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The Pending Farmers' Market Fiasco: Small-Time Farmers, Part-Time Shoppers, and a Big-Time Problem

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THE PENDING FARMERS' MARKET FIASCO: SMALL-TIME FARMERS, PART-TIME SHOPPERS, AND A BIG-TIME PROBLEM

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I. INTRODUCTION

Farmers' markets are thriving.[1] Products liability insurance covering injuries sustained as a result of farmers' market products, however, is limited, and problems are inevitable. The United States Department of Agriculture (USDA), recognizing the rise of the market, began publishing the National Directory of Farmers' Markets in 1994.[2] Since the establishment of this directory, the number of farmers' markets in the United States has more than doubled, increasing from 1,755 in 1994 to 4,685 markets in 2008.[3] Numerous factors may have contributed to this explosive growth: our national food chain is susceptible to bioterrorism;[4] local farmers' markets may reduce a consumer's carbon footprint because the food travels shorter distances.[5] These enterprises support local farmers and neighboring communities by keeping money in the local economy.[6] Moreover, other local businesses see higher spending due to farmers' markets.[7] These markets offer expanded choices for fresh produce.[8] Many people visiting farmers' markets also harbor fears about the pesticides used

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[1] USDA, WHOLESALE AND FARMERS MARKETS: FARMERS MARKET GROWTH, 1994-2008, http://www.ams.usda.gov/AMSv1.0/ams.fetchTemplateData.do?template=TemplateS&navID=WholesaleandFarmersMarkets&leftNav=WholesaleandFarmersMarkets&page=WFMFarmersMarketGrowth&description=Farmers%20Market%20Growth&acct=frmrdirmkt (last visited Feb. 22, 2009).

[2] *Id.*

[3] *Id.*

[4] *See* Michael Pollan, *The Way We Live Now: The Vegetable-Industrial Complex*, N.Y. TIMES MAG., Oct. 15 2006, at 15, 16, *available at* http://www.nytimes.com/2006/10/15/magazine/15wwln_lede.html?_r=1&8br&oref=slogin.

The author proclaims "the reasons to support local food economies could not be any more hardheaded or pragmatic. Our highly centralized food economy is a dangerously precarious system, vulnerable to accidental—and deliberate—contamination. This is something the government understands better than most of us eaters. When Tommy Thompson retired from the Department of Health and Human Services in 2004, he said something chilling at his farewell news conference: 'For the life of me, I cannot understand why the terrorists have not attacked our food supply, because it is so easy to do.'"

[5] FRIENDS OF THE EARTH, RDA BRIEFING 2: FARMERS' MARKETS, *available at* http://www.foe.co.uk/resource/briefings/rda_farmers_markets.html

[6] *Id.*

[7] *Id.*

[8] *Id.*

in mass farming operations.[9] Other consumers may be seeking cheaper food amid soaring food prices and a troubled economy. Whatever the reasons, the number of farmers' markets is increasing, and if current trends are any indication, will continue to do so.[10]

Historical economic theories suggest that additional customers are generally good for business. However, an expanding market results in a greater potential for liability, and market vendors frequently neglect to obtain products liability insurance. This failure is a dire problem, and the consumer will likely bear the ultimate risk of loss.

II. A HISTORY OF FARMERS' MARKETS

Los Angeles claims to be home to the original "farmers market."[11] In July of 1934, during the Great Depression, Fred Beck and Roger Daholhjelm started what has been labeled the first farmers' market.[12] The two approached the owners of the former Gilmore Island dairy farm with an idea incredible in its simplicity.[13] They would "invite local farmers to park trucks on vacant Gilmore land to sell fresh produce to local shoppers."[14] After the owners agreed to the idea, eighteen farmers showed up and paid fifty cents apiece.[15] While it was unquestionably risky to start any business during a depression, the Farmers Market at Third and Fairfax has become a piece of American history.[16] Now millions of patrons visit the market each year.[17]

Many people credit Fred Beck and Roger Daholhjelm for inventing the first farmers' market in 1934, but others contend that farmers' markets are much older. Pike Place Market is not often referred to as a farmers market, and rightfully so.[18] Pike Place Market includes scores of year round businesses, street performers, craftsman, and apartments for low-income seniors.[19] Nonetheless, the market still rents space to 120 farmers

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[9] *See* Timothy Egan, *Apple Growers Bruised and Bitter After Alar Scare,* N.Y. TIMES, July 9, 1991, at A1, *available at* http://www.nytimes.com/1991/07/09/us/apple-growers-bruised-and-bitter-after-alar-scare.html?sec=&spon=&pagewanted=1.

[10] *See* USDA, *supra* note 1.

[11] FARMERS MARKET, 74 FARMERS MARKET FACTS, http://www.farmersmarketla.com/history/marketfacts.html (last visited Feb. 22, 2009).

[12] *Id.*

[13] *Id.*

[14] *Id.*

[15] *Id.*

[16] *See id.*

[17] *See* Farmers Market, *supra* note 11.

[18] *See* PIKE PLACE MARKET, EXPERIENCE THE MARKET; HISTORY OF THE MARKET, http://www.pikeplacemarket.org/site.asp?p=history (last visited Feb. 7, 2009).

[19] *See* PIKE PLACE MARKET, LIVE IN THE MARKET, http://www.pikeplacemarket.org/site.asp?p=livemarket (last visited Feb. 7, 2009).

every day.[20] Furthermore, the history of Pike Place Market suggests that farmers' markets were invented well before 1934.[21]

In 1907, the citizens of Seattle became outraged when the price of onions "increased tenfold" in the span of a year.[22] The citizens felt that intermediaries were price-gouging and radically inflating the cost of produce.[23] Consequently, Seattle City Councilman Thomas Revelle "proposed a public street market that would connect farmers directly with consumers."[24] As a result, "[o]n August 17, 1907 . . . eight farmers brought their wagons to the corner of First Avenue and Pike Street . . ."[25] These farmers were greeted by 10,000 potential customers,[26] and "[b]y 11:00 am, they were sold out. Thousands of shoppers went home empty-handed, but the chaos held promise. By the end of 1907, the first Market building opened, with every space filled."[27]

Likewise, Philadelphia identifies farmers' markets that existed long before the Pike Place Market.[28] Early in Philadelphia's history, outdoor markets were prevalent.[29] The city contained six blocks of market vendors by the "middle of the nineteenth century."[30] However, Philadelphia had declared such traditional street markets a health hazard by 1859, and ". . . two main markets sprang up at 12th and Market Streets. They were known as the Farmers' Market and the Franklin Market."[31]

Nevertheless, farmers' markets are not solely the result of American innovation. While the Los Angeles "Farmers Market" might be the first farmers' market by name, it was not the first in form.[32] Open air markets have existed for thousands of years.[33] During the height of the

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[20] PIKE PLACE MARKET, HISTORY OF THE MARKET, http://www/pikeplacemarket.org/site.asp?p=history (last visited Feb. 7, 2009).

[21] *Id.*

[22] *Id.*

[23] *Id.*

[24] *Id.*

[25] *See* PIKE PLACE HISTORY, *supra* note 20.

[26] *Id.*

[27] *Id.*

[28] READING TERMINAL MARKET, HISTORY, http://www.readingterminalmarket.org/about/history (last visited Feb. 16, 2009) ("Markets have been a part of Philadelphia's history since the city's development by William Penn in the late seventeenth century. When William Penn's managers established the town of Philadelphia, one of their first actions was to herd the ragtag crowd of farmers, fisherman, and huntsman, who were hawking their goods all over the bustling settlement, into an open area at the foot of what was known as High Street, along the Delaware River.").

[29] *Id.*

[30] *Id.*

[31] READING TERMINAL MARKET, MARKET MOVES INDOORS, http://www.readingterminalmarket.org/about/indoors (last visited Feb. 16, 2009).

[32] *See* FARMERS MARKET, *supra* note 11.

[33] David Edwards, *The Magic of the Markets,* http://www.barriefarmermarket.com/news2.htm (last visited Feb. 17, 2009).

Roman Empire, the cities placed shops in planned markets known as *macellas*.[34] The *macella* was not exclusive to farmers, but they played a key role in these local markets.[35] Farmers' markets may date back to at least 5,000 BC.[36] In fact, one could reasonably argue under a liberal interpretation that farmers' markets have been around since human beings first traded for food grown by another person. Whether "mercados" in the Peruvian Andes, or street markets in Asia,[37] "[f]armers markets are one of the oldest forms of direct marketing by small farmers."[38]

In discussing traditional outdoor markets, one author declares that "[t]hey have endured the rise and fall of cities and nations. They have weathered wars, collapsed economies, natural disasters. They are tough, enduring, flexible. They are a place where you can experience the pulse of life and commerce as it was for much of recorded history."[39] Regardless of when one believes that farmers' markets began, they are growing and enduring. Capitalist systems require markets, and farmers' markets are no exception. There is a demand, and there will be a supply. "Big food" produced by large-scale farming, manufacturing, and retailing, is experiencing big problems, and farmers' markets are harvesting the benefits. However, the markets are producing problems of their own. While it appears that farmers' markets will continue to thrive, uninsured market vendors, due to the possibility of crippling liability if an injury occurs, may not.

III. A FARMER'S POTENTIAL LIABILITY FOR NON-FARMERS' MARKET PRODUCT

The sale of food was one of the earliest forms of strict liability imposed under English common law.[40] The Restatement Second of Torts proclaims:

> As long ago as 1266 there were enacted special criminal statutes imposing penalties upon victualers, vintners, brewers, butchers, cooks, and other persons who supplied "corrupt" food and drink. In the earlier part of this century this ancient attitude was reflected in a series of decisions in

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[34] ANCIENT ROME: HOUSES AND SHOPS, http://library.thinkquest.org/26602/romanhouses.htm (last visited Feb. 17, 2009).

[35] *See id.*

[36] *See* Edwards, *supra* note 33.

[37] LOCAL HARVEST, FARMERS MARKETS, http://www.localharvest.org/farmers-markets/ (last visited Feb. 16, 2009).

[38] *Id.*

[39] Edwards, *supra* note 33.

[40] RESTATEMENT (SECOND) OF TORTS § 402(A) cmt. b (1965).

> which the courts of a number of states sought to find some method of holding the seller of food liable to the ultimate consumer *even though there was no showing of negligence on the part of the seller.*[41]

Similarly, many American state courts have historically applied strict liability against sellers of food.[42] In *Hart v. Wright*,[43] a New York court acknowledged the nearly universal rule that a sound price does not give rise to a warranty.[44] Nevertheless, the court held that this rule does not apply to sellers of food if the food is purchased for consumption.[45] Based on this rule, farmers might reasonably expect to find themselves strictly liable for any damages caused by their food products. The law, however, has changed significantly over the last 171 years.

For instance, the 1888 case *Giroux v. Stedman* involved defendant farmers who sold hogs tainted with "hog cholera."[46] The defendants butchered the hogs and then sold the meat.[47] The *Giroux* court acknowledged that "[t]hey sold it 'as farmers,'" and declared that the issue came down to whether "the mere circumstance that they did not keep a shop, or put up a sign, or run an ordinary butcher's wagon exempt them from the responsibility which would attach to a market-man."[48] In ultimately holding that the defendant farmers were not liable, the court stated that it would be unjust "to hold . . . [the farmers] to the duty of ascertaining, at . . .[his] peril, the condition of the articles sold, and of impliedly warranting," even if they had knowledge that the hogs were to be used as food, because this "imposes a larger liability than should be placed upon those who may often have no more means of knowledge than their purchasers."[49] This favorable result seems to stem from the fact that the *Giroux* court did not believe the farmers to be negligent, and felt that it was unjust to impose strict liability on the farmers through an implied warranty.[50] By definition, this was not strict liability. While this case has not been explicitly overruled, the court might not reach the same result

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[41] *Id.* (emphasis added).
[42] *See id.*; Hart v. Wright, 17 Wend. 267 (Sup. Ct. N.Y. 1837).
[43] Hart v. Wright, 17 Wend. 267 (Sup. Ct. N.Y. 1837).
[44] *Id.* at 272.
[45] *Id.*
[46] Giroux v. Stedman et al, 14 N.E. 538 (Mass. 1888).
[47] *Id.*
[48] *Id.* at 538.
[49] *Id.* at 540.
[50] *See id.* at 538-40.

today.[51] At the very least, the farmers might be required to warn the purchaser that the hogs might have been exposed to hog cholera.[52]

In *Moses v. Mead*,[53] the defendant wholesalers sold 194 barrels of mess beef to the plaintiffs.[54] Neither party knew that the beef was not in marketable condition.[55] When the plaintiffs later discovered that the meat was "unsound," they brought an action against the defendants.[56] The issue before the court was whether a seller would be liable for poor quality food when the sale did not involve fraud or an express warranty, and was from "one dealer to another."[57] In holding that the defendants were not liable, the court declared:

> [T]he implied warranty attaches only where the purchase is made for consumption in the purchaser's own family, and not where he purchases to sell again; that in the latter case the transaction is governed by the same rules which apply to the sale of other personal property . . . . *and where the sale is by wholesale, the vendor has no more opportunity of knowing their quality than the purchaser.*[58]

Whipple v. Sherman involved a plaintiff butcher who purchased a beef cow from the defendant farmer.[59] The butcher then discovered that the cow had tuberculosis, rendering part of the meat unfit for human consumption.[60] The butcher salvaged what meat he could, and offered to pay the farmer for the edible meat, but refused to pay for the entire cow.[61] The *Whipple* court held that the cow was sold as merchandise, and not for consumption, by the butcher.[62] There was no implied warranty of soundness, because this was not a sale to a consumer, and "[t]here is a very plain distinction between selling provisions for domestic use and selling them as articles of merchandise, which the buyer does not intend to consume, but to sell again."[63] The court reasoned that the distinction was

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[51] *See* RESTATEMENT (THIRD) OF TORTS: PROD. LIAB. § 7 (1998).

[52] *See id.*; *see also* Livingston v. Marie Callender's, Inc., 72 Cal. App. 4th 830, 838 (Cal. Ct. App. 1999); Zabner v. Howard Johnson's, Inc., 201 So.2d 824 (Fla. Dist. Ct. App. 1967).

[53] Moses et. al. v. Mead et. al, 1 Denio 378 (N.Y. Sup. Ct. 1845).

[54] *Id.* at 378.

[55] *Id.*

[56] *Id.*

[57] *Id.* at 382-383.

[58] *Id.* at 383 (emphasis added).

[59] Whipple v. Sherman, 200 N.Y.S. 820, 820 (N.Y. County Ct. 1923).

[60] *Id.* at 820-821.

[61] *Id.* at 821.

[62] *Id.*

[63] *Id.* (citing Moses et. al. v. Mead et. al, 1 Denio 378 (N.Y. Sup. Ct. 1845)).

appropriate, as a consumer relies on the skill of the vendor, while a butcher relies on his own skills and knowledge.[64]

The *Whipple* court explained that even though both parties understood that the animal was to be converted to meat that, "as between these parties, she [the cow] was the same as any article of merchandise; and, in the absence of fraud, deceit or express warranty, the maxim of caveat emptor must apply."[65] Finally, the court discussed the rule of *caveat emptor*[66] and concluded that this rule "is not so unreasonable, after all."[67] The court clarified that the civil law rule was "caveat venditor, [or] 'let the seller beware'[.]"[68] As a result, "the vendor was liable for defects in goods which were not apparent unless"[69] both parties agreed and understood that the vendor "guaranteed nothing."[70] The court stated "[t]he common-law rule of caveat emptor seems to me to be the most reasonable. There is no reason why a purchaser should not inquire and ask for a guaranty when he is in doubt."[71]

These older cases were not limited to discussing transactions involving the sale of meat.[72] *Swank v. Battaglia* involved a plaintiff and defendant who were both in the business of selling fruits and vegetables.[73] The plaintiff sold the defendants 100 sacks of potatoes that were later discovered to be dry-rotted and unfit for human consumption.[74] The defendants argued that when food is sold for immediate consumption, there is an implied warranty of fitness that such goods are suitable for consumption.[75] The court acknowledged that this might be the rule, but refused to extend this warranty to dealers.[76] The *Swank* court held that when a dealer is selling to a consumer, "[t]he relation of the buyer to the seller and the circumstances of the sale may raise the presumption that the seller impliedly represents them to be sound."[77] The court refused to extend this rule to sales between merchants, however, claiming that "the rule is settled that in the sale of provisions, *in the course of general commercial*

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[64] *Id.*
[65] *Id.* (citing Cotton v. Reed, 54 N.Y.S. 143 (1898)).
[66] BLACK'S LAW DICTIONARY 236 (8th ed. 2004). Latin for "let the buyer beware."
[67] Whipple v. Sherman, 200 N.Y.S. 820, 822 (N.Y. County Ct. 1923).
[68] *Id.*
[69] *Id.*
[70] *Id.*
[71] *Id.*
[72] Swank v. Battaglia, 164 P. 705 (Or. 1917).
[73] *Id.* at 706.
[74] *Id.*
[75] *Id.*
[76] *Id.* at 706-07.
[77] *Id.* at 706.

transactions, the maxim caveat emptor applies, and there is no implied warranty or representation of quality or fitness."[78]

Under the common law, farmers have long enjoyed protection that was not extended to other purveyors of food and drink, but the 1965 Restatement Second of Torts basically created products liability, and removed this common law protection.[79] Section 402A states:

> (1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if
>
> (a) the seller is engaged in the business of selling such a product, and
>
> (b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.[80]

While the Restatements are not binding, products liability has been adopted by nearly every state.[81] It is therefore important for farmers to understand how a products liability claim would be analyzed, because it is now generally accepted that food is a product.[82] A recent law review article[83] suggests that the first question to be asked in a products liability case involving food is whether or not a product was involved.[84] The author uses an example taken from Dean Keeton[85] that a bowl of spinach served at a restaurant might be considered a service, while a can of spinach would be considered a product.[86] This distinction was apparently never very popular[87] and "presently this view is virtually non-existent. . . ."[88]

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[78] Swank, 164 P. at 706-07 (emphasis added).

[79] RESTATEMENT (SECOND) OF TORTS § 402A (1965).

[80] *Id.*

[81] *See* John F. Vargo, *The Emperor's New Clothes: The American Law Institute Adorns a "NEW CLOTH" For Section 402A Products Liability Design Defect—A Survey of The States Reveals a Different Weave*, 26 U. MEM. L. REV. 493, 538 (1996).

[82] Charles E. Cantu, *A Continuing Whimsical Search For The True Meaning Of The Term "Product" In Products Liability Litigation*, 35 ST. MARY'S L.J. 341, 355 (2004).

[83] *Id.* at 341.

[84] *Id.* at 352.

[85] "During his fifty-eight years of service to The University of Texas School of Law—twenty-five of them (1949-74) as its dean—Page Keeton became 'fabled' for his remarkably varied and lasting achievements as law school dean, teacher, torts scholar, lawyer, and public citizen." The University of Texas at Austin, *In Memoriam, W. Page Keeton*, http://www.utexas.edu/faculty/council/1999-2000/memorials/Keeton/keeton.html (last visited Feb. 24, 2009).

[86] Cantu, *supra* note 82 at 352-53.

[87] *Id.* at 353.

Ironically, strict products liability for the sale of food provides less protection to consumers than the common law. Food can be unwholesome, cause injury, and still not be considered a defective product.[89] It is generally understood that most consumers purchase food for consumption. Disregarding those who are hypersensitive to food, such as those with allergies, a consumer should be able to bring a cause of action under strict products liability if she uses the product as intended (consuming the food) and it causes injury. This is a defective product, but this is not what American law considers a defective product.[90]

While some early courts based their determination of whether a food was defective by the foreign versus natural test, "modern courts have rejected the foreign/natural distinction as too rigid a rule of law for assessing the defectiveness of food."[91] Under the foreign v. natural test, the seller is not liable if the harmful ingredient is present when the food is in its natural state.[92] Bones in fish and meat dishes are considered natural substances,[93] as are pieces of shells in seafood dishes are natural substances.[94] The test does not consider the extent of the processing or the size of the foreign substance.[95] Small bones in ground beef and large bones in chicken soup would be natural substances.[96]

Therefore, courts have rejected the "foreign v. natural" test,[97] and the "[n]aturalness of the substance to any ingredients in the food served is important only in determining whether the consumer may reasonably expect to find such substance in the particular type of dish or style of food served."[98] Williston declares that reasonable consumers should often expect natural substances in their food; however, a natural substance ". . . is not a bar to recovery . . . provided the substance is of such a size, quality or quantity, or the food has been so processed, or both, that the substance's presence should not reasonably have been anticipated by the consumer."[99]

Modern courts have adopted this reasoning and employ the consumer expectations test.[100] The Restatement Third of Torts details this

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[88] *Id.*

[89] *See* David G. Owen, *Manufacturing Defects*, 53 S.C.L. REV. 851, 893-94 (2002).

[90] RESTATEMENT (THIRD) OF TORTS: PROD. LIAB. § 7 (1998).

[91] Owen, *supra* note 89 at 900.

[92] 18 SAMUEL WILLISTON & RICHARD A. LORD, A TREATISE ON THE LAW OF CONTRACTS § 52.88 (4th ed. 2001).

[93] *Id.*

[94] *Id.*

[95] *See id.*

[96] *See id.*

[97] *See id.*; RESTATEMENT (THIRD) OF TORTS: PROD. LIAB. § 7, Reporters' Note to cmt. b (1998).

[98] Betehia v. Cape Cod Corp., 103 N.W.2d 64, 67 (Wis. 1960).

[99] WILLISTON & LORD, *supra* note 92, § 52.88 (citing Goodman v. Wenco Foods, Inc., 423 S.E.2d 444, 451 (N.C. 1992)).

[100] RESTATEMENT (THIRD) OF TORTS: PROD. LIAB. § 7 (1998).

test in Section 7.[101] Liability for harm caused by a defective food product will be incurred if a person is in the business of selling or distributing food products, that food product is defective, and the product defect causes harm.[102] The food product is not considered defective solely because it causes harm.[103] In fact, under the consumer expectations test, "a harm-causing ingredient of the food product constitutes a defect if a reasonable consumer would not expect the food product to contain that ingredient."[104] The Restatement continues:

> *A consumer expectations test in this context relies upon culturally defined, widely shared standards that food products ought to meet.* Although consumer expectations are not adequate to supply a standard for defect in other contexts, assessments of what consumers have a right to expect in various commercial food preparations are sufficiently well-formed that judges and triers of fact can sensibly resolve whether liability should be imposed using this standard.[105]

Whether a reasonable consumer would guard against a particular defect is a question of fact, and that determination should be left to the jury. For example, *Zabner v. Howard Johnson's, Inc.*[106] involved a plaintiff who purchased a bowl of maple walnut ice cream containing a piece of walnut shell.[107] Unaware of the walnut shell, the plaintiff bit into it, causing injuries to her "upper gums" and "some of her teeth."[108] Despite the fact the ice cream contained this shell, the court declared that the determination of whether the food was fit for consumption was to be governed by a consumer's reasonable expectations.[109] The *Zabner* court consequently ruled that this determination was properly a jury question.[110] This case provides a classic example of how the "reasonable expectations test" offers a consumer less protection than the common law, which imposed actual strict liability upon those who served food.[111]

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[101] *Id.*
[102] *Id.*
[103] *Id.*
[104] *Id.*
[105] RESTATEMENT (THIRD) OF TORTS: PROD. LIAB. § 7 cmt. b (1998) (emphasis added).
[106] Zabner v. Howard Johnson's, Inc., 201 So.2d 824 (Fla. Dist. Ct. App. 1967).
[107] *Id.* at 825.
[108] *Id.*
[109] *Id.* at 828.
[110] *Id.*
[111] See RESTATEMENT (SECOND) OF TORTS § 402A cmt. b (1965).

Earlier cases in a number of states held the seller of food liable regardless of negligence.[112] While it is possible for the jury to decide the food was defective and hold the seller liable, it is also possible that a seller of food can escape liability, despite the fact that the food caused injury. Since the question of consumer expectations is left to the jury, outcomes are likely to be based on the jury's perception of fairness. Moreover, courts are extremely reluctant to take this question from the jury,[113] and rule, as a matter of law, that a food product does not meet consumer's expectations.[114]

Gates v. Standard Brands Inc. is instructive of this reluctance.[115] *Gates* involved a plaintiff who bit into a Baby Ruth candy bar that contained a snake vertebra.[116] Remarkably, the appellate court declared the trial court was correct in allowing the question of whether the product was defective to go to the jury.[117] In Washington, reasonable consumers should apparently examine their Baby Ruth candy bars for snake vertebra before consuming them.[118] Thus, if a person misses the snake vertebra, consumes the candy bar, and becomes ill, a jury will determine whether that person should have expected the Baby Ruth to contain a snake vertebra. This is a classic example of a court claiming to protect the consumer by enforcing strict products liability.[119] Nevertheless, the court permits the defendants the opportunity to escape liability because the product may not be considered defective.[120]

IV. PRACTICAL IMPLICATIONS

The rise of big food was likely driven in large part by convenience. People have different demands than they did twenty years ago, and farmers' markets reflect this fact. At the beginning of the twentieth century, Americans had never entertained the idea of bagged lettuce; now, "six million bags of salad are sold every day in this country."[121] Farmers' markets are also cashing in on the public's desire for the convenience of "ready to eat" food. For example, Kentucky recently passed a house bill "allow[ing] the farmer to process whole fruit and vegetables, mixed greens,

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[112] *Id.*
[113] *See* Gates v. Standard Brands Inc., 719 P.2d 130, 135 (Wash. Ct. App. 1986).
[114] *See id.*
[115] *See id.*
[116] *Id.* at 131.
[117] *Id.* at 134.
[118] *Id.*
[119] *See id.*
[120] *See id.*
[121] Lea Thompson , *Unseen Danger in Bagged Salads,* MSNBC, Aug. 30, 2006, http://www.msnbc.msn.com/id/12536902/ (last visted Apr. 17, 2009).

fruit jams, fruit jellies, sweet sorghum syrup, preserves, fruit butter, bread, fruit pies, cakes, or cookies in his or her home kitchen."[122]

The trend for "ready to eat" food can provide a great opportunity for both the farmer and the market patron, but it can also mean increased liability for the farmer who chooses to make and sell these processed foods.[123] For example, a farmer who grows cherries may not consider the potential liability arising from the sale of cherries, but the farmer who makes and sells a cherry pie is exposed to increased liability.[124] Under the consumer expectations test, the farmer who sells the processed food product of cherry pie may be liable if a cherry pit is left in the pie and causes damage to the plaintiff.[125] If the farmer is selling whole cherries, the consumers should expect cherry pits, but a reasonable consumer may not expect to find cherry pits in cherry pie.[126]

Williams v. Braum Ice Cream Stores involved a similar situation.[127] A plaintiff purchased a cherry pecan ice cream cone from the defendant.[128] The plaintiff then bit into a cherry pit in the ice cream, which broke his tooth.[129] The court adopted the reasonable expectations test, and declared that whether a customer should expect to guard against a cherry pit in cherry pecan ice cream was for the jury to decide.[130]

As a result, farmers who sell processed goods must take extra precautions.[131] Kentucky farmers who market "canned" goods must guard against foreign substances that might enter the jar.[132] Sellers of jams, jelly, or honey must do the same, and must thoroughly wash the produce.[133] If customers are allowed to sample the product before buying, a reasonable consumer might expect the fruit or vegetable to be free from any residue that could have been washed away.[134]

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[122] KENTUCKY DEPARTMENT OF AGRICULTURE, HOME PROCESSING OF PRODUCTS (HB 391) (2006), *available at* http://www.kyagr.com/marketing/farmmarket/documents/homeprocessingofproducts.pdf.

[123] *See id.*

[124] *See id.; See also* Williams v. Braum Ice Cream Stores, Inc., 534 P.2d 700 (Okl. Civ. App. 1974).

[125] *See* Williams v. Braum Ice Cream Stores, Inc., 534 P.2d 700 (Okl. Civ. App. 1974).

[126] *Id.*

[127] *Id.*

[128] *Id.* at 701.

[129] *Id.*

[130] *Id.* at 702.

[131] *See* KENTUCKY DEPARTMENT OF AGRICULTURE, HOME PROCESSING OF PRODUCTS (HB 391) (2006), *available at* http://www.kyagr.com/marketing/farmmarket/documents/homeprocessingofproducts.pdf; *see also* Livingston v. Marie Callender's, Inc., 72 Cal. App. 4th 830, 838 (Cal. Ct. App. 1999).

[132] *See* KY. DEPT. OF AGRICULTURE, *supra* note 131; *see also Livingston*, 72 Cal. App. 4th at 838.

[133] *See id.*

[134] *See id.*

Farmers might also have a duty to warn customers if their processed product contains unusual ingredients that are common allergens.[135] *Livingston v. Marie Callender's, Inc.*,[136] involved a plaintiff who purchased vegetable soup that contained monosodium glutamate (MSG).[137] The plaintiff suffered from asthma, which can be adversely affected by MSG.[138] After consuming the soup, he "suffered MSG Symptom Complex, including, but not limited to, respiratory arrest, hypoxia, cardiac arrest, and brain damage."[139] While the MSG did not render the soup defective, the court held there was a genuine issue of material fact as to whether the restaurant had a duty to warn that the soup contained MSG.[140] Farmers who sell processed food may thus have a duty to list the ingredients in their products. Furthermore, farmers might have a duty to warn of cross contamination risks. For example, a farmer who sells processed products which contain peanuts might be required to tell customers that he used his kitchen to prepare products which contain peanuts. Congress requires manufacturers to document their risk of cross contamination.[141] Farmers should do the same.

The duty to warn can further be extended, as evidenced by *Edwards v. Hop Sin, Inc.*[142] *Edwards* involved a man who, after consuming raw oysters, became ill with "septicemia, a bacterial invasion of his blood stream."[143] The septicemia was caused by "[v]ibrio vulnificus, an organism naturally occurring in sea water and commonly found in oysters and other marine filter feeders."[144] While the bacterium posed little risk to healthy persons, it posed substantial risk of death or serious injury to persons "with stomach, liver, or blood conditions or with compromised immune systems."[145] The court explained that consumers might not be aware of this increased risk,[146] and a jury could find the restaurant liable because it failed to warn the customer.[147] As a result, farmers might have a duty to warn about an uncommon risk to particularly susceptible individuals. If a farmer has actual knowledge of a unique risk to certain individuals, or is in a better position to acquire such knowledge, he or she should warn all customers about the risk.

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[135] *Livingston*, 72 Cal. App. 4th at 830.
[136] *Id.* at 830.
[137] *Id.* at 832.
[138] *Id.* at 833.
[139] *Id.*
[140] *Id.* at 840.
[141] Food Allergen Labeling and Consumer Protection Act of 2004, 21 U.S.C. § 374a (2004).
[142] Edwards v. Hop Sin, Inc., 140 S.W.3d 13 (Ky. Ct. App. 2003).
[143] *Id.* at 15.
[144] *Id.*
[145] *Id.* at 16.
[146] *Id.*
[147] *Id.* at 17.

V. FURTHER REASONS CONTRIBUTING TO A FALSE SENSE OF SECURITY

A. *Health Insurance*

In the past, many additional factors have precluded people from suing farmers for food borne illnesses. In 2000, the USDA published a report stating that people were less likely to pursue legal claims if "health insurance or employee benefit programs" covered a portion of the cost of medical expenses.[148] Those who are uninsured will consequently have a greater incentive to sue. Unfortunately, many Americans are living without health insurance.[149] While health insurance has provided some insulation from lawsuits, it will not provide the same protection if it is not as readily available.

Additionally, a lack of health insurance presents another problem for the farmer. A person without health insurance is less likely to seek treatment for a food-borne illness. Delaying treatment could exacerbate the extent of the injury, and greater injuries provide the purchaser with a greater incentive to sue.

B. *Recession*

People may be more likely to sue during economic down times, such as a recession. The Portland Business Journal interviewed several prominent lawyers to explore this hypothesis.[150] Mark Turner observed that "[w]hen the economy is going great, people don't need litigators that much because they're making money the 'honest' way . . ."[151] Scott Seidman, the "chair of the litigation department at Tonkon Torp,"[152] stated that he "think[s] that people do tend to litigate a little bit more in tough times."[153] The global law firm of Fulbright & Jaworski studies such litigation trends

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[148] JEAN C. BUZBY ET. AL, USDA ECONOMIC RESEARCH SERVICE, PRODUCT LIABILITY AND MICROBIAL FOODBORNE ILLNESS 9 (2001), *available at* http://www.ers.usda.gov/publications/aer799/aer799.pdf.

[149] U.S. CENSUS BUREAU, HOUSEHOLD INCOME RISES, POVERTY RATE DECLINES, NUMBER OF UNINSURED UP (2007), *available at* http://www.census.gov/Press-Release/www/releases/archives/income_wealth/010583.html.

[150] Anne Laufe, *Recession-Proof Industry*, PORTLAND BUS. J. (Nov. 5, 2004), *available at* http://www.bizjournals.com/portland/stories/2004/11/08/focus1.html.

[151] *Id.* The comment merely illustrates when someone is not making "enough" money from one venture then he or she is likely to look elsewhere.

[152] *Id.*

[153] *Id.*

affecting large companies.[154] Stephen C. Dillard, the chairperson of "Fulbright's global litigation practice," observed that "economic challenge[s] . . . [are] likely to fuel litigation over who is to blame and who should pay for the consequences. . . ."[155] Consumers have similar reasons to sue. Smaller injuries, and hence smaller recoveries, become more significant to a plaintiff without money.

C. *The Chain of Commerce*

If the farmer is not involved in direct marketing, the plaintiff might have problems proving that the product was defective when it left the farm and entered the chain of commerce.[156] Since there are multiple opportunities for contamination, it is more difficult to prove the farmer is liable.[157] Consequently, "because there are steep obstacles to surmount in proving causation, the vast majority of food borne illnesses do not result in lawsuits."[158] If a farmer is engaged in direct marketing, such as through a farmers' market, it will be much easier for a plaintiff to identify and prove the source of the contamination. The farmer will therefore be exposed to increased liability.

D. *The Lack of Insurance*

Despite the need for farmers to obtain products liability insurance, many choose not to do so. A recent study conducted by the University of West Virginia found that more than half, or 110 out of 195, of the market vendors surveyed did not have product liability insurance.[159] However, approximately ten percent, 19 out of the 195 surveyed, were covered under an umbrella policy provided by the market.[160] The University of Georgia discovered that seventy-nine percent of farmers' markets in Georgia did not

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[154] GREENWOOD ASSOCIATES, FULBRIGHT'S LITIGATION TRENDS SURVEY: U.S. COMPANIES PREPARE FOR RISE IN LITIGATION (Oct. 14, 2008), *available at* http://www.fulbright.com/index.cfm?fuseaction=news.detail&article_id=7637&site_id=286.

[155] *Id.*

[156] Angela Holt, *Alternative Liability Theory: Solving the Mystery of Who Dunnit in Foodborne Illness Cases*, 2 PITT. J. ENVTL PUB. HEALTH L. 105, 109 (2008).

[157] *Id.*

[158] *Id.* (*quoting* Neil D. Fortin, *The Hang-Up With HACCP: The Resistance to translating Science into Food Safety Law*, 58 FOOD & DRUG L.J. 565, 575 (2003)).

[159] WEST VIRGINIA UNIVERSITY EXTENSION SERVICE, FARMERS' MARKET IN WEST VIRGINIA: SUPPORTING FARMS AND FEEDING FAMILIES 5 (2005), *available at* http://www.wvu.edu/~agexten/farmman2/FMReport.pdf.

[160] *Id.*

require vendors to carry any type of insurance,[161] and only fifty-six percent had any liability insurance at all.[162]

The Kentucky Department of Agriculture conducted a survey of farmers' markets in 2007.[163] Of the forty-one farmers' markets that responded, only three required vendors to carry any type of products liability insurance.[164] In an even more troubling development, fifteen out of these forty-one markets reported that they did not carry any insurance whatsoever.[165] One survey question asked the market managers whether they were interested in obtaining insurance for the market.[166] While many respondents expressed an interest in insurance, one respondent wrote, "yes, if cheaper."[167] This concern over cost is likely the fundamental reason that so many market vendors are not covered by products liability insurance.

The National Agricultural Statistics Service reported that in Iowa, "[t]he expected total gross sales per vendor through all farmers' markets for the 2004 season were $2,501-5,000."[168] Furthermore, Iowa vendors who had high sales served as outliers[169] that inflated the average sales numbers.[170] Without these "mega-vendors," the average sales in Iowa would have been less.[171]

West Virginia University has also analyzed farmers' market vendors' income.[172] The vendors were divided into four groups: retired, part-time growers, full-time growers with no off-the-farm employment, and full-time growers working more than ten hours per week off the farm.[173] Fifty-four percent of retired growers brought in less than $1,500 of total farmers' markets sales.[174] Even more surprisingly, forty percent of full-

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[161] KENT WOLFE, GEORGIA'S FARMERS MARKETS, THE UNIVERSITY OF GEORGIA CENTER FOR AGRIBUSINESS AND ECONOMIC DEVELOPMENT, CENTER OF AGRICULTURAL AND ENVIRONMENTAL SCIENCES 10 (2008), *available at* http://www.caed.uga.edu/publications/2008/pdf/CR-08-09.pdf.

[162] *Id.*

[163] Kentucky Farmers' Market Association, *Insurance Survey* (2007), http://www.kentuckyfarmersmarket.org/pages/default2.asp?active_page_id=57 (follow "Insurance Survey" hyperlink) (last visited Feb. 28, 2009).

[164] *Id.* (analyzing the results further shows that of the three that require insurance, only one requires commercial vendors to carry insurance).

[165] *Id.*

[166] *Id.*

[167] *Id.*

[168] IOWA STATE STATISTICAL OFFICE, NAT'L AGRIC. STATISTICS SERV., IOWA FARMERS' MARKET VENDOR SURVEY 1 (Dec. 2004), *available at* http://www.nass.usda.gov/Statistics_by_State/Iowa/Publications/2004VendorSummary.pdf.

[169] AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 1249 (4th ed. 2004) (Outlier – A value far from most others in a set of data: *"Outliers make statistical analyses difficult" (Harvey Motulsky)*).

[170] IOWA STATE STATISTICAL OFFICE, *supra* note 168.

[171] *See id.*

[172] WEST VIRGINIA UNIVERSITY EXTENSION SERVICE, *supra* note 159, at 1, 4.

[173] *Id.*

[174] *Id.* at 5.

time growers with no off-the-farm employment sold less than $7,500 a season.[175] With such abysmal sales, it is likely difficult or impossible for many farmers to pay any insurance premium of the top of the profits received from their sales at the farmers' markets.

Some states are forming statewide farmers' market associations that work to negotiate better rates for products liability insurance.[176] Cheaper insurance will not solve the problem, however, as most farmers are simply not selling enough produce to justify the cost of insurance. Ironically, the biggest obstacle for farmers in obtaining products liability insurance may actually provide the most protection. If a farmer has limited assets, then the injured consumer may not view the case as worth pursuing. Furthermore, lawyers, recognizing the limited chances of recovery, may refuse to take a case if the farmer has limited assets.

VI. CONCLUSION

With farmers' markets seeing explosive growth, it is inevitable that food-borne illnesses will occur because of food purchased at farmers markets. Whether it is beef, peppers, tomatoes, spinach, or high levels of mercury making fish in Kentucky waterways unsafe to consume, recent news stories have alerted us to the danger of contaminated food. As the planet becomes more crowded, we produce more waste and our world becomes more polluted. Food contamination is real, and will not be going away soon. Farmers can guard against foreign objects in processed foods, but they cannot guard against all of today's food contaminations. Therefore, people will consume food, and they will get sick.

Farmers' markets can be great for communities and the world in general, but there are tradeoffs. Big food is backed with big money, and a plaintiff's recovery could be substantial. Farmers' markets are not, so shop at your own peril.

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[175] *Id.* The survey does not address whether these farmers sold their product by means other than through farmers' markets.

[176] Kentucky Farmers' Market Association, http://www.kentuckyfarmersmarket.org/pages/ (last visited Feb. 22, 2009); Washington State Farmers Market Association, http:// www.wafarmersmarkets.com/info /market _info_ insurance.html (last visited Mar. 2, 2009); Minnesota Farmers' Market Association, http://www.mfma.org/ (last visited Mar. 2, 2009).