

Animal Identification



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Animal Identification: Liability Exposure and Risk Management

Overview

As the livestock industry considers implementation of the National Animal Identification System (NAIS), one of the chief concerns focuses on the possibility of increased liability for livestock producers. This concern arises from the recognition that a key component of a lawsuit is knowing who caused the harm. The fear is that the NAIS will allow people to find out who owned an animal at the time that the animal acquired the condition that caused the harm.

At the outset, it is worth noting that most discussions of the NAIS do not include requirements that the meat be traced through the meatpacking plant. Another point to recognize is that packers currently know the identity of the owner of the animal when the animal arrives at the packing plant. It follows, then, that the NAIS may not affect the liability concerns of feeders as those concerns relate to consumers because these two factors, the identity of the seller and the ability to trace meat through the packing plant, are not affected by the NAIS. That is, if packers currently have the ability to trace meat through the plant, it is likely that they can already determine the owners of the problem cattle at the feedlot level. Nevertheless, the movement toward animal ID may nudge the industry to fuller traceability throughout the supply chain. Also, cow/calf operations, backgrounders, and others near the beginning of the supply chain may no longer be anonymous to others further down the chain.

Some confuse the two distinct ideas of liability and confidentiality. But even if the information is confidential, that is, not available to the public, a court considering a lawsuit may subpoena the information in court. The court may decide to keep that information sealed from public view; those involved with the trial, however, would be able to use the information in the trial.



General Liability and the NAIS

Regardless of the existence of the NAIS, livestock producers are and always have been liable for the livestock they produce. NAIS does not create new duties of care or warranties. If practices are employed that eventually injure someone else, the livestock producer responsible for creating that threat always could have been liable. Practices that create liability risks for livestock producers include treating animals with illegal drugs, ignoring withdrawal times, creating safety hazards such as a broken syringe needle left in the muscle, or using other poor management practices.

The NAIS helps identify a livestock producer in the chain of custody for a particular animal. Such identification increases the accountability of a livestock producer and may increase his or her liability exposure. Livestock producers have traditionally been anonymous in the chain of custody. Once cattle left the livestock producer's operations, identity was lost. Depending on whether the meat is traceable through the packing plant, the NAIS may remove this anonymity. Although the NAIS does not automatically make livestock producers liable, it may increase their liability exposure by making it easier to determine who mismanaged the animal.

Tort law governs the liability exposure of livestock producers for the mismanagement of animals. Tort law deals with cases where a plaintiff has suffered a loss and is trying to shift the responsibility for that loss to one or more defendants. The plaintiff must first prove that a defendant's conduct was of a type that entitles the plaintiff to be compensated. The two most common forms of conduct on

the defendant's part that may justify such shifting of loss are negligence and strict liability.

In the livestock and meat industry, the plaintiff could be anyone harmed by someone else's conduct. The plaintiff could be a consumer harmed by food poisoning or a feeder injured by something the cow/calf operator did. A case could include any combination of the different actors in the livestock industry. For a plaintiff to prove his case, he will need to know who caused the injury; in other words, the meat and/or animal must be traceable. NAIS, however, does not affect the traceability of meat through a packing plant, so if the plant does not trace the origins of meat, a producer cannot be found liable for injury caused by meat consumed from that plant. For instance, if a cow/calf producer leaves a broken needle in a calf that eventually injures a consumer, but that calf is processed in a plant that does not trace the meat, the producer cannot be found liable because the injured person would have no way of identifying the producer. In another example, the cow/calf producer could again break off a needle, but this time the packer catches the problem and severely docks the feeder who sold the fat steer. The feeder may be able to use data in NAIS to trace that animal back to the cow/calf producer and seek damages. Before NAIS, the feeder may not have been able to determine who the cow/calf producer was because the calf may have been mingled with other calves by a livestock broker or in an auction market.



NAIS and Negligence

Negligence is the failure to exercise reasonable care. Reasonable care is what a reasonably prudent person would do in the same or similar circumstances. Thus, in a negligence action, a livestock producer must show that he exercised the kind of care in the management of his animals that a reasonable and prudent livestock producer would have exercised under similar circumstances. This is a fact-specific question usually determined by a jury on a case-by-case basis. If the livestock producer fails to exercise reasonable care, the plaintiff must also show that the livestock producer's breach was a proximate cause of the plaintiff's injury and that the plaintiff suffered legally compensable damages.

For example, in a case where a consumer suffers from *E. coli* O157:H7 (*E. coli*) poisoning, the consumer may initially sue the retailer and packer for negligent handling of the meat. If the packer has a traceability system in its plant, the packer may bring in the feeder who fed the steer as another defendant. For the producer to be liable in this situation, the packer would have to show that the feeder failed to exercise reasonable care in taking care of the steer and that this failure caused the meat to carry *E. coli*. Although it is impossible to predict what a court might find as "reasonable care," it might mean the usual level of cleanliness by other feeders.

NAIS and Strict Liability

Strict liability is imposed when one has introduced a defective product that is unreasonably dangerous into the stream of commerce. Unlike negligence, strict liability pays no attention to whether someone employed a duty of care. If strict liability applies, the livestock producer could be liable even if he used the best management practices in good faith. Although the law is not well developed to answer whether animals can be defined as "unreasonably dangerous products" for purposes of strict liability, it is probable that at least some courts would apply the strict liability analysis to cases where an injury is caused by a characteristic of an animal.¹ For example, if a plaintiff alleges that he is harmed because he consumed beef from an animal that had BSE (also commonly referred to as Mad-Cow Disease), it is likely that the feeder could be liable under strict liability because a court would find that the cow was unreasonably dangerous when it entered the stream of commerce. Under a negligence analysis, on the other hand, the feeder may not be liable because the feeder may have engaged in the best management practices and raised the cattle as any reasonable person would have at the time. In this circumstance the producer had no way of suspecting that the feed he used even had a chance of causing BSE.

The critical issue for strict liability is whether the plaintiff establishes that the defendant caused the harm. Under strict

¹ In general, animals that served as pets have sometimes been found as "products" for strict liability purposes. The court in *Beyer v. Aquarium Supply Co.*, 404 NYS2d 778 (1977) defined diseased hamsters as products. Some courts have refused to define farm animals as products. See Christopher H. Hall, Annotation, *Live Animal as "Product" for Purposes of Strict Products Liability*, 63 A.L.R.4th 127 (1988-2004). For example, in *Anderson v. Farmers Hybrid Cos.*, 408 N.E.2d 1194 (Ill. App. Ct. 1980), the court refused to define hogs as products, even though the hogs spread the contagious and infectious disease "bloody dysentery" to other hogs.



liability, a livestock producer can be liable only if the plaintiff can trace a defect or infectious animal disease to the producer's operation. If a third party altered the animal product in the time between when the livestock producer had control of the animal and the plaintiff consumed the meat, then the livestock producer is not liable. For example, where an *E. coli* O157:H7 (*E. coli*) outbreak occurs at or after slaughter, the livestock producer should not be found liable. In contrast, where drug residues in meat are caused by improper withdrawal periods and harm results, the livestock producer may be found liable. Just as in the negligence analysis, it is sometimes difficult to predict exactly when an action "causes" injury. Ultimately, these are questions of fact left to the jury.

A court will likely focus on the condition of the animal at the time of the purchase, rather than concentrating on the ability of the animal to contract an illness subsequent to the transaction. For liability to attach to the livestock producer, the diseased animal must have been infected at the time of the transaction. Thus, in the case of meat contaminated with *E. coli* during the grinding process, even if the meat can be traced back to the ranch, the producer will not be liable if it was sold without *E. coli* in the muscle.

Practical Litigation Concerns

A plaintiff may attempt to bring everyone in the stream of commerce into the action, including the livestock producer. If the meat is traceable through the packing plant, animal identification will help the plaintiff trace back to the livestock producer. Even if a livestock

producer is found not liable, going to court is expensive and can damage a producer's reputation. As a practical matter, however, it may not be worth it to the plaintiff. Plaintiffs generally go for the "deep pockets" such as the retailer, restaurant, or packer. Plaintiffs should realize that many producers do not have the resources to pay out a large claim, even if they are found liable.

While plaintiffs may decide to recover damages caused by their injuries from the store or restaurant they dealt with directly, the same store or restaurant may bring the livestock producer into the lawsuit as a third-party defendant in order to reduce the store's liability exposure. In other words, NAIS could allow a retailer to reduce its penalties by passing the blame back to a livestock producer.

It is nearly impossible to find a case of a livestock producer being party to a suit involving consumer injury because of something that the producer did. Beyond the fact that producers tend not to have deep pockets, other reasons for the lack of cases on this subject may be that producers' actions rarely cause consumer harm and that packers have not traditionally traced the meat through the plant. Given that NAIS does not directly affect any of these factors, NAIS may not result in very much increased liability exposure.

On a different note, the ability to identify a particular animal may shield a livestock producer from being unnecessarily included in a lawsuit. Here, animal identification may enable a livestock producer to prove that his animals did not cause the problem, protecting him from liability exposure.

Ways to Limit Risk of Liability

If a producer believes that he carries too much risk of liability, he may choose a number of ways to deal with that risk. Liability insurance can provide protection against any increase in liability exposure for the livestock producer. At this time it is unclear how common this type of insurance is, but these types of packages may develop in the future. In a way, the possible risk of liability for injury caused by raising animals is a perfect candidate for liability insurance because the risk of occurrence is very, very low, but the size of the damages if there were an incident could be very high.

Another way to limit the risk of liability is to keep good records. A livestock producer who uses best management practices can use his own records to shield him from liability because the records could prove that the producer employs reasonable and prudent care or could not have caused the harm. Documentation supporting best management practices includes treatment records, animal health programs, inputs, and other quality assurance records. These records help the livestock producer defend himself.

A livestock producer may want to consider structuring his business in a way that contemplates increased exposure to liability. For example, forming a Limited Liability Company (LLC) to own the livestock separately may be beneficial because it may insulate the producer's other assets. The livestock producer should know that each business struc-

ture has its own advantages and disadvantages, and that there are many modifications and variations within these forms. Selecting the optimal business structure usually revolves around the concept of liability and taxation.² In choosing a business structure, the livestock producer should consult with a qualified accountant and an attorney who are familiar with his resources and objectives.

Some states limit liability exposure by exempting livestock production from implied warranty laws. Strict liability and implied warranty laws are two sides of the same coin. An implied warranty law essentially requires that merchants who place an unreasonably dangerous product into the stream of commerce are liable for injuries that the product causes. When a merchant does so, he is liable under a strict liability or breach of implied warranty claim. Livestock producers long enjoyed some legal protection from commercial implied-warranty laws partly because farmers were not considered not to be "merchants." In general, merchants are held to a higher standard of responsibility because it is assumed that they have specialized knowledge of the products or business practices of a particular market.

As farms become more commercialized and buyers more litigious, this protection has become less secure. To determine whether a farmer is "merchant" for these purposes, a court might look to the length of time the farmer has been engaged in the sale of commodities, the degree of business acumen the

² For a thorough discussion on business organizations available to farmers and ranchers, see Carol R. Goforth, *An Overview of Organizational and Ownership Options Available to Agricultural Enterprises*, National Agricultural Law Center, available at <http://www.nationalaglawcenter.org/research/articles/#ownership> (2002).

farmer shows, and the farmer's awareness of farm markets.³ In any event, in response to some courts finding that a farmer lost the liability protection because it found the farmer to be a merchant, some states have passed specific exemptions for livestock sales from implied warranty statutes, usually stating that there is no implied warranty that livestock are sold free from disease.⁴ This exemption protects farmers and ranchers in those states from strict liability claims. It does not, however, protect farmers from negligence claims. This is because negligence claims rise out of a reasonable duty of care, where strict liability claims rise out of the implied warranty not to introduce unreasonably dangerous products into the stream of commerce, even if someone produced that product with the greatest care.

In a variation on the statutory waiver from implied warranty, at least one livestock organization has publicly called for limits on liability that may arise from animal identification. The effectiveness of this legislation, however, may be limited, given that increased liability is unlikely to come from NAIS; rather, the main factor currently protecting feeders from liability is the lack of traceability through the packing plant, a factor not affected by NAIS.

References and Sources of Additional Information on Liability and NAIS

A further explanation of strict liability, with links to short explanations of negligence, proximate cause, and intervening cause: http://law.freeadvice.com/general_practice/legal_remedies/strict_liability.htm.

Typical statutory language of the implied warranty of merchantability. <http://www.law.cornell.edu/ucc/2/article2.htm#s2-314>

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³ See *Colorado-Kansas Grain Co. v. Reifschneider*, 817 P.2d 637, 640 (Colo. Ct. App. 1991). Whether a farmer is a merchant or not depends on the particular facts, and states are split on the question.

⁴ Many, if not most, states that include animal agriculture as an important part of their economy have passed versions of this exemption, including Arkansas (Ark. Code Ann. § 4-3-316 (2003)), Illinois (810 Ill. Comp. Stat. Ann. 5/2-316 (2004)), Iowa (Iowa Code Ann. § 554.1 (2004)), Kansas (Kan. Stat. Ann. §84-2-316 (2003)) Montana (Mont. Code Ann § 30-2-316 (2003)), Nebraska (Neb. Rev. Stat. 2-316), South Dakota (S.D. Laws 57A-2-316.1 (2004)), Utah (Utah Code Ann. § 70-A-2-316 (2004)) and Wyoming (Wyo. Stat. Ann. § 34.1-2-316 (2003)).

