

THE PARTY IS ABOUT TO (RE)START: UNDERSTAND AND AVOID LIQUOR LIABILITY AS SOCIAL DISTANCING RULES RELAX

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Arizonans have spent a beautiful spring and the last remnants of pleasant weather locked down in our homes and socially distanced from our friends and extended family. Governor Ducey, however, has announced that dine-in restaurants will reopen on May 11th. Although it is still unclear what that will look like, it is clear that bars will be opening their doors again in the near future, as well. Many of us, socially starved and looking to beat the heat, will be eager to once again clink glasses with our friends in our homes, by our pools, and in our favorite establishments. And as Arizonans emerge from isolation, restaurants and bars will be looking to tempt paying customers in order to mitigate lost profits associated with a socially distanced spring season. Surrounded by what will no doubt be a dizzying array of drink specials and social opportunities, it will be easy to lose sight of the fact that Arizona has some of the toughest liquor liability laws in the country.

Businesses licensed to serve alcohol in Arizona face two avenues of potential liability in the event an intoxicated patron causes injury to another person, property, or even themselves. The first avenue of liability is statutory. A.R.S. § 4-311(A) holds liquor licensees liable for personal injuries, property damage, or wrongful death when a licensee sells liquor to a purchaser who is “obviously intoxicated,” the purchaser consumes the liquor, and the consumption is the proximate cause of the injury. The vast majority of these cases involves drunk drivers or assaults.

A.R.S. § 4-311(D) defines “obviously intoxicated” as inebriated to such an extent that a person’s physical faculties are substantially impaired to the point that it would be obvious to a reasonable person. This type of statute is not unusual among jurisdictions that recognize dram shop liability. Other jurisdictions recognize that people who routinely imbibe might be able to better mask signs and symptoms of intoxication. In those jurisdictions, a licensee can avoid liability by establishing that the person regularly consumes alcohol and was able to mask his or her intoxication. In those jurisdictions, it is often difficult for a plaintiff to establish that a served person was so obviously drunk as to trigger liability under the statute. The analysis thus ends there in many jurisdictions.

In Arizona, however, this is where the analysis starts to get as spicy as a buy-one-get-one-free jalapeno infused Bloody Mary. Here, claimants can seek to establish liability under both 4-311(A) and they can seek to establish liability under the common law, which does not require a showing of outward signs of intoxication.

Ontiveros v. Borak established common law liability where a patron was served so many drinks that any reasonable person would know the patron was intoxicated, irrespective of whether the patron exhibits any outward signs. Arizona’s common law sets the bar (no pun intended) much lower than the statutory standard of “obviously intoxicated.” To be clear, under *Ontiveros*, a person can appear stone cold sober, but if they have been served enough drinks to be inebriated, liability will attach.

To avoid liability, Arizona liquor must closely watch not only for signs and symptoms of intoxication but also the number of drinks any particular patron is served. This is a difficult task under the best of circumstances. The jubilant excesses that will no doubt occur when social isolation is lifted will make it even more difficult to track to whom each purchased drink is being served. At the same time, servers must be careful not to run afoul of a myriad of additional rules imposed by Arizona’s Title IV, some of which are counter intuitive to the nature of bars and taverns. For example, a liquor licensee is prohibited from allowing anyone that is intoxicated to remain on their premises, except for thirty minutes to arrange transportation. Under Arizona law, drunk people are simply not permitted to be in bars.

Post-pandemic drink specials will fuel a socially starved public with good cheer, and fill taverns and restaurants with imbibing (and paying) patrons. Keeping the liquor flowing, however, has a down side. In addition to increasing the potential for punitive damages in liability cases, drink specials can also violate Title IV. For example, licensees are prohibited from serving an unlimited number of drinks to patrons for a fixed price. Similarly, employees are not permitted to raise a toast with patrons. A.R.S. § 4-244 strictly prohibits employees from consuming alcohol while serving customers. Liquor licensees must be ever vigilant and, most of all, must keep the party professional.

Easing social distancing rules will not be all about taverns and drink specials, however. Once we are again permitted to gather, neighbors will open their doors, show off their isolation-driven-Pinterest successes, and start filling glasses. Thankfully, Arizona law treats social hosts more gently than professional dram shops. As long as social hosts are only filling glasses for guests over the age of twenty-one, they are immune from liability pursuant to A.R.S. § 4-301. Of course, the key to alcohol service, whether you are a licensee or hosting a private party, is responsibility. Enjoy your friends and your favorite establishments. But be safe.

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Brandi Blair defends clients against claims involving dram shop liability, premises liability, wrongful death and personal injury, professional liability, and Section 1983. She represents clients in a variety of industries including retail and hospitality, medical and healthcare, legal, accounting, and governmental and quasi-governmental entities.