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## *Legislative Affairs Report*

### **Hospitality Sector Under Attack in Trenton**

by Jeffrey A. Warsh, Esq., Legislative Representative

For the last two legislative sessions, it is clear that major forces in the New Jersey Legislature have placed a relentless and unjust bulls eye squarely on the backs of the over 10,000 small businesses that comprise the New Jersey hospitality sector. As New Jersey's largest employer, in the midst of the worst economic downturn since the Great Depression, times are tough for New Jersey's bars, taverns and restaurants. An aggressive and damaging legislative agenda is throwing the proverbial wet blanket on the few small sparks still faintly glowing in New Jersey's hospitality hearth.

Still reeling from the direct to consumer wine shipment bill, which became effective on May 1, 2012, a historically unprecedented broadside to New Jersey's time-tested three-tier distribution system, our industry is now embroiled in another major fight against A1325 (D-Greenwald). This bill will eliminate New Jersey's long-standing and judicially upheld prohibition against holding more than two liquor store licenses. It will allow individuals and corporations to hold ten (10) package store licenses – effectively wiping out small, family-owned businesses throughout New Jersey.

The so-called Two License Limitation Law – in effect since 1962 and upheld in Federal Court as recently as 1998 – has been a highly effective tool in assuring opportunities for small, family-owned businesses to gain a foothold as independent businesses. It has assured the presence of wine shops and liquor stores in downtowns across New Jersey. It has prevented the scourge of the big box domination that we currently witness in states without the Two License Limitation. Supporters of the bill, big boxes like Walmart and Costco and large grocery store and convenience store chains (yes, convenience stores throughout New Jersey would carry full lines of alcoholic beverages under A1325!) call for “modernization” of New Jersey's alcoholic beverage distribution system. “Modernization” is a euphemism for the elimination of those pesky small businesses in the way of global, big box domination and should be summarily rejected by the New Jersey Legislature and by Governor Christie.

Our industry also faces a major challenge in the form of a bill to create a new class of licenses permitted to sell wine and beer for on-premises consumption. A1525/S1429, sponsored by Senator James Beach (D-Camden) and Assemblyman John Burzichelli

(D- Gloucester), would create an unlimited number of new wine and beer licenses for an annual renewal fee of 75% of the annual renewal fee for alcoholic beverage retail licenses. This bill would obviously result in massive economic damage to the 8000 existing holders of Plenary Retail Consumption Licenses throughout the Garden State. This effort must be stopped cold at all costs.

The rumor on the street is that the sponsors of the bills discussed above plan to move the Two License Bill by June 30th and the Beer and Wine License Bill after the Legislature's Summer recess.

As if these two challenges were not enough, we also find ourselves fighting an unbelievable attempt in the midst of a moribund economy to raise the minimum wage for tipped employees. Sponsored by newly elected Assemblywoman Shavonda Sumter (D-Passaic), A2708 proposes to increase the current minimum wage from its current level of \$2.13 per hour to \$2.90 in June and then to \$5.00 per hour in 2013. As we all know, the \$2.13 per hour is what employers are required to contribute above and beyond minimum wage. When a tipped employee receives less than the minimum wage (currently \$7.25 per hour) in tips, the employer is required by law to make up the difference. Waiters and bartenders, like everyone else, are currently guaranteed the minimum wage of \$7.25 per hour every day they go to work. Our sector works on a 6% to 8% profit margin. A2708 proposes to double our payrolls and would drive many businesses, already on the brink, into ruin and bankruptcy. It will also eliminate many of the jobs the sponsors profess to support. We must loudly voice our opposition to this ill-considered and factually incorrect legislation.

It is for the challenges described above and many others that it is critical for bar, tavern and restaurant owners to become politically active. While many of you are actively engaged in the political process, we all know fellow business owners who are not. Do your best to recruit them to add their voice and their efforts to the cause. Now is the time. Remember the sage words of Benjamin Franklin who, in opposing British Empire attempts to crush American Liberty, said: “Gentlemen we must all hang together or we shall most assuredly all hang separately.” Contact the New Jersey Licensed Beverage Association and get involved. The NJLBA - since 1933, your voice in Trenton.



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# The Wellhofer-Wilinski Scholarship Foundation Annual Picnic and Motorcycle Raffle

**June 27, 2012 Rain or Shine**

**This year's picnic is again being held**

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**located on Schoolhouse Road in Wall Township,**

**on June 27, 2012 from 2 pm to 7 pm**

**Tickets are \$60**

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The Harley-Davidson Motorcycle raffle drawing to benefit the Scholarship Foundation will also be held at the Annual Picnic. We ask that all NJLBA members sell the five Motorcycle raffle tickets that were sent to you several months ago. The proceeds from the sale of the tickets go directly to the scholarship foundation to fund future education scholarships. We are now selling the tickets for five for \$100 or \$25 a piece and ask that you sell the tickets and return the proceed to the NJLBA office at 206 West State Street, Trenton, NJ 08608 as soon as possible. Should you need additional tickets please contact Anastasia at 1.800.LBA-0076. The drawing date is June 27, 2012, at 5:00 pm at the Oak Tree Lodge in Wall Township. We must have all the sold ticket stubs prior to the drawing. Tickets will be sold at the picnic and can be paid for with cash, check or credit card. Please make all checks payable to "The Wellhofer G. Scholarship Foundation." Thank you for your continued support.

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**Does having low prices work? Ask yourself, what is your reason to lower prices?**

- Compete with competition
- Attract new business
- Create a value image
- Create a center of attention

Having low prices to beat the competition sounds good, but rarely accomplishes that goal and may eventually put you out of business.

Most businesses cannot afford having a low pricing policy by selling drinks at thin margins. Pricing & profits go hand in hand; you simply can't have low prices and expect to make a reasonable profit. Pricing policy cannot be the same for everyone. It depends on many factors. Basically, what is your debt service, your cost of operation and hours of operation? Certainly if you have been in business for many years, have no mortgage, or low rent, are not paying off loans, and are doing a healthy volume, you may be in a better position to offer lower prices than a competitor. Unfortunately not many businesses are in the position just described. If you are thinking about, or currently have a low pricing policy, you need to ask yourself if it is working, and is it meeting your expectations.

There is a big difference between having low prices, and having low priced specials. Using specials during Happy Hour and sporting events are very effective marketing tools and rarely impact the bottom line adversely. Specials are generally time limited to several peak or off peak hours a day or event.

Based on your hours of operation, these specials represent between 5%-10% of the businesses hours of operation. Even if the specials are extreme discounts they generally will not negatively affect your profit structure, because they are not in effect long enough to have a severe impact. However, if they represent too much of the weekly gross, then they need to be altered so the image remains, but the profits are not negatively impacted.

**Business is about survival. It is also about image & perception.** Are you a sports bar, a neighborhood saloon, a nightclub? Are you a restaurant that serves liquor, or a bar that serves food? All these factors have a bearing on the price you can reasonably charge. You, as the owner or manager, need to avoid the pressure of bartenders and customers requesting lower prices. They both have a vested interest for lower pricing. Most customers will respect and patronize fair pricing policies.

The next factor you need to evaluate is whether you are priced fairly? Pricing a bar depends on the type of establishment, cost of operation, and what is needed to operate in the black. If you're a restaurant, and 70% of your business is food, you would price differently than you would if 70% of your business were liquor. Restaurants generally work on a greater percentage.

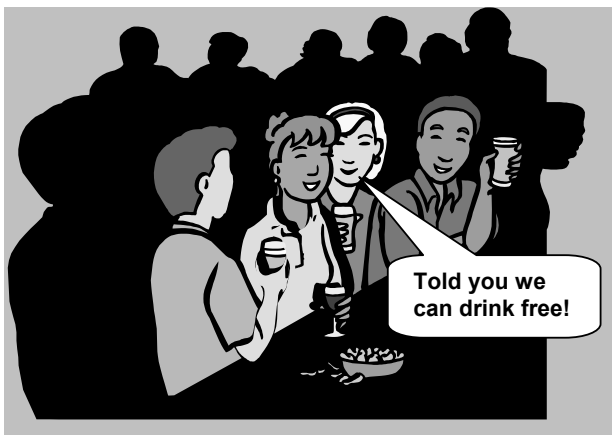
I try to convince owners about the need to protect themselves by using spotters and doing weekly audits for financial reasons. Your accountant (hopefully), is telling you if you are making a profit. It is not the accountant's job, nor can the accountant tell you if you have shrinkage, or what the perfect scenario should be. Are you aware of your pouring cost and what the ideal should be?

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## THE NJLBA IS WORKING WITH THE HERO CAMPAIGN FOR SUMMER 2012

The NJLBA is working with William Elliott, Chairman of the HERO Campaign, to encourage all licensees in the State to promote the use of a designated driver. This is a special program designed specifically for New Jersey Bars, Taverns and Restaurants. All you need to do to participate in this FREE program is register, display the HERO poster and decals and

provide complimentary soft drinks or coffee to designated drivers. We encourage all of our members to sign-up and promote the HERO Campaign.

Below is a message from William Elliott:



Greetings,

We invite you to join an exciting, life-saving campaign this Summer that also will benefit you and your establishment at little or no cost. From June through Labor Day, the Jersey Shore HEROES Campaign will promote the use of safe and sober designated drivers from Sandy Hook to Cape May and beyond.

You will join an expected 500 bars, taverns and restaurants who agree to promote the campaign by displaying Jersey Shore HEROES posters and serving free soft drinks to safe and sober designated drivers. The program is part of the HERO Campaign for Designated Drivers®, which was born in New Jersey in memory of Navy Ensign John Elliott. Ensign Elliott, whose family lives in Atlantic County, was killed by a drunken driver in July, 2000, two months after graduating from the United States Naval Academy in Annapolis, MD.

At the Naval Academy, John was named the Outstanding HERO of his graduating class. Now you can be a HERO by joining our campaign, one of the fastest growing and popular

drunk driving prevention programs in the nation. Your establishment will be promoted through the news media and on the HERO Campaign's website.

Registration is easy! Simply visit [www.JerseyShoreHEROES.org](http://www.JerseyShoreHEROES.org). It's time we put a positive spotlight on the Jersey Shore. Help us attract national attention by promoting and registering designated drivers and make the Jersey Shore a model for safe and responsible summer fun. If you have any questions, call us toll free at 1-866-700-4376 or [info@herocampaign.org](mailto:info@herocampaign.org).

Catch the wave, join the HERO Campaign, and become a Jersey Shore HERO this summer!

Sincerely,

William Elliott, Chairman  
The Ensign John R. Elliott  
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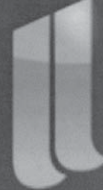


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# NEW JERSEY SUPREME COURT DETERMINES AN INTOXICATED DRIVER CAN SUE A LICENSED ALCOHOLIC BEVERAGE SERVER

by Laurence D. Granite, Esquire  
Cooper Levenson

Since we last reported to you, the New Jersey courts have not announced any sweeping, policy-oriented, rulings regarding liquor liability law. Most of the recent court decisions relate to technical issues of law and other appeal matters which, if summarized in this article, would surely bore you until you glazed over, jaw agape, drooling and mumbling “beer” as if you were Homer Simpson thirsting for a Duff. But there is one decision you need to be aware of, if you are not already.

Since you are reading this newsletter you are obviously a responsible bar or tavern owner who is, or who should be, aware of the June 1, 2011 New Jersey Supreme Court decision in the case of *Voss v. Tranquilino*, 206 N.J.93; 19 A.3d 470, which upheld an Appellate Division decision allowing an intoxicated driver to seek recovery of personal injury damages against a licensed alcoholic beverage server for violation of New Jersey’s “Licensed Alcoholic Beverage Servers Fair Liability Act” (Dram Shop Act.)

*N.J.S.A.39:6A-4.5(b)* of the New Jersey Motor Vehicle Code provides that a driver of a motor vehicle who is convicted of, or who pleads guilty to, driving while intoxicated in connection to their motor vehicle accident has no cause of action or recovery for economic or non-economic losses sustained as a result of the accident. Notwithstanding this statutory language, in *Voss* the Supreme Court ruled the statute does not bar an intoxicated driver from seeking recovery from a licensed alcohol beverage server for injuries sustained in a motor vehicle accident, despite the driver’s own voluntary intoxication at that licensee’s establishment.

In its rather brief decision, the Supreme Court affirmed the Appellate Division ruling for substantially the same reasons. See *Voss v. Tranquilino*, 413 N.J. Super 82, 992 A.2d 829 (App.Div.2010).

The *Voss* case stems from an accident involving a motorcycle driven by plaintiff Frederick Voss, and a motor vehicle driven by defendant Kristoffe Tranquilino. Prior to the accident Voss had been a patron at Tiffany’s Restaurant in Toms River, New Jersey where he consumed alcoholic beverages. Voss’ BAC following the accident was measured at .196. He was charged with several motor vehicle offenses, including DWI, to which he ultimately pled guilty.

Initially, the Supreme Court acknowledged that both laws (the Dram Shop Act and *N.J.S.A.39:6A-4.5(b)* of the N.J. Motor Vehicle Code) were designed to deter drunk driving. The relevant provision of the Motor Vehicle Code was enacted to deter people from driving while intoxicated under

penalty of losing their right to sue for recovery of personal injury damages under a policy of automobile insurance. However, in permitting the claim to proceed against the alcoholic beverage server under its general commercial liability insurance policy, the Supreme Court reasoned that allowing an intoxicated driver to recover damages against a licensed alcohol beverage server that violates the statute (namely, by serving a visibly intoxicated customer) also “advances the goal of deterring drunk driving.”

Thus, the “deterrent” is directed toward the licensed alcoholic beverage server and is meant to foster its vigilance when it comes to refusing service to a visibly intoxicated patron, in conformance with the statute. The Supreme Court obviously believed this decision will assure fault is properly apportioned as between the licensed alcoholic beverage server and the injured drunk driver. *Voss* at 101; 475.

Notably, the Supreme Court’s opinion was followed by a dissent authored by Justice Albin and joined in by Judge Rivera-Soto. While Justice Albin expressly stated “that exempting taverns from the scope of *N.J.S.A.39:6A-4.5(b)* would [ ] be a rational policy for the reasons expressed by the Appellate Division” he believed the statute as written “*explicitly* repeals the drunk driver’s right to sue in all cases in which he previously possessed a common-law and statutory right to do so.” *Id.*

Despite the fact Justice Albin did not disagree with the policy adopted by the majority, he was unwilling to “engraft a judicial exception onto the statute that the legislature did not.” *Id.* Justice Albin found *N.J.S.A.39:6A-4.5(b)*, enacted in 1997, to be clear and unambiguous, and believed the Appellate Division should have refrained from tinkering with the legislation to make it “more reasonable in its eyes . . .” *Id.*

Consequently, instead of waiting for the New Jersey Legislature act on this issue, the Supreme Court opted to engage in judicial activism and revised the law on its own initiative. As can sometimes be the case, the Supreme Court’s result-oriented approach prevailed, although it arguably exceeded its constitutional boundaries in doing so.

In coming to its decision, the Supreme Court noted that juries will still be able to allocate fault as between the injured, albeit intoxicated, driver and the bar or tavern.

From the perspective of a licensed alcoholic beverage server, it would of course have been far better had the Supreme Court ruled that intoxicated drivers have no right of recovery against an alcoholic beverage server based on a claim of over-service. However, in light of the reasoning

adopted by both the New Jersey Appellate Division and Supreme Court, it is highly unlikely any new legislation will be enacted to undo the Voss decision. Thus, while it may seem inequitable to allow an injured driver the right to recover personal injury damages from a bar or tavern due to his or her own voluntarily intoxication, the ultimate decision whether to award damages to that intoxicated driver will remain within the province of the jury, the members of which may likely share the sentiments against allowing any recovery and will therefore be reluctant to return a verdict in favor of the intoxicated driver.

But the news is not all on the negative side of the ledger. A recent, well-reasoned appellate case found in favor of a licensed alcoholic beverage server. In *Parola v. Chili's Grill and Bar, et als.* (2011 N.J.Super. Unpub. LEXIS 2494) (October 3, 2011), an unpublished per curium opinion with no precedential value but illuminating nonetheless, the Appellate Division affirmed the order of a Middlesex County trial court which dismissed a claim against Chili's Grill and Bar on a motion for summary judgment.

In that case, on June 22, 2006 plaintiff Edna Parola met Keith Young at Chili's for a first date. They consumed alcoholic beverages at two different establishments that evening at Chili's, where they also had dinner, and later at Club Abyss.

Parola and Young left Club Abyss in separate vehicles at 2:30 a.m. On her way home Parola was hit by another vehicle, which then fled the scene. Parola suffered severe injuries. Her blood alcohol was measured at .22 percent. (Notably, no mention was made in the court's decision as to

whether Parola was charged with DUI and, unlike in Voss, *N.J.S.A.39:6A-4.5(b)* was apparently not at issue.)

During discovery Parola "presented no evidence of any conduct on her part indicative of being 'visibly intoxicated' while at Chili's. Parola at 12. Even her date did not perceive her to be intoxicated. In an effort to establish she was in fact served alcohol while visibly intoxicated so as to be entitled to pursue a claim against Chili's, Parola submitted a toxicologist's report which stated Parola was served while "visibly intoxicated" at Club Abyss, but which offered no similar statement as to Chili's. *Id.* When Chili's moved for summary judgment, Parola attempted to defeat the motion by relying on her own deposition testimony wherein she stated that while at Chili's "she was feeling great, talkative, but not loud and also feeling tipsy." Parola at 13. However, the court noted that not only did her own expert fail to opine plaintiff was served while visibly intoxicated while at Chili's, her own "internal feelings, personal to her, do not represent "a perceptible act or series of acts which present clear signs of intoxication". This is the express definition of "visible intoxication" in the N.J. Dram Shop Act. *Id.* Additionally, there was no evidence Parola "conveyed any of these feelings to her server." *Id.*

Unlike in Voss, here the Appellate Division did not reject the black letter of the law. Therefore, lacking proof by way of expert opinion stating she was served while visibly intoxicated at Chili's, the court left it to Parola to prove her claim via lay witness. Since she had no supporting lay witness testimony, her case was properly dismissed.

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- June 27, 2012**    **Wellhofer/Wilinski Scholarship Picnic**  
2 – 7 pm Oak Tree Lodge, Wall Township  
Motorcycle Raffle Drawing
- October 4, 2012**    **NJLBA Cape May County Golf Tournament**  
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- Nov. 13-14-2012**    **NJLBA 80th Annual Convention**  
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