In This Issue

Carol P. Michel and Jeffrey N. Amason examine foodborne illness claims brought as product liability claims and the intricacies of such claims due to the complex nature of the U.S. food system.

Foodborne Illness: The Other Product Liability Claim

About the Authors

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The food industry has undergone tremendous changes in the last 100 years. Increased production abilities as well as the expansive U.S. transportation system has allowed food products to be produced in greater quantities and transported farther than ever before. Just a few generations ago, food products were consumed within miles, if not just feet of where the commodity was raised or produced. Now, we as consumers have access to food products produced from around the country and the world. Lettuce from Mexico can reach Michigan and fish from Connecticut can reach California.

Today, the U.S. food industry reaches everyone in the U.S. and Americans spend approximately $1 trillion a year on food. The food industry employs millions of workers from the produce growers, processors, manufacturers, and distributors through to the retailers, enabling our food to go from farm to fork. The U.S. food industry is critical to not just the health of the U.S., but the economic welfare as well. Protecting this vital interest, the food industry is monitored by and responsive to a food safety system comprised of numerous state, federal, and industry entities each with their own guidelines and regulations.

Foodborne Illness and Regulation

An estimated 76 million cases of foodborne disease occur each year in the United States. The great majority of these cases are mild and cause symptoms for only a day or two. Some cases are more serious, and CDC estimates that there are 325,000 hospitalizations and 5,000 deaths related to food borne diseases each year. The most severe cases tend to occur in the very old, the very young, those who have an illness already that reduces their immune system function, and in healthy people exposed to a very high dose of an organism such as Clostridium botulinum, Escherichia coli 0157:H7 and Giardiasis.

The seemingly recent proliferation of foodborne illness outbreaks across the U.S. have caused many to conclude that the current food safety system is “outdated, underfunded and overwhelmed.” The perceived increase in outbreaks coupled with an increasing awareness of potential vulnerability of the food industry to food terrorism or agri-terrorism is driving changes to the current food safety system. Currently, U.S. Senate Bill S.510, the FDA Food Safety Modernization Act, has been introduced and has been placed on the Senate’s Legislative Calendar. As introduced, the Senate Bill addresses numerous issues intended to update the food safety statutes (some of which are unchanged since the early 1900s) and buttress existing agency budgets and authority. Pertinent portions of the Bill include: requiring that each food facility evaluate hazards and implement preventive controls; enabling the Secretary to collect fees supportive of facility re-inspections and recalls; preparation of a National Agriculture and Food Defense Strategy; improving the capacity to trace raw agriculture commodities; enhancing foodborne illness surveillance systems; and authorizing the Secretary to recall food products. Due to the comprehensive nature of this Bill, criticism of various parts is already evident and the final bill is likely to differ from the present version.

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Nature of a Foodborne Illness Claim

Despite the size, complexity, and oversight of the U.S. food system, an action premised upon a foodborne illness claim is, at its essence, simply a products liability claim. A manufacturer of a product has a duty to ensure that the product it places into the stream of commerce is safe when used for its intended purpose.6 A product liability suit, such as for foodborne illness, can commonly include causes of action for strict liability, negligence, and breach of warranty.7 Recent cases based upon a claim of foodborne illness have included: a claim for negligence in the preparation of contaminated mussels resulting in a plaintiff contracting the Hepatitis A virus;8 a plaintiff’s claim for negligence and breach of implied warranty for the malpreparation of hot dogs at Michigan State’s stadium;9 and Minnesota consumers bringing suit against a local restaurant for negligence, breach of warranty, and strict liability based on bacteria contaminated parsley.10

The doctrine of strict products liability developed from the policy of protecting the consumer and imposes strict liability in tort on all of the participants in the chain of distribution of a defective product.11 Therefore, strict liability can be applied to not only the manufacturer, but throughout the distribution chain (possibly involving multiple hand-offs with distributors and importers) as well as the seller of a food product. This result can appear harsh for a passive participant in the distribution chain with no knowledge of the design or manufacture of the product. However such a faultless party can seek indemnity from the party at fault. Further, application of strict liability across the distribution chain enables an injured party to maintain an action when the manufacturer (or other party at fault) is insolvent, no longer in existence, or not subject to jurisdiction.12 In a case that is typical of the food distribution chain, a Minnesota restaurant was liable for the $1 million award that arose from consumers’ claims for strict liability and negligence for serving bacteria contaminated parsley. Subsequently, the restaurant brought a contribution and indemnity claim against both the importer and the distributor/seller of the bacteria contaminated parsley that was found to have originated in Mexico.13 Unable (or unwilling) to bring suit against the foreign party at fault, the restaurant sought to allocate the liability among the parties in the distribution chain.

Although strict product liability verbiage may vary by state, the plaintiff in a foodborne illness case must show that the defendant manufactured, distributed or sold the product; the product was not in the condition contemplated; the product was used in a way foreseeable by the defendant; and the product’s defect was the proximate cause of the injury.14 Strict liability may also arise by violation of state statute (if so enacted) such as the California Pure Food Act,15 as well as

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10In re Shigellosis Litigation, 647 N.W.2d 1 (Minn. App. June 18, 2002).
12See In re Shigellosis Litigation, 647 N.W.2d 1 (Minn. App. June 18, 2002).
13Id.
if a state adopts Section 402A of the Restatement (Second) of Torts.\(^\text{16}\)

**Defenses to Foodborne Illness Claims**

All states have a statute of limitation regarding personal injury claims that are applicable to a claim for foodborne illness. Typically, these statutes range from one year to four years and provide that the plaintiff must file the action within the statutory period beginning with the date of injury or the action is time barred.

If the action is timely filed, defenses are available for a foodborne illness action similar to the typical product liability action. As would be expected in any category of products, certain products require a particular focus. Food products are no exception.

Due to the critical nature of the distribution and delivery system to the safety of the food products, a manufacturer may find that the product was safe when it left its facility but was made unsafe by downstream changes in the stream of commerce. For instance, the food container may have been breached during transit permitting contamination. Also, proper climate can be critical for certain food products and spoilage of perishables can occur if not maintained within prescribed limits. Tracking a product across the country or across the world can yield a plethora of food product handlers, and the possibility for adulteration of the food product.\(^\text{17}\)

Also, the food product may have safely traversed the stream of commerce to the consumer only for the consumer to have altered or misused the food product. The consumer may have mixed other products or supplemented the subject food product with an adulterated second product. The defense of “sole cause” provides that if the conduct of a non-party or the plaintiff was the sole cause of the injury, then the defendant could not be the producing cause.\(^\text{18}\)

Additionally, due to the complexity of our current food distribution system, an action premised upon a claim of foodborne illness can encounter a *forum non conveniens* issue due to geographically diverse defendants. Although a state’s long arm statute can bring defendants that placed commodities into the stream of commerce into a particular state, defendants may prevail in showing the requisite undue burden necessary to move the forum to a more convenient locale.

**Conclusion**

The U.S. food system has grown into a complex system that is not only critical to our welfare, but the economy of the U.S.. While our shelves are filled with diverse products, contamination in the food products can spread quickly across the U.S.. The criticality and impact of food safety is evident in the regulation and oversight of the food industry as well as in the increase of claims based on foodborne illness. When actions are brought premised upon foodborne illnesses, the claims fall under the framework for products liability but care must be applied in adjusting the scale to accommodate the intricacy and complexity of the U.S. food industry and its numerous components.

\(^{16}\) See *McKisson v. Sales Affiliates, Inc.*, 416 S.W.2d 787, 798 (Tex. 1967)(Citing *Decker v. Capps*, 139 Tex. 609, 164 S.W.2d 828 (Tex. 1942) as adopting Section 402A for ‘foodstuffs for human consumption’ and strict liability.)

\(^{17}\) 21 U.S.C § 350c(b) requires in part that manufacturers, processors, packers, transporters, distributors, receivers, holders, or importers of food, maintain records for two years identifying the immediate previous sources and the immediate subsequent recipients of food.

\(^{18}\) *Ahlschlager v. Remington Arms Co.*, 750 S.W.2d 832, 835 (Tex. 1988).
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