

The Legal Intelligencer

THE OLDEST LAW JOURNAL IN THE UNITED STATES 1843-2011

PHILADELPHIA, MONDAY, JULY 11, 2016

An **ALM** Publication

Food Allergy Lawsuits Can Be a Tough Nut to Crack

P.J. D'Annunzio

Of the Legal staff

These days, diners are more attuned to what's in their food when eating out, whether they're allergic to peanuts, seafood, or have a sensitivity to gluten. Restaurants and the food service industry in general have responded in kind by asking patrons about their allergies when they sit down to eat.

Legal experts and observers say that this has more to do with businesses responding to public sway than it does with food allergy lawsuits—which they note are difficult to prosecute because of the difficulty of proving that food servers should have known about a particular customer's risk for an allergic reaction.

Suing a restaurant is far different from suing manufacturers that are responsible for making sure their ingredients are explicitly labeled, according to Philadelphia-based litigator Thomas R. Kline.

"The food industry has done a better job of warning," Kline said, adding, "it also holds the seller of food to a higher standard."

Even if there hasn't been a noticeable uptick in litigation against servers of prepared foods, Kline said greater public consciousness of the prevalence of food allergies makes it more likely that liability may be found if a patron has a reaction.

As a policy, wait staff are now more likely to ask diners about their allergies, according to Bill Sullivan, an instructor in the Hotel, Restaurant & Institutional Management department at the University of Delaware.

"The liability comes when you're not honest with people," Sullivan said. If a dish contains peanuts and a server doesn't indicate that to someone who has expressed they have a peanut allergy, the case is a strong one.

Sullivan said that beyond exposure to liability, restaurants give warnings simply because it's good business.

"It's more trying to be preventative instead of running from the law. You have to ask the right questions," Sullivan said. "Imagine the humiliation of someone getting sick in your restaurant."

He noted, "The consumer is much more aware," adding that sensitivity to customers' allergies is increasingly part of food safety training implemented in restaurants.

"It's no longer just temperatures and storage times," Sullivan said.

Brendan Flaherty, an attorney at PritzkerOlson in Minneapolis, said he screens countless calls related to allergic reactions to food, but only takes a fraction of the cases.

One factor that makes food allergy cases so difficult is the general lack of a long-term injury. If a potential plaintiff has a reaction, but sees a doctor and is fine soon thereafter, most of the time there is no case.

"When I screen a case I look at a couple of things, is there a clear fault, are we certain what allergen is in the food?" Flaherty said.

He also looks at whether a restaurant violated a clear rule by not disclosing certain ingredients. He noted, however, that some allergens do not have to be disclosed.

"It's not like E. coli or salmonella," Flaherty said. "It's not strict liability."

Additionally, Flaherty said defense lawyers in certain cases try to argue the common-sense factor: if a person allergic to eggs eats a piece of cake and has a reaction, it was their own fault.

A restaurant's duty to warn is largely an issue of state law and varies from place to place, according to Richard Fama, a food and liquor liability lawyer in Cozen O'Connor's New York office.

For the most part, he said, "as a matter of law, the restaurant doesn't have a duty to warn you of a potential allergen in the product."

However, the situation changes if a patron tells the restaurant staff that they have an allergy to dairy, for instance, and they disregard the information or fail to accommodate the customer.

"It does change the game if they are warned even if the statute doesn't have a duty to warn," Fama said. "The reaction of the restaurant does play a part too, if the restaurant says there's no milk and they're wrong, there could be a case there."

Other factors lawyers in allergy cases look at is whether the customers' food was cross-contaminated by common utensils in the kitchen or whether it was prepared next to another dish containing an allergen.