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An Agricultural Law Research Article

Legal Issues in Developing a National Plan for Animal Identification

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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

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/.

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

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>.

80 cows that entered the United States with it¹⁵ 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 news conference, Secretary Veneman stated:

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

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.

Confidentiality of Stored Information

Producer Concerns of Confidentiality

Some producers object to a national animal identification plan due to 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.

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.*

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 agencies³⁰ 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 made³²

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

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.

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. 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. Information exempted under FOIA 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 immunized for the most part 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

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/>.

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 track problems quickly and provide documentation that appropriate methods and measures were followed to avoid disease contamination.

The concern of some producers 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 liability exposure to liability under a national animal identification program. The question is to the extent to which exposure will increase on a practical level under an animal identification system and what efforts, if any, lawmakers should and can be made, 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 due to their mutability and their tendency to be affected by a purchaser, animals are not

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).

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 Thus, in answer to the earlier question posed in this article concerning 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.

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).