

October 29, 2012

Federal Trade Commission
Office of the Secretary
Room H-113 (Annex X)
600 Pennsylvania Ave., NW
Washington, DC 20580

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

Dear Sir or Madam:

House Bill 1406, which is currently being considered and would require veterinarians to provide clients with written prescriptions for all pet medications, should be passed but with additional amendments.

I am a third-year law student with an interest in animal law. Additionally, I am the current president of my school's Animal Legal Defense Fund. I also currently volunteer at the local animal shelter, and I have fostered and adopted several dogs from the shelter.

H.R. 1406 should be passed because it recognizes pet owners as consumers and provides them with broader protections under the law. What the bill and the Federal Trade Commission's (FTC) Request for Comments fail to recognize, however, is that pet owners need more protections under the law for veterinary malpractice—either as against a veterinarian providing medication to an animal or as against a secondary pharmaceutical retailer (hereinafter referred to only as “retailer”) providing medication to an animal. In this way, the bill and the FTC are only considering consumer protection in so far as the bill provides an informed choice and access to medication, instead of providing consumer protection against products liability and malpractice.

As discussed in the supplementary information within the middle column of the first page of the FTC's Request for Comments, over half of the country owns a household pet and those pet owners spent an estimated \$50 billion on their pets last year. Additionally, pet owners spend approximately \$19 billion on veterinary care annually.¹ These staggering numbers evidence the high value society attributes to its companion animals, in addition to illustrating the considerable potential for a pet owner to experience both non-economic loss and economic loss in the event of veterinary malpractice. Accordingly, protections must be in place to properly guard the interests of pet owners.

¹ Christopher Green, The Future of Veterinary Malpractice Liability in the Care of Companion Animals, 10 Animal L. 163, 163-164 (2004).

I. CURRENT STATE OF THE LAW

Presently, pet owners' interests are inadequately protected under the law. Currently, most states categorize animals only as property.² Because of this categorization, courts find themselves bound by earlier common law decisions which hold that a person can only recover economic damages for torts committed against her property.³ With this view, most states bar pet owners from recovering for non-economic damages, such as loss of companionship, in veterinary malpractice cases. Indeed, only in limited instances do state statutes even reference veterinary malpractice.⁴ These shortcomings of the law fail to address the incalculable emotional investment that pet owners experience in their relationship with their companion animal, which is exactly similar to that experienced by people in relation to their human loved ones.

The failure of the law to provide protections to pet owners in veterinary malpractice cases essentially creates two problems for pet owners: 1) that pet owners are treated inequitably so far as the law fails to fully compensate them "for the emotional and financial investments made in their companion animals," and 2) a pet owner's inability to recover more than the economic damages financially precludes them from pursuing their right to bring their negligence case against a veterinarian in court.⁵

A few states are moving in the right direction towards providing the proper remedies to pet owners, but these steps are still wholly inadequate. Tennessee passed legislation in 2000 which provides for recovery of non-economic damages, but only in cases where a domestic cat or dog is killed or fatally injured while on the property of its family, guardian, or caretaker.⁶ Oregon and Rhode Island have passed similar bills which require the injury or death take place at the premises of the pet owner or under the direct control and supervision of its owner.⁷ Thus, the limited circumstances of these laws would most likely not apply to veterinarians or retailers, as their conduct is conducted away from the pet's home and owner.

Michigan presented a similarly progressive bill that would have allowed up to \$250,000 in non-economic damages for the loss of a companion animal when such loss arises from gross negligence, willful, or wanton conduct, regardless of the animal's location at the time of its death.⁸ The broad language of this bill would properly protect pet owners when a veterinarian prescribed a medication in gross error or when an animal pharmaceutical manufacturer failed to assure the quality of its product prior to distribution. Unfortunately, this bill failed to become a law, leaving pet owners and their animals unprotected from malpractice.⁹

² Mary Margaret McEachern Nunalee & G. Robert Weedon, Modern Trends in Veterinary Malpractice: How Our Evolving Attitudes Toward Non-Human Animals Will Change Veterinary Medicine, 10 *Animal L.* 125, 1445 (2004).

³ See Green, *supra* note 1, at 188.

⁴ See Nunalee & Weedon, *supra* note 2, at 151.

⁵ See Green, *supra* note 1, at 192.

⁶ See Nunalee & Weedon, *supra* note 2, at 144.

⁷ See Green, *supra* note 1, at 236-37.

⁸ See Nunalee & Weedon, *supra* note 2, at 144-45.

⁹ *Id.*

Illinois law defers cases alleging “gross veterinary malpractice” to an administrative agency¹⁰; however, statistics have shown that such regulatory bodies typically decline to bring their weight to bear against veterinarians for their negligence, “essentially eliminating the likelihood of any meaningful enforcement of the veterinary standard of care.”¹¹ Even worse than the failure of the courts to protect pet owners under existing law, several states have specifically exempted veterinarians from liability in companion animal compensation bills.¹²

II. FUTURE RECOMMENDATIONS

First, it is of the utmost importance that the FTC uses this opportunity to include language in H.R. 1406 providing for both economic and non-economic damages in the event of medical malpractice resulting from a medication prescription. While it is highly valuable that this proposed legislation provides protections to the pet owner as a consumer, it is imperative that it also recognizes the risks faced by those same consumers, as well as their pets, by pharmaceutical suppliers, including their veterinarians.

In reviewing the public comments of others that have already been posted, many veterinarians believe that opening the animal pharmaceutical market will not only be detrimental to the business side of veterinaries, but also to the animals themselves. One reason stated is that the animals may be victims of malpractice because the retailers will only be trained in human pharmacology, and will not have any background in animal pharmacology. Similar concerns note that retailers may either produce or sell counterfeit drugs, which may be harmful to animals. While these concerns are very real possibilities, they can be addressed by providing protection to consumers in the event of malpractice.

H.R. 1406 is an opportunity for federal legislation to finally provide much-needed protection to pet owners and ultimately to their pets. One model that H.R.1406 can follow is California’s common law, which has viewed veterinarians in the same light as medical doctors in that they are both “licensed health care providers.”¹³ As such, both types of health care providers must exercise the degree of skill required for the profession.¹⁴ In this way, “California has thus imputed its traditional medical malpractice statutes to veterinary malpractice cases.”¹⁵ H.R.1406 could similarly include language imputing veterinarian’s liability to retailers. Specifically, H.R. 1406 could explicitly define both veterinarians and retailers as “licensed health care providers” within the meaning of the statute.

H.R. 1406 could also include language which clearly establishes the standard of care that any person, whether it be a veterinarian or a pharmacist on behalf of a retailer, would be required to provide while prescribing and distributing medications for animals. Such a provision would provide even more power to the consumer than what is already proscribed in

¹⁰ *Id.* at 151 (noting that California, Connecticut, Maryland, Oregon, Rhode Island, and Tennessee exempt veterinarians from their companion animal compensation bills).

¹¹ *See* Green, *supra* note 1, at 183.

¹² *Id.* at 236-37.

¹³ *See* Nunalee & Weedon, *supra* note 2, at 151.

¹⁴ *Id.*

¹⁵ *Id.*

the proposed legislation as it currently stands because it would inform the consumer of what they are entitled to expect from both pharmacists and retailers in regards to their pets' medications.

III. CONCLUSION

Ultimately, this proposed legislation makes strides in recognizing that pet owners are currently inadequately protected by the law, but it still falls short of recognizing the injustice subjected to pet owners when veterinarians and retailers fail to practice according to an appropriate standard of care. These shortcomings must be addressed in amendments to the bill establishing both veterinarians and retailers as entities liable to a pet owner for both economic and non-economic damages in the event of malpractice involving medications. When the liability of veterinarians and retailers are properly addressed, the bill will be even more suited to protect the interests of the consumer.

Sincerely,

Amanda Mitchell