CAN THE INJURED PET OWNER LOOK TO LIABILITY INSURANCE FOR SATISFACTION OF A JUDGMENT? THE COVERAGE IMPLICATIONS OF DAMAGES FOR THE INJURY OR DEATH OF A COMPANION ANIMAL

By
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Much has been written in recent years regarding the important role pets play in our society and the legal consequences that have developed from that relationship. Both our courts and legislatures have recognized, in certain circumstances, the ability of a pet owner to recover from a wrongdoer in the event of negligent or intentional conduct that results in the death or injury of a companion animal. However, securing a damages award and recovering on a judgment secured may present the aggrieved pet owner with two entirely different challenges. Liability insurance coverage is critical to the latter concern. Although results can vary considerably by jurisdiction, questions such as the definition of covered damages and the operation of the intentional acts exclusion are likely to play a key role in any analysis. This paper provides a broad overview of some of the larger issues regarding coverage applicability, and illustrates the possible application of these principals by applying them to the facts of cases which have found damages for pet owners where their animals have been injured or killed as a result of negligent, reckless or intentional conduct.

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I. INTRODUCTION

Americans love their pets. One survey found that fifty-eight percent of respondents take their pets to the veterinarian more often than they see their own physician,[1] ninety-four percent take their pets to the veterinarian for "regular check-ups," and ninety-three percent responded that they were "likely to risk their own life for their pet."[2] When a companion animal dies, their owners often grieve the loss as that of a close friend.

Given the bond we share with our pets, it is not surprising that courts and legislatures have considered the question of compensation for damages resulting from the injury or death of a pet. In *City of Garland v. White*,[3] the Texas Court of Appeals considered a claim for emotional distress resulting from a police officer shooting the plaintiff's registered three-year-old Boxer.[4] Following a complaint of the dog's aggressive behavior, the Garland police investigated and saw the dog running loose.[5] After seeing aggressive behavior firsthand, the officers chased the dog onto the plaintiff's property and cornered it in a garage.[6] Although the dog made no aggressive move toward the officers and could have been easily captured by closing the garage door, the officers shot the animal.[7]

The police made no effort to notify the owners prior to the shooting, although they were home at the time.[8] While the facts of the case bring to mind the actions of the officers in connection with the state's police power, the court's decision turned on civil liability. The trial court found the police officers liable for trespass and intentional killing

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1 Am. Animal Hosp. Assn., *2004 AAHA Pet Owner Survey*, http://www.aahanet.org/index_adds/POS04.html (accessed Mar. 12, 2005) (providing results from a 2004 survey of 160 accredited veterinary practices).

2 *Id.*

3 368 S.W.2d 12, 13 (Tex. Civ. App. 1963).

4 *Id.*

5 *Id.* at 14.

6 *Id.* at 14–15.

7 *Id.* at 15.

8 *Id.*

of the dog.[9] The appellate court upheld a jury award for mental pain and suffering of the owners, specifically noting the damaging impact of the event upon the plaintiff.[10]

Much has been written in recent years regarding the relationship we have with our companion animals, the evolving court interpretations of legal duty, and the appropriate remedy for breach of that duty that has sprung from that relationship.[11] However, there is also a corollary issue of compensation for damages. Typically, the primary vehicle used to settle claims or satisfy judgments has been liability insurance. This paper explores the likely response of common insurance products to an award of damages to a pet owner resulting from the injury or death of a companion animal.

Part II of this paper reviews the legal basis on which courts and legislatures have allowed recovery for the damage suffered by owners of companion animals, and shows that the types of damages allowed have expanded in recent years. Part III discusses the key provisions of several common liability insurance policies that may indemnify a tortfeasor in the event of a suit seeking damages for the death or injury of a companion animal. Finally, Part IV analyzes the potential for insurance coverage in the event of a judgment rendered against a wrongdoer for the injury or death of a companion animal.

II. THE CHANGING VIEW OF COMPENSATION FOR DAMAGES CAUSED BY THE INTENTIONAL OR NEGLIGENT DEATH OF A COMPANION ANIMAL

Courts have approached the issue of damages for the death or injury of a pet in one of three general ways.[12] The traditional approach treats a companion animal as property and attempts to assign a fair market value.[13] Another approach, which has gained acceptance in recent years, considers the damages due for the emotional distress suffered by an owner when she establishes liability for negligent or intentional infliction of emotional distress.[14] A third approach has been to award punitive damages in particularly egregious circumstances.[15]

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9 *White*, 368 S.W.2d at 17.

10 *Id.*

11 *See e.g.* Jay M. Zitter, *Recovery of Damages for Emotional Distress Due to Treatment of Pets and Animals*, 91 A.L.R.5th 545 (2001) (explaining the types of actions and damages available to a pet owner).

12 Lynn A. Epstein, *Resolving Confusion in Pet Owner Tort Cases: Recognizing Pets' Anthropomorphic Qualities under a Property Classification*, 26 S. Ill. U. L.J. 31, 36 (2001) (providing an outline of the common and evolving approaches used by courts in determining damages for the injury or death of pets).

13 *Id.*

14 *Id.*

15 *Id.*

A. The Traditional Approach

In the past, courts have most often viewed animals as personal property and have valued the damages resulting from the death or injury to an animal in much the same way that they would determine damages to any other piece of personal property. The historical rule has been that pet owners are allowed to recover only the fair market value of their animal when death or injury occurs.[16] The traditional valuation approach seeks to achieve the familiar goal of placing the victim in the same position they were in prior to the wrongful act.[17] This approach was applied in *Nichols v. Sukaro Kennels*.[18] In *Nichols*, the court considered damages to the owner of a dog that was severely injured while in the custody of the defendant for boarding.[19] Although the defendant offered to confess judgment for a sum approximating the dog's fair market value and plaintiff's out of pocket costs, the plaintiff sought damages for emotional injury, mental suffering, and the intrinsic value of the pet to the owner. The court rejected these claims and held fast to a position that "damage resulting from injury to an animal is the difference in value before and after the injury."[20]

In calculating damages, factors such as pedigree, purchase price, health, traits, and show record are often used to establish a sum that will compensate the owner.[21] Often, in the case of rare or pedigreed animals, the availability of the animal to the general public is a significant factor considered in arriving at a value.[22] Nevertheless, while acknowledging the close relationship between pets and their owners,

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16 William C. Root, *"Man's Best Friend": Property or Family Member? An Examination of the Legal Classification of Companion Animals and Its Impact on Damages Recoverable for Their Wrongful Death or Injury*, 47 Vill. L. Rev. 423, 423 (2002). *See also* Richard Cupp, Jr. & Amber E. Dean, *Veterinarians in the Doghouse: Are Pet Suits Economically Viable?* 31 The Brief (newsletter of the ABA Tort & Ins. Prac. Sec.) 43, 43 (Spring 2002) (discussing courts' persistence in treating pets as simple property, despite strong bonds formed between pet owners and their pets). With regard to the values found, the authors note that, "[e]xcept for registered breeds, the market value of most pets is likely exceeded by their owners' weekly dog biscuit or catnip bill." *Id.*

17 Root, *supra* n. 16, at 426–27.

18 555 N.W.2d 689 (Iowa 1996).

19 *Id.* at 690.

20 *Id.* at 692. The court also defined the elements used to prove loss of fair market value. The court observed "[t]here may be other elements of damage such as expense of treatment or temporary loss of use. But whether an animal is injured or destroyed the total damages ordinarily recoverable may not exceed its value prior thereto." *Id.*

21 *Id.*

22 *Wells v. Brown*, 217 P.2d 995, 997–98 (Cal. App. 4th Dist. 1950) (discussing the determination of damages for the death of a Weimaraner, at a time when the dog was not a common breed in the United States); *Soucek v. Banham*, 524 N.W.2d 478, 481 (Minn. App. 1995) (holding that compensatory damages for death of a dog are limited to the fair market value of the animal); *Miller v. Economy Hog & Cattle Powder Co.*, 293 N.W. 4, 10–11 (Iowa 1940) (holding that the measure of damages for destruction of animals is the difference between their value before the occurrence which caused their deaths and the value of the remains).

courts have been reluctant to award damages for emotional distress.[23] The rationale for this position has been based upon a fear that recognition of these damages would open unlimited possibilities with regard to other items of personal property.[24] Further, there has been a concern for the burden on our courts that would result from a flood of litigation seeking these types of damages.[25]

Although fair market value has been an icon of the traditional approach, courts have on occasion stretched the concept to allow consideration of the intrinsic loss to the owner.[26] In *McDonald v. Ohio State University Veterinary Hospital*, the plaintiff owned an award-winning Schutzhund German Shepherd.[27] The court noted that the dog had compiled an impressive record of awards at shows and competitions, and had been earning income from breeding service prior to an accident that caused its partial paralysis.[28] In its decision, the Ohio Supreme Court recognized that market value was a standard as opposed to a shackle.[29] The court awarded damages that took into account the extensive training, efforts to rehabilitate, and loss of future earnings suffered by the owner as a result of the injury to the dog. However, the

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[23] *Johnson v. Douglas*, 723 N.Y.S.2d 627, 628 (N.Y. Sup. 2001). In this case, the plaintiff's pet was killed by a speeding automobile that struck the dog and narrowly missed the owner. In acknowledging the relationship between the dog and its owner, the court stated, "There is no doubt that some pet owners have become so attached to their family pets that the animals are considered members of the family. This is particularly true of owners of domesticated dogs who have been repeatedly referred to as 'Man's Best Friend' and a faithful companion." *Id.*

[24] *Id.* The court used as an example the possibility that one might try to recover for the emotional distress caused by the loss of a family heirloom or school ring. *Id.*

[25] *Id.*

[26] *See* Cupp & Dean, *supra* n. 16, at 43. The authors note that, "[i]n what may be a trend, courts increasingly are allowing pet owners to recover loss of companionship and emotional distress damages, punitive damages, and both the 'actual value' of the companion animal and its sentimental value, rather than simply the pet's mere market value." *Id.*

[27] 644 N.E.2d 750, 751–52 (Ohio Ct. Cl. 1994). Though the case does not go into specifics regarding the event that caused the dog's paralysis, there was reference to several surgical efforts to reverse the paralysis. *Id.* at 752. The court noted that prior to its paralysis, the dog had been used as a stud five times in eight years, and had sired thirty-one puppies that brought revenue of $350 to $500 per puppy. *Id.*

[28] *Id.* However, the court noted that "[a]lthough the plaintiff went to great expense in time and money to enter [the dog] in these shows, the awards won were never monetary." *Id.* at 751.

[29] *Id.* The court noted that a more flexible standard was required to address the valuation problems of the case. *Id.* Specifically, the court noted that:

> Market value is the standard which the courts insist on as a measure of direct property loss, where it is available, but that is a standard not a shackle. When market value cannot be feasibly obtained, a more elastic standard is resorted to, sometimes called the standard of value to the owner. This doctrine is a recognition that property may have value to the owner in exceptional circumstances which is the basis of a better standard than what the article would bring on the open market.

Id. at 752 (citing *Bishop v. E. Ohio Gas Co.*, 56 N.E.2d 164, 166 (Ohio 1944)).

court was careful to observe that "[s]entimentality is not a proper element in the determination of damages caused to animals" and characterized its evaluation as appropriate under the exceptional circumstances at hand.[30]

An interesting problem has arisen in cases where the pet has minimal monetary value. In *Jankoski v. Preiser Animal Hospital, Ltd.*, the Illinois Court of Appeals rejected the owner's claim of loss of companionship and emotional distress but recognized the actual value to the owner as a determinant of the damage suffered.[31] The court noted that "[t]he concept of actual value to the owner may include some element of sentimental value in order to avoid limiting the plaintiff to merely nominal damages."[32]

B. *Expansion of the Concept of Damages: Recognition of Emotional Distress*

Although the rule followed by courts in the past has been to value animals as property at fair market value, courts in recent years have begun to broaden the scope of damages allowed, and recognize the loss caused by emotional distress to pet owners.[33] Damages have been allowed in several situations,[34] including cases where the injury or death of the pet was caused by intentional conduct,[35] gross negli-

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[30] *Id.*

[31] 510 N.E.2d 1084, 1087 (Ill. App. 1st Dist. 1987). The plaintiffs sued their veterinarian for loss of companionship and emotional distress after the dog died following negligent administration and monitoring of anesthesia. *Id.* at 1085. Prior to granting the defendant's motion to dismiss, the court offered the plaintiffs the opportunity to amend their complaint to one seeking compensation for property damage, but the plaintiffs refused because the dog had no monetary value. *Id.*

[32] *Id.* at 1087. The court rejected the plaintiffs' claim for loss of companionship as an independent cause of action, but reasoned that loss of some element of companionship or sentimental value could be taken into account when determining the loss of value to the owner.

[33] Peter Barton & Frances Hill, *How Much Will You Receive in Damages from the Negligent or Intentional Killing of Your Pet Cat or Dog?* 34 N.Y.L. Sch. L. Rev. 411, 424 (1989). The authors note that:

> Although several states recognize a cause of action for emotional distress, usually the act causing the emotional distress must be intentional or, if due to negligence, the act must be accompanied by physical harm to the plaintiff. However, a small but growing number of states have abolished the physical harm requirement for the tort of negligent infliction of emotional distress. There have been successful cases involving pets where the act causing the emotional distress has been intentional and where it has been due to negligence.

Id. at 421.

[34] *Id.*

[35] *Infra* nn. 45–48 and accompanying text.

gence,[36] conversion,[37] or even for the loss of a pet's body where the owner had planned a funeral.[38]

Claims of infliction of emotional distress can be pursued either as a claim for intentional or negligent infliction. To prevail on a claim of intentional emotional distress, extremely egregious or outrageous conduct must occur.[39] A claim of negligent infliction of emotional distress is generally available only when there is direct contact with a plaintiff or they are in the zone of danger. The applicability of this doctrine varies significantly by jurisdiction.[40] However, given the limited application of the negligent infliction of emotional distress doctrine, it does not appear to represent a viable option for recovery to an owner in the event of injury or death to their companion animal.[41] The most viable theory appears to be intentional infliction of emotional distress.

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[36] *Id.*

[37] *Fredeen v. Stride*, 525 P.2d 166 (Or. 1974). The case involved the theft of a pet that the defendant veterinarian had recommended be euthanized. *Id.* at 168. After the plaintiff agreed, two kennel helpers became fond of the animal and the defendant allowed them to nurse the animal back to health. *Id.* The court found sufficient evidence to support the plaintiff's claim of mental anguish. *Id.* at 169.

[38] *Corso v. Crawford Dog & Cat Hosp., Inc.*, 415 N.Y.S.2d 182 (N.Y.C. Civ. Ct. 1979). The defendant veterinarian euthanized the plaintiff's poodle due to old age and agreed to turn the dog's remains over to a pet funeral service. *Id.* at 182–83. However, due to a mistake, the body of the dog was destroyed and the casket arrived containing the body of a dead cat. *Id.* The court, in awarding damages beyond the market value of the dog observed, "[a] pet is not an inanimate thing that just receives affection; it also returns it. I find that plaintiff Ms. Corso did suffer shock, mental anguish, and despondency due to the wrongful destruction and loss of the dog's body." *Id.*

[39] Cupp & Dean, *supra* n. 16, at 48 (noting that although pet owners have recovered under this theory, the defendants have typically not been veterinarians).

[40] *Id.* at 49 (noting that the theory generally requires a plaintiff to "contemporaneously sense or experience the other's injury" which can create problems in the context of companion animals); *see also* Judith Nallin, *Torts-Dogs-Emotional Distress*, 167 N.J. L.J. 1458, 1458–59 (March 25, 2002) (discussing the reasons courts have been reluctant to award damages for negligent infliction of emotional distress, including an inability to define who should recover, difficulty in identifying the types of animals for which the damages should be recognized, and the financial burden created for the negligent defendant).

[41] *See* Dan B. Dobbs & Paul T. Hayden, *Torts and Compensation: Personal Accountability and Social Responsibility for Injury* 511–14 (4th ed., West 2001) (discussing the law related to negligent infliction of emotional distress). The law has developed from the "classic case of emotional harm resulting from injury to another." *Id.* at 511. Courts originally denied these types of claims all together, but eventually carved out an exception for one who was actually in the "zone of danger" as long as part of the fear experienced was fear of personal harm. *Id.* California courts have expanded the analysis to include recovery for persons who were mere bystanders and not in the zone of danger, extending the duty of the negligent party to the injured person and those who might foreseeably suffer emotional harm as a result of the injury. However, even this broad minority view requires the injured third party to be closely related to the victim. *Id.* at 512; *see also Thing v. La Chusa*, 771 P.2d 814 (Cal. 1989) (involving a mother whose child was struck and injured by an automobile). Even given the strong attachment many owners have to their pet, it is difficult to imagine a court awarding damages under a 'negligent infliction' theory in the case of a pet's death, even in the most liberal of jurisdictions.

Another problem that arises in some jurisdictions is the fact that recovery of emotional distress is not permitted where a plaintiff suffers only property damage.[42] An example of the historical approach taken by courts to a claim of emotional distress is seen in *Fackler v. Genetzky*.[43] In *Fackler*, the court refused to permit recovery for emotional distress of an owner due to the death of two racehorses resulting from negligent administration of drugs by a veterinarian.[44]

Other courts have recognized damages for emotional distress, especially in cases where the injury or death of the pet was inflicted intentionally. One case allowing such recovery suffered by a companion animal owner is *Gill v. Brown*.[45] In *Gill*, the plaintiff alleged that the defendant had recklessly shot and killed the plaintiff's donkey that was used as both a pack animal and family pet.[46] The court, following the view expressed in Restatement (Second) of Torts § 46 (1948), allowed the plaintiff to claim damages for severe mental anguish caused by defendant's extreme and outrageous intentional conduct.[47] The court reasoned that by pleading facts in their complaint supporting allegations of severe mental anguish caused by reckless behavior, the plaintiffs met the requirement for a claim of intentional infliction of emotional distress.[48]

C. Punitive Damages

In addition to fair market value and loss due to mental anguish or emotional distress, courts have been willing to consider the imposition of punitive damages in select cases. In considering this category of damages, it has been noted that, "[w]here the defendant's wrongdoing has been intentional and deliberate, and has the character of outrage frequently associated with crime, all but a few courts have permitted

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[42] Root, *supra* n. 16, at 424.

[43] 595 N.W.2d 884, 887 (Neb. 1999).

[44] *Id.* at 892. The court focused on the doctrine that emotional damages are not recoverable as a legitimate measure of damages in cases involving destruction of personal property in Nebraska. *Id.* at 890–91. However, the court also noted that "[s]ome courts have recognized a cause of action for intentional infliction of emotional distress where intentional killing of an animal was concerned." *Id* at 892.

[45] 695 P.2d 1276 (Idaho App. 1985); *see also Knowles Animal Hosp. v. Wills*, 360 So. 2d 37, 38 (Fla. 3d Dist. App. 1978) (allowing recovery for mental pain and suffering in a claim of gross negligence against a veterinarian who caused severe burns and disfigurement to a pet dog by leaving it unattended under a heating pad for an excessive amount of time).

[46] *Gill*, 695 P.2d at 1277.

[47] *Id.* at 1278. The court was careful to note they were not departing from the general rule that "[t]he measure of damages when personal property is destroyed by the tortuous conduct of another is the fair market value." *Id* at 1277. However, the court distinguished *Gill* from the general rule by the claim that the defendant's negligent and reckless behavior caused "extreme mental anguish and trauma." *Id.*

[48] *Id.*

the jury to award in the tort action 'punitive' or 'exemplary' damages, or what is sometimes called 'smart money.'"[49]

Given the trusting nature of companion animals, cases involving outrageous conduct resulting in their injury or death provide fertile ground for imposition of punitive damages. In *Wilson v. City of Eagan*, the Minnesota Supreme Court held that it was appropriate to award punitive damages against an animal warden that had killed a cat in violation of a state statute.[50] In *Wilson*, the city's animal control warden received a complaint from a local day care center that a stray cat was being a nuisance in the yard.[51] The warden located the cat across the street on its owner's apartment patio, captured the cat and brought it in a cage to city hall.[52] After a failed attempt to find a volunteer to take the cat for the required five day impound period, the warden decided, along with a deputy police chief, to euthanize it. After an unsuccessful attempt at asphyxiation, the warden and deputy took the cat to a local firing range and shot it three times with a shotgun.[53]

The plaintiff filed suit seeking compensatory and punitive damages. The claim was based upon the failure of the city employees to abide by Minn. Stat. § 35.71(3) (1978), which required a five-day waiting period before the destruction of an impounded animal.[54] A jury awarded compensatory damages and $5,000 in punitive damages against the warden and deputy.[55] The defendants appealed on several issues, including the appropriateness of the punitive damage award. In upholding the award, the court noted that "the potential for abuse of authority by public officials and employees in ways that can cause harassment, invasion of privacy, or injury to property low in value is great."[56]

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[49] William L. Prosser & W. Page Keeton, *Prosser and Keeton on Torts* 9 (5th ed., West Publg. Co. 1984). The authors also note that:

> [s]omething more than the mere commission of a tort is always required for punitive damages. There must be circumstances of aggravation or outrage, such as spite or "malice," or a fraudulent or evil motive on the part of the defendant, or such a conscious and deliberate disregard of the interests of others that the conduct may be called wilful or wanton.

Id. at 10.

[50] 297 N.W.2d 146, 150 (Minn. 1980).

[51] *Id.*

[52] *Id.*

[53] *Id.*

[54] *Id.* at 150–51.

[55] *Id.* at 148.

[56] *Wilson*, 297 N.W.2d at 151. However, in this case, the court also upheld the reduction of the punitive damage award from $2,000 to $500 as pertained to the warden and deputy. The court noted that although they killed his cat, the defendants had not acted with malice toward the plaintiff. *Id.* Additionally, the deputy was unaware how long the cat had been impounded before the shooting. Nevertheless, the decision recognizes the right to punitive damages in the case of reckless conduct by municipal employees toward a pet. *Id.*

Another notable case applying punitive damages in the context of the death of a companion animal is *LaPorte v. Associated Independents*.[57] In *LaPorte*, a dog owner brought an action for the malicious killing of her dog by a garbage collector.[58] In upholding an award of punitive damages, the Florida Supreme Court stated,

> Without indulging in a discussion of the affinity between "sentimental value" and "mental suffering," we feel that the affection of a master for his dog is a very real thing and that the malicious destruction of the pet provides an element of damage for which the owner should recover, irrespective of the value of the animal. . . .[59]

D. Statutory Remedies

Finally, in addition to the common law causes of action discussed above, statutory provisions have been enacted in several states to provide a remedy for the non-economic damages to an owner of a pet that has been injured or killed. The statutory response was foretold in several state Supreme Court decisions suggesting the need for a legislative rather than judicial response to the question of legal status and remedy for harm to a companion animal.[60]

Though several states considered such legislation, the most widely publicized law is a Tennessee statute allowing non-economic damages to compensate the owner of a companion animal for its death or injury.[61] The statute provides for up to $5,000 in non-economic damages in the event that a pet dog or cat is killed or injured as a result of an unlawful and intentional or negligent act of another.[62] In addition, the $5,000 cap does not apply in the case of the intentional infliction of emotional distress or to any other action not necessarily restricted to the loss of the pet.[63] The statute also places special valuation provisions on a guide dog that has received special training, and makes a

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[57] 163 So. 2d 267 (Fla. 1964).

[58] *Id.* at 267. The facts specifically state that while the plaintiff was eating breakfast her miniature dachshund was tied to a tree in her yard. The plaintiff witnessed the defendant garbage collector hurl a garbage can in the direction of the dog and heard the dog yelp. *Id.* at 268. When she confronted the garbage collector regarding his conduct, he laughed and left the scene. *Id.*

[59] *Id.* at 269. In sustaining the award of punitive damage, the court also noted the extreme indifference exhibited by the garbage collector to the rights of the owner. *Id.* at 268.

[60] Elaine T. Byszewski, *Valuing Companion Animals in Wrongful Death Cases: A Survey of Current Court and Legislative Action and a Suggestion for Valuing Pecuniary Loss of Companionship*, 9 Animal L. 215, 224 (2003); *see also* Felicia R. Lee, *Coping; What Price for a Pet's Life*, N.Y. Times, sec. 14 at 1 (Apr. 29, 2001) (discussing legislation proposed by New York Assemblyman Manning).

[61] Byszewski, *supra* n. 60 at 225 (describing the "T-Bo Act of 2000" authored by Tennessee state Senator Steve Cohen after his pet Shih Tzu was killed by a negligent party). Although the law limits damages to $5,000 and only includes death to dogs or cats, the law is significant as the first of its kind. *Id.*

[62] Tenn. Code Ann. § 44-17-403(e) (2000).

[63] *Id.* at § 44-17-403(a), (c) (2000). Specifically section (c) states that "[l]imits for non-economic damages set out in section (a) shall not apply to causes of action for inten-

clear exception for employees of a nonprofit or governmental agency who kill or injure a pet while acting on behalf of the public health or animal welfare.[64]

The statutory trend is by no means limited to Tennessee, as legislation has been proposed in at least ten states that would codify the ability of a pet owner to recover non-economic damages.[65] The proposed legislation varies, but in some cases includes provisions for damages of up to $100,000 for non-economic loss.[66] Common threads that run through the proposed acts are a limitation of the applicability to dogs and cats, a triggering event being of an unlawful, negligent, or intentional nature, and the fact that the catalyst for the legislation is often a well-publicized instance of abuse.[67]

The foregoing sections make it clear that courts have long acknowledged an owner's right to recover the fair market value of a pet that is injured or killed as a result of a negligent or intentional act. In addition, courts are increasingly looking to additional types of damages to compensate owners for the loss of companionship, mental anguish, and emotional damages that accompany a pet's death or injury. Furthermore, several state legislatures are being asked to consider legislation that would significantly change or broaden the traditional approach to damages. With these trends in mind, the question arises as to the response of a commercial insurer in the event of an award against one of its insureds for non-economic damages caused by death or injury to a claimant's pet.

III. COMMON LIABILITY INSURANCE PROVISIONS IN THE CONTEXT OF COMPANION ANIMAL CLAIMS

The traditional way that most cases are settled and judgments satisfied are through payments made under liability insurance poli-

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tional infliction of emotional distress or any other civil action other than the direct and sole loss of the pet." *Id.* at § 44-17-403(c).

64 *Id.* at § 44-17-403 (a)(2), (e).

65 Byszewski, *supra* n. 60, at 225–30 (summarizing the attempted or successful legislation that would provide damages for the loss of a companion animal).

66 Colo. H. 1260, 64th Gen. Assembly, 1st Reg. Sess. (Jan. 31, 2003) (This particular piece of legislation was not passed, in part due to strenuous resistance from the state's veterinary lobby.).

67 *See e.g.* Tenn. Code Ann. § 44-17-403(e) (2000). The T-Bo act is a prototypical statute of this type. It applies to the death of a pet if "a person's pet is killed or sustains injuries which result in death caused by the unlawful and intentional, or negligent, act of another or the animal of another." *Id.* The act applies to "any domesticated dog or cat normally maintained in or near the household of its owner." *Id.* In addition, the impetus for the legislation was the death of a dog owned by a state Senator; *see* National Conference of State Legislatures, *Canine Loss Spurs New Law*, State Legislatures Magazine (Oct./Nov. 2000) (available at http://www.ncsl.org/programs/pubs/1011dog.htm) (describing the account of Senator Steve Cohn of Tennessee regarding the death of his Shih Tzu, T-Bo); *see also* Byszewski, *supra* n. 60, at 225–30 (providing an overview of the T-Bo act as well as other proposed legislation). The proposed laws generally cover intentional and reckless conduct of domesticated pets. *Id.*

cies.[68] Law professors, legal scholars, and practicing attorneys have long had a keen appreciation for the symbiotic relationship between tort law and liability insurance.[69] One authority noted that, "many commentators have observed that tort law cannot be understood if the business of insurance and the law regulating it is ignored, and that insurance law cannot be understood if tort law is ignored."[70] This section outlines the key provisions of the homeowner's commercial general liability, and veterinarians professional liability policies that could apply in the event of a claim of the type described above. Although a full analysis of these policies exceeds the scope of this paper, a background is provided on several key provisions of these coverages that would likely be considered when analyzing coverage for a claim of damages resulting from the injury or death of a companion animal.

A. Homeowner's Coverage

The modern homeowner's insurance policy is a package of insurance coverage designed to protect the dwelling, contents, and personal liability exposures of a policyholder.[71] The coverage is generally sold to non-business consumers who rent or own single or multi-family homes.[72] The policy consists of two primary sections: a first-party section indemnifying the policyholder for damage to her own property, and a third-party section providing coverage for legal liability of the insured to third parties.[73] Although specialized products exist, the general rule is that the first party coverage under a homeowner's policy does not cover death or injury to animals.[74] Therefore, the focus of this analysis will be the third-party section, or legal liability coverage.

The primary portion of the policy that would apply in the event of a liability claim against a policyholder for injury or death of a companion animal would be the liability coverage,[75] which is contained in the

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[68] *See* 43 Am. Jur. 2d *Insurance* § 2 (2003) (noting that insurance is a loss-sharing mechanism whereby losses are distributed in a manner that allows the insurer to "accept each risk at a slight fraction of the possible liability upon it"). The Author describes insurance as "an agreement by which one person, for a consideration, promises to pay money . . . to another on the destruction, death, loss, or injury of someone or something by specified perils." *Id.* at § 1.

[69] David A. Fisher & Robert H. Jerry II, *Teaching Torts without Insurance: A Second Best Solution*, 45 St. Louis U. L.J. 857, 857 (Summer 2001).

[70] *Id.*

[71] Diane W. Richardson, *The Homeowners Coverage Guide: Interpretation and Analysis*, 1 (2d ed., Natl. Underwriter Co. 2002).

[72] *Id.* at 3 (describing the eligibility requirements for the homeowner's policy). The author also discusses the ability of an individual policyholder to insure incidental business pursuits, although liability coverage for a business entity should be obtained through purchase of a commercial general liability policy. *Id.* at 6.

[73] *See generally* Richardson, *supra* n. 71 (describing the coverage provided by standard homeowners policies). Coverage is provided for standard first party property exposures. *Id.* at 71–75. In addition, the form provides coverage for standard liability exposures faced by homeowners. *Id.* at 93–128.

[74] *Id.* at 38–39.

[75] *Id.* at 93.

second part of the policy. The coverage provided by the liability section is described in a clause called the insuring agreement. The common wording used in a typical homeowner's insuring agreement states:

> If a claim is made or a suit is brought against an "insured" for damages because of "bodily injury" or "property damage" caused by an "occurrence" to which this coverage applies, we will:
> Pay up to our limit of liability for the damages for which an insured is legally liable. Damages include prejudgment interest awarded against the "insured," and
> Provide a defense at our expense by counsel of our choice, even if the suit is groundless, false or fraudulent. We may investigate and settle any claim or suit that we decide is appropriate. Our duty to settle or defend ends when our limit of liability for the "occurrence" has been exhausted by payment of a judgment or settlement.[76]

There are several key terms in the insuring clause that have special significance and which are specifically defined in the policy. An understanding of these terms is important in analyzing the coverage that could apply in the event of a companion animal claim or suit. For example, the typical homeowner's policy defines the insured generally as the named policyholder, resident relatives, and persons under the age of twenty-one residing in the household.[77] The intent is to provide coverage for the named policyholder and his family.[78] This provision is important because generally, only acts of an insured can be covered under the liability section of an insurance policy.[79]

In addition, coverage under the typical policy is triggered only when there is an "occurrence" as defined by the form. The homeowner's policy defines occurrence as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions, which results, during the policy period, in: a) 'Bodily Injury'; or b) 'Property Damage.'"[80] The occurrence requirement lists the types of fortuitous events that qualify for coverage, and defines the types of damages for which the coverage may indemnify an insured in the event of a liability claim by a third party.

As noted in the above definition, the types of damages covered by the liability section of a homeowner's policy fall into two broad categories. It is therefore necessary to understand the definitions of property damage and bodily injury in order to understand what damages may be indemnified by the homeowner's policy in the event of liability of an insured. Property damage is defined as "physical injury to, destruction of, or loss of use of tangible property."[81] Bodily injury is defined as

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[76] *Id.* at app. B, ISO Homeowners 3 – Special Form, Entire Policy, HO 00 03 (10 00), at 16 of 22.

[77] Richardson, *supra* n. 71, at 93.

[78] *Id.*

[79] *Id.*

[80] *Id.* at app. B, ISO Homeowners 3 – Special Form, Entire Policy, HO 00 03 (10 00), at 2 of 22.

[81] *Id.*

"bodily harm, sickness, or disease, including required care, loss of services, and death that results."[82]

When considering the possibility of coverage for liability of a policyholder due to death or injury of a companion animal, there are several issues that must be considered. First, the insuring clause of the policy makes it clear that the policy only applies to an accidental event.[83] This requirement of fortuity could eliminate coverage in the event of an intentional act.[84] In addition, although the death or injury of a pet would certainly constitute property damage as defined by the policy, the coverage only extends to the physical injury or destruction of the property itself.[85] This clause could presumably be applied to provide coverage for the fair market value loss, but may not respond to a claim for mental anguish or emotional distress of the owner of the companion animal caused by its death or injury.

There are significant uncertainties regarding the applicability of bodily injury coverage to a claim resulting from death or injury of a pet. Though injury to the animal would not constitute bodily injury as defined by the policy, it is unknown whether the owner's mental anguish and emotional distress would apply. As noted above, some pet owners become quite attached to their animals[86] and would conceivably suffer mental anguish and emotional distress, particularly if the animal was injured intentionally or in a cruel manner. As a general rule, for emotional distress to be afforded coverage, it must result from bodily contact.[87] However, if a plaintiff's distress results in physical manifestation of symptoms, some jurisdictions have held this to constitute bodily injury, thus qualifying as a covered damage under a liability insurance policy.[88] Under this scenario, death or injury to the pet, which causes emotional distress to its owner, could be construed as bodily injury and potentially indemnified under the policy as such. The majority position holds that the bodily injury coverage of a homeowner's policy does not extend to claims and suits resulting from al-

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[82] *Id.* at app. B, ISO Homeowners 3 – Special Form, Entire Policy, HO 00 03 (10 00), at 1 of 22.

[83] Richardson, *supra* n. 71, at app. B, ISO Homeowners 3 – Special Form, Entire Policy, HO 00 03 (10 00), at 2 of 22.

[84] *But see* John Alan Appleman, *Insurance Law and Practice with Forms* vol. 7A, § 4492.02, 26–29 (Walter F. Berdal ed., rev. ed., West 1979) (noting that some courts consider the accidental nature of the event from the point of view of the injured party, which will often result in the loss being covered by the liability insurance of the actor).

[85] Richardson, *supra* n. 71, at 95–97.

[86] *Supra* nn. 1–2 and accompanying text.

[87] *See* Allan D. Windt, *Insurance Claims and Disputes: Representation of Insurance Companies and Insureds* vol. 2, § 11:2 (4th ed., West 2001) (providing an overview of the coverage available for bodily injury under commercial and personal liability insurance polices).

[88] *State Farm Fire & Cas. Co. v. Westchester Inv. Co.*, 721 F. Supp. 1165 (C.D. Cal. 1989) (the court found that physical manifestations produced bodily injury).

leged intentional infliction of emotional distress in the absence of allegations of physical manifestations.[89]

The major cases in this area tend to involve intentional torts such as defamation and wrongful termination. A good example of this analysis is seen in *Allstate Insurance Co. v. Diamant*, where a high school teacher sued the parents of a student who sent an insulting and accusatory letter to the principal after the teacher gave the student a failing grade.[90] Although there was no manifestation of physical injury, the teacher claimed to have suffered mental pain and anguish as a result of the incident. The insurer filed a declaratory judgment action and in deciding the case for the insurer, the court found that the term bodily injury was not ambiguous and focused upon the distinction between the terms bodily injury and personal injury.[91]

Other courts have found coverage in situations where emotional distress results in a manifestation of physical symptoms. One example of this is *Holcomb v. Kincaid*, where the potential for coverage was found for mental anguish of the plaintiff in a suit against her former husband for harassment.[92] The court ruled that physical manifestations due to mental anguish, including a rash, hair loss, weight loss, and stroke-like symptoms were within the scope of the bodily injury coverage.[93] Whether a court would equate the distress and anguish of a pet owner with that of the claimants in cases such as *Holcomb* is an open question; however, the potential certainly exists.

A final consideration from the standpoint of the insuring agreement is that the policy requires an insurer to provide a defense in the event that a lawsuit falls within the scope of the coverage. The analysis of an insurer's duty to defend can be complex and specific to the individual jurisdiction, however, a couple of generalizations can be drawn.[94] First, the insurer's duty to defend is very broad and exceeds the duty to indemnify, with the practical effect that an insurer may have a duty to defend "even if coverage is in doubt or never ultimately

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89 Kevin M. LaCroix, *Emotional Distress, Mental Anguish and Bodily Injury Coverage*, 4 Coverage 10, 10–11 (July/August 1994). The author analyzes emotional distress and mental anguish coverage in conjunction with the coverage provided for bodily injury in common liability insurance policies. The overwhelming majority of courts hold that the term bodily injury does not encompass non-physical harm and is not ambiguous. These courts refuse to cover emotional distress or mental anguish where no physical manifestation has occurred. A minority of courts have found the potential for coverage in cases involving emotional distress, specifically *Lavanant v. Gen. Accident Ins. Co. of Am.*, 584 N.Y.S.2d 744 (N.Y. 1992).

90 518 N.E.2d 1154 (Mass. 1988).

91 *Id.* at 1157.

92 406 So. 2d 646 (La. App. 2d Cir. 1981).

93 *Id.* at 649.

94 *See* Amanda M. Riley, *The Exciting Adventure of an Insurer's Duty to Defend*, 46-DEC Orange County Law. 40, 40–42 (Dec. 2004) (providing an overview of the duty to defend); *see also* Richardson, *supra* n. 71, at 130 (noting that "the insurer's duty to defend is broader than the duty to pay"). A claim of damages for any action that may fall within the policy must be investigated and defended. *Id.*

comes to fruition."[95] In addition, the burden on an insurer can be onerous because all coverage issues must be resolved in favor of the insured.[96] Once a duty to defend is found, the insurer must defend the entire lawsuit, including counts which may fall outside of the scope of the coverage.[97] Much to the consternation of insurers, "[t]his is sometimes the reason that a plaintiff will include a far fetched negligence claim in the complaint because, if he or she can obtain coverage on one of the actions, he or she can obtain [defense] coverage on all of the actions."[98]

The duty to provide a defense is a significant consideration for an insurer. This duty is broad, and triggering it can obligate the insurer to hire defending counsel, the cost of which can eclipse the value of the underlying claim. The liability section of a typical homeowner's policy contains several exclusions designed to narrow the coverage provided.[99] As a rule, "[i]n the absence of restrictions imposed by statute or public policy, responsibility cannot be fixed on an insurance company under its liability policy for injuries due to risks or causes which have been excluded in the policy."[100] However, exclusions to a liability policy are generally "strictly construed against the company, and any uncertainty in the meaning of the exclusion clause should be decided in favor of [the] insured."[101]

Cases regarding the injury or death of a companion animal often involve cruel and intentional behavior.[102] If a pet owner obtained an award against a wrongdoer in such a case, the provision excluding coverage for loss or damage expected or intended from the standpoint of the insured is important in determining whether or not her insurance policy would indemnify. This provision reinforces the fortuity requirement implied in the insuring agreement.

The common homeowner's policy excludes any loss that is "expected or intended by the insured."[103] However, despite the apparent simplicity of the exclusion, application can be difficult.[104] This particu-

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95 Riley, *supra* n. 94, at 40.

96 *Id.*

97 *Id.*

98 *Id.* at 40–41.

99 C. Arthur Williams, George L. Head, Ronald C. Horn, & G. William Glendenning, *Principals of Risk Management and Insurance* Vol. II, 50–51 (2d ed., Am. Inst. Prop. & Liab. Underwriters 1981).

100 46 C.J.S. *Insurance* § 944 (2002).

101 *Id.*

102 *Supra* nn. 50–59 and accompanying text.

103 Richardson, *supra* n. 71, at 147.

104 *Id. See also* Robert H. Jerry II, *Understanding Insurance Law*, 479 (3d. ed., Matthew Bender & Co., Inc. 2002) (discussing the difficulty experienced by insurers and courts in applying this provision). The underlying policy rationale for the exclusion is the fact that insurers base their rates upon fortuitous or accidental losses—where an insured intentionally causes a loss, the ability to predict the outcome and calculate an appropriate rate is frustrated. *Id.* There have been multiple interpretations on the exact meaning of an "intended" injury, with the majority view holding that an insured must have intended to commit the act and cause some kind of damage for the exclusion to

lar exclusion has been the source of a great deal of litigation over the years.[105] As a rule:

> Where coverage is excluded for an intentional injury, [the] insured must intend to cause the injury, but where coverage is precluded for injury which is expected or intended by [the] insured, it must only be shown that the injury was the natural, foreseeable, expected, and anticipatory result of an intentional act, but there must still be an intention to act.[106]

In addition, the exclusion does not generally apply to injury or loss resulting from reckless (as opposed to intentional) conduct.[107]

A case applying the homeowner's intentional acts exclusion to a companion animal case is *Putman v. Zeluff*.[108] In *Putnam*, the insured's son shot and killed a valuable hunting dog that approached his

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operate. *Id.* at 483. One minority view restricts coverage in the event a loss is the reasonable and foreseeable result of the act. *Id.* A second minority view requires the insured to have specific intent in a criminal law sense to cause the specific type of injury that resulted. *Id.* In addition, the meaning of "expected" in the exclusion has been a source of controversy. Some courts have found the term synonymous with "intended"; others have focused upon the subjective expectations of the insured. *Id.* at 480. Professor Kenneth S. Abraham has suggested a multi-pronged approach to the question of what is and is not expected, including consideration of the probability of harm, the awareness of the insured of that probability, and the specificity of the expectation of harm. *Id.* at 481.

105 Richardson, *supra* n. 71, at 238 (noting that the majority of courts have held that both the act and the injury or damage must be expected or intended for the exclusion to bar coverage. A loss occurring as the unintended result of an intentional action will not be excluded); *see also* Appleman, *supra* n. 84, at 32 (noting that "[i]t is only the intended injuries flowing from an intentional act that are excluded"). However, "[c]onduct or behavior which reasonably can be expected to result in injury or damages has been held not to be protected under a liability insurance policy." *Id.* at 35; *but see* 46 C.J.S. *Insurance* § 934 (2002) (describing the various approaches noted *supra* n. 104). Specifically,

> [a] subjective standard governs the determination of whether the insured intended or expected the injury or damage. The presumption in tort and criminal law that a person intends the natural and probable consequences of an intentional act does not apply, and the policy term "expected or intended" cannot be equated with "foreseeable," but, rather, it requires a specific intent to do harm or a conscious awareness of a high degree of certainty that harm will result.

Id. Generally, the analysis of the intentional act exclusion can be approached from a subjective point of view—looking at whether the insured intended or expected to cause the damage, or from an objective point of view—looking at whether the consequences of the act were the natural and probable result of the intentional act. The point of view taken by the jurisdiction where the contract is being considered is paramount to evaluating the applicability of this provision.

106 46 C.J.S. *Insurance* § 945 (2002). The article also notes that "[w]here the injury is intentional, the exclusion will preclude coverage even though the actual harm which occurs is different in character or magnitude from that intended." *Id.*

107 *Id.*; *see also* 46 C.J.S *Insurance* § 934 (2002) (explaining that the question of whether an insured intended the harm to result from her act is a question of fact that is most often satisfied by proof that the insured was consciously aware that the injury could occur as well as situations where the nature of harm should have been reasonably foreseen).

108 127 N.W.2d 374 (Mich. 1964). The dog approached with two other dogs and when the boy shot his gun in the air to scare the dogs, the other two left. *Id.* at 376.

camp site.[109] The record reflects that the boy thought he was protecting himself when he killed the dog. The dog's owner secured a $1,000 award, and in a subsequent garnishment action, the court found that the insurance coverage available to the boy's parents was applicable.[110] In its holding, the court focused on the trial court's finding that the boy had no ill intent or desire to kill the dog.[111]

Another potentially important exclusion is the "business pursuits" exclusion. Specifically, this provision exempts from coverage any loss "arising out of or in connection with a 'business' engaged in by an 'insured.' This exclusion applies but is not limited to an act or omission, regardless of its nature or circumstance, involving a service or duty rendered, promised, owed, or implied to be provided because of the nature of the 'business.'"[112] To the extent that liability results from business operations, the homeowner's policy coverage will not apply.[113] Coverage is also excluded for damage to property that is "rented to, occupied by, used by, or in the care of an insured."[114] This provision may have the effect of barring coverage for an insured who is involved in the boarding of pets and is sued for death or injury of a companion animal in her custody as a bailee.[115]

B. Commercial General Liability Coverage

The most common policy used to insure business exposures is the commercial general liability (CGL) insurance policy or one of its derivatives. A pet owner would likely encounter a CGL policy if it claimed damages or injuries were caused by a business entity such as a pet food supplier, grooming salon, or boarding facility. A veterinarian would probably also carry CGL coverage, along with professional liability coverage for her veterinary activity.

The insuring agreement of the CGL policy provides coverage similar to the homeowner's coverage described above, stating:

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109 *Id.* at 376.

110 *Id.* Considering the date of this case, the award was significant.

111 *Id.*

112 Richardson, *supra* n. 71, at 150.

113 *See* Appleman, *supra* n. 84, at 271 (observing that the business need not be the sole occupation of the insured for the exclusion to operate).

114 Richardson, *supra* n. 71, at 159.

115 *See* 46 C.J.S. *Insurance* § 936 (2002). The article explains:

> An activity constituting a business pursuit requires two elements: continuity and profit motive; for continuity there must be a customary engagement or a stated occupation, and for profit motive there must be such activity as a means of livelihood, gainful employment, means of earning a living, procuring subsistence or profit, commercial transactions or engagements. The acts complained of need not themselves be performed for profit, however, but need only be performed during the business pursuit of the insured. When the questioned conduct is incidental to [the] insured's regular employment, profit motive is irrelevant to a business pursuits determination.

Id.

> The company will pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of *bodily injury* or *property damage* to which this insurance applies, caused by an *occurrence*, and the company shall have the right and duty to defend any suit against the insured seeking damages on account of such bodily injury or property damage, even if any of the allegations of the suit are groundless, false or fraudulent, and may make such an investigation and settlement of any claim or suit as it deems expedient.[116]

As with the homeowner's coverage, the CGL policy defines the following key terms:

> *"Occurrence"* means an accident, including continuous or repeated exposure to substantially the same general harmful conditions.
> *"Property damage"* means:
> Physical injury to tangible property, including all resulting loss of use of that property; or
> Loss of use of tangible property that is not physically injured.
> *"Bodily injury"* means bodily injury, sickness or disease sustained by a person, including death resulting from any of these at any time.[117]

It is likely that most acts causing injury to a companion animal would constitute both an occurrence and property damage as defined by the policy. In addition, the provision of coverage for damages assessed for the loss of use of tangible property could be expected to respond to lost profits or revenue generated by a companion animal such as show winnings or breeding fees.

As with the homeowner's coverage, there are uncertainties regarding the applicability of the bodily injury coverage.[118] As noted by an industry expert, "[i]n its usual sense of the word [the term] bodily injury means hurt or harm to the human body by contact of some force and any resulting pain and suffering, sickness or disease, as well as death."[119] However, as noted above, some jurisdictions have afforded

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116 Insurance Services Office, *Commercial General Liability Coverage Form* (reprinted in Donald S. Malecki & Arthur L. Flitner, *Commercial General Liability* 174 (5th ed., The Natl. Underwriter Co. 1994)) (emphasis added).

117 *Id.* at 187–89 (emphasis added). *See also*, Jerry, *supra* n. 104, at 542 (discussing the evolution of the definition of 'bodily injury' and 'property damage'). In the case of "bodily injury" most courts have held that it "refers to physical injuries only and not purely nonphysical or emotional harm." *Id.* at 543. However, as noted previously, where physical manifestations have resulted from the emotional distress, bodily injury has been found. *Id.* The definition of "property damage" has likewise evolved. *Id.* The original CGL formulation in 1966 included only loss to tangible property, whereas the modern formulation includes both injury to tangible property and loss of use. *Id.* As noted by Professor Jerry, "[b]ecause 'loss of use' is cast in the alternative, it is not necessary that the property be physically damaged." *Id.* at 544. In addition, because the CGL definition refers to liability imposed upon an insured "'because of . . . property damage,' an economic loss that casually follows from a direct physical injury to tangible property is within the coverage of the CGL." *Id.*

118 *Supra* nn. 87–93 and accompanying text.

119 Malecki & Flitner, *supra* n. 116, at 8.

bodily injury coverage where emotional distress has manifested in physical symptoms.[120]

Like the homeowner's policy, the CGL coverage form contains several exclusions.[121] The form excludes expected or intended injury by providing that the insurance shall not apply to "'[b]odily injury' or 'property damage' expected or intended from the standpoint of the insured. This exclusion does not apply to 'bodily injury' resulting from use of reasonable force to protect persons or property."[122] This exclusion is worded substantially differently from the homeowner's exclusion in that it allows coverage for an insured who commits an intentional act while attempting to protect her property. It is not difficult to imagine a situation where a policyholder injures or kills a pet under the mistaken belief that it was attacking her or a customer. Under this scenario, an argument could be made for coverage.

It is also interesting to note that courts have at times considered that "most of the actors involved in irresponsible behavior are also financially irresponsible,"[123] with the resulting effect of viewing the behavior of the wrongdoer from the victim's point of view. In essence, under this view, "[i]f it was accidental from [the victim's] point of view, the loss will be covered by the liability insurance issued to the actor."[124] While this reasoning may not represent a majority view, it does emphasize the potential that coverage may be found in particularly egregious circumstances.

Another potentially relevant exclusion precludes coverage for property damage to "personal property in the care, custody, or control of the insured."[125] Considering that the law views a pet as personal property, this exclusion could have a significant impact on veterinary clinics and boarding facilities, although there is certainly specialized coverage available to address their unique bailment needs.[126]

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120 *State Farm Fire & Cas. Co.*, 721 F. Supp. at 1167.

121 *See* Donald S. Malecki, Ronald C. Horn, Eric A. Wiening & James H. Donaldson, *Commercial Liability and Insurance* vol. I, 257–96 (2d ed., Am. Inst. Prop. & Liab. Underwriters 1986) (noting that the CGL forms are subject to fourteen different exclusions, ranging from contractual liability, liquor liability, and pollution to defective products and workers compensation).

122 Malecki & Flitner, *supra* n. 116, at 18.

123 Appleman, *supra* n. 84, at 27.

124 *Id.*

125 Malecki & Flitner, *supra* n. 116, at 48.

126 *See* 46 C.J.S. *Insurance* § 947 (2002) (discussing application of the exclusion). Control of the property by the insured must be exclusive but not continuous, and intimate handling of property is also not required for the exclusion to apply. *Id.* "The damaged property may be deemed to be in the care, custody, or control of [the] insured where it is within the possessory control of [the] insured at the time of the loss, and is a necessary element of the work performed, or where it is the subject of the work performed." *Id.*

C. *Professional Liability Insurance for Veterinarians*

Veterinarians also face the prospect of expanded liability for death or injury to a companion animal under their care.[127] Although often not excluded *per se* in most commercial general liability policies, endorsements are frequently added to such policies when issued to a professional, such as a veterinarian, that exclude the exposure created by their professional activities.[128] The rationale for excluding the professional activity is that the CGL policy was developed and priced for the policyholder who does not possess a professional liability exposure.[129] The professional liability needs of a veterinarian can be met by a veterinarian's professional liability policy, which operates similar to the medical malpractice coverage issued to medical doctors.

One product currently available is the Veterinarians Professional Liability Coverage Form (form PR0014), or a derivative, produced by the Insurance Services Office. This policy provides coverage, under its basic insuring agreement as follows:

> We will pay those sums that the insured becomes legally obligated to pay as damages because of injury to which this insurance applies. We will have the right and duty to defend the insured against any "suit" seeking those damages. However, we will have no duty to defend the insured against any "suit" seeking damages for injury to which this insurance does not apply. We may at our discretion investigate any "veterinary incident" and settle any "claim" that may result.[130]

The triggering event for coverage under the Veterinarians Professional Liability Coverage Form is the "veterinary incident."[131] A veterinary incident under the policy is:

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[127] *See* Root, *supra* n. 16, at 441–45 (noting that veterinarians have traditionally been exposed to limited liability due to the law's categorization of companion animals as property). However, the author observes that the very existence of the veterinary industry depends in large part upon the bond pet owners have for their companion animals. In recent years, the total expenditures for care of pets have exceeded $11.1 billion dollars on an annual basis. Given the benefits derived, it is argued that veterinarians should be answerable for damages due to loss of companionship in cases of gross negligence or misconduct. *Id.*

[128] *See* 46 C.J.S. *Insurance* § 951 (2003) (noting that some policies issued to professionals exclude liability for the "rendering or failure to render professional services"). However, the application of the exclusion is restricted to situations where the loss arises "out of a vocation or occupation involving specialized knowledge or skills, and the skills are mental as opposed to manual." *Id.*

[129] *See* 46 C.J.S. *Insurance* § 955 (2002) (noting that "[g]enerally, a policy of liability insurance issued to professional persons or entities protects them against liability for malpractice, error, or mistake that occurs in the course of their professional duties"). To be covered by a professional liability policy, "the liability must arise out of the special risks inherent in the practice of the profession." *Id.*

[130] Insurance Services Office, *Veterinarians Professional Liability Coverage Form*, PR 00 14 12 97, § I(1)(a) (1997). The policy is unique in that it also provides a separate insuring agreement with similar coverage for partnerships, limited liability companies, associations, or corporations as policyholders.

[131] *Id.*

> [A]ny act or omission:
> Arising out of the providing of or failure to provide professional veterinarian services by:
> (1) The insured; or
> (2) Any person acting under the personal direction, control or supervision of the insured.
> Arising out of the insured's serving as a member of a formal accreditation, standards review or equivalent professional board or committee.[132]

Note that the definition of covered damages is much broader than the CGL policy considered above in that the damages recoverable are not qualified by the terms property damage or bodily injury. Conceivably, a claimant may have a better chance of recovering damages for emotional trauma or mental anguish caused by the death or injury of a companion animal under the professional liability form.

The professional liability form contains several exclusions that may be relevant in a companion animal claim or suit. For example, the policy provides that the coverage shall not be applicable to:

> a. Criminal Acts: Injury arising out of a criminal act, including but not limited to fraud committed by the insured or any person for whom the insured is legally responsible.
> b. Contractual Liability: Injury for which the insured is obligated to pay damages by reason of the assumption of liability in a contract or agreement. This exclusion does not apply to liability for damages that the insured would have in the absence of the contract or agreement
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> . . .
>
> f. Theft: Liability arising out of the theft of any animal.
> g. Fire Liability: Injury due to fire, however caused.[133]

In comparing the exclusions of the Veterinarians Professional Liability Coverage Form with the CGL coverage form, the first obvious difference is that the professional liability form does not contain a "care, custody, or control" or "intentional acts" exclusion.[134] This is possibly due to the fact that by their nature, veterinarians perform services on animals that are in their care, custody, and control, and often perform acts that can be considered intentional in their efforts to treat the animal. However, the Veterinarians Professional Liability Coverage Form does not cover conduct considered to be criminal activity.

Also, a typical policy contains a contractual liability exclusion similar to those found in the homeowner's and CGL policies discussed above.[135] For example, if a pet owner sued for alleged breach of contract in connection with a failed procedure, the contractual liability exclusion would probably act to bar coverage. Another feature that appears curious at first reading is the exclusions for theft and injury due to fire. Theft and fire are two basic insurance perils covered by

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[132] *Id.* at §§ 6, 12.

[133] *Id.* at §§ 1, 3(a)–(f).

[134] *Supra* n. 125 and accompanying text (discussing "care, custody, or control" provision of the CGL).

[135] *Supra* nn. 100, 121 and accompanying text.

insurance policies. A possible reason for these exclusions is the fact that the exposure is better addressed by a first party property or bailee type coverage.

D. *Punitive Damages*

Finally, there is the question of the insurability of punitive damages. Some states take the position that punitive damages are an element of damages that should be covered unless there is a specific exclusion in the policy. Under this view, "courts concentrate on the language of the insuring agreement and attempt to make an interpretation with a view toward the nature of punitive damages which is to deter certain types of conduct."[136] Another view is that "absent specific language in the policy extending coverage for punitive damages, no coverage exists for such damages as it is against public policy to allow the insured wrongdoer to shift the burden of payment of punitives to its insurer."[137]

IV. ANALYSIS – AN APPLICATION OF CURRENT COVERAGE PROVISIONS TO PREVIOUSLY DECIDED CASES

Considering that the injury or death of a companion animal may occur as a result of irresponsible behavior and that those who behave irresponsibly are often financially irresponsible,[138] the importance of liability insurance coverage to a pet owner seeking recovery is clear. The preceding sections have discussed common theories of liability and the insurance products that may be available to compensate a pet owner in the event of injury or death of their pet at the hands of a tortfeasor protected by one of these policies. This section illustrates the applicability of the coverage provisions outlined above by applying the provisions to the facts of cases previously discussed. The analysis demonstrates that while a recovery from a liability insurance policy is possible in certain circumstances, it is far from certain.

A. *Claims Involving an Intentional Injury or Killing*

Several of the published companion animal cases involve acts that appear to be intentional in nature, such as the acts of the police officers and public officials in *City of Garland v. White* [139] and *Wilson v. City of Eagan*.[140] In these cases, the municipality would quite possibly have a CGL policy tailored to meet the needs of public entities. The coverage would probably contain an expected and intended acts exclu-

136 Lee R. Russ & Thomas F. Segalla, *Couch on Insurance* § 172:33 (West 1998).

137 *Id.*

138 Appleman, *supra* n. 84, at 27.

139 368 S.W.2d 12, 13 (Tex. Civ. App. 1963). *Supra* nn. 3–10 and accompanying text (discussing *City of Garland v. White*).

140 297 N.W.2d 146, 147–48 (Minn. 1980). *Supra* nn. 50–56 and accompanying text (discussing *Wilson v. City of Eagan*).

sion,[141] and the primary issue of coverage would turn on its application. While the precise interpretation of the provision would be defined by the jurisdiction involved, the majority view applies the exclusion only where the act and consequences were expected and intended.[142]

In *Wilson*, both the animal warden and police officer were active in planning and committing the act that killed the plaintiff's cat.[143] As such, it appears the exclusion would apply. However, it could be argued that while they intended to cause the death of the cat, there was no intent to cause emotional distress to the owner. In addition, the record reflects that the police officer did not know how long the cat had been impounded at the time of the shooting, leading to an inference that he did not necessarily intend to commit an act that violated the state statute regarding impoundment of stray animals.[144] However, if the jurisdiction were one where the intentional acts exclusion is interpreted in light of the natural and foreseeable consequences of the act, it is quite possible that the exclusion could bar coverage for the tortfeasor/insured.[145]

In *City of Garland*, police officers responded to a report that a loose dog had been threatening local residents.[146] In addition, it was reported that the dog lunged and growled at the officers.[147] Given these facts, it might be argued that the officers were protecting the public from a vicious dog when they shot and killed it.[148] The CGL policy provides an exception to the expected and intended injury exclusion in cases where the policyholder is using reasonable force to protect persons or property.[149] In *City of Garland*, the officers could argue that the exception applies and therefore the coverage should not be barred. However, the fact that the officers could have contained the

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141 *Supra* nn. 121–24 and accompanying text (discussing the expected and intended damage exclusion contained in the standard CGL insurance policy).

142 *Supra* nn. 103–07 and accompanying text (describing the majority view of the expected and intended exclusion). Although the section discusses this view in connection with the homeowner's coverage, the analysis is equally applicable to commercial general liability form and other coverage forms utilizing the same language.

143 *Wilson*, 297 N.W.2d at 147–48. The plaintiff claimed that the defendants "intentionally killed [plaintiff's] cat on the day it was impounded." *Id.*

144 *Id.* at 151. The court noted that, "[t]here is no evidence in the record, [however] that O'Brien, the police officer who did the actual shooting, knew how long the cat had been impounded." *Id.*

145 *See supra* nn. 104–05 (discussing the various theories regarding the applicability of the intentional acts exclusion).

146 368 S.W.2d at 14. It was noted that the person who made the complaint stated that she encountered the dog in her back yard, and that it had charged her so that its front paws hit her feet. *Id.* However, the dog did not bite the complainant. *Id.*

147 *Id.*

148 *Supra* nn. 108–11 and accompanying text (discussing *Putman v. Zeluff*). Similar to the child in *Putman*, the officers could argue that they were protecting themselves from possible injury. However, the Michigan Supreme Court in *Putman*, under a stronger set of facts supporting self-defense, refused to apply the intentional act exclusion. Again, the interpretation of this provision would be very jurisdiction specific.

149 Malecki & Flitner, *supra* n. 116, at 18.

dog by closing the garage door would weigh against this conclusion. In addition, the officers would likely argue that coverage for a claim of the owners should not be barred by the intentional act exclusion because they intended to harm the animal, but not the owners. The intentional act exclusion makes a distinction between an intended act and the consequences of an act.[150] In a jurisdiction recognizing this distinction, both must be expected and intended for the exclusion to operate.[151]

B. Questions Regarding Damages: Property Damage or Bodily Injury?

As noted above, covered damages are key to the homeowner's or CGL policy—specifically, either property damage or bodily injury as defined by the policy.[152] Two cases that illustrate potential issues in applying the policy definition of covered damages are *McDonald v. Ohio State University Veterinary Hospital*[153] and *Gill v. Brown*.[154]

In *McDonald*, the court focused on the dog's show record and the stream of revenue that would be subsequently lost by the owner due to inability to use the dog for breeding.[155] Although a claim in this case could be made under the veterinarian's professional liability coverage,[156] this analysis assumes that the claim is made under a CGL coverage form. In evaluating the damage awarded, the court was careful to limit damages allowed to monetary losses derived from the property damage and expressly stated that sentimentality was not considered in the calculation of damages.[157]

Given the approach taken by the court, the damages award would appear to fall within the scope of property damage as defined by the policy. The definition of property damage under the CGL policy includes the damage or destruction of tangible property as well as the loss of use suffered as a result.[158] An analysis of the damages in this case would provide coverage for the injury to the dog as damage to property. The court noted that evidence was presented that the dog's

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150 Fisher & Jerry, *supra* n. 69, at 885 (describing the operation of the intentional acts exclusion).

151 *Id.*

152 Malecki & Flitner, *supra* n. 116, at 243–46 (quoting the language of the insuring agreement used in the commercial general liability policy).

153 644 N.E.2d 750, 751–52 (Ohio Ct. Cl. 1994). *Supra* nn. 27–30 and accompanying text.

154 695 P.2d 1276, 1276 (Idaho App. 1985). *Supra* nn. 45–48 and accompanying text.

155 644 N.E.2d at 752.

156 *Supra* n. 112–15 and accompanying text (providing an overview of the key coverage provisions).

157 *McDonald*, 644 N.E.2d at 752.

158 Richardson, *supra* n. 71, at app. B, ISO Homeowners 3 – Special Form, Entire Policy, HO 00 03 (10 00), at 2 of 22. (defining property damage). Given the current state of the law, the dog in *McDonald* would be considered property and the dog's paralysis would be property damage; *see also supra* n. 117 (describing the general interpretation of the term "property damage" to include loss of use and consequential damages).

life had been shortened as a result of the paralysis.[159] The court may use this fact in an effort to put a monetary value on the damage done as a result of the defendant's wrongdoing. The remainder of the damages relate to the lost income resulting from the plaintiff's inability to use the dog for breeding service.[160] The facts in this case lend themselves well to a finding of loss of use caused by the injury to the dog. The quantification of these damages could be the likely number of puppies that would have been sired had the paralysis not occurred.

A different perspective on damages is found in *Gill*. This case involved the reckless shooting of a donkey that was a pack animal and a pet.[161] The damages awarded included loss of the fair market value of the donkey, loss of use of the donkey as a pack animal, and the mental anguish resulting from the death of a companion animal.[162] The fair market value and loss of use as a pack animal appear to qualify as property damage. The fair market value could likely be derived from local livestock auction records, and the loss of use could be established as the cost to hire an equivalent donkey or other pack animal during the period the plaintiff is without the animal.

However, *Gill* is unique in that the court went a step further by recognizing the plaintiff's mental anguish resulting from the shooting.[163] The defendant was an individual and the coverage considered would probably be a homeowner's policy or similar product. If this were the case, under the homeowner's coverage, mental anguish would only be recoverable as an element of bodily injury.[164] To meet this requirement, there must be bodily harm, sickness, or disease, and generally, the injury must result from bodily contact.[165] However, as noted above, some jurisdictions have interpreted the term to allow coverage for bodily injury where emotional distress or mental anguish manifests itself in physical symptoms.[166] It appears that the best chance for recovery of mental anguish as awarded in the *Gill* case would be in a jurisdiction that recognizes recovery for bodily injury for physical manifestations of the anguish, and then only upon proper showing of the required physical manifestation.

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159 *McDonald*, 644 N.E.2d at 752.

160 *Id.*

161 *Gill*, 695 P.2d at 1277.

162 *Id.*

163 *Id.* at 1278.

164 *Supra* n. 82 and accompanying text (describing damages covered as bodily injury by a homeowner's policy).

165 *Supra* n. 88 and accompanying text.

166 *State Farm Fire & Cas. Co. v. Westchester Inv. Co.*, 721 F. Supp. 1165, 1167 (C.D. Cal. 1989) (describing the analysis and different approaches in interpreting bodily injury under commercial and personal policies). By physical symptoms, one would expect that the plaintiff experienced an outward physical manifestation such as loss of sleep or ability to concentrate. It appears that in this area that the analysis varies significantly by jurisdiction.

C. *Malpractice and Injury or Damage to Companion Animals Entrusted to a Bailee*

The nature of a veterinary practice provides a number of legal exposures ranging from professional liability to liability as a bailee. The Veterinarians Professional Liability Coverage Form is designed to meet the unique exposures of veterinarians. Two cases that illustrate the unique exposures faced by veterinarians are *Jankoski v. Preiser Animal Hospital, Ltd.*[167] and *Corso v. Crawford Dog and Cat Hospital, Inc.*[168]

In *Jankoski*, two veterinarians were sued for property damage and emotional distress resulting from the death of the plaintiff's dog due to the administration of anesthesia.[169] The alleged negligent act appears to fall within the insuring agreement of a veterinarians professional liability policy coverage form considered above. Assuming the veterinarian who administered the anesthesia utilized a form with similar wording and was listed as an insured on the policy, the incident may qualify as a "veterinary incident" as defined by the policy,[170] and if so, could trigger the coverage as long as legal liability was established.[171]

The court in *Jankoski* rejected the plaintiff's attempt to recover damages for the emotional distress and loss of companionship, and limited recovery to market value.[172] As discussed above, the definition of covered damages is broad under the veterinarians professional liability form.[173] The award of loss of actual value to the owner might fall within the scope of coverage. Further, if the court had awarded damages for loss of companionship, an argument could be made for coverage of those damages as well.

The court considered a much different situation in *Corso*, which involved the negligent destruction of the body of a deceased dog, resulting in emotional trauma to the owner.[174] The veterinarian was liable as a bailee for negligently cremating the plaintiff's dog after euthanizing the animal. In this case, there would be an issue as to whether the act of turning the body over to the pet funeral service con-

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[167] 510 N.E.2d 1084 (Ill. App. 1st Dist. 1987). *Supra* nn. 31–32.

[168] 415 N.Y.S.2d 182 (N.Y.C. Civ. Ct. 1979). *Supra* n. 38.

[169] 510 N.E.2d at 1085. The plaintiffs alleged that "on January 31, 1985, they took their pet German shepherd dog to the hospital for diagnostic treatment. During the course of the examination, the veterinarian administered anesthesia to the dog and it died. The plaintiffs allege[d] that the defendants [veterinarians] were negligent in failing to properly administer the anesthesia and in failing to properly monitor the condition of the dog." *Id.* at 1085.

[170] *Supra* nn. 131–32 and accompanying text (defining the term "veterinary incident").

[171] *Supra* n. 130 and accompanying text (quoting the insuring agreement of the veterinarians professional liability policy).

[172] 510 N.E.2d at 1087.

[173] Insurance Services Office, *supra* n. 130, at §§ 6, 12, and accompanying text.

[174] 415 N.Y.S.2d at 183.

stitutes a professional veterinary service.[175] Assuming that the proper delivery of the dog to the pet funeral service was a professional veterinary service, it appears that coverage may apply under veterinarians professional liability. Additionally, the policy would most likely cover the award of damages for mental distress, given its broad definition of damages. In the event the loss was not deemed to arise from a veterinary incident, the veterinarian could also look to her CGL coverage for protection. However, the "care, custody and control" exclusion in the CGL would almost certainly bar coverage.[176]

V. CONCLUSION

The law of damages as related to the loss of a companion animal has evolved significantly in recent years, with both courts and statutes beginning to recognize the loss suffered by owners in the event of a pet's death or injury.[177] As the ability of pet owners to seek recovery for loss beyond the fair market value of their pet increases, it is probable that both personal and commercial insurance products will be asked to respond to claims and resulting damage awards.

The survey of insurance coverage forms and factual applications outlined in this paper is certainly not exhaustive, but rather is meant to be an illustrative sampling of the issues that can be expected to arise as the law of insurance confronts the changing notions of damages related to companion animals. However, even in this brief analysis, the numerous questions that arise in applying traditional insurance products to this new aspect of damages is apparent.

As the forgoing analysis demonstrates, there is considerable uncertainty regarding the ability of a plaintiff pet owner to recover damages from a defendant's liability insurance. However, the continued development of the law in this area may motivate the insurance industry to respond with products that address the new potential exposures to their policyholders. As with other evolving areas of the law, new niche products may eventually be developed to address the expanding liability exposures faced by policyholders. As additional coverage eventually becomes available, owners may find it easier to receive full and fair compensation in the event of death or injury to their companion animal caused by intentional or reckless conduct.

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175 *Supra* nn. 131–32 and accompanying text (defining "veterinary incident").

176 *Supra* n. 125 and accompanying text.

177 Barton & Hill, *supra* n. 33, at 412. "It is also noted that in the last two years, the number of attorneys belonging to the Animal Legal Defense Fund, a group dedicated to promoting the interests of animals in tort law as well as other fields, has grown from 450 to 600." Cupp & Dean, *supra* n. 16, at 43. This increase is certainly indicative of the growing viability of animal law as a legal discipline.