

## KY DRAM SHOP MEMO II

### I. Kentucky's Dram Shop Act

#### **KRS § 413.241 Legislative finding; limitation on liability of licensed sellers or servers of intoxicating beverages; liability of intoxicated person**

- (1) The General Assembly finds and declares that the consumption of intoxicating beverages, rather than the serving, furnishing, or sale of such beverages, is the proximate cause of any injury, including death and property damage, inflicted by an intoxicated person upon himself or another person.
- (2) Any other law to the contrary notwithstanding, no person holding a permit under KRS 243.030, 243.040, 243.050, nor any agent, servant, or employee of the person, who sells or serves intoxicating beverages to a person over the age for the lawful purchase thereof, shall be liable to that person or to any other person or to the estate, successors, or survivors of either for any injury suffered off the premises including but not limited to wrongful death and property damage, because of the intoxication of the person to whom the intoxicating beverages were sold or served, unless a reasonable person under the same or similar circumstances should know that the person served is already intoxicated at the time of serving.
- (3) The intoxicated person shall be primarily liable with respect to injuries suffered by third persons.
- (4) The limitation of liability provided by this section shall not apply to any person who causes or contributes to the consumption of alcoholic beverages by force or by falsely representing that a beverage contains no alcohol.
- (5) This section shall not apply to civil actions filed prior to July 15, 1988.

[...]

#### **2. Does the KY Dram Shop Act create a separate cause of action?**

In all likelihood, yes. The issue has not been specifically litigated in the appellate courts (and it doesn't help that the statute itself is silent as to whether it creates a private right of action), but two Kentucky Supreme Court cases and one Court of Appeals case concerning the Dram Shop Act makes it reasonably clear that the Act creates a separate, statutory cause of action. All three cases involved motor vehicle accidents.

**A. *DeStock v. Logsdon*, 993 S.W.2d 952 (Ky.1999)**

KRS 413.241(3) declares the intoxicated person to be “primarily” liable for injuries to third persons. This makes the dram shop “secondarily” liable and therefore entitled to cross-claim for indemnity against the intoxicated person. *DeStock No. 14, Inc. v. Logsdon*, 993 S.W.2d 952, 958 (Ky.1999). According to the Kentucky Supreme Court, the injured party can sue to recover from either the intoxicated person or the dram shop, or both. *Id.* The dram shop is entitled to indemnity against the intoxicated person for “injuries to third persons,” but *not* entitled to indemnity for the separate (statutory) tort of selling alcohol to a person when “a reasonable person under the same or similar circumstances should know that the person served is already intoxicated at the time of serving.” KRS 413.241(2).

In *DeStock*, the injured parties had settled with the drunken patron prior to trial. *DeStock*, 993 S.W.2d at 954. In its discussion of the Dram Shop Act in relation to KRS 411.182(1),<sup>1</sup> the Court made a point of saying that the settlement between the intoxicated person and the injured parties did not relieve the tavern owner of liability because the tavern owner is regarded as a “separate tortfeasor.” *Id.* at 959. This language in the context of discussing the Dram Shop Act strongly suggests that the Court recognizes that the Dram Shop Act creates a separate tort (*i.e.*, negligently selling alcohol to intoxicated persons.) That the *DeStock* Court did not specifically state outright that the Dram Shop Act creates a separate right of action is not a surprise, given that the issue was not raised by the parties in *DeStock*.

*DeStock* outlines the trial procedure thus: If a jury finds that (1) the dram shop sold intoxicating beverages to a patron when a reasonable person under the same or

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<sup>1</sup> which requires apportionment “in all tort actions”.

similar circumstances should have known that the patron was already intoxicated, and (2) such was a substantial factor in causing the patron to be intoxicated at the time of the accident, and (3) the patron's intoxication was a substantial factor in causing the third parties' injuries, then the dram shop will be found "liable." *DeStock*, 993 S.W.2d at 960.

Again, the Kentucky Supreme Court did not specifically state the dram shop would be "liable under the Dram Shop Act," but given that the first factor delineated by the Court exactly reflects the language of KRS 413.241(2), no other interpretation is reasonable.

**The point:** In addition to recovering from the intoxicated person, a plaintiff could recover from a tavern found to be secondarily liable under the Dram Shop Act, although the tavern would then be entitled to recover from the intoxicated person any monies it paid to the injured party. *Id.*

**B. *Sixty-Eight Liquors, Inc. v. Colvin*, 118 S.W.3d 171 (Ky.2003)**

In *Sixty-Eight Liquors, Inc. v. Colvin*, 118 S.W.3d 171 (Ky.2003), the Kentucky Supreme Court noted that the Dram Shop Act clearly creates a civil cause of action for a minor against a dram shop that sells him alcohol because such is not a "legal sale." *Id.* at 175. The plain language of the Dram Shop Act therefore suggests that both (1) the sale of alcohol to a minor and (2) the sale of alcohol to an intoxicated person create civil liability under the Act:

In fact, sections (1) and (3) could never have been intended to completely immunize dram shops from liability; for even the original version of House Bill 570 did not purport to abrogate dram shop liability with respect to a sale or service to a minor. *There is no reason to assume that the legislature intended one result with respect to a sale or service to a minor and a different result with respect to sale or service to an intoxicated person.*

*Sixty-Eight Liquors*, 118 S.W.3d at 175, citing *DeStock No. 14, Inc. v. Logsdon*, 993 S.W.2d 952, 957 (Ky.1999) (emphasis added).

The Kentucky Supreme Court noted further noted in *Sixty-Eight Liquors* that the statutory assignment of proximate cause requires that the purchaser be over the age for lawful purchase. If the purchase is lawful *and a reasonable seller would not believe the purchaser to be intoxicated*, the plain language of sections (1) and (2) relieves a dram shop of liability. A legal sale is required for a dram shop to be shielded from liability under KRS 413.241.

*Sixty-Eight Liquors, Inc. v. Colvin*, 118 S.W.3d 171, 175 (Ky.2003) (emphasis added).

Thus, the Kentucky Supreme Court in *Sixty-Eight Liquors* has again suggested (without stating outright, because the issue was not raised by the parties) that the sale of alcohol to a tavern patron when “a reasonable person under the same or similar circumstances should know that the person served is already intoxicated at the time of serving” is separate, tortious conduct for purposes of KRS 413.241, the Dram Shop Act.

C. ***Jackson v. Tullar*, 285 S.W.3d 290 (Ky.App.2007)**

The issue of suing a dram shop based on a theory of secondary liability did not appear before the appellate court until 2007, and has not yet been addressed by the Kentucky Supreme Court.

*Jackson* concerned apportionment of liability between the intoxicated tortfeasor and the dram shop, and concluded that such apportionment was prohibited. *Jackson v. Tullar*, 285 S.W.3d 290, 297 (Ky.App.2007).

Importantly, *Jackson* states that apportionment between the intoxicated person and the dram shop is not appropriate “because the actions that give rise to liability -- directly causing injury and improperly serving alcohol to someone who later causes injury, respectively -- do not constitute concurrently negligent acts. Rather, they are

*separate and independent actions of two fundamentally different characters.” Id. at 296 (emphasis added).*

Notably, if there is more than one dram shop, as was the case in *Jackson*, there can be apportionment of liability between the dram shops themselves. “Multiple dram shops that violate KRS 413.241 would have committed similar acts that would have had a similar relationship to a plaintiff’s ultimate injury. In light of this similarity of circumstance and character, liability among multiple dram shops is properly apportioned under comparative fault principles.” *Id. at 297.*

The *Jackson* court outlined the trial procedure in the same manner as the *DeStock* court: First, the jury must determine the percentage of fault attributable to the drunken patron. Next, the jury could consider whether the elements under KRS 413.241 were satisfied such that the dram shop could be held secondarily liable. *Id. at 296.*

Accordingly, once a jury determines that the elements under KRS 413.241 are satisfied such that either or both dram shops could be held secondarily liable, the jury should be instructed to apportion that liability between them based on the evidence presented. Specifically, the jury should be instructed to determine to what degree the sale or service of alcohol by each dram shop was a substantial factor in causing the tortfeasor’s intoxication at the time of the accident.

*Id. at 297.* The *Jackson* court then cites to *DeStock* at page 960, where the *DeStock* court outlines the trial procedure (regarding indemnity) described on page 2, above. [...]