

Protecting Your Farm or Ranch Assets

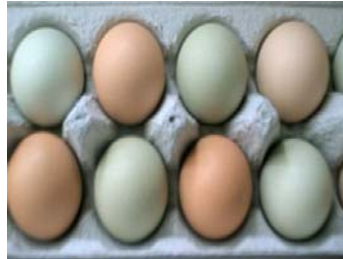
Developing Direct Market Agricultural Enterprises
and Understanding Legal Liability in the Inland Northwest

Chapter 2: Safe Farm Products



Herb Vinegars

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Assuring Safe Products

Introduction

“The [food processing] laws may limit what you can sell and to who, they may set minimum guidelines for the steps you must take to prepare and sell certain foods, and they may require you to obtain licenses and have your facilities inspected by state or local officials. Complying with these laws and regulations – most of which are based on the desire to protect the health and safety of our food supply – will be essential to the future of your operation.” (Hamilton, p. 159.)

Product liability is a term that addresses claims of customers who have been injured by a product and a determination of responsibility for those damages on the part of all persons or entities in the chain of custody of the product.

Foreign Objects in Food Products

The definition of foreign objects hinges on the “consumer expectations test”: “What objects might a consumer reasonable expect to find in the food?” Marketers of food products that are processed or sold as “ready to eat” have a higher responsibility in eliminating foreign objects that may cause harm. A consumer would more likely expect to find a “worm” in a fresh ear of corn still in the husk than in a bag of cut salad greens labeled as ready to eat.

Regulations and Processed Foods

Processing foods is often a way to increase the value to food items such as jams from damaged fruit, cheese, and baked goods. Direct marketers involved in selling processed products fall under local, state, and federal laws which regulate the foods industry.

Minimally altering food items such as cutting lettuce and mixing it in bags for ready-to-eat salads or juicing apples may be considered processing and subject of food safety laws and regulations. The sale of meats, poultry, eggs, and dairy products are all subject to extensive laws and regulations controlling site requirements, processing procedures, warehousing issues and where these products can be sold.

Farmers that direct market processed products must be familiar with regulations affecting their operation. These regulations specify guidelines for processing practices and requirements for facilities as well provision for regular inspections. Compliance with these regulations assures that proper food safety techniques are in place and reduce the likelihood of products becoming contaminated.

If a claim regarding harm should arise, evidence that these regulations have been followed liability is less likely. Violation of these regulations may result in strict negligence in which the marketer will most likely be liable.

Definition of “negligence per se”: Negligence that results from violation of a statute or ordinance enacted for the protection of others.

The guide for the State of Washington is [The Handbook of Regulations for Direct Farm Marketing](#) or commonly known as “The Green Book.” The 2005 edition is available from the Small Farm & Direct Marketing Program, Washington State Department of Agriculture. The handbook can be found on the web at: <http://agr.wa.gov/Marketing/SmallFarm/greenbook.htm>

The Handbook includes information on doing business in Washington State, direct marketing strategies, selling specific products such as eggs, milk or poultry, labeling and a list of local health departments. This handbook should be on the shelf of every direct farm marketer and the producer should be familiar with the regulations that affect his or her operation. Questions can be directed to staff at the Small Farm & Direct Marketing Program when ambiguity arises and Program staff can provide guidance on working with local health department officials.

Although local health department officials and WSDA Food Safety officials work for agencies that enforce regulations that may seem onerous to the producer they can just as easily become your allies in solving problems and helping to meet local and state regulations. Building constructive working relationships with these individuals and getting to know them will help direct marketers meet food safety requirements as easily as can be expected.

Food-borne illness

There are very few court cases on food-borne illness resulting from sales at typical direct farming marketing operations. However, there are legitimate concerns regarding lawsuits when it comes to marketing food products.

There is no way to guarantee everything the direct farm marketer grows is free from harmful microbial contamination. The risk can be reduced if preventative steps are taken before products leave the farm. Direct farm marketers can minimize this risk by knowing the sources of contamination and by adopting practices to minimize pathogen contamination during production, and harvest or processing of fresh products, poultry and animal products. Clean soil, clean water, clean hands and clean surfaces are all important in achieving this goal.

The goal of the Good Agricultural Practices (GAPs) program at Cornell University is to reduce the microbial risks to fresh fruit and vegetable products through educational programs. Their publication “Reduce Microbial Contamination with

Good Agricultural Practices” is included in this manual. Additional information can be found at their website: <http://www.gaps.cornell.edu>

There are additional ways the producers can protect themselves from such claims. The farm can educate customers about the potential for contamination such as salmonella contamination in eggs. Producers can buy labels to put on product packaging that provide information on proper storage, handling, and cooking requirements. Generally, liability is more likely for processed or cooked food products than for those sold raw, because, for example, a consumer should know how to cook meat and poultry products to the required temperature to kill potential pathogens. Complying with local, state, and federal regulations may help to cushion the farmer from liability.

Limiting Liability

- Educate Yourself. Obtain training on the types of microorganisms that cause food borne illnesses and ways they may enter the food chain.
- Educate Your Employees. Farm employees should be familiar with good agricultural practices regarding hygiene and the production and handling of food products.
- Educate Your Customers. Inform your customers of safe handling and preparation practices of food products they purchase from you as well as dangers that may develop if these guidelines are not followed.
- Know Regulations. Most regulations affecting the direct marketing of food products in Washington are found in “The Green Book.” Local health districts may have additional requirements and some products (livestock) may be subject to federal regulations. There may be labeling requirements for some products.
- Know Safe Food Handling Practices. Handling, storing and preparing your products may require a food handler’s permit. Regardless, it is necessary to know safe food handling practices.
- Read Pesticide Labels. If you use pesticides, carefully read and follow label directions and make sure applications are correct. You may be required to keep records of mixtures, date of applications, location, and weather conditions. Make sure employees are closely supervised.
- Keep Records. Document any training you have received and training you have provided for your employees. Document good agricultural practices you have followed in educating your customers and in the production, processing and sale of your products.

- Compile a Library. Create a comprehensive library of applicable regulations, good agricultural practices and safe food handling practices.

Good agricultural practices with regard to clean water.

- Wells are protected from outside contamination
- Drinkable water supply and/or wells are tested at least once a year
- Water source(s) used for washing produce are located the distance required by local/state regulations from manure storage facility, livestock area, pesticide storage area and/or septic system drainage field
- Records of all water tests on file
- Backflow devices and air gaps installed at appropriate locations

Supporting resources:

Liability concerns for Farmers Involved in Direct Marketing of Farm Products
[follows]

WA Handbook of Regulations for Direct Farm Marketing: "[The Green Book](http://agr.wa.gov/Marketing/SmallFarm/greenbook.htm)"
[<http://agr.wa.gov/Marketing/SmallFarm/greenbook.htm>]

Cornell University's [Good Agricultural Practices \(GAPs\)](http://www.gaps.cornell.edu) Program Publications
[<http://www.gaps.cornell.edu>]

"Food Safety Begins on the Farm" and

"Reduce Microbial Contamination with Good Agricultural Practices"

Cornell University/ Good Agricultural Practices Program
Reduce Microbial Contamination with Good Agricultural Practices

Food Safety Begins On The Farm

Outbreaks of foodborne illness make news headlines on a regular basis. In the U.S., it is estimated that as many as 76 million people contract some type of foodborne illness each year. As a result, over 325,000 are hospitalized and about 5,000 deaths occur. *Salmonella* on tomatoes and cantaloupes, *E. coli* 0157:H7 on lettuce and in apple juice, hepatitis A on strawberries, and *Cyclospora* on raspberries have shaken consumer confidence in the safety of fruits and vegetables. Since 1987, the number of produce-associated outbreaks has doubled, raising concern among the produce industry, government agencies, and consumers.

From planting to consumption, there are many opportunities for bacteria, viruses, and parasites to contaminate produce. On the farm, soil, manure, water, animals, equipment, and workers may spread harmful organisms. Produce may be harvested on a farm, processed in one plant, repackaged in another, then stored, displayed, or served by an institution or in the home. Each of these steps is an opportunity for harmful microorganisms to enter the food supply.

How much foodborne illness originates on the farm? **No one knows.** Are there reasonable steps that a grower can take to reduce the risk that pathogens will contaminate the food produced on the farm? **Absolutely.**

Clean Soil

The improper use of manure can be a risk factor contributing to foodborne illness. Pathogens such as *E. coli* 0157:H7, *Salmonella*, and *Campylobacter* can be present in manure slurry and soil for up to 3 months or more, depending on temperature and soil conditions. *Listeria* may survive on vegetables growing in the soil, even though it may not survive in the soil itself. *Yersinia* may survive in soil for up to 330 days. Composting manure, incorporating it prior to planting, and

avoiding top-dressing with fresh manure are important steps that can reduce the risk of contamination while making use of this important source of nutrients. Excluding domestic and wild animals as much as possible from production fields will help reduce the risk of manure (fecal) contamination.

Clean Water

When using surface water for irrigation, test quarterly for fecal coliforms, especially if water passes close to sewage treatment or livestock areas. Make sure that water used for produce cooling, washing, dipping, and processing operations is drinkable (potable). Whenever possible, use chlorinated water. Always make ice with potable water.

Clean Hands

Attention should be paid to worker hygiene in the field and the packing house. Workers who pick, sort, grade, or pack produce **must** wash their hands after using the restroom. Hepatitis A outbreaks have been linked to infected workers. Teach workers about microbial risks. Provide soap, clean water, and single-use towels in the field and insist that all workers wash hands before handling fruits and vegetables.

Clean Surfaces

Before harvesting or packing and at the end of each day, clean all bins and work surfaces. Sanitize surfaces using recommended chemicals and procedures (consult local extension service for specific recommendations).

There is no way to guarantee that everything we grow and consume is free of harmful microbial contamination. The risk can be reduced if preventative steps are taken before produce leaves the farm. This brochure contains detailed suggestions on how you can reduce risks of microbiological contamination on the farm.

Cornell University/ Good Agricultural Practices Program

Minimize Pathogen Contamination during Production and Harvest of Fresh Produce

Pre-Plant

Select Produce Fields Carefully

- ✓ Review land history for prior use and applications of sludge or animal manure.
- ✓ Choose fields upstream from animal housings.
- ✓ Know upstream uses of surface water and test water quality as needed.
- ✓ Prevent runoff or drift from animal operations from entering produce fields.

Store Manure

- ✓ Store slurry in continuously loaded systems for 60 days in summer or 90 days in winter prior to field application.
- ✓ Consider satellite storage for slurry used on produce fields.
- ✓ Compost manure properly to kill pathogens.

Time Applications and Incorporate Manure

- ✓ In fall- apply manure to all planned vegetable ground, preferably when soils are warm (>50°F), non-saturated, and cover cropped.
- ✓ In spring- incorporate manure two weeks prior to planting.
- ✓ Whenever possible, incorporate manure.
- ✓ Do *NOT* harvest produce within 120 days after manure application.
- ✓ Keep records of application rates, source, and dates.

Choose Crops Carefully

- ✓ Avoid root / leafy crops if manure is applied in spring.
- ✓ Plant agronomic or perennials crops where manure is applied in spring.

Production

Do NOT Sidedress with Manure

- ✓ **ABSOLUTELY DO NOT SIDEDRESS** with fresh or slurry manure or manure 'tea' or mulches containing fresh manure.
- ✓ OK to sidedress with mature composts or compost teas.

Exclude Animals

- ✓ *NO* grazing of livestock near produce fields.
- ✓ Minimize wild and domestic animal traffic in produce fields.

Promote Worker Hygiene in the Field

- ✓ Provide and maintain clean restrooms.
- ✓ Supply soap, clean water and single-use towels for hand washing and enforce use.

Test Irrigation Water Quality

- ✓ Identify water source for irrigation.
 - ◆ Municipal drinking water- low risk
 - ◆ Potable well water- minimal risk if well casing is maintained and livestock excluded from active recharge area
 - ◆ Surface water- high risk
- ✓ Test quarterly or during season (beginning, mid or high draw, and at harvest) if water source passes near livestock or sewage treatment.
- ✓ Filter or use settling ponds to improve water quality.
- ✓ Use potable water for crop protection sprays.
- ✓ Maintain records of water tests.

Select Irrigation Method

- ✓ Where feasible, use drip irrigation to reduce crop wetting and minimize risk.
- ✓ Apply overhead irrigation early in the day so leaves dry quickly.

Cornell University/ Good Agricultural Practices Program

Minimize Pathogen Contamination during Production and Harvest of Fresh Produce

Harvest

Clean Harvest Aids

- ✓ Check that bins are clean and in good repair.
- ✓ High-pressure wash and sanitize bins prior to harvest and clean bins daily during harvest.
- ✓ Remove excess soil from bins in field.
- ✓ Ensure that packing containers are not overfilled and protect produce adequately from bruising and damage.

Handle Produce Carefully During Harvest

- ✓ Avoid standing in bins during harvest to reduce pathogen spread by shoes.
- ✓ Minimize bruising of produce during harvest.
- ✓ Remove excess soil from produce in the field.

Promote Cleanliness at U-Pick

- ✓ Invite customers to wash their hands prior to entering fields.
- ✓ Provide clean and convenient restrooms.
- ✓ Supply soap, clean water, and single-use towels and encourage use.

Avoid Drops for Apple Cider

- ✓ Do not use decayed or wormy fruit.
- ✓ Pasteurize cider.

Promote Worker Hygiene (see “Production”)

Keep Produce Cool

- ✓ Cool produce quickly to minimize growth of any potential pathogens.
- ✓ Use ice made from potable water.
- ✓ Store produce at appropriate temperatures to maintain good quality.
- ✓ Do not overload coolers.

Post-Harvest Handling

Promote Worker Hygiene and Health

- ✓ Teach workers about microbial risks and the importance of hygiene.
- ✓ Provide clean restrooms with soap, clean water, and single-use towels.
- ✓ Post signs in restrooms and enforce hand washing.
- ✓ Provide non-food contact jobs for sick employees.

Monitor Wash Water Quality

- ✓ Use potable water for all washes.
- ✓ Maintain clean water in dump tanks by sanitizing and changing water regularly.
- ✓ Chlorinate wash water.
 - ◆ Monitor chlorine levels
 - ◆ Maintain 150 ppm for leafy vegetables and up to 500 ppm for other crops
 - ◆ Maintain water pH at 6.0-7.0
 - ◆ Provide final rinse if using >100 ppm chlorine
- ✓ Avoid tank water temperatures more than 10°F cooler than produce temperature.

Sanitize Packing House

- ✓ Clean and sanitize loading, staging, and all food contact surfaces at end of each day.
- ✓ Exclude all animals, especially rodents and birds from the packing house.
- ✓ No smoking or eating in packing area.

Transportation and Refrigeration

- ✓ Check and clean trucks prior to loading.
- ✓ Sanitize if animals previously hauled.
- ✓ Pre-cool vehicles prior to loading.
- ✓ Ensure that refrigeration equipment is working properly.

Liability Concerns for Farmers Involved in Direct Marketing of Farm Products

(August 2003)

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The purpose of this publication is to help you learn more about this important issue. The material is general and educational in nature. It is not intended to be legal advice. If you need legal advice, you are encouraged to seek the aid of a competent attorney in your area.

Introduction: What is Direct Farm Marketing?

Direct farm marketing is a growing segment of America's food system.¹ Direct farm marketing is defined as selling food and farm products directly to consumers without using an intermediary.² There are many direct marketing opportunities available to farmers, including roadside markets and farmstands, farmer's markets and public markets, pick-your-own, community supported agriculture, direct sales to restaurants and stores, and agricultural tourism and on-farm recreation.³ No matter what form direct marketing activity takes, it is an effort to establish personal contact between the people who raise the food and the people who eat it and the ultimate result is a shortening of the chain that brings food to the marketplace.⁴

Direct farm marketing is an important part of Pennsylvania's economy. From road-side stands to farmer's markets and fairs, direct marketing of farm products provides a connection between consumers and farmers as well as an important source of income for Pennsylvania's farmers. Direct farm marketing offers many benefits to both consumers and growers. "By eliminating several layers of intermediaries, such as wholesalers and processors, the parties can

¹ Neil D. Hamilton, *The Legal Guide for Direct Farm Marketing* (1999).

² *Id.* at 22.

³ *Id.* at 24-28.

⁴ *Id.* at 1.

enjoy food that is usually fresher and better tasting, and they both gain economic advantages.”⁵ Farmers receive a greater share of profits and the cost of goods to consumers remains the same or may even decrease.

Along with these benefits, however, arise a number of legal questions. When the middleman is eliminated, will farmers face increased liability in cases of foreign object, food-borne illness, and other related cases? The purpose of this paper is to examine some of the various product liability claims related to food products and to address the liability challenges posed by the increase in direct marketing of farm products.

Part I: What liability issues arise when farmers participate in direct farm marketing?

A. Something is there that should not be – Foreign Objects in Food Products

Suppose a consumer is harmed by a pebble in her canned peaches or a worm in her ear of fresh corn. When situations like this occur, the issue of who is liable for injuries caused by foreign objects in food arises. Central to resolving this issue is the *consumer expectations test*. This test asks “what objects might a consumer reasonably expect to find in the food?” Thus, while early foreign objects cases turned upon whether the object was “foreign or natural”⁶ to the food product, the standard used by most courts today is what a consumer (as determined by the jury) should foresee as possibly being present in her food item and therefore guard against. The

⁵ *Id.* at 1.

⁶ The foreign versus natural test created liability on the basis of breach of wholesomeness and reasonable fitness for human consumption for the vendor of food containing a foreign object which injured the consumer, but absolved the vendor where the object was natural to the food, since the natural object did not render the food not reasonably fit for human consumption. David Owen, *Manufacturing Defects*, 53 S. C. L. Rev. 851, 853 (Summer 2002).

foreseeability of harm mandates a food vendor to remove such harmful objects (whether foreign or naturally occurring) as a consumer would not normally anticipate and guard against.

Therefore, purveyors of food products that are processed or sold as “ready to eat” must take greater precautions in eliminating foreign objects that may cause harm to the consumer. Returning to our example, for instance, a consumer may be more likely to “reasonably expect” to find a worm in a fresh ear of corn still in the husk than in a bag of cut salad greens labeled as “ready to eat” and would probably be even less likely to anticipate and guard against a pebble in a can of peaches.

The question arises as to what constitutes “processing” of food products. The consideration of what food products fall under the “processed” category is generally a matter of state and municipal regulations. Such regulations may require special licensing of vendors selling products designated as processed.⁷ Violation of such applicable regulations may render the food vendor strictly liable.

B. Marketing High Value and Processed Foods

For farmers that only sell raw products (including whole fruits and vegetables) that are not processed in any way (such as by cooking, preparing, slicing or in any other way transforming from their natural state), there is, in most circumstances, little need to be concerned with food processing laws.⁸ However, as processing foods may be a way to add value to food items (such as in the production of bread, jam, cheese, and baked goods), many farmers involved in direct marketing sell products that are considered processed and thus fall under state and federal laws which regulate the processed foods industry.⁹ It is important for those involved in

⁷ See Hamilton at 159.

⁸ *Id.* at 158.

⁹ *Id.* at 158.

direct marketing to take note that even minimally altering food items (for instance, cutting lettuce and mixing it in bags for ready-to-eat salads or juicing apples) may be considered processing and thus subject to state or federal laws. Additionally, the sale of meat, poultry, eggs, and dairy products are all subject to extensive state and federal laws controlling what products must be inspected and where they can be sold.¹⁰

It is crucial that farmers involved in direct marketing of products regulated by state or federal laws be familiar with these laws. Such laws may set minimum guidelines for the steps taken to prepare food or require that facilities be licensed or regularly inspected.¹¹ In any scenario, compliance with such regulations helps assure that proper food safety techniques are in place and helps to reduce the likelihood of products becoming contaminated. In addition, if a products liability case does arise, and where such regulations have been followed, liability is less likely; whereas violation of such regulations may sometimes result in strict negligence.¹²

As state laws regulating sales of food produced on farms vary widely from state to state, it is important that farmers familiarize themselves with the specific laws applicable to them. State and local food officials are in the best position to know what regulations apply to the activity under consideration.¹³ For internet access to these names, contact the FDA web site at <www.fda.gov/ora/fed-state/directorytable/htm>.¹⁴

C. *“It must have been something I ate” – Food-borne Illness*

It seems as though the news is filled with reports of foodborne illness and food recalls. The truth is, though, that court cases are rare in comparison to the vast quantities of food sold

¹⁰ *Id.* at 159.

¹¹ *Id.* at 159.

¹² *See* Owen at 852.

¹³ *See* Hamilton at 159.

¹⁴ *Id.* at 159.

and there is, in fact, little case law on the topic. This is especially true as it relates to foods sold in typical direct farming marketing operations.¹⁵ Nevertheless, it is crucial that food purveyors take the necessary precautions to avoid such outbreaks and prepare themselves for the possibility that such a lawsuit may arise.

There are many ways in which farmers and other food purveyors can protect themselves from such claims. Consumer education is one such area. Acting in the role of educator and informing people about the potential for contamination of food, such as salmonella contamination in eggs, is an important role of those involved in direct marketing. Some relevant topics include proper storage and handling methods. Additionally, labeling of perishable food products with such directions may result in the purveyor being less likely to be found liable if a case of foodborne illness does arise.

Cases involving foodborne illness turn on the specific facts of the case. Generally, liability is more likely for processed or cooked food products than it is for those sold raw because, for example, a consumer should know to cook a meat product to a certain temperature to avoid such illness and the failure to do so may be considered contributory negligence.

Finally, complying with all federal and local regulations with regard to products sold may help to cushion the food purveyor from liability, whereas failure to comply may result in the violator being found strictly liable.

While none of the above will completely shield food purveyors from liability, they may help to establish that such foodborne illness, should it arise was not their fault.

Part II: Traditional Food-Products Liability Claims

¹⁵ *Id.* at 175-176.

Plaintiffs in food products liability cases, whether foreign object, food-borne illness or other, typically seek recovery under three theories: negligence, breach of warranty, or strict liability in tort.

A. Negligence

While early courts handling food products liability cases held food purveyors to a standard of “extraordinary” or “utmost care”, modern food purveyors are usually held to the normal standard of reasonable care.¹⁶ Often, if a state has a pure food act, violation of such an act by a food purveyor will amount to negligence per se.

B. Warranty

Where an express warranty exists, plaintiffs have a distinct advantage over negligence in that proof of the defendant’s fault is not necessary. Although express warranties are rare in food products cases, they do arise where food is labeled as e.g. “boneless chicken breasts”.¹⁷

Warranty may also be found under the implied warranty of quality or wholesomeness, which is now encompassed under the implied warranty of merchantability (i.e. that a good is “fit for the ordinary purpose for which such goods are used”) of the Uniform Commercial Code (UCC)¹⁸, which has been adopted as the commercial code by most states including Pennsylvania.

The issue arises as to whether farmers are considered to be merchants under the UCC definition and thus held to the higher standards imposed upon merchants. The courts are divided as to whether or not a farmer should be considered a merchant for purposes of sales transactions. The resolution of this issue determines whether specific duties are imposed¹⁹, such as the implied

¹⁶ See Owen at 852.

¹⁷ *Id.* at 852.

¹⁸ See 13 PA. CONS. STAT ANN. § 2314 (b) (3) (West 2003).

¹⁹ J.W. Looney, Julia R. Wilder, Sam Brownbeck and James B. Wadley *Agricultural Law* 298. American Bar Association with the National Center for Agricultural Law Research and Information (1990).

duty of merchantability. There are three basic ways in which the criteria defining a merchant may be satisfied, as laid out in *Decatur Cooperative Association v. Urban*²⁰:

A merchant is (1) a dealer who deals in goods of the kind involved, or (2) one who by his occupation holds himself out as having knowledge or skill peculiar to the practices or goods involved in the transaction, even though he may not have such knowledge, or (3) a principal who employs an agent, broker or other intermediary who by his occupation holds himself out as having knowledge or skill peculiar to the practices of goods involved in the transaction. *Professionalism, special knowledge and commercial experience are to be used in determining whether a person in a particular situation is to be held to the standards of a merchant.* (Emphasis added).²¹

Thus, a farmer not actively and regularly engaged in the selling of a product, for example, selling the product only occasionally, may not be considered to be a merchant as in *Decatur* where the farmer only sold his wheat crop once a year. Conversely, a farmer selling his product regularly and actively may be held to be a merchant, as in the case of a farmer in the hog business for 30 to 40 years and regularly selling large numbers of the animals in *Musil v. Hendrich*.²²

C. *Strict Liability in Tort*

“With the rise of the doctrine of strict products liability in tort in the 1960s and 1970s, problems of establishing negligence and satisfying the technical rules of warranty (such as the need for proof of privity) fell away in cases involving foodstuffs.”²³ Thus, where statutes governing liability for the sale of defective food products, food purveyors will be found to be strictly liable for the violation of such statutes.

Part III. Proving Causation: The Chain of Liability

²⁰ *Id.* at 300 citing 219 Kan. 171, P.2d 323 (1976).

²¹ *Id.* at 300.

²² *Id.* at 299 citing 6 Kan. App. 196, 627 P. 2d 367 (1981).

²³ See Owen at 892.

Even if a plaintiff can establish that a food or drink ingested was dangerously defective, the plaintiff must connect the defect both to the defendant and to the plaintiff's injury or illness. "It is fundamental that a seller is responsible for an injury only if the seller was responsible for the defect—that is, if the defect was in the product when it left the seller's control."²⁴ Thus, when intermediary handlers of a food product enter into the picture (for example, a farmer sells lettuce to a retailer who sells it to a restaurant where a customer finds a pebble or other foreign object in her salad), a farmer may be less likely to be found liable for the presence of the foreign object than if he were to sell salad fixings directly to a consumer. It may be impossible in such a case for a plaintiff to eliminate the possibility that the foreign object entered the product while in the farmer's presence, and thus the farmer may not be held to be responsible.

Only a plaintiff who proves all three elements—(1) that food or drink was defective, (2) that the defendant manufacturer or food purveyor was responsible for the defect, and (3) that the defect proximately caused the harm – may recover damages for the harm. Therefore, eliminating intermediaries, while it may result in positive changes for the farmer such as increased profits, may also result in his being not as far back the chain of liability and thus potentially the defendant in more product liability claims.

Part IV. Additional Considerations

A. Insurance

"As a general rule, the typical farm liability policy does not provide protection for activities which happen off the farm premises, such as at a nearby market. In addition, the policy

²⁴ *Id.* at 902.

may treat these sales as business activity not covered by the farm liability policy.”²⁵ Finally, typical farm insurance may not cover such claims as products liability. Thus, a farmer engaged in the sale of products at a farmers’ market or off-farm roadside stand may require additional insurance. A farmer involved in direct marketing of products would be well-advised to consult his insurance provider for the specifics of his policy and for information regarding the purchase of additional insurance.

Conclusion

Direct marketing of farm products will continue to increase as an important segment of the agricultural business sector as consumers seek the freshest foods at the lowest prices and small farms look for ways to improve their profits. As more and more farmers become involved in direct marketing, it is important that they are aware of both the positive and negative effects of this important sales venue. By becoming educated marketers, farmers can help to protect themselves from potential liability and increase their profits as well as provide their consumers with the best products.

²⁵ Neil D. Hamilton, *Farmer’s Markets Rules, Regulations and Opportunities*, 34.. National AgLaw Center Publications (June 2002).

BASIC REGULATIONS FOR SELLING AT IDAHO FARMERS MARKETS 2006



STATE OF IDAHO TAXES

All vendors are required to collect six-percent Idaho sales tax and remit to the tax commission.

The permit is free.

The permit must be displayed at the market.

If a vendor does not have a permit on market day, the market manager will issue a temporary form. The vendor must obtain a permanent permit before the next market day.

Idaho State Tax Commission
800 Park Boulevard Plaza IV
Boise, ID 83712
(800) 972-7660 or (208) 334-7660

<http://tax.idaho.gov/>

334-7660

Brochure:

http://www.tax.idaho.gov/pdf/SalesTaxBrochures/2003/4_Retailers_%20WebVersion.pdf

☑ **CHICKENS & EGGS in the State of Idaho**

The following information is from the Idaho Department of Agriculture, Central District Health, and the Idaho Statutes.

Chickens are susceptible to salmonella, a family of bacteria that can also infect their eggs. The Department of Agriculture monitors the production and sale of eggs. If you have fewer than 300 hens, there is no Department of Agriculture license, inspection, or fee.

If you have fewer than 300 hens and sell direct to the customer, then you don't need a Department of Agriculture license, nor an inspection, and you don't have to grade your eggs. You do need a license from the Health Department, and you do need to write your name, address, and "ungraded eggs" on each carton. You may print this information on address labels and stick them to the cartons. And you may use used cartons. Eggs must be stored at 45 degrees or lower. You may keep the eggs in an ice chest at the farmers market. You must have a thermometer. A thermometer from the kitchen section of the supermarket is fine.

If you have 300 or more hens, grade eggs, sell to distributors or retailers, then you will need a Department of Agriculture license and an inspection. The annual license is \$20 for each distribution location. The license fee to grade eggs is \$5. The Department of Agriculture license and inspection is to ensure that if lots of chickens are raised in one place that it is done in a healthy environment. The Department of Agriculture license is addition to the Health Department license. The latter is to ensure that the eggs are handled properly after they are produced.

Idaho Department of Agriculture

Contact: Romero Benavidas

Phone: 208-332-8500

All ag rules are at

<http://www2.state.id.us/adm/adminrules/rules/idapa02/02index.htm>

Egg rules are

<http://www2.state.id.us/adm/adminrules/rules/idapa02/0211.pdf>

<p>For more details see State of Idaho District Health Department Contact Information on Page 44 of this chapter</p>

No license is needed from the Health Department as eggs are regulated by Department of Agriculture. However, an ice chest may be used at events under four hours in duration. If the event goes longer, then refrigeration should be used. Most of the farmers markets in Idaho last approximately three or four hours and an ice chest is acceptable. The vendor must have a thermometer. The eggs must be 45 degrees or cooler.

Idaho Egg Law

Title 37 - Food, Drugs, and Oil

Chapter 15 - Eggs and Egg Products

<http://www3.state.id.us/idstat/TOC/37015KTOC.html>

Poultry Processors List: USDA or State Approved Plants and Mobile Processing Units that Custom Process Poultry

Compiled by Jeanette Beranger, American Livestock Breeds Conservancy, and Anne Fanatico, National Center for Appropriate Technology

Contact Anne Fanatico, annef@ncat.org, 800-346-9140 for more information.

Introduction

Interest in specialty poultry production is growing in the U.S. Many small farmers raise poultry with outdoor access, or they may raise a heritage American breed. Many consumers would like to buy poultry meat and products from these specialty birds. However, one problem is that there are few processing facilities that provide poultry processing services for independent producers. Very large poultry processing plants are usually only set up to process their own birds. Therefore, some small meat processing plants have added poultry processing to their services, or entrepreneurs have established poultry processing plants that offer custom processing. Since it is expensive to build a processing plant, some producers share resources and build mobile processing units.

Some of these plants are USDA-inspected with inspectors are present during processing. If your birds are processed at a USDA plant, you have more options for selling the carcasses or products. For example, you can sell to the public, stores, restaurants, across state lines, etc. Some of these plants are state plants. If your birds are processed at a state plant, you will have fewer options for selling the carcasses.

Some plants offer special types of processing such as cut-up or further processing (sausage, jerky), air chilled, kosher, halal, or certified organic.

Poultry Processing in Idaho:

Janie Burns

HomeGrown Poultry

9904 Southside

Nampa, ID 83686

208-278-3471

Contact: Janie Burns medowlrk@velocitus.net

Idaho Health District Offices

Panhandle District Health Department

2195 Ironwood Court
Coeur d'Alene, ID 83814
Phone: (208) 667-3481
Fax: (208) 664-8736

North Central District Health Department

215 10th Street
Lewiston, ID 838501
Phone: (208) 799-3100
Fax: (208) 799-0349

Southwest District Health Department

920 Main Street
Caldwell, ID 83605-3700
Phone: (208) 455-5300
Fax: (208) 454-7722

Central District Health Department

707 N. Armstrong Place
Boise, ID 83704-0825
Phone: (208) 327-7499
Fax: (208) 327-8553

South Central District Health Department

1020 Washington Street N.
Twin Falls, ID 83301-31566
Phone: (208) 734-5900
Fax: (208) 734-9502

Southeastern District Health Department

1901 Alvin Ricken Drive
Pocatello, ID 83201
Phone: (208) 233-9080
Fax: (208) 234-7169

District Seven Health Department

P.O. Box 4776
254 "E" Street
Idaho Falls, Idaho 83402-3597
Phone: (208) 522-0310
Fax: (208) 525-7063

Organic Certification



Look for the State of Idaho Organic Certification Seal on the products you buy as a symbol of the producer's commitment to organic farming. The Idaho Certified Organic label has the full force of law behind it as well as the support of the Idaho Organic Alliance, the Idaho Organic Feed Growers Association and the Idaho State Department of Agriculture (ISDA).

In 2002, the ISDA received its accreditation as an organic certifying agency by the United States Department of Agriculture National Organic Program. For organic certification, a producer/handler must submit an application, pay a nominal application fee and undergo an on-site inspection. If all requirements are met, the producer/handler is then certified as organic for the crops grown.

The organic certification program is designed to give the consumer assurances regarding the term "organic" when it is used in the marketing and labeling of food products. Certification also benefits Idaho organic producers by facilitating the development of out-of-state and out-of-country markets for their Idaho certified organic products.

Certification Process

Program registrants submit to the ISDA an application, appropriate fees and a producer/handler organic plan with maps. Accurate recordkeeping is required. An inspector will visit each farm or handling operation during the growing season and samples may be taken for pesticide residue analysis. Additional unannounced on-site inspections may be conducted.

For application forms, please click on "Forms, Reports & Publications" at the left of this screen.

A Resource Guide outlining Idaho's organic rules, regulations, materials list and generally accepted cultural practices is available through the Idaho State Department of Agriculture for \$15.00. This fee covers the cost of development and reproduction.

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