

Corporate Brief

Listeria cases are heating up

Technology can help plaintiffs, but it's no guarantee at trial.

By Bob Van Voris
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REGARDLESS OF THE advertising jingle, it sure looks like somebody doesn't like Sara Lee. According to figures from the Centers for Disease Control, approximately 100 people became ill, and 21 died, after eating meat from a Sara Lee subsidiary contaminated with the listeria bacterium.

At least four lawsuits have been filed on behalf of people who were sickened and families

of others who died, and more are expected. And two state court cases, filed in Chicago and Detroit, could cover the rest if class action status is granted.

Genetic technology makes it easier to track and prevent cases of food poisoning, but lawyers and scientists say that it can sometimes be difficult to recover damages. Among the reasons: "Genetic fingerprinting" of food-borne bacteria is designed to help stop outbreaks of illness rather than to assign blame once they have already occurred. And it often remains impossible to locate the source of illnesses not linked to big outbreaks.

Lawyers are now trying to figure out which cases can be

traced to Sara Lee Corp.

Just a week after the Chicago-based company announced a voluntary recall of hot dogs and deli meats from the company's Bil Mar plant in Zeeland, Mich., that may have been contaminated with listeria monocytogenes, Chicago plaintiffs' lawyer Kenneth B. Moll filed a class action in state court. A hearing on class certification is set for May.

And in January, a month later, Mr. Moll filed a wrongful-death suit on behalf of a man



Kenneth Moll: Chicago lawyer has been flooded with claims.

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who claimed that his wife died from eating Ballpark brand hot dogs.

Prompted in part by the publicity generated by the suits—including Mr. Moll's 12-hour tour of the Bil Mar plant with several food safety experts—callers to Mr. Moll's office have claimed as many as 40 deaths and 400 injuries, although the cases

have not yet been screened for viability. Neither Sara Lee spokesman Jeffrey Smith nor its lawyer, Jeffrey Coleman, of

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Suits erupt over listeria

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Chicago's Jenner & Block, would comment on the litigation.

Mr. Moll was not in the forefront of the litigation arising out of earlier outbreaks of food-borne illness, although he has litigated other mass torts including breast implants, tobacco and the fen-phen diet drugs. In fact, his first client in the Sara Lee outbreak was a man who had a fen-phen case with Mr. Moll.

In addition, Southfield, Mich., lawyer Harvey Chayet, of Thurswell, Chayet & Weiner, has filed a class action in Michigan state court, which Sara Lee removed to federal court. And lawyers in Arizona have filed a handful of individual cases.

The outbreak is the subject of a U.S. Department of Agriculture investigation, and a federal grand jury is investigating possible criminal wrongdoing.

William D. Marler, of Seattle's MarlerClark, who specializes in food-borne illnesses [see story above], says that companies need to consider carefully how they will respond to outbreak cases. He favorably contrasts the approach of the Jack in the Box restaurant chain following an E. coli outbreak in 1993 with that of most other defendants he has litigated against: "I think Jack in the Box came to the realization to get these things behind them as promptly and as fairly as possible and to get them off the front page as quickly as possible."

Internet network

A new tool in the control of food-borne illness outbreaks was introduced in May 1998, when federal officials announced the inauguration of PulseNet, an Internet-based network of public health labs around the country set up to identify and stop outbreaks sooner, by genetically fingerprinting disease-causing bacteria.

Using PulseNet, public health authori-

ties began to catch on to the Sara Lee outbreak when New York state health authorities reported an increase in listeriosis cases to the Centers for Disease Control and Prevention in Atlanta last summer, says Dr. Bala Swaminathan, chief of the CDC's Food-Borne and Diarrheal Disease Laboratory section.

Catherine Smith-DeWaal, of Washington, D.C.'s Center for Science in the Public Interest, credits PulseNet with hastening the end of the outbreak.

But Mr. Marler cautions against overreliance on technology in court. "Genetic fingerprinting helps, but you can still get to the same place if you know what you're doing," he says. And PulseNet data linking an E. coli outbreak at a Georgia water park to contaminated meat produced in Florida turned out, on closer scrutiny, to be wrong.

Despite the addition of PulseNet to help fix responsibility for an outbreak, plaintiffs' lawyers say, the cases can still be complicated.

"You're getting down into some pretty heady science and some pretty heady medicine," says Robert Hopper, of Zimmerman Reed in Minneapolis. Mr. Hopper says that his firm has clients from the Sara Lee outbreak, although no complaints have yet been filed.

Despite the risks the bacteria carry, the USDA lacks the power to compel a recall of contaminated meat or poultry. Similarly, the Food and Drug Administration, which regulates other foods, also cannot order a recall.

In January, Senator Tom Harkin, D-Iowa, introduced legislation, backed by the Center for Science in the Public Interest and others, that would give the USDA that power. He said the bill would provide "simple and obvious authorities the USDA needs to assure that meat and poultry products are as safe as possible." **ML**