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Exposing Private Third-Party Food Safety Auditors to Civil Liability for Negligence: Harnessing Private Law Norms to Regulate Private Governance

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Abstract

In many industries, companies rely on private third-party audits to monitor their suppliers' adherence to various standards. These audits are frequently paid for by the entity being audited, which creates a conflict of interest that incentivizes auditors to reduce the burden of audits by cutting corners and inflating audit scores. This article presents a case study of food safety audits in the fresh produce sector. It explains why large commercial buyers of fresh produce rely on private third-party audits paid for by growers despite the conflict of interest, and it argues that exposing auditors to civil liability for negligence would improve the rigor and reliability of these audits. The article concludes with a more general analysis of how the private law norms of duty and reasonable care imposed by civil liability can improve private governance.

Keywords: regulatory governance, private standards, risk regulation, food safety, standards conformity, certification, health & safety regulation, private law

INTRODUCTION

In many industries, companies rely on private third-party audits to monitor their suppliers' adherence to a wide variety of standards related to product safety, labor conditions, and environmental stewardship.[1] Such audits play an essential role in food safety governance, especially within the fresh produce sector. Large commercial buyers—processors, distributors, retail supermarkets, restaurant chains, and cafeteria caterers—typically require the farmers who supply them to obtain certification from private third-party auditors of compliance with food safety standards as a condition of doing business. The first such audits of growers date back to the late 1990s. Since that time, a global infrastructure of private third-party food safety auditing has emerged, in which

[1] Third-party audits generally refer to audits of a supplier conducted by an outside auditor other than a buyer. The auditor is a third-party to the supplier-buyer relationship. Second-party audits are audits of a supplier conducted by a buyer. First-party audits, also known as internal audits, are audits of a supplier conducted by the supplier itself. Mark Hammar, "First-, Second- & Third-Party Audits, What are Differences?" *ISO 9001 Blog*, February 24, 2015, archived at https://perma.cc/5UPJ-2SHN. For a general overview of third-party auditing and certification in supply chain management, see T. BARTLEY, 'Certification as a Mode of Social Regulation', in D. Levi-Faur (ed), *Handbook on the Politics of Regulation* (Cheltenham, UK: Edward Elgar 2011); L. BUSCH, 'Standards, Law, and Governance', 25. *Journal of Rural Social Sciences* 2010, p 56-78; G. AULD, *Constructing Governance* (New Haven, CT: Yale University Press, 2014).

individual buyers, trade associations, and auditing firms have developed various food safety standards used by hundreds of auditing firms to assess the food safety practices of hundreds of thousands of farms.[2]

Private third-party food safety audits in the fresh produce sector suffer from two problems. On the one hand, retail buyers motivated by reputational concerns sometimes demand excessively stringent and untested audit standards unsupported by science or cost-benefit analysis. Fearful that a foodborne illness outbreak traced back to their products could damage or destroy their popular brands, buyers have produced unrealistic policies declaring "zero tolerance" for the presence of potentially harmful microbes on the fresh produce that they purchase for resale to consumers. For example, some buyers have insisted on a mile-wide clear-cut buffer around produce fields to prevent animal intrusion, without any evidence that such a margin would be safer than a smaller margin, and without considering the cost of such a large margin in terms of lost productivity for growers and environmental impact.[3] On the other hand, the common practice of auditors being paid by the farmers whom they audit creates a conflict of interest that leads some auditors to reduce the rigor of audits by cutting corners and skewing results. Auditors, eager to keep their existing accounts and to obtain new ones, have an incentive to provide audits that impose minimal demands on growers and to issue passing scores.[4] Thus, in the worst cases, the private third-party auditing system produces unreasonable standards that are inadequately enforced—a state

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[2] For an account of the history and scope of private third-party food safety auditing in the U.S., see T. LYTTON, *Outbreak: Foodborne Illness and the Struggle for Food Safety* (Chicago: University of Chicago Press 2019) ch. 5, appendix C. For an overview of the global private third-party food safety auditing infrastructure, see T. LYTTON & L. MCALLISTER, 'Oversight in Private Food Safety Auditing; Addressing Auditor Conflict of Interest', 2014. *Wisconsin Law Review* 2014, p 289. The estimate of the number of private third-party auditors is based on U.S. Food and Drug Administration, *Preliminary Regulatory Impact Analysis for the Proposed Rules on Foreign Supplier Verification Programs*, Docket No. FDA-2011-N-0143, 2011, 139, archived at https://perma.cc/FS2F-72PN (estimating "there are 568 accredited auditors/CBs specializing in food safety audits"). See also J. CASWELL et al., 'Food Certification Industry Capacity and Ability to Comply with FSMA Final Rule on Accredited Third-Party Certification', unpublished paper presented at the Agricultural & Applied Economics Association Annual Meeting, Chicago, 30 July 2017, p 3, archived at https://perma.cc/YS2K-XPK5 (estimating 581 food safety certification bodies internationally). The estimate of the number of audited farms is based on David Gombas (former Senior Vice President of Food Safety and Technology, United Fresh Produce Association), personal communication with author, June 4, 2018; Bob Whitaker (Chief Science and Technology Officer, Produce Marketing Association), personal communication with author, June 4, 2018. GlobalG.A.P., a leading European-based certification system for fresh produce, estimates that nearly 200,000 farms in more than 125 countries are certified under its scheme. 'GlobalG.A.P. Chain of Custody: Guardian of Food Safety, Sustainability & Social Responsibility Claims', GlobalG.A.P. archived at https://perma.cc/B82X-BCDG.

[3] T. LYTTON, *Outbreak*, Appendix D.

[4] For a detailed analysis of this conflict of interest, see T. LYTTON & L. MCALLISTER, 2014. *Wisc. Law Review* 2014, p 297-304.

of affairs that brings to mind comedian Woody Allen's famous joke about a restaurant where one patron complains that "the food in this place is really terrible" and the other responds, "yeah, I know, and such small portions."[5]

To address these problems, this article advocates exposing private third-party food safety auditors to civil liability for negligence. Taking the U.S. as an example, it argues that courts should impose a common law duty on auditors to exercise reasonable care in conducting audits. American common law defines the standard of reasonable care by reference to prevailing industry customs regarding safety, taking into account the cost-effectiveness of those customs. Exposure to liability for negligence would, thus, create an incentive for private third-party food safety auditors to adopt industry associations' substantive standards for food safety and procedural standards for conducting audits, and to take into account the cost-effectiveness of these standards. Liability exposure would harness the private law norms of duty and reasonableness to improve the rigor and integrity of private third-party food safety auditing.

In the following section, the article explains why buyers rely on private third-party food safety audits paid for by suppliers despite the conflict of interest that this arrangement creates. Next, the article analyzes the current state of U.S. law regarding the liability exposure of private third-party food safety auditors. After that, the article presents arguments for subjecting private third-party food safety auditors to liability for negligence and addresses objections. Finally, the article considers more broadly the complementary roles of public and private law norms in regulating private governance.

Before proceeding, an important caveat is in order. Evidence of reduced rigor in food safety audits attributable to conflict of interest is almost entirely anecdotal.[6] Personal interviews, professional commentary,

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[5] WOODY ALLEN, *Annie Hall* (1977).

[6] For a quantitative study of conflict of interest in third-party environmental audits as a result of auditors being paid by regulated entities, see E. DUFLO, 'Truth-Telling by Third Party Auditors and the Response of Polluting Firms: Experimental Evidence from India', 128. *Q.J. Econ.* 2013, p 1499. For additional examples and an analysis of other factors that influence the rigor of third-party audits, see J. SHORT & M. TOFFEL, 'The Integrity of Private Third-Party Compliance Monitoring', 42. *Administrative and Regulatory News*, p 22; J. SHORT, M. TOFFEL & A. HUGILL, 'Monitoring Global Supply Chains', 37. *Strategic Management Journal* 2016, p 1878. For quantitative studies of government food safety inspections of restaurants, see D. HO, 'Fudging the Nudge: Information Disclosure and Restaurant Grading', 122. *Yale Law Journal* 2012, p 574; D. HO, 'Does Peer Review Work? An Experiment of Experimentalism', 69. *Stanford Law Review* 2017, p 1; D. HO, Z.

and the popular press suggest that conflict of interest compromises the integrity of some audits and undermines public confidence in private third-party food safety auditing more generally.[7] However, the extent and impact of the problem are unknown. Nevertheless, government regulations, audit scheme guidelines, industry association benchmarks, auditing firm management policies, and accreditation standards all include provisions that specifically address the problem.[8] At the very least, it is safe to say that both industry insiders and outside commentators believe it to be a significant concern that merits attention.

1. WHY BUYERS RELY ON PRIVATE THIRD-PARTY FOOD SAFETY AUDITS PAID FOR BY GROWERS

The conflict of interest that arises when private third-party food safety auditors are paid by growers could be avoided in three ways: government could provide routine food safety inspections on farms, buyers could pay for audits, or buyers could insist that suppliers pay for government audits. Figure 1 represents various options for structuring the payment and performance of audits.

ASHWOOD & C. HANDAN-NADER, 'The False Promise of Simple Information Disclosure: New Evidence on Restaurant Hygiene Grading', 17-043. *Stanford Institute for Economic Policy Research Working Paper*, 20 December 2017, archived at https://perma.cc/RVA5-P6NC.

[7] *See, e.g.*, F. ALBERSMEIER et al., 'The Reliability of Third-Party Certification in the Food Chain: From Checklists to Risk-Oriented Auditing', 20. *Food Control* 2009, 927; L. BUSCH, 'Quasi-States? The Unexpected Rise of Private Food Law', in B.M.J. van der Meulen (ed.), *Private Food Law: Governing Food Chains through Contract Law, Self-Regulation, Private Standards, Audits and Certification Schemes* (Wageningen, Netherlands: Wageningen Academic Publishers, 2011) p 61, 65; D. POWELL et al., 'Audits and Inspections Are Never Enough: A Critique to Enhance Food Safety', 30. *Food Control* 2013, p. (686) at 686–90; 'Editorial: Food Safety Auditors Too Tied to Industry', *USA Today*, Dec. 24, 2012, archived at https://perma.cc/7UXV-KXNL; Richard Stier (leading food safety scientist and commentator on food safety auditing), telephone interview by the author, Aug. 26, 2013.

[8] See T. LYTTON & L. MCALLISTER, 2014. *Wisc. Law Review* 2014, p 313-329.

Figure 1. FOOD SAFETY AUDITING ARRANGEMENTS

		Who Performs the Audit?	
		Government Inspector	**Private Auditor**
Who Pays for the Audit?	**Government**	routine government inspection	inspection by government contractors
	Buyer	LGMA audits	audits by buyer's in-house staff buyer-funded private 3rd party audits
	Supplier	USDA fee-for-service audits	private 3rd party audits paid for by suppliers

Despite these options, most large commercial buyers of fresh produce rely on private third-party audits paid for by growers. The discussion below offers a variety of explanations that help account for this curious state of affairs.

Although the federal Food and Drug Administration (FDA) and state departments of health and agriculture are charged with overseeing food safety on farms, no government entity in the U.S. has ever possessed sufficient resources to conduct routine food safety inspections of the more than 200,000 U.S. farms that grow fresh produce.[9] When government inspectors do appear on farms, it is typically to investigate the causes of foodborne

[9] FDA jurisdiction over food safety on farms derives from the federal Food, Drug, and Cosmetic Act of 1938; V. BURROWS, *FDA Authority to Regulate On-Farm Activity*, Congressional Research Service, Report RS22939, 14 August 2008, p 3. However, neither the agency nor any other government entity has never conducted routine inspections of fresh produce operations for food safety. FDA, "Guide to Produce Farm Investigations," November 2005, archived at https://perma.cc/2VPQ-C5FP. The estimate for the number of US farms that grow fresh produce is derived from the 2012 USDA CENSUS OF AGRICULTURE, Tables 38, 39, and 40 available at https://www.agcensus.usda.gov/Publications/2012/Full_Report/Volume_1,_Chapter_1_US/.

illness outbreaks after they occur.[10] Under the federal Food Safety Modernization Act (FSMA) of 2011, designed to promote a new preventive approach to food safety, the FDA has published new produce safety regulations that contemplate routine government inspection of farms.[11] In 2018, the agency began working with state departments of agriculture to train state inspectors to inspect farms for compliance with the agency's new Produce Safety Rule. The FDA says that its own inspectors will conduct inspections in states unwilling to do so.[12] However, the availability of new and extensive state resources to conduct routine farm inspections remains to be seen, and many commentators doubt the FDA's capacity to inspect farms. "The fact is that the FDA doesn't have the resources or the people to be able to adequately inspect produce farms in any way," asserts David Acheson, former FDA associate commissioner for foods who now directs a leading food safety consulting firm. "They don't have the people and they don't have the funding to hire them."[13]

It is conceivable that government could pay private third-party auditors. Government contracts of this sort exist in other regulatory arenas. For example, the Federal Emergency Management Agency contracts with private companies to conduct home inspections to assess damage from disasters.[14] However, the same limitations on resources that constrain deployment of government inspectors likely explain the lack of such a program to cover the vast need for on-farm food safety inspections.

Buyers could pay government inspectors to audit growers. One successful example of this approach is the California Leafy Green Product Handler Marketing Agreement (LGMA). Although successful, the LGMA model has not spread to other parts of the fresh produce sector due to the concerns of small and medium growers

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[10] Bob Whitaker (Chief Science and Technology Officer, Produce Marketing Association), telephone interview by the author, June 1, 2016; Michelle Smith (Senior Policy Analyst at the FDA), telephone interview by the author, June 7, 2016; Trevor Suslow (Research Specialist, University of California, Davis), telephone interview by the author, June 1, 2016.
[11] FDA Food Safety Modernization Act, Pub. L. No. 111-353, 124 Stat. 3885 (January 4, 2011), sec. 105(a)(2); Standards for Growing, Harvesting, Packing, and Holding of Produce for Human Consumption, Final Rule, 80 Fed. Reg. 74, p 354.
[12] 'States and FDA Prepare for On-Farm Inspections', *The Packer*, 22 February 2017, archived at https://perma.cc/8B8K-R4FB; 'FDA Sends $32.5 Million to States for Help with Produce Safety Rule', *Food Safety News*, 13 July 2018, archived at https://perma.cc/FK4J-C4FF.
[13] 'States and FDA Prepare for On-Farm Inspections'.
[14] ICA Blogger, 'FEMA Inspectors: A Day in the Life', *ICA*, 28 February 2018, archived at https://perma.cc/Q7LS-3AHU. Another example is the Swiss government's reliance on private veterinarians to enforce regulations governing the use of veterinary medicines for livestock. See E. THOMANN & F. SAGER, 'Hybridity in Action: Accountability Dilemmas of Public and For-Profit Food Safety Inspectors in Switzerland', in P. Verbruggen and T. Havinga (eds), *Hybridization of Food Governance: Trends, Types and Results* (Cheltenham, UK: Edward Elgar 2017).

about anti-competitive effects, the high cost of coordination required to establish and maintain a marketing agreement, and the preference of many buyers for private auditors over government inspectors. Under the LGMA, launched in 2007, fresh produce handlers—defined as "any person who handles, processes, ships or distributes leafy green product for market"—agree to purchase leafy greens exclusively from farms that pass food safety audits conducted by California Department of Food and Agriculture inspectors using criteria developed by the LGMA.[15] In exchange, participating handlers receive the right to display an LGMA food safety certification mark on the packaging of their products. To participate in the agreement, handlers must pay an assessment, from which the LGMA funds the audits.

Although outbreaks can affect everyone in the leafy greens industry, they pose the greatest threat to handlers who produce leading brands of fresh-cut bagged produce. These companies lack the anonymity among consumers that shields growers and handlers of unmarked whole produce. Packaging bearing a brand name makes it easier to identify a particular company as the source of an outbreak and tends to focus unwanted media attention on the company, even if contamination originates with a grower further upstream in the supply chain. Consequently, ninety-seven handlers, responsible for 99% of the leafy greens produced in California have joined the LGMA.[16] Handlers in Arizona have established a similar agreement. Together, these agreements cover nearly 95% of the leafy greens grown in the U.S.[17]

However, opposition from small and mid-size farmers and consumer advocates concerned about the dominance of large handlers in the LGMA blocked the creation of a national leafy green handlers marketing

[15] The agreement distinguishes handlers from growers, who produce greens, and retailers, who sell greens to consumers. Thus, handlers are the link between growers and retailers. State of California Dept. of Food and Agriculture Marketing Branch, *California Leafy Green Products Handler Marketing Agreement*, p 1-2, 9-10, archived at https://perma.cc/8NQP-ER65. For details on how LGMA standards are developed, see T. LYTTON, *Outbreak*, ch. 6.

[16] D. COHEN, 'The History, Politics & Perils of the Current Food Safety Controversy: CAFF Guide to Proposed Food Safety Regulations', *Community Alliance with Family Farmers*, January 2008, p 9, 11, archived at https://perma.cc/TM8V-PDKB; B. ENDRES & N. JOHNSON, 'Integrating Stakeholder Roles in Food Production, Marketing, and Safety Systems: An Evolving Jurisdictional Approach', 26. *J. of Environmental L. & Litigation* 2011, p 48-49; M. KOHNKE, 'Reeling in a Rogue Industry: Lethal E. coli in California's Leafy Green Produce & The Regulatory Response', 12. *Drake J. of Agricultural Law* 2007, p 509; V. SHEKHAR, 'Produce Exceptionalism: Examining the Leafy Greens Marketing Agreement and Its Ability to Improve Food Safety', 6. *J. of Food Law & Policy* 2010, p 285; T. LYTTON, *Outbreak*, ch. 5. For a listing of current California LGMA members, see 'Certified Members', *California LGMA*, archived at https://perma.cc/F9YB-FCV3.

[17] "Farming Leafy Greens," *California LGMA*, archived at https://perma.cc/3M6T-2KRC.

agreement and helped steer food safety reforms away from this approach in favor of more traditional command-and-control regulation by the FDA under FSMA's new produce safety rules. In addition to concerns about anti-competitive effects, coordination costs—the difficulty of organizing and maintaining a marketing agreement—may explain why the LGMA model has not spread to other commodity markets within the fresh produce sector.[18]

Buyers could pay for audits by sending their own in-house staff to audit suppliers. Although this is common in supply chains for processed foods, it is not the norm in the fresh produce sector due to limited capacity and inefficiency. Large commercial buyers of fresh produce frequently lack sufficient in-house staff to audit their many suppliers. For example, a typical supermarket carries more than 700 fresh produce items, each of which may have as many as a dozen suppliers. Moreover, to ensure consistent availability of fresh produce throughout the year, some large commercial buyers purchase items in an auction system, meaning that their suppliers change frequently. These buyers do not know who many of their suppliers are until they purchase items at auction, too late to inspect the suppliers' cultivation and harvest practices. Retail supermarkets, restaurant chains, and cafeteria caterers often buy from distributors, so they lack a direct relationship with growers.[19]

Moreover, in the fresh produce sector, reliance on third-party auditors is more cost-effective. A third-party auditor can spread the cost of travel and other expenses by conducting multiple audits in a single trip to a growing region, resulting in a lower cost per audit compared to the cost per audit by in-house staff whom a buyer sends out to audit its one or two suppliers in the region. Similarly, a third-party auditor can generate

[18] See T. LYTTON, *Outbreak*, ch. 5. For more detailed analysis of marketing agreements, see G. B. WOOD, 'Marketing Agreements and Orders—Without Production Controls', Farm Foundation, *Increasing Understanding of Public Problems and Policies*, (Chicago: conference publication 1961), p 69-70, archived at https://perma.cc/PDL7-PE5Q.

[19] E. MCLAUGHLIN, K. PARK & G. HAWKES, 'Produce Industry Procurement: Changing Preferences and Practices', *Food Industry Management Program*, Cornell University, no. E.B. 2015-10, September 2015, p 6-8, archived at https://perma.cc/JW36-38NG; John Hansen (former Vice President, Enterprise Risk Management, Sprouts Farmers Market), telephone interview by the author, March 17, 2015; Hilary Thesmar (Vice President of Food Safety Programs, Food Marketing Institute), telephone interview by the author, December 17, 2014; David Acheson (President and CEO of The Acheson Group, former FDA Associate Commissioner of Foods), telephone interview by the author, December 15, 2014; Tom Chestnut (Vice President, NSF Global), telephone interview by the author, August 15, 2013; James Prevor (Editor-in-Chief of Produce Business magazine), telephone interview with the author, August 13, 2013; Dave Theno (former founder and owner of Gray Dog Partners, leading independent food safety consultant), telephone interview by the author, September 5, 2014; Stier, interview.

enough audits in a particular type of operation to develop specialized expertise beyond that of in-house staff tasked with auditing a variety of different types of growers. Consequently, large commercial buyers outsource auditing services to reduce costs and obtain a higher level of expertise. On the supplier side, the cost to a grower of shepherding around a different auditor from each of its buyers is higher than obtaining a smaller number of third-party audits, each of which typically satisfies multiple buyers.[20]

Aside from capacity and efficiency, some buyers believe that third-party auditors are more reliable than in-house staff, who may feel pressure to obtain aesthetically-appealing or low-cost produce. These other concerns compete with and can bias in-house staff judgments regarding food safety. In addition, some buyers use third-party audits to provide buyers with "another set of eyes" to reinforce the reliability of their in-house auditing programs.[21]

Buyers could pay third-party auditors, which would avoid the problems of limited capacity and inefficiency associated with reliance on in-house staff. However, since buyers often do not know their suppliers until after harvest—because they buy produce at auction or through a distributor—they cannot contract with auditors to inspect growers during cultivation and harvest. Buyers might contribute in advance to a collective fund to pay for third-party audits, but this would generate the kind of coordination costs and concerns about anti-competitive effects associated with the LGMA.

Buyers could require growers to pay for government audits to avoid concerns about the reliability of audits performed by private third-party auditors. The U.S. Department of Agriculture's Agricultural Marketing Service (AMS) offers a voluntary fee-for-service food safety auditing program for fresh produce growers and handlers to assist them in complying with federal food safety guidance and offers the option of audits using a set of

[20] S. HENSON & J. NORTHERN, 'Economic Determinants of Food Safety Controls in Supply of Retailer Own-Branded Products in United Kingdom', 14. *Agribusiness* 1998, p 113; L. FULPONI, 'Private Voluntary Standards in the Food System: The Perspective of Major Food Retailers in OECD Countries', 31. *Food Policy* 2006, p 1; Roy Costa (founder and owner of Environmental Health Associates), telephone interview by the author, August 12, 2013; Art Davis (Vice President of Food Safety at The Vista Institute), telephone interview by the author, August 12, 2013; Gale Prince (founder and owner of SAGE Food Safety Consultants, former Corporate Director of Regulatory Affairs from 1979 to 2007 at Kroger), telephone interview by the author, August 6, 2013; Theno, interview; Chestnut, interview; James Prevor, personal communication with the author, September 4, 2014.

[21] Craig Wilson (Vice President for Quality Assurance and Food Safety, Costco Wholesale), telephone interview by the author, August 15, 2013; Davis, interview; Prevor, personal communication; Chestnut; interview.

standards developed by the United Fresh Produce Association.[22] However, despite the option of requiring a government auditor, most buyers in the fresh produce sector still rely on private auditors. Government inspectors performed only 4,224 food safety audits of farms and handlers in 2016 as part of the AMS's fee-for-service auditing programs. By contrast, Primus Labs, a leading private auditor in the fresh produce sector, alone, performed an estimated 15,000 audits that year.[23]

It appears that most large commercial buyers of fresh produce prefer private auditors to government auditors. One reason might be that private auditors charge less for their services. Another explanation might be that private auditing firms, unlike government auditors, can customize audits to incorporate the particular product specifications of any buyer. Private auditors are free to audit against any standard requested by a buyer. By contrast, government auditors can audit only against standards that are incorporated into agency regulations or guidance, or that, at least, undergo a review by multiple layers of agency personnel to obtain agency approval. Buyers' long-term relationships with specific private firms may also explain their preference for private auditors. When it comes time to select a list of acceptable auditors for the growers who supply them, buyers may gravitate to private auditing firms that have previously provided auditing or testing services for food processors in their supply chain.[24]

Globalization of supply chains and the influence of the Global Food Safety Initiative (GFSI) benchmarking system suggest another possible explanation for why buyers rely on private auditors. GFSI is an industry-sponsored system of minimum requirements for food safety schemes that encourages buyers to treat all GFSI-

[22] USDA AMS, 'Harmonized GAP', www.ams.usda.gov/services/auditing/gap-ghp/harmonized archived at https://perma.cc/UQ7D-ULQ2; Ken Petersen (Chief of Audit Services Branch at USDA-AMS Fruit and Vegetable Program), telephone interview by the author, September 2, 2016; E. STARMER & M. KULLICK, 'Bridging the GAPs: Strategies to Improve Produce Safety, Preserve Farm Diversity and Strengthen Local Food Systems', *Food & Water Watch and Institute for Agriculture and Trade Policy*, September 2009, p 3-4, 19, archived at https://perma.cc/5UQW-A9X3. For details on the origins of the USDA AMS Harmonized GAP audit program, see T. LYTTON, *Outbreak*, ch. 8 note 13.
[23] The number of USDA audits in 2016 is from Ken Petersen, email message to author, May 11, 2017. Audit volume for Primus Labs is from U.S. House of Representatives, Committee on Energy and Commerce, Committee Staff, 'Report on the Investigation of the Outbreak of Listeria monocytogenes in Cantaloupe at Jensen Farms', 10 January 2012, p 6.
[24] Petersen, interview.

recognized schemes as equivalent.[25] Large multinational buyers, who purchase fresh produce from dozens of countries in hundreds of categories, may prefer to require their suppliers to obtain a GFSI-recognized food safety certification. Government audit services are ineligible for GFSI recognition, which requires that a food safety scheme be independent of any particular auditor and that any auditor using it be accredited, which excludes government auditors, who cannot, without legislative authorization, submit themselves to the demands of independent accreditation organizations.[26]

Finally, not everyone believes that government auditors are more reliable than private auditors. There is no empirical evidence to support broad generalizations about the comparative reliability of private auditors and public inspectors. Moreover, auditors often come from the same communities as the farmers that they audit and may be tempted to relax standards because they "want to be liked," according to one industry insider, who believes that government inspectors are no less subject to this social pressure than private auditors.[27]

The conflict of interest that arises when private third-party food safety auditors are paid by growers might be mitigated by having growers agree to random assignment of auditors paid from a common fund to which growers contribute.[28] The eligible pool of auditors would all have to be qualified to provide certification based on any particular audit standards that a grower might wish to meet to satisfy a supplier. The wide variety of different standards, which are continuously evolving, in addition to the coordination and administrative costs of operating a common fund, likely explain such an arrangement has not emerged in the fresh produce sector.

[25] Food safety schemes typically comprise standards for supervising auditors, audit procedures, and sector-specific food safety standards. For an overview, see T. LYTTON & L. MCALLISTER, 2014. *Wisc. Law Review* 2014, p 317-320.
[26] Global Food Safety Initiative, GFSI Benchmarking Requirements, GFSI Guidance Document Version 7.2, Part 2, Sections 1.1.1., 2.2.2; Petersen interview; Scott Horsfall (CEO of the California LGMA), telephone interview by the author, September 15, 2015.
[27] Theno, interview; James Prevor, telephone interview by the author, January 28, 2014.; J. PREVOR, 'Auditing and Food Safety: California Agencies Weigh In On Cantaloupe Crisis', *Jim Prevor's Perishable Pundit*, 4 January 2012, archived at https://perma.cc/WU9C-4PGC. For a review of evidence that third-party monitors tend to be more lenient when monitoring firms with whom they have longstanding relationships, see J. SHORT AND M. TOFFEL, *Administrative & Regulatory News*, p 23. For evidence of political and social pressure on government inspectors specifically in restaurant and food service inspection, see D. HO, 122. *Yale Law Journal* 2012, p. 574, p 595; D. HO, 69. STANFORD LAW REVIEW 2017, p 1, fn. 355.
[28] J. SHORT & M. TOFFEL, *Administrative & Regulatory Law News*, p 24.

2. THE LIABILITY EXPOSURE OF PRIVATE THIRD-PARTY AUDITORS UNDER U.S. COMMON LAW

In 2008, cantaloupes contaminated with a virulent bacterial pathogen, *Listeria monocytogenes*, caused 147 reported cases of serious illness and thirty-three deaths in twenty-eight states.[29] Outbreak victims and their survivors filed lawsuits claiming more than $50 million in damages. They sued the grower, distributors of its products, several retailers, and, for the first time, a private third-party food safety auditing firm.[30]

The grower, Jensen Farms, had entered into a contract with the auditing firm, Primus Labs, to provide food safety certification required by the distributors and the retailers. Primus hired a subcontractor to audit Jensen Farms. In late July 2011, the subcontractor audited the Jensen Farms packinghouse using audit criteria and a form provided by Primus. The subcontractor awarded Jensen Farms a score of 96 percent and a "superior" rating. An audit certificate signed by the president of Primus Labs accompanied the final audit report.[31]

Two weeks later, physicians started reporting cases of serious illness eventually attributed to contaminated cantaloupes from Jensen Farms.[32] A subsequent government investigation identified a number of significant food safety problems in the Jensen Farms packinghouse. Investigators found that the facility design allowed for standing water to accumulate on the floor directly under packing equipment and that the drain was not accessible for adequate cleaning. In addition, the investigators stated that the machines used to wash and dry the cantaloupe were not designed to be easily or routinely cleaned and sanitized—investigators observed dirt and product buildup on some areas of the equipment even after it had been disassembled, cleaned, and sanitized. The report also stated that the machines were equipped with a system to inject antimicrobial solution into the wash water

[29] Centers for Disease Control and Prevention, 'Multistate Outbreak of Listeriosis Linked to Whole Cantaloupes from Jensen Farms, Colorado (FINAL UPDATE)', 27 August 2012, archived at https://perma.cc/NG2K-J6NZ.
[30] Bill Marler, telephone interview by the author, November 5, 2014; J. ANDREWS, 'Jensen Farms Files for Bankruptcy', *Food Safety News*, 26 May 2012, archived at https://perma.cc/6MAF-ESXR; K. NILAND, 'Jensen Farms Cantaloupe Victims Reach Settlement with Walmart', *Righting Injustice*, 15 May 2014, archived at https://perma.cc/K9QW-KXHB; C. BEACH, 'Victims Settle wth Kroger, Frontera; dismiss Primus', *The Packer*, 11 February 2015, archived at https://perma.cc/SQ6X-QLCE; S. PAULSON, 'Denver Judge Settles Most Wrongful-Death Lawsuits in 2011 Listeria Outbreak that Killed 33', *Associated Press*, 11 March 2015, archived at https://perma.cc/UH88-WK2E; B. MARLER, 'Publisher's Platform: Three Years Since People Died from Cantaloupe', *Food Safety News*, 22 July 2014, archived at https://perma.cc/FS7F-92KK. For further details, T. LYTTON, *Outbreak*, ch. 1.
[31] Primus Labs, audit certificate for Jensen Farms, 25 July 2011, archived at https://perma.cc/YSC6-W4FB.
[32] 'Timeline of Events: Multistate Outbreak of Listeriosis Linked to Whole Cantaloupes from Jensen Farms in Colorado', 24 October 2011, archived at https://perma.cc/FFA6-SVQS. For further details see T. LYTTON, *Outbreak*, ch. 1.

but that this system was not used. Finally, according to the report, after harvest, the cantaloupes were not pre-cooled to remove field heat prior to placing them in cold storage, thereby allowing for the formation of condensation on the rind, which created cold and damp conditions conducive to the growth of *Listeria*. Samples collected from standing water on the floor, processing equipment, and cantaloupes in cold storage all tested positive for outbreak-related strains of *Listeria*. According to one federal inspector, "It was a very tragic alignment of poor facility design, poor design of equipment and very unique post-harvest handling practices of those melons. If any one of those things would have been prevented, this tragedy probably wouldn't have occurred."[33]

Based on these findings, the plaintiffs alleged that Primus and its subcontractor were negligent under a variety of theories. The plaintiffs argued that the subcontractor negligently conducted the audit by failing to observe or properly score conditions in Jensen Farms' packinghouse operations that violated audit criteria, and that Primus should be held vicariously liable for these failures based on its agency relationship with the subcontractor. In addition, the plaintiffs contended that Primus was negligent in hiring and supervising the subcontractor, whom the plaintiffs alleged lacked sufficient expertise in food safety. The plaintiffs further asserted that Primus was negligent in the design of its audit criteria, which the plaintiffs argued fell short of industry custom and FDA guidance.[34]

Primus denied all of these allegations. It argued that the subcontractor was properly qualified and conducted the audit according to Primus's audit standards. In defense of its audit criteria, Primus explained that it offered a menu of audit options to growers, which varied in stringency and rigor, and that Jensen Farms requested and

[33] This paragraph draws from T. LYTTON, *Outbreak*, ch. 1. FDA, 'Environmental Assessment'; K. MOGEN, 'Memorandum to the File on the Environmental Assessment', FDA, 15 December 2011, p 14, archived at https://perma.cc/V7Z5-4HCX; House of Representatives, 'Report', p 3; District Court of Colorado 22 October 2013, *U.S. v. Jensen*, Rule 11(c)(1)(A) and (B) Plea Agreement and Statement of Facts Relevant to Sentencing, Crim. No. 13-mj-01138-MEH, archived at https://perma.cc/J28C-6J3L; BRONSTEIN & GRIFFIN, 'Third-Deadliest U.S. Food Outbreak.' David Gombas, a leading expert on food safety in the fresh produce sector, notes that, although pre-cooling to remove field heat has benefits for extending the life of melons by retarding softening and also can reduce the growth of some pathogens, it does not reduce condensation, which is the result of warm air coming into contact with a cold surface, not cold air coming into contact with a warm surface. David Gombas, personal communication with the author, 28 August 2017.

[34] B. MARLER, 'Publisher's Platform'; B. MARLER, 'The Primus Audit Failures and Victims' Allegations', undated document, archived at https://perma.cc/2ZN3-RJB6; Prowers County Colorado District Court 2014, *Jensen Farms v. Primus Group, Inc.*,archived at https://perma.cc/2NY2-HHVY.

paid for the firm's least demanding audit, the standards of which conformed to industry custom and government regulations.[35]

Whether the conduct of a defendant qualifies as careless to the point of negligence is a factual question, which U.S. common law ultimately assigns to a jury (or, in a bench trial, to a judge acting as a factfinder in the place of a jury). Whether any such carelessness on the part of the defendant caused the plaintiff's damages is also a factual question for the jury (or the judge acting as a factfinder). However, before these factual questions can be addressed, a judge must first determine whether the defendant owed the plaintiff a legal duty to exercise a certain level of care. Only if the defendant owed the plaintiff such a legal duty would the defendant's failure to exercise that level of care constitute a breach of duty giving rise to liability.[36]

The plaintiffs' claims against Primus never reached the fact finding stage. In three cases, judges held that neither Primus nor the subcontractor owed a duty of care to the plaintiffs, and they dismissed the plaintiffs' lawsuits. In nine other cases, judges found that Primus and the subcontractor owed a duty of care to the plaintiffs, and Primus settled the lawsuits prior to trial.[37] In addressing the threshold issue of duty, these courts grappled with arguments for and against subjecting private third-party food safety auditing firms to common law standards of care. Diverse reasoning—even among courts that reached the same result—reveals doctrinal complexity and ambiguity.

As a general rule, individuals and companies owe a duty to exercise reasonable care in their operations and are subject to civil liability for any failure to exercise reasonable care when such failure causes foreseeable or direct harm to another. However, the law distinguishes between misfeasance—affirmative acts of negligence for which an individual or company is subject to liability—and nonfeasance—a failure to act for which an individual or company is not subject to liability in the absence of special circumstances. This distinction is complicated by the fact that many uncontroversial examples negligent conduct are characterized as failures to act—for example, the failure of a driver to apply his brakes to avoid hitting a pedestrian in a crosswalk. Further

[35] For a more detailed account of the arguments, see T. LYTTON, *Outbreak*, ch. 1.
[36] D. DOBBS, P. HAYDEN, & E. BUBLICK, *Dobbs' Law of Torts, 2d* (2011), § 251; *Restatement (Third) Torts*, §§ 6-8.
[37] B. MARLER, 'Publisher's Platform'.

complicating matters, it is often possible to frame the same conduct as an affirmative act and as a failure to act. One could accurately re-describe the above example as the driver's improper entry into the crosswalk while a pedestrian was crossing. Similarly, one could recharacterize a clear case of nonfeasance as an affirmative act. The failure to help an injured crime victim who comes to the door seeking assistance could be portrayed as an active refusal to help. Some commentators have suggested that the absence of liability for nonfeasance is better articulated as a refusal to impose a duty of care on actors whose conduct did not create the risk of harm to another. According to this account, the failure to brake, even if an omission, increases the risk of harm to the pedestrian, while the failure to help the crime victim, even if an active refusal, does not increase the risk of harm.[38]

In cases where judges characterize allegations in terms of misfeasance, common law doctrine does not automatically impose a duty of care on defendants. Judges frequently decide whether to impose a duty by weighing of a mix of factors that take into account fairness, efficient risk regulation, administration of justice, and the separation of powers. These factors include the foreseeability of harm to the plaintiff as a result of the defendant's conduct, the closeness of connection between the defendant's conduct and the plaintiff's harm, the moral blame attached to the defendant's conduct, the potential impact of imposing liability on reducing similar risks in the future, the burden of liability on the defendant and the community, the availability and cost of insurance to cover the risk involved, the potential volume of litigation that liability would generate and its impact on the court system, and any relevant statutes passed by the legislature or regulations issued by the executive. The weight of these factors may be either in favor or against imposing a duty.[39]

In cases where judges characterize allegations in terms of nonfeasance, common law doctrine still permits the judge to impose a duty of care under a variety of different special circumstances. One such special circumstance is when an actor voluntarily undertakes to render services aimed at reducing the risk of harm from

[38] D. DOBBS, P. HAYDEN, & E. BUBLICK, §§ 251, 405, 406; *Restatement (Third) Torts*, §§ 7 & 37.
[39] D. DOBBS, P. HAYDEN, & E. BUBLICK, § 255; *Restatement (Third) Torts*, § 7.

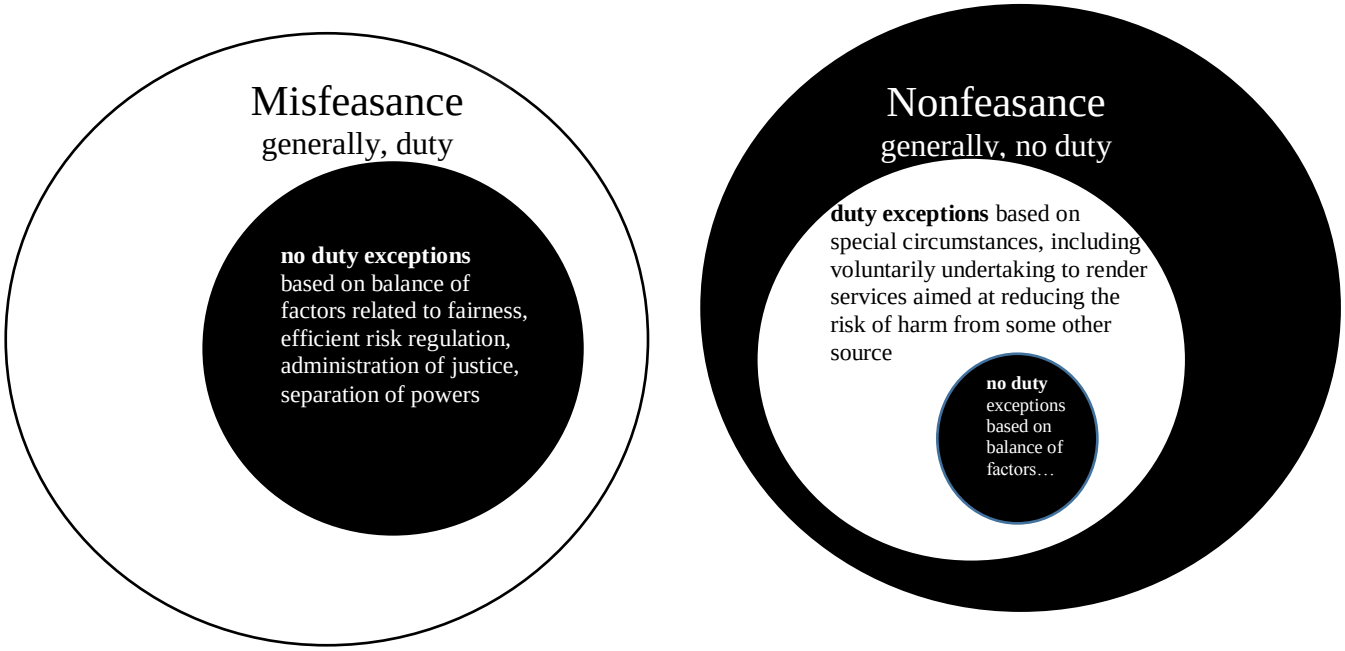
some other source. Such an actor's duty extends beyond those to whom the actor voluntarily undertakes to render the service to include third persons. According to one articulation of this doctrine:

> An actor who undertakes to render services to another and who knows or should know that the services will reduce the risk of physical harm to which a third person is exposed has a duty of reasonable care to the third person in conducting the undertaking if:
>
> (a) the failure to exercise reasonable care increases the risk of harm beyond that which existed without the undertaking,
>
> (b) the actor has undertaken to perform a duty owed by the other to the third person, or
>
> (c) the person to whom the services are rendered, the third party, or another relies on the actor's exercising reasonable care in the undertaking.[40]

Even in cases where one or more of these conditions are fulfilled, a judge may refuse to impose a duty of care based on the balance of factors mentioned above related to fairness, efficient risk regulation, administration of justice, and the separation of powers. Figure 2 depicts these various doctrinal rules governing the threshold question of duty.

[40] *Restatement (Third) Torts,* § 43; see also D. DOBBS, P. HAYDEN, & E. BUBLICK, § 412. See also, P. SCHUCK, 'Tort Liability to Those Injured by Negligent Accreditation Decisions', 57. *Law & Contemp. Probs*. 1994, p. 185.

FIGURE 2. DUTY DOCTRINES



Negligence claims brought by outbreak victims against Primus presented judges with the initial question of whether to characterize Primus's alleged lack of rigor in its audit of Jensen Farms' packinghouse as misfeasance or nonfeasance. The judges then had to consider whether exceptions to the general rules governing each applied. In one case, the judge dismissed a plaintiff's claims, characterizing Primus's lack of rigor as a failure to protect the plaintiffs' from a risk of illness created by Jensen Farms (i.e. nonfeasance) and finding that the balance of factors weighed against imposing a duty.[41] In another case, the judge allowed a plaintiff's claim to go forward, characterizing Primus's conduct as certifying Jensen Farms' operations despite multiple unsafe conditions (i.e. misfeasance) and, thereby, creating the risk that the contaminated melons would be distributed to retail stores and sold to consumers.[42] In several cases, judges allowed plaintiffs' claims to proceed, suggesting that, although Primus's alleged lack of rigor constituted nonfeasance, Primus voluntarily undertook to audit food safety practices in Jensen Farms' packinghouse to reduce the risk of contamination that might sicken consumers. Judges in these cases variously asserted that Primus's lack of rigor increased the risk of harm to consumers; that

[41] U.S. District Court of Wyoming 2013, *Corsi v. Jensen Farm*, Case No. 2:12-CV052-SWS.
[42] U.S. District Court of Nebraska 2014, *Drinkwater v. Frontera Produce*, Case No. 7:13CV5006.

in agreeing to audit Jensen Farms, Primus undertook to perform a duty owed by Jensen Farms to consumers of its products; and that Jensen Farms, its distributors, the retailers who sold its products, and consumers all relied on Primus to exercise reasonable care in conducting audits.[43] In some cases, judges offered multiple arguments in favor of imposing a duty on Primus.[44] Finally, two courts allowed plaintiffs' claims to proceed against Primus on theories of negligent misrepresentation and negligent hiring and supervision of the contractor.[45]

Although nine out of twelve plaintiffs' negligence claims survived motions to dismiss based on the question of duty, the subsequent settlement of these claims has left unresolved the factual question of whether Primus's audit of Jensen Farms fell below the standard of reasonable care and, if it did, whether this caused the plaintiffs' injuries. With regard to the second question, plaintiffs asserted in pleadings that, had the subcontractor properly scored the audit, or had Primus properly hired a qualified subcontractor or properly supervised the one it had, or had Primus provided more stringent audit standards, then Jensen Farms would not have obtained certification, and the contaminated melons would not have been sold to consumers.[46] Answering the first question requires defining the standard of reasonable care. As a general matter, the law permits parties to present at trial a wide variety of evidence concerning what reasonable care requires, including: company policies, industry customs, professional standards, safety statutes, government agency regulations and guidance, and cost-benefit analysis.[47]

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[43] U.S. District Court of Nebraska 2014, *Braddock v. Primus*, Case No. 8:13CV258; U.S. District Court Western District of Oklahoma 2014, *Robertson v. Frontera Produce*, Case No. CIV-11-1321-R; District Court of El Paso, Colorado 2013, *Hauser v. Frontera Produce*, Case No. 2012CV1196.

[44] U.S. District Court of Montana 2014, *Onsager v. Frontera Produce*, Case No. CV 13-66-BU-DWM-JCL; U.S. District Court Western District of Missouri 2014, *Pumphrey v. Frontera Produce*, Case No. 6:13-cv-03308-MDH; District Court of Kansas 2014, *Rutherford v. Frontera Produce*, Case No. 13 CV 2492.

[45] District Court Eastern District of Oklahoma 2014, *Underwood v. Jensen Farms*, Case No. 6:11-CV-348-JHP; U.S. District Court Western District of Louisiana 2014, *Gilbert v. Frontera Produce*, Case No. 12-2754.

[46] See, e.g., Complaint, District Court of Prowers County Colorado 2014, *Jensen Farms v. Primus Group, Inc.*, (no Case No. provided), para. 33, archived at https://perma.cc/2NY2-HHVY.

[47] On standards of reasonable care in negligence claims, see R. Friedman & P. Malone, *Rules of the Road: A Plaintiff Lawyer's Guide to Proving Liability* (2nd ed.) (Portland, OR: Trial Guides 2010); D. DOBBS, P. HAYDEN, & E. BUBLICK, §§178-181.

3. THE CASE FOR HOLDING PRIVATE THIRD-PARTY FOOD SAFETY AUDITORS LIABLE FOR NEGLIGENCE

In light of the novelty of the issue, its ongoing relevance, and the lack of uniformity among courts in the recent litigation against Primus Labs, this section further develops the arguments in favor of subjecting private third-party food safety auditors to liability for negligence. First, liability exposure would improve the reliability of audits. It would provide auditors a disincentive to relax standards or inflate audit scores. The standard of reasonable care in negligence cases involving professional services is defined by reference to the formal and informal standards of the profession—in the case of food safety auditors, this would include audit firm policies, audit schemes, auditor accreditation standards, common practice among peers, and, where available, government regulations and guidance. Thus, to avoid negligence liability to potentially dozens or hundreds of outbreak victims, auditors must conform to these standards of the profession. Moreover, since audit firms may be held liable for the negligence of their employees or for their own negligence in hiring, training, and supervising their employees, they will have an incentive to filter out unqualified applicants, provide training to ensure minimum competence, and provide management oversight to ensure that audits meet the firm's quality standards. The National Environmental Health Association has recently launched a new standardized training and credential for food safety auditors, and negligence liability would reinforce this and similar efforts to professionalize auditing services.[48]

Second, liability exposure would create incentives for optimal consumer protection in the design and implementation of audits. Pressure from growers, who pay for audits, to keep costs down encourages audit schemes and audit firms to reduce the burdens that audits impose. This may result in industrywide suboptimal audit standards and practices. One doctrinal formulation defines negligence as the failure to take a safety precaution the burden of which is less than the risk of harm to others that it would eliminate.[49] This liability

[48] National Environmental Health Association, 'NEHA credentialed Food Safety Auditors Crucial to Supply Chain', *Food Safety News*, 10 April 2018, archived at https://perma.cc/DT9T-6VUJ; N. FINNEY, 'NEHA's Certified Comprehensive Food Safety Credential and Review Course', *Food Safety Magazine*, 3 July 2018, archived at https://perma.cc/2RHD-SRL4.
[49] *Restatement (Third) Torts*, § 3. For the classic articulation of this formulation, see *US v. Caroll Towing Co.*, 159 F.2d 169 (2nd Cir. 1957).

standard would incentivize audit schemes and audit firms to require cost-effective food safety precautions.[50] The cost-effectiveness standard for negligence liability would counteract pressure from growers to underinvest in safety without reinforcing the countervailing pressure to overinvest in safety from large retail buyers who insist on excessively stringent standards that are not worth the costs that they impose.

Third, liability for negligence would make audit firms accountable for violating the justifiable reliance of commercial buyers and consumers. Audit firms promote their services as a means of identifying potential sources of contamination in food production and reducing the risk that contaminated foods will be sold to commercial buyers and consumers. Commercial buyers rely on audit reports and certifications in their purchasing decisions. As the media, in news coverage of outbreaks, provides more information about the role of private third-party audits in food safety management, consumers increasingly rely on auditors to protect them from contamination of the food supply.[51] This reliance creates a duty on the part of auditors and audit firms to design and implement food safety audits using reasonable care. Protection of justifiable reliance is a longstanding common law value, and holding those who violate them accountable is a principle of fairness embedded in common law tradition.[52]

Fourth, imposing liability on private third-party food safety auditors for negligence harnesses the comparative institutional advantages of the civil liability system to provide regulatory oversight. Civil litigation is likely to be more effective than government oversight as a means of improving the reliability of private third-party food safety audits. In the U.S., plaintiffs' attorneys pursue litigation in exchange for contingency fees—if a claim is successful, the attorney receives a portion of the money damages awarded to the plaintiff (typically somewhere between a third and 40 percent), but if the claim is unsuccessful, the attorney charges the client

[50] On the liability exposure of third-party certifiers for setting unreasonably lax product safety and quality standards, see D. OWEN, *Products Liability Law*, (3rd ed.) (St. Paul, MN: West Academic Publishing 2015) p 985-992. For an argument in favor of granting private standard setting bodies immunity from negligence liability, see ROBERT H. HEIDT, 'Damned for their Judgment: The Tort Liability of Standards Development Organizations', 45. *Wake Forest Law Review* 2010, p 1227.
[51] See, e.g., *Editorial: Food Safety Auditors Too Tied to Industry*.
[52] See, e.g.s, N. DAVIDSON, 'Property's Morale', 110. *Michigan Law Review* 2011, p 437; 'Justifiable Reliance Law and Legal Definition', *USLegal.com*, archived at https://perma.cc/49ZS-CQS4.

nothing.[53] This method of financing litigation incentivizes plaintiffs' attorneys to file lawsuits whenever an audit falls short of industry standards and the resulting injuries are severe. For plaintiffs' attorneys, searching out and suing unreliable auditors is a business opportunity.[54] By contrast, for government regulators, such efforts are a drain on already overtaxed agency budgets. Moreover, as liability exposure increases, the demand for liability insurance is likely to increase. Insurers attempt to reduce the liability exposure of their clients, for which they are financially responsible, by creating incentives—in the form of premium discounts and coverage limitations—that reward companies that take steps to improve their safety practices. Insurance companies also provide their clients risk management advice—known as loss prevention services—to help companies further reduce risk.[55]

Fifth, reliance on civil liability to govern food safety auditing is consistent with the traditional role of common law courts in policing the quality of private services affected with a public interest. Beginning in the thirteenth century, English common law courts imposed liability on private individuals engaged in "common callings" for lack of care in the performance of a service. Examples included common carriers, innkeepers, victuallers, farriers, tailors, and surgeons. This legal duty arose not from any voluntary, contractual obligation, but because one who provided such a service was said to take "upon himself a Publick Trust for the Benefit of the rest of his fellow Subjects" and because he had "made Profession of a Trade that is for the Public Good." Although the rise of laissez-faire ideology during the industrial revolution led courts to reduce the types of services that qualified as common callings, and the subsequent emergence of the welfare state put government administrative agencies in charge of consumer protection and health and safety regulation, common law negligence liability has remained an important source of risk regulation and has preserved remnants of the

[53] Bill Marler, the leading plaintiffs' attorney in foodborne illness litigation, charges contingency fees of 20 percent. Bill Marler, personal communication with the author, July 8, 2018.
[54] The absence of contingency fee arrangements in other jurisdictions blunts the impact of tort litigation. Nevertheless, U.S. litigation can have global implications because liability exposure in the U.S. may cause auditors to adjust their policies and practices globally.
[55] T. LYTTON, *Outbreak*, ch. 5 & 8.

common callings concept in its treatment, for example, of common carriers and the unenforceability of contractual liability waivers that are inconsistent with the public interest.[56]

Sixth, civil litigation can improve the regulatory performance of other governance institutions. The value of litigation does not require all or even most claims to reach juries, or even for all or most plaintiffs to win in court. Regardless of the outcome of litigation, the litigation process—filing, pleading, discovery, and negotiation—generates media coverage that shapes the way the public and regulators think about health and safety issues, the availability of policy-relevant information, and the agenda priority of the issue. Filing claims against auditors would highlight unreliable audits as a key factor in foodborne illness outbreaks. Discovery would uncover details about the design and implementation of audits relevant to improving the regulation of auditing services. And litigation would generate widespread media coverage and, due to the drawn-out, episodic nature of litigation, keep the need to improve the reliability of private audits in the media, before the public, and on the policy agendas of business associations, standards development organizations, legislatures, and administrative agencies.[57]

Liability exposure may have a downside. In their efforts to avoid lawsuits, audit firms and their liability insurers may seek to standardize audits in ways that rely more heavily on checklists that minimize the need for auditor discretion and discourage nuanced professional judgment tailored to each operation under review. An audit by a novice who mechanically follows a company protocol is less likely to generate litigation than an audit by an experienced auditor who makes professional judgments subject to second guessing. This type of defensive auditing would impair the ability of audits to generate creative solutions to food safety problems. Audit firms may also shy away from auditing higher risk sectors, like fresh produce—the very sectors that most need reliable auditing—to avoid liability exposure.[58]

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[56] C. BURDICK, 'The Origin of the Peculiar Duties of Public Service Companies', 11. *Columbia L. Rev.* 1911, p. 514. See also D. DOBBS, P. HAYDEN, & E. BUBLICK, §234.
[57] T. LYTTON, 'Using Tort Litigation to Enhance Regulatory Policy Making: Evaluating Climate-Change Litigation in Light of Lessons from Gun-Industry and Clergy-Sexual-Abuse Lawsuits', 86. *Texas L. Rev.* 2008, p. 1837.
[58] For evidence of this effect of liability on public financial accountancy partnerships, see L. BERTON & J. LUBLIN, 'Seeking Shelter: Partnership Structure is Called in Question as Liability Risk Rises', *Wall Street Journal*, 10 June 1992, A1; L.

The infrequency with which foodborne illness outbreaks are identified and traced back to a particular production facility may mean that the volume of litigation will never be sufficient to have much impact. Most victims of foodborne illness never recognize food as the source of their illness. Even when they do, victims rarely obtain medical tests that identify the responsible pathogen and retain samples of the contaminated food—both of which are necessary to link a victim's illness to a particular food vehicle. Additional investigative resources and adequate distribution records are needed to then identify the root cause of contamination. All of this means that legal claims arising out of foodborne illness are relatively rare. The framing, information, and agenda effects of litigation discussed above, in addition to the reputational concerns of companies, may make liability exposure more influential than the volume of litigation suggests. However, in the absence of empirical data, one can only speculate.[59]

Examples from other professions offer some support for the claim that liability exposure can promote consistency in the quality of professional services.[60] Tom Baker, a leading academic expert on medical malpractice and insurance, surveyed empirical literature on the influence of litigation on doctors in his 2005 book *The Medical Malpractice Myth*. Based on this literature, Baker argues that malpractice lawsuits exposed medical errors and prompted professional associations and hospitals to address the problem by developing new safety practices. He also argues that lawsuits are one of the only ways to get rid of incompetent or unethical doctors. Baker highlights the example of the American Society of Anesthesiologists, which reviewed over 4000 medical malpractice insurance files and discovered that "adverse respiratory events" were more damaging and more preventable than other anesthesia injuries. Based on this finding, the society "backed the development of better anesthesia equipment and new practice guidelines and then worked hard to get anesthesiologists to use them," resulting in a dramatic decrease in injury and malpractice insurance rates. Joanna Schwartz, a UCLA law

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BERTON, 'Big Accountancy Firms Weed out Risky Clients', *Wall Street Journal*, 26 June 1995, B1. For skepticism regarding this effect, see G. VAN DIJCK, 'Should Physicians be Afraid of Tort Claims? Reviewing the Empirical Evidence', 6. *European J. of Tort L.* 2016, p 282-303.

[59] Compare J. BUZBY & P. FRENZEN, 'Food Safety and Product Liability', 24. *Food Policy* 1999, p. 637 and J. COGAN, 'The Uneasy Case for Food Safety Liability Insurance', 81. *Brooklyn Law Review* 2016, p. 1501 with T. LYTTON, *Outbreak*, ch. 6.

[60] This and the next two paragraphs draw from T. LYTTON, *Outbreak*, ch 8.

professor, conducted a national survey of healthcare professionals and personal interviews with hospital risk managers across the U.S., and she concluded that "lawsuits play a productive role in hospital patient safety efforts by revealing valuable information about weaknesses in hospital policies, practices, providers, and administration."[61]

In addition to the example of medical malpractice litigation, civil lawsuits have also influenced a variety of other professions. Civil lawsuits have had a profound influence on the professional standards of financial accounting. Judicial rulings have shaped Financial Accounting Standards Board financial accounting and reporting standards and Securities and Exchange Commission regulations. Civil liability has also influenced legal practice. Baker and a co-author found that liability exposure prompts law firms to obtain advice from their liability insurers about industry best practices for reducing the risk of legal malpractice. In a study of police departments that reviewed litigation files to identify personnel and policy weaknesses, Schwartz found that "lawsuit data has proven valuable to these departments' performance improvement efforts: Suits have alerted departments to incidents of misconduct, and the information developed during the course of discovery and trial has been found to be more comprehensive than that generated through internal channels." Similarly, lawsuits on behalf of sexual assault victims against institutions that provide youth services—such as schools, churches, and scouting organizations—have prompted more rigorous oversight of teachers, pastoral workers, and troupe leaders by administrators. For example, Catholic dioceses throughout the U.S., under the direction of their liability insurers, have implemented background checks for hiring, training programs to reduce the risk of sexual assault, protocols for investigating allegations, and policies for reporting abuse to public authorities. Additional studies have documented the impact of litigation on the oversight of store personnel and prison guards.[62]

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[61] T. BAKER, *The Medical Malpractice Myth* (Chicago: University of Chicago Press 2005), chap. 5; J. SCHWARTZ, 'A Dose of Reality for Medical Malpractice Reform', 88. *New York University Law Review* 2013, p 1224-1307. Compare D. STUDDERT et al., 'Relationship Between Quality of Care and Negligence Litigation in Nursing Homes', 364. *New England Journal of Medicine* 2011, p 1243-1250; M. MELLO et al., 'Who Pays for Medical Errors? An Analysis of Adverse Event Costs, the Medical Liability System, and Incentives for Patient Safety Improvement', 4. *Journal of Empirical Legal Studies* 2007, p 835-860; Y.T. YANG el al., 'Does Tort Law Improve the Health of Newborns, or Miscarry? A Longitudinal Analysis of the Effect of Liability Pressure on Birth Outcomes', 9. *Journal of Empirical Legal Studies* 2012, p 217-245.
[62] Carl Liggio (attorney specializing in accounting & securities law), telephone interview by the author, 10 May 2017; J. SCHWARTZ, 'What Police Learn from Lawsuits', 33. *Cardozo Law Review* 2012, p 841-894. See also Rick Swedloff and

Admittedly, empirical evidence for the beneficial effects of litigation is limited. With the exception of the anesthesiologists study, the examples above link litigation to the promulgation of new and more detailed professional standards and practices, but they do not provide any data beyond anecdotal evidence that these new standards and practices improved the quality of financial audits, discouraged legal malpractice, reduced the incidence of police misconduct, or decreased the rate of sexual abuse. Indeed, not everyone shares the view that litigation has improved the quality of all of these professional services. In the case of medicine especially, many advocates of medical malpractice reform assert that litigation has degraded medical practice by encouraging expensive and unnecessary tests and procedures designed to preempt legal claims rather than to serve the best interests of patients.[63] Nevertheless, the evidence from these examples suggests that exposing private food safety auditors to civil liability would encourage further professionalization of private auditors, expose auditors who fail to conform to the established standards of the profession, and incentivize audit firms to avoid hiring or to dismiss auditors who lack the requisite professional skills and diligence to do an average or better job.

4. THE COMPLEMENTARITY OF PUBLIC AND PRIVATE LAW NORMS IN REGULATING PRIVATE GOVERNANCE

Standards development in private organizations is often subject to public law norms of participation, transparency, and accountability. Many private standards development organizations have adopted notice-and-comment rulemaking procedures that mimic the methods used by government administrative agencies. Such procedures encourage standards development organizations to take into account the various perspectives of stakeholders, open their deliberations to outside scrutiny, and provide public justification for their decisions. The

Tom Baker, "Insurers as Bumblebees I the Garden of Law Firm Norms, unpublished manuscript on file with Harvard Law School Library, 2016; J. SCHWARTZ, 'Introspection through Litigation', 90. *Notre Dame Law Review* 2015, p 1055-1104; M. SCHLANGER, 'Operationalizing Deterrence: Claims Management (in Hospitals, a Large Retailer, and Jails and Prisons)', 2. *Journal of Tort Law* 2008, p.1; J. RAPPAPORT, 'How Private Insurers Regulate Public Police', 130. *Harvard Law Review* 2017, p 1539-1614; T. LYTTON, *Holding Bishops Accountable: How Lawsuits Helped the Catholic Church Confront Clergy Sexual Abuse* (Cambridge, MA: Harvard University Press 2008), p 172-176; C. EPP, *Making Rights Real: Activists, Bureaucrats, and the Creation of the Legalistic State* (Chicago; University of Chicago Press 2009).

[63] See, e.g. H. SCHERZ & W. OLIVER, 'Defensive Medicine: A Cure Worse than the Disease', *Forbes*, 27 August 2013, archived at https://perma.cc/638R-YKAG. Compare G. VAN DIJCK, 'Should Physicians be Afraid of Tort Claims? Reviewing the Empirical Evidence', 6. *European J. of Tort L.* 2016, p 282-303.

adversarial nature of notice-and-comment rulemaking procedures also aims to ensure that standards development is based on state-of-the-art scientific expertise.[64] Notice-and-comment rulemaking procedures and the public law norms that they impose increasingly govern standards development by fresh produce industry associations, which produce both substantive standards specifying food safety practices on farms as well as procedural standards governing how audits should be conducted and supervised by auditing firms.[65]

Although public law norms can enhance the quality and legitimacy of standards development, they are not well suited to improve the rigor and integrity of standards conformity assessment. Consider, for example, participation and transparency. Whereas standards development benefits from input from a broad spectrum of stakeholders, standards conformity assessment requires insulating auditors' judgment from the influence of those with an interest in the outcome of the audit. Stakeholder participation would interfere with the need for unbiased expert evaluation. Similarly, whereas transparency enhances the legitimacy of standards development, public disclosure of audit results would lead those subject to the audit to be much less willing to open up their operations to scrutiny. The ability of an auditor to gain access to all aspects of a client's operations typically requires a promise of confidentiality.

By contrast, private law norms can improve the rigor and integrity of standards conformity assessment. As this article has demonstrated, exposure to liability for negligence would subject private third-party food safety auditors to the private law norms of duty and reasonable care. The norm of duty makes auditors accountable to those whom they injure, and the norm of reasonable care requires that they live up to their own policies, conform

[64] For examples of the robust scholarly literature on the influence of public law norms on the effectiveness and legitimacy of private standard setting, see, e.g., E. MEIDINGER, 'The Administrative Law of Global Public-Private Regulation: the Case of Forestry', 17. *European Journal of International Law* 2006, p. 47; H. SCHEPEL, 'Rules of Recognition: A Legal Constructivist Approach to Transnational Private Regulation', in H. Muir Watt & D. Fernandez Arroyo (eds), *Private International Law and Global Governance* (Oxford: Oxford University Press 2014); S. BERNSTEIN & B. CASHORE, 'Con Non-State Global Governance be Legitimate? An Analytical Framework', 1. *Regulation and Governance* 2007, p. 347; S. WOOD, R. SCHMIDT, K. ABBOTT, B. EBERLEIN, & E. MEIDINGER (eds), *Transnational Business Governance Interactions: Empowering Marginalized Actors and Enhancing Regulatory Quality* (Cheltenham, UK: Edward Elgar 2018); T. LYTTON, 'Technical Standards in Health & Safety Regulation: Risk Regimes, the New Administrative Law, and Food Safety Governance', in J. Contreras (ed), *Cambridge Handbook of Technical Standardization Law, Vol. 2: Administrative Law, Copyright, Trademark, and International Law* (Cambridge, UK: Cambridge University Press 2019).

[65] For an overview of private standard setting in the fresh produce sector, see T. LYTTON, *Outbreak*, ch. 6 and T. LYTTON & L. MCALLISTER, 2014. *Wisconsin Law Review* 2014, p 289.

to formal and informal industry standards, comply with government regulations and guidance, and adopt cost-effective standards. Whereas the public law norms of participation, transparency, and accountability promote quality and legitimacy in standards development, the private law norms of duty and reasonableness promote rigor and integrity in standards conformity assessment. Together, they help to ensure that, in contrast to the restaurant in Woody Allen's joke, the food is okay (or, at least, free of microbial pathogens) and the portions just right.