AGRICULTURAL DISPARAGEMENT LAWS
The Trend to Impose Statutory Liability on Speech

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The LDRC has formed a committee to monitor developments under the new agricultural disparagement statutes. For more information, contact the committee’s chairman, Bruce E. H. Johnson at Davis Wright Tremaine, LLP (Seattle, Washington).
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INTRODUCTION

What do you think of beef? Do you like to eat it, but eat less than you used to? Why? Do you think it’s unhealthy for you? What sort of grass grows best in your backyard? Is there a kind you’ve tried that you wouldn’t recommend? What’s your view of the fact that the Department of Agriculture does not prohibit the repackaging of eggs whose freshness date has expired? Do you worry about eating eggs that may not be as fresh as the packaging suggests? And what about Emus? Do you think raising them is a good idea or a good investment? What is your opinion?

These may sound like innocuous or even silly questions, but “silly cases” are, as one of the authors below points out, the norm under the agricultural disparagement statutes that are taking hold across the nation. As these cases develop, they illustrate the frivolous nature of the complaints that are blooming under these statutes and, more importantly perhaps, the real danger and expense of these lawsuits.

These statutes injure media defendants on two levels. First, of course, there is a financial cost to defense as in all lawsuits. But the agricultural disparagement statutes in most states appear to attempt to shift burdens imposed by the Constitution on plaintiffs in defamation actions to defendants. This unconstitutional power play, if left in place, will likely result in the granting of far fewer pretrial motions. Think, for example, what the result might have been in Auvil v. CBS “60 Minutes” if it had been the defendant’s burden to prove truth rather than the plaintiff’s burden to prove falsity.

Beyond this, there is a chilling effect that is very real. Media lawyers reviewing the statutes discussed throughout this BULLETIN will feel that chill as they come to understand the purpose and reach of these statutes. In general, they aim to prevent potential critics — including scientists or members of the media — of agricultural and aquacultural products and their producers from stating any opinion, no matter how honestly held, that cannot be proven true by that critic. The statutes then turn thermostats down even lower by heaping onto actual damages punitive, sometimes treble damages, and attorneys’ fees, all without benefit of the actual malice standard that would routinely be applied in defamation cases. See, e.g., Bruce E.H. Johnson, Alar Problems: The Auvil v. CBS Case, Part One, below (quoting plaintiffs’ experts in Auvil to the effect that predicting cancer risks “is very speculative” and that “there is no such thing as a scientific certainty because there is always tomorrow and always new evidence . . .”).

The statutes ignore the fluid nature of the scientific method. Thus, reports on ongoing scientific research are absolutely imperiled. As one author explains below,

the basis of “trial and error.” With respect to food safety, the veggie libel laws threaten to turn this into “trial and liability.”

Luther T. Munford & Hayes Johnson, The Statutes Offend Constitutional and Commonly Accepted Doctrines of Verifiability, Truth, Opinion and Scientific Inquiry, Part Two, B, below. See also Fred H. Altshuler, Perspective of an Environmentalist, Part Two, C, below (“the accepted mode of scientific analysis in public health matters does not even purport to attain certainty”).

This is vividly illustrated by the extensively publicized lawsuit brought against Oprah Winfrey by Texas cattle feed companies who objected to her response to hearing that healthy cows were fed the remains of diseased cows: “It has just stopped me cold from eating another burger. I’m stopped.” As Oprah’s defense lawyer, Chip Babcock, points out herein, if the case had been tried when the show aired — when there was only a scientific suspicion that such feeding could cause humans to contract mad cow disease — defendants could not have satisfied their burden under a statute requiring them to prove this to a reasonable certainty. Two years later, science established the link and, if the defendants had been forced to defend against plaintiffs’ statutory agricultural disparagement claim (which was ultimately dismissed), they should have won.

Many of the authors writing below refer to these statutes as “veggie libel” laws. This term may be too charming for such harmful laws. However, the term rightfully suggests that the broad constitutional shadow of libel law falls on these statutes just as it does on any claim based on allegedly injurious speech. As Bruce Johnson and Eric Stahl explain below, “First Amendment limits on defamation liability apply equally to disparagement claims.” B. E.H. Johnson and E.M. Stahl, Food Disparagement Laws: an Overview of the Constitutional Issues, Part Two, A, below. Johnson and Stahl quote Blatty v. New York Times Co., 728 P.2d 1177, 1182-83, 232 Cal. Rptr. 542 (Cal. 1986) (internal citations omitted):

Although the limitations that define the First Amendment’s zone of protection for the press were established in defamation actions, they are not peculiar to such actions but apply to all claims whose gravamen is the alleged injurious falsehood of a statement: “that constitutional protection does not depend on the label given the stated cause of action,” and no cause of action can “claim . . . talismanic immunity from constitutional limitations” . . . . Furthermore, it is immaterial for First Amendment purposes whether the statement in question relates to the plaintiff himself or merely to his property broadly defined . . . .

Given the applicable constitutional protections, much of what the agricultural disparagement statutes provide is unconstitutional.

Media defendants and lawyers must now battle statutory agricultural disparagement claims in 13 states. More are waiting in the wings. The purpose of this BULLETIN is to provide the ammunition each of you will need to win that fight.
We begin with a historical perspective on the common law tort of product disparagement and the birth of the agriculture industry’s movement for statutory protection following its disappointment in *Auvil v. CBS “60 Minutes.”* We present the anatomy of a statute fight, using North Dakota as our example. We then switch to the legal arguments you may wish to employ in defending your clients, first providing a broad view of the constitutional imperfections in the statutes. Next we analyze the statutes issue by issue: an impressive collection of experienced litigators offer “clip and save” arguments for your briefs on each of these issues. We also offer practical arguments from the environmental lawyer who represented the National Resources Defense Counsel in *Auvil.* The Appendix provides an extensive bibliography, the text of the agricultural industry’s model bill and an opinion by the Idaho Attorney General on the unconstitutionality of a proposed agricultural disparagement statute. Finally, a couple of cartoons from the popular press appear. Their presence is not simply meant to provide humor, but to illustrate, as they do best, the absurdities these new statutes create.
"ALL I SAID WAS, 'THE STEAK IS TOUGH'....!"

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PART ONE: HOW THE TROUBLE STARTED

PRODUCT DISPARAGEMENT:
THE COMMON LAW TORT

By David Heller

I. INTRODUCTION

At common law, product disparagement, or trade libel as it is also known, provides a remedy against the publication of false statements of fact that impugn the quality of a product thereby causing pecuniary loss. Although there are obvious similarities between product disparagement and defamation, the torts are considered distinct. While both torts arise from a publication, product disparagement protects a person's financial interest in a product, whereas defamation protects one's personal interest in character and reputation. In addition, as an intentional economic tort, product disparagement historically imposed stricter requirements than defamation with respect to falsity, fault and damages. Nevertheless, the elements of product disparagement are expressed in the "language" of defamation law and the tort is perhaps best discussed in relationship to defamation law.

Treatises categorize product disparagement as a form of injurious falsehood, a tort which also encompasses disparaging statements about ownership of real property (slander of title). Restatement (Second) of Torts §623 (1977); Prosser & Keeton on The Law of Torts §128, at 962-63 (5th ed. 1984); Harper, James and Grey, The Law on Torts §6.1 (2d ed. 1986). According to Prosser, "any type of legally protected interest that is capable of being sold may be the subject of disparagement." Prosser & Keeton, supra, §128 at 965. Protectable interests have included land, leases, chattel, trademarks, copyrights, id., and, more recently, apples and beef. Auvil v. CBS "60 Minutes," 800 F. Supp. 928 (E.D. Wash. 1992); Texas Beef Group v. Oprah Winfrey, C.A. No. 2-96 CV 208 (N.D. Texas 1998). "The gist of the tort is the interference with the prospect of sale or some other advantageous relation..." Prosser & Keeton, supra, at 966.

II. ELEMENTS OF DISPARAGEMENT

The elements of product disparagement are: (1) a false statement by defendant; (2) published to a third party; (3) derogatory to the plaintiff's business or property interests (4) with the requisite fault and (5) special damages. See Restatement (Second) of Torts § 623A (1977).

A. Falsity

In product disparagement, as opposed to defamation, the plaintiff has always had the burden of proving falsity. Restatement (Second) of Torts 623A comments; Prosser & Keeton, supra, at 967. Proving falsity is an essential element of plaintiff's case and if plaintiff does not prove falsity...
there is no claim. Id.

With respect to statements of opinion, originally at common law a statement of opinion could be actionable. Restatement (Second) of Torts § 623A comment e; Harper, et. al, supra, at 273. However, statements of opinion are no longer considered actionable, unless, as in defamation law, they imply undisclosed misstatements of fact. Prosser & Keeton, supra, at 967-68; R. Sack & S. Baron, Libel, Slander, and Related Problems § 4.2.4.2 (2d ed. 1994); see also Milkovich v. Lorain Journal Co., 497 U.S. 1 (1990); Redco. Corp. v. CBS, Inc., 758 F.2d 970 (3rd Cir.), cert. denied, 474 U.S. 843 (1985) (opinion based on disclosed facts not actionable as disparagement or defamation); Henderson v. Times Mirror Co., 669 F. Supp. 356 (D. Co. 1987) (expression of opinion not actionable as disparagement), aff’d, 876 F.2d 108 (10th Cir.1989).

B. Publication

The standards for publication of a disparaging statement are considered identical to those in defamation law. Restatement (Second) of Torts §630 comment a. Thus, publication of the disparaging statement must be made to a third party. The publication may be purposeful, or it may occur negligently. Id.

C. Disparagement Defined

A statement is disparaging if it is understood to cast doubt upon the quality of another’s property, and the publisher intends the statement to cast the doubt, or the recipient’s understanding of it as casting doubt was reasonable. Restatement (Second) of Torts §629 (1977). For example, stating that a product is dangerous, defective, unhealthy, or otherwise unfit for use is disparaging. See, e.g., Restatement (Second) of Torts §634 comment a.

Impugning the quality of a product may at the same time defame the personal reputation of the producer or seller of the product if the imputation implies that the merchant is dishonest or unprofessional, or that he is perpetrating a fraud upon the public by selling something that he knows to be defective. Restatement (Second) of Torts §623A comment g.

D. Defendant’s Fault

According to the Restatement, the principle basis for liability for product disparagement has been that the defendant knew that his statement was false or had a reckless disregard as to its truth or falsity, a standard later deemed “actual malice” when applied in defamation law in New York Times v. Sullivan, 376 U.S. 254 (1964). Restatement (Second) of Torts §623A comment d. In addition, the common law recognized two other bases of liability: (1) motivation by ill will (malice); or (2) intent to harm. In contrast to defamation law, product disparagement never imposed liability for simple negligence or imposed strict liability for false statements. Id; see also Prosser & Keeton, supra, at 969-70. The Restatement proposes liability be imposed when:

(a) the defendant intends for publication of the statement to result in harm to interests of the other having a pecuniary value, or either recognizes or should recognize that it is likely to do so, and
(b) he knows that the statement is false or acts in reckless disregard of its truth or falsity.

Restatement (Second) of Torts §623A. The comments to this section state that the constitutionality of this formulation is certain to be sustained, but takes no position on whether malice and intent to harm, either alone, or combined with a showing of negligence can still support liability consistent with constitutional protections. See also Sack & Baron, supra, at 653 n.71 (listing cases for and against proposition that nonpublic plaintiff must prove actual malice as element of disparagement).

E. Damages

A product disparagement plaintiff must plead and prove special damages and may recover damages that are directly and immediately caused by the disparagement. Restatement (Second) of Torts §633. Unlike in defamation, damages are not presumed, regardless of the opprobrium heaped on a product, and there is no recovery for personal damages such as emotional distress or bodily harm. These stricter requirements lead many plaintiffs to plead their case in whole or part as a defamation action where damages are more comprehensive. As for punitive damages, there seems to be no bar to such recovery, especially if fault is based on actual malice, though case law analysis of this issue is not extensive. See Sack & Baron, supra, at 657.

The chief characteristic of special damages is realized loss. Prosser & Keeton, supra, at 971 n.2. Proof of special damages usually consists of evidence of specific lost sales or diminution in sales price. Id. at 971-72; Restatement (Second) of Torts §633. Both authorities agree, though, that in certain circumstances this rule is liberalized. For instance, a plaintiff can recover for lost market share if he can show with reasonable certainty that the disparagement caused the loss. In such a case, proof may consist of eliminating any other likely cause for a decline in sales, such as a change in the market, increased competition, different sales methods or a difference in the product sold. See Restatement (Second) of Torts §633 comment h, illustration 1.

F. Privileges

All the absolute and conditional privileges from defamation law generally apply. Restatement (Second) Torts § 646A (1977); Prosser & Keeton, supra, at 974 (including, e.g., fair report of judicial proceedings and fair comment on matters of public concern). In addition, a seller or business enjoys a common law privilege to engage in “puffing” or exaggeration about the qualities of its own products. Such boasting will not be interpreted as denigrating a rival’s product either because it is regarded as a statement of opinion or because buyers disregard the importance of such exaggeration. Prosser & Keeton, supra, at 975.

III. CONSTITUTIONAL DIMENSIONS OF PRODUCT DISPARAGEMENT

The Supreme Court has not directly decided the extent to which constitutional defamation principles apply to product disparagement. In Bose Corp. v. Consumers Union, 466 U.S. 485 (1984), the Court simply treated plaintiff’s disparagement claim against a magazine as a libel claim, the Court emphasizing that it did not decide whether disparagement claims are governed by the Sullivan
standard. Id. at 499. Later, in Hustler Magazine v. Falwell, 485 U.S. 46 (1988), the Court held that a plaintiff could not end-run the constitutional aspects of defamation law by pleading emotional distress, a rationale arguably applicable to product disparagement claims against the media.

Several lower court cases decided before and after Falwell applied First Amendment defamation principles directly to product disparagement claims. See, e.g., Unelko v. Rooney, 912 F.2d 1049,1058 (9th Cir. 1990) (opinion and matters of public concern), cert. denied, 499 U.S. 961 (1991), Blatty v. New York Times Co., 42 Cal. 3rd 1033, 1042-43, 232 Cal. Rptr. 542, 728 P.2d 1177 (1986) (applying “of and concerning” requirement), cert. denied, 485 U.S. 934 (1988), see also Sack & Baron, supra, at 662 (“Indeed, where there is a media defendant publishing news or similar information, the constitutional protections evolved in the law of libel should fully apply”). According to Prosser & Keeton, these and other recent cases suggest that constitutional defamation rules apply to disparagement with respect to fault, opinion and reference to plaintiff’s product (the “of and concerning” requirement). Prosser & Keeton, supra, at 976 supplement.

However, in Auvil, the court held that the “of and concerning” principle does not apply identically to the common law of product disparagement. See B. E.H. Johnson, Alar Problems: The Auvil v. CBS Case, below. Acknowledging that the “of and concerning” principle is constitutionally required, the court reasoned that in disparagement the “of and concerning” rule requires that the false statement be directed at a specific product. Thus the “group libel” rule did not bar a product disparagement suit brought by 4,700 apple growers against 60 MINUTES. Although not one of the plaintiffs was mentioned in the broadcast, their product was.

Auvil is apparently the only reported case directly analyzing the application of the “of and concerning” principle in a common law disparagement case involving a generic product. See E. Stahl, Can Generic Products Be Disparaged? The “Of and Concerning” Requirement After Alar and the New Crop of Agricultural Disparagement Statutes, 71 WASH. L. REV. 517, 524 (1996). Its reasoning was apparently followed by the court in Texas Beef Group v Oprah Winfrey, 26 Media L. Rep. 1498 (N.D. Tex. 1998) (allowing common law product disparagement claim to proceed without addressing the “of and concerning” requirement), discussed in detail later in this BULLETIN. See C. Babcock, What’s the Beef?, Part Three, below. Here a group of cattlemen filed suit over a broadcast that in one segment questioned the safety of beef. The broadcast did not mention or identify the plaintiffs or otherwise directly connect them to the subject of the broadcast. The trial court dismissed their defamation, negligence and state law claim under the Texas False Disparagement of Perishable Food Products Act, but allowed their common law claim that beef was disparaged to go to the jury.

Auvil taken together with Oprah suggests that creative plaintiffs are trying to blur the law by prosecuting a sort of group libel claim against media defendants that is not sustainable under defamation law and hardly traditional in product disparagement law.

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ALAR PROBLEMS: THE AUVIL V. CBS CASE

By Bruce E. H. Johnson

Is it safe for a member of the media to discuss cancer risks that are based on scientific data approved by the United States Environmental Protection Agency ("EPA"), the National Academy of Sciences ("NAS"), and the United Nations' International Agency for Research on Cancer ("IARC")? Or should such a discussion be subject to a multimillion-dollar disparagement claim, because the plaintiffs believe that these agencies should be ignored in favor of plaintiffs' expert witnesses?

The various "veggie libel" statutes all have their genesis in the so-called "Alar case," also known as Auvil v. CBS "60 Minutes" - which was pending in the federal district court in Spokane between November 1990 and September 1993.¹ These statutes, to one degree or another, seek to penalize statements about perishable food products that are not (to select the Ohio law as an example) "based upon reasonable and reliable scientific inquiry, facts, and data." If the Alar case is the prototype of how such a factual determination about what is "reasonable and reliable" science will be presented to the courts - a case that involved relatively non-controversial data that were the results of almost two decades of government-mandated scientific studies - defending against "veggie libel" claims will be very expensive and difficult. Indeed, in the heat of litigation, what is "reasonable and reliable" often turns on policy choices, not scientific ones.

The Auvil lawsuit, a purported class action brought by eleven Washington State apple growers against CBS, the Natural Resources Defense Council ("NRDC"), Fenton Communications, Inc. (the NRDC's public relations firm), and three CBS network affiliates, was presented as a product disparagement case. The Auvil plaintiffs alleged that "'A' is for Apple," a report that was broadcast on the February 26, 1989, edition of 60 MINUTES, "presented verbal and visual statements to the viewing public... which were false, misleading, and without scientific foundation" and "made in reckless disregard of their truth or falsity." The plaintiffs further claimed that the broadcast, which discussed a report from the NRDC entitled Intolerable Risk: Pesticides in Our Children's Food and included a debate about the Environmental Protection Agency's regulation of Alar,² suggested to viewers "that red apples were poisonous, dangerous or harmful for human consumption," "failed to distinguish any difference between red apples that were Alar-treated and those red apples that were untreated," and did not include any opinions by "advocates for the healthy, safe nature of all red apples."


² Alar is a chemical pesticide that had been sprayed on apples since the 1960's. "Alar" was a trade name used by Uniroyal Chemical Company for daminozide. A contaminant, metabolite, and breakdown product of daminozide is unsymmetrical 1, 1 dimethylhydrazine (UDMH), which was a component of rocket fuel and of particular concern to EPA scientists.
Intolerable Risk and the 60 MINUTES program were based primarily on EPA data, which involved at least five scientific studies from 1973 to 1984 that demonstrated with statistically significant results a correlation between ingestion of Alar and various types of tumors in certain lab animals. By 1989, the EPA had obtained additional tests, showing the same results. Citing these various studies, the scientists who wrote Intolerable Risk calculated the increased consumption of apple products by children and stressed that continued use of Alar posed a special lifetime risk of cancer to children because of their heavy consumption of apple juice and other apple products. These calculations were quite straightforward, and supportable by reference to ten years of scientific studies (which were indeed reaffirmed by the EPA in 1992 and the NAS in 1993), but they formed the centerpiece of the plaintiffs' allegations in the Auvil case and the basis for plaintiffs' challenge to the CBS broadcast.

Alar was not a new problem. In 1986, it had been the target of a nationwide consumer boycott led by Ralph Nader and joined by major grocery chains and juice companies. The EPA had attempted to remove Alar from the market in 1984 and 1985 but backed down in the face of objections by Uniroyal and pro-pesticide scientists. By 1987, Agency scientists had concluded that "the evidence is more than adequate" to classify UDMH, a breakdown product of daminozide or Alar, "as a carcinogen in animal test systems," but the EPA still awaited the results of additional Uniroyal tests before determining whether to take any action. On February 1, 1989, three weeks before the 60 MINUTES broadcast, the Agency announced that preliminary results from the Uniroyal tests showed "an inescapable and direct correlation between exposure to UDMH and the development of life-threatening tumors in test mice" and again began proceedings to remove Alar from the market.

The 60 MINUTES broadcast never mentioned the Auvil plaintiffs or indeed any of the 4,700 Washington State apple growers who allegedly were members of the "class" action. Thus, under traditional "group libel" rules and First Amendment "of and concerning" doctrine outlined in Sullivan, it seemed clear that the claims were not cognizable. In January 1992, CBS moved to dismiss the complaint because the broadcast was not "of and concerning" any of the plaintiffs. In June 1992, U.S. District Court Judge William Fremming Nielsen denied the motion and allowed the plaintiffs to proceed with product disparagement claims against CBS, even though the court held that no single grower could satisfy the Constitution's "of and concerning" requirement, if this were a defamation action. The trial court thus allowed the case to proceed to discovery against CBS on the issue of falsity.

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4 Two weeks later the court dismissed claims against NRDC and Fenton, applying traditional "of and concerning" principles and holding that the plaintiffs lacked standing to sue because the statements attributed to plaintiffs to NRDC and Fenton, both in Intolerable Risk and on the 60 Minutes broadcast, had disparaged "at least the whole agricultural world." Auvil 800 F. Supp. 941, 944 (E.D. Wash. 1992). Thus, statements by an NRDC staff attorney, who was quoted in the broadcast, were not actionable because they were "directed to EPA inaction, not apples." Id. The court also held that the NRDC's Intolerable Risk report "is not about apples" or "about the State of Washington," but rather "about children and pesticides." Id. at 943.
With the district court's denial of the "of and concerning" motion to dismiss, the plaintiffs and CBS were suddenly launched into a thirteen-month odyssey to determine the alleged truth or falsity of statements about future cancer risks made in the 60 MINUTES broadcast. The parties exchanged thousands of pages of documents, many involving the two decades of scientific studies of Alar and other pesticides. The plaintiffs then selected eight expert witnesses to present their claim that the broadcast was false because Alar allegedly was not a potent carcinogen and did not present increased risks to children. CBS selected four scientific and medical experts to testify in support of its position.

Oddly enough, when CBS lawyers took depositions of the plaintiffs' experts, this challenge withered and the great debate about the safety of Alar never took place. Rather than present counter-evidence establishing the safety of Alar and thus the falsity of the assertions made by NRDC and Consumers Union spokespersons in the broadcast, the plaintiffs' experts quibbled with the conclusions by the EPA, NAS, and IARC, but offered little more than their apparent lack of concern about risks from pesticides and their personal view that cancer risks should be downplayed or even ignored by the media until cancer causation is proven with certainty.

Thus, one of them, Dr. Robert Olson, insisted the "true risk value [of Alar] is unknown." Another, Dr. Paul Slovic, testified that "[t]he whole enterprise is very speculative" and that verification of risk estimates, such as those contained in Intolerable Risk and discussed on the CBS broadcast, was "beyond the capabilities of science." A third expert witness, Dr. Joseph Rosen, admitted that "[w]hether in fact [pesticides] cause cancer and birth defects, your guess is as good as mine." Dr. Christopher Wilkinson, another plaintiffs' expert, demurred when asked whether he could testify that Alar was in fact not a carcinogen, saying that "you will never prove a negative." Another, Dr. Elizabeth Whelan, conceded that "all but one of the proven carcinogens (the exception is arsenic) have been found also to cause cancer in laboratory animals" and refused to opine that Alar was not a carcinogen because, as she said, "we cannot prove a negative." Dr. Whelan also admitted "there is no such thing as a scientific certainty because there is always tomorrow and always new evidence and you never know what the next day will bring."

Yet, even as they conceded that they were unable to offer any evidence that would prove the allegations in the 60 MINUTES story false, these experts took political potshots at regulatory science and the EPA and NAS establishment. In essence, the experts' scientific debate had suddenly boiled down to a policy debate.

Because the 60 MINUTES broadcast was based upon the predictive science of risk assessment, the experts' views about Alar seemed to be premised more on political beliefs than on the scientific method, and their testimony often had a theological tone. Thus, Dr. Whelan announced that as far as she was concerned, there was no "scientific view" that was "contrary to ours," while Dr. Wilkinson insisted that "scientists who are properly trained" will assert that "Alar is safe" and that those with a contrary view are "very much in [the] minority." During his deposition, Dr. Olson

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5 Half of these witnesses were affiliated with a lobbying group called the American Council for Science and Health, an organization funded in major part by the chemical and pesticide industries.
announced that the issue of children's susceptibility to cancer was, in his view, "not a widespread concern." Why? "Well," he said, "it's not a concern of mine, therefore in a sense it's not widespread, because it doesn't include me."

As a result, despite their experts' cries of "bad science" or "junk science," it became evident during these depositions that the plaintiffs' position was in essence one of generalized optimism about pesticides and the environment, which fueled their determination to punish CBS because it had allowed the pessimists an opportunity to present their views during the 60 MINUTES broadcast. As for the accumulated animal data showing the dangers of Alar, the plaintiffs argued that EPA, the IARC, and the other public agencies that had identified Alar as a probable human carcinogen were simply wrong. They further contended that these test results should be ignored because "mice are not little men" and because some of the tests had methodological flaws.

Displeased by the testimony offered by the CBS experts, who held contrary views, the plaintiffs moved to strike their opinions, claiming that their evidence was not "scientific" because CBS had not specifically identified any deaths caused by the actual use of Alar on fruit. CBS responded by quoting the plaintiffs' own expert Dr. Wilkinson, who conceded that epidemiological tools were too imprecise to provide any guidance regarding whether the NRDC risk estimates on Alar were accurate. The trial court, applying the test in Daubert v. Merrell Dow Pharmaceuticals, 509 U.S. 579 (1993), denied the motion and permitted the CBS evidence to the extent it was supported by government tests and reports.

For all the cosmic questions posed, the ultimate issue in the Alar case really was whether optimists can recover for product disparagement against those who publicize the views of pessimists. Nor would it have been surprising that the ultimate message in the broadcast was objectively unverifiable, given the attention to generalized issues of cancer causation and to questions of what might have happened during the lifetimes of those who were children in 1989 if Alar had remained on the market.

After extensive expert discovery, CBS moved for summary judgment, arguing that the broadcast was not verifiably false and thus was not actionable under Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767 (1986). The plaintiffs responded that the apparent absence of any human deaths attributed to Alar consumption meant that the pesticide was safe and suggested that all animal data relied upon by the EPA, IARC, NAS, and the United States Congress were meaningless. Meanwhile, the plaintiffs also sought to avoid the additional evidence that had accumulated since they filed their lawsuit, including the EPA's October 1992 final assessment of daminozide and UDMH, in which the Agency again concluded that Alar was a probable human carcinogen, and a NAS June 1993 report on children and pesticides that corroborated many of the important conclusions in Intolerable Risk.

On September 13, 1993, the district court granted CBS's motion for summary judgment, ruling that the 60 MINUTES broadcast was not actionably false and that the various cancer risks presented in the CBS broadcast were ultimately unverifiable. The plaintiffs appealed to the Ninth
Circuit, which affirmed in March 1995. The Supreme Court denied certiorari in 1996.

There is an ironic postscript, given that the Auvil case was ostensibly about truth and falsity in public debates. With the loss in Auvil, foes of government regulation of pesticides, chemicals, and similar products turned to the state legislatures for relief. Again, private parties were the targets – critics, activists, environmentalists, and the media that publicized and discussed health risks – but in the process the Auvil lessons were recast, downplayed, or even ignored. Despite the determination that the 60 MINUTES broadcast was not actionably false, the same public relations machine that had supported the Auvil lawsuit invented a new myth – the so-called “Alar scare” – and attempted to persuade state legislatures that this 1989 incident illustrated the need for toughened product disparagement legislation. In 1996, reviewing several years of conventional wisdom, the Columbia Journalism Review discussed this “media myth” – that there had been “no real health risk” from Alar – and surveyed the results of the organized “disinformation campaign” against the Alar opponents and the claims that the Alar problem was either a “hoax” or a “panic [that] originated from a controversial report of questionable science.”6

Of course, this newest public relations battle now continues in state after state, long after the original Alar controversy ended – with no scientific evidence that the risks from this dangerous pesticide had been substantially falsified or exaggerated by its opponents. History is sometimes written by the winners; sometimes by angry losers. Whether truth or falsity will win in this new public forum remains to be seen.

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THE MOVEMENT BEGINS:
THE MODEL BILL FOR AGRICULTURAL DISPARAGEMENT STATUTES

By John Margiotta

I. THE ALAR SCARE AND ITS AFTERMATH

Searching for the genesis of the 13 agricultural disparagement bills that have passed into law in the 1990's is not a difficult task. All were conceived and passed after the 1989 airing of a 60 MINUTES show highlighting the dangers of Alar, a chemical pesticide which was once commonly sprayed on apples, and the subsequent lawsuit. See B.E.H. Johnson, Alar Problems: The Auvil v. CBS Case, above.


Defeated in their inaugural try, farmers and industry groups have since inspired a movement that, at last count, has led 29\(^2\) states to consider adopting agricultural and aquacultural disparagement statutes and 13\(^3\) states to pass one. The energy and money behind this movement is provided by food industry groups that are less than subtle in expressing their desire to stifle criticism of their products. The American Feed Industry Association ("AFIA") and the American Farm Bureau Federation ("AFBF"), representing the interests of American farmers and ranchers, drafted the Model State Code to Protect Agricultural Producers and Products from Defamation ("the Industry’s Model Bill") in 1992.\(^4\) That same year the AFIA and the AFBF distributed the Bill to state organizations. See

\(^1\) Ultimately, Colorado enacted a statute making it unlawful to disparage a product. See Colo. Rev. Stat. Ann. § 35-31-104. Colorado’s statute provides for a criminal penalty; on its face, however, it does not allow for civil damages.

\(^2\) In addition to the states in which agricultural disparagement statutes have passed (see footnote 3), the following states have considered and rejected similar legislation: California, Delaware, Illinois, Iowa, Maryland, Michigan, Minnesota, Missouri, Nebraska, New Jersey, Pennsylvania, South Carolina, Vermont, Washington, Wisconsin, and Wyoming.


\(^4\) The text of the Industry’s Model Bill is reprinted in the Appendix, below.
The Industry's Model Bill was patterned after Acquafresca's failed bill. By drafting and distributing a model bill that represents the apotheosis of what industry groups in each state can ask from their legislatures, the groups have given local lobbyists something tangible to hand to their state representatives when lobbying. The Industry's Model Bill, reviewed below, provides a blueprint for the many states that have enacted, or tried to enact, a product defamation statute. Surprisingly, though the Model Bill's influence on the legislation that has passed is clear, many states have passed laws even more favorable to growers and industry members. See chart, State-by-State Analysis of Agricultural Disparagement Statutes, at the conclusion of this article, and the discussion and analysis of the characteristics of the state agricultural disparagement statutes in Part Two, B, of this BULLETIN, below.

II. THE INDUSTRY'S MODEL BILL

A. What It Provides

The stated purpose of the Industry's Model Bill is "to protect the free flow of agricultural products and producers thereof" while enhancing the "general public welfare by proscribing the dissemination of false and disparaging information." § 1. It provides causes of action — termed "Civil Liability for Defamation" — for allegedly damaging speech concerning an agricultural producer or product. §§ 4-5 (emphasis added).

In order to achieve its end, the Industry's Model Bill grants a cause of action to agricultural producers for damages against "[w]hossoever willfully or purposefully disseminates a false and defamatory statement, knowing the statement to be false, regarding an agricultural producer [or product] under circumstances in which the statement may be reasonably expected to be believed." Id. (emphasis added). The Industry's Model Bill also contains a section making this a criminal act. § 3. The definitions provide that "'knowing the statement to be false' means the communicator knew or should have known that the statement was false . . ." § 2(g) (emphasis added). A false statement is defined as a "statement which either expressly includes a fact or implies a fact as justification for an opinion and such fact is not correct." § 2(e).

In addition, the Industry's Model Bill defines an "agricultural producer" as "any person engaged in growing or raising an agricultural product, or manufacturing such product for consumer use." § 2 (b). An agricultural product is defined in the statute as "any plant or animal, or product thereof, grown or raised for a commercial purpose; the term shall also include agricultural practices used in the production of such products." § 2(a). The Industry's Model Bill protects not only individual producers and products, the statute provides that if an entire group or class of agricultural producers or products is disparaged, each producer of the group or class is given a cause of action, regardless of the number of potential plaintiffs. § 6. "Disseminate" is defined as "to publish or otherwise convey a statement to a third party but shall not include repeating a false and defamatory statement made by another unless the person repeating such statement knew or should have known the statement to be false." § 2(d). Thus, the person who repeats a false statement is no more
protected than the originator of the statement; if that person knew or should have known that the statement was false, then that person is liable for republishing that statement.

The Industry's Model Bill draws a distinction in monetary recovery between disparaging a producer and disparaging its product. §§ 4-5. If the producer is defamed, it may recover actual and punitive damages. If the product is disparaged and if the statement at issue is "made with malice," the producer may recover "punitive damages in an amount equal to at least three times the actual damages." § 5 (emphasis added). The "malice" required is common law malice; it is defined as "an intent to vex, injure, or annoy another." § 2(g).

If the false and defamatory statement is made about "an entire group or class of agricultural producers or products, a cause of action arises in favor of each producer of the group or class." § 6. Each successful member of the group or class is entitled to his or her own actual damages, but punitive damages are unlimited. Id.

Finally, the Industry's Model Bill also provides that a plaintiff can be given an injunction to prohibit the further dissemination of the statement that gives rise to the cause of action. § 7. The prevailing party is entitled to attorney's fees. § 8.

B. **Infirmities of the Model Bill**

Though statutes may abrogate common law, the Industry's Model Bill goes further, soundly trampling the First Amendment.

First, the Industry's Model Bill, which styles itself as a defamation law, does away with the First Amendment requirement established in defamation law that the plaintiff has no cause of action unless he or she can prove that the actionable statement was "of and concerning" him or her. *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

The Industry's Model Bill also fails to assign to the plaintiff the burden of proving a statement's falsity or truth. At common law, the plaintiff in a product disparagement action must prove falsity. Likewise, the First Amendment requires that plaintiffs prove falsity in cases involving matters of public concern. *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767 (1986).

The Industry's Model Bill adopts a level of culpability required to recover from a defendant that is far lower than at common law, and that ignores constitutional bars. At common law, a plaintiff suing for product disparagement must show that the defendant published a false statement harmful to the interests of the plaintiff with some form of "malice." The Restatement (Second) of Torts provides that the plaintiff must prove that the defendant acted with either the intent to harm or with the knowledge that the statement is likely to harm the plaintiff's pecuniary interest and that the defendant must also have known that the statement was false or acted in reckless disregard of its truth or falsity. Restatement (Second) of Torts § 623A. Of course, the *New York Times* rule requiring clear and convincing proof of actual malice should apply, at the very least, where the plaintiff is a public figure and where the speech at issue is a matter of public concern. The Industry's Model Bill
allows recovery upon a showing of mere negligence, that is, that the communicator "knew or should have known that the statement was false."

One State Attorney General has issued an opinion stating that eliminating the actual malice standard from a disparagement statute "probably renders the bill unconstitutional." Op. Att’y. Gen. (Idaho Feb. 28 1992) (legality of House Bill 593; Product Disparagement), reprinted in the Appendix to this BULLETIN, below. See also David J. Bederman, Scott M. Christensen and Scott Dean Quesenberry, Of Banana Bills and Veggie Hate Crimes: The Constitutionality of Agricultural Disparagement Statutes, 34 HARV. J. ON LEGIS. 135, 139 (Winter 1997) (New York Times standards "should arguably apply to common law product disparagement actions"). Bederman notes that courts are divided on the level of legal culpability required to sustain an action of disparagement, but that "all courts require a high standard of care," either a showing that the defendant intended to injure the plaintiff or that the defendant intended to use false information. Id. at 140. The adoption in the Industry’s Model Bill of a negligence standard thus lowers the bar for recovery.

The remedies offered by the Industry’s Model Bill also modify basic common law requirements. First, the Model Bill provides that if the false statement regards an agricultural producer, then both actual and punitive damages may be recovered on a showing of negligence. § 4. The plaintiff must also demonstrate common law malice to recover punitive damages when the actionable statement concerned an agricultural product rather than the producer. § 5. The common law of product disparagement made it much more difficult to recover damages, requiring no less than proof of special damages as a basic element of the claim. See D. Heller, Product Disparagement: The Common Law Tort, above. And, of course, the Model Bill’s failure to require a showing of actual malice as a predicate for the imposition of punitive damages by any plaintiff runs afoul of Gertz v. Robert Welch, Inc., 418 U.S. 323, 350 (1974).

The Model Bill also provides for the possibility of criminal sanctions, including fines and possible jail time. Though there once were many criminal libel laws on the books, 13 states have now repealed their laws; seven have had their laws either struck down completely or cut back by a finding of unconstitutionality; and five others simply do not have criminal libel statutes. In the other 25 states, many of their criminal libel laws have never been tested for their constitutionality, and still many others go utterly unenforced. Since Sullivan, the Supreme Court has only ruled on the constitutionality of a criminal libel statute in a case involving a public official. There, the Court struck the statute down, ruling that Sullivan standards apply in the criminal context as well. Garrison v.

5 Alaska, Arizona, California, Delaware, Hawaii, Indiana, Maine, Nebraska, New Jersey, New York, Oregon, Vermont, and Wyoming.

6 Arkansas, Florida, Louisiana, Mississippi, New Mexico, Pennsylvania, and South Carolina; see also Colorado v. Ryan, 806 P.2d 935, 940 (Colo.) (en banc) (stating a portion of Colorado’s criminal defamation statute is unconstitutional because it permitted criminal sanctions to be imposed on defendants for public speech on a showing of less than actual malice), cert. denied, 502 U.S. 860 (1991).

7 Connecticut, Rhode Island, South Dakota, Texas, and Missouri.
Louisiana, 379 U.S. 64 (1964).

III. CONCLUSION

Though the Model Bill eliminates many common law and First Amendment protections from product disparagement actions, many of the 13 state agricultural disparagement statutes have gone even further in that direction. Idaho stands out as the single state that has made an effort to protect food producers while respecting First Amendment principles. These statutes are described in the chart immediately following this article and, in Part Two, B, of this BULLETIN, below, where they are discussed in detail by legal topic.

John Margiotta is the current LDRC Legal Fellow.
## State-by-State Analysis of Agricultural Disparagement Statutes

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<td><strong>The Industry's Model Bill</strong></td>
<td>“Whosoever willfully or purposefully disseminates a false and defamatory statement, knowing the statement to be false, regarding another's agricultural product [or the agricultural producer] under circumstances in which the statement may be reasonably expected to be believed” is liable to the producer or owner for damages.</td>
<td>Agricultural producers as individuals or as members of a group disparaged. “Producer” is defined as &quot;any person engaged in growing or raising an agricultural product, or manufacturing such product for consumer use.&quot;</td>
<td>A statement “which either expressly includes a fact or implies a fact as justification for an opinion and such fact is not correct.”</td>
<td>Willful or purposeful dissemination of a false and defamatory statement made by a person “knowing the statement to be false . . . [i.e.] the communicator knew or should have known that the statement was false.”</td>
<td>Actual and punitive damages available. If the statement concerns another's agricultural product, and it is made with malice, &quot;the producer or owner shall be entitled to punitive damages in a [sic] amount equal to at least three times the actual damages.&quot; Prevailing party &quot;entitled&quot; to attorneys' fees and court costs. Injunctive relief available. Criminal penalties available.</td>
<td>Not defined.</td>
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<td><strong>Alabama</strong>&lt;br&gt;Ala. Code § 5-5-621 (1996)</td>
<td>“The dissemination to the public in any manner of false information that a perishable food product or commodity is not safe for human consumption.” Statute protects perishable agricultural and aquacultural products and commodities.</td>
<td>“Any person who produces, markets, or sells a perishable food product or commodity and suffers damage” as a result of the dissemination.</td>
<td>“The information shall be deemed to be false if it is not based upon reasonable and reliable scientific inquiry, facts, or data.”</td>
<td>“The dissemination to the public in any manner of false information that a perishable food product or commodity is not safe for human consumption.” The statute notes that “[i]t is no defense under the article that the actor did not intend, or was unaware of, the act charged.”</td>
<td>“[D]amages and any other relief a court of competent jurisdiction deems appropriate, including but not limited to, compensatory and punitive damages.”</td>
<td>1 year “after the cause of action accrues.”</td>
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<td><strong>Arizona</strong>&lt;br&gt;Ariz. Rev. Stat. Ann. § 3-113 (1997)</td>
<td>The “malicious public dissemination of false information that the food product is not safe for human consumption.” Statute protects both perishable agricultural and aquacultural products and commodities.</td>
<td>“A producer, shipper, or an association that represents producers or shippers, of perishable agricultural food products that suffers damages” as a result of the dissemination.</td>
<td>Information “that is not based on reliable scientific facts and reliable scientific data and that the disseminator knows or should have known to be false.”</td>
<td>The “malicious public dissemination of false information [i.e., information that the disseminator knows or should have known to be false] that the food product is not safe for human consumption.”</td>
<td>“[D]amages and for any other appropriate relief, including compensatory and punitive damages.” The court may award the successful party courts costs and reasonable attorney fees.</td>
<td>Within 2 years “after the false information is disseminated.”</td>
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<td>Florida</td>
<td>&quot;[T]he willful or malicious dissemination to the public in any manner of any false information that a perishable agricultural food product is not safe for human consumption.&quot;</td>
<td>&quot;Any producer or any association representing producers of perishable agricultural food products which suffers damage as a result of the disparagement. See definitions of &quot;producer&quot; and &quot;perishable agricultural product.&quot;</td>
<td>Information &quot;which is not based on reliable, scientific facts and reliable scientific data.&quot;</td>
<td>&quot;[T]he willful or malicious dissemination to the public in any manner of any false information [i.e., the disseminator knows or should have known to be false] that a perishable agricultural food product is not safe for human consumption.&quot;</td>
<td>&quot;[D]amages and . . . any other relief a court of competent jurisdiction deems appropriate, including, but not limited to, compensatory and punitive damages.”</td>
<td>&quot;2 years from the date the disparagement occurs.&quot;</td>
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<td>Georgia</td>
<td>&quot;[T]he willful or malicious dissemination to the public in any manner of false information that a perishable food product or commodity is not safe for human consumption.&quot; Statute protects both perishable agricultural and aquacultural food products.</td>
<td>Creates an action for &quot;[p]roducers, processors marketers, and sellers,&quot; which &quot;shall include the entire chain from grower to consumer.&quot;</td>
<td>&quot;The information shall be deemed to be false if it is not based upon reasonable and reliable scientific inquiry, facts, or data.&quot;</td>
<td>&quot;[T]he willful or malicious dissemination to the public in any manner of false information that a perishable food product or commodity is not safe for human consumption.&quot;</td>
<td>&quot;[D]amages and . . . any other relief a court of competent jurisdiction deems appropriate, including, but not limited to, compensatory and punitive damages.”</td>
<td>&quot;Within two years after the cause of action accrues.&quot;</td>
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<td>Idaho</td>
<td>&quot;[T]he publication to a third party of a false factual statement . . . [that is] of and concerning the plaintiff's specific perishable agricultural food product. The statement must clearly impute the safety of the product and it must &quot;be clearly directed at a particular plaintiff's product.&quot; No cause of action for disparagement of a generic group of products.</td>
<td>Creates action for &quot;producers of perishable agricultural food products.&quot;</td>
<td>No definition. Plaintiff assigned burden of proof by clear and convincing evidence.</td>
<td>&quot;The defendant made the statement with actual malice, that is, he knew that the statement was false or acted in reckless disregard of its truth or falsity&quot; and the defendant intended the publication to cause harm to the plaintiff's pecuniary interest, or either recognized or reasonably should have recognized that it was likely to do so.&quot;</td>
<td>&quot;The plaintiff may only recover actual pecuniary damages. Neither presumed nor punitive damages shall be allowed.&quot;</td>
<td>&quot;Within two (2) years after the cause of action accrues and not thereafter.&quot;</td>
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<td>Louisiana</td>
<td>The &quot;dissemination to the public in any manner of any false information that the disseminator knows or should have known to be false, and which states or implies that a perishable agricultural or aquacultural food product is not safe for consumption by the consuming public.&quot;</td>
<td>Creates action for &quot;any producer of perishable agricultural or aquacultural food products who suffers damage&quot; as a result of the disparagement.</td>
<td>Information is &quot;presumed to be false when not based upon reasonable and reliable scientific inquiry, facts, or data.&quot;</td>
<td>The &quot;dissemination to the public in any manner of any false information that the disseminator knows or should have known to be false, and which states or implies that a perishable agricultural or aquacultural food product is not safe for consumption by the consuming public.&quot;</td>
<td>&quot;[D]amages, and . . . any other appropriate relief in a court of competent jurisdiction.”</td>
<td>&quot;Within one year after the cause of action accrues.”</td>
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<td>State</td>
<td>Fault Standard</td>
<td>Available Relief</td>
<td>Statute of Limitations</td>
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<td>South Dakota, S.D.</td>
<td>The dissemination in any manner to the public of any information that the disseminator knows to be false, or that states or implies that an agricultural food product is not safe for consumption by the public or that generally accepted agricultural and management practices make agricultural food products unsafe for consumption.</td>
<td>Damages and any other appropriate relief available. A person who disparages a perishable agricultural food product with intent to harm the producer is liable to the producer for treble damages so caused.</td>
<td>Within one year after the cause of action accrues.</td>
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<td>Texas, Tex. Code Ann. § 86.01 (1997)</td>
<td>The dissemination to the public of any information that states or implies that a perishable food product is not safe for consumption by the public.</td>
<td>Damages and any other appropriate relief.</td>
<td>A person knows the information is false.</td>
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Note: The table above outlines the standards for actionable speech, available relief, and statute of limitations for South Dakota and Texas. For exclusive use of MLRC members and other parties specifically authorized by MLRC. © Media Law Resource Center, Inc.
ANATOMY OF A LEGISLATIVE BATTLE: THE NORTH DAKOTA STORY

By Jack McDonald

“What’s wrong with feeling good?” With this response from a committee chair to criticism that the so-called “veggie libel” bill — dubbed “sirloin slander” in North Dakota — was nothing more than feel-good legislation, North Dakota’s 1997 Legislature overwhelmingly enacted the darn thing.

So now we have Chapter 32-44 of the ND Century Code, the “North Dakota Defamation of Agricultural Products and Management Practices Act.” Quite a mouthful, but maybe that’s not the best phrase to use when talking about legislation that passed (I’m sorry) because of horse urine. A review of how it was passed in North Dakota points out vividly the dangerous nature of the legislation and how difficult it is to defeat.

The 1995 North Dakota Legislature defeated sirloin slander legislation, but its narrow defeat was a portent of bad things to come. And come they did, with a vengeance, in 1997.

But first, a bit of background. One of the major drugs prescribed to relieve menopausal symptoms in women is Premarin. One of Premarin’s primary ingredients is horse urine collected from pregnant mares, or what’s more delicately called PMU. The PMU is collected from 454 horse ranches in Canada and 29 in the United States, with all of the American ranches in North Dakota.

People for the Ethical Treatment of Animals (PETA) claimed the PMU horses were mistreated, and staged some clandestine video sneak attacks on the North Dakota PMU ranches in 1995 and 1996 which purported to show this abuse. These TV clips were shown on INSIDE EDITION and caused great anger and outrage in North Dakota. The INSIDE EDITION feature spawned PETA ads by Mary Tyler Moore and a feature by a Salt Lake City TV station against the North Dakota PMU ranches. Subsequent examinations by independent veterinarians thoroughly disproved the abuse claims. The state’s newspapers editorialized against PETA. The PMU operators, nearly all of whom are family ranchers, were quoted often and very sympathetically.

It was against this background the bill’s sponsors came back in 1997 with the model legislation drafted by a Washington, D.C., law firm and with support from at least a zillion North Dakota organizations ranging from the North Dakota Medical Association to the North Dakota Equine Ranchers Association (the PMU ranchers).

The tactics were quickly evident and devastatingly effective. First, they talked about everything except the bill and its First Amendment consequences. The bill’s primary backers were the North Dakota Agricultural Coalition, composed of 30 statewide agricultural organizations ranging from buffalo ranchers to pea growers, as well as bankers and the state’s chamber of commerce; the North Dakota Farmers Union and Farm Bureau; the North Dakota Stockmen’s Association; and the
North Dakota Medical Association.

Why the doctors? Well, first the hearings became a medical seminar on the major benefits of Premarin. One of the bill’s sponsors was a women senator who passed around Premarin tablets and spoke about how much they’d helped her. All the legislators agreed and several commented on how their wives had also been helped. Next came one of the state’s leading ob-gyn doctors, who likewise praised the drug.

Then came an endless line of PMU ranchers and agricultural officials with paeans of praise in reaffirmation of everything good about North Dakota agriculture and the evils visited upon it by PETA. Since the hearings were before the agriculture committees, all the members and the chairmen joined in the chorus of praise. Some of the PMU ranches adjoined those of some of the legislators.

Next came a review of the terrible agricultural damages caused by the 1989 60 MINUTES report on Alar, followed by a review of the bill showing only how it would protect farmers and ranchers from similar injustices without harming any North Dakota newspapers, who never do the bad things the bill was intended to remedy. Instead, the bill was said to be aimed at those terrible tabloids and shows like INSIDE EDITION and 60 MINUTES.

Finally, the proponents finished with its litany of saints (a listing of all of the bills supporters), and then told legislators who would be opposing the bill: environmentalists, the ACLU and the media. Zowee!! What a trio for a rural, agriculturally-based state like North Dakota.

Media organizations, supported by organic farmers and vegetarians, fought the good fight against the legislation, but to little avail.

What lessons can be learned from this experience? A full semester’s worth! These bills are particularly dangerous because they allow the supporters to talk about God, motherhood and apple pie, and all that is good about agriculture, instead of the bill itself.

There are four major problems in opposing these bills. First, opposition to the bill has to deal with arcane and technical arguments about libel law, which is about like pumping ether into the air conditioning — legislators’ eyes glaze over in about 5 minutes and heads nod in unison. Secondly, the opposition quickly becomes labeled as “media,” hardly a harbinger for success in state legislatures. Thirdly, it’s difficult to arouse much public support for technical defamation arguments against family farmers and ranchers. And, fourthly, these bills will always be heard by state legislative agricultural committees, a highly sympathetic venue. Since agriculture is basically governed by federal law and regulations, state legislators are always looking for something they can do. The sirloin slander bills are the answer to their prayers. They can help agriculture and strike a blow against the ACLU, the media and environmentalists all in one stroke. Nirvana!!

What can be done? First, try to head off the legislation by pointing out to the sponsors that statutory and common law product disparagement suits or fair business practice laws will remedy
these problems. Secondly, try to get together your own coalition of organic farmers, vegetarians, research and development companies and businesses which will likely be harmed by lawsuits aimed at opposition to common comparison advertising. You could also try to get support from bank groups and seed companies that support research that may need to point out problems with current production methods.

Finally, you have to get the traditional supporters of First Amendment issues to take these bills seriously and present some opposition. Since many smaller newspapers, broadcasters and land-grant colleges often work closely with agricultural interests, this is a difficult task.

*Jack McDonald is counsel and lobbies for the North Dakota Newspaper, Broadcasters and Cable Television Associations.*
PART TWO: PREPARING YOUR BRIEF

A. A Constitutional Overview

FOOD DISPARAGEMENT LAWS: AN OVERVIEW OF THE CONSTITUTIONAL ISSUES

By Bruce E.H. Johnson and Eric M. Stahl

Attacking the constitutionality of the recent agricultural disparagement statutes requires no novel or controversial interpretation of the First Amendment. For the most part, the arguments are derived from well-established principles developed since the constitutionalization of defamation law in New York Times v. Sullivan.

Indeed, the statutes themselves are a direct affront to the notion that imposing liability for speech threatens the “breathing space” necessary to make freedom of expression meaningful. Sullivan, 376 U.S. 254, 272 (1964). This “breathing space” includes the right to make controversial, even erroneous, statements on important public issues. It cannot seriously be doubted that the food disparagement statutes are designed to snuff out debate on the important public issue of food safety; in fact, advocates of the laws brag that this is their purpose. As an executive for the American Feed Industry Association, which has led efforts to enact such bills, put it recently, “I think that to the degree the mere presence of these laws has caused activists to think twice, then these laws have already accomplished what we set out to do.” Laws that make activists — or journalists, or scientists, or talk-show hosts — “think twice,” by threatening litigation and potentially enormous liability, before speaking out on public issues clearly are offensive to the protections of free expression the Supreme Court has fashioned.

Of course, there is no way for the industry to accomplish its goals constitutionally, precisely because the goal is to deter speech that enjoys First Amendment protection. See Auvil v. CBS “60 Minutes,” 67 F.3d 816 (9th Cir. 1995) (discussed in Part One of this BULLETIN, above); Elliot Negin, The Alar “Scare” Was for Real and So is that “Veggie Hate-Crime” Movement, COLUM. JOURNALISM REV., September/October 1996, p. 13.

This article reviews the reasons why the food disparagement statutes unconstitutionally restrict speech. Part I addresses the extent to which the body of First Amendment doctrine relating to defamation applies to product disparagement claims. Part II discusses specific constitutional infirmities (some of which are addressed elsewhere in further detail this BULLETIN) of the disparagement statutes. Part III discusses applicable state constitutional protections. Finally, Part IV gives a brief overview of the possibility for bringing a preemptive suit.

1 Aaron Epstein, “Oprah” case to test food-libel law, SEATTLE TIMES, December 29, 1997 (quoting AFIA senior vice president Steve Kupperud).
I. APPLICABILITY OF CONSTITUTIONAL LIMITS ON DEFAMATION LIABILITY TO DISPARAGEMENT CLAIMS.

A threshold question is whether, or to what extent, the constitutional limits on defamation liability that have evolved since Sullivan apply to claims for product disparagement.

Defamation and disparagement developed as distinct, though related, torts. The two contain similar elements (both require publication of a false, injurious statement) and claim fundamentally identical injuries (the damage resulting from such a statement). There is no persuasive reason why the First Amendment principles relating to defamation claims should not apply with equal force to disparagement claims. The rationales supporting free speech about people apply with equal if not greater force to speech about things — particularly where the things involve public issues, such as health or food safety. See Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 759 (1985) ("speech on public issues occupies the ‘highest rung of the hierarchy of First Amendment values,’ and is entitled to special protection").

The Supreme Court has never stated directly how First Amendment principles apply to disparagement, though in Bose Corp. v. Consumers Union of United States, Inc., 466 U.S. 485 (1984), the Court accepted, without deciding on, a district court holding that Sullivan’s constitutionally mandated actual malice requirement applied to a disparagement claim.\(^2\)

Furthermore, the Court has applied Sullivan and its progeny to claims other than defamation. The Court has cautioned against, and repeatedly rejected, efforts by plaintiffs to circumvent First Amendment limitations on liability for speech by framing their claims as something other than defamation. See Hustler Magazine v. Falwell, 485 U.S. 46 (1988) (emotional distress); Time v. Hill, 385 U.S. 374 (1967) (invasion of privacy)\(^3\). These cases suggest that where the alleged injury is the damaging effect of speech, full First Amendment protections apply no matter how the claim is labeled.

The California Supreme Court has stated directly what the U.S. Supreme Court has implied: that the First Amendment limits on defamation liability apply equally to disparagement claims:

Although the limitations that define the First Amendment’s zone of protection for the press were established in defamation actions, they are not peculiar to such actions but apply to all claims whose gravamen is the alleged injurious falsehood of a statement: "that constitutional protection does not depend on the label given the stated cause of action," and no cause of action can "claim . . . talismanic immunity from constitutional limitations" . . . Moreover, it is immaterial for First Amendment purposes whether the statement in question relates to the plaintiff himself or merely to his property


\(^{3}\) The court in Oprah Winfrey’s trial similarly dismissed plaintiffs’ negligence claims, finding them an attempt to avoid constitutional restrictions. Texas Beef Group v. Winfrey, 26 Media L. Rep. 1498, 1503 (N.D. Tex. 1998)
broadly defined . . . .


Any argument that disparagement is not subject to the same constitutional limits as defamation ultimately must rest on the notion that speech about things is less important, and thus less worthy of protection, than speech about individuals. This is dubious as a general proposition in a consumerist society, where news about products may be viewed by many as being at least as useful as news about politicians. But especially where the speech involves health or safety of food products, the public-interest rationales supporting broad protection of speech on matters of public concern should apply.5 Indeed, the courts have recognized that news reports about the public debate that often swirls around health and safety issues often address generic products, making them all the more entitled to broad First Amendment protection because they address matters of public concern. See, e.g., Edwards v. National Audubon Soc’y, 556 F.2d 113, 115 (2d Cir.) (First Amendment protects newspaper report of “accusations of a leading environmentalist organization” which “attack[ed] the good faith of prominent scientists supporting continued use” of DDT), cert. denied, 434 U.S. 1002 (1977).

A few lower courts have recognized that speech about products, such as consumer reporting, is of sufficient value to the public to warrant First Amendment protection. See, e.g., Quantum Elecs. Corp. v. Consumers Union of United States, Inc., 881 F. Supp. 753 (D.R.I. 1995); Dairy Stores Inc. v. Sentinel Publ’g Co., 516 A.2d 220 (N.J. 1986). The food disparagement statutes

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In addition, there is precedent in some states for treating injurious falsehood claims like defamation claims, rather than like property injuries, for purposes of determining the applicable statute of limitations. Unfortunately, several states with agricultural disparagement statutes — including Colorado, Georgia and Texas — have adopted the minority rule that disparagement claims are not barred by defamation statutes of limitations. See Idaho Norland COT. v. Caelter Indus., 509 F. Supp. 1070, 1071 (D. Colo. 1981); Scott Paper Co. v. Fort Howard Paper Co., 343 F. Supp. 229 (E.D. Wisc. 1972) (both noting split in authority and discussing cases).

not only fail to recognize the importance of speech about food products, they seek to strip it of even the most basic of recognized First Amendment protections.

Defamation law is a balance of "competing values" — the constitutional interest in protecting important debate from self-censorship and the state’s interest in compensating those injured by false speech. See Gertz v. Robert Welch Inc., 418 U.S. 323 (1974). It is likely a court considering these statutes would find the state’s interests "extends no further" than they do for speech in the defamation context, id. at 349, and thus that the statutes are unconstitutional to the extent they make speech more actionable than is permitted in defamation cases.6

There is no basis for arguing that speech about food products is of lesser import than that about people. Nor is there a basis for arguing that products should receive more protection from a solicitous state.

II. HOW FIRST AMENDMENT PRINCIPLES SHOULD APPLY TO A CLAIM UNDER AN AGRICULTURAL DISPARAGEMENT STATUTE.

Assuming that First Amendment protections apply, there are a number of constitutional attacks that can be made on the state agricultural disparagement statutes. Most of the statutes create a tort that deprives defendants of numerous constitutionally mandated safeguards, in a manner that goes farther than necessary to further the state’s interests in protecting domestic agriculture, and without consideration of the countervailing free-speech values. Among the constitutionally omitted elements are the "of and concerning" requirement, the standard for defining actionable falsity, the burden of proof, the standard of fault, and the restrictions on the availability of damages. Each of these arguments is discussed in further detail in Part Two B of this BULLETIN. Furthermore, by singling out speech about a particular industry for special protection, the laws violate the principle that government restrictions on speech must be enacted neutrally and without favoring one side of a debate.

A. The "Of and Concerning" Requirement

Sullivan and Rosenblatt v. Baer, 383 U.S. 75 (1966) establish that the First Amendment bars defamation liability when the statement in question is not "of and concerning" the plaintiff. Without the "of and concerning" requirement, “otherwise impersonal attack[s]” on speech about large groups could result in potentially limitless liability, which in turn could stifle public debate in a manner intolerable under the First Amendment. Sullivan, 376 U.S. at 292.

6 The Supreme Court defamation cases have not expressly examined state defamation laws for "narrow tailoring," but it is clear that the cases review such laws under what amounts to strict scrutiny. For example, in Gertz, the Court found unconstitutional state laws permitting presumed or punitive damages for defamation absent an actual malice showing, because the state’s interest "extends no further" than actual compensation. 418 U.S. 323.

7 Idaho’s statute is the only new agricultural disparagement law that provides a cause of action consistent with First Amendment protections. Only false factual statements aimed at a plaintiff’s specific product are actionable, and then only if they were made with actual malice. The burden of proof is on the plaintiff, and punitive damages are unavailable.
Under most of the agricultural disparagement laws, there is no requirement that the allegedly disparaging speech make any reference to the plaintiff personally, or even its specific production. In general, a plaintiff has a cause of action under the laws if it grows (and in some cases, sells, ships, or consumes) the type of product disparaged. Under such a theory, the class of potential plaintiffs could be unfathomably large: if Oprah Winfrey had been liable for disparaging beef, she would be liable not just to the plaintiffs, but to every cattle grower in Texas and in every other state with a similar statute. Such extended liability for speech exceeds anything allowed in the Sullivan era and even at common law.  

B. Standards for “Truth” and Treatment of Scientific Opinion

Consistent with the claims by advocates of the laws that they simply want to prevent irresponsible journalism, “junk science” or otherwise unproven allegations from causing market panics, the laws generally impose liability for statements that are not provably based on reliable or reasonable scientific facts. These statutes fail to define what sort of science is sufficiently reliable, and fail to recognize that science only advances when the present orthodoxy is challenged by a theory that may not be considered “reasonable” or “reliable” at the moment. By making scientific opinion actionable, the statutes threaten to chill scientific inquiry. Particularly with questions such as whether a particular food is linked to a particular disease, opinions can differ vastly as to what methods and what degree of proof may be considered scientifically reliable or reasonable. The statutes fail to reflect this, leaving those who comment on food safety issues to wonder whether the data supporting their speech will stand up in court.

One unresolved question is the effect on scientific discourse of Milkovich v. Lorain Journal Co., 497 U.S. 1 (1990), which held that a statement of opinion that implies the assertion of a verifiably false, defamatory fact does not warrant First Amendment protection. At least one court has found that Milkovich did not require imposing liability for an assertion, in a scientific journal, of a speculative scientific theory. Immuno AG. v. J. Moor-Jankowski, 576 N.E.2d 1270 (N.Y. 1991).

C. Burden of Proof

In defamation claims involving statements on matters of public concern, the plaintiff has the
burden of proving the statement is false. *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767 (1986). This requirement is necessary to prevent the self-censorship that would result were speakers forced to consider that they may be required to prove, in court, the truth of anything they say.

Many of the new food disparagement laws contain no such requirement, or reverse the constitutionally mandated burden of proof, permitting courts to presume falsity unless defendants prove the reliability of their statements.

**D. Standards of Fault**

The Supreme Court has held that liability for speech may not be imposed unless the defendant acted with some degree of fault; at least a showing of negligence is required. *Gertz*, 418 U.S. 323 (1974). For certain types of plaintiffs — public officials and public figures — the heightened mental state of actual malice is necessary. *Sullivan*, 376 U.S. at 279-80. (A plurality once held that the *actual malice* standard applied to speech relating to any issue of public concern, *Rosenblatt*, but the Court in *Gertz* reversed that holding as it related to private figures claiming defamation.)

Obviously, a defendant in a disparagement action will benefit from having the heightened actual malice standard apply. Several arguments for the applicability of actual malice, and the implications of the court’s determination of the appropriate standard of fault, are discussed by J. Borger and D. Ellingboe in Part Two B, below.

**E. Damages**

States may not permit recovery of presumed or punitive damages for speech relating to matters of public concern unless the statement was made with actual malice. *Gertz*, 418 U.S. 323, 349-50 (1974); *Dun & Bradstreet*, 472 U.S. 749. Several of the state disparagement laws provide for automatic punitive damages, without the heightened showing of fault required under *Gertz*.

**F. Viewpoint Neutrality**

Finally, the statutes violate the constitutional requirement of “viewpoint neutrality” in government regulation of speech. In *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992), the Court recognized that though government may restrict certain types of speech, any such restrictions must be enacted neutrally, without discrimination based on the viewpoint expressed by the speaker. For example, though the government could proscribe obscenity, it cannot limit the proscription to politically offensive obscenity. The government may not “license one side of a debate to fight freestyle, while requiring the other to follow Marquis of Queensberry rules.” *Id.* at 392.

Yet this is precisely what the food disparagement statutes do: they restrict not disparaging speech generally, but only speech that disparages a perishable food product. Additionally, the agricultural industry is free to dispute health and safety concerns about its products by the usual rules of free expression, while its critics are saddled with a requirement that they prove the scientific reliability of their statements. The statutes thus unconstitutionally favor one side of the debate. For a discussion of the genesis of the statutes and the agricultural lobbies that spawned them, see Part One, above.
III. APPLYING STATE LAW

"The First Amendment creates a broad, uniform ‘floor’ or minimum level of protection that state law must respect. Above this floor, states may balance the need to redress injuries to reputation with guarantees of free expression in a distinct way . . . ." West v. Thomson Newspapers, 872 P.2d 999, 1007 (Utah 1994). With this in mind, defendants also should consider whether food disparagement statutes may be attacked under state constitutional principles that provide greater protection of speech than the ‘floor’ required under the federal constitution.

Some courts in states with food disparagement statutes have held the actual malice standard applies to statements on matters of public concern, regardless of whether the plaintiff is a public or private figure. See Romero v. Thomson Newspapers (Wisconsin), Inc., 648 So.2d 866 (La. 1995); Mucci v. Dayton Newspapers, Inc., 654 N.E.2d 1068 (Ohio 1995) (holding that in cases involving "synergistic defamation" or "defamation by implication" and a public issue and a media defendant, plaintiff must show actual malice); Diversified Mgmt., Inc. v. Denver Post, Inc., 653 P.2d 1103 (Colo. 1982).

In addition, at least one state at present with an agricultural disparagement statute has rejected Milkovich in favor of a broad “opinion privilege” based on state law, see Vail v. The Plain Dealer Publishing Co., 649 N.E.2d 182 (Ohio 1995).

Furthermore, practitioners should be aware of several strong cases from states that presently do not have food disparagement laws. These cases may help persuade a state court to recognize greater protections of expression than is required by the U.S. Supreme Court. See, e.g., West v. Thomson Newspapers, 872 P.2d 999 (Utah 1994) (recognizing state “opinion” privilege); Immuno AG. v. Moor-Jankowski, 567 N.E.2d 1270 (N.Y. 1991) (reading Milkovich narrowly, but finding state law provides broad protection for opinion, and applies it to protect expressions of scientific theory in academic journal); Dairy Stores, Inc. v. Sentinel Publishing Co., 516 A.2d 220 (N.J. 1986) (speech about safety of commercially sold bottled water was matter of public interest and actual malice standard applied).

IV. PREEMPTIVE STRIKES

In the only published decision to date involving a food disparagement law, two food safety watchdog groups brought a declaratory judgment action challenging the constitutionality of Georgia’s disparagement law. An appellate court affirmed dismissal, finding no ripe controversy existed. Action for a Clean Env’t v. State, 457 S.E.2d 273 (Ga. App. 1995). The court found that the state, the defendant in the declaratory judgment action, had no interest adverse to the plaintiffs and was not

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12 See also Levin v. McPhee, 119 F.3d 189 (2d Cir. 1997) (applying this more protective New York law).
presently denying any right claimed by them. For an account of the case by plaintiffs' attorneys and an argument that a state enacting a food disparagement law is an appropriate defendant in a declaratory action, see David Bederman et al., *Of Banana Bills and Veggie Hate Crimes: The Constitutionality of Agricultural Disparagement Statutes*, 34 Harv. J. on Legis. 135 (1997).

Whether the outcome would be similar in other states remains to be seen. Some states relax the justiciability requirement in declaratory judgment actions that would resolve issues of public importance, though generally preemptive actions require adverse parties to an actual controversy. Practitioners should check practices in their states, but declaratory judgment should not be ruled out, particularly when a client is specifically threatened, by an identifiable potential plaintiff, with a food disparagement claim for a report that has been prepared but not yet released.

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13 A state's attorney general usually is notified of lawsuits in which the constitutionality of a state statute is challenged. Interestingly, after receiving such notice in the Oprah Winfrey case, the Texas Attorney General declined to participate in the defense of Texas' food disparagement law.
B. Nuts and Bolts for Brief Writers

THE BURDEN OF PROOF

By Charles Tobin

Regardless of the wording of the hastily planted veggie libel legislation, the First Amendment imposes certain *prima facie* burdens on any plaintiff whose suit is based on allegedly defamatory speech. State legislation cannot simply sweep those constitutional burdens aside like so much worthless chaff.

I. OF AND CONCERNING

Defense counsel must remind the court at the outset of the litigation, that state legislators cannot override burdens that the Constitution imposes on plaintiffs, beginning with the *prima facie* "of and concerning" requirement. This defense, which should be raised at the outset, holds the most promise in jurisdictions that have a codified or strongly developed common law requirement that plaintiff meet its "of and concerning" burden. See, e.g., Ala. Code §6-5-182; Okla. Stat. tit. 12, §1444; *Ferguson v. Watkins*, 448 So. 2d 271 (Miss. 1984); *Lambert v. Garlo*, 484 N.E.2d 260 (Ohio 1984).

And while, at first blush, the District Court's decision in "*Auvil v. CBS 60 Minutes*," 800 F. Supp. 928 (E.D. Wash. 1992), eliminated that burden in holding the "60 Minutes" broadcast was actionable by all apple growers, the continuing vitality of that ruling is questionable. The Ninth Circuit later affirmed summary judgment rendered for defendants in *Auvil* on grounds that plaintiffs failed to prove falsity, and, in doing so, specifically declined to address the "of and concerning" issue. 67 F.3d 816, 818 n.4 (9th Cir. 1995).

II. FALSITY

Legal presumptions shift burdens. Thus, statutes like Louisiana's (La. Rev. Stat. Ann. §4502(1)), Georgia's (Ga. Code Ann. §2-16-2(1)) and Alabama's (Ala. Code §6-5-621(1)) — which provide that a disparaging statement about an agricultural product that is "not based upon reasonable and reliable scientific inquiry, facts, or data" is "presumed" or "deemed" to be false — appear to shift the burden, in the first instance, on defendants to come forward with a "reasonable" or "reliable" scientific basis to prove truth. Presumably, the burden then would shift back to the plaintiff to persuade the court that a triable issue exists on reliability. Many other statutes, whose definitions of "false information" (see, e.g., Ohio Rev. Code Ann. §2307.81(C)) or "disparagement" (see, e.g., Fla. Stat. Ann. §865.065 (2)(a)) encompass all expressions that are not based on such "reasonable" or "reliable" "scientific" data, also appear to place the initial burden on defendants to come forward with evidence that the statements were not "false" under the statutes.

Yet under the First Amendment, plaintiffs may not rely on the presumption of falsity. In most
libel actions, truth is no longer an affirmative defense with the corresponding burden of production borne by the defense. In *Philadelphia Newspapers v. Hepps*, 475 U.S. 767 (1986), the Supreme Court held the Constitution requires that even a private figure bears the burden of proving falsity in actions against media defendants, at least where the statement was on “matters of public concern.” And several lower courts explicitly have reached the inescapable conclusion that the quality and safety of the food we eat is of public concern. See, e.g., *McCain v. KTVY, Inc.*, 738 P.2d 960 (Okla. Ct. App. 1987); *Dairy Stores v. Sentinel Publishing*, 516 A.2d 220 (N.J. 1986). See also Restatement (Second) of Torts §651(1)(c), providing that in all product disparagement cases, the plaintiff has the burden of proving the “falsity of the statement.”

Defense counsel should resist the statutes’ efforts to shift the burden of falsity to their clients by citing the Supreme Court of the United States — as well as established authority under the jurisdiction’s codes or common law, see, e.g., *Alabama Pattern Jury Instructions (Civil) §23.00; Blake v. Gannett Co., Inc.*, 529 So. 2d 595 (Miss. 1988); *Cox Enterprises v. Thrasher*, 442 S.E.2d 740 (Ga. 1994) — for the essential proposition that falsity is always plaintiff’s burden. Legislative fiat simply cannot shift back on the defense a *prima facie* burden that rests with plaintiffs. Also, do not overlook the holdings of courts in some of these jurisdictions that plaintiffs, in public figure or public concern cases, have the added burden of proving falsity by “clear and convincing” evidence. See, e.g., *Friedgood v. Peters Pub. Co.*, 521 So. 2d 236 (Fla. Ct. App. 1988); *Anderson v. Cramlet*, 11 Media L. Rep. 1534 (D. Colo. 1984); *Spears v. McCormick & Co., Inc.*, 520 So. 2d 805 (La. Ct. App. 1987). It was this precise strategy, emphasizing to the court that it is plaintiff’s First Amendment and state common law burden to prove falsity, that brought about CBS’s ultimate success in a common law product disparagement action. See *Auvil*, 67 F.3d 816 (9th Cir. 1995); B. E.H. Johnson, *Alar Problems — The Auvil v. CBS Case*, Part One, above.

III. FAULT

As with falsity, most of the crop of new statutes endeavor to abrogate the burden imposed by the Supreme Court on plaintiffs to prove fault. In fact, Alabama has eliminated the fault requirement entirely and has enacted a law of strict liability, in which “[i]t is no defense . . . that the actor did not intend, or was unaware of, the act charged.” Ala. Code § 6-5-623.

At least in public figure cases (or in jurisdictions with heightened burdens of proof for “matters of public concern,” like Colorado), most of the statutes are infirm or silent as to the nature of the burden imposed, the quantum of proof required, and the party that bears the burden on fault. Under constitutional analysis, at the very least, plaintiffs who are public figures should shoulder the burden to prove actual malice — that the defendant knew the information was false or subjectively entertained doubts as to the truth. *St. Amant v. Thompson*, 390 U.S. 727 (1968). Moreover, the Supreme Court has held that the Constitution requires that plaintiffs produce a “clear and convincing” quantum of proof before courts may find a triable issue of actual malice. *Anderson v. Liberty Lobby*, 477 U.S. 242 (1986).

As to the nature of the burden, the party who bears it, and the quantum of the burden, only
Idaho's statutory language contains the rigid First Amendment standards for actual malice. See Idaho Code §6-2002(D). The Texas and South Dakota statutes also contain some appropriate language, requiring that the defendant "knows" the information "to be false" (Texas Code Ann. §96.002(a)(2); S.D. Codified Laws Ann. §20-10A-1(2)), although neither explicitly provides that it is plaintiff's burden to meet the standard, nor does either say the evidence must be "clear and convincing."

The majority of the remaining statutes appear inadequate as to the burden to prove fault for the same reason they are defective on falsity: they can be construed to require defendants to come forward with evidence to persuade the court that their broadcasts fall under the "reasonable" and "reliable" scientific-basis language. This new burden of the defendant — to demonstrate the objective reliability of its sources for a publication — reduces, if not entirely supplants, the constitutional focus of actual malice, which is the defendant's subjective state of mind. In fact, it appears under the plain language of many of the statutes that, any time plaintiff simply produces testimony that the scientific data on which defendant's sources based their conclusions was not "reasonable" or "reliable," it would be for the jury to decide the issue of fault. In other words, the statutes on their face contain no requirement that, to prevail, plaintiff must produce any evidence of the defendant's state of mind, so long as plaintiff can satisfy its minimal statutory burden of some evidence of unreliability.

Thus, conceivably, pre-trial motions could be brought where the testimony of, say, a newspaper defendant's reporter is entirely irrelevant. What he or she actually believed or thought in writing an article has no bearing on whether the source would, to the trier of fact, be deemed "reliable" under the statutes. That would be an astounding evisceration of the First Amendment burdens, as we've come to understand them over the past three decades.

Again, a sound strategy in combating all of these burdens-of-persuasion-or-production issues is to show that, under the precedent in the jurisdiction where a statutory disparagement action is brought, the courts have dutifully followed the Supreme Court's mandate and required that defamation plaintiffs bear the burden of proving actual malice with convincing clarity. See, e.g., Camp v. Yeager, 601 So.2d 924 (Ala. 1992); Stange v. Cox Enterprises, 440 S.E.2d 503 (1994); Dupler v. Mansfield Journal Co., 413 N.E.2d 1187 (Ohio 1980); Janklow v. Viking Press, 459 N.W.2d 415 (S.D. 1990).

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OF AND CONCERNING

By Seth D. Berlin

The "of and concerning" requirement is one of the central safeguards to our constitutional framework protecting the free flow of ideas on matters of public concern. In the context of generic product disparagement actions, the "of and concerning" test, when properly applied, functions to separate those instances where a particular producer is specifically mentioned in the publication or broadcast at issue — and therefore individually shoulders the full brunt of any disparaging statement about its product — from those instances where general comment on the health and safety of entire categories of products might otherwise be subject to attack.

From the ancient Hebrews and Romans to the earliest American governments to those of the present, one of the most important functions of government has been to enhance the public health and safety. Intimately bound up with this core governmental function is a long and distinguished tradition of news reporting, investigative journalism and popular debate on issues of the health and safety of our food supply and other products we consume. From Upton Sinclair's The Jungle to Rachel Carson's Silent Spring to early reports of the potentially deleterious health effects of tobacco, the press has served an invaluable role in raising health and safety issues of the highest public concern. The "of and concerning" requirement on actions that would seek to punish or chill such generalized reports serves to preserve this honored heritage.

I. "OF AND CONCERNING" AND THE AGRICULTURAL DISPARAGEMENT STATUTES

While the United States District Court for the Eastern District of Washington ultimately granted summary judgment to CBS on the basis that the plaintiff apple growers could not meet their burden of proving falsity (see 836 F. Supp. 740 (E.D. Wash. 1993), aff'd, 67 F.3d 816 (9th Cir. 1995), cert. denied, 116 S.Ct. 1567 (1996), it had earlier rejected CBS's argument that its broadcast on the potential hazards of apples and other fruits treated with "Alar" was not "of and concerning" the plaintiffs. See 800 F. Supp. 928 (E.D. Wash. 1992). See B.E.H. Johnson, Alar Problems: Auvil v. CBS, Part One of the BULLETIN, above.

Only one of the agricultural disparagement statutes enacted in the wake of Auvil (and the events that led up to it) incorporates on its face the "of and concerning" requirement to require that the "disparagement" at issue be directed at any particular plaintiff's product. The class of plaintiffs permitted under the remaining statutes range from "[a]ny person who produces, markets or sells a perishable food product or commodity" (See, e.g., Ala. Code § 5-6-5-21) to anyone in "the entire chain from grower to producer." (See, e.g., Ga. Code § 2-16-2(3)).

Only Idaho's statute (Idaho Code § 6-2003(4)) expressly requires that, to be actionable, the allegedly "disparaging factual statement must be clearly directed at a particular plaintiff's product." While Idaho had initially considered legislation similar to that passed in other states, it was
substantially revised after the State’s Attorney General opined that it raised First Amendment "concerns . . . of sufficient magnitude that a reviewing court would likely find” such legislation "unconstitutional.” Idaho Op. Att’y Gen., at 11 (Feb. 28, 1992) (reproduced in the Appendix, below). The Attorney General advised that, “at some point, group defamation or disparagement suits must be limited so that the public discourse so essential to the core of the first amendment can be protected.” *Id.* at 9. Specifically, because the statute would render actionable “general health assertions about widely used food products which do not name a particular producer,” its “potentially broad and chilling sweep” would “likely” render it unconstitutional. *Id.* at 10.

II. ORIGINS OF THE CONSTITUTIONAL “OF AND CONCERNING” REQUIREMENT

The “of and concerning” requirement, an essential component of the constitutional protection afforded to freedom of expression, protects against actions that would “dampen[] the vigor and limit[] the variety of public debate.” *New York Times Co. v. Sullivan*, 376 U.S. 254, 279 (1964). In *Sullivan*, the Supreme Court made plain that, however a plaintiff may style such a cause of action, “[i]t must be measured by standards that satisfy the First Amendment.” *Id.* at 269.

There, although the plaintiff public safety commissioner was nowhere referred to by name in the advertisement at issue, the Alabama Supreme Court had found that, as a matter of common law, the “of and concerning” requirement was satisfied by the testimony of seven witnesses that “they read some or all of the statements as referring” to the plaintiff “in his capacity as commissioner.” *Id.* at 258. Although *Sullivan* is perhaps best remembered for its creation of the constitutional malice and “public official” rules, the Court left no doubt that “the evidence was constitutionally deficient in another respect; it was incapable of supporting the jury’s finding that the allegedly libelous statements were made ‘of and concerning’ the plaintiff.” *Id.* at 288. The Court recognized that Alabama’s application of the common law rule would “sidestep” constitutional requirements “by transmuting criticism of government, however impersonal it may seem on its face, into personal criticism.” *Id.* at 292.

In *Rosenblatt v. Baer*, 383 U.S. 75, 79-80 (1966), the Supreme Court reaffirmed the fundamental constitutional role of the “of and concerning” requirement in connection with a verdict in favor of the plaintiff, who sued over a column which contained “no reference” to him or to “anyone else who had part in the administration” of the publicly-owned recreation facility at issue. “To the extent the trial judge authorized the jury to award respondent a recovery without regard to evidence that the asserted implication of the column was made specifically of and concerning him,” the Court concluded, “the instruction was erroneous.” *Id.* at 82. To maintain a cause of action the plaintiff, “whether or not” he was a “public official,” must satisfy the “of and concerning” requirement by showing that column made “specific reference” to him. *Id.* at 83.
III. LIKE OTHER CONSTITUTIONAL PROTECTIONS OF EXPRESSION, THE “OF AND CONCERNING” REQUIREMENT EXTENDS TO AGRICULTURAL DISPARAGEMENT CASES.

Courts have regularly recognized the constitutional heritage of the “of and concerning” test and have applied it to prevent self-censorship in the reporting of matters of public concern, with the notable exception of Auvi. See, e.g., Barger v. Playboy Enters., Inc., 564 F. Supp. 1151, 1153 (N.D. Cal. 1983), aff’d, 732 F.2d 163 (9th Cir.), cert. denied, 469 U.S. 853 (1984); Blatty v. New York Times Co., 232 Cal. Rptr. 542, 728 P.2d 1177, 1183 (1986). As the California Supreme Court explained in Blatty:

The “of and concerning” or specific reference requirement limits the right of action for injurious falsehood, granting it to those who are the direct object of criticism and denying it to those who merely complain of nonspecific statements that they believe cause them some hurt. To allow a plaintiff who is not identified, either expressly or by clear implication, to institute such an action poses an unjustifiable threat to society.

* * * *

The “of and concerning” requirement serves to immunize a kind of statement which, though it can cause hurt to an individual, is deemed too important to the vigor and openness of public discourse in a free society to be discouraged.

Id.

Thus, in Schuster v. U.S. News & World Report, Inc., 602 F.2d 850 (8th Cir. 1979), aff’g, 459 F. Supp. 973 (D. Minn. 1978), the Eighth Circuit affirmed that laetrile distributors not specifically identified in an article condemning the so-called cancer “cure” were barred from pursing their claims by the “of and concerning” requirement. “The effectiveness of laetrile as a cure for cancer is an issue of public moment,” the district court in Schuster explained. “To hold that statements commenting generally on the laetrile controversy are of and concerning individuals prominent in the controversy would chill heated public debate into lukewarm pap. The first amendment does not countenance such a deterrent to free speech.” 459 F. Supp. at 978.

In Gintert v. Howard Publications, Inc., 565 F. Supp. 829, 837 (N.D. Ind. 1983), the court held that a newspaper article that discussed the alleged connection between environmental conditions and the high incidence of cancer in a small community could not form the basis of a claim by a community group not specifically identified in the article. The court recognized that “the philosophy behind the rule on group libel,” especially in its constitutional dimension, barred the claim:

The environmental conditions and any possible relationship to the high incidence
of cancer are matters of public concern wherein the interest in free press and
discussion of such matters is paramount. As the articles have no statements that
are reasonably susceptible to application to any given individual, the interest of the
defendant should prevail.

Id. at 835.

Mich. 1980), aff'd, 665 F.2d 110 (6th Cir. 1981), plaintiffs, who sought “to represent ‘more than
one million sport hunters and hunting license buyers within the State of Michigan,’” claimed that
they were defamed by two CBS broadcasts that addressed the practice of sport hunting. Id. at
895. The court recognized that, “[i]f plaintiffs were allowed to proceed with this claim, it could
invite any number of vexatious lawsuits and seriously interfere with public discussion of issues,
or groups, which are in the public eye.” Id. at 900. “Such suits,” the court concluded, “would
be especially damaging to the media, and could result in the public receiving less information
about topics of general concern.” Id. Accordingly, the court held that, “[t]o avoid this conflict
with First Amendment values,” it must “reaffirm the general tort principle which requires that a
publication specifically refer to or point to the plaintiff before he is permitted to maintain a suit.”
Id. In so holding, the court cited a case decided in 1840 which applies with equal force today:

It is far better for the public welfare that some occasional consequential injury to
an individual arising from general censure of his profession, his party or his sect
should go without remedy than that free discussion on the great questions of
politics, or morals, or faith should be checked by the dread of embittered and
boundless litigation.

Id. (quoting Ryckman v. Delevan, 25 Wend. 186, 198-99 (N.Y. 1840)). See also Weatherhead
v. Globe Int'l, Inc., 832 F.2d 1226, 1228-29 (10th Cir. 1987) (court affirmed dismissal of class
action by 995 dog breeders against newspaper on the ground that a “group of 955 was too large
to afford relief and could not be denominated in a smaller subset” because none was identified in
the article); National Nutritional Foods Ass'n v. Whelan, 492 F. Supp. 374, 377, 380 (S.D.N.Y.
1980) (plaintiffs, a trade association of retailers, manufacturers and distributors of health food
products, could not maintain cause of action against publications that criticized claims that
“organically grown food is more nutritious and safer than ‘regular’ food,” on the ground that
none of the statements at issue “in any manner named or specifically suggested any of the
1997) (affirming dismissal of action on behalf of 436 commercial net fisherman, who contended
that television stations had defamed them by airing commercials promoting passage of amendment
to State Constitution restricting commercial net fishing, because plaintiffs could not “show that
the statements were ‘of and concerning’ them”; but inviting “the legislature to consider regulation
of disparagement of an occupation, in a manner akin to regulation of disparagement of a
product”); Kentucky Fried Chicken v. Sanders, 563 S.W.2d 8, 9 (Ky. 1978) (franchise owner
could not maintain claim against Colonel Sanders because statements at issue did not single out
any specific restaurant among 5,000 KFC outlets).

IV. THE COMMON LAW ALSO FREQUENTLY IMPOSES AN "OF AND CONCERNING" REQUIREMENT

Although frequently viewed as a federal constitutional issue, the common law of many jurisdictions also imposes an "of and concerning" requirement, a point which should not be overlooked in agricultural disparagement actions. This common law doctrine furthers "the social interest in free press discussion of matters of general concern." Service Parking Corp. v. Washington Times Co., 92 F.2d 502, 505-06 (D.C. Cir. 1937); accord Sims v. KIRO, 580 P.2d 642, 647 (Wash. App. 1978) (emphasizing that "of and concerning" requirement reflects "the desirability of protecting the need for fair comments by the disseminators of news and information"), cert. denied, 441 U.S. 945 (1979). This includes in the context of product disparagement actions. See Restatement (Second) of Torts § 564A (1977); California Canners & Growers Ass'n v. United States, 7 Cl. Ct. 69, 86 (1984) (manufacturer and seller of foods containing cyclamates could not bring product disparagement action because defendant's characterizations were of cyclamates generally, not of plaintiffs or their products specifically); Flotech, Inc. v. E.I. DuPont de Nemours Co., 627 F. Supp. 358, 370 (D. Mass. 1985) (statements critical of Teflon as ingredient in oil treatment products not "of and concerning" plaintiff's particular oil treatment product containing Teflon), aff'd, 814 F.2d 775 (1st Cir. 1987); Adams v. WFTV, Inc., 691 So. 2d 557 (Fla. Dist. Ct. App. 1997) (group of 637 net fisherman too large to allege defamation where "there is no specific reference to a member of the group" and "no plaintiff was named or depicted in the advertisement" at issue).

VERIFIABILITY, TRUTH, OPINION AND SCIENTIFIC INQUIRY

By Luther T. Munford and Hayes Johnson

The agricultural disparagement statutes are an overt attempt to overrule Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 780 (1986), which places the burden of proving falsity on a plaintiff when the speech is a matter of public concern. The degree to which these statutes will chill truthful speech depends in part on the difficulty a defendant will have in proving truth. Some statements are easily proven, e.g., cattle have hooves. Other statements are not, e.g., eating beef carries a risk of mad cow disease. In many, perhaps most, cases, statements covered by the veggie libel statutes will be particularly hard to prove, especially by the required scientific means. For this reason, the veggie libel statutes threaten far-reaching deterrence of both popular and scientific speech about food safety.

Typically, the statutes prohibit statements that an agricultural product “is not safe for human consumption” unless the statement can be proven true “based upon reasonable and reliable scientific inquiry, facts or data.” See, e.g., Ohio Rev. Code § 2307.81 (B)(1),(2). The literal meaning of “not safe” is “risky.” The dictionary defines “safe” as “free[] from harm or risk.” Webster’s New Collegiate Dictionary 1018 (1977). There are several reasons why statements about food safety risks may be particularly difficult to prove true.

I. EVIDENCE CONCERNING FOOD SAFETY IS NOTORIOUSLY UNCERTAIN AND EXPENSIVE.

Disagreement about food safety can spring from many sources. Some is contextual. Belladonna is poisonous, but not to those who happen to need a dose of atropine, a life-saving drug extracted from it.

A more fundamental problem is that scientists cannot run tightly controlled experiments on human beings. They must rely on reading the tea leaves of epidemiological studies. Should we eat more olive oil to prevent heart disease, or less? Scientists cannot agree. See Fats, Oils, Health, 90 J. AM. MED. ASS’N 3146 (1990).

A third problem lies in the very nature of science, which involves the testing of hypotheses. According to one philosopher of science, “every interesting and powerful statement must have a low probability,” otherwise it would not need testing. K. Popper, Conjectures and Refutations: The Growth of Scientific Knowledge 58 (1965), quoted in Curtis, Monkey Trials: Science, Defamation, and the Suppression of Dissent, 4 WM. & MARY BILL OF RIGHTS J. 507, 522 (1995). Science operates on the basis of “trial and error.” With respect to food safety, the veggie libel laws threaten to turn this into “trial and liability.”

Put differently, scientific debate demands not just the freedom to speak the truth but the freedom to advance conclusions which may be false: “a hypothesis that proves false, or a criticism
that proves mistaken, may still have substantial value in advancing knowledge and political understanding.” Curtis, supra, at 532. The veggie libel laws, however, would impose liability on the scientist who advances a hypothesis about food safety that the scientist cannot prove to be true to the satisfaction of a jury. That which cannot be proven true may nonetheless not be false.

An example from the field of drug regulation shows how expensive proof concerning safety “for human consumption” can be. Manufacturers of new drugs must prove to the Food and Drug Administration that their products are safe and effective for their intended use. 21 U.S.C. § 355(d). Ten years ago, the average cost of research, development and administration required to get a new chemical compound through the approval process was $231 million. Many scholars have argued that the cost, a significant portion of which is due to testing, keeps potentially useful drugs off the American market and so harms public health. See Note, FDA Reform and the European Medicines Evaluation Agency, 108 HARY. L. REV. 2009, 2011-2016 (1995). If the cost of safety testing deters drug manufacturers, who have a direct financial incentive, it will certainly deter those who have no such direct incentives. Journalists and scientists have no such incentives. In fact, if a journalist or scientist had such an incentive it would be grounds for questioning professional objectivity.

II. STATEMENTS ABOUT SAFETY ARE FREQUENTLY OPINIONS WHICH CANNOT BE PROVEN TRUE OR FALSE.

For many years, opinions about safety risks have been held not to be statements of fact for which a libel action would lie. See, e.g., Peter Scalamandre & Sons, Inc. v. Kaufman, 113 F.3d 556, 562 (5th Cir. 1997) (“people of Texas are being poisoned” was matter of honest belief); Redco Corp. v. CBS Inc., 758 F.2d 970, 972 (3d Cir. 1985) (statements about safety protected opinions where underlying facts disclosed); Yiannouliannis v. Consumers Union, 619 F.2d 932, 941 (2d Cir. 1980) (opinion that there is no controversy over safety of fluoridation not actionable). But see Church of Scientology v. Eli Lilly & Co., 778 F. Supp. 661, 667 (S.D.N.Y. 1991) (statements regarding safety of Prozac not protected opinion). One of the reasons these statements have been protected is that they are not verifiable, i.e., cannot be proven true or false. As Justice Harlan once said: “Any nation which counts the Scopes trial as a part of its heritage cannot so readily expose ideas to sanctions on a jury finding of falsity.” Time Inc. v. Hill, 385 U.S. 374, 406 (1967) (Harlan, J. concurring).

Under Milovich v. Lorain Journal, 497 U.S. 1 (1990), it is undisputed that there can be no liability for a statement that cannot be proven true or false. Ironically, and unconstitutionally, these statutes attempt to impose liability on that basis alone. If there is “no such thing as a false idea,” Gertz v. Robert Welch, Inc., 418 U.S. 323, 339 (1974) (Powell, J. concurring), there may be no such thing as a provably true one either. Unverifiability, a source of protection under the common law, leads to condemnation under the veggie libel statutes. See B.E.H. Johnson, Alar Problems: The Auvil v. CBS Case, Part One, above; F. Altshuler, “Veggie Libel”: An Environmentalist’s View, Part Two, C, below.
III. "REASONABLE AND RELIABLE SCIENTIFIC INQUIRY"
CAN BE A VERY HIGH EVIDENTIARY STANDARD.

As noted above, Justice Harlan once advised that the courts should stay out of the arena of scientific debate. That was before the explosion of product liability litigation that thrust the courts deep into that quandary. In those cases, where the burden is on the plaintiff to prove that a product is not safe, the federal courts have adopted high standards to determine what expert evidence is sufficiently "reliable" to support a finding of liability. This high standard makes sense when the issue is whether or not a manufacturer will be held liable for a tort. It should not, however, be a threshold standard that must be overcome before the safety of an agricultural product can be discussed in either popular or scientific literature.

For example, in General Electric Co. v. Joiner, 118 S. Ct. 512, 66 U.S.L.W. 4036 (No. 96-188, Dec. 15, 1997), the U.S. Supreme Court upheld a district court's decision to exclude expert testimony as not being reliable. The expert testified that the plaintiff's workplace exposure to PCB's had caused his small cell lung cancer. The Supreme Court said the district court had not abused its discretion because the studies on which the expert relied were "dissimilar." The studies either involved massive doses of PCB's injected into animals or were epidemiological studies that were inconclusive or suggested the presence of other carcinogens as well. 66 U.S.L.W. at 4038. Dissenting, Justice Stevens said the expert's methodology was the same as that used by the EPA. Id. at 4040. See also Merrell Dow Pharmaceuticals, Inc. v. Havner, 953 S.W.2d 706 (Tex. 1997) (epidemiological studies must show exposure more than doubled risk of injury).

State courts may or may not adopt this high standard of "reliability" in construing a defendant's burden under veggie libel laws. They should not. The federal debate over the meaning of "reliability" shows at its worst how draconian it could be to prohibit all statements about food safety risks that a publisher or scientist could not prove were based on "reliable" science.

IV. THE STATUTES IRRATIONALY PRECLUDE CONCLUSIVE RELIANCE ON EVIDENCE OTHER THAN SCIENTIFIC TESTS.

By requiring that statements be based on "reasonable and reliable scientific inquiry" in order not to be declared "false," some veggie libel statutes appear to eliminate alternative sources of relevant proof.

For example, government findings supporting statements about safety would not insulate those statements from veggie libel attack if the plaintiff questioned the reliability of the science relied on by the government. The veggie libel statutes thus could operate to jeopardize discussion of government findings by subjecting them to relitigation in the courts under different statutory standards of proof. See Dameron v. Washington Magazine, Inc., 575 F. Supp. 1575, 1576 (D.D.C. 1983) (recognizing privilege to republish NTSB findings without defamation liability).
Similarly, discovery might show admissions by a plaintiff's employees. An officer of an apple growers' association might have written an internal memo warning of the same Alar dangers as those broadcast by CBS. The memo, however, would not be proof of "truth" as defined in the veggie libel law if it was not itself based on "reasonable and reliable scientific inquiry."

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STATE OF MIND

By John Borger and Deborah Ellingboe

I. THE STATUTES

The state of mind required before a speaker may be held liable for agricultural disparagement varies significantly by state under statutory standards, even before those standards are subjected to scrutiny under the First Amendment.

Three states—South Dakota, Mississippi, and Texas—expressly require that a person allegedly making a disparaging statement actually know the statement is false before that person may be held liable under those states' agricultural defamation statutes.

Four states—Oklahoma, Louisiana, Florida, and Ohio—have adopted a negligence standard. Thus, a person allegedly making a disparaging statement may be held liable for agricultural defamation in these states if that person knew or should have known the statement was false. Two states—Idaho and North Dakota—require a showing that the speaker acted with actual malice in the constitutional sense.

1 See S.D. Codified Laws § 20-10A-1(2) ("Disparagement" means "dissemination in any manner to the public of any information that the disseminator knows to be false . . .").

2 See Miss. Code Ann. § 69-1-253(a) ("'Disparagement' means dissemination to the public in any manner of any false information that the disseminator knows to be false . . .").

3 See Tex. Civ. Prac. & Rem. Code Ann. § 96.002(a)(2) (A person is liable under this statute if the person disseminates disparaging information about perishable food products and "the person knows the information is false").

4 See Okla. Stat. tit. 2, § 3012 (Person may be held liable for disparaging statements “based on false information . . . which the disseminator knows or should have known to be false”).

5 See La. Rev. Stat. Ann. § 3:4502(1) ("'Disparagement' means dissemination to the public in any manner of any false information that the disseminator knows or should have known to be false . . .").

6 See Ohio Rev. Code Ann. § 2307.81© ("If the plaintiff establishes that the disseminator knew or should have known that the information was false, damages may be awarded . . .").

7 See Idaho Code § 6-2002(1)(d) (Disparagement means "[t]he defendant made the statement with actual malice, that is, he knew that the statement was false or acted in reckless disregard of its truth or falsity").

8 See N.D. Cent. Code § 32-44-01(6) ("'Knowing the statement to be false' means the communicator knew the statement was false or acted with reckless disregard of whether the statement was false").
Arizona\textsuperscript{9} and Florida\textsuperscript{10} define “false information” in a way that resembles negligence but have fault standards that require something more. Arizona’s fault standard appears to encompass both constitutional principles of attitude-toward-truth (through a negligence-based — “knows or should have known” — definition of “false information”) and common law principles of attitude-toward-plaintiff (the dissemination must be “intentional” and “for the purpose of harming” the plaintiff).\textsuperscript{11}

Florida requires “willful or malicious dissemination” of the information, but on its face this may refer to the act of dissemination rather than to an attitude toward the truth or falsity of the information. Florida law defining “willful” and “malicious” in other contexts sheds some light on this question. Under Florida’s criminal jury instructions, for example, “willful” is defined as intentional or purposeful, while “malicious” is defined as wrongful, intentional, and done without legal justification.\textsuperscript{12} The requirement that the dissemination be both wrongful and intentional suggests the disseminator must know the information is false.

In Georgia, a speaker allegedly making a disparaging statement must have “willful[ly] or malicious[ly]” disseminated “false information” about perishable food products.\textsuperscript{13} “Willful” or “malicious,” as in the Florida statute, arguably relate to the act of dissemination, rather than the defendant’s attitude toward truth or falsity. Under Georgia law, “malicious” has referred to a common law requirement in disparagement actions that the plaintiff demonstrate that the statement was deliberately calculated to injure. See Williams v. Trust Co. of Georgia, 230 S.E.2d 45, 50 (Ga. 1976), Taggart v. Savannah Gas Co., 175 S.E. 491, 492 (Ga. 1934). The statute appears to impose an affirmative duty of inquiry on the defendant, because information is “deemed false” if it is “not based upon reasonable and reliable scientific inquiry, facts, or data.”

Georgia law, like Florida law, fails to answer whether the speaker must know the allegedly disparaging statement was false. Under Georgia tort law, for example, “malicious” is defined as

\begin{itemize}
\item \textsuperscript{9} See Ariz. Rev. Stat. § 3-113(A)(1) (“‘False information’ means information that is not based on reliable scientific facts and reliable scientific data and that the disseminator knows or should have known to be false”).
\item \textsuperscript{10} See Fla. Stat. Ann. § 865.065(2)(a) (“‘Disparagement’ means the willful or malicious dissemination to the public in any manner of any false information that a perishable agricultural food product is not safe for human consumption. False information is that information which is not based on reliable, scientific facts and reliable scientific data which the disseminator knows or should have known to be false”).
\item \textsuperscript{11} See Ariz. Rev. Stat. § 3-113(B) (“A person who intentionally disseminates false information to the public that a perishable agricultural food product is not safe for human consumption for the purpose of harming a producer or shipper is liable for damages . . . ”) (emphasis added).
\item \textsuperscript{12} See Florida Standard Jury Instructions (Criminal).
\item \textsuperscript{13} See Ga. Code Ann. § 2-16-2(1) (“‘Disparagement’ means the willful or malicious dissemination to the public in any manner of false information that a perishable food product or commodity is not safe for human consumption. The information shall be deemed to be false if it is not based upon reasonable and reliable scientific inquiry, facts, or data”).
\end{itemize}
“any unauthorized interference or any interference without justification or excuse.” Under Georgia’s securities crimes statutes, “willful” means “knowingly and intentionally committing the acts that constituted the violation.”

In Colorado, a speaker may be held criminally liable for agricultural disparagement for making a materially false statement “knowingly.” While the language arguably has the same ambiguities as the language of the Florida and Georgia statutes, in People v. Ryan the Colorado Supreme Court declared in dicta that the Colorado criminal libel statute was unconstitutional as applied to libelous statements about public figures because the statute did not require knowing falsity or reckless disregard for the truth or falsity of the statement. Colorado requires a showing of “actual malice” in any libel action involving matters of public concern. Thus, to avoid constitutionality concerns, Colorado courts would likely construe the state’s anti-disparagement statute to require an intentionally false statement.

Alabama’s statute appears to be the most permissive, making actionable “[t]he dissemination to the public in any manner of false information.” In addition, the Alabama statute provides, “[i]t is no defense under this act that the actor did not intend, or was unaware of, the act charged.”

Alabama’s strict liability statute, and the approaches of those states that may require only knowledge of the act of dissemination without regard to knowledge of content or fault with respect to content, would not pass constitutional muster. The state interest in protecting the reputations of individuals and companies — recognized in Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974), as the interest against which the First Amendment’s protection of free and open communication would be balanced — is undoubtedly no less, and probably is greater, than the state interest in protecting agricultural products. Therefore, Gertz’s constitutional minimum fault standard of negligence almost certainly sets the floor of fault in agricultural disparagement cases, as well as traditional defamation actions.

In addition, defense counsel faced with statutes arguably permitting liability based only on strict liability should have no difficulty locating cases in or near their jurisdictions holding that

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17 806 P.2d 935 (Colo. 1991).
19 See Ala. Code § 6-5-621(1).
persons who knowingly disseminate material but who are unaware of the specific contents—such as booksellers or local television affiliates—cannot be held liable for the allegedly false and harmful nature of the publication or broadcast. Indeed, this requirement got local stations out of the case in the *Auvil* litigation itself. See *Auvil v. CBS “60 Minutes,”* 800 F. Supp. 928, 931 (E.D. Wash. 1992); see generally R. Sack & S. Baron, *Libel, Slander, and Related Problems* §6.3.1 (2d ed. 1994) and R. Smolla, *Law of Defamation,* § 4.13[1][d] (1986).

II. ARGUMENTS TO ADVANCE

A. *Construe Your Statute in Favor of Speech*
   As the foregoing review demonstrates, many of the statutes may require the skills of a linguist to understand them. They are often confusing or vague, and where this is the case, counsel should argue that they must be construed in favor of speech. Thus, ambiguities as to whether a statute requires the speaker to know that a statement is false, or whether the speaker must simply know she is making the statement, must be construed to require knowledge of falsity. Similarly, where the statute appears to blur the line between negligence and strict liability, or negligence and actual malice, it is counsel’s duty to clarify the distinctions on the side of speech.

B. *Agricultural Disparagement Statutes Should Be Construed to Comport with Common Law Tort Principles of Liability*
   Business “wrongful speech” torts such as product disparagement, interference with contract, and misrepresentation are intentional torts. Harper James & Grey, *The Law on Torts* (2d ed. 1986) §6.1 et seq.; Prosser, *The Law of Torts,* (4th ed.) §§107, 128, 129. That is, before liability will be imposed on a defendant, plaintiff must show that the defendant intended to commit some specific harm. Whether through sloppy drafting, industry lobbying, or both, several state agricultural disparagement laws now permit liability for food disparagement using a negligence or strict liability standard. While liability for defamation may be premised on negligence in some circumstances, a defamation plaintiff must always prove that the objectionable speech was “of and concerning” him. These agricultural disparagement statutes require no such nexus between the plaintiff and the speech. Thus, they create a tort that imposes on the media and general public a duty of care that is owed to a vast and unforeseeable group of plaintiffs. This violates basic principles of tort law.

In general, tort law provides that there can be no liability for a negligent act without more. That is, simply because a defendant causes harm to a plaintiff does not make the defendant *per se* liable. No tort permits “liability to the world” simply on the basis of a defendant’s act. There must be more, such as a reasonable foreseeability of harm (*Palsgraf v. Long Island R. Co.*, 248 N.Y. 339, 162 N.E. 99 (1928)).

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21 The court should also be reminded that these statutes have their roots in the purely intentional tort of product disparagement. See D. Heller, *Product Disparagement: The Common Law Tort,* Part One, above, and discussion in parts II.B of this article, below.

22 Alabama, Arizona, Florida, Louisiana, Ohio, & Oklahoma.
For example, one business tort, negligent misrepresentation, involves a negligence standard, but there must also be a commercial relationship between the parties and reasonable reliance on the false statement by a party to the transaction. According to the Restatement, the tort only imposes liability on a defendant who, in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss, caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.

Restatement (Second) of Torts § 552.

Commercial relationships generally supply the sphere of potential plaintiffs in business torts and operate as a kind of “of and concerning” requirement, as in defamation law. For example, a commodities trader who negligently dispenses false professional advice about cattle futures may be liable to a customer for false speech, but he or she will certainly not be liable to an unknown cattle rancher, or hamburger stand owner for a decline in beef consumption. See also Robert D. Sack & Sandra S. Baron, Libel, Slander and Related Problems § 11.8 (2d ed. 1994) (In negligent misrepresentation cases “courts have frequently articulated the concern that the specter of unlimited liability could severely hamper the free flow of information and therefore the exercise of First Amendment rights”).

In contrast, many agricultural disparagement laws, if read literally, impose an immense almost incomprehensible duty that is owed by the media, the scientific community and the general public to commercial agricultural interests to whom they have no relationship of any kind, let alone a commercial relationship. These absurd results can be avoided if the statutes are read to require intentionality and focus, i.e., knowledge that one’s statements are false; and by construing the statutes to require a commercial context and to require an “of and concerning” element so that actionable statements would have to at least be about a plaintiff’s specific agricultural product. See Idaho Code 6-2001 (1997) (requiring that the actionable statement be about a plaintiff’s specific agricultural product). Without being moored to foreseeable plaintiffs, agricultural disparagement laws with a negligence standard essentially expose the media to unprecedented and boundless liability.

C. Actual Malice must Be the Constitutional Standard for Agricultural Disparagement

As previously discussed in this BULLETIN, constitutional limitations on liability for speech must be applied to these agricultural disparagement statutes. See, e.g., B.E.H. Johnson & E. Stahl, Food Disparagement Laws: An Overview of the Constitutional Issues, Part Two, A, above. This includes the requirement that liability for speech may not be imposed unless the defendant acted with the necessary degree of fault. The goal of a defendant in a food disparagement action is to convince the court that no matter what a state’s statute says, the constitution requires that
the highest level of culpability — actual malice — must be found in order to permit liability.23

Defendants may reach this goal by the following routes: (1) defendants may argue the actual malice standard applies because any food — which is, after all, the interest protected by the tort of disparagement — should be treated, in effect, as a public figure; and (2) defendants may argue that the particular food product in their case should be deemed a public figure or limited purpose public figure, for which the actual malice test would apply under traditional defamation analysis.

Under defamation cases decided by the Supreme Court, the actual malice test has been applied where the plaintiff is a public official, public figure or limited purpose public figure, attempting to redress a perceived injury to reputation involving a matter of public concern. Agricultural disparagement has a different focus. The plaintiff is, in essence, the agricultural product at issue. In Oprah Winfrey’s case, it was the beef. In the AgriGeneral case, it is eggs, and so on.

Where defamation protects the reputation of an individual — a matter which “reflects no less than our basic concept of essential dignity and worth of every human being — a concept at the root of any decent system of ordered liberty”24 — disparagement protects an economic interest in a product.

Given this distinction, defendants should argue that the constitutional law that evolved from New York Times and its progeny, meant to protect the vigor of debate on matters of public concern and balancing free speech against state interests in protecting its citizens from harm, must require application of the actual malice rule no less when an inanimate product is the plaintiff than when a human and human dignity is at issue. See B.E.H. Johnson & E. Stahl, Food Disparagement Laws: An Overview of the Constitutional Issues, Part Two, A, above.

Arguing whether beef or eggs are public figures or not should not sidetrack the underlying balancing analysis. The distinction between public and private plaintiffs arose in the defamation context, where the right protected — individual reputation — can be outweighed by free-speech concerns based on how “public” the plaintiff is. Disparagement, however, is concerned with economic loss based on damaging speech about a product. Moreover, a relevant consideration in deciding how heavily to weigh free-speech concerns is how “public” the interest is in the product. The heightened standard of fault should apply to food disparagement issues because the thing being discussed — food safety — is of the utmost public concern. Put another way, in

23 The argument gains ground from the fact that the common law governing product disparagement has existed for many decades in the shadow of New York Times. In common law product disparagement cases, where, as noted, a suit involves only the economic interest surrounding a product, plaintiffs of all kinds — private or public — have had to satisfy a malice standard. See D. Heller, Product Disparagement: The Common Law Tort, Part One, above. To the extent state legislators have attempted to abrogate the common law, they have attempted to undercut its constitutional underpinnings.

disparagement actions without an individual reputation at stake, and with the public’s interest in food safety, research and consequent debate all at stake, the balance tips in a manner akin to that of public figures in all instances. Cf. Dairy Stores, Inc. v. Sentinel Publishing Co., 516 A.2d 220 (N.J. 1986). The product is the public figure. See also Robert D. Sack & Sandra S. Baron, Libel, Slander and Related Problems § 5.7 (2d ed. 1994) (Given that the interest protected is purely economic, parties targeted under the product disparagement statutes may get some mileage from arguing that the law traditionally has afforded commercial interests less protection than interests that advance the public good).

Of course, the task will be made easier, or, at the least, subject to a larger body of precedent, if the plaintiff is simply characterized as a public figure or limited purpose public figure. It is likely that plaintiffs in food disparagement actions would qualify as “limited purpose public figures” under Gertz. The relevant factors are whether they inject themselves into a public controversy (which food producers do by marketing their goods to the public) and whether they have access to “channels of effective communications” (which any food producer with a marketing budget or trade association does). Additionally, food producers and the safety of their products often are subject to regulation by government agencies, in effect inviting public scrutiny. In any long-running controversy over the safety of a particular type of food product, prominent producers or their representatives likely will have made public comments sufficient to meet the limited public figure standard under Gertz. See generally R. Smolla, Law of Defamation, § 2.09[3]-[4] (1986).

If plaintiffs in a food disparagement suit are held to the actual malice standard under any of the above arguments, it seems unlikely that they would be able to prove defendant acted with that degree of fault, at least where media defendants repeat or rely upon the pronouncements of qualified experts, even if those experts disagree with the positions of the plaintiffs or of plaintiffs’ experts. See, e.g., Aequitron Medical, Inc. v. CBS Inc., 964 F. Supp. 704, 25 Media L. Rep. 1897 (S.D.N.Y. 1997). Indeed, public figure plaintiffs probably will fail even if the defendants’ source lacks official scientific credentials, so long as the source was “reasonably reliable.” See generally R. Sack & S. Baron, above, §5.5.2.3.

Even if the plaintiff is not deemed a public figure, a negligence standard is not a death knell to the defendant. Reliance upon a scientifically authoritative source ought to preclude liability even under a negligence standard in a case involving a private-figure plaintiff. See

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35 Smaller producers often will rely on, and benefit from, the participation of larger producers and trade associations in the debate. Thus, if any food producer can get around the “of and concerning” requirement of a defamation action by virtue of statutory enablement, there should be a correlative “public figure by proxy” doctrine that makes every producer subject to the burdens of public figure status if any producer has joined the public debate in a significant fashion. Judicial skepticism of “group libel” claims would seem to require such a trade-off, at the very least. Schuster v. U.S. News & World Report, Inc., 459 F. Supp. 973, 978 (D. Minn. 1978) (“To hold that statements commenting generally on the laetrile controversy are of and concerning individuals prominent in the controversy would chill heated public debate into lukewarm pap. The first amendment does not countenance such a deterrent to free speech.”) aff’d, 602 F.2d 850 (8th Cir. 1979).
generally cases cited in J. Borger, *Summary Judgment in Negligence Cases: It Can Happen To You*, 3 LDRC (1997) BULLETIN at 7 (July 31, 1997). The statutory standards that require reliance on “reasonable and reliable scientific inquiry, facts, or data” ought to be satisfied by reliance on a credible critic of the orthodox scientific viewpoint, in order to protect responsible scientific debate. However, the vagueness of some statutory language likely will lead first to a battle of experts, and second, to plaintiffs’ argument that defendants should be liable for all damages caused by repetition of statements that do not conform completely to the generally accepted scientific position. One can anticipate a plaintiff arguing that a lay defendant reasonably can not rely upon a source who appeared to have appropriate scientific credentials, but whose testimony ends up being excluded by the trial court under the gate-keeping function of *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). Faced with a proffer of expert scientific testimony, a court engaging in a Daubert inquiry must make a preliminary assessment of whether the testimony’s underlying reasoning or methodology is scientifically valid. This inquiry is not limited to whether the theory proffered has attracted widespread acceptance within the relevant scientific community; the court must also consider, among other things, whether the theory or technique can or has been tested, whether the theory or technique was subjected to peer review and publication, and the known or potential rate of error. 509 U.S. at 593-94.

While Daubert is appropriate for evaluating experts at trial, media defendants and other participants in public debate should be entitled to take credentialed authorities at something approaching face value, without having to engage in their own Daubert-style inquiry before publishing or broadcasting statements about food safety; journalists are (for the most part) neither scientists nor jurists, and should not be held to those higher professional norms. At the very least, however, assuming that the defendant has repeated or relied upon the statements of an authority who can meet the Daubert requirements, both the negligence and actual malice standards under the First Amendment should preclude liability even if that authority does not agree with the positions of the scientific mainstream. Basic principles of science call for the continual testing of accepted wisdom, and the law should not be abused to cut off that scientific inquiry or public debate. American society long ago rejected heresy trials in the context of religious and political disputes. No legitimate reason exists to revive the practice of persecuting heretics in the form of imposing tort liability for the act of blaspheming food products.

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DAMAGES

By Amy B. Ginensky and Kathy E. Ochroch

Although the damages phase is every defendant’s least favorite part of a trial, defendants in agricultural disparagement cases are going to be especially dismayed by the remedies provided in the agricultural disparagement statutes. In contrast to the common law of disparagement, which requires plaintiffs to prove special damages, most of these statutes provide for compensatory, presumed, and punitive damages. Injunctive relief may be an available remedy, and some statutes even provide for the automatic award of treble damages, attorney’s fees and costs. Considering the low threshold of culpability required for liability under these statutes, if upheld, these provisions will not only extract a heavy price from defendants, but also threaten public safety by chilling speech critical of agricultural products and producers.

I. THE REMEDIES PROVISIONS OF THE AGRICULTURAL DISPARAGEMENT STATUTES.

All of the agricultural disparagement statutes, with the exception of Colorado, permit the plaintiff to recover compensatory damages. Given the enormous number of plaintiffs who may claim to be aggrieved by any one statement about an agricultural product, and the potential exorbitant liability for actual damages alone, one might think that the states would limit the remedy provided. That is surely not the case. Indeed, almost every one of the thirteen state statutes expressly or implicitly provides for the award of punitive damages.

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1 Colorado’s agricultural disparagement statute provides for a criminal penalty, but does not, on its face, allow for civil damages. See Colo. Rev. Stat. Ann. § 35-31-104. Specifically, the Colorado statute makes it a crime to “knowingly” make a materially false statement about a product. See Colo. Rev. Stat. Ann. § 35-31-101. The statute, however, fails to define “knowingly.” See id. If “knowingly” is interpreted to mean any standard less than actual malice, this criminal statute should be unconstitutional under the rules established by the Supreme Court for criminal defamation statutes. See Garrison v. State of Louisiana, 379 U.S. 64, 74, 78 (1964) (holding unconstitutional a criminal defamation statute that imposed criminal liability for public speech on a standard of less than actual malice). Many other courts, including the Supreme Court of Colorado, have similarly struck down statutes that allow criminal liability to be imposed for public speech made without actual malice. See Colorado v. Ryan, 806 P.2d 935, 940 (Colo.) (en banc) (holding a portion of a Colorado criminal defamation statute unconstitutional because it permitted criminal sanctions to be imposed on defendants for public speech on a showing of less than actual malice), cert. denied, 502 U.S. 860 (1991); see generally Phelps v. Hamilton, 828 F. Supp. 831, 849 (D. Kan. 1993) (citing cases throughout the country which have held “criminal defamation statutes unconstitutional for not expressly recognizing the ‘actual malice’ standard”), rev’d on other grounds, 59 F.3d 1058 (10th Cir. 1995) (interpreting statute at issue as requiring “actual malice in criminal defamation cases involving matters of public concern”).

2 Five state statutes provide expressly for punitive damages by stating that a successful plaintiff may recover from the defendant damages “and any other relief a court . . . deems appropriate, including but not limited to, compensatory and punitive damages.” Ala. Code § 6-5-622 (1996); see also Ariz. Rev. Stat. Ann. § 3-113(A) (1997); Fla. Stat. Ann. § 865.065(3) (West 1997); Ga. Code Ann. § 2-16-3 (1997); Ohio Rev. Code Ann. § 2307.81 (Banks-Baldwin 1997). North Dakota’s statute also states explicitly that a plaintiff may recover exemplary damages if the defendant “willfully and purposefully disseminates a false and defamatory statement, knowing the statement to be false” regarding an agricultural
In addition, several statutes expressly provide for treble damages. In South Dakota, a defendant "who disparages a perishable agricultural food product with intent to harm the producer is liable to the producer for treble the damages so caused." S.D. Codified Laws § 20-10A-3 (Michie 1997). Similarly, in North Dakota, if the defendant has "maliciously disseminated a false and defamatory statement" about an agricultural product or producer, the producer "may recover up to three times the actual damages proven . . . ." See N.D. Cent. Code § 32-44-02 (1997). Ohio's statute mandates that a defendant who "intentionally disparages a perishable agricultural . . . food product for the purpose of harming the producers of that product" is liable for treble damages in addition to any award of punitive damages. Ohio Rev. Code Ann. § 2307.81(E) (Banks-Baldwin 1997). Finally, the Agricultural Industry's Model Bill ("the Industry's Model Bill") permits recovery of punitive damages in "an amount equal to at least three times the actual damages" if the statement was made "with malice." § 5 (the Industry's Model Bill is reprinted in the Appendix, below).

Three state statutes and the Industry's Model Bill also permit recovery of reasonable attorney's fees and court costs associated with the action. Arizona and the Industry's Model Bill permit the court to award attorney's fees and court costs to the successful party in the action. See Ariz. Rev. Stat. Ann. § 3-113© (1997); Industry's Model Bill § 8. Ohio and North Dakota, however, permit only the plaintiff to recover such costs from the defendant. See N.D. Cent. Code § 32-44-02 (1997); Ohio Rev. Code Ann. § 2307.81© (Banks-Baldwin 1997). Moreover, North Dakota mandates that the court "must order that the agricultural producer recover costs, disbursements, and actual reasonable attorney fees incurred in the action" if the court finds that the defendant "maliciously disseminated a false and defamatory statement" regarding an agricultural product or producer. See id. (emphasis added).

Finally, the Industry's Model Bill and at least one other state statute expressly permit the court to provide injunctive relief to the plaintiff. See N.D. Cent. Code § 32-44-02 (1997) (expressly permitting injunctive relief for statutory violations); Industry's Model Bill § 7 (same).³

³ Several statutes provide that once liability has been established, the plaintiff is entitled to recover "damages and any other appropriate relief." S.D. Codified Laws § 20-10A-2 (Michie 1997); see also La. Rev. Stat. Ann. § 4503 (West 1997); Miss. Code. Ann. § 69-1-255 (1996); Okla. Stat. Ann. tit. 1, § 3012 (West 1997); Tex. Civ. Prac. & Rem. Code Ann. § 96.002(b) (West 1997). Courts may interpret this vague provision to award to the plaintiff injunctive relief, punitive damages, attorney's fees and court costs in addition to compensatory damages. For a discussion of why punitive damages and injunctive relief are not appropriate remedies, see below, Part B.I., B.II.3 of this article.

⁴ Florida's statute contained a treble damages provision until this provision was deleted in a 1995 amendment to the statute. See Fla. Stat. Ann. § 865.065 (amended 1995).

II. POSSIBLE CHALLENGES TO THE REMEDIES PROVISIONS OF THE AGRICULTURAL DISPARAGEMENT STATUTES

In addition to raising concerns about proximate cause and burden of proof requirements under state laws, at least three facial challenges to the agricultural disparagement statutes exist. First, most of the statutes, because they do not require the plaintiff to prove actual malice (as defined in New York Times v. Sullivan) to recover presumed and punitive damages, can be attacked under the Supreme Court's decision in Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974). Second, those that contain injunctive provisions, which permit the court to enjoin speech, should fail as allowing for an unconstitutional prior restraint. Third, because these statutes lack an "of and concerning" requirement, the potential number of plaintiffs is limitless, creating prudential concerns and contradicting the rule against group libel claims.

A. The Absence of An Actual Malice Requirement

In Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974), the Supreme Court held that a private figure defamation plaintiff could not recover presumed or punitive damages on a showing of anything less than actual malice under New York Times v. Sullivan — knowledge of falsity or reckless disregard for the truth. See id. at 350. The Court explained that it was "appropriate to require that state remedies for defamatory falsehood reach no farther than is necessary to protect the legitimate interest involved. It is necessary to restrict defamation plaintiffs who do not prove knowledge of falsity or reckless disregard for the truth to compensation for actual injury." See id. at 349 (emphasis added).

Many of the agricultural disparagement statutes attempt to bypass the requirement of actual malice for punitive, treble, and presumed damages announced in Gertz, however, and permit their recovery based on a "less demanding standard than that stated by New York Times . . . ." Gertz, 418 U.S. at 350. For examples, see J. Borger, State of Mind, above. These statutes, which permit punitive and presumed damages to be awarded on standards of negligence and strict liability, directly contradict the rule established by Gertz. To the extent that Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749 (1985), is invoked to support the statutory scheme, it should be considered irrelevant. In Dun & Bradstreet, the Supreme Court held that a private defamation plaintiff could recover "presumed and punitive damages — even absent a showing of 'actual malice,'" if the speech involved a matter of private concern. See id., at 761. Agricultural disparagement lawsuits, however, do not involve matters of "private concern." A speaker found liable under an agricultural disparagement statute presumably will be speaking on a matter involving the dangers and problems associated with certain agricultural products. Food safety and public danger are matters of public, not private, concern. Thus, a court should find

Code Ann. § 96.002(b) (West 1997) (same). For reasons explained within, courts should not consider injunctive relief an "appropriate" remedy for these statutory violations. See infra, Part B.11.

that plaintiffs suing under an agricultural disparagement statute must satisfy \textit{Gertz}, and therefore, must establish that the defendant made the defamatory statement with actual malice.

B. \textit{Permitting Injunctive Relief Violates the Presumption Against Prior Restraints}

Those statutes that apparently allow a court to enjoin statements that allegedly disparage agricultural products should be deemed to run afoul of the basic constitutional principle disfavoring prior restraints.\footnote{\textit{See Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 559 (1976)} ("prior restraints on speech and publication are the most serious and the least tolerable infringement on First Amendment rights" because they act as an "immediate and irreversible sanction").}

\textit{See Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 559 (1976)} ("prior restraints on speech and publication are the most serious and the least tolerable infringement on First Amendment rights" because they act as an "immediate and irreversible sanction").

Moreover, these injunctions would be especially suspect because they involve content-based prior restraints. \textit{Cf. Madsen v. Women's Health Ctr., 512 U.S. 753, 762-64 (1994)} (holding that injunction in question was content-neutral and therefore, not subject to heightened scrutiny). The agricultural disparagement statutes impose content-based injunctions, "regulating [speech] based on hostility — or favoritism — towards the underlying message expressed." \textit{Id. at 763 (citing R.A.V. v. St. Paul, 505 U.S. 377, 386 (1992)).} Under these statutes, a speaker who disseminates praise and support for agriculture, even if false, will not find himself subject to an injunction or other sanctions. On the other hand, a speaker who falsely criticizes an agricultural product or producer is subject to an injunction to halt his message. Thus, these agricultural disparagement statutes act as content-based prior restraints and must meet the strictest standard of scrutiny. \textit{See Perry Educ. Ass'n v. Perry Local Educators Ass'n, 460 U.S. 37, 45 (1983)}

None of the statutes, however, would withstand application of the strict scrutiny test. Because these statutes only further the economic interests of certain agricultural groups, and because there are less restrictive means of accomplishing the same goals (through damages rather than prior restraints), courts should find the injunctive provisions of the agricultural disparagement statutes unconstitutional.

C. \textit{Eliminating the "Of and Concerning" Requirement Creates Unlimited Liability for Defendants and Impermissibly Chills Speech}

As discussed in other articles in this BULLETIN, to prove a \textit{prima facie} defamation case, a plaintiff is required to show that the allegedly defamatory statement is "of and concerning" the plaintiff. \textit{See S. Berlin, Of and Concerning, above.}

Despite these basic principles, most\footnote{In contrast to the other state disparagement statutes, Idaho specifically requires that the disparaging statement be "of and concerning" the plaintiff's product. \textit{Idaho Code § 6-2003(4) (1997)} (requiring that the statement be "clearly directed at a particular plaintiff's product" and stating that "[a] factual statement regarding a generic group of products . . . shall not serve as the basis for a cause of action").} of the agricultural disparagement statutes permit recovery for statements generally disparaging agricultural products, "even if the statements make no specific reference to a plaintiff's own product." \textit{See Stahl, 71 WASH. L. REV. at 518.} As a
result, entire industries are able to sue a defendant for the wide range of remedies discussed above for one allegedly disparaging remark. This situation creates an unreasonably high risk that the disseminator of information will not only be subject to suit by one party, but will be liable for damages to a unlimited number of plaintiffs in an amount that threatens any party’s economic viability. Such a result chills speech — preventing the free exchange of information by creating a fear of limitless liability under the newly passed agricultural disparagement statutes — and should be used as a basis to attack the damages’ provisions of these statutes. See Michigan United Conservation Clubs v. CBS News, 485 F. Supp. 893, 900 (W.D. Mich. 1980) (holding that the group libel doctrine barred claim because “[i]f plaintiffs were allowed to proceed with this claim, it could invite any number of vexatious lawsuits and seriously interfere with public discussion of issues . . . which are in the public eye.”), aff’d, 665 F.2d 110 (6th Cir. 1981).

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C. Perspective of an Environmentalist

By Fred H. Altshuler

A starting point for analyzing the impact of the “veggie libel” statutes on environmental advocacy groups is the Alar incident, discussed in Part One, above. The carcinogenic properties of Alar were known as early as 1973. After several research studies found a correlation between exposure to Alar and tumors in laboratory animals, the Environmental Protection Agency’s (EPA) carcinogenic assessment group classified it in 1987 as a “probable human carcinogen.” However, EPA’s attempts to ban Alar were hamstrung by industry resistance and by an outmoded statute that made it unduly difficult to ban any pesticide currently in use.

In May of 1989, the Natural Resources Defense Council (NRDC) published Intolerable Risk: Pesticides in Our Children’s Food, which analyzed the health risks to children from 23 commonly used pesticides, including Alar. Shortly thereafter, CBS based a segment of 60 MINUTES on this study. In 1990, a group of Washington apple growers filed a product disparagement action, Auvil v. CBS 60 Minutes, against CBS, the NRDC and others in Yakima County Superior Court. This case is discussed in detail in Part One, above.

In addition to the Alar defendants’ legal victory, a less widely known but equally significant vindication came in the scientific arena. After the controversy surrounding the 60 MINUTES broadcast arose, the EPA completed yet another special review of Alar, reaffirming its finding that Alar was a probable human carcinogen and its decision to ban the product, and concluding once again that “the dietary risk posed to the general population in 1989 was unreasonable.” See 54 Fed. Reg. 47942 (1992). The EPA also conducted a third peer review assessment of both its own earlier studies and more recent data produced by Alar’s manufacturer, which likewise confirmed that Alar and its byproduct are probable human carcinogens. Subsequent studies by other agencies likewise confirmed Alar’s carcinogenicity.

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1. “Alar” is the trade name of daminozide, a known carcinogen. When used as a pesticide, daminozide produces as a metabolized byproduct unsymmetrical dimethylhydrazine (“UDMH”), which is even more carcinogenic. In this article, the term “Alar” includes both Alar itself and its byproduct, UDMH.

2. Intolerable Risk pointed out that existing regulatory standards did not take account of the special risks pesticides pose to children. Among other factors, it noted that children were particularly vulnerable because of their developing tissues and organs, lower body weight and consumption of greater proportions of certain types of food (such as apple products).

3. The World Health Organization’s International Agency for Research on Cancer and the National Toxicology Program both found that Alar and its degradation products were in fact carcinogenic. In addition, in 1993, the National Academy of Sciences issued a comprehensive study confirming the basic conclusion of the CBS and NRDC reports — that children were uniquely vulnerable to pesticides in food and that existing federal pesticide laws did not adequately protect them. National Academy of Sciences, Pesticides in the Diets of Infants and Children (1993). In further recognition of this finding, Congress enacted the Food Quality Protection Act of 1996 specifically to ensure that children are safeguarded from pesticides in food. Pub. L. 104-170, 110 Stat. 489 (Aug. 3, 1996).
Despite the fact that the criticisms of Alar were upheld in numerous scientific studies, a public perception remains that CBS and the NRDC perpetrated an unjustified "scare." That perception, which has facilitated the enactment of the "veggie libel" statutes, has been actively perpetuated in a continuing public relations campaign by the agribusiness and chemical industries, who repeatedly cite the Alar "scare" in response to suggestions that pesticides or pollutants pose a health risk to consumers.6

A leading tool in industry's ongoing efforts is an organization called the American Council of Science and Health (ACSH). Although identifying itself as a "consumer education and public health organization," the ACSH is heavily funded by the agrichemical industry, including such companies as Dupont, Monsanto, Dow Chemical, Union Carbide and Uniroyal, the manufacturer of Alar.6 The ACSH is a regular industry supporter when environmental or food safety issues are raised, and it invariably repeats the assertion that the environmental organizations that raise these concerns are merely perpetrating another "Alar scare." Yet despite the ACSH's well-known ties to the agrichemical and related industries, its assertions that food safety concerns are bogus are routinely repeated, with no mention of its industry funding, by such major news outlets as the Associated Press, United Press International, the Washington Post, the New York Times, the Los Angeles Times and USA Today. See Fullwood, Alar Report Right From the Start, But You'd Never Know It, Pub. R. Q. (Summer 1996) at 10, citing studies by the Columbia Journalism Review. By using the ACSH and other organizations whose names disguise their actual positions, funding or both, industry has fostered the false perception that the "veggie libel" statutes are necessary to counteract an epidemic of "junk science."

In practice, the "veggie libel" laws are aimed at intimidating environmental and food-safety advocates. By replacing the common law product disparagement standards applied in Auvil with a lower standard of liability, permitting claims for punitive (or treble) damages and allowing plaintiffs to recover attorney's fees, the statutes give pause to even the most fearless

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7 Such organizations include, for example, "Responsible Industry for a Sound Environment," which argues in favor of pesticides; "The Advancement of Sound Science Coalition," which is supported by executives of petrochemical and other industries and criticizes the methodologies used to assess food safety; the "Alliance for Environmental Resources," which supports clear cutting in national forests; the "National Wetlands Coalition," which favors wetlands development; the "Abundant Wildlife Society," which supports the hunting of mountain lions and coyotes; the "U.S. Council for Energy Awareness," which advocates nuclear power; "People for the West," which supports mining companies; and "Northwesterners for More Fish," which supports hydroelectric, timber and aluminum companies.
food-safety critics. And the fact that a well-regarded media personality like Oprah Winfrey was forced to spend more than a million dollars to defend herself against a traditional product disparagement claim stands as an ominous threat to small non-profit organizations or individuals who lack the financial resources to defend themselves from a determined agribusiness attack.

The key provision in almost all of the “veggie libel” statutes is the requirement that the defendant substantiate food-safety claims with “reliable” scientific inquiry, facts, or data. See, e.g., Ala. Code § 6-5-621 (“information shall be deemed to be false if it is not based upon reasonable and reliable scientific inquiry, facts, or data”); see also in L. T. Munford & H. Johnson, Verifiability, Truth, Opinion and Scientific Inquiry, Part Two B, above. In the context of the science of food safety, a strict application of the “reliability” requirement would subject food safety advocates to a standard of proof that is fundamentally incompatible with scientific analytical methods.

One of the most widely used tools in evaluating the safety of food products is the risk assessment. Risk assessment is a composite of established disciplines, including toxicology, biostatistics, epidemiology, economics and demography. See Risk and the Environment: Improving Regulatory Decision Making 76 (Carnegie Commission Report, June 1993). This Report provides the following example of a risk assessment formula, as applied to determining the carcinogenic effects of vinyl chloride released from an industrial plant:

- **Hazard identification** — Quantifying the adverse health effects that vinyl chloride can cause, a process that involves the collection and critical analysis of test tube assays (for mutagenicity), long-term assays (such as two-year rodent carcinogenicity tests) and human epidemiologic data (either cohort studies of populations exposed to vinyl chloride or case control studies of particular victims).

- **Exposure assessment** — Determining the amount of vinyl chloride that leaves the plant in any given time, how much of the chemical is dispersed in the atmosphere and transformed into other compounds, how much air people breathe, both indoors and outdoors, and how many hours per day people spend in various locations near the plant.

- **Dose-response assessment** — Quantifying the carcinogenic potency of vinyl chloride by fitting the animal bioassay data (numbers of tumors produced at different exposure levels) to a mathematical model (usually one that is linear at low doses), and then transforming the resultant potency estimate for rodents into a human potency estimate.

- **Risk characterization** — Integrating the results of the above steps to describe the adverse effects in “risk numbers,” such as “[t]his vinyl chloride plant is estimated to produce up to 3 excess cases of liver cancer every 70 years among the 100,000 people living within one mile of the plant.”

As the vinyl chloride example illustrates, the accepted mode of scientific analysis in public
health matters does not even purport to attain certainty. As Victor Kimm, then Deputy Assistant Administrator of the Office of Pesticides and Toxic Substances, wrote in a letter to Science: “Characterizing risk is not an exact science: Uncertainty is inherent in the estimation of risk regardless of the methodology used. Deciding how to deal with that uncertainty — and thus which animal models, exposure scenarios, and means of extrapolations to use — is ultimately a matter of making value judgments as well as doing science.” 254 SCIENCE 1276 (Nov. 29, 1991).

The uncertainty inherent in risk analysis has important implications for the application of the “veggie libel” statutes. As discussed above, most of the “veggie libel” statutes define falsity as speech that is not based on “reasonable and reliable scientific inquiry, facts or data.” Since risk assessment is an accepted means of scientific inquiry, and since it may result in widely varying conclusions depending on what variables are applied, that statutory definition — speech that is based on “reasonable and reliable scientific inquiry, facts or data — must be applied expansively, with no expectation that a defendant prove its conclusions with certainty. See also Baffler & Kyle, Regulatory Reform Proposals and the Public Health, 104 J. NAT’L INST. ENVTL. HEALTH SCI. 356, 359 (noting the “limited ability of . . . risk assessment to resolve uncertainty”).

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How did cattlemen do in the Oprah trial?
PART THREE: CASE STUDIES

WHAT'S THE BEEF?
OPRAH AND THE CATTLEMEN *

By Charles L. Babcock

Any nation which counts the Scopes trial as a part of its heritage cannot so readily expose ideas to sanctions on a jury finding of falsity.


In February 1998, a federal jury in Amarillo, Texas returned a unanimous defense verdict in _Texas Beef Group v. Oprah Winfrey_. The lawsuit and the verdict attracted widespread attention because the plaintiffs’ case against the OPRAH WINFREY SHOW was brought under the recently enacted Texas False Disparagement of Perishable Food Act -- the so-called veggie libel law. Additional claims were made for common law business disparagement, defamation and negligence. The case became a referendum on the First Amendment and, to a lesser extent, Oprah Winfrey herself.

The federal court jury victory in the heart of cattle country was a wonderful event, but some followers of the case were disappointed because the trial judge did not decide the constitutionality of the Texas agricultural disparagement statute. Ironically, the Court side-stepped the constitutional issue because, she held, live cattle are not perishable food products despite one Plaintiff’s amusing testimony that cows are just like peaches.

In an odd twist, one of the lead plaintiffs in the federal case now appears as a plaintiff in a new lawsuit filed against several of the original defendants in state court in Dumas, Texas, a mere 45 miles from Amarillo.

Other plaintiffs include customers of that original plaintiff, who claim to be asserting assigned claims based on the agricultural disparagement statute, common law business disparagement and negligence. The complaint has not yet been served. These claims have been fully litigated in the federal suit and thus are barred by _res judicata_ and collateral estoppel.

What follows are some of the strategic issues that arose during the course of the original litigation. The case took six weeks to try.

* Portions of this article previously appeared in LDRC's March 1998 LIBELLETTER.

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I. PRE-TRIAL

A. The Broadcast

The suit arose from an April 16, 1996 OPRAH WINFREY SHOW entitled “Dangerous Food” (“The Program”). The first segment of The Program dealt with Mad Cow Disease, also known as bovine spongiform encephalopathy, or BSE. It described the March 20th announcement of the British Health Minister that the disease had “most likely” crossed the species barrier from cows to humans, and asked the question “Could It Happen Here?”

Oprah’s staff assembled three knowledgeable people to discuss that issue: Dr. Will Hueston of the United States Department of Agriculture, Dr. Gary Weber of the National Cattlemen’s Beef Association and Howard Lyman of The Humane Society. Lyman, who was also a defendant in the suit, is a former cattle rancher turned vegetarian.

Lyman opened the debate by agreeing, “absolutely,” that a Mad Cow scare in the United States could make AIDS look like the common cold. Lyman suggested that BSE could infect the US beef supply through a process known as “rendering,” where dead cattle are, in Lyman’s words, “rounded up, ground up, fed back to other cows. If only one of them has mad cow disease,” Lyman concluded, “it has the potential to infect thousands.”

Upon hearing that cows were being fed to other cows, Oprah exclaimed that, “[i]t has just stopped me cold from eating another burger. I’m stopped.” Cattle futures on the Chicago Mercantile Exchange went down the limit the day of the broadcast. Some members of the media described this as the “Oprah Crash.”

During the editing process, approximately 75% (by time) of Weber and Hueston’s comments were omitted. The Program did not mention plaintiffs, their specific cattle or Texas.

B. Preliminary Motions

Initially there were two lawsuits brought against Oprah, HARPO Productions, Inc. which produces the Oprah Winfrey Show, King World Productions, Inc. which distributes the show and Lyman. One case was brought in federal court in Amarillo, Texas while the other was brought in state court in Potter County which includes Amarillo. Defendants decided to remove the state court case to federal court as there was diversity of citizenship. This decision was not clear-cut. There is a right of interlocutory appeal from denial of summary judgment in state court in Texas, but no similar right in federal court. In addition, the jury pool in state court would have been comparatively urban as opposed to the eighteen county Amarillo federal division which is predominately rural. Some argued that limiting the jury pool to one relatively urban county favored defendants.

Once removed, defendants moved to dismiss both cases on grounds of personal jurisdiction, improper venue and failure to state a claim. The part of the motion that attacked the claims challenged the constitutionality of the statute emphasizing that the failure to require that the
Program be "of and concerning" plaintiffs or their specific property was fatal to the case. United States District Judge Mary Lou Robinson gave notice to the Texas Attorney General that the constitutionality of the statute had been questioned but the Attorney General declined to participate in the case. Defendants also argued that under Texas choice of law rules, Illinois law should apply to this action and, since Illinois does not have a comparable perishable food act, plaintiffs' claim in that regard should be dismissed. The court denied the motions to dismiss without explanation and answers were filed in the late fall of 1996.

Since little or no discovery had been done prior to defendants' answers, the parties (with one plaintiff objecting) presented the court with an agreed revised scheduling order extending the discovery deadline by four months. The court denied the motion. Therefore, written discovery was exchanged but virtually no depositions were taken prior to the close of discovery in February 1997. The court, on its own motion, opened discovery for a limited period and the parties took thirty-three days of depositions within forty-five business days all over the country during the summer of 1997. Many of the witnesses at trial were not deposed, including some experts.

C. Motion for Summary Judgment

The motion for summary judgment deadline arose before the court re-opened limited discovery. Accordingly, the motion focused on the constitutionality of the Perishable Food Act and again emphasized the "of and concerning" element of the plaintiffs' causes of action. In addition, defendant King World Productions, Inc. argued in its Motion that it was merely the distributor of the Oprah Winfrey Show and had no input whatsoever into the production of the program. The court, without explanation, overruled the motions for summary judgment.

II. THE TRIAL

A. Trial Related Motions

During discovery defendants learned that the plaintiffs were attempting to claim damages to cattle that they did not own. The plaintiffs, once this defect was revealed, asserted their claims through assignments from the true owners of the cattle (and, alternatively,) under a bailment theory. Defendants objected by Motion in Limine which was granted. Accordingly, evidence of all the assigned claims was not allowed. The effect of this ruling was that two plaintiffs were left completely without damages (because they owned no cattle) and the remaining plaintiffs' losses were greatly reduced (in the millions of dollars). These claims, which were based on the same facts asserted as the basis of the federal lawsuit, are the ones plaintiffs are now attempting to reassert in the new state lawsuit.

Defendants also filed a motion in limine arguing that neither the court nor the jury is entitled to second guess the editorial judgments of the HARPO Productions' staff when they deleted certain statements from the final version of the program. The court denied the motion but gave an instruction to the jury to this effect at the beginning of the case and repeated it in a stronger form in the jury charge. This was an important instruction because the plaintiffs tried the case largely on the theme of negligent editing.
At the same time, Defendants renewed their Motion to change venue, arguing that justice required it. This was based on a number of factors:

- When one deplanes at the Amarillo International Airport it is hard to miss the sign of greeting which states “Welcome to Cattle Country. Amarillo — Supplying Over 25% of America’s Beef.”

- It is also hard to miss the 20-foot mural in the lobby of the federal courthouse depicting a cattle drive.

- Shortly before trial the President of the Amarillo Chamber of Commerce authored a memo which stated that the Chamber would not be rolling out the red carpet or giving the keys to the city when Oprah arrived and that all staff members were prohibited from attending her show. (He later retracted that memo.)

- There were bumper stickers all over town saying “The only mad cow in America is Oprah.”

- T-shirts were being sold at the local high school with a picture of Oprah with a red line across it. There were also anti-Oprah buttons.

- Pretrial research indicated that 60% of the prospective jurors would favor the cattle industry over a national talk show host regardless of the evidence.

- The court itself had cited negative pretrial publicity as a basis for a gag order. One op-ed piece in the Amarillo Daily News went so far as to criticize the local newspaper’s editorial stance that the jurors should be fair and impartial. The op-ed author argued that the cattle industry supported the livelihood of virtually everyone in the community and that the jurors, therefore, should not be unbiased but rather should vote for the home industry.

The motion to transfer venue and the motion to vacate the gag order were jointly filed. Defendants argued that if the proffered support for the gag order was valid then the case of necessity should be transferred. The court denied the motion to transfer stating that defendants could select a fair and impartial jury in Amarillo.

2 Approximately one month before the trial, the court, on its own motion, entered a broad gag order. King World, which was at best a nominal defendant, asked the court to modify the gag order so that the news programs of its subsidiaries, INSIDE EDITION and AMERICAN JOURNAL, could report on the trial. The trial court declined to modify the gag order but gave notice that she intended to reconsider her denial of King World’s motion for summary judgment. Several days later, the Court granted King World’s summary judgment and relieved it from the gag order.
B. **Jury Selection**

Defendants employed a jury consultant and his assistance was invaluable. Plaintiffs also employed a consultant. Of a panel of sixty-five prospective jurors, there were no African-Americans. A large majority had ties to the cattle industry, either directly or indirectly. A number of panel members volunteered that they could not be fair to defendants and were excused. Two revealed that they were Oprah fans and probably would be biased in her favor. The court was liberal in sustaining objections to a juror for cause. The jury *voir dire* lasted most of the day with the court doing the majority of the questioning. The *voir dire* was the longest the court had ever conducted in a civil matter. Each side was allotted 30 minutes to ask questions.

Plaintiffs used their challenges for cause to strike six women. Defendants cut five men and one woman. The 12-member jury was comprised of eight women and four men. Left on the jury was a retired government worker who spent her career at the United States Department of Agriculture. Five other jurors had direct ties to the cattle industry, including a man who told reporters afterward that he was “stunned” that he was left on the jury inasmuch as he raised cattle. It turned out that this juror was perhaps the staunchest First Amendment advocate on the jury.

C. **Opening Statements**

The court allowed 30 minutes per side for opening statements. The Oprah defendants wanted to clearly define this as a First Amendment case and to make sure the jury was aware that Oprah was not anti-beef and was not anti-cattlemen but rather, wanted to have a debate on the issue of whether the mad cow disease in Britain could happen in the United States. The plaintiffs characterized themselves as family farmers and ranchers who had lost millions of dollars because of the allegedly false and malicious statements on the OPRAH WINFREY SHOW that implied the American beef supply was unsafe.

D. **The Evidence**

1. **Plaintiffs’ Case**

   Plaintiffs themselves testified as well as three bovine spongiform encephalopathy (BSE) experts, two members of the Chicago Mercantile Exchange (who said that cattle futures dropped the limit because of the program), two damage experts, Oprah, as an adverse witness, four HARPO employees and an ex-HARPO employee. The highlight of the Plaintiffs’ case was when their BSE expert cried on the witness stand.

   Plaintiffs also called Howard Lyman and attempted to paint him as a radical vegetarian activist (with some success). Plaintiffs’ theme was that this was an irresponsible program put together by people who knew nothing about the science and that the industry and government guests had the scientifically valid information while Lyman was diabolical and biased against the beef industry.
2. **Motion for Judgment as a Matter of Law**
   At the close of plaintiffs' case, defendants moved for judgment as a matter of law. The judge seemed to have great reservations about the constitutionality of the Perishable Food Act, and when she granted the motion with respect to that statute, defendants were hopeful that her opinion would declare the statute unconstitutional. Instead, she relied on two alternate grounds: first, that live cattle are not a perishable food product and therefore not subject to the statute; and second, that there was no evidence that defendants knowingly made a false statement of fact on the program, an element of the act. She dismissed plaintiffs' defamation claim on “of and concerning” grounds and disposed of the negligence cause of action on Texas common law grounds (because the state does not recognize an independent cause of action for negligent publication). The court denied the motion with respect to plaintiffs' claim for common law product disparagement.³

3. **Defendants' Case**
   Defense counsel tried this case in a way completely different from any previous libel trial. Our aim was to make this a case exclusively about the First Amendment. Given our understanding that 60% of the prospective jury pool was inclined to side with plaintiffs no matter what the evidence, we decided to put to the jury forthrightly that while they may not agree with the opinions expressed, everyone is entitled to his or her own opinion and is entitled to express it. Unlike previous trials, we did not spend much time on truth, i.e., trying to prove that mad cow disease in humans was transmitted by contaminated beef.

   Defendants called Dianne Hudson the executive producer of the OPRAH WINFREY SHOW, the CEO of the National Cattlemen's Beef Association ("NCBA"), the media advisor for the NCBA and three damage experts. Defendants did not call BSE experts on the theory that the case was about the First Amendment, not about whether the United States has mad cow disease.

   The NCBA witnesses gave surprisingly positive testimony for defendants. The CEO testified that while he was irritated by Oprah's first show on the subject, Oprah had had them back on the air to give their views, and he believed she was committed to fairness and was not malicious. He also testified that, coincidentally, the NCBA had conducted a poll the week before the show aired and a week after. The polls showed America's confidence level in beef unchanged and that it was at an all time high, in the 80% range. In addition, the media advisor's testimony helped refute plaintiffs' theme that they were ambushed by Oprah and her staff, whom, they alleged had not fairly represented to the NCBA what the show would be about. He disclosed that they had conducted a mock Oprah show before their spokesman appeared on the actual show. Defendants subpoenaed the videotape of the mock show. It was uncannily close to the Program, thus demonstrating that the nature of the show had been fairly explained in advance by

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³ A package of materials including the charge, the jury verdict form, the court's written opinion on the Motion for Judgment as a Matter of Law, reported at 26 Media L. Rep. 1498, and part of the defendants' closing argument is available by contacting the author.
defendants. In fact, the media advisor testified that he believed the NCBA spokesman had poorly presented the NCBA's position on the program.

Defendants also called a reporter from City Paper, an alternative weekly paper in Baltimore. The reporter had written an article about the rendering industry but, more importantly, had taken photographs at a rendering plant. Inasmuch as plaintiffs challenged as false Lyman's statement on the program that road kill and euthanized pets were put into rendering plants and then turned into cattle feed, defendants argued, over objection, that the jury should be entitled to see pictures of road kill and euthanized pets being placed in the rendering process. The court allowed the testimony and the pictures.

E. The Jury Charge and Closing Statements

The jury charge was First Amendment friendly. In closing statements, plaintiffs emphasized their theme that defendant Lyman was a renegade and that the HARPO people were irresponsible. Plaintiffs made a strategic decision to take on Oprah and one of plaintiffs' lawyers called her a liar.

Defendants emphasized the First Amendment, stressing that in this country everyone has the right to express his or her opinion. The defendants also discussed the talk show format and differentiated it from other journalistic endeavors such as news magazines and newspapers.

F. The Verdict

The verdict was unanimous. The jury answered "no" to the first question (in Texas, the practice is to submit the case to juries on special interrogatories). Jury Question No. 1 was:

Did a below-named Defendant publish a false, disparaging statement that was of and concerning the cattle of a below-named Plaintiff as those terms have been defined for you?

Plaintiffs have appealed.

III. CONCLUSION

In the aftermath of the verdict, plaintiffs' spin was that Oprah was too powerful a personality to overcome. She was certainly a forceful and articulate spokesperson for her position and spread her personal warmth not simply in the courtroom but through Amarillo, where her show originated throughout the trial. But that does not completely explain the verdict. The jurors truly put aside their personal biases in favor of the local industry and decided the case on First Amendment grounds pursuant to the court's instructions.

Moreover, the case puts in full relief the flaw in imposing liability for honest opinions — lay or scientific — based on developing scientific theories, which is what the agricultural disparagement statutes attempt to do. If, for example, this case had been tried about the time
the Program aired — a month after the British Minister of Health announced a suspected link between infected beef and disease in humans — defendants might have lost the case. Two years later, when the link was proven, defendants should have clearly won. Thus, these statutes not only chill speech — they attempt to freeze scientific inquiry as well.

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EMUS AND SOD

By Tom Leatherbury and Stacy Simon

In 1995, the Texas Legislature enacted the False Disparagement of Perishable Food Products Act, TEX. CIV. PRAC. & REM. CODE ANN. § 96.001 et seq. (Vernon 1997), Texas’s so-called “veggie libel” law. The statute provides a cause of action against a person who (1) disseminates to the public in any manner (2) information relating to a perishable food product (3) that states or implies that the perishable food product is not safe for public consumption (4) when the person knows the information is false. Id. § 96.002(a). A “perishable food product” is defined as “a food product of agriculture or aquaculture that is sold or distributed in a form that will perish or decay beyond marketability within a limited period of time.” Id. § 96.001. A person who is liable under § 96.002(a) is liable to the producer of the perishable food product for damages and any other appropriate relief from the person’s dissemination of the information. Id. § 96.002(b). In determining whether the information disseminated is false, the trier of fact must consider whether the information was based on reasonable and reliable scientific inquiry, facts, or data. Id. § 96.003. A person is not liable under the False Disparagement of Food Products Act for marketing or labeling any agricultural product in a manner that indicates that the product (1) was grown or produced by using or not using a chemical or drug; (2) was organically grown; or (3) was grown without the use of any synthetic additive. Id. § 96.004.

In 1998, the Texas False Disparagement of Perishable Food Products Act attracted nationwide attention in the lawsuit filed by Texas cattlemen against Oprah Winfrey, HARPO Productions, Inc., King World Productions, Inc., and Howard Lyman, Civil Action No. 2-96-CV-208, in the United States District Court for the Northern District of Texas, Amarillo Division, relating to an episode of THE OPRAH WINFREY SHOW that discussed the possibility of “mad cow disease” in the United States. To date, two other lawsuits (and another against Oprah Winfrey) have been filed in Texas asserting claims under the False Disparagement of Perishable Food Products Act. This article focuses on these cases.

THE EMU CASE

In Burleson Enterps., Inc., v. American Honda Motor Co., Inc., Civil Action No. 2-97-398, several emu breeders sued American Honda Motor Company in the United States District Court for the Northern District of Texas, Amarillo Division, the same court in which the Oprah Winfrey case was tried. The action arose out of a thirty-second television commercial for the Honda Civic sedan entitled “Opportunities.” The commercial depicted a person named “Joe” driving to six different potential employers weighing his career opportunities. In the commercial, “Joe” eventually makes a stop at “Fowl Technologies,” an emu ranch, where the emu rancher and “Joe” stand outside a pen of grazing emus and the rancher tells “Joe” that emu is “the pork of the future.” In the commercial, “Joe” also shares a hot dog with “Frank,” the proprietor of “Fabulous World of Wieners,” and visits “Amalgamated Plastics, Inc.,” among other potential “employers.” The commercial includes a voice-over stating: “Lots of career opportunities. One car. Make it
a good one. The Civic Sedan from Honda.”

Plaintiffs claim that the “Opportunities” commercial disparaged emus as pork “[w]hen, in fact, the emu is the antithesis of pork,” and allegedly likened the emu industry to a pyramid scheme when, in fact, emu breeders “are hardworking, honest Americans.” Plaintiffs also claim that the commercial diminished the emu market and that “[t]he sole purpose of the commercial was an attempt to belittle and disparage American traditions and to associate the emu industry to that of a myriad of schemes.” Plaintiffs assert a cause of action under the False Disparagement of Perishable Food Products Act, as well as claims for business disparagement, negligence, slander, and libel.

With respect to their claim under the False Disparagement of Perishable Food Products Act, plaintiffs allege in their First Amended Complaint that American Honda (1) falsely disparaged emu meat by claiming it to be as healthy as pork; (2) implied that there was nothing about emus that distinguished them from “scams,” including a pyramid scheme; (3) made statements about emus that were not based upon reasonable and reliable scientific inquiry, facts, or data; and (4) negligently implied that the emu-consuming public should be afraid of emu produced in this country. The emu breeders asserted further that American Honda’s “statements about emu that equate it to pork creates the belief in both the fundamental Christian and Hebrew religions that emu is unsafe for consumption.”

On February 24, 1998, American Honda filed a motion to dismiss the complaint under FED. R. CIV. P. 12(b)(6) on the grounds that (1) the commercial did not state or imply that emu was not safe for public consumption; (2) the commercial contained no false, slanderous, or defamatory statement; (3) the statements in the commercial were hyperbolic opinion and not factual statements; and (4) the commercial was not “of and concerning” plaintiffs or their emu ranches. With respect to the statutory disparagement claim in particular, American Honda argued that the commercial merely compared emu to another safe and edible product — pork, that the statute was intended to address false claims about food safety and not other allegedly disparaging words, and that the commercial never stated or implied that pork or emu were unsafe for public consumption. On March 5, 1998, the district court ordered that American Honda’s motion would be treated as a motion for summary judgment.

In response to the attack on their statutory disparagement claim, the emu breeders first contended that live and processed emu are “perishable food products” under the statute because they need food and water to survive, can spoil easily, and must be handled with proper care before being “harvested.” Relying on the affidavit of an Oklahoma reverend about Judeo-Christian and Islamic views of eating pork, the plaintiffs further claimed that implying that emu is like pork is itself a violation of the Texas statute. Moreover, citing the dictionary, the emu breeders also asserted that they are “producers” within the meaning of the statute because they are responsible for “growing” and selling emu, regardless of their placement in the chain of emu product distribution. In further support of their motion for summary judgment, each plaintiff filed an affidavit averring: “The value of emu, both live and processed parts, was negatively impacted...
by the Honda commercial which compares emu with pork. My business has suffered and continues to suffer monetary loss of the depressed emu market which I believe was caused by the Honda commercial which makes a basis of my lawsuit.” The motion for summary judgment is pending.

II. THE SOD CASE

*Pat Anderton, d/b/a A-I Turf Farm, and d/b/a A-1 Grass Co. v. James McAfee*, Cause No. 96-12667, in the 134th Judicial District Court of Dallas County, Texas, is another Texas action which involved a claim under Texas’s False Disparagement of Perishable Food Products Act. Plaintiff Pat Anderton owns and operates businesses that produce and sell Texturf 10 grass sod in Texas. James McAfee, Ph.D., a doctor in agronomy who specializes in turf grass management and who was employed as an agricultural extension specialist by Texas A&M University, wrote a news release regarding the suitability of Texturf 10 grass for lawns located in the Dallas-Fort Worth area. In the published statements, Dr. McAfee opined that Texturf 10 is susceptible to disease in areas with higher rainfall or humidity and should not be planted in metroplex lawns and described the basis for his conclusions. Dr. McAfee commented, “Texturf 10 just isn’t happy here,” and recommended against its use in the Dallas-Fort Worth metroplex.

Anderton filed suit against McAfee for libel, slander, tortious interference with business relationship, personal injury, and for alleged violation of Texas’s agricultural disparagement statute. Anderton also claimed that the publication caused a constructive taking of her property in violation of the United States Constitution and violated her due process rights. Anderton sought recovery in excess of $1,000,000 for alleged past and future pain and suffering, “land acquisition and development costs and/or turf grass variety conversion costs,” lost earnings and earning capacity, and reputational harm.

In support of her statutory disparagement claim, Anderton alleged that McAfee published statements disparaging the turfgrass industry, the reliability and/or fitness of Texturf 10, and its resistance to disease. In particular, Anderton claimed that Texturf 10 falls within the Texas statute because it is sold for consumption at health food stores and is perishable when cut for such use. According to Anderton, McAfee’s statements “would lead health food consumers to shy away from consuming such food.”

Defendant McAfee filed a motion for summary judgment on the grounds that the alleged statements are true and that Anderton admitted, by failing to respond to requests for admissions, that neither she nor her businesses were named or identifiable as the entity toward which any of the statements were made. McAfee filed a second motion for summary judgment on the ground that he is immune from suit under the doctrine of official immunity because the news release at issue was written in the course and scope of his employment with the Texas A&M University Agricultural Extension Service and the statements contained therein were made in good faith. The district court held a summary judgment hearing on March 12, 1998.
On April 8, 1998, the district court granted McAfee’s motion for summary judgment and dismissed all claims made against him on the ground that the claims were barred by the doctrine of official immunity. The district court judge did not comment on the merits of Anderton’s agricultural disparagement claim at the hearing or in the order granting summary judgment.

Despite Oprah’s big win, these silly cases present new and serious concerns for media and non-media defendants alike. The Texas False Disparagement of Perishable Food Products Act, if upheld on the facts of these cases, will effectively circumvent the “of and concerning” requirement. Plaintiffs in both the Anderton and Burleson cases admit that they are not mentioned expressly in the publications at issue, and they stretch to argue that individuals understood the publications at issue to reference them. Moreover, Burleson Enterprises raises the question of whether parody or hyperbole are defenses under the Texas False Disparagement of Perishable Food Products Act. While the courts consider these novel questions, examples of misuse of this statute accumulate bringing with them a noticeable chill.

*Tom Leatherbury is a partner at Vinson & Elkins, LLP, in Dallas, Texas. Stacy Simon is an associate at the firm.*
EGGS IN OHIO

By J. Mark Finnegan

The agricultural defamation issue in this series of lawsuits concerns eggs, and it arose out of other lawsuits brought against Ohio’s largest egg producer, AgriGeneral Co. (now known as Buckeye Egg).

The Equal Justice Foundation (“EJF”) sued Buckeye in March 1997 in federal court in Toledo, Ohio contending that Buckeye illegally denied overtime payment to workers in its egg plants. An additional count in the complaint contended that Buckeye fraudulently recycles eggs whose freshness dates have expired into cartons stamped with new expiration dates. The plaintiff on this count was Ohio Public Interest Research Group (PIRG). On the day this suit was filed, Ohio PIRG’s director, Amy Simpson, held a press conference to announce the suit and discussed some of the underlying allegations.

In May 1997, Ohio PIRG filed a statewide class action for consumer fraud in Lorain County state court against Buckeye based on the egg repackaging and dropped that count from the federal overtime lawsuit.

In August 1997, Buckeye sued Ohio PIRG and Amy Simpson in state court in Columbus for alleged violation of Ohio’s agricultural defamation statute based on her remarks in the press conference announcing the federal suit.

Buckeye contends that it is not required to pay overtime because it is engaged in agriculture. The overtime case is proceeding. Buckeye moved to dismiss the consumer fraud case, contending that the suit was based on false facts and frivolous allegations. The court denied the motion.

Several months ago, Ohio PIRG and Ms. Simpson, who are represented by EJF, moved to consolidate the Columbus lawsuit with the Lorain County suit. No decision has been made on that motion. The case is now starting to draw attention. David Marburger of Baker & Hostetler in Cleveland has agreed to help defend, as has Professor David Bederman of Emory University, the American Civil Liberties Union, and the Ohio State College of Law Legal Clinic. Discovery is beginning and trial is set for November 1998.

Although this is not a media case, this month, NBC’s DATELINE aired a segment using hidden camera footage showing egg recycling at Buckeye. Buckeye did not deny the obvious, but defended itself by stating it was not a violation of United States Department of Agriculture (USDA) regulations to do this. The USDA then announced that it is reviewing its regulations to determine whether they should be amended to preclude this practice.

J. Mark Finnegan is an attorney with the Equal Justice Foundation in Cleveland, Ohio.
PART FOUR: APPENDIX

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**Court Opinions**

**Attorney General Opinion**
MODEL STATE CODE TO PROTECT AGRICULTURAL PRODUCERS AND PRODUCTS FROM DEFAMATION

Section 1. Statement of Purpose.

To protect the free flow of agricultural products and producers thereof, as well as enhancing the general public welfare by proscribing the dissemination of false and disparaging information, the following sections are hereby enacted.

Section 2. Definitions.

As used in this Act, the following terms shall have the meanings stated below:

(a) the term "agricultural product" means any plant or animal, or product thereof, grown or raised for a commercial purpose; the term shall also include any agricultural practices used in the production of such products.

(b) the term "agricultural producer" means any person engaged in growing or raising an agricultural product, or manufacturing such a product for consumer use.

(c) the term "defamatory statement" means intentional words or conduct which reflect on the character or reputation of another or upon the quality, safety or value of another's property in a manner which tends: (I) to lower another in the estimation of the community, (ii) to deter third persons from dealing with another, or (iii) to deter third persons from buying the products of another.

(d) the term "disseminate" means to publish or otherwise convey a statement to a third party but shall not include repeating a false and defamatory statement made by another unless the person repeating such statement knew or should have known the statement was false.

(e) the term "false statement" means a statement which either expressly includes a fact or implies a fact as justification for an opinion and such fact is not correct.

(f) the term "knowing the statement to be false" means the communicator knew or should have known that the statement was false; and

(g) the term "malice" means an intent to vex, injure, or annoy another.
Section 3. Criminal Liability.

Whosoever willfully or purposefully disseminates a false and defamatory statement, knowing the statement to be false, regarding another's agricultural product or an agricultural producer under circumstances in which the statement may reasonably be expected to be believed shall be fined (amount), imprisoned for not more than _______ year(s), or both.

Section 4. Civil Liability for Defamation of Agricultural Producers.

Whosoever willfully or purposefully disseminates a false and defamatory statement, knowing the statement to be false, regarding an agricultural producer under circumstances in which the statement may be reasonably expected to be believed shall be liable to the producer for actual and punitive damages.

Section 5. Civil Liability for Defamation of Agricultural Products.

Whosoever willfully or purposefully disseminates a false and defamatory statement, knowing the statement to be false, regarding another's agricultural product under circumstances in which the statement may be reasonably expected to be believed shall be liable to producer or owner of such product for actual damages; provided that if the statement was made with malice, the producer or owner shall be entitled to punitive damages in an amount equal to at least three times the actual damages.

Section 6. Persons Entitled to Maintain a Cause of Action Under Sections 4 and 5 of this Act.

If a false and defamatory statement is disseminated with reference to an entire group or class of agricultural producers or products, a cause of action arises in favor of each producer of the group or class, regardless of the size, provided, however, that each member's cause of action is limited to actual damages of such member; provided further, that punitive damages are not so limited.

Section 7. Injunction.

In any suit filed under sections 4 or 5 of this Act, complainant can also request an appropriate court order prohibiting the defendant from disseminating false and defamatory statements about the agricultural producer or its agricultural products in the future.

Section 8. Attorneys' Fees.

In any suit brought under sections 4 and 5 of this Act, the prevailing party is entitled to an award of attorneys' fees in connection with the costs of the litigation.
Section 9. Effective Date.

This Act shall be effective upon date of enactment and shall apply to any false and defamatory statement published or otherwise communicated after that date.
STATE OF IDAHO
OFFICE OF THE ATTORNEY GENERAL
NOTE 12276-1099

February 28, 1992

The Honorable Herb Carlson
Idaho State Senate
HAND DELIVERED

THE CORRESPONDENCE IS A LEGAL GUIDELINE OF THE ATTORNEY GENERAL SUBMITTED FOR YOUR GUIDANCE

Re: House Bill 593: Product Disparagement

Dear Senator Carlson:

You have requested our opinion concerning the constitutionality of H.B. 593, which creates a statutory cause of action for agricultural food product disparagement. It is the opinion of this office that H.B. 593 probably violates the first amendment of the United States Constitution. The bill's negligence standard, its broad terms and its provision for treble damages all raise serious constitutional concerns.

This letter will first address the elements of H.B. 593 and the bill's relation to traditional product disparagement law. The relevant constitutional principles will then be examined to provide a framework for a first amendment analysis. Finally, this letter will discuss some specific constitutional vulnerabilities of H.B. 593.

I. H.B. 593 AND PRODUCT DISPARAGEMENT LAW

H.B. 593 creates a statutory action for agricultural food product disparagement. Such an action already exists at common law. H.B. 593 codifies this action, but significantly alters certain elements of the common law tort.

Traditional product disparagement is a tort in which the plaintiff must prove that a false statement concerning the nature or quality of plaintiff's product was made by the defendant. The tort of product disparagement is closely associated with the more familiar tort of defamation. See afroli Corp. v. OMP Corp., 541 F. Supp. 404 (E.D. Penn. 1983). However, the two torts protect different interests. An action for defamation protects reputation or character from false statements directed at the moral character of an individual. Zerold at 408. The cause of action for product disparagement, on the other hand, "protects economic interests by providing a remedy to one who suffers pecuniary loss from slurs affecting the marketability of his goods." Id.

The two torts, while closely aligned, contain different elements. One who publishes a defamatory statement "of and concerning" another person can be held liable in damages if: (1) the statement is false; (2) the publication is not privileged; and (3) the publication results from fault which at least amounts to negligence. Restatement (Second) of Torts § 565. In contrast, the elements for common law product disparagement are stricter. The publication of a disparaging statement "of and concerning" the product of another is only actionable where: (1) the statement is false; (2) the publisher either intends the publication to cause pecuniary loss or reasonably should recognize the publication will result in pecuniary loss; (3) the statement is not privileged; (4) material pecuniary loss did in fact occur; and (5) the statement is made with malice; that is, the publisher either knew that the statement is false or acts in reckless disregard of its truth or falsity. Zerold at 409.

H.B. 593 modifies the common law tort of product disparagement. Under the bill, a defendant may be liable for civil damages if he disseminates to the public, in any manner, "false" information not based upon "reliable scientific facts" and data "which the disseminator knows or should have known to be false, and which casts doubt upon the safety of any perishable agricultural food product . . . ." Additionally, if the statement was made with the intent to harm the producer, treble damages are available.

The most obvious modification is that the traditional malice standard has been replaced with the lower standard of negligence. As noted, at common law, the plaintiff has to show the defendant knew the statement was false or acted with reckless disregard of its falsity—a malice requirement. Under H.B. 593, the plaintiff now only demonstrate negligence; that is, the defendant
should have known" the statement was false. Additionally, the statute contains no express provision that the false statement be "of and concerning" the particular plaintiff's product. Finally, the statute includes a treble damage scheme not found in common law disparagement suits. Thus, while H.B. 593 is, in essence, a codification of the common law disparagement action, a number of the stringent common law requirements have either been relaxed or omitted altogether.

II. RELEVANT CONSTITUTIONAL BACKGROUND

Having discussed the elements of H.B. 593, we now turn to the relevant constitutional doctrines against which this bill must be assessed. It is important, at this point, to bear in mind that H.B. 593 affects speech—generally considered both the most valuable and the most fragile of our constitutional rights. Consequently, unlike the deference accorded most statutes, this bill will not be presumed to be constitutional if it is challenged. Rather, it will be held invalid if it either (1) encompasses within its scope protected speech or (2) is so vague that it has a chilling effect on expression shielded by the First Amendment. See NAACP v. Button, 371 U.S. 415 (1963).

With this heightened level of judicial scrutiny in mind, there are two bodies of first amendment case law which are directly implicated by H.B. 593. Because the bill creates a statutory disparagement action so closely aligned with defamation, the First Amendment restrictions imposed by the United States Supreme Court on defamation suits must be examined. Moreover, as product disparagement actions may arise in the commercial setting, the Court's commercial speech doctrine is also relevant. Each of these bodies of law will be discussed before being applied to H.B. 593.

A. Defamation and the First Amendment

In the last 20 years, the United States Supreme Court has placed significant First Amendment restrictions on the law of defamation and has established a complex set of rules governing when defamatory false speech is actionable. In its leading opinion, New York Times Co. v. Sullivan, 376 U.S. 256 (1964), the Court determined that public figures cannot prevail on a defamation action without proving "actual malice," defined as intentional falsity or reckless disregard for the truth. The Court reasoned that, in open public discussion, false statements about public figures are inevitable and that worthwhile contributions to the flow of information might be deterred without the insulation from liability provided by the actual malice rule.

Subsequently, in Gertz v. Robert Welch Inc., 418 U.S. 308 (1974), the Court declined to extend the actual malice requirement to defamation suits brought by private figures. The Court did, however, require that private figures prove some degree of fault, at least negligence, to recover actual damages. The Court went on to hold that actual malice would be required for private parties to recover presumed or punitive damages. Id. at 349-50. While the Court has not directly addressed the issue, the prevailing view is that, under the Court's reasoning, public figures can recover punitive damages. Moreover, the Court also concluded in Gertz that a private party could, in some instances, become a "limited purpose" public figure and subject to the actual malice standard for any recovery. Id. at 331.

The United States Supreme Court has also provided other First Amendment protections in the defamation area. For example, only factual assertions or opinions which "imply an assertion of objective fact" are actionable. Milkovich v. Lorain Journal Co., 110 S. Ct. 2595, 2703 (1990). Pure opinions, statements that do not imply facts capable of being true or false, remain absolutely protected. Milkovich at 2703 (Brannon, J., dissenting).

Additionally, lower courts have deployed an increased unwillingness to entertain defamation actions when the defamatory statement addressed a large group rather than an individual. Again, the concern has been avoiding interference with "public discussion of issues, or groups, which are in the public eye." Michigan United Conservation Clubs v. C.R. Koop, 405 F. Supp. 873, 900 (W.D. Mich. 1976), aff'd, 665 F.2d 110 (6th Cir. 1981).

These are some of the constitutional limits imposed on defamation suits in the struggle to balance the interest in open discussion against the interest in compensating defamation plaintiffs for their injury. These restrictions are beginning to be applied by a handful of courts as they address product disparagement cases raising similar concerns.

B. Commercial Speech

While the United States Supreme Court has jealously guarded the First Amendment in the area of defamation law, the area is not true when commercial speech is examined. Commercial speech is generally profit-motivated speech contained in advertisements. See Bolger v. Young Drug Products Corp., 463 U.S. 60 (1983). In
other words, it is the speech which businesses or individuals use to sell their products.

For many years, commercial speech was wholly unprotected under the first amendment. See Valentine v. Chrestensen, 316 U.S. 52 (1942). Today, the Court grants commercial speech some protection on the basis that society has a "strong interest in the free flow of commercial information" and that consumers' decisions should be "intelligent and well informed." Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748, 764-65 (1976). Nevertheless, the protection is limited and the Court has consistently emphasized that false or misleading commercial speech enjoys no right to first amendment protection. 1d.

III. APPLYING CONSTITUTIONAL DOCTRINES TO H.B. 593

Because H.B. 593 implicates both the constitutional body of law surrounding defamation and the commercial speech doctrine, the first step in addressing the bill's constitutionality is distinguishing between the potential defendants who fall within its scope. Noncommercial defendants will be entitled to the heightened protections provided by New York Times. For example, disparaging statements may not be actionable unless "actual malice" is proved. Commercial defendants will enjoy only minimal first amendment protection under the commercial speech doctrine.

A. Commercial Defendants

H.B. 593 is likely constitutional as applied to commercial defendants. As noted, commercial speech must be true before it is accorded any first amendment protection. Virginia State Bd., supra. Consequently, H.B. 593's threshold requirement that the disseminated information be false before it is actionable appears to preclude commercial defendants who disparage their competitors' products from successfully raising a first amendment shield. Certainly, there is a push now, at least by academics, to increase the protection granted commercial speech and even perhaps shield some misleading statements. See W.N. Redish, Product Health Claims and the First Amendment: Scientific Expression and the Twilight Zone of Commercial Speech, 4 Vand. L. Rev. 1473 (1990). Regardless, under current United States Supreme Court precedent requiring that commercial speech be truthful before it is protected, it appears that if a commercial defendant falsely disparages a competitor within the terms of H.B. 593, the defendant will not be protected by the Constitution. See Pepsico ex rel. Fumber v. Gym of America, Inc., 493 F.2d 460 (Colo. 1972) (holding that product disparagement provisions in the state's Consumer Protection Act do not violate the first amendment); and Dairy Stores, Inc. v. Sentinel Publishing Co., Inc., 465 A.2d 953, 960 n.4 (M.J. Super. Ct. Law Div. 1982), aff'd on other grounds, 516 A.2d 520 (M.J. 1986) (noting that the New York Times privilege may not apply to disparagement actions arising in the commercial context).

B. Noncommercial Defendants

While H.B. 593 may be constitutional if applied solely to commercial speech, the analysis does not end here. H.B. 593, by its terms, addresses any false disparaging information. Therefore, it encompasses statements made by nonbusiness defendants. These statements do not constitute commercial speech, and a higher standard of first amendment protection is given to them.

Because product disparagement is so closely linked to defamation, the few courts that have addressed the constitutional implications of noncommercial disparaging speech have routinely applied the first amendment protections surrounding defamation law. See Rose Corp. v. Consumer Union of U.S., Inc., 446 U.S. 457 (1980); States Unlimited, Inc. v. Turner, 623 F.2d 364 (3rd Cir. 1980); Dairy Stores, Inc., 465 A.2d at 953. The two torts are not identical and, consequently, the overlay of defamation case law onto disparagement suits is sometimes a rough fit. The remaining question, then, is: What protections are applicable when comparing defamation and disparagement, and how are those protections likely to affect the constitutionality of H.B. 593?

1. Malice. The primary first amendment protection which needs to be addressed is the New York Times malice standard. As noted, malice is traditionally required to prove a claim of common law product disparagement. However, H.B. 593 has created only a negligence requirement. This departure from the traditional malice standard probably renders the bill unconstitutional.

The United States Supreme Court has only examined product disparagement and the first amendment once. In Rose, supra, the Court addressed a critic's disparaging review of loudspeakers. On appeal to the Court, the producer did not challenge the trial court's characterization of him as a "public figure" for first amendment purposes. Consequently, the Court was not called upon to determine whether malice was in fact the proper standard to apply. Nevertheless, the Court did apply the malice standard as it analyzed its only product disparagement suit. Id. at 513.

Perhaps the most cogent analysis of this issue can be found in Dairy Storey, supra, which involved a newspaper's critical remarks about the quality of spinach. The court examined the societal values requiring malice in certain individual defamation suits and determined these same values demanded a malice standard in product disparagement suits as well.

Relying on United States Supreme Court precedent, the court in Dairy Storey initially recognized that consumers have a first amendment interest in obtaining information regarding products and services they purchase and that this interest "is comparable... to being informed about political and social issues." Id. Second, the court emphasized that a producer voluntarily exposes itself to criticism and depends on the "freedom of the press to publicize facts as does a public figure, by placing its product into the marketplace. Id. at 940. The court noted that "a business which makes representations about the content, quality or safety of its products... invites attention and comment." Id. Finally, the court stressed that like public figures, businesses have greater access to channels of effective communication and "hence have a greater opportunity to counter factual false statements than private individuals normally enjoy." Id. The court concluded that when a consumer product has been placed into the public marketplace, a malice standard must be applied.

First amendment scholars generally support judicial determinations that information regarding the health and safety of consumer products deserves a high level of constitutional protection. See Product Health Claims, supra, and Note, The Tort of Disparagement: And the Developing First Amendment, 137 Duke L.J. 727 (1987). For example, N.R. Redish, in Product Health Claims, emphasizes the urgent need to release emerging scientific theories to the public without chilling scientific and health debates with the threat of litigation. In his article, Redish points out that early studies on cigarette smoke indicated they were healthy, and that if fragmentary scientific theory revolved the health effects of smoking had been excessively burdened during that period, the consequences could have been devastating. Id. at 743.

In sum, there is little case law on whether disparagement suits require malice and courts are not in complete accord on the issue. Nevertheless, it appears that a significant portion, if not all, noncommercial disparagement cases will not be actionable unless it is based on "actual malice." This judicial position has received wide support by legal scholars. Moreover, because of the underlying public concerns, if a product involves health or safety issues, the likelihood that malice will be required is enhanced. N.B. 593 directly burdens speech addressing safety, yet contains only a negligence standard. Consequently, this portion of N.B. 593 is probably unconstitutional.

2. Opinion v. Fact. The next issue involves the protection of pure opinion. As noted, false factual assertions or opinions premised upon facts are actionable. Hilliard, supra. However, expressions of theology and ideas have generally been held to be protected by the first amendment.

N.B. 593 provides no express protection of theology and ideas. Rather, the bill makes actionable disparaging "information." This term is broader than that contained, for example, in the product disparagement provision of Idaho's Consumer Protection Act. Idaho Code 39-7204.5. The function of such a provision is to eliminate false assertions of "fact." Idaho Code § 40-603(3). The issue then is whether "information" is either so broad or so vague that it potentially chills protected expression.

Perhaps the most sensitive area here is, again, disparaging scientific information regarding the health and safety of products. In Product Health Claims, supra, Redish convincingly argues that scientific expression and debate should be granted the same constitutional protections as political discourse. We draw a distinction between "basic fact" and assertions of scientific fact; the latter, he argues, should be treated as protected expressions of ideas. Product Health Claims at 1435. Redish emphasizes the changing nature of scientific belief, arguing that any attempt by the government to impose "a national scientific orthodoxy would undermine or inhibit the advance of scientific knowledge, which underpins a free exchange of ideas." Id. See also Moore v. Gannett County Board of Education, 397 F. Supp. 1057 (W.D. N.C. 1977) for an interesting discussion on stifling scientific inquiry.
Our research has not disclosed a recent disparagement opinion directly involving scientific expression and the first amendment; thus, it is speculative to attempt to discern precisely what protections a court might provide scientific expression. When a court reviewing H.B. 593's broad language would likely conclude the terms of H.B. 593 excessively burden open debate on important public issues and thus are unconstitutional.

3. The "Of and Concerning" Requirement. The next issue to be analyzed is the traditional requirement in both defamation and disparagement that the false statement be "of and concerning" the individual or product. H.B. 593 does not expressly contain this requirement. Consequently, if a disparagement statement not directly "said as a particular producer, but rather as a generic product relating to conceivably actionable under H.B. 593 if the producer is damaged. Under recent case law, constitutionally limiting group defamation and disparagement suits, this may pose another constitutional hurdle for the bill.

As mentioned earlier, a number of courts have constitutionalized the "of and concerning" element of defamation by limiting group defamation actions. The interest protected by these decisions is open to debate on issues or groups which are in the public eye.
IV. CONCLUSION

House Bill 59 is designed to protect agricultural food producers from the harm caused by negligent falsehoods which disparage their products. The goal of this bill is understandable. Agriculture is important to Idaho and deserving of protection. However, because this bill affects speech, it will have to meet stringent requirements if it is challenged. While the body of case law applicable to a bill such as this is only now emerging, what precedent exists reveals some shortcomings in this proposed legislation. The absence of a malice requirement, coupled with broad terms which conceivably encompass protected expression and discourse, create serious First Amendment concerns. The punitive damages scheme is also of concern. It is our opinion that these concerns are of sufficient magnitude that a reviewing court would likely find H.B. 59 unconstitutional.

Important to note, however, is that the constitutional vulnerability of this bill does not foreclose legal protection for agricultural producers. Idaho Code § 46-2003(a) already protects producers from product disparagement by competitors. Moreover, a common law tort claim may be brought if a noncommercial defendant disparages a product. Thus, there are already legal protections in place for agricultural producers. To the extent the legislature determines more protection is necessary, this office recommends that H.B. 59 be more narrowly tailored to account for the constitutional concerns discussed above.

Yours very truly,

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Deputy Attorney General