

Department of Justice Makes Food Safety a Prosecution Priority



By W. Kelly Johnson and Phillip J. Calabrese

Several investigations initiated by the United States Department of Justice (DOJ) indicate more aggressive prosecution of conduct related to foodborne illness outbreaks. Cases involving Chipotle Mexican Grill (Chipotle) and Blue Bell Creameries (Blue Bell) suggest that DOJ is focused on holding executives accountable criminally for distributing contaminated products or defrauding the public and regulators when responding to outbreaks.

The investigations follow the conviction of five executives of the Peanut Corporation of America (PCA) in Fall 2015. Stewart Parnell, the owner and president of PCA, was sentenced to 28 years in federal prison. His brother, Michael, was sentenced to 20 years. PCA was linked to a salmonella outbreak which caused nine deaths and sickened more than 700 people across the country.

Chipotle Norovirus Outbreak

Chipotle announced that it had received a federal grand jury subpoena in December 2015 as part of a criminal investigation by DOJ and the Food and Drug Administration (FDA). Federal prosecutors in California launched an investigation following an outbreak of norovirus at a Chipotle restaurant in Simi Valley, California. During this outbreak, more than 200 people became ill, including 17 restaurant workers. A spokesman for Chipotle stated that the subpoena related only to the Simi Valley outbreak.

Media sources indicate that Chipotle may have been aware of the employee illness on Aug. 18, 2015. Under California law, Chipotle was required to notify California officials of the outbreak. Instead of immediately notifying the government, Chipotle chose to dispose of all food items, bleached cook-

ing and food handling surfaces, and replaced sick employees with employees from other restaurants before notifying county health officials of the outbreak. Chipotle closed the restaurant on Aug. 20. On Aug. 22, a Chipotle corporate official left a voicemail for local health officials saying that 17 employees of the restaurant were ill. During that time, more than 3,000 meals were served to unsuspecting customers.

Since this norovirus outbreak, Chipotle has modified internal restaurant operations to reduce the risk of foodborne illness outbreaks. Changes include improved DNA-based testing of all ingredients before they are shipped to restaurants and the requirement that vegetables and cheese be processed in central kitchens instead of at each restaurant. The company also now offers paid sick leave to employees to stop ill workers from coming to work and infecting customers. On Feb. 8, Chipotle took the unprecedented step of closing every restaurant in the United States for staff meetings to discuss food safety. Indications are that the criminal investigation continues.

Blue Bell Listeria Outbreak

Shortly after the criminal investigation into Chipotle began, DOJ also opened an investigation into Blue Bell, among the largest ice cream companies in the country by sales. Last year, a South Carolina lab detected listeria in routine testing at a distribution center. In response, the company issued a limited recall in March 2015, the first in the company's 108-year history. As the investigation by the company and public health agencies continued, the recall expanded; eventually leading Blue Bell to shut down operations for a time. Additionally, listeria contamination was traced back to 2010 and was linked to three deaths. In civil litigation following the recall, plaintiffs alleged that FDA

inspections as early as 2009 found health and safety issues at Blue Bell facilities, including listeria contamination that was not remedied.

After DOJ launched its Chipotle investigation, media reports indicated that DOJ opened a criminal investigation into Blue Bell's knowledge of unsanitary conditions and the response of the company and its representatives. Reportedly, the same prosecutor who obtained the PCA convictions is leading the investigation. Information about the investigation, even whether DOJ is formally conducting one, is difficult to learn due to DOJ's policy of not commenting on pending investigations.

New DOJ Focus

At the time the Chipotle grand jury subpoenas were announced, legal commentators characterized the investigation as highly unusual because past prosecutions involving foodborne illnesses have focused on food producers. Counsel for Chipotle commented that the investigation was surprising because there was no clear interstate element in the events leading to the investigation. Legal commentators now suggest that the focus on Chipotle, and other federal prosecutions related to food safety, will be on what the company knew and whether it acted appropriately.

Deputy Assistant Attorney General Jonathan Olin, when he addressed the Food and Drug Law Institute Enforcement Litigation Compliance Conference in December 2015, said that "where the conduct we uncovered goes beyond unsanitary conditions or other FCDA violations to outright fraud, we will not hesitate to use every available tool to hold accountable those who put their own profits over the safety of the American consumer."¹

In his comments, Olan also cited the "Yates Memo" issued to all DOJ attorneys in September 2015 by Deputy Attorney General Sally Quillian Yates, which places individual accountability at the heart of DOJ's enforcement strategy. Olan reminded the food industry that in criminal investigations, corporations should be prepared to discuss individuals and compliance, and to account for

specific acts uncovered by government investigations.

Turning the Tables on Civil and Criminal Liability

DOJ's investigations in the food industry mark an important development. For years, criminal investigations of antitrust violations, fraud and other white collar offenses often triggered civil litigation. In such cases, companies had time to prepare for civil litigation while a criminal investigation was underway but often unknown to the public. Only after a criminal investigation became public were civil plaintiffs able to piggy-back on the government's investigation to aid their civil claims.

DOJ's foray into the food industry is a paradigm shift. At least in the case of Blue Bell, the plaintiffs' bar undertook investigation and litigation that apparently prompted DOJ to open a criminal investigation. Plaintiffs have always looked at recalls as a source of potential civil claims and, in the right circumstances, would invest resources in pursuing such claims. If civil claims against food companies become a source of potential criminal investigations, then the stakes for the industry have greatly increased—and responses to outbreaks will become considerably more complex. Companies will need to ensure that their responses to any investigation of outbreaks of illness anticipate potential criminal investigations, not just civil claims—and do so aware of heightened demands by the government and private plaintiffs that the companies immediately protect the public's health.

Conclusion

The Centers for Disease Control and Prevention (CDC) estimates that each year roughly one in six Americans (or 48 million people) get sick, 128,000 are hospitalized and 3,000 die of foodborne diseases.² The Chipotle and Blue Bell investigations and the substantial sentences imposed in 2015 in the PCA case indicate that food safety is a new priority for DOJ. In addition, DOJ investigations have expanded beyond companies knowingly shipping contaminated food and

have focused on companies preventing foodborne illness and having adequate controls to ensure food safety. Failure to notify authorities of outbreaks, and failure to put testing protocols in place to assure that food remains safe, could place individuals in companies at risk. When responding to foodborne illness and conducting a recall, companies and their personnel must now consider not just public health and safety, business risks and the potential for civil litigation, but also potential criminal liability.

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- 1 Deputy Assistant Attorney General Olin Remarks at Food and Drug Law Institute Conference, December 9, 2015. <http://www.justice.gov/opa/speech/deputy-assistant-attorney-general-jonathan-olin-delivers-remarks-food-and-drug-law>
- 2 CDC, Estimates of Foodborne Illness in the United States. <http://www.cdc.gov/foodborneburden/>

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