

The Modern Menu

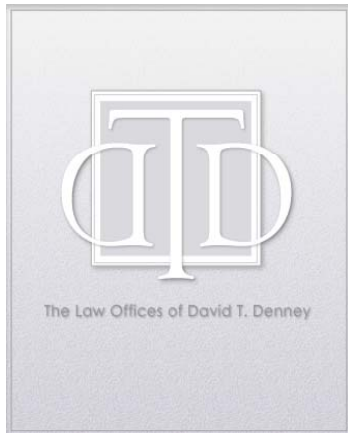
Warnings, Disclaimers & Menu Labeling

Presenter



David T. Denney, Esq.

- 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 placement of securities, corporate transactions, commercial leasing, civil litigation, employment matters and beverage alcohol licensing.
- www.foodbevlaw.com



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
 - Written (“Wild Salmon”)
 - Oral (“We can serve you a meal without nuts.”)

Reasonable Expectation Test

- Foreign Substance (glass/metal/band-aid)
 - You probably lose.
- Natural but Unexpected Substance (bone/pit)
 - You may still lose.

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

Statutory Liability

Florida Dept. of Business & Professional Regulation
Division of Hotels & Restaurants

Fines start at \$500 for each instance of “food misrepresentation”

- **Strict Liability** for restaurants
- If possible, know your products’ chain of custody

Statutory Liability, cont'd.

- 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”)

Federal Menu Labeling Law

Nutrition Labeling and Education Act of 1990 (NLEA)

- “Nutrient Content Claims” direct or implied statements about the level of a substance in a food (e.g. “low sodium,” “low fat” or “contains 100 calories”);
- “Health Claims”: direct or implied statements that characterize the relationship of the food or an ingredient to a disease or health-related condition (e.g. a “heart” symbol or “heart healthy” designation)

NLEA, Cont'd

- Once a restaurant makes a “Claim” on its menu, it must make nutritional information available to customers upon request.
- May be provided via a brochure, insert, or orally
 - Restaurant must make a “reasonable basis determination” that the nutrition information it provides to the consumer is correct
- FDA will look at
 - recipe,
 - source of the nutrition information, and
 - the restaurant’s ingredient calculations
 - FDA will then evaluate whether the basis information and the information provided to customers is consistent with the FDA’s definition for the Claim used.

NLEA Recordkeeping

FDA checklist for information that should be retained:

1. A standardized recipe, including the ingredients used and their quantities;
2. Nutrient content data for each ingredient (may include information from the ingredient manufacturer, a reliable data base, or other nutrient information source, or a combination of these; information must include data for the nutrients that are the basis for the claim and may include data for other nutrients);
3. The source of the above data (e.g., the name of the data base, cookbook, etc.);
4. Any assumptions made by the restaurant or any calculations that were performed that may affect the reliability of the data (e.g., combining data sources, assumed nutrient values, replacing generic or average data base values with values for brands specifically used in the restaurant, etc.);
5. Serving size (total weight) of the finished food or meal;
6. Total amount of nutrient present per RACC (“Reference Amount Customarily Consumed”), actual serving, or per 100 g of food, as appropriate for the definition of the claim;
7. Evidence of staff awareness that reasonably consistent ingredient measurement and portion control are necessary for foods bearing a claim (e.g., training materials, observation of food preparation methods); and
8. Presence and use of a standard operating procedure identifying essential parameters in the preparation of a food bearing a claim (e.g., the use of skim milk instead of whole milk, broiling instead of frying, or the need to measure salt instead of salting to taste), when the method of preparation could affect the basis for a claim.

Proposed Federal Law: MEAL

Application: Restaurants with ≥ 20 units under same trade name

- Disclosures required:
 - Calories;
 - Grams of saturated/trans fat; and
 - Sodium (mg)
- Placement of Information:
 - Printed Menus: all disclosures, “clear & conspicuous”
 - Menu Boards: calories, with provision for additional info to be provided on customer request
 - Salad Bar: calories at each item
- Not applicable to specials, temporary or irregular items

Proposed Federal Law: LEAN

Application: Restaurants with ≥ 20 units under same trade name

- Disclosures required:
 - Calories
- Placement of Information:
 - Printed Menus: an insert, an appendix OR a supplement;
 - Menu Boards: calories, with provision for additional info to be provided on customer request;

BUT: if calories not listed on menu board, then a statement directing customer to additional information

- Not applicable to items on menu < 90 days/year

MEAL v. LEAN – preemption

MEAL Act would not preempt additional laws promulgated by states or other political subdivisions

LEAN Act would preempt any state or local law that is not identical.

Selected Menu Warning Cases

Edwards v. Hop Sin, Inc.
140 S.W.3d 13 (Ky. Ct. App. 2003)

- Plaintiff with chronic liver condition ate raw oysters from the restaurant's oyster bar.
- Restaurant did not have any warnings (in menu or otherwise) about consuming raw oysters
- Delivery container contained this warning:

There is a risk associated with consuming raw oysters or any raw animal protein. If you have chronic illness of the liver, stomach, blood or have immune disorders, you are at greater risk of serious illness from raw oysters. You may, however, eat your oysters fully cooked. If unsure of your risk you should consult your physician. Please share this information with your customers.
- Court reversed summary judgment for restaurant, finding that a jury could find either (a) restaurant altered the product by failing to convey supplier's warning, or (b) restaurant should have known oysters were dangerous to certain people without a warning.

Livingston v. Marie Callender's, Inc. 72 Cal.App. 4th 830 (1999)

- Allergic diner asked server whether soup contained MSG, and was “assured” it did not.
- Server was wrong (as usual).
- Soup was advertised as “made fresh, from scratch . . . every day.”
- Appellate court reviewed the case under the application of strict liability principles –whether the soup contained “an ingredient to which a substantial number of the population are allergic;” or an ingredient “which the customer would reasonably not expect to find in the product.”
- Appellate court remanded for trial on whether the restaurant had a duty to warn customers that MSG was present.
- **The Appellate Court also reversed the trial court’s order dismissing the Marie Callender’s parent entities.

Woeste v. Washington Platform Saloon & Restaurant 836 N.E.2d 52 (Oh. App. 2005)

- Diner ordered raw oysters without opening the menu.
- Diner suffered from Hepatitis C and cirrhosis, making him susceptible to *vibrio* bacteria.
- Restaurant's menu contained the following warning:

Consumer Information: There may be risks associated when consuming shell fish as in the case with other raw protein products. If you suffer from chronic illness of the liver, stomach or blood, or if you are pregnant or if you have other immune disorders, you should eat these products fully cooked.

- HELD: Restaurant could not be subjected to liability for the deceased's failure to read the warning

Developing Policies

- Learn the Truth in Menu regulations in your jurisdiction.
- Do not laminate menus. Opt instead for jackets/sleeves. This allows for rapid changes to text, and will keep menus looking fresh.
- Make disclaimers readable, but not overwhelming. For counter service, consider placing disclaimers at the point of sale.

Developing Policies, cont'd.

- Consider the following disclaimers/warnings:
 - Allergy notification
 - Raw protein
 - Unpasteurized fruit juices
 - Pits/bones
 - Sulfites
 - Economic disclaimers
 - » Service Charge (e.g. 18% added to parties of 8 or more)
 - » Not responsible for...
 - » Limitations on availability

Developing Policies, cont'd.

Sample Disclaimer:

There is a risk associated with consuming raw oysters or any raw or undercooked animal protein. If you have chronic illness of the liver, stomach or blood, or have immune disorders, you are at greatest risk of illness from raw or undercooked protein, and should eat these items fully cooked. If unsure of your risk, consult your physician.

We make every attempt to identify ingredients that may cause allergic reactions for those with food allergies; however, there is always a risk of contamination. There is also a possibility that manufacturers of the products we use could change the formulation at any time, without notice. Guests concerned with food allergies need to be aware of this risk. We will not assume any liability for adverse reactions to food consumed, or items one may come in contact with while eating at this establishment. Please inform the manager if you have a food allergy.









