

## Chapter 5

### Summary

Product liability is a seemingly powerful mechanism for shifting the costs of foodborne illness from the persons who become ill to the firms responsible for the contaminated product. However, high transaction and information costs combined with the structure of the legal system limit the effectiveness of the litigation for compensating ill consumers and providing firms with signals to produce safer food. This report has nine key points, drawn both from the background literature review and from findings from the jury verdict analysis.

***Point 1: Litigation for foodborne illnesses attributed to microbial contamination of food by firms is limited because of high information and transaction costs.***

Reliable estimates of the annual number of foodborne illness claims and lawsuits are unavailable. However, a review of the evidence suggests that the vast majority of foodborne illnesses attributed to microbial contamination of food by firms do not result in foodborne illness lawsuits. We found that those stricken by a foodborne illness face high information and transaction costs when pursuing legal compensation. In particular, we uncovered several reasons that help explain why legal action is rare:

1. The incubation period between the consumption of contaminated food and the initial symptoms of foodborne illness makes it difficult for consumers to identify the specific food item (and firm) which caused their illness.
2. Physical evidence of contamination is rarely available because most food items are likely to have been consumed or thrown out before the initial symptoms of illness appear. Ill individuals rarely save a sample of food to test for contamination.
3. Medical evidence from clinical specimens identifying a specific illness-causing pathogen is rare.<sup>18</sup> Less than half (48 percent) of the foodborne illness lawsuits implicated a specific foodborne pathogen, toxin, or illness, presumably because the plaintiff did not specify

or know them. As a result, many consumer plaintiffs apparently entered court without strong evidence of a causal link between their illness and the defendant's food product.

4. The implicated pathogen may also be associated with multiple foods or may be spread via other routes (e.g., person-to-person contact) (Draper, 1994), increasing the number of potential causes of illness and making it more difficult to prove that the cause was contaminated food from a particular firm.
5. Many processed food products include a variety of ingredients from different sources, further increasing the difficulty of identifying the particular food item (and firm) that caused the illness.
6. Most foodborne illnesses are not part of a well-identified foodborne disease outbreak, limiting the availability of supporting information from public health authorities.
7. The complexity and slow pace of the legal system impose high transaction and information costs for consumers who decide to pursue legal action. The average lawsuit in our data was not tried until more than 3 years after the incident that resulted in illness.
8. Some attorneys may be unwilling to take a food-poisoning case because: (a) they believe that a food product sample containing a pathogen is needed to proceed with a case (untrue), (b) they are not educated about how to proceed with foodborne litigation, and (c) they rely only on court data and therefore think that foodborne illness cases are not worth much (Rosenbaum, 2000).

Other aspects of foodborne illness may also hinder or discourage ill individuals from pursuing legal compensation. In particular, a high proportion of foodborne illnesses are relatively mild and result in only minor financial losses for individual consumers, reducing the incentives to pursue individual legal action. And, most consumers have health insurance, and many workers

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<sup>18</sup> However, science is increasingly supplying more and better tools to link specific illnesses to specific food sources, and these tools are being applied more frequently. Foodborne-illness victims may carry antibodies to the impli-

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cated pathogen in their bloodstream. Although the presence of an antibody does not show exactly when the illness or exposure occurred, it is one piece of evidence that can be used to meet the causation requirement (Clark, 2000).

have sick leave benefits, limiting their direct financial losses due to foodborne illness.

***Point 2: Foodborne illness claims that are settled confidentially are likely to have different characteristics than those that reach court verdicts. This implies that confidential settlements distort legal incentives to produce safer food.***

Although we do not have data indicating what percent of foodborne illness claims are resolved through settlements, data on the broader category of product liability cases involving bodily injury indicate that 95 percent of claims are settled out of court, and only 5 percent ultimately reach a court verdict (Viscusi, 1991). These data suggest that even when foodborne illness claims are pursued, most are resolved through settlements between plaintiffs and firms (or their insurers) before trial.

A review of the legal literature also suggests that in general, there are real differences between claims that result in settlements and claims that result in court verdicts (Vidmar, 1997; Eisenberg, 1991). In essence, tried cases are not representative of all claims (Priest and Klein, 1984). For foodborne illness claims, the same distinction appears to hold. Foodborne illness claims that are bona fide (without deceit or fraud) tend to settle while claims that go to trial are typically those where there is a serious causation question or where the amount of damages is disputed (Clark, 2000).

When complaints and lawsuits are settled confidentially, direct economic signals from the legal system about the costs of producing pathogen-contaminated food are usually restricted to the responsible firm and its insurer (which may then decide to raise the firm's premium for product liability coverage).<sup>19</sup> In particular, if there is selection bias determining which lawsuits end up in confidential settlements and which lawsuits end up in court decisions, the representativeness of awards publicized in the media and the associated feedback to other firms to produce safe food will be distorted. Whisper information among firms also occurs, but perhaps more so in more serious cases involving high monetary awards, once again implying that firms do not receive

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<sup>19</sup> Insurers actually share information about losses, and use this information to estimate risks and set premiums. So the economic signals are sent indirectly to the insurance market and subsequently also to other firms when premiums are raised. However, increases in premiums encourage food firms to produce safer food only if the firm links the premium increase to its food safety record.

perfect information about the true costs of producing unsafe food or about the frequency with which firms are actually sued for food contamination.

***Point 3: Plaintiffs are unlikely to win awards in foodborne illness jury trials.***

It appears that relatively few foodborne illnesses are compensated either through court awards or out-of-court settlements. Of the WLN sample of 175 foodborne illness lawsuits ultimately resolved in court during 1988-97, 31.4 percent resulted in some compensation paid by firms. This suggests that most plaintiffs who go to trial do not have a strong case. Lack of convincing evidence on causation is likely to be the key factor in the low success rate of plaintiffs in court.

***Point 4: Plaintiffs were more likely to win jury trials if they could link their illness to a specific pathogen, and more severe illnesses tended to result in higher awards.***

Multivariate analyses indicate that the odds of a plaintiff victory increased if a foodborne pathogen or illness was specified and decreased if defendants had "deep pockets" or used medical expert testimony. This highlights the importance of a plaintiff's being able to link the illness to a specific foodborne pathogen in order to prevail in court. Higher awards were given when the illnesses involved hospitalization, death, or chronic complications.

***Point 5: The expected monetary compensation from a foodborne illness lawsuit provides only limited incentives to pursue litigation.***

Most foodborne illnesses are relatively mild and do not result in high medical costs or lost productivity costs. And of those illnesses that are more severe and result in higher costs, some portion of these costs is likely to be covered by other parties such as health insurance and employers. Therefore, most people with foodborne illness have weak monetary incentives to take legal action to recover damages.

Only a third of jury trials involving injuries due to pathogen-contaminated food products resulted in monetary compensation for the injured consumer. However, some of these consumers received substantial sums (mean award was \$133,280), significantly elevating the expected award (\$41,888) above the median award (\$25,560) (all in 1998 dollars). It is possible that plaintiff lawyers might be misled by this seemingly high expected award and accept weak claims to pursue in the legal system. Consumer plaintiffs seldom receive all of the awards because a sub-

stantial portion (typically one-third or more) is usually used to pay legal fees and court costs. Out-of-pocket medical expenses, lost productivity, and other costs incurred because of the illness reduce the net award to the plaintiff even further.

***Point 6: Foodborne illness costs are shared by many sectors of the economy, in turn limiting incentives to firms to produce safer food.***

Although we do not have reliable estimates of the total costs of illness to all sectors that are caused by safety lapses by food firms (as opposed to errors by consumers), the estimate is likely to be substantial. And, we suspect that food firms pay directly for only a small, unknown, portion of the total costs of illnesses caused by their errors. For example, much of the costs of illness borne by people who became ill (and/or their families) are not reimbursed by the food firms responsible. Instead, they are paid for by the ill consumer or his or her household, shifted to other parties such as employers, private health insurers, and governments (and in turn, taxpayers), or handled by some combination of these parties.

Because a large share of the foodborne illness costs are borne by consumers who become ill or by other sectors of the economy, firms receive only limited feedback to produce safer food. If food firms have sufficient product liability insurance to cover a lawsuit, they may not feel the full financial impact, even if their premiums and those of similar firms should increase. One implication of the current social allocation of foodborne illness costs is that food firms probably underinvest in food safety.

***Point 7: Legal incentives probably work better in outbreak situations and less well for sporadic cases.***

Incentives for firms to avoid foodborne illness outbreaks are probably stronger than the incentives to avoid isolated, sporadic cases of illness because outbreaks have greater potential to damage firms. Public health authorities are also more likely to become involved in outbreaks and technological advances have improved the chances that widely scattered cases will be traced back to a source and linked to each other.<sup>20</sup> For example, CDC traced the 1998 listeriosis outbreak (80 illnesses, 21 deaths) to hot dogs and luncheon

meats produced and sold by Bil Mar and Sara Lee (FSnet, Aug. 27, 1999).

One issue needing study is how legal incentives from outbreaks differ by size of firm. Most firms are small operations, not giant national entities. Small firms are probably less prepared to deal with legal consequences of foodborne illness than are large firms due to differences in insurance coverage, economic resources, size of market, in-house legal and disaster management expertise, and so forth. If small firms have limited insurance, they may have much higher incentives to see that claims are resolved because of the risk that claims will outstrip coverage or that even modest local publicity will hurt near-term business (Clark, 2000).

It is primarily the business disruption and negative publicity of the catastrophic foodborne illness or outbreaks that cost firms money so it is these extraordinary, nonrecurrent illnesses or outbreaks that have the potential to substantively shape corporate behavior (Clark, 2000). In the rare instances where foodborne disease outbreaks are linked to particular firms, the impact on those firms can be large. For example, Foodmaker Inc. [now Jack in the Box Inc.] lost an estimated \$160 million in the first 18 months after the 1993 *E. coli* O157:H7 outbreak (Roberts et al., 1997).<sup>21</sup>

***Point 8: It is unclear whether foodborne illness litigation will become more common in the future. However, class action lawsuits may become more common in the case of outbreaks where many persons have similar, mild illnesses.***

It is unclear whether foodborne illness litigation will become more common in the future. Foodborne illness—and the reasons for litigation—may decrease if firms continue to improve quality control practices to ensure safer food. In contrast, improvements in pathogen detection and identification techniques (including DNA fingerprinting and more rapid microbial tests) may increase the chances that foodborne illnesses (particularly outbreaks) will be detected and linked to specific food products and firms. Attorneys who specialize in personal injury cases may also

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<sup>20</sup> This may mean that there will be an increase in the number of small outbreaks detected and a drop in the average size of reported outbreaks.

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<sup>21</sup> Also, in the 6 months following the 1998 recall of Sara Lee Corp. hot dogs and deli meats due to contamination with *Listeria*, sales of Sara Lee meat products fell by about \$200 million and the company's stock price fell by 19 percent, reducing the company's value from \$25 billion to \$20.3 billion (FSnet, Aug. 27, 1999).

become more interested in handling foodborne illness litigation as scientific and technological advances make it easier to link foodborne illnesses to individual firms. In addition, increasing consumer awareness that food products may be contaminated by pathogens could increase the likelihood of a claim after a foodborne illness occurs (Clark, 2000). The experience of Marler-Clark (the law firm that has handled more foodborne illness litigation in the United States than any other law firm) is that consumers are increasingly interested in exploring legal recourse when made sick by food (Clark, 2000). But, these trends may encourage food firms to further improve quality control standards to reduce the risk of producing contaminated food products that might cause illness and result in litigation.

Several law and consulting firms now specialize in foodborne illness lawsuits. Class action or “mass” lawsuits may be more frequently used in the case of outbreaks resulting in many similar, mild illnesses, particularly as identification and documentation of outbreaks improves, as legal expertise in this area grows, and as media coverage of successful class action suits involving consumer products accumulates.

***Point 9: The legal system provides incentives, though limited, for firms to produce safer food.***

Because firms responsible for the microbial contamination compensate relatively few foodborne illnesses, the legal system provides only limited feedback to firms about the need for greater food safety. The product liability system provides firms with incentives to control hazards in food primarily when the hazards are easily identifiable, the foodborne illness can be traced back to firms, and ill individuals or their families are compensated by the firms responsible for the contamination. These findings suggest that the direct impact of litigation on firms is small, although few if any firms are likely to ignore the potential legal consequences of making or distributing contaminated food products that might cause illness or death. And, firms cannot ignore the risk that they may face catastrophic losses if they produce contaminated food. It is difficult to assess exactly how firms are affected by such legal action because the actual decisionmaking process on food safety issues by firms is generally kept confidential.

However, the small percentage of foodborne illness jury trials that are resolved in the public view may have an indirect, possibly significant, impact on the behavior of the defendants and other firms. This is particularly true for lawsuits that attract adverse media

attention. Other firms may decide to increase investments in food safety after observing the economic costs to defendant firms accused of producing contaminated food products that caused foodborne illness.

Economic costs from these lawsuits that food firms wish to avoid include: (1) the potentially high legal costs and court fees involved in defending lawsuits, (2) the compensation payments and possible punitive damages when the defendant firm is found liable, and (3) business losses as a result of trial publicity. These business losses include the loss of reputation of firm or product, reduced product demand, reduced stock prices, higher premiums for product liability insurance, temporary plant closings for cleanup, or permanent plant closings following adverse publicity about a foodborne illness lawsuit, even when the firm successfully defends itself. Catastrophic financial losses for defendants may result even when the law is apparently in their favor. In addition to the possibility of incurring these economic costs, the uncertain outcome in the case of jury trials may be daunting, particularly for more risk-averse firms and firms with lower equity.

For example, an effective, industry-generated, food safety reform occurred after the large 1993 outbreak from hamburgers contaminated with *E. coli* O157:H7 and subsequent litigation. Jack in the Box, Inc., revamped its food safety program and significantly altered the practices of the fast food industry with respect to protein products (Clark, 2000). As we are increasingly able to identify the source of a foodborne illness, the power of litigation to shape industry behavior about food safety will increase (Clark, 2000).

Future research should focus on developing a better understanding of the litigation process because foodborne illness lawsuits are a potentially important economic signal to firms to invest more in food safety. Specific questions for research include determining: (1) how often lawsuits are filed, (2) how often lawsuits are settled or otherwise resolved before trial, and (3) how settlements differ from court decisions. This information about noncourt cases is critical to improve understanding of the extent of foodborne illness lawsuits and the true probability that plaintiffs will be compensated for damages caused by foodborne illness. Consumer complaints and out-of-court settlements are far more frequent than lawsuits that go to trial and may be the most common signals about the costs of unsafe food received by firms.