

PUBLICATION

Gambler Rolls Dice In Room Service Case, House Wins

August 6, 2012

You spend a fun evening at a casino. You get a room in the casino hotel. The next morning you feel queasy and then become terribly ill. Chalk it up to a night of debauchery or blame it on room service food poisoning? In a recent case decided by the United States Third Circuit, a casino guest bet on the latter scenario and lost to the house.

Food poisoning is a foodborne illness caused by eating contaminated food. According to foodsafety.gov, infectious organisms – including various bacteria, viruses and parasites or their toxins – represent the most common causes of food poisoning. Food can become contaminated at any point during its processing or production; see the Mayo Clinic website for more background. Symptoms of food poisoning typically include nausea, vomiting or diarrhea, which can start just hours after eating contaminated food. In most cases, food poisoning resolves without treatment, but some cases are severe and require hospitalization. In a smaller number of cases, foodborne illnesses can trigger serious health problems months or years after victims suffer an initial bout.¹ These late effects are believed to make up a very small fraction of the nation's estimated 76 million annual food poisonings, but have been linked to such serious consequences as diabetes, chronic arthritis, brain and nerve damage, kidney failure and death.² The Centers for Disease Control and Prevention website predicts that this year alone, one in six people will get sick with food poisoning; 128,000 thousand people will be hospitalized for it; and 3,000 people will die from it.

Proving food poisoning in a court of law can be a definite gamble, as the plaintiff learned in the recent case of *Kim v. Marina District Development Company LLC d/b/a Borgata Hotel Casino and Spa*.³ After a night at the Borgata Hotel Casino and Spa in New Jersey, plaintiff Dr. John Kim, a dentist from Maryland, ordered a breakfast of steak and eggs from the room service menu. At some point after eating the breakfast, Dr. Kim became ill and his symptoms grew progressively worse, prompting his girlfriend to summon the hotel emergency medical technicians. The following day, the hotel convinced Dr. Kim to visit its on-site medical clinic, ultimately leading to his hospitalization and an emergency room diagnosis of food poisoning. Dr. Kim subsequently filed suit in the United States District Court for the District of New Jersey, alleging negligence on the part of the Borgata in its food preparation and on-site medical treatment. He sought compensatory damages for his medical bills, loss of wages, bodily injury and pain and suffering, as well as punitive damages.

The Borgata prevailed on a motion for partial summary judgment, obtaining pre-trial dismissal of Dr. Kim's claims for negligent medical treatment and punitive damages.⁴ After a jury trial, the jury returned a verdict in favor of the Borgata on the remaining negligence claim, finding that the Borgata had not been negligent in the preparation of Dr. Kim's food. On appeal, the United States Court of Appeals for the Third Circuit upheld the grant of summary judgment and the jury verdict.⁵

Three evidentiary rulings at trial proved crucial to the Borgata's victory on the negligent food preparation claim. First, the trial court allowed the Borgata to introduce evidence that Dr. Kim engaged in gambling in the Casino the very same evening that he consumed the allegedly tainted room service breakfast.⁶ Second, the trial court excluded records relating to the health department's assessment of the three cooks alleged to have been involved in preparing Dr. Kim's breakfast, based on its finding that the records sought to be admitted consisted of assessments made after the incident in question and no evidence had been offered to explain the relevance of the assessments. Third, the trial court disallowed testimony by Dr. Kim's medical expert because the

expert's opinion was based on information provided by Dr. Kim's counsel, not a personal examination or a first-person case history. One could argue here that "the House" knew the rules better than the customer.

In spite of the outcome in this recent case, and the widely acknowledged difficulty of proving a food poisoning claim, the hospitality industry should not treat food preparation and service lightly. The business of selling food involves the obligation to sell food that is not a danger to the consuming public. This author's research suggests that most food poisoning cases are resolved through pretrial motion practice or settlement, making it difficult to assess the risk of litigating through trial. Indeed, very few food poisoning cases are reported, particularly in view of the Centers for Disease Control statistics concerning the frequency of foodborne illnesses.⁷ Nevertheless, the stakes can be high in a number of ways, as evidenced by a recent \$8.3 million verdict against Kentucky Fried Chicken in Australia. Even the filing of a lawsuit alleging food poisoning can mean bad publicity and the erosion of goodwill for a business. And if a case proceeds to trial, courts have considerable discretion in determining whether certain evidence is relevant.⁸ In this area of liability, "the House" does not always win, although this case turned into a good bet.⁹

¹ http://www.msnbc.msn.com/id/22771973/ns/health-diet_and_nutrition/t/foodpoisoning-can-haunt-health-years/

² <http://www.foodsafety.gov/poisoning/effects/index.html>

³ 2012 U.S. App. LEXIS 14255 (3d Cir. July 12, 2012).

⁴ See 2010 WL 2877784 *(D.N.J. July 16, 2010) (granting summary judgment on (1) negligent treatment claim, holding that casino did not have duty under New Jersey law to treat a patron who allegedly suffered from food poisoning, except to summon medical assistance if patron became "helpless," and undisputed facts showed plaintiff was at no point "helpless;" and (2) punitive damages claim, holding that the undisputed evidence did not permit a finding that defendant had showed a "wanton and willful disregard" for plaintiff's condition).

⁵ 2012 U.S. App. LEXIS 14255.

⁶ *Id.* Also notable, although not the focus of the court's opinion, was evidence suggesting that Dr. Kim's girlfriend had also ordered room service breakfast and had not become ill.

⁷ *Supra* note 7. Anyone who has seen the movie *Contagion*, which features an airborne illness (and coincidentally, a flashback to a casino at which the virus spread) has to wonder why there are not more reported decisions on claims for foodborne illness.

⁸ See *Averitt v. Southland Motor Inn of Oklahoma*, 720 F. 2d 1178 (10th Cir. 1983) (upholding jury verdict awarding \$375,000 in compensatory damages and \$500,000 in punitive damages for food poisoning that resulted in ulcerative colitis and chronic colon disease, and admission into evidence of health department inspection reports covering a four-year period preceding the incident and evidence related to conditions unrelated to the specific type of poisoning suffered by the plaintiff).

⁹ *Cf. Corbi v. Harrah's Hotel & Casino*, 2010 WL 4226523 (D. N.J. Oct. 21, 2010) (denying summary judgment and discussing standard for establishing causation in food poisoning case)