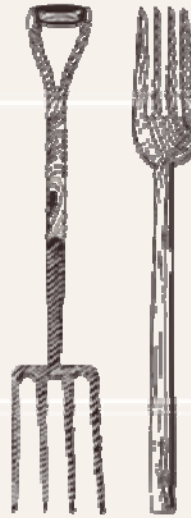

**THE
FOOD LAW
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Foscolo & Handel PLLC

Legal Tools for Food Hubs

National Good Food Network Food Hub Collaboration
Spring 2014 Conference

Topics

- Protecting and leveraging intellectual property
- Key contract provisions for food businesses
- Preparing for FSMA

Intellectual Property: Different Types, Different Means of Protection

- Patents – inventions
- Trade secrets – commercially valuable confidential information
 - Know-how, recipes, customer lists, pricing
- Copyright – original works of authorship
 - Literary, audio-visual, pictorial, graphic
- Trademarks

Intellectual Property: Strategy

- Audit – know what you have
- Protect
 - Register
 - Enforce
 - Contracts (nondisclosure agreements, work for hire agreements, licenses)
- Leverage
 - Licensing, co-branding

Trademark Basics

- A trademark can be words, symbols, a design, anything that distinguishes goods or services as yours
- Rights come from use of the mark in commerce
- Owner has an exclusive right to use the mark
 - Persons using confusingly similar mark can be sued for infringement

Value of Trademarks

- Values, goodwill associated with the brand
 - Distinguish local, sustainable, artisanal products from conventional food
 - Command price premium
- Royalty revenue from licensing

Choosing a Trademark

- Strongest marks are fanciful or arbitrary – e.g., Exxon
- Cannot be merely descriptive or generic
- Cannot be confusingly similar to other marks

Trademarks: Why Register?

- Nationwide protection
- Deter others from using similar mark
- Presumption of validity, ownership and exclusive rights to use the mark
- Incontestability after 5 years
- Right to sue in federal court

Trademark Licensing

- Always have a written contract
- Quality control is essential to prevent loss of trademark rights (abandonment)
- Licensor retains ownership, ability to revoke the license

Options for Geographically Descriptive Marks

- Registration on the Supplemental Register
 - No presumed rights or validity
 - May use ® symbol
 - Block later applicants with similar marks from registering
 - After 5 years of use, mark presumed to have become distinctive; apply for the principal register

Options for Geographically Descriptive Marks

- Certification mark
 - Certifies the geographic origin of goods or that they meet quality or production standards
 - Owner does not use the mark, but licenses it out to others who meet the standards
 - Owner must monitor to ensure mark is used properly
 - Owner must allow anyone who meets the standards to use the mark

Contracts

*But we don't want to be too
legalistic . . .*

Key Issues for Food Sales Contracts

- Risk management
- Special legal protections for produce and livestock producers/sellers

Contracts: Risk Management

- Why are risk management provisions especially important in food sales contracts?

STRICT PRODUCT LIABILITY!

Contracts: Risk Management

- Safety standards
 - HACCP, GAPs
 - Audits, monitoring to ensure compliance
- Recalls
 - Define responsibilities
- Indemnification
 - Party in best position to protect against loss
- Insurance
 - General liability policy may not cover food contamination or recalls
 - Additionally insured

Contracts: Special Rules for Produce and Livestock

- Perishable Agricultural Commodities Act (PACA) – fresh or frozen fruits and vegetables
- Packers and Stockyards Act – livestock, poultry, swine contracting
- “Interstate” Commerce

Contracts: Produce Sales

- Perishable Agricultural Commodities Act (PACA)
 - Applies to produce dealers, commission merchants, and brokers
 - USDA-issued license required
 - Statutory trust for benefit of unpaid sellers
 - Personal liability
 - Violators subject to civil penalties, damages, license revocation

Contracts: Produce Sales

Payment Terms

- PACA requires full payment within 10 days after delivery
- Different terms must be agreed in writing *before* the transaction takes place
- May not exceed 30 days
- Invoice must include payment terms that match the written agreement

Contracts: Preserving PACA Trust Rights

Invoice notice:

The perishable agricultural commodities listed on this invoice are sold subject to the statutory trust authorized by Section 5(c) of the Perishable Agricultural Commodities Act, 1930 (7 U.S.C. 499e(c)). The seller of these commodities retains a trust claim over these commodities, all inventories of food or other products derived from these commodities, and any receivables or proceeds from the sale of these commodities until full payment is received.

Contracts: PACA Rights

- In PACA case, courts will enforce contract terms requiring buyer to pay:
 - Costs of collecting the debt, including attorneys' fees
 - Interest at a specified rate

Contracts: Purchase of Livestock or Poultry

- Packers and Stockyards Act
 - Applies if purchasing livestock or live poultry or if contracting for raising of poultry or hogs
 - Companies with more than \$500K in livestock purchases must be bonded and comply with trust requirements
 - Companies with more than \$100K in poultry sales or purchases must comply with trust provisions

Contracts: Purchase of Livestock or Poultry

- Prompt payment requirements
 - For purchases of livestock for slaughter, payment is required by close of the next business day
 - For purchases of live poultry, payment required by close of next business day or, if procured from a contract grower, within 15 days of slaughter
- Payment terms may be modified but only if agreed in writing before transaction

Food Safety Modernization Act

- New rules will affect food hubs
 - *Current Good Manufacturing Practice and Hazard Analysis and Risk-Based Preventive Controls* (“Preventive Controls Rule”)
 - *Standards for Growing, Harvesting, Packing, and Holding of Produce for Human Consumption* (“Produce Rule”)

FSMA Timeline

- Revised draft rules to be released early summer
- Deadlines for final rules:
 - August 30, 2015 for Preventive Controls Rule
 - October 31, 2015 for Produce Rule
- Businesses must comply 1-3 years after publication of final rule, depending on size

FSMA: Preventive Controls Rule

- Revises Current Good Manufacturing Practice rules – protection against allergen cross-contamination, etc.
- Required hazard analysis and risk-based preventive controls:
 - Written food safety plan
 - Monitoring
 - Corrective actions
 - Verification
 - Recordkeeping
- Estimated compliance cost \$700 million

FSMA: Produce Rule

- Covers six aspects of production:
 - Equipment, tools, buildings
 - Biological soil amendments
 - Livestock
 - Personnel training and hygiene
 - Agricultural water
 - Sprouts
- Estimated compliance cost \$460 million

FSMA: Key Terms

- A “facility” subject to the Preventive Controls Rule is “any facility engaged in manufacturing, processing, packing, or holding food for consumption in the United States,”
excluding:
 - Farms
 - Restaurants
 - Retail food establishments

FSMA: Key Terms

- A “farm” is “a facility in *one general physical location* devoted to the growing and harvesting of crops, the raising of animals (including seafood), or both.”
 - Harvesting includes activities to prepare goods for market (e.g., washing, cooling, trimming, packing, holding), but only if the products were grown on that farm or another farm under *common ownership*

FSMA: Key Terms

- A “farm mixed-type facility” is a farm that also has a manufacturing/processing operation
 - Washing, trimming, packing, holding, etc. of products *grown on someone else’s farm* = manufacturing
 - Processing food for personal consumption does not count as manufacturing

FSMA: Preventive Controls Rule

Exemptions

- Exemptions for certain types of operations:
 - “Small” or “very small” business conducting low-risk manufacturing activities (e.g., repackaging intact produce)
 - Covered by other rules – seafood, juice, low-acid canned foods
 - Solely storing raw agricultural commodities *other than fruits and vegetables* intended for further distribution or processing
 - Solely storing packaged food not exposed to the environment

FSMA: Preventive Controls Rule

Exemptions

- Exemptions based on size of business/sales:
 - “Small” business = less than 500 employees (exempt only if engaged in low-risk activities)
 - “Very small” business = annual food sales less than amount to be determined (\$250K, \$500K or \$1M)
 - Qualified exemption if annual food sales are less than \$500K and more than half (by value) are (1) direct to consumers and/or (2) restaurants or retailers in the same state or within 275 miles
- Sales of the *entire enterprise* count

FSMA: Produce Rule Exemptions

- Exemptions for certain produce
 - Produce rarely consumed raw
 - “Kill-step”
 - On-farm consumption

FSMA: Produce Rule Exemptions

- Exemptions based on average annual sales of *all* food
 - Farms with not more than \$25,000 in annual food sales are entirely exempt
 - Qualified exemption for farms with annual food sales under \$500,000 if majority of sales (by value) are (1) directly to consumers and/or (2) restaurants or retailers in the same state or within 275 miles of the farm

FSMA: Planning to Minimize Regulatory Burdens on Small Businesses

- Consider business structures to avoid aggregation of sales
- Consider effects of partnerships among farms
 - e.g., multi-farm CSA
- Farmers should consider what they grow, for what purposes, and where

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