CLASS ACTION LITIGATION OF FOODBORNE ILLNESS CLAIMS

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A class action lawsuit is a civil lawsuit brought by one person or a few people as representatives of a larger group – the proposed “class” – who have suffered similar harm or have similar claims. Class action lawsuits involving foodborne illness are uncommon, but such actions have been asserted successfully in the past, and in certain circumstances prove the most effective means for compensating claims caused by a foodborne illness outbreak.

The three main purposes served by bringing a class action lawsuit are (1) administrative efficiency, (2) conservation of judicial resources, and (3) quickly achieving a group remedy. Class action lawsuits also provide for the cost-effective adjudication of small claims by allowing people to assert claims that could not be realistically litigated individually because the costs of litigation would far outweigh any potential recovery. Class actions have been filed in the United States to address many different kinds of harm, ranging from stockholder redress actions to actions seeking refunds of improperly charged utility fees.

At first, class actions were not considered appropriate for mass personal injury litigation, primarily because of the varied individual nature of issues of causation, liability, and damages applicable to each claimant. That changed in the 1980s, however, when mass tort class actions were approved for claims of injury caused by hazardous products including tobacco and prescription drugs. Corporate defendants have also become aware of the advantages of global solutions to mass personal injury disputes. [1]

Class actions can be brought in either United States federal courts or in individual state courts. Federal courts are generally thought to be more favorable for defendants, whereas state courts are generally thought to be more favorable for plaintiffs. Accordingly, most class action cases are filed by plaintiffs in state court, and defendants often try to remove such cases to federal court. A recent federal law, the Class Action Fairness Act of 2005, was enacted to prevent alleged out-of-state bias in some state courts and now makes it easier for defendants to move class action lawsuits from state to federal courts. [2]

In order to start a class action, one or more plaintiffs must first file a lawsuit claiming some kind of common harm. The original plaintiff(s) must define the membership of the proposed class, and must then ask the court to certify the case as a class action. According to both federal and state law, the original plaintiffs seeking class certification must generally provide evidence to convince the court that the proposed class meets the following criteria:

- The class must be so large as to make individual suits impractical ( numerosity);
Proposed class members must have legal or factual claims in common (commonality);
Claims or defenses must be typical of the plaintiffs or defendants (typicality); and
The representative parties must adequately protect the interests of the class (adequacy of representation).

In most cases, the party seeking certification must also show that:

- Common issues between the class and the defendants will predominate in the proceedings, as opposed to individual fact-specific conflicts between class members and the defendants (predominance); and
- The class action, instead of individual litigation, is a superior vehicle for resolution of the disputes at hand (superiority). [2]

The court’s certification of the proposed class is critical; without it, there can be no class action. Defendant(s) will often oppose the initial certification of a class, by claiming the proposed class fails to meet the required criteria; should the court deny class status, all similar related claims would then have to be asserted individually.

If a class action is successfully certified, class membership is automatic in most cases. Everyone affected by the action or product at issue is part of the class unless they choose to opt out. To ensure due process, the court therefore requires that notices be sent, published, or broadcast to the public by the most effective means possible, in any place where the class members can be found. As part of this notice procedure, class members are also generally informed of their opportunity to opt out of the class, i.e. if people wish to proceed with individual claims, they are entitled to do so if they give timely notice to the class counsel or the court.

Once the class has been certified, most of the class members do not take part in the case directly. The original plaintiffs, representing the entire class, may consult with the class action attorneys to plan the strategy and conduct of the case, may provide relevant evidence if necessary, and may accept or reject settlement offers. The other class members generally only have the option to either follow the lead of the original plaintiffs and the class action attorneys or to opt out of the litigation and possible settlement.

Eventually, the court must review and approve how any recovery at the end of a successful class action suit will be divided. If a settlement is proposed, the court will usually direct the class action counsel to send a settlement notice to all the members of the certified class, informing them of the terms of the proposed settlement offer being made by the defendants. The successful class action attorneys are awarded costs and fees, often calculated as a percentage of the entire recovery. The rest of any recovery is generally proportionally divided among the class members.

Class action lawsuits offer a number of advantages:
1. Initially, they aggregate a large number of individual claims into one representative lawsuit, increasing the efficiency of the legal process and lowering the costs of litigation.

2. In cases with common questions of law and fact, aggregating claims into a class action may avoid the necessity of repeating "days of the same witnesses, exhibits and issues from trial to trial." [3]

3. Class actions also provide incentive for any individual to bring action prosecuting his or her rights despite the size of their claim and the expected recovery. [4]

4. A class treatment of claims may be the only way to effectively impose the costs of wrongdoing on a defendant, thereby deterring future wrongful activities.

5. As opposed to individual actions, class actions avoid the potential for different outcomes and inconsistent standards of conduct for the defendant.

6. And in those cases where the defendant has limited funds to pay multiple claims, a class action centralizes all claims into one venue, where a court can equitably divide the assets amongst all the plaintiffs if they win the case.

Class action lawsuits have also been criticized. Members of the class usually have no control over how the class action suit is handled, or what settlement is reached. People with claims are generally included in the class, thereby limiting their individual claims recovery to that of the class remedy even if they received no actual notice of the action. Although class members generally can opt out of settlements, and existing law requires prior judicial approval of a proposed settlement, in practice class action lawsuits may at times bind a majority of class members with a low individual settlement, such as when attorneys are awarded large fees, thus leaving class members with awards of little or no value. Defendants have in fact learned that in certain circumstances a certified plaintiffs’ class provides a way for the defendants to avoid major damages liability.

Foodborne illness claims in the United States have typically been asserted as product liability claims. When a person is injured by a product, such as food, that is unreasonably dangerous or unsafe, the injured person has a claim or cause of action against the company that designed, manufactured, sold, distributed, leased, or furnished the product. Accordingly, anyone injured by the consumption of contaminated food has a viable product liability claim against the entity that manufactured, prepared or sold that food item.

In addition, foodborne illness claims in most states are now primarily asserted as strict product liability claims. The rule of strict liability first developed in the United States in cases involving defective food. Strict product liability is liability without fault for an injury proximately caused by a product that is defective and not reasonably safe. Therefore, in establishing strict liability for a contaminated food product, the injured plaintiff need only prove that: (1) the food product was not reasonably safe, and thus defective, and (2) that the product defect was the cause of the injury. The focus at trial is on the dangerous or defective food product, not the conduct of the manufacturer or seller, because it does not matter whether the manufacturer or seller took every possible precaution; if the food product was dangerous and defective and thereby caused the plaintiff an injury, the manufacturer or seller is liable for all of the plaintiff’s related
damages. Application of strict liability to foodborne illness claims asserted in class action suits makes it far easier for the class plaintiffs to establish liability. Strict liability eliminates the need to examine the conduct of the manufacturer or seller in each individual class member transaction; it is sufficient for the class plaintiffs to establish that food products manufactured or sold by the defendants were contaminated and dangerous, and that each class claimant was thereby injured.

Class action lawsuits involving foodborne illness outbreaks have been rare, despite the relative ease of establishing the defendant’s liability in most recognized outbreaks caused by the sale of contaminated food. The nature of the related individual injuries typically involve a significant variety of different symptoms and damages, ranging from a few days or weeks of pain and suffering to significant hospitalizations, with long-term permanent sequelae, or even death. Accordingly, a significant variety of related illness amongst proposed class members may cause the proposed class to not be certified, as the variation in injuries and damages fails to meet the commonality and typicality requirements for class actions. [5]

The first foodborne illness class action lawsuit in the United States apparently arose due to a large Salmonella outbreak traced to contaminated milk sold at Jewel Food Stores in the Chicago area during the late 1980s. Since then, a number of other class actions related to foodborne illness outbreaks have been brought successfully. It is possible that the increase in similar class actions has in part been due to the widespread media coverage of the successful class action lawsuit related to the 1993 E. coli O157:H7 outbreak linked to contaminated hamburgers sold at Jack-in-the-Box restaurants. [5]

Class actions involving foodborne illness outbreaks are most likely to be certified when the outbreak results in many mild illnesses, when class members can demonstrate having suffered generally similar symptoms, and present relatively uncomplicated and similar claims for damages. In 1997, a Florida court affirmed the class certification for several hundred cases of Salmonella poisoning allegedly caused by the consumption of contaminated food from a restaurant, over a period of four days. [6] Also in 1997, an Indiana court affirmed the class certification for approximately seventy residents of a nursing facility who alleged claims of Salmonella poisoning due to contaminated food. [7] In 2000, an Ohio court affirmed the class certification of over one hundred claimants who had allegedly suffered from food poisoning linked to small round structured viruses in food served at a restaurant. [8]

Marler Clark has successfully brought class actions for claims arising from large foodborne illness outbreaks. Typically, the class of claimants consisted of those persons who had suffered similar, relatively small, individual losses. Those persons who suffered from serious injuries were not included in the class definition, or had the opportunity to opt out of the class, so that their atypical claims could be brought individually. These class actions include those brought on behalf of those persons who had to receive immune globulin (IG) shots, to prevent hepatitis A (HAV) infection after being exposed to contaminated food or food and beverages prepared by a food worker who was diagnosed with hepatitis A infection. A class was certified for over 1,400 persons who
received IG shots due to an outbreak of HAV at a Carl’s Jr. restaurant in Spokane, Washington, in 2000; a class was certified for over 1,700 persons who received IG shots due to an outbreak of HAV at a D’Angelo’s deli in Massachusetts, in 2001; and a class was certified for over 9,400 persons who received IG shots due to an outbreak of HAV at a Chi Chi’s restaurant in Pennsylvania, in 2003.

Most recently, Marler Clark has filed a class action suit related to the Salmonella outbreak that has been linked to contaminated Peter Pan and Great Value brand peanut butter manufactured in ConAgra's Sylvester, Georgia, peanut butter plant. The U.S. Centers for Disease Control & Prevention (CDC) has said that at least 628 people in 47 states have been confirmed victims of the outbreak linked to the peanut butter. Marler Clark filed a class action lawsuit against ConAgra on Tuesday, February 20, 2007 on behalf of all individuals who became ill with symptoms consistent with Salmonella infection, but were not hospitalized, and who have strong evidence of consumption of Salmonella-contaminated peanut butter. Marler Clark will pursue individual claims on behalf of all those individuals who sustained more severe, atypical, consequences due to their illness, such as those who were hospitalized or died.

Class action lawsuits related to foodborne illness outbreaks will continue to be unusual, as in most foodborne illness outbreaks there is significant variation in the extent of injuries and damages suffered by the victims. Class actions remain a viable option, however, for people who have suffered relatively similar injuries and damages as a result of mass outbreaks of foodborne illness, and seek to recover some compensation for their individual losses.

REFERENCES:


[8]  *Farrenholz v Mad Crab Inc.*, 2000 Ohio App. LEXIS 4519