

# ***Liability Concerns for Farmers Involved in Direct Marketing of Farm Products***

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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.<sup>1</sup> Direct farm marketing is defined as selling food and farm products directly to consumers without using an intermediary.<sup>2</sup> 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.<sup>3</sup> 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.<sup>4</sup>

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

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

<sup>2</sup> *Id.* at 22.

<sup>3</sup> *Id.* at 24-28.

<sup>4</sup> *Id.* at 1.

enjoy food that is usually fresher and better tasting, and they both gain economic advantages.”<sup>5</sup> 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”<sup>6</sup> 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

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<sup>5</sup> *Id.* at 1.

<sup>6</sup> 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.<sup>7</sup> 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.<sup>8</sup> 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.<sup>9</sup> It is important for those involved in

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<sup>7</sup> See Hamilton at 159.

<sup>8</sup> *Id.* at 158.

<sup>9</sup> *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.<sup>10</sup>

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.<sup>11</sup> 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.<sup>12</sup>

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.<sup>13</sup> For internet access to these names, contact the FDA web site at <[www.fda.gov/ora/fed-state/directorytable/htm](http://www.fda.gov/ora/fed-state/directorytable/htm)>.<sup>14</sup>

### *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

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<sup>10</sup> *Id.* at 159.

<sup>11</sup> *Id.* at 159.

<sup>12</sup> *See* Owen at 852.

<sup>13</sup> *See* Hamilton at 159.

<sup>14</sup> *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.<sup>15</sup> 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

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<sup>15</sup> *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.<sup>16</sup> 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”.<sup>17</sup>

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)<sup>18</sup>, 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 imposed<sup>19</sup>, such as the implied

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<sup>16</sup> See Owen at 852.

<sup>17</sup> *Id.* at 852.

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

<sup>19</sup> 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*<sup>20</sup>:

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).<sup>21</sup>

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*.<sup>22</sup>

### *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.”<sup>23</sup> 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

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

<sup>21</sup> *Id.* at 300.

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

<sup>23</sup> *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."<sup>24</sup> 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

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<sup>24</sup> *Id.* at 902.



may treat these sales as business activity not covered by the farm liability policy.”<sup>25</sup> 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.

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

## 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.