



**American Spice Trade Association
2011 Annual Meeting & Exhibits
Scottsdale, Arizona**





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Lessons Learned From Recent Foodborne Illness Outbreaks

Views from both sides of the fence.



David W. Babcock, Esq. - Marler Clark
Shawn Stevens, Esq. - Gass Weber Mullins





The View From The Plaintiffs' Side



David W. Babcock, Esq. - Marler Clark

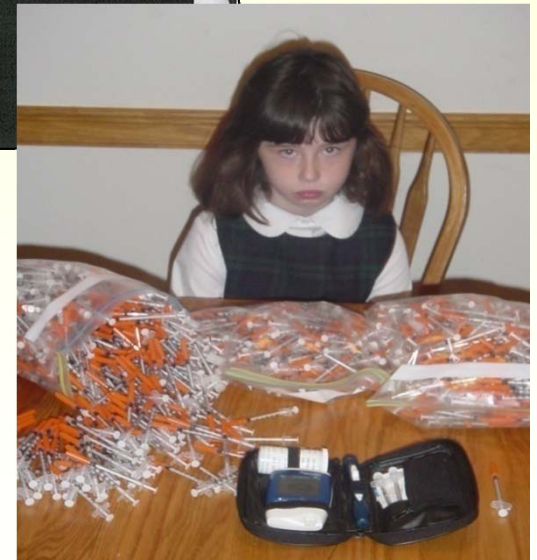




Putting it into perspective ...



- Estimated 48 million cases of foodborne illness each year in the US
- 128,000 hospitalizations, and over 3,000 deaths





More than just a stomach ache ...



According to the Food and Drug Administration, an estimated 2 to 3 percent of foodborne illness victims develop secondary long-term medical complications.

That's 1 million lingering health problems each year.

See Frezen. Economic Research Service, USDA. The Economics of Food, Farming, National Resources & Rural America, www.ers.usda.gov



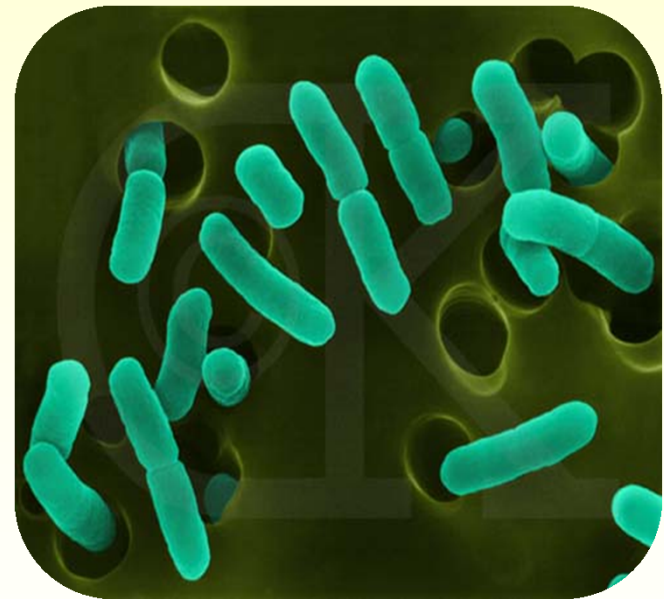


High-profile Pathogens



E. coli O157:H7

- *E. coli* O157:H7 – tens of thousands of cases per year.
- 46% of reported *E. coli* cases occur in children under ten years of age.
- Children under five years are at highest risk of developing Hemolytic Uremic Syndrome (HUS), a complication of *E. coli* infection.





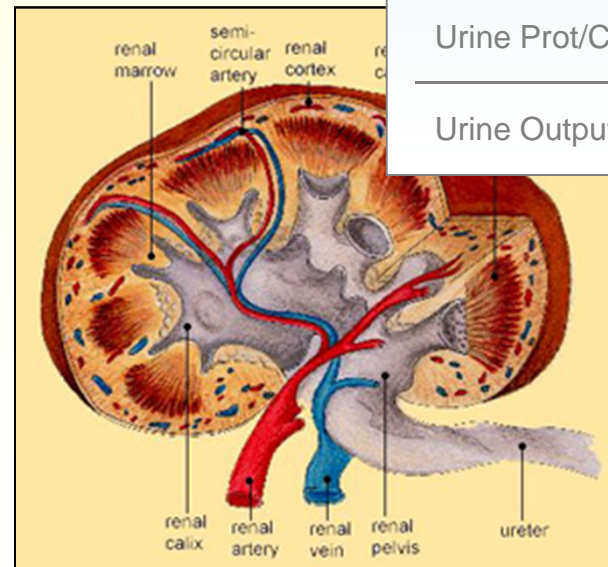
Hemolytic Uremic Syndrome (HUS)



- 5 to 10% of people with *E. coli* infections develop HUS.
- Characterized by:
 - Destruction of red blood cells;
 - Destruction of platelets; and
 - Acute renal failure.
- Organs effected: Kidneys, pancreas, liver, brain, heart

ABNORMALITIES

Serum Cr	2.5 mg/dl	High
GFG	23 ml/min/1.73m ²	Low
BP	140/90	High
Urine Protein	300 mg/dl	High
Urine Prot/Cr	1.8	High
Urine Output	125 ml	Low





Case Study: Katelyn



- Hospitalization – three weeks
 - ✓ Hemolytic Uremic Syndrome
 - ✓ Destruction of red blood cells and platelets
 - ✓ Impaired kidney function
 - ✓ Pancreatitis
 - ✓ Central Nervous System Involvement, seizures, slurred speech
 - ✓ Liver damage
 - ✓ Increased Blood Pressure





Case Study: Katelyn



- Lasting effects of her *E. coli* illness:
 - ✓ Pancreas destroyed
 - ✓ Type 1 diabetic
 - ✓ Inability to produce digestive enzymes



Case Study: Katelyn



- Even worse:
 - ✓ She will likely progress to end stage renal disease, necessitating multiple transplants in her shortened lifespan.
 - ✓ Insulin-dependent diabetes is the #1 cause of kidney failure in adult Americans.

Since this horrific event occurred, people always ask me how our lives have changed and I don't even know where to begin. Instead of getting into details, the answer I usually give is that "Everything has changed. Nothing is the same."



Liability for Contaminated Food



- Strict liability
 - Focus on the product –is it unreasonably dangerous or defective.
- Negligence
 - Focus on the conduct- did it meet the standard of care.





Strict Liability for Food a Bit(e) of History



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

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

The manufacturer's promise to provide safe food follows the food product to its ultimate user or consumer



Strict Liability



- The focus is on the product; not conduct.
- You are liable if:
 1. The product had a defect which rendered it unreasonably dangerous;
 2. The defect existed at the time the product left the manufacturer's control; and
 3. The defect caused the plaintiff's



Who is a Manufacturer?



- The definition differs slightly in every state.
- Many states exclude product sellers.
- Working definition: entity that designs, constructs, or fabricates the product.
- Ex. A “manufacturer” is defined as a “product seller who designs, produces, makes, fabricates, constructs, or remanufactures the relevant product or component part of a product before its sale to a user or consumer...”

RCW 7.72.01 0(2); SEE ALSO Washburn v. Beatt Equipment Co., 120 Wn.2d 246 (1992)



Negligence



NEGLIGENCE is the legal standard applied to non-manufacturers in many states.

The reason for excluding non-manufacturing retailers from strict liability is to distinguish between those who have actual control over the product and those who act as *mere conduits* in the chain of distribution.

See *Butello v. S.A. Woods-Yates Am. Mach. Co.*, 72 Wn.App. 397, 404 (1993).





Negligence



Negligence is...the failure to use reasonable care.

THUS, those who merely pass along—or act as conduits—for a product are held to a lesser, much less stringent legal standard for imposing liability.



The PCA Salmonella Outbreak



- Over 700 persons infected with the outbreak strains of *Salmonella* Typhimurium have been reported from 46 states
- Over 150 people hospitalized
- Nine Deaths
- Over 4,000 products recalled
- Bankruptcy
- Criminal Prosecution?
- Declaratory Judgment





So, Who Gets Paid?



- **Category 1:** culture positive, Salmonella Typhimurium, genetic (PFGE) match, within the “epi” curve, verification of product consumption.
- **Category 2:** Salmonella Typhimurium without genetic confirmation, consumption of product.
- **Category 3:** Consistent symptoms within 12-72 hours of product consumption



Current Status ...



- Hartford, PCA's insurer tendered it \$12M policy for 2008-2009, plus \$750,000 in litigation expenses for a full release.
- Out of over 700 potential claimants, only 123 filed claims with the bankruptcy court.
- An agreement was reached on a mediation/arbitration process between trustee and King Nut and Kellogg – to primary re-manufacturers.
- \$12M has been applied to claims – shortfall to be paid by whom?



Self Regulation



Self-Regulation Only Works If Companies Are Serious About It

David Mackay, Kellogg's chief executive, said his company trusted audits performed by the American Institute of Baking International, the biggest food-inspection firm in the country. The institute conducted scheduled inspections of PCA's facilities and never flagged serious problems. It issued a "certificate of achievement" and a "superior" rating at the same time that PCA was getting results from internal laboratory tests that revealed a salmonella problem in its plant in Blakely, Ga., congressional investigators said.

The Washington Post 3.20.2009





Self Regulation



E-mails released by the committee showed a comfortable relationship between the auditor for AIB and PCA's plant manager. In one e-mail, **the auditor tells the plant manager to get the plant ready for inspection, asks the manager to select the date** and then offers holiday wishes to the manager and his family.

Brian Soddy, vice president of marketing and sales for AIB, **defended the audits** in a telephone interview yesterday and said that PCA "**went to great lengths to clean it up" before scheduled inspections**. Others, including Georgia state inspectors, had also missed problems in PCA's facilities, he said.