Medical Law Perspectives
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Defending a foodborne illness case is very different from defending a typical product liability case. These types of cases, involving someone who eats a food and then claims to have developed an illness as a result, can be divided into two categories. In one category of case, the person has been tested, the health department has identified the foodborne pathogen and the food causing the illness, and the individual has been classified as part of an outbreak recognized by the Centers for Disease Control. In the other category of case, people say "I ate something, I had some tummy problems and now I'm suing you because I think I have food poisoning." But they never went to the hospital and had a blood or stool test that was positive for a specific pathogen like salmonella, E. coli, or listeria.

Cases in the first group may be difficult to defend. When a health department or the CDC identifies someone as part of an outbreak linked to a specific food, the plaintiff's job of establishing causation is essentially done. In those cases, a so-called "genetic fingerprint" may link that person's illness to a certain pathogen in a certain food. The only possible avenues for defense are to show that the plaintiffs got the same pathogen from some other mechanism of exposure. As a result, confirmed outbreak cases identified by a health department or CDC often settle.

On the other hand, cases of the other type, where someone has no testing to identify a specific pathogen, usually don't settle. In fact, they usually are not litigated because the claim is inherently speculative. If they do litigate they are often dispensed with at summary judgment. The reason for this result is that when someone gets sick and reports diarrhea or vomiting or abdominal pain there are so many potential causes beyond foodborne illness. Even if it is a food-related illness, there are many different types of foodborne pathogens and many different mechanisms of exposure. Courts routinely hold that without a specific positive test showing what the pathogen is, a plaintiff can't even establish a claim.

Even with that positive test, without a health department investigation linking the pathogen to a specific food, the claim remains speculative. For instance, if someone tests positive for salmonella, it may be very difficult to identify the source of that infection. There are any number of potential mechanisms of transmission, including fresh fruits and vegetables, poultry and meat products, even things like pet food, exposure to household pets, and other animal exposure. In those cases we often look closely at the incubation period, which is the time between exposure to the pathogen and development of the symptoms.

People have a tendency to think that the last thing that they ate made them sick. Only rarely does that happen. Most incubation periods involve days, not hours. So if someone says, "I ate some eggs for breakfast and I was sick at lunchtime," I know that is not salmonella from the eggs. It is just impossible for the pathogen to create symptoms that quickly. In cases like that, the defense will move for summary judgment because the claim is inherently speculative.

One of the other challenges in defending foodborne illness cases is assessing the damages. Even when someone has established that they have a foodborne illness, in the vast majority of cases, there is no permanent injury. There are some exceptions to that. For example, in E. coli cases there is a very serious condition called hemolytic uremic syndrome that is in a different category altogether. For most of these cases, though, the damages are pretty limited. But often plaintiffs and plaintiffs' lawyers don't see it that way. They think that a few days of illness is a very significant claim. I often hear the statement made that "The pain was so bad, I thought I was going to die." Or people say that the pain was worse than the pain of childbirth, which is interesting when male plaintiffs say that. These plaintiffs often over-value their claims, which can be an impediment to settlement. It also can create a situation where, even if the plaintiff is able to convince the jury, the recovery doesn't meet the plaintiff's expectations going in.

Typically foodborne illness cases are strict liability cases. The claim is that the food was defective and it caused the plaintiff's illness. The negligence of the food company is not an issue. If a food company manufactures and sells a defective product it is going to be strictly liable regardless of negligence or intent. But plaintiffs also typically assert negligence claims and seek discovery of company documents to bolster those claims. Frankly, those documents often end up helping the food manufacturer. The documents can show that at the time the food was produced everything was normal – there were no anomalies in manufacturing, no reports of problems, and no unexpected test results. Often companies produce video showing the manufacturing process at the time, how it was functioning smoothly, and that testing was being done.

Sometimes, though, plaintiffs are able to discover documents like FDA inspection reports with findings of general insanitary conditions or other problems that, even if they don't relate to the issue of whether the specific food was contaminated, may not show the food company in the best light. More of those types of documents, involving inspections and regulatory compliance, may become available to plaintiffs' lawyers following the implementation of the Food Safety Modernization Act, which was signed into law in January of 2011. Under that act, FDA is going to be conducting more frequent and more rigorous inspections, and more documents that FDA generates as part of those inspections may be available to the public. This expanded access may help plaintiffs in these cases uncover more documents and more information and affect these cases going forward.

Sarah Brew is a partner at **Faegre Baker Daniels LLP** in Minneapolis. She leads the firm's nationally ranked food litigation and regulatory practice and is a member of the firm's food and agriculture industry group. Sarah has a national reputation for effectively representing food processors, distributors and retailers in foodborne illness and contamination cases, defending them against product liability, labeling and consumer class action claims, and representing them in complex commercial litigation and supply chain disputes.

Sarah also counsels and provides risk management advice to food and dietary supplement clients on labeling and regulatory compliance matters, including the Food Safety Modernization Act, product recalls and reportable food registry events, FDA and USDA inspections and enforcement actions, and supply chain management and related agreements.

Sarah writes and lectures nationally on a variety of food law and litigation issues, and she is coauthor of the Minnesota Practice treatise on Products Liability Law published by Thomson West. Sarah was elected to the American Law Institute in 2007. She is a member of the International Association for Food Protection, the Food and Drug Law Institute, the American Bar Association's Food & Dietary Supplements Subcommittee and other professional and trade associations relating to the food industry.

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