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FAKE IDs: CAN BAR OWNERS SUE IF THEY GET FOOLED?

I. INTRODUCTION

It is an annual occurrence toward the end of each summer. Parents across the country send their fresh-faced children off to college, anxious and hopeful that their kids are ready for exposure to a whole new world. The parents wonder if their children can handle the academic rigors of college and whether they will fit in amongst a new group of people in an unfamiliar place. It can be a trying time for these parents, as the prospect of their youngsters growing up and leaving home becomes a reality.

The children, meanwhile, typically have a similar anxiety, but that anxiety may be more focused on the uncertainties of their college social life rather than academic achievement. Without mom and dad to supervise them, they imagine the possibilities of parties, joining fraternities and sororities, and going out on the town as key components of the college experience. Within weeks they understand that in order to take part in many of these “essential” college activities, there is one thing that they need to obtain: a fake identification (“ID”) card.¹

With hordes of underage kids coming to this realization, there has been a boom in the fake identification market,² as well as an increasing awareness of the fake identification problem by both alcohol providers, who are required to obtain proof of age, and law enforcement officials.³ In Part II, this Comment discusses the explosion of fake identification use among minors, the industry it has created, and measures that have been taken to prevent the creation and use of “fakes.” Part III reviews early case law concerning the use of fake identification and its effect on alcohol providers, and Part IV examines a possible shifting of liability from alcohol providers to the minors in underage drinking cases. Finally, Part V explores a recent case that may signal a change in the relationship between alcohol provider and underage drinker.

1. The terms “fake identification,” “fake ids,” and “fakes” are synonymous within this Comment and are used interchangeably.

2. See *infra* Part II.A.

3. See *infra* Part II.B.

Specifically, this Comment will address whether an alcohol provider may have an action against a minor that has used fake identification to obtain admittance or alcohol where proof of legal age is required.

II. THE FAKE ID EPIDEMIC

The need for fake identification among minors first prominently arose in the mid-1980s when most states increased their legal drinking age from eighteen to twenty-one.⁴ Suddenly, college-age students were no longer allowed to drink alcohol, and they resorted to crude cutting and pasting methods to create fake IDs.⁵ These early fakes were easily recognizable and any reasonable diligence on the part of alcohol providers and law enforcement exposed the identification as not authentic.⁶ The 1990s, however, brought about a change in the world of fake identification.⁷

A. Computers and the Internet

Two related developments have been the main reasons for the huge growth in the fake identification industry: advances in computer technology and the proliferation of the Internet.⁸ The combination of these two elements, along with the proficiency with which teenagers have been able to use each, has led to unprecedented high-quality, and virtually undetectable, forms of fake identification.⁹

The rapid advances in computer technology, coupled with drops in prices for sophisticated computer software and equipment, have given almost anyone with sufficient knowledge the capability to produce quality identification documents.¹⁰ Youths, having grown up with this technology, are particularly skilled with it—perhaps more so than the

4. Donna Leinwand, *Tech-Savvy Teens Swamp Police with Fake IDs*, USA TODAY, July 2, 2001, at A1. A federal law passed in 1984 required states to either change their legal drinking age to twenty-one or give up federal funds. *Id.*; see 23 U.S.C. § 158 (2004).

5. *Id.*

6. *Id.*

7. *Id.*

8. See Leinwand, *supra* note 3, at A1; Marilyn Geewax, *Fake ID Sites Multiply on Web*, ATLANTA J. & CONST., May 20, 2000, at 1F; Patrik Jonsson, *Teens Can Get Fake IDs in a Few Keystrokes on Web*, CHRISTIAN SCI. MONITOR, Aug. 29, 2001, available at <http://www.csmonitor.com/2001/0829/p1s4-ussc.html>.

9. Leinwand, *supra* note 4; Jonsson, *supra* note 8.

10. John-John Williams IV, *Technology Fuels Teen Trouble*, ARGUS LEADER (Sioux Falls, S.D.), Oct. 8, 2002, at 1A.

law enforcement personnel responsible for cracking down on fake identification.¹¹ Even “the average kid” is able to obtain the equipment necessary to create fake identification for under two-hundred dollars if he or she already has a computer.¹²

The availability of this technology is an issue because of the “shockingly high quality” of the fakes that are produced.¹³ Today, fake IDs are so undetectable that laboratory equipment is sometimes necessary to discern their authenticity.¹⁴ States have resorted to myriad anti-forging measures, including the use of holograms and bar codes, to curb the expansion of fake identification.¹⁵

The growth of the Internet has allowed successful identification forging methods to spread rapidly worldwide.¹⁶ In 2000, there were at least ten-thousand websites offering fake ID templates for almost every form of identification,¹⁷ with some sites receiving over ten-thousand inquiries daily.¹⁸ The swift incorporation of the Internet within the fake identification market is further illustrated by statistics that estimate in 1998 only about one percent of all fake identifications created were from the Internet, with that number increasing to five percent in 1999 and jumping to thirty percent in 2000.¹⁹ Operating a fake identification website can be extremely lucrative, possibly generating over \$1,000,000 in annual income; and website operators are becoming adept at disguising their operations or building new websites once they have

11. Leinwand, *supra* note 4.

12. Williams IV, *supra* note 10. The components include a scanner costing about eighty dollars and a color printer around one-hundred dollars. *Id.* These prices are likely much lower today, as 2002 prices are quoted. Additionally, a laminate pouch costs about fifteen dollars. Jonsson, *supra* note 7. This cost is also likely cheaper today.

13. Geewax, *supra* note 8 (quoting K. Lee Blalack II, a director of the Senate Permanent Subcommittee on Investigations who is investigating problems with fake identification).

14. Leinwand, *supra* note 4. Dave Myers, an agent from Florida’s Division of Alcoholic Beverages and Tobacco, adds, “The average printer you can buy from Wal-Mart creates a very good quality license.” *Id.*

15. *Id.* Additionally, states have used “shadow pictures and detailed state insignias.” *Id.*

16. *Id.* Most of the websites that sell IDs contain disclaimers that the fakes should be “for novelty and entertainment purposes only.” Isaac Baker, *Agency Tries to Slow Growth of Fake IDs*, THE OREGONIAN, Feb. 12, 2001, at A1.

17. Leinwand, *supra* note 4.

18. *Phony IDs and Credentials Via the Internet—An Emerging Problem: Hearing Before the Senate Comm. on Gov’t Affairs Permanent Subcomm. on Investigations*, 106th Cong. 33-34 (2000) (statement of David Myers, Special Agent, Florida Division of Alcoholic Beverages and Tobacco Department of Business and Professional Regulation Fraudulent Identification Unit).

19. *Id.*

been detected.²⁰

Many websites are targeted toward teenagers in search of a means to purchase alcohol, and some site operators have admitted to having agents on college campuses.²¹ In a related issue, law enforcement officials have recently begun to crack down on Internet sites that sell alcohol directly to minors.²² These websites allow minors to have a variety of alcohol delivered to their front doors without ever proving that they are of age.²³ The Internet has opened the door for those interested in underage drinking; a recent fake ID website set up by law enforcement officials revealed that about eighty percent of the applicants over an eighteen-month period were “teenagers below the legal drinking age who wanted identification showing that they were old enough to get into bars.”²⁴ The fake identification boom is not confined to the United States, as requests from this website originated from almost forty countries.²⁵

It is estimated that “50% of underage high school and college students have fake IDs.”²⁶ Agents in Florida recently confiscated ten-thousand fake IDs from teenagers during a recent four-week stretch over spring break.²⁷ What then, if anything, is being done to combat the prevalence of fake identification among our youth?

B. Fighting the Fake ID Boom

The incredible increase in the production and use of various forms of fake identification has both law enforcement officials and alcohol providers struggling to keep up.²⁸ Federal legislation was enacted in 2000 that aimed to prevent the creation and distribution of fake identification via the Internet.²⁹ Those caught using fake IDs typically

20. *Id.*

21. *Id.*

22. *Online Alcohol Vendors Nabbed for Selling to Kids*, PR NEWSWIRE, June 9, 2004, <http://www.prnewswire.com>.

23. *Id.* Sometimes, all that minors need to do is to check a box upon delivery that says they are of age. *Id.*

24. Mike O'Sullivan, *Internet Fake ID Ring Busted*, VOICE AM. NEWS (Los Angeles, Cal.), Dec. 21, 2002, <http://www.voanews.com/english/Archive/a-2002-12-21-21-Internet.cfm>.

25. *Id.*

26. Leinwand, *supra* note 4.

27. *Id.*

28. *Id.*

29. Internet False Identification Prevention Act of 2000, 18 U.S.C. § 1001 (2005).

have them confiscated and are fined,³⁰ although some school administrators impose additional penalties on students enrolled at their colleges or universities.³¹ Despite these measures, it has become a major challenge for authorities to curtail the use of fake identification among minors.

The rampant use of fake identification has put alcohol providers in a tenable situation. Be it a bar, club, tavern, or liquor store, the owners and employees of these establishments are required by law to be diligent in checking the validity of identification documents presented upon admittance to an establishment or purchase of alcohol.³² The costs involved with a violation of underage drinking laws can encompass severe fines, temporary closings, or even a revocation of a liquor license.³³ It has become in the alcohol provider's best interests to screen rigorously for fake identifications and take whatever measures are necessary to ensure they are not making illegal sales or admittances.

There are a variety of precautions that alcohol providers can choose to undertake, but as technology advances, most of these precautions are becoming more expensive. The cheapest tactic that many providers use is the extensive training of employees on how to better recognize identification that is not authentic.³⁴ Simple increased diligence and pressure from the employer on employees to enforce underage drinking rules are also tactics that are commonly used.³⁵ Many employers use

30. Connecticut underage drinkers, for example, may be fined up to \$500. *Bar Owner May Serve Up a Lawsuit to a Youthful Drinker*, N.Y. TIMES, Aug 9, 1995, at B5; see CONN. GEN. STAT. § 33-88a (2004). New Mexico, however, has five different classifications of fake ID violations, and the punishments can vary from fines, community service, or time in jail. Mandi Kane, *Consequences of Fake IDs Outweigh Fun*, DAILY LOBO (Albuquerque, N.M.), Dec. 15, 2003, <http://www.dailylobo.com/media/paper344/news/2003/12/15/News/Consequences.Of.Fake.I.d.Outweigh.Fun-577319.shtml>.

31. Steve Koehler, *Universities Fight Underage Drinking with Facts, Fines*, SPRINGFIELD NEWS-LEADER (Springfield, Mo.), Aug. 15, 2004, at 1A. Students may be fined anywhere from \$45-\$130 depending on if they are repeat offenders. *Id.*

32. In many states, both the employer and employee responsible for the violation are penalized. In Montana, employers are fined from \$250 to \$1500, and employees must pay \$160 and attend a fake ID recognition training class. JoDee Black, *Feeling the Sting*, GREAT FALLS TRIB. (Great Falls, Mont.), July 25, 2004, at 12B.

33. *Id.*; Kristin Reichardt, *False IDs Offer Minors a Way*, in INDEP. COLLEGIAN (Toledo, Ohio), Nov. 29, 2004, available at <http://www.independentcollegian.com/media/paper678/news/2004/11/29/News/False.Ids.Offer.Minors.A.Way.In-815656.shtml>.

34. Black, *supra* note 32.

35. Lieutenant Timothy Lee, a policeman in Providence, Rhode Island, said that in one particular club raid the club staff actually tried to assist the illegal underage drinkers, shouting, "Police! Drop your drinks!" *Barring Underage Drinkers*, PROVIDENCE J. BULL., Dec. 27, 2003, at B06.

money as a motivator for employee compliance by assessing fines for violations or awarding cash bounties for confiscated fake IDs.³⁶ Some employers fear the costs associated with permitting illegal underage drinking so much that they will hire expensive outside doormen to regulate the admittance of patrons into their establishment.³⁷

Black lights have also been used by alcohol providers to detect irregularities commonly present in many fake identification cards.³⁸ The detection tool currently in demand, however, is the ID scanner.³⁹ ID scanners can cost anywhere from \$800 to \$2000, depending on the quality of the scanner, and are effective in screening nearly all of the country's state ID cards.⁴⁰ The ID scanner reads the encoded information present on most state ID magnetic strips or bar codes that are found on the back of the ID and can verify the ID's authenticity within moments.⁴¹ These scanners are gaining in popularity for their effectiveness and ease of use.⁴²

Some bar owners are even considering turning away a portion of their business in an effort to prevent underage drinking in their establishments.⁴³ Many states have laws that allow minors that are at least eighteen years old to be admitted into bars, clubs, or taverns, but they are restricted from drinking alcohol.⁴⁴ In the past, the owners of these kinds of businesses understandably favored this rule, as they profited from larger crowds.⁴⁵ However, the problem and liability associated with underage drinking is now such a great threat for these owners that there is support among them to fully prohibit minors under

36. Additionally, some cities are considering offering twenty-five dollars or more per fake ID taken. Nahal Toosi, *Official Proposes Fake ID Bounty*, MILWAUKEE J. SENTINEL, Feb. 9, 2001, at 1B.

37. A Charleston, South Carolina company charges bar owners twenty dollars an hour per doorman, and one bar spends around \$15,000 a year on doormen. Schuyler Kropf, *ID Checkers Can Help Put Lid on Underage Drinking*, POST AND COURIER (Charleston, S.C.), Dec. 31, 2004, at 1B.

38. Baker, *supra* note 16.

39. *Id.*

40. Baker, *supra* note 16; Black, *supra* note 32.

41. Black, *supra* note 32. In about ten seconds, a scanner can detect an underage ID and sound off a tone that alerts a clerk or relevant personnel. *Id.*

42. *Id.* ID scanners can also keep records of identification that have been scanned through the machines, providing some level of protection from law enforcement officials in the event of a discrepancy. *Id.*

43. Jordan Erin, *Bar Owners Warm Up to Banning Minors*, DES MOINES REG., June 28, 2004, at 1A.

44. *Id.* Iowa City, Iowa recently experimented with a nineteen-year-old rule, which, in the words of a University of Iowa administrator, "has not worked." *Id.*

45. *Id.*

the drinking age from entering their establishments.⁴⁶

Even by taking a number of precautions, alcohol providers are, in some cases, only stemming the tide before fake identification manufacturers discover ways to deceive even the latest and most advanced detection devices.⁴⁷ Industry experts predict that it will not be long before thumbprints and other “biometric ID” systems, along with credit cards embedded with computer chips, are the norm in license technology, thus forcing alcohol providers to purchase additional costly equipment to detect the validity of the new fake identification.⁴⁸

Is there any point where lawmakers or society believe that the cost in fighting underage drinking via fake identification becomes too much for alcohol providers to bear? Or are taking these expensive measures just a cost that these business owners must accept as part of doing business? A chain of Oregon convenience stores recently spent \$100,000 implementing ID scanning technology to be used in conjunction with their automated cash registers.⁴⁹ Are expenditures of this amount and conduct of this type reasonably expected of alcohol providers, and if so, how far must they go to ensure that minors are not admitted or served?

III. GENERAL STANDARD OF LIABILITY FOR ALCOHOL PROVIDERS

Since the initial rise in the use of fake identification during the 1980s, there have been only a few reported court decisions that discuss the possibility of an alcohol provider escaping liability for mistakenly allowing a minor to have access to his or her establishment. Of those few reported cases, almost all of them concluded that there was no defense for alcohol providers that were caught serving or selling alcohol to a minor. In some cases, courts looked beyond specific statutory language to enforce broad public policy objectives and fulfill perceived legislative intent in order to achieve desired end results.⁵⁰

One of the earliest cases involving an alcohol provider seeking compensation from a minor for damages stemming from a statutory

46. *Id.*

47. Leinwand, *supra* note 4.

48. Baker, *supra* note 16.

49. *Id.*

50. Ray's Liquors, Inc. v. Newland, 367 N.E.2d 982, 984 (Ill. App. Ct. 1977).

violation of underage alcohol sales was *Ray's Liquors, Inc. v. Newland*.⁵¹ In *Ray's Liquors*, a sixteen-year-old minor twice used a fake identification card to purchase alcohol, and the plaintiff liquor store relied on these previous representations in allowing the minor to purchase alcohol in a third instance.⁵² Due to that incident, the store's liquor license was temporarily suspended, but that decision was then reversed and its license was reinstated after an appeal to the state's alcohol agency.⁵³ The liquor store sued the minor for attorney's fees, other litigation expenses, and damages to its reputation.⁵⁴ The trial court dismissed the case for failure to state a claim, and that dismissal was affirmed on appeal.⁵⁵

In affirming the trial court's decision, the appellate court examined the Illinois Liquor Control Act of 1934⁵⁶ and determined that language recently added to that statute allowed only for "evidence to be introduced to mitigate punishment, not to establish an affirmative defense" to an alcohol provider that had served a minor.⁵⁷ Even more central to the court's holding, however, were the overriding public policy implications that would be compromised if licensed alcohol providers were able to recover damages resulting from violations of the state's underage alcohol sales law.⁵⁸ The court looked to the Illinois Legislature's purpose in enacting the statute and found that a heavy burden was intended for alcohol providers and others involved in the liquor industry, with public policy not favoring "passing on the liability as here attempted."⁵⁹

In another Illinois case four years later, *B&W Liquors, Inc. v. Illinois Liquor Control Commission*,⁶⁰ the court reaffirmed the holding of *Ray's Liquors*.⁶¹ In *B&W Liquors*, a liquor store asserted that past reliance on a minor's fake identification was a defense that could be used in

51. *Id.*

52. *Id.* at 984.

53. *Id.* at 983.

54. *Id.* at 983-84.

55. *Id.* at 984.

56. 235 Ill. Comp. Stat. 5/6-16 (2004).

57. *Ray's Liquors, Inc.*, 367 N.E.2d at 984-85.

58. *Id.* at 985. The court noted that the legislature "intended a substantial burden on those engaged in the liquor industry, more stringent than those imposed on other business ventures and penal in nature." *Id.*

59. *Id.*

60. 421 N.E.2d 396 (Ill. Ct. App. 1981).

61. *Id.* at 397.

proceedings brought by the State Alcohol Commission.⁶² The commission did find that the store's reliance on the fake ID was a "mitigating circumstance" and reduced the length of the store's liquor license suspension as a result.⁶³ Despite this reduction in penalty, however, the liquor store could not use the commission's determination that the minor's fake ID use was a "mitigating circumstance" to completely escape punishment.⁶⁴ The court stated that principles of statutory construction would be violated if that reliance was allowed to provide an affirmative defense to the liquor store's violation of the law forbidding the sale of alcohol to minors.⁶⁵

IV. POSSIBLE AFFIRMATIVE DEFENSES

Some state statutes that regulate the sale of alcohol to minors do provide an affirmative defense for alcohol providers, and these defenses may be used in either criminal proceedings or hearings involved with revoking or suspending a liquor license.⁶⁶ Most of these statutes share a requirement that the liquor provider relied on a written misrepresentation made by the minor when the provider served the minor alcohol.

In *Faces, Inc. v. Kennedy*,⁶⁷ a bar that had its liquor license suspended sued a minor for lost profits after the minor misrepresented her age with fake identification.⁶⁸ The New Jersey statute prohibiting the sale of alcohol to a minor⁶⁹ was plainly violated, but the court also considered another statute that provided an affirmative defense for an alcohol provider.⁷⁰ The latter statute provided that if a minor made a false written representation of being of age, reasonably appeared to be of age, and the resulting sale was made in good faith in reliance upon the minor's written representation and physical appearance, then the alcohol provider had a valid defense under the statute.⁷¹

62. *Id.*

63. *Id.* at 396. B&W Liquors had its liquor license suspension reduced from fifteen days to three days. *Id.*

64. *Id.* at 397.

65. *Id.*

66. *See infra* notes 103-05.

67. 447 A.2d 592 (N.J. Super. Ct. Law Div. 1981).

68. *Id.* at 594.

69. N.J. ADMIN. CODE § 13:2-23.1(a) (2005).

70. *Faces*, 447 A.2d at 594.

71. N.J. STAT. ANN. § 33:1-77 (West 2004); *Faces*, 447 A.2d at 594.

In *Faces*, however, the bar did not meet the affirmative defense requirements set forth in the statute, as the minor had only orally misrepresented her age, and the bar did not rely on any kind of writing when deciding to provide the minor with alcohol.⁷² The court held that while the legislature clearly provided an absolute defense to alcohol providers in some cases of a minor's misrepresentation, the bar's conduct here did not fulfill the elements of the statute and the bar could not avail itself of that defense.⁷³

V. A DIFFERENT DIRECTION

A recent Indiana case, *Millenium Club, Inc. v. Avila*,⁷⁴ also contemplates a possible defense for a club owner that mistakenly serves an underage drinker and appears to be the first reported case to allow a club owner's affirmative defense to stand. In *Millenium Club*, a club was raided by the Indiana State Alcohol Commission because the owners admitted over two-hundred minors into their bar and faced a revocation of its liquor license as a resulting penalty.⁷⁵ While its hearing with the Alcohol Board was pending, the club sued each of the minors for fraud to recover damages that the club sustained as a result of the raid, including expenses, losses, costs, and attorney fees.⁷⁶ Specifically, the club claimed that its damages were caused by the minors falsely representing their ages with fake identifications and misrepresentations, which allowed the minors to gain admission into its establishment.⁷⁷

Unlike alcohol providers in previous cases, the club owner in *Millenium Club* took precautions to follow the Indiana state statute that specifically provided for an affirmative defense to a liquor licensee that provided alcohol to a minor.⁷⁸ According to the statute, a liquor licensee could use the defense in either a criminal proceeding or in a hearing before a local commission if the following elements were met: (1) The purchaser falsely represented his or her age in a written statement that was supported by two forms of photographic identification; (2) a

72. *Faces*, 447 A.2d at 597.

73. *Id.* at 596-97.

74. 809 N.E.2d 906 (Ind. Ct. App. 2004). Although the correct spelling of the plaintiff in this case is Millennium Club, the official reporter misspelled it. Throughout this Comment, the case will be referenced as it appears in the official reporter.

75. *Id.* at 909.

76. *Id.*

77. *Id.*

78. *Id.* at 908; *see also* IND. CODE ANN. § 7.1-5-7-5.1(a) (West 1998).

reasonable person would believe that the appearance of the purchaser was one of legal age; (3) the sale was made in good faith that the purchaser was actually of legal age; and (4) the liquor licensee had taken all reasonable precautions in instructing, hiring, and supervising employees regarding the sale of alcohol to minors.⁷⁹

The club owner in *Millenium Club* arguably fulfilled the requirements set out in the statute. Two forms of photo identification were required to gain admittance into the club, along with the signing of an affidavit card that stated that the minor understood that he or she could be arrested and prosecuted if he or she was misrepresenting his or her age.⁸⁰ The affidavit card the club had its patrons sign before admittance contained the same language set out in a sample form that was provided in the statute.⁸¹ Only the reasonableness of appearance of the minors and the good faith actions of the club in admitting the minors were questionable in the club's attempt at statutory compliance, yet the trial court dismissed its suit for failure to state a claim.⁸² The trial court doubted the club's reliance on the minor's representation, and the court focused on this point and the club's inability to prove damages that were proximately caused by the minors as reasons for dismissing the club's suit.⁸³

Central to the minors' argument was that the club's hearing before the state alcohol board was still pending, so the club could not yet have suffered any damages.⁸⁴ The minors argued that if the board fined the club, the club could not have reasonably relied upon the minors' misrepresentations, as the Alcohol Board necessarily would have found the club's reliance to be unreasonable.⁸⁵ As a result, the club should be estopped from arguing reasonable reliance in a fraud action. Conversely, if the board did not fine the club, the minors reasoned, then the club would have sustained no damages and any award to it would "represent an unjust enrichment."⁸⁶

The appellate court, however, reversed the trial court's dismissal, holding that the collateral estoppel issue raised by the minors could not

79. *Millenium Club*, 809 N.E.2d at 908.

80. IND. CODE. ANN. §7.1-5-7-5.1 (West 1998); *Millenium Club*, 809 N.E.2d at 908.

81. IND. CODE. ANN. §7.1-5-7-5.1(a); *Millenium Club*, 809 N.E.2d at 910.

82. *Millenium Club*, 809 N.E.2d at 910.

83. *Id.* at 911.

84. *Id.*

85. *Id.* at 911-12.

86. *Id.* at 911.

be decided thus far in the litigation.⁸⁷ No information was presented during trial that detailed the club's opportunity to present its case at the board proceeding, so the court could not determine whether the club had a "full and fair opportunity to litigate the issue" at that time.⁸⁸ With respect to damages, the appellate court noted that the club did not limit its damages to possible fines that would be levied by the Alcohol Board, but alleged other expenses, losses, and fees originating from the incident as well, and pointed out that the club could suffer damages without any action by the Alcohol Board.⁸⁹

Finally, the public policy arguments presented in almost all of the previously litigated liquor licensee cases were addressed by the court.⁹⁰ The minors cited case law from other jurisdictions in actions similar to the club's and urged the court to follow that persuasive authority and reject the club's claim on public policy grounds.⁹¹ In particular, the minors advanced two related arguments. They first argued that allowing the club to recover damages against minors would discourage tavern owners from being diligent in checking the authenticity of identification upon admittance.⁹² The second point rested on the principle that one should not be able to profit from one's own knowingly illegal conduct, which in this case would be the bar knowingly admitting and serving underage drinkers.⁹³

As to the second argument, the appellate court stated that it was too early in the case to make a determination as to whether the club or any of its employees were guilty of any criminal acts.⁹⁴ The court also rejected the minors' first policy argument for two reasons. First, the court stated that the legislature had obviously considered the statute's implications when it drafted the defense for tavern owners and recognized that technological advances have allowed for the creation and use of high-quality and realistic-looking fake identification that is difficult to detect.⁹⁵ Second, the appellate court opined that the club owners and alcohol providers, in general, should not have to bear the

87. *Id.* at 912.

88. *Id.*

89. *Id.*

90. *Id.* at 914. For a discussion on the public policy issues present in this type of case, see *supra* Part III.

91. *Id.* at 912.

92. *Id.*

93. *Id.* at 913.

94. *Id.* at 914.

95. *Id.*

total cost of the minors' violations but that the minors who actually used the fake identifications should also be held responsible.⁹⁶

The significance of the Indiana Court of Appeals' decision may be far-reaching. It is the first reported decision that not only allows the possibility of a club, bar, or tavern owner to recover damages against underage patrons, but also suggests that public policy implications do not necessarily prevent a court from finding in favor of an alcohol provider in this type of situation. The court recognized advances in technology and the difficulties that modern tavern owners face in regulating the admittance of patrons, while acknowledging the sensitivity of the situation because minors are involved.⁹⁷

Although *Millenium Club* is the first published decision that appears to clear the way for an alcohol provider to recover against underage patrons, it is not completely unprecedented in its possible result. In 1992, a Connecticut bar owner brought suit against five underage drinkers after the State's Liquor Commission levied a fine against the bar.⁹⁸ While a court dismissed two of the bar's claims, three of the minors eventually agreed to pay the owner \$1000 each.⁹⁹ In New Hampshire, a college student was sued by a liquor store in 2002 after the store was fined for selling alcohol to him while he was a minor.¹⁰⁰ In that case, the minor avoided a trial and settled with the liquor store, agreeing to provide thirty hours of community service instead of paying possible fines.¹⁰¹ In 2004, a small claims court in San Francisco awarded the owners of a bar \$5000 from an underage drinker who was involved in an incident that originally caused the bar to be fined \$3000.¹⁰²

Several states have alcohol sales statutes similar to Indiana's, which provide an affirmative defense to an alcohol provider that sells to a minor if certain conditions are met. Most of these statutes contain similar elements that are designed to prevent any drop-off in diligence by alcohol providers in checking identification authenticity: a prevalent concern present in discussions regarding the creation of any possible

96. *Id.*

97. *Id.*

98. *Bar Owner May Serve Up a Lawsuit to a Youthful Drinker*, *supra* note 30.

99. *Id.*

100. Bryan Nieder, *Liquor Stores Suing Fake ID Users*, THE DIAMONDBACK (College Park, Md.), Mar. 15, 2002, <http://www.diamondbackonline.com/News/Diamondback/archive/-2002/03/15/>.

101. *Id.*

102. *Calif. Bar Owners Sue Underage Drinkers*, LEXIS Nexis Library, UPI File, May 10, 2004.

defenses for alcohol providers.

New York's statute requires reasonable reliance based upon a photo "identification card apparently issued by a governmental entity" in order for a defense to be raised.¹⁰³ In Kentucky, a defense can be established if fake identification is used and the purchaser's "appearance and character" strongly indicates that of the legal age.¹⁰⁴ Both Montana's and New Hampshire's statutes add the requirement of a good faith sale in setting out a defense, with New Hampshire, like Indiana, requiring a false representation to be in writing.¹⁰⁵

Incidentally, the decision of the Indiana Court of Appeals to reverse the trial court and require a full trial in *Millenium Club* will probably never come to fruition. While the case was pending back at the trial court level, the club was again raided by the state's Alcohol Board, and this time thirty-two minors were cited for underage drinking.¹⁰⁶ The club was in the process of appealing the Alcohol Board's recommendation not to renew the club's liquor license for the first raid that was the subject of *Millenium Club*, and this second offense prompted the club to close its business permanently.¹⁰⁷ At the time this Comment was written, the prospects of any further proceedings resulting from the decision in *Millenium Club* were unclear but did not look promising.¹⁰⁸

VI. CONCLUSION

As technology advances and minors are armed with increasingly undetectable fake identification, more states will have to consider enacting legislation that better prevents underage drinking. Some states, like Indiana, may attempt to shift some of the liability for underage drinking to minors, who arguably should be forced to accept some responsibility for their actions. Other states may continue to maintain a type of strict liability standard for alcohol providers and refuse to permit any possible decreases in diligence in combating underage drinking. At least one state has introduced legislation that

103. N.Y. ALCO. BEV. CONT. LAW § 65(4) (Consol. 2004).

104. KY. REV. STAT. ANN. § 244.080(1) (West 2004).

105. MONT. CODE ANN. § 16-3-301(6) (2004); N.H. REV. STAT. ANN. § 179:7 (2004).

106. Patrick M. O'Connell, *Ticketed Drinkers in Raid Mostly ND Students*, S. BEND TRIB., Dec. 11, 2004, at B1.

107. *Id.*; Teresa Fralish, *Boat Club Shuts Doors for Good*, THE OBSERVER (Notre Dame, Ind.), Jan. 12, 2005, <http://www.ndsmcobserver.com/news/2005/01/12/News/Boat-Club.Shuts.Doors.For.Good-832026.shtml>.

108. *Id.*

would actually increase an alcohol provider's liability in the form of a felony if an underage drinker was subsequently injured or died after drinking at its establishment.¹⁰⁹ It is impossible to predict how the pieces will fall in the coming years, but undoubtedly both minors and alcohol providers will be closely watching.

Underage drinkers with fake identification will likely not be a combination that is ever completely eliminated. However, the legal relationship between minors and alcohol providers is evolving, and may, as a result, directly affect the market for fake identifications and the extent to which they are used. As alcohol providers push for more accountability to be placed on the minors who use fake identification to gain admittance into their establishments, any resulting shifts in liability should factor into a minor's future decisions of whether to purchase or use a fake ID. Maybe the Indiana Court of Appeals' decision in *Millenium Club* will prompt an underage drinker to pause before undertaking in one of these endeavors. But some doubt the effectiveness of any shift in liability and agree with the chairman of the Connecticut Liquor Control Commission, who said, "I don't know that a minor who wishes to drink is going to be significantly influenced by a potential penalty down the pike."¹¹⁰

The reality behind this rise in fake identification use by minors is that society is reluctant to punish children too harshly for poor choices made during a time in their lives when they are susceptible to many pressures, both internally and externally, especially when alcohol use is involved. A balance will have to be struck that protects both our youth and the alcohol provider, one that does not penalize either group in an unreasonable manner. That balance will continue to shift as states experiment with different laws, and hopefully a workable solution can be revealed.

Perhaps the best way to reach a solution is to increase the cooperation between the stakeholders involved with fake identification and underage drinking: law enforcement, lawmakers, and alcohol providers. Rather than continue the adversarial nature of the relationships between these groups, alcohol providers should be rewarded for becoming more involved in suggesting practical and effective measures that can prevent the use of fake IDs in securing alcohol among youths. The key is that rewarding alcohol providers not

109. A.B. 72, 96th Assem., Reg. Sess. (Wis. 2003); Tom Sheehan, *Bill Would Stiffen Bartender Penalty*, WIS. ST. J. (Madison, Wis.), Nov. 27, 2003, at B1.

110. *Bar Owner May Serve Up a Lawsuit to a Youthful Drinker*, *supra* note 30.

only helps them to avoid liability, but also truly focuses on curbing the larger problem of underage drinking.

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