

The Best Offense is a Good Defense

Strategies for Preventing and
Defending Food, Allergy and
Alcohol Claims

Presenter



- **David T. Denney**
- The Law Offices of David T. Denney, PC – Dallas, Texas
- The firm's Food, Beverage and Hospitality practice focuses on representing clients in:
 - The formation, purchase and sale of entities;
 - Private Placements of Securities;
 - Franchising;
 - Corporate transactions;
 - Civil litigation;
 - Commercial leasing;
 - Beverage alcohol licensing;
 - Developing Comprehensive Policies and Procedures;
 - Employment matters; and
 - Other random, weird stuff.



Legal Foundations of Liability

- Breach of Warranty
 - Implied Warranties
 - Warranty of Fitness for Human Consumption
(also plead as Strict Liability in Tort)
 - Warranty of Merchantability
 - Express Warranties
 - Oral (“We can serve you a meal without nuts.”)
 - Written (“Wild Salmon”)

Legal Foundations of Liability

“Merchantable” means the product is fit for the ordinary purposes for which it is sold...

...EATING/DRINKING.

This warranty can be a gateway for lawsuits under state “deceptive trade practices” statutes, which can result in awards of treble (3x) damages, and attorney’s fees.

Legal Foundations of Liability

Fitness for Human Consumption:

Where food products sold for human consumption are unfit for that purpose, the law imposes a warranty of purity in favor of the consumer.

Examples of food that does not meet this standard:

- Spoiled
- Un/Undercooked
- Containing Foreign Object

Foreign/Natural Substance Test

- No liability, as a matter of law, for breach of warranty if the injury-causing substance is natural to the food. (bone/shell)
- Liability automatic if the substance is foreign to the food. (glass/metal/Band-Aid[®])
- Minority view.
- Ignores realities of food preparation.

Reasonable Expectations Test

- Foreign Substance
 - You probably Lose.
- Natural but Unexpected Substance
 - You may still lose.

The question becomes: **Was the food/beverage, upon delivery to the customer, in a condition that (a) was not contemplated, and (b) unreasonably dangerous?**

Legal Foundations of Liability

- Negligence
- Strict/Statutory Liability
 - Products Liability (inherently unsafe)
 - “Food Misrepresentation”
 - Substituting one species of fish for another
 - Labeling beef as “Kobe”
 - Fudging on Pre-cooked weight
 - Cooking methods
 - “Free-range,” “Grass-fed,” “Organic”
 - Place of origin (“Atlantic,” “Roquefort”)

Legal Foundations of Liability

- Dram Shop: seller liable for the actions of patron whom it serves after she becomes obviously intoxicated.
- Dram Shop “Safe Harbor”:
 - Not liable for the act of your employee if:
 - Employer requires employees to obtain certification;
 - The employee has attended such a course; and
 - The Employer has not *directly or indirectly* encouraged employee to violate the law.

Food Claims

Gupta v. Asha Enterprises, 422 N.J. Super. 136 (2011)

- 16 Hindu vegetarians sued after consuming meat-filled samosas instead of the vegetarian samosas one had ordered for the group (take-out).
- Told by restaurant that it did not make meat-filled samosas.
- About the same time they placed the order, another order was made for meat samosas.
- MIX UP.
- Guests sued for “spiritual injuries and damages” because, as a result of eating meat, they were required to undertake purification in the Ganges River.

Jones v. Landry's Seafood Inn & Oyster Bar-Galveston,
328 SW3d. 909 (2010)

- Plaintiff ordered a dish made of ground oyster meat; alleged that she cracked a tooth on a foreign object.
- GM told diner that the restaurant would cover her dental bills (on which she relied).
- Corporate office declined to pay since the object (thought by the GM to be an oyster) was “naturally occurring.”

Jones v. Landry's Seafood Inn & Oyster Bar-Galveston,
328 SW3d. 909 (2010)

- GM was not an expert in either oysters or pearls.
- GM kept the foreign object, but restaurant presented no evidence that it had the item tested or examined.
- Court found that since the dish was “processed” (not a whole oyster), the Plaintiff’s claim was a “manufacturing defect.”

Gann v. Biglari Holdings, Inc.,
V-10-824, Bradley Co., TN Circuit Court

- Parents suing Steak & Shake franchisor, franchisee and employee after the employee allegedly served their son “Mega Death” hot sauce (not a Steak & Shake product)
- Suit also names the makers of the sauce, claiming it is an inherently dangerous product.
- Suit seeks compensatory and punitive damages against the restaurant companies.

Allergy Claims

White v. Leung,

No. 2010L-2254, Cook Co., IL Circuit Court

- Plaintiff allergic to shrimp, but ordered the lunch special – substituting chicken for the shrimp in shrimp egg foo young, shrimp fried rice and shrimp eggroll.
- Plaintiff alleged that eggroll contained shrimp, and (eventually ended up at the hospital).
- Suffered cardiac arrest and 3-week coma.
- Court found for restaurant, since Plaintiff did not have sample of the food (and could not prove from which Chinese restaurant she ordered).

Seiler v. Jimmy John's Enterprises, Inc.

No. 2009L-012869, Cook Co., IL Circuit Court

- Allergic guest ordered a turkey sandwich, no cheese/mayo. Received tuna, with cheese/mayo.
- Restaurant allegedly refused requests to cover medical bills prior to suit.
- Trial may hinge on whether unwrapping a sandwich like a burrito, top down, is a “traditional” way to consume a sandwich.

Alcohol Claims

Aughenbaugh v. Napper Tandy's
78 AD 3d 745 (NY App. Div. 2010)

- Plaintiffs sued under Dram Shop statute, alleging bar served guest who was “visibly intoxicated.”
- Bartender testified that at the end of her shift (7:00 p.m.), the guest did not appear to be intoxicated.
- Driver left the bar more than an hour after the end of bartender’s shift, so bar had no evidence to defeat summary judgment.

Caplinger v. Korrzan Rest. Mgt., Inc.

2011 Ohio 6020

- Minor plaintiff injured when intoxicated father (restaurant employee) crashed into bridge abutment.
- Bartenders and GM testified that the father was not “visibly intoxicated.”
- Court found that circumstantial evidence (quantity of alcohol served, etc.) merely created “a suggestion of constructive,” not “actual,” knowledge.

Developing Defensive Policies & Procedures

Incident Reports

- All employee witnesses should complete.
- Written legibly, contemporaneously with incident.
- Objective, factual statements (no opinion).
- Use quotes when quoting.
- No slang.
- No objectionable language.

Incident Reports

- Attorney/Client Privileged?
- Must be communication with attorney, by employee.
- Communication must be made in scope of employee's job duties/responsibilities.
- Include something like “drafting incident reports for counsel, as needed to evaluate the company's legal rights” in employee job description or handbook.

Witness Statements

- Train employees to properly encourage witnesses to make a useful statement.
- Obtain and retain good contact information for the witness.
- Employ same considerations as incident reports.

Other Trial Prep Materials

- “Red Book” or Manager log from the date of the incident
- Security camera footage (before it’s gone)
- Police report
- 911 recording
- POS system reports (e.g. item, time ordered, etc.)
- Food item or foreign object in question (maintain chain of custody)

Common Sense Policies & Procedures?

Middleton v. Luna's Restaurant & Deli, LLC

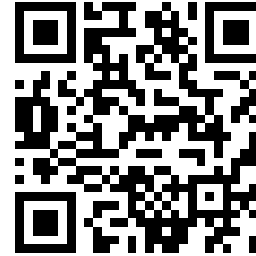
2011 Ohio 4388

- Slip & Fall occurred in the restaurant.
 - Plaintiff sent 2 demand letters.
 - Suit served by CMRRR, signed for by a waitress, and put on the owner's desk.
 - No Answer filed.
 - Default judgment entered: \$242,740.49.
- “insufficient or negligent internal procedures...may not comprise excusable neglect”**

QUESTIONS?



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Session Evaluation



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