

ABC News, a unit of Walt Disney Co, is being sued for more than \$1 billion in damages by a company that makes a beef product once widely found in fast-food burgers and school lunch tacos. The case could help define defamation in the Internet Age

# Did Diane Sawyer Smear 'Pink Slime'?

BY P.J. HUFFSTUTTER AND MARTHA GRAYBOW

## COURT BATTLE DID DIANE SAWYER SMEAR “PINK SLIME”?

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**A** year ago, Beef Products Inc. had four state-of-the-art plants, more than 1,300 employees and was expanding aggressively.

The meat company was the leading maker of “lean finely textured beef,” a low-fat product made from chunks of beef, including trimmings, and exposed to tiny bursts of ammonium hydroxide to kill *E. coli* and other dangerous contaminants. Few Americans realized the product was a mainstay of fast-food burgers, school lunch tacs and homemade meatloaf.

Today, the South Dakota company’s revenues have plummeted from more than \$650 million to about \$130 million a year, and three of its plants are shuttered. Company officials blame the abrupt falloff on a series of ABC News broadcasts that began last March – stories that repeatedly called its product “pink slime.”

BPI hired a high-powered Chicago trial lawyer and in September slapped the network, star anchor Diane Sawyer and other defendants with a 27-count lawsuit that seeks at least \$1.2 billion in damages – about one-fifth of the fiscal 2012 net income of American Broadcasting Co parent Walt Disney Co. Now, the case, which many observers initially wrote off as a public relations ploy by a desperate company, is shaping up as one of the most high-stakes defamation court battles in U.S. history.

The court fight could put modern television journalism on trial and highlight the power of language in the Internet Age: In the wake of the reports on “World News with Diane Sawyer,” the term “pink slime” went viral.

The case also underscores an intensifying war between the farm sector and its critics over how food is made. In Europe, for instance, an uproar has erupted over the inclusion of horsemeat in a variety of products. Although the media furor over “lean finely



ABC ANCHOR SAWYER: BPI says the network called its product “pink slime” 137 times over almost four weeks. **REUTERS/CHIP EAST**

textured beef” has waned in the U.S., the economic ripple effect is still being felt by the nation’s meat-packers and ground beef manufacturers, which are wrestling with a dwindling cattle supply and rising meat prices – and are now slowly reintroducing products similar to LFTB into the marketplace.

Libel cases are extremely difficult to win in the U.S. because of strong press protections, and ABC has compelling legal arguments. However interviews with BPI’s founders, agriculture industry officials and legal experts, as well as a review of federal documents and court records, suggest that ABC’s reports had certain flaws that could resonate with a jury: ABC’s lead reporter on the story mischaracterized BPI’s product on Twitter; the network failed to clearly describe on-air how the company’s beef wound up in the nation’s food supply; and ABC did not reveal in an interview with a former BPI employee that he had lost a wrongful termination lawsuit against the company.

ABC denies the allegations in the lawsuit and is seeking to have it thrown out.

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**Executive Director Gene Policinski**

Freedom Forum’s First Amendment Center

The network and its lawyers at Washington D.C. law firm Williams & Connolly declined to comment on the case. In court papers, the network argues that the lawsuit is a bid by BPI to chill media coverage of the food industry.

The case also could shine an unflattering light on BPI. Many consumers find the notion of processed beef unsavory, and the lawsuit could open the door to the company having to reveal closely guarded information about its processes that could be used in other litigation.

BPI founders Eldon and Regina Roth say they plan to pursue their fight against ABC even if it takes years and tens of millions of dollars in legal fees.

“We have to do this,” Eldon Roth told Reuters. “We have no other choice.”

The lawsuit, originally filed in South Dakota state court, is hinged partly on a state product-disparagement statute designed to protect farming interests. Twelve other states have similar laws – dubbed “veggie libel” measures by critics – but they have rarely been invoked.

Under the South Dakota version of the law, plaintiffs must show that defendants publicly spread information they knew to be false and stated or implied “that an agricultural food product is not safe for consumption by the public.”

If BPI were to win on that claim, under the law it could be awarded triple the damages that were caused. That means that the company’s claim of more than \$400 million in projected lost profits could balloon to damages of more than \$1.2 billion.

For BPI to prove the defamation piece of its case, it would need to show that the network negligently reported a false statement of fact that injured its reputation. If BPI is deemed by the court to be a public rather than a private figure in the legal sense, it would have a higher bar to cross: The company would need to prove ABC knew the facts it was reporting were false or it recklessly disregarded the truth.

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While the case is in the early stages, the network appears to have a legal leg-up on both counts: ABC never said BPI's product is dangerous, and courts have repeatedly offered broad protections for journalists in the course of their work.

But by calling a food product “slime” 137 times over the span of nearly four weeks on its newscasts, its website and on Twitter, according to BPI's tally, did ABC make the public think LFTB was unsafe? If, as BPI alleges, ABC shrugged off information that refuted parts of its reporting, did it act recklessly and could it therefore be held liable for defamation?

“It's hard to imagine ‘slime’ being a positive term, but at the same time, was it used with malice?” said Gene Policinski, senior vice president and executive director of the First Amendment Center at the Freedom Forum, a group that promotes free-speech issues. “This is going to be a very tough thing for BPI to prove.”

### WHAT EXACTLY IS “SLIME”?

At the crux of the debate are two little words: “pink slime.”

The term is believed to have been coined as a description for LFTB by a U.S. Department of Agriculture scientist who used it in a 2002 email to colleagues after touring a BPI plant. The phrase came to light in December 2009 when the New York Times published a story by Pulitzer Prize-winner Michael Moss that cited the email. The story discussed BPI's technology and effectiveness in preventing the spread of food contaminants.

BPI did not sue the Times. That story, and subsequent media reports that referred to the term, “were not causing any damage to the company,” said BPI's attorney, Dan Webb, chairman of law firm Winston & Strawn and a former U.S. Attorney in Chicago.

But, Webb contends, ABC's use of “pink slime” so many times – combined with alleged misstatements and omissions – made consumers believe the



WHATEVER IT TAKES: BPI founder Eldon Roth with (clockwise from top left) daughter Jennifer Letch, son-in-law Craig Letch, son Nick and co-founder/wife Regina vows to pursue ABC even if it requires years of litigation and millions in legal fees. **REUTERS/LANE HICKENBOTTOM**

“No one said this slime is dangerous. It's just not what it purports to be. Meat.”

**Tweet by Jim Avila**

ABC reporter

company's beef was something foul.

That's led lawyers for ABC and BPI to pull out their dictionaries in a duel over the definition of slime.

BPI's lawyers point to the Oxford Dictionary, which describes slime as a “moist, soft, and slippery substance, typically regarded as repulsive,” and the American Heritage Dictionary, which calls it “vile or disgusting matter.”

But ABC's lawyers, in their motion to dismiss the case, argued that slime is a fitting description of the company's product. They point to “more neutral” definitions of the term, citing another entry in the American Heritage Dictionary that calls slime a “thick, sticky, slippery substance.”

And regardless, ABC's lawyers also argue, use of the term was the kind of “rhetorical hyperbole” that is constitutionally protected. They point out that courts have rejected defamation claims based on allegations of “name calling.”

Restaurant reviewers, they note, have been protected over speech that describes food in unpleasant ways. One example the network's lawyers have held up for comparison: A 1977 court ruling that found a reviewer who called a dish “trout a la green plague” and a sauce “yellow death on duck” had not defamed a Louisiana restaurant owner.

One issue in dispute in this case: the circumstances around the U.S. Department of Agriculture's approval of using LFTB in the making of ground beef. In ABC's first broadcast on the subject on March 7, the network said that former Assistant Secretary of Agriculture Jo Ann Smith was appointed to the board of directors of a large BPI supplier after she “made the decision to okay” BPI's “mix.”

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LOSING THE FAT: Boneless beef trimmings, on a BPI food line and in a close-up, are turned into “lean, finely textured beef.” REUTERS/LANE HICKENBOTTOM

H. Russell Cross, a former head of USDA’s Food Safety and Inspection Service, told Reuters he, not Smith, made a pivotal decision in mid-1993 that “lean finely textured beef” was beef, and therefore did not need to be labeled in packages of ground beef. “She had nothing to do with it,” he said.

Moreover, it wasn’t until 2001 that the company secured USDA approval for its use of ammonium hydroxide as a processing aid, according to a document Reuters obtained through a Freedom of Information Act request.

Smith, who had left the agency by early 1993, could not be reached for comment. Cross left USDA in 1994 and is now head of the department of animal science at Texas A&M University. BPI said Cross “did some consulting work” on its behalf about nine years ago; Cross, who was employed by a large beef packer at the time, says he was not paid by BPI.

### THE ROLE OF TWITTER

BPI’s lawsuit cites other examples of what the company calls misleading and sloppy reporting by the news network.

Among them: Twitter exchanges

between Jim Avila, the lead ABC reporter on the story and a defendant in the case, and meat industry officials and other critics of his reporting.

One of his tweets has become central to BPI’s claims that the network falsely stated that LFTB is not meat. In that tweet last March, Avila wrote in a reply to a critical viewer that “no one said this slime is dangerous. It’s just not what it purports to be. Meat. And if it’s in ground beef it should be labeled.”

ABC’s lawyers have said in their court papers that this “single brief statement” was directed at “a very limited audience” and should be understood as protected opinion.

While BPI’s lawsuit points to the tweet as an example of alleged false statements, Avila’s remark could help ABC in other ways: It backs up the network’s argument that its reporters did not say the product was unsafe.

The beef processor has also accused the network of ignoring comments and research from experts who provided a more positive view of BPI’s product.

In its lawsuit, BPI described a telephone interview it said Avila conducted with an agricultural food-safety consultant, David

Theno. According to the lawsuit, Theno told Avila that BPI’s process was safe, but the reporter told him he wasn’t credible and hung up on him.

Theno, who describes himself as a friend of the Roth family, told Reuters that Avila appeared to be pushing for quotes slanted against BPI and its product. Theno said he told the reporter he had been paid by the company previously for consulting work. The reporter said he was on deadline. The two continued to talk and then the line went dead, Theno said.

Thinking the call had been dropped, Theno said he called Avila back to see if they had been disconnected, but Avila replied that he had hung up. The conversation then grew heated, Theno recalled.

“He said, ‘fuck you’ and hung up on me again,” Theno said.

Avila, through an ABC spokesman, declined to discuss those phone calls.

Theno’s comments were never used in the broadcasts.

In their court papers, the network’s lawyers noted that the ABC reports informed the public about how BPI’s product is perceived by both supporters and critics and that the reports included

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responses from the meat industry and information from academic experts in animal science and nutrition.

### RESTRAINING ORDER

BPI has also sued some of the people ABC interviewed on air, including a former BPI quality assurance manager, Kit Foshee, for alleged false statements. Among them: Foshee told ABC that LFTB “will fill you up, but it’s not going to do you any good.”

In a follow-up story posted on ABC’s web site, Avila reported that Foshee had been fired by BPI years earlier after complaining about some of the company’s practices.

But ABC’s stories did not mention that Foshee was involved in messy litigation with the company a decade ago.

Based on court files, Foshee was fired in late 2001. A few months later, BPI sued Foshee in South Dakota over allegations of theft of trade secrets. Foshee counter-sued, claiming he had been wrongfully terminated. A jury ruled against Foshee on his claims.

Last summer, a few months after his ABC interview, Foshee drove onto the parking lot of BPI’s headquarters and spoke with employees. “Kit stated it wasn’t over and that he looked forward to more things happening to Eldon Roth,” according to a copy of an affidavit of one BPI employee who spoke with Foshee. BPI and the Roths returned to South Dakota state court last summer and were granted a restraining order against Foshee. Foshee’s lawyer, Steven Sanford, said the restraining order does not matter to his client “since he has no desire ever to return.”

BPI has also disputed how ABC characterized others who appeared in the broadcasts. When the first “pink slime” broadcast aired last March, Diane Sawyer said “a whistleblower has come forward” to tell the public about the processed beef. She was referring to former USDA scientist Gerald Zirnstein, who is credited

with coining the term “pink slime.”

Zirnstein is also a defendant in the case. His attorney, William Marler, told Reuters his client is not a whistleblower.

A court affidavit from the retired scientist also said ABC approached him to do the interview about BPI – not the other way around.

In the coming weeks, U.S. District Judge Karen Schreier in Sioux Falls, South Dakota, is expected to rule on whether the lawsuit will stay in her courtroom, as ABC wants, or go back to state court, where it was originally filed.

If ABC then wins on its motion to dismiss, the claims are knocked out. If not, the case would move toward trial.

Even before ABC began airing its “pink slime” reports, BPI and the ground beef business were coming under closer scrutiny. McDonald’s Corp said in early 2012 that McDonald’s USA had stopped purchasing ammonium hydroxide-treated lean beef trimmings in an effort to make its global beef supply chain consistent.

Today, the U.S. meat industry has changed how it makes ground beef, turning to more expensive types of beef trimming and other parts of the beef carcass. At the same time, retail prices for ground beef are soaring as cattle ranchers and beef packers struggle with elevated feed prices resulting from last summer’s drought in the U.S. Midwest.

One beef processor wasn’t able to keep up. AFA Foods Inc in Pennsylvania filed for Chapter 11 bankruptcy last April and blamed its woes on general media coverage of “pink slime.”

Cargill, the world’s largest ground beef producer, said it, too, has seen an impact on its business from news stories and social media chatter about “pink slime.” Cargill makes a product similar to BPI’s, though it relies on different technology and on citric acid, rather than ammonium hydroxide, as a

processing agent to kill potential pathogens.

Last spring, Cargill told Reuters, it saw an 80 percent drop in production volume of finely textured beef. Though its production volume is still far less than a year ago, a company spokesman said demand is slowly returning.

These days, ground-beef manufacturers have the option to label their packaging to disclose the presence of LFTB, a change that the USDA approved after the ABC broadcasts began. Previously, LFTB was not listed as an ingredient: Federal regulators said it was no different than other protein found in ground beef. BPI has said it supports the rule change, saying it will help restore consumer confidence in its product.

BPI has been trying to woo back customers. Hy-Vee Inc, the Midwestern grocery retailer headquartered in Iowa, dropped ground beef with LFTB in it during the height of the general media coverage of “pink slime.”

But a company spokeswoman said the retailer soon reversed that decision.

Customers in areas where BPI had factories demanded Hy-Vee bring it back, the retailer said. People wanted to buy it.

At a Hy-Vee store in South Sioux City, Iowa, part of the refrigerated meat case is stocked with tube-shaped packages of ground beef. They have a small stamp on the back that reads: “contains lean finely textured beef.”

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