A TAXONOMY OF CLASS ACTIONS FOR ANIMALS IN THE UNITED STATES

By
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Class actions are commonly used to redress mass wrongs against humans—but what about mass wrongs against animals? This Article provides a comprehensive overview of the types of animal-related class actions that have been filed in the United States, predominantly in the field of consumer law, and explores how these actions can be used as a strategic tool to advance protections for animals within the confines of their legal status as property. This Article also highlights the challenges that have been faced by these animal-related class actions in obtaining class certification pursuant to Rule 23 and offers some practical strategies for overcoming them in the future. In doing so, the author hopes to provide a clear and concise guide for the animal protection movement to successfully utilize the class actions for the benefit of animals.

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I. INTRODUCTION

Since the 1970s, there has been a growing movement of animal advocates in the United States filing litigation seeking to promote the interests and well-being of animals, known as the animal law movement.[1] From the very first cases that were filed challenging federally sanctioned slaughter practices and the conditions of animals held in public zoos, to modern cases that boldly seek to establish rights and legal personhood on behalf of animals, a clear trend emerged: litigation filed by the animal law movement rarely concerns the well-being of a single animal. Rather, the aim is almost always, either explicitly or implicitly, to use litigation strategically to affect change on a larger scale, with the goal of improving the lives of as many animals as possible. As the animal law movement has grown, both in size and sophistication of its strategy, it makes sense that animal advocates have increasingly turned to class actions, a procedural device commonly used to redress mass wrongs against humans, to file lawsuits affecting the mass well-being of animals. In 2011, Jonathan Lovvorn, Chief Counsel for Animal Protection Litigation at the Humane Society of the United States, observed that "the use of class action consumer litigation" had allowed the animal law movement "to address animal abuse on a scale that was previously impossible."[2] But despite the growing recognition and use of class actions as a tool to address animal issues, animal-related class actions have received little attention in academic literature.[3]

This Article seeks to address this gap in the literature by providing a taxonomy of class actions that have been filed in the United States. Part II will provide a brief introduction to the field of animal law and describe some of the challenges the animal law movement has faced in trying to litigate on behalf of animals. Part III will provide an overview of the diverse types of class actions that have been filed in relation to animals, involving a broad spectrum of animal protection issues. Part III will also highlight that while class actions affecting companion animals have been very popular and are most likely to reach the class certification stage—that is, the point at which the court determines whether the case is suitable to proceed as a class action—they have also generally been *denied* class certification by the courts. Denial of class certification is problematic because it means that a lawsuit can only continue as an individual proceeding, and not as a class action, which severely curtails the potential strategic impact of the ac-

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[1] Joyce Tischler, *The History of Animal Law, Part I (1972–1987)*, 1 STAN. J. ANIMAL L. & POL'Y 1, 3 (2008).

[2] *Taking Animals to Court: A Q&A with Jonathan Lovvorn and Peter Petersan*, ENVIROSHOP (Jan. 6, 2011), http://enviroshop.com/taking-animals-to-court-a-qa-with-jonathan-lovvorn-and-peter-petersan/ [https://perma.cc/Y2FM-QFVE] (accessed Jan. 3, 2020).

[3] The author has not been able to locate any article written specifically on the use of class action procedures in the animal law movement.

tion. Part IV will nonetheless argue that animal-related class actions are still a viable field, because these certification problems are not unique to animal-related class actions, and there are a number of strategies that can be deployed to remove, or at least reduce, these obstacles to certification. While class actions for animals will still invariably face some challenges and setbacks, the class action regime remains a powerful, and, arguably underutilized, mechanism in the toolbox of strategies available to advocates looking to use litigation to advance the well-being of animals.

II. THE CHALLENGE OF LITIGATING ON BEHALF OF ANIMALS

Animal law litigation has grown rapidly over the past fifty years. Once a niche area, the subject is now taught in over 160 law schools across the United States and Canada.[4] At its broadest, the term 'animal law' describes all statutory or common laws that apply to, or have an impact on, the lives of animals.[5] This means that, in addition to specific laws enacted for the protection of animals, animal law can also include aspects of torts, contracts, family, wills and trusts, administrative, constitutional, criminal, consumer protection, environmental, and international law.[6] At the same time, the term 'animal law' is also sometimes used to describe the movement of lawyers who, since the 1970s, have formed organizations such as the Animal Legal Defense Fund (ALDF), People for the Ethical Treatment of Animals (PETA), and the Humane Society of the United States (HSUS) with the express aim of using the law to advocate for better treatment of animals, particularly through litigation.[7]

However, the animal law movement quickly encountered a problem. In the United States, like most of the world, animals are legally classified as property.[8] Equivalent to a washing machine or a coffee table, an animal is treated as an object that can be owned, bought, sold, and not much else, as far as the law is concerned. To be sure, there are some legal protections for animals that are not afforded to other forms of property. For example, each state has animal anti-cruelty statutes that make it an offense to abuse or neglect animals in certain circumstances,[9] and there are federal laws such as the Endan-

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[4] *Animal Law Courses*, ANIMAL LEGAL DEF. FUND, https://aldf.org/article/animal-law-courses/ [https://perma.cc/78JU-DH9X] (accessed Jan. 3, 2020).

[5] Jerrold Tannenbaum, *What is Animal Law?*, 61 CLEV. ST. L. REV. 891, 891 (2013).

[6] *Animal Law 101*, ANIMAL LEGAL DEF. FUND, https://aldf.org/article/animal-law-101/ [https:// perma.cc/8A9E-6U7H] (accessed Jan. 3, 2020).

[7] Tannenbaum, *supra* note 5, at 896–97; *see* Tischler, *supra* note 1, at 3 (detailing the history of the animal law movement); *see also* Joyce Tischler, *A Brief History of Animal Law, Part II (1985–2011)*, 5 STAN. J. ANIMAL L. & POL'Y 27, 28 (2012) (providing insights and understanding of how the field of animal law has grown and developed).

[8] SONIA S. WAISMAN, PAMELA D. FRASCH & BRUCE A. WAGMAN, ANIMAL LAW: CASES AND MATERIALS 35 (5th ed. 2014).

[9] *Id.* at 72.

gered Species Act that provide additional protections to select categories of animals.[10] However, the property status of animals prevents them from claiming these 'rights' granted to them under the law, or even calling them rights at all, because legal property cannot possess rights.[11] Rather, property is subject to other people's rights. Therefore, as property, animals cannot hold even the most basic rights that are afforded to legal persons, such as the right to life, or the right to sue and be sued.[12] This is in spite of growing recognition of the intelligence and sentience—that is, the subjective capacity to experience pleasure and pain—in many species of animals of a similar level to humans.[13]

As such, some animal advocates believe that the property status must be abolished and that animals should be granted a form of rights or legal personhood, to achieve any real progress for animals—although this is by no means a universally held view—with others in the animal law movement vehemently arguing that the well-being of animals can be protected within the property status.[14] However, the idea of legal personhood for animals is not as radical as it initially may seem. The law has already shown a willingness to grant legal personhood to nonhuman entities such as corporations and ships.[15] Further, the progress of other social justice movements, such as the women's rights movement and the abolitionist movement, were both marked by the transition of oppressed persons (married women and slaves) from property to full 'legal persons.'[16]

Many animal advocates see similarities between these historic social justice movements and the animal law movement, and they argue working towards a similar transition for animals is a worthy and attainable goal.[17] However, cases that have sought to push animals towards legal personhood have, so far, been largely unsuccessful. Perhaps most famously, the Nonhuman Rights Project, led by attorney Steven Wise, has engaged in a sustained and strategic campaign of filing common law *habeas corpus* writs in New York on behalf of highly intelligent animals held in captivity, such as primates and elephants, with the goal of establishing a precedent that they are legal persons

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[10] *Id.* at 605.

[11] *Id.* at 35.

[12] *Id.*

[13] *See generally* Helen Proctor, *Animal Sentience: Where Are We and Where Are We Heading?*, 2 ANIMALS 628–29 (2012) (summarizing the understanding and acceptance of animal sentience through the ages).

[14] *See* Luis E. Chiesa, *Animal Rights Unraveled: Why Abolitionism Collapses into Welfarism and What it Means for Animal Ethics*, 28 GEO. ENVTL. L. REV. 557, 559 (2017) (detailing the 'rights' versus 'welfare' debate within the animal law movement); *see also* Gary L. Francione & Robert Garner, *The Animal Rights Debate: Abolition or Regulation?*, 2 ANIMALS 200, 200–01 (2011) (comparing the abolitionist viewpoint with a more moderate viewpoint aimed at protecting animal rights).

[15] WAISMAN, FRASCH & WAGMAN, *supra* note 8, at 56.

[16] *Id.* at 36–44.

[17] *Id.* at 44.

based on their similarities to humans.[18] Other examples include *Tilikum v. Sea World Parks & Entertainment, Inc.*,[19] in which PETA and others sought to establish that orcas held in captivity were illegally being held as slaves under the Thirteenth Amendment of the U.S. Constitution; *Justice v. Vercher*,[20] in which ALDF argued a horse named Justice was entitled to commence civil proceedings for damages after his former owner was found guilty of criminal neglect; *Naruto v. Slater*,[21] in which PETA argued a monkey should be able to claim copyright in a 'selfie' it took on a camera intentionally left on a photographer's tripod; and *Cetacean Community v. Bush*,[22] in which a self-appointed lawyer for the 'world's cetaceans' sought to challenge the United States Navy's use of low-frequency sonar.

However, each of these cases was dismissed, largely due to lack of standing—a perennial problem in animal law cases.[23] To bring a case in federal court, a person must first meet the three requirements of constitutional standing established by the Supreme Court.[24] First, the plaintiff must prove they have suffered or will suffer an injury in fact.[25] Second, their injury must have been caused by the defendant's conduct.[26] Third, the plaintiff's injury must be redressable by the courts.[27] The first element, injury in fact, has proven to be particularly difficult in animal law cases. It is well established the injury must be an 'actual or imminent' violation of a legally protected interest that is

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[18] *See* Steven M. Wise, *Legal Personhood and the Nonhuman Rights Project*, 17 ANIMAL L. 1, 2, 8–9 (2010) (detailing Wise's strategy of using *habeas corpus* writs to obtain legal personhood for animals); *Litigation*, NONHUMAN RIGHTS PROJECT, https://www.nonhumanrights.org/litigation/ [https://perma.cc/UA5U-T4PT] (accessed Jan. 3, 2020).

[19] Tilikum v. Sea World Parks & Entm't, Inc., 842 F. Supp. 2d 1259, 1260 (S.D. Cal. 2012).

[20] Opinion Letter, Justice v. Vercher, No. 18-cv-17601 (Wash. Cty. Cir. Ct. Sept. 17, 2018); *see also Justice the Horse Sues Abuser*, ANIMAL LEGAL DEF. FUND, https://aldf.org/case/justice-the-horse-sues-abuser/ [https://perma.cc/8EN2-WVJ2] (accessed Feb. 20, 2020) ("In 2018, the Animal Legal Defense Fund filed a groundbreaking lawsuit on behalf of an 8-year-old horse named Justice.").

[21] Naruto v. Slater, No. 15-cv-04324-WHO, 2016 U.S. Dist. LEXIS 11041, at *1 (N.D. Cal. Jan. 28, 2016).

[22] Cetacean Cmty. v. Bush, 386 F.3d 1169, 1171, 1179 (9th Cir. 2004).

[23] The exceptions are the Nonhuman Rights Project (NHRP) cases, as standing is not required in *habeas corpus* cases. However, the NHRP cases nonetheless failed because the courts found, inter alia, the common-law writ of *habeas corpus* does not lie on behalf of nonhuman animals. *See, e.g.*, Matter of Nonhuman Rights Project, Inc. v. Lavery, 152 A.D.3d 73, 74, 77-80 (N.Y. App. Div. 2017) (holding *habeas corpus* relief did not extend to chimpanzees, despite the chimps' human-like characteristics).

[24] Lexmark Int'l, Inc. v. Static Control Components, Inc., 572 U.S. 118, 125 (2014).

[25] *Id.*

[26] *Id.*

[27] *Id.* In addition, it is traditionally understood that a plaintiff must also meet the test for prudential standing unless the enabling statute contains a citizen suit provision, although this has been questioned recently in *Lexmark International, Inc. v. Static Control Components*. *Id.* at 127–28, n.3.

'concrete and particularized' to the plaintiff.[28] In most cases brought by animal advocacy organizations, the animals are the true injured parties. However, as the above cases demonstrate, the courts have found that animals lack standing to bring cases on their own behalf because they are not legal persons.[29] This problem is relatively easy to overcome where the animal has a relationship with, and more importantly is property of, a concerned human, because the human can file the lawsuit as the plaintiff.[30] For example, where the family dog or cat is injured due to negligence or intentional infliction of harm, the human owner clearly has standing to sue for damage to their animal 'property.'[31] However, damages in these cases are generally restricted to the market value of the animal, which is often a very small amount—particularly if the animal is not a pure-breed.[32] In some cases, the value of the utility of the animal, for example, as a show dog or guard dog, can also be awarded.[33] However, there is very little scope for damages to be awarded for the emotional harm or loss of companionship to the human owner of having their dog or cat injured or killed, despite the close familial relationship between humans and their companion animals.[34] And, of course, there is no compensation at all for the suffering of the animal itself, even if the animal has died as a result of an intentional attack. The court is only concerned with addressing the monetary loss to the human plaintiff as a result of the property damage—and under the law, property cannot suffer harm. Where the animals in question are not privately owned, for example wild or endangered animals, or the human owner is the one causing the harm, like with farmed animals or animals in zoos or circuses, establishing standing, even for a human plaintiff, becomes more difficult. The courts have held that mere interest or concern in the welfare of animals is insufficient to establish an injury in fact for the purposes of standing.[35] One common strategy is to allege that a human plaintiff or organization has suffered an 'aesthetic injury' as a result of witnessing the unlawful treatment of an animal.[36] But to succeed in this strategy, organizations must be able to locate a willing human plaintiff who has not only personally witnessed the animals being harmed and suffered an injury as a result, but also intends to continue seeing those animals in order to meet the redressability prong of Article III standing—a dif-

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[28] Lujan v. Defenders of Wildlife, 504 U.S. 555, 560, 661 (1992).

[29] Katherine A. Burke, *Can We Stand for it? Amending the Endangered Species Act with an Animal-Suit Provision*, 75 U. COLO. L. REV. 633, 662 (2004).

[30] Lauren M. Sirois, *Recovering the Loss of a Beloved Pet: Rethinking the Legal Classification of Companion Animals and the Requirements for Loss of Companionship*, 163 U. PA. L. REV. 1199, 1207 (2015).

[31] *Id.*

[32] *Id.* at 1203.

[33] *Id.* at 1216.

[34] *Id.* at 1216, 1222.

[35] Sierra Club v. Morton, 405 U.S. 727, 739 (1972).

[36] Jeffrey Skopek, *Aesthetic Injuries, Animal Rights, and Anthropomorphism*, 122 HARV. L. REV. 1204, 1205 (2009).

ficult task, particularly when these animals are intentionally kept away from the public.[37] As such, animal advocates have had to continue to look for new and creative ways to bring lawsuits on behalf of animals, and one such mechanism has been class actions.

III. TYPES OF ANIMAL-RELATED CLASS ACTIONS

A class action is a procedural mechanism that allows for numerous individual claims to be aggregated into a single proceeding.[38] A single named plaintiff can commence a class action on behalf of a 'class' of similarly affected individuals, for example, all consumers who were harmed by the same product or incident or were subject to the same discriminatory behavior by an employer, and anyone meeting that 'class definition' automatically becomes a 'class member' in the proceedings.[39] Class members are entitled to benefit from the successful resolution of a class action, including any award of damages, but are barred from bringing any future action if the class action is unsuccessful.[40] Class actions can be an incredibly useful tool. They promote access to justice by allowing individual cases to be brought collectively that would otherwise be too small, or costly, to bring on their own.[41] Given that the stakes are so high in a class action, involving potentially vast numbers of individuals and high risk for corporate and government defendants (high legal costs, large damages awards, and adverse publicity) they can also be "powerful and pervasive instruments of social change."[42] Class actions have been employed by other social justice movements in the advancement of important causes such as remedying desegregation, discrimination, and environmental

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[37] *See, e.g.*, Animal Legal Defense Fund, Inc. v. Glickman, 154 F.3d 426 (D.C. Cir. 1998) (establishing that the plaintiff had standing to sue for the 'aesthetic injury' caused to him in his regular visit to an exhibition where he observed primates living under inhumane conditions). However, finding human plaintiffs with a particularized injury in fact has generally proven to be difficult, particularly when it involves animals in the wild. *See Lujan*, 504 U.S. at 555, 564, 578 (holding environmental groups challenging regulations under the Endangered Species Act lacked sufficient 'imminent injury' to have standing).

[38] Owen M. Fiss, *The Political Theory of the Class Action*, 53 WASH. & LEE L. REV. 21, 24 (1996).

[39] *Id.* This class membership is subject to the right to 'opt out' of the proceedings in certain circumstances. *See generally* ROBERT H. KLONOFF, CLASS ACTIONS AND OTHER MULTI-PARTY LITIGATION CASES AND MATERIALS 371 (4th ed. 2017) (discussing the process and requirements for class members to opt out of the class to file individual actions).

[40] Fiss, *supra* note 38, at 24.

[41] *See* Amchem Products, Inc., v. Windsor, 521 U.S. 591, 617 (1997) (citation and internal quotation marks omitted) ("The policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights. A class action solves this problem by aggregating the relatively paltry potential recoveries into something worth someone's (usually an attorney's) labor.").

[42] KLONOFF, *supra* note 39, at 1.

harms.[43] As such, it makes sense that the animal law movement would also look to class actions as a strategy to redress harm to animals and enact social change.

A review of publicly available decisions reveals two main categories of putative class actions being filed in the United States with respect to animals.[44] The term 'putative' is an important qualifier because, as will be explained in Part IV of this Article, a lawsuit can only purport to be a class action until it is certified by the court pursuant to Rule 23 of the Federal Rules of Civil Procedure.[45] The first category is cases involving companion animals, whereby the plaintiffs are the human owners of animals that have been harmed. Such class actions involve defective or harmful pet food or flea and tick medication, or problems with the animal itself, as in the puppy mill cases. The second category involves cases where the animals in question are not owned by the human plaintiffs but have somehow been implicated in an alleged harm to the human plaintiffs, for example, misrepresentations regarding the treatment of animals in entertainment, 'humane' food claims, and products tested on animals. The author is not aware of any class actions being filed with animals as named plaintiffs or class members, although this would be an interesting topic for further scholarship. The purpose of this Part is to highlight how class actions have been used in creative ways to address a broad range of animal issues, often with great success, while also highlighting the recurring struggle of some of these class actions to obtain class certification.

A. Non-Companion Animal Cases

It is interesting to note that almost all the cases discussed in this Section concerning non-companion animals were commenced as putative class actions but were settled or discontinued prior to class certification stage. The settlement of a putative class action is certainly not a bad outcome. In fact, many of the cases below show that animal advocacy organizations were able to extract useful settlement terms from the defendant, including agreement to raise their animal welfare standards, which is the ultimate goal of many of these cases. However, it does mean that there was no written decision provided by the court in these cases as to whether these class actions would have met the requirements for class certification. This makes these cases slightly less helpful in determining the types of class certification issues that animal-related class actions are likely to encounter. These cases, nonetheless, are still useful in highlighting the creative ways in which even putative class actions can be used to address harm to animals.

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[43] *Id.*

[44] The author wishes to clarify that this Article does not purport to contain an exhaustive list of *all* animal-related class actions filed in the United States. The intention is simply to provide some broad categorization of some of the common types of animal related class actions that have been filed in the United States.

[45] FED. R. CIV. P. 23(c).

1. *Animal Testing*

In 2012, class actions were commenced against cosmetics companies Mary Kay, Estee Lauder, and Avon for fraudulently representing that they did not test their products on animals.[46] In reality, all three companies were testing on animals in countries where it was required by law—for example, in China, where it is mandatory for foreign manufacturers to test their products on animals prior to import.[47] After a partially successful motion to dismiss, all three class actions were discontinued by plaintiffs prior to class certification.[48] Notably, however, the court rejected the defendants' argument that the plaintiffs lacked Article III standing because the animal testing occurred with respect to products "they did not purchase and that were sold only in foreign countries."[49] Rather, the court accepted that the plaintiff and class members had been injured by virtue of paying money for a product they would not have purchased *but for* the misrepresentations about the use of animal testing.[50] The court concluded that "consumers have grown more aware of the social, environmental, and political impact of their purchasing decisions . . . [i]t should not be unexpected then that, when companies make misrepresentations about their company-wide operations, they face potential liability in court to consumers who relied on those representations in purchasing their products."[51] This is a useful acknowledgment from the court that consumers do care about the ethical claims made by corporations and that breaches of those claims will be taken seriously.

2. *Humane Food Claims*

Class actions have also targeted misrepresentations made by the agricultural industry in their advertising and labelling of animal-based food products, particularly with respect to chickens and eggs.[52] Terms such as 'cage free' and 'free range' are not defined by law, and

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[46] Stanwood v. Mary Kay, Inc., 941 F. Supp. 2d 1212, 1215 (C.D. Cal. 2012).

[47] *Id.*; *see also* Li You, *The Beastly Reality Behind China's Beauty Industry*, SIXTH TONE (Mar. 2, 2018), http://www.sixthtone.com/news/1001848/the-beastly-reality-behind-chinas-beauty-industry [https://perma.cc/4HYF-7W5N] (accessed Sept. 17, 2019) (indicating cosmetics brands "must prove that they've undergone animal testing" if they want to export their products into China).

[48] A fourth class action was filed with Avon as the sole defendant, but it was also discontinued prior to certification. *See* Gavin Broady, *Avon Ducks Animal Testing False Ad Class Action*, LAW360 (Aug. 26, 2013), https://www.law360.com/articles/467533 [https://perma.cc/F3NH-RX26] (accessed Jan. 3, 2020) (stating that the plaintiffs decided to end the suit after a motion opposing class certification revealed the case was not "amenable to class treatment").

[49] *Stanwood*, 941 F. Supp. 2d at 1217.

[50] *Id.* at 1219.

[51] *Id.* at 1218.

[52] Abby Meyer, *Spate of Recent False Advertising Class Actions Take on Animal Treatment Label Claims*, NAT'L L. REV. (Aug. 19, 2019), https://www.natlawreview.com/article/spate-recent-false-advertising-class-actions-take-animal-treatment-label-claims [https://perma.cc/RLF3-YGJV] (accessed Jan. 3, 2020).

therefore consumers—who often pay premium for these products—are forced to rely on questionable certification standards set by the food industry that often do not match public expectations with respect to the welfare of the animals.[53] This mismatch of public expectations and industry practices, combined with the large numbers of consumers purchasing these products, makes this area a prime target for class actions, most of which have been successfully resolved through settlement. For example, in *In re Processed Egg Producers Antitrust Litigation*, a putative class action was settled for $80 million after a group of egg producers was alleged to have conspired to increase egg prices.[54] To add insult to injury for animal advocates, the conspiracy was apparently conducted under the auspices of an animal-welfare program that was ostensibly aimed at improving cage sizes for hens, but was really designed to control the supply of eggs and drive up prices.[55]

In another case, the Humane Society settled a class action against Perdue Farms, the fourth largest poultry producer in the United States, concerning allegations that Perdue fraudulently advertised its chickens as being "humanely raised" when, in fact, they only complied with National Chicken Council standards, which the Humane Society alleged permitted cruel slaughter practices.[56]

Additionally, ALDF commenced a putative class action against Petaluma Egg Farm for misrepresentations in relation to its eggs.[57] The proceedings settled prior to class certification, but ALDF was still able to get Petaluma to obtain 'certified humane' accreditation for its hens amongst other settlement terms, no doubt improving the lives of many animals.[58]

Most recently, in March 2019, PETA filed a putative class action against Nellie's Free Range Eggs and its parent company with respect to alleged violations of New York General Business Law, fraud, fraudulent misrepresentation, and breach of express warranty.[59] The class

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[53] *See generally* Sarah Cranston, *So Sue Me: How Consumer Fraud, Antitrust Litigation, and Other Kinds of Litigation Can Effect Change in the Treatment of Egg-Laying Hens Where Legislation Fails*, 9 RUTGERS J.L. & PUB. POL'Y 72, 92 (2012) (detailing how consumers are willing to pay for the label but the label is misleading).

[54] *See In re Processed Egg Products Antitrust Litigation Website*, EGG PRODUCTS SETTLEMENT, http://www.eggproductssettlement.com/index [https://perma.cc/K8HJ-7SE2] (accessed Jan. 3, 2020) (identifying the sums each defendant paid in the settlement).

[55] *In re* Processed Egg Prods. Antitrust Litig., 821 F. Supp. 2d 709, 733–34 (E.D. Pa. 2011).

[56] Anne Bucher, *Kroger, Perdue Farms Settle Chicken Labeling Class Action Lawsuits*, TOP CLASS ACTIONS (Oct. 15, 2014), https://topclassactions.com/lawsuit-settlements/lawsuit-news/42213-kroger-perdue-farms-settle-chicken-labeling-class-action-lawsuits/ [https://perma.cc/WYZ4-VD F5] (accessed Jan. 3, 2020).

[57] *Challenging Judy's Family Farm Organic Eggs' Deceptive Advertising*, ANIMAL LEGAL DEF. FUND (Dec. 31, 2014), https://aldf.org/case/challenging-judys-family-farm-organic-eggs-deceptive-advertising/ [https://perma.cc/5FZC-PCLC] (accessed Jan. 3, 2020).

[58] *Id.*

[59] Complaint at 46–49, Lugones v. Pete & Gerry's Organics (S.D.N.Y., filed Mar. 6, 2019) (No. 1:19-cv-02097-KPF).

action complaint alleges that the defendants made false and misleading representations through the labelling and packaging of their eggs that showed hens freely roaming outdoors when, in fact, the eggs came from hens crammed into sheds with up to 20,000 birds, among other cruel practices.[60]

3. Animals in Entertainment

Animals held in captivity for the entertainment of humans, such as those in zoos, aquariums, and circuses, have also been the regular subject of class actions. For example, PETA commenced a putative class action on behalf of individuals who purchased tickets to Soul Circus.[61] These individuals purchased tickets in reliance on the company's seemingly robust Animal Rights Policy Statement that was published on the Soul Circus website when, in fact, the circus's vendors had been found to violate the Animal Welfare Act on seventeen occasions.[62] The proceedings settled on confidential terms prior to class certification in 2017.[63]

A variety of class actions were also commenced against SeaWorld in the wake of the 2013 documentary *Blackfish*, which exposed the cruel conditions in which orcas are held at SeaWorld marine parks, most of which are still ongoing.[64] A number of consumer class actions were filed seeking injunctions and damages on behalf of ticket purchasers who felt they had been misled by SeaWorld's previous statements regarding its supposedly humane treatment of its orcas.[65] A shareholder class action was also filed, alleging that SeaWorld failed to disclose (and even denied) the financial impact of *Blackfish* for a considerable period of time, leading to a 33% drop in the share price in late 2014 when the impact was finally disclosed.[66]

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[60] *Id.*

[61] *Update: Judge Rules UniverSoul Circus Must Stand Trial*, PETA (Jan. 13, 2019), https://www.peta.org/blog/dc-mom-files-class-action-suit-against-circus-for-misleading-people/ [https://per ma.cc/Y5YJ-5Q39] (accessed Jan. 3, 2020).

[62] Sloan v. Soul Circus, Inc., No. 15-01389, 2015 U.S. Dist. LEXIS 169565 at *4–6 (D.D.C. Dec. 18, 2015).

[63] *D.C. Mom Settles Consumer Fraud Lawsuit Against UniverSoul*, PETA (Feb. 28, 2017), https:// www.peta.org/media/news-releases/d-c-mom-settles-consumer-fraud-lawsuit-universoul/ [https://perma.cc/AY6H-T73P] (accessed Jan. 3, 2020).

[64] E.C.M. Parsons & Naomi Rose, *The Blackfish Effect: Corporate and Policy Change in the Face of Shifting Public Opinion on Captive Cetaceans*, 13 TOURISM IN MARINE ENVIRONMENTS 73, 76 (2018).

[65] These proceedings are ongoing. *See generally* Anderson v. SeaWorld Parks & Entertainment, No. 15-cv-02172-JSW, 2019 U.S. Dist. LEXIS 3550 (N.D. Cal. Jan. 8, 2019) (exemplifying the very current and ongoing litigation in these class actions).

[66] Baker v. SeaWorld Entertainment, No. 14cv2129-MMA (AGS), 2017 U.S. Dist. LEXIS 196235 (S.D. Cal. Nov. 29, 2017). Despite class certification being granted, the shareholder proceedings have been delayed due to ongoing investigation by the U.S. Department of Justice into SeaWorld's conduct. *See* Baker v. SeaWorld Entertainment, No. 14cv2129-MMA (AGS), 2018 U.S. Dist. LEXIS 60958 at *3–4 (S.D. Cal. Apr. 10, 2018) (showing a four-year delay from when class action was commenced).

B. Companion Animal Cases

There has also been a sizeable number of class actions involving companion animals filed by both animal advocacy organizations and plaintiffs represented by private law firms. The frequency of these cases is unsurprising—Americans love their pets. It is estimated that there are 85.8 million cats and 78 million dogs living in households across the United States, meaning 35% and 44% of American households include a cat or dog respectively.[67] Studies have shown that 90% of those households consider their dog or cat a "fully fledged family member."[68] This trend is reflected in an increasing number of cases where people seek to bequeath their estates to their companion animals through pet trusts or engage in custody disputes over who should take possession of the family pet upon dissolution of a marriage.[69] Accordingly, it is not surprising that when an animal is injured due to a defective product, the animal's human family is sufficiently aggrieved to seek out a private firm to file a class action. The result is that private attorneys who consider themselves outside the animal law movement may still find themselves practicing animal law (in the broader sense) when working on companion animal cases. As noted at the outset, however, an unfortunate trend in these companion animal cases is that while they are much more likely to reach class certification stage than the non-companion animal cases, class certification has generally been denied.

1. Puppy Mills

'Puppy mill' is a term coined by animal advocates to describe a "commercial breeding operation that inadequately cares for its dogs" and where "profit is given priority over the well-being of the dogs."[70] Animals in puppy mills often grow up in cramped, unsanitary conditions with inadequate veterinary care, leading to health and behavioral problems later in life.[71] These operations are able to function due to the high demand for pure-bred dogs by Americans—particularly, dogs meeting American Kennel Club standards—which are sold both

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[67] *Pet Statistics*, ASPCA, https://www.aspca.org/animal-homelessness/shelter-intake-and-surrender/pet-statistics [https://perma.cc/SA48-DMWK] (accessed Jan. 3, 2020).

[68] Catherine Amiot et al., *People and Companion Animals: It Takes Two to Tango*, 66 BIOSCIENCE 552, 552 (2016).

[69] Casey Chapman, *Not Your Coffee Table: An Evaluation of Companion Animals as Personal Property*, 38 CAP. U. L. REV. 187, 187–88 (2009).

[70] Kimberly Barnes, *Detailed Discussion of Commercial Breeders and Puppy Mills*, MICH. ST. U.: ANIMAL LEGAL & HIST. CTR. (2017), https://www.animallaw.info/article/detailed-discussion-commercial-breeders-and-puppy-mills-0 [https://perma.cc/WG3Q-V2U4] (accessed Jan. 3, 2020).

[71] *Id.*

directly to consumers and through pet stores.[72] It is sadly estimated that 90% of puppies sold in pet stores were raised in a puppy mill.[73]

While puppy mills are technically regulated by the Animal Welfare Act—a federal law that directs the United States Department of Agriculture (USDA) to "promulgate standards to govern the humane handling, care, treatment, and transportation of animals by dealers, research facilities, and exhibitors"[74]—the law contains numerous loopholes with respect to commercial and backyard breeders, and the regulations are chronically under-enforced by the USDA.[75] As a result, animal advocacy organizations have sought to take matters into their own hands by filing consumer class action lawsuits against unscrupulous breeders.

For example, in 2007, the Humane Society of the United States (HSUS) filed a class action against "notorious Florida puppy dealer," Wizard of Claws, that was alleged to have "defrauded customers by misrepresenting the origin of puppies, and by selling puppy mill dogs who suffer from severe health problems and genetic defects."[76] It was the first class action filed by HSUS and reportedly the first class action filed against any puppy mill in the United States.[77] The proceedings subsequently settled prior to certification; although, as is sadly common with breeding operations, the owners of the puppy mill simply assumed a new identity and continued to breed dogs in a new jurisdiction.[78]

Subsequent class actions have used similar strategies to target large pet stores allegedly selling dogs from puppy mills. However, such cases have been denied class certification for reasons that will be discussed in further detail in Part IV.

2. Defective Pet Products

One of the largest groups of animal-related class actions has been litigation involving defective products that have caused harm to companion animals—particularly flea and tick treatments and pet food. In one of the earliest animal-related class actions, *Ikonen v. Hartz Mountain Corporation*, the plaintiffs commenced putative class action pro-

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[72] Katherine C. Tushaus, *Don't Buy the Doggy in the Window: Ending the Cycle that Perpetuates Commercial Breeding with Regulation of the Retail Pet Industry*, 14 DRAKE J. AGRIC. L. 501, 503 (2009).

[73] *Puppy Mills*, HUMANE SOC'Y INT'L, http://www.hsi.org/assets/pdfs/puppy_mills_factsheet.pdf [https://perma.cc/X3CY-TQS5] (accessed Jan. 3, 2020).

[74] 7 U.S.C. § 2143(a)(1) (2018).

[75] Tushaus, *supra* note 72, at 506–07.

[76] Wayne Pacelle, *Big Lawsuit for Little Victims*, HUMANE SOC'Y U. S.: KITTY BLOCK'S BLOG (June 20, 2007), https://blog.humanesociety.org/2007/06/off_to_sue_the_.html [https://perma.cc/96XG-Y XMT] (accessed Jan. 3, 2020).

[77] *Id.*

[78] Brian Hamacher, *Puppy Sellers Stay in Business, Fined $26,000*, NBC SOUTH FLA. (June 22, 2010, 2:21 PM), https://www.nbcmiami.com/news/local/Puppy-Mill-Owners-96896709.html [https://perma.cc/4XUU-T2J8] (accessed Jan. 3, 2020).

ceedings with respect to an aerosol flea & tick spray, Blockade.[79] The product contained no instructions on dosage or application of the product and the manufacturer, Hartz, quickly received over 3,000 complaints of animals experiencing side effects including seizures, vomiting, and death, possibly due to overapplication.[80] However, class certification in this case was denied.[81]

A second wave of flea and tick-related cases were filed in 2009–2010, coinciding with a press release by the Environmental Protection Agency reporting a "recent sharp increase in the number of incidents being reported from the use of spot-on pesticide products for flea and tick control for pets."[82] Seven related putative class actions were filed against manufacturers of these flea and tick treatments.[83] One of these putative class actions, *Mahtani v. Wyeth*, alleged that a specific treatment failed to eradicate fleas and ticks and caused the plaintiff's dog to suffer lethargy, vomiting, and diarrhea, which the plaintiff said was in breach of the New Jersey Consumer Fraud Act, unjust enrichment, and breach of warranty.[84] However, this class action was also denied certification.[85]

The pet food class actions have had slightly better success. In 2010, the *In re Pet Food Products Liability Litigation* settled for $24 million, after over 100 class actions were commenced on behalf of consumers who purchased contaminated pet food that was subsequently recalled.[86] However, other putative class actions such as *Gartin v. S & M NuTec*[87] and *Bietsch v. Sergeant's Pet Care Products*[88]—both of which concerned dog treats that were difficult to digest and caused internal blockages, among other health issues for some dogs that consumed them—suffered the same fate as the flea and tick actions and were denied class certification. Most recently, in January 2019, Hill's Pet Nutrition recalled its dog food products after they were found to

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[79] Ikonen v. Hartz Mountain Corp., 122 F.R.D. 258, 260 (S.D. Cal. 1988).

[80] *Id.*

[81] *Id.* at 266–67. It is notable that counsel for the plaintiff in *Ikonen* was Herbert B. Newberg, author of the famous treatise *Newberg on Class Actions*.

[82] Smith v. Merial Ltd., No. 10-439, 2011 WL 2119100, at *1 (D.N.J. May 26, 2011).

[83] *See* Smith v. Merial Ltd., No. 11-6976, 2012 WL 2020361 at *1 (D.N.J. June 5, 2012) ("Presently before the Court are six putative class actions which are collectively known as the Flea and Tick cases."). After certification was denied in the seventh case, *Mahanti v. Wyeth*, the Court sought submissions in the balance of the proceedings as to how they intended to overcome class certification concerns. *See id.* at *6–7.

[84] Mahtani v. Wyeth, No. 08–6255, 2011 WL 2609857, at *1 (D.N.J. Jun. 30, 2011).

[85] *Id.* at *11–12 ("Proving each class member's unjust enrichment claim will therefore require an inquiry into each class member's individual circumstances . . . . [C]lass certification of plaintiffs' unjust enrichment claim is unwarranted, . . . and plaintiffs' motion for class certification is denied.").

[86] *In re* Pet Food Prods. Liab. Litig., 629 F.3d 333, 336–37 (3rd Cir. 2010).

[87] Gartin v. S & M NuTec LLC, 245 F.R.D. 429, 432 (C.D. Cal. 2007).

[88] Bietsch v. Sergeant's Pet Care Prods., No. 15 C 5432, 2018 U.S. Dist. LEXIS 160264, at *1–2 (N.D. Ill. Sept. 19, 2018).

have toxic levels of vitamin D that caused death and injury in dogs.[89] This recall led to the commencement of at least seven putative class actions against Hill's Pet Nutrition, the outcomes of which are still to be determined.[90]

There is a clear trend here. Most of these companion animal actions reached a hearing on class certification only to have certification denied. In most cases, this led to the action subsequently being discontinued. Denial of class certification presents a real problem for animal advocacy organizations seeking to use the proceedings to effect mass change for the benefit of animals because the defendant is no longer faced with the threat of a significant judgment for damages and adverse publicity associated with a class action trial. It is equally problematic for a commercial attorney and their named plaintiff, who are left with an individual lawsuit often worth very little money on its own (perhaps no more than the cost of a refund on pet food) and now have much less bargaining power against the defendant to negotiate a favorable settlement. For animal-related class actions to be an effective tool of the animal law movement, attorneys must be able to identify and overcome recurrent class certification issues. As such, the next portion of this Article will highlight some recurring issues that appear to prevent certification in the companion animal cases highlighted above and offer some solutions.

IV. OVERCOMING CLASS CERTIFICATION PROBLEMS FOR ANIMAL-RELATED CLASS ACTIONS

There are three broad requirements that must be satisfied to bring a certified class action in federal court.[91] First, the plaintiff must meet the implicit threshold requirements of Rule 23.[92] This requires the plaintiff to demonstrate that the proposed class is definable, that they are a member of the proposed class, and their claim is live—not moot.[93] Second, the plaintiff must establish the four requirements of Rule 23(a): "(1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class."[94] Third, the plaintiff must demonstrate that the proposed class falls under one of the four categories set out in Rule 23(b).[95]

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89 Susan Thixton, *Seven Class Action Lawsuits Against Hill's Pet Nutrition*, TRUTH ABOUT PET FOOD (Mar. 6, 2019), https://truthaboutpetfood.com/seven-class-action-lawsuits-against-hills-pet-nutri tion/ [https://perma.cc/5995-238Y] (accessed Jan. 3, 2020).

90 *Id.*

91 Klonoff, *supra* note 39, at 35.

92 *Id.*

93 *Id.*

94 *Id.*; FED. R. CIV. P. 23(a).

95 FED. R. CIV. P. 23(b); *see also* KLONOFF, *supra* note 39, at 159 ("Rule 23(b)(1)(A) permits a class action when a party opposing the class would otherwise face individual

In each of the cases outlined above, plaintiffs sought certification under the category set out in Rule 23(b)(3), which provides that a class action may be maintained if "the court finds that the questions of law or fact common to class members *predominate* over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy."[96] These are known, in shorthand, as the requirements of predominance and superiority.[97]

As noted throughout this Article, an emerging trend seems to be that while companion animal cases reach class certification stage, class certification is almost always denied. The main barrier, as will be discussed further below, is the predominance requirement. Many courts have rejected certification due to the concern that individual issues with respect to fact or law will predominate over the common issues in the class action.[98]

Predominance problems are not unique to companion animal-related class actions. However, in reviewing the companion animal certification decision, there are several unique factors that may complicate the question of predominance when a class action involves animals. First, because animals are both property and living creatures, they face a unique combination of certification problems associated with both defective product claims (because the animal is treated like any other consumer product under the law, like a defective dishwasher) *and* mass tort claims (because, at the same time, animals are nothing at all like a defective dishwasher—they are living creatures with a complex biology, individualized medical histories, and variable lifestyle factors that raise individual questions of liability, causation and damages, like in mass tort claims concerning harm to humans). Second, even though animals are legally classed as property, the decision to purchase an animal is, arguably, quite unlike the decision to purchase a regular consumer product. Unlike a purely rational consumer decision, the process of purchasing a pet is arguably more akin to the emotional process of adopting a child and does not fit well with notions of the consumer who dispassionately weighs which product to buy based on cost, appearance, functionality, and so on. These emotional elements, which are not present in other consumer product class

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adjudication that would pose a risk of creating incompatible standards of conduct. Rule 23(b)(1)(B) permits a class action when individual litigation otherwise risks the ability of class members to protect their rights or interests, such as when a defendant has only a limited fund available to satisfy the claims of many claimants. Rule 23(b)(2) provides that a class may be certified when a party opposing the class has acted (or refused to act) in the same manner towards a definable group, thus making it appropriate to render declaratory or injunctive relief to that group. Finally, Rule 23(b)(3) permits a class to be certified when one or more questions of law or fact common to a group of litigants 'predominate' over any individualized issues that would have to be litigated . . . .").

[96] FED. R. CIV. P. 23(b)(3) (emphasis added).

[97] KLONOFF, *supra* note 39, at 212, 231.

[98] KLONOFF, *supra* note 39, at 219.

actions, have the potential to complicate questions of reliance on alleged misrepresentations and, in turn, complicate the question of predominance.

With these observations in mind, the remainder of this Part will highlight the three main predominance problems faced by companion animal class actions—reliance problems, mass tort problems, and 'all purchaser' class action problems. It will also offer some strategies for minimizing and overcoming these problems.

A. Problem 1 – Reliance

Establishing reliance in consumer class actions has proved a vexing problem for plaintiffs' attorneys. On the one hand, consumer claims involving fraudulent misrepresentations and defective products are well suited to class action litigation because they combine similar, small individual claims for damages that might not otherwise be able to be brought before the courts due to the high cost of litigation.[99] On the other hand, many courts have been reluctant to certify consumer fraud class actions due to concerns that individual questions of reliance and damages are likely to predominate over common questions of liability.[100] This concern is reflected in the Rule 23(b)(3) Advisory Committee Notes providing that "a fraud case may be unsuited for treatment as a class action if there was material variation in the representations made or in kinds or degrees of reliance by the persons to whom they were addressed."[101] Although the Advisory Committee Notes acknowledge that fraud class actions can be viable in some circumstances, Robert Klonoff has observed that many courts have "adopted essentially a per se view that fraud suits involving questions of individual reliance are not suitable for class certification."[102]

In keeping with this trend, individual reliance has also proven to be a barrier to establishing predominance in many of the companion animal class actions. For example, in the *Petland* class action, the motion for class certification focused on the fact that, to succeed in their Racketeer Influenced and Corrupt Organizations Act (RICO Act) claim, the plaintiffs and class members would need to prove that reliance on the defendants' fraudulent scheme proximately caused the

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[99] *See* Samuel Issacharoff, *The Vexing Problem of Reliance in Consumer Class Actions*, 74 TUL. L. REV. 1633, 1634, 1640 (2000) (discussing consumer claims for defective products as the perfect setting for class actions because they combine claims that generally do not justify individual litigation and drawing an example from insurance class actions and the significant financial burden an individual claimant would undertake from litigation).

[100] *See generally id.* at 1640–41 (discussing how "a number of courts have refused to certify class action for litigation" for insurance premium claims, and on the issue of reliance "some courts have found that the issue of individual reliance would defeat manageability and the predominance of common issues over class-wide issues").

[101] FED. R. CIV. P. 23(b)(3) (advisory committee's notes to 1966 amendment).

[102] Robert H. Klonoff, *The Decline of Class Actions*, 90 WASH. U. L. REV. 729, 793 (2013).

plaintiffs' loss.[103] To prevent individual reliance from defeating predominance, the plaintiffs argued two "common" theories by which reliance—and therefore causation—could be established.[104] First, the plaintiffs argued that direct reliance by class members could be established by proving that Petland engaged in a "pervasive, centrally-orchestrated" campaign to misrepresent its puppies as healthy dogs coming from United States Department of Agriculture (USDA) licensed breeders.[105] The plaintiffs alleged that these orchestrated representations were made through a combination of Petland's health certificates and warranties provided at the time of sale, as well as on its website, in brochures, and in oral representations.[106] This reliance theory was rejected, in large part because the court was already forced to dismiss the claims of twenty-nine out of the thirty-one plaintiffs because they did not allege reliance on *any* of Petland's alleged misrepresentations (even after being given an opportunity to amend their pleadings to make such allegations).[107] In these factual circumstances, where even the named plaintiffs did not universally rely on Petland's representations, the court was not prepared to assume Petland's alleged scheme was so pervasive that all class members relied on it.[108]

In the alternative, the plaintiffs alleged a 'third-party reliance' theory, arguing Petland also made misrepresentations to its franchisees about the quality and source of its puppies that were passed onto consumers.[109] The court rejected this reliance theory for three reasons.[110] First, the plaintiffs' pleadings alleged Petland's franchisees were complicit in the RICO scheme, which was inconsistent with the theory of the franchisees also being misled by Petland.[111] Second, even if the third party reliance theory was accepted, individual issues would still predominate in determining what misrepresentations were made to each of Petland's franchisees, and the extent to which they relied on those misrepresentations and repeated them to customers.[112] Third and finally, the plaintiffs would still need to prove each class members' injuries were "directly related to Petland's fraud on the franchisees."[113] Because the plaintiffs claimed veterinary expenses as well as a partial refund of the purchase price, the case would still require a

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103 Martinelli v. Petland, Inc., 274 F.R.D. 658, 660–61 (D. Ariz. 2011).

104 *See generally id.* at 661 (discussing plaintiffs' argument that "reliance can be established by both first-party and third-party reliance, and that common questions will predominate over individual questions for both types of reliance if the class is certified").

105 *Id.*

106 *Id.*

107 *Id.* at 662.

108 *Id.* at 661–62.

109 *Id.* at 664.

110 *See id.* (illustrating that the Court disagrees with the plaintiffs "for several reasons" and then proceeds to list three reasons throughout the opinion).

111 *Id.*

112 *Id.*

113 *Id.* at 664–65.

puppy-by-puppy analysis to determine whether they became sick *due* to their treatment at a puppy mill, rather than for any intervening reason—if they got sick at all.[114] As such, the court also rejected the third-party reliance theory.[115]

Having rejected both common reliance theories proposed by the plaintiffs, the court concluded that to establish causation, it would be necessary to conduct "purchaser by purchaser" assessments to determine if the class member relied on the alleged misrepresentations, which would lead to individual issues predominating over common issues.[116] Thus, class certification was denied.[117]

Some aspects of rejection of certification in *Petland* are specific to the unique facts of the case—for example, the arguably poor choice of class representatives who could not allege they relied on the misrepresentations made by Petland.[118] However, the case still provides some important lessons for attorneys seeking to bring companion animal class actions. One such lesson is that RICO Act claims may not be well suited to class actions given the heightened scrutiny the elements of these claims attract with respect to individual reliance and causation.[119] RICO Act claims have been popular among class action attorneys because they allow the plaintiff to bring a nationwide misrepresentation claim based on federal statute.[120] This litigation strategy avoids some of the difficulties associated with certifying nationwide class actions based on state consumer law statutes due to concerns about conflicts in state law overwhelming common issues.[121] However, given the difficulties exposed in *Petland*, it may well be that filing separate claims in state court under state consumer protection statutes, or using state-based subclasses in a federal class action claim, is a more effective route, given many of them do not contain the same strict reliance and causation requirements as the RICO Act.[122] For example, under the California Unfair Competition Law, proof of individual reliance is arguably not required to grant relief.[123]

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114 *Id.* at 665–66.

115 *Id.* at 665.

116 *Id.* at 663.

117 *Id.* at 666.

118 *Id.* at 661–62.

119 *Id.* at 664 (disagreeing with franchises plaintiffs' claims, the court describes how bringing in the franchises under the RICO statute creates a break in the chain of causation plaintiffs are alleging between their injury and Petland's misrepresentations).

120 Randy D. Gordon, *Rethinking Civil RICO: The Vexing Problem of Causation in Fraud-Based Claims Under 18 U.S.C. § 1962(C)*, 39 U.S.F.L. REV. 319, 322–23 (2005).

121 Sarah Roshanne Anchors, *Mass Market Fraud Theory: Dispensing with Individual Reliance in Class Actions Where Plaintiffs Allege Pervasive Misrepresentations to the Public*, 43 TORT TRIAL & INS. PRAC. L.J. 221, 224–25 (2008).

122 *Id.* at 243.

123 Mass. Mut. Life Ins. v. Super. Ct., 97 Cal. App. 4th 1282, 1288 (2002) ("California courts have repeatedly held that relief under the UCL is available without individualized proof of deception, reliance and injury.").

However, problems of individual reliance may still defeat predominance even without a RICO Act claim. For example, in *Gartin v. S & M NuTec*, a plaintiff dog owner commenced a putative class action against the manufacturer of canine chew treats Greenies for alleged failure to disclose certain dangers associated with the treats, including the potential to cause harmful internal blockages in dogs.[124] Unlike *Petland*, the plaintiff did not allege a fraudulent scheme under RICO, but alleged similar claims with respect to fraud, negligence, breach of state consumer protection, and breach of unfair competition laws.[125] The case also had some additional complications. Despite the complaint alleging that the defendant's statements misled class members, the plaintiff was deemed not to be an adequate or typical representative because, *inter alia*, she never saw or relied upon the defendant's representations.[126] Further, the plaintiff's dog had a unique medical history including previous esophageal tumors; thus, the court was concerned that the plaintiff's unique claim would require individual findings as to causation that would not be useful or relevant to other class members.[127]

Nonetheless, the primary concern of the court was that individual questions of reliance would predominate over common issues.[128] With respect to the fraud claim, the court held that because the plaintiffs alleged the defendant made a variety of misrepresentations, "different class members may have relied on different representations," if they relied on any at all.[129] As such, reliance would require individual proof, as would the issue of whether the representations were justifiable, another element of the fraud claim.[130] Like *Petland*, the plaintiffs were not found to be entitled to any presumption of reliance because (a) the claim was not a securities fraud class action where 'fraud on the market' theory applies, and (b) even if the theory could be applied outside the securities context, it is restricted to omissions and cannot be extended to the kinds of misrepresentations alleged in *Gartin*.[131]

The court expressed similar predominance concerns with respect to establishing proximate causation, highlighting the individual evidence required with respect to each dog's medical history and whether the class members were following instructions when using the treats.[132] With respect to the claim under the UCL, the court was ambivalent as to whether evidence of individual reliance was required.[133] However, the court nonetheless concluded that individual issues would

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124 *Gartin*, 245 F.R.D. at 432.
125 *Id.* at 437–40.
126 *Id.* at 434.
127 *Id.*
128 *Id.* at 435, 437.
129 *Id.* at 437.
130 *Id.* at 438.
131 *Id.*
132 *Id.* at 439.
133 *Id.* at 439–40.

still predominate (even if individual reliance was not required) because it would be necessary to prove whether each class member's dog's injuries were caused by the Greenies treats or something else entirely.[134] Accordingly, class certification was denied.[135]

Like *Petland*, *Gartin* might have had a greater chance of success with a different plaintiff, given the chosen plaintiff did not allege reliance on the defendant's misrepresentations and owned a dog that already had complicated medical issues prior to purchase of the offending pet treats.[136] Animal advocacy organizations looking to run successful animal-related consumer fraud class actions would ideally select cases with a plaintiff that relied on highly uniform representations, preferably made in writing, to minimize any question of individualized reliance—but this is not always possible.

More importantly, there is an argument to be made that reliance issues should not have defeated predominance in *Petland* or *Gartin* and should not defeat similar animal-related cases filed in the future. Other courts have allowed class actions to proceed in spite of individual questions of reliance.[137] After all, Rule 23(b)(3) does not require all questions of fact or law to be common for a class action to be certified.[138] All that is required is that "*some* questions are common and that they predominate over individual questions."[139]

With this in mind, courts in cases such as *Kirkpatrick v. J.C. Bradford & Co.*, a putative securities class action concerning the collapse of the Petro-Lewis oil and natural gas investment funds, held that where there is an "overwhelming number of common factual and legal issues presented by plaintiffs' misrepresentation claims . . . the mere presence of the factual issue of individual reliance could not render the claims unsuitable for class treatment."[140] Similarly in *Klay v. Humana*, a putative class action alleging that the defendant health maintenance organizations systematically underpaid physicians, the court held that predominance could be established despite variations between representations made to physicians because the representations "all conveyed essentially the same message."[141]

The same applies to *Petland* and *Gartin*. Although the courts were concerned with certain variations between the representations made and seen by each individual in the class, the crux of the representations—that the treats in *Gartin* were safe, and that the puppies in

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134 *Id.* at 440.

135 *Id.* at 441. The court also discussed issues regarding the CLRA claim, affirmative defenses, and superiority, which are outside the scope of this Article.

136 *See id.* at 436 (denying plaintiff's motion based on the reasoning that plaintiff is "neither [a] typical nor [adequate] representative").

137 KLONOFF, *supra* note 39, at 227.

138 FED. R. CIV. P. 23(b)(3).

139 *In re* Theragenics Corp. Secs. Litig., 205 F.R.D. 687, 697 (N.D. Ga. 2002) (emphasis added).

140 Kirkpatrick v. J.C. Bradford & Co., 827 F.2d 718, 724–25 (11th Cir. 1987).

141 Klay v. Humana, 382 F.3d 1241, 1258 (11th Cir. 2004).

Petland were healthy, high quality, and did not come from puppy mills—were the same across the various forms and ways in which the representations were made. There were also a large number of common issues in both *Petland* and *Gartin* that, in spite of some limited individual questions of reliance and damages, would have made certification appropriate and a more efficient way to proceed with these cases. The fact that the decision to purchase a pet is more complex than the decision to purchase debentures should not allow a defendant to escape liability. To the contrary, animal advocates would argue the involvement of a living creature in the misrepresentation creates even greater harm that demands a means of redress.

The animal law movement has seemingly not been deterred by these reliance issues. In 2017, ALDF commenced another nationwide RICO Act class action against Petland regarding its practice of sourcing dogs from alleged puppy mills.[142] As of the date of this Article, there has been no hearing or decision on class certification, although a motion to dismiss unrelated to class certification was granted in 2018 and ALDF has appealed.[143] If the proceedings reach the class certification stage, it will be interesting to see how ALDF chooses to argue the issue of individual reliance in light of *Petland*, and how the court responds to these arguments.

B. Problem 2 – Mass Tort Issues

It has been observed that "[n]o area of class action law has generated more analysis and controversy by both courts and commentators during the past four decades than mass tort class actions."[144] The term 'mass tort' is a catch-all phrase encompassing at least four kinds of legal claims: mass accidents, personal injury mass torts, property damage mass torts, and economic loss.[145] As explored above, the companion animal cases have elements of both personal injury claims, due to the injuries caused to the animals as living beings, property damages, and economic loss claims, due to the harm caused to the human owners as a result of the harm caused to their pets as legal property.

Mass tort claims have typically struggled to obtain class certification, although the attitude of the judiciary towards them has fluctuated over time. The main concern, raised in formative product liability cases, such as *Dalkon Shield*, is whether mass torts are suitable to be determined within the class action format given the significant questions they raise as to damages, liability and defenses to liability, and the risk of these individualized issues overwhelming the class action

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142 *Challenging Petland's Business Practices (Racketeering Class Action)*, ANIMAL LEGAL DEF. FUND, https://aldf.org/case/challenging-petlands-business-practices-racketeering-class-action/ [https: //perma.cc/PA5A-K43Q] (accessed Jan. 3, 2020).

143 *Id.*

144 KLONOFF, *supra* note 39, at 725.

145 *Id.* at 726–27 (citing Anne Cohen, *Mass Tort Litigation After Amchem*, ALI-ABA Course on Civil Practice and Litigation Techniques in the Federal Courts 269, 273 (1998)).

procedure.[146] A related concern, raised in other proceedings, is the "insurmountable pressure" placed on a defendant to settle following certification of a mass tort action, even if chances of succeeding in an individual action would be slim—sometimes referred to as "judicial blackmail."[147]

These issues are played out in some of the companion animal cases. As outlined above, *Ikonen v. Hartz Mountain Group* involved a putative class action with respect to an allegedly defective flea and tick aerosol spray.[148] In determining class certification in that case, the court initially made some promising comments about the desirability of class actions in mass injury class actions:

> Class actions may very well be the best means available to redress mass repetitive wrongs . . . . Here, some potential class members may only be able to recover for the loss of their animals, and for veterinary fees incurred in caring for them, should a trial reveal that Blockade injured the animals. For such persons, it could possibly be too expensive to conduct discovery and arrange for the appearance of expert witnesses for their individual cases. It is therefore necessary to be especially careful in examining the requirements for certifying a class under Rule 23(b)(3) before deciding whether or not a class action is appropriate here.[149]

The court also acknowledged that there would be issues general to the class, such as whether Blockade was defective, whether Hartz gave adequate warning of the dangers of the product, or whether Hartz engaged in misleading conduct.[150] However, following *Dalkon Shield*, the court highlighted that in product liability cases more so than mass accident cases, such as airplane crashes, individual issues may outnumber common ones because "no one set of operative facts establishes liability" and "no single proximate cause applies equally."[151] There is also the potential for different affirmative defenses to arise such as contributory negligence or failure to follow directions.[152] In particular, the court noted that "physiological differences among the pets of class members, such as species, weight, size, age, and health, may affect proof of causation in each case."[153] The court also noted the "circumstances of each animal's exposure to Blockade" and "whether each animal was exposed to other harmful chemicals" were all individual issues which, given the potentially large class, were likely to overwhelm the common issues.[154]

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146 *In re* N. Dist. of Cal. "Dalkon Shield" IUD Prods. Liab. Litig., 693 F.2d 847, 851–52 (9th Cir. 1982).

147 Castano v. American Tobacco, 84 F.3d 734, 746 (5th Cir. 1996).

148 *Ikonen*, 122 F.R.D. at 260.

149 *Id.* at 264.

150 *Id.*

151 *Id.*

152 *Id.*

153 *Id.*

154 *Id.*

The plaintiffs tried to overcome these concerns by arguing that generic causation issues, such as "whether Blockade is harmful," could be heard in a "phase 1" trial—with individual issues to be determined later.[155] However, the court held, relying on *In re Agent Orange*, this argument was not persuasive because the proper question is not whether Blockage has the capacity to cause harm, but whether it did *in fact* cause harm—which requires individual determinations.[156] In addition, the court held the claim could not meet the requirements of commonality given "the individual case histories of the pets of each class member will all involve different negligence, strict products liability, breach of warranty, fraud, and adequacy of warning issues."[157] Typicality was also not established, with the court highlighting the difficulty of identifying a single 'typical' claim in negligence class actions, given the individualized causation requirements.[158]

Although *Ikonen* is a 1988 case, later companion animal cases have taken a similar approach. For example, in *Gartin*, the court denied certification due to individual reliance issues predominating over common legal issues.[159] In addition, the court also relied on both *Ikonen* and *Dalkon Shield* in finding individual factual issues predominated, including whether class members followed instructions, the unique medical histories of each dog, the environment, age, and diet of each dog, as well as what harm, if any, was caused to each dog.[160] It is quite ironic, given the heavy reliance of these, and many other cases, on *Dalkon Shield*, that a class action with respect to the Dalkon Shield intrauterine device was eventually certified in separate proceedings in 1989.[161] Further, the Ninth Circuit has softened the effect of *Dalkon Shield* in later proceedings.[162]

Similar issues arose in proving causation through common evidence in *Bietsch v. Sergeant's Pet Care Products*, where the plaintiffs commenced a putative class action alleging breach of warranty and consumer fraud statutes after their dogs became unwell after eating Pur Luv pet treats.[163] In the hearing of the motion for class certification, the plaintiffs pointed to eight sources of common evidence they intended to rely on to prove the treats were defective, including plaintiff and class member testimony and the defendants' internal records showing hundreds of customer complaints, no safety testing prior to sale, and many confidential settlements of claims regarding the

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155 *Id.* at 265 (citing *In re* Agent Orange Prod. Liab. Litig., 818 F.2d 145, 164 (2nd Cir. 1987)).

156 *Id.*

157 *Id.* at 262.

158 *Id.* at 262–63.

159 *Gartin*, 245 F.R.D. at 440.

160 *Id.* at 439.

161 *In re* A.H. Robins Co., 880 F.2d 709, 710 (4th Cir. 1989).

162 *See, e.g.*, Sweet v. Pfizer, 232 F.R.D. 360, 367 (C.D. Cal. 2005) (citing Staton v. Boeing Co., 313 F.3d 447, 462 (9th Cir. 2002)) (holding the plaintiffs met the low bar of showing commonality since there were "core salient facts among the plaintiffs").

163 *Bietsch*, 2018 U.S. Dist. LEXIS 160264, at *1.

treats.[164] Most significantly, the plaintiffs sought to rely on testing undertaken by their expert witness showing the Pur Luv Treats had "low dissolution rates."[165] However, the court found that even the plaintiffs' own expert was "unwilling to categorically say that the Pur Luv Treats are unsafe" and, under examination, agreed that a dog-by-dog analysis would be required to determine whether the treats caused digestibility issues.[166] This was particularly troublesome to the court given the plaintiffs' own veterinarians had not conclusively determined that the Pur Luv Treats caused their dogs' health issues.[167] In light of these revelations, the court concluded the plaintiffs could not establish a prima facie case on the common evidence alone, given the balance of the evidence was at best anecdotal.[168] As such, the court found predominance could not be established, as individualized evidence would be required to prove the plaintiffs' case.[169]

Given the longstanding difficulties associated with mass tort class actions, it is difficult to provide concrete suggestions as to how class certification issues might be overcome. Many have argued reform is necessary to ensure mass tort litigation can be fairly managed within the class action system.[170] A solid strategy to overcome predominance issues, particularly with respect of individualized damages, is to utilize Rule 23(b)(3)(A) to certify specific common issues in the litigation—for example, whether pet food or a flea and tick treatment was defective or the labelling was misleading—with individual issues to be dealt with in subsequent hearing(s).[171]

Although there was once some debate regarding how these kinds of 'issues classes' should operate, there now seems to be "universal agreement that the predominance requirement of Rule 23(b)(3) does not apply when certification is only for an issues class."[172] Eliminating the requirement to prove predominance is a significant advantage for the plaintiff, particularly given the struggles in obtaining predominance in animal-related class actions highlighted throughout this Article.

Alternatively, it might be possible to utilize multidistrict litigation (MDL) as an alternative, or addition to, the class action regime. Although a detailed discussion of MDL is outside the scope of this Article, it is a unique procedure allowing multiple individual or class action proceedings filed in federal court that involve common questions

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164 *Id.* at 28.

165 *Id.*

166 *Id.* at 29.

167 *Id.* at 32.

168 *Id.* at 29, 30–33.

169 *Id.* at 25. The plaintiffs also certify a class pursuant to rule 23(b)(2), seeking a mandatory injunction that the defendants recall and reformulate the Pur Luv treats. However, this was also denied. *Id.*

170 KLONOFF, *supra* note 39, at 725–26.

171 FED. R. CIV. P. 23(b)(3)(A).

172 Alon Klement & Robert Klonoff, *Class Actions in the United States and Israel*, 19 THEORETICAL INQUIRIES L. 151, 161 (2018).

of fact to be consolidated or coordinated in one jurisdiction for pretrial proceedings.[173] Although the intent of the MDL statute was for proceedings to be transferred back to their original jurisdictions for final hearing, in reality this only occurs in a very small percentage of cases.[174] For this reason, MDL has proved to be extremely popular in mass tort cases—in fact, it has been reported that 96% of pending multidistrict litigation cases are mass tort cases.[175] Courts have been more willing to certify class actions involving mass torts once they have settled, as reflected in high profile settlements such as *In re NFL Players Concussion Injury Litigation*[176] and *In re Oil Spill by Oil Rig Deepwater Horizon*,[177] both of which involved a combination of the class action and MDL procedure. This willingness to certify after settlement is in large part because, as observed in the seminal case *Amchem Products v. Windsor*, when "confronted with a request for settlement-only class certification, a district court need not inquire whether the case, if tried, would present intractable management problems[,] . . . for the proposal is that there be no trial."[178] The success rate of these high-profile settlements is not only due to the more relaxed approach to certification, but also due to the skill of the experienced counsel carefully crafting settlements that avoid typical mass tort predominance problems. For example, while the *Deepwater Horizon* case was more easily able to satisfy predominance requirements because it was a "single event, single location mass tort," the settlement was also well drafted in that it limited recoverable medical conditions to those that arose within 24 to 72 hours of exposure to the oil spill.[179] This created a much more contained class that avoided problems of other "sprawling personal injury" classes that were decertified such as *Castano v. American Tobacco*.[180] It may well have been possible to impose a similar time limitation on the class definitions in the pet food and flea and tick class, thereby narrowing and simplifying questions of individual causation as to how the dogs became sick, and in turn making a stronger argument that common legal and factual issues predominate.

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173 28 U.S.C. § 1407 (2018).

174 Elizabeth Chamblee Burch, *Judging Multidistrict Litigation*, 90 N.Y.U. L. REV. 71, 73 (2015).

175 Thomas Metzloff, *The MDL Vortex Revisited*, 99 JUDICATURE 36, 41 (2015).

176 *See generally In re* NFL Players Concussion Injury Litig., 821 F.3d 410 (3d Cir. 2016) (regarding a case where retired professional football players' claims against the NFL were consolidated and granted class certification).

177 *See generally In re* Oil Spill by Oil Rig Deepwater Horizon, 910 F. Supp. 2d 891 (E.D. La. 2012) (regarding the Deepwater Horizon Oil spill in the Gulf of Mexico which resulted in hundreds of plaintiffs asserting claims for economic loss and property damage).

178 Amchem Prods. v. Windsor, 521 U.S. 591, 620 (1997).

179 *In re* Oil Spill by Oil Rig Deepwater Horizon (*Deepwater Horizon*), 295 F.R.D. 112, 141 (E.D. La. 2013).

180 *Id.* (citing *Castano*, 84 F.3d at 742).

Despite this critique, there have been some successful companion animal class action settlements. For example, the *In re Pet Food Products Liability Litigation* involved over one hundred putative class actions filed against Menu Foods and other pet food manufacturers regarding contaminated pet food that was subsequently recalled, but not before it resulted in the death and illness of numerous cats and dogs that had consumed it.[181] The various class actions were then consolidated by the Judicial Panel on Multidistrict Litigation and transferred to the United States District Court for the District of New Jersey.[182] Shortly thereafter, the proceeding settled for $24 million.[183] In approving the settlement, the court had no concerns regarding predominance, concluding that the "same set of core operative facts and theory of proximate cause appl[ied] to each member of the class."[184] This positive outcome suggests there is still some hope for successful mass tort type class actions involving companion animals.

C. Problem 3 – No Injury, Overbroad, and All Purchaser Class Actions

This final category concerns the trend of courts declining to certify class actions filed on behalf of all purchasers of a companion animal-related product due to concerns that some of those purchasers, and their animals, have apparently not suffered any harm. For example, in *Mahtani v. Wyeth*, the plaintiffs commenced a putative class action alleging that the defendant's spot-on flea and tick treatment product, ProMeris, failed to eradicate their dogs' fleas and ticks, and caused the dogs to suffer lethargy, vomiting, and diarrhea.[185] The plaintiffs alleged that, in breach of the New Jersey Consumer Fraud Act, the defendant represented ProMeris as safe and effective when, in fact, it was ineffective and harmful, and therefore defective.[186] However, the evidence showed that only 0.14% of 2.2 million doses of ProMeris was reported as causing any adverse reaction in dogs.[187] In other words, "the defect asserted did not manifest itself in a vast majority of the class sought to be certified," because most dogs did not have an adverse reaction to the product and therefore most class members did not suffer harm.[188] The court in *Mahtani* had serious concerns about this low rate of injury.[189] Quoting *Chin v. Chrysler*, the court observed that "[p]roving a class-wide defect where the majority of class members have not experienced any problems with the alleged defective product,

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181 *In re Pet Food Prods. Liab. Litig.*, 629 F.3d at 336–37.
182 *Id.* at 337.
183 *Id.* at 354.
184 *Id.* at 342.
185 *Mahtani*, 2011 WL 2609857, at *1.
186 *Id.* at *7.
187 *Id.* at *9.
188 *Id.* at *9–10.
189 *Id.* at *3.

if possible at all, would be extremely difficult."[190] This concern was because, in the court's view, the only way to determine whether ProMeris was defective, in the sense that it caused harm, would be to conduct an intensive inquiry as to "whether each class member's dog suffered harm and what proximately caused the harm," with the result that these individual inquiries would predominate over common issues.[191] There was also an added concern that the plaintiffs would struggle to prove ascertainable loss through common evidence because most putative class members got an effective product and suffered no loss, and the three named plaintiffs either received the product for free, or had already received a refund, arguably suffering no loss.[192] Therefore, the court denied class certification due to a failure to establish predominance.[193]

Similar problems arose in both *Petland* and *Gartin*. In *Petland*, the plaintiffs' model for calculating purchase price damages was criticized because it failed to take into account those purchasers who, despite receiving dogs from a breeding facility Petland had not inspected, suffered 'no injury' because they still received a high-quality dog with no health issues.[194] In *Gartin*, the plaintiff sought to certify a class that included all purchasers of dog treats, including those purchasers whose dogs had not been directly injured by the treats.[195] However, the plaintiff was deemed not to be a 'typical' representative because, while her dog was allegedly injured by the treats, other class members had dogs that were not (yet) injured, and may require different relief—for example, the "costs for monitoring their dogs' health to ensure no injuries arise in the future."[196] As a result, in both cases, the class was not certified.[197]

These 'all purchaser' or 'no injury' type classes raise several complex issues. As a starting point, there is an implicit requirement under Rule 23(a) that a class definition must be objective and ascertainable.[198] As such, some courts have expressed concerns about the use of class definitions that define the class by reference to whether individuals were 'damaged by' or 'harmed by' a certain product because these definitions rely on a finding by the court that the class members were in fact legally harmed or damaged by the product.[199] The definition is therefore 'fail-safe' because if an individual is found not to be harmed or damaged by the offending product, they would no longer meet the

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190 *Id.* at *8 (quoting Chin v. Chrysler, 182 F.R.D. 448, 455 (D.N.J. 1998)).

191 *Id.* at *9–10.

192 *Id.* at *10.

193 *Id.*

194 *Martinelli*, 274 F.R.D. at 666.

195 *Gartin*, 245 F.R.D. at 435.

196 *Id.*

197 *Martinelli*, 274 F.R.D. at 666.

198 O'Connor v. Boeing North American, Inc., 180 F.R.D. 359, 367 (C.D. Cal. 1997) (quoting FED. JUDICIAL CTR., MANUAL FOR COMPLEX LITIGATION 217 (3d ed. 1995)).

199 Klonoff, *supra* note 102, at 731.

class definition and therefore not be bound by the outcome of the class action, allowing the individual to have a 'second bite of the cherry' and sue the defendant again if they so chose.[200] All purchaser class actions are therefore a useful tool because they avoid this definitional problem.[201]

On the other hand, defense attorneys have generally viewed all purchaser class actions as an attempt to maximize the size of a class and exert greater pressure on the defendant to settle.[202] From the perspective of the courts, however, the biggest concern is whether actions where a substantial number of class members have not suffered an injury meet the case or controversy standing requirement of Article III.[203] This issue has arisen in a number of consumer class actions, most notably, a series of cases alleging certain washing machines had a defect that made the machines susceptible to mold, although most consumers had not developed the alleged defect at the time the action was filed.[204] Courts have different approaches to the issue, with some finding it is sufficient for at least one plaintiff to have standing and others requiring all or most class members to have standing for the action to proceed.[205] The issue reached the Supreme Court twice in 2016 in *Tyson Foods v. Bouaphakeo*, a class action seeking recovery of unpaid overtime, but where many class members were apparently uninjured,[206] and *Spokeo v. Robins*, a class action alleging breach of the

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[200] *Id.* at 761.

[201] *"No Injury" and "Overbroad" Consumer Class Actions: Strategies to Pursue or Defend Class Certification*, STRAFFORD PUBLICATIONS (Oct. 7, 2015), https://www.straffordpub.com/products/no-injury-and-overbroad-consumer-class-actions-strategies-to-pursue-or-defend-class-certification-2015-10-07 [https://perma.cc/RZV4-JNQW] (accessed Jan. 3, 2020).

[202] *See* Nora Coleman & Scott L. Haworth, *Stopped Before They Start: Dismissing No-Injury Class Actions*, 52 FOR THE DEF. 47 (2010) ("[T]hese so-called 'no-injury' actions are very often nothing more than an attempt by creative plaintiffs' lawyers to cash in on the class action concept . . . these lawsuits represent a serious threat to product manufacturers."); Michael J. Mueller, *How to Defend Against Multi-Model Product Class Actions*, 23 WESTLAW J. CLASS ACTION 1 (2017) (describing how some lawyers use no-injury class actions to earn exponential amounts of money for themselves at the cost of damage to the company defendant).

[203] KLONOFF, *supra* note 39, at 70; *see also* Joshua P. Davis et al., *The Puzzle of Class Actions with Uninjured Members*, 82 GEO. WASH. L. REV. 858, 861–67 (2014) (discussing how courts have interpreted standing, due process, and the Rules Enabling Act in the class action setting).

[204] *In re* Whirlpool Corp. Front-Loading Washer Prods. Liab. Litig., 722 F.3d 838, 844, 846 (6th Cir. 2013); Butler v. Sears Roebuck & Co., 702 F.3d 359, 361–62 (7th Cir. 2012), *vacated*, 133 S. Ct. 1768 (2013), *reinstated*, 727 F.3d 796 (7th Cir. 2013); *see also* PUB. CITIZEN FOUND., THE FICTION OF THE "NO-INJURY" CLASS ACTION 9 (2015), https://www.citizen.org/sites/default/files/the-fiction-of-no-injury-class-action.pdf [https://perma.cc/JN8H-NXCQ] (accessed Oct. 14, 2019) ("Class members, however, properly alleged injury in one of two ways: Either they purchased defective machines that developed mold, and/or they overpaid when they purchased the washing machines with an undisclosed defect.").

[205] KLONOFF, *supra* note 39, at 70.

[206] Tyson Foods, Inc. v. Bouaphakeo, 136 S. Ct. 1036, 1041 (2016).

Fair Credit Reporting Act, where the plaintiff speculated that inaccurate information reported about him prevented him from obtaining work.[207] Unfortunately, neither decision definitively resolved the Article III issue.[208] Nor did the recent opinion of the Supreme Court with respect to a putative class action against Google for alleged violations of the Stored Communications Act, which simply remitted the case to be re-decided in light of *Spokeo*.[209]

In the meantime, plaintiff attorneys have at least three options to avoid the all purchaser or no injury class action problem. First, they can seek to limit their class to those alleged to be harmed by or damaged by the offending product. Despite the potential problems with using this language discussed above, these kinds of class definitions have still been routinely accepted by the courts.[210]

Second, they can follow the approach taken in the *Deepwater Horizon* medical benefits settlement. The class definition in that case allowed recovery by individuals who worked in the oil spill clean-up or resided nearby, *and* who suffered from certain medical conditions that developed after the oil spill.[211] Although it was implied and understood that those medical conditions were in fact caused by the oil spill, the removal of the element of causation from the class definition made it "objective and precise" and eliminated any suggestion the definition improperly "turn[ed] on the merits" of the case.[212] The same approach could be adopted in the companion animal class actions. For example, like *Ikonen*, the class could be limited to individuals who purchased the flea and tick product *and* whose animal(s) developed certain medical conditions in a set period of time after using the product.

Third and perhaps most significantly, they can choose to argue that all purchasers of a class have, in fact, suffered harm. In *In re Whirlpool Corp. Front-Loading Washer Products Liability Litigation*, the class action involving washing machines having a tendency to develop mold discussed above, the court was not persuaded to deny certification simply because some class members owned machines that had not (yet) developed a mold problem.[213] As the court observed, "If defective design is ultimately proved, all class members have experienced injury *as a result of the decreased value of the product purchased*. The remedy for class members who purchased [the washing machine] at a premium price but have not experienced a mold problem can be resolved through the individual determination of damages . . . ."[214] On

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[207] Spokeo, Inc. v. Robins, 136 S. Ct. 1540, 1544 (2016).

[208] KLONOFF, *supra* note 39, at 71.

[209] Frank v. Gaos, 139 S. Ct. 1041, 1043, 1046 (2019).

[210] *See, e.g.*, Union Asset Mgmt. Holding A.G. v. Dell, Inc., 669 F.3d 632, 633, 640 (5th Cir. 2012) (approving a class definition that included the words "damaged thereby" and observing that this language is routine in class definitions).

[211] *Deepwater Horizon*, 295 F.R.D. at 134.

[212] *Id.*

[213] *In re Whirlpool Corp. Front-Loading Washer Prods. Liab. Litig.*, 722 F.3d at 857.

[214] *Id.* at 856–57 (emphasis added).

this construction, all class members have suffered legally cognizable harm because they overpaid for a product with a latent defect.[215] As such, distinguishing between those class members whose machines developed a mold problem and those whose did not becomes an individual damages calculation problem which, as is well established, does not defeat predominance.[216]

The court came to a similar decision in *In re IKO Roofing Shingle Products Liability Litigation*, a class action brought on behalf of all purchasers of a brand of organic asphalt roofing shingles that allegedly did not comply with the advertised quality standard.[217] The court noted the plaintiffs had two plausible theories of damages, both of which matched the theories of liability in the case and were capable of class certification.[218] The first theory was that every purchaser of a tile was injured by virtue of receiving a tile that "does not meet the quality standard represented by the manufacturer" and should receive the same amount of damages per tile purchased, those damages being "the difference in market price between a tile as represented and a tile that does not satisfy the . . . standard."[219] The second, alternative theory was that only those purchasers whose tiles actually failed were entitled to damages—a more traditional approach but one that, as the court noted, would require individual 'buyer-specific' hearings to determine damages, therefore making the first theory perhaps more attractive.[220] The existence of a 'premium price' harm has also been recognized in other consumer cases and has led some to argue that the concept of a no injury class action is really a corporate fiction designed to avoid class action liability.[221]

This approach theorizing class-wide injury could be game-changing for animal-related consumer class actions in the future. It does not appear that any of the companion animal class actions argued that the apparently 'non-injured' purchasers had in fact suffered an injury through overpayment or a price premium. If they had, it seems likely the outcome of the certification decisions would have been different. After all, the value of a flea and tick product is arguably lessened if there is an increased risk it will not work or will cause side effects, even if it has not yet caused harm to every single purchaser's animal. Indeed, a concerned animal owner who has used such a flea and tick product arguably suffers more than the owner of a potentially moldy washing machine, both with respect to the emotional distress they may suffer out of concern for their pet's health, as well as the cost they

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215 *Id.*

216 *Deepwater Horizon*, 295 F.R.D. at 142.

217 *In re* IKO Roofing Shingle Prods. Liab. Litig., 757 F.3d 599, 599–600 (7th Cir. 2011).

218 *Id.* at 603–04.

219 *Id.* at 603.

220 *Id.*

221 PUB. CITIZEN FOUND., *supra* note 204.

may incur from additional veterinary care to ensure their animal is not, and does not become, unwell. This is a clear and concrete harm.

Indeed, the all purchaser class was not a concern for the court in the *In re Pet Food Products Liability Litigation* settlement, despite objectors raising the issue.[222] The $24 million settlement was structured with separate allocations for different categories of economic loss, with most of the funds going to injury claims and a limited pool for $250,000 for purchase claims.[223] Mimicking the concerns of the court in *Gartin*, several objectors felt there was a conflict between the class representatives who had both injury and purchase claims and those class members who had only purchase claims.[224] The objectors argued that, since the class representatives' injury claims were worth more, they had no incentive to maximize damages for the smaller purchase-only claims.[225] The court firmly disagreed, finding that since the class representatives had both injury and purchase claims, and the settlement allocated funds to both kinds of claims, which reflected the "relative value of the different claims," there was no conflict that warranted withdrawing settlement approval.[226]

This Article has focused on the struggle of animal-related class actions to obtain class certification under Rule 23(b)(3) due to predominance problems. Rule 23(b)(3) class actions are generally the most popular type of class action, for both animal and non-animal related claims, because they are intended primarily for actions seeking monetary relief.[227] However, as noted at the outset, there are four different types of class actions that can be brought under Rule 23(b). Notably, Rule 23(b)(2) provides that a class action may be brought where "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that *final injunctive relief or corresponding declaratory relief* is appropriate respecting the class as a whole."[228] Seeking certification under Rule 23(b)(2) may therefore present an attractive alternative for animal advocates who wish to avoid the hurdle of establishing predominance, which is *not* required under Rule 23(b)(2), where the primary aim of the litigation is to modify the conduct of a corporate defendant in their treatment of animals, rather than monetary relief.

This strategy has been attempted in some of the previous animal-related class actions discussed in this paper. For example, in *Bietsch v. Sergeant's Pet Care Products*, the plaintiff also sought to certify a class

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[222] *See In re Pet Food Products Liab. Litig.*, 629 F.3d at 349 (agreeing with the District Court's finding that the interests of the class members with only Purchase Claims are aligned with those with Injury Claims, so the creation of a subclass is not necessary).

[223] *Id.* at 345–46.

[224] *Id.* at 340–43.

[225] *Id.* at 344–45.

[226] *Id.* at 347.

[227] Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2557–59 (2011).

[228] FED. R. CIV. P. 23(b)(2) (emphasis added).

under Rule 23(b)(2) seeking a "mandatory injunction requiring Sergeant's to recall and reformulate the Pur Luv Treats."[229] Unfortunately, the court held that the plaintiffs were not entitled to an injunction because they could not demonstrate "the likelihood of future harm" and the court was concerned the terms of the injunction would impose a "significant burden on the defendant and considerable enforcement challenges for the Court."[230]

Similarly, the plaintiffs in *Anderson v. Seaworld Parks and Entertainment Inc.* sought to certify a Rule 23(b)(2) class against SeaWorld as part of the series of consumer law class actions filed after the *Blackfish* documentary.[231] In addition to seeking damages pursuant to a Rule 23(b)(3) class, the plaintiffs also sought an injunction that SeaWorld cease making false or misleading statements about orca health and requiring SeaWorld to make corrective statements on its website.[232] In an earlier decision, the court expressed concern that the overlap between the putative 23(b)(2) injunctive class action and the 23(b)(3) damages class action may create a risk of claim preclusion, but ultimately did not determine the issue.[233] The claim for injunctive relief came under threat again in a subsequent motion to dismiss in which the defendant argued that the plaintiffs did not have Article III standing to seek an injunction.[234] The defendant alleged, in circumstances where the plaintiffs did not allege any intention to purchase SeaWorld tickets or products again in the future, plaintiffs could not satisfy the requirement that they would suffer future harm if the injunction was not granted.[235] There has been a split in the Ninth Circuit as to how standing for injunctive relief should be determined in these kinds of consumer law cases involving misleading advertising and, in light of this uncertainty, the court was unwilling to dismiss the claim for injunctive relief for lack of standing.[236] As noted above, these proceedings against SeaWorld are ongoing.[237]

These cases demonstrate that filing a Rule 23(b)(2) injunctive class action does not necessarily eliminate all class certification problems for animal-related class actions; however, it may be a viable alternative to a Rule 23(b)(3) damages class action in certain circumstances, particularly where there is a high risk of predominance problems arising.

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229 *Bietsch*, 2018 U.S. Dist. LEXIS 160264, at *2.

230 *Id.* at *34–35.

231 Anderson v. SeaWorld Parks & Entm't, Inc., 132 F. Supp. 3d 1156, 1159 (N.D. Cal. 2015).

232 *Id.*

233 *Id.* at 1165–67.

234 Anderson v. Seaworld Parks & Entm't, Inc., No. 15-cv-02172-JSW, 2016 U.S. Dist. LEXIS 188044, at *5 (N.D. Cal. Nov. 7, 2016).

235 *Id.* at *9–10.

236 *Id.* at *9, *12.

237 *Id.* at *38.

V. CONCLUSION

The purpose of this Article is to draw attention to the wide range of class action types that have been filed involving issues affecting the well-being of animals. It is also written to encourage private practitioners and those working in the animal law movement to see animal-related class actions as both a viable field of practice, and a potentially powerful strategic tool for enacting change regarding the treatment of animals by major corporations. Although many animal-related class actions have struggled to obtain certification in the past, as this Article has explored, these are not insurmountable problems and there are strategies available to overcome these problems. Of course, class actions are not a perfect tool for animal advocacy. Class actions require a level of investment of time, financial resources, and expertise that is not always readily available at non-profit animal advocacy organizations, particularly considering the degree of risk involved in commencing a putative class action that may ultimately be refused certification by the court. However, the hope is that this Article encourages attorneys to at least *consider* class actions as one possibility in their toolbox of strategies that can be used in creative and potentially powerful ways. Given the mass suffering of animals continuing to occur in the United States and around the world, it is fair to say animal advocates need to consider every strategy available to reduce it.