



LOCAL ATTORNEYS ARE MAKING THE FUR FLY IN ANIMAL LAW

Kathleen Guthrie Woods

Today's animal law cases range from the everyday (custody disputes, dangerous dogs, animal cruelty) to the entertaining (such as the monkey "selfie" case in which People for the Ethical Treatment of Animals [PETA] is trying to win copyright protection for Naruto, a Celebes crested macaque whose images have become an Internet sensation).

In addition to defining the rights of animal owners, animal law is intended to protect pets, wildlife, farm animals, animals used in entertainment, and animals used in research. "People like to think animals are not 'property,' and that humans are 'guardians,'" says Bruce Wagman, a partner at Schiff Hardin who has represented organizations and individuals in a wide variety of cases aimed at defending and improving the lives of animals. While this

may be a popular sentiment and intention in communities such as San Francisco, West Hollywood, and Berkeley, the law is much more complicated—and exciting.

Tammi Hill, an associate at Fenwick & West, worked on New York City's Central Park carriage laws, which have raised awareness about the treatment and retirement of the horses. More recently she assisted on a case in which the Animal Legal Defense Fund (ALDF) challenged Utah's agricultural gag law, which says taking photos of slaughterhouses and farms as part of undercover investigations is a felony. "Animal activists say you can't mistreat animals and hide behind laws; agribusiness says they [activists] are using unlawful measures to hurt agribusiness," says Hill. In this case, the plaintiff took photos of a slaughtering facility from the sidewalk; she never set foot on the property. "In and of itself, [the gag law] is a violation of free speech and self-protection, so ALDF and PETA have legitimate concerns," says Hill. At press time, summary motions are due to be filed in April.

Other local attorneys are playing active roles in setting precedents that extend throughout California and beyond its borders. Among recent developments are cases involving the foie gras ban, the shark fin ban, and California's Proposition 2, the Prevention of Farm Animal Cruelty Act.

Here are some highlights.

EXAMINING LEGALITIES BEYOND THE FOIE GRAS BAN

Foie gras, the fatty liver delicacy loved by foodies around the globe, came under fire because of the force-feeding of ducks and geese used to make it. In 2004, California lawmakers deemed force-feeding to be inhumane, and a ban went into effect in 2012. The ban was overturned in January 2015 in federal court, a decision California has appealed.

Meanwhile, a restaurant in Napa thought it had found a way to skirt the intent of the law by offering foie gras for "free" with an expensive menu option, instead of outright "selling" it. "ALDF brought the case and won, then won also at appeal. Then the federal district court ruled the ban was unconstitutional," says Will Pierog, an associate at Fenwick & West, who worked on a petition for review before the California Supreme Court following a favorable decision from the First District Court of Appeal. Pierog enjoyed the challenges. "A number of issues were brought on appeal to the California Supreme Court," he says, including "a really interesting and bizarre preemption issue." Was it an ingredient versus a final product? ("In California, we can regulate one but not the other," he says.) Was it legality versus the spirit of the law? "Ethical concerns of the state were affected by the federal government," he says. "It was wrapped up in social policy issues; it's interconnected."

PROSECUTING AND CONVICTING UNDER THE SHARK FIN BAN

The fight over the shark fin ban has also been perceived to be a social or cultural issue, what some consider to be environmentalists versus members of the Chinese American community. "I grew up eating shark fin soup with my family—it's delicious!" says Ryan Kao, an assistant district attorney in San Francisco who prosecuted the first case. "It has a lot of cultural importance; [serving it is] a way of showing generosity."

But finning—catching a shark, cutting its fins off, and dumping the carcass back into the water—has dangerous implications for the ecosystem. Assembly Bill 376 (AB 376), signed into law by Governor Jerry Brown in 2011, added Section 2021 to the Fish and Game Code. With some exceptions, ". . . it shall be unlawful for any person to possess, sell, offer for sale, trade, or distribute a shark fin" ("raw, dried, or otherwise processed"). Similar laws are on the books in Delaware, Hawaii, Illinois, Maryland, New York, Oregon, and Washington.

In California, the new law went into effect on January 1, 2013. Seven months later merchants and leaders in the Bay Area's Chinese community filed a federal civil lawsuit asserting that the ban was discriminatory and compared it to racist laws and bans that were enacted in the late nineteenth century. That case was dropped when one of the parties, a supplier, was caught in possession of a large number of shark fins.

"This was not some guy with a bowl of soup," says San Francisco Assistant District Attorney Alex Bastian. Nor was it someone in possession of ten pounds or less, as California Department of Fish and Wildlife (CDFW) investigators had seen in a few prior cases resulting in citations, admissions of guilt, and fines. But in this scenario,

the defendant was caught with 2,138 pounds, the product of possibly thousands of sharks. Furthermore, since the defendant was named in the civil suit, he was not unwitting. “He knew the law—he was fighting it,” says Bastian.

That it was a controversial subject was only part of the difficulty for the state’s first prosecution. “It was a brand-new law, it was uncharted water,” says Kao. “There was no baseline.” Typically violators of the ban receive a citation and fine of about \$1,000 for the misdemeanor-level offense. The defendant in this case was charged with four misdemeanor counts. In a plea agreement that appeared to satisfy environmentalists, three misdemeanor counts were dropped. He entered a no contest plea to one count, the violation of Fish and Game Code 2021, for which the court found him guilty and sentenced him to thirty days in jail with three years’ probation. He also had to forfeit the shark fins (some of which were retained for research) to the tune of a market value of \$1 million.

In light of the extremely large quantity of shark fin the defendant had in his possession, Kao isn’t sure his sentence offers much of a deterrent. “I would like to see a tiered penalty system,” he says, along the lines of drug possession for sale penalties. Whether that comes to pass remains to be seen.

Meanwhile, Kao clarifies that the law was never intended to criminalize cultural practices. “It’s not a way of targeting or punishing Asian Americans, it’s strictly about the environmental impact,” he says. “And the law is sound. We’re going to enforce it to the extent allowed.”

“We need to be thoughtful of both concerns,” says Bastian, and, “at the end of the day, we have to do what the law says.”

PREVENTING FARM ANIMAL CRUELTY

In California, agribusiness is a big business, and it butted heads with animal rights activists when California’s Proposition 2 went into effect on January 1, 2015. The Prevention of Farm Animal Cruelty Act (AB 1437), which passed in 2008, adds a chapter to the California Health and Safety Code (Sections 25995–25997) that prohibits confining calves raised for veal, pregnant pigs, and, most significantly, egg-laying hens in such a way that they are unable to turn around freely, lie down, stand up, and fully extend their limbs or wings. A violation of AB 1437 is a misdemeanor, carrying up to a \$1,000 fine and 180 days in jail.

Although state law prohibits cruelty to animals, growing public awareness about accepted production methods and the treatment of farm animals motivated proponents to introduce this measure. “Battery cage confinement is cruel, inhumane, and unnecessary,” says Wagman, noting that as many as eight hens might share a cage that gives each hen a space smaller than a letter-size sheet of paper. Being caged doesn’t allow for their natural behavior, such as digging in the dirt, and requires extreme acts such as cutting off the animals’ beaks and toes to protect them from injuries.

“This is not saying ‘you have to go vegan,’” says Wagman, “although most people would say, ‘I want to eat a hamburger, but I’d like to know the cow was treated well before it became food.’”

Farmers were given seven years to implement the changes, and the new requirements affected the more than 15 million egg-laying hens in the state. Early arguments against the changes cited concerns about excessive costs that would be passed along to consumers, while supporters noted that when the European Union banned battery cages in 2012,

prices rose initially in the first year to accommodate the reforms, then leveled out just a year later. An additional result was that there was an increase in consumer demand for more humanely raised products during that same time period. “All the propaganda [against the proposition] was disproven,” says Wagman. “It cost about one cent more for a dozen eggs.”

Producers in California weren't the only ones affected by AB 1437. There is also a component of the law that says producers in other states must comply if they want to sell their eggs here. As a result, producers in Michigan, Ohio, Oregon, and Washington have made moves to phase out various types of cages for hens, and support for expanding this trend has come from big corporate players including Starbucks, Burger King, and Whole Foods.

The law has faced three unsuccessful challenges: 2010's *JS West v. State of California* (“Basically, the industry wanted to be told in inches how big the cages needed to be,” says Wagman), and two other cases that alleged Prop 2 was unconstitutionally vague. “They were due process challenges,” says Wagman, who teamed Schiff Hardin and the in-house litigation department at the Humane Society of the United States (HSUS) to represent HSUS in litigation.

There is one pending case, *Missouri v. Harris*, in which six states—Missouri, Nebraska, Iowa, Oklahoma, Alabama, and Kentucky—claim the California law interferes with interstate commerce and is therefore unconstitutional and should be stricken. The court dismissed the case in 2014 (ruling in favor of the California law), but plaintiffs have appealed.

Activists and consumers continue to put pressure on agribusiness to treat farm animals humanely. “I hope people are complying,” says Wagman, who acknowledges it's a difficult process since the noncompliance has first to be discovered. “My hope,” he says, “is this is going to spread nationally, to become the default, the norm.” The outlook is encouraging, as Florida, Arizona, Oregon, and Colorado have laws similar to California's, and Massachusetts has an initiative on the 2016 ballot.

Kathleen Guthrie Woods is a San Francisco-based freelance writer. She and her husband are the guardians of two much-loved and pampered dogs—both adopted from rescue organizations.

Editor's Note

As of the publication date, the case of the monkey “selfie” has been dismissed by the U.S. District Court for the Northern District of California and appeals are pending.