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Approaching Liability with Animal Identification

by

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Introduction

Many livestock producers across the United States are skeptical of the National Animal Identification System (NAIS) because of the prospect of increased exposure to liability for their product. Livestock producers have always been potentially liable for the livestock that they produce, and their records have always been subject to disclosure with a court order.² NAIS, however, could allow for additional transparency throughout the livestock production process, in addition to the new possibility of imposing liability on all of the producers involved along the way.³ While the concept and potential ramifications of producing livestock remain the same, there is now a concern about the possibility of establishing a causal connection between the damage caused by a defective animal and a producer who is no longer the owner or in control of that animal.⁴

This increased possibility for exposure to liability stands as a potential roadblock to the adoption of the NAIS as a voluntary program,⁵ even though general public policy concerns may require a livestock producer to take responsibility for the damages that result from his or her animals.⁶ The overriding concern is that, after NAIS is implemented, the records could be used to establish a cause of action such as breach of warranty, strict liability, or negligence, and lead to the implication of more producers in lawsuits that seek to impose liability for defective or dangerous animals.⁷ The ability to establish the identity of those responsible is a key element to any of these causes of action.⁸ Also, as the use of the NAIS becomes more common, those who chose not to use the system may be exposed to additional liability.⁹ Thus, it is important to look at liability under the NAIS with varying causes of action in mind when discussing the producers' concerns about increased liability stemming from possible causal connections established by these records.

Background

In 2003, after the discovery that a cow in Washington State had contracted Bovine Spongiform Encephalitis (BSE), an affliction commonly known as "mad cow" disease, the USDA announced that it

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² MICHAEL ROBERTS & DOUG O'BRIEN, ANIMAL IDENTIFICATION: LIABILITY EXPOSURE AND RISK MANAGEMENT, W. EXTENSION MKTG. COMM. FS#6-04, at 2 (Fall 2004), available at <http://imic.info/memberspublic/animalID/fs06.pdf>.

³ *Id.*

⁴ *Id.*

⁵ Personal conversation with Michael Popp, University of Arkansas Assistant Professor, Department of Agricultural Economics and Agribusiness (January 18, 2007).

⁶ See ROBERTS & O'BRIEN *supra* note 2.

⁷ *Id.*

⁸ *Id.*

⁹ ROBERTS & O'BRIEN *supra* note 2, at 3.

was moving forward with a nationwide animal identification plan.¹⁰ That plan manifested itself as the NAIS, which strives for a 48-hour trace back to an animal's premises of origin in the event of a disease outbreak or animal health emergency.¹¹ Originally, the system was to become mandatory following an implementation period; however, the USDA announced in late 2006 that NAIS would remain a voluntary program after considerable opposition by the livestock industry.¹²

Designed with safety of the food supply and herd health in mind, the system includes premises registration, animal identification, and animal tracking which will add transparency to the livestock production process.¹³ Premises registration is the process of identifying the locations where livestock are held or accumulated, such a farm or stockyard, and recording the contact information of the owner or person responsible for the care of those animals.¹⁴ The animal identification component involves establishing a mechanism to identify the livestock either on a group or individual basis, depending on the species.¹⁵ Animals that stay together as groups during their lifetime, such as chickens or hogs, are to be identified on a group basis, while livestock with more individualized production processes, such as cattle, are identified on an individual basis.¹⁶ Once the premises registration and animal identification components are functional, they will be combined to provide an animal tracking system which reports animal movements and shows where they have been and the other animals with which they have come into contact.¹⁷ Each of these components will involve records that could potentially be used to implicate livestock producers and establish liability in a manner that could not be done otherwise.

Warranties Theory

The livestock industry is no stranger when it comes to addressing issues relating to warranties and the sale of livestock; a group of states has already enacted statutory provisions to limit the application of warranties within the livestock industry. The warranties of merchantability and fitness for a particular purpose, whether implied or express, could apply to producers in the livestock industry because those warranties could serve as a basis for attaching liability after a sale if the animals do not meet certain standards.¹⁸ This warranty theory is important with respect to the NAIS because producers along the production chain might try to join earlier owners in the process in an attempt to establish that someone else was responsible for the defective condition of the animals.¹⁹

A warranty of merchantability is defined as a guarantee that an item is fit for the ordinary purpose for which it is used.²⁰ Similarly, a warranty of fitness for a particular purpose imposes a guarantee that an item is fit for its intended use when the buyer relies upon the seller's knowledge of the goods and the seller knows of the buyers intended use.²¹ In the context of the Uniform Commercial Code (U.C.C.), both of these warranties can be expressed in a written contract or implied when the sale of the livestock occurs between merchants.²² While some jurisdictions have reached opposing conclusions,

¹⁰ NATIONAL AGRICULTURAL LAW CENTER, ANIMAL IDENTIFICATION: AN OVERVIEW, *available at* <http://www.nationalaglawcenter.org/assets/overviews/animalid.html>.

¹¹ USDA-APHIS, (NAIS) NATIONAL ANIMAL IDENTIFICATION SYSTEM: A DRAFT USERS GUIDE AND ADDITIONAL INFORMATION 3 (2006), *available at* <http://www.ag.state.co.us/animals/COAnimalID/NAISUserGuideDraftNov2006.pdf>.

¹² *See id.*

¹³ *Id.* at 3-4.

¹⁴ *Id.* at 5.

¹⁵ *Id.* at 5-6.

¹⁶ *Id.* at 6.

¹⁷ *Id.*

¹⁸ *Id.* at 6.

¹⁹ *Id.*

²⁰ BLACK'S LAW DICTIONARY 1619 (8th ed. 2004).

²¹ *Id.*

²² *Id.*

it is not difficult for courts to find that agricultural producers are merchants, especially in a time when farming and ranching more closely resemble business models than a simplified way of life.²³ The facts and circumstances surrounding the farmer's or rancher's situation often play an important role in determining whether the producer is a merchant and, subsequently, if the implied warranties of merchantability and fitness for a particular purpose will apply.²⁴

Sixteen states have already enacted statutes that limit or exclude these warranties of merchantability and fitness for a particular purpose with respect to livestock producers.²⁵ Included below is a table identifying the states that have adopted this type of legislation with the corresponding statutory citation:

State	Citation
Alabama	Ala. Code Ann. § 2-15-4
Arkansas	Ark. Code Ann. §4-2-316 (3)(d)(ii)
Illinois	810 Ill. Comp. Stat. Ann 5/2-316 (3)(d)
Iowa	Iowa Code § 554A.1
Kansas	Kan. Stat. Ann. § 84-2-316
Missouri	Mo. Rev. Stat. § 277.141 & Mo. Rev. Stat. § 400.2-316(5)
Montana	Mont. Code Ann. § 30-2-316 (3)(d)
Nebraska	Neb. Rev. Stat § 2-316 (3)(d)
Ohio	Ohio Rev. Code Ann. § 1302.29 (c)(4)
Oklahoma	Okla. Stat, tit. 12A § 2-316(3)(d)
Oregon	Or. Rev. Stat. § 72.3160
South Dakota	S.D. Codified Laws § 57A-2-316.1
Texas	Tex. Business and Commerce Code Ann. § 2.316 (f)
Utah	Utah Code Ann. § 70A-2-316 (5)
Washington	Wash. Rev. Code § 62A.2-316 (3)(d)
Wyoming	Wyo. Stat. Ann. § 34.1-2-316 (c) (v)

Each of these statutes is loosely based upon the U.C.C. and its requirements, with special modifications applying to the livestock industry.²⁶ The exact language of the various statutes, however, is far from uniform.²⁷

The least complex versions of these statutes have been enacted by Texas and Missouri. The text of the relevant section of the Texas statute reads “[t]he implied warranties of merchantability and fitness do not apply to the sale or barter of livestock or its unborn young.”²⁸ Like other statutes pertaining to livestock warranties, the Texas version is based on the U.C.C. and offers a blanket exclusion of the warranties, rather than a more constrained exclusion as seen in some other states.²⁹ Missouri’s

²³ See generally *Colorado-Kansas Grain Co. v. Reifschneider*, 817 P.2d 637 (Co. App. 1991) (identifying Indiana, Michigan, Missouri, Nebraska, Ohio, Illinois, and Texas as states holding that farmers are merchants, and Alabama, Arkansas, Iowa, Kansas, South Dakota, and Utah as states holding that farmers are not merchants.)

²⁴ *Id.*

²⁵ The states with these limitations are Alabama, Arkansas, Illinois, Iowa, Kansas, Missouri, Montana, Nebraska, Ohio, Oklahoma, Oregon, South Dakota, Texas, Utah, Washington, & Wyoming.

²⁶ See generally U.C.C. § 2-316 (2005).

²⁷ For example, compare IOWA CODE § 554A.1 (2006) and TEX. BUS. & COM. CODE ANN. § 2.316(f) (2007).

²⁸ TEX. BUS. & COM. CODE ANN. § 2.316(f) (2007).

²⁹ Compare TEX. BUS. & COM. CODE ANN. § 2.316(f) (2007) with ARK. CODE ANN. §4-2-316(3)(d)(ii) (2007), which includes language limiting the application of the warranty exclusion.

warranty exclusions for livestock can be found in two locations within its code, but both sections essentially state that without an express warranty, the seller of livestock is not liable for any damage caused by the livestock.³⁰

A more common approach is to limit the warranty exemption to disease. The states that categorically exclude the application of warranties to livestock with respect to disease include Alabama,³¹ Montana,³² Nebraska,³³ South Dakota,³⁴ Utah,³⁵ and Wyoming.³⁶ These states simply eliminate disease in livestock from the possible reasons for a breach of warranty action.³⁷ Another set of states that includes Arkansas,³⁸ Illinois,³⁹ Kansas,⁴⁰ Ohio,⁴¹ Oregon,⁴² and Washington⁴³ limit the exception to the warranty to those who sold livestock without knowledge of disease.⁴⁴ In other words, if the seller has knowledge that the livestock are diseased, then he does not get the benefit of the exemption to the implied warranties.⁴⁵ From a somewhat different perspective, these statutes offer sellers of livestock protection from liability for selling livestock with conditions that they did not know existed, while still offering protection from fraud and deceptive practices to those purchasing the animals.⁴⁶

Another noteworthy aspect of several of these statutes is the requirement that the livestock producer be in compliance with state and federal animal health programs. Alabama,⁴⁷ Illinois,⁴⁸ Oklahoma,⁴⁹ and Washington⁵⁰ require compliance with all laws and regulations, state or federal, that apply to animal health and disease. With this approach, the producer will not be afforded the protection of the warranty exclusion if the legal requirements of the animal health programs are not met.⁵¹

Two states do not offer the warranty exception to animals sold for immediate slaughter. Both Kansas⁵² and Oregon⁵³ limit the applicability of their statutes' warranty exclusions to preharvest transfers of ownership. This exception to the livestock warranty exception prevents livestock owners who sell to packers and slaughter facilities from receiving the benefits of limited liability.⁵⁴ In essence, this variation of the warranty exception allows the final owner before slaughter to be held responsible for any disease or condition without having the opportunity to show that a previous owner caused the problem or defective condition.

³⁰ MO. REV. STAT. § 277.141 (2007); MO. REV. STAT. § 400.2-316(5) (2007).

³¹ ALA. CODE § 2-15-4 (2007).

³² MONT. CODE ANN. § 30-2-316(3)(d) (2005).

³³ NEB. REV. STAT. § 2-316(3)(d) (2007).

³⁴ S.D. CODIFIED LAWS § 57A-2-316.1 (2007).

³⁵ UTAH CODE ANN. § 70A-2-316(5) (2007).

³⁶ WYO. STAT. ANN. § 34.1-2-316(c)(v) (2007).

³⁷ See state statutes, *supra* notes 31-36.

³⁸ ARK. CODE ANN. § 4-2-316(3)(d)(iii) (2007).

³⁹ 810 ILL. COMP. STAT. ANN. 5/2-316(3)(d) (2007).

⁴⁰ KAN. STAT. ANN. § 84-2-316(3)(d) (2006).

⁴¹ OHIO REV. CODE ANN. § 1302.29(c)(4) (2007).

⁴² OR. REV. STAT. § 72.3160(3)(d) (2005).

⁴³ WASH. REV. CODE § 62A.2-316(3)(d) (2007).

⁴⁴ See state statutes, *supra* notes 38-43.

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ ALA. CODE ANN. § 2-15-4 (2007).

⁴⁸ 810 ILL. COMP. STAT. ANN. 5/2-316(3)(d) (2007).

⁴⁹ OKLA. STAT. tit. 12A § 2-316(3)(d) (2007). It should be noted that the Oklahoma statute expressly excludes its application from the sale or barter of horses.

⁵⁰ WASH. REV. CODE § 62A.2-316 (3)(d) (2007).

⁵¹ See state statutes, *supra* notes 47-50.

⁵² KAN. STAT. ANN. § 84-2-316 (3)(d) (2006).

⁵³ OR. REV. STAT. § 72.3160(3)(d) (2005).

⁵⁴ State statutes, *supra* notes 52-53.

The most unique livestock warranty exemption has been enacted by Iowa.⁵⁵ Unlike the statutes enacted by other states, Iowa places an affirmative disclosure obligation on the seller of livestock before he can be entitled to the warranty exception.⁵⁶ A seller of livestock must disclose (1) that the livestock have been inspected in accordance with federal and state animal health regulations and have been found to be free from infectious disease,⁵⁷ and (2) that the person selling the livestock has been the owner for the past thirty days.⁵⁸ If the present owner has not owned the livestock for at least thirty days and the animals have been brought together from two or more locations, then the animals are considered “assembled livestock” with special reporting requirements that are beyond the scope of this discussion.⁵⁹ A buyer can require these disclosures to be confirmed in writing before acceptance.⁶⁰ In addition to the state and federal health program compliance issues discussed above, the Iowa statute’s disclosure requirements set forth another avenue for a cause of action in breach of warranty if not strictly followed by the livestock producer or seller.

The varying approaches of these sixteen states offer a variety of methods to keep liability from attaching to livestock producers under a breach of warranty theory. Each approach has its own limitations, exclusions, and implications, but they all offer some protection to help prevent producers from bearing the costs of litigating the condition of their animals once they are sold. From broad and blanket exceptions to implied warranties, to the unique reporting requirements relating to animal ownership, and including the various knowledge and stage of production limitations in between, these statutes offer considerable guidance on potential approaches to addressing liability under a warranty theory.

Strict Liability

Although the concept of strict liability in livestock disease control is not as well defined as the warranty theory, it too could lead to additional liability for livestock producers if their livestock are considered products.⁶¹ As a general proposition, strict liability is imposed when one introduces an unreasonably dangerous product into the stream of commerce.⁶² The additional traceability associated with NAIS could lead to further application of the doctrine of strict liability, which has traditionally been limited by the anonymity within the livestock industry.⁶³ This traceability could allow a plaintiff to determine which person along the production chain was the animal’s owner when the defect developed.⁶⁴ Little guidance has been offered by the states in the form of statutory enactment or even court decisions with regard to the applicability of strict liability and animal identification. The most that can be offered at this time is a discussion of the way that strict liability has been previously applied within the livestock industry.

While strict liability has already been applied to the livestock industry in some situations, its definition raises questions about its application to the sale of livestock. Strict liability, in terms of the sale of products, arises when the buyer proves that the goods were unreasonably dangerous and that (1) the seller was in the business of selling goods, (2) the goods were defective when they were in the seller’s hands, (3) the defect caused the plaintiff’s injury, and (4) the product was expected to and did

⁵⁵ See IOWA CODE § 554A.1 (2006).

⁵⁶ IOWA CODE § 554A.1(1) (2006).

⁵⁷ IOWA CODE § 554A.1(1)(a) (2006).

⁵⁸ IOWA CODE § 554A.1(1)(b)(1) (2006).

⁵⁹ IOWA CODE § 554A.1(1)(b)(2) (2006). For further discussion of assembled livestock, see the text of the Iowa Code.

⁶⁰ *Id.*

⁶¹ See ROBERTS & O’BRIEN, *supra* note 2, at 3.

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.*

reach the consumer without substantial change in condition.⁶⁵ Animals, because of their mutability and tendency to be affected by the purchaser, are often found not to be products to which strict liability can apply.⁶⁶ Some jurisdictions, on the other hand, have held that the characteristics of the product need not be fixed to apply strict liability and thereby extended the application to livestock.⁶⁷

In jurisdictions that have considered this issue, the determination of whether the animal qualifies as a product depends upon the nature of the problem with the animal and even the type of animal involved.⁶⁸ Animals sold for pets are more commonly held to be products if they were diseased or if the defect began while they were under the seller's control,⁶⁹ however, pets that later develop the disease or defect have been held not to be products because outside circumstances or even the new owners can influence the condition.⁷⁰

Following this line of reasoning, if livestock are considered products, those who have owned the animal at some point throughout the production chain can be held strictly liable for any disease or defect that arose during their period of ownership.⁷¹ For example, if a rancher purchases a diseased animal with a communicable disease that causes the rest of his otherwise healthy herd to become infected, that purchaser could attempt to trace the animal back to the point when the disease originated and have a cause of action against the owner at that time.⁷² In the past, courts have been reluctant to hold that livestock, those animals that are grown for food, are products for the purposes of strict liability.⁷³ The reasoning behind the courts unwillingness to classify livestock as products for strict liability purposes is that the animals are sold and raised for the specific purpose of changing, growing, and reproducing.⁷⁴ "Living creatures...are by their nature in a constant process of internal development and growth and they are also participants in constant interaction with their environment around them as part of their development."⁷⁵

If livestock are determined to be products, a producer's liability could increase because a dangerous or defective product has been introduced into the stream of commerce. The NAIS has the potential to extend the application of strict liability to producers that were otherwise insulated from the legal process, because the anonymity built into the production and processing systems could be dissolved by the new information maintained within the system. Plaintiffs would still have to overcome the fact that the condition of the animals within the livestock industry will always change and develop over time. Thus, the application of a strict liability theory would only be affected by the NAIS because of the added transparency which could implicate additional producers along the production chain, and courts would likely continue to take into account the mutable characteristics of the livestock.

⁶⁵ BLACK'S LAW DICTIONARY 932 (8th ed. 2004).

⁶⁶ See MICHAEL T. ROBERTS & HARRISON PITTMAN, NAT'L AGRIC. L. CTR., LEGAL ISSUES IN DEVELOPING A NATIONAL PLAN FOR ANIMAL IDENTIFICATION (2004), available at http://www.nationalaglawcenter.org/assets/articles/roberts_animalid.pdf.

⁶⁷ Christopher H. Hall, Annotation, *Live Animal as "Product" for Purposes of Strict Liability*, 63 A.L.R.4th 127 (1988-2007) (citing *Sease v. Taylor's Pets, Inc.*, 700 P.2d 1054 (Or. Ct. App. 1985) (rabid pet skunk held to be product regardless of mutable characteristics)).

⁶⁸ See *id.*

⁶⁹ See *Beyer v. Aquarium Supply Co.*, 404 N.Y.S.2d 778 (N.Y. Sup. Ct. 1977) (hamsters that were diseased at time of sale were products); see also *Sease v. Taylor's Pets, Inc.*, 700 P.2d 1054 (Or. Ct. App. 1985) (skunk sold while in incubation stage of rabies was a product).

⁷⁰ *Whitmer v. Schneble*, 331 N.E.2d 115 (Ill. App. 1975) (female Doberman pincher's aggressive nature was the result of a pregnancy that was conceived while under the new owners control, and therefore the animal did not qualify as a product).

⁷¹ ROBERTS & O'BRIEN, *supra* note 2, at 3.

⁷² See *id.*

⁷³ Christopher H. Hall, Annotation, *Live Animal as "Product" for Purposes of Strict Liability*, 63 A.L.R.4th 127 (1988-2007).

⁷⁴ See *id.*

⁷⁵ *Anderson v. Farmers Hybrid Com. Inc.*, 408 N.E.2d 1194, 1199 (Ill. App. 1980) (hogs that developed "bloody dysentery" were not products for purposes of strict liability).

Negligence

In addition to the theories of strict liability and warranty, negligence could also be a cause of action against livestock producers that would increase their exposure to liability upon implementation of the NAIS.⁷⁶ Generally, negligence is the failure to exercise the standard of care that a reasonably prudent person would have exercised in a similar situation.⁷⁷ The reasonable person standard is designed to determine whether someone exercised the degree of knowledge, attention, intelligence, and judgment that society requires of its members for the protection of their own and others' interests.⁷⁸ As with strict liability, the statutory guidance regarding the application of a negligence theory to the production of livestock is limited, and the best that can be offered is a discussion of the possible effect of the NAIS on its application to livestock.

Under a negligence theory, plaintiffs would have to show that the livestock producer breached its standard of care by not acting in the way that a reasonably prudent livestock producer would act under similar circumstances.⁷⁹ This reasonableness standard is a question of fact that must be established by the plaintiff, who must also show that the breach of the producer's duty under that standard was the proximate cause of any damage.⁸⁰ As has been discussed throughout this work, animal identification technologies might allow for meat packers, down-stream owners, or even consumers who act as plaintiffs to identify which previous owner or owners of the animal did not meet the reasonable person standard and to impose liability upon those owners.⁸¹

Unlike other causes of action, however, negligence depends on an evolving standard that could effectively require livestock producers to use animal identification technologies or the NAIS to avoid liability for the spread of disease.⁸² It is possible that animal identification and the NAIS could become standard practices within the livestock industry that must be complied with in order to meet the reasonable person standard.⁸³ The line of reasoning that would require utilization of animal identification techniques to avoid liability for negligence may parallel the approach associated with the spread of venereal disease within the human population.⁸⁴ Over the course of several years, a standard developed to require the adoption of methods to prevent the spread of disease based upon the methods commonly used within the population.⁸⁵ If a similar requirement was imposed upon the livestock industry, one producer could be compared to another producer in similar circumstances to establish that a reasonable livestock producer would employ animal identification techniques under the NAIS to prevent the spread of disease in that situation.⁸⁶

Initially, the NAIS's effect on the theory of negligence resembles the other causes of action, with the only additional liability being imposed because of the increased transparency created by the system. The difference between negligence and the other causes of action stems from the reasonable person standard, which introduces the comparison of a producer to others who are similarly situated. If the use of the NAIS becomes commonplace, the use of animal identification techniques may be required in order for a producer's actions to be deemed reasonable. Overall, the amount of liability faced by a livestock producer under a negligence theory is not only associated with the added transparency brought about by the NAIS, but its overall level of adoption and use within the industry.

⁷⁶ See ROBERTS & O'BRIEN, *supra* note 2, at 3.

⁷⁷ BLACK'S LAW DICTIONARY 1061 (8th ed. 2004).

⁷⁸ BLACK'S LAW DICTIONARY 1294 (8th ed. 2004).

⁷⁹ ROBERTS & O'BRIEN, *supra* note 2, at 3.

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.*

⁸³ *See id.*

⁸⁴ See 65 C.J.S. Negligence §171 (2006); see also *Meany v. Meany*, 639 So.2d 229, 233 (La. 1994).

⁸⁵ *Id.*

⁸⁶ ROBERTS & O'BRIEN, *supra* note 2, at 3.

Conclusion

Regardless of whether liability is imposed under a theory based on warranty, strict liability, or negligence, the producer may be responsible for the damage that results from a defective or dangerous animal.⁸⁷ In general, the NAIS and animal identification have the potential to increase the exposure to liability by increasing the transparency in the production process, which causes great concern among some livestock producers.⁸⁸ Some states have mechanisms in place to address some of these concerns by limiting livestock producers' exposure to claims of breach of warranty.⁸⁹ Strict liability and negligence, on the other hand, have received far less statutory attention and are generally in the same position as before the NAIS, but with the added possibility of liability imposed on those owners down the production chain who were previously protected by the lack of traceability.⁹⁰ In addition, animal identification may eventually become the standard within the industry, and producers who refuse to participate could be found to have acted unreasonably and face additional liability based on negligence.⁹¹ While livestock producers have always been potentially liable for the animals that they produce, the NAIS has the potential to increase their liability by introducing additional transparency into the production and processing system and necessitating its adoption in order for a producer's actions to be considered reasonably prudent.

⁸⁷ ROBERTS & O'BRIEN, *supra* note 2, at 1.

⁸⁸ *Id.*

⁸⁹ States limiting warranty liability *supra* note 25.

⁹⁰ See ROBERTS & O'BRIEN, *supra* note 2.

⁹¹ *Id.* at 3.