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FARM-LEVEL CONTRACTING FOR PRODUCTION PROCESS ATTRIBUTES: AN ANALYSIS OF RBST IN MILK PRODUCTION

Clayton Cook-Mowery, Nicole J. Olynk, and Christopher A. Wolf

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INTRODUCTION

On November 5, 1993, the Food and Drug Administration (FDA) approved Recombinant Bovine Somatotropin (rBST), also

called Recombinant Bovine Growth Hormone (rbGH), for commercial use to increase milk production in dairy cattle.¹ The FDA determined that milk from cows which have been treated with rBST was safe for human consumption and that there was no significant impact on the environment from the production and use of rBST.² In February 1994 the Monsanto Corporation (Monsanto) introduced POSILAC[®] bovine somatotropin,³ making rBST commercially available to United States dairy farmers.

Even after 14 years of commercial availability in the United States, the use of rBST continues to stir significant controversy with and among dairy producers, producer-owned milk marketing cooperatives, dairy processors, retailers, and consumer groups. In particular, controversy arises from the finding by the FDA that there is "no significant difference between milk from treated and untreated cows"⁴ in regards to labeling products derived from milk from cows treated with rBST. Further, there is mounting attention being paid to how to verify that cows were or were not treated with rBST. Contributing to all of the recent controversy over rBST are questions over the approval of rBST by the FDA, which may have been partially responsible for the reduction of "public confidence in the agency and increased consumer anxiety over" foods produced with biotechnology.⁵

The FDA's failure to force Monsanto to devise a test to distinguish between the two hormones has provided grounds for challenging the FDA's decision to approve rBST for commercial use.⁶ The FDA determined that a tolerance level for rBST was not required⁷ due to the fact that "[i]t is undisputed that the dairy products derived from herds treated with rBST are indistinguishable from products derived from untreated herds."⁸ Taken together, questions

1. Interim Guidance on the Voluntary Labeling of Milk and Milk Products from Cows That Have Not Been Treated with Recombinant Bovine Somatotropin, 59 Fed. Reg. 6279 (Feb. 10, 1994) [hereinafter *Interim Guidance*].

2. *Id.* at 6279-80.

3. *Biotechnology, Interim Voluntary Guidance on BST Issued by FDA for Milk Producers*, Daily Rep. Exec., Reg. Econ. and Law, A (BNA) 26 (DER Feb. 9, 1994) (noting that POSILAC was introduced following a 90-day ban following its November approval by the FDA).

4. *Interim Guidance, supra* note 1, at 6279-80.

5. Kristine Cerro, comment *High Tech Cows: The BST Controversy*, 6 S.J. AGRIC. L. REV. 163, 192 (1996).

6. *Id.* at 189.

7. Symposium, *Food Products Affected by Biotechnology*, 55 U. PITT. L. REV. 653, 677 n. 111 (1994).

8. *Int'l Dairy Foods Ass'n v. Amestoy*, 92 F.3d 67, 69 (2d Cir. 1996).

surrounding the approval of rBST by the FDA, the lack of a test to distinguish between milk from treated cows versus untreated cows, and the determination by the FDA that a tolerance level was unnecessary all fuel the controversy today regarding the use of rBST in milk production.

Americans are taking increased interest in the production practices and technologies employed in the production of their food, including irradiation, antibiotics, and hormone and pesticide use.⁹ Certainly, consumers are further concerned with genetic engineering of their foods,¹⁰ and the many questions which surround the use of biotechnology in food production. In particular, consumers have increased concern about genetic engineering processes used in food production with foods that are fed to babies and young children.¹¹ Consumers of dairy products associate the words “wholesome” and “pure” with the milk they purchase.¹² Milk is perhaps thought of as the most wholesome of foods and is a staple of a baby’s diet, meaning that consumers may be particularly sensitive to genetic engineering, which affects the milk production processes used. Retailers selling milk labeled as “rBST-free” risk damaging the image of the dairy products they sell and the image of the retailer itself, if the mislabeled¹³ milk were to be sold. “Everyone in the dairy foods industry stands to gain if the pure and wholesome image of milk is enhanced and maintained,”¹⁴ therefore, all those involved in the dairy industry have incentives to protect the consumer perception of milk as a wholesome and pure food. The image of the dairy indus-

9. Rodolfo M. Nayga, Jr., *Sociodemographic Influences on Consumer Concern for Food Safety: The Case of Irradiation, Antibiotics, Hormones, and Pesticides*, 18 REV. OF AGRIC. ECON. 467, 467-75 (1996).

10. Diane Thue-Vasquez, *Genetic Engineering and Food Labeling: A Continuing Controversy*, 10 S.J. AGRIC. L. REV. 77, 77 (2000).

11. See David B. Schweikhardt & William P. Browne, *Politics by Other Means: The Emergence of a New Politics of Food in the United States*, 23 REV. OF AGRIC. ECON. 303, 312-18 (2001), [hereinafter *Schweikhardt & Browne*].

12. Jerry Dryer, *Quality: Job No. 1 - Successful Marketing of Dairy Foods Depends on Quality - Dryer on Marketing-Column*. Dairy Foods, Oct. 1991, available at http://findarticles.com/p/articles/mi_m3301/is_n11_v92/ai_11533635 [hereinafter *Dryer*].

13. “Mislabeled” may not be precisely correct, depending on the wording used in the label. A label stating that “Our farmers promise that our milk is synthetic hormone free,” for instance, may be true. For this article, however, we will use the term “mislabeled” to refer to milk with some sort of “synthetic hormone free” or “rBST-free” label, when that milk either actually did come from cows treated with rBST or came into contact with milk that had been produced using rBST and is therefore contaminated. See *infra* note 59.

14. Dryer, *supra* note 12 at 1.

try as a whole would likely suffer if milk labeled as rBST-free were to be found to have come from cows that were treated with rBST.

Recently, the Kroger Company (Kroger) announced that it would "complete the transition of the milk that it processes and sells to a certified rBST-free supply by February 2008."¹⁵ This decision led to a chain of events occurring in the milk market as milk marketing cooperatives and individual dairy producers adjusted to meet changing demands in milk production process attributes by Kroger. The Michigan milk market offers a case-study style analysis for movement towards rBST-free milk supplies, which is valuable in assessing adjustments and contracting for production process attributes, not only in Michigan, but also in regions throughout the United States.

This article examines some of the possibilities that are available to accurately govern the production and labeling of dairy products produced from cows not treated with rBST. Retailers may want to initiate the use of a regulatory or third-party verification system in order to reduce their risks associated with selling mislabeled "rBST-free" milk. Even if states opt to specifically regulate rBST labeling, the regulations will likely not require more than a third-party verification system. Since regulation is unlikely to require additional verification beyond the use of a third-party certification or inspection, producers employing the use of such a third-party system would be in compliance with any legislation likely to be passed in order to govern the labeling of rBST-free dairy products. In order to reduce retailer liability and to ensure properly labeled dairy products, the use of a third-party examination system could be explored to verify production practices employed by individual dairy producers.

Part I outlines the FDA's position on the labeling of rBST in the use of milk production. Part II evaluates the movement through market systems towards supplies of rBST-free milk. Part III investigates the potential liabilities and damages associated with misrepresentation of milk production practices as may be incurred by producers, milk marketing cooperatives and retailers. Part IV evaluates the incentives to verify the lack of rBST use in the current system. Part V evaluates possible solutions, including market-based and legislatively imposed solutions, for dealing with the verification of rBST-related labels.

15. Press Release, The Kroger Co., Kroger to Complete Transition to Certified rBST-Free Milk by Early 2008 (Aug. 1, 2007) available at http://www.the-krogerco.com/corpnnews/corpnnewsinfo_pressreleases_08012007.htm, [hereinafter *Kroger Press Release*].

I. FDA POSITION ON RBST LABELING

The FDA did not recognize a significant difference between milk from rBST-treated and untreated cows, leading it to conclude that it did not have the authority under the Federal Food, Drug, and Cosmetic Act, to require special labeling for milk from rBST-treated cows.¹⁶ In February 1994, the FDA offered interim guidance on the labeling of milk from untreated cows¹⁷ in response to industry and consumer representatives having requested guidance from the FDA on this labeling issue.¹⁸ The FDA agreed that the issuance of guidance would help prevent false or misleading claims regarding rBST use following the expiration of the congressional moratorium on the commercial sale of rBST on February 3, 1994.¹⁹ The FDA stated that due to the presence of natural bST in milk that such labeling statements as “bST-free” would be false²⁰ and could imply a compositional difference in the milk from cows treated with rBST versus those not treated with rBST rather than a difference in production methods.²¹ The FDA recommends inclusion of the statement “from cows not treated with rBST” or a similar statement²² and that misleading implications with such statements could be avoided by putting the statement in proper context, which could be achieved through the addition of accompanying statements such as “[n]o significant difference has been shown between milk derived from rBST-treated and non-rBST-treated cows.”²³

In the interim guidelines for labeling of milk from cows not treated with rBST, the FDA stated that naturally occurring BST and rBST could not be analytically identified in milk and that there were not any measurable compositional differences between treated and untreated cows.²⁴ Records to substantiate labeling claims were recommended, as the failure to maintain such records would make de-

16. Interim Guidance, *supra* note 1, at 6280.

17. *Id.* at 6279

18. *Id.*

19. *Id.* at 6280.

20. *Id.*

21. *See* Interim Guidance, *supra* note 1, at 6280. The FDA implies that it supports the labeling of milk having been produced under certain production practices or methods. *See id.* Therefore, the intent of labeling is to identify the milk from cows which was produced under certain production methods rather than to convey differences in composition or quality in the milk or dairy products. *See id.*

22. *Id.*

23. *Id.*

24. *See* Interim Guidance, *supra* note 1, at 6280.

fense of such labeling claims difficult if challenged.²⁵ A particular example was given in the FDA recommendation, namely a dairy cooperative that only processed milk from untreated cows, in which the statement was made that “[s]tates may decide that affidavits²⁶ from individual farmers and processors are adequate to document that milk or milk products received by the firm were from untreated cows.”²⁷ While the FDA has offered guidance to processors and retailers in the labeling of dairy products made from the milk of cows not treated with rBST, individual states clearly retain control over such labeling.

II. MARKET MOVEMENTS TOWARDS RBST-FREE MILK SUPPLIES

A well-functioning market allows consumers to signal to producers what they desire and are willing to pay for. Through market channels changing consumer tastes and preferences are communicated to suppliers through changes in their demand. Changes in policies and production practices by food producers have been increasingly driven by consumer demand rather than governed by changing regulations.²⁸ The growth in “politics by other means – politics practiced through the market” has allowed interest groups to pursue political objectives through the market system rather than through the more traditional legislative channels.²⁹ Recently there has been movement by retailers toward securing rBST-free milk supplies in response to trends in consumer preferences and demand.³⁰ As retailers react to changing consumer tastes and prefer-

25. *Id.*

26. Cooperatives provide producers a standard form “affidavit” to sign. T.J. Centner & K.W. Lathrop, *Legislative and Legal Restrictions on Labeling Information Regarding the use of Recombinant Bovine Somatotropin*, 80 J. DAIRY SCI. 215, 216 (1997). The cooperative offers the possibility of premiums and requires that the producer foregoes the use of rBST. The form is in actuality a contract, rather than an affidavit (an affidavit is a signed, sworn statement that is notarized, and can lead to perjury penalties for violations. The rBST forms do not require any oath or notarization.). The contract is accepted when the producer signs. For this article, the documents will be referred to as contracts, rather than affidavits, in order to more properly characterize the purpose of the documents.

27. See Interim Guidance, *supra* note 1, at 6280.

28. See Schweikhardt & Browne, *supra* note 11, at 304, 311.

29. *Id.* at 305.

30. Kyle Kennedy, *Florida Heading Toward being rBST-Free: Producers Dropping Production-Increasing Hormone*, THE LEDGER, (Lakeland, FL), June 10, 2007, available at http://www.organicconsumers.org/articles/article_5630.cfm. [hereinafter *Organic Consumers*]

ences, dairy producers must alter production practices in order to continue to serve the market. In short, retailers react to serve customer demands for food produced under specific production practices and in turn individual food producers, hence dairy farmers, must then adjust their production practices to fulfill the demand of their customer – namely the retailer. In this way, politics practiced through the market³¹ have led dairy producers to move away from the use of rBST although no regulation or legal action has been taken to eliminate the use of the technology.

The market to provide fluid milk is comprised of individual dairy producers, cooperatives that participate in the marketing and transportation of milk, fluid milk processors, retailers such as supermarkets and convenience stores, and consumers who ultimately make milk purchasing decisions. In order to provide fluid milk produced without rBST to the consumer, adjustments to milk production, handling, procurement, processing, and possibly even marketing, must be made throughout the entire milk supply chain.

A. Retailer Response to Consumer Demand

Perhaps the most influential move by a retailer towards rBST-free milk in Michigan was the announcement by Kroger on August 1, 2007 that it would “complete the transition of the milk that it processes and sells to a certified rBST-free supply by February 2008.”³² Further, by February 2008, the milk that Kroger processed and sold in stores in Arkansas, Georgia, Illinois, Indiana, Kentucky, Michigan, Mississippi, North Carolina, Ohio, South Carolina, Tennessee, Virginia, and West Virginia, was to be certified as rBST-free.³³ Kroger’s senior vice president and president of manufacturing said the following in relation to Kroger’s decision to secure rBST-free milk: “[o]ur customers’ increasing interest in their health

As retailers begin to respond to consumer demand by making rBST-free milk available, other retailers follow suit in order to remain competitive. Once a retailer has made the decision to provide rBST-free milk, due to logistical, transportation, and processing coordination concerns, a given retailer would likely move towards procurement of all rBST-free milk. See generally Christopher Wolf, *Farm Decisions Related to rBST use in Michigan*, 12 MICHIGAN DAIRY REVIEW 1, 1 (Oct. 2007), available at <https://www.msu.edu/nmdr/vol12no4/Vol12no4.pdf>. [hereinafter *Wolf*].

31. Schweikhardt & Browne, *supra* note 11, at 304.

32. See Kroger Press Release, *supra* note 15.

33. *Id.* (Highlighting that the only apparent certification that the milk sold to Kroger comes from cows not treated with rBST is through producer statements. There does not appear to be a third party certification system in place). *Id.*

and wellness is the basis for our decision.”³⁴ As Kroger’s multi-state process shows, the movement towards providing dairy products which are made from milk produced from cows that were not treated with rBST is not specific to Michigan.³⁵ In fact, many retailers that sell milk throughout the country are selling all or some of their products as “rBST-free.”³⁶

Meijer, Inc. (Meijer), a retailer with 182 stores in Michigan, Ohio, Indiana, Illinois, and Kentucky,³⁷ has recently announced that their Meijer-brand milk comes from cows not treated with rBST.³⁸ The Meijer group vice president has said, “[o]ur customers have asked for a different choice in their milk, as many prefer it from cows that have not been treated with artificial growth hormones.”³⁹ Meijer further states as the reason for their switch to milk from cows not treated with rBST, “[w]e’ve researched the topic and have listened to our customers. This move is not a reaction to any health concerns. It’s a decision to give our customers what they want.”⁴⁰ According to the statement by Meijer, the move towards provision of milk from cows not treated with rBST is driven by changing consumer preferences, thereby illustrating the move by retailers to serve a changing market. Beyond supermarkets and grocery stores, retailers such as Starbucks are also moving towards the procurement of

34. *Id.*

35. *Id.* Likely, as retailers within a given region begin to offer rBST-free milk, other retailers in the area may end up offering rBST-free milk by “default” because in order to provide rBST-free milk to one retailer, entire production sectors will need to be altered. This argument is similar to that employed by the cooperatives in Michigan when seeking to fulfill the demand for rBST-free milk by Kroger, wherein entire cooperatives moved towards rBST-free milk production. *See generally* Wolf, *supra* note 30, at 1-2.

36. The following, admittedly incomplete list, is a sampling of processors who are reportedly completely rBST free: Publix, Kroger, California Dairies, Inc., Prairie Farms Dairy, Ben & Jerry’s Homemade Inc., Stonyfield Farm, Inc., Michigan Milk Producers Association, Wilcox Farms, Cloverland/Green Spring Dairy, Oakhurst Dairy, BelGioioso Cheese Inc., Wawa Dairy, Oberweis Dairy Inc, Joseph Gallo Farms, and Smith Dairy Products. *See Organic Consumers, supra* note 30. Additional processors throughout the nation offer a portion of their products as being from cow not treated with rBST, a few of these processors are Dean Foods, Dairy Farmers of America, HP Hood, Darigold, National Dairy Holdings, Safeway Dairy Group, Tillamook County Creamery Assoc. *Id.*

37. Meijer, Store Locator, http://www.meijer.com/custserv/store_locator.jsp (last visited Aug. 19, 2008).

38. Meijer, Meijer Offers Milk Produced Without Artificial Growth Hormone, http://www.meijer.com/content/content_leftnav_manual.jsp?pageName=pr_meijer_milk (last visited Aug. 19, 2008).

39. *Id.*

40. *Id.*

rBST-free milk supplies. Starbucks is reportedly “[r]esponding to consumer concerns about genetic engineering and food safety [and] the company committed to making 100 percent of the milk supply for its more than 5,600 American locations free” from rBST by the end of 2007.⁴¹

Retailers wishing to offer dairy products produced without the use of rBST must secure milk supplies which are free from milk from rBST-treated cows. According to FDA recommendations, the milk from non-rBST herds should be kept separate from other milk by physical segregation (which can be verified by records) throughout transportation and processing and until the dairy product is in its final package and appropriately labeled.⁴² The FDA further clarified that, although the physical separation and paper record trail is not necessary due to any safety concerns about milk from cows treated with rBST, it would be useful to defend against claims that the milk labeling is false or misleading.⁴³

B. Milk Cooperatives Response to Retailer Demand

Cooperatives need to provide a certain amount of Class I⁴⁴ fluid milk, which fluctuates based on regional demand for fluid milk, in order to qualify for the Federal Milk Marketing Order pool price.⁴⁵ Therefore, cooperatives must maintain adequate fluid milk contracts with milk buyers in order to provide enough fluid milk to qualify. Milk from cows treated with rBST will not qualify for Class I if retailers are unwilling to purchase it for that market,⁴⁶ meaning that

41. Terri Coles, *Monsanto's Bovine Growth Hormone Being Driven off the Market* (Sept. 2007), available at http://www.organicconsumers.org/articles/article_6974.cfm.

42. See Interim Guidance, *supra* note 1, at 6280.

43. *Id.*

44. See United States Dept of Agric., Econ. Research Serv., <http://www.ers.usda.gov/Briefing/Dairy/definitions.htm> (explaining that there are 4 classes of milk in US Federal Milk Marketing Orders, namely Class I which is Grade A milk used for beverage milk, Class II which is Grade A milk used in fluid cream products, yogurt, ice cream, cottage, cheese, and other perishable manufactured products, Class III which is Grade A milk used to produce cream cheese and hard manufactured cheese, and Class IV which is Grade A milk used to produce butter and milk in dried form). *Id.*

45. See Wolf, *supra* note 30, at 2 (pointing out that cooperatives have little choice but to supply rBST-free milk if they want to continue to receive the higher “pool” price).

46. Increased numbers of retailers are moving towards the sale of only rBST-free milk, however, this does not preclude any retailer from selling fluid milk from cows having been treated with rBST. Therefore, farmers and cooperatives may have a

the cooperative had to replace this milk with rBST-free milk in order to fulfill fluid contracts.⁴⁷

Following Kroger's decision to supply rBST-free milk beginning February 1, 2008, the cooperatives serving Kroger had to determine how to fulfill Kroger's demand.⁴⁸ Cooperatives in Michigan selected from a variety of ways to provide an rBST-free fluid milk supply to Kroger.⁴⁹ Cooperatives could have chosen to simply mandate that their farms be rBST-free for the Michigan fluid milk supply.⁵⁰ Alternatively, cooperatives could have decided that producers in the cooperative who chose to continue to use rBST would receive the Class III price rather than the uniform pool price for their milk.⁵¹ This decision to pay only the Class III price for milk produced with rBST, rather than the uniform pool price reflects the fact that the cooperative would not be able to service the Class I fluid market with that milk.⁵² A third option was cooperatives could determine producers that chose to use rBST would receive the Class III price and may also be forced to incur any increased transportation costs in order to find a processing plant suitable for the milk.⁵³ Therefore, producer-members of such cooperatives choosing to use rBST could lose the quality, volume, and over-order premiums that they may have otherwise received, in addition to potentially incurring increased costs.⁵⁴

market for fluid milk from cows treated with rBST, however the size of such market is likely to be small and is unpredictable overall. *See generally* Wolf, *supra* note 30, at 2 (noting that treated milk will be subject to increased hauling fees, implying that a separate market may exist, while also stating that the amount of treated milk will affect the prices obtained, making the market relatively unpredictable).

47. *Id.*

48. *Id.* (recognizing that it must be recognized that the cooperatives are responding to the demands of the retailers, whom are their customers. The retailers are presumably fulfilling the demands of consumers. *See supra* Part II.A.

49. Wolf, *supra* note 30, at 2.

50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.*

54. Wolf, *supra* note 44, at 2. Note that the total additional costs incurred by producers choosing to use rBST will depend on the amount of milk being produced from cows supplemented with rBST versus cows not being supplemented with rBST. *Id.* The ultimate determinant of additional costs, from added transportation costs, for example, will be the market dynamics at work at the time between the amounts of rBST-free and rBST milk demanded and supplied in a given region. *Id.* "Thus, the higher the quantity of milk produced with rBST, the larger the cost and price penalty on that milk will likely be." *Id.*

C. *Individual Dairy Producer Decisions*

At the heart of the rBST controversy, is the decision of the co-operatives to impose consequences on member-producers choosing to use rBST after January 1, 2008. Given the changing market dynamics in which dairy producers must now operate, individual farm managers were forced to make decisions regarding how to react. Individual producers can choose whether to sign the contracts and produce rBST-free milk, sign the contracts and produce milk from cows supplemented with rBST but sell the milk as rBST-free milk through their cooperatives, thereby avoiding any lost revenue associated with the production of rBST milk, or to produce milk from cows supplemented with rBST and market the milk as such. Virtually all dairy producers with a given cooperative will choose to sign the contract with the cooperative agreeing not to use rBST.⁵⁵

III. PRODUCER LIABILITY

Dairy producers who sign contracts pledging not to use rBST, and then in fact do use the hormone, subject themselves to several risks. Under the terms of the contracts, they can be held liable for monetary damages incurred by parties relying on the statements averred. Additionally, a producer who signs and violates these contracts opens himself up to criminal fines and prison sentences. While it is not clear that a producer would be prosecuted, producers should be cognizant of the risks they take by violating the contract.

A. *Civil Liability*

According to the terms of the agreement, a producer who uses rBST will be liable for all resultant damages to parties relying on the contract. The purchasing cooperative is clearly such a party, as are grocery stores or supermarkets that purchase milk from the cooperative. The retailers are not intended beneficiaries under the contract,⁵⁶ but do rely on the contract when they pay a premium for rBST-free milk. The retailers rely on the averments of the producers in determining what milk qualifies as rBST-free. As a result, the

55. *See id.*

56. The contract is written to benefit the cooperative and the producer. In the absence of contract terms to the contrary, if a retailer paid a premium for rBST-free milk, but actually received rBST-treated milk from the cooperative, its remedy would be to sue the cooperative.

producer is liable for damages to the retailers because he has agreed to increase his exposure to liability.⁵⁷

Costs that would presumably be incurred by the retailer at the supermarket level, if milk is mislabeled, include the costs associated with removal of milk from the store shelves, costs of replacing the milk removed from store shelves with new product,⁵⁸ and costs associated with loss of consumer goodwill.⁵⁹ Presumably, retailers would be unable to label, as coming from cows not treated with rBST, any milk mixed with milk that was found to be from cows treated with rBST.⁶⁰ Mixing of milk from multiple sources, including multiple cooperatives, could occur when picking up milk from the farm for transport, placing milk into storage at the processing plant, during processing itself, or even during packaging. Given the number of opportunities for mixing milk in transporting and processing, a retailer could end up with a substantial volume of milk that could not be labeled as coming from cows not treated with rBST.⁶¹ The cooperative would incur costs associated with milk in its possession that it is now unable to use to fulfill fluid contracts because it has come

57. Even without such an agreement, the end results are similar. If a cooperative paid a judgment to a retailer, the cooperative would then have damages and the producer would again be liable.

58. There would likely be costs associated with the time in which milk was unavailable for purchase because the retailer was involved in procurement of suitable replacement product, although such costs are difficult to quantify *a priori*.

59. A retailer who is found to be selling mislabeled milk would incur losses in consumer goodwill, although such losses are difficult to quantify and would likely be case-specific.

60. Symposium, *Drug Residue Avoidance: The Issue of Testing*, 79 J. DAIRY SCI. 1065, 1065 (1996) (inferring that any milk that had been mixed with milk that had come from cows treated with rBST would be considered contaminated. For example, in the case of antibiotic contamination any milk that is determined to be positive is dumped, which results in costs for the producer found to have contaminated the milk and the industry as whole because contaminated portions of a tanker load of milk must be discarded). *Id.* Given that milk is a fluid, physical separation would be necessary to prevent cross-contamination. It follows that any milk which had come into contact with milk from cows treated with rBST is contaminated and cannot be labeled as having come from untreated cows. *Id.*

61. *Id.* Presumably, upon discovery that a farm had shipped milk from treated cows as though it were milk from untreated cows, any milk that had been in contact with that milk at any point in transport or in the processing plant would be rendered unusable for fluid milk by the retailer who had previously proclaimed that their fluid milk was from cows not treated with rBST. See Wolf, *supra* note 30, at 2. The retailer who had found that their milk was unusable to sell as their own fluid milk would have to mitigate damages in by finding another use for that milk. *Id.*

into contact with milk from cows having been treated with rBST, and for which it would need to find another use.⁶²

While the potential damages cooperatives and retailers face are substantial, producers may also face liability to consumers. Even though the FDA has determined that there is no compositional difference to the milk, it is possible for consumers to sustain damages. For instance, if a producer is found to be providing milk from rBST-treated cows, and the end product is mislabeled, a consumer (or more likely, many consumers in a class-action) can show damages in the amount of the premium paid over “regular” milk. Despite a small sum for an individual producer, a class action suit claiming potentially large damages would be possible.

B. Criminal Liability

While milk producers face civil liability, they may also be exposed to criminal liability. Michigan producers face prosecution under two separate statutes. Violations of either statute could result in fines or jail, and some producers may even commit crimes serious enough to result in a prison sentence.

1. Record Keeping Crimes

The first relevant statute focuses on record-keeping, and makes it a misdemeanor to commit or attempt any fraudulent or dishonest practice in connection with keeping records.⁶³ Producers found to be using rBST, but with contrary records, could likely be charged under this statute. This statute is particularly dangerous for unsuspecting producers who want to hide any use of rBST. If producers alter or omit information relating to the use of rBST in the herd, in order to hide rBST use, they have likely violated the statute. In fact, because the statute is expansively worded, prohibiting “any fraudulent or dishonest practice,” a producer might violate the law through financial

62. *See generally id.* Another use would be found for the milk, which may have come into contact with milk from cows treated with rBST, although it is likely that the next best use would provide less value than use in the fluid milk market. *Id.* (noting that treated milk receives Class III prices, and that producers will incur the costs of finding a market for the treated milk).

63. MICH. COMP. LAWS ANN. § 750.295 (2004). In full, the statute reads, “[a]ny person who connives at, commits, or attempts to commit any fraudulent or dishonest practice in connection with the making of official or semiofficial records of milk and butter fat production of cows, is guilty of a misdemeanor punishable by imprisonment for not more than 1 year or a fine of not more than \$1,000.00.” *Id.*

records as well.⁶⁴ For example, if a producer pays for rBST with a check, and notes that the payment is for Roundup®, another Monsanto product, he has again violated the statute. While the monetary penalty for a violation is relatively small, each violation could result in a fine, and some producers could even face jail time.⁶⁵

2. False Pretenses

The second statute that could be used against producers who violate their contracts has potentially more serious penalties. If a producer signs the contract, knowing that he will later violate it, and then receives a premium for rBST-free milk, he has committed false pretenses.⁶⁶ The penalty for false pretenses is graduated, based on the value conferred by the false pretense. At the lowest end, the penalty is up to three months in jail and/or a fine, the greater of \$500 or 3 times the value,⁶⁷ but at the high end the penalty can be a fine the greater of \$15,000 or 3 times the value received and/or 10 years in prison.⁶⁸ To merit such a severe penalty, the producer must receive \$20,000 in premiums for the rBST-free milk.⁶⁹ Financial records could show when rBST purchases began, leading to estimates about the value gained from the deception.

The United States Department of Agriculture (USDA) and National Agricultural Statistics Service report that daily dairy cow milk production in Michigan in December 2007 was 60.3 pounds of milk per day.⁷⁰ There exists a range of reported responses to rBST supplementation with regards to the expected milk production increases.⁷¹ Further, there are both reported values for increased milk

64. *Id.*

65. *Id.*

66. MICH. COMP. LAWS ANN. § 750.218 (2004). If a person uses a false pretense to obtain from a person any money or personal property, he has committed the crime. MICH. COMP. LAWS ANN. § 750.218(1)(c).

67. MICH. COMP. LAWS ANN. § 750.218(2).

68. MICH. COMP. LAWS ANN. § 750.218(5).

69. *Id.* Only money that was paid as a premium for rBST-free milk counts towards this \$20,000. However, if the buyer's policy is to only deal with rBST-producers, then *all* money the producer receives is based on the misrepresentation, and would count towards the \$20,000.

70. See Press Release, United States Dept. Agric., Nat'l Agric. Statistical Serv., *December Milk Production*, available at http://www.nass.usda.gov/Statistics_by_State/Michigan/Publications/Current_News_Release/nr0807.txt

71. LOVELL S. JARVIS, *THE POTENTIAL EFFECT OF TWO NEW BIOTECHNOLOGIES ON THE WORLD DAIRY INDUSTRY* 8-9 (1996) (reporting that over numerous experimental

production in absolute pounds of milk per day and in percentage of total milk production terms. Monsanto claims that using rBST can increase milk yield by ten pounds per cow per day through their "Make 10" campaign, making the statement that "By adding POSILAC® to your dairy management program, you can increase milk production by an average of 10 pounds per supplemented cow per day."⁷² Cornell University reports through their bST fact sheet that a 10% increase in milk production can be expected with rBST use.⁷³

Assuming a response of 10 pounds per day of additional milk with rBST use, the average cow being treated with rBST would then produce 70.3 pounds of milk per day. If, for example, the premium for rBST-free milk is \$0.75 per hundred pounds of milk, the premium paid per day per cow is \$0.53. If a producer milks 100 rBST-treated cows per day, it takes over a year to reach the \$20,000 threshold.⁷⁴ However, the next-lowest penalty, which is up to 5 years in prison and a \$60,000 fine, can be triggered at only \$1,000 in fraudulently received premiums.⁷⁵ With the same 100 rBST-treated cows, it now takes roughly three weeks to earn \$1,000 in premiums. Even with smaller herds, it would not take very long for a producer to reach the \$1,000 threshold, and therefore be guilty of a felony. There are additional misdemeanor grades of false pretenses for in-

trials rBST was found to increase milk yield by 2.5% to 30% depending on management). *Id.*

72. Monsanto Company, *Making 10 Could Make a Real Difference*, <http://www.make10.net/default.aspx> (last visited Aug. 20, 2008).

73. Press Release, U.S. Food and Drug Admin., Center for Food Safety and Applied Nutrition, *Cornell University-bST Fact Sheet* (June 6, 1995), <http://vm.cfsan.fda.gov/%7Eear/CORBST.html>. (last visited Aug. 20, 2008).

74. A milking herd of 100 rBST-treated cows is assumed to simplify computations. Under typical management conditions milking herds will not consist solely of animals treated with the hormone. *See generally* L.J. Butler, *The Profitability of rBST on U.S. Dairy Farms*, 2 AG. BIO FORUM 111 (1999), available at <http://www.agbioforum.org/v2n2/v2n2a08-butler.htm>. As the herd makeup changes, so will the percentage of cows giving 70.3 pounds of milk per day, as opposed to the MI average of 60.3 pounds. With the lower production number, it simply takes longer to reach the threshold for each level of false pretenses. However, for purposes of false pretenses, the premium paid on *all* milk is obtained fraudulently-not just the premium paid for milk coming from actually treated cows. The misrepresentation is that the *entire* milking herd is rBST-free, and the premium is therefore paid for all milk.

75. MICH. COMP. LAWS ANN. § 750.218(4). The fine amount is the greater of \$10,000 or three times the amount obtained through the false pretenses, making \$60,000 the largest fine possible at this level. *Id.*

stances where the producer gained only limited benefits, but the biggest jump in penalties occurs at the \$1,000 mark.⁷⁶

False pretenses may be difficult to prove, as prosecutors must show that the producer intended to defraud the buyer when the contract was signed.⁷⁷ This can be difficult if the producer ships milk for a lengthy period before the rBST use is discovered. A producer could conceivably claim that he started using rBST only recently, and that when he signed the contract he intended to fulfill the terms of the contract.⁷⁸ Claims regarding rBST use by individual dairy producers should be carefully scrutinized and are likely dependent on the information which the producer has at the time the decision to use or not use rBST is made, and on the perceived probability of detection of rBST use and perceived probable consequences.⁷⁹

Producers who use rBST in contravention of their contracts are subjected to criminal liability through two statutes, which act in concert to subject them to a high level of risk of breaking the law. Such a producer cannot openly admit to using rBST, or face liability under the contract and possible prosecution for false pretenses. However, a producer also cannot alter herd production, veterinary, or financial records in order to hide the purchase or use of rBST without subjecting himself to criminal liability.⁸⁰ A producer using rBST

76. See MICH. COMP. LAWS ANN. § 750.218.

77. *Id.* If the producer later affirms that he is not using rBST, this can also be the basis for a conviction. *Id.* § 750.218(9).

78. While this may relieve a producer of the intent required for false pretenses, he can still be liable for damages for breaking the contractual agreement. See *supra* Part III.A., MICH. COMP. LAWS ANN. § 750.218 (2004).

79. Economic analysis of the producer as a rational economic actor would suggest that given the extremely large consequences associated with being caught in violation of the agreement that with perfect information that the producer would not violate the agreement. Further, since consequences for violation of the agreement could be catastrophic to the future of the farm business, even a very small probability of being caught would be sufficient to prevent producers from violating the agreement. This argument is further strengthened if the producer is a risk averse agent. Given that economic analysis of the producer as a rational economic actor would suggest producers do not violate the agreement under perfect information scenarios, possible scenarios under which producers may act outside the predictions of such a model include informational asymmetries, the perception of "no possibility of detection" or that it is impossible to be caught, or otherwise not understanding the consequences associated with violation of the agreement.

80. Of course, a prosecutor has discretion whether to bring these charges, and a producer may not be charged. However, it is important for producers to be aware of the risks they face by violating the contract. See MICH. COMP. LAWS ANN. § 750.218 (2004).

faces liability no matter what action is taken, as long as the cooperative which required the contract attempts to discover the rBST use.

IV. INCENTIVE TO TEST?

According to the contract, the cooperative may inspect a producer's dairy in order to determine whether rBST is being used.⁸¹ The question, however, is whether the cooperative has anything to gain by actually detecting farmers using rBST. In fact, no interested party (producer, cooperative, or retailer) wants any producer to be discovered violating the contract.⁸² Additionally, the FDA does not test milk for rBST, and claims that no test can detect the synthetic version of the hormone.⁸³ If third-party testing is implemented, the costs will likely be borne by the dairy producers themselves.⁸⁴ However, the individual farmers and milk marketing cooperatives do not want to incur costs of policing or testing if they do not have to. As of yet, retailers are not requiring the implementation of testing.

A. Retailers

Retailers do not want any producers to be caught using rBST in violation of the contract for two reasons. First, a retailer does not want to be associated with mislabeled products. Particularly, a retailer does not want the headache of dealing with mislabeled food

81. The contract refers to a producer/cooperative agreement that is on file with the author.

82. Each individual producer clearly does not want to be caught using rBST because of the liabilities discussed *supra*. Furthermore, because individual producers are owners of the cooperative in which they market milk it is also in each producer's best interest that the cooperative itself not incur financial losses due to other producers being caught using rBST.

83. *Supra* Part I.

84. If third party testing is implemented, the costs associated with the testing will likely be borne by the cooperatives or producers themselves. *See infra* Part V.C.2. In such cases, it can be hypothesized that a single third-party would certify all producers with a given cooperative and be "hired" by that cooperative. In such a situation, the cooperative would incur the costs of testing and pass such costs along to farmer members. Another situation can be imagined in which individual farmers each seek third party certification on their own, in which case the farmers would incur costs directly. Overall, whether indirectly through the cooperative or directly by hiring a third party individually, farmers will ultimately pay for the third party testing.

that is tied to genetic engineering, a hot-button issue.⁸⁵ Even if a retailer can collect from the producer or the cooperative for the costs associated with replacing the mislabeled milk, it may suffer large damages to its company's reputation and goodwill. These reputation and goodwill damages can be difficult and costly to prove because it may be difficult for a retailer to show that any loss of goodwill was caused by mislabeled milk, and not some other source.⁸⁶ Given these difficulties, there is a strong possibility that a retailer will not be able to win a judgment for the actual value of the loss of goodwill.

Second, like a cooperative, a retailer will be concerned that some portion of a judgment will be uncollectible. Even if a retailer wins a judgment against a producer, there is no guarantee that the individual producer will have enough assets to satisfy the judgment.⁸⁷ Retailers may incur heavy damages, but if the damages are greater than the assets of the producer, the retailer may not be able to fully recover the judgment. If a producer's use of rBST causes the cooperative \$100,000 in damages, but the producer only has \$50,000 in unsecured assets, the cooperative may have \$50,000 in uncollectible judgments.⁸⁸

The nature of the milk-mixing process also means that a small amount of milk from rBST-treated cows can cause large quantities of milk to be considered as if it came from treated cows. Any one of Michigan's 2,700 milk producers⁸⁹ may cause substantial damages, regardless of how much milk they sell to the cooperative. While it is of course speculative as to the amount of a judgment a retailer could receive, it is useful to note that while the mean level of Michigan

85. See generally Jen Soriano, *Hot Button Issue: Genetically Modified Foods*, MOTHER JONES (Nov. 24, 1999), available at <http://www.mojones.com/wto/soriano2.html>.

86. See, e.g., *Agriculture Servs. Ass'n, Inc. v. Ferry-Morse Seed Co.*, 551 F.2d 1057 (6th Cir. 1977) (holding that an award of goodwill damages to plaintiff cooperative was clear error, when defendant seller breached expressed and implied warranties and provided mislabeled plant seed, causing the cooperatives customers to lose faith in the cooperative).

87. This is especially true for savvy producers who create separate limited liability entities in order to reduce overall liability.

88. Alternatively, the cooperative and a retailer may both have damages, leading to a pro-rata distribution of the producer's assets. In this case, neither injured party is completely happy.

89. U.S. Dept. of Agric., Nat'l Agricultural Statistics Service, *Michigan Agricultural Statistics 2006-2007* http://www.nass.usda.gov/Statistics_by_State/Michigan/Publications/Annual_Statistical_Bulletin/stats07/livestock.pdf.

dairy producer assets is relatively high⁹⁰ a producer's assets include many assets, such as land, buildings, and equipment, which are likely to be encumbered by some security interest.⁹¹ Since a retailer cannot predict eventual damages or producer assets, it is clearly preferred if no producer is detected using rBST in the first place.

B. Cooperatives

According to the contract,⁹² the cooperatives may authorize a third-party to examine a producer's facilities and animals in order to determine if rBST is being used. However, the cooperative does not want any of its producers to be caught using the hormone for two primary reasons. First, while the producer will be liable for any damages the cooperative or the retailer sustains, the producer again may not have sufficient assets to cover that damage. The co-dependant relationship confers risk to the cooperative of rBST detection.⁹³

The second reason a cooperative does not want a producer to be caught using rBST is based on retailer demands that all fluid milk be rBST-free.⁹⁴ If producers are discovered using rBST, the cooperative might be liable for any grocery store damages that the producer cannot pay, but more importantly, the retailer might not be willing to continue dealing with the cooperative, at least until more stringent facility examinations are in place in order to reduce the likelihood of rBST use. A cooperative does not want to risk contracts with retailers, and again does not want to discover that its producers are using rBST.

90. See Eric Wittenberg & Christopher Wolf, *2006 Michigan Dairy Farm Business Analysis Summary*, Michigan State University Department of Agricultural Economics Staff Paper, at 16 (November, 2007). The mean at the end of 2006 was \$1,565,241 for total farm assets. *Id.* This was comprised of \$318,082 in current assets, \$720,583 in intermediate assets, and \$526,576 in long-term assets. *Id.*

91. *Id.*

92. The contract refers to a producer/cooperative agreement that is on file with the author.

93. The cooperative may be able to purchase insurance to cover this type of loss (while producers cannot, because they would be insuring against something that they themselves willfully control). However, such a policy would likely require more stringent examinations in order to reduce the insurer's risk. In this case, any discovered rBST use would raise insurance costs for the cooperative.

94. See Wolf, *supra* note 30 at 2.

V. POSSIBLE MARKET OR LEGISLATIVE SOLUTIONS

One disgruntled farm employee could be all that is needed to bring intense public scrutiny to the current affidavit system and the lack of independent verification. While this might be a risk that the involved parties are currently willing to take, it is also worthwhile to examine the alternatives. First, the legislature could get involved and attempt to ban "rBST-free" labeling on the ground that it is misleading. This solution is not optimal, however, because such a ban might also include non-misleading labels, and the prohibition would likely be challenged under *Amestoy*.⁹⁵ Another option is to implement an independent third-party testing system. This system could be modeled after the system used by the organics industry. While this testing will impose additional costs on the parties that may not be recouped, it may reduce the risks posed to the retailers and cooperatives, and would also benefit the vast majority of producers who are not using rBST. While virtually all-dairy producers who agreed not to use rBST are likely fulfilling such contractual agreements, a single violation could cause large damages to the cooperative and retailers to whom the milk was sold. Such damages would include loss of consumer confidence in dairy product labeling overall, financial losses for the producer, cooperative, and retailer, and legal implications for the producer found to be in violation. For these reasons, an independent third-party testing system could be explored to lessen risk to all parties involved in the production and sale of milk labeled as rBST-free.

A. *Make No Changes to the Current System*

The simplest alternative available regarding the use of rBST in milk production is to keep the current system for production of rBST-free milk in place. For the moment, this system imposes few costs on the involved parties, and cooperatives and producers are able to enjoy premiums on milk they certify as rBST-free. However, as more retailers make the shift to rBST-free milk they will also face the possibility of incurring damages from mislabeled milk.

95. See generally *Int'l Dairy Foods Ass'n v Amestoy*, 92 F.3d 67, 69-74 (2d. Cir. 1996).

1. Producers and Cooperatives

At the current time, cooperatives in some states are able to enjoy a premium from the retailers for agreeing to forego the use of rBST. There is always a chance that producers could be discovered using rBST,⁹⁶ but such cases would almost certainly be due to producers being unaware of all of the possible consequences, particularly the criminal consequences, or due to producers having the perception that there is zero probability of being detected in violation of the contract.

Of course, there are some producers who will not use rBST at all, for a variety of reasons, and these producers will enjoy the premium with no personal risk.⁹⁷ If current premiums and risk levels are maintained, producers are likely to make a similar analysis, and continue to use, or non-use, at similar levels. However, if the premiums, perceived consequences, or perceived probabilities of being detected in violation of the contract change, producers will have to reevaluate their situations. Producers and cooperatives would like the premiums for rBST-free milk to remain, and therefore prefer the status quo to a reduction in premiums for rBST-free milk. However, this is not likely, because retailers will not pay premiums unless there is some concurrent benefit for selling rBST-free milk and the benefits to selling rBST-free milk for a single retailer are likely to decrease as increased numbers of retailers in a given area offer rBST-free milk.

2. Retailers

Right now, retailers are paying a premium to cooperatives for providing milk from producers who have promised not to use rBST. As long as there is a competitive advantage or a net benefit⁹⁸ from

96. For instance, a disgruntled employee might leak the information that a farm has used rBST. Any producer or distributor of rBST has a clear interest in keeping its customers satisfied (and anonymous), but if a court order sought the records, they might have little choice but to turn them over.

97. As owners of the cooperative, they may suffer some losses if the cooperative loses money due to other producers being caught. However, on an individual level, these non-using producers face no risk.

98. Competitive advantage means that retailers may be able to sell rBST-free milk at a higher price. See generally Tom Webb, *Parents Demand for Milk Free of Monsanto's Genetically Engineered Bovine Growth Changing Dynamics of Marketplace*, ST. PAUL PIONEER PRESS, Sept. 23, 2006, available at http://www.organicconsumers.org/articles/article_2847.cfm. However, retailers may also receive a goodwill benefit from being associated with foods not tied to genetic engineering. Even

doing so, retailers are likely to consider offering a premium for rBST-free milk. However, if the benefits to the retailers shrink, they will not be willing to pay as high a premium, if any premium at all, to cooperatives for rBST-free milk. This premium is not likely to remain stable indefinitely as more retailers switch to rBST-free milk in order to remain competitive.⁹⁹ If all major retailers sell rBST-free milk, none have a competitive advantage over the others based on offering rBST-free milk. For instance, if 80% of the fluid milk in Michigan is rBST-free, there is less incentive to pay cooperatives a premium for it. There is also less benefit from making statements such as “none of our milk comes from cows treated with rBST,” because this does little to differentiate that retailer’s product. No retailer will want to maintain premiums when there is little extra benefit of rBST-free milk, and therefore premiums paid to producers will begin to shrink.

A second consideration must also be made regarding retailers. As more retailers demand that fluid milk be rBST-free, they gain more leverage as a group. Each individual retailer faces the risk that its producers will be discovered using rBST. This risk does not change based on how many retailers are selling rBST-free milk. The risk for each individual retailer remains the same, but industry-wide, if there are more retailers selling rBST-free milk, there are more opportunities for milk to be mislabeled. Without a reliable third-party testing system in place, a retailer cannot predict if it will inadvertently sell mislabeled milk. Therefore, each individual retailer has an interest in reducing the likelihood that producers will be caught using rBST. While one individual retailer might not have sufficient power to demand effective third-party testing, if several retailers work together to demand the change, they may be able to do so.

As retailers react to consumers changing tastes and demands by providing milk with particular production process attributes, consumers are likely to continue the trend towards increased concern for food production practices and methods.¹⁰⁰ Because consumers continue to exert pressure on retailers for food produced under certain methods, retailers are presumed to continue to exert chang-

if rBST-free milk sells for the exact same price as “normal” milk, a retailer might still be willing to pay the premium in order to be able to say “none of our milk contains artificial hormones.” *Id.* Intangible reasons such as this factor into net benefits.

99. See *supra* note 35.

100. *Supra* Part II.A.

ing demands on food producers. When the benefits of going rBST-free fade, retailers will be more aware of the risks they face, and will want to mitigate those risks to the extent possible whether that is through requiring third-party testing or some other means. With increased attention paid to production practices by consumers and retailers alike, in order to mitigate some risk held by the retailer in mislabeling practices, a necessity for verification of practices by a party other than those with incentives to misrepresent practices may evolve. Given the economic incentives for the retailers, marketing cooperatives, and producers to label food as having been produced under the practices desired by consumers, an outside party would likely be necessary in order to validate such production practice claims. For this reason, it appears that the “do nothing” solution has a limited duration, at least from the perspective of the retailers. At some point, the collective risk that retailers face may outweigh the benefits gained, and the retailers may want to take steps to reduce their risk. Over the long term, retailers may not be satisfied with a do nothing approach, although it is likely to be acceptable in the short-run.

B. Legislative Action

The Michigan legislature may decide to step into the rBST labeling arena. Michigan would not be the first state to do so.¹⁰¹ The state might try to solve the problems surrounding rBST labeling by simply prohibiting all rBST-related labeling. A full proscription, however, is not likely to be upheld against challenges, as it contradicts the FDA’s own recommendation.¹⁰² A state may be able to ban these labels, but it would likely have to do so for a reason other than what the FDA considers material.¹⁰³ Alternatively, it may consider a somewhat more relaxed law; for instance, Indiana recently considered a bill to prohibit labels that were supported solely by a pro-

101. See Daniel Malloy, *Pa. Dairy Label Rule Shelved*, PITT. POST GAZETTE, Nov. 28, 2007, available at <http://www.post-gazette.com/pg/07332/837268-85.stm> Other states, such as Pennsylvania and Indiana, have considered drafting legislation to deal with rBST labeling. See H.B. 1300 (In. 2008).

102. Interim Guidance, *supra* note 1, at 6280.

103. See *id.* at 6281 (explaining that material factors include information regarding the consequences of use on health and safety, and includes information that, if it were not presented, would make the label as a whole misleading).

ducer's affidavit.¹⁰⁴ A law such as this seeks to prevent false and misleading labeling by requiring some independent verification that the labels are true. It would allow rBST-related labels as long as some other evidence supported them.

1. Complete Ban

Michigan could consider an outright ban on any rBST-related labeling. States have the authority to regulate commercial speech, but complete suppression of commercial speech must be linked to substantial state interests,¹⁰⁵ and complete suppression of commercial speech that is otherwise protected by the First Amendment¹⁰⁶ is not permitted unless the ban is "no more extensive than necessary to further the State's interest."¹⁰⁷

Michigan does not have many substantial reasons to prevent the labeling of milk production practices. One reason might be to keep milk purchasers from being misled by rBST-related labeling, but it is unclear why less information, rather than more, would be the appropriate remedy.¹⁰⁸ The state has a stronger rationale when it claims that it is acting in order to prevent confusion or deceptive labeling.¹⁰⁹ While the state has a substantial interest in preventing this type of commercial speech, the regulations it enacts must be no broader than reasonably necessary to prevent the confusing or deceptive speech.¹¹⁰

104. See H.B. 1300, 115th Gen. Assem., 2d Reg. Sess. (Ind. 2008) (amending the state's misbranded food law, IC 15-2.1-2-29.7, to include the following in its definition of misbranded food:

(13) For dairy products, if the labeling contains a:

(A) compositional claim that cannot be confirmed through laboratory analysis; or

(B) compositional or production-related claim that is supported solely by sworn statements, affidavits, or testimonials).

105. *Central Hudson Gas & Elec Corp. v. Public Serv. Comm'n of N.Y.*, 447 U.S. 557, 569 (1980).

106. *Id.* at 566 (explaining that false or misleading commercial speech, or commercial speech advocating illegal activities, is not entitled to First Amendment protection).

107. *Id.* at 569-70.

108. *Whitney v. California*, 274 U.S. 357, 377 (1927) ("If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence. Only an emergency can justify repression").

109. See *Shapiro v. Kentucky Bar Ass'n*, 486 U.S. 466, 472 (1988).

110. *Id.*

A complete ban is not reasonably necessary to prevent misleading rBST labels, if the labels are used in context.¹¹¹ A state may not absolutely prohibit potentially misleading commercial speech that could be presented in a non-misleading way.¹¹² Milk labelers may provide the necessary context so that rBST-related labels are not misleading. A complete ban of rBST-related labels would be too broad, and would not hold up under a First Amendment challenge.

2. The Indiana Model

Indiana considered a bill to prohibit labeling based solely upon a producer's affidavit. While Indiana did not pass the law, other states may consider a similar path. This type of law is designed to prevent a situation where milk from rBST-treated cows is sold as rBST-free. It would encompass all labels for compositional claims that cannot be confirmed by laboratory analysis, and all compositional or production-related claims that are only supported by the producer's statement, even those that mirrored the FDA recommendations, whether or not the label was accurate.¹¹³ In effect, the law attempts to create a presumption that such labels are false or misleading, and therefore not entitled to First Amendment protection.

In its Interim Guidance, the FDA acknowledged that rBST-related labels might be false or misleading, and encouraged producers to keep records showing rBST was not being used, in order to defend against circumstantial evidence that the hormone was being used.¹¹⁴ However, the proposed Indiana law goes an extra step, effectively lifting the state's burden of having to show speech is false or misleading, and placing a burden on the advertiser to show that the speech is in fact true.¹¹⁵ Without some sort of corroborating evidence, any rBST-related label would be statutorily misleading.¹¹⁶

111. See Interim Guidance, *supra* note 1, at 6280.

112. *Shapero*, 486 U.S. at 488.

113. See *supra* Part I.

114. Interim Guidance, *supra* note 1, at 6280.

115. CAL. BUS. PROF. CODE 17508(b) (2008) (demonstrating a similar scheme used in California, for prosecuting entities where a prosecutor may request evidence to support an advertiser's claims, and the advertiser must comply). This section does not apply to consumers. *Id.*

116. It is unclear whether courts would find this to be violating the judicial test outlined in *Central Hudson*, where the first prong requires the court to determine if the speech is misleading. See *Central Hudson Gas & Elec. Corp.*, 447 U.S. at 566. It is assumed that the legislature may create this "per se misleading" designation. If, however, the law was struck down, the analysis, explained *infra*, would be to examine what solution the retailers push for once they grow weary of the risks associated

However, as long as the label was not based only on a producer's averment, the label avoids being considered per se misleading.

Under this type of law, corroborative evidence is required to justify an rBST-related label. However, there simply are not currently many ways to provide evidence that milk did not come from a cow treated with rBST. It may be true for some products that different production processes affect the composition of the final product, but there is no recognized way to test the milk itself for rBST. This lack of recognized test means that the production process itself must be examined, in order for there to be any probative evidence that an rBST label is correct. An independent third-party would need to examine production facilities, financial records, and other information in order to be able to verify that the cows really were not treated with rBST.

If a state does pass a law similar to the one considered in Indiana, it is effectively mandating a third-party verification system for rBST labeling, precisely because there is no currently recognized way to test the milk itself for rBST. If a legislature determines that a producer's averment is insufficient grounds for the labels, only a third-party examination of the production system and practices would be able to determine whether or not there has been rBST use. The law Indiana considered would simply force producers, cooperatives, and retailers to devise a third-party system that provides evidence rBST was not used.

C. Third-Party Examinations

An additional alternative for rBST-free verification is for the parties to enact some form of third-party testing, whether simply in response to market demand and without being forced to by legislative action or in response to a law such as the one considered in Indiana. While a third-party testing or certification system would impose costs upon the parties, it would also provide additional evidence that milk was being properly labeled. Further, since third-party verification of production practices would likely be the result of regulations on rBST-labeling, producers willingly participating in a third-party system are placing themselves in compliance of any legal requirements, which they are likely to need to comply with in the foreseeable future.

with the "do nothing" solution. The solution the retailers will likely demand is identical to the one that the law would require.

1. Emerging Markets for Third-Party Certification Agencies

A growth in “politics by other means – practiced through the market”¹¹⁷ has clearly led to milk producers movement towards producing rBST-free milk, and may lead to a need for verification of such practices in the future. Increasing needs for verification of production practices could arguably lead to a demand for third-party verification agencies. As consumer groups have moved towards the pursuit of political objectives through the market system rather than through legislative channels,¹¹⁸ perhaps the dairy industry itself could move towards verification through the market system. It was changes in consumer preferences and what production practice attributes consumers were willing to pay for in the market that led to movements towards the production of rBST-free milk in the first place. A market system method of practice verification could be third-party agencies hired to verify practices, thereby alleviating risk to individual producers, cooperatives and milk marketers, and the retailers. Through such a market-based verification system agencies capable of verifying production practices would evolve to fulfill the demand for such services by dairy producers and cooperatives.

Third-party verification of production practices surrounding the use of rBST on dairy farms is the best option facing the dairy industry today for three main reasons. First, once dairy producers and cooperatives begin to demand the service of third-party production practice verifiers, verifying agencies will evolve to fulfill that demand. In essence, the voluntary use of a third-party verification system is the market solution to this rBST-use verification problem. Second, as stated prior,¹¹⁹ it is unlikely that legislation would force producers to go beyond the use of a third-party verification system. Producers choosing to voluntarily participate in the third-party verification system would be proactive in staying ahead of legislation, which could possibly be enacted in the regulation of rBST labeling. Third, the third-party verification system has been used in the verification of production system attributes, some of which are also unable to be detected by testing the product itself, such as organic production. The third-party verification system used in the certification of organics, and in particular, in certifying organic milk production could serve as a useful model for the development of a third-party rBST verification system.

117. Schweikhardt & Browne, *supra* note 11, at 304.

118. *Id.* at 309, 310, 314, 315.

119. *Supra* Part V.B.

Perhaps the closest existing potential framework for third-party verification of rBST usage on dairy farms is the USDA Process Verified Program.¹²⁰ The USDA states that, “[i]n light of the ever-changing consumer, successful livestock producers must adapt their production practices to consider consumers’ lifestyles, preferences, and taste.”¹²¹ To aid producers in verifying such production processes, the USDA offers a service by which a third-party verifies a company’s documented quality management program through audits.¹²² The USDA Process Verified Program uses the International Organization for Standardization’s ISO 9000 series standards for documented quality management as their framework for ensuring auditing practices through the evaluation of program documentation.¹²³ The USDA Process Verification Program is limited to those programs in which the process verified points are identified by the supplier and are supported by a documented quality management system.¹²⁴ Currently verified points reported by the USDA include age, source, feeding practices, or raising and processing claims.¹²⁵ Specifically, examples of claims associated with process verified points given by the USDA and AMS are “grass (forage) fed, [n]ever-ever claims such as [n]o antibiotics, [n]o [g]rowth [p]romotants ([h]ormones), and [n]o [a]nimal [b]y-products [a]dministered, [b]reed.”¹²⁶ Because that raising and processing claims are currently verified, specifically regarding the use of hormones, it is plausible that a similar program could be developed for verification that cows are not treated with rBST on a given dairy farm.¹²⁷ Companies with

120. See U.S. Dept. of Agric., Grading Certification and Verification, *LS Process Verified Program*, <http://processverified.usda.gov/> (last visited Aug. 19, 2008).

121. U.S. Dept. of Agric., Agricultural Marketing Service, *USDA Process Verified: Verification Services of the Livestock and Seed Program*, <http://www.ams.usda.gov/AMSVl.o/getfile?dDoc.Name=STELPRDC5065676> (last visited Sept. 8, 2008).

122. *Id.*

123. U.S. Dept. of Agric., Agricultural Marketing Service, Grading, Certification, and Verification, *LS Process Verified Program*, <http://processverified.usda.gov/> (last visited Sept. 8, 2008).

124. *Id.*

125. *Id.*

126. U.S. Dept. of Agric., Agricultural Marketing Service, *USDA Process Verified: Verification Services of the Livestock and Seed Program*, <http://www.ams.usda.gov/AMSVl.o/getfile?dDoc.Name=STELPRDC5065676> (last visited Sept. 8, 2008).

127. U.S. Dept. of Agric., Agricultural Marketing Service, *USDA Process Verified: Never ever 3*, <http://www.ams.usda.gov/AMSul.0/getfile?DocName=STELPRDC5066028> (last visited Sept. 8, 2008). It does not appear that this verification process is currently being used for rBST-free claims.

approved USDA Process Verified Programs are able to market themselves as “USDA Process Verified”.¹²⁸

According to the USDA, “verification programs ensure a system is in place that requires you to ‘do what you say you are doing’.”¹²⁹ Given the goals of the current USDA programs, which seek to provide third-party audits in order to verify that producers are using the processes they indicate that they are in their labeling, the dairy industry could develop similar programs to verify that cows are not treated with rBST.

2. Potential Costs of Third-Party Verification System

Whether a certification system is enacted voluntarily or imposed by a legislature, it is going to increase expenses for at least one of the involved parties. The costs of a third-party system must be evaluated to determine if the benefits of such a system are worth the added expense.¹³⁰ It seems likely that the producers will be the ones who bear the costs. Individual producers might have to pay a testing agency, or perhaps the producer-owned cooperative could negotiate with the agency to inspect all its producers, in order to reduce transaction costs associated with having each individual producer seek a third-party on their own. In either case, the producer is paying the increased cost in order to become certified as not having used rBST. A third-party verification system will reduce risks to retailers, thereby making it in the retailers’ best interest that they buy milk from somehow certified producers. Currently, cooperatives are receiving a premium for the milk they sell to retailers which is rBST-free, although whether such premiums will continue is unknown. It can not be predicted whether retailers would offer some

128. U.S. Dept. of Agric., Agricultural Marketing Service, Grading, Certification, and Verification, *LS Process Verified Program*, <http://processverified.usda.gov/> (last visited Sept. 8, 2008).

129. U.S. Dept. of Agric., Agricultural Marketing Service, *USDA Process Verified: Verification Services of the Livestock and Seed Program*, <http://www.ams.usda.gov/AMSVl.o/getfile?dDoc.Name=STELPRDC5065676> (last visited Sept. 8, 2008).

130. *Id.* The benefits of a third-party system are mostly intangible, in that they reduce the risk of damaging the retailers’ and the industry’s reputation. There have also been studies, which have found that the display of a USDA organic seal on milk increased the probability of consumers purchasing milk. Kristin Kiesel & Sofia B. Villas-Boas, *Got Organic Milk? Consumer Valuations of Milk Labels after the Implementation of the USDA Organic Seal*, 5 J. AGRIC. & FOOD INDUS. ORG., Art. 4 (2007) available at <http://www.bepress.com/jafio/vol5/iss1/art4>. Further, it was found that consumers valued the changes in the labeling regulations as put forth under the National Organic Program. *Id.*

form of payment or cost-sharing in order to initiate a third-party verification system, although it is conceivable that some form of premium would be offered to provide assistance, at least during the initial switch to a third-party verification system.

While the actual costs of a third-party verification system for rBST-free milk production are speculative, it is helpful to look at testing costs for the organic industry, which uses an independent third-party certification system. It should be noted, however, that certification of dairy farms for organic production is very complex, including inspection of organic feed for cattle in addition to cattle management practices and overall farm management techniques employed. Third-party certification for cows being managed without the use of rBST would likely be much less complex than certification for organic standards, and therefore costs associated with certification can be expected to be significantly less. In the certification of organics, either state Departments of Agriculture or private entities act as certifiers.¹³¹ A producer fills out a registration form and pays a fee, and an inspector does a physical tour of the production facilities to determine if the product meets the requirements for organic.¹³² Each certifying agency has its own cost structure for organic certification, although estimates exist that the costs of maintaining organic certification for most farms will be roughly \$400 to \$1,000 annually.¹³³ Further, the cost to the producer may vary depending on the size of the farm, as certifying agencies may charge a fee based on the annual organic sales of the operation.¹³⁴ A survey of 11 certification agencies operating in multiple states, yielded that for first-time certification, the average cost to a small farm with roughly 25 acres and \$30,000 in annual sales was \$579.¹³⁵ A medium farm, with 150 acres and \$200,000 in annual sales paid an average of \$1414, while a 500-acre farm with \$800,000 in sales paid \$3,623.¹³⁶ The largest farms, with 3,000 acres and \$10,000,000 in sales paid an

131. James J. Ferguson, *Organic Certification Procedures and Costs*, HS971, May 2004, available at <http://edis.ifas.ufl.edu/HS208> [hereinafter *Ferguson*].

132. *Id.*

133. Jody Padgham & Harriet Behar, *GUIDEBOOK FOR ORGANIC CERTIFICATION 5* (2007), available at <http://www.mosesorganic.org/attachments/hwguidebook06.pdf>.

134. *Id.*

135. Ferguson, *supra* note 130.

136. *Id.*

average of \$33,276.¹³⁷ Costs for subsequent years were roughly one third less than for the first year that the farm was certified.¹³⁸

If actual costs for implementing an rBST-free certification system are at all similar to the certification of organic production, smaller producers would be expected to pay a greater percentage of their sales than larger ones in certification costs. Smaller producers may therefore have economic incentives to resist a certification system unless there is a cost-sharing device to help defray costs. In the certification of organics, the United States Department of Agriculture provides funds to reimburse producers 75% of the first year's certification, up to \$500.¹³⁹ This ambitious plan is possible because of the relatively small number of organic farms nationally, but would cost \$1.3 million if used for cost-sharing with Michigan's 2,700 dairy producers. If the cooperative negotiates with the certifying party, it could negotiate rates with volume discounts that would allow members to become certified at a lower cost than obtaining third-party verification as individuals. Even if the cooperative was not able to negotiate with the certifying party, it could set up its own rebate plan, in order to help those producers with smaller sales volumes.

The costs associated with certifying a dairy producer as rBST-free are not prohibitive, and are likely to be significantly less than those for certification of organic production.¹⁴⁰ It is likely that smaller producers will pay a larger portion of their sales in order to be certified, but the cooperative can take steps to alleviate this concern. The cooperative is in a good position to do so, as it represents only the interests of its members, and can craft some sort of cost-sharing structure that satisfies its members. Because a third-party testing system would reduce the risks to the parties, and will likely satisfy any foreseeable changes in state legislation, and does so at a manageable cost, it is the best alternative. When retailers realize the shrinking benefits of going "rBST-free" are not worth the risk to their reputations, they may start to demand change. The best change retailers, and the dairy industry alike, can seek if such changes are sought is a third-party verification system.

137. *Id.*

138. *Id.*

139. *Id.*

140. The costs are likely to be higher in the first year of certification, but are expected to be subsequently lower, just as when organic certification is undertaken. See Ferguson, *supra* note 130.

CONCLUSION

An incident involving mislabeled milk would erode consumer confidence in the dairy industry and in the retailers labeling such milk as well. Further, as the market for rBST-free milk increases in scale nationwide and there are increased numbers of retailers, cooperatives, and producers involved, there may be increased potential for milk to be mislabeled. Retailers and the dairy industry alike want to avoid the possibility of a mislabeling incident, therefore verification could be explored as a potential method to mitigate risks faced by retailers, cooperatives, and individual dairy producers. Third-party certification of production practices used to produce milk is the best option facing the dairy industry today if rBST labeling claims eventually must be validated, whether dictated by legislation or adopted due to market pressures.