

# A Review of the RECENT AMENDMENTS OF IOWA'S DRAMSHOP ACT

by Adam Zenor

**D**ramshop statutes exist in most jurisdictions across the United States and impose civil liability on an establishment that wrongfully furnishes alcohol to an intoxicated person for damages thereafter caused by that intoxicated person. Dramshop statutes are intended to discourage irresponsible alcohol service and compensate the public for hazards resulting from the same. Such laws are a creature of statute and often create the exclusive remedy for irresponsible sale and service of alcohol. Because each state's statute is unique, dram liability varies across jurisdictions.

Iowa's dramshop statute has been in existence since 1862. The statute remained generally unchanged until 1986 when the legislature removed strict liability from our dram statute. This spring, the Iowa legislature passed a bill amending the Iowa Dramshop Act. Governor Kim Reynolds signed the bill into law on April 10, and it went into effect on July 1.

This article endeavors to highlight the recent statutory amendments and briefly consider their relative implications.

## IOWA'S AMENDED DRAMSHOP ACT: IOWA CODE § 123.92

**As recently amended, the liability portion of the Iowa Dramshop Act provides (with alterations indicated):**

Any person third party who is not the intoxicated person who caused the injury at issue who is injured in person or property or means of support by an intoxicated person or resulting from the intoxication of a person, has a right of action for all damages actually sustained, severally or jointly, up to the amount specified in paragraph (c), against any licensee or permittee, whether or not the license or permit was issued by the division or by the licensing authority of any other state, who sold and served any beer, wine, or intoxicating liquor directly to the intoxicated person, ~~when the licensee or permittee knew or should have known the person was intoxicated, or~~

~~who sold to and served the person to a point where the licensee or permittee knew or should have known the person would become intoxicated~~ provided that the person was visibly intoxicated at the time of the sale or service.

## IMPACT OF AMENDMENTS ON THE SCOPE OF DRAMSHOP LIABILITY

The 2018 amendments seem designed to impact the scope of dram liability in three (3) respects:

- **Standing;**
- **Sale and Service; and**
- **Scienter.**

### STANDING

The first alteration to the statute, which explicitly prohibits recovery by the alleged intoxicated person who caused an injury, relates to standing. Of course, standing is a legal principle involving whether a person has a right to bring a claim. And, as to dramshop liability, the statute previously stated that "any person" had a right to bring a claim, so long as all the other statutory prerequisites were satisfied. But that language has been revised. In its place, the legislature explicitly barred recovery for "the intoxicated person who caused the injury at issue."

The practical import of this statutory change, however, may be inconsequential. Indeed, Iowa courts have long interpreted the dram statute to bar recovery by the alleged intoxicated person. See e.g., *Evans v. Kennedy*, 162 N.W.2d 182 (Iowa 1968). For example, in *Evans*, an administrator filed a dram action on behalf of an estate of a fatally injured intoxicated person after he consumed alcohol and then died in a single vehicle accident. The trial court

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granted the dram's motion to dismiss for lack of standing. In affirming the trial court's decision, the Iowa Supreme Court determined the statute's purpose was to protect innocent parties and not intended to allow a person who over-indulges to recoup his losses incurred as a result of his own intoxication. *Id.* at 187. Accordingly, that the legislature has explicitly prohibited recovery by the alleged intoxicated person may be insignificant.

On the other hand, dramshop plaintiffs may ask the courts to interpret the change as having some significance. Appreciate that Iowa courts hold a person who participated in the alleged intoxicated person's imbibing by their complicity or assumed the risk are also not innocent and barred from recovery. *Slager v. HWA Corp.*, 435 N.W.2d 349, 351 (Iowa 1989); *Berge v. Harris*, 170 N.W.2d 621, 625-27 (Iowa 1969). By explicitly prohibiting the alleged intoxicated person's standing to recover and by not mentioning other classes of persons that Iowa courts have held cannot recover may be influential in a statutory construction analysis. That said, complicity and assumption of the risk have not been treated as standing issues, but rather as affirmative defenses that the dramshop defendant bears the burden to prove at trial.

In short, whether this first alteration will have any practical significance may be subject to future litigation.

### SALE AND SERVICE

The second alteration to the liability portion of the statute, however, will likely narrow successful dramshop claims. The alteration merely inserts the word directly after the words sold and served [alcohol] and before the words to the intoxicated person. Because the ordinary meaning of directly is without changing direction or stopping and with nothing or no one in between, this alteration seems to narrow the sale and service element.

This alteration may have been a

reaction to the Iowa Supreme Court's recent holding in *Sanford v. Fillenwarth*, which arguably enlarged the scope of what constitutes sale and service. 863 N.W.2d 286, 293-94 (Iowa 2015) (finding sale and service could even be remote from one another in terms of time and location). Indeed, *Sanford* held even being a third-party beneficiary to the contract may be sufficient to satisfy the sale and service element. *Id.* Compare, *Hawthorne v. Estate of Krommenhoek*, No. 12-1455, 2013 WL 2637176 (Iowa Ct. App. June 12, 2013) (finding the sale and service element unsatisfied as a matter of law where a dram's alcohol was purchased by another and provided to a minor in the dram unbeknownst to the dram).

In short, by explicitly requiring sale and service be made directly to the alleged intoxicated person, the legislature appears to be narrowing dramshop liability.

### SCIENTER

The third alteration to the liability portion of the statute will likely also narrow successful dramshop claims. The alteration limits the scope of the statute's scienter requirement because the scienter element now appears to require objective evidence that the intoxicated person was showing visible signs of intoxication.

Of course, scienter connotes the particular wrongfulness or culpability that the dram has in its service of alcohol to the alleged intoxicated person. Iowa's statute has required dram plaintiffs prove scienter since 1986. This 2018 alteration modifies that scienter requirement. Specifically, the alteration removes the dram's obligation to predict or foresee how the alcohol being furnished will impact the patron. Now, liability appears limited to only those situations where the sale and service was made directly to an AIP who showed observable signs of

intoxication at the time of the sale and service.

This amendment results in a more stringent proof requirement and appears to narrow the circumstances where a dram would be found liable.

### IMPACT OF AMENDMENTS ON DRAMSHOP DAMAGES

While Iowa courts have long held punitive damages were not recoverable in a dram case, there were no other limits or caps on the size of a jury award. The 2018 amendments change that, adding a new paragraph (c) and thereby creating a soft cap on noneconomic damages for each plaintiff. The new subsection provides:

*c. The total amount recoverable by each*

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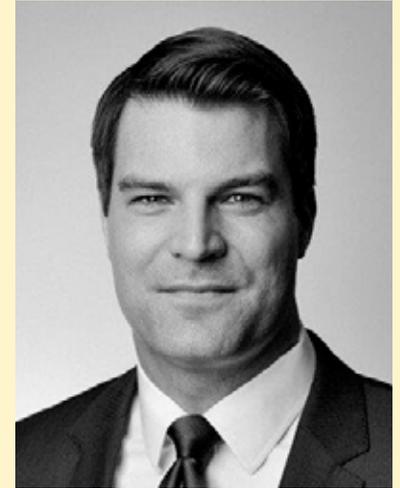
This amendment is a soft cap because the statute provides an avenue for a jury to opt out of the limitation under certain circumstances.

### CHANGES TO DRAMSHOP INSURANCE?

Although there is scant legislative guidance as to what precipitated these amendments, some suggest the changes were driven by a view by some in Iowa's restaurant and bar industry. That industry feels it unfair that it should bear the burden to pay premiums for dramshop insurance. Indeed, dramshop insurance is required to

be licensed to sell and serve alcohol in Iowa. But others find it difficult to sympathize with those feelings, given that the dramshop statute preempts all other forms of potential liability for a dram's irresponsible service of alcohol and the relatively modest insurance limits required of dramshops.

Notably, the legislation also creates a new subsection, 123.92(4), requiring the Alcohol and Beverages Division to evaluate the minimum dramshop liability coverage every two years. The division previously had the authority to evaluate and change minimum liability coverage, which is required of all license and permit holders, but now must report to the General Assembly how Iowa's minimums compare with other states and any recommendations it has regarding those minimums.



Adam Zenor's practice involves complex business litigation, white collar criminal defense, trials and appellate practice. He serves on the Board of Governors for both the Polk County Bar Association and The Iowa State Bar Association. He is a Fellow in the Iowa Academy of Trial Lawyers.



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