

## Foster Farms Beats Bid To Revive 'Humane' Labeling Suit

By Lauren Berg

*Law360 (February 24, 2021, 5:37 PM EST)* -- A Los Angeles judge got it right when he tossed a proposed class action accusing Foster Farms of misleading customers with American Humane Association certification labels when it actually mistreats its chickens, a California state appeals court ruled Tuesday, saying the labels were already USDA-approved.

In a published opinion that could have broad implications across the poultry industry, the three-judge panel found that Carol Leining's claims are preempted under the Poultry Products Inspection Act because Foster Farms' labels that included the AHA Certified logo were reviewed and pre-approved by the U.S. Department of Agriculture's Food Safety and Inspection Service.

The PPIA forbids the sale of any poultry or poultry product using false or misleading labelling, so if the USDA thought any label might mislead consumers, it can direct the company not to use it, according to the Second Appellate District opinion. The panel agreed with Foster Farms' argument that Leining's complaint is trying to impose a labeling requirement in addition to or different than those required under the PPIA.

"Because the labels were pre-approved by the FSIS, the federal government has determined that the labels, which include American Humane certification, are not misleading under the PPIA," the panel wrote.

Leining initially filed suit against Foster Poultry Farms Inc. in July 2015, alleging that she purchased the company's chicken labeled as being "American Humane Certified" because she assumed the birds lived comfortably and were killed quickly and painlessly but claimed she discovered that the AHA certification doesn't require special treatment.

Foster Farms charges more for its chicken than other producers whose chicken doesn't bear the AHA certification stamp, and Leining said she bought the Foster Farms chicken because she believed the animals had been humanely treated. But she maintains that the AHA standards mean nothing.

The AHA standards allow the birds to undergo forced molting and beak-trimming. They are starved and deprived of water, and male chicks are ground up while alive while roosters have their toes and combs cut without anesthesia, according to the complaint.

Slaughtering is also inhumane, according to the plaintiff, who said the chickens are shackled upside-

down and dunked into electrified water before having their throats cut.

The AHA advertises its certification program as a way to assure customers and retailers that the products meet rigorous, science-based animal welfare standards and that the animals in the program are humanely raised, according to Tuesday's opinion.

In order to get the AHA certification on its products, Foster must meet those standards and pay a licensing fee for the use of the AHA logo, the opinion states. And to use the label on its chicken products, the company must get federal approval from the FSIS, according to the opinion.

The trial court granted Foster Farms' first demurrer, saying it was concerned that Leining was trying to make herself arbiter of what is or is not humane but did allow Leining to rework her complaint, according to the opinion. Leining then filed an amended complaint and this time added the American Humane Association as a defendant, alleging negligent misrepresentation.

Both Foster Farms and AHA demurred, but the trial court denied the move. Instead, the defendants moved for summary judgment and presented evidence that AHA's certification was actually based on a reasonable investigation and legitimate standards, the opinion states.

The court then sided with Foster Farms and AHA, finding that the certification program was independent, reasonable and involved some level of expertise, according to the opinion.

On Tuesday, the appellate panel affirmed the trial court's decision, rejecting Leining's argument that the claims are not preempted by federal law because state law remedies that enforce the federal standards are not preempted. The panel, however, said additional labeling requirements are preempted.

One of the key purposes of the PPIA preemption is to ensure national uniformity in labeling, according to the opinion.

"This purpose would be defeated if states could, via tort law or otherwise, impose additional labeling requirements on labels already approved under the PPIA," the panel wrote.

The panel also found that Leining hadn't alleged negligent misrepresentation against the AHA, saying she didn't allege that she suffered a physical injury as a result of the AHA certification logo on the Foster Farms' chicken. Leining only alleged an economic injury, the panel said.

The panel affirmed the trial court's decision granting summary judgment in favor of Foster Farms and the AHA.

Carmine Zarlenga of Mayer Brown LLP, an attorney for Foster Farms, told Law360 on Wednesday that the ruling is significant because it's the first of its kind from a California appellate court and sweeps across the entire poultry industry.

While the ruling specifically involves Foster Farms, he said, it will have much broader industry implications.

"Federal preemption is something any other poultry company could use as a defense in labeling cases like this," Zarlenga said.

"Under that statute, the USDA reviews all the labels on meat and poultry and either approves or disapproves them," he added. "When it approves them, then the law says a state like California or Colorado or Texas can't come in and try to apply different standards. We want a nationwide standard."

Zarlenga said Tuesday's ruling comes at the end of a long, but worthwhile, road. He said there is now a sound published opinion that is very clearly articulated and easy to understand.

"This decision reaffirms the rigor of the American Humane Certification and our steadfast commitment to the humane treatment of animals," Dr. Robin R. Ganzert, president and CEO of American Humane, said in a statement to Law360 on Wednesday.

Leining's attorney, Sheldon Eisenberg of Sullivan & Triggs LLP, told Law360 on Wednesday that he and his client are disappointed that the appellate court failed to reach any aspect of the claims' merits.

"We believe the court failed to follow the California Supreme Court's instructions on when it's appropriate to find federal preemption of state tort claims," Eisenberg said.

Eisenberg said California's high court has instructed lower courts that there is a strong presumption against federal preemption and that the panel in this case didn't even mention that instruction in its analysis.

The attorney also disagreed with the panel's finding that physical injury is required in a negligent misrepresentation claim against a third-party certifier, saying that rule isn't supported by existing authority.

"The upshot of the opinion is to give immunity to false and misleading food packaging claims," Eisenberg said. "We think that's a serious issue of statewide concern that may well justify the California Supreme Court's review."

Counsel for the AHA did not immediately respond to a request for comment Wednesday.

Presiding Justice Laurence D. Rubin and Justices Lamar W. Baker and Dorothy C. Kim sat on the panel that reached Tuesday's decision.

Leining is represented by Sheldon Eisenberg of Sullivan & Triggs LLP and Mark Haddad, who is a lecturer in law at the University of Southern California Gould School of Law.

Foster Farms is represented by Carmine Zarlenga, Dale J. Giali and Donald M. Falk of Mayer Brown LLP.

The American Humane Association is represented by Michelle Pardo, Rebecca Bazan and Paul J. Killion of Duane Morris LLP.

The case is Carol Leining v. Foster Poultry Farms Inc. et al., case number B291600, in the Court of Appeal of the State of California, Second Appellate District.

--Editing by Gemma Horowitz.