



THE BASSETT BULLETIN™

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DRAM SHOP LIABILITY: ROUND TWO

The Texas Supreme Court has recently heard oral argument in a rehearing of a dram shop decision the justices had handed down only 14 months earlier, which had affirmed a \$35 million jury verdict. The case, *F.F.P. Operating Partners v. Xavier Duenez, et al.*, involves a family of five injured in a 1997 head-on collision with a drunk driver. The Duenez family had sued the store that sold alcohol to the drunk driver that caused the accident.

On September 3, 2004, the Texas Supreme Court affirmed the verdict in a 5-4 ruling. However, following the departure of three justices who voted in the majority, the court voted in April of 2005 to rehear the case. In essence, this is another bite at the responsibility apple for the Defense bar.

The key issue in *Duenez* is whether the proportionate responsibility statute, Texas Civil Practice & Remedies Code Chapter 33, applies to a dram shop claim brought by an innocent third party such as the Duenez family. Chapter 33 governs the apportionment of responsibility generally and applies to “any cause of action based on tort in which a defendant, settling person, or responsible third party is found responsible for a percentage of harm.”

The Court had previously ruled that Chapter 33 does apply when the Plaintiff allegedly was negligent in the accident that injured him. For example, when a drunk driver causes an accident, injures himself, and then sues the establishment that sold him the alcohol, a jury can apportion responsibility on the drunk driver and reduce the exposure of the establishment that sold him the alcohol.

The Texas Supreme Court now is trying to decide if it should extend the reach of Chapter 33’s apportionment of responsibility in the *Duenez* case. The Plaintiff’s bar contends that that the Dram Shop Act, clearly and simply, provides for an alcohol provider to be **solely responsible** when it sells alcohol to a person who was “obviously intoxicated to the extent that he presented a clear danger to himself and others.” The Defense bar wants the “drunk driver’s” responsibility to be factored in as well.

As we all know, “the more, the merrier” principle applies when a jury is apportioning responsibility. If the Texas Supreme Court agrees with the Defense bar it might make it difficult for a jury to hang the lion’s share of responsibility on the alcohol provider. At a minimum, if this works out for the defense, alcohol providers down the road won’t be the only ones with a bulls-eye on their backs in a dram shop case.

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