

[Products Liability Law Daily Wrap Up, CAUSATION—FOOD AND BEVERAGES—D. N.M.: Without expert testimony, rancher unable to prove improper feed poisoned animals, \(May 9, 2019\)](#)

Products Liability Law Daily Wrap Up

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By David Yucht, J.D.

Discovery rule violations resulted in the exclusion of the rancher's expert evidence; and consequently, he lacked proof that contaminated feed caused the death of his horses.

A veterinarian, retained by a rancher who claimed that his animals had been poisoned by improper feed, was precluded from offering an expert opinion because of the rancher's failure to comply with discovery rules according to a ruling by the federal district court in New Mexico. Without expert testimony, the rancher could not prove the causation element of his claims against the feed manufacturer. Therefore, his causes of action alleging negligence, negligence per se, and strict products liability against the feed maker were dismissed ([Derrick v. Standard Nutrition Co.](#), May 8, 2019, Brack, R.).

A rancher, who owned a horse breeding program, contracted with a feed manufacturer for a customized feed for his horses and cattle. However, an order for 24,000 pounds of the specified feed inadvertently contained 3,500 pounds of a different feed. Two of the rancher's horses died after being given contaminated feed and others were sickened. Subsequently, four other horses died. His veterinarian took tissue and stomach contents samples from the two dead horses. The tissue samples had broken down too far to yield conclusive results. Samples from the feed showed that at least part of it contained 1.2 parts per million (ppm) of monensin, an antibiotic sometimes added to cattle feed. The veterinary toxicologist who analyzed the feed indicated that at this concentration, "a 1000 lb. horse would have to consume more than its body weight in feed to get a lethal dose of monensin." The rancher brought several claims against the feed manufacturer, including strict liability, negligence and negligence *per se* claims. The manufacturer moved for partial summary judgment and to preclude the expert testimony of the rancher's veterinarian.

Expert testimony. The court ruled that the rancher may only utilize his veterinarian as a fact witness. The court noted that the rancher failed to properly disclose his expert witness by the scheduling deadline that had been set by the court. During oral argument on a late motion to extend that deadline, the rancher's lawyer advised the court that he was unprepared to identify any liability and causation experts and "was unsure whether he ever would have any such experts." The rancher failed to comply with the relevant rules regarding the disclosure of experts. Consequently, he could not call his veterinarian as an expert witness. The court, however, allowed the rancher to call the veterinarian as a lay witness to testify concerning his observations and actions on the day he examined the horses. The doctor would not be permitted to discuss monensin or offer an opinion on causation/diagnosis.

Causation. The court granted the feed manufacturer's motion for summary judgment as to the rancher's negligence, negligence per se, and strict liability claims. The central issue in this case was the causation element of the rancher's claims. The rancher contended that the monensin present in the feed injured and killed several of his horses. However, he failed to present any expert testimony to dispute the assertion that there was not enough monensin present to injure his animals. The rancher's theory that there were pockets of feed with more monensin than the amount that was present in the analyzed sample was "shaky at best." Furthermore, the rancher had no expert testimony to support his theory that the horses were injured or died as a result of monensin poisoning. The rancher argued that four other horses had died due to monensin exposure, yet he failed to submit evidence of testing on any of these other horses. Also, his assertion that the remaining living

horses showed signs of monensin exposure was equally unsupported. Knowledge of monensin poisoning clearly was not “within the province of a common person” and, therefore, required expert testimony to be demonstrated.

Other issues. The court also dismissed claims for negligent infliction of emotional distress. The rancher's motion for summary judgment on his claims of fraud, negligent misrepresentation, unfair trade practices were denied. The court dismissed the rancher's claims for breach of contract and breach of implied warranty of merchantability because under New Mexico law, both claims required proof of causation.

The case is [No. 2:17-cv-01245-RB-SMV](#).

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Companies: Standard Nutrition Co. d/b/a A-C Nutrition LP, a Texas Ltd. Partnership

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