LIABILITY ARISING OUT OF THE SALE OF FOOD AND NON-ALCOHOLIC BEVERAGES

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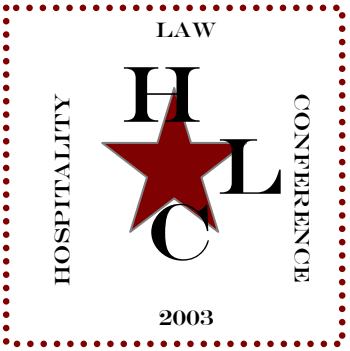

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I. SCOPE OF ARTICLE

This article addresses product liability law and its application to food and beverage products prepared and sold in retail food establishments such as restaurants, grocery stores, and hotels. It is intended to serve as a brief introduction to product liability law as it relates to food and beverage.

II. INTRODUCTION

The food supply in the United States is unquestionably one of the safest in the world. Modern sanitation and food preparation methods have undoubtedly lessened the likelihood of contracting serious illness because of eating spoiled or contaminated foods, or from being harmed by an object in food, but food poisoning and other similar illnesses and injuries do still occur. Most food retail operators will not experience a catastrophic foodborne illness incident such as the Jack-in-the-Box e.coli contamination in 1993. However, it is likely that they will have at least one customer complaint involving food – either illness or an object in the food product.

Defective food and beverages can harm people in a variety of ways. Defects in food can run from a piece of metal in a meatball to a clamshell in fried clam strips. Most claims involving food and beverages allege some type of manufacturing defect – hazardous objects, contaminants, and other deviations from the safe and wholesome condition intended by the seller and expected by the buyer. Less often, claimants will allege defects in design or warnings, such as serving hot coffee at too high a temperature with insufficient warnings of the risks, or failing to warn consumers of possible allergic reactions from certain foods.

III. CAUSES OF ACTION

A. Negligence

Although many jurisdictions require privity of contract in order for the plaintiff to sue under a negligence theory, courts have made an exception for a product that is inherently dangerous both in its condition and as to its condition if it is defect. Food products have been so classified and the absence of privity is not an obstacle to negligence claims for food product defects.

Early cases held food and beverage sellers to a standard of extraordinary care. *See, e.g., Race v. Krum*, 222 N.Y. 410, 415 (1918) ("This rule is based upon the high regard which the law has for human life. The consequences to the consumer resulting from consumption of articles of food sold for immediate use may be so disastrous that an obligation is placed upon the seller to see to it, at his peril, that the articles sold are fit for the purpose for which they are intended. The rule is an onerous one, but public policy, as well as the public health, demand such obligation should be imposed"). Today, courts hold purveyors of food and beverage to the normal standard of reasonable care. *See, e.g., Flagstar Enters. v. Davis*, 709 So. 2d 1132, 1139 (Ala. 1997) (restaurant owed a duty to claimant to exercise reasonable care in the preparation and packaging of her food, i.e., that it had a duty to sell her merchantable food or food that was not unreasonably dangerous); *Porteous v. St. Ann's Cafe & Deli*, 713 So.2d 454, 457 (La. 1998) (“A food provider, in selecting, preparing and cooking food, including the removal of injurious substances, has a duty to act as would a reasonably prudent man skilled in the culinary art in the selection and preparation of food”).

Negligence *per se* can be established by proof of a violation of a pure food statute. The defendant food operator must have violated the statute, which usually requires a finding that the food was adulterated and which may allow for a defense of good faith efforts to comply. *See, e.g., Koster v. Scotch Assocs.*, 640 A.2d 1225, (N.J. Super. Ct. 1993) (Violation of the statute is, in itself, an act of negligence. Salmonella found in a variety of food over five days.); *Chambley v. Apple Restaurants Inc.*, 504 S.E.2d 551 (1998) (broad definition of "adulterated food" in the context of the statute, included unwrapped condom in chicken salad).

Without a pure food statute, a plaintiff may have difficulty proving the negligence of the seller of defective food. *See, e.g., Porteous, infra*, (reversing judgment for plaintiff on claim of restaurant's negligence for failing to find and remove pearl in oyster po-boy sandwich). This is particularly true where a food service operator has purchased the food and then resells it unchanged or in the sealed container in which it was received. However, in other cases, the seller's fault is clear. *See, e.g., Flagstar Enters., infra*, (allowing blood from unbandaged cut to spill into take-out order of biscuits and gray); *Bullara v. Checker's Drive-In Rest.*, Inc., 736 So.2d 936, 937 (La. Ct. App. 1999) (allowing cockroach to enter chili dog, failing to discover roach lurking in dog prior to sale, and making sale to customer of roach-infested dog). Some courts will allow juries to infer the negligence of a food seller merely from the presence of a defect in the food. *See Bullara, infra*.

Plaintiffs may invoke the doctrine of *res ipsa loquitor* when no direct evidence of responsibility is available, but where circumstantial evidence points to the defendant's probable negligence as the cause of the defective food. In these cases, the circumstantial evidence surrounding the accident leads to inferences that the food would not have been defective without the negligence of someone, that the defendant's exclusive control over the food at the time of preparation suggests that the negligence was that of the defendant, and that the plaintiff did not contribute to the injury. Such inferences are quite strong where the consumer is injured by a foreign object in food or beverages found in a package, can, bottle, or other container sealed at the defendant's place of business.

B. Warranty

In warranty claims, the plaintiff need not necessarily prove that the defendant is at fault. Although express warranty actions are unusual in food cases, they do arise. *See, e.g., Cott v. Peppermint Twist Mgmt. Co.*, 856 P.2d 906, 911-12 (Kan. 1993) (nightclub server told patrons that drink was good when it was dishwashing liquid containing lye). Claims for breach of the implied warranty of quality or wholesomeness are most often used in food cases. *See, e.g., Jones v. GMRI, Inc.*, 551 S.E.2d 867, 869 (N.C. Ct. App. 2001) (involving a breach of the implied warranty where foreign object in meatball). The implied warranty of wholesomeness, now encompassed by the implied warranty of merchantability, provides a strict no-fault basis for liability under the Uniform Commercial Code. *See* U.C.C. 2-314. While the seal-container doctrine, privity, and other sales law restrictions sometimes limit the reach of warranty law claims, courts have long and widely used the law of warranty to provide relief to persons injured by defective food and beverages. *See, e.g., Jones, infra*, (upholding judgment for restaurant on implied warranty claim on basis of statutory sealed-container defense); *Barnett v. Leiserv, Inc.*, 968 F.Supp. 690 (N.D. Ga. 1997) (barring warranty action brought by child burned by hot coffee purchased and spilled by family friend in restaurant, due to lack of privity with coffee machine manufacturer); *Minutilla v. Providence Ice Cream Co.*, 144 A. 884, 885 (R. I. 1929) (no warranty without privity of contract); *Clime v. Dewey Beach Enters.*, 831 F.Supp. 341, 348-49 (D. Del. 1993) (allowing breach of warranty claim for ingestion of a naturally occurring bacteria in the raw shellfish).

C. Strict Liability in Tort

Strict liability has become the preferred theory of recovery in most food and beverage cases. Courts have held restaurants subject to strict liability in torts for injuries from contaminated oysters, MSG in soup, human blood in a biscuit and gravy, and many other situations involving defective food and beverages. *See, e.g., Kilpatrick v. Superior Ct.*, 277 Cal. Rptr. 230, 232 (Ct. App. 1991); *Livingston v. Marie Callendar's, Inc*., 85 Cal. Rptr. 2d 528, 529 (Ct. App. 1999); *Flagstar Enters., Inc*., *infra*.

Regardless of the particular cause of action, two issues predominate in food cases – defectiveness and causation. The burden of proof on both issues resides with the plaintiff.

IV. PROVING DEFECTIVENESS

A. General

To recover for injuries from ingesting food or drink, a plaintiff must establish that the food contained some element that rendered it unwholesome or "defective." A food or beverage item generally is defective, and a seller generally is subject to liability in negligence, warranty, and strict liability in tort for selling it, if the food product's condition is dangerous in a manner not intended by the seller nor expected by the consumer. As with any other type of product, a person injured by food or drink must establish its defectiveness - in this context, that it was unwholesome, unfit for human consumption, adulterated, or contained a foreign or otherwise dangerous substance of a type that consumers generally do not expect. *See, e.g., Sowell v. Hyatt Corp*., 623 A.2d 1221 (D. C. Ct. App. 1993) (worm in rice served at restaurant).

Sometimes, the food's defectiveness is very clear, as when a meatball contains a piece of metal or a chilidog contains a cockroach. Where a food's defectiveness is plain, unless the danger was so open and obvious that it should have been apparent to the consumer, its manifest deficiency renders it unwholesome, unfit, and defect by any standard. In such cases, it is wise to attempt settlement with the plaintiff, unless the demand is excessive. In other cases, the defectiveness of a food's dangerous condition may be in doubt. For example, in hot beverage cases, courts have ruled as a matter of law that a hot drink's propensity to burn is not a defective condition but an obvious risk that must be borne by those who drink hot beverages. *See, e.g., Olliver v. Heavenly Bagels, Inc.*, 729 N.Y. S.2d 611, 612 (Sup. Ct. 2001) (discussing other coffee burn cases and granting summary judgment for the defendant). Similarly, a food's defectiveness is subject to challenge if the hazard naturally occurs in the particular food, as a chicken bone in soup.

The plaintiff must establish that the food really did contain an improper substance, a fact that the plaintiff's testimony may establish. Nevertheless, the plaintiff's uncorroborated testimony that he or she swallowed a bug is not the strongest type of evidence. A plaintiff who swallows or otherwise disposes of the objectionable item, as a piece of metal in a meatball or dish of barbequed spareribs, may not be able to sustain the lawsuit. *See, e.g., Farroux v. Denny's Rest., Inc*., 962 S.W.2d 108, 109 (Tex. Ct. App. 1997) (affidavit of restaurant patron, allegedly sick from undercooked eggs, conflicted with his deposition testimony and where medical records contained no evidence of food poisoning but only showed that he suffered from obesity and gout). Even though the plaintiff has no direct evidence of a defect in food, defectiveness may be established by circumstantial evidence and credible expert testimony that the defendant's food was probably defective. *See, e.g., Gant v. Lucy Ho's Bamboo Garden, Inc*., 460 So.2d 49, 501 (Fla. Dist. Ct. App. 1984) (doctor testified that the bacteria involved is usually transmitted from fecal material of the infected person and that the egg rolls were the probable source).

B. The Tests

Defectiveness is clear enough when food or beverages contain a foreign object, such as glass, or metal or bugs or when the food is spoiled or otherwise contaminated. Yet, the parties' expectations and legal responsibilities may be quite different with respect to hazards that are natural to certain types of food, such as clamshells in clam chowder, cherry pits in cherry pies, and fish bones in fish fillets. To the extent that such naturally occurring objects are dangerous, food sellers ordinarily try to keep them out of the food and beverages they sell. But sometimes, their efforts are unsuccessful and a consumer is injured by a naturally occurring object of this type. The question in such cases is whether the food should be considered defective or whether such naturally occurring objects should be expected and thus the responsibility of the consumer.

1. Foreign/Natural Doctrine

In a California case decided more than sixty years ago, the court promulgated what has become known as the foreign/natural test for determining liability for injuries caused by objects in food, which are natural and related to the food but not intended to be in the food. In the case, *Mix v. Ingersoll Candy Co*., 6 Cal. 2d 674 (1936), the plaintiff ordered a chicken pie at defendants' restaurant and was severely injured when he swallowed a chicken bone contained in the pie. Two causes of action were separately alleged in plaintiff's complaint, one for damages for injuries resulting from an alleged breach of an implied warranty, the other for personal injuries resulting from the alleged negligence of defendants and their servants in the preparation and serving of the chicken pie.

After concluding that the plaintiff could state a cause of action for breach of the implied warranty of merchantability because the furnishing of food constituted a sale, the court next addressed the question of whether plaintiff could recover on this theory. The court observed that the finder of fact is frequently responsible for determining whether a particular alleged defect in food rendered an item not reasonably fit for consumption. Despite this observation, the court itself determined that, first, because chicken bones were natural to chicken meat (unlike stones, wires, glass or nails), and, second, because it is "a matter of common knowledge [that] chicken pies occasionally contain chicken bones," the plaintiff was barred from recovering on an implied warranty or negligence theory as a matter of law because he should have reasonably anticipated the bone and taken measures to guard against injury. The court offered several additional examples of cases in which no liability should attach. These examples were a bone natural to the meat in a T-bone steak or beef stew, a fish bone in a fish dish, or a cherry stone in a cherry pie.

The court also found that since naturally occurring risks are to be expected by the food consumer, the plaintiff could not recover damages under negligence either. The restaurant could not be compelled to assure that its chicken pies were perfectly free from chicken bones.

As you can see, this test creates liability, on the basis of breach of an implied warranty of wholesomeness and reasonable fitness for human consumption, for the seller of food containing a foreign object which injuries a consumer, but absolves the seller where the object is natural to the food, since the presence of the natural object does not render the food unwholesome, nor, on the premise that the consumer is not entitled to expect perfect food, does it render the food not unreasonably fit for human consumption. As for negligence, this test requires a consumer to act upon common knowledge that certain food products may contain natural parts of the ingredients, not intended to be in the final product, and to guard against them, and the mere presence of such natural components does not, without more, constitute negligence.

This test has been cited with approval and followed in numerous jurisdictions. *See, e.g., Silva v. F. W. Woolworth Co*., 28 Cal. App. 2d 649 (1938) (no recovery for turkey bone in turkey dressing); *Shapiro v. Hotel Statler Corp*., 132 F. Supp. 891 (1955) (no liability for fish bone in seafood dish); *Brown v. Nebiker*,

296 N.W. 366 (Iowa 1941) (no recovery for pork chop bone lodged in throat); *Goodwin v. Country Club of Peoria*, 54 N.E.2d 612 (1944) (no liability for bone in creamed chicken); *Norris v. Pig'n Whistle Sandwich Shop*, 53 S.E.2d 718 (1949) (no liability for bone in barbeque pork sandwich); *Webster v. Blue Ship Tea Room, Inc*., 198 N.E.2d 309 (1964) (no breach of implied warranty because a restaurant customer eating fish chowder, should have anticipated having to remove some fish bones from her bowl).

2. Consumer Expectations Test

In time, the foreign-natural test was widely criticized and rejected by many states in favor of the reasonable expectation test. Under the reasonable expectation test, the query to determine liability is whether a reasonable consumer would anticipate, guard against, or expect to find the injurious substance in the type of food dish served. *See, e.g., Dandy Fast Food, Inc. v. Miriam Carpenter*, 535 S.W.2d 786 (Tex. Civ. App. 1976) (chicken bone caught in customer's throat was unreasonably dangerous); *Wood v. Waldorf System, Inc*., 83 A.2d 90 (R.I. 1951) (assuming that chicken bones were natural to and used in the preparation of chicken soup, it was not necessary, natural, or customary that harmful bones had been allowed to remain concealed in the soup as finally dispensed to the customer); *Zabner v. Howard Johnson's Inc*., 201 So.2d 824 (Fla. Dist. Ct. App. 1967) (walnut shell was not reasonably expected to be found in ice cream). Whether the injurious substance is natural or foreign is irrelevant. Rather, liability will be imposed on the restaurant if the customer had a reasonable expectation that the injurious substance would not be found in the food product. On the other hand, if it can be shown that the customer should reasonably have expected the injurious substance in his food, that customer is barred from recovery.

In *Mexicali Rose v. Superior Ct*., 822 P.2d 1292 (Cal. 1992), the California Supreme Court, replacing the *Mix* doctrine, took a middle-of-the-road approach, shielding food sellers from strict liability, but not negligence, for dangers naturally occurring in food products. The court outlined its test -

> If the injury-producing substance is natural to the preparation of the food served, it can be said that it was reasonably expected by its very nature and the food cannot be determined unfit or defective. A plaintiff in such a case has no cause of action in strict liability or implied warranty. If, however, the presence of the natural substance is due to a restaurateur's failure to exercise due care in food preparation, the injured patron may sue under a negligence theory.
>
> If the injury-causing substance is foreign to the food served then the injured patron may also state a cause of action in implied warranty and strict liability, and the trier of fact will determine whether the substance (i) could be reasonably expected by the average consumer and (ii) rendered the food unfit or defective.

In the mid-nineties, the American Law Institute shifted from the foreign/natural doctrine to the consumer expectations test providing in the Products Liability Restatement 7 –

> One engaged in the business of selling or otherwise distributing food products who sells or distributes a food product that is defective under 2, 3, or 4 is subject to liability for harm to persons or property caused by the defect. Under 2(a), a harm-causing ingredient of the food product constitutes a defect if a reasonable consumer would not expect the food product to contain that ingredient.
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> Note 7, 7. In comment b, the Reporters note: "A consumer expectations test in this context relies upon culturally defined, widely shared standards that food products ought to meet." Id. 7 cmt. b.

In recent years, courts have almost abandoned the foreign/natural doctrine as a liability determinative test in favor of the consumer expectations test. However, *see, e.g*., *Mitchell v. T.G.I.Friday's*, 748 N.E.2d 89 (Ohio Ct. App. 2000) (applying both tests); *Ford v. Miller Meat Co*., 33 Cal. Rptr. 2d 899 (Ct. App. 1994) (bone fragment was a natural substance to be anticipated in beef).

C. Law or Fact

An important sub-issue to the application of either test is the naturalness of the dangerous item's presence in the food product. Usually this question is left for a jury to resolve. *See, e.g*., *Yong Cha Hong v. Marriott Corp*., 656 F.Supp. 445 (D.Md. 1987) (deciding whether the presence of a worm-like trachea or aorta in fast-food chicken fell below reasonable consumer expectations was question of fact). However, courts have taken the issue from the jury and have held as a matter of law that consumers should expect that a fish fillet might contain a one-centimeter bone, that a fried clam strip might contain a piece of clam shell, that a raw clam served in a restaurant might contain harmful bacteria, and that a cake might contain a strand of human hair. *See, Morrision's Cafeteria of Montgomery, Inc. v. Haddox*, 431 So.2d 975 (Ala. 1983); *Mitchell v. T.G.I. Friday's*, 748 N.E.2d 89 (Ohio Ct. App. 2000); *Clime v. Dewey Beach Enters*., 831 F.Supp. 341 (D.Del. 1993); *Cain v. Winn-Dixie La., Inc*., 757 So.2d 712 (La.Ct.App. 1999). The decline of the foreign/natural doctrine in favor of the consumer expectations test evidences that the trend is to case-specific judicial rulings on when consumers, as a matter of law, should be required to expect natural hazards in the food they eat.

VI. PROVING CAUSATION

Even if a plaintiff can establish that a food or beverage ingested was dangerously defective, the plaintiff must connect the defect both to the defendant and to the plaintiff's injury or illness.

A. Defendant

It is fundamental that a seller is responsible for an injury only if the seller was responsible for the defect – that is, only if the defect was in the product when it left the seller's control. *See, e.g. Mears v. Heinz Co., 1995 Tenn. App. LEXIS 50* (Tenn. Ct. App. 1995) (Although 90% of tin plate, which was the primary composition of the sliver found in the soup served at a cafeteria, is used for tin can containers, the sliver could have come from other sources); *Russac v. Crest Hollow Country Club*, 675 N.Y.S.2d 643 (App. Div. 1998 (finding that the plaintiff failed to meet his burden of showing that it was more probably than not that his ingestion of a toothpick occurred at the country club); *Riviere v. J.C. Penney Co*., 478 So. 2d 965 (La. Ct. App. 1985) (patron had the burden to prove that the store's restaurant product contained a deleterious substance, that the substance was consumed, and that as a result of the consumption, the plaintiff was injured).

However, the plaintiff need not prove the defendant's responsibility for the defect beyond all doubt; the plaintiff may recover if the evidence, including reasonable inferences from any circumstantial evidence, suggests the likelihood that the defect was in the product at the time the defendant sold it. *See, e.g., Flagstar Enters., Inc. v. Davis*, 709 So. 2d 1132 (Ala. 1997) (blood in take-out order of biscuits and gravy); *Fisher v. McDonald's Corp.*, 2002 Conn. Super. LEXIS 3036 (2002) (human blood in hamburger). Thus, a plaintiff may recover if she bites into a cockroach in a chili dog she had purchased earlier at a fast-food restaurant if she establishes that she ate the dog shortly after she arrived home and before her own household roaches had

time to crawl inside. *Bullara v. Checker's Drive- In Rest*., 736 So.2d 936 (La.Ct.App. 1996).

B. Plaintiff's Harm

In order to link an injury or illness to a defective food, a plaintiff first must connect the injury or illness to a particular food item sold by the defendant and, further show that it was bad. When a person becomes ill shortly after eating, the natural tendency is to associate the illness with the foods or beverages the person recently consumed. If any of the food remained unconsumed, it often is discarded, which means that no samples may remain to test and analyze to ascertain whether the food was good or bad. In such cases, courts have allowed plaintiffs to go to the jury if they offer reasonable circumstantial evidence of defectiveness, such as that a particular food smelled or tasted strange. Yet without credible evidence suggesting that a particular food item was in fact defective, the plaintiff's case quite properly will fail. *See, e.g., Mann v. D.L. Lee & Sons, Inc*., 537 S.E. 2d 683 (Ga. Ct. App. 2000) (finding that although plaintiffs probably suffered food poisoning, there was insufficient evidence that the defendant's ham was defective); *Meyer v. Super Discount Mkts*., 501 S.E. 2d 2 (Ga. App. 1998) (a mere showing that a person became sick subsequent to eating food is insufficient); *Fuggins v. Burger King*, 760 So.2d 605 (La. Ct. App. 2000) (evidence was insufficient to establish that defendant's illness was food poisoning and, if so, whether it had any connection to the hamburger sold by the defendant).

In addition to showing that a particular food item was defective, the plaintiff must also link the defective food product to the harm. In many cases, the causal link between defective foodstuff and a plaintiff's harm is undisputed, as when the plaintiff immediately is injured or sickened from consuming food that clearly is defective, as a sirloin steak containing the tip end of a hypodermic needle or a chili dog containing a cockroach. But if the connection between defective food or beverage and a person's illness is not self-evident, as often is the case, expert testimony may be required to establish the causal link between the defect and the harm. *See, e.g., Arbourgh v. Sweet Basil Bistro, Inc*., 740 So. 2d 186 (La. Ct. App. 1999) (testimony by treating doctors that plaintiff's infection probably was caused by ingestion of raw chicken was sufficient to establish causation).

A plaintiff who proves all three elements - (1) that the food or beverage was defective, (2) that the manufacturer was responsible for the defect, and (3) that the defect proximately caused the harm - may recover damages for the harm. If a plaintiff bites off the head of a cockroach hiding in a sandwich, the plaintiff normally can recover damages for emotional distress. *See, e.g., Brayman v. 99 West, Inc*., 116 F.Supp. 2d 225 (D. Mass. 2000) (plaintiff, cut in the throat by a piece of glass hidden in mashed potatoes, could recover for past and future pain and suffering, emotional distress, anxiety, mental anguish, embarrassment and loss of enjoyment of life). Even if nothing is eaten of the intruder or even of the food, the plaintiff still may establish causation in most jurisdictions by proof that he or she was sickened by observing, touching, or smelling (and thinking about) the bug, spoilage, or other offending condition. *See, e.g., Sowell v. Hyatt Corp.*, 623 A.2d 1221 (D.C. Ct. App. 1993) (defendant liable for a worm in rice plaintiff almost ate); *Chambley v. Apple Rests. Inc*., 504 S.E.2d 551 (Ga.Ct. App. 1998 (condom in chicken salad). As with other types of products, damages for lost consortium are available on proper proofs. *See, e.g., Bullara, infra*, (noting that for a few months after she bit into a cockroach in a chili dog, wife was not in the mood for sex and husband had to cook and eat alone).

VII. WHAT CAN YOU DO

As noted above, food safety has become an issue of great importance to the retail food industry. There are many opportunities for food to become contaminated between production and consumption. From its origin at the farm, orchard or sea to the last stages of production at a retail establishment, food can be contaminated. Even when food is purchased from inspected and approved sources, ingredients may be contaminated when they arrive at your operation. Handling ingredients properly and ensuring that safety precautions are in place will go a long way in preventing food and beverage claims.

A. HACCP

Most food contamination, whether from objects in the food or specific pathogens, can be prevented. Potential reasons for contamination include: (1) use of contaminated raw food; (2) cross-contamination of prepared food by contaminated raw food; (3) poor personal hygiene by infected food handlers; (4) inadequate cleaning of equipment; (5) inadequate cooking or reheating; (6) improper holding temperatures; (6) cooling food too slowly after heating (7) eating food too long after preparation. The food retailer's best line of defense against food-related claims is HACCP.

Pillsbury developed Hazard Analysis and Critical Control Point (HACCP) in the 1960s in the United States to ensure food safety for the first NASA manned space missions. Most state and local health departments require that every retail food operation develop and maintain a HACCP program.

HACCP is a systematic application of good practices for the prevention of food safety problems and the assurance of safe food. HACCP assists the food operator in anticipating problems and finding the right preventative solution. Briefly, with HACCP, you conduct a hazard analysis; identify the critical control points in the process where a hazard can be prevented, eliminated, or reduced to an acceptable level; establish critical control point monitoring requirements; establish corrective action to be taken when monitoring indicates that there is a deviation from the established critical limit; establish effective record-keeping procedures; establish procedures for verification that HACCP is working correctly.

Perhaps, the most effective tool in HACCP is the record-keeping process. This process identifies each step in the preparation and serving of the food item; identifies any hazards associated with the item; verifies the monitoring process; documents corrective action. HACCP helps the food operator eliminate contamination of food and beverage products. Critical to the success of a HACCP program is management commitment. If the food operator continually emphasizes the importance of HACCP, ensures that it is followed, and disciplines employees who do not use it, it will promote safer food in the retail establishment.

Sample HACCP programs are available from the National Restaurant Association and most state and local health departments.

B. Crew Training

Training offers your crew a better understanding of how food can become contaminated and how food-related claims can be avoided through proper food handling procedures. The food service operator should have a training plan in place to identify the training needed for each crew position. There are many off-the-shelf programs available, such as Serv-Safe from the National Restaurant Association and Silver Platter, a CD-Rom interactive program available through Pencom, Inc. As each crew member receives training, you should maintain records of such training and review the training needs of each employee as

they are promoted or moved to other positions. Basic food handling procedures should be reviewed with each crew member at least once annually to remind employees of the best practices.

Employees can be the single biggest source of foodborne illness and contamination in the retail food establishment. Items commonly found in food prepared and served to the public usually come from employees. Bandages, jewelry, fingernails, hair, glass and the like have been placed in the food or fall in due to employee carelessness.

Poor employee hygiene contributes to foodborne illness. Employees who arrive at work with a communicable illness should be sent home. Plastic gloves worn by crew members will not prevent pathogens from spreading to food and beverages. Bacteria multiply to very high numbers on the moisture that accumulates inside gloved hands. Pathogens from unwashed hands in gloves can leak though pinholes or small tears. Cuts and sores that are left unbandaged contribute to the bacteria in food. Coughing and sneezing spreads bacteria and pathogens. Improper hand washing does the most damage spreading fecal, urine and vomit pathogens.

Finally, disgruntled or terminated employees can become vindictive and wreak havoc with the retail food operation. Remember, these crew members know the policies and procedures of the business and can sabotage the operation.

C. Health Department

The state or local health department can be the retail food operator's best friend or worst enemy. Many health departments across the country have established food establishment rating and employee certification systems. Los Angeles County, for example, has both. The rating system is an inspection and grading system where food establishments are inspected using a four page report. The inspector reviews the establishment's food temperatures, employee practices, vermin, water / sanitizing, sewage, food temperatures, food preparation, operations, utensils / equipment / shelving / cabinets, plumbing / fixtures, consumer protection / truth-in-menu, walls / ceilings / floors, vermin, equipment drainage, ventilation / lighting, toilets / toilet rooms / dressing rooms, refuse / premises / janitorial. Points are assigned to each item and added up to obtain an overall grade. Based on the overall grade, the establishment is given an A, B, C or no designation. Operations not given a designation are temporarily closed in order to bring them into compliance with the health code. Inspection reports must be made available at the establishment to anyone who wants to see them. This type of practice is used throughout the United States.

In Los Angeles, each food establishment must have an owner or employee who is certified in food safety and such certification must be renewed every three years by passing an approved certification examination. This requirement is met by passing the National Restaurant Association's Serv-Safe program which is recognized by the Los Angeles County Department of Health Services. This requirement is similar to those around the country. Many states and counties require every employee to obtain a food handler's certificate or a similar certification prior to commencing work in a restaurant.

Since health department inspection reports are available to the public, the media has used them for the past few years in exposes of the industry. Likewise, the plaintiffs' bar will use these reports against the restaurant in furthering their claims. Knowing the local health inspector and keeping him/her informed of your training and HACCP policies and procedures can lessen and alleviate negative reports. Working with the health department will also help you if and when a food-related problem arises.

D. Emergency Response Procedures

Effective emergency management requires sound decision-making in a chaotic and emotionally-charged environment. To achieve this, dedicated emergency planning and training is necessary. Although most of you will never face a catastrophic accident or injury, you must prepare your staff in the event that one occurs.

Do your employees understand how to handle a food-borne illness or contaminated product claim? Who do they call when something happens in your operation? What do they say to a customer who is making a claim? At the first mention of an injury or accident, your staff should know what procedures to follow. Keep in mind that those first few minutes could be crucial to your defense of any claim.

Putting procedures in place requires effective planning and the involvement of both employees and management. Most importantly, management commitment and leadership is required to ensure the success of your plan. Once you have your plan in place, communication and training will guarantee the effectiveness of your plan.

Customer claims involving food and beverage must be handled properly in order to avoid problem if and when they are litigated. Things to consider when developing your emergency response plan include: scripting your employees in how to respond to a customer claim; getting and preserving the food or beverage item for further investigation; observing the claimant and relaying such information to the appropriate investigator; tracking the food or beverage item from delivery of its ingredients to preparation and serving it to the customer; video and audio taping of customer areas, such as salad bars and cashier/ordering counters; who to call – ambulance, doctor, police, attorney, district manager, corporate office; photographing the scene or food product.

E. Crisis Management Planning

A foodborne illness outbreak such as the Jack-in-the-Box or the Odwalla Juice incidents probably will never affect most of you. But, as the tragedy of 9/11/01 taught us, you can never be too prepared.

Some 5,000 people die annually from foodborne illness, according to the Centers for Disease Control and Prevention. The CDC defines a foodborne disease outbreak as an incident in which two or more people experience a similar illness after ingestion of a common food.

When a crisis hits your business, it will come out of nowhere, all of a sudden. With foodborne illness and injury, you will most likely get a telephone call from the health department requesting information. This is not the time to start preparing your crisis management plan. In fact, there is no substitute for having a solid plan in place.

Whether you operate a single restaurant or an international chain, you can manage any crisis with which you are faced, if you have a plan and a working team operating within the guidelines prescribed in the plan.

The elements of your plan should include

- Team members
    - Senior Manager who is charged with making decisions
    - General Counsel or outside counsel

    - Public Relations
    - Risk Management or insurance professional
    - Microbiologist
    - Medical professional
    - Chief spokesperson
    - Counselor

- A clear set of crisis management procedures
    - How is the plan triggered
    - How are decisions made and by whom
    - A system for rapid first-step communications
    - A public information plan that includes basic messages, such as the organization's primary concern for health and safety
    - Checklist of contact
    - Monitoring system
    - Procedure to test the plan
    - Provision for training

Be prepared for the worst. Take the initiative. Do not be afraid to be forthright with good news or bad. Do not hesitate to admit that you do not have all the answers or that you do not have an instant solution. Express genuine concern, not explanation, not blame and never specifics such as compensation – just concern. Do not panic. What is the situation? Who says it's a crisis? Look at the information you are receiving? If it is coming primarily from the media, consider sending your own personnel out to investigate immediately. Try to obtain information from other sources. Above all, be comfortable with having no instant, ultimate solution to the crisis. Identify your supporters. Now is the time that your relationships with your vendors and the health department should bear fruit. Join with them in facing the issues together. Cooperating with the health department will go a long way in preserving your goodwill in the community. It is not appropriate to be pointing fingers, looking for scapegoats. If one of your franchisees has the problem, remember the public perception is that it is your company operation. Support the franchisee through the crisis; do not let them stand alone. Deal with only the crisis during the crisis. A crisis is not the time to defend policies based on a superior record or outstanding performance in the past. When the crisis begins to wane, re-integrate the issue into your day-to-day operations. Finally, conduct a post-mortem. Follow up and make modifications so you are better prepared next time.

Terrorism is a real threat to restaurants, particularly those with salad bars, self-service buffets or condiment bars. Pathogens, bacteria and other substances can be introduced in food held in these areas with little detection. In 1984, members of an Oregon religious commune—followers of an Indian-born guru named Bhagwan Shree Rajneesh—tried to influence a local election by poisoning salad bars with salmonella bacteria to sicken voters. Although no one died, 751 people became ill. There have been a couple of other attempts to deliberately contaminate food with biological agents since World War II, but these have been criminal acts, not terrorism.

The Oregon attack took place at local restaurants, near the end of the food-distribution chain, but an attack could occur at any point between farm and table. Imported food could be tainted with biological or chemical agents before entering the United States, or toxins could be introduced at a domestic food-processing plant. Crops or livestock raised on American soil could also be targeted. Experts also worry that terrorists might try to spread false rumors about unsafe foods via the mass media or the Internet.

Concerns about such attacks have grown since September 11. Some forms of attack would not require a large or highly skilled organization and could come from foreign groups like Osama bin Laden's al-Qaeda network, domestic terrorists, eco-terrorists, a cult-like group such as Oregon's Rajneeshees, or an unaffiliated individual—anyone who wanted to undermine the economy and spread panic. Elsewhere, groups that have threatened agroterrorist attacks include Tamil militants in Sri Lanka and British activists opposed to chemical and biological warfare.

F. Handling Claims

How you handle a claim when it is first reported can affect its final outcome. Customers will remember how your staff treats them and, if they are treated poorly, may use that when negotiating a settlement or considering litigation.

1. Gathering Information

Obtaining information in order to adjust a claim can be difficult. You may be dealing with an emotional, angry, or demanding customer who is threatening to call the media or file suit immediately. The customer may have a nonspecific illness that the doctor is attributing to food poisoning, but has no confirmation of the specific pathogen involved. In order for you or your insurance carrier to properly evaluate the claim, you need to get information from the customer calmly and professionally.

You should develop a script to use in obtaining such information. Information you will need includes:

- Customer name
- Address
- Date of visit to restaurant
- Time and date of onset of illness; how long after they ate
- Medical treatment
- Medical provider
- Any medical tests and their results (this is extremely important; most foodborne illness cannot be diagnosed without a stool culture)
- Does customer have the offending food item
- If customer claims object in food, does customer have the object (try to obtain the object for future investigation and testing)
- Any other family or friends who ate with customer
- Who paid for the food
- Any witnesses
- Did customer eat at other restaurants before or after eating at yours
- Names of any employees the customer came in contact with

The task of gathering this information should go to management. Staff should be trained to refer the customer to the on-duty manager or corporate management. Remember anyone who deals with the customer regarding his/her claim is a potential witness. When talking to the customer, do not admit liability, discuss other similar incidents that may have occurred in your establishment, or promise to pay for anything.

Do not stop at just gathering information from the claimant. Obtain all documents relating to the purchase of the food item. Find out who was on duty at the time of the incident.

2. Reporting

If you are insured, remember to comply with the reporting requirements of your policy and report the claim as soon as you are notified of it by the claimant. Failure to do so could negate your coverage.

If your health department has reporting requirements with regard to food-related claims, remember to notify them as well.

3. Defending

The development and implementation of a proactive defense strategy is essential to successfully handling food and beverage litigation. As discussed above, food and beverage claims involve either illness due to bacteria in the food or the presence of an object in the food.

The plaintiff will usually complain: "I ate your food and now I'm sick." Without more evidence, the plaintiff's case will fail. In order to hold a defendant liable for foodborne illness that plaintiff must establish a precise factual trail, with a clear link between consumption of the food and his/her illness. Once you have gathered the information delineated above, you can be begin to create a timeline of the events leading up to the plaintiff's alleged injury.

Familiarize yourself with the usual incubation periods of common bacteria and pathogens. For example, salmonella usually manifests itself approximately twelve to twenty-four hours after consumption of the offending food. If the plaintiff claims a shorter incubation period following consumption, chances are that he/she did not contract the illness at your restaurant.

Keep in mind, that food poisoning may be caused by factors that have nothing to do with your operation. It could be caused by bacteria that are normally present in one's throat or intestines, and which can produce what appears to be food poisoning. Plaintiff may be allergic to a particular dish. He may eat the same food consumed by others with no ill effects or results, but he may have an allergy or may at that particular time be easily susceptible to a stomach or intestinal upset.

Many claims that objects in food caused injury to the plaintiff are based in fraud. If the food has been served to the customer and is out of your control, it is entirely possible that the customer introduced the object into the product.

Your documentation of your food preparation will evidence the many preventative measures you have in place to produce a safe product. Show that you follow a HACCP plan. Show that you inspect and test the product from the time it is purchased until it is served. HACCP monitoring and temperature reports will aid in this. Show that your cleaning procedures and time break the causal chain.

Expert testimony in several areas will help as well. For example, the DNA of e. coli O157:H7 can be isolated to a particular strain. If the strain causing the plaintiff's illness does not match any found on your premises or matches a strain found in another operation, you can discredit the plaintiff's claim. A microbiologist, epidemiologist, or DNA expert can provide such expertise to your defense team.

Investigation of the plaintiff should be conducted as well. Is this a person who has had several claims in the past? Is the plaintiff just traveling through town and happened to stop in your restaurant? Is the object found in the food, one unrelated to the product, such as a condom, mouse, frog, etc.? Consider having the object tested. An autopsy on a mouse or frog can tell you whether the animal is common to your area or

came from a pet store. Test objects alleged to be found in your products. Condoms found in hot food will not hold up at 160 degree cooking temperatures.

Do not become the defendant of choice by refunding money or giving customers meal coupons to compensate them. Remember food and beverage are your products and you should be relentless in defending them.

4. Settling

Settling cases should only be done when your operation is clearly at fault. If you have insurance, settling a case outside of your coverage is not wise and can void your insurance. Partner with your carrier to establish guidelines in settling cases. If you have information adverse to your case, let the carrier know. Settling when liability is clear and the litigation costs are minimal will assist you in maintaining low insurance premiums.

G. Insurance

1. General and Products Liability

The commercial general liability policy (CGL) defines the products-completed operations hazard as including bodily injury and property damage that arises out of the named insured's products or work and that occurs away from the named insured's owned or rented premises.

Your CGL should include the products/completed operations hazard redefined endorsement. This endorsement redefines the first paragraph of the products-completed operations hazard so that bodily injury or property damage does not have to occur away from premises owned by or rented to the named insured to be included in the definition of "your product" if the injury occurs after the named insured has relinquished possession of the products.

2. Product Tampering/Product Recall

a. Product Tampering

Recent incidents of malicious tampering with food, beverage, pharmaceutical and cosmetic products have given rise to interest in insurance to cover a manufacturer or retailer for the cost of recalling the alleged tampered items from the shelves of stores or other operations throughout the country or in local areas affected. A product tampering policy would apply if an individual were actually to tamper with products or threaten to do so. The policy also would cover related costs such as necessary inventory destruction, lost profits, business interruption and product rehabilitation. If a product tampering case arises, crisis management and loss prevention firms can be called in to assist insureds to reduce chances that their companies will become further targets and minimize damage that can arise. Coverage does not apply to third-party liability or extortion payments. Premiums are based on corporate size and assessment of exposure.

b. Product Recall

Interest in this form of insurance has been stimulated by the explicit exclusion in the 1966 revision of standard general liability policies, and by the increased activity of the government in recalling products on the market suspected of being defective and causing bodily harm to consumers. A common example of such

recall is activity by the Food & Drug Administration in recalling food and drug products allegedly contaminated by salmonella or botulism. The policy is a form of extra expense coverage, rather than legal liability coverage. Insurance is provided for measurable expenses involved in withdrawing the product, including cost of communications; shipping charges; radio and television announcements and newspaper advertisements; costs of hiring additional personnel and the payment of overtime to regular employees; and cost of destroying the product if necessary, all when directly related to the withdrawal of a suspected defective product from the market. The policy generally is written with both a deductible and coinsurance feature.

3. Premise Medical Payments

Medical payments coverage is primarily intended to pay for injuries sustained by members of the general public while on the insured's premises or otherwise exposed to the insured' operations. The significant aspect of this coverage is that it pays without regard to the legal liability of the insured. If, for example, a customer were to be injured while at the insured's business, the insurer would pay for reasonable medical expenses incurred and reported within one year of the incident whether or not the insured is legally liable for the injury. The rationale for this no-fault coverage approach is that payment of expenses without regard to liability will help reduce both frequency and severity of bodily injury lawsuits because, in general, injured parties may be less inclined to sue if they receive conciliatory treatment at the time of the incident.

VIII. Conclusion

Food-related product liability claims remain an unsettled area of the law. An informed and trained management and staff will go a long way in preventing and minimizing the potential liability to the food operator.

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