

1-1-2023

Animal Welfare Consumer Protection Litigation: Challenges and Possibilities for Bringing About More "Humane" Labeling Practices

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Recommended Citation

Jaycie Thaemert, *Animal Welfare Consumer Protection Litigation: Challenges and Possibilities for Bringing About More "Humane" Labeling Practices*, 2 *Animal L. Rev.* 215 (2023).

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ANIMAL WELFARE CONSUMER PROTECTION LITIGATION: CHALLENGES AND POSSIBILITIES FOR BRINGING ABOUT MORE “HUMANE” LABELING PRACTICES

By
Jaycie Thaemert*

Abstract

Consumer protection claims have become a critical tool for animal welfare advocates to attack the misrepresentations that animal agriculture producers make about the humane treatment of their animals. Currently, these claims are an important accountability mechanism, as “humane” labeling standards have not been adopted on the federal level. As consumers become increasingly focused on making ethical food-purchasing decisions, consumer protection claim lawsuits have become more and more successful, drawing the attention of attorneys within and outside of the animal welfare movement. The primary limitation of consumer protection claims in the animal welfare space is that these lawsuits do not actually address the treatment of the animals themselves, but rather only what the companies themselves are saying about the treatment of their animals, using “humane” marketing as an advertising tactic. Still, consumer protection lawsuits represent an important opportunity to hold animal agriculture producers responsible for any misrepresentations they make about their treatment of animals. This Article explores the growth and challenges of bringing the animal welfare movement into consumer protection claim litigation.

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I. Introduction

Consumer protection claims can be a useful tool to address animal agriculture producers' statements about animal welfare and, ultimately, the behavior of those companies. In recent years, the U.S. animal welfare movement has used consumer protection claims, including fraud and false advertising, to attempt to bring about better conditions for farmed animals based on companies' misrepresentations about their treatment of animals, with varying degrees of success.¹ This area of law includes both common law and statutory claims.² Under common law, consumer protection claims in these contexts frequently include fraud/misrepresentation and unjust enrichment. In general, to allege fraud a plaintiff must prove that a defendant has made (1) a misrepresentation of fact, which is (2) fraudulent and/or material,³ and which (3) induced justified reliance.⁴ To allege unjust enrichment, a plaintiff must prove that the defendant has obtained an economic benefit and that it would be unjust for the beneficiary to retain that benefit.⁵ Alongside common law causes of action, claims are often brought under state consumer protection statutes, including those for false advertising and deceptive trade practices. Federal consumer protection statutes may also offer avenues for litigation in limited circumstances.⁶

While requirements vary based on the particular wording of the consumer protection statutes, alleging a false advertising claim gener-

¹ Cf. *Settlement Reached in Calif. Beef Recall Case*, USA TODAY (Nov. 27, 2013, 7:09 PM) <https://perma.cc/Q2TU-UUB9> (accessed Feb. 20, 2023); U.S. *ex rel.* Humane Soc'y of U.S. v. Hallmark Meat Packing Co., No.08-CV-00221, 2013 WL 5753784 (C.D. Cal. 2013) [hereinafter *Hallmark Meat*] (settled), and *Complaint*, Claybaugh v. Trader Joe's Co., No. RG18897085 (Cal. Sup. Ct. 2018) (settled), with *People for the Ethical Treatment of Animals, Inc. v. Cal. Milk Advisory Bd.*, 22 Cal. Rptr. 3d 900 (Cal. Ct. App. 2005) [hereinafter *CMAB*, 22 Cal. Rptr. 3d] (dismissed). See also *Trader Joe's Cage-Free Egg Lawsuit Reaches Settlement in a Win for Truth in Advertising*, ANIMAL LEGAL DEF. FUND (June 20, 2018), <https://perma.cc/85PC-KFSQ> (accessed Mar. 19, 2023) (announcing the details of Trader Joe's settlement).

² See, e.g., *Complaint* at 35–36, *Bohr v. Tillamook*, 516 P.3d 284 (Or. Ct. App. 2022) (including a claim under Oregon's consumer protection statute and a common law claim for unjust enrichment).

³ Some courts require both fraudulence and materiality of misrepresentation; other courts—and the Restatement—only require one of the two. Practical Law Commercial Litigation, *Asserting a Fraud Claim: Material Misrepresentation*, WESTLAW (accessed Feb. 20, 2023) (requiring fraud and materiality to maintain a misrepresentation claim). See RESTATEMENT (SECOND) OF CONTRACTS § 164(1) (1981) (requiring either fraud or materiality to maintain a misrepresentation claim).

⁴ RESTATEMENT (SECOND) OF CONTRACTS § 164(1) (1981).

⁵ RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 1 (AM. L. INST. 2011).

⁶ See, e.g., *Hallmark Meat*, *supra* note 1 (successfully utilizing the federal False Claims Act as a consumer protection cause of action to allege that “several defendants falsely certified and represented in their technical proposals and bids to the United States Department of Agriculture that cattle processed at the facility in question were handled humanely and in accordance with federal rules and regulations”).

ally requires a plaintiff to assert that the defendant (1) made false and misleading statements as to their products, which resulted in (2) actual and material deception of a substantial portion of the intended audience, and (3) actual or likely injury to the plaintiff.⁷ A deception is material when it is likely to influence purchasing decisions by reasonable consumers.

For state consumer protection claims, statutes specify who may bring the claim: an aggrieved private party, a class, a market competitor, or any combination thereof.⁸ In California, for instance, only the aggrieved individual consumer is allowed to bring suit.⁹ New York and Florida allow market competitors, private consumers, and the state to bring suit, though in Florida, the competitor can only obtain declaratory relief, not damages.¹⁰ In Ohio, only consumers may bring suit, though, if a timely application is filed, the state attorney general may intervene in the suit.¹¹ State consumer protection statutes may also vary as to the elements required to prove false advertising or unfair trade practices, the forms of relief available to plaintiffs, and whether the prevailing party may receive attorney fees.¹² Because there is substantial overlap between the elements of common law fraud and statutory deceptive trade practices claims, plaintiffs frequently assert them together. These claims have increased, and successes over the past two decades may provide a critical opportunity for consumers to hold industrial agriculture producers responsible for their speech.

II. Significance and Importance

Consumer protection claims are critical for accountability in a landscape without strict regulatory standards. Food labeling standards in the United States provide little in the way of specific humane handling standards for animals, or for beef, pork, and poultry products. In fact, the United States Department of Agriculture (USDA)

⁷ See RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 2 (AM. L. INST. 1995) (describing deceptive marketing claims). See, e.g., Minn. Stat. § 325.F69, subdiv. 1 (2022) (to constitute a claim, Minnesota's statute notably does not require showing whether the person was actually misled or deceived, nor showing that the person suffered actual damages); Del. Code Ann. tit. 6, § 2513 (2021) (like Minnesota, Delaware's statute does not require showing that the person was actually misled); 15 U.S.C. § 1125(a) (2020) (describing the Federal Trade Commission's regulation of false advertising).

⁸ Elizabeth O'Connor Tomlinson, *Causes of Action Under State Consumer Protection Law for "Greenwashing" or Misleading Environmental Claims in Advertising or Marketing*, 79 CAUSES ACTION 2ND SERIES 323 at § 14 (2017).

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² Carter Dillard, *False Advertising, Animals, and Ethical Consumption*, 10 ANIMAL L. 25, 40–41 (2004).

does not define “humanely raised” or “humanely handled” anywhere in its regulations.¹³

For example, the USDA requires only that “packages labeled as cage free are laid by hens that are able to roam vertically and horizontally in indoor houses,” and that enclosures allow hens to “exhibit natural behaviors.”¹⁴ It is unclear to what extent the hens must be able to exhibit their natural behaviors to meet this standard, yet consumers are led to believe that the label equates to humane treatment. Most of the labeling standards for beef, pork, and poultry products address materials that are not meat (so-called ‘imitation’ products) and nutrient content, rather than humane treatment.¹⁵

This regulatory vacuum has led to pushes from consumers and the animal welfare movement towards stricter and more regulable labeling standards. The public is able to participate in USDA processes via both comments and rulemaking petitions; in fact, the solicitation of public input led to the adoption of the national “organics” labeling standards.¹⁶ Over the past decade, several organizations filed rulemaking petitions with the USDA and the Food Safety and Inspection Service (FSIS), although none of these petitions has led the USDA or FSIS to take any action.¹⁷

This process has even attracted rulemaking petitions from market competitors to no avail. In 2011, Tyson Foods filed a rulemaking petition asking the USDA to regulate the use of Perdue’s “Process Verified” label, which included claims about “humanely raised,” “cage free” chickens.¹⁸ Although this petition came from an industry petitioner, the USDA still declined to regulate the terms, stating that they were “truthful and not misleading,” and that it was “sufficient that consum-

¹³ See *Meat, Eggs, and Dairy Label Guide*, ASPCA (2022), <https://perma.cc/UW98-BYWX> (accessed Feb. 14, 2023) (detailing the different requirements and conditions for different “humane” certifications); 9 C.F.R. § 313 (2017) (listing what is considered humane, but notably lacking a definition of “humane”).

¹⁴ *Questions and Answers: USDA Shell Egg Grading Service*, USDA AGRIC. MKTG. SERV. (Oct. 1, 2015), <https://perma.cc/PQC6-VYZH> (accessed Feb. 15, 2023).

¹⁵ See A GUIDE TO FEDERAL FOOD LABELING REQUIREMENTS FOR MEAT, POULTRY, AND EGG PRODUCTS, FOOD SAFETY AND INSPECTION SERVICE 30, 80 (Robert Post et al. eds., 2007) [hereinafter Post et al.] (discussing label standards and what they aim to address).

¹⁶ Dillard, *supra* note 12, at 29.

¹⁷ Despite receiving at least six petitions over the past ten years, USDA and FSIS have declined to take any action based on these petitions. Erin Sutherland & Adrienne Craig, *Oversight of Animal Raising Claims on Product Packaging: A Review of Jurisdiction and Challenges to Label Claims*, 26 ANIMAL L. 217, 301–04 (2020) (citing examples where petitions regarding labeling disclosures and practices were denied, e.g., Letter from Terri Nintermann, Assistant Adm’r, U.S. Dep’t of Agric., Office of Policy & Program Dev., to Kelsey Eberly, Staff Attorney, Animal Legal Def. Fund (Dec. 30, 2019) and Letter from Roberta Wagner, Assistant Adm’r, U.S. Dep’t of Agric., Food Safety & Inspection Serv., to Dena Jones, Dir., Farm Animal Program, Animal Welfare Inst., (Feb. 22, 2019)).

¹⁸ *Id.* at 289, 290 n.149 (citing Petition from Robert W. George, Vice President & Assoc. Gen. Counsel, on behalf of Tyson Foods, Inc., to Alfred V. Almanza & Rayne Pegg, Adm’rs., U.S. Dep’t of Agric. (Mar. 18, 2011)).

ers could visit the [Perdue] website” to learn more about the meaning of the terms and standards.¹⁹

There have also been attempts from both the animal welfare movement and from industry to produce more straightforward labels corresponding to certain standards of care. In the early 2000s, Humane Farm Animal Care established the “Certified Humane” label, which contains numerous standards for handling, veterinary care, feeding, breeding, environmental enrichment, and staff competency, backed by third-party inspections of handling and slaughter sites.²⁰ Under statutes like the Federal Meat Inspection Act (FMIA), the Poultry Products Inspection Act (PPIA), the Egg Products Inspection Act (EPIA), the Agricultural Marketing Act (AMA), and the Fair Packaging and Labeling Act (FPLA), the USDA clearly has the authority to promulgate more specific food handling and labeling standards, including the endorsement of some form of “humane” labeling.²¹

However, despite both bottom-up attempts to produce non-misleading labels and several associated rulemaking petitions, the USDA has yet to promulgate any stricter labeling standards, even though the adoption of more specific regulations for “humane care” has the potential to prevent companies from benefiting from intentional misrepresentations to consumers.²² Until the USDA promulgates more specific “humane” standards, the regulatory vacuum this leaves alongside the self-regulatory attempts at labeling may continue to sow consumer confusion.²³

¹⁹ *Id.* at 290 (citing Letter from Rosalyn Murphy-Jenkins & Dean Kastner, Dirs., U.S. Dep’t of Agric., Food Safety & Inspection Serv., to Robert George, Vice President & Assoc. Gen. Counsel, Tyson Foods, Inc. (July 11, 2011)).

²⁰ *Our Standards*, CERTIFIED HUMANE (2022), <https://perma.cc/YD43-HZ84> (accessed Feb. 20, 2023) (offering resources with suggestions on pain management methods for veterinarians, as well as suggestions on rearing, handling, feeding, environmental design, transporting, and slaughtering of livestock animals); *21st Century Brings More Awareness of Farm Animal Welfare*, HFAC (Jan. 25, 2017), <https://perma.cc/CN4G-7L8F> (accessed Feb. 26, 2023).

²¹ Post et al., *supra* note 15, at 4.

²² Dillard, *supra* note 12, at 28 n.5.

²³ Carter Dillard observed two decades ago that it remains to be seen whether industry self-regulatory labeling practices or external labeling standards like “Certified Humane” can provide the necessary level of clarification for consumers to make non-misleading purchasing decisions. *Id.* (“Various organizations have created labels, symbols, and logos that identify products as ‘Cruelty Free,’ ‘Certified Humane Raised and Handled,’ and ‘Free Farmed,’ [phrases all unregulated by the Federal Government] which may be used by sellers certified in accordance with the particular organization’s program . . . However, such programs are not currently in widespread use and without any general consensus on the meaning of the subject terms there is no guarantee that independent certification programs will not themselves mislead some consumers.”). This observation is still true, as no further federal regulatory action has yet been taken. While several organizations have produced “humane” labels over the years, these labels themselves and their differing levels of pervasiveness have the potential to produce *more* confusion for consumers. Without better federal regulation, consumer protection lawsuits may still be the most effective way for consumers to protect the integrity of their purchasing decisions. *Id.*

Consumer protection claims have become increasingly important as consumer concern for animal welfare has grown, and as animal agriculture producers have begun to make more public commitments to humane treatment. Deceptive advertising has the potential to disrupt the flow of the free market, since a free flow of truthful information is critical to the operation of this market.²⁴ False advertising about humane treatment leads consumers to make “mistaken” purchases by paying for goods they would not have purchased otherwise.²⁵

A 2015 consumer poll showed that more than 87% of consumers were willing to pay more for products they perceived to be humanely produced.²⁶ More than 58% of consumers said they had grown more concerned in recent years about the welfare of animals used in food production, including handling, housing, feeding, and slaughter.²⁷ Thus, at least on an abstract level, a majority of consumers care about the welfare of animals used in food production, regardless of whether those animals are later slaughtered. In addition, more than 80% of consumers say they are confused by the food labels; for instance, consumers tend to assume that the “organic” label is linked to animal welfare standards, but this standard actually deals only with the use of pesticides and chemical fertilizers.²⁸ These preferences explain why companies increasingly choose to market their products as humane: companies can upcharge for the “humane” treatment their animals receive without spending any more money than a “non-humane” producer would spend, resulting in greater profits.²⁹ This injures consumers in two ways. First, the consumers can no longer trust the sourcing of their food products, and second, the consumers pay more for a unique service that the company is not actually providing. Ethical consumption is one of the most important ways that individual consumers can force change in their food system, but that change will prove elusive if companies are free to make consistent misrepresentations about the “humane” nature of their products.

²⁴ Jean Wegman Burns, *The Paradox of Antitrust and Lanham Act Standing*, 42 UCLA L. REV. 47, 54 (1994).

²⁵ *Id.*

²⁶ CONSUMER REPORTS NATIONAL RSCH. CTR., NATURAL FOOD LABELS SURVEY 2 (2015) [hereinafter 2015 SURVEY].

²⁷ *Survey Reveals Consumer Demands for Certified Humane*, CERTIFIED HUMANE (Jan. 14, 2021), <https://perma.cc/8329-Y55R> (accessed Feb. 13, 2023).

²⁸ *Id.*; 2015 SURVEY, *supra* note 26, at 2. An additional example concerns the use of the term “natural,” while consumers tend to believe that the term indicates that animals have outdoor space, the use of this term is unrelated and has no impact on animal welfare. 2015 SURVEY, *supra* note 26, at 2.

²⁹ Victor Spain et al., *Are They Buying It? United States Consumers’ Changing Attitudes Toward More Humanely Raised Meat, Eggs, and Dairy*, 8 ANIMALS 128, 128 (2018).

III. Animal Welfare Consumer Protection Suits: State and Common Law

Animal welfare claims often include evidence from undercover investigations from animal welfare organizations and may deal with misrepresentations about animal welfare, misleading labels, false certifications of compliance with state or federal standards, or failures to disclose facts about production processes.³⁰ Complaints allege violations of state consumer protection law for false advertising or deceptive trade practices, frequently alongside common law fraudulent misrepresentation.³¹ In addition to fraud, a few plaintiffs have sought equitable relief under the doctrine of unjust enrichment.³²

The first of these lawsuits took place in 2002, when PETA filed a lawsuit alleging false advertising by the California Milk Advisory Board's (CMAB) "Happy Cows" campaign.³³ The CMAB ran several advertisements showing cows in "spacious, grassy pastures on beautiful, rolling hills . . . enjoying the ease, luxury, and contentment of life as a dairy cow in California."³⁴ PETA challenged the campaign under the California Marketing Act on the basis that it gave the "impression that California dairy producers cared for the comfort, health, and welfare of their cows," when in reality the cows were "subjected to physical and psychological pain and stress."³⁵ The court dismissed the complaint, finding that the CMAB was a quasi-governmental entity that could not be sued under California's unfair competition law.³⁶

PETA renewed the claim in 2011, but the court again dismissed the case, this time finding that PETA's claims were not supported by the knowledge of the CMAB, despite PETA presenting USDA survey results which indicated high levels of disease and suffering among California dairy cows.³⁷ Mixed results have followed the "Happy Cows" dismissals. While some courts have entertained animal welfare consumer protection suits, other have categorically dismissed them. For instance, a class action led by Mercy for Animals (MFA) about a "Humane Certified" label on chickens was dismissed in California because

³⁰ The animal welfare cases are part of a larger trend of consumer protection litigation around food labeling. See Andrew Jacobs, *Lawsuits Over 'Misleading' Food Labels Surge as Groups Cite Lax U.S. Oversight*, N.Y. TIMES (Sept. 15, 2021), <https://perma.cc/33LL-QM9G> (accessed Feb. 20, 2023) (describing a "flurry" of food-related litigation and reporting that 220 false advertising and labeling lawsuits were filed against food and beverage producers in 2020 alone).

³¹ Complaint, *supra* note 2, 5–6.

³² See, e.g., *id.* at 35–36 (seeking relief under the doctrine of unjust enrichment in addition to a violation of the Oregon consumer protection statute).

³³ *CMAB*, 22 Cal. Rptr. 3d at 902.

³⁴ *Id.*

³⁵ *PETA Loses 'Happy Cow' Lawsuit*, FARM PROGRESS (Sept. 3, 2012), <https://perma.cc/Q8TZ-DHGV> (accessed Mar. 19, 2023).

³⁶ *CMAB*, 22 Cal. Rptr. 3d at 900–02.

³⁷ Ruling on Submitted Matter, *People for the Ethical Treatment of Animals, Inc. v. Ross*, No. 34-2011-80000886 (Cal. 2012).

it was preempted by a federal agency decision stating that the term “humane” was not misleading.³⁸ Meanwhile, similar suits from the Humane Society of the United States (HSUS) and Animal Outlook reached settlement agreements wherein defendants removed humane treatment claims from their packaging.³⁹

However, some recent claims, particularly those related to egg labeling standards, have found better success. The Animal Legal Defense Fund (ALDF) has filed several lawsuits about egg-related misrepresentations, which have led to either damages or the removal of misleading claims. In *Glover v. Mahrt* in 2012, ALDF filed a class action suit against an egg producer who used an image of a hen that could “run, scratch, and play” on its cartons, while in reality, the eggs came from hens housed indoors with no outdoor access.⁴⁰ ALDF settled with the defendant egg producers, and the producers agreed to remove the misleading labels from their packaging, obtain “Certified Humane” certification, and donate to animal welfare causes.⁴¹ Similarly, in *Claybaugh v. Trader Joe’s Co.* in 2018, ALDF alleged that Trader Joe’s was using the term “cage free” in a misleading way, alongside advertising that depicted chickens in an open field.⁴² According to the complaint, Trader Joe’s acquired its eggs from industrial hen houses, meaning the “cage free” representation was fraudulent and in violation of California’s consumer protection act, false advertising act, and unfair competition law.⁴³ This and similar complaints note that because there is no regulatory definition for the term “cage free,” it is easier for companies to utilize the term as shorthand for humanely raised animals, gaining the benefit of purchases from caring consumers without facing scrutiny under state or federal standards.⁴⁴ *Claybaugh* was successful: Trader Joe’s pulled the misleading packaging nationwide as a part of a settlement agreement.⁴⁵

More recent complaints may signal a trend towards greater acceptance of animal welfare consumer protection claims. In 2021, HSUS filed a complaint alleging that Smithfield Foods’ advertising discussing its “crate-free” breeding practices violated the D.C. Consumer Pro-

³⁸ *Leining v. Foster Poultry Farms*, 275 Cal. Rptr. 3d 682, 696 (Cal. Ct. App. 2021).

³⁹ Georgi Gyton, *Perdue Farms Reaches Settlement Over Labelling Lawsuit*, FOOD NAVIGATOR USA (Oct. 15, 2014), <https://perma.cc/N7MK-PFST> (accessed Mar. 19, 2023); *Simple Truth Chicken Labeling Lawsuit – Settlement Reached*, ANIMAL OUTLOOK (Oct. 13, 2014), <https://perma.cc/UDR6-MRVH> (accessed Feb. 16, 2023); Anne Bucher, *Kroger, Perdue Farms Settle Chicken Labeling Class Action Lawsuits*, TOP CLASS ACTIONS (Oct. 15, 2014), <https://perma.cc/6Y2U-TSNG> (accessed Feb. 16, 2023).

⁴⁰ Complaint at 2–3, *Glover v. Mahrt*, No. RG12650058 (Cal. 2012).

⁴¹ *Challenging Judy’s Family Farm Organic Eggs’ Deceptive Advertising*, ALDF (updated Dec. 31, 2014), <https://perma.cc/VQB3-FTHC> (accessed Mar. 16, 2023).

⁴² Complaint, *supra* note 1, at 2–3.

⁴³ *Id.* at 16–17.

⁴⁴ *Id.* at 8–9.

⁴⁵ *Trader Joe’s Cage-Free Egg Lawsuit Reaches Settlement in a Win for Truth in Advertising*, *supra* note 1.

tection Act.⁴⁶ Contrary to Smithfield’s advertising, HSUS photos included in the complaint show that Smithfield’s facilities commonly use gestation and farrowing crates.⁴⁷ This complaint recently survived a motion to dismiss.⁴⁸

Another trend showing a greater acceptance of animal welfare consumer protection claims is the growing involvement of personal injury, consumer protection, and class action attorneys outside the animal welfare movement in these suits. A pair of cases filed in 2019 demonstrate the potential advantages and pitfalls of expanding these claims beyond the movement.⁴⁹ In one of these cases, *Bohr v. Tillamook County Creamery Association*, a group of consumers in Oregon filed a class action lawsuit, alleging that they purchased Tillamook products under the mistaken impression that the dairy for Tillamook products comes from the pasture-raised cows Tillamook uses in its advertising, not the feed lot in eastern Oregon from which Tillamook actually sources the majority of its dairy.⁵⁰ The named plaintiffs pled reliance on Tillamook’s specific advertising; to plead reliance for the unnamed plaintiffs, the complaint advanced two theories of causation—price inflation and inducement.⁵¹

In August 2022, the Oregon Court of Appeals ruled that the plaintiffs’ causation theories were not viable.⁵² The court distinguished the price inflation theory—that the class purchased Tillamook goods at an “inflated” price because Tillamook’s misrepresentations increased the market price of their goods—from prior cases where economic loss theories had sufficiently shown causation because the plaintiffs could still potentially prove the misrepresentations actually reached them.⁵³ The court also dismissed the inducement theory—that the class purchased the goods in the first place because they believed that Tillamook products came from small family farms—on the basis that reliance was an

⁴⁶ Complaint at 2, *Humane Soc’y of the U.S. v. Smithfield Foods, Inc.*, No. 2021-CA-003777-B (D.C. Sup. Ct. 2021).

⁴⁷ *Id.* at 16, 21.

⁴⁸ Order Denying Smithfield Food’s Inc.’s Opposed Motion to Dismiss, *Humane Soc’y of the U.S. v. Smithfield Foods, Inc.*, No. 2021-CA-003777-B (D.C. Sup. Ct. 2021).

⁴⁹ See *Bohr v. Tillamook County Creamery Ass’n*, 516 P.3d 284, 287, 289, 305 (Or. Ct. App. 2022) (ruling that non-named plaintiffs may not proceed with their consumer protection suit and limiting potential theories of liability for remaining plaintiffs); Christopher Doering, *Coca-Cola and Others Agree to \$21M Settlement for Fairlife Animal Abuse Lawsuits*, FOOD DIVE (May 3, 2022), <https://perma.cc/3CKN-THE6> (accessed Feb. 16, 2023) (reporting the large settlement obtained from Fairlife by non-animal welfare attorneys); Abraham Jewett, *Milk Companies Get Final Settlement Approval in \$21M Inhumane Cow Treatment Lawsuit*, TOP CLASS ACTIONS (Oct. 2, 2022), <https://perma.cc/2ZYW-D65T> (accessed Mar. 3, 2023).

⁵⁰ Complaint and Demand for Jury Trial at 2–5, *Bohr v. Tillamook County Creamery Ass’n*, 516 P.3d 284 (2022).

⁵¹ *Bohr*, 516 P.3d at 287, 289. The putative class was to potentially include “all persons in Oregon who purchased Tillamook dairy products.” *Id.* at 289.

⁵² *Id.* at 305.

⁵³ *Id.* at 301.

essential element of inducement.⁵⁴ Having failed to plead the reliance necessary to support the claim, all plaintiffs who could not plead specific reliance were dismissed from the class, and only those who could show specific reliance-in-fact remained.⁵⁵ While garnering support and involvement from lawyers who do not commonly work in the animal welfare space could provide needed momentum for the movement, lawyers outside the movement may have less of an understanding of the landscape surrounding animal welfare claims. Based on the theories of causation they advanced, the lead lawyers in this case, who have dealt more generally with class actions outside of the animal welfare movement, may have underestimated the hostility that even progressive courts may have towards animal welfare-based, industry-opposed claims.

However, this does not mean that extra-movement involvement has not been successful in other cases. In fact, it may be a critical element in advancing these claims on a greater scale; when larger firms get involved, more lawsuits can be brought, leading to more potential settlements, including payouts and removals of misleading advertising. In 2019, four separate class actions were filed against the dairy producer Fairlife, including causes of action for common law fraud and unjust enrichment as well as violations of several state consumer protection statutes.⁵⁶ The complaints each alleged that Fairlife had been successful in large part due to advertising strategies touting the “extraordinary care and comfort” that it provided to its cows, for which it charges a premium.⁵⁷ However, an undercover video released by animal protection group Animal Recovery Mission showed widespread abuse at the company’s flagship farm in Indiana.⁵⁸

The complaints alleged that Fairlife’s promise of “extraordinary care and comfort” was substantially untrue; instead, as the video showed, Fairlife subjected its cows to abuse and torture “as a matter of routine and practice.”⁵⁹ In reliance on Fairlife’s misleading representations, the plaintiffs alleged they paid more for the milk products than they were actually worth.⁶⁰ To support their claims for fraud and deceptive trade practices, the plaintiffs included statistics showing that

⁵⁴ *Id.* at 290, 303.

⁵⁵ *Id.* at 287.

⁵⁶ Complaint at 1, 2, 15, Michael v. Fairlife LLC, No. 1:19-cv-03924 (N.D. Ill. June 11, 2019) (listing states whose statutes were violated, including “California, Florida, Illinois, Massachusetts, Michigan, Minnesota, Missouri, New Jersey, New York, and Washington”).

⁵⁷ *Id.* at 1–2; Complaint at 1, Sabeehullah v. Fairlife LLC, No. 1:19-cv-07171 (N.D. Ind. June 17, 2019); Complaint at 2, 6, Schwartz v. Fairlife LLC, No. 1:19-cv-03929 (N.D. Ill. June 12, 2019); Complaint at 2, Salzhauer v. The Coca-Cola Co., No. 1:19-cv-02709 (N.D. Ga. June 13, 2019).

⁵⁸ Alexia Elejalde-Ruiz, *Alleged Animal Abuse at Fair Oaks Farms Under Investigation After Activists Release Graphic Video*, CHICAGO TRIB. (June 6, 2019, 6:50 AM), <https://perma.cc/8LUP-3D5V> (accessed Feb. 18, 2023).

⁵⁹ Complaint, *supra* note 56, at 2.

⁶⁰ *Id.* at 4.

consumers would pay increased prices for products made from humanely-treated animals,⁶¹ photos showing that Fairlife's welfare claims were central to its marketing practices,⁶² and photo stills from the undercover videos showing the actual conditions of Fairlife's cows.⁶³

After filing, the complaints were quickly consolidated into a multidistrict class action lawsuit in Illinois.⁶⁴ In May 2022, Fairlife settled, agreeing to pay out \$21 million to the plaintiffs and to strengthen animal welfare oversight at its farms.⁶⁵ While this represents only a small portion of Fairlife's overall profits, the threat of further litigation about the discrepancy between its advertising and its actions ostensibly changed the company's representations.⁶⁶

There are several potential reasons that the Fairlife investigation—unlike most others to date—may have attracted the attention of plaintiffs' attorneys from outside the movement. The investigative video was incredibly graphic, the animal welfare claims were central to Fairlife's marketing, the abuse occurred on a property near an amusement-park-style facility on which Fairlife welcomed tourists to observe its husbandry practices, the farm was directly owned by Fairlife—and not, as in many cases, a farm owned by a separate company from which Fairlife could distance itself—and Fairlife was owned by a larger company, Coca-Cola.⁶⁷ Each of these factors may have contributed to increased media attention on the case and the plaintiffs' subsequent representation by more general plaintiff-side attorneys.

While the full impact of non-animal welfare lawyers on the animal welfare consumer protection space remains to be seen, the overall increase in popularity of state-based consumer protection lawsuits seems to indicate that attorneys and judges alike view them as increasingly cognizable claims. This survey of these cases reveals that they are becoming at least marginally more successful over time; many have produced monetary awards and/or declaratory relief, as well as settlements or resolutions, including the voluntary removal of the claims at issue.⁶⁸ While many of the companies at issue continue to claim that many of the suits are 'frivolous,' popular companies like Ben

⁶¹ *Id.* at 6–7.

⁶² *Id.* at 8–10.

⁶³ *Id.* at 12–13.

⁶⁴ Robert Channick, *Fairlife Milk Drinkers 'Feel Betrayed' by Alleged Fair Oaks Farms Cow Abuse, Says Attorney with Lawsuit Seeking Class-Action Status*, CHI. TRIB. (Nov. 27, 2019, 8:36 AM), <https://perma.cc/733F-NJR9> (accessed Feb. 18, 2023).

⁶⁵ Doering, *supra* note 49.

⁶⁶ *See id.* (reporting that Fairlife made over \$1 billion in sales in 2021).

⁶⁷ *Id.*; Michelle Grant, *Fairlife Dairy Products Pulled From Store Shelves Amid Animal Abuse Controversy*, TODAY (June 9, 2019, 9:25 AM), <https://perma.cc/6BFJ-ZG8W> (accessed Feb. 19, 2023).

⁶⁸ *See Hallmark Meat*, *supra* note 1 (finding Hallmark/Westland entered a consent judgment of \$155 million); Settlement Agreement at 3, U.S. *ex rel.* C.O.K., 2:17-cv-210 MCE (requiring Superior Farms pay a \$200K settlement and comply with additional investigation and oversight from the federal government).

& Jerry's and Butterball have been successfully convinced to remove claims about the "humane" treatment of animals from their products based on these suits.⁶⁹

IV. Animal Welfare Consumer Protection Suits: Federal Law

In addition to claims under state consumer protection statutes and common law, federal statutes authorize consumer protection claims in limited circumstances. In the animal welfare context, the False Claims Act has been successfully used where the federal government was a party to the contract at issue.⁷⁰ The False Claims Act applies when a misrepresentation is "material," meaning of sufficient importance to the government when it decides whether to pay the contractor for its goods or service, and when the fraudulent action violates a federal law or regulation.⁷¹ In the animal welfare context, plaintiffs are often able to show that the misrepresentations are material because animal handling is an integral part of the "quality" of the meat, a standard on which the contract is based.⁷²

United States ex rel. Humane Society of the United States v. Westland/Hallmark Meat Co. is an example of a successful case brought under the False Claims Act.⁷³ HSUS sued Hallmark Meat, alleging fraud and false certification under the False Claims Act as well as common law fraud and negligent misrepresentation.⁷⁴ The United States intervened as a party because the complaint alleged misrepresentations that induced the federal government to enter into a contract to provide beef for the National School Lunch Program.⁷⁵ The False Claims Act was applicable because (1) the government was a party to the contract, (2) the contract involved certifications under federal animal handling acts, and (3) the alleged misrepresentations were material to the government in deciding whether to pay for the goods.⁷⁶

While the court did not reach the merits of the misrepresentation claims, the suit was successfully settled with a \$155 million consent

⁶⁹ Jacobs, *supra* note 30.

⁷⁰ See, e.g., *Hallmark Meat*, 2013 WL 5753784 at *1, *18 (utilizing the False Claims Act as a primary cause of action, plaintiffs overcame summary judgment); Settlement Agreement, *supra* note 68, at 3, 8, 11 (utilizing the False Claims Act as a primary cause of action plaintiffs received a beneficial settlement).

⁷¹ Dave Nadler, *The False Claims Act: A Novel Tool for Enforcing Federal Animal Welfare Laws*, AM. BAR ASSOC., <https://perma.cc/H369-RJKQ> (accessed Feb. 18, 2023) (citing *Universal Health Services, Inc. v. U.S.*, 579 U.S. 176, 193 (2016) and 31 U.S.C. § 3729(b)(4)).

⁷² See *id.* (citing *Hallmark Meat*, 2013 WL 5753784 at *13–16 [discussing the court's reasoning that Westland/Hallmark lack of humane treatment in compliance with federal regulations constituted nonconforming goods, which subsequently became worthless to the government]).

⁷³ *Hallmark Meat*, 2013 WL 5753784 at *1, *18.

⁷⁴ *Id.* at *1.

⁷⁵ See *id.* at *1–2, 5, *11, *15 (describing the contractual interest between the U.S. and the defendants).

⁷⁶ *Id.* at 1–2, 11, 15.

judgment against Hallmark Meat.⁷⁷ These types of claims may be more successful than garden-variety state consumer protection lawsuits because they wield the force, authority, and finances of the federal government.

Besides the False Claims Act, there may be a private cause of action available to market competitors in the Lanham Act, the federal statute that governs trademarks, service marks, and unfair competition.⁷⁸ While individual consumers have typically been denied standing under the Lanham Act, market competitors can sue under Section 43 to prevent false product claims.⁷⁹ In *Huntingdon Life Sciences, Inc. v. Rokke*, the court determined that PETA was not a “competitor” within the meaning of the Lanham Act and dismissed the claim.⁸⁰ A former employee of Huntingdon Life Sciences—and later employee of PETA—released undercover video footage of Huntingdon’s animal testing, leading Huntingdon to file suit under the Lanham Act.⁸¹ The court found that the Lanham Act claim was not cognizable, partially because PETA could not be considered a competitor of Huntingdon.⁸² While the dismissal was ultimately advantageous for PETA here, the decision to exclude PETA from liability as a competitor potentially foreclosed the possibility of animal welfare groups becoming “competitors” for future suits against industrial agriculture producers.⁸³

As a result, actions under the Lanham Act will likely only be available to “humane” producers seeking to challenge the advertising of a more traditional producer.⁸⁴ An additional challenge is that the Lanham Act is vague about what constitutes a “misrepresentation”

⁷⁷ James Barragan, *Meatpacking Firms Reach Settlement on Animal Cruelty Charges*, L.A. TIMES (Nov. 27, 2013, 12:00 AM), <https://perma.cc/LVD6-VU6W> (accessed Feb. 16, 2023).

⁷⁸ The Lanham Act of 1946, 15 U.S.C. §§ 1051–1141 (2018).

⁷⁹ See Jean Wegman Burns, *Confused Jurisprudence: False Advertising Under the Lanham Act*, 79 B.U. L. REV. 807, 822, 844–45, 879 (1999) [hereinafter Burns II] (explaining the applicability of Section 43 and noting that market competitors, not individual consumers, are typically the beneficiaries of Section 43).

⁸⁰ *Huntingdon Life Sciences, Inc. v. Rokke*, 978 F. Supp. 662, 663 (E.D. Va. 1997).

⁸¹ *Id.* at 663–64.

⁸² *Id.* at 667 (“While Huntingdon alleges that PETA was a competitor, there is no allegation that PETA is engaged in testing any consumer products, the very definition of a direct competitor. Under Huntingdon’s rationale every public interest group and consumer reporting service opposing a particular industry or group or commenting upon their product or service would be a competitor for Lanham Act purposes.”).

⁸³ Dillard, *supra* note 12, at 38.

⁸⁴ *Id.* at 38, 52. Despite the inclusion of language stating that “any person” may sue under the Lanham Act, courts have, in practice, found numerous rationales for limiting standing to market competitors. Burns II, *supra* note 79, at 836. Courts have articulated the following justifications for the standing limitations: concerns about too many false advertising lawsuits, textual revisions in the act itself, the availability of other consumer remedies, and competitors as more fitting plaintiffs due to their financial situations. *Id.* at 836–38. However, there is some controversy as to whether this limitation makes sense; as Burns argues, competitor suits are not a proxy for consumer needs, since competitors will not necessarily challenge the advertising “that harm[s] consumers the most.” Burns, *supra* note 24, at 98.

within the meaning of the Act; while the language and substance of the Act is similar to the Federal Trade Commission Act, there is no other guidance about what claims are deceptive.⁸⁵ Thus, the terms have been primarily defined through case law, which relies on fraught legislative history and has produced complex and conflicting outcomes.⁸⁶ Still, if a suit under the Lanham Act is successful, the Act provides for broad remedies, including injunctive relief, damages, and corrective advertising.⁸⁷

V. Defenses

Animal agriculture companies have often sought dismissal of false advertising suits based on federal preemption. In *Animal Legal Defense Fund v. Hormel Foods Corp.*, for example, Hormel argued that the Federal Meat Inspection Act (FMIA) and the Poultry Products Inspection Act (PPIA) impliedly preempt consumer protection suits about its labeling of meat as “100% natural” because these suits would “serve as an obstacle to Congress’ intent to establish reliable, uniform descriptions of meat products.”⁸⁸ However, the court declined to find the lawsuit preempted, instead holding that neither statute suggests that Congress meant to heavily limit states’ powers to regulate advertising to protect their citizens from fraud and deception, allowing the lawsuit to move forward.⁸⁹ A district court in California ruled similarly, finding that neither the FMIA nor the PPIA contains a “clear and manifest” intention from Congress to preclude consumer protection suits, which are typically the province of state law.⁹⁰

However, a recent decision from the Tenth Circuit may cast doubt on these rulings. In *Thornton v. Tyson Foods, Inc.*, the court found that both a consumer’s and a competitor’s suits were preempted by the FMIA.⁹¹ Contrary to the decisions in *Hormel* and *Organic Consumers*, the court found that the FMIA does include an express preemption provision that prohibits states from imposing any “labeling . . . requirements in addition to, or different than” the federal requirements.⁹² Still, this case did not exactly address the animal welfare claims—the label indicated the beef was “Produced in the USA,” despite the fact

⁸⁵ See Burns II, *supra* note 79, at 835, 871–72 (summarizing the complex history of the Lanham Act’s application to misleading advertising); Gregory Klass, *False Advertising Law and New Private Law*, GEORGETOWN UNIV. L. CTR. 2, 3, 7, 15 (2020) (describing the similarities between Lanham Act and the Federal Trade Commission Act).

⁸⁶ Burns II, *supra* note 79, at 835, 871–72; Klass, *supra* note 85, at 2, 3, 7, 15.

⁸⁷ 15 U.S.C. §§ 1116–1117(a); See D. Scott Bosworth et al., *Corrective Advertising in Lanham Act Damages: The Use and Misuse of Past Advertising Expenditures*, 107 TRADEMARK REP. 760, 761 (2017) (describing corrective advertising as a form of economic damages).

⁸⁸ *Animal Legal Def. Fund v. Hormel Foods Corp.*, 258 A.3d 174, 191 (D.C. 2021).

⁸⁹ *Id.* at 191–92.

⁹⁰ *Organic Consumers Ass’n v. Sanderson Farms*, 284 F. Supp. 3d 1005, 1013 (N.D. Cal. 2018).

⁹¹ *Thornton v. Tyson Foods*, 28 F.4th 1016, 1020 (10th Cir. 2022).

⁹² *Id.* at 1020 (quoting Federal Meat Inspection Act, 21 U.S.C. § 678 (1906)).

that the cattle were raised in other countries.⁹³ FSIS approved the producers' labels in accordance with their general policy that products which are "processed" in the United States may bear the "Produced in the USA" label.⁹⁴

In interpreting the statute, the court found that the preemption section of the FMIA "sweeps widely," preventing not only the imposition of conflicting labeling requirements by states, but also non-conflicting, additional labeling requirements.⁹⁵ This, coupled with the FSIS's interpretation that the products could bear the "Produced in the USA" label, meant that the plaintiffs' labeling claims were "plainly" preempted.⁹⁶

VI. Non-Litigation Opportunities

While litigation strategies under state consumer protection statutes seem to hold significant promise, there may be additional means to address animal agriculture companies' "humane" claims. Individuals and other interested parties may submit petitions for rulemaking to the USDA seeking the promulgation of more stringent standards for both humane handling and labeling. As mentioned previously, new standards would eliminate many of the ambiguities and force animal agriculture operators to comply with better handling standards for their products to receive desirable labels such as "Certified Humane."

Additionally, as a prelude to litigation or as a stand-alone tactic, consumers, market competitors, and government entities may submit formal complaints to regulatory bodies such as the Federal Trade Commission (FTC), which reviews complaints about deceptive trade practices.⁹⁷

Individual consumers, classes, market competitors, and states may also submit complaints to the National Advertising Division (NAD) of the Better Business Bureau (BBB). NAD serves as an investigative arm of the BBB, providing some private regulation of the advertising industry.⁹⁸ Because the BBB is a self-regulating program, NAD's determinations are not binding law; nonetheless, NAD inquiries can lead to the voluntary removal of misleading advertising.⁹⁹ NAD investigates a complaint, gives public recommendations about the ad-

⁹³ *Id.*

⁹⁴ *Id.* at 1022–23.

⁹⁵ *Id.* at 1024 (citing 21 U.S.C. § 678) (prohibiting states from imposing "[m]arking, labeling, packaging, or ingredient requirements in addition to, or different than, those made under this chapter").

⁹⁶ *Id.*

⁹⁷ *Bureau of Consumer Protection*, FED. TRADE COMM'N, <https://perma.cc/T2LN-6HXU> (accessed Feb. 16, 2023).

⁹⁸ *National Advertising Division*, BETTER BUS. BUREAU, <https://perma.cc/9W82-HVTF> (accessed Feb. 17, 2023).

⁹⁹ *Id.* In cases where NAD inquiries have not led to removal of the advertising claims at issue, the cases are often referred to the FTC for further investigation and potential legal action.

vertising at issue, and allows a period of time for the advertiser to respond.¹⁰⁰ While the FTC dismisses the majority of complaints it receives and brings only a few major cases per year, NAD may be a more favorable body for animal welfare complaints because it offers public recommendations in response to complaints almost daily.¹⁰¹ Successful complaints to the FTC and to NAD may directly impact company representations and be useful in subsequent litigation, particularly to show company awareness of misrepresentations.

For instance, in 2003, Compassion Over Killing (COK) filed complaints with both the FTC and NAD against United Egg Producers (UEP).¹⁰² UEP created a labeling system which certified certain farms that met 90% of the trade group's criteria during annual inspections as "Animal Care Certified" (ACC).¹⁰³ The criteria included "fresh food and water," "the ability to move throughout their cages," to "dust bath[e] and scratch" and to provide protection from environmental harms.¹⁰⁴ While these standards provided for some level of well-being for the hens, they still allowed egg producers to confine hens in cages with no enrichment or outdoor access.¹⁰⁵

COK filed a complaint with NAD, which concluded that the label was misleading because consumers could "reasonably interpret the seal to mean that the hens who laid the eggs sold in ACC-labeled cartons are accorded a more humane level of care than what is allowed by the UEP guidelines."¹⁰⁶ The review board upheld this finding and recommended that UEP discontinue or modify the ACC program to more accurately represent the specific standard of care with which the farms produced the eggs.¹⁰⁷

While COK had already filed a separate complaint with the FTC, NAD also recommended the case to the FTC for further investigation and potential enforcement.¹⁰⁸ At that time, UEP had taken no action on the ACC label.¹⁰⁹ However, shortly following referral to the FTC, UEP released a new label—"United Egg Producers Certified"—maintaining the same care and inspection standards while changing the name of the program such that consumers will not think that the eggs

¹⁰⁰ *Id.*

¹⁰¹ *BBB National Programs Decision Summaries*, BETTER BUS. BUREAU, <https://perma.cc/ST3G-UWHL> (accessed Feb. 17, 2023).

¹⁰² Letter from Mary K. Engle, Assoc. Dir., Div. of Advert. Prac., Fed. Trade Comm'n, to Al Pope, President and CEO, United Egg Producers, and Gene Gregory, Senior Vice President, United Egg Producers (Sept. 30, 2005), <https://perma.cc/ABW6-94K7> (accessed Feb. 14, 2023).

¹⁰³ *Seal: United Egg Producers Certified*, CONSUMER REP. (2022), <https://perma.cc/4X9C-AEV6> (accessed Feb. 14, 2023).

¹⁰⁴ *Five Freedoms of Animal Welfare*, UNITED EGG PRODUCERS (July 23, 2021), <https://perma.cc/XDX5-4G5Q> (accessed Feb. 14, 2023).

¹⁰⁵ *Seal: United Egg Producers Certified*, *supra* note 103.

¹⁰⁶ Letter from Mary K. Engle, *supra* note 102.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

are produced more ‘humanely’ than others.¹¹⁰ In a closing letter in 2005, the FTC stated that it believed that this step “directly” addressed the misrepresentation at issue and that it would not be taking enforcement action.¹¹¹ Thus, while NAD determinations may ultimately be non-binding, they have the potential to create meaningful change in labeling practices, especially if coupled with a threat of action from the FTC.

VII. Conclusions

Consumer protection claims have become a critical tool for animal welfare advocates to attack the misrepresentations that animal agriculture producers make about the humane treatment of their animals. This is an important accountability mechanism because “humane” labeling standards have not been adopted on the federal level, consumers increasingly believe in the importance of making ethical food-purchasing decisions, and companies are increasingly seeking to profit at greater margins by marketing their products as “humane.” While these lawsuits were often dismissed in the early 2000s, the claims have become both more common and more successful, leading to large settlements and removals of misleading advertising. Most recently, these lawsuits have received attention from attorneys outside the animal welfare movement, which may create both new challenges and possibilities. The primary limitation of consumer protection claims in the animal welfare space is that these lawsuits do not actually address the treatment of the animals themselves, but rather only what the companies themselves are saying about the treatment of their animals. Still, consumer protection lawsuits represent an important opportunity to hold animal agriculture producers responsible for any misrepresentations they make about their treatment of animals.

¹¹⁰ *Id.* at 2.

¹¹¹ *Id.* However, the FTC stated that it reserved the right to continue to monitor UEP’s activities and to bring an enforcement action in compliance with Section 5 of the FTC Act. *Id.*