



Animal Law Podcast: Transcript for Episode 90, Interview with Alene Anello

Mariann Sullivan: Welcome to the Animal Law Podcast, Alene.

Alene Anello: Hi. Thank you so much! This is a huge, huge honor!

Mariann: Oh, it's a huge honor to have you. I'm excited about your case. I don't think we've ever had a case quite like it before, and it's very cool. We'll get into the legalities further into the interview and I do want to start with the facts, which is how we always start.

But as a preliminary matter, can you set the scene for us with a brief description of what a shareholder derivative action is, for those who maybe learned about them in law school? I learned about them in law school because I went to law school a long time ago, and they were much more popular then.

But even if they did learn about them in law school, they might not really remember what they are if they don't practice in that area. So just a brief description of what is a shareholder derivative action?

Alene: So a shareholder derivative action is a special kind of lawsuit where an owner of a corporation, such as a shareholder, can bring a lawsuit on the corporation's behalf.

Obviously, if a corporation is harmed, the corporation has the right to sue. And normally when a corporation is harmed, the executives who run the corporation will decide whether or not the corporation should sue. So if somebody shoplifts from a huge corporation, the corporation's executives might think, "Let's not sue this person because the lawsuit will cost way more than the amount of value that was shoplifted."

And they can make that decision, just like any of us can make a decision whether or not to sue someone who wronged us. But in some cases, the person

that allegedly wronged the corporation is also an executive. So what happens if someone, if the whole board of a corporation gets together and does something wrong, that hurts the corporation?

In that case, the board, that would normally decide whether to bring a lawsuit, can't really be trusted to make that decision because they will not want to get in trouble, and they know that if they sue themselves, they'll be found liable and they'll get in trouble. The law has developed a solution for this problem, which is a shareholder derivative lawsuit, and this is basically a special mechanism for what to do when people who run a corporation, who normally would be the decision makers about whether to bring a lawsuit, when they themselves are the alleged wrongdoers. And in that case, any owner of the corporation can come to court and say, "I think this corporation should file this lawsuit, and I want to make the lawsuit happen."

I'm actually limiting it. It's not only for those circumstances, it's basically for any circumstances where the people who run the corporation can't be trusted to make the decision. So sometimes maybe it's because the director's husband is accused to have done something wrong.

So, in a publicly traded corporation, there are hundreds of thousands of owners because every shareholder is an owner. So that is where shareholder derivative lawsuits usually happen because there's so many people that own a piece of the corporation and each have the power to make sure that the corporation brings lawsuits that it should be bringing, if the directors can't be trusted to make that decision.

Mariann: And I can imagine people are also thinking, "Hmm", who haven't thought of it before, that this might really have some potential in animal law. So that's exactly what you're trying to establish here. Okay. Let's just talk about this case and get back to the facts. I think everybody know what Costco is, and what is their rotisserie chicken?

I don't shop at Costco. I don't think I've ever lived near one, so I didn't know this was a big thing, but apparently it's a big thing, right?

Alene: Yeah, it's a huge thing. So Costco is a retailer. They sell all sorts of things like TVs and cherries and everything you could ever dream of. One of the things they sell that's most famous is these rotisserie chickens, which is basically an entire body of a chicken that's pre-cooked.

So you could go to Costco and buy that and bring it home and eat it for dinner without having to do as much work as normal cooking. For years, Costco has been selling these rotisserie chickens for only 4 99 each, so that's 4 99 for an entire bird. They use these chickens as a loss leader to drive traffic to their stores and to encourage membership renewals.

So people will say, “oh, I really want that 4.99 chicken. I think it's a really good deal. So I'm gonna pay the membership fee to be a member of Costco so that I can always get those cheap chickens.”

On any given day when they want to have that chicken, a person will go to the store to get that really cheap chicken and they have to walk through all the other aisles and on their way they'll pick up like a flat screen TV or something expensive.

Mariann: So sounds like something I would do. Well, I wouldn't buy a dead chicken, but I might accidentally come home with a TV instead of dinner.

Alene: Yeah. So the idea is it's almost like an advertisement, that the products draw in customers.

Mariann: I would like to know how many chickens are we talking about?

Alene: So Costco breeds and slaughters a hundred million chickens every year.

Mariann: Wow. Wow. That's crazy. And the other thing that's really interesting about this is Lincoln Premium Poultry. Now they kind of quote/unquote, get their chicken from this company, Lincoln Premium Poultry. So can you explain what Lincoln is?

Alene: Yeah. So previously Costco was buying all of its chicken meat from other companies, just like most grocery stores do. You know, like grocery stores buy chicken meat from Tyson or Cargill or JBS.

But Costco really wanted the price to be really low and it felt that other companies were charging more than Costco wanted to pay. And so Costco came up with this idea to try to save money by cutting out the middle man. So Costco decided to become vertically integrated to breed, raise and slaughter its own chickens. And the way that Costco did this was by setting up a company called Lincoln Premium Poultry.

It's a Nebraska based company, and it's owned and controlled by Costco.

Mariann: So this isn't a situation where we're talking about just the responsibility of a retailer for the stuff that they're buying. Costco is Lincoln, and Lincoln is Costco. And Costco is totally responsible for the lives of these chickens.

Now let's get into the lives of these chickens, what you wanted to get into before. I mean, chickens are raised in horrible ways and we all know that. But what does Costco do specifically to keep the price of these chickens so low?

Alene: First, Costco recruited new growers to raise the chickens and these are individual contract growers that had no experience raising chickens before, for the most part. Costco actually intentionally tried to pick people that didn't have experience raising chickens. And then Costco gives each of these inexperienced people hundreds of thousands of chickens to keep in their barns.

These chickens, Costco breeds them to grow so big so fast that a lot of them end up not being able to stand under their own weight. The reason that Costco wants to grow really big, really fast is that way more can be produced more quickly and so it would cut costs. And then Costco is theoretically responsible for the providing veterinary care to the chickens, but it skimps on the veterinary care as well, resulting in there being huge numbers of birds that can't stand and that don't get any care.

So there was an undercover investigation done that showed that a lot of birds in Costco's poultry supply chain, when they can't stand up, they just sit there and they can't reach food or water, and then they slowly die. And then even after they die, their body's decompose for days without anyone doing anything about it.

So basically, failing to provide its growers with the means to make sure that each of these animals have access to individualized food or water. I don't know if it's already clear, but the reason that the birds who can't stand can't reach food or water is that the food and water is only available in certain parts of the barn in these like high tech feeder systems.

And those feeder systems raise up as the birds get bigger. So eventually, even if you were next to a feeder, you would no longer be able to reach it if you couldn't stand because the feeder gets like higher and higher. It's very disturbing.

Mariann: I mean, learning about how chickens are quote/unquote “raised” is disturbing.

And this seems like every bad practice I've ever heard of seems to have been incorporated into this lawsuit. You mentioned this undercover investigation. I think it was Mercy for Animals that did it. In addition to that, and we can get into more detail when we're discussing the lawsuit, but can you give us a basic idea of what the evidence is that shows that this was not a secret?

Costco's directors had every reason to be fully aware, even if you assume that they're not aware of what's going on in their own company, they had plenty of other reasons that they were told "this is what's going on in your own company." One was the Mercy for Animals investigation, and I think there was a column in the *New York Times*. Was it Nick Kristof who wrote a column?

Alene: Yeah, exactly. So in 2021, Mercy for Animals did this undercover investigation and like you mentioned, the *New York Times* had an opinion piece explaining how the birds were being mistreated in Costco's supply chain. And the *New York Times* reached out to Costco to ask Costco for a comment, and the *New York Times* showed Costco the footage of these birds being unable to stand, unable to access the food or water, and slowly dying of hunger and thirst. And Costco's official response was that this is quote/unquote normal and uneventful livestock activity. And Lincoln Premium Poultry also came out and made a statement saying that the grower that was investigated was following the processes that Costco laid out for them.

So this is not a case where the big company said, "Oh, that was one bad apple. We don't want birds to be treated this way." Unfortunately, Costco's public response was basically like, "Yeah, this is how we raise birds. What's the problem?"

So I think the American public sees it and feels that there's a problem, but Costco's leadership sees it and feels like this is business as normal.

Mariann: Yeah, it's kind of refreshing to have them actually just say, "Yeah, this is what we do."

Alene: Yeah. It certainly makes our job easier.

Mariann: Refreshing in this horrifying way. Rather than the typical one bad apple... I guess it's hard to claim the one bad apple when your whole system... when you own the system and you're making these arguments about the way the system is run, not just about one particular incident.

So, alright, that brings us to this lawsuit and we had a little intro to what a shareholder derivative action is. So you must have a couple of shareholders who are the plaintiffs and then after that, tell us who the defendants are.

Alene: Yeah, the plaintiffs are Tyler Lobdell and Crystal Smith. They're both shareholders in Costco who are extremely passionate about animal welfare. And who were really horrified to know that a company that they partly own is doing these terrible things to animals. Both because it's illegal and because it's immoral.

And the defendants are a group of Costco executives and board members. I don't want to bore people by listing all their names.

Mariann: No, please don't, there are a lot of them! And what court are you in?

Alene: We are in Washington State Court in King County and it's the Superior Court.

Mariann: Okay. Is there a particular reason why you are in Washington?

I know the facilities that you're talking about are, and we'll get into this, are in Nebraska and Iowa. So why are you suing in Washington?

Alene: Costco is incorporated in Washington. There are not that many companies incorporated in Washington. Probably listeners know that most companies are incorporated in Delaware these days, but that's where Costco's incorporated.

Mariann: Just as an overview, what are your three causes of action?

Alene: So our first cause of action is a shareholder derivative claim for violation of the duty to act lawfully, which I will explain more after if you give me a chance, because that's new to a lot of people. The second one is a shareholder derivative claim for a Caremark violation of the Duty of Loyalty.

Caremark is the name of a place that it's based on. And then the third cause of action is an ultra vires of claim, which basically means a claim for a company doing something that it's not supposed to or that is not part of its purpose.

Mariann: I think I'd like to lay out this demand requirement because Costco brought this motion to dismiss, which is the main thing we're talking about here,

based primarily on your alleged failure to fulfill the demand requirement. Can you explain what a demand requirement is in the context of a shareholder derivative action?

Alene: Usually the executives of a corporation, specifically the board, are the ones who get to decide whether a corporation brings a lawsuit or not. In a shareholder derivative case, a shareholder is basically saying, “I think there should be an exception to that rule in this case, because I don't think the board could be trusted to make their decision.”

If the shareholder is wrong about that and the board could be trusted, then the proper thing for a shareholder to do, when the shareholder wants a lawsuit to happen, is to just ask the board to bring the lawsuit. So like let's say you saw somebody shoplifting from a corporation that you own stock in. The proper thing is not for you to bring a shareholder derivative suit over it, but it's for you to just contact the board and say, “Hey, I saw someone shoplifting. Do you wanna sue them?” Basically it's the board's job, normally, to decide, and so the shareholder can just tell the board, and that's basically what making a demand is. It's like saying, “Hey, board, did you know this bad thing happened? Do you wanna sue over it?”

That is not required when it would be futile. If there's a case where there's no point in asking the board to bring the lawsuit because everyone knows the board would never bring the lawsuit because the board themselves are liable for the misconduct, or something along those lines. In that case, demand is excused and the shareholder doesn't need to ask the board. The shareholder can just bring the lawsuit.

Mariann: I did have a couple other questions. I know that you make the argument that Washington Law is not as onerous as many other states regarding demand requirements. They make a very big deal of this. But, it seems obvious that Washington law is not quite as onerous.

Can you just explain the difference between, I think other states have a universal demand... does that mean that you have to make a demand for every single shareholder action?

Alene: In some states, that could be the baseline rule that you have to make a demand, even if it would be futile. But the defendants are mostly citing Delaware law because that's where most companies are incorporated. And so it's easiest to find Delaware cases about this topic. And Delaware does have a

demand of futility exemption where you don't have to make a demand if it would be futile.

But the defendants are citing a lot of Delaware cases about that demand futility exemption and citing cases to try to interpret that exemption very, very narrowly. And some of the cases that they're citing are not applicable to Washington. So basically whether we go with their cases or not, they do admit that there is an exemption when demand would be futile.

The question is just like, how narrow is that exemption or how do we know when demand would be futile? Basically,

Mariann: So what is the standard? Here you're focusing, as you mentioned, on the type of demand futility that involves when you're alleging personal liability of the board of directors, as it would be futile to ask somebody to sue themselves.

What is the standard for what has to be shown for a demand to be considered futile on this crown? How likely does their liability have to be?

Alene: So it's actually a really fun standard, in my opinion, for lawyers. The standard is- you have to show a reasonable doubt that a majority of the board could objectively consider the demand.

And it's assumed that somebody cannot objectively consider a demand if they face a likelihood of liability under the lawsuit. So I just think the reasonable doubt language is very interesting because most people in law school learn about reasonable doubt as related to criminal law. And that a defendant needs to be proven guilty beyond a reasonable doubt, and if they can show a reasonable doubt, then they need to be acquitted.

This is my first time seeing the word reasonable doubt in a different context, but basically if we can show a reasonable doubt that they can be objective, then we shouldn't have to make a demand.

Mariann: I don't think I've ever seen reasonable doubt used in any other context other than criminal law. So that is really interesting.

All right, this is really what we wanted to focus on. You have three different ways, as we pointed out, that you claim that the board violated its obligations to the corporation. And the first is this argument that they violated a duty to act

lawfully. Now that sounds pretty self explanatory, that they have to obey the law.

You contend that this is a completely separate duty from the duties of care and loyalty, which they also admit that they have, and they say that, “No, no, no, that's wrong. It's not separate.”

I'm not sure how important that is. Explain to me, why is that important, and why do you think this is a totally separate duty that they have to obey the law. Which doesn't seem like that that's shocking, a duty that they should have to obey the law.

Alene: No, I do agree with you that it's not very important whether it's separate or not. I think we win either way.

Everyone who is an executive at a corporation owes duties to their corporation. They basically owe a duty of care, which is- be careful, don't make mistakes that hurt the corporation or careless mistakes.

A duty of loyalty, which is basically- put the corporation's interests first. So don't take an opportunity from the corporation to benefit yourself at the expense of the corporation. And then a duty to act lawfully, which is- don't make the corporation break the law, even if you're being thoughtful and careful about it, and even if you think it's in the corporation's best interest.

So an example would be...well, the most well known example of the Duty to Act lawfully comes from a case called Miller vs AT&T where AT&T was allegedly giving free things to the Democratic National Party and Democratic Committee. And it was a good business move in a purely cold-hearted evil sense, because if they give free things to the Democrats, maybe the Democrats will do them a favor.

So it's kind of like a bribe, but it was illegal. And so some shareholders sued saying, “Hey, we don't want our executives to be giving free stuff to the Democrats because that's an illegal campaign finance violation.” The court said like, “Yeah, if you can prove that they're breaking a law, even if they think they're doing it to help the corporation, that would be a violation of a duty they owe the corporation.”

That's where the duty to act lawfully is best known from. But there have been other courts and law review articles saying that this is a duty that all executives owe their corporation. The question of whether it's the same as the duty of care

and the duty of loyalty or whether it's a different thing that is something that different people disagree on.

We believe that it's separate because it logically makes sense that it would be separate. Since in the case of Miller vs AT&T, the executives weren't being reckless, weren't being un-careful. They very thoughtfully planned out how they were going to bribe the Democrats, at least allegedly. I don't know if AT&T actually did these things, it's just the allegation.

They also weren't being selfish in the most obvious sense of taking something from the corporation for their own benefit because they were trying, in their minds, to help the corporation by helping it make more money. So the best way of describing what they were doing, is that it was some third bad thing of just, they made the corporation break the law, and that's the problem.

But some people argue that if you make a company break the law, you're actually being disloyal to the company because a company's most fundamental interest is in following the law. So only a human would want a company to break the law. So I think you can kind of see either way. We think it's easiest to think of it as a separate duty. But we also think that we win either way because, whether or not it's a separate duty, clearly there's cases saying that executives have a duty not to make a corporation break the law, whether or not that's a type of duty of loyalty or whether or not is a different thing.

Mariann: I'm glad to hear that whole argument on that they were making doesn't really matter because that brings us to the really exciting part of this case. This is the nitty gritty of the case, and people who are listening who hadn't thought of this before, it may be dawning that this might be a way to get what's happening to animals and whether it violates the law, the cruelty laws, into court!

Because you are arguing that these Costco executives, who allowed these things to happen to chickens, who mandated these things to happen to chickens, were violating the law. I don't know whether I should say unfortunately, but I think it's probably unfortunate, the two states in which these chickens are being raised do not have the most powerful cruelty laws for farm animals on the books.

And yet, you say there's still a very strong argument that what is happening to these chickens violate the laws of Nebraska and Iowa. Let's take Iowa first, we should take these one by one, so let's take Iowa first. Can you tell us what provision of Iowa law that applies to farm animals, or applies to chickens, you

are asserting was violated, and why you believe it was violated by the practices of Costco, or Lincoln, or Costco/Lincoln?

Alene: The statute is called Iowa Livestock Neglect Law. The specific subsection is IL code, section 717.2, subsection one, subsection B. And it says, "A person who impounds or confines livestock in any place and does any of the following commits the offense of livestock neglect."

And the specific thing is "deprives livestock of necessary sustenance." So Costco is keeping its birds in these contract grower facilities, that Costco has total control over, and Costco is depriving them of necessary sustenance, such as food and water, by intentionally breeding them to be in such a way that everyone knows a significant portion of them will not be able to access food and water and then not doing anything to compensate for that.

So you could imagine a situation where Costco bred them to be so big they couldn't move, but then Costco paid workers to go up to each bird with a little cup of food and water and feed them. Or maybe you could even imagine a situation where Costco bred them to be so big they couldn't move, but then immediately euthanized all the birds that couldn't move.

But instead, what Costco is choosing to do, knowingly, is just breed them to be so big they can't move, and then let them slowly die of dehydration. That, if you just read the statute, seems to be a clear violation of Iowa law. In order to defend themselves, the defendants are bringing up exemptions from other provisions of Iowa law and they're basically asking the judge to cut and paste those exemptions to this provision.

I think they're just hoping the judge won't look that carefully and will kind of jumble all the words together. There's other ways you can commit neglect in Iowa, and these other ways are subsection one A and subsection one C of the Iowa Code Section 717.2. And those two other ways have exemptions in them for, I forget the exact word, I think it might be for customary practices, but there's no exemption from the part that says you need to give animals food and water. And that makes sense because you need to give animals food and water. It's kind of a basic thing. You know, there might be some case where you could imagine a legislature thinking, "Well, we don't want to outlaw livestock industry and we know that you need to keep animals confined and they don't get as much exercise as they want. We don't want that to be considered neglect," but no legislator would ever say, "We want to eliminate the requirement that you feed and give water to your animals." It's just such a basic requirement.

Mariann: They actually are arguing that, and it is like...I just wonder are we finally reaching the point where a court is going to see, just as we see and the industry sees, these completely insane arguments that, as long as the industry doesn't customarily feed and water its animals, it's fine. It's not against the law anymore. Will light finally dawn that the way these customary farming practice exemptions are being applied, there's something terribly wrong here.

I don't know, maybe this is the case that's finally going to break through that block. All right, I mentioned that you not only have Iowa, you have Nebraska, which I don't know a lot about Nebraska law, but I can't imagine it's at the forefront of animal protection. Not that any state really is. So what's the situation in the applicable law in Nebraska?

Alene: So Nebraska has something called the Livestock Animal Welfare Act, and it prohibits multiple things, and two of the things it prohibits are abandoning and neglecting livestock. And these are kind of defined the way you would think, basically. I don't want to bore everyone by reading the quotes again. But, they're pretty broad things saying you need to take care of your animals. If you have animals and you're not taking care of them, then that could be abandonment or neglect.

We think it's pretty clear that what the defendants are doing violates that. So once again, the defendants want there to be an exemption for their behavior and they're trying to kind of get the court to imagine an exemption based on other things that are in other parts of the statute.

There's an exemption to the crime of cruel mistreatment, which is I think similar to what we would mostly think of as cruelty, and that exemption exempts anything that's "common to the livestock animal industry." So the defendants are arguing that anything that's common should also be exempted from the crimes of neglect and abandonment.

But there's two big problems with that. One, that's just not what the statute says. The statute, the common exemption, is in the definition of cruel mistreatment. It's not in the definition of abandonment or neglect. So they're basically asking the court to just rewrite the statute and if they want the change of statute, in the American government, the way to do that is by going through the political process and lobbying, not by going to court. But the other problem is that there's no evidence that what the defendants are doing is common.

So they're saying that what they think what they're doing is common, but we're at the motion to dismiss stage. All we have right now is the facts that we have

alleged in our complaint, and it's not appropriate at the motion to dismiss stage for defendants to say, "Well, we think we have some other facts that we're going to be able to present that would create an affirmative defense for us."

A lot of your listeners will know, but not all of them, basically in the first stage of a lawsuit, plaintiffs can say, "here's what we allege is happening." And then the defendants can say, "even if you can prove that it wouldn't be illegal, so you should let us off the hook."

And that's basically the stage we're at. We're supposed to be arguing about- are the things that we alleged illegal? And the defendants are not supposed to be able to come up with other evidence that they think they're eventually going to be able to show that nobody has seen yet.

It seems clear to me that we have plausibly alleged violations of the law and that the exemptions they want are not even real exemptions, but we'll see.

Mariann: There was one more thing in there, and correct me if I'm wrong, regarding this commonly accepted language. You were talking about the fact that the public does not accept such practices, which I think there's probably a good deal of truth to that and probably evidence that could be gathered as to that, but they say it just means commonly accepted in the livestock industry.

So again, are they making this argument that if everybody in the livestock industry starves their animals, then that's all that you need to exempt yourself? And I know that you have a number of other reasons why this doesn't apply here, but I was just wondering whether that was also a sticking point between your argument and there. That you think that commonly accepted should apply to what the public commonly accepts?

Alene: Yeah. I feel like I sort of oversimplified it a second ago when I was trying to explain the Nebraska law. So the Nebraska law does have an exemption that applies to the whole Livestock Animal Welfare Act for anything commonly accepted.

Even the crimes of neglect and abandonment are exempt if it's commonly accepted. And it is a little confusing because there's a special exemption from the crime of cruel mistreatment for things that are "common." So basically, some things are exempt anytime they're common, others are exempt only if they're commonly accepted.

And in my mind, there's a difference. If there's one thing that's exempt when it's common, and one thing that's exempt when it's commonly accepted, clearly those two terms must have different meanings because it doesn't make sense that the same legislature would add an extra word one time and not add it another time for no reason.

We should assume that when they sometimes add the word accepted and they sometimes don't, they mean something. And so we believe the best way to interpret the term commonly accepted is- what does the public think, like you were saying. And that is based on textualism. Textualism is the philosophy that you should interpret a statute based on what each word in the statute means, looking it up in the dictionary and how people would commonly use that word.

So if you look up common in the dictionary, it generally refers to what the general public does. And if you look up accepted in the dictionary, it generally refers to what the general public thinks. So commonly accepted is double generally public. So I think that the most obvious interpretation of commonly accepted is asking does the public think this is okay?

And the public clearly does not think what Costco's doing is okay. We know this because there was the *New York Times* expo about how terrible it is. There have been multiple petitions asking Costco to changes it's practices that got huge numbers of signatures. There's been a big social media backlash against Costco, and one of the most telling things, to me, is that even Costco's most ardent supporters are really upset about this.

So, for example, there was this Facebook fan page for Costco's rotisserie chicken that had 10,000 likes. It was created by a Costco member who loved the rotisserie chicken and loved how cheap it was. And when she saw Mercy for Animals' undercover investigation, she was so upset about how the chickens are being treated, she changed the fan page into an advocacy page to advocate for Costco to treat chickens better.

To me, this is very clear that the general public is not okay with what Costco is doing to its birds, but they're not even trying to argue that the general public is okay with it. They're trying to argue that we should interpret commonly accepted to mean what does the industry accept?

And I don't think that's the best interpretation based on the dictionary, but even if we go with that interpretation, even the industry does not think this behavior is acceptable. The way we know that is the National Chicken Council, which represents the poultry or the chicken meat industry, actually put out a statement

about the *New York Times* article that was exposing Costco and said the description in that article do not represent our industry.

So even the National Chicken Council is trying to distance itself from what's going on with Costco. And who knows what their strategy with that is, but clearly they don't feel that this is acceptable. So yeah, those are our arguments.

Mariann: It really is so powerful and shining a light on things really makes... well, I don't want to insult any animals by referring to cockroaches scrambling, but it kind of is like that. This has gone on in secret for so long and you shine a light on it and all of a sudden everybody is disassociating themselves from it.

And it really is so powerful, regardless of what happens with the lawsuit. Not that I think that anything bad is gonna happen with this lawsuit, I have a lot of confidence in it. But in addition to arguing that no laws were broken, they argue that you haven't shown that they knew and intentionally participated in illegal conduct. I think that's the wording they used. Is that the standard and can you explain why you think you have met it? Do they have to be shown to have intentionally participated?

Alene: I mean, it would be funny if not for the fact that we're talking about huge numbers of animals suffering and dying. I guess it's funny in a dark humor kind of way, that the defendant's counsel in this lawsuit are arguing that the defendants didn't know what was happening to the animals because that's not what the defendants have said publicly. They've publicly said, "Yeah, this is how..." You know, the quote in the *New York Times* that Costco gave was like, this is normal and uneventful activity. And Lincoln Premium Poultry came out to say that this is how we told our growers to treat the animals.

So in this lawsuit, the defense counsel was arguing that the defendants didn't know what was going on, which is just totally nonsensical because it's the opposite of what the defendants have been saying publicly, which was that they did know what was going on. In any case, we've definitely plausibly alleged that defendants knew what was going on because we alleged all those things I just told you.

The other crazy thing about it is that it feels like the defense is talking out of both sides of their mouth in their motion to dismiss because at the same time is arguing what you mentioned, that they didn't know what was going on, they also try to argue, "oh, the way that we treat birds, letting them die slowly without footer water, that's how the whole industry does it. It's normal."

So it seems a little weird to simultaneously say, “What we're doing is totally normal and we didn't know what we were doing.” Which one is it? Is this totally normal or did you not know about it? They think it's normal kind of indicates that they probably knew they were doing it because they don't think there's anything wrong with doing it.

So as for the standard, we do need to show, in order to show a violation of the Duty to act lawfully, that the defendant caused Costco to break the law. And in the case of neglect and abandonment, the way that a person commits neglect and abandonment is through inaction. So if you had a dog and you just left the dog somewhere for weeks until the dog died, that would be neglect and abandonment.

Therefore, when the defendants say we weren't personally involved, I feel like they're kind of making a defense to the wrong crime because like “yeah, you weren't involved. That's the problem. You left them to die.” You know, like you were off on vacation while your dog was starving. That's the problem. So yes, we agree that the defendants didn't go to these factory farms and touch the birds, that's the problem!

If they had gone there, maybe they would've given the birds food or water. But instead they just knowingly left the birds to slowly die. I guess whether they need to be involved personally, I would say in a sense they don't need to be involved, but in a sense they are involved in that.

The crime of abandonment is the crime of just saying, “we know that those are our animals and that they're slowly dying and we're not going near them.” That's the crime.

Mariann: Another argument they make, which is really disturbing for a couple of different reasons, is that they say that you not only have to show that they knew what was going on, but that they knew it was illegal.

They expand on that saying that, “well, nobody's been prosecuted.” This may be made in a couple of different contexts and they say there's no corporate trauma because nobody's been prosecuted, but they have a point here. Not a good one, but a point that because none of these crimes, which are crimes, are being prosecuted and because everybody in the industry is constantly saying that these laws don't apply that they can argue, “well, we didn't know. We might have known the facts of what was going on, but we had no way of knowing it was illegal.” How do you counter that?

Alene: There's two things. One is generally ignorance of the law is not an excuse.

We all learn that, even before law school, I think we learned that in high school. In this particular case, I think that ignorance of the law is particularly not an excuse and also that it's unlikely that they didn't know what they were doing is illegal for the same reason. And that reason is because what they're doing is so immoral.

So everyone knows that it's wrong to leave animals to die without food or water. A child knows that that's wrong and people quickly learn that it's also illegal. For example, in Washington state, where a lot of the defendants live, and where Costco's incorporated, there's a law against neglecting animals.

Even if the defendants never researched and found out that Nebraska also has a law like Washington has, saying it's illegal to neglect animals. It should have been pretty obvious to them that a law like that would exist because it's a moral issue. Generally, if something's immoral, I think we should be on alert that it could also be illegal, especially if it's illegal in our home state.

So one way I like to think about this is the distinction between malum in se and malum prohibitum crimes, which is something I feel like people don't really talk about that much anymore because it doesn't come up that much. But malum in se crimes are where there's a crime that's wrong in and of itself, like murder or neglecting animals or abusing animals.

And malum prohibitum is when there's a crime that's only wrong because somebody made a law against it, like not paying your taxes. If there was no law requiring you to pay taxes, it wouldn't be wrong to not pay them. It's wrong because of the law. And animal neglect is malum in se, it's just wrong in and of itself, and a law that tells you not to neglect animals is just putting into writing what we all know in our hearts.

In that case, I would say it's particularly ridiculous to try to use ignorance of the law as an excuse because- A, whether or not they knew it was illegal, they knew it was wrong, and B, the fact that it is wrong should be a flag that it's probably illegal.

Mariann: Yeah, it's such an important point, I think, for animal law because these crimes aren't prosecuted. That's one of the reasons why it's so important to

have some kind of a civil cause of action to pursue this and if just the fact that they aren't being properly prosecuted was enough to let people off the hook, it would be a disaster.

And not just for animal law, but in general, it could just mean that any crime that was ignored by law enforcement couldn't be pursued in any other way, was no longer a crime, which just can't be right. I think your first cause of action is the one that I get the most excited about but you do have two other causes of action and the second one has to do with their responsibility for oversight, is that right?

Alene: Yeah. So the second one actually ties in, I think, nicely to what you said about how there haven't been a lot of prosecutions for this kind of thing. Because you never know in the future if there could be, like, if an administration changes. Keep that in mind when we're talking about the second cause of action, which is our Caremark claim.

So Caremark is a case where it's one of these cases that's come to stand for more than the facts of that actual case. But it's a case that basically means that if corporate executives are paying so little attention to what's going on in their company that they're ignoring red flags and letting crazy, terrible stuff happen, at some point it rises to the level of breaching the duty of loyalty, and they could be sued for breaching their duty of loyalty.

You might be wondering why does that matter? Because wouldn't they already have been breaching their duty of care if they weren't paying a lot of attention? And that's probably true, but most shareholder derivative lawsuits are more likely to focus on duty of loyalty claims than duty of care claims because there's a doctrine that makes it harder to sue over duty of care claims.

Basically, Caremark stands to the proposition that if a company's executives are being so inattentive that they ignore red flags of terrible stuff going on, at that point, they're being disloyal by not stepping in. And we are alleging Costco's executives ignore the red flags of a *New York Times* article saying that horrible stuff is happening.

And they ignored the red flag of a public pressure campaign saying that Costco should treat its chickens better. And they even ignored the red flag of our shareholders reaching out, asking for more information about what's going on with Costco's chickens, saying they're concerned that something illegal could be happening, and that by ignoring all those red flags and failing to step in and

change Costco's treatment of chickens, the executives are being so reckless that they're violating their duty of loyalty to Costco.

And one of the reasons this is really reckless tie into what you were saying about prosecution, which is that at any moment, if you're doing something illegal for a very long time, it can catch up with you. I think a lot of people know these examples of somebody that got caught doing something bad, and it turned out they had been doing that bad thing for a really, really long time, and everyone thinks like, "well, how could they do a bad thing for so long?"

And probably the wrong doer was just thinking, "well, I hadn't gotten caught, so I just kept doing it." So basically at any moment there could be a new administration that thinks "we wanna be tough on crime" and Costco could be liable for a huge amount of criminal activity that it has been engaging in.

Mariann: Another argument that they make, I mean, I obviously am not nearly as familiar with the case as you are, but in looking through the papers, I noticed they talked about...they didn't ignore it because they talked about it a lot! Which I thought was really like, "so what you talked about it?" That's ignoring it if you don't do anything about it.

So I thought that was kind of a funny argument. All right, your third cause of action is that the board was causing the corporation to act ultra vires, which is another Latin word that we may remember from law school. Can you just remind us of what it means?

Alene: Yeah. I thought this was really fun because when I learned about it in law school, I learned this is an old thing that will never matter to your life. And then it was cool that it does matter.

So basically in the olden days when corporations were first invented, corporations are creatures of law, they didn't exist in nature or something. Government needs to pass statutes saying you can create a corporation.

When corporations were first invented, they were always created for very limited purposes. So there'd be like, I'm making an example, I dunno if this is realistic, but there could be like a shoemaking corporation that exists to make shoes or something. A corporation could get in trouble if it ever did something that was outside of its purposes.

So if it was a shoemaking corporation, but they started making sweaters that would be considered ultra vires. And ultra vires was basically the word for

outside of your purposes. That has become way less important because over time, corporations started getting created for broader and broader purposes. So now virtually every corporation exists for all lawful purposes.

The purposes of the corporation will be set out in the articles of a corporation. And now if you look at almost any corporation, the articles will almost always say, this corporation exists for all lawful purposes. So that means you can make shoes, you can make sweaters, you can do whatever you want. So people basically figured, okay, ultra vires is dead, that's not a concept that matters anymore. Because nobody was paying attention to the word lawful because you just assume, well, of course a corporation would only do lawful things. It never dawns on you. What if a corporation decided instead of selling cigarettes, we're gonna sell heroin? That would be unlawful.

And so I guess recently some lawyers started realizing actually something can still be ultra vires if it's unlawful. So if a corporation does something unlawful, basically anything unlawful is always going to be outside of its purposes. And that's, at least in Washington state and in Delaware and probably in all states or most states, there's actually a law saying corporations can only exist for lawful purposes.

So you'll never hear of like a drug dealing corporation. If it's a corporation, its purposes are lawful. There's a doctrine in Washington saying that a shareholder can sue executives if they're causing the corporation to do something ultra vires, and it's not used very much because the only thing for most corporations that could be ultra vires would be breaking the law.

And most corporations don't break the law, but Costco is breaking the law, and so we are bringing this ultra vires claim.

Mariann: I love it. That really is a fun claim. All right, we went through the three causes of action. Is there anything else about this motion that I should have asked?

Alene: Well, I guess there's something kind of interesting procedurally, which is like the defendant filed a motion to dismiss, we filed our response, they filed their reply. We had a hearing scheduled, and then the day before the hearing, the judge recused herself. I don't know why the judge recused herself. So now the hearing is gonna be rescheduled for some other time, which is dramatic and exciting because everyone was all ready and then it didn't happen.

And it's a big mystery, but yeah.

Mariann: Yeah, yeah. That's stressful. All right, so assuming that it is denied, what are the next steps in this case?

Alene: So the next steps would be discovery. Well, I guess it's possible that if we survive the motion to dismiss, maybe the defendants would want to try to settle, because basically what we are asking...actually that is something I should have mentioned to you.

The main goal from the lawsuit is just to get the defendants to treat the animals better and follow the law. We have a cause of action for damages, but what our shareholders, our clients, really care about is helping the animals. So, the only way they will be happy is if they get the company to change its practices.

And maybe if we survive motion of dismiss, the company will basically realize, "okay, we should just change our practices rather than go forward with lawsuit." So that would be a wonderful outcome if that could happen. But if that doesn't happen, then we'll go to discovery. So we're going to want to depose all of these executives, find out exactly what they knew and what their motivations were, and we're gonna wanna do a request to do a site inspection of Lincoln Premium Poultry and site inspections of the some of the contract grower facilities. There's over a hundred, I believe, different contract growers that raise these birds for Costco. So yeah, we just try to get a whole bunch of information and then we can get an expert report ready explaining how what Costco's doing is not the proper way to care for animals and then we'll file a motion for summary judgment.

Mariann: And what happens if you win? I mean, I understand a settlement. You could just enter into an agreement with Costco to treat their animals in specific ways. But what happens if you win like straight out win? Do you own Costco?

Alene: Um, well, I guess our clients already do own Costco, tiny pieces of Costco, like tiny, tiny pieces. So if we were to win, then the main relief we're seeking is an injunction, and we want an injunction ordering Costco to make sure that each of its animals have access to food or water. And we would, at that point, if we're getting an injunction, we'll be able to say the specifics of what we want the injunction to be, and the defendants will be able to argue against that.

So even if we win, there will probably be an argument about what the relief should be and what we would ideally want is not only to have this injunction where Costco's executives are required to make sure Costco's birds get food and water, but also some kind of accountability mechanism, like requirements that

Costco report or that we are allowed to do random inspections to make sure that the animals are getting food and water.

And then we're also seeking damages. But the most important thing like that we really want is the injunction.

Mariann: So assuming the motion is granted this particular motion, does that mean that you can start again and just make a demand? Is it all just a delay tactic or does the actual act of making the demand somehow put an end to the lawsuit in some way?

Alene: Yeah, I would say yes to both of those things. If the case is dismissed, we probably can still make a demand, but it is futile. So that's why we don't wanna make a demand, because basically if we make a demand, we'd be asking a bunch of people to sue themselves because those people are breaking the law. It seems like there is essentially zero chance that Costco's executives will bring this lawsuit.

So yeah, so we lose the case we'll probably make a demand, but we expect them to reject the demand, and then if they reject the demand, we can theoretically try to sue them for rejecting the demand. But at that point, it's a much like worse posture to be in than we are now. We don't know what would happen at that point, but some courts, not in Washington, but in other places, have said that if you make a demand, you're conceding that the other side is objective. And obviously we don't wanna concede that because we don't think they're objective. We don't know that a Washington court would do that, but we don't wanna be in a situation where anybody is suggesting we could have conceded anything because we don't think that they're objective.

Mariann: Yeah, you really are between a rock and a hard place there. All right. So I think that covers this case, unless you have anything more you wanna talk about. But before I let you go, I would like you to tell us a little bit about Legal Impact for Chickens.

Alene: Legal Impact for Chickens is a new litigation nonprofit that I started last year. Right now there's two full-time staffers, myself and an amazing, smart, hard working lawyer named Denise Morris. And we also have a really cool intern named Sabrina Palacios. Our whole goal is to make factory farm cruelty a liability and to hold companies and executives accountable for mistreating animals on factory farms.

So this was our first lawsuit and we planned to bring other lawsuits. The really exciting reason I really wanted to talk about it is that we're hiring. You were so nice to us and you actually put a shout out for us the first time we were hiring on this podcast. So I just want listeners to know we are hiring.

If you are interested in suing companies and executives for mistreating animals on factory farms, go to legalimpactforchickens.org and apply.

Mariann: Very excited. I'm very excited to hear that you're hiring. I'm very excited about this case and I can't wait to hear what happens. So thanks so much for sharing it with us in such detail today, Alene and for joining us on the Animal Law Podcast.

Alene: Thank you so much. It's been my dream to be on this podcast ever since it started. And I told you that over email, but I forgot to say it cause I was too nervous at the beginning . But this is a huge dream. When I got your email, I forwarded it to my boyfriend because he knew that this has like been my goal and he was freaking out because he listens to it also.

Mariann: Well, very few things have made me quite as happy as that statement, so thank you! That's really a thrill.