

SPOT-ON FLEA & TICK PRODUCT LAWSUITS

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DEFINITION

Spot-on flea and tick products are a convenient ready-to-use liquid that is available in a single-use squeeze on disposable vial in order to kill and alleviate irritations caused by fleas, mites, lice and tick infestations in dogs and cats. Some spot-ons are advertised to also kill heartworms in dogs. Each vial's dose is determined by the weight and age of the animal and is applied directly to the skin, usually between the shoulder blades of the dog or cat. Depending on the brand, the ingredients kill the fleas, ticks and their eggs for four or more weeks. The ingredients in the tube can vary depending on the brand, but usually include active ingredients such as **fipronil** (Frontline, Frontline Plus, Frontline Top Spot), **imidacloprid** (Advantage, Advantix, Advocate), **permethrin** (Elimite, Nix for lice), **pyriprole** (Prac-tic), phenothrin (Ultra Guard) or **selamectin** (Stronghold, Revolution). These neurotoxins are poisons that can harm a pet if not properly applied or used.

FEDERAL LAW

Although consumers might consider these spot-ons to be "drugs," they are actually considered to be pesticides. Because the parasites they control (fleas, ticks, mosquitoes, lice, mites, and heartworms) are considered pests, regulation falls under the Environmental Protection Agency (EPA). Federal law requires EPA registration or licensing of all pesticides before they can be sold to the public.

7 U.S.C. §§ 136-136y, Federal Insecticide, Fungicide, and Rodenticide Act, (FIFRA), regulates the distribution, sale and use of pesticides in the United States. The EPA is responsible for assuring that pesticides sold in the U.S. do not cause unreasonable risks to animal health when used properly.

EPA COMPLAINTS

In 2009, the EPA received an increase in adverse effect complaints of spot-on dog and cat treatments. The adverse effects reported included excessive salivating, vomiting, dilated pupils, loss of appetite, lethargy, tremors, hiding, shivering, skin irritations, disorientation, brain damage, heart attack, violent seizures and death. It was suggested that the increase in complaints was because pet owners, in order to save money, were buying more of these products at retail stores rather than at their more expensive veterinary clinic. As a result, they were not fully educated by a vet as to the dangers and possible side effects of these products. The EPA decided to investigate these complaints and looked into manufacturer's aggregate incident reports and data evaluations from an expert team of veterinarians.

In 2010, the EPA produced its recommendations for spot-on flea and tick treatments without removing or recalling any product from the market place. The EPA found that most of the complaints

demonstrated that the product either had been misused by the pet owner, or that the label was not clear and understandable enough. The EPA found that (1) the most common adverse effects included (a) gastrointestinal or digestive problems, (b) neurological reactions, and (c) skin irritations; (2) that small breed dogs were affected more than larger breed dogs which suggested that the dosage needed to vary more depending on the weight of the dog; (3) that the misuse or accidental exposure of cats to dog products showed that label warnings to not use dog products on cats were not heeded or effective; and (4) that data used to determine toxicity levels for a pet based on size were not accurate.

LAWSUITS AND CLASS ACTIONS

In 2010, the road to litigation started when a 72-year-old dog owner, Frank Bowers, won a landmark decision against Hartz Mountain Corporation, the country's leading maker of pet care products. This case was the first small claims court action of its kind to win against a large corporation like Hartz. Bowers alleged that Hartz Ultra Guard Pro Flea and Tick Drops caused the death of his beloved old English Bulldog, Diesel. The Texas jury awarded Frank Bowers \$4,440.75 for the death of his dog due to the use of Hartz Mountain flea and tick treatment.

Soon thereafter, a lawsuit was filed alleging that Biospot (**Johansson v. Cent. Garden & PET Co.** (N.D. Cal., 2010) brand flea and tick spray was responsible for neurological problems in hundreds of animals, resulting in death in some cases. The suit, filed in federal court in San Francisco, blamed the problem on pyrethrins, organic compounds that kill fleas and ticks, but that also had a long history of poisoning cats. Pyrethrins kill fleas and ticks by interfering with their nervous systems, thus paralyzing and killing the parasites. Pyrethrins can have the same effect on a significant number of pets, causing neurological problems which have often resulted in injury and/or death to the animal. The EPA reported that "pyrethroid spot-ons accounted for more than half of the 'major' pesticide pet reactions reported to EPA over the previous five years, (or those incidents involving serious medical reactions such as brain damage, heart attacks, and violent seizures.)" In contrast, non-pyrethroid spot-on treatments accounted for only about six percent of all major incidents. Five named plaintiffs represented a putative class composed of anyone who bought flea products containing pyrethrins manufactured by the defendants, provided that their claims fell within the applicable statute of limitations. The court transferred the case to the U.S. District Court of New Jersey.

Consequently, five suits, all filed in New Jersey federal court, alleged that so-called spot-on flea and tick treatments contained harmful pesticides that can kill pets and that have been red-flagged by the U.S. Environmental Protection Agency. The plaintiffs in each suit sought damages for breach of express warranty, breach of implied warranty, unjust enrichment, and violation of the New Jersey Consumer Fraud Act. Separate suits targeted Bayer Healthcare LLC, which makes the Advantage brand of flea treatments for cats and dogs, and Merial Ltd., which makes the Frontline brand. Other defendants included Sergeant's Pet Care Products Inc., Hartz Mountain Corp., Farnam Cos. and Central Garden and Pet Co. Class action status was denied in several of the cases because the adverse effects associated with the product were so uncommon, the court categorically rejected plaintiffs' argument that the case could be resolved through class treatment under Federal Rule 23,

even on an individual state level. It explained that each purchaser's claim required intensive individual inquiry to possibly find liability, and thus, individual questions predominated over common ones. Since the vast majority of purchasers got a product that worked perfectly well with no adverse effects, the court found no basis to subject defendants to a certified class action.

Claims such as fraud under the New Jersey Consumer Fraud Act ("NJCF"), unjust enrichment, and breach of express or implied warranties were dismissed in some cases. Several of the cases that dismissed Plaintiff's express warranty claims were not based on the merits of the claim but were dismissed because they were not adequately pleaded. The final disposition of several of the breach of implied or express warranty and product liability claims have yet to be determined.

(See Appendix A)

WHAT TO DO IF YOUR PET IS EXPERIENCING SIDE EFFECTS AFTER USING SPOT-ON PRODUCTS

If you suspect your pet may be experiencing adverse reactions to a spot-on treatment, such as salivating, dilated pupils, tremors, vomiting, hiding, shivering, skin irritations, vomiting, diarrhea, or convulsions, you should:

- (1) Immediately call your veterinarian or emergency animal clinic if symptoms are moderate to severe;
- (2) Read label for instructions of what to do in an emergency;
- (3) Bathe the treated area with mild soap and rinse with large amounts of water;
- (4) Report the incident to the National Animal Poison Control Center (NAPCC) at (888) 426-4435;
- (5) If it is a non-emergency, you can call the National Pesticide Information Center (NPIC) at (800) 858-7378;
- (6) Contact the Georgia Department of Agriculture, Pesticide Complaint Division: 404-656-4958;
- (7) Submit a report to the EPA.

The EPA recommends that you:

- (1) Never use dog treatments on cats, and vice versa;
- (2) Always be certain of your pet's weight before purchase to ensure proper dosage;
- (3) Don't split one "large dog" dose in half for two small dogs (or combine two "small dog" doses for one large dog);
- (4) Read and follow all instructions when using these products;
- (5) Do not use these products on elderly or pregnant animals.

REFERENCES

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www.consumeraffairs.com/flea-and-tick-product-risks-and-recalls
www.law360.com/
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<http://healthypets.mercola.com/>

APPENDIX A - CASE LAW

Arlandson v. Hartz Mountain Corp. (D.N.J., 2011)

Complaint: Plaintiffs, on behalf of themselves and other purchasers of Defendants' products, bring the following causes of action: (1) breach of implied warranty of merchantability (Count One); (2) breach of express warranty (Count Two); (3) violation of the New Jersey Consumer Fraud Act ("NJCFA") against Defendants Hartz and Summit1 (Count Three); and (4) unjust enrichment (Count Four). Specifically, Plaintiffs seek economic damages based upon the difference between the amount they paid for the product and the diminished (or nonexistent) value of the product as a result of it being unsafe to apply to their pets.

Conclusion: Defendants' motions to dismiss are GRANTED as to Counts Two, Three and Four as to all Plaintiffs, and Counts Two, Three and Four are DISMISSED WITHOUT PREJUDICE. Defendants' motions to dismiss are also GRANTED as to Counts One, Three and Four as to New Jersey Plaintiffs only. Counts One, Three and Four as to New Jersey Plaintiffs are DISMISSED as subsumed by the NJPLA. Defendants' motions to dismiss as to Count One are DENIED as to all non-New Jersey Plaintiffs. Defendant Sergeant's motion to dismiss the Complaint pursuant to Rule 12(b)(2), or in the alternative to transfer, is DENIED. An Order follows this Opinion.

NEWARK, N.J. – 6-28-2013 - A settlement in the topical flea and tick treatment products liability class actions coordinated in the U.S. District Court for the District of New Jersey was announced June 26 in a minute order issued following the third settlement conference since June 18 (**Aundria Arlandson, et al. v. Hartz Mountain Corp., et al.**, No. 10-1050 [coordinated], D. N.J.).

Snyder v. Farnam Companies Inc., 792 F.Supp.2d 712, 74 UCC Rep.Serv.2d 592 (D.N.J., 2011)

Complaint: Plaintiffs' Amended Complaint ("Complaint") brings a putative class action on behalf of themselves and other purchasers and users of "spot on" flea and tick treatments for dogs and cats manufactured by Defendants. Defendants manufacture various flea and tick control pesticide

products (“Products”) containing insecticides Permethrin, (S)–Methoprene, Pyriproxyfen, and Etofenprox. The Products are considered “spot on” flea and tick treatments because the pesticide is

applied directly to one or more localized areas on the body of the pet. On April 21, 2009, the Environmental Protection Agency (“EPA”), which regulates the safety of pesticides, issued a press release, reporting a “recent sharp increase in the number of incidents being reported from the use of spot-on pesticide.

Conclusion: While the alleged warranties may later be found to be no more than “puffery,” except in clear cases, this is normally a question of fact for the jury. As such, Defendants' motion to dismiss Count One (Breach of Express Warranty) is denied.

Johansson v. Cent. Garden & Pet Co., 804 F.Supp.2d 257 (D.N.J., 2011)

Complaint: Plaintiffs, on behalf of themselves and other purchasers of Defendants' Products, bring the following causes of action: (1) violation of the California Unfair Competition Law (Count One); (2) breach of implied warranty of merchantability (Count Two); (3) violation of the Magnuson–Moss Warranty Act, 15 U.S.C. § 2310(d)(1) (Count Three); (4) strict products liability (Count Four, mislabeled Count Five); (5) violation of the California Consumer Legal Remedies Act, Cal. Civ.Code § 1770(a) (Count Five, mislabeled Count Six); and (6) punitive damages pursuant to Cal. Civ.Code § 3345 (Count Six, mislabeled Count Seven).

Conclusion: Defendants' motion to dismiss is GRANTED as to Counts Two and Three, and Counts Two and Three are DISMISSED WITHOUT PREJUDICE. Defendants' motion to dismiss is DENIED as to all other Counts. An Order follows this Opinion.

Mahtani v. Wyeth & Animal Health Int'l, Inc. (D.N.J., 2011)

Plaintiffs' final claim is that defendant warranted that ProMeris was safe when used as directed, and that defendant breached this warranty by selling to plaintiffs a product that is unsafe even when used as directed. (Moving Br. at 23-24.) New Jersey's version of the Uniform Commercial Code-Sales governs express warranty claims. Based on the foregoing, individual issues of fact predominate over common issues, and plaintiffs' motion for class certification is denied.

McDonough v. Bayer Healthcare, LLC (D.N.J., 2011)

Plaintiffs' Amended Complaint (“Complaint”) brings a putative class action on behalf of themselves and other purchasers and users of “spot on” flea and tick treatments manufactured by Defendant. Plaintiffs, on behalf of themselves and other purchasers of Defendant's product, bring the following causes of action: (1) breach of express warranty (Count One); (2) breach of implied warranty of merchantability (Count Two); (3) unjust enrichment (Count Three); and (4) violation of the New Jersey Consumer Fraud Act (“NJCFA”) (Count Four). Specifically, Plaintiffs seek economic damages based upon the difference between the amount they paid for the product and the diminished (or nonexistent) value of the product as a result of it being unsafe to apply to their pets. For the reasons stated above, Defendant's motion to dismiss is GRANTED as to Counts Two, Three and Four, and

Counts Two, Three and Four are DISMISSED as subsumed under the NJPLA. Defendant's motion to dismiss as to Count One is DENIED, and Defendant's motion to strike is GRANTED.

Smith v. Merial Ltd. (D.N.J., 2012)

First, the Court ruled that plaintiffs' claims are not pre-empted by the Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. § 136 ("FIFRA").⁶ (Arlandson Op. at 13-14, ECF No. 77.) Second, the Court dismissed plaintiffs' New Jersey CFA claim after ruling that New Jersey's Products Liability Act ("PLA") - and not its CFA - is the governing statute for the harm caused to plaintiffs' pets by defendants' products. (Id. at 16 (citing N.J.S.A. § 2A:58C-1(b)(3)).) Accordingly, any plaintiff entitled to seek relief under New Jersey law had to amend his pleading to assert a claim under New Jersey's PLA (the "CFA/PLA Claim"). Third, the Court made several choices of law determinations in the District of New Jersey Cases that adversely affect the likelihood of class certification in these cases. Therefore, at present, the Court will require additional and limited briefing on certain class certification issues.

Bayer HealthCare LLC And Merial Limited Flea Control Products Marketing and Sales Practices

Litigation, MDL #2319, in the U.S. District Court for the Northern District of Ohio.

February 7, 2012 -- The U.S. Judicial Panel on Multidistrict Litigation centralized in Ohio six class actions claiming Bayer HealthCare LLC and Merial Ltd.'s Frontline and Advantage flea and tick products are ineffective and accusing the companies of running deceptive advertisements for those products. In an order assigning the MDL to U.S. District Judge Daniel A. Polster, the panel said the responding plaintiffs, including one among three additional related actions that could be joined to the suit, had unanimously chosen Ohio's Northern District as the venue for consolidation.

March 19, 2013 -- A federal judge on Tuesday tossed out multidistrict litigation claiming Bayer HealthCare LLC's Advantage and Merial Ltd.'s Frontline flea and tick medications are ineffective and accusing the companies of running deceptive advertisements for the products.

Simms, et al. v. Bayer Healthcare, et al. (U.S. Dist. Ct of Appeals, 6th Circ., 2014)

This case involves multidistrict litigation focused on whether defendants Bayer and Merial falsely advertised their flea-and-tick products for pets. In an effort to streamline the case, the district court framed the case as turning on a single issue, and crafted a case management plan in which Bayer and Merial would bear the initial burden of producing studies to substantiate their advertising claims. After Bayer and Merial met their burden, the burden would shift to the plaintiffs to refute the studies, showing how the studies were unreliable, inaccurate, or incomplete. The plaintiffs' failure to carry their burden would result in dismissal of the case. The plaintiffs agreed to the case management plan, but then at the end of the process wanted to instead conduct discovery relating to issues besides the agreed-on dispositive issue. The district court denied most of the plaintiffs' discovery requests, and granted summary judgment to Bayer and Merial. The doctrines of waiver and invited error preclude plaintiffs' arguments that go to the heart of the case management plan. In light of the case management plan, therefore, we conclude that the judgments of the district court must be AFFIRMED.



03-17-2014 - EPA Secures Removal of Pesticide from Pet Collars

Two pet collar companies agreed to phase out products containing the pesticide **propoxur** after the U.S. Environmental Protection Agency found that use of the chemical in flea and tick collars endangered children's health, the agency said on Friday.

Credit to Kaye Klapper

