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Recouping the Costs of Outbreak Investigations and Prevention

Editor's note: From April 2001 to March 2004, the Journal featured a Legal Briefs column that presented short case studies about legal issues important to environmental health professionals. Vincent Sikora, the author of Legal Briefs during that time, passed away in December 2003. Because his columns were well received by many of our readers and provided practical and relevant legal information, we decided to search for a committed columnist with the appropriate knowledge and experience to restore Legal Briefs. We are happy to announce that we found several insightful and dedicated columnists: Bill Marler, Denis Stearns, Drew Falkenstein, Patti Waller, and David W. Babcock, all of the law firm Marler Clark. Their columns will appear in every other issue of the Journal.

The attorneys at Seattle-based Marler Clark, LLP, PS (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.

David W. Babcock, the author of this month's installment of our newly restored Legal Briefs column, joined Marler Clark as the firm's senior litigation associate in 2001. Representing children and the elderly has been central to Mr. Babcock's practice at Marler Clark, where he focuses on litigation resulting from foodborne-illness outbreaks.

Your environmental health agency has just completed a fine investigation of an outbreak of hepatitis A tied to a local restaurant. Although a number of people were sickened, your agency's quick action has prevented many more illnesses by notifying the public of the situation and then offering IgG shots for potentially exposed restaurant customers. In your investigation, you learned that the restaurant manager refused to allow an ill worker, later found to be the index case in the outbreak, to leave his shift as a prep cook, even though the worker was exhibiting clear symptoms of illness. In addition, the investigation uncovered a near total failure by restaurant management to train or supervise employees to avoid bare-hand food contact. In the end, the agency spent tens of thousands of dollars on the investigation, the IgG shots, and the administration of these shots to exposed members of the public.

As you stare at the spreadsheet that shows the better part of your yearly budget having been spent several months ago, you ask yourself, "Are we entitled to have our expenses reimbursed? Even if we are, is that the right move for our agency?"

As is far too typical in legal quandaries, there is no hard-and-fast answer. The best guidance is probably found through a review of cases in which environmental health agencies have sought reimbursement for (some of) their expenses in similar situations.

Are Health Agencies Entitled to Reimbursement of Expenses?

In many cases, health agencies likely have a legal right to recoup expenses incurred in discharging their duty to protect the public. Consider the Pennsylvania Department of

Health's (PDOH's) successful effort to recoup portions of its expenses related to an outbreak of hepatitis A at a casual dining restaurant in the fall of 2003.¹ PDOH sought \$146,610.79 for the cost of purchasing the IgG serum at various clinics it operated to prevent additional illnesses. To assert its claim for repayment, PDOH filed a claim in the bankruptcy court that was overseeing claims against the chain. The basis for the claim was that PDOH was mandated by law to carry out "all appropriate control measures" pursuant to the administrative regulations that created its agency and conferred power upon it.²

Theories for Recovery of Costs—Strict Liability

PDOH's claim against the restaurant chain was based on common legal theories, generally available to any health agency in the 50 states with minor variations. First among these theories is "strict liability." In Pennsylvania, as elsewhere, manufacturers and sellers are liable for all damages caused by their defective products.³ Under strict liability principles, the concept of "privity" has been removed, meaning that the liability of a manufacturer or seller is not limited to the person who purchased the product. As a result, any damages that flow in a "natural sequence of events" from a defective product are chargeable to the manufacturer or seller.⁴

To recover expenses on a "strict liability" theory, a health agency would need to demonstrate that there was a defective product (i.e., contaminated food) and that the costs of investigation or remediation of the outbreak were natural consequences of the defect. In the Pennsylvania hepatitis A outbreak, PDOH was able to demonstrate that there had been

a defective product (i.e., food contaminated with hepatitis A) and that the agency's costs had flowed naturally from its response to the resulting outbreak. In making its pitch to the court, PDOH pointed out that its quick action in administering IgG shots likely saved the company a great deal of money by preventing additional illnesses.

Negligence

The basic components of a negligence claim—duty, breach, causation, and damages—have recently been described in this column.⁵ Breach and damages can generally be easily shown in this context; the other two components prove to be the heart of the matter.

A health agency can demonstrate a “breach of the standard of care” by demonstrating that the entity responsible for an outbreak has deviated in some way from proper food safety and health standards. In many cases, the violation of a health and safety regulation is considered a breach under the doctrine of “negligence per se.”⁶ Damages are obviously present—the cost of the investigation and remediation of the outbreak.

Duty and causation may pose somewhat more complicated and entwined questions. For the element of “duty,” the question is whether the entity that is the source or cause of the outbreak has a duty to the environmental health agency, and not just to its customers. The question of whether there is a duty is often formulated as a question of “foreseeability.” Is it foreseeable that a foodborne outbreak will lead to costs for an agency? It would seem to be rather plain that retailers of food should be well aware that health and safety failures on their part would lead directly to such expenses. As a result, an agency should be able to meet the duty requirement.

Meeting the causation standard involves a similar determination. Legally, it is not enough that “but for” the outbreak of illness, the agency would not have incurred the expenses. Instead, a court will look to determine whether the outbreak was the “proximate” or “legal” cause of the damage (i.e., the incurred expenses). The scope of this “proximate-cause” determination is the subject of nearly endless discussion well outside of the scope of this article. In the end, the foreseeability of the damages that was part of the duty element is often the important factor in the proximate-cause determination. Because the health department expenses flow rather directly from a foodborne-illness outbreak, agencies ought to be able to meet the causation requirement as well.

Should Health Departments Seek Reimbursement of Costs?

It is feasible, in many cases, for a health department to recover at least a portion of costs incurred in responding to an outbreak of foodborne illness. Is it desirable? Again, let's examine the question through an example. In 2003, a *Salmonella* outbreak at another casual-dining chain restaurant led to significant costs for the Lake County Board of Health in Illinois. Believing that several errors on the part of the restaurant's management may have caused or contributed to the outbreak, the board grappled with the question of whether to seek repayment of some of the costs it had incurred.

The Argument For: Replenishing a Strapped Budget to Continue the Agency's Mission

To anyone charged with operating an agency on a shoestring budget, the argument for seeking repayment jumps off the ledger. A for-profit entity, through its own failures to follow established protocols, has endangered the public health and has cost the taxpayers money. A failure to recoup some or all of these costs may further endanger the public in the future since constraints on the remaining budget may limit agency effectiveness. In the case of the Lake County outbreak, health board members cited “the gravity of the outbreak, the underlying poor management decisions that caused the outbreak, the scope of the investigation and necessary follow-up, as well as the number of infected persons” as reasons to seek repayment of costs.⁷

The Argument Against: Fear of Reduced Cooperation

In the early hours of a foodborne-illness investigation, the cooperation of the suspected restaurant or other entity might make the difference in preventing additional illnesses. One concern for environmental health professionals is that the practice of seeking investigation and remediation costs might reduce the likelihood of this cooperation. Dismantling this type of cooperation cuts against the grain of many agencies' current operating approaches.

Board of health members from Lake County echoed these concerns: “Now that we have a more cooperative educational approach we are seeing better results.”⁸ It was also noted that imposing costs after the fact was not directly related to the agency's original goal in such a situation—preventing further primary and secondary illnesses.⁹ Others were concerned that seeking reimbursement could lead to legal costs for the agency and might not ultimately be successful.¹⁰

The Continuing Balancing Act

As is true with much of the work an agency does in maintaining public health, handling outbreaks and associated costs is a balancing act. The question of whether to seek reimbursement has to be addressed on a case-by-case basis. In the end, the same elements that make it easier to succeed in such a claim—egregious behavior by a food provider and extensive costs to the agency—may be the best reasons to seek reimbursement in certain cases. These factors appeared to be the crux of the matter for the Lake County Board of Health: “We fully understand both the reservation to requests [sic] reimbursement as well as the desire to recover some of the substantial costs to conduct the investigation and contain the accident.”¹¹ In the end, agencies will need to evaluate which course of action best serves the underlying purpose of their work. 🐷

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References

1. See *In re Chi-Chi's Inc.*, United States Bankruptcy Court for the District of Delaware, No. 03-13063.
2. See 35 P.S. § 521.3(b), 35 P.S. 521.5.
3. § 402A Restatement (Second) of Torts, American Law Institute, 1965.
4. *Berkebile v. Brantly Helicopter Corp.*, 462 Pa. 83, 337 A.2d 893 (1975).
5. R. Drew Falkenstein, An Introduction to Liability, Negligence, and All Things in Between: Part I. *Journal of Environmental Health*, Sept. 2005, at 40.
6. For a more detailed discussion of negligence per se, see §286 Restatement (Second) of Torts, American Law Institute, 1965. Generally, negligence per se is negligence as a matter of law, meaning the plaintiff does not need to show more than the violation of law. For example, drunk driving, in a civil automobile accident case, is negligence per se.
7. Minutes, Lake County Board of Health, August 6, 2003. Retrieved November 4, 2005, from <http://www.co.lake.il.us/elibrary/meetings/boh/data/m2003-08-06.pdf>.
8. *Id.*
9. *Id.*
10. *Id.*
11. *Id.*