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## **The Retail Practitioner's Toolbox in the Brave New World of Science and Technology**

### **I. Defining the Win**

Whether you are a claims handler or defense attorney, it is critical that all parties involved in the defense of a restaurant or retailer be on the same page. Often the client's perspective is different from the carrier's perspective. The client typically has a macro understanding of how this case will impact other cases in different jurisdictions, and its impact on the fiscal year. The carrier may be more focused on the SIR limits and its exposure. Defense counsel often has a micro focus on how to best prevail in that particular case. Unfortunately, those perspectives do not always align to create the same objective for all parties. Indeed, some times that objective is a quick resolution. Sometimes, the objective is to protect the client from discovery. Sometimes it may be to limit legal fees, and other times it may be to win at trial. Defense counsel's obligation and legal duty is to ascertain that objective and develop a defense strategy to meet that objective. Best practices suggest that as soon as possible after the case assignment is made, counsel, the adjuster, and the corporate claims representative should discuss the case in detail to make sure all parties understand the client's priorities and goals, and a strategy is created to accomplish the stated objectives.

### **II. Executing the Strategy**

**A. Using Technology to Win Cases** - For the vast majority of tort claims likely to be involved in retail and restaurant claims, the governing law has not changed drastically. The cases either deal with the duty owed to an invitee, and in the case of dangerous conditions, whether there is actual or constructive notice of the hazardous condition. The main difference, however, has been in how parties can prove notice.

While eyewitness testimony and documents kept in the course of business have been the traditional method of proving notice for generations, the greatest change in our society over the last several years has been the remarkable advancements in technology, and its daily injection into our world. The technology revolution started in the 90s with the use of private surveillance cameras installed by business owners. Instead of relying on eyewitnesses to establish whether a hazardous condition was seen or how long it had existed, cameras showing the area became part of the standard evidence.

However, technology did not stop at surveillance cameras. Mobile technology and social media have become ubiquitous, and the ability of counsel and the client to tap into those resources can make the difference between winning and losing cases.

Social data mining can often be a vital source of important evidence. Social media can be useful in determining what happened in an accident, and how the plaintiff has fared since the accident. Platforms such as Facebook, Instagram, Snapchat, and Youtube, several instant messenger programs are regularly at the fingertips of employees, plaintiffs and witnesses. It is second nature for today's youth to immediately post thoughts, photos, and communications in real time, without ever thinking of the ramifications of such acts. These real time posts are very similar to the "excited utterance" hearsay exceptions because they offer immediate mental impressions. Using Interrogatories, subpoenas, and basic investigative techniques, defense counsel should always seek user names and account information of every social media account used by all plaintiffs, eyewitnesses, or persons known to have been in the area of an incident. It is particularly helpful to locate photos and videos of the plaintiff in post accident activities. Do not forget to also search profiles of plaintiff's friends, as there are often comments and photos posted on those pages that might not be apparent on the plaintiff's sites alone. The disclosure of social media websites had frequently been challenged as overly broad and an invasion of privacy, but courts across the country have regularly ruled that there is no expectation of privacy in a social media page. While it can be difficult to force the social media provider to disclose the profile page contents through a subpoena, almost all courts are willing to compel a plaintiff to produce such content.

A few recent business developments have made social media searching easier. Many companies have now set up social media and internet investigations. For a small fee, the companies will search a specific target or blanket number of social media and internet sites to determine if the Plaintiff or other person has been active, and if so, what their postings include. In addition, companies have learned to construct "geo-fences" around a geographic area. Typically, this will involve an accident scene, and the size of the fence can be built as large or small as desired. Once the geo-fence is constructed, the searching company will search for all social media postings within the geo-fence for a defined time. This will help find photos, witnesses, and videos from known and potentially unknown witnesses.

## B. Science is your friend –

1. **Accident reconstruction technologies** – Back in the day, defense counsel interested in understanding ambient conditions, sightlines and other environmental factors would send an investigator to an accident scene to take measurements and photographs. The competent investigator would deliver pencil-drawn diagrams and 15-50 photographs. Now, with the advent of 3D laser imaging, the investigator can turn a 45 minute site visit into literally millions of data points, and document the minutiae of a scene or an instrumentality. Those data points can then be reconstructed and used in myriad ways, whether to create 3D animations, to obtain discrete measurements, the importance of which could not have been predicted at the time the data was gathered, or to determine forces necessary to create certain crush points or other damage. This technology creates vibrant, interesting trial demonstratives and allows the fact finder to become immersed in the conditions responsible for an accident.
  2. **Using Biomechanical evidence to contest damage claims** - The laws of physics, much like facts, are stubborn things. Human tissue responds to certain forces in predictable ways. Evaluating and measuring the forces involved in an accident and comparing those with day-to-day stresses and normal movements can provide an effective defense to exaggerated claims of injuries allegedly stemming from a fall. Appropriately using biomechanical evidence, while avoiding the often-fatal pitfall of allowing the court to believe the biomechanical expert is “practicing medicine without a degree” can ensure that the jury has an appropriate understanding of the mechanism of a particular injury and by doing so, limit damage verdicts.
- C. **Use of retail beacons/biometrics** – A recent development in retail technology is the use of store beacons. These beacons are posted in a retail environment and recognize smart phones that come within the store. These beacons are designed to send personalized information to customers as they shop, but in fact, can be used to identify persons within a store at the time of an accident.
- D. **Use of technology to track food shipments and deliveries**- The cause and source of tainted food that leads to food borne illness outbreaks is often an evidentiary nightmare. Legislative enactments to standardize food traceability have not been successful to date. In 2009, the Food Safety Enhancement Act was drafted to expand FDA authority on the issue, and it would require food manufacturers to and processors to regulate cultivation, harvesting and other measures. The bill sought some standardization on food delivery, including the establishment and maintenance of lot numbers; a standardized format for pedigree information; and the use of a common nomenclature for food. The bill passed in the House of Representatives, but it failed to pass in the Senate. Various government agencies

have oversight or regulatory control over different aspects of fresh fruit and produce production, processing and distribution. In addition to the FDA, the [Centers for Disease Control](#) has gotten involved in investigations of food borne illness outbreaks. Regardless of which agency is in charge, groups have pushed for a better means of investigating food safety, including the formation of a single food-safety agency, requiring on-farm improvements and improved reporting and surveillance of foodborne illness outbreak. Such an agency is likely to institute tracking technology to help gain information on the scope, breadth, and timing of outbreaks of food borne illnesses.

In tainted food outbreaks, being able to identify the source of the suspected food is often the key piece of evidence. For years, large companies who had multiple sources of the same food type could not show which supplier provided the particular ingredient. Due to technology, this has started to change. Two of those technologies that allow for food traceability are [Radio-frequency identification](#) (RFID) and [barcodes](#). Barcoding is a common and cost-effective method used to implement traceability at both the item and case-level. RFID is based on coding that is placed on tags and read by specialized equipment. While RFID is a promising technology and is frequently used, its industry wide use has been slowed due to costs and the ability for specialized equipment to always read the tags. Specifically, produce packed in or setting in water has limited the reliability of the tags.

Consumers can use websites to trace the origins and history of their purchased produce. Using the codes found on a produce item, consumers can type a code found on a produce item and view information about the grower, field, and packing operation that the produce came from.

On a much more individualized level, industry software used by Restaurants such as Grubhub and Foodfleets allow restaurants the ability to use mobile technology not only to order supplies and food items, but also track deliveries, which can be very useful when investigating food borne illness claims. Trycaviar.com also allows GPS tracking of meal delivery drivers.

- E. **Use of customer history and transactions to validate sales and returns for loss prevention** – Loss Prevention cases often arise out of suspicious returns of products without a receipt. In almost all major retailers, receipts are digitized and can be quickly accessed by loss prevention personnel. Proper training of LP agents to not rely solely on the paper receipt and a willingness to look into digitized receipts and tracking of credit card purchases can limit the exposure for inappropriate stops of customers.
  
- F. **Wearable technology to investigate damage claims** - In addition to social media posts, the influx of wearable technology such as FitBit Smart Watches, GoPros, and the various mobile synched applications that track physical exertion are sources of information that can refute the alleged injury claims of Plaintiff's. Interrogatories

directed to wearable technology can uncover this date, but also observation and intelligent examinations in depositions can lead to discovery of this information as well.