

USDA's Food Safety and Inspection Service Should Say What It Means, Mean What It Says—and Say It Clearly

Has the USDA Food Safety and Inspection Service (FSIS) decided to let the meat industry sell intact cuts of meat that are surface-contaminated with *E. coli* O157:H7 even if that meat is intended for further processing at retail? A court in Wisconsin ruled that it did and then dismissed several lawsuits filed against a meat company by persons injured as part of a widespread *E. coli* O157:H7 outbreak attributed to contaminated food sold at two Milwaukee-area restaurants. The court also dismissed the lawsuits that the restaurant owners had filed against the meat company, its long-time supplier.

In moving for the dismissal of these lawsuits, the meat company was joined by the American Meat Institute (among other industry trade groups) in arguing that the FSIS, in a January 19, 1999 “policy statement” published in the *Federal Register*, interpreted the Federal Meat Inspection Act (FMIA) to allow the sale of meat that was surface-contaminated with *E. coli* O157:H7 so long as the meat was an “intact product.” In this case, the “intact product” was a three-pound sirloin tri-tip distributed to restaurants for processing into, among other things, marinated and needle-tenderized steaks. As a result, it was not really disputed that the product, as distributed by the meat company, was not intended to reach the ultimate consumer as an intact product.

In its ruling, the court emphasized that it was “the USDA’s job to determine when meat is safe, wholesome, and not adulterated.” The court therefore accepted the meat industry’s argument that the USDA’s stamp of inspection, once applied, meant that the meat that bears it is “safe, wholesome, and not adulterated”—even when, as a factual matter, it is neither safe nor wholesome. The court therefore concluded that states are powerless to prevent or prohibit the sale of surface-contaminated meat within their borders, and that meat companies can knowingly sell such meat without risk of being subject to a lawsuit filed under state law.

According to the court’s ruling, the “policy behind preemption in this area makes sense. [The meat company’s] processing plant is an ‘official establishment’ governed by the Federal Meat Inspection Act. The federal government has acted in this area to provide national standards so that properly handled and cooked meat products are safe for human consumption. These standards protect the meat processors also, so that they know what is expected of them in regards to the products that are distributed among the many states. In an area of such great national concern, it is essential that the rules be uniform. Federal inspectors are in these meat plants, testing the meat and monitoring the processing programs. The



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federal regulatory scheme is so long-standing and so comprehensive that I conclude it preempts any state laws to the contrary. That includes bringing civil suits against meat processors.”

While the court’s decision is alarming to many as representing a step backwards from the goal of food safety, what is most alarming to me is that the meat industry was able to use the USDA’s ambiguous and equivocal statements regarding its *E. coli* O157:H7 policy to immunize meat companies from lawsuits based on state law. (In

the interest of full-disclosure I should point out that I was one of the attorneys on the losing side of the court’s ruling.) In my view, the more important lesson to be learned is that the USDA needs to formulate, announce, and implement policy changes in a way that is not subject to multiple, inconsistent, or self-serving interpretations.

Even if we assume (as the AMI argued) that it is “essential that the fundamental principle of national uniformity, and its attendant preemption of conflicting state or local requirements, not be weakened,” it does not follow that the goal of uniformity is protected or advanced by the USDA’s inability to speak clearly or with one voice. For example, when I sought the assistance of the USDA’s Technical Service Center in trying to find out whether the January 19 policy statement had been intended by the USDA as a controlling interpretation of the FMIA, I was told in an e-mail that the policy had not been enacted, and that it was still being studied. Similarly, when I tried to find out whether the policy, if enacted, applied to meat that was intended for further processing at retail, I could get no answer one way or the other.

Which brings me to my final point. If our goal is to have a uniform national standard—one that is uniformly interpreted, uniformly enforced, and uniformly successful in protecting the public health—then the USDA must, once and for all, bring the rule-making process out of the shadows and into the open. It must also endeavor to enact rules and regulations that are clear enough to allow courts to determine whether a conflict between state and federal law actually exists, and do so without merely taking the meat industry’s word for it. In other words, if federal law is going to sweep aside state law, then let it do so solely in the interest of the public health, and not as a way for the meat industry to avoid responsibility for the sale and distribution of unsafe products.

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