



Food Safety and Specialty Crops

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Specialty crops are uniquely susceptible to the presence of foodborne diseases for several reasons. Many specialty crops are eaten uncooked, or with minimal processing and it is often difficult to fully clean or sanitize them depending on the specific fruit or vegetable. Issues such as regulations and liability are becoming increasingly important as technology improves. As a specialty crop producer, it is critical to know the laws that have the potential to affect their operation, so that the risks associated with foodborne illnesses are minimized when possible.

The Federal Agencies that Regulate Food Safety and Enforcement

Food safety laws and regulations have traditionally been implemented in an unorganized manner, typically in response to food-related emergencies. As a result, the federal food safety structure includes numerous federal agencies with authority to enforce some, but not all, of the many different food regulations. Although there are over ten different federal agencies that maintain regulatory control over different aspects of food safety within the United States, two of them clearly stand out as the most important for agricultural producers.

The Food and Drug Administration (“FDA”) and the Food Safety and Inspection Service (“FSIS”) (part of the United States Department of Agriculture) enforce the vast majority of food safety statutes and regulations. The general rule is that the FSIS regulates meat and poultry products while the FDA handles the remaining food groups. However there is a significant “gray area” where multiple agencies are responsible for food safety at some point in the food production process or several agencies may have joint jurisdiction over the food. For example, consider a can of soup. The FDA has regulatory control over the vegetables in the soup as well as factory where it was canned. But if the soup contains meat, FSIS is involved in the inspection of the meat.

For the purposes of specialty crops, the most relevant actors will often be the FDA and the state government organizations that they work with. Under the federal FDCA and the Public Health Service Act, the FDA is granted broad power to provide for inspection, fumigation, disinfection, sanitation, pest extermination, and destruction of animals or articles found to be so infected or contaminated as to be sources of dangerous infection to human beings. What this means is that the FDA may have the authority to regulate on-farm activities as well as the food processing plants where it has traditionally spent most of its time and resources. In consideration of that

authority, the FDA releases “good agricultural practices” which provide guidance, but not binding regulation, to reduce certain risks before a crop is actually harvested.

The Food Safety Modernization Act of 2011¹ was signed into law in January of 2011. Currently, the FDA is drafting regulations to implement the many changes included in this expansive piece of legislation. There is a provision (called the Tester Amendment) that provides an exemption from HACPP-like requirements if the producer sells more than half of their product to consumers or restaurants and that on a three year average they do not make more than \$500,000 per year²; however the breadth of this exemption, and of the law itself, cannot be determined until FDA has finalized the regulations to put it into full effect.

Current Liability Issues Facing Specialty Crop Growers

While federal regulations may be passed in the near future that will affect the production of specialty crops there are legal liability issues that confront growers now. Specialty crop growers are held to the same general civil liabilities that everyone within the United States faces. People that consume the farmer’s products and become ill as a result may have the ability to recover damages from the farmer through a civil lawsuit. The primary cause of action that a farmer faces for civil liability is negligence.

Liability for negligence occurs when a person with a legal responsibility, or duty, fails to exercise reasonable care and, as a result of that failure, another individual was injured. Negligence is an extremely broad area of the law and many, if not most, lawsuits across the country are brought under this theory.

Example: A farmer fertilizes his vegetables with animal manure that contains E. Coli. A consumer becomes ill as a result of eating the vegetables. These questions, among others, may help to determine negligence:

1. Would a person exercising reasonable care have applied animal manure to the vegetables?
2. Would a reasonable person have taken steps to wash or sterilize the vegetables before distributing them?
3. Did the farmer take reasonable steps to prevent the spread of foodborne diseases?
4. Is it foreseeable that a farmer could contaminate his vegetables by fertilizing with animal manure that is not properly composted?

If people are injured and the farmer is found to be negligent, the farmer may then be liable for damages. However, there are steps that producers can take to reduce the likelihood of civil liability. Using “good agricultural practices” and documenting the steps that one takes to ensure that the food sold is wholesome and safe are both relatively easy steps that many farmers can

¹ 21 U.S.C.A. §§ 2201 – 2252.

² 21 U.S.C.A. § 350g.

take. However, the issue of liability in negligence cases often hinges on what the court finds that a person exercising reasonable care would do in a like situation.

The producer's ability to limit risk through the exercise of proper food safety practices will be a necessary skill if the producer wants to maintain or expand their business. The technology for identifying and tracing foodborne pathogens has made rapid advancements in the past decade and this progress will eventually allow easier traceback with greater success. This means that, even in the absence of federal and state food safety laws and regulations, the ability of consumers to trace back foodborne pathogens to their source can enable them to bring civil suits against the grower. When the increased traceability is combined with the strong likelihood of some form of state and federal food safety regulation for specialty crops, the need for proper food handling processes and good record keeping becomes critical for any grower to prosper.³

³ For more information on the topic, please see the National Agricultural Law Center's Reading Room on Food Safety at <http://www.nationalaglawcenter.org/readingrooms/foodsafety/>.