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## Class Action Foodborne-Illness Claims

*Editor's note: The Journal recognizes the importance of providing readers with practical and relevant legal information through Legal Briefs columns. In every other issue of the Journal, this information is presented by one or more of several insightful and dedicated columnists: Bill Marler, Denis Stearns, Drew Falkenstein, Patti Waller, and David W. Babcock, all of the law firm Marler Clark.*

*The attorneys at Seattle-based Marler Clark, LLP, PS ([www.marlerclark.com](http://www.marlerclark.com)) have developed a nationally known practice in the field of food safety. Marler Clark represents people who have been seriously injured, or the families of those who have died, after becoming ill with foodborne illness during outbreaks traced to restaurants, grocery chains, and other food suppliers. The attorneys have litigated thousands of food contamination cases throughout the United States, many of them high-profile, including the Jack in the Box and Odwalla E. coli outbreaks; the Malt-O-Meal, Sun Orchard, and Chili's Salmonella outbreaks; the Senor Felix Shigella outbreak; and the Subway and Chi-Chi's hepatitis A outbreaks.*

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**A** class action lawsuit is a civil lawsuit brought by one person or a few people as representatives of a larger group—the proposed “class”—whose members have suffered similar harm or have similar claims. Bringing a class action lawsuit serves three main purposes: 1) administrative efficiency, 2) conservation of judicial resources, and 3) quick achievement of a group remedy.

Class action lawsuits offer a number of advantages:

1. They provide for the cost-effective adjudication of small claims when the costs of litigation would far outweigh any potential recovery if the claims were brought individually.<sup>1</sup>
2. In cases with common questions of law and fact, the aggregation of claims into a class action may avert the need to repeat “days of the same witnesses, exhibits and issues from trial to trial.”<sup>2</sup>
3. A class treatment of claims provides the means to effectively impose the costs of wrongdoing on a defendant, thereby deterring future wrongful activities.
4. A class action provides for uniform treatment of the defendant in a single venue, as opposed to the varying outcomes and standards that may be applied to a single defendant facing individual lawsuits in several different courts and jurisdictions.
5. In cases in which the defendant has limited funds to pay multiple claims, a class action centralizes all claims into one venue, where a court can equitably divide the assets among all the plaintiffs if they win the case.

In order to start a class action, one or more plaintiffs must first file a lawsuit claiming some type of common harm. The original plaintiff(s) must define the membership of the proposed class and must then ask the court to certify the case as a class action. According to both federal and state law, the original plaintiffs seeking class certification must generally provide evidence to convince the court that the proposed class meets the following criteria:

- numerosity—the class is so large as to make individual suits impractical,
- commonality—proposed class members have legal or factual claims in common,
- typicality—claims or defenses are typical of the plaintiffs or defendants, and
- adequacy of representation—the representative parties will adequately protect the interests of the class.

In most cases, the party seeking certification must also show:

- predominance—the issues between the class and the defendants that will predominate in the proceedings are ones that class members have in common, as opposed to individual fact-specific conflicts between class members and the defendants; and
- superiority—the class action is superior to individual litigation as a vehicle for resolution of the disputes at hand.<sup>3</sup>

The court's certification of the proposed class is critical; without it, there can be no class action. Should the court deny class status, each claim would have to be asserted individually.

If a class action is successfully certified, class membership will usually be automatic.

All people affected by the action or product at issue are part of the class unless they choose to opt out—that is, if people wish to proceed with individual claims, they are entitled to do so if they give timely notice to class counsel or the court. To ensure due process, the court therefore requires that notices be sent, published, or broadcast to the public by the most effective means possible, in any place where the class members can be found. As part of this notice procedure, class members are also generally informed of their opportunity to opt out of the class.

### When Is a Class Action Lawsuit Appropriate in the Litigation of Foodborne-Illness Cases?

Class action lawsuits involving foodborne-illness outbreaks have been rare, despite the relative ease of establishing the defendant's liability in most recognized outbreaks caused by the sale of contaminated food. The related individual injuries typically involve a significant variety of symptoms and damages, ranging from a few days or weeks of pain and suffering to significant hospitalizations with long-term permanent sequelae or even death. Accordingly, a significant variation in the severity of illness among proposed class members may cause the proposed class to not be certified because of failure to meet the commonality and typicality requirements for class actions.<sup>4</sup>

The first foodborne-illness class action lawsuit in the United States arose due to a large *Salmonella* outbreak traced to contaminated milk sold at Jewel Food Stores in the Chicago area during the late 1980s. Since then, a number of other class actions related to foodborne-illness outbreaks have been brought successfully. It is possible that the increase in similar class actions has in part been due to the widespread media coverage of the successful class action lawsuit related to the 1993 *E. coli* O157:H7 outbreak linked to contaminated hamburgers sold at Jack-in-the-Box restaurants.<sup>4</sup>

Class actions involving foodborne-illness outbreaks are most likely to be certified when

the outbreak results in many mild illnesses, when class members can demonstrate having suffered generally similar symptoms, and when they present relatively uncomplicated and similar claims for damages. In 1997, a Florida court affirmed the class certification for several hundred cases of *Salmonella* poisoning allegedly caused by the consumption of contaminated food from a restaurant over a period of four days.<sup>5</sup> Also in 1997, an Indiana court affirmed the class certification for approximately 70 residents of a nursing facility who alleged claims of *Salmonella* poisoning due to contaminated food.<sup>6</sup> In 2000, an Ohio court affirmed the class certification of over 100 claimants who had allegedly suffered from food poisoning linked to small round structured viruses in food served at a restaurant.<sup>7</sup>

Marler Clark has successfully brought class actions for claims arising from large foodborne-illness outbreaks. Typically, the class of claimants consisted of persons who had suffered similar, relatively small, individual losses. People who suffered from serious injuries were not included in the class definition, or had the opportunity to opt out of the class, so that their atypical claims could be brought individually. These class actions include those brought on behalf of people who had to receive immune globulin (IG) shots to prevent hepatitis A (HAV) infection after being exposed to contaminated food or food and beverages prepared by a food worker who had been diagnosed with hepatitis A infection.

Most recently, Marler Clark filed a class action suit related to the *Salmonella* outbreak that was linked to contaminated Peter Pan and Great Value brand peanut butter manufactured by ConAgra. The Centers for Disease Control and Prevention reported that at least 628 people in 47 states have been confirmed victims of the outbreak linked to the peanut butter. Marler Clark filed a class action lawsuit against ConAgra on Tuesday, February 20, 2007, on behalf of all individuals who became ill with symp-

toms consistent with *Salmonella* infection, but who were not hospitalized, and who have strong evidence that they consumed *Salmonella*-contaminated peanut butter. Marler Clark will pursue individual claims on behalf of all individuals who sustained more severe, atypical, damages, such as individuals who were hospitalized or families of those who died.

Class action lawsuits related to foodborne-illness outbreaks will continue to be unusual because there is significant variation in the extent of injuries and damages suffered by the victims in most foodborne illness outbreaks. Class actions remain a viable option, however, for people who have suffered relatively similar injuries and damages as a result of mass outbreaks of foodborne illness and who seek to recover some compensation for their individual losses. 🐞

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