



California Court of Appeal Outlines Standard for Recovery in Allergen Claims

By Christian Stegmaier

A growing trend in food adulteration litigation relates to claims that assert the presence of allergens in food products eaten by patrons. Specifically, patrons of restaurants and other foodservice operators are increasingly bringing suit when they fall ill after purportedly consuming food to which they are allergic. The basis of such suits often includes allegations of the foodservice operator's **failure to warn of ingredients** that are common allergens, which include pine nuts, peanuts, and shellfish. This article outlines the analysis that courts commonly employ to determine liability when such suits are brought.

In a recent case out of California, the California Court of Appeal articulated the legal standard for recovery in a food allergen case: 2007 WL 2121240 (Cal.Ct. App - 2d Cir. July 2007). The case involved a claim in which a restaurant patron asserted she was made severely ill from eating shellfish, which was an allergen for her. The patron maintained she specifically ordered a chicken dish that would not contain shellfish and that she advised the server of her allergy.

In this case, the court observed that claims against a restaurant for serving otherwise wholesome food that could cause an allergic reaction in susceptible persons are governed by comment j to the Restatement (Second) of Torts section 402A. The Restatement (Second) of Torts is a secondary legal authority, which is often employed by appellate entities throughout the country when grappling with novel legal issues.

The court relied on Section 402A, which provides that where a product includes an ingredient that causes an allergic reaction, it may be considered defective if no warning was given and the defendant may be liable on a strict liability/failure-to-warn theory. 2007 WL 2121240 (Cal.Ct. App - 2d Cir. July 2007)

known, or if known is one which the consumer would reasonably not expect to find in the product’”; and (3) “the defendant knew or ‘by the application of reasonable developed human skill and foresight should have know[n], of the presence of the ingredient and the danger.’” 2007 WL 2121240 (Cal.Ct. App - 2d Cir. July 2007)

The trial court dismissed the case. The California Court of Appeal affirmed, holding the plaintiff failed to propound evidence demonstrating she in fact had eaten shellfish while dining at the defendant restaurant. We note the defendant restaurant greatly aided its own defense by being able to provide extensive evidence of its industry-compliant food handling protocols.



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The rule set forth in section 402A states that a warning is required when “the product contains an ingredient to which a substantial number of the population are allergic”; its danger “is not generally known, or if known is one which the consumer would reasonably not expect to find in the product”; and the seller “has knowledge, or by the application of reasonable, developed human skill and foresight should have knowledge, of the presence of the ingredient and the danger.” 2007 WL 2121240 (Cal.Ct. App - 2d Cir. July 2007)

Thus, to support a claim for strict liability/failure-to-warn based on allergic reaction to a food item, the plaintiff must establish, in addition to causation and damages, that:

- (1) “the defendant’s product contained ‘an ingredient to which a substantial number of the population are allergic’”;
- (2) “the ingredient ‘is one whose danger is not generally

In essence, the defendant restaurant demonstrated that it was difficult, if not impossible, for the chicken dishes ordered by the patron to have been contaminated by the shellfish. The patron was unable to counter the proof of the care the defendant restaurant took to eliminate cross contamination in its food preparation.

While a California case, the ruling summarized above may be applicable to such disputes arising in other jurisdictions. This is because most states have adopted Restatement (Second) of Torts section 402A as a common law rule. Still, there are other food allergen opinions that take the opposite view of the case that has been summarized above. So, if presented with such a claim, you should confer with competent legal counsel in your jurisdiction to determine the applicability of the underlying analysis in this case to the facts presented in your case.

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