

AMERICAN VETERINARY MEDICAL LAW ASSOCIATION

NEWSLETTER



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American Veterinary Medical Law Association Newsletter



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MISSION STATEMENT

The AVMLA was incorporated in 1994 as a nonprofit organization with the following objectives:

- Provide information to members regarding pertinent issues in the field of veterinary medical law.
- Increase public awareness and understanding of the impact of law on all aspects of veterinary medicine.
- Facilitate interactions among organizations, regulatory agencies, and the courts for the benefit of society.

The diverse membership of the AVMLA provides a unique forum for discussion of issues and the dissemination of information. This is accomplished through conferences, newsletters, and interaction among individual members.

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President's Message

Hello members.

One of the messages given by the speakers at our annual meeting was the importance of ethics. Ethics is a major branch of philosophy, encompassing right conduct and good life. It is significantly broader than the common conception of analyzing right and wrong.

Professional ethics concerns the moral issues that arise because of the specialist knowledge that professionals attain, and how the use of this knowledge should be governed when providing a service to the public. As veterinarians and attorneys it is incumbent on us to use our knowledge wisely.

I would challenge all of us to look upon one another as colleagues. It's too easy in today's world to start putting labels on others. We hear it every day in the news media as political candidates trash one another. If we disagree, let's debate these differences. Let's not use our power and positions to build ourselves up at the expense of others.

Plans are now under way for the 2009 AVMA Annual Meeting to be held in conjunction with CVC-West on November 7-8 in San Diego, CA. SAVE THE DATE!!

If you have concerns that you want the AVMLA Board to discuss, please let me know. Agenda items to be discussed at the next Board meeting will include: 2009 budget and the 2009 Annual Meeting.

I look forward to hearing your ideas and concerns.

Regards,

Karen M Wernette, DVM

AVMLA President

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Executive Director's Report

To begin, a warm welcome to Dr. Brian Ausman, LL.B, MBA, DVM as he assumes the role of Director for District III until the 2009 election. The Board recently approved Dr. Ausman to fill the remainder of the vacated term in that district.

As mentioned in our last issue, we had a great continuing education conference in New Orleans in July with an impressive array of speakers and topics. Copies of the conference proceedings are available, so please contact me if you'd like one. The AVMLA also held its annual meeting in New Orleans, the minutes of which are published in the back of this newsletter.

The Board adopted a Member List Use and Privacy Policy governing the use of the information contained in the Member List that is distributed to all AVMLA members. The policy is reproduced below. If you have any questions regarding this policy, please let me know.

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Please feel free to contact me with any suggestions for items you'd like to see in the *AVMLA Newsletter* or on-line and feel free to send ideas regarding how we can enhance the value of your AVMLA membership. If you have a speaking engagement, a publication or other news item that you'd like to share, please do so - we would love to feature it.

Julia Fullerton, JD

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Case Law

June 1, 2008 – August 31, 2008

Abandoned Animals

COURT ISSUES INJUNCTION TO SAVE "ABANDONED" HORSE.

***Saffran v. Fairfield*, 2008 Conn. Super. LEXIS 1980 (Conn. Super. Ct. Aug. 8, 2008).**

Quick Summary: Veterinarian recommended euthanasia for sick horse and the horse owner refused to allow it. Instead, the owner indicated he would pick up the horse and take it to another location. He never retrieved the horse and filed suit to prevent the veterinarian from euthanizing it. The Court issued a temporary restraining order finding there was an issue as to whether the horse was abandoned despite the owner's refusal to retrieve the horse and the veterinarian's multiple attempts to notify the owner that the animal was considered abandoned under Connecticut law.

This case is unreported and may be subject to further appellate review, however, we felt that it should be included in its current form – watch for further developments. Saffran, the owner of a horse being held at Fairfield Equine Association (FEA) filed for a motion for temporary restraining order prohibiting the defendants, Fairfield, from euthanizing his horse pursuant to Connecticut General Statutes § 20-205a, Disposition of Abandoned Animals.

The horse was delivered on April 1, 2008 to Fairfield. At the time Saffran delivered the horse to FEA, he understood that she would be placed in a full body sling to support her weight. On April 2nd, Dr. Edwards told Saffran that because of the severe changes the horse had experienced that he did not think a sling was appropriate, but euthanasia would be appropriate. The horse suffered from severe degenerative arthritis. FEA told Saffran that they had done all they could, and would arrange for discharge the following week on April 8th. Saffran did not pick-up the horse and told FEA that he was waiting to hear from one or two locations to move the horse. FEA continued to try to contact Saffran and on April 14th sent a letter by certified mail to Saffran stating defendant considered the horse to be abandoned, indicating their intent to dispose of her "as we see fit fifteen days after today" and enclosing discharge instructions which recommended euthanasia as soon as possible. On April 26th Saffran told FEA that he was waiting to hear from one or two locations to move the horse.

Saffran and FEA continued to disagree about treatment for the horse and the issue of euthanasia. Saffran had visited the horse and spoken by phone to the doctors several times between April and August 8th when this case was heard. FEA had also sent a subsequent abandonment notice on May 21st which Saffran denied receiving. On June 2nd, FEA sent a copy by fax to Saffran stating that euthanasia was scheduled for June 9th. An attorney responded to FEA on behalf of Saffran stating that Saffran opposed euthanasia.

The Court reviewed the facts and found that Saffran is entitled to injunctive relief prohibiting FEA from disposing of his mare since euthanasia would cause irreparable injury to Saffran and that he lacks an adequate remedy at law. The Court determined the central question to be whether the defendants are entitled to treat the horse as "abandoned". The Court found that Saffran did not intend to abandon the horse; therefore, the Connecticut Abandoned Animal Act does not apply. FEA has continued to treat the horse for many months and has not been paid by Saffran for this care. Saffran also filed a complaint alleging medical malpractice and common-law negligence relating to the horse's care by the defendants. The Court upheld Saffran's motion for a temporary restraining order to prevent euthanasia of the horse.

Animal Classification

DOGS: COMPANION ANIMALS OR LIVESTOCK?

United States of America v. Ron and Mary Park, 536 F.3d 1058, 2008 U.S. App. LEXIS 17075 (9th Cir. Idaho 2008).

Quick Summary: Government asserted that the defendant's dog kennel and training operation was a violation of a scenic easement that ran with the land. Defendants countered that the kennel constituted "livestock farming" that is specifically allowed by the easement. The district court granted summary judgment finding that kennel activities are not livestock activities: dogs are not livestock. However, the 9th Circuit found the definition of livestock sufficiently ambiguous so as to preclude summary judgment. The case was remanded for further proceedings.

Introduction

In 2005, the United States brought an action against the defendants for operating a dog kennel on their property in violation of a scenic easement granted to the U.S. Forest Service by the previous landowners. Under the applicable terms of the easement, the defendants were prohibited from using the lands within the easement for any professional or commercial activities requiring outside alteration to the residential dwelling; but they retained the right to use the easement for general crop and livestock farming and limited residential development. However, over the years since defendants' purchase of the property in 1989, the U.S. Forest Service had approved various improvements and uses of the property, including the addition of horse stalls, the use of the home as a craft and hobby shop, and the use of the home as a bed and breakfast.

The U.S. Forest Service challenged the defendants' use of the property as a dog training and kennel business as an unauthorized commercial activity that required new structures built without prior approval. Defendants claimed that the dog kennel constitutes "livestock farming" and was specifically permitted by the terms of the easement. Plaintiff/United States contended that under Idaho law dogs are not livestock.

The district court held that the defendants activities could not be construed as livestock farming "[r]egardless of how broadly defines [the term]" and granted summary judgment in favor of the United States. Defendants were ordered to cease operations and to remove associated structures or convert them to non-commercial use. Defendants appealed, staying the district court's order.

Livestock Farming

The 9th Circuit reviewed the district court's interpretation of the language of the scenic easement *de novo*. Under Idaho law, courts may look to extrinsic evidence to determine the meaning of

terms within a conveyance of property only if the language in such deed is ambiguous and subject to conflicting interpretations.

The scenic easement permits defendants to engage in “livestock farming”, but does not define this term. Examining various definitions and common uses of the term, the appellate court concluded that the district court erred in holding that “livestock”, even broadly defined, could not include dogs. Given the lack of uniform definition of “livestock” and the absence of any guidance within the four corners of the easement, the Appellate Court concluded that the term was ambiguous and that summary judgment was not appropriate.

Commercial Activity

The district court held that the defendants’ dog kennel business was prohibited commercial activity. However, if it is found to be “livestock farming”, that right was specifically retained under the easement without exception. Because “livestock farming” is ambiguous, interpretation of the easement cannot be resolved on summary judgment. The Appellate Court reversed the district court’s judgment and remanded for further proceedings.

Animal Ownership

JAZZ RETURNS TO NEW ORLEANS.

***Augillard v. Madura*, 257 S.W. 3d 494; 2008 Tex. App. LEXIS 4552 (Tex. App. Austin 2008).**

Summary: Appellant, the owner of a lost dog during the aftermath of Hurricane Katrina, sued the appellee, who adopted a dog rescued from the City of New Orleans, after the flooding. The suit alleged conversion of the dog by the appellees, as the adopted dog was believed to be owned by the appellant. The trial court dismissed the claim for lack of sufficient information, even though the plaintiff offered expert testimony that the DNA of the adopted dog was a match for the lost dog. The Court of Appeals reversed the trial court, and held that the evidence was legally insufficient to support the judgment of the trial court.

Appellant/Plaintiff, Shalanda Augillard (“Augillard”), was a Federal Express worker, living in the New Orleans area during Hurricane Katrina. Augillard left her cocker spaniel with her mother, when she was required to stay at the New Orleans airport and supervise the delivery of Federal Express supplies. Subsequently, Augillard’s mother was required to evacuate her home, and leave the dog. The cocker spaniel, named “Jazz”, was left on the second floor of the home with water and food. When Augillard was allowed to return, she found the dog had been taken, and the Appellant began searching for Jazz with the rescue groups who had worked in the area.

Eventually, Augillard determined that the dog adopted by the appellees was Jazz, but the appellees refused to turn over the dog. Suit was filed for conversion, and seeking a temporary restraining order and an injunction in an effort to have the dog returned to Augillard. The only issue in dispute was whether the dog adopted by the appellees was, in fact, Jazz.

Augillard offered testimony of knowledge of the medical condition of the dog. Additionally, she called Dr. Joy Halverson, an expert in veterinary medicine, DNA analysis and director of QuestGen Forensic Laboratory. By collecting DNA material from the adopted dog and hairs from the brush and sweater of Jazz, Dr. Halverson was able to determine that “it is a trillion times more likely that the samples match because they came from the same dog”. Further, Dr. Halverson compared the DNA of the adopted dog and the DNA of a dog born from the same mother as Jazz. Dr. Halverson testified the dogs were of the same mitochondrial type, which occurs when the dogs are maternal relatives. The only contradictory testimony to the DNA analysis, provided by the appellees, was the possibility of tampering.

The Court of Appeals held that once the DNA analysis testimony was admitted, without objection or rebuttal, it may not be ignored by the court. Since the record was void of any reliable evidence contradicting the DNA analysis, the trial court was reversed and judgment rendered in favor of Augillard.

Ballot Propositions

MASSACHUSETTS SUPREME COURT APPROVES BALLOT INITIATIVE TO BAN PARIMUTUEL DOG RACING.

George L. Carney, Jr., & others, 451 Mass. 803; 890 N.E. 2d 121; 2008 Mass. LEXIS 497.

Quick Summary: Plaintiffs sued the Massachusetts Attorney General for certifying a ballot proposition banning parimutuel dog racing asserting that the proposition violated provisions of the Massachusetts Constitution. The Court did not find any violations and concluded that the Attorney General's certification of the measure was appropriate.

In 2000, a ballot initiative banning parimutuel dog racing - identical to the one at issue here - was rejected by the voters of Massachusetts. In 2006, the Supreme Judicial Court of Massachusetts considered a ballot initiative that proposed banning parimutuel dog racing and amending animal cruelty statutes.¹ The Court found that dog racing and the expansion of animal cruelty statutes to address dog fighting and general abuse and neglect should be separate ballot questions and enjoined the Secretary of State from placing the petition on the ballot.

The ballot initiative petition presented to the Court in this case does not contain the animal cruelty penalty provisions, leaving the Court to address issues it did not need to consider in the prior case: does the proposition fulfill the requirements of the initiative petition process and is the proposition inconsistent with the right to receive compensation for private property appropriated to public use.

The Massachusetts Attorney General is required by the Massachusetts Constitution to certify that proposed initiatives meet specific requirements. One of those requirements prohibits initiatives from being inconsistent with certain rights, such as the right to trial by jury.² It is under this section of the Massachusetts Constitution that the plaintiffs bring their objections to placing this initiative on the ballot.

¹ *Carney v. Attorney General*, 850 N.E.2d 521, 447 Mass. 218 (Mass., 2006).

² MA CONST. Art. XLVII, § 2. No measure that relates to religion, religious practices or religious institutions; or to the appointment, qualification, tenure, removal, recall or compensation of judges; or to the reversal of a judicial decision; or to the powers, creation or abolition of courts; or the operation of which is restricted to a particular town, city or other political division or to particular districts or localities of the commonwealth; or that makes a specific appropriation of money from the treasury of the commonwealth, shall be proposed by an initiative petition; but if a law approved by the people is not repealed, the general court shall raise by taxation or otherwise and shall appropriate such money as may be necessary to carry such law into effect. Neither the eighteenth amendment of the constitution, as approved and ratified to take effect on the first day of October in the year nineteen hundred and eighteen, nor this provision for its protection, shall be the subject of an initiative amendment.

No proposition inconsistent with any one of the following rights of the individual, as at present declared in the declaration of rights, shall be the subject of an initiative or referendum petition: The right to receive compensation for private property appropriated to public use; the right of access to and protection in courts of justice; the right of trial by jury; protection from unreasonable search, unreasonable bail and the law martial; freedom of the press; freedom of speech; freedom of elections; and the right of peaceable assembly.

No part of the constitution specifically excluding any matter from the operation of the popular initiative and referendum shall be the subject of an initiative petition; nor shall this section be the subject of such a petition.

The limitations on the legislative power of the general court in the constitution shall extend to the legislative power of the people as exercised hereunder.

Plaintiffs asserted that the petition was not consistent with the right of a trial by jury and that it was an unconstitutional delegation of legislative authority beyond the power of the people to enact through the initiative process because the initiative provides a fine without a specified maximum amount. Additionally, the plaintiffs claimed that the Attorney General failed to discharge her constitutional duty to take official notice of information in the files of state agencies. The Court did not agree and found appropriate notice was taken.

The Court also considered the petitioners' contention that the ballot proposition was contrary to the Massachusetts Constitution in that it included an "Excluded Matter." The Massachusetts Constitution does not permit any measure that will in its application be restricted to a particular unit of local government. The petitioners alleged that this measure targeted the only two towns where dog racetracks are located. The Court reasoned that this provision was designed to avoid bringing strictly local concerns to the ballot and the fact that an initiative may affect different areas in different ways was not a violation of the State Constitution. This proposal would apply to all localities in Massachusetts, not just those with racing tracks. [Citations omitted.] In addition, though the state legislature did allow localities limited veto authority, the State retained regulation of this industry.³ Essentially, the issue of parimutuel dog racing is an issue of state concern and appropriate for placement on the ballot.

In response to the petitioners' argument that the ballot measure would be a regulatory taking of their real property and facilities at Raynham Track and a categorical taking of their expectation of renewal of their racing licenses, the Court addressed the real taking of the racetrack owners' property by finding that the Attorney General does not have enough information to determine any diminution of property value at this certification stage of the ballot initiative process. Therefore, the Attorney General correctly concluded that this initiative isn't necessarily a regulatory taking of the plaintiff's tangible property. However, if the measure is adopted, the racetrack owners may then bring suit.

With respect to the value of an expectation of licensure renewal for the parimutuel dog racing tracks, the Court reasoned that there is a difference between those types of property that are subject to the Takings Clause and those that are covered under the Due Process Clause.

A greater variety of types of property are recognized under the Due Process Clause, including the type of licensure that the plaintiffs currently hold. The Court found that the initiative process and statewide election would fulfill any requirements for procedural due process for the plaintiffs' licensure.

With respect to the right of compensation for the racing licenses, the Court applied the *Peanut Quota Holders*⁴ analysis comprised of the following three factors: a compensable interest as indicated by the absence of express statutory authority to preclude the formation of the interest as a property right; presence of the right to transfer the interest and the right to exclude. After conducting the analysis, the Court concluded that the plaintiffs did not have a compensable interest in their racing licenses. Again, they found that the Attorney General did not err by certifying that the petition did not appear to prohibit compensation for private property appropriated to public use.

Addressing the plaintiffs' claim that the ballot proposition denies the right of a jury trial by penalizing those who violate the dog racing ban with a fine of at least twenty thousand dollars (\$20,000) payable to the Dog Racing Commission, the Court found that the ballot language could be read to mean that the penalty is imposed by a Court with the option of a jury trial. Thus, the ballot initiative was appropriately certified by the Attorney General.

Finally, the Court addressed the plaintiffs' argument that the failure of the ballot proposition to specify a maximum monetary penalty for violations of the proposed ban on parimutuel dog racing constituted a delegation of legislative authority by stating that the delegation of legislative authority is not one of the matters that the Attorney General is constitutionally required to screen for when considering whether to certify a measure for the ballot.

³ G.L. c. 128A

⁴ *Peanut Quota Holders Ass'n v. United States*, 421 F3d 1323 (Fed.Cir.2005) cert. Denied, 548 U.S. 904 (2006).

Discipline

SUBSTANTIAL EVIDENCE FOUND TO SUPPORT THE REVOCATION OF MINNESOTA VETERINARIAN'S LICENSE.

In the matter of Dudley, 2008 Minn. App. Unpub. LEXIS 896.

Quick Summary: Veterinarian appealed veterinary board decision to revoke his license stating such action was arbitrary and capricious and not supported by substantial evidence. Substantial evidence was found where defendant had multiple rules violations including inadequate record-keeping practices and a failure to comply with previous disciplinary orders.

This case is an appeal from a Minnesota Board of Veterinary Medicine (BVM) decision to revoke the license of plaintiff Dudley. Plaintiff asserts that the decision to revoke his license to practice veterinary medicine was arbitrary and capricious and not supported by substantial evidence. The veterinarian has been licensed to practice veterinary medicine since 1958. On September 16, 2005, the BVM initiated a disciplinary proceeding against the veterinarian alleging rules violations pertaining to the care of four animals and then later amended its allegations to include complaints concerning three additional animals. The rules violations included the (1) use of inadequate pain medication, (2) the mistaken removal of a dog's prostate which also severed the urethra and failed to notice recognizing monitoring equipment malfunction and the death of the dog, (3) inadequate record keeping, (4) failure to use adequate pain medication and the failure to remove a tourniquet from a cat's leg in a timely fashion which necessitated amputation of the cat's leg, (5) failure to provide post-surgical pain medication or antibiotics, (6) improper treatment of a broken leg and (7) failure to provide adequate pain medication, antibiotics or home-care instruction for a cat declaw procedure. In all cases, the BVM alleged that record-keeping practices were inadequate.

The administrative law judge (ALJ), upon the VMB's motion, granted partial summary disposition on several of respondent's allegation and found that the veterinarian had failed to comply with three parts of a 2001 disciplinary order that had been imposed by the VMB requiring the veterinarian to (1) comply with record keeping requirements, (2) comply with any written request for information from respondent within 30 days of the date of request; and (3) obtain informed consent from clients before hospitalizing critically ill or injured animals overnight. At the hearing, the VMB introduced information that prior to 2005, the veterinarian had been the subject of four disciplinary orders pertaining to his record-keeping practices and care of animals. The veterinarian objected to the admission arguing that it did not pertain to the incidents at issue and that the evidence was unfairly prejudicial and lacking in probative value. The ALJ allowed the evidence for the limited purpose of demonstrating the veterinarian's familiarity with the VMB and its policies and the concerns that had been raised by the VMB in the past. The VMB called a veterinarian as an expert witness who testified that the veterinarian's treatment of the animals at issue failed to comport with the standards of practice in the veterinary field.

The Court of Appeals found that the ALJ and VMB had substantial evidence to revoke the veterinarian's license and that the conclusions of law and order are based on this substantial evidence and are grounded in the legislative requirements providing that a veterinarians' conduct must comply with minimum standards of acceptable practice. The Court also noted that the VMB's use of the veterinarian's prior disciplinary orders was used in a limited and appropriate manner.

Depictions of Animal Cruelty

DEPICTIONS OF ANIMAL CRUELTY CONSIDERED PROTECTED SPEECH.

U.S. v. Stevens, 533 F.3d 218; 2008 U.S. App. LEXIS 15277.

Quick Summary: The defendant was convicted under a federal law prohibiting selling depictions of animal cruelty with the intent of placing them in interstate commerce for commercial gain. The U.S. Court of Appeals overturned the conviction finding that 18 U.S.C. §48 was an unconstitutional restraint on the defendant's right to free speech.

Robert Stevens was convicted under 18 U.S.C. §48 for knowingly selling depictions of animal cruelty (dog fighting) with the intent of placing those depictions in interstate commerce for commercial gain. Though he asserted that §48 abridged his First Amendment right to freedom of speech, he was convicted in 2005 by a jury in Western District of Pennsylvania. His was the first prosecution under §48 and he appealed his conviction to the U.S. Court of Appeals. Ultimately, the Court rejected §48 and vacated Stevens' convictions stating that the statute does not pass constitutional muster.

Specifically, the Court found that §48 is a content-based restriction on speech and the speech at issue here is not, as asserted by the plaintiff, unprotected. And, when strict scrutiny is applied, the measure fails. The Government attempted to draw an analogy between *New York v. Ferber*, 458 U. S. 747 (1982) and §48 that was rejected by the Court as they applied the *Ferber* factors to §48.⁵

The Court did not find a compelling government interest stating that

...on balance, animal rights do not supersede fundamental human rights. Here, while the Government can and does protect animals from acts of cruelty, to make possession of the films of such acts illegal would infringe upon the free speech rights of those possessing the films.

The Court drew further distinction in finding that while there is a compelling interest in the physical and psychological well-being of a minor because a democratic society rests on the development of healthy, well-rounded children maturing into citizens, the same cannot be said of animals. Further, if this were a compelling government interest, content-based restrictions have been only for the well-being of humans, not animals.

In addition, §48 does not criminalize the underlying conduct, and cannot because the states already do so – it only regulates the depictions of animal cruelty. The Government failed to tie these depictions to actually preventing cruelty to animals.

With respect to the second factor, the depictions do not exacerbate or prolong the harm suffered by the animal in the depiction as is the case with child pornography. The third factor requires an economic motive behind the depiction that a ban will reduce or eliminate so as to reduce or eliminate the underlying conduct. With respect to taping dogfights, the conduct addressed here, the primary economic motivator is gambling on-site at the fight, as opposed to the revenue from recording it.

In considering the fourth factor, that the value of the prohibited speech is “exceedingly modest, if not de minimis,” the Court states that “...outside of patently offensive speech that appeals to the prurient interest, the First Amendment does not require speech to have serious value in order for it to fall under the First Amendment umbrella.” Since this is protected speech, the Court applied heightened scrutiny.

The Court reiterated its finding that no compelling government interest is served and finds further that §48 is not narrowly tailored to achieve such an interest, nor does it use the least restrictive means necessary to achieve that interest.

The Court also reasoned that, with respect to the commerce clause, the measure is both underinclusive and overinclusive. If the measure's intent is to prevent animal cruelty, it is underinclusive because it does not cover depictions generated for personal use or transferred about instate. It is overinclusive because it criminalizes a depiction that may be legal in the geographic region where it was produced.

⁵ Five factors articulated in *Ferber* that favor the creation of a new category of unprotected speech: compelling interest in safeguarding the physical and psychological well-being of a minor; child pornography is intrinsically related to the sexual abuse of children; advertising and selling child pornography are an economic motive and thus an integral part of the production of child pornography; the material of value that would be prohibited under the category of child pornography is de minimis and banning full categories of speech is an accepted approach in First Amendment law and appropriate in this instance.

Additionally, the fit between banning the depiction of the behavior and preventing its occurrence is not close. The Government argues that finding the individuals who are taking part or filming animal cruelty is very difficult since faces or markers are rarely available in such depictions. However the Court, after examining the evidence introduced in the record, observed that faces, names and contact information was included in some of the video footage. Thus, §48 was not a particularly effective or necessary means of prosecuting the underlying animal cruelty. Since §48 was an “impermissible infringement on free speech” Stevens’ conviction was vacated.

Emergency Treatment

PENNSYLVANIA COURT DEFINES AN “EMERGENCY CIRCUMSTANCE” UNDER ITS VETERINARY IMMUNITY ACT.

Hoffa v. Bimes, 2008 PA Super 181; 954 A. 2d 1241; 2008 Pa. Super, LEXIS 2048.

Quick Summary: Veterinarian treated a sick horse brought by employees of the training facility where the horse was boarded in the absence of any owner consent and under emergency circumstances. The horse died one year later and the owner asserted that the veterinarian’s actions caused the death. The owner sued for lack of consent, trespass to chattels and bailment. The Superior Court agreed with a lower court’s finding that the Pennsylvania Veterinary Immunity Act applied and found further that it was designed to respond to emergency, life-threatening situations allowing a decision-maker (veterinary doctor) the flexibility to act based on information they received or from the physical examination of the animal to make medically sound decision regarding treatment. Additionally, in order to recover for injuries to an animal stemming from veterinary treatment, the plaintiff was required to state a case for professional negligence. He failed to do so.

This case is an appeal from a judgment of compulsory non-suit in favor of Bimes and Quakertown Veterinary Clinic (QVC). The facts of the case, which are not in dispute, are that a horse owned by Hoffa was presented to QVC with symptoms of colic. The horse was brought to the facility by employees of the training facility where he was boarding. The horse was cared for by two veterinarians during the night at the QVC facility. Initial attempts were made to contact the owner (Hoffa) to discuss the horse’s condition. Both Hoffa and QVC agree that there was “an emergency situation” when Dr. Bimes arrived at 12:15a.m. He performed, among other things, an abdominal tap to try to diagnose the source of the horse’s pain. After the procedure was completed, Dr. Bimes was able to get in contact with Hoffa. Together they decided to move the horse to a different facility where surgery could be performed. The horse was taken to New Bolton Center at around 3:30a.m. for further treatment.

It was later discovered that during the course of the abdominal tap the needle pierced the horse’s small intestine and intestinal fluid leaked into the abdomen. This caused an infection to develop which Hoffa alleges contributed to the death of the horse more than a year later on July 29, 2002. On June 9, 2003 Hoffa filed a writ of summons in trespass which was followed by a complaint filed on June 27, 2005 claiming alleged lack of informed consent, a claim for bailment and a claim of trespass to chattel with respect to the treatment the horse received at QVC. At the close of Hoffa’s case, the trial court granted Bimes & QVC’s motion for nonsuit on each of the claims. A motion for compulsory non-suit is proper only where the facts and circumstances compel the conclusion that the defendants are not liable for the cause of action pleaded by the plaintiff when the plaintiff is given the benefit of all reasonable inferences.

At appeal Hoffa claims that the trial court erred in granting the non-suit after finding that the Veterinary Immunity Act bars claims against veterinarians except those based upon gross negligence. The Veterinary Immunity Act states, in part:

1. Any individual licensed to practice veterinary medicine who, In good faith, renders emergency care to an animal which such individual has discovered at the scene of an accident or

emergency situation ... shall not be liable for any civil damages as a result of any acts of omissions by such person in the rendering of the emergency care, except any acts or omissions intentionally designed to harm, or any grossly negligent acts or omissions which result in harm to the animal. ... (c) Exception – This section shall not apply where the owner of the animal is in attendance and can be consulted as to the proposed action by the veterinarian.

The Superior Court noted that the kernel of the dispute between the litigants concerned the meaning of “emergency care” and “emergency situation”, neither of which is defined by the Veterinary Immunity Act. There are no historical or statutory notes and no controlling case law to define these terms in the context of the Act. The Court looked to dictionary descriptions of these terms as well as other cases in which the court defined “emergency”. After their analysis the court found that the Veterinary Immunity Act is designed to respond to emergency, life-threatening situations allowing a decision-maker (veterinary doctor) the flexibility to act based on information they received or from the physical examination of the animal to make medically sound decision regarding treatment.

Hoffa also contended that the trial court erred in finding that his consent was not required for Dr. Bimes to perform an abdominal tap on his horse. However, Hoffa conceded he was not present at the veterinary clinic and that his horse was transported by someone that Hoffa referred to as his “agent”. The Court noted that both parties had stipulated that the veterinary care was rendered during an “emergency situation,” which, by law, dispenses with the need to secure the informed consent of the horse’s owner prior to administering “emergency care”.

Hoffa also argued that the trial court erred in barring his causes of action for bailment and trespass to chattels. The trial court and the Superior Court cited *Price v. Brown*, 545 Pa. 216, 680 A.2d 1149 (1996), in finding that the purpose for which an animal is entrusted to the care of a veterinarian is a material fact that must be considered in determining whether a plaintiff’s complaint states a cause of action for professional negligence. In this case both courts found that a cause of action for professional negligence must be pleaded and proved to recover damages for loss (death or injury) brought on by a veterinarian’s treatment.

Employment

WORKER’S COMPENSATION AVAILABLE TO EMPLOYEE WHO PURSUED AN ESCAPED DOG.

***Town and Country v. Deardorff*, 2008 Va. App. LEXIS 278 (Va. Ct. App. June 10, 2008).**

Quick Summary: Kennel assistant was found to be working in the “course and scope of employment” at the veterinary office and kennel, when he pursued an escaped dog. The employee was entitled to workers compensation benefits, due to injuries when he was struck by two vehicles during the pursuit of the dog.

Sean Deardorff (“Deardorff”) was working as a kennel assistant at the Town and Country Animal Hospital, when a pet owner brought his dog to be boarded at the kennel. Deardorff and his supervisor waited at the front door, as the owner walked the animal, on a lead, toward the business. As they neared the door, the dog pulled from his collar and began running toward the busy nearby road. Deardorff pursued the dog, even as his supervisor yelled “don’t do it.” The employee denies hearing the shouts of his supervisor, due to the sounds of the busy street. He safely crossed the highway, but, when the dog turned back towards the path of on-coming vehicles, Deardorff was struck, while attempting to catch hold of the animal. The last thing the employee remembers was running across the parking lot, in pursuit of the dog.

Town and Country Animal Hospital (“T&C”) and American Home appeal the decision of the Worker’s Compensation Commission (“Commission”), which awarded disability and medical benefits to Deardorff. The appellants argue the kennel assistant was not in the course and scope of employment at the time he pursued the dog. First, the pursuit took place off the premise of

T&C. Second, the pursuit of the dog was not in the duties of the kennel assistant, and it was not reasonably anticipated he would be expected to pursue the dog. Third, since the employee had no recollection of the incident, he could not introduce evidence to meet his burden of establishing it was within the course and scope of employment.

The court disagreed with the appellants. Evidence was introduced that T&C had a history of searching for other escaped pets during office hours in the vicinity. Thus, it would be anticipated that the search was within the duties of the employee. Additionally, the testimony of eyewitnesses allowed the Commission to determine the injuries occurred in the course of employment. The decision of the Commission was upheld.

PROPERTY OWNERSHIP ALONE DOES NOT GIVE RISE TO A SEPARATE AND DISTINCT CAPACITY FOR PURPOSES OF THE ILLINOIS DUAL-CAPACITY DOCTRINE.

***Kolacki v. Verink*, 2008 Ill. App. LEXIS 773 (Ill. App. Ct. 3d Dist. Aug 8, 2008).**

Quick Summary: Employee/plaintiff appealed a dismissal of her claim alleging that at the time of her injury, the defendants acted in a dual-capacity and thus were barred from the protection of the Workman's Compensation Act; thus liable as third party tortfeasors. The Appellate Court found that property ownership alone does not give rise to a separate and distinct capacity for purposes of the dual-capacity doctrine.

Here, the plaintiff appealed her case's dismissal stating that at the time of her injury, the defendants acted in a dual-capacity. Thus, the defendants should be barred from the protection of the Workman's Compensation Act and be held liable as a third party tortfeasors. Under the dual-capacity doctrine, also referred to as the dual-persona doctrine, a defendant who is protected by the exclusive remedy provision of the Workman's Compensation Act may become liable in tort if s/he acted in a second capacity that creates obligations independent of those imposed upon the defendant as an employer [Citation omitted]. The plaintiff must show (1) that the defendant operated in a second capacity, separate and distinct from his first capacity as the plaintiff's employer and (2) that the plaintiff's injuries must have been as a result of the activities performed by the defendant while engaging in the second capacity. Here, according to plaintiff, the defendants were acting in a separate and distinct capacity as owners of the property and as operators of a second business, one that boarded, trained and sold horses. Plaintiff also claimed that she was not acting as an employee or agent for the defendants at the time of the injury.

This Court found that defendants were acting within their capacity as owners and operators of the veterinary practice. The defendants did not own the horse and were not selling the horse they were merely boarding it and preparing the horse to be viewed by a buyer. Also, plaintiff was acting in her capacity as a barn manager by preparing the horse. Further, courts have repeatedly held that property ownership alone does not give rise to a separate and distinct capacity for purposes of the dual-capacity doctrine.

Insurance

INCREASE IN VETERINARIAN'S HEALTH CARE INSURANCE WAS PART OF A CLASS INCREASE AND NOT IMPROPERLY BASED ON HER HEALTHCARE HISTORY.

***Friedman v. NY Life*, 985 So. 2d 56; 2008 Fla. App. LEXIS 9122; 33 Fla. L. Weekly D1615 (Fla. Dist. App. 4th Dist. 2008).**⁶

⁶ This case is a continuation of *Friedman v. New York Life Ins. Co.*, 410 F.3d 1350 (U.S.C.A., 11th Cir., 6/6/05) which was remanded to state court. This case appeared in the *AVMLA Newsletter* Vol. X, No. 4 (Fall 2005).

Quick Summary: Veterinarian's suit against New York Life Co. alleging breach of contract for a rate increase based on her health history was dismissed at the trial court level because the increase was for the plaintiff/appellant's entire classification group. The Appellate Court affirms.

Plaintiff/Appellant purchased a health insurance policy from the defendant under a group contract through the American Veterinary Medical Association (AVMA). When her rates went up, she brought a class action lawsuit against the defendant/appellee, alleging breach of contract and seeking a declaratory judgment.

Plaintiff/Appellant's breach of contract claim must allege (1) a valid contract; (2) a material breach; and (3) damages. In her pleadings, plaintiff/appellant identified several statutory sections of the Florida Insurance Code that were violated by the parties' contract, but she failed to plead how she, herself, suffered because of these violations. She claimed that the breach of contract caused her to suffer monetary loss in excess of fifteen thousand dollars (\$15,000), but failed to tie this loss to a statutory violation.

Her declaratory relief claims alleged that defendant/appellee improperly discriminated by increasing insurance premium rates based on claimants' history/health status in violation of the Florida Insurance Code §627.65625. However, the premium increase was for plaintiff/appellant's entire classification group, and not based upon individual claimants' health-status-related factors. Furthermore, one of plaintiff/appellant's exhibits suggested that the trustees of the AVMA, and not the defendant/appellee, raised the insurance premiums.

Plaintiff/Appellant failed to properly plead a claim of injury or dispute against the defendant/appellee. The lower court's final order granting defendant/appellee's motion to dismiss with prejudice plaintiff's third amended complaint and order of dismissal was affirmed.

Licensure

NEW YORK'S REQUIREMENT OF U.S. CITIZENSHIP OR PERMANENT RESIDENCY FOR VETERINARY LICENSURE UNCONSTITUTIONAL.

***Kirk v. NY*, 562 F. Supp. 2d 405; 2008 U.S. Dist. LEXIS 48538 (W.D.N.Y. 2008).**

Quick Summary: Plaintiff, a Canadian citizen, with a "TN Visa", through NAFTA provisions, sought a professional veterinary license from New York State. On cross-motions for summary judgment, the USDC granted the plaintiff's motion and denied the State's motion, reasoning that New York's requirement of U.S. citizenship or permanent resident, was unconstitutional. The court determined the professional licensing requirement violated the Equal Protection and Supremacy Clauses of the U.S. Constitution. Thus, the Canadian citizen must be granted a New York State Veterinary License.

Plaintiff, Simon Kirk ("Kirk"), a Canadian citizen, lawfully entered the U.S., under a "TN" Visa, pursuant to the North American Free Trade Agreement ("NAFTA"). In accordance with the TN Visa requirements, Kirk intended to engage in business activities at a professional level (i.e. practicing veterinary medicine) but would not seek to be a permanent resident. Though New York Education Law § 6704(6) ("NY Statute") required that all applicants for a veterinary license be a U.S. citizen or an alien lawfully admitted for permanent U.S. residence, Kirk was granted a temporary waiver of the immigration requirement, due to a shortage of qualified veterinarians in the state.

Since NAFTA specifically required that persons admitted in the U.S. under a TN Visa may not intend to establish permanent residence, Kirk could not meet the immigration requirement of the NY Statute and could not be granted a permanent state license. The veterinarian challenged the NY Statute on two fronts. First, the statute provisions regarding immigrants violated the Equal Protection Clause of the U.S. Constitution, since it "discriminates against aliens." Second, the State Law violated the Supremacy Clause of the U.S. Constitution, since federal law pre-empted the regulatory area through the NAFTA treaty, and immigration requirement is directly contrary to the provisions of the TN Visa.

The arguments of the parties were presented to the trial court on cross motions for summary judgment. New York State argued that the NY Statute was only subject to a rational basis standard of review, since “non-immigrant aliens” (such as Kirk) were not considered a suspect class. In support of the position, the defendant cited jurisprudence from the Fifth and Sixth Circuit U.S. Courts of Appeal. Further, the State argued that it met the rational basis test, since there was a legitimate goal to restrict the type of persons who had access to controlled substances and was involved with the horse racing industry. The trial court disagreed with the State, and it reviewed the NY Statute at the higher standard of strict scrutiny, because the court considered all “aliens” members of a suspect class. Further, the court determined that, even under the lower standard of review, the State did not have a legitimate goal, which was demonstrated when the State allowed Kirk to operate under a temporary waiver of the immigration requirement.

The Federal Court also held that the area of the law, regarding the immigration requirements for professionals, had been pre-empted by the U.S. federal government with the passage of NAFTA. Thus, the NY Statute requirement of permanent resident status placed an additional burden on Kirk, which was not contemplated by NAFTA and was a violation of the Supremacy Clause.

Local Ordinances

ALBUQUERQUE HEART ORDINANCE IS CHALLENGED AGAIN.

***Rio Grande v. City of Albuquerque*, 2008 NMCA 93; 190 P. 3d 1131; 2008 N.M. App. LEXIS 64.**

Quick Summary: Petitioners appealed to the New Mexico Appellate Court to overturn the entire Humane and Ethical Animal Regulations and Treatment ordinance (HEART), which includes mandatory spay/neuter and other provisions, as unconstitutional. They had been successful in a lower court with respect to striking provisions authorizing warrantless, unannounced inspections and kennel requirements. However, since these provisions were severable, the rest of the ordinance stood. The Appellate Court affirmed the district court’s decision to strike those provisions, but reversed and remanded with regard to the issues of HEART’s licensing and permit fees as an impermissible excise tax and the ordinance’s burden on interstate commerce.

The City of Albuquerque adopted the HEART ordinance in 2007 and it contained numerous provisions governing the care and keeping of domestic animals, including mandatory spay/neuter for pets unless an intact permit is obtained. As one of its findings, the City of Albuquerque provided the following:

The Council further finds that the people of Albuquerque should treat animals as more than just lifeless inanimate chattel property and recognizes that the relationship between human beings and animals is a special relationship that improves people’s lives and reflects basic humanitarian beliefs.⁷

Plaintiffs brought suit in district court alleging multiple constitutional defects: violation of due process, procedural due process and substantive due process; violation of ex post facto laws; violation of New Mexico Constitution; preemption by both state and federal law; impediment to freedom of contract; violation of federal commerce clause; unconstitutional vagueness; impermissible excise tax and violation of the Fourteenth Amendment. The plaintiffs requested that the ordinance be declared unconstitutional and the City be enjoined from enforcing it. The City filed five motions to dismiss the claims. The district court found that only two of the provisions should be stricken: authorization of warrantless, unannounced inspections as an unreasonable search and seizure and requirements for kennels as violations of substantive due process. However, those provisions were severable and the remainder of the ordinance was upheld.

⁷ Full ordinance available through the City of Albuquerque website:
http://www.amlegal.com/albuquerque_nm/

The plaintiffs appealed to the Appellate Court alleging most of their original complaint and that the district court erred by dismissing the complaint based on an undeveloped record and without allowing the plaintiffs to amend their complaint. The City raised defenses to all of the plaintiff's allegations and urged the Court to affirm on the following grounds: plaintiffs lacked standing, plaintiffs did not seek to amend their complaint, development of the record was unnecessary because the challenge to the ordinance was facial and that the district court correctly entered summary judgment because the plaintiffs introduced materials outside the scope of the pleadings.

The Court found that the plaintiffs had standing because each owns an animal or business subject to HEART. Additionally, the district court was not required to allow a factual record to be developed in order to decide a motion to dismiss because such a motion considers only whether the plaintiff has pled a set of facts whereby s/he would be entitled to relief. The Court also found that the record did not indicate that the plaintiffs had requested permission to amend their complaint, thus the lower court made no ruling and the issue was not preserved for appeal.⁸

Licensure Fees as Improper Excise Tax

The plaintiffs objected to provisions of HEART requiring 60% of licensing and permit fees be dedicated to a fund dedicated to free microchipping, spay and neuter for low income residents. They asserted that this was an excise tax and pursuant to the New Mexico Constitution it was required to be placed before the voters before it could be effective. The Court remanded this issue back to the district court for consideration because, although fees that generate excess revenue are permissible, fees must bear a reasonable relationship to the city's burden in enforcing the regulation. And, that in entertaining a Rule 1-012(B)(6) motion to dismiss, the district court was required weigh evidence because this was a question in fact. The Court noted that since the ordinance had been effective since 2006, there should be ample data to determine if the City collected fees that are "unreasonably in excess of the cost of the regulation."

Due Process Violations

With regard to the plaintiff's assertion that the HEART ordinance would result in a taking without just compensation, the Court found that the issue was not ripe for adjudication. This differed from the district court's reasoning that the application of the HEART ordinance would not result in a taking. The Court also observed that the plaintiffs failed to allege that just compensation would be unavailable to them and that the absence of this allegation was fatal to the plaintiff's claim because the Fifth Amendment allows takings where there is just compensation.

In considering the plaintiff's claim that HEART contains no right of appeal for an administrative hearing officer's decision and that an impartial hearing is not provided, the Court found that New Mexico regulations allow appellate review by writ of certiorari of administrative proceedings where no other statutory right of appeal or review exists.

The Court declined to address the issue of whether or not the Mayor's ability to declare a moratorium on permits issued pursuant to HEART violates due process because the plaintiffs failed to cite any authority in support of their assertion. With regard to vagueness, the Court found that the plaintiffs failed to provide substantive arguments and authority as required by the rules of appellate procedure.

Preemption by State and Federal Law

The plaintiffs also argued that HEART was preempted by the Federal Animal Welfare Act; however, the Court found that the plaintiffs failed to state how the two actually conflicted. Thus, the district court acted appropriately when it dismissed the federal preemption claim. With regard to the plaintiffs' argument that HEART was also preempted by the New Mexico State Constitution and the New Mexico Livestock Code. The Court did not find any preemption issue at the state level either because the ordinance did not allow or prohibit something specifically allowed or prohibited by New Mexico Statutes or the New Mexico Constitution.

⁸ The Rules of Appellate Procedure requires parties to illustrate that an issue was preserved in the record and that all claims must be supported with argument and authority.

Reporting Client Information

The plaintiffs alleged that the requirement that veterinarians report certain information about animal owners to the City is impermissible; however, the Court did not find the issue preserved in the record and found no authority in support of this assertion. They did not address the issue.

Burden on Interstate Commerce, Violation of Freedom to Contract and Strict Products Liability

In addressing HEARTs alleged prohibition and elimination of business commerce pertaining to well-bred pets, the Court did not affirm the district court's determination that any burden on interstate commerce is incidental. Instead, the Court found that the district court erred because the pleadings set forth a sufficient claim and the issue was remanded back to the district court.

The plaintiffs also alleged that the HEART ordinance infringed on the plaintiff's freedom to contract. The Court found that no authority was cited to support this argument, so they declined to address the claim. Finally, in response to the plaintiff's assertion that HEART inappropriately applied the doctrine of strict products liability to the seller of a sick puppy or kitten, the Court found that the issue of strict liability was not preserved in the record.

Negligence

COMMON LAW TORT NEGLIGENCE ELEMENT OF HARM NOT NECESSARY IN A DISCIPLINARY HEARING PROCEEDING.

***Lawendy v. Connecticut*, 109 Conn. App. 113; 951 A.2d 13; 2008 Conn.App. LEXIS 356.**

Quick Summary: Board of Veterinary Medicine appeals a district court decision finding that the Board failed to meet its burden of proving the plaintiff's negligence. The Appellate Court overturned that decision indicating that the trial court had misapplied the common law tort elements of negligence to a disciplinary hearing.

The plaintiff had allowed one of his employees, a Columbian-licensed veterinarian who was not licensed to practice veterinary medicine anywhere in the United States, to perform cat neuters. For this conduct, the Connecticut Board of Veterinary Medicine found that Lawendy was negligent and had assisted with the unauthorized practice of veterinary medicine under Conn. Gen. Stat. § 20(2);(8). Lawendy filed suit contesting the sanctions alleging that the Board did not meet its burden to establish negligence; the Board failed to give adequate notice of the charges by not providing citations to the specific sections of statute and regulation he had allegedly violated; the Board erroneously admitted a prior Board action against Lawendy; the Board erroneously found that his practice was not entitled to a veterinary hospital education training exemption from the practice act and that Lawendy was unable to cross-examine witnesses at the hearing.

The trial court did not find for the plaintiff on any of the issues that he raised and affirmed the Board's determinations, with the exception of its finding of negligence. On that issue, the trial court agreed with Lawendy that the Board had failed to show all of the common law elements of a tort negligence claim, lacking specifically a showing of any harm. The Board appealed the trial court's negligence decision and the plaintiff cross-appealed on the issues he raised at trial with the exception of the introduction of prior disciplinary sanctions against him. His cross-appeal also alleged that the trial court improperly failed to remand the case back to the Board after reversing its finding of negligence. The Appellate Court found that since the negligence was in the context of a disciplinary action, the trial court improperly applied the common law standard. In all other respects the trial court's decision was upheld and the Court did not address the remand claim because it was moot.

Pharmacy

COMPOUNDED DRUGS ARE "NEW DRUGS" AND "NEW ANIMAL DRUGS" WITHIN THE MEANING OF THE FDCA.

***Medical Center Pharmacy v. Mukasey*, 536 F. 3d 383; 2008 U.S. App. LEXIS 15276.**

Quick Summary: The United States Court of Appeals for the Fifth Circuit rejected the finding by the United States District Court for the Western District of Texas that compounded drugs are exempt from the definitions of "new drugs" and "new animal drugs" in the Federal Food, Drug, and Cosmetic Act (FDCA). The Fifth Circuit found that compounded drugs are "new drugs" and "new animal drugs" within the meaning of the FDCA and thus subject to regulation by the FDA. The Court also ruled on the severability of advertising prohibitions in section 503A of the FDCA, which were found unconstitutional in a prior Supreme Court decision. The Fifth Circuit found that these prohibitions can be severed from section 503A, leaving the remaining parts of that section valid and effective.⁹

The Fifth Circuit's severability ruling conflicts with an earlier decision by the United States Court of Appeals for the Ninth Circuit, which held that the unconstitutional parts of §503A are not severable and that all of §503A is therefore void. The FDA and the Department of Justice are currently evaluating the Fifth Circuit's opinion. In the meantime, FDA will follow the court's decision in the Fifth Circuit and with respect to the plaintiffs covered by the decision. Elsewhere, the agency will continue to follow the enforcement approach reflected in the Compliance Policy Guide (CPG) section 460.200 [Pharmacy Compounding] issued by FDA on May 29, 2002.

Plaintiff/Pharmacies specialized in compounding prescription drugs for human and animal use. Drug compounding is the process by which a pharmacist combines or alters drug ingredients, according to a doctor's prescription, to create a medication to meet the unique needs of an individual human or animal patient. Compounding is a long-standing pharmaceutical practice that has been used to "prepare medications that are not commercially available, such as medication for a patient who is allergic to an ingredient in a mass-produced product." [Citation omitted.]

In the 1990's, however, the FDA became concerned that some pharmacies were purchasing bulk quantities of drug products, "compounding" them into specific drug products before receiving individual prescriptions, and marketing those drugs to doctors and patients. To address this, the FDA in 1992 promulgated Compliance Policy Guide No. 7132.16, which stated that the Federal Food Drug and Cosmetic Act of 1938 (FDCA) does not provide a general exemption to pharmacies from that statute's "new drug, adulteration, or misbranding provision." [Citation omitted.] This Guide was followed by congressional amendments to the FDCA: the *Food and Drug Modernization Act of 1997 (FDAMA)* and the *Animal Medicinal Drug Use Clarification Act of 1994 (AMDUCA)*. Both of these amendments exempted extra-label uses of human and animal drugs from the new drug approval process while restricting this exemption to certain narrow circumstances.

In 2002, the Supreme Court struck down FDAMA's advertising-related provision as unconstitutional restrictions on commercial speech, affirming in part the 9th Circuit's holding in *Western States Medical Center v. Shalala*, 238 F.3d 1090, 1096-98 (9th Cir. 2001). *Thompson v. Western States Medical Center*, 535 US 357, 360-61 (2002). However, whereas the 9th Circuit found FDAMA non-severable, and therefore invalid in its entirety, the Supreme Court declined to address the validity of the remaining non-advertising provisions. In response, the FDA issued revised Compliance Policy Guides addressing compounding of human and animal drugs, taking the position that these drugs are not exempt from the FDCA's new drug approval, adulteration, or misbranding provisions.

Plaintiff/Appellants sued for declaratory and injunctive relief, challenging the authority of the FDA to regulate compounded drugs under the FDCA. They sought, in part, declaratory judgments stating that: (1) compounded drugs are not "new drugs" or "new animal drugs", and therefore are not subject to the requirements and prohibitions imposed by the FDCA on such drugs; and (2) the FDCA permits pharmacists to compound drugs from bulk ingredients for non-food animals. The district court granted plaintiff/appellants' request for declaratory judgment regarding compounding from bulk ingredients for non-food animals, reasoning that "the remaining provisions of [FDAMA] demonstrate that Congress intended to declare that compounding is an approved and legal practice." The court reiterated that "compounded drugs, when created for an individual patient pursuant to a prescription from a licensed practitioner, are implicitly exempt from the new drug definitions of the FDCA.

⁹ Source: http://www.fda.gov/cder/pharmcomp/medical_center_pharmacy.htm

The FDA appealed this holding that compounded drugs are “implicitly exempt” from the “new drug” and “new animal drug” definitions. The agency also appealed the holding that drugs compounded from bulk ingredients for non-food animals do not violate the FDCA’s unsafe, adulteration, or misbranding provisions.

The Appellate Court reviewed de novo the questions of summary judgment and those related to statutory interpretation. [Citations omitted.] Finding that the FDAMA’s provisions were severable – based upon the explicit severability provision contained in the FDCA – the definition of “new drug” under the FDCA had to be construed in light of the language of the FDAMA. Accordingly, the FDCA’s definition of “new drugs” applied to drugs created by compounding. Because compounded drugs were “new drugs”, the restrictions on “new drugs” generally applied to compounded drugs. Against this backdrop, however, the FDAMA carved out explicit, conditional exceptions for compounded drugs that complied with its enumerated conditions. If and only if the compounded drugs satisfied these conditions, were they exempt from the requirements of the FDCA.

Similarly, the Appellate Court concluded that compounded drugs designed for animal use were also subject to the FDCA’s “new drugs” or “new animal drugs” provisions. Although its provisions were different from FDAMA’s, AMDUCA’s effect on construction of the “new animal drug” definition was much the same as FDAMA’s effect on construction of the “new [human] drug” definition. So, unless the compounded drugs were exempt under AMDUCA’s provisions, compounded animal drugs were subject to the FDCA’s unsafe, adulteration, and misbranding requirements. As with human drugs, the FDCA contained no blanket “implicit exemption” for animal drugs by compounding. The Appellate Court vacated the judgment of the trial court and remanded the matter for further proceedings.

PHARMACY BUSINESS ATTEMPTS TO DEFINE ALL ANIMAL OWNERS AS VETERINARIANS UNDER THE ANIMAL OWNER EXEMPTIONS IN STATE PRACTICE ACTS.

***U.S. v. Goldberg*, 538 F. 3d 280; 2008 U.S. App. LEXIS 16852.**

Quick Summary: The defendant was convicted for illegally distributing drugs to horse owners and illegally obtaining anabolic steroids for use in his brother’s horse training operation. He distributed drugs to animal owners on the theory that because animal owners were allowed by state practice acts to treat their own horses, they were in fact acting as veterinarians to their horses. Therefore, distributing drugs without prescriptions to these individuals was a vet-to-vet transfer. Despite warnings from individual states and the FDA, Goldberg continued to distribute these drugs until he was convicted. Here, he challenged his conviction and sentence. The Court upheld the convictions, but reduced the misbranding violations from felony to misdemeanor violations and reversed the two-level enhancement to Goldberg’s sentence.

This case is an appeal from the Eastern District of Pennsylvania in which Goldberg was convicted of wire and mail fraud, possession with intent to distribute an anabolic steroid, introducing misbranded drugs into interstate commerce and felony misbranding in violation of 21 U.S.C.S. §331(k).

Goldberg, under the business name Equihealth Products, sold veterinary grade prescription drugs to horse owners, as long as they affirmed that they were using the drugs to treat their own horses and that under the state law in where they resided they were considered “veterinarians” when treating their own horses. Goldberg argued that his business could legally dispense these drugs without proof of prescription citing the Food, Drug and Cosmetic Act (F.D.C.A.) provisions permitting the transfer between veterinarians without a prescription. Equihealth had a veterinarian on staff and was selling to horse owners who were recognized as “veterinarians” under their states’ laws.

The FDA and its state counterparts repeatedly notified Goldberg that his attempt at using the F.D.C.A. was no more than an excuse to illegally distribute prescription drugs. Because Equihealth continued to distribute prescription drugs to owners, the F.B.I. launched an investigation that eventually led to Goldberg’s indictment for crimes related to Equihealth’s operations, as well as for crimes related to his role in supplying his brother, a race horse trainer,

with anabolic steroids for use in the brother's horse training operation. The district court found Goldberg guilty on all counts and the jury rejected his theory of vet-to-vet transfer.

On appeal, Goldberg accepts that Equihealth's activities were illegal, but argues that his conviction is flawed and that the district court erred in calculating his sentence. The veterinarian that worked for Equihealth denied any involvement with ordering the anabolic steroids for Goldberg's brother and accused Goldberg of stealing his D.E.A. number and placing the order without his knowledge. The Appeals Court upheld all of Goldberg's convictions except that they reduced the misbranding violations from felony to misdemeanor violations. The Court's logic follows.

Misbranding is governed by 21 U.S.C. §331(k) which prohibits "the doing of any...act with respect to...a food, drug, device, or cosmetic, if such act is done while such article is held for sale (whether or not the first sale) after shipment in interstate commerce and results in such article being adulterated or misbranded." According to the Court, this includes dispensing prescription drugs without a prescription. The difference between felony and misdemeanor misbranding is intent. Willful misbranding is only a misdemeanor unless there is "the intent to defraud or mislead", then it is a felony. The Court found that Goldberg's customers were the ones lying about their respective state laws since they were required to make the affirmative statement that they were allowed to treat their own horses. They were also told that the drugs were not being provided to them via a prescription from a veterinarian and that no veterinarian would be able to consult directly with them either before or after they placed their order. The Court also found that the suppliers of the drugs were not told and no implication was made by Goldberg that the drugs would not be resold, nor that he had a prescription to buy these drugs.

The Appeals Court also reversed the two-level enhancement to Goldberg's sentence related to "violating a prior, specific judicial or administrative order, injunction, decree, or process or administrative order, injunction, decree, or process not addressed elsewhere in the guidelines" U.S.S.G. §2B1.1(b)(8). The Court found that although the F.D.A. had repeated dealings with Goldberg, the F.D.A. never issued a definitive order telling Goldberg that he had to stop; therefore, the F.D.A.'s notice was insufficient to support his conviction on this charge since no administrative order was issued. The court also reviewed the various letters from state veterinary medical boards and found that they were merely warning letters to "cease and desist" without any invitation for Goldberg to participate in the process in any meaningful way.

Research

MSU- IAMS RECORDS NOT SUBJECT TO PUBLIC DISCLOSURE.

Mississippi State University and the Iams Company v. People for the Ethical Treatment of Animals, Inc., 2008 Miss. LEXIS 355 (Miss. July 31, 2008).

Quick Summary: PETA sued MSU and Iams seeking Institutional Animal Care and Use Committee ("IACUC") records for projects, tests, and experiments funded by Iams under MSU's agreements with Iams. Iams and MSU alleged that the documents contained proprietary information and fought disclosure. A chancery court ordered the disclosure of the documents and both parties filed a joint notice of appeal. The Mississippi Supreme Court overturned that decision finding that the documents were not subject to public disclosure. PETA has applied for a rehearing.

MSU and Iams have a contract limiting disclosure of confidential information and intellectual property rights relating to research projects that were conducted at MSU from 1999 to date. PETA requested documentation of the research projects, seeking only Institutional Animal Care and Use Committee ("IACUC") records for projects, tests, and experiments funded by Iams under MSU's agreements with Iams. MSU and Iams refused to submit 534 pages that were requested stating that those pages contain proprietary information. Daniel Carey, D.V.M., Director of Technical Communications for Iams, submitted an affidavit attesting that the data and information recorded on the IACUC protocol forms that MSU has refused to release constitutes "trade secrets," "confidential commercial information," and "proprietary information." PETA filed a complaint in Chancery Court in Oktibbeha County seeking disclosure.

Both parties filed numerous motions with PETA seeking the release of the documents claiming that MSU is a public body and that pursuant to Mississippi Public Records Act documents created by MSU are open for disclosure to the public. MSU and Iams filed motions stating that they have released the documents pursuant to the law but that they are exempt from releasing proprietary information pursuant to both Mississippi law and Federal Law and they are further exempt from releasing proprietary information based on their contractual agreement of non-disclosure. The Chancery court reviewed the motions, performed an in camera review of the documents and ordered the release of the documents to PETA holding that the documents were not generated by the contractual agreement between MSU and Iams, but rather were generated as required by IACUC and federal legislation. Further, the court agreed with PETA and found that MSU is a public body and documents created by MSU are open for disclosure to the public. Iams and MSU timely filed a joint notice of appeal.

The Supreme Court addressed the following: (1) if the Chancery Court erred in holding that the data and information recorded on the IACUC protocol forms were not protected from disclosure by the Mississippi Public Records Act, and (2) if the contractual relationship between MSU and Iams exempts the release of the documents pursuant to their non-disclosure agreement.

The IACUC is a committee created by MSU pursuant to the Federal Animal Welfare Act, 7 U.S.C. §§ 2131-2157 (1985). Its purpose is to review all proposals for use of animals for research at the university, in order to assure that the research animals will be properly treated according to federally established guidelines. The IACUC requires the "principal investigator" seeking funding for a project using animals to submit to the committee a protocol application. The application seeks to elicit information regarding what type of animals are to be used and how many, the care and use of the animals throughout the experiment. [Citations omitted.] These are the protocols that PETA requests.

The Mississippi Public Records Act provides that public bodies shall disclose documents when a written request for such documents is made. Denial by a public body of the request for access shall be made in writing with the reasons stated for such denial. However, "[t]rade secrets and confidential commercial and financial information of a proprietary nature developed by a college or university under contract with a firm, business, partnership, association, corporation, individual or other like entity shall be exempt from the provisions of the Mississippi Public Records Act of 1983." Miss. Code Ann. §79-23-1(3) (Rev. 2001) (emphasis added).

Under federal law, "[n]o rule, regulation, order, or part of this chapter shall be construed to require a research facility to disclose publicly or to the Institutional Animal Committee during its inspection, trade secrets or commercial or financial information which is privileged or confidential." 7 U.S.C. §2143(a)(6)(B) (1985) (emphasis added).

This Court found that while the form for the IACUC is in the public domain, the information on that form is not. While a public body is to release data to the public, the data is not to be released if the data is information that is of a proprietary nature, exclusively owned, trade secrets, confidential commercial or financial information of a proprietary nature developed by a college or university.

Turning to the contractual relationship between MSU and Iams, Iams consistently maintained that their information is of a most confidential nature. Iams made more than reasonable efforts to protect this information from disclosure through their contractual provisions. Dr. Carey's affidavit attests that the data recorded on the IACUC protocol forms constitutes trade secrets and proprietary information. PETA submitted no evidence to contradict this testimony. Therefore, the Court found that the data and information requested by PETA was exempted from the provisions of the Mississippi Public Records Act, in harmony with applicable federal law. The Court reversed the order of the Chancery Court and remanded this case to the trial court for entry of judgment consistent with this opinion.

In his dissent, Justice Diaz stated that the standard of review should be abuse of discretion, not de novo because the chancellor's order is an application of the law to the facts. Also, the information requested by PETA concerns the discomfort, distress, and pain endured by the animals, not the proprietary interest between MSU and Iams. Justice Diaz agreed with the chancellor that MSU and Iams did not establish with specificity that the protocols are a trade

secret and that Dr. Carey's affidavit was merely a legal conclusion that the protocols contain trade secrets and confidential information. Diaz further states that PETA was not able to produce evidence that contradicts Dr. Carey's affidavit without access to the sealed documents.

Rule Challenges

PORTIONS OF NJ HUMANE TREATMENT OF LIVESTOCK REGULATIONS STRUCK AS ARBITRARY AND CAPRICIOUS.

New Jersey Society for the Prevention of Cruelty to Animals, et al. v. New Jersey Department of Agriculture, 2008 N.J. LEXIS 894 (N.J. July 30, 2008).

Quick Summary: Plaintiffs sued the New Jersey Department of Agriculture alleging that rules promulgated to promote the humane treatment of livestock were not humane. The New Jersey Supreme Court struck portions of the regulation as either arbitrary and capricious or too vague to be enforced. However, the Court specifically stated that this decision is not a ban on the continuation of any practice, but it does require the Department to better define the standards or conditions under which these procedures can humanely be performed. It was noted that if an individual engages in these practices s/he may be subject to challenge by an enforcement authority regarding whether or not the activity is humane.

In 1994 the New Jersey Legislature introduced SB 713 to create "An Act concerning domestic livestock and animal cruelty and animal welfare laws." A statement attached to the bill indicated that the intent of the bill was to allow the New Jersey Society for the Prevention of Cruelty to Animals (NJ ASPCA), in cooperation with the New Jersey Department of Agriculture (Department), to continue to enforce New Jersey's animal cruelty laws. The Senate committee that heard the bill adopted the identical intent statement regarding the bill and SB 713 became law in June of 1994.

When the bill came to Governor Whitman's desk she exercised her power to "item veto" the \$50,000 GRF appropriation for the bill, while acknowledging the merit and goal of the bill. On the same day, the Legislature enacted the bill without the appropriation.

The bill required the State Board of Agriculture (Board) and the Department, in consultation with the New Jersey Agricultural Experiment Station, to develop rules for the humane care of livestock¹⁰. The bill further stated that a presumption will exist that these rules create standards

¹⁰ N.J. Rev. Stat. § 4:22-16.1. a. The State Board of Agriculture and the Department of Agriculture, in consultation with the New Jersey Agricultural Experiment Station and within six months of the date of enactment of this act, shall develop and adopt, pursuant to the "Administrative Procedure Act," P.L.1968, c.410 (C.52:14B-1 et seq.): (1) standards for the humane raising, keeping, care, treatment, marketing, and sale of domestic livestock; and (2) rules and regulations governing the enforcement of those standards.

b. Notwithstanding any provision in this title to the contrary:

(1) there shall exist a presumption that the raising, keeping, care, treatment, marketing, and sale of domestic livestock in accordance with the standards developed and adopted therefore pursuant to subsection a. of this section shall not constitute a violation of any provision of this title involving alleged cruelty to, or inhumane care or treatment of, domestic livestock;

(2) no person may be cited or arrested for a first offense involving a minor or incidental violation, as defined by rules and regulations adopted pursuant to subsection a. of this section, of any provision of this title involving alleged cruelty to, or inhumane care or treatment of, domestic livestock, unless that person has first been issued a written warning.

c. For the purposes of this act, "domestic livestock" means cattle, horses, donkeys, swine, sheep, goats, rabbits, poultry, fowl, and any other domesticated animal deemed by the State Board of Agriculture and the Department of Agriculture, in consultation with the New Jersey Agricultural Experiment Station, to be domestic livestock for such purposes, according to rules and

that are neither inhumane nor cruel. The New Jersey animal cruelty statutes were also amended so that activities conducted in accordance with the rules would be exempt from the statute. The bill also specifically exempted properly conducted scientific experiment from animal cruelty statutes.

Though the Department had a six month time frame in which to promulgate regulations pursuant to the bill, the regulations were not published for comment until 2003. In response, the Department received over 6,500 written comments and did modify the proposed regulations before adopting them on June 7, 2004. In releasing the regulations, the Department also stated that it sought to establish the “minimum level of care that can be considered humane” and referenced the many authorities and information sources they consulted in promulgating the regulations. Additionally, the Department indicated that it understood its mandate as meeting the “complementary objectives of developing standards to protect animals from inhumane treatment and ...fostering industry sustainability and growth.” At the same time these regulations were published, other regulations to amend them were posted for notice. These amendments were revisions to the definition of “routine husbandry practices” and were subsequently adopted. Further amendments were adopted on December 4, 2006 to limit induced molting procedures and to ban full feed-removal forced molting.

The NJ ASPCA brought suit against the Department in Appellate Court asserting that the Legislature wanted to elevate the treatment of farm animals so that only humane practices were used and that the regulations did not achieve that aim. Specifically, the exemption for “routine husbandry practices”¹¹ was too broad, impermissibly vague and not grounded on any evidence in record. Further, some subsections were vague or undefined so as to render them unenforceable and the regulations authorized practices that failed to meet the Department’s own definition of humane.

The Appellate Court rejected the NJ ASPCA’s challenges and upheld the regulations finding that the enabling legislation directed the Department to consult with the Agricultural Experiment Station and that this allowed them also to consider and rely on other information sources in defining “routine husbandry practices.” Regarding unenforceable standards, the Appellate Court rejected the New Jersey ASPCA’s contention that the requirement for “minimization of pain” in performing specified practices was not a meaningful standard. In addressing other challenged practices addressed in the rules, the Appellate Court found that the Department had reviewed voluminous, wide-ranging authorities before making a decision and because support for the practices could be found in these authorities, deference to the Department’s rule-making authority was appropriate. The NJ ASPCA appealed to the New Jersey Supreme Court.

NJ ASPCA argued that the Appellate Court erred and failed to recognize that the regulations allow the continuation of practices that are not humane. They contended that the Legislature’s intent was not to simply allow practices considered routine or common, but rather to have the Department examine practices to determine whether or not they were humane. In addition, they reiterated the same arguments brought before the Appellate Court.

The Supreme Court stated that though deference is given to the Department for its final actions, the standard of review allowed these regulations to be invalidated if they were “arbitrary, capricious or unreasonable” or not supported by a substantial, credible record as a whole.¹² The

regulations adopted by the department and the board pursuant to the "Administrative Procedure Act." L.1995,c.311,s.1.

¹¹ N.J. Admin. Code tit. 2 § 8-1.2 "Routine husbandry practices" means those techniques commonly taught by veterinary schools, land grant colleges, and agricultural extension agents for the benefit of animals, the livestock industry, animal handlers and the public health and which are employed to raise, keep, care, treat, market and transport livestock, including, but not limited to, techniques involved with physical restraint; animal handling; animal identification; animal training; manure management; restricted feeding; restricted watering; restricted exercising; animal housing techniques; reproductive techniques; implantation; vaccination; and use of fencing materials, as long as all other State and Federal laws governing these practices are followed.

¹² *Henry v. Rahway State Prison*, 81 N.J. 571, 579-80 (1980).

regulations could also be invalidated if they ran contrary to enacting legislation¹³ or if they failed to provide adequate notice or standards to inform the public and “guide the agency in discharging its function.”¹⁴

The Supreme Court decided not to invalidate the regulations in their entirety because there was no “pervasive defect in process or content” and determined that the definition of “routine husbandry practices” was so “broad and all-encompassing” that it was an improper delegation of the Department’s authority. The Court found that such a delegation occurred because the Department never actually reviewed the techniques taught at the veterinary colleges and presumed them to be humane. In addition, the Court found that the Department was directed to exempt humane practices from the animal cruelty statutes, not just “common” or “routine” husbandry practices. The Court reasoned that if exempting commonly performed tasks was the goal of the Legislature, they would have included in the actual law as other states have done. Further, the exemption of “routine husbandry practices” was one of exceptional breadth, not supported by an adequate record and failed to meet “the statutory mandate to base its [the Department’s] regulations on a determination about is humane.” The Court found the definition of “routine husbandry practices” invalid and invalidated the portions of the regulation referring to the definition.¹⁵

The Supreme Court then considered whether to uphold the regulations allowing for the performance of the following procedures: tail docking of cattle; use of crates or tethering of swine, cattle and veal calves; castration of cattle, horses and swine; de-beaking of poultry; toe-trimming of turkeys and transporting sick and downed cattle to slaughter. The Department allowed these procedures to be performed and considered them humane as long as they are “performed in a sanitary manner by a knowledgeable individual and in such a way as to minimize pain.”¹⁶ The NJ SPCA attacked the regulations allowing these procedures as inhumane.

The Court reviewed literature about tail docking, including an AVMA position paper stating the procedure is of no benefit to the animal, and determined that the record reflected that the procedure is “specifically disparaged” by both the AVMA and Canadian VMA. In addition, the scientific evidence suggesting any possible benefit is inconclusive. The Department and industry trade group even discourage its use. The Court found that permitting this practice without support in the record and without any limitation as to how it may be performed in an objectively humane manner was arbitrary and capricious.

The remaining procedures were considered together and the Court found that there was a sufficient record to support these practices and permitting them was neither arbitrary nor capricious. The Court pointed out that it did not “suggest that these procedures cannot be carried out in a manner that is, objectively, humane.” However, since the Department failed to define key terms in determining whether the procedures were humane, specifically, “knowledgeable” “sanitary” and “way to minimize pain,” the regulations failed to fix a standard for the procedures to be performed humanely and were too vague to establish an enforceable standard.

The Court also considered the NJ SPCA’s objections to the use of crates and tethering for swine and veal calves. Petitioners submitted an array of materials, including a portion of the Florida Constitution banning the use of sow gestation crates.¹⁷ The Court found that the Department had support in its record for allowing the practice and allowing it was neither arbitrary nor capricious. In addition, it noted that the Legislature had twice declined to adopt bills banning crates for veal calves.

¹³ In re Rulemaking, N.J. Admin. Code tit. 10:82-1.2 & 10:85-4.1, 117 N.J. 311, 325 (1989).

¹⁴ *Lower Main St. Assocs. v. N.J. Hous. & Mortgage Fin. Agency*, 114 N.J. 226, 235 (1989) (citing *Dep’t of Env’tl. Prot. v. Stavola*, 103 N.J. 425, 436-38 (1986); *Dep’t of Labor v. Titan Constr. Co.*, 102 N.J. 1, 12-18 (1985)).

¹⁵ N.J. Admin. Code tit. 2:8 -2.2(b)(4)(iv), -2.6(f), - 2.4(g), -2.4(h), -3.6(f), -4.7(e), -4.7(f), -5.7(e)(2), -6.6(d), -7.6(d), -7.4(b)(2).

¹⁶ N.J. Admin. Code tit. 2:8-4.7, 2:8-5.7 and 2:8-6.6.

¹⁷ Fla. Const. Art. X § 21.

Finally, the Court addressed the NJ ASPCA's argument that the transport of sick and downed cattle to slaughter was inhumane. The Court, in reviewing the New Jersey Administrative Code found that since the permissible, humane methods of euthanasia are strictly limited¹⁸, the decision of the Department to allow farmers to transport animals for slaughter was neither arbitrary, nor was it capricious.

In summarizing its decision, the Court specifically states that its decision is not a ban on the continuation of any practice, but it does require the Department to better define the standards or conditions under which these procedures can humanely be performed. It is noted that if an individual engages in these practices s/he may be subject to challenge by an enforcement authority regarding whether or not the activity is humane.

Scope of Practice

STATUTORY REQUIREMENTS FOR MINNESOTA TEETH FLOATERS UPHELD.

Christopher Johnson v. the Minnesota Board of Veterinary Medicine, No. 27-CV-06-16914 (Minn. 4th Dist. Ct. June 20, 2008).

Quick Summary: Plaintiff alleged ten causes of action attacking the ability of the Board of Veterinary Medicine to regulate equine teeth floating. The Court upheld the Board's authority finding that the regulating statute set objective standards and was rationally related to protecting the health, safety and welfare of the public. In addition, the Court found that such regulation did not excessively burden entry into equine teeth floating because it offers several avenues for non-veterinarians to lawfully perform those activities.

In this case The Institute for Justice¹⁹ represented plaintiff Christopher Johnson. He had violated the Minnesota Veterinary Practice Act in 2004 by illegally floating teeth and was ordered to cease and desist by the Minnesota Board of Veterinary Medicine. In 2005, the Minnesota Legislature enacted Minn. Stat. §156.075²⁰ to allow unlicensed persons to perform the procedure where the

¹⁸N.J. Admin. Code tit. has euthanasia standards that incorporate by reference the Report of the AVMA Panel on Euthanasia (N.J. Admin. Code tit. 2:8-2.6(a)(1)); prohibit dragging non-ambulatory cattle while conscious (N.J. Admin. Code tit. 2:8-2.6(a)(3)(ii)) require cattle be humanely treated while going slaughter or to be euthanized (N.J. Admin. Code tit. 2:8-2.6(a)(3)(v)) and require prompt and humane euthanasia or treatment for sick or injured cattle N.J. Admin. Code tit. 2:8-2.6(a).

¹⁹ The Institute for Justice is a 501(c)(3) founded in 1991, as a libertarian public interest law firm.

²⁰ MINN. STAT. §156.075 REQUIREMENT FOR EQUINE TEETH FLOATERS.

Subdivision 1. Definitions. For purposes of this section the following terms have the meanings given them.

(a) "Equine teeth floating" means:

- (1) removal of enamel points from teeth with handheld, nonmotorized, non-air-powered files or rasps;
- (2) reestablishing normal molar table angles and freeing up lateral excursion and other normal movements of the mandible;
- (3) shaping the lingual aspect of the lower arcades and the buccal aspect of the upper arcades to a rounded smooth surface; and
- (4) removing points from the buccal aspect of the upper arcade and the lingual aspect of the lower arcade.

(b) "Indirect supervision" means a veterinarian must be available by telephone or other form of immediate communication. The veterinarian must be currently licensed under this chapter.

Subd. 2. Equine teeth floating services. (a) A person may perform equine teeth floating services after submitting to the board the following:

- (1) proof of current certification from the International Association of Equine Dentistry or other professional equine dentistry association as determined by the board; and
- (2) a written statement signed by a supervising veterinarian experienced in large animal

The Institute for Justice (IJ) also filed two lawsuits in Texas. One in 2007 alleging that the inclusion of teeth floating as the practice of veterinary medicine violates the Texas constitution by infringing on plaintiff teeth floaters' rights to "economic liberty" and is a violation of their equal protection rights. Plaintiffs also allege that the statute creates an unconstitutional business monopoly by the state.

– *Mitz v. Texas State Board of Veterinary Medical Examiners* filed on August 28, 2007 in Travis County District Court in Austin, TX.

IJ filed a second suit in Texas seeking to "hold the Board accountable for its actions" with respect to its conduct in addressing the first lawsuit.

– *Boone, et al. v. Texas State Board of Veterinary Medical Examiners, et al.* filed on April 23, 2008 also in Travis County.

IJ has also filed a suit in Maryland this summer challenging the Maryland Veterinary Medical Board's authority to regulate animal massage asserting a violation of the plaintiff animal masseuse's fundamental constitutional rights.

– *Clemens v. Maryland State Board of Veterinary Medical Examiners, et al.* filed on June 10, 2008, in the Circuit Court for Montgomery County in Rockville, Md.

following criteria are met: proof of current certification from approved equine dentistry association and a written statement from a supervising veterinarian experience in large animal medicine that s/he will provide direct/indirect supervision for the procedure. A grandfather clause was also included as an additional route to legally perform this procedure.

The plaintiff filed suit against the Board on September 8, 2006 alleging ten causes of action challenging Minn. Stat. §156.075 and the Court granted the defendants summary judgment on the following six causes: unlawful delegation under Minnesota and federal law; violation of rights/privileges under Minnesota law; violation of privileges/immunities under federal law and violation of procedural due process under Minnesota and federal law.

The following causes survived summary judgment, but were ultimately dismissed with prejudice: violation of equal protection clause under Minnesota and federal law and violation of substantive due process under Minnesota and federal law.

In addressing the asserted equal protection violation under the Minnesota Constitution, the Court analyzed the statute using the heightened rational basis test:

1. Classification distinctions must be genuine and substantial with a natural and reasonable basis for justifying the legislation. The distinctions cannot be arbitrary;
2. The classification must be genuine or relevant to the purpose of the law; and
3. The statute's purpose must be one that the state can legitimately attempt to achieve. [citation omitted.]

The Court indicated that the Minnesota test differs from the federal one in that it does not hypothesize a rational basis to justify a classification. [Citations omitted.] The Court found that even under this test, the state may legitimately exercise its police power to protect public health, safety, or welfare by regulating professions. Because teeth floating does pose

medicine that the applicant will be under direct or indirect supervision of the veterinarian when floating equine teeth.

(b) The board must waive the requirement in paragraph (a), clause (1), and allow a person to perform equine teeth floating services if the person provides satisfactory evidence of being actively engaged in equine teeth floating for at least ten of the past 15 years and has generated at least \$5,000 annually in personal income from this activity.

risks to the public and is distinct from other professions, there is a natural and reasonable basis justifying the statute. Further, Minn. Stat. §156.075 serves a legitimate state purpose to protect the health, safety and welfare of horses and the public. The Court found that Johnson failed to illustrate that he was treated unequally with respect to other similarly situated individuals. Similarly, the plaintiff's claim failed when analyzed under the federal rational basis test.

With respect to analysis of substantial due process violations under the Minnesota and U. S. Constitutions, both tests require government regulations to be rationally related to a legitimate government interest and cannot be arbitrary or capricious. [Citations omitted.] The analysis of state substantive due process claims that do not involve a suspect class or fundamental right require the application of Minnesota's three-pronged rational basis test detailed above. Additionally, with respect to occupational licensing, regulations must have a rational connection with a citizen's ability to work in a particular vocation and cannot place an excessive burden on the entry into a lawful occupation with regulatory requirements unrelated to the occupation. [Citations omitted.] The Court found that the Minn. Stat. §156.075 set objective standards and was rationally related to protecting health, safety and welfare because teeth floating differs from other professions and requires regulation in order to be practiced safely. The Court found that the regulation put forth to govern equine teeth floating did not excessively burden entry into that profession because it offers several avenues for non-veterinarians to lawfully perform teeth floating activities.

LEGISLATIVE WATCH

June - August 2008

Thank you to the American Veterinary Medical Association's Legislative and Regulatory Affairs Department in the Communications Division for the use of its legislative and regulatory tracking chart. For summary information and links to the full text of bills and regulations, please see the "Advocacy" section of the AVMA website: <http://www.avma.org/advocacy/state/default.asp>

The measures listed below have all been adopted. To see the entire text of the bills, please refer to the website of the bill's state of origin.

Animal Welfare

California adopted A.B. 2098 to tighten the statute governing the treatment of "downer" animals. This bill prohibits a slaughterhouse from holding a non-ambulatory animal without taking immediate action to humanely euthanize the animal. It would also require a stockyard, auction, market agency, or dealer holding a non-ambulatory animal to take immediate action to either humanely euthanize the animal or provide immediate veterinary treatment.

In addition, A.B. 2098 prohibits a person from selling, consigning, or shipping a non-ambulatory animal, or receiving such an animal for transport or delivery, to a slaughterhouse, stockyard, auction, market agency or dealer. The bill attaches penalties for violations of up to one year of imprisonment in a county jail and/or a twenty-thousand dollar (\$20,000) fine. Effective January 1, 2009.

District of Columbia L.B. 89 requires humane officers, law enforcement officers and protective services professionals to report animal cruelty. It also amends the duties of the Animal Care and Control Agency and increases licensure fees for intact dogs. LB 89 caps the number of animals that may reside at a residence and revises the statute applicable to dangerous dog determinations and treatment. In addition, the bill requires a circus, carnival or other event involving animal performance to obtain a permit from the DC Mayor.

Other provisions included in L.B. 89 include increased penalties for those staging or who are present at dogfights; licensure scheme for commercial breeders; prohibition on releasing shelter animals to any entity/person for research purposes; requirements for keeping guard dogs and classroom animals and a mandate to develop an emergency preparedness plan for animals. Effective following approval by the Mayor, a 30-day period of Congressional review and publication in the District of Columbia Register.

Louisiana adopted S.B. 264 to allow pets to be included in temporary restraining orders, effective June 21, 2008.

New York created a task force to examine slaughter of non-ambulatory (downer) animals by adopting A.B. 3689. This task force is charged with examining, evaluating and determining the “most effective state actions to prevent the slaughter of downer animals and the entrance of the meat of downer animals into the New York State food supply.” The task force must report its finding and recommendations by January 15, 2010 at which time this act will be repealed.

Members of the task force shall include at least one member representing the following entities: an agricultural organization based in New York State, meat processors, New York State-based retailers that sell meat to the public, humane organization based in New York State, organization representing veterinary professionals, including large animal veterinarians active in New York and the Commissioner of Agriculture. The Commission shall also include the Chair of the Consumer Protection Board and the Commissioner of Health or their designees. Effective immediately.

New York adopted S. 5920/A. 246 prohibiting licensing for any new animal slaughter facilities within 1,500 feet of a residential dwelling. This measure basically prohibits any new live poultry markets in New York City for four years. Effective immediately.

New York A.B. 7402 prohibits manufacturers and contract testing facilities from conducting traditional animal test methods where an appropriate alternative has been validated and recommended by the interagency coordinating committee for the validation of alternative methods and adopted by the federal entity responsible for regulating the product or activity for which the test is conducted. One of the activities specifically excluded from A.B. 7402 is medical research.

Rhode Island adopted S.B. 2566/H.B. 8425 to make transporting or sheltering a horse on a double-trailer a violation of animal cruelty statutes. Violations carry a fine of five hundred dollars per animal for a first offense and one thousand dollars (\$1,000) per animal for subsequent violations. Effective upon passage.

Regulations

Rhode Island approved R.I. Code R. §12 020 042 to implement an animal ID program for all sheep and goats moving interstate or intrastate, or those residing within the state such that all animals are identified by a USDA accepted, permanent, official identification prior to any change of ownership or movement off a premises or farm, and that records of this official identification be made available to federal and state health officials upon request. Final rule issued April 8, 2008.

Euthanasia

As adopted, S.B. 845 will allow the **North Carolina** Board of Agriculture to adopt rules for euthanasia technicians. The bill indicates that this section is retroactive to November 1, 2007.

Regulations

The **North Carolina** Rules Review Commission adopted N.C. Admin. Code §02 NCAC 52J .0203, .0210, .0302 to clarify the following issues: separate housing is not required for the unweaned offspring of an animal in a shelter; rabies vaccination is not required for animals less than 12 weeks old or that have been in the shelter less than 15 days; ambient temperature requirements and enclosures must be secured to the vehicle during transit. The Rules also made other technical changes. However, after approving the rules, the Commission received requests for legislative review of the rules; therefore, they are subject to a delayed effective date.

The following proposed rules: 02 NCAC 52J .0401 - .0420, .0501 - .0502, .0601 - .0610, .0701 - .0705, .0801 - .0803 - S.L. 2005-267, s. 11.5 that would have allowed the use of carbon monoxide gas in the euthanasia of animals under specified conditions were withdrawn by the Board of Agriculture. They are expected to re-submit amendments to the rules in September.

Horse Racing

Kentucky banned the use of anabolic steroids from thoroughbred and standardbred racing in adopting emergency regulation 811 KAR 1:018, 811 KAR 1:090. Effective July 24, 2008.

Licensure and Practice

The **California** Legislature adopted A.B. 2427 in response to *California Veterinary Medical Ass'n v. City of West Hollywood California*, 152 Cal. App. 4th 536 (Cal.App. 2 Dist., 2007). In *West Hollywood*, an Appellate Court ruled to uphold a West Hollywood ordinance prohibiting the declawing of cats. The CVMA petitioned the California Supreme Court to hear the case, but the Court declined. This bill prohibits cities and counties from regulating professions that are already regulated by the state. However, A.B. 2427 contained a grandfather clause allowing the West Hollywood ordinance, and any other ordinance effective prior to January 1, 2009, to stand. The bill did not prohibit a city or county from levying a business license tax solely for revenue purposes or for covering the cost of regulation. Effective January 1, 2009.

District of Columbia L.B. 89 amended exemptions to their veterinary practice act to allow veterinary students to practice under the supervision of DC-licensed veterinarians. In addition, Maryland or Virginia-licensed veterinarians may practice in DC for up to 120 days annually if s/he has practiced for a minimum of two years and is in good standing with the veterinary board(s) where s/he is licensed. Effective following approval by the Mayor, a 30-day period of Congressional review and publication in the District of Columbia Register.

Missouri amended Mo. Code Regs. §20 CSE 2270-4.031 to clarify that veterinary radiographs must be kept for five years from the date the radiographs were taken. Effective July 15, 2008.

Civil Immunity

Illinois adopted H.B. 5076 to provide civil immunity to veterinarians who are licensed in any state or territory of the United States and who, in good faith, provide emergency care or treatment without fee to an injured animal or one separated from its owner due to an emergency or disaster. The immunity will not apply in cases of willful or wanton misconduct. Effective August 20, 2008.

Animal Care Workers

New Hampshire S.B. 318 will create a commission to study "the creation of an animal care worker classification." Membership will include one member of the Senate, two House members, the New Hampshire Commissioner of the Department of Agriculture or his/her designee, Director of the Thompson School of Applied Science, University of New Hampshire or his/her designee, representative of the New Hampshire Veterinary Medical Association, representative of the board of veterinary medicine, representative of the New Hampshire Veterinary Technician Association, two representatives of the New Hampshire Farm Bureau Federation, one of whom shall be a horse breeder or owner, a dairy farmer or breeder of cows or other kine species and one member of the public. The commission's scope is as follows:

The commission shall study the creation of an animal care worker classification to perform the basic care of animals under the direct or indirect supervision of a state licensed veterinarian. The study shall include, but not be limited to, defining the necessary accreditation for this position, consideration and allowance for past experience and employment as an animal care worker, and the scope of the allowable practices for such position. In performing this study and making its recommendations, the commission shall review and consider using as basic standards, accreditation policies, guidelines, and procedures of the American Veterinary Medical Association's Committee on Veterinary Technician Education and Activities.

Effective, June 11, 2008.

Unlawful Practice

Oklahoma H.B. 2732 increases the penalties for practicing, aiding another in practicing, or attempting to practice veterinary medicine without a license. Under H.B. 2732, unlawful practice is a felony with a minimum fine of one thousand dollars (\$1,000) and a maximum of ten thousand dollars (\$10,000). Imprisonment for unlawful practice ranges from one to four years. Penalties are also applicable to veterinary support personnel who act outside the scope of their duties and to veterinarians who permit or direct such personnel to act outside the scope of their permitted duties. Lesser penalties for unlawfully practicing as veterinary support personnel are also included. Effective November 1, 2008.

Regulations

Oregon amended Or. Admin. R. §875-015-0020 and 875-030-0050 to require veterinary facilities to publicly display licenses of veterinarians and certified veterinary technicians, including copies of relief or temporary employees' licenses. The amended rule also requires mobile practice licensees to provide legible proof of licensure upon request. Effective July 22, 2008

The **Utah** Department of Commerce, Occupational and Professional Licensing adopted amendments to Utah Admin. Code §R156-28, *et seq.* This amendment to the rules governing the veterinary profession makes technical changes; revises the experience qualifications for veterinary licensure; requires an examination to ascertain a veterinary continuing education participant's knowledge where CE is given without an instructor physically present; allows for CE requirements to be excused in specified circumstances and incorporates the AVMA Veterinary Ethics Model as a standard for professional conduct. Effective July 10, 2008.

Pet Trusts

California S.B. 685 amends current trust provisions to classify pet trusts as "for a lawful noncharitable purpose". Such a trust will terminate if no animal is alive at the time of the settlor's death, unless the instrument specifies otherwise. SB 685 requires the liberal construction of such trusts contrary to any presumption that such instruments are mere requests or honorary and to carry out the intent of the settler. Extrinsic evidence is allowed to determine such intent.

S.B. 685 prohibits the conversion of trust principal or income for the trustee or any other use other than to benefit the animal. It also provides a statutory distribution for unexpended trust property at the termination of the trust if the trust does not provide a distribution scheme. S.B. 685 allows a wide array of people to enforce the use of trust principal or income for the benefit of the animal and enables the court to designate a trustee if needed. S.B. 685 also requires accounting be provided to those who are beneficiaries of trust after the animal dies and to any animal welfare nonprofit that makes a request in writing if the value of the trust assets exceed forty thousand dollars (\$40,000). In addition, any beneficiary, individual designated by the trust instrument or animal welfare nonprofit may, upon reasonable request, inspect the animal, its living quarters and the books and records of the trust. The bill also provides that pet trusts are not subject to section 15408 which provides that a trust may be terminated, modified or a new trustee appointed if a court determines the fair market value of the principal drops significantly (Probate Code section 15408). Pet trusts are also exempt from Cal. Prob. Code §15211 which would cap their existence at 21 years. Effective January 1, 2009.

Pharmacy

Regulations

Oklahoma amended Okla. Admin Code §775:26-1-1 (distribution of veterinary prescription labeled drugs) to require every wholesaler or distributor selling, supplying or dispensing veterinary prescription drugs for use in the State of Oklahoma to annually notify the Board of the name, address and business telephone number of each sales representative and/or veterinarian doing business in Oklahoma that is employed by or under contract with the wholesaler or

distributor, by filing a written notice with the Board no later than January 1 of each year on printed forms provided by the Board for such purpose. Effective July 1, 2008.

Oregon amended Or. Admin. R. §875-011-0010 to add non-veterinary prescribing, use, theft or diversion of controlled drugs to conduct subject to Board discipline. Effective July 22, 2008.

Veterinary Loan Repayment

Missouri adopted H.B. 931 (effective August 28, 2008) to modify the large animal veterinary student loan program and H.B. 2006 (effective July 1, 2008) to appropriate one hundred twenty thousand dollars (\$120,000) fund loans for six veterinary students. Missouri adopted the large animal veterinary student loan program in 2007, but did not fund it until this year. Missouri also approved emergency rules (Mo. Code Regs. §2CSR 30-11.010 *et seq.*) in order to make the program ready to accept applications for the large animal veterinary student loan program in 2009. Effective on July 24, 2008.

New Hampshire enacted H.B.173 to direct the postsecondary education commission to create a large animal veterinarian tuition repayment program. This bill identifies large animal veterinarian shortage area in the counties of Coos, Carroll, Grafton, and Belknap. It offers veterinarians who dedicate 35% of their practice to large animal medicine for ten years in an area of need, including the aforementioned counties, the ability to be reimbursed for up to \$100,000 for his/her qualifying veterinary net tuition costs (\$10,000/per year). Effective Date: June 3, 2008.

New Jersey adopted its FY08-FY09 budget (A.B. 2800) appropriating two-hundred, eleven thousand dollars (\$211,000) to the State Board of Veterinary Medical Examiners, Veterinary Medicine Education Program. New Jersey does not have a school of veterinary medicine, the Education program allows New Jersey residents to attend veterinary schools in other states through contracts negotiated by the Office of Student Assistance. A.B. 2800 modified the conditions of participation in the program to require veterinary graduates to work in New Jersey one year for every year of contracting funding provided on their behalf. They have up to one year after graduation to begin fulfilling the requirement. If they are unable to do so, they must repay the Higher Education Student Assistance Authority the amount the Authority expended for the participant's contract seat minus any offset amount for time spent practicing in New Jersey. Effective July 1, 2008.

Oklahoma S.B. 70 created the Large Animal Veterinarian Incentive Act. This bill enables the Center for Veterinary Health Sciences at Oklahoma State University to enter into agreements with a maximum of three first-year veterinary students or currently practicing large animal veterinarians with qualifying school loans to practice veterinary medicine in underserved areas. Effective November 1, 2008.

Eligible veterinary students or veterinarians will be eligible for up to \$20,000 per year for a maximum of four years for tuition and other school-related expenditures. Those failing to meet their obligations under this program will be required to pay back the loan, plus interest at the prime rate, plus two percent from the date the assistance accrued with interest compounded annually.

Regulations

Wyoming promulgated Wyo. Admin. R. & Regs. Chapter 23, Wyoming Livestock Board Rules, Veterinary Loan Repayment Rules, to set the terms under which the veterinary loan program will operate. The program was created by the legislature earlier this year with the adoption of H.B. 74.

Veterinary Continuing Education

Regulations

The **Oklahoma** Board of Veterinary Medical Examiners adopted an amendment to Okla. Admin Code §775:10-3-5 (continuing education required for renewal); §775:10-3-7 (continuing education

required for reinstatement); §775:10-7-4 (veterinary technician certification) to remove the cap of four hours, but still require two hours, of CE on the subjects of state or federal controlled dangerous substance laws or review of the Oklahoma Veterinary Practice Act and applicable rules. Adopted August 20, 2008.

Veterinary Technicians

Regulations

Oklahoma also amended Okla. Admin. Code §775:10-7-9.1 and §775:25-1-4 to allow veterinary technicians to perform the following duties without direct supervision: vaccinations and dental scaling and polishing. See also §775:10-7-4 discussed above. Adopted August 20, 2008.

Oregon amended Or. Admin. R. § 875-005-0005 to clarify that a 'veterinary technician' is an individual licensed by the Board as a Certified Veterinary Technician. OAR 875-030-0010 was amended to require Veterinary Technician National Exam applicants claiming on-the-job experience to provide proof of experience, such as W-2 forms, or other proof approved by the Board. OAR 875-030-0040 was amended to allow Certified Veterinary Technicians to place an endotracheal tube for delivery of oxygen and anesthetic gas to patient. Effective July 22, 2008.

NEWS & COMMENTARY

Calif. Senate snips spay/neuter bill

Source: *DVM Newsmagazine* (8/1/08)

A bill introduced into the California Senate in February 2007, named the California Healthy Pet Act of 2007 has been dramatically altered. Originally written to require almost every cat and dog over the age of 4 months to be spayed or neutered, the revised version imposes monetary fines on the owners of unsterilized pets that are found wandering. The penalty would increase with each subsequent offense. The bill would also allow pet owners and breeders to be exempt from spaying or neutering their pets if they secured a permit.

Many supporters of the original bill, such as the Humane Society of San Bernadino County (HSBC), are disappointed with the changes.

Susan Dawson, president of the board of directors at the HSBC said, "It had changed so dramatically. It just takes the meat out of the whole bill."

As originally written, the bill was estimated to save California tax payers \$250 million per year on supporting unwanted animals. It received support from the California Veterinary Medical Association, the California State Human Society, and the Los Angeles Department of Animal Services as well as many celebrity animal rights advocates.

"The amendments did become a problem for us," explained Dr. Bill Grant II, president of the CVMA. The CVMA rescinded its support and took a neutral stance, citing issues with how the bill is now written.

Other agencies such as the Humane Society of the United States (HSUS) still support the bill. Although it's not exactly what the organization would like to see, it is a step in the right direction, to the HSUS.

"Although the bill was greatly weakened, it will still help to combat pet overpopulation in California," HSUS says on its website.

The bill was opposed by originally by groups such as the American Kennel Club, the National Pet Alliance, and the California Farm Bureau Federation, but these groups now support the bill in its current form.

In a letter of support for the current bill, the AKC stated, "The American Kennel Club opposes the concept of breeding permits, breeding bans, or mandatory spay/neuter of purebred dogs.

Instead, we support reasonable and enforceable laws that protect the health and welfare of purebred dogs and do not restrict the rights of breeders and owners who take their responsibility seriously.”

The bill has been waived through the appropriations committee because of its negligible cost to the state. It is on its way to a full vote by the Senate.

Farm animal rights law would require room to roam

Source: *Mercurynews.com* (7/24/08)

As more and more human food retailers are promoting “cage-free” eggs and “free range” meat, California voters will decide on a farm animal rights law at the ballot box this fall. The initiative would ban cramped metal cages for egg-laying hens, metal gestation cages for pregnant sows, and veal crates for lambs.

Other states such as Colorado, Arizona, Florida, and Oregon have already enacted similar bans, and more states are likely to follow. Two undercover videos that have been circulating on the internet in the past few months have brought more attention to the issue. One of the videos, which was reported to be taken at an egg producer’s facility in California, shows close-ups of chickens with open, infected lesions. It also showed a worker stomping on a sick hen.

The other video showed footage taken at a slaughterhouse in California in which cows that were too sick to walk were kicked, beaten, and dragged with forklifts to slaughter. The plant in the video was subsequently closed and the largest beef recall in U.S. history was initiated because of concerns of sick cows spreading disease.

The measure is opposed by members of the egg producer and poultry industries. They counter that allowing hens to roam exposes them to diseases from wild birds that standard biosecurity measures prevent. They also say that due to the expense this will force on producers, it will likely end the egg industry in California.

“The measure jeopardizes our food safety and public health, putting us at greater risk for salmonella and avian flu outbreaks; cuts off consumer choice for safe, local, fresh, and affordable California eggs; and drives up the cost of basic groceries at a time when Californians are already struggling with high gas, housing, and other everyday living expenses,” said Julie Buckner, a spokeswoman for Californians for SAFE food, an egg industry group.

The proponents of cage-free hens are using the momentum of the videos as well as support from groups like the California Democratic Party and the Union of Concerned Scientists. The vote will take place later this year.

UF faces suit over veterinary changes

Source: *Gainesville.com* (7/25/08)

The University of Florida eliminated a very unique program in small animal reproduction as part of university-wide budget cuts. Dr. John Verstegen, the director and creator of that program has now sued the school for breach of contract.

Verstegen’s program offered services such as artificial insemination and a sperm bank used by breeders of show dogs. It was designed to promote responsible breeding and education, much like in Northern Europe according to Verstegen.

Although the university has now offered to reinstate him – although his program will still be eliminated – he’s sticking with his lawsuit. He claims that he was brought to the U.S. from Belgium to develop this program and was promised tenure.

Glen Hoffsis, the Dean of the UF College of Veterinary Medicine, said that the budget cuts forced difficult decisions and the innovative program was a luxury that could no longer be afforded.

“This was one that was not as critical to the mission of the college,” said Hoffsis.

Many of Verstegen's clients are rallying around him. Chow breeder Terry Tapp had moved closer to Gainesville from Miami to be closer to the service.

"This program supports people that try to do a good job," said Tapp.

Although the college has rescinded the layoff, Verstegen feels the offer to stay is false choice. He would still be without tenure, his wife would not have a job, and the reproductive service would still be closed.

"I came to Florida to build a program, and that's the only reason I would stay," he said.

DVM Newsmakers' Summit: Exploring the legal realities for the profession

Source: *DVM Newsmagazine* (8/1/08)

DVM Newsmagazine convened a panel of veterinary market leaders recently at the CVC East in Baltimore. Some of the topics discussed by the panel were legal issues facing veterinary medicine. The panel members were Jim Flanigan of the AVMA; Dr. John King of the Minnesota state veterinary board; Howard Rubin of Brighthouse Veterinary Centers; Dr. Richard Timmins of the Association of Veterinary Family Practice; Dr. James F. Wilson, an attorney and consultant; and *DVM Newsmagazine* Editor Daniel R. Verdon.

The future of veterinary medicine will be shaped in part by some of the legal realities facing the profession. One area that is changing is the malpractice. Dr. Wilson pointed out that some states are testing the market value of animals as the deciding factor on damages that can be recovered. He cited that Maryland recently passed a law allowing \$7500 worth of damages to recover economic losses. The recovery is the same, regardless of the actual value of the pet.

"What I think is happening is that the legal process is lifting the lid on economic damages without expanding the opportunity for noneconomic damages, like for pain and suffering or emotional distress," commented Dr. Wilson.

Change is likely coming, but currently, a cap still exists because of the legal status of animals – they're considered property, and property has no rights. Jim Flanigan reported that according to a survey by the AVMA, student members' top concerns were changes in the legal status of animals, which could result in larger recovery in malpractice suits.

He went on to add, "At least from the studies I've seen, there doesn't seem to be a groundswell of public sentiment wanting a change in legal status of animals."

A recent Gallup poll confirms this. Even after the melamine-related pet food recall, when pet owners were asked specifically if they would be willing to change the law to allow owners to pursue damages for pain and suffering, only 33% replied that they would. The majority, 63%, said that the law shouldn't be changed.

Many consumers are taking their complaints to the court of public opinion. Internet commentary, blogs, and traditional media are outlets for owner frustration. The damages that can come from the bad publicity generated can be worse than a loss in court. Many times, these owners will also take their case to the state board. Dr. John King said that owners may go to the internet to find negative material to try to corroborate their view to strengthen their claim or show a pattern with a particular veterinarian.

Another issue facing veterinarians discussed by the panel was animal welfare. The general public's awareness of animal welfare issues has increased dramatically. Dr. Timmins cited the recent coverage of the situation in California where mistreatment of cattle resulted in one of the largest recalls in U.S. history. With the public concern for the prevention of animal cruelty, it will be important for veterinary professionals to be aware of the issues and take action when necessary.

"I think the veterinary profession has to stand up and say, 'We're in the animal-welfare arena with you,' as opposed to saying, 'We don't want to be involved in this animal-cruelty stuff. Maybe somebody will sue us. A client might get ticked off at us,'" remarked Timmins.

Dr. King cited a lack of training as part of the difficulty in recognizing and dealing with animal cruelty. Veterinary schools have not traditionally emphasized this topic. Students are learning how to recognize animal cruelty, and once they can recognize it, they can do something about.

While there are many legal issues facing the profession of veterinary medicine, the panel discussed some of the larger ones looming in the immediate future. As the issues continue to evolve, so will the laws to address them.

WELCOME NEW MEMBERS

District 4

Student

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REQUEST FOR ARTICLES AND NEWS

If you would like to submit a brief veterinary medical law article to the *Newsletter*, please send your e-mail to attn: Editor at avmlainquiry@gmail.com. If you'd prefer to mail your contribution, please send your correspondence to Attn: Julia Fullerton, AVMLA, 5 Golfview Place, DeKalb, IL 60115. Also, if you become aware of a veterinary related court or administrative decision, attorney general opinion, new or proposed law or regulation, please send along the cite and/or a copy.

LETTERS TO THE EDITOR, ARTICLES, COMMENTARIES AND BOOK REVIEWS WELCOME

The AVMLA welcomes letters to the Editor of the *Newsletter*. Letters should be sent to Attn: Julia Fullerton, AVMLA, 5 Golfview Place, DeKalb, IL 60115. The AVMLA also welcomes articles, commentaries and book reviews on legal matters affecting veterinarians or the practice of veterinary medicine. The AVMLA reserves the right to decide whether to publish a letter, article, commentary or book review and may edit such to accommodate space limitations.

SPEAKER'S BUREAU

AVMLA members are invited to submit their speaking engagements for publication in the *Newsletter*. AVMLA members are also encouraged to contact the AVMLA if they are willing to speak to a group, organization or school on any topic affecting veterinary medicine.

2008 ANNUAL MEETING MINUTES

AMERICAN VETERINARY MEDICAL LAW ASSOCIATION

MINUTES 2008 ANNUAL MEETING

JULY 19, 2008 – New Orleans, LA

The meeting was called to order at 1 p.m. by President Ed Liebler, DVM, JD. It was announced that President-Elect Elizabeth Settles, DVM, JD would not be able to attend the meeting.

AGENDA

The agenda was approved.

2007 ANNUAL MEETING MINUTES

The 2007 Annual Meeting minutes were approved.

PRESIDENT'S REPORT

President Ed Liebler, DVM, JD thanked Dr. Karen Wernette, DVM for her many years of service as the AVMLA Executive Director and announced that Julia Fullerton, JD became Executive Director in February of this year. President Liebler also announced that the AVMLA anticipates launching a new website by the year's end. The close of President Liebler's term coincides with his retirement from practice. He thanked everyone for their support.

SECRETARY/TREASURER'S REPORT

John Thomas, JD submitted a cash flow statement comparing receipts and expenditures for FY 2007 and 2008 to date. Mr. Thomas indicated that the FY 2008 budget was adopted and that dues continue to flow in. The increase in dues effective last year did not appear to have negatively affected our membership count. This year the AVMLA took out a CD in the amount of \$10,000 and the balance of our funds are held in a money market account. He stated that the AVMLA's largest expenses continue to be printing our newsletter and the CE conference. In addition, AVMLA has made a significant investment to enhance the current website.

EXECUTIVE DIRECTOR'S 2008 ANNUAL MEETING REPORT

Membership

For 2007-2008, the AVMLA has a total of 219 members. 176 members are Active, 34 are Associate and 9 are Student. 35 individuals, who were members in 2007, did not renew for 2008.

Membership Directory

The 2007 Membership Directory was sent out electronically in April.

Website

Thank you to Dr. David Barbee, DVM for hosting and maintaining the AVMLA website and list serv for many years. We are currently working with Affiniscape to update and host the AVMLA website.

Elections

Bonnie Lutz, JD has been elected Director of District 5 and John Scott, JD was re-elected Director of District 4. Some nominations have been received to replace Christine Pfeiffer, JD as Director of District 3. She tendered her resignation effective June 30, 2008. Elizabeth Settles, DVM, JD has been elected President-Elect.

Newsletter

Linda Wyner has stepped down as co-editor of the newsletter. We are looking for volunteers to assist with the creation of the newsletter.

INSTALLATION OF NEW PRESIDENT

Outgoing President Ed Liebler, DVM, JD introduced President-Elect Karen Wernette and conferred on her the responsibilities of the office of AVMLA President for the year 2008-2009 by handing her the gavel.

CONGRESSIONAL FELLOWS

Congressional fellows Drs. Shelton and Carlin, DVM spoke to the AVMLA membership regarding their experiences on the Hill and legislative developments to which they had contributed.

PRESIDENTIAL ADDRESS

President Wernette, DVM thanked everyone for their support and asked members to introduce themselves. President Wernette stated that AVMLA will be holding its meeting in conjunction with the CVC in San Diego, CA in 2009 and in Kansas City in 2010. There was some discussion of the schedule and the membership agreed that the AVMLA meeting should be hosted in

conjunction with CVC for the next two years. After which time, AVMLA could evaluate how well the arrangement was working.

The membership also decided that the continuing education program should be held on Saturday with the membership meeting on Sunday. The membership also discussed holding continuing education programming as part of the AVMA Conference.

ADJOURNMENT

The meeting was adjourned at 3:10p.m.

