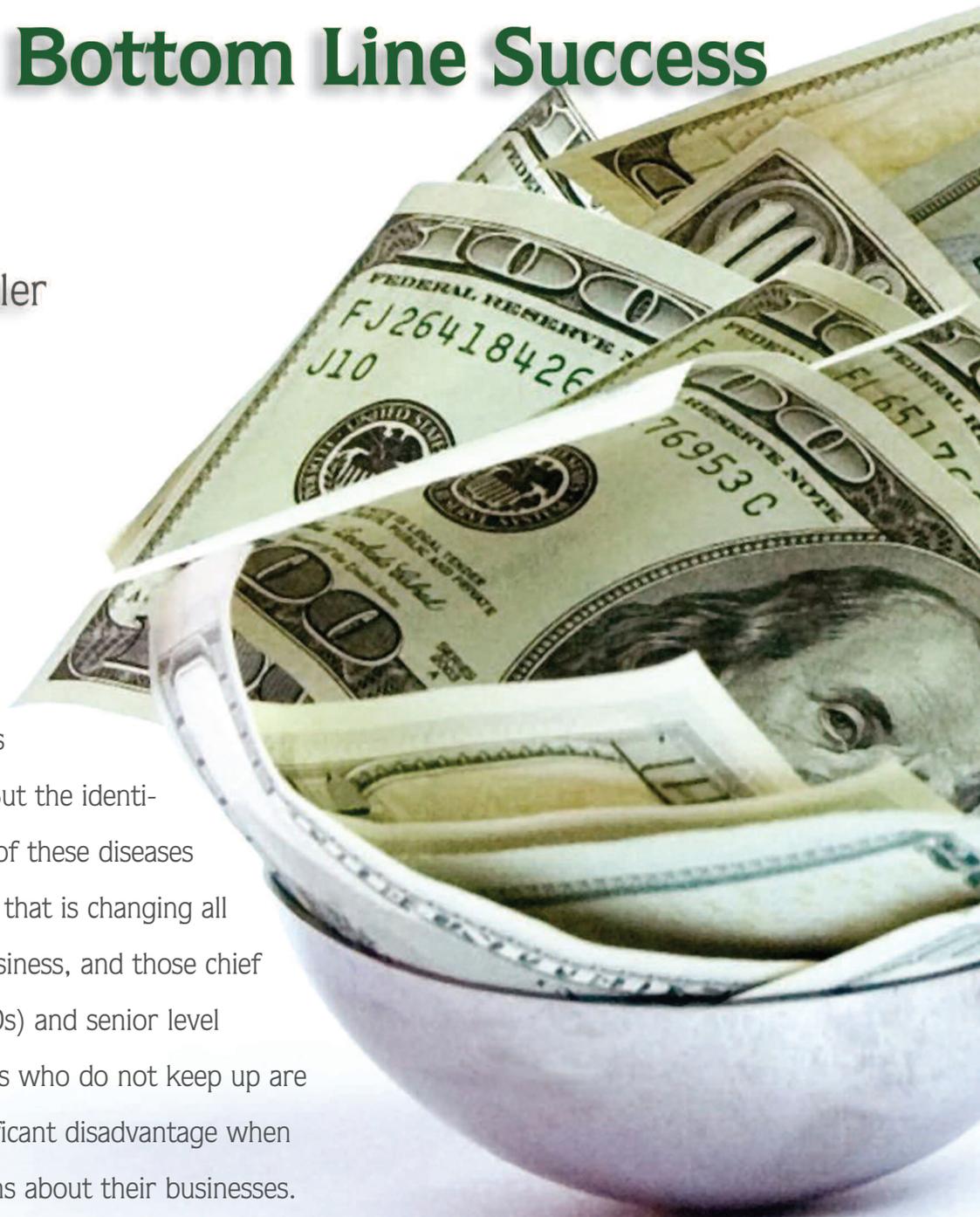


Food Safety & the CEO

Keys to Bottom Line Success

By William Marler

Foodborne illness has, of course, been around as long as there has been food. But the identification and diagnosis of these diseases is an emerging science that is changing all sectors of the food business, and those chief executive officers (CEOs) and senior level directors and managers who do not keep up are bound to be at a significant disadvantage when making critical decisions about their businesses.





It is one thing to read or view media reports on the latest foodborne illness outbreaks and brand-damaging product recalls; it is quite another to really understand the widespread, adverse impact these incidents have on your consumer base, on your employees, on the efficiencies of your operations, and ultimately, on your bottom line. In other words, today's food company CEO needs to know a lot more than producers in the fresh-cut produce industry initiated massive recalls last week, or that a regional restaurant chain closed down, or that a recent spate of pet fatalities due to the inclusion of a banned substance on an international scale means his or her company should look more closely at imported ingredients for awhile.

What you, the CEO, should know about food safety comes down to a few key concepts. First, all companies along the food supply chain need to go beyond managing the business: To be successful, food companies are now in the business of managing risk. This means garnering a good understanding of why food safety is important to your business, what risks there are to the business, how you can mitigate or eliminate those risks, and how in doing so the food safety program will provide a return on your investment.

Why Food Safety Needs Your Immediate Attention

E. coli O157:H7, which occupies much of my professional time as an attorney, was only first recognized as a human pathogen in 1982 during an outbreak of illness caused by hamburgers from a fast food restaurant in Oregon.¹ But the problem drew little public attention for another decade when, finally, 600 people across the West, most of them children or senior citizens, became ill after eating undercooked Jack in the Box hamburgers.² Four children died, and many others suffered terrible kidney damage, which may eventually lead to the need for transplants.

I became involved when a woman for whom I'd done some pro bono work years earlier contacted me. Her daughter, Brianne Kiner, had eaten one of those burgers, and was in the hospital with hemolytic-uremic syndrome (HUS). Brianne proved to be only the first of many young children I've seen sprawled in hospital beds, horribly bloated and discolored,

hooked up to kidney dialysis and life support machines, surrounded by doctors frustrated by a disease for which there is no known cure. Many of these kids died. Brianne barely survived, and she will suffer after-effects from her *E. coli* poisoning for the rest of her life. I hope that suffering is eased somewhat by the \$15.6 million settlement eventually paid by the company. Jack in the Box, co-defendants and insurers paid out over \$125 million in compensation to victims. The costs to the businesses involved were at least twice that.

At the time, *E. coli* O157:H7 was viewed as a pathogen carried only in ground beef—and especially beef crammed into industrial feedlots. There were outbreaks involving hamburger from virtually every fast food chain in America, ground beef from supermarkets, big box stores and public school lunches. People were getting sick around the country, and it was all blamed on meat. Since then, I've made a career of representing people poisoned by *E. coli*, *Salmonella* and a half-dozen other pathogens potentially carried in virtually every food, processed or unprocessed, fresh or packaged, industrial or home-grown. Here are just a few examples:

Shortly after the Jack in the Box case, we represented most of the seriously affected victims of an outbreak of *E. coli* traced to Odwalla apple juice.³ Odwalla is a San Francisco-based processor that marketed “fresh” juice with no preservatives. At least 70 people fell ill, and a 16-month-old Colorado girl died, from drinking unpasteurized juice that is believed to have become contaminated by apples that fell off trees and into cow manure before being harvested. The case had a nationwide impact, demonstrating that foodborne illness can be contracted from fresh produce as well as meats. After an ugly legal fight, the company eventually paid a multi-million-dollar settlement to the victims and their families—and Odwalla began pasteurizing its juices using a flash pasteurization treatment.

Vegetables came next. In 2002, more than 50 high school cheerleaders and dancers contracted *E. coli* from prepackaged lettuce served at a dance camp in Washington.⁴ We represented several victims, including a Spokane teenager who had to endure dialysis treatments because her kidneys were severely damaged by the *E. coli*. The U.S. Food and Drug Administration (FDA) was sufficiently alarmed to issue a rare warning that consumers should throw out prepackaged bags of Romaine lettuce. The following year, at least 660 people were sickened, and four died, from hepatitis A contracted from Mexican green onions served at a Chi-Chi's chain Mexican

restaurant near Pittsburg, Pennsylvania. The FDA attributed the outbreak to poor sanitation, leading to the largest single-source epidemic of hepatitis A in U.S. history.⁵ We represented many of the approximately 300 victims who sought compensation from Chi-Chi's and four companies that supplied the green onions. One gentleman who required a liver transplant collected nearly \$6.5 million. Total compensation to victims was nearly \$50 million and Chi-Chi's never exited bankruptcy.

Just last year, a nationwide *E. coli* epidemic was attributed to pre-packaged, fresh-cut spinach packed for Dole Foods by Natural Selection Foods LLC, a California company that specializes in processing specialty lettuces, primarily spinach and spring mix. The Centers for Disease Control and Prevention (CDC) and FDA confirmed 204 illnesses in 26 states—including a frightening 31 with HUS—104 hospitalizations, and three deaths associated with this outbreak. Victims of the *E. coli* outbreak were identified in 26 states. *E. coli* was isolated on cattle ranches adjacent to the spinach fields.⁶ We represent 93 of the victims.

It goes on and on. We have handled cases of foodborne illness traced to packaged almonds, homemade apple cider, alfalfa sprouts, fruit salad, packaged breakfast cereal, sushi, orange juice, tomatoes, cantaloupe, gelatin desserts, and most recently, peanut butter. The microorganisms involved in these outbreaks range from *Listeria monocytogenes*, to *E. coli* O157:H7, to numerous strains of *Salmonella*, and include microbial toxins and viruses such as *Clostridium botulinum*, *Cryptosporidium*, *Vibrio*, hepatitis A, and Norwalk virus, to name a few. We have represented thousands of clients, sued most of the nation's large restaurant chains and won a total of \$300 million in judgments and settlements.

Managing Risk is Part of Managing the Business

So what's happening out there? Is there an epidemic of *E. coli* and *Salmonella* and other foodborne illness? Or is it just a bunch of guys like me, chasing ambulances and making life miserable for hardworking CEOs? We know, after all, that people have been getting sick from eating tainted meat, fruits, vegetables and dairy products since the beginning of human history; and it may well be true that, thanks to advances such as pasteurization and flash freezing, that food is actually safer than it was 50 years ago. So why is this happening now?

First, it may be true that industrial food production fosters an environment friendlier to these bugs. Enormous feedlots, centralized processing plants, long-distance shipping, and even air conditioning systems may create new opportunities for pathogens to spread. And in any case, big business makes the system less tolerant of error. If a small town processing plant has an outbreak, a few people might be infected—perhaps too few to detect. But today, with extended and increasingly efficient supply chains, a mistake in a peanut butter plant in Georgia or meat packing plant in Colorado can quickly sicken thousands of people around the country or even on a global scale.

Second, recent technological advances, especially DNA analysis, provide new tools for detecting, tracking and identifying pathogens such as *E. coli* O157:H7. It's only very recently



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that we can establish a direct and virtually certain link between one or more sick people and a specific food source. My job would be far more difficult without DNA analysis. The bottom line is that with technology comes the great likelihood that a company that produces tainted food will get caught.

And perhaps contemporary society is less tolerant of risk, as well. People these days expect to be healthy. When they get sick, they want to know why. And if they know why, they want to hold somebody accountable. You can argue with that phenomenon, but it is a fact of life.

So, what can you do about it? How can you manage your own business and produce a healthy and profitable product without making people sick? Given these new realities, how can we manage risk in a free society? There are three broad options.

First, we can do what most Western societies have done for most of their history, and what much of the world still does today, which is to rely on the open market. In part, it is up to the individual consumer. We can choose to trust our farmers and food processors, and the marketplace will take care of everything else. If they make an error and some of our kids get sick, that is too bad. The marketplace imposes sanctions; if people are afraid of getting sick, they'll stop buying the product. Case closed.

We know the problem with that. Consider the case of those nice people in California who produced unpasteurized apple juice, poisoning hundreds of kids. Most farmers and processors will be conscientious. But a few bad apples will get lazy, or cocky, and make a fatal mistake. Consumers will become wary not of just one bad apple, but of the entire apple industry. Everybody in the affected food category pays the consequences of one outfit's error.

The second option is Big Brother: regulate. We enact laws, impose penalties and hire the inspectors necessary to enforce them. But my guess is that this solution doesn't appeal to anybody in any business. To make it work, we would need trained inspectors on every farm, in every processing plant, in every restaurant, at every hot dog stand. It's expensive, and potentially too intrusive. And there's another problem: Regulatory systems may work for a while but success tends to be followed by breakdowns. Inspectors get lazy, or corrupt, and stop doing their jobs. Or the political system intervenes; government budgets come under strain and politicians look at the system and conclude that nobody is getting sick, so clearly we don't need so many inspectors. They cut budgets, the regulatory system gets stretched too thin, some *E. coli* bacteria slip through the cracks, and suddenly we have another tragic outbreak.

The third option is the legal system. If people get sick, we allow them, even encourage them, to go to court and sue for compensation. Food producers go about their business, and if they do everything right, they're fine. But if somebody gets sick then somebody like me will probably be waiting at his or her doorstep. And I will do my best to make it a very costly mistake. But civil law, of course, has its own costs. Even if you run a flawless business and never poison anybody, you need to carry enough insurance to spread the risks and costs across your industry.

In the U.S., we've seen the evolution of a political system that is a mix of each of these elements. We have a market system that theoretically rewards farmers and producers who don't take risks—or, at least, whose mistakes are not detected and traced back to the source. We have a regulatory system of food safety laws and enforcement, though that system is, by almost any account, woefully inadequate in funding, staffing and efficiency to enforce the laws presently in force, let alone any new and tougher body of law. And we have civil laws that allow people to seek compensation for their injuries.

Whatever strategies we employ to prevent foodborne illness, the analysis should not be purely political or legal. We could criminalize food poisoning (see what China does), employ thousands of inspectors and impose stiffer penalties for people who produce tainted food. But ultimately, this is also a fundamental question of morality. As individuals and as businesses, do we subscribe to the Law of the Jungle? Or to the Golden Rule? If food producers, and their CEOs, put themselves in the position of food consumers, perhaps it would be easier for them to understand why consumers need to be able to trust their food supply. If CEOs could see what I've seen—two- and three-year-old children hooked up to kidney dialysis machines and life support, or in their tiny coffins—it might change some attitudes about the importance of food safety.

If that were to happen, the food industry would profit, consumers would be safer, and lawyers like me would have to look for another way to make a living.

The CEO's Checklist

I often speak to food manufacturers, foodservice and retailers about why CEOs and senior management (even outside of the traditional food safety or quality assurance department functions) must be dedicated to food safety, as I've related above. But I also have a few recommendations for translating the "why" into a practical "how." The fact is, paying attention to headlines isn't nearly as important as paying attention to your food safety management professionals on staff and those with whom you contract for their food safety systems expertise. CEOs are in the business of managing the business to make a profit—whether you are a multinational food manufacturer or a one-shop restaurant owner—and are not necessarily versed in the lingua franca of science-based solutions that microbiologists, chemists or food engineers propose. But investments in food safety systems, technologies, testing and tools are just that—economic investments of either money, staff or time that must be justified at the bottom line or to the company's shareholders. This is why my first recommendation to CEOs is to



ensure that the company is placing qualified people in charge of food safety—and the second is to listen to them.

1. Put qualified people in charge of food safety. Invest in hiring scientists and experienced quality assurance professionals to manage the food safety programs. These individuals can often be trained in management techniques that will help them articulate to CEOs and senior level management the basis for requests to implement or improve food safety programs that involve technical concepts.

Providing and supporting general and overall training programs to food safety leaders in your organization is also important. You want to keep your qualified staff qualified. Continuous training and education of food safety department heads, managers and staff is a practical way that CEOs can ensure they are getting the most up-to-date information and recommendations from which to make critical—and proactive—food safety decisions. This may mean investing in fee-based training or professional certification or accreditation seminars in planning and implementing Hazard Analysis and Critical Control Points (HACCP) programs, specialized testing laboratory workshops for technicians and supervisors, or even train-the-trainer type courses in auditing methods or safe food handling. For smaller companies, off-the-shelf and customized software programs and video and audio training can be a cost-effective way to achieve professional development of your food safety staff.

Also, encourage food safety professionals in your organization to get involved with recognized industry and scientific organizations, and to attend these organizations' trade conferences, participate in committees and network with other food safety colleagues and leaders in the field—and fund it. Food safety is not a competitive issue and supporting your staff in these types of collegial, educational endeavors will help them deepen their knowledge of emerging trends, issues and solutions, which in turn improves corporate knowledge and decision-making effectiveness.

2. Listen to the qualified food safety professionals you've hired. Understanding what your in-house experts or outside contract professionals are recommending is key to investing in the right food safety systems and technologies—and to helping you justify associated costs to relevant stakeholders on the business side. Pay attention to what the experts advise are the existing or potential risks to your operation. Not all microbes, viruses or chemical contaminants are equal when it comes to the likelihood of adulterating particular foods or beverages. But

if you are manufacturing ready-to-eat luncheon meat or deli salads, it is important to know that these have been ranked as products with a very high risk for *Listeria monocytogenes* contamination if appropriate preventive strategies and systems are not in place. The operation may have other bugs to worry about but identifying the “baddest” bug helps senior managers understand why recommended technologies, equipment or systems investments should be implemented faster than others. Similarly, restaurant and other foodservice establishments where food is handled know that risks associated with poor personnel hygiene practices, among others, can result in the spread of hepatitis A, noroviruses and other illnesses. Knowing this makes it easier to make the investment decision to improve employee training or provide more handwashing stations. Your food safety professionals should be able to identify and rank the risk factors associated with your particular processing or food handling/distribution operations and provide information on the management strategies or technological solutions that will mitigate or eliminate those risks.

It is great to have good advice that you, as a critical decision maker, can trust but you must be able to translate that into action. When the head of food safety recommends a capital investment in new equipment that is of sanitary design, be prepared to see past the new line item it represents. Rather, focus on listening to the why's, what's and how's of the presented material to better understand how your company can get a return on investment for the proposed expenditure.

3. Use contracts with your vendors to protect your customers and indemnify your company of liability if something goes wrong. Putting pressure on your suppliers to make sure they take into account food safety is a good thing. Your product is only as safe as its component parts. Requiring suppliers to be bound by your specifications makes the risks lower that an error will occur. And, if a supplier's product is contaminated, shouldn't it pay for its error and not you?

4. Understand why information management (IT) is important to your company, especially as it relates to the food safety mission. In today's high-tech climate and global economy, it is more important than ever to develop and implement IT systems that increase the food company's effectiveness in making collected food safety data meaningful. Without this “usability” factor, critical data on traceability, sanitation and food safety audit findings, testing results, and HACCP, allergen control or other food safety management and control systems are essentially impotent. Streamlined, inter-departmental management and reporting of food safety data helps senior management see the big picture and navigate a course that takes into account all areas that involve the food safety imperative.

5. Stay current with regulatory and code compliance for every jurisdiction in which your company operates. Certainly, food company CEOs and senior level managers who are educated about the applicable food safety laws and regulations that govern the production, distribution or handling of foods and beverages are better prepared to respond to a crisis or recall event. But perhaps more importantly, those who are more knowledgeable about these laws and rules are able to



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make food safety improvement decisions that foster proactive compliance.

From the Top

Ultimately, dedication to food safety must go beyond the company's HACCP program—in terms of compliance, implementation, testing and auditing. This commitment starts at the top of the organization with the CEO, president and senior management team. Managing the business in a way that pays more than lip service to food safety will produce high-quality, profitable products that don't make people sick, and is essential to the continued health of your bottom line and the health of your consumers. ■

William Marler is an accomplished personal injury and products liability attorney. He began litigating foodborne illness cases in 1993, when he represented Brianne Kiner, the most seriously injured survivor of the Jack in the Box *E. coli* O157:H7 outbreak. Mr. Marler settled Brianne's case for \$15.6 million, creating a Washington state record for an individual personal injury action. In 1998, he settled the claims of three small children who became ill with *E. coli* O157:H7 infections and hemolytic uremic syndrome after drinking Odwalla apple juice, for a reported \$12 million. Since that time, Mr. Marler has focused his practice on representing individuals, mostly children, in litigation resulting from *E. coli*, Salmonella, Shigella, hepatitis A, and other food contamination cases. He can be reached at bmarler@marlerclark.com

References

1. CDC. Epidemiologic Notes and Reports Isolation of *E. coli* O157:H7 from Sporadic Cases of Hemorrhagic Colitis—United States. *MMWR* Nov. 5, 1982. 31(43); 580,585.
www.cdc.gov/mmwr/preview/mmwrhtml/00001184.htm.
2. CDC. Update: Multistate Outbreak of *E. coli* O157:H7 Infections from Hamburgers—Western United States, 1992-1993. *MMWR* April 16, 1993. 42(14);258-263.
www.cdc.gov/mmwr/preview/mmwrhtml/00020219.htm.
3. CDC. Outbreak of *E. coli* O157:H7 Infections Associated with Drinking Unpasteurized Commercial Apple Juice—British Columbia, California, Colorado, and Washington, October 1996. *MMWR* Nov. 8, 1996. 45(44), 975.
www.cdc.gov/mmwr/preview/mmwrhtml/00044358.htm.
4. California Department of Health Services. *E. coli* O157:H7 Illnesses in Washington—July, 2002. Final Report. Oct. 29, 2002.
www.dhs.ca.gov/ps/fdb/local/PDF/02_07reportweb.pdf.
5. CDC. Hepatitis A Outbreak Associated with Green Onions at a Restaurant—Monaca, Pennsylvania, 2003. *MMWR* Nov. 21, 2003. 52 Dispatch;1-3.
www.cdc.gov/mmwr/preview/mmwrhtml/mm52d1121a1.htm.
6. California Department of Health Services. CDHS Investigation of an *E. coli* O157 H7 Outbreak Associated with Consumption of Dole Brand Pre-packaged Baby Spinach Manufactured by Natural Selection Foods: Sept. 13, 2006 – March 21, 2007. Redacted.
www.dhs.ca.gov/ps/fdb/local/PDF/2006%20Spinach%20Report%20Final%20redacted.pdf.