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COMMITTEE ON LEGAL ISSUES PERTAINING TO ANIMALS

Amendment to Dog and Cat Fur Prohibition Enforcement Act

H.R. 891 Rep. Moran (D–Va.)
S.3610 Sen. Menendez (D–N.J.)

This legislation is approved, with recommendations

Summary of Specific Provisions

The Dog and Cat Fur Prohibition Enforcement Act of 2000 (“DCP Act”), 19 U.S.C. Sec. 1308 already prohibits the export, import, manufacture or sale of dog and cat fur products. In addition, the Fur Products Labeling Act of 1951 (“1951 Act”) requires that fur garments be labeled with the name of the species used, manufacturer, country of origin, and other information, thereby providing the means to determine whether dog or cat fur is used in a garment. 15 U.S.C. Sec. 69, 69a-j. However, the 1951 Act exempts products with a relatively small quantity or value of fur, and allows the Federal Trade Commission (“FTC”) to establish regulations determining that value. The FTC currently exempts fur garments whose value is less than \$150, unless (1) such garments contain any dog or cat fur, (2) such garments contain used fur, (3) such garments consist of the whole skin of an animal: head, ears, tail and paws and (4) any false, deceptive or misleading statements are made about the fur, *e.g.*, that it is “faux” when it is not, regardless of the value of the garment.¹

In order to effectuate the provisions of the DCP Act and completely prohibit the use of dog and cat fur, the proposed bills H.R. 891 and S. 3610 would amend the DCP Act to require labeling of all fur products regardless of value. The House bill, approved in 2008, also bans the fur of “Raccoon Dog” (*Nyctereutes procyonoides*), an animal that is a member of the canidae family (which includes dogs, wolves, and foxes) and that has only a superficial resemblance – facial markings - to non-canid raccoon. The inclusion of Raccoon Dog in the House bill is proper, for the reasons described below. However, we note that the House bill only addressed garments, and did not apply to any other product that contained fur. Many toys and other trinkets from China and other importers to the U.S. also contain fur, fur trim or what purports to be synthetic or “faux fur.” Therefore, we strongly urge that this legislation be amended to include all products containing fur, in addition to expressly banning Raccoon Dog fur.

Further, the Senate version, in Committee last year, now awaiting reprinting and a new bill number, has an additional subdivision (subdivision four) which provides that the bill shall

¹ FTC Business Alert <http://www.ftc.gov/bcp/edu/pubs/business/alerts/alt0006sht>, In-FUR-mation Alert: How to Comply with the Fur Products Labeling Act.

not be construed to prevent states from enacting more restrictive legislation. We recommend that the House version be conformed to that of the Senate on this issue. While this provision accords with established principles of federalism in areas such as the environment and animal protection², it clarifies the issue so as to preclude any challenge to more restrictive state laws on the ground of Federal preemption. By way of example, in 2003, New York’s General Business Law Sec. 399aa prohibited the sale of any garment containing the skin or fur of a domestic cat or dog. In 2007, N.Y. Gen. Bus. Law Sec. 399aaa further required accurate labeling of all clothing containing fur or “faux” fur. Other states like Massachusetts³ require accurate labeling of all fur, real or “faux”, irrespective of value. Several other states prohibit the sale of domestic dog and cat fur and/or their parts, such as Alabama, Delaware, and Florida.⁴

We note that the bill, as currently drafted, does not expressly authorize a consumer to bring an action against a violator of this Act. However, there is precedent in Federal legislation in the animal law area for a private right of action.⁵ Additionally, a number of states, including New York, prohibit deceptive business practices, which include mislabeling and misrepresenting products as well as false advertising.⁶ Some states authorize their Attorney Generals and/or District Attorneys to bring representative lawsuits⁷, as well as providing for private rights of action.⁸

² For example, New York limits the use of the steel leghold trap under Environmental Conservation Law (ECL Sec. 11-1101(6)) to particular dimensions and narrow circumstances, subject to further regulations promulgated by the State Department of Environmental Conservation, although its use is not prohibited nationally. Other states such as Arizona have prohibited the use of the leghold trap on all public lands within its borders, whether Federal or state, with a narrow public health and safety exception. See Ariz. Rev. Stat. Sec. 17-301 D (1). However, the Ninth Circuit ruled in *National Audubon Society v. Davis*, 307 F. 3d 835 (C. A. 9 2002) that the principles of Federal preemption prevented state law from barring Federal employees under California’s statutory ban from utilizing the leghold trap to protect endangered wildlife from predators. But see *v. New York State Restaurant Ass’n: v. New York City Bd. Of Health*, _ F3d _, 2009 WL 367961(2d Cir. 2/17/09 2d) (Federal preemption did not prevent City Health Commissioner from requiring chain restaurants to post calorie content of food served to promote public health).

³ Mass. Gen. Laws 94 Sec. 277A

⁴ See Alabama: Ala. Crim. Code Sec. 13A-H-241(a) (felony crime of animal cruelty to knowingly sell or offer for sale the hide, skin, pelt or fur of any domestic dog or cat); Delaware, Del. Crim. Code Sec. 1325 (misdemeanor to knowingly trade in fur or any product derived from a domestic dog or cat); Florida, Fla. Stat. Ann. Sec. 828.123 (felony to kill any domestic dog or cat for the purpose of sale for its skin or fur); Fla. Stat. Ann. Sec. 828.1231 (misdemeanor to knowingly sell domestic dog or cat skin or fur; felony for second sale offense).

⁵ See *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992)(plaintiffs, wildlife conservation and other environmental groups, must demonstrate “injury in fact” for standing under the Endangered Species Act of 1973, *i.e.*, a concrete and particularized, actual or imminent invasion of a legally-protected interest).

⁶ NY General Business Law Article 22-A; Alabama Code, Chapter 19, Deceptive Trade Practices, defined in Sec. 8-19-5 as misrepresenting the nature, source and condition of goods and products as well as false advertising; Cal. Bus. & Prof Code Sec. 17200 so defines Unfair Competition.

⁷ NY Gen. Bus. Law Sec. 349; Ala. Code Sec. 8-19-4; Cal. Bus. & Prof. Code Sec. 17206 permits, Attorney Generals, District Attorneys, and under certain circumstances county and city attorneys to bring representative lawsuits; Mass. Gen. Laws 94 Sec. 277A provides a criminal penalty for violation but states that it is not to be exclusive of any other legal remedy or penalty. .

⁸ NY Gen. Bus. Law Sec. 349 permits court to award a successful private plaintiff as much as treble damages and counsel fees; Ala. Code Sec. 8-19-10 contains a similar provision.

This Legislation is Important to Inform Consumers.

The proposed legislation enables consumers to make informed choices. A restaurant, for example, would have legal difficulties if it listed an item as “steak” on its menu that was actually horse, dog or cat meat. Likewise consumers should know whether a garment or other item is made from real animal fur or hide, and if so, from what animal. Today many consumers have ethical objections to fur and/or concern about the use of certain species of animals. Consumers may also have allergies to fur or the chemicals used in some cases to dye or otherwise process some types of fur. A consumer might assume it is “faux” or synthetic fur unless it is labeled otherwise. Because the fur industry widely uses dyeing and shearing, fur that appears pink, orange, blue or as sheared trim might lead a customer to incorrectly assume that it is synthetic because it is not labeled and does not resemble natural animal fur. A free market economy should permit consumers to make informed decisions. Most countries have laws protecting consumers from labeling fraud. In the U.S., product labeling is regulated by the Federal Trade Commission⁹ under the Packaging and Labeling Program 15 U. S. C. Sec. 1451-1456 and the Federal Regulations promulgated thereunder. In 15 U.S.C. Sec. 1451, the policy statement setting forth the purpose and intent of the statute, Congress noted the importance of “informed consumers” as “essential to the fair and efficient functioning of a free market economy.”

Product Labeling is Necessary to Protect Public Health

The government has the right to require manufacturers to accurately label their food, drug, cosmetic, clothing, toy, furniture and numerous other products sold to the consuming public. Statutes on the state and Federal level have been enacted in the area of product safety since at least the last century. The Federal government enacted the first version of the Food, Drug and Cosmetics Act in 1938 (see 21 U.S.C. Sec. 301 et. seq.); see also the Wool Products Labeling Act of 1939, 15 U. S. C. Sec. 68d; Textile Fiber Products Identification Act, 15 U. S. C. Sec. 70e. More recently, in 2006, the National Uniform Nutritional Labeling Act went into effect (21 U.S.C. Sec. 343-1), with very specific uniform national requirements as to the labeling of nutrients and dietary supplements in packaged food with certain limited exceptions for scientifically prescribed dietary supplements. Even more recently, the New York City Health Commissioner’s requirement that chain restaurants post the calorie content of their food offerings was held not to be an illegal burden on those restaurants in light of the strong public health interest such regulation served. *New York State Restaurant Ass’n v. N.Y.C. Bd. of Health*, _F3d_, 2009 WL 367961 (2d Cir. 2/17/09).

It is in the context of these settled legal principles that the labeling of fur products must be viewed. Therefore, it cannot seriously be contended that there is a significant or undue burden on manufacturers either to know what they are selling or to accurately label the same when it comes to fur, fur trim and faux fur. Accordingly, arguments to the effect that accurate and full disclosure in labeling is a burden on manufacturers should not be given any consideration.

⁹ 15 U.S.C. Sec. 1454 (a)(A). The statute also delegates authority to the Secretary of Health and Human Services to regulate food, drugs, cosmetics, and devices. 15 U.S.C. Sec. 1454 (a)(B). See 15 U.S.C. Sec. 41 *et seq.* establishing the Federal Trade Commission.

This Legislation is Important to Animal Protection

The fur industry encompasses farming or trapping certain fur bearing animals, processing their skins for sale to manufacturers of fur garments, and marketing finished garments to retail outlets. The term “fur” refers to any animal skin that it is naturally covered with hair or fleece either in a raw or processed state.

This proposed legislation is an important corollary to existing Federal law protecting animals. In addition to the laws cited above, the Endangered Species Act of 1973 (16 U.S.C. Sec. 1531-1540) was enacted as a result of the threat of extinction to certain animal species threatened with extinction and the wanton waste and cruelty presented by the practice of harvesting the fur of those animals for fashion and adornment. Under this Act and its treaty provisions, the United States and nearly 80 other nations established procedures to control and monitor the import and export of imperiled species covered by treaty.

The proposed bills provide protection to a species currently excluded from the protection of the existing regulatory network, the Raccoon Dog. As hereinabove stated, this animal is a member of the canine family and is not related to a raccoon. The Raccoon Dog was originally native to eastern Siberia, northern China, North Vietnam, Korea and Japan. It is now also found in northern and western Europe. Because of its fluffy fur and markings, the fur is commonly passed off deceptively as being from raccoons or other species, or as being “faux” fur. Raccoon dogs live in pairs or in small groups, engage in social grooming and are apparently fond of social contact. The male brings food to the pregnant female and assists in the post-natal care of the pups. The pups often remain with the parents throughout the summer and take up independent existence in the autumn. Investigation by the Humane Society of the United States revealed that dozens of designers and retailers were selling fur-trimmed jackets labeled as “faux” when in fact the fur was real, often that of dogs or Raccoon Dogs.¹⁰ Synthetic material has improved to provide warm clothing and an appearance often difficult to distinguish from a genuine animal product. The use of real fur rather than “faux” in this modern era is an issue of vanity and conspicuous consumption.¹¹

¹⁰ The results of these investigations were published on the Humane Society website, www.hsus.org. Among the findings reported were the following: in 2006-2007, 25 fur-trimmed jackets labeled “faux” were purchased. Laboratory tests showed that twenty contained raccoon dog, raccoon, and rabbit. There were numerous other instances detailed on this website and reported in the HSUS newsletter. Yubanet.com, the Internet edition of the newsletter of the Sierra Club, reported on Feb.19, 2009, that on the 16th of that month the Humane Society and Assemblymember Linda B. Rosenthal, sponsor with Senator Frank Padavan of NY’s Gen. Bus Law Sec. 399aaa requiring accurate labeling, called a press conference to reveal that large retailers in NY were still selling mislabeled and unlabeled fur and fur trim garments. Videocamera and investigative evidence established that Bloomingdale’s had sold “Parajumpers” and “Steve by Searle” mislabeled jackets and Bergdof Goodman and Saks Fifth Avenue both sold unlabeled fur trim jackets.

¹¹ A number of business people in the fashion industry design and/or sell “faux fur” and other man-made clothing from synthetics. The Internet features articles on companies like Loyale, which sells a “faux” fur vegan jacket, not made from polyester or acrylic but from environmentally friendly material. Ms. Jaclyn Sharp, President of the company Imposter, [imfurlife@hotmail.com] and a panelist at a 2008 LIPTA Committee forum at the Association of the Bar of the City of New York on fur labeling and dog and cat fur prohibition, designs beautiful faux fur clothing motivated by opposition to the use of fur.

Summary

In sum, we support these bills and recommend that (1) they be amended to include all products containing fur, in addition to expressly banning raccoon dog fur and (2) the House bill be conformed to the Senate bill so as to state that the legislation shall not be construed to prevent states from enacting more restrictive legislation. Additionally, Congress should consider giving standing to consumers for violations of the Act, as has been provided under the Endangered Species Act.