

STRATEGIZER 57



Reducing Alcohol-Related Harms
Through Commercial Host Liability

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I. INTRODUCTION



Excessive alcohol consumption causes 88,000 deaths in the U.S. annually—1 in 10 among working-age adults,¹—and it cost the U.S. \$223.5 billion in 2006.³ *Dram shop liability**, or commercial host liability, is a legal doctrine that allows injured parties to seek monetary damages from alcohol retail establishments that negligently provide alcohol to underage or intoxicated patrons who subsequently injure others. There is strong scientific evidence that commercial host liability is an effective strategy for reducing excessive alcohol use and related harms. This strategy is recommended by the Community Preventive Services Task Force to help achieve this goal.⁴

This *Strategizer* introduces public health departments, community coalitions and other interested organizations and individuals to commercial host liability as a public health intervention to reduce the health and social problems associated with excessive alcohol use. State and local public health departments, in particular, can improve community health and well-being by educating and informing partners on the implementation of evidence-based strategies to prevent and reduce alcohol-related harms, such as commercial host liability laws. This *Strategizer* is designed to provide important background information on this prevention strategy.

Background and Purpose

Excessive Alcohol Consumption is a Public Health Issue

Excessive drinking causes approximately 88,000 deaths per year in the U. S., including 4,300 among

CASE STUDY

Texas



Prior to 1983, Texas had no statutory or common law commercial host liability. The situation dramatically changed in 1983 and 1984 when Texas courts reversed previous rulings and recognized commercial host liability in the state for the first time. The reversal was based on lawsuits brought by victims of alcohol-related motor vehicle crashes against on-premises alcohol outlets, claiming that the outlets had negligently served obviously intoxicated patrons who had caused the crashes. Both cases received substantial media attention, including articles in major public newspapers and in the alcohol beverage industry press.

In 1991 Wagenaar and Holder² examined the effects of a sudden change in retailer exposure to commercial host liability on the frequency of injury-producing (both fatal and non-fatal) traffic crashes in Texas. They reported a 6.5 percent reduction in crashes immediately after the 1983 court case followed by an additional 5.3 percent decrease following the 1984 case. They attributed these reductions to the court decisions, suggesting that the cases had led to changes in serving and selling practices among retail establishments.

*“Dram shop liability” is a legal term that originated in the 19th century. Dram shops were retail establishments that sold distilled spirits by the “dram” – a liquid measure that equals one ounce. This guide uses the more current “commercial host liability” terminology.



persons under 21.¹ It is also closely associated with the three leading causes of death among persons ages 2 to 20: unintentional injuries (including motor vehicle crashes), homicide and suicide.⁵ Excessive alcohol consumption includes binge drinking, which is four or more drinks on one or more occasions for women and five or more drinks on one or more occasions for men; heavy drinking (8 or more drinks per week for women or 15 or more drinks per week for men); and any drinking by women who are pregnant or underage youth.⁶ For persons under age 21, purchase of alcohol is illegal in all 50 states, and alcohol use is the leading drug problem, more common than the use of tobacco or illegal drugs.^{7,8}

Binge drinking accounts for more than half of the alcohol consumed by adults in the U.S. and about 90 percent of the alcohol consumed by youth under the age of 21.^{9,10} Seventy percent of binge drinking episodes involve adults aged 26 years and older. It is most common among men, whites, 18-34 year olds, and people with household incomes greater than \$75,000 per year.¹¹ This dangerous behavior can lead to a range of health and social problems,

including unintentional injuries (e.g., automobile crashes and drowning), interpersonal violence, HIV infection, unplanned pregnancy, alcohol poisoning and Fetal Alcohol Spectrum Disorders.¹² Over time, excessive alcohol consumption increases the risk of alcohol dependence, cancer and high blood pressure, among other chronic conditions.¹³ However, 90 percent of adult binge drinkers are not alcoholics or alcohol dependent.¹⁴

Underage youth who binge drink are at additional risk of poor school performance and interrupted brain development.^{7,15} Early initiation of alcohol use is also associated with an increased risk of alcohol problems, including alcohol dependence, later in life.¹⁶ Taken together, problems resulting from excessive alcohol consumption constitute a major public health problem for individuals, families, communities and society at large. They also create huge economic costs: the direct and indirect costs of excessive alcohol consumption in 2006 were estimated to be \$223.5 billion.³ The reduction of excessive alcohol consumption is therefore a matter of major public health and economic concern.





TABLE 1:

**Community Preventive Services Task Force Recommendations for
Preventing Excessive Alcohol Consumption and Related Harms, August 2013**

Dram shop (commercial host) liability	RECOMMENDED
Increasing alcohol taxes	RECOMMENDED
Regulation of alcohol outlet density	RECOMMENDED
Electronic Screening and Brief Intervention (e-SBI)	RECOMMENDED
Maintaining limits on hours of sale	RECOMMENDED
Maintaining limits on days of sale	RECOMMENDED
Enhanced enforcement of laws prohibiting sales to minors	RECOMMENDED
Privatization of retail alcohol sales	RECOMMENDED AGAINST

**The Guide to Community Preventive Services
(The Community Guide)**

[The Community Preventive Services Task Force](#) (Task Force) systematically reviews scientific evidence on the effectiveness of population-based strategies to address public health problems, including excessive drinking, and recommends those strategies that are scientifically proven to save lives, increase lifespans and improve quality of life. Several policy interventions for preventing excessive alcohol consumption and related harms—including commercial host liability, increasing alcohol excise taxes, and regulating alcohol outlet density—have been reviewed and were subsequently recommended by this independent, nonfederal Task Force (Table 1). Summaries of these reviews may be found in the Excessive Alcohol Consumption Chapter on the Community Guide website (www.thecommunityguide.org/alcohol).

**Community Guide Findings on Commercial
Host Liability**

The Community Guide reviewed multiple research studies on the effectiveness of commercial host

liability and found that Dram Shop (commercial host) liability was associated with substantial reductions in alcohol-related outcomes, particularly deaths in alcohol-related motor vehicle crashes (median 6.4 percent reduction). The review also emphasized the need to study the possible effects of legal modifications to dram shop laws, such as the imposition of statutes of limitation, increased evidentiary requirements and caps on recoverable amounts.¹⁷

Based on these findings, the Community Preventive Services Task Force made the following recommendation:⁴

**The Task Force ... concludes
on the basis of strong evidence
that dram shop [commercial
host] liability is effective in
preventing and reducing
alcohol-related harms.**



In recognition of the importance of commercial host liability as a prevention strategy, the Centers for Disease Control and Prevention (CDC) has included this policy in its Prevention Status Reports (PSRs) on Excessive Alcohol Use. The PSRs highlight—for all 50 states and the District of Columbia—the status of public health policies and practices designed to address 10 important public health problems and concerns, including excessive drinking.¹⁸

Purpose of the Strategizers and Intended Audiences

Community Anti-Drug Coalitions of America (CADCA) has partnered with the Center on Alcohol Marketing and Youth (CAMY) at the Johns Hopkins Bloomberg School of Public Health to develop *Strategizers* to educate state and local public health departments and communities on strategies recommended by the Community Guide to prevent excessive alcohol use. The first collaborative effort focused on alcohol outlet density (Strategizer 55).

This *Strategizer* is intended to support state and community efforts to reduce excessive alcohol use by providing information and guidance on public health and legal strategies related to commercial host liability. Although state and local public health departments are the primary audience, this *Strategizer* is also designed to support the work of community coalitions on this intervention strategy. While community coalitions primarily operate at the local level, they have a history of state-level action focused on policy, including laws pertaining to commercial host liability.

II. THE ROLE OF STATE AND LOCAL PUBLIC HEALTH AGENCIES IN IMPLEMENTATION OF STRATEGIES RECOMMENDED BY THE COMMUNITY GUIDE

State and local health departments are uniquely positioned to educate and inform partners on

implementing the Community Guide recommendations to establish or strengthen state-level commercial host liability laws. For example, health departments generally focus on the health of populations, and are thus comfortable with the use of evidence-based policies to reduce key health risks, such as excessive drinking. They also have specific expertise that can inform the implementation of such policies, including:

- Expertise in public health surveillance and evaluation methods.
- Experience developing, implementing, and evaluating policy-based strategies (e.g., tobacco control and injury prevention).
- Ability to develop multisector efforts that effectively network, convene, and provide technical assistance to other organizations.
- Ability to oversee a strategic planning, implementation, and evaluation process.

As discussed later in this *Strategizer*, addressing commercial host liability requires active public health surveillance, including the systematic collection, analysis and interpretation of data on the health impacts of excessive consumption. State and local health departments employ epidemiologists with expertise in public health surveillance. A growing number of states are specifically hiring alcohol epidemiologists with the subject matter expertise to work with public health programs and community coalitions to perform these assessments.

State and local public health departments are also well-positioned to coordinate and convene state and local efforts to address excessive alcohol consumption, including strategic planning and program planning, implementation, and evaluation about the health effects of decreasing the sale of alcohol to intoxicated patrons and minors. This process is complex and requires building support and coordinating the activities of numerous public and private partners.



State and local health departments also have experience leading other community health promotion initiatives, such as tobacco control and promoting healthy eating and active living, while collaborating with state and local coalitions. By working with community coalitions and other partners, health departments can support the implementation of Community Guide-recommended strategies.

III. KEY DIMENSIONS, HISTORY AND STATUS OF COMMERCIAL HOST LIABILITY

What is Commercial Host Liability?

Commercial host liability is grounded in a basic principle of American jurisprudence called tort liability: A party whose intentional, reckless or negligent actions causes harm to another may be required to compensate the injured party. Commercial host liability is a form of tort liability. If recognized by a state, alcohol retailers are potentially liable for alcohol-attributable harms (e.g., an alcohol-related motor vehicle crash death) caused by a patron who was illegally served alcohol when the patron was either intoxicated (adult liability) or underage (underage liability) at the time of service. On-premises retailers (e.g., bars, restaurants) and off-premises retailers (e.g., liquor stores, convenience stores) may be held liable.¹⁹

Congress and state legislatures can establish the parameters of tort liability, including commercial host liability, using numerous, often complex rules for when, how, and how much compensation is permitted. This is termed “statutory liability.” In the absence of legislative guidance, courts are able to establish these rules through their “common law” powers. Common law refers to the inherent powers of courts, absent legislative guidelines, to resolve claims between parties for damages on an equitable basis. Commercial host liability can therefore be based on either statutory provisions or common law jurisprudence.¹⁹ States are primarily responsible for determining if commercial host

liability exists in their jurisdictions; federal law plays a role only when alcohol sales occur on federal lands, and local governments have no authority to contradict or augment state law.

Tort liability comes into play only when the injured party chooses to bring a lawsuit (tort claim) against the person causing the injury. The state provides the forum and the rules for resolving the dispute but otherwise does not take a proactive role in the process. The person suing the alcohol retailer (the plaintiff) receives compensation from the retailer based on a jury’s determination of damages. The state does not receive any fees and does not impose any fines or other penalties as part of the process (although the state may impose penalties in separate proceedings based on the underlying illegal behavior).^{19,20}

History of Commercial Host Liability

The Temperance Movement promoted the first commercial host liability statutes in the mid-19th century as a tactic to highlight the saloon’s adverse role in profiting from habitual drunkards to the detriment of family life. The statutes typically had limited scope, went into disuse during Prohibition and were repealed or largely ignored after Prohibition ended. Until the 1960s, the courts generally adhered to the “old” common law rule that protected alcohol retailers from liability for the injuries caused by their underage and intoxicated patrons. Under that rule, the drinker causing the injury was a “superseding” or “intervening” cause of the injury, and was considered entirely responsible for any resulting harm, overriding any negligent behavior by the server.²⁰

Beginning in the 1960s, state courts started rejecting the superseding cause principle and began implementing a “new” common law rule that imposed a duty on both the patron and the retailer to protect the public from harm and allowed both to be held liable. This shift in jurisprudence may have reflected the gradual erosion



of the pre-Prohibition view that drunkenness was a moral failing and that the drinker needed to be held solely accountable for his/her actions to encourage behavioral change. The shift may also reflect the courts' concern that injured plaintiffs may be unable to obtain adequate compensation from the drinker causing the harm. Many courts have concluded as a matter of fairness that an innocent victim who is unable to recover compensation from the drinker (e.g., because the drinker lacks adequate funds or insurance) should not have to bear the burden of the injury when the retailer acted in a negligent and illegal manner that contributed to the harm. Following adoption of the new common law rule, many state legislatures enacted statutes (thus substituting statutory liability for common law liability) that limit the scope of the courts' rulings and establish barriers to plaintiffs seeking compensation.^{19,20}

How Commercial Host Liability Laws Work to Reduce Public Health Harms

The new common law rule on commercial host liability (described in the paragraph above) has had a powerful impact on the alcohol retail industry, as documented by the Community Preventive Services Task Force review of the research evidence.^{4,17} All states prohibit selling or providing alcohol to minors, and all but three states (Florida, Nevada and Wyoming) prohibit sales to obviously intoxicated persons.^{7,21} Violation rates are generally high, enforcement is weak, violations are seldom prosecuted and when they are, penalties typically involve fines or short suspensions.^{7,21} This is particularly true of violations of laws prohibiting sales to obviously intoxicated adults.²¹ Nonetheless, states that adopted the new commercial host liability common law rule substantially raised the stakes for violating these laws; commercial host lawsuits can result in multimillion dollar verdicts, and can threaten the continued operation of a retailer's business. Retailers are therefore encouraged

to take steps that reduce the likelihood of sales and service to intoxicated or underage patrons, reflecting the deterrent effect of the law.

Commercial host liability may also encourage retailers to adopt responsible beverage service (RBS) programs and practices. In 1985, the National Institute on Alcohol Abuse and Alcoholism funded the development of a model commercial host liability law (Model Law) to enhance the health benefits of commercial host liability.²² The Model Law relied on the new common law rule, and featured a RBS practices affirmative defense. RBS practices include instituting effective identification checks, training staff on identifying signs of intoxication, discontinuing marketing practices that encourage intoxication (e.g., drink specials), hiring security staff and other management policies and staff practices. If a retailer can show that RBS practices were adhered to at the time of alcohol service to an underage or intoxicated patron, this affirmative defense can protect the retailer from liability. The RBS affirmative defense's underlying purpose is therefore to expand the role of commercial host liability so that it promotes more responsible business retail practices, standardizes those practices and, in turn, promotes public health prevention and compensation to victims negatively impacted by illegal sale violations.²²

Many states now mandate or encourage retailers to participate in programs that train managers and staff in RBS practices.^{23,24} Research has shown inconsistent public health outcomes due to variability in research design, program quality and implementation of RBS training curricula.²⁵ This led the Community Prevention Services Task Force to conclude that there is "insufficient evidence to determine the effectiveness of responsible beverage service training programs for reducing excessive alcohol consumption and related harms at the community level."²⁵ The Model Law addresses these weaknesses to some degree by



limiting the RBS practices affirmative defense to cases where the retailer shows that RBS standards were actually implemented.²²

Commercial host liability thus serves as a deterrent to illegal and negligent retail practices that increase the likelihood of patron intoxication and youth access to alcohol, and may encourage retailers to adopt RBS practices which in turn reduce alcohol problems. The impact on alcohol-related motor vehicle crashes is not surprising. As noted above, binge drinking rates are high, and more than 85 percent of alcohol-impaired driving episodes involve binge drinkers.²⁶ Furthermore, according to a recent CDC study, most binge drinkers (54.3 percent) who reported driving after their most recent binge drinking episode drank in an on-premises retail alcohol establishment (i.e., a bar, club, or restaurant).²⁷

Current Status of Commercial Host Liability Law

States vary widely on the extent to which they recognize commercial host liability. As more state courts adopted the new common law rule, many state legislatures began enacting statutes to rescind or limit the courts' action.¹⁹ Three types of limitations are particularly prevalent:

1. Increased evidentiary requirements for finding liability. Many states now require injured parties to provide additional evidence of

wrongdoing by the retailer beyond what is required in standard common law cases. These requirements fall into three categories:

- a. Increased burden of proof:* Under common law, the plaintiff must show wrongdoing by the preponderance of the evidence, i.e., the evidence shows that it is more likely than not that the wrongdoing occurred. Some states now impose a stricter standard, such as beyond a reasonable doubt.
- b. More egregious behavior on the part of the retailer:* As noted above, under common law, the retailer must be shown to have acted negligently. Some state statutes require the plaintiff to show that the retailer acted recklessly or intentionally.
- c. Additional elements of proof:* Some states have restricted liability to only certain types of events. For example, in California, liability is allowed only if the retailer serves an obviously intoxicated minor.

2. Limitations on damage awards. Seven states limit what injured parties can recover by establishing a damage cap, which ranges from approximately \$60,000 (Illinois) to \$1 million (Utah). These caps can discourage viable claims because of the high cost of litigation.

3. Restrictions on who may be sued. Some states exempt off-premises alcohol retailers that are selling alcohol for consumption at another location. Texas has a unique law that permits liability only if the server is 21 years or older and serves a minor 18 years or younger.¹⁹

Adoption of these restrictions can undermine the effectiveness of commercial host liability in reducing public health problems.^{4,17} (Note that additional restrictions may exist in states that recognize liability in addition to the three types described here.)

Table 2 provides a breakdown of the status of commercial host liability in the 50 states and D.C.



TABLE 2:

Commercial Host Liability Status: 50 States and District of Columbia (1/1/2011)¹⁹

Type Of Liability	Liability: No Major Restrictions	Liability: 1 Or More Restrictions	No Liability
Furnishing minors	29	16	6
Furnishing intoxicated adults	22	16	13

States are much more likely to recognize commercial host liability in cases involving service to minors than service to intoxicated adults. Twenty-two states recognize both forms of liability without major restrictions. The CDC'S prevention status reports provide a state-by-state overview of commercial host liability status.¹⁸

Six states include an RBS affirmative defense provision.¹⁹

IV. THE ROLE OF PUBLIC HEALTH SURVEILLANCE

Effective implementation of a commercial host liability strategy should begin with robust public health surveillance on excessive alcohol consumption and related harms. These surveillance activities should include measurement of the extent to which alcohol problems are emanating from retail establishments. As previously noted, state and local health departments are well-positioned to lead these measurement activities because of their expertise in epidemiology, including the development of measurement tools for assessing population health status, and their expertise in assessing environmental factors, such as the role of alcohol retail establishments in drinking driving incidents and other alcohol-related harms. States are increasingly hiring alcohol epidemiologists with expertise in the assessment of excessive alcohol consumption and related harms, who can work with public health programs and community coalitions to measure excessive alcohol

consumption and the community factors and policy environments that may be contributing to it.

Measuring Excessive Alcohol Consumption and Related Disease Impacts

With support from the Robert Wood Johnson Foundation, the CDC developed the Alcohol-Related Disease Impact (ARDI) application, available at www.cdc.gov/ardi, which allows users to access state and national estimates of deaths and years of potential life lost from excessive alcohol use. It also allows users to perform custom analyses, such as by location or among specific racial or ethnic groups. Working in collaboration with the Council of State and Territorial Epidemiologists and the National Association of Chronic Disease Directors, the CDC has also developed a cross-cutting set of Chronic Disease Indicators (CDIs) to help guide state and local public health surveillance on a number of chronic conditions and their risk factors, including excessive alcohol consumption. The alcohol-related measures, including binge drinking among adults and among youth, provide a good starting point for public health surveillance on excessive alcohol consumption and related harms. More specific measures of binge drinking, such as the frequency (i.e. number of binge drinking occasions) and intensity (i.e., number of drinks per binge) of binge drinking episodes are also available by state at <http://www.cdc.gov/cdi/>. These tools and resources can help define the public health problem of excessive alcohol use in states and communities and provide a foundation for implementing effective prevention strategies to reduce excessive alcohol use.



Measuring the Link between Alcohol Retail Practices and Public Health Harms

Commercial host liability addresses the impact of unsafe alcohol retail practices on adverse public health outcomes that were caused by excessive alcohol use, including underage and binge drinking. Specific public health surveillance measures that could be useful for characterizing excessive alcohol use and related harms as well as the link between these outcomes and alcohol retail practices include the following:

- Alcohol-related harms associated with underage and binge drinking (e.g., alcohol-attributable deaths and years of potential life lost);
- Prevalence, frequency and intensity of binge drinking among adults and youth;
- Drinking location, intensity and driving after drinking among adult binge drinkers;
- Number, type and location of alcohol retail outlets in communities;
- The locations where alcohol was purchased and/or consumed prior to specific adverse alcohol-attributable harms, such as motor vehicle crashes (i.e., place of last drink).

Ideally, these measures should be assessed at the state and local levels to assess differences in alcohol-attributable harms, drinking patterns and alcohol availability.

Data Sources

Data on alcohol-attributable harms can usually be obtained from surveys, hospitals and law enforcement agencies. The focus should be on acute harms associated with underage and binge drinking, including alcohol-related motor vehicle crashes, alcohol-related crash injuries and alcohol-related crime and violence, including, but not limited to, fights, intimate partner violence, sexual assaults and child maltreatment.

Measures of binge drinking and underage drinking can generally be obtained using state-based surveys, such as the Behavioral Risk Factor Surveillance System (BRFSS) and the Youth Risk Behavior Surveillance System. As previously mentioned, a number of core public health surveillance measures on alcohol consumption (e.g., binge drinking among adults) are also included in the CDIs (www.cdc.gov/cdi). More specific



information on drinking by binge drinkers (e.g., drinking location and driving after binge drinking) can be obtained from an optional module of questions on binge drinking that some states have included in their state BRFSS.

Alcohol outlet information can usually be obtained from the state's Alcoholic Beverage Control (ABC) agencies, or local police departments. However, these data systems can vary considerably across states and communities, which can affect the type of information that is available on retail alcohol outlets (e.g., whether it is possible to differentiate between on-premises alcohol outlets, such as bars and restaurants and off-premises alcohol outlets, such as liquor and grocery stores). More challenging is identifying the location where alcohol was purchased or consumed prior to alcohol-attributable incidents (e.g., motor vehicle crashes or violent events). Potential sources include:

- **Local and state law enforcement agencies.** For harms occurring at the retail establishment itself, local police incident reports can provide the location and type of harm. For harms occurring at locations other than the retail establishment where alcohol was last consumed, it may still be possible to obtain information on the “place of last drink”. However, the availability of this information varies by state. According to the National Liquor Law Enforcement Association, the alcohol law enforcement agencies in 12 states routinely collect these data.[†] However, other state and local law enforcement agencies may be collecting these data as well.
- **Courts, probation departments and alcohol-impaired driving offender programs.** Some communities and states conduct interviews with persons who have been convicted of alcohol-impaired driving, which could include questions on the location where they were drinking prior to their arrest.

[†] Connecticut, Delaware, Hawaii, Massachusetts, New Hampshire, New Jersey, Oklahoma, Oregon, Pennsylvania, Texas, Vermont, Washington. (Personal interview, R. Ramirez, Executive Director, National Liquor Law Enforcement Association.)

- **State ABC agencies.** Many state ABC agencies investigate the drinking location of underage alcohol-impaired drivers after serious crashes.
- **Emergency medical response teams and hospital emergency room departments.** An additional source of place of last drink data is from the emergency medical response system as part of the intake process.

Alcohol epidemiologists in health departments can also help state and community leaders to assess the availability of these data and identify ways to assess the potential link between alcohol retail service practices and alcohol-related harms. Geographic information system mapping provides an excellent resource for understanding, managing, interpreting and visualizing place of last drink data.[‡]

Using Qualitative Data

Survey and archival data do not tell the whole story about the impact of alcohol retail practices on public health outcomes. Putting a face to the harms helps deepen an understanding of the multiple causes and consequences of alcohol-attributable harms. This is accomplished through the collection of qualitative data, including the compilation of reports of particular incidents and their effects on individual citizens. Qualitative information makes problems concrete, understandable and promotes support for efforts to “fix the problem.”

Qualitative data can be collected systematically, through structured interviews, focus groups and case study methodologies, or more informally, by collecting individual stories that illustrate particular problems associated with outlets that over-serve patrons. For example, when a serious alcohol-related crash occurs, it is important to determine whether the driver was drinking at an on-premises establishment or whether a minor purchased alcohol at an off-premises establishment prior to the crash. If so, investigating and

[‡]. See *Strategizer 55: Regulating Alcohol Outlet Density*, available at http://www.camry.org/action/Outlet_Density/index.html.



publicizing the problem serving and selling practices of the establishment can highlight the need for commercial host liability reform. Photo-voice is another tool for using photographs to tell a story. Photos can be a valuable community tool to reflect visually the local issues related to commercial host liability.

Qualitative data can be gathered by and from:

- Residents who live near retail alcohol outlets that are known to have been responsible for community problems as a result of their serving practices.
- Law enforcement personnel who respond to problems occurring at alcohol outlets;
- Emergency room staff or emergency medical services staff who respond to alcohol-related injuries resulting from excessive drinking at retail alcohol outlets;
- Parents, teachers, school administrators and others who are familiar with the impact of alcohol outlets on young people;
- Young people who can speak about how alcohol outlets affect their beliefs about whether and how much alcohol consumption is appropriate to consume (e.g., the acceptability of drinking to get drunk) and who can be particularly powerful change agents;
- Law-abiding alcohol retailers who are adversely affected by other alcohol retailers who sell alcohol to minors or intoxicated patrons;
- Other businesses that are adversely affected by illegal alcohol service (e.g., service to intoxicated patrons) in the vicinity of their business.

V. CONSIDERATIONS ASSOCIATED WITH COMMERCIAL HOST LIABILITY AS A PUBLIC HEALTH INTERVENTION

Commercial Host Liability is Established at the State Level; Local Governments Cannot Establish or Alter Commercial Host Liability

Commercial host liability law is exclusively in the domain of the state courts and legislatures, and local governments are not able to deviate from state decisions. Decision-makers, including state legislatures and administrations, may need to be educated on the evidence base for implementing commercial host liability as an effective strategy for preventing excessive alcohol consumption and reducing alcohol-related harms.

Commercial Host Insurance's Potential Role in Promoting RBS Practices

Most alcohol retail establishments carry liability insurance to protect themselves from commercial host claims. Insurance companies can base their premiums on risk assessments of the insured establishments, giving discounts for adoption of RBS practices.²⁸

Lack of Familiarity with the Public Health Benefits of Commercial Host Liability

Although many working in the public health field or with community coalitions may have heard of commercial host liability, knowledge of how the law works is rare, and commercial host liability claims are relatively uncommon. Greater awareness of the public health benefits of commercial host liability laws is therefore an important first step toward implementation.

Commercial Host Liability Laws Do Not Generate Financial Resources for Public Health

Generating support for implementing evidence-based policy solutions may be easier when the proposed policy solution raises revenue for public health or other programs (e.g., earmarked alcohol taxes or alcohol outlet density ordinances that include fees for enforcement and implementation). Commercial host liability, by contrast, does not generate revenues for public programs. The financial beneficiaries of commercial host liability laws are the victims of alcohol-related injuries and the attorneys assisting the victims.



VI. UNDERSTANDING COMMERCIAL HOST LIABILITY IMPLEMENTATION: EXAMPLES FROM THE FIELD

Introduction

As noted in section II, both state courts and state legislatures have been active in previous decades in shaping commercial host liability policies across the country. As discussed above, during the 1970s and 1980s, many courts used their common law authority to recognize and expand commercial host liability. In contrast, during the 1990s and 2000s, many state legislatures imposed restrictions on the courts' decisions on commercial host liability. Today, all but six states have some form of commercial host liability, a dramatic increase since the 1960s, when very few states recognized this form of tort liability, but many states still have major limitations to these policies.

This history provides a rich set of examples for public health professionals to learn how commercial host liability is implemented and understand barriers to the implementation of this evidence-based prevention strategy. This section of the *Strategizer* provides a few brief case histories to help illustrate some of the issues involved in implementing this evidence-based policy strategy.

Understanding the Status of Current Commercial Host Liability Law

Since states vary widely in the extent to which they recognize commercial host liability, it is important to conduct an in-depth assessment of each state law prior to engaging in future work on the implementation process.

There are generally three stages of implementation. They include the following:

- Not implemented: The state does not have a policy that includes key components that maximize its public health potential.

- Partial implementation: The state's existing commercial host liability law imposes restrictions that undermine its effectiveness from a public health perspective.
- Full implementation: The state has an effective commercial host liability law, and implementation involves preserving the effectiveness of the policy for maximum public health impact.

As previously discussed, the CDC has included commercial host liability in the PSRs on excessive alcohol use, providing a green/yellow/red designation to the status of the policy for each state.¹⁸ The PSRs include an overview of the policy, the basis for the ratings and a list of resources for further information. However, if a state recognizes commercial host liability with major restrictions (partial implementation, a yellow designation in the PSRs), additional research will be necessary to identify the specific limitations of the law for achieving maximum public health impact. Two federally funded research reports provide background for understanding the most prevalent restrictions found in commercial host liability laws: *The Report to Congress on the Prevention and Reduction of Underage Drinking* (underage liability only) and a journal article that addresses both underage and adult liability.^{7,19}

Commercial Host Liability Laws that Adhere to Public Health Best Practice May Be Difficult to Reform

The Nebraska case study (see pg. 17) represents the only successful commercial host liability legislative effort since 1990, and as the case study illustrates, it only enacted underage liability. Adult liability and the RBS defense proposals were both stripped from the bill before passage, and later efforts to expand the law were not successful. Public health proponents proposed reforms in numerous states during this period without success. In Nevada (see pg. 18), for example, the



relevant legislative committee amended the relevant bill to codify the state's policy not to recognize commercial host liability.

Public Health Departments and Researchers Can Play an Important Role in Educating Decision-Makers on Commercial Host Liability as an Effective Strategy

As discussed in section II, public health departments have an important role in the implementation of commercial host laws, particularly in their surveillance and research functions, including monitoring legislative proposals. Public health departments can educate on evidence-based strategies to reduce excessive alcohol use and related harms, particularly regarding relevant surveillance data and policy research. The Maryland (see pg. 19), Nebraska and Nevada case studies illustrate the importance of these data in framing arguments in support of commercial host liability laws as an effective strategy to reduce excessive alcohol use and related harms. In Nebraska, proponents cited public health surveillance data in their testimony as part of a successful effort to enact a commercial host liability law. In Maryland, proponents included specific reference to the Task Force on Community Preventive Services' findings and recommendations in their briefs to the state's highest court. In Montana (see pg. 20), by contrast, no public health groups attended the legislative hearing considering a bill to restrict the state's law; hence public health surveillance data and research reports were not presented to the committee, which overwhelmingly supported the restrictive bill. The important role of public health can be enhanced through establishing communication and collaboration with other stakeholders and partners, including community groups.

Consider a Step-by-Step Approach to Implementation

The Nebraska and Nevada case studies illustrate a step-by-step approach to implementing a

comprehensive commercial host liability policy. In Nebraska, those supporting reform accepted as a first step underage liability, seeking legislation in later sessions to expand the law to include adult liability and a RBS affirmative defense. In Nevada, proponents decided to promote social host liability reform when their efforts at commercial liability reform were thwarted. Although commercial host liability was not implemented, their efforts did result in positive results from a public health perspective.

Understanding Barriers to Implementation of Commercial Host Liability as a Public Health Strategy

Constituencies that Support Commercial Host Liability Tend to be Limited to Victims' Rights Groups and Trial Lawyers Associations

As observed in Nebraska, Nevada, and Maryland, the most ardent supporters for commercial host liability have been victims of motor crashes, particularly those who were injured (or whose loved ones were injured) as a result of illegal and reckless service to minors or intoxicated adults by alcohol retailers. Mothers Against Drunk Driving (MADD) is usually the primary advocacy group representing this constituency. Trial lawyers and their professional associations are also a powerful lobby group at both the state and federal level.²⁹ They support legislation that protects and expands victims' rights to recover damages through civil litigation, including commercial host liability laws. State trial lawyer associations generally support legislation that expands tort liability, including commercial host liability, because of their membership's financial interest in representing those who have been injured seeking damages from the persons or entities causing the injuries. They can play an important role in educating legislators regarding its importance in preventing public health harms, although they may not be effective as public spokespeople on behalf of public health because of their perceived conflict of interest.

CASE STUDY

Nebraska



Nebraska enacted a new commercial host liability statute (for service to minors, excluding liability for service to intoxicated adults) in 2007. The campaign was led by Senator Lowan Kruse, a retired pastor whose own son had been paralyzed decades earlier by an underage drinking driver. Senator Kruse introduced LB 573, which originally included both underage and adult liability, as his priority bill for that legislative session. The judiciary committee dropped adult liability and an RBS defense provision from the bill. The full legislature unanimously passed the amended bill, which became known as the Minor Alcoholic Liquor Liability Act.^{30,31}

Supporters of the bill included the Nebraska Trial Attorneys Association, organizations that addressed underage and excessive alcohol consumption (Project Extra Mile, Nebraskans for Peace, and the Nebraska Council on Indian Affairs), victims' families and a representative of the Winnebago Indian Tribe. Associations representing restaurants, liquor stores, grocers and convenience stores as well as the Nebraska Retail Federation opposed the bill.³² The Nebraska Restaurant Association took credit for having the intoxicated adult provision removed from the bill.³³

Proponents' testimony included reviews of surveillance data highlighting the social harms of alcohol and reviews of relevant research findings regarding the public health benefits of commercial host liability laws. Opponents' testimony focused primarily on the unfairness

of commercial host liability laws, the adverse economic impact on alcohol retailers and resulting harm to the state's economy, increases in insurance costs and the vested interests of trial attorneys.^{30,34}

Previous efforts to implement commercial host liability (most recently in 2005) had failed. Senator Kruse acknowledged in an interview that the success of the bill benefited from his personal story of loss and pain, his support and work on a broad range of issues beyond alcohol and the growing public sentiment of support for getting tough on alcohol-impaired driving. As the former senator noted, "The law is an expression of consensus, and by that time, the public consensus had grown quite a bit."³⁵ He also attributed the bill's success in part to the increased support among grass roots groups.³⁵ In particular, adding the nontraditional voices of those working with and within the Native American communities brought a new layer of support.

Senator Kruse, who left the legislature the following year, stated that he was confident that the passage of LB 573 was just a first step toward full implementation of commercial host liability in Nebraska.³⁵ The coalition supporting full implementation found a new sponsor for the bill in 2010 and 2011. However, the re-introduced bill did not receive priority status, and, as a result, it did not make it out of the relevant legislative committee and was never considered by the full legislature.³⁴



The case studies also illustrate the types of groups that might support commercial host liability policies, including law enforcement groups, the faith community, the non-profit sector, state and local prevention coalitions and children's and parents advocacy groups. In Nebraska, representatives of Native American constituencies were important members of the coalition, adding additional authentic voices to the proponents' public health arguments regarding the need for policy change. It may be difficult for these groups to participate in state legislative hearings due to limited resources and lack of experience in the state legislative process.

Commercial Host Liability Policies May Face Strong Opposition

All of the case studies highlighted stakeholders who opposed commercial host liability. In each case, constituencies opposing commercial host

liability laws organized coalitions that worked effectively to either advance legislative proposals to weaken the potential public health impact of existing laws or defeat proposals to enact new laws or strengthen existing laws. The opposing coalitions may have access to key legislators; for example, in the Montana case study, the sponsor of the legislation had a financial stake in the alcohol industry. The opposing coalition typically includes a variety of business groups (such as the state's chamber of commerce) in addition to alcohol retailer associations. Retailers may span a wide array of businesses: grocers, liquor stores, convenience stores, gas stations, bars, restaurants, bed and breakfast establishments, hotels and motels and catering businesses, among many others. Even groups not normally associated with the alcohol retail industry may have a vested interest in opposing commercial host liability reform. For

CASE STUDY

Nevada



The Nevada Supreme Court has consistently adhered to the old common law rule, stating any changes in commercial host liability law should come from the state legislature, not the judiciary.³⁶ In 1995, Mothers Against Drunk Driving supported a legislative effort to adopt commercial host liability and testified at an initial hearing on the bill.³⁷ Representatives from the Nevada Resort Association testified against the bill and submitted a proposed amendment to the bill that would codify the state Supreme Court decision that commercial host liability should not be recognized. The legislature ultimately enacted the Nevada Resort Association's proposed amendment.³⁷

Proponents shifted their strategy a decade later, deciding to propose underage social host liability and exempting retailers. Underage social host liability applies to noncommercial alcohol service to minors; for example, by adults supplying alcohol for underage drinking parties. The 2005 bill did not pass but was reintroduced in 2007. Testimony at the judiciary committee hearing in favor of the bill included extensive and well-prepared recitals of public health surveillance data by both proponent groups and governmental agency representatives.³⁸ There was no formal opposition to the bill, which easily passed.³⁹

CASE STUDY

Maryland



In 2011, Delegate Kathleen Dumais of Rockville introduced a bill that would have held alcohol vendors and servers civilly liable for serving underage patrons or noticeably intoxicated adults who then kill or injure someone, or damage property while driving drunk. The bill never made it past a House of Delegates committee.⁴⁰

The Maryland Court of Appeal (equivalent to other states' Supreme Court) decided a high-profile commercial host liability case in 2013 involving a drinking driving crash that resulted in a child fatality. The person causing the crash had been served twenty-one drinks at the defendant bar over a 6-hour period, becoming violent and aggressive. He left the bar in his car driving at high speed, colliding with another car and killing a young child. The court, in a 4-3 decision, overruled a lower court decision that imposed liability. It instead adhered to the old common law rule, refused to impose liability, and concluded that any changes in commercial host liability law should come from the Maryland legislature.⁴¹ The dissenting opinion, relying in part on epidemiological data and the Community Preventive Services Task Force's findings and recommendations, strongly disagreed. Both Mothers Against Drunk Driving and a trial lawyers' group filed Amicus briefs in the case that provided the dissenting justices with the public health data.⁴²

The case received extensive press coverage in both the popular and industry press in part because the child's grandfather, a reverend, became an impassioned spokesperson on behalf of his family.⁴³ Press coverage also included references to the Task Force findings and recommendations.⁴⁴

example, in Montana, a higher education representative was a member of the opposing coalition, reflecting the fact that many universities are engaged in alcohol sales at institutional events, even though commercial host liability may be an effective strategy to reduce alcohol-related harms among college students, particularly those who are underage.

A State's Judiciary may be Insufficient to Implement and Maintain Strong Commercial Host Liability Policies

It is tempting for public health professionals and advocates in states without commercial host liability to rely on the state courts to use their common law authority and institute the policy without the need for a legislative effort. After all, this is precisely how the policy was instigated in many states.

As the case studies illustrate, however, this approach has pitfalls. In Maryland, public health advocates generated considerable press and anticipation prior to a major case before the state's highest court was decided. Disappointment ensued when the court declined to impose commercial host liability. The Nevada Supreme Court has repeatedly held to the old common law rule and will not impose commercial host liability without legislative action. The Montana case study highlights another common pattern: Even when the courts do institute the policy, legislative action may partially reverse the court decision, often shortly after the court has made its ruling. Although a state's judiciary may be supportive of commercial host liability, the state legislature is the most likely forum for determining the ultimate status of the policy.

CASE STUDY

Montana



The Montana Supreme Court recognized common law commercial host liability in 1986, overruling previous case law.⁴⁵ The Montana legislature codified the Supreme Court's decision in 1989, creating a statutory basis for liability limiting the court's opinion, although maintaining the key elements of a common law claim.⁴⁶ In 2003, the legislature enacted another amendment to the statute, adding a low damage cap (\$250,000) among other limiting provisions, making claims less likely to succeed.⁴⁶ The legislator introducing the bill noted in his statement to the committee conducting a hearing on the bill that "he and his family have been in the liquor business for many years."⁴⁷ Proponents included the Montana Tavern Association, Montana Beer and Wine Wholesalers Association, Montana Innkeepers Association, the Montana Chamber of Commerce, representatives from the insurance industry, a representative of the Montana University System and several individual alcohol retail businesses.⁴⁷ Proponents characterized the amendment as a balanced, common sense approach to the issue, providing technical revisions that addressed problems with current law. They highlighted a legal case that illustrated their contention that commercial host liability created unfair verdicts for alcohol retailers.

The sole opponent at the legislative hearing was the Montana Trial Lawyers Association, whose spokesperson spoke briefly in opposition. Public health, safety and victims' groups were absent, and there was no discussion about the adverse health and safety impact of illegal service of alcohol to minors and intoxicated adults or the effectiveness of commercial host liability as a strategy for reducing excessive alcohol use and related harms. Only one news report about the legislative action could be found from online sources, and this appeared after the legislation was passed by an overwhelming majority.⁴⁸ A recent law review article proposed sweeping revisions to the statute to make it more effective, relying in part on public health surveillance data and the Community Preventive Services Task Force's findings and recommendations.⁴⁶

Changes to Legislation may Undermine Public Health Effectiveness

As noted above, many state legislatures have enacted legislation to seriously undermine the public health effectiveness of their state's commercial host liability law. As the Montana case study suggests, the legislatures can act with relatively little public awareness and without taking into consideration the public health impacts involved. Public health officials can establish a routine mechanism to monitor their state legislatures' proposed alcohol policy legislation as a first step in addressing this problem. As part of this

monitoring process, they may have opportunities to educate legislators on evidence-based strategies to prevent excessive alcohol use and related harms, including commercial host liability, by working across equivalent branches of government within boundaries of normal and recognized executive-legislative relationships.

In many cases, input into the legislative process must occur with short notice, as many state legislatures have established fast-track procedures for handling proposed legislation that is viewed as technical or noncontroversial and has the backing of well-financed constituency groups.



VII. CONCLUSION

The Community Preventive Services Task Force has recommended commercial host liability based on strong scientific evidence that this strategy can help reduce alcohol-related harms, particularly alcohol-related motor vehicle crashes and fatalities. While most states have some form of commercial host liability, some states do not recognize this legal doctrine and many others have adopted legislation that limits its scope, thereby reducing its potential public health impact. Therefore, commercial host liability in states represents an important public health policy strategy for reducing excessive alcohol use and related harms. Recent state experiences with commercial host liability also provide important lessons learned that can help other states and communities that are interested in fully implementing this evidence-based policy strategy. Some of these lessons learned include the following:

- Victims' groups, particularly MADD, and state trial lawyers' associations can be important partners.
- Broadening the support for commercial host liability as a public health intervention can improve the chances of it being fully implemented at the state and local levels.
- Organized coalitions have been successful in weakening existing commercial host liability laws and opposing proposals to strengthen them.
- The surveillance, monitoring and research functions of state and local health departments provide important data for constituency groups seeking reform of commercial host liability. Collaboration and ongoing communication between public health professionals and other constituency groups, such as community coalitions, is critical in order for public health data to be effectively used to inform discussions of commercial host liability.



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ABOUT CADCA

CADCA (Community Anti-Drug Coalitions of America) is a national membership organization representing over 5,000 coalitions and their affiliates working to make America's communities safe, healthy and drug-free. CADCA's mission is to strengthen the capacity of community coalitions by providing technical assistance and training, public policy and advocacy, media strategies and marketing programs, conferences, and special events.

ABOUT CAMY

The Center on Alcohol Marketing and Youth (CAMY) at the Johns Hopkins Bloomberg School of Public Health monitors the marketing practices of the alcohol industry to focus attention and action on industry practices that jeopardize the health and safety of America's youth. Reducing high rates of underage alcohol consumption and the suffering caused by alcohol-related injuries and deaths among young people requires using the public health strategies of limiting the access to and the appeal of alcohol to underage persons.

This publication is part of CADCA's *Strategizer* series. *Strategizers* offer concise, proven solutions to issues facing coalitions. Designed to provide step-by-step guidance, *Strategizers* range in topics from how to start a coalition, advocacy, getting the faith community involved, youth programs, conducting evaluations to reducing underage drinking, prescription drug abuse prevention, the myths of marijuana, effective prevention strategies, and community mobilization. To order copies, visit www.cadca.org or send an e-mail to editor@cadca.org.

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