

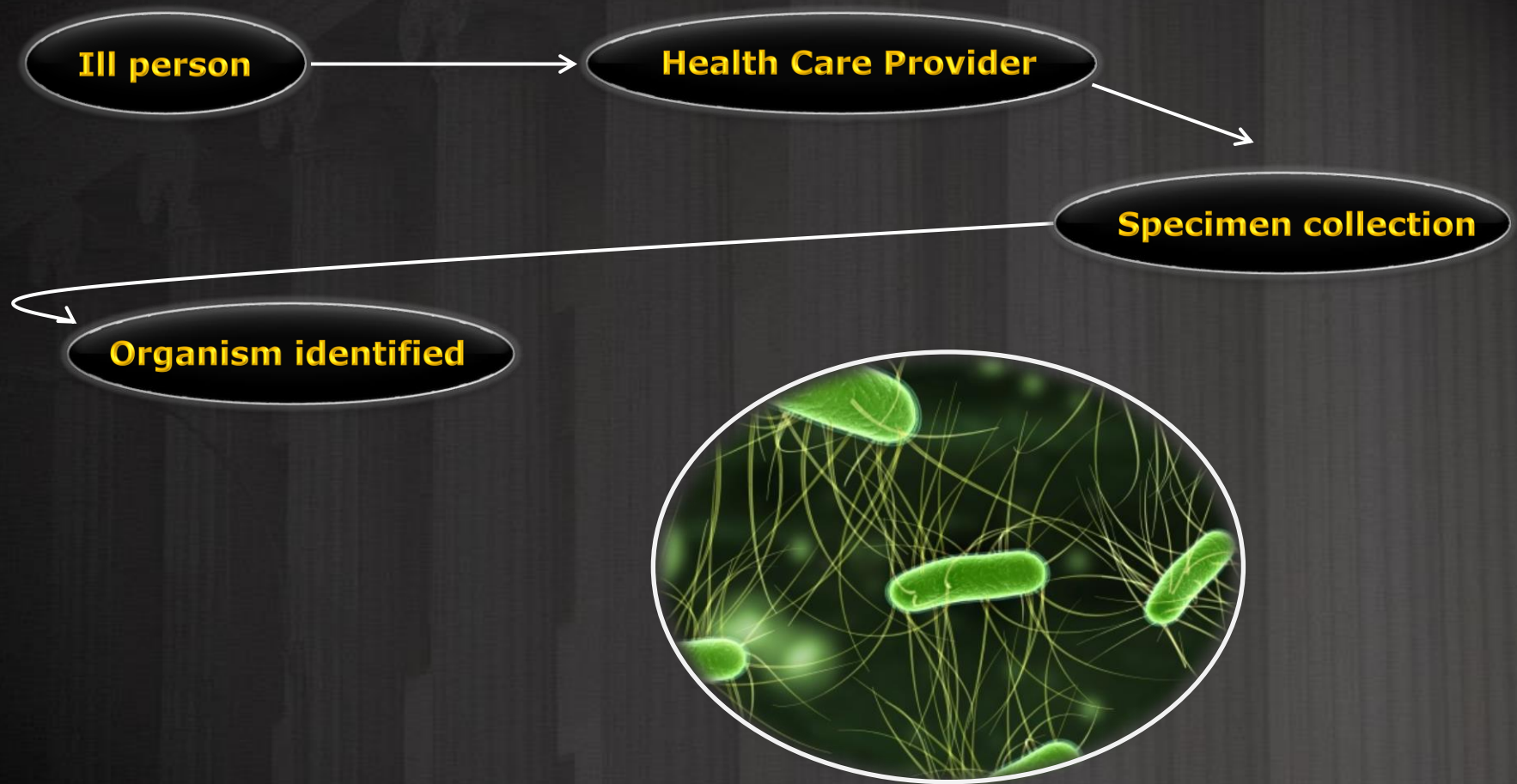


Focus on Food Safety

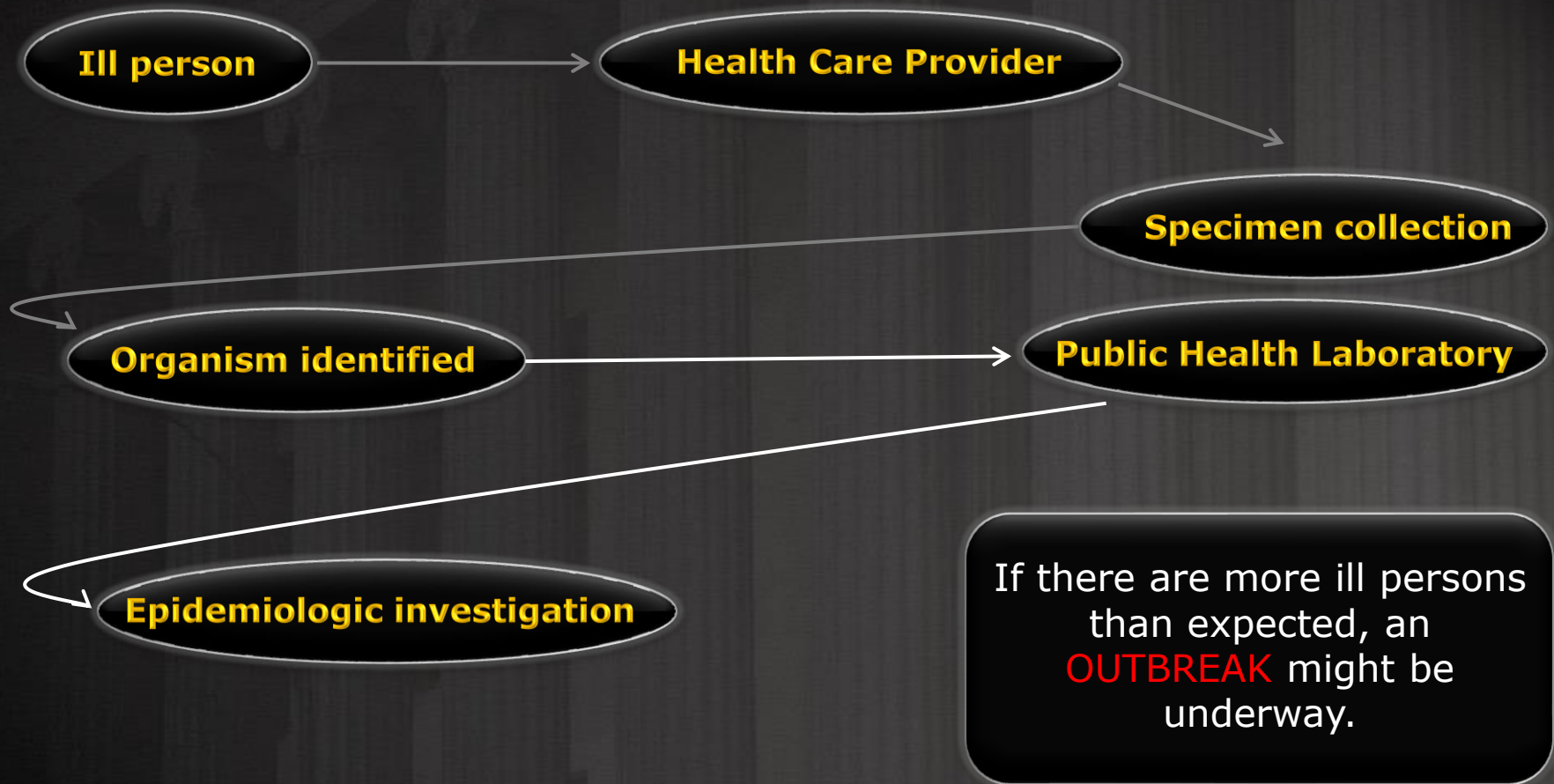
MARLERCLARK
THE FOOD SAFETY LAW FIRM

William D. Marler, Esq.

Pathway of a Foodborne Illness Investigation



Pathway of a Foodborne Illness Investigation



Pathway of a Foodborne Illness Investigation



Strict Product Liability



- Punitive Damages /Criminal Liability
 - Did you act with conscious disregard of a known safety risk?

- Strict Liability
 - Are you a manufacturer?
 - Was the product unsafe?
 - Did product cause injury?
- Negligence
 - Are you a product seller?
 - Did you act “reasonably”?

Who is a Manufacturer?

A “manufacturer” is defined as a “product seller who designs, produces, makes, fabricates, constructs, or remanufactures the relevant product or component part of a product before its sale to a user or consumer.”



RCW 7.72.010(2); see also *Washburn v. Beatt Equipment Co.*, 120 Wn.2d 246 (1992)

It's called STRICT Liability for a Reason



- The only defense is prevention
- It does not matter if the manufacturer took all reasonable precautions
- If they manufacture a product that makes someone sick, they are going to pay
- Wishful thinking does not help

Litigation as Incentive

Jack in the
Box



Odwalla





TO: MANAGER, OPERATIONS SERVICE AND MAINTENANCE, SAN DIEGO

FROM: Wendy Cochran

TITLE/POSITION: Shift leader

RESTAURANT: 8466

PHONE: (602) 435-3178

DATE: 6/10/92

IN THE SUGGESTION BOX

Type of suggestion: (Check)

☐ Restaurant Procedure (POS, Admin, Maintenance, etc.)

☒ Quality Improvement (Procedure, Equipment, Systems)

☐ QSC&P Standards

☐ New Product

☐ Other

Describe change/New Product idea I think regular patties
should cook longer. They don't get done and
we have customer complaints

RECEIVED
JUL 23 1992

Describe change/New Product idea I think regular patties
should cook longer. They don't get done and
we have customer complaints

Describe benefit/New Product build If we change this we
will be making our burgers done and edible.

Wendy Cochran
Signature

6/10/92

ORIGINAL COPY TO: MANAGER, OPERATIONS SERVICE AND MAINTENANCE, SAN DIEGO

SECOND COPY KEPT BY INITIATOR

EXHIBIT
65

LINE NO. 1788



July 24, 1992

Wendy Cocharella
Shift Leader
JACK IN THE BOX #8466
3818 172nd. St. N.E.
Arlington, WA 98223

Dear Wendy:

We have received your suggestion regarding increasing the cooktime for our regular patties.

Your suggestion is currently being researched within the Corporate Office. You will again be notified with more detail as soon as a decision has been made regarding this suggestion.

We would like to acknowledge the time and effort you have taken to contribute to the success of JACK IN THE BOX by enclosing this pen/highlighter. Each person submitting suggestions is eligible to receive one gift per quarter with their first suggestion.

Sincerely,

Randell J. Hoggan

MARK BROWN

We would like to acknowledge the time and effort you have taken to contribute to the success of JACK IN THE BOX by enclosing this pen/highlighter. Each person submitting suggestions is eligible to receive one gift per quarter with their first suggestion.

Mike McQuitty
Janice Eubank, Restaurant Manager J8466
Ed Mulhausen - Northwest
Rex Lynch - Northwest

suggest/jad/suggest

A Division of
Foodmaster, Inc.
1000 Indian Avenue
San Diego, CA 92122-1500
Marketing Address P.O. Box 905
San Diego, CA 92123-0905
619/573-2123



LateNightOC.com



August 28, 1992

Windy Cochineila
Shift Leader
JACK IN THE BOX #3466
3818 172nd. St. N.E.
Arifington, WA 98223

Dear Wendy:

Thank you for your suggestion that we increase the cooking time for our regular portion.

We have researched your suggestion and determined that with the variability of our grill temperatures (350° - 400°) the two minute cooktime is appropriate. If the pizzas are cooked longer than two minutes, they tend to become tough. To ensure that you are meeting quality expectations for regular pizzas, please ensure that the grill temperature is correct and grill temperatures are using proper products.

We have researched your suggestion and determined that with the variability of our grill temperatures (350° - 400°) the two-minute cooktime is appropriate. If the patties are cooked longer than two minutes, they tend to become tough. To ensure that you are meeting quality expectations for regular patties, please ensure that the grill temperature is correct and grill personnel are using proper procedures.

cc: Stephanie Green
Vanessa Fanchin
Mike McQuitty
Janice Eubank, Restaurant Manager 13466
Ed Mulhaussen - Northwest
Rex Lyoch - Northwest

FOCUS: 1/5ad/FOCUS

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MARLER CLARK
THE FOOD SAFETY LAW FIRM

The Most Historic Shift In USDA Enforcement Policy for Meat

“To clarify an important legal point, we consider raw ground beef that is contaminated with *E. coli* O157:H7 to be adulterated within the meaning of the [FMIA]. We are prepared to use the Act’s enforcement tools, as necessary, to exclude adulterated product from commerce. Finally, we plan to conduct targeted sampling and testing of raw ground beef at plants and in the marketplace for possible contamination.”

September 28, 1994

FSIS Administrator,
Michael Taylor, in a
speech to the AMI

E. coli O157:H7 as an Adulterant

MEAT INDUSTRY REACTION:

“How can FSIS treat *E. coli* in hamburger meat as an adulterant subject to enforcement strategies, while not applying the same standard to *Salmonella* in broilers...Such gross policy interpretation favoring the poultry industry and disfavoring the beef industry is a travesty indeed.” —
Rosemary Mucklow

FOOD MARKETING INSTITUTE:

“It is essential that nothing dilute the consumer message that the proper cooking of meat eliminates foodborne pathogens.”

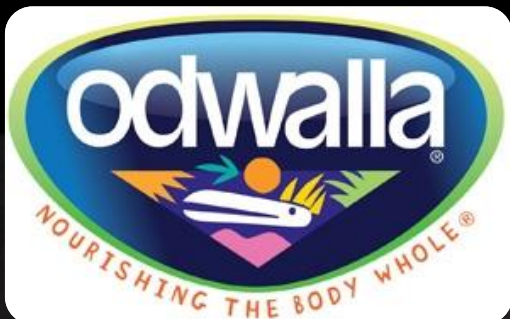
And so, of course, they sued the
USDA

A Positive Tend Line

Marler Clark
Revenue



E. coli
O157:H7



DEPARTMENT OF THE ARMY
HEADQUARTERS, UNITED STATES ARMY VETERINARY COMMAND
2050 WORTH ROAD
FORT SAM HOUSTON, TEXAS 78234-6000

REPLY TO
ATTENTION OF

August 6, 1996

Approved Sources
Division

Odwalla
1900 Davis Drive
Dinuba, California 93618

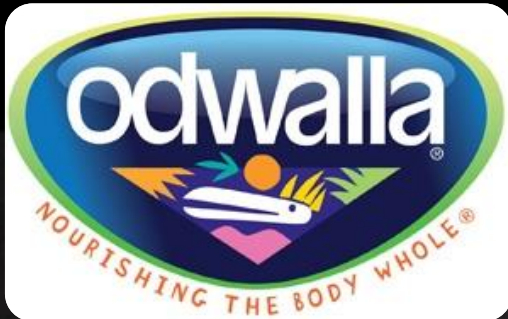
Gentlemen:

We received the report of the June 6, 1996,
initial sanitary inspection of your establishment.

We reviewed the deficiencies noted in the report,
which our inspector discussed with you at the time of
the inspection. As a result, we determined that your
plant sanitation program does not adequately assure
product wholesomeness for military consumers. This
lack of assurance prevents approval of your

We reviewed the deficiencies noted in the report,
which our inspector discussed with you at the time of
the inspection. As a result, we determined that your
plant sanitation program does not adequately assure
product wholesomeness for military consumers. This
lack of assurance prevents approval of your
establishment as a source of supply for the Armed
Forces at this time.


Robert E. Kilburn
Chief, Department of Defense
Approved Sources Division



From: C B
To: SK , FJB
Date: 9/2/96 11:30am
Subject: BSK Testing -Reply -Reply -Reply

It is not the vendors criteria I am concerned about. It is Odwalla's...why are we doing it, why now, what do we WANT TO PROVE...IF THE DATA is bad, what do we do about it. Once you create a body of data, it is subpoenaable...you should look at this as though the Fresno Bee has looked into the results and asked a lot of questions. This should be done in advance so you know what you are in for if you don't like the data. I'm not saying no, I'm just saying that you want everyone in Dinuba on board.

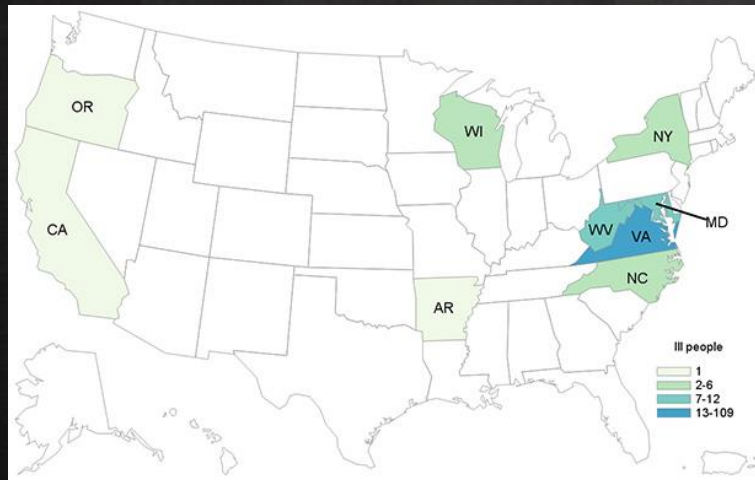
It is not the vendors criteria I am concerned about. It is Odwalla's...why are we doing it, why now, what do we WANT TO PROVE...IF THE DATA is bad, what do we do about it. Once you create a body of data, it is subpoenaable...you should look at this as though the Fresno Bee has looked into the results and asked a lot of questions. This should be done in advance so you know what you are in for if you don't like the data. I'm not saying no, I'm just saying that you want everyone in Dinuba on board.

>>> S K 08/30/96 05:09pm >>>
D , I recently had a conversation with R R about testing within the plant for listeria. I am having him come in on Tuesday and run the first test. I also remember you mentioning that you wanted to run a test with a specific sanitizer. If you can give me a heads up we can talk to R about it. Thanks S .

It is a Global Food Economy



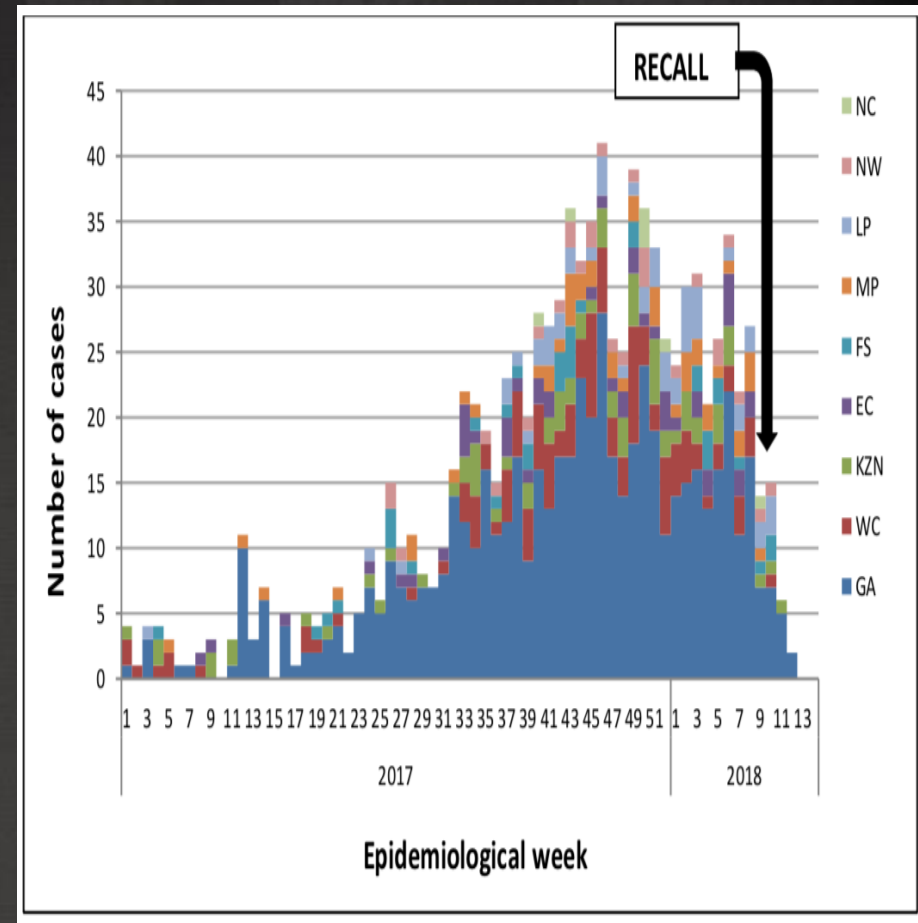
Imports – A New Worry



- The Hawaii Department of Health (HDOH) is investigating an outbreak of hepatitis A in its state. On August 15, 2016, HDOH identified raw scallops served at Genki Sushi restaurants on the islands of Oahu and Kauai as a likely source of the ongoing outbreak.
- On August 18, 2016, Sea Port Products Corp. recalled three lots of frozen bay scallops produced on November 23-24, 2015, in the Philippines. The lot numbers are 5885, 5886, and 5887. The products were distributed to California, Hawaii, and Nevada. 292 people sickened with 2 deaths.
- 143 people with hepatitis A have been reported from nine states: Arkansas (1), California (1), Maryland (12), New York (5), North Carolina (4), Oregon (1), Virginia (109), West Virginia (7), and Wisconsin (3). 56 ill people were hospitalized. No deaths were reported.
- FDA traceback information indicated that the frozen strawberries served in the Tropical Smoothie Café locations were from the International Company for Agricultural Production & Processing (ICAPP), imported from Egypt. On August 8, 2016, Tropical Smoothie Café reported that they removed the Egyptian frozen strawberries from their restaurants in Maryland, North Carolina, Virginia, and West Virginia.

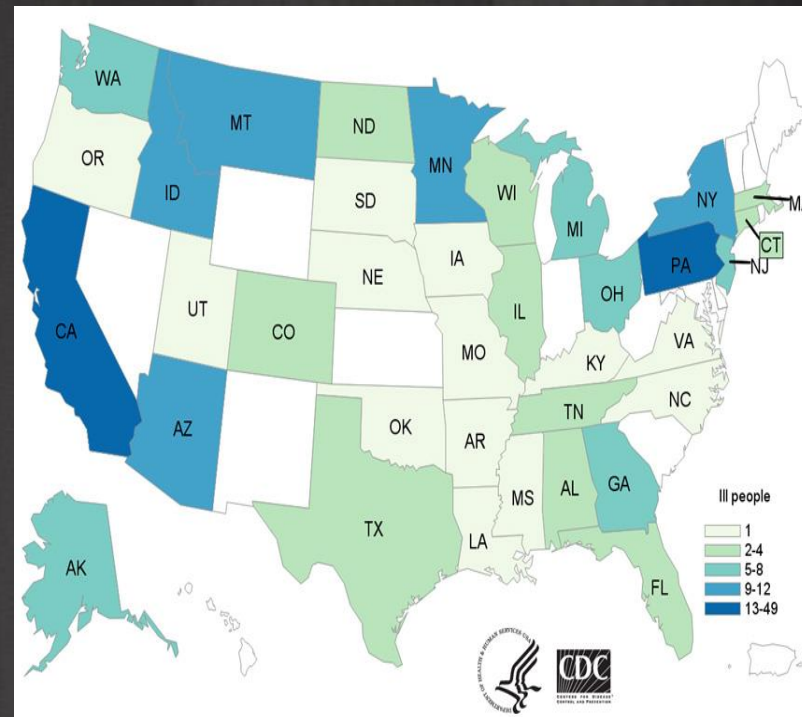
A South African *Listeria* Tragedy

- 1008 cases have been reported since January 2017.
- 743 cases were reported in 2017.
- Females account for 55% cases where gender is reported.
- Ages range from birth to 92 years.
- 204 patients are known to have died – mostly children



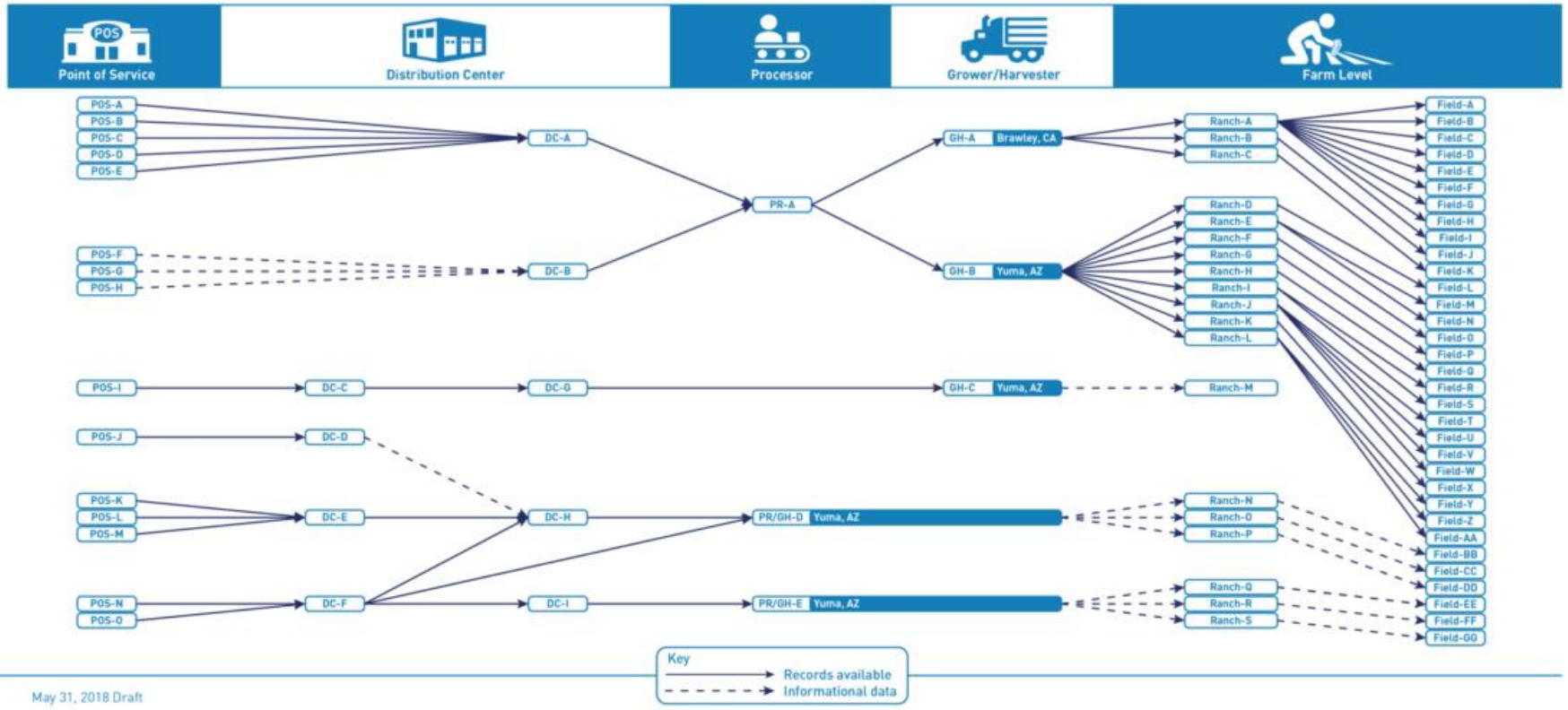
“Romaine Calm”

- A total of 210 people in the United States infected with the outbreak strain of *E. coli* O157:H7 were reported from 36 states. There were 8 illnesses reported in Canada.
- Illnesses started on dates ranging from March 13, 2018, to June 6, 2018.
- Ill people ranged in age from 1 to 88 years.
- 96 (48%) were hospitalized, including 27 people who developed hemolytic uremic syndrome (HUS), a type of kidney failure.
- Five deaths were reported from Arkansas, California, Minnesota (2), and New York.



The Traceback

E. coli O157:H7 – Romaine – Multi-state Outbreak
Master Traceback Diagram



May 31, 2018 Draft

The Source?



Are things are Different Today?



It Started with just a Little Salmonella



- 714 persons infected with the outbreak strain of *Salmonella* Typhimurium were reported from 46 states.. Additionally, one ill person was reported from Canada.
- Among the persons with confirmed, reported dates available, illnesses began between September 1, 2008, and March 31, 2009. Patients ranged in age from <1 to 98 years. The median age of patients was 16 years which means that half of ill persons were younger than 16 years. 21% were age <5 years, 17% were >59 years. 48% of patients were female. Among persons with available information, 24% reported being hospitalized.
- Nine deaths: Idaho (1), Minnesota (3), North Carolina (1), Ohio (2), and Virginia (2).

Then there were Congressional Hearings

- *"Turn them loose," Parnell had told his plant manager in an internal e-mail disclosed at the House hearing. The e-mail referred to products that once were deemed contaminated but were cleared in a second test last year.*
- *Parnell ordered products identified with salmonella to be shipped and quoting his complaints that tests discovering the contaminated food were "costing us huge \$\$\$\$\$."*
- *Parnell insisted that the outbreak did not start at his plant, calling that a misunderstanding by the media and public health officials. "No salmonella has been found anywhere else in our products, or in our plants, or in any unopened containers of our product."*
- *Parnell complained to a worker after they notified him that salmonella had been found in more products. "I go thru this about once a week," he wrote in a June 2008 e-mail. "I will hold my breath again."*



Then a 76 Count Federal Indictment

- Stewart Parnell, the former owner of Peanut Corp. of America
 - Michael Parnell, who is Stewart Parnell's brother and a former supervisor
 - Samuel Lightsey, a onetime plant operator
 - Mary Wilkerson, a former quality-assurance manager
 - Daniel Kilgore, plant manager
- Allegations Include:
 - Mail Fraud
 - Wire Fraud
 - Introduction of Adulterated and Misbranded Food into Interstate Commerce with Intent to Defraud or Mislead
 - Conspiracy



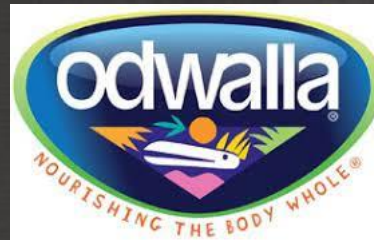
And, It May Not Require Intent?

- A misdemeanor conviction under the FDCA, unlike a felony conviction, does not require proof of fraudulent intent, or even of knowing or willful conduct.
- Rather, a person may be convicted if he or she held a position of responsibility or authority in a firm such that the person could have prevented the violation.
- Convictions under the misdemeanor provisions are punishable by not more than one year or fined not more than \$250,000 or both.



Criminal Sanctions Rare, but Large

- Blue Bell – \$19,500,000 Fine – President went on trial last August on felony charges stemming from 2016 *Listeria* outbreak – 10 sick with 3 deaths.
- Con Agra – \$11,200,000 Fine – Linked to *Salmonella*-tainted peanut butter outbreak 2008 – over 700 sickened.
- Chipotle – \$25,000,000 Fine – Linked to multiple outbreak – *E. coli*, *Salmonella* and Norovirus in 2015 with hundreds sickened.
- Wright County Egg (DeCoster) – \$7,000,000 Fine – Linked to *Salmonella* outbreak that sickened thousands in 2010.
- Odwalla – \$1,500,000 Fine – Linked to *E. coli* outbreak in 1996 that sickened 70, killing 1 child.
- Jensen Farms – Plead guilty to 5 count indictment after 148 sick with 33 deaths linked to *Listeria*-tainted cantaloupe in 2011.



Planning AGAINST Litigation – What Is Really Important

- Identify Hazards
 - HACCP
 - Do you have qualified and committed people?
- What is the Culture?
- Involve Vendors and Suppliers
 - Do they really have a plan?
 - Ever visit them?



Planning AGAINST Litigation – Establish Relationships

They are your best friends!

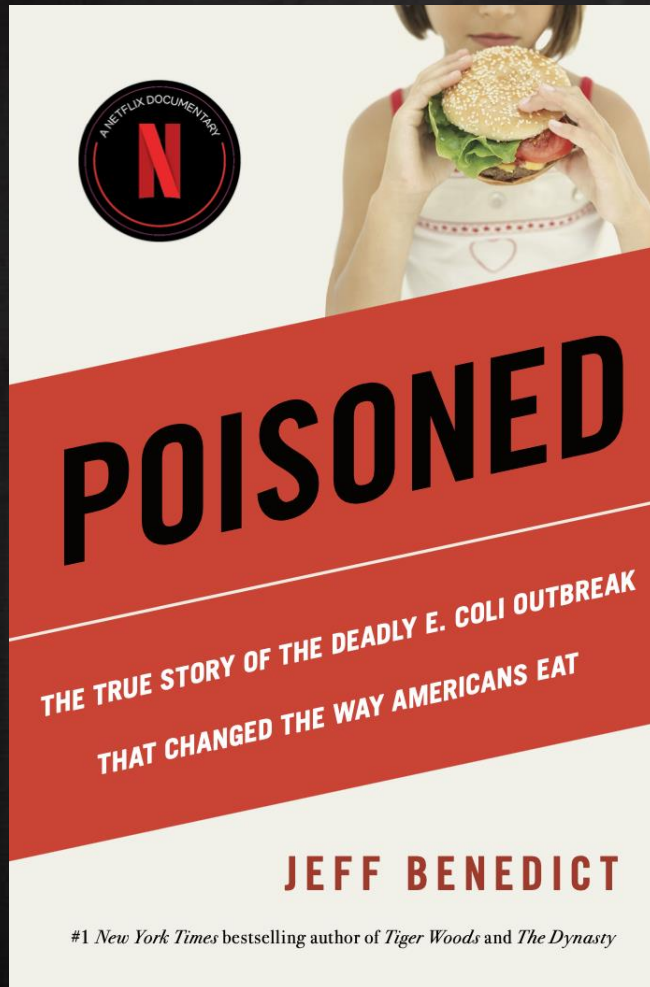


Lessons Learned From Litigation

You can insure the brand's and the company's reputation

1. Arm yourself with good, current information
2. Since you have a choice between doing nothing or being proactive, be proactive
3. Make food safety part of everything you, your suppliers and customers do

Something for Before Lunch Reading



"A stunningly researched work, "Poisoned" reads as though Clarence Darrow had written "The Jungle."

"Just in time for BBQ season, an investigative journalist traces the path of a devastating outbreak of food-borne illness linked to hamburger meat."

Questions

