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Cattle Traceability: Potential Legal Implications

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As the cattle industry considers implementation of a farm-to-fork traceability system, concerns about the legal implications consequential to that system have been raised. This paper will outline those concerns, including potential legal theories under which cattle producers and finishers may either be protected or held liable.

The first concern discussed will involve issues of privacy. Once information is collected from producers, who will be allowed access to it? How, if at all, can confidentiality be assured? Much of this will depend on the method in which the information is collected and maintained, whether it be through federal law, state law or private entities. While the federal government and some state[1] have passed laws regarding the confidentiality of the information, it is still not a

failsafe protection.

The second issue focuses on the possibility of increased liability for livestock producers and feeders. This arises from recognizing that a key component of a lawsuit is knowing who caused the harm. As a result, there are questions about the implications of this type of tracking system, which would allow identification of all owners of the animal during its lifetime.

Confidentiality

A main factor in determining confidentiality of information is the structure of the system under which it is collected and maintained. An industry-led, private-sector system may have very different consequences than one mandated by the federal government, for example. This section will discuss the legal privacy implications of each structure of system.

1. Under a federally mandated system

If a traceability system is mandated by federal law (a law passed by Congress, with regulations written by USDA), then information that is gathered is protected from dissemination by the Privacy Act.[2] The Privacy Act is designed to give individuals more control over the gathering and sharing of information about themselves, and to prohibit the unnecessary and excessive exchange of personal information that has been collected by the government.[3] However, even with Privacy Act protections, information collected by the federal government can still typically be released in one of two ways.

Congress included an exception in the Privacy Act that allow for information to be released as a result of requests made under the Freedom of Information Act, or "FOIA."[4] FIOA is a federal law that gives the public the right to access federal agency records by requesting them. FOIA applies to "agency records" maintained by agencies within the executive branch of government.[5] These include records that are either created or maintained by an agency and under agency control at the time the request is made.[6] Potential records affected would include any information maintained in a federal database, but could arguably include other collected information as well.

However, in writing FOIA, Congress included some exemptions, which allow the government to withhold certain information. One exemption allows information to be withheld if a statute explicitly forbids its disclosure. [7] As part of the 2008 Farm Bill, 7 U.S.C. §8791 was passed. It forbids "any officer or employee of the Department of Agriculture" from disclosing

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[1] States' Animal Identification Statutes. Compilation found at http://nationalaglawcenter.org/state-compilations/animal-identification/. Current through 2018 legislative sessions.
[2] 5 U.S.C. § 552a.
[3] *Id*.
[4] 5 U.S.C. § 552.
[5] 5 U.S.C. § 551.
[6] *U.S. Dep't of Justice v. Tax Analysts*, 492 U.S. 136 (1989).
[7] 5 U.S.C. § 552(b)(3).

"information provided by an agricultural producer or owner of agricultural land concerning the agricultural operation, farming or conservation practices, or the land itself."[8]

While this statutory provision has been used frequently in regards to USDA gathered information as a whole,[9] it has only been tested once in terms of specific identification information gathered as part of the federal National Animal Identification System ("NAIS"), a voluntary animal traceability program in place from 2004 through 2010.

In that case, a journalist submitted a FOIA request asking for information contained in the National Premises Information Repository ("NPIR"),[10] including "all records of registered premises contained in the NPIR, including the name of the entity, name of contact person, address, telephone number, alternate telephone number, and type of operation run on the premises."[11] USDA denied the request, and when the reporter took it to court, the judge sided with the USDA, holding that the statute forbade disclosure of the information, and that the request was properly denied.[12] In other words, it is probable that information submitted as part of a federally organized system of animal identification and traceability would be protected from disclosure under 7 U.S.C. §8791.

2. *Under a state mandated system*

If a traceability system were instituted by state law, collected information would probably be stored and maintained in individual state databases. While all fifty states have enacted freedom of information acts of their own[13], the level to which identification information is protected depends entirely on the parameters of the state statutes as well as whether other state laws have been passed limiting disclosure of animal identification information.[14]

One group of states has not specifically passed a law regarding the accessibility of information gathered under an animal identification program. One example of those is Florida, which has neither adopted the federal rules by statute nor created its own animal traceability rules. Further, Florida is an example of state that has a fairly board FOIA-type statue allowing citizens to request nearly any public record that is not exempted by law. Fla. Stat. § 119.01.

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[8] 7 U.S.C. §8791(b)(2).

[9] In FY2017 alone, USDA relied on this exemption 359 times in denying FOIA requests. USDA Annual FOIA Report; FY 2017, found at https://www.dm.usda.gov/foia/reading.htm#reports

[10] The NPIR was part of the first step in the NAIS system. This step, called premises registration, was to ensure that individuals are notified quickly when a disease event might impact their area(s) or the species of animals they have. In order to take part in this, landowners register their premises, which is "a unique and describable geographic location where activity affecting the health and/or traceability of animals may occur." United States Department of Agriculture, *National Animal Identification System (NAIS)—A User Guide and Additional Information Resources* (2007), page 14. Archived at https://www.aphis.usda.gov/traceability/downloads/NAIS-UserGuide.pdf.

[11] *Zanoni v. U.S. Dep't of Agric*, 605 F. Supp.2d 230, 233 (D. D.C. 2009).

[12] *Id*.

[13] Compiled by and available at Reporter's Committee for Freedom of the Press, found at https://www.rcfp.org/open-government-guide.

[14] *See* Eric Pendergrass, *Varying State Approaches to Confidentiality with Premises and Animal Identification Systems*, (2007) *available at* http://nationalaglawcenter.org/wp-content/uploads/assets/articles/pendergrass_confidentiality.pdf

Another example is Arkansas, whose freedom of information law says "[a]ll records maintained in public offices or by public employees within the scope of their employment shall be presumed to be public records." A.C.A. § 25-19-101. In these states, together with others where strong disclosure laws have been enacted, any state collected or maintained information is almost certainly subject to disclosure. In other states with more restrictive definitions of public records or more exemptions to disclosure, the information may be protected.

Other states have passed specific protections for information collected as part of an animal identification program. For example, Alabama adopted a rule stating that "[a]ll information collected by the department pursuant to…[an animal identification program] is confidential and shall not be subject to public disclosure except by order of a court of competent jurisdiction or as authorized by rule of the department." Ala Code § 2-1-11(c).

Georgia is another state that has included specific protections for the information collected by a national animal identification program. Found in Ga. Code Ann. § 50-18-72(a)(17), the law protects:

> Records, data, or information collected, recorded, or otherwise obtained that is deemed confidential by the Department of Agriculture for the purposes of the national animal identification system, provided that nothing in this paragraph shall prevent the release of such records, data, or information to another state or federal agency if the release of such records, data, or information is necessary to prevent or control disease or to protect public health, safety, or welfare. As used in this paragraph, the term "national animal identification program" means a national program intended to identify animals and track them as they come into contact with or commingle with animals other than herdmates from their premises of origin. Such records, data, or information shall be subject to disclosure only upon the order of a court of competent jurisdiction[.]

Little uniformity exists within these approaches to confidentiality concerns. These examples are meant to show the wide range of protection that is offered, while also highlighting the potential for disclosure in states that have not otherwise specifically protected this information.

3. Under an industry-led system

Under this system, the traceability of cattle would not be mandated by law. Instead, it would be instituted by the private sector, rather than the government. As such, it would be a voluntary system. Under such a system, traceability information would be maintained in private databases. In terms of confidentiality, the advantage of private databases is that the information is not subject to either state or federal FOIA-type laws, because it is not collected or maintained by a governmental entity.

However, it would instead be subject to private contractual agreements regarding who may access the information. Unless specific limits are placed on a private entity's authority to release information, the information has the potential to be shared beyond the scope of the originally intended audience. For example, credit card companies frequently share information about their cardholders with partner companies. Without an agreement stating otherwise, private entities may legally share animal identification information in a similar fashion.

4. Subpoena power

Another method of accessing the information does not depend on whether the system is state, federal or private. This alternative method through which collected information may be released is a court's subpoena power. Private parties in the course of litigation can request a subpoena from the judge. This subpoena is an order requiring the release of certain information relevant to a case. Information that is exempted under FOIA is not automatically immune from subpoena.[15] Instead, it may be obtained through discovery if the party's need for information exceeds the government's need for confidentiality.[16] As a result, the court has the responsibility of balancing the interests of the two parties and deciding whether the information should be released. Subpoenas, themselves, and the documents they yield, are not typically public information, although they may become public in the course of a trial. We have been unable to find a publically available situation wherein information collected in the course of an animal identification program was released through a court-ordered subpoena.

Liability

A system of animal identification and traceability will not, on its own, expand the liability that a producer is exposed to. If practices are employed that eventually injure someone else, the livestock producer responsible for creating that threat has always been potentially liable. Practices that create liability risks for livestock producers may include the administration of illegal drugs, failure to follow withdrawal times, or selling sick or diseased livestock.

Instead, the change lies in that a traceability system helps identify individuals who have been part of the chain of custody for particular animals. This identification increases the accountability for individuals who until now have been anonymous. This makes it easier to determine who mismanaged the animal, which can lead to increased liability exposure for that person or entity. Additionally, a comprehensive system of traceability may identify everyone who owned the animal, but be unable to pinpoint the wrongdoer, exposing everyone along the chain to potential liability.

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[15] *Friedman v. Bache Halsey Stuart Shields, Inc.*, 738 F.2d 1336 (D.C. Cir. 1984).

[16] *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); and *Baldrige v. Shapiro*, 455 U.S. 345 (1982). *See also* Roberts and Pittman, *Legal Issues in Developing a National Plan for Animal Identification* (2004), *available at* http://www.nationalaglawcenter.org/assets/articles/roberts_animalid.pdf.

Increased liability exposure in this situation is governed by legal bases broadly called "tort" law. Tort law governs 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 three most common forms of conduct on which liability may be imposed are warranty theory, strict liability or negligence.

1. Warranty Theory

Under one version of warranty theory, individuals are held responsible under an "implied warranty of merchantability," a law adopted in most state as part of their commercial code, which is a set of laws regulating sales. The implied warranty of merchantability states that goods sold by a merchant are fit for the ordinary purposes for which they were sold. Alternatively, liability may be imposed under an express warranty that the producer or finisher contractually agrees to.

a. Farmers as "merchants"

The Uniform Commercial Code defines a merchant as "a person who deals in goods of the kind or otherwise by his occupation holds himself out as having knowledge or skill peculiar to the practices or goods involved in the transaction or to whom such knowledge or skill may be attributed by his employment of an agent or broker or other intermediary who by his occupation holds himself out as having such knowledge or skill."[17]

Courts are divided on the issue of whether a farmer is a merchant, with the outcome depending on the jurisdiction and the facts of the particular case. In general, though, courts have considered several factors in determining whether a particular farmer is a merchant. These factors include (1) the length of time the farmer has been engaged in marketing products produced on the farm; (2) the degree of business skill demonstrated in transactions with other parties; (3) the farmer's awareness of the operation and existence of farm markets; and (4) the farmer's past experience with or knowledge of the customs and practices unique to the marketing of the product sold.[18] In 2012, a Tennessee court considered whether a party was a merchant, and in doing so provided an extensive list of cases in which courts had considered the issue and come to differing conclusions.[19] Because only merchants can give warranties, if the

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[17] UCC §2-104.

[18] *Colorado-Kansas Grain Co. v. Reifschneider,* 817 P.2d 637 (Colo. Ct. App. 1991).

[19] As identified in *Brooks Cotton Co. v. Williams*, 381 S.W.3d 414, 423 (Tenn. Ct. App. 2012), courts who found that farmers were not merchants within the UCC meaning include: *Loeb & Co., Inc. v. Schreiner,* , 321 So.2d 199 (Ala. 1975), *Pierson v. Arnst,* 534 F.Supp. 360, 362 (D.Mont.1982); *Cook Grains, Inc. v. Fallis,* 395 S.W.2d 555, 555 (Ark. 1965); *Sand Seed Service, Inc. v. Poeckes,* 249 N.W.2d 663, 666 (Iowa 1977); *Decatur Cooperative Association v. Urban,* , 547 P.2d 323, 328 (Kan. 1976); *Terminal Grain Corp. v. Freeman,* 270 N.W.2d 806 (S.D.1978); *Lish v. Compton,* 547 P.2d 223 (Utah 1976); *Gerner v. Vasby,* , 250 N.W.2d 319, 325–26 (Wis. 1977)

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producers are not considered merchants, they cannot be held responsible under this theory. Unfortunately, however, specific producers in specific situations cannot know with certainty whether they are merchants without becoming involved in legal action on the issue.

Further, the definition of merchant is almost certain to encompass entities farther down the supply chain (such as feeders, packers and distributers) who may also be exposed to liability due to implied warranties. One such example happened in 2000, when multiple customers of a Wisconsin restaurant were confirmed with *E. coli* 0157:H7. Of the 64 people confirmed, dozens were hospitalized and one- a toddler- died. The infections were traceable to meat served at the restaurant, which had been shipped to the restaurant from the packer, via a distributor. Numerous lawsuits were filed against both the restaurant and the packer, in part on the basis of warranty.

The packer argued that the company was not liable because it did not mishandle the meat, and because it complied with U.S. Department of Agriculture inspections before shipping. However, the Wisconsin Court of Appeals ruled that although federal authorities inspected the meat before shipping, the responsibility ultimately fell on the processor to make sure it was safe. In one of the cases, the jury assigned liability to fall 80% on the packer/processor and 20% on the restaurant based on the implied warranty of merchantability.[20] The Wisconsin Supreme Court affirmed the verdict.[21]

b. Statutory limitations on warranties

Beyond the question of whether a farmer or rancher is a merchant, the warranty theory may not impose liability on producers in states where that theory has been limited by law. A significant number of states in which animal agriculture is a major part of the economy limit livestock producers' exposure under a warranty theory of liability.[22] These statutes, which vary widely within the states in which they have been passed, provide protection for either specific individuals or prohibit implied warranties from attaching to livestock generally.

Laws limiting implied warranties for livestock take several different forms. For example, Texas's statute explicitly excludes the theory states that the "implied warranties of

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Edwards, 206 N.W.2d 508 (Mich. Ct. App. 1973); *Dotts v. Bennett,* 382 N.W.2d 85 (Iowa 1986); *Musil v. Hendrich,* 6 Kan.App.2d 196, 627 P.2d 367 (1981); *Glacial Plains Co-op. v. Lindgren,* No. A10–185, 2010 WL 3307077, at *5 (Minn. Ct. App. Aug. 24, 2010); *Dawkins & Co. v. L & L Planting Co.,* 602 So.2d 838, 843 (Miss. 1992); *Rush Johnson Farms, Inc. v. Mo. Farmers Ass'n,* 555 S.W.2d 61 (Mo. Ct .App. 1977); *Smith v. Gen. Mills, Inc.,* 968 P.2d 723 (Mont. 1998); *Agrex, Inc. v. Schrant,* 379 N.W.2d 751 (Neb. 1986); *R.F. Cunningham & Co. v. Driscoll,* 790 N.Y.S.2d 368 (N.Y.City Ct.2005); *Currituck Grain, Inc. v. Powell,* 246 S.E.2d 853 (N.C. App. 1978); *Hagert v. Hatton Commodities,* 350 N.W.2d 591 (N.D. 1984); *Ohio Grain Co. v. Swisshelm,* 318 N.E.2d 428 (Ohio Ct. App. 1973); *Nelson v. Union Equity Co-op. Exchange,* 548 S.W.2d 352 (Tex. 1977); *Lish v. Compton,* 547 P.2d 223 (Utah 1976); *Aube v. O'Brien,* 433 A.2d 298 (Vt. 1981); *Fred J. Moore, Inc. v. Schinmann,* 700 P.2d 754 (Wash. Ct. App. 1985).

[20] *Estate of Kriefall v. Sizzler USA Franchise, Inc.*, 335 Wis. 2d 151 (Wis. Ct. App., 2011).

[21] *Estate of Kriefall v. Sizzler USA Franchise, Inc.*, 342 Wis. 2d 29 (Wis. Sup. Ct. 2012).

[22] *See also* Pendergrass, *Approaching Liability with Animal Identification*, *available at* http://nationalaglawcenter.org/wp-content/uploads/assets/articles/pendergrass_liability.pdf

merchantability and fitness do not apply to the sale or barter of livestock or its unborn young."[23] In other states, like Nebraska, "there shall be no implied warranty that the cattle, hogs, and sheep are free from disease."[24] In a third type of state statute, as enacted in Kansas, the legislature said that "with respect to the sale of livestock, other than the sale of livestock for immediate slaughter, there shall be no implied warranties, except… where the seller knowingly sells livestock which is diseased."[25]

In other words, while all three states limit the implied warranty that may be attached to livestock, the amount of protection offered to producers and finishers differs significantly. Texas offers complete protection from warranty claims. Nebraska offers protection from warranty claims in the cases of animal disease, while Kansas protects from warranty claims in the cases of animal disease only in cases where the seller is unaware of the disease. Those substantial differences in the level and type of protection between states can have significant impacts in the ultimate effect of the laws themselves. Given the structure of the cattle industry in the United States, where animals may be moved through several states during their lifespan, it may be difficult to ascertain what protection is offered, when, and to whom without litigating the issue.

c. Express warranties

Further, even if the implied warranty of merchantability does not apply, a comprehensive system of traceability may also lead to liability through express warranties. Express warranties are warranties that a producer agrees to when they sign a contract with a cattle buyer. This contractual language may include specific warranties as to the health and marketability of the livestock that will then bind the seller/producer.

2. Products liability

A manufacturer or seller of goods may be held liable for introducing a defective product that is unreasonably dangerous into the stream of commerce. Liability may be imposed regardless of either intent or its exercise of reasonable care. This is called "strict liability."[26] In other words, plaintiffs must show that the product caused the harm, but do not have to prove that the manufacturer was careless or acted in an unreasonable manner. If a plaintiff can prove that harm resulted, that alone is sufficient to hold the defendant liable. Thus, a plaintiff may recover even if the seller has exercised all possible care in the preparation and sale of the product.

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[23] Tex. Bus. & Com. Code Ann. § 2.316.

[24] Neb. Rev. Stat § 2-316 (3)(d).

[25] Kan. Stat. Ann. § 84-2-316.

[26] The "strict liability" standard as applied to products has been modified over the years, with the current Restatement providing that a person who sells or distributes a defective produce is subject to liability if the product contains a manufacturing defect. *See* Restatement (Third) of Torts: Prod. Liab. §§1-2 (1998). There is no requirement for a plaintiff to prove that the product is unreasonably dangerous, as was the case with traditional "strict liability." *See* Brian Daluiso, *Is the Meat Here Safe? How Strict Liability for Retailers Can Lead to Safer Meat*, 92 B.U. L. Rev. 1081 (2012).

With regard to products liability, there are three type of defects that may lead to liability: manufacturing defects, design defects, and defects due to inadequate instructions or warnings.[27] The threshold issue for livestock producers is whether the animals are considered "products" at all. Courts across the nation have frequently considered whether an animal can be considered a "product" for purposes of a products liability claim. The majority of courts—those in Illinois (dogs, pigs), Colorado (horse), Missouri (parrot), Florida (horse), South Dakota (dog), and Ohio (parakeet)--have found that because animals are living creatures that continue to grow and change, rather than having a fixed nature when sold, they are not considered "products" in order for a products liability claim to be viable.[28] However, it is important to note that there are three states that have taken the opposite approach. In New York, the court found that a diseased hamster constituted a "product."[29] Later, Oregon adopted the New York position, finding that a diseased skunk constituted a product.[30] Connecticut followed suit in 1989 in a case involving a puppy.[31] Additionally, the Restatement (Third) of Torts expressly states that "when a living animal is sold commercially in a diseased condition and causes harm to other property or persons, the animal constitutes a product…"[32] Thus, while the majority rule makes it seem likely that an animal would not be considered a "product" as required for a successful products liability claim, there are some states where this would not be true and there could be a successful products liability claim against an animal owner.

Additionally, an argument may exist that livestock producers do not meet statutory definitions such that products liability will apply. Many states have limited the situations in which strict liability is a viable claim in a product defect case. Some have done so by statute, based on the Model Uniform Products Liability Act, and others by common law.[33] For example, in Washington, the Washington Product Liability Act provides that strict liability can be imposed on a product "manufacturer," but that "non-manufacturers" can be guilty only of negligence.[34] In Georgia, strict liability is limited only to "manufacturers" and not to "sellers."[35] As these statutory provisions and definitions differ by state, it will likely be a state-by-state analysis of whether the owners of livestock would be considered "manufacturers."

3. Negligence

The most likely theory under which liability would attach to producers or finishers is negligence, or the failure to exercise reasonable care. Reasonable care is defined as what a reasonably prudent person would do in the same or similar circumstances. So, in a lawsuit on the

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[27] Restatement (Third) of Torts: Product Liability §1 (1998).
[28] *Zendejas v. Redman*, 2017 WL 2547202 (S.D. Fla. 2017) (citing court decisions finding animals are not "products.").
[29] *Beyer v. Aquarium Supply Co*,, 94 Misc.2d 336 (N.Y. Sup. Ct. 1977).
[30] *Sease v. Taylor's Pets, Inc.*, 700 P.2d 1054, 1058 (1985).
[31] *Worrell v. Sachs*, 563 A.2d 1387 (Conn. Super. 1989).
[32] Restatement (Third) of Torts: Products Liability §19 cmt. B (1998).
[33] *See* William Marler, *Serving Up Trouble*, 45 Feb Trial 40 (Feb. 2009).
[34] Wash. Rev. Code. Ann. §7.18.010(2).
[35] Ga. Code Ann. §51-1-111.1 (2000). *See also* Daluiso, *supra* note 17 at n.198 for a discussion of various approaches.

grounds of negligence, a livestock producer or finisher must show that she exercised the level of care in the management of her animals that a reasonable and prudent livestock producer or finisher would have exercised under similar circumstances. There's no one-size fits all answer to this question. Instead, 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 hypothetical case where a consumer becomes ill from E. coli, 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 feed lot owner who fed the steer as another defendant. To hold them liable in this situation, the packer would have to show that the feed lot owner failed to exercise reasonable care in taking care of the steer and that this failure caused the meat to be contaminated by E. coli. Although it is impossible to predict what a court might find as "reasonable care," it might mean the usual level of cleanliness used by other feeders.

The foundation of this hypothetical case, and how it differs from the real-life Wisconsin example above is the existence of a systematic and effective traceability framework. For negligent producers and feeders, traceability information may help pinpoint other parties in the chain who may then be drawn in as defendants.

Conclusion

The law surrounding a system of animal traceability is not entirely clear. Because it may ultimately take on so many different forms, the ultimate legal consequences may not be discovered until years in the future. Regardless, the approach that is chosen,the precise data requirements and maintenance of information will certainly affect all participants of the livestock industry. Further, as a system is developed, participants must be mindful of the law concerning the confidentiality of the information and the liability of those involved in the raising and processing of livestock.