

Preventative Measures to Protect Against Liability Relating to Food-Borne Illness

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THE RECENT HEPATITIS outbreaks in Pennsylvania, Georgia and Tennessee present a prime example to members of the agriculture industry of the importance of protecting one's business interests before catastrophe occurs. This is especially true when dealing with imported product. There are several common steps that agricultural businesses take in the effort to avoid liability when a consumer gets sick:

- The FDA has promulgated voluntary guidelines that should be followed;
- Insurance is a must;
- It is standard practice to have facilities tested by a certifying laboratory;
- Some contracts also contain indemnification provisions, which impose liability down the chain of production from store to distributor to importer to shipper to grower.

By taking these basic but necessary measures, most businesses believe they have done everything possible to protect themselves. However, these steps will not fully protect against liability. In the past, involvement in litigation and liability for food-borne illness was generally limited to the restaurant or store, which have actual contact with the consumer. Many times it was simply not possible to determine where the product was grown or imported. Now, with faster and more reliable testing methods to trace food borne illnesses to their source, importers and growers will face more and more lawsuits when an outbreak occurs. Furthermore, many supply contracts are nothing more than price sheets, which do not contain even minimal indemnification provisions. Even where parties have more comprehensive contracts, it may be the case that even the most carefully drafted indemnity provision is financially impossible and impractical to enforce outside U.S. borders. It is therefore essential that importers go beyond the minimum requirements to make sure their safety efforts have

real results. In order to ensure the most protection, and the best defense possible, businesses should go beyond the basic paperwork. In this article, we discuss what preventive measures should be taken to protect against liability relating to food-borne illness. Our next article will focus on the course of action once an outbreak has occurred and your company is in the sights of a plaintiff's lawyer.

INSURANCE

Many businesspeople do not realize that they can negotiate with their insurance carrier regarding how the insurance company will handle a claim. This is particularly important in food-borne illness cases, which generally have multiple plaintiffs with varying degrees of injury. Issues such as the scope of coverage, the right of the client to consent to any settlement, coordination of various lawsuits, and selection of legal counsel should be negotiated with the insurance carrier prior to entering into any policy.

To the extent possible the importer, the grower and the importer's customers should have different insurance carriers. This will take consideration early in the contracting process before litigation is even a possibility; but will guard against a conflict of interest on the part of the insurance company should litigation arise. If a lawsuit is filed, it is very likely that the importer, the grower and the customer will all be named as defendant. An insurance company that insures more than one defendant in a lawsuit will treat the case as if the different clients are one defendant. This does not serve the defendants well, as their interests regarding litigation strategy and settlement possibilities may be very different.

Selection of counsel is also very important due to the specialized nature of agriculture. Although most insurance defense firms are very skilled at handling, for example, an auto accident claim or even general products liability, such a firm may have no

experience dealing with the unique circumstances under which agribusiness operates. When imported produce is involved, at the very least these issues will include agricultural law, international law, and products liability law relating to damages and tracing the product to its source. Each of these specialties will be equally important in such a case. Most insurance defense firms simply do not have the necessary expertise.

Unfortunately, an insurance company will generally not agree to pay more than its customary rate to an insurance defense firm. Also, for the insurer the most important consideration is getting out of that particular case with the least cost, and often times that means making a settlement deal. This may engender a conflict between the insurance company and the importer, because the importer wants to stay in business and knows that a finding of liability, or even paying a settlement that implies liability, may be a fatal blow to the company. To ensure the counsel of choice, the client may be forced to pay the difference between its lawyer and what the insurance company pays. It is also possible for the attorneys to work together, with the insurance attorney handling the more routine aspects of the case. Although there may be additional expense, this is justified by the increased likelihood of a positive outcome for the importer.

Finally, it is unfortunate but true that many times settling a lawsuit is interpreted in the marketplace as an admission of responsibility. Entering into an ill-considered settlement agreement can be as damaging as an actual finding of guilt. Therefore, the ability of an importer or shipper to consent to any settlement entered into by the insurance company is very important. Most insurance contracts do not give the defendant any voice in the consideration of a settlement, let alone the right to consent. Any importer or shipper should require its consent to any settlement as part of its insurance contract.

FACILITY TESTING

Most facilities in the United States conduct sanitary testing through a laboratory such as Primus Labs. These facilities routinely score 98 percent or higher on such tests, indicating an extremely high level of cleanliness. Many foreign facilities receive similar results. However, foreign facilities may rate much lower due to a variety of factors that may be out of the importer's control. For example, a facility will rate very low if it does not have a written sanitary policy, regardless of how clean the facility may be. Such a situation is dangerous because of the possibility of contamination, and the fact that a low score could possibly be used against the importer in the event of an outbreak.

It is therefore imperative that an importer requires a certified test prior to receiving product from a facility. It is also wise to have the test performed through an attorney in order to maintain confidentiality of any results or recommendations. In this manner, in the event of a low score the test will be subject to privilege and cannot be used as evidence. At the same time, the importer can use the test to mandate that the facility comply with FDA and USDA standards, further protecting itself and the public from the chance of an outbreak.

Even if a facility performs well on a laboratory test, it is very important that the importer vigilantly monitor the facility's practices throughout the business relationship. While many foreign facilities pay lip service to compliance standards, in some cases the enforcement of those standards is lax and may disappear altogether after the inspection is finished. As we discuss below regarding the standard of liability for the importer, this is dangerous because the importer cannot use the defense that it was not aware of the problem. Importers should require that the facility perform mock inspections, and the importer should have its own representative present, to ensure against conditions such as children in the fields, use of unpurified water for cleaning and icing, and a lack of restrooms for field workers.

PUBLIC RELATIONS

In the event of an outbreak it is also important, and perhaps essential to the continued business of the importer, that the public receive accurate information regarding

the disease and the importer's product. Of course, the most important consideration is the health of the consumer. People should receive the best guidance regarding how to protect against food-borne illness, and how the produce industry strives to keep the public safe. However, the consumer is also entitled to a complete understanding of where the danger may have come from.

In the event of a serious outbreak, agencies such as the FDA may make blanket statements regarding a certain product, company, or growing region in the effort to protect as many consumers as possible. Unfortunately, while this effort may be well intentioned, it is not always in the best interest of the consumer, the importer, or the produce industry as a whole.

To guard against a public "rush to judgment" against a particular company or

"The task forces would focus on property crimes against the agricultural industry from tractors and chemicals to crops and livestock"

product, companies must understand the publicity that will surround an outbreak. This can be accomplished in a number of ways. For example, on the larger scale, the various state and federal agencies promote programs to educate the public on the nutritional value of produce and steps that consumers can take to protect themselves. Companies can, and should, take extra steps to promote dissemination of accurate information. A personal relationship with the relevant agency is a plus. It may also be worthwhile for a company to have a public and media relations specialist, either on staff, as a consultant, or through a trade association.

By maintaining a relationship between the company and agency, regional and local investigators and other representatives are more likely to provide information regarding compliance issues or the progress of investigations or recalls. Perhaps more importantly, an importer or other company with such a relationship may have more input on the release of information regarding an outbreak. Further, if the

importer or other company has a reputation of following safety standards within the agency, it is less likely that the agency will make rash announcements regarding that company's culpability in an outbreak without a thorough investigation.

STRICT LIABILITY

So, you may ask, why go through the trouble and expense involved with these suggestions, especially when outbreaks of food borne illness are few and far between? Again, the first reason is public safety. However, the legal reason is just as important to the survival of a company. In food borne illness cases, the law may impose strict liability on anyone and everyone involved in the chain of production of the product at issue. This means that, for example, if a plaintiff can prove that an importer actually caused food to become contaminated, that importer will be liable for all resulting injuries no matter what safety measures the importer practices. There is no standard of care that will suffice in the event of an outbreak to protect against liability.

Why then, should an importer do anything? Even in a strict liability case, the plaintiff must prove that the particular defendant either caused the contamination or should have prevented it from spreading. Most cases will include multiple parties, and a judge or jury is likely to lay blame on the defendants with lax sanitary standards and practices. And, as new testing methods that make it easier to trace product, it is increasingly likely that contaminated food will be traced to the importer and grower. Therefore, the ugly truth is that the only certain way to protect a business against liability is to make sure that no contaminated food reaches the consumer. With increasingly large damage awards, the stakes are high, and just one such lawsuit can be the death knell for any company. The preventative measures described above will help reduce the possibility of food contamination and increase the likelihood that your company will not be implicated in an outbreak. This can be the difference in the success or failure of your business. ■