The debate over the use—or overuse—of antibiotics in livestock is not new, but the consumer media is starting to take notice.

So are the plaintiff’s attorneys.

In February 2010, the CBS Evening News aired a segment on claims that feeding antibiotics to healthy livestock helps spawn bacteria that are resistant to medications, thus posing a threat to human health.

Among other things, the CBS broadcast highlighted a 2009 study by researchers at the University of Iowa.

The study found that 70% of hogs and 64% of workers on pig farms that routinely used antibiotics had traces of a new string of methicillin-resistant staph aureus, commonly known as “MRSA.” MRSA is a potentially deadly bacterium typically associated with infections in hospitals and nursing homes.

New York Times columnist Nicholas Kristoff followed a month later with a column stating that “routine use of antibiotics to raise livestock is widely seen as a major reason for the rise of superbugs.

“There’s broad agreement that [human medical] doctors themselves overprescribe antibiotics,” Kristoff wrote, “but a big part of the problem is factory farms.”

Citing estimates by the Union of Concerned Scientists, Kristoff wrote that in the U.S., 70% of all antibiotics are provided to healthy livestock, usually in feed, while only 14% are provided to sick animals, and 16% to humans.

In June 2009, the Canadian news magazine, Macleans, reported that “antibiotics such as cephalosporin used in chicken hatcheries across [Canada] are causing human resistance to the medicines.”

Rebuttal

Livestock producer organizations dispute the idea that “non-therapeutic” (or “sub-therapeutic”) use of antibiotics on the farm poses a significant risk to humans.

Although the topic has been researched and debated since at least the early 1970s, livestock associations, with the support of some independent veterinary and food science experts, say the risks of non-therapeutic application of antibiotics have been elusive, while the benefits have been manifest.

“Antibiotics help animals grow healthier, improve animal well-being, and help provide safe food,” writes H. Scott Hurd in an online rebuttal to the CBS broadcast. Hurd is a former deputy undersecretary for food safety at the U.S. Dept. of Agriculture, now with the College of Veterinary Medicine at Iowa State University.

“Food-borne illness rates are declining,” Hurd writes, “and resistance [to antibiotics] in those pathogens is stable to declining. Environmental spread of those pathogens is largely theoretical.”

In 2009, New Jersey State Veterinarian Nancy Halpern wrote in the Drake Journal of Agricultural Law that “the mere identification of a resistant pathogen in food animals is insufficient evidence of transmission to humans.”

Halpern noted that “calls to prohibit use [of
non-therapeutic antibiotics] in food animals have persisted for at least a quarter century, [but] the evidence to support such bans is circumstantial and heavily contested by evidence demonstrating that the benefits to humans and animals far outweigh the minimal risks.”

Policy debate

The American Medical Association, Union of Concerned Scientists, and other organizations have come out in favor of restrictions on non-therapeutic use of animal antibiotics. U.S. Rep. Louise Slaughter (Dem., N.Y.), herself a microbiologist, has introduced a bill in Congress with more than 100 co-sponsors seeking to ban the practice.

Proponents and opponents of a ban debate the implications of results from Denmark, which banned non-therapeutic use of antibiotics in pigs in 1998. Proponents of a ban note that the Danish pork industry has grown despite the ban, and that the rest of Europe followed Denmark’s example in 2006.

Opponents, however, note that the overall use of antimicrobial agents in Danish pigs has risen dramatically because more pigs have become ill and require therapeutic antibiotics. Hurd also notes that the Danish ban did not spare that country from its worst-ever outbreak of MSRA.

Liability?

Whatever the public policy outcome is, farmers and insurers must manage their own risks as regards non-therapeutic use of antibiotics in livestock. On that point, they’ll be watching the trial lawyers, who have started to weigh in on the issue.

To date, it is hard to find any lawsuits claiming bodily injury arising from antibiotic-resistant bacteria tied to livestock.

So far, the most significant lawsuit related to animal antibiotics was filed by competitors of Tyson Foods, challenging Tyson’s claim that its chickens were “free” of antibiotics. The parties settled, and Tyson agreed to stop making such a far-reaching claim.
“The technology to trace specific outbreaks of bacteria to the point of origin already exists.”
— Kelli Kukulka, senior vice president, Munich Re, Chicago

Still, insurers can see the portent of a class action in the content and tone of an article posted in December 2009 by Michigan attorney David Mittleman on InjuryBoard.com, a web service for consumers and plaintiffs’ attorneys.

In the article, entitled “Overuse of Antibiotics in Livestock Leads to Drug-Resistant Infections in Humans, Scientists Argue,” Mittleman writes:

“Although the World Health Organization warns that overuse of antibiotics in farm animals is becoming a serious threat to human health, some farm groups and pharmaceutical companies refuse to change the practice. . . . The Centers for Disease Control, the Food and Drug Administration, and the U.S. Dept. of Agriculture are calling these drug-resistant diseases stemming from the overuse of antibiotics in livestock a ‘serious emerging concern’ that must be addressed if we hope to avoid moving into a ‘post antibiotic era.’”

How serious of a legal threat might livestock producers face over use of antibiotics?

“I have not heard of any lawsuits against livestock producers over general illnesses arising from antibiotic-resistant bacteria,” says James Pizzirusso, a partner in the Washington, D.C. law firm Hausfeld LLP.

“There have been lawsuits against hospitals, however, when patients have contracted such bacteria,” he adds. “There certainly have been lawsuits against livestock companies when people have been sickened by, for example, salmonella poisoning.”

Yet, while acknowledging the potential for lawsuits over antibiotic use, Pizzirusso says such lawsuits would face several difficulties.

“If an individual contracts a drug-resistant strain of bacteria and sues the ‘livestock industry’ because it uses antibiotics irresponsibly, then it would likely be dismissed as too remote to prove causation,” he says.

“On the other hand, if a plaintiff comes in contact with livestock or consumes a tainted product, and the individual develops an antibiotic-resistant disease as a direct result, then the claim would be much stronger.”

How likely is that?

It’s getting likelier by the day, says Sherry Taylor, AAIS manager of farm and agribusiness programs.

**Exposure**

“A lot of direct lines can be drawn now with DNA,” Taylor says. As an example, she notes that e-Coli detected in a crop of spinach was traced by DNA testing to water runoff containing traces of fecal matter from a neighboring herd of cattle.

“There are cases of antibiotic strains of MRSA that have been traced back to farms, particularly in Europe,” says Kelli Kukulka, senior vice president and agricultural specialist in the Chicago office of Munich Re.

“The technology to trace specific outbreaks of bacteria to the point of origin already exists,” Kukulka adds. “It is highly likely to be employed at the government level for disease control and consumer safety.”
Policies

Standard farm policies typically address disease-related liability exposures in two ways, according to Deborah Summerlin, AAIS vice president for insurance lines.

For one, farm personal liability forms will commonly have “communicable disease” exclusions developed for homeowners policies and carried over into personal liability coverage provided under farmowners policies.

These exclusions were primarily developed to prevent property/casualty insurers from being liable for health care costs for sexually transmitted diseases that resulted from willful behavior of insureds.

“...much is still unknown about how this technology will be employed in practice, but many believe it could have significant implications for the way insurers respond to claims and for policyholders and others who may be affected by the use of this technology.”

So, where does this leave insurers? First-party exposure for loss to animals from antibiotic-resistant bacteria is largely a concern of animal mortality insurers, as standard farm P/C forms only cover loss to animals from named perils, if at all, and the standard named perils do not include bacteria and illness.

As for potential third party claims, whether for bodily injury to humans or property damage to others’ animals, the question of liability for improper use of antibiotics is largely unexplored.

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The integration of communicable disease exclusions into farm policies had little, if anything, to do with farming operations, according to Summerlin.

Secondly, farm commercial liability policies typically provide products liability coverage for bodily injury that arises from disease-causing bacteria, such as e-Coli, that are traced to an insured farm operation.

“Nothing in these provisions directly addresses a condition (antibiotic feeding) over the lifetime of an animal that can spawn the growth of an organism that causes bodily injury,” Summerlin says.

**Damned if you . . . ?**

This discussion would be academic if there were not a “damned if you do, damned if you don’t” dimension to the use of antibiotics on livestock.

While plaintiffs’ lawyers may be looking to initiate actions based on the overuse of livestock antibiotics, they can easily shift gears and pursue cases alleging that the underuse of antibiotics in livestock caused illness that was preventable.

If they did so, they could use the statements of livestock associations to argue that systematic use of antibiotics on healthy animals is a standard farming practice that poses minimal risk to humans compared with the risks it prevents.

No matter what side they’re hit from, if insurers are forced to defend claims related to the use of antibiotics on farms, they can expect to provide costly defenses in complex cases.

Addressing the complexity of the issue, Terence Centner wrote in 2008 that “governments need to develop regulations that are species- and antibiotic-specific.”

Centner, a professor of agriculture and applied economics at the University of Georgia, added that “the U.S. lacks an appropriate regulatory mechanism for evaluating the prudent and responsible use of non-therapeutic antibiotics [in livestock].”

It follows from Centner’s assertions that any claims involving antibiotic use on farms will be heavily fact-driven, requiring costly investigation and expert witnesses.

**Underwriting**

While the potential for antibiotic-related farm liability claims remains hypothetical, some farm insurers and reinsurers aren’t treating it as such.

Kukulka at Munich Re says some farm writers already avoid writing coverage at all for any agricultural operation with a known history of an e-Coli or MRSA infection to an employee or others.

Others, she says, will ascertain that all antibiotics used in livestock are provided at the direction of a veterinarian, and that all medicated feeds are prepared commercially, establishing the possibility of transfer of liability.

Short of avoiding all operations that utilize nontherapeutic antibiotics, an option Kukulka says is impractical for most farm insurers, she recommends that primary insurers impose a differential liability charge on farms that routinely feed antibiotics to food animals.

“None of the above steps is a magic solution,” she says. “As underwriters we can try to avoid the risk, modify the risk, or price for the risk.

“These options are all variations on those basic underwriting principles.”

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