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## THE BASSETT BULLETIN™

### NEW RELIEF FOR ALCOHOL PROVIDERS

If your store sells alcohol to a person, are you as the provider solely responsible if that person goes out and injures an innocent third party after consuming that alcohol? Does the intoxicated person take some of the liability for the damages that he/she caused?

The Texas Supreme Court recently ruled on this issue and held in favor of alcohol providers. The Texas Supreme Court held that the proportionate responsibility statute applies to all Dram Shop Act claims. For alcohol providers, this means that you could lessen your exposure by sharing the liability with all the parties involved.

### FACTS OF THE CASE

In [\*F.F.P. Operating Ptnrs., L.P. v. Duenez\*, 2006 Tex. LEXIS 1130 \(Tex. 2006\)](#), Roberto Ruiz spent a day cutting firewood while consuming a case and a half of beer. When he was done, Ruiz drove to Mr. Cut Rate (a convenience store owned by FFP Operating Partners), and purchased a 12-pack of beer. Carlos Solis, an employee of Mr. Cut Rate, sold the beer to Mr. Ruiz. After Mr. Ruiz purchased the beer, he climbed into his truck, opened a can of beer, and put the open beer can between his legs. No one knows for sure if Ruiz actually drank any of this beer.

Ruiz drove onto a nearby highway where he crossed the center lane and hit the Duenez family head-on, injuring all five (5) family members.

The Duenez family filed suit against F.F.P. Operating Partners, Roberto Ruiz, Carlos Solis, the beverage company that provided the beer to the convenience store, and the landowner where Roberto Ruiz was cutting wood that day.

F.F.P. Operating Partners in turn filed a Responsible Third Party Action against Roberto Ruiz, the intoxicated driver. Before trial, the Duenez family non-suited everyone, except F.F.P. Operating Partners. At the trial level, the judge ruled that there would be no jury question on proportionate responsibility, and that F.F.P. Operating Partners would be the only Defendant in this case.

F.F.P. Operating Partners' cross-action against Ruiz was still pending at the trial court level. For F.F.P. Operating Partners, this meant that they would be the only Defendant on the jury charge because the judge would not allow the jury to put percentages of responsibility on the other parties (this is otherwise known as proportionate responsibility).

At the trial, the jury found that Roberto Ruiz was drunk *when he purchased* the beer from Mr. Cut Rate and rendered a verdict for \$35,000,000.00 against F.F.P. Operating Partners, the only Defendant. The jury found, as required to impose dram-shop liability, that when the alcohol was sold to Ruiz, it was “apparent to the seller that he was obviously intoxicated to the extent that he presented a clear danger to himself and others.”

F.F.P. Operating Partners appealed the jury verdict because (1) it was the only Defendant named on the jury charge and (2) the judge would not submit a question on proportionate responsibility to the jury.

The Appellate Court reviewed the case and held that:

1. Third-party actions under The Dram Shop Act means that a provider of alcohol (a store) is vicariously liable for the damages caused by the intoxicated person and that the store cannot offset its liability by hiding behind the intoxicated person. This means that a store cannot use proportionate responsibility to limit its liability.
2. In addition, the Appellate Court held that since an innocent third party (the Duenez family) was the one that was injured, F.F.P. therefore, could not hide behind the intoxicated person (Ruiz) because the store was the one that served Ruiz the alcohol.

## THE SUPREME COURT’S DECISION

The Texas Supreme Court reversed the trial court and the appellate court’s ruling.

The Supreme Court found that proportionate responsibility applies to both first-party and third-party actions under Dram Shop actions such as this. In *Smith v. Sewell*, the Court considered whether a provider of alcoholic beverages was responsible for an intoxicated individual's injury to himself under Chapter 2 of the Alcoholic Beverage Code (Dram Shop). [858 S.W.2d 350, 351 \(Tex. 1993\)](#).

In *Sewell*, the Court held that an intoxicated person suing a provider of alcoholic beverages for his own injuries under Chapter 2 of the Civil Liabilities for Serving Beverages will be entitled to recover damages *only* if his percentage of responsibility is found to be less than or equal to 50 percent. *Id.*

*Sewell* is different than *Duenez* because *Duenez* deals with innocent third party actions and not just first party actions. According to *Duenez*, the proportionate responsibility statute now applies to both first party and third party actions.

Therefore, liability under The Dram Shop Act is premised on the conduct of the provider of the alcoholic beverages and not just the conduct of the recipient or a third party.

This means that a provider of alcohol could reasonably limit its liability or negate its liability by designating the intoxicated person as a Responsible Third Party. The intoxicated person could be on the jury charge as a person who is also responsible for the plaintiff’s injuries.

For alcohol providers, this means that you, as the store, could limit your liability to the innocent third party by taking the steps discussed below.

## WHAT DO YOU NEED TO DO?

1. Tell your employees that if someone is *obviously* intoxicated, then do not sell them alcohol. You, as a provider, could increase your chances of liability to an innocent third party if you knowingly sold alcohol to an intoxicated person.

The Dram Shop Act requires a Plaintiff to prove that, when the alcohol was provided, the recipient “was obviously intoxicated to the extent that he presented a clear danger to himself and others” and the recipient’s intoxication was a proximate cause of the damages suffered.

2. It is very important to make sure that you are checking everyone’s identification to make sure that they are old enough to purchase alcohol. You do not want to be in a position where your employees sold alcohol to an underage consumer.
3. Have your employees attend a training course approved by the Texas Alcoholic Beverage Commission. Alcohol providers have a safe-harbor provision if they can show that they required their employees to attend a pre-approved training course on providing alcohol to the public. If you, as the store owner, can show that you (1) required this employee to attend the class, (2) the employee actually attended the course, and (3) you did not encourage the employee to violate the law, then you may be able to shield yourself from liability. This is called the “server-training defense.”
4. Make sure your liquor license is up-to-date.
5. If the intoxicated person that caused the Plaintiff’s injury was not named in the lawsuit, then make sure your attorney files a Responsible Third Party Action to bring them in. At the very least, that person needs to be on the jury charge to take some, if not all, of the liability for the accident.
6. You can plead the affirmative defense of contributory negligence against the third party, if applicable. Make sure you discuss with your attorney if that is a viable defense. This could also alleviate some of your liability.
7. The Dram Shop applies to your employees as well as to patrons. Make sure your employees are not selling alcohol to each other. If you have an employee leave your establishment intoxicated and they got that alcohol from you, then you could be liable for providing that alcohol should they injure themselves or another person.
8. Have store managers or supervisors keep some sort of system in place to make sure that folks are checking identification cards and not selling alcohol to intoxicated people. This goes along with the theory of undercover cops posing as employees.

Following these steps may not prevent a lawsuit against you. However, with this new case law, a store now can limit its liability by allowing a jury to proportion responsibility to everyone involved. The best protection you can offer yourself is to not sell alcohol to obviously intoxicated people and make sure your employees are checking identification.

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