

HAMMER TIME

Preparation pays when disputes escalate to lawsuits

By David Hendee
Meat & Poultry Magazine
meat&poultry@sosland.com

Bill Marler has heard them all: “It’s not fair.” “People are just suing over a tummy ache.” “We shouldn’t be blamed. Although somebody got sick, we did everything right. Why can you sue me?” But Marler doesn’t accept the excuses.

Bill Marler, of course, is William D. Marler, the Seattle trial lawyer whose firm is one of the nation’s foremost litigators of lawsuits representing victims of foodborne illness. Since 1993, Marler and his partners have won millions of dollars in judgments and settlements in cases involving tainted food.

Marler’s high-profile product liability practice is just one example of the legal challenges facing the meat and poultry industry. Although lawsuits are part of any business—and as America continues to become a more litigious society—meat and poultry companies are seeing legal flare-ups on a variety of fronts including labor issues, environmental pollution and retaliation by disgruntled employees.

There is one sure strategy, however, to prepare your company for potential litigation for any reason: Don’t make mistakes. “Close the loops,” says Phil Olsson, a Washington, D.C. – based attorney who represents the National Meat Association and other trade associations and companies.

“Practice preventive maintenance,” says Richard Alaniz, a Houston labor-issues attorney.

“The best way to get ready for litigation is to avoid it,” says Mark Dopp, legal counsel for the American Meat Institute, Arlington, Va.

“In every case that I have been involved in, there always is a mistake that leads to people getting poisoned,” says Marler. “There always is a decision that somebody makes or chooses not to make that ultimately is the thing that starts the series of events that leads to an outbreak.”

And finally, “Hire a good counsel who tells you what you need to hear, not what you want to hear,” says Michele Corash, a San Francisco attorney who has defended many businesses and trade groups sued under California’s Proposition 65, a law intended to protect people from environmental toxins and other substances.

Olsson, a founder and senior principal of Olsson, Frank and Weeda, says plaintiff’s lawyers are skilled at pointing out where food companies make mistakes, whether it is a food-safety concern,

a labor dispute, or any other issue. “People go wrong by not closing the loop, by not following up where there is a suggestion that something is amiss,” he says.

Closing the loop includes understanding and addressing new requirements whether they are labor issues or food-safety guidelines.

“You get the culture you create,” Olsson says. “You’ve really got to get into this. If you have a recall situation, for example, you really want to get your arms around it and get control of the facts early. You don’t want to say, ‘I don’t want to deal with that.’”

Olsson says the longer company executives put off dealing with a situation, the more the facts evaporate. Likewise, managers hoping that no news is good news are apt to lose control of information that could be their best defense.

“If the facts are going to hurt you, they’re going to hurt you more later than they will if you deal with them up front,” he says. Corash’s version of “closing the loop” is this: Don’t provide the plaintiff with the gun and the bullets he needs to fight. Most companies that are sued are themselves the source of the plaintiff’s best ammunition—documents created and kept, carelessly written e-mail messages, and internal policies intended to set worthwhile goals but are ignored or not quite achieved.

“If you treat every word you write, electronically and otherwise, and every message you record as one which will one day end up in the hands of an adversary, you will probably leave them with very little to work with,” Corash says. “Every paper trail should have an ending that shows the company in the right light.”

Corash, of the firm Morrison & Foerster ((cq, Foerster)), has three other tips for avoiding or preparing for litigation: Keep up with the “flavor of the month.” At any one time there is a chemical or health scare that is the current buzz and focus of news reports. It may be obesity one day, food preservatives or growth hormones the next. Many plaintiffs’ lawyers get their cases by reading newspapers. Even when a story is no longer news, it can leave a trail of lawsuits in its wake. Know what the plaintiffs are reading and don’t assume that they will read the news with the same skepticism you do.

Be involved in setting government standards that protect the public in a way that is practical. It can be done. There is a mistaken tendency for companies to think they can’t influence the process or that it should be left to lobbyists. Even if you think a particular standard is unnecessary or ill advised, get involved not only in arguing the necessity of the law or regulation, but also to make sure that if adopted, it is feasible.

Watch what happens in California. There are more lawsuits coming out of California than any other state. Its pro-plaintiff laws give plaintiffs broad tools to bring lawsuits not only where they claim injury, but even where they were not injured but legal standards were violated. Other states often follow.

Dopp expects that both serious and frivolous product liability lawsuits will continue to trouble the industry. “It will always be there at some level,” he says, “unless and until the industry can make everything perfect. We’re just not there. We can’t produce a sterile product at this point, unless it’s irradiated or we cook everything—and that’s not the way people like to buy their meat.”

Dopp says the short-lived but widely publicized lawsuits that named McDonald’s food and Oreo cookies as not healthful are examples of an emerging trend in lawsuits against food companies. “I think we will see more of those cases run up the flagpole,” he says. “The fact that they aren’t meritorious isn’t going to stop some plaintiff’s lawyer from taking a run at them.”

Marler says companies should fight frivolous lawsuits. “It doesn’t do anybody any good to just pay off somebody who’s trying to shake them down,” he says. “It doesn’t do the plaintiff’s bar any good. It doesn’t do real victims any good and it doesn’t do industry any good.”

Dopp says food companies could avoid legitimate legal trouble by focusing on producing the best and safest product possible. “You don’t get sued if your products don’t

Make people sick,” he says. “If you’re putting out the highest quality, safest, best product possible, you minimize the likelihood of getting sued. That’s your best defense.”

This past spring, A.M.I. sponsored its first workshop for members to share their best meat-slaughter practices. The goal was to gather managers and supervisors from companies across the country to share information about techniques that work in their operations. Dopp says, “our member companies allow us to pick the best and the brightest in our industry to share information so everybody can have the best chance at doing the best they can to ensure they produce the safest product.”

Alaniz says “class-action fever” is a growing trend across the country. Plaintiff’s lawyers, for example, have found many meat industry companies to be vulnerable in complying with wage and hour rules in the Fair Labor Standards Act.

Corporate neglect of employee issues can, in part, be attributed to the decline of unions in the meat and poultry industry during the past 30 years. “Union contracts addressed these issues and as unions have waned in the meat industry, employee policies have not necessarily kept pace. It’s not until somebody brings a lawsuit or a complaint is filed that employers even focus on that particular issue,” says Alaniz.

Alaniz encourages companies to perform periodic self-audits of labor and employment policies. “It starts before employees get in the door and it doesn’t end unlike they leave,” he says. “Check on how you recruit for workers and what obligations you have to affirmative action laws. Make sure you’re paying properly. Are you paying people for the breaks they take? Are you giving them the breaks they’re entitled to? All it takes is one instance of somebody saying, ‘I didn’t get my break,’ and all of a sudden it becomes an epidemic of complaints.”

In the daily grind of business it is easy to put these issues on the back burner, Alaniz says, but it can be costly. “Sometimes in this industry there is such a press to get bodies in the door and to keep them in the building working that we lose sight of some of these things,” he says. “It isn’t until a charge or lawsuit is filed that it ever comes to light.”

Marler is a frequent guest at meat and poultry industry conferences across the country. Paid only for their expenses, Marler and his colleagues from the Marler Clark firm produce a couple of video and PowerPoint presentations per month on how food companies can avoid tangling with them in court.

The presentations are made under a non-profit wing of Marler’s firm known as Outbreak, Inc., a consulting company started in 1998. Marler usually opens with a short video depicting people who have developed severe health problems or died after eating tainted food. Marler continues with a slide show that invites discussion.

His bottom line pitch is that there is a moral reason not to poison your customers – not to mention lost profits, the hassle of news media scrutiny, the headache of recalling product, and the fact that a lawyer like Marler will show up on your doorstep.

He is often invited back to address conferences annually by organizations eager to hear his message. Still, he says, some don’t take it seriously enough. Marler says it is too easy to look at U.S. Centers for Disease Control and Prevention statistics that indicate microbial pathogens in food cause an estimated 76 million cases of illness in Americans each year, including 325,000 hospitalizations and up to 5,000 deaths, and only about 150 lawsuits.

“Most people don’t figure out what made them sick so the chances of a company getting caught sometimes drives their complacency,” Marler says. “If they’re not going to get caught, do they really need to spend that extra \$100,000 to avoid making somebody sick? That’s still a big driving issue.”

Marler says it is cheaper and better in the long run for food companies to establish strong relationships with federal, state and local regulatory agencies and public health offices. “They are your best friend,” he says.

Companies that work hard to learn as much as possible about food safety in cultivating relationships by inviting inspections and sending employees to seminars invariably have fewer legal problems, Marler says.

“If they do have a problem the health department people usually go to bat for them, and that makes my job far more difficult,” he says.

Under the legal standard of strict liability, plaintiff’s lawyers only have to prove that a product was contaminated when it left a processing facility and that it made someone sick.

Marler says ConAgra Foods recently provided a textbook example of how to properly handle potential litigation. ConAgra recalled 18.6 million pounds of beef in July 2002 because of

suspected E. coli O157:H7 contamination. Health officials in 23 states blamed the beef for making 47 people ill. “They investigated it. They understood the facts that they had a problem and they understood there was little room for them to maneuver,” Marler says. “So what did they do? They called immediately and offered to pay the kids’ medical bills and parents’ lost wages.” Then attorneys sat down and started settling the cases one by one.

“The victims needed to be compensated fairly and the company wanted to get off the front page of newspapers.”

Companies can best prepare for potential litigation by simply making food safety a part of everything they do, says Marler.

“They need to think about who their customer is and how the customer really does handle the product. “Customers are not statistics. They’re real people. They aren’t sophisticated in food microbiology and they aren’t sophisticated in the proper cooking techniques to handle a bacterium that could kill them. That’s the reality of it.” M&P

The author is a contributing editor to M&P and covers trends and issues on the Great Plains for the Omaha-World Herald.