

## Separating the Chaff from the Wheat

### The Key to Successful Foodborne Illness Litigation

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## What about....



### The McDonald's Coffee Case

## The Facts of the Case

- 79 year old woman spilled McDonalds coffee onto herself
- 3<sup>rd</sup> degree burns over 16% of her body
- 8 days hospitalization
- Disabled for 2 years
- Offered to settle with McDonalds for \$20,000



Jury awarded \$200,000 (reduced to \$160k)  
compensatory damages and \$2.7 million in  
punitive damages

## Evidence in the case

- McDonald's sold coffee at 180-190° F
- Liquid at that temperature, if spilled, causes 3<sup>rd</sup> degree burns
- From 1982 to 1992, McDonald's coffee burned more than 700 people
- McDonald's admitted that its coffee was "not fit for consumption" when sold at that temperature because of burn risks



The day after the verdict, news media  
documented McDonald's coffee was sold at 158°

## Marler Clark, LLP PS

- Since 1999 Marler Clark has represented thousands of food illness victims in over 30 States
- Settlements and Verdicts - nearly \$300,000,000

## To Put Things in Perspective

For FIVE foodborne pathogens, medical costs, productivity losses, and the costs of premature death total:

\$6.9 BILLION annually



And there are over **FORTY** different foodborne pathogens thought to cause human illness.

## Human Costs of Foodborne Illness



- 76 million cases of foodborne illness annually
- 325,000 hospitalizations
- 5,000 deaths
- Agent is unknown in 64% of all deaths, and 81% of illnesses and hospitalizations

Mead PS, *et al.*, Food-related illness and death in the United States, *Emerg Infect Dis.* 5:607-614, 1999.

## A little history to begin with

ONCE UPON A TIME....

**there was no product liability law**

- A product needed only be as good as promised
- Only broken promises created liability
- And liability was to the buyer only



**Non-manufacturing sellers were not subject to liability**

## The Exceptions that Follow the Rule

To this rule, certain exceptions have been recognized: (1) Where the thing causing the injury is of a noxious or dangerous kind; (2) where the defendant has been guilty of fraud or deceit in passing off the article...

Mazetti v. Armour & Co., 75 Wash. 622 (1913)

These exceptions to the privity requirement developed first in cases involving explosives, guns, and poisons.

## A New Exception for Food



*"... a manufacturer of food products under modern conditions impliedly warrants his goods when... and that such warranty is available to all who may be damaged by reason of their use in the legitimate channels of trade..."*

Mazetti v. Armour & Co., 75 Wash. 622 (1913)

## The Rule of Strict Liability

"To establish the manufacturer's liability it was sufficient that the plaintiff proved he was injured while using the [product] in a way it was intended to be used as a result of a defect in the design and manufacture of which the plaintiff was not aware that made the [product] unsafe for its intended use."

Greenman v. Yuba Power Products (1960)

## The Legal Standard: Strict Liability



- The focus is on the product; not conduct.
- A manufacturer is liable if:
  - The product was unsafe and thus defective
  - The defective product caused an injury

STRICT LIABILITY IS LIABILITY  
*WITHOUT* REGARD TO FAULT.

## Strict Liability, expanded

- Liability all along the chain of distribution
- Sellers as sitting ducks
  - Deep-pockets
  - Indemnification
  - Tort reform (for sellers)



E. coli is difficult to detect during processing (CNN)

In most cases now, to hold a seller liable for a product-claim, you must show negligence.

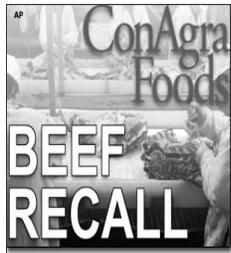
## But how can I be held responsible for something I didn't know about?

- It doesn't matter, and the law doesn't care
- The law presumes a manufacturer knows what they *should have* discovered (i.e., if they bothered to look)
- It's called *constructive* knowledge, and it's proof of their negligence
- Ignorance is no defense



## Why Strict Liability? – Public Policy

- It puts pressure on those (manufacturers) that most likely could correct the problem in the first place
- It puts the cost of settlements and verdicts directly on to those (manufacturers) that profit from the product



## Punitive Damages



- Punish the defendant for its conduct
- Deter others from similar conduct

Historically, such damages were awarded to discourage intentional wrongdoing, wanton and reckless misconduct, and outrageous behavior

## The Legal Arsenal

- Interrogatories
- Requests for production
- Requests for inspection
- Request for admission
- Third-party subpoenas
- Depositions
- Motions to compel



## What We Do At Marler Clark



- Web Site Inquiries
  - Average 21 per week
  - Max 88 during Spinach
- 800 Toll-free number listed on Web site
  - Average 37 per week
  - Max 139 during Spinach

### Who Do We Turn Away?

## There is a Worm in my Freezer!

*"I recently found a whole, 2-cm long worm packaged inside a Lean Cuisine frozen dinner. I have the worm in my freezer. I'm interested in discussing my rights in this matter. Could you please contact me, or refer me to a firm that may be able to give me assistance?"*

## "Christening" the Carpet

*"I opened a box of Tyson Buffalo wings and saw an unusually shaped piece of chicken and I picked it up. When I saw that the 'piece' had a beak, I got sick to my stomach. My lunch and diet coke came up and I managed to christen my carpet, bedding and clothing. I want them to at least pay for cleaning my carpet etc."*

## Lending a Helping Hand

*"My husband recently opened a bottle of salsa and smelled an unusual odor but chose to eat it regardless, thinking that it was just his nose. He found what appeared to be a rather large piece of animal or human flesh. He became very nauseated and I feel the manufacturer should be held responsible."*



## The Chaff

**Just like health departments, we need to quickly and reliably recognize unsupportable claims.**

**How Do We Do It?**

## Basic Tools of the Trade



- Symptoms
- Incubation
- Duration
- Food History
- Medical Attention
- Suspected source
- Others Ill

★ Health Department Involvement

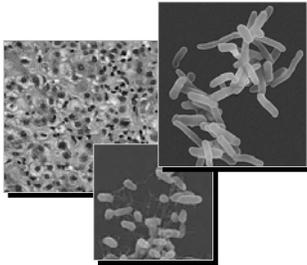
## Matching Symptoms with Incubation Periods

Incubation Periods Of Common Pathogens

PATHOGEN	INCUBATION PERIOD
<i>Staphylococcus aureus</i>	1 to 8 hours, typically 2 to 4 hours
<i>Campylobacter</i>	2 to 7 days, typically 3 to 5 days
<i>E. coli</i> O157:H7	1 to 10 days, typically 2 to 5 days
<i>Salmonella</i>	6 to 72 hours, typically 18-36 hours
<i>Shigella</i>	12 hours to 7 days, typically 1-3 days
Hepatitis A	15 to 50 days, typically 25-30 days
<i>Listeria</i>	3 to 70 days, typically 21 days
Norovirus	24 to 72 hours, typically 36 hours

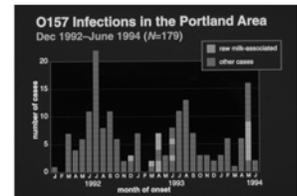
## Matching Symptoms with Specific Characteristics of Pathogens

- *E. coli* O157:H7
- Hepatitis A
- *Salmonella*
- *Shigella*
- *Campylobacter*
- *Vibrio*



## Epidemiologic assessment

- Time
- Place
- Person association
- Part of a recognized outbreak?



## Medical Attention



- Health care provider
- Emergency Room
- Hospitalization

## Health Department Involvement



## FOIA/Public Records Requests



**MARLER CLARK**  
ATTORNEYS AT LAW, L.L.P., P.S.



## Communicable Disease Investigation

- Reportable Disease Case Report Form
- Enteric/viral laboratory testing results
  - Human specimens
  - Environmental specimens



## Molecular Testing Results

- PFGE and PulseNet
- CaliciNet

## Traceback Records



## Environmental Response to the FBI



Chris Skilton, Public Health Seattle King County

## Prior Health Department Inspections

- Improper Cooking Procedures
- Improper Refrigeration
- Improper Storage and Cooking Procedures
- Improper Sanitation

## Improper Cooking Procedures

- A young girl suffered HUS after eating a hamburger from a midsized southern California fast-food chain.
- Her illness was not culture-confirmed.
- No food on site tested positive for *E. coli* O157:H7.
- Review of health inspections revealed flaws in cooking methods.

Hamburger buns are toasted on the grill immediately adjacent to the cooking patties, and it is conceivable that, early in the cooking process, prior to pasteurization, meat juices and blood containing active pathogens might possibly splash onto a nearby bun.

## Improper Refrigeration

- A Chinese buffet-restaurant in Ohio was the suspected source of an *E. coli* O157:H7 outbreak.
- No contaminated leftover food was found.
- A number of ill patrons were children. Jell-O was suspected as the vehicle of transmission.
- Health Department report noted "raw meat stored above the Jell-O in the refrigerator."

The likely source of *E. coli* O157:H7 in the Jell-O was from raw meat juices dripping on the Jell-O while it was solidifying in the refrigerator.

## Improper Storage and Cooking

- Banquet-goers in southeastern Washington tested positive for Salmonella.
- Leftover food items had been discarded or tested negative.
- Restaurant had "pooled" dozens, if not hundreds, of raw eggs in a single bucket for storage overnight, then used them as a "wash" on a specialty dessert that was not cooked thoroughly.



## Improper Sanitation



- West coast *Shigella* outbreak linked to 5-layer bean dip
- Facility inspections revealed :
  - Lack of fully operational bathrooms
  - Insects near food production sites
  - Evidence of rodents
- Major customer had refused to purchase any more products until significant upgrades were made to the facility

## What Do We Have That the Health Department Doesn't Have?

- Time
- Money



20-20 Hindsight

## Two Recent Cases With a TN Connection

- August 2005 – Outbreak of *E. coli* O157:H7 at YMCA in Brentwood, Tennessee
- July-August 2005 – Multi-State Outbreak of *E. coli* O157:H7



**Outbreak of *E. coli* O157:H7 Among Patrons of the Maryland Farms YMCA, August 2005**



- Sophie – Age 4, onset August 6, 2005, lab + for *E. coli* O157:H7, developed HUS, 18 days hospitalization
- Ella – 6 year old sister, onset August 5, 2005, no lab test but clinical symptoms of *E. coli*

**Outbreak of *E. coli* O157:H7 Among Patrons of the Maryland Farms YMCA, August 2005**

- August 25, 2005 – TDOH notified of 2 children with *E. coli* O157:H7, 2 enzyme PFGE match, unique patterns
- 14 cases (4 secondary HH contacts), 5 with HUS
- Multi-Agency Investigation



**Outbreak of *E. coli* O157:H7 Among Patrons of the Maryland Farms YMCA, August 2005**

- Case/control study links cases to Maryland Farms YMCA (OR 29.7, CI 4.3, 313.4)
  - Attendance on Aug. 1 (OR 10.0, CI 1.8 – 54.6) and Aug. 2 (OR 5.3, CI 1.2-23.2)
  - Swimming in any outdoor pool (OR undefined)
  - Dining at pool picnic tables (OR 18.3, CI 1.9-179.9)
  - Attending Tennis Camp (5.3, CI 1.2-24.4)



**Outbreak of *E. coli* O157:H7 Among Patrons of the Maryland Farms YMCA, August 2005**



- Adequate chlorine & pool filtration
- Adequate chlorine in tap water
- Leaking, contaminated well water
- Soil, clay-no evidence of *E. coli* O157:H7
- Animal exhibit – no evidence of *E. coli* O157:H7

**Probably Associated with Pools**

**Outbreak of *E. coli* O157:H7 Among Patrons of the Maryland Farms YMCA, August 2005**

**Our Conclusion**

**Unable to Proceed with a Claim**

**Outbreak of *E. coli* O157:H7 Associated with Ground Beef, July - August 2005**



Brothers William (age 1 yr) and Alex (age 3 yrs)

Consumed hamburgers at faculty picnic; meat traced back to Georgia plant



**Alex and William developed *E. coli* O157:H7 and HUS**

### Outbreak of *E. coli* O157:H7 Associated with Ground Beef, July - August 2005

- Alex hospitalized for more than 1 month; medical bills exceed \$650,000
- William hospitalized for 16 days, medical bills exceed \$64,000

**Both boys are expected to suffer from the effects of their illnesses for the rest of their lives.**

### Outbreak of *E. coli* O157:H7 Associated with Ground Beef, July - August 2005

#### Public Records Requests

	<u>Date Requested</u>	<u>Date Received</u>
CO Dept of Health	01/13/2006	01/23/2006
El Paso County HD	01/13/2006	02/03/2006
CDC	01/18/2006	09/19/2006
Dewitt Pitt HD	10/30/2006	11/03/2006
USDA	10/31/2006	11/17/2006
TN DOH	10/31/2006	12/26/2006
IL Dept. of PH	11/02/2006	11/17/2006

### Outbreak of *E. coli* O157:H7 Associated with Ground Beef, July - August 2005

- Multi-state cluster – 0508mEXH-1c
- PFGE patterns EXHX01.0200/EXHA26.0015
- Association with consumption of ground beef
- 49 cases in 19 states including MI, CO, TN, IL
  - 14 hospitalizations, 7 cases of HUS

### Outbreak of *E. coli* O157:H7 Associated with Ground Beef, July - August 2005

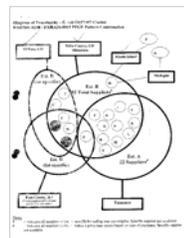
- Tennessee – 2 individuals with *E. coli* O157:H7 diagnosed in Alaska and Canada; both attended a BBQ in Cookeville, 7/10/2005; TN PHL isolates strain in leftover ground beef
- Illinois – 2 unrelated cases of *E. coli* O157:H7; IL PHL does not isolate *E. coli* O157 in leftover product; Meat sent to CDC where it is + by MLVA & PFGE

### Outbreak of *E. coli* O157:H7 Associated with Ground Beef, July - August 2005

- Government trace back investigation leads back to a Georgia meat processing plant
- Plant issues first recall on August 22, 2005 followed by a second recall on September 23, 2005



### Outbreak of *E. coli* O157:H7 Associated with Ground Beef, July - August 2005



September 25, 2005 – CDC Pulsenet Forum posting:

“Trace back of ground beef package labels has led to three distribution plants (A, B, and C)

USDA investigating common suppliers to A, B, and C”

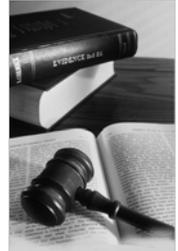
**Outbreak of *E. coli* O157:H7 Associated with  
Ground Beef, July - August 2005**

**Distributors to meat processing plant  
not identified**

**Out of court settlement  
January 2007**

**The Reality of Foodborne Illness  
Litigation**

- Only a fraction of the victims who contact us are investigated
- Very few cases make it to the court system
- Even fewer receive compensation
  - 31.4% of 175 cases
  - Median award was \$25,560



Buzby, Jean C., Paul D. Frenzen, and Barbara Rasco. "Product Liability and Microbial Foodborne Illness." U.S. Dept. of Agr., Econ. Res. Serv., AER 799, April 2001.

**Questions?**

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