



SO SUE ME: HOW CONSUMER FRAUD,
ANTITRUST LITIGATION,
AND OTHER KINDS OF LITIGATION
CAN EFFECT CHANGE IN THE TREATMENT
OF EGG-LAYING HENS WHERE
LEGISLATION FAILS

Student Note

Sarah Cranston

INTRODUCTION

Animal welfare groups like the Humane Society of the United States (HSUS) and Compassion Over Killing (COK) are diligent in their efforts to improve the lives of egg-laying hens and continue to push legislation at both the federal and state level to improve farm animal lives, but the process can be slow. What's more, the United States is home to mostly omnivores who, at least in the past century, have had little knowledge or concern for how the animals they eat end up on their plate.¹

However, there is a growing popular concern regarding farm animal welfare and the response, in addition to changing

¹ See generally, Michael Pollan, *The Omnivore's Dilemma* (2006).

legislation, has been to inform consumers about the conditions under which animal products were produced.² As part of that effort, the U.S. government, farm animal industry, and independent third parties have developed labeling programs addressing animal welfare issues. However, their impact on “improving animal welfare has been minimal.”³

Food labeling and marketing claims are typically unverified and subjective.⁴ Among the claims least relevant to animal welfare are those found on shell egg cartons.⁵ Since changing public perception can be slow and legislation even slower, animal welfare groups also look to litigation to improve egg-laying hen welfare. What is most interesting, and also very

² Regulation of farm animal treatment is not discussed at length here because the federal government, with the exception of the Organic Foods Productions Act of 1990, 7 U.S.C.A. § 6501 (West, Westlaw through P.L. 112-54 (excluding P.L. 112-40) approved 11-12-11), does not address the welfare of farm animals while they are on the farm. Federal regulations protecting animals include: Animal Welfare Act, 7 U.S.C.A. §§ 2131-2159 (West, Westlaw through P.L. 112-54 (excluding P.L. 112-40) approved 11-12-11); Humane Methods of Livestock Slaughter, 7 U.S.C.A. §§ 1901-1907 (West, Westlaw through P.L. 112-54 (excluding P.L. 112-40) approved 11-12-11); and Twenty-Eight Hour Law of 1877, 49 U.S.C.A. § 80502 (West, Westlaw through P.L. 112-54 (excluding P.L. 112-40) approved 11-12-11). Furthermore, all fifty states either explicitly or implicitly exempt livestock from their animal cruelty laws. Sheila Rodriguez, *The Morally Informed Consumer: Examining Animal Welfare Claims on Egg Labels*, 30 Temp. J. Sci. Tech. & Env'tl. L. 51, 61 n.96 (2011). Only two states address the confinement of hens or prohibit battery cages. They are California and Michigan. See Cal. Health & Safety Code §§ 25990-25995 (West, Westlaw current with all 2011 Reg.Sess. laws; all 2011-2012 1st Ex.Sess. laws; and Gov.Reorg.Plan No. 1 of 2011.); M.C.L.A. 287.746 (West, Westlaw through P.A. 2011, No. 265, of the 2011 Regular Session, 96th Legislature).

³ Citizens' Petition to Change the Labeling Requirements for Eggs Sold in the United States, Compassion Over Killing, 7 http://www.cok.net/files/FDA_egg_labeling_petition.pdf [hereinafter Citizens' Petition] (last visited Jan. 4, 2011) (Consolidated Version of No. 2006P-0394 and No. 2007P-0235/CP1).

⁴ FARM SANCTUARY, FARM ANIMAL WELFARE: AN ASSESSMENT OF PRODUCT LABELING CLAIMS, INDUSTRY QUALITY ASSURANCE GUIDELINES AND THIRD PARTY CERTIFICATION STANDARDS 6 (2005), *available at* http://www.farmsanctuary.org/mediacenter/assets/reports/FAWS_Report.pdf [hereinafter FARM SANCTUARY, FARM ANIMAL WELFARE].

⁵ CITIZENS' PETITION, *supra* note 3, at 8.

effective, is that the statutes they are using were designed to protect human and not animal interests.

The following focuses on regulation of the egg production industry and is divided into three sections: the first section provides a brief overview of conventional egg-laying hen husbandry practices and the agencies that regulate labels; the second discusses the egg industry's incentive to use certain kinds of labeling; and the final section gives an overview of creative litigating on the part of animal welfare groups. This last section primarily considers consumer fraud and anti-trust litigation but also presents cases having to do with quasi-government agency actions and environmental and nuisance law. These cases show that effective animal welfare litigation does not have to be about farm animals at all—in fact, it might be more successful if it is not.

THE REGULATING AGENCIES

The U.S. Department of Agriculture (USDA),⁶ and in some cases, the Food and Drug Administration (FDA),⁷ are charged with regulating egg and egg product labeling and marketing claims. Within the USDA are the Food Safety and Inspection Service (FSIS)⁸ and the Agricultural Marketing

⁶ Under the authority of the USDA, a label that is false or misleading or has not been approved as required by the regulations of the Secretary of Agriculture may be withheld unless the labeling or container is changed so that it will no longer be “false or misleading.” 21 U.S.C.A. § 1036 (West, Westlaw through P.L. 112-28 approved 8-12-11).

⁷ The FDA has primary statutory authority to establish labeling requirements for foods pursuant to the Federal Food, Drug and Cosmetic Act (FFDCA). U.S. DEP'T OF AGRIC., A GUIDE TO FEDERAL FOOD LABELING REQUIREMENTS FOR MEAT AND POULTRY PRODUCTS 6 (R. Post et al. eds., 2007), available at www.fsis.usda.gov/PDF/Labeling_Requirements_Guide.pdf. The FDA regulations regarding shell egg labels are confined to handling and enforcement. For example, one regulation requires a label instructing the consumer to keep their eggs refrigerated and cook them thoroughly. 21 C.F.R. § 101.17(h) (2010). The other regulation exempts shell eggs from the requirement that nutrition information be on the outer label, rather than the inner label. 21 C.F.R. § 101.9 (2010). The FDA regulations do not address animal welfare and will not be addressed here.

⁸ The FSIS is a public health agency charged with “ensuring that the nation's commercial supply of meat, poultry, and egg products is safe,

Service (AMS).⁹ Of primary interest here are the AMS, which regulates shell eggs, and the Federal Trade Commission (FTC). Under the Federal Trade Commission Act of 1914, the FTC is charged with investigating complaints of deceptive or unfair marketing claims and can take action against producers that use labels incorrectly.¹⁰ Just how many farmers display animal-related food product labeling claims is unknown, but specialty products are one of the fastest growing segments of the food industry.¹¹

wholesome, and correctly labeled and packaged.” FSIS has jurisdiction over egg products, but not shell eggs. *About FSIS*, USDA FOOD SAFETY & INSPECTION SERV. HOMEPAGE, http://www.fsis.usda.gov/about_fsis/index.asp (last visited Jan. 12, 2012). See generally U.S. DEPT OF AGRIC., *supra* note 7, at 6.

⁹ AMS regulates five commodity programs, one of which oversees poultry and shell eggs. AMS also administers the National Organic Program (NOP), which “develops, implements, and administers national production, handling, and labeling standards for organic agricultural products.” *About AMS*, USDA AGRIC. MARKETING SERV., <http://www.ams.usda.gov/AMSV1.0/ams.fetchTemplateData.do?template=TemplateD&navID=AboutAMS&topNav=AboutAMS&page=AboutAMS&acct=AMSPW> (last visited Jan. 12, 2012).

¹⁰ The Federal Trade Commission Act states that the FTC shall prohibit the false advertisement of “foods, drugs, devices, services or cosmetics.” 15 U.S.C.A. § 52 (West, Westlaw through P.L. 112-28 approved 8-12-11). Although the definition of “advertisement” excludes labeling, FTC has authority to prevent “unfair or deceptive acts or practices in or affecting commerce.” § 45(a)(1). This allows FTC to take action against all unfair business practices, including false and misleading labeling of food products. *Fresh Grown Preserve Corp. v. FTC*, 125 F.2d 917, 919 (2d Cir. 1942). Under the FTC Act, the FTC may proceed against anyone who disseminates a false advertisement that induces, or is likely to induce, the purchase of a product in interstate commerce. § 45. A producer must be able to substantiate a claim before it can be made and policy guidelines require that a claimant have a reasonable basis for an objective fact. Different claims require different levels of substantiation. See National Commission on Egg Nutrition, 88 FTC 89, 191-92 (1976), 1976 WL 180010 (requiring that claims about the healthfulness of a particular product have a relatively high level of substantiation). The courts have upheld FTC’s authority to proceed against false labeling of food products. See *Houbigant v. Federal Trade Commission*, 139 F.2d 1019, 1020 (2d Cir. 1944) (holding FDA does not have exclusive jurisdiction over false and misleading labeling).

¹¹ FARM SANCTUARY, THE TRUTH BEHIND THE LABELS: FARM ANIMAL WELFARE STANDARDS AND LABELING PRACTICES 45 (April 2009), available at <http://www.farmsanctuary.org/issues/assets/Farm%20Animal%20Welfare%20Standards%20Report.pdf> [hereinafter FARM SANCTUARY, THE TRUTH].

CONVENTIONAL INDUSTRY PRACTICES

There are no explicit federal prohibitions in egg-laying hen husbandry practices and chickens are exempt from many state animal anti-cruelty statutes, with the exception of recent California and Michigan laws.¹² In response to pressure from food retailers, trade associations and individual producers have developed programs and guidelines to assess farm animal rearing and handling.¹³ In creating these programs, producers may avoid government regulation and third-party audits.¹⁴

Once such program is United Egg Producers Certified (UEP).¹⁵ Approximately ninety-five percent of the eggs produced in the U.S. are produced under this program.¹⁶ Because of the number of egg producers UEP certifies and because the allowable practices are considered routine husbandry practices, I will characterize UEP's standard as conventional.

UEP certification addresses housing and space allowance, beak trimming, molting, and handling and transportation.¹⁷ UEP currently prohibits only one inhumane practice – feed withdrawal to induce molting in hens.¹⁸ Specific practices

¹² See *supra* note 2 and accompanying text.

¹³ FARM SANCTUARY, THE TRUTH, *supra* note 11, at 1.

¹⁴ *Id.*

¹⁵ *Id.* at 3.

¹⁶ *About Us*, UNITED EGG PRODUCERS, <http://www.unitedegg.org/> (last visited Jan.14, 2012).

¹⁷ See UNITED EGG PRODUCERS, ANIMAL HUSBANDRY GUIDELINES FOR U.S. EGG LAYING FLOCKS (2010), *available at* <http://www.uepcertified.com/media/pdf/UEP-Animal-Welfare-Guidelines.pdf>.

¹⁸ *Id.* at 10. Forced molting extends the productive life of egg-laying hen flocks and results in a significant reduction in the “number of chickens needed to produce the nation’s egg supply.” Letter from American Veterinary Medical Association to Valerie Frances, Executive Director of the National Organic Standards Board, Livestock Committee § (c)(10) (Oct. 19, 2009), *available at* <http://www.aaap.info/assets/documents/AVMA%20Comments%20National%20Organic%20Program--Welfare%20Standards%20Oct%202009.pdf>. Methods of feed withdrawal varied among procedures with feed being removed

condoned by the industry violate what animal welfare groups call the “Five Freedoms” for farm animals.¹⁹ Contentious practices include the following: non-therapeutic use of antibiotics; feed withdrawal up to 24 hours before slaughter; wire and slatted flooring; beak trimming;²⁰ confinement to small cages;²¹ continuous exposure to low-level light; and, lastly, denying access to the outdoors, litter, dust bathing areas, and

anywhere from five to fourteen days. D. D. Bell, *Historical and Current Molting Practices in the U.S. Table Egg Industry*, 82 *POULTRY SCIENCE* 965, 968 (2003).

¹⁹ The “five freedoms” were created by the United Kingdom’s Farm Animal Welfare Council, and assumes that humans have a moral obligation to afford farm animals “five freedoms.” The freedoms are an “ideal” and intended to provide a framework for improving the welfare of animals within an effective livestock industry. The “Five Freedoms” are: (1) freedom from hunger and thirst – by ready access to fresh water and a diet to maintain full health and vigor; (2) freedom from discomfort – by providing an appropriate environment including shelter and a comfortable resting area; (3) freedom from pain, injury and disease – by prevention or rapid diagnosis and treatment; (4) freedom to express normal behavior – by providing sufficient space, proper facilities, and company of the animal’s own species; and (5) freedom from fear and distress – by ensuring conditions and treatment that avoid mental suffering. *Five Freedoms*, FARM ANIMAL WELFARE COUNCIL, <http://www.fawc.org.uk/freedoms.htm> (last visited Jan. 14, 2012).

²⁰ Beak trimming is a routine husbandry procedure that removes one-third to one-half of the hen’s beak and aims to “prevent feather pecking and cannibalism.” Heng-wei Cheng, *Current Developments in Beak-Trimming*, LAYING HEN WELFARE FACT SHEET (USDA-ARS-NWA Livestock Behavior Research Unit, West Lafayette, IN), Fall 2010, at 1. While beak trimming does seem to have some positive behavioral impact, there is a considerable body of research indicating the birds suffer acute and chronic pain as a result of trimming, particularly if the trimming is done after five weeks using a hot-blade beak trimmer rather than the infrared technology that is sometimes used. *Id.* at 2.

²¹ These small cages are also known as battery cages. Battery cages are wire cages, commonly measuring sixteen inches wide and are “stacked in tiers and lined up in rows.” *The Welfare of Hens in Battery Cages: A Summary of the Scientific Evidence*, FARM SANCTUARY, http://www.farmsanctuary.org/issues/factoryfarming/eggs/bc_evidence.html (last visited Jan. 14, 2012). Four hens are usually housed in a cage this size. Cages may be bigger, but they are always stacked in tiers. The birds cannot stretch their wings or legs. *See id.* UEP requires cages to have an area of sixty-seven square inches for white hens and seventy-six square inches for brown hens. UNITED EGG PRODUCERS, *supra* note 17.

nest boxes.²² Industry practices also do not address slaughtering practices for spent hens and male chicks.²³

Egg producers that wish to display the UEP Certified label must submit monthly compliance reports and be audited yearly by an independent auditor approved by UEP.²⁴ To become certified, producers must implement the standards in all of their own as well as contract production facilities.²⁵ Either USDA-AMS or a private auditing company conducts the audit.²⁶ Auditors award points in various husbandry areas and the producer must receive 170 out of a possible 200.²⁷

²² FARM SANCTUARY, THE TRUTH, *supra* note 11, at 68.

²³ In the Humane Slaughter Act, Congress declared that using humane methods to slaughter livestock would prevent needless suffering. It is U.S. policy “that the slaughtering of livestock and the handling of livestock in connection with slaughter shall be carried out only by humane methods.” 7 U.S.C.A. §1901 (West, Westlaw through P.L. 112-28 approved 8-12-11). The term livestock includes “cattle, calves, horses, mules, sheep, swine, and other livestock.” 7 U.S.C. § 1902(a) (West, Westlaw through P.L. 112-28 approved 8-12-11). “Other livestock” is not defined and while it could be read to include poultry, “the USDA has always taken the position that it does not.” Jeff Welty, *Humane Slaughter Laws*, 70 LAW & CONTEMP. PROBS. 175, 198 (2007). One slaughter method for spent hens was observed at Rose Acre Farms, one of the three largest egg producers in the nation. There a “HSUS investigator documented workers grabbing hens by their legs, then cramming them into gassing carts where they’re killed with carbon dioxide.” *Appalling Cruelties at Nation’s Top Egg Producers*, HUMANE SOC’Y OF THE U.S. (Apr. 27, 2010), http://www.humanesociety.org/news/news/2010/04/investigation_rose_acre_rembbrandt_040710.html.

²⁴ FARM SANCTUARY, THE TRUTH, *supra* note 11, at 30.

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.* at 31. Points are awarded according to whether a facility uses or prohibits certain husbandry practices. For example, if a facility meets UEPs housing and space allowance, it earns 110 points; if it prohibits beak trimming, it earns thirty points. Molting, handling and transportation are also awarded point values. Producers that do not meet the required points in the “housing and space allowance” section automatically fail; they also fail if there is evidence of backfilling. *Id.* “Backfilling is the practice of adding extra pullets (young hens) from growing houses to cages of older birds to replace mortality.” Antitrust Complaint, *infra* note 166, at 8. This will be relevant when UEP’s price-fixing scam is discussed later. Companies that fail may request to be re-audited, but it must be completed within thirty days of the original audit. UNITED EGG PRODUCERS, *supra* note 17, at 5. UEP represents producers that

INDEPENDENT THIRD-PARTY VERIFICATION PROGRAMS

The USDA will accept third-party certification claims once “documentation about the independent certification program has been submitted and reviewed by FSIS and AMS staff.”²⁸ The USDA approved the “Certified Humane” and “American Humane Certified” third-party certification programs in this manner. The “Certified Humane Raised and Handled” program is a third-party certification and labeling program that aims “to improve the lives of farm animals by driving consumer demand for kinder and more responsible farm animal practices.”²⁹ The standards for egg-laying hen care are as follows. Antibiotics are permitted for treatment of disease only, no access to outdoors is required, each hen must be allotted 1.5 square feet and 1.0-1.2 square feet for houses with overhead perches and may not be continuously confined to wire cages.³⁰ The hens must have access to litter for dust bathing and at least one nest box per five hens.³¹ The hens must be exposed to at least eight hours of dim light and six hours of darkness per day. Feed withdrawal to induce molting is prohibited.³² The American Humane certification program standards are essentially the same as Certified Humane except that it requires

house “approximately 95 percent of all the nation’s egg-laying hens.” *About Us*, UNITED EGG PRODUCERS, <http://www.unitedegg.org/> (last visited Jan. 14, 2012). UEP estimates there were 281 million hens in the United States. *General U.S. Stats*, UNITED EGG PRODUCERS, <http://www.unitedegg.org/GeneralStats/default.cfm> (last visited Jan. 14, 2012). This means nearly 267 million hens were being kept in UEP-certified facilities in 2010. Even though the majority of U.S. egg producers are audited by UEP, only 25 percent of the facilities are actually audited each year, because UEP only requires that 50 of a company’s farms be audited and on those farms only fifty percent of the actual buildings are inspected. FARM SANCTUARY, THE TRUTH, *supra* note 11, at 30.

²⁸ FARM SANCTUARY, THE TRUTH, *supra* note 11, at 18.

²⁹ *Overview*, CERTIFIED HUMANE, <http://www.certifiedhumane.org/index.php?page=overview> (last visited Jan. 14, 2012).

³⁰ FARM SANCTUARY, THE TRUTH, *supra* note 11, at 68.

³¹ *Id.*

³² *Id.*

producers to give their hens at least minimal access to the outdoors.³³

OTHER LABELS RELEVANT TO EGG-LAYING HENS

The lack of labeling regulation regarding descriptive terms allows producers to make certain claims that imply humane animal husbandry practices and still participate in many inhumane practices. Under the Agricultural Marketing Act of 1946³⁴ and the Egg Products Inspection Act,³⁵ AMS handles the voluntary USDA grading (e.g. Grade A Large, Grade A Extra Large, etc.) of shell eggs and all claims regarding shell eggs marked with a USDA grade shield.³⁶ If producers choose not to have their eggs graded by the USDA they are subject to state regulations, which vary and may not exist at all.³⁷ Aside from USDA grading, egg producers, like any food manufacturer, add descriptive labeling to egg cartons. What follows is a primer on some of the animal-welfare-related terms that appear on those cartons and an explanation of the applicable federal regulation, if any.

Cage-Free & Free-Roaming

Cage-free means that the laying hens are confined in a “building, room, or open area with unlimited access to food and

³³ *Id.*

³⁴ 7 U.S.C.A. §§ 1621-1638 (West, Westlaw through P.L. 112-71 (excluding P.L. 112-40, 112-55, and 112-56) approved 12-19-11).

³⁵ 21 U.S.C.A. §§ 1031-1056 (West, Westlaw through P.L. 112-71 (excluding P.L. 112-40, 112-55, and 112-56) approved 12-19-11).

³⁶ 7 C.F.R §§ 56.1-.77 (2010).

³⁷ The most recent and notable state regulation regarding egg-laying hen husbandry practices is the passage of Prop 2 in California. The law requires that, as of January, 2015, all whole eggs sold in California sourced from in-state and out-of-state producers come from hens able to stand up, fully extend their limbs, lie down and spread their wings without touching either side of their enclosures. CAL. HEALTH & SAFETY CODE §§ 25990-25995 (West, Westlaw through all 2010 Reg.Sess. laws; all 2009-2010 1st through 8th Ex.Sess. laws; and all Props. on 2010 ballots).

water, and with freedom to roam within these areas.”³⁸ AMS allows a facility to use the term “cage-free” after the agency has visually confirmed that the facility is free of cages.³⁹ It will revisit the facility at least once a year to ensure cages are not in use.⁴⁰ If the farm produces both caged and cage-free eggs AMS requires the facility to segregate the eggs.⁴¹ “Free-roaming” may be used interchangeably with cage-free provided the hens are allowed to roam freely within the confines of a barn.⁴² It’s important to note that while cage-free eggs come from hens not confined to a cage, the density at which they are kept may be “so high that some of the problems associated with caging are experienced.”⁴³

Free-Range

The only difference between cage-free and free-range is the hens in the latter category must have access to the outdoors. However, producers may confine free-range hens due to “(1) [i]nclement weather; (2) conditions under which the health, safety or well being of the animal could be jeopardized; or (3) risk to soil or water quality.”⁴⁴ AMS does not regulate “the number and size of exits, size of the outdoor area, [or] flock density or size.”⁴⁵

The term free-range may be used if the eggs are USDA Certified Organic. If the eggs are not organic, the use of the term “free-range” is not approved by the agency.⁴⁶ As with cage-free hens, it is unlikely that free-range (or “free-roaming”) hens

³⁸ FARM SANCTUARY, THE TRUTH, *supra* note 11, at 15.

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.* at 15-16.

⁴³ FARM SANCTUARY, THE TRUTH, *supra* note 11, at 16.

⁴⁴ *Id.* at 15.

⁴⁵ *Id.*

⁴⁶ *Id.*

are ever able to venture outside. The barn doors are usually open for a limited period of time each day and outside areas are unlikely to have “features attractive to hens, such as adequate space, forage and protection from predators and environmental elements.”⁴⁷ There is very little actual difference between the terms “cage free,” “free roaming,” and “free range.”

Humanely Raised

Because the USDA does not approve it for use, the producer that uses the term “humanely raised” must include an explanation on the label of what it means by the term and send the USDA-FSIS, and in some cases, the Agricultural Marketing Service documentation substantiating the claim.⁴⁸ While the USDA does not visit the farms to assure compliance with “humanely raised” claims, it does require third-party certification programs, such as “Certified Humane” and “American Humane,” to show how compliance with their standards is verified.⁴⁹ The USDA handles complaints regarding use of the “humanely raised” unconnected with a third-party certification program.⁵⁰ If it is asserted in connection with a third-party certification program the USDA refers the complaint to the relevant enforcement program for investigation.⁵¹ If it is

⁴⁷ *Id.*

⁴⁸ FARM SANCTUARY, THE TRUTH, *supra* note 11, at 18. AMS allows companies to develop processes themselves and then make marketing claims associated with those processes once AMS verifies them. *Grading, Certification, and Verification*, AGRIC. MARKETING SERV., <http://www.ams.usda.gov/AMSV1.0/ams.fetchTemplateData.do?template=TemplateN&navID=GradingCertificationandVerification&leftNav=GradingCertificationandVerification&page=PYProcessVerifiedPrograms&acct=pgeinfo> (last visited Jan. 21, 2012). This includes claims related to raising and processing the hens and eggs. They may also market themselves as being “USDA Process Verified” with use of the “USDA Process Verified” shield and term. *Id.* The USDA Process Verified Program allows companies to provide customers with assurances that it provides consistently reliable products. *Id.* The company develops specific verified process points and supports them with a documented quality management system. *Id.*

⁴⁹ FARM SANCTUARY, THE TRUTH, *supra* note 11, at 19.

⁵⁰ *Id.*

⁵¹ *Id.* at 19.

not used in connection with a third-party verification program it appears that it may be used without consequence.⁵²

Natural

USDA defines the term “natural” only in terms of meat and poultry products and not eggs.⁵³ It is only appropriate for use on “products that contain no artificial ingredients, including artificial coloring ingredients or chemical preservatives,” and on products where “ingredients are not more than minimally processed.”⁵⁴ It may be used on eggs indiscriminately. Heavy use of the natural label probably leads to some consumer confusion about production practices for organic and non-organic eggs.⁵⁵

Organic

The National Organic Program (NOP) is a federal program administered by the USDA. In terms of animal welfare it requires organically-raised animals be provided with “[y]ear-round access for all animals to the outdoors, shade, shelter, exercise areas, fresh air, clean water for drinking, and direct sunlight, suitable to the species, its stage of life, the climate, and the environment.”⁵⁶ Immediately after the NOP regulations were finalized, poultry and egg producers complained that they should be exempted from the requirements.⁵⁷ They are not

⁵² The terms “humane,” “animal care,” “animal welfare,” and “animal well-being” may also be used without actually treating the animals humanely. *Id.* at 51.

⁵³ FARM SANCTUARY, THE TRUTH, *supra* note 11, at 19

⁵⁴ *Id.*

⁵⁵ LYDIA OBERHOLTZER ET AL., ORGANIC POULTRY AND EGGS CAPTURE HIGH PRICE PREMIUMS AND GROWING SHARE OF SPECIALTY MARKETS 6 (USDA, Outlook Report from the Econ. Research Serv. No. LDP-M-150-01, 2006), available at www.ers.usda.gov/publications/ldp/2006/12dec/.../ldpm15001.pdf.

⁵⁶ 7 CFR § 205.239 (2010).

⁵⁷ FARM SANCTUARY, THE TRUTH, *supra* note 11, at 37. As soon as the NOP regulations were finalized, poultry and egg producers argued that they should be exempt from the outdoor access requirements. *See id.* at 37-38. The National Organic Standards Board accepted public comment on the issue beginning in

exempt. Other standards prohibit use of antibiotics and require dry bedding.⁵⁸ Although forced molting is not specifically addressed, producers must provide “a total feed ration” and access to direct sunlight.⁵⁹ Producers are allowed a certain degree of non-compliance so long as they describe how the issues are being remedied. Anyone may file a complaint with the NOP, the State Organic Program (if available), or the certifying agent if they suspect a violation of NOP standards.⁶⁰

THE ECONOMICS OF ANIMAL WELFARE

The best market indicator of whether consumers will actually pay for humanely raised products is the growing organic market. According to the Organic Trade Association (OTA), U.S. sales of organic food and beverages in 2010 were an estimated \$26.7 billion.⁶¹ Organic egg sales grew 12.5% from 2004 to 2005 when they earned producers \$161 million.⁶² Organic eggs

May 2002 and adopted a clarification which stated that “organic livestock facilities must give poultry the ability to choose to be in the housing or outside in the open air and direct sunlight” and furthermore, that a producer’s organic system plan must “illustrate how the producer will maximize and encourage access to the outdoors.” FARM SANCTUARY, FARM ANIMAL WELFARE, *supra* note 4, at 58. Despite the clarification, the USDA’s October 2002 official interpretation of the “access” provision said nothing more than that producers must provide livestock with an opportunity to exit any barn or other enclosure. *Id.*

⁵⁸ FARM SANCTUARY, THE TRUTH, *supra* note 11, at 63.

⁵⁹ *Id.* at 68.

⁶⁰ *Id.* at 38.

⁶¹ *Industry Statistics and Projected Growth*, ORGANIC TRADE ASSOC., <http://www.ota.com/organic/mt/business.html> (last visited Jan. 21, 2012).

⁶² OBERHOLTZER ET AL., *supra* note 55, at 8. “The number of organic eggs produced in the United States is currently not tracked; however, the number of organic layer hens provides an indication of the level of production.” *Id.* at 11. The most recent ERS statistics say there were approximately 5.5 million organic certified laying hens in the United States in 2008. *Organic Production*, USDA ECON. RESEARCH SERV., tbl. 5, <http://www.ers.usda.gov/data/organic/> (follow “Table 5. Certified Organic Livestock” hyperlink) (last visited Jan. 21, 2012).

sales grew about 19% annually between 2000 and 2007.⁶³ A 2005 Nielsen study reported that 15% of all consumers purchase organic eggs on a regular basis,⁶⁴ despite the fact that organic products cost more. Organic products and products that make similar claims are more expensive due to higher production, processing, procurement, and distribution costs, as well as certification and segregation costs.⁶⁵ Supply and demand also play a part in the price organic eggs demand⁶⁶ as does the fact that organic consumers are *willing* to pay a higher price for organic eggs.⁶⁷

The growing organic egg sector suggests that making certain representations regarding animal welfare can dramatically increase marketability. Considering the demand for humanely raised animals, egg producers can expect to increase profits by exploiting this niche market. Unfortunately, as previously indicated, the lack of strict regulation of descriptive terms allows egg producers to make claims that imply a greater standard of care than actually exists.⁶⁸

Economics considers what people value or prefer, but unlike moral philosophy, which is concerned “with what preferences people ought to have,” economics asks “what preferences people actually have, and how they can best be

⁶³ CAROLYN DIMITRI & LYDIA OBERHOLTZER, *MARKETING U. S. ORGANIC FOODS: RECENT TRENDS FROM FARMS TO CONSUMERS* 18 (USDA, Econ. Info. Bull. No. 58, 2009).

⁶⁴ OBERHOLTZER ET AL., *supra* note 55, at 8.

⁶⁵ *Id.* at 13.

⁶⁶ See Kim Severson, *Suddenly, the Hunt is On for Cage-Free Eggs*, N.Y. TIMES (Aug. 12, 2007), available at <http://www.nytimes.com/2007/08/12/us/12eggs.html>. A 2007 article in the NEW YORK TIMES described cage-free eggs as the latest “must have” foodie item. *Id.* The sudden increase in demand caused big buyers like Ben & Jerry’s Ice Cream and Burger King to have difficulty acquiring the quantities of eggs it would need. *Id.* Ben & Jerry’s said it would take four years to go completely cage-free. *Id.* Even though cage-free eggs sold up to an extra 60 cents per dozen, producers were wary that the craze was just a passing fad and hesitant to convert their facilities, further exacerbating the supply/demand problem. *Id.*

⁶⁷ OBERHOLTZER ET AL., *supra* note 55, at 13.

⁶⁸ CITIZENS’ PETITION, *supra* note 3, at 9.

satisfied.”⁶⁹ An economically efficient society is defined as one that maximizes “the satisfaction of its members’ preferences.”⁷⁰ Since farmed animals do not participate in markets, their satisfaction can only be measured “by the extent to which human consumers value animal welfare when making their economic decisions.”⁷¹ For example, an egg-layer’s desire not to be caged has market value only if “a consumer recognizes this preference, feels some obligation to respect it, and chooses not to buy eggs laid by caged hens.”⁷²

The farm animal production process transforms “inputs” (animals, feed, housing, human labor) into “outputs” (eggs, milk, meat).⁷³ Maximizing profits involves maximizing “the efficiency of this transformation.”⁷⁴ This means producers walk the line of investing the least amount of input while still maximizing output. For example, even if animal mortality results, death is “economically acceptable to producers, so long as the gains in efficiency outpace the increase in mortality.”⁷⁵ It follows then, that if consumers are opposed to certain animal husbandry practices, they may avoid products that were produced using them. Polls indicate that many Americans are offended by standard agricultural practices once they’re told what those practices are.⁷⁶

One factor in egg producers’ favor is “elasticity” in the market. Elasticity indicates the degree of flexibility a seller has for offering an item at higher prices and consumers have relatively inelastic demand for a staple like eggs.⁷⁷ Since

⁶⁹ Jennifer Fearing & Gaverick Matheny, *The Role of Economics in Achieving Welfare Gains for Animals*, in STATE OF THE ANIMALS IV: 2007 159, 162 (Deborah J. Salem & Andrew N. Rowan eds., 2007).

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ Fearing & Matheny, *supra* note 69, at 164.

⁷⁷ *Id.* at 161.

consumers tend to “need” eggs, they are less sensitive higher prices—they may purchase fewer, but they will probably still purchase them.⁷⁸ On the supply side, producers can respond to price changes by expanding or reducing the number of products available.⁷⁹

Implicit in each of these assertions is an economic question: will a consumer pay more for eggs that are humanely produced? If not, there is no incentive to produce them in such a manner, never mind label them in such a way that implies (truthfully or not) they have been humanely raised.

Improving animal welfare costs money, and egg industry representatives use economic arguments when fighting proposed welfare reforms. These arguments are effective as “[c]itizens are less likely to support animal welfare reforms they’ve been told will double their shopping bill or impoverish family farmers.”⁸⁰

However, studies assessing the importance of animal welfare to U.S. consumers are not conclusive, especially when weighed against the growing organic market. A 2000 survey conducted by Zogby International determined that an “overwhelming majority of adults find routine egg production practices unacceptable.”⁸¹ Furthermore, 75.4% of Americans say it is unacceptable to starve hens to force them to molt.⁸² Lastly, “by about six to one (80.7% to 14.6%), Americans say they are willing to pay more for eggs they know are from humanely raised hens in humane conditions rather than pay the lowest price for eggs no matter how the chickens are treated.”⁸³

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ Fearing & Matheny, *supra* note 69, at 159.

⁸¹ E-mail from Rebecca Wittman, Zogby International, to Gene Bauston, President, Farm Sanctuary (Sept. 18, 2000), *available at* <http://www.fda.gov/OHRMS/dockets/dockets/06p0394/06p-0394-cp00001-06-Tab-04-US-Poll-Exhibit-4A-02-vol1.pdf>.

⁸² *Id.*

⁸³ *Id.*

Another survey confirms that U.S. consumers care about animal welfare but also asks what that data means.⁸⁴ In that survey of over 1,000 Americans, respondents were asked to what extent they agreed with three statements regarding farm animal welfare. The survey indicated that the respondents were concerned with farm animal treatment, with most claiming “they consider animal well-being in their shopping decisions, consider animal well-being more important than low meat prices, and approve of government regulation to promote farm animal welfare.”⁸⁵ The results also indicated that gender, geography, political affiliation, and income are good predictors of animal welfare views.⁸⁶

The survey also asked which production practices consumers consider most important for animal welfare.⁸⁷ The practices deemed most important were providing enough food and water and treating injury and disease.⁸⁸ Production practices that give animals access to the outdoors and opportunity to exhibit natural behaviors also ranked high on the list.⁸⁹ Respondents ranked protecting farm animals from the weather and predators, shelter, socialization, and comfortable bedding as the least importance practices.⁹⁰

⁸⁴ See generally Robert W. Prickett et al., *Consumer Preferences for Farm Animal Welfare: Results from a Telephone Survey of U.S. Households* 23-25 (Oklahoma State University, Department of Agricultural Economics, Working Paper, 2008), available at <http://asp.okstate.edu/baileynorwood/Survey4/files/InitialReporttoAFB.pdf>.

⁸⁵ *Id.* at 24.

⁸⁶ *Id.* at 25. For example, females, residents in the Northeastern U.S., and Democrats are more concerned with farm animal welfare than males, residents of other regions, and Republicans. *Id.* The former, along with consumers from densely populated areas, also favor government regulation to protect farm animals. Midwestern consumers are more willing to sacrifice animal well-being in return for low food prices. *Id.* Survey participants with household incomes over \$50,000 showed less concern for farm animals' well-being and do not want government intervention in production decisions of livestock farmers. *Id.*

⁸⁷ Prickett et al., *supra* note 84, at 8.

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.*

However, some issues remain unresolved. While over half of the respondents said they consider animal well-being in their purchasing decisions, it is unclear how those considerations are made in the normal grocery store given that the average customer knows little about farm animal production, and the grocery store does not provide such information.⁹¹ Furthermore, while respondents indicated that animal welfare is more important than low meat prices, literature on hypothetical bias⁹² “suggests their willingness to pay higher prices may be overstated.”⁹³

DOES LABELING PAY?

Historically, the government has monitored labeling for three reasons: “to ensure fair competition among producers, increase consumers’ access to information, and to reduce risks to individual consumer safety and health.”⁹⁴ Recently, however, the government has used labeling to influence consumer choices so that they align with social objectives.⁹⁵

Voluntary labeling occurs when a company wants to maximize profits. In those cases it will “add information about an attribute to the label as long as [it] eventually generates more

⁹¹ *Id.* at 26.

⁹² Hypothetical bias occurs when “survey participants giv[e] socially desirable responses” when questioned about topics “for which there are strong social norms such as animal welfare.” Jayson L. Lusk & F. Bailey Norwood, *Direct vs. Indirect Questioning: An Application to the Well-Being of Farm Animals*, 96 SOC. INDICATORS RES. 551, 563 (2010). The research team determined that asking a combination of direct and indirect questions would yield more accurate responses. This method involved asking an individual about their opinions as well as asking people about others’ opinions. *Id.*

⁹³ Prickett, *supra* note 84, at 27.

⁹⁴ Elise Golan et al., *Economics of Food Labeling*, 24 J. CONSUMER POL’Y 117, 118 (2001) [hereinafter Golan et al., *Economics*].

⁹⁵ *Id.* at 118. The first time the government explicitly acknowledged the link between labeling and a social goal was at the White House Conference on Food, Nutrition, and Health in 1969 where it was recommended the federal government develop “a system for identifying the nutritional qualities of food” to help address nutritional deficiencies in the U.S. diet. The FDA “proposed the Nutrition Labeling and Education Act (NLEA) in 1990.” *Id.*

benefits than costs,”⁹⁶ and this will only happen if “consumers use the information to differentiate the labeled product from similar products and then buy it.”⁹⁷ To bolster claims so that consumers believe them, firms often rely on advertising and may use third-party labeling services.⁹⁸ “By offering an ‘unbiased’ assessment of a labeling claim, these services help strengthen the credibility of voluntary labeling.”⁹⁹ As indicated earlier, a number of entities, including consumer groups, trade associations, and the U.S. government provide third-party services.¹⁰⁰

In the private sector, producers that wish to maximize profits using labels will only add messaging they believe will generate more profits.¹⁰¹ The label is supposed to help the consumer differentiate between similar products as well as call attention to desirable attributes so that the consumer will respond by purchasing that product instead of another.¹⁰² This is especially important for labels on credence goods.¹⁰³

Some researchers suggest, however, that government labeling requirements may not be effective “in redressing environmental or other spillovers associated with food production and consumption.”¹⁰⁴ When it comes to labeling

⁹⁶ Elise Golan, Fred Kuchler & Berry Krissoff, *Do Food Labels Make a Difference? . . . Sometimes*, AMBER WAVES, Nov. 2007, at 12, available at <http://www.ers.usda.gov/AmberWaves/November07/Features/FoodLabels.htm>.

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ See Golan et al., *Economics*, *supra* note 94, at 119, 127.

¹⁰² *Id.*

¹⁰³ Animal products are “credence goods,” because a buyer cannot determine characteristics like animal welfare before or after purchase. Labeling of credence goods is a prime candidate for government intervention because “[m]ore complete and accurate labeling improves economic efficiency by helping consumers to target expenditures toward products they most want.” Fearing & Matheny, *supra* note 69, at 165.

¹⁰⁴ Golan et al., *Economics*, *supra* note 94, at 119.

eggs, the questions for producers are: Do U.S. consumers actually care about animal welfare? Will they pay to improve it? And, which descriptive labels best convey information that influences consumer spending?

First, do people actually read or care about the label? Studies have indicated that labels are both “successful and unsuccessful in educating consumers and changing consumption behavior.”¹⁰⁵ Influencing factors include how busy the shopper is, how clear and concise the label is, and the consumer’s ability to rank the message’s importance in comparison to other messages.¹⁰⁶ If a label is unclear it is unlikely to influence consumer spending.¹⁰⁷ Another reason labels may not be a good way of addressing social concerns is that, “[i]ndividuals tend to weigh their individual private costs and benefits, exclusive of [external costs and benefits], when making consumption decisions.”¹⁰⁸ Furthermore, if a significant percentage of the population does not allow the labels to influence their consumption, policy objectives will not be met.¹⁰⁹ In this case, if only a small number of consumers purchase free-range or organic eggs, the goal of encouraging the humane treatment of animals will not be met.¹¹⁰ Even if certain individuals alter their behavior to completely reflect the positive benefits of humane hen treatment, the fact that others do not means that the objective will probably not be met. Other factors that may influence whether labeling is an effective tool include

¹⁰⁵ ANNIE FREDRICK, TEXTBOOK OF FOOD AND NUTRITION 229 (2006).

¹⁰⁶ Golan et al., *Economics*, *supra* note 94, at 139.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* at 140.

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

differing personal preferences¹¹¹ and “free-rid[ing] on others’ socially responsible behavior.”¹¹²

If Americans are ignorant about practices that violate animal welfare—and it appears that they are—then their purchases cannot accurately reflect their stated preferences. Animal products are credence goods and consumers are utterly reliant on labeling to determine which products are in line with their values.¹¹³

The following conclusions can be deduced about the role of economics in animal welfare and labeling. Products that carry labels asserting humane animal husbandry practices generally cost more, and consumers seem willing to pay more for those products. Evidence that this is actually true in the grocery store can be found in the growth of the organic products segment and the surveys mentioned here. Consequently, egg producers have an interest in, at a minimum, making such claims in their descriptive labeling. However, since eggs are credence goods, consumers are entirely dependent on producers to use accurate labels and must rely on third-party certification programs to enforce label accuracy. Given the U.S. government’s unwillingness to regulate some terms and the dearth of products subscribing to third-party verification schemes, there is room for misleading claims on egg cartons. This leads to the third section of this paper—the use of litigation by animal welfare groups to promote animal welfare.

THE PROMISE OF LITIGATION

Laws like the FTC Act give animal welfare groups “a more legally developed and relaxed standard” to address animal welfare issues than would a method directly addressing animal

¹¹¹ See Golan et al., *Economics*, *supra* note 94, at 140. For example, even if everyone agrees that treating food animals humanely is a good social (and personal) objective, some consumers’ preferences for cheaper eggs may outweigh their valuation of the social objective.

¹¹² *Id.* at 141. For example, even if a buyer feels that layer hens should be protected, he or she may decide that buying conventional eggs will not really make a difference.

¹¹³ Fearing & Matheny, *supra* note 69, at 165.

cruelty.¹¹⁴ For example, bringing suit under a claim for false advertising allows the groups to frame the issue as a “truth issue” or a “consumer protection issue” and provides a “hearing on whether practices are cruel, at least in the eyes of consumers.”¹¹⁵ The primary concern here is people, not animals, and this “large umbrella” allows welfare groups to use a range of tactics “in conjunction with cruelty cases as a strategy to target the worst abuses on more than one front.”¹¹⁶

The laws used by animal welfare groups include the Lanham Act,¹¹⁷ the Federal Trade Commission Act,¹¹⁸ and state-level false advertising laws.¹¹⁹ To bring suit for anti-trust violations, plaintiffs have relied on the Clayton Act¹²⁰ and the

¹¹⁴ Cheryl Leahy, General Counsel, Compassion Over Killing, Slide Presentation at Animal Rights and the Public’s Right to Know: Farmed Animal Welfare and Consumer Labeling Issues, ABA Teleconference (Sept. 28, 2010) (on file with author).

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ 15 U.S.C. §§ 1051-1127 (West, Westlaw through P.L. 111-382 (excluding P.L. 111-296, 111-309, 111-314, 111-320, 111-350, 111-358, and 111-377)). The standing standard is stringent and competitors are required because the false or misleading statements must be alleged to have hurt a business. Leahy, *supra* note 114. Section 1125(a) requires a false or misleading statement (1) to have been made in a commercial advertisement or promotion; and (2) to have been likely to cause confusion or to cause mistake. *Id.*

¹¹⁸ 15 U.S.C §§ 41-58 (West, Westlaw through P.L. 111-382 (excluding P.L. 111-296, 111-309, 111-314, 111-320, 111-350, 111-358, and 111-377)). The FTCA is enforced by the FTC, which has “the authority to police anti-competitive practices.” 15 U.S.C. § 45(a). In order to request that the FTC act on a misleading claim, consumers file a complaint. Leahy, *supra* note 114. The goal is not for an individual to be awarded damages, but to persuade the FTC to take action against the offending company and possibly pursue civil penalties on its own. *Id.*

¹¹⁹ All fifty states have false advertising and consumer protection laws. *Id.* Most are modeled on the FTCA. *Id.* For example, California activists have used California Business and Professions Code section 17200, which is the state’s version of the FTC Act. Donna Mo, Comment, *Unhappy Cows and Unfair Competition: Using Unfair Competition Laws to Fight Farm Animal Abuse*, 52 UCLA L. REV. 1313, 1315-16 (2005).

¹²⁰ 15 U.S.C. §§ 4, 15, 16, 26 (West, Westlaw through P.L. 111-382 (excluding P.L. 111-296, 111-309, 111-314, 111-320, 111-350, 111-358, and 111-377)).

Sherman Antitrust Act.¹²¹ Other claims that will be addressed in this section include regulation of government agency spending, and environmental and nuisance laws.

False Advertising Under the FTC Act

Much of the case law relying on false advertising laws relates “to physical differences in the products – health, nutrition, safety, etc.,” and does not address production.¹²² However, a case can still be made. Proving a claim under any provision of the FTC Act requires evidence and usually a lot of it.¹²³ In animal welfare cases, such evidence includes the ads as well as their background and history, which “may establish a circumstantial case of seller intent.”¹²⁴ Plaintiffs also need to provide evidence of the actual animal conditions, and often “the most telling evidence available [includes] videos, photographs, or witness affidavits.”¹²⁵ Surveys of consumer perception are also valuable for establishing a misleading or false claim complaint,¹²⁶ as are consumer affidavits since state agencies act on complaints by consumers who have actually been deceived.¹²⁷ Affidavits also present “an opportunity to put the elements of the false advertising case into a persuasive narrative form.”¹²⁸ Public opinion polls “can show consumer deception and impact the outcome of the case,” even though they are not as reliable as surveys and in some contexts are not admissible.¹²⁹

¹²¹ 15 U.S.C. § 1 (West, Westlaw through P.L. 111-382 (excluding P.L. 111-296, 111-309, 111-314, 111-320, 111-350, 111-358, and 111-377)).

¹²² Leahy, *supra* note 114.

¹²³ Carter Dillard, *False Advertising, Animals and Ethical Consumption*, 10 ANIMAL L. 25, 52 (2004).

¹²⁴ *Id.* at 53.

¹²⁵ *Id.* at 54.

¹²⁶ *Id.*

¹²⁷ *Id.* at 56.

¹²⁸ Dillard, *supra* note 123, at 56.

¹²⁹ *Id.* at 57.

In 2009, The Humane Society of the U.S. (HSUS) accused The International House of Pancakes (IHOP) of putting false claims on its website.¹³⁰ In fact, HSUS asserted that IHOP's claim of "Cruelty-Free Food" was a brazen lie.¹³¹ It was a lie, the group says, because IHOP exclusively uses eggs from hens confined in barren battery cages so small, the birds can't even spread their wings.¹³² Peter Brandt, a senior attorney with HSUS said IHOP posts such claims "because they know it matters to people."¹³³

HSUS filed complaints with the FTC and the Securities and Exchange Commission saying the company engaged in "false or deceptive advertising."¹³⁴ Specifically, HSUS asked the FTC to require IHOP to stop making the claim.¹³⁵ The SEC complaint was filed against IHOP's parent company, DineEquity Inc., and asserted that shareholders were being misled.¹³⁶

The complaints alleged that the cages in which the hens are kept do not "meet a consumer's reasonable expectation of what 'cruelty-free' means."¹³⁷ When HSUS submitted the complaint, IHOP's website said, "we are against the cruel treatment of animals" and that the company's suppliers "go beyond what is required by law" to ensure animals are treated

¹³⁰ *IHOP and DineEquity Face SEC, FTC Complaints Over False Animal Welfare Claims*, HUMANE SOC'Y OF U.S. (Oct. 4, 2009), http://www.humanesociety.org/news/press_releases/2009/10/ihop_trade_complaints_101409.html.

¹³¹ *Id.*

¹³² Tracie Cone, *Humane Society: IHOP's Eggs Aren't 'Cruelty Free'*, DAYTON DAILY NEWS (Oct. 14, 2009), <http://www.daytondailynews.com/business/humane-society-ihops-eggs-arent-cruelty-free-346852.html>.

¹³³ Telephone Interview with Peter Brandt, Senior Attorney, Farm Animals, Humane Soc'y of the U.S. (July 28, 2010) [hereinafter Brandt Interview] (on file with author).

¹³⁴ Cone, *supra* note 132.

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ *Id.*

well.¹³⁸ HSUS's particular contention with IHOP's statements was that they were misleading "because there are no federal laws governing farm animal care" and IHOP suppliers mostly "operate in states where caged animals are exempt from cruelty laws."¹³⁹

One fact in HSUS's favor was that Californians had recently passed Prop 2, known as the Prevention of Farm Animal Cruelty Act, which prohibits the confinement of pigs during pregnancy, calves raised for veal, or egg-laying hens¹⁴⁰ in a manner that prevents the animal from lying down, standing up, fully extending his or her limbs, and turning around freely.¹⁴¹ Shapiro said, "This is a California-based company, and Californians just took an historic vote where two-thirds of voters agreed that this type of extreme confinement of farm animals ought to be illegal."¹⁴²

In addition to filing the complaint, HSUS sent out press releases and sent letters to sixteen state attorneys general who had been involved in egg-related false advertising cases before.¹⁴³ Brandt said that the states these attorneys general were located in had previously said, "[C]ompanies couldn't lie to people about where eggs are coming from."¹⁴⁴ HSUS wrote to them saying, "IHOP is operating in your state and doing exactly what they said companies couldn't do."¹⁴⁵

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ CAL. HEALTH & SAFETY CODE § 25991 (West, Westlaw through all 2010 Reg.Sess. laws; all 2009-2010 1st through 8th Ex.Sess. laws; and all Props. on 2010 ballots).

¹⁴¹ CAL. HEALTH & SAFETY CODE § 25990 (West, Westlaw through all 2010 Reg.Sess. laws; all 2009-2010 1st through 8th Ex.Sess. laws; and all Props. on 2010 ballots).

¹⁴² Cone, *supra* note 132.

¹⁴³ Brandt Interview, *supra* note 133.

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

HSUS's combined efforts worked.¹⁴⁶ The animal welfare group announced that IHOP would begin using eggs from cage-free hens.¹⁴⁷ IHOP's website also removed any indication that the animal-based products in its menu were raised humanely. Instead it indicated it "believe[s] in" and "supports" efforts to improve farm animal welfare.¹⁴⁸ It also said the restaurant uses only "a small fraction of the animal-based products purchased each year in the U.S."¹⁴⁹

Another successful campaign, this one headed by Compassion Over Killing (COK) and the Better Business Bureau's (BBB) National Advertising Review Board, suggested the egg industry "stop advertising its products as humane as long as it continues such practices as clipping hens' beaks and depriving birds of food and water."¹⁵⁰ This claim was against United Egg Producers for its original voluntary certification label.¹⁵¹ The program allowed egg producers to label their eggs "Animal Care Certified."¹⁵² UEP claimed that the standards set for the program would improve animal welfare, but in fact, they served "primarily as a marketing tool to promote the sale of battery-caged eggs in response to heightened consumer interest in welfare standards."¹⁵³ Paul Shapiro, COK's campaigns director, said, "I think that it's pretty clear that most consumers

¹⁴⁶ *Id.*

¹⁴⁷ *Positive News from IHOP*, HUMANE SOC'Y OF U.S. (Mar. 22, 2010), http://www.humanesociety.org/news/news/2010/03/ihop_good_news_032210.html.

¹⁴⁸ *Caring for the Environment*, INT'L HOUSE OF PANCAKES, http://www.ihop.com/index.php?option=com_content&task=view&id=219&Itemid=73 (last visited Jan. 23, 2012).

¹⁴⁹ *Id.*

¹⁵⁰ *Business Group Shells Egg-Industry Ads: Better Business Bureau Disputes Humane Claim*, MSNBC.COM (May 11, 2004, 8:06:37 AM), <http://www.msnbc.msn.com/id/4951194/> [hereinafter *Business Group*].

¹⁵¹ FARM SANCTUARY, THE TRUTH, *supra* note 11, at 8. The complaint that compelled UEP to change the certification label will be discussed in the litigation section of the article.

¹⁵² *Id.*

¹⁵³ *Id.*

don't consider a cage that doesn't let a chicken flap its wings as so-called 'animal care certified.'"¹⁵⁴

The BBB filed a complaint with the FTC in 2004 stating that the "Animal Care Certified" seal was misleading and recommended that UEP cease using the seal. Only then did UEP agree to prohibit feed withdrawal for forced molting of hens.¹⁵⁵ In September 2005, the FTC "announced that the United Egg Producers' deceptive logo would no longer be stamped on egg cartons nationwide."¹⁵⁶ UEP replaced the "Animal Care Certified" label with a "UEP Certified" label until 2006.¹⁵⁷

In another action, the Humane Society of the United States filed a complaint against Indiana-based Rose Acre Farms under the FTC Act for deceptive advertising.¹⁵⁸ HSUS alleged in the complaint that Rose Acre made various claims on its website and media statements including that Rose Acre chickens "are kept in a humane and friendly environment;" the chickens are "happy" at all times; "unhappy" chickens will not lay eggs; and there is "plenty of space for each chicken to move about and socialize with the other chickens."¹⁵⁹ The complaint also alleged Rose Acre repeatedly referred to battery cages as "pens" and "pen-based housing."¹⁶⁰

HSUS conducted its own investigation into Rose Acre's operations to verify whether the claims were true.¹⁶¹ During the

¹⁵⁴ *Business Group*, *supra* note 150.

¹⁵⁵ FARM SANCTUARY, THE TRUTH, *supra* note 11, at 8.

¹⁵⁶ "Animal Care Certified"—A Case of Animal Abuse and Consumer Fraud, COMPASSION OVER KILLING, <http://www.cok.net/camp/acc/> (last visited Jan. 23, 2012).

¹⁵⁷ *Id.*

¹⁵⁸ Complaint for Action to Stop False or Deceptive Advertising, at 2-3, HSUS v. Rose Acre (F.T.C. 2010) available at http://www.humanesociety.org/assets/pdfs/farm/complaint_rose_acre.pdf [hereinafter Rose Acre Complaint].

¹⁵⁹ *Id.* at 4-5.

¹⁶⁰ *Id.* at 5.

¹⁶¹ *Id.*

investigation, HSUS investigators claimed to have observed the following: broken bones resulting from rough handling and hens being crowded together during transportation; depopulation methods such as carrying as many spent hens by their legs as possible and then “cramming them into gassing carts where they are killed with carbon dioxide; “trapped birds unable to reach food and water;” dead young hens that had mummified in their cages; manure pits that had not been cleaned in two years; and hens that fell into and were left in the manure pits below the cages.¹⁶² The welfare group again relied on Prop 2 to assert that consumers do care about the treatment egg-laying hens receive and as such Rose Acre was making claims about its production practices in order to appeal to consumers.¹⁶³

HSUS argues in the complaint that, by using the word “happy,” Rose Acre implied a certain level of humane treatment in production practices and that the claim could not be substantiated.¹⁶⁴ The complaint also explained the difference between what one might perceive the word “pen” means and what battery cages actually are.¹⁶⁵ The complaint expressed the concern that because people who care about animal welfare are accustomed to looking for whether hens are kept in battery cages, any claims that do not explicitly say the hens are kept in such cages may be construed to mean the hens are humanely housed.¹⁶⁶

Anti-trust litigation

In 2010, plaintiffs, including restaurants and other purchasers of shell eggs, filed a class action anti-trust suit against certain shell egg producers including heavy-weights Land O’ Lakes, Rose Acre Farms and Cal-Maine, and their trade

¹⁶² *Id.* at 6.

¹⁶³ Rose Acre Complaint, *supra* note 158, at 2.

¹⁶⁴ *Id.* at 14.

¹⁶⁵ *Id.* at 17.

¹⁶⁶ *Id.*

groups, notably UEP and the United Egg Association (UEA).¹⁶⁷ The plaintiffs alleged that:

[d]efendants conspired to fix, stabilize and/or maintain egg prices in at least the following nine ways: (a) agreeing to reduce the total number of hens at laying farms in order to decrease overall egg production; (b) agreeing not to replace hens lost through increased cage space requirements; (c) agreeing to manipulate the molting, culling, and disposal of hens to keep egg production low; (d) agreeing not to “backfill” cages; (e) agreeing to delay or reduce chick hatching; (f) agreeing to reduce inventory; (g) agreeing not to expand or to curtail operations; (h) agreeing to export eggs to restrain output in the United States; and (i) agreeing overall to manage supply and reduce output of eggs in the United States.¹⁶⁸

Commenting on the UEP scheme, Peter Brandt of HSUS said what was particularly offensive about the violation—a “classic supply restriction scheme”—was that UEP hid it in an animal care program.¹⁶⁹ The egg industry goes through boom and bust cycles where egg prices rise and fall. The plaintiffs in this case allegedly discovered that they could level off production and stabilize egg prices at a high level by requiring UEP-certified producers to give their hens more space in the cage but prohibiting them from adding overall space to the production facility.¹⁷⁰ By prohibiting them from adding space UEP limited the number of egg-laying hens, and consequently the supply of eggs.¹⁷¹ As a result, UEP producers not only

¹⁶⁷ Second Consolidated Amended Class Action Complaint, at 2, 15-19, 27, *In re Processed Egg Products Antitrust Litigation*, No. 2002 08-md-02002 (E.D. Pa. 2010) [hereinafter *Antitrust Complaint*], available at http://www.eggproductsettlemnt.com/docs/second_complaint.pdf.

¹⁶⁸ *Id.* at 8.

¹⁶⁹ Brandt Interview, *supra* note 133.

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

benefited from being able to claim they were giving hens more room in their cages, they also reduced the number of eggs in the supply chain, which led to significant profits.¹⁷²

The slightest “reductions in production can cause egg prices to rise sharply.”¹⁷³ In 2007, the United States Egg Marketer exported approximately 246,000 cases of eggs. This accounted for less than one-third of daily U.S. egg production. This in turn caused egg prices to rise \$0.31/dozen earning shell egg producers “a \$44,000,000 pay hike.”¹⁷⁴

Remember, consumers tend to purchase the same number of eggs even when prices rise because there really is no adequate substitute for eggs.¹⁷⁵ The Wall Street Journal reported that UEP members and internal documents, such as newsletters, proved the trade group pressured “members to increase the sizes of their hen cages, a response to the growing number of producers advertising “cage free” eggs and the threat by some states to introduce new animal-treatment rules.”¹⁷⁶

As of my interview with Peter Brandt, two of the defendants in the case settled—one for \$400,000 and the other for \$25 million—and turned over documents. He said, “I think

¹⁷² *Id.*; See Dr. David Roland, *Supply Management: The Key to Profits*, EGG INDUSTRY, June 2007, at 5, available at <http://www.eggindustry-digital.com/eggindustry/200706?pg=5#pg5>.

¹⁷³ John Todd, *What 2007 Has in Store: No Shortage of Challenges and Opportunities*, EGG INDUSTRY, Jan. 2007, at 1, available at <http://www.eggindustry-digital.com/eggindustry/200701/?pg=1#pg1>.

¹⁷⁴ *Id.*

¹⁷⁵ Antitrust Complaint, *supra* note 167, at 37-38. In 2008, prior to this complaint being filed, federal prosecutors investigated possible price-fixing by major egg-producers. John R. Wilke, *Federal Prosecutors Probe Food-Price Collusion*, WALL ST. J. (Sept. 23, 2008), <http://online.wsj.com/article/SB122213370781365931.html>. Noting that food prices had climbed in recent years, the federal government cited as reasons increased global demand and rising energy costs but also suspected “years of unrestrained consolidation among food producers may have had an impact as well, diminishing competition in many markets.” *Id.* The collusion in this and other cases included organizing exports to reduce domestic supply and controlling domestic hen populations. *Id.* In fact, it appears that whenever egg prices began to soften, UEP organized another export effort. *Id.*

¹⁷⁶ Wilke, *supra* note 175.

it's an incredibly important case. It has to do with greed and trading on people's desire to buy humane products."¹⁷⁷

Other Useful Laws

Animal welfare groups of course aren't limited to the above kinds of litigation—there are other creative ways to promote animal welfare as well that have nothing to do with labeling. For example, in *Californians for Humane Farms v. Schafer*,¹⁷⁸ HSUS requested records from the USDA because it said in a trade publication that the American Egg Board, a quasi-government group, was going to donate money to groups that opposed California's Prop 2.¹⁷⁹ Californians for Humane Farms (CHF), a non-profit ballot committee sponsored by HSUS and charged with supporting Prop 2,¹⁸⁰ alleged that Ed Schafer, the United States Secretary of Agriculture, violated 7 U.S.C. § 2707.¹⁸¹ The Secretary was named as a defendant because he controlled “the activities and expenditures of the Egg Board that [were] at issue in this case.”¹⁸² The Egg Board was created as a “national commodity research and promotion program[.]”¹⁸³ Its purpose is “to expand the markets for [eggs], as well as to conduct research.”¹⁸⁴ It is responsible for such iconic cultural slogans as “The Incredible, Edible Egg.”¹⁸⁵ It consists of eighteen members and alternates, “all of whom are egg

¹⁷⁷ Brandt Interview, *supra* note 133.

¹⁷⁸ *Californians for Humane Farms v. Schafer*, No. C 08-03843 MHP, 2008 WL 4449583 (N.D. Cal. Sept. 29, 2008).

¹⁷⁹ *Id.* at *1-2.

¹⁸⁰ *Id.* at *1.

¹⁸¹ *Id.* at *2-3. 7 U.S.C.A. § 2702 establishes the Egg Board and outlines its duties and responsibilities. It also outlines what it is prohibited from doing. 7 U.S.C. § 2702 (West, Westlaw through P.L. 111-382 (excluding P.L. 111-296, 111-309, 111-314, 111-320, 111-350, 111-358, and 111-377)).

¹⁸² *Californians for Humane Farms*, 2008 WL 4449583, at *1.

¹⁸³ *Id.*

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

producers nominated by regional egg industry organizations and appointed by the Secretary.¹⁸⁶ It is prohibited from acting like a lobbyist.¹⁸⁷

What CHF and ultimately the court took issue with was the following: the Egg Board, in an executive committee meeting, unanimously passed a motion to set aside \$3 million “to be held in reserve for a consumer education campaign to educate consumers about current production practices.”¹⁸⁸ A few months later, the trade publication “Egg Industry” reported that the AEB would reserve the \$3 million “to assist the state if necessary in the industry’s current battle with animal activists.”¹⁸⁹ With the money for the education fund, the Egg Board created ads it claimed were generic and not related to Prop 2, because they did not discuss confinement measures.¹⁹⁰ The district judge disagreed, noting that “dovetailing of the Egg Board’s message and even specific buzzwords (“fresh,” “local,” “affordable”) with those of Prop 2’s organized opposition,” was an “unlikely” coincidence.¹⁹¹ The judge issued a preliminary injunction prohibiting the Egg Board from spending any funds in California until after the November election was over.¹⁹²

In another case brought by HSUS, the animal welfare group represented ten plaintiffs living in proximity to Olivera Egg Ranch, in San Jose, California.¹⁹³ The plaintiffs filed suit under the citizen suit provisions of the Comprehensive

¹⁸⁶ *Id.*

¹⁸⁷ *Id.* at *2. Congress included a provision that explicitly prohibits the action: “[N]o funds collected by the Egg Board under the order shall in any manner be used for the purpose of influencing governmental policy or action, except [for recommending to the Secretary amendments to an order].” 7 U.S.C.A. § 2707(h).

¹⁸⁸ *Californians for Humane Farms*, 2008 WL 4449583, at *2.

¹⁸⁹ *Id.* at *2-3.

¹⁹⁰ *Id.* at *6.

¹⁹¹ *Id.* at *7.

¹⁹² *Id.* at *9.

¹⁹³ Complaint at ¶ 1, *Aliva v. Olivera Egg Ranch*, 2008 WL 5180989 (E.D. Cal. 2008) [hereinafter *Olivera Complaint*] (No. 2 08-at-1220).

Environmental Response, Compensation, and Liability Act (CERCLA)¹⁹⁴, and the Emergency Planning and Community Right-to-Know Act (EPCRA).¹⁹⁵ The complaint alleged that Olivera “confines its 750,000 hens in small, barren wire cages, a method of production that results in extreme suffering” and the birds confined there produce “significant amounts of waste.”¹⁹⁶ Note that this is an air quality and nuisance case – it does not purport to be at all concerned with animal welfare, but the complaint’s language reveals at least HSUS’s intent to address animal welfare concerns by sanctioning Olivera and potentially reducing the number of birds on the ranch.

The complaint further alleged that the ranch dumped the waste in a lagoon “that is not built to contain waste for the number of hens Olivera currently confines.”¹⁹⁷ Due to this practice, “Olivera has systematically and continuously released unlawful levels of ammonia from the hen houses and manure lagoon into the local community without reporting them as required by CERCLA and EPCRA since at least 2004.”¹⁹⁸ Brandt also noted that HSUS filed a nuisance claim for the neighbors under California state law.¹⁹⁹ The plaintiffs complained of health problems and an inability to enjoy their property as a

¹⁹⁴ 42 U.S.C. § 9659(a)(1) (West, Westlaw through P.L. 111-382 (excluding P.L. 111-296, 111-309, 111-314, 111-320, 111-350, 111-358, and 111-377)). CERCLA requires any person in charge of a “facility” to report any release of a hazardous substance in a quantity equal to or greater than the established reportable quantity to the National Response Center and lists ammonia as a hazardous substance. § 9603(a). A release of ammonia exceeding 100 pounds per day must be reported. 40 C.F.R. § 302.4.

¹⁹⁵ 42 U.S.C. § 11046(a)(1)(A)(i)) (West, Westlaw through P.L. 111-382 (excluding P.L. 111-296, 111-309, 111-314, 111-320, 111-350, 111-358, and 111-377)). EPCRA requires emergency notification of any release of a reportable quantity of a hazardous substance subject to the notification requirement of CERCLA. § 11004. The plaintiffs asserted that Olivera’s facility released “reportable quantities of ammonia under CERCLA and was “required to provide notice of reportable releases to the appropriate State and local emergency response officials.” Olivera Complaint, *supra* note 193, at ¶ 45.

¹⁹⁶ Olivera Complaint, *supra* note 193, at ¶ 1.

¹⁹⁷ *Id.*

¹⁹⁸ *Id.*

¹⁹⁹ Brandt Interview, *supra* note 133.

result of the ammonia emissions.²⁰⁰ The complaint requested that the court, among other things, enjoin the defendants from operating their facility in a manner that “will result in further violation of CERCLA or EPCRA,” and award compensatory and punitive damages to the plaintiffs.²⁰¹ This case has not yet been decided.

CONCLUSION

The current form of federal and state animal cruelty laws do little to protect farm animals from inhumane practices. The labeling on eggs and other animal products conveys little to consumers about the conditions in which the animals lived. While changing current attitudes and legislation regarding farm animal welfare are paramount to animal advocates like HSUS and COK, litigation is a promising tool. “We’re not going to fix all of these problems,” says Brandt. “But it is one thing to make money while treating animals inhumanely, and it’s another to deceive people into thinking you are treating the animals humanely . . . if someone is being deceptive we have to take action.”²⁰²

²⁰⁰ Olivera Complaint, *supra* note 193, at ¶¶ 12-31.

²⁰¹ *Id.* at ¶¶ B, F.

²⁰² Brandt Interview, *supra* note 133.