

## Animal Law Headlines

THE YEAR 2008 has been an eventful year for animal advocates. These are my top three picks—in reverse order—for this year's headlines about issues in animal law.

### Headline Number 3

In March 2007, Menu Foods was at the center of the largest pet food recall in history—one that involved 12 pet food makers and 180 brands of pet food and treats. Pet injuries and deaths were linked to the industrial chemical melamine. The Food and Drug Administration determined that ingredients sold to pet food makers as wheat gluten and rice protein concentrate had been adulterated in China with melamine to make them appear to have more protein than they actually contained. Melamine is used in manufacturing countertops, dry erase boards, fabrics, glues, housewares, and flame retardants. Melamine is the same chemical recently found in contaminated Chinese milk powder that sickened more than 50,000 people and killed at least four infants in China.

Following the pet food recall, dozens of lawsuits were filed against Menu Foods and other companies. The lawsuits alleged unfair and deceptive trade practices, negligence, and breach of implied and express warranties. Some pet owners also claimed that they had suffered emotional trauma. The cases were consolidated as a class action in a New Jersey federal court.

As part of a settlement approved by the federal court in October 2008, Menu Foods and others have agreed to set up a \$24 million fund to compensate pet owners whose cats and dogs became sick or died after eating contaminated food. The filing period for claims runs from May 30 to Nov. 24, 2008. To date, almost more than 10,000 claims have been filed. Documented expenses such as veterinary bills and burial costs are 100 percent reimbursable, if they are deemed reasonable. Undocumented expenses are compensable up to \$900. The damages awarded in this class action will be the same as those historically allowed by courts that have viewed pets as personal property. In my opinion, this settlement is completely inadequate, because it does not take into account noneconomic damages for pain and suffering or loss of companionship. This settlement is a missed opportunity to re-evaluate traditional notions of damages for injury or death to pets. That is a shame because the issue of damages is at the forefront of animal law.

### Headline Number 2

In December 2007, a federal court sentenced Michael Vick, ex-superstar quarterback for the Atlanta Falcons, to 23 months in federal prison for financing "Bad Newz Kennels," a dog fighting operation and for aiding in the execution of dogs that did not perform to expectations. The court ordered Vick to pay \$928,000 for the lifelong care of 50 or so dogs seized from his property. Pit bulls seized from illegal fighting operations are usually euthanized after becoming property of the government. Instead, the court gave the dogs a second chance by ordering that each dog be evaluated individually. Of the lot, only one pit bull was deemed too aggressive toward people and a second was too sick and in pain to save.

So where are the dogs now? Of the 50 or so dogs, 25 were placed in foster homes; a few have been adopted; and, in January 2008, 22 dogs that were deemed potentially aggressive toward other dogs were sent to the Best Friends Animal Society sanctuary, a no-kill, nonprofit facility in Kanab, Utah. At the 3,700-acre Best Friends sanctuary, the dogs live in their own building with heated floors, sound-absorbing barriers, skylights, and individual dog runs. They have squeaky toys, fluffy beds, and four full-time caregivers. All but one dog wear a green collar—a signal that they are good with people. Still, experts do not know if dogs that have experienced the sort of physical and psychological trauma these dogs lived through can be rehabilitated. As for Vick, he should be released from a federal prison in Leavenworth, Kansas, next year; in July 2008, he filed for Chapter 11 bankruptcy.

### Headline Number 1

On July 18, 2008, the Third Circuit Court of Appeals reversed the conviction of Robert Stevens, the first person tried under 18 U.S.C. § 48, a 1999 law banning depictions of animal cruelty. *U.S. v. Stevens*, 553 F.3d 218 (3d Cir. 2008) (en banc). The law provides the following, in pertinent part: "Creation, sale, or possession.—Whoever knowingly creates, sells, or possesses a depiction of animal cruelty with the intention of placing that depiction in interstate or foreign commerce for commercial gain, shall be fined under this title or imprisoned not more than 5 years, or both." Exceptions include "any depiction that has serious religious, political, scientific, educational, journalistic, historical, or artistic value." Finding that the law violated the First Amendment, the 10-3 majority

**SIDEBAR** continued on page 15

cited to refute a necessity for infringement-related fact or opinion discovery prior to a *Markman* briefing and decision. A party on this side of the argument will generally seek the earliest possible *Markman* process and employ all lawful means to resist or delay discovery on infringing products and the like until the adversary has committed to positions on proper claim construction.

Virtually all federal courts expect counsel to try to resolve these conflicts in a joint scheduling proposal. Probably the most defensible solution is a practical compromise. The discovery sought by one or both counsel before committing to *Markman* positions should be described and confined as precisely as possible and conducted as promptly as possible. Even in the best of circumstances, some depositions will probably need to be adjourned and resumed later, and interrogatory answers and document productions will almost certainly require supplementation as the case progresses. Federal Rules of Civil Procedure 16 and 26 allow and even encourage follow-up case management conferences between the initial scheduling of the case and trial. Such conferences can be enormously valuable in solving these patent litigation dilemmas, and counsel will find that many courts welcome requests to hold these meetings. **TFL**

---

*Mark Vorder-Bruegge Jr. litigates patent cases and serves as leader of the intellectual property service team at Wyatt, Tarrant & Combs LLP, a full-service regional firm.*

---

## SIDEBAR continued from page 4

vacated Stevens' conviction.

At first blush, it looks like the Third Circuit struck a lethal blow against our furry four-legged friends. Upon further consideration, I do not necessarily think that is the case. The legislative history for § 48 indicates that Congress sought to stop "crush videos," which are defined as "a depiction of 'women inflicting ... torture [on animals] with their bare feet or while wearing high heeled shoes.'" H.R. Rep. No. 106-397, at 2 (1999). Stevens was indicted on three counts of knowingly selling depictions of animal cruelty. In all three counts, the depictions were of pit bulls either fighting each other (filmed in the 1960s and 1970s in the United States and more recent footage from Japan) or being used to "catch" wild boars. The facts of this case—in which no crush videos were involved—did not support the intent of the statute. So was this simply a case of bad facts making bad law?

It appears, to me at least, that the Third Circuit may have been punting the ultimate decision of creating a new category of unprotected speech to the Supreme Court. *Stevens*, 553 F.3d at 225–226 ("Without guidance from the Supreme Court, a lower federal court should hesitate before extending the logic of [*New York v. Ferber*] 458 U.S. 747 (1982)] to other types of

## The McCammon Group

is pleased to announce our newest Professional



**Hon. Barry R. Poretz (Ret.)**

Retired Magistrate Judge,  
United States District Court,  
Eastern District of Virginia

Judge Poretz's distinguished judicial service was preceded by a civil litigation career representing both plaintiffs and defendants in Northern Virginia and DC. An experienced neutral with more than 200 settlement conferences to his credit, he is now available to serve your private mediation and arbitration needs throughout the mid-Atlantic and beyond.

*Mediation, Arbitration, Facilitation, Training & Consulting*

Toll Free 1-888-343-0922 or visit [www.McCammonGroup.com](http://www.McCammonGroup.com)



speech. The reasoning that supports *Ferber* has never been used to create whole categories of unprotected speech outside of the child pornography context. ... For these reasons, we are unwilling to extend the rationale of *Ferber* beyond the regulation of child pornography without express direction from the Supreme Court.").

Finally, all hope is not lost; the dissent did its best to lay the groundwork for expanding the scope of unprotected speech to include depictions of animal cruelty. Pointing out that laws prohibiting cruelty to animals have existed in this country since 1641, the dissent argued that the government has a "compelling interest in protecting animals from wanton acts of cruelty." *Stevens*, 553 F.3d at 238, 250. The dissent also argued that the prohibited depictions have "such minimal social value as to render this narrow category of speech outside the scope of the First Amendment." *Stevens*, 553 F.3d at 250. **TFL**

---

*Julie China is a member of the FBA editorial board.*