

WRITTEN TESTIMONY BEFORE THE COMMITTEE ON ENERGY AND COMMERCE

Chairman and members of the committee, my name is William Marler. I am a trial lawyer. My law firm Marler Clark, located in Seattle, Washington, specializes in representing victims of foodborne illness. Unfortunately, for my clients, I have been in business too long. It began in 1993 with over 700 people sickened, hundreds hospitalized - many with life-long complications - and four deaths - stemming from the Jack in the Box E. coli outbreak.

I thank you for the honor of being allowed to testify before this committee. I am proud of the work that this committee has done to try to improve food safety throughout the U.S. This will be my first time testifying before the U.S. Congress. Although I have never had the honor to testify, I was there in 1994 for Senate hearings about the lack of safety in our food supply. I was with Brianne Kiner, then a nine year old girl, who spent six months hospitalized, suffered acute kidney failure and multiple strokes, had her large intestine removed, was in a coma for over a month, and spent 100 days on dialysis, all from eating a hamburger. Thirteen years later, I was here again, this time with Ashley and Isabella Armstrong – victims of the more recent Dole Spinach E. coli outbreak that sickened 205, killing 5; with Sean Pruden - a victim of an E. coli outbreak at Taco Bell that sickened nearly 100; and with Terri Marshal, whose mother-in-law has remained in a nursing home since December 2006 after eating a few spoonfuls of Salmonella-tainted peanut butter.

Since 1993, I have had the privilege to represent thousands of Americans - some your constituents. In 2002, during the middle of yet another E. coli outbreak, during the middle of another visit to an ICU to watch a new client struggle for life attached to more tubes than you can imagine, I penned an Op-ed for the Denver Post. Here is part of it:

This summer, scores of Americans, most of them small children or senior citizens, have already or will become deathly ill after eating ground beef boldly labeled "USDA approved." The now infamous outbreak started with a few sick kids in Colorado and quickly spread coast-to-coast, eventually triggering the recall of 19 million pounds of ground beef tainted with E. coli O157:H7.

Because their parents trusted our government's food inspections, several kids suffered kidney failure and spent days or weeks hooked up to kidney dialysis machines. For some, the long-term prognosis is grim, with the risk of further kidney failure, dialysis, transplants or worse.... Most of those kids' parents have hired me to help them get compensation for hundreds of thousands in medical costs and the risks of future kidney failure. This may prompt some readers to consider me a blood-sucking ambulance chaser that exploits other people's personal tragedies.

If that is the case, here is my plea: Put me out of business. Please.

For this trial lawyer, E. coli has been a far too successful practice - and a heart-breaking one. I am tired of visiting with horribly sick kids who did not have to be sick in the first place. I am outraged with a food industry that allows E. coli and other poisons to reach consumers, and a President, Congress and federal regulatory system that do nothing about it. Stop making kids sick - and I will happily move on.

That was 2002. Ladies and Gentlemen, the time has finally come to put me out of business. Today, the CDC estimates that there are still 76 million cases of foodborne illness annually. That means one in four Americans will contract a foodborne illness every year. Hundreds of thousands will be hospitalized and thousands will die. That's the human suffering part.

There is also the business part. Billions of dollars will be spent on medical treatment and many more billions will be lost in wages, in recall costs, in the sale of food, and yes, in legal fees to defend and prosecute these companies. Civil litigation in America is a blunt instrument for change. It is better that government and business work together to eliminate the need for lawsuits and for lawyers. When American business poisons its customers, and when our regulatory agencies do not have the manpower, willingness or the ability to help business perform, people die and market share is lost, nationally and internationally. It is time that we help business and consumers to simply make me unnecessary. If you fix the food safety system, trial lawyers like me will become a small, irrelevant footnote in history, but you will be remembered and honored for helping to fix a broken system.

The issue of food safety is not new, of course. A century ago Upton Sinclair's book "The Jungle" exposed both contamination of meat processing and the corruption that lead inspectors to look the other way. What has changed since Upton Sinclair's time? Are we better off than we were 100 years ago?

A year ago, I was asked by the spinach and lettuce growers of California to address them in Salinas. Considering that by then the leafy green industry was on its knees financially and I had lawsuits pending in several states, it was a tense lunch. Why I was invited? I am still not so sure, but why I was suing them was all too clear, in the prior 10 years there had been 21 outbreaks related to fresh leafy products with hundreds sickened. In 2006, 205 people became sick and five died from eating E. coli contaminated spinach, followed quickly by lettuce E. coli cases at Taco Bell and Taco John's. The common denominators - California lettuce and more lawsuits. Mexico banned the importation of California spinach and lettuce.

I told the quiet audience of 250 growers and producers a story that I believed at the time to be true. I told them about what I had seen since the 1993 Jack in the Box case. I told them what seemed to have happened after the Jack in the Box crisis was that incidences of E. coli in meat seemed to decline. First slowly and then more rapidly. I told them how I believed that the problem - through governmental oversight and industry know how. I told them that I had lived to see one of the major food safety success stories of

our time. According to the CDC, *E. coli* outbreaks linked to tainted meat had declined by 42 percent through 2006. I told them that they should emulate what the beef industry had done to put me out of business, because they had. From 1993 to 2002, nearly all of my work was *E. coli* cases tied to hamburger. In 2003, one year after the recall of 19 million of pounds of meat, I had no ambulance to chase. I had no one to sue on behalf of victims of tainted hamburger because I had no victims.

And then the spring of 2007 started with an ominous “uptick” in *E. coli* recalls and illnesses and ended with hundreds sickened, 33 million pounds of meat recalled, and guess what? More sick and dead children, and yes, more lawsuits. China banned the import of some US beef. If you ask the USDA and industry to explain this “uptick,” they have none. That is unacceptable.

Things are different from Sinclair’s critical view of packing plants of the 1900’s. We now face things Sinclair could not even begin to imagine. Those two things must drive food safety decisions now. The first is the threat of terrorist attacks via the food system. Just as too many could not imagine the horror of 9/11, too many cannot envision this kind of food disaster today. When a terrorist attacks our food system it will look eerily similar to any other outbreak of foodborne illness. Second, is the growth of food imports. Sinclair could not have imagined a world where the meat that may be in one hamburger could originate in Argentina, Canada and Colorado or that we would have fruits and vegetables year-round shipped in from South America, Asia and Africa. It is with these two enormous issues in mind, that I offer suggestions on how to put me out of business.

First, create a local, state and national public health system that catches outbreaks before they balloon into a personal and business catastrophe. Everyone believes that the Jack in the Box outbreak started in Seattle in January 1993. It did not. It actually began in November 1992 when young Lauren Rudolph died and another 30 people were sickened in and around southern California. However, because *E. coli* O157:H7 was not a reportable illness at the time, the death and illnesses were not recognized as an outbreak and the contaminated meat was shipped to Seattle. CDC’s PulseNet and Food Net were launched and are rightly credited with helping reduce the size of outbreaks by helping to more quickly conclude what suspect product is causing harm. But surveillance of human bacterial disease is lacking. For many foodborne illnesses, for every one culture positive case, 20 to 50 other cases are missed because of lack of surveillance. Most people who become ill with a bacterial or viral disease are either seldom seen or never cultured. The more people are tested, the greater the likelihood that a source, accidental or not, will be found sooner.

Second, actually inspect and sample food before it is consumed. At present, Local and State authorities, along with the USDA and FDA, employ thousands of inspectors across the nation and world to inspect tens of thousands of plants that produce billions of pounds of food at farms, processing plants and retail outlets. The GAO has warned in the past that our food sampling and inspection is so scattered and infrequent that there is little chance of detecting microscopic *E. coli* or any other pathogen for that matter.

Third, consider mandatory recall authority on all food products. Recalls must be completely transparent. If a recall is ordered, consumers need to know what in fact is being recalled. Full disclosure must be the rule. Under the present system of voluntary recalls, last September we saw the disastrous Topps recall where the company knowingly left E. coli contaminated product on store shelves three weeks after being confronted with an ill customer and its product both testing positive for E. coli O157:H7. But recalls are not perfect. Although stunned by the video of animal abuse at Hallmark/Westland, I am more stunned that the recall has ballooned to 143 million pounds of meat and is quickly encompassing products that might contain trace amounts of the meat. No people have been sickened. I wonder if resources are better spent elsewhere.

Fourth, on a national level, merge and then adequately fund the three federal agencies responsible for food safety. Right now, USDA's Food Safety and Inspection Service and the inspection arm of the Food and Drug Administration share this mission with the CDC. The system is trifurcated, which leads to turf wars and split responsibilities. We need one independent agency that deals with food-borne pathogens. You have a moral responsibility to consumers in your hometown or anywhere U.S. goods are sold. It is time to adequately fund our health and safety authorities to help business protect their customers.

Fifth, we cannot regulate ourselves out of this. Standards need to be set with the entire food chain at the table – from farmer, to manufacturer, to retailer and customer. Standards must also be based upon good science. We must invest in solid research at our land grant institutions to help producers manufacturer food that is safe, nutritious and the envy of the world.

None of this will stop bacterial and viral illnesses entirely. These invisible poisons have been around a long time. However, these five steps will enable us to help prevent it, help detect it far more quickly, to alert stores and families, and to keep our most vulnerable citizens - kids and seniors - out of harm's way. Thank you Mr. Chairman. I am happy to answer any questions.