

A NEED FOR DISCLOSURE OF THE PRESENCE OF ALLERGENS IN RESTAURANT FOOD

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INTRODUCTION

The main function of the Food Allergen Labeling and Consumer Protection Act of 2004 (FALCPA) is to require food labeling to disclose the presence of “major food allergens” in packaged foods.¹ With few exceptions, a food is to be considered misbranded “[i]f it is not a raw agricultural commodity and it is, or it contains an ingredient that bears or contains, a major food allergen.”² However, “[n]o mandatory system comparable to packaged food labeling exists for the disclosure of food ingredients to food establishment patrons.”³ In fact,

¹ Food Allergen Labeling and Consumer Protection Act of 2004, Pub. L. No. 108-282, 118 Stat. 891, 905-11 (2004) [hereinafter *FALCPA*].

² *Id.* at 906-07. *See also* H.R. REP. NO. 108-608, *20, *as reprinted in* 2004 U.S.C.C.A.N. 830.

³ Laura E. Derr, *When Food is Poison: the History, Consequences, and Limitations of the Food Allergen Labeling and Consumer Protection Act of 2004*, 61 *FOOD & DRUG L.J.* 65, 92 (2006) (discussing the FALCPA).

restaurants are even exempt from normal nutrition labeling requirements.⁴

This paper will argue that restaurants should be required to disclose the presence of allergens in their food to food allergic consumers. Part I will discuss public policy reasons favoring imposing a duty on restaurants to disclose the presence of allergens in their food including (A) preventing unnecessary allergic reactions to food and (B) raising the quality of life for food allergic consumers. Part II will evaluate the lack of legal remedies available to consumers who suffer severe allergic reactions to restaurant food by (A) examining litigation against restaurants for failure to warn consumers about the presence of allergens in their food and (B) discussing the potential for legislation pertaining to food allergens in restaurants beyond the FALCPA. Part III will discuss the current level of awareness in the restaurant industry regarding food allergens by examining (A) ways that some restaurants have voluntarily chosen to disclose the presence of allergens in their food and (B) the overall lack of knowledge in the restaurant industry regarding food allergens. The conclusion of this paper is that the FALCPA should be amended to apply to restaurant food as a step towards requiring full disclosure of the presence of allergens in restaurant food.

⁴ 21 C.F.R. § 101.9 (j)(2)(i) (2006) (“Food products which are: [s]erved in restaurants [are exempt], *Provided*, That the food bears no nutrition claims or other nutrition information in any context on the label or in labeling or advertising. Claims or other nutrition information subject the food to the provisions of this section.”).

I. PUBLIC POLICY REASONS FAVORING IMPOSING A DUTY ON RESTAURANTS TO DISCLOSE THE
PRESENCE OF ALLERGENS IN THEIR FOOD

“Food allergy” has been defined as “an abnormal response to a food triggered by the body’s immune system.”⁵ The FALCPA defines “major food allergen” as:

(1) Milk, egg, fish (e.g., bass, flounder, or cod), Crustacean shellfish (e.g., crab lobster, or shrimp), tree nuts (e.g., almonds, pecans, or walnuts), wheat, peanuts, and soybeans.

(2) A food ingredient that contains protein derived from a food specified in paragraph (1), except the following:

(A) Any highly refined oil derived from a food specified in paragraph (1) and any ingredient derived from such highly refined oil.

(B) A food ingredient that is exempt under paragraph (6) or (7) of section 403(w).⁶

Milk, egg, fish, shellfish, tree nuts, wheat, peanuts, and soybeans are commonly referred

⁵ NATIONAL INSTITUTE OF ALLERGY & INFECTIOUS DISEASES, U.S. DEP’T OF HEALTH AND HUMAN SERVICES, NIH PUBL’N No. 04-5518, FOOD ALLERGY, AN OVERVIEW 2 (2004) [hereinafter *NIAID Pamphlet*].

⁶ *FALCPA*, *supra* note 1, at 908. Paragraphs (6) and (7) of section 403(w) explain when a person may petition to exempt one of these food ingredients from allergen labeling requirements and when a person need not petition to exempt one of these food ingredients, respectively. *Id.* at 907-08.

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to as the “Big Eight” food allergens and “account for 90 percent of food allergies”.⁷

“[A]pproximately 2 percent of adults and about 5 percent of infants and young children in the United States suffer from food allergies”.⁸ The percentage of the population with food allergies has been growing,⁹ and will probably continue to grow.¹⁰

⁷ *Id.* at 906.

⁸ *Id.*

⁹ *See, e.g.,* Derr, *supra* note 3, at 70 (“While food allergies were thought to affect two to four percent of children and as few as one percent of adults as recently as ten years ago, the estimated prevalence of food allergies among both children and adults has more than doubled in the past five years.”).

¹⁰ *See, e.g.,* Raymond Formack, Jr., FDA CONSUMER, FDA PUBL’N NO. 04-1312C, *When Food Becomes the Enemy*, (Aug. 31, 2001) available at http://www.fda.gov/fdac/features/2001/401_food.html (last visited Dec. 4, 2006) (“The prevalence of food allergy is growing and probably will continue to grow along with all allergic diseases” (quoting Robert A. Wood, M.D., director of the pediatric allergy clinic at Johns Hopkins Medical Institutions in Baltimore.)); Jenn Abelson, *New on the Menu: Allergens*, BOSTON GLOBE, May 14, 2006, available at http://www.boston.com/news/local/massachusetts/articles/2006/05/14/new_on_the_menu_allergens/?page=1 (“Food allergies are a problem that isn’t going away. It’s only getting worse.”)

Despite the prevalence of food allergies, public awareness of how to manage food allergies is not high enough as evidenced by “a recent study show[ing] that many parents of children with a food allergy were unable to correctly identify in each of several food labels the ingredients derived from major food allergens.”¹¹ This finding suggests that consumers are not adequately informed about how to identify the presence of food allergens, even when an ingredient list is available. In restaurants, where food labels are not required, the task of identifying what foods contain ingredients derived from major food allergens is nearly impossible. “Since there is currently no cure for food allergies¹², consumers need to be empowered to know whether or not food allergies [sic] are present in the food they consume.”¹³ The current absence of accommodations for food allergic consumers is arguably a life-threatening form of discrimination.¹⁴ Requiring restaurants to disclose the presence of

(quoting Anne Muñoz-Furlong, Founder and CEO, Food Allergy & Anaphylaxis Network)

(Last visited Dec. 2, 2006).

¹¹ *FALCPA*, *supra* note 1, at 906.

¹² *Accord Id.* (“at present, there is no cure for food allergies.”)

¹³ H.R. Rep. No. 108-608 at *3.

¹⁴ Abelson, *supra* note 10 (“People used to discriminate based on skin color and wheelchairs . . . Nowadays there is discrimination against people with food allergies . . . But creating policies to accommodate people with food allergies isn’t going to put restaurants out

allergens in the foods they serve will enable people to make more educated food choices when eating out which will likely prevent unnecessary allergic reactions to restaurant food and enhance the quality of life for food allergic consumers.

A. Prevent food allergic consumers from having unnecessary allergic reactions to food

People with food allergies can experience a variety of symptoms when they have allergic reactions to food, most commonly “nausea, hives, skin rash, nasal congestion, and wheezing.”¹⁵ The following excerpt describes what happens when a person has an allergic reaction to food:

An allergic reaction to food can take place within a few minutes to an hour. The process of eating and digesting food affects the timing and the location of a reaction.

of business. It’s going to save lives.” (quoting Ming Tsai, restaurant “chef-owner” and national spokesman for the Food Allergy and Anaphylaxis Network)).

¹⁵ David Schardt, *Food Allergies*, NUTRITION ACTION HEALTHLETTER, April 2001, http://www.cspinet.org/nah/08_01/index.html. Other potential symptoms include: “vomiting, gastrointestinal distress . . . eczema, dizziness, migraines, ear and sinus infections, pneumonia, drops in blood pressure, chest pain, mental uneasiness, lethargy, depression, arthritis, osteoporosis, malabsorption of nutrients, increased risk of various cancers, and acute life-threatening systemic anaphylaxis, asthma, and swelling of the tongue and throat.” Derr *supra* note 3, at 65.

- If you are allergic to a particular food, you may first feel itching in your mouth as you start to eat the food.
- After the food is digested in your stomach, you may have GI¹⁶ symptoms such as vomiting, diarrhea, or pain.
- When the food allergens enter and travel through your bloodstream, they may cause your blood pressure to drop.
- As the allergens reach your skin, they can cause hives or eczema.
- When the allergens reach your lungs, they may cause asthma.¹⁷

Unfortunately, the only way for food allergic consumers to avoid allergic reactions to food is avoidance, which means that “[u]nlike most medical treatments, treatment of a food sensitivity depends on the adequate disclosure of information possessed by third parties.”¹⁸ Since third parties such as restaurants are not required to disclose information regarding food allergens, the likelihood of accidental allergic reactions to food in restaurants is common.¹⁹

Reliance on information that is rarely available is why “[t]he primary complaint of food-sensitive individuals has not been about the effort and inconvenience involved in avoiding the

¹⁶ “[G]astrointestinal (GI) tract—area of the body that includes the stomach and intestines.”

NIAID Pamphlet, supra note 5, at 30.

¹⁷ *Id.* at 4.

¹⁸ Derr, *supra* note 3, at 77.

¹⁹ Cf. Scott H. Sicherer et al., *The Impact of Childhood Food Allergy on Quality of Life*, 87(6) ANNALS OF ALLERGY, ASTHMA & IMMUNOLOGY 461, 463 (2001) (“Accidental exposures are common and occur both in the home and in locations such as . . . restaurants, and virtually every location where food is served.”).

consumption of allergens but rather, that despite their best efforts, avoidance of allergens has been impossible to achieve.”²⁰ The inability of food allergic consumers to completely avoid the foods to which they are allergic is a serious problem because “[a]llergic reactions to food can cause serious illness and, in some cases, death.”²¹ A large proportion of deadly allergic reactions to food occur in restaurants.²² Since “a food allergic consumer *must* avoid the food to which the consumer is allergic,”²³ many deadly allergic reactions to food that occur in restaurants could be prevented if restaurants disclose the presence of allergens in the foods they

²⁰ Derr, *supra* note 3, at 76.

²¹ *NIAID Pamphlet*, *supra* note 5, at 2. *See also FALCPA*, *supra* note 1, at 906 (“[E]ach year, roughly 30,000 individuals require emergency room treatment and 150 individuals die because of allergic reactions to food.”); Derr, *supra* note 3, at 72 (“Although only a subset of people with food allergies are at risk for a life-threatening reaction to food, it is estimated that 150 to 200 people die of food-induced anaphylaxis each year and food allergies are responsible for 29,000 emergency room visits annually.”).

²² *See* Derr, *supra* note 3, at 92 (“A study published in 2001 of thirty-two fatalities caused by food allergies found that nearly thirty percent of lethal allergen exposures occurred in food establishments.”). *See also* Schardt, *supra* note 15 (“Then there’s eating out, where most food-allergy deaths occur.”).

²³ *FALCPA*, *supra* note 1, at 906 (emphasis added).

serve.

B. Raise the quality of life for food allergic consumers

Diagnosis of a food allergy is life-altering and has an adverse affect on the quality of life of food allergic consumers²⁴ and their families.²⁵ One study concluded that “childhood food allergy has a significant impact on [general health perception], [emotional impact on parents] and [limitation on family activities].”²⁶ Deadly peanut allergies in children have especially harmful effects on quality of life:

A study conducted in 2003 in the United Kingdom found that children with a peanut allergy reported *higher anxiety and an overall poorer quality of life than*

²⁴ *See, e.g.,* Derr *supra* note 3, at 75 (“Diligently monitoring food consumption, living with constant anxiety about mistakes, managing the frustrations of refusing tempting foods of uncertain safety, and feeling ‘abnormal’ or different from peers can take its toll on food-sensitive individuals.”).

²⁵ Families of food allergic children “must live with constant vigilance and fear. The activities of daily life are potentially impacted by issues such as label reading of commercial food products, concerns for cross-contamination of foodstuffs in various settings, and exposures that may occur in school, childcare, and social activities.” Sicherer, *supra* note 19, at 461. “These issues presumably affect the quality of life for these children and their families, but this issue has not been well investigated.” *Id.*

²⁶ *Id.* at 463.

children with insulin-dependent diabetes. These children reported more fear of an adverse event, felt more threatened by potential hazards within their environment, felt more restricted in their physical activities, and expressed more worry about being away from home.²⁷

The comparison of food allergies to diabetes is noteworthy, especially in the context of determining whether a food allergic consumer is limited in a major life activity for purposes of a claim under the Americans with Disabilities Act (“ADA”)²⁸. A food allergic consumer whose “food allergies may result in severe, life-threatening reactions (anaphylactic reactions) . . . meets the [Rehabilitation Act’s²⁹] definition of ‘handicapped person.’”³⁰ One court made the following observation,

²⁷ Derr, *supra* note 3, at 76 (citing N.J. Avery et al., *Assessment of Quality of Life in Children with Peanut Allergy*, 14 PEDIATRIC ALLERGY IMMUNOLOGY 5, 378-82, Oct. 2003) (emphasis added).

²⁸ The ADA’s definition of “disability” includes “a physical or mental impairment that substantially limits one or more of the major life activities of such individual.” 42 USC § 12102(2) (2006).

²⁹ See Jonathan Bridges, *Suing for Peanuts*, 75 NOTRE DAME L. REV. 1269, 1286 (2000) (“[T]he Rehabilitation Act’s definition of ‘handicapped’ is nearly identical to the ADA’s definition of ‘disability.’”).

³⁰ *Id.* (quoting U.S. Dep’t of Agriculture, Food & Nutrition Serv., Instruction 783-2, rev. 2, Meal Substitutions for Medical or Other Special Dietary Reasons (Oct. 14, 1994)).

[B]roadly speaking, eating is a major life activity. However, eating specific types of foods, or eating specific amounts of food, might or might not be a major life activity. If a person is impaired only from eating chocolate cake, he is not limited in a major life activity because eating chocolate cake is not a major life activity. On the other hand, peanut allergies might present a unique situation because so many seemingly innocent foods contain trace amounts of peanuts that could cause severely adverse reactions.³¹

The reality is that food allergies adversely affect the lives of food allergic consumers regardless of whether or not the courts consider food allergies to be a disability. Providing food allergic consumers with information regarding the presence of allergens in restaurant food will improve the quality of their lives.³²

³¹ *Fraser v. Goodale*, 342 F.3d 1032, 1040 (9th Cir. 2003) (holding that eating constitutes a major life activity for a diabetic employee under the ADA) *but cf.* *Bohacek v. City of Stockton*, 2005 WL 2810536, at *4 (E.D. Cal. Oct. 26, 2005) (holding that eating does not constitute a major life activity for a peanut allergic child under the ADA); *see also* *Land v. Baptist Med. Ctr.*, 164 F.3d 423 (1999) (holding that although eating is a major life activity under the ADA, peanut allergies were not substantially limiting to the plaintiff because “her physical ability to eat” was not restricted).

³² *Cf.* *Derr*, *supra* note 3, at 66 (“For people with food sensitivities, access to accurate, comprehensive information about the contents of the foods they consume means the difference between a good and a poor quality of life.”).

II. LACK OF LEGAL REMEDIES WHEN FOOD ALLERGIC CONSUMERS SUFFER SEVERE ALLERGIC REACTIONS TO RESTAURANT FOOD

The FALCPA “represents a national, public recognition of the health, safety, and attendant legal needs of people with food allergies, and it provides a strong foundation to begin to address those needs.”³³ However, while allergic reactions to food are extremely common, “the frequency of these allergic reactions has not been accompanied by a frequent filing of lawsuits.”³⁴ The few lawsuits that have been filed involve claims like strict products liability (i.e., manufacturing defects and failure to warn), negligence, implied warranty, and disability.³⁵ The main legal issue in cases regarding restaurants’ failures to warn consumers about the presence of food allergens is when, if ever, restaurants have a duty to warn consumers about the presence of allergens in their food. If restaurants do not have a duty to warn consumers about the presence of allergens in their foods under case law, then perhaps this duty could be imposed through legislation.

A. Whether restaurants have a legal duty to warn consumers about food allergens

Case law suggests that restaurants are generally not liable for failing to warn food allergic

³³ Derr, *supra* note 3, at 66.

³⁴ Bridges, *supra* note 29, at 1271.

³⁵ *See generally Id.* at 1275-86.

consumers about the presence of allergens in restaurant food,³⁶ however restaurants may have some duty to warn consumers about food allergens.³⁷ For example, in *Brown*, the defendant “admit[ted] that, had he known that there was some risk associated with an ingredient of the [menu item containing a food allergen], he would have had a duty to warn his customers.”

Section 402(A), comment j, of the Restatement (Second) of Torts has been adopted by courts:

In order to prevent the product from being unreasonably dangerous, the seller may be required to give directions or warning, on the container, as to its use. The seller may reasonably assume that those with common allergies, as for example to eggs or strawberries, will be aware of them, and he is not required

³⁶ See, e.g., *Thompson v. E. Pac. Enters.*, 2003 WL 352914 (Wash. App. Div. 1 Feb. 18, 2003) (holding that a restaurant did not have a duty to warn customers of possible inclusion or cross contamination of peanuts); Cf. *Mills, M.D., v. Giant of Maryland, LLC*, 2006 WL 2165756 (D.D.C. Aug. 2, 2006) (holding that there is no duty to warn people who are lactose intolerant of the consequences of consuming milk).

³⁷ See, e.g., *Brown v. McDonald’s Corp.*, 655 N.E.2d 440 (1995) (holding that even though the food manufacturers “neither knew nor should have known of the risk of an adverse reaction to carrageenan,” there was still a genuine issue of material fact as to whether they had a duty to warn); *Livingston v. Marie Callender’s, Inc.*, 85 Cal.Rptr.2d 528, 534 (1999) (“Plaintiff is entitled to a trial on the theory there was a failure to warn of an ingredient to which a substantial number of the population are allergic within the meaning of comment j to section 402A of the Restatement Second of Torts.”).

to warn against them. Where, however, the product contains an ingredient to which a substantial number of the population are allergic, and the ingredient is one whose danger is not generally known, or if known is one which the consumer would reasonably not expect to find in the product, the seller is required to give warning against it, if he 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.³⁸

Another version of this standard is that

[c]ases of adverse allergic . . . reactions involve a special subset of products that may be defective because of inadequate warnings The general rule in cases involving allergic reactions is that a warning is required when the harm-causing ingredient is one to which a substantial number of persons are allergic.³⁹

In terms of the warnings themselves, there is a fear that “using too many warnings raises the concern that unnecessary or unhelpful warnings may get users or consumers in the habit of ignoring warnings that are truly helpful.”⁴⁰ However, “[w]arnings about food allergens . . . are precisely the kind of warnings that will prevent harm—because individuals with allergies are watching for them.”⁴¹ The lack of case law

³⁸ *Brown*, 655 N.E.2d at 444 (quoting RESTATEMENT (SECOND) OF TORTS § 402A cmt. j (1965)). *Accord Livingston*, 85 Cal.Rptr.2d at 533; *Thompson*, 2003 WL 352914 at *3; *Mills*, 2006 WL 2165756 at *5.

³⁹ *Livingston*, 85 Cal.Rptr.2d at 533 (quoting RESTATEMENT (THIRD) OF TORTS: PROD. LIAB. § 2 cmt. k (1998)).

⁴⁰ *Bridges*, *supra* note 29, at 1279.

⁴¹ *Id.*

holding in favor of plaintiffs who suffer severe allergic reactions in restaurants suggests that restaurants do not, in practice at least, have an affirmative duty to warn customers about the presence of allergens in their food. This means that food allergic consumers have the ultimate duty to avoid the food ingredients to which they are allergic.⁴² Even so, litigation could be a useful tool in the future for imposing a duty on restaurants to disclose the presence of allergens in their foods.⁴³

B. Legislation beyond the FALCPA

There appears to be “a general appreciation among food-sensitive individuals who are aware of how much the FALCPA fails to do that, at least, legislation finally has acknowledged the serious problem of food allergens.”⁴⁴ In fact, additional legislation has been proposed in Massachusetts, Michigan, New York, New Jersey, and Pennsylvania “pertaining to restaurants and food allergies.”⁴⁵ The New Jersey legislature has even ordered a statewide campaign⁴⁶

⁴² *Cf. Id.* at 1289 (“[I]ndividuals with nut allergies must accept primary responsibility for their own safety They are, after all, in the best position to reduce the risk of exposure.”).

⁴³ *Cf. Id.* (“But exposure [to food allergens] is inevitable, and a multi-million dollar judgment or two might go a long way towards reducing that risk too.”).

⁴⁴ Derr, *supra* note 3, at 124.

⁴⁵ The Food Allergy & Anaphylaxis Network, Advocacy, Restaurants,

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entitled “Ask Before You Eat!” with the stated goal “to help protect New Jersey’s residents from the dangers of food allergies. The goal is to help everyone – friends, neighbors, and restaurants – understand why it is so important for people with food allergies to avoid foods that trigger allergic reactions.”⁴⁷ As part of this campaign, “[r]estaurants throughout the state will receive a *Know Before You Serve* factsheet to help them serve enjoyable and safe meals to customers with food allergies.”⁴⁸ Until there is a federal law requiring the disclosure of

<http://www.foodallergy.org/Advocacy/restaurants.html> (last visited Dec. 3, 2006).

⁴⁶ See, e.g., Press Release, University of Medicine & Dentistry of New Jersey, UMDNJ, Rutgers Team to Avert Severe Food Reactions in Ask Before You Eat! Campaign (May 11, 2006) (http://www.umdnj.edu/about/news_events/releases/06/r051206_Food_Reactions.htm) (“The Ask Before You Eat! campaign was mandated by the New Jersey Legislature last year to safeguard residents safe from food allergies, and implemented by Rutgers University through a grant from the New Jersey Department of Health and Senior Services.”).

⁴⁷ Food Allergies, Ask Before You Eat!, <http://www.foodallergy.rutgers.edu/#> (last visited Dec. 3, 2006). “To achieve this goal, the Ask Before You Eat! campaign has created factsheets for New Jersey’s restaurants with advice on how to serve enjoyable and safe meals to customers with food allergies.” *Id.*

⁴⁸ Press Release, Rutgers, “Ask Before You Eat” (May 1, 2006) (<http://www.foodallergy.rutgers.edu/images/pr/1-AskBeforeYouEatFull.doc>)

allergens in restaurant foods, a statewide effort like the “Ask Before You Eat!” campaign has the potential to enhance the lives of many food allergic consumers by raising public awareness and educating restaurants about how to safely serve food to food allergic consumers.

III. LEVEL OF AWARENESS IN THE RESTAURANT INDUSTRY REGARDING FOOD ALLERGENS

Avoiding food allergens is always difficult,⁴⁹ but in restaurants is “even trickier because chefs and waiters may not know what ingredients were added to the broths, sauces, breadings, and other prepared foods they cook with.”⁵⁰ The FALCPA is the “first amendment to the Federal Food, Drug, and Cosmetic Act (FDCA) to directly address food allergy concerns.”⁵¹ One of the “positive secondary effects” of the FALCPA has been “to enhance industries’ and the public’s awareness of the seriousness of food sensitivities.”⁵² This is an important

⁴⁹ *See, e.g.*, Derr *supra* note 3, at 75 (“Shopping and preparing food for an allergen-free diet can be a time-consuming and expensive endeavor, particularly because the most commonly allergenic foods, such as milk, wheat, egg, and soy, are ubiquitous in the American diet. Food-sensitive individuals often must prepare food from scratch or purchase expensive specialty products.”).

⁵⁰ Schardt, *supra* note 15.

⁵¹ Derr, *supra* note 3, at 66.

⁵² *Id.* at 121-22. The phrase “food sensitivity” includes “three basic types of ailments associated with adverse responses to foods that are safe for the vast majority of people to ingest

achievement because “[a]s a result of this increased attention, food establishment personnel . . . may become more responsive to the concerns of people with food sensitivities.”⁵³ Some fast food restaurants have made attempts to inform consumers about the presence of food allergens⁵⁴, but there is an overall lack of knowledge in the restaurant industry regarding food allergies.

A. Voluntary disclosure of food allergens by some restaurants

Many fast food restaurants have charts available through their websites containing information about which food items contain the eight major food allergens⁵⁵, and others also include information about the presence of gluten⁵⁶ and MSG.⁵⁷ A few restaurants even provide

– food intolerances (e.g., lactose intolerance), immediate hypersensitivity reactions (typically known as ‘food allergies’), and delayed hypersensitivity reactions (the most notable of which . . . is celiac disease).” *Id.* at 67-68.

⁵³ *Id.* at 122.

⁵⁴ *See infra* Part III.A.

⁵⁵ *See e.g.*, BK Worldwide, Nutrition, Allergens, <http://www.bk.com/#menu=3,2,-1> (last visited Dec. 2, 2006); Qdoba Mexican Grill, Allergens, <http://qdoba.com/Allergens.aspx> (last visited Dec. 2, 2006).

⁵⁶ Several restaurants have even created gluten-free menus for people with gluten allergies or sensitivities. *See e.g.*, McDonald’s USA Menu Items for People with Gluten Sensitivity,

http://www.mcdonalds.com/usa/eat/nutrition_info/nutrition_lists/gluten.html (last visited Dec. 2, 2006); Outback Steakhouse, *Dinner Menu, Gluten Free*, available at

<http://www.outback.com/ourmenu/pdf/glutenfree.pdf> (last visited Dec. 2, 2006); P.F. Chang's China Bistro, *Gluten Free Menu*, available at

<http://www.pfchangs.com/cuisine/menu/GlutenIntolerantMenu.pdf> (last visited Dec. 2, 2006);

Wildfire's Gluten-Free Menu,

http://www.wildfirerestaurant.com/second_level/menu/celiac.htm (last visited Dec. 2, 2006).

⁵⁷ See e.g., McDonald's USA Food Allergens and Sensitivities Listing,

http://www.mcdonalds.com/usa/eat/nutrition_info/nutrition_lists/allergens.html (last visited Dec. 2, 2006); A & W Restaurants, Allergens, Sensitivities,

http://www.yum.com/nutrition/allergen/allergen_aw.asp (last visited Dec. 2, 2006); Taco Bell, Allergens, Sensitivities, http://www.yum.com/nutrition/allergen/allergen_tb.asp (last visited

Dec. 2, 2006); Pizza Hut, Nutrition Information, *Food Allergen and Sensitivity Information*,

<http://www.pizzahut.com/menu/allergen.asp> (last visited Dec. 2, 2006); Culver's, *Culver's Allergen and Sensitivity Guide*, available at

<http://www.culvers.com/AdminToolFiles/Documents/Document166/Allergen.9.06.pdf>

(contains the additional category of "Corn"); Subway Ingredient Information for People with Food Allergies & Sensitivities, available at

<http://subway.com/subwayroot/MenuNutrition/Nutrition/pdf/AllergenChart.pdf> (Contains the

full ingredients lists⁵⁸, much like those required on packaged foods.

However, even where full ingredient disclosure is available, consumers are not always able to access it. *Brown v. McDonald's Corp.*⁵⁹ is illustrative of this problem. The *Brown* plaintiff was severely allergic to seaweed and “developed a rash, a tight chest, blue lips, and hives” after eating a McDonald’s “McLean Deluxe” hamburger.⁶⁰ While “a flier describing the

additional categories of “Sulfites,” “Autolyzed Yeast, Hydrolyzed Prot.,” and “Nitrites/Nitrates,” but no information about MSG) (last visited Dec. 2, 2006).

⁵⁸ See e.g., McDonald’s USA Ingredients Listing for Popular Menu Items, http://www.mcdonalds.com/app_controller.nutrition.categories.ingredients.index.html (last visited Dec. 2, 2006); Boston Market, Restaurant, Nutrition, <http://www.bostonmarket.com/restaurant?page=nutritionSub&id=1&name=Make%20Your%20Meal> (last visited Dec. 2, 2006); Taco Bell Ingredient Statement, *available at* http://www.yum.com/nutrition/documents/tb_ingredient_statement.pdf (last visited Dec. 2, 2006); Qdoba Mexican Grill, *Allergen Information, available at* <http://qdoba.com/Documents/allergen.pdf> (“Detailed Information Regarding Ingredients and Food Allergies”) (last visited Dec. 2, 2006).

⁵⁹ See *Brown*, *supra* note 37 (holding that restaurant franchisee could not be held liable for customer’s severe allergic reaction to carrageenan found in hamburger).

⁶⁰ *Id.* at 441.

McLean [was] made available to all McDonald’s customers which lists the ingredients, including carrageenan⁶¹,” the plaintiff purchased the sandwich at the drive-through window and testified “that she did not receive the flier and that she was not aware that it was available.”⁶² If a duty is imposed upon restaurants to warn consumers about the presence of food allergens, then presumably food allergic consumers will become more aware of this sort of flier and be advised to look at it before ordering. However, in order for this sort of labeling reform to occur, restaurant owners and employees must first become more knowledgeable about the hazards posed by food allergens as well as how to identify the presence of these potentially lethal ingredients in the foods they serve.

B. Lack of knowledge in the restaurant industry regarding food allergies

Ignorance of ingredients in the restaurant industry is a major obstacle preventing full disclosure of the presence of allergens in restaurant food:

Servers and food preparers frequently lack the level of knowledge about dish ingredients required by food-sensitive individuals, and restaurants rarely implement employee training about—and protocols regarding—how to serve individuals with food sensitivities safely. Even when food establishments take food sensitivity seriously, waiters and food preparers often have not known the ingredients in their foods, either because the original packaging was discarded

⁶¹ Carrageenan is a seaweed-derivative, and the flier did “not inform the reader that carrageenan is derived from seaweed, nor that persons who are allergic to seafood may experience an adverse reaction to that ingredient.” *Id.* at 443.

⁶² *Id.* at 443.

or because the labels were difficult to decipher due to the absence of plain English labeling.⁶³

A study which surveyed fifty-eight restaurants found that “only about half had a plan in place for how to provide a safe meal, and 25 percent of servers, chefs, and managers surveyed incorrectly believed that it was safe for people to eat small amounts of foods to which they are allergic.”⁶⁴ One argument against imposing a duty on restaurants to “take responsibility for what they serve” is that “it would be too costly to conduct widespread training and list allergens on menus given high employee turnover and frequent menu changes [especially] for mom-and-pop venues that do not write down recipes and places that employ servers and food handlers who do not speak English.”⁶⁵ However, the economic cost to the restaurant is arguably outweighed by the cost to food allergic consumers who risk their lives every time they eat in a restaurant that does not disclose the presence of allergens in their

⁶³ Derr, *supra* note 3, at 92.

⁶⁴ Abelson, *supra* note 10 (citing Scott Sicherer, Associate Professor of Pediatrics, Jaffe Food Allergy Institute in New York). *Cf.* Bridges *supra* note ____, at 1270 (“The irony is that everybody knows that people can die from bee stings . . . [b]ut more people die from food allergies than from bee stings.” (quoting Anne Muñoz-Furlong, Founder and CEO, Food Allergy & Anaphylaxis Network)).

⁶⁵ *Id.* (citing Peter Christie, President of the Massachusetts Restaurant Association).

food.⁶⁶ Perhaps one solution to this dilemma could be to require disclosure only from chain restaurants and other restaurants that would not incur an undue burden from researching the ingredients in menu items.

Even when food ingredients are known, restaurants are often “reluctant to disclose food ingredients” because of concerns regarding “exposing themselves to liability by making representations about their food or by revealing proprietary information.”⁶⁷ One example of a misrepresentation made about restaurant food is the *Livingston* case in which a customer sued after suffering a severe allergic reaction to soup containing monosodium glutamate (MSG):

He told the waitress he had asthma and he wanted to know if the soup contained MSG. The waitress assured plaintiff the soup did not contain MSG. Plaintiff ordered and consumed the soup. In fact, the soup did contain MSG. As a result of consuming the soup, plaintiff suffered MSG Symptom Complex including, but not limited to, respiratory arrest, hypoxia, cardiac arrest, and brain damage.

⁶⁸

Livingston is particularly disturbing because of the fact that the waitress misinformed plaintiff regarding the presence of a food ingredient to which he was allergic after he had made

⁶⁶ Cf. Lionel Thomas Jr. & Juline E. Mills, *Consumer Knowledge and Expectations of Restaurant Menus and their Governing Legislation: a Qualitative Assessment*, 17 *Journal of Foodservice* 6, 7 (2006) (“Restaurants are facing the dilemma of profitability vs. social responsibility when considering the use of food labeling measures.”)

⁶⁷ Derr, *supra* note 3, at 92.

⁶⁸ *Livingston*, 85 Cal.Rptr.2d at 833.

a point to ask about this ingredient. This case exemplifies the extent to which food allergic consumers struggle to obtain information about food ingredients in restaurant foods to which they are allergic. “Had plaintiff known the soup contained MSG, he would not have eaten it.”⁶⁹ The severe allergic reaction suffered by the *Livingston* plaintiff could have been completely prevented if the restaurant had disclosed the presence of allergens in their food.

A restaurant’s interest in protecting trade secrets is not substantially different from that of manufacturers of packaged foods who are required under the FALCPA to disclose the presence of allergens in their products.⁷⁰ The interests of restaurants in avoiding liability and concealing trade secrets must be weighed against the enormous public health risk posed by food allergens.⁷¹

CONCLUSION

Restaurants should be required to provide consumers with information regarding the presence of food ingredients to which consumers are allergic. One possible way to achieve this goal is for the FALPCA to be amended so that it applies to restaurant food. While this

⁶⁹ *Id.* at 832.

⁷⁰ *Cf. generally FALCPA, supra* note 1 (requiring disclosure of “major food allergens” on labeling of packaged foods).

⁷¹ *Cf. infra* note 66.

would not fix the problems of hidden food allergens, cross-contamination,⁷² and food allergens other than the “Big Eight”,⁷³ it would be a promising step toward making restaurants safer places for food allergic consumers to eat. Another possibility could be requiring states to enact legislation that imposes a duty on restaurants to disclose the presence of allergens in their food. At a minimum, information regarding the presence of allergens in restaurant food ingredients should be readily available to food allergic consumers upon request. Until there is a duty imposed on restaurants to make this type of information available, food allergic consumers will not be able to safely eat restaurant food.

⁷² See generally Derr, *supra* note 3, at 82-86 (discussing the problems of hidden ingredients and cross-contamination).

⁷³ See generally *Id.* at 145-50 (discussing the FALCPA’s failure to address food allergies to “non-Big Eight foods”).