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**FOODBORNE ILLNESS CLAIMS
LIKELY TO RISE:
PROACTIVE STEPS TO
MINIMIZE RISK**

According to the Centers for Disease Control and Prevention, each year in the United States, some 76 million illnesses, 325,000 hospitalizations, and 5,000 deaths can be attributed to food-borne illness. The Washington Post reported that the recent salmonella outbreak involving peanuts from Peanut Corp. of America reached forty-three states and Canada. Further, that outbreak came on the heels of two other recent outbreaks involving peanut butter and spinach. The significant number of foodborne illnesses each year and the recent national attention on food safety means that defense counsel should take proactive measures to help clients in the food products industry reduce the risk of foodborne illness claims. Here are some steps to consider taking to minimize risk and avoid litigation.

Regularly evaluate clients' policies regarding food manufacture, preparation, storage and service. A carefully crafted policy, routinely enforced by the client, can be an effective tool to minimize risk. Clients' policies should include a policy outlining the process for employees to report food safety concerns. The client should ensure that all reports submitted under the policy are maintained and that a proper response is made and documented.

Instruct clients to document the content and regularity of any food safety training

undertaken by employees. Also, such documentation will help the client evaluate potential areas of risk and identify areas where additional training may be necessary. Further, if litigation does develop, the client will be armed with evidence of its reasonable efforts to prevent harm.

Review the clients' contracts with vendors. If the client has sufficient leverage, it may be able to obtain indemnification for any contaminated food provided by the vendor. In addition, certain companies provide auditing services specific to the food industry. Clients should consider using only those vendors that can provide proof of high audit results. Ultimately, when a client takes efforts to ensure its workforce is educated concerning food safety matters and armed with a process for reporting any issues, the client's risks will be reduced and, in the event litigation does develop, the client will be able to establish that it exercised reasonable care. Further, an evaluation of the clients' contracts and selection of vendors will enable the client to not only reduce the risk of a food-borne illness claim but to spread the risk if litigation arises.

If a food-borne illness claim does arise, counsel should act quickly to gather all possible samples and a "food history." If the Indiana Department of Health ("ISDH") is already involved, counsel should contact the ISDH to ascertain what information the department has gathered. Consideration should be given to contacting the claimant to obtain a stool sample. Such a sample can be important in identifying what pathogen, if

any, caused the illness. Knowing the pathogen permits identification of the applicable incubation period, which may be dispositive of the claim. Many lay people assume that a food-borne illness was caused by the last meal consumed before symptoms developed. In fact, food-borne pathogens have incubation periods ranging from an hour to several days. Thus, if the pathogen can be identified, it may be possible to demonstrate that the claimant did not consume the clients' product during the applicable incubation period and thus that the client cannot be held responsible. Also, determine if any of the food at issue is still available. If so, a sample of the food should be sent for testing. Finally, counsel should obtain a food history from the claimant. The common misconception that the last meal caused the illness means that when the ISDH investigates an illness days or weeks later, or worse when counsel conducts discovery months or even years after the illness, the only meal the claimant may remember is the last meal, which he associates with his illness. Oregon and Minnesota both provide copies of their state health department questionnaires on their respective websites, which provide a great start for obtaining a claimant's food history.

Counsel should also work with the client to gather all necessary documents, such as

contracts with vendors or distributors related to the product; all invoices for the purchase of the product by the client and the sale of the product to any consumers, including any records showing the method of transporting the product to the client or to a sales point; any indemnification agreements related to the product; and any records documenting the preparation or storage of the product. These documents may enable counsel to eliminate the client's product as a source of the illness. Even if the documents do not provide such a clear cut defense, and they often will not, they will ensure that documents necessary to put on a proper defense are not lost or destroyed.

Given the recent news reports, food-borne illness claims are likely to rise. You can help your clients by recommending that action be taken now to prevent litigation later.

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