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NOTE

SUING FOR PEANUTS

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In 1986 in Providence, Rhode Island, an eighteen-year-old freshman at Brown University died from an allergic reaction.[1] Katherine Brodsky passed away February 18, after accidentally ingesting peanut butter at a local restaurant. Unknown to her, the chili she ordered had been flavored with the peanut butter. Katherine began to complain about feeling ill as she left the restaurant with a friend. She drove to the home of a physician, a relative of her companion, where she received a shot of epinephrine[2] and an ambulance was summoned. Katherine was unconscious nine minutes later when the ambulance arrived. She had no vital signs by the time she reached a nearby hospital where she was pronounced dead.[3]

In 1993 at Portsmouth Abbey School, a Rhode Island boarding school, student John Federico, Jr., died from an allergic reaction to nuts.[4] Although he "was known to be very careful about his diet," he apparently ingested the nuts while eating Chinese food that "did not

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The author's personal experience contributes significantly to his appreciation of the issues. He experiences mild allergic reactions to nuts on average about five times per year. Dairy Queen Blizzards and egg rolls at Chinese restaurants are most frequently hazardous—perhaps because the author cannot quit ordering them. Also the author has, on numerous occasions, received false assurances that food (chiefly egg rolls and cheesecake) at restaurants does not contain nuts. He has learned not to rely on restaurant employees for ingredient information.

1 *See Death from Allergy to Food Spurs Study in Rhode Island*, N.Y. TIMES, Mar. 23, 1986, § 1, at 54 [hereinafter *Death from Allergy*].

2 For a discussion of the use of epinephrine as a medication for allergic reactions, see *infra* notes 38–43 & accompanying text.

3 *See Death from Allergy*, *supra* note 1.

4 *See* Federico v. Order of Saint Benedict, 64 F.3d 1 (1st Cir. 1995).

appear to have nuts in it."[5] About twenty minutes after eating, John sought help, believing he was having an asthma attack. A school nurse administered emergency treatment, and a rescue squad was called. But John had stopped breathing, and none of them "could get air in [his] chest or revive him."[6] The rescue squad took John to a local hospital where he was pronounced dead approximately one hour after he had first sought help.[7]

In 1994 in Bloomington, Indiana, a freshman at Indiana University died after eating a single nut.[8] Amanda Jean Pelsor of Dayton, Ohio, "began complaining of tightness in her throat" after eating in her dormitory, but she thought that medication would prevent a reaction.[9] She tried to treat her symptoms with an inhaler, but it did not help. She "was pronounced dead less than an hour later."[10]

According to Anne Munoz-Furlong, executive director of the Food Allergy Network[11] of Fairfax, Virginia, tragedies such as these are not altogether uncommon. "The irony is that everybody knows that people can die from bee stings," she says, "[b]ut more people die from food allergies than from bee stings."[12] Recent medical literature appears to support her opinion.[13] However, the literature also points out that "[t]here are no reliable data on the incidence, prevalence, or mortality rates for food-induced [allergic reactions] in either children or adults."[14] One study bemoans that "[t]here is no code for the diagnosis of food-induced [allergic reactions] in *The International Classification of Diseases*,[15] so it has been difficult to ascertain the incidence of [such reactions]."[16] It is by extrapolating the findings of small, iso-

5 *Id.* at 2.

6 *Id.*

7 *See id.* at 1–2.

8 *See Deadly Food Allergies Not So Rare, Experts Say*, INDIANAPOLIS STAR, Nov. 13, 1994, at B6 [hereinafter *Deadly Food Allergies*].

9 *Id.*

10 *Id.*

11 For information regarding the Food Allergy Network and food allergies in general, see the Network's web site at <http://www.foodallergy.org> or call (703) 691-3179.

12 *Deadly Food Allergies*, *supra* note 8.

13 *See* Hugh A. Sampson et al., *Fatal and Near-Fatal Anaphylactic Reactions to Food in Children and Adolescents*, 327 NEW ENG. J. MED. 380 (1992); John W. Yunginger, *Lethal Food Allergy in Children*, 327 NEW ENG. J. MED. 421 (1992); *see also* John W. Yunginger et al., *Fatal Food-Induced Anaphylaxis*, 260 JAMA 1450 (1988). These sources provide detailed, clinical discussions of food-induced anaphylaxis.

14 Yunginger, *supra* note 13, at 421.

15 U.S. DEP'T OF HEALTH & HUMAN SERVS., ICD-9-CM 2000: THE INTERNATIONAL CLASSIFICATION OF DISEASES (deluxe ed. 1999).

16 Sampson et al., *supra* note 13, at 380.

lated studies that researchers conclude food allergies are so frequently (and increasingly[17]) deadly.[18]

Surprisingly, the frequency of these allergic reactions has not been accompanied by a frequent filing of lawsuits.[19] Newspaper accounts of airlines and schools enforcing "peanut bans" or creating "peanut-free zones" have become increasingly common,[20] but so far, the anticipated liability is nonexistent. The *New York Times* reports that "fear of litigation [has caused] growing numbers of public and private schools across the country" to ban peanut butter, declare peanut-free zones, or "set up committees to figure out what to do."[21] But

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17 *See id.* at 384 ("It is our belief and that of other investigators studying food allergy that the frequency of fatal and near-fatal food-induced [allergic] reactions has risen over the past several years.").

18 *See* Yunginger, *supra* note 13, at 421.

19 The author's research turned up only three opinions involving an allergic reaction to nuts, each finding against the allergic plaintiff: *Land v. Baptist Medical Center*, 164 F.3d 423 (8th Cir. 1999) (holding that allergy to peanuts does not constitute a disability under the ADA) (discussed *infra* Part IV), *Federico v. Order of Saint Benedict*, 64 F.3d 1 (1st Cir. 1995) (discussed *supra* text accompanying notes 4–7), and *Abbhi v. AMI*, CV 9603822195S, 1997 Conn. Super. LEXIS 1523 (Conn. Super. Ct. June 3, 1997) (finding against the plaintiff on defendants' limited motion to strike) (discussed *infra* Part III).

Some cases are settling. *See, e.g., Restaurant Settles Suit over Fatal Allergic Reaction*, MINNEAPOLIS STAR TRIBUNE, Aug. 8, 1992, at 2B ("The widow of a Farmington [Minnesota] man who died from an allergic reaction to peanut butter despite warning a waitress of his allergy will receive $450,000 in a settlement with a Twin Cities restaurant."); U.S. Dep't of Justice, *Settlement Agreement Under the Americans with Disabilities Act Between the United States of America and La Petite Academy, Inc.* (1997) (last modified May 8, 1998) <http://www.usdoj.gov/crt/ada/lapetite.htm> [hereinafter *La Petite Settlement*] (discussed *infra* text accompanying note 115); Memorandum of Understanding Between Northwest Suburban Montesori School, Raye Thompson, & Ted Thompson (Mar. 24, 1998) (on file with author) (settling ADA suit alleging discrimination based on food allergy).

Another case which may have settled is described in Paul Langner, *N.H. Man Blames Sauce for Wife's Death, Sues Bertucci's*, BOSTON GLOBE, Aug. 8, 1995, at 33 ("A New Hampshire man says Bertucci's Inc., the restaurant chain, is responsible for the death of his wife [Janet Walker], who allegedly died of a severe allergic reaction to walnuts in a special pesto sauce after she had been assured the nuts were not in it."). Even with the assistance of the Food Allergy Network's Terry Furlong, the author was unable to track down any other nut allergy related lawsuits.

20 *See, e.g.*, James Bovard, *Designer Disabilities*, WASH. TIMES, Nov. 12, 1998, at A14; *Budget Deal Halts Mandate for No-Peanut Zones Aloft*, MILWAUKEE J. SENTINEL, Oct. 25, 1998, at 5 [hereinafter *Budget Deal*]; Constance L. Hays, *A New Fear of Flying: Peanuts*, N.Y. TIMES, May 10, 1998, § 4, at 5; Carrie Hedges, *Peanut Ban Spreads to Cafeteria: Schools Worry About Allergies—Or Lawsuits*, USA TODAY, Dec. 3, 1998, at 17A.

21 Anemona Hartocollis, *Nothing's Safe: Some Schools Ban Peanut Butter as Allergy Threat*, N.Y. TIMES, Sept. 23, 1998, at A1.

determining precisely what to do is far from easy—perhaps because there is little relevant case law for guidance.

This Note attempts to identify the legal issues implicated by nut[22] allergies and evaluate the potential for liability that has received so much media attention. Part I describes the nature and severity of allergic reactions to nuts. Part II addresses potential liability for allergic reactions under products liability law, while additional theories of liability are discussed briefly in Part III. Finally, in Part IV, this Note explores relevant disability law under the Americans with Disabilities Act[23] and the Air Carrier Access Act.[24]

I. ALLERGIC REACTIONS TO NUTS

While approximately twenty percent of the population worldwide suffers from some sort of allergy,[25] only one to two percent is allergic to foods.[26] One article, which identifies protocol for diagnosis and treatment of allergic reactions in children, is more specific:

> Although more than 100 foods have been reported to cause [allergic reactions], the list of the most common ones is quite short . . . . Milk, soy, and egg allergies . . . are typically outgrown by age 5 years. In older children and adults, most food induced [allergic] reactions

22 This Note does not attempt to distinguish among tree nuts, peanuts (which are actually legumes), and other nuts. For a discussion distinguishing them, see Sami L. Bahna, *Man Shall Not Live by Peanut Alone!*, 102 PEDIATRICS 148 (1998), and Scott H. Sicherer, *Manifestations of Food Allergy: Evaluation and Management*, 59 AM. FAM. PHYSICIAN 415, 418 (1999) ("The foods most often responsible for food-induced anaphylaxis are peanuts, tree nuts (walnut, almond, pecan, cashew, hazel nut, Brazil nut, etc.) and shellfish.").

23 42 U.S.C. § 12101–213 (1994).

24 49 U.S.C. § 41705 (1994).

25 *See* John A. Anderson, *Milk, Eggs and Peanuts: Food Allergies in Children*, 56 AM. FAM. PHYSICIAN 1365 (1997). The most common, dangerous, *non-food* allergies include antibiotics (such as penicillin) and insect venom (from bees, wasps, and fire ants). *See* Elisabeth Rosenthal, *Backward Protection*, N.Y. TIMES, July 2, 1989, § 6, at 27.

26 *See* Hugh A. Sampson, *Assessment of Patients Who Have Experienced Anaphylaxis: A 3-Year Survey*, 96 PEDIATRICS 384, 384 (1995) ("The prevalence of food allergy is estimated to be 6% in children less than 4 years of age and about 2% in older children and adults."); Albert L. Sheffer, *Food Allegies: When Edibles Become the Enemy*, 22 HARV. HEALTH LETTER 4, 4 (1997) ("[F]ood allergies affect between 1% and 2% of the U.S. population, or about 2.5 million to 5.2 million people."); *see also* Scott H. Sicherer et al., *Prevalence of Peanut and Tree Nut Allergy in the U.S. Determined by a Random Digit Dial Telephone Survey*, 103 J. ALLERGY & CLINICAL IMMUNOLOGY 559, 559 (1999) ("Peanut and/or [tree nut] allergy affects approximately 1.1% of the general population, or about 3 million Americans, representing a significant health concern. . . . Despite the seriousness of the problem, there have been no reports attempting to determine the prevalence of peanut and [tree nut] allergy in the general population.").

> are caused by peanuts, nuts, fish, or shellfish. Allergies to these foods are rarely, if ever, outgrown.[27]

Peanut allergy is the food allergy most likely to be fatal.[28] Baked goods, Asian foods, candies, and ice creams are common sources of accidental ingestion of nuts.[29]

While records at the Centers for Disease Control show only eighty-eight lethal allergic reactions to food between 1979 and 1995 (or five and one-half per year), many allergists believe these numbers are unreliable.[30] The Food Allergy Network "estimates that 125 people die every year from all kinds of food allergies, the majority from peanuts."[31] More frequently, however, reactions are not fatal.

The medical term for a severe allergic reaction is "anaphylaxis." Anaphylaxis, also known as "anaphylactic shock," is described as "an acute, systemic allergic reaction with a variety of manifestations, ranging from relatively mild symptoms affecting only the skin to dramatic reactions involving the respiratory and cardiovascular systems. In its fullest form, anaphylaxis is a true medical emergency with life-threatening potential."[32] Mild anaphylaxis may involve "itching, swelling, hives, wheezing, coughing, vomiting, and diarrhea."[33] A stronger reaction can cause "a sudden drop in blood pressure and the closing of the breathing passages."[34] Within a few seconds, over several minutes, or even a few hours after exposure these symptoms may develop or worsen.[35] Each episode of anaphylaxis may increase the risk of a severe reaction;[36] however, some medical literature states that "there is absolutely no predictable pattern" of severity.[37]

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27 Robert A. Wood, *Anaphylaxis in Children*, 31 PATIENT CARE 161, 170 (1997).

28 *See* Bahna, *supra* note 22, at 148.

29 *See* Wood, *supra* note 27, at 175.

30 *See supra* notes 14–18 and accompanying text; *see also* Hartocollis, *supra* note 21.

31 Hartocollis, *supra* note 21. It is likely that nuts are responsible for most food-allergy related deaths because allergic reactions to nuts are much more severe than reactions to most food allergens, *see* Sicherer, *supra* note 22, at 418, and because nuts and nut products (such as peanut butter or peanut oil) are more frequently unexpected ingredients in food, *see, e.g.*, *supra* text accompanying notes 1–3.

32 Wood, *supra* note 27, at 161.

33 Hartocollis, *supra* note 21.

34 *Id.* For a clinical discussion of anaphylaxis, see *supra* note 13. For a detailed description in lay terminology, see Rosenthal, *supra* note 25, or Sheffer, *supra* note 26.

35 *See* Sheffer, *supra* note 26, at 4; *see also supra* note 13.

36 *See* Sheffer, *supra* note 26, at 5.

37 Wood, *supra* note 27, at 165.

The literature is unanimous in recommending immediate injection of epinephrine, the "biochemical equivalent" of adrenaline,[38] as the best treatment for anaphylaxis:

> Epinephrine is the drug of choice for the acute relief of the respiratory and cardiovascular complications of anaphylaxis and for angioedema. For mild episodes, a single dose . . . will be sufficient, while more severe episodes may require multiple doses.[39]

Doctor John W. Yunginger's study at the Mayo Clinic concludes, "Food-allergic persons should be provided with epinephrine-containing syringes and instructed how to promptly self-administer epinephrine at the first sign of allergic reaction."[40] In a later editorial, Doctor Yunginger added, "A delay in the administration of epinephrine [is] likely to be associated with a fatal outcome."[41] However, in some cases epinephrine may not be enough.[42] A trip to the emergency room, where respiratory collapse and cardiac arrest can be treated, is recommended.[43]

Some medical literature recommends the use of antihistamines "in all cases of anaphylaxis."[44] But research indicates that "reliance on

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38 William R. Greer, *Warnings on Food Allergies*, N.Y. TIMES, Mar. 29, 1986, § 1, at 9.

39 Wood, *supra* note 27, at 182.

40 Yunginger et al., *supra* note 13, at 1452. The study adds, "Ironic as it seems, one cannot assume that emergency rescue units will be supplied with epinephrine . . . ." *Id.* (citations omitted). Doctor Elizabeth Rosenthal also expresses concern about the availability of the drug:

> Although I have no allergies, I usually bring along an EpiPen [brand-name syringe filled with epinephrine] when I travel to the countryside, a practice I always attributed to paranoia. I have since discovered that many colleagues do the same. One, whose wife has a celery allergy, carries the device whenever they go out; another keeps one in his pocket at all times, "just in case." I suppose we all have dreams and nightmares about that potential moment when one injection, at a cost of a few dollars, could literally make the difference between life and death.

Rosenthal, *supra* note 25.

41 Yunginger, *supra* note 13, at 421.

42 *See* Wood, *supra* note 27, at 183 ("In the worst cases, death from anaphylaxis will occur in spite of optimal management."); *see also* Sampson et al., *supra* note 13, at 384 ("[M]any children [in this study] appeared to have either progressive symptoms despite injections of epinephrine or a second wave of symptoms that were poorly responsive to epinephrine.").

43 *See* Sampson et al., *supra* note 13, at 384 ("All children and adolescents with a food allergy who have an allergic reaction should be observed for three to four hours after the reaction in a center capable of dealing with anaphylaxis."); Wood, *supra* note 27, at 182 ("Should further respiratory compromise occur in spite of treatment, intubation or tracheotomy may be required.").

44 Wood, *supra* note 27, at 182.

oral antihistamines alone to treat symptoms" may be a contributing factor "to the severity of individual reactions."[45]

Also, according to the American Peanut Council, there is hope for a vaccine which may eliminate nut allergies—perhaps within the next few years.[46]

II. PRODUCTS LIABILITY

Although anaphylactic reactions to nuts are not uncommon, it appears that related lawsuits are. Even with the help of the Food Allergy Network, the author has not uncovered one such case prior to 1992, and only six since.[47] Certainly the scarcity of this type of litigation is not due to a shortage of potential plaintiffs[48]—or lawyers. Neither does it seem to be the result of an inability of the law to afford a remedy to the injured allergic. More likely, it is an issue just starting to attract the kind of attention that precedes prolific litigation. Two cases recounted in recent medical literature illustrate the type of exposure to liability that may soon result in increasing litigation for restaurants and food manufacturers.

A. Manufacturing Defects

In 1996 Stephen Kemp, a thirty-four year old allergist-immunologist who suffers from an allergy to nuts, reported experiencing an episode of anaphylaxis after eating from a box of gingersnap cookies.[49] The box did not list peanuts as an ingredient, and peanuts were not an intended ingredient. Doctor Kemp self-administered epinephrine and went to the emergency room where, thirty minutes later, he suffered a severe anaphylactic reaction. He reports that significant traces of peanut antigen were later discovered in the remaining cookies, leading to a recall of the production lot by the manufacturer.[50]

Doctor Kemp's case is an excellent example of a manufacturing defect. Under section 402A of the *Restatement (Second) of Torts*, "One who sells any product in a defective condition unreasonably danger-

45 Yunginger et al., *supra* note 13, at 1450.

46 *See* Constance L. Hays, *Allergic Reactions to Nuts Are Dangerous to Millions*, N.Y. TIMES, Feb. 22, 1998, § 1, at 12 ("Hugh A. Sampson, director of a newly opened allergy clinic at Mount Sinai Medical Center in Manhattan, is working on such a vaccine.").

47 *See supra* note 19.

48 *See supra* text accompanying notes 25–31.

49 *See* Stephen F. Kemp et al., *Peanut Anaphylaxis from Food Cross-Contamination*, 275 JAMA 1636 (1996).

50 *See id.*

ous to the user or consumer . . . is subject to liability for physical harm thereby caused to the ultimate user or consumer . . . ."[51] Comment g clarifies "defective condition": "The rule stated in this Section applies only where the product is, at the time it leaves the seller's hands, in a condition not contemplated by the ultimate consumer, which will be unreasonably dangerous to him."[52]

The *Restatement (Third) of Torts* is in accord. Section 2 states that a manufacturing defect exists when "the product departs from its intended design even though all possible care was exercised in the preparation and marketing of the product."[53] Comment c further describes the concept: "[M]anufacturing defects disappoint consumer expectations."[54] Section 7, specifically addressing defective food products, states that "a harm-causing ingredient of [a] food product constitutes a defect if a reasonable consumer would not expect the food product to contain that ingredient."[55]

In Doctor Kemp's case, it is clear that the doctor did not expect the gingersnaps to contain nuts, and reasonably so. His purpose in reading the listed ingredients was to check for nuts. It is also clear that the cookies were not intended to contain nuts but were somehow

51 RESTATEMENT (SECOND) OF TORTS § 402A (1965). Strict liability for manufacturers and sellers generally applies to restaurants. *See* § 402A cmt. f; *see also* Koster v. Scotch Assocs., 640 A.2d 1225, 1226–27 (N.J. Super. Ct. Law Div. 1993) ("There are three basic reasons for concluding that the defendant restaurant is strictly liable to the plaintiff: the Uniform Commercial Code, the Adulterated Food Statute, and the Products Liability Statute.") (citations omitted); Heber v. Loveless, 474 S.W.2d 732, 738 (Tex. Ct. App. 1971) ("The restaurant patrons dealt directly with the owner and had the right to rely upon his implied warranty that everything which was served to them, including the ice, was fit for human consumption and would not cause injury or illness."). *But see* Goodman v. Wenco Foods, Inc., 423 S.E.2d 444, 453 n.4 (N.C. 1992) ("There is some authority for holding restaurateurs liable on a theory of strict liability in tort, thus presuming negligence or obviating its proof. . . . Such a theory is neither relied on by plaintiff here nor have we adopted it in North Carolina.").

52 RESTATEMENT (SECOND) OF TORTS § 402A cmt. g (1965).

53 RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2 (1998).

54 *Id.* § 2 cmt. c.

55 *Id.* § 7. Comment b to this section further elaborates,

> Although consumer expectations are not adequate to supply a standard for defect in other contexts, assessments of what consumers have a right to expect in various commercial food preparations are sufficiently well-formed that judges and triers of fact can sensibly resolve whether liability should be imposed using this standard.

Id. § 7 cmt. b.

contaminated. The manufacturer is liable[56]—and fortunate that the doctor was satisfied with publishing his experience.

It is surprising that lawsuits in similar circumstances are not commonplace. One leading allergist suggests that "[m]any foods may contain peanuts without listing them on the label."[57] Last year Pillsbury discovered walnuts in packages of Martha White brownie mix and recalled them.[58] In 1997 Hershey recalled "hundreds of Sweet Escapes candy bars . . . after it was found that they had mingled with another company's nut bars in a packaging plant both companies were using."[59] Also, General Mills "moved production of Honey Nut Cheerios, which uses almonds, to a separate area of its operations . . . 'because of a recognition that [cross contamination] is becoming a larger and larger problem.'"[60] However, cross contamination is often difficult and expensive to prevent. Hershey's director of quality and regulatory compliance describes "one circumstance where [Hershey] had a peanut product run on a line, then a plain chocolate product. To clean the line after the peanut product had run, [Hershey] had to shut it down for three weeks."[61]

B. Failure to Warn

Doctor Yunginger, in his study of fatal anaphylactic reactions to food allergies, reports that one subject of the study accidentally ingested nuts at a Vietnamese restaurant.[62] The study describes the event:

> A 43-year-old atopic man had a history of asthma and severe allergy to peanuts. While dining at a Vietnamese restaurant he was specifically assured that the dishes contained no peanuts. After eating one bit [sic] of his entree, he again queried the waitress and was then

56 Under a res ipsa loquitor theory, the doctor could prove his case even without discovering traces of peanut in the food. The *Restatement (Third) of Torts* comments on such a theory: "[A] plaintiff [may] reach the trier of fact when, unable to identify the specific defect, the plaintiff becomes violently ill immediately after consuming the defendant's food product and other causes are sufficiently eliminated." *Id.* § 7 cmt. a.

57 *Peanut Allergies on the Increase*, 14 CHILD HEALTH ALERT 3, 3 (1996) (identifying as likely culprits "breakfast cereals, trail mixes, chili and spaghetti sauces, gravies, oriental cooking (including egg rolls), pastries, sweets, ice creams, desserts, and . . . garnishes for many foods"). Other products that do list nuts as an ingredient may not be suspected of containing nuts, and thus the label may go unread. Or foods that do not contain nuts may be prepared using peanut oil.

58 *See* Hays, *supra* note 46.

59 *Id.*

60 *Id.* (quoting Pam Becker, General Mills spokesperson).

61 *Id.*

62 *See* Yunginger et al., *supra* note 13, at 1451.

> told that there was [sic] slivered peanuts atop the dish. He refused the remainder of that dish, took an unknown oral medication, and then consumed the rest of his meal. Approximately 90 minutes later, he felt ill and apparently self-administered epinephrine in the rest room. He collapsed five minutes later, was given a second epinephrine injection by a local physician, and was then transported to a nearby emergency department, where resuscitation attempts were unsuccessful.[63]

This case is an example of a product rendered defective by a failure to warn. The *Restatement (Second) of Torts* provides the following guidance regarding a seller's duty to warn:

> In order to prevent the product from being unreasonably dangerous, the seller may be required to give directions or warning . . . 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 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.[64]

Likewise, the *Restatement (Third) of Torts* includes the following category of product defect:

> A product . . . is defective because of inadequate instructions or warnings when the foreseeable risks of harm posed by the product could have been reduced or avoided by the provision of reasonable instructions or warnings by the seller . . . and the omission of the instructions or warnings renders the product not reasonably safe.[65]

In comment k, the *Restatement* specifically addresses the allergy issue in the context of a seller's duty to warn:

> 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. The degree of substantiality is not precisely quantifiable. . . . In determining whether the plaintiff has carried the burden in this regard, however, the court may properly consider the severity of the plaintiff's harm. *The more*

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63 *Id.*

64 RESTATEMENT (SECOND) OF TORTS § 402A cmt. j (1965) (emphasis added). A third type of defect, design defect, is not implicated by issues involving nut allergies.

65 RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2 (1998).

> *severe the harm, the more justified is a conclusion that the number of persons at risk need not be large to be considered "substantial" so as to require a warning.*
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> . . .
>
> The ingredient that causes the allergic reaction must be one whose danger or whose presence in the product is not generally known to consumers. When both the presence of an allergenic ingredient in the product and the risks presented by such ingredient are widely known, instructions and warnings about that danger are unnecessary. *When the presence of the allergenic ingredient would not be anticipated by a reasonable user or consumer, warnings concerning its presence are required.* Similarly, when the presence of the ingredient is generally known to consumers, but its dangers are not, a warning of the dangers must be given.[66]

Products liability is not absolute liability, however, and "warnings concerning risks of allergic reactions that are not reasonably foreseeable at the time of sale need not be provided."[67]

There is also no need to warn of "obvious or generally known risks."[68] In fact, 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. Warnings about food allergens, however, are precisely the kind of warnings that will prevent harm—because individuals with allergies are watching for them.

It is clear in the case Doctor Yunginger describes that the consumer did not expect to find nuts in his entree—at least not once the waitress assured him there were none. It is also clear that the omission of a warning rendered the meal unreasonably unsafe. It is less certain that a "substantial number"[69] of individuals are allergic to nuts—especially if each type of nut is considered individually. Considering the severity of the potential harm, however, and estimates that as many as 5.2 million people in the United States suffer from food

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66 *Id.* § 2 cmt. k (emphasis added). Thus, there is no duty to warn that peanuts are an ingredient in peanut butter, but perhaps a duty does exist to warn of the presence of peanut butter in chili.

67 *Id.*

68 RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2 cmt. j (1998). *But see* Liriano v. Hobart Co., No. 96-9641(L), 97-7449(CON), 1999 U.S. App. LEXIS 3634, at *15 (2d Cir. Mar. 9, 1999) ("[T]he duty to warn is not necessarily obviated merely because a danger is clear.").

69 In *Presbrey v. Gillette Co.*, 435 N.E.2d 513 (Ill. App. Ct. 1982), the court identified the requisite number as "a 'small proportion' or 'some persons' or an 'identifiable' class or an 'appreciable' number or 'a substantial' number of persons." *Id.* at 520 (citations omitted).

allergies of some type,[70] the numbers are probably "substantial" enough.[71]

It is also uncertain whether it was reasonable for the consumer to expect that his food was nut-free. While at first glance it may seem that a restaurant patron should be able to rely on the assurances of restaurant employees, circumstances may cloud the issue. First, it is unlikely that the waitress in the case Doctor Yunginger describes understood the gravity of the inquiry. She probably did not know of the possible consequences of her mistake. Second, ignorance concerning food ingredients or communication barriers such as language differences may often lead to misunderstandings in similar situations. (Some scholars suggest that individuals with allergies are in a better position to bear the burden of avoiding allergens for reasons such as these.[72]) Third, the consumer's prior experience at this restaurant, with this food, or in similar situations may make it *unreasonable* for him to rely on the assurances of the waitress.

At a minimum, such circumstances raise the issue of contributory (or comparative) negligence.[73] At most, they suggest that the consumer's expectations were not reasonable at all and, thus, undermine his theory of recovery. In most cases, however, reliance on the representations of restaurant employees is probably sufficient to establish liability for a failure to warn.

Many manufacturers and restaurants are aware of nut and other food allergies and are trying to provide adequate warnings. General Mills has "produced a brochure for [allergic] consumers, and when a recipe includes any of eight foods that are known to cause allergic reactions, it lists them in boldface on its boxes."[74] Kellogg has a simi-

70 *See supra* note 26.

71 For a discussion of the "allergy defense" in product liability cases, see Guido Calabresi & Kenneth C. Bass III, *Right Approach, Wrong Implications: A Critique of McKean on Products Liability*, 38 U. CHI. L. REV. 74, 86 (1970), Page Keeton, *Products Liability—Drugs and Cosmetics*, 25 VAND. L. REV. 131, 136–37 (1972), Michael D. Schattman, *A Cause of Action for the Allergic Consumer*, 8 HOUS. L. REV. 827 (1971), Thomas T. Rogers, Note, *Products Liability: The Allergic Plaintiff—Formulating a Cause of Action in Oklahoma*, 30 OKLA. L. REV. 439 (1977), and Richard F. Yarborough, Jr., Comment, *Strict Liability and Allergic Drug Reactions*, 47 MISS. L.J. 526 (1976).

72 *See* Calabresi & Bass, *supra* note 71, at 86.

73 Perhaps failing to carry epinephrine at all times could also support a contributory negligence or comparative fault defense. While there is probably no duty to anticipate the negligence of others, liability may attach without fault under a strict liability theory. Because an allergic plaintiff may be in a better position to avoid an accident—or at least its harshest effects—strict liability may be inappropriate. In this case, however, the plaintiff died despite having epinephrine with him.

74 Hays, *supra* note 46.

lar brochure.[75] Although the Food and Drug Administration does not currently require manufacturers "to make notices of allergens more prominent," some already do.[76] Also, the National Restaurant Association has made efforts to inform its constituents about cross contamination, food allergies, and allergic-reaction symptoms.[77] It is likely that these and similar efforts will reduce the risk of liability for nut-induced anaphylaxis; it is unlikely they will eliminate it.

III. NEGLIGENCE, IMPLIED WARRANTY, AND ADDITIONAL THEORIES OF LIABILITY

For an allergic plaintiff, a negligence or breach of implied warranty claim adds very little to a strict liability cause of action, other than an occasional procedural advantage. In many cases, bringing additional claims would merely duplicate the strict liability claim. The *Restatement (Third) of Torts* addresses such duplicative claims:

> In all instances set forth above in which claims are duplicative, if one or the other theory presents an advantage to the plaintiff—in connection with the statute of limitations, for example—the plaintiff may pursue the more advantageous theory. But the trier of fact may not consider both theories on the same facts.[78]

Generally, there will be no reason for an allergic plaintiff to bring additional claims.

In a recent Connecticut case, *Abbhi v. AMI*,[79] a peanut-allergic plaintiff did bring claims in addition to statutory products liability counts, but to no avail. In this case the decedent, nine-year-old Shibani Abbhi, "was known to have a serious peanut allergy as well as asthma."[80] While playing at a friend's house, Shibani ate a danish

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75 *See id.*

76 *Id.* In response to a study indicating "that transgenic foods may contain hidden allergens," however, the FDA does require "premarketing notification, safety testing and labeling of transgenic foods that contain genes transferred from the 10 or so common allergenic foods." Mara Bovsun, *Allergy Causing Proteins Jump from Nuts to Soybeans in Gene Transfer*, BIOTECHNOLOGY NEWSWATCH, Mar. 18, 1996, at 1.

77 *See* Hays, *supra* note 46. Many food manufacturers also post notices of recalled products containing allergens with the Food Allergy Network on its web page at <http://www.foodallergy.org>.

78 RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2 cmt. n (1998). Negligence, implied warranty, and strict liability claims may be brought initially, however—even on the same facts. *See id.* ("In proceedings in which multiple theories are alleged, the Restatement leaves to local law the question of the procedural stage in a tort action at which plaintiff must decide under which theory to pursue the case.").

79 CV 960382195S, 1997 Conn. Super. LEXIS 1523 (Conn. Super. Ct. June 3, 1997).

80 *Id.* at *4.

pastry containing peanuts. The pastry's packaging did not list peanuts as an ingredient.[81] Approximately thirty minutes later, when her mother arrived to pick her up, Shibani was experiencing the initial stages of anaphylaxis.[82] The complaint describes the progression of her symptoms:

> En route from the friend's home, while driving with her mother and siblings in the family car, Shibani's anaphylactic reaction to the danish worsened and became violent and severe. Shibani attempted frantically to use her inhaler as she struggled to breathe and turned blue. Shibani Abbhi's anaphylactic reaction culminated in her death at Greenwich Hospital, approximately two hours after her ingestion of the danish.[83]

Shibani was under the care of allergists and pediatricians, but her doctors had not prescribed epinephrine for her allergy.[84] According to the plaintiffs, the doctors also "failed to properly advise, instruct and warn [Shibani or her mother] concerning the seriousness of this condition and its proper management."[85]

The plaintiffs, Shibani's estate and her mother, brought strict liability claims under the Connecticut Product Liability Act[86] against the distributor and seller of the danish, and medical malpractice claims against Shibani's doctors. In addition, they brought claims under the Connecticut Unfair Trade Practices Act[87] and alleged bystander liability and negligent infliction of emotional distress. The defendants moved to strike all counts save the products liability and malpractice claims.[88]

Applying a "functional equivalency test," the court found that the unfair trade practice claims "do not go beyond the product liability claims being made against the same defendants, and they are therefore barred by the exclusivity provisions of the product liability act."[89] The court also granted the motions to strike the counts of bystander liability and negligent infliction of emotional distress because Shibani's mother was not present when she ate the danish. The court concluded, "The death of Shibani Abbhi is surely a tragic event, but if the estate is able to prove its product liability and/or medical malprac-

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81 *See id.* at *5.
82 *See id.* at *30.
83 *Id.*
84 *See id.* at *4–5.
85 *Id.*
86 CONN. GEN. STAT. §§ 52-572m to -572r (1991 & Supp. 1999).
87 *Id.* §§ 42-110a to -110q (1992 & Supp. 1999).
88 *See Abbhi*, 1997 Conn. Super. LEXIS 1523, at *2–3.
89 *Id.* at *27–29.

tice claims against the respective defendants, appropriate remedies will be available to it."[90]

As in *Abbhi*, the primary liability in most nut allergy cases will probably sound in products liability. Not all products liability acts will contain an exclusivity provision as strict as that in Connecticut's act. But most additional theories of liability will only duplicate products liability claims. In Doctor Kemp's case and in the case described by Doctor Yunginger above, for example, no additional theory of liability would help the case of either potential plaintiff. With the possible exception of disability claims, then, the allergic plaintiff will be most successful pursuing claims under a products liability theory.

IV. Disability Theories

Much of the recent media attention focusing on nut allergies has centered on the potential for liability under a disability discrimination theory. Whether on a commercial airline, in school, or at a day care facility, the question is whether accommodations must be made for those with allergies. More precisely, the issue is whether an allergy to nuts constitutes a disability under the Americans with Disabilities Act (ADA)[91] or the Air Carrier Access Act (ACAA).[92] Since 1994, the debate surrounding this issue has reached Congress, the federal courts, and three federal agencies.

A. Liability Under the Americans with Disabilities Act

In 1995 Marie Land enrolled her daughter Megan in day care at Baptist Medical Center (Baptist), where Marie was employed.[93] Megan was not yet one year old.[94] While attending day care, Megan suffered an allergic reaction to peanuts on two separate occasions, once while under the care of Baptist and once at another day care facility.[95] Because of her allergy, "Baptist refused to provide [further] day care services to Megan."[96] Unable to find another day care provider that could accommodate the six a.m. mornings her employer

90 *Id.* at *51. Apparently, the court's idea of an appropriate remedy is not a large cash recovery. The wrongful death of a child is not generally accompanied by a significant award of money damages.

91 42 U.S.C. § 12101–213 (1994).

92 49 U.S.C. § 41705 (1994).

93 *See* Land v. Baptist Med. Ctr., 164 F.3d 423 (8th Cir. 1999).

94 Appellant's Brief at 1, *Land* (No. 98-2019EALR) (on file with author).

95 *See id.* at 2.

96 *Land*, 164 F.3d at 424.

required, Marie Land was forced to seek another job.[97] She also filed suit under the ADA and a similar state statute.

After the case was dismissed on summary judgment by a federal district court, Marie (and Megan) appealed to the Eighth Circuit where, in a split decision, the court affirmed that Megan did not have a disability as defined by the ADA or the state statute.[98] According to Judge George G. Fagg, writing for the court, the "pivotal question" was "whether Megan's allergy substantially limit[ed] her ability to eat or breathe."[99] The court concluded it did not. Thus neither court reached the question of what accommodation might be reasonable in Megan's case.

To qualify for protection under the ADA or the state statute, Megan had to show (1) that she had an impairment that substantially limited her in a major life activity, (2) that she had "a record of such an impairment," or (3) that she was "regarded as having such an impairment."[100] Had she qualified under this definition, Megan would then be entitled to "reasonable modifications."[101] Under prong one of the definition, the court determined that Megan's allergy did constitute an impairment, and it found (to the surprise of no one) that eating and breathing were among Megan's major life activities.[102] But the court concluded (as did Megan's doctor) that her allergy affected her life "only a little bit."[103] The court explained,

> Although Megan cannot eat foods containing peanuts or their derivatives, the record does not suggest that Megan suffers an allergic reaction when she consumes any other kind of food or that her physical ability to eat is in any way restricted. Additionally, the record shows Megan's ability to breathe is generally unrestricted, ex-

97 Appellant's Brief at 3, *Land* (No. 98-2019EALR).

98 *See Land*, 164 F.3d at 424.

99 *Id.*

100 42 U.S.C. § 12102(2)(A)–(C) (1994).

101 *Id.* § 12182(2)(A)(ii) (covering public accommodations). It is unclear precisely what modifications are reasonable at schools or day care facilities. "[M]any schools prohibit [children] from carrying a loaded syringe of epinephrine." Jane E. Brody, *Needless Deaths Are Attributed to Food Allergy*, N.Y. TIMES, Aug. 6, 1992, at A17. At a minimum, it seems, "reasonable modifications" require a change in this policy.

102 *See Land*, 164 F.3d at 424. The court did not address appellants' argument that attending day care was also a major life activity for a preschooler. Though appellants argued persuasively, comparing day care attendance to employment, they failed to raise the issue prior to the appeal. *See* Appellee's Brief at 8–10, *Land* (No. 98-2019EALR) (on file with author). This failure likely explains the court's silence.

103 *Land*, 164 F.3d at 425 (quoting Megan's doctor).

cept for the limitations she experienced during her two allergic reactions.[104]

In light of treatment and preventative measures recommended by allergists,[105] however, this decision appears to be uninformed. The proposition that life-threatening food allergies do not substantially limit an individual's ability to eat seems preposterous. Certainly Megan *can* continue to eat, but she cannot do so in the same way in which most people can—or in the way an "average person" can, to use the words of the Equal Opportunity Commission's regulations on the ADA.[106] Megan (or her mother) must be painstakingly cautious in reading every ingredient on every food label, in quizzing every waiter at every restaurant, in educating every caregiver and every babysitter. They must remain prepared, at any meal or snack, to head for the nearest hospital emergency room for treatment. The next exposure and corresponding reaction are, after all, practically inevitable.[107] Had Megan's doctor so testified, the outcome might have been different.

In dissent, Judge Richard S. Arnold pointed out that ingesting a peanut product could cause Megan to "go into anaphylactic shock or, worse, die."[108] He continued, "The *risk* . . that Megan may accidentally ingest peanuts (a risk that may be slight, if labels are accurate and those responsible for her care are vigilant) must be understood in light of the potential for serious injury."[109] Judge Arnold concluded that "an inference may reasonably be drawn that Megan is substantially limited in her ability to eat," and thus, that summary judgment was inappropriate.[110] This analysis appears to be much more realistic about the seriousness of Megan's allergy, and it is much more responsive to the Supreme Court's recent decision in *Bragdon v. Abbot*, in which the Court held that risk of harm must be taken into account when determining whether a major life activity is substantially limited.[111]

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104 *Id.*

105 *See* Brody, *supra* note 101 ("Dr. [Hugh] Sampson warned adults to treat all anaphylactic reactions as requiring emergency medical treatment, even if they seem to go away on their own. 'The child should be taken to the hospital even if the reaction does not seem so bad,' he said."); *see also supra* text accompanying notes 32–45.

106 *See* 29 C.F.R. § 1630.2(j)(1) (1998).

107 *See, e.g., supra* text accompanying notes 49–50.

108 *Land*, 164 F.3d at 426 (Arnold, J., dissenting).

109 *Id.* (emphasis added).

110 *Id.*

111 524 U.S. 624 (1998) (holding that risk must be a factor in determining whether carrying HIV significantly limits reproductive choice); *see also* Thomas Simmons, *The ADA Prima Facie Plaintiff: A Critical Overview of Eighth Circuit Case Law*, 47

Judge Arnold also pointed out a 1994 interpretive rule issued by the Department of Agriculture that supports his conclusion.[112] Although the rule concerns implementation of the Rehabilitation Act of 1973[113] rather than the ADA, the Rehabilitation Act's definition of "handicapped" is nearly identical to the ADA's definition of "disability."[114] The Department's rule states, "Generally, participants [in certain food programs] with food allergies . . . are not 'handicapped persons'. . . . However, when in the physician's assessment food allergies may result in severe, life-threatening reactions (anaphylactic reactions) . . . , the participant then meets the definition of 'handicapped person'. . . ."[115]

The Department of Justice apparently agrees. In a 1997 agreement with La Petite Academy, Inc., a nationwide day care provider, the Department settled five complaints against La Petite brought by guardians of children with peanut allergies.[116] Although La Petite did not concede liability in the agreement, it did agree with the Department that the children are "persons with disabilities within the meaning of [the ADA]."[117] La Petite also agreed to pay a total of $55,000 to the five complainants. In return, the Department agreed not to bring a pattern or practice suit under Title III of the ADA,[118] and the complainants relinquished their claims.

DRAKE L. REV. 761, 788–89 (1999) (commenting on *Bragdon*). *But cf.* Sutton v. United Airlines, Inc., 119 S. Ct. 2139, 2147–49 (1999) (narrowing the scope of the disability definition).

112 *Land*, 164 F.3d at 424 (Arnold, J., dissenting).

113 29 U.S.C. §§ 701–97 (1994).

114 *Compare id.* § 706(8)(B) ("[T]he term 'individual with a disability' means . . . any person who (i) has a physical or mental impairment which substantially limits one or more of such person's major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment."), *with* 42 U.S.C. § 12102(2) ("The term 'disability' means, with respect to an individual—(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment."). The Supreme Court recently commented on this similarity in *Bragdon*. *See* 524 U.S. at 631 ("The ADA's definition of disability is drawn almost verbatim from the definition of 'handicapped individual' included in the Rehabilitation Act of 1973 . . . .").

115 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).

116 *See La Petite Settlement*, *supra* note 19.

117 *Id.*

118 42 U.S.C. § 12181–89 (1994).

B. Liability Under the Air Carrier Access Act

The Department of Transportation has also contributed to the debate. In August of 1998, the Department sent a letter to ten major airlines explaining the Department's "current policy on the extent to which the . . . Air Carrier Access Act . . . regulations require carriers to accommodate passengers with documented severe peanut allergies."[119] As with the Rehabilitation Act, the ACAA uses language nearly identical to the ADA's in defining disability.[120]

The Department's letter states that, "in most instances, airline passengers with medically-documented severe allergies to foods have a qualifying disability as defined in the ACAA regulations."[121] The letter also suggests that the ACAA requires the airlines "to provide peanut-free 'buffer zones,' on request and with advance notice, to passengers with medically-documented severe allergies to peanuts."[122] The letter adds that, "at a minimum," a buffer zone should include "the passenger's row and the rows immediately in front of and behind him."[123] Nothing less, it appears, would constitute sufficient accommodation.

Due perhaps to the influence of the peanut lobby, however, Congress reversed the effect of the Department's policy by passing a spending bill preventing its enforcement.[124]

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119 Letter from Norman A. Strickland, Chief of the Aviation Consumer Protection Division, U.S. Dep't of Transp., to the 10 Largest U.S. Certificated Airlines (Aug. 12, 1998) [hereinafter DOT Letter] (on file with author).

120 *See* 49 U.S.C. § 41705 (1994) (prohibiting discrimination "against an otherwise qualified individual on the following grounds: (1) the individual has a physical or mental impairment that substantially limits one or more major life activities. (2) the individual has a record of such an impairment. (3) the individual is regarded as having such an impairment").

121 *Id.*

122 *Id.*

123 *Id.* Buffer zones, however, may not be adequate protection from airborne peanut dust or particles. *See* Robert S. Dawe & James Ferguson, *Allergy to Peanut*, 348 LANCET 1522, 1522–23 (Nov. 30, 1996) (describing the cases of "four patients with anaphylaxis triggered by airborne peanut vapour"). *But see* DOT Letter, *supra* note 119, at 2 (stating that "none of the medical literature we have reviewed states that an individual with a severe peanut allergy is known to have experienced reactions to peanuts as a result of contact with very small airborne peanut particles of the kind that may circulate via aircraft ventilation systems"); *see also* Hartocollis, *supra* note 21 ("Dr. Hugh A. Sampson of Mount Sinai Medical School in New York City . . . said that fears of death resulting from secondhand contamination, breathing peanut fumes or touching peanut residue, are exaggerated.").

124 *See* Pub. L. No. 106-69, 113 Stat. 986 (1999); *see also Budget Deal*, *supra* note 20 (attributing the legislation to the influence of Senator Richard C. Shelby "who hails from a peanut-producing state"); Kathleen Doheny, *Airline Policy on Peanuts Is Mixed*

Nonetheless, the airline industry has responded. Though voluntary compliance is not the only motivating factor, many airlines have pulled peanuts from their flights altogether.[125] And nearly all (perhaps all) of those that continue to serve peanuts will, upon request of an allergic passenger, either create a peanut-free buffer zone or pull peanuts from that flight.[126]

C. *No Liability—Yet*

Though Congress and the courts (thus far) have stymied the viability of disability theories, the question is far from settled. Regardless of its ultimate resolution, however, the question has attracted so much attention already that airlines, schools, and day care providers (as well as any other "public entities"[127] or "public accommodations"[128] under the ADA) must currently assume the disability laws apply. The risk of liability is too significant to ignore. After all, fear of liability—as much as liability itself—inspires compliance. And it appears that potential plaintiffs are beginning to push the issue.[129]

V. CONCLUSION

The recent media attention focusing on nut allergies and potential liability may, in the next few years, significantly alter the legal land-

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Bag After DOT Raised Allergy Concerns, L.A. TIMES, Dec. 13, 1998, at L12. In an October 20, 1998 news release, Senator Shelby stated,

> I have every sympathy for individuals with special needs and/or medical conditions, but to move airline passengers into peanut friendly and "peanut-free" zones to guard against "airborne peanut particles" is not only failing to use common sense, it is an absolutely ludicrous response to a problem that there is little if any evidence to substantiate its existence.

News Release, United States Senate (Alabama), Oct. 20, 1998, *available at* <http://www.senate.gov/~shelby/press/prsrs225.htm>. The statute is only effective, however, "for the fiscal year ending September 30, 2000." 113 Stat. at 986.

125 *See* Hays, *supra* note 20 (stating that American Airlines, for example, replaced peanuts with pretzels because its customers prefer low-fat snacks).

126 *See id.*; Doheny, *supra* note 124. *But see* Hays, *supra* note 20 (stating that "in some cases, passengers have been denied the right to board a plane because of their peanut allergies").

127 *See* 42 U.S.C. § 12131 (1994). It is interesting to note, however, that some public entities may enjoy immunity under the 11th Amendment to the U.S. Constitution despite the language of 42 U.S.C. § 12202 to the contrary. *See* Kimel v. Florida Bd. of Regents, 120 S. Ct. 631 (2000); Alden v. Maine, 119 S. Ct. 2240 (1999).

128 *See* 42 U.S.C. § 12181(7) (1994).

129 *See, e.g.*, Hedges, *supra* note 20 (relating one parent's plan to "seek to have [his child] classified as legally disabled so that [his] school district will have to ban peanuts").

scape surrounding food allergies. Nut allergies are serious, life-threatening medical conditions—and they are just beginning to receive recognition as such. As public awareness grows, sympathy will no doubt follow, as will additional medical research and documentation. It is likely that allergy-related lawsuits will increase as well.

It is also possible the next few years will witness significant advances in medicine that will lessen the risks accompanying nut allergies. But if not medicine, then perhaps information can have similar effects. Food labeling may improve; cross-contamination in food preparation may be reduced; restaurants, schools, and airlines may begin to be more careful—all because awareness of the dangers is increasing. Certainly, liability can play a role in increasing awareness. While it may be that no one is to blame for the deaths of Katherine Brodsky,[130] John Federico, Jr.,[131] Amanda Jean Pelsor,[132] and Shibani Abbhi,[133] these deaths were not unavoidable.

It is true that individuals with nut allergies must accept primary responsibility for their own safety—and this requires that they be extremely cautious. They are, after all, in the best position to reduce the risk of exposure. But exposure is inevitable, and a multi-million dollar judgment or two might go a long way towards reducing that risk too.

130 *See supra* text accompanying note 1.
131 *See supra* text accompanying note 4.
132 *See supra* text accompanying note 8.
133 *See supra* text accompanying note 79.