Luxury Brands Alert

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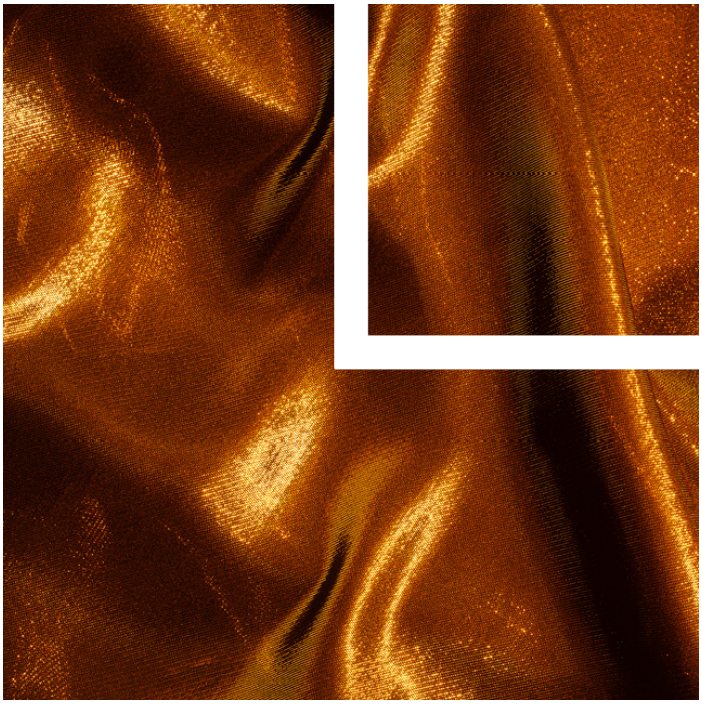
CA 2023 Luxury Law Update: First State to Ban Animal Testing and Furs, but Loses Preemption Battle On Alligator/Crocodile Ban



Key Takeaways:

- California law prohibiting trade in alligator and crocodile products (California Penal Code Sec. 653o) is preempted by the Endangered Species Act (ESA) and the U.S. Department of Fish and Wildlife Service's implementing regulations.
- California's ban on the sale and manufacture of new animal fur products (through amendments to Sec. 2023 and Sec. 3039 of the California Fish and Game Code) officially went into effect on Jan. 1, 2023, making it the first state to officially end the fur trade within its borders.
- California's Prohibiting Extraneous Testing (PET) Act (SB 879) became effective on Jan. 1, 2023; following suit, nine other states have passed similar legislation banning cosmetics testing on animals.

California's Ban on Alligator and Crocodile Products Is Preempted by Federal Law

California Penal Code Sec. 653o has historically made it a misdemeanor to import into the state for a commercial purpose, to possess with the intent to sell, or to sell within the state the dead body or a part or product thereof of a number of specific animals. Effective since Jan. 1, 2020, AB 1260 (the amendment) added alligators and crocodiles to that list, specifically "iguana, skink, caiman, hippopotamus, or a Teju, Ring, or Nile lizard" (Cal. Penal Code Sec.653o(c)).

Several cases were brought separately challenging the constitutionality of the amendment with respect to the animals added to this prohibited list. The ban was subject to a temporary restraining order while the court weighed whether to enjoin its enforcement. In December 2019, just weeks before the alligator and crocodile ban was to take effect, two sets of plaintiffs filed challenges to the ban in federal court in two related cases: *Louisiana Wildlife and Fisheries Commission et al. v. Becerra (Delacroix)* and *April in Paris, et al. v. Becerra (April in Paris)*. Plaintiffs in the *Delacroix* and *April in Paris* cases claimed that the ban was expressly preempted by the federal Endangered Species Act (ESA) because it prohibits activity (namely, trade in alligator products) that the ESA and the U.S. Department of Fish and Wildlife Service's implementing regulations explicitly allow.

The parties in these consolidated cases of *Delacroix* and *April in Paris* each moved for summary judgment in March on this narrow legal question: does the ESA preempt California criminal laws that punish imports and sales of alligator and crocodile products? Through rigorous legal analysis and review of congressional committee documents, the court found that when Congress passed the ESA, it intended to preempt state laws (such as California Penal Code Sec. 653o) that prohibit what the

federal regulations authorize. On that basis, the court granted plaintiffs' cross-motions for summary judgment in both cases and denied the defendants' motions.

In its analysis, the court referred to the ESA's detailed section about the relationship between the federal government and the state legislatures. If state laws and regulations conflict with the ESA and its implementing regulations, the state rules are expressly preempted by Section 6(f), codified at 16 U.S.C. Sec. 1535(f). Section 6(f) delineates the preemption affirmatively: "Any State law or regulation which applies with respect to the importation or exportation of, or interstate or foreign commerce in, endangered species or threatened species is void to the extent that it may effectively (1) permit what is prohibited by this chapter or by any regulation which implements this chapter, or (2) prohibit what is authorized pursuant to an exemption or permit provided for in this chapter or in any regulation which implements this chapter." Section 6(f) prohibits two types of conflicts between federal and state laws and regulations. First, if a state law or regulation permits conduct that is forbidden by the ESA or its implementing regulations, then the state law is preempted. Second, if the ESA or its implementing regulations authorize conduct by "exemption or permit," then a state may not prohibit the authorized conduct.

Diving deeper into congressional intent with respect to the ESA, the court referred to a House report, which explained "the Committee rewrote the . . . bill to make it clear that states would and should be free to adopt legislation or regulations that might be *more restrictive* than that of the Federal government and to enforce the legislation," (emphasis added) but in cases of "a specific Federal permission for or a ban on importation, exploitation, or interstate commerce," states "could not override the Federal action." The court found that while this legislative history is not decisive, it confirms what the text of Section 6(f) implies.

First, even if an animal species is not listed as endangered or threatened in the federal regulations, states can choose to give greater protections to that species. Second, for species that are categorized as endangered or threatened in the federal regulations, states can regulate takings within their borders. They can also "conserve" wildlife within their borders if their laws and regulations are more restrictive than federal laws and regulations, but only within their borders. Section 6(f) refers to "migratory, resident, or introduced fish or wildlife ... [and] takings," not foreign, nonnative animals. Third, Section 6(f) expressly and unambiguously voids state laws and regulations that conflict with federal regulation of interstate and foreign commerce.

By prohibiting all trade in crocodile products, California Penal Code Sec. 653o falls within the area of preemption under each of these three factors. First, California is regulating crocodile species on the federal "threatened" list. Second, California is not regulating crocodile takings within its borders; nothing in the record evidenced that crocodiles reside in California, migrate into California or have been introduced into California. Third, Section 653o applies expressly to interstate and foreign commerce by barring "imports," thus encroaching on a federal system of permits and exemptions that implements the Convention in International Trade in Endangered Species, an international treaty.

Note that both *April in Paris* and *Delacroix* had been reassigned to the same judge on Jan. 11, 2023, as had two additional cases, *Los Altos Boots, Inc., et al. v. Rob Bonta, et al. (Los Altos Boots) (and Boot Barn, Inc., et al. v. Rob Bonta (Boot Barn)*. These additional cases advanced similar constitutional challenges to California's regulation of crocodile, alligator, caiman or lizard products. The court's recent rulings in *April in Paris* and *Delacroix* likely will determine the outcome in *Los Altos Boots* and *Boot Barn*. On April 6, 2023, the court extended the proposed summary judgment briefing from March 21, 2023, to April 18, 2023, for *Los Altos Boots*; no further filings have been made with respect to the *Boot Barn* case since procedural motions in November 2022.

California Ban on the Sale of New Animal Fur Products Takes Effect

California's ban on the sale and manufacturing of new animal fur products officially went into effect on Jan. 1, 2023, making it the first state to officially end the fur trade within its borders through amendments to Sec. 2023 and Sec. 3039 of the Fish and Game Code. The new law only applies to the sale of new fur garments, making it "unlawful to sell, offer for sale, display for sale, trade, or otherwise distribute for monetary or nonmonetary consideration a fur product in the state" (Cal. Fish & G Code Sec. 2023(b)(1)) and "unlawful to manufacture a fur product in the state for sale" (Cal. Fish & G Code Sec.

2023(b)(2)). It explicitly does not affect the sale of used fur products (Cal. Fish & G Code Sec. 2023(c)(1)), which would permit the ongoing sale of used fur products by consignment, nonprofit thrift stores, secondhand stores or pawn shops, subject to the requirement that the seller must maintain a record of each sale for at least one year. (Cal. Fish & G Code Sec. 2023(d)). It also explicitly excludes the sale of items made with other animal products, such as leather or shearling (Cal. Fish & G Code Sec. 2023(a)(2)(B)). With respect to the sale of used fur products, penalties include up to $500 for the first violation, $750 for a violation that occurred within one year of a previous violation and $1,000 for a violation that occurred within one year of a second or subsequent violation (Cal. Fish & G Code Sec.2023(e)(1)(A)-(C)). The statute does not directly address the question of the repair of previously purchased fur products. However, since it explicitly does not apply any of the prohibitions to "used fur" products (Cal. Fish & G Code Sec. 2023(c)(1)), a consumer should have the right to send a previously purchased, used fur product to a business for repair. Additionally, the law does not impact fur ownership rights, and it remains legal to wear fur garments in the state. There has been no material update and no case law involving this legislation.

California and Nine Other States Pass Legislation Prohibiting Animal Testing of Cosmetics

By amendment effective Jan. 1, 2020 (SB 1249), California Civil Code Sec. 1834.9 closed a loophole on the use of animal testing conduced out of state by companies that sell cosmetics within the state of California. AB 357, amended as of March 15, 2023, proposes changes to Sec. 1834.9 for coherence and clarity but does not change the spirit of the law.

Additionally, on Sept. 26, 2022, California passed the Prohibiting Extraneous Testing (PET) Act (SB 879), which prohibits toxicity testing on dogs and cats of pesticides, chemical substances and other products. The law, which took effect on Jan. 1, 2023, includes exemptions for tests related to products intended for use on dogs or cats, including medical treatments, and does not impact any federally required testing (e.g., by the Environmental Protection Agency or the Food and Drug Administration). Through the PET Act, California effectively became the first state in the U.S. to remove the option for companies seeking to conduct toxicity testing on their products through the use of cats and dogs, except where required by federal law.

While California helped pave the way for banning the use of animal testing in cosmetics and for other toxicity testing purposes, there have been a number of states that have since followed suit in recent years. For example, on Dec. 15, 2022, New York's governor signed legislation (A.5653B/S.4839B), known as the New York Cruelty-Free Cosmetics Act (NYCFCA). The law, which took effect on Jan. 1, 2023, prohibits manufacturers from importing for profit, selling, or offering to sell any cosmetic or ingredient in the state for which the manufacturer knew or reasonably should have known that animal testing was performed by or on behalf of the manufacturer or manufacturer's supplier if the animal testing was conducted after Jan. 1, 2023.

Through passage of the NYCFCA, New York became the 10th state to ban the sale of cosmetics tested on animals. New York follows similar actions taken in Virginia, Louisiana, New Jersey, Maine, Hawaii, Nevada, Illinois and Maryland as well as California. Outside the U.S., several other countries have also been making changes towards banning animal testing of cosmetic products and harmonizing its cosmetic regulations with the European Cosmetic Regulation ((EC) No. 1223/2009).

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