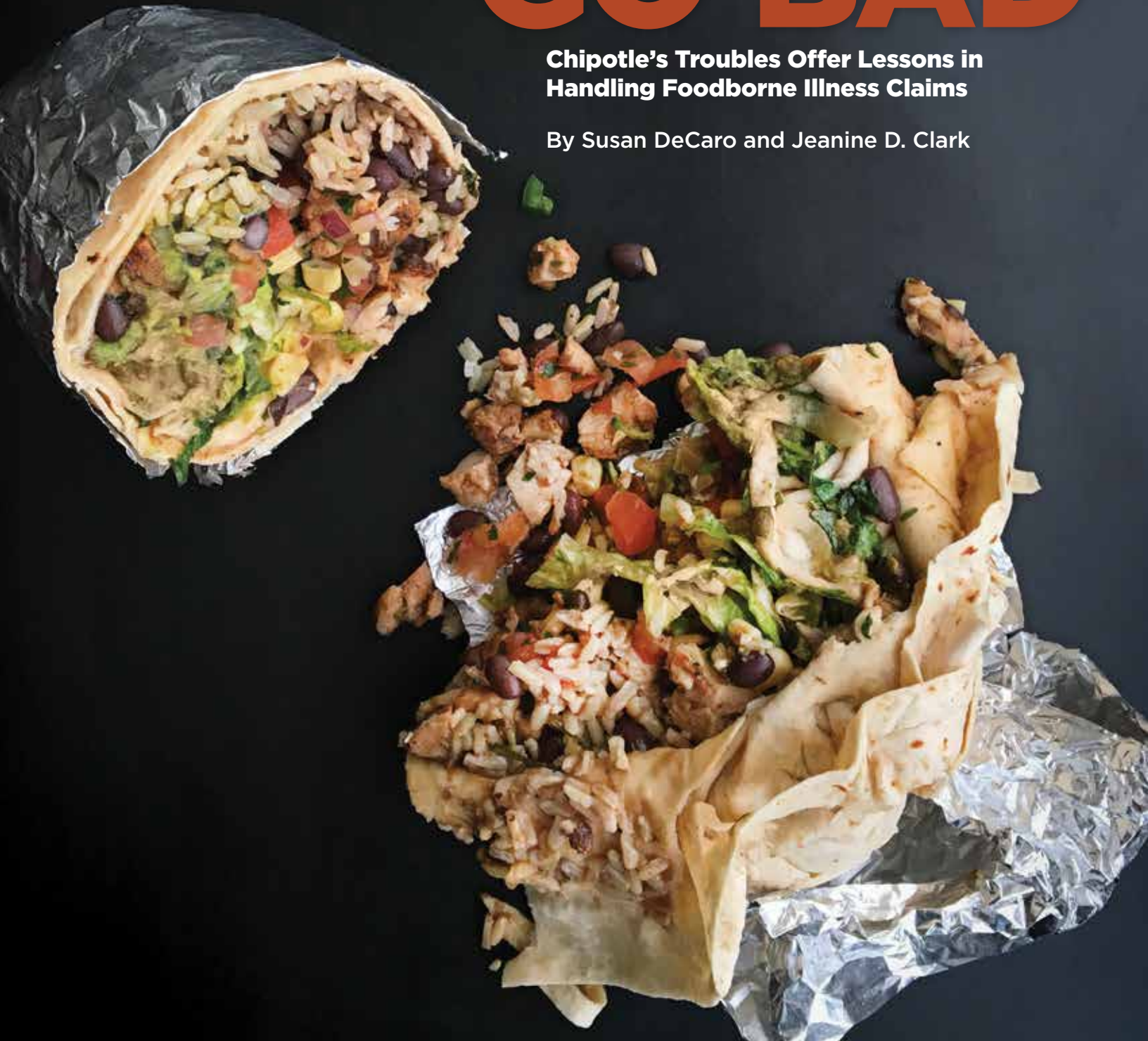


WHEN BURRITOS GO BAD

**Chipotle's Troubles Offer Lessons in
Handling Foodborne Illness Claims**

By Susan DeCaro and Jeanine D. Clark



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Food safety and associated claims and litigation are nothing new. For instance, in 1993, one of the largest foodborne outbreaks arose at Jack in the Box restaurants and affected more than 600 families. Four children died as a result of that E. coli outbreak. Recently, the relatively new and trendy restaurant chain Chipotle has been affected not only by foodborne illnesses like E. coli, but also other unfavorable publicity in the form of allegations with respect to labeling and disclosure of the source of its food ingredients.

These foodborne illness troubles aren't a first for the company. It also had problems in Minnesota with a salmonella outbreak in September 2015, when tomatoes were identified as the source of the outbreak. Chipotle's CEO Steve Eells apologized in a nationwide interview in December 2015 and committed to reforming food safety practices at the popular chain.

In connection with the early efforts to resolve Chipotle's E.coli outbreak, health officials focused on Washington and Oregon, temporarily closing company locations in those states during the investigation. In addition to deep cleaning and sanitizing, ingredients were tested in an effort to determine the source of the contamination. No employees tested positive for E.coli, which indicated that the food was contaminated before it entered the restaurants. Chipotle retained an outside laboratory to assist in the investigation, which ultimately revealed cases in California, Illinois, Maryland, Minnesota, New York, Ohio, Oregon, Pennsylvania, and Washington. Locations in Vancouver also were reportedly affected. As part of its plan to revamp food safety, Chipotle closed all of its locations nationally on Feb. 8, 2016, for a food safety meeting. Some were critical of the chain, calling for even more decisive action.

Coverage Questions

In these situations, claims professionals must evaluate coverage, including issues of whether the outbreak constitutes a single occurrence or multiple occurrences. Early investigative efforts should center on identifying the source or sources of the contamination, which may include upstream processors or suppliers. Identification of this

group is critical to evaluating the potential risk transfer opportunities in the form of either contractual indemnification or insurance coverage.

Once roles and responsibilities are identified, claims professionals must obtain and evaluate the agreements governing these services, which will serve as the road map for the potential risk transfer. Information about the symptoms, including how long it took for claimants to become ill, is relevant to the investigation. The investigator or claims professional also will want to interview claimants and their families to determine what other foods, meals, and potential sources were encountered around the time of the alleged exposure to the insured's product. Evidence preservation, including testing of remaining food samples or supplies, also must be coordinated. Retention of an outside laboratory consultant to perform testing not only of any remaining food product, but also of raw materials may be essential.

From the claims professional's perspective, prevention and education go a long way toward reducing losses. Requirements for employer and employee training and established safety procedures can help prevent new outbreaks and potentially mitigate liability in the event of an outbreak. Of course, with any policy or procedure, flagrant disregard of established policies will only hurt the insured should the matter reach the litigation stage.

Setting the Table

There are many consultants who offer both training and equipment to help ensure effective food safety programs. Federal regulations now require that key personnel in charge of managing the food safety plan at an organization must be "preventative control qualified." Compliance deadlines vary depending upon the size and nature of the operation. For instance, very small businesses and those subject to pasteurized milk ordinances have less than three years to comply, while small businesses with less than 500 full-time employees have two years. All other businesses have one year. Additionally, there are variations of these deadlines for downstream producers and retailers.

Preventing foodborne illness outbreaks requires a good working relationship between production personnel, risk management, and claims professionals and a

commitment to education. Reducing the risk goes hand in hand with educating the facility and its own risk management team. Limiting the exposure after an outbreak may depend, in part, on how well those preventative measures were effectuated. Outside counsel must have a thorough knowledge of not only the appropriate regulations of foodborne illnesses, but also about other medical conditions that may make a person particularly susceptible to foodborne pathogens.

Unfortunately, once a foodborne illness outbreak reaches the claims stage, it usually reaches the litigation stage. In fact, for large outbreaks, claimants may simply file suit rather than attempt any type of pre-suit resolution.

From a litigation standpoint, counsel's role is twofold. First, counsel should assist the restaurant, chain, or food reprocessing facility in getting to the root of the problem and minimizing the impact. Counsel's primary role, however, is to defend against the inevitable onslaught of litigation. Involvement at an early stage can help with the investigation, which may be highly relevant to the subsequent litigation. To the extent that an investigation reveals that either there was an equipment failure or problems with raw food materials provided by a supplier, having counsel on board early can help minimize or offset liability. However, when an early investigation reveals that the outbreak was caused by unsanitary conditions or failure to properly follow established procedures, it is likely that a different tact will be taken when claims are presented.

Depending upon the number of claimants and scope of complaints, counsel and the client could face something as small as a few isolated cases in one or more venues, or something as large as an organized mass tort filing or even multidistrict litigation in a district court. Discovery strategies will vary widely depending on whether one is dealing with a handful of isolated cases versus a national outbreak of hundreds or thousands of potential claimants.

Form interrogatories can be developed in widespread cases that allegedly arise from the same source. This information can be put into a database to identify the most typical group of plaintiffs for purposes of selecting the same for depositions. An early and organized effort to obtain medical records also

may be necessary. In either situation, a few select depositions taken early in a case may narrow issues or even serve to ready a bellwether case. There are regional and national plaintiffs' firms specializing in foodborne illness litigation that can help in situations like this.

Know the Risks

The Centers for Disease Control and Prevention (CDC) tracks and compiles data regarding all reported foodborne illness outbreaks and estimates that one in six people will get food poisoning. Many cases of foodborne illness are never reported, particularly where only a limited number of people are affected. Of those reported incidents, many do not receive much in the way of press or publicity. Review of the CDC's website, cdc.gov, on any given day will provide you with a list of the trending foodborne illness outbreaks such as salmonella shakes, listeria-laced packaged sal-

ads, and salmonella contaminated cucumbers.

According to the CDC, the top pathogens contributing to domestically-acquired foodborne illnesses and deaths between 2000 and 2008 were norovirus, salmonella, listeria, toxoplasma, clostridium, campylobacter spp., and staphylococcus aureus. Foodborne illnesses include not only bacteria and viruses, but also parasites such as cryptosporidium and cyclospora. While there were more cases of norovirus-induced illnesses reported, deaths from salmonella, listeria, and toxoplasma exceeded deaths that were caused by norovirus. According to the CDC, foodborne illnesses for the reporting period 1998-2008 were from produce; meat and poultry; dairy and eggs; and fish and shellfish. Forty-six percent of foodborne illnesses reported during that time frame were the result of produce; 22 percent were from meat and poultry; 20 percent from dairy and eggs; and only 6.1 percent from

fish and shellfish. Twenty-nine percent of the deaths reported from foodborne illnesses for that same time period were attributed to meat and poultry; 23 percent to produce; 15 percent to dairy and eggs; and 6.4 percent to fish and shellfish.

While foodborne illness claims are impossible to prevent, understanding the risks and challenges of handling them can go a long way in stemming losses and keeping those affected safe. [CM](#)

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