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Where's the Meat? The Need for Full Public Disclosure in Meat Recalls

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.

Patti Waller joined Marler Clark in 2003 after 12 years as an epidemiologist at the Washington State Department of Health. Patti brought her knowledge of the public health system to Marler Clark and serves as a liaison between public health agencies and the firm.

Denis Stearns, one of the founding partners of Marler Clark, got his start in foodborne and other outbreak-related litigation as one of the lead defense attorneys in the Jack in the Box E. coli outbreak litigation. It was with the cases arising from the Odwalla apple juice E. coli outbreak that he began primarily representing injured persons. He is a frequent speaker and writer on issues related to food safety law, administrative regulation, and public health policy.

As the content of this article began to take shape, a newly released U.S. Department of Agriculture (USDA) proposal abruptly altered the focus. Instead of discussing the pros (few) and cons (many) of USDA's current recall policy, one that keeps potentially important product information from consumers, we write now in support of USDA's newly proposed rule, one that would make public lists of retail outlets that have received potentially unsafe meat products.

Food recalls are voluntary events. The two federal agencies—USDA and the Food and Drug Administration (FDA)—responsible for food safety have no legal authority to require companies to carry out a recall of food.¹ (The sole exception is that FDA has the authority to order a mandatory recall of adulterated or misbranded infant formula.) To the extent that these agencies can compel a food recall, it is only because of an understood threat that the agency can take

other regulatory action, such as issuing a warning letter, seizing product, or pursuing criminal prosecution—all of which would create adverse publicity about the company's lack of cooperation. None of these actions are effective in quickly removing unsafe food from the market; only a recall, voluntary or not, can accomplish this important public safety goal.

USDA provides guidance to companies for carrying out voluntary recalls of meat, poultry, and egg products, and it monitors those recalls. There are three classes of recalls:

- Class I—for situations presenting the greatest risk to human health. An example would be a recall of meat containing *E. coli* O157:H7 or *Listeria monocytogenes* in a ready-to-eat product. Another example would be a product that contains peanuts or eggs not identified on the label, thus posing a severe risk of illness or death to someone allergic to these ingredients.
- Class II—for situations presenting a health hazard situation in which there is a more remote probability of adverse health consequences from the use of the product.
- Class III—for situations in which the use of the product will not cause adverse health consequences, but the product is still otherwise misbranded.²

In October 2004, a report issued by the Government Accountability Office (GAO) identified serious weaknesses in the current food recall system.³ A comparison with the system of the Consumer Product Safety Commission (CPSC) is illustrative. By law, a manufacturer faces penalties of up to \$1.65

million if it does not notify CPSC that one of its products has the potential to cause serious injury or death. In contrast, food companies are not required to notify any agency when potentially unsafe food has been identified.

The GAO report also noted that procedures USDA uses to alert consumers to a recall “may not be effective.” Both USDA and CPSC rely on press releases issued by the company recalling the product and agency Web postings, but the information that the two systems provide to the consuming public is markedly different. Under current rules, a USDA recall notice cannot identify specific stores or retailers that might carry the contaminated meat. The alert provides only a general description and product code for the food product that is being recalled. Consider a February 16, 2006, recall alert posted on the USDA Food Safety and Inspection Service (FSIS) Web site that Chung’s Gourmet Foods was voluntarily recalling chicken egg rolls because they were labeled as being filled with chicken but may have instead been filled with shrimp, a known allergen. FSIS identified the labels of the products being recalled:

36-ounce packages of “China Express, Chicken Egg Rolls, With Sweet & Sour Sauce Packets, 12 Count.” Each package bears the establishment number “P-13218” inside the USDA mark of inspection. The packages also bear the case code “2003425” or “1003425.”⁴

FSIS reported in its press release that “the egg rolls were produced on December 8, 2005, and were shipped to distribution centers and retail establishments nationwide.” But specific distribution centers and retail establishments that sold the product were not identified. Consumer advocacy groups such as the Center for Science in the Public Interest argue that most recall notices issued by USDA are not useful to consumers because they lack the specificity—such as store locations—that consumers need to help them determine whether they purchased food that is being recalled.

CPSC has no such restraints, as illustrated as recently as March 1, 2006. That day, CPSC issued a press release alerting consumers that Glowin’ Dino and Glowin’ Doggy Animal Flashlights that had been sold at Target stores nationwide between November and December 2005 were being recalled because paint used on the flashlights could contain excess levels of lead. The CPSC press release included a complete product description, identified retail outlets where the product was sold, and provided consumers with product codes and photos of the products being recalled.⁵ Target

also posted the recall notice on its Web site.⁶

A 2002 USDA FSIS rule allowed the agency to provide specific retail information to state health agencies, *but only if* states promised not to share the distribution lists they were given. Officials of other federal agencies would need to provide a similar written commitment. While the rule was promoted as a way to better protect public health, placing restrictions on release of the information was also seen as a way to protect “confidential commercial information that is valuable to a firm and to its competitors.”⁷

By 2005, only 12 states had signed a memorandum of understanding (MOU) to participate in this program, which would strictly prohibit sharing information with the public. The “public” in this case also included local health departments, often the agencies most responsible for conducting verification checks that contaminated meat had been pulled from the market. Plainly, support for the USDA policy was minimal, if that.

For example, when Californians learned that meat from a cow that had tested positive for bovine spongiform encephalopathy (BSE) (or “mad cow disease”) had been distributed to retailers there, local health officials admitted to being unable to effectively respond because of the state’s participation in the MOU agreement. The ensuing uproar called attention to MOU restrictions and prompted state legislators to propose legislation (California Senate Bill 1585) to overturn restrictions in the MOU agreement.⁸ Governor Schwarzenegger vetoed the measure.

On the national level, the Infectious Diseases Committee of the Council of State and Territorial Epidemiologists (CSTE), a professional association with over 850 public health epidemiologists, issued a position statement.⁹ CSTE called for the removal of restrictions against the release of information to public health officials. It noted that notifying the consuming public of where contaminated product had been distributed, allowed affected customers to then “dispose of or return the product; and, if the product were already consumed, to self monitor for symptoms and consult their doctor, if needed.”¹⁰ There was no apparent official response by USDA to the position statement. Not long after, however, important changes to the USDA recall process were placed under consideration.

On March 7, 2006, in a welcomed move, USDA proposed amending its food recall process by making lists of retail outlets for meat and poultry products available to the pub-

lic—something state health departments and environmental health agencies had by then been arguing in favor of for several years. In the proposed rules, USDA stated that FSIS is proposing to routinely post these retail consignee lists on its Web site as they are developed by the Agency during its recall verification activities.

FSIS is proposing this action because it believes that the efficiency of recalls will be improved if there is more information available as to where products that have been recalled were sold. By providing consumers more information about the locations where recalled products have been sold, FSIS believes that consumers will be more likely to identify and return such products to those locations or to dispose of them.¹¹

The revised recall policy proposed by USDA represents a commonsense approach that balances industry concerns and the public’s right to know. It is thus deserving of widespread public support. More can, of course, be done to improve recall policy, not the least of which is the creation of a single food safety agency with the authority to mandate the immediate recall of potentially unsafe food. But, as with all things, progress comes in small steps. And the small step proposed by USDA to make recall-related distribution lists public is a step worth taking indeed. ■

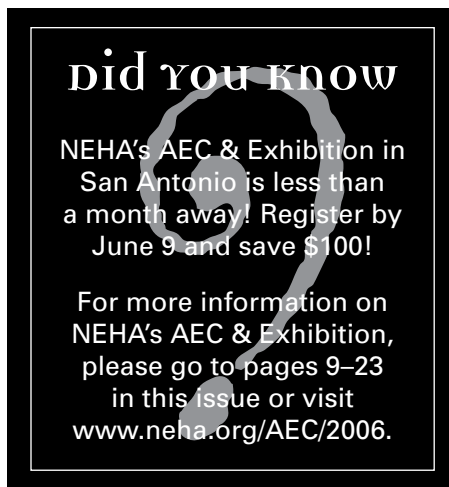
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References

1. For an interesting and in-depth discussion of the food recall system, and an argument in favor of creating a single food safety agency with mandatory recall authority, see Michael T. Roberts, *Mandatory Recall Authority: A Sensible and Minimalist Approach to Improving Food Safety*, 59 *Food and Drug Law Journal*, 563-583 (2004).
2. See “FSIS Food Recalls” (2006). Accessed April 5, 2006, at http://www.fsis.usda.gov/Fact_Sheets/FSIS_Food_Recalls/index.asp.
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- Better Ensure Prompt and Complete Recalls of Potentially Unsafe Food* (2004). Retrieved April 6, 2006, from <http://www.gao.gov/new.items/d0551.pdf>.
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 10. *Id.*
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