SHAMBERG JOHNSON AND BERGMAN

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IN THIS ISSUE

FEATURE ARTICLE

STRAW PURCHASE CASES AGAINST WAL MART SETTLE

Two cases against Wal Mart for the straw purchase of a shotgun used in the April 2014 shootings at Kansas City area Jewish facilities have settled. The cases helped establish important precedent in the evolving field of negligence claims for firearms sales.

On April 13, 2014, an avowed white supremacist shot and killed Dr. William Corporon and grandson Reat Underwood outside the Jewish Community Center in Overland Park, Kan. The white supremacist later shot and killed a woman outside Village Shalom retirement center, also in Overland Park. Four days before the shootings, the killer obtained a shotgun used in the shootings from a Wal Mart store in Republic, Mo.

Because the killer was a convicted felon and could not pass a federal background check, he brought an acquaintance with him to the Wal Mart store to pose as the actual purchaser. According to the Bureau of Alcohol Tobacco and Firearms, straw purchases are one of the primary ways criminals obtain firearms.

SJB attorneys David Morantz, Lynn Johnson and Paige McCreary represented the family of Dr. Corporon and Reat. Based on firearms retailers' duty under Kansas law to follow the highest degree of care, and based on educational programs and awareness in the firearms industry about the dangers of straw purchases, we alleged that Wal Mart should have suspected and stopped the April 9, 2014, straw purchase of the shotgun.

The cases posed unique legal and evidentiary challenges. As reported in our previous newsletter, the cases first had to survive

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WELCOME

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Shamberg, Johnson & Bergman has long practiced on the frontier of tort law. This edition of our newsletter highlights the unique cases we handle in evolving areas of the law, as well as our use of innovative claims and new technologies in pursuing traditional cases. To learn more about our firm, please visit *www.sjblaw.com*

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motions to dismiss under the Protection of Lawful Commerce in Arms Act ("PLCAA"). 15 U.S.C. 7901 et seq. PLCAA is a 2005 federal statute designed to provide immunity to firearms manufacturers and retailers for many civil claims. It has narrow exceptions for properly pleaded claims of a retailer making a false entry on transaction records, as can happen in cases where a retailer should suspect a straw purchase.

To counter allegations of comparative fault against the shooter and against the straw purchaser, we determined that under Kansas law, intentional acts cannot be compared with negligent acts. See *Gould v. Taco Bell*, 239 Kan. 564, 722 P.2d 511 (Kan. 1986); *M. Bruenger v. Dodge City Truck Stop*, 234 Kan. 682, 675 P.2d 864 (Kan. 1984). Also, because the killer fired several other guns during his April 13, 2014, rampage, we had to counter an argument that the tragedies would have occurred regardless of whether Wal Mart had stopped the straw purchase.

The cases resolved at mediation following the disclosure of plaintiffs' expert witnesses, including a retired ATF agent who was going to testify about the firearms transaction and about the dangers of straw purchases.

The cases did not seek to change firearms laws or add burdens to firearms ownership. Rather, they sought to ensure that firearms retailers follow existing laws and stop straw purchases.

The Corporon family has exhibited tremendous resilience, determination and grace in honoring the memories of Dr. Corporon and Reat.

For more information about the family's efforts to promote tolerance and understanding through the Faith Always Wins Foundation and its annual event, **Seven Days: Make a Ripple, Change the World**, please visit *givesevendays.org*

01

WENTLING DAMAGES SPUR $2 MILLION TRUCKING SETTLEMENT

A fiery collision involving two over-the-road truckers in western Kansas resulted in a $2 million wrongful death settlement, with much of the recovery accounting for *Wentling* damages.

The defendant truck driver was westbound on Interstate 70 near Colby, Kan., when, according to Kansas Highway Patrol investigators, he moved his tractor-trailer from the right to left lanes near an emergency vehicle turnaround in the median. An investigating officer determined that the driver was attempting a U-turn on the Interstate in order to return to a service station and refill his diesel exhaust fluid (DEF). If a tractor-trailer runs out of DEF, it will power down and stop.

As the defendant was attempting the U-turn, a truck driver behind the defendant tried to brake but could not avoid the collision. The trailing driver died in the ensuing blaze. The defendant driver walked away unharmed.

David Morantz, Lynn Johnson and Paige McCreary represented the surviving spouse of the deceased truck driver, along with the driver's two adult sons from a previous marriage.

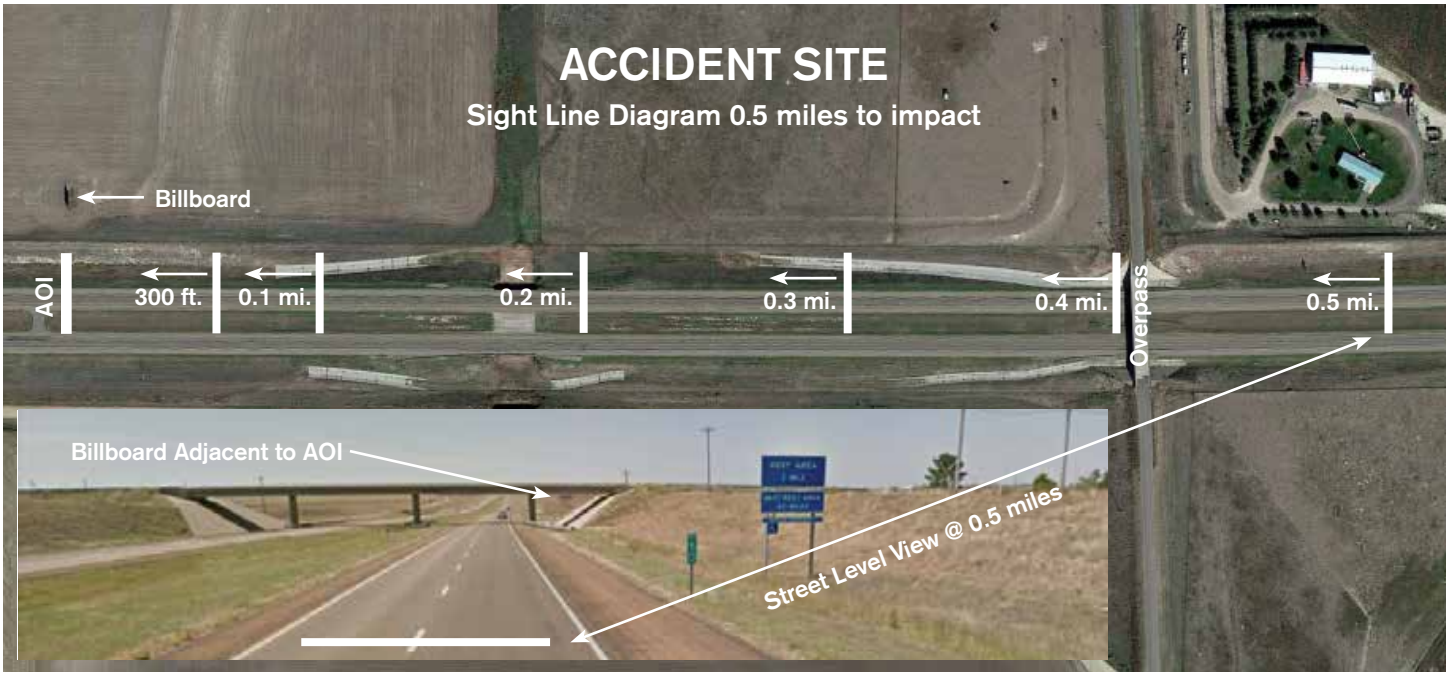
Discovery revealed that the defendant driver had received several tickets and violations during his short span with the trucking company, which was also named as a defendant. The company had hired the driver directly out of truck driving school. In the driver's first weeks on the job, an on-the-road trainer had to kick the defendant driver out of his truck because the trainer didn't feel safe riding with him.

Our trucking safety expert opined that because of safety concerns and the defendant driver's checkered record, the company should have fired him before the collision that killed our client's husband and father. Instead, the defendant trucking company failed to discipline the driver for numerous tickets and violations — all accumulated in fewer than 18 months on the job.

We also hired an accident reconstruction expert to discuss why the trailing truck was unable to brake in time and avoid the collision. Much of the dispute between expert witnesses in the case focused on how far back the decedent was when the defendant driver started his turn, and why the decedent could not stop in time.

Aside from approximately $800,000 in loss of financial support and Kansas' $250,000 statutory cap on non-economic damages, the remainder of the damages consisted of the heirs' loss of guidance, comfort, companionship, attention, advice, protection and emotional support. Under the Kansas Supreme Court's *Wentling v. Med. Anesthesia Svcs.* opinion, these damages are considered to be economic and thus not subject to the statutory cap on recovery. 237 Kan. 503, 701 P.2d 939 (Kan. 1985).

Even though the defendant driver had limited contact with his grown sons, and even though he spent many nights each week on the road and away from home, his strong relationship with his surviving wife provided compelling testimony and evidence for significant *Wentling* damages.



An exhibit prepared in anticipation of trial illustrated sight lines and braking distances before the collision.

02

INSURANCE HANDLING CLAIM SETTLES FOR $4 MILLION

An insurance company's handling of a claim for a rear-end trucking crash that paralyzed a 42-year-old working mother resulted in a $4,000,000 settlement.

The plaintiff was making a left turn on a two-lane highway in western Kansas, with her blinker activated. A tractor-trailer traveling faster than the 65 mph speed limit struck the plaintiff from behind, forcing her across the center line and directly into an on-coming tractor-trailer. The plaintiff survived, but suffered a spinal cord injury resulting in paraplegia.

The tractor-trailer that rear-ended the plaintiff was insured by Star Insurance, a division of the Meadowbrook Insurance Group. The policy carried liability limits of $1 million, and there was no excess coverage. Within 45 days of the crash, Star had confirmed via the police report and an independent investigator that liability on the part of its insured tractor-trailer driver was clear, and that there was no comparative fault. Within 60 days of the crash, Star had received multiple reports that plaintiff was paraplegic, including the subrogation file from the plaintiff's medical insurance carrier which documented the plaintiff's medical bills, lost wages and paralysis.

As reported in our previous newsletter, the plaintiff entered into a *Glen v. Fleming* agreement with the trucking company. 247 Kan. 296, 799 P.2d 79 (1990). After a contested bench trial, the Court awarded a $10.48 million verdict. Scott Nutter and Daniel Singer then filed suit against Star.

Depositions of the Star adjusters proved key. Star's adjusters admitted they had a duty to offer policy limits in clear liability, excess damages cases. Both admissions are in line with Kansas law. Kansas law places an affirmative duty on insurance companies to offer policy limits in cases where an insured's liability is clear and where damages likely exceed policy limits.

Star's adjusters admitted they knew within 60 days of the crash – at most – that the fault of their insured was clear, and that the damages exceeded policy limits, likely by a large amount. Yet, Star did not offer policy limits until almost one year after the crash, only after the plaintiff brought suit against its insured.

Discovery was extensive and hotly contested. Of note, we suspected the primary claims adjuster was overworked and unqualified. We requested her personnel file and performance reviews, which Star refused to produce. After the Court ordered production, we learned this adjuster was a problem employee with the heaviest case load in the office and a history of mishandling and neglecting claims, some of which resulted in lawsuits against Star insureds.

Star defended the case by claiming it needed the plaintiff's full medical chart to confirm causation, and that the lack of a policy limits demand (which we never made) undermined our claim.

After discovery concluded, the case resolved following mediation for $4,000,000, four times policy limits.

Our client was severely injured when a tractor-trailer struck her car from behind and pushed her into the path of another tractor-trailer.

PUZZLER ANSWERS

ACROSS: 2) Plumbers 7) Virginia 9) Turkey 12) Swanson 14) Shopping 16) Cranberries 17) Macys 18) Tryptophan 19) Minnesota

DOWN: 1) Cornbread 3) Moral 4) Hurricane 5) Feathers 6) Snood 8) Texas 10) Pardon 11) Lobster 13) Lincoln 15) Potatoes

03

SJB RESOLVES KANSAS AUTOMOTIVE CRASHWORTHINESS CASE

Our client's truck's roof collapsed during a rollover crash, resulting in a spinal cord injury.

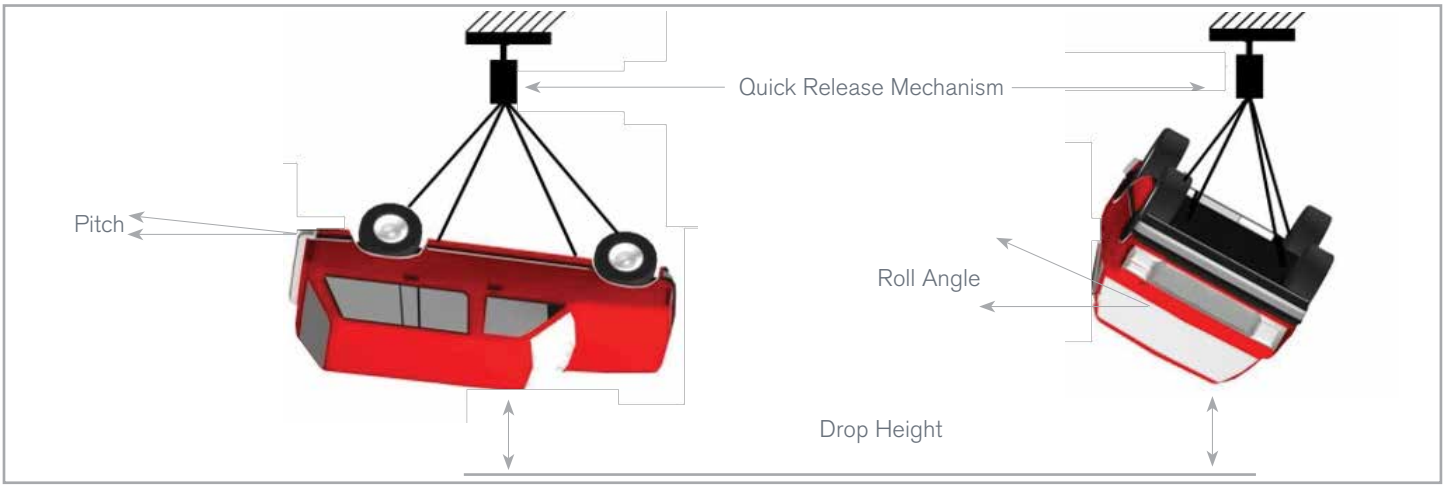
Our client suffered a spinal cord injury resulting in tetraplegia during a single-vehicle rollover crash in rural southeast Kansas. He was driving a 1990 Chevy CK15 pickup truck at highway speeds when he encountered an oil spill. He lost traction control, causing the vehicle to travel off-road where it rolled over three times before coming to rest on its passenger side. Our client was belted and contained within the occupant protection space during the rollover. But he was catastrophically injured when the roof crushed.

Following a full investigation aided by experts in the fields of accident reconstruction, biomechanics/injury causation and automotive design safety, we filed suit against General Motors alleging the CK pick-up's roof and roof support structure were not crashworthy and were prone to collapse in routine, foreseeable rollover events.

Building on our firm's experience handling complex automotive product liability cases, we knew that GM and the other automakers had known for decades of the importance of building strong roofs to withstand rollovers. That experience allowed us to efficiently collect the key documents and testing essential to the case.

We also worked with a design expert who had tested the production 1990 CK roof and a modified CK roof with structural reinforcements. Inverted drop testing showed the modified roof was 96% stronger. Importantly, the stronger design was achieved at a cost of $40/vehicle. GM was aware of feasible design alternatives, such as the modified roof we tested, yet chose not to use them. Had our client's roof withstood the rollover without collapse, he would have walked away with minor injuries. The case settled at mediation following our production of expert reports.

Automotive product liability cases are viable in Kansas and can be successful under the right facts. We have handled these cases for decades and continue to accept cases involving airbags, seat belts, stability control, doors, roofs, tires and other automotive devices that fail and cause serious injury or death. Call Lynn Johnson or Scott Nutter to discuss a referral or co-counsel relationship.



Inverted drop testing demonstrated that modifications would have prevented the roof from crushing during the rollover crash.

04

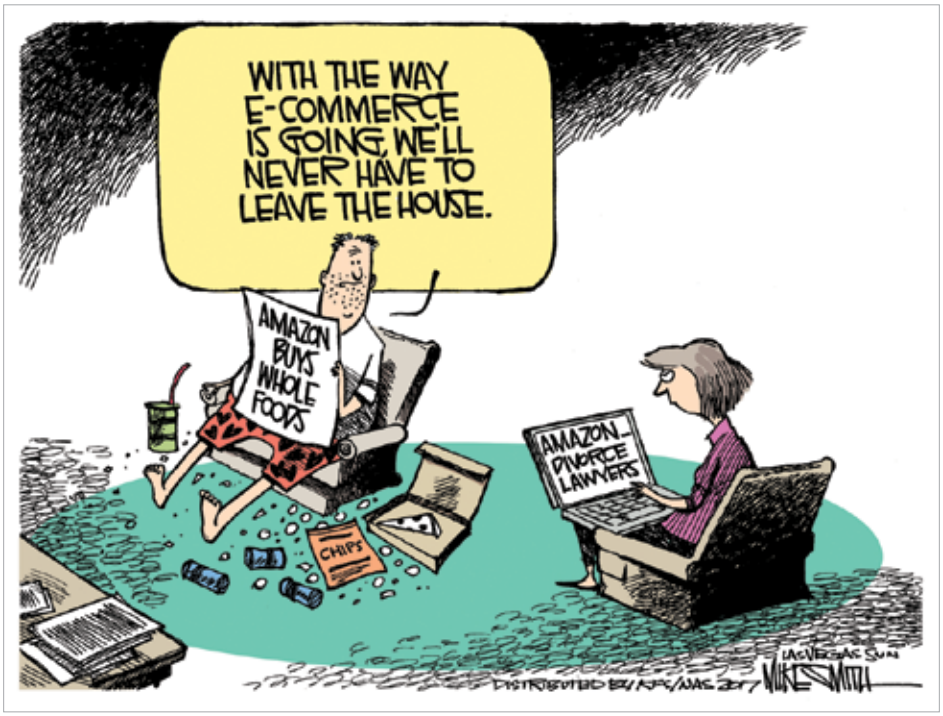
MEDICAL CASES CLARIFIED WITH ELECTRONIC DATA

Attorneys representing patients in medical negligence actions used to be able to anticipate a comfortable and predictable process to learning the story.

The first step was to collect the medical records, which form the foundation for all medical negligence actions. These documents tell a story, often in excruciating detail, of the care at issue. But these records often form a narrative based on one point of view — that of the health care provider. So frequently, the foundational narrative of a case is written by the defendant from the beginning. This has always challenged attorneys representing patients.

Advances in technology and the widespread use of electronic medical records (EMRs) have added a wrinkle to this challenge. Today, most attorneys who represent patients are familiar with the phrase "audit trail" and routinely request an audit trail in discovery. The audit trail is generally understood to be the record of a health care provider's effort to comply with 21 C.F.R. § 11.10(e) and 45 C.F.R. § 170.210(b), which require providers to record and preserve extensive information relating to the creation of EMRs, including the user names of anyone accessing the record, the actual time of entries, the author of any entry, the date of any changes, and the substance of any changes. While this information is a must for anyone litigating a patient's claim, a general request for an audit trail is only the beginning of obtaining the digital evidence behind the story.

Understanding the nature and extent of this information and relentlessly pursuing it are often keys to winning or favorably resolving medical negligence cases.



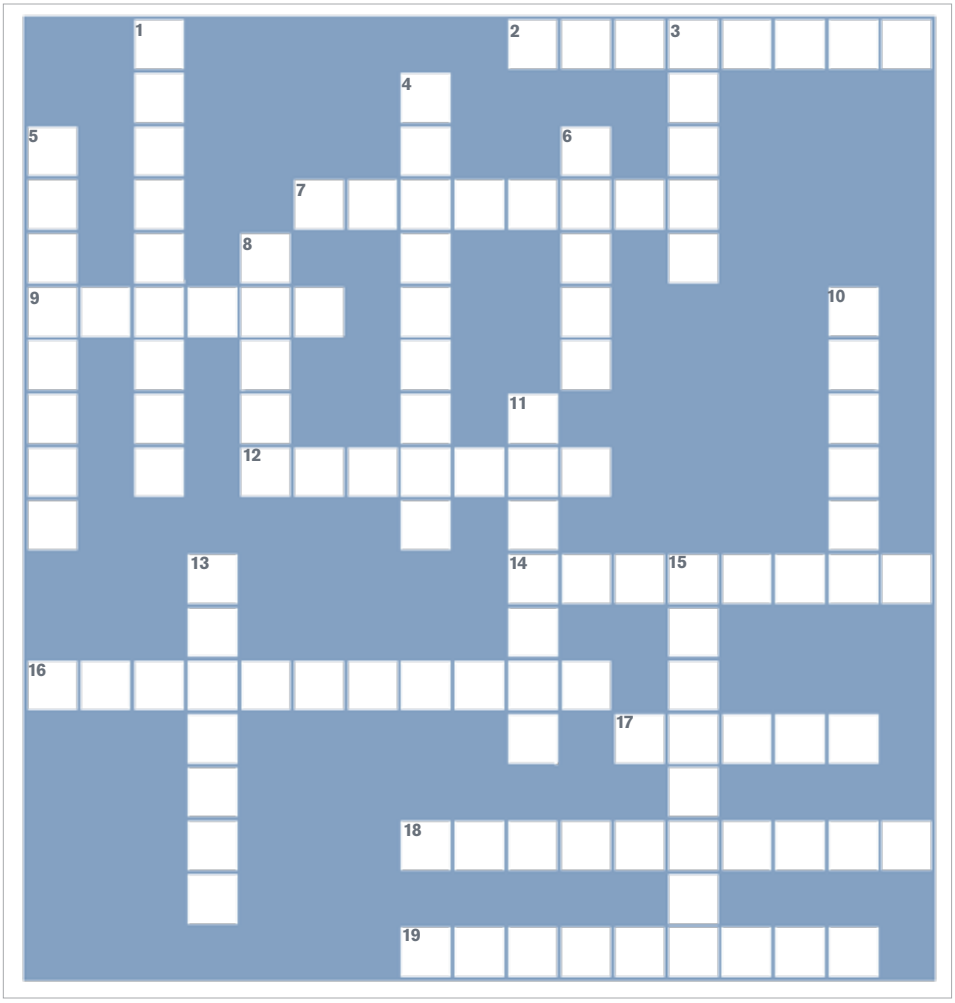
Two recent cases handled by Matt Birch provide examples. In the death of a twin in utero, questions surrounded the follow-up care (or lack thereof) after an ultrasound revealed a change in one twin's growth velocity relative to the other twin. The ultrasound report and recommendations were signed by a maternal fetal medicine specialist who was not the patient's normal provider. Depositions revealed that the entire report, including the crucial "recommendation" portion, was actually drafted by the ultrasound technician rather than the physician who signed the document.

When the digital data was obtained, a few things became clear. The document was signed in the early evening. The document was signed with no changes. And the physician was in the chart for less than one minute before signing the document. This changed the case's narrative.

Another case alleged that a neurosurgeon failed to operate in a timely manner. The neurosurgeon claimed he had viewed an MRI showing an unstable spine on the day of or the day after admission, but he could not recall when. By obtaining the digital physician portal records, which record when a physician logs into the hospital server from a remote location, we established that the physician never viewed the study from his home. By obtaining the hospital's security records, we established the times the physician entered and exited the building that day. Finally, by obtaining a separate radiology log, we established that the study at issue was never accessed during the time the physician was at the hospital.

The discovery damaged the neurosurgeon's defense and credibility. Without the electronic data, the narrative laid by the defendant in the traditional medical records would have obscured the true story of our client's care.

THANKSGIVING PUZZLER



ACROSS

2. Clogged kitchen drains, garbage disposals and toilets make Black Friday a busy day for _____, according to Roto-Rooter.
7. In 1855, this southern state was the first in the United States to adopt Thanksgiving.
9. Sesame Street character Big Bird wears a suit made of _____ feathers dyed yellow.
12. The first TV dinner was created in 1953 when food giant _____ overestimated the amount of turkey Americans would consume that Thanksgiving and was left with 260 tons of frozen turkey. Each meal sold for 98 cents.
14. To increase the holiday _____ season, President Franklin Roosevelt in 1939 moved Thanksgiving from the final Thursday of November to the third Thursday of the month. It was moved to the fourth Thursday of the month in 1941.
16. More than just a sauce, Native Americans used _____ to treat wounds and dye fabric.
17. A Philadelphia department store sponsored the first Thanksgiving Day parade in 1920, four years before this department store became synonymous with the annual New York parade.
18. Although this chemical in turkey is commonly blamed for feeling drowsy after Thanksgiving dinner, overeating is thought to be the likely cause.
19. According to the U.S. Department of Agriculture, this northern state produces the most turkeys.

DOWN

1. Southerners often make turkey stuffing out of _____ while other regions typically use white bread.
3. In 1784, founding father Benjamin Franklin advocated for the turkey, rather than the bald eagle, to be the national bird, saying the turkey had better _____ character.
4. The Virgin Islands celebrate Thanksgiving in late October to celebrate the end of _____ season.
5. A fully grown turkey has about 3,500 _____.
6. Name for the loose skin under a male turkey's neck (rhymes with "mood").
8. Following the Civil War, the governor of this southern state refused to declare Thanksgiving a holiday in his state, calling it a "damned Yankee institution."
10. The act of issuing a turkey ____ is believed to date back to President Harry Truman.
11. No definitive proof exists that the Pilgrims ate turkey at the first Thanksgiving. But historians say they did eat swan and seafood, such as ____ and seal.
13. Writer and editor Sarah Joseph Hale is credited with convincing President _____ to declare Thanksgiving a national holiday in 1863. She is also credited with writing "Mary Had a Little Lamb."
15. Historians do not think _____ were popular enough in Europe in the early 1600s to have made it on to the Mayflower. So these traditional holiday vegetables (some say legumes) were likely not served at the first Thanksgiving.

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