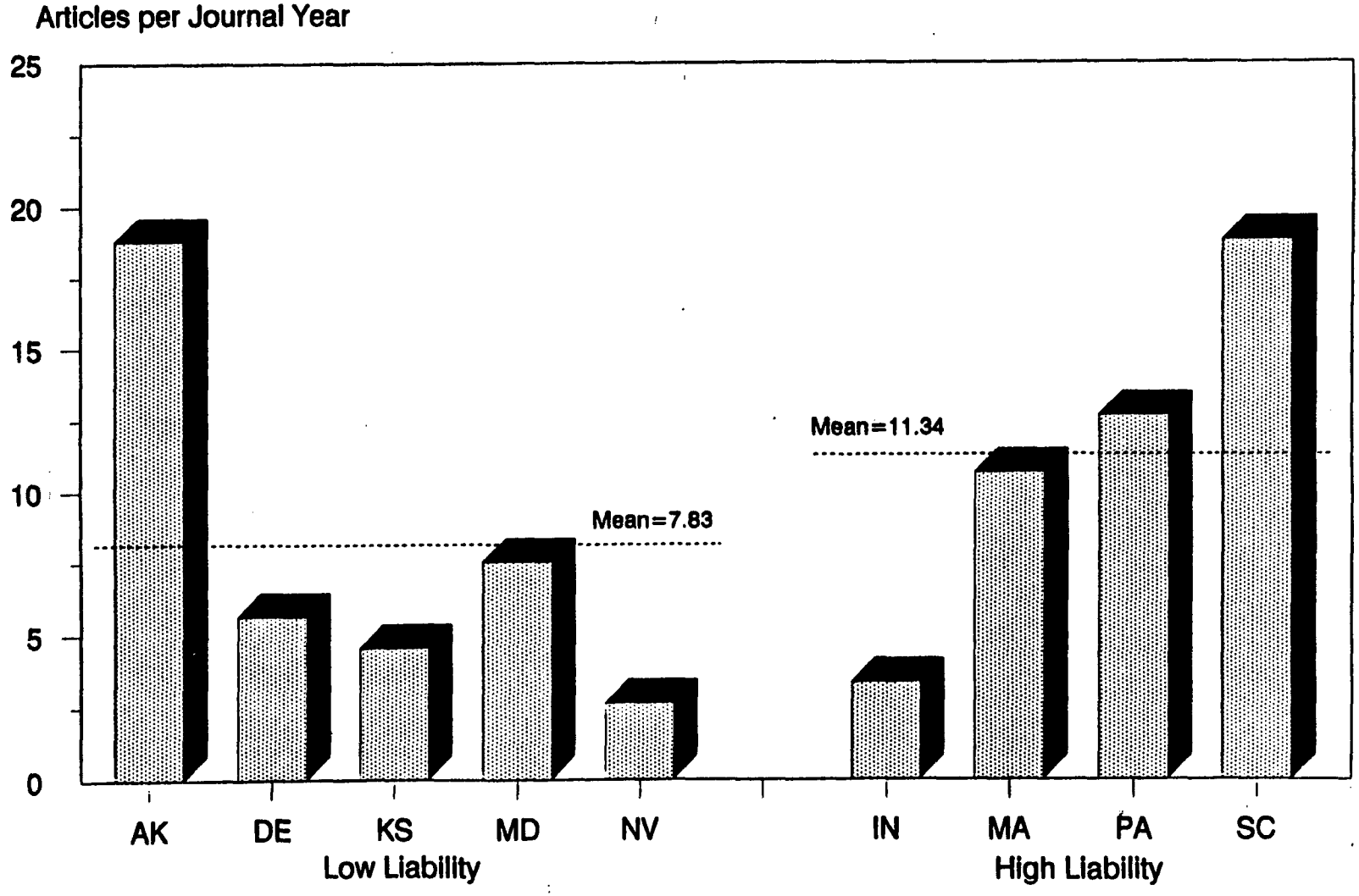
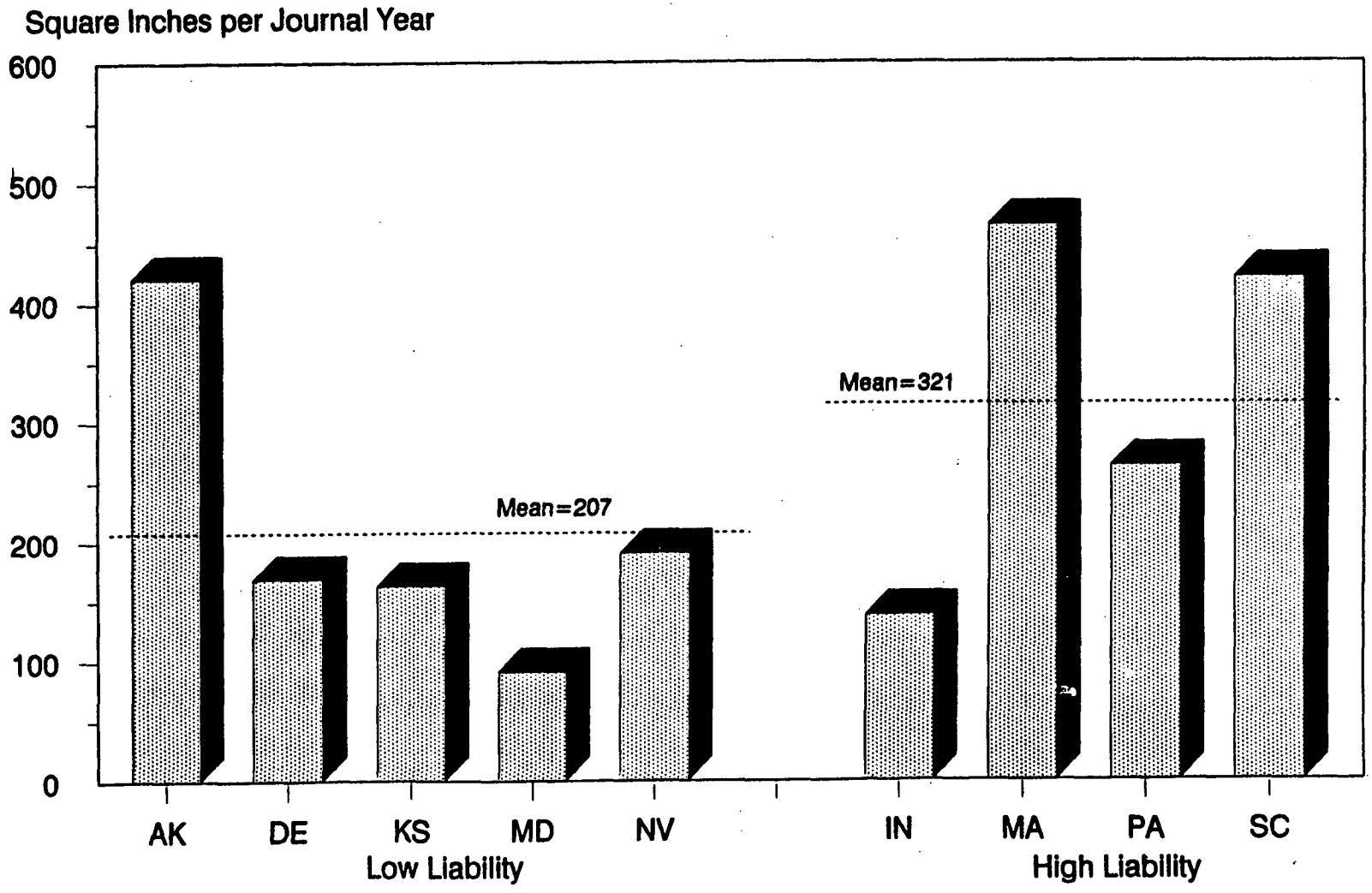


FIGURE IV - 4

High and Low Server Liability States

Trade Journal Coverage Excluding Enforcement



identified. As the number of newspapers and the years available for indexing in each newspaper varied, it is necessary to adjust the article total counts by the number of articles per paper year. The result is shown in Table IV-6. This confirms that publicity in high liability states is higher than low liability state publicity.[121]

Figure IV-7 shows total column inches per paper year for liability coverage. Differences in mean coverage shows high liability states with 10.87 and low liability states at 8.16. It is important to note that using only the content category one (server liability); three of the five low liability states (Arkansas, Delaware, and Nevada) have no newspaper coverage of liability, while only one of the four high liability states (South Carolina) has no newspaper mention. See Figure IV-8.

States are roughly comparable on Category 2 (server practices). See Figure IV-9. This result is not surprising, since server practices, particularly around holiday periods are given considerable publicity in all states. Enforcement of ABC laws (Category 3) is not mentioned in but one low liability state (Delaware) and two high liability states (Indiana and Massachusetts). See Figure IV-10.

E. Summary

The results of local newspaper and beverage trade journal content analyses show differences in publicity concerning server liability in high liability compared to low liability states. Taking the results from journals and newspapers together we obtain a composite picture of the amount of emphasize given liability and server behavior in each of the states. In general, both the public newspapers and the specialized journals within states with high server liability give more space more frequently to such topics than in states with low server liability.

The results from the local newspapers and trade journals within each state suggest some interesting patterns. Within high liability states Massachusetts and Pennsylvania have the most overall publicity about server liability. The public and licensed establishments are given more information about server liability in these two states (both via the trade journals and local newspapers) than in any other states within the high liability group. However, within this study group the most trade journal coverage for server liability is in South Carolina which gave no attention to liability in the local newspapers. This suggests inconsistency between the editorial policy of the journal and

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[121] *A content analysis of the Washington Post was included with the original data set for Maryland because of proximity to Maryland and thus licensed establishments could be exposed to publicity about server liability. However, inclusion of the articles from the Post skews results for the low liability state totals, and thus these data were dropped.*

FIGURE IV - 5

High and Low Server Liability States

Newspaper Coverage -- 1984-1988

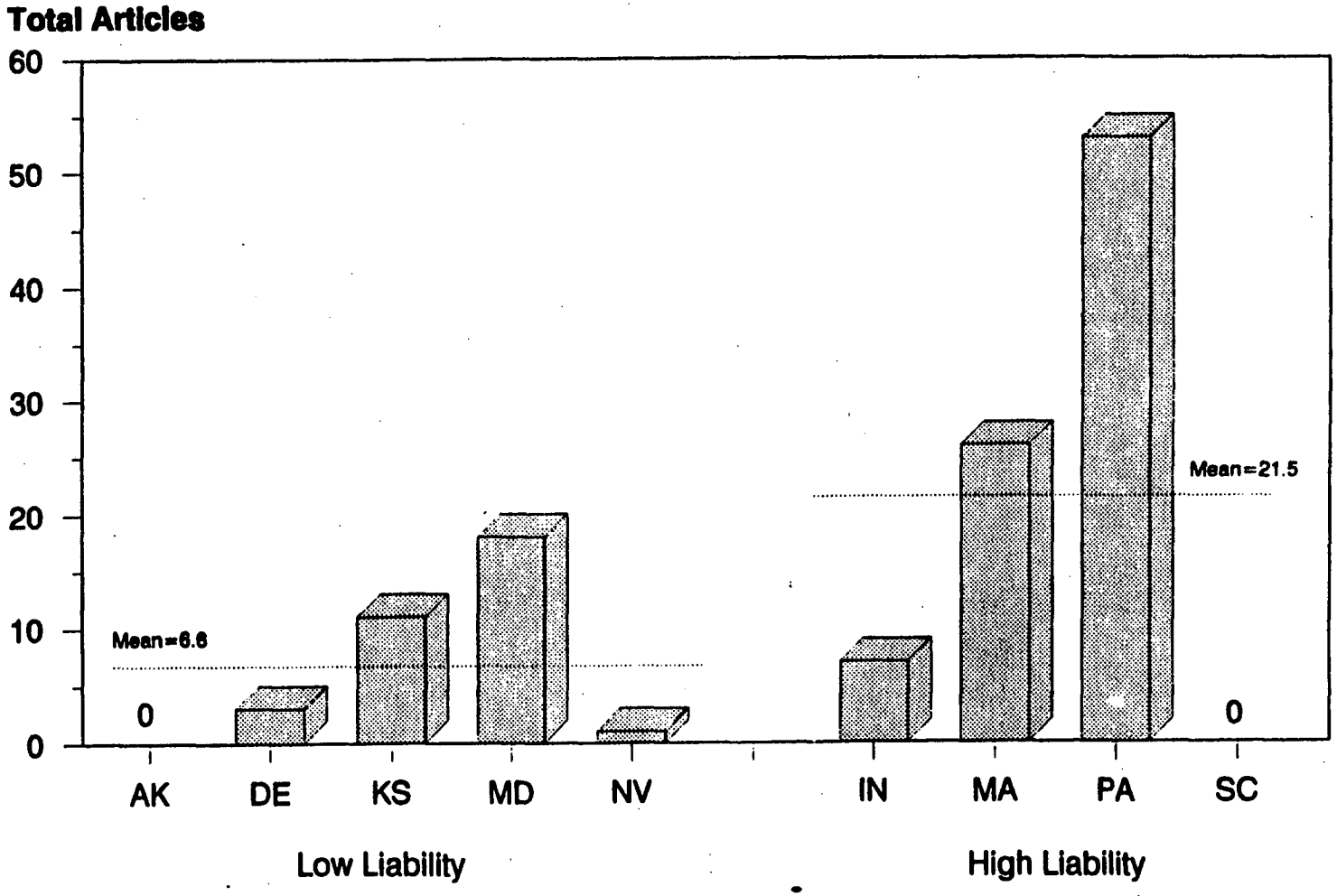


FIGURE IV - 6

Newspaper Coverage in High and Low Server Liability States
Articles on Liability, Practices, and Enforcement -- 1984-1988

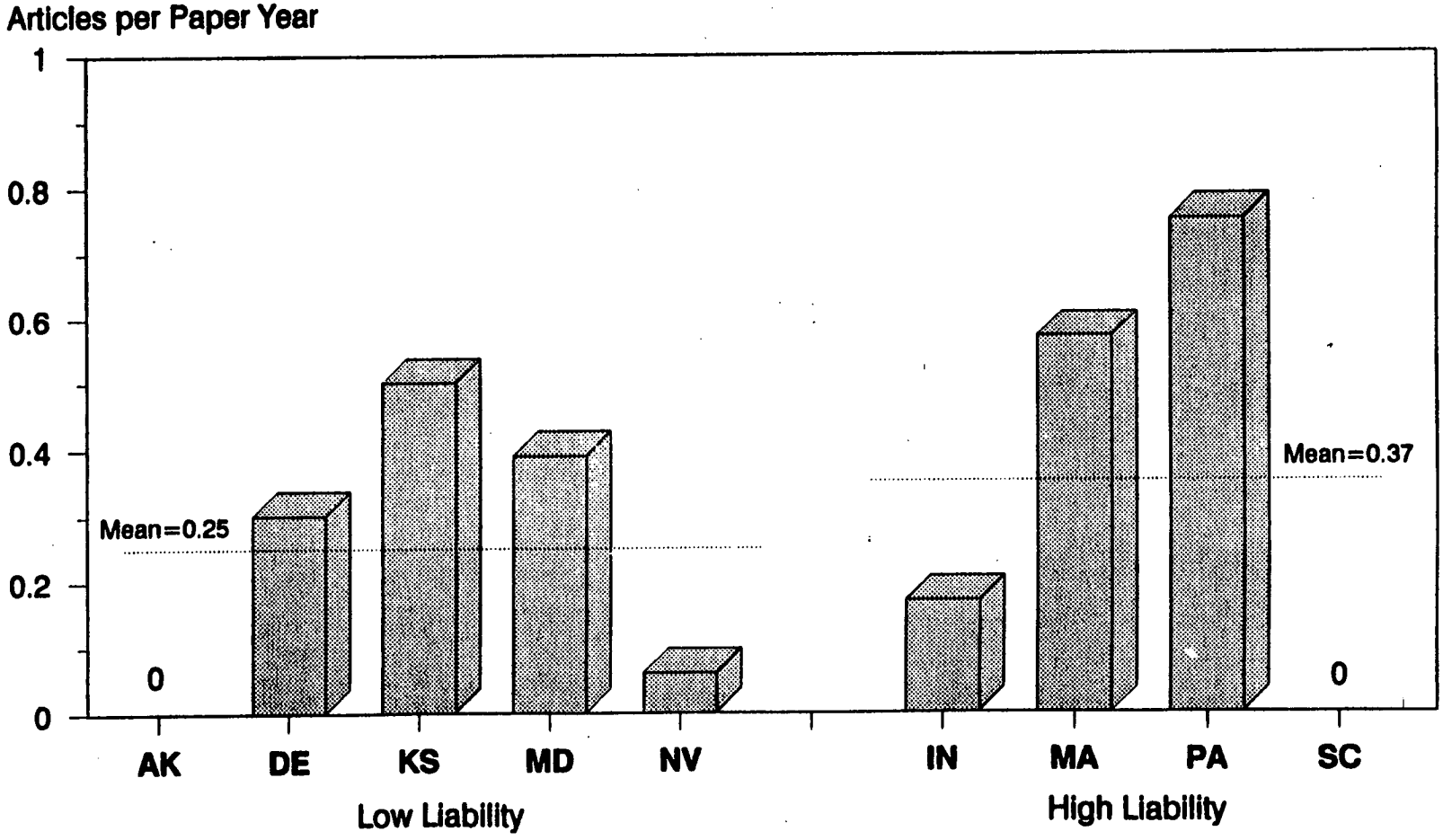


FIGURE IV - 7

Newspaper Coverage in High and Low Server Liability States
Space Devoted to Liability, Practices, and Enforcement -- 1984-1988

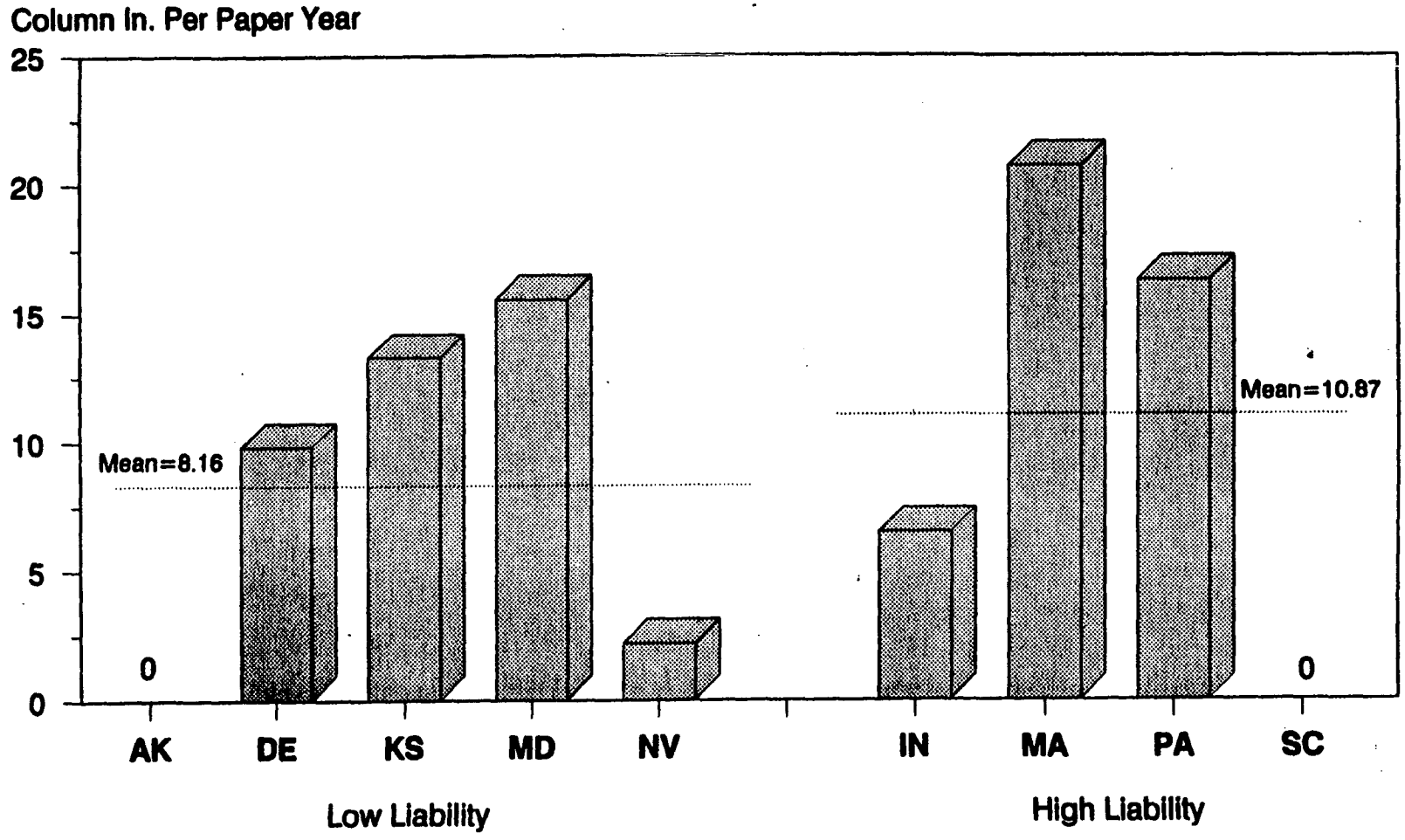


FIGURE IV - 8

Newspaper Coverage in High and Low Server Liability States
Legal Liability Articles Only -- 1984-1988

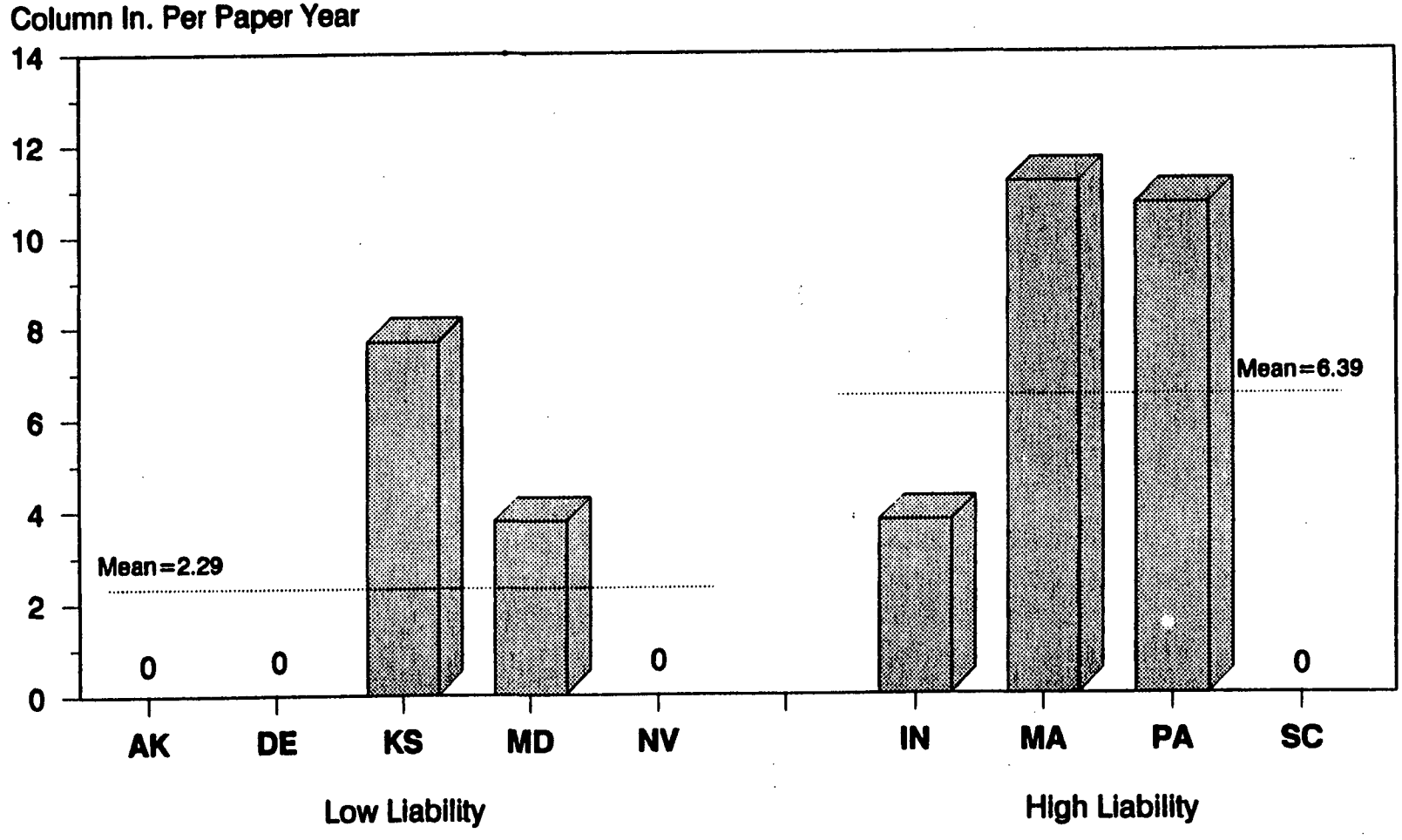


FIGURE IV - 9

Newspaper Coverage in High and Low Server Liability States
Server Practices Articles Only -- 1984-1988

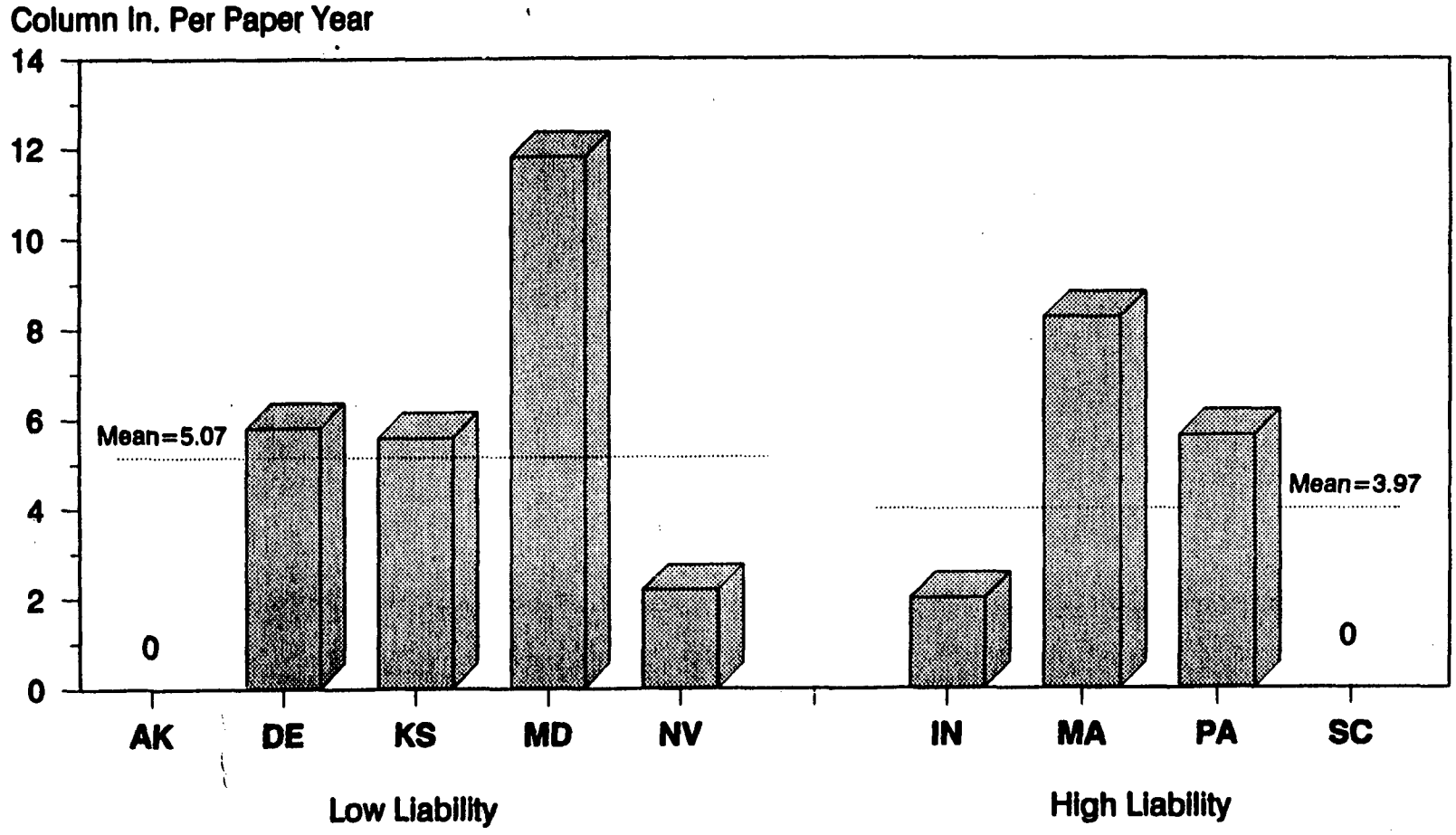
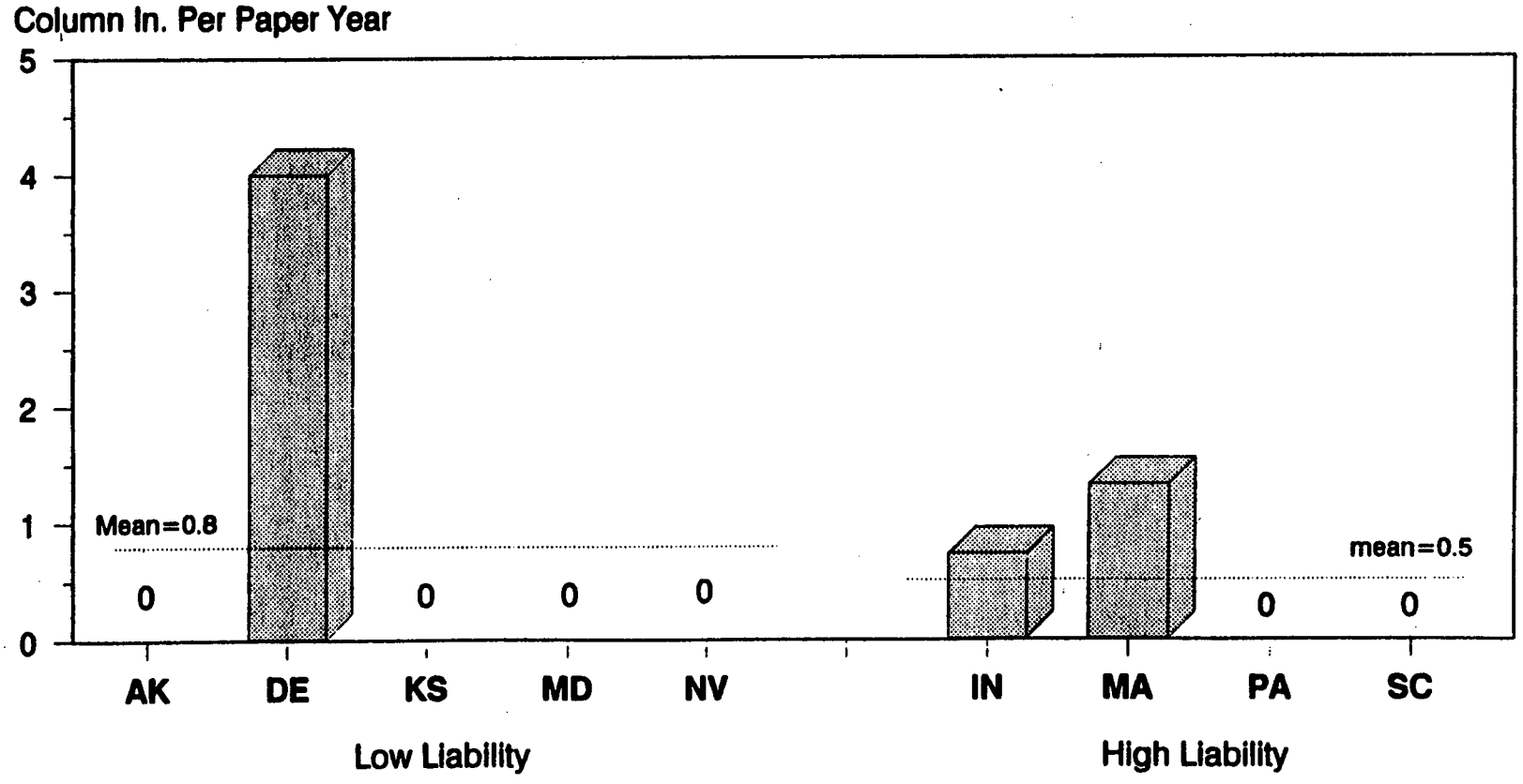


FIGURE IV - 10

High and Low Server Liability States
Newspaper Coverage -- 1984-1988
[Enforcement]



the concern of the local newspapers within a high liability state. Indiana which is the rated as the highest liability state in the country has relatively lower number of articles in both the trade journal and the local newspapers. In fact, if one looked only at coverage, you might conclude that this was a lower liability state, certainly not the highest liability state.

Even if the low liability state group has on-the-average lower attention to server liability within both trade journals and newspapers, this difference is not consistent across all states. For example, the Arkansas trade journal has given a great deal more attention to liability than any other low liability state, even more than any high liability state journal other than South Carolina. On the other hand, there was no coverage of server liability by the local newspapers in Arkansas. Kansas and Maryland both have higher newspaper coverage of server liability than Indiana or South Carolina, both high liability states.

In final summary, one can conclude:

--States with high potential server liability have more publicity about such liability in both local newspapers and beverage trade journals serving these states than in states with low potential server liability.

--States within each low and high liability group have considerable variability in the level of publicity overall and between newspaper and trade journal coverage within the state. This means that each high liability state does not always have the highest level of publicity.

--Trade journals give more coverage on the average than local newspapers about server liability. There are three low liability states (Arkansas, Delaware, and Nevada) and one high liability state (South Carolina) with no newspaper coverage at all over five years studied. As evidenced by South Carolina (high state) and Arkansas (low state) the trade journals are more concerned about liability than the popular press.

--Both high and low liability states have some publicity about server liability. The lowest attention to liability occurs in Nevada (low state) but there is even a small amount of trade journal coverage, even in this state. In fact, as a low liability state, there have been some liability suits in this state as evidenced by the cases reaching the state appellate courts. See Figure II-2.

--Indiana as the state judged in the legal analysis to have the highest potential server liability has rather moderate to low coverage in both journals and newspapers. One might conclude that Indiana was a low liability state based on publicity alone.

--If the coverage that newspapers and trade journals give to the server liability exposure of licensed beverage outlets reflects the level of concern about liability within the state, the higher the liability potential the greater the news coverage and publicity given to such matters.

--If publicity and news coverage reflects exposure (and potential awareness) to level of liability within a state, then licensed established within high liability states will have more awareness.

CHAPTER V

ALCOHOL BEVERAGE SERVER BEHAVIOR, PERCEPTION, TRAINING AND PRACTICES

A. Introduction

One of the primary goals of this project is to learn whether differences in dram shop liability law across states are associated with differences in serving practices or management policies from state to state. One would expect, for instance, that states with laws that allow liquor liability suits would be more likely to comprise businesses that addressed the risk via staff training or more restrictive serving practices.

B. Server/Manager Survey

Given that the NHTSA contract precluded original data collection, it was fortunate that *Top Shelf Magazine* and the Responsible Beverage Service Council expressed interest in conducting a survey of alcoholic beverage outlets on the topic of liquor liability, with consultation from the research staff.

Because the effects of dram shop liability laws would be difficult to measure in the midst of many other factors that might influence server behavior (and given limited resources) the survey was designed to sample selected states representing the extreme ends of liquor liability risk (high vs. low risk), while at the same time covering different geographic regions of the country. It was important, too, to select states in which the liability laws have remained constant for the last several years. With the benefit of the Delphi panel deliberations (see Chapter II), nine states (five with a relatively low risk of liquor liability lawsuits, four with high risk) were selected for the sample (see Table V-1).

TABLE V-1

Sampled States for Server/Manager Survey

Low Risk	Sample Size	High Risk	Sample Size
Arkansas	970	Indiana	970
Delaware	764	Massachusetts	971
Kansas	970	Pennsylvania	971

Maryland	970	South Carolina	130
Nevada	484		

The survey plan was to send three mailings to 800 randomly-selected licensees from each of the states. The businesses were selected from a comprehensive list of licensees compiled by Top Shelf Magazine. The first mailing included a cover letter (see Appendix V-A), the questionnaire (see Appendix V-B, and a business reply envelope for returning the completed questionnaire. Approximately three days after the first mailing, a reminder post card was sent out (see Appendix V-C). Finally, a second set of questionnaire materials was sent out, (along with a notice of second mailing), about two weeks after the original mailing.

Given the interest level and working styles of the people being asked to participate, and that the survey was being administered by non-specialists in survey research, we had anticipated a response rate of somewhere between ten and twenty per cent. In fact, we discovered that the magazine did not send out 800 questionnaires per state, but rather "made up" for having a lower number of subscribers in some states by mailing out "extras" to others (see Table V-1). The final response rate was 11.7%, with a response rate of 10.3% for the "low" liability states, and 13.5% for the "high" liability states (other comparisons are made in the preliminary results section, below).

C. Questionnaire

The questionnaire was designed to cover the following topics: awareness of the risk of liquor liability lawsuits; liability insurance coverage and availability; server training, serving practices; and descriptive information about the business establishment itself. In an effort to maximize response rates, it was decided to limit the questionnaire to no more than four sides of 8 1/2" by 11" paper. For the most part, items were constructed with close-ended responses, again, in an effort to maximize return rates.

Preliminary Results

The basic frequency distributions for questionnaire items are provided in [Appendix V-D]. Percentages are rounded, and thus may not sum to 100%. It is also important to note the number of responses for a given item, since the percentages reported are based on the subsample that provided an answer (and not the total number of returned questionnaires).

Turning first to the items describing business characteristics, we find an equal number of restaurants and bars/nightclubs (40% each). Most of the respondents (63%) offer a full menu. The

great majority of outlets are independently owned, and most employ fewer than 10 service staff. The mean proportion of beer to all alcoholic beverage sales is 50%.

Approximately half of the licensees offer large servings of alcoholic beverages (either pitchers or carafes. Refusal of service to intoxicated customers is relatively rare (less than once or twice per month). On-the-job or orientation training is reportedly quite common, though fewer businesses (about half) report having used a formal training program directed at service to minors or intoxicated patrons.

More interesting results may be found in [Appendix V-E], where frequencies from the "high" liability states are compared with responses from the "low" liability states. Looking at the descriptive data, there appears to be a fairly high degree of similarity among businesses across the two sets of states. The "high" liability states comprise slightly more bars and nightclubs (41% vs. 34%), more independently owned business (95% vs. 89%), and have been in business a bit longer. The high liability outlets seem to be a bit smaller, with slightly higher proportion of alcohol-to-food sales. Given the similarities of businesses and that patterns of missing data also do not diverge between high and low liability states, we have confidence that the results represent "real" answers and not noise resulting from low reliability.

Table V-2 summarizes bivariate relationships between liability status (low versus high) and four sets of primary outcome variables. First, we note a definite relationship between liability and awareness, with people in high liability states much more likely to know of liquor liability lawsuits, more likely to report that such suits are possible in their state, and much more likely to characterize the business climate as "hostile" toward their business.

Businesses in high liability states are more likely to carry liability insurance, but among those who don't, it is clear that their reasons for not having it reflect liability differences. Those in high liability states say that they don't have it because it is too expensive, while those in low liability states say they don't need it.

Interestingly, if there are any differences between the two groups with regard to training, it would appear that the low liability states are more likely to have formal training for their staff on matters of service to minors or intoxicated patrons than are the high liability bars and restaurants, though the differences are small. Similarly, there is little difference in checking age identification or offering drinks in oversize

Table V-2
Low vs. High Liability States on Selected Measures of Awareness, Insurance, and Practices

Awareness	Percent "Yes" Low Liability	Percent "Yes" High Liability	N
Can be sued? (Question #2)	62	99	764
Is your state's legal climate hostile toward business? (Question #3)	25	71	590
Do you know of any liquor liability lawsuits in your state in the past three years? (Question #4)	15	65	448
Insurance			
Yes, am insured (Question #5)	35	49	795
No, don't need it "	37	2	706
No, too expensive "	21	45	706
Training			
Formal training for service to minors (Question #8)	32	26	817
Formal training for service to intoxicated customers (Question #9)	31	27	813
Practices			
Check age identification more than just when patrons "look too young to drink"? (Question #11)	62	69	828
Offer drinks in pitchers or bottles? (Question #17)	78	78	789
Reduced drink prices, or 2-for-1 sales (Question #17)	30	9	789
Refuse to serve intoxicated customers more often than once or twice a month? (Question #14)	34	50	822

servings (pitchers or bottles). On the other hand, it does appear that business in the high liability states are much less likely to use price promotions (happy hours or two-for-one sales), and are more likely to refuse service to intoxicated patrons.

These bivariate results should be treated cautiously, however, as they do not account for the slight differences that do exist in the mix of business in the high vs. low liability states (e.g., more bars and clubs in the high liability states). To statistically control for effects due to differences between types of businesses, we have conducted a series of logistic (and ordered logistic) regression analyses of the primary outcome variables in which descriptive data (e.g., size of serving staff, sales volume, bars and clubs vs. restaurants and others) are included along with the liability status variable.

Table V-3 shows the variables used in the sequence of analyses reported in Tables V-4 through V-16. Questionnaire responses were coded into dichotomies (and a couple of trichotomies) to minimize errors due to outliers and to increase the likelihood of "robust" results. Following the earlier discussion of bivariate relationships, the variables in Table V-3 and the logistic analyses are grouped to explore the relationship of liability to awareness of liability risk, to insurance status, to training, and to other management and serving practices.

Without explicitly restating the results shown in the logistic regression tables, we can nevertheless summarize the results, by noting that they are mostly consistent with the bivariate results shown above (i.e., the bivariate results do not change when controlling for business characteristics). Liability status seems strongly related to awareness of liability risk and perception of a more hostile legal climate, with none of the other variables playing a major role.

On the question of whether a business is insured or not (Table V-7), high liability states are more likely to be insured, as are those with larger staffs, and, interestingly, those who believe it possible to be sued (even when controlling for the state's liability status). In the ordered logistic regression (Table V-8), we note that bars and clubs score lower (toward the "too expensive" end of the trichotomy) than do other businesses.

The single variable that seems to be significantly related to formal training (for service to minors or intoxicated patrons) is having a large service staff. This is not too surprising, but we note that

Table V-3
List of Variables Used in Logistic Regression Models

Descriptive Variables

LIAB	1= High Liability State 0= Low Liability State
LRGSTF	1= More than 10 people in service staff 0= 10 or fewer people
HISALS	1= Total gross annual food and beverage sales $500,000 or more 0= Less than $500,000 gross sales
BARCLUB	1= Business described as either bar or nightclub 0= Other type of business
ALCSAL	1= Gross sales from alcoholic beverages equal 50% or more of total gross sales 0= Alcohol sales less than 50% of total

Awareness

CANSUE	1= Answered "yes" to question of whether could be sued for liability 0= Answered "no" to possibility of liability lawsuit
SUITS	1= Knew of one or more liquor liability lawsuits in past 3 years 0= Did not know of any lawsuits
CLIMATE	0= Legal climate generally favorable 1= Legal climate neutral 2= Legal climate hostile

Insurance

INSURED	1= Insured 0= No Insurance
INSTAT	0= No Insurance, too expensive 1= Insured 2= No Insurance, don't need it

TRINT	1= Staff has had specific, formal training on avoiding service to intoxicated patrons 0= No formal training
TRMIN	1= Staff has had specific, formal training on avoiding service to minors 0= No formal training
TRALL	Composite score of level of training in both areas above where 0= No training 1= On the job training rather than formal training or part of orientation 2= Specific, formal training Scores for each topic (minors, intoxicated patrons) were assigned, then summed with the resulting total divided by 2 (and rounded) to maintain original)0-2 scale and avoid artificially-inflated variance

Management and Serving Practices

AGECK	1= Check identification for everyone or those under 25 or 30 0= Check only when patrons look "too young to drink
REFUSAL	1= Reported refusing service to intoxicated patrons more often than once or twice a month 0= Refusal less frequent
LGDRNK	1= Serves alcoholic beverages in pitchers, carafes, or bottles 0= No large containers
LOPRIC	1= Offers either reduced prices during "happy hours" or has 2-for-1 drink sales 0= No lowered prices
PROMO	0= Neither LGDRK nor LOPRIC 1= Either LGDRK or LOPRIC 2= Both LGDRK and LOPRIC

though liability status is not significantly related to training in these data, the analysis suggests that the relationship, if any, would be negative (i.e., businesses in higher liability states less likely to train their staff).

Finally, in the arena of management and serving practices, we see some mixed results, and note that here some other characteristics of the businesses also come into play. As an example, while it seems that businesses in high liability states are not likely to be more cautious in establishing drinkers' ages, those whose sales in alcoholic beverages account for more than 50% of their total are more likely to check more thoroughly (Table V-12). Similarly, bars and clubs, as well as managers who believe it possible to be sued for liquor liability report more frequent refusal of service (Table V-13).

Tables V-14 through V-16 center on serving sizes and price promotions (and then an ordinal scale combining the two). Here we see that service in larger containers (bottles or pitchers) is unrelated to liability status, and negatively related to businesses primarily selling alcohol (perhaps because bottles of wine are more frequently found in restaurants). Price promotions, however, are less likely to be used in high liability states, by those with large staffs, and those knowledgeable of other lawsuits.

These multivariate results must be taken as suggestive rather than definitive, of course. Beside the potential biases resulting from lower response rates, one may note from the accompanying tables that the log likelihood ratios are rather large, indicating a lack of good fit. In addition, non-responses for specific items (either through refusal to give information, fatigue, ignorance, or confusion) means that many of the multivariate analyses are based on a subset of cases with complete data. Though the analyses could be conducted with pair-wise deletion, it was felt that the more conservative strategy should be used here.

In sum, these analyses suggest that owners and managers are quite aware of the liability climates in which they operate, and perceive their need and ability to obtain liability insurance to likewise be affected by that climate. Training per se does not seem to be encouraged by working in a high liability environment, or at least the encouragement is not sufficient to overcome the costs of providing that training. Nevertheless, higher risk of liability does seem to influence certain management and serving practices that may, in the end, prove to be as important if not more important than training per se in reducing the risk of driving while impaired.

Table V-4
Logistic Regression Analysis:
Dependent Variable: CANSUE

Variable	Coefficient	Standard Error	t-statistic
CONSTANT	.7618390	.2360343	-3.2277***
LIAB	4.727020	.7179683	-6.5839***
LRGSTF	-.0529362	.3219443	.16443
HISALS	-.2912652	.3149033	.92494
BARCLUB	-.4687455	.3048349	1.5377
ALCSAL	-.0764551	.3253278	.23501

Log Likelihood: -226.4175073894
n=166

* p<=.10 (two-tailed)
** p<=.05
*** p<=.01

Table V-5
Logistic Regression Analysis:
Dependent Variable: SUITS

Variable	Coefficient	Standard Error	t-statistic
CONSTANT	-1.875207	.2897322	6.4722***
LIAB	2.295021	.2447403	-9.3774***
LRGSTF	-.1278932	.3547790	.36049
HISALS	.2106705	.3678908	-.57264
BARCLUB	.1777295	.3181020	-.55872
ALCSAL	.2700807	.3225036	-.83745

Log Likelihood: -212.5656194672
n=400

* p<=.10 (two-tailed)
** p<=.05
*** p<=.01

Table V-6
Ordered Logistic Regression Analysis:
Dependent Variable: CLIMATE

Variable	Coefficient	Standard Error	t-statistic
CONSTANT	0.739457	0.231936	3.188 **
LRGSTF	-0.010882	0.303143	-0.036
LIAB	1.92674	0.199804	9.643 ***
BARCLUB	0.424254	0.236745	1.792 *
HISALS	0.073786	0.291364	0.025
ALCSAL	0.255214	0.250738	1.018
MU(1)	2.04713	0.147506	13.878 ***

Log Likelihood: -417.34
n=476

* p<=.10 (two-tailed)
** p<=.05
*** p<=.01

Table V-7
Logistic Regression Analysis:
Dependent Variable: INSURED

Variable	Coefficient	Standard Error	t-statistic
CONSTANT	-1.921710	.3652416	5.2615***
LRGSTF	.8785037	.3291849	-2.6687***
LIAB	.8824395	.3015065	-2.9268***
BARCLUB	-.4126785	.3073663	1.3426
HISALS	.4424406	.3377733	-1.3099
ALCSAL	.1015613	.3143888	-.32304
SUITS	-.2679882	.2740908	.97774
CANSUE	1.025321	.3543593	-2.8934***

Log Likelihood: -219.0017147738
n=369

* p<=.10 (two-tailed)
** p<=.05
*** p<=.01

Table V-8
Ordered Logistic Regression Analysis
Dependent Variable: INSTAT

Variable	Coefficient	Standard Error	t-statistic
CONSTANT	3.47551	0.471340	7.374 ***
LRGSTR	-0.0174554	0.472977	-0.037
LIAB	-1.06549	0.414205	-2.572 **
BARCLUB	-0.745228	0.368858	-2.020 **
HISALS	0.377895	0.459053	0.823
ALCSAL	0.0347930	0.408598	0.085
SUITS	-0.145360	0.345989	-0.420
CANSUE	-1.83948	0.378853	-4.855 ***
MU (1)	2.73613	0.275651	9.926 ***

Log Likelihood: -183.21
n=209

* p<=.10 (two-tailed)
** p<=.05
*** p<=.01

Table V-9
Logistic Regression Analysis:
Dependent Variable: TRMIN

Variable	Coefficient	Standard Error	t-statistic
CONSTANT	-1.422484	.3320256	-4.2843***
LRGSTF	1.486756	.3355168	4.4312***
LIAB	- .2553189	.3108954	- .82124
BARCLUB	.0634724	.3192717	.19880
HISALS	- .0710402	.3237083	- .21946
ALCSAL	.3472860	.3333121	1.0419
SUITS	.2385631	.2799259	.85224
CANSUE	- .1512277	.3162954	- .47812

Log Likelihood: -218.7876418919
n=374

* p<=.10 (two-tailed)
** p<=.05
*** p<=.01

Table V-10
Logistic Regression Analysis:
Dependent Variable: TRINT

Variable	Coefficient	Standard Error	t-statistic
CONSTANT	-1.181162	.3244607	-3.6404***
LRGSTF	1.190371	.3314349	3.5916***
LIAB	- .1264146	.3085741	- .40967
BARCLUB	.1668718	.3189037	.52327
HISALS	.0973617	.3231359	.30130
ALCSAL	.2404825	.3307867	.72700
SUITS	- .0498499	.2776798	- .17952
CANSUE	- .3035712	.3135196	- .96827

Log Likelihood: -220.4807315432
n=373

* p<=.10 (two-tailed)
** p<=.05
*** p<=.01

Table V-11
Ordered Logistic Regression Analysis
Dependent Variable: TRALL

Variable	Coefficient	Standard Error	t-statistic
CONSTANT	0.794089E-01	0.335854	0.236
LRGSTR	1.21059	0.363071	3.334***
LIAB	0.00258337	0.359254	0.007
BARCLUB	0.0348315	0.364416	0.096
HISALS	0.195701	0.349961	0.559
ALCSAL	0.394371	0.392154	1.006
SUITS	0.0405857	0.295507	0.137
CANSUE	0.310230	0.362154	0.857
MU (1)	1.91691	0.170255	11.259 ***

Log Likelihood: -257.68
n=251

* p<=.10 (two-tailed)
** p<=.05
*** p<=.01

Table V-12
Logistic Regression Analysis:
Dependent Variable: AGECK

Variable	Coefficient	Standard Error	t-statistic
CONSTANT	-.1753042	.3018027	-.58086
LRGSTF	.5034933	.3235322	1.5562
LIAB	.1553615	.2910308	.53383
BARCLUB	.0455387	.2994588	.15207
HISALS	.4046269	.3343366	1.2102
ALCSAL	.8700864	.3092044	2.8140***
SUITS	.4139703	.2672391	1.5491
CANSUE	-.2041607	.3052141	-.66891

Log Likelihood: -234.9623319445
n=377

* p<=.10 (two-tailed)
** p<=.05
*** p<=.01

Table V-13
Logistic Regression Analysis:
Dependent Variable: REFUSAL

Variable	Coefficient	Standard Error	t-statistic
CONSTANT	-1.483486	.3366978	-4.4060***
LRGSTF	.7787587	.3470879	2.2437**
LIAB	.4781988	.3061471	1.5620
BARCLUB	1.663349	.3134342	5.3069***
HISALS	.1035683	.3434129	.30159
ALCSAL	.2679835	.3198482	.83785
SUITS	.7462697	.2701067	2.7629***
CANSUE	-.4909808	.3268085	-1.5024

Log Likelihood: -220.9820159786
n=374

* p<=.10 (two-tailed)
** p<=.05
*** p<=.01

Table V-14
Logistic Regression Analysis:
Dependent Variable: LGDRNK

Variable	Coefficient	Standard Error	t-statistic
CONSTANT	1.590888	.3867769	4.1132***
LRGSTF	.3111816	.4523806	.68788
LIAB	-.2200353	.3840332	-.57296
BARCLUB	.0136042	.3759387	.03619
HISALS	-.0308335	.4706913	-.06551
ALCSAL	-.8284837	.3952768	-2.0960**
SUITS	.3554362	.3377335	1.0524
CANSUE	.3515569	.3927864	.89503

Log Likelihood: -159.1453621684
n=363

* p<=.10 (two-tailed)
** p<=.05
*** p<=.01

Table V-15
Logistic Regression Analysis:
Dependent Variable: LOPRIC

Variable	Coefficient	Standard Error	t-statistic
CONSTANT	-1.290367	.3512557	-3.6736***
LRGSTF	.6285417	.3786003	1.6602*
LIAB	-1.927540	.3748048	-5.1428***
BARCLUB	.3888331	.3583955	1.0849
HISALS	.0507426	.3654604	.13885
ALCSAL	.0710391	.3778271	.18802
SUITS	.5966486	.3320618	1.7968*
CANSUE	.2078227	.3122536	.66556

Log Likelihood: -178.0327419491
n=363

* p<=.10 (two-tailed)
** p<=.05
*** p<=.01

Table V-16
Ordered Logistic Regression Analysis
Dependent Variable: PROMO

Variable	Coefficient	Standard Error	t-statistic
CONSTANT	2.05372	0.408827	5.023***
LRGSTF	0.526978	0.376556	1.399
LIAB	-1.34737	0.392195	-3.435***
BARCLUB	-0.0951097	0.428204	-0.222
HISALS	0.0921061	0.358924	0.257
ALCSAL	-0.516469	0.440442	-1.173
SUITS	0.705127	0.330636	2.133**
CANSUE	0.528927	0.379350	1.394
INSURED	-0.380370	0.303156	-1.255
MU(1)	3.54426	0.258248	13.724***

Log Likelihood: -203.23
n=250

* p<=.10 (two-tailed)
** p<=.05
*** p<=.01

CHAPTER VI

DRAM SHOP LIABILITY AND ALCOHOL INVOLVED TRAFFIC PROBLEMs

A. Introduction -- Analysis of Two Case Study Change States

Analysis of the legal history and status of server liability in states as well as the description of high and low liability states through content analysis and server/manager surveys provide useful information about existing differences between states. They do not provide information which enable us to determine the impact of liability on alcohol traffic problems. As a result two change states, North Carolina and Texas, of the possible set of change states described in Chapter II, were selected in order to conduct pilot research into the potential effect of changes in liability on alcohol-involved traffic problems. The legislative and case law history in the 1980's of these two states, North Carolina and Texas, are summarized in Chapter II. The following sections summarize our findings from these two change states.

B. North Carolina

(1) Introduction to the State

The State of North Carolina has a 1980 population of 5,882,000, which ranks 10th nationally. It is located in the Southeast Atlantic Coast area between Virginia and South Carolina. Except for urban centers, the state is largely rural with a population density of 120 people per square mile. The largest city, Charlotte, has a 1980 population of 326,000. Over 22% of North Carolina's residents are black, 1% are Native Americans, and 75% are white. The 1980 per capita income was $7,774. As a rural state, it has an extensive network of paved roads distributed over a varied terrain. Its topology rises eastward from the coastal plan region through the central Piedmont plateau to the Appalachian Mountains in the East.

North Carolina through county level Alcoholic Beverage Control offices maintains a monopoly on retail sale of distilled spirits by the bottle. Since local option is exercised in North Carolina, state store sales as well as other types of licenses are available depending upon the results of local votes on these matters. Beer and wine sales if accepted by local vote can be available for consumption off premise only or on and off premise.

Spirits can be available on premise if permitted by local vote, through "brown bag" licenses or through on-premise sales licenses, or through private membership clubs. Brown bag licensing permits

individuals to bring their own spirits to a restaurant for consumption and the licensed establishment can sell ice, glasses, and mixes for customer use. On-premise licenses which enable a retail establishment to sell spirits by the individual drink were not permitted in North Carolina until 1978 following prohibition. Private clubs permit members to store their own personal bottle of distilled spirits at the club and consume from this bottle while in the club.

The most significant growth in alcohol licenses in North Carolina during the 1980's has occurred in all on-premise spirits licenses including brown bag, private clubs, and mixed drink licenses. This is shown in Figure VI-1. Figures VI-2 and VI-3 show plots of beer licenses for on and off premise consumption. Figure VI-2 shows that over the period December 1979 through December 1988 the number of beer on premise licenses has grown and such licenses appear to oscillate around a 7,000 total license level. Beer off-premise license had a significant increase in the 1979-1981 period (see Figure VI-3) and like on-premise license, appears to stabilize.

Figure Vl-4 shows total alcohol outlets as the sum of beer off premise licenses, beer on premise licenses, mixed beverage, and brown bagging licenses. State stores are not included in this total. The purpose of this chart is to provide information about the patterns of alcohol beverage outlets over the past nine years in North Carolina. This plot suggests that there has been an upward trend in total alcoholic beverage outlets, which appears to be primarily a function of increases in on-premise spirits outlets. This growth is not surprising. From the end of Prohibition until 1978, North Carolina did not permit the sale of spirits for on-premise consumption, i.e., mixed beverage licenses. This new form of availability which has replaced brown bagging permits in those counties which voted to allow them has been shown in prior research to both increase overall spirits consumption as well as increased alcohol-involved crashes. (Blose and Holder, 1987)

(2) Events and Chronology Server Liability, Drinking and Driving and Other Traffic Legislation in North Carolina

A number of significant events have occurred between December 1979 and December 1988. The most significant events (those most likely to impact alcohol-involved traffic problems) are listed below.

A chronology of significant events are shown below:

December 1979 -- Traffic crash occurred causing injuries following a company Christmas workplace party from which an employee was allowed to leave in an intoxicated state

March 1981 -- A fatal traffic crash caused by a customer who drank a large number of beers in licensed establishment who subsequently caused the fatal crash. The owner of the establishment was sued. (Hutchens V. Hankins)

FIGURE VI - 1

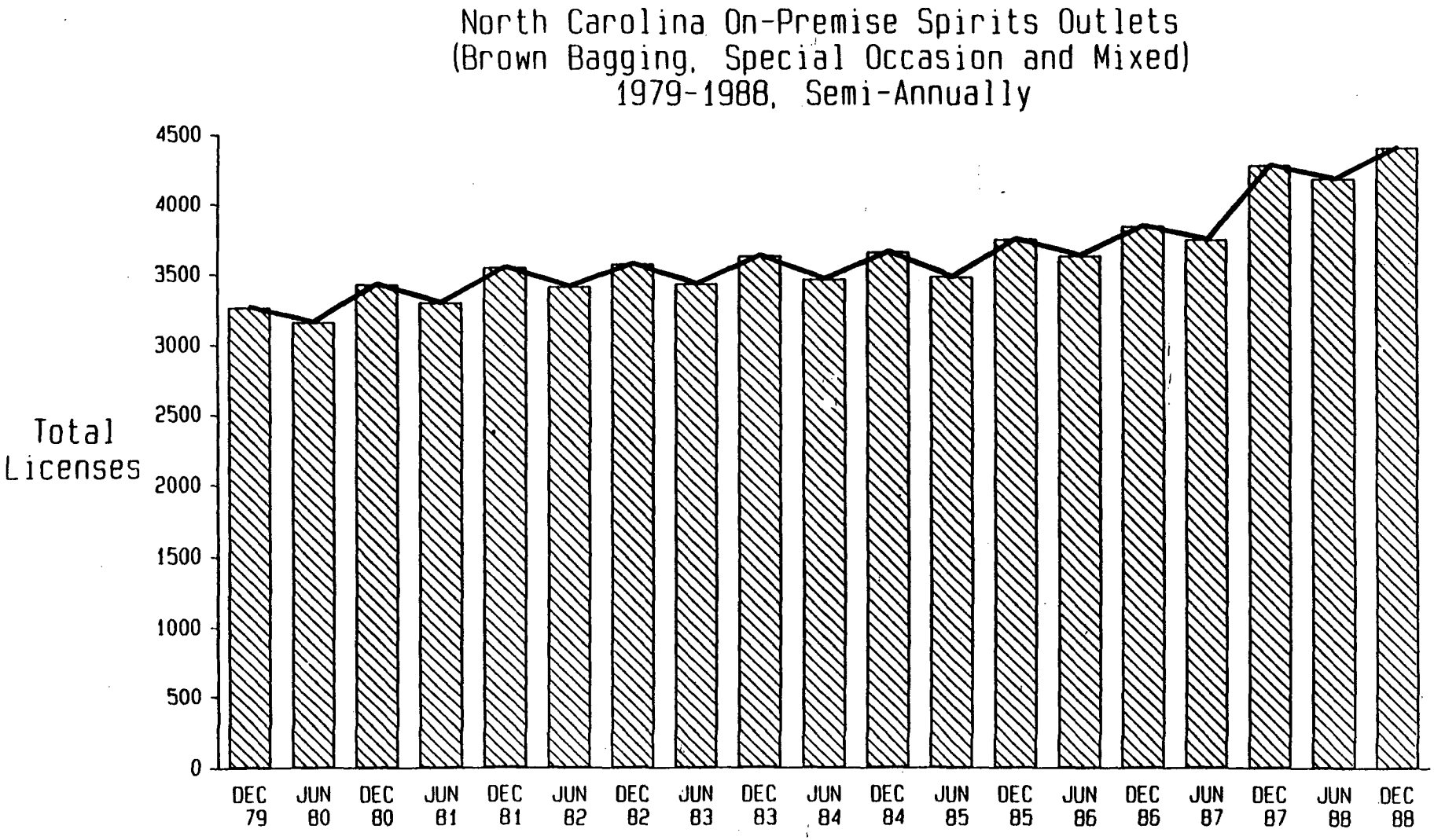

North Carolina On-Premise Spirits Outlets
(Brown Bagging, Special Occasion and Mixed)
1979-1988, Semi-Annually
Total Licenses
4500
4000
3500
3000
2500
2000
1500
1000
500
0
DEC 79
JUN 80
DEC 80
JUN 81
DEC 81
JUN 82
DEC 82
JUN 83
DEC 83
JUN 84
DEC 84
JUN 85
DEC 85
JUN 86
DEC 86
JUN 87
DEC 87
JUN 88
DEC 88

FIGURE VI - 2

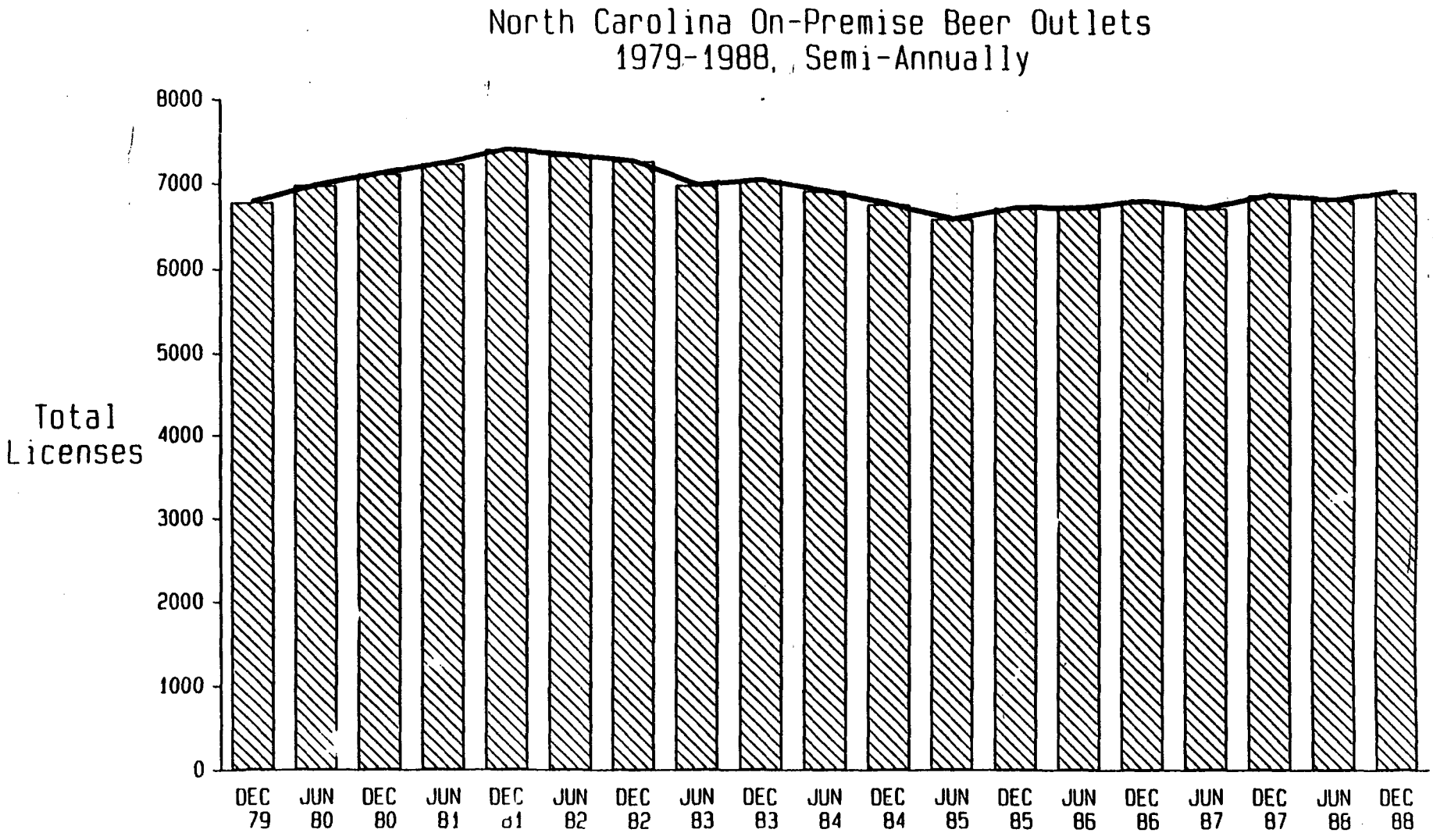

North Carolina On-Premise Beer Outlets
1979-1988, Semi-Annually
Total Licenses
8000
7000
6000
5000
4000
3000
2000
1000
0
DEC 79
JUN 80
DEC 80
JUN 81
DEC 81
JUN 82
DEC 82
JUN 83
DEC 83
JUN 84
DEC 84
JUN 85
DEC 85
JUN 86
DEC 86
JUN 87
DEC 87
JUN 88
DEC 88

FIGURE VI - 3

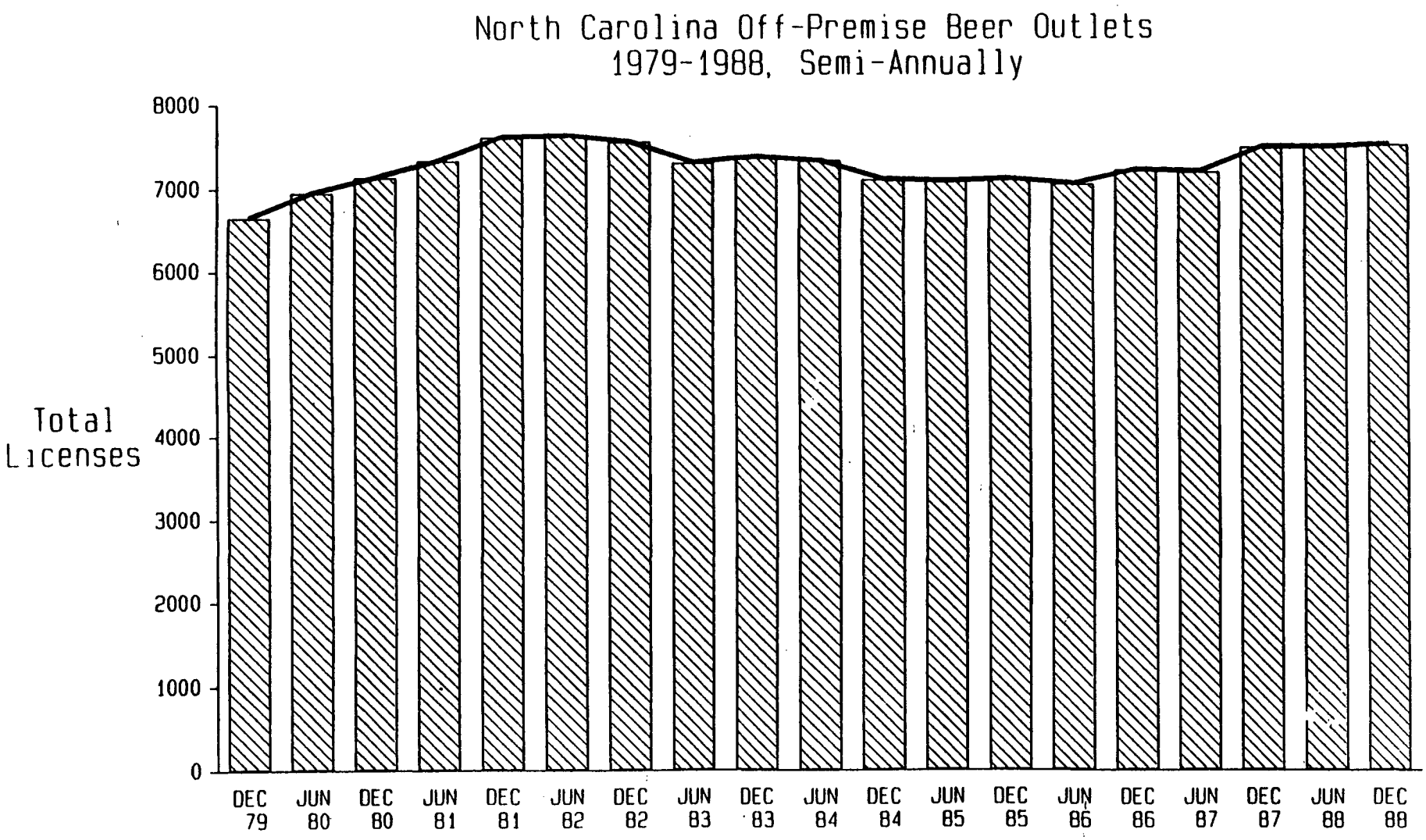
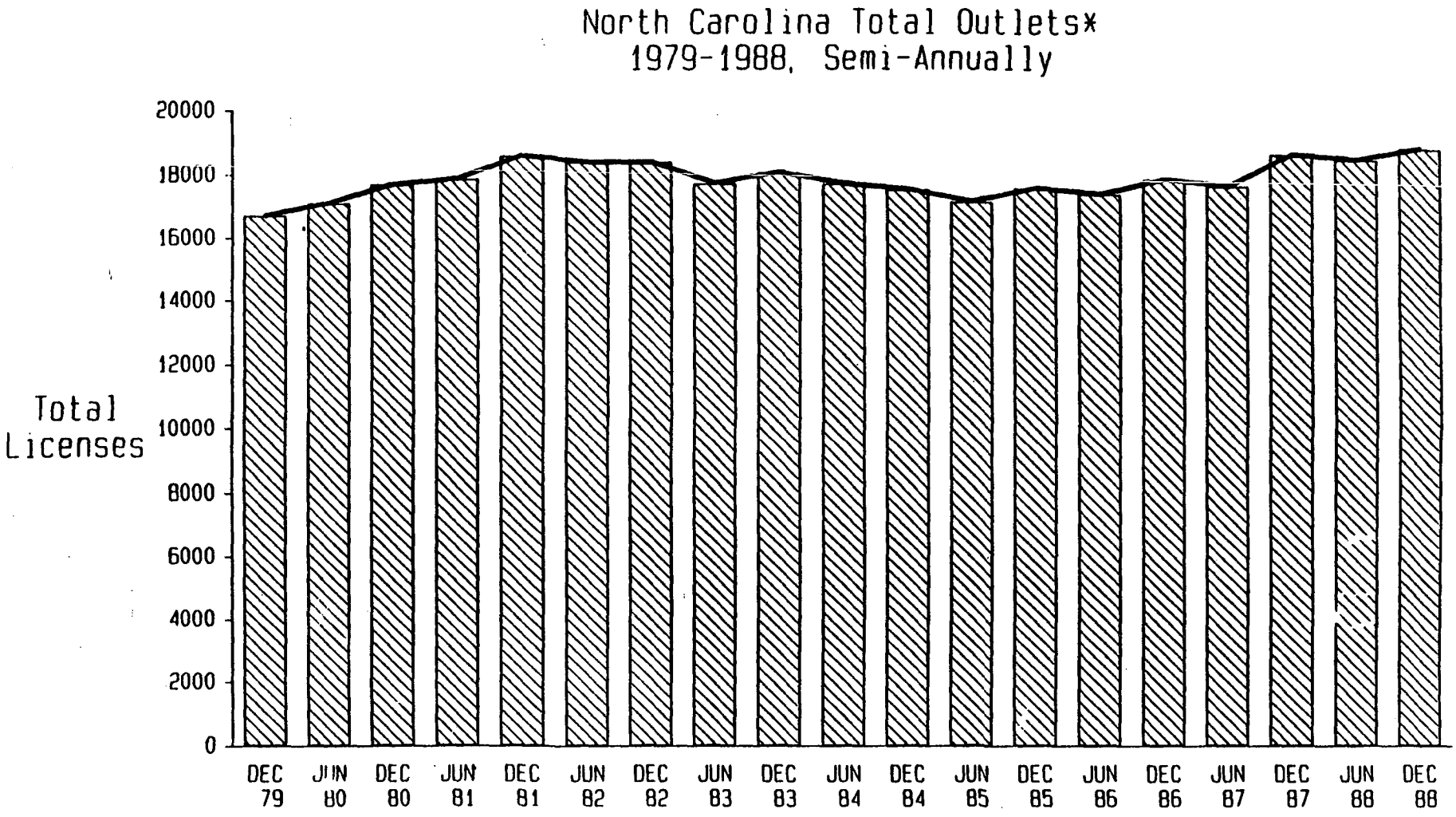

North Carolina Off-Premise Beer Outlets
1979-1988, Semi-Annually
Total Licenses
8000
7000
6000
5000
4000
3000
2000
1000
0
DEC 79
JUN 80
DEC 80
JUN 81
DEC 81
JUN 82
DEC 82
JUN 83
DEC 83
JUN 84
DEC 84
JUN 85
DEC 85
JUN 86
DEC 86
JUN 87
DEC 87
JUN 88
DEC 88

FIGURE VI - 4



*State Spirits Stores not included

December 1982 -- N.C. Appellate Court upheld decision for plaintiff that a nonlicensed employer may be sued for negligence in serving alcohol and allowing intoxicated employee to drive away. (Chastain V. Litton Systems, Inc., 694 F 2d 957, 1982)

June 1983 -- N.C. Appellate Court upheld decision for plaintiffs in Hutchens V. Hankins (303 S.E. 2d 584, 1983)

October 1983 -- Effective date of amendment to N.C. Alcoholic Beverage Control law was by "Safe Roads Act" which included a number of provisions:

Server Liability

(a) Statutory dram shop liability for negligent alcohol sales to underage persons for injuries proximately caused by underage driver's negligent operation of an automobile while impaired by alcohol. Effective October 1, 1983. As originally proposed, the Act included a provision creating dram shop liability for sales to intoxicated persons also. However, that provision was omitted during legislative consideration of the bill. Section 41.1 of the Safe Roads Act of 1983 states that the original inclusion and ultimate deletion of statutory liability for those who serve intoxicated persons does not reflect any legislative intent with respect to civil liability for such negligence. This statute does not preclude common law liability suits for service to intoxicated persons. Furthermore section 18B-12B states that common law rights are not abridged by the statute so common law suits for illegal service to minors are also possible. This may be an important limitation of the statute since the cause of action outlined above is quite limited.

(b) Damages recoverable under this statute are limited to $500,000. This statute contains the first statutory provision for admissibility of evidence regarding a licensee's "good practices", such as training of employees or evidence that the minor presented false identification.

DUI Enforcement and Sanctions

(a) Immediate short-term license suspension for persons arrested for DUI who have a blood alcohol concentration (BAC) of .10 or more or who refuse to submit to a chemical test;

(b) Mandatory jail terms for multiple offenders and those involved in especially serious cases;

(c) Strict sentencing guidelines even for less serious offenders;

(d) Elimination of lesser, included offenses which had been plea bargaining alternatives; and

(e) Several special provisions designed to deter drinking and driving by the youthful driving population including raising the drinking age for beer and light wine from 18 to 19.

December 1983 -- N.C. Court of Appeals upheld liability of a package store which sold beer to minors who subsequently were involved in traffic crashes which injured and killed plaintiffs. (Freeman V. Finney, 309 S.E. 2d 531, 1983)

April 1985 -- N.C. Court of Appeals held that an intoxicated patron's contributory negligence in consuming sufficient alcohol to become intoxicated may be used as a defense to bar his negligence suit based on violation of a statute against a licensee who serves him. (Bower V. Robert Chappell and Associates, Inc. 328 S.E. 2d 45, 1985)

October 1985 -- N.C. mandatory seat belt law.

In order to examine the changes in alcohol-involved traffic crashes, we obtained monthly counts of total injury crashes (Figure VI-5), total fatal crashes (Figure VI-6), and total fatal nighttime crashes (Figure VI-7) from January 1983 through December 1988. In addition, we obtained counts of single vehicle nighttime auto crashes from January, 1988, through December, 1988 (Figure VI-8). All crash counts were filtered to include only those with at least one passenger car or 2 axle truck. Crashes involving commercial trucks, farm vehicles, bicycles, etc. only, were removed from the monthly counts. For each plot, significant events of relevance to alcohol-involved crashes are also shown on each plot. As 1982 monthly data were not available on injury crashes, total fatal crashes, and total nighttime crashes, we elected to only consider single vehicle nighttime crashes. All plots provide information about general changes and trends in North Carolina traffic crashes in general as well as information about crashes which may have a high percentage of alcohol involvement.

(3) Concurrent Other Factors

Concurrently with the significant events which have been identified previously, other factors which may have affected the number of alcohol-involved traffic crashes have occurred during this period.

Figure VI-9 shows the quarterly pattern of DUI arrests in North Carolina from 1980-1988. In general, arrests were highest in absolute numbers during the early 1980's, reached their lowest levels in the period 1983-1985 and rose again in the late 1980's. The plot suggests that DUI arrests were at the lowest during the period of greatest emphasis on dram shop liability and the state drinking and driving legislation which became effective October (4th quarter) 1983.

FIGURE VI - 5

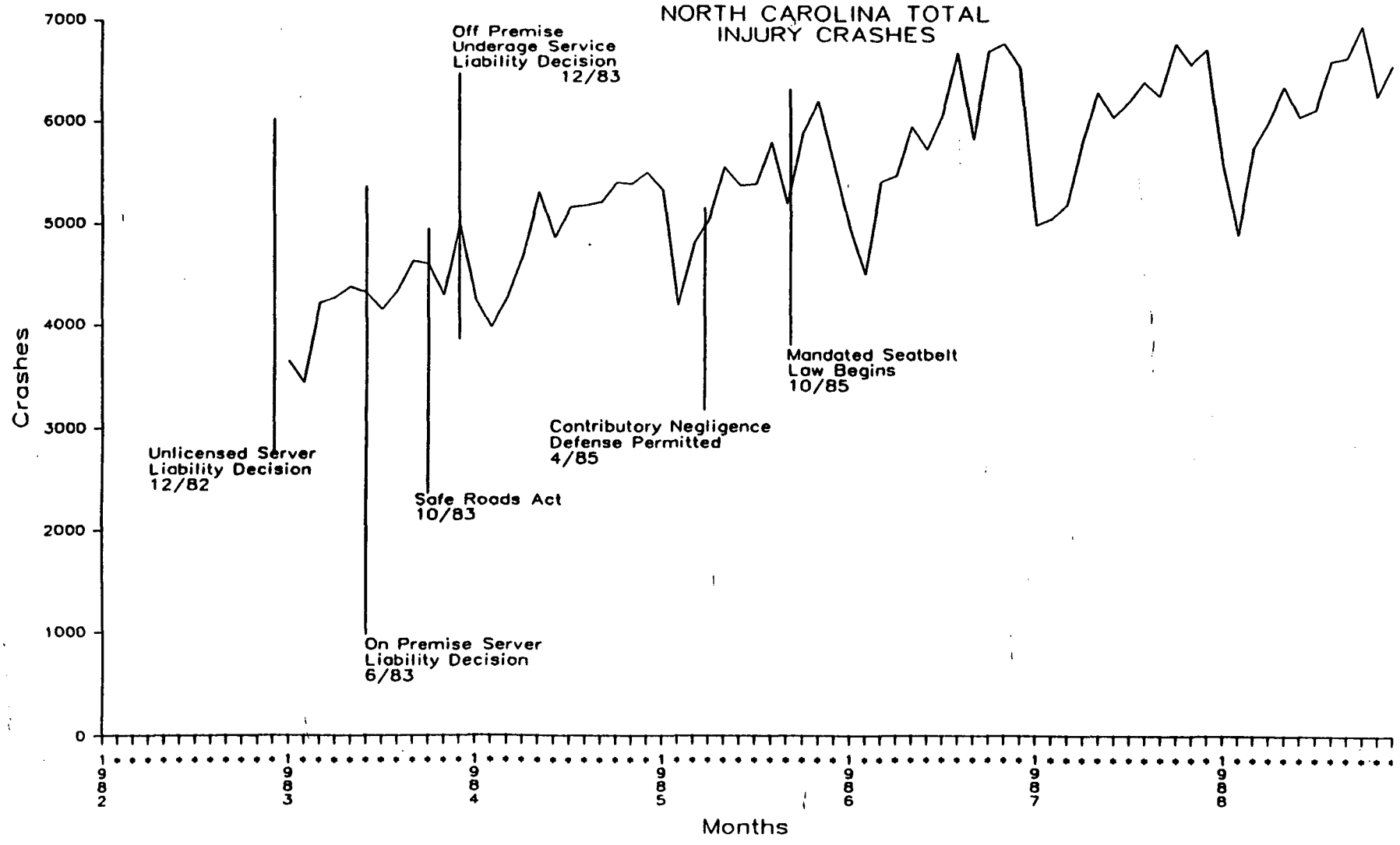

NORTH CAROLINA TOTAL
INJURY CRASHES
Crashes
7000
6000
5000
4000
3000
2000
1000
0
Off Premise
Underage Service
Liability Decision
12/83
Unlicensed Server
Liability Decision
12/82
On Premise Server
Liability Decision
6/83
Safe Roads Act
10/83
Contributory Negligence
Defense Permitted
4/85
Mandated Seatbelt
Law Begins
10/85
1982
1983
1984
1985
1986
1987
1988
Months

FIGURE VI - 6

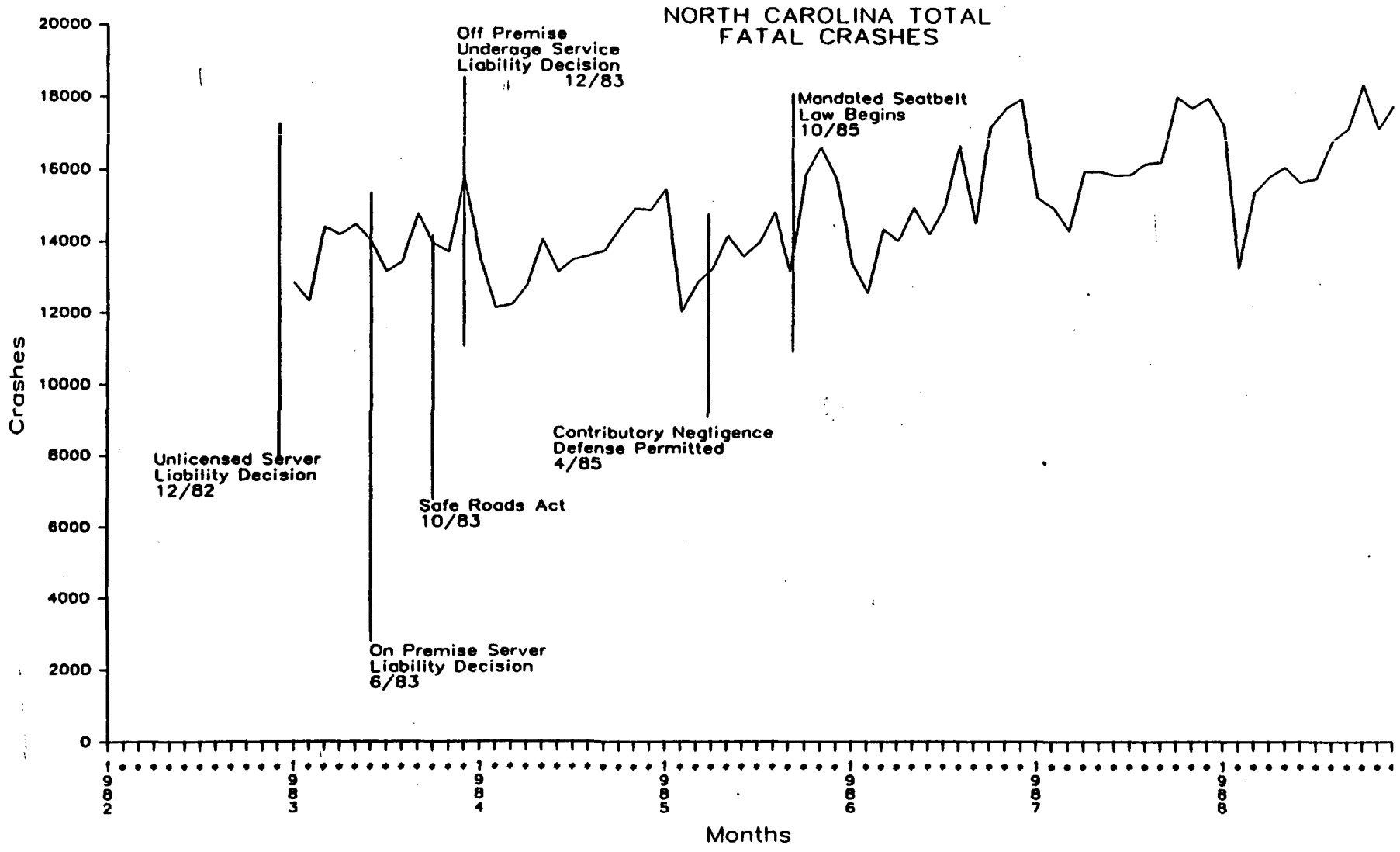

NORTH CAROLINA TOTAL
FATAL CRASHES
Crashes
20000
18000
16000
14000
12000
10000
8000
6000
4000
2000
0
Off Premise
Underage Service
Liability Decision
12/83
Mandated Seatbelt
Law Begins
10/85
Unlicensed Server
Liability Decision
12/82
On Premise Server
Liability Decision
6/83
Safe Roads Act
10/83
Contributory Negligence
Defense Permitted
4/85
1982
1983
1984
1985
1986
1987
1988
Months

FIGURE IV - 7

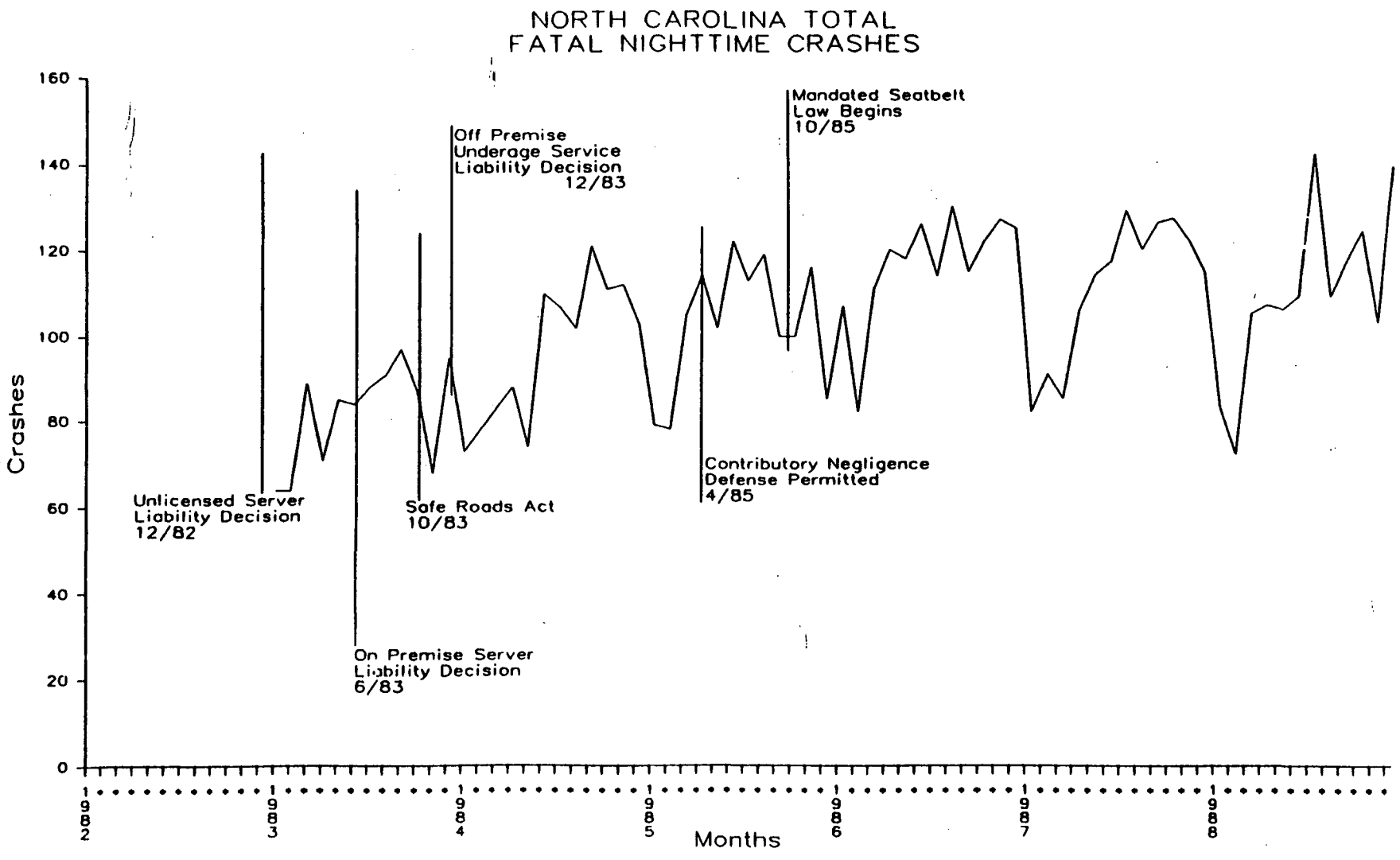

NORTH CAROLINA TOTAL
FATAL NIGHTTIME CRASHES
Crashes
160
140
120
100
80
60
40
20
0
Unlicensed Server
Liability Decision
12/82
On Premise Server
Liability Decision
6/83
Safe Roads Act
10/83
Off Premise
Underage Service
Liability Decision
12/83
Contributory Negligence
Defense Permitted
4/85
Mandated Seatbelt
Law Begins
10/85
1982
1983
1984
1985
1986
1987
1988
Months

FIGURE VI - 8

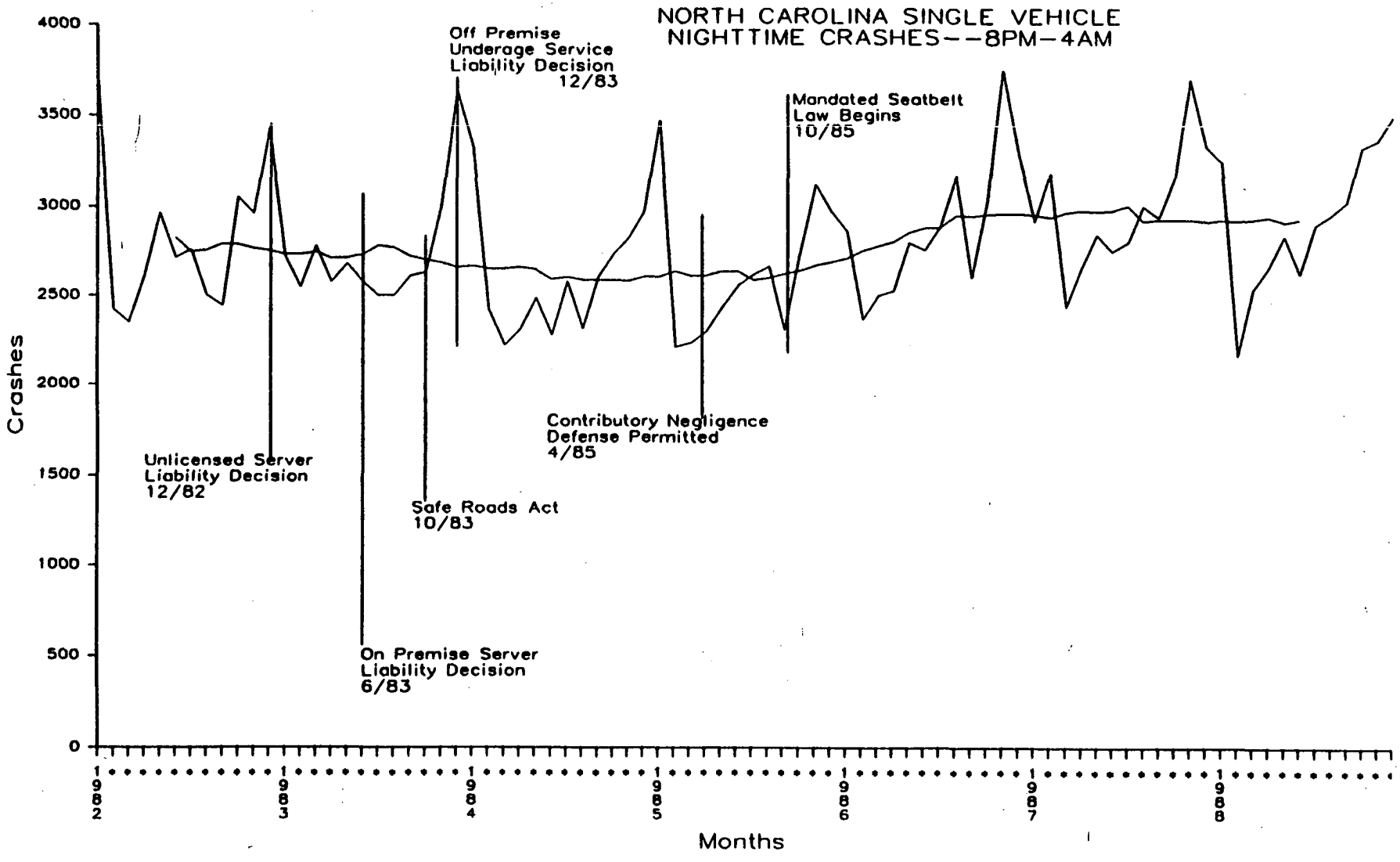

NORTH CAROLINA SINGLE VEHICLE
NIGHTTIME CRASHES--8PM-4AM
Crashes
4000
3500
3000
2500
2000
1500
1000
500
0
Off Premise
Underage Service
Liability Decision
12/83
Mandated Seatbelt
Law Begins
10/85
Contributory Negligence
Defense Permitted
4/85
Unlicensed Server
Liability Decision
12/82
Safe Roads Act
10/83
On Premise Server
Liability Decision
6/83
1982
1983
1984
1985
1986
1987
1988
Months

FIGURE VI - 9

North Carolina Arrests for DUI
1980–1988, Quarterly

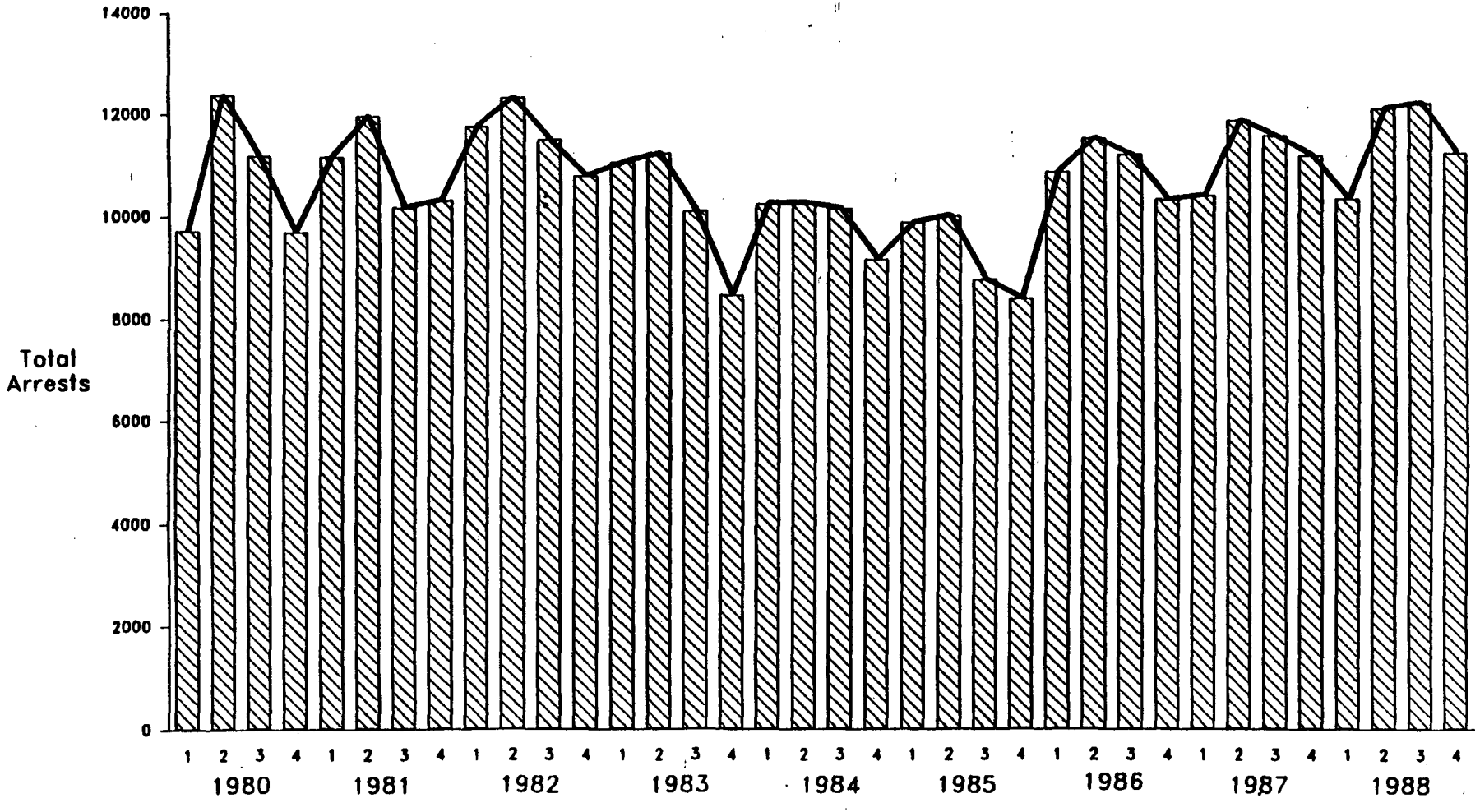
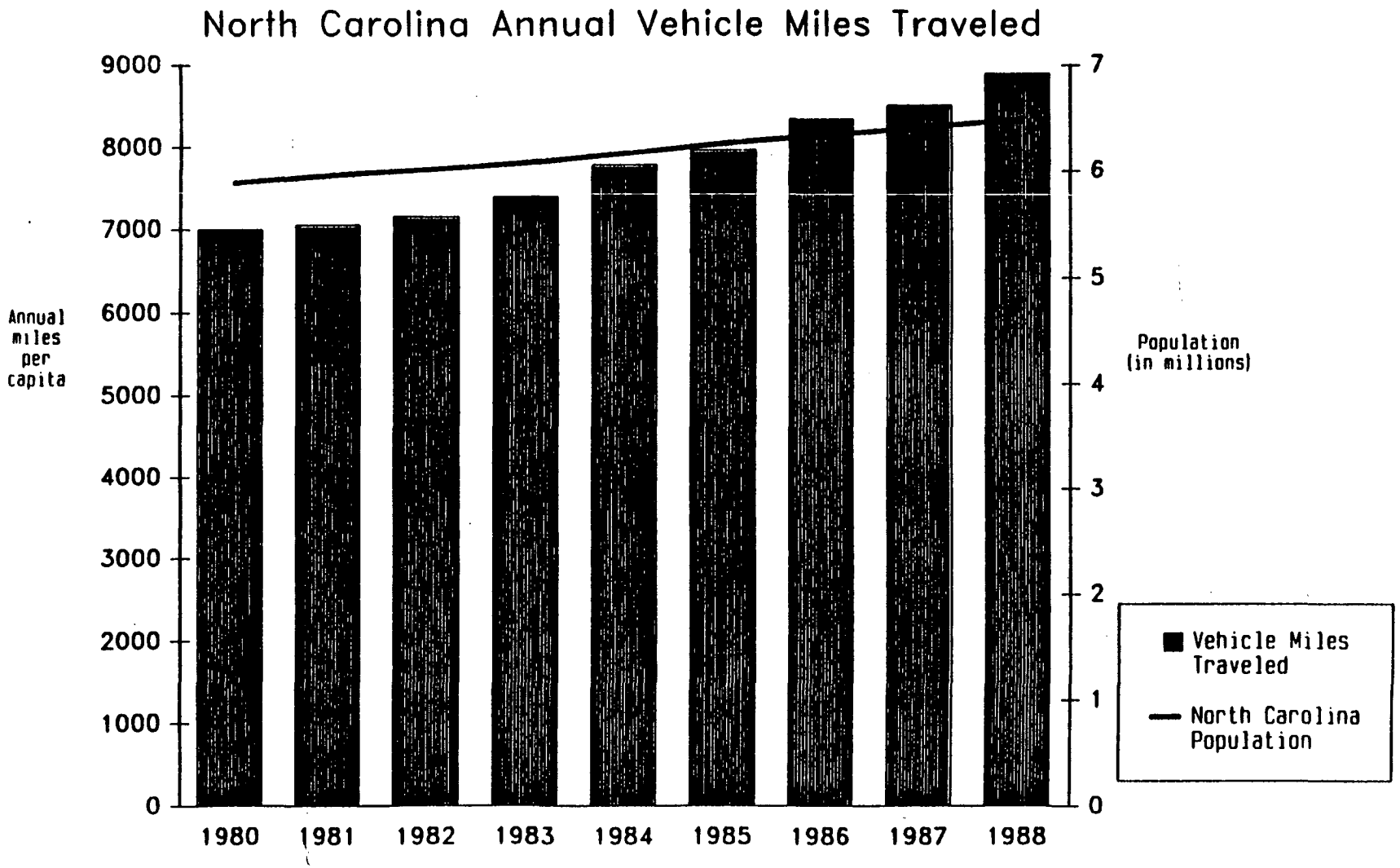


FIGURE VI - 10


North Carolina Annual Vehicle Miles Traveled
Annual miles per capita
9000
8000
7000
6000
5000
4000
3000
2000
1000
0
Population (in millions)
7
6
5
4
3
2
1
0
1980
1981
1982
1983
1984
1985
1986
1987
1988
Vehicle Miles Traveled
North Carolina Population

Therefore, it does not appear that enforcement stimulated lowered drinking and driving events but perhaps followed reductions in such events.

Figure VI-10 shows the annual vehicle miles traveled in North Carolina 1980-1988. The total miles traveled increases each year over the period. The figure also shows the North Carolina population over the same period and suggests that miles traveled increased at a faster rate than the general population. In general, if alcohol involved crashes followed miles traveled per capita, then indications should be going steadily downward.

A potentially important concurrent factor is mass media publicity about drinking and driving. Figure VI-11 shows the total number of articles and stories concerning drinking and driving in major newspapers and television over period January 1, 1980, through December, 1988. Data for the period 1980-1984 were previously developed by Dr. William Luckey at the University of North Carolina under a NHTSA contract. Findings were reported in Luckey, et al. (1985). These data were supplemented with data from the Raleigh News and Observer for 1985-1988. Figure VI-12 shows monthly articles per month for the Raleigh News and Observer (N&O), five daily newspapers including the Durham Morning Herald, Winston-Salem Journal, Greensboro Daily News, Charlotte Observer, and the N&O and three television stations.

Appendix V-A shows a six month moving average for newspaper coverage and Appendix VI-B shows annual number of articles.

The areas covered by these daily newspapers are the three major population areas of North Carolina. They are physically separate and constitute distinct media markets. They are Charlotte and Gastonia (Mecklenburg and Gaston Counties), the three cities of Winston-Salem, Greensboro, and High Point (Forsyth and Builford Counties) and the three cities of Raleigh, Durham and Chapel Hill (Wake, Durham, and Orange Counties). Together these three areas contain 35% of the total population of the state and most of the urban population. The three television stations content analyzed are one from each of the three major media markets in the state. Details of methods for coding articles and coder reliability are given in Luckey, et al (1985). An inventory of available years of data by newspaper is given in Appendix VI-C.

The plot suggests that the N&O is an appropriate surrogate for other mass media. In fact, the correlation between the number of articles on drinking and driving per month across all five newspapers over the period 1980-1985 was 0.946. The correlation between the N&O and the number of stories broadcast on the three television stations studies for the same period was 0.830. This provides strong evidence that the N&O as a single source of data over the period provides a good indicator of the amount of coverage statewide. Therefore, an average of the five newspapers will be used for 1980-1984 and the N&O for

1985-1988 will be used in the remainder of our discussion of mass media publicity.

Figure VI-12 therefore shows the articles per month on drinking and driving over the period January 4, 1980 through December 31, 1988. It is not surprising that the highest publicity about drinking and driving occurred during 1983 which was the time of both a major dram shop liability suit and the legislative activity around the "Safe Roads Act" (the anti-drinking and driving legislation described previously). The bill was introduced in the General Assembly in January 1983 and passed in June 1983. The effective date of the legislation was October 4, 1983. All three months were relatively high points of media coverage.

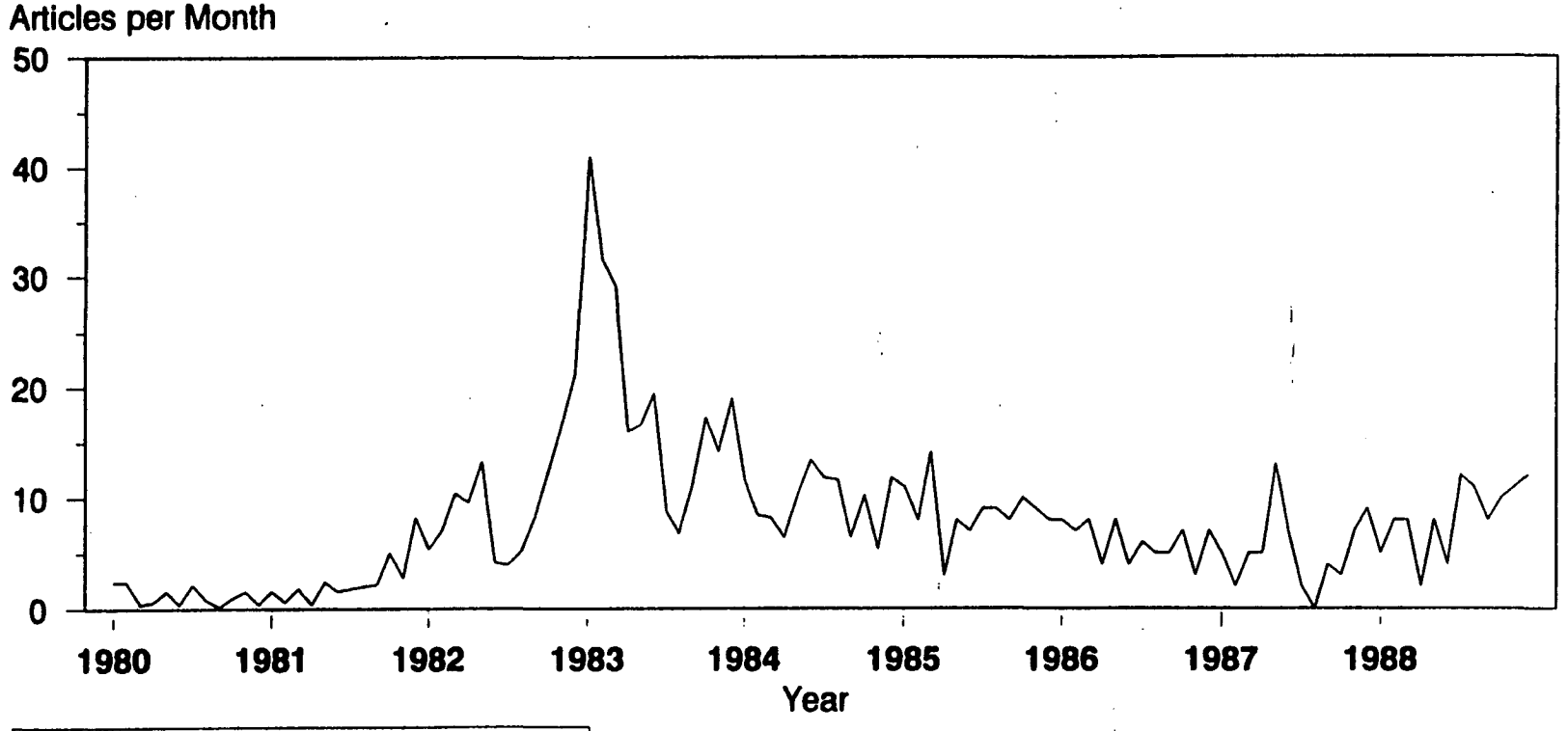
There is earlier attention to drinking and driving matters in 1982, when a Governor's Task Force on drinking and driving was established which subsequently held public hearings in the spring and early summer of that year. The Task Force produced its report in November, 1982. Figure VI-12 shows that publicity dropped substantially between the end of the public hearings and the release of the report. After reaching a peak in coverage during the first quarter of 1983, mass media attention to the drinking and driving issue drops steadily over the next five years with a slight upward movement in the mid-1987 through 1988 period.

What is the effect (if any) of all of this publicity on alcohol-involved crashes? Perhaps the previous evaluations of the "Safe-Roads Act" provide some clues. Evaluations of the this legislation by the Highway Traffic Safety Research Center, University of North Carolina, Chapel Hill, have concluded that, this act did not have an effect on reducing alcohol-involved traffic problems. See discussions by Steward (1985), and Lacey (1987). Figure VI-13 taken from the report by Stewart (1985) is a ratio of alcohol involved crashes (officer reported) as a percentage of total crashes. This plot shows a drop in this ratio which begins in 1982 approximately 18 months before the effective date of the legislation. Stewart (1985) concludes that publicity about drunk driving and the pending legislation may have had the greatest effect. Lacey (1987) with a longer series of data (Appendix VI-D) shows the percentage nighttime total crashes and (Appendix VI-E) shows the percentage officer reported alcohol crashes, to total crashes through 1986. He concludes no effect of the implementation of the Act.

The additional factor of special interest to this report is publicity about server liability. Figure VI-14 shows the monthly number of articles on server liability over the period 1980-1988. Appendix VI-F shows the plot of monthly column inches, Appendices VI-G and VI-H respectively show annual number of articles and column inches over the same period. All of these plots provide essentially the same information about pattern of coverage.

FIGURE VI - 11

North Carolina Newspaper Coverage of Drinking & Driving -- 1980-1988



Average of five major newspapers for 1980-1984.
Raleigh News & Observer for 1985-1988.

FIGURE VI - 12

North Carolina Media Coverage of Drinking & Driving -- 1980-1988

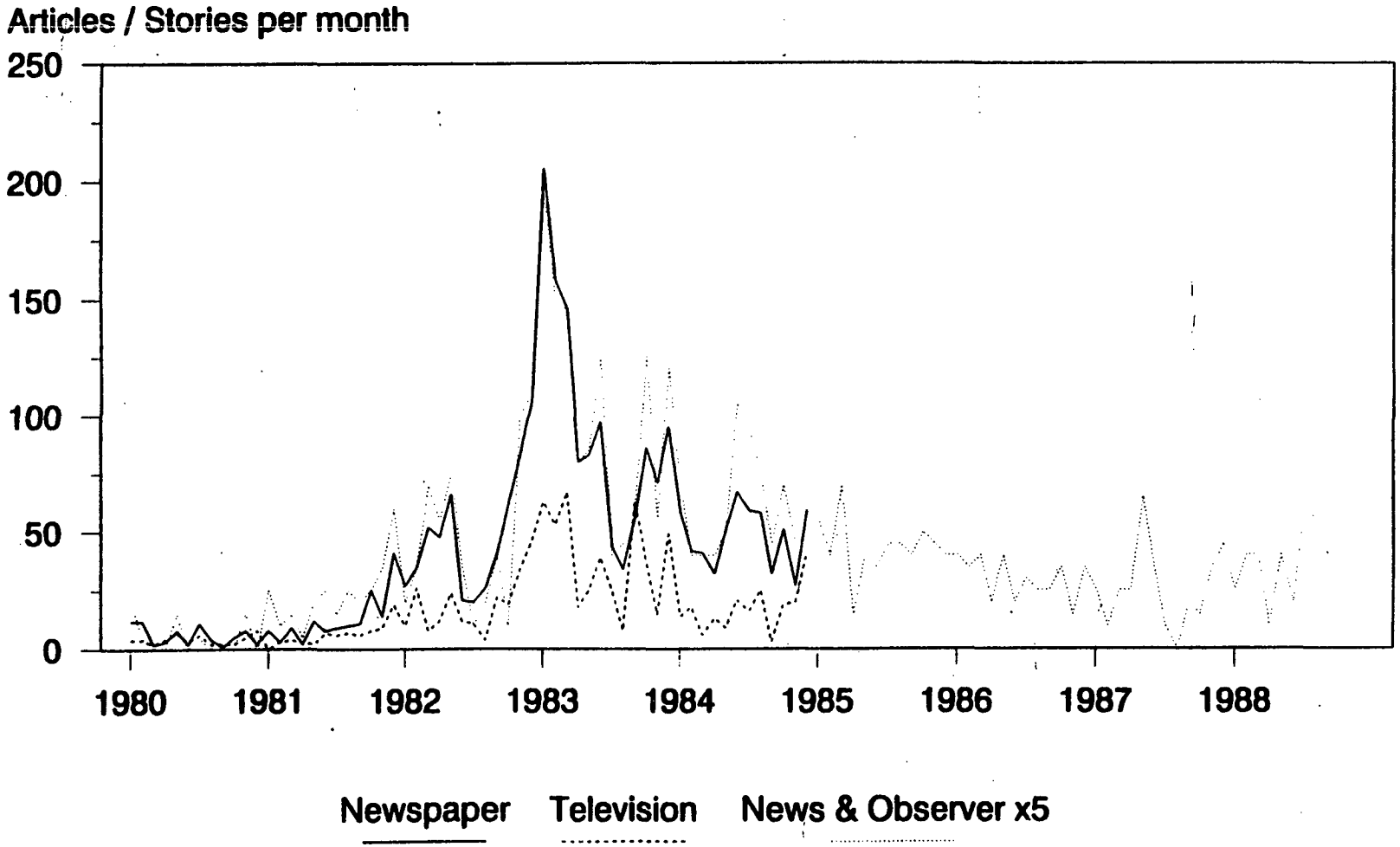
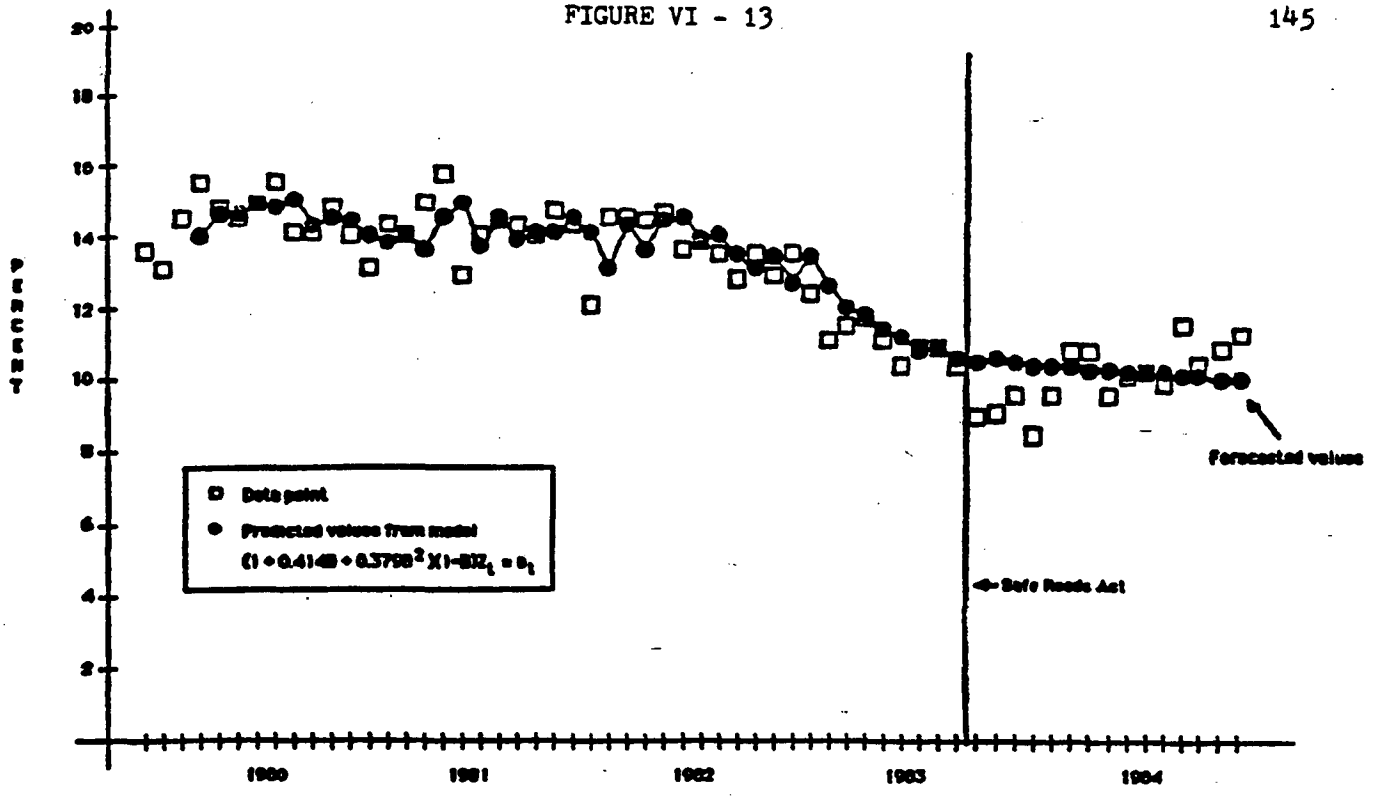


FIGURE VI - 13

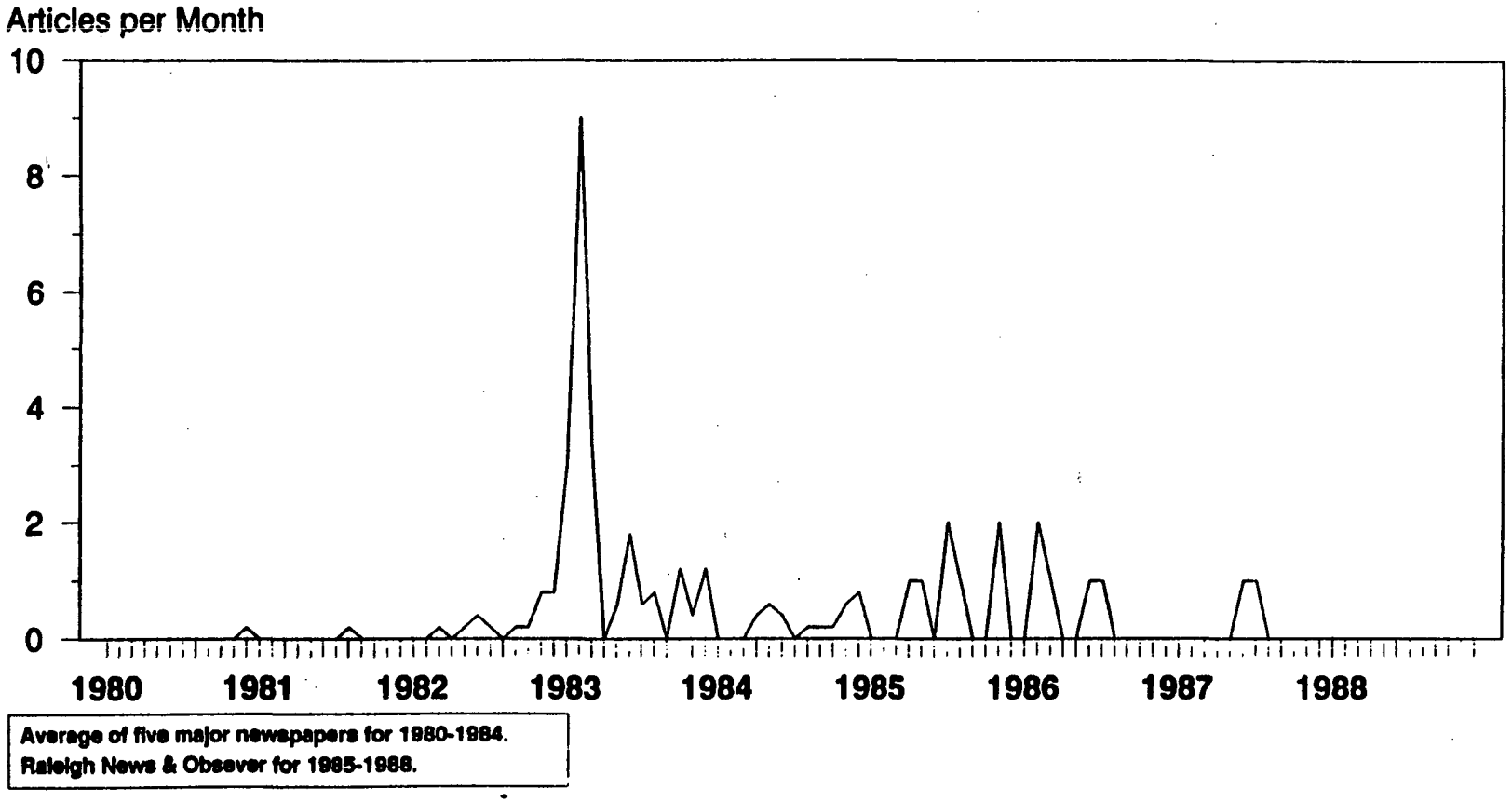


NC alcohol-related crashes as a percent of total crashes with time series model and forecast

Source: Stewart, J. Richard. "Estimation of the Effects of Changes in Drinking and Driving Laws on Alcohol Related Automobile Crashes." Chapel Hill, NC: UNC Highway Safety Research Center, HSRC-A113, 1985, p. 10.

FIGURE VI - 14

North Carolina Newspaper Coverage of Server Liability -- 1980-1988



Coverage of dram shop liability is highly correlated with coverage of drinking and driving matters in general. This is consistent with the fact that the "Safe Roads Act" had an element on server liability and the two server liability decisions for the defendants occurred in the same year. There is a jump in coverage in 1985 which is the year that a contributory negligence defense was permitted by state legislation that year.

(4) Problems of Undertaking Time Series Analysis

The two liability suits which re-established the standards of server liability occurred in December, 1982, and June, 1983. In December, 1983 with North Carolina Court of Appeals upheld the decisions for the plaintiff in the suits. Examination of changes in single vehicle nighttime crashes over this period suggests the possibility of changes associated with all three dram shop decisions.
There appears to be a drop in the dependent variable following the last Appellate Court decision in December, 1983. Unfortunately, this occurs two months following the effective date of the North Carolina "Safe Roads" Act.

In addition, the major publicity about drinking and driving and about server liability occurred at essentially the same time. This prohibits us from easily separating out the potential effect of publicity about drinking and driving (which might alter the behavior of drivers) from the effect of publicity about server liability (which might effect the behavior of servers).

Each of these factors led to a project decision not to undertake a time series analysis of alcohol involved traffic crashes in North Carolina. Looking over the information provided by the number of plots on North Carolina leads to such conclusions as:

--While beer outlet availability remained relatively constant over the period 1980-1988, spirits availability increased.

--Publicity about drinking and driving prior to the effective date of the state "Safe Roads Act" may have had more impact on alcohol involved traffic crashes than the act itself. Publicity is at its highest level when there appears to be a drop both in single vehicle nighttime crashes (Figure VI-8) and in officer reported alcohol-involved traffic crashes (Figure VI-13).

--Evaluations by Steward (1985) and Lacey (1987) concluded that the "Safe Roads Act" (implemented in October 1983) had no effect on alcohol involved traffic crashes following implementation of the legislation. This is not necessarily confirmed with the plot of single vehicle traffic crashes (Figure VI-8) where there appears to be a drop in level of crashes in the first half of 1984. However it would be difficult to separate any statistically significant impact of the implementation of the Act from the dram shop decision in December, 1983, and the accompanying publicity about server liability.

--Media coverage of both drinking and driving and server liability appears to have a significant effect on the number of alcohol involved traffic crashes in North Carolina. This supports the importance of publicity in analyzing the impact of dram shop liability.

C. State of Texas

(1) Introduction to State

The State of Texas, the largest state in the contiguous United States, has an extensive network of paved highways and roads. As a western state, it has several large population centers with large sections of farm and ranch land. Texas is a state which licenses private individuals to sell alcohol by the container for consumption off the premises and by the drink for on-premise consumption.

Prior to 1983, only the Texas Alcoholic Beverage Code provided regulations and precedent against service to intoxicated patrons. Section 101.63 of the Texas Alcoholic Beverage Code (TABC) prohibits a person selling an alcoholic beverage to a habitual drunkard, to an intoxicated person, or to an insane person. Violation of this section is a misdemeanor, which subjects a seller to a fine of at least $100 and up to $500 for the first offense and/or to confinement in jail for up to one year. Repeat violations carry a penalty of a $500-$1000 fine or confinement in jail for up to a year, or both. Section 61.71 of the Code allows the Texas Alcoholic Beverage Commission to suspend or cancel a seller's license if the seller violates any provision of the Code.

The Alcoholic Beverage Code also establishes an exclusive statutory cause of action against a person who sells or serves an alcoholic beverage, under a state license or permit, for damages resulting from the intoxication of the person served. A party suing a provider of alcoholic beverages must prove that it was apparent to the provider that the drinker was intoxicated to the extent that the person was a danger and that the intoxication of the drinker was a proximate cause of the damages. This provision does not affect the right of any person to bring a common law cause against the intoxicated person who caused the damages. Suspension or cancellation of an alcohol permit for conviction of an offense involving discrimination or violation of civil rights is also established in the TABC.

(2) Chronology of Server Liability Judicial Activity, Alcohol Countermeasures, and Injury Prevention

A number of events occurred in the 1980s with potential impact on alcohol-impaired traffic safety in Texas. One of the major events were liability suits against licensed establishments. A summary of the legislative and case law events during this period is given below

along with a listing of events relevant to alcohol-involved traffic safety and injury prevention. Detail discussion of case law history in Texas is contained in Chapter II.

September 1981 -- Minimum purchase age changed from 18 to 19 years old.

January 1983 -- An admitted alcoholic was served alcohol at a restaurant operated by El Chico Corporation from 5 PM to 7:45 PM. The alcoholic subsequently caused an accident in which a young person was killed. The parent sued the Corporation for negligently selling drinks to an intoxicated person. (El Chico Corporation V. Poole)

January 1984 -- Texas Impaired Driving Legislation (Senate Bill 1) becomes effective. Primary emphasis on adjudication rather than enforcement and prevention. The legislation provided for suspension of driver's license for one year with a conviction of driving while intoxicated (DWI), authorized blood and breath specimens to determine alcohol concentration, and provided for an automatic 90-day driver's license suspension for a refusal to be tested for alcohol level.

November 1984 --A motorcycle rider was killed after being hit by a drunk driver at an intersection after midnight. The driver had been drinking at a restaurant which offered free and cheap drinks. The suit (Joleeno V. Evans) which followed the crash alleged that the establishment which served the driver was negligent in serving alcohol when the driver was intoxicated.

September 1985 --Mandatory Safety Belt Use law begins. No sanctions for violations.

December 1985 --Mandatory Safety Belt Use law instates fines for violations.

June 1986 --The Texas Court of Appeals held in both cases (Poole V. El Chico 713 S.W. 2d 955 Tex. App 1986 and in Evans V. Joleeno 71114 S.W. 2d 394 Tex. App. 1986) that the trial courts in each case had erred in dismissing causes of actions based on negligent service of alcohol to an intoxicated person and negligence in failing to provide alternative transportation.

September 1986 --Texas raised the minimum drinking age from 19 to 21 to comply with the provision of the U.S. Uniform Minimum Drinking Age Act of 1984.

June 1987 --The Texas Supreme Court ruled in the combined cases (El Chico V. Poole and Joleeno V. Evans,732 S.W. 2d 306, Tex. 1987) that the licensees had a duty to the general public not to serve alcoholic beverages to a person when the licensee knows or should know the patron is intoxicated.

September 1987 --Effective date of a Texas statute (Texas Alcoholic Beverage Code, Ch 2, Section 2.01-2.03, 1987) which establishes specific liability for selling, service, or providing alcoholic beverages to a person who is obviously intoxicated to the extent that the person presented a clear danger to themselves or others. The statute did not preclude common law suits against licensees who serve minors under the age of 18.

September 1987 -- A second statute (Texas Alcoholic Beverage Code, Section 106.14, 1987) provided protection from liability by establishing immunity for the acts of employees who illegally serve minors or intoxicated persons and if the employer has not directly or indirectly encouraged the employee to violate the law. This immunity is established if the employee has attended a "seller training" program which was approved by the Texas ABC Commission.

Finally legislation also established for the first time an "open container" law which makes it illegal to drink from an open container of alcoholic beverage. An open alcohol container is not illegal, only drinking from the container. In practical enforcement, an officer would have to actually see the driver drinking.

(3) Publicity About Server Liability

Nineteen eighty-three was also the first year in which server liability cases were given widespread publicity in Texas. The Houston Post is the only daily newspaper in Texas for which an index of articles exists as far back as 1978. As a major daily with wide circulation, the newspaper is believed to be representative of most daily newspapers in Texas. This was confirmed by comparing the coverage of server liability in the Post with other daily newspapers using both subject indexes and full text computer searches for the period 1983-1988. For example, a computer full text data base exists for the Dallas Morning Herald for 1984-1988. A comparison of the coverage of server liability between the two newspapers shows generally high correlation, particularly in 1986 through 1988 (see Figure VI-15).

As a result given the long term availability of the index for the Houston Post, we elected to use the Post as a representative of coverage in state newspapers. An inventory of newspapers coded for available years is shown in Appendix VI-I. A count of the number of articles per year in the Houston Post on the subject of server liability from 1978 through 1988 revealed no coverage of server liability at all prior to 1983 compared to one to ten articles per year from 1983 through 1988 (Figure VI-16). This is also confirmed in a plot of total column inches per year for coverage of server liability (Figure VI-17).

FIGURE VI - 15

Texas Newspaper Coverage

Server Liability

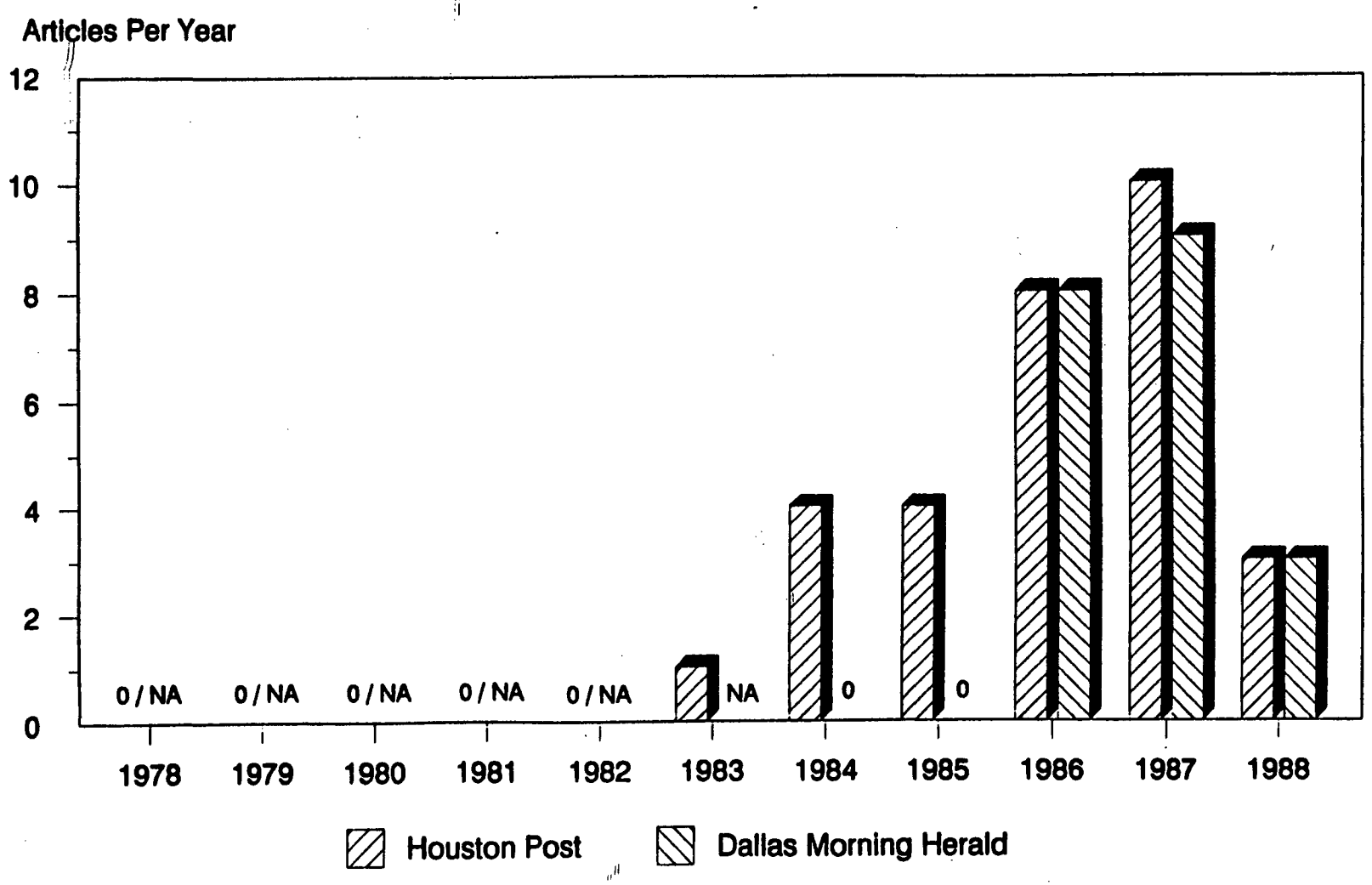


FIGURE VI - 16

Texas Newspaper Coverage of Server Liability -- 1978-1988

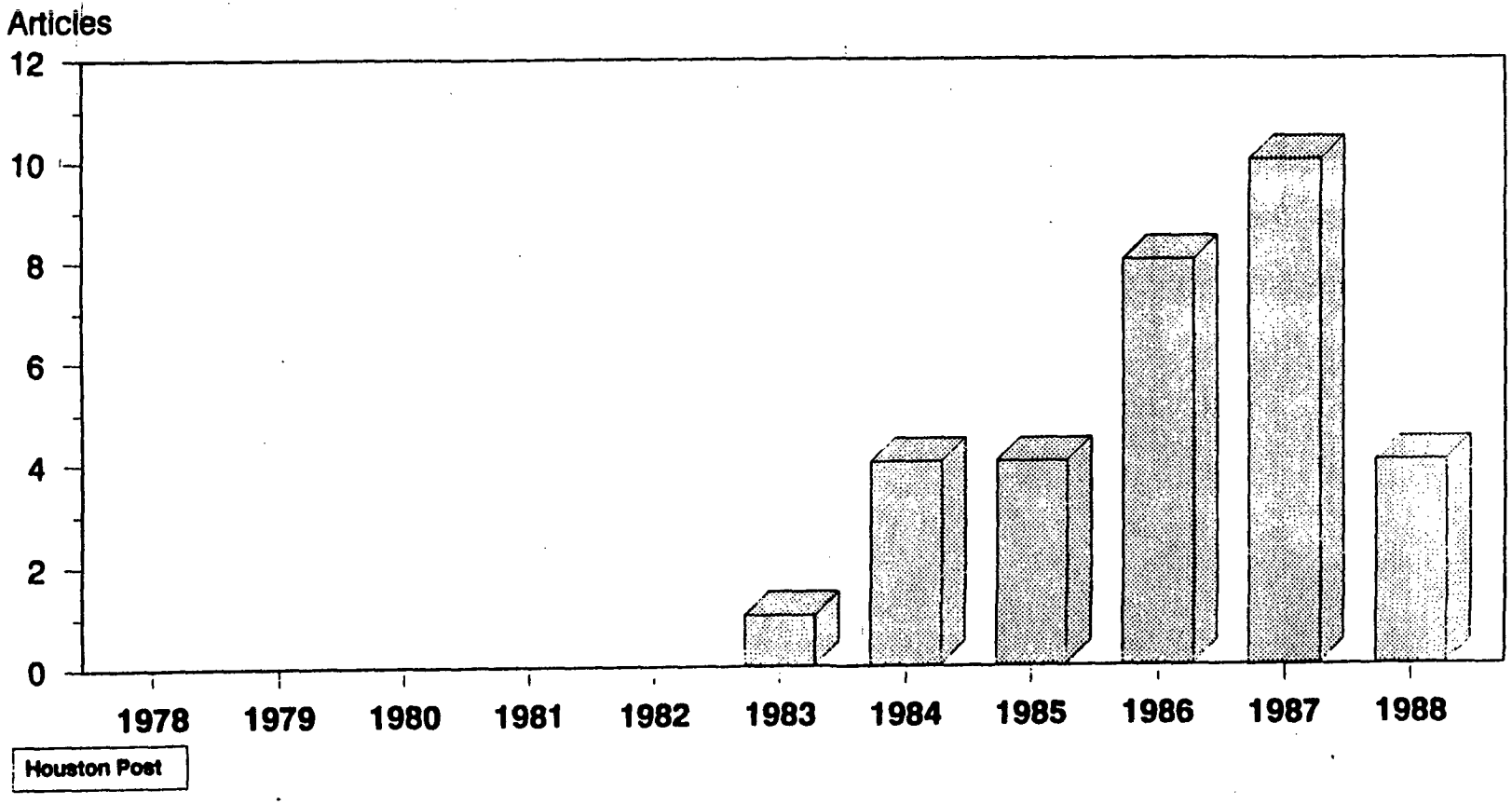
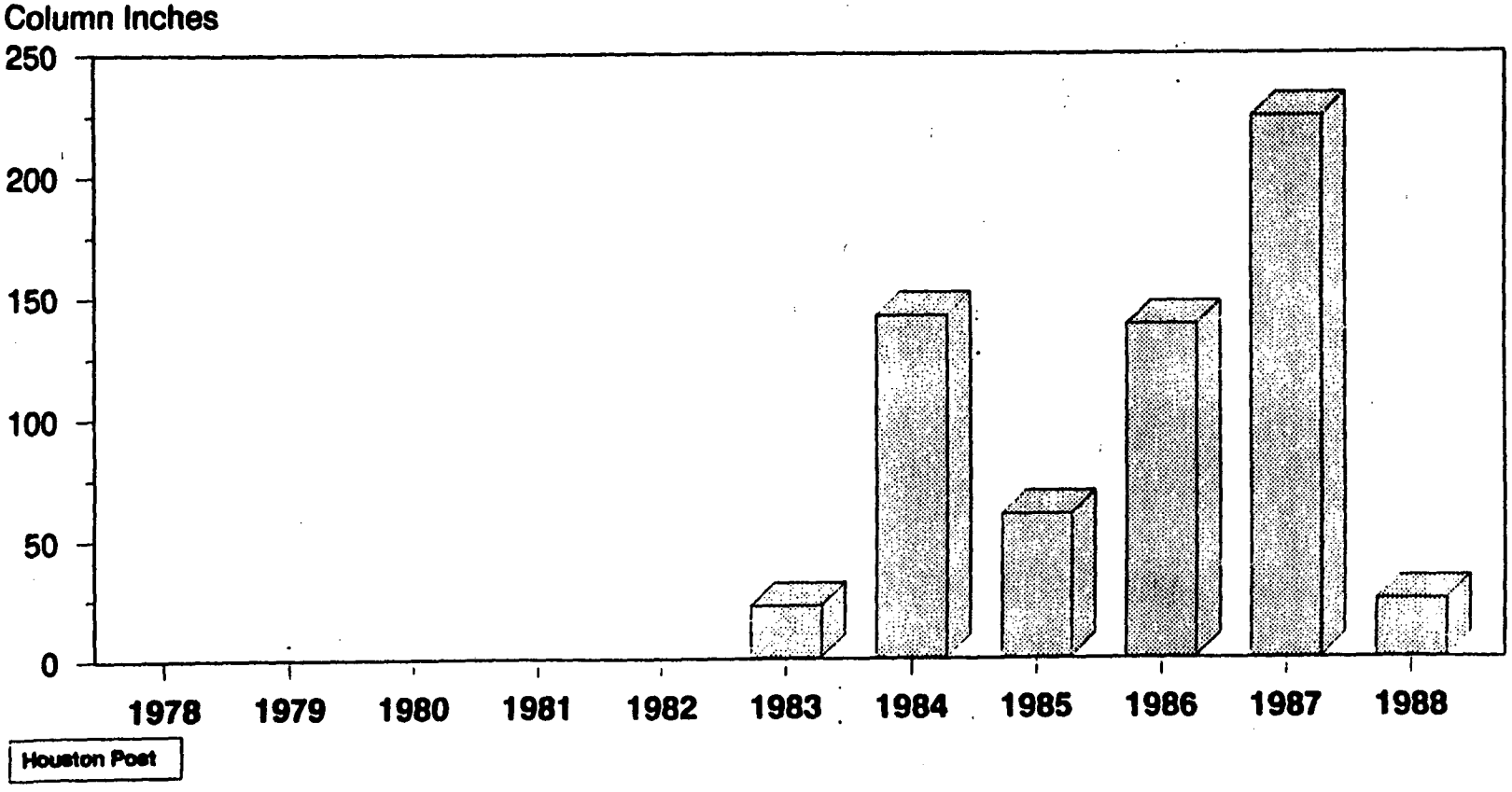


FIGURE VI - 17

Texas Newspaper Coverage of Server Liability -- 1978-1988



In addition, 1983 was the year in which the only bi-monthly trade newspaper for alcohol licensed retail establishments, the Texas Beverage News, gave extensive front-page coverage to server liability cases. The January 10, 1983, issue contained the headline "Retailer Sued for $300,000 for Selling to Driver in Fatal Auto Accident" in one-inch type; this single issue contained 136 column-inches of text on server liability. Out of 22 issues in 1983, seven contained articles on server liability (e.g., "Cafe Sued in Minor's Death," April 25, 1983; (see Appendix VI-K) "Store Sued in Minor's Death," June 27, 1983 (see Appendix VI-L) and " 'Dram Shop' By Court Decree", December 19, 1983 (see Appendix VI-M), for a total of 852 column-inches for the year.

Our objective in this study was to assess the effects of the substantial change in liability exposure in Texas on the frequency of injury-producing traffic crashes. For liability exposure to affect crashes, specific serving and selling behaviors of licensed establishments must change in such a way that there are fewer alcohol-impaired drivers on the highway as a result. The hypothesized relationships (following Figure I-1) are the effect of statutory and case law mediated by publicity, perceptions of establishment owners and managers, and changes in serving and related practices, to produce changes in customer drinking and driving behavior and subsequent traffic crashes.

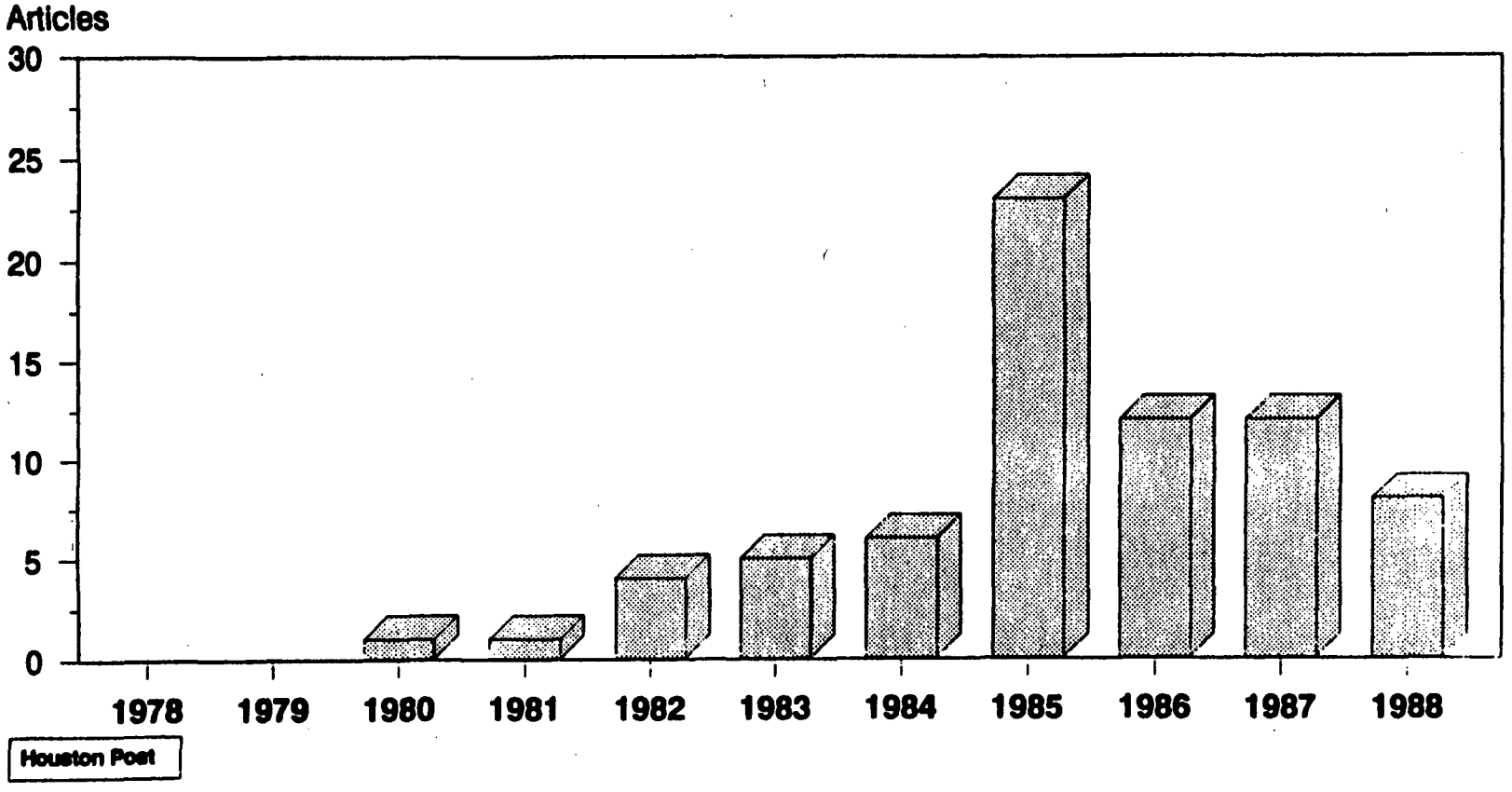
In addition to server liability publicity, we were interested in coverage of general drinking and driving. Using the Houston Post again as a representative for the state as a whole, we see the pattern in Figure VI-18. Unlike server liability, drinking and driving begins to be given attention in 1980 with a modest rise in coverage until 1985, one year after the Texas Impaired Driving Legislation became effective. This suggests that publicity about drinking and driving around the time of the change in server liability and attendant publicity was not a major confound. Annual coverage for drinking and driving for 1982, 1983, 1984 was roughly comparable.

(4) Analysis Plan

There are many constituencies with varying interests in the potential effects of dram shop liability on public health outcomes such as traffic crashes, including the alcoholic beverage industries (producers, wholesalers, retailers), hospitality industry, insurance industry, traffic safety community, attorneys, and so forth. As a result, we sought a design that would permit causal inferences concerning the effects of liability exposure could be made. The preferred design is a true experiment, in which we would randomly sample from the total U.S. population of relevant actors (bar owners and managers, customers, drivers), and randomly allocate segments of that sample to varying levels of liability exposure. Because we do not have that level of control over liability exposure, an alternate

FIGURE VI - 18

Texas Newspaper Coverage of Drinking and Driving -- 1978-1988



research designs had to be used. In the absence of random assignment to treatment conditions, the design with the highest levels of internal validity (i.e., producing the greatest confidence in causal interpretations of observed relationships) is the multiple time-series design (Cook and Campbell 1979).

The multiple time-series design involves comparisons of series of observations over time expected to be affected by an intervention (here a noticeable change in liability exposure) with comparison series not expected to be affected. The design is as follows:

$$\begin{array}{llllllllll} O_1 & O_2 & O_3 \ldots & O_{n1} & X & O_{n1+1} & O_{n1+2} & O_{n1+3} \ldots & O_{n1+n2} \\ O_1 & O_2 & O_3 \ldots & O_{n1} & & O_{n1+1} & O_{n1+2} & O_{n1+3} \ldots & O_{n1+n2} \end{array}$$

where each O_i represents the number of drivers involved in crashes in a particular month, X represents the intervention--a noticeable change in liability exposure, n_1 is the number of observations before the change in liability, and n_2 is the number of observations after the change in liability. The second row shows a comparison time series, not influenced by the liability change intervention included in the first row.

The experimental group is the State of Texas, which experienced an major increase in liability exposure, beginning January, 1983. The comparison group consists of the other 47 contiguous states. There were substantial changes in number and rate of alcohol-related crashes in the United States in the early and mid-1980s (Fell and Nash 1989). Using all states (but Texas) as a comparison in the research design permitted explicit controls for these national trends when estimating the specific effects of the increased dram shop liability exposure in Texas.

(5) Data Collection

The main dependent measure is the monthly frequency of alcohol-impaired drivers involved in motor vehicle crashes in Texas that result in personal injury. There are four possible indicators of the involvement of beverage alcohol in a crash. First is whether a citation or arrest was made because of alcohol-impaired driving. The resulting count of alcohol-involved crashes, however, is more a function of police activities and priorities than the underlying phenomenon of alcohol-impaired driving. Second is whether the police officer investigating the crash noticed whether the driver "had been drinking" soon before the crash, or whether the officer judges that alcohol was a "contributing circumstance" in the etiology of the crash. Again, these records are a function of both the underlying behavior of alcohol-impaired driving and the priorities and perceptions of police officers.

Also police reporting varies both over time and across states, complicating interpretation of observed differences. In some crashes, particularly those causing deaths, drivers breath or blood is tested to measure the concentration of beverage alcohol. However, the practice of testing for alcohol varies across jurisdictions and over time, and such tests are often not available for drivers in nonfatal crashes. Fourth, trends and shifts in alcohol-involved crashes can be measured via a surrogate indicator, such as single-vehicle-nighttime (SVN) crashes. Previous research has indicated that a majority of SVN crashes involve alcohol (Mounce, Pendleton and Gonzales, 1988). Although obviously an imperfect measure, with some alcohol-involved crashes not included in the SVN indicator, and some included crashes that actually did not involve alcohol, the SVN indicator is helpful because of the ease and consistency with which time of day and number of vehicles in the crash are recorded. The measure is particularly useful for comparisons across time, jurisdictions, and injury severity, since recording of number of vehicles and time of day is consistent across these dimensions.

Data on SVN crash involvement for the State of Texas were extracted from databases on all reported crashes in Texas maintained by The University of Michigan Transportation Research Institute and the State of Texas. Data on SVN crash involvement in all other states were obtained from the Fatal Accident Reporting System maintained by the U.S. National Highway Traffic Safety Administration.

(6) Analyses

Ordinary least-squares regression and other commonly used statistical procedures were not used in this study because they assume independent observations, that is, no serial correlation. A series of observations on the same unit over time, such as the crash time series examined here, are likely to be autocorrelated and therefore violate the assumption of independence required for the use of standard statistical procedures. Thus, alternative data-analysis strategies are necessary. One such approach is the modeling strategy of Box and Jenkins (1976) and Box and Tiao (1975). The Box-Jenkins approach involves modeling the autocorrelations in time-series variables to produce unbiased estimates of error variance in the presence of serially correlated observations. The use of transfer functions (that is, intervention models) along with the Auto-Regressive Integrated Moving Average (ARIMA) modeling strategy make these techniques the best currently available for the analysis of time-series quasi-experiments (Box and Tiao 1975; Hibbs 1977; McCleary and Hay 1980). The techniques identify a wide variety of patterns in dependent time-series variables, provide a sensitive test of intervention effects, and allow for the analysis of a variety of intervention-effect patterns (Gottman 1981).

First we identified a parsimonious ARIMA (i.e., baseline) model of single-vehicle nighttime crash involvement in Texas. The ARIMA model isolated the stochastic autocorrelation structure of the series and

provided a benchmark for the assessment of intervention effects. Because traffic-crash time series often contain large seasonal components, the general multiplicative seasonal model was considered for each dependent series. The general seasonal ARIMA model is

$$y_t = \frac{(1-\Theta_1 B^s-\ldots\Theta B^{sQ})(1-\theta_1 B-\ldots\theta_q B^q)u_t+\alpha}{(1-\Phi_1 B^s-\ldots\Phi_p B^{sP})(1\Phi_1-\ldots\Phi_p B^p)(1-B^s)^D(1-B)^d}$$

where p is the order of the auto-regressive process, d is the degree of nonseasonal differencing, q is the order of the moving-average process, P is the order of the seasonal auto-regressive process, D is the degree of seasonal differencing, Q is the order of the seasonal moving-average process, s is the seasonal span, Θ_1 to Θ_Q are the seasonal moving-average process, Θ_1 to Θ_q are the regular auto-regressive parameters, Φ_1 to Φ_p are the seasonal auto-regressive parameters, ϕ_1 to ϕ_p are the regular auto-regressive parameters, u_t is the random (white-noise) error component, α is a constant, and B is the backshift operator such that $B(z_t)$ equals z_{t-1}. It is important to realize that the ARIMA model is not based on a theory of the causes of the dependent series. It is a model to describe the nature of the ongoing regularities in the series caused by any number of causes. ARIMA models, therefore, are empirically determined by analyzing the particular outcome variable of interest.

Theoretical autocorrelation and partial-autocorrelation functions corresponding to various ARIMA models have been described by Box and Jenkins (1976). We identified a preliminary ARIMA $(p,d,q)\ (P,D,Q)_s$ model based on an examination of the estimated autocorrelations and partial autocorrelations for the Texas crash series, assessing the degree to which the actual autocorrelations fit one of the theoretically expected patterns.

After we identified an ARIMA baseline model, transfer functions representing hypothesized effects of the changes in liability exposure were added to the ARIMA model. The general form of the transfer function is

$$y_t = \frac{\omega_0-\omega_1 B-\ldots\omega_s B^s}{(1-\delta_1 B-\ldots\delta_r B^r}(I_{t-b})$$

where ω_0 to ω_s and δ_1 to δ_r specify the manner in which the input, or independent variable, I_t influences the output, or dependent variable, y_t, B is the backshift operator such that $B(z_t)$ equals z_{t-1}. To test for effects of interventions, I_t is either a step function with the value zero before the intervention and one thereafter, or a pulse function with the value one for the month in which the intervention begins and zero otherwise, and b is a delay parameter indication the length or lag, or dead time, between the intervention and the initial effects of the intervention (Hibbs 1977). Alternatively, the I_t may represent a

random variable whose relationship with the outcome variable is taken into account in the model. Many specific forms of the general transfer function are possible, depending on whether the hypothesized effect pattern is immediate or delayed, sudden or gradual, temporary or permanent.

Nine transfer functions were added to the baseline ARIMA model, eight using dichotomous input variables, and one with a stochastic input variable. Four transfer functions were related to changes in dram shop liability. The model parameters are described below.

--Minimum Age from 18 to 19, September, 1981, introduced into model as abrupt permanent change.

--Dram shop suit-January 1983, introduced into the model as either an abrupt but gradually decaying effect or as a gradual permanent change.

--DUI legislation, January 1984, introduced into the model as either a pulse with a gradual decaying effect of an abrupt permanent change.

--Dram shop suit, November, 1984, introduced into the model as either an pulse with a gradually decaying effect or as a gradual permanent change.

--Seat belt legislation, December 1985, introduced into the model as an abrupt permanent change (see Wagenaar, Maybee, and Sullivan, 1988, concerning seat belt law effects).

--Texas Court of Appeals decision, June 1986, introduced into the model as an abrupt permanent change.

--Minimum purchase age from 19 to 21-year-old, September, 1986, introduced into the model as an abrupt, permanent change.

--Dram shop State Supreme Court Decision, June 1987, introduced into the model as either a pulse with gradual decay or a gradual permanent change. A short time later Server Training Legislation was implemented, (September, 1987), introduced into the model as one abrupt, permanent change.

Note that we included the national (excluding Texas) SVN frequency in the time-series model for Texas, rather than simply comparing intervention effects in Texas (experimental group) with the nationwide series (control group). This was done because we know that the frequency of alcohol-involved crashes changed substantially in the early and mid-1980s throughout the U.S. Our objective was to assess possible effects of the change in dram shop liability exposure in Texas, independent of these broader nationwide trends, and independent of other interventions in Texas that may also have affected crash involvement.

Because the models are intrinsically nonlinear, we used the Gauss-Marquardt method to obtain maximum-likelihood estimates of the parameters. The unconditional-least-squares (that is, backcasting) estimation algorithm was used rather than the conditional-least-squares estimation, because traffic crash series require seasonal models, and backcasting algorithms produce more accurate parameter estimates for such models (Box and Jenkins 1976).

(7) Alcohol Involved Traffic Crashes

Figure VI-19 shows a plot of total number of moderate and severe single-vehicle nighttime crashes along with the significant events previously mentioned. The purpose of this plot is to identify the significant events which related to alcohol-involved traffic safety over the 9-year period and to identify the important events specifically related to server liability. The three events are (1) server liability suit (noted on the graph as "Dram Shop Suit, Sept/81") refers to the El Chico Corporation V. Poole Suit, (2) server liability suit (noted on the graph as "Dram shop Suit. November 1984") refers to Joleeno v. Evans, and (3) The Texas Supreme Court ruling which upheld a judgement against the licensed establishments.

In Texas, we elected to utilize the combined total of moderate and severe single vehicle nighttime crashes as the dependent variable. Such a dependent variable has already been determined to be an acceptable surrogate for alcohol-involved traffic crashes (see Mounce, Pendleton, and Gonzales, 1988 which showed that in Texas traffic crashes 63% of single-vehicle fatal traffic crashes had BAC greater than or equal to .10 and an additional 11.8% had positive (non-zero) BAC levels or a total of 74.5% of single-vehicle fatal crashes involve a drinking driver).

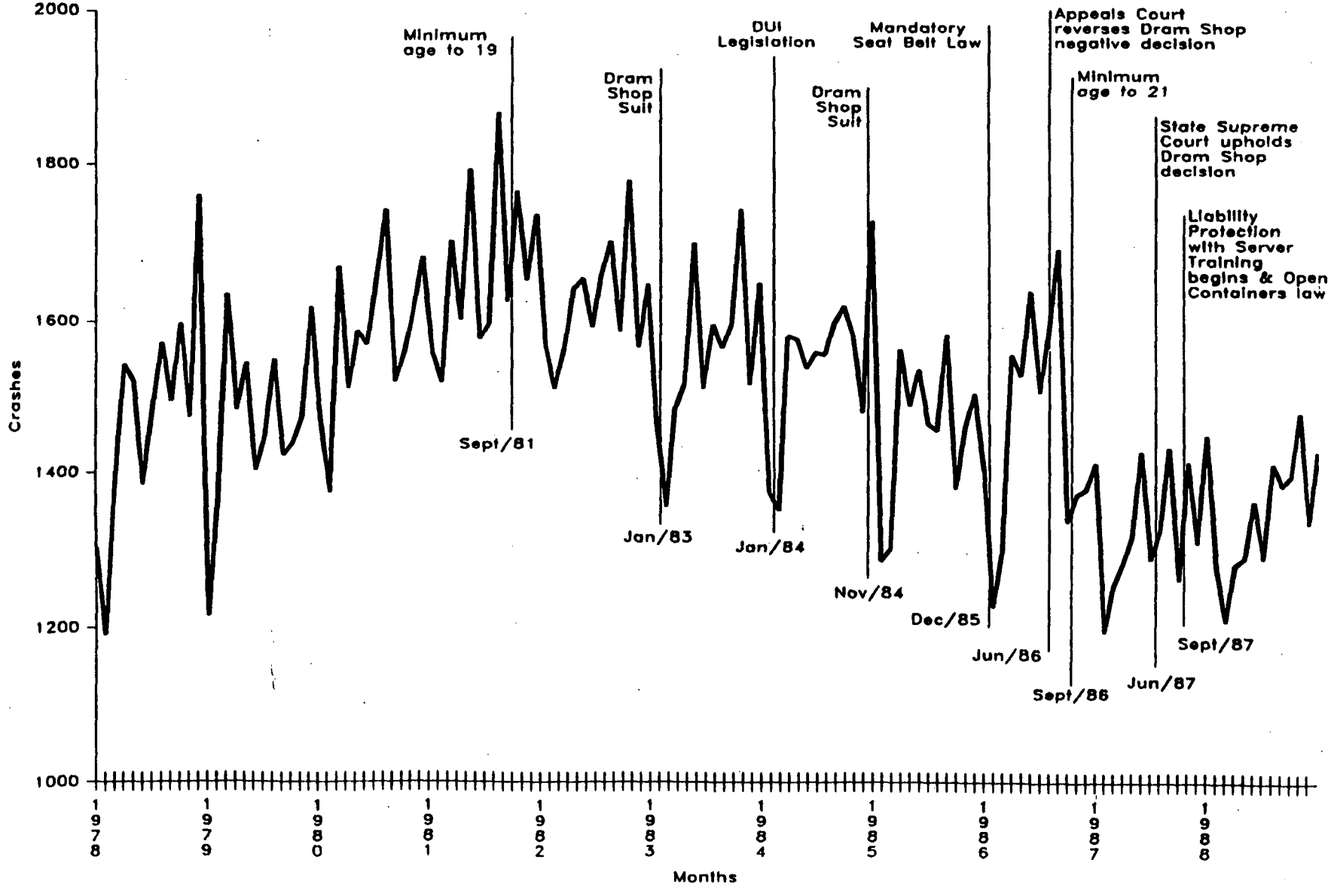
(8) Results

The final time-series model parameter estimates revealed statistically significant reductions in the frequency of single-vehicle nighttime injury traffic crashes following the January, 1983, and the November, 1984, filings of major dram shop liability court cases (El Chico Corporation v. Poole, 1983 and Joleeno v. Evans, 1984). Crashes decreased 6.5% immediately after the 1983 case was filed, and decreased 5.3% after the 1984 case was filed. These decreases represent net effects associated with the court cases, after controlling for broader crash trends reflected in data from other states, and controlling for the effects of other major policy changes in Texas in the 1980s, such as raising the legal drinking age, strengthened DUI laws, and requiring safety belt use.

The final time-series model, shown below, included: first-order and seasonal (lag 12) differencing; three significant multiplicative moving average components at lags 1, 10, and 12; a parameter controlling for nationwide trends in crash frequencies (lag 0); four intervention components controlling for the effects of policy changes

FIGURE VI - 19

STATE OF TEXAS SERIOUS & MODERATE
SINGLE VEHICLE NIGHTTIME TRAFFIC CRASHES, 1978–88



expected to influence crash rates in Texas; and finally, four abrupt, permanent intervention components to estimate the effects of the four dram shop court actions in Texas. The model adequately accounted for significant autocorrelations in the outcome time series, and explained a large proportion of the variance in the frequency of single-vehicle nighttime injury crashes (Adjusted R^2=0.98; See Table V-1.

The Final model is described as follows:

$$(1-B)(1-B^{12})Y_t = (1-0.794B)(1-0.220B^{10})(1-0.846B^{12}u_t + 0.239(1-B^{12})X_t - 0.035(1-B)$$

$$(1-B^{12})I_{1t}-0.031(1-B)(1-B^{12})I_{2t} + 0.035(1-B)(1-B^{12})I_{3t} + 0.035(1-B)(1-B^{12})I_{4t}-$$

$$0.141(1-B)(1-B^{12})I_{5t} - 0.68(1-B)(1-B^{12})I_6 - 0.054(1-B)(1-B^{12})I_{7t} + 0.022(1-B)(1-B^{12})I_{8t} -$$

$$0.0015(1-B)(1-B^{12})I_{9t}$$

Effects of the lawsuits were found at the time they were originally filed, not when appeals courts issued their decisions three to four years later. Presumably this was due to a sudden increase in publicity concerning liability that increased the level of awareness and concern of owners and managers of alcohol outlets. Furthermore, there is evidence that the filing of the 1983 and 1984 cases dramatically increased the levels of concern among alcohol retailers. The later Appeals Court and Supreme Court decisions simply upheld liability that retailers perceived beginning at the time the suits were filed.

In addition to abrupt, permanent intervention models for the dram shop liability suits, we examined alternative possible forms of the intervention effects. Intervention models tested included a sudden but temporary effect that gradually decayed, and a gradual, permanent effect. The sudden, temporary effect may obtain if the effect is **solely** due to publicity, with the effect dissipating as media coverage faded. The gradual, permanent effect may obtain if awareness of liability and specific serving practices gradually develop and diffuse throughout the population of alcohol outlet owners and managers. None of the alternative models fit as well as the more parsimonious sudden, permanent effect models. As a result, it does not appear that effects of the suits are solely due to publicity, which inevitably decays over time. It also appears that the role of the media (both general population mass media and specialized publications targeted at alcohol retailers) in rapidly disseminating information on these cases supersedes a more gradual diffusion process.

TABLE V-1 -- Time-series Model Results for Single-Vehicle-Nighttime-Injury Producing Motor Vehicle Crashes in the State of Texas: 1978-1988

Component	Lag	Estimate	95% Confidence Interval Lower	Upper	Percent Change
Moving Average	1	0.794	0.668	0.920	
Moving Average	10	0.220	0.037	0.402	
Moving Average	12	0.846	0.781	0.910	
Comparison States	0	0.239	0.153	0.325	
Safety Belt Law	0	-0.035	-0.021	0.092	
DUI Legislation	0	-0.031	-0.084	0.021	
Drinking Age 18 to 19	0	0.035	-0.021	0.092	
Drinking Age 19 to 21	0	-0.141	-0.202	-0.081	-13.2
Dram Shop Jan 1983	0	-0.068	-0.120	-0.015	- 6.5
Dram Shop Nov 1984	0	-0.054	-0.107	-0.002	- 5.3
Dram Shop June 1986	0	0.022	-0.039	0.083	
Dram Shop June 1987	0	-0.015	-0.068	0.038	

Lag	RESIDUALS Autocorrelation	Q-statistic
1	0.01	0.0
2	-0.05	0.3
3	0.09	1.3
4	0.00	1.3
5	0.08	2.1
6	0.06	2.6
7	-0.19	7.1
8	0.02	7.1
9	-0.07	7.7
10	-0.03	7.9
11	0.12	9.9
12	-0.01	9.9
13	-0.12	12.0
14	0.09	13.0
15	0.09	14.0
16	-0.09	15.0
17	0.12	18.0
18	-0.18	22.0
19	-0.05	23.0
20	0.06	23.0
21	-0.04	23.0
22	-0.12	25.0
23	-0.01	25.0
24	-0.10	27.0

CHAPTER VII

SUMMARY AND CONCLUSIONS

A. Introduction

This final chapter summarizes the overall conclusions from this project. This chapter has three sections. The first summarizes specific findings from each of the preceding chapters. The second section suggests modifications to the conceptual model originally designed to guide the research of this project based on findings. The third section makes final conclusions and recommendations.

B. Summary of Specific Findings

Significant findings from the various research components of this project are shown below.

Ratings of Server Liability Exposure for States--All known state cases and statutes relating to dram shop (server) liability were analyzed to identify those which influence the risk of such liability in any state. As a result of this legal analysis, 26 factors were identified and grouped into five categories: (1) acts giving rise to liability such as serving minors or intoxicated persons, (2) liability standards, such as negligence, recklessness or strict liability, (3) standing to sue, including the injured third party, injured adult drinker, or injured minor drinker, (4) legal restrictions such as limits or recovery caps upon suits, and (5) defenses available to a defendant, including responsible business practices and/or training of servers.

An expert (Delphi) panel of seven dram shop liability authorities was formed to rate the relative importance of each of the 26 factors in contributing to liability exposure or potential in any state. Each expert panel member assigned a relative weight or score to each factor within a defined range from plus 10 to minus 10. A positive score was judged to increase liability exposure and a negative score was judged to decrease exposure. These scores were then averaged across all raters for each factor. Through a series of ballots followed by discussion, a final set of weights were obtained.

The factors judged to be the most influential in increasing or decreasing licensee liability included liability for serving minors (8.4), liability for serving a person who becomes intoxicated (10), strict liability (9.7), allowing an adult drinker to sue (8.6), allowing an innocent third party to sue (9.0), limiting recovery to less than $100,000 (-8.6), and statutory presumption of responsibility (-9.0). Statutory presumption of responsibility for

licensees who participate in approved server training program was also judged as important.

The potential influence of a specific factor in practice is legally or judicially uncertain. Where no legal precedent exists on a certain topic, the risk of a judicial finding against the plaintiff is greater than where a negative precedent or prohibitory statute exists. The expert panel sought to quantify the effect of uncertainty on the key factors by assigning half the weight of a positive factor.

The rating weight assigned to each specific factor reflected the elements considered by the expert panel. These weights do not take into account several other factors which might influence the severity of dram shop liability, including state court rules and procedures, general tort law rules, public opinion, and availability of liability insurance.

The server liability law and case precedents of all 51 U.S. jurisdictions (50 states plus District of Columbia) were coded as of mid-1988 according to the presence or absence of each of the 26 factors. By applying the assigned weights for each factor to the codes for each state and summing over all factors, a final liability score was developed for each state.

Table VII-1 shows each of the states and the District of Columbia ranked according to their final assigned score from highest to lowest liability.

Three states had summary scores over 60. These states, Indiana, Pennsylvania, and South Carolina, allow dram shop liability based on common law case precedent. In contrast, the lowest rated states, Arkansas, Kansas, Nebraska, Nevada, South Dakota, Maryland and Virginia (all of which had scores less than 10), limit liability through case law precedent. Courts in these states have consistently refused to allow liability for service of alcohol in the absence of legislation establishing state policy.

States in which liability is defined by statute tended to fall in the middle range of scores. For example, North Carolina, Utah, Alaska, New Mexico and New York, all of which have statutes allowing liability with certain limitations, scored in the low 50s. States whose statutes severely limit dram shop liability, such as Florida and California, scored in the 40s.

Final state scores were utilized to identify states for further case study. Four high liability states were selected: Indiana, Massachusetts, Pennsylvania, and South Carolina. Five low liability states were selected: Arkansas, Delaware, Kansas, Maryland, and Nevada. Effort was made to obtain some regional

TABLE VII-1
STATE SERVER LIABILITY RISK SCORES

VERY HIGH	
Indiana	70.3
Pennsylvania	70.0
South Carolina	65.0
HIGH	
Mississippi	61.8
Oklahoma	61.3
Massachusetts	60.3
New Jersey	59.5
Wyoming	59.0
Montana	59.0
District of Columbia	58.3
Alabama	57.3
Washington	55.4
Utah	55.3
North Carolina	55.0
Hawaii	54.5
MEDIUM	
Texas	53.0
Kentucky	52.6
New York	51.9
Alaska	51.8
Iowa	51.3
New Mexico	50.3
Ohio	48.8
Rhode Island	48.3
LOW MEDIUM	
Connecticut	46.7
West Virginia	46.4
New Hampshire	45.4
North Dakota	45.0
Tennessee	44.5
Florida	44.4
Wisconsin	44.2
Oregon	43.5
Illinois	43.4
California	43.2
Arizona	42.5
Minnesota	41.8
Vermont	41.3
LOW	
Louisiana	38.7
Idaho	38.5
Michigan	38.2
Georgia	36.2
Missouri	32.8
Maine	32.5
Colorado	28.4
Delaware	17.7
VERY LOW	
Arkansas	8.2
Kansas	8.2
Nebraska	8.2
Nevada	8.2
South Dakota	8.2
Maryland	1.2
Virginia	1.2
AVERAGE	42.9

dispersion, though it was impossible to obtain representatives from every region of the country.

In addition, two states, North Carolina and Texas, were selected as case study states which had undergone a significant change in server liability. These states were examined in a longitudinal analysis to determine the effect of the change in liability on alcohol involved traffic problems.

Legal Restrictions on Dram Shop Liability Statutes -- This study reviewed four types of legal restrictions that have been used to modify dram shop liability law in the United States: 1) stricter evidentiary standards (such as clear and convincing evidence); 2) stricter liability standards (such as recklessness or wantonness); 3) elimination of joint and several liability; and 4) limitations on recovery (damage caps). These restrictions represent a legislative reaction to the recent tendency of state courts to expand application of common law principles to negligent service of alcohol.

Evaluation of these restrictions was based on their potential impact on retailers' responsible business practices and on the appropriateness of the restrictions within existing legal frameworks. Appropriateness was considered by evaluating 1) the fairness or equitable distribution of burden on plaintiffs and defendants, 2) consistency with related legal provisions such as alcohol control laws and 3) clearness of the legal provision to those affected by it.

The legal analysis concluded that all four types of restrictions reduce incentives for retailers to adhere to responsible service practices. Furthermore, the restrictions are inconsistent with related legal provisions, such as alcohol control laws and other tort law, and unfairly distribute the burden of liability on the victim. Specific findings from this part of the project included:

--The five categories of law judged to be most related to server liability in any state were: (1) acts giving rise to liability, (2) liability standards, (3) standing to sue, (4) legal restrictions, and (5) defenses.

--When specific legal factors were assigned relative weights and applied to the legislation and case law in each state an overall score of server liability exposure was obtained. These final scores were judged to be generally consistent and reliable by the expert panel.

--Highest liability states based on these scores were judged to include Indiana, Pennsylvania, and South Carolina. Lowest liability states were judged to be Maryland and Virginia.

--Common law states (those with no existing statutes concerning server liability) tended to fall in the highest and lowest categories. States with dram shop liability statutes tended to have middle or moderate scores. This appears to be the result of a response in these states to court decisions concerning liability.

--Fear of open-ended liability defined under common law by court acts appears to stimulate legislation to establish boundaries for liability including setting limits on the amount of potential awards which might be made.

Legal Histories of Case Study States -- Eleven case study states (5 low, 4 high, and 2 change states) were chosen for closer study of their hospitality industries and traffic safety data. Representative states of high or low liability were chosen for study based on their scores on the dram shop liability rating scale. States which had experienced a major change in dram shop liability climate in the last decade were also selected for study because they offer the opportunity to measure the effects of the changes.

Five states were chosen from the low or very low groups of liability scores. Courts in these states have consistently refused to recognize dram shop liability in the absence of legislation which mandates such liability. Brief legal histories of each follow:

Arkansas (Score=8.2) courts have consistently refused to allow dram shop liability since the first case which raised the issue in 1965. In 1986 and 1987 cases involving illegal sales to minors, the Court refused to reverse its earlier opinion in the absence of legislation allowing dram shop liability.

In **Delaware (Score=17.7)** although a trial court had allowed a dram shop liability suit to proceed in 1978 (Taylor v. Ruiz), there was no binding legal precedent regarding dram shop liability in Delaware until 1981. In that year the Supreme Court of Delaware ruled that violation of liquor control laws could not be used as the basis for a suit by an intoxicated person against a licensee. The Court deferred to the state legislature to define state policy regarding dram shop liability. However, a 1988 negligence case against a social host (DiOssi v. Maroney) raised the possibility of liability for negligent service of alcohol with a holding that a property owner owes a duty to exercise reasonable care in providing a safe workplace, especially in light of the known risks of underage drinking.

In **Kansas (Score=8.2)** the Supreme Court first adopted the common law rule of nonliability for a liquor vendor in 1949 (Stringer v. Calmes). In 1985 the Court again refused to impose common law negligence liability on a licensee in the absence of legislation (Ling v. Jan's Liquors). This decision was reaffirmed in 1986 with a holding that Kansas common law does not recognize liability on the part of liquor vendors (Fudge v. City of Kansas City).

The **Maryland (Score=1.2)** Supreme Court adopted the common law rule that an innocent party has no cause of action against a liquor vendor in 1951 (State v. Hatfield). That decision was upheld in Felder v. Butler (1981), Fisher v. O'Connors (1982) and Kuykendall v. Top Notch Laminates (1987).

The **Nevada (Score=8.2)** Supreme Court has refused to allow licensee liability without legislation which authorizes it. In 1969 and again in 1982 the Court refused to allow a common law liability claim for selling alcohol to an intoxicated person, either on negligence principles or negligence per se (Hamm v. Carson City; Nugget and Yascovitch v. Wasson).

Four states from the high and very high groups on the dram shop liability scale were chosen as case study states. These states all had scores over 60 and are from diverse areas of the country east of

the Mississippi. They are characterized by extensive common-law liability, even where statutes limiting liability exist.

Indiana (Score=70.3) has recognized common law actions for negligence in serving alcohol since 1966 (Elder v. Fisher). In that case the Indiana Supreme Court held that the statute forbidding furnishing alcohol to a minor can be the basis of a suit against a licensee who violates it. This rationale was extended to social hosts as early as 1974 (Brattain v. Herron). In 1980 the right to a cause of action was extended to the intoxicated person (Parrett v. Lebamoff) although the defense of contributory negligence was allowed. A statute passed in 1988 (Ind. Code section 7.1-5-10-15.5) is intended to limit previous liability under common law by requiring that the server have "actual knowledge" that the patron is visibly intoxicated. However, if common law actions apart from the statute are allowed by the courts, the limitation of the new liability statute may not offer protection to licensees.

Massachusetts (Score=60.3) courts first recognized the potential for dram shop liability in 1967 (Adamian v. Three Sons). In that case the Supreme Judicial Court of Massachusetts held that violation of a criminal statute could be used as evidence of negligence, and that the statute was intended to safeguard the general public. A 1979 case extended the Adamian ruling to violation of statute prohibiting sales to minors (Wiska v. Stanislaus Social Club).

In **Pennsylvania (Score=70.0)** the present dram shop liability statute (47 PS 4-497), enacted in 1965, limits liability actions to third party suits in which the person served was visibly intoxicated. Thus, liability for serving minors would seem to be precluded. However, the Pennsylvania Supreme Court has been very willing to apply common law negligence principles beyond the provisions of the statute, including liability for serving minors and for injuries to intoxicated persons (Schelin v. Goldberg, 1985; Congini v. Portersville Valve Co, 1983). The statutory immunity from third party liability suits did not protect the licensee from common law negligence claims. Thus licensees in Pennsylvania are subject to both statutory liability for service to visibly intoxicated persons and common law liability for violation of the criminal statute banning sales to minors.

The **South Carolina (Score=65.0)** Supreme Court held in 1985 that violation of a statute prohibiting sale of alcohol to an intoxicated person could be the basis of a liability suit because the intoxicated person was among the class of people protected under the statute (Christiansen v. Campbell). In allowing the intoxicated person to sue licensees who serve them, South Carolina law is extremely liberal.

Two states -- North Carolina and Texas, -- in which major changes in liability have occurred have been chosen as case study states to investigate the impact of these changes on alcohol involved traffic crashes. Selection criteria were a dramatic shift in liability exposure in the last seven years and availability of alcohol-involved motor vehicle crash data.

North Carolina (Score=55.0) had not recognized dram shop liability prior to 1982. In 1982 a federal appeals court interpreted North Carolina law to allow broad dram shop liability (Chastain v. Litton Systems). This holding was affirmed by a North Carolina appellate

court in 1983 (Hutchens v. Hankins). These cases held that a defendant, even a non-licensee, could be sued for illegally furnishing alcohol to an intoxicated person under common-law negligence principles. Subsequent appellate decisions held that off-premise licensees could face liability for service to minors (Freeman v. Finney) and that an intoxicated person's contributory negligence could be used as a defense (Brower v. Robert Chappell & Associates). Another major change occurred in 1983 with the passage of a statute which attempted to limit liability for injuries caused by intoxicated underage motorists. However, common-law rights are not abridged under the statute. Thus, liability risk for licensees remains broad following the 1982 Chastain decision.

In **Texas (Score=53.0)** two highly publicized dram shop liability cases made their way through the Texas courts in the early 1980s. In 1987, the Texas Supreme Court ruled in the combined cases of El Chico v. Poole and Joleema v. Evans, that licensees have a duty to the general public not to serve alcoholic beverages to a person whom the licensee knows or should know is intoxicated. This decision represented a major change in Texas law and was followed immediately by legislative action. The statute passed in 1987 allows liability for service to an intoxicated person only when the drinker presents a "clear danger" to himself and others. This statute precludes common-law actions for service to intoxicated adults but does not preclude suits for service to minors under 18. Another statute passed in 1987 has also had a major impact on liability risk. This statute provides immunity for licensees who require their employees to attend state approved "seller training" programs. This statutory immunity from liability will encourage widespread participation in seller training programs even though training is not mandatory.

A summary of findings concerning server liability and legal tradition for each state is shown below in Table VII-2.

Table VII-2
Summary of Findings, Concerning Legal Tradition for Server Liability

State	Type	Result
Arkansas (8.2)	Low	Case law precludes liability
Delaware (17.7)	Low	Case law precludes liability
Kansas (8.2)	Low	Case law precludes liability
Maryland (1.2)	Low	Case law precludes liability
Nevada (8.2)	Low	Case law precludes liability
Indiana (70.3)	High	Common-law liability allowed despite statute Massachusetts (60.3)High Common-law liability allowed
Pennsylvania (70.0)	High	Common-law liability allowed despite statute South Carolina(65.0)High Common-law liability allowed

North Carolina (55.0)	Change	1983 state case and statute
Texas (53.0)	Change	1983 and 1984 cases and 1987 Supreme Court decision and 1987 statute allowing immunity for training

Server Liability Insurance--The project investigated the availability of data on liability insurance of alcohol beverage serving establishments. Two studies were undertaken. One was an analysis of data from a survey of all state insurance commissioners and insurance trade associations undertaken by the Responsible Hospitality Institute to determine what data were available on insurance sold within the state and on suits and final payments made in liability suits. A second result of research focused on a review of existing reference materials and documents concerning server liability insurance.

The results of the surveys are informative but, in our judgement, limited due to (a) low response rates and (b) lack of available data on liability insurance rates and liability payments. Nevertheless, some general patterns emerge. Often the most prevalent source of liability insurance in a state is a high-risk insurance company or "surplus line" or "excess line" carriers. Such companies, which specialize in providing insurance under situations of high or uncertain risk at high premiums, are often not required to be licensed in the states in which they do business. They likely do not belong to traditional insurance associations. Since they may not be licensed, state insurance commissioners often do not collect data regarding their activities. There is no national (across state) source of data, and since states vary in their reporting requirements for insurance carriers, there is often no government monitoring of insurance carriers providing liability insurance to licensed beverage establishments.

Based on review of available insurance data and documents from published public sources, the project found that in the absence of barriers to entry or collusion, the insurance market for liability coverage appears to be reasonable competitive. There exists assigned risk or limited liability pools (insurers of last resort) which enable high risk retailers to be subsidized by those of low risk. These pools can dilute incentives to adopt preventive serving practices by those retailers who service practices may be most likely to produce serious injuries or deaths for patrons after leaving their establishment.

Both the analysis of survey results and published data suggests that insurance rates for server liability could be based on relative risk of claims and level of liability payments. In the absence of such information, premium rates do not necessarily reflect actual relative risk but a type of assigned risk which appears to be based on an estimate of risk not based on actual experience. Further, even in states with relatively low liability, such as California, insurance premiums has increased dramatically.

A few insurance companies are beginning to offer discounts for evidence of serving practices and formal server training. They do not conduct a risk assessment of the licensee, but rather only require evidence of training.

Content Analysis of Newspapers and Trade Journals in High and Low Liability States--In order to determine the amount of public attention or publicity given to server liability in various states, a content analysis of newspapers and trade journals in each case study state was undertaken. This analysis which used available issues from each state over 1984-1988 provided counts of average annual number of articles and column inches devoted to such server liability and related matters in each state over the five year study window.

Results of local newspaper and beverage trade journal content analyses showed that high liability states do give more public attention to liability issues than low liability states. Both public newspapers and the specialized journals within states with high server liability give more space more frequently to such topics than in states with low server liability.

High liability states (Massachusetts and Pennsylvania) have the most publicity about server liability. The general public and licensed establishments are exposed to more information about server liability in these two states (both via the trade journals and local newspapers) than in any other states within the high liability group. However, within this high liability group the most trade journal coverage for server liability is in South Carolina which gave no attention to liability in the local newspapers. This suggests inconsistency between the editorial policy of the trade journals and the concern of the local newspapers within a high liability state. Indiana which is the rated as the highest liability state in the country has relatively few articles in both the trade journal and the local newspapers.

Even if the low liability state group has on-the-average lower attention to server liability within both trade journals and newspapers, this difference is not consistent across all states. For example, the Arkansas beverage trade journal has given a great deal more attention to liability than any other low liability case state, even more than any high liability state beverage trade journal other than South Carolina. On the other hand, there was no coverage of server liability by the local newspapers in Arkansas. Kansas and Maryland both have higher newspaper coverage of server liability than Indiana or South Carolina, both high liability states.

In Summary:

--States with high potential server liability have more publicity about such liability in both local newspapers and beverage trade journals serving these states than in states with low potential server liability.

--States within each low and high liability group have considerable variability in the level of publicity overall and between newspaper and trade journal coverage within the state. This means that each high liability state does not always have a level of publicity higher than each low liability state.

--Trade journals give more coverage on the average than local newspapers about server liability. There are three low liability states (Arkansas, Delaware, and Nevada) and one high liability state

(South Carolina) with no newspaper coverage at all over the five years studied. As evidenced by South Carolina (high state) and Arkansas (low state) the trade journals are more concerned about liability than the popular press.

--Both high and low liability states have some publicity about server liability. The lowest attention to liability occurs in Nevada (low state) but even in this state there is even a small amount of trade journal coverage. In fact, as a low liability state, there have been liability suits in this state as evidenced by the cases reaching the state appellate courts. See Figure II-2.

--Indiana as the state judged in the legal analysis to have the highest potential server liability has rather moderate to low coverage in both journals and newspapers. One might conclude that Indiana was a low liability state based on publicity alone.

--If the coverage that newspapers and trade journals give to the server liability reflects the level of concern about liability within the state, the higher the potential liability the greater the news coverage and publicity given to such matters.

--If publicity and news coverage reflects exposure (and potential awareness) to level of liability within a state, then licensed established within high liability states will have more awareness.

Alcohol Beverage Server Behavior, Perception,, Training, and Practices --One of the important goals of this project was to learn whether differences in dram shop liability were associated with differences in serving practices and management policies. Since primary data collection was precluded under the contractual terms of this project, data from high and low liability states contained within a survey undertaken by *Top Shelf Magazine* (a national trade magazine for establishments with licenses for alcohol beverage service) and the Responsible Hospitality Institute were analyzed. The survey data provided to the project by *Top Shelf Magazine* involved three mailings to 7200 randomly-selected licenses across the survey states. The final response rate was 11.7% overall which reflected a 10.3% rate from low liability states and 13.5% from high liability states.

There is a high degree of similarity between the respondents from the two types of liability states. The high liability states respondents are slightly more from bars and nightclubs than low liability (41% to 34%), more independently owned businesses (95% vs 89%), and have been in business a bit longer.

The questionnaire was designed to cover the following topics: awareness of the risk of liquor liability lawsuits with the respondent's state, liability insurance coverage and availability, server training, serving practices, and descriptive information about the business establishment itself.

An equal percentage of restaurants with beverage licenses and of bars/nightclubs responded (approximate 40% each). The majority of responding outlets were independently owned and most employ fewer than 10 service staff. Beer is the single beverage sold most often.

In general, servers/managers from high liability states are more aware that they can be sued, more aware of suits within their state, and view the liability climate in their state as more unfavorable or hostile than those from low liability states. Respondents from high liability states are slightly more likely to have liability insurance (49% to 35%), but reasons for not obtaining insurance are quite different. Of those who don't have insurance, many more (37%) low liability state respondents cite "I do not need" as do high liability (2%).

In terms of practices there are little differences between low and high liability states in providing training for their servers and in checking identifications for underage patrons. Respondents are identical in citing the use of large drink sizes for service (78%).

The most significant differences occur in reports of drink refusal and in providing price incentives. For example, 50% of high liability respondents report refusing drinks to intoxicated customers more than once or twice a month compared to 34% for low liability, and only 9% of high liability state respondents report providing low price incentives (such as happy hours) compared to 30% of low liability state respondents. While Massachusetts specifically bans happy hours, a statistically significant difference remains when this state is dropped in the comparison.

While the relatively low response rates to this survey suggests caution in interpreting these findings, the observed differences between low and high states are not unexpected. The data do appear to be statistically robust and are consistent with our original model shown in Figure I-1..

In Summary:

--Alcohol beverage establishments from high liability states are more aware of their liability than their counterparts in low liability states. Thus their perceptions match the independent rating of states by the legal experts.

--High liability state respondents tend to obtain liability insurance more often and few believe they do not need such insurance, even if they fail to purchase it.

--Liability does not appear to stimulate formal training or underage checking more often. Establishments in both types of states conduct training and check IDs equally often.

--Liability does reduce low-price promotions and increase refusals of service to intoxicated patrons.

Effect of Liability on Alcohol Involved Traffic Problems -- Both North Carolina and Texas were examined in an effort to determine if a sudden change in liability resulted in a decline in alcohol involved traffic crashes. Cross-sectional analyses of publicity and server perceptions and behavior provide important information about existing differences between states with different liability climates. They do not provide

information about the potential impact of liability in reducing traffic problems involving drinking and driving. Such a determination requires a longitudinal design in which one is able to examine changes in the dependent variable, alcohol-involved traffic crashes, following a significant change in the independent variables e.g., liability exposure and awareness. Such a design was applied to both case study states.

North Carolina had relatively low liability before 1980 as there had been little or no court activity around such liability and there was no legislation addressing the subject. However, a number of significant events occurred to change the situation. From 1979 through 1982 liability suits were entered in North Carolina courts culminating in a N.C. Appellate Court decision which upheld an earlier decision for the plaintiff that serving alcohol to and allowing an obviously intoxicated patron to drive away (who later crashes) was basis for liability. In addition, as a part of the North Carolina "Safe Roads Act" (a major drinking and driving legislation which became effective in October, 1983, one of the specific provisions of the law was to establish liability for negligent alcohol sales to underage persons when injuries are proximately caused by this underage person.

In December, 1983, the state Court of Appeals upheld liability of a package store for selling beer to minor who subsequently were involved in traffic crashes. In April, 1985, this same court held that there was contributory negligence of a intoxicated person in consuming sufficient alcohol to be impaired which could be used as a defense to bar negligence liability of a licensee.

Patterns of indicators of alcohol-involved traffic crashes including total fatal crashes and single-vehicle nighttime (between 8 pm and 4 am) crashes were examined for the period January 1980 through December 1988. In addition, content analysis of major newspapers and of television stations news broadcasts were undertaken.

A visual examination of the time series plot of single-vehicle nighttime crashes for changes associated with two significant liability suits (December 1982 and June 1983) and the December 1983 Court of Appeals decision for the plaintiff suggests an associated decline. However, the project was unable to undertake a time-series statistical analysis of this or any other variable due to the fact that these important court actions were so close in time to the effective date of the major drinking and driving legislation in the state. This legislation and the concurrent publicity about drinking and driving make isolation of the potential effect of a change in dram shop liability impossible.

Some general observations which can be made from examination of the data from North Carolina include:

--While beer outlet availability remained relatively constant over the period 1980-1988, spirits availability increased, primarily due to licenses for on premise sales of spirits.

--Independent evaluations of the state legislation to reduce drunk driving including the establishment of server liability for underage service by Steward (1985) and Lacey (1987) concluded no impact of the

law. However, it would be difficult to separate out the effect of the law from the server liability changes brought about by judicial activity independent of the law itself.

--Media coverage of both drinking and driving (concurrent with the drinking and driving legislation) and server liability appears to be highly correlated with observed changes in the number of alcohol-involved traffic crashes in North Carolina. However, this association was not tested statistically.

Texas, like North Carolina, also experienced a sudden change in liability exposure as a result of key liability suits. Before 1983, there was no court or legislative precedent for server liability. However, two important liability cases were filed against licensed establishments in 1983 and 1984 resulted in considerable public attention to potential liability. Content analysis of daily newspapers in the state from 1978 through 1988 showed that prior to 1983 there was no publicity about server liability. In addition, during 1983, the major state trade newspapers, *Texas Beverage Journal*, carried a number of stories with attending large headlines concerning server liability suits.

A Box-Jenkins time-series analysis was conducted on injury-producing monthly single-vehicle nighttime crashes in Texas from 1978 through 1988. Injury producing crashes are those n which at least one vehicle occupant was killed or received an incapacitating or non-incapacitating injury, as reported by the police officer at the scene of the crash. The effects of several other factors expected to potentially impact injury rates in Texas, were controlled in the statistical analysis e.g., national crash patterns, major Texas drinking and driving legislation in January, 1984; mandatory safety belt legislation in December, 1985; and increases in the minimum drinking age from 19 to 21 in September, 1986.

The final time-series model parameter estimates revealed significant reductions in the frequency of single-vehicle nighttime injury traffic crashes following the January, 1983, and the November, 1984, filings of major server liability court cases. Crashes decreased 6.5% immediately after the 1983 case was filed and decreased an additional 5.3% after the 1984 case was filed. No statistically significant change in crashes was found associated with the January, 1984, Impaired Driving Legislation which occurred between these two cases.

These decreases represent net effects associated with the court cases and associated publicity, after controlling for broader crash trends reflected in data from other states, and controlling for the effects of other major policy changes in Texas in the 1980s, such as raising the legal drinking age, strengthened DUI laws, and requiring safety belt use.

Effects of the lawsuits were found at the time they were originally filed, not when appeals courts issued their decisions three to four years later. Presumably this was due to a sudden increase in publicity concerning liability that increased the level of awareness and concern of owners and managers of alcohol outlets. Furthermore, there is evidence that the filing of the 1983 and 1984 cases

dramatically increased the levels of concern among alcohol retailers. The later Appeals Court and Supreme Court decisions simply upheld liability that retailers perceived beginning at the time the suits were filed.

In addition to abrupt permanent intervention models for the dram shop liability suits, we examined alternative possible forms of the intervention effects. Intervention models tested included a sudden but temporary effect that gradually decayed, and a gradual permanent effect. The sudden temporary effect may obtain if the effect is solely due to publicity, with the effect dissipating as media coverage faded. The gradual permanent effect may obtain if awareness of liability and specific serving practices gradually develop and diffuse throughout the population of alcohol outlet owners and managers. None of the alternative models fit as well as the more parsimonious sudden permanent effect models. As a result, it does not appear that effects of the suits are solely due to publicity, which inevitably decays over time. It also appears that the role of the media (both general population mass media and specialized publications targeted at alcohol retailers) in rapidly disseminating information on these cases supersedes a more gradual diffusion process.

C. The Final Conceptual Model of Dram Shop Liability, Server Behavior, and Alcohol-Involved Traffic Problems.

This project provided information about a number of factors relating to server liability and its potential impact on reduction of alcohol-involved traffic problems. These results have both confirmed the importance of most of the factors in the conceptual model and resulted in a modification of the model as originally shown in Figure I-1.

The revised model is shown in Figure VII-1. This project confirmed the importance of both judicial activity and legislation in defining the nature and extent of server liability in each state, i.e., DRAM SHOP LIABILITY. The full extent of the impact of GENERAL TORT LIABILITY in a state on the specific server liability of licensed establishments is difficult to determine across all states. Restrictions on liability imposed by changes in tort liability can have important effects on DRAM SHOP LIABILITY.

A few states have statutes which either require the training of servers (Oregon) or provide for server training as a potential defense or protection against liability (Texas), i.e., STATE STATUTES ON SERVER TRAINING. The potential preventative effect of LIABILITY INSURANCE has not been fully explored by the insurance industry. There is no empirical basis for currently determining the actual extent of liability exposure. As a result, premiums are established more to protect insurance carriers against the highest estimated risk rather than actual risk.

Based upon results from the survey of licensees from high and low liability states and the time-series analysis of Texas, we conclude that liability exposure does influence the SERVER PRACTICES of licensed establishments. These practices are related to the OWNER/MANAGER PERCEPTIONS OF LIABILITY RISK which are associated with actual liability. In general, high liability states have more LIABILITY PUBLICITY than low liability states and owner/managers report correspondingly greater awareness and concern.

Conceptual Model of Dram Shop Liability, Server Practices, and Alcohol-Involved Traffic Problems

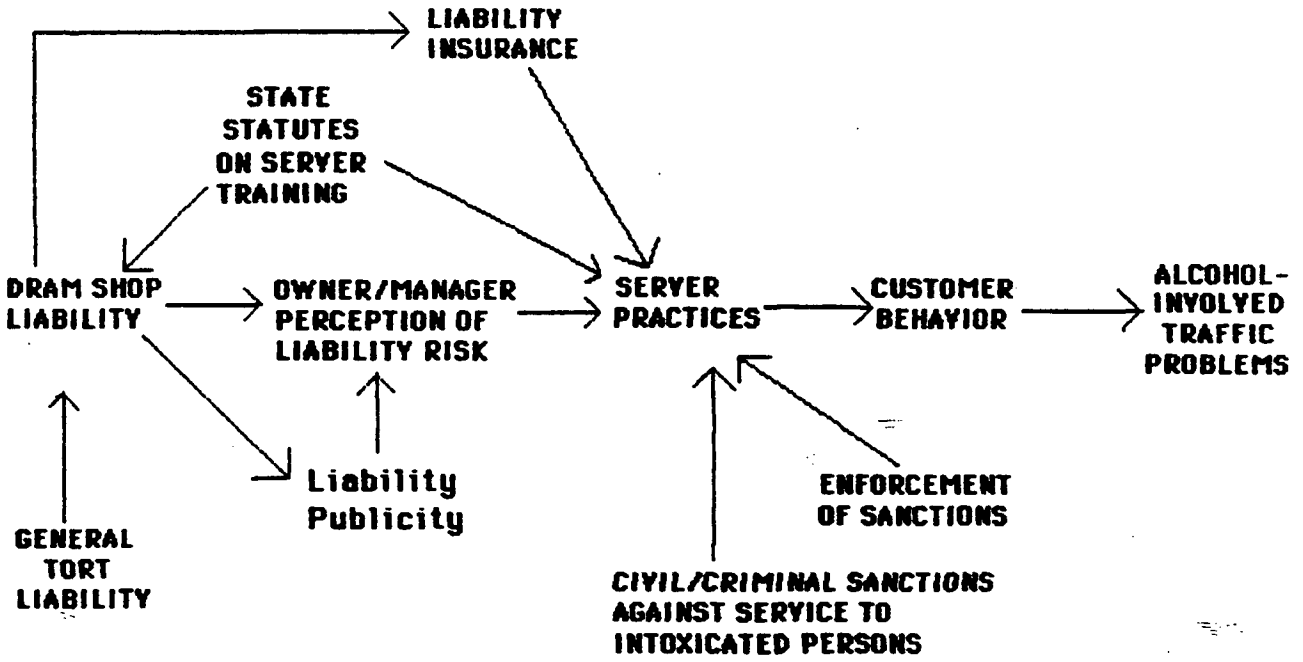


FIGURE VII-1

Licensed establishments from high liability states are more likely to purchase liability insurance or know that they should have insurance if they do not purchase it. Establishments from high liability states are much more likely not to have price promotions and are more likely to cut off intoxicated patrons than establishments from low liability states. These are specific behaviors which are related to liability and associated publicity and perceptions. Such practices as formal training of servers and checking identifications of possible underage patrons are not differentially stimulated by liability according to the survey results. These practices occur as often in high as in low liability states.

The specific effects of State SANCTIONS AGAINST SERVICE TO INTOXICATED PERSONS and ENFORCEMENT OF SANCTIONS were not investigated by this project. Most states have these sanctions. Only Alabama, Florida and Nevada do not have either civil or criminal sanctions against service to intoxicated persons. In most states such laws are enforced by the Alcohol Beverage Control authority and is most often the basis for loss of license and/or fines. States which are more restrictive about the availability of alcohol have more enforcement of ABC laws including underage service (Prevention Research Center, 1990). Enforcement is not necessarily associated with the level of server liability. This may explain why there are no differences in formal server training and checking IDs between high and low liability states.

This project was not able to directly examine the impact of changes in SERVER PRACTICES and CUSTOMER BEHAVIOR. However, the research of Saltz (1985, 1987), McKnight (1987), Gliksman and Single (1988), and Russ and Geller (1987), and Geller and Delphos 1987 demonstrate that changes in serving practices do result in reductions in the number of intoxicated persons leaving establishments. Such research supports a conclusion that changes in SERVER BEHAVIOR can produce differences in the Blood Alcohol Level (BAL) of patrons leaving licensed establishments and thus the subsequent risk of becoming involved in a traffic crash.

A potential relationship between SERVER LIABILITY and a reduction in Alcohol-involved TRAFFIC PROBLEMS was demonstrated in this project through the time-series analysis of single-vehicle nighttime injury producing crashes in Texas. This finding strengths the empirical association between changes in liability, associated publicity, server behavior, customer levels of alcohol impairment, and subsequent traffic crashes involving alcohol.

D. Conclusions and Recommendations

This section will summarize the overall conclusions drawn by the research staff from project findings and provide recommendations which have implications for policy concerning server liability and efforts to reduce alcohol-involved traffic crashes. Recommendations for future research are also provided.

Existing state statutes which address server liability (thus establishing a legislative basis for such liability) most often impose restrictions or boundaries on liability which actually limits

liability. The high liability states are those where the courts have established liability through judicial decisions not through legislative action.

Two high liability states, Indiana and Pennsylvania, passed statutes about liability as a result of public concern. In the lowest liability states, the courts have refused to recognize a common-law basis for liability in the absence of any state legislative action. In general, where there is legislatively defined liability it is in response to judicial action.

Legislative restrictions tend to reduce the incentives for retailers to engage in safe practices in serving alcohol. In addition, these restrictions often have the effect of (a) setting limits or caps on possible liability payments, (b) eliminating joint and several liability which restricts the ability of the injured party to sue others such as licensed establishments following a traffic crash, (c) establishing stricter liability standards which can reduce the ability of injured parties to enter suits, and (d) providing statutory evidentiary standards which can reduce the information used to support a case of liability.

Therefore, a conclusion of this project is that most <u>current</u> statutory responses to dram shop liability do not necessarily contribute to the prevention of alcohol-involved traffic crashes. This is based on two points. First, many state statutes tend to establish boundaries and limits on liability which can be viewed by licensed establishments as reducing actual liability exposure and reduce the incentive to alter unsafe serving practices. Second, they rarely provide positive incentives for licensed establishments to engage in preventative behaviors or practices.

We believe that statutes which provide incentives to retailers to seek such activities as server training and modifications of serving policy and practices will have a greater potential to reduce the risk (likelihood) that patrons will be served to intoxication, that intoxicated patrons will leave a licensed establishment, and that underage persons will be served. One example of such legislation is the Model Dram Shop Act developed under a grant from the National Institute on Alcohol Abuse and Alcoholism (Prevention Research Group, 1985). A copy of enclosed in Appendix VII-A. At least one state, Rhode Island, has adopted this act.

Without anything else to provide incentives for responsible serving practices, the higher the server liability the better (for example, the case of Texas). While the "stick" (high liability) has been shown to be effective, the project concludes that incentives as "carrots" are more desirable and have the greatest potential to reduce drinking and driving in the long run.

Pure high liability is not necessarily in itself most preventative. Even though a change in liability may, produce a change in server behavior, as shown in Texas, legislative incentives may in the long run hold the most potential for preventative effects. This project has concluded that maximum liability exposure alone does not necessarily lead to incentives or server behavior to reduce alcohol involvement among drivers.

Insurance for server liability is a significant ingredient in evaluating server liability impact. However, the lack of information about actual risk of liability exposure either incurred by a specific licensed establishment or types of establishments within a state means that there is currently no empirical basis to establish risk and determine appropriate insurance premiums.

This project has concluded that it may not be desirable to have excess line companies writing insurance for server liability. This conclusion is on two grounds: (1) premiums are not based on actual exposure in existing law and actual case activity, and (2) there are no incentives provided by such companies for retailers to engage in preventative practices such as server training or reduce promotions which can increase the level of patron intoxication.

This project found that it was difficult to locate and obtain beverage trade journals, newsletters, and newspapers. We found it notable that these valuable sources of data on the types and amount of news and editorial content which owners, managers, and servers are exposed to are not readily available. As the license beverage retail industry is orientated around state and local issues, there is no national source of such valuable data across states. Even at the state level, industry newsletters are typically not retained and are not available to the scientific community.

This project is the first to find an association between drinking and driving and server liability. While the effects on single-vehicle nighttime injury traffic crashes in Texas following significant changes in liability and the attending publicity were modest, they were statistically significant amidst a number of other efforts to reduce traffic crashes and injuries.

This project concludes, based upon both the legal and empirical research findings of this project, that dram shop laws can be preventative. Using different sources of information which provided further confirmation of single findings, we found that retail establishments do respond to changes in liability and to the existence of high liability. This was shown in both the server survey and in the analysis of changes in traffic crashes in Texas. It can be concluded that such laws stimulate responsible alcohol serving practices that the preventative potential to reduce alcohol impaired driving is enhanced.

Specific recommendations are:

--Clarify the specific impact of existing (and future restrictions) on server liability, court and legislative action. Future legislation should clarify negligence and recklessness as standards of liability. The doctrine of joint and several liability should be reviewed to ensure fairness to incidental defendants while taking plaintiff's conduct and damages in account. Legal reform measures should be based in general negligence law and shall be clearly and carefully drafted.

--Future legislative, judicial, and state government actions should coordinate the reform of dram shop liability with general negligence laws and Alcoholic Beverage Control laws, and regulations which can affect the serving practices of licensed establishments.

--Information on liquor liability insurance can and should be collected. Without more active data collection efforts by state insurance commissions on premiums charged for server liability insurance and on actual liability payments and exposure, research on this topic is limited and insurance premiums can not be based on actual risk exposure. Active mandated data collection in a state (for example in the case of the State of Michigan) can enhance competition within the market and lower insurance rates. By stimulating competition and reporting rates and loss ratios, state regulator agencies aid competitors to effectively enter the market. Insurance costs can then be adjusted to reflect actual relative risk more accurately.

--States need to create liability pools which can make lower cost insurance available to licensed establishments and provide positive incentives for establishments to engage in safer serving practices.

--It is recommended that either the beverage serving industry and/or schools for hotel and restaurant management training be encouraged to develop and maintain central depositories for publications designed for establishments licensed to serve alcohol. Without such centralized collection of materials and data, future research on policies and historical trends of direct relevance to the reduction of drinking and driving will be lost or not easily available to the industry or researchers.

--Further research is needed to confirm the rather modest reductions in alcohol-involved traffic crashes associated with server liability in a single state. We will have more confidence in the robustness of these findings as similar research is replicated in other states and in different time periods.

--Future research is needed to document the potential changes in customer behavior resulting from specific changes in serving practices and behavior directly in response to changes in liability. The existing evidence on the impact of such changes on customer behavior comes from evaluations of server training not evaluations of changes in server liability.

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II-A Key Elements of Liquor Liability

APPENDIX II-A

KEY ELEMENTS OF LIQUOR LIABILITY

FINAL LIST DECEMBER 5, 1988

CATEGORY #1: Acts Giving Rise to Liability

1. **Serving Minor** (no notice required) Illegal in all states. Minors are presumed to be incapable of dealing with alcohol's intoxicating effects.
2. **Serving Minor in Violation of Notice** Licensee who serves minor despite notice not to serve (Wyoming 12-5-502) or who was chargeable with notice of minority (Alabama 6-5-70) may face liability.
3. **Serving Obviously Intoxicated Minor** Statutory language of California B&P 25602.1, which precludes liability without showing that minor's intoxication was obvious. Liability for serving obviously intoxicated adults precluded.
4. **Serving Person who Becomes Intoxicated** Licensee who serves any alcohol to a person who subsequently becomes intoxicated may face liability, regardless of the customer's condition at the time of service.
5. **Serving Obviously Intoxicated Person** The most common act leading to liability, along with serving minors. Liability usually rests on whether intoxication was obvious, apparent or some similar standard.
6. **Serving Drunken Person** Statutory language of Alaska 04.21.020:2. Definition of "drunken" is unclear.
7. **Serving Habitual Drunkard** (no notice required) Temperance era statute still in effect in Colorado. New statute in Florida. Liability potential because licensee may be more aware if intoxication is habitual.
8. **Serving Habitual Drunkard in Violation of Notice** Licensee who ignores written notice from family member or alcohol control agency not to serve habitual drunkard may face liability. Requirement of Ohio 4399.01 and Wyoming 12-5-502. Utah 32A-14-1 allows liability for service to "known interdicted person" (not defined).
9. **Occupiers' Liability; Failure to Maintain Safe Premises** Common law actions relating to licensee behavior on premises: physical condition of premises, those who are allowed to enter and remain; activities allowed on the premises; management of intoxicated persons; assumption of affirmative duty and subsequent breach or omission.

CATEGORY #2: Liability Standard

10. **Liability Standard to be Applied to each Category Above:**

a. Strict Liability Statute allows liability for service of alcohol without regard to defendant's fault. Connecticut 30-102 and Illinois 43-135.

b. Negligence per se Criminal statute prohibiting sale to minors or intoxicated persons sets standard of care to which licensee's behavior must conform.

c. Negligence (common law) Common law principle of foreseeability of injury applied to service of alcohol to minors (Rappaport v. Nichols, 156 A2d 1, 1959) or service of alcohol to obviously intoxicated persons (Berkeley v. Park, 262 NYS2d 290, 1965).

d. Reckless, Willful or Wanton Issue to be addressed is not punitive damages. Licensee behavior must go beyond "mere" negligence before liability will attach.

e. Criminal Negligence Statutory requirement of standard of care in Alaska 04.211.020:2. Not defined in statute.

f. Criminal Conviction Plaintiff must show defendant has been convicted of violation of criminal laws prohibiting sale to minor or intoxicated person prior to initiation of civil suit. Missouri 537.053.

g. No liability Statute or supreme court case precludes liability.

h. Uncertain Liability standard not defined by statute or case law.

CATEGORY #3: Standing to Sue

11. **Minor Drinker** Since minors are presumed to be less able to handle effects of alcohol than are adults, they may be considered persons intended to be protected by laws prohibiting sale and, thus, allowed to bring suit against licensees who serve them.
12. **Adult Drinker** Adult drinkers are frequently precluded from bringing suit against those who serve them as a matter of law. A jurisdiction which allows the drinker to sue presents a greater risk of liability to licensees.
13. **Innocent Third Party Only (no complicity)** Third parties with no previous relationship with the drinker who are injured as a result of service to minors or intoxicated persons are the most common plaintiffs in liquor liability suits.
14. **Complicitous Third Party** Third parties who participate in the drinking event by buying drinks for or drinking with the intoxicated tortfeasor and who are subsequently injured may be precluded from suit by the doctrine of complicity. (Though this issue interacts with contributory negligence, it is frequently treated by courts as a standing issue.)
15. **Family Members of Drinker** If the drinker is precluded from suit, family members may not be allowed to bring wrongful death or survival suits.
16. **Family Members of Third Party** Statutory provisions regarding recoverable damages may preclude family members from seeking certain damages. Also if the injured party's suit is precluded by complicity, family member suits may also fail.

CATEGORY #4: Procedural/Recovery Restrictions

17. **Recovery Cap** Statutory recovery caps have been grouped into low (less than $100,000), medium ($100,000-$200,000) and high (greater than $200,000) ranges. Minimum recovery figures are not included.
18. **Notice Provision** Some statutes require that plaintiff notify defendant licensees of a pending suit within a certain number of days after the injury. Those statutes which require notice specify 60 days, 120 days, or 180 days. Failure to comply with the notice provision will preclude a suit.
19. **Statute of Limitations shorter than standard tort SL** Some liquor liability statutes restrict liability by specifying a statute of limitations shorter than the state's normal tort statute of limitations. Those statutes which specify require either 1 year or 2 years.
20. **Name and Retain Requirement** Statutory requirement that the intoxicated tortfeasor be named as a defendant and retained as a real party to the proceeding until its conclusion. Intended to prevent collusion between plaintiff and tortfeasor.
21. **Joint but not Several Liability** Limits defendant's potential liability to his portion of fault for plaintiff's injury. Statutory requirement of New Jersey 2A:22a-5.
22. **Standard of Proof** If liability statute requires a standard of proof higher than proof by a preponderance of the evidence, plaintiff's burden of proof will be harder

to meet. Oregon 30.950 (2) requires clear and convincing evidence of visible intoxication.

23. **State Immunity** Prevents government entity which sells alcohol from being sued. Statutory provision of Utah 32A-14-1. Removed from consideration by panel because a) state liquor stores are immune because they are not licensees; and b) state Tort Claims Acts would control.

CATEGORY #5: Defenses

24. **Contributory Negligence** Common law bar to recovery by plaintiff whose own negligence played some part in his injury.

25. **Comparative Negligence** Modern rule which allows a negligent plaintiff to recover for that portion of his injuries caused by another's negligence.

26. **Responsible Business Practice Defense** Some recent liquor liability statutes codify this provision of the Model Dram Shop Act of 1986. State alcohol control statutes which mandate or allow voluntary server training may also set a standard of care to which licensees may adhere. In jurisdictions which consider evidence of licensees' normal business practices to be relevant, and thus admissible, in a liquor liability suit, licensees may be able to successfully defend.

27. **Presumption of Responsible Behavior** Statutory provision of Texas 106.14; Voluntary participation in server training programs approved by state ABC leads to presumption of responsible behavior in suit premised on negligence in service of alcohol.

II-B Server Liability Codes for Each State

APPENDIX II-B Server Liability Codes for Each State

STATE DESCRIPTORS	1	2	3	4	5	6	7	8	9	11	12	13	14	15	16	17a	17b	17c	18a	18b	18c	19a	19b	20	21	22	23	24	25	26	27
Alabama	c	g	g	g	c	g	g	g	h	i	i	1	1	1	1	0	0	0	0	0	0	0	0	0	0	0	0	1	0	0	0
Alaska	c	g	g	g	g	c	g	g	h	i	i	1	i	i	1	0	0	0	0	0	0	0	0	0	0	0	0	0	1	0	0
Arizona	c	g	g	g	c	g	g	g	h	i	0	1	0	0	1	0	0	0	0	0	0	0	0	0	0	0	0	1	0	0	0
Arkansas	g	g	g	g	g	g	g	g	h	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	1	0	0
California	g	g	c	g	g	g	g	g	h	1	0	1	i	i	1	0	0	0	0	0	0	0	0	0	0	0	0	0	1	0	0
Colorado	d	g	g	g	d	g	g	c	h	0	0	1	i	0	1	0	1	0	0	0	0	1	0	0	0	0	0	0	1	0	0
Connecticut	e	g	g	g	a	g	g	g	h	i	i	1	1	i	1	1	0	0	1	0	0	1	0	0	0	0	0	0	1	0	0
Delaware	g	g	g	g	g	g	g	g	h	i	0	i	i	i	1	0	0	0	0	0	0	0	0	0	0	0	1	0	0	0	0
District of Columbia	b	g	g	g	b	g	g	g	h	i	i	1	i	i	1	0	0	0	0	0	0	0	0	0	0	0	0	i	1	0	0
Florida	d	g	g	g	g	g	d	g	h	i	i	1	i	i	1	0	0	0	0	0	0	0	0	0	0	0	0	0	1	0	0
Georgia	d	g	g	g	d	g	g	g	h	0	0	1	i	0	1	0	0	0	0	0	0	0	0	0	0	0	0	0	1	0	0
Hawaii	b	g	g	g	b	g	g	g	h	i	0	1	i	0	1	0	0	0	0	0	0	0	0	0	0	0	0	0	1	0	0
Idaho	c	g	g	g	c	g	g	g	h	0	0	1	0	0	i	0	0	0	0	0	1	0	0	0	0	0	0	0	1	0	0
Illinois	a	g	g	a	g	g	g	g	c	0	0	1	0	0	1	1	0	0	0	0	0	1	0	0	0	0	0	0	1	0	0
Indiana	b	g	g	g	b	g	g	g	c	1	1	1	1	1	1	0	0	0	0	0	0	0	0	0	0	0	0	0	1	0	0
Iowa	g	g	c	c	g	g	g	g	h	i	i	1	0	i	1	0	0	0	0	0	1	0	0	0	0	0	0	0	1	0	0
Kansas	g	g	g	g	g	g	g	g	h	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	1	0	0
Kentucky	b	g	g	g	c	g	g	g	h	i	i	1	1	i	i	0	0	0	0	0	0	0	0	0	0	0	0	1	0	0	0
Louisiana	c	g	g	g	g	g	g	g	h	0	0	1	1	1	1	0	0	0	0	0	0	0	0	0	0	0	0	1	0	0	0
Maine	c	g	g	g	c	g	g	g	h	1	0	1	1	0	1	0	0	1	0	0	1	0	1	1	1	0	0	0	1	1	0
Maryland	g	g	g	g	g	g	g	g	h	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	1	0	0	0
Massachusetts	c	g	g	g	b	g	g	g	h	i	i	1	i	i	1	0	0	0	0	0	0	0	0	0	0	0	0	0	1	0	0
Michigan	c	g	g	c	g	g	g	g	h	0	0	1	0	0	1	0	0	0	0	1	0	0	1	1	0	0	0	0	1	0	0
Minnesota	c	g	g	g	c	g	g	g	h	0	0	1	0	i	1	0	0	0	0	1	0	0	1	0	0	0	0	0	1	0	0
Mississippi	b	g	g	g	b	g	g	g	h	i	i	1	i	i	1	0	0	0	0	0	0	0	0	0	0	0	0	0	1	0	0
Missouri	f	g	g	g	f	g	g	g	h	i	i	1	i	i	1	0	0	0	0	0	0	0	0	0	0	0	0	1	0	0	0
Montana	c	g	g	g	c	g	g	g	h	i	i	1	i	i	1	0	0	0	0	0	0	0	0	0	0	0	0	0	1	0	0
Nebraska	g	g	g	g	g	g	g	g	h	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	1	0	0
Nevada	g	g	g	g	g	g	g	g	h	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	1	0	0
New Hampshire	c	g	g	g	c	g	g	g	h	0	0	1	i	i	1	0	0	0	0	0	0	0	0	0	0	0	0	0	1	1	0
New Jersey	c	g	g	g	c	g	g	g	h	1	1	1	i	i	1	0	0	0	0	0	0	0	0	0	1	0	0	0	1	0	0
New Mexico	c	g	g	g	c	g	g	g	h	i	0	1	1	i	1	0	1	0	0	0	0	0	0	0	0	0	0	0	1	0	0
New York	c	g	g	g	c	g	g	g	h	0	0	1	0	1	1	0	0	0	0	0	0	0	0	0	0	0	0	0	1	0	0
North Carolina	c	g	g	g	c	g	g	g	h	i	i	1	i	i	1	0	0	0	0	0	0	0	0	0	0	0	0	1	0	0	0
North Dakota	c	g	g	g	c	g	g	g	h	0	0	1	i	0	i	0	0	0	0	0	0	0	0	0	0	0	0	0	1	0	0
Ohio	d	g	g	g	d	g	g	c	h	i	i	1	i	i	1	0	0	0	0	0	0	0	0	0	0	0	0	0	1	0	0
Oklahoma	c	g	g	g	c	g	g	g	h	i	i	1	1	i	1	0	0	0	0	0	0	0	0	0	0	0	0	0	1	0	0
Oregon	c	g	g	g	c	g	g	g	h	0	0	1	i	i	1	0	0	0	0	0	0	0	0	0	0	1	0	0	1	0	0
Pennsylvania	c	g	g	g	c	g	g	g	h	i	i	1	i	i	1	0	0	0	0	0	0	0	0	0	0	1	0	1	0	0	0
Rhode Island	c	g	g	g	c	g	g	g	h	i	0	1	i	0	1	0	0	0	0	0	0	0	0	0	0	0	0	1	1	0	0
South Carolina	b	g	g	g	b	g	g	g	c	1	1	1	i	1	i	0	0	0	0	0	0	0	0	0	0	0	1	0	0	0	0
South Dakota	g	g	g	g	g	g	g	g	h	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	1	0	0	0
Tennessee	c	g	g	g	c	g	g	g	h	i	i	1	i	i	1	0	0	0	0	0	0	0	0	0	1	0	1	0	0	0	0
Texas	c	g	g	g	c	g	g	g	h	i	i	1	i	1	1	0	0	0	0	0	0	0	0	0	0	0	0	1	0	1	0
Utah	c	g	g	g	c	g	g	g	h	i	i	1	i	i	1	0	0	1	0	0	0	0	1	0	0	0	1	0	1	0	0
Vermont	c	g	g	g	c	g	g	g	h	0	0	1	i	0	1	0	0	0	0	0	0	0	1	0	0	0	0	0	1	1	0
Virginia	g	g	g	g	g	g	g	g	h	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	1	0	0	0
Washington	c	g	g	g	c	g	g	g	c	1	i	1	i	1	1	0	0	0	0	0	0	0	0	0	0	0	0	1	0	1	0
West Virginia	h	g	g	g	h	g	g	g	h	i	i	i	i	i	i	0	0	0	0	0	0	0	0	0	0	0	0	0	1	0	0
Wisconsin	c	g	g	g	g	g	g	g	h	i	0	1	i	i	1	0	0	0	0	0	0	0	0	0	0	0	0	1	0	0	0
Wyoming	c	g	g	g	c	g	g	g	h	i	i	1	i	i	1	0	0	0	0	0	0	0	0	0	0	0	0	1	0	0	0

II-C Delphi Panel Members

APPENDIX II-C

DELPHI PANEL MEMBERS

The Delphi Panel included the leading experts on dram shop liability law in the United States and Canada. The members come from a wide variety of background and experience and represented both academic and practical perspectives. The membership included the authors of the major treatises on the topic, the authors of the ***Model Dram Shop Act of 1985****, which now guides much of the legislative activity in state capitols and is the only model legislation available, and defense and plaintiff experts. Finally the leading Canadian expert (Solomon) served on the panel. Canadian law is based on the same common law principles as U.S. law, and Solomon provided a valuable outside perspective on the importance of various legal factors in assessing the overall impact of a given state law. Collectively, as envisioned in the Delphi Panel Methodology, the panel provided a unique combination of knowledge, experience, and expertise. Detailed biographical sketches follow.*

Victor Colman*, J.D., has been working in the alcohol policy field for six years. His introduction to the alcohol field began in the dram shop arena. He worked extensively on a seminal dram shop case in California against a convenience store, which settled for a large sum of money and received nationwide publicity. While working directly with Mosher, he and others researched and developed the* ***Model Dram Shop Act of 1985****, which has provided the foundation for both the introduction and passage of dram shop legislation in over a dozen states. Mr. Colman has co-authored several law review articles on various aspects of liquor liability and co-authored with Mosher and others the legal treatise* ***Liquor Liability Law*** *(Matthew Bender Co. Inc. 1987). Mr. Colman has also consulted with numerous attorneys and retail alcohol beverage managers and owners on various aspects of liquor liability. Finally, Colman written extensively on the topic, including serving as primary author of the lead legal journal article on dram shop liability in California and has delivered numerous papers to public health, traffic safety, and responsible beverage service conferences across the country.*

James M. Goldberg*, J.D., is a Washington, D.C. attorney who serves as General Counsel to the National Alcoholic Beverage Control Association. He is the author of NABCA'S annual publication* ***Alcohol Server Liability****, which is a compilation of the commercial server and social host liability statutes of each state, plus summaries of relevant court decisions on the subject of server liability. His research regarding dram shop liability law in the 50 states is widely respected and relied upon by both scholars and practitioners. Goldberg has also lectured and consulted widely on the topic and has served in an advisory capacity to a variety of research and training programs. He has a J.D. degree from The George Washington University National Law Center, is a member of the District of Columbia and Maryland bars, and is admitted to practice before the Supreme Court of the United States.*

***Kathy Janes**, J.D., serves as a research analyst at the Prevention Research Center of the Pacific Institute for Research and Evaluation. She is a leading scholar on liquor liability law, liquor liability insurance, and alcohol control laws. She worked under Mosher on the federally funded research project which drafted the **Model Dram Shop Liability Act of 1985**. In 1986, she was a Post-Doctoral Research Fellow in the School of Public Health at the University of California, Berkeley, studying the dram shop liability insurance policy and its impact on public health. She is the author of "Dram Shop Statutes: Defenses and Statutory Limitations" (Chapter 6) and "Employer Liability" (Chapter 17) in Mosher, James F., **Liquor Liability Law**, (Matthew Bender, 1986). Other publications include **Analysis of Liquor Liability Insurance Claims and Risk**, Prevention Research Center Working Paper KJ 401, and "The Role of Formal Law in Alcohol Control Systems: A Comparison Among States," (with Paul Gruenewald), forthcoming in American Journal of Drug and Alcohol Abuse. Her research experience has on previous and current projects has given her a strong working knowledge of dram shop laws throughout the country.*

***James F. Mosher**, J.D., Program Director for the Marin Institute for the Prevention of Alcohol and Other Drug Problems, has conducted extensive studies of dram shop liability laws and their potential for preventing alcohol-related traffic crashes. His first article on the topic was published in 1979, and provides the benchmark for future research. He was principal investigator for a study of dram shop laws (1983-1985) awarded by the National Institute for Alcohol Abuse and Alcoholism, which resulted in the drafting of the **Model Dram Shop Act of 1985**. The Model Act has since been adopted in three states and has framed the legislative debate on the topic in more than a dozen other jurisdictions. Mosher is the primary author of the two volume legal treatise **Liquor Liability Laws**, published by Matthew Bender Co. Inc. (1987), which is the most comprehensive treatment of dram shop liability available. Mosher has testified before numerous state and federal legislative and policy bodies on dram shop liability and is acknowledged as one of the leading experts on the topic nationwide.*

***Michael Sabbeth**, J.D., is a private plaintiff attorney who practices in Denver, Colorado. One of the leading plaintiff attorneys in the dram shop field, he has extensive experience in the practical aspects of handling such claims from a plaintiff's perspective. He has lectured at national, regional and local workshops on dram shop liability claims, has developed a server training curricula and conducted trainings for private clubs and commercial retail establishments.*

***Ronna Schmoker**, is the Litigation Manager for S & A Restaurant Corporation in Dallas, Texas, where she has been employed for 8 years. S & A operates 386 Steak and Ale and Bennigan's restaurants in 32 states nationwide. In her capacity as Litigation Manager, she manages the practical aspects of the multitude of dram shop law suits brought against the company each year. She is responsible for maintaining company records, including the records of all dram shop cases and has extensive experience in*

all aspects of dram shop liability litigation, from the defense perspective, and has a working knowledge of state dram shop laws throughout the country. Schmoker also serves as Treasurer of the Responsible Beverage Service Council. She holds a Bachelor of Business Administration Degree from the University of North Texas.

***Robert Solomon,** J.D., Professor of Law, University of Western Ontario, London, Ontario, Canada, is the leading scholar on dram shop liability law and alcohol regulatory policy in Canada. He has written extensively on the topic, including developing a training curriculum on liability law for industry, government, and University campuses as it pertains to server training programs. His writings include a chapter in **Liquor Liability Law** (Matthew Bender Co., Inc. [1987]) on Canadian law. Solomon has also lectured extenstwely in both Canada and the United States.*

II-D Memorandum to Delphi Panel Members -- Delphi Panel Procedures

THE MARIN INSTITUTE

FOR THE PREVENTION OF ALCOHOL AND OTHER DRUG PROBLEMS

APPENDIX II-D

MEMORANDUM

To: Delphi Panel Members

From: Jim Mosher

Re: Delphi Panel procedures

Date: November 10, 1988

Thank you for agreeing to participate in the Delphi Panel to assess the relative risks of dram shop liability in each of the 50 states. As I have discussed with each of you by telephone and letter, the Panel will be meeting from 9:00 a.m. - 5:00 p.m., December 5, 1988 at the Marin Institute, 1040 B Street, San Rafael, CA 94901, (415) 456-5692. Please contact Toni Clifton or me if you need any assistance in making travel arrangements.

The Delphi Panel is part of a larger research project funded by the National Highway Traffic Safety Administration (NHTSA) to study the impact of dram shop liability laws on alcohol-related motor vehicle crashes. C & H Resource Associates, Inc., is the grantee to conduct the project (with Harold Holder serving as Project Director). C & H has subcontracted with the Marin Institute to conduct the legal research aspects of the project. I am supervising the Marin Institute portion of the project, and Kathy Janes, also an attorney, is serving as legal consultant. Both Kathy and I will participate in the Delphi Panel process.

The Task of the Delphi Panel: Creating a "Liability Exposure Scale"

Our task is critical to the overall project design. As each of you know, dram shop laws and case opinion vary widely by state, with a variety of key variables involved -- what acts give rise to liability, what liability standard is applied, and so on. For the project to succeed, we need to provide some means of comparing the relative severity of the dram shop laws across the states. By severity, or "liability exposure," I mean the relative risk of a successful lawsuit being pursued against a licensee, factoring in the potential for very large settlements and judgment (since some states put caps on the size of judgments).

We need to determine the relative "liability exposure" of each state's dram shop laws in order to proceed to the remaining steps in the project. It will provide us a basis for comparing states' experiences with dram shop laws and their impact on traffic crash experiences. Do states with relatively high liability exposure have relatively lower traffic crashes? If a state enacts a new dram shop

TELEPHONE: 415 456-5692
1040 B STREET, SUITE 300
SAN RAFAEL, CALIFORNIA
USA 94901

statute that strictly limits dram shop liability, will traffic crash rates go up (and vice versa)? Development of a liability exposure scale is needed because of the diversity in the law among the states. Simply dividing states between those that do have liability and those that do not will create spurious results, since a state with a very limited statute may actually provide more protection to licensees than a state with an uncertain case history.

A liability exposure scale requires identifying and rating the key factors contributing to the exposure. Kathy and I have developed such a list, that includes 25 factors, grouped into five categories. Our list is based on our analysis of all major appellate court cases and statutes as well as a review of all major treatises and law review articles on the topic. Most of these should be familiar to you, although some exist in only a small number of states. We have included a brief annotation or description of each of the factors.

The Delphi Panel's task is to assign a numerical value to each factor to indicate the contribution of that factor to a state's overall liability exposure, with each factor rated on a scale from -10 to +10. After each factor is given a score, they are added together to determine the overall state score, with the bottom of the scale indicating no risk of liability within that state, and the top of the scale indicating very high risk.

For example, state "x" may permit suits for serving minors only, uses a negligence liability standard, and has no recovery cap. State "y" may allow suits for serving minors as well as obviously intoxicated adults, requires a showing of wanton conduct, and places a recovery cap of $15,000. Serving minors, an act giving rise to liability, may be deemed to have a severity value of +5; serving an intoxicated adult, another act giving rise to liability, may be deemed to have a severity value of +8. The negligence standard may be rated as a +6, and the wantonness requirement a +1. The recovery cap, which greatly reduces the severity of the state's dram shop law, may have a value of -10. Using these values, state "x" would have a severity score of +11, while state "y" would have a value of +4.

The Delphi Panel Process

This is obviously an imperfect process, which must be based on opinion and experience rather than objective, scientific measures. That is why we have chosen a Delphi Panel methodology for developing the scale. The Delphi Panel relies on the knowledge of experts to conduct this type of rating or prediction when scientific indices are not available. The concept is to facilitate discussion and debate among experts who represent a broad range of perspectives and expertise on a particular topic in a format that will lead to consensus regarding the particular phenomenon being predicted.

The particular format used in a Delphi Panel varies. For this project the following procedure will be followed: Discussion will begin regarding the definition and scope of each variable. Each of the seven members of the panel will then be asked to conduct a preliminary rating on an individual basis. The scores will be reported to the full group. Factors which receive widely divergent scores will be identified and discussed, followed by a second individual rating, also reported to the full group. This process will be continued until a maximum level of consensus is reached.

During the discussion and rating process, project staff will be able to provide the panel with direct feedback regarding how a particular rating scheme would translate into a score for a particular set of states, thus facilitating the rating process. However, you as members are not expected to be familiar with the factors of particular states. We are instead interested in your opinion and knowledge of how dram shop liability claims are affected by these key factors, and we as staff will provide information on particular state laws at the request of the panel to facilitate discussion.

We recognize that many variables that affect liability exposure are not included in our factors list -- for example court procedures regarding jury selection, availability of attorneys, court philosophy regarding settlements and the like. We have chosen to focus particularly on factors related directly to the dram shop law itself because of the difficulties in identifying and researching these diverse elements in all states. Because we are primarily interested in the impact of dram shop reform in a particular state over time, the scale will be useful provided these outside factors remain constant before and after the reform in implemented.

One final note: some states provide two independent causes of action for dram shop liability -- one under common law and one by statute (where the statute has been determined not to preempt common law). In these cases, we will include in our study the cause of action which creates the greatest exposure to liability.

Tasks Prior to December Meeting

The agenda for the December 5 meeting will obviously be full just conducting the Delphi Panel. We therefore hope to minimize discussion regarding the factor list itself. Kathy and I have endeavored to include all major elements of dram shop liability law. However, we may have framed the factors inappropriately or left out something needed to be included.

Please review the enclosed material to assess the comprehensiveness of the list. If you have comments, questions, concerns, or proposed revisions please contact either Kathy or me as soon as possible, either by telephone or mail. Kathy can be reached at Prevention Research Center, 2532 Durant Avenue, Berkeley, CA 94704 (415) 486-1111; I can be reached at the Marin Institute 1040 B Street, Suite 300, San Rafael, CA 94901 (415) 456-5692. We will attempt to incorporate your comments into a final list before December 5.

It would also be helpful, but not critical, if you take the time to play with the rating scale, and in the process begin thinking about the relative weight that should be given to each of the factors. If in your experience, California's law is more restrictive than Massachusetts, why? How would that be translated into numerical values?

I am sure that, by now, I have thoroughly confused you. If that is your feeling, please do not despair. The Delphi Panel should be a rewarding experience, and through the process itself the issues should become more clear.

Thanks again for you willingness to help on this important research project. I look forward to seeing you December 5.

LIQUOR LIABILITY RESEARCH PROJECT

DELPHI PANEL MEETING

DECEMBER 5, 1988

AGENDA

9:00 a.m.	Convene, Introduction of Panel Members
9:15 a.m.	Description of Panel Methods
9:30 a.m.	Initial Rating of Liability Factors
10:30 a.m.	Break
10:45 a.m.	Review of discussion of Category Weights & State Scores
11:45 a.m.	Second Rating of Liability Factors
12 noon	Break for Lunch
1:00 p.m.	Review and Discussion of State Scores and Category Weights
3:00 p.m.	Break
3:15 p.m.	Final Determination of Category Weights
4:30 p.m.	Nomination of Change States
5:00 p.m.	Adjourn

II-E Memorandum to Delphi Panel Members -- Final Review of Panel Results

THE MARIN INSTITUTE

FOR THE PREVENTION OF ALCOHOL AND OTHER DRUG PROBLEMS

APPENDIX II-E

MEMORANDUM

TO: Delphi Panel members

FROM: Jim Mosher and Kathy Janes

RE: Final Review of Panel Results

DATE: February 2, 1989

We have enclosed two documents for your review as part of our Delphi Panel process:

1) Proposed Changes in State Factors List:

We have reviewed in detail our research regarding state dram shop law variables and have made numerous, mostly technical, changes, based on discussions that occurred at the Panel meeting; and

2) Draft Panel Report:

This is the first of two anticipated reports, which addresses the needs of the NHTSA project as a whole. Our charge here is to make recommendations for case study states based on their history with dram shop law and their status as "high" or "low" liability states.

The first document, regarding proposed changes, represents an additional, and hopefully final, part of the Delphi Panel process. The changes, we believe, represent Panel concerns and comments and provide a necessary fine tuning of our results. They do cause some shifting in the state rankings, but the shifting is modest. Please review the proposed changes and their impact on the state rankings, You need to address two critical questions: (1) are the changes correct? and (2) given the changes and their impact on the state rankings, should the scores for each variable remain the same? Please send your comments and proposed changes, if any, regarding variable scoring, together with your reasoning to us no later than February __. If we do not hear from you by that date, we will assume that you agree with the changes proposed. Any comments will be circulated for further review by the Panel.

TELEPHONE: 415 456-5692
1040 B STREET, SUITE 300
SAN RAFAEL, CALIFORNIA
USA 94901

Please review the draft final report as well. Your comments and suggestions are welcome. This report will be followed by a more detailed analysis of our findings, geared toward a legal audience. We will send you a copy of final version of the enclosed report after we have incorporated all comments.

Thank you again for your participation in the Panel. I believe our results will be a significant contribution not only to the NHTSA project, but to researchers and practitioners generally.

DELPHI.MEM
2/1/89

PROPOSED CHANGES IN STATE VARIABLES

Our review of the state variables list, based on comments received at the Panel meeting resulted in numerous changes. The most important involves the issue of contributory/comparative defenses. In our original cataloguing, we based the status of state law on dram shop cases and statutes only. As was pointed out at the Panel, the contributory/comparative defense issue may have been resolved in case law or statute found outside the specific dram shop area. We have now reviewed this matter and determined, in numerous cases, that the law is in fact settled in states where we had assumed it was inconclusive or where we had relied on outdated law. All but 11 states experienced some change in this category. We have not detailed these changes in this memo. They can be reviewed by comparing our December variable list for variables 24 and 25 with the new January list (both enclosed).

The net result of this change and the other, technical, changes listed below by State is modest in terms of the overall state rankings. As discussed in the draft final report, we plan to describe our results by placing states in six groups (very high; high; medium; low medium; low; and no. We are using these groupings because our scoring system is based on subjective (albeit expert) judgments and because so many states are separated by a very few points.

Only Louisiana experienced a major shift, from #3 to #37 (or from very high to low), as a result of our reinterpretation of the Louisiana statute (this was discussed at the December meeting). While there was considerable shifting among other states, the overall rankings are remarkably similar, with only eight states moving either up or down one group: New Jersey, Hawaii, Illinois (all three moving up one category), and Kentucky, Iowa, Tennessee, Georgia, and Alabama (all moving down one category).

Note that we are only proposing changes in how state law is described in our state variables list. We have not made any changes in our variables scores which resulted from our deliberations and consensus scoring. The critical issues for your review are: (1) are the proposed modifications accurate, and (2) do they alter your vote regarding any of the variable scores, and if so how?

Please review the enclosed list of changes and new state ranking list. If you have specific comments regarding either of these issues please send them, with your reasoning, to us by February __ for review by all Panel members. If we do not hear from you by that date, we will assume you agree with our proposed changes and new rankings.

Proposed changes in state variables, listed by state, are as follows:

Delaware: 1(h) changed to 1(g) (no liability for service to minors rather than uncertain). Case law regarding no liability for service to intoxicated persons implicitly applies to causes of action based on service to minors.

District of Columbia and Hawaii: 1(h) changed to 1(b) (uncertain liability for service to minors changed to liability under a per se negligence theory). Logic of service to adults case law implicitly applies to service to minors cases.

Georgia: Change 1(a) to 1(d) (from strict liability for serving minor to reckless willful and wanton). Original score based on very restrictive "parental rights" statute, which provides for strict liability but which places severe restrictions procedurally. New rating based solely on main statute.

Illinois: Change 1(g) to 1(a) (no liability for service to minors to strict liability for service to minors). Statute establishes strict liability for service to any person. It thus covers both service to minors and service to adults.

Iowa: Change 5(c)to 5(g). Variables 4 and 5 should be treated as mutually exclusive (service to person who becomes intoxicated; service to obviously intoxicated person -- code only the most liberal standard).

Louisiana: Statute interpreted to permit no liability (from previous analysis of case law applying to social hosts). This major change was recommended by the Panel.

Michigan: Change 1(g) to 1(c) (from no liability for serving minors to negligence standard for serving minors). Statute reinterpreted by staff. Also change 26(1) to 26(0). Responsible Business Defense determined to be too weak to include (found in case law only without any specific guidelines).

North Carolina: Change 26(1) to 26(0). Responsible Beverage Service Defense found in statute, but common law liability, which is broader and inclusive a statute, is still recognized. Thus, RBS Defense is not a practical barrier since plaintiff can proceed under common law.

Oklahoma: Change 1(h) to 1(c) (cause of action for serving minor from uncertain to recognized. Cause of action for serving minors can be implied in law governing liability for service to intoxicated adults.

South Carolina: Change 11(0) to 11(1); 1(h) to 1(b). Case law permits adult drinkers to sue. Ability of minors to sue implicitly included in adult drinker case. Cause of action for serving minors (negligence per se) implicit in case law creating negligence per se action for service to intoxicated adults.

Wyoming: Change 2(c) to 2(g). Variables 1 and 2 are mutually exclusive; code only the broadest provision.

II-F State Values for Each Legal Factor

APPENDIX II-F State Values for Each Legal Factor

STATE SCORES (missing=uncertain wt.)	1	2	3	4	5	6	7	8	9	11	12	13	14	15	16	17a	17b	17c	18a	18b	18c	19a	19b	20	21	22	23	24	25	26	27	Total
Alabama	11.8	0.0	0.0	0.0	10.6	0.0	0.0	0.0	8.2	3.6	4.3	9.0	4.4	6.0	6.3	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	-7.0	0.0	0.0	0.0	57.3
Alaska	11.8	0.0	0.0	0.0	0.0	3.3	0.0	0.0	8.2	3.6	4.3	9.0	2.2	3.0	6.3	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	51.8
Arizona	11.8	0.0	0.0	0.0	10.6	0.0	0.0	0.0	8.2	3.6	0.0	9.0	0.0	0.0	6.3	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	-7.0	0.0	0.0	0.0	42.5
Arkansas	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	8.2	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	8.2
California	0.0	0.0	7.2	0.0	0.0	0.0	0.0	0.0	8.2	7.3	0.0	9.0	2.2	3.0	6.3	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	43.2
Colorado	5.5	0.0	0.0	0.0	5.0	0.0	0.0	1.6	8.2	0.0	0.0	9.0	2.2	0.0	6.3	0.0	-6.7	0.0	0.0	0.0	0.0	-2.7	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	28.4
Connecticut	11.8	0.0	0.0	0.0	14.7	0.0	0.0	0.0	8.2	3.6	4.3	9.0	4.4	3.0	6.3	-8.6	0.0	0.0	-7.4	0.0	0.0	-2.7	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	46.7
Delaware	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	8.2	3.6	0.0	4.5	2.2	3.0	3.1	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	-7.0	0.0	0.0	0.0	17.7
District of Columbia	13.2	0.0	0.0	0.0	11.9	0.0	0.0	0.0	8.2	3.6	4.3	9.0	2.2	3.0	6.3	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	-3.5	0.0	0.0	0.0	58.3
Florida	5.5	0.0	0.0	0.0	0.0	0.0	2.3	0.0	8.2	3.6	4.3	9.0	2.2	3.0	6.3	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	44.4
Georgia	5.5	0.0	0.0	0.0	5.0	0.0	0.0	0.0	8.2	0.0	0.0	9.0	2.2	0.0	6.3	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	36.2
Hawaii	13.2	0.0	0.0	0.0	11.9	0.0	0.0	0.0	8.2	3.6	0.0	9.0	2.2	0.0	6.3	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	54.5
Idaho	11.8	0.0	0.0	0.0	10.6	0.0	0.0	0.0	8.2	0.0	0.0	9.0	0.0	0.0	3.1	0.0	0.0	0.0	0.0	0.0	-4.3	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	38.5
Illinois	16.4	0.0	0.0	19.4	0.0	0.0	0.0	0.0	10.6	0.0	0.0	9.0	0.0	0.0	6.3	-8.6	0.0	0.0	0.0	0.0	0.0	-2.7	0.0	0.0	0.0	0.0	0.0	-7.0	0.0	0.0	0.0	43.4
Indiana	13.2	0.0	0.0	0.0	11.9	0.0	0.0	0.0	10.6	7.3	8.6	9.0	4.4	6.0	6.3	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	-7.0	0.0	0.0	0.0	70.3
Iowa	0.0	0.0	7.2	14.0	0.0	0.0	0.0	0.0	8.2	3.6	4.3	9.0	0.0	3.0	6.3	0.0	0.0	0.0	0.0	0.0	-4.3	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	51.3
Kansas	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	8.2	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	8.2
Kentucky	13.2	0.0	0.0	0.0	10.6	0.0	0.0	0.0	8.2	3.6	4.3	9.0	4.4	3.0	3.1	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	-7.0	0.0	0.0	0.0	52.6
Louisiana	11.8	0.0	0.0	0.0	0.0	0.0	0.0	0.0	8.2	0.0	0.0	9.0	4.4	6.0	6.3	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	-7.0	0.0	0.0	0.0	38.7
Maine	11.8	0.0	0.0	0.0	10.4	0.0	0.0	0.0	8.2	7.3	0.0	9.0	4.4	0.0	6.3	0.0	0.0	-2.6	0.0	0.0	-4.3	0.0	-1.1	-4.0	-7.4	0.0	0.0	0.0	0.0	-5.7	0.0	32.5
Maryland	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	8.2	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	-7.0	0.0	0.0	0.0	1.2
Massachusetts	11.8	0.0	0.0	0.0	11.9	0.0	0.0	0.0	8.2	3.6	4.3	9.0	2.2	3.0	6.3	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	60.3
Michigan	11.8	0.0	0.0	14.0	0.0	0.0	0.0	0.0	8.2	0.0	0.0	9.0	0.0	0.0	6.3	0.0	0.0	0.0	0.0	-6.0	0.0	0.0	-1.1	-4.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	38.2
Minnesota	11.8	0.0	0.0	0.0	10.6	0.0	0.0	0.0	8.2	0.0	0.0	9.0	0.0	3.0	6.3	0.0	0.0	0.0	0.0	-6.0	0.0	0.0	-1.1	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	41.8
Mississippi	13.2	0.0	0.0	0.0	11.9	0.0	0.0	0.0	8.2	3.6	4.3	9.0	2.2	3.0	6.3	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	61.8
Missouri	1.7	0.0	0.0	0.0	1.5	0.0	0.0	0.0	8.2	3.6	4.3	9.0	2.2	3.0	6.3	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	-7.0	0.0	0.0	0.0	32.8
Montana	11.8	0.0	0.0	0.0	10.6	0.0	0.0	0.0	8.2	3.6	4.3	9.0	2.2	3.0	6.3	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	59.0
Nebraska	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	8.2	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	8.2
Nevada	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	8.2	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	8.2
New Hampshire	11.8	0.0	0.0	0.0	10.6	0.0	0.0	0.0	8.2	0.0	0.0	9.0	2.2	3.0	6.3	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	-5.7	0.0	45.4
New Jersey	11.8	0.0	0.0	0.0	10.6	0.0	0.0	0.0	8.2	7.3	8.6	9.0	2.2	3.0	6.3	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	-7.4	0.0	0.0	0.0	0.0	0.0	0.0	59.5
New Mexico	11.8	0.0	0.0	0.0	10.6	0.0	0.0	0.0	8.2	3.6	0.0	9.0	4.4	3.0	6.3	0.0	-6.7	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	50.3
New York	11.8	0.0	0.0	0.0	10.6	0.0	0.0	0.0	8.2	0.0	0.0	9.0	0.0	6.0	6.3	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	51.9
North Carolina	11.8	0.0	0.0	0.0	10.6	0.0	0.0	0.0	8.2	3.6	4.3	9.0	2.2	6.0	6.3	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	-7.0	0.0	0.0	0.0	55.0
North Dakota	11.8	0.0	0.0	0.0	10.6	0.0	0.0	0.0	8.2	0.0	0.0	9.0	2.2	0.0	3.1	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	45.0
Ohio	5.5	0.0	0.0	0.0	5.0	0.0	0.0	1.6	8.2	3.6	4.3	9.0	2.2	3.0	6.3	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	48.8
Oklahoma	11.8	0.0	0.0	0.0	10.6	0.0	0.0	0.0	8.2	3.6	4.3	9.0	4.4	3.0	6.3	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	61.3
Oregon	11.8	0.0	0.0	0.0	10.6	0.0	0.0	0.0	8.2	0.0	0.0	9.0	2.2	3.0	6.3	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	-7.6	0.0	0.0	0.0	0.0	0.0	43.5
Pennsylvania	11.8	0.0	0.0	0.0	10.6	0.0	0.0	0.0	8.2	7.3	8.6	9.0	2.2	6.0	6.3	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	70.0
Rhode Island	11.8	0.0	0.0	0.0	10.6	0.0	0.0	2.2	8.2	3.6	0.0	9.0	2.2	0.0	6.3	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	-5.7	0.0	48.3
South Carolina	13.2	0.0	0.0	0.0	11.9	0.0	0.0	0.0	10.6	7.3	8.6	9.0	2.2	6.0	3.1	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	-7.0	0.0	0.0	0.0	65.0
South Dakota	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	8.2	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	8.2
Tennessee	11.8	0.0	0.0	0.0	10.6	0.0	0.0	0.0	8.2	3.6	4.3	9.0	2.2	3.0	6.3	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	-7.6	0.0	-7.0	0.0	0.0	0.0	44.5
Texas	11.8	0.0	0.0	0.0	10.6	0.0	0.0	0.0	8.2	3.6	4.3	9.0	2.2	6.0	6.3	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	-9.0	53.0
Utah	11.8	0.0	0.0	0.0	10.6	0.0	0.0	0.0	8.2	3.6	4.3	9.0	2.2	3.0	6.3	0.0	0.0	-2.6	0.0	0.0	0.0	0.0	-1.1	0.0	0.0	0.0	0.0	0.0	0.0	..0	0.0	55.3
Vermont	11.8	0.0	0.0	0.0	10.6	0.0	0.0	0.0	8.2	0.0	0.0	9.0	2.2	0.0	6.3	0.0	0.0	0.0	0.0	0.0	0.0	0.0	-1.1	0.0	0.0	0.0	0.0	0.0	0.0	-5.7	0.0	41.3
Virginia	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	8.2	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	-7.0	0.0	0.0	0.0	1.2
Washington	11.8	0.0	0.0	0.0	10.6	0.0	0.0	0.0	10.6	7.3	4.3	9.0	2.2	6.0	6.3	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	-7.0	0.0	-5.7	0.0	55.4
West Virginia	9.2	0.0	0.0	0.0	8.2	0.0	0.0	0.0	8.2	3.6	4.3	4.5	2.2	3.0	3.1	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	46.4
Wisconsin	11.8	0.0	0.0	0.0	0.0	0.0	0.0	0.0	8.2	3.6	0.0	9.0	2.2	3.0	6.3	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	44.2
Wyoming	11.8	0.0	0.0	0.0	10.6	0.0	0.0	0.0	8.2	3.6	4.3	9.0	2.2	3.0	6.3	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	59.0

III-A Summary of Liquor Liability Claims Filed or Settled in 1987
-- Oregon Liquor Control Commission

APPENDIX III-A Oregon Liquor Control Commission

SUMMARY OF LIQUOR LIABILITY CLAIMS FILED OR SETTLED IN 1987

Name of Ins. Company	Claim No.	Name of Premises	Kind of License	# Licenses Issued Statewide	Date of Incident	Date Claim Closed	Indemnity Paid	Other Indemnity
Classified Ins. Corp.	87-345	Rogue Riviera Supper Club	DA	1200	12-11-87	Not Settled Yet	Not Settled Yet	Unknown
Comstock Ins.	78 36 88	Holiday Inn (Eugene-225 Coburg)	DA	1200	04-12-85	04-21-87	$100,000	Unknown
Comstock Ins.	784852	Margie's Eola Inn	DA	1200	09-03-84	02-02-88	0	Unknown
Comstock Ins.	780765	Office 290	RMB	1459	11-03-83	07-24-87	$ 60,000	Unknown
Comstock Ins.	679883	Rodeo	DA	1200	11-11-83	11-06-85	0	Unknown
Comstock Ins.	782661	The Freeloader Tavern	RMB	1459	06-01-83	05-14-87	$ 20,000	Unknown
Fireman's Fund Insurance	B864L86 564841	Plaid Pantry	PS	3088	10-10-86	Not Settled Yet	Not Settled Yet	Unknown
Fireman's Fund Insurance	B864L87 565694	Lila's Lounge	DA	7200	01-30-87	11-05-87	0	Unknown
Fireman's Fund Insurance	B864L87 567464	Newport Bay	DA	7200	08-08-87	Not Settled Yet	Not Settled Yet	Unknown
Fireman's Fund Insurance	B864L85 559830	Siskiyou Winery	Winery	72	06-08-85	11-19-87	$ 23,000	Unknown
Guaranty National Companies	092685	Who's Harry Tavern	RMB	1459	09-26-85	Not Settled Yet	Not Settled Yet	Unknown
Guaranty National Companies	092185	Taylor's Viewpoint	DA	7200	09-21-85	Not Settled Yet	Not Settled Yet	Unknown
Guaranty National Companies	011285	The Palm Steakhouse	RMB	1459	01-12-85	01-13-87	0	Unknown

Name of Ins. Company	Claim No.	Name of Premises	Kind of License	# Licenses Issued Statewide	Date of Incident	Date Claim Closed	Indemnity Paid	Other Indemnity
Guaranty National Companies	030385	Danny's Den	DA	1200	03-03-85	09-28-87	$ 98,478	$257,500
Guaranty National Companies	030285	B & I Tavern	RMB	1459	03-02-85	07-22-87	$ 2,500	Unknown
Guaranty National Companies	112584	Joe's Pastime Tavern	RMB	1459	11-25-84	04-07-87	$ 35,000	$ 97,500
Insurance Company of the West	110-88-00008	Shamrock Inn	DA	1200	11-08-87	02-26-88	0	0
Oregon Mutual Insurance Co.	719784	Sunnyside Inn	DA	1200	08-01-83	07-21-87	$487,500	0
Oregon Mutual Insurance Co.	OP5086481 723410	Kowloon Restaurant	DA	1200	06-30-85	05-13-87	$375,000	0
Ranger Insurance	456093	Omar's Restaurant	DA	1200	12-18-56	05-26-87	0	$ 1 750
Ranger Insurance	461221	Lung Fung	DA	1200	11-29-86	Not Settled Yet	Not Settled Yet	Unknown
Royal Insurance Co. of America	4P913Af 0540-00	Diary Mart	PS	3088	02-05-87	10-09-87	0	Unknown
Traveler's Indemnity	B304235	Grocery Carts	PS	3088	12-19-86	Not Settled Yet	Not Settled Yet	Unknown
United Employers Insurance	UE 30270	Surfrider	DA	1200	03-14-86	Not Settled Yet	Not Settled Yet	Unknown
U.S. Fidelity & Guaranty Co.	7603L 002947-001	Mad Trapper	DA	1200	07-25-87	Not Settled Yet	Not Settled Yet	Unknown
U.S. Fidelity & Guaranty Co.	7603L 002947-015	Mad Trapper	DA	1200	07-25-87	Not Settled Yet	Not Settled Yet	Unknown
U.S. Fidelity & Guaranty Co.	7603L 002947-023	Mad Trapper	DA	1200	07-25-87	Not Settled Yet	Not Settled Yet	

Name of Ins. Company	Claim No.	Name of Premises	Kind of License	# Licenses Issued Statewide	Date of Incident	Date Claim Closed	Indemnity Paid	Other Indemnity
U.S. Fidelity & Guaranty Co.	7603L 900130-00	Mad Trapper	DA	1200	07-25-87	Not Settled Yet	Not Settled Yet	
U.S. Fidelity & Guaranty Co.	7602L 008383-00-1	The Ship Inn	DA	1200	05-14-86	12-01-87	$ 6,000	$ 32,000
Valley Ins. Co.	63678-9	Tom Tom	DA	1200	09-17-85	11-12-87	0	0
Vausau Underwriters Ins. Co.	M53-040439	McCormick's Fish House & Bar - Beaverton	DA	1200	10-10-85	11-12-87	0	0
Vausau Underwriters Ins. Co.	M53-041257	Captain Ankeny's Well	RMB	1459	06-09-85	07-21-87	$ 21,091	$ 42,182
Vausau Underwriters Ins. Co.	M53-041038	Captain Ankeny's Well	RMB	1459	06-09-85	07-22-87	$ 18,695	0

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III-B Liquor Liability Insurance Report -- Vermont -- 1987

APPENDIX III-B

LIQUOR LIABILITY INSURANCE REPORT

VERMONT

Calendar Year 1987

Written/Paid Report

COMPANY	PREMIUMS WRITTEN	POLICIES WRITTEN	CLAIMS PAID	CLAIM COUNT	AVERAGE PAID CLAIM
Columbia Cas.	$1563081	551	$13958	1	$13958
Continental	65083	13	0	0	
Travelers	15103	N/A	0	0	
N.H. Group	21191	18	0	0	
Frontier	35994	17	0	0	
Fireman's Fund	14076	35	0	0	
Nationwide	8057	N/A	0	0	
U.S.F.& G.	32792	12	1180	0	
CIGNA	17136	9	0	0	
Home	4428	N/A	0	0	
American Empire	0	0	14993	2	7497
TOTALS	$1776941	655	$30131	3	$10044

Earned/Incurred Report

COMPANY	PREMIUMS EARNED	CLAIMS INCURRED	CLAIM COUNT	LOSS RATIO	AVERAGE INCURRED CLAIM
Columbia Cas.	$1758660	$ 704463	16	0.40	$44029
Continental	64329	0	0	0.00	
Travelers	24720	-4550	0	-0.18	
N.H. Group	38345	0	0	0.00	
Frontier	41787	27278	0	0.65	
Fireman's Fund	8232	35	0	0.00	
Nationwide	11605	0	0	0.00	
U.S.F.& G.	57529	3785	0	0.07	
CIGNA	8573	1718	0	0.20	
Home	5001	0	0	0.00	
American Empire	0	-3397	0	-	
TOTALS	$2018781	$ 729332	16	0.36	$45583

* Represents recovery made by company through subrogation or overreserving.

APPENDIX III-B (continued)

LIQUOR LIABILITY INSURANCE REPORT

COUNTRYWIDE

Calendar Year 1987

Written/Paid Report

COMPANY	PREMIUMS WRITTEN	POLICIES WRITTEN	CLAIMS PAID	CLAIM COUNT	AVERAGE PAID CLAIM
Columbia Cas.	$16087541	4394	$ 1383322	83	$ 16667
Continental	2316475	587	372462	6	62077
Travelers	2083850	N/A	119408	9	13268
N.H. Group	60549	50	4510	11	410
Frontier	4346478	2634	841885	42	20045
Fireman's Fund	9328460	13400	156613	21	7458
Nationwide	1020411	N/A	133476	24	5561
U.S.F.& G.	3475945	2182	485406	78	6223
CIGNA	7076256	5747	5647123	430	13133
Home	2468509	N/A	1491981	N/A	N/A
American Empire	203023	13	1523114	51	29865
TOTALS	$48467497	29007	$12159300	755	$ 16105

Earned/Incurred Report

COMPANY	PREMIUMS EARNED	CLAIMS INCURRED	CLAIM COUNT	LOSS RATIO	AVERAGE INCURRED CLAIM
Columbia Cas.	$16944002	$ 8137280	185	0.48	$ 43985
Continental	1812776	1114914	4	0.62	278729
Travelers	2212757	293384	8	0.13	36673
N.H. Group	123752	171010	9	1.38	19001
Frontier	5776691	4738973	223	0.82	21251
Fireman's Fund	9152984	3786268	70	0.41	54090
Nationwide	1078683	200306	18	0.19	11128
U.S.F.& G.	3650843	877204	152	0.24	5771
CIGNA	6051423	4830937	305	0.80	15839
Home	2720294	1387880	N/A	0.51	N/A
American Empire	570179	268867	6	0.47	44811
TOTALS	$50094384	$25807023	980	0.52	$ 26334

III-C Liquor Liability Report -- Michigan Dept. of Licensing and Regulation -- 1988

APPENDIX III-C

STATE OF MICHIGAN

INSURANCE BUREAU
P.O. BOX 30220
LANSING, MI 48909

JAMES J. BLANCHARD, Governor

DEPARTMENT OF LICENSING AND REGULATION

RAYMOND W. HOOD, SR., Director

March 17, 1989

MEMORANDUM

TO: The Liquor Control Commission, All Members of the House of Representatives Committees on Insurance and Liquor Control, and All Members of the Senate Committee on Commerce

FROM: Dhiraj N. Shah
Acting Commissioner of Insurance

SUBJECT: Liquor Liability Report

In accordance with Public Act 176 of 1986, as of April 1, 1988, all retail liquor licensees must show proof of financial responsibility in amounts of $50,000 or more in order to obtain or renew a liquor license. This proof may be in the form of a liquor liability policy. The requirement remains in effect subject to an annual study of the market and the subsequent determination by the Insurance Commissioner that this insurance is available in Michigan at a reasonable premium. Attached is a final report and certification on the availability and pricing of liquor liability insurance in Michigan

Since 1987, the liquor liability market has become increasingly competitive. At least 95 companies are currently providing this insurance to Michigan liquor licensees and this competition is having an impact on the reduction of rates. Additionally, 1987 insurer loss ratios were lower than projected which has further stimulated rate reductions as well as insurer entrance into the market. In response to a request by the Commissioner, minimum premiums have also been reduced by most admitted insurers which will enable small retailers to obtain policies at considerably lower premiums than in 1988. Overall, this insurance is reasonably available to all classifications of liquor licensees and it is available at a reasonable premium.

Attachment

THE AVAILABILITY AND PRICING OF LIQUOR LIABILITY INSURANCE

A REPORT BY THE

MICHIGAN COMMISSIONER OF INSURANCE

INSURANCE BUREAU
DEPARTMENT OF LICENSING AND REGULATION

MARCH 1989

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I

INTRODUCTION

Background

Within the insurance industry there exists an underwriting cycle which is characterized by successive periods of increasing and diminishing competition known as "soft" and "hard" markets. In 1985, the commercial liability insurance market in general, and the liquor liability insurance market in particular, were extremely hard. Rates were high, available sources were scarce and many Michigan liquor retailers were "going bare"-- conducting business without protection of insurance. At that time, two surplus lines insurers dominated the liquor liability insurance market in this state, writing 96 percent of the earned premium. Citing unprofitability of the line due to frequent lawsuits and high damage awards to plaintiffs in Michigan, few admitted insurers wrote liquor liability insurance and, if so, only in minimal amounts in conjunction with a general liability policy.

In 1986, the market began to soften due to a number of legislative changes which took place. First, the Commissioner of Insurance, pursuant to Section 6506 of the Insurance Code, held a public hearing and determined that liquor liability insurance was not readily available in Michigan at a reasonable premium. He then issued an order which allowed for the formation of limited liability pools for the purpose of issuing liquor liability insurance policies.

Additionally, in 1986, the Legislature passed a series of dramshop law revisions designed to minimize the number of lawsuits against liquor retailers and mandated an insurance requirement for liquor retailers to take effect in 1988, subject to a determination by the Commissioner of Insurance that liquor liability insurance would then be available in Michigan at a reasonable premium. This action would not only create an automatic market for liquor liability insurance, it would also benefit the public by ensuring a source of compensation for victims of drunk driving accidents.

The dramshop law revisions helped foster a belief among insurers that the number of liquor liability lawsuits and damage awards in Michigan would be substantially decreased. By 1987, when the Insurance Bureau conducted its study of the market for the purpose of making a recommendation to the Legislature on the mandatory insurance requirement for liquor retailers, there were at least 21 insurers writing liquor liability coverage in Michigan, including two limited liability pools. The Bureau found that, based on estimated loss ratios, projected profits, and the closeness of the premium charges to expected losses, liquor liability insurance was available at a reasonable premium.

Although many liquor retailers initially protested, the mandatory requirement took effect on April 1, 1988. In order to obtain or renew a liquor license after that date, retailers in this state must provide proof of financial responsibility in the form of an insurance policy or bond for at least $50,000.

To assure that licensees can obtain the mandatory levels of coverage, Public Act 173 of 1986 requires the Commissioner to issue a report by March 1 of each year detailing the state of the liquor liability insurance market and delineating specific classifications of liquor liability insurance where reasonable availability does not exist. If, based on this annual report, the Commissioner certifies that liquor liability insurance is not reasonably available, or not available at a reasonable premium, the Liquor Control Commission is authorized to waive the requirement of proof of financial responsibility.

Much of the information contained in this report is based on rate filings and data submitted to the Insurance Bureau by the companies surveyed for the Commissioner's 1988 report, and by the Insurance Services Office, which submits commercial insurance rates and forms for general liability coverage, including liquor liability, on behalf of over 200 companies.

According to the Liquor Control Commission, over 95 insurers currently provide liquor liability coverage to 17,806 retail liquor establishments either through a liquor liability policy or by an endorsement onto a general liability insurance policy. Since the mandatory requirement was enacted in 1988, one new liquor liability insurer has become licensed to enter the Michigan market. Several unregulated risk retention groups are also writing this coverage in Michigan.

Considerations

In making a determination as to the availability and reasonable pricing of liquor liability insurance, Section 2409b(2) of the Code requires that the Commissioner consider the following:

a. The extent to which any insurer controls the liquor liability insurance market in this state or any portion thereof.

b. Whether the total number of companies providing liquor liability insurance in this state is sufficient to provide multiple options to liquor licensees.

c. The disparity among liquor liability insurance rates.

d. The overall rate level which is not excessive, inadequate, or unfairly discriminatory.

e. Any other factors the Commissioner considers relevant.

II

PUBLIC HEARINGS

When the mandatory insurance requirement was first enacted, many licensees expressed their dissatisfaction through written correspondence to the Insurance Bureau and the Legislature. Some suggested there should be exceptions for seasonal licensees or those who sell a significantly low amount of liquor annually. To determine whether such changes would be in the public interest, the Legislature requested the Commissioner of Insurance to conduct a series of five public hearings across the state during May and June of 1988. In the hearing notices, the Commissioner set forth four specific questions to be addressed. These were as follows:

1. Should the requirement for proof of financial responsibility be eliminated for liquor licensees whose businesses are only seasonal?

2. Should the requirement for proof of financial responsibility be eliminated for liquor licensees with gross liquor sales of less than, for example, $50,000, or some other amount?

3. Should the minimum amount of proof of financial responsibility for all licensees be some amount less than $50,000? If so, what amount should it be?

4. Would a lowering of minimum premium levels currently established by many insurers reduce the need for changes in the existing law?

Approximately 200 persons attended the hearings and 61 testified (Table IIa). In addition, 44 pieces of correspondence were received by the Bureau. Few people addressed the above questions even though they were encouraged to do so at the hearings. This is because almost all testimony was submitted by liquor retailers who overwhelmingly wanted to eliminate the requirement rather than modify it.

Three major points were made. First, many persons stated they could not afford to purchase liquor liability insurance despite the certification by the Commissioner that it is reasonably priced. Second, although the major purpose of the hearings was to solicit comments and suggestions for changes in the requirement, there was little interest in making such changes. A few noted that the financial responsibility requirement was one of the trade-offs for dramshop amendments benefiting liquor retailers; however, almost everyone who testified wanted the requirement eliminated. Third, they believe the liability for damages due to intoxicated persons should be placed on the intoxicated person and not on the liquor retailer.

Though most questions regarding modification of the requirement were ignored, there was a consensus among the few who did comment that the reduction of the minimum premium would reduce the need for other changes in the law. Other views shared by a number of speakers included: the creation of a state fund for liquor liability insurance; basing premiums on the wholesale cost, rather than the retail sales of alcoholic beverages; and allowing package liquor dealers a greater than 17 percent markup to cover the costs of liquor liability insurance.

In January of this year another public hearing was held to obtain information for this report and to determine whether there continued to be a need to allow limited liability pools to form to issue liquor liability policies. Only a few insurance company representatives attended this hearing, and there was no testimony offered. Interestingly, not one liquor licensee appeared at this hearing, and no written correspondence was subsequently received by the Bureau. It appears as though the market is readily supplying this insurance to retailers and they have accepted, albeit grudgingly, the mandatory insurance law. As such, the Commissioner has issued an order precluding the formation of any new limited liability pools for liquor liability insurance.

TABLE IIa.

PUBLIC HEARINGS ON LIQUOR LIABILITY INSURANCE ATTENDANCE FIGURES

LOCATION	DATE	PERSONS IN ATTENDANCE	PERSONS SPEAKING
Escanaba	5-18-88	40	15
Alpena	5-31-88	45	7
Grand Rapids	6-6-88	30	9
St. Ignace	6-7-88	35	16
Detroit	6-23-88	40	14

In addition to testimony at the hearings, 44 persons sent the Commissioner letters expressing their views.

III

ANALYSIS

Control of the Market

In 1986, two surplus lines companies, Mt. Vernon Fire Insurance Company and Columbia Casualty Insurance Company, dominated the liquor liability insurance market, writing 96 percent of the earned premium. The softening of the liquor liability insurance market in Michigan, largely a result of sweeping legislative changes to the dramshop laws, has encouraged licensed companies to write this line of coverage, thereby reducing the surplus lines share of the market to 80 percent in 1987. Indicative of the significant inroads being made by admitted insurers into this market is the fact that North Pointe Insurance Company, a relatively new liquor liability insurer established after the dramshop law revisions were passed, captured almost 15 percent of the 1987 written premium.

The Insurance Bureau's annual liquor liability premium report for 1987 shows surplus lines companies continuing to dominate the market based on premiums earned (Table IIa). It is significant to note, however, that since the mandatory insurance requirement for liquor retailers was put into effect in 1988, admitted or licensed insurers have written the highest number of actual policies for Michigan liquor licensees, based on the Liquor Control Commission records. In fact, 44 percent of the policies received were from North Pointe and the Michigan Licensed Beverage Association Limited Liability Pool (Table IIIb), both of which are subject to regulation by the state, and both of which are newly established insurers.

Multiple Options to Liquor Licensees

As has been previously stated, the Liquor Control Commission maintains a database of insurance companies which are providing policies to liquor licensees (Appendix A). This list includes the liability pools formed by the Michigan Licensed Beverage Association (MLBA) and the Michigan Bowling Proprietors Association and various risk retention and risk purchasing groups formed under the federal Liability Risk Retention Act passed in 1986. Almost 87 percent of the current 17,806 policies received were issued by 10 companies (Table IIIb). These ten companies have the capacity to insure all classes of licensees, and the top five have no restrictions on which classes they will write.

Prior to the enactment of the insurance requirement, it was believed that bars and taverns would have the most difficulty in locating a source for coverage. North Pointe and the MLBA targeted this segment of the market and appear to have alleviated the concern. Several insurers who originally excluded the bar and tavern classification from their underwriting plan have expressed to the Bureau an interest in writing coverage for these risks.

Private clubs were also considered to be a high risk classification for which insurance coverage would be difficult to secure. Some national organizations, such as the Elks, discovered they could obtain group coverage through their national charter. Others were able to get liquor liability endorsed onto their general liability policies. Further, American Commercial Liability, a new company which will target private clubs, was licensed early this year. With over 95 liquor liability providers writing coverage for most classes of licensees and several companies targeting the higher risk classes, liquor retailers should have at least five and probably many more insurer options.

Disparity in Rates

When liquor liability insurance companies were first surveyed in 1987, their rates were quite diverse. As with any competitive market structure, over the past two years rates have moved toward a certain equilibrium. This is being accomplished in various ways. Some companies, particularly the surplus lines, have simply reduced rates for all licensee classifications. Other rate-reducing practices include reducing the factor by which rates are multiplied for increasing amount of coverage, using territorial rating structures, or offering seasonal rates for businesses such as beach or ski resorts, though most companies simply prorate the premium.

An increasingly popular company strategy involves revising the rating structure. Where risk classifications for rating purposes were previously based on six to seven classes of retail liquor licenses, it is now common for insurers to further divide these classes based on various characteristics of the individual businesses. Many companies, for example, now divide the restaurant and bar/tavern classifications into subgroups according to the ratio of food to liquor served, or the type and amount of entertainment offered. This practice enables a company to attract more "low risk" business within a licensee class with lower rates and still maintain acceptable loss ratios by keeping average rates in effect for the higher risk businesses. Some companies go even further by offsetting the lower rates offered with higher-than-average rates for the highest risks within a class.

Because company rate classifications and structures are so diverse, it is difficult to display a comparison of specific rates by insurer. While one company may offer a single rate for bars, it is not unusual for another to offer as many as eight. Bars, taverns and clubs are often grouped in the same class; however, some companies rate clubs separately or the same as restaurants. Hotels are rated as either restaurants or taverns, depending on the ratio of liquor to food served and the insurer. Surplus lines companies and some admitted companies offer territorial rates by class, with rural rates tending to be slightly higher than city rates. In order to illustrate how

rates can vary among classes, however, a comparison of ranges of rates for licensee classifications is given in Table IIIc. The disparity in rates appears extreme because the ranges include rates some companies offer subgroups of the risk classifications. It is important to note that when risk groups or subgroups with similar characteristics are compared there is very little disparity in rates between companies.

Rate disparity in 1987 was also due to differing assumptions among insurers as to how the dramshop law revisions would affect company loss experience. Although the changes are relatively recent, 1987 loss ratios were lower than expected. For some companies, loss ratios predicted to be in the 60-80 percent range were actually in the 50-60 percent range. For this reason many companies are reassessing the effect current laws will have on future losses.

Appropriate Rate Level

The overwhelming complaint with regard to liquor liability insurance, besides the question of whether it should indeed be a coverage mandated by the Legislature, is the cost. The legislative requirement of this report is to consider an overall rate level which is not excessive, inadequate, or unfairly discriminatory, rating terms which are defined in Section 2403(1)(d) of the Insurance Code of 1956 (Appendix B).

In the 1988 report, a rate of $3 per 100 dollars of liquor sold was cautiously declared to be an appropriate rate for all classes of liquor retailers combined. This rate continues to meet the standards of Section 2403(1)(d). However, until the effects of the dramshop revisions on rates can be more accurately assessed, an appropriate rate level remains difficult to measure.

Depending on the type of business to be insured, higher or lower rates may also be appropriate since licensee classifications pose varying degrees of risk to insurers. A bar, for example, pays a significantly higher rate than a packaged liquor dealer. As was previously mentioned in this report, even within a licensee class there can be a wide range of rates due to the different rating classifications and structures companies use. In an effort to obtain premiums that track closely to loss data, insurers are currently adjusting rates due to lower than anticipated loss ratios for 1987 and 1988. This will continue as data for claims filed after the dramshop revision is evaluated.

Tort Reform

In an effort to learn more about how tort reform is impacting cases currently in the system, the Insurance Bureau polled a sample of both defense attorneys and the plaintiffs' bar as to their perceptions of the effect of the 1986 tort reforms on various types of liability cases. The majority of attorneys polled agree that, overall, the 1986 revisions make it more

difficult to initiate a liability suit and provide for smaller settlements of lower costs to the insurer. Enactment of the collateral source rule, for example, enables the actual award amount to be reduced by any other applicable coverages that a plaintiff may have such as health insurance or automobile insurance.

The dramshop law revisions eliminated the right of the families of intoxicated persons to sue and instituted the presumption that the last bar to serve the drunk driver was the responsible server. Penalties can now be imposed against the plaintiff for frivolous lawsuits. There are also more defenses available to the licensee in cases involving sale to intoxicated persons or minors. These changes foster the belief among attorneys that the number of liquor liability lawsuits and claims will decrease.

Minimum Premiums

The Insurance Bureau received a number of complaints from small businesses who claimed they could not afford the liquor liability insurance despite the fact that the Bureau's study determined rates in Michigan to be reasonable with respect to expected claims and expenses. Part of this problem was due to the high minimum premiums established by companies as part of their underwriting plan. A minimum premium is the lowest premium for which a company will issue a policy, despite the amount that is actually generated when rates are applied to liquor receipts. If, for example, an insurance company established an $.80 rate per hundred dollars of liquor sold, and a minimum premium of $500 for take out liquor stores, a store would have to sell $62,500 in liquor annually to generate the minimum premium. As the liquor receipts for a store decrease, the effective rate it pays for insurance is increased. A store that sells only $10,000 of liquor annually, and pays a $500 premium, is paying an effective rate of $5.00 per hundred dollars of liquor sold.

Among the companies surveyed in 1987, average minimum premiums were $700 for the lowest risk class and as high as $3000 for bars, taverns and clubs. The Insurance Bureau staff took the position that these high minimum premiums imposed an effective rate that was unfairly discriminatory to small businesses and requested that they be reduced. Most companies complied with this request and reduced minimum premiums accordingly (Table IIIc). The Bureau took administrative action against those who did not by issuing notices of opportunity to show compliance with Michigan insurance laws. Two hearings are currently pending on this issue.

The reductions that did occur took effect in the summer of 1988, too late for retailers who had to comply with the April 1 deadline for purchasing coverage to renew their licenses for the 1988 business year. As the 1989 renewal date approaches, however, small business retailers are receiving substantially lower quotes on premiums for policies to be issued for the 1989 business year.

Other Factors: Claims-Made Policies vs. Occurrence Policies

Some insurers who offer liquor liability coverage use "claims-made" policies rather than "occurrence" policies. An occurrence policy covers a person for any claim arising from an action which occurred during the policy period no matter when the claim is filed. A claims-made policy covers the insured person for claims filed only while the policy is in effect. In certain specialized types of liability insurance, the use of claims-made policies offer definite advantages. Chief among these advantages are the possibilities, at least in theory, for more accurate initial pricing and for more ready and reliable price adjustments upon renewal.

The risks for which the use of claims-made policies may be appropriate are those exhibiting the so-called "long tail", that is, a relatively long period of time between the commission by the insured of an act, error, or omission from which legal liability arises and the filing of a claim against the insured or the insurer seeking monetary compensation for damages suffered as a result. The Insurance Bureau has identified liquor liability insurance as eligible for coverage under a claims-made policy and some companies offer such a policy in Michigan. Such a policy, however, terminates coverage at the policy's expiration date and Section 22(5) of the Liquor Control Act provides for a two year statute of limitations for filing liability claims against licensees. In addition, Section 22f of the Michigan Liquor Control Act provides:

> The insurance policy hereinbefore mentioned shall cover the liability imposed by section 22 of Act No. 8 of the Public Acts of the Extra Session of 1933, as amended, and shall contain the following conditions: that no condition, provision, stipulation of limitation contained in the policy, or any other endorsement thereon, shall relieve the insurer from liability (within the statutory limits provided by section 22a of Act No. 8 of the Public Acts of the Extra Session of 1933, as amended), for the payment of any claim for which the insured may be held legally liable under section 22 of said act.

The dilemma over whether a claims-made policy met the requirements of Section 22f prompted the Liquor Control Commission to request an opinion from the Attorney General's Office which confirmed that such a policy should not be accepted.

Most licensed companies who offered claims-made policies were ISO members and were able to convert to ISO occurrence policy forms. The MLBA Pool, however, was in the process of issuing claims-made policies approved by the Bureau to its members when the AG opinion was issued. After some negotiation an agreement was reached whereby the MLBA Pool would begin writing only occurrence policies as of January 1, 1990. Persons who purchased claims-

made policies before that date would be required to purchase an extended "tail coverage" for the two year statute of limitations period in order to fulfill the mandatory insurance requirement. As a guarantee to the Liquor Control Commission that the licensee would be insured in compliance with the law, the Pool agreed to provide tail coverage which would be paid for by imposing a lien against the surplus certificate purchased by the member should that person fail to purchase the coverage.

TABLE IIIa.
MICHIGAN DEPARTMENT OF LIC. & REG./INSURANCE BUREAU
DESCENDING PREMIUM LIQUOR LIABILITY REPORT
CALENDAR YEAR 1987
(MICHIGAN BUSINESS ONLY)

COMPANY NAME	DIRECT PREMIUMS WRITTEN	DIRECT PREMIUMS EARNED	DIRECT LOSSES PAID	DIRECT LOSSES INCURRED	LOSS RATIO: LOSS INC./ PREM EARNED
MOUNT VERNON FIRE INS CO	$9,558,099	$11,774,153	$1,878,229	$7,064,492	60.00
COLUMBIA CASUALTY CO	8,403,121	9,505,801	282,350	274,948	2.89
NORTH POINTE INS CO	3,320,285	1,517,522	0	887,751	58.50
BOWL. PROP/MI LTD LIAB	593,108	62,960	0	38,745	61.54
NORTHWESTERN NL CAS CO	318,941	318,941	321,000	82,861	25.98
ST. PAUL SURPLUS LINES CO	167,158	167,158	0	147,099	88.00
AETNA LIFE & CASUALTY GRP	166,508	146,204	0	10,000	6.84
CONTINENTAL INS CO	165,018	81,439	0	0	0.00
AMERICAN AUTOMOBIL INS CO	150,335	139,463	0	0	0.00
CONTINENTAL CAS CO	146,088	110,194	0	0	0.00
CITIZENS INS CO OF AMER	103,965	18,905	0	0	0.00
LEXINGTON INS CO	42,958	27,878	0	0	0.00
FIRST SECURITY CAS CO	40,198	8,040	0	5,226	65.00
UNITED STATES FID & GUAR CO	33,339	34,391	25,000	-36,154	****
TRANSCONTINENTAL INS CO	25,026	25,907	5,000	3,499	13.51
NATIONAL SURETY CORP	17,263	16,550	0	0	0.00
CALVERT INS CO	14,052	9,042	1,078	7,503	82.98
WAUSAU UNDERWRITERS INS CO	4,567	3,479	0	0	0.00
FIREMAN'S FUND INS CO	4,350	1,898	0	0	0.00
GREAT AMERICAN INS CO	2,000	0	0	0	0.00
ATLANTIC MUTUAL INS CO	1,748	1,112	0	0	0.00
LIBERTY MUTUAL INS CO	1,500	1,653	0	0	0.00
LUMBERMENS M CAS CO	1,340	1,021	3,950	3,950	386.88
NORTHWESTERN NL INS CO	818	818	21,341	21,536	****
CAPITOL INDEMNITY CORP	590	590	234,600	42,525	****
SENTRY INS OF MICHIGAN INC	483	483	0	0	0.00
HOME INDEMNITY CO	107	80	0	0	0.00
NORTHBROOK PROP & CAS INS CO	40	15	0	15	60.00
SENTRY INS A M C	35	35	0	0	0.00
CIGNA INS CO	0	0	2,673,760	665,124	****
COMMERCE AND INDUSTRY INS CO	0	66	0	0	0.00
GIBRALTAR CAS CO	0	0	899,747	-1,363,323	****
INS CO OF NORTH AMERICA	0	0	789,083	334,778	****
NEW HAMPSHIRRE INS CO	0	0	0	-5,000	****
ST PAUL FIRE & MARINE INS CO	0	0	2,500	97,500	****
SCOTTSDALE INS CO	0	198	0	-123	-62.12
STONEWALL INS CO	0	0	534,386	-361,114	****
UNITED CAPITOL INS CO	0	84,591	0	575,000	679.74
WESTERN CASUALTY & SURETY CO	0	0	347,416	418,416	****
GUARANTY NATIONAL INS CO	-15,335	-15,335	1,537,824	700,422	****
TOTAL	$13,709,606	$12,271,099	$9,557,264	$9,615,676	39.99 ****

TABLE IIIb.

TOP 10 INSURANCE PROVIDERS TO
MICHIGAN LIQUOR LICENSEES

COMPANY	TYPE OF INSURER	NO./INSURED LICENSEES	PERCENT/ TOTAL INSURED
1. NORTH POINTE INSURANCE CO	ADMITTED	4,856	27
2. MLBA LIMITED LIABILITY POOL	LIMITED POOL	3,083	17
3. MT. VERNON FIRE INSURANCE CO	SURPLUS LINES	2,563	14
4. BEL-AIRE INSURANCE CO	NON-ADMITTED	1,953	11
5. COLUMBIA CASUALTY CO	SURPLUS LINES	953	5
6. NAT'L UNION FIRE INS. CO/PA	ADMITTED	453	3
7. FIRST SECURITY CASUALTY CO	ADMITTED	385	3
8. SOURCE ONE	ADMITTED	323	2
9. FEDERATED MUTUAL INSURANCE CO	ADMITTED	313	2
10. INSURANCE CO. OF N. AMERICA	ADMITTED	291	2

Source: Michigan Department of Commcerce, Liquor Control Commission; 2/89

TABLE IIIc

AVERAGE MINIMUM PREMIUMS AND RATES BY LICENSEE CLASSIFICATION

	Risk Classification	1987 Average Minimum Premium	Current Minimum Premiums of Most Licensed Insurers	Rates*
1.	Restaurant - Class C licensee - selling beer, wine & liquor for consumption on premises	1,000	500	.53 - 3.66
2.	Hotels - Class A & B - retail selling beer & wine or beer, wine & liquor for consumption on premises	2,000	500/750	Usually rated as bar or restaurant depending on ratio of food to liquor served
3.	Clubs - Fraternal clubs & lodges; country clubs - selling beer, wine & liquor for consumption on premises	2,500	1,000	.85 - 10.34
4.	Taverns - selling beer & wine at retail for consumption on premises only	2,500	750	1.75 - 10.74
5.	Bar - Class C licensee - selling or serving beer, wine & liquor from a barrier or counter	3,000	750	1.75 - 10.74
6.	Specially designated merchants - selling beer and/or wine at retail for consumption off premises	700	200	.14 - .95
7.	Specially designated distributor - selling beer, wine and/or liquor at retail for consumption off premises	700	200	.40 - .95

Table IIIc (continued)

Risk Classification	1987 Average Minimum Premium	Current Minimum Premiums of Most Licensed Insurers	Rates*
8. Temporary licensees - selling beer wine and/or liquor for consumption on or off premises for a specifically limited period	varies upon type & length of event	N/A	varies

* Based on $50,000 occurrence policy rates of top insurance providers (Table 3).

Note: Range includes base rates established for sub-groups of licensee classification which vary significantly among companies. First Security Casualty, for example, has 3 restaurant rates and 8 bar/tavern rates depending on ratio of food to liquor served and type and amount of entertainment scheduled.

IV

CONCLUSIONS

Based on the information contained in this report, the Commissioner finds that:

1. Based on 1987 premium data information, surplus lines companies control 80 percent of the liquor liability market. Admitted companies are making increasing inroads into gaining a share of the market. North Pointe Insurance Co. wrote 15 percent of the earned premium in 1987. North Pointe and the MLBA Limited Liability Pool, which began issuing policies to liquor retailers in 1988, issued 45 percent of the policies received by the Liquor Control Commission in 1988.

2. Ten insurers provided policies to 87 percent of licensees in Michigan according to Liquor Control Commission data. The top five of these companies do not restrict policies to any class or classes of licensees. There are at least 95 companies who provide liquor liability coverage either in the form of a liquor liability policy or coverage endorsed onto a general liability policy.

3. The disparity among rates is being tempered by competition. Insurers are utilizing a variety of rate-reducing strategies to remain competitive. Rates are being reduced also because 1987 loss ratios were lower than originally anticipated. While it is still too early to assess the full impact of the reforms, loss experience in Michigan is better than insurers expected.

4. Minimum premium amounts have been lowered by most licensed companies. This will enable businesses with relatively low amounts of liquor receipts to obtain policies in 1989 at premiums much lower than were offered in 1988.

5. At this time, over all liquor licensee classes combined, a rate of $3 per $100 of liquor sold continues to meet the statutory requirement standards defined as not excessive, inadequate or unfairly discriminatory. However, until the effects of the dramshop law revisions on rates can be more accurately assessed, an appropriate rate level remains difficult to measure.

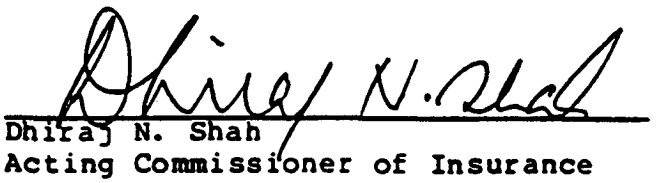
6. Claims-made policies are not acceptable for purposes of fulfilling the mandatory insurance requirement for liquor licensees.

7. Liquor liability insurance is currently available in Michigan at a reasonable premium. Accordingly, the Commissioner of Insurance has issued an order precluding the formation of any new limited liability pools for liquor liability insurance.

V

CERTIFICATION

Based on the analysis and findings contained in this report I certify that liquor liability insurance is reasonably available in Michigan at a reasonable premium.



Dhiraj N. Shah
Acting Commissioner of Insurance

Date: March 17, 1989

APPENDIX A

MICHIGAN LIQUOR LICENSEE INSURANCE PROVIDERS

Company	Total Number of Licensees Covered
Aetna Casualty & Surety Co of IL	9
Aetna Casualty & Surety Company	37
Allstate Insurance Company	8
American Empire Surplus Lines Ins Co.	3
American Guarantee & Liability Ins Co	2
American Home Assurance Company	8
American Insurance & Indemnity Co	1
American Insurance Company	96
American Motorists Insurance Company	131
American Trust Insurance Company, Ltd	0
Argonaut Insurance Company	12
Arkwright Mutual Insurance Company	0
Bankers Standard Insurance Company	7
Bel-Aire Insurance Company	1,953
Beverage Retailers Ins Co (AKA Brico)	2
Bowling Proprietors of MI Ltd Liab Pool	115
Cadillac Insurance Company	1
Calvert Insurance Company	99
Centennial Insurance Company	1
Cigna Insurance Company	17
Cigna Property & Casualty Ins Company	2
Cincinnati Insurance Company	1
Citizens Insurance Company of America	235
Columbia Casualty Company	953
Commerce & Industry Insurance Company	1
Commercial Union Insurance Company	2
Continental Casualty Company	73
Continental Insurance Company	23
Employers Casualty Company	1
Evergreen Indemnity, Ltd	1
Federal Insurance Company	1
Federated Mutual Insurance Company	313
Financial Casualty & Surety Ltd	5
Fireman's Fund Insurance Company	44
Firemen's Ins Co of Newark, NJ	91
First Security Casualty Company	385
Globe Indemnity Company	0
Granite State Insurance Company	1
Great American Insurance Company	5
Great Central Insurance Company	81
Great Midwest Insurance Company	180
Hartford Accident & Indemnity Company	21
Hartford Casualty Insurance Company	2
Hartford Fire Insurance Company	2
Hastings Mutual Insurance Company	0
Home Indemnity Company	48
Home Insurance Company	16
Institute of London Companies	2
Insurance Company of North America	291

Company	Total Number of Licensees Covered
Insurance Corporation of America	9
International Fidelity Insurance Company	1
Liberty Mutual Insurance Company	64
Lincoln Insurance Company	28
Lloyds of London	1
Lonepeak Insurance Company	4
MI Higher Ed Self Ins & Risk Mgt Facility Inc	12
MI Licensed Beverage Ass'n Ltd Liability Pool	3,083
MI Municipal Risk Management Authority	4
Michigan Mutual Insurance Company	0
Mt Vernon Fire Insurance Company	2,563
Nat'l Union Fire Ins Co of Pittsburg, PA	453
Nationwide Mutual Fire Insurance Company	1
Nationwide Mutual Insurance Company	35
Niagara Fire Insurance Company	4
North Pointe Insurance Company	4,856
Northbrook National Insurance Company	4
Northbrook Property & Casualty Ins Co	1
Northwestern National Casualty Company	105
Northwestern National Insurance Company	122
Nutmeg Insurance Company	24
Old Republic Insurance Company	284
Pacific Employers Insurance Company	3
Planet Insurance Company	76
Protection Mutual Insurance Company	1
Reliance Insurance Company	4
RLI Insurance Company	27
Royal Indemnity Company	3
Royal Insurance Company of America	50
Sentry Insurance A Mutual Insurance	25
Sentry Insurance of MI, Inc.	2
Source One Insurance Company	323
Special-Liability Thru More Than 1 Carrier	11
St Paul Fire & Marine Insurance Company	39
St Paul Surplus Line Insurance Company	23
The Standard Fire Insurance Company	1
Transamerica Insurance Company	3
Transportation Insurance Company	30
Travelers Indemnity Company	30
Travelers Indemnity Company of IL	29
Travelers Insurance Company	23
Travelers Insurance Company of IL	7
United Pacific Insurance Company	4
United States Fidelity & Guaranty Co	135
United State Fire Insurance Company	1
Veritas Insurance Corporation	6
Wausau Underwriters Insurance Company	1
Westchester Fire Insurance Company	2
Zurich Insurance Company	7
	17,806

Source: Liquor Control Commission, February 2, 1989

APPENDIX B

Section 2403(1)(d), MCLA 500.2403(1)(d); MSA 24.12403(1)(d) which provides:

> (1) All rates shall be made in accordance with this section and all of the following:
>
> (d) Rates shall not be excessive, inadequate, or unfairly discriminatory. A rate shall not be held to be excessive unless the rate is unreasonably high for the insurance coverage provided and a reasonable degree of competition does not exist with respect to the classification, kind, or type of risks to which the rate is applicable. A rate shall not be held to be inadequate unless the rate is unreasonably low for the insurance coverage provided and the continued use of the rate endangers the solvency of the insurer; or unless the rate is unreasonably low for the insurance provided and the use of the rate has or will have the effect of destroying competition among insurers, creating a monopoly, or causing a kind of insurance to be unavailable to a significant number of applicants who are in good faith entitled to procure the insurance through ordinary methods. A rate for a coverage is unfairly discriminatory in relation to another rate for the same coverage, if the differential between the rates is not reasonably justified by differences in losses, expenses, or both, or by differences in the uncertainty of loss for the individuals or risks to which the rates apply. A reasonable justification shall be supported by a reasonable classification system; by sound actuarial principles when applicable; and by actual and credible loss and expense statistics or, in the case of new coverages and classifications, by reasonably anticipated loss and expense experience. A rate is not unfairly discriminatory because the rate reflects differences in expenses for individuals or risks with similar anticipated losses, or because the rate reflects differences in losses for individuals or risks with similar expenses. Rates are not unfairly discriminatory if they are averaged broadly among persons insured on a group, franchise, blanket policy, or similar basis.

III-D Summary of Responses to Survey of State Agencies and Organizations about Information on Liability Insurance

APPENDIX III-D
Summary of Responses to Survey of State Agencies
and
Organizations about Information on Liability Insurance

Summary of Response to Letter 1

Alabama:

No Response

Arkansas:

No Response

Colorado:

Herbert Luoma of the **Insurance Commission** responded but was unable to provide any information.

Roger Morris of the **Liquor Enforcement Division** provided some information on server training.

Delaware:

Marie Simmons from the **Delaware Insurance Department** provided information on insurance companies licensed to write liquor liability policies in Delaware.

Irene Beardwood from the **Delaware Restaurant Association** provided some information on server training and insurance companies.

Amy Carrow of the **Delaware Office of Highway Safety** responded but was unable to provide any information.

Hawaii:

Hiram Tanaka from the **Hawaii Insurance Division** provided a list of insurance companies that are able to write general liability coverages which include such specialty lines as dram shop/liquor liability coverage. He only provided a list of company names, no addresses were included. He was unable to provide server training information.

Edward Y Hirata of the **Hawaii Department of Transportation** responded but was unable to provide any information. He fowarded copies of the letter to the Dept. of Commerce and Consumer Affairs and the Liquor Commission.

Clem Judd From the Hawaii Hotel Assoc. provided information about server training.

Randal S. Yoshida from the Liquor Control Commission provided us with information on server training programs.

Indiana:

The Governors Task Force to Reduce Drunk Driving provided a list of insurance companies writing liquor liability insurance coverage and server training information.

The Alcoholic Beverage Commission responded with some information on server training and made reference to the information already provided by the Governor's Task Force.

Kansas:

There were two responses from the **Kansas Insurance Department.** Both responses provided information on insurance comppanies writing liquor liability coverage. They did not provide information on server training.

The Kansas Alcoholic Beverage Commission referred the letter to the Kansas Insurance Department.

There was another response from Kansas which is believed to be from the **Kansas Restaurant Association.** This response provides information about server training programs and insurance companies writing liquor liability coverage.

Maryland:

William Pyle, director of the **Alcohol and Tobacco Tax Division** responded but was unable to provide any information.

The Department of Liquor Control for Montgomery County responded to the server training portion of the survey. They use the T.I.P.S. and T.A.M. programs.

The state Licensed Beverage Assoc. provided information on server training programs and insurance companies.

Massachusetts:

The Division of Insurance responded with information on insurance laws and information on the Liquor Liability Joint Underwriting Association.

The Massachusetts Restaurant Association also provided information on LLJUA. They also commented that a requisite to obtaining liquor liability insurance from a casualty company in Massachusetts "would be that servers have completed an accredited responsible alcohol beverage service training program, such as T.I.P.S."

Montana:

The Montana Liquor Division responded but was unable to provide any information.

Nebraska:

The Nebaska Insurance Dept. provided information on insurance companies.

The Nevada Restaurant Assoc. provided information on their server training program.

The Department of Motor Vehicles responded with information on server training and insurance companies writing liquor liability coverage.

The Liquor Control Commission responded but could not provide any information.

Nevada:

The Insurance Division responded,with limited information on insurance companies writing liquor liability coverage. They were not able to provode information on server training.

The Department of Motor Vehicles referred the letter to the Insurance Division.

North Carolina:

No Response

Oregon:

The Department of Insurance responded with information on insurance companies writing liquor liability insurance. They could not provide information on server training.

The Independent Insurance Agents of Oregon responded but could not provide the information requested.

The Oregon Restaurant and Hospitality Association responded, providing information on server training and insurance companies writing liquor liability insurance.

Pennsylvania:

The Insurance Commission provided information on insurance companies writing liquor liability policies.

The Liquor Control Board referred to the Insurance Commission.

The Observer, The Jnl. of the Pennsylvania Liquor Industry, provided us with some information on server training programs and insurance companies.

South Carolina:

The Alcoholic Beverage Control Commission responded but could not provide the information.

Texas:

The State Board of Insurance responded, providing information on insurance companies writing liquor liability policies and a copy of the Texas Dram Shop Laws.

The Texas Alcoholic Beverage Commission responded providing and extensive list of server training programs.

The Department of Highways and Public Transportation responded, but they referred to the information provided by the Texas Alcoholic Beverage Commission.

Utah:

No Response

Virginia:

The Bureau if Insurance provided a list of insurance companies who write liquor liability coverage. They only provided a list of names, no addresses were included.

The Independent Insurance Association provided information on insurance companies writing liquor liability coverage.

The ABC provided a list of insurance company names.

The Department of Motor fowarded the letter to the Alcoholic Beverage Control.

Washington:

The Washington State Liquor Control Board provided information on their training program. They also fowarded the letter to the insurance commissioner.

IV-A Guide for Undertaking Content Analysis

APPENDIX IV-A

CODING.DOC

GUIDE FOR UNDERTAKING CONTENT ANALYSIS

5/30/89

I. Task

(a) Code all articles in daily newspapers and state trade publications for licensed establishments including newsletters for case study states. Information about newspapers will come from newspaper indexes, microfiche, and computer searches. Back issues of trade publications from the publishers will be separately coded.

(b) Use the following years:

-- High and low liability states, 1984-1988: (At least 12 months of the most recent year of any publication available must be obtained as newspapers and trade publications will not be available for all years in every state.)

-- Change states: 1980-1988
-- Note that Texas is from 1978-1988

II. Definitions of Items to be Coded

Publication -- code (3 digits) for newspaper or trade publication/newsletter. See attached list.

000-299 newspapers
300-599 state trade publications
900 national trade publications

State -- code (2 digits) for state in which the publication occurs or is circulated.

AR - Arkansas
DE - Delaware
IN - Indiana
KS - Kansas
MA - Massachusetts
MD - Maryland
NC - North Carolina
NV - Nevada
OR - Oregon
PA - Pennsylvania
SC - South Carolina
TX - Texas

Day - day of month of publication (2 digits)

Month - Month of year of publication (2 digits)

Year -- Year of publication (2 digits)

Subject -- basic emphasis or main subject of article. Hint: the main theme of the article should be in the first two to three paragraphs and in the headline. This is certainly true for newspapers. The trade publications may take a more careful reading to judge the main subject.

1 = Legal liability of alcohol servers.

Legislation about liability, legal analysis, law, legislation in court or legislation pending, discussion of liability, editorials, legal suits against or involving a licensed establishment, court case, court decision, settlement of damages, liability insurance.

2 = Server training, server policy, and serving practices.

Actions by licensed establishments to reduce their risk of violating the law or of customers becoming intoxicated or drinking and driving, whether the action is required or elective (e.g., training servers). Bans or elimination of "Happy Hours" and drink specials and actions or practices to reduce/eliminate service to underage persons; relinquish license/permit to avoid insurance costs and/or exposure to liability. Actions or information about drinking and driving (general information statistics or specific crashes not involving a licensed establishment) are NOT included.

3 = Law Enforcement. (police, ABC)

i.e., citations, arrests or license action including licenses suspension by law enforcement and/or ABC against licensed establishments for ABC code or violations such as service to minors or serving intoxicated persons.

4 = Other.

i.e., other relevant subjects to server liability but not either of the three above.

5 = Crash Event(s).

Article about a particular crash in which one driver was drinking or arrested for drinking or about more than one crash involving alcohol.

6 = Enforcement.

Enforcement by police of drunk driving--arrest activity, statistics, special emphasis by police, additional patrols for DUI or DWI not crash involved.

7 = Punishment by Courts.

Sentencing or punishment of DUI or DWI by courts, activity of groups concerned with punishment of DUI/DWI,e.g., MADD, SADD. Court decisions.

8 = Legislation Concerning Drinking and Driving.

New laws, new budget appropriations for drunk driving enforcement and/or education.

9 = Other.

i.e., other relevant subjects including public concerns and activity about drinking and driving (editorials) but not either of the four above.

Page -- page of publication (3 digits). For newspapers which have separate sections, use a letter code for the newspaper section (if relevant) followed by page number with leading zeros if indicated. For example "B02" would indicate Section B, p. 2.

Explanation: Rather than sequential numbering from beginning to end, some newspapers (particularly large daily newspapers) have separate sections which are coded with numbers or letters. The pages are numbered sequentially within each section. These sections should be coded as A, B, C, ... to designate the first, second, third, etc. section no matter how the publication labelssuch sections itself. In this way we can code the prominence of an article relative to the entire newspaper.

Headline -- size of headline (2 digits). First digit is height of headline (top to bottom) in inches; second digit is length of heading (left to right) in inches. For example "42" means the headline is 4 inches high and 2 inches wide.

Column inches -- length in inches of articles (2 digits). Use a ruler to measure. If size is given as a category (short, medium, or long) code as shown below.

Column width -- the width to the nearest inch. Use a ruler.

NOTE: VUTEXT. For VUTEXT, estimates for the length of an article were made according to the average number of words for articles classified as: short, medium or long. Assume

approximately 35 words per newspaper column (2" width) inch. Therefore the average length (assuming 2" width) for each category was estimated to be short: 3"
medium: 12"
long: 22"

Computer Search: Key words utilized to identify candidate articles:

(a) Dram Shop -- alcohol, intoxicated, drink, liquor, and licensed restaurant, tavern, bar,or server and liability, liable, lawsuit, litigation, or dram

(b) Drinking and Driving -- legislation, laws, enforcement, and drunk drivers, drunk driving.

IV-B Inventory of Beverage Trade Journals in Content Analyses

Inventory of Beverage Trade Journals in Content Analysis

NAME: SOUTHERN BEVERAGE JOURNAL -- (ARKANSAS)

PUBLISHER: Southern Beverage Journal, Inc.
13225 S.W. 88 Avenue
Miami, Florida 33176
305 233-7230

Frequency of Publication: Monthly

Inventory:

1984	1985	1986
January	January	January
February	February	February
March	April	March
April	May	April
May	June	May
July	July	June
August	August	July
October	September	August
November	October	September
December	November	October
	December	November
		December

1987	1988
January	January
February	February
March	March
April	April
May	May
June	June
July	August
August	October
September	November
October	December
November	
December	

Comments:

NAME: DELAWARE RESTAURANT ASSOCIATION NEWS

PUBLISHER: Delaware Restaurant Association
P.O. Box 7838
Newark, Delaware 19714
302 366-8565

Frequency of Publication: Currently published monthly; issues prior to 1989 published on a "sporadic schedule"

Inventory:

1983

January/February
March/April
May/June
July/August
September/October
November/December

1984

January/February
March/April
May/June
July/August
September/October
November/December

1985

January/February
March/April
September/October

1986

March/April
May/June
July/August
September/October
November/December

1987

March
September
December

1988

January
April
June
August
September
October
November
December

Comments:

NAME: KANSAS EDITION BEVERAGE NEWS

Publisher: Charles Walters, Jr.
340 Laura
Wichita, Kansas 67211
316 263-0107

Frequency of Publication: Monthly

Inventory:

1984	1985	1986
January	January	January thru
February	February	December
March	March	
April	April	
May	June	
June	July	
July	August	
August	September	
September	October	
October	November	
November	December	

1987	1988
January thru	January thru
December	December

Comments: Even though we had nearly five complete years of this publication, our search for relevant articles provided a relatively small yield.

NAME: MARYLAND-WASHINGTON BEVERAGE JOURNAL
(Maryland Edition)

PUBLISHER: The Beverage Journal, Inc.
Tom Murray
2 W. 25th Street
Baltimore, Maryland 21218
301 235-1716

Frequency of Publication: Monthly

Inventory:

1986	1987	1988
June	January	January
July	April	February
November	May	March
December	August	June
	September	July
	October	August

Comments:

NAME: NEVADA BEVERAGE INDEX

PUBLISHER: Nevada Publishing Co.
300 East 1st Street
P.O. Box 99
Reno, Nevada 89504
702 786-5553

Frequency of Publication: Monthly

Inventory:

1984	1985	1986
January thru May July thru December	January thru December	January thru December

1987	1988
January thru December	January thru December

Comments: Even though we had nearly five complete years (only 1 issue missing) of this publication, our search for revelant articles provided a relatively small yield.

APPENDIX VI-I

CONTENT ANALYSIS INVENTORY FOR DRAM SHOP
AND TRAFFIC SAFETY PUBLICITY
Change State

TEXAS

Years			'78	'79	'80	'81	'82	'83	'84	'85	'86	'87	'88	Index Source
Codes:		Cities/Newspapers												
D/S	DUI													
090	510	Houston Post	X	X	X	X	X	X	X	X	X	X	X	Newsb/VuText
091	511	Amarillo Daily News									4/86	X	X	Newsbank
093	512	Beaumont Enterprise									4/86	X	X	Newsbank
094	513	Corpus Christi Caller										6/87	X	Newsbank
096	514	Dallas Times Herald									X	X	X	Newsbank
098	515	Fort Worth Star-Telegram										8/87	X	Newsbank
099	516	Glaveston Daily News									X	X	X	Newsbank
100	517	Houston Chronicle										X	X	Newsbank
101	518	Midland Reporter-Telegram										X	X	Newsbank
103	519	San Antonio Light									4/86	X	X	Newsbank
097	520	El Paso Times	X	X	X	X	X	X	X	X	X	X	X	Newsbank
104	521	Standard (San Angelo)									4/86	X	X	Newsbank
105	522	Texarkana Gazette									4/86	X	X	Newsbank
106	523	Victoria Advocate									X	X	X	Newsbank
107	524	Waco Tribune-Herald									4/86	X	X	Newsbank
092	530	Austin Amer Statesmn	X	X	X	X	X	X	X	X	X	X	X	Newsbank
095	540	Dallas Morning News	X	X	X	X	X	X	X	X	X	X	X	Newsbank
102	550	San Antonio Expr-News	X	X	X	X	X	X	X	X	X	X	X	Newsbank

D/S = Dram Shop Publicity
DUI = Driving Under the Influence (Drinking & Driving) Publicity

VI-J Front Page of Texas Beverage News, January 10, 1983

VI-K Front Page of Texas Beverage News, April 25, 1983

VI-L Front Page of Texas Beverage News, June 27, 1983

VI-M Front Page of Texas Beverage News, December 19, 1983

Drastic Permit Fee Increase Is Propos

Special to Beverage News
AUSTIN — A bill that would drastically increase all license and permit fees — to raise an estimated $22 million annually in new state revenue — has been pre-filed for the upcoming legislative session.

Senate Bill 3 would hike the cost of an initial mixed beverage permit from $2,000 to $4,690. A package store permit in a city of more than 75,000 population would jump from $250 a year to $1,675. A brewer's permit would skyrocket from $1,000 annually to $6,700.

The language of the bill is somewhat obscure — but apparently it would "earmark" some or all annual revenue from license and permit fees for alcohol abuse and alcoholism prevention and treatment programs.

The state collected $11.2 million from license and permit fees in fiscal 1982 — and it is roughly estimated that SB 3 by Sen. Bill Sarpalius of Hereford would tack on an additional $22 million — for a total of about $33 million annually.

• • •

THE BILL would tie the license and permit fees to the federal minimum wage — presently $3.35 an hour — to provide a built-in inflation factor.

Fees would be calculated by multiplying the federal minimum wage by arbitrary figures assigned to various license and permit categories.

For example, an original mixed beverage permit would be set by

Continued on Page 7

The Newspaper of the Texas Industry

Texas Beverage News

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Published Twice Every Month

ENTY-FIFTH YEAR, Vol. 50, No. 1 (USPS No. 648340) FORT WORTH, TEXAS, JANUARY 10, 1983 12 PAGES $10 PER YEAR

Retailer Sued for $300,000 #1

For Selling To Driver In Fatal Auto Accident

By WALTER GRAY
Special to Beverage News

PARIS — A beverage alcohol retailer is being sued in this North Texas town for more than $300,000 for selling to an intoxicated customer who was involved in a fatal auto accident shortly after he left the store with a six-pack of beer.

The lawsuit has the potential to set a devastating precedent in a new area of liability for Texas retailers and will be closely monitored by the entire industry.

The plaintiff's attorney is Bill Flanary of Paris, former asst. chief of the Consumer Protection Division in the Texas Atty. General's office.

• • •

A PRINCIPAL defendant is Harley Wagnon, owner and operator of a package store and adjoining convenience store at the tiny Sun Valley community — a wet "oasis" near Paris in virtually dry Lamar County.

The defendant customer, Mickey Bates, pleaded guilty in September to a criminal offense of involuntary manslaughter — and "judicially confessed" in a sworn statement that he did "unlawfully, knowingly and intentionally, while intoxicated, operate a [illegible] vehicle and, by reason of [illegible] intoxication, cause" an [illegible] claimed the life of his [illegible] Wesley A. Conley Sr.

• • •

FLANARY'S petition [illegible] sale of alcoholic [illegible] Bates "in his intoxi[illegible]tion constituted negli[illegible] in violation of S[illegible] the Texas Alcoh[illegible] Code — and that [illegible] and illegal activ[illegible]

Continued [illegible]

austin report

Bills Already In On Alcohol Issues

Special to Beverage News

AUSTIN — The 68th Legislature convenes here tomorrow (Jan. 11) in a session that may be remembered as an historic one for the beverage alcohol industry.

The emotion-packed alcohol abuse, alcoholism and DWI issues will be in the spotlight and many informed industry sources anticipate that it will be "one tough session."

The Texas industry generally is expected to take low-key positions on a flurry of alcohol-related bills — but will vigorously defend against harsh or unreasonable proposals intended to "punish" the licensed trade.

• • •

AN UNUSUALLY large number of industry-related bills (23) have been pre-filed for the session. Predictably, most pertain to the long-debated major issues:

- Raising the age limit to 21 from 19.
- Bills to strengthen the state's already tough DWI laws.
- A ban on open containers of beverage alcohol products in the passenger section of a moving motor vehicle.
- Elimination of "deferred adjudication" by the courts in DWI cases, to crack down on repeat offenders.

Other anticipated bills pre-filed include a "bottle bill" and a measure to drastically increase annual license and permit fees (see related stories).

• • •

PRE-FILED bills not pertaining to alcohol-related social issues and not reported elsewhere include these:

- House Bill 4 by Rep. Gerald Hill of Austin, restricting local-option elections to four days a year: (1) Third Saturday of January (2) First Saturday in April (3) Second Saturday in August and (4) General election day, the first Tuesday after the first Monday in November.

Current law requires a county commissioners court to call a local option election within 30 days after

Continued on Page 4

ttle' Bill roduced Legislature

ecial to Beverage News
STIN — A bill that would mandatory 5-cent deposit on age containers and prohibit nience packaging has been led for the legislative session p. Terral Smith of Austin.

se Bill 136 would:

ix a mandatory deposit on everage, soft drinks and wantainers sold for off-premise nption, and force retailers holesalers into the used-con-redemption business.

Prohibit "pull tab" openers detach from the can when pened.

an plastic bottles and six-packaging devices which are edegradable (won't disinte-within 6 months after being ed).

• • •

TAILERS would be required penalty of a fine that would from $100 to $1,000 for a on to redeem a used bever-ntainer of any kind, size and "sold by that retail dealer" container is not broken.

retail dealer may refuse to and pay the refund value ore than 48 beverage con-s a day from a person," the ds.

ributors would be required eem empty containers "of d, size, and brand sold by ntributor . . . If the brand

Continued on Page 7

observatio

Follow The Sun[illegible] This Session

LOOKING AHEAD to the 1987 leg[illegible] the Texas beverage alcohol industry [illegible] tunity in Austin this year to gauge the [illegible] of the "Sunset" review process.

How the "Sunset" winds blow [illegible] could have a bearing of critical imp[illegible] trade as well as the Texas Alcoholic [illegible] . . . and testing the winds could [illegible] pared for 1987.

• • •

THIS YEAR 33 state regulato[illegible] some of the largest and most pow[illegible] under the "Sunset" reform law o[illegible]

Continued on [illegible]

oliday Sales Report:

cial to Beverage News
ay wine and spirits sales spotty" in Texas — with ranging from "strong" in where the general economy ng to "way off" in areas usiness was already slack employment up.

ndom check of wholesale ail companies indicated that rs who were aggressive eir advertising and mer-ng did O.K., although e was struggling to meet last year's figures."

"We met last year's figures," one contact said — "but we've been up in sales for so many years that we don't understand break even."

• • •

MULTI-CASE sales to commercial and industrial gift buyers were definitely off.

Individual consumers did their buying late — reflecting a general retail pattern for the season — "but traffic was good in the stores as the holidays approached."

"Consumers were definitely value conscious this year," said one contact. "It used to be you could put out a wooden box or a bag of merchandise and it would move. That wasn't so this year. Consumers were looking for more value."

• • •

ONE RETAIL company executive reported that his sales of super-premium merchandise, popular for gift-giving, showed a

Continued on Page 10

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Cafe Sued In Minor's Death

observations

Beer-Bill Maneuver Is Most Puzzling

IN A MOST PUZZLING trade development, the executive vice president of the National Beer Wholesalers Assn. (NBWA) has stirred up a hornet's nest of response in an apparently misguided effort to gain support for an important bill pending in Congress.

If everything claimed is true — and we have no reason to assume that it isn't — then the lobbyist for the nation's beer wholesalers in Washington may have single-handedly killed the Malt Beverage Interbrand Competition Act, which NBWA so badly wants Congress to pass this year.

The president of the 30,000-member National Licensed Beverage Assn. (NLBA), Matthew J. Protos, is fighting mad about the whole thing. NLBA is an association of tavern owners which has no state affiliate in Texas, but which is influential throughout the Midwestern and Eastern states. NLBA opposes the pending bill.

• • •

PROTOS, WHO NO DOUBT feels that he has been insulted, has taken in after NBWA's executive vice president Robert Sullivan for statements made and questionable tactics used in a mailing by Sullivan — directly to members of the national tavern association. In the direct mailer to NLBA's membership, Sullivan:

• Implied that NLBA's board of directors are puppets of the Food Market Institute (FMI), the supermarket trade association, which also opposes the bill.

• Urged the tavern owners "not to be hood-winked by the FMI's propaganda" into opposing the bill pending in Congress which would enable breweries to assign "exclusive" distribution territories to beer wholesalers. By association, Sullivan was telling the tavern owners not to be hood-winked by the "puppet" officers and board members of their own trade association.

• • •

PROTOS FURTHER alleges that NBWA's Sullivan used

Continued on Page 4

TOP HONOR — Raymond Hutner, center, was awarded the 1982 Western Region Man of The Year plaque at the annual region meeting for Fleischmann Distilling Co. Hutner resides in Houston and directs a 3-state region. At left is Lou Colantuono, Fleischmann's region vice president, and at right is Fran Morelli, senior vice president and national sales manager.

Governor Wants To Double Liquor and Drinks Taxes

Special to Beverage News

AUSTIN — Gov. Mark White has proposed that the excise tax on distilled spirits by-the-bottle and the 10 per cent gross receipts tax on mixed drinks be doubled as part of a package to raise $1.6 billion in new state revenue.

Although details of the governor's recommendation to the Legislature haven't been made public, it appears that wine and beer excise taxes would not be raised.

• • •

IN A SESSION which is markedly anti-liquor because of the highly publicized campaign to reduce the DWI threat on the highways, there is a possibility that many legislators will consider higher liquor taxes a favorable alternative to other means of raising revenue.

However, state Sen. John Traeger of Seguin said following a meeting at which Gov. White unveiled his proposal that the liquor tax hikes won't gain approval because if taxes are raised too high lawbreakers "will bootleg the hell out of us."

• • •

THE TAX increases are proposed in addition to substantial fee increases for some beverage

Continued on Page 4

Suit Alleges Youths Served Before Wreck

Special to Beverage News

SAN ANTONIO — The parents of a San Antonio minor who died in an alcohol-related auto wreck are seeking unspecified damages in a lawsuit against a well-known restaurant-bar here.

The suit alleges that the youngster was with a group of underage high school friends who attended a birthday celebration and were served intoxicating beverages at Mi Tierra Cafe and Bakery.

It is possible that the suit will go to trial this summer.

The wreck victim, 16-year-old Daniel B. Davis, was the son of a San Antonio medical doctor and his wife, Dr. and Mrs. Rex Davis. The parents have become members of the local Mothers Against Drunk Driving (MADD) chapter since their son's death, and MADD strongly supports the court action.

The defendant establishment is represented by attorneys for Aetna Insurance Co., Beckman, Krenek, Olson & Quirk.

• • •

AUSTIN attorney Mack Kidd, who represents the parents, said the suit attempts to extend the state's criminal statutes against sales to a minor to civil liability under the civil law.

The action is similar to a $300,000 third-party liability suit filed against a North Texas package store owner by the widow of a man who was killed in an alcohol-related auto wreck (see lead story in the Jan. 10 issue of the paper).

• • •

IN ANOTHER pending case, a Houston jury has awarded $1.4-million in damages to a motorcyclist who was involved in a wreck with a driver who had just left a bar and failed to stop at a stop sign.

The bar owner was named as a third-party defendant in the suit, and 10 per cent of the liability was assigned to the permittee ($140,000). Judgment has not been entered pending an appeal.

• • •

THE FOLLOWING is the significant portion of the original petition filed by attorney Kidd:

"On or about January 16, 1981, Daniel B. Davis attended a birthday party for a friend at the Mi Tierra Cafe & Bakery. Although all of the persons at the party were high school students and well under the legal and lawful drinking age, the employees of Mi Tierra served margaritas to these minors.

"As a direct result of this ac-

Continued on Page 2

EARN AWARDS — Two Texas distributing companies received Achievement Awards from Schenley Industries, Inc., at the company's annual distributors' conference. Shown receiving the award in left photo from Howard S. Feldman, left, Schenley's president, are Martin Golman, president of Max Golman Wholesale Liquor Co. of Dallas; James Roberts, Golman's sales manager, and Richard (Dick) Payne, Golman's merchandising manager. ● Right photo, Feldman presents the trophy to Frank Crapitto, president of Key Distributors Inc. in Houston.

National WAABI Meeting In San Antonio

The Newspaper of the Texas Industry

Texas Beverage News

Devoted to Moderation • Respect of Law • Profitable Selling

Published Twice Every Month

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tore Sued in Minor's Death

lation's WAABI eaders in Texas

pecial to Beverage News

N ANTONIO — The Nation- Women's Assn. of Allied Bev- es Industries (WAABI) opened 6th annual convention today nday) at the Hyatt Regency l on the Riverwalk at Paseo Alamo.

n Antonio WAABI leader Chambers will be installed nesday evening as national dent, to succeed Irene Wild- n of San Francisco.

len Gatewood of Dallas will nstalled as national first vice dent.

• • •

IE NEW panel of officers also rises:

gy Coyne of New York City, d vice president; Reba White- of Minneapolis/St. Paul, third president; Frances Mershon of nnati, secretary, and Terry tin of Hartford, treasurer.

e new officers will be in- ed by Geoffrey G. (Jeff) Pet- n, director of federal govern- t relations at the Distilled its Council of the U.S. (DIS-).

McCurdy

Wildhagen

KEYNOTE speaker at the installation banquet will be M. Jacqueline McCurdy, vice president-regulatory counsel of Joseph E. Seagram & Sons, and chairman of the Distilled Spirits Council of the U.S. (DISCUS).

Irene Wildhagen will open the convention at 9 a.m. Monday and San Antonio's Mayor Henry Cisneros is scheduled to welcome WAABI to the city.

This year marks the 50th anniversary of the Repeal of prohibition and the historic development will be reviewed in a presentation

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n Antonio's Billie Chambers Head National Association

pecial to Beverage News

N ANTONIO — Billie Cham- has been active in WAABI the past 22 years — serving adership positions in both the Antonio Chapter and in Na- l WAABI.

r the past two years she has served as first vice president of National WAABI, is a member of the board, and is past national chairman for Sky Ranch.

She's a past president of the San Antonio Chapter and is presently its membership and Sky Ranch chairman.

• • •

SHE IS AN active member of Jefferson United Methodist Church, United Methodist Women, Order of the Eastern Star, Ladies Oriental Shrine of North America, and active in the work for the Shrine Crippled Children's Hospital and Burn Institute. Does volunteer service for other local agencies and a nursing home.

Billie retired after fifteen years with Owens-Illinois Glass Container Division. Prior to that time she was bookkeeper for family owned service station business.

She is married to A. B. Chambers, and they have a married daughter and son and four grandchildren. Billie enjoys hobbies of oil painting, decoupage and needlework.

Billie Chambers

Cheatham, Samuels to Speak At July TPSA Convention

Special to Beverage News

HOUSTON — A young distillery president and a veteran Texas wholesale company executive will be guest participants at the annual Texas Package Stores Assn. (TPSA) Convention in July).

—T. William Samuels Jr., president of Maker's Mark Distillery in Kentucky will speak on a topic to be announced at the main business session the afternoon of July 26.

—Jack Cheatham, who entered the industry 45 years ago and is president of Penland Distributing Co., will be a panelist at the July 26 morning Retailers Roundtable Workshop.

Cheatham will join on the panel Sam Bronfman II of New York, sales executive vice president of The Seagram Wine Companies.

• • •

WORKSHOP co-moderators Red Coleman and Don Golman of Dallas said retailer panelists also will be announced — for a topic titled "Wine and Spirits Futures."

Sidney Sigel of Dallas, main program chairman, said speakers for the session in addition to Samuels will be announced next week.

• • •

BRISK convention pre-registration has been reported by Sheldon Lubovits of Fort Worth, state convention chairman, and John Rydman of Houston, local chairman.

"We will have an outstanding registration again this year," said Lubovits, who noted that the con-

Cheatham

Samuels

vention attendance has set a record each of the past five years.

The convention will be held at the plush downtown Hyatt Regency Hotel July 24-26. It is open to TPSA non-members.

• • •

TWENTY hospitality suites have been reserved by wine and spirits companies and will operate throughout the convention.

Last year's expanded Trade Show will be repeated this year.

The Sunday Afternoon With Wine opening event "will feature an extensive selection of wines for tasting," Rydman said. "There will be available virtually any type of wine a retailer might be interested in from the standpoint of building his wine trade, and wholesale and winery personnel will be there as in the past to discuss their products and answer questions."

• • •

FOR GOLFERS, a limited field of 100 will tee off Monday morn-

Continued on Page 8

Multi-Million Dollar Damage Award Sought

Special to Beverage News

SAN ANTONIO — Parents of a minor who was killed in an auto accident after he made an alleged illegal purchase of liquor have filed a lawsuit in which they seek minimum damages of $3 million.

The suit was filed against Western Beverages, Inc., which operates package stores here and in other Texas cities. Similar third-party liability suits are pending against off-premise and on-premise permittees in San Antonio, Houston and Paris, in North Texas.

• • •

IN THE suit just filed in state district court here, Mr. and Mrs. Daniel Burnam seek damages that could range from $3 million in the April 1 highway death of their 17-year-old son, Christopher Darrin Burnam.

They allege that the youth and a friend purchased one liter and one quart of liquor, mixer, ice and cups at a Western Beverage outlet in southeast San Antonio — then set out on a drive to join Burnam's parents at their lake house at Port Aransas on the Gulf Coast.

En route young Burnam lost control of the auto and it rolled over several times about 5 miles south of Robstown, according to attorney John N. Mastin, who filed the suit.

Burnam, whose father owns and

Continued on Page 11

NATIONAL HONOR — Phil J. Schepps of Dallas, chairman of The Julius Schepps Company, standing center, is pictured with other distributor executives from throughout the nation who were named winners of the annual TIME Magazine Distinguished Wholesaler Award. The award was presented at the Wine and Spirits Wholesalers of America Convention (WSWA) in Atlanta. See story on Page 2.

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Texas Supreme Court Opinion Creates New 'Standard of Duty'

'Dram Shop' By Court Decree?

Tax-Free Sales To Military Gain Approval

Special to Beverage News

AUSTIN — The state's attorney general said in an opinion last week that it is permissible for licensed Texas wholesalers to sell alcoholic beverages to U.S. military installations in the state without adding on the state excise tax.

The opinion was requested in the wake of a lawsuit in which the Navy challenged the state's power to levy the state excise tax on military sales. The U.S. Supreme Court denied a request that it review a lower court's holding that the military should be exempt from the state tax.

The Texas Alcoholic Beverage Commission (TABC) and the Licensed Beverage Distributors fought the case to the supreme court, in an effort to protect an estimated $817,229 in annual state revenue collected from the $2 per gallon distilled spirits excise tax alone.

• • •

THE JUDGMENT will allow out-of-state suppliers to sell direct to Texas military installations without collecting the state excise tax.

The attorney general's opinion will allow Texas wholesalers to do the same thing.

"The rationale of this opinion is applicable to all alcoholic beverages," said W. S. (Sherman) McBeath, TABC administrator, in an advisory letter sent to wholesalers.

Here's The Complete Text Of Court Majority's Opinion

Special to Beverage News

THE FOLLOWING is the majority opinion written by Supreme Court Associate Justice William K. Kilgarlin:

This is a wrongful death action instituted by Larry and Clifford Clark against Otis Engineering Corporation after the Clarks' wives were killed in an automobile accident involving an Otis employee, Robert Matheson. At the time of the accident Matheson was not in the course of his employment.

The trial court granted Otis' motion for summary judgment. The court of appeals reversed and remanded the cause for trial, holding there were genuine issues of fact. 633 S. W. 2d 538. We affirm the judgment of the court of appeals.

• • •

TWO QUESTIONS are presented. First, does the law impose any duty upon Otis under the evidence as developed?

Secondly, does such evidence give rise to any genuine issues of material fact?

The Facts

MATHESON worked the evening shift at Otis Carrollton plant. He had a history of drinking on the job, and was intoxicated on the night of the accident.

At his dinner break that night and on other occasions that day he went to the parking lot, where he allegedly consumed alcoholic beverages in his automobile.

Donald Roy was Matheson's supervisor and Ronnie Pyle was a co-worker who assisted Matheson on occasion. Pyle testified[1] that he knew of Matheson's drinking problems and that he told Roy on the day of the accident that Matheson was not acting right, was not coordinated, was slurring his words, and that "we need to get him off the machines."

David Sartain, a fellow worker, testified that Matheson was either sick or drinking, was getting worse, "his complexion was blue and like he was sick," and that he was weaving and bobbing on his stool and about to fall into his machine.

The supervisor testified that he observed Matheson's condition and was aware that other employees believed he should be removed from the machine.

When Matheson returned from his dinner break, Roy suggested that he should go home. Roy, as he escorted Matheson to the company's parking lot, asked if he could make it home, and Matheson answered that he could.

Thirty minutes later, some three miles away from the plant, the

[1]All testimony referred to is by way of depositions on file at the time of the hearing of the Motion for Summary Judgment.

Continued on Page 13

Employer Liability Drastically Extended

By WALTER GRAY
Special to Beverage News

AUSTIN — In an opinion of extreme importance, the Texas Supreme Court has broadly expanded the legal concept of "third party liability" and by decree may have established a strict "dram shop" law.

The defendant company in the case, Otis Engineering Corp., broke no existing Texas law — but may nonetheless be held liable for an employee's off-duty wrongful act involving alcohol abuse because the Supreme Court in its opinion adopted a "new standard of duty" to fit the facts of the case.

The opinion's potential impact on beverage alcohol licensees and permittees cannot be over-emphasized. It represents a radical departure from established legal precedent in Texas, and Associate Justice William K. Kargarlin said in the 8-4 majority opinion that it brings the law into conformity with "what society demands."

Associate Justice Sears McGee said in a strongly worded dissenting opinion that the "unstated premise" of the majority opinion is that it will "somehow reduce the number of accidents caused by drunk drivers and will assure adequate compensation for victims of such accidents.

• • •

HE NOTED that it places alcohol licensees and permittees in a extremely vulnerable position, and will have this effect in the lower courts:

"The trial and appellate courts will feel compelled to impose liability on anyone who furnishes or sells intoxicants to another as a result of the majority opinion."

That is, Justice McGee's position is that it creates a "dram shop law — and said further:

"The result the majority reaches in this case will no doubt reinforce cynical public attitudes that tort liability is not based upon fault, but upon ability to satisfy a judgment."

Justice Kargarlin said the opinion does not create a "dram shop law, but does significantly broaden the concept of "third party" liability.

Continued on Page 5

• • •

Editorial

Dram Shop Is Here

IN THE OTIS CASE reported here the Texas Supreme Court has taken a large step toward imposing "dram shop" liability upon the Texas beverage alcohol industry.

The Court holds a third-party liable for damages caused by an intoxicated person. To a layman, that's "dram shop."

Although the opinion of the court tried to say this is not a dram shop case, we cannot but believe that Justice McGee was right in his vigorous dissenting opinion, when he said: "The trial and appellate courts will feel compelled to impose liability on anyone who furnishes or sells intoxicants to another as a result of the majority opinion."

Unless the Texas Supreme Court is able to draw a logical distinction between the Otis case and more traditional "dram shop" cases, dram shop liability for sellers of beverage alcohol is now the law in Texas.

Opinion Warns Against Open-End Liability Law

Special to Beverage News

THE FOLLOWING is the text of the dissenting opinion of Supreme Court Associate Justice Sears McGee, edited to delete copious references to past written court opinions:

I dissent. The summary judgment evidence before us is not disputed. The sole question is whether an employer is under a duty to control the conduct of an intoxicated, off-duty employee.

Otis Engineering Corporation's agent, Donald Roy, was responsible for the supervision of 23 employees, including Matheson. On a prior occasion, Roy was informed by other workers that Matheson drank on the job, allegedly in his car during breaks. Subsequently, Roy confronted Matheson, explained the company's policy against drinking, and warned him that he would be terminated if he drank on company premises.

Roy testified that he never observed Matheson drinking nor did he ever smell alcohol on his breath, but that Matheson appeared incapable of continuing his job on the night in question.

That same night Matheson complained to Roy that he was not feeling right, and Roy suggested that Matheson go home. Roy escorted Matheson to the door of the plant, but did not go outside or watch him walk to his car.

Editor's Note:

EDITOR'S NOTE: The Texas Supreme Court case reported here seems to merit a reprinting of both the majority and dissenting opinions, for the convenience of interested readers and/or their attorneys.

The opinions are taken from The Texas Supreme Court Journal of Dec. 3, 1983, Vol. 27 No. 9. The style of the case is Otis Engineering Corp. vs. Larry Clark et al.

Approximately a half hour later Matheson was involved in the fatal accident, which also claimed his own life.

• • •

AT THE TIME of the accident Matheson was not acting within the course and scope of his employment: Otis assumed no responsibility for the means by which its employees traveled to and from work. Moreover, Matheson was neither on Otis' premises nor in an automobile owned by Otis at the time of the collision.

The Clarks do not seek recovery in this suit under any theory of vicarious liability, but instead on the premise that Otis was, itself primarily negligent because it breached a duty to control Matheson's conduct.

No Law Broken

IN MY OPINION, Otis was under no legal duty to restrain Matheson or to refrain from sending

Continued on Page 15

VII-A Model Dram Shop Act

THE MODEL ALCOHOLIC BEVERAGE RETAIL LICENSEE LIABILITY ACT OF 1985

Reprinted from
WESTERN STATE LAW REVIEW
Volume 12, Number 2, Spring 1985

APPENDIX A

The Model Alcoholic Beverage Retail Licensee Liability Act of 1985*

(Model Provisions and Commentaries)

TABLE OF CONTENTS

* Preparation was supported by Grant #RO1 AA0621-01 (Prevention Research: Server Intervention and the Law) to the Medical Research Institute of San Francisco.

** Reprinted with permission of Matthew Bender Co. Tables will appear in a forthcoming treatise entitled LIQUOR LIABILITY LAW to be published by Matthew Bender Co.

INTRODUCTION

Background and Purpose

The Model Dram Shop Act (officially entitled the "Alcoholic Beverage Retail Licensee Liability Act") represents the culmination of an 18-month research project on dram shop liability law conducted by the Prevention Research Group (PRG) and funded by the National Institute on Alcohol Abuse and Alcoholism (NIAAA). It is designed as a resource tool for legislators, policymakers, court officials, attorneys and others interested in the prevention of alcohol-related problems who seek to develop a comprehensive approach to this rapidly-changing area of law.

"Dram shop liability" is a term of art referring to the potential legal liability of servers of alcoholic beverages for the injuries caused by their intoxicated and underaged patrons. Originally established in several states in the nineteenth century, dram shop statutes fell into disuse during and immediately following Prohibition.[1] The concept reappeared in the legal community during the late 1940's and 1950's and has had a major resurgence since 1979, concurrent with the recent wave of concern for the societal costs of drunk driving. Legislatures and courts in several states have expanded the liability of commercial servers of alcoholic beverages in an effort to prevent drunk driving and as a means to compensate victims.[2]

This trend has become increasingly apparent and represents a national phenomena. Currently, 37 states and the District of Columbia impose dram shop liability in some form as a matter of state law (either through statutes or State Supreme Court opinions) and several additional states have adopted it de facto, through lower court cases.[3] Many cases are settled out of court, even in states where liability in the particular circumstances is debatable, because of the possibility that courts will reverse previous decisions. In addition, the number of governmental, public interest and private groups supporting the imposition of dram shop liability is expanding, with the Presidential Commission on Drunk Driving being perhaps the most notable group to do so in the recent past.[4]

The PRG research project was conducted over an 18 month period

1. "Dram Shops" were establishments in the nineteenth century which sold alcoholic beverages by the "dram", a unit of measure. For a discussion of the history of dram shop laws, see Mosher, J., "Dram shop law and the prevention of alcohol-related problems," 40 J. OF STUDIES ON ALCOHOL, 773 (1979).

2. See Mosher, J., "Legal Liabilities of Licensed Alcoholic Beverage Establishments: Recent Developments in the United States," paper presented at "Public Drinking and Public Policy: A Symposium on Observational Studies" Banff, Alberta, Canada (Apr. 1984).

3. *Id.*

4. Presidential Commission on Drunk Driving, *Final Report* (1983).

(beginning in October 1983) and included three data components. In the first phase, all state appellate and supreme court dram shop cases were systematically reviewed and analyzed with the aid of a specially-designed computer program. The second phase consisted of detailed interviews with practicing attorneys for both plaintiffs and defendants primarily in three case-study states (Massachusetts, California and Michigan). The interviews were designed to determine how dram shop cases are currently being litigated, with particular attention to the role, if any, of server intervention programs and to the process of settling claims. Finally, an inventory of current server intervention programs was developed. During this final phase, program components and training topics were examined, which provided the data from which the model "responsible server defense" was developed (see below)[5]

The research established several key findings. The case law review revealed that the legal system was not establishing clear guidelines for applying dram shop liability provisions or concepts. The states vary widely in the type and extent of liability that is being imposed and, frequently, there is great uncertainty as to when liability will apply. Even in states where the legislature has acted to establish statutory guidelines, cases have reached conflicting interpretations of the provisions. This uncertainty has had a major impact on the litigation strategy of the parties, encouraging settlements of questionable claims, high insurance costs, and considerable debate and uncertainty in the legal community.

The research also found that courts and attorneys have ignored the recent efforts by the retail industry, educators, and others to develop server intervention programs as a means for the industry to meet its responsibility to the public safety. "Server intervention" refers to reforms in the mode of operation by retail establishments designed to reduce the risk of serving alcoholic beverages to intoxicated or underaged patrons and to promote alternative forms of transportation (other than drunk driving) for patrons who do become intoxicated. Such programs are be-

5. Detailed findings of the research are reported in the following: Mosher, *supra* n.2; Mosher, J., "Server Intervention: Present Status and Future Prospects," paper presented at the Research Workshops on Alcohol and the Drinking Driver sponsored by the National Institute on Alcohol Abuse and Alcoholism and the National Highway Traffic Safety Administration, Bethesda, Maryland, (May 1984); Mosher, J., "Server Intervention: A Guide to Implementing Local and State Programs," paper presented at a conference entitled "Control Issues in Alcohol Abuse Prevention II: Impacting Communities," Charleston, South Carolina, sponsored by the South Carolina Commission on Alcohol and Drug Abuse and other organizations, (Oct. 1984). Colman, V., Krelll, B., and Mosher, J., "Preventing Alcohol-Related Injuries: Dram Shop Liability in a Public Health Perspective," *W.S.U. L. Rev.* (forthcoming); Colman, V., "Dram Shop Laws: A Prevention Tool," paper presented at the 40th Annual Conference on the National Council on Alcoholism, Detroit, Michigan, (Apr. 1984); Harrington, C., "Illustrative Dram Shop Settlement and Jury Verdict Cases: Further Evidence that Server Liability Is Expanding?" Prevention Research Group, (Dec. 1984).

ing instituted throughout the country and consist of two types of trainings. Serving staff (e.g., bartenders and cocktail waitresses) are trained to recognize intoxicated persons and minors, and to intervene effectively. Management personnel are trained to adopt procedures to support the server intervention process, by promoting alternative nonalcoholic beverages and foods, alternative transportation programs and other business reforms. Efforts to formalize the training curricula are now in process.[6]

This industry response to public pressure represents a first step toward establishing a definition of negligent service of alcoholic beverages within a dram shop context. Current law rests primarily on whether a patron was served while "obviously intoxicated," a subjective standard that has led to uncertainty in practice. By focusing the issues so narrowly, the courts have left out an evaluation of the management and server practices which led to the service in question. These practices can be evaluated by a fact-finder to determine whether a reasonable person in like circumstances could have acted more prudently, the classic definition of negligent behavior.

The Model Dram Shop Act is designed to address these problems. It provides a structured, comprehensive guide for drafting a dram shop law or deciding a dram shop case and addresses the uncertainties in current law that have been identified in the course of the research project. It also establishes a "responsible practices" defense as a means to coordinate the legal handling of dram shop cases and the recent development of server intervention programs. As such, it is a resource tool, based on systematic and thorough research, for those developing a comprehensive dram shop liability policy once a decision that such a policy is appropriate in a given state or court. Thus, it is not meant as a vehicle for advocating the imposition of liability but rather as a means to maximize its beneficial public health impact once the decision to impose liability has been made.

A first draft of the Model Act was circulated for comment in January 1985 to over 150 interested persons, including representatives of industry, citizen leaders, trial attorneys, health professionals, and government officials. Twenty responses were received, many of which offered detailed critiques and suggestions. The Act was revised based on the critiques and further study, and a final version of the Act was com-

6. *See*, Mosher, *supra* n.5; Peters, J. (ed.), *Proceedings of the First Northeast Conference on Alcohol-Server Liability*, January 12-13 1984, Boston, Mass. (Northampton, MA: Intermission Ltd., 1984). Intermission Ltd., a non-profit organization, is the leading institute developing such trainings and coordinating the efforts of all training programs. Services include consultations, the newsletter *Responsible Beverage Service*, trainings and a resource library. For further information, contact Intermission, Ltd., 56 Main Street, Northampton, MA 01060.

pleted in March 1985.[7]

Design and Structure

The Model Act is divided into 14 sections covering all major aspects of the tort liability of commercial alcoholic beverage retail outlets subject to the limitations defined in Section 14. Each section provides model statutory language and is followed by a detailed commentary discussing the section's background, rationale, and relationship to other provisions and other state laws. For convenience, Appendix A includes the model provisions without the commentaries. Support materials are found in Appendices B and C.

All states have enacted comprehensive legislation regulating the commercial sale of alcoholic beverages (Alcoholic Beverage Control (ABC) Acts) administered by a separate state agency (referred to here as ABC Agencies, although various names and administrative structures have been created). The Model Act is designed to be included in the state ABC Act and made part of the ABC state structure generally. Several model sections refer specifically to related ABC statutes. In some cases, amendments to existing ABC provisions may be necessary in order to implement an effective dram shop act.

Although the Model Act is conceived of an integral unit, it may nevertheless be advisable or necessary to modify various sections or to adopt only a limited number of sections, depending on the perceived needs and circumstances of a particular state. Several sections specify these limitations in their Commentary and discuss options that are available. Thus, the Model Act should be viewed as a guide for legislative drafting, but each state should evaluate the appropriateness of each section and its exact working. Current ABC Agency practices, the structure of the state retail industry, current law and court decisions, practices of the state insurance industry, and the availability of server intervention programs may all affect the application of the Model Act. It remains important, however, to carefully review all of the topics raised in the model provisions to insure that clear guidelines are established and that uncertainties regarding when and how liability is imposed do not remain.

In addition, various topics generic to negligence actions are not covered by the Act, e.g., issues involving causation. It is anticipated that such issues will be resolved by reference to common law or statutory

7. Summaries of the responses and the resulting revisions are available on request from the Prevention Research Center, 2532 Durant Avenue, Berkeley, CA 94704.

provisions applicable to all negligence claims and that special provisions applicable only to dram shop claims are not necessary.

The Model Act is designed to contribute to the legislative process and therefore does not address many of the issues that arise in applying dram shop liability in particular court cases. Because courts must adopt dram shop principles only within factual situations based on existing state legislation and previous court decisions, they may be unable to adopt the Model Act provisions as such. Nevertheless, several sections may provide a basis for court decisions, and both the specific statutory language and the commentaries may prove to be useful in litigating and deciding particular dram shop cases. The model "Responsible Business Practices" defense (Section 10) may be of particular interest as a means to maximize the preventive potential of the dram shop liability concept.

Optional Provisions

The Model Act includes one optional provision, regarding advance notice to the defendant. Strong public policy arguments can be made for and against the inclusion of a notice provision, and the Model Act takes no position in that debate. If, however, a notice provision is deemed appropriate, the Model Act section provides the best type of provision currently available.

Mandatory Liquor Liability Insurance

In recent years, general insurance liability policies for licensed establishments have excluded dram shop liability from their coverage. Defendants are thus required to purchase separate coverage, which may be very expensive. Many choose to forego coverage or to purchase inadequate coverage despite the potential risks involved either because of the cost or the perception that lawsuits are unlikely. In addition, dram shop insurance may be difficult to purchase at any price. In Minnesota, for example, the state Commerce Commissioner recently warned that unless insurance companies begin providing coverage at reasonable prices an assigned risk pool will be established in that state.[8]

These trends may deny an injured plaintiff recovery even though a valid claim has been established, thus defeating the purposes of the Model Act. To deal with this problem, states should evaluate the need for a statutory provision that requires all licensees to show proof of insurance (or equivalent bond) as a condition of doing business. If enacted, a

8. "Dramshop Insurance Sources Dry Up," Minneapolis Star and Tribune, Jan. 8, 1985, at 8B, col. 1.

minimum coverage should be established, and although the Act does not specify an amount, at least $500,000 coverage is recommended. Licensees who show proof of responsible alcoholic beverage service practices (as defined in Section 10) should also be given a discount on the premium rate due to the reduced risks of acting negligently or recklessly. States should encourage voluntary reductions in premiums by the insurance industry and consider appropriate regulations if reductions are not forthcoming.

A mandatory insurance provision is not included in the Model Act for several reasons. First, a thorough legislative review may be warranted before enactment, with attention to issues or enforcement and feasibility, and a comprehensive set of provisions may be required in order to implement the mandatory insurance provision effectively. The research conducted as part of the Model Act development did not include a careful analysis of insurance practices and policies and their impact on dram shop liability claims. Thus, the development of comprehensive legislation is beyond the scope of the Model Act. Second, the mandatory insurance provision may appropriately belong in a state code other than the ABC code, an existing state law may substantially influence the type of provision to be enacted. Finally, states may wish to delay enactment of the provision until after the main body of the Act has been evaluated and the need for mandatory insurance is clearly established. Although it is not included, the issue of mandatory insurance should nevertheless be carefully considered as part of the enactment of the Model Act.

Topics Not Addressed

The Model Act does not cover several aspects of dram shop liability either because they fall beyond the law's scope and purpose or because they involve policy decisions that will vary from state to state. Those using the Model Law may decide to incorporate additional provisions in the areas outlined below, depending on the circumstances existing in a particular state.

(1) *Social Host Liability*: The Model Act does not cover the potential liability of noncommercial servers of alcoholic beverages and takes no position regarding this form of liability. See Section 5 commentary for further discussion.

(2) *Definition of Licensees and Licensed Premises*: The Act relies on existing state law regarding who is required to obtain a license to serve alcoholic beverages and what constitutes a licensed premise. Guidelines for modifications of these provisions are provided in Section 3.

(3) *Mandated Server Training*: No state now requires training as a condition of employment in a licensed premise or of obtaining a license, although at least two states are considering such legislation. The Model Act does not take a position on this topic, although it may provide a means to standardize the reasonable practices defense found in Section 10. Appendix C provides a model mandated training bill introduced (in modified form) into the Massachusetts and Hawaii state legislatures.

(4) *Minimum Legal Drinking Age*: The Model Act takes no position on what age should be established for legal consumption and possession of alcoholic beverages. This issue falls beyond the scope of the Act. See section 3(e) for further discussion.

(5) *Recovery by Intoxicated Minor for Negligent Service of Alcoholic Beverages*: The Act does not permit an intoxicated adult to recover damages from the party serving that adult for self inflicted injuries unless the server acts recklessly. The Act takes no position as to whether this rule should apply to those under the legal drinking age. See Sections 4, 6, and 7 for further discussion.

(6) *Recovery Caps*: The Model Act does not establish a limit on plaintiff's award. See Section 8 Commentary for discussion.

SECTION 1: SHORT TITLE

This Act shall be entitled the [State] Alcoholic Beverage Retail Licensee Liability Act of]year].

SECTION 2: PURPOSE

(a) The primary legislative purpose of the Act is to prevent intoxication-related traumatic injuries, deaths and other damages, as specified in Section 8, among [State]'s population.

(b) The secondary legislative purpose is to establish a legal basis for obtaining compensation to those suffering damages as a result of intoxication-related incidents in accordance with the provisions of this Act.

Commentary

Current dram shop legislation and court opinions cite numerous purposes for imposing liability on retail licensees. In several states, courts have characterized their states' dram shop statute as either remedial or penal, or both.[1] These characterizations have led to some confu-

1. *See, e.g.*, Village of Brooten v. Cudahy Packing Co., 291 F.2d 284 (8th Cir. 1961); Camille v. Barry Fertilizer, Inc., 30 Ill. App. 3d 1050, 334 N.E.2d 205 (1975); Williams v. Klemesrud, 197 N.W.2d 614 (Iowa 1972).

sion and frequently appear to be contradictory. The penal nature of the statutes is used as a rationale for strictly construing their provisions, for example, by not extending coverage to damages caused by social hosts who negligently serve alcoholic beverages.[2] The remedial nature of the statues is used as a rationale for giving them a broad or liberal reading.[3] As noted by at least one court,[4] the statutes may thus appear to be remedial or penal depending on the outcome which the court seeks to justify. A further problem with the penal justification is that it frequently rests on a finding that the particular statute imposes strict liability upon the licensee. This denies defendants certain defenses, creates uncertainty and arbitrary results, and may impose an unwarranted burden on the alcoholic beverage retail trade.

Cases based on common law negligence principles, on the other hand, have cited both the preventive and compensatory purposes of the liability rule. Courts frequently point to the incidence of drunk driving fatalities and injuries as a justification for imposing liability on licensees and assert that the duty toward third parties will encourage them to exercise caution.[5] These opinions, however, have failed to analyze the standards of conduct which have been imposed to determine whether they are sufficiently certain to be understood and followed. To avoid this problem, the courts appear to rely heavily on a more certain justification—that the rule will provide a means for at least some victims to obtain compensation. Because of the lack of complete analysis, the compensation rationale appears to be the dominant justification for adoption of the new common law rule which imposes liability.

Section 2 specifically rejects the "penal" rationale and the strict liability rule adhered to in many states and explicitly adopts the prevention and compensation rationales found in *Rappaport* and other cases. This recognizes the grounding of the Act in common law negligence principles. The Act provides prevention as a primary purpose for two reasons:

(1) unless the Act does in fact prevent injuries and deaths, the burden placed on the alcoholic beverage retail industry may not be justified, particularly since alternative, fairer means for compensating victims maybe available;

(2) it places a responsibility on the judicial system to apply the provisions of the Act in such a way that they will encourage responsible practices among licensees.

2. *See, e.g.*, Camille v. Berry Fertilizer Co., 30 Ill. App. 3d 1050, 334 N.E.2d 205 (1975).
3. For review, *see* Village of Brooten v. Cudahy Packing Co., 291 F.2d 54 (8th Cir.1961).
4. *Id.*
5. *See, e.g.*, Coulter v. Superior Court, 145 Cal. Rptr. 534, 577 P.2d 669 21 Cal. 3d 144, (1978); Kelly v. Gwinnell, 96 N.J. 538, 476 A.2d 1219 (1984); Rappaport v. Nichols, 31 N.J. 188, 156 A.2d 1 (1959).

Compensation is a secondary purpose of the Act in recognition of victims' rights to recover damages from those with a duty to protect them who act negligently. In this respect, the provision merely recognizes the basis upon which our system of civil liability law rests. By placing compensation as a purpose secondary to prevention, it provides guidance to the judicial system for weighing alternative courses of action during the litigation process.

This section is not intended to impose a new burden of proof on either party or to exonerate the intoxicated tortfeasor from liability. It does, however, serve to emphasize the need for the judicial system to devise standards of conduct on the part of the alcoholic beverage retail industry which will actively deter intoxication-related injuries and deaths and to establish procedures which will encourage adherence to those standards. See in particular Section 10 (Responsible Business Practices Defense). At the same time, it is not intended to reduce the responsibility of those who become intoxicated and cause injuries and deaths.

SECTION 3: DEFINITIONS

(a) *Adult* means any person of legal age to purchase alcoholic beverages, as defined by [state statutory provision].

(b) *Alcoholic beverages* means [definition used in state Alcoholic Beverage Control (ABC) Act].

(c) *Intoxicated person* means an individual who is in a state of intoxication as defined by this Act

(d) *Intoxication* means an impairment of a person's mental or physical faculties as a result of drug or alcoholic beverage use so as to diminish that person's ability to think and act in a manner in which an ordinary prudent and cautious person, in full possession of his or her faculties and using reasonable care, would act under like circumstances.

(e) *Licensee* means any person who is required to be licensed to serve alcoholic beverages [including any governmental entity permitted by law to serve alcoholic beverages] pursuant to [state ABC Act].

(f) *Minor* means any person under the legal age to purchase alcoholic beverages as defined by [state statutory provision].

(g) *Person* means any individual, governmental body, corporation or other legal entity.

(h) *Premises* means [definition used in state ABC act].

(i) *Service of Alcoholic Beverage: Service* means any sale, gift or other furnishing of alcoholic beverages.

Commentary

Subsection (a): Adult

The Act relies on the legal age of purchase of each state (see Appendix B for listing). Because the Act only applies to service of alcoholic beverages by licensees or by those who should be licensed but are not, the rules and exemptions applicable to the service by licensees to minors are applicable (see Commentary to Section 6 for further discussion). For states with differential purchase ages depending on the type of alcoholic beverage, a slight modification of the definition may be necessary. The Act takes no position regarding an appropriate state legal purchase age.

Subsection (b): Alcoholic Beverages

Because the Act is designed as an integral part of the state's ABC Act, it is appropriate to define alcoholic beverages in accordance with the definition used for the entire Act. It is anticipated that the ABC Act includes all beverages designed for human consumption which are capable of inducing a person's intoxication. If this is not the case, the ABC Act definition should be amended to avoid confusion and to insure a comprehensive approach to alcoholic beverage control.[1]

Subsection (c): Intoxicated Person

See Commentary to subsection (d).

Subsection (d): Intoxication

The intoxication definition incorporates use of either alcoholic beverages or controlled substances. Thus, use of any combination of the two which deprives a person of his or her normal use of mental and physical capabilities is considered intoxication. The definition is based in part on that found in the Uniform Vehicle Code,[2] which also includes both drug and alcoholic beverage use in its definition. Although both alcohol and drug use are included, other sections of the Act provide that defendants do not have a duty to recognize signs of intoxication other than those associated with the use of alcoholic beverages (see Section 6, Commentaries to Sections 6, 10).[3]

The Act's language regarding the "impairment of mental or physical facilities" is based in part on the intoxication definition found in the

1. *See*, Wegan v. Village of Lexington, 309 N.W.2d 273 (Minn. 1981), for a discussion of the problems associated with definitions of alcoholic beverage that are not sufficiently inclusive.
2. UNIFORM VEHICLE CODE § 11-902 (Supp. 1979).
3. Surprisingly, no reported dram shop case or state statute has addressed this specific issue.

Model Penal Code, which states that intoxication is the "disturbance of mental and physical capabilities resulting from the introduction of substances into the body."[4] The Act incorporates this language into the "reasonable care" and "prudent person" standards appropriate to a negligence-based cause of action. This is commonly done in applying an intoxication definition to driving while intoxicated cases.[5]

Early definitions of intoxication did not rely upon this impairment standard specifically, defining intoxication more generally, e.g., as a state in which a person does not possess that clearness of intellect and control that the person would otherwise have.[6] The Act's definition provides a more definite basis for the factfinder to determine the existence of intoxication.

The requisite impairment of mental and physical faculties provided under the Act can come at either high or low blood alcohol levels (BALs), depending on the reactions of a particular individual to alcohol use. Thus, the Act specifically does not incorporate a per se BAL rule, a common provision in drunk driving statutes.[7] This recognizes that the Act is directed primarily at the actions of servers of alcoholic beverages rather than drinkers, although drinkers do remain the primary tortfeasor. The key issue is thus whether the server knows or should know that the person being served is impaired due to intoxication such that additional alcoholic beverages should not be provided. See Commentaries in Sections 6 and 10 for further discussion. A per se BAL rule would tend to impose liability on a defendant whenever a patron is at the requisite BAL level without regard to the defendant's actual or constructive knowledge of intoxication. This is manifestly unfair, since signs of intoxication may not appear until BAL levels are reached that are much higher than those relied upon by existing per se rules.

Subsection (e): Licensee

The Act relies upon the state licensing provisions for determining what parties are licensed to serve alcoholic beverages. States that permit sales by governmental entities and do not wish to grant governmental

4. MODEL PENAL CODE § 2.08 (1980).
5. *See, e.g.*, Gilbert v. Municipal Court, 73 Cal. App. 3d 723, 140 Cal. Rptr. 897 (1977) (interpreting CAL. VEHICLE CODE § 23152).
6. *See, e.g.*, Commonwealth v. Buoy, 128 Pa. Super. 264, 193 A. 144 (1937).
7. This is in accord with all dram shop cases that have addressed this issue. *See, e.g.*, Seeley v. Sobczak, 281 N.W.2d 372 (Minn. 1979) (a .269 BAL did not establish as a matter of law that decedent drinker was obviously intoxicated when served). *Accord*, King v. Ludlow, 165 Cal. App. 2d 620 332 P.2d 345 (1958) (*results of having a .15 BAL is not such a law of nature that the court* must take judicial notice that driving therewith is intoxication as a matter of law).

immunity should include the phrase in brackets. See Commentary to Section 5 for further discussion.

Subsection (f): Minors

See Commentary to subsection (a).

Subsection (g): Person

The Act does not distinguish between individuals and corporate entities. This is in accord with most state ABC statutes and prevents efforts by defendants to avoid liability by attributing personal actions to a corporate body. The lack of such a definition has created ambiguities and confusion in several dram shop cases.[8] See Sections 4 and 5 for further discussion.

Subsection (h): Premises

It is anticipated that each state will define a licensee's premises in an identical fashion to the definition used in the state's Alcoholic Beverage Control Act. Attention should be placed on the inclusion of areas both inside and outside of a licensee's physical establishment which are under the licensee's exclusive control and which are accessible to the licensee's customers. This may include parking areas or rooms where alcoholic beverage consumption is not permitted.

Subsection (i): Service of Alcoholic Beverages; Service

The Act's definition encompasses all dispensing of alcoholic beverages by defendants in their capacity as commercial vendors. This insures that defendants will not circumvent the intent of the Act by resort to transactions not traditionally associated with actual sales. The definition is in accord with other dram shop statutes and case law.[9] This Act is not intended to cover the potential liability of social hosts for serving alcoholic beverages. See Commentary to Section 5 for discussion.

SECTION 4: PLAINTIFF

(a) Any person who suffers damage, as provided in Section 8, may bring an action pursuant to this Act subject to the limitation found in subsection (b) of this Section.

8. *See, e.g.*, Fowler v. Rome Dispensary, 5 Ga. 36, 62 S.E. 660 (1908); Rosenthal v. Dunphy, 18 Conn. Supp. 271 (1953).

9. *See, e.g.*, MICH. COMP. LAWS. § 436.22(5) (1983); Guitar v. Sieniek, 402 Mich. 152, 262 N.W.2d 9 (1978); IOWA CODE ANN. § 123.92 (West 1981).

(b) A [person/adult] who becomes intoxicated may not bring an action pursuant to Section 6 of this Act (negligent service of alcoholic beverages) against a defendant for serving alcoholic beverages to such person.

Commentary

Any person (or corporate entity) suffering damages may bring a cause of action, subject to the limitations imposed by other provisions of the Act and subject to the limitation imposed in section (b). This is in accord with most negligence-based dram shop statutes,[1] and avoids ambiguities and confusion found in statutes with enumerated classes. Many such provisions list relatives, employers, etc., and "other persons" as possible plaintiffs, and courts have had difficulty determining the legislative intent of the listing particularly the identity of "other persons."[2] Statutes which limit the class of plaintiffs are sometimes interpreted to impose strict liability and in some cases create a cause of action not known at common law (e.g., for loss of support).[3] These ancillary issues are not present in the Act.

The Plaintiff Section, in subsection (b), makes one exception to the general rule that any person suffering damages may bring a cause of action pursuant to the Act. Under most existing dram shop laws, intoxicated persons, at least those who are not minors, are not permitted to recover for self-inflicted injuries due to their contributory negligence.[4] This rule has been established based on inferred legislative intent, even though most statutes are silent on the topic.[5]

The Act adopts this restriction in light of its near universal acceptance in states with dram shop liability and the tenet that one should not be permitted to benefit from one's own negligence. The Act does permit potential actions by intoxicated persons for reckless misconduct on the part of defendants (see Section 7). This recognizes the traditional common law rule that contributory and comparative negligence are not defenses to claims based on recklessness.[6]

1. *See, e.g.*, CAL. BUS. & PROF. CODE § 25602.1 (West 1980); ILL. REV. STAT. CH. 43 § 135 (Supp. 1983); N.Y. GEN. OBLIG. LAW § 11-101 (McKinney Supp. 1983); N.C. GEN. STAT. § 188-120 (1983).

2. *See, e.g.*, OHIO REV. CODE ANN. § 4399.01 (1982); Dworak v. Tempel, 17 Ill. 2d 181, 161 N.E.2d 258 (1959).

3. *See* Commentary to § 8, *infra*.

4. *See, e.g.*, Robinson v. La Mott, 289 N.W.2d 60 (Minn. 1979); Sager v. McClendon, 296 Or. 33, 672 P.2d 697 (1983).

5. *Id.*

6. In cases of aggravated misconduct short of intentionally harmful behavior, courts in comparative fault jurisdictions have been divided, with some holding that the plaintiff's contributory

The Act takes no position regarding the appropriateness of this rule for claims by intoxicated minors. The Alaska Supreme Court, in a landmark decision, has held that the minimum age drinking law (MADL) is designed to protect minors from their own alcohol-related injuries; thus their intoxication can not be used to reduce or bar their recovery from those who serve them in a negligence-based claim.[7] The California Supreme Court reached a similar result in its interpretation of that state's dram shop law.[8] Age does not appear to be a distinguishing factor for other courts interpreting statutory provisions that bar recovery for intoxicated persons.[9] It is too early to evaluate the impact of the Alaska and California decisions. MADL's are undergoing rapid changes, reflecting changes in social attitudes. This issue should therefore be carefully evaluated in light of current social policies and attitudes in each state and community.

Subsection (b) is specifically limited to claims based on negligent services of alcoholic beverages to the plaintiff ("to such person"). Claims against defendants for service to third parties are not barred under the subsection even if the defendant also served plaintiff and the intoxicated person in the drinking event. Several states have created the doctrine of "complicity," which bars claims by plaintiffs who "actively participate" in the drinking episode of another, who later injures plaintiff. Courts have had difficulties defining "active participation," and considerable confusion and litigation has resulted.[10] Complicity is especially prevalent in states which have "strict liability" statutes.[11] These provisions have been interpreted to preclude contributory and comparative negligence defenses, an added rationale for imposing the complicity doctrine.

The Act follows the better rule, that issues of participation in the drinking event should be presented to the fact-finder as an issue of comparative or contributory negligence and should not create a bar to recovery as a matter of law. This procedure is in accord with standard negligence principles and will avoid litigation of what is, in essence, a factual determination.

negligence should reduce the recovery. *See*, PROSSER AND KEETON, THE LAW OF TORTS, 5th ed., § 67 (1984).

7. Morris v. Farley Enterprises Inc., 661 P.2d 167 (Alaska 1983).

8. Cory v. Shierloh, 29 Cal. 3d 430, 174 Cal. Rptr. 500, 629 P.2d 8 (1981).

9. *See, e.g.*, Randall v. Village of Excelsior, 103 N.W.2d 131 (Minn. 1960).

10. *See, e.g.*, Nelson v. Araiza, 43 Ill. App. 3d 685, 357 N.E.2d 207, 2 Ill. Dec. 230 (1976), *aff'd* 69 Ill. 2d 534, 374 N.E.2d 637 (1977); Heveron v. Village of Belgrade, 288 Minn. 395, 181 N.W.2d 692 (1970).

11. *Id.*

SECTION 5: DEFENDANTS

The following persons who commit an act giving rise to liability, as provided in Section 6 and 7, may be made a defendant to a claim under the provisions of this Act:

(a) an alcoholic beverage retail licensee, and any employee or agent of such a licensee;

(b) any person who, at the time of such act, was required by law to have had an alcoholic beverage retail license under the provisions of [State ABC Act], and any employee or agent of such person.

Commentary

Section 5 provides that the Act only addresses the actions of persons licensed (or those who should have been licensed at the time of the act and were not) to serve alcoholic beverages. Thus, the Act does not include claims against nonlicensees ("social hosts"). This limitation has been imposed for three reasons:

(1) as several courts have noted, the service of alcoholic beverages in noncommercial settings is a fundamentally different activity than such service in commercial settings, involving distinct standards of conduct;[1]

(2) the Act relies heavily on related provisions in the states' ABC Acts, which are not applicable to nonlicensees;

(3) because licensees are in the business of providing alcoholic beverages and anticipate profits from such activities, it is reasonable to expect responsible practices in the conduct of the business.

Social Host Liability

Several courts have had to determine the extent, if any, of a social host's liability, and there is a substantial conflict of authority. Liability has most readily been imposed in situations involving service to minor, particularly when the facts show a lack of adequate adult supervision. Only a small number of appellate cases (in California, Minnesota, Iowa and New Jersey) have imposed liability on all social hosts for service to intoxicated adults.[2] All but the case in New Jersey, decided in 1984, have been overruled by legislative action. The New Jersey Supreme Court stated that imposing liability was justified in part by the changing social attitudes regarding drunk driving. It is too early to determine

1. Camille v. Berry Fertilizers, Inc., 30 Ill. App. 3d 1050, 334 N.E.2d 205 (1975).

2. *See, e.g.*, Ross v. Ross, 294 Minn. 115, 200 N.W.2d 149 (1972); Williams v. Klemesrud, 197 N.W.2d 614 (Iowa 1972); Coulter v. Superior Court, 21 Cal. 3d 144, 577 P.2d 669 145 Cal. Rptr. 534 (1978); Kelly v. Gwinnell, 96 N.J. 538, 476 A.2d 1219 (1984).

whether this precedent-setting opinion will be followed by other states or will also be overruled by legislative enactment.

Social host liability may arise in a diverse set of circumstances; an employer's service to intoxicated employees; service to University students at University-sponsored events; wedding receptions where alcohol is served by a caterer; or service of alcoholic beverages to social acquaintances at a social host's home. Alternative theories of liability in these circumstances may be appliable. For example, some cases have imposed liability on employers under a respondeat superior theory for serving alcoholic beverages to intoxicated employees who subsequently injure a third party if the service occurred during the course of employment.[3] Universities have a special duty of care for their students that may be applicable. Service of alcoholic beverages to a person with a disability that is known to make him or her particularly sensitive to alcoholic beverages has also been held to be the basis of liability.[4] The Act takes no position regarding the appropriateness of these and other alternative theories of liability regarding social host service of alcoholic beverages.

Licensee Liability

The distinction between social hosts and commercial servers of alcoholic beverages has created much confusion in the courts. The Act relies on the licensing provisions of the State Alcoholic Beverage Control (ABC) Act in order to avoid this uncertainty and to emphasize the Act's integral relationship to other ABC Act provisions. Nonlicensees required to obtain a license are explicitly included in the Act in order to eliminate any incentive on the part of licensees to avoid the relevant licensing provisions.[5]

Many courts have based the distinction between social hosts and licensees on whether an actual sale has occurred.[6] This may create an arbitrary result, as the social host may be acting substantially as a licensee even though actual payment for the service by those being served is lacking. For example, in some states, caterers are not required to obtain a license as a condition of serving alcoholic beverages at catered events. A licensee catering a social event may be potentially liable under the Act while a caterer which is not required to obtain a license would be protected.

3. *See, e.g.*, Brockett v. Kitchen Boyd Motor Co., 24 Cal. App. 3d 87, 100 Cal. Rptr. 752 (1972).
4. Cantor v. Anderson, 178 Cal. App. 3d 124, 178 Cal. Rptr. 540 (198[illegible].
5. *See*, Guitar v. Bieniek, 402 Mich. 152, 262 N.W.2d 9 (1978).
6. *See, e.g.*, Bartkowiak v. St. Adalbert's Roman Catholic Church Society, 40 A.D.2d 306, 340 N.Y.S.2d 137 (1973).

This suggests that the licensing provisions of the State ABC Act should be carefully reviewed so that all those acting in the role of a licensee (in the business of providing alcoholic beverages on a commercial basis) are required to obtain a license. One-day licenses, caterers' licenses, etc. may provide a means for reaching this result. It is anticipated that the licensing provisions will require a license for all commercial transactions of alcoholic beverages where a direct pecuniary gain for the sale is anticipated. This would exclude situations where the alcohol is served in a social setting in order to further an unrealted business venture or when those at a social gathering pool their resources to purchase a collective amount of alcoholic beverages.

SECTION 6: NEGLIGENT SERVICE OF ALCOHOLIC BEVERAGES

(a) A defendant, as defined in Section 5, who negligently serves alcoholic beverages to a minor or to an intoxicated person is liable for resulting damages, subject to the provisions of this Act.

(b) Service of alcoholic beverages to a minor or to an intoxicated person is negligent if the defendant knows or if a reasonably prudent person in like circumstances, adhering to responsible business practices as defined in Section 10, would know that the person being served is a mior or is intoxicated.

(c) Proof of service of alcoholic beverages to a minor without request for identification shall form a rebuttable presumption of negligence.

(d) Service of alcoholic beverages by a defendant to an adult person who subsequently serves a minor off the premises [or who is legally permitted to serve a minor] does not constitute service to the minor unless a reasonably prudent person in like circumstances would know that such subsequent service is reasonably likely to occur [and is illegal].

(e) A defendant does not have a duty to investigate whether a person being served alcoholic beverages intends to serve the alcoholic beverages to other persons off the premises.

(f) A defendant is not chargeable with knowledge of a person's consumption of alcoholic beverages or other drugs off the defendant's premises unless the person's appearance and behavior, or other facts known to defendant, would put a reasonably prudent person on notice of such consumption.

(g) A defendant is not under a duty to recognize signs of a person's intoxication other than those normally associated with the consumption of alcoholic beverages except for intoxication resulting in whole or in

part from other drugs consumed on defendant's premises with defendant's actual or constructive knowledge.

COMMENTARY

A. *Service of Alcoholic Beverages to Minors*

Service of alcoholic beverages to an underaged person violates the licensing laws of every jurisdiction, and is punishable by criminal sanctions in all but one state.[1] These statutes are indicative of the universal legislative recognition that minors are neither physically nor emotionally equipped to handle the consumption of alcoholic beverages,[2] and that such consumption leads to tragic injuries and deaths. Civil liability for service to minors is already widely recognized by common law in at least 15 jurisdictions and by statute in at least 18.[3] This Act codifies an exclusive remedy for negligently providing alcohol to minors, while confining liability to circumstances reasonably within the control of licenses.

The liability imposed by this section is based on the premise that the hazards created by the intoxication of minors can be prevented in many cases by responsible licensee practices. The negligence standard imposes the duty on licensees to exercise reasonable care in avoiding service to minors. However, licensees may inadvertently cause the intoxication of minors because of convincing false identification, collusion with an adult, or apparent majority.

Subsections (d) and (e) address the most common means for minors to obtain alcoholic beverages—by collusion with a person of legal drinking age. Subsection (d) specifically exempts the defendant from liability when there is such collusion unless the defendant should reasonably have known that the collusion would occur affirmative duty to investigate subsequent service of alcoholic beverages off the premises.[4] These subsections also include optional provisions that may be applicable in states where certain adults (e.g., parents, spouses) are legally permitted to serve minors.

Checking the identification of patrons is a simple and effective means of reducing the risk of service to minors. Subsection (c) explicitly recognizes that failure to check the identification of a minor is evidence of negligence. The provision is similar to one included in a North Carolina statute providing licensee liability for sale of alcoholic beverages to minors.[5] However, when presented with convincing false identification, a licensee cannot reasonably be expected to prevent service to a minor, absent actual or constructive knowledge of the patron's minority. Implementation of the practices specified in Section 10 or due care in the use of reasonable alternative practices provide a defense to liability under this Act. States with statutory or regulatory provisions regarding checking identification without official documentation may wish to incorporate them by reference into this section.

Finally, unusual circumstances may arise where a licensee cannot reasonably be expected to suspect a patron is underaged. This will not normally arise, since current business practices recognize that age identification without documentation is extremely difficult and that, in general, proof of age should be required even when a patron appears to be several years older than the legal drinking age. Nevertheless, a situation may arise where, due to highly unusual physical characteristics or mode of dress, a patron's appearance may be sufficiently deceptive as to allay any reasonable suspicion on the part of the licensee. In these circumstances, the existence of a Responsible Business Practices Defense pursuant to Section 10 may be determinative.

Service of alcoholic beverages to a minor by a defendant may lead to liability even though the minor is not intoxicated when served. This is in accord with most state dram shop statutes and common law cases.[6] However, as in any negligence action, liability will not attach unless the service of alcoholic beverages is shown to be a substantial cause of subsequent damages.

B. *Service of Alcoholic Beverages to Intoxicated Persons*

Service of alcoholic beverages to intoxicated persons is negligent provided that the defendant knew or should have known that the person being served was intoxicated. Such service is illegal in all but seven states,[7] although liability under this section is not based on violation of criminal statutes but rather on common law negligence principles. Negligence per se claims are not permitted, as the Act provides the exclusive remedy for damages caused by negligent services of alcoholic beverages (see Section 14).

The statutory enactments will support a legislative finding that service to intoxicated persons creates a substantial risk of harm to both the

1. *See*, Appendix A. In North Carolina service to an underaged person is punishable as an administrative penalty, rather than as a criminal offense, with fines of up to $500.
2. *See, e.g.*, Young v. Caravan Corporation, 99 Wash. 2d 655, 663 P.2d 834 (1983).
3. *See, e.g.*, Elder v. Fisher, 247 Ind. 598, 217 N.E.2d 847 (1966); Sorensen v. Jarvis, 119 Wisc. 2d 627, 350 N.W.2d 108 (1984); N.C. Gen. Stat. § 18B-120 (1983).
4. Bradshaw v. Rawlings, 612 F.2d 135 (3rd Cir. 1979) (applying Pennsylvania law).
5. N.C. GEN. STAT. § 18B-121 (1983).
6. *But see* CAL. BUS. & PROF. Code § 25602(a)(1) (West 1980); *see* cases cited *supra* notes 3,4.
7. *See*, Appendix C.

intoxicated person and to others that is foreseeable to the defendant. This section codifies this finding within a negligence context.

The Act does not provide for liability for serving a nonintoxicated adult, even if the service leads to intoxication.[8] The defendant's duty is to avoid increasing the intoxication of the person being served once a state of intoxication has been reached. This recognizes the inability of a defendant to determine whether a given amount of alcoholic beverages will produce intoxication and the fact that risks of harm increase substantially as the level of intoxication increases. (In order to avoid attempts to circumvent the defendant's duty in this regard, multiple-drink service should be treated as distinct service.)

A California case, *Cantor v. Anderson*,[9] provides a limited exception to this rule, which is not followed in the Act. There, it was alleged that the social host served a person with a known disability whom the host should have known would lose control and become violent due to the intoxicating effects of alcoholic beverages on him. This limited cause of action is not recognized under the Act (nor is it recognized under any existing dram shop act) unless the defendant's conduct reaches the level of recklessness (see Section 7). This is in recognition of the potential for widespread abuse of such a cause of action, including the possibility of actions based on service known alcoholics, and the unfair burden that such a duty of care would place on defendants.

If a defendant knows of a person's particular sensitivity to alcoholic beverages, he may be on notice that intoxication of that person may result after a very limited number of drinks. Thus, a cause of action based on service to an intoxicated person may arise after a very limited number of drinks are served, depending on the particular facts of the case (see discussion this Commentary). Service to a nonintoxicated adult, however, may not give rise to a cause of action based on negligence.

A defendant may have either actual or constructive knowledge of the intoxication of the person being served. Constructive knowledge may be based on observations of the intoxicated person or on facts known to the defendant that would lead a reasonably prudent person to conclude that the person is intoxicated. Several courts and commentators have documented the observable signs of intoxication.[10]

A defendant is under a duty to ascertain whether a patron is intoxi-

8. *Cf.* ILL. REV. STAT. CH. 43 § 135 (Supp. 1983).
9. 126 Cal. App. 3d 124, 178 Cal. Rptr. 540 (1981).
10. *See, e.g.*, Strand v. Village of Watson, 245 Minn. 28, 70 N.W.2d 60 (1955); INTERMISSION, LTD., RESPONSIBLE BEVERAGE SERVICE TRAINING PROGRAM: PARTICIPANT'S MANUAL, 11 (Northampton, MA 1984).

cated by taking those steps which a reasonably prudent person would regard as adequate to ascertain whether the conduct of the prospective purchaser manifests the loss of control of actions or emotions that constitutes intoxication.[11] The Supreme Court of Minnesota gives a list of such steps which may be required of a seller to avoid a charge of negligence:

> . . . engage the prospective purchaser in conversation, to note specifically the details of the purchaser's physical appearance, to observe his conduct during the course of his drinking at the supplier's establishment, or to scrutinize his actions in other ways by which the supplier may detect intoxication which is observable even though not obviously.[12]

A defendant may also be held liable when he or she has actual knowledge of facts which would lead a reasonable person to the conclusion that the person being served is intoxicated. A seller who does not know of a patron's intoxication and cannot reasonably observe it may still be found negligent if the service took place under circumstances in which he should have known of the patron's intoxication. This may occur when a large quantity of alcoholic beverages is served to a person in such a short period of time that intoxication is bound to result.[13] Sellers of alcoholic beverages may be charged with knowing the effects of quantities of alcoholic beverages on their patrons, since they are in the business of purveying them. Other situations in which knowledge of intoxication may be imputed are when the server is told the number of drinks a person has consumed prior to the service.

These duties are also reflected in the Act in the Responsible Business Practices Defense (see Section 10 for further discussion), which is specifically cross referenced in this section. Thus, if a defendant can show that reasonable steps were taken to ascertain whether a person being served was intoxicated then a defense may be established.

Subsections (f) and (g) deal with particular problems that can arise when attempting to determine the intoxication of another. Subsection (f), modeled after a provision in the New Mexico dram shop statute,[14] deals with consumption of alcoholic beverages by a person prior to entering the premises. A defendant cannot reasonably be expected to know of such behavior unless he is told of it or unless he is given a reasonable time to observe the person. His duty is therefore substantially affected compared to service to a person who is sober upon entering the premises. Subsection (f) applies to both off- and on-premises defendants. Fact-find-

11. Mjos v. Village of Howard Lake, 287 Minn. 427, 178 N.W.2d 862 (1970).
12. *Id.* at 435, 178 N.W.2d at 868.
13. Cimino v. Milford Keg, 385 Mass. 323, 431 N.E.2d 920 (1982).
14. N.M. STAT. ANN. s 41-11-1 (Supp. 1983).

ers should take into account that off-premises defendants have only a limited time to observe a customer before service of alcoholic beverages occurs, which may substantially affect their ability to determine the intoxicated condition of the person being served.

Subsection (g) provides that a defendant does not have a duty to recognize signs of intoxication other than those commonly associated with alcoholic beverage consumption. Many persons combine alcoholic beverages with other drugs. This may lead to intoxication that is not observable to a defendant not familiar with drug impairments other than those associated with alcoholic beverages. This subsection recognizes that a defendant's duty is related directly to the service of alcoholic beverages. However, if the defendant permits the use of other drugs on the premises, a duty may arise because of having knowledge of facts which would lead a reasonable person to the conclusion that the person being served is intoxicated (see discussion *supra*, this Commentary).

SECTION 7: RECKLESS SERVICE OF ALCOHOLIC BEVERAGES

(a) The service of alcoholic beverages is reckless when a defendant, as defined in Section 5, intentionally serves alcoholic beverages to a person when the server knows, or a reasonable person in his position should have known, that such service creates an unreasonable risk of physical harm to the drinker or to others that is substantially greater than that which is necessary to make his conduct negligent.

(b) A defendant who recklessly provides alcoholic beverages to another is liable for resulting damages.

(c) Specific serving practices that are admissible as evidence of reckless conduct include, but are not limited to, the following:

(1) Active encouragement of intoxicated persons to consume substantial amounts of alcoholic beverages;

(2) Service of alcoholic beverages to a person, sixteen years old or under, when the server has actual or constructive knowledge of the patron's age;

(3) Service of alcoholic beverages to a patron that is so continuous and excessive that it creates a substantial risk of death by alcohol poisoning;

(4) The active assistance by a defendant of a patron into a motor vehicle when the patron is so intoxicated that such assistance is required and the defendant knows or should know that the intoxicated person intends to operate the motor vehicle.

Commentary

Subsection (a): General Definition

The general definition of reckless service of alcoholic beverages is a codification of the Restatement (Second) of Torts § 500[1] within the server liability context. The Restatement defines three key components of recklessness:

(1) *Intentionally serving alcoholic beverages*: The act of serving alcoholic beverages must first be intentional in order for the server's conduct to be reckless. It must be deliberate. "It . . . must be more than any mere mistake resulting from inexperience, excitement, or confusion, and more than mere thoughtlessness or inadvertance, or simple inattention. . . ."[2] For example, a server who brought a drink to one patron who later passed it on to a customer who was visibly intoxicated, may be negligent, but not reckless. The server must know that he or she is providing an alcoholic beverage to a particular patron in order for the service to be intentional.

(2) *Creating an unreasonable risk of physical harm to the drinker or to others*: There can be two types of reckless conduct in the service of alcoholic beverages. In the first, the server knows that the service creates a high degree of risk of physical harm to the drinker or to others. S/he appreciates the risk but acts in conscious disregard of the consequences. A second type of reckless conduct involves a server who know that s/he is serving a particular patron but s/he does not appreciate the risk that the service is creating, although a reasonable person would be conscious of the risk. In either situation, it does not matter that the server did not intend for the consequences to result. "If conduct is sufficiently lacking in consideration for the rights of others, reckless, heedless to an extreme, and indifferent to the consequences it may impose, then regardless of the actual state of mind of the actor and his actual concern for the rights of others, we call it willful misconduct . . ."[3] Recklessness is often used interchangeably by courts with willful and wanton misconduct.

In sum, reckless conduct involves a risk taken by the server of the alcohol that is unreasonable, such that physical injury is not merely a possible result, but a probable one. However, even when appreciated, it is not necessary that the server perceive the risk as being extremely hazardous in order to be considered reckless. "The risk must be of such

1. RESTATEMENT (SECOND) TORTS § 500 Reckless Disregard of Safety, defined (1965).
2. W. PROSSER AND W. KEETON, HANDBOOK OF THE LAW OF TORTS 185 (5th ed. 1984).
3. Ewing v. Cloverleaf Bowl, 20 Cal. 3d 395, 402, 572 P.2d 1155, 1158, 143 Cal. Rptr. 13, 17 (1978).

nature and degree that, considering the nature and purpose of the actor's conduct and the circumstances known to him, its disregard involves a gross deviation from the standard of conduct that a law-abiding person would observe in the actor's situation."[4]

(3) *Distinguishing negligent and reckless conduct*: The Restatement (Second) of Torts labels the risk presented by both negligence and recklessness as being unreasonable, with the degree of unreasonable risk as the key factor in distinguishing the two concepts.[5] (For discussion of negligence, see Section 6, *supra*). "The difference between reckless misconduct and conduct involving only such a quantum of risk as is necessary to make it negligent is a difference in the degree of the risk, but this difference of degree is so marked as to amount substantially to a difference in kind."[6] A defendant may be negligent in serving alcohol to a patron, but absent a showing of a greater degree of risk disregarded by him, such conduct is not reckless.

Subsection (b): Liability for the Reckless Service of Alcoholic Beverages

The rules for finding a defendant liable for reckless conduct are based on Section 501 of the Restatement (Second) of Torts. That section states that the rules for determining whether a person is liable for reckless disregard of another's safety are the same as those which determine his liability for negligence,[7] with three exceptions.

First, to be held liable for negligence, the actor's conduct must be a substantial factor in bringing about the harm. In an action for recklessness, the jury need only find that the actor's conduct bears a sufficient causal relation to another's harm to find him liable. In a recklessness action, then, the standard for finding a causal relation to a plaintiff's harm must be "sufficient" to warrant a finding of liability but not necessarily "substantial," even though, under negligence no such finding would be permissible.[8]

Second, the treatment of the plaintiff's conduct and its effect on the defendant's liability is handled differently under negligence and recklessness rules. In a negligence action, the plaintiff's contributory or comparative negligence may bar or reduce his recovery, while in an action involving a defendant's recklessness, it at worst would only reduce recovery. Third, a finding of recklessness may give rise to punitive damages. See the discussion concerning defenses and damages in Section 9 and 8, respectively, for the impact of a finding of recklessness.

4. BLACK'S LAW DICTIONARY, p. 1142 (5th ed. 1979).
5. RESTATEMENT (SECOND) TORTS, § 500.
6. *Id.* § 500, Comment g.
7. *Id.*, §§ 430, 431.
8. *Id.*, § 501, Comment a.

Subsection (c): Admissible Evidence of Reckless Conduct in the Service of Alcoholic Beverages

The server practices that evidence reckless conduct which follow are not meant to be an exhaustive list. They serve as illustrations of the recklessness concept, and provide examples in the context of alcohol service. They do not create a presumption of recklessness and are subject to certain defenses as defined in Sections 9 and 10.

Subsection (c)(1): Active encouragement of intoxicated persons to consume substantial amounts of alcoholic beverages

Serving practices that actively encourage intoxicated patrons to consume substantial amounts of alcoholic beverages can be evidence of recklessness. These practices center around an active urging or coaxing of intoxicated patrons to drink. These should be distinguished from practices which encourage sober patrons or intoxicated patrons, whom a server would not reasonably have known were intoxicated, to continue drinking. Thus, serving practices such as happy hours, free drinks, or other drink promotions, which are promoted only to patrons who are not known to be intoxicated may be evidence of negligence but not of recklessness. If such practices are applicable to all patrons, regardless of their intoxication, it may be evidence of recklessness.

The subsection also provides that patrons be encouraged to consume "substantial amounts" of alcoholic beverages. A showing that only one drink was offered to an intoxicated person is insufficient; rather, evidence of repeated serving is required. This requirement is included in recognition that determining intoxication of a patron is an inexact science and that reckless service of such persons must clearly be highly abusive in order to meet the standards set forth in the recklessness definition.

As in the proof of negligence, BAL levels may be used as evidence that "substantial amounts" were served, but are not conclusive. No set BAL is established, and the circumstances of each case will be critical (see Commentary to Sections 2 and 10). Nevertheless, BAL levels substantially above a state's legal or presumptive definition of intoxication, which normally can only be reached with extremely heavy consumption of alcoholic beverages, may be relevant in the determination of this element of the definition.

The subsection also required that the server "actively encourage" the continued drinking by the intoxicated person. This standard has been adopted in recognition that the reckless conduct must be intentional and deliberate (see Commentary, *supra*, this section). Evidence that a server inadvertently permitted such drinking to occur, or that another patron helped to deceive the server could be used to show the lack of recklessness even though it might be sufficient to show negligence.

The conduct described in this subsection is defined as reckless in part because of the substantial risk it creates of harm to the drinker and others that is substantially greater than mere negligent service. The risk of injury rises dramatically as the drinker's intoxication level increases to ranges of BALS substantially greater than those normally associated with intoxication. The act of encouraging continued drinking beyond intoxication is thus evidence that the server is ". . . indifferent to the consequences it may impose. . . ."[9]

Subsection (c)(2): Service of alcoholic beverages to persons 16 years of age and under

This subsection recognizes the substantially greater risk of harm involved in serving a person 16 years of age or under. Children are known to be exposed to great risk of harm to themselves and others if they come under the influence of alcohol, and are also recognized as not capable of bearing the responsibility of their own drinking behavior. Thus, servers are held to a higher standard of conduct in their handling of very young patrons, and the latters' contributory or comparative negligence does not necessarily provide a defense to the server.

The subsection also recognizes that the failure to identify the underaged status of those 16 years and under evidences a much greater degree of carelessness and disregard for safety of others than service to those who are over 16 years of age but still under the legal drinking age. Although there may be circumstances in which a 16 year old might appear to be over the drinking age, it is unlikely that such a person would not appear to be an age that would clearly require the careful checking of identification. The evidence of recklessness would thus be more persuasive as the age of the patron decreases.

Service of alcoholic beverages to minors who are over 16 years of age may be reckless, depending on other circumstances, and the evidence of minority may be relevant to that determination. The mere service of alcoholic beverages to those over 16 years of age, even if intoxicated,

9. *See* Ewing v. Cloverleaf Bowl, 30 Cal. 3d at 402, 572 P.2d at 1158, 143 Cal. Rptr. at 17.

however, is not alone sufficient for a finding of recklessness. Other factors that may be relevant to the determination of recklessness include (but are not limited to) those found in other subsections of this provision.

Criminal laws in all states prohibit the furnishing of alcoholic beverages to minors generally. These laws evidence a legislative finding, well documented in research literature, that all those under the legal drinking age are particularly sensitive to alcohol and are at a greater risk to cause harm to themselves and others. This provision recognizes that those over 16 years of age have a greater degree of responsibility for their own conduct than their younger counterparts.

As with the service of alcoholic beverages to minors generally, evidence of responsible serving practices, particularly regarding false identification, may apply. However, the standards of responsible practices clearly become more strict as the age of the patron decreases.

Subsection (c)(3): Continuous and excessive service of alcoholic beverages

Alcohol is a drug that can act as a poison when ingested in large quantities. As a poison, it is second only to carbon monoxide as the agent responsible for the most deaths in the United States.[10] "Slow alcohol ingestion generally leads to unconsciousness before the drinker consumes enough to reach lethal blood level. Rapid alcohol ingestion while sober often causes vomiting. However, because intoxication depresses the brain's emetic mechanisms, rapid alcohol ingestion by a person already intoxicated can be fatal."[11] The liver is unable to metabolize the alcohol fast enough and therefore the amount of alcohol in the body reaches a toxic level.

The risk of alcohol poisoning is substantial when the patron's blood alcohol is already elevated to a high degree or when the amount of alcohol already consumed has the potential for creating a high blood alcohol level. In *Ewing v. Cloverleaf Bowl*,[12] an experienced bartender was alleged to have served a patron (who had just turned 21) 10 straight shots of 151 proof rum, 1 vodka collins and 2 beer chasers in less than an hour and a half. The patron died of acute alcohol poisoning. The court held that a jury could find that the bartender's conduct was not merely a want of ordinary care, but constituted reckless conduct.[13]

10. L.J. WEST, ALCOHOLISM AND RELATED PROBLEMS: ISSUES FOR THE AMERICAN PUBLIC, 9 (1984).
11. *Id.*
12. 20 Cal. 3d 395, 572 P.2d 1155 143 Cal. Rptr. 13 (1978).
13. *See also* Davis v. Butler, 95 Nev. 763, 602 P.2d 605 (Nev. 1979).

Subsection (c)(4): Assistance of patron into an automobile

A bartender followed an intoxicated patron out to his car and gave the patron instructions on how to turn his steering wheel so that he might drive out of the parking lot. The court stated that "[i]t is not at all unlikely that a trier of fact could find the action of this defendant in helping a man with a morning-acquired state of intoxication into a car and sending him out on a public highway might well be considered reckless and wanton conduct on defendant's part."[14]

Clearly, a patron who is so intoxicated that, without aid by another, he would be unable to enter an automobile by himself, should not be driving. A responsible licensee practice would be to make alternative transportation arrangements for intoxicated patrons. But under no circumstances should active aid to an intoxicated patron into an automobile be rendered.

SECTION 8: DAMAGES

(a) Damages may be awarded for all injuries recognized under [State] common law (or codified common law provisions).

(b) Punitive damages may be awarded in all actions based on reckless conduct, as defined in Section 7. Punitive damages may not be awarded for actions based on negligent conduct, as defined in Section 6.

(c) Damages may be recovered under [wrongful death statute] and [survival statute] as in other tort actions.

Commentary

The damages section has been drafted in accordance with the intent of this Act which states the negligent or reckless service of alcohol by licensed vendors be governed primarily by ordinary principles of tort liability.

Review of all existing licensee liability statutes has revealed two primary approaches to damages. One approach specifies that damages be allowed for injuries to persons, property or means of support.[1] Some states allow additional or fewer types of specified damages.[2] These statutes have led to numerous interpretations as to the scope of the categories enumerated, which have in turn led to uncertainty and unnecessary

14. Galvin v. Jennings, 289 F.2d 15, 17 (3rd Cir. 1961).

1. *See, e.g.*, ILL. ANN. STAT. CH. 43, § 135 (Supp. 1983); IOWA CODE ANN. § 123.92 (West Supp. 1983); OHIO REV. CODE ANN. § 4399.01 (1982); VT. STAT. ANN. tit. 7, § 501 (1972).

2. *See, e.g.*, CAL. BUS. & PROF. CODE § 25602.1 (West 1980); CONN. GEN. STAT. ANN. § 30-1-2 (West 1975); MICH. COMP. LAWS § 436.22 (1978); MINN. STAT. ANN. § 340.95 (Supp. 1984); N.Y. GEN. OBLIG. LAW § 11-101 (McKinney Supp. 1983).

litigation. Terms such as "persons," "property" and "support" have taken on specialized meanings in these states, not necessarily coinciding with ordinary tort principles of the jurisdictions.[3]

The other major statutory approach has been to allow recovery for "injuries," without specifying the meaning of the term.[4] Again, the lack of specificity of this type of statute has led to litigation over the intent of the term.

This Act explicitly rejects the view that the provision of licensee liability for serving alcohol is a special species of statute governed by principles differing from the common law. The damage provisions of this Act have been specifically linked to state policy as enunciated by the common law or by legislative common law codifications.[5] These well established bodies of law should provide the basis for uniform state rules on such issues as recovery for intangible injuries, e.g., loss of consortium and mental anguish.

The provision regarding punitive damages is intended to clarify the application of such damages in dram shop cases. The general rule in effect in most states is followed, that punitive damages are only allowed when aggravating circumstances are present.[6] Under this Act, reckless conduct presents aggravating circumstances that authorize imposition of punitive damages. The provision is structured so as to avoid litigation over whether reckless conduct also involves wilful or wanton conduct, malice, fraud, oppression, or other conduct associated with punitive damages.

The provision regarding damages under wrongful death and survival statutes is again intended to extend general tort law principles to liability arising under this Act. Wrongful death and survival provisions have been enacted in most jurisdictions to cure defects in the common law which deny recovery under various circumstances involving the death of a tort victim or the tortfeasor.[7] Although some current licensee liability statutes set out wrongful death or survival provisions in their text,[8] this Act incorporated existing provisions by reference for two reasons. First, wrongful death and survival provisions vary from state to state, and in-

3. *See, e.g.*, Kelly v. Hughes, 33 Ill. App. 2d 314, 179 N.E.2d 273 (1962); Podbielski v. Argyle Bowl, Inc., 392 Mich. 380, 220 N.W.2d 397 (1974); State Farm Mut. Auto. Ins. Co. v. Village of Isle, 265 Minn. 360, 122 N.W.2d 36 (1963).

4. *See, e.g.*, ALASKA STAT. § 04.21.020 (1980); FLA. STAT. ANN. § 768.125 (West Supp. 1984); OR. REV. STAT. § 30.930 (1980); PA. STAT. ANN. tit. 47 § 4-497 (Purdon 1969).

5. *See, e.g.*, GA. CODE ANN § 105-2002 (1982).

6. W. PROSSER AND W. KEETON, HANDBOOK OF THE LAW OF TORTS, § 2 (5th ed. 1984).

7. *Id.* § 125A (5th ed 1984); SPEISER, RECOVERY FOR WRONGFUL DEATH, p. 407 (2d ed. 1975).

8. *See, e.g.*, N.Y. GEN. OBLIG. LAW § 11-101 (McKinney Supp. 1983); N.D. CENT. CODE § 5-0106 (Supp. 1983); UTAH CODE ANN. § 32-11-1 (Supp. 1983).

corporation by reference facilitates a uniform state policy. Second, incorporation provides a well-settled body of law, eliminating litigation over the meaning of new provisions.

Legislatures may desire to incorporate an additional provision requiring that any wrongful death action be brought at the same time as the action under this Act. This would eliminate disputes that have arisen as to whether the Act's remedies are coextensive with those afforded under the wrongful death act, and whether relief in separate actions under both statutes would amount to an improper double recovery.[9] It was not possible to include such a provision under this Model Act, since a uniform provision could not respond to the varying statutory schemes presented by State wrongful death statutes.

Recovery Caps

Three states (Connecticut, Illinois, and North Carolina) have established limits on total awards on all claims brought under the states' dram shop acts.[10] Several other states are considering similar legislation. The Connecticut and Illinois recovery caps are very restrictive ($50,000 and $20,000 respectively), while North Carolina imposed a $500,000 limitation. The primary rationale for recovery caps concerns the cost of insurance. Dram shop liability may cause large increases in insurance premiums, particularly because of the uncertainty of the law and the potential for multi-million dollar claims. In Illinois, the statute imposes a strict liability approach such that a defendant may be found liable even if the patron who was served was not intoxicated at the time of service.[11] The recovery cap thus tends to counterbalance the potential unfairness of the statute, which is not based in negligence principles. Connecticut also has a "strict liability" statute,[12] although it has not been as broadly interpreted as the Illinois statute.

The Model Act addresses these concerns in part by creating the new "responsible practices" defense in Section 10. It is anticipated that if the law is enacted, insurance companies will offer discounts to those who adopt appropriate management and serving practices, thus alleviating the insurance cost issue at least to some degree.[13] The Act is also negligence-

9. *See, e.g.*, Wendelin v. Russell, 259 Iowa 1152, 147 N.W.2d 188 (1966); Fitzer v. Bloom, 253 N.W.2d 395 (Minn. 1977).

10. CONN. GEN. STAT. ANN. § 30-1-2 (West 1975); ILL. REV. STAT. Ch. 43 § 135 (Supp. 1983); N.C. GEN. STAT. § 18B-123 (1983). The limitations apply to all claims arising from a single incident; Connecticut and Illinois place lower limits for each plaintiff's claim.

11. *See, e.g.*, Tate v. Coonce, 97 Ill. App. 3d 145, 421 N.E.2d 1385 (1981).

12. *See, e.g.*, Pierce v. Albanese, 144 Conn. 241, 129 A.2d 606 (1957); Passini v. Decker, 39 Conn. Supp. 20, 467 A.2d 442 (1983).

13. According to Intermission, Ltd., at least one insurance company has already offered a discount if certain server training courses are attended. Personal interview with James E. Peters, Executive Director, Intermission, Ltd., 56 Main Street, Northampton, MA, December 10, 1984.

based; thus defendants are given adequate defenses and are not facing strict liability. States may wish to take appropriate regulatory action so that insurance premiums accurately reflect costs. Unfortunately, very little is known regarding the insurance cost issue, and the debate regarding its impact is thus based on speculation and conjecture. A detailed evaluation of the topic is therefore warranted.

The Model Act therefore does not include a recovery cap. If a cap is deemed necessary, it should be imposed with caution and at a high enough level to cover the costs of most intoxication-traumatic injuries. Any recovery caps should not apply to punitive damages, as a cap may defeat the purpose of discouraging extremely inappropriate behavior. In general, recovery caps are in conflict with basic tort law principles, which assume that a plaintiff has a right to full recovery, regardless of amount, if he or she can prove defendant's fault and the amount of loss.

SECTION 9: COMMON LAW DEFENSES

Defenses applicable to tort actions based on negligence and recklessness in [state] may be asserted in defending actions brought pursuant to this Act.

Commentary

Because the Act codifies causes of action based on the negligence and recklessness of servers of alcoholic beverages, all defenses normally available to such actions may be asserted under the Act. Comparative negligence (or contributory negligence, depending on state law) and assumption of the risk are the most commonly asserted defenses to dram shop claims.

The Act takes no position regarding whether a state should adopt comparative negligence, and, if so, in what form. Most states, however, do not permit the person who becomes intoxicated to recover damage from the person who served him, a doctrine recognized in Section 4, *supra*. It should be noted that, in some jurisdictions, contributory/comparative negligence defenses are not available in actions based on recklessness. Thus, assuming a bar to a negligence claim is available to the defense the intoxicated person must show recklessness on the part of the defendant to recover.

SECTION 10: RESPONSIBLE BUSINESS PRACTICES DEFENSE

(a) A defendant's service of alcoholic beverages is not negligent or reckless if the defendant, at the time of the service, is adhering to responsible business practices. Responsible business practices are those business policies, procedures and actions which an ordinarily prudent person would follow in like circumstances.

(b) The service of alcoholic beverages to a person with actual or constructive knowledge that such person is intoxicated or a minor constitutes an unreasonable business practice. Evidence of responsible business practices pursuant to this section is relevant to determining whether a defendant who does not have actual knowledge should have known of the person's intoxicated condition or age.

(c) Evidence of responsible business practices may include, but is not limited to, comprehensive training of defendant and defendant's employees and agents who are present at the time of service of alcoholic beverages and responsible management policies, procedures and actions which are in effect at the time of such service.

(d) For the purposes of service to intoxicated persons, evidence of comprehensive training includes, but is not limited to, the development of knowledge and skills regarding the responsible service of alcoholic beverages and the handling of intoxicated persons. Such training shall be appropriate to the level, kind, and type of responsibility for each employee and agent to be trained.

(e) For the purposes of service to intoxicated persons, evidence of responsible management policies, procedures, and actions may include, but is not limited to, those policies, procedures and actions which are implemented at time of service and which:

(1) encourage persons not to become intoxicated if they consume alcoholic beverages on the defendant's premises;
(2) promote availability of nonalcoholic beverages and food;
(3) promote safe transportation alternatives other than driving while intoxicated;
(4) prohibit employees and agents of defendant from consuming alcoholic beverages while acting in their capacity as employee or agent;
(5) establish promotions and marketing efforts which publicize responsible business practices to the defendant's customers and community;
(6) implement comprehensive training procedures;
(7) maintain an adequate, trained number of employees and agents for the type and size of defendant's business;
(8) are written in a policy and procedures handbook, or similar format, and made available to employees;

(9) establish a standardized method for hiring qualified employees; and
(10) reprimand employees who violate employer policies and procedures.

(f) For the purposes of service to minors, evidence of responsible business practices may include, but is not limited to those listed in subsection (e) and the following:

(1) management policies which are implemented at the time of service and which insure the examination of proof of identification [as established by state law] for all persons seeking service of alcoholic beverages who may reasonably be suspected to be minors;
(2) comprehensive training of employees who are responsible for such examination regarding the detection of false or altered identification.

(g) Proof of responsible business practices shall be based on the totality of the circumstances, including but not limited to: the availability of training programs and alternative public transportation; the defendant's type and size of business; and defendant's previous contacts with the intoxicated person or minor who is served. Proof of the existence or omission of one or more elements of responsible business practices does not constitute the proof or disproof of the responsible business practices defense.

Commentary

Overview

The responsible business practices defense is a central provision of the Act. It provides a defendant a means of protection from liability if it can be shown that, at the time of the service of alcoholic beverages, the defendant was following those business practices which an ordinarily prudent person would follow with the same duty under like circumstances. The defense reaffirms the defendant's duty not to serve intoxicated persons and minors. Subsection (b) makes this clear by providing that when a defendant serves a person with actual knowledge that such person is a minor or intoxicated, the defense does not apply. Evidence of responsible business practices is needed to determine whether a defendant who did not have actual knowledge should have known of the person's intoxicated condition or age. Nor does the defendant have to pursue this defense in order to avoid liability. If the plaintiff cannot meet his or her burden of proof that the defendent served an intoxicated person or minor knowing or in circumstances where the defendant should have known of the intoxication or the underaged status, then liability will not attach, whatever business practices were in existence at the time of

APPENDIX V-D

BASIC FREQUENCY DISTRIBUTIONS
N=839

THE NATIONAL LIQUOR LIABILITY SURVEY

Please answer each of the questions by circling one of the responses provided. All answers are confidential and will be used to generate a statistical picture of licensees across the country. You may choose to skip any question if you desire for any reason. Please let us know why you skipped it, however, by writing "Don't know (DK)", "not applicable (NA)," or "refused", whichever applies.

1. **First, within which state is your business located?** _____

2. **In your state, could you be sued if someone had been killed by a drunk driver who had just left your business?** *(CIRCLE ANSWER FOR EACH CASE)*

	YES	NO	N	% YES
YES, IF THE DRIVER WAS A MINOR	1	2	764	60
YES, IF THE DRIVER WAS "OBVIOUSLY INTOXICATED" WHEN SERVED A DRINK	1	2	764	66
YES, NO MATTER WHETHER THE DRIVER WAS A MINOR OR OBVIOUSLY INTOXICATED	1	2	764	62
I COULD NOT BE SUED ACCORDING TO THE LAWS IN MY STATE	1	2	764	20

3. **What would you say is the "legal climate" regarding liquor liability suits like these for businesses like yours in your state?** *(CIRCLE ONE)* N=590

THE LEGAL CLIMATE IS GENERALLY FAVORABLE FOR BUSINESS	1	17%
THE LEGAL CLIMATE IS NEUTRAL TOWARD BUSINESSES	2	33%
THE LEGAL CLIMATE IS HOSTILE TOWARD BUSINESSES	3	50%
I DON'T KNOW	4	

4. **What is your best estimate of the number of liquor liability suits that have been brought against a licensee in your state in the past three (3) years?** *(IF NONE, PUT 0 AND SKIP TO QUESTION #5)*

N=448 Mean = 21.3 SUITS

4a. **About how much money was awarded or settled for in the largest case that you know of?** N=261

NO MONEY	1	18%
UNDER $100,000	2	10%
$100,000-499,000	3	18%
$500,000-1,000,000	4	21%
OVER $1,000,000	5	33%

5. **Do you now carry liquor liability (or dram shop) insurance for your business?** *(CIRCLE ONE)* N=795

YES	1	42%
NO, I DON'T NEED IT	2	17%
NO, IT'S TOO EXPENSIVE	3	30%
NO, I CAN'T GET IT	4	4%
NO, OTHER REASON (SPECIFY_____)	5	8%

6. **What is (or would be) the dollar limit of your coverage, the amount that the insurance would cover?**

N=388 $ mean = ≈ $700,000

7. **How much is (or would be) your annual premium for liquor liability coverage?**

N=326 $ mean = ≈ $8,000

8. **Have your employees been trained in ways to avoid service to minors?** *(CIRCLE ANSWER FOR EACH CASE)* N=817

	YES	NO	% YES
YES, AS PART OF ORIENTATION FOR NEW EMPLOYEES	1	2	62
YES, IN A FORMAL TRAINING FOR JUST THAT PURPOSE	1	2	29
YES, DURING "ON THE JOB" TRAINING RATHER THAN A FORMAL TRAINING SESSION	1	2	63
THEY HAVEN'T BEEN TRAINED ON THIS TOPIC	1	2	6

9. **Have your employees been trained in ways to avoid service to intoxicated customers? If so, how long was that training?** *(CIRCLE AND WRITE IN ANSWER FOR EACH CASE)* N=813

	YES	NO	% YES
YES, AS PART OF ORIENTATION FOR NEW EMPLOYEES	1	2	53
YES, IN A FORMAL TRAINING FOR JUST THAT PURPOSE	1	2	29
YES, DURING "ON THE JOB" TRAINING RATHER THAN A FORMAL TRAINING SESSION	1	2	61
THEY HAVEN'T BEEN TRAINED ON THIS TOPIC	1	2	7

10. **If you answered formal training above, for either service to minors or intoxicated customers, what was the name of the training (e.g., TAM, TIPS, etc.) if it had one? What percentage of your current employees went through the formal training?** *(IF NONE, PUT 0)*

NAME cited by 208 respondents median = 90 %

11. **Under what circumstances do you require age identification?** *(CIRCLE ANSWER FOR EACH CASE)* N=828

	YES	NO	% YES
ASKED FOR ALL CUSTOMERS	1	2	6
WHEN THE CUSTOMER LOOKS TOO YOUNG TO DRINK	1	2	65
FOR ALL CUSTOMERS WHO LOOK YOUNGER THAN 25 OR 30	1	2	61

12. **What is done with a customer who is intoxicated?** *(CIRCLE ANSWER FOR EACH CASE)* N=827

	YES	NO	% YES
HE OR SHE IS ASKED TO LEAVE	1	2	36
HE OR SHE IS REFUSED FURTHER SERVICE	1	2	78
HE OR SHE IS GIVEN TRANSPORTATION HOME TO PREVENT THEM FROM DRIVING	1	2	58
HE OR SHE IS ASKED TO STAY, BUT IS GIVEN NON-ALCOHOLIC DRINKS UNTIL THEY SOBER UP	1	2	37
POLICE ARE CALLED TO DEAL WITH THE CUSTOMER	1	2	14
OTHER (WHAT? _____)			9

13. **Do you set any limit to how many drinks a customer may have?** N=746

YES 1 20%

IF NO, SKIP TO Q. 14 NO 2 80%

13a. **What is the limit? A certain number of drinks or a number of drinks per hour?**

N=74 median = 3 DRINKS

N=79 *OR* median = 3 DRINKS PER HOUR

14. How often would you say you have had to refuse service to an intoxicated customer? *(CIRCLE ONE)* N=822

SEVERAL TIMES A DAY	1	2%
ONCE OR TWICE A DAY	2	3%
SEVERAL TIMES A WEEK	3	8%
ONCE OR TWICE A WEEK	4	14%
A FEW TIMES A MONTH	5	15%
ONCE OR TWICE A MONTH	6	19%
VERY SELDOM OR NEVER	7	39%

15. What best describes your business? *(CIRCLE ONE)* N=833

RESTAURANT	1	38%
NIGHTCLUB	2	8%
BAR	3	30%
HOTEL/MOTEL LOUNGE	4	6%
OTHER (SPECIFY _____)	5	11%
CLUB		8%

16. What kind of menu do you have? *(CIRCLE ONE)* N=812

BEVERAGES ONLY	1	6%
SNACKS WITH BEVERAGES	2	31%
FULL MENU	3	63%

17. Do you offer any of the following? *(CIRCLE ANSWER FOR EACH CASE)* N=789

	YES	NO	% YES
BEER OR MIXED DRINKS BY THE PITCHER	1	2	46
WINE BY THE BOTTLE OR CARAFE	1	2	49
DOUBLES OR TRIPLES	1	2	31
REDUCED DRINK PRICES AT HAPPY HOUR	1	2	19
TWO-FOR-ONE DRINK SALES	1	2	2

18. Type of ownership? *(CIRCLE ONE)* N=801

FRANCHISE	1	3%
CHAIN	2	5%
INDEPENDENT	3	92%

19. Which of the following best represents the types of patrons you have? *(CIRCLE ANSWER FOR EACH TYPE)*

	70%	FAMILIES	Y	N	RETIRED PEOPLE	Y	N	73%
N=825	73%	BLUE COLLAR	Y	N	WHITE COLLAR	Y	N	65%
	70%	SINGLES	Y	N	STUDENTS	Y	N	29%

20. About what is the age mix of your customer base?

UNDER 21	mean 3.0%	N=823
21-30	22.3%	N=822
31-50	43.2%	N=822
OVER 50	22.3%	N=822

21. How many years has the business been in operation at this location? *(CIRCLE ONE)* N=829

1-5 YEARS	1	17%
6-15 YEARS	2	30%
OVER 15 YEARS	3	54%

22. How large is the service staff? *(CIRCLE ONE)* N=827

1-10 PEOPLE	1	64%
11-20 PEOPLE	2	17%
21-50 PEOPLE	3	13%
OVER 50 PEOPLE	4	7%

23. What are your gross annual food and beverage sales? *(CIRCLE ONE)* N=790

UNDER $100,000	1	28%
$100,000-199,000	2	24%
$200,000-499,000	3	22%
$500,000-1,000,000	4	14%
OVER $1,000,000	5	12%

24. What percentage of your gross sales are from food? non- alcoholic beverages? from alcoholic beverages?

FOOD	Mean = 40.0 %		N=811
NON-ALCOHOLIC BEVERAGES	= 7.5 %		N=812
ALCOHOLIC BEVERAGES	= 45.7 %		N=813

25. What percentage of your alcoholic beverage sales are in beer? in wine (and wine coolers)? in distilled spirits?

BEER Mean = 51.6 %		N=811
WINE = 10.8 %		N=812
SPIRITS = 29.0 %		N=812

Thank you for your help on these important issues

V-E Frequencies for "High" and "Low" Liability States.

the service. Thus, the defense does not create a new or alternative cause of action to those stated in Sections 6 and 7.

There are, however, numerous instances in which a defendant did not know of the person's intoxication, and the issue of liability rests on whether he should have known of this fact. The most common issue concerns whether the person's intoxication was "obvious" or "apparent." Frequently there is conflicting evidence regarding the obvious signs of intoxication, the number of drinks served and the other circumstances of the sale. Plaintiffs may be placed at an initial disadvantage due to the possible lack of evidence to make a prima facie case against a particular defendant; defendants in turn are put at a disadvantage if such a case is made due to the difficulty in recreating the particular circumstances of the sale and the very subjective and uncertain nature of the "obvious intoxication" standard. In such cases, where factual determinations are difficult to make, the responsible business practices defense may take on particular importance for the fact-finder in determining whether due care was exercised.

While this defense recognizes the difficulties in fulfilling the defendant's duty not to serve intoxicated persons and minors, it also provides that the defendant, as a member of the legitimate business operation, is in a position to take practical steps in the operation of that business to reduce the risk of harm to others. The Act's intent is to provide an incentive to adopt appropriate procedures, practices and actions in order to reduce those risks. Thus, the Act provides possible means of protection when an intoxicated person or minor is served, but only if the business is conducted in a responsible and prudent manner.

The defense is a relatively new concept in dram shop law, but not unprecedented. The North Carolina statute provides that evidence of "good practices" in cases involving service to minors, may be used as a defense.[1] In addition, business practices have been found relevant in some cases on the issue of negligence without any explicit standard in the state's dram shop statute.[2]

Responsible business practices encompass a broad range of business activities. The section provides a noninclusive set of practices to provide guidance to the fact-finder. Subsection (g) is critical in interpreting the intent of this listing. As stated in that provision, the defense may be available even if some of the practices (or others not listed) have not been met. The particular type of business, the existence of adequate resources

1. N.C. GEN. STAT. § 18B-122 (1983).
2. *See, e.g.*, Ewing v. Clover Leaf Bowl, 20 Cal. 3d 389, 572 P.2d 1155, 143 Cal. Rptr. 13 (1978).

for implementation, particularly of training programs and the defendant's community, may all have an input on how a reasonable person would act in defendant's circumstances. Thus, the "totality of the circumstances" must be considered in applying the section to particular facts.

One possible objection that has been raised regarding the responsible business practices defense concerns the potential increase in liability of the licensee if certain business practices are adopted too enthusiastically (a "good samaritan" rule objection). This section is drafted to avoid this problem. The defendant has a duty to take reasonable steps to avoid serving intoxicated person and minors. This section, as well as Section 6, provides a basis for balancing this duty against the defendant's need to conduct a legitimate business and the difficulties of recognizing intoxicated persons. Thus, a defendant who decides not to take reasonable steps to fulfill this duty does so at his or her own peril. The duty remains the same. If a defendant takes actions that go beyond such reasonable steps, it provides not an increase in liability, but additional support for a responsible business practices defense. In addition, Section 6 provides specific limitations on the defendant's duty to investigate behavior of persons outside the defendant's premises.

Training

The section provides that responsible business practices include comprehensive training of defendant and defendant's employees and agents regarding responsible service of alcoholic beverages and handling of intoxicated patrons. Numerous training programs are now in existence, but they are at a preliminary stage of development and vary widely in format, duration and content. The section does not attempt to define responsible service of alcoholic beverages in recognition of this experimental stage of development, and recognizes the need for the fact-finder to judge the training programs in light of community and business standards at the time of the service in question.

A critical variable, which is included in the section, concerns the development of both knowledge and skills regarding the responsible service of alcoholic beverages and the handling of intoxicated persons. This reflects the need to learn interaction skills in order to make the identification of intoxicated persons easier and to make interventions with patrons who drink heavily more effective. The inability to implement training procedures renders a training program useless. Several training pro-

grams currently in existence lack this skills development component.[3]

Training programs concerning potential sales to minors have more specific components, reflected in Subsection (f)(2). A realtively short training program can provide employees with skills for identifying whether an identification is authentic or false. In evaluating a defendant's training program, the fact-finder needs to take into account any on-the-job training efforts as well as the availability of training from outside sources. Comprehensive training is currently available only on a limited basis. Thus, a defendant's good faith effort to meet this standard may fall short of its goal. The type of training, if any, needed for different levels of employees may also vary signficantly. It is anticipated that current training programs will be expanded both in content and in geographic availability in the near future and that their effectiveness will be enhanced with further research, implementation, and evaluation. Thus this portion of the defense may change in its applicability both over time and by geographic location.

Management Policies, Procedures and Actions

The second major component of responsible business practices concerns management policies, procedures and actions designed to fulfill the defendant's duty not to serve intoxicated persons. As with the training component, the development of appropriate management procedures is in its infancy, with more research, implementation and evaluation necessary. Nevertheless, sufficient experimentation and consensus has occurred to devise general guidelines, found in Subsection (e)(1)-(7).[4]

As with the training component, management policies regarding potential service to minors can be more specifically ascertained. Management may establish procedures to insure that all identification of possible underaged persons is adequately inspected. Such procedures may be critical in cases in which the factual issues regarding place of service and type of identification are in doubt. This section provides a possible defense for the defendant if the fact-finder determines that such procedures were in place and being regularly followed at the time of the alleged service. (See Commentary to Section 6 for further discussion).

3. For further discussion, *see*, Mosher, J. "Server Intervention: Present Status and Future Prospects," presented at the Research Workshop on "Alcohol and the Drinking Driver" sponsored by the National Institute on Alcohol Abuse and Alcoholism and the National Highway Traffic Safety Administration, Bethesda, Maryland, May 1984.

4. *Id.*; *see also*, Peters, J., ed. *Proceedings of the First Northeast Conference on Alcohol Server Liability* (Intermission, Ltd., Boston, MA) 1984; Intermission, Ltd. Minutes from a meeting to plan a comprehensive server and manager training curricula, Detroit, MI, April 16, 1984.

SECTION 11: STATUTE OF LIMITATIONS

Any action under this Act against a defendant alleging negligent conduct shall be brought within —— year(s) of the conduct complained of. Any action under this Act against a defendant for reckless conduct shall be brought within —— year(s) of the conduct complained of.

Commentary

The statute of limitations provisions are left blank to allow jurisdictions to create limitations periods consistent with state policy. Given that the thrust of this statute is to extend ordinary principles of tort law to the serving of alcoholic beverages by a licensee, it is anticipated that limitations periods will be adopted that are consistent with the limitations periods for analogous actions. Separate limitations provisions are included for actions based on negligent and reckless conduct, as analogous actions may be governed by different limitations periods under state law.

SECTION 12: PRIVILEGES

(a) No defendant, as provided in Section 5, may be held civilly liable for damages resulting from a good faith refusal to serve alcoholic beverages to any person who:

(1) fails to show proper identification of age; or
(2) reasonably appears to be a minor; or
(3) is refused service of alcoholic beverages by defendant in a good faith effort to prevent excessive consumption of alcohol by a person.

(b) No defendant, as provided in Section 5, may be held civilly liable for holding a person's identification documents presented to defendant as proof of the person's age for the purposes of receiving alcoholic beverages provided:

(1) such holding is for a reasonable length of time in a good faith effort to determine whether the person is of legal age or to summon law enforcement officers; and
(2) the person whose identification is being held is informed of the reason for defendant's action.

(c) No defendant, as provided in Section 5, may be held civilly liable for using reasonable force to detain for a reasonable period of time necessary to summon law enforcement officers a person who, in the defendant's presence, is committing or has committed a breach of the peace or felony or is attempting to operate a motor vehicle while intoxicated.

(d) This section does not limit a defendant's right to assert any other defense to a civil liability claim otherwise provided by law.

Commentary

Defendants who establish procedures for minimizing consumption of alcoholic beverages by minors or intoxicated persons may face potential liability claims by those affected by the procedures. False imprisonment, intentional infliction of emotional distress, and conversion are among the most likely civil claims that may arise. Most frequently, such claims are for minimal damages and are more in the nature of harassment. No reported case has been found which imposed liability on a defendant for acting in good faith to prevent service to minors or intoxicated persons. Indeed, existing defenses under common law may be adequate to provide protection to defendants.

The privileges found in Section 12 are nevertheless included in the Model Act as a means to prevent harassment claims and to promote responsible serving practices. However, nothing in this section should be interpreted as mandating any given action or procedure for the purposes of establishing or disproving a responsible practices defense as defined in Section 10. The privileges should be interpreted as a minimal protection available; as stated in Subsection (d), defendants have a right to assert any additional defenses available by law. It should be noted that the right to possess alcoholic beverages is restricted and more in the nature of a privilege than a right.[1] Thus, the state interest in preventing unlawful consumption and in preventing service to minors and intoxicated persons may be broadly construed when claims against defendants for failure to serve alcoholic beverages are made.

Subsection (a) provides a defendant a defense against claims based on the defendant's refusal to serve alcoholic beverages to those suspected of being minors or of being intoxicated or nearly intoxicated. Subsections (a)(1) and (a)(2) are substantially the same provisions found in the North Carolina dram shop act.[2] The provision complements Section 10, which provides a potential defense to a claim under the Act if a defendant reasonably relies on proof of age identification. Because of the potential for liability and the societal interest in preventing minors from consuming alcohol beverages, the defendant's privilege is broadly drawn to include refusal to serve alcoholic beverages to anyone who reasonably appears to be a minor, even when proof of identification is presented.

1. *Cf.*, California v. LaRue, 409 U.S. 109 (1972).
2. N.C. GEN. STAT. § 18B-129(a) (1983).

Defendants are required by law in most states not to serve anyone who appears intoxicated. Thus, no civil liability claim may be based on the defendant's refusal to serve such persons. Subsection (a)(3) extends this basic protection to situations in which defendant's refusal is based on a good faith effort to prevent a person's intoxication. The provision again complements Section 10, which provides a defense to a claim under the Act if defendant is adhering to responsible business practices. However, the failure to refuse service to a person in order to prevent his or her intoxication does not constitute negligence under Section 6, and the inclusion of this privilege in no way implies that the failure to do so constitutes unreasonable business practices. It is included as a means to protect defendants who may act more cautiously than is required by law in order, to insure that they are not punished for exercising that caution. The societal interest in preventing intoxication-related offenses and injuries is sufficient to justify this minimal restriction on an individual's right to possess alcoholic beverages, provided that the refusal of service is applied such that it does not violate some other paramount state interest (e.g. race discrimination).

Subsection (b) is based substantially on a provision found in North Carolina dram shop act[3] and provides explicit protection to defendants against the imposition of civil liability for holding identification papers for a reasonable time to determine their authenticity. It is anticipated that, if reasonably believed to be false, they may be held until law enforcement officers can be summoned to determine whether a crime has been committed. The protection found in this subsection may already be established in many states and may thus be unnecessary.

Subsection (c) is based on provisions found in the Restatement (Second) of Torts[4] and is a codification of common law principles.[5] A private citizen has a right to make a citizen's arrest if a breach of the peace or a felony is being or has been committed in his or her presence.[6] Subsection (c)(2) provides explicit protection from civil liability to defendants who detain a person attempting to commit a drinking driving offense. It is unclear whether this right of detention exists under subsection (c)(1) since, arguably, the detention may occur before the crime is actually being committed. In many states, such a right may be explicitly recognized, making this provision unnecessary. In addition, the rights of those

3. N.C. GEN. STAT. § 18B-129(b) (1983).
4. RESTATEMENT (SECOND) TORTS § 119 (1965).
5. *See* W. PROSSER AND W. KEETON, HANDBOOK OF THE LAW OF TORTS, 5th ed., § 26 (1984).
6. *Id.*; RESTATEMENT (SECOND) TORTS § 119 (1965); Commentary to Restatement §§ 115-119 for discussion of definitions and principles associated with this right.

making a legal citizen's arrest may be broader than those granted here (to detain for a reasonable time for the summoning of law enforcement officials). States may wish to broaden this language to conform with state law. Alternatively, subsection (d) will provide an avenue for a defendant to assert such rights.

SECTION 13: SETTLEMENT; RELEASE; CONTRIBUTION; INDEMNITY

(a) A plaintiff's settlement and proper release of either the intoxicated tortfeasor or a defendant, as defined in Section 5, will not bar potential claims against any other defendant(s).

(b) The amount paid to a plaintiff in consideration for the settlement and proper release of any defendant will be offset against all other subsequent judgments received by plaintiff.

(c) The liability of the intoxicated tortfeasor and any defendant, as defined in Section 5, who served alcoholic beverages, shall be joint and several.

(d) In cases of negligent conduct, the liability of the intoxicated tortfeasor and any defendant, as defined in Section 5, who served alcoholic beverages shall have a right of contribution and not a right of indemnification.

(e) In cases of reckless conduct, nonreckless defendants have a right of either indemnification or contribution from any reckless defendants.

Commentary

Several issues may arise when a plaintiff settles with and releases a joint tortfeasor from liability. Courts will usually recognize a release from liability, although courts may strike down such an agreement if it is contrary to public policy.[1] Subsection (a) recognizes this principle, and requires that the release be "proper" in the sense that it does not violate public policy. Furthermore, courts are divided on the impact of a settlement and release upon other defendants. The old common law rule held that any other defendants would be subsequently released from liability.[2] Modern case law has permitted plaintiff to bring subsequent actions and allowed defendants to offset previous settlements by other defendants against any later judgments.[3] The Model Act, in Subsections (a) and (b),

1. *See, e.g.*, Scheff v. Homestretch, Inc., 60 Ill. App. 3d 424, 377 N.E.2d 305 (1978) (defendant raceway company obtained a release form from all participants in a racing event which it sponsored).
2. *See, e.g.*, Manthei v. Heimerdinger, 332 Ill. App. 335, 75 N.E.2d 132 (1947).
3. *See, e.g.*, Larabell v. Sesbuknecht, 308 Mich. 419, 14 N.W.2d 50 (1944).

adopts this modern view, which is based on equitable principles.

Contribution, a concept that allows one who is liable to another to shift a portion of that liability to a third person, has a fairly uneven case history within a dram shop context. However, some general rules have been established by the courts. Licensed vendors will have a right of contribution among themselves,[4] and intoxicated wrongdoers have been able to recover contribution from the server.[5] On the other hand, there is conflicting authority as to whether servers can claim a right of contribution from their intoxicated customers. Courts which have not permitted servers to seek contribution from their intoxicated patrons have relied at least in part on the penal nature of the dram shop act. The Model Act therefore permits a right to such contribution [in subsection (d)], as do most courts which analyze dram shop liability within a negligence context, because the Act is not penal in nature (see Section 2), and because there is not a wide disparity of fault between the parties.[6] The North Carolina dram shop statute has substantially the same provision.[7]

Indemnity shifts the entire loss from one tortfeasor to another.[8] Within a dram shop context indemnity issues are rarely involved, as indemnity will only be allowed when there exists a wide disparity in the gravity of fault between tortfeasors. Licensees and intoxicated persons are usually not considered to have wide disparities in the gravity of fault,[9] thus precluding any right of indemnification. This principle is adopted in subsection (e), which provides that indemnification is permitted only if one defendant has committed reckless conduct.

SECTION 14: EXCLUSIVE REMEDY

This Act is the exclusive remedy against defendants, as defined in Section 5, for claims by those suffering damages based on the defendants' service of alcoholic beverages.

4. *See, e.g.*, Hammerschmidt v. Moore, 274 N.W.2d 79 (Minn. 1973).
5. Morgan v. Kirk Bros., Inc., 111 Ill. App. 3d 914, 444 N.E.2d 504 (1982) (court relied on interpretation of newly enacted Illinois Contribution Act, which clearly stated that where two or more persons are subject to liability in tort arising out of the same injury there exists a right of contribution among them).
6. *See*, Pautz v. Cal-Ros, Inc., 340 N.W.2d 338 (Minn. 1983) (to deny the vendor a right of contribution would be a repudiation of the essential principle of contribution). *But see*, Virgilio v. Hartfield, 4 Mich. App. 582, 145 N.W.2d 367 (1966) (court denied vendors a right of contribution from the intoxicated wrongdoer based on the theory that the parties were not joint tortfeasors, despite a single, indivisible injury).
7. N.C. GEN. STAT. § 18B-124 (1983).
8. W. PROSSER AND W. KEETON, HANDBOOK OF THE LAW OF TORTS, § 51 (5th ed. (1984).
9. Geocaris v. Bangs, 91 Ill. App. 2d 81, 234 N.E.2d 17 (1968).

NAME: INDIANA BEVERAGE JOURNAL

PUBLISHER: Indiana Beverage Life, Inc.
Corporate Square - East
2511 E. 46th St., Suite A-7
Indianapolis, Indiana 46205
317 545-5262

Frequency of Publication: Monthly

Inventory:

1983	1984	1985
June July August September October November December	January thru December	January thru December

1986	1987	1988
January thru December	January thru December	January thru December

Comments: Even though we had nearly six complete years for this publication, our search for relevant articles provided a relatively small yield.

NAME: MASSACHUSETTS BEVERAGE JOURNAL

PUBLISHER: Emanual N. Rempelakis
Massachusetts Beverage Publications, Inc.
227 East Main St.
Avon, Massachusetts 02322
508 580-1710

Frequency of Publication: Monthly

Inventory:

1984	1985	1986
January	January thru December	January thru December
February		
March		
April		
May		
June		
July		
August		
October		
November		

1987	1988
January	January thru December
February	
March	
April	
May	
June	
December	

Comments:

NAME: INSIDE THE COUNCIL (Pennsylvania)

PUBLISHER: Pennsylvania Travel Council
902 N. Second Street
Harrisburg, PA 17101

Frequency of Publication: Since 1987, published monthly; earlier issues published bi-weekly ("or probably intended to be published by-weekly")

Inventory:

1986

January
February 10 and 28
March 5 and 31
May 1
June 4
July 8
August 4
September 2 and 24
October 29
December 3

1987

January 15
February 18
April 27
June 9
August
December

1988

January
February
March
April
May
June
July
August
September
October
November

Comments:

NAME: PENNSYLVANIA RESTAURANT ASSOCIATION JOURNAL

PUBLISHER: The Pennsylvania Restaurant Association
501 N. Front Street, Suite 200
Harrisburg, PA 17101
717 232-4433

Frequency of Publication: Currently published monthly;

Inventory:

1984	1985	1986
March	November	January
April 4 and 26		Feb/March
May 16		April
June 18		September
July 17		October
August 17		November
September 10		December

1987	1988
January	January
February	February
March	March
April/May	April
June	May
July	June
August	July
September	August
October	September
November	October
December	November
	December

Comments: The Pennsylvania Restaurant Association's Executive Vice President died in office in 1984, resulting in "a time of turmoil" for PRA. A new Executive Vice President was not hired until January or February 1985. The publication of the JOURNAL was not re-instated on a consistent basis until January 1986.

NAME: THE OBSERVER
(Pennsylvania Liquor News)

PUBLISHER: Observer Corporation
226 N. 12th St.
Philadelphia, PA 19107
215 567-6221

Frequency of Publication: Every other week

Inventory:

1986

January 6 and 20
February 3 and 17
March 3, 17, and 31
April 14 and 28
May 12 and 26
June 9 and 23
July 7 and 21
August 4 and 18
September 1, 15 and 29
October 13 and 27
November 10 and 24
December 8 and 22

1987

January 5 and 19
February 2 and 16
March 2, 16 and 30
April 13 and 27
May 11 and 25
June 8 and 22
July 6 and 20
August 3, 17 and 31
September 14 and 28
October 12 and 26
November 9 and 23
December 7 and 21

1988

January 4 and 25
February 1, 15 and 29
March 14 and 28
April 11 and 25
May 9 and 23
June 6 and 20
July 4 and 18
August 1, 15 and 29
September 12 and 26
October 10 and 24
November 7 and 21
December 5 and 19

Comments:

NAME: SOUTHERN BEVERAGE JOURNAL -- (SOUTH CAROLINA)

PUBLISHER: Southern Beverage Journal, Inc.
13225 S.W. 88 Avenue
Miami, Florida 33176
305 233-7230

Frequency of Publication: Monthly

Inventory:

1984	1985	1986
January	January	January
February	February	February
March	April	March
April	May	April
May	June	May
July	July	June
August	August	July
October	September	August
November	October	September
December	November	October
	December	November
		December

1987	1988
January	January
February	February
March	March
April	April
May	May
June	June
July	August
August	October
September	November
October	December
November	
December	

Comments: The same Journals used for Arkansas were used for South Carolina. The SOUTHERN BEVERAGE JOURNAL covers the states of Florida, Georgia, Louisiana, South Carolina Tennessee, Mississippi, Arkansas, and Washington, D.C. It is our understanding that the same editorial text is used in the various different regional/state issues.

IV-C Content Analysis Inventory for Dram Shop Publicity -- Newspapers in High and Low Liability States

CONTENT ANALYSIS INVENTORY FOR DRAM SHOP PUBLICITY
Low Liability States

Years	'84	'85	'86	'87	'88	Index Source
Code: Cities/Newspapers						
ARKANSAS						
001 Arkansas Democrat			X	X	X	Newsbank
002 Arkansas Gazette	X	X	X	X	X	Newsbank
003 Pine Bluff Commercial			5/86	X	X	Newsbank
DELAWARE						
004 Southwest Times Record(Fort Smith)			X	X	X	Newsbank
005.Evening Journal (Wilmington)	X	X	X	X	X	Newsbank
006.Dover State News	X	X	X	X	X	Newsbank
(Delaware State News is the same)						
KANSAS						
007.Capital-Journal (Topeka)	X	X	X	X	X	Newsbank
008.Wichita Eagle-Beacon	X	X	X	X	X	Newsb/VuTxt
009.Emporia Gazette			5/86	X	X	Newsbank
010.Hays Daily News				5/87	X	Newsbank
011.Herald (Ottawa)			3/86	X	X	Newsbank
012.Hutchinson News			5/86	X	X	Newsbank
013.Wichita Journal (Business)				X	X	Newsbank
MARYLAND						
014 Capital (Annapolis)	X	X	X	X	X	VuTxt,Nwsbk
015 Sun (Baltimore)	X	X	X	X	X	Newsbank
016 Columbia Flier					10/88	Newsbank
017 Daily Record					5/88	Newsbank
018 Evening Sun (Baltimore)				X	X	Newsbank
019 Frederick Post			10/86	X	X	Newsbank
020 Jeffersonian (Towson)					10/88	Newsbank
125 Washington Post (D.C.)	X	X	X	X	X	Wash Post File
NEVADA						
021 Review Journal (Las Vegas)	X	X	X	X	X	Newsbank
022 Las Vegas Sun			X	X	X	Newsbank
023 Nevada Appeal (Carson City)	X	X	X	X	X	Newsbank
024 Reno Gazette-Journal			6/86	X	X	Newsbank

CONTENT ANALYSIS INVENTORY FOR DRAM SHOP PUBLICITY
High Liability States

Years	'84	'85	'86'	'87	'88	Index Source
Code: Cities/Newspapers						
INDIANA						
025 Indianapolis Star	X	X	X	X	X	Newsbank
026 Anderson Herald			7/86	X	X	Newsbank
027 Post Tribune (Gary)				X	X	VuText
028 Chronicle-Tribune (Marion)			5/86	X	X	Newsbank
029 Elkhart Truth			7/86	X	X	Newsbank
030 Evansville Courier	X	X	X	X	X	Newsbank
031 Herald--Telephone (Bloomington)			5/86	X	X	Newsbank
032 Journal and Courier (Lafayette)			5/86	X	X	Newsbank
033 Journal-Gazette (Fort Wayne)			X	X	X	Newsbank
035 Muncie Star			5/86	X	X	Newsbank
036 News Dispatch (Michigan City)				X	X	Newsbank
037 Palladium-Item (Richmond)				7/87	X	Newsbank
038 Republic (Columbus)			X	X	X	Newsbank
039 South Bend Tribune			6/86	X	X	Newsbank
040 Times (Hammond)				10/87	X	Newsbank
MASSACHUSETTS						
041.Morning Union (Springfield,MA)	X	X	X	X	X	Newsbank
042.Herald (Boston)	X	X	X	X	X	Newsbank
043.Republican (Springfield,MA)			8/86	X	X	Newsbank
044.Middlesex News (Farmington,MA)			5/86	X	X	Newsbank
045.Union-News (Springfield,MA)				X	X	Newsbank
046.Boston Globe	X	X	X	X	X	VuText
047.Berkshire Eagle (Pittsfield)			X	X	X	Newsbank
048.Beverly Times				X	X	Newsbank
049.Cape Cod Times			9/86	X	X	Newsbank
050.Daily Evening Item (Lynn)			X	X	X	Newsbank
051.Enterprise (Brockton)				X	X	Newsbank
052.Fall River Herald News			5/86	X	X	Newsbank
053.Lawrence Eagle-Tribune			4/86	X	X	Newsbank
054.Sentinel & Enterprise (Fitchburg)					X	Newsbank
055.Standard-Times (New Bedford)				X	X	Newsbank
056.Sun (Lowell)			4/86	X	X	Newsbank

Years	'84	'85	'86'	'87	'88	Index Source
PENNSYLVANIA						
057.Pittsburg Press	X	X	X	X	X	Newsbank
058.Philadelphia Inquirer	X	X	X	X	X	VuTxt/Newsb
059.Patriot-News(Harrisburg)	X	X	X	X	X	Newsbank
060.Morning Call (Allenton)	X	X	X	X	X	VuText
061.Phi.Daily News	X	X	X	X	X	VuText
062.Beaver County Times			4/86	X	X	Newsbank
063.Bucks County Courier Times			4/86	X	X	Newsbank
064.Daily Local News(West Chester)				X	X	Newsbank
065.Daily News(Lebanon)				5/87	X	Newsbank
066.Globe-Times (Bethlehem)				X	X	Newsbank
067.Intelligence Record (Doylestown)			5/86	X	X	Newsbank
068.Mercury (Pottstown)				5/87	X	Newsbank
069.Observer-Reporter(Washington)			4/86	X	X	Newsbank
070.Pittsburh Post-Gazette			X	X	X	Newsbank
071.Lancaster New Era				X	X	Newsbank
072.Reading Times			7/86	X	X	Newsbank
073.Scranton Times			4/86	X	X	Newsbank
074.Tribune (Scranton)			X	X	X	Newsbank
075.Tribune-Democrat (Johnstown)			X	X	X	Newsbank
076.Tribune-Review (Greensburg)			X	X	X	Newsbank
077.Wilkes-Barre Times Leader			X	X	X	Newsbank
078.York Daily Record			X	X	X	Newsbank
079.Morning News (Erie)				X	X	Newsbank
SOUTH CAROLINA						
080.The State & Columbia Record	X	X	X	X	X	Newsb/VuTxt
081 Anderson Independent-Mail			X	X	X	Newsbank
082 Charleston News and Courier	X	X	X	X	X	Newsbank
083 Greenville News			4/86	X	X	Newsbank
084 Herald (Rock Hill)				6/87	X	Newsbank
085 Spartanburg Herald-Journal				X	X	Newsbank
086 Sun News (Myrtle Beach)			4/86	X	X	Newsbank

IV-D Example of Article on Server Liability in a Beverage Trade Journal

APPENDIX IV-D Example of Article on Server Liability in a Beverage Journal

LAST CALL

by
Curtis C. Christy, MSED
&
Victor J. Colman, J.D.

Readers, we are introducing a new column. We give a lot of space to news stories about different kinds of "liquor liability." The insurance crisis, civil law suits, licensing violations, and crimnal problems related to illegal sales are some of the most critical features about which our readers need to know. News stories on licensees' problems and state legislature bills which are being introduced are not enough. We have decided to include a consistent, regular column dealing with tips and information on how licensees, managers, and servers can protect themselves from civil, criminal, and licensing liability.

The people we found to write this column have very special credentials. One is a graduate-level prevention educator who is also a certified bartender and bar manager; the other is a liquor liability research lawyer. Both have ample experience in retail alcohol sales and service. Both are involved at the "cutting edge of work in the field of "server education." They are researchers and write in beverage journals across the country.

The non-profit corporation, LAST CALL is completely independent and can tell us exactly what we need to hear — without having to hide facts for the benefit of any sponsor. To understand what LAST CALL is all about, just consider what the acronym "LAST CALL" stands for: Learning Alcohol Service Techniques for Control Against Liquor Liability.

This month's column will discuss issues that are common to most dram shop law suits. A notorious, real-life example which took place in Northern California will be used to illustrate the points, but the names will be omitted to protect the licensee from further embarrassment. It should be stated from the beginning, however, that the licensee in question has learned a great deal from the experience and has an active interest in prevention at the point-of-sale. The lessons learned from this dram shop should be of interest to **all** alcohol retailers.

On March 19, 1982, at approximately 3:30 AM, a minor driver, who had already consumed approximately a half a case of beer over a short time, was given additional beer by a retail clerk. At 4:40 AM, the 19-year-old male driver with his three passengers crashed into a stump. His blood alcohol level was .16%, and he died shortly after the accident. A 15-year-old female, a front seat passenger, was severely and permanently injured in the crash. The testimony of the two surviving minor passengers revealed the events of that evening.

The driver's intoxication was determined to have been caused by three twelve packs of beer which he had illegally obtained from the off-sale store clerk. This included a second purchase less than one hour before the accident occurred, and more than one hour after 2:00 AM — the hour after which alcohol cannot be furnished by licensed establishments in California.

Defendants named in the state superior court case included the estate of the driver of the automobile, the convenience store clerk, and the store itself. The lawyers for the female victim's mother (the plaintiff) discovered some problems in the convenience store's business practices as they related to this case. The clerk was newly hired, and he was hired without his references or criminal record being checked. Although he was given no formal training, the clerk had begun working on the evening he was hired. Almost immediately he began working the 11 PM to 7 AM shift alone. If care had been taken in hiring, the store manager would have discovered that the young man had 13 prior criminal **convictions**, some of which were alcohol-related. Clearly, this was not an ideal candidate to work alone, **unproved**, on the graveyard shift.

At 3:30 AM the early morning of the accident, the clerk broke three state laws. (1) he furnished alcohol to a minor; (2) this took place after ABC hours; and (3) the minor was already obviously intoxicated. This is the most fatal mixture of California law imaginable.

What was the outcome of this case? The defendants (the store, the clerk, and the estate of the deceased driver) made an out-of-court settlement with the comatose plaintiff's lawyers at the beginning of the trial. If the (still) unconscious young woman lives out her life expectancy of fifty more years, she and her mother will receive more than $10 million. It should be noted that the settlement did not contain any admission of liability on the part of the convenience store. However, the size of the settlement makes it abundantly clear that there was real and reasonable concern about a potential jury verdict and award.

The store's defense at the pre-trial stage centered on the individual responsibility of the clerk, and on whether the minor was, indeed, intoxicated. It was argued that the clerk was not acting within the scope of his employment when he furnished (for free, by the way) the alcohol to this friend on two separate occasions. But California law covers all the bases, and responsibility is on the establishment and licensee for alcohol furnished in any way in the licensed establishment.

The plaintiffs concentrated on the lack of responsible business practices by the licensee, including a lack of corporate policies regarding hiring, supervising and training of employees. Additionally, written policies regarding responsible alcohol sales and service were also lacking. In the end it was the combination of these factors which led to the settlement of the case.

Ironically, although the lack of responsible practices hurt this store's case, under present California law, the existence of responsible business practices would not necessarily be considered by the judge or jury. In our next column, we will discuss a proposed dram shop law which would provide responsible licensees with a defense in a civil suit of the type described above.

V-A National Liquor Liability Survey -- Cover Letter

V-B National Liquor Liability Survey -- Questionnaire

V-C National Liquor Liability Survey -- Reminder Postcard

TOP SHELF
BARKEEPING AT ITS BEST

The National Liquor Liability Survey

11 Pearl Street • P.O. Box 4080 • Springfield, MA 01101-4080
1-800-443-7277

Attention Hospitality Professionals:

Does the possibility of becoming involved in a dram shop/liquor liability lawsuit concern you? Would you like to see liability insurance become more available or more affordable?

By completing the enclosed questionnaire, your answers will provide the facts needed to create fair liability reform and a better business climate. *Top Shelf Magazine* is working in cooperation with the RBS Council in conducting this survey to determine the truth about liability and insurance. The questionnaire is anonymous and your answers are totally confidential.

Formed in 1987, the RBS Council is an association of professionals from throughout the United States and Canada working to formulate guidelines on beverage service policies and training to protect responsible alcohol retailers from liability, and create more favorable insurance rates. Members include hospitality professionals, restaurant trade association executives, insurance companies, researchers and hospitality educators.

With your help, we can bring some rationality to the current maze of inflated costs and uncertain future. If you have any questions, be sure to call the RBS Council toll-free at 1-800-443-7277. Because your questionnaire is part of a scientifically-selected sample, your response is crucial for achieving our common goals.

We appreciate your time for participating in this important research project. Just enclose your completed questionnaire in the pre-paid business reply envelope. A summary of the results of this study will appear in a future issue of *Top Shelf*.

Thank you.

Sincerely,

Rod Groetzinger, Publisher
Top Shelf Magazine

Martin A Venayine, Chair
RBS Council

THE NATIONAL LIQUOR LIABILITY SURVEY

Please answer each of the questions by circling one of the responses provided. All answers are confidential and will be used to generate a statistical picture of licensees across the country. You may choose to skip any question if you desire for any reason. Please let us know why you skipped it, however, by writing "Don't know (DK)", "not applicable (NA)," or "refused", whichever applies.

1. **First, within which state is your business located?** _____

2. **In your state, could you be sued if someone had been killed by a drunk driver who had just left your business?** *(CIRCLE ANSWER FOR EACH CASE)*

	YES	NO
YES, IF THE DRIVER WAS A MINOR	1	2
YES, IF THE DRIVER WAS "OBVIOUSLY INTOXICATED" WHEN SERVED A DRINK	1	2
YES, NO MATTER WHETHER THE DRIVER WAS A MINOR OR OBVIOUSLY INTOXICATED	1	2
I COULD NOT BE SUED ACCORDING TO THE LAWS IN MY STATE	1	2

3. **What would you say is the "legal climate" regarding liquor liability suits like these for businesses like yours in your state?** *(CIRCLE ONE)*

THE LEGAL CLIMATE IS GENERALLY FAVORABLE FOR BUSINESS 1
THE LEGAL CLIMATE IS NEUTRAL TOWARD BUSINESSES 2
THE LEGAL CLIMATE IS HOSTILE TOWARD BUSINESSES 3
I DON'T KNOW 4

4. **What is your best estimate of the number of liquor liability suits that have been brought against a licensee in your state in the past three (3) years?** *(IF NONE, PUT 0 AND SKIP TO QUESTION #5)*

_____ SUITS

4a. About how much money was awarded or settled for in the largest case that you know of?

NO MONEY 1
UNDER $100,000 2
$100,000-499,000 3
$500,000-1,000,000 4
OVER $1,000,000 5

5. **Do you now carry liquor liability (or dram shop) insurance for your business?** *(CIRCLE ONE)*

YES 1
NO, I DON'T NEED IT 2
NO, IT'S TOO EXPENSIVE 3
NO, I CAN'T GET IT 4
NO, OTHER REASON (SPECIFY_____) 5

6. **What is (or would be) the dollar limit of your coverage, the amount that the insurance would cover?**

$_____

7. **How much is (or would be) your annual premium for liquor liability coverage?**

$_____

8. **Have your employees been trained in ways to avoid service to minors?** *(CIRCLE ANSWER FOR EACH CASE)*

	YES	NO
YES, AS PART OF ORIENTATION FOR NEW EMPLOYEES	1	2
YES, IN A FORMAL TRAINING FOR JUST THAT PURPOSE	1	2
YES, DURING "ON THE JOB" TRAINING RATHER THAN A FORMAL TRAINING SESSION	1	2
THEY HAVEN'T BEEN TRAINED ON THIS TOPIC	1	2

9. **Have your employees been trained in ways to avoid service to intoxicated customers? If so, how long was that training?** *(CIRCLE AND WRITE IN ANSWER FOR EACH CASE)*

	YES	NO
YES, AS PART OF ORIENTATION FOR NEW EMPLOYEES	1	2
YES, IN A FORMAL TRAINING FOR JUST THAT PURPOSE	1	2
YES, DURING "ON THE JOB" TRAINING RATHER THAN A FORMAL TRAINING SESSION	1	2
THEY HAVEN'T BEEN TRAINED ON THIS TOPIC	1	2

10. **If you answered formal training above, for either service to minors or intoxicated customers, what was the name of the training (e.g., TAM, TIPS, etc.) if it had one? What percentage of your current employees went through the formal training?** *(IF NONE, PUT 0)*

NAME _____ _____%

11. **Under what circumstances do you require age identification?** *(CIRCLE ANSWER FOR EACH CASE)*

	YES	NO
ASKED FOR ALL CUSTOMERS	1	2
WHEN THE CUSTOMER LOOKS TOO YOUNG TO DRINK	1	2
FOR ALL CUSTOMERS WHO LOOK YOUNGER THAN 25 OR 30	1	2

12. **What is done with a customer who is intoxicated?** *(CIRCLE ANSWER FOR EACH CASE)*

	YES	NO
HE OR SHE IS ASKED TO LEAVE	1	2
HE OR SHE IS REFUSED FURTHER SERVICE	1	2
HE OR SHE IS GIVEN TRANSPORTATION HOME TO PREVENT THEM FROM DRIVING	1	2
HE OR SHE IS ASKED TO STAY, BUT IS GIVEN NON-ALCOHOLIC DRINKS UNTIL THEY SOBER UP	1	2
POLICE ARE CALLED TO DEAL WITH THE CUSTOMER	1	2
OTHER (WHAT? _____)		

13. **Do you set any limit to how many drinks a customer may have?**

YES 1

IF NO, SKIP TO Q. 14 NO 2

13a. **What is the limit? A certain number of drinks or a number of drinks per hour?**

_____ DRINKS

OR _____ DRINKS PER HOUR

14. How often would you say you have had to refuse service to an intoxicated customer? *(CIRCLE ONE)*

SEVERAL TIMES A DAY	1
ONCE OR TWICE A DAY	2
SEVERAL TIMES A WEEK	3
ONCE OR TWICE A WEEK	4
A FEW TIMES A MONTH	5
ONCE OR TWICE A MONTH	6
VERY SELDOM OR NEVER	7

15. What best describes your business? *(CIRCLE ONE)*

RESTAURANT	1
NIGHTCLUB	2
BAR	3
HOTEL/MOTEL LOUNGE	4
OTHER (SPECIFY _____)	5

16. What kind of menu do you have? *(CIRCLE ONE)*

BEVERAGES ONLY	1
SNACKS WITH BEVERAGES	2
FULL MENU	3

17. Do you offer any of the following? *(CIRCLE ANSWER FOR EACH CASE)*

	YES	NO
BEER OR MIXED DRINKS BY THE PITCHER	1	2
WINE BY THE BOTTLE OR CARAFE	1	2
DOUBLES OR TRIPLES	1	2
REDUCED DRINK PRICES AT HAPPY HOUR	1	2
TWO-FOR-ONE DRINK SALES	1	2

18. Type of ownership? *(CIRCLE ONE)*

FRANCHISE	1
CHAIN	2
INDEPENDENT	3

19. Which of the following best represents the types of patrons you have? *(CIRCLE ANSWER FOR EACH TYPE)*

FAMILIES	Y	N	RETIRED PEOPLE	Y	N
BLUE COLLAR	Y	N	WHITE COLLAR	Y	N
SINGLES	Y	N	STUDENTS	Y	N

20. About what is the age mix of your customer base?

UNDER 21	_____%
21-30	_____%
31-50	_____%
OVER 50	_____%

21. How many years has the business been in operation at this location? *(CIRCLE ONE)*

1-5 YEARS	1
6-15 YEARS	2
OVER 15 YEARS	3

22. How large is the service staff? *(CIRCLE ONE)*

1-10 PEOPLE	1
11-20 PEOPLE	2
21-50 PEOPLE	3
OVER 50 PEOPLE	4

23. What are your gross annual food and beverage sales? *(CIRCLE ONE)*

UNDER $100,000	1
$100,000-199,000	2
$200,000-499,000	3
$500,000-1,000,000	4
OVER $1,000,000	5

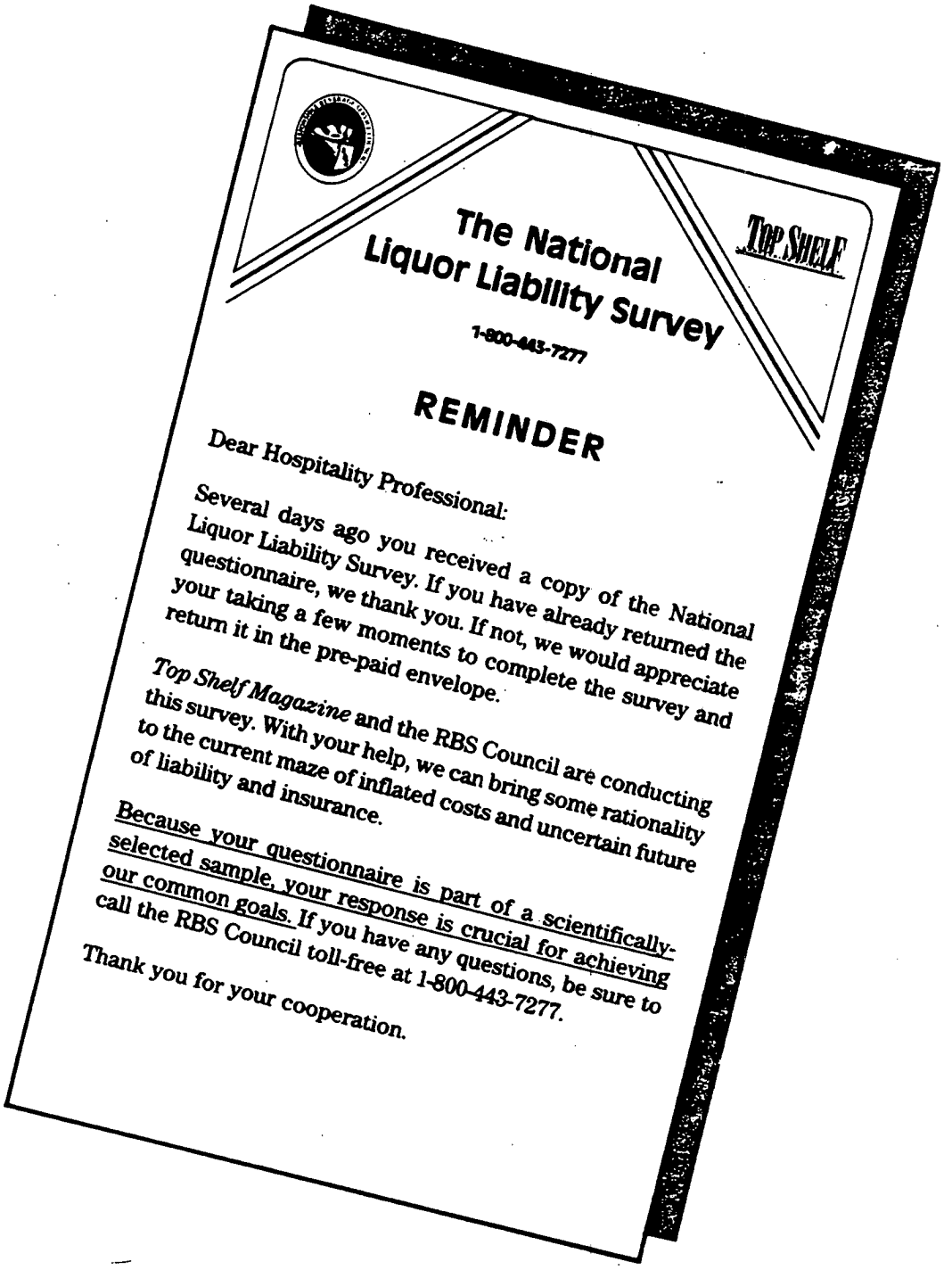
24. What percentage of your gross sales are from food? non- alcoholic beverages? from alcoholic beverages?

FOOD	=	_____%
NON-ALCOHOLIC BEVERAGES	=	_____%
ALCOHOLIC BEVERAGES	=	_____%

25. What percentage of your alcoholic beverage sales are in beer? in wine (and wine coolers)? in distilled spirits?

BEER	=	_____%
WINE	=	_____%
SPIRITS	=	_____%

Thank you for your help on these important issues



The National Liquor Liability Survey

TOP SHELF

1-800-443-7277

REMINDER

Dear Hospitality Professional:

Several days ago you received a copy of the National Liquor Liability Survey. If you have already returned the questionnaire, we thank you. If not, we would appreciate your taking a few moments to complete the survey and return it in the pre-paid envelope.

Top Shelf Magazine and the RBS Council are conducting this survey. With your help, we can bring some rationality to the current maze of inflated costs and uncertain future of liability and insurance.

Because your questionnaire is part of a scientifically-selected sample, your response is crucial for achieving our common goals. If you have any questions, be sure to call the RBS Council toll-free at 1-800-443-7277.

Thank you for your cooperation.

V-D Frequency Distributions for Items in National Liquor Liability Survey.

APPENDIX V-E

FREQUENCY DISTRIBUTIONS BY LIABILITY STATUS
(LOW VS. HIGH LIABILITY)

THE NATIONAL LIQUOR LIABILITY SURVEY

Please answer each of the questions by circling one of the responses provided. All answers are confidential and will be used to generate a statistical picture of licensees across the country. You may choose to skip any question if you desire for any reason. Please let us know why you skipped it, however, by writing "Don't know (DK)", "not applicable (NA)," or "refused", whichever applies.

	Low	High
N =	429	410

1. **First, within which state is your business located?** _____

2. **In your state, could you be sued if someone had been killed by a drunk driver who had just left your business?** *(CIRCLE ANSWER FOR EACH CASE)*

Low	High		YES	NO	% YES LOW	% YES HIGH
N= 372	392	YES, IF THE DRIVER WAS A MINOR	1	2	40	78
		YES, IF THE DRIVER WAS "OBVIOUSLY INTOXICATED" WHEN SERVED A DRINK	1	2	48	82
		YES, NO MATTER WHETHER THE DRIVER WAS A MINOR OR OBVIOUSLY INTOXICATED	1	2	37	86
		I COULD NOT BE SUED ACCORDING TO THE LAWS IN MY STATE	1	2	40	2

3. **What would you say is the "legal climate" regarding liquor liability suits like these for businesses like yours in your state?** *(CIRCLE ONE)*

Low	High			LOW	HIGH
N= 267	323	THE LEGAL CLIMATE IS GENERALLY FAVORABLE FOR BUSINESS	1	30	6
		THE LEGAL CLIMATE IS NEUTRAL TOWARD BUSINESSES	2	45	24
		THE LEGAL CLIMATE IS HOSTILE TOWARD BUSINESSES	3	26	71
		I DON'T KNOW	4		

4. **What is your best estimate of the number of liquor liability suits that have been brought against a licensee in your state in the past three (3) years?** *(IF NONE, PUT 0 AND SKIP TO QUESTION #5)*

	LOW	HIGH
N =	246	202
Mean	5	41 SUITS

4a. **About how much money was awarded or settled for in the largest case that you know of?**

Low	High			% YES LOW	% YES HIGH
N= 71	190	NO MONEY	1	58	3
		UNDER $100,000	2	11	10
		$100,000-499,000	3	9	22
		$500,000-1,000,000	4	11	24
		OVER $1,000,000	5	11	41

5. **Do you now carry liquor liability (or dram shop) insurance for your business?** *(CIRCLE ONE)*

Low	High			LOW	HIGH
N= 399	396	YES	1	35	50
		NO, I DON'T NEED IT	2	31	2
		NO, IT'S TOO EXPENSIVE	3	18	42
		NO, I CAN'T GET IT	4	5	2
		NO, OTHER REASON (SPECIFY_____)	5	11	4

6. **What is (or would be) the dollar limit of your coverage, the amount that the insurance would cover?**

	Low	High	LOW	HIGH
N =	150	238		
$ =			$800,000	$650,000

7. **How much is (or would be) your annual premium for liquor liability coverage?**

	Low	High	LOW	HIGH
N =	93	233		
$			7,600	8,100

8. **Have your employees been trained in ways to avoid service to minors?** *(CIRCLE ANSWER FOR EACH CASE)*

Low	High		YES	NO	% YES LOW	% YES HIGH
N= 414	403	YES, AS PART OF ORIENTATION FOR NEW EMPLOYEES	1	2	63	61
		YES, IN A FORMAL TRAINING FOR JUST THAT PURPOSE	1	2	32	26
		YES, DURING "ON THE JOB" TRAINING RATHER THAN A FORMAL TRAINING SESSION	1	2	58	67
		THEY HAVEN'T BEEN TRAINED ON THIS TOPIC	1	2	7	5

9. **Have your employees been trained in ways to avoid service to intoxicated customers? If so, how long was that training?** *(CIRCLE AND WRITE IN ANSWER FOR EACH CASE)*

Low	High		YES	NO	% YES LOW	% YES HIGH
N= 411	402	YES, AS PART OF ORIENTATION FOR NEW EMPLOYEES	1	2	51	55
		YES, IN A FORMAL TRAINING FOR JUST THAT PURPOSE	1	2	31	27
		YES, DURING "ON THE JOB" TRAINING RATHER THAN A FORMAL TRAINING SESSION	1	2	57	65
		THEY HAVEN'T BEEN TRAINED ON THIS TOPIC	1	2	9	6

10. **If you answered formal training above, for either service to minors or intoxicated customers, what was the name of the training (e.g., TAM, TIPS, etc.) if it had one? What percentage of your current employees went through the formal training?** *(IF NONE, PUT 0)*

	Low	High
NAME cited N=123 (Low) N=96 (High) Median = 90	≈ 90	≈ 90 %

11. **Under what circumstances do you require age identification?** *(CIRCLE ANSWER FOR EACH CASE)*

Low	High		YES	NO	% YES LOW	% YES HIGH
N= 422	406	ASKED FOR ALL CUSTOMERS	1	2	5	7
		WHEN THE CUSTOMER LOOKS TOO YOUNG TO DRINK	1	2	67	64
		FOR ALL CUSTOMERS WHO LOOK YOUNGER THAN 25 OR 30	1	2	59	64

12. **What is done with a customer who is intoxicated?** *(CIRCLE ANSWER FOR EACH CASE)*

Low	High		YES	NO		
N= 424	403	HE OR SHE IS ASKED TO LEAVE	1	2	38	35
		HE OR SHE IS REFUSED FURTHER SERVICE	1	2	75	82
		HE OR SHE IS GIVEN TRANSPORTATION HOME TO PREVENT THEM FROM DRIVING	1	2	57	58
		HE OR SHE IS ASKED TO STAY, BUT IS GIVEN NON-ALCOHOLIC DRINKS UNTIL THEY SOBER UP	1	2	38	36
		POLICE ARE CALLED TO DEAL WITH THE CUSTOMER	1	2	12	15
		OTHER (WHAT? _____)				

13. **Do you set any limit to how many drinks a customer may have?**

Low	High			LOW	HIGH
N= 381	365	YES	1	17	23
		IF NO, SKIP TO Q. 14 NO	2		

13a. **What is the limit? A certain number of drinks or a number of drinks per hour?**

	LOW	HIGH
N= 21, 45	LOW ~~HIGH~~ 3	2 DRINKS
N= 33, 46	*OR* 2	3 DRINKS PER HOUR

14. How often would you say you have had to refuse service to an intoxicated customer? *(CIRCLE ONE)*

N = Low 418 High 404

		LOW	HI
SEVERAL TIMES A DAY	1	1%	2
ONCE OR TWICE A DAY	2	3%	4
SEVERAL TIMES A WEEK	3	7%	9
ONCE OR TWICE A WEEK	4	10%	1
A FEW TIMES A MONTH	5	14%	1
ONCE OR TWICE A MONTH	6	17%	21
VERY SELDOM OR NEVER	7	49%	2

15. What best describes your business? *(CIRCLE ONE)*

N = Low 424 High 409

		LOW	HI
RESTAURANT	1	39	3
NIGHTCLUB	2	9	
BAR	3	26	34
HOTEL/MOTEL LOUNGE	4	5	
OTHER (SPECIFY _____)	5	13	10
CLUB		8	

16. What kind of menu do you have? *(CIRCLE ONE)*

N = Low 407 High 405

		LOW	HI
BEVERAGES ONLY	1	7	4
SNACKS WITH BEVERAGES	2	31	3
FULL MENU	3	63	6

17. Do you offer any of the following? *(CIRCLE ANSWER FOR EACH CASE)*

N = Low 398 High 391

	YES	NO	% YES LOW	% YES HI
BEER OR MIXED DRINKS BY THE PITCHER	1	2	45	4
WINE BY THE BOTTLE OR CARAFE	1	2	51	4
DOUBLES OR TRIPLES	1	2	36	2
REDUCED DRINK PRICES AT HAPPY HOUR	1	2	30	
TWO-FOR-ONE DRINK SALES	1	2	2	1

18. Type of ownership? *(CIRCLE ONE)*

N = Low 409 High 392

		LOW	HI
FRANCHISE	1	5	
CHAIN	2	6	
INDEPENDENT	3	90	9

19. Which of the following best represents the types of patrons you have? *(CIRCLE ANSWER FOR EACH TYPE)*

LOW	HIGH							LOW	HIGH
75	65	FAMILIES	Y	N	RETIRED PEOPLE	Y	N	74	72
67	78	BLUE COLLAR	Y	N	WHITE COLLAR	Y	N	68	63
66	74	SINGLES	Y	N	STUDENTS	Y	N	28	30

N = Low 408 High 417

20. About what is the age mix of your customer base?

	Low	High			MEAN % LOW	MEAN % HIGH
N=	421	402	UNDER 21	_____%	3.4	2.5
	421	401	21-30	_____%	20.7	24.0
	421	401	31-50	_____%	42.3	44.0
	421	401	OVER 50	_____%	23.9	20.7

21. How many years has the business been in operation at this location? *(CIRCLE ONE)*

	Low	High			LOW	HIGH
N=	425	404	1-5 YEARS	1	20	13
			6-15 YEARS	2	30	30
			OVER 15 YEARS	3	50	57

22. How large is the service staff? *(CIRCLE ONE)*

	Low	High			LOW	HIGH
N=	423	404	1-10 PEOPLE	1	60	67
			11-20 PEOPLE	2	20	13
			21-50 PEOPLE	3	13	14
			OVER 50 PEOPLE	4	7	6

23. What are your gross annual food and beverage sales? *(CIRCLE ONE)*

	Low	High			LOW	HIGH
N=	406	384	UNDER $100,000	1	30	26
			$100,000-199,000	2	20	29
			$200,000-499,000	3	24	20
			$500,000-1,000,000	4	16	12
			OVER $1,000,000	5	11	13

24. What percentage of your gross sales are from food? non- alcoholic beverages? from alcoholic beverages?

	Low	High			LOW	HIGH
N=	413	398	FOOD	= mean %	42.1	37.9
	413	399	NON-ALCOHOLIC BEVERAGES	= _____%	7.8	7.2
	414	399	ALCOHOLIC BEVERAGES	= _____%	42.7	48.7

25. What percentage of your alcoholic beverage sales are in beer? in wine (and wine coolers)? in distilled spirits?

	Low	High			LOW	HIGH
N =	416	395	BEER	= mean %	50.6	52.7
	417	395	WINE	= _____%	11.0	10.5
	417	395	SPIRITS	= _____%	28.8	29.3

Thank you for your help on these important issues

VI-A North Carolina Newspaper Coverage of Drinking and Driving -- 1980-1988. (6 months average, Articles per month.)

VI-B North Carolina Newspaper Coverage of Drinking and Driving -- 1980-1988. (Annual Articles.)

VI-C Content Analysis Inventory for Dram Shop and Traffic.

VI-D Percentage of Nighttime Crashes by Month (North Carolina) -- Jan. 1980 - Dec. 1986

VI-E Percentage of Alcohol-Related Crashes by Month (North Carolina) -- Jan. 1980-Dec. 1986

VI-F North Carolina Coverage of Server Liability -- 1980-1988--Monthly Column Inches

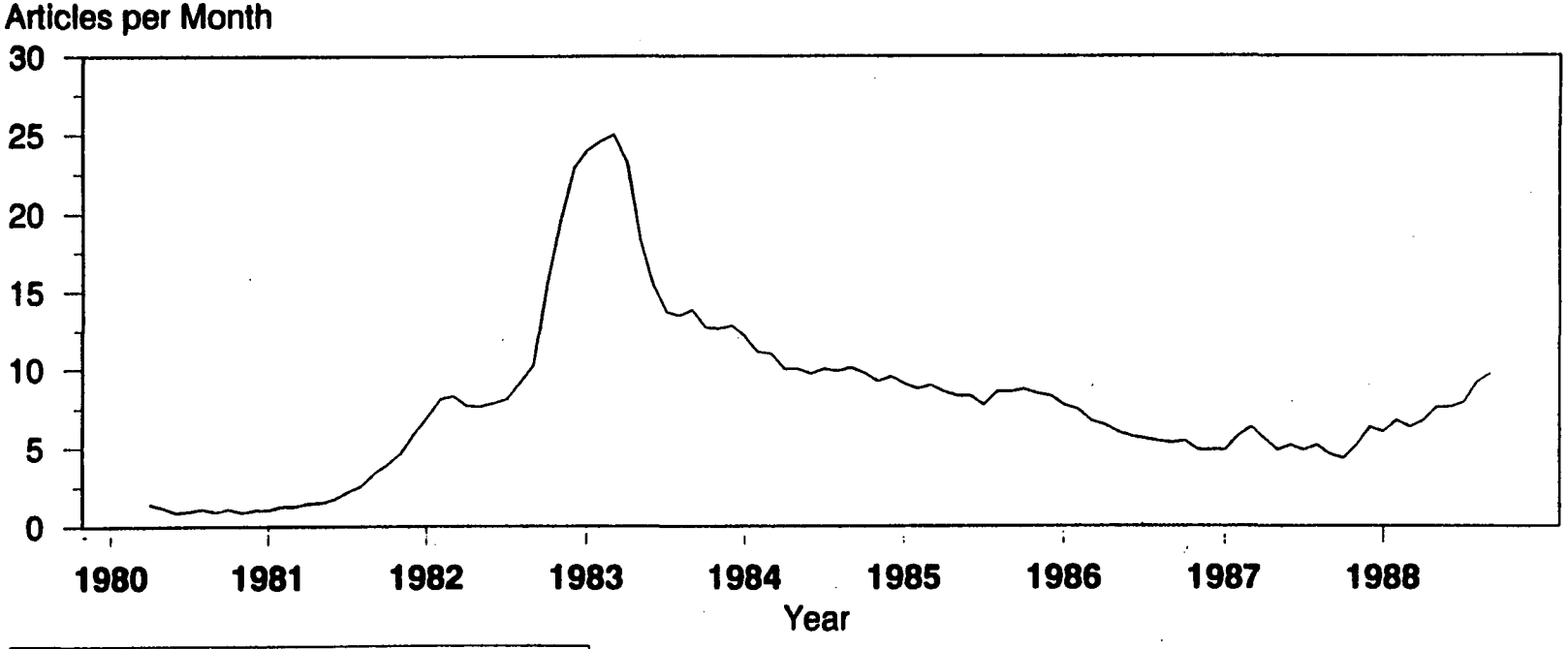
VI-G North Carolina Coverage of Server Liability -- 1980-1988 -- Annual Articles

VI-H North Carolina Coverage of Server Liability -- 1980-1988 -- Annual Column Inches

VI-I Content Analysis Inventory for Dram Shop and Traffic Safety Publicity, Texas -- 1978-1988

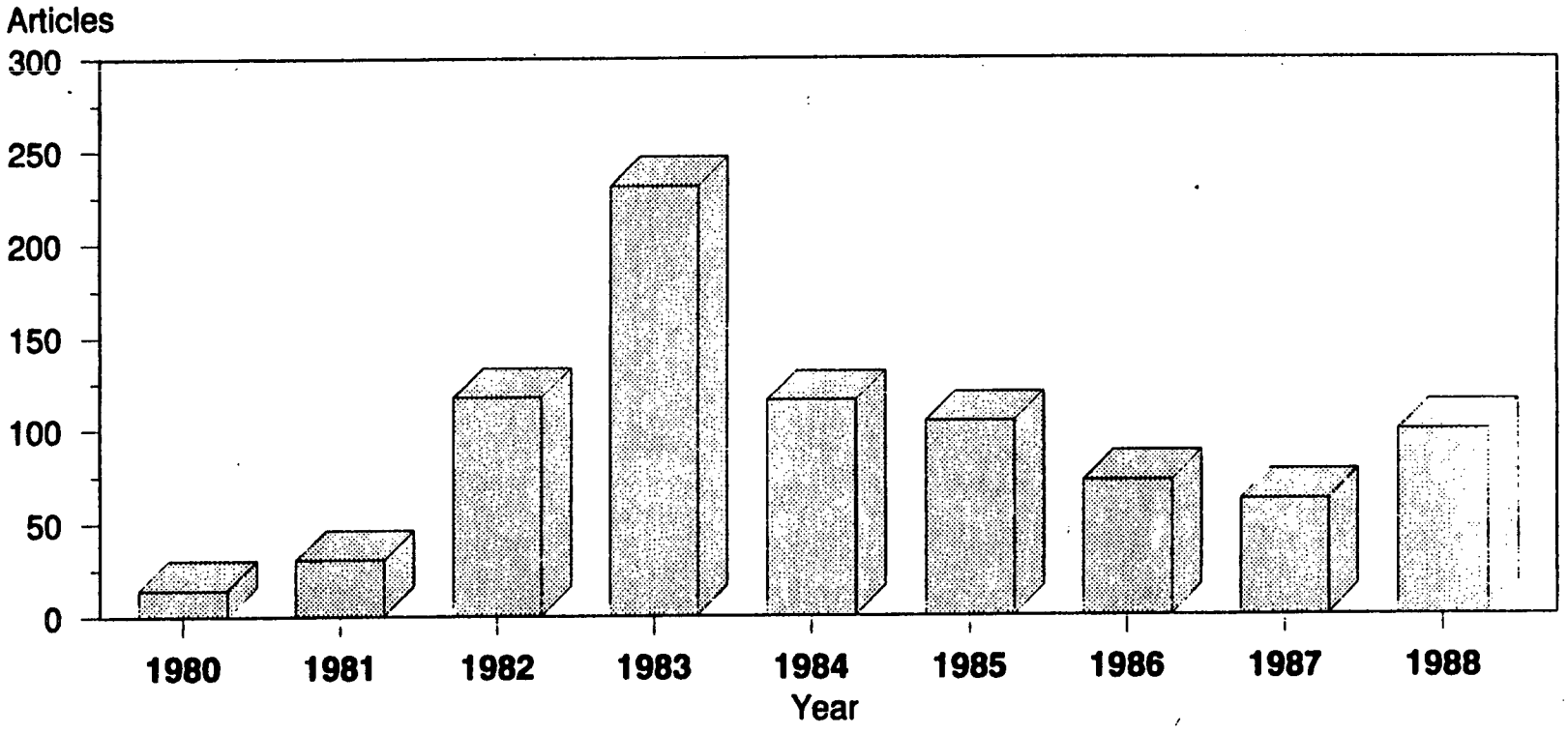
APPENDIX VI-A

North Carolina Newspaper Coverage of Drinking & Driving -- 1980-1988 [Six Month Moving Average]



Average of five major newspapers for 1980-1984.
Raleigh News & Observer for 1985-1988.

North Carolina Newspaper Coverage of Drinking & Driving -- 1980-1988



Average of five major newspapers for 1980-1984.
Raleigh News & Observer for 1985-1988.

APPENDIX VI-C

CONTENT ANALYSIS INVENTORY FOR DRAM SHOP
AND TRAFFIC SAFETY PUBLICITY
Change State

NORTH CAROLINA

Codes D/S	Codes DUI	Cities/Newspapers	Years 80	'81	'82	'83	'84	'85	'86	'87	'88	Index Source
108	300	Charlotte Observer	X	X	X	X	X	/	X	X	X	VuText
		Durham Morning Herald	X	X	X	X	X					Luckey (1985)
		Greensboro Daily News	X	X	X	X	X					Luckey (1985)
		Raleigh Nws & Observer	X	X	X	X	X	X	X	X	X	Luckey (1985)*
		Winston-Salem Journal	X	X	X	X	X					Luckey (1985)

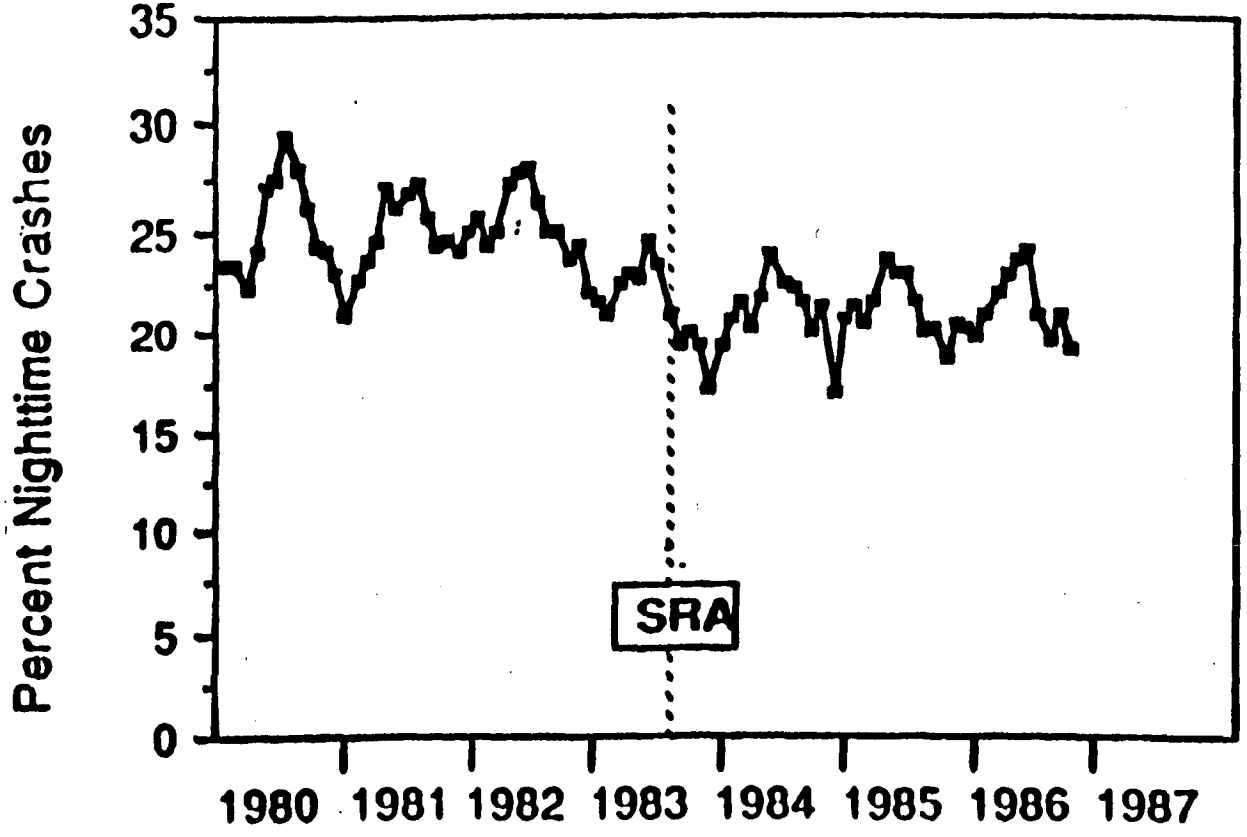
D/S = Dram Shop Publicity
DUI = Driving Under the Influence (Drinking & Driving) Publicity

*Additional data (1985-1988) provided by Dr. William Luckey.

APPENDIX VI-D

SOURCE: Lacey, John. 1987. "Safe Roads Act Update." Prepared for North Carolina Medical Society, Traffic Safety Committee. UNC Highway Safety Research Center, Chapel Hill, NC, April 12.

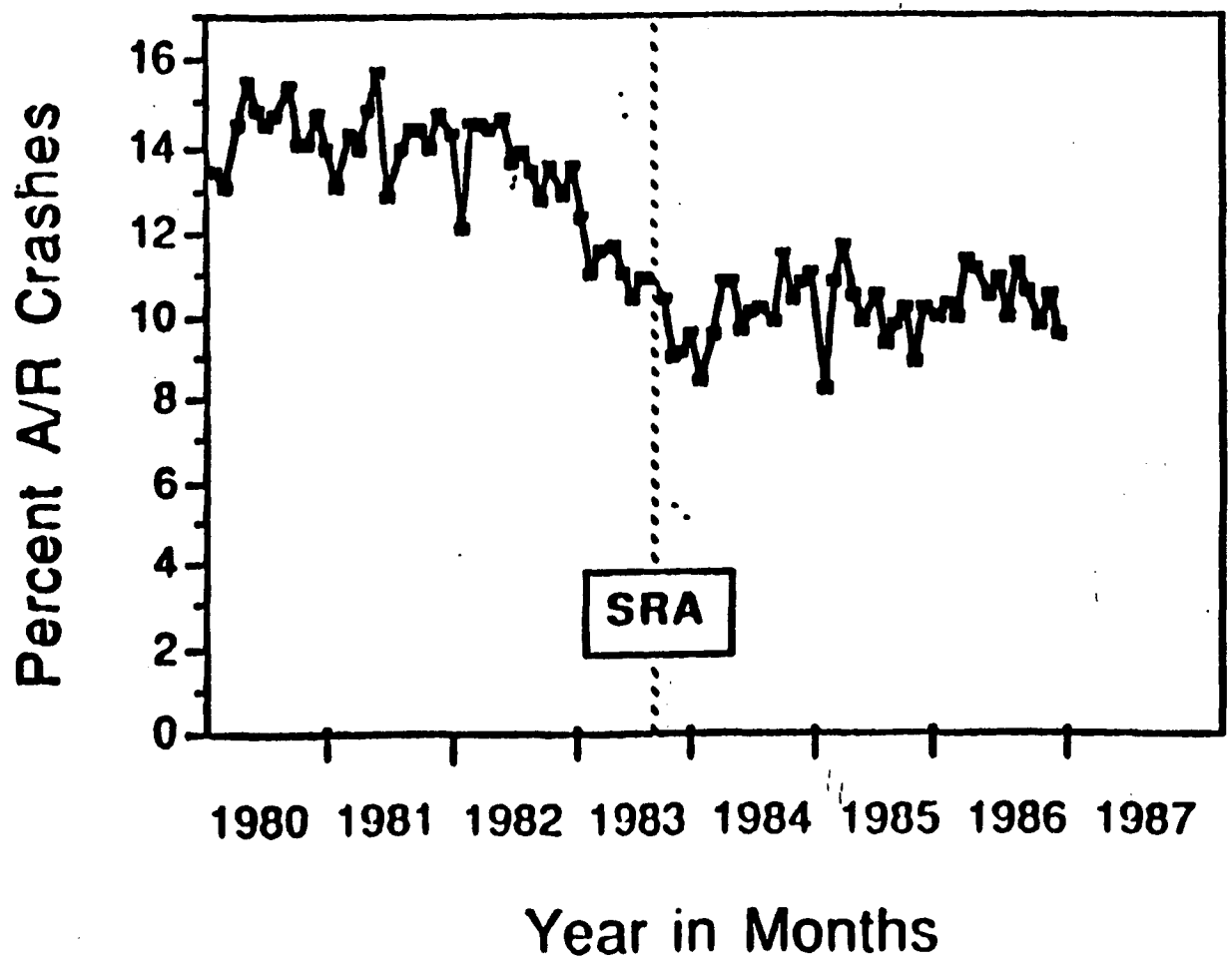
Percentage of Nighttime Crashes by Month
Jan. 1980 - Dec. 1986



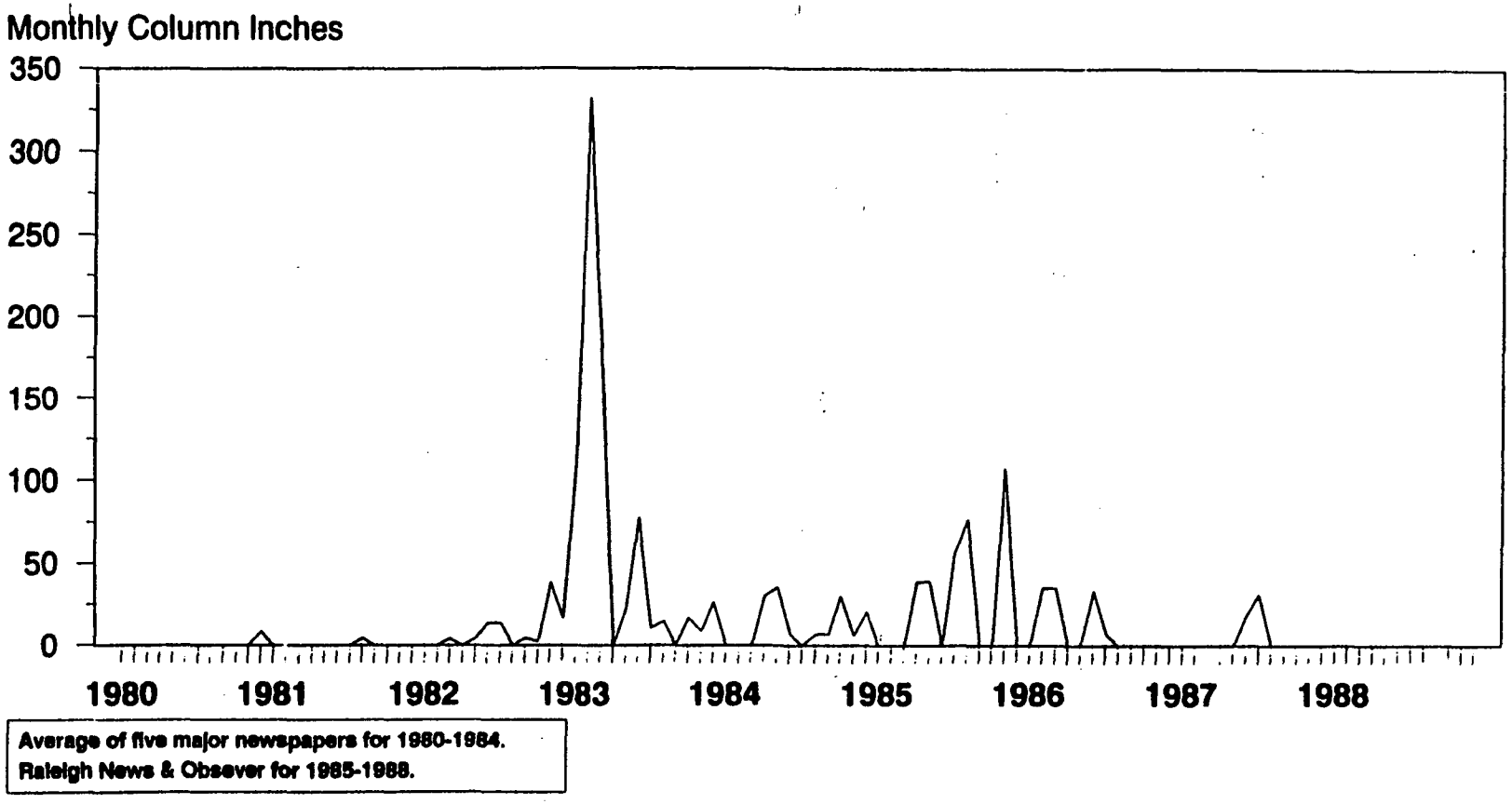
APPENDIX VI-E

SOURCE: Lacey, John. 1987. "Safe Roads Act Update." Prepared for North Carolina Medical Society, Traffic Safety Committee. UNC Highway Safety Research Center, Chapel Hill, NC, April 12.

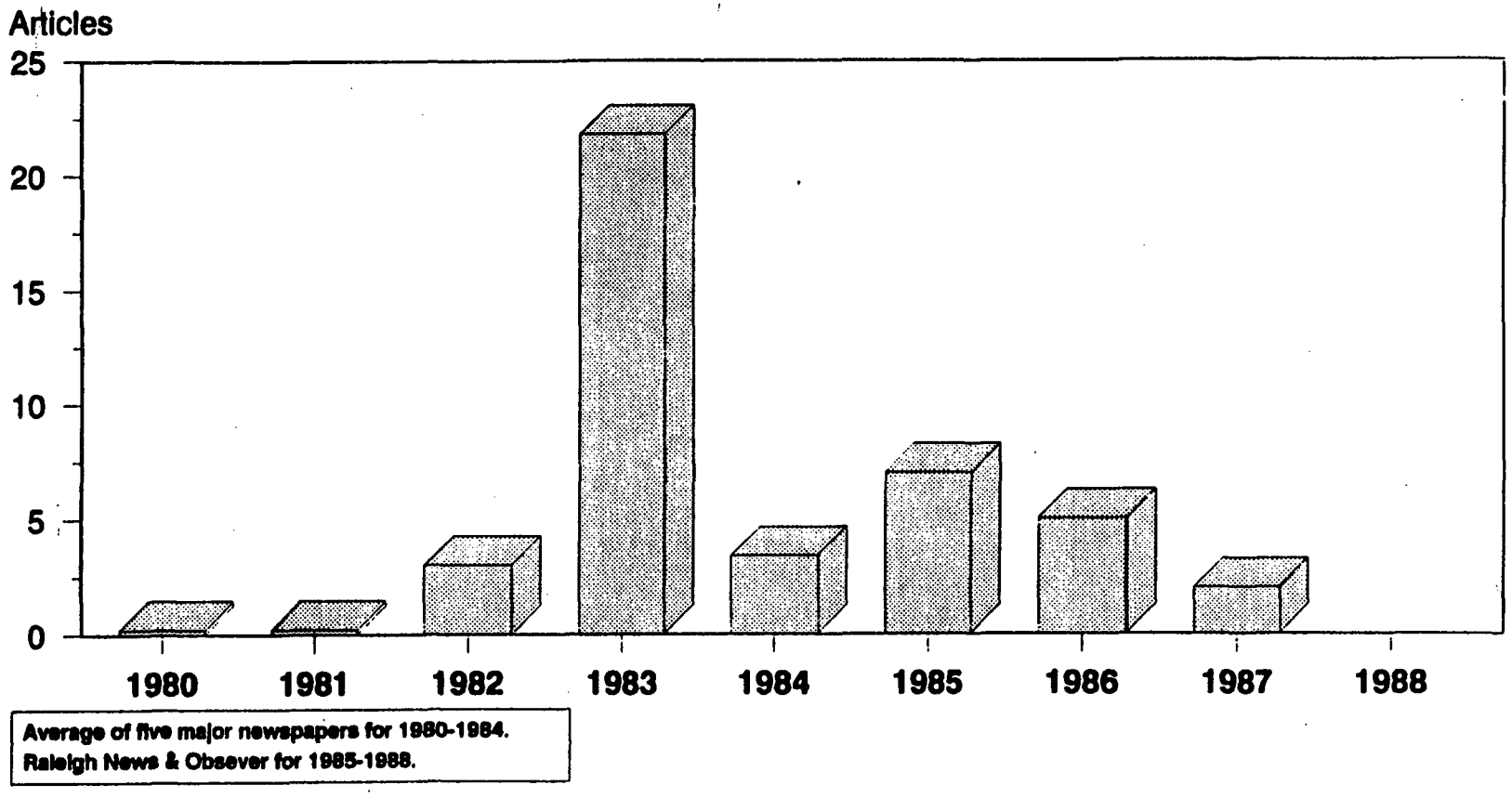
Percentage of Alcohol/Related Crashes by Month Jan. 1980 - December 1986



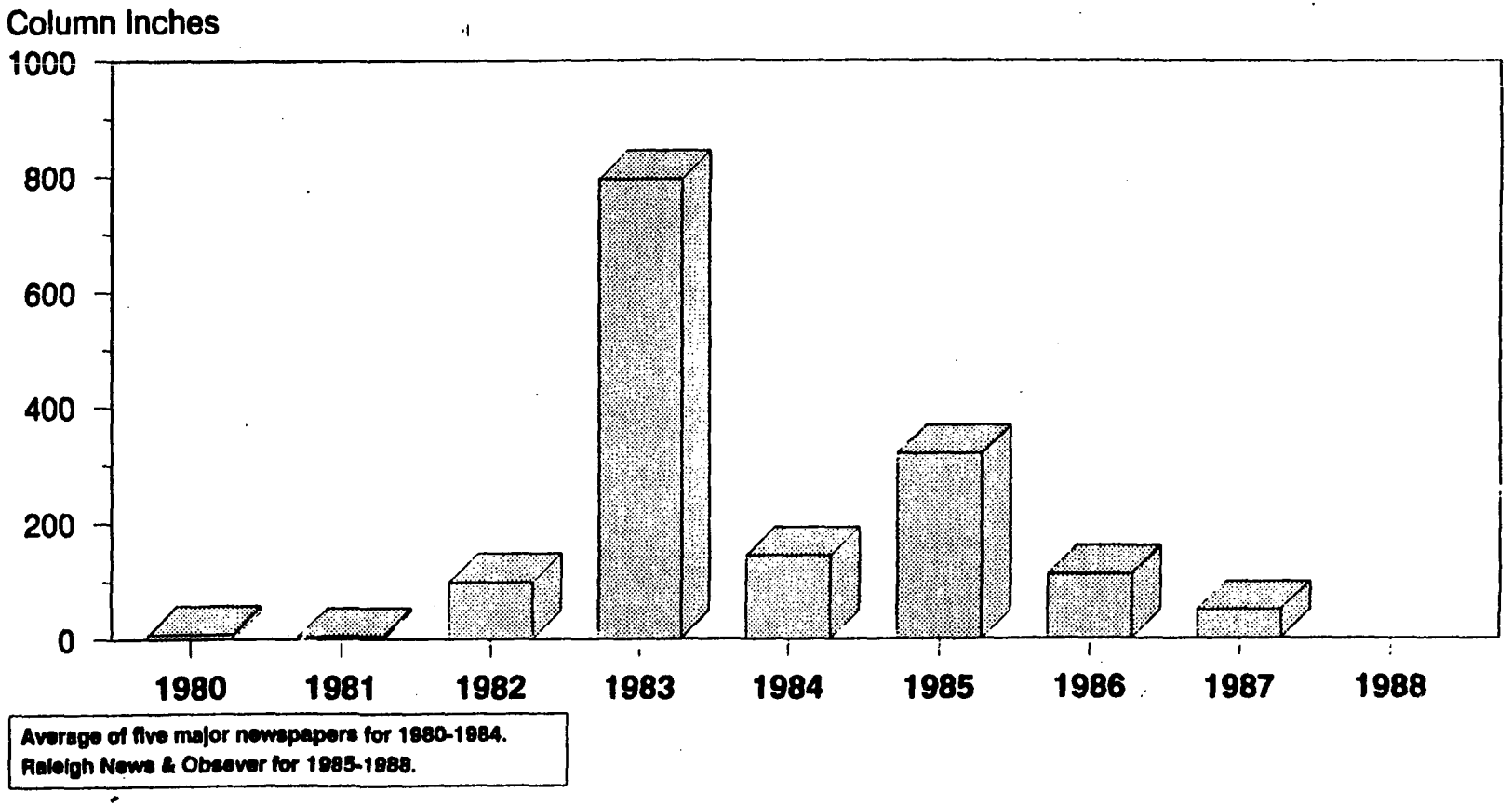
North Carolina Newspaper Coverage of Server Liability -- 1980-1988



North Carolina Newspaper Coverage of Server Liability -- 1980-1988



North Carolina Newspaper Coverage of Server Liability -- 1980-1988



Commentary

A pressing legal issue in many states with dram shop liability statutes is whether plaintiffs may seek alternative remedies at common law outside the statutory remedy. Although there is a conflict in authority, the modern trend is toward permitting common law actions based either on negligence per se or common law negligence standards.[1] Some state legislatures have addressed this issue explicitly. For example, in California, the dram shop statute purports to be the exclusive remedy for all service of alcoholic beverages; in North Carolina, the statute provides that it does not exclude common law claims.[2]

The primary reason for permitting alternative actions is that the statutory provisions in question are usually antiquated and are not based on common law principles.[3] In many cases, suits are permitted only by a limited class of plaintiffs and the acts giving rise to liability are defined very narrowly.[4] Courts have thus turned to common law principles as a means to avoid otherwise harsh results.

This Act codifies a common law negligence cause of action for the commercial service of alcoholic beverages. It therefore is the exclusive remedy, and an alternative set of duties, defenses, and other provisions are not permitted.

Section 14 is carefully worded so as to not preclude possible causes of actions outside this Act in at least two closely related circumstances:

(1) cases in which the licensee has acted negligently in a manner not related to the service of alcoholic beverages;
(2) cases that involve the service of alcoholic beverages by someone not included as a potential defendant in Section 5.

See Commentary to Section 5 for discussion of potential liability of noncommercial servers of alcoholic beverages. State legislatures may wish to preclude such suits as a matter of law.[5]

SECTION 15: EVALUATION

The Alcoholic Beverage Control Agency shall conduct an evaluation of the impact of this Act, to be completed within two years of its enactment. Evaluation topics to be addressed include but are not limited to initiation of, extent of, or changes in:

(1) the number and type of server and manager training programs in the state;
(2) the curricula of such programs;
(3) the management policies, procedures and actions of licensees regarding the service of alcoholic beverages;
(4) the number of actions filed, settled, and litigated pursuant to the Act and the number and amounts of recoveries;
(5) the number of successful defenses based on Section 10 of this Act;
(6) the legal interpretations of the provisions of this Act, particularly as compared to other state court interpretations;
(7) the incidence of driving while intoxicated offenses, injuries and deaths;
(8) the incidence of other alcohol-related problems;
(9) the incidence of sales to minors and intoxicated persons.

Commentary

Perhaps the least recognized shortcoming of new legislation is its failure to evaluate its impact. Laws are enacted to address particular social problems, but without an evaluation, legislators and other social policymakers have no basis for determining whether the desired impact has been achieved. A carefully developed evaluation project is therefore vital to the legislative process generally and to the successful implementation of this Act.

This provision mandates the ABC agency of the state to conduct the evaluation, to be completed within two years of the Act's enactment. It is anticipated that the agency may need to contract with an organization that specializes in such studies, since most ABC agencies do not have the required expertise. The Act may need to be amended to establish the contracting process in such cases. In some jurisdictions, another state agency may have the resources and expertise to conduct an evaluation, and the Act should be modified to specify that agency, if one is available. A non-inclusive list of variables to be studied has been included to provide guidance.

In most circumstances, the evaluation study will require an appropriation of funds. Because of the current fiscal crisis in most states, this may create a barrier to passage. Strategies for funding can include imposing a special fee on all new license and renewal applications or imposing special court costs in all dram shop cases brought pursuant to the Act.

1. *See, e.g.*, Lewis v. State, 256 N.W.2d 181 (Iowa 1977); Mason v. Roberts, 294 N.E.2d 884 (Ohio 1973); McClellan v. Tottenhoff, 666 P.2d 408 (Wyo. 1983). *But see* Nunn v. Comidas Exquisitos, Inc., 166 Ga. App. 796, 305 S.E.2d 487 (1983).
2. CAL. BUS. AND PROF. CODE § 25602 (West 1980); N.C. GEN. STAT. § 18B-128 (1983).
3. *See, e.g.*, McClellan v. Tottenhoff, 666 P.2d 408 (Wyo. 1983).
4. *Id.*; *see also*, Kerby v. Flamingo Club, Inc., 532 P.2d 975 (Colo. 1974).
5. At least two states have taken such action. *See* CAL. CIVIL CODE § 1714 (West 1980); N.M. STAT. ANN. § 41-11-1(E) (Supp. 1983) (liability permitted only if recklessness is proven). *But see*, OR. REV. STAT. § 30.955 (1983), which permits such liability.

SECTION 16: OPTIONAL NOTICE PROVISION
NOTICE TO DEFENDANT

Every plaintiff seeking damages under this Act shall give written notice to all defendants within 120 days of the date of entering an attorney-client relationship for the purpose of pursuing a claim under this Act. In the case of claims for contributions and indemnity, notice shall be given within 120 days of receiving written notice under this Act. The notice shall specify the time, place and circumstances of the defendant's conduct complained of, and the time, place and circumstances of any resulting damages. No error or omission in the notice shall void the effect of the notice, if otherwise valid, unless the error or omission is of substantially material nature. Failure to give written notice within the time specified shall be grounds for dismissal of a claim, and may only be waived by the court upon a showing of exceptional circumstances. Actual notice of sufficient facts to reasonably put a defendant on notice of a possible claim shall be construed to comply with the notice requirement herein.

Commentary

An optional notice provision is provided by the Model Act for use at the discretion of state legislatures. The provision is made optional due to the strong arguments that may be made for both the inclusion or exclusion of a notice requirement.

The principal argument in support of a notice provision is to allow a defendant to investigate a claim while the underlying facts are still fresh. Since dram shop cases often involve accidents occurring off premises, defendants often will have no knowledge of the accident until informed by the plaintiff. Absent a notice provision, a defendant may not learn of a claim until just prior to expiration of the applicable statute of limitations, which may be a period of several years. An additional argument in favor of a notice provision is that it will motivate plaintiff attorneys to act more promptly on their clients' behalf.

An argument against the optional provision is that notice provisions are an exception to the general rule in civil liability law. The law abounds with the imposition of civil liability for injuries occurring outside the presence of a defendant for which no notice is required. Arguably, it is unfair to make plaintiffs under the Model Act, who are generally innocent third parties, bear a burden not required of plaintiffs in other cases. A related argument, discussed in detail, *infra* is that notice provisions almost invariably involve uncertainty and litigation. Traditional notice provisions, which commence from the date of discovery of the injury, invariably involve litigation over incapacity, tolling periods and due diligence. The notice provision of the Model Act, which is based upon the beginning date of the lawyer-client relationship, may involve weighty questions regarding a plaintiff's ability to select counsel and the privacy of that relationship. These problems inherent in notice provisions may help explain why only three of the twenty-three existing dram shop statutes include notice provisions.

The purpose of the notice provision is primarily to give a defendant an opportunity to investigate while the facts underlying a claim are still fresh.[1] This will cure the defect inherent in most licensee liability statutes that allows plaintiffs to prepare their case while the facts are fresh, without having to inform defendants of their potential liability until the limitations period of one or more years is about to elapse.

The requirements of the notice provision are based primarily on the Minnesota statute.[2] As in the Minnesota statute, the notice requirement begins to run upon the initiation of the attorney-client relationship, rather than the date of the occurrence in question. This is based on the tendency of traumatically injured persons to delay legal considerations until after medical matters are attended to, and the fact that defendants will not be put in an unfair position, because they can begin their investigations within a reasonable time of initiation of the plaintiff's case. Stale cases are eliminated by the statute of limitations provision. This approach is found to be preferable to that under the Connecticut[3] and Iowa statutes,[4] which base their notice requirements on the date of injury and engender litigation over incapacity, tolling periods and diligence.[5]

The notice period of 120 days for plaintiffs is adopted directly from the Minnesota statute. A notice period for contribution and indemnity claims of 120 days is used, rather than the 60 day period of the Minnesota statute, on the basis that such claims may require considerable investigation, which may not be complete within 60 days of plaintiff's notice.

The form of the notice is calculated to adequately inform defendants as to both the injury suffered and the underlying circumstances complained of. This is considered to be an improvement over the Connecticut and Iowa statutes, which only require plaintiffs to inform defendants

1. *See, e.g.*, Zucker v. Vogt, 329 F.2d 426 (2nd Cir. 1964) (applying Connecticut law); Wegan v. Village of Lexington, 309 N.W.2d 273 (Minn. 1981) (additional purposes cited).
2. MINN. STAT. ANN § 340, 951 (West Supp. 1984). The statute was amended in 1982 to cure latent defects revealed in *Wegan v. Village of Lexington*, 309 N.W.2d 273 (Minn. 1981).
3. CONN. GEN. STAT. ANN. § 30-102 (West 1975).
4. IOWA CODE ANN. § 123.93.
5. *See, e.g.*, Ehlinger v. Mardorf, 285 N.W.2d 27 (Iowa 1979); Shersteen v. Sojka, 260 N.W.2d 48 (Iowa 1977); Harrop v. Keller, 253 N.W.2d 588 (Iowa 1977).

of the circumstances of the injury and their intention to bring an action. The broader language of Iowa's form of notice is used, rather than Minnesota's more specific provision, to allow for cases where specifics such as the time of injury or service cannot be established prior to discovery.[6] This is in keeping with the Minnesota provision, adopted in full, which protects the validity of notice containing errors or omissions which are not material.[7]

Court discretion to waive timely notice is authorized only under exceptional circumstances. Although the Minnesota statute bars claims not in compliance with the notice provisions, Minnesota decisions have recognized exceptions to the rule under equitable principles.[8] Discretion should be exercised only under truly unusual and unforeseen circumstances, such as death or incapacity of counsel. It is anticipated that this provision will be interpreted consistently with similar provisions found in state law.[9]

As in the Minnesota statute, actual notice of facts informing a defendant of the circumstances of a claim satisfies the notice requirement.[10] Such actual notice serves the same purpose as written notice—to afford the defendant a timely opportunity to investigate a claim.

6. *See, e.g.*, Saur v. Tobin, 23 Conn. Supp. 145, 178 A.2d 158 (1962); Shasteen v. Sojka, 260 N.W.2d 48 (Iowa 1977).

7. *Cf.*, Thompson v. Bristol Lodge No. 712, Loyal Order of Moose, Inc., 31 Conn. Supp. 405, 372 A.2d 985 (1974).

8. *See, e.g.*, Hammerschmidt v. Moore, 174 N.W.2d 79 (Minn. 1978).

9. *Id.*

10. *See, e.g.*, Donahue v. West Duluth Lodge No. 1478 of the Loyal Order of Moose, 1 Conn. Supp. 405, 372 A.2d 985 (1974), *cf.*, Lavier v. Ulysses, 149 Conn. 396, 180 A.2d 632 (1962); Saur v. Tobin, 23 Conn. Supp. 145, 178 A.2d 158 (1962).

APPENDIX B

An Act Regarding The Establishment of Alcohol Server Training Programs

SECTION 1. The Formation and Purpose of the Regulation Board. The Alcoholic Beverage Control Commission, hereinafter referred to as the Commission, shall establish a Regulation Board with representation from the Commission, the Department of Public Safety, the Attorney General, the Division of Alcoholism, the Massachusetts association of hotels, restaurants, bars, taverns and package stores, the association of insurance companies, and the directors of the regional offices as shall be described forthwith. This board shall regulate the development of training courses and materials, the examination procedures, the fee structure, enforcement procedures, penalties and fines.

The Regulation Board shall, as necessary, establish regional offices for the purpose of education and consultation, examination administration, and coordination of enforcement of the permit system as defined in this chapter.

SECTION 2. *Implementation.* Upon passage of this act, the Regulation Board shall be formed and shall, during the first two years of this act, work with the Commission in establishing training courses and materials, the examinations and examination procedures, the fee structure, enforcement procedures, penalties and fines, and certification procedures for instructors and schools. The Commission and Regulation Board shall also oversee the establishment and licensing of regional schools, for the purpose of providing training courses which shall be evaluated and modified to provide the most comprehensive and efficient training. Participation in these programs shall be voluntary, but shall fulfill the requirements of this act for the purpose of obtaining a permit as described forthwith. During the third and subsequent years of this act, the Commission shall require that all applicants for new licenses issued under Massachusetts General Law Chapter 138 Sections 12, 12a, 13, 14 and 15 shall demonstrate that all managers and employees have attended an approved training school, and that such employees shall have permits for being employed in establishments licensed under Massachusetts General Law Chapter 138 sections 12, 12a, 13, 14 and 15 as described forthwith. Also, during the third and subsequent years of this act the Commission shall require that all applicants for renewed licenses issued

under Massachusetts General Law Chapter 138 Section 12, 12a, 13, 14 and 15 shall demonstrate that all managers and employees have attended an approved training school, and that such employees shall have permits for being employed in establishments licensed under Massachusetts General Law Chapter 138 Sections 12, 12a, 13, 14 and 15 as described forthwith until such time that all persons employed by establishments licensed under Massachusetts General Law Chapter 138 Sections 12, 12a, 13, 14 and 15 shall have permits as described forthwith.

SECTION 3. *Permits for Servers of Alcoholic Beverages or Wines and Malt Beverages to be Drunk on the Premises.* The Commission may annually grant to individual citizens of the Commonwealth employed as managers, bartenders, waiters, waitresses or other such persons responsible for serving alcoholic beverages to be drunk on the premises of licensees under section 12, 12A, 13 and 14 permits which shall authorize such employees to serve alcoholic beverages, and the fee for each permit shall be determined annually by the Commission and the Regulation Board. The Commission and Regulation Board may make and enforce rules and regulations covering the granting of permits under this section and regulating the exercise of the authority granted under such permits.

SECTION 4. *Permits for Servers of Alcoholic Beverages or Wines and Malt Beverages Not to be Drunk on the Premises.* The Commission may annually grant to individual citizens of the Commonwealth employed as managers and sales clerks or other such persons responsible for serving alcoholic beverages not to be drunk on the premises for licensees under section 15 permits which shall authorize such employees to serve alcoholic beverages and the fee for each permit shall be determined annually by the Commission and Regulation Board. The Commission and Regulation Board may make and enforce rules and regulations covering the granting of permits under this section and regulating the exercise of the authority granted under such permits.

SECTION 5. *Application and Issuance of Permits for Dispensing Alcoholic Beverages.* Application for a permit to serve alcoholic beverages as described in sections 3 and 4 may be made by any person except a person who has been issued a permit and whose permit is not in force because of revocation or suspension or whose permit is suspended by the Commission; but before such a permit is granted, the applicant shall pass such application as to his/her qualifications as the Commission and Regulation Board shall require, and no permit shall be issued until the Commission is satisfied that the applicant is a proper person to receive it and no permit shall be issued to any person who is not of the legal age to serve or dispense alcoholic beverages as defined by Massachusetts General Law.

The applicant shall also be required to demonstrate he/she has successfully completed an alcohol education and training course approved by the Commission and Regulation Board. The aforesaid examination and alcohol education and training course shall be administered for each of three classifications of permit: 1) package store clerk 2) bartender, waitress/waiter or 3) manager. To each permittee shall be assigned some distinguishing number or mark; and the permits issued shall be in such form as the Commission shall determine provided, however, that a person issued a permit for each of the three classifications shall receive a permit of a different color. They may contain special restrictions and limitations. They shall contain a photograph of the permittee, the distinguishing number or mark assigned to the permittee, his/her name, his/her place of residence and address, and a brief description of him/her for purposes of identification and such other information as the Commission shall deem necessary. A person to whom a permit has been issued under this section shall not perform duties in a position other than that for which such permit has been made valid by the Commission. Every person issued a permit to perform in the job categories as aforesaid shall endorse his/her usual signature on the margin of the license in the space provided for the purpose immediately upon the receipt of said permit, and such permit shall not be valid until so endorsed. A permit or any renewal thereof issued to a server shall expire on the anniversary of the operator's date of birth occurring more than twelve months but not more than sixty months after the effective date of such permit. The permit issued to a person born on February twenty-ninth shall, for the purpose of this section, expire on March first. Every application for an original permit filed under this section shall be sworn to by the applicant before a justice of the peace or notary public. Any applicant shall be permitted, at his/her request, to take any written examination in connection with the issuances of such a license in a language other than English.

SECTION 6: *Forgery or Alteration of Servers Permit; Penalty; Suspension; and Reinstatement of Permit.* Whoever falsely makes, alters, forges or counterfeits, or procures or assists another to falsely make, alter, forge or counterfeit a permit to serve alcoholic beverages; or whoever forges or without authorization uses the signature, facsimile of the signature, or validating signature stamp of the Commissioner upon a genuine or falsely made, altered, forged or counterfeited permit to serve alcoholic beverages; or whoever has in his/her possession, or utters, or publishes as true, or in any way makes use of a falsely made, altered, forged or coun-

terfeited permit; and whoever has in his/her possession, or utters, or publishes as true or in any way makes use of a falsely made, altered, forged or counterfeit signature, facsimile of the signature or validating a signature stamp of the Commissioner, shall be punished by a fine of not more than five hundred dollars or by imprisonment in the state prison for not more than five years or in jail or house of correction for not more than two years.

A conviction of a violation of this section shall be reported forthwith by the court or magistrate to the Commission who shall suspend immediately the permit to serve alcoholic beverages of the person so convicted; and no appeal, motion for new trial or exceptions shall operate to stay the suspension of the permit. The Commission, after having suspended the permit to serve in accordance with this paragraph, shall not terminate such suspension nor reinstate the right to serve alcoholic beverages until one year after the said conviction provided, however, that if the prosecution of such a person has terminated in his/her favor, the Commission shall forthwith reinstate his/her permit to serve alcoholic beverages.

SECTION 7: *Examinations.*

a. No person shall be issued a permit to serve alcoholic beverages unless he/she shall have passed an examination conducted by the Commission.

b. Examination shall be written in the English language unless a second language is required as determined by the needs of the candidate. Examinations may also be administered using word processing or video equipment in those locations where such equipment is available.

c. Examinations shall be held at least twelve times a year. Additional examinations may be scheduled at the discretion of the Regulation Board with at least sixty days public notice.

d. Time allowed for the examinations will be set forth in the instructions to examinees.

e. Applicants will be given written notice when and where to appear for the examination.

f. The following examination rules will prevail, and violation of any part will be considered grounds for disqualification of the applicant:

1. Examinees will not be permitted the use of books or memoranda during the examination.

2. The copying of questions or making of notes relative thereto is prohibited during the examination.

3. No one shall be permitted to remove from the examination room copies of the examination prior to or subsequent to the examination.

4. Examinees shall not leave the examination room for any reason until they have returned in to the person conducting the examination the complete examination papers and any other material relating thereto.

g. The results of the examination shall be mailed to the applicant.

h. The examination papers written by the applicant will not be returned to the applicant, and the applicant will not be permitted the examination papers except by making a written appeal to the Regulation Board.

i. Any appeal of the results of the examination must be filed in writing with the Regulation Board within fifteen days of notification of the results of the examination.

j. Applicants who fail to pass an examination may reapply for examination in no less than sixty days of notification of the results of the examination.

k. Reissuing of a permit by examination will be required for the initial permit and again every five years. In considering applicants for a renewed permit, the Regulation Board shall take into account every five years each candidate's continuing experience, education, training and maintenance of professional skills. Candidates not showing evidence of maintaining standards satisfactory to the Regulation Board shall be required to pass a written examination to sustain their present status.

The Commission and Regulation Board shall prescribe such reasonable rules and regulations as may be deemed necessary to carry out the provisions of this section.

Every licensee shall keep such records as the Commission and Regulation Board may by regulation require. The records of the licensee shall be open to the inspection of the Commission or Regulation Board or his representatives at all times during reasonable business hours.

No persons shall be employed by a licensee as an instructor, nor shall any person give instruction for hire in the serving of alcoholic beverages unless such a person is the holder of a certificate issued by the Regulation Board. Such certificate shall be issued only to persons qualified as described forthwith.

SECTION 8. *Application for License to Give Instruction for Hire in Alcohol Server Schools: Fee: Qualifications of Applicant: Suspension or Revocation of License or Instructor's Certificate.* No person shall engage in the business, hereinafter called Alcohol Server School, of giving instruction for hire in serving alcoholic beverages without being licensed by

the Commission and the Regulation Board. A separate license shall be secured for each place of business where a person operates an Alcohol Server School. Application for a license under this section may be filed with the Commissioner and shall contain such information as required by the Commission and Regulation Board. Every such application shall be accompanied by an application fee of fifty dollars, which shall in no event be refunded. If an application is approved by the Commissioner and Regulation Board, the applicant upon the payment of an additional fee the amount of which shall be determined annually by the Commission and Regulation Board shall be granted a license, which shall be valid for a period of one year from the date of its issuance. The annual fee for renewal of such license shall be determined annually by the Commission and Regulation Board. The Commissioner shall issue a license certificate to each licenses, which certificate shall be conspicuously displayed in the place of business of the licensee. In case of the loss, mutilation or destruction of a license certificate, the Commissioner shall issue a duplicate certificate upon proper proof thereof and payment of a fee of twenty-five dollars.

No license shall be issued to a person to conduct an Alcohol Server School as an individual unless he/she shall have been the holder of an instructor's certificate issued by the Commissioner under this section for at least two years, nor shall such a license be issued to a partnership unless at least one of the partners shall have held such a certificate for at least two years, nor to a corporation unless at least one of the directors shall have held a certificate for at least two years. The provisions of this paragraph shall not apply during the first two years of this act during which time the Commission and Regulation Board shall determine the necessary requirements for issuance of a license.

The Commission may deny the application of any person for a license, if, in his/her discretion, s/he determines that:

a. Such applicant has made a material false statement or concealed a material fact in connection with his/her application.

b. Such applicant, any officer, director, stockholder or partner, or any other person directly or indirectly interested in the business was the former holder, or was an officer, director, stockholder or partner, in a corporation or partnership which was the former holder of an Alcohol Server School license which was revoked or suspended by the Commissioner.

c. Such applicant or any officer, director, stockholder, partner, employee, or any other person directly or indirectly interested in the business, has been convicted of a felony, or of any crime involving violence, dishonesty, deceit, indecency, degeneracy or moral turpitude.

d. Such applicant has failed to furnish satisfactory evidence of good character, reputation and fitness.

e. Such applicant is not the true owner of the Alcohol Server School.

f. Such applicant or any officer, director, stockholder, partner, employee, or any person directly or indirectly interested in the business is the holder of a current license to serve alcoholic beverages for on or off premises consumption in the Commonwealth.

The Commissioner may suspend or revoke a license or refuse to issue a renewal thereof for any of the following causes:

a. The conviction of the licensee or any partner, officer, agent or employee of such licensee of a felony or of any crime involving violence, dishonesty, deceit, indecency, degeneracy or moral turpitude.

b. Where the licensee has made a material false statement or concealed a material fact in connection with his/her application for the license or renewal thereof.

c. Where the licensee has failed to comply with any of the provisions of this section or any of the rules and regulations of the Commissioner made pursuant thereto.

d. Where the licensee or any partner, officer, agent or employee of such licensee has been guilty of fraud or fraudulent practices in relation to the business conducted under the license, or guilty of inducing another to resort to fraud or fraudulent practices in relation to securing for him/herself or another a permit to serve alcoholic beverages.

e. For any other good cause.

The term "fraudulent practices" as used in this section shall include but shall not be limited to any conduct or representation on the part of the licensee or any partner, officer, agent or employee of a licensee tending to induce another or to give the impression that a permit to serve alcoholic beverages may be obtained by any other means other than those prescribed by law or furnishing or obtaining the same by illegal or improper means or requesting, accepting, exaction or collecting money for such purpose.

Notwithstanding the renewal of a license, the Commissioner may revoke or suspend such license for causes and violations as prescribed by this section and occurring during the two license periods immediately preceding the renewal of such license.

Except where a refusal to issue a license or renewal or revocation or

suspension is based solely on a court conviction or convictions, a licensee or applicant shall have an opportunity to be heard, such hearing to be held at such time and place as the Commissioner shall prescribe.

A licensee or applicant entitled to a hearing shall be given due notice thereof. The sending of a notice of a hearing by mail to the last known address of a licensee or applicant ten days prior to the date of the hearing shall be deemed due notice.

SECTION 9. *Certification of Instructors for Alcohol Server Schools.* The Regulation Board shall have authority to grant upon application provisional and permanent certificates, as provided in this section, to instructors of Alcohol Server Schools licensed under this chapter. Each application shall be accompanied by a fee to be determined annually by the Regulation Board.

Any applicant shall be eligible for a provisional or a permanent certificate who satisfied the requirements of this section and who furnishes the Regulation Board with satisfactory proof that he/she 1) is an American citizen, 2) is of sound moral character, 3) possesses a bachelor's degree or an earned higher academic degree or is a graduate of a four year normal school approved by the Regulation Board and 4) meets such requirements as to courses of study, semester hours therein, experience, advanced degrees and such other requirements as may be established and put into effect by the Regulation Board; provided, however, that no requirements as to courses of study, semester hours therein, experience, advanced degrees and other such requirements shall take effect prior to one year subsequent to the promulgation of such requirements by the Regulation Board.

The first certificate which the board may grant to any eligible applicant shall be a provisional certificate for two years from the date thereof. Before the Regulation Board grants any other certificate, the applicant shall be evaluated by an evaluation committee in the manner hereinafter provided.

Each evaluation committee shall be selected by and under the auspices of the Regulation Board and shall consist of persons who hold a permanent certificate. Each evaluation committee shall consist of three persons, one of whom shall be appointed by the Regulation Board, one nominated by the applicant and the third shall be appointed by the other two members of the evaluating committee from professionals in the same field as the applicant or as closely allied thereto as possible.

Before an applicant completes a second year of service under his/her provisional certificate, he/she shall be evaluated by the evaluation committee described in the preceeding paragraph as to his/her readiness

to obtain a permanent certificate in terms of his/her professional growth and performance. Any evaluation made by the evaluation committee shall be based on criteria determined by the Regulation Board.

The evaluation committee may recommend to the Regulation Board that the applicant be granted a permanent certificate; and if the applicant has met all the other requirements established by the board, the board shall grant the applicant a permanent certificate.

The evaluation committee may, as one of its alternatives, recommend that the applicant's provisional certificate be renewed for an additional two years; and if the applicant has met all the other requirements established by the Regulation Board, the board shall grant the applicant a renewal of his/her second year of service under a renewed provisional certificate, the applicant shall be reevaluated in accordance with the provisions that govern the evaluation of an applicant under an initial provisional certificate.

If the evaluation committee recommends that a renewal of the original provisional certificate shall not be granted to an applicant, or if the evaluation committee recommends that a permanent certificate shall not be granted to an applicant, or if the board denies a renewal of a provisional certificate or of a permanent certificate to an applicant because he/she has not met all the requirements for eligibility as provided in this section, the Regulation Board shall notify the applicant of the adverse recommendation of the evaluation committee or the denial for certification by the Regulation Board; and such notice shall be accompanied by a report of the evaluation committee or a report of the reasons for the denial of certification by the Regulation Board, as the case may be, and a description of the procedures by which the applicant may initiate an appeal before a hearing officer; and such notice shall be mailed to the applicant by registered or certified mail not later than thirty days from the date of the meeting of the evaluation committee.

Notwithstanding any provisions of this section to the contrary, a person whose application for a renewal of a provisional certificate or whose application for a permanent certificate has been denied by the Regulation Board may submit a new application for certification in accordance with the provisions of this section at any time subsequent to two years after the expiration date of his/her last certificate. A person whose provisional certificate has expired, provided the Regulation Board has not denied the issuance of a provisional or permanent certificate, may reapply for a provisional certificate immediately.

For the purpose of certifying provisional instructors, the Regulation Board may approve programs at colleges or universities devoted to the

preparation of instructors for Alcohol Server Schools. A college or university offering such an approved program shall certify to the Regulation Board that a student has completed the program approved and shall provide the Regulation Board with a transcript of the person's record.

Any certificate issued by the Regulation Board may be revoked for cause, pursuant to standards and procedures established by rules and regulations of the Regulation Board.

The Regulation Board shall have authority from time to time to make, amend and rescind such rules and regulations as may be necessary to carry out the provisions of this section.

SECTION 10. *Curriculum of Alcohol Server Training Schools.* The curriculum of Alcohol Server Schools shall be determined by the Regulation Board and shall include, but not be limited to, the following:

Level 1: Package Store Clerks (9 hour minimum)

Alcohol as a drug and its effects on the body and behavior, especially driving ability. Blood alcohol content (BAC).

Effects of alcohol in combination with commonly used drugs, legal, illegal, prescription and nonprescription.

Recognizing the problem drinker and community treatment programs and agencies.

Massachusetts General Law for package stores, especially the alcoholic beverage laws such as sale to minors, sale to intoxicated persons, sale for on/off premise consumption, hours of operation and penalties for violation of these laws. The drunken driving laws and third party liability.

Level 2: Bartenders, waitresses and waiters (15 hour minimum)

Same as Level 1 plus—

Intervention with the problem customer. Communication skills for intervening with the intoxicated customer. Ways to cut off service and protect the customer. Alternative means of transportation to get the customer home safely. Ways to deal with the belligerent customer.

More comprehensive understanding of the Massachusetts General Laws pertaining to sale of alcoholic beverages.

Knowledge of mixology. Storage and servics of various alcoholic and non-alcoholic beverages.

Sanitation procedures, refrigeration and public health policies.

Level 3: Managers (30 hour minimum)

Same as Levels 1 and 2 plus—

Legal responsibilities of licensees.

Recognition of signs and symptoms of problems with employees. Development of Assistance Programs.

Advertising and marketing for safe and responsible drinking patterns. Standard operating procedures for dealing with problem customers.

Record keeping for fulfilling statutory obligations.

Understanding of management practices and their relation to safe and responsible drinking patterns including the number of employees on the job, the number of patrons allowed on the premises, the interior design, hours of operation, and the use of promotional techinques.

SECTION 11. *Penalties for Violation of this Chapter.* The Commission and Regulation Board shall establish guidelines for fines and penalties of violations in this chapter. These shall include, but not be limited to, the following violations:

Establishments employing workers without the proper permits.

Employees working without proper permits.

Employees working with permit suspended or revoked.

Employees not having permit available for inspection by Commission or Regulation Board.

Employees with permit convicted of violating a statute related to sale of alcoholic beverages, such as sale to minor, sale to intoxicated person, sale after hours, etc.

SECTION 12. *Funding for Administration, Implementation and Enforcement of this Chapter.* Fees collected under this chapter shall be used for the administration and enforcement of this system. These funds shall also be used for the development of educational programs and materials. Additional funding shall come from licensing fees, fines from drunken drivers, fines and penalties from violations of this chapter, and private sources such as restaurant and package store associations, insurance companies, brewers and distillers.

There shall be a scholarship fund established for those applicants with a demonstrated need who have to attend an education course. Money awarded from this fund shall be reimbursed by the individuals after employment has been obtained.

SECTION 13. *Employee Manual.* All establishments licensed under this act will be required to have a manual prepared by the Regulation Board on the premises at all times and available to all employees. The manual will detail all the information required for the passage of the permit examination as described in this chapter. In addition, the manual will describe specific situations encountered by bartenders, waiters and

waitresses and package store clerks with alternative methods of dealing with these situations so as to avoid liability. There will also be specific suggestions for marketing safe, responsible drinking patterns in customers.

**APPENDIX C: TABLE 1.

STATES WITH DRAM SHOP LIABILITY

STATE	STATUTORY DRAM SHOP LIABILITY				CASE LAW LICENSEE LIABILITY	
	SERVING INTOXICATED PERSON	SERVING MINOR	SERVING HABITUAL DRUNKARD	OTHER LIMITS	SERVING INTOXICATED PERSON	SERVING MINOR
Alabama	yes 6-5-71	yes 6-5-70 6-5-71		only parent or guardian may bring suit under 6-5-70		
Alaska	yes (drunken) 04.21.020:2	yes, if no id 04.21.020:1		licensees only	Nazareo v. Unic 638 P2d 671 (1981)* negligence per se	
Arizona					Brannigan v. Raybuck 667 P2d 213 (1983)* negligence	Ontiveros v. Borak 667 P2d 200 (1983)* negligence
California		yes, if obviously intoxicated B&P 25602.1				
Colorado			yes, prior notice required 13-21-103		Kerby v. Flamingo Club 532 P2d 975 (1974)# negligence	
Connecticut	yes 30-102			$50000 limit, written notice within 60 days, 1 year S of L		
D.C.						Morgan v Dist of Columbia 484 F2d 828 (1973)#
Florida		yes, if willful and unlawful 768.125	yes, if knowingly 768.125			

** Tables reprinted with permission of Matthew Bender Co. Tables will appear in a forthcoming treatise entitled Liquor Liability Law to be published by Matthew Bender Co.

* State Supreme Court Case

Appellate Level Case

STATES WITH DRAM SHOP LIABILITY

STATE	STATUTORY DRAM SHOP LIABILITY				CASE LAW LICENSEE LIABILITY	
	SERVING INTOXICATED PERSON	SERVING MINOR	SERVING HABITUAL DRUNKARD	OTHER LIMITS	SERVING INTOXICATED PERSON	SERVING MINOR
Georgia		yes 51-1-18		only parent may bring cause of action		
Hawaii					Ono v Applegate 612 P2d 533 (1980)* negligence per se	
Idaho						Algeria v. Payonk 619 P2d 135 (1980)* negligence
Illinois	yes 43-135		yes 43-135	$15000 limit for injury; $20000 limit loss of support, lessor also liable; 1 year S of L		
Indiana						Elder v. Fisher 217 NE2d 847 (1966)* negligence per se
Iowa	yes 123.92 123.93			written notice to server in 6 months		Haafke v. Mitchell 347 NW2d 381 (1984)* negligence per se
Kentucky						Pike v. George 434 SW2d 626 (1968)# negligence per se
Louisiana						Chausse v. Southland 400 So2d 1199 (1981)# negligence

* State Supreme Court Case
\# Appellate Level Case

STATES WITH DRAM SHOP LIABILITY

* STATE	STATUTORY DRAM SHOP LIABILITY				CASE LAW LICENSEE LIABILITY	
	SERVING INTOXICATED PERSON	SERVING MINOR	SERVING HABITUAL DRUNKARD	OTHER LIMITS	SERVING INTOXICATED PERSON	SERVING MINOR
Maine	yes 2002	yes 2002		actual and exemplary damages, lessor also liable		
Massachusetts					Adamian v Three Sons Inc 233 NE2d 18 (1967)* negligence per se	
Michigan	yes (visibly intoxicated) 436.22			min = $50, 2 yr S of L	Jones v Bourrie 120 NW2d 236 (1963)* negligence per se	Longstreth v. Fitzgibbon 335 NW2d 677 (1983)#, negligence
Minnesota	yes 340.95, 340.951			written notice within 120 days, 2 yr S of L		Holmquist v. Miller 352 NW2d 47 (1984)# negligence
Mississippi						Munford Inc v. Peterson 368 So2d 213 (1979)* negligence per se
Missouri					Carver v. Schafer 647 SW2d 570 (1983)# negligence	Sampson v. W F. Enterprises 611 SW2d 333 (1981)# negligence per se
New Hampshire					Ramsey v. Anctil 211 A2d 900 (1965)* negligence	
New Jersey					Kelly v. Gwinnell 476 A2d 1219 (1984)* negligence	Rappaport v. Nichols 156 A2d 1 (1959)* negligence per se

* State Supreme Court Case
\# Appellate Level Case

STATES WITH DRAM SHOP LIABILITY

STATE	STATUTORY DRAM SHOP LIABILITY				CASE LAW LICENSEE LIABILITY	
	SERVING INTOXICATED PERSON	SERVING MINOR	SERVING HABITUAL DRUNKARD	OTHER LIMITS	SERVING INTOXICATED PERSON	SERVING MINOR
New Mexico	yes, if reasonably apparent 41-11-1	yes 41-11-1-E			Lopez v. Maez 651 P2d 1269 (1982)* negligence	MRC Prop v Grace 652 P2d 732 (1982)* negligence
New York	yes Gen Obl 11-101	yes Gen Obl 11-101			Berkeley v Park 262 NYS2d 290 (1965)# negligence	
North Carolina		yes, if driving negligently 18B-120 etc.		$500,000 limit to recovery	Hutchens v. Hankins 303 SE2d 584 (1983)# negligence	
North Dakota	yes 5-01-06	yes 5-01-06				
Ohio	yes, notice required 4399.01		yes, notice required 4399.01	owner and lessee liable	Mason v Roberts 294 NE2d 884 (1973)* negligence	
Oregon	yes (visibly intoxicated) 30.950				Campbell v. Carpenter 566 P2d 893 (1977)* negligence	
Pennsylvania	yes (visibly intoxicated) 47-4-497				Jardine v Upper Darby Lodge 198 A2d 550 (1964)* negligence per se	
Rhode Island	yes 3-11-1	yes 3-11-1	yes, notice required 3-11-2			
South Dakota					Walz v City of Hudson 372 NW2d 120 (1982)* negligence per se	

\# Appellate Level Case
* State Supreme Court Case

STATES WITH DRAM SHOP LIABILITY

STATE	STATUTORY DRAM SHOP LIABILITY				CASE LAW LICENSEE LIABILITY	
	SERVING INTOXICATED PERSON	SERVING MINOR	SERVING HABITUAL DRUNKARD	OTHER LIMITS	SERVING INTOXICATED PERSON	SERVING MINOR
Tennessee					Mitchell v. Kerner 393 SW2d 755 (1964)# negligence per se	
Utah	yes 32-11-1	yes 32-11-1	yes 32-11-1	state immune from liability		
Vermont	yes 7-501	yes 7-501				
Virginia						Corrigan v United States 595 FSupp 1047 (1984)** negligence
Washington						Young v Caravan Corp 663 P2d 834 (1983)* negligence per se
Wisconsin						Sorensen v. Jarvis 350 NW2d 108 (1984)* negligence per se
Wyoming		yes 12-5-502	yes 12-5-502	written notice required		

* State Supreme Case
\# Appellate Level Case
** Trial Court Case

APPENDIX C: TABLE 2

STATES WITHOUT ESTABLISHED DRAM SHOP LIABILITY

STATE	CASE LAW DENYING LIABILITY: STATE SUPREME COURT DECISIONS AGAINST	CASE LAW DENYING LIABILITY: STATE LOWER COURT DECISIONS AGAINST	NO APPELLATE CASES DECIDING ISSUE
Arkansas	Carr v. Turner 385 SW2d 656 (1965) no negl per se/intoxicated person		
Delaware	Wright v. Moffitt 437 A2d 554 (1981) no negl or negl per se intoxicated person		
Kansas			no cases
Maryland	Felder v. Butler 438 A2d 494 (1981) no negligence intoxicated person		
Montana	Runge v. Watts 589 P2d 145 (1979) no negligence for social host/ intoxicated person		
Nebraska	Holmes v. Circo 244 NW2d 65 (1976) no negl per se/intoxicated person		
Nevada	Hamm v. Carson City Nugget 450 P2d 358 (1969) no negl per se/intoxicated person Yoscovitch v. Wasson 645 P2d 975 (1982) no negl per se/minor		
Oklahoma			no cases
South Carolina			no cases
Texas			no cases
West Virginia			no cases

APPENDIX C: TABLE 3

CRIMINAL LIABILITIES FOR SERVING MINORS

STATE (CITATION)	MINIMUM DRINKING AGE	TYPE OF OFFENSE	PENALTY FOR SERVER: FIRST OFFENSE TERM	PENALTY FOR SERVER: FIRST OFFENSE FINE	PENALTY FOR SERVER: SECOND OFFENSE TERM	PENALTY FOR SERVER: SECOND OFFENSE FINE	PENALTY FOR SERVER: THIRD OFFENSE TERM	PENALTY FOR SERVER: THIRD OFFENSE FINE
ALABAMA (28-3A-25)	19	misdemeanor	0-6 months	$100-1000	3-6 months	$100-1000	6-12 months	$100-1000
ALASKA (04.16.180)	21	Class A misdemeanor	1 year	$5000				
ARIZONA (4-241)	19	misdemeanor	30 days-6 months	$100-$300	30 days-6 months	$100-$300	30 days-1 year	$100-$1000
ARKANSAS (48-324, 48-901,2,3)	21	misdemeanor	—	$100-$250	6 months-1 year	$250-$500	6 months-1 year	$250-$500
CALIFORNIA (B&P 25658)	21	misdemeanor	< 6 months	< $500				
COLORADO (12-46-114)	21/18*	misdemeanor	—	$100-$500 ($100 fine mandatory)	—	$100-$500	—	$100-$500
CONNECTICUT (30-113)	20	misdemeanor	< 1 year	< $1000				
DELAWARE (4-713,904)	21	misdemeanor	30 days	< $100				
D.C. (25-121.132)	21/18#	unspecified	< 1 year	< $1000				
FLORIDA (562.11)	19	misdemeanor	< 60 days	< $500				
GEORGIA (Act 1980, 1573, 1649)	19	misdemeanor	< 1 year	< $1000				

Key to Symbols:
< indicates not more than specified penalty
* indicates beer only
-# indicates beer and wine

CRIMINAL LIABILITIES FOR SERVING MINORS

STATE (CITATION)	MINIMUM DRINKING AGE	TYPE OF OFFENSE	PENALTY FOR SERVER					
			FIRST OFFENSE TERM	FIRST OFFENSE FINE	SECOND OFFENSE TERM	SECOND OFFENSE FINE	THIRD OFFENSE TERM	THIRD OFFENSE FINE
HAWAII (281-78,102)	18	misdemeanor	< 6 months	< $500				
IDAHO (23-603)	19	misdemeanor 1 year	3 months-$1000	$300-(felony)	5 years	$5000 (felony)	5 years	$5000
ILLINOIS (43.149)	21	Class B misdemeanor	< 6 months	< $1000				
INDIANA (7.1-5-7-7)	21	misdemeanor	< 60 days	$10-$100	< 6 months	$25-$200		
IOWA (123.50)	19	misdemeanor	< 30 days	< $100				
KANSAS (21-3610)	21/18*	Class B misdemeanor	< 6 months	< $1000				
KENTUCKY (244.080)	21	misdemeanor	< 6 months	$100-$200	< 6 months	$200-$500		
LOUISIANA (14.91)	18	misdemeanor	0-6 months	$0-$300				
MAINE (28-155,303 28-1058)	20	violation	no criminal	action				
MARYLAND (28-69,118)	21	misdemeanor	< 2 years	< $1000				
MASSACHUSETTS (138-34)	20	??	< 6 months	< $1000				

Key to Symbols:

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CRIMINAL LIABILITIES FOR SERVING MINORS

STATE (CITATION)	MINIMUM DRINKING AGE	TYPE OF OFFENSE	PENALTY FOR SERVER					
			FIRST OFFENSE TERM	FIRST OFFENSE FINE	SECOND OFFENSE TERM	SECOND OFFENSE FINE	THIRD OFFENSE TERM	THIRD OFFENSE FINE
MICHIGAN (18.1004, 18.1021)	21	misdemeanor	< 6 months	< $500				
MINNESOTA (340.73)	19	gross misdemeanor	30 days-90 days	$50-$100				
MISSISSIPPI (67-1-71,81)	21/18*	misdemeanor (liquor)	—	$500-$1000	< 1 year	$100-$2000		
(67-3-53)		misdemeanor (wine and beer)	< 6 months	< $500				
MISSOURI (311.310)	21	misdemeanor	< 1 year	$50-$1000				
MONTANA (16-3-301,314)	19	misdemeanor	< 6 months (Civil fine	< $500 of $1500	also	possible)		
NEBRASKA (53-180, 53-180.05)	20	Class III misdemeanor	0-3 months	$0-$500				
NEVADA (202.055)	21	misdemeanor	< 6 months	< $1000				
NEW HAMPSHIRE (175:6)	20	misdemeanor	< 1 year	< $1000				
NEW JERSEY (2:1-4, 2C:43-8, 33:1-77)	21	petty offense	< 6 months	< $1000				
NEW MEXICO (60-7A-25, 7B-1)	21	individual: corporation:	0-7 months —	$0-300 $0-$1000				
NEW YORK (ABC 65, Penal 260.20)	19	misdemeanor	30 days-1 year	$200-$1200				

Key to Symbols:

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CRIMINAL LIABILITIES FOR SERVING MINORS

STATE (CITATION)	MINIMUM DRINKING AGE	TYPE OF OFFENSE	PENALTY FOR SERVER					
			FIRST OFFENSE		SECOND OFFENSE		THIRD OFFENSE	
			TERM	FINE	TERM	FINE	TERM	FINE
NORTH CAROLINA (18B-104, 18B-302)	21/19*	none	—	up to $500	—	up to $750	—	up to $1000
NORTH DAKOTA (5-02-06, 12.1-32-01)	21	Class A misdemeanor	< 1 year	< $1000				
OHIO (4301.22(A), 4301.69,99)	21/19*	misdemeanor	—	$100-$500	—	$200-$500	—	
OKLAHOMA (37-538f)	21	felony (for 3.2% and above)	5 years maximum	$0-$5000				
		none (for .5% to 3.2%)	none	none				
OREGON (471.410)	21	Class A misdemeanor		$350-$500		$1000	30 days	$1000
PENNSYLVANIA (47-4-471,493)	21	misdemeanor	1-3 months	$100-$500	3 months-1 year	$300-$500		
RHODE ISLAND (3-8-1, 3-8-5)	21	misdemeanor	up to 1 year	$250	up to 1 year	$500	up to 1 year	$750
SOUTH CAROLINA (61-3-990, 61-13,290)	21/18#	misdemeanor	< 5 years	< $5000				
SOUTH DAKOTA (35-4-78, 22-6-2)	21/18*	Class 1 misdemeanor	1 year	$1000				
TENNESSEE (57-4-203)	19	misdemeanor	30 days-6 months	$25-$1000	1-3 years (felony)	$500-$3000	1-3 years	$500-$3000
TEXAS (106.06)	19	misdemeanor	—	$100-$500				

CRIMINAL LIABILITIES FOR SERVING MINORS

STATE (CITATION)	MINIMUM DRINKING AGE	TYPE OF OFFENSE	PENALTY FOR SERVER					
			FIRST OFFENSE		SECOND OFFENSE		THIRD OFFENSE	
			TERM	FINE	TERM	FINE	TERM	FINE
UTAH (32-7-15, 32-8-59(	21	misdemeanor	30 days-1 year	$100-$1000				
VERMONT (7-658)	18	misdemeanor	2 years	$200-$1000				
VIRGINIA (4-37,62,92)	21/19*	misdemeanor	< 1 year	< $500				
WASHINGTON (66.44.180,310)	21	individuals:	2 months	$500	6 months	—	1 year	—
		corporations:	no term	$5000	—	$10000	—	$1000
WEST VIRGINIA (60-3-22a1)	21	misdemeanor	< 1 year	$100-$500				
WISCONSIN (125.07:1)	19	forfeiture	—	< $500	—	$200-$500	—	$200-$500
WYOMING (12-6-101,102)	19	misdemeanor	< 6 months	< $100				

Key to Symbols:

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# indicates beer and wine

Sources:
Commerce Clearing House, Liquor Control Law Reporter, 1983.
National Highway Safety Traffic Administration, A Digest of State Alcohol-Highway Safety Related Legislation, 1983.

APPENDIX C: TABLE 4

CRIMINAL LIABILITIES FOR SERVING INTOXICATED PERSONS

STATE (CITATION)	STANDARD FOR INTOX	TYPE OF OFFENSE	PENALTY FOR SERVER					
			FIRST OFFENSE TERM	FIRST OFFENSE FINE	SECOND OFFENSE TERM	SECOND OFFENSE FINE	THIRD OFFENSE TERM	THIRD OFFENSE FINE
ALABAMA	xx	none	none	none				
ALASKA (04.16.030, 04.16.180)	drunken	Class A misdemeanor	< 1 year	< $5000				
ARIZONA (4-244, r-246)	intoxicated or disorderly	misdemeanor	30 days-6 months	$100-$300	30 days-6 months	$100-$300	30 days-1 year	$100-$1000
ARKANSAS (48-529, 48-901,2,3)	intoxicated condition	misdemeanor	—	$100-$250	6 months-1 year	$250-$500	6 months-1 year	$250-$500
CALIFORNIA (B&P 25602)	obviously intoxicated	misdemeanor	< 6 months	< $500				
COLORDAO (12-46-112, 12-46-114)	visibly intoxicated	misdemeanor	—	$100-$500 ($100 fine is	—	$100-$500 mandatory)	—	$100-$500
CONNECTICUT (30-102, 30-113)	intoxicated	misdemeanor	< 1 year	< $1000				
DELAWARE (4-711, 4-903)	intoxicated or appears to be intoxicated	not specified	30 days	< $100				
D.C. (25-121,132)	intoxicated or appears to be intoxicated	not specified	< 1 year	< $1000				
FLORIDA	xx	none	none	none				
GEORGIA (5A-509)	noticeable intoxication	misdemeanor	< 1 year	< $1000				
HAWAII (281-78, 281-102)	under the influence	misdemeanor	< 6 months	< $500				

Key to Symbols:

< indicates not more than specified penalty

CRIMINAL LIABILITIES FOR INTOXICATED PERSONS

STATE (CITATION)	STANDARD FOR INTOX	TYPE OF OFFENSE	PENALTY FOR SERVER					
			FIRST OFFENSE TERM	FIRST OFFENSE FINE	SECOND OFFENSE TERM	SECOND OFFENSE FINE	THIRD OFFENSE TERM	THIRD OFFENSE FINE
IDAHO (23-605)	intoxicated or apparently intoxicated	misdemeanor 1 year	3 months-$1000	$300-				
ILLINOIS (43.131, 43-148)	intoxicated	Class B misdemeanor	< 6 months	< $1000				
INDIANA (7.1-5-10-15)	state of intoxication if person knows the other is intoxicated	misdemeanor	< 60 days	$10-$100	< 6 months	$25-$200		
IOWA (123.49, 123.50(1))	intoxicated or simulating intoxication	misdemeanor	< 30 days	< $100				
KANSAS (21-4501, 41-715)	physically or mentally incapacitated by liquor consumption	misdemeanor	< 30 days	< $200				
KENTUCKY (244.080)	actually or apparently under influence	misdemeanor	< 6 months	$100-$200	< 6 months	$200-$500		
LOUISIANA (26:88.2, 26.191)	intoxicated	misdemeanor 6% or more	1-6 months	$100-$500				
(26:285:2	intoxicated	.5% to 6%	1-6 months	$100-$500	2-12 months	$200-$1000	2-12 months	$200-$1000

Key to Symbols:

< indicates not more than specified penalty

CRIMINAL LIABILITIES FOR INTOXICATED PERSONS

STATE (CITATION)	STANDARD FOR INTOX	TYPE OF OFFENSE	PENALTY FOR SERVER					
			FIRST OFFENSE TERM	FIRST OFFENSE FINE	SECOND OFFENSE TERM	SECOND OFFENSE FINE	THIRD OFFENSE TERM	THIRD OFFENSE FINE
MAINE (28-155,303, 28-1058)	under the influence of liquor	violation	none	none				
MARYLAND (2B-69,118)	visibly under influence of any alc bev	misdemeanor	< 2 years	< $1000				
MASSACHUSETTS (138-69)	intoxicated or known to have been intox within 6 months preceding	??	1-12 months	$50-$500				
MICHIGAN (18.993&1021) (436.29&50)	intoxicated condition	misdemeanor	< 6 months	< $500				
MINNESOTA (340.73)	obviously intoxicated	gross misdemeanor	30-90 days	$50-$100				
MISSISSIPPI (67-1-71, 67-3-53, 69)	visibly or noticeably intoxicated	misdemeanor	< 6 months	$500				
MISSOURI (311.310)	intoxicated or appearing to be intoxicated	misdemeanor	< 1 year	$50-$1000				
MONTANA (16-3-301, 16-6-4)	intoxicated or actually, apparently, or obviously intoxicated	misdemeanor	< 6 months (Civil fine	< $500 of $1500	also	possible)		

CRIMINAL LIABILITIES FOR INTOXICATED PERSONS

STATE (CITATION)	STANDARD FOR INTOX	TYPE OF OFFENSE	PENALTY FOR SERVER					
			FIRST OFFENSE TERM	FIRST OFFENSE FINE	SECOND OFFENSE TERM	SECOND OFFENSE FINE	THIRD OFFENSE TERM	THIRD OFFENSE FINE
NEBRASKA (53-180, 53-180.05)	physically or mentally incapacitated	Class III misdemeanor	0-3 months	$0-$500				
NEVADA	zz	none	none (Local laws	none may	control)			
NEW HAMPSHIRE (175:6)	under the influence of liquor	misdemeanor	< 1 year	< $1000				
NEW JERSEY	zz	none	none (Local laws	none may	control)			
NEW MEXICO (60-7A-16,25)	intoxicated with knowledge recipient is intoxicated	individual: corporation:	0-7 months —	$0-300 $0-$1000				
NEW YORK (ABC 65, 130)	intoxicated, or actually or apparently under influence of liquor	misdemeanor	30 days-1 year	$200-$1200				
NORTH CAROLINA (18B-104, 18B-305)	intoxicated	administrative	—	up to $500	—	up to $750	—	up to $1000
NORTH DAKOTA (5-01-09, 12.1-32-01)	intoxicated	Class A misdemeanor	< 1 year	< $1000				
OHIO (4301.22(B), 4399.09.99)	intoxicated	misdemeanor	—	$100-$500	—	$200-$500	—	$200-$500

Key to Symbols:

< indicates not more than specified penalty

CRIMINAL LIABILITIES FOR INTOXICATED PERSONS

STATE (CITATION)	STANDARD FOR INTOX	TYPE OF OFFENSE	PENALTY FOR SERVER					
			FIRST OFFENSE TERM	FIRST OFFENSE FINE	SECOND OFFENSE TERM	SECOND OFFENSE FINE	THIRD OFFENSE TERM	THIRD OFFENSE FINE
OKLAHOMA (37-538g)	intoxicated	felony	1 year maximum	$0-$1000				
OREGON (471.410)	visibly intoxicated	Class A misdemeanor		$350-$500		$1000	30 days	$1000
PENNSYLVANIA (47-4-471,493)	visibly intoxicated	misdemeanor	1-3 months	$100-$500	3 months-1 year	$300-$500		
RHODE ISLAND (3-8-1;3-11-5)	intoxicated	misdemeanor	3 months	$200	6 months	$300	< 1 year	< $500
SOUTH CAROLINA (61-3-990, 61-5-30)	intoxicated condition	misdemeanor	< 1 month	< $100				
SOUTH DAKOTA (22-6-2, 35-4-78)	intoxicated at the time	Class 1 misdemeanor	1 year	$1000				
TENNESSEE (57-4-203)	visibly intoxicated	misdemeanor	30 days-6 months	$500-$1000				
TEXAS (101.63)	intoxicated	misdemeanor	< 1 year	$100-$500	< 1 year	$500-$1000		
UTAH (32-7-14, 32-8-59)	under or apparently under influence of liquor	misdemeanor	30 days-1 year	$100-$1000				
VERMONT	xx	none	none	none				
VIRGINIA (4-37,62,92)	intoxicated	misdemeanor	< 1 year	< $500				

Key to Symbols:

< indicates not more than specified penalty

Key to Symbols:

< indicates not more than specified penalty

CRIMINAL LIABILITIES FOR INTOXICATED PERSONS

STATE (CITATION)	STANDARD FOR INTOX	TYPE OF OFFENSE	PENALTY FOR SERVER					
			FIRST OFFENSE TERM	FIRST OFFENSE FINE	SECOND OFFENSE TERM	SECOND OFFENSE FINE	THIRD OFFENSE TERM	THIRD OFFENSE FINE
WASHINGTON (66.44.180,200)	apparently under influence of liquor	individuals: corporations:	2 months —	$500 $5000	6 months —	— $10000	1 year —	— $1000
WEST VIRGINIA (60-3-22a3, 60-7-13)	intoxicated	misdemeanor	< 1 year	$100-$500				
WISCONSIN (125.07:2)	intoxicated	misdemeanor	< 60 days	$100-$500				
WYOMING	xx	none	none	none				

Sources:

Commerce Clearing House, Liquor Control Law Reporter, 1983.

National Highway Safety Traffic Administration, Digest of State Alcohol-Highway Safety Related Legislation, 1983.

APPENDIX

MODEL ALCOHOLIC BEVERAGES RETAIL LICENSEE LIABILITY ACT OF 1985

(Model Provisions Only)

Prevention Research Group
Medical Research Institute
of San Francisco
2532 Durant Avenue
Berkeley, CA 94704

Preparation was supported by Grant # RO1 AA0621-01 (Prevention Research: Server Intervention and the Law) to the Medical Research Institute of San Francisco.

SECTION 1: SHORT TITLE

This Act shall be entitled the [State] Alcoholic Beverage Retail Licensee Liability Act of [year].

SECTION 2: PURPOSE

(a) The primary legislative purpose of the Act is to prevent intoxication-related traumatic injuries, deaths and other damages, as specified in Section 8, among [State]'s population.

(b) The secondary legislative purpose is to establish a legal basis for obtaining compensation to those suffering damages as a result of intoxication-related incidents in accordance with the provisions of this Act.

SECTION 3: DEFINITIONS

(a) Adult means any person of legal age to purchase alcoholic beverages, as defined by [state statutory provision].

(b) Alcoholic beverages means [definition used in state Alcoholic Beverage Control (ABC) Act].

(c) Intoxicated person means an individual who is in a state of intoxication as defined by this Act.

(d) Intoxication means an impairment of a person's mental or physical faculties as a result of drug or alcoholic beverage use so as to diminish that person's ability to think and act in a manner in which an ordinary prudent and cautious person, in full possession of his or her faculties and using reasonable care, would act under like circumstances.

(e) Licensee means any person who is required to be licensed to serve alcoholic beverages [including any governmental entity permitted by law to serve alcoholic beverages] pursuant to [state ABC Act].

(f) Minor means any person under the legal age to purchase alcoholic beverages as defined by [state statutory provision].

(g) Person means any individual, governmental body, corporation or other legal entity.

(h) Premises means [definition used in state ABC act]

(i) Service of Alcoholic Beverage; Service means any sale, gift or other furnishing of alcoholic beverages.

SECTION 4: PLAINTIFF

(a) Any person who suffers damage, as provided in Section 8, may bring an action pursuant to this Act subject to the limitation found in subsection (b) of this Section.

(b) A [person/adult] who becomes intoxicated may not bring an action pursuant to Section 6 of this Act (negligent service of alcoholic beverages) against a defendant for serving alcoholic beverages to such person.

SECTION 5: DEFENDANTS

The following persons who commit an act giving rise to liability, as provided in Section 6 and 7, may be made a defendant to a claim under the provisions of this Act:

(a) an alcoholic beverage retail licensee, and any employee or agent of such a licensee;

(b) any person who, at the time of such act, was required by law to have had an alcoholic beverage retail license under the provisions of [State ABC Act], and any employee or agent of such person.

SECTION 6: NEGLIGENT SERVICE OF ALCOHOLIC BEVERAGES

(a) A defendant, as defined in Section 5, who negligently serves alcoholic beverages to a minor or to an intoxicated person is liable for resulting damages, subject to the provisions of this Act.

(b) Service of alcoholic beverages to a minor or to an intoxicated person is negligent if the defendant knows or if a reasonably prudent person in like circumstances adhering to responsible business practices as defined in Section 10 would know that the person being served is a minor or is intoxicated.

(c) Proof of service of alcoholic beverages to a minor without request for identification shall form a rebuttable presumption of negligence.

(d) Service of alcoholic beverages by a defendant to an adult person who subsequently serves a minor off the premises [or who is legally permitted to serve a minor] does not constitute service to the minor unless a reasonably prudent person in like circumstances would know that such subsequent service is reasonably likely to occur [and is illegal].

(e) A defendant does not have a duty to investigate whether a person being served alcoholic beverages intends to serve the alcoholic beverages to other persons off the premises.

(f) A defendant is not chargeable with knowledge of a person's consumption of alcoholic beverages or other drugs off the defendant's premises unless the

person's appearance and behavior, or other facts known to defendant, would put a reasonably prudent person on notice of such consumption.

(g) A defendant is not under a duty to recognize signs of a person's intoxication other than those normally associated with the consumption of alcoholic beverages except for intoxication resulting in whole or in part from other drugs consumed on defendant's premises with defendant's actual or constructive knowledge.

SECTION 7: RECKLESS SERVICE OF ALCOHOLIC BEVERAGES

(a) The service of alcoholic beverages is reckless when a defendant, as defined in Section 5, intentionally serves alcoholic beverages to a person when the server knows, or a reasonable person in his position should have known, that such service creates an unreasonable risk of physical harm to the drinker or to others that is substantially greater than that which is necessary to make his conduct negligent.

(b) A defendant who recklessly provides alcoholic beverages to another is liable for resulting damages.

(c) Specific serving practices that are admissible as evidence of reckless conduct include, but are not limited to, the following:

(1) Active encouragement of intoxicated persons to consume substantial amounts of alcoholic beverages;

(2) Service of alcoholic beverages to a person, sixteen years old or under, when the server has actual or constructive knowledge of the patron's age;

(3) Service of alcoholic beverages to a patron that is so continuous and excessive that it creates a substantial risk of death by alcohol poisoning;

(4) The active assistance by a defendant of a patron into a motor vehicle when the patron is so intoxicated that such assistance is required and the defendant knows or should know that the intoxicated person intends to operate the motor vehicle.

SECTION 8: DAMAGES

(a) Damages may be awarded for all injuries recognized under [State] common law (or codified common law provisions).

(b) Punitive damages may be awarded in all actions based on reckless conduct, as defined in Section 7. Punitive damages may not be awarded for actions based on negligent conduct, as defined in Section 6.

(c) Damages may be recovered under [wrongful death statute] and [survival statute] as in other tort actions.

SECTION 9: COMMON LAW DEFENSES

Defenses applicable to tort actions based on negligence and recklessness in [state] may be asserted in defending actions brought pursuant to this Act.

SECTION 10: RESPONSIBLE BUSINESS PRACTICES DEFENSE

(a) A defendant's service of alcoholic beverages is not negligent or reckless if the defendant, at the time of the service, is adhering to responsible business practices. Responsible business practices are those business policies, procedures and actions which an ordinarily prudent person would follow in like circumstances.

(b) The service of alcoholic beverages to a person with actual or constructive knowledge that such person is intoxicated or a minor constitutes an unreasonable business practice. Evidence of responsible business practices pursuant to this section is relevant to determining whether a defendant who does not have actual knowledge should have known of the person's intoxicated condition or age.

(c) Evidence of responsible business practices may include, but is not limited to, comprehensive training of defendant and defendant's employees and agents who are present at the time of service of alcoholic beverages and responsible management policies, procedures and actions which are in effect at the time of such service.

(d) For the purposes of service to intoxicated persons, evidence of comprehensive training includes, but is not limited to, the development of knowledge and skills regarding the responsible service of alcoholic beverages and the handling of intoxicated persons. Such training shall be appropriate to the level, kind, and type of responsibility for each employee and agent to be trained.

(e) For the purposes of service to intoxicated persons, evidence of responsible management policies, procedures, and actions may include, but is not limited to, those policies, procedures and actions which are implemented at time of service and which:

(1) encourage persons not to become intoxicated if they consume alcoholic beverages on the defendant's premises;

(2) promote availability of nonalcoholic beverages and food;

(3) promote safe transportation alternatives other than driving while intoxicated;

(4) prohibit employees and agents of defendant from consuming alcoholic beverages while acting in their capacity as employee or agent;

(5) establish promotions and marketing efforts which publicize responsible business practices to the defendant's customers and community;

(6) implement comprehensive training procedures; and

(7) maintain an adequate, trained number of employees and agents for the type and size of defendant's business;

(8) are written in a policy and procedures handbook, or similar format, and made available to employees;

(9) establish a standardized method for hiring qualified employees;

(10) reprimand employees who violate employer policies and procedures.

(f) For the purposes of service to minors, evidence of responsible business practices may include, but is not limited to those listed in subsection (e) and the following:

(1) management policies which are implemented at the time of service and which insure the examination of proof of identification [as established by state law] for all persons seeking service of alcoholic beverages who may reasonably be suspected to be minors;

(2) comprehensive training of employees who are responsible for such examination regarding the detection of false or altered identification.

(g) Proof of responsible business practices shall be based on the totality of the circumstances, including but not limited to: the availability of training programs and alternative public transportation; the defendant's type and size of business; and the defendant's previous contacts with the intoxicated person or minor who is served. Proof of the existence or omission of one or more elements of responsible business practices does not constitute the proof or disproof of the responsible business practices defense.

SECTION 11: STATUTE OF LIMITATIONS

Any action under this Act against a defendant alleging negligent conduct shall be brought within _____ year(s) of the conduct complained of. Any action under this Act against a defendant alleging reckless conduct shall be brought within ____ year(s) of the conduct complained of.

SECTION 12: PRIVILEGES

(a) No defendant, as provided in Section 5, may be held civilly liable for damages resulting from a good faith refusal to serve alcoholic beverages to any person who:

(1) fails to show proper identification of age; or

(2) reasonably appears to be a minor; or

(3) is refused service of alcoholic beverages by defendant in a good faith effort to prevent excessive consumption of alcohol by a person.

(b) No defendant, as provided in Section 5, may be held civilly liable for holding a person's identification documents presented to defendant as proof of the person's age for the purposes of receiving alcoholic beverages provided:

(1) such holding is for a reasonable length of time in a good faith effort to determine whether the person is of legal age or to summon law enforcement officers; and

(2) the person whose identification is being held is informed of the reason for defendant's action.

(c) No defendant, as provided in Section 5, may be held civilly liable for using reasonable force to detain for a reasonable period of time necessary to summon law enforcement officers a person who, in the defendant's presence, is committing or has committed a breach of the peace or felony or is attempting to operate a motor vehicle while intoxicated.

(d) This section does not limit a defendant's right to assert any other defense to a civil liability claim otherwise provided by law.

SECTION 13: SETTLEMENT; RELEASE; CONTRIBUTION; INDEMNITY

(a) A plaintiff's settlement and proper release of either the intoxicated tortfeasor or a defendant, as defined in Section 5, will not bar potential claims against any other defendant(s).

(b) The amount paid to a plaintiff in consideration for the settlement and proper release of any defendant will be offset against all other subsequent judgments received by plaintiff.

(c) The liability of the intoxicated tortfeasor and any defendant, as defined in Section 5, who served alcoholic beverages, shall be joint and several.

(d) In cases of negligent conduct, the liability of the intoxicated tortfeasor and any defendant, as defined in Section 5, who served alcoholic beverages shall have a right of contribution and not a right of indemnification.

(e) In cases of reckless conduct, nonreckless defendants have a right of either indemnification or contribution from any reckless defendants.

SECTION 14: EXCLUSIVE REMEDY

This Act is the exclusive remedy against defendants, as defined in Section 5, for claims by those suffering damages based on the defendants' service of alcoholic beverages.

SECTION 15: EVALUATION

The Alcoholic Beverage Control Agency shall conduct an evaluation of the impact of this Act, to be completed within two years of its enactment. Evaluation topics to be addressed include but are not limited to initiation of, extent of, or changes in:

(1) the number and type of server and manager training programs in the state;

(2) the curricula of such programs;

(3) the management policies, procedures and actions of licensees regarding the service of alcoholic beverages;

(4) the number of actions filed, settled, and litigated pursuant to the Act and the number and amounts of recoveries;

(5) the number of successful defenses based on Section 10 of this Act;

(6) the legal interpretations of the provisions of this Act, particularly as compared to other state court interpretations;

(7) the incidence of drivng while intoxicated offenses, injuries and deaths;

(8) the incidence of other alcohol-related problems;

(9) the incidence of sales to minors and intoxicated persons.

SECTION 16: OPTIONAL NOTICE PROVISION

NOTICE TO DEFENDANT

Every plaintiff seeking damages under this Act shall give written notice to all defendants within 120 days of the date of entering an attorney-client relationship for the purpose of pursuing a claim under this Act. In the case of claims for contributions and indemnity, notice shall be given within 120 days of receiving written notice under this Act. The notice shall specify the time, place and circumstances of the defendant's conduct complained of, and the time, place and circumstances of any resulting damages. No error or omission in the notice shall void the effect of the notice, if otherwise valid, unless the error or omission is of substantially material nature. Failure to give written notice within the time specified shall be grounds for dismissal of a claim, and may only be waived by the court upon a showing of exceptional circumstances. Actual notice of sufficient facts to reasonably put a defendant on notice of a possible claim shall be construed to comply with the notice requirement herein.