

# Litigation Strategies For Responding to Significant Consumer Threats

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Cultivating Our Future:  
New Landscapes in Food and Agricultural  
Law and Policy

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# Litigation Tools

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- Is the Claim Legit?
- Obtaining Records
- Determining Trial Strategy ASAP
- 3 Types of Consumer Claims



# Legitimate Food-Borne Illness Claim?

Pathogen	Incubation	Symptoms	Duration	Source
Enterohemorrhagic E. coli, including E. coli O157:H7 and other Shiga toxin-producing E. coli (STEC)	1-10 days; usually 3-4 days	Diarrhea, frequently bloody; abdominal cramps (often severe); little or no fever; 5-10% develop Hemolytic-uremic syndrome (HUS) and average of 7 days after onset, when diarrhea is improving (more common in children, elderly and immune-compromised)	5-10 days	Ground beef, unpasteurized milk and juice, raw fruits and vegetables, contaminated water, sprouts, person to person
Listeria	9-48 hours for GI symptoms; 2-6 weeks for invasive disease	Fever, muscle aches and nausea or diarrhea; pregnant women may have flu-like illness and stillbirth; elderly, immune-compromised and infants infected from mother can get sepsis and meningitis	Variable	Fresh soft cheeses, unpasteurized or inadequately pasteurized milk, ready-to-eat deli meats and hot dogs
Salmonella	6 hours to 10 days; usually 5-48 hours	Nausea, diarrhea, cramps, fever	4-7 days	Poultry, eggs, meat, unpasteurized milk or juice, raw fruits and vegetables (e.g., sprouts), person to person

# Obtain Medical and Public Health Records

October 23, 2008

Mr. Good  
Health Officer  
Somewhere in the United States Health Institute  
1111 Main Street, Somewhere, USA 11111  
Tel: 111-111-1111

**Re: Brown v. Green.**

**Request for Public Records re Ima Hertton**

Dear Mr. Good,

In connection with my representation of Ima Hertton in the above-referenced *E. coli* litigation, I am requesting records and information from the Somewhere in the United States Health Institute ("SUSHI") pursuant to the Government Records Access and Management Act ("GRAMA").

To that end, I enclose a medical records release from Ima Hertton, allegedly affected by the *E. coli* outbreak in 2006 (the "Outbreak"). I am requesting a copy of any and all confidential or non-confidential data and records (including, but not limited to, medical records) that relate to this individual, including, but not limited to the following:

1. Copies of all information, documents, notes, and records regarding interviews, laboratory data, clinical data, Pulse Field Gel Electrophoretic ("PFGE") data, and epidemiological data relating to SUSHI case-identifier ABC123.
2. Copies of all medical records, information, documents, and any other record that relate to Ima Hertton that are within the possession, custody, or control of SUSHI.
3. Copies of all information, investigations, conclusions, and any other record which relate to Ima Hertton that are within the possession, custody, or control of SUSHI.
4. Copies of all information, documents, and records relating to PFGE testing of the *E. coli* strains that were isolated in connection with the Outbreak, including photographs of the PFGE gels. In addition, please provide copies of all notes, emails, interview forms, or other correspondence with the CDC, other epidemiologists, or any academic researcher regarding the interpretation of the PFGE data.
5. Any other testing, test results, validations, batching protocols, and other laboratory data relied upon to compile the findings for the "*E. coli* Outbreak Investigation" ("Final Report"), published by the SUSHI.

I am prepared to pay for the complete costs associated with these requests. If you deny any part of this request, please cite each specific reason that you think justifies your refusal to release the information. Please notify me of appeal procedures available under the law.

If you have any questions regarding this request, you may contact me at the above telephone number.

Very truly yours,

Kenneth M. Odza

Enclosures

# Reach Out to the Health Department



# Gather Other Intelligence and Reach-Out for Allies

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# Talk to Adverse Parties

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# Trial Strategy Should Be Determined ASAP B/C

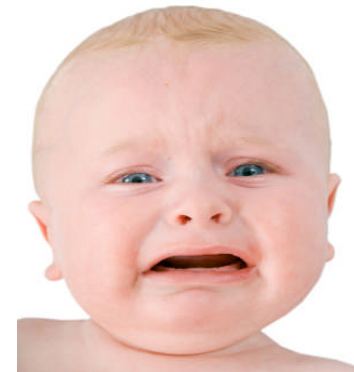
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- Retention of experts
- Discovery strategy
- Settlement
- Testing of themes and strategies



# Three Types of Cases

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## Type 1 – Strict Liability

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**Sick Victim +  
Nexus With Food Product =  
Liability  
(*Fault Not Relevant*)**



# What Can You Do in A Type 1 Case?

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- Assess damages
- Attempt to settle
- Chase others in supply chain



# Firing Squad Strategy

Where liability will almost certainly established, damages are severe and plaintiff won't settle?

What do you do?



## Type 2 Characteristics

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- Usually sick (or at least a credible diagnosis)
- Plaintiff believes product is source of illness
- Product not the source of illness



# Example

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## Plaintiff sues national quick service restaurant

- Ate burger at restaurant
  - Developed diarrhea and severe abdominal cramping next day
  - Claimed E. Coli and HUS
  - Actually Recurrent TTP
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= DEFENSE VERDICT (Actual case)



## Type 2 Strategy

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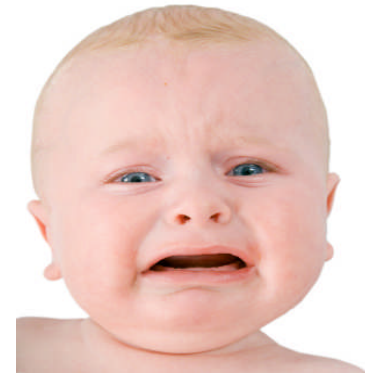
- Health Department Position?
- Illness Consistent with Food Poisoning
- Alternative Cause(s) of Illness?
- Strength of Other Facts Pointing Liability?
- Other Plaintiffs?



## Type 3 Characteristics

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- Aggrieved claimant
- May not be ill
- Often motivated by emotions
- Food is blamed but communication is often the source of anger



## Example

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- BSE Claimants
    - Contradictory information given by store managers
    - Difficulty getting Loyalty Card information
    - Felt let down by their favorite Supermarket
    - Claimed fear of illness (though odds were very slim)
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**= CLAIMS DISMISSED ON SUMMARY JUDGMENT**



## Responding to Type 3

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- Depose plaintiffs ASAP – “Lock them into a story”
- Summary judgment successful if:
  - No damages
  - No duty
  - No breach of duty
  - No causation (Nexus – like type 2)



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# Questions?

[www.foodliabilitylaw.com](http://www.foodliabilitylaw.com)

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