



Introduction

Farmers markets, along with many businesses, changed the way they operate during the COVID-19 pandemic.

In order to ensure that farmers continued to have a forum to sell their goods and that consumers continued to have access to fresh, local food, many markets shifted their operations to align with public health guidelines. As a result, these markets began aggregating products as part of online ordering and curbside pickup.

These changes have raised questions about whether these new modes of operation impact the liability risks a farmers market faces. They have also prompted practical questions about the role of

insurance and a commercial insurer's contractual obligation to defend a market against third-party claims arising from such operational changes.

This resource aims to address these questions about insurance and liability. It is primarily intended to be used by state farmers market associations and other technical assistance providers who may be fielding these types of questions from markets. It does not offer case-specific assistance to market operators. While these questions were prompted by the COVID-19 pandemic, they are generally relevant to markets facing liability claims during other public health crises, and even during times of normal operation.



State Laws May Vary

It is important to note that each market situation is unique, and state laws may vary. This information is provided for general educational purposes, and is not intended to serve as legal advice. Farmers markets should consult with an attorney licensed in their state for market- and state-specific guidance.

Q:

Does a market engaging directly in the aggregation and handling of food for contactless pickup or delivery face new or additional liability risks?

A:

Conducting aggregation and handling of food products introduces a new role to most farmers markets: direct handling of food and brokering of sales transactions. With this shift comes the potential for a greater risk of liability should someone become ill from a foodborne illness linked back to the products handled by the market.

Product liability, which includes foodborne illness, refers to the liability of any or all parties along the chain of distribution for damage caused by a product. Product liability claims for foodborne illness typically fall under two main categories: negligence and strict liability. As discussed further in the next question, negligence is a failure to exercise reasonable care appropriate to the situation. Strict liability, on the other hand, does not depend upon whether reasonable care was exercised or not. Rather, the standard looks only at whether the product was defective and caused harm.

State law varies, but generally speaking, someone injured as a result of a foodborne illness can bring a claim under either a strict liability or a negligence theory. However, state law also varies with regard to whether strict liability claims can be brought against intermediaries who ultimately have little to no control over the product. Some states do not allow product liability claims against distributors or retailers that have not altered the product after receiving it. In other states, passive retailers, along with any other sellers in the chain of distribution, can be held strictly liable. A farmers market would be more likely to face a negligence action than a strict liability action given that they are generally not selling the food purchased at a market.



BOTTOM LINE

Markets should speak with an attorney licensed in their state about the nuances of their state's product liability laws, including whether any new aggregation and handling activities may pose additional risks, and how they can best manage those risks. Markets may also benefit from viewing the webinar "[Pickup and Order Options at Farmers Markets: Create Resilience, Not Legal Vulnerability](#)" co-hosted by Farm Commons, the Food Liability Insurance Program, and the Farmers Market Legal Toolkit team, and reading through the [food-related illnesses](#) section of the Farmers Market Legal Toolkit.

Q:

Could a market be held liable for transmission of COVID-19?

A:

It is unlikely that a farmers market would be found liable for illness or injury resulting from the transmission of COVID-19, or of any similarly transmissible virus.

Businesses are expected to exercise reasonable care in providing a safe environment for their patrons. Whether a market exercised reasonable care in preventing the spread of COVID-19, or of any similarly transmissible virus, is likely to come down to whether the market took precautions to reduce the likelihood of transmission (such as setting up one-way traffic flow, reducing capacity, requiring masks) and whether the market complied with any applicable state or



federal law or other best practices or guidance established to prevent against COVID-19 transmission.

Even if a claimant is able to prove that the market failed to exercise reasonable care, it would be very difficult to prove that the market was the source of the claimant's illness or injury. With airborne or even foodborne illnesses, many variables are beyond a market's control. For example, given the lack of regular testing, the potential for asymptomatic carriers, and long incubation periods for COVID-19, it would be difficult to prove that an individual contracted COVID-19 at the market.

Therefore, while someone could conceivably sue a farmers market for injury sustained as a result of COVID-19 transmission that allegedly occurred at the farmers market, it is very unlikely a market would actually be found negligent and therefore liable for the person's injuries.

BOTTOM LINE

Even though the likelihood of litigation is low, markets should still take proactive steps to provide a safe environment for their vendors and shoppers. Visit the [Farmers Market Legal Toolkit resource on COVID-19 and masks](#) for more information on steps markets can take to reduce the risk of transmission, and ensure compliance with the Americans with Disabilities Act. Additional COVID-19 resources for farmers markets are available via the Farmers Market Coalition's [COVID resource page](#) and the Local Food System Response to COVID [website](#).

Q:

When is a commercial general liability (CGL) insurer required to defend its policyholder (in this case, a market) against a lawsuit?

A:

Commercial general liability (CGL) policies generally include a “duty to defend” clause. This clause contractually requires the insurance carrier to defend its insured from lawsuits alleging claims that may potentially fall within the policy’s coverage. Importantly, the duty to defend requires an insurer to defend a policyholder against any potentially covered claim, regardless of whether the claim is likely to succeed or not. So, it would not matter if the claim being brought against the market is particularly strong. What matters most is whether the claim is one that the policy might ultimately cover.

Many states take a liberal approach in determining whether a particular claim is covered, which triggers the duty to defend. Typically, courts compare the allegations of the complaint against the language of the policy. If any of the allegations of the complaint could arguably fall within the scope of the policy’s coverage, the duty to defend is triggered. Once

the duty to defend is triggered, an insurer must defend all claims alleged in the lawsuit, even if some are ultimately not covered.

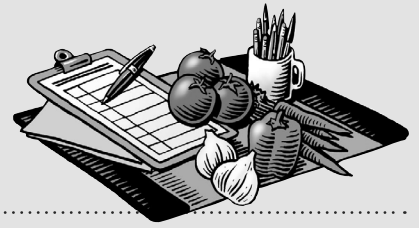
It is important to note that the duty to defend is separate from the duty to indemnify, which is the duty of the insurer to pay a covered claim. Just because the duty to defend has been triggered by the allegations of a lawsuit against a market does not necessarily mean that the insurer will pay for any judgment or settlement against the market. While the duty to defend is very broad, and is triggered where a claim is potentially covered under a CGL policy, an insurance carrier is only obligated to pay covered claims. In practice, this means that even though a CGL insurer might defend a market against a negligence lawsuit—for example, alleging that the market was negligent in handling food—if the facts ultimately show that the market intentionally disregarded food safety guidelines, then the claim may not be covered and the insurer may not be obligated to pay for any settlement or judgment against the market.

BOTTOM LINE

A market should speak with its insurance broker about the terms in its policy, and seek legal counsel if it has difficulty determining whether a claim may be covered. Product liability insurance is generally sold separately from general liability coverage, so markets that are engaging in food aggregation and handling may need to consider adding product liability coverage. Standard CGL policies also generally exclude liability arising from bacteria or viruses.

Q:

What if an insurer declines to defend or pay a claim the market believes falls under its CGL insurance policy?



A:

If a market has been denied defense of a claim that potentially falls within the policy terms, the market may contest that decision. Just because an insurer declines to defend a claim does not mean that it was not obligated to defend the market against it. Only if the allegations of the complaint fail to potentially allege a covered claim is an insurer justified in denying a defense. Furthermore, an insurer's reasonable belief that coverage is excluded under the policy is not considered enough to deny a defense of its insured. In order to deny a defense based on an exclusion in the policy, the insurer has the burden to show, based on the facts of the complaint, that there is no possibility of coverage. This is a difficult burden for an insurer to overcome.

Similarly, if an insurer defends the market but ultimately declines to indemnify (pay) a claim that the market believes is covered, the market may challenge that decision. Because the duty to defend is broader than the duty to indemnify, if an insurer refuses to defend the market and pay a covered claim, the market would typically challenge the insurer's decision under both duties.

If a market submits a claim to their insurer, the insurer will typically send the market a "reservation of rights" letter, recognizing its obligations to the market under the policy and advising the market of any potential defenses to coverage while it investigates the claim. Markets should keep detailed records to best enable the market to contest the insurer's decision not to defend. Best practices include

- documenting all correspondence with the insurance company;
- keeping copies of emails and notes of phone conversations;
- keeping track of expenses incurred to determine coverage; and
- being professional in all interactions with the insurer.

These actions and records will help an attorney best present your case. If an insurer still refuses to defend a market, the market may sue for breach of contract or bad faith, depending on the state. And while state law varies, courts generally construe the duty to defend broadly.

BOTTOM LINE

Legal counsel can help a market determine whether to challenge an insurer's decision not to defend and indemnify a claim.

Q:

How does the essential business designation impact a farmers market's ability to submit a claim to their insurer?

A:

The decision to categorize farmers markets as essential during COVID-19 was left to the states. At this time, however, the designation is moot as most states have reopened to the point where more than only those businesses that qualify as essential can operate. Many states

have also issued guidance or requirements for those businesses that are permitted to be open, including some states with farmers market-specific guidance. Nevertheless, there could be a situation where COVID-19 or another pandemic forces states to again adopt shelter-in-place orders and designate essential businesses.

BOTTOM LINE

Ultimately, whether or not a farmers market is designated as an essential business is unlikely to impact its CGL coverage. It is unlikely that a CGL policy would contain a specific exclusion for claims brought against nonessential businesses. A policy could potentially contain a provision excluding claims brought against a market operating in violation of state, local, or federal law. This could mean that if a market was not designated as essential, and was operating in violation of a state's order that nonessential businesses refrain from operating, then an insurer could conceivably deny coverage and refuse to defend a claim brought against that market. This situation seems unlikely, but markets are advised to consult with an attorney licensed in their state and also to speak with their insurance broker proactively about their policy terms to understand their specific situation.

Learn More

For more information generally about insurance and farmers markets, see the Insurance section of the [Farmers Market Legal Toolkit](#), or the Farmers Market Coalition's webpage on [Insurance](#).

If you wish to see the legal research and citations that underlie this resource, please contact cafs@vermontlaw.edu or submit a request via the ["Contact Us" page](#).