

Enforcement and Liability

Open dating, as it exists today, has a built-in enforcement mechanism through the consumer. If a consumer is aware of date marking, understands it, and uses it, out-of-date products with a sell-by date will not be purchased at full prices.

In most States, provision is made for sale of these products at a reduced price. If the product cannot be sold, most manufacturers will take the product back and refund the retailer. The same is true if consumers feel a product is not up to the quality desired, they can return it and get their money back from most retailers.

Some consumers feel, however, that returning a product is too time-consuming and unfair to them. They look to open dating as the institution of a fail-safe system—i.e., anything purchased with an unexpired sell-by or use-by date would not be bad; it would presumably be of excellent quality. Unfortunately, as pointed out in the previous parts of this report, such a guarantee is an impossibility, since unintentional abuse during distribution can severely reduce food quality even though an item is dated.

The type of enforcement and liability would depend very much on the system used. With a pack date, there is no liability except from the standpoint of misbranding if it is made mandatory and left off the package. It would be up to the Federal or State inspection systems to routinely survey the market for such violations, and the liability would be the same as at present for misbranding. The sell-by and best-if-used-by dates are another matter, however, as discussed in this chapter.

METHODS OF ENFORCEMENT

If the date were a sell-by or best-if-used-by date, there could be two types of enforcement. The first would be before-date enforcement. In other words, if a date is based on some standard such as loss of sensory quality and the food is found to be below that standard before the date is reached, it would be in violation. The second type of enforcement would involve offering a product for sale after the date (beyond-date enforcement).

Before-Date Enforcement

Two types of before-date enforcement are discussed and are presently used for enforcing labeling standards. Note that they lead to substantially different potential costs and liability.

One method is to construct an enforcement scheme that would allow processors to establish reasonable dates (be they sell-by or best-

if-used-by) for each individual product and/or process within a product. Thus, canned green beans may have different sell-by dates, for example, than canned peaches. Also, glazed frozen shrimp may have longer sell-by dates than frozen shrimp that are not glazed. Processors in this scheme would be required to justify the "reasonable" dates chosen, presumably before instituting the system and if asked by the regulatory agency. Tests and data would be necessary to support the claim made for reasonableness by the processor for his date.

A second method could be for an enforcement agency to spot check products at the processor and retailer level via laboratory testing. A regulatory agency could sample products from the processor's line or purchase products at retail and perform appropriate laboratory tests for nutritional and/or sensory characteristics. However, the laboratory testing would vary from quick and simple for some products to difficult and costly for most products. The regulatory agency would still need the information of the first method to determine whether the product was within the quality limits for the date set.

With spot-check enforcement, food producers might feel the necessity of setting quality specifications for a date as low as possible in order to protect themselves in case the product is severely abused during distribution. The quality standards would probably be much lower than those at which the processors currently try to sell their products—in other words, lower than those the consumer currently expects and finds. It should be noted that spot-check enforcement of label claims is presently done by Federal and local agencies. The Food and Drug Administration (FDA) is preparing to initiate this enforcement scheme to help enforce nutrition labeling declarations.

The first method would be considerably less expensive to enforce and would not lead to a decline in quality specifications for the date. In addition, the first alternative would avoid liability questions raised by the second alternative. The second scheme raises ques-

tions about the extent of manufacturers' liability, especially if the product tested were purchased at retail. If the product chosen for testing had been abused in the distribution channel (e.g., high temperature in frozen food), processors could conceivably be held responsible for the actions of distributors over which they have no control.

Beyond-Date Enforcement

Two alternatives are possible. One is complaint-based enforcement, the other is spot-check enforcement.

Complaint-based enforcement would involve a consumer's return of a beyond-date product, or the out-of-date product would simply go unsold, thus indicating consumer displeasure or disinterest. This system would be possible with sell-by or best-if-used-by dates, but not a pack date. Enforcement costs would be minimal.

A second alternative would be to have an enforcement agency randomly spot-check retail stores for merchandise that was beyond date. Costs of this alternative would be considerably higher than complaint-based enforcement. In the case of pack dates, spot checks could be made at the origin of retail packaging, so this alternative could cover any type of open date.

Again, the manufacturers who set the highest standard would run the greatest risk of being in technical violation of their own standard. For this reason, food should be allowed to be sold after a sell-by or best-if-used-by date, since the date is only an estimate.

Especially with semiperishable and long shelf-life foods, there should be no discernible difference between quality shortly before the date and shortly after. Even with perishable foods, open dating is not a safety issue, since there are laws currently in effect that make it illegal to sell unsafe food. If consumers refused to pay full price for over-age food, it could be offered at a reduced price.

FEDERAL/STATE ENFORCEMENT

As discussed earlier in this report, 40 percent of the States have some type of mandatory open-dating law that they are currently enforcing. Thus, an alternative to exclusive Federal enforcement would be cooperation with the States. Basically, this type of cooperation could be achieved either through cost-sharing programs or model regulations,

Cost-sharing programs can be in the form of contracts or grants. The most common arrangements are 50-50, although there are some arrangements with 80 percent Federal and 20 percent State and some with 90 percent Federal and 10 percent State. Contracts are formal agreements between Federal and State governments to perform specific tasks over a specified time period. Grants are lump-sum payments to States for use at their discretion in a general area.

OTA found that Federal and State officials prefer contracts over grants for the purpose of cooperating on enforcement. The advantage for Federal officials is that specific tasks are identified and both parties know what is expected for satisfactory performance. For the States, the advantage is that in most cases, multiyear contracts can be established which will provide a continuous source of funds for the States to perform their tasks.

Grants are viewed as “one-shot” affairs, and States cannot depend on them for continuous funding. Federal officials also take a dim view of grants because they are not specific in terms of tasks to perform. This makes it difficult for Federal officials to judge each State’s performance.

The basic problem with these cost-sharing programs is nonparticipation by the States. The program works only if States feel there is a need for a specific activity or that they are going to benefit directly. Thus, States that presently have open-dating legislation will be more likely to participate than those that do not. If States do not participate, there is no equivalent means of enforcement. This is the present situation with the Fair Packaging and

Labeling Act (FPLA). FDA is doing little FPLA enforcement in States where there are no contracts.

In the final analysis, the Federal Government must assume enforcement responsibilities if States decide they do not want to cooperate. Experience with cost-sharing or partial-funding programs such as the Wholesome Meat Act indicate that the States are not likely to cooperate. One-hundred percent Federal funding may have to be provided to ensure State cooperation. Otherwise, State officials are not going to look with much favor or give priority to a program the Federal Government will have to take over if States are not willing to do it.

To qualify for 100-percent” funding, States must have a law that is at least as encompassing as the Federal law. To illustrate, if a State has no law or a law that is less than the Federal law, it would not qualify for funding. However, if the State had a law that was more encompassing than the Federal law, it would qualify.

States adopting the Uniform Model Act have a history of adding to their laws and acts, areas that are above and beyond those of the Federal Government. Thus, if an absolutely uniform open-dating law or regulation is desired, using State enforcement will not ensure this outcome,

The alternative to a cost-sharing program is a model State regulation applicable to State and local jurisdictions. The National Bureau of Standards has designed such a model for open dating. The model provides for the use of a sell-by date on perishable and semi-perishable foods but does not address the basis on which to establish the date and excludes products for which a date would be useful and feasible. Four States have adopted the model to date. As a result, the Association of Food and Drug Officials is considering preparing its own model regulation for open dating.

The Association has designed the Uniform Food, Drug, and Cosmetic Act, which has been adopted by some States. The Act could be amended to include food-labeling areas like open dating.

The Act as currently written is State-oriented, since each State can change the Act to meet its individual situation. It is purely a model and not sufficient in terms of enforcement. A State may adopt the model regulation

but may not enforce it if funds have not been allocated.

Although there is the possibility of Federal funds for States that adopt the model Act, Congress would have to first amend the Food, Drug, and Cosmetic Act. Presently, FDA does not have the authority to establish contracts for which it does not have basic responsibility by law.

LIABILITY

There is a difference in establishing liability between open-date labeling and most other food-labeling requirements. For example, in nutrition labeling, basically only the manufacturer, not distributors, is involved in compliance, although abuse in distribution can lead to labels that overstate nutritional value. In open-date labeling, processors, wholesalers, and retailers are all involved in compliance. If a retailer sells a product at full price that is out of date, the retailer, not the manufacturer, would be liable. Naturally, wholesalers and retailers are concerned that if a Federal open-dating system were implemented, this would in effect increase their liability.

At present, there is no definitive legislation or judicial definition of the legal significance of an open date. A search of the literature found no court decisions during the last two decades on the question of liability for spoiled food that has been open dated. Thus, the discussion of this question must be speculative.

In order to assess possible legal consequences, it is necessary to make certain assumptions about the intent and effect of a Federal open-dating requirement. First, such a requirement must avoid as much as possible the technological problems associated with open-date labeling of some foods. Second, it must provide for specific, uniform, and scientifically sound criteria by which the chosen date is established and its validity

measured. Third, it must be designed to minimize confusion about the attributes of a food product. That is, the objective of open dating is to increase consumer awareness about food freshness; it is not an indicator of the safety of food. As indicated earlier in this report, consumer confusion on this point could have serious consequences.

Liability Under the Food, Drug, and Cosmetic Act

Food manufacturers and retailers could be subjected to increased liability exposure under the Federal Food, Drug, and Cosmetic Act (FDCA) if a Federal open-dating requirement is intended to relate to the misbranding and adulteration provisions of that statute. To the extent that any food is marketed in a way (for example, without a sell-by or best-if-used-by date, if required) that it becomes misbranded under FDCA, it is an illegal commodity. Additionally, the sale of "spoiled" food is prohibited by the adulteration provision of FDCA, whether or not the label of a product bears an open date.

Liability for such misbranding would flow to the manufacturer who failed to properly label the food, as well as to the intermediate distributors and retailers who sold, or held for sale, the misbranded product. Liability would not extend to distributors and retailers who could demonstrate that they received the

misbranded food and delivered or proffered delivery of it in “good faith, ”

The FDCA provision that declares as misbranded any food article the label or labeling of which is false or misleading, if taken literally, raises difficult problems from both a compliance and enforcement standpoint. The least of these problems involves food products the label of which might declare that they were packed on a particular date. If the “pack date” is not accurate, the product is misbranded and the manufacturer or packer of the product would be liable for such misbranding. (A retailer who has purchased the misbranded product in good faith and sells it or holds it for sale would probably not be liable.) Pack dates are definite in time and thus can be objectively determined to be either accurate or false.

On the other hand, the other forms of open dates that might be selected (“use by, ” “sell by,” “best-if -used-by,” etc.) only can provide approximations of the ultimate shelf stability of the labeled products. Such dates offer freshness guidelines, but nothing more, and can never be precise. Different food manufacturers are likely to have different quality standards for their products, limiting the “precision” and significance of open dates. Moreover, storage or handling variables to which a product is subjected during its distribution cycle, or even during home storage, can affect the accuracy of all dates other than a pack date on the package.

The sell-by date raises an additional issue. The meaning of this date is somewhat vague. A sell-by date suggests that the product can be consumed for a reasonable period of time after the date with no recognizable difference in the quality of the food. The exclusion of information that indicates the ensuing consumption period could constitute the omission of a material fact rendering the product misbranded. This should be specifically addressed in the legislative history of any open-dating provision.

Literal application of FDCA could result in misbranding of a product because of distribu-

tion abuses—abuses that would render the open date inaccurate or misleading. For instance, a phrase such as “use by”^{*} on a food label might lead a consumer to believe the quality of the food will remain unchanged as long as it is consumed by the stated date. If such a product were left an unusually long time in the sun on a retailer’s loading dock, for example, that inference would no longer be true. If and when it is discovered that the product is “outdated,” it is unlikely that the fact of its storage irregularity would also be discovered. One possible solution to this problem might be to provide that as long as a labeled date is objectively accurate in light of foreseeable marketing conditions at the time a product is labeled, when measured in terms of those criteria specified for the establishment of such a date, that product should be considered to be in compliance with FDCA.

Literal application of FDCA might or might not also result in an illegal product because of abuse in distribution. The same issue arises with respect to the declared net quantity of contents of packaged food. The law permits FDA to enforce it sensibly by determining the average net quantity of contents. There is nothing inherent in FDCA that would suggest that this approach would not be equally applicable for open dating of food.

Civil Liability

In addition to liability under FDCA, there are two theories under which a manufacturer, distributor, or retailer could be held civilly liable to a consumer and/or third party who purchases and/or consumes a “spoiled” food product, the label of which bears an open date. The two potentially applicable theories are: 1) strict product liability under tort law and 2) warranty liability under either the Magnuson-Moss Warranty Act or the Uniform Commercial Code. The viability of either of these theories will depend primarily on what an open date—and especially any qualifying terminology accompanying the date (“use by,” “best-if-used-by,” “freshness guaranteed if used by,” etc.)—means to a consumer purchasing the food product. For

example, if an open date and/or accompanying terminology were construed to constitute a promise, guarantee, or other affirmation of fact with respect to a food's quality, and a consumer, relying on the dating information, purchased a food that "spoiled" prior to the date, that consumer might be able to recover damages under a breach of warranty theory of civil liability.

Research in the individual States with open-date labeling found no court decisions on the question of liability for spoiled food that has been open dated. Since product liability is almost entirely a matter of State law, a discussion of the theories would be speculative.

The criteria by which an open date is established and by which food quality is measured, as well as the legal meaning and significance of the date, will ultimately determine the viability of the theories noted. These matters should be thoroughly explored and resolved in the legislative history of any open-dating provision. In this regard, it is important that the limitations of open-date labeling be addressed. The legislative history of any open-dating provision must make clear that open dates are only guides to freshness, not safety indications nor guarantees of product freshness. Otherwise, unintended and potentially onerous legal ramifications could arise under both criminal and civil law.