Legal issues in developing a national plan for animal identification

The recent discovery of bovine spongiform encephalopathy, commonly referred to as mad cow disease, in the United States has accelerated efforts to implement a national identification program for animals. This is no easy task, as funding, logistical, and legal concerns need to be resolved. This article briefly reviews the efforts to develop a nationwide animal identification program and frames the legal issues raised by some producers to such a program.[1]

Background

Development of National Animal Identification Plan

In 2002, the National Institute for Animal Agriculture organized a task force composed of approximately 70 representatives from more than 30 stakeholder groups to produce a National Identification Work Plan.[2] The plan was seen as imperative to ensuring the health of the nation's animal herd,[3] improving the ability to respond to biosecurity threats,[4] adding value to meat products,[5] and competing with international trading partners.[6] The work plan was drafted and accepted by the United States Animal Health Association, which also passed a resolution requesting USDA's Animal and Plant Health Inspection Service (APHIS) to establish a national animal identification development team.[7] The resolution requested further that the development team establish a national plan using the work plan as a guide.[8] Accordingly, in the spring of 2003, the development team completed the United States Animal Identification Plan (USAIP).[9]

Description of USAIP

USAIP's objective is to develop a traceback system that can identify all animals and premises potentially exposed to a diseased animal within 48 hours after discovery.[10] The animal species included in the plan are domestic cattle, bison, swine, sheep, goats, cervids (deer and elk), equine, poultry, game birds, aquaculture, camelids (llamas, alpacas, etc.), and ratites (ostriches, emus, etc.).[11] USAIP envisions that APHIS will administer the program, but recommends governance as a joint federal-state responsibility with industry input.[12]

Implementation of USAIP is scheduled to take place in three phases. Phase I involves premises identification and is currently set to begin by July 2004. This phase would require establishment of standardized premises identification numbers for all production operations, markets, assembly points, exhibitions, and processing plants. Phase II would enable individual or group/lot identification for interstate and intrastate commerce. Phase III involves retrofitting remaining processing plants and markets and other industry segments with appropriate technology to enhance traceability of animals throughout the livestock marketing system.[13]

Mad cow disease and prioritizing implementation of a National Animal Identification Plan

On December 9, 2003, a non-ambulatory dairy cow arrived at Verns Moses Lake Meats, a slaughter plant in Moses Lake, Washington. Consistent with USDA's standard testing protocols for bovine spongiform encephalopathy (BSE), samples were taken from the animal for testing. After the samples tested positive for BSE, USDA Secretary Ann Venemen announced a "presumptive positive" case for BSE. Following this announcement, the United Kingdom world reference laboratory confirmed USDA's diagnosis of BSE.[14] Attempts to trace the origins of the infected Holstein and the 80 cows that entered the United States with it[15] have been delayed, subjecting agricultural officials to criticism.[16] Hampering investigators has been the lack of a modern tracking and identification system.[17]

In response to these delays and criticism, USDA began to promote implementation of a national animal identification program as a major policy priority for mad cow disease prevention.[18] At a December 30, 2003, news conference, Secretary Veneman stated:

USDA has worked with partners at the federal and state levels and in industry for the

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past year and a half on the adoption of standards for a verifiable nationwide animal identification system to help enhance the speed and accuracy of our response to disease outbreaks across many different animal species.... I have asked USDA's Chief Information Officer to expedite the development of the technology architecture to implement this system."[19]

Legal issues

Two legal issues complicate the implementation of a nationwide animal identification program: first, the confidentiality of the information collected and stored; and, second, the exposure of producers to liability.[20] The following is not intended to develop an exhaustive analysis of these two issues; rather, it is limited to the framing of these issues for further examination.

Confidentiality of stored information

Producer concerns for confidentiality

Some producers object to a national animal identification plan because of confidentiality concerns. At least three concerns have surfaced: first, that establishing a central database may allow their rivals to know detailed information about their operations;[21] second, government agencies such as the Internal Revenue Service or the Environmental Protection Agency may access the data;[22] and, third, animal rights extremists might gain information to find and damage animal facilities.[23]

USAIP's treatment of confidentiality

USAIP does not resolve these producer concerns. Two specific issues revolve around the general issue of confidentiality: first, what type of data will be kept; and, second, who will have access to the data. APHIS's response to the first question is that "[o]nly essential information will be reported to the central database."[24] This essential information is defined as follows:

> In the case of individual animals, this is: 1) an U.S. AIN (U.S. Animal Identification Number), 2) the premises ID that the U.S. AIN was seen at or allocated to, and 3) the date it was seen or allocated. Additional information that can be important in a disease trace-back such as species, breed, sex, age or date of birth can also be reported if available. In the case of group or lot movements, the key data are the groups' Lot ID number, the premises ID the Lot number was seen at, and the date it was seen. If species is available, this can also be provided to the central database.[25]

APHIS's response to the second specific question is that "[o]nly state and federal officials will have access to the premises animal ID information when performing their duties to maintain the health of the national herd. Proper safeguards are being researched and will be put in place to ensure that the data is protected from public disclosure."[26] Neither USAIP nor APHIS disclose how the program will restrict access to certain federal and state officials or identify the safeguards necessary to protect the data from public disclosure.

Freedom of Information Act considerations

Critical to the analysis of confidentiality is one of the more contentious issues in developing the national animal identification plan: whether the plan is voluntary or mandatory.[27] A voluntary plan would be industry-driven and implemented without government involvement,[28] while a mandatory plan would be implemented with government involvement. Whether a plan is voluntary or mandatory may determine whether information submitted by plan participants is obtainable by the general public through the Freedom of Information Act (FOIA).[29]

FOIA applies to "agency records" maintained by "agencies" within the executive branch of the federal government, including government corporations, government controlled corporations, and independent regulatory agencies.[30] FOIA generally does not apply to entities that "'are neither chartered by the federal government [n]or controlled by it.'"[31] Although the FOIA does not define "agency records," in *United States Dep't of Justice v. Tax Analysts*, 492 U.S. 136, the Supreme Court set forth a two-part test to determine what constitutes "agency records" pursuant to FOIA: (1) records that are either created or maintained by an agency, and (2) under agency control at the time the FOIA request is made.[32]

It is unlikely that FOIA would be applicable for those who might seek access to information and data gathered pursuant to a voluntary animal identification program since such a voluntary program would presumably involve the collecting and maintaining of information by entities other than federal executive agencies or entities that are chartered or controlled by the federal government. In other words, the information would not be created or maintained by an agency, or be under agency control at the time a request for access to that information was made. FOIA would most likely be applicable if an animal identification plan was mandatory because a federal executive agency, presumably APHIS, would have at least some level of involvement in implementing the plan.

Even if FOIA were applicable, however, it does not necessarily mean that information gathered under the animal identification plan would be available to the public. FOIA generally provides that any person can request access to information held by a federal executive agency and that the agency is required to disclose that information unless it can be withheld pursuant to one of the nine exemptions or three exclusions set forth in the FOIA.[33] In particular, FOIA exempts certain types of commercial or financial information, business information such as trade secrets, and confidential material the disclosure of which might cause harm to that individual.[34] Thus, it is possible that the information could be exempted from public disclosure.

Court subpoena power considerations

FOIA may not be the only method of obtaining access to information provided by animal identification plan requirements.

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Editor's note: Apologies to Neil E. Harl for omitting his name as author of the article entitled "Income Tax Consequences of Loss of Personal Property to Creditors" in the December issue of the *Agricultural Law Update* and to the *Agricultural Law Digest* for failing to acknowledge their permission to reprint the article from the October 3, 2003 issue of the *Agricultural Law Digest*, Vol. 14, No. 19.

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— Drew L. Kershen, Professor of Law, The University of Oklahoma, Norman, OK

Production contracting called into question: poultry integrator held to be operator of contract grower facility

By Barclay Rogers

In a decision with far-reaching consequences for production contracting, a federal district court in Kentucky held Tyson Chicken, Inc., a subsidiary of Tyson Foods, Inc., liable for pollution resulting from its chicken production operations. Citing Tyson Chicken's control over the production operations, the court found that the corporation was responsible for reporting hazardous emissions from poultry operations owned by growers who raise chickens for the company under contract. *Sierra Club v. Tyson Foods, Inc.*, ___F.Supp.2d__, 2003 WL 22595989 (W.D. Ky. November 7, 2003).[1] This article discusses this decision insofar as it addressed the fundamental question of who is responsible if pollution requirements are not met.

Production contracting

Tyson Foods, Inc., and its subsidiaries including Tyson Chicken, Inc., produce chicken through a system of production contracting, a form of agriculture that is becoming increasingly common. Under a typical production contracting arrangement, Tyson Foods and other "integrators" provide products (animals, crops, etc.) to "growers" who raise and return them to the integrators for processing. Production contracting appears in virtually every agricultural sector; however, it is used primarily in livestock production. In 2001, over 36% of all agricultural production occurred under contract, with 90% of poultry and eggs, 61% of hogs, 53% of dairy, and 11% of cattle produced under contract. USDA, Economic Research Service, *Farm Structure: Questions and Answers*, http://www.ers.usda.gov/briefing/FarmStructure/Questions/Qa.htm. The poultry and egg sectors have been the leaders in production contracting since the 1960s, and roughly 25,000 poultry and egg farms currently operate under contract. *Id.*

Tyson Foods boasts of its success as the industry leader in poultry production, proudly claiming that its "vertical integration" model "allows us to oversee every aspect of production." Tyson Foods, *Our Chicken Process*, http://www.tysonfoodsinc.com/corporate/processes/chicken.asp. Tyson Foods and Tyson Chicken, its subsidiary doing business in Kentucky, exercise strict control over the production process, and contract with growers to raise the chickens "according to [Tyson] standards and under the supervision of [Tyson] technical service personnel." Tyson Foods, *Investor Fact Book*, http://www.tysonfoodsinc.com/IR/publications/factbook/factbook01/p6.pdf. For its Kentucky operations, Tyson Chicken supplies the chickens, feed, and medicine, and retains ownership of these products while they are at the growers' operations; the growers provide the housing and labor necessary to raise the animals to market weight. Tyson Chicken also provides the growers with a growing guide that sets forth management practices and equipment specifications, and Tyson Chicken employees regularly visit the operations to provide detailed instructions to the growers. After the chickens reach market weight, Tyson Chicken picks them up for processing. *See Sierra Club v. Tyson Foods, Inc.*, 2003 WL 22595989, * 2.

Under a Tyson Chicken production contract, the grower "agrees to cooperate with [Tyson Chicken] in adopting and/or installing recommended management practices and equipment." Tyson Chicken Broiler Contract ¶ 2.B., on file with U.S. District Court for the Western District of Kentucky. If a grower deviates from Tyson Chicken's specifications or growing instructions, Tyson Chicken may take control of the grower's operation or refuse to deliver chickens in the future. *Id.* at ¶ 15. The contract, however, provides that the grower "is an independent contractor and is not a partner, agent, or employee of [Tyson Chicken]." Id. at ¶ 6.

Tyson Chicken is "person in charge" and "operator"

The Sierra Club sued Tyson Chicken for failing to report ammonia gas emissions from several poultry operations in Kentucky as required by Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), 42 U.S.C. §§ 9601-9675, and the Emergency Planning and Community Right-to-Know Act ("EPCRA"), 42 U.S.C. §§ 11001-11050. The Sierra Club argued that, because of its substantial control over the operations in question, Tyson Chicken was liable for unreported emissions from these facilities. Tyson Chicken countered, arguing that the growers were independent contractors and that its involvement in these operations was not sufficient to warrant liability.

> Section 103(a) of CERCLA provides that: Any *person in charge* of…an onshore facility shall, as soon as he has knowledge of any release (other than a federally permitted release) of a hazardous substance from such…facility in quantities equal to or greater than those determined pursuant to section § 9602 of this title, immediately notify the National Response Center.

42 U.S.C. § 9603(a) (emphasis added). Similarly, section 304(a) of EPCRA provides that an "owner or operator" of a facility must notify state and local officials of a release that must be reported to the National Response Center under CERCLA section 103(a). 42 U.S.C. § 11004(a). Therefore, the legal questions before the court were whether Tyson Chicken was a "person in charge" and/or an "owner or operator" of its growers' operations.

Finding "person in charge" undefined in the statute, the court reviewed the case law and concluded that "the proper inquiry in determining whether the Defendant qualifies as a 'person in charge' should be whether the Defendants 'occupy positions of responsibility and power' and whether they are in a position to 'make timely discovery of a release, direct the activities that result in the pollution, and have the capacity to prevent and abate the environmental damage.'" *Sierra Club v. Tyson Foods, Inc.*, 2003 WL 22595989, *13 *citing United States v. Carr*, 880 F.2d 1550 (2d Cir. 1989). In addressing the scope of "operator" liability, which is only tautologically defined in the statute, the court relied upon *United States v. Bestfoods*, 524 U.S. 51 (1998). In *Bestfoods*, the Supreme Court held that:

> an operator is simply someone who directs the workings of, manages, or conducts the affairs of a facility. To sharpen the definition for purposes of CERCLA's concern with environmental contamination, an operator must manage, direct, or conduct operations specifically related to pollution, that is, operations having to do with the leakage or disposal of hazardous waste, or decisions about compliance with environmental regulations.

Id. at 66-67.

Applying these standards, the court held that "no reasonable juror could differ on the issue of whether Tyson Chicken is a person in charge of [its growers' operations]. Tyson Chicken is clearly in a position of responsibility and power with respect to each facility and is in a position to make a timely discovery of a release, direct the activities that result in the ammonia releases, and has the capacity to prevent and abate the alleged environmental damage." *Sierra Club v. Tyson Foods, Inc.*, 2003 WL 22595989, *16. The court observed that Tyson Chicken was involved in designing and equipping the production operations, remarking that "Tyson Chicken directs growers how to build and orient the houses, how to heat, cool, ventilate the buildings, and how to

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Barclay Rogers, a staff attorney at the Sierra Club, represents the Sierra Club in this case, along with John Harbison and Phillip Shepherd.

illuminate the house to ensure optimum chicken growth." *Id.* The court further pointed out that "Tyson Chicken owns the chickens throughout the production process…[and] provides…the feed, technical support, medicine, and veterinary care for the chicks." *Id.*

The most important factor influencing the court's decision was the role of the Tyson technical advisors, the employees who visited the operations on a weekly basis to advise the growers on proper management practices. Tyson Chicken had argued that these advisors did not have sufficient involvement with the farms necessary for Tyson Chicken to be considered a person in charge and that they were not in the best position to detect a hazardous release. The court disagreed, ruling that Tyson need not be in the *best* position to detect a release. All that was necessary was that Tyson be in *a* position to detect the release. *Id.* The court noted that Tyson technical advisors test ammonia levels inside the houses and direct growers to exhaust the ammonia into the environment. Citing the advisors' written instructions to discharge ammonia, the court concluded that "Tyson Chicken technical advisors are present at the facility on a weekly basis and are in a position to make a timely discovery of some of the releases, Tyson Chicken directs the discharge of ammonia from the chicken production facility through the Broiler Growing Guide and individual instructions from the technical advisors, and Tyson Chicken has the capacity to prevent and abate the alleged environmental damage." *Id.* at 17.

Having concluded that Tyson Chicken was a person in charge for CERCLA purposes, the court considered its status as an operator under EPCRA. The court found that Tyson Chicken met the operator liability standard set forth in *Bestfoods* and held that "for the reasons set forth in the Court's discussion of 'person in charge,' the Court concludes that these facts clearly demonstrate that Tyson Chicken is an operator of the chicken production facilities owned by" the growers. *Id.*

Major development in integrator liability

The decision raises serious questions about the ability of integrators to insulate themselves from liability arising from contract grower operations. At the heart of production contracting is the integrator's desire to obtain a stable supply of quality products without assuming additional liabilities. Integrators ensure quality products through controlled genetics and careful oversight of the production process. Wary of additional burdens, the integrators disclaim environmental liability resulting from the production operations. For instance, roughly 90% of livestock production contracts assign responsibility for manure management, the key source of pollution problems, to the contract growers. USDA, Economic Research Service, *Farm Structure: Questions and Answers*, http://www.ers.usda.gov/briefing/FarmStructure/Questions/Qa.htm. The Tyson Chicken contract discussed above specifically provides that the grower "shall be responsible for the removal of all dead birds and litter and shall dispose of dead birds and litter in accordance with the law." Tyson Chicken Broiler Contract ¶2.G., on file with U.S. District Court for the Western District of Kentucky. This attempted liability transfer is, no doubt, partially in response to increasing public and governmental scrutiny of large livestock operations. *See* Farmers' Legal Action Group, *Assessing the Impact of Integrator Practices on Contract Poultry Growers*, p. 3-29, http://www.flaginc.org/pubs/poultry/poultrypt3.pdf *(*poultry production contracts either expressly or implicitly assign manure manage responsibility to growers because of liability concerns).

Since the mid- to late-1990s, the integrator-grower relationship has been the subject of increasing attention from both government regulators and the public. Under the federal rules governing large livestock operations proposed by the Clinton administration, integrators were responsible for water pollution stemming from the production operations; these provisions, however, were subsequently discarded by the Bush administration. Similarly, in 2000 and 2001, Kentucky and Maryland proposed administrative co-permitting rules that would have required integrators to assume responsibility for pollution from grower operations. But these rules never went into effect: the Kentucky rules were blocked by the state legislature, and the Maryland rules were abandoned by a subsequent administration.

The outcry has been equally loud on both sides of the issue, with the environmentalists arguing that "the companies need to take responsibility for this waste product and not leave the small farmers and growers out there on their own," and the industry representatives claiming that co-permitting in agriculture would lead to "[s]ervice stations [being held] responsible for what oil companies do at their refineries." Anita Huslin, *Maryland Governor Ehrlich Eases Liability for Big Chicken Firms*, Wash. Post, June 14, 2003 (quoting Theresa Pierno, Maryland director for the Chesapeake Bay Foundation, and William Satterfield, executive director of Delmarva Poultry Industry, Inc.).

The *Sierra Club v. Tyson Foods* decision, together with another decision involving Tyson Foods, moves the debate beyond administrative rules and policies to questions of statutory and common law liability. In *Tyson Foods, Inc. v. Stevens*, 783 So. 2d 804 (Ala. 2000), the Alabama Supreme Court upheld a lower court decision that sustained a jury verdict against Tyson Foods. The jury in that case found an agency relationship between Tyson Foods and one of its growers. Like the court in *Sierra Club v. Tyson Foods*, the Alabama Supreme Court focused on the degree of control exerted by Tyson Foods to hold that the "evidence presented was sufficient to create a jury question as to the existence of an agency." *Tyson Foods, Inc. v. Stevens*, 783 So. 2d at 809. The court observed that Tyson Foods supplied the animals (hogs in this case), feed, veterinary supplies and care in addition to inspecting the operation and recommending solutions for waste-management problems. The court reduced the punitive damages award issued by the jury but let stand a $25,000 award jointly enforceable against Tyson Foods and its grower.

These cases open the door for integrators to be held liable under both statutory and common law theories for pollution occurring at grower operations. The jury in the *Tyson Foods, Inc. v. Stevens* case found an agency relationship between Tyson Foods and one of its growers so that Tyson Foods, as a principal, was liable in tort. Under this holding, integrators may be liable for nuisance, trespass, and other pollution-related torts if their control is sufficient to create an agency relationship. Similarly, as set forth in *Sierra Club v. Tyson Foods*, integrators may be considered persons in charge and operators under federal environmental laws, depending on their degree of control. While that case was limited to CERCLA and EPCRA, the decision may have bearing on the scope of liability under other environmental statutes, including the Clean Water Act, 33 U.S.C. §§ 1251-1387, Clean Air Act, 42 U.S.C. §§ 7401-7671p, and the Resource Conservation and Recovery Act, 42 U.S.C. §§ 6901-6992k.

Together, these cases cast into doubt the ability of integrators to retain control over the production process without assuming liability for pollution occurring at grower operations. Both courts focused on the fact that integrators provided the animals, feed, medicine, and veterinary care–all key elements of quality control. The courts also cited the integrators' involvement in designing and equipping the confinement buildings. Clearly the most important factor, at least in the *Sierra Club v. Tyson Foods* case, was degree of control evidenced by Tyson's advisors' instructions to the growers.

Integrator oversight of the production process is the crucial factor in determining liability. When the integrator's control reaches a certain level so that they "occupy positions of responsibility and power," courts will not hesitate in imposing liability on the integrators. *Sierra Club v. Tyson Foods, Inc.*, 2003 WL 22595989, *16. In both the *Sierra Club* and *Stevens* cases, the parties had labeled theirs an independent contractor relationship. However, both courts quickly dispensed with the parties' charac-

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terization, explaining that "whether an agency exists is determined from the facts, not by how the parties choose to characterize their relationship." *Tyson Foods, Inc. v. Stevens*, 783 So. 2d at 808 *citing Curry v. Welborn Transport*, 678 So. 2d 158, 161 (Ala. Civ. App. 1996). *See also Sierra Club v. Tyson Foods, Inc.*, 2003 WL 22595989, *16 ("Whether Tyson Chicken is a person in charge is determined by examining the relationship between it and the facility and not by how the parties choose to characterize their relationship."). Therefore, the question is not the label attached by the parties but the control exercised over the production operation: if the integrators exert substantial control, the courts will hold them jointly liable for pollution, no matter how the parties choose to define their relationship.

Conclusion

Production contracting is becoming increasingly common in agriculture. To control its supply line, integrators frequently retain ownership over the products and often exercise substantial control over the production process. The ability of integrators to avoid liability, while maintaining oversight of the production process, has been a hotly debated issue for several years. The recent decision in *Sierra Club v. Tyson Foods, Inc.*, ___ F. Supp. 2d___, 2003 WL 22595989 (W.D. Ky. 2003), and another case with similar facts, *Tyson Foods, Inc. v. Stevens*, 783 So. 2d 804 (Ala. 2000), have materially advanced this debate. Under these decisions, integrators may be held liable under common law and environmental statutes for pollution occurring at growers' operations, depending on their degree of control. These decisions appear to present integrators with something of a Hobson's choice: either relinquish control over production or assume liability for pollution.

[1] Several affiliated companies were named as defendants in the suit including Tyson Foods, Inc., Tyson Chicken, Inc., Tyson Children Partnership, Adams Chicken Farms, Stirman Adams, Buchanan Livestock, Buchanan Farms, and Roland Buchanan. The liability of Tyson Foods, Inc. and Tyson Children Partnership is still in question. This article focuses on the liability of Tyson Chicken, Inc., and uses "Tyson" as shorthand for this company. Additional plaintiffs included Mary B. Edwards, Norma Caine, and Leesa Webster–all neighboring landowners to the chicken production facilities in question. For simplicity, the plaintiffs are collectively referred to as the "Sierra Club." The decision granted the plaintiffs partial summary judgment on the scope of liability, specifically on the question of whether Tyson could be considered a person in charge or an operator. Final liability will depend on whether the operations in question have violated the law by releasing ammonia gas without reporting it to the appropriate authorities.

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Private parties in the course of litigation pursuant to a court's subpoena power could seek certain documents and information.[35] The obtaining of information through a subpoena differs from obtaining information through FOIA because it involves parties to litigation, whereas FOIA involves a question of whether the general public can have access to the information. The FOIA exemption does not automatically, however, constitute a "privilege" within the meaning of the Federal Rules of Civil Procedure.[36] Information exempt under FOIA may be obtained through discovery if the party's need for information exceeds the government's need for confidentiality.[37]

Producer liability

Producer concerns of liability

Having been for the most part immunized from liability once their product is sold, producers are concerned that a national animal identification plan will increase their liability. Some producers fear that the information they provide pursuant to a plan would create a paper trail to their operations, potentially exposing them to liability.[38] Such concerns give rise to important questions for producers: for example, will the cow-calf producer be held partially responsible for an E-coli outbreak, even though the contamination had to have occurred at or after slaughter? Who is liable for drug residues when there were several owners of the animal?

USAIP's treatment of producer liability

APHIS responds to concerns of liability for producers by stating that:

> [p]roducers are, and have always been responsible for the livestock they produce. If practices are employed that would endanger consumers at any level the producer responsible for creating that threat could have increased liability. Merely having the animals identified through the USAIP will neither increase or decrease that liability.
>
> Effective traceability can help protect producers who apply best management practices. The system can help limit liability or narrow the scope of eradication efforts in the case of a disease emergency by being able to document that appropriate and responsible measures were followed.[39]

APHIS is correct in stating that traceability under USAIP does not alter the liability rules as applied to producers and that effective traceability could be viewed as a method to limit or manage risk in the food marketing chain. Traceability can make possible tracking problems quickly and providing documentation that appropriate methods and measures were followed to avoid disease contamination.

The concern of some producers that is not addressed by this APHIS statement, however, is that by more readily identifying a producer in the chain of custody for a particular animal, an animal identification system will increase the exposure of producers to liability. This article does not opine whether or not this is a positive development, but producers arguably will have greater exposure to liability under a national animal identification program. The question is the extent to which exposure to liability will increase on a practical level and what efforts, if any, law makers should and can make, if any, to limit the exposure.

Strict liability considerations

Strict liability is imposed where one has introduced a defective product that is unreasonably dangerous into the stream of commerce.[40] Thus, a plaintiff is required to establish that the product was defective at the time it was introduced into the stream of commerce,[41] that this defect was attributable to the defendant,[42] and that the defect caused the injury.[43] Strict liability pays no attention to whether a duty of care was employed. Thus, if strict liability applies, then the defendant rancher or farmer is liable even if due care was employed.

There seems to be a split in the courts as to whether a live animal is a product. Some courts state that because of their mutability and their tendency to be affected by a purchaser, animals are not products as a matter of law.[44] However, other courts have held that a live animal can be considered a product even though its nature is not fixed.[45] The comments to the Restatement (Second) of Torts state that a product need not be manufactured or processed for strict liability to apply.[46]

Where an animal in question is in some way diseased or varies from the norm, courts have in some cases reached the conclusion that those sustaining harm may proceed on the basis of strict products liability.[47] These cases focus on the condition of the animal at the time of the purchase, not the ability of the animal to contract an illness subsequent to the purchase of the animal. In these decisions, the diseased animal was infected at the time of the transaction, thus creating the defect in the animal.[48] Therefore, in answer to the earlier question posed in this article concerning

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producer liability: where an E-coli outbreak occurs at or after slaughter, the cow-calf producer should not be found liable.

Conclusion

Debate over the development of a national animal identification plan has accelerated significantly since the discovery of BSE in the United States. The debate has clearly moved away from *if* a national identification plan should be developed and towards *when* it should be implemented and what form the plan should take. As policy makers move closer to establishing a national animal identification plan, many issues will have to be addressed and resolved. The legal issues discussed in this article are two important considerations among the many that will have to be addressed as a nationwide animal identification plan is developed.

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[1] This article does not purport that all or even a majority of producers share these concerns. Reportedly, even amid reservations, producers generally are supportive of an animal identification plan. *See* Martin Wolk, *Mad Cow Spurs Interest in Food Tracking*, MSNBC, Jan. 8, 2004, *available at* http://www.msnbc.msn.com/Default.aspx?id=3900553&p1=0.

[2] *See* Animal and Plant Health Inspection Service, USDA and Industry Developing National Animal Identification Plan (2003), *at* http://www.aphis.usda.gov/oa/pubs/sa_ahanimalidplan.html.

[3] *See id.*

[4] *See id.*

[5] Market incentives to keep records tracking food production and distribution include differentiating and marketing foods with subtle or undetectable quality attributes. *See* Economic Research Service, Traceability in the U.S. Food Supply, *at* http:www.ers.usda.gov/briefing/traceability/.

[6] Canada, New Zealand, and the European Union and Great Britain have mandatory animal identification programs. Australia's program is voluntary, except for the state of Victoria where electronic ear tagging is compulsory. Japan is fine-tuning and expanding its mandatory program, while Argentina, Brazil, and Uruguay have begun to implement national animal identification systems. Mexico also is moving towards mandatory identification. Clint Peck, *Around the ID World*, Beef, Dec. 2003, *at* http://beef-mag.com/ar/beef_around_id_world/,

[7] *See* Animal and Plant Health Inspection Service, *supra* note 2.

[8] *Id.*

[9] The entire USAIP is 74 pages long. A Web site has been developed that includes the plan, summary information, frequently asked questions, and other pertinent information. The Web site is http://usaip.info. There is a public comment period that ends January 31, 2004.

[10] *See* National Identification Development Team, United States Animal Identification Plan: A Work in Progress, Dec. 2003, *at* http://usaip.info/USAIP4.1.pdf.

[11] *Id.*

[12] National Identification Development Team, Frequently Asked Questions (FAQs) on the U.S. Animal Identification Plan, *at* http://usaip.info/faq.htm.

[13] *See* National Identification Development Team, *supra* note 10.

[14] See United States Department of Agriculture, Case of BSE in the United States Chronology of Events, *at* http://www.usda.gov/news/releases/2003/12/bsechronology.htm.

[15] For recent news releases from USDA on traceback attempts, *see* United States Department of Agriculture Newsroom, at *http://www.usda.gov/Newsroom/0039.04.html* and *http://www.usda.gov/Newsroom/0034.04.html.*

[16] *See, e.g.,* Mark Sherman, *High-Tech Tools Needed to Track Cows*, Associated Press, Jan. 17, 2004, *available at* http://www.ohio.com/mld/ohio/business/7735578.htm; Scott Kilman, *U.S. Pegs Mad-Cow Exposure at 81*, Wall St. J., Dec. 30, 2003; Denise Grady, *Way to Track U.S. Cattle Isn't Ready for Quick Use*, N.Y. Times, Jan. 3, 2004, at A9.

[17] *See* Mark Sherman, *High-Tech Tools Needed to Track Cows,* Associated Press, Jan. 17, 2004, *available at* http://www.ohio.com/mld/ohio/business/7735578.htm.

[18] *See* Scott Kilman, *Mad-Cow Crisis Spurs Rules Change*, Wall St. J., Dec. 31, 2003, *available at* http://www.ocnus.net/cgi-bin/exec/view.cgi?archive=38&num=9441.

[19] United States Department of Agriculture Newsroom, *Veneman Announces Additional Protection Measures to Guard Against BSE*, Dec. 30, 2003, *at* http://www.usda.gov/news/2004/12/0449.htm.

[20] Other issues include whether the plan should be mandatory or voluntary; who will pay the costs for the program; what technology will be used to implement the program; how the program is to be implemented; and, the role of the federal government, the states, and the private sector. *See, e.g.,* Sally Schuff, *Funding Key to National ID Program,* Feedstuffs, Jan. 12, 2004, at 1.

[21] *See* Sherman, supra note 17.

[22] *See* John F. Wiemers, Animal Identification and Traceability: Protecting the National Herd, Feb. 21, 2003, *at* http://www.usda.gov/oce/waob/oc2003/speeches/weimers.doc.

[23] *See* Geoffrey S. Becker, Animal Identification and Meat Traceability, Congressional Research Service, RL32012 (Dec. 31, 2003).[24] *See* Animal Identification Development Team, *supra* note 12.

[25] *See id.*

[26] *See id.*

[27] *See* Sherman, *supra* note 17. *See also* Sarah Lueck, *Cattlemen Saddle Up For Duels Over Rules*, Wall St. J., Jan. 8, 2004, *available at* http://www.meatfyi.com/news/articles/2349.html.

[28] In this industry-driven context, however, the producer may view "voluntary" as a misnomer since industry may require producer participation.

[29] 7 U.S.C. § 552.

[30] *See id.* at § 552(f)(1).

[31] United States Department of Justice, Justice Department Guide to the Freedom of Information Act (1992) (quoting H.R. Rep. No. 1380, 93d Cong., 2d Sess. 14 (1974) (citations omitted)).

[32] *See Tax Analysts v. United States Dep't of Justice*, 845 F.2d 1060, 1069 (setting forth test for determining whether an agency has sufficient control over a record for that record to constitute an "agency record").

[33] *See generally* United States Department of Justice, Department of Justice Freedom of Information Act Guide, 2002, *available at http://www.usdoj.gov/04foia/04_7.html. See also* United States Department of Justice, *supra* note 31, at 3.

[34] *See* 7 U.S.C. § 552(b).

[35] *See* David P. Graham & Jacqueline M. Moen, *Discovery of Regulatory Information for Use in Private Liability Litigation: Getting Past the Road Blocks*, 27 Wm. Mitchell L. Rev. 653, 667-78 (2000).

[36] *See, e.g.*, *Frankel v. SEC*, 460 F.2d 813, 818 (2d Cir. 1972).

[37] *See* Janice Toran, *Information Disclosure in Civil Actions: The Freedom of Information Act and the Federal Discovery Rules*, 49 Geo. Wash.L.Rev. 843, 848-54 (1981); Baldrige v. Shapiro, 455 U.S. 345 (1982); Friedman v. Bache Halsey Stuart Shields, Inc., 738 F.2d 1336 (D.C. Cir. 1984) (stating that although Commodities Exchange Act allows Commodity Futures Trading Commission to withhold from public disclosure any data or information concerning or obtained in connection with any pending investigation of any person, that protection does not apply to court-supervised discovery).

[38] *See* Sherman, *supra* note 17. *See also* Wisconsin Farm Bureau Federation, *Wisconsin's Livestock Industry A Leader on Animal* Identification, Ag News, Jan. 2, 2004, *available at* http://www.wfbf.com/Newsreleases/livestockid.htm; Martin Wolk, *Mad Cow Spurs Interest in Food Tracking,* MSNBC News, Jan. 8, 2004, *available at* http://www.msnbc.msn.com/id/3900553/.

[39] *See* Animal Identification Development Team, *supra* note 12.

[40] *See, e.g., Leon v. Caterpillar Indus., Inc.,* 69 F.3d 1326 (7th Cir. 1995); *Prompt Air, Inc. v. Firewall Forward*, Inc., 707 N.E.2d 235 (Ill. App. Ct. 1999).

[41] *See, e.g., Ziliak v. AstraZeneca LP*, 324 F.2d 518, 521 (7th Cir. 2003) (holding that "[u]nder Indiana law, manufacturers are strictly liable [for] injuries incurred as a result of placing defective product in stream of commerce.").

[42] *See, e.g., Gebhart v. Mentor Corp.*, 191 F.R.D. 180, 184 (D. Ariz. 2003).

[43] *See, e.g., Ritchie v. Glidden Co.*, 242 F.3d 713, 717 (7th Cir. 2001) (claiming that the accident pump supplied by the defendant was defective and resulted in her finger being amputated).

[44] *Latham v. Wal-Mart Stores, Inc.,* 818 S.W.2d 673 (Mo. Ct. App. E.D. 1991).

[45] *Worrell v. Sachs*, 563 A.2d 1387 (Conn. Super. Ct. 1989); *Sease v. Taylor's Pets, Inc.*, 700 P.2d 1054 (Ore. 1985) (involving a strict products liability action by the purchaser of a rabid skunk where the court expressly rejected the argument that live animals may not be deemed products for purposes of strict liability because of their mutability or lack of a fixed nature.).

[46] *See* Restatement (Second) of Torts § 402A, cmnts. a-m.

[47] *See Worrell*, 563 A.2d at 1388 (supporting the proposition that the sale of a diseased animal warrants recovery under a strict liability theory); *Beyer v. Aquarium Supply Co.,* 404 N.Y.S.2d 778, 778-89 (N.Y. Super. 1977) (allowing recovery in a cause of action in strict products liability against the distributor of hamsters to recover for illness suffered by the plaintiff after coming in contact with allegedly diseased hamsters distributed by the defendant); *Sease*, 700 P.2d at 1058.

[48] *But see Anderson v. Farmers Hybrid Companies, Inc.,* 408 N.E.2d 1194, 1199 (Ill. App. Ct. 1980) (holding that natural immutability is essential to determining whether a product exists).

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