

A course of action for food processors facing recalls

One afternoon, as you are monitoring your quality assurance staff on the production lines, you receive a call from the executive offices alerting you to an emergency meeting.

You arrive at the designated conference room and notice immediately that your plant's regular USDA inspector is present and you are soon introduced to a few new people who quickly identify themselves as upper-level officials from the Food Safety and Inspection Service (FSIS) of the United States Department of Agriculture and representatives of the Centers for Disease Control (CDC). They tell you that their respective agencies have been investigating a foodborne disease outbreak for several months and that the outbreak is responsible for numerous illnesses.

They present you with consumer questionnaires and microbiology reports that purport to link your product to these illnesses. They immediately recommend that your plant institute a recall of its products in multiple states.

Not only is your company faced with a significant recall and the consequent concerns about eroding consumer confidence in your product and your brand name, but you are now facing the prospect of personal injury claims and potential class-action litigation.

According to the FSIS, since the beginning of 1997, there have been more than 139 reported food recalls related to foodborne pathogen contamination. In the last few years, the alarming recall scenario has played out at scores of food processing plants across the country resulting in major food producers instituting massive recalls of products suspected of being contaminated with various foodborne pathogens.

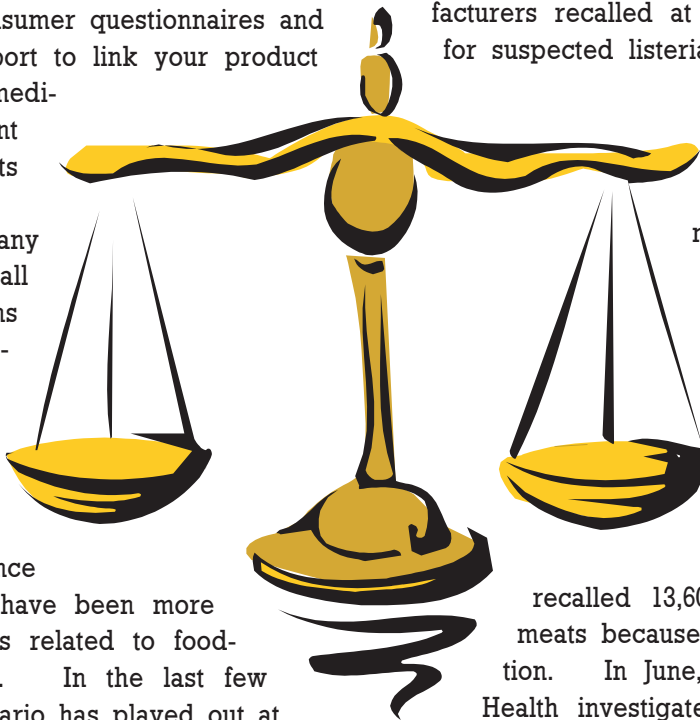
In 1997, one meat producer alone recalled 25 millions pounds of ground beef because of alleged E. coli con-

Editor's note: This series is a collaborative effort from FOOD PROCESSING and attorneys at Jenner & Block LLC in Chicago that will appear in this magazine over the next year. We will provide a guide to addressing the legion of issues that will confront food processors if, and when, they have to deal with bacterial contamination of products and a resulting recall. The focus of this series will be to show food processors how to institute a successful recall that protects consumers' health and also to effectively cooperate with government investigators—all in the context of having to prepare for possible civil litigation and potential criminal investigation.

tamination. A year later, several companies instituted recalls of a combined total of more than 40 million pounds meat products after government regulators suspected salmonella and listeria contamination. In 1999, two manufacturers recalled at least 37 millions pounds of meat for suspected listeria contamination.

These large, nationwide recalls were not aberrations. This summer alone there has been a food product recall every month due to a suspected contamination of products with a foodborne pathogen. In July, a cheese manufacturer recalled batches of shredded cheese that were believed to be contaminated with listeria.

That same month, after the USDA investigated a consumer complaint, a meat producer recalled 13,600 pounds of pre-sliced luncheon meats because of possible salmonella contamination. In June, after the Georgia Department of Health investigated the illnesses of three Georgia children, a major supermarket chain in five states recalled 190,000 pounds of ground beef and ground pork as a result of suspected E. coli contamination. And in May, a Wisconsin meat packer recalled over 700,000 pounds of meat that was alleged to be contaminated with a deadly strain of E. coli bacteria.



The articles in this series will provide details about the following food recall- related issues:

- **Article 1:** The Evolving Science Relating to Recall and Litigation Issues. We will explore the interaction among federal, state and local agriculture and health officials, as well as the methodology used by these government agencies to identify and determine the source of food outbreaks. Understanding how these pieces fit together is essential to retaining appropriate experts to assist you should litigation arise, as well as help you respond to government inquiries and investigations.
- **Article 2:** The Law Relating to Product Recalls. We will discuss the classification of recalls and the roles played by various government agencies in such decisions, as well as liability issues arising out of recall implementation or failure to institute a recall.
- **Article 3:** Practical Considerations in Deciding to Recall and Implementing That Decision. If food processors are to effectively respond to food safety concerns, they must establish a crisis management and recall action plan. This article will provide insight into the appropriate structure of such plans, provide a model for creating and implementing an effective recall, and suggest systems that should be in place at the start of a recall

As a result of recall announcements, and the outbreaks of foodborne illnesses often associated with the recall decision, consumers across the country are becoming increasingly familiar with “E. coli,” “salmonella,” and “Listeria” – terms that were once largely known only to scientists, government regulators, and quality assurance personnel.

The most commonly recognized foodborne infections are those caused by the bacteria *Campylobacter*, *Salmonella*, and *E. coli* O157:H7, and by a group of viruses called calicivirus, also known as the Norwalk and Norwalk-like viruses. Although these illnesses cause similar symptoms (e.g., fever, diarrhea and abdominal cramps), they do not share common origins.

For example:

- The *Campylobacter* bacteria lives in the intestines of healthy birds and most raw poultry meat is infected with it. Eating undercooked chicken, or other food that has been contaminated with juices dripping from raw chicken is the most frequent source of this infection.

- *Salmonella* is also a bacterium that is widespread in the intestines of birds, reptiles and mammals and is spread to humans via a variety of different foods of animal origin. It is particularly threatening to people with poor underlying health or weakened immune systems because it can invade the bloodstream and cause life-threatening infections.

to reduce future liability and claims.

- **Article 4:** Conducting a Careful Factual Investigation. Your internal investigation of a suspected foodborne pathogen outbreak is important not only to prevent future processing problems but also to better enable your company to defend itself against lawsuits. This article will make recommendations about the nature, timing and sequence of your internal investigation into the source of any suspected contamination, and provide a suggested course of action to learn all relevant facts about your company’s situation as soon as possible.
- **Article 5:** Civil Litigation Issues. If your product is suspected of causing either physical or economic injury to your customers, you should be aware of their possible bases of recovering damages from you, as well as how best to respond to such allegations. An overview of class action and products liability cases will be provided, as well as a highlight of hurdles that must be overcome in order for such claimants to prevail.
- **Article 6:** Important Issues Relating to Potential Criminal Investigations and Criminal Liability. This article will explain the legal bases for holding a company criminally liable for manufacturing allegedly contaminated food, and detail the implications such an investigation could have on civil litigation.

- *E. coli* is a bacterial pathogen often found in cattle. It infects humans following consumption of food or water that has been contaminated with microscopic amounts of cow feces. An acute infection can result in temporary anemia, profuse bleeding, and kidney failure.

- Calicivirus, also known as Norwalk-like virus, is an extremely common cause of foodborne illness. It is rarely diagnosed, however, because the laboratory test to detect it is not widely available. Unlike many foodborne pathogens that have animal sources, it is believed that Norwalk-like viruses spread primarily from one infected person to another.

- *Listeria monocytogenes* (“L.m.”) is found in soil and water. Vegetables can become contaminated from the soil or from manure used as fertilizer. Animals can carry the bacterium without appearing ill and can contaminate foods of animal origin such as meats and dairy products. The bacterium has been found in a variety of raw foods, such as uncooked vegetables and meats, as well as in processed foods that become contaminated after processing, such as soft cheeses and cold cuts sliced at the deli counter. An infection can spread to the nervous system and cause symptoms such as headache, stiff neck, confusion and loss of balance; in some cases convulsions can occur. Each year, the CDC attributes a number of fatalities to L.m. contamination.

· Given the ubiquitous nature of these foodborne pathogens and the development of sophisticated testing mechanisms to alert government health officials to potential outbreaks, product contamination and resulting recalls are almost certain to happen with greater frequency in the years ahead. Identifying a foodborne illness outbreak is a coordinated effort among local, state, and federal health agencies, which increasingly are developing technology and information-sharing networks to handle widespread occurrences of foodborne illnesses.

· Traditionally, state public health departments monitor information that they receive from local health agencies about reportable diseases, which often include infections caused by foodborne pathogens. When a foodborne illness is reported with any degree of frequency, the state public health departments' laboratories will test to determine the molecular make-up of a bacteria isolated from samples taken from people who were ill. Although not free from error or criticism, new forms of DNA-like fingerprinting technologies can make detecting outbreaks easier, and the Internet now enables state laboratories and the CDC to compare fingerprints of certain diseases to try to establish a link among patients and thus identify an outbreak.

Our goal is to provide food processors with appropriate guidance and the tools necessary to deal with these very troubling problems. We want to make that difficult trip to the conference room as smooth as possible, under all circumstances.

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