

# OUTBREAK Guilty as Charged!

## Will you be found holding the smoking gun?

**T**he only thing worse for you the operator to hear than “See you in court!” would be “Guilty as charged.” But that’s exactly what you will hear if a jury finds that your operation is liable for causing illness from *E. coli*, *Salmonella*, *Hepatitis A*, *Listeria*, *Shigella*, *Campylobacter* or *Norovirus*. Sound chilling? Imagine also the impact of lost revenue and damages on your financial health. YUM! Brands, for instance, estimates that lost revenues, lost franchise and license fees and marketing costs related to the recent Taco Bell *E. coli* outbreak were \$20 million in its fourth quarter. Plus, 11 lawsuits have been filed.

As an operator, if customers can prove that they became sick after eating in your establishment, you are liable. Bill Marler of Marler-Clark in Seattle, a leading class-action foodborne illness litigator, says, “If you manufacture or change a food product – meaning that you cook it, chop it, wash it – and that product has a pathogen that makes someone sick, then you are ‘strictly liable’ under the law.” He adds, “It’s not whether you pay damages, it’s how much.”

Don’t be complacent. Many companies across the nation don’t see a lawsuit coming. Like you, they don’t intend to violate food safety regulations. They don’t set out to make people sick. But the law is clear: Strict liability depends on proving causation. Yes, the burden of proof is up to the ill patron(s) to prove and foodborne illness is more difficult to prove if only one person becomes ill. But if there is an outbreak and it can be traced to your operation, you are holding the smoking gun.

Bill Marler cut his teeth on the watershed *E. coli* liability case against Jack-in-the-Box. He represented a nine-year-old victim and won a \$15.6 million settlement, the largest at that time. He was also active in several other Jack-in-the-Box cases settled for more than \$2.5 million each. Since then, he has focused his practice on pathogen liability.

Outbreak culprits can come in the door or they can occur from improper storage and preparation methods. In the case of a *Hepatitis A* outbreak at Chi Chi’s Mexican Restaurant in Beaver City, Pa., the cause was Mexican-grown green onions. Improper storage of the tainted onions created what officials call a “hepatitis soup” that compounded the danger. Eventually, 660 people became ill, four of whom died. The case was settled for \$6.25 million.

In some cases, like the Chili’s outbreak of *Salmonella* in 2002, the problem arises from unsafe practices in the operation. A Chili’s unit in Vernon Hills, Ill., violated a number of food safety and health ordi-

nances, including a broken dishwashing machine that did not sanitize dishes properly, improper temperatures in the cooler and continuing to operate during lunch with no water, not to mention no hot water the day before. Eventually, 28 employees tested positive for *Salmonella* as well as 141 customers. With other infected individuals who tested as probable, the more than 300 people sickened met the health department’s definition of probable cause.

## WHAT CAN YOU DO TO STAY NOT GUILTY?

The best way to protect yourself from litigation, Marler says, is to avoid contamination. Look at all internal procedures. Food safety should be part of your culture. Also, it is critical to know and trust the source of fresh food. Seek a contract to hold you harmless if suppliers sell you contaminated goods.

What to do if you are accused:

- ◆ Consult your lawyer(s).
- ◆ Have your local health department investigate.
- ◆ Make certain that all of your health department inspections are up to date and positive.

If the health department determines that your operation was responsible for food that caused an outbreak, you will be liable. However, the health department will also be able to determine if you are not responsible.

Pay attention to the possibility of pathogens! Your first priority is patron safety, the second, to avoid financial disaster resulting from liability. As Marler says, “Unfortunately, business is good.”

## LAWSUITS FILED

Within the last year, it has been reported that these class-action or individual lawsuits concerning outbreaks have been filed by Marler-Clark, the Seattle litigation firm, against the following:

- ◆ Con Agra, manufacturer of Peter Pan, Great Value peanut butter – *Salmonella*
- ◆ Houlihan’s, a unit in Geneva, Ill. – *Hepatitis A*
- ◆ Taco Bell, several restaurants (Ready Pac Produce is included in the suit) – *E. coli*
- ◆ Taco John’s, units in Iowa and Minn. – *E. coli*
- ◆ Wal-Mart, Greenwood, Ind. – *Salmonella*
- ◆ Wendy’s, a unit in North Ogden, Utah – *E. coli*
- ◆ Blimpie’s, a unit in Grand Rapids, Mich. – *Norovirus*
- ◆ Bravo! Cucina Italiano, a unit in Lansing, Mich. – *Norovirus*

To find out more information, visit [www.marlerclark.com](http://www.marlerclark.com)