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EMPLOYEE RIGHTS AND THE FOOD SAFETY MODERNIZATION ACT:

OPENING KEYNOTE

This Article is an annotated transcript of a panel that occurred on February 11, 2011 at the American University Washington College of Law. The podcast of the event can be found on the American University website at <http://media.wcl.american.edu/mediasite/SilverlightPlayer/Default.aspx?peid=49b34600-ffa6-412c-a0da-e61e47d040f>. The event was co-sponsored by the Washington College of Law and The Government Accountability Project.

ROBERT VAUGHN: This conference is being filmed, so if your presence here is secret . . . you should stay toward the back rows. [I]t's my pleasure to introduce a man who absolutely does not need an introduction, especially in legal tort circles, William Marler.¹ He has dedicated his life and his legal career to making the victims of food safety as whole as our legal system allows. His goal is to put himself out of business by helping to create a truly safe food environment for our entire nation—thank you.

1. William Marler is an accomplished personal injury lawyer and national expert in foodborne illness litigation. Mr. Marler began litigating foodborne illness cases in 1993, when he represented a survivor of the Jack in the Box E. coli 0157:H7 outbreak, resulting in a landmark \$15.6 million settlement. He has focused his practice on representing individuals in litigation resulting from other food contamination cases, securing over \$500,000,000 for his clients. He is a graduate of the Seattle University School of Law and has received numerous awards for his work. Presently, Mr. Marler serves as the managing partner at Marler Clark, LLP.

WILLIAM MARLER: I was a little late this morning and for that I apologize, but the good news is, I have something I can share with you. I got to meet with the Department of Justice (DOJ) this morning, along with a young man whose mother died from eating salmonella contaminated peanut butter.

Many of the victims of that outbreak have been instrumental in the passage of the Food Safety Modernization Act² (Act). And we constantly, myself included, have been probing and pushing the [DOJ] along. And I can tell you, they would not tell us much, but the fact they are talking to us should speak volumes. So I had a short meeting today with three prosecutors and an FBI agent. Even though I think that justice moves slowly, sometimes so slowly that it's hard to imagine if it ever will get there, but the fact of the matter is—justice is moving and that's a good thing. I almost feel like I could talk the entire time about that, but that's not why they asked me to come here, and I'm really happy about that.

I look out in the audience and I see so many people who have fought for this [Act] for such a long time, some with heavy hearts, and some with very little pay, and I think about the two people who were responsible for the passage of this [Act].

The fascinating thing about this [Act] to me, is how it was almost like a relay race—Caroline Smith DeWaal³ would carry the ball for a while, then Nancy Donley⁴ would pick it up and flip it to somebody else. Then there was a series of events that catapulted food safety into the public domain—into the support of public conscience at the same time that politics were ripe.

2. *See generally*, Food Safety Modernization Act of 2010, 21 U.S.C. § 2201 (2010) (amending 21 U.S.C. § 350d (2006)) (providing for the prevention of foodborne illnesses including the protection of food safety whistleblowers).

3. Caroline Smith DeWaal is the director of the Food Safety Program for the Center for Science in the Public Interest and co-author of *IS OUR FOOD SAFE? A CONSUMER'S GUIDE TO PROTECTING YOUR HEALTH AND THE ENVIRONMENT* (Three Rivers Press, 2002). She represents CSPI before Congress and in the regulatory arena on a broad range of food safety issues. Ms. DeWaal is the leading consumer analyst on laws and regulations governing food safety, and she has testified more than twenty times on pending food safety issues before the United States Congress. She also maintains and publishes a listing of foodborne illness outbreaks in the United States organized by food source. She has presented papers on food safety at over 100 scientific and public policy conferences. She has participated in a number of World Health Organization consultations on food safety and is currently an expert advisor on its Integrated Surveillance of Antibiotic Resistance project. She represents the International Association of Consumer Food Organizations at the Codex Committee on Food Hygiene. She has participated in several national advisory committees in the USDA and FDA. She represents the International Association of Consumer Food Organizations at Codex. DeWaal graduated from the University of Vermont and Antioch School of Law.

4. Nancy Donley is the president of STOP Foodborne Illness. She has been a leading proponent of improvement in both government and private food safety efforts since the death of her six-year-old son, Alex, in 1993 from consumption of *E. coli* O157:H7-contaminated ground beef.

Even though food safety has been talked about for decades, the Food and Drug Act hasn't been revised for seventy-five to eighty years.⁵ But yet, we had a series of tragedies and difficult outbreaks that sickened hundreds and killed people—all coming together at the same time when Congress flipped parties. And where you'd never get hearings before, hearings started happening; things started moving and people started joining the fray—victims who had no political experience began taking dozens of trips to Washington D.C. in support of Nancy and Carolyn and the other people who pushed for food safety. And those people, the ones who lost family members or whose children were sickened—those are real heroes. We forget about those people. And in my business, this is one of the things I told the DOJ this morning, is that everybody forgets the victim. Nobody sits across the table from them at the dining room table, listening to them explain how their daughter died. Nobody from the government comes to listen, nobody from the DOJ comes and listens, and for God's sake, nobody from the businesses that poisoned their kid comes to sit across the kitchen table from them and listen to that story.

But the fact that some of these people took it upon themselves, to come to Washington D.C. to buttonhole a Congress member or a Senator, to come and talk to the press, to tell their story again and again and again, to pick that wound, to tell their story in an emotional way—you've got to know that those people are all heroes and make it right for all of us. And I think that the people at this conference—the people who have influence on policy—can never forget those people.

I think a lot about the impact that these people have on my life and on my career as a trial lawyer. I've taken a lot of money from the food companies, and they keep poisoning people and so I'll keep taking money from them. The fact of the matter is, is that at some point in my life, I realized that change was not going to happen the way I thought it was going to happen as a lawyer. Some of my trial lawyer friends probably won't like me saying this, but I really believed when I started out that suing companies would change their behavior—and it is not the way it is. It is a part, it is a very small part, which is something I learned along the way and as I sat across the table from victims and I heard their stories over and over. And now two decades later the reality is that so much of what I see and what I do is sort of like that Bill Murray movie *Groundhog's Day*⁶—it just keeps happening. The names change, the businesses change, but sometimes the businesses are the same. For example, I think I could find the Con-Agra corporate facility in my sleep; I have been

5. See generally, Federal Food, Drug and Cosmetic Act of 1906, 21 U.S.C. § 301 (2006) (regulating the inspection of meat and other food products and paved the way for the creation of the Food and Drug Administration (FDA)).

6. GROUNDHOG DAY (Columbia Pictures 1993).

there so many times.⁷ The victims come and the victims go, but the stories are all the same and they are all very tragic. The reality is that nobody has taken responsibility for those people except some people in this room and arguably myself.

But what I learned in those decades, fairly early on, was that the civil justice system was not enough. There was more to do. There was more outreach to do to victims' groups. There was more communication to have with whistleblower organizations and more communication to have with politicians. Because the one thing that I think I have learned about human behavior is you never know when you push, when pushing is going to be enough. What I mean by that is: so many people become victims and they sit back, but the people that are willing to press and to keep pressing, and then maybe get tired and somebody else presses—you never know when change is going to happen. And that is, I think that says volumes about our ability as human beings to effectuate change in our society.

Not to sound sort of silly but it is kind of like the butterfly effect: does the butterfly in the Amazon cause the hurricane in the Caribbean?⁸ The people, my clients, who have stood up to corporations and have come to Washington D.C. and who have kept pushing, they are like the butterfly. You never know when it is going to happen, but if you do not help it happen—if you do not push it—it never will happen. And that is the great thing about organizations that help protect people who come forward. That is what is really important, because you never know for sure if that one whistleblower is going to change the safety of the chicken industry or the beef industry or the tomato industry or save a workers' life or save a child's life—you never know. And I think that's really one of the most important things about what we all do, that what we do is so vitally important to all of our families, our clients.

Carolyn and I admittedly were sitting in a bar just shortly before the lame duck session was winding down, wondering what was going to happen with the Food Safety Modernization Act. And admittedly, I was pretty depressed. I was convinced that the whole system was aligned against us. The bill blew through the House in the way things blow through the House and was passed

7. See generally, Centers for Disease Control and Prevention, *Multistate Outbreak of Salmonella Serotype Tennessee Infections Associated with Peanut Butter—United States, 2006 - 2007*, MORBIDITY AND MORTALITY WEEKLY REPORT (June 1, 2007), available at <http://www.cdc.gov/mmwr/preview/mmwrhtml/mm5621a1.htm> (describing a 2006 and 2007 salmonella outbreak and reporting that the source of the outbreak was likely Peter Pan brand of peanut butter manufactured at a ConAgra-operated facility in Georgia).

8. Lorenz, Edward N. *Deterministic Nonperiodic Flow*, 20 J. ATMOSPHERIC SCI. 130, 130–141 (March 1963) (describing sensitive dependence on initial conditions, later termed the butterfly effect, due to the hypothesis that a butterfly flapping its wings in South America can affect the weather in Central Park).

in July of 2009⁹ and then it stagnated in the Senate.¹⁰ Carolyn and Nancy are in the background, pushing, pushing, pushing, but it just was not happening. I am sitting in the bar with Carolyn and I am just so depressed. Christmas was the following week and it was going to be ugly. The House had flipped to Republicans and I knew that the chances of ever having a hearing on food safety with a Republican Congress were zero.

I knew that if the bill did not get out of the Senate, it would be dead. And here I am sipping my scotch and Carolyn says, “It’s going to work, it’s going to happen”, and I say, “You know, only somebody that has lived inside the Beltway for as long as you have can feel that way, because it doesn’t feel that way for the people outside the Beltway.” I remember flying home that Friday night and Saturday thinking to myself, “What more can I do? Is there anything that I can do?” I had a list of Republican Senators’ staffers so I started e-mailing them Saturday morning with: “this is important stuff, look at this link, this is a real human being,” and I kept typing and I kept [sending them information], and my wife finally said “We really need to go out to your parents” and I replied “Yeah, we’ll do that.” So I kept texting and e-mailing staffers in the car, and I thought to myself about the people that I have represented and about the butterfly effect—maybe if I keep texting people, maybe if I do another blog post, somebody will wake up.

I kept doing that, and, on Sunday morning, I got a couple of e-mails back saying that it is not dead yet, and I replied to ask what is going on and I finally received an e-mail back saying that they have figured out a way to do this, and have attached it to a House bill. So I googled the bill and it was the Cash for Clunkers Bill,¹¹ and I was thinking, here is where I wish I would have called Carolyn and asked, “Carolyn what’s going on?” And she probably would have easily explained how a food safety bill from the Senate can get stuck on the Cash for Clunkers Bill that had already been passed and then sent back to the House so the House could vote on it.

And then it was Sunday afternoon, I can’t believe this worked, I cannot believe all of the work that Nancy’s been doing for decades and Carol’s been doing for decades and all of the people who have worked for decades, how they all came in and bugged their Senators . . . all of those people pushed—it

9. See Lyndsey Layton, *House Approves Food-Safety Bill; Law Would Expand FDA’s Power*, THE WASHINGTON POST, July 31, 2009, available at <http://www.washingtonpost.com/wp-dyn/content/article/2009/07/30/AR2009073003271.html?hpid=topnews> (observing that food-borne illnesses and falling consumer confidence spurred the House’s passage of the bill).

10. See Alexander Bolton, *In Sunday-Evening Surprise, Senate Passes Food-Safety Legislation*, THE HILL, December 19, 2010, <http://thehill.com/blogs/healthwatch/food-safety/134447-in-sunday-evening-surprise-senate-passes-food-safety-bill-by-unanimous-consent> (noting that the bill faced such strong obstruction that its passage was a surprise).

11. See generally Council of Economic Advisors, *ECONOMIC ANALYSIS FOR THE CAR ALLOWANCE REBATE SYSTEM (“CASH FOR CLUNKERS”)* (Sept. 10, 2009), available at http://www.whitehouse.gov/assets/documents/CEA_Cash_for_Clunkers_Report_FINAL.pdf (describing the impact of the “Cash for Clunkers” program on automobile sales, Gross Domestic Product, and employment).

all kind of came together. And then there was this sense of elation for twelve to twenty-four hours until we realized that there is still more work to do. We could feel good about what happened, but the reality is that there's just a lot more work to do.

The Act needs to be funded, monitored, and tweaked. We need to make sure that the provisions are rolled out the way they should be. There's going to be a lot of buttonholing of Congress members and Senators on all of those issues. And there's still a lot of work left to be done on the meat side of the equation. All of this needs to be looked at. There's still a lot to do, but the thing that we can take out of this is that it's all about taking care of each other, it's all about us doing our . . . part. It's about suing a company, tweeting about something, supporting a whistleblower, buttonholing a Congress member or Senator. It is all working together for . . . ourselves and the common good. We all do what we do in different ways, but we are doing it all for the common good. And yes, we have lots of background noises, we are liberal wackos and we are evil trial lawyers, we are doing it for greed, and we are doing it for publicity—but the reality is that I think deep in our hearts, we all know why we are doing this.

We are doing it for Nancy and what happened to her family . . . we are doing it because we do not want to see that happen to our loved ones. We do not want to see that happen to our neighbor's kid.

I was going to show you a video of a client of mine, but I want to close soon. You can . . . go to my website and see lots of videos. If you go to my blog on the upper left hand side . . . click on some of those videos.

There is a little girl named Abby Fenstermaker and Abby was, as her parents will describe her, the kind of kid that lit up a room. But also the kind of kid that, as her father said, if you tell her don't stand on the bat—it's going to slide out from under you and you will fall down—she would be the kid that stands on the bat and lets it slide out from under her, because she wanted to learn for herself. In 2009, her grandfather, who was a Korean War Vet . . . would go to the VFW hall and hang out with his buddies. One day [while he was there] he got a hamburger. Three days later he was sick, and was then hospitalized—diagnosed with e-coli 015787. [He was a] very sick, elderly gentlemen—sick enough that he was hospitalized for several weeks—but he recovered. [While he was sick he was in] isolation, and Abby could not visit [him], but as soon as he got into rehab, . . . it was okay for her to visit. So [as soon as she could] she jumped into bed and gave grandpa a kiss, they hugged, and she said “It's going to be great to have you home Grandpa.” Three days later, Abby is sick. A week later she is dead, from e-coli 015787. It is not just [about] the people that eat the hamburger—it is [about their] family [as well].

[S]itting across the table [from this] family in working class Cleveland [after losing] their one and only child, watching just the pain [in] the husband's face, watching the anguish in the mother's eyes, was so palpable, that I kept thinking to myself, “I wonder what it would be like to have the company director do that,” and “I wonder what it would be like to have [S]ecretary Vilsak meet this person.” “I wonder how that would change them,” “I wonder if like me, that Abby [would be] constantly on [their] mind[s].”

Think about that I will leave you with one story and then since it's only seven o'clock in the morning and I am from Seattle and I have not had my twelfth cup of coffee, I am going to have a cup of coffee. The first case I ever had was the Jack in the Box e-coli case—[where] several hundred people [got sick], and [four kids were] killed.¹² [During the course of the litigation] I got to know a guy by the name of Dave Theno, who is Vice President of Jack in the Box. He came in after the outbreak. Dave and I, I deposed him a [number] of times, we hated each other for several years [afterwards]. [Until I found out later that] Dave would carry [around a photograph of] a young girl who died in that outbreak. [A]nd he would have it in his briefcase, and when he had to make a food safety decision, he would pull that photograph out and look at it and say “what would Lauren have me do?” That's a little morose, but it sort of underscores the point about how important it is—the things that we do. And whether you are a professor writing an article, an advocate putting a point forward, somebody supporting a whistleblower, somebody thinking about being a whistleblower, think about the Abby's, think about the Lauren's, think about what we're trying to accomplish and keep pushing, keep probing, keep handing the baton off, because eventually good things will happen. We have a lot of work to do. There are a lot of issues that we are going to face in the future, but I am confident that if you take that little bit of extra time, you keep pushing, you keep prodding, things get better. Things do get better.

Thank you very much. I am really honored to be here, I am going to be here the whole day. I look forward to hearing from the whistleblowers at noon today. I have a bunch of folks, people who were victims of the PCA outbreak,¹³ are going to do a little press conference to talk about justice from their perspective. I thank the University for hosting this, [the Government Accountability Project] for all the great work they do. And I really admire all of the work that everyone is doing here, so thank you very much.

12. Kiner v. Jack in the Box Restaurant, 1995 WL 901051 (Wash. 1995).

13. Center for Disease Control and Prevention, INVESTIGATIONS UPDATE: OUTBREAK OF SALMONELLA TYPHIMURIUM INFECTIONS, 2008-2009 (Apr. 29, 2009), <http://www.cdc.gov/salmonella/typhimurium/update.html>.