Legal Briefs

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Note to readers: Because of a heavy caseload, the attorneys of Marler Clark will be taking a hiatus from their bimonthly contributions to Legal Briefs. If you are interested—or you know someone who is interested—in writing about legal issues for the Journal, we invite you to contact Kim Clapper, Interim Journal *content editor, at kclapper@neha.org or (303) 756-9090, extension 314.*

Intentional Contamination: The Legal Risks and Responsibilities

Editor's note: The Journal *recognizes the importance of providing readers with practical and relevant legal information through Legal Briefs columns. In every other issue of the* Journal*, this information has been presented by the attorneys at Seattle-based Marler Clark, LLP, PS (www.marlerclark.com). Marler Clark has developed a nationally known practice in the field of food safety. They represent people who have been seriously injured, or the families of those who have died, after becoming ill with foodborne illness during outbreaks traced to restaurants, grocery chains, and other food suppliers.*

Denis Stearns, one of the founding partners of Marler Clark, got his start in foodborne and other outbreak-related litigation as one of the lead defense attorneys in the Jack in the Box E. coli *outbreak litigation. It was with the cases arising from the Odwalla apple juice* E. coli *outbreak that he began primarily representing injured persons. He is a frequent speaker and writer on issues related to food safety law, administrative regulation, and public health policy.*

In an excellent book, *Safe Food: Bacteria, Biotechnology, and Bioterrorism*, author Marion Nestle describes several incidents involving intentionally contaminated food. One of the incidents, which occurred during the December holidays in 2001, caused a recall of 300,000 pounds of ham that an angry employee had spiked with nails, screws, and other nonfood material. This is an example of what Dr. Nestle calls "food bioterrorism."[1]

More recently, Tommy Thompson, in announcing his resignation as Secretary of Health and Human Services, remarked:

> I, for the life of me, cannot understand why the terrorists have not … attacked our food supply because it is so easy to do. And we are importing a lot of food …, and it would be easy to tamper with that.

He then observed that, given the significantly increasing amounts of food being imported, only a "very minute amount" is inspected before being allowed to enter the stream of commerce.[2]

These remarks proved prescient, because, not two years later, the United States was beset by multiple outbreaks of illness and injury linked to wheat gluten contaminated with melamine, and not by accident either. The melamine—a chemical used to make plastic and sometimes used as a fertilizer—was reportedly added to the wheat gluten to fake higher protein levels and to secure a higher price for otherwise substandard ingredients.

The poisoned wheat gluten made it deep into both the animal and the human food supplies, but it was pets that primarily paid the price, with dozens of companion dogs and cats dying. Over 10 pet food manufacturers were forced to recall over 120 varieties of products. Costs related to the recall, damaged brand names, and lost sales have easily exceeded $100 million.[3]

But that is only the beginning of the story. By mid-April, over 50 class action lawsuits had been filed, and an unknown number of individual lawsuits.[4] In August, 13 lawsuits were transferred to the federal court in New Jersey, with 97 more soon likely to follow. It is likely to be a year or more before the cases go to trial or—more likely—a settlement is reached.

Bad People Making Food Bad: Who Pays and Why

Beyond the political implications of the use of food products as weapons, there is also the legal question of whether a company can be held liable for the criminal acts of an employee who decides, for whatever reason, to contaminate food products that then go on to make a number of people sick. To answer this question, we need first to discuss the rule of vicarious liability, or, as it is also known, *respondeat superior*—which is Latin for "let the superior make the answer."

Under this rule, a company is liable for all harm caused by wrongful acts of an employee acting within the scope of his employment. One need not show that the employer was negligent or at fault in any way. The employer is *vicariously* liable for the negligence of its employee while the employee is on the job, which is to say that the law treats the employer as if it had committed the act itself. Employees or agents are merely an extension of

the employing company, and the acts of one are the acts of the other. Thus, for example, if a delivery driver kills a person crossing the street while he is making a delivery, the employer is liable. If the driver is no longer on the job, however, and has taken the delivery truck without permission for personal use, then there may be no liability, because a jury could find that the employee was not acting within the scope of his employment.

As a general rule, there is no vicarious liability for intentional or criminal acts; courts have usually treated such acts as falling outside the scope of employment. We can see why this makes sense: No employer hires a delivery-driver to use a company truck as a getaway car at a bank robbery. Similarly, no food company hires a person to sprinkle cyanide on its strawberries, or put thumbtacks in its sausages. Such acts are not part of a job description, at least not for any legitimate (or sane) food business.

But does this mean there could never be liability arising from a case of intentional food contamination? Of course not. As with nearly every general rule in the law, there are exceptions to the rule that an employer is not liable for the criminal acts of its employees.

First, there is the doctrine of strict product liability. Recall that this is liability for the manufacture or sale of a defective product without the need to prove negligence. The focus is on the product, not on how it came to be defective. As a result, a person injured by nail-spiked ham can sue the manufacturer, and the fact that the ham was made defective by the criminal acts of an employee is legally irrelevant to the question of liability. So long as the product was defective at the time it left the manufacturer's control, the manufacturer is liable for all damage caused by the product defect.

The flip side is that a manufacturer would not be liable for defects caused after the product left its control, except with proof of negligence. So if someone working for a distributor intentionally contaminated the product, one would need some strange facts—*e.g.*, a company that used a distributor it knew hired crazy people—to prove negligence against the manufacturer. The distributor, however, might still be on the hook, even for a criminal act, if the act was foreseeable.

Foreseeability is a factual question that is usually resolved by the jury. The easiest way to show that a risk is foreseeable, and therefore must be guarded against, is to show that it has happened before. So, for example, if a delivery driver has several prior convictions for drunken driving, a company that hires him without doing a background check is pretty likely to be held liable to a person he runs over after having had several beers with lunch. By failing to do a reasonable background check, the company was negligent in its hiring of the employee. Under the rules governing negligence, a company is responsible not only for what it actually knows, but for what it should have known—also known as "constructive knowledge."

Finally, there is the case—as with the melamine that ended up in pet food—in which some unsafe ingredient is, unknown to the manufacturer, used in the manufacture of a product. Here again, there is no escaping the legal responsibility imposed by strict liability. A manufacturer is responsible for the ingredients it uses regardless of whether it knows—or even has reason to know—that they might be unsafe. This allocation of legal responsibility has a wholly defensible policy rationale because, as between the manufacturer and the consumer, the manufacturer is the only one in a position to prevent the use of the contaminated ingredients. Therefore, even if the equities seem to be in favor of the "innocent" manufacturer that receives intentionally contaminated ingredients, the balancing tilts against the manufacturer when its interests are weighed against the interests of the consumer. The manufacturer is able to test its ingredients, audit its suppliers, and pay more for higher-quality ingredients. And if the manufacturer is in the best position to protect the public, then it may justifiably be held legally responsible for failing to do so.

Getting What We Pay For

In the end, of course, we all get what we pay for—or so it is said. Numerous studies confirm that the public is willing to pay more for safer food—or so they say.[5] The problem is that looking at food does not tell you anything about its safety. No one standing in the grocery aisle selecting cans of dog food could see the melamine contamination. Indeed, even people paying extra to buy "super-premium" dog foods were caught up in the resulting scare. That is why, ultimately, when we purchase food we must trust that the manufacturer has done all it could to ensure that its product is safe to eat or use. And if that ability to trust requires that we all pay a little more, then so be it.

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References

1. M. Nestle, *Safe Food: Bacteria, Biotechnology, and Bioterrorism,* Berkeley: University of California Press, 265-268 (2003).
2. Tommy Thompson, News Conference, December 3, 2004, unofficial transcript available online at http://transcripts.cnn.com/TRANSCRIPTS/0412/03/se.01.html.
3. For example, the manufacturer hardest hit by the recall, Menu Foods, lost sales of over $65 million during the first six months of 2007, compared with the prior year. See Menu Foods, Second Quarter Results, available online at http://www.menufoods.com/ir/docs/2007Q2PR.pdf.
4. In the interest of full disclosure, Marler Clark was contacted by dozens of people seeking legal representation because of the injury or death of their pets. We did not take any of the cases for reasons wholly unrelated to their potential legal merits and do not currently represent anyone in connection with pending litigation.
5. See, for example, J. McCluskey & M. Loureiro, "Consumer Preferences and Willingness to Pay for Food Labeling: A Discussion of Empirical Studies," 34 *Journal of Food Distribution Research*, 95-102 (Nov. 2003) (noting that consumers must perceive high quality for food to command a premium).

Did You Know

The FDA has recently released its Food Protection Plan: An Integrated Strategy for Protecting the Nation's Food Supply? To access the press release, visit http://www.hhs.gov/news/press/2007pres/11/pr20071106a.html and to access the Food Protection Plan, visit http://www.fda.gov/oc/initiatives/advance/food/plan.pdf.