

# **DEFENDING A FOOD LIABILITY CLAIM**

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**Christian Stegmaier  
Shareholder, Retail & Hospitality Liability Practice Group**

**Collins & Lacy, P.C.  
Columbia, South Carolina**

**[cstegmaier@collinsandlacy.com](mailto:cstegmaier@collinsandlacy.com)**



**CHRISTIAN STEGMAIER**  
**COLLINS & LACY, P.C.**

### **Shareholder, Retail & Hospitality Liability Practice Group**

Christian Stegmaier is a shareholder in Collins & Lacy's Retail & Hospitality Liability Practice Group. He earned an undergraduate degree in political science and a masters degree in public health administration from the University of South Carolina. He also earned his law degree from the University of South Carolina School of Law. Before joining Collins & Lacy, Christian served as Law Clerk to The Honorable Ralph King Anderson, Jr., Judge of the South Carolina Court of Appeals.

Christian regularly appears in court of behalf of the firm's clients. He has served as first and second chair in trials in both the civil and criminal venues. As well, he has drafted, argued, and secured summary judgment in numerous cases. He is also an active member of the firm's Appellate Practice team. Christian's published cases include: *Romero v. Rodriguez*, 363 S.C. 80, 610 S.E.2d 488 (2005); *Hamilton v. R&L Transfer*, 361 S.C. 286, 604 S.E.2d 397 (Ct. App. 2004); *Charleston Dry Cleaners & Laundry, Inc. v. Zurich American Insurance Company*, 355 S.C. 614, 586 S.E.2d 586 (2003). Unpublished cases include: *McQueen v. Staffmark*, 2004-UP-495 (Ct. App. 2004).

Christian is admitted to practice in South Carolina; the United States District Court, District of South Carolina; and the United States Court of Appeals for the Fourth Circuit.

Christian is a member of the Hospitality Association of South Carolina; the South Carolina Association of Convenience Stores; and the Global Alliance of Hospitality Attorneys. He is also a member of the South Carolina Defense Trial Attorneys' Association; the Defense Research Institute(Appellate Advocacy Section and Food Law Specialized Litigation Group).; the South Carolina Defense Attorneys Association; the Richland County Bar Association; and the South Carolina Bar.

Christian is an avid writer on legal matters and is a regular contributor to numerous publications, such as *The Defense Line* (a publication of the South Carolina Defense Trial Attorneys Association), *Hospitality News* (a publication of the Hospitality Association of South Carolina), and HospitalityLawyer.com's online monthly newsletter. Christian publishes a weekly update relating to retail and hospitality liability issues, as well as a quarterly update on appellate advocacy. If you would like to receive these updates, please email Christian at [cstegmaier@collinsandlacy.com](mailto:cstegmaier@collinsandlacy.com).



5<sup>th</sup> Annual Hospitality Law Conference  
Presents

## Defending a Food Liability Claim

Presented by:  
Christian Stegmaier



Christian  
Stegmaier

- Christian is a shareholder with Collins & Lacy
- His practice includes appellate advocacy, retail and hospitality liability defense, and complex litigation.
- Christian is a member of the Hospitality Association of South Carolina; the South Carolina Association of Convenience Stores; and is a member of the South Carolina Defense Trial Attorneys' Association.
- He is an avid writer on legal matters and is a regular contributor to numerous publications, such as *The Defense Line* and *Hospitality News*

## Defending a Food Liability Claim: The Nuts & Bolts

Christian Stegmaier  
Shareholder  
Retail & Hospitality Liability Practice Team  
Collins & Lacy, PC  
Columbia, South Carolina

### Assumptions

- Claim Is Already in Suit
- Not an Outbreak, But a Single Loss
- Client Is Insured

### Initial Questions for Your Risk Manager/Adjuster

- Is Client Self Insured to a Certain Amount? If So, How Much?
- What Does The Client Want Regarding Information? Every Sheet of Paper, Periodic Reports, or Something in Between?
- How Does the Client Handle Discovery Matters?

### Initial Requests to the Risk Manager/Adjuster

- Secure the Entire Claim File, Including Adjuster Notes, Witness Statements, and Investigative Reports
  - Copy of Franchise Agreement
- Any Other Client Materials Like Reports of Sales for DOL by Product, Surveillance Tapes, Etc.
  - Run a Database Search for Other Insurance Claims by the Plaintiff
- Get An Idea What the Reserves Are – Manage Expectations

## Suit is Served: Now What? Part 1

- Determine Date of Service and Confirm Same with Plaintiff's Counsel
- Secure Extension to Answer or Otherwise Plead
  - Confirm Whether Discovery was Served with Complaint and Secure Extension to Answer the Same
- Confirm Extensions in Writing

## Suit is Served: Now What? Part 2

- Confirm Whether Defendants Named in Suit are the True/Proper Defendants and Take Immediate Steps to Cure
- Deal with Tender Issues Immediately

## Tender Issues Between Franchisor and Franchisee: Determining Duty to Defend and Indemnify

What Does the Franchise Agreement Say?

- Defense and Indemnification Provisions
  - Additional Insured Provisions

## Tender Issues Between Franchisors and Franchisees

- Make/Respond to Tender Demands in Writing
- Confirm Acceptance/Denial of Tender in Writing As Well
- File Notice of Substitution of Counsel (if necessary)
- If Representing a Franchisee and Tender of a Claim by the Franchisor is Accepted, Immediately Evaluate Need to Move to Dismiss Franchisor as Defendant

## Tender Issues Between Franchisors and Franchisees



*Remember the Ongoing and Future Business Relationship Between the Franchisor and Franchisee*

- Be Prompt in Communications
- Be Respectful
- Avoid an Adversarial Firefight If At All Possible

## Suit is Served: Now What? Part 3

- Immediately Evaluate Removal to Federal District Court
  - Federal Question
  - Diversity Jurisdiction

## Removal: Pros and Cons

### Pros

- (Many) Plaintiff's Lawyers Hate Federal Court
  - Wider Geographic Scope for Venue
    - Better Voir Dire
  - Tighter Timeframe for Resolution
  - Seemingly Easier to Obtain MSJ

## Removal: Pros and Cons

### Cons

- Labor Intensive, More Costly to Defend
  - Pressure to Resolve via ADR
- Assignment to Case to Difficult Judge Can Result in Headaches

## Putting a Lid on Exposure in the Early Stages

Plaintiff's Lawyers (at least many in South Carolina) Dislike Federal District Court

Accordingly, Many Will Jump at the Opportunity to Execute a Stipulation of Damages

Case Stays in State Court with the Stipulation; However, You Have Been Able to Deliver Certainty For Your Client By Obtaining a Cap on Exposure

## The Three Biggest Pursuits of Defense Counsel

- Determining the Existence of Proximate Cause
- Determining Nature and Extent of Damages
- Building an Impeachment Case

## Proximate Cause

Initial Question: What Type of Claim?

- (1) "Food Poisoning"/Illness Claim
- (2) Product Claim (e.g., Bone in Filet)

## Proximate Cause

Can you tag someone else with the claim?

- Manufacturers
- Distributors
- Other Vendors



## Life Lessons

Make Sure Your Client Has Defense and Indemnification and/or Additional Insured Agreements With Its Vendors Where Possible

- Can Operate to Resolve Claims for Client Quickly and Cheaply



## Proximate Cause: First Steps



- Get a Complete Understanding of What Plaintiff Alleges Happened
- Collect As Much Information As Possible From Available Sources

## Determining What Happened

- Review Incident Report / Written or Verbal Statement of Plaintiff
- Informal Conference with the Plaintiff and Counsel
  - Interrogatories
  - Requests to Produce
- Subpoena Medical Providers, Pharmacies, Etc.

## Finding Out What Happened: Key Questions



- What did the Plaintiff eat?
- When Was the Plaintiff at the Location?
- How Was the Plaintiff Injured and To What Extent?

## Corroborate/Investigate Plaintiff's Story

- Witness Interviews of Client's Employees on Duty
- Interview Client's Management/Quality Control to Determine Possibility of Claim's Occurrence
- Interviews of Willing Third Parties (use caution)
  - Interview of Health Department Investigator
  - Review Health Department Complaints

## A Word About Health Department Inspections Reports

- Obtainable via Freedom of Information Act
- Alternatively, Reports Can Likely Be Obtained From Client

### Bottom Line:

You Want to Know What Type of Operation Your Client is Running When Preparing Your Resolution Strategy

## Lock the Plaintiff Into His/Her Story: Critical Strategy

- Requests to Admit
- Deposition



## Responding to Discovery

- Limit Disclosures of Proprietary Information Whenever and Wherever Possible
- Secure Confidentiality Agreement/Protective Order Where There is a Need to Disclose Proprietary Information
- Make Sure Client Knows Exactly What You are Disclosing via Discovery

## Deposition of the Client

- Identify All Witnesses and Disclose the Same to the Plaintiff
  - If There Are to be Fact Depositions - - - Prepare, Prepare, Prepare Your Witnesses
  - If There Is To Be 30(b)(6) Deposition, Make Sure Your Witness(es) Can Fully and Accurately Make Responses to the Subject Areas Identified in the Deposition Exhibit

## A Word About Responding to Discovery and Case Investigation

Your Client is in the Restaurant Business, Not the Litigation Business. A Business Cost to Defending Lawsuits is the Time and Effort Spent by Employees Responding to Your Requests for Information. Therefore, When Engaging Employees:

- Be Prepared
- Be Mindful of the Constraints on their Time; and
- Don't Waste Time with Unnecessary or Duplicative Requests

## Working With Employees

- Properly Identify Yourself and the Reason Why You are Contacting Them for Assistance/Consultation
- Provide a Contact at the Client's Risk Management Department or the Client's Insurer for Added Credibility
- Educate/Explain the Reason for Your Contact With Them, the Discovery Process, and Your Expectations of Them in the Future

## Defendant's Expert Witness

Will Evaluate Plaintiff's Proximate Cause and/or Damages Arguments to Determine Validity

- Medical Experts
- Non-Medical

## Defendant's Expert Witness

### Medical Experts

- Treating Doctors
- Non-Treating Specialists
- Other Specialists, Such as Infectious Disease Experts, Epidemiologists

## Defendant's Expert Witness

### Non-Medical Experts

- In-House Operations Personnel
- External Quality Control Specialist (e.g., ServSafe Expert)

## Sources for Expert Witnesses

- Local Universities or Medical Schools
  - Local Hospitals
  - Your Client / Franchisor
  - State Hospitality Association
- National Restaurant Association Educational Foundation
  - Defense Research Institute / IDEX
  - State Defense Attorneys Association

## Building an Impeachment Case

### The Reason for Building an Impeachment Case:

To Destroy or Impair the Plaintiff's Truthfulness or Veracity in the Jury's Eyes

## Sources of Impeachment



### Computer Data Bases

- Prior Lawsuits Judgments
- Criminal History/Imprisonment
- Employment/Housing

## Sources of Impeachment



### Personnel Files: A Bounty of Information

- Prior Disciplinary Actions
- Evidence of Untruthfulness to Employer



## Sources of Impeachment

### Surveillance

A True Test of the Plaintiff's Representations Regarding Injuries and Impairment



## Sources of Impeachment

### Medical Records

Is the Plaintiff a "Frequent Flyer" or Possess Other Previously Documented Conditions that Emulate His/Her Complained of Conditions?



## Types of Damages

- (1) Loss of Income
- (2) Loss or Impairment of Earning Capacity
- (3) Out-of-Pocket Expenses
- (4) Medical Expenses, Including Doctors, Hospitals, and Medicines
- (5) Future Damages Arising From Permanent Injuries

## Types of Damages (Continued)

- (6) Loss of Family Services
- (7) Deprivation of Normal Life Expectancy
- (8) Alternation of Lifestyle
- (9) Mental Anguish/Distress/Psychological Trauma
- (10) Apprehension and Anxiety

## Types of Damages (Continued)

- (11) Sexual Dysfunction
- (12) Pain and Suffering
- (13) Loss of Enjoyment of Life

## Case Valuation



Inpatient Hospitalization Can Change Everything

- Can Dramatically Increase Hard Damages
- Can Lend Legitimacy to Claim

## The Case for Summary Judgment

### Consider Going For It When:

- There is a Failure to Propound Expert Testimony, Which Creates Nexus
- Expert Witness Cannot Credibly Create Nexus
- There Are No Proximately Caused Damages
- Comparative Negligence of Plaintiff Outweighs Client's



## Case Evaluation: A Study in Risk Management

### Key Factors to Consider:

- (1) Defense Costs
- (2) Nature and Extent of Damages
- (3) Plaintiff's Proximate Cause Argument/  
Likelihood of Defense Verdict
- (4) Characteristics of the Plaintiff
- (5) Reputation and Community Regard for Client
- (6) Importance to Client of "Having Its Day in Court"

## Exercise of 7<sup>th</sup> Amendment Rights vs. Business Considerations

On One Hand, A Restaurant's Reputation is Built Squarely Upon Its Food Product; However, Taking a Case to Trial Creates the Prospect of Adverse Publicity, Which Your Client May Not Want.

### Key Questions:

- (1) How Serious/Credible is Plaintiff's Case?
- (2) What Type of Operation is Your Client Running and Can It Withstand the Publicity?

## However ...

If Plaintiff's Case is Junk or Lacks Credibility, the Client Should Carefully Consider Trying It

- Demonstrates to Plaintiff's Bar the Client Doesn't Pay on Bad Claims

- Juries Have Skepticism About Doubtful Claims; Accordingly, Prospect for Favorable Verdict Exists



### Christian Stegmaier

Shareholder, Retail & Hospitality Liability Practice Group  
Collins & Lacy, PC  
Post Office Box 12487  
Columbia, South Carolina 29211

(803) 255-0454 (voice)  
(803) 771-4484 (facsimile)

cstegmaier@collinsandlacy.com  
www.collinsandlacy.com