

Federal Trade Commission
Office of the Secretary, Room H-113 (Annex X)
600 Pennsylvania Avenue NW
Washington, DC 20580
<https://ftcpublic.commentworks.com/ftc/petmedworkshop>

Re: Pet Medications Workshop, Project No. P12-1201

Dear Sir or Madam,

I am a third year law student, pet owner, and pet medications consumer. I am the proud “owner” of Moby Crockett, a Bernese Mountain Dog, family protector, and best friend that regularly needs prescription and OTC medications. I appreciate this opportunity to comment for the FTC’s Pet Medications Workshop, and to address an important issue implicitly raised in the FTC’s call for comments. The ongoing debate in many states over whether to allow pet owners to recover non-economic damages in civil litigation may play an important role in shaping competition and consumer protection issues in the pet medications industry.

Introduction

As many commenters have noted broadening consumer choice and access to pet medications will likely increase the risk of harm and death to companion animals, resulting in higher rates and costs of pet litigation. Though state courts have rarely allowed non-economic damages in pet cases, advocates for these potential changes are growing, and the debate itself creates uncertainty in the market for pet medication. Moreover, the rise and probable change in litigation will directly affect pets, their owners, veterinarians, manufacturers, distributors and retailers.

Central to this debate—for FTC purposes—is the tension between a growing public desire to raise the legal status of companion animals and their relationship with their “owners,” and the need to protect veterinarians, manufacturers, et.al, from undue liability risks, increased operation costs, and uncertain market conditions.

Below, I will briefly outline the policies underpinning this debate and assess the likely effect of the debate on competition and consumer protection issues in the pet medications industry. Because I am an advocate for greater legal recognition and protection for companion pets—and all animals—I will address this debate and why it matters through a “pro” lens, limiting the scope of my comment to pet litigation in which a companion animal dies.

The Growing Movement for Courts and Legislatures to Allow Non-Economic Damages

When pets die from the medications given to them, owners can generally seek to recover damages through several claims, including veterinary malpractice and product liability claims. Because animals are treated as property under tort law, an owner's damages are generally low, limited to the fair market value of the animal. However, the mere market valuation of a companion animal fails to adequately compensate an owner for the emotional distress or loss of companionship accompanying a pet's death due to veterinary or manufacturer negligence.

Moreover, this ignores not only the inherent worth of an animal as a sentient, complex being, but the *real or actual* value of the companion to its owner. As Maneesha Deckha notes in *Property on the Borderline: A Comparative Analysis of the Legal Status of Animals in Canada and the United States*, courts recognizing this have, "given awards for veterinary expenses, emotional distress, loss of companionship, or 'special value' when a companion animal is injured or the subject of a wrongful death claim" 20 Cardozo J. Int'l & Comp. L. 313, 323 (Winter 2012). By expanding available recovery for pet owners, courts show not only a willingness to recognize the special place animals have in our society not reflected in traditional tort law.

The growing movement for courts and legislatures to allow non-economic damages also reflects the superior status animals already represent in our legal system. State and federal animal cruelty laws represent a shift in law and policy away from traditional treatment of animals as property. Admittedly, this legal treatment of animals may have more to do with preventing troubling human behavior than protecting animals.

Finally, this movement towards change in current tort laws reflects the lofty place we Americans public give to our pets. As noted in the October 2, 2012 FTC Pet Medication Workshop presentations (and through simple online searches), the pet industry represents well over half of U.S. households engaged in this multi-billion dollar enterprise each year. As consumers spend more, and become more savvy about the treatment and medications their pets receive, the more consumers access to tort remedies they will demand when their companion animals are injured or killed due to veterinary or manufacturer negligence.

Favorable Court and Legislative Treatment Represents a Trend Towards Greater Allowance of Non-Economic Damages

Though rare, courts have looked favorably on allowing non-economic damages in pet litigation since at least the late 1970s. In his erudite case against allowing non-economic damages in pet cases, Victor Schwartz (of torts casebook fame) notes several “outlier courts” amenable to this expansion of tort law. See *Non-Economic Damages in Pet Litigation: The Serious Need to Preserve a Rational Rule*, 27 Pepperdine L. Rev. 273, 243 (Vol. 33 2006). In each of the cases analyzed, and under different rationales, each court allowed recovery for mental anguish or emotional distress suffered by pet owners after the loss of their animal due to another’s negligence.

Notably, the court in *Campbell v. Animal Quarantine Station*, 632 P.2d 1066 (Haw. 1981) headed off a common argument against tort expansion in this area. Referencing an argument that such expansion would open the flood gates of litigation, the court stated because, “there has been no plethora of similar cases... fears of unlimited liability have not proved true.” *Campbell*, 632 P.2d at 1071.

Litigation in which plaintiffs request non-economic damages continues to gain traction. In response, the American Veterinarian Medical Association has crafted an extensive selection of writings addressing non-economic damages. While recognizing the special place animals hold, and the lofty place of companion animals (in particular) in society, the AVMA regards an allowance of non-economic damages by courts to be a dangerous proposition that will increase liability of all interested parties, drastically increase the cost of animal healthcare, and decrease the quantity of quality care animals will receive. See e.g. “Pros and Cons of Allowing Non-Economic Damages (As Opposed to Punitive Damages) for Injuries to or Loss of Animals” (June 2005).

The ongoing nature of this debate does not bode well for those advocating against an expansion of the tort system in this area.

Conclusion

For good or ill, an allowance of non-economic damages will have consequences for competition and consumer protection issues, and the debate itself likely has a measurable impact on the pet medications market due to uncertainty in future costs associated with veterinary malpractice insurance, and the legislative and judicial recognition of the special role animals play in American society. For these reasons, an FTC Pet Medications Workshop Report should provide a platform for increased discussion of this facet of the pet medication industry.