



How to Keep Your  
**FOCUS**  
on Food Safety

HENDERSON



**R**ecently, the media has focused public attention on a one-inch piece (uncooked) of a finger found in the chili at a fast-food restaurant. Claims and counter-claims have flown. But, at this writing, most indications point to a grotesque hoax.

It's too bad that some people make bogus, unsupportable claims of foodborne illness. But they do, and that means that health officials—and lawyers—need reliable criteria for identifying illegitimate claims. At the same time, the food industry tends to overemphasize, and thus overreact to, such claims. Such a strategy can lead to the denial of legitimate complaints. Denying legitimate claims increases the likelihood of overlooking real problems with food safety. And overlooking real problems increases the risk of regulatory and health code violations, of poisoning consumers, costly litigation and public relations headaches.

**By William D. Marler, Esq.**

So how does one distinguish between legitimate and illegitimate or unsupported claims of food poisoning? On a slow day, our firm gets about 25 emails and phone calls from prospective clients. We reject about 95% of them, mostly on the basis of a few basic criteria, such as the following:

**Incubation Period.** Incubation periods, the time between ingestion of a foodborne pathogen and the onset of symptoms, are only ranges—and wide ones at that. But they can serve as a first test in assessing a claim. And incubation periods are generally measured in days. Some typical incubation periods of foodborne illness-causing pathogens are given in Table 1.

<b>PATHOGEN</b>	<b>INCUBATION PERIOD</b>
<i>Staphylococcus aureus</i>	1-8 hrs, typically 2-4 hrs
<i>Campylobacter</i>	2-7 days, typically 3-5 days
<i>E. coli</i> O157:H7	1-10 days, typically 2-5 days
<i>Salmonella</i>	6 -72 hrs, typically 18-36 hrs
<i>Shigella</i>	12 hrs-7 days, typically 1-3 days
Hepatitis A	15-50 days, typically 25-30 days
<i>Listeria</i>	3-20 days, typically 21 days
Norovirus	24-72 hrs, typically 36 hrs

Table 1. Some typical incubation periods by foodborne illness-causing pathogens.

As an example, consider this recent query from a consumer:

*After getting out of church yesterday morning, I stopped at [a restaurant] to grab a sandwich, just a double cheese [sandwich], and a small [cola] at 12:02 pm. I still have my receipt. I had not eaten anything prior to eating the sandwich, and I still am unable. Within two hours of eating that sandwich I became very ill. My fever went up from 98.6 to 100.2; I got diarrhea, stomach cramps, headache and chills. I am still very sick, I'm very weak, I can't really eat anything, and I'm having chills. I'm at work trying to work and I feel like crap...I don't know what to do, I called the restaurant and the manager is supposed to be calling me back when he gets in. Can you please help me?*

A quick consultation of Table 1 suggests that this person's lunch from this restaurant is likely *not* the source of his illness. The incubation period is too short. A diagnosis of *Salmonella*, *Shigella*, *Campylobacter* or *E. coli* O157:H7, for example, all of which have incubation periods longer than two hours, would effectively rule out the meal as a source of the illness. It is possible that the person became ill after ingesting *Staphylococcus aureus*, but given the prevalence of the bug and without knowledge of multiple ill persons, this would be very difficult to establish in court.

**“The Food Looked/Smelled/Tasted Funny.”** Here is another case we turned away:

*I have recently read articles and lawsuits that you have pursued regarding contaminated food. I am hoping that you may be able to give me your professional advice or recommendation. 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. After taking two bites and tasting rather badly, he found what appeared to be a rather large piece (approximately the size of the back of an adult's fist) of human or animal flesh. Even though he didn't seek medical attention, he did become very nauseated. I do feel that the manufacturer should be*

*held responsible for this mishap. Thank you for your time and consideration.*

In most situations, harmful bacteria are not detectable by the consumer. So, customers who complain that they know they got a foodborne illness from a particular meal because the food tasted funny are probably wrong. However, consumers with legitimate complaints tend to retroactively assign a negative connotation to a meal once the health department has identified it as a source of an outbreak. This common instinct should not undermine an otherwise viable claim. But a claim that something tasted funny, without other proof linking a particular food to illness, remains suspicious.

**Gross-Out Claims.** This is the finger-in-the-chili case. While certainly not the type of thing a food provider may want on the evening news, claims centered on finding, but not eating, some undesirable agent in food rarely have value in court. Consider this case:

*I opened a box of Buffalo wings and dumped them out on a plate to be cooked in the microwave. An unusually shaped piece caught my eye and I picked it up. When I saw that the “piece” had a beak, I got sick to my stomach. My lunch and diet [cola] came up and I managed to christen my carpet, bedding and clothing. I want them to at least pay for cleaning my carpet, etc. What do you think?*

We thought the incident was suspect, so we did not take it. Not all complaints are either clearly compelling or clearly illegitimate.

## Evaluating Claims Like A Pro

At Marler Clark, we use four methods for evaluating a claim of foodborne illness. These methods can provide a useful set of criteria for the food industry, both the manufacturing and foodservice sectors, from which to evaluate incoming customer complaints—typically the first time a company is notified of a potential problem with their product—and use these to make an initial determination of whether these complaints (claims) are likely legitimate or not. In applying these assessment methods, the food company can more effectively respond to those problems that are or are most likely to be associated with foodborne illness outbreaks, rather than lose valuable response time and resources focusing on illegitimate claims that do not threaten public health. We'll use examples from the foodservice industry here to illustrate the four evaluation methods, but these strategies are also useful for food processing operations in which regulatory inspections and other food safety audits are conducted and that operate customer complaint programs.

**The Health Department Investigation of an Outbreak.** While statutes and regulations vary from state to state, there are a number of bacterial and viral illnesses associated with food consumption that are monitored by health departments, including *E. coli* O157:H7, *Campylobacter*, *Salmonella*, *Shigella*, *Listeria*, Norovirus and Hepatitis A. For most of these, a positive lab result from a human sample (blood or stool), triggers a mandatory report to the local health department and some type of follow-up investigation.

The length, breadth and paperwork involved in any investigation varies depending on the pathogen involved, the type of

food, the number of persons who are or may be sick, the local jurisdiction, and other factors. In most situations, the results of the investigation are either made public by the health authorities or can be obtained through public records acts like the Freedom of Information Act (5 U.S.C. 552 et. seq.). It is very difficult to dispute a health department-confirmed outbreak or isolated case.

In litigating thousands of food poisoning claims arising out of dozens of outbreaks, many defendants have taken issue with some or all of the

health department's conclusions regarding the outbreak. None of these defendants, however, have yet avoided liability where the health department concluded that the defendant's food was the source of a given outbreak. One likely reason for this is that, in general, health departments do good and careful work. Despite the occasional disagreement of the pinpointed member of the foodservice industry, most would agree that health departments are rather cautious and conservative. In our experience, health departments do not prematurely label an entity as the source of an outbreak.

In addition, health departments are operating with a much higher burden of proof than the civil justice system. Most epidemiologists will not confirm an outbreak without 95% confidence in a particular conclusion. This makes it very difficult to convince a jury that health officials have erred in their investigations. Finally, it has also been our experience that jurors are more likely to accept the neutral determinations of health officials rather than the opinions of paid expert witnesses.

That credibility can favor either side. If health investigators conclude that a claimant's illness did not come from a particular source, the plaintiff will face the same uphill battle in court. Although this scenario occurs infrequently, it is possible for a plaintiff to make a claim for damages. In these cases, reliable expert opinion or examination of the health department investigators themselves can establish the source of a plaintiff's illness with sufficient certainty to meet the legal burden of proof.

**Prior Health Inspections/Violations.** One extraordinarily effective tool in establishing the defectiveness of a product that no longer exists is to obtain documentation of a restaurant's track record. This may include information regarding prior incidents or accusations of food contamination and prior inspections of the facility and the establishment's food production and service procedures.

Supportive documents can be acquired through the discovery process or through the Freedom of Information Act. The uncovered documents will help the plaintiff make his case in a variety of ways. Sometimes, there may be documentation of improper food handling procedures that can circumstantially prove the manner of contamination. In other situations, a list of improper techniques and code violations can serve as a tool

for limiting a defendant's trial options, or it can position a case for early and favorable settlement.

Finally, particularly egregious or repetitive examples of improper food handling techniques can build a punitive damages case, where such damages are available.

**Identifying the Improper Procedure that Led to the Contamination of the Food.** It is rare for lawyers or investigators to arrive on the scene of alleged contamination in time to recover contaminated leftovers. But this missing piece of the puzzle can be supplied by identifying specific errors in the preparation of the suspected food or foods. For example, in 2001 a young girl suffered a particularly severe *E. coli* O157:H7 infection that left her with permanent kidney damage. The little girl had eaten a hamburger purchased from a southern California fast-food chain. Hamburgers have been commonly viewed as the source of *E. coli* O157:H7 infections in humans and nothing else in the girl's food history was a likely source of the infection. By the time health department officials investigated, however, the suspect meat was long gone and investigators failed to find any food on site that tested positive for *E. coli* O157:H7.

A thorough review of the restaurant's current and prior inspections though, revealed a serious flaw in the operator's cooking method that provided an explanation for the client's exposure. According to the inspection report: "*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.*" On six separate occasions spanning three years, the management of the restaurant had been advised of the dangers of the hamburger buns being contaminated by hamburger juices. The plaintiff's expert also reviewed the prior inspection reports and concluded that the chain's cooking methods presented a high risk of cross-contamination. The matter settled shortly after the presentation of this information.

In a 2002 case, a Chinese restaurant in Ohio was the suspected source of an *E. coli* O157:H7 outbreak. There was no leftover food, and the buffet-style serving made it difficult to identify a single source. However, many of the sickened patrons were children, and it began to appear that the culprit food might be in fact a gelatin dessert. A previous health department investigation report provided the answer to the obvious question: How might the gelatin have become the source of an *E. coli* O157:H7 outbreak? The report noted a host of food handling errors in the restaurant, none more important than this one: raw meat stored above the the gelatin in the refrigerator. Officials concluded that the likely source of *E. coli* O157:H7 in the gelatin was from raw meat juices dripping on the gelatin while it was solidifying in the refrigerator. Once this report surfaced, the defendant never seriously contested liability.

Another example: In 2003, a group of people became ill after attending a banquet hosted by a restaurant in Washington State. Many of the guests tested positive for *Salmonella*, but leftover food had either been discarded or had tested negative.

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But health officials learned that the establishment had violated state food regulations by pooling dozens, if not hundreds, of raw eggs in a single bucket for storage overnight. This process allows bacterial contamination from a single egg to taint exponentially larger amounts of food, thereby placing many more consumers at risk. The establishment subsequently used the raw eggs as a wash on a specialty dessert. Then, once again in violation of food code, the food workers failed to cook the egg thoroughly. When these actions were taken together with the fact that raw eggs are a particularly notorious source of *Salmonella*, the smoking gun was back in the defendant's hands.

**Medical Records.** What medical evidence can make or break a case? Four types of medical records can help establish the credibility of a claim. First, of course, are laboratory tests. Stool cultures—and less commonly, blood cultures—can identify the specific pathogen causing a claimant's illness. These tests and their impact on subsequent legal claims are discussed at length below. In reviewing a claim, it is important to recognize that laboratory testing is not always ordered by healthcare providers.

Secondly, records can show whether the symptoms of foodborne illness match the expected incubation period. As discussed earlier, each foodborne pathogen carries with it an expected incubation period the amount of time expected to transpire between exposure to the pathogen and the onset of symptoms. The incubation period can encompass a significant period of time, and can thus lessen the effectiveness in a given situation. Nevertheless, it can still be useful. For example, people often assume that the last meal they consumed before falling ill was the culprit. With many pathogens, however, this is unlikely. The typical incubation for *E. coli* O157:H7 is two to seven days, with a reported range of one day to 20 days.

Third, investigators can match symptoms with typical profiles of a given pathogen or a given outbreak. Most common bacterial and viral pathogens found in food share similar symptoms—nausea, vomiting, diarrhea, fever, aches, chills, and the like. Various pathogens can have more typical courses. While these cannot be used alone to determine the pathogen affecting a claimant, it can provide part of the puzzle. For example, Hepatitis A infections are often characterized by yellow skin and eyes, or jaundice. *E. coli* O157:H7 infections are often characterized by excessively painful, bloody diarrhea.

Finally, while the lack of a laboratory test or a negative result may detract from the strength of a claimant's case, it is unwise to assume invulnerability where a lack of a positive test can be easily explained by other factors. The consumption of antibiotics, whether or not related to the illness at issue, essentially renders a stool culture worthless. A negative result after commencement of antibiotics is common. For different pathogens and different people, the speed with which the pathogen exits the body varies widely. The symptoms can continue well after the pathogen has been expelled from the body. Testing that occurs more than a few days after the onset of symptoms is unreliable, and a negative result at that time is not necessarily indicative that the pathogen had not been pre-

viously present. Healthcare providers do not order blood and stool cultures for all, or even most, cases of gastroenteritis. In many cases, there simply will not be testing to include in the determination of the source of illness.

With an isolated illness, the lack of a positive stool culture may be a problem for a claimant. But it is not a problem in the context of a broader outbreak. Circumstantial evidence may easily compensate. One such example is where one member of a dining party does not get tested, and others do. Three of four persons who all ate together fall ill with the same, documented pathogen. The fourth demonstrates the same symptoms in the same timeframe, but his or her doctor does not order stool cultures. Liability can be easily established without the positive stool culture. In food poisoning cases there is generally no food to test because, not surprisingly, it was eaten. But leftover food that tests positive for the given bacteria or virus is powerful evidence that the food is the likely cause of the illness. If there is food to be tested (whether the request is by the state investigators or a party to a suit), one must be aware of chain of custody issues that may arise to question the results.

### Keeping an Eye on Safety

In conclusion, the goal of the food manufacturing and foodservice industry is to produce high-quality products that sell well without injuring consumers. Focusing on bogus or marginal claims is likely to distract your attention from the legitimate needs of your customers. Using these tools should help you serve your customers without sickening them. When a claim is made, you can quickly and fairly decide if it is serious; if it is not, then fight it. If a claim has merit, treat the customer fairly and learn from your error. This will help you keep your eye on your bottom line as opposed to looking for the finger in the chili. □

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He spends several days per month helping food companies avoid bacteria contamination through Outbreak Inc., a consulting firm formed in 1998 by three of the attorneys at Marler Clark. In their roles as Outbreak consultants, the Marler Clark attorneys visit food companies and attend food industry conventions and trade shows, offering practical advice on how to avoid litigation related to foodborne illness outbreaks. Marler can be reached at [bmarler@marlerclark.com](mailto:bmarler@marlerclark.com).