



# PET-RELATED PRODUCT LIABILITY CLAIMS: WILL COVID-19 INSPIRE AN INCREASE IN LITIGATION?

by Rachael Flanagan

The number of pet owners surged during COVID-19. Although the exact percentage differs among sources, the pet industry reported a 3 to 4 percent increase in the number of families who introduced furry family members in 2020 and 2021.<sup>1</sup>

As product liability lawyers, we are always on the lookout for products that could bring harm to our families — toys with toxic lead paint, seat belts that malfunction, medications that cause harm. But what about our furry family members? Are we equally as vigilant about the products that can cause them harm? A quick Google™ search reveals that the potential harm to our furry family members looms large.

The manufacture and sale of pet products is big business. In 2020, the pet industry recorded sales of \$103.6 billion, an increase of \$6.5 billion since 2019.<sup>2</sup> Of that, \$42 billion was spent on pet food and treats.<sup>3</sup> While the Food & Drug Administration (FDA) is responsible for regulating animal drugs, feeds/foods, and medical devices, it does not regulate animal grooming products, toys, and clothing, which are generally overseen by other governmen-

tal agencies that regulate consumer goods such as the Consumer Product Safety Commission and the Federal Trade Commission.<sup>4</sup>

With 70 percent of U.S. households (90.5 million homes) reporting ownership of at least one pet,<sup>5</sup> supporting a \$103.6 billion, quasi-regulated market space, the potential for product liability claims should not be overlooked.

## How Pet Food Claims Are Litigated

As with most cases where small economic damages make it impracticable to bring individualized suits, pet product cases are generally brought as a putative class action alleging claims from product liability and warranty to negligence, deceptive trade practices, and false advertising.

## Food Contamination Claims

By far, the most successful product liability cases have come from the pet food industry. The largest pet food recall in U.S. history started in March 2007, when a recall was issued for more than 50 brands of dog food and 40 brands of cat food.

The recall eventually spread to cover more than 180 brands of pet food and pet treats manufactured by 12 separate manufacturers and distributed by dozens of retailers. As it turned out, two Chinese supply companies had added melamine and cyanuric acid to their wheat gluten and rice protein in order to comply with the protein level required by U.S. industry standards. The Chinese companies then shipped the contaminated wheat gluten and rice protein concentrate to U.S. manufacturers, which in turn used the concentrate in the production of more than 180 brands of dog and cat food. Ingestion of the adulterated pet food led to acute renal failure, with smaller pets being particularly susceptible to the toxins. Two months later the FDA reported nearly 8,500 pet deaths. Over 100 class action complaints were filed against manufacturers, ingredient suppliers, distributors, repackagers, and retailers. The causes of action ranged from violation of state consumer protection laws to product liability, warranty, and negligence claims. Ultimately, the cases were consolidated into a multidistrict litigation (MDL), *In re: Pet Food Products Liability Litigation*, and transferred to the District Court of New Jersey. By April 2008, a little more than a year since the original recall, negotiations resulted in a settlement proposal of a \$24 million cash fund in addition to the estimated \$8 million in reimbursement payments already made to pet owners. Preliminary approval was granted on May 30, 2008, which included an award of \$6 million in attorney's fees and \$394,403.09 in expenses.

### **New Regulations, but Limited Enforcement**

The United States is home to a large number of pet food manufacturers. Some of the biggest names in the business include Mars Petcare, Inc. (Franklin, Tennessee), Nestlé Purina PetCare (St. Louis, Missouri), JM Smucker (Orville, Ohio), Hill's Pet Nutrition (Topeka, Kansas), and Blue Buffalo (Wilton, Connecticut).<sup>6</sup> Florida alone boasts approximately 95 manufacturers of animal food, with the largest being Trop-

icana Products, Inc., in Bradenton, Florida, and Southeast Milk, Inc., in Belleview, Florida.<sup>7</sup>

On January 2, 2011, President Barack Obama signed the Food Safety Modernization Act (FSMA) into law.<sup>8</sup> The FSMA applies to both human and animal food, with the goal of shifting food safety from reactionary to preventive. But added regulatory enforcement has not prevented contamination from continuing to permeate the industry.<sup>9</sup>

In 2020, a \$12.5 million class settlement was reached with Hill's Pet Nutrition after several of its pet food brands were found to have excessive levels of vitamin D, which led to pet illness associated with vitamin D toxicity.<sup>10</sup> Hill's, in conjunction with the FDA, issued a voluntary recall, and multiple class actions were filed thereafter. The cases were consolidated into an MDL in June 2019 and mediated in October and December 2019, with the ultimate settlement being reached shortly thereafter.

As recently as August 2021, the FDA issued a corporatewide warning to Oklahoma manufacturer Midwestern Pet Foods, Inc., after it found several violations during an FDA inspection triggered by consumer reports related to SPORTMiX® dog food.<sup>11</sup> The FDA found samples of SPORTMiX had aflatoxin levels as high as 558 parts per billion (ppb) (where 20 ppb is the cutoff) which likely contributed to the illness or death of hundreds of dogs. Midwestern Pet Foods, Inc., which describes itself as a "fourth-generation family-owned company" had issued a recall on December 30, 2020, that was expanded on January 11, 2021.<sup>12</sup> In March 2021, Midwestern also recalled several brands manufactured at its Illinois plant when several samples tested positive for salmonella. Following inspections of all four Midwestern manufacturing sites, the FDA issued the August 2021 warning. Meanwhile,



multiple class actions were filed on behalf of pet owners seeking class certification and alleging causes of action from negligence, negligent misrepresentation, and unjust enrichment to breach of warranty, product liability, and violation of state consumer protection statutes.

**Other Types of Claims**

Other pet food litigation has centered around the use of buzzwords in advertising. Complaints allege that the use of words such as “natural,” “holistic,” or “organic” are misleading when the pet food actually contains synthetic or artificial ingredients. Rachael Ray’s Nutrish® pet food, manufactured by JM Smucker Company, has been the subject of multiple lawsuits alleging deceptive advertising and breach of express warranty. These consumer protection suits, however, have not been as successful. For example, a Southern District of New York judge dismissed a complaint against Rachael Ray, et al., finding that the “level



of glyphosate in the tested Products is negligible and significantly lower than the FDA’s limit, which supports a finding that the Products’ glyphosate residue is not likely to affect consumer choice and that labeling them ‘natural’ is not materially misleading to a reasonable consumer.”<sup>13</sup> The court granted leave to amend, but found the Amended Complaint failed to “sufficiently allege facts showing how or why a reasonable consumer would understand ‘Natural’ or ‘All Natural Ingredients’ to be the utter absence of residual pesticides.” The case was dismissed February 20, 2020.<sup>14</sup>

In sum, it would appear that actions which stem from harm inflicted upon pets are achieving relatively swift recoveries through mediation and often reach settlement prior to class certification, whereas cases that sound solely in consumer-based causes of action have been met with scrutiny by the courts.

With more furry family members warming our hearts and homes, creating greater demand for pet products, we must remain vigilant of the industry and the harm it can inflict. ■



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<sup>1</sup> Debbie Phillips-Donaldson, *New US Pet Ownership Study Confirms Pandemic-Led Growth*, PETFOOD INDUSTRY.COM (June 21, 2021), [www.petfoodindustry.com/articles/10325-new-us-pet-ownership-study-confirms-pandemic-led-growth](http://www.petfoodindustry.com/articles/10325-new-us-pet-ownership-study-confirms-pandemic-led-growth) (reporting a 3 percent rise in pet ownership); see also Emma Bedford, *How COVID-19 Affected Pet Ownership in the U.S. 2020-2021*, STATISTA (Jan. 28, 2022), [www.statista.com/statistics/1191395/pet-ownership-status-due-to-covid-19-in-the-us](http://www.statista.com/statistics/1191395/pet-ownership-status-due-to-covid-19-in-the-us) (reporting a 4 percent rise in pet ownership).

<sup>2</sup> *Pet Industry Market Size, Trends & Ownership Statistics*, AMERICAN PET PRODUCTS ASSOCIATION (Dec. 28, 2020), [www.americanpetproducts.org/press\\_industrytrends.asp](http://www.americanpetproducts.org/press_industrytrends.asp).

<sup>3</sup> *Id.*

<sup>4</sup> Animal Products FDA Regulates, U.S. FOOD & DRUG ADMINISTRATION (Nov. 6, 2017), [www.fda.gov/animal-veterinary/resources-you/animal-products-fda-regulates#:~:text=the%20food%20and%20drug%20administration,federal%20or%20state%20government%20agencies;see%20also](http://www.fda.gov/animal-veterinary/resources-you/animal-products-fda-regulates#:~:text=the%20food%20and%20drug%20administration,federal%20or%20state%20government%20agencies;see%20also) AMERICAN PET PRODUCTS ASSOCIATION, [www.americanpetproducts.org/law/lawlibrary\\_article.asp?topic=62](http://www.americanpetproducts.org/law/lawlibrary_article.asp?topic=62) (last visited Mar. 8, 2022).

<sup>5</sup> AMERICAN PET PRODUCTS ASSOCIATION, *supra* note 2.

<sup>6</sup> Tara Loszach, *10 Top Pet Food Companies Headquartered in the US*, PETFOODINDUSTRY.COM (June 15, 2021), [www.petfoodindustry.com/articles/10368-top-pet-food-companies-headquartered-in-the-us;see%20also](http://www.petfoodindustry.com/articles/10368-top-pet-food-companies-headquartered-in-the-us;see%20also) DUN & BRADSTREET, [www.dnb.com/business-directory/company-information.animal\\_food\\_manufacturing.us.html](http://www.dnb.com/business-directory/company-information.animal_food_manufacturing.us.html) (last visited Mar. 8, 2022).

<sup>7</sup> Animal Food Manufacturing Companies in Florida, United States of America, DUN & BRADSTREET, [www.dnb.com/business-directory/company-information.animal\\_food\\_manufacturing.us.florida.html?page=1](http://www.dnb.com/business-directory/company-information.animal_food_manufacturing.us.florida.html?page=1) (last visited Mar.

8, 2022) (list of manufacturers is not limited to domestic pet food).

<sup>8</sup> FDA Food Safety Modernization Act, PL 111-353, January 4, 2011, 124 Stat 3885; available at [www.govinfo.gov/content/pkg/PLAW-111publ353/pdf/PLAW-111publ353.pdf](http://www.govinfo.gov/content/pkg/PLAW-111publ353/pdf/PLAW-111publ353.pdf).

<sup>9</sup> Animal & Veterinary Recalls & Withdrawals, U.S. FOOD & DRUG ADMINISTRATION (Feb. 24, 2022), [www.fda.gov/animal-veterinary/safety-health/recalls-withdrawals](http://www.fda.gov/animal-veterinary/safety-health/recalls-withdrawals).

<sup>10</sup> Class Settlement Agreement, *In re: Hill’s Pet Nutrition, Inc., Dog Food Products Liability Litigation*, No. 19-md-02887 (D. Kan. Dec. 15, 2020), ECF No. 98-1, available at: [www.petfoodsettlement.com/home/458/documenthandler?docpath=/documents/class\\_settlement\\_agreement.pdf](http://www.petfoodsettlement.com/home/458/documenthandler?docpath=/documents/class_settlement_agreement.pdf).

<sup>11</sup> Warning Letter Midwestern Pet Food, U.S. FOOD & DRUG ADMINISTRATION (Aug. 9, 2021), [www.fda.gov/inspections-compliance-enforcement-and-criminal-investigations/warning-letters/midwestern-pet-food-613845-08092021](http://www.fda.gov/inspections-compliance-enforcement-and-criminal-investigations/warning-letters/midwestern-pet-food-613845-08092021).

<sup>12</sup> Midwestern Pet Foods Voluntarily Expands Recall of Pet Food for Aflatoxin Health Risk, MIDWESTERN PET FOODS (Jan. 12, 2021), [www.midwesternpetfoods.com/midwestern-pet-foods-voluntarily-expands-recall-of-pet-food-for-aflatoxin-health-risk](http://www.midwesternpetfoods.com/midwestern-pet-foods-voluntarily-expands-recall-of-pet-food-for-aflatoxin-health-risk).

<sup>13</sup> Opinion & Order, *Parks v. Ainsworth Pet Nutrition, LLC*, No. 18-cv-06936 (S.D.N.Y. Apr. 18, 2019), ECF No. 32 (granting defendant’s motion to dismiss complaint with leave to amend).

<sup>14</sup> Memorandum and Order, *Parks v. Ainsworth Pet Nutrition, LLC*, No. 18-cv-06936 (S.D.N.Y. Feb. 20, 2020) (granting defendant’s motion to dismiss the amended complaint), available at: [www.casetext.com/case/parks-v-ainsworth-pet-nutrition-llc-1](http://www.casetext.com/case/parks-v-ainsworth-pet-nutrition-llc-1).