

Legal Issues Regarding the Post-Harvest Treatment of Oysters



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Approved or proposed technologies to reduce the amount of vibrio in raw oysters to non-detectable levels

❖ Mild Heat Treatment

❖ Freezing

❖ Irradiation

❖ Hydrostatic Pressure

Oysters processed with approved treatment can be labeled:

**Processed to reduce
V.v. to non-detectable
levels**



Common Law vs. State Law

State Law Supercedes Common Law

Most States Have Product Liability Acts

Only Apply to Certain Groups

Benefits

- 1) Not subject to common law strict liability actions
- 2) Legal regime *may* be more favorable

REMEMBER

Even if exempt from Act, still at risk of being sued on other common law causes of actions



Potential Common Law Causes of Action in Foodborne Illness Cases

- 1) Strict Product Liability**
- 2) Negligence**
- 3) Breach of Warranty**

Strict Product Liability

Individual engaged in selling or distributing defective food product is liable for harm caused by the defect.

A Product is Defective if it:

- 1) Contains a Manufacturing Defect,
- 2) Is Defective in Design, **or**
- 3) Contains Inadequate Warning

Manufacturing Defect

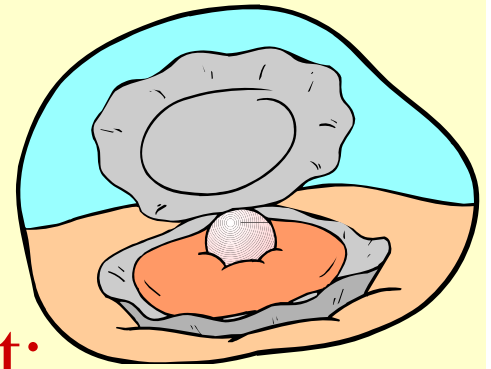
A harm-causing ingredient in a food product constitutes a defect if a reasonable consumer would not expect the food product to contain that ingredient

For Example:

Glass in Jar of Baby Food

Pebble in Can of Peas

Is *Vibrio vulnificus* a Manufacturing Defect?



Reasonable Consumer Expectation Test:

- ❖ Followed by a majority of courts, including AL
- ❖ *V.v.* would be considered a defect if a reasonable consumer would not expect to find it in the oyster

Foreign – Natural Test:

- ❖ Followed by a minority of courts, including LA
- ❖ Whether *V.v.* is natural to oysters or a foreign substance picked up in water

***V.v.* is most likely not a manufacturing defect**

Defective Design

Product is defective if foreseeable risks of harm posed by the product could have been reduced or avoided by the adoption of a reasonable alternative design

Restatement of Law, 3rd, Torts, Product Liability, Section 2(b).

Post-Harvest Treatments – Alternative Design?

Inadequate Warning



Product sold or distributed
without adequate
consumer warning

A consumer warning should
accompany all oyster sales

Example: There is a risk associated with consuming raw oysters or any raw animal protein. If you have chronic illness of the liver, stomach, or blood or have immune disorders, you are at greater risk of serious illness from raw oysters. You may, however, eat your oysters fully cooked. If unsure of your risk you should consult your physician.

Negligence

Plaintiff Must Prove:

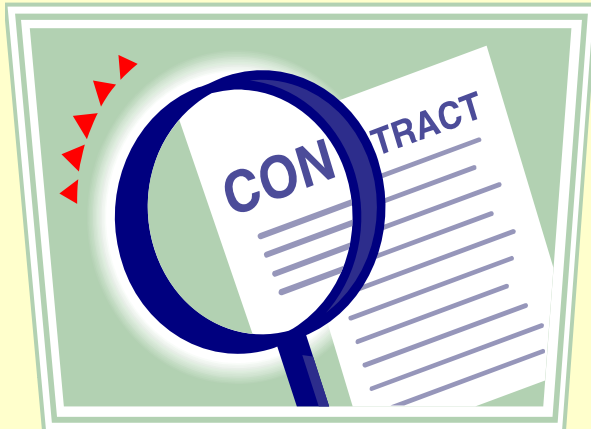
- ❖ Defendant had a duty to exercise reasonable care in producing/selling product.
- ❖ Defendant failed to exercise reasonable care; and
- ❖ Failure caused harm



Related Claim – *Negligence Per Se*

- ❖ Defendant violated a statute or regulation that was enacted to prevent exactly the type of harm that plaintiff suffered
- ❖ Failure to follow HACCP regulations

Breach of Warranty



In general, a Seller incurs obligations just by selling a project

Express or Implied Warranties

Express Warranty:

- ❖ Merchant makes representations about material facts of product, such as safety, in sales pitch, on label, or in advertisement
- ❖ **Breach occurs if representations are untrue**

Implied Warranty:

- ❖ A merchant warrants that the product is fit for the ordinary purpose for which it is sold and, if certain representations are made about the product, the product must also be fit for that particular purpose
- ❖ Question – **Is Food Fit for Human Consumption?**
 - Reasonable Expectation or Foreign-Natural Test

In Breach of Warranty Cases:

- ❖ No negligence on part of defendant required
- ❖ Plaintiff must only prove that merchant sold non-conforming food and that food caused the injury

Ways to Reduce Liability Risk

Include specific warnings on all shipments of oysters

Follow HACCP regulations and guidelines



Utilize post-harvest treatments if economically feasible

Do NOT make representations about product which may be untrue

These are only generalizations from basic tort law research. Your state laws may be different. Please consult your own attorney prior to developing a business strategy.



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