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Courts and Legislatures Have Kept the Proper Leash on Pet Injury Lawsuits
*Why Rejecting Emotion-Based Damages Promotes
The Rule of Law, Modern Values, and Animal Welfare*

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Abstract

This article addresses a highly dynamic area of animal law: how much an owner can recover when his or her pet is wrongfully injured or killed.

The article focuses mostly on cases involving negligence. The article's first part explains what owners can get under current laws, namely economic compensation for their pet as well as any reasonable and necessary medical or other expenses incurred as a result of the incident. If the economic compensation for the pet cannot be derived through the pet's market value, there are alternative methods for calculating damages to assure proper compensation.

The remainder of the article captures the debate over whether the compensation can include emotion-based damages, such as pain and suffering, emotional distress and loss of companionship. Courts and legislatures have broadly rejected these damages, and this article explains why, delving into the legal theory and social values debated when this issue arises.

In short, courts have held that the tort system does not compensate for relational attachments, including with pets. Courts have pointed out that this is the same reason why, for example, emotion-based damages are not compensable for harm to close personal relations, such as a cousin, fiancée, or human best friend, or for cherished personal property.

The article concludes that keeping emotion-based damages out of pet litigation is, ultimately, what is best for pets themselves. Adding new, uncertain liability to pet litigation would cause the price of pet welfare services and products prices to rise. If owners cannot afford to pay these higher costs, then many pets will not get the care they need.

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Introduction

Since the 1950s, Patti Page has had us singing, “How much is that doggie in the window?” The new refrain from some pet owners is, “How much is that doggie worth in the courtroom?” This is because in the past thirty years, some pet owners have filed lawsuits seeking an array of new emotion-based damages, including emotional distress, pain and suffering, and loss of companionship, as part of pet injury-related claims. This litigation has been highly contentious and controversial with good, pet-loving people on both sides of the debate.

National and state-based groups that focus on pet welfare and pet ownership have generally opposed emotion-based recovery in pet litigation.¹ Their concern is that injecting these damages into pet-injury litigation will drive up costs of veterinary care and other services and products important to America’s pets—just like it has done in the human healthcare system. At litigation-inflated prices, many owners will not be able to afford some of the services and products their pets need. In some cases, the quality of the pets’ lives will be lowered. In others, the impact on pets can be devastating; owners may be forced to euthanize their pets or choose not to own pets if they cannot or will not pay the higher cost of treating pet illnesses or injuries.

Advancing this litigation is a dedicated group of animal rights activists, animal legal foundations, and a select group of owners and lawyers.² While some plaintiffs seek the monetary benefit from the litigation, most are driven by their ideological belief that pets should have greater legal rights than they currently have, potentially equal to those of human beings.³ They contend that many owners treat their pets as children, and the law should as well. Some owners have even waived their rights to recover their economic losses in order to expedite appellate review of the availability of emotion-based damages.⁴

¹ See, e.g., *Amici Curiae* Brief of the American Kennel Club, Cat Fanciers’ Association, Animal Health Institute, American Veterinary Medical Association, National Animal Interest Alliance, American Pet Products Association, and Pet Industry Joint Advisory Council in Support of Petition for Review at 1, *Strickland v. Medlen*, 397 S.W.3d 184 (Tex. 2013) (No. 02-11-00105-CV) (urging the court to overturn a decision allowing for sentimental damages in a case where a shelter euthanized the owner’s dog despite a hold notice that the owner was to pick up the dog).

² See generally Richard L. Cupp Jr., *Moving Beyond Animal Rights: A Legal/Contractualist Critique*, 46 SAN DIEGO L. REV. 27 (2009) [hereinafter Cupp Jr., *Legal/Contractualist*].

³ The American Bar Association’s Journal reported that animal rights lawyers acknowledge that their “rights” agenda in these cases can differ from the monetary interests of the owners who are plaintiffs in the cases. Terry Carter, *Beast Practices: High-Profile Cases Are Putting Plenty of Bite into the Lively Field of Animal Law*, 93-NOV A.B.A. J. 39, 41 (2007) (quoting one of the lawyers as saying, “I’m in it to remind everyone that, while there are grieving guardians, we’re here for the animals, and this is a unique opportunity to evolve the law”).

⁴ See, e.g., *McMahon v. Craig*, 97 Cal. Rptr. 3d 555, 559 (Cal. Ct. App. 2009); *Goodby v. Vetpharm, Inc.*, 974 A.2d 1269, 1271 (Vt. 2009).

Claims seeking emotion-based damages have been brought in some thirty-five states, mostly over the past twenty years. The courts hearing the claims have dismissed them.⁵ They have held that under American tort jurisprudence, when people, including pet owners, do not have physical injuries themselves, they are not permitted to seek emotion-based damages. There are some exceptions for when the injury is to a spouse or child, or the plaintiff was in the “zone of danger,” but these exceptions do not apply in pet cases.⁶ Also, there are no statutes that permit broad emotion-based damages for pets. Wrongful death acts are generally limited to spouses and children and do not include fiancés, cousins, human best friends or pets.⁷

In the last few years, advocates of this litigation have repackaged these lawsuits, often invoking novel legal theories, including alternative measures for property damage and basing claims against kennel operators and veterinarians in contract law. They also have turned to state legislatures to authorize the recoveries. How this issue plays out will have an enormous impact on many Americans and their pets. This is because claims over emotional injuries for pet loss could reach hundreds of thousands of dollars and would arise in a variety of circumstances implicating many aspects of society, including allegations of veterinary malpractice, car accidents, neighborly pet scuffles, and police actions, to name a few.

⁵ Appellate courts denying emotional loss recovery in pet cases include Alaska, Arizona, California, Connecticut, Delaware, Florida, Georgia, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Massachusetts, Michigan, Minnesota, Missouri, Nebraska, Nevada, New Jersey, New Mexico, New York, North Dakota, Ohio, Oregon, Pennsylvania, Rhode Island, South Carolina, Texas, Vermont, Virginia, Washington, West Virginia, and Wisconsin. *Amicus Brief of the American Kennel Club et al., in Support of Petition for Review, supra* note 1 at 4-7; *see also* Victor E. Schwartz & Emily J. Laird, *Non-economic Damages in Pet Litigation: The Serious Need to Preserve a Rational Rule*, 33 PEPP. L. REV. 227, 236-37 (2006) (listing twenty five such states).

⁶ *See* DAN B. DOBBS, *THE LAW OF TORTS* § 309, at 839 (2000) [hereinafter Dobbs, *Torts*]; *see also* Vaillancourt v. Med. Ctr. Hosp. of Vt. Inc., 425 A.2d 92 (1980) (describing, for example, Vermont’s zone of danger test); Dale Joseph Gilsinger, *Recovery Under State Law for Negligent Infliction of Emotional Distress Due to Witnessing Injury to Another Where Bystander Plaintiff Must Suffer Physical Impact or Be in Zone of Danger*, 89 A.L.R.5th 255 (originally published in 2001); Dale Joseph Gilsinger, *Immediacy of Observation of Injury as Affecting Right to Recover Damages for Shock or Mental Anguish from Witnessing Injury to Another*, 99 A.L.R.5th 301 (originally published in 2002).

⁷ *See* DAN B. DOBBS, *HANDBOOK ON THE LAW OF REMEDIES: DAMAGES-EQUITY-RESTITUTION* § 8.2, at 552-56 (1973) [hereinafter Dobbs, *Remedies*] (surveying wrongful death statutes); *RESTATEMENT (SECOND) OF TORTS* § 925 (1979) (describing types of wrongful death statutes); *see, e.g.*, CAL. CIV. PROC. CODE § 377.34 (West 2013) (prohibiting noneconomic damages, such as pain and suffering); R.I. GEN. LAWS § 10-7-1.2 (1956) (permitting damages for loss of consortium in a husband-wife relationship and for loss of society and companionship in a parent-child relationship); *Russell v. Salem Trans. Co.*, 295 A.2d 862, 865 (N.J. 1972) (denying noneconomic loss of consortium damages to parent-child relationship); *Liff v Schildkrout*, 404 N.E.2d 1288, 1292 (N.Y. 1980) (“The Legislature, by including the pecuniary injury limitation in its statutory scheme, clearly intended that damages for loss of consortium should not be recoverable in wrongful death actions.”).

This article captures and analyzes this ongoing legal debate. As a pet owner myself, I fully understand the deep emotional ties people and pets share and empathize with anyone who loses a pet. My puppy Riley adds tremendous value to my family's life, as has my dog Quincy, who my mom trained to be a therapy dog and visits elderly shut-ins and children in school-reading programs with her. At the end of the day, this article sides with the animal owner and animal welfare groups, not the animal rights groups. Courts and legislatures should continue rejecting emotion-based damages in animal injury cases. This result is better for America's pets, is in step with American tort jurisprudence, and establishes the right public policies.

Part I of this article discusses the current rights of owners for recovery when their pets are injured or killed. Part II examines the initial efforts to introduce emotion-based damages in pet injury and death cases, which generally looked to extend theories for recovery of human family members to pets. Part III explores some of the new theories, particularly novel property valuations. Part IV provides a summary of the state legislative landscape. Part V looks behind the veil of the advocates' arguments for changing the law. Part VI looks at the public policy implications of introducing emotion-based damages into pet litigation, including the impact on pet welfare and the potential proliferation of pet litigation. Finally, Part VII concludes the article and looks for potential areas for common ground.

I. The Current Legal Environment for Pet Injury Claims

The legal rights and responsibilities governing animal ownership and animal care in the United States have been remarkably consistent for the entirety of American jurisprudence. Courts in every state have long held that pets are characterized as property under civil and criminal law, while recognizing the special, emotional bonds that owners have with their pets.⁸ Such laws have created a stable legal system that promotes responsible animal ownership, deters animal abuse, and allows for innovative, affordable, and quality animal care.

Under this system, owners whose pets are wrongfully injured or killed are able to be fully and fairly compensated for their economic losses. In assessing economic damages, courts look at a variety of costs.⁹ They often start with assessing the economic value of the pet. If a pet has significant market worth, the

⁸ It is uncontroverted that animals are classified as the property of their owners. The Animal Legal Defense Fund has stated this point in their amicus briefs in cases seeking emotion-based damages. *See, e.g.*, Brief In Amicus Curiae at 10, *Goodby*, 974 A.2d 1269 (No. 2008-030) (“Animals are considered property in every United States jurisdiction”); Brief of Amicus Curiae Animal Legal Defense Fund in Support of Appellant at 2, *Carbasha v. Musulin*, 618 S.E.2d 368 (W. Va. 2005) (No. 32288) (“Companion animals are considered property”).

⁹ *See* VICTOR E. SCHWARTZ ET AL., *PROSSER, WADE AND SCHWARTZ'S TORTS: CASES AND MATERIALS* 548-50 (11th ed. 2005).

fair-market value of the pet may be an appropriate measure for this loss.¹⁰ In these cases, experts can testify, for example, as to the breeding, pedigree, personal characteristics of the animal, capabilities of the pet, and whether its offspring would be valuable.¹¹ For working pets, such compensation can include replacement and training costs.¹²

Most pets, like my dogs, are deeply cherished, but have little or no market value. In cases involving these pets, many courts have allowed juries to base a pet's economic worth on factors other than market value, including original cost, specialized training and cost of replacement. These alternative measures of economic damages are commonly referred to as the pet's "actual" or "intrinsic" value.¹³ As discussed in detail later in this article, how these damages are measured is a developing area of law, though courts have been clear that they include only economic factors, not sentiment or emotion.¹⁴

In addition to increased flexibility in measuring the economic worth of a lost pet, states are now allowing owners to recoup other economic costs incurred as a result of the incident. Unlike in traditional property cases, courts have ruled that these other costs are in addition to and can exceed the economic value of the pet. For example, several states now include reasonable and necessary veterinary expenses incurred as a result of the injury.¹⁵ A policy judgment has been made in these states that this additional recovery facilitates animal welfare. Owners can provide their pets with proper treatment after a pet has been wrongfully injured with a reasonable expectation that the costs will be recovered from the tortfeasor.

¹⁰ See, e.g., *S.A. Gerrard Co. v. Fricker*, 27 P.2d 678, 681 (Ariz. 1933) (finding that the "true measure of damages" for the loss of plaintiff's bee colony is "the market value of them at the time of their loss or destruction"); *Wright v. Edison*, 619 S.W.2d 797 (Mo. Ct. App. 1981) ("The measure of damages to animals is the difference between fair market value of the animals immediately before and immediately after the alleged injury.").

¹¹ Richard L. Cupp, Jr. & Amber E. Dean, *Veterinarians in the Doghouse: Are Pet Suits Economically Viable?*, 31-SPG BRIEF 43, 47 (2001) (detailing these and other potential economic recoveries); see also ARIZ. REV. STAT. ANN. § 44-1799.05(C) (2013) (stating available remedies for purchasing an animal unfit for sale may include refund, replacement of the animal, or cost of reasonable veterinary services).

¹² See ARIZ. REV. STAT. ANN. § 13-2910(E) (2013) (providing that damages for killing a working or service animal are the animal's replacement value, training costs, and any veterinary bills).

¹³ See *infra* Part III.A.

¹⁴ See *infra* Part III.A.

¹⁵ See, e.g., *Martinez v. Robledo*, 147 Cal. Rptr. 3d 921 (Cal. Ct. App. 2012) ("[A]llowing an injured pet's owner to recover the reasonable and necessary costs incurred in the treatment and care for the animal attributable to the injury is a rational and appropriate measure of damages."); *Leith v. Frost*, 899 N.E.2d 635, 641 (Ill. App. Ct. 2008) (allowing for "reasonable and customary costs of necessary veterinary care and treatment"); *Burgess v. Shampooch Pet Industries, Inc.*, 131 P.3d 1248, 1252 (Kan. Ct. App. 2006) (upholding damage award for veterinary bills); *Kondaurov v. Kerdasha*, 629 S.E.2d 181, 186 (Va. 2006) (stating that out-of-pocket expenses must be "reasonable and necessary").

In cases involving negligence, the damages calculation ends here: an owner can receive the economic value of his or her pet, determined by its market value or other economic valuation, plus certain costs stemming from the incident that injured the pet.

In cases involving malicious, intentional acts against an animal, such as an act of animal cruelty, most states allow additional damages. In states where punitive damages are available for tort actions, punitive damages can be awarded in pet cases to punish such malicious conduct.¹⁶ These awards have been substantial and can be effective deterrents.¹⁷

In some of the cases, the malicious act against the pet is committed for the purpose of inflicting emotional distress on the owner. These cases are reminiscent of the movie “Fatal Attraction” in which Glenn Close’s character kills a rabbit to inflict emotional pain on Michael Douglas’s character. Courts treat these cases the same as traditional claims for intentional infliction of emotional distress, which generally require the defendant’s act against a person to be outrageous and cause several emotional distress. In Kentucky and Idaho, the courts explained that the target of the act is still the owner; the fact that the defendant injured the owner’s animal to intentionally inflict emotional distress on the owner can be used to satisfy the outrageousness of the defendant’s conduct.¹⁸

There have been two fairly recent offshoots of these intentional infliction of emotional distress cases. In 2006, the Washington Court of Appeals in *Womack v. Von Rardon* allowed an action for malicious injury to a pet.¹⁹ In this

¹⁶ See, e.g., *Dolan v. Pearce*, No. CIV.A. 97-7519, 1998 WL 252114, at *5 (E.D. Pa. May 19, 1998) (finding punitive damages appropriate in a case involving injury to animals caused by defendant’s “reckless indifference”); *Acheson v. Shafter*, 490 P.2d 832, 835 (Ariz. 1971) (upholding punitive damages for a willful tort against one’s personal property); *Propes v. Griffith*, 25 S.W.3d 544 (Mo. Ct. App. 2000) (upholding punitive damages award against a woman who killed her neighbor’s dog through “malicious, willful, and intentional action”).

¹⁷ See, e.g., *Burgess v. Taylor*, 44 S.W.3d 806, 813 (Ky. Ct. App. 2001) (upholding a \$75,000 punitive damages award); Associated Press, *Family Gets \$56,400 in Dog’s Death*, SEATTLE TIMES, May 31, 2006 (Local News), available at http://seattletimes.com/html/localnews/2003031484_webdog31.html (awarding \$50,000 in punitive damages).

¹⁸ See *Gill v. Brown*, 695 P.2d 1276, 1278 (Idaho Ct. App. 1985) (barring cause of action for negligent infliction of emotional distress where defendant shot and killed plaintiff’s donkey, but allowing a claim for intentional infliction of emotional distress if the plaintiff could prove “that [defendant’s] conduct was reckless and that they thereby suffered extreme mental anguish and trauma”); *Burgess*, 44 S.W.3d at 813 (holding that a claim for intentional infliction of emotional distress is not “precluded simply because the facts giving rise to the claim involve an animal”).

¹⁹ 135 P.3d 542, 546 (Wash. Ct. App. 2006) (holding “malicious injury to a pet can support a claim for, and be considered a factor in measuring a person’s emotional distress damages”); see also *Paul v. Osceola Cnty.*, 388 So. 2d 40, 41 (Fla. Dist. Ct. App. 1980) (holding, where animal control was accused of improperly killing plaintiff’s cat, that plaintiff could not recover for negligent infliction of emotional distress—only where there was “malice or intentional destruction”).

case, several teens poured gasoline and lit a neighbor's cat on fire.²⁰ In 2012, a California Court of Appeal in a case involving a long-running dispute between neighbors permitted a dog's owners to recover mental distress after their neighbor hit their dog with a baseball bat.²¹ In both cases, the owners did not have to prove that they were the targets of these acts. Though the courts did not state this directly, committing an outrageous act against animals the defendants knew were cherished pets of neighbors and would cause these neighbors severe emotional distress was essentially equated with intending to cause the neighbors this emotional harm.

Under this civil liability regime, owners have received significant compensation for pet-related claims in both negligence and malicious harm cases, often receiving far in excess of a true fair market value calculation of what a pet might be worth. In Oregon, for example, a neighbor repeatedly ran over a dog in front of the dog's owners and their children.²² The family was awarded \$56,400, which included \$50,000 in punitive damages and several thousand dollars for intentional infliction of emotional distress.²³ Noneconomic damages, including loss of companionship, were not permitted.²⁴ The family's attorney was delighted with the recovery saying, "God I'm pleased . . . \$50,000 is a great price to levy on a dog killer."²⁵

With regard to negligence cases, the Animal Legal Defense Fund has reported that veterinary malpractice cases settle for several thousand dollars and have increased ten-fold in recent years without any change in law.²⁶ For example, in 1994, in an Ohio veterinary malpractice case over the paralysis of a dog, the owner was awarded \$5,000.²⁷ Many recoveries since then have been much greater. In 2009, the *South Florida Sun Sentinel* reported that a boarding kennel suit resulted in a \$30,000 award, which included \$20,000 for the dog's "intrinsic"

²⁰ *Womack*, 135 P.3d at 542.

²¹ *Plotnick v. Meihaus*, 146 Cal. Rptr. 3d 585, 591 (Cal. Ct. App. 2012).

²² Sarah Skidmore, *Pets' Legal Value May Be on Rise: Suit over Dog's Death Could Change View of Pets as Property*, SPOKESMAN-REVIEW, May 23, 2006, at B6.

²³ Associated Press, *supra* note 17.

²⁴ *Id.*

²⁵ *Id.* (internal quotations marks omitted).

²⁶ Peter Lewis, *What's Fido Worth? Almost Nothing*, MSN MONEY, <http://articles.moneycentral.msn.com> (last visited Aug. 11, 2009).

²⁷ *McDonald v. Ohio State Univ. Veterinary Hosp.*, 644 N.E.2d 750, 752 (Ohio Ct. Cl. 1994) (holding that noneconomic damages are "not a proper element in the determination of damages caused to animals").

value.²⁸ Settlements in veterinary malpractice cases often exceed \$10,000.²⁹ The “Closed Claim Forum” in the American Veterinary Medical Association’s Professional Liability newsletter regularly includes reports of settlement for multiple times that amount, including a recent \$31,750 award for an injured dog.³⁰ These awards often include costs of veterinary care, travel expenses, lost wages and other economic harms in addition to the value of the harmed pet.

Overall, owners are being fairly and reasonably compensated for injuries to or the loss of their pets. Recoveries are not artificially limited to some low market value. They often include a variety of economic costs to assure that owners are made financially whole.

II. Recent American Jurisprudence on Emotion-Based Damages in Pet Litigation

As indicated above, courts have been open to evolutions in the law with regard to economic damages and malicious acts in litigation over harm to pets. However, they have not been receptive to claims seeking emotion-based damages, namely pain and suffering for the owner or pet, the owner’s emotional distress from the pet’s injuries, and the owner’s loss of companionship. These claims have been tried, but have largely failed.

In explaining why emotion-based damages are not compensable in pet injury cases, courts have properly put these claims into context of when such damages are and are not available in other, comparable situations.³¹ As discussed below, when a person (here the owner) is not injured him or herself, emotion-based damages are generally not permitted even though a person may have

²⁸ Sallie James, *Boca Woman Wins \$30,000 After Suing Pompano Kennel over Rottweiler Death*, SOUTH FLORIDA SUN SENTINEL, April 30, 2009 (State and Regional News) (reporting that \$20,000 was awarded for the pet’s “intrinsic” value); see also *Petco Animal Supplies, Inc. v. Schuster*, 144 S.W.3d 554, 563 (Tex. Ct. App. 2004) (a comparable Texas case approving more than \$9,000 in damages for replacement costs, training, microchip implantation, lost wages and attorney’s fees).

²⁹ Cassio Furtado, *Lawsuits Blame Vets for Harm to Pets*, TAMPA TRIBUNE, May 24, 2003 at 1 (Nation/World) (citing Stephen Wise); see also Mary Ann Fergus, *Putting a Price on Pet Grief*, CHI. TRIB., Apr. 2, 2007 (discussing settlements and verdicts); Laura Parker, *When Pets Die at the Vet, Grieving Owners Call Lawyers*, USA Today, Mar. 15, 2005, at A1 (reporting on a California case where an owner was awarded \$28,000 in damages after her Rottweiler had to have its teeth capped after a bungled dental surgery).

³⁰ See, e.g., *Closed Claims Report*, 31 PROF’L. LIAB., no. 4, Fall 2012, at 2 (reporting on a \$31,750 award that included medical expenses, travel expenses and lost wages).

³¹ See Dobbs, *Torts supra* note 6, § 310, at 841-43 (discussing loss of consortium claims); Bruce I. McDaniel, *Recovery for Mental or Emotional Distress Resulting from Injury to, or Death of, Member of Plaintiff’s Family Arising from Physician’s or Hospital’s Wrongful Conduct*, 77 A.L.R.3d 447 (originally published in 1977); see also *Hislop v. Salt River Project Agric. Improvement and Power Dist.*, 5 P.3d 267, 272 (Ariz. Ct. App. 2000) (rejecting, for example, recovery for negligent infliction of emotional distress for witnessing death of close friend and co-worker).

suffered real and severe emotional harm at someone else's wrongdoing. As discussed below, in most states the only exceptions are for when the harm is to a spouse or child.

People, though, have sought emotional loss in many situations, including for the deaths of close cousins, fiancées, and human-best-friends, with which they had strong mutual attachments.³² People also have sought noneconomic damages for the loss of property, such as treasured family heirlooms, which have high personal worth but no market value.³³ Courts hearing these claims, just as in pet-related cases, have expressed their deep appreciation for the emotional hardship of losing a close relation or cherished property, but they have steadfastly separated these emotions from creating new, uncertain liability law.³⁴

This section discusses the initial pet-related claims, which focused largely on two legal theories. First, owners argued they should have an independent cause of action for emotional distress for negligent injuries to their pets, just as they might for spouses or children. Second, even if no separate cause of action is available, the owners have said they should be able to recover their loss of companionship or some other noneconomic damage to account for a pet's emotional value to its owner. These claims have been widely rejected.³⁵

A. Independent Causes of Action

The most common independent cause of action offered in pet cases has been negligent infliction of emotional distress, with others seeking causes of action for loss of companionship and wrongful death. In dismissing these claims, the courts have engaged in the same type of line-drawing that is common throughout tort law, namely that the law must be “mindful of the difficulty to be encountered if courts were required to determine which personal relationships

³² See, e.g., *Harris v. Sherman*, 708 A.2d 1348, 1350 (Vt. 1998) (stating, in fiancée case, that the law must be “mindful of the difficulty to be encountered if courts were required to determine which personal relationships were sufficiently harmed to merit recovery”).

³³ See W.E. Shipley, *Recovery for Mental Shock or Distress in Connection with Injury to or Interference with Tangible Property* § 12, 28 A.L.R.2d 1070 (originally published in 1953); W.E. Shipley, *Measure of Damages for Conversion or Loss of, or Damage to, Personal Property Having No Market Value*, 12 A.L.R.2d 902 (originally published in 1950); see also *Mieske v. Bartell Drug Co.*, 593 P.2d 1308 (1979) (involving unique film).

³⁴ See, e.g., *Guilmette v. Alexander*, 259 A.2d 12, 14-15 (Vt. 1969) (“[I]t has never been suggested that everyone who is adversely affected by an injury inflicted upon another should be allowed to recover his damages.”) (internal quotation marks omitted); *McMahon v. Craig*, 97 Cal. Rptr. 3d 555, 568 (Cal. Ct. App. 2009) (rejecting emotion-based damages even though the court “recognize[d] the love and loyalty a dog provides creates a strong emotional bond between an owner and his or her dog”); *Pacher v. Invisible Fence of Dayton*, 798 N.E.2d 1121, 1125-26 (Ohio Ct. App. 2003); *Rabideau v. City of Racine*, 627 N.W.2d 795, 798-99 (Wis. 2001).

³⁵ See *In Re Pet Foods Prods. Liab. Litig.*, No. 07-2867(NLH), 2008 WL 4937632, at *10 (D.N.J. 2008) (“[I]n almost every state in the Union, the current state of the law is that emotional damages are not recognized as a recoverable damage for pets.”).

were sufficiently harmed to merit recovery.”³⁶ They have expressed concern that if the gates to emotion-based tort recovery are opened, whether in pet or other cases, a cause of action for emotion-based damages “would arise as an ancillary claim in nearly every tort.”³⁷ Consequently, courts have carefully controlled when people can be awarded emotion-based damages.

With respect to negligent infliction of emotional distress, this tort has historically applied in only two circumstances. The first requires the plaintiff to be the direct victim, sustaining “a physical impact” from the defendant’s tortious act. In cases involving injury to a pet, the owner is “not touched or injured . . . in any way during the alleged” incident, so the owner cannot satisfy the physical impact test.³⁸ Otherwise, the tort is available only when a plaintiff can meet specific elements developed under the state’s common law, often either a “zone of danger” or “bystander” test, or some other comparably restrictive standard.³⁹ Courts have applied each of these tests in a variety of circumstances involving harm to pets, including veterinary malpractice, mishandling of pets by airlines and groomers, and police protecting public safety.⁴⁰

In states with a “zone of danger” test, the defendant’s act must “unreasonably endanger [the] plaintiff’s physical safety or cause the plaintiff to fear for his or her own safety.”⁴¹ For example, the Supreme Court of Vermont

³⁶ *Harris*, 708 A.2d at 1350.

³⁷ *Leo v. Hillman*, 665 A.2d 572, 577 (Vt. 1995).

³⁸ *Holbrook v. Stansell*, 562 S.E.2d 731, 733 (Ga. Ct. App. 2002) (holding plaintiffs owners “cannot recover for any of [their] emotional distress” unless plaintiffs can satisfy impact rule, requiring (1) physical impact to plaintiff, (2) the impact causes physical injury to the plaintiff, and (3) the physical injury causes the plaintiff’s mental suffering or emotional distress).

³⁹ *See Dobbs*, Torts, *supra* note 6 § 309, at 839-41; 1 JACOB A. STEIN, *Stein on Personal Injury Damages* § 3:29 (3d ed. 1997) (mental anguish or distress of survivors—bystander liability); 2 JACOB A. STEIN, *Stein on Personal Injury Damages* § 10:33 (3d ed. 1997) (zone of danger and injury to third persons); *see also* *Little v. Williamson*, 441 N.E.2d 974, 975 (Ind. Ct. App. 1982) (prohibiting negligent infliction of emotional distress claim solely for injury to animal, where a boy witnessed a Great Dane kill his puppy and injure his sister as she tried to protect the puppy, stating that “negligent infliction of emotional distress, absent contemporaneous physical injury, is not compensable”); *Vaillancourt v. Med. Ctr. Hosp. of Vt., Inc.*, 425 A.2d 92, 95 (Vt. 1980).

⁴⁰ *See, e.g.*, *Thompson v. Lied Animal Shelter*, No. 2:08-cv-00513-RCJ-PAL, 2009 WL 3303733, at *7 (D. Nev. Oct. 14, 2009) (holding that “a plaintiff cannot make out a prima facie case of . . . negligent infliction of emotional distress (‘NIED’) in Nevada based on the death of an animal”); *Gluckman v. Am. Airlines, Inc.*, 844 F. Supp. 151, 159 (S.D.N.Y. 1994) (airline); *Mitchell v. Heinrichs*, 27 P.3d 309, 314 (Alaska 2001) (police); *Krasnecky v. Meffen*, 777 N.E.2d 1286, 1287-90 (Mass. App. Ct. 2002) (owners of dogs that killed plaintiffs’ sheep); *Harabes v. Barkery, Inc.*, 791 A.2d 1142, 1146 (N.J. Super. Ct. Law Div. 2001) (groomer); *Oberschlake v. Veterinary Assocs. Animal Hosp.*, 785 N.E.2d 811, 812-15 (Ohio Ct. App. 2003) (veterinary malpractice).

⁴¹ *Perry v. Valley Cottage Animal Hosp.*, 690 N.Y.S.2d 617, 617 (N.Y. App. Div. 1999); *accord Harasymiv v. Veterinary Surgical Assocs.*, No. A100269, 2003 WL 22183946, at *3 (Cal. Ct. App. Sept. 23, 2003) (unpublished) (“[C]onduct outside of plaintiff’s presence, and directed to his pet cannot serve as a basis for any claim by plaintiff for emotional distress.”); *Naples v. Miller*, No. 08C-01-093 PLA, 2009 WL 1163504, at *3 (Del. Super. Ct. Apr. 30, 2009), *aff’d*, 992 A.2d

denied such a claim from a father who was in the delivery room with his pregnant wife and witnessed the medical malpractice that killed his child during birth and risked his wife's life.⁴² The court explained that the father was not within the "zone of danger" because he did not have "reasonable fear for [his] own safety."⁴³ The same was true for a mother coming out of her house to greet her daughter when she witnessed a motorist driving into her daughter, "causing her to fly through the air" and "injuring her severely."⁴⁴

When a cat owner sued her veterinarian, alleging she was in the zone of danger because she gave her cat the pills that allegedly caused the cat's death, the Vermont Supreme Court similarly denied her claim.⁴⁵ The Court held that, just as in these other cases, she could not satisfy the elements of the tort because she was "in no fear for [her] own safety."⁴⁶

States that follow the "bystander" test for negligent infliction of emotional distress allow such claims only for severe emotional distress from witnessing a brutal incident involving an immediate family member.⁴⁷ As courts in these states

1237 (Del. 2010) ("there was no impact upon [Plaintiff], nor was she in the zone of danger"); Carroll v. Rock, 469 S.E.2d 391, 393 (Ga. Ct. App. 1996) (finding no "impact on the plaintiff that results in a physical injury"); Gill v. Brown, 695 P.2d 1276, 1277 (Idaho Ct. App. 1985) (same); Little, 441 N.E.2d at 975 (holding where boy witnessed pet's death that "negligent infliction of emotional distress, absent contemporaneous physical injury, is not compensable"); Soucek v. Banham, 503 N.W.2d 153, 164 (Minn. Ct. App. 1993) ("there is no evidence of physical injury accompanying respondent's emotional distress"); Ullmann v. Duffus, No. 05AP-299, 2005 WL 3047433, at *8 (Ohio Ct. App. Nov. 15, 2005) (same); Langford v. Emergency Pet Clinic, 644 N.E.2d 1035, 1038 (Ohio Ct. App. 1994) (finding no claim where owner had no "fear of physical harm to her own person"); Bales v. Judelsohn, No. 011-268-05 (S.C. Ct. App. 2005) (unpublished) (same).

⁴² *Vaillancourt*, 425 A.2d at 96.

⁴³ *Id.* at 95 (internal quotations marks omitted).

⁴⁴ *Guilmette v. Alexander*, 259 A.2d 12, 13 (Vt. 1969).

⁴⁵ *Goodby v. Vetpharm, Inc.*, 974 A.2d 1269, 1274 (Vt. 2009); *see also* *Scheele v. Dustin*, 998 A.2d 697, 700-01 (Vt. 2010) (denying recovery in case involving intentional act of shooting a pellet gun in the direction of a pet).

⁴⁶ *Goodby*, 974 A.2d at 1274.

⁴⁷ *See, e.g.*, *Barnes v. Outlaw*, 964 P.2d 484, 487 (Ariz. 1998) (spouse may maintain action for loss of spousal consortium); *Villareal v. State Dept. of Transp.*, 774 P.2d 213, 220 (Ariz. 1989) (children may maintain action for loss of parental consortium); *Frank v. Superior Court*, 722 P.2d 955, 961 (Ariz. 1986) (parents may maintain action for loss of adult child consortium); *Reben v. Ely*, 705 P.2d 1360 (Ariz. Ct. App. 1985) (parents may maintain action for loss of child consortium).

have ruled, “witnessing the death or severe injury of a pet is [in]sufficient”⁴⁸ to allow such a claim because a pet, no matter how cherished, is “not a relative of [the] plaintiff.”⁴⁹ Courts have also ruled that such a duty cannot be created on foreseeability grounds alone. For example, a California Court of Appeals concluded that “[r]egardless of how foreseeable a pet owner’s emotional distress may be in losing a beloved animal, [there is] no basis in policy or reason to impose a duty on a veterinarian to avoid causing emotional distress to the owner of the animal being treated . . .”⁵⁰

Other causes of action attempted in pet cases include claims for loss of companionship and wrongful death. In most states, though, wrongful death acts provide the authority for lawsuits in which someone seeks love and companionship for the death of a loved one. These statutes generally limit emotional loss recovery to spouses, parents, and children of the deceased.⁵¹ Indeed, courts have denied recovery when people have suffered severe emotional distress due to the wrongful death of sons-in-law, foster parents, “de facto spouse[s],” siblings, and human best friends.⁵² As in these other circumstances, pet owners cannot satisfy the elements of these statutes.

In many cases, owners have urged courts to loosen the reins on these causes of action because of the nature of the owner-pet bond. Courts have recognized that while pets are “considered by many to be . . . member[s] of the family,”⁵³ creating such an exception does not make sense when recoveries for similar harms to cherished family members have been denied, as was the case

⁴⁸ *Lachenman v. Stice*, 838 N.E.2d 451, 461 (Ind. Ct. App. 2005); *see also Roman v. Carroll*, 621 P.2d 307, 308 (Ariz. Ct. App. 1980) (finding no claim for “witnessing injury to property”); *Coston v. Reardon*, No. 063892, 2001 WL 1467610 (Conn. Super. Ct. Oct. 18, 2001) (holding that bystander claims for pets are not recognized; they are recognized only for parents and children and sibling to sibling); *Altieri v. Nanavati*, 573 A.2d 359 (Conn. Super. Ct. 1989) (“[T]he Supreme Court recently held that there can be no bystander emotional disturbance claims arising from medical malpractice on another person. There is no reason to believe that malpractice on the family pet will receive higher protection than malpractice on a child or spouse.”); *McDougall v. Lamm*, 48 A.3d 312 (N.J. 2012) (holding that plaintiff was not entitled to compensation for emotional distress she experienced while watching her dog being attacked and killed); *Lockett v. Hill*, 51 P.3d 5 (Or. Ct. App. 2002) (dismissing negligent infliction of emotional distress and loss of companionship claims where owner witnessed dog maul her cat).

⁴⁹ *Rowbotham v. Maher*, 658 A.2d 912, 912 (R.I. 1995).

⁵⁰ *McMahon v. Craig*, 97 Cal. Rptr. 3d 555, 564 (Cal. Ct. App. 2009). Duty is “an expression of the sum total of those considerations of policy which lead the law to say that the plaintiff is entitled to protection.” W. PAGE KEETON, *PROSSER & KEETON ON TORTS* 358 (5th ed. 1984).

⁵¹ *See, e.g.*, ARIZ. REV. STAT. ANN. §§ 12-611, 12-612, 12-613 (2013).

⁵² *See, e.g.*, *Solomon v. Harman*, 489 P.2d 236 (Ariz. 1971) (foster parents (where deceased’s biological mother was surviving)); *Rodriguez v. Kirchhoefel*, 26 Cal. Rptr. 3d 891 (Cal. Ct. App. 2005) (best friend); *Moon v. Guardian Postacute Services, Inc.*, 116 Cal. Rptr. 2d 218 (Cal. Ct. App. 2002) (son-in-law); *Drew v. Drake*, 168 Cal. Rptr. 65 (Cal. Ct. App. 1980) (“de facto spouse”); *Ford Motor Co. v. Miles*, 967 S.W.2d 377, 382-383 (Tex. 1998) (siblings).

⁵³ *Kennedy v. Byas*, 867 So. 2d 1195, 1198 (Fla. Dist. Ct. App. 2004).

with the Vermont father-to-be in the delivery room. As a Connecticut court explained, “[t]here is no reason to believe that malpractice on the family pet will receive higher protection than malpractice on a child or spouse.”⁵⁴ A Massachusetts court echoed this sentiment, saying, “[i]t would be illogical . . . to accord the plaintiffs greater rights than would be recognized in the case of a person who suffers emotional distress as a result of the tortiously caused death of a member of his immediate family.”⁵⁵

This widespread rejection of claims for negligent infliction of emotional distress in pet litigation has demonstrated that equating pets to children or other familial relatives for litigation purposes is inconsistent with American jurisprudence.

B. Noneconomic Damages

The other predominant avenue owners have used for pursuing emotion-based damages in pet litigation is to urge courts to include the emotional value a pet has to its owner into the damages awarded for the pet’s worth. These damages, often loss of companionship or sentimental value, depend on the viability of an underlying cause of action, namely negligence, conversion or trespass to chattel.⁵⁶ These efforts have also failed.⁵⁷

⁵⁴ *Altieri v. Nanavati*, 573 A.2d 359, 361 (Conn. Super. Ct. 1989).

⁵⁵ *Krasnecky v. Meffen*, 777 N.E.2d 1286, 1289 (Mass. Ct. App. 2002); *accord Harabes v. The Barkery, Inc.*, 791 A.2d 1142, 1146 (N.J. Super. Ct. App. Div. 2001) (“Most significantly,” this cause of action is “unavailable for the loss of a child or spouse.”); *see also Lachenman v. Stice*, 838 N.E.2d 451, 461 (Ind. Ct. App. 2005) (“We are not willing to expand the bystander rule to include pets, however beloved by their owners.”); *Fowler v. Town of Ticonderoga*, 131 A.D.2d 919 (N.Y. App. Div. 1987) (same).

⁵⁶ *See, e.g., Trepanier v. Getting Organized, Inc.*, 583 A.2d 583 (Vt. 1990) (finding “wrongful death and loss of consortium claims are derivative in nature and must fail absent an independent underlying tort”); *Derosia v. Book Press, Inc.*, 531 A.2d 905 (Vt. 1987) (holding that “loss of consortium claim is not independently compensable”).

As discussed above, in every state the legal classification for pets is that they are the property of their owners, and noneconomic damages are generally not permitted for harm to property.⁵⁸ In a case involving a car accident, the Supreme Court of Appeals of West Virginia explained that “dogs are personal property and damages for sentimental value, mental suffering, and emotional distress are not recoverable” for harm to property.⁵⁹ Recently, an Arizona Court of Appeal, in a veterinary malpractice case involving a pet macaw, agreed, observing that it is

⁵⁷ See, e.g., *Gill v. Brown*, 695 P.2d 1276, 1277 (Idaho Ct. App. 1985) (“In the case of destroyed animals, the majority of jurisdictions use [fair market value] and specifically deny recovery for mental anguish suffered by the property owner. We are not persuaded to depart from this general rule.”); *Myers v. City of Hartford*, 853 A.2d 621, 626 (Conn. App. Ct. 2004) (“[T]here is no common law authority in this state that allows plaintiffs to recover noneconomic damages resulting from a defendant’s alleged negligent or intentional act resulting in the death of a pet . . . Furthermore, various public policy concerns discourage . . . such a claim.”); *Fackler v. Genetzky*, 595 N.W.2d 884, 892 (Neb. 1999) (“This court has clearly held that animals are personal property and that emotional damages cannot be had for the negligent destruction of personal property.”); *Pacher v. Invisible Fence of Dayton*, 798 N.E.2d 1121, 1125 (Ohio Ct. App. 2003) (“[W]e must continue to reject recovery for noneconomic damages for loss or injury to animals.”). Plaintiffs and their *amici* often cite *Corso v. Crawford Dog and Cat Hospital*, 415 N.Y.S.2d 182 (N.Y. Civ. Ct. 1979), which held that a pet can be categorized somewhere between a person and a piece of personal property and allowed a \$700 award to include the owner’s emotional distress for the loss of a pet. See, e.g., Amicus Brief for Animal Legal Defense Fund, *Goodby v. Vetpharm, Inc.*, 974 A.2d 1269 (No. 2008-030) (Vt. 2009). *Corso*, however, is a trial court decision that has been called by other courts an “aberration . . . flying in the face of overwhelming authority to the contrary.” *Gluckman v. Am. Airlines, Inc.*, 844 F. Supp. 151, 159 (S.D.N.Y. 1994). Appellate courts in New York have widely rejected all emotion-based damages in pet cases. See, e.g., *Jason v. Parks*, 638 N.Y.S.2d 170, 171 (Sup. Ct. App. Div. 1996) (“It is well established that a pet owner in New York cannot recover damages for emotional distress caused by the negligent destruction of a dog.”); *Feger v. Warwick Animal Shelter*, 814 N.Y.S.2d 700, 702 (Sup. Ct. App. Div. 2006) (“[Owner] may not recover damages for the emotional harm she allegedly suffered from the loss of her cat . . .”); *DeJoy v. Niagara Mohawk Power Corp.*, 786 N.Y.S.2d 873, 873 (Sup. Ct. App. Div. 2004) (“An animal owner in New York may not recover damages for loss of companionship . . .”).

⁵⁸ See, e.g., *Daughen v. Fox*, 539 A.2d 858, 865 (Pa. Super. Ct. 1988) (“Under no circumstances, under the law of Pennsylvania, may there be recovery for loss of companionship due to the death of an animal.”); *Gluckman*, 844 F. Supp. at 159 (“New York law does not permit recovery for mental suffering and emotional disturbance as an element of damages . . .”) (citing *Young v. Delta Air Lines, Inc.*, 432 N.Y.S.2d 390, 391 (1980)); *Wilcox v. Butt’s Drug Stores, Inc.*, 35 P.2d 978, 979 (N.M. 1934) (“sentimental value [is] not recoverable”); *McDonald v. Ohio State Univ. Veterinary Hosp.*, 644 N.E.2d 750, 752 (Ohio Ct. of Claims 1994) (“Sentimentality is not a proper element in the determination of damages caused to animals.”); *Mitchell v. Heinrichs*, 27 P.3d 309, 314 (Alaska 2001) (an owner “may not recover damages for her dog’s sentimental value”); *Pantelopoulos v. Pantelopoulos*, 869 A.2d 280, 284 (Conn. Super. Ct. 2005) (“[N]either Connecticut nor New Jersey recognizes a cause of action for intentional infliction of emotional distress in connection with the loss of a pet.”); *Burgess v. Shampooch*, 131 P.3d 1248, 1252 (Kan. Ct. App. 2006) (allowing reasonable and necessary veterinary costs where injured dog had no market value); *Lockett v. Hill*, 51 P.3d 5, 6 (Or. Ct. App. 2002) (denying loss of companionship for owner who witnessed defendant’s dog maul her cat).

⁵⁹ *Carbasha v. Musulin*, 618 S.E.2d 368, 369, 371 (W. Va. 2005).

clear throughout the country that “the majority position [is] classifying animals as personal property and limiting damages for their negligent injury or death” to economic damages only.⁶⁰

Some plaintiffs have used the “property” label as a rallying cry for changing the law.⁶¹ They argue that it is inhumane to put pets in the same legal category as inanimate objects, such as ashtrays and tables.⁶² While many courts have been sympathetic to the objection of this label in popular parlance, they have been careful to point out that even though pets have long been characterized as property for litigation purposes, these legal tenets do not undermine the value of pets and are accounted for in animal cruelty and animal welfare laws.⁶³

The Supreme Court of Wisconsin, in a thoughtful and thorough opinion, explained, saying it was “uncomfortable with the law’s cold characterization of a dog . . . as mere ‘property’” because “[l]abeling a dog ‘property’ fails to describe the value human beings place upon the companionship that they enjoy with a

⁶⁰ Kaufman v. Longhofer, 222 P.3d 272, 275 (Ariz. Ct. App. 2009); see also Gill, 695 P.2d at 1277 (“The measure of damages when personal property is destroyed by the tortious conduct of another is the fair market value of the property at the time of its destruction. In the case of destroyed animals, the majority of jurisdictions use this measure and specifically deny recovery for mental anguish suffered by the property owner. We are not persuaded to depart from this general rule.”); Fackler, 595 N.W.2d at 890-92 (veterinarian charged with negligently killing two racehorses; court barred claim for negligent infliction of emotional distress: “This court has clearly held that animals are personal property and that emotional damages cannot be had for the negligent destruction of personal property.”).

⁶¹ The effort to recast pets as legal entities, and not property, has materialized in a campaign to urge states and municipalities to change the terminology in their codes from “pet owners” to “pet guardians.” Advocates insist the term “guardian” is not meant to convey new legal standards. Veteran legal commentator Jeffrey Toobin has asked: “Will there come a time when dogs can sue for a new guardian—or to avoid being put to sleep?” Jeffrey Toobin, *Rich Bitch*, THE NEW YORKER, Sept. 29, 2008, available at http://www.newyorker.com/reporting/2008/09/29/080929fa_fact_toobin; see also Christopher Green, Note, *The Future of Veterinary Malpractice Liability in the Care of Companion Animals*, 10 ANIMAL L. 163, 234 (2004) (positing, “if a legal conflict does arise over an animal’s best interest, who will be the arbiter of any decision?”).

⁶² See, e.g., Appellant’s Opening Brief, *McMahon v. Craig*, 97 Cal. Rptr. 3d 555 (Cal. Ct. App. 2009), No. 06CC03530, 2008 WL 5161530, at *29-30 (filed Oct. 31, 2008) (arguing that “[a] pet is not a ‘thing’ like a family portrait or wearing apparel,” that a pet “is a living, breathing, loving ‘being,’” and that in many families “the companionship and affection a companion animal like Tootsie offers is” her true value to that family).

⁶³ See, e.g., *Ammon v. Welty*, 113 S.W.3d 185, 187 (Ky. Ct. App. 2002) (“The affection an owner has for, and received from, a beloved dog is undeniable. It remains, however, that a dog is property, not a family member.”); *Nichols v. Sukaro Kennels*, 555, N.W.2d 689, 691 (Iowa 1996) (“[W]e are mindful of the suffering an owner endures upon the death or injury of a beloved pet”); *Frampton v. Allenwood Veterinary Hospital*, No. A-2154-03T2 (N.J. Ct. App. 2004) (unpublished) (“[W]e do not intend to minimize or question the legitimacy in this case of plaintiffs’ real and meaningful affection for their pet.”). A list of states with animal cruelty statutes can be found at <http://aldf.org/article.php?id=261>.

dog.”⁶⁴ But, it continued, the classification is important to give people the right to control all decisions related to their pets and “[t]o the extent this opinion uses the term ‘property’ in describing how humans value the dog they live with, it is done only as a means of applying established legal doctrine to the facts of this case.”⁶⁵

An Ohio court similarly explained that these rulings do not “in any way discount[] the bonds between humans and animals . . .”⁶⁶ “Whether or not one agrees with the view that pets are more than personal property, it is clear that [we do] not recognize noneconomic damages for injury to companion animals.”⁶⁷ As these courts have appreciated, it is not appropriate or wise to create a third legal category between people and property for animals that would pervade all laws.⁶⁸

Over the years, a few courts have sporadically allowed some emotional harm damages to be recovered for harm to property, including pets. These awards have largely been overturned, involved malicious acts, or were tightly limited.⁶⁹ For example, in 1981, the Supreme Court of Hawaii extended an earlier ruling allowing mental distress in a case over the wrongful destruction of a home to a

⁶⁴ Rabideau v. City of Racine, 627 N.W.2d 795, 798 (Wis. 2001).

⁶⁵ *Id.*

⁶⁶ Pacher v. Invisible Fence of Dayton, 798 N.E.2d 1121, 1125 (Ohio Ct. App. 2003); *see also* Strawser v. Wright, 610 N.E. 2d 610, 612 (Ohio Ct. App. 1992) (stating that, while the court “sympathize[d] with one who must endure the sense of loss which may accompany the death of a pet,” it “cannot ignore the law”).

⁶⁷ Oberschlake v. Veterinary Assocs. Animal Hosp., 785 N.E.2d 811, 814 (Ohio Ct. App. 2003).

⁶⁸ *See, e.g.,* Naples v. Miller, 2009 WL 1163504, No. 08C-01-093, at *3 (Del. Sup. Ct. 2009) (unpublished) (“While the Court is mindful that dogs are often beloved family members, and that many owners will spend inordinate sums of money to keep their pets healthy, the law in Delaware has not advanced to the point where it has carved out a personal injury action for injured dogs . . .”); Roman v. Carroll, 621 P.2d 307, 308 (Ariz. Ct. App. 1980) (“A dog, however, is personal property. Damages are not recoverable for negligent infliction of emotional distress from witnessing injury to property.”); Propes v. Griffith, 25 S.W.3d 544, 549 (Mo. Ct. App. 2000) (“Missouri’s common law holds that dogs are property”); Fackler v. Genetzky, 595 N.W.2d 884, 892 (Neb. 1999) (“This court has clearly held that animals are personal property and that emotional damages cannot be had for the negligent destruction of personal property.”); Schrage v. Hatzlacha, 788 N.Y.S.2d 4, 5 (N.Y. App. Div. 2004) (“pets are treated under New York law as personal property”); Kondarov v. Kerdasha, 629 S.E.2d 181, 186 (Va. 2006) (“[T]he law in Virginia, as in most states that have decided the question, regards animals, however beloved, as personal property.”).

⁶⁹ *See* La Porte v. Associated Independents, Inc., 163 So. 2d 267 (Fla. 1964) (where garbage collector maliciously killed a pet dog, court held that the owner’s mental suffering was properly submitted to the jury as an element of damages); Lincecum v. Smith, 287 So. 2d 625, 629 (La. Ct. App. 1973) (where pet was justifiably put to sleep, but without owner’s consent, court held that the cause of action for conversion was proper and that evidence warranted award of \$100 for mental anguish and humiliation); *compare* Corso v. Crawford Dog and Cat Hosp., 97 Misc. 2d 530 (N.Y. Civ. Ct. 1979) (allowing noneconomic damages in a pet injury case) *with* Gluckman v. Am. Airlines, Inc., 844 F. Supp. 151, 159 (S.D.N.Y. 1994) (calling *Corso* an “aberration . . . flying in the face of overwhelming authority to the contrary”).

negligence case involving a pet in *Campbell v. Animal Quarantine Station*.⁷⁰ In 1986, the Hawaii legislature overturned the case and barred such awards.⁷¹ More recently, an Illinois Court of Appeal, in *Jankoski v. Preiser Animal Hospital, Ltd.*, stated that for lost property, recovery “may include some element of sentimental value in order to avoid limiting the plaintiff to merely nominal damages,” but it must be “severely circumscribed.”⁷² In none of these cases, though, did courts create special damages law for pets; their rulings applied to recoveries for all types of personal property.

C. Legal Public Policy Concerns With Emotion-Based Recoveries in Pet Cases

In addition to rejecting the above theories on doctrinal grounds, courts have provided several practical public policy concerns with allowing emotion-based damages for harm to pets. In short, they have warned that the scope of liability and the increase in lawsuits from the ability to seek these new damages would have no identifiable bounds.⁷³

Of primary concern, there would be “no sensible or just stopping point” for liability.⁷⁴ First, it would be impossible “to cogently identify the class of companion animals”—dogs, cats, hamsters, rabbits, parakeets, snakes, turtles, and goldfish—“because the human capacity to form an emotional bond extends to an enormous array of living creatures.”⁷⁵ As well-regarded animal rights attorney Bruce Wagman, who has worked with the Animal Legal Defense Fund to advocate this litigation, has explained: “The species is not the question, it’s the relationship.”⁷⁶

⁷⁰ 632 P.2d 1066 (Haw. 1981).

⁷¹ HAW. REV. STAT. § 663-8.9 (2006).

⁷² 510 N.E.2d 1084, 1087 (Ill. App. Ct. 1987); *see also* *Anzalone v. Kragness*, 826 N.E.2d 472, 477 (Ill. App. Ct. 2005) (“[R]ecoverly in the death of a pet is geared toward compensation for the loss of personal property and, consequently, the emotional increment in that loss, while recognized, has been severely restricted.”).

⁷³ *See, e.g.*, *Myers v. City of Hartford*, 853 A.2d 621, 625 (Conn. Ct. App. 2004) (“There are fears of flooding the courts with spurious and fraudulent claims; problems of proof of the damage suffered; [and] exposing the defendant to an endless number of claims.”) (internal citations omitted).

⁷⁴ *Rabideau v. City of Racine*, 627 N.W.2d 795, 802 (Wis. 2001).

⁷⁵ *Id.*; *accord* *Pacher v. Invisible Fence of Dayton*, 798 N.E.2d 1121, 1126 (Ohio Ct. App. 2003) (finding tremendous “difficulty in defining classes of persons entitled to recover, and classes of animals for which recovery should be allowed.”).

⁷⁶ *How Much Are Your Clients’ Pets Worth*, 26 PROD. LIAB. L. REP. 143, 144 (Aug. 2007).

Second, with many communities increasingly permitting farm animals as pets,⁷⁷ drawing a line even broadly at companion animals can be exceedingly difficult. Indeed, litigation seeking emotion-based damages for harm to pets has already arisen over dogs, cats, sheep, birds, racehorses, and donkeys, among others. Third, it would be “difficult to define with precision the limit of the class of individuals who fit into the human companion category,” particularly when several people can file claims for the same pet.⁷⁸

In addition, courts have expressed concern that the veracity of claims for noneconomic damages based on a relationship with a pet would also be hard to prove. Psychologists and other expensive resources, such as autopsies, associated with human injury litigation would be imported into pet litigation. The litigation would be highly variable, as courts could not readily distinguish between those who were close with their pets and those who were not, but claimed they were for the purpose of litigation. A New York court also cautioned that the rise in case filings from pet injuries would increase “the ever burgeoning caseloads of the court.”⁷⁹

Many courts have also warned that “charging tortfeasors with financial burdens” for an owner’s emotional loss may be unfair if it saddles them with excessive liability.⁸⁰ For example, in the Oregon case that resulted in the \$56,400 award, the family originally sought \$1.6 million from their neighbor to include loss of companionship damages.⁸¹ A Manhattan couple sued a dog-walking service for \$1 million when their dog died from heat exhaustion when they were away.⁸² In Massachusetts, a family sought \$740,000 from the City of Boston when their dog strayed outside and was electrocuted by live underground wires.⁸³

⁷⁷ See Ralph Ranalli, *The New Faces Settling into Suburbia: Owners Cite Practical, Spiritual Rewards of Farm Animals as Pets*, BOSTON GLOBE, June 29, 2008, available at http://www.boston.com/news/local/articles/2008/06/29/the_new_faces_settling_into_suburbia/?page=full.

⁷⁸ *Rabideau*, 626 N.W.2d at 802. *Ferrell v. Trustees of the University of Pennsylvania*, 1994 U.S. Dist. LEXIS 17740 at *1-2 (E.D. Pa. Dec. 12, 1994), demonstrates the challenges of co-ownership to liability: the husband authorized the pet to be euthanized, and the wife sued the veterinarians for doing so without her permission, alleging that veterinarians had conspired to give an intentionally false diagnosis of leukemia to induce consent for euthanasia to cover up veterinary malpractice.

⁷⁹ *Johnson v. Douglas*, 723 N.Y.S.2d 627, 628 (N.Y. App. Div. 2001).

⁸⁰ *Rabideau*, 626 N.W.2d at 802.

⁸¹ Skidmore, *supra* note 22.

⁸² Thomas Zambito, et al., *Dog-Walking Biz Hit with \$1M Suit*, N.Y. DAILY NEWS, July 14, 2010, at 24 (News).

⁸³ *\$740,000 Sought for Electrocuted Dog*, UNITED PRESS INTERNATIONAL, Mar. 8, 2005 (reporting that plaintiffs “came up with the \$740,000 figure because that is the annual salary” of the utility’s Chief Executive Officer).

A California family sued the Orange County Animal Hospital for \$500,000.⁸⁴ There have been many such filings.⁸⁵

In the end, there has developed a solid body of case law against emotion-based damages for harm to pets, both as a cause of action and as a measure of damages. In 2012, the American Law Institute issued its Restatement of the Law Third on Physical and Emotional Harm, which examined this case law. The Restatement concludes that “an actor who negligently injures another’s pet is not liable for emotional harm suffered by the pet’s owner.”⁸⁶ It recognizes that “pets are often quite different from other chattels in terms of emotional attachment” and that harm to pets “can cause real and serious emotional harm in some cases.”⁸⁷ But, “lines—arbitrary at times—that limit recovery for emotional harm are necessary” and are needed here.⁸⁸

Some leaders in the animal rights movement have now recognized that, pardon the pun, they may be barking up the wrong tree.⁸⁹ Accordingly, the trend has been to repackage emotion-based damage claims for harm to pets in hopes of finding an avenue that succeeds.⁹⁰

⁸⁴ Jean-Paul Renaud, *Man Hopes to Take Big Bite out of Vets Over Dead Dog: Owner of Labrador Seeks \$500,000 from O.C. Animal Hospital with a History of Legal Troubles*, L.A. TIMES, Feb 8, 2004, at B5.

⁸⁵ See, e.g., Gerald L. Eichinger, *Veterinary Medicine: External Pressures on an Insular Profession and How Those Pressures Threaten to Change Current Malpractice Jurisprudence*, 61 MONT. L. REV. 231, 249-52 (2006) (providing examples of recent verdicts and demands).

⁸⁶ RESTATEMENT (THIRD) OF TORTS: PHYS. & EMOT. HARM § 47 cmt. m (2012).

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ See *How Much Are Your Clients’ Pets Worth?*, 26 PROD. LIAB. L. REP. 143, 144 (Aug. 2007) (quoting Adam Karp, a creative litigator with an animal law practice in Washington State, as saying he started counseling clients to “steer clear of avowing any existence of market or replacement value” and “focus on the specific relationship between the companion animal and the plaintiff in ways not materially distinct from that with a blood relative, spouse or adopted child”); Richard L. Cupp, *A Dubious Grail: Seeking Tort Law Expansion and Limited Personhood as Stepping Stones Toward Abolishing Animals’ Property Status*, 60 S.M.U. L. REV. 3, 32 (2007) [hereinafter Cupp, *A Dubious Grail*] (“Animal rights activists have recognized that if courts or legislatures reject the market value paradigm in these cases and instead treat pets in the same way human children are treated—again emotional distress damages are allowed to parents when their children are negligently killed—a significant legal step will have been taken toward ultimately eradicating animals’ property status.”).

⁹⁰ See, e.g., David Favre, *Living Property: A New Status for Animals Within the Legal System*, 93 MARQ. L. REV. 1021 (2010) (arguing that nonhuman animals can themselves possess and exercise legal rights, and should have the right to file tort claims on their own behalf); Casey Chapman, *Not Your Coffee Table: An Evaluation of Companion Animals as Personal Property*, 38 CAP. U. L. REV. 187 (2009) (arguing for expanded causes of action for animal owners, and proposing a model statute to be adopted by states, to account for changes in social values); Logan Martin, *Dog Damages: The Case for Expanding the Available Remedies for the Owners of Wrongfully Killed Pets in Colorado*, 82 U. COLO. L. REV. 921 (2011) (arguing that Colorado should adopt a rule allowing the owners of wrongfully killed pets to recover emotional distress damages).

III. Attempts to Repackage Pet Litigation to Get Around Established Law

In an effort to circumvent the precedent discussed in the previous section, owners and their attorneys have tried shoehorning emotion-based claims into other legal theories. The theory most commonly attempted is to urge courts to allow emotion-based recoveries for property, including pets, that have little or no market value. In actions against kennels, veterinarians and other service providers, attorneys have sought to have an owner's emotional harm compensated under a breach of contract theory, or, alternatively, by arguing that the defendant owed a special duty to the owner to protect his or her emotional state of mind when caring for the pet. This section discusses these theories and explains why they, too, should be rejected.

A. Expanding Property Damage Law to Include a Pet's Emotional Value

1. Intrinsic or Actual Value

In several states, pet owners have sought to recover emotion-based damages through an exception in market valuation laws that some states use when the harmed property at issue in the litigation has little or no market value. Under these measures of damages, the owner may be compensated for the item's intrinsic, peculiar, actual, or special value.

In popular parlance, these terms, which are all comparable, may sound broad and ambiguous, but each is a narrowly construed legal concept for arriving at an item's *economic* value. Intrinsic value is an item's "true, inherent, and essential value."⁹¹ *Black's Law Dictionary* explains that, for example, the intrinsic value of a silver coin is the value of the silver within it.⁹² Awards based on this value, therefore, do not depend on subjective factors, such as "accident, place, or person, but [are] the same every where and to every one."⁹³ Accordingly, "sentimental or emotional value" is not included in these awards.⁹⁴

In California, a pet owner in *McMahon v. Craig* waived her right to economic damages to expedite appellate review of the trial court's rejection of her theories of recovery for emotion-based claims, including those based on her pet's "peculiar value."⁹⁵ Under California case law, property has "peculiar value" if it is *economically* different from the typical items of the same kind. This value is

⁹¹ *Bank of State v. Ford*, 27 N.C. 692, 698 (5 Ired. 692) (1845).

⁹² BLACK'S LAW DICTIONARY 1549 (7th ed. 1999).

⁹³ *Ford*, 27 N.C. at 698.

⁹⁴ *McMahon v. Craig*, 97 Cal. Rptr. 3d 555, 566 (Cal. Ct. App. 2009).

⁹⁵ *Id.* at 559.

“ascertained by reference to [the item’s] usefulness or other qualities.”⁹⁶ In that regard, it is not a subjective value, and “[t]estimony regarding the sentimental value of the property, or any speculative valuations of the property must necessarily be excluded.”⁹⁷ Also, courts require a defendant to have notice that an item has peculiar value to be liable for these damages because an item’s peculiar value may not be obvious.⁹⁸

For example, a guide dog may have peculiar value to its blind owner because a guide dog provides an economic service to its owner that might not be easily replaced, but a defendant would not be liable for peculiar damages in negligently causing the death of such a dog without knowledge that it was someone’s guide dog. A dog may also have peculiar value because of its breeding opportunities, but again, notice would be required for the dog’s owner to recover a breeding dog’s peculiar value.⁹⁹

In *McMahon*, a dog owner sued a veterinarian for malpractice and suggested that she should be compensated for her emotional attachment to her pet as part of her pet’s peculiar value to her.¹⁰⁰ To her credit, she did not argue that her bond with her pet was different than anyone else’s. She argued that under her theory, noneconomic damages for peculiar value would be available “in virtually all veterinary malpractice actions.”¹⁰¹ First, by definition, all pets cannot have “peculiar” value. Second, the court held, even if peculiarity is established, such damages can only include the “item’s characteristics that enhance its *economic* value to the owner, and does not include the owner’s *emotional* attachment to it.”¹⁰²

Other states, including Alaska, use the term “actual value to the owner” to allow owners to recover economic damages for harmed property that has no

⁹⁶ *Roos v. Loeser*, 41 Cal. App. 782, 785 (Cal. Ct. App. 1919).

⁹⁷ *Robinson v. United States*, 175 F. Supp. 2d 1215, 1232 (E.D. Cal. 2001).

⁹⁸ See CAL. CIV. CODE § 3355 (“Where certain property has a peculiar value to a person recovering damages for deprivation thereof, or injury thereto, that may be deemed to be its value against one who had notice thereof before incurring a liability to damages in respect thereof, or against a willful wrongdoer.”).

⁹⁹ See *Drinkhouse v. Van Ness* 260 P. 869 (Cal. 1927) (breeding value of racehorse); *King v. Karpe*, 338 P.2d 979 (Cal. Ct. App. 1959) (breeding value of prize cow).

¹⁰⁰ See Appellant’s Opening Brief, *McMahon v. Craig*, 97 Cal. Rptr. 3d 555 (Cal. Ct. App. 2009), No. 06CC03530, 2008 WL 5161530, at *48 (filed Oct. 31, 2008).

¹⁰¹ See *id.*; see also *id.* at *30, *42 (“[a] companion animal’s function is to be a companion” and “[t]he acknowledged purpose of pet ownership is acquisition of love, affection, and companionship.”).

¹⁰² *McMahon*, 97 Cal. Rptr. 3d at 557 (emphasis added).

market value.¹⁰³ These damages are based on “the cost of replacement, original cost, and cost to reproduce,” as well as other such economic costs.¹⁰⁴ In *Mitchell v. Heinrichs*, a dog owner invoked this term, suggesting that it should be broadened to compensate her for mental anguish when someone shot her dog.¹⁰⁵ The Supreme Court of Alaska affirmed that the state’s “actual value” doctrine does not include any emotion-based value, holding the owner could not recover “for her dog’s sentimental value as a component of actual value to her as the dog’s owner.”¹⁰⁶

In West Virginia, courts use the term “special value” to refer to this category of damages.¹⁰⁷ In *Carbasha v. Musulin*, the plaintiff and her dog were struck by a car while walking down an alley.¹⁰⁸ The court held, as in the other states, that “special value” refers only to “a dog’s particular traits, pedigree and/or special qualities, such as whether the dog is a service animal.”¹⁰⁹ “[D]amages for sentimental value or mental suffering are not recoverable.”¹¹⁰

The issue in Washington arose in a pair of veterinary malpractice cases. In *Sherman v. Kissinger* and *Sexton v. Brown*, which were heard concurrently, the Court of Appeals ruled out including a pet’s emotional value under the state’s “intrinsic value” doctrine.¹¹¹ The court explained that a pet’s intrinsic value is an objective, economic value only. “[I]t is well established that a pet owner has no right to emotional distress damages or damages for loss of human-animal bond based on the negligent death or injury to a pet.”¹¹² Testimony “establishing damages on the basis of sentiment or loss of companionship” is, therefore, precluded.¹¹³

¹⁰³ *Mitchell v. Heinrichs*, 27 P.3d 309, 313-14 (Alaska 2001). Further, the Restatement (Second) states that if “a dog trained to obey only one master [has] substantially no value to others than the owner . . . the owner will be compensated for its special value to him, as evidenced by the original cost, and the quality and condition at the time of the loss.” RESTATEMENT (SECOND) TORTS § 911 cmt. e (1965).

¹⁰⁴ *Mitchell*, 27 P.3d at 313-14.

¹⁰⁵ *Id.* at 314.

¹⁰⁶ *Id.*

¹⁰⁷ *Carbasha v. Musulin*, 618 S.E.2d 368, 369 (W. Va. 2005).

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* at 370 n.3.

¹¹⁰ *Id.* at 370.

¹¹¹ See *Sherman v. Kissinger*, 195 P.3d 539, 542 (Wash. Ct. App. 2008); *Sexton v. Brown*, No. 61363-4-I, 2008 WL 4616705, at *1 (Wash. Ct. App. 2008); see also *Pickford v. Masion*, 98 P.3d 1232, 1235 (Wash. Ct. App. 2004) (“[D]amages are recoverable for the actual or intrinsic value of lost property but not for sentimental value.”).

¹¹² *Sherman*, 195 P.3d at 548.

¹¹³ *Id.* at 548, n.8 (holding that the trial court properly struck the portion of plaintiff’s declaration that she “mourned for [her dog] Ruby ‘the way someone would grieve for a human passing . . .’”).

Pet owners in North Carolina tried a variation on this theory. In North Carolina, the plaintiffs in *Shera v. North Carolina State University Veterinary Teaching Hospital* did not argue, as owners had in the previous cases, that the actual value of their dog should include pure emotional or sentimental value.¹¹⁴ Rather, they said the actual value of their dog to them can be demonstrated by the amount of money they spent on cancer treatments to save their dog's life several years earlier. The owners testified they spent more than \$28,000 on such medical and travel-related expenses and should be reimbursed that amount even though the cancer treatments had nothing to do with the alleged malpractice that killed their dog.¹¹⁵

The court rejected this creative effort, concluding it would “expand[] that category of damages beyond what is currently recognized under [North Carolina] law.”¹¹⁶ As a practical matter, allowing owners to establish high-damage awards by tallying how much they spent over a pet's lifetime for care or items unrelated to the allegations in a case would turn traditional damages law on its head. Old pets could be worth more than young ones. Sick pets that had received expensive care would be worth more than healthy pets. Pets with market value, for which intrinsic value would not be permitted, would ostensibly be worth far less than pets without market value. Also, the many owners who could not spend thousands of dollars on pet care, but cherish their pets just as dearly, could not garner large awards.

So far, the ability to seek a pet's intrinsic, actual, peculiar or special value has provided owners with the opportunity to be awarded expanded economic compensation when their pets have no market value. But, they have not become escape hatches for emotion-based recoveries.

2. The “Heirloom Exception”

The issue has taken a slightly different path in the small handful of states where sentimental value can be recovered for heirlooms and memorabilia.¹¹⁷ But, the destination has still been the same.

Only a few states have this property law exception, whereby property owners can seek sentimental damages for the destruction of heirlooms or memorabilia. The exception is based on the theory that, unlike any other type of personal property, heirlooms and memorabilia never had market value or a function for that owner, are kept only for sentimental reasons, and cannot be replaced with anything similar.¹¹⁸ Thus far, courts in two states, Texas and

¹¹⁴ See *Shera v. N.C. State Univ. Veterinary Teaching Hosp.*, 723 S.E.2d 352 (N.C. Ct. App. 2012).

¹¹⁵ *Id.* at 357.

¹¹⁶ *Id.* at 358.

¹¹⁷ See *Brown v. Frontier Theaters, Inc.*, 369 S.W.2d 299, 304-05 (Tex. 1963).

¹¹⁸ *Id.* at 305.

Indiana, have looked at whether this exception can be applied to pets. The Supreme Court of Texas and a mid-level appellate court in Indiana both have held that “the emotional attachments a person establishes with [a] pet cannot be shoe-horned into keepsake-like sentimentality for litigation purposes.”¹¹⁹

The Texas case received national attention. In 2011, a Court of Appeal in Fort Worth created a stir when, in *Medlen v. Strickland*, it tried to turn this exception into the general rule, holding that “sentimental damages may now be recovered for the loss or destruction of all types of personal property,” including pets, that are now being kept for sentimental reasons.¹²⁰ In *Medlen*, the plaintiffs’ dog was picked up by the city’s shelter and mistakenly euthanized before the owners returned to pick up their dog.¹²¹ A non-pet example might be an old shirt that one used to wear, but now sits on a shelf because it reminds the owner of a concert or vacation. Other Texas courts, including a Court of Appeals in Austin, previously rejected these theories.¹²²

In April 2013, the Texas Supreme Court overturned the Fort Worth court’s ruling in *Medlen*, holding that it opposed “effectively creating a novel – and expansive – tort claim: loss of companionship for the wrongful death of a pet.”¹²³ In a thoughtful and well-reasoned opinion, the Court explained that the compensation sought for a lost pet is relational, based on the emotional attachment the owner has developed to the pet itself, which is “formed over time and based on the pet’s specific attributes, namely the rich companionship it provides.”¹²⁴ Such “[r]elational attachment is unquestionable. But it is also uncompensable,” just as the relational attachments to family and human friends are not compensable except as permitted through wrongful death acts.¹²⁵

The Court continued that if the sentimental value associated with heirlooms is expanded to relational attachments, it would open up a broad, new area of liability that could readily be abused. The heirloom exception, the Court stated, was narrowly drawn: the sentimentality must exist “at the time a keepsake is acquired,” be “based not on the item’s attributes but rather on the nostalgia it

¹¹⁹ *Strickland v. Medlen*, 397 S.W.3d 184 (Tex. 2013) (quoting from the amicus brief submitted by the American Kennel Club and several other pet-welfare groups); *accord Lacheman v. Stice*, 838 N.E.2d 451, 467 (Ind. Ct. App. 2006).

¹²⁰ 353 S.W.3d 576, 580 (Tex. App. 2011).

¹²¹ *Id.* at 577.

¹²² *Petco Animal Supplies, Inc. v. Schuster*, 144 S.W.3d 554, 563 (Tex. App. 2004) (barring damages for mental anguish, counseling costs, intrinsic value, and loss of companionship where dog escaped from groomer and was run over by car).

¹²³ *Strickland*, 397 S.W.3d at 185.

¹²⁴ *Id.* at 190.

¹²⁵ *Id.* at 195 (“[Plaintiffs] seek emotion-based damages for the death of ‘man’s best friend’ when the law denies such damages for the death of a human best friend. For all their noble qualities, dogs are not human beings, and the Texas common-law tort system should not prioritize human-animal relationship over intimate human-human relationships, particularly familial ones.”).

evokes,” and be “kept around chiefly to commemorate past events or passed family members.”¹²⁶ Pets and other cherished items that may once have had market or use value to that owner, but now are kept primarily for sentiment, cannot slide into this heirloom silo. Otherwise, owners of pets with significant market or use value “would be better off saying his beloved pet was a ‘worthless mutt,’” so that he “could sue for unlimited emotional-injury damages.”¹²⁷ The “tort system cannot countenance liability so imprecise, unbounded and manipulable.”¹²⁸

The Indiana appellate court also held that pets do not fit within its state’s heirloom exception: “A family dog may well have sentimental value, but it is not an item of almost purely sentimental value such as an heirloom.”¹²⁹ The measure of damages for a pet, the court stated, is “the actual value of [the] dog, *i.e.*, not including emotional distress, ‘sentimental’ value, etc.”¹³⁰

B. Breach of Contract Damages

Another new theory for seeking emotion-based damages in pet litigation is based on contracts law. In contracts, the parties to the contract themselves “define their respective obligations, rewards and risks.”¹³¹ Damages in breach of contract cases, therefore, are based on the meeting of the contracting parties’ minds.¹³² Accordingly, “damages for mental suffering and emotional distress are generally not compensable in contract actions,” that is, unless they are specifically written into the contract itself.¹³³

Some courts have developed a narrow exception to this written requirement for when a party’s “emotional tranquility is the contract’s essence.”¹³⁴ To fit in this category, courts have held that there must have been specific representations made between the contracting parties that incorporated

¹²⁶ *Id.* at 190.

¹²⁷ *Id.* at 196.

¹²⁸ *Id.*

¹²⁹ *Lacheman v. Stice*, 838 N.E.2d 451, 467 (Ind. Ct. App. 2006).

¹³⁰ *Id.* at 468.

¹³¹ *Applied Equipment Corp. v. Litton Saudi Arabia Ltd.*, 869 P.2d 454, 461 (Cal. 1994).

¹³² *See, e.g., Erlich v. Menezes*, 981 P.2d 978, 982, 987 (Cal. 1999) (stating that “contract actions are created to enforce the intentions of the parties to the agreement” and “damages beyond the expectations of the parties are not recoverable”).

¹³³ *See Applied Equipment Corp.*, 869 P.2d at 481; *Erlich*, 981 P.2d at 460 21 Cal. 4th 543, 551-553 (Cal. 1999) (stating that “tort law is designed to vindicate social policy” and that tort recovery is not permitted in contract breach cases absent special circumstances).

¹³⁴ *Erlich*, 981 P.2d at 986.

the property owner's emotional well-being into the contract.¹³⁵ For example, damages for emotional suffering were allowed for breach of a mortician's contract to preserve the plaintiff's mother because he knew the contract was based on the plaintiff's desire to place a ring and slippers on her mother's body in the future.¹³⁶ Courts have distinguished this narrow exception from the many contracts and business dealings where one's emotional well-being may be significantly impacted by the breach, but is not the essence of the contract.¹³⁷

A few owners have contended that pet-care providers, namely veterinarians and boarders, know that every owner has an emotional bond with his or her pet. Therefore, these providers have accepted the risk of harming an owner's emotional well-being when providing services to the pet. In *McMahon*, the owner argued that, because "[t]he acknowledged purpose of pet ownership is acquisition of love, affection, and companionship," the "express object of a contract to care for the medical needs of a pet is to preserve that love, affection, and companionship."¹³⁸ She further suggested that her specific veterinarian knew her "emotional well-being was inextricably tied up with [the pet's] welfare."¹³⁹ Ms. McMahon spent several pages in her brief on this novel theory, but the California court did not address it in rejecting her overall claim.

In Louisiana, which operates under its own civil code, a mid-level court of appeal upheld an award for the death of a pet dog against a boarding clinic even though it may have included "nominal" sentimental damages.¹⁴⁰ The court reasoned that delivering a pet "to the clinic for safekeeping and return" invokes the state's code for depository contracts, which has a lower standard for when emotion-based damages can be recovered than in states that apply traditional contracts law.¹⁴¹ Rather than requiring the owner's emotional state of mind to be the "contract's essence," Louisiana's code states that "nonpecuniary loss may be recovered when . . . the obligor knew, or should have known, that his failure to

¹³⁵ See *Windeler v. Scheers Jewelers*, 88 Cal. Rptr. 39, 44-45 (Cal. Ct. App. 1970) (allowed emotional harm damages based on specific representations made); *Gonzalez v. Personal Storage, Inc.*, 65 Cal. Rptr. 2d 473, 479 (Cal. Ct. App. 1997) (discussion of emotional value at time of contract did not make owner's emotional well-being essential to the contract).

¹³⁶ See *Chelini v. Nieri*, 196 P.2d 915, 916 (Cal. 1948) ("[D]efendant knew, at or about the time he agreed to preserve the body 'almost forever,' that plaintiff was highly preoccupied with the importance of such preservation and that at some indefinite future date plaintiff intended to move the casket and expected the body to be in such a state of preservation that defendant could place a ring and slippers on it.").

¹³⁷ *Erlich*, 981 P.2d at 989 ("A rule which focuses not on the risks contracting parties voluntarily assume but on one party's reaction to inadequate performance, cannot provide any principled limit on liability.").

¹³⁸ See Appellant's Opening Brief at *42, *McMahon v. Craig*, 97 Cal. Rptr. 3d 555 (2009) (No. 06CC03530), 2008 WL 5161530.

¹³⁹ *Id.* at *44.

¹⁴⁰ *Smith v. Univ. Animal Clinic, Inc.*, 30 So. 3d 1154, 1159 (La. Ct. App. 2010).

¹⁴¹ *Id.* at 1157; LA. CIV. CODE. ANN. art. 2926 (2012).

perform would cause that kind of loss.”¹⁴² The court hearing the case held that this test was satisfied because the boarding kennel’s website discussed the significant impact of a pet’s death,¹⁴³ meaning that it “certainly knew that the boarding services it provided were rooted in reasons of sentimental nature and that a failure to render services properly would result in a non-pecuniary loss.”¹⁴⁴ The court further stated that awards for emotional damage have always been fairly “nominal,” and the recovery of \$800 in the case was consistent with this approach and did not demonstrate any abuse of the law.¹⁴⁵

Pet owners seeking to expand on this theory in other states can be expected to augment their breach of contract claims in ways that make the emotional well-being of the owner appear to be more integral to the specific transaction giving rise to their claims. A plaintiff may assert, for example, that she specifically told the veterinarian that she cherished her pet and chose the veterinarian because she trusted him or her to take care of the pet. A plaintiff may also allege that the provider’s financial gain is premised on this emotional value. Finally, a plaintiff may reference the provider’s advertising or a conversation with the veterinarian whereby the provider said that “we know how important your pet is to you and we will take good care of her.”

None of these scenarios, though, ought to convince a court to allow emotion-based damages based on a breach of contract claim. In these situations, there would have to be a meeting of the minds among the parties that the contract for services included emotional distress. Niceties, assurances, and advertising puffery are not offers and acceptances under contracts law. As courts have held across all types of contracts cases, requiring parties to pay breach of contract claims when they did not voluntarily assume the risks will “make the financial risks of [contracts] difficult to predict.”¹⁴⁶ Such decisions will increase the costs of performing a contract and affect the availability of people willing to engage in those contracts.

C. Special Relationship

The final new theory for emotion-based damages is based on the idea that veterinarians or other providers have a special duty or relationship in which the provider has voluntarily accepted a tort duty to protect the owner’s emotional well-being. This theory is drawn from a body of case law in which courts have imputed affirmative duties on limited categories of businesses. The most well-known of these duties is often referred to as “common carrier liability,” where a

¹⁴² LA. CIV. CODE ANN. art. 1998 (2012).

¹⁴³ *Smith*, 30 So. 3d at 1158 (referring to statements on the Clinic’s website that “[t]he death of a cherished pet can mean the loss of an entire lifestyle as well as a devoted companion”).

¹⁴⁴ *Id.*

¹⁴⁵ *Id.* at 1158-59.

¹⁴⁶ *Erlich v. Menezes*, 981 P.2d 978, 987 (Cal. 1999).

carrier, innkeeper, or other similarly situated person has been required to take reasonable steps to aid a passenger or person in their care if that person is in peril.¹⁴⁷ Affirmative duties are rare, and, as with common carriers, generally apply only to a person's physical well-being.

There is a much narrower set of circumstances where someone, as a result of a special duty or relationship, has been subject to liability for causing a person emotional harm. A California court allowed an expectant mother to sue her doctor in connection with his alleged malpractice that caused injury to her child during childbirth.¹⁴⁸ The court did not base the duty on the doctor's relationship to the child, though, as is sought in comparable veterinary malpractice cases, but on the duty the doctor independently assumed with the mother when he entered the physician-patient relationship with her.¹⁴⁹

Another area where such a cause of action has been allowed is with the handling of a dead body.¹⁵⁰ Some courts have permitted familial relatives of a dead person to sue under negligence, not just breach of contract, should a funeral parlor mishandle the deceased in a way that caused the family members emotional harm.¹⁵¹ For example, a New York court allowed such a claim when the plaintiff's son's body was displayed to the family, but due to negligent embalming, the son's remains were decomposed, with fluid and odors coming from the corpse.¹⁵² In each of these situations, the person with whom the defendant has the special duty or relationship is the "direct victim" of the tort.

In *McMahon*, the owner alleged that her pet's veterinarian owed her such a special duty because the veterinarian could foresee that malpractice harming her pet would emotionally injure her.¹⁵³ In traditional medical malpractice cases, there is no special duty owed to a parent or spouse of a patient because the care is directed at the patient, and not the parent or spouse.¹⁵⁴ For this reason, a mother does not have a qualifying special relationship with a child's doctor¹⁵⁵ and a father does not have one with his wife's obstetrician during childbirth.¹⁵⁶ This is

¹⁴⁷ Keeton, *supra* note 50, at 376-77.

¹⁴⁸ See *Burgess v. Superior Court*, 831 P.2d 1197, 1198 (Cal. 1992).

¹⁴⁹ See *id.* at 1204.

¹⁵⁰ See RESTATEMENT (SECOND) OF TORTS § 868 (1979).

¹⁵¹ See, e.g., *Christensen v. Superior Court*, 820 P.2d 181, 183 (Cal. 1991); *but see* *Washington v. John T. Rhines Co.*, 646 A.2d 345, 346 (D.C. 1994).

¹⁵² See *Thompson v. Duncan Bros. Funeral Home*, 455 N.Y.S.2d 324, 326-27 (N.Y. Civ. Ct. 1982).

¹⁵³ Appellant's Opening Brief, *McMahon v. Craig*, 97 Cal. Rptr. 3d 555 (Cal. Ct. App. 2009), No. 06CC03530, 2008 WL 5161530, at *31 (filed Oct. 31, 2008).

¹⁵⁴ *Huggins v. Long Drug Stores California, Inc.*, 862 P.2d 148, 151 (Cal. 1993).

¹⁵⁵ *Ochoa v. Superior Court of Santa Clara County*, 703 P.2d 1, 10 (Cal. 1985) (medical malpractice "was directed primarily at the decedent").

¹⁵⁶ *Burgess v. Superior Court*, 831 P.2d 1197, 1204 n.8 (Cal. 1992) ("The physician-patient relationship critical to a mother's cause of action is almost always absent in a father's claim.").

true regardless of whether there is a fiduciary relationship between the parent or spouse and the doctor.

As the California court held in *McMahon*, the veterinarian-owner relationship does not create the type of direct victim status such that it could become one of the few circumstances, along with mishandling a corpse, that give rise to pure emotional harm damages. “[A]lthough a veterinarian is hired by the owner of a pet, the veterinarian’s medical care is directed only to the pet. Thus, a veterinarian’s malpractice does not directly harm the owner in a manner creating liability for emotional distress.”¹⁵⁷ Further, the court explained, it would be inappropriate to allow emotion-based liability in pet-related cases but not when the harm is to a child or spouse.

Consequently, none of the new theories offered for emotion-based liability have changed the courts’ steadfast resistance to allowing these damages in pet cases. Regardless of the tort, court or circumstance, emotion-based damages have not been recoverable under state common law for injuries to or the death of a pet.

IV. Legislative Attempts to Authorize Emotion-Based Damages

Courts have largely agreed that, should any emotion-based damages be allowed in pet injury cases, a liability expansion of this magnitude should be made through legislatures, just as with wrongful death acts for spouses and children.¹⁵⁸ State legislatures have the capacity to broadly consider the pros and cons of establishing such new liability, as well as the many interests involved, given that the claims can arise in a myriad of ways. Such wrongful death acts for pets have been introduced in about a dozen states.¹⁵⁹

A. Developments in State Legislation

The reception of these bills is instructive. In several states, the initial perception was that this legislation might be a modest way to honor the

¹⁵⁷ *McMahon v. Craig*, 97 Cal. Rptr. 3d 555, 561 (Cal. Ct. App. 2009).

¹⁵⁸ See, e.g., *McMahon*, 97 Cal. Rptr. 3d at 564 (“These considerations persuade us to conclude that any extension of a duty of care to avoid emotional distress to pet owners is a matter best left to the Legislature.”); *Koester v. VCA Animal Hosp.*, 624 N.W.2d 209, 211 (Mich. Ct. App. 2000) (“[P]laintiff and others are free to urge the Legislature to visit this issue in light of public policy considerations”); *In Re Pet Foods Prods. Liab. Litig.*, 2008 WL 4937632, at *10 (D. N.J. Nov. 18, 2008) (“Courts that have addressed the issue of emotional distress damages for the injury or death of a pet found that it is a subject properly left to legislature.”); *Kondaurov v. Kerdasha*, 629 S.E.2d 181, 187 (Va. 2006) (“[P]ermitting such an award would amount to a sweeping change in the law of damages, a subject properly left to legislative consideration.”); *Hey v. Moran*, 2002-568-A (R.I. Nov. 25, 2003) (“[M]ore appropriately left to the General Assembly”).

¹⁵⁹ See Sabrina DeFabritiis, *Barking Up the Wrong Tree: Companion Animals, Emotional Damages and the Judiciary’s Failure to Keep Pace*, 32 N. ILL. U. L. REV. 237, 255-263 (2012) (recounting and advocating for legislation that would establish emotion-based damages in pet injury litigation).

relationship owners and pets share. But, the more people learned about the adverse consequences of such liability, the more skeptical they grew to this change in law. Legislators, newspapers, and other groups quickly recognized that putting animal rights over animal welfare in this way was not the “pro pet” position. They also grew to learn that the potential litigation over pets was not a novel legal issue, but, as discussed later in this article, would invade many areas of society.

One of the first high-profile legislative debates on this issue occurred in 2003, when a Colorado legislator introduced a bill to permit noneconomic damages in pet litigation.¹⁶⁰ The *Denver Post* editorialized that allowing such recovery “actually may work against getting the medical care our dogs and cats need.”¹⁶¹ The *Post* explained that, just as with human healthcare, the rise in prices from the additional liability would lead to defensive pet medicine, “put ordinary veterinary care beyond the reach of poorer households,” and keep some people from spaying or neutering pets.¹⁶² The bill’s sponsor withdrew his own legislation.¹⁶³

A similar occurrence happened in Nevada in 2007, when a state legislator introduced a bill that also would have permitted broad emotion-based damages in pet litigation. Here, too, the sponsor voluntarily struck this provision.¹⁶⁴ In the end, the bill, which was enacted into law, allowed for additional *economic* recoveries beyond market value, such as reasonable and necessary expenses arising from the injury, up to a \$5,000 limit for the entire award.¹⁶⁵ It specifically barred the recovery of any noneconomic damages.¹⁶⁶ In Washington, D.C., an omnibus animal law bill also initially included a provision for emotion-based damages in pet litigation; the bill was enacted in 2008 after that provision was removed.¹⁶⁷

Tennessee and Illinois are the only two states where legislatures have enacted laws to permit emotion-based damages in certain pet suits, though both carefully limit the availability of these damages. In Illinois, the law applies only to acts of aggravated cruelty, torture, or bad faith, not negligence.¹⁶⁸ Tennessee’s statute applies only to pets negligently injured or killed on the property of their

¹⁶⁰ H.B. 1260, 2003 Leg., Reg. Sess. (Colo. 2003) (proposing recovery of up to \$100,000 for noneconomic damages for the death or injury of a companion animal).

¹⁶¹ Op-Ed., *Pet Law Barks Up Wrong Tree*, DENVER POST, Feb. 12, 2003, at B6.

¹⁶² *Id.*

¹⁶³ See Julia C. Martinez, *Pet Bill Killed by House Sponsor; Move Outrages Senate Backer*, DENVER POST, Feb. 16, 2003, at B1.

¹⁶⁴ S.B. 298, 2007 Leg., Reg. Sess. (Nev. 2007).

¹⁶⁵ NEV. REV. STAT. § 41.740 (2007).

¹⁶⁶ See *id.*

¹⁶⁷ See B17-89, 2007 Leg., Reg. Sess., (D.C. 2007).

¹⁶⁸ See 510 ILL. COMP. STAT. 70/16.3 (2013) (capping noneconomic damages at \$25,000).

owners, such as in their backyards, or under the owner's control, such as on a leash.¹⁶⁹ The Tennessee law specifically exempts licensed veterinarians and public institutions, such as animal shelters, from being subject to emotion-based damages.¹⁷⁰ Also, in 2010, Tennessee created additional assurance that its law would not be misconstrued when it barred noneconomic damages for all claims involving harm to property unless specifically authorized by statute.¹⁷¹ Thus, neither Illinois's nor Tennessee's law would apply to general acts of negligence, such as in car accidents, in kennels, by groomers, or as part of a pet's health care.

Finally, several states, including Maryland and Connecticut, also do not permit emotion-based damages in pet litigation under their statutes, but they have taken a different approach. These states have statutes defining damages allowable in pet injury cases, namely the economic loss of the pet plus reasonable and necessary veterinary care expenses from the incident.¹⁷² These statutes do not include emotion-based damages.¹⁷³

In all, no state has legislatively permitted the broad emotion-based recoveries sought in the cases discussed above. Just the opposite is true. States with a legislative history on damages in pet litigation have chosen not to allow such liability.

B. State Legislative Organizations

Opposition to legislating emotion-based damages into pet litigation has also arisen in organizations that take positions on state legislation.

The issue first arose before the Council of State Governments ("CSG") in 2004. CSG passed a resolution "oppos[ing] legislation permitting the recovery of non-economic damages for the loss or injury of a pet."¹⁷⁴ CSG found the existing laws for harm to animals "maintains a healthy balance between the rights of [owners] and the responsible care and well-being of all animals."¹⁷⁵ Changing the law to include emotion-based damages "would ultimately erode access to affordable and high quality animal health care."¹⁷⁶ The American Legislative Exchange Council, an organization of state legislators, echoed CSG's resolution

¹⁶⁹ See TENN. CODE ANN. § 44-17-403 (2013) (capping noneconomic damages at \$5,000).

¹⁷⁰ See *id.*

¹⁷¹ See TENN. CODE ANN. § 29-39-102(k) (2013) ("Noneconomic damages are not permitted for any claim arising out of harm or loss of property, except as authorized by statute.").

¹⁷² CONN. GEN. STAT. ANN. § 22-351 to 22-351a (West 2013); MD. CODE ANN., CTS. & JUD. PROC. § 11-110 (West 2013).

¹⁷³ See CONN. GEN. STAT. ANN. § 22-351 to 22-351a (West 2013); MD. CODE ANN., CTS. & JUD. PROC. § 11-110 (West 2013).

¹⁷⁴ "Resolution on Animal Guardianship and Liability Legislation," Council of State Governments (Adopted Sept. 29, 2004) (on file with author).

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

soon thereafter, passing a resolution that it opposed laws that allow for “the recovery of any type of noneconomic damages for the loss of a pet.”¹⁷⁷

In addition, the highly respected National Conference of Commissioners on Uniform State Law (NCCUSL), which puts out the Uniform Commercial Code and other model bills to standardize state law, rejected an overture in 2009 to support emotion-based damages in pet litigation.¹⁷⁸ The American Bar Association’s Torts Trial and Insurance Practice Section Council (“TIPS Council”) had been approached by its Animal Law Committee to endorse model legislation calling for the broad availability of emotion-based damages in these cases.¹⁷⁹ In February 2009, the TIPS Council referred the issue to NCCUSL.¹⁸⁰ After several months of consideration, NCCUSL responded that “there was a consensus among the members of the Scope Committee that a proposal of this nature would not be appropriate as uniform state legislation and that there would be little likelihood for enactment success in the states.”¹⁸¹

The TIPS Council took up the issue again in October 2010. At the fall ABA meeting, the Animal Law Committee initially offered a model act similar to the one NCCUSL had declined to endorse.¹⁸² The Animal Law Committee leadership then withdrew the model bill and sought approval for a resolution calling for the same types of damages.¹⁸³ The American Kennel Club and Cat Fanciers’ Association, the primary ownership groups for dogs and cats respectively, urged the TIPS Council to reject the resolution.¹⁸⁴ The Cat Fanciers’ wrote that “[i]f this resolution should become the basis for ABA legislative policy, resulting in enactment of laws, pets and their owners will be worse off. . . .

¹⁷⁷ “Resolution on Animal Liability and Guardianship,” American Legislative Exchange Council (Adopted 2004) (on file with author).

¹⁷⁸ Letter from Michael Houghton to Timothy Bouch (July 24, 2009) (on file with author).

¹⁷⁹ See Memorandum from ABA Animal Law Committee to ABA TIPS Council, Model Recovery for Harm to a Companion Animal Act (Jan. 21, 2009) (attaching exhibits) (on file with author).

¹⁸⁰ See 2008-2009 Committee Annual Report, ABA Animal Law Committee (“The Committee presented Model Legislation on the Recovery for Harm to Companion Animals to the TIPS Council, which in turn submitted the Model Bill to NCCUSL.”).

¹⁸¹ Houghton, *supra* note 178.

¹⁸² See Recommendation/Report, ABA Law Committee, Valuation of Damages for Harm to a Domestic Companion Animal Act (2nd Draft)(Oct. 2010) (on file with author).

¹⁸³ See Policy Recommendation, ABA TIPS, Damages for Harm to a Domestic Companion Animal (Oct. 2010) (on file with author).

¹⁸⁴ See E-mail from Margaret Poindexter, General Counsel, American Kennel Club, to ABA TIPS Council (May 16, 2011) (on file with author); E-mail from George J. Eigenhauser, Jr., Legislative Coordinator, Cat Fanciers’ Ass’n., to ABA TIPS Council (Nov. 3, 2010, 17:04 EST) (on file with author).

This is one issue where animal rights and animal welfare diverge.”¹⁸⁵ The TIPS Council voted against adopting the resolution.¹⁸⁶

Thus, there has not developed a base of support for this initiative in state legislatures or among groups that advocate for model legislation.

V. **Analysis of the Policy Arguments the Litigation’s Advocates Raise For Why the Law Should Be Changed to Allow Emotion-Based Damages in Pet Cases**

In trying to persuade judicial and legislative communities to change the law, advocates for emotion-based damages in pet litigation have developed several public policy arguments. Their primary argument is that there is a new, modern era of pet ownership that demands greater legal recognition of the owner-pet relationship. They also have argued that such recoveries, particularly in veterinary malpractice cases, will help pets and not impact costs. As discussed below, these arguments are myths and should not motivate a change in law.

A. **Myth: There is a Modern Era of Pet Ownership, Where Owners Treat Pets Like Children and the Law Should Too**

The most prominent theory the litigation’s advocates have advanced is that a change in law is necessary to keep up with the modern relationship between owners and pets.¹⁸⁷ These arguments are well stated in the plaintiff’s brief to the Supreme Court of Vermont in *Goodby v. Vetpharm*, as well-known animal rights leader and former Harvard animal law lecturer Stephen Wise represented the

¹⁸⁵ Eigenhauser, *supra* note 184. The first director of the Duke Animal Law Clinic, Jeff Welty, has explained “the distinction between the pursuit of animal rights as legal standing for animals that is inconsistent with their legal status as property and the pursuit of animal rights as ‘animal welfare, which deals with the well-being of and prohibition against cruelty to animals.’” Tamie L. Bryant, *The Bob Barker Gifts to Support Animal Rights Law*, 60 J. LEGAL ED. 237 (2010) (citing *Animal Law Clinic Launched*, Duke Law Magazine, Spring 2006, at 27).

¹⁸⁶ As chronicled by Joyce Tischler, a well-known and respected animal rights lawyer, efforts to have the American Bar Association endorse an expansion of damages available for lawsuits over harms to pets date back to the 1980s. See Joyce Tischler, *A Brief History of Animal Law, Part II*, 5 STAN. J. OF ANIMAL L. & POL. 27, 33 (2012).

¹⁸⁷ See *Amicus* Brief of Animal Legal Defense Fund at 23-24, *Goodby v. Vetpharm*, 974 A.2d 1269 (Vt. 2009) (No. 2008-030) (“There is a growing consensus around the country that the legal system must recognize the important role companion animals play in American society.”); *Koester v. VCA Animal Hosp.*, 624 N.W.2d 209, 211 (Mich. Ct. App. 2000) (“Plaintiff requests that we allow such recovery when a pet is the property that is damaged, arguing that pets have evolved in our modern society to a status that is not consistent with their characterization as ‘chattel.’”).

plaintiffs.¹⁸⁸ He argued that categorizing pets as property is “archaic” and comes from a time when animals were used for food or work, not companionship, which is their primary role today.¹⁸⁹ In an *amicus* brief to a Washington Court of Appeals in *Sherman v. Kissinger*, the Animal Legal Defense Fund suggested this “major shift in the public’s attitude toward companion animals . . . has developed over the last 30 years.”¹⁹⁰

The hallmark of this new era, Mr. Wise, ALDF, and others argue, is that for many people today, “[c]ompanion animals are functionally children.”¹⁹¹ In a Virginia case involving a pet dog killed during a car accident, for example, the plaintiff’s psychiatrist described the plaintiff’s relationship with her dog as “like a mother/child unit.”¹⁹² Others have similarly tried to anthropomorphize pets as part of this legal argument, pointing out that “one out of three married women (33%) reported that their pets are better listeners than their husbands” and that many pet owners would “rather spend Valentine’s Day with their pet than their

¹⁸⁸ Brief for Appellant, *Goodby*, 974 A.2d 1269 (No. 2008-030); Cupp, A Dubious Grail, *supra* note 89, at 6 (explaining that Professor Wise’s “stepping stone approach is to pursue evolution in a number of legal arenas that will not directly lead to rights, but which will pave the way for eventual abolition of property status for some or all animals through incremental heightening of their legal status. Tort law is one of the most significant areas of focus in the stepping stone approach”); Drake Bennett, *Lawyer for the Dog: Inside the Booming Field of Animal Law, in Which Animals Have Their Own Interests – and Their Own Lawyers*, BOSTON GLOBE, Sept. 9, 2007, at D1 (stating that this “slippery slope is exactly the point” in the effort to make fundamental changes in how the law treats animals).

¹⁸⁹ Brief for Appellant, *supra* note 188, at 21 (citing R. Scott Nolen, *The Golden Age of Veterinary Medicine*, 218(9) J. Amer. Med. Soc. 1401 (2001)); *see also* Diane Sullivan & Holly Vietzke, *An Animal Is Not an iPod*, 4 J. Animal L. 41, 43 (2008) (“[T]he need to eliminate animals as property is a crucial requirement to the expansion of animal rights.”). Well-published animal law professor David Favre has also advocated for a change in a pet’s status under the law so that they can have standing in courts and engage in contractual relationships. *See* David Favre, *Living Property: A New Status For Animals Within the Legal System*, 93 MARQ. L. REV. 1021 (2010). Nonetheless, he has appreciated that categorizing pets as the property of their owners can be vital to pet welfare: “[T]he keeper of [a] non-property animal could not look to the protections of the law; an owner could not call the police if her dog had been stolen or killed. If the human owner’s interest in her dog was not recognized by the law, then clearly the interests of the dog also were not recognized.” *Id.* at 1027.

¹⁹⁰ *Amicus Curiae* Animal Legal Defense Fund’s Brief Regarding Valuation of Ruby at 9, *Sherman v. Kissinger*, 195 P.3d 539 (Wash. Ct. App. 2008) (No. 60137-7-I) (“This change in attitude has developed over the last 30 years, evidencing a major shift in the public’s attitude toward companion animals.”).

¹⁹¹ Brief for Appellant, *supra* note 188, at 28.

¹⁹² *Kondaurov v. Kerdasha*, 629 S.E.2d 181, 183 (Va. 2006).

spouse.”¹⁹³ They also compare the animal rights movement to the civil rights and women equality movements.¹⁹⁴

This claim of a sudden or recent shift in the emotional bond between owners and pets, though, is unfounded. Pets have long been important companions in people’s lives. As Mr. Wise also cites in his Vermont brief, “dogs have been mankind’s companion throughout the ages.”¹⁹⁵ Another animal rights advocate, Christopher Green, who has made similar arguments, has observed that “dogs were among the only animals brought over by the European Pilgrims on the Mayflower in 1620” and “were the first domesticated animals to appear in what we now know as America.”¹⁹⁶ Another animal rights scholar, citing the biblical story of a man who raised a lamb like a child, stated that “even in biblical times, the law recognized that animals in close relationship with people were considered more than mere property—even akin to children.”¹⁹⁷

Indeed, archeologists who have studied the human-pet bond have found that “[t]he relationship between people and dogs is an intensely social one, and has been for thousands of years.”¹⁹⁸ The domestication of dogs occurred more than 14,000 years ago.¹⁹⁹ Dog burial sites in Illinois from 8,500 years ago led archeologists to conclude that “an affectionate relationship” between humans and dogs existed back then.²⁰⁰ Dog and human remains buried together, which signifies a loving bond, date back 6,600 years in Idaho and 5,500 years in Kentucky.²⁰¹ Analogous sites have been found around the world.²⁰²

¹⁹³ Sebastian Gay, *Companion Animal Capital*, 17 ANIMAL L. 77, 80 (2010) (suggesting that pets should be valued at what their “shadow wage[s]” would be, based on their contributions to their owners’ lives).

¹⁹⁴ See, e.g., Sullivan & Vietzke, *supra* note 189, at 43 (“With a recognition that animals are sentient creatures capable of experiencing great pain should come a realization that animals are not property—not innate objects—and our legal system must recognize this. It did when slaves, women, and children were considered property, and now it is time to reclassify the status of animals, too.”); see also Richard L. Cupp, Jr., *Children, Chimps, and Rights: Arguments from “Marginal” Cases*, 45 ARIZ. ST. L.J. 1 (2012).

¹⁹⁵ Brief for Appellant, *supra* note 188, at 19 (quoting *Morgan v. Kroupa*, 167 Vt. 99 (Vt. 1997)).

¹⁹⁶ Green, *supra* note 61, at n.5.

¹⁹⁷ Christopher D. Seps, Note, *Animal Law Revolution: Treating Pets as Persons in Tort and Custody Disputes*, 2010 U. ILL. L. REV. 1339 (2010).

¹⁹⁸ Darcy F. Morey, *Burying Key Evidence: The Social Bond Between Dogs and People*, 33 J. ARCHAEOLOGICAL SCI. 158, 158 (2006).

¹⁹⁹ Joshua M. Akey et al., *Tracking Footprints of Artificial Selection in the Dog Genome*, 107 PROCEEDINGS OF THE NAT’L ACAD. OF SCI. 1160 (2010).

²⁰⁰ Darcy F. Morey & Michael D. Wiant, *Early Holocene Domestic Dog Burials from the North American Midwest*, 33 CURRENT ANTHROPOLOGY 158, 159 (1992).

²⁰¹ See *id.*

²⁰² *Id.* at 162.

A similar story has emerged with respect to cats, as cats were domesticated in the Fertile Crescent 8,000 – 10,000 years ago when nomads began to gather in villages around agricultural settlements.²⁰³ Pet cats were mummified in ancient Egypt “in enormous numbers.”²⁰⁴

The truth is that the fundamentals of the owner-pet relationship are no different today than in years past; people have long domesticated pets, cared for them and treated them like family members. It is true that many owners may spend more money on their pets today than in the past, just as they do in many other areas of their lives, but that does not indicate acceptance that their pets are due new legal rights.

Professor Richard Cupp, an associate dean at Pepperdine University School of Law and member of the American Law Institute, has spent much of the past decade studying and writing about the legal issues surrounding pet ownership and explains that, to the extent there is a difference in attitudes toward pets today, it is that people are more attuned to animal welfare.²⁰⁵ He writes that the “public interest in humane treatment of animals has probably never been stronger. Animal welfare issues ‘are part of the public domain like never before.’”²⁰⁶ The proliferation of animal cruelty statutes in the past twenty years supports this observation.²⁰⁷ But, as Professor Cupp explains, there is a strong distinction in the public consciousness between animal welfare and animal rights.²⁰⁸ Respected leaders in the animal law field have acknowledged that the divergent interests of

²⁰³ Stephen J. O’Brien & Warren E. Johnson, *The Evolution of Cats*, SCI. AM., July 2007, at 68, 74; see also Carlos A. Driscoll et al., *The Taming of the Cat*, SCI. AM., June 2009, at 68, 72 (“2,000 YEARS AGO: Cat remains preserved at the German site of Tofting in Schleswig and increasing reference to cats in art and literature show that domesticated cats were common throughout Europe.”).

²⁰⁴ JULIET CLUTTON-BROCK, *DOMESTICATED ANIMALS FROM EARLY TIMES* (1981).

²⁰⁵ Professor Richard Cupp is the John W. Wade Professor of Law and Associate Dean for Research at the Pepperdine University School of Law.

²⁰⁶ Professor Richard Cupp has extensively researched this issue and writes that what “has changed dramatically in the past decade” is that activists have changed their focus from animal welfare to animal rights. Cupp Jr., *Legal/Contractualist*, *supra* note 2, at 42.

²⁰⁷ At the same time that courts and legislatures have rejected emotion-based damages in animal injury litigation, legislatures have been enacting animal cruelty laws to make it a felony offense. In 1990, only 7 states had felony animal cruelty law. In 2012, Idaho became the 48th state to have these laws. See *U.S. Jurisdictions With and Without Felony Animal Cruelty Provisions*, ANIMAL LEGAL DEF. FUND, <http://aldf.org/article.php?id=261> (last visited Nov. 13, 2012).

²⁰⁸ Cupp Jr., *Legal/Contractualist*, *supra* note 2, at 31 (“The popularity of the phrase *animal rights activists* rather than something like *animal welfare activists* reflects an increasing focus on animals as potential bearers of rights rather than on humans as bearers of responsibility for the welfare of animals they control.”).

animal rights activism and animal welfare has been a source of great tension within their community.²⁰⁹

Indeed, polling has shown that, while the American people overwhelmingly recognize the importance of pets to their lives, this sentiment does not translate into a majority of Americans believing that pets should have innate legal rights or that owners should be entitled to emotion-based damages. In 2007, nearly two-thirds of the public (63%), including many pet owners, stated that pet owners should be entitled only to their actual economic losses, and not emotion-based damages in pet injury litigation.²¹⁰

This poll was taken at a time when Americans were highly sensitized to the loss of pets. Images from the 2005 coverage of Hurricane Katrina with “people clinging to their companion animals on the top of their roofs and then being forcibly separated”²¹¹ were fresh in people’s minds. Michael Vick, a quarterback in the National Football League, created national outrage in 2007 when he was suspended and ultimately jailed for his association with dog-fighting. Also, high-profile litigation was being waged against Menu Foods over tainted dog food.²¹²

These episodes were defining animal welfare moments, yet they did not create a majority support for expanding damages in pet litigation to include emotional loss. The assertion that the law needs to change to reflect some new owner-pet relationship is a myth.

B. Myth: Emotion-Based Damages Will Benefit or Not Impact Veterinary Care

Over the past decade, some of the litigation advocates have also spent considerable resources trying to convince courts and veterinarians that adding emotion-based damages to a veterinarian’s liability has no downside. They argue that it will both enhance veterinary care by reducing carelessness and have no impact on the cost of veterinary services. Both assertions are myths, and as discussed below, are not necessarily supported by all of the leaders in the effort to introduce emotion-based damages in pet cases.

²⁰⁹ See Tischler, *supra* note 186, at 52 (discussing that “[n]ot every animal lawyer has greeted [the animal rights-focused approach] with enthusiasm” and that one animal lawyer “published an eloquent plea to students and practitioners of animal law to step away from the focus on animal rights and instead work for progressive welfare reforms . . . [which] has gained a good deal of traction with animal law practitioners”).

²¹⁰ See Joseph Carroll, *Pet Owners Not Worried That Their Pets Will Get Sick From Pet Food: Most Don’t Agree With Pain and Suffering Damages for Pets*, GALLUP NEWS SERVICE, Apr. 3, 2007, available at <http://www.gallupoll.com/content/?ci=27076&pg=1>.

²¹¹ Sullivan & Vietzke, *supra* note 189, at 52.

²¹² See *FDA Finds Melamine in Pet Foods Linked to Deaths*, MARKET WATCH, Mar. 30, 2007, available at <http://www.marketwatch.com/news/story/us-finds-melamine-pet-food/story.aspx?guid=%7BE39-4314-99C3-34D1474C9E3F%7D>.

1. Liability Is Not an Efficient “Regulator” of Veterinary Misconduct

The first contention is that pets will benefit from increasing veterinary malpractice liability by giving veterinarians greater incentives to not be careless. The premise that veterinarians need such an incentive is simply not true. As Joyce Tischler, the respected founder of the Animal Legal Defense Fund has appreciated, veterinarians “go into being vets for the same reasons [she] went into animal law . . . to get involved in animal protection.”²¹³ They do not need liability to motivate them to provide proper care.

Professor Cupp, in studying the veterinary profession, has found that the public generally agrees with this sentiment. The state of veterinary medicine in this country, he has said, is considered “to be quite good. Veterinarians routinely score in the upper rungs of surveys of the most respected professions in America.”²¹⁴ In a forum co-hosted by the Stanford Journal of Animal Law & Policy in March 2013, Matthew Liebman, a thoughtful attorney with ALDF, agreed that he does not see a veterinary malpractice crisis in this country or the need for systemic change to the delivery of veterinary care services. Rather, he explained that the rationale for introducing emotion-based damages into pet litigation is based in ideology and, as discussed above, the new place that he and ALDF believe that pets have in American families.

Also, in practice, the notion that increasing liability will improve veterinary care is unfounded. In the human medical arena, which is a helpful guide for assessing the impact of large liability awards, there is a “lack of empirical evidence that the threat of medical malpractice [liability]” has correlated with enhanced medical care.²¹⁵ Further, studies have shown that lawsuits alleging medical malpractice are a poor indicator of whether malpractice has actually occurred. Studies have shown that only 17% of the lawsuits alleging medical malpractice turn out to involve any actual malpractice.²¹⁶ Communication, not malpractice, is the largest factor as to whether a patient will

²¹³ See Alicia Karapetian, *The Rise of Animal Law*, DVM360 MAGAZINE, May 1, 2011, available at <http://veterinarynews.dvm360.com/dvm/Veterinary+news/The-rise-ofanimal-law/ArticleStandard/Article/detail/717873> (quoting Ms. Tischler).

²¹⁴ Richard L. Cupp, Jr., Commentary, *Emotional Distress and Loss of a Pet: Collecting Damages in the Wrongful Death of an Animal Can Have Harmful Consequences*, PHILA. INQUIRER (Apr. 26, 2007), http://articles.philly.com/2007-04-26/news/25241634_1_pet-owners-emotional-distress-damages-pet-death.

²¹⁵ Steve Barghusen, *Noneconomic Damage Awards in Veterinary Malpractice: Using the Human Medical Experience as a Model to Predict the Effect of Noneconomic Damage Awards on the Practice of Companion Animal Veterinary Medicine*, 17 ANIMAL L. 13 (2010).

²¹⁶ Gerald L. Eichinger, *Veterinary Medicine: External Pressures on an Insular Profession and How Those Pressures Threaten to Change Current Malpractice Jurisprudence*, 61 MONT. L. REV. 231, 238-39 (2006).

sue a doctor.²¹⁷ Also, “many more people [are] injured by negligent physicians than ever bring claims.”²¹⁸

Also, the costs associated with the threat of litigation negatively impacts good providers, not just the few bad ones.²¹⁹ For example, in a congressional hearing on human healthcare liability, a family-owned nursing home owner testified that it had never been liable for malpractice, yet its insurance premiums increased nearly 400% from 2001 to 2003.²²⁰ Along the same vein, 87% of the members of the Ohio Association of Free Clinics said it was difficult to find affordable liability insurance even though Ohio has a charitable immunity law and no lawsuits were filed against the clinics.²²¹

Careful and competent veterinarians, along with free veterinary clinics, could face similar challenges if emotion-based damages are introduced into pet litigation. Also, veterinary malpractice allegations face an important additional challenge: the patient cannot testify to or shed light on what occurred. The results of the litigation could be skewed if this factual void is filled with conjecture, battling experts, and emotional testimony.

If the goal is to identify and punish a careless act by a veterinarian, the more direct and efficient path is for the owner to report the veterinarian to the state’s veterinarian discipline board. The Board can conduct an inquiry into what occurred, punish the veterinarian, and implement rules for all veterinarians to follow should changes to practice standards be needed to guard against such careless acts from being repeated by that or any other veterinarian.

²¹⁷ BARRY F. SCHWARTZ & GERALDINE M. DONOHUE, COMMUNICATION IS CRUCIAL IN PRACTICING MEDICINE IN DIFFICULT TIMES: PROTECTING PHYSICIANS FROM MALPRACTICE LITIGATION 47, 69 (Jones & Bartlett Publishers, 2009).

²¹⁸ Eichinger, *supra* note 216.

²¹⁹ According to the personal injury bar, “[j]ust six percent of doctors are responsible for nearly 60 percent of all medical negligence.” See *Medical Negligence: The Role of America’s Civil Justice System in Protecting Patients’ Rights*, Am. Assoc. for Justice, at 4 (Feb. 2011).

²²⁰ See *The Medical Liability Insurance Crisis: A Review of the Situation in Pennsylvania*, Hearing Before House the House Energy and Commerce Subcommittee on Oversight and Investigations, 108th Cong., Feb. 10, 2003 (statement of Alan G. Rosenbloom); see also Milt Freudenheim, *Other Perils of Overweight*, N.Y. TIMES, May 27, 2005, available at http://www.nytimes.com/2005/05/27/business/27bariatric.html?pagewanted=all&_r=0 (last visited May 25, 2013) (reporting on bariatric surgeon who was rejected by multiple medical malpractice insurers despite having no lawsuits filed against him or settlements in five years as chief of obesity surgery).

²²¹ Final Report and Recommendations, Ohio Medical Malpractice Commission, Apr. 2005, at 14.

2. Contrary to Some Assertions, There Has Been No Statistically Valid Study on Allowing Broad Emotion-Based Damages in Pet Litigation

The second part of the argument advocates of the litigation offer with respect to the impact on animal care is that adding emotion-based damages to veterinary malpractice cases will not cause the cost of pet-care services to increase. Veterinarians can pay these additional awards, they say, without having to recoup the costs through higher prices. The source regularly cited for this argument is a 2004 student note in the journal *Animal Law*,²²² but as discussed below, the accuracy of that article has been questioned.

The student's article states that "the president of the second largest veterinary liability insurer, ABD Insurance, instructed his company's actuarial experts to calculate the bottom-line cost" of a California initiative to allow emotion-based damages up to \$25,000.²²³ It continues that ABD arrived at these numbers "[a]fter crunching all the relevant proprietary figures . . . calculat[ing] exactly how much they would have to increase veterinary liability premiums if emotional damages for companion animal losses were allowed"²²⁴ The article concludes that based on these numbers – and the author's own math – a pet owner would only see his or her veterinary bills go up by a mere thirteen cents per year.²²⁵ This hypothesis has been cited widely in briefs and articles urging courts and legislatures to allow emotion-based damages in pet cases.²²⁶

In 2010, the key individual associated with the ABD analysis wrote the American Veterinary Medical Association, saying, "some clarification may be helpful" in light of the fact that "such a comprehensive undertaking has previously been attributed to ABD in a variety of articles and forums."²²⁷ The letter states that, in 2003, Fireman's Fund Insurance Company (not ABD, which is a brokerage firm, not an insurer) undertook a study that was "very limited in

²²² See Green, *supra* note 61.

²²³ *Id.* at 218.

²²⁴ *Id.*

²²⁵ *Id.*

²²⁶ See, e.g., Amicus Curiae Brief of the No Kill Advocacy Center in Support of Respondents Kathryn and Jeremy Medlen at 16-17, *Strickland v. Medlen*, 397 S.W.3d 184 (Tex. 2013) (No. 02-11-00105-CV); Statement by Plaintiffs' Attorney Randall Turner in Oral Argument, *Strickland*, 397 S.W.3d (No. 02-11-00105-CV).

²²⁷ Letter Providing the Court with Supplemental Materials on behalf of Amici Curiae American Kennel Club, Cat Fanciers' Association, Animal Health Institute, American Veterinary Medical Association, National Animal Interest Alliance, American Pet Products Association, and Pet Industry Joint Advisory Council, *Strickland*, 397 S.W.3d (No. 02-11-00105-CV) [hereinafter American Kennel Club *Amici* Letter] (including the entire letter from J. Edward Branam to Adrian Hochstadt sent on June 11, 2010).

nature”: “The objective was simply to get a ‘guestimate’ of how the addition of a small non-economic damages award would affect” existing claims.²²⁸

It is very important to note that no other changes in the program expenses were accounted for in the studies calculations, i.e., anticipated adverse trend changes, increased servicing and claims processing costs, increased carrier investment risk and adverse experience other than non-economic damages, including increased veterinary medical board defense costs. All of which would be critical components of a valid actuarial analysis.

*In conclusion, unfortunately this study was not designed to be a comprehensive actuarial analysis with the objective of predicting future professional liability premiums. . . . I would not consider this study to have any statistical validity. . . .*²²⁹

To the contrary, the letter expresses concern about whether “insurance carriers will continue to write veterinary professional liability insurance at all if non-economic damages are awarded.”²³⁰

As this letter clearly appreciates, if people could get emotion-based damages in pet litigation, the entire legal system around animal injuries would fundamentally change. Looking at the cost of paying out \$25,000 for existing claims (particularly when veterinarian claims already often settle for more than \$10,000) is not a good predictor. Not only would the amount of the awards escalate, there would now be a large financial incentive for owners and their lawyers to sue veterinarians.²³¹ Accordingly, actuarial models would have to be based on how much litigation would be spawned by these changes and a guestimate of how high the verdicts might reach, which would likely be many times the cap upon which the ABD analysis was based. This task would be akin to going back to 1950 and trying to predict the impact that pain and suffering damages would have on medical malpractice cases; nobody could have accurately

²²⁸ *Id.* Limitations in the law are rarely set in stone. Already, one state (Maryland) that has a law allowing for some additional economic damages in animal injury cases has increased its cap from \$2,500 in 1989 to \$7,500 in 2005. See MD. CODE ANN., CTS. & JUD. PROC. § 11-110; H.B. 941 Reg. Sess. (2005). Also, the entire history of wrongful death acts shows that caps at first can be limited (\$10,000), then are raised, and then disappear. Mr. Green, in urging veterinarians to accept such a compromise has threatened that the push for expanded veterinary malpractice will “travel[] faster and farther than [veterinarians] ever anticipated. . . . Keep in mind that legislative bills introduced both in Oregon and Michigan would have allowed up to \$250,000 in recovery for companion animal loss.” Green, *supra* note 61, at 227.

²²⁹ American Kennel Club *Amici* Letter, *supra* note 227, at 3-4 (emphasis added).

²³⁰ *Id.* at 4.

²³¹ Green, *supra* note 61, at 197 (arguing that “few [owners] choose to pursue malpractice suits against veterinarians” and that it must be profitable for personal injury lawyers to build litigation practices around these cases).

modeled the exponential rise, even in relative terms, in such awards over the past 60 years.²³²

The student's article properly recognizes that "it is pet owners, not veterinarians, who are the true consumers of malpractice insurance," and tells of many owners who "spend years paying off thousands of dollars in credit card charges for [] emergency veterinary care."²³³ It is true that some owners may willingly set back their personal or family finances to pay for veterinary care, but not everyone can or is willing to do so. Forcing people to choose between spending more—whether \$50, \$100, or \$500—or not giving pets needed care so that a handful of owners could seek enhanced litigation awards is not the right public policy for people or their pets.

VI. The Pet Care Impact of Allowing Emotion-Based Damages in Pet Litigation

Whenever the issue of emotion-based damages in pet litigation has arisen, those who have taken the time to peel the onion layers on its implications have understood the broad, negative consequences these damages will have, particularly for pets themselves. During the pet food litigation in 2007, an Illinois newspaper editorialized that "[b]efore anyone enacts laws allowing pet owners to sue for 'loss of companionship' – as is done when someone loses a child or a spouse – consider the repercussions."²³⁴ Jon Katz, a noted author of books on the importance of the human-dog bond, agreed, telling the *Los Angeles Times* that he did not "think people have thought through the consequences" of allowing these damages.²³⁵

A. The "Best Interests of the Pet" Is Keeping Emotion-Based Damages out of Pet Litigation

By all measures, advancements in pet care over the past couple of decades have been tremendously successful. Basic care is affordable or otherwise available for most owners, as the average cost for an examination of a sick pet in 2010 was less than \$50, a one-year rabies shot cost \$18, and neutering a dog was

²³² See generally NEAL C. HOGAN, UNHEALED WOUNDS: MEDICAL MALPRACTICE IN THE TWENTIETH CENTURY 1 (LFB Scholarly Publ'g., LLC 2003).

²³³ Green, *supra* note 61, at 178.

²³⁴ Editorial, *Contaminated Pet Food Raises Sticky Questions*, PANTAGRAPH, Apr. 4, 2007, available at <http://www.highbeam.com/doc/1P2-11703998.html> (last visited May 26, 2013).

²³⁵ Molly Selvin & Abigail Goldman, *A Dog's Life: What's It Worth?*, L.A. TIMES, Mar. 30, 2007, available at <http://articles.latimes.com/2007/mar/30/business/fi-pets30> (last visited May 26, 2013).

about \$200.²³⁶ At the same time, owners with sufficient resources have access to advanced care, including organ transplants, joint replacements, cancer treatments, and other innovative procedures and medicines to help pets live longer, healthier lives.²³⁷ These procedures, which can be more complicated than comparable procedures on humans, cost far less than in the human healthcare system.²³⁸

Adding the costs of broad new emotional harm damages into pet litigation will irreparably change these dynamics. If tens of thousands (or hundreds of thousands) of dollars are at stake every time an owner alleges malpractice, the number of lawsuits and the value of those suits would rise dramatically.²³⁹ As Dr. Kent McClure of the Animal Health Institute has explained, this “across the board” increase could put essential pet services and products out of the reach of

²³⁶ See *The Veterinary Fee Reference*, AMERICAN ANIMAL HOSPITAL ASSOCIATION PRESS, 2011, available at <https://www.aahanet.org/Store/ProductDetail.aspx?type=PracticeManagement&code=VFRE7> (last visited May 26, 2013).

²³⁷ See, e.g., Verena Dobnik, *U.S. Pet Owners Paying for High-Tech Veterinary Care*, ASSOCIATED PRESS, July 20, 2010, available at http://www.boston.com/news/nation/articles/2010/07/20/us_pet_owners_paying_for_high_tech_veterinary_care (last visited May 26, 2013) (reporting there is an increasing number of pet owners who have the resources and the desire to provide their pets with high levels of care, while also acknowledging that “many Americans don’t get the kind of care [that some of these] pets do”); Judy Peet, *At Red Bank Veterinary Hospital, They’ll Go to any Length to Save a Family Pet, But Do Some Owners Go a Little Too Far?*, STAR-LEDGER, May 4, 2008, at 1; Fraser Sherman, *More Dollars and Devices Devoted to Animal Care, Area Vets Say*, DESTIN LOG, June 11, 2008, at 1 (quoting a veterinarian who “had a lady two years ago who spent \$1,000 on a rooster”).

²³⁸ For example, one veterinarian compared data for a hysterectomy and hip replacement surgery. He found that a “hysterectomy surgical fee for a woman is \$30,000 to \$70,000 but for your adult Rottweiler it is \$200 to \$500 including anesthesia and post operative care” and that a “total hip replacement surgical fee for a person is \$90,000 to \$150,000 but for your boxer it’s only \$4,000 - \$6,000 including anesthesia and post operative care,” see *Why Is Veterinary Care So Darn Expensive?*, VETLIVE, Oct. 25, 2010 available at <http://www.vetlive.com/2010/10/25/why-is-veterinary-care-so-darn-expensive/> (last visited May 25, 2013); further, a hysterectomy involves removing the uterus, whereas spaying a dog includes removing the uterus and ovaries. Another veterinarian compared his costs for his elbow surgery compared with one he recently performed on a golden retriever. His cost was \$16,014 and the golden retriever’s cost was \$1,685. See Dr. Doug Mader, *Comparing Costs of Human vs. Pet Health Care*, PARK HILL VETERINARY MEDICAL CENTER, Sept. 14, 2012, available at <http://parkhillvet.com/2012/09/comparing-costs-of-human-vs-pet-health-care/> (last visited May 25, 2013).

²³⁹ Cupp, Jr. & Dean, *supra* note 11, at 43 (noting, as with human medicine, pet owners have become “increasingly likely to sue” when they are not pleased with the care their pets receive).

many responsible owners.²⁴⁰ Most pet owners have limits—often a few hundred dollars—on how much they can or will spend on pet care.²⁴¹ The Associated Press has reported that 62% of Americans would likely get veterinary care for \$500, less than half would for \$1,000, about a third would for \$2,000, and only 22% would for \$5,000.²⁴²

The numbers also highlight a disturbing undercurrent: there is a chasm between the “haves” and the “have nots” with respect to pet care. Nearly a quarter of all pet-owning households spend no money on veterinary care.²⁴³ Forty-five percent are postponing care for sick pets.²⁴⁴ The median number of new owner visits to veterinarians and owners actively using veterinarians has declined.²⁴⁵ Also, during the recent economic downturn, owners “in lower socioeconomic areas” have been “skimping on preventive care,” which increases the likelihood that pets will “encounter other animals that haven’t been

²⁴⁰ See Arthur D. Postal, *Calif. Court: Pet Owners Can’t Sue Vets for Emotional Damage*, PROPERTY CASUALTY 360, Aug. 6, 2009, available at <http://www.propertycasualty360.com/2009/08/06/calif-court-pet-owners-cant-sue-vets-for-emotional-damage-> (last visited May 26, 2013) (quoting Dr. McClure). Adrian Hochstadt of the American Veterinary Medical Association has called this the “breaking point” where pet owners cannot or choose not to pay for the medical care, which harms the pets. See Carter, *supra* note 3, at 41.

²⁴¹ Richard L. Cupp, Jr., *Barking Up the Wrong Tree Justice: Awarding Emotional Distress Damages to Pet Owners Whose Animals Are Harmed Is a Dog of an Idea*, L.A. TIMES, June 22, 1998, available at <http://articles.latimes.com/1998/jun/22/local/me-62429> (last visited May 26, 2013) [hereinafter Cupp Jr., *Barking Up the Wrong Tree*]; see also Richard Marosi, *Every Dog Has His Day in Court*, L.A. TIMES, May 24, 2000, available at <http://articles.latimes.com/2000/may/24/news/mn-33495> (last visited May 26, 2013) (“Veterinarians believe animal health care costs would skyrocket under an avalanche of litigation. Ironically, they say, animals would suffer because owners would not be able to afford treatment.”). For example, a 1999 study showed that owners would pay \$688 for treatment if there was a 75% chance of recovery, but only \$356 for a procedure with a 10% chance of recovery. John P. Brown & Jon D. Silverman, *The Current and Future Market for Veterinarians and Veterinary Medical Services in the United States*, 215:2 J. AM. VETERINARY MED. ASS’N 161, 167 (1999).

²⁴² Sue Manning, *AP Poll: Money Is a Huge Consideration in Pet Care*, ASSOCIATED PRESS, June 9, 2010, available at http://www.nbcnews.com/id/37591254/ns/health-pet_health/t/money-woes-factor-pet-care/ (last visited May 25, 2013).

²⁴³ See AMERICAN VETERINARY MEDICAL ASSOCIATION, 2007 US PET OWNERSHIP & DEMOGRAPHICS SOURCEBOOK (2007); JOHN W. ALBERS & MICHAEL T. CAVANAUGH, 2010 AAHA STATE OF THE INDUS. REPORT, available at <http://secure.aahanet.org/eweb/dynamicpage.aspx?site=AAHAYC2010&webcode=StateoftheIndustry> (last visited May 26, 2013).

²⁴⁴ See National Commission on Veterinary Economic Issues, Survey of Veterinarians, Quick Poll Jan. 2010.

²⁴⁵ See AAHA PulsePoints 2002-2010, cited by KAREN E. FELSTED, NCVEI UPDATE: NEW INSIGHTS IN PRACTICE GROWTH 23, http://www.ncvei.org/articles/FINAL_BAYER_VETERINARY_CARE_USAGE_STUDY.pdf.

vaccinated.”²⁴⁶ In all, households that “continue to purchase veterinary services are spending substantially more, but an increasing proportion of households are choosing not to spend any money for veterinary services.”²⁴⁷

Owners who do not spend thousands of dollars on their pets’ care do not cherish their pets any less. A mother who put her dog down because she could not afford a \$500 heart-related procedure explained that for her, “[i]t was pretty straight forward because I had four young children to feed. The vet said surgery was my only option. I did not want my dog to suffer.”²⁴⁸ She cared enough for her dog to deprive her family of its companionship in order to end its suffering. More than half of American veterinarians have recently put down a cat or dog “because their owner could not afford to treat them.”²⁴⁹

Injecting the costs of broad emotion-based damages would make this situation worse. The first casualty would likely be free clinics for spaying and neutering.²⁵⁰ One California veterinarian told a reporter that “[t]his hysteria and sue-happy mentality is very bad. . . . If I have to pay hundreds of thousands of dollars for insurance, how much will I have to charge for a spay or neuter?”²⁵¹ In addition, insurance premiums, as with human healthcare, could dictate care options and decisions that may not be in the best interests of the patient. Veterinarians may be pressured to engage in “defensive medicine,” perform unnecessary treatments, or avoid risky procedures, thereby depriving all pets of some new advancements in veterinary care.

Other pet-related services, including boarding, grooming, and training, would face similar financial pressures. Even friends may not take the risk of watching a pet if they could be sued for emotional loss if the pet is injured under their care. There also is a human health concern because control of rabies and zoonotic disease are important functions of veterinary services.

²⁴⁶ *Pet Owners are Increasingly Skipping Vet Visits as the Economy Declines*, DAILY BEAST, Nov. 11, 2008, available at <http://www.thedailybeast.com/newsweek/2008/11/11/creature-comforts.html> (last visited May 25, 2013).

²⁴⁷ Brown & Silverman, *supra* note 241; see *Pets Are “Members of the Family” and Two-Thirds of Pet Owners Buy Their Pets Holiday Presents*, Harris Interactive, Dec. 4, 2007, available at <http://www.reuters.com/article/2007/12/04/idUS95745+04-Dec-2007+BW20071204> (last visited May 27, 2013) (60% of Americans have not pursued pet care because of cost; 10% of cat owners never take cats to veterinarians due to cost); see also Christopher A. Wolf et al., *An Examination of U.S. Consumer Pet-Related & Veterinary Serv. Expenditures, 1980-2005*, 233 J. AM. VETERINARY MED. ASS’N 404, 410 (2008).

²⁴⁸ *Pets Destroyed Over Vet’s Costs*, ASSOCIATED PRESS, Sept. 4, 2008.

²⁴⁹ *Id.*

²⁵⁰ Rebecca J. Huss, *Valuation in Veterinary Malpractice*, 35 LOY. U. CHI. L.J. 479, 531 (2004).

²⁵¹ Denise Nix and Josh Grossberg, *Cat Owners File Lawsuit Over Tainted Pet Food*, DAILY BREEZE, Mar. 29, 2007, at A1; Barghusen, *supra* note 215, at 41-42 (discussing the difference in the cost of spaying a pet and conducting a similar hysterectomy on a woman, concluding that the operation on the woman, which may be less complicated, costs ten times the amount of the operation on the animal).

B. Increasing the Cost of Pet Litigation Would Have a Wide Societal Impact

A common misperception about pet litigation is that it is a novel legal issue without much application. Nothing could be further from the truth. Two-thirds of Americans collectively own between 150 million and 200 million pets and, if higher damage awards were available, owners would become “increasingly likely to sue” whenever their pet is injured or killed.²⁵² As the *Wall Street Journal* has reported, pet litigation would become a cottage industry in which “just about everyone would potentially bear more liability.”²⁵³

For starters, pet owners themselves could face enormous liability should their pets attack another’s animal, even when the incident is entirely out of character for the pet. Such “pet-on-pet aggression is at least as common as attacks on humans,” given the increased popularity of public dog runs and dog parks in suburban communities and the propensity for dogs and cats to be outside in rural communities.²⁵⁴ The Supreme Court of New Jersey heard such a case last summer.²⁵⁵ Also, owners have been sued when their dogs have killed neighboring farm animals. In Massachusetts, plaintiffs sought loss of companionship when a couple of neighboring dogs killed seven of their sheep, claiming the sheep were “companion animals” themselves.²⁵⁶

Also, anyone who drives a car or owns property could be subject to this new liability. It is not unusual for a dog or cat to run into the street and be hit by a car or for a pet to be injured by a hazard on another’s property.²⁵⁷ If individual people were liable for tens of thousands of dollars for such accidents, neighbors would become more litigious and the price of auto and homeowner insurance

²⁵² Cupp, Jr. & Dean, *supra* note 11, at 43.

²⁵³ See Steve Malanga, Opinion, *Pet Plaintiffs*, WALL ST. J., May 9, 2007, available at <http://online.wsj.com/article/SB117867043711996595-search.html> (last visited May 25, 2013).

²⁵⁴ *Id.*; see, e.g., Roman v. Carroll, 621 P.2d 307, 308 (Ariz. Ct. App. 1980) (plaintiff witnessed a St. Bernard dismember her poodle, with court holding because her dog “is personal property, [d]amages are not recoverable for negligent infliction of emotional distress from witnessing injury to property”); Rowbotham v. Maher, 658 A.2d 912, 913 (R.I. 1995) (denying claim for negligent infliction of emotional distress to owner where dog was mauled by two other dogs because the tort is only allowed where the plaintiff is a “close relative of the victim” and that “clearly” a pet is “not a relative of plaintiff”); Pickford v. Masion, 98 P.3d 1232, 1235 (Wash. Ct. App. 2004) (pet mauled by others’ dogs).

²⁵⁵ See McDougall v. Lamm, 48 A.3d 312 (N.J. 2012).

²⁵⁶ Krasnecky v. Meffen, 777 N.E.2d 1286, 1287 (Mass. App. Ct. 2002).

²⁵⁷ See, e.g., Johnson v. Douglas, 723 N.Y.S.2d 627, 627 (N.Y. App. Div. 2001) (holding that, where family dog was run over by a car, “the law is clear that pet owners cannot recover for emotional distress based upon an alleged negligent or malicious destruction of a dog, which is deemed to be personal property.”); Kondarov v. Kandasha, 629 S.E.2d 181, 183 (Va. 2006) (riding in car).

would go up to account for these costs.²⁵⁸ Defendants without insurance might have to pay such high emotion-based awards out of their own pockets, regardless of the economic impact on their own families.

In several cases, people have been sued when they were forced to shoot a neighbor's dog, either in self-defense or to protect their own animals. In *Mitchell v. Heinrichs*, a family farmer grew concerned when stray dogs ran near her livestock pen, where a goat had just given birth; she perceived that "the dogs were excited by the smell of the blood and were threatening her livestock."²⁵⁹ Ms. Heinrichs tried to scare the dogs away and only shot them when the dogs turned to threaten her.²⁶⁰ In Georgia, a similar lawsuit arose after a dog injured a newborn foal.²⁶¹

Finally, taxpayer resources would be at risk, as a number of cases have been filed against government agencies, including police departments and city shelters.²⁶² In addition to causing government and personal liability exposure, these suits could cause officers, for example, to hesitate before taking the necessary actions to protect themselves or the community from a vicious dog.²⁶³ In one case where owners sued the police for \$125,000, the officer explained that he shot only in self-defense, saying, "I hated to shoot the dog, but had no choice."²⁶⁴

It is also important to point out that pets do not enjoy any countervailing benefits from the litigation. Owners, not pets, receive the awards, and there is no

²⁵⁸ "Actuaries probably haven't even contemplated what cases like that would do to our insurance premiums." Malanga, *supra* note 253.

²⁵⁹ *Mitchell v. Heinrichs*, 27 P.3d 309, 311 (Alaska 2001).

²⁶⁰ *Id.*

²⁶¹ See *Holbrook v. Stansell*, 562 S.E.2d 731, 733 (Ga. Ct. App. 2002) (prohibiting NIED solely for injury to animal where plaintiff saw dog injure her newborn foal because plaintiff "was not touched or injured by the dog in any way during the alleged attack on the foal, she cannot satisfy any of the elements of the impact rule and therefore cannot recover for any of her emotional distress from viewing the attack").

²⁶² See *Paul v. Osceola County*, 388 So. 2d 40, 41 (Fla. Dist. Ct. App. 1980) (animal control was accused of improperly killing plaintiff's cat); *Richardson v. Fairbanks N. Star Borough*, 705 P.2d 454 (Alaska 1985) (negligence claim against animal shelter for killing dog where negligent infliction of emotional distress was disallowed); see also John W. Schedler, *Seattle Should Not Set Bad Precedent in Pet Case*, SEATTLE TIMES, Apr. 4, 2011, available at http://seattletimes.com/html/opinion/2014684459_guest05schedler.html (last visited May 25, 2013) (discussing potential suit against the City of Seattle for \$50,000 by the owner of a dog that was accidentally electrocuted when he stepped on a metal plate connected to one of the city's streetlights).

²⁶³ See, e.g., *Kautzman v. McDonald*, 621 N.W.2d 871, 876-77 (N.D. 2001) (dog shot to protect community); *Soucek v. Banham*, 503 N.W.2d 153, 164 (Minn. Ct. App. 1993) (same).

²⁶⁴ Laura Summers, *Suit Seeks \$125,000 in Officer's Killing of Dog*, TULSA WORLD, July 2, 2008, available at http://www.tulsaworld.com/article.aspx/Bartlesville_Suit_seeks_125000_in_officers_killing/2008_0702_12_a14_spancl679086 (last visited May 25, 2013).

requirement that owners spend this money to improve the lives of theirs or others' pets. This point was made clear by a Boston family who sued a utility company for causing stray voltage that allegedly electrocuted their dog. The family reportedly turned down a \$200,000 settlement offer, saying they wanted enough to set aside \$200,000 for "savings" plus "send their two sons to college."²⁶⁵

VII. Conclusion and Future Outlook

The effort to legally recognize the emotional value of companion animals is certain to continue. Animal law is one of the fastest growing areas in law schools around the country.²⁶⁶

The seeds of the modern animal law movement were planted by Bob Barker of "The Price is Right" fame. In 2001, Mr. Barker donated \$500,000 to Harvard Law School to fund teaching, research, and student opportunities in the field of animal law, specifically animal rights law.²⁶⁷ He followed that up with a second \$500,000 donation to Harvard and \$1 million gifts to several more law schools, including those at Columbia, Duke, Georgetown, Northwestern, Stanford, UCLA, and the University of Virginia.²⁶⁸ As a result, there are now more than 120 schools with animal law programs,²⁶⁹ and the first animal law casebook, published in 2000, is in its fourth edition, with a second book being published.²⁷⁰

The field of animal law is also maturing and broadening its appeal. Many of the lawyers graduating from these programs are not focused on animal rights, but are finding careers in animal welfare organizations, government, and companies that service animals or make animal-related products. These animal welfare-focused attorneys have emphasized pragmatism and building bridges with

²⁶⁵ \$740,000 Sought for Electrocuted Dog, *supra* note 83 (reporting that plaintiffs "came up with the \$740,000 figure because that is the annual salary" of the utility's Chief Executive Officer).

²⁶⁶ Cupp, A Dubious Grail, *supra* note 89, at 4 (stating that the animal rights movement has evolved into an "increasingly sophisticated legal action" movement with "startling rapidity on a large scale").

²⁶⁷ See Taimie L. Bryant, *The Bob Barker Gifts to Support Animal Rights Law*, J. LEGAL ED. 237, 237 (2010).

²⁶⁸ *See id.*

²⁶⁹ Karapetian, *supra* note 213.

²⁷⁰ BRUCE A. WAGMAN, SONIA S. WAISMAN & PAMELA D. FRASCH, ANIMAL LAW: CASES AND MATERIALS (4th ed. Carolina Academic Press 2010); DAVID S. FAVRE, ANIMAL LAW: WELFARE, INTERESTS AND RIGHTS (Aspen 2008).

the veterinary and business communities, with whom the many animal rights attorneys have previously sparred.²⁷¹

This struggle between practicality and ideology has also divided efforts to expand damages in litigation over harm to pets. As suggested in this article, over the past few years there has been some judicial and legislative receptivity for allowing owners to recover monies for the reasonable and necessary veterinary expenses incurred trying to care for an injured pet.²⁷² These developments have been hailed by some as providing important animal welfare benefits. But, they are not without controversy. Some courts have rejected these damages because, under traditional property law, no recovery in excess of fair market value is allowed.²⁷³ The American Bar Association's TIPS Council suggested that it would be open to considering a policy of advocating for these "curative costs," but not emotion-based damages. This compromise was not accepted.

At the end of the day, there is no argument with the premise that losing a pet unexpectedly can be tragic. The role of tort law, though, is not to compensate people for all of their emotional losses. Courts and legislatures have carefully drawn lines for when such recoveries are allowed. What the law can do is to assure that those who engage in acts of animal cruelty, such as the Oregon man who ran over his neighbors' dog several times, can be brought to justice. It also can assure that owners can be made economically whole when a pet is wrongfully injured. The practical reality is that the recoveries for veterinary malpractice and other claims over pet injuries have already escalated to tens of thousands of dollars. There is no litigation need to increase recoveries by including broad emotion-based damages in these cases.

Courts and legislatures should continue being guided by American jurisprudence and pet welfare and reject ideologically-driven attempts to include emotion-based damages in pet litigation. Giving into these claims will end up harming pets themselves, and, if human medical malpractice claims are our guide,

²⁷¹ See Megan A. Senatori and Pamela D. Frasch, *The Future of Animal Law: Moving Beyond Preaching to the Choir*, 60 J. LEGAL EDUC. 209, 220 (2010) (stating that some in the animal rights movement have urged their colleagues to not let disagreements, for example, with the veterinary community on emotion-based damages and the business community on other issues, to stop them from working with these same people on issues of mutual concern).

²⁷² See, e.g., *Kondaurov v. Kerdasha*, 629 S.E.2d 181, 186 (Va. 2006) (rejecting emotional harm damages and allowing for recovery of "reasonable and necessary" costs associated with the injury); *Leith v. Frost*, 899 N.E.2d 635 (Ill. Ct. App. 2008) (allowing "reasonable and customary cost of necessary veterinary cost and treatment"); *Burgess v. Shampooch*, 131 P.3d 1248, 1252 (Kan. Ct. App. 2006) (upholding damage award, where dog was allegedly injured during grooming, for veterinary bills restoring dog to previous health and holding that for purposes of determining damages, the dog is personal property). Also, Maryland and Nevada have capped economic damages at \$7,500 and \$5,000, respectively, to assure that recoveries do not exceed societal expectations. MD. CODE ANN. CTS. & JUD. PROC. § 11-110 (2006); NEV. REV. STAT. § 41.740 (2007).

²⁷³ See *Naples v. Miller*, No. 08C-01-093, 2009 WL 1163504, at *1 (Del. Super. Ct. Apr. 30, 2009) (rejecting recoveries above fair market value).

once the barn door to such liability is opened, the awards will escalate exponentially and create a worse medical environment for America's pets.