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Our Spring Newsletter includes, in addition to a careful examination of the recently refined standards for the use of expert testimony in Pennsylvania, a very timely look at two topics that have dominated the headlines locally.

Richard McMillan and Marla Presley both take a comprehensive look at the latest developments in the law of expert evidence. Richard McMillan looks at a number of recent decisions that formulate and refine issues of expert qualifications and relevancy, and Marla Presley takes a detailed look at the Pennsylvania Supreme Court's recent pronouncement that it would continue to follow the *Frye* standard of determining the admissibility of an expert's opinion, rather than the more widely invoked *Daubert* standard. The battle over "junk science" continues to be fought.

In the aftermath of the recent Chi Chi's hepatitis outbreak in Beaver County, James Creenan offers ten poignant and timely tips for anyone in the food distribution industry to follow, tips that will hopefully allow the business to avoid not only various food-borne diseases, but also the inevitable food poisoning claims and litigation that follow. These pointers offer a variety of ways that your business can insulate itself from these ever-increasing types of problems.

John Bogut has authored a piece that looks at the new enforcement and penalty provisions of the laws in Pennsylvania dealing with the issue of driving under the influence. With the new .08 BAC provisions on the books, the article addresses how the new laws deal with various levels of intoxication at the penalty stage and offers some practical guidance on how to determine if you have surpassed the legal limits.

Finally, Gregory Knight examines a recent decision addressing when the "limited tort" option is applied and discusses the practical implications of this ruling.

We hope that you find the Spring edition to be enjoyable and helpful reading. If you know of anyone that is not on our mailing list for the Newsletter that you believe might benefit from being on the list, please call or e-mail me at dforsythe@waymanlaw.com.

RULING REJECTS "DAUBERT" AS EXPERT EVIDENCE TEST

By: Marla Presley

In a monumental New Year's Eve decision, the Pennsylvania Supreme Court resolved to continue to apply the *Frye* test in Pennsylvania, effectively rejecting a move to the *Daubert* standard which is currently used in several state and federal courts. In *Grady v. Frito-Lay, Inc.,* 839 A.2d 1038, the Pennsylvania Supreme Court concluded that *Frye's* "general acceptance" test is a proven and workable rule, which, when faithfully followed, fairly serves its purpose of assisting the court in determining when scientific evidence is reliable and should be admitted. The *Frye* test, first announced in *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923), and adopted in Pennsylvania in *Commonwealth v. Topa*, 369 A.2d 1277 (Pa. 1977), is part of Rule 702 of the Pennsylvania Rules of Evidence. Under *Frye*, novel scientific evidence is admissible if the methodology that underlines the evidence has general acceptance in the relevant scientific community.

In *Daubert v. Merrell Dow Pharmaceuticals' Inc.*, 509 U.S. 579 (1993), the United States Supreme Court rejected *Frye*. The court determined that *Frye's* "general acceptance" rule had been superceded by the adoption of the Federal Rules of Evidence and reasoned that it was no longer consistent with the federal law's liberal thrust. Id. at 588. Accordingly, the Court announced a different test for the federal courts to use when deciding whether to admit scientific evidence. Under *Daubert*, the trial judge evaluates whether the evidence will assist the trier of fact and whether the evidence is reliable and scientifically valid. Id. at 592. In *Grady*, Grady and his wife brought suit against the manufacturer of Doritos, the Frito-Lay Corporation, alleging negligence, strict liability and breach of warranty. In their Complaint, Appellees alleged that Mr. Grady suffered an esophageal tear while eating Doritos. The Complaint further alleged that Doritos were unsafe and defective because they fracture into sharp fragments that are capable of lacerating the esophagus when eaten. Thereafter, Frito-Lay filed a Motion for Summary Judgment asserting that Appellees failed to produce sufficient evidence to satisfy their burden of proof that the product was defective. In their response to the Motion for Summary Judgment, Appellees filed two expert reports. One of the reports (the "Beroes Report") was prepared by Charles

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WHAT'S UP WITH EXPERTS

By: Richard L. McMillan

The Courts are constantly revisiting the topic of expert witnesses, and it is always good to see what the latest rulings have been in this key area for litigators.

When an expert is permitted to give opinions at trial which are not clearly set forth in an expert report, the prejudice to the opposing party is even more pronounced. For example, a plaintiff's medical expert in the case of *Kovak v Central Trucking, Inc.*, 808 A2d 958 (Pa. Super. 2002), was allowed to testify that the motor vehicle accident involved in that case was a contributing factor in the development of plaintiff's arthritic condition, though the expert report that had been submitted made no mention whatsoever of arthritis. Even though the defendant asserted surprise and prejudice, the Superior Court reversed the ruling of the trial judge and permitted the expert to significantly expand the damage aspect of the case with no opportunity for the defendant to adequately prepare to respond to this surprise testimony, which arose during a deposition taken for use at trial.

In determining whether an expert's testimony is "within the fair scope" of his/her report, the courts have held that the emphasis is on the word "fair". In *Bainhauer v Lehigh Valley Hospital*, 835 A2d 1146 (2003), the Pennsylvania Superior Court reversed a trial judge's decision to instruct the jury to disregard any expert testimony about a certain drug, since that drug was not specifically referred to as a cause of the harm in the pretrial report of plaintiffs' expert. Where there is a claimed discrepancy between the expert's report and the testimony elicited at trial, the courts will examine whether the discrepancy is of the nature which would catch the adverse party by surprise or mislead the adverse party as to the nature of the expert's expected trial testimony. The Superior Court held that it was an abuse of discretion which constituted reversible error for the trial judge in the *Bainhauer* case not to permit expert testimony (from the plaintiffs' expert or from the expert witness of one of the defendants) about the role of a particular drug even though the plaintiffs' expert report contained no reference to that particular drug causing a problem (the report did list that drug along with the others administered to the patient during the surgery).

The *Bainhauer* case involved a medical malpractice claim arising out of allegedly substandard anesthetic care during an operation. The plaintiffs' expert report set forth that the patient, who suffered from severe hypertension (high blood pressure), must have any anesthetics carefully administered to avoid periods of hypotension (low blood pressure) during surgery. Thus, the adverse parties were on notice that the testimony would concern the problem of a sustained drop in blood pressure during the operation, and there was no unfair surprise. The Court reasoned that the defendants could approach the preparation of their defense based upon the knowledge that the expert testimony would be critical of "the anesthetic care," which would incorporate the use of each and every one of the drugs administered to the patient and which were all listed in the expert's report.

In a workers' compensation case, the employer had challenged the qualifications of claimant's psychiatrist to render an opinion on the employee's psychiatric condition and its cause, especially in light of the fact that the employee did not call her treating psychiatrist to testify. The three judge panel of the Commonwealth Court held that it is well-established that a physician is competent to testify in a specialized area of medicine even if that physician is not a specialist in that field. *Marriott Corp. v WCAB/Knechtel,* 837 A2d 661 (Pa. Cmwlth. 2003).

Sometimes proposed expert opinion is challenged as being based upon "junk science." The Pennsylvania courts and the federal courts use two different approaches in dealing with such challenges to novel scientific evidence. Pennsylvania has long adhered to the *Frye* test, which permits the expert testimony in various areas of science so long as the expert's opinion has been deduced from a principle or discovery that is well-recognized in the relevant scientific community. The *Daubert* test, utilized in federal court, makes the trial judge the "gatekeeper" who evaluates based on several factors whether the evidence is reliable and scientifically valid. Many commentators would like to see Pennsylvania adopt the *Daubert* test, but their arguments were again turned back by the Pennsylvania Supreme Court on December 31, 2003 in the case of *Grady v Frito-Lay, Inc.*, 839 A2d 1038 (Pa.Supreme.2003). You are invited to look a Marla Presley's excellent article in this edition, detailing the *Grady* decision and the interplay of the *Frye* and *Daubert* tests.

Have we heard the last word on these various issues involving expert witnesses? We know better than that, now, don't we? Stay tuned… ■

Please contact Richard McMillan at rmcmillan@waymanlaw.com with any questions or concerns you may have in this area of law.

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10 THINGS YOU MUST UNDERSTAND ABOUT EFFECTIVE HANDLING OF FOOD RELATED DISEASE

By: James W. Creenan

Many diseases or illnesses can be spread through food purchased at your local market or served at your favorite restaurant. In 1999, the Centers for Disease Control (CDC) reported that 76 million Americans got ill from consumption of food-borne illnesses, including 325,000 hospitalizations, and more than 5,000 deaths. If all of that did not raise significant questions concerning the risks of food service to the public, the FDA gently reminds food suppliers to be vigilant for terrorism related threats at each link of the food distribution chain.

In addition to maintaining proper food distribution, preparation, and service practices, all restaurants, stores, and suppliers (and their insurers) must be alert to the numerous ways in which their product can cause harm, including human carelessness, intentional adulteration, and naturally occurring pathogens.

This article briefly addresses ten things you should know about food contamination liability.

1. Liability Without Fault Can Attach

Food service companies can be held liable for damages resulting from food-borne illnesses under three main theories: (1) negligence, (2) product liability, and (3) breach of warranty. An

DRIVING AFTER IMBIBING ALCOHOL OR USING DRUGS

By: John C. Bogut, Jr.

Pennsylvania's Driving Under the Influence law has been changed significantly with the signing on September 30, 2003 by Governor Rendell of Act 24 of 2003, Driving After Imbibing Alcohol or Using Drugs. 75 PA. C.S. §3802. One notable change is the lowering of the Per Se "legal limit" blood alcohol concentration to .08 BAC from the previous level of .10 BAC. Increased fines, periods of incarceration and treatment requirements based on offender's BAC are included in other revisions which became effective on February 1, 2004.

The new statute grades offenses on three tiers for most adult DUI offenders based upon BAC and number of prior offenses: 1) general impairment (.08-.099%), 2) high rate of alcohol (.10-.159%) and 3) highest rate of alcohol (.16% and above). Exceptions are established for minors, commercial drivers, school bus drivers and those who refuse a chemical test. Additionally, the legislature added per se violations for drivers with any amount of a Schedule I, II or III controlled substance in their blood stream that has not been medically prescribed.

Tier 1 - General Impairment: Drivers rendered incapable of safe driving or with **BAC** levels of **.08-.099%** within two hours may not drive, operate or be in actual physical control of a vehicle. **(§3802(a)) (no injury/property damage)**

1st offense is an ungraded misdemeanor
no license suspension
up to 6 months probation
$300 fine
alcohol highway safety school
treatment when ordered
no ignition interlock

2nd offense is an ungraded misdemeanor
12 months license suspension
5 days to 6 months prison
$300-$2,500 fine
alcohol highway safety school
treatment when ordered
1 year ignition interlock

3rd or subsequent offense is a 2nd degree misdemeanor
12 months license suspension
10 days to 2 years prison
$500-$5,000 fine
treatment when ordered
1 year ignition interlock

Tier 2 - High Rate of Alcohol: Drivers with **BAC** levels of **.10-.159%** within two hours may not drive, operate or be in actual physical control of a vehicle. **(§3802(b))**

1st offense is an ungraded misdemeanor
12 months license suspension
Occupational Limited License after 60-day suspension
48 consecutive hrs. to 6 months prison
$500-$5,000 fine alcohol highway safety school
treatment when ordered
ARD eligible

2nd offense is an ungraded misdemeanor
12 months license suspension
30 days to 6 months prison
$750-$5,000 fine alcohol highway safety school
treatment when ordered
1 year ignition interlock

3rd offense is a 1st degree misdemeanor
18 months license suspension
90 days to 5 years prison
$1,500-$10,000 fine treatment when ordered
1 year ignition interlock

4th or subsequent offense is a 1st degree misdemeanor
18 months license suspension
1 to 5 years prison
$1,500-$10,000 fine
treatment when ordered
1 year ignition interlock

Tier 3 - Highest Rate of Alcohol: Drivers with **BAC** levels of **.16% & above** within two hours may not drive, operate or be in actual physical control of a vehicle. **(§3802(c))**

1st offense is an ungraded misdemeanor
12 months license suspension
Occupational Limited License after 60-day suspension
72 consecutive hours to 6 months prison
$1,000-$5,000 fine alcohol highway safety school
treatment when ordered
ARD eligible

2nd offense is a 1st degree misdemeanor
18 months license suspension
90 days to 5 years prison minimum
$1,500 fine alcohol highway safety school
treatment when ordered
1 year ignition interlock

3rd or subsequent offense is a 1st degree misdemeanor
18 months license suspension
1 to 5 years prison
minimum $2,500 fine
treatment when ordered
1 year ignition interlock

All first time violators are eligible for an **Occupational Limited Licenses** if they first serve a 60-day license suspension. Occupational limited licenses are permitted for some second offenders if they operate an ignition interlock vehicle and have served 12 months of their 18 month license suspension.

PLCB Item # 0079 Alcohol Impairment Chart

Men — Approximate Blood Alcohol Percentage

Drinks	Body Weight in Pounds								
	100	120	140	160	180	200	220	240	
0	.00	.00	.00	.00	.00	.00	.00	.00	Only Safe Driving Limit
1	.04	.03	.03	.02	.02	.02	.02	.02	Impairment Begins
2	.08	.06	.05	.05	.04	.04	.03	.03	Driving Skills Significantly Affected
3	.11	.09	.08	.07	.06	.06	.05	.05	
4	.15	.12	.11	.09	.08	.08	.07	.06	
5	.19	.16	.13	.12	.11	.09	.09	.08	Possible Criminal Penalties
6	.23	.19	.16	.14	.13	.11	.10	.09	
7	.26	.22	.19	.16	.15	.13	.12	.11	Legally Intoxicated
8	.30	.25	.21	.19	.17	.15	.14	.13	
9	.34	.28	.24	.21	.19	.17	.15	.14	Criminal Penalties
10	.38	.31	.27	.23	.21	.19	.17	.16	

Subtract .01% for each 40 minutes of drinking. One drink is 1.25 oz. of 80 proof liquor, 12 oz. of beer, or 5 oz. of table wine.

Women — Approximate Blood Alcohol Percentage

Drinks	Body Weight in Pounds									
	90	100	120	140	160	180	200	220	240	
0	.00	.00	.00	.00	.00	.00	.00	.00	.00	Only Safe Driving Limit
1	.05	.05	.04	.03	.03	.03	.02	.02	.02	Impairment Begins
2	.10	.09	.08	.07	.06	.05	.05	.04	.04	Driving Skills Significantly Affected
3	.15	.14	.11	.10	.09	.08	.07	.06	.06	
4	.20	.18	.15	.13	.11	.10	.09	.08	.08	Possible Criminal Penalties
5	.25	.23	.19	.16	.14	.13	.11	.10	.09	
6	.30	.27	.23	.19	.17	.15	.14	.12	.11	Legally Intoxicated
7	.35	.32	.27	.23	.20	.18	.16	.14	.13	
8	.40	.36	.30	.26	.23	.20	.18	.17	.15	Criminal Penalties
9	.45	.41	.34	.29	.26	.23	.20	.19	.17	
10	.51	.45	.38	.32	.28	.25	.23	.21	.19	

Subtract .01% for each 40 minutes of drinking. One drink is 1.25 oz. of 80 proof liquor, 12 oz. of beer, or 5 oz. of table wine.

Data supplied by the Pennsylvania Liquor Control Board.

Please contact John Bogut at jbogut@waymanlaw.com with any questions or concerns you may have in this area of law.

ANOTHER TWIST IN "LIMITED-TORT" LITIGATION

By: Gregory S. Knight

Once litigators feel they have the concepts of limited-tort litigation nailed down, another twist presents itself. This time, the Supreme Court of Pennsylvania arguably expands those covered by the full-tort option in the December 30, 2003 decision of *Hoffman v. Troncelliti.* Both litigators and insurance adjusters need to be aware of this change.

If you owned a car that you covered with your own insurance and choose the limited-tort option, that is what governed your ability to sue for non-economic damages. Now times have changed.

The facts in *Hoffman* are straight forward. Sherry Hoffman was a passenger in a van owned by her mother while a resident in her mother's home. The driver was her then fiancé, Glenn. At that time she owned her own vehicle which was insured under her own insurance, separate from her mother's. Sherry choose the limited-tort option and her mother choose full-tort. As fate would have it, there was an accident in which both Glen and Sherry were injured. Suit was filed and the trial court applied the mother's full-tort option to Sherry as an insured under the mother's policy. On April 16, 2002 the Superior Court reversed and remanded.

The Superior Court's reasoning seemed logical. The critical distinction the court draws is the difference between the terms "insured" and "named insured." The panel stated, "... we are required to vacate the judgment entered on the verdict of the jury and remand for a new trail, the reason of the express statutory mandate that:

> [t]he tort option elected by a **named insured** shall apply to all **insureds** under the private passenger motor vehicle policy who are not **named insureds** under another private passenger motor vehicle policy…"

75 Pa.C.S. § 1705 (b)(2)(Sentence one)(emphasis added). Therefore, Sherry, although an insured under her mother's policy, would not benefit from her mother's election of the full-tort option because Sherry was a named insured under her own policy. The court went on to add that, "[w]hile it provides no part of the basis for our decision today, it merits mention that our interpretation of the terms of the statute is consistent with the legislative purpose of reducing premium costs for motor vehicle insurance." The Court held that Sherry was bound by her tort election on her own policy.

Sherry Hoffman appealed to the Pennsylvania Supreme Court, which reversed the Superior Court and reinstated the holding of the trial court, determining that the mother's full-tort election applies. The Supreme Court finds that the second sentence of 75 Pa.C.S. § (b)(2) applies to Sherry's situation. That sentence reads:

> [i]n the case where more than one private passenger motor vehicle policy is applicable to an **insured** and the policies have conflicting tort options, the **insured** is bound by the tort option of the policy associated with the private passenger motor vehicle in which the **insured** is an occupant at the time of the accident if he is an **insured** on that policy and bound by the full tort option otherwise.

75 Pa.C.S. § (b)(2) (Second sentence)(emphasis added) The Supreme Court purports to be upholding and applying the reasoning in the Superior Court decision of *Berger v. Rinaldi*, 651 A.2d 553 (Pa. Super. 1994).

In *Berger,* a son was injured in his mother's car while he owned a registered car which was uninsured. The son was deemed to be limited-tort by operation of 75 Pa.C.S. § 1705 (a)(5). The *Berger* court stated, and the majority of the Supreme Court agreed in *Hoffman,* that sentence one applies only where there is one applicable policy of insurance and sentence two applies where there is more than one policy in play. Therefore the holding was that the full-tort option applied to Sherry.

Justice Eakin dissented. His reasoning was more in line with the Superior Court. His Dissenting Opinion draws the insured/named insured distinction that the lower court argued. Additionally, he felt that the majority relied on what he and the Superior Court characterized as *dicta* in the *Berger* decision. He felt that the discussion in Berger related to the "second sentence" was merely *dicta* because the case was decided by analysis of "sentence one." Be that as it may, the holding of the majority is now the law of the Commonwealth…for now.

There is another point which could be made here that no one has addressed to date. If one reads the Second sentence of 75 Pa.C.S. § (b)(2) at issue here, you will note, at the end, there is a clause which seems to have slipped through the cracks, " ... and bound by the full tort option otherwise." This can be read to mean that there are two conditions precedent to applying the tort-option of the occupied vehicle in a two policy situation. One, the claimant must be an insured under the policy, and two, they must be bound by the full-tort option otherwise. If Sherry was not bound by the full tort option otherwise, does she receive the benefit of sentence two? It does not appear that this was raised. Additionally, it could be argued that sentence two was meant to apply to a situation where a person is a resident relative of a two car household, with two separate policies of insurance with different tort options, and does not own a car themselves. They would be an insured under two policies, but not a named insured under either. Some fictional facts make this clear. There is family with two brothers living in the household. Mom owns a car covered by full tort. Older brother owns a car covered by his own policy with limited tort. Younger brother is in older brother's car when there is an accident. Which tort option applies? Is younger brother stuck with older brother's limited tort election? The Supreme Court language seems to apply sentence two and the older brother's limited tort election.

This is a situation that will need to be monitored. Plaintiff counsel will praise the decision and defense counsel will denounce it, at least until the next fact situation results in what a court feels is an unjust outcome. The fact that there is a dissent will mean that it will continue to be litigated by defense attorneys believing the Court was wrong. The situation may be addressed by the legislature, or we may litigate under this rule for some time to come. At the end of the day, litigators and insurance adjusters need to keep this issue in their radar and keep certain cases in their files in mind if they have intentions of possibly "running them up" to test the law. But vigilance here will be crucial.

Please contact Gregory Knight at gknight@waymanlaw.com with any questions or concerns you may have in this area of law.

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Beroes, Ph.D., P.E., an associate professor emeritus of chemical engineering at the University of Pittsburgh. In the report, Dr. Beroes stated that Doritos possessed "several hidden hazardous physical-strength and physical-shape properties" and described the tests he had performed on several types of Doritos, including Doritos that came from the bag of chips that Mr. Grady had eaten, to quantify these propensities (Beroes Report at 2).

Thereafter, Frito-Lay filed a number of Motions in limine seeking to exclude Dr. Beroes' testimony. In said Motions, Frito-Lay alleged that Dr. Beroes was not qualified by training or experience to testify as to the causal relationship between Mr. Grady's consumption of Doritos and his esophageal tear. Furthermore, Frito-Lay alleged that Dr. Beroes' opinions with regard to ultimate issues were inadmissible because they were based on conflicting and unreliable evidence. Lastly, Frito-Lay alleged that Dr. Beroes' testimony regarding Doritos physical characteristics was inadmissible because it did not reach the rule announced in *Frye,* which required Dr. Beroes to show that the method he used to test the Doritos was generally accepted in the relevant scientific community. The trial court granted the Motions that raised the admissibility of Dr. Beroes' testimony, ruling that Dr. Beroes could not testify as to the tests he conducted on Doritos or give opinions about them. On appeal, the majority of the Superior Court *en banc* reversed the trial court's order granting Frito-Lay's Motions in limine, vacated the judgment of non-suit, and remanded for trial. As to Dr. Beroes, the Superior Court concluded that he was competent to testify on the physical characteristics of Doritos; that his testimony satisfied the *Frye* test; that his compression strength calculations used standard principles that experts in the field can and have examined and that any flaws in Dr. Beroes' testing design could be the subject of cross-examination at trial. This appeal followed and was limited to whether the Superior Court correctly applied the law in reversing the trial court's decision to exclude Dr. Beroes' expert testimony on certain physical characteristics of Doritos.

The Supreme Court held that "requiring judges to pay deference to conclusions of those who are in the best position to evaluate the merits of scientific theory and technique when ruling on the admissibility of scientific proof, as the *Frye* rule requires, is the better way of insuring that only reliable expert scientific evidence is admitted at trial." The Court went on to say that the *Frye* test, which is premised on a rule-matter of "general acceptance," is more likely to yield uniform, objective, and predictable results among the courts than is the application of the *Daubert* standard, which calls for a balancing of several factors. Moreover, the decisions of individual judges, whose background in science may vary widely, will be similarly guided by the consensus that exists in the scientific community on such matters.

In applying the *Frye* test to Dr. Beroes' testimony, the Supreme Court held that Dr. Beroes' conclusions were not necessarily a generally accepted method that scientists in the relevant field use for reaching a conclusion as to whether Doritos remain too hard and too sharp as they are chewed and swallowed to be eaten safely. It was, therefore, incumbent upon Appellees to prove that scientists in the relevant field generally accepted Dr. Beroes' methodology as a means for arriving at such a conclusion. The court concluded that the Appellees failed to satisfy their burden of proving that Dr. Beroes' evidence met the *Frye* rule. Accordingly, the Supreme Court found that the trial court did not abuse its discretion in deciding that Dr. Beroes' testimony was inadmissible and held that the Superior Court erred in reversing the trial court's ruling.

This opinion is sure to impact any case in which a party anticipates the use of expert testimony. It is now important to ensure that any expert testimony to be admitted in court have achieved "general acceptance" in its particular scientific community as well as meet the requirement for admissibility under Pennsylvania Rule of Evidence 702. ■

Please contact Marla Presley at mpresley@waymanlaw.com with any questions or concerns you may have in this area of law.

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establishment's careful safety measures are directly relevant only in the negligence theory. A product liability claim exists if the food product was "unreasonably dangerous" at the time of sale, and raw food that must be cooked generally cannot meet this standard. Breaches of warranty claims simply require proof that the food was not fit for human consumption at the time of sale. A product liability claim can affect each business in the supply line.

2. Food Evidence Must Be Preserved and Tested Promptly

Obviously, spoliation is an enormous problem in food liability cases. Many times the consumer has consumed the entire product and there is no food to test. This works well when only one customer has fallen ill (issues of proof are made more difficult), but may prove to be an obstacle in publicized cases where unaffected consumers attempt to gain from a reported outbreak.

3. The Pennsylvania Food Law and the Federal Food and Drug Law Apply

Neither act creates a private cause of action against the food supplier. Each act delegates authority to an administrative body to inspect or monitor food service establishments. The Pennsylvania Act imposes few additional obligations above the federal requirements.

4. A Plethora of Agencies Share Responsibility for Food Safety

Federal agencies include Department of Agriculture, Centers for Disease Control, Customs Agency, Food and Drug Administration, and even the TSA share different food safety related responsibilities. The Pennsylvania Department of Agriculture and the Pennsylvania Department of Health share food safety responsibilities at the state level

5. Get the Facts About the Food-Borne Pathogens

An understanding of the known food contaminants and their spread is essential to complete and accurate claims avoidance and handling. Illnesses associated with food contamination may be caused by other factors. Persons handling food-related claims must understand and identify the possible causes of each illness, incubation period (days or weeks), diagnoses, treatment, complications, and preventative measures. You should also understand other illnesses that have the same symptomotology. A proper understanding of the food-borne illness will significantly affect and impact the early investigation. Prior to taking a recorded statement and before requesting samples of the food, do your homework and learn the details of each pathogen. For

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Wayman Watch…

- ***Michael L. Magulick*** *and* ***Mark J. Gesk*** *recently represented the firm at the Federation of Defense and Corporate Counsel Spring Meeting in Hawaii in March.*
- ***Warren L. Siegfried*** *represented the firm at the New Orleans meeting of the Trucking Insurance Defense Association in March as well.*
- ***Marla Presley*** *has recently enlisted the firm as a member of the Northern Allegheny County Chamber of Commerce.*
- ***April Morgan Hincy*** *has recently joined the Washington County Bar Association.*
- ***Dale K. Forsythe*** *will be speaking at and moderating the General Liability/Property section of the Pennsylvania Claims Association Spring Education Seminar in May.*

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example, identification of other possible exposures to the illness, including workplace, other markets, restaurants, recent travel and vacations, and any unusual activity within the past 60 to 90 days. The CDC identifies dozens of bacterial, parasitic and viral food-borne illnesses or pathogens. Most of these pathogens cause flu-like or gastrointestinal symptoms. The CDC website is very informative and should be consulted regularly.

6. Food service establishments should adopt policies and document compliance

Great food safety and hygiene habits will reduce the number of claims. In addition to maintaining clean working and storage environments for food distribution, preparation, and service, food providers should establish clear policies governing employee behavior (hand washing), cleanliness, food preparation, and cooking temperatures. Maintaining invoices and purchase orders for each shipment from all suppliers will aid in defending food claims and, at a minimum, reduce proportional liability.

7. HIPAA Compliance

As prompt gathering of medical information is essential in food claims. Take a moment to ensure that your standard forms are now HIPAA-compliant.

8. Jury Awards

A recent study, published by Jury Verdict Research, reported that jury awards in restaurant food liability cases average $9.000.00 - among the lowest of studied case types. However, the nightly news reveals numerous examples (or potential examples) of mass tort-like claims, which would greatly increase the claim costs for a single event. Even though the average jury award may be low, an aggressive defense is necessary to repel further claims and prevent your establishment from being considered an easy target for swindlers.

9. Fair Share Act

The relatively recent changes to joint and several liability law in Pennsylvania may limit a tortfeasor's liability to its pro rata share of liability. Thus, in a mass tort situation, early identification of exculpatory facts through a thorough investigation may lead to complete defenses or at least a reduction in proportional liability.

10. Recalls

FDA has three levels of product recalls, depending on the nature of the hazard. Class I recalls are for dangerous or defective products that predictably could cause serious health problems or death, such as botulism contaminated food. Class II recalls are for products that might cause a temporary health problem, or pose only a slight threat of a serious nature. Class III recalls are for products that are unlikely to cause any adverse health reaction, but that violate FDA labeling or manufacturing regulations.

With this information in hand, a food handler can take effective steps to avoid food-borne illnesses and the inevitable claims and litigation that follow. ■

Please contact James Creenan at jcreenan@waymanlaw.com with any questions or concerns you may have in this area of law.