

PINK SLIME BY ANY OTHER NAME IS STILL LEAN  
FINELY TEXTURED BEEF: *BEEF PRODUCTS, INC. V.  
AMERICAN BROADCASTING COMPANIES, INC.* & THE  
POLICY CONSIDERATIONS SURROUNDING  
AGRICULTURAL PRODUCT DISPARAGEMENT  
STATUTES

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I. Background .....	192
A. Origin of Food Disparagement Laws: <i>Auvil v. CBS “60 Minutes”</i> ...	192
B. <i>Texas Beef Group v. Winfrey</i> .....	196
C. <i>Beef Products Inc. v. ABC</i> .....	197
1. Background .....	197
2. What exactly is pink slime and what caused the public outcry against it?.....	200
3. Impact of pink slime controversy .....	203
4. Will BPI succeed in their claim against ABC?.....	206
II. Policy Surrounding Agricultural Product Disparagement Laws .....	208
A. Pros .....	208
B. Cons .....	210
III. Solutions.....	214
IV. Conclusion.....	215

“It would be difficult to conceive of any topic of discussion that could be of greater concern and interest to all Americans than the safety of the food that they eat.” Judge Mary Lou Robinson, *Texas Beef Group v. Oprah Winfrey*

The only thing more American than baseball and apple pie is a thick, grilled, juicy hamburger. What most Americans do not expect to find when biting into a typical burger, however, is Lean Finely Textured Beef (LFTB), known more widely as ‘pink slime.’ Extensive public and media attention about LFTB has resulted in an ongoing case involving an agricultural product disparagement (APD) law, also known more informally as a “veggie libel” law. The case, filed in South Dakota, involves the potential disparagement of Beef Product Inc.’s product, Lean

Finely Textured Beef, by American Broadcasting Companies, Inc.<sup>1</sup> It has been over ten years since a case has been grounded on an APD law, possibly hinting at the law's unconstitutionality, or perhaps only because such suits can be costly and challenging to win.<sup>2</sup> Yet, no APD law has ever been repealed. Such statutes remain untouched by the Supreme Court to decide on their constitutionality.

This Note argues that in their current form, APD laws are impractical due to policy considerations, and presents solutions to address their problematic nature. Part I explains the background information surrounding APD laws, including the current controversy involving pink slime in ground beef. Part II recounts both the positive and negative policy matters concerning such disparagement laws. Part III proposes addressing the issue of agricultural disparagement at a federal level, or more preferably, pushing for the repeal of such state laws.

## I. BACKGROUND

### A. Origin of Food Disparagement Laws: *Auvil v. CBS "60 Minutes"*

APD laws result from a combination of the torts of defamation and product disparagement, and became enacted after *Auvil v. CBS "60 Minutes,"* discussed below. Although defamation actions may vary depending on the jurisdiction and circumstances, the elements of a cause of action include:

(1) a statement of fact; (2) that is false; (3) and defamatory; (4) of and concerning the plaintiff; (5) that is published to a third party. . . ; (6) not absolutely or conditionally privileged; (7) that causes actual injury. . . ; (8) that is the result of fault by the defendant. . . ; (9) that causes special (pecuniary) harm in addition to generalized reputational injury.<sup>3</sup>

Defamation actions protect against damage to a person's reputation.<sup>4</sup> Prod-

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1. Sam Robinson, *Ag Disparagement Laws Take Root*, GATEWAY JOURNALISM REV. (Oct. 12, 2012), [//gatewayjr.org/2012/10/12/ag-disparagement-laws-take-root](http://gatewayjr.org/2012/10/12/ag-disparagement-laws-take-root) [hereinafter *Ag Disparagement Laws Take Root*].

2. 1 RODNEY A. SMOLLA, LAW OF DEFAMATION § 1:34 (2d ed. 2013).

3. See *id.* at § 1:21.

uct disparagement actions, also known as trade libel, result in liability when a defendant:

(1) publishes a false statement harmful to the interests of another<sup>5</sup>; (2) intends for publication of matter “disparaging the quality of another’s land, chattels or intangible things, that the publisher should recognize as likely to result in pecuniary loss to the other through the conduct of a third person in respect to the other’s interests in the property,”<sup>6</sup> and (3) [the defendant] knows that the [matter] is false or acts in reckless disregard of its truth or falsity.<sup>7</sup>

Product disparagement actions protect against false statements concerning the quality of a product or service.<sup>8</sup> The difference between claims for defamation and disparagement depends on the harm that occurs; defamation protects character and reputation, while disparagement compensates for loss incurred from statements made about the quality of a product or service.<sup>9</sup> Although the torts of defamation and product disparagement are similar, product disparagement is a more difficult cause of action to win, because it is only an action for special damages. It is also difficult because the burden of proving falsity, damages, and malice is higher than in defamation claims.<sup>10</sup>

In February 1989, CBS’s news program, *60 Minutes*, aired a segment entitled “A Is for Apple,” which discussed the dangers of the chemical daminozide, which is used on apples to increase desirability.<sup>11</sup> Daminozide was sold under the name of Alar by Uniroyal, Inc., and “retarded premature falling, increased apple size and color, and boosted storage life.”<sup>12</sup> Research revealed that daminozide was highly carcinogenic and absorbed by the apples. The *60 Minutes* segment took much of its information from a Natural Resources Defense Council (NRDC) research report.<sup>13</sup> The report was previously highly publicized by Fenton Communications, the NRDC’s public relations agency.<sup>14</sup> “A Is for Apple,” which was seen by approximately forty million Americans, emphasized that children were most at risk

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4. RESTATEMENT (SECOND) OF TORTS § 623A (1977).

5. *Id.* at § 626.

6. *Id.* at § 623A.

7. See 2 ROBERT D. SACK, SACK ON DEFAMATION: LIBEL, SLANDER, AND RELATED PROBLEMS § 13:1.3 (4th ed. 2012).

8. *Id.* at § 13:1.4.

9. *Id.*

10. LAWRENCE SOLEY, CENSORSHIP INC.: THE CORPORATE THREAT TO FREE SPEECH IN THE UNITED STATES 111 (2002).

11. *Id.*

12. *Id.*

13. *Id.*

to Alar.<sup>15</sup> Apples and apple products were publicly boycotted, and consequently, apple growers in the state of Washington suffered a seventy-five million dollar loss.<sup>16</sup> Apple growers stopped using Alar, Uniroyal, Inc. pulled the chemical off the market, and the Environmental Protection Agency banned Alar.<sup>17</sup>

Washington apple growers brought a lawsuit for trade libel (or product disparagement) against CBS, the NRDC, Fenton Communications, and several Washington television stations which aired *60 Minutes*.<sup>18</sup> Trade libel requires the plaintiff to allege the defendant “published a knowingly false statement harmful to the interests of another and intended such publication to harm the plaintiff’s pecuniary interests.”<sup>19</sup> The plaintiffs argued there was no link between the ingestion of Alar and cancer in humans, as research had only involved animal testing, but this was not found to be sufficient.<sup>20</sup> The Ninth Circuit held that the apple growers failed to produce evidence relating to the falsity of “A Is for Apple” which was a triable issue of fact,<sup>21</sup> and affirmed the trial court’s decision granting CBS’s motion for summary judgment.<sup>22</sup> The court opined that a plaintiff must prove that “statements made to disparage food products are false,”<sup>23</sup> but because the CBS segment was based heavily on the scientifically solid NRDC report, this was not proven.<sup>24</sup>

Agriculture and aquaculture associations contemplated the problems with the common law tort of product disparagement, and decided they wanted a remedy for losses due to a decrease in product sales, caused by publicly-made disparaging comments.<sup>25</sup> In the same year that Washington apple growers lost their lawsuit against CBS, the lobbyist group American Feed Industry Association (AFIA) contacted the law firm of Olsson, Frank & Weeda, from Washington, D.C., to create a model APD statute.<sup>26</sup> Known as the Model State Code to Protect Agricultural Producers and Products from Defamation (Model Bill), the bill was distributed to

14. *Ten Years Later, Myth of ‘Alar Scare’ Persists*, ENVTL. WORKING GRP., (Feb. 1, 1999), <http://ww.soc.iastate.edu/sapp/alar3.pdf>.

15. SOLEY, *supra* note 10, at 112.

16. *Ten Years Later, Myth of ‘Alar Scare’ Persists*, *supra* note 14.

17. SOLEY, *supra* note 10, at 113; Dan Flynn, *Alar Apples Case Precedence for BPI v. ABC*, FOOD SAFETY NEWS (Sept. 14, 2012), <http://www.foodsafetynews.com/2012/09/alar-case-is-precedent-for-bpi-v-abc/> [hereinafter *Alar Apples Case Precedence for BPI v. ABC*] (Auvil was the named plaintiff, representing 4,700 Washington state apple growers).

18. *Auvil v. CBS “60 Minutes”*, 67 F.3d 816, 820 (9th Cir. 1995).

19. *Alar Apples Case Precedence for BPI v. ABC*, *supra* note 17.

20. *Id.*

21. *Auvil*, 67 F.3d at 823.

22. *Alar Apples Case Precedence for BPI v. ABC*, *supra* note 17.

23. *Ag Disparagement Laws Take Root*, *supra* note 1.

24. *Id.*

25. SOLEY, *supra* note 10 (AFIA lobbies for pet food and livestock feed industries).

state organizations.<sup>27</sup>

The Model Bill allowed for a civil or criminal cause of action for agricultural producers against “[w]hosoever 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.”<sup>28</sup> According to Dennis Johnson, the drafter of the statute, the purpose of the statute is “to protect small farmers and time-sensitive, perishable products.”<sup>29</sup> Colorado was the first state to consider an APD statute, but Louisiana was the first state to adopt such legislation after media coverage of an E. coli outbreak harmed cantaloupe producers.<sup>30</sup> North Dakota was the most recent state to approve this type of law in 1997.<sup>31</sup> Generally, state legislatures that have adopted APD statutes declare that the legislative purpose of the law is to protect the agricultural and aqua-cultural economy of the state.<sup>32</sup> To date, thirteen states have adopted APD statutes:<sup>33</sup> Louisiana,<sup>34</sup> Idaho,<sup>35</sup> Mississippi,<sup>36</sup> Georgia,<sup>37</sup>

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26. John Margiotta, *The Movement Begins: The Model Bill for Agricultural Disparagement Statutes*, LIBEL DEF. RES. CTR. BULL. (1998), 17, available at [http://geneva.directrouter.com/~medialaw/images/stories/MLRC\\_Bulletin/1998/MLRC\\_Bulletin\\_1998\\_Issue\\_2.pdf](http://geneva.directrouter.com/~medialaw/images/stories/MLRC_Bulletin/1998/MLRC_Bulletin_1998_Issue_2.pdf).

27. *Id.*

28. SOLEY, *supra* note 10.

29. *Ag Disparagement Laws Take Root*, *supra* note 1.

30. N.D. CENT. CODE § 32-44-02 (2013).

31. ALA. CODE § 6-5-620 (2014); FLA. STAT. § 865.065 (2014); GA. CODE ANN. § 2-16-1 (2014); LA. REV. STAT. ANN. § 3:4501 (2013); MISS. CODE ANN. § 69-1-251 (2014); OHIO REV. CODE ANN. § 2307.81(A) (West 2014).

32. *Food-Disparagement Laws: State Civil & Criminal Statutes*, FOODSPEAK: COALITION FOR FREE SPEECH (Mar. 19, 1998), <http://www.cspinet.org/foodspeak/laws/existlaw.htm>.

33. LA. REV. STAT. ANN. § 3:4503 (2014).

34. IDAHO CODE ANN. § 6-2003 (2014).

35. MISS. CODE ANN. § 69-1-255 (2014).

36. GA. CODE ANN. § 2-16-1 (2014).

Colorado,<sup>38</sup> South Dakota,<sup>39</sup> Texas,<sup>40</sup> Florida,<sup>41</sup> Arizona,<sup>42</sup> Alabama,<sup>43</sup> Oklahoma,<sup>44</sup> Ohio,<sup>45</sup> and North Dakota,<sup>46</sup> while sixteen other states (including Iowa) have considered and rejected similar legislation.<sup>47</sup> The Supreme Court has never ruled on the constitutionality of such disparagement laws.<sup>48</sup>

*B. Texas Beef Group v. Winfrey*

Following the implementation of food disparagement laws, one of the most high profile cases involved a lawsuit against Oprah Winfrey by Texas ranchers for a comment she made about eating beef.<sup>49</sup> In April 1996, the Oprah Winfrey Show aired an episode titled “Dangerous Food,” and the first segment of the program centered on the potential spread of Mad Cow Disease in the United States.<sup>50</sup> One expert on the show, Howard Lyman, stated that infected dead cattle were fed to other cattle, and that one cow could potentially infect thousands.<sup>51</sup> Upon hearing this, Winfrey stated she was “stopped . . . cold from eating another burger.” Beef commodity prices on the Chicago Mercantile Exchange went down significantly the day the program aired.<sup>52</sup> Beef ranchers referred to this as the “Oprah Crash,” and complained that Winfrey’s comments caused them to lose millions of dollars.<sup>53</sup>

Six cattlemen brought suit against Winfrey and Lyman under the Texas APD

37. COLO. REV. STAT. § 35-31-101 (2014).

38. S.D. CODIFIED LAWS § 20-10A-2 (2013).

39. TEX. CIV. PRAC. & REM. CODE § 96.002 (2013).

40. FLA. STAT. § 865.065 (2014).

41. ARIZ. REV. STAT. ANN. § 3-113 (2013).

42. ALA. CODE § 6-5-622 (2014).

43. OKLA. STAT. 2 § 5-102 (2013).

44. OHIO REV. CODE ANN. § 2307.81 (West 2014).

45. N.D. CENT. CODE § 32-44-02 (2013).

46. Margiotta, *supra* note 27, at 17.

47. Sam Robinson, *Beef Products Inc. Seeks Restitution from ABC News*, GATEWAY JOURNALISM REV. (Sept. 21, 2012), <http://www.gatewayjr.org/2012/09/21/beef-products-inc-seeks-restitution-from-abc-news/> [hereinafter *Beef Products Inc. Seeks Restitution from ABC News*].

48. Grant Schulte & Chet Brokaw, ‘Pink Slime’ Lawsuit: Defamation Case Against ABC News Tough to Prove, Experts Say, THE HUFFINGTON POST, Sept. 14, 2012, [http://www.huffingtonpost.com/2012/09/14/pink-slime-lawsuit-abc-news\\_n\\_1883528.html](http://www.huffingtonpost.com/2012/09/14/pink-slime-lawsuit-abc-news_n_1883528.html).

49. Charles L. Babcock, *What’s the Beef? Oprah and the Cattlemen*, LIBEL DEF. RES. CTR. BULL. 73, 74 (1998), available at [http://geneva.directrouter.com/~medialaw/images/stories/MLRC\\_Bulletin/1998/MLRC\\_Bulletin\\_1998\\_Issue\\_2.pdf](http://geneva.directrouter.com/~medialaw/images/stories/MLRC_Bulletin/1998/MLRC_Bulletin_1998_Issue_2.pdf).

50. *Id.*

51. *Id.*

52. SOLEY, *supra* note 10, at 122.

statute.<sup>54</sup> The Texas legislation only protected defamation of perishable food products, which created a problem because the losses involved steers rather than fruits or vegetables.<sup>55</sup> Ultimately, the case turned into a public relations nightmare, and was dismissed, not only because plaintiffs failed to prove intent, but also because the cattle were not perishable products.<sup>56</sup>

### *C. Beef Products Inc. v. ABC*

#### *1. Background*

Currently, a hot topic involving agricultural disparagement law is the undecided defamation lawsuit filed by Beef Products Inc. (BPI) and two related companies against American Broadcasting Companies, Inc. (ABC), among others, submitted on September 13, 2012 in South Dakota state court.<sup>57</sup> BPI brought this action against ABC based on statements made by the news channel about BPI's product, Lean Finely Textured Beef (LFTB).<sup>58</sup> The lawsuit is grounded in South Dakota's Agricultural Food Products Disparagement Act (AFPDA), one of the only thirteen previously mentioned states to adopt such legislation.<sup>59</sup> The statute, passed in 1995, provides a cause of action for damages for "[a]ny producer of perishable agricultural food products who suffers damage as a result of another person's disparagement of any such perishable agricultural food product."<sup>60</sup> Prior to this case, there had not been a case brought under any agriculture disparagement law for over ten years.<sup>61</sup> The action arose from reports made by ABC about LFTB, also known as pink slime.<sup>62</sup> Beginning on March 7, 2012, and continuing until

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53. *Id.* at 122-23.

54. *Id.* at 123.

55. *Id.* at 122-23; see *Engler v. Winfrey*, 201 F.3d 680 (5th Cir. 2000).

56. *Beef Products Inc. Seeks Restitution from ABC News*, *supra* note 47 (The Supreme Court of South Dakota in May 2014 dismissed claims in this suit not explicitly mentioned in this Note).

57. *Id.*

58. Sam Robinson, *ABC News Wonders 'Where's the Beef' in Recent Lawsuit*, GATEWAY JOURNALISM REV. (Oct. 5, 2012), <http://gatewayjr.org/2012/10/05/abc-news-wonders-%E2%80%98where%E2%80%99-in-recent-lawshit/>.

59. S.D. CODIFIED LAWS § 20-10A-2 (2013).

60. *Ag Disparagement Laws Take Root*, *supra* note 1.

61. *Beef Products Inc. Seeks Restitution From ABC News*, *supra* note 47.

April 3, 2012, BPI cited eleven broadcasts aired by ABC as part of an attack “campaign” against BPI and LFTB.<sup>63</sup> Plaintiffs allege that “defendants knowingly misled the public into believing that LFTB was not beef at all, but rather was an unhealthy ‘pink slime’ ‘hidden’ in ground beef as part of an ‘economic fraud’ masterminded by BPI.”<sup>64</sup> The term ‘pink slime’ was used more than 130 times in ABC’s reports.<sup>65</sup> Attorneys for BPI assert that ABC’s use of the phrase so many times, coupled with purported misstatements and omissions, led consumers to think something was wrong with BPI’s beef.<sup>66</sup>

BPI’s 250-page-plus suit is seeking \$400 million in damages representing projected lost profits from the reports by ABC, which can be tripled under South Dakota’s AFPDA, amounting to \$1.2 billion.<sup>67</sup> The suit names ABC, Diane Sawyer, ABC reporters Jim Avila and David Kerley, and other ABC correspondents, along with Gerald Zirnstein, Carl Custer, and Kit Foshee as defendants.<sup>68</sup> Zirnstein is the USDA microbiologist who first coined the term ‘pink slime’ when describing LFTB, while Custer is a former federal food scientist, and Foshee, a former BPI quality assurance manager.<sup>69</sup> Zirnstein, Custer, and Foshee all appeared on ABC’s broadcast segments regarding LFTB.<sup>70</sup>

Shortly after BPI filed suit, ABC filed a notice of removal to move the suit from state court in Union County, South Dakota, to federal U.S. District Court for the District of South Dakota, and it was granted.<sup>71</sup> ABC’s lawyers next submitted a motion to dismiss the lawsuit against BPI.<sup>72</sup> The lawyers asserted that, “ABC . . . did not knowingly disparage LFTB or BPI . . . [and] that while the term ‘pink

62. Complaint and Jury Demand, *supra* author biography, at 3.

63. *Id.*

64. Bearshelle Edmé, *UPDATE: BPI v. ABC Preliminary Hearing in Union County*, SIOUXLAND NEWS (Dec. 17, 2013), <http://www.sioxlandnews.com/story/24247433/update-bpi-vs-abc-hearing>.

65. P.J. Huffstutter & Martha Graybow, *Special Report: Did Diane Sawyer Smear “Pink Slime”?*, REUTERS (Mar. 4, 2013), <http://www.reuters.com/article/2013/03/04/us-usa-media-abc-bpi-idUSBRE92313R20130304> [hereinafter *Did Diane Sawyer Smear “Pink Slime”?*].

66. S.D. CODIFIED LAWS § 20-10A-3 (2013); *Beef Products Inc. Seeks Restitution from ABC News*, *supra* note 48; Jonathan Stempel & P.J. Huffstutter, *UPDATE 2-Judge Rejects ABC News Bid to Throw Out ‘Pink Slime’ Lawsuit*, REUTERS (Mar. 27, 2014), <http://www.reuters.com/article/2014/03/28/usa-media-abc-bpi-idUSL1N0MO2ET20140328> [hereinafter *Judge Rejects ABC News Bid to Throw Out ‘Pink Slime’ Lawsuit*].

67. *Alar Apples Case Precedence for BPI v. ABC*, *supra* note 17.

68. *Beef Products Inc. Seeks Restitution from ABC News*, *supra* note 47.

69. *Alar Apples Case Precedence for BPI v. ABC*, *supra* note 17.

70. Claire Mitchell, *ABC Files Motion to Dismiss BPI’s Defamation Lawsuit*, FOOD LIAB. LAW BLOG (Nov. 13, 2012), <http://www.foodliabilitylaw.com/2012/11/articles/litigation-2/abc-files-motion-to-dismiss-bpis-defamation-lawsuit/>.

71. *Id.*



slime' is unflattering, it does not convey false facts about LFTB.<sup>73</sup> ABC's attorneys also stated that calling the product 'pink slime' is not an objectively false statement, as it is certainly pink and slimy.<sup>74</sup> Additionally, ABC argued that BPI cannot bring a claim under South Dakota's AFPDA, because the statute provides for actions that question the safety of a product, which ABC alleges it did not do regarding LFTB.<sup>75</sup> BPI's lawyers contested this motion to dismiss the case, and sought to remand the case back to state court.<sup>76</sup> In June 2013, U.S. District Court Judge Karen E. Schreier, seated in Sioux Falls, South Dakota, remanded the action back to state court in Union County, and did not issue a ruling on the merits.<sup>77</sup> The action would finally remain in state court, giving BPI (a Dakota Dunes, South Dakota-based company) a home court advantage in front of South Dakota Circuit Judge Cheryle Gering.<sup>78</sup>

More recently, in December 2013, after the filing of another motion to dismiss the action by ABC, Judge Gering heard oral arguments from both parties, and issued a written ruling in March 2014.<sup>79</sup> Judge Gering rejected twenty-one of ABC's twenty-six counts to dismiss the case, and said, "BPI may pursue claims under South Dakota's food disparagement laws."<sup>80</sup> The five counts which were dismissed were common law disparagement claims, and the judge held these were

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72. *ABC News Files Motion to Dismiss BPI Lawsuit*, MEAT & POULTRY, (Nov. 1, 2012), [http://www.meatpoultry.com/articles/news\\_home/Business/2012/11/ABC\\_News\\_files\\_motion\\_to\\_dismiss.aspx?ID={4318B1E5-8ECB-4859-B303-A2FD0449CEFE}](http://www.meatpoultry.com/articles/news_home/Business/2012/11/ABC_News_files_motion_to_dismiss.aspx?ID={4318B1E5-8ECB-4859-B303-A2FD0449CEFE}).

73. Dave Dreeszen, *Judge: BPI Suit Against ABC, Other Defendants May Proceed*, SIOUX CITY J., Mar. 27, 2014, [http://siouxcityjournal.com/news/local/a1/judge-bpi-suit-against-abc-other-defendants-may-proceed/article\\_9c675d1c-19c5-566b-8bb1-9f95a5289ab9.html](http://siouxcityjournal.com/news/local/a1/judge-bpi-suit-against-abc-other-defendants-may-proceed/article_9c675d1c-19c5-566b-8bb1-9f95a5289ab9.html).

74. Mitchell, *supra* note 70; *Did Diane Sawyer Smear "Pink Slime"?*, *supra* note 65 ("ABC never said BPI's product [was] dangerous").

75. Associated Press, *BPI Wants 'Pink Slime' Lawsuit Back in State Court*, RAPID CITY J. (Nov. 28, 2012), [http://rapidcityjournal.com/news/bpi-wants-pink-slime-lawsuit-back-in-state-court/article\\_8fccdb6-c1e8-54a1-845c-76801db6866e.html](http://rapidcityjournal.com/news/bpi-wants-pink-slime-lawsuit-back-in-state-court/article_8fccdb6-c1e8-54a1-845c-76801db6866e.html).

76. Dan Flynn, *BPI v. ABC Remanded Back to South Dakota Courts*, FOOD SAFETY NEWS (June 14, 2013), <http://www.foodsafetynews.com/2013/06/bpi-v-abc-remanded-back-to-south-dakota-courts/#.VAz60vldVne> [hereinafter *BPI v. ABC Remanded Back to South Dakota Courts*].

77. *Id.*; *see Correction: Pink Slime-Lawsuit Story*, THE GAZETTE (Mar. 28, 2014), <http://gazette.com/correction-pink-slime-lawsuit-story/article/feed/103261> (reporting Cheryle Gering as presiding judge in the South Dakota court).

78. Michael Avok, *ABC News Seeks to Have \$1.2 Bln 'Pink Slime' U.S. Defamation Suit Dismissed*, REUTERS (Dec. 17, 2013), <http://www.reuters.com/article/2013/12/18/usa-abc-law-suit-idUSL2N0JW1CL20131218>; Dreeszen, *supra* note 73.

79. Dreeszen, *supra* note 73.

preempted by the AFPDA.<sup>81</sup> In making her ruling, Judge Gering carefully wrote “the issue before the court is whether the Plaintiffs have sufficiently alleged, as a matter of law, claims for defamation and disparagement. The court is not reaching any conclusions as to whether the alleged defamatory or disparaging statements are actually true or not true.”<sup>82</sup>

## 2. *What exactly is pink slime and what caused the public outcry against it?*

In 1971, Eldon Roth started Roth Refrigeration, and invented the Roller Press Freezer, which made it possible to freeze meat in two minutes, rather than the normal time of three to five days.<sup>83</sup> Ten years later, Roth founded BPI, and BPI’s first plant in Texas used the Roller Press Freezer to begin manufacturing frozen beef.<sup>84</sup> In 1991, BPI began producing LFTB, using it as an ingredient in ground beef.<sup>85</sup> When beef carcasses are cut into pieces, the beef trimmings that are cut off frequently still have lean meat on them.<sup>86</sup> The USDA inspected trimmings are sent to producers of LFTB, such as BPI, and placed in machines to remove connective tissue, cartilage, and other pieces which might be in with the trimmings.<sup>87</sup> The beef trimmings are next heated up to 105°F (the temperature prior to refrigeration), spun in a centrifuge to separate the meat from the fat, and lastly sprayed with a puff of ammonium hydroxide gas to kill bacteria,<sup>88</sup> such as *E. coli* and salmonella.<sup>89</sup> The trimmings are then frozen and packaged, and can be

80. *Id.*

81. Memorandum Decision on Defendant’s Motions to Dismiss, *Beef Prod., Inc. v. Am. Broad. Co.*, Civ. 12-292, at \*19 (S.D. 1<sup>st</sup> Cir. Ct. Mar. 27, 2014), available at [http://siouxcityjournal.com/union-county-circuit-court-judge-cheryle-gering-s-ruling-in/pdf\\_f663dd56-8635-5e04-a681-9b7cbc33f888.html](http://siouxcityjournal.com/union-county-circuit-court-judge-cheryle-gering-s-ruling-in/pdf_f663dd56-8635-5e04-a681-9b7cbc33f888.html).

82. *History*, BEEF PRODUCTS INC., <http://www.beefproducts.com/history.php> (last visited Jan. 20, 2015).

83. *Id.*

84. *Id.*

85. See *LFTB Frequently Asked Questions*, BEEF IS BEEF, <http://beefisbeef.com/lftb-faq> (last visited Jan. 20, 2015).

86. *Id.*

87. *Id.*; *Editorial: Lean Beef or Pink Slime? It’s All in the Name*, USA TODAY, Apr. 1, 2012, <http://usatoday30.usatoday.com/news/opinion/editorials/story/2012-04-01/pink-slime-lean-beef/53933770/1>.

88. Michael Hill, *Pink Slime: Why Is It Now Striking a Nerve?*, THE HUFFINGTON POST, Mar. 14, 2012, [http://www.huffingtonpost.com/2012/03/14/pink-slime\\_n\\_1345310.html](http://www.huffingtonpost.com/2012/03/14/pink-slime_n_1345310.html). (Interestingly, in a somewhat connected, but unrelated case, the family of a man who died from *E. coli* poisoning in 2010 filed a lawsuit against BPI (for allegedly contaminated LFTB) and several other companies in early 2013 for the man’s death; see James Andrews, *Lawsuit Filed*

mixed in with ground beef.<sup>90</sup> The FDA has approved the process of making LFTB since the early 1990s.<sup>91</sup> In 2002, BPI's "lean beef" gained its infamous nickname of 'pink slime' in an internal email sent by former USDA scientist Zirnstein.<sup>92</sup> Lean beef did not become publicly known as 'pink slime' until a 2009 *New York Times* report.<sup>93</sup>

Although the term 'pink slime' has been in the media since the 2009 *New York Times* report,<sup>94</sup> concern about the product caught fire and "went from a simmer to a boil" in less than a week in the spring of 2012.<sup>95</sup> Prior to the extensive coverage of the topic in March 2012, British chef and television star Jamie Oliver showed beef trimmings being washed in ammonia, drained, and put through a meat grinder on an April 2011 episode of *Jamie Oliver's Food Revolution*.<sup>96</sup> Oliver claimed that seventy percent of U.S. beef is treated in this fashion, and that the USDA does not require labeling of this process.<sup>97</sup> Oliver's fierce opposition to LFTB and call for fast food chains to abandon the product led McDonald's, Taco Bell, and Burger King to stop using the product in their meat.<sup>98</sup> In March 2012, however, a story by David Knowles in *The Daily* kicked off the major media coverage of the pink slime debacle, soon followed by an ABC News segment by Jim

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*in E. coli Death; Defendants Include JBS, BPI and Tyson*, FOOD SAFETY NEWS, Jan. 15, 2013, <http://www.foodsafetynews.com/2013/01/lawsuit-claims-that-e-coli-in-bpi-beef-killed-minnesota-man/#.U0yQxdw9Vg2>.

89. Dan Piller, *Beef Industry Braces for Loss of 'Pink Slime' Filler*, THE DES MOINES REG., Mar. 27, 2012, <http://usatoday30.usatoday.com/news/health/wellness/fitness-food/safety/story/2012-03-27/Beef-industry-braces-for-loss-of-pink-slime-filler/53802154/1?csp=34>.

90. *Id.*

91. See Michael Moss, *Safety of Beef Processing Method Is Questioned*, N.Y. TIMES, Dec. 30, 2009, [http://www.nytimes.com/2009/12/31/us/31meat.html?pagewanted=all&\\_r=0](http://www.nytimes.com/2009/12/31/us/31meat.html?pagewanted=all&_r=0).

92. Editorial: *Lean Beef or Pink Slime? It's All in a Name*, *supra* note 87.

93. See Moss, *supra* note 91.

94. Hill, *supra* note 88.

95. See *Jamie Oliver's Food Revolution: Pink Slime*, YOUTUBE (Apr. 12, 2011), <http://www.youtube.com/watch?v=wshlnRWnf30>; Paula Forbes, *McDonald's Ditches 'Pink Slime' – Jamie Oliver's Doing?*, EATER.COM (Jan. 27, 2012), <http://eater.com/archives/2012/01/27/mcdonalds-ditches-pink-slime-thanks-to-jamie-oliver.php>.

96. See *Jamie Oliver's Food Revolution: Pink Slime*, *supra* note 95; Forbes, *supra* note 95.

97. KJ Dell'Antonia, *Will There Be "Pink Slime" in Your Child's School Lunch?*, N.Y. TIMES BLOG (Mar. 9, 2012, 6:47 PM), <http://parenting.blogs.nytimes.com/2012/03/09/will-there-be-pink-slime-in-your-childs-school-lunch/>; Joe Satran, *Pink Slime, Ammonium Hydroxide Fast Food Ground Beef Additive, Dropped by McDonald's Et Al.*, THE HUFFINGTON POST, Jan. 27, 2012, [http://www.huffingtonpost.com/2012/01/27/pink-slime-fast-food\\_n\\_1237206.html](http://www.huffingtonpost.com/2012/01/27/pink-slime-fast-food_n_1237206.html).

Avila on *World News with Diane Sawyer*.<sup>99</sup> Knowles reported that LFTB is made by grinding connective tissue and beef scraps together, which is then sprayed with ammonia hydroxide to kill pathogens.<sup>100</sup> This results in a pink substance, which can be mixed in with ground beef; neither scientists Zirnstein, nor Custer, consider this product to be meat.<sup>101</sup> The news segment by Avila, who spoke with both Zirnstein and Custer, focused on the ground beef that many consumers purchase and stated again that seventy percent of the ground beef purchased at U.S. supermarkets contains pink slime, or beef trimmings, which were formerly used only in dog food and cooking oils, as a substitute or filler.<sup>102</sup>

When pink slime came under public scrutiny in March 2012, Google reported over 2,000 stories on the topic, many using the word “gross” in their headlines.<sup>103</sup> A Houston resident and blogger who writes about kids’ food, Bettina Siegel, started an online petition on Change.org<sup>104</sup>, where she asked Secretary of Agriculture Tom Vilsack to immediately stop the use of pink slime in children’s food at schools.<sup>105</sup> The following day, the petition had more than 220,000 signatures.<sup>106</sup> In response to the public reaction to LFTB, BPI started a website, [www.beefisbeef.com](http://www.beefisbeef.com), whose stated objective is “to share information and answer questions about [LFTB].”<sup>107</sup> Interestingly enough, only BPI has come under fire for producing LFTB; Cargill Meat Solutions, “one of the largest producers of pink

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98. Deborah Blum, *It Came From the Media: What Prompted the Ruckus About “Pink Slime”?* *And Is It Unhealthy?*, DISCOVER MAG., THE CRUX BLOG, Mar. 23, 2012, 9:34 AM, <http://blogs.discovermagazine.com/crux/2012/03/23/it-came-from-the-media-what-prompted-the-ruckus-about-pink-slime-and-is-it-unhealthy/>; *See 70 Percent of Ground Beef at Supermarkets Contains ‘Pink Slime’* (ABC television broadcast Mar. 7, 2012), available at <http://abcnews.go.com/blogs/headlines/2012/03/70-percent-of-ground-beef-at-supermarkets-contains-pink-slime/>.

99. *What’s On the School Cafeteria Menu? “Pink Slime”*, COMMON DREAMS, MAR. 5, 2012, <http://www.commondreams.org/news/2012/03/05/whats-school-cafeteria-menu-pink-slime>.

100. *Id.*

101. *70 Percent of Ground Beef at Supermarkets Contain ‘Pink Slime’*, (ABC television broadcast Mar. 7, 2012), available at <http://abcnews.go.com/blogs/headlines/2012/03/70-percent-of-ground-beff-at-supermarkets-contains-pink-slime/>.

102. Blum, *supra* note 98.

103. Bettina Siegel, *Tell USDA to STOP Using Pink Slime in School Food!*, CHANGE.ORG (Mar. 6, 2012), <http://www.change.org/petitions/tell-usda-to-stop-using-pink-slime-in-school-food>.

104. Hill, *supra* note 88.

105. *Id.*

106. Beef Products Inc., *About LFTB*, BEEF IS BEEF, <http://www.beefisbeef.com/about-lftb#section6/> (last visited Jan. 20, 2014).

slime in the United States and around the world,” has avoided heavy media attention.<sup>108</sup>

### 3. *Impact of pink slime controversy*

In the midst of the pink slime scare, Secretary of Agriculture Vilsack asserted, “[w]e will continue to maintain the safety of the product.”<sup>109</sup> USDA’s Food Safety and Inspection Service (FSIS), the branch responsible for ensuring the safety of meat and proper labeling of products, showed a division between employees as to whether LFTB was fit for human consumption.<sup>110</sup> According to Food Safety News, thousands of internal emails from the FSIS exposed extremely different opinions regarding the quality and safety of LFTB, “from employees who called it ‘GROSS’ to those who called media skepticism of LFTB ‘a bunch of bull.’”<sup>111</sup> Despite this disunion within the FSIS, the USDA’s Under Secretary for Food Safety, Elisabeth Hagen, stated that the process used to make LFTB is safe, and it is also safe to consume the product.<sup>112</sup> The Department contracted with BPI in 2012 to purchase seven million pounds of ground beef for the National School Lunch Program, but this is a rather insignificant amount compared to the overall total of 111.5 million pounds of beef to be bought by the USDA.<sup>113</sup> The USDA did announce that as of Fall 2012, schools enrolled in the National School Lunch Program could choose whether or not to purchase ground beef containing LFTB

107. *Beef Products Inc. Seeks Restitution from ABC News*, *supra* note 48 (Cargill potentially evaded scrutiny due to its use of citric acid rather than ammonium hydroxide to kill contaminants). *But see* P.J. Huffstutter, *Exclusive: Cargill to Change Beef Labeling in Wake of ‘Pink Slime’ Furor*, REUTERS (Nov. 15, 2013), <http://www.reuters.com/article/2013/11/05/us-usa-cargill-labeling-idUSBRE9A40XE20131105> [hereinafter *Cargill to Change Beef Labeling in Wake of ‘Pink Slime’ Furor*].

108. O. Kay Henderson, *Ag Secretary Comments on BPI Lawsuit Against ABC*, RADIOIOWA.COM (Sept. 15, 2012), <http://www.radioiowa.com/2012/09/15/ag-secretary-comments-on-bpi-lawsuit-against-abc/>.

109. Helena Bottemiller & Gretchen Goetz, *Internal Emails Reveal FSIS Was Divided on ‘Pink Slime’*, FOOD SAFETY NEWS (Apr. 8, 2013), <http://www.foodsafetynews.com/2013/04/internal-emails-reveal-fsis-was-divided-on-pink-slime/#.U0x2L9w9Vg0>.

110. It should be noted that Food Safety News did not uncover this division within the internal emails until a year after the pink slime controversy began, in the spring of 2013, *Id.*

111. Elisabeth Hagen, *Setting the Record Straight on Beef*, USDA BLOG (Mar. 22, 2012, 11:42 AM), <http://blogs.usda.gov/2012/03/22/setting-the-record-straight-on-beef/>.

112. Michelle Castillo, *USDA: Schools Can Decide if ‘Pink Slime’ Will Be Served in School Lunch*, CBS NEWS (Mar. 15, 2012), <http://www.cbsnews.com/news/usda-schools-can-decide-if-pink-slime-will-be-served-in-school-lunch/>.

or beef without it; however, the USDA only provides approximately twenty percent of school lunches, while the remaining eighty percent of food for school lunches is ordered outside the department.<sup>114</sup> Only Iowa, Nebraska, and South Dakota have chosen to order beef that may contain pink slime for their school lunch programs.<sup>115</sup>

Not all groups are responding as kindly as the USDA to the use of LFTB in their beef. In addition to the above mentioned fast food chains halting the use of LFTB in their meals, grocery stores such as Safeway, SUPERVALU, and Food Lion are no longer selling hamburger that contains LFTB; Walmart and Sam's Club have decided to offer alternative hamburger products which do not contain LFTB.<sup>116</sup> One of the biggest impacts, which consumers are already experiencing, caused by the pink slime controversy is an increase in ground beef prices.<sup>117</sup> To compensate for the loss of LFTB in ground beef, the American Meat Institute stated that 1.5 million more cows would need to be slaughtered every year, which accounts for the price increase.<sup>118</sup> As of the end of March 2012, beef prices hit a record high of \$4.70 per pound, an increase of more than six percent as of the same time in 2011.<sup>119</sup>

BPI is also experiencing major problems because of the pink slime fiasco, due to many customers no longer wanting to purchase ground beef containing their LFTB product.<sup>120</sup> In early March 2012, BPI had 1,300 employees working at four plants, averaging operating profits of \$2.3 million per week.<sup>121</sup> The company

113. *Id.*

114. Henderson, *supra* note 108.

115. Kim Souza, *Packers Deal with "Pink Slime" Debate (Updated)*, THECITYWIRE.COM (Mar. 27, 2012, 9:20 AM), <http://www.thecitywire.com/node/21138>; *see also* Ryan Jaslow, *More Grocery Chains Drop "Pink Slime" From Shelves: What About Wal-Mart?*, CBS NEWS (Mar. 23, 2012), [http://www.cbsnews.com/8301-504763\\_162-57403217-10391704/more-grocery-chains-drop-pink-slime-from-shelves-what-about-wal-mart/](http://www.cbsnews.com/8301-504763_162-57403217-10391704/more-grocery-chains-drop-pink-slime-from-shelves-what-about-wal-mart/) (Noting these supermarket chains include Acme, Albertsons, Cub Foods, Farm Fresh, Hornbacher's, Jewel-Osco, Harveys, Reid's, Genuardi's, and Dominicks stores). *But see Did Diane Sawyer Smear "Pink Slime"?*, *supra* note 65 (reporting that Hy-Vee, a Midwestern grocery retailer headquartered in Iowa, stopped carrying ground beef containing LFTB at the time of the media coverage on pink slime, but has since brought it back due to customer demand).

116. *See* Souza, *supra* note 115.

117. Caroline Scott-Thomas, "Pink Slime": Safe, Nutritious – and – Icky, FOOD NAVIGATOR – USA (Mar. 27, 2012), <http://www.foodnavigator-usa.com/Markets/Pink-slime-Safe-nutritious-and-icky>.

118. Souza, *supra* note 115.

119. *See Id.*

120. Elaine Watson, *Beef Products Inc: We Were an American Success Story. . . Until March 7, 2012*, FOOD NAVIGATOR-USA (Sept. 14, 2012), <http://www.foodnavigator-usa.com/suppliers2/Beef-Products-Inc-We-were-an-American-success-story-until-March-7-2012>.

closed three facilities in Texas, Kansas, and Iowa, with over 700 BPI employees who have lost their jobs at these plants, as well as at BPI's South Dakota headquarters.<sup>122</sup> Because of the plant closures, one former BPI employee is reportedly suing ABC, ABC News, Jamie Oliver, and Change.org blogger, Siegel, for \$70,000 in damages.<sup>123</sup> As of September 2012, BPI was averaging a weekly operating loss of over a half-million dollars, and sales of LFTB had decreased from approximately five million pounds per week to less than two million pounds per week.<sup>124</sup> BPI stated their "company lost 80% of its sales, a loss of \$20 million per month, following news broadcasts about 'pink slime.'"<sup>125</sup> The company's gross revenue declined by around \$140 million, and their profits dropped by approximately \$70 million.<sup>126</sup> BPI calculations indicate that the company will lose over \$400 million in profit over the next five years due to ABC's "disinformation campaign."<sup>127</sup> *Meat & Poultry*, a magazine that does annual rankings of the industry's biggest companies, had BPI listed at the number twenty-seven position in 2012; by 2013, BPI had slipped to the number sixty-three spot.<sup>128</sup> The magazine reported that BPI's sales dropped from \$1.1 billion to \$400 million; "[i]n other words, BPI lost \$700 million in sales due to the collapse of demand for its [LFTB] product after it was publicized as 'Pink Slime' in the media."<sup>129</sup> Suppliers and others that depend on BPI's industry will also suffer negative consequences.<sup>130</sup>

Although Cargill managed to avoid heavy media attention regarding its use of pink slime in their "finely textured beef" (FTB), their company saw demand for their product drop by eighty percent.<sup>131</sup> In response to surveys, and in an effort to increase transparency between Cargill and its consumers, the company declared

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21. Marion Nestle, *Maker of "Pink Slime" Sues Everyone Who Calls It That*, FOOD POLITICS (Sept. 14, 2012), <http://www.foodpolitics.com/2012/09/maker-of-pink-slime-sues-everyone-who-calls-it-that/>.

22. Sam Robinson, *\$1.2 Billion Defamation Suit Against ABC News Pending, While BPI Tries to Get Case Back to South Dakota Court*, GATEWAY JOURNALISM REV. (Feb. 1, 2013), <http://gatewayjr.org/2013/02/01/1-2-billion-defamation-suit-against-abc-news-pending-while-bpi-tries-to-get-case-back-to-south-dakota-court/>.

23. Watson, *supra* note 120.

24. Nestle, *supra* note 121.

25. Complaint and Jury Demand, *supra* note 1, at 127.

26. *Id.* at 128.

27. Dan Flynn, *Tyson Still No. 1; JBS Almost Closed Gap and BPI Took a Hit*, FOOD SAFETY NEWS (Apr. 5, 2013), <http://www.foodsafetynews.com/2013/04/tyson-still-no-1-jbs-almost-closed-gap-and-bpi-took-a-hit/#.U0tdVNw9Vg0>.

28. *Id.*

29. Souza, *supra* note 115.

30. *Cargill to Change Beef Labeling in Wake of 'Pink Slime' Furor*, *supra* note 107.

that it would begin labeling its products containing FTB by the 2014 summer grilling season.<sup>132</sup> Some of Cargill's products are already sporting the new labels, which state "Contains Finely Textured Beef."<sup>133</sup> Because previous federal regulators considered FTB and LFTB products to be beef, the products were never listed as ingredients on ground beef packaging; however, the USDA approved a rule change which now allows ground beef manufacturers to disclose the presence of such products, in response to the ABC news broadcasts on BPI.<sup>134</sup> In an attempt to require mandatory labeling of beef which contained LFTB or similar products, a bill was introduced in the U.S. House of Representatives at the height of the pink slime debacle, entitled the "Requiring Easy and Accurate Labeling of Beef Act" (REAL Beef Act); however, this bill was not enacted.<sup>135</sup>

#### 4. Will BPI succeed in their claim against ABC?

BPI's lawsuit against ABC is grounded in South Dakota's APD law.<sup>136</sup> South Dakota's Disparagement of Agricultural Food Products Act provides a cause of action for damages for "[a]ny producer of perishable agricultural food products who suffers damage as a result of another person's disparagement of any such perishable agricultural food product."<sup>137</sup> In BPI's disparagement claim, the company alleges that ABC and the other named defendants made almost two-hundred "false and disparaging" statements about LFTB which have damaged BPI.<sup>138</sup> As established in *New York Times Co. v. Sullivan*, and further clarified in *Bose Corp. v. Consumers Union*, decided by the Supreme Court in 1964 and 1984 respectively, the Court stated that in a product disparagement case, a plaintiff must prove actual malice by the defendant, meaning "that the defendant knowingly and willingly published false information about a product."<sup>139</sup> Here, BPI will need to prove ABC

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131. *Id.*

132. *Cargill Rolls Out Labels for Some Finely Textured Beef Products*, FOOD SAFETY NEWS (Feb. 4, 2014), <http://www.foodsafetynews.com/2014/02/cargill-rolls-out-labels-for-some-finely-textured-beef-products/#.U0s44dw9Vg0>.

133. *Cargill to Change Beef Labeling in Wake of 'Pink Slime' Furor*, *supra* note 107.

134. *See* Requiring Easy and Accurate Labeling of Beef Act, H.R. 4346, 112th Cong. (2012); *House Bill Would Require Labeling LFTB*, FOOD SAFETY NEWS (Apr. 2, 2012), <http://www.foodsafetynews.com/2012/04/bill-introduced-to-house-would-require-labeling-lftb/#.U0yM6dw9Vg1>.

135. *ABC News Wonders 'Where's the Beef' in Recent Lawsuit*, *supra* note 58.

136. S.D. CODIFIED LAWS § 20-10A-2 (2013).

137. *Alar Apples Case Precedence for BPI v. ABC*, *supra* note 17.

138. *Ag Disparagement Laws Take Root*, *supra* note 1; *see also* *Bose Corp. v. Consumers Union*, 466 U.S. 485 (1984).



knew it was broadcasting false information, or that ABC had good reason to know and ignored it.<sup>140</sup> This is a very high legal standard to fulfill,<sup>141</sup> but one attorney for BPI, Dan Webb, exhibited confidence that the company will win.<sup>142</sup> On the other hand, Jeffrey Schneider, ABC's senior vice president, has stated that the lawsuit is without merit, and that the news station will contest it vigorously.<sup>143</sup>

Most legal experts think BPI will have a difficult time prevailing in its defamation claim against ABC.<sup>144</sup> No appeal based on the disparagement law has ever reached the state supreme court in South Dakota.<sup>145</sup> Media libel defense attorney, Laura Handman, pointed out that BPI has a very high burden of proving that ABC knew what they were reporting was false.<sup>146</sup> According to Neil Hamilton, a Drake University Law School professor and director of the Agricultural Law Center in Des Moines, Iowa, "[a] jury may have a very difficult time finding the news stories involved here were defamatory, or that there was any intent to harm the company."<sup>147</sup> Bob Drechsel, a journalism professor at the University of Wisconsin, said BPI will have to provide extreme evidence that ABC acted wrongly; like proof that the network used clearly unreliable sources.<sup>148</sup> Drechsel further stated, "It's always an uphill battle for anyone to win a libel suit."<sup>149</sup> Despite legal opinions forecasting a challenging case for BPI, according to Reuters:

[I]nterviews with BPI's founders, agriculture industry officials and legal experts, as well as a review of federal documents and court records, suggest that ABC's reports had certain flaws that could resonate with a jury: ABC's lead reporter on the story mischaracterized BPI's product on Twitter; the network failed to clearly describe on-air how the company's beef wound up in the nation's food supply; and ABC did not reveal in an interview with a former BPI

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139. *ABC News Wonders 'Where's the Beef' in Recent Lawsuit*, *supra* note 58.

140. *Id.*

141. Schulte & Brokaw, *supra* note 48.

142. *Id.*

143. Michael J. Racette, *Very Free Speech: The Truth About Pink Slime, or Not*, 2PARAGRAPHS.COM (Oct. 22, 2012), <http://www.2paragraphs.com/2012/10/very-free-speech-the-truth-about-pink-slime-or-not/>.

144. Schulte & Brokaw, *supra* note 48.

145. Tim Carman, *Producer of 'Pink Slime' Textured Beef Suing ABC and ABC News*, WASH. POST, Sept. 13, 2012, [http://www.washingtonpost.com/lifestyle/style/producer-of-pink-slime-textured-beef-suing-abc-and-abc-news/2012/09/13/04f42b3a-fde8-11e1-8adc-499661afe377\\_story.html](http://www.washingtonpost.com/lifestyle/style/producer-of-pink-slime-textured-beef-suing-abc-and-abc-news/2012/09/13/04f42b3a-fde8-11e1-8adc-499661afe377_story.html).

146. Schulte & Brokaw, *supra* note 48.

147. *Id.*

148. *Id.*

employee that he had lost a wrongful termination lawsuit against the company.<sup>150</sup>

As laid out in the recent ruling handed down by Judge Gering in South Dakota state court, BPI may pursue claims under South Dakota's food disparagement law.<sup>151</sup> Judge Gehring wrote, "a reasonable factfinder could find that the statements are defamatory and/or disparaging."<sup>152</sup> Although it was clearly explained that the court was not reaching any conclusions as to whether the alleged defamatory or disparaging statements were true or not true,<sup>153</sup> this is likely providing BPI and its attorneys with encouragement as to their pending claims. Erik Connolly, an attorney for BPI, expressed content with the court's decision, and stated that they "look forward to starting discovery and ultimately presenting [their] case to a jury."<sup>154</sup>

## II. POLICY SURROUNDING AGRICULTURAL PRODUCT DISPARAGEMENT LAWS

### A. *Pros*

Policy arguments in favor of APD statutes are: they are necessary for states to safeguard their economies by protecting their agriculture industries, they protect the marketability of perishable food products, and they prevent agricultural producers from suffering major losses, or in the alternative, serve as a remedy for them.

To begin with, APD statutes are necessary for individual states to safeguard their economies by protecting their agriculture industries.<sup>155</sup> These laws simply demonstrate the general concern of state legislatures to protect their agricultural and aqua-cultural interests.<sup>156</sup> The statutes further provide economic stability in

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149. *Did Diane Sawyer Smear "Pink Slime"?*, *supra* note 65 (One of Jim Avila's tweets reportedly read, "no one said this slime is dangerous. It's just not what it purports to be. Meat. And if it's in ground beef it should be labeled").

150. Dreeszen, *supra* note 73.

151. Memorandum Decision on Defendant's Motion to Dismiss, *supra* note 81, at 19.

152. Dreeszen, *supra* note 73.

153. *Id.*

154. Dan Flynn, "Veggie Libel Laws" *Still on Books*, FOOD SAFETY NEWS (Nov. 28, 2009), <http://www.foodsafetynews.com/2009/11/veggie-libel-laws-still-on-books-in-13-states/> [hereinafter "Veggie Libel Laws" *Still on Books*].

155. *What are Agricultural Disparagement Statutes?*, PROCON.ORG, <http://milk.procon.org/view.answers.php?questionID=000838> (last visited Jan. 20, 2015).

state economies which chiefly rely on the agriculture industry.<sup>157</sup> They do not shield agriculture industries from criticism, but ensure that critiques are based on truthful evidence.<sup>158</sup> The laws guarantee statements made against a state's interests "are not merely false creations by the media, designed to produce a public scare and increase ratings."<sup>159</sup> One state's legislative history, in particular, pointed to wanting to protect farmers from food safety scares.<sup>160</sup> It seems fair to require those who make statements which alarm the public and harm the food industry to take responsibility for their assertions.<sup>161</sup>

Second, APD statutes protect the marketability of perishable food products.<sup>162</sup> Disparaging statements made about products with a long shelf-life might not have to worry about effects on their marketability, but products with a short shelf-life, such as "[s]tuff that will rot in the silos or in the warehouses,"<sup>163</sup> do have to worry about marketability. Lobbyists claim APD statutes protect small farmers' perishable products.<sup>164</sup> Unlike other industries, the majority of agricultural products cannot be stored to "ride the market."<sup>165</sup> Opponents of APD statutes will assert that these laws might result in a slippery slope toward other disparagement statutes; but the key here is these statutes only apply to perishable, time sensitive products, not to other products like cars.<sup>166</sup>

Finally, not only will the APD statutes protect product marketability, they will also prevent agricultural producers from major losses like those suffered by apple growers following the Alar scare, and presently, losses experienced by BPI.<sup>167</sup> These losses not only include monetary damage, but also encompass harm to reputation.<sup>168</sup> If the laws fail to prevent against major losses, they can instead serve as a remedy for them. Following the Alar controversy, APD statutes were

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156. *Ag Disparagement Laws Take Root*, *supra* note 1.

157. "Veggie Libel Laws" *Still on Books*, *supra* note 154.

158. *What are Agricultural Disparagement Statutes?*, *supra* note 155.

159. *Id.*

160. Anita Manning, *Beef with Oprah Tests Food Speech Laws*, USA TODAY, Jan. 13, 1998, <http://www.mad-cow.org/Constitution.html>.

161. Symposium, *Limitations on Commercial Speech: The Evolution of Agricultural Disparagement Statutes*, 10 DEPAUL BUS. L.J. 169, 174 (1998).

162. *Id.* (An example of a disparaging statement made about a product with a short shelf life).

163. SOLEY, *supra* note 10, at 129.

164. *Ag Disparagement Laws Take Root*, *supra* note 1.

165. Manning, *supra* note 160.

166. Helen Cordes, *Watch Your Mouth! New Laws Could Gag Critics of Unsafe Food*, UTNE READER (October 9, 2007), <http://www.utne.com/archives/Watchyourmouth.aspx>.

167. See Racette, *supra* note 143.

developed as a remedy for these losses, after agriculture associations noticed problems with common law tort.<sup>169</sup> These laws allow recovery of monies lost due to decreased profits caused by disparaging comments.<sup>170</sup>

### B. Cons

The first policy argument against APD statutes are that they initially discourage the marketplace idea of public participation, as such laws might be considered a form of strategic lawsuits against public participation (SLAPP), and also seen as preventative of scientific opinions being subjected to second opinions. Additionally, APD statutes may chill the media from fully participating in news reporting. Further, lawsuits surrounding APD statutes are costly and time consuming, and could result in criminal sanctions. Finally, the passage of APD statutes could result in a slippery slope, affecting other outside matters.

First, APD statutes discourage the marketplace idea of public participation. “For free debate to occur and for democracy to be achieved, people cannot be afraid of participating in critical, public discourse.”<sup>171</sup> Although these statutes are designed to protect local and national industry interests, they do so at the price of encouraging citizens to stay quiet about issues that affect them.<sup>172</sup> The public should be able to rely on the marketplace of ideas, and on the principle that the good information will drive out bad information.<sup>173</sup> Agricultural interests influence public opinion by distributing information and conducting science, and the public can differentiate between good and bad information.<sup>174</sup> Lawsuits against those who question the safety of food not only discourage public participation, but can also have a negative impact on the public health discourse.<sup>175</sup> Patrick Leahy, U.S. Senator from Vermont, commented, “That is not the American way – healthy debate on issues of public concern is how this country does business. . . . Americans in all states must be allowed to openly debate issues of public health.”<sup>176</sup>

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168. *Ag Disparagement Laws Take Root*, *supra* note 1.

169. *Id.*

170. *Id.*

171. Lauren Asmus, *Milking the Media: The U.S. Political Economy’s Obstruction of Food Free Speech* (Summer Semester, 2010) (unpublished Master in Arts thesis, Florida State University) (on file with author).

172. Symposium, *supra* note 161, at 177.

173. *Id.* at 177-78.

174. Bill Tchakirides, *What Do You Know About Food Disparagement Laws?*, DAILY KOS (Apr. 27, 2011, 7:01 PM), <http://www.dailykos.com/story/2011/04/27/970849/-What-do-you-know-about-Food-Disparagement-Laws>.

175. *Id.*

Supporters of APD statutes might argue that these laws encourage free expression and debate, due to the high burden of proof required to succeed at a disparagement claim.<sup>177</sup> But opponents would argue that APD suits might be considered a form of strategic lawsuits against public participation, also known as SLAPP suits.<sup>178</sup> A corporation files a SLAPP suit, even when they know they might not win, just to send a message.<sup>179</sup> SLAPP suits are a form of intimidation, and quiet public discussion by threatening a lawsuit.<sup>180</sup> These lawsuits may be criticized for only creating fear, when instead they could be utilized to reveal manipulative actions of companies.<sup>181</sup> Plaintiffs bring the lawsuit to “intimidate criticism of their product, company, or political view; either through the legal process itself, or the mounting costs of litigating the long and complicated claims.”<sup>182</sup> Some states have statutes to protect against SLAPP lawsuits, but this does not include all of those with APD statutes in place.<sup>183</sup>

Moreover, APD statutes prevent scientific opinions from being subjected to second opinions of environmental, food safety, and health groups.<sup>184</sup> Secondary opinions are necessary to challenge accepted knowledge, as those judgments can change, fix, or bring to light national health issues.<sup>185</sup> Expression of new and debated ideas not yet agreed upon by the scientific community may be stifled completely.<sup>186</sup> It seems flawed to potentially impose liability on an actor for expressing an honest opinion about an emerging scientific theory.<sup>187</sup> Bringing a scientific question into a legal battle is a poor manner of encouraging scientific inquiry.<sup>188</sup>

176. Racette, *supra* note 143.

177. Ctr. for Media and Democracy, *SLAPP Happy: Corporations That Sue to Shut You Up*, PR WATCH (2d Quarter 1997), <http://www.prwatch.org/prwissues/1997Q2/slapp.html>.

178. Asmus, *supra* note 171.

179. Laura Orlando, *Food Disparagement Laws: A New Tool in an Old Bag of Tricks*, RESOURCE INSTITUTE FOR LOW ENTROPY SYSTEMS (July 12, 1999), <http://www.riles.org/musings21.htm>.

180. Asmus, *supra* note 171.

181. Erika K. Eckley & Roger A. McEowen, *Pink Slime and the Legal History of Food Disparagement*, CHOICES MAG. (4th Quarter 2012), <http://www.choicesmagazine.org/choices-magazine/theme-articles/pink-slimemarketing-uncertainty-and-risk-in-the-24-hour-news-cycle/pink-slime-and-the-legal-history-of-food-disparagement>.

182. *Id.*

183. See Cordes, *supra* note 166.

184. See *id.*

185. Ronald K. L. Collins, *Veggie Libel: Agribusiness Seeks to Stifle Speech*, MULTINATIONAL MONITOR MAG., May 1998, <http://www.multinationalmonitor.org/mm1998/051998/collins.html> [hereinafter *Veggie Libel: Agribusiness Seeks to Stifle Speech*].

186. Babcock, *supra* note 49.

187. *PBS NewsHour: Oprah Winfrey v. The Beef People* (PBS Television Broadcast Jan.

Food producers should not bring lawsuits against product critics, but instead take into consideration public safety concerns.<sup>189</sup> Consumers and producers alike should be interested in the open and free exchange of ideas for the health, safety, and well-being of the general public. Producers should be more concerned about generating safe, quality food products rather than immediately jumping into a court action against a person or group who questions the safety of said product. A statute which impedes the free exchange of ideas can have the harmful side effect of constraining public health, safety, and well-being. Therefore, the public should not support these statutes if they stretch too far to protect product interests and shield them from the typical public vetting of information. Ultimately, producers could be more profitable if they serve their consumer's interests, rather than trying to do things their way, thus forcing consumers to bend to their will instead of vice-versa.

Second, APD statutes may chill the media from fully participating in news reporting. Agricultural producers have the ability to retaliate against those within the media who disparage perishable agricultural products.<sup>190</sup> Corporations can use APD statutes to "punish and muzzle their critics."<sup>191</sup> News outlets may feel pressure not to air or cover particular stories, even if journalists, publishers, or reporters believe them to be "truly newsworthy."<sup>192</sup> APD statutes could be considered a barrier to news personnel for reporting about important food safety issues.<sup>193</sup> In those states with APD laws in place:

[C]omment on the health dangers of bacteria in meats and poultry, the threat of bacterial infection from raw oysters, sulfites in salads, nitrites in bacon and other processed foods, cholesterol in eggs, fat in milk and meat, food dyes, polluted fish, Alar-sprayed apples, pesticide-treated foods, non-pasteurized juices and contaminated grapes . . . could subject the speaker to a lawsuit.<sup>194</sup>

In the high profile *BPI v. ABC* case, ABC and its attorneys have claimed allowing this suit to move forward would have a chilling effect on First Amendment freedoms, and that the network had a right to report on a matter of public

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20, 1998), available at [http://www.pbs.org/newshour/bb/law/jan-june98/fooddef\\_1-20.html](http://www.pbs.org/newshour/bb/law/jan-june98/fooddef_1-20.html).

188. Cordes, *supra* note 166.

189. See Ken Silverstein, *Veggie Libel, Wilted Press: How Food-Disparagement Laws Gag Reporting on Issues of Public Health and Safety*, THE NATION (Apr. 20, 1998), at 23, <http://www.cspinet.org/foodspeak/oped/nation.htm>.

190. *Id.*

191. Asmus, *supra* note 171.

192. Cordes, *supra* note 166.

193. *Veggie Libel: Agribusiness Seeks to Stifle Speech*, *supra* note 185.

interest.<sup>195</sup> Another such example involved Professor J. Robert Hatherill's authorship of *Eat to Beat Cancer*.<sup>196</sup> Before his book was published, Hatherill's publisher took out extensive passages from the book which would have alerted readers to dangers found in common foods such as meat products; there was not insufficient evidence to support Hatherill's assertions, but rather, the book's publisher feared litigation.<sup>197</sup> If the public was aware that bad news about food safety was not being adequately reported, they could elect to make different food choices, such as purchasing products from a farmer's market or eating organic foods.<sup>198</sup>

Third, lawsuits involving APD statutes are costly and time consuming.<sup>199</sup> BPI founder Eldon Roth, along with his wife Regina, stated that they would continue their battle against ABC, "even if it takes years and tens of millions of dollars in legal fees."<sup>200</sup> Looking back at the *Winfrey* case, Winfrey personally lost over one million dollars, plus the case and its appeal took nearly six years to win.<sup>201</sup> Some APD laws even provide legal fees for plaintiffs who win in court, but not for defendants.<sup>202</sup> Even if a plaintiff's APD lawsuit fails, legal fees can still result in bankruptcy for defendants.<sup>203</sup> "Since even victory can therefore lead to bankruptcy for defendants, cash-rich corporations have every incentive to file frivolous lawsuits . . ."<sup>204</sup> Those without enough money to defend against a lawsuit are particularly susceptible to media chill.<sup>205</sup> Not only are APD lawsuits costly and time consuming, but they could also result in criminal punishment. Although twelve states can award damages for civil liability under APD statutes, Colorado is unique in that its law provides for criminal sanctions.<sup>206</sup>

Lastly, the passage of APD statutes could result in a slippery slope, affecting

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194. Dreeszen, *supra* note 73.

195. See e.g., Ronald K.L. Collins, Op-Ed., *Congress Must Address Food-Disparagement Laws*, BALTIMORE SUN (June 10, 1999) available at <http://www.cspinet.org/food-speak/oped/baltsun2.htm> [hereinafter *Congress Must Address Food-Disparagement Laws*] (Hatherill is a professor at the University of California at Santa Barbara).

196. *Id.*

197. Carli Dolieslager & Amber Knight, *Gag Me With a Food Disparagement Law*, PROJECT CENSORED (Apr. 30, 2010), <http://www.projectcensored.org/top-stories/articles/13-gag-me-with-a-food-disparagement-law/>.

198. Asmus, *supra* note 172; *Congress Must Address Food-Disparagement Laws*, *supra* note 196.

199. *Did Diane Sawyer Smear "Pink Slime"?*, *supra* note 65.

200. Asmus, *supra* note 171.

201. Silverstein, *supra* note 189.

202. Cordes, *supra* note 166.

203. Silverstein, *supra* note 189.

204. *Veggie Libel: Agribusiness Seeks to Stifle Speech*, *supra* note 185.

205. *Id.*; see COLO. REV. STAT. § 35-31-101 (2014).

other matters outside those to which the laws apply.<sup>207</sup> Other industries could push for the adoption of similar disparagement statutes, ranging from the protection of fast food chains to alcohol companies.<sup>208</sup> Sandra Baron, executive director of the Media Law Resource Center, stated she thinks “there’s an enormous risk that these laws will be applied to other categories of life.”<sup>209</sup> Automobile makers would certainly like a “car disparagement” law.<sup>210</sup>

### III. SOLUTIONS

The policy considerations outlined above weigh heavily against APD statutes. One solution would be national legislation on agricultural disparagement rather than individual state statutes.<sup>211</sup> Most of the currently enacted state laws are similar, but national legislation would provide for uniformity by clearing up any disparities between the state statutes, perhaps through clearer definitions of those who can bring actions, or what types of products are covered. Although thirteen states currently have some form of APD statute in place,<sup>212</sup> it is important to remember that sixteen other states have considered and *rejected* similar legislation.<sup>213</sup> Because of this, national legislation is likely not the most appropriate solution.

The best option seems to be pushing for the immediate repeal of current APD statutes. It will be up to concerned citizens, consumer rights and public interest groups, environmentalists, and the media to take on agribusiness and grower interests in working toward repealing these statutes. The media and other individuals or groups that report on agricultural products should be most interested in repealing these statutes, as their interests would be best served by avoiding potential lawsuits. Businesses would no longer have the option of filing SLAPP suits under APD statutes. Additionally, instant repeal of APD statutes would be beneficial to the general public, because it would give citizens more confidence in their food supply, knowing that agricultural industries are not hiding behind such laws. It could stop the agriculture industry from receiving special protection for their products, compared to other industries.

To date, no state agricultural disparagement law has been repealed.<sup>214</sup> Up

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206. *Veggie Libel: Agribusiness Seeks to Stifle Speech*, *supra* note 185.

207. *Id.*

208. Manning, *supra* note 160.

209. *Id.*

210. *Congress Must Address Food-Disparagement Laws*, *supra* note 195.

211. *See Food-Disparagement Laws: State Civil & Criminal Statutes*, *supra* note 32.

212. Margiotta, *supra* note 26.

213. *Ag Disparagement Laws Take Root*, *supra* note 1.



until the filing of *BPI v. ABC*, there had been no cases brought under APD laws for more than ten years, while only five cases had ever been brought to court under such laws (three in Texas, one in Georgia, and one in Ohio).<sup>215</sup> Only two cases have resulted in written opinions, and fascinatingly, none of the five cases were decided on the merits of the APD claims.<sup>216</sup> The best strategy for getting legislatures to strike down APD statutes would involve a combined effort of grass roots lobbying or movements, lobbying of state legislators, and, potentially, a public ad campaign to effectively attack APD laws. Lobbying might be the simplest and most effective way of doing this, while a grassroots movement or public ad campaign would need an interested individual or group which would be willing to spearhead the effort. It might be possible to wait on state courts to strike down the constitutionality of these laws, however, none have seized the opportunity to do so thus far, nor has the Supreme Court had the opportunity to rule on any state statute.<sup>217</sup>

#### IV. CONCLUSION

With the present controversy surrounding the pink slime case, policy concerns surrounding agricultural product disparagement statutes are again in the spotlight. It is uncertain whether BPI or ABC will come out as the victor in the pending lawsuit. What is certain is that now is the time to act. The easiest method would be by contacting state legislators in states where these APD statutes have been adopted, and expressing concerns (emphasized by the policy considerations above) as to why these laws should be repealed, preferably, or alternatively, addressed at a national level. This is the surest way to keep agricultural product disparagement

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214. *Id.* (Only two of the five total cases have resulted in written decisions); see *Engler v. Winfrey*, 201 F.3d 680 (5th Cir. 2000); *Action for a Clean Env't v. State*, 457 S.E.2d 273 (Ga. App. 1995); *Agric. Gen. Co. v. Ohio Pub. Interest Research Grp.*, No. 397CV7262 (N.D. Ohio Mar. 25, 1997) (egg producer sued a public interest group for its statements about eggs); *Anderson d/b/a A-1 Turf Farm, and d/b/a A-1 Grass Co. v. McAfee*, No. 96-12667 (Dallas Cnty. Dist. Ct., 134th Judicial Dist., Apr. 24, 1998) (grass farm owner sued a state agricultural agent); *Burleson Enterprises, Inc. v. American Honda Motor Co., Inc.*, No. 2-97-CV-398 (N.D. Tex. Nov. 7, 1998) (emu ranchers sued Honda Motor Co.); see Eileen Gay Jones, *Forbidden Fruit: Talking About Pesticides and Food Safety in the Era of Agricultural Product Disparagement Laws*, 66 BROOK. L. REV. 823, 842 (2000–2001).

215. *Engler v. Winfrey*, 201 F.3d 680, 690 (5th Cir. 2000); *Action for a Clean Env't v. Georgia*, 457 S.E.2d 273, 274 (Ga. App. 1995); Eileen Gay Jones, *Forbidden Fruit: Talking About Pesticides and Food Safety in the Era of Agricultural Product Disparagement Laws*, 66 BROOK. L. REV. 823, 842 (2000–2001).

216. *Beef Products Inc. Seeks Restitution from ABC News*, *supra* note 47.

statutes from further negative policy implications. Otherwise, such laws will remain on the books, waiting another ten years before they are used.