

SPECIAL CONSIDERATIONS WHEN RESPONDING TO AND DEFENDING AGAINST CLAIMS
INVOLVING E. COLI EXPOSURE
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INTRODUCTION

Although E. coli outbreaks are not a recent phenomenon, media coverage of E. coli outbreaks at Chipotle restaurants in 2015 brought increased attention to this issue and the growing litigation surrounding E. coli outbreaks. These types of incidents pose a significant risk exposure to businesses and their insurers as the losses typically involve multiple claimants infected with potentially life threatening illnesses. In the case of one of the larger Chipotle outbreaks, the Centers for Disease Control and Prevention (CDC) reported a total of 55 people in 9 states infected with E. coli. (See <http://www.fda.gov/Food/RecallsOutbreaksEmergencies/Outbreaks/ucm470410.htm>)

In order to properly evaluate and defend against E. coli claims, we must understand what E. coli is, how it works and the injuries it can cause. Understanding E. coli will help in evaluating both liability and damages, as each E. coli case, even within the same outbreak, can produce different results among various claimants. Once we have an understanding of E. coli we will also examine settlement strategies that can be utilized both before litigation commences and prior to trial. Finally, we will also examine trial strategy. Discussing each of these topics will provide a useful framework for handling E. coli claims.

WHAT IS E. COLI POISONING?

E. coli poisoning is a gastrointestinal illness that can be caused by food, water or animal feces contaminated with strains of E. coli bacteria. There are numerous strains of E. coli, many of which are not only harmless to humans but actually help us to survive.

Certain strains of *E. coli*, however, including most commonly 0157:H7, 026 and 0121, produce Shiga toxins that can cause severe illness or even death in humans. *E. coli* bacteria will travel to the large intestine resulting in an inflammatory disease that can be serious enough to require a colectomy. In some instances the Shiga toxins will enter the blood stream affecting the kidneys. This can result in serious injury including hemolytic uremic syndrome (HUS) that causes kidney failure, damage to other organs and even death.

Recognition of *E. coli* poisoning may not occur right away. The incubation period typically takes about 3 to 4 days. This poses interesting problems in identifying the source of the infection. Reaction to the infection is typically painful and can include severe cramps, watery or bloody diarrhea, fever, nausea and vomiting. Early recognition and medical oversight during the early stages of the infection are essential and may help prevent more serious outcomes. When evaluating these types of claims it is important to examine the medical response, including the timing of the response, to determine whether appropriate medical intervention occurred.

IDENTIFYING A COMMON SOURCE OUTBREAK

As stated earlier, recognition of an *E. coli* infection will typically occur days after inoculation. Identifying the source of the outbreak will therefore involve careful investigation. Both the CDC and local agencies like the State Department of Health are equipped and tasked with responding to potential disease outbreaks. These agencies conduct interviews of those infected and provide surveys that examine where individuals have traveled, what food they've purchased and consumed, and other information (including collection of fecal samples in some instances) in an attempt to identify a

common source among those infected. In cases involving food poisoning or exposure to contaminated fecal matter there may numerous individuals affected and thus finding common sources is frequently obtained by gathering information from multiple individuals who have experience similar symptoms, over the same time period, in the same proximate geographical location. In some cases however, contaminated food may be shipped to multiple sources over a vast geographical range.

Once the agencies have information sufficient to identify a potential common source they will collect samples from that source and prepare reports with their findings and conclusions. These investigations are a useful tool for Plaintiffs attorneys who can simply rely on these agencies and their findings without the need to hire their own experts and conduct their own costly investigation. In addition, these reports may be considered public records and therefore automatically admissible under The Rules of Evidence 803. See Fed. R. Evid. 803(8). Investigators from the agencies who prepare these reports may also be protected from involvement in the litigation and their findings not subject to cross-examination. This presents a harsh reality for adjuster and defense attorneys who must either hire their own experts to review and opine on the investigation and findings of the government agencies or simply accept the findings of the agencies. In this sense, Plaintiff's attorneys essentially have their discovery conducted for them, at no expense, by agencies typically deemed as reputable by the public.

RETAINING EXPERTS

Adjusters and attorneys will need to consider hiring both liability and damage experts. In some case the fact that an outbreak has occurred does not necessitate a determination of fault on the business where the outbreak occurred. E. coli, after all, is a

microscopic bacteria invisible to the human eye. If the insured business had in place, and complied with, industry standards, especially those involving sanitation and appropriate hygiene, that evidence can be used as the basis for a summary judgment motion or, at a minimum, as leverage in settlement negotiations.

In certain scenarios, involving smaller “ma and pop” operations, liability defenses may be even stronger. There have been several E. coli claims involving petting zoos, apple orchards, pumpkin patches and other similar farm-setting festivals or attractions. These types of settings pose a risk of E. coli exposure through contaminated fecal matter from farm animals. In instances where these operations have provided suitable options for guest to wash or sanitize their hands after interacting with animals, liability will certainly be debatable.

Medical experts will also play an important role in E. coli cases. Treating doctors and specialists will be relied upon by Plaintiffs to establish the harm suffered and the potential risks and injuries that may present themselves in the future. Adjusters may want to get their own medical evaluation, not only of the claimant and their current medical situation, but also an evaluation of the treatment that was provided. This serves at least two useful purposes: 1) Examining the initial response and treatment can provide useful information and predictors regarding future outcomes for the claimant; 2) examining early treatment may reveal misdiagnosis or improper care that exacerbated or worsened an otherwise treatable incident.

In cases involving children or young adults it may also be necessary or useful to retain a vocational expert, particularly when the Plaintiff offers allegations regarding work or earning limitations in the future.

SETTLEMENT/MEDIATION

Settling E. coli cases can be uniquely difficult particularly when it involves a mass injury with multiple claimants. Communicating with the claimants attorneys early so that they can manage the expectations of their clients is essential. For instance, in claims involving multiple injured parties and a single negligent party with limited policy limits, an adjuster may be able to convince some claimants to settle early. That allows the adjuster to use those settlement and the diminishing policy funds to incentivize the remaining claimants to settle before the policy is exhausted. Other potentially negligent parties should also be looked to for settlement contribution based on their anticipated portion of fault.

Attorneys and claims adjusters should also consider the benefit of the meditation process in resolving difficult cases like these that involve specialized scientific and medical knowledge. Evaluation of these claims typically involves the review of a large volume of scientific literature and medical records. Finding a mediator with experience in these types of claims will likely be beneficial to all parties involved.

TRIAL

As in any case, it is important to consider the attorneys on the other side. Research into prior disease outbreak claims and verdicts by the opposing counsel should not be discounted. The jurisdiction is also an important consideration not only when assessing what the measure of damages are but also when examining verdict range. Perhaps more important than any other factor, however, will be the opposing party. Even with a strong liability case it can be difficult to overcome an overly sympathetic Plaintiff such as a sick child. Putting in the work in at the discovery stage to evaluate the

claimants will help give the attorney and adjuster an idea of what best and worse-case scenarios will look like. Using the jury instructions for the subject state in depositions and taking the claimants through the damage items one by one is one of the most effective ways to prepare for trial.

CONCLUSION

With a growing number of claims involving E. coli exposure it is important to understand and consider the various nuances of an E. coli claim. Knowing about E. coli will help to better understand and evaluate a claim for damages caused by an E. coli outbreak.