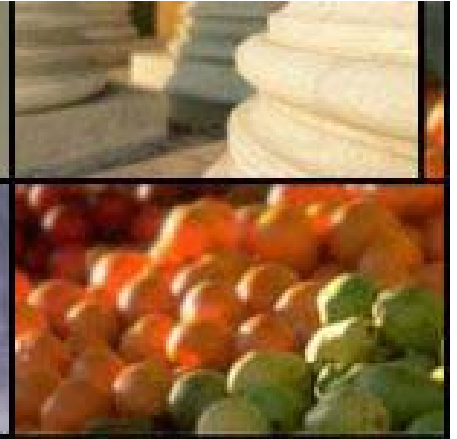


The National Agricultural Law Center



University of Arkansas
School of Law



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Confidentiality and Liability Under the National Animal Identification System

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What we'll cover today

- Confidentiality
 - What information is collected?
 - What does USDA say about confidentiality?
 - How could someone obtain the information?
- Liability
 - What does USDA say about liability?
 - Possible theories of liability
 - Does your liability increase if you participate in NAIS?
- Religious Freedom
 - *Farm-to-Consumer Legal Defense Fund v. Vilsack*



Confidentiality

What information is collected?

What does USDA say about confidentiality?

How could someone obtain the information?

What Information is Collected: Premises Registration

- Premises Identification Number
- Name of Entity (business name)
- Contact Person for Premises
- Street Address
- City, State, & ZIP (or geographic coordinates)
- Contact Phone Number
- Operation Type (farm/ranch, processor, vet, lab etc)
- Date activated, date retired and reason retired
- Each state/tribe may also have additional information that they require
 - Maintained on state level only. Additional information is NOT part of National Premises Information Repository

What Information is Collected: Animal Identification

- All Premises Registration Information
PLUS
- Personal Identification Number will be “associated with the animal identification numbers of the identification tags or devices distributed to their premises.”
 - Associated in AIN Management System



What Information is Collected: Animal Tracing

- All Premises Registration Information
PLUS
- All Animal Identification Numbering System Information
PLUS
- Animal Movement Records
 - Maintained by state or private service provider

What does USDA say about Confidentiality?

- “Federal law protects individuals' private information and confidential business information from disclosure. Animal health officials will only request access to animal identification records in the case of an animal health event”
 - Quote from APHIS, NAIS, “Animal Identification”
- “If USDA needs animal movement and location information to respond to an animal health event, data will be requested from the private or State databases where it is held.”
 - Quote from NAIS User’s Guide
- “USDA maintains only limited premises registration information and will not have direct access to animal identification or movement records.”
 - Quote from APHIS, “NAIS FAQ”



How Could Someone Obtain the Information?

- Freedom Of Information Act (FOIA) Request
- Court Subpoena Power

Freedom of Information Act

- What is FOIA?
 - Act that gives public the right to access federal agency records by requesting them.
- What records may FOIA apply to?
 - “agency records” maintained by “agencies” within the executive branch of government.
 - Records either created or maintained by an agency AND
 - Under agency control at the time the FOIA request was made
- What records does FOIA **not** apply to?
 - Private companies, persons who receive federal contracts or grants, private organizations, or state or local governments
 - Note that all states have their own version of state-level FOIA laws.



Exemptions to FOIA

- Classified secret information/national defense
- Internal Personnel Rules and Practices
- Information Specifically Exempted by Other Statutes
- Trade Secrets, Commercial or Financial Information
- Privileged Information
- Personal Information Affecting a Person's Privacy
- Records Compiled for Law Enforcement Operations
- Records of Financial Institutions
- Geographical Locations of Wells

Must USDA Release NAIS Information in Response to FOIA Requests?

- NO
 - According to Judge Sullivan in D.C. District Court
- Reasoning
 - It is information specifically exempted by 7 U.S.C. §8791.
- While USDA also claimed that the information might contain trade secrets, commercial or financial information, Sullivan did not rule whether that exemption applied

Zanoni v. USDA, 605 F. Supp.2d 230 (D.C. 2009)

What Statute Exempts it from Disclosure?

- **7 U.S.C. §8791** (Part of the 2008 Farm Bill)
- Requires that “any officer or employee of the Department of Agriculture ... shall not disclose ... information provided by an agricultural producer or owner of agricultural land concerning the agricultural operation, farming or conservation practices, or the land itself”
 - “Agricultural operation” includes “the production and marketing of agricultural commodities and livestock
- As a result, “§8791(b)(2)(A) does apply to Zaroni’s FOIA request and her request was properly denied under FOIA Exemption (3)”

Exceptions to 7 U.S.C. §8791

- It may be disclosed to a “person or Federal, State, local or tribal agency“ that is working with a USDA program for the purpose of
 - A. providing technical or financial assistance with respect to the agricultural operation, agricultural land, or farming or conservation practices; or
 - B. responding to a disease or pest threat to agricultural operations
- They may disclose “payment information (including payment information and the names and addresses of recipients of payments) under any Department program that is otherwise authorized by law”
- They may disclose NAIS information if it has been transformed into statistical or aggregate form without naming any
 - individual owner, operator, or producer; or
 - specific data gathering site
- Agricultural producer/owner of agricultural land may waive these protections and allow the release of the information. However, farm program benefits may not be conditioned on the consent of the producer to release the information

Court Subpoena Power

- In the course of litigation, courts have “subpoena power” to obtain information necessary to resolve the case that’s being heard.
- Information exempted under FOIA is not automatically immune from subpoena.
- Instead, it may be obtained through discovery if the party’s need for information exceeds the government’s need for confidentiality.
- No court cases have addressed this in the NAIS context.



Liability

What does USDA say about liability?

Possible theories of liability

Does your liability increase if you participate in NAIS?

What does USDA say about liability?

- “USDA and the States will only collect and retain necessary identification data in the preharvest production chain and through final inspection at slaughter establishments. USDA would emphasize that the NAIS, in serving as a repository of verifiable data, will increase the accuracy of animal health information and will not expose producers to unwarranted or additional liability”
 - -USDA: Q&A on NAIS



Possible Theories of Liability

- Warranty
- Strict Liability
- Negligence

What is a “Warranty”?

- Warranty of merchantability:
 - Guarantee that an item is fit for the ordinary purpose for which it is used
- Warranty of fitness:
 - 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 buyer’s intended use.
- Warranties can be expressly stated OR implied
- Only “merchants” can give warranties

Can a warranty theory lead to liability?

- Possibly, yes. However, warranties are only given by “merchants,” and courts in the past haven’t always found that farmers are merchants. This seems to be changing nowadays, though.

Is there anything that can prevent breach-of-warranty actions for livestock?

- Yes, sixteen states have created exceptions to prevent liability from attaching to livestock producers



State Exceptions to Warranties

- Statutes limiting or excluding warranties on livestock in general
- Statutes limiting the warrant exception to disease
- Statutes limit the exception to those who sold livestock without knowing they are diseased
- Statutes limiting the exception to those animals that are not sold for immediate slaughter
- A statute limiting the exception only to those producers who affirmatively report that the animals are free of disease



What is “strict liability”?

- Liability imposed when one introduces a defective product that is unreasonably dangerous into the stream of commerce.

Is it a defense to be careful?

- NO!
- Under strict liability, one can be liable even if he used best management practices in good faith.



Elements of Strict Liability

- The defective and unreasonably dangerous condition of the defendant's product
- Causal connection between the defective condition and the plaintiff's injuries or damages
 - Usually involves proof that the product did not change substantially after it left the control of the defendant

Can strict liability lead to liability?

- Maybe. For it to happen, animals must be defined as “unreasonably dangerous products”
- The majority of courts say that animals can not be defined as products because of their mutable, changing nature
 - aka, it “changes substantially” once it leaves their hands
- However, a couple of courts have held that animals (household pets, specifically) are “products.”



What is “Negligence”?

- The failure to exercise reasonable care

What is “reasonable care”?

- What a reasonably prudent person would do in the same or similar circumstances

Negligence Elements

- Duty
 - Were you responsible for doing something/not doing something to a certain person?
- Breach of Duty
 - Did you fail in your responsibility?
- Harm
 - Did someone get hurt?
- Causation (two part)
 - Were you the reason that someone got hurt?
 - Could you have foreseen that someone would get hurt?

Can a negligence theory lead to liability?

- Yes.
- If a plaintiff can prove that the producer/feeder/processor failed to use reasonable care and that failure led to plaintiff's injury, the producer/feeder/processor can be held responsible under a theory of negligence.
- Negligence can be reduced or even eliminated by the use and documentation of best management practices on the animals.
- Documentation supporting BMP: Treatment records, animal health programs, inputs, quality assurance records.

Does your liability increase if you participate in NAIS?

- Not directly. Livestock producers are currently liable for the livestock they produce. They will continue to be held to the same standard
- **However**, NAIS helps identify livestock producers in 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, and can lead to increased liability exposure.

How are liability and confidentiality connected?

- For increased liability exposure to be an issue, NAIS information must be released. For example:
 - Plaintiff eats contaminated meat and files suit against the processor.
 - The processor tries to reduce its liability by bringing in the producer who raised the animal.
 - In order to identify the producer, the processor files a FOIA request for the information, which USDA denies because of 7 U.S.C. §8791.
 - The producer then requests a subpoena from the court, which would force USDA to turn over the information
 - The court will decide **if the producer's need for the information exceeds the government's need for confidentiality**, and from that make a decision on whether to issue the subpoena.
 - If the subpoena is issued, the information is turned over, and the case proceeds- this time with the producer as a party.



Religious Freedom

*Farm-to-Consumer Legal Defense Fund v.
Vilsack*

FCLD Fund v. Vilsack

- Plaintiffs- farmers in Michigan- filed suit against USDA, asserting two claims
 - That the national government was forcing national animal identification on the states and requiring both states and producers to take part.
 - That NAIS violated their freedom of religion by forcing them to adopt technology that was against their religious beliefs.

Farm-to-Consumer Legal Defense Fund v. Vilsack, ---F.Supp.2d---,
Civ. Act. No. 08-1546 (July 23, 2009)

The Court's Response: Argument #1

- “NAIS is neither a ‘federal law’ nor ‘federal regulation.’ It is an identification and tracking program developed by USDA and adopted by state agriculture departments on a voluntary basis. While that voluntariness may be influenced by such desires as [obtaining federal money] that goal does not rob state officials of decision authority.”
- “Therefore, because the source of plaintiff’s alleged injuries is independent MDA orders, enjoining the implementation and enforcement of the NAIS would not provide Plaintiffs with redress.”



The Court's Response: Argument #2

- The court held that the plaintiffs were arguing against a state law (mandatory animal identification implemented by the MDA), and not against a federal law (the voluntary NAIS).
- Therefore, the (federal) court held that it did not have jurisdiction to order state officials to conform to state law.
- The court DID NOT say whether a mandatory federal program would violate federal freedom of religion laws.



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Issues left to be addressed

- For the most part, concerns about confidentiality from FOIA requests have been addressed with the passage of 7 U.S.C. §8791.
- Liability is the much larger concern, and it has not been adequately addressed by either state or federal government.
- Liability is intertwined with confidentiality. Is NAIS information able to be subpoenaed as part of a court case?
- Would a *required* federal NAIS system violate laws on religious freedom?



What can you do?

- “If USDA does decide to make all or parts of the NAIS mandatory, we will follow the normal rulemaking process. The public will have the opportunity to comment upon any proposed regulations”

- Taken from USDA Q & A on NAIS

COMMENT!!!

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Animal Identification

Overview

An animal identification system traces the whereabouts and movement of certain animals. While government officials and private industry had been working on the issue prior to the discovery of bovine spongiform encephalopathy in late 2003, USDA announced that it would expedite its efforts in the wake of the discovery. On April 27, 2004 Secretary Veneman announced a framework for the implementation of the system called the National Animal Identification System (NAIS) that was developed with the collaboration of USDA, private industry, and state animal health officials and is largely based on earlier work done with the United States Animal Identification Plan. The plan will eventually encompass all livestock and poultry in the United States. The NAIS will provide information on the animal from the point of origin through the plant to the consumer. This information is critical in the event of a certain event such as a disease outbreak.

Note: Recently added resources are posted here.

Major Statutes

The Animal Health Protection Act
Freedom of Information Act
Uniform Commercial Code

Regulations

Regulations Pertaining to
Federal Register Rules and Regulations
Center published Federal Register Notices

Case Law

Note: Recently summarized cases are listed here.

Case Law Index for Animal Identification

Center Research Publications

Approaching Liability with
A Comparison of International
Varying State Approaches
(Pendergrass, 2007)

State Identification Statutes: Confidentiality Provisions Relating to Animal and Premises Identification
(Pendergrass, 2007)

Animal Identification and the Next Farm Bill (O'Brien, 2008)

Legal Issues in Developing a Plan for Animal Identification (Roberts and Pittman, 2004)

Animal Identification: Liability Exposure and Risk Management (Roberts and O'Brien, 2004)

Animal Identification: Confidentiality of Information (Roberts and O'Brien, 2004)



Includes:

- Overview of animal identification laws
- Listing of and links to major statutes
- Listing of and links to regulations
- Case law
- Listing of Center Research Publications
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Research Articles

- **Approaching Liability with Animal Identification** (Pendergrass)
- **A Comparison of Animal Identification Programs** (Pendergrass)

- **Varying State Approaches to Confidentiality with Premises and Animal Identification Systems** (Pendergrass)
- **State Identification Statutes: Confidentiality Provisions Relating to Animal and Premises Identification** (Pendergrass)
- **Animal Identification and the Next Farm Bill** (O'Brien)
- **Legal Issues in Developing a National Plan for Animal Identification** (Roberts and Pittman)
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