

Food Impact Litigation

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Course Overview

This course examines the potential benefits and limitations of litigation against the industrial agriculture system. We will touch on the most common causes of action used in federal courts, new theories good food movement advocates are testing, and the ways in which they can and cannot address the racial and economic justice issues that are intertwined with industrial animal agriculture. In considering these approaches we will discuss their legal elements and remedies, how they can be used to advance a narrative about the current food system, and how they might be combined with policy advocacy. The goal is not to provide you a full review of each area of law, but to give you a flavor of how each area can be used to hold industrial agriculture accountable for the harms it causes—both legally, and as part of a broader campaign. Because offensive litigation never occurs without pushback, we'll also consider ways in which industry has sought to protect itself, and, in one instance, how litigators are challenging those laws. Regulatory petitions and proceedings under the APA will not be the focus of this course, but we will discuss those to the extent they intersect with more traditional trial court litigation theories. The hope is students will leave with an appreciation both for how litigation can be used to advance the good food movement, as well as how litigation is only one of many tools we rely upon.

Course Structure and Evaluation

One notch on the grading scale will be determined by class participation. That is, I will adjust from a B+ to an A- or an A- to an A, or vis-a-versa based on class participation. Class participation will be made up for two components: (1) helping lead discussion for one class (sign-up to occur on the first day); and (2) participation in other classes. For each class I have suggested some items I would like to discuss. "Leading" the discussion can involve having responses to these questions and being prepared to engage in a further discussion about them, *or* bringing your own questions and ideas in response to the class. "Participating" in other classes simply involves listening to these points and being prepared to react. Come to class ready to ask questions, engage with other students on their ideas, and expand on them.

The remainder of your grade will be based on a ten to fifteen page paper (double spaced, 12pt, Times New Roman Font, with 1 inch margins) due following the end of the course, laying out a proposal for a legal approach you would like to test out. The paper can focus on litigation or policy/campaign ideas. That is, it can delve into a particular legal theory that you think worth investigating, in which case you should examine the elements and remedies, discuss how you could gather the evidence to plead your case, and why you think it would be beneficial cause of action to bring for the good food movement. It can also discuss a specific policy proposal you think the movement should pursue, or a narrative it should advance and how. The key for this

type of paper is the idea has to be realistic. It should not, for instance, propose an entire new environmental law regime. Rather a policy driven paper, for example, should propose something that could be passed or gain traction in the next 1-2 years, and explain how you can build support for it, the obstacles you will need to overcome and how you propose to do so.

Of course, I am available to discuss ideas. Please just email to set up a time. The same goes if you have any questions about what is raised in the readings or class.

Readings:

Class I: Intro to Industrial Animal Ag and Its Consequences and Their Causes

1. Leah Douglas, *Consolidation and Mergers Are Eating Our Farm and Food Economy*, Pacific Standard (May 10, 2016), <https://psmag.com/news/consolidation-and-mergers-are-eating-our-farm-and-food-economy>;
2. Watch: Pew, *The Rise of Industrial-Scale Chicken Production* (Jul. 26, 2011), <https://www.pewtrusts.org/en/research-and-analysis/video/2011/the-rise-of-industrial-scale-chicken-production>;
3. Excerpts from USDA, *U.S. Hog Production From 1992 to 2009: Technology, Restructuring, & Productivity Growth*, pp. 5-6, 10-15, 17-27, 33-36 (Oct. 2013), https://www.ers.usda.gov/webdocs/publications/45148/40364_err158.pdf?v=0;
4. Elsadig Elsheikh, *Race and Corporate Power in the US Food System: Examining the Farm Bill*, *Dismantling Racism in the Food System* (Summer 2016), <https://foodfirst.org/publication/race-and-corporate-power-in-the-us-food-system-examining-the-farm-bill/> (must download pdf. from this website to get full article)

Focus: How has the food industry changed in recent decades? What has driven these trends? What are the consequences?

Discussion topics: What should food litigation seek to accomplish? Why? How are our hands tied by the laws we work under?

Class II: Environmental Litigation I

1. Excerpts of CDC, *Understanding Concentrated Animal Feeding Operations & Their Impact on Communities*, pp. 2-11 (2010), https://www.cdc.gov/nceh/ehs/docs/understanding_cafos_nalboh.pdf?fbclid=IwAR3DK7qlkmPsTg6D8CGoDnrLQfjOvvekIP34AHQvD47ugqTR9RvwDOMqpU;
2. **Optional:** Erica Hellerstein & Ken Fine, *A million tons of feces and an unbearable stench: life near industrial pig farms*, *The Guardian* (Sept. 20, 2017), <https://www.theguardian.com/us-news/2017/sep/20/north-carolina-hog-industry-pig-farms>;

3. Excerpts of *In Re Swine Farm Litigation*, Complaint ¶¶ 1-6, 30-33, 102-31, 147-65 (E.D.N.C. Aug. 21, 2014), <https://www.perkinscoie.com/images/content/1/9/v2/197673/McKiver-v.-Murphy-Brown-Complaint.pdf>;
4. Leah Douglas, *Big Ag is Pushing Laws to Restrict Neighbors' Ability to Sue Farms*, NPR (Apr. 12, 2019), <https://www.npr.org/sections/thesalt/2019/04/12/712227537/big-ag-is-pushing-laws-to-restrict-neighbors-ability-to-sue-farms>;
5. The two North Carolina bills referenced in the Douglas article:
 - a. 2017 law is here, <https://www.ncleg.net/Sessions/2017/Bills/House/PDF/H467v0.pdf>; and
 - b. 2018 law is § 106-701 of the larger bill found here, <https://www.ncleg.gov/Sessions/2017/Bills/Senate/PDF/S711v7.pdf> (just read § 106-701(a)-(a2), which show the amendments)

Focus: How does nuisance work as a claim? What are its limits and benefits?

Discussion topics: What are your reactions to how *In Re Swine* was brought, particularly their choice of defendant and the facts they focused on? How do you prepare for and defend against legislative pushback like what we saw in North Carolina?

Class III: Environmental Litigation II

1. Excerpts of *Waterkeeper Alliance, Inc. v. EPA*, 399 F.3d 486 (2nd Cir. 2005) (in reading packet);
2. Excerpts of 40 C.F.R. §§ 122.23, 122.43 (in reading packet);
3. Excerpts of 33 U.S.C. §§ 1319, 1365 (in reading packet);
4. Excerpts of 42 U.S.C. §§ 6903, 6972 (in reading packet);
5. Excerpts of *Community Association for Restoration of the Environment, Inc. v. Cow Palace*, 80 F.Supp.3d 1180 (E.D. Wash. 2015) (in reading packet).

Focus: The elements of CWA and RCRA claims and the facts necessary to meet those elements.

Discussion topics: When would you want to pursue CWA or RCRA claims? How would you gather the necessary facts? How would you determine whether it is worth the effort?

Class IV: Environmental Litigation III

1. Excerpts of Luke W. Cole & Caroline Farrell, *Structural racism, Structural Pollution and the Need for a New Paradigm*, 20 Wash. U. J. L. & Pol'y 265, 276-282 (§§ VI-VI), https://openscholarship.wustl.edu/cgi/viewcontent.cgi?article=1247&context=law_journal_law_policy (and on Westlaw);

2. Excerpts of Earthjustice, North Carolina Title VI Complaint, Intro, ¶¶ 1-7, 12-26, 58-169 & Relief (Sept. 3, 2014), <https://earthjustice.org/sites/default/files/files/North-Carolina-EJ-Network-et-al-Complaint-under-Title-VI.pdf>;
3. *Excerpts of Iowa Citizens for Community Improvement v. Iowa, Complaint* ¶¶ 16-39, 64-69, 76-88 (Iowa Dist. Ct. Mar. 27, 2019), <https://www.publicjustice.net/wp-content/uploads/2019/03/2019.03.27-Iowa-PTD-Petition-FINAL.pdf>.

Focus: The nature of Title VI and Public Trust Doctrine claims. The role of narrative in litigation.

Discussion topics: What struck you about these complaints from a storytelling perspective? How could they be enhanced? How would you build this into your work?

Class V: Workers' Rights

1. Southern Poverty Law Center, *Unsafe at These Speeds* (2013), <https://www.splcenter.org/20130228/unsafe-these-speeds>;
2. Jessica Lussenhop, *Coronavirus at Smithfield pork plant: The Untold story of America's biggest outbreak*, BBC News (Apr. 17, 2020), <https://www.bbc.com/news/world-us-canada-52311877>;
3. Litigation Memo on New Jersey cause of action (in reading packet);
4. Migrant Justice, *Milk With Dignity* (last updated Oct. 3, 2017), <https://migrantjustice.net/milk-with-dignity-campaign> (review website & Milk With Dignity Program Description linked from website).

Focus: The risks to workers and how COVID exposed that. The difficulties of litigating these issues.

Discussion topics: What do you think of the Milk With Dignity approach as compared to a litigation approach? Workers' rights has been hotly featured in the news, how could the good food movement capitalize on that? Are there other ways to protect workers?

Class VI: Advertising

1. Excerpt of *Lentz v. Sanderson Farms, Inc.*, Complaint ¶¶ 41-91 (N.D. Cal. Oct. 11, 2019) (in reading packet);
2. Excerpts of *Bohr v. Tillamook County Creamery*, ¶¶ 1-13, 24-65, <https://www.documentcloud.org/documents/6301321-TCCA-Complaint.html>;
3. Excerpts of *ALDF v. Hormel*, Motion to Dismiss Decision, pp. 1-6 (Sept. 20, 2017), http://hr.cch.com/hld/AnimalLegalDefenseFundvHormelFoodsCorp_DCSuper_20170920.pdf;
4. Excerpts of *Animal Legal Defense Fund v. Hormel Foods Corporation*, Motion for Summ. J. Decision, pp. 21-25 (D.C. Sup. Ct. Apr. 8, 2019) (in reading packet).

Focus: The nature of false and misleading advertising claims, the hurdles in bringing them, and the potential remedies (and their limits).

Discussion topics: What do you think of a consumer focused approach to food advocacy? How does this help or hinder the good food movement? How concerned should we be that consumers will be overwhelmed with information if there really was complete transparency?

Class VII: Competition

1. Excerpts of American Antitrust Institute presentation to the Ranchers-Cattlemen Action Legal Fund, United Stockgrowers of America (2018) (in reading packet);
2. Excerpts of *Morris v. Tyson, Complaint*, ¶¶ 108-171 (July 30, 2015) (in reading packet);
3. One page summary of *In re Broiler Chicken*, <https://www.cohenmilstein.com/case-study/re-broiler-chicken-antitrust-litigation>;
4. Press Release, *Booker, Tester Reintroduce Bill to Halt Ag Mergers Immediately, Indefinitely* (May 22, 2019), <https://www.booker.senate.gov/news/press/booker-tester-reintroduce-bill-to-halt-ag-mergers-immediately-indefinitely>;
5. Aila Slisco, *Elizabeth Warren and Cory Booker Join Forces on Bill to Ban Most Factory Farming By 2040*, Newsweek (May 7, 2020), <https://www.newsweek.com/elizabeth-warren-cory-booker-join-forces-bill-ban-most-factory-farming-2040-1502699>.

Focus: The nature and limit of competition laws, particularly the Packers and Stockyards Act. Legislative proposals to reform these laws.

Discussion topics: What do you think of a concentration focused approach to food advocacy? How does this help or hinder the good food movement? Are there ways to make the Booker bill more palatable to actually get it passed? What sorts of compromises should the good food movement be willing to make?

Class VIII: Backlash: Ag-Gag

1. Center for Constitutional Rights & Defending Rights & Dissent, *Ag-Gag Across America* (2017), <https://ccrjustice.org/sites/default/files/attach/2017/09/Ag-GagAcrossAmerica.pdf>;
2. *W. Watersheds Project v. Michael*, 869 F.3d 1189 (10th Cir. 2017);
3. *Animal Legal Def. Fund v. Herbert*, 263 F. Supp. 3d 1193 (D. Utah 2017).

Focus: What are “Ag-Gag” laws? The First Amendment rules for challenging them, and how industry has responded to victories by rewriting the laws.

Discussion topics: Lingering questions from class. Questions on the movement. Questions about hiring, jobs and the like.