Where The Buck Stops

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As the legal consequences for selling faulty products falls more and more on the shoulders of retailers, food processors' customers may push for greater protections for consumers and themselves.

Over the next several months, food manufacturers should prepare for retailers to make changes to requirements regarding food safety and protection. Though most large food processors likely have adequate food safety mechanisms in place, providing thoroughly detailed documentation to customers may prove the biggest challenge. For processors behind the curve on food safety, the increased liability placed on retailers will amplify pressure to secure food protection mechanisms at the plant level.

In the wake of the high profile recalls of 2011 — sprouts, various lettuces, ground turkey, cantaloupes and many more — grocers and other food retailers are under increased scrutiny. At the point of sale, these companies and their employees interface directly with customers, meaning that when consumers are sickened by tainted products their first association is with the retailer, increasing liability for these stores.

DeGennaro v. Rally Manufacturing, a district court case in New Jersey, has recently reaffirmed the long-held legal concept that retailers can be found liable for selling defective merchandise, even if the defect did not originate at the retail location. In the case, the plaintiff sued the manufacturer and retailer after being injured in a car battery explosion. The judge ruled that, in addition to manufacturer liability, the retailer was liable because it "knew or should have known" that the packaging material posed a danger.

The parallels to food manufacturing are clear. If retailers have a reason to believe that certain food manufacturing suppliers are not operating with appropriate food

safety guidelines or that certain products are unsafe, then those retailers will be liable for foodborne illnesses suffered by consumers who buy and eat tainted products.

Potential fallout could be seen most immediately in the juice industry. Late last year, television personality Dr. Oz reported on his daytime talk show that he and his staff had run tests on apple juice and found dangerously high levels of arsenic. Industry representatives and other public health experts balked, claiming that safe levels of arsenic are found naturally in apple juice, among other food products, and called for additional tests to disprove Oz.

When new tests were run, the results were alarming. Arsenic levels were, indeed, found to be well above acceptable levels for bottled water and other products as set by the Food and Drug Administration (FDA). Dr. Oz was vindicated, but more importantly, a critical eye turned toward the juice industry.

After initial claims supporting the juice industry's safety, the FDA came out in late November to announce that it was considering mandating lower levels of arsenic in juice.

Armed with this arsenal of information, retailers may begin to pressure the juice industry to change its practices. Now that this information is in the public realm, if a consumer were to experience a health problem traceable to arsenic in apple juice, retailers could be found just as liable as processors. These kinds of liabilities are likely beyond the scope of what most retailers are willing to risk.

In an interconnected supply chain, negligence on one party affects every party further down the line. In an attempt to shield themselves from liability, retailers may continue to implement safety mechanisms that strengthen the supply chain.

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