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ANIMAL HEALTH

LIABILITY INSURANCE IMPLICATIONS OF NONECONOMIC DAMAGES

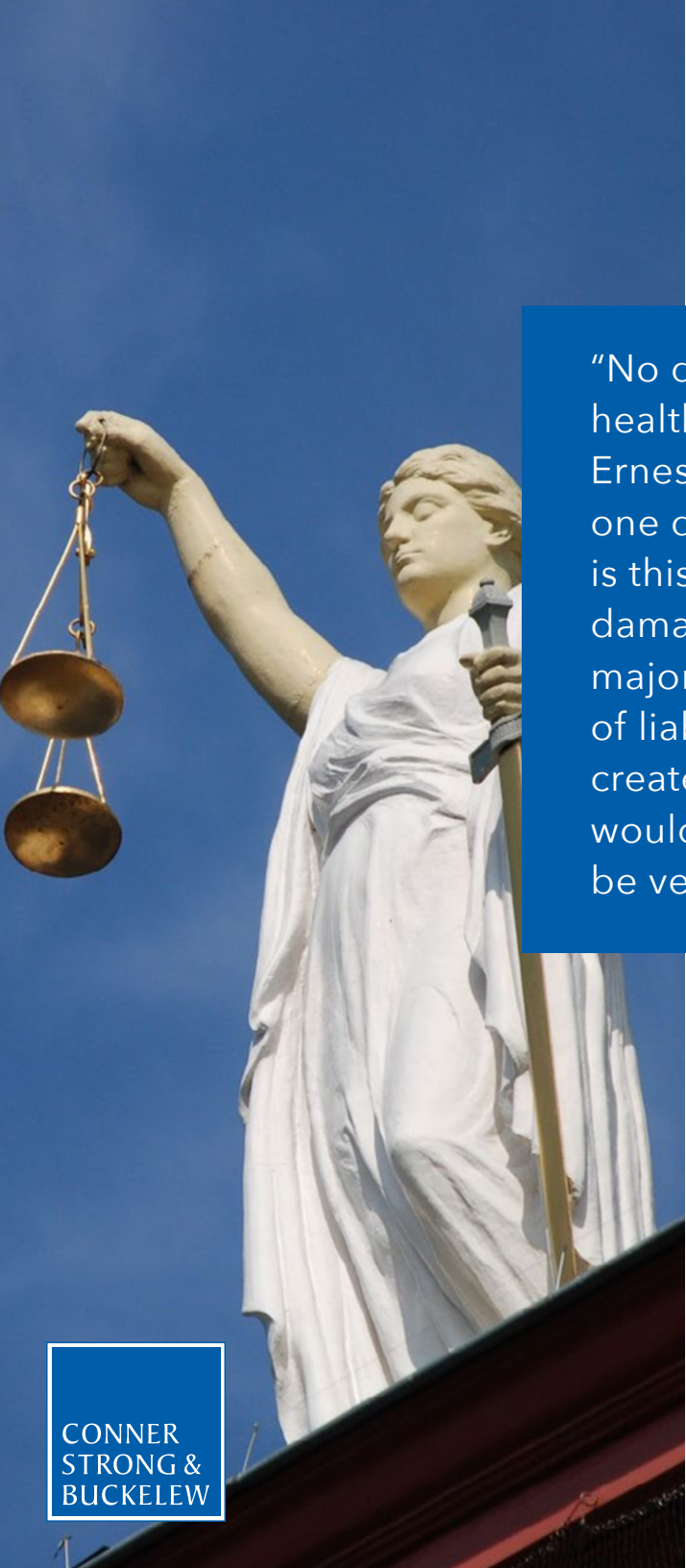


In many households, pets are considered another member of the family. When they are harmed or killed as a result of negligence or a faulty product, the result can be devastating to the pet's owners and lead to severe emotional and physical distress. While many producers, developers and providers of medicine or medical devices used on household pets believe they are safe from noneconomic damages caused to the owners resulting from the harm or death of a pet, certain circumstances can leave these companies on the hook for damages.

When it comes to liability associated with an injured pet, most states consider companion animals to be "property" relative to placing financial responsibility on a negligent party.

This means that it is difficult for pet owners to prove that any party responsible for the damage to the animal is on the hook for anything more than the monetary value of the pet. However, a review of individual state laws as well as prior cases indicate that there are some instances where individuals are able to prove they have experienced physical and emotional harm and have successfully sued organizations for the resulting noneconomic damages.

Cases related to pain and suffering of a pet owner whose pet is injured as a result of pharmaceutical veterinary drugs and professional liability are limited and generally involve extraordinary cruelty. Most companies look to their commercial general liability insurance coverage for protection in these instances, but because animals are considered to be "property" and therefore compensation for damages due to injured animals are generally limited to the cost of the animal itself, insurance coverage does not always apply to any potential allegation of pain, suffering or emotional distress of the owner of the animal.



“No question that non-economic damages involving animal health is an ever-evolving risk to the life sciences sector,” said Ernest Koschineg, Partner at law firm Cipriani & Werner PC. “No one questions the deep bond humans develop with their pets. It is this bond that could possibly push the expansion of available damages for a pet owner either at the trial or legislative levels. The major concern for the life sciences industry is not only the degree of liability exposure that a non-economic damage award would create from a straightforward negligence claim, but also how one would measure the amount of non-economic damages. This could be very problematic.”

It can be difficult for life sciences companies that deal with the treatment of animals to know if they are exposed to such risks and if so, whether or not their current insurance package provides sufficient coverage. In order to understand this dynamic, it is helpful to first explore prior cases of pet owners suing companies for noneconomic damages as well as the individual state laws being considered in these cases.

THE CASE FOR EMOTIONAL DISTRESS - NONECONOMIC DAMAGES DAMAGES

Admittedly, a review of such cases is hampered by the pharmaceutical industry's tendency to settle cases and keep them out of the public eye. In addition, few cases reach the Federal level and most reside in individual state courts. In such cases, each state's laws vary on the subject and property damage (including pet damage) and may have nuances which change on a state-by-state basis.

Courts in most states do not allow claims for emotional distress when defendants are simply found negligent.¹ Where a defendant is found to have acted maliciously or intentionally, the pet owner may have a stronger claim.² In one instance, a Washington appellate court found a cat owner was entitled to \$5,000 for sleeplessness, depression and other emotional distress that she experienced after three boys set her cat on fire.


Generally, pet owners can sue for shock and distress caused by seeing an accident or mistreatment. They may also sue for grief and the long-term effect the loss has on their lives. If they sought medical treatment or psychological counseling, that may strengthen their claims.

However, a Florida appeals court in the case of *Kennedy v. Bayas* allowed emotional distress damages in a veterinary malpractice case where there was "no impact." The impact rule requires some type of physical impact prior to recovery. In this case, the dog owner claimed that the vet mistreated the dog. The court refused to allow the damages, stating that it would not abandon the impact rule and allow emotional damages in veterinary malpractice cases.

¹ See, e.g., *Kaufman v. Langhofer*, 222 P.3d 272 (Ariz. Ct. App. 2009)

² See, e.g., *Womack v. Von Rardan*, 135 P.3d 542 (Wash. Ct. App. 2006)





In 2000, Tennessee enacted law that would authorize noneconomic damages of up to \$5,000 where someone negligently or intentionally killed a companion animal.³ This legislation did however immunize veterinarians and animal shelters from negligence liability. Moreover, an Illinois statute similarly limits the emotional-distress recovery to instances where there is exceptional cruelty or torture or when the animal is killed or injured in bad-faith.⁴ Ordinary negligence is not allowed for under this legislation. But plaintiffs may be entitled to punitive damages ranging from \$500 to \$25,000 for a specific covered act.

Texas, like most other states, removed the issue from the legislature. While Tennessee, Illinois, Connecticut and Maryland have enacted legislation, several bills have been proposed in multiple states, including but not limited to Pennsylvania and Florida (SB 1270), that have been unsuccessful. Notably, the Illinois statute is more expansive than Tennessee's statute in the type of animal (more than cats and dogs), the kind and type of injury one can recover for and the allowance for emotional distress, veterinary costs and other expenses. Illinois' statute does not allow recovery for third-party negligence and only allows for certain acts of an aggressor. On the other hand, Connecticut's statute does not allow for the recovery of noneconomic emotional damages.

In some states, courts may also award punitive damages. For example, California, Montana and Connecticut all have statutes that specifically allow exemplary/punitive damages for injuries to animals "committed willfully or by gross negligence." The Florida Supreme Court upheld a \$1,000 punitive damage award to an owner whose dog was killed when a garbage collector maliciously threw a garbage can at her.

To summarize, legislation ranges from being limited and restrictive in disallowing noneconomic damages, moderate by allowing economic damages for only certain types of acts with a specific cap like Texas, or as far reaching as states like Illinois by providing for punitive damages.

³ Tenn. Code Ann. § 44-17-403

⁴ 510 Ill. Comp. Stat. § 70/16.3

LEGISLATION AND THE CASE FOR SENTIMENTAL VALUE AND LOSS OF COMPANIONSHIP

Lawmakers in a few states have also recognized the sentimental value of pets and loss of companionship. Many state courts have been reluctant to allow noneconomic damages. However, some state legislatures have enacted laws on damages in pet cases. Tennessee was the first, as previously discussed. In Tennessee, pet owners may recover up to \$5,000 in noneconomic damages as compensation for the loss of “companionship, love and affection” in certain cases when their pets have been killed intentionally (and legally) or through negligence.⁵

A similar bill was referred to the Pennsylvania Judiciary Committee in 2013, but the Committee did not act on it. Illinois’ statute limits claims to cases in which the defendant subjected the animal to aggravated cruelty or torture, or engaged in bad faith which led to the animal’s death or injury. Further, it applies to any animal (not just cats and dogs) and allows for recovery of attorney’s fees and costs. Other states, such as Connecticut and Maryland, have also enacted statutes. Connecticut’s statute is limited to cats and dogs. Bills have been introduced in other states over the years, but have not had much success.

A few courts have found that sentimental value could be one element in an animal’s actual value to the owner if it does not have a meaningful market value.⁶ However, judges will sometimes compensate the owner for out-of-pocket treatments costs that exceed an animal’s market value when recognizing the sentimental value of pets.⁷ As this has played out, most states view owners as not being entitled to recover noneconomic losses for sentimental value when negligence is the cause behind a pet’s death.

Finally, while some citations concerning legislatures such as Tennessee and Illinois have allowed noneconomic damages in pet cases, the overwhelming majority of courts have determined that noneconomic damages cannot be awarded in pet cases. However today, legislatures are increasingly being asked to enact legislation allowing these damages.

⁵ Tenn. Code Ann. § 44-17-403.

⁶ See, e.g. *Jankoski v. Preiser Animal Hospital, Ltd.*, 510 N.E. 2d 1084 (Ill. App. 1987)

⁷ See *Strickland v. Medlen*, 397 S.W.3d 184 (Tex. 2013) and *Barking Hound Village, LLC v. Monyak*, 787 S.E.2d 191 (Ga. 2016)).



INTENTIONALLY MALICIOUS CONDUCT

Certain courts have allowed emotional harm damages for intentional or reckless infliction of emotional distress where the defendant deliberately or maliciously harmed the plaintiff's pet.

Some of these cases allowing noneconomic damages for intentionally caused harm to pets involved defendants who deliberately harmed the pets in order to inflict emotional distress upon the owners.

In these cases, courts have reasoned that the tort occurred against the owner of the animal and not the pet, and therefore applied the traditional criteria for intentional infliction of emotional distress.

Otherwise, because noneconomic damages cannot be recovered for harm to property, the law is clear that pet owners cannot recover for emotional distress. Since traditional tort recovery for injury to property is the fair market value of the property and pets are considered to be property, in a majority of jurisdictions, when a pet is negligently injured or killed, its owner generally recovers only its market value. Under this approach, damages are measured by the amount which will return the pet owner monetarily to the state they were in prior to the loss.

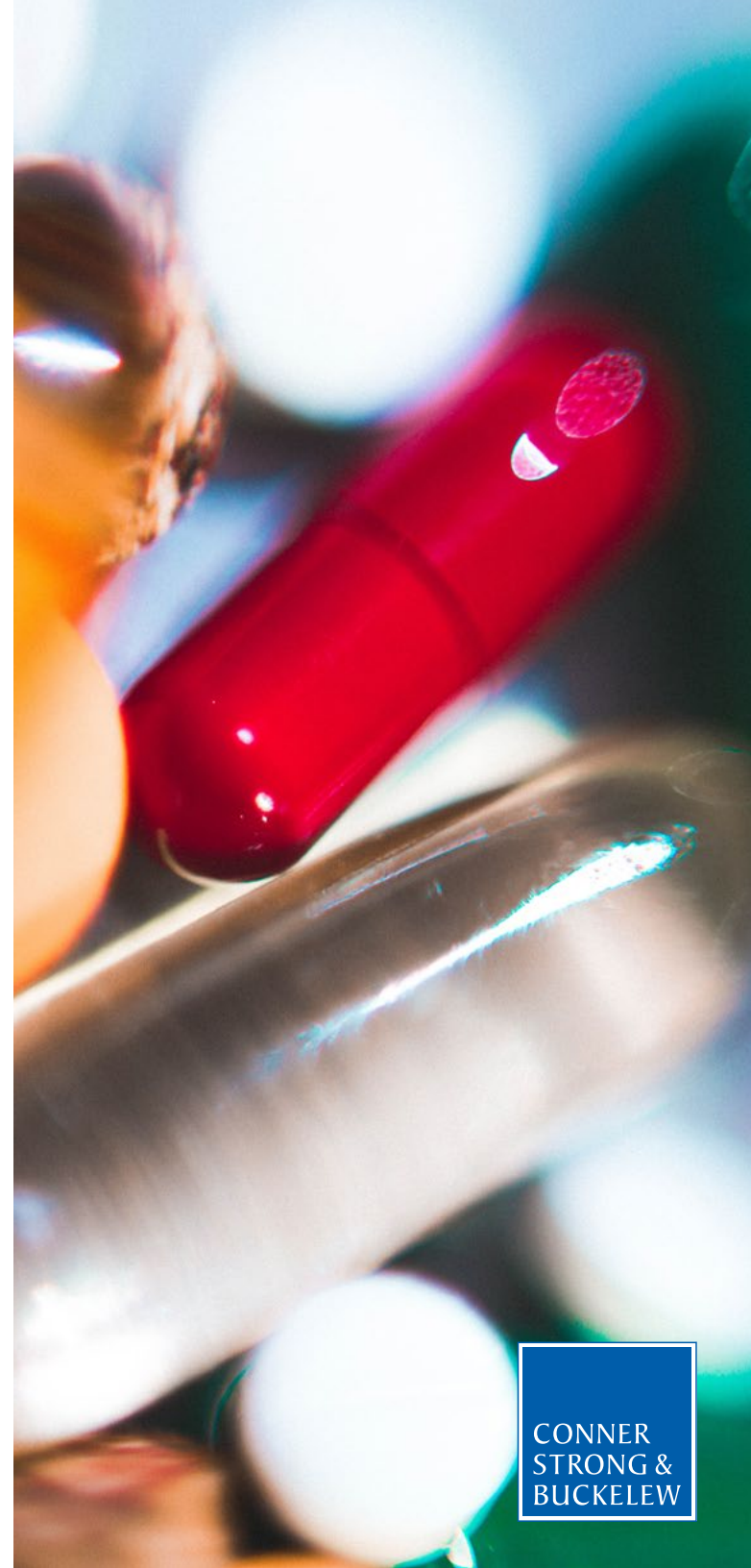
THE PHARMACEUTICAL INDUSTRY'S POSITION

Historically, Pharma Industry Associations discourage noneconomic damages for pets, arguing that “when Courts allow noneconomic damages in pet cases, they step outside of the institutional bounds of the judiciary and undertake changes that should be left to the legislature.”⁸ They also argue that “*noneconomic damages in pet suits will harm manufacturers of medicines for animals.*”⁹ Even though the manufacturer played little or no role in harming the animal, joint and several liability may allow the potential of large damages against the manufacturer if the veterinarian is judgment-proof or has little or no insurance.

The increased availability of noneconomic damages in pet cases will likely make these suits very appealing to trial attorneys. The benefits of holding a manufacturer who played little or no role in harming a pet responsible are far outweighed by the fact that these suits would impact the production, research, and development of new and current medicines. In short, the industry argues that liability against pharmaceutical manufacturers has a history of reducing the number of beneficial products available to American consumers.

⁸ https://www.animallaw.info/sites/default/files/vol11_p283.pdf

⁹ https://www.animallaw.info/sites/default/files/vol11_p283.pdf



INSURANCE IMPLICATIONS

A commercial general liability policy includes coverage for damages or destruction of tangible property as well as the loss of use suffered as a result. Given the state of current damage awards, it would appear that pet injuries by and large fall within the scope of property damage as defined by the policy. An examination of the following insurance contract definitions (see below) suggests insurers have crafted policies based on the wide spread view that animals are chattel and indemnification under a typical commercial liability policy would be treated as property damage:

1. **AUTO** - means a land motor vehicle, trailer or semi-trailer, including any attached machinery or equipment.
2. **BODILY INJURY** - means physical injury, sickness, shock, mental anguish, mental illness, emotional distress, death or disease sustained by any person.
3. **PROPERTY DAMAGE** - means:
 - a. Physical injury to or destruction of tangible property, including the loss of use thereof at any time resulting therefrom; or
 - b. Loss of use of tangible property which has not been physically injured or destroyed.

To the extent that emotional distress is argued, the definition of bodily injury (see above) sets a high bar for recovery due to emotional distress resulting from a pet's injuries since such loss must demonstrate a specific connection between the pet's injury and the bodily injury sustained by a person. However, with the increased availability of noneconomic damages allegations in pet cases, insurers may feel pressure to settle to avoid claim expenses under their commercial general liability contracts.

COVERING THE BASES

Noneconomic damages in pet liability cases are premised on the issue that there was some intentional or outrageous conduct leading to the loss of companionship with the animal. Additionally, they are also allowed when the injury was against the owner and not the animal due to such outrageous conduct. In those matters, courts have refused to extend liability to veterinarians. Existing statutes also explicitly immunize veterinarian professionals in the vast majority of jurisdictions. It then follows that pharmaceutical manufacturers may similarly be immune from liability for unintentional acts.

Both courts and statutes are being tested and a handful of states allow limited recovery for noneconomic damages. One can speculate that as the ability of a pet's owner to seek recovery for loss beyond fair market value evolves, one might expect pressure for commercial insurance policies to respond to claims for noneconomic damages. However for now, there is considerable uncertainty regarding recovering such damages from commercial insurance policies.

While animals are considered to be "property" and therefore compensation for damages due to injured animals are generally limited to the cost of the animal itself in the majority of the states, insurance coverage does not apply to any potential allegation of pain, suffering or emotional distress of the owner of the animal, including loss of "companionship, love and affection."

Any life sciences company that deals with the treatment of animals should consult their broker on these evolving risks to ensure they are covered. Brokers experienced in the nuances of policy language, state law and the implications of new cases that may come to light will be able to secure an adequate insurance package to protect against liability resulting from these potential lawsuits.

To learn more about Conner Strong's approach:

Please contact a Conner Strong & Buckelew representative



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ADDITIONAL SOURCES

Conversation with Ernie Koschineg, Esq., CIPRIANI & WERNER, P.C., 450 Sentry Parkway, Suite 200 Blue Bell, PA 19422; Ekoschineg@c-wlaw.com, Admitted in PA, NJ and NY (See Citations in case sections) Email from Ernie - Thu 5/9/2019 8:14 AM

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Issues and Advocacy: Pet Litigation. Animal Health Institutes see www.ahi.org/issues0advocacy/pet-litigation.

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