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## A Clarion Call for Emotional Damages in Loss of Companion Pet Cases

Debra D. Burke

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## ARTICLE

### A CLARION CALL FOR EMOTIONAL DAMAGES IN LOSS OF COMPANION PET CASES

*Debra D. Burke\**

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## I. Introduction

Damages for the loss of a companion animal or pet as a result of negligence typically are limited to the value of the property lost, while damages for emotional harm are generally not recoverable.<sup>1</sup> Arguably, however, companion animals are more than just property with economic worth because they are animate and capable of being the recipient of an emotional connection to their owners.<sup>2</sup> In the United States, laws such as the Fair Housing Act, the Air Carrier Access Act, and the Americans with Disabilities Act permit accommodations for emotional support animals.<sup>3</sup> Such legislative mandates recognize implicitly the emotional connection of owners to their companion animals, along with the potential for emotional harm stemming from their loss, in contrast to the historic common law approach that classifies them as the equivalent of inanimate objects.

This paper first briefly discusses the traditional property classification for companion animals and the limited damages recoverable for their loss. The paper provides anecdotal evidence that some pet owners categorize their animals as something other than tangible, personal property. It then examines U.S.

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<sup>1</sup> For an overview of the traditional treatment of damages for loss of a companion animal, see Phil Goldberg, *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*, 6 STAN. J. ANIMAL L. & POL'Y 30 (2013).

<sup>2</sup> See *infra* notes 150–86 and accompanying text.

<sup>3</sup> See *infra* notes 75–149 and accompanying text.

legislation which recognizes and protects the use of emotional support animals. The paper advances the proposition that the recognition of the psychological benefit in such legislation inherently suggests that damages for emotional harm should be recoverable in pet loss cases, whether or not the animal is a trained emotional support dog. It argues that some animals, because of this emotional attachment to some owners, should fall into a *property-plus* category. As such, in appropriate circumstances, damages for mental distress resulting from either the intentional or negligent destruction of a pet should be recoverable. Finally, it examines how contract provisions could mitigate the recognition of a property-plus category, along with its commensurate expansion of compensatory relief.

## II. Common Law Property Law

Traditionally, the common law views pets as property.<sup>4</sup> As a result, damages for the loss of a pet are limited to compensatory damages representing the market value of the property,<sup>5</sup> although some courts have debated other measurements.<sup>6</sup> Typically, emotional

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<sup>4</sup> “Animals are generally regarded as personal property.” 4 AM. JUR. 2D *Animals* § 3 (2019). Under Louisiana law, a domestic animal is considered corporeal movable property. *Holland v. Teague*, 996 So. 2d 325 (La. Ct. App. 2008).

<sup>5</sup> More specifically, dogs also are personal property for damage purposes, and their destruction does not give rise to any cause of action for personal injury damages. The measure of damages is the fair market value at the time of destruction. 4 AM. JUR. 2D *Animals* § 116 (2019).

<sup>6</sup> For examples of cases considering claims for fair market value, intrinsic value, punitive damages, mental anguish and loss of companionship, see David Favre, *Overview of Damages for Injury to Animals – Pet Losses*, ANIMAL LEGAL & HIST. CTR., MICH. ST. UNIV. (2003), <https://www.animallaw.info/article>

distress damages for the loss of the pet are not recoverable.<sup>7</sup> However, if an egregious and intentional act results in the loss, some courts are willing to allow recovery for the independent tort of the intentional infliction of emotional distress for the outrageous conduct.<sup>8</sup> An examination of four example cases illustrates the traditional common law approach to treating animals as tangible, personal property and the market valuation for loss.

In *Strickland v. Medlen*,<sup>9</sup> a family dog was accidentally euthanized by animal control. The dog, “Avery,” had escaped the owner’s backyard and was picked up by Fort Worth animal control.<sup>10</sup> The owner and family members attempted to retrieve Avery, but lacked enough money to pay the required fees.<sup>11</sup> Although the shelter hung a “hold for owner” tag on Avery’s cage to alert employees that the Medlens were coming for Avery, he was placed on the euthanasia list and put to sleep.<sup>12</sup> Devastated, the Medlens sued for Avery’s *intrinsic* value. The court of appeals held that a dog owner may recover intangible loss-of-companionship damages in the form of

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/overview-damages-injury-animals-pet-losses. For an examination of nuanced approaches to that measurement in various cases, see Robin C. Miller, Annotation, *Damages for Killing or Injuring Dog*, 61 A.L.R. 5th 635 (1998).

<sup>7</sup> Jay M. Zitter, Annotation, *Recovery of Damages for Emotional Distress Due to Treatment of Pets and Animals*, 91 A.L.R. 5th 545 (2001) (discussing cases). For a comprehensive overview of emotional distress damages in pet death cases, see William A. Reppy, Jr., *Punitive Damages in Pet-Death Cases: How Do the Ration Rules of State Farm v. Campbell Apply?* 1 J. ANIMAL L. & ETHICS 19, 24–47 (2006), [https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=2368&context=faculty\\_scholarship&sei-redir=1](https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=2368&context=faculty_scholarship&sei-redir=1).

<sup>8</sup> See *infra* notes 155–60 and accompanying text.

<sup>9</sup> 397 S.W.3d 184 (Tex. 2013).

<sup>10</sup> *Id.* at 186.

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

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intrinsic or sentimental-value property damages.<sup>13</sup> On appeal, the Texas Supreme Court determined that “[l]oss of companionship, the gravamen of the Medlens’ claim, is fundamentally a form of *personal injury* damage, not property damage,” and hence, it is not recoverable.<sup>14</sup>

In rejecting any claim for intrinsic value or loss of companionship, the court reiterated the “majority rule throughout most of America” and declined to “jettison our 122-year-old precedent classifying dogs as ordinary property, and . . . permit noneconomic damages rooted in relational attachment.”<sup>15</sup> It determined that in cases in which “a dog’s market value is unascertainable, the correct damages measure is the dog’s ‘special or pecuniary value’ (that is, its actual value)—the economic value derived from its ‘usefulness and services,’ not value drawn from companionship or other non-commercial considerations.”<sup>16</sup> The court, nevertheless, still recognized that “dogs are a special form of personal property,” that “animals, though property, are unique,” and that the simple job description of most dogs is, in fact, to “provide devoted companionship.”<sup>17</sup>

In *Barking Hound Village, LLC v. Monyak*, the owners’ mixed-breed dachshund, “Lola,” and mixed-breed Labrador retriever, “Callie,” boarded for ten days at a kennel owned by Barking Hound Village, LLC.<sup>18</sup> Three days after picking up their dogs, Lola was diagnosed with acute renal failure because she was “administered toxic doses of the medication prescribed for Callie, a much

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<sup>13</sup> *Medlen v. Strickland*, 353 S.W.3d 576, 581 (Tex. App. 2011).

<sup>14</sup> *Strickland*, 397 S.W.3d at 191–92.

<sup>15</sup> *Id.* at 198.

<sup>16</sup> *Id.* at 192 (quoting *Heiligmann v. Rose*, 16 S.W. 931, 932 (1891)).

<sup>17</sup> *Id.* The court pointed to laws that banned animal cruelty, dog fighting, and unlawful restraints of dogs to support a distinction of sorts. *Id.*

<sup>18</sup> 787 S.E.2d 191, 193 (Ga. 2016).

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larger dog.”<sup>19</sup> After extensive veterinary care over a nine-month period, including dialysis, Lola died.<sup>20</sup>

The Supreme Court of Georgia observed that “Georgia law clearly provides that a pet ... is considered the personal property of its owner.”<sup>21</sup> Nevertheless, it concluded that, for cases in which an animal is “negligently injured and subsequently dies as a result of those injuries, the proper measure of damages recoverable by the animal's owner includes not only the full market value of the animal at the time of the loss plus interest, but also expenses incurred by the owner in an effort to cure the animal.”<sup>22</sup> The court further noted, however, that Georgia precedent did not allow for the recovery of damages based on the sentimental, or intrinsic value, of this type of personal property to its owner.<sup>23</sup> The appeals court had reversed the trial court's determination that non-economic factors could be introduced as evidence to demonstrate the dog's intrinsic value,<sup>24</sup> and the Georgia Supreme Court also rejected the trial court's approach.<sup>25</sup>

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<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> *Id.* at 194.

<sup>22</sup> *Id.* at 195. “[W]e conclude, pursuant to long-established Georgia precedent, that the proper measure of damages recoverable by the Monyaks for the negligent injury and death of their dog includes both the dog's fair market value plus interest *and* any reasonable medical costs and other expenses they incurred in treating the animal for its injuries.” *Id.* at 197. The court noted that “determining the reasonableness of medical treatment and the reasonableness of its cost is a function for the factfinder.” *Id.* at 199.

<sup>23</sup> *Barking Hound Vill., LLC v. Monyak*, 787 S.E.2d 191, 198 (Ga. 2016)

<sup>24</sup> *Barking Hound Vill., LLC v. Monyak*, 771 S.E.2d 469, 472 (Ga. Ct. App. 2015).

<sup>25</sup> *Barking Hound Vill., LLC v. Monyak*, 787 S.E.2d 191, 198 (Ga. 2016).

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In *Harabes v. Barkery, Inc.*, the owners' dog, "Gabby," died of medical complications after she was negligently subjected to extreme heat for an extended period of time at The Barkery, a dog grooming business.<sup>26</sup> When the owners retrieved Gabby she could not walk and had to be carried to the car.<sup>27</sup> Although she was treated at veterinary hospital, Gabby had to be euthanized.<sup>28</sup> Plaintiffs sued to recover damages for emotional distress and loss of companionship. The New Jersey Superior Court noted that there was "no New Jersey precedent permitting a pet owner to recover non-economic damages when a pet is negligently injured or killed."<sup>29</sup> It reviewed decisions in other jurisdictions, including those more open to emotional distress damages, but concluded that public policy concerns counseled against that result.<sup>30</sup>

Finally, in *Hendrickson v. Tender Care Animal Hosp. Corp.*, the owner brought "Bear," her golden retriever, to Tender Care to be neutered and implanted with a microchip.<sup>31</sup> "After the procedures, Kristen Cage, the veterinarian on duty that evening, noticed that Bear's abdomen looked swollen. She ordered that x-rays be taken to make sure that Bear did not have gastric dilatation volvulus (GDV), a life-threatening condition that results from the accumulation of gas, fluid, or a combination of the two in the stomach."<sup>32</sup> The vet concluded erroneously that Bear had significant gastric distention but not GDV.<sup>33</sup> Ultimately, Bear's condition

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<sup>26</sup> *Harabes v. Barkery, Inc.*, 791 A.2d 1142, 1143 (N.J. Super. Ct. Law Div. 2001).

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> *Id.* at 1144.

<sup>30</sup> *Id.* at 1146.

<sup>31</sup> 312 P.3d 52, 53 (Wash. Ct. App. 2013).

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

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worsened, and he died of cardiac arrest, with the likely cause of death being GDV.<sup>34</sup>

The owner sued for damages for the reckless breach of bailment and emotional distress.<sup>35</sup> The court observed that Washington law uniformly recognizes the historic treatment of animals as property, with emotional distress damages limited to cases of malicious or intentional infliction of injury to animals.<sup>36</sup> The court further refused to create a claim for emotional distress damages arising out of a bailment contract action, suggesting that the “more prudential approach would be for the Legislature to consider the matter prior to such a change occurring.”<sup>37</sup>

These sample cases illustrate the prevailing view about the recovery of damages for the loss of pets in the majority of jurisdictions. While the market value is typically recoverable, and some jurisdictions allow for recovery of costs associated with a death caused through negligence, the majority are reluctant to recognize damages for any proposed intrinsic or unique value, for emotional distress resulting from a negligent act, or for loss of companionship. However, this position is likely not shared by the majority of pet owners. The following section examines the various ways in which pet owners demonstrate that, to them, their pets are more than tangible personal property valued either by the market or replacement value, or cost to repair.

### **III. The Changing Role of Animals and Pets in Society**

While some animals are owned for the specific functions they perform, such as protecting and hunting,

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<sup>34</sup> *Id.* at 53–54.

<sup>35</sup> *Id.*

<sup>36</sup> *Id.* at 57.

<sup>37</sup> *Id.* (quoting *Gaglidari v. Denny’s Rests., Inc.*, 815 P.2d 1362, 1374 (Wash. 1991)).

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the majority of pets are not owned for some useful purpose. Consequently, significant sums of money are spent annually on pets, without any expectation of them doing anything except offering their owners companionship and adoration, as noted by the Texas Supreme Court.<sup>38</sup> The total U.S. pet industry expenditures in 2019 was \$95.7 billion.<sup>39</sup> Estimated expenditures for 2020 are \$99 billion, categorized as: Food \$38.4 billion; Supplies/OTC Medicine \$19.8 billion; Vet Care \$30.2 billion; and Other Services \$10.7 billion.<sup>40</sup>

Niche markets have developed in the pet product and services industry, as well. For example, Chinese herbal treatments, as well as acupuncture, are now available for pets.<sup>41</sup> The market for grooming, training, boarding, pet sitting, and dog-walking has nearly doubled over the past decade, particularly price-premium services.<sup>42</sup> In-home pet-sitting and dog-walking services can prove quite lucrative for entrepreneurs.<sup>43</sup> The

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<sup>38</sup> *Strickland*, 397 S.W.3d at 198.

<sup>39</sup> *Pet Industry Market Size and Ownership Statistics*, AM. PET PROD. ASS'N, [https://www.americanpetproducts.org/press\\_industrytrends.asp](https://www.americanpetproducts.org/press_industrytrends.asp).

<sup>40</sup> *Id.*

<sup>41</sup> See, e.g., Jean Hofve, *A Short Guide to Chinese Herbal Medicine for Dogs and Cats*, ONLY NAT. PET (Aug. 10, 2020), <https://www.onlynaturalpet.com/blogs/holistic-healthcare-library/a-short-guide-to-chinese-herbal-medicine-1>; Jean Scherwenka, *Chinese herbs for your dog's arthritis*, ANIMAL WELLNESS (Apr. 29, 2014), <https://animalwellnessmagazine.com/chinese-herbs-dogs-arthritis/>.

<sup>42</sup> *Pet Grooming and Boarding Industry in the U.S. – Market Research Report*, IBISWORLD (Apr. 15, 2020), <https://www.ibisworld.com/united-states/market-research-reports/pet-grooming-boarding-industry/>.

<sup>43</sup> Brett Arends, *This 50-year-old dog walker retired after making more than \$1 million — working just three days a week*, MARKETWATCH (Dec. 28, 2019), <https://www.marketwatch>.

availability of natural pet food stores, pet boutiques, pet bakeries, dog spas, doggie day-care facilities, and off-leash dog parks all suggest that people love and spoil their pets.<sup>44</sup> Hotels also welcome pets, sometimes with special packages designed specifically for them.<sup>45</sup>

Aside from the financial investment willingly made by owners for a net economic return of zero, there is strong evidence that public opinion considers animals, including pets, to be more than a just form of tangible property. People all over the world were enthralled with the amazing journey of Gobi, the true story of a runner and a stray Chinese desert dog that became his faithful companion during a marathon, with the two forging an unbreakable bond.<sup>46</sup>

The flip side of such a love story is the commensurate outrage with which the public generally responds to animal mistreatment.<sup>47</sup> Horrific conditions in puppy mills quickly draws the public ire,<sup>48</sup> and concern

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com/story/this-50-year-old-dogwalker-retired-after-making-over-1-million-working-just-three-days-a-week-2019-08-27.

<sup>44</sup> Julie Chen, *How Much Is that Doggy in the Window*, FED. LAW. (June 2007), at 8, <https://www.fedbar.org/wp-content/uploads/2007/06/sidebar-jun2007-pdf-1.pdf>.

<sup>45</sup> See Nina Ruggiero, *The Best Dog-friendly Hotels in the U.S.*, TRAVEL & LEISURE (June 29, 2019),

<https://www.travelandleisure.com/hotels-resorts/pet-friendly-hotels/best-dog-friendly-hotels> (providing examples).

<sup>46</sup> See DION LEONARD & CRAIG BORLASE, *FINDING GOBI* (2017) (recounting their incredible journey).

<sup>47</sup> Kathleen Wilde, Note, *Animal Law in Nevada: All Bark and No Bite*, 11 NEV. L.J. 254, 255–56 (2010).

<sup>48</sup> See, e.g., Michele W. Forehand, *Public outrage over puppy mill should spark animal abuse law reform*, DOTHAN EAGLE (Mar. 28, 2017), [https://www.dothaneagle.com/opinion/editorials/public-outrage-over-puppy-mill-should-spark-animal-abuse-law/article\\_6ce9f45a-13f9-11e7-875d-bbdf4a150a9a.html](https://www.dothaneagle.com/opinion/editorials/public-outrage-over-puppy-mill-should-spark-animal-abuse-law/article_6ce9f45a-13f9-11e7-875d-bbdf4a150a9a.html); Lissa Guyton, *Rescue group calls for more action in alleged puppy mill case*, ABC NEWS TOLEDO, OHIO (Nov. 8, 2019), <https://www.13abc.com/content/news/Local->

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for mistreatment has made pets the subject of protective orders, as well.<sup>49</sup> Moreover, Congress passed the Animal Crush Video Prohibition Act of 2010, which made it a federal crime to show animals being crushed, burned, drowned, suffocated, impaled, or subjected to other forms of torture.<sup>50</sup> Most recently, a federal law passed in 2019, the Preventing Animal Cruelty and Torture Act, for the first time, makes intentional acts of cruelty themselves a federal crime, and provides for penalties of up to seven years in prison.<sup>51</sup> Animal rights advocates and their

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rescue-group-calls-for-more-action-in-alleged-puppy-mill-case-564626971.html; Paul Solotaroff, *The Dog Factory: Inside the Sickening World of Puppy Mills*, ROLLING STONE MAG. (Jan. 3, 2017), <https://www.rollingstone.com/culture/culture-features/the-dog-factory-inside-the-sickening-world-of-puppy-mills-112161/>; see also Rebecca J. Huss, *Lessons Learned: Acting as Guardian/Special Master in the Bad Newz Kennels Case*, 15 ANIMAL L. 69 (2008) (discussing the author's role as guardian/special master for the American Pit Bull Terriers in the criminal case against Michael Vick for his unlawful dog fighting activities).

<sup>49</sup> See, e.g., Dianna J. Gentry, *Including Companion Animals in Protective Orders: Curtailing the Reach of Domestic Violence*, 13 YALE J.L. & FEMINISM 97 (2001) (discussing the problem of animal abuse in the domestic violence setting and proposing model legislation for defining and including companion animals in protective orders); Joan MacLeod Heminway & Patricia Graves Lenaghan, *Safe Haven Conundrum: The Use of Special Bailments to Keep Pets Out of Violent Households*, 12 TENN. J. L. & POL'Y 79 (2017) (proposing that safe haven shelters use a conditional bailment for the pets of domestic violence victims to prevent the pet's return to its owner if there was a significant risk of harm).

<sup>50</sup> Pub. L. No. 111-294, 124 Stat. 3177 (2010).

<sup>51</sup> Pub. L. No. 116-72, 133 Stat. 1151 (2019). The statute makes criminal "animal crushing" defined as "actual conduct in which one or more living non-human mammals, birds, reptiles, or amphibians is purposely crushed, burned, drowned,

efforts are also a testament to a significant societal segment's desire to ensure that animals are protected from abuse.<sup>52</sup> Of particular note, is the growing movement to stop cosmetic testing on animals, with three states now banning the sale of cosmetics that have used animals in testing.<sup>53</sup>

The grieving process for the loss of a pet also demonstrates an emotional attachment to the animal.<sup>54</sup> In recognition of the pain associated with such a loss, there are numerous organizations and resources that are available to help pet owners deal with the loss.<sup>55</sup> Losing

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suffocated, impaled, or otherwise subjected to serious bodily injury . . . .”

<sup>52</sup> See David S. Favre, *Judicial Recognition of the Interests of Animals-A New Tort*, 2005 MICH. ST. L. REV. 333, 334 (2005) (evaluating how the legal system deal with the claims of animals for protection against harms inflicted by humans); Stephen A. Plass, *Exploring Animal Rights As an Imperative for Human Welfare*, 112 W. VA. L. REV. 403, 403 (2010) (evaluating arguments in support of more legal protection for animals).

<sup>53</sup> Deb Pressey, *Pritzker signs statewide ban on sale of cosmetics tested on animals*, STATE-JOURNAL REGISTER (Aug. 14, 2019), <https://www.sj-r.com/news/20190814/pritzker-signs-statewide-ban-on-sale-of-cosmetics-tested-on-animals>.

<sup>54</sup> Wilde, *supra* note 47, at 256–57; see also William C. Root, Note, *“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, 439–41(2002) (discussing grief reactions reflective of the human-animal bond).

<sup>55</sup> See, e.g., *Grief Support Center*, RAINBOW BRIDGE, [https://www.rainbowsbridge.com/grief\\_support\\_center/grief\\_support\\_home.htm](https://www.rainbowsbridge.com/grief_support_center/grief_support_home.htm); *Pet Loss and Grief Resources*, BEST FRIENDS, <https://resources.bestfriends.org/article/pet-loss-and-grief-resources>; *Pet Loss Support*, UNIV. FLA. SMALL ANIMAL HOSP., COLLEGE OF VETERINARY MEDICINE, <https://smallanimal.vethospital.ufl.edu/resources/pet-loss-support/>; *Pet Loss Support Hotline*, CUMMINGS SCH. VETERINARY MEDICINE, TUFTS UNIV.,

a pet can “impair our emotional and physical health. Symptoms of acute grief after the loss of a pet can last from one to two months, with symptoms of grief persisting up to a full year.”<sup>56</sup> The owner may experience physical manifestations of the distress, in addition to psychological trauma and emotional anxiety. The New England Journal of Medicine reported that an older woman, who suffered the loss of her dog, experienced acute onset of severe chest pain, diagnosed as Takotsubo cardiomyopathy, or stress cardiomyopathy, typically preceded by a stressful or emotional event.<sup>57</sup>

That people are willing to remain with their pets in the face of natural disasters is another indication that there is a sense of emotional attachment as well as a sense of responsibility to what many owners consider to be a family member.<sup>58</sup> Of the one-third of the people who chose to stay behind during Hurricane Katrina, “[F]orty-

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<https://vet.tufts.edu/petloss/pet-loss-support-hotline-support-group-link/>. For suggested approaches to coping with the loss, see *Four Steps to Take After Experiencing Pet Loss*, PSYCHOL. TODAY (Feb 3, 2017), <https://www.psychologytoday.com/us/blog/animal-attachment/201702/four-steps-take-after-experiencing-pet-loss>.

<sup>56</sup> Guy Winch, *Why We Need to Take Pet Loss Seriously*, SCIENTIFIC AM. (May 22, 2018), <https://www.scientificamerican.com/article/why-we-need-to-take-pet-loss-seriously/>.

<sup>57</sup> Abhishek Maiti & Abhijeet Dhoble, *Takotsubo Cardiomyopathy*, 377 NEW ENGLAND J. MEDICINE e24 (Oct. 2017).

<sup>58</sup> Marianna Parraga, *Texans refuse to leave pets behind as they flee Harvey*, REUTERS (August 28, 2017), <https://www.reuters.com/article/us-storm-harvey-animals/texans-refuse-to-leave-pets-behind-as-they-flee-harvey-idUSKCN1B82A1>; see also Megan McNabb, *Pets in the Eye of the Storm: Hurricane Katrina Floods the Courts with Pet Custody Disputes*, 14 ANIMAL L. 71, 73 (2007) (discussing the existing law and ethics relevant to animal custody cases, particularly those arising from Hurricane Katrina).

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four percent said they did not want to leave their pets.”<sup>59</sup> As a result, Congress passed the Pet Evacuation and Transportation Standards Act, which requires states to create disaster plans that include arrangements for family pets.<sup>60</sup> Moreover, that sense of responsibility accounts for emerging estate planning devices designed specifically to address the care of the pet in the case of its caregiver’s incapacity or death.<sup>61</sup>

Divorce proceedings shed additional light on the changing role of pets. Traditionally judges treat pets as any other personal property, subject to equitable distribution or community property laws, although some courts appear to be more open to other arguments.<sup>62</sup> That people are willing to incur substantial legal costs to obtain custody of their pets, when they could be replaced for much less, is a testament to the fact that pets are not

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<sup>59</sup> Kathleen Struck, *Pet Owners Loath to Leave Their Pals During Evacuations*, VOANEWS (Sept. 14, 2018), <https://www.voanews.com/usa/pet-owners-loath-leave-their-pals-during-evacuations>.

<sup>60</sup> Pub. L. No. 109-308, § 2, 120 Stat. 1725, 1725 (2006) (codified as amended at 42 U.S.C. § 5196 (20\*\*)). For a discussion of the Act, see *The PETS Act: Companion Animals Affected by Natural Disasters*, ANIMAL LEG. DEFENSE FUND, <https://aldf.org/article/the-pets-act-companion-animals-affected-by-natural-disasters/>. See also Paige Chretien, *Discretion Bites: The Current State of Animal Emergency Planning*, 8 San Diego J. Climate & Energy L. 249, 250 (2017) (discussing the statute and the state of emergency preparedness in California).

<sup>61</sup> See Shari L. Miller, *Arizona Attorney’s Guide to Pet Trusts*, 1 PHOENIX L. REV. 473, 476 (2008) (providing an overview on creating pet trusts in Arizona).

<sup>62</sup> Kirsten M. Koepsel, *A Public Policy Argument for Mediation of Pet Custody Disputes*, 2 MID-ATLANTIC J.L. & PUB. POL’Y 83, 85–93 (2013); see also Ann Hartwell Britton, *Bones of Contention: Custody of Family Pets*, 20 J. AM. ACAD. MATRIM. L. 1, 4 (2006); T. Christopher Wharton, Note, *Fighting Like Cats and Dogs: The Rising Number of Custody Battles Over the Family Pet*, 10 J.L. & FAM. STUD. 433, 434 (2008).

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just property to their owners.<sup>63</sup> One two-year custody battle racked up over \$150,000 in legal fees.<sup>64</sup> Some commentators suggest mediation in animal custody matters to diffuse the emotional nature of animal-related disputes and bring peace and resolution to both parties.<sup>65</sup> Some couples and roommates are proactive regarding custody issues and execute a “Pet Custody Agreement” that outlines a living arrangement in the event of a separation, including visitation rights and care responsibilities.<sup>66</sup>

In sum, although the common law principles suggest that dogs are personal property, no different than furniture, reality suggests that humans have a symbiotic relationship with their pets that is very different from the one of functionality that characterizes their relationship to inanimate objects, such as furniture.<sup>67</sup> Some humans love their pets, feel a great responsibility for them, and receive what they perceive to be reciprocity of affection

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<sup>63</sup> Stanley Coren, *In a Divorce Who Gets Custody of the Dog?*, PSYCHOL. TODAY (Oct. 03, 2018), <https://www.psychologytoday.com/us/blog/canine-corner/201810/in-divorce-who-gets-custody-the-dog>.

<sup>64</sup> Christopher Mele, *When Couples Divorce, Who Gets to Keep the Dog? (Or Cat.)*, N.Y. TIMES, (Mar. 23, 2017), <https://www.nytimes.com/2017/03/23/us/divorce-pet-custody-dog-cat.html>.

<sup>65</sup> Michael Ploudre Kaiser, *Cut the Dog in Half: Resolving Animal Law Disputes Through the Use of Alternative Dispute Resolution*, 15 CARDOZO J. CONFLICT RESOL. 515, 515–529 (2014).

<sup>66</sup> See, e.g., *Free Pet Agreement*, LAW DEPOT, <https://www.lawdepot.com/contracts/pet-agreement/?loc=US#XeMV-NV7mM8>, *Free Pet Custody Agreement*, LEGAL TEMPLATES, <https://legaltemplates.net/form/pet-custody-agreement/>.

<sup>67</sup> See Rebecca J. Huss, *Separation, Custody, and Estate Planning Issues Relating to Companion Animals*, 74 U. Colo. L. Rev. 181, 187 (2003) (discussing the domestication of animals and the changing perception of certain companion animals in our society).



and dependency from them.<sup>68</sup> Federal law also recognizes the support role animals can play in their relationship with humans on an emotional level, as well as with specific tasks. The next section discusses how federal policy that is embodied in statutory enactments recognizes the significance of the relationship between animals and disabled individuals.

#### **IV. Statutory Recognition of Emotional Support Role under Federal Law**

Service animals have been used for animal-assisted activities and animal-assisted therapy for some time.<sup>69</sup> Studies have found that individuals with psychiatric disorders, such as post-traumatic stress, seem to benefit greatly from emotional support animals.<sup>70</sup>

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<sup>68</sup> See John Archer, *Why Do People Love Their Pets?*, 18 *EVOLUTION & HUM. BEHAVIOR* 237 (1997), <https://reader.elsevier.com/reader/sd/pii/S0162309599800014?token=9DBBE DC4FA918340C8B55A8FDC4FBC287A685E30A146E8125BB DB6A870BF61770F0ED6CE8350361E28649D6CE87EE9B4> (reviewing characteristics of the relationship with pets being both sources of security and the objects of caregiving).

<sup>69</sup> Rebecca J. Huss, *Why Context Matters: Defining Service Animals Under Federal Law*, 37 *PEPP. L. REV.* 1163, 1166–69 (2010).

<sup>70</sup> Kristin M. Bourland, Note, *Advocating Change Within the ADA: The Struggle to Recognize Emotional-Support Animals as Service Animals*, 48 *U. LOUISVILLE L. REV.* 197, 205–07 (2009); Christopher C. Ligatti, *No Training Required: The Availability of Emotional Support Animals as a Component of Equal Access for the Psychiatrically Disabled Under the Fair Housing Act*, 35 *T. MARSHALL L. REV.* 139, 141–42 (2010); Chelsea Hernandez-Silk, *They Say Emotional Support Dog, We Say Service Dog: Why the Americans with Disabilities Act Should Recognize Emotional Support Dogs as Service Animals*, 21 *RICH. PUB. INT. L. REV.* 313, 318–20 (2018). *But see* Karin Brulliard, *Therapy animals are everywhere. Proof that they help is not*, *WASH. POST* (July 2, 2017), <https://www.washingtonpost.com/news/animalia/wp/2017/07/02/therapy-animals-are-everywhere->

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Companion animals integrated into the programming of correctional facilities suggest there is a decrease in inmate violence and a potential decline in recidivism.<sup>71</sup> Court facility dog programs also use comfort dogs to assist children who are involved in judicial proceedings and who must give potentially traumatic testimony.<sup>72</sup> Older adults are increasingly keeping and benefiting from companion animals,<sup>73</sup> and there are programs for allowing pets to visit nursing homes, assisted living facilities, hospitals and people in hospice care.<sup>74</sup> Federal law also recognizes the beneficial relationship that can be forged between humans and their animal companions. The subsequent sections discuss four federal statutes that require accommodation for service animals, and in some circumstances, an emotional support animal (ESA).

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proof-that-they-help-is-not/ (questioning some conclusions about therapeutic effects); Kate Thayer, *Despite the popularity of emotional support animals, experts say there's little evidence they work*, CHICAGO TRIBUNE (May 30, 2018), <https://www.chicagotribune.com/lifestyles/ct-life-emotional-support-animals-evidence-20180521-story.html> (evaluating with skepticism claims of measurable mental health benefits).

<sup>71</sup> Rebecca J. Huss, *Canines (and Cats!) in Correctional Institutions: Legal and Ethical Issues Relating to Companion Animal Programs*, 14 NEV. L.J. 25, 33–34 (2013) (discussing the benefits and challenges of their integration).

<sup>72</sup> Casey Holder, Comment, *All Dogs Go to Court: The Impact of Court Facility Dogs as Comfort for Child Witnesses on a Defendant's Right to a Fair Trial*, 50 HOUS. L. REV. 1155, 1156 (2013).

<sup>73</sup> Rebecca J. Huss, *Re-Evaluating the Role of Companion Animals in the Era of the Aging Boomer*, 47 AKRON L. REV. 497, 498 (2014) (arguing in favor of more support for older adults to obtain, foster, and care for companion animals in housing).

<sup>74</sup> For example, Wags for Hope is a nonprofit “that provides volunteers with their pets to bring joy to the lives of others.” WAGS FOR HOPE, <https://www.wagsforhope.org/>.

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## A. The Fair Housing Act

Congress passed the Fair Housing Act (FHA) in 1968 to protect individuals against discrimination in the sale or rental of housing on the basis of race, national origin, religion and color.<sup>75</sup> The Fair Housing Amendments Act (FHAA) of 1988 complemented the FAA by covering “handicapped” individuals as well.<sup>76</sup> The definition of an individual with a handicap under the statutes includes persons with either a physical or mental impairment “which substantially limits one or more of such person’s major life activities, a record of having such an impairment, or being regarded as having such an impairment.”<sup>77</sup> Therefore, individuals with mental disabilities are covered under the statute, although they arguably still face a substantial stigma in locating housing.<sup>78</sup>

According to the Department of Housing and Urban Development (HUD), tenants may keep an *assistance animal* – an animal that works, provides assistance, or performs tasks for the benefit of a person with a disability, or that provides emotional support that

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<sup>75</sup> Pub. L. No. 88-352, 78 Stat. 241 (1968) (codified in scattered sections of 42 U.S.C. §§ 3601–3619). The FHA covers a wide range of housing. 42 U.S.C. § 3603(a) (2019).

<sup>76</sup> Pub. L. No. 100-430, 102 Stat. 1619 (1988) (codified in scattered sections of 42 U.S.C. §§ 3601–19) (Note: Use of the term “handicapped” rather than “disabled” is outdated and use of the term in this article merely reflects the language in the original statute). Discrimination based upon familial status is also prohibited. 42 U.S.C. § 3604(b) (2019). Victims of discrimination can seek redress through private lawsuits as well as through an administrative remedy through the Department of Housing and Urban Development (HUD). 42 U.S.C. §§ 3610–14 (2019).

<sup>77</sup> 42 U.S.C. § 3602(h) (2019). The term excludes individuals with a current, illegal use of or addiction to a controlled substance.

<sup>78</sup> Ligatti, *supra* note 70, at 140, 151–52 (2010).

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alleviates one or more identified effects of a person's disability.<sup>79</sup> The term thus covers both service animals, such as guide dogs for blind individuals which assist with a specific task, as well as ESAs.<sup>80</sup> There is little statutory or regulatory guidance on the specifics of assistance animals, although presumably no training is required because the ability to comfort and provide a nexus with the person's disability is considered sufficient.<sup>81</sup> However, there should be a nexus between the disability diagnosis and the use of the animal in its treatment.<sup>82</sup> Further, the presence of the animal, even in the face of a *no-pets* policy, arguably should be considered as part of a reasonable accommodation.<sup>83</sup> The accommodation process is a fact specific inquiry that balances the needs

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<sup>79</sup> The animal can be excluded if it is not properly controlled or housebroken. 28 C.F.R. § 35.136(b). For other qualifications, see *Assistance Animals*, HUD.GOV, U.S. DEPT. OF HOUSING, [https://www.hud.gov/program\\_offices/fair\\_housing\\_equal\\_opp/assistance\\_animals#\\_What\\_Is\\_an](https://www.hud.gov/program_offices/fair_housing_equal_opp/assistance_animals#_What_Is_an).

<sup>80</sup> For a discussion of HUD's more inclusive reading of the term *assistance animal* to include ESAs, see Rebecca J. Huss, *A Conundrum for Animal Activists: Can or Should the Current Legal Classification of Certain Animals Be Used to Improve the Lives of All Animals? The Intersection of Federal Disability Laws and Breed-Discriminatory Legislation*, 2015 MICH. ST. L. REV. 1561, 1582–87 (2015).

<sup>81</sup> Mariko Yamamoto, Mayllynne T. Lopez & Lynette A. Hart, *Registrations of Assistance Dogs in California for Identification Tags: 1999–2012*, PLOS ONE (Aug. 19, 2015), <https://journals.plos.org/plosone/article?id=10.1371/journal.pone.0132820>.

<sup>82</sup> See Rebecca J. Huss, *No Pets Allowed: Housing Issues and Companion Animals*, 11 ANIMAL L. 69, 74–75 (2004).

<sup>83</sup> Ligatti, *supra* note 70, at 149–63. For a discussion of case law on the accommodation of service animals under the FHA and the waiver of a no-pet rule, see Huss, *supra* note 69, at 1196–1202.

of individuals with disabilities with the potential adverse impact on others.<sup>84</sup>

## B. Air Carrier Access Act

The Air Carrier Access Act (ACAA) prohibits discrimination by air carriers based on disabilities.<sup>85</sup> The regulatory guidance clarifies that passengers with service animals on commercial flights should be protected in certain circumstances.<sup>86</sup> It is yet unsettled, however, whether Congress created a private cause of action for damages resulting from a denial of an emotional support companion animal accommodation under the ACAA,<sup>87</sup> or whether the Act preempts state-law negligence claims for injuries related to a failure to provide appropriate accommodations.<sup>88</sup> Airlines, however, may refuse to carry

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<sup>84</sup> Kathleen Farro Ryan, *Reasonable Accommodation Review of Service Animals Under the Americans with Disabilities Act and Fair Housing Act: The “Fact-Specific Inquiry”*, FED. LAW. (Jan/Feb 2017), at 8, [http://www.fedbar.org/Resources\\_1/Federal-Lawyer-Magazine/2017/JanuaryFebruary/Columns/Spotlight-on-Civil-Rights.aspx?FT=.pdf](http://www.fedbar.org/Resources_1/Federal-Lawyer-Magazine/2017/JanuaryFebruary/Columns/Spotlight-on-Civil-Rights.aspx?FT=.pdf).

<sup>85</sup> 49 U.S.C. § 41705 (2019). For a discussion of the evolution of the ACAA and suggested changes to facilitate travel for people with disabilities, see Erin M. Kinahan, *Despite the ACAA, Turbulence Is Not Just in the Sky for Disabled Travelers*, 4 DEPAUL J. HEALTH CARE L. 397 (2001).

<sup>86</sup> 14 C.F.R. § 382.117(a) (2019).

<sup>87</sup> See *Love v. Delta Air Lines*, 310 F.3d 1347, 1359 (11th Cir. 2002) (concluding that Congress did not intend to create a private right of action in a federal district court to vindicate the ACAA's prohibition against disability-based discrimination); see also Kristine Cordier Karnezis, *Recovery for Discriminatory Conduct Under Air Carrier Access Act*, 49 U.S.C.A. § 41705, 188 A.L.R. FED. 367, §§ 3&4 (2003).

<sup>88</sup> See, e.g., *Diveroli v. American Airlines, Inc.*, 2019 WL 5697198, \*4 (S.D. Fla. Nov. 4, 2019) (concluding that alleged negligence claim for failure to accommodate is disability claim preempted by ACAA); *Adler v. WestJet Airlines, Ltd.*, 31 F.

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animals if they determine that: (1) certain factors, such as the size and weight of the animal, would preclude the animal from traveling in the cabin of the aircraft; (2) the animal would pose a “direct threat to the health or safety of others;” (3) the animal would cause a “significant disruption of cabin service;” or (4) the law of the destination country would prohibit entry of the animal.<sup>89</sup>

Previously the Department of Transportation (DOT) required airlines to recognize emotional support animals (ESA) and psychiatric service animals (PSA) as service animals, but allowed airlines to require that ESA and PSA users provide a letter from a licensed mental health professional of the passenger’s need for the animal.<sup>90</sup> PSAs, like other traditional service animals, are trained to perform a specific task for a passenger with a disability, whereas ESAs provide emotional support for

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Supp. 3d 1381, 1386 (S.D. Fla. 2014) (holding that the ACAA may be relevant to the defendant airline’s duty of care); *Gilstrap v. United Air Lines, Inc.*, 709 F.3d 995, 1010 (9th Cir. 2013) (holding that the ACAA and its implementing regulations preempt state standards of care on providing assistance to passengers with disabilities in moving through the airport but not available state remedies for violating those standards); *Elassaad v. Independence Air, Inc.*, 613 F.3d 119, 133 (3d Cir. 2010) (concluding that the ACAA mandate to ensure nondiscriminatory treatment of disabled passengers can coexist with the standard of care required under state law).<sup>89</sup> 14 C.F.R. §382.117(f) (2019). U.S. Airlines are not required to accommodate certain unusual animals such as snakes, reptiles, ferrets, rodents and spiders.

<sup>90</sup> 14 C.F.R. § 382.117(e) (2019). DOT permits airlines to require that passengers give an advance notice of 48 hours if they plan to travel with an ESA or PSA so that the airlines have sufficient time to assess the passenger’s documentation. 14 C.F.R. § 382.27(c)(8) (2019).

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a passenger with a mental/emotional disability but are not trained to perform specific tasks.<sup>91</sup>

Prompted by complaints concerning animals on aircrafts, as well as the treatment of animals transported, DOT sought public comment on the regulation concerning the transportation of service animals.<sup>92</sup> The Department sought input on ensuring nondiscriminatory access for individuals with disabilities, while simultaneously preventing instances of fraud.<sup>93</sup> Complaints suggested that online companies sold phony certificates for service and support animals, and there was insufficient oversight and control.<sup>94</sup> DOT issued guidance in 2019 that clarified some issues, for example, that exotic species can be acceptable emotional support animals, that health and safety must be reasonably documented by the passenger, and that containment of an animal must be reasonable.<sup>95</sup> Most

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<sup>91</sup> Advance Notice of Proposed Rulemaking, *Traveling by Air with Service Animals*, U.S. DEPT. OF TRANSPORTATION, 4–5 (May 16, 2018),

<https://www.transportation.gov/sites/dot.gov/files/docs/resources/individuals/aviation-consumer-protection/310476/service-animal-anprm-final.pdf>.

<sup>92</sup> *Id.* at 32.

<sup>93</sup> *Id.* at 1, 25.

<sup>94</sup> Hal Herzog, *Emotional Support Animals: The Therapist's Dilemma*, PSYCHOL. TODAY (July 19, 2016), <https://www.psychologytoday.com/us/blog/animals-and-us/201607/emotional-support-animals-the-therapists-dilemma>; Joseph Darius Jaafari, *Emotional Support Animals Are Not Service Animals. Here's Why It Matters*, NATIONS SWELL (Sept. 5, 2018), <https://nationswell.com/service-animal-fraud-esa/>. *But see* Regina Schoenfeld-Tacher, et al., *Public Perceptions of Service Dogs, Emotional Support Dogs, and Therapy Dogs*, 14 INT'L J. ENVTL. RES. & PUB. HEALTH 1 (2017) (reporting that misrepresentation of assistance animals is perceived by the general public to be lower than presumed).

<sup>95</sup> *Guidance on Nondiscrimination on the Basis of Disability in Air Travel*, U.S. DEPT. OF TRANSPORTATION (Aug. 8, 2019),

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recently, in January of 2020, The Department of Transportation announced a public comment period on proposed amendments to its Air Carrier Access Act (ACAA) regulation on the transportation of service animals by air.<sup>96</sup> The Notice of Proposed Rulemaking (NPRM) on Traveling by Air with Service Animals proposed to track more closely the treatment of emotional support animals under Titles II and III of the Americans with Disabilities Act (ADA),<sup>97</sup> and define a service animal as a dog that is individually trained to do work or perform tasks for the benefit of a person with a disability, as well as to include a psychiatric service animal within the definition of a service animal, requiring it to have

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<https://www.transportation.gov/sites/dot.gov/files/docs/resources/individuals/aviation-consumer-protection/345426/final-enforcement-policy.pdf>. For an overview of the changes, see Julia Thompson, *Flying with an emotional support animal? This DOT guidance might help you*, USA TODAY (Aug. 8, 2019), <https://www.usatoday.com/story/travel/airline-news/2019/08/08/emotional-support-animals-flights-dot-issues-clarifying-guidance/1958817001/>.

<sup>96</sup> *U.S. Department of Transportation Seeks Comment on Proposed Amendments to Regulation of Service Animals on Flights*, U.S. DEPT OF TRANSPORTATION (Jan. 22, 2020), <https://www.transportation.gov/briefing-room/us-department-transportation-seeks-comment-proposed-amendments-regulation-service>.

<sup>97</sup> See *infra* notes 133–42 and accompanying text.

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training like other service animals.<sup>98</sup> The final rule took effect in January of 2021.<sup>99</sup>

### C. The Americans with Disabilities Act

Based upon findings that discrimination persisted against individuals with disabilities to the detriment of those victims, as well as to the productivity of society as a whole,<sup>100</sup> Congress passed the Americans with Disabilities Act (ADA) in July of 1990 with its declared purpose being “to provide a clear and comprehensive

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<sup>98</sup> Advance Notice of Proposed Rulemaking, *Traveling by Air with Service Animals*, U.S. DEPT. OF TRANSPORTATION (Jan. 22, 2020), <https://cms8.dot.gov/sites/dot.gov/files/2020-01/traveling-air-service-animals-nprm.pdf>. Other proposed regulatory controls include required attestations of good behavior and health, as well as the ability to relieve itself in a sanitary manner on long flights, requirements for check-in, a limitation on the number of animals per passenger (2), prohibition on breed discrimination and a requirement that the animal’s carrier fit under the handler’s foot space. *Id.*

<sup>99</sup> *U.S. Department of Transportation Announces Final Rule on Traveling by Air with Service Animals*, U.S. DEPT. OF TRANSPORTATION (Dec. 2, 2020), <https://www.transportation.gov/briefing-room/us-department-transportation-announces-final-rule-traveling-air-service-animals>. For an overview of the changes see *Traveling by Air with Service Animals*, U.S. DEPT. OF TRANSPORTATION, <https://www.transportation.gov/sites/dot.gov/files/2020-12/Service%20Animal%20Final%20Rule.pdf>.

<sup>100</sup> 42 U.S.C. § 12101(a) (2019). Congress concluded in 1990 that “individuals with disabilities are a discrete and insular minority who have been faced with restrictions and limitations, subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society, based on characteristics that are beyond the control of such individuals and resulting from stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to, society.” 42 U.S.C. § 12101(a)(7) (2008).

national mandate for the elimination of discrimination against individuals with disabilities.”<sup>101</sup> In its separate titles, the ADA targets, *inter alia*, the critical areas of Employment (Title I), Public Entities (Title II), and Public Accommodations (Title III).<sup>102</sup>

### 1. Title I

Title I of the ADA prohibits discrimination in employment against qualified individuals with disabilities “in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.”<sup>103</sup> The Act defines the term “qualified individual [with a disability]” as “an individual [with a disability] who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires” with consideration being given to the employer’s judgment as to what job functions are essential.<sup>104</sup> Congress

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<sup>101</sup> 42 U.S.C. § 12101(b) (2019). For an overview of the statutes and its mandate, see THE ADA MANDATE FOR SOCIAL CHANGE (Paul Wehman, ed. 1993); Robert L. Burgdorf, Jr., *The Americans with Disabilities Act: Analysis and Implications of a Second-Generation Civil Rights Statute*, 26 HARV. C.R.-C.L. L. REV. 413 (1991).

<sup>102</sup> The ADA complements the Rehabilitation Act of 1973 which protects handicapped individuals, who are otherwise qualified workers, from employment discrimination by the federal government and by private employers who contract with the federal government for the provision of services or property, along with employers who administer programs receiving federal assistance. 29 U.S.C. § 701–796 (2019).

<sup>103</sup> 42 U.S.C. § 12112 (2019). A “covered entity” means “an employer, employment agency, labor organization, or joint labor-management committee.” 42 U.S.C. § 12111 (2019).

<sup>104</sup> 42 U.S.C. § 12111(8) (2019); see also John D. Ranseen & Gregory S. Parks, *Test Accommodations for Postsecondary*

amended the ADA in 2008, emphasizing that the definition of disability should be interpreted broadly to extend to a wider class of individuals.<sup>105</sup>

The legislation defines disability as having “a physical or mental impairment that substantially limits one or more major life activities, a record of such impairment, or being regarded as having such an impairment.”<sup>106</sup> Major life activities include “caring for

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*Students: The Quandary Resulting From the ADA’s Disability Definition*, 11 PSYCH. PUB. POL’Y & L. 83, 89 (2005) (observing that a disable employee must show a substantially limiting disability that nevertheless does not prevent essential work requirements if accommodations are provided).

<sup>105</sup> “The definition of disability in this Act shall be construed in favor of broad coverage of individuals under this Act, to the maximum extent permitted by the terms of this Act.” ADA Amendments Act of 2008, Pub. L. No. 110-325, § 4 (a). The amendments clarified 1) that persons who use adaptive measures and mitigating medications are included in the definition of disabled, 2) that an impairment that is episodic or in remission is still a disability if it would substantially limit a major life activity when active, and that the employer’s perception of the degree to which the impairment may limit a major life activity (regarded as discrimination) is irrelevant. The Amendments also refined the term substantially limits as meaning significantly restricted, and expanded the definition of major life activities by including two non-exhaustive lists. *Id.* §§ 2, 4. For an overview of the changes, see *Notice Concerning The Americans With Disabilities Act (ADA) Amendments Act Of 2008*, EQUAL EMPLOY. OPPORTUNITY COMM’N, [http://www.eeoc.gov/ada/amendments\\_notice.html](http://www.eeoc.gov/ada/amendments_notice.html); Paul A. Race & Seth M. Dornier, *ADA Amendments Act of 2008: The Effect on Employers and Educators*, 46 WILLAMETTE L. REV. 357 (2009).

<sup>106</sup> 42 U.S.C. § 12102(2) (2019). The “regarded as” prong specifically aimed at invidious bias and erroneous stereotypical assumptions, not only about the abilities of persons with actual disabilities, but also relating to those persons who mistakenly were regarded as being disabled, such a burn victims, because of prejudicial misperceptions. Alex B. Long, *Introducing the New*

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oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working,” as well as the operation of major bodily functions.<sup>107</sup> Therefore, anxiety and depression could be a disability, provided the condition substantially impairs one or more major life activities, such as sleeping, concentrating, thinking, communicating, or working.<sup>108</sup>

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*and Improved Americans with Disabilities Act: Assessing the ADA Amendments Act of 2008*, 103 NW. U. L. REV. Colloquy 217 (2008); Dale Larson, Comment, *Unconsciously Regarded as Disabled: Implicit Bias and the Regarded-As Prong of the Americans With Disabilities Act*, 56 UCLA L. REV. 451(2008).

<sup>107</sup> 42 U.S.C. § 12102(2) (2012). Major bodily functions include, for example, functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions. *Id.* § 12102 (2)(B).

<sup>108</sup> 42 U.S.C. § 12102(2) (2019). *See, e.g.*, *Jacobs v. N.C. Admin. Office of the Courts*, 780 F.3d 562, 577 (4th Cir. 2015) (reversing summary judgment for defendants and concluding that a reasonable jury could determine that plaintiff with social anxiety disorder established a prima facie case of disability discrimination); *Hernandez-Echevarria v. Walgreens de Puerto Rico, Inc.* 121 F.Supp.3d 296 (D.P.R. 2015) (finding sufficient evidence to support the conclusion that plaintiff either had a record of depression or was regarded as having a disability); *Williams v. AT & T Mobility Servs., LLC*, 186 F. Supp. 3d 816 (W.D. Tenn. 2016) (concluding as a matter of law that plaintiff met her evidentiary burden of establishing she had an actual mental impairment because of depression); *U.S. Equal Employment Opportunity Comm'n v. Gulf Logistics Operating, Inc.*, 299 F. Supp. 3d 832 (E.D. La. 2018) (concluding that plaintiff who was diagnosed with “situational depression” and then discharged stated a cause of action for an ADA violation). *See also* Deirdre M. Smith, *The Paradox of Personality: Mental Illness, Employment Discrimination, and the Americans with Disabilities Act*, 17 GEO. MASON U. CIV. RTS. L.J. 79 (2006)

Employers owe an affirmative duty to make reasonable accommodations for employees with disabilities under Title I, such as by making existing facilities accessible, restructuring jobs, modifying work schedules, acquiring or modifying equipment or devices, providing accessible examinations, and training materials, as well as qualified readers or interpreters, and other similar accommodations.<sup>109</sup> The regulations provide that to “determine the appropriate reasonable accommodation it may be necessary for the covered entity to initiate an informal, interactive process with the individual with a disability in need of the accommodation” to identify the limitations of the disability and potential accommodations that could overcome those limitations.<sup>110</sup> This process involves: 1) analyzing the job to determine its purpose and essential functions, 2) consulting with the employee to ascertain the precise job-related limitations imposed by the individual’s disability and how those limitations could be overcome with a reasonable accommodation, 3) identifying potential accommodations and assesses the effectiveness of each in consultation with the employee, and 4) selecting and implementing the accommodation that is most appropriate for parties, considering the preferences of the individual.<sup>111</sup>

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(discussing the challenges for plaintiffs in proving a mental impairment disability claim).

<sup>109</sup> 42 U.S.C. § 12111(9) (2019).

<sup>110</sup> 29 C.F.R. § 1630.2(o)(3)(2019).

<sup>111</sup> *Id.* Pt. 1630, App. § 1630.9. For a discussion of the interactive process after the 2008 amendments, see Sandra B. Reiss & J. Trent Scofield, *The New and Expanded Americans with Disabilities Act*, 70 ALA. LAW. 38, 43 (2009); Christopher Snow & Sarah Campbell, *Recent Changes to Federal Employment Laws Will Affect Utah Companies: Examining the ADA Amendments and New FMLA Regulations*, 22 UTAH BAR J. 18, 20 (2009); Michelle A. Travis, *Lashing Back at the ADA Backlash: How the Americans with Disabilities Act Benefits*

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Therefore, under Title I of the ADA a reasonable accommodation may be required as the result of an interactive process that identifies the limitations of the mental disability and examines potential accommodations that could mitigate those limitations.<sup>112</sup> If an ESA, because of the employee's mental disability, would improve the employee's job performance, then its presence in the workplace should be considered as a reasonable accommodation. Commensurately, the absence of an ESA could result in an unfair disadvantage and illegal discrimination. The interactive process should consider the employee's mental or physical issue and how the animal alleviates, at least in part, that issue. In addition to permitting the animal in the workplace, a reasonable accommodation might also include, for example, providing a space for the animal or allowing time to walk the animal or care for the animal during the workday.<sup>113</sup> The U.S. Equal Employment Opportunity Commission (EEOC) recently settled a Title I case in which an employer failed to accommodate a truck driver applicant because he used a service dog to assist with his post-traumatic stress disorder (PTSD), a recognized disability.<sup>114</sup>

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*Americans Without Disabilities*, 76 TENN. L. REV. 311, 357 (2009).

<sup>112</sup> See Reiss & Scofield, *supra* note 111.

<sup>113</sup> Peter Petesch & Mark Phillips, *Dear Littler: Do I Really Have to Let an Employee Bring an "Emotional Support Pig" to Work?* LITTLER (June 16, 2017), [https://www.littler.com/files/dear\\_littler\\_\\_do\\_i\\_really\\_have\\_to\\_let\\_an\\_employee\\_bring\\_an\\_emotional\\_support\\_pig\\_to\\_work.pdf](https://www.littler.com/files/dear_littler__do_i_really_have_to_let_an_employee_bring_an_emotional_support_pig_to_work.pdf).

<sup>114</sup> Press Release, Equal Emp't. Opportunity Comm'n, CRST to Pay \$47,500 to Settle EEOC Disability Discrimination and Retaliation Lawsuit (Mar. 6, 2019). The plaintiff alleged in his complaint that his psychiatrist prescribed an ESA to cope with his disabilities and social interactions. *EEOC v. CRST Int'l, Inc.*, No. 3:17-cv-241-J-32JBT, 2017 U.S. Dist. LEXIS 180761 (M.D. Fla. Nov. 1, 2017). See also *Clark v. Sch. Dist. Five of*

Nevertheless, the undue hardship caveat of the ADA could affect a proposed accommodation for a comfort animal. A requested change that would result in an *undue hardship*, defined as “an action requiring significant difficulty or expense” is not required under the statute.<sup>115</sup> Factors to be considered in determining whether an accommodation would impose an undue hardship include 1) the nature and cost of the accommodation, 2) the overall financial resources of the facility or entity involved including the number of persons employed, and 3) the type of operations of the entity including the composition, structure, and functions the workforce.<sup>116</sup> Additionally, Title I recognizes an employer defense to an allegation of discrimination based upon a *qualification standard* which is “job-related and consistent with business necessity,”<sup>117</sup> for example, “a requirement that an individual . . . not pose a direct threat to the health or safety of other individuals in the workplace.”<sup>118</sup>

In the case of an ESA, if the presence of the animal would result in an undue hardship, such as if the animal posed a threat that would be unduly burdensome to eliminate, then the accommodation would not be required.<sup>119</sup> However, inconvenience is not synonymous

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Lexington & Richland Ctys., 247 F.Supp.3d 734 (D.S.C. 2017) (allowing a teacher to bring her emotional support dog to work helped to minimize panic attacks could be a reasonable accommodation).

<sup>115</sup> 42 U.S.C. § 12111(10)(A) (2012).

<sup>116</sup> 42 U.S.C. § 12111(10)(B).

<sup>117</sup> 42 U.S.C. § 12113(a).

<sup>118</sup> *Id.* § 12113(b).

<sup>119</sup> *See supra* notes 115-116 and accompanying text. In a fact-intensive inquiry, the employee must demonstrate that the requested accommodation is reasonable and then the burden shifts to the employer to provide evidence that the requested reasonable accommodation would cause an undue hardship. *US Airways, Inc. v. Barnett*, 535 U.S. 391 (2002). For an overview of the accommodation of animals in the workplace see *SPB In-Depth: Service Animals as Reasonable Workplace*

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with an undue hardship, although there could be competing concerns from other employees. For example, if a co-worker was allergic to pet dander, then using an air filter, arranging different shifts, or providing a private office could minimize the adverse impact of providing an accommodation for the animal. Requiring a trial period for comfort animals in the workplace is also both reasonable and wise.<sup>120</sup> Requiring that the animal be trained, not disruptive, and able to navigate the workplace safely are also reasonable standards, as is requiring documentation to that effect.<sup>121</sup>

However, because the ADA makes it illegal to limit or segregate an employee in a way that adversely affects the employee's opportunities or status constitutes illegal discrimination,<sup>122</sup> it would be illegal to ostracize or segregate an employee because of their negotiated emotional support animal accommodation.<sup>123</sup> Seemingly,

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*Disability Accommodations (US)*, NAT'L L. REV. (Jan 20, 2020), <https://www.natlawreview.com/article/spb-depth-service-animals-reasonable-workplace-disability-accommodations-us>.

<sup>120</sup> Linda Carter *Batiste*, *Emotional Support Animals in the Workplace: A Practical Approach*, Consultants Corner, JOB ACCOMMODATION NETWORK (JAN), <https://askjan.org/publications/consultants-corner/vol12iss04.cfm>.

<sup>121</sup> A certification of professional training is not required generally under the ADA. *Frequently Asked Questions about Service Animals and the ADA*, U.S. DEPT. JUSTICE, [https://www.ada.gov/regs2010/service\\_animal\\_qa.pdf](https://www.ada.gov/regs2010/service_animal_qa.pdf).

However, some documentation that the animal is not disruptive, or a danger would be reasonable as part of the accommodation.

<sup>122</sup> 42 U.S.C § 12112(b)(1). The regulations further provide that it "is unlawful for a covered entity to limit, segregate, or classify a job applicant or employee in a way that adversely affects his or her employment opportunities or status on the basis of disability." 29 C.F.R. § 1630.5 (2019).

<sup>123</sup> Care should also be taken not to disclose any private medical information when arranging the accommodation for the support animal. The Health Insurance Portability and



the interactive process, as well as the undue hardship and direct threat provisions of the statute, would address employer concerns about animals in the workplace. Title I of the ADA would not differentiate between service animals and ESAs. It does not specifically permit service dogs, so both types of animals are subject to the interactive process for determining a reasonable accommodation.<sup>124</sup>

## 2. Titles II and III

Title II of the ADA applies to state and local government entities. It protects qualified individuals with disabilities from discrimination in the services, programs, and activities provided by state and local government entities because of their disability.<sup>125</sup> It also prohibits discrimination in the provision of public transportation services, such as city buses, as well as intercity and commuter rail, which must be readily

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Accountability Act (HIPPA) requires security safeguards be taken to protect against the disclosure of medical information by covered entities, such as some employers. Health Insurance Portability and Accountability Act, Pub. L. 104–191, 110 Stat. 1936 (1996).

<sup>124</sup> *Must employers allow service animals in the workplace?*, SOC'Y FOR HUMAN RES. MGMT (SHRM) (Nov. 20, 2018), <https://www.shrm.org/resourcesandtools/tools-and-samples/hr-qa/pages/disabilityaccomodationsmustemployerallowserviceanimalsintheworkplace.aspx>.

<sup>125</sup> 42 U.S.C. § 12132 (2012). A qualified individual with a disability is “an individual with a disability who, with or without reasonable modifications to rules, policies, or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity.” *Id.* § 12131(2).

accessible to, and usable by, individuals with disabilities, including individuals who use wheelchairs.<sup>126</sup>

Similarly, Title III provides that “no individual shall be discriminated against on the basis of disability in the full and equal enjoyment of . . . any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation.”<sup>127</sup> Denying persons with disabilities the opportunity to participate in programs or services (or providing separate, but unequal, goods or services) constitutes illegal discrimination. The phrase “public accommodation” lists categories of establishments, some of which include the hospitality industry, such as places of lodging, establishments serving food or drink, places of exhibition or entertainment.<sup>128</sup>

Title III also requires covered entities that provide public accommodations and public transportation to make “reasonable modifications in policies, practices, or procedures” to accommodate disabled individuals.<sup>129</sup>

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<sup>126</sup>42 U.S.C. §§ 12141–12150, 12161–12165. In essence, Title II extends the prohibition on discrimination established by Section 504 of the Rehabilitation Act of 1973 to all activities of state and local governments regardless of whether these entities receive federal financial assistance. For a discussion of the Rehabilitation Act, see *infra* notes 143–49 and accompanying text.

<sup>127</sup> 42 U.S.C. § 12182(a) (2012).

<sup>128</sup> 42 U.S.C. § 12181(7).

<sup>129</sup> 42 U.S.C. §§ 12182(b)(2)(A)(ii), 12184(b)(2)(A). The Act also requires the removal of “architectural barriers, and communication barriers that are structural in nature” where such removal is “readily achievable,” defined as being “easily accomplishable and able to be carried out without much difficulty or expense.” 42 U.S.C. §§ 12181(9), 12182(b)(2)(A)(iv), 12184(b)(2)(C). Title III further requires that any determination of “readily achievable” account for the impact of the removal of the barrier upon the overall operation of the facility. *Id.* § 12181(9).

Entities that provide public accommodations or public transportation 1) may not impose “eligibility criteria” that tend to screen out disabled individuals, 2) must make “reasonable modifications in policies, practices, or procedures, when such modifications are necessary” to provide disabled individuals full and equal enjoyment, 3) must provide auxiliary aids and services to disabled individuals, and 4) must remove architectural and structural barriers, or if barrier removal is not readily achievable, must ensure equal access for disabled individuals through alternative methods.<sup>130</sup>

However, eligibility criteria that screen out disabled individuals are permitted when necessary for the provision of the services or facilities being offered.<sup>131</sup> Moreover, policies, practices, and procedures need not be modified, and auxiliary aids need not be provided if doing so would “fundamentally alter” the services or accommodations being offered.<sup>132</sup> Furthermore, auxiliary aids are not mandated if they would result in an “undue burden,” nor is any accommodation required if, as a result, disabled individuals would pose “a significant risk to the health or safety of others that cannot be eliminated by a modification of policies, practices, or procedures or by the provision of auxiliary aids or services.”<sup>133</sup>

In the context of service animals, the regulations provide that “a public entity shall modify its policies, practices, or procedures to permit the use of a service animal by an individual with a disability.”<sup>134</sup> Both titles

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<sup>130</sup> 42 U.S.C §§ 12182(b), 12184 (2012).

<sup>131</sup> *Id.* §§ 12182(b)(2)(A)(i), 12184(b)(1).

<sup>132</sup> *Id.* §§ 12182(b)(2)(A)(ii)–(iii).

<sup>133</sup> *Id.* §§ 12182(b)(2)(A)(iii), 12182(b)(3). For a discussion of the “fundamentally alter” and “direct threat” in the context of service animals, see *Tamara v. El Camino Hosp.*, 964 F.Supp.2d 1077 (2013).

<sup>134</sup> 28 C.F.R. § 35.136 (a) (2019). For an overview of the treatment of service animals under the ADA, see *ADA*

require that covered entities permit service animals to accompany people with disabilities in all areas where members of the public are allowed to go.<sup>135</sup> A service animal helps a person to accomplish a *task* related to the person's disability,<sup>136</sup> such as a guide dog for a blind person.<sup>137</sup> A service animal is defined as "any dog that is individually trained to do work or perform tasks for the benefit of an individual with a disability, including a physical, sensory, psychiatric, intellectual, or other mental disability."<sup>138</sup> Thus, the ADA recognizes a mental impairment as a disability, and the regulations permit dogs that are trained to do work or perform tasks for persons with psychiatric or other mental disabilities. For example, in *Etine v. Linner*, the plaintiff suffered from debilitating panic attacks.<sup>139</sup> She trained her dog to climb

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*Requirements: Service Animals*, U.S. DEPT. JUSTICE, [https://www.ada.gov/regs2010/service\\_animal\\_qa.html](https://www.ada.gov/regs2010/service_animal_qa.html).

<sup>135</sup> 28 C.F.R. § 35.136 (g) (2019).

<sup>136</sup> 28 C.F.R. § 36.104 (2019). Federal law does not require the dog to be professionally trained, registered, or certified. 28 C.F.R. § 35.136 (f) (2019).

<sup>137</sup> Even though the regulations require that an accommodation be made, cases suggest that disabled persons may still face discrimination when accompanied by service animals. For a discussion of several cases, see Huss, *supra* note 69, at 1189–94.

<sup>138</sup> 28 C.F.R. § 36.104 (2019). Since 2011, only dogs that are individually trained to do work or perform tasks for a person with a disability are recognized as service animals under Titles II and III of the ADA. However, the regulations require public accommodations to make reasonable modifications to policies, practices, or procedures to permit the use of a miniature horse by a person with a disability if the miniature horse has been individually trained to do work or perform tasks for the benefit of the individual with a disability. *See* 28 C.F.R. § 36.302(c)(9) (2019).

<sup>139</sup> *Entine v. Lissner*, No. 2:17-cv-946 (S.D. Ohio Nov. 17, 2017), [https://www.govinfo.gov/content/pkg/USCOURTS-ohsd-2\\_17-cv-00946/pdf/USCOURTS-ohsd-2\\_17-cv-00946-1.pdf](https://www.govinfo.gov/content/pkg/USCOURTS-ohsd-2_17-cv-00946/pdf/USCOURTS-ohsd-2_17-cv-00946-1.pdf).

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on her torso during a panic attack; the pressure of his body weight would restore her ability to breathe and move, while the animal's smell would lower her heart rate.<sup>140</sup> Such training was viewed by the courts as likely accomplishing a task under Title II.<sup>141</sup>

However, neither the statute nor its regulations as yet have embraced the notion that an ESA that provides generic emotional support without accomplishing a specific task is covered, even though an ESA can aid a person with an anxiety disorder or depression to reduce stress, and arguably should be considered as an integral part of an accommodation.<sup>142</sup> Nevertheless, the fact that mental assistance alone is not yet defined as a task per the regulations does not detract from the reality that comfort animals do provide therapeutic assistance.<sup>143</sup>

#### D. Rehabilitation Act of 1973

The Rehabilitation Act of 1973 protects individuals with disabilities from discrimination “by the federal government and by private employers who receive assistance from or contract with the federal government.”<sup>144</sup> Section 504 of the Rehabilitation Act provides that “[N]o otherwise qualified individual with a disability in the United States . . . shall, solely by reason

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<sup>140</sup> *Id.* at 3–4.

<sup>141</sup> As a result, the dog met the definition of a service animal under the ADA. *Id.* at 13. The plaintiff sought temporary injunctive relief to preclude her removal from university housing. *Id.*

<sup>142</sup> Hernandez-Silk, *supra* note 70, at 315, 317–20, 332–34. See also Bourland, *supra* note 70 (arguing for the recognition of emotional-support animals as service animals under the ADA).

<sup>143</sup> Laurel Paluzzi, Note, *Four-Legged Tenants: Encouraging Pet-Friendly Housing While Protecting Landlords from Liability*, 2 MID-ATLANTIC J. L. & PUB. POL'Y 101, 109–111 (2013).

<sup>144</sup> 29 U.S.C. § 794 (2015).

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of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any *program or activity* receiving federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service.”<sup>145</sup> For example, the Act applies to higher education and protects the right of access for individuals with disabilities in programs and activities that receive federal financial assistance from the U.S. Department of Education, including both public and private institutions.<sup>146</sup> The regulations: 1) prohibit postsecondary education recipients of federal funding from excluding any qualified student with a disability from its courses or programs,<sup>147</sup> 2) require modifications to prevent discrimination,<sup>148</sup> and 3) prohibit discrimination against students because of the absence of educational auxiliary aids.<sup>149</sup> The statute’s reach extends to secondary

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<sup>145</sup> 29 U.S.C. § 794(a) (2015) (emphasis added). Moreover, the Civil Rights Restoration Act of 1988 clarified that if a state agency or entity receives federal funding for any purpose, it is subject to liability for discriminatory practices in all its programs. Pub. L. 100-259, 102 Stat. 28 (1988). For a discussion of the statute, see Katie R. Eyer, *Rehabilitation Act Redux*, 23 YALE L. & POL’Y REV. 271, 283 (2005).

<sup>146</sup> As defined, program or activity includes a “college, university, or other postsecondary institution, or a public system of higher education.” 29 U.S.C. § 794(b)(2)(A). For an overview of the law as applied to education, see *Protecting Students With Disabilities*, Office of Civil Rights, U.S. DEPT. OF EDUC., <https://www2.ed.gov/about/offices/list/ocr/504faq.html#introduction>.

<sup>147</sup> 45 C.F.R. § 84.43(c) (2015).

<sup>148</sup> 45 C.F.R. § 84.44(a) (2015).

<sup>149</sup> “Auxiliary aids may include taped texts, interpreters or other effective methods of making orally delivered materials available to students with hearing impairments, readers in libraries for students with visual impairments, classroom equipment adapted for use by students with manual

education as well as post-secondary education, providing there is a verifiable disability and a need for either an assistance animal or an ESA.<sup>150</sup> Therefore, while Titles II and III of the ADA may not cover ESAs that provide generic emotional support without accomplishing a specific task, places of public accommodation still may have a responsibility to make an accommodation, if covered by the Rehabilitation Act.

In sum, federal anti-discrimination law recognizes that the emotional human-animal bond can have a positive psychological effect on individuals and requires a reasonable accommodation to be made for an ESA in appropriate circumstances in critical areas of life: housing, transportation, work, and education. This endorsement belies the concept in common law that animals are mere personal property and instead supports the notion that animals, as animate creatures, have the capacity to form an important emotional bond with some owners. The following section argues for a modification of the current common law classification from one of mere property to one of property-plus, at least in those situations where the finding of an emotional bond can be supported.

## V. Property- Plus Argument

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impairments, and other similar services and actions.” 45 C.F.R. § 84.44(d)(2) (2015).

<sup>150</sup> See, e.g., Rebecca J. Huss, *Canines in the Classroom: Service Animals in Primary and Secondary Educational Institutions*, 4 J. ANIMAL L. & ETHICS (2011); Dawinder S. Sidhu, *Cujo Goes to College: On the Use of Animals by Individuals with Disabilities in Postsecondary Institutions*, 38 U. BALT. L. REV. 267 (2009); Tara A. Waterlander, *Canines in the Classroom: When Schools Must Allow a Service Dog to Accompany a Child with Autism into the Classroom under Federal and State Laws*, 22 GEO. MASON U. C.R. L.J. 337 (2012).

Religious and philosophical arguments support a view of pets being more than the equivalency of inanimate property.<sup>151</sup> Buddhism, Hinduism, and naturalist religions acknowledge that animals should be treated humanely, while Christianity recognizes the stewardship role mankind has in relationship to God's creatures.<sup>152</sup> Philosophers such as Pythagoras, Jeremy Bentham, and John Stewart Mill supported animal rights, while psychiatrists have recognized a link between animal abuse and violent crimes.<sup>153</sup> Understandably, then, commentators argue that the law's categorization of companion animals as property is archaic because the relationship of certain animals to humans is more than a mere property ownership one, and their loss should be compensated more holistically.<sup>154</sup> The next sections will examine the current deficiencies in remedies in loss of pet cases, the significance of the difference in ownership of animate verses inanimate objects, and avenues for holistic compensation for loss.

### **A. Compensation for Loss: Current Shortcomings**

“First, courts must recognize that the market value approach does not adequately compensate many

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<sup>151</sup> For a discussion of the philosophical basis for the moral status of animals, see Rebecca J. Huss, *Valuing Man's and Woman's Best Friend: The Moral and Legal Status of Companion Animals*, 86 MARQ. L. REV. 47, 52–68 (2002).

<sup>152</sup> Wilde, *supra* note 47, at 257–58.

<sup>153</sup> *Id.* at 258–60.

<sup>154</sup> Root, *supra* note 54, at 446. See also Amber M. Lopez-Hunter, Note, *Fur Babies Matter: My Dog Is Not Property!*, 4 SAVANNAH L. REV. 259 (2017) (arguing that the emotional capacity of dogs distinguish them from property and that a legal correction of this misclassification would further animal rights).

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companion animal owners whose pets have been injured or killed through wrongful conduct.”<sup>155</sup> The law then should recognize damages stemming from the intentional or negligent infliction of emotional distress.<sup>156</sup> The Restatement of Torts permits the recovery of damages for emotional harm that results from extreme and outrageous conduct intentionally or recklessly inflicted, and for bodily harm as well, if bodily harm results from the emotional harm.<sup>157</sup> Specifically, a comment to the Restatement provides the example of “torturing or maliciously killing another’s pet” as being illustrative of extreme and outrageous conduct.<sup>158</sup> Thus, some courts have allowed the recovery of damages for the plaintiff’s emotional distress resulting from outrageous conduct that inflicts harm on pets.<sup>159</sup> A few courts have allowed

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<sup>155</sup> Root, *supra* note 54, at 446–47.

<sup>156</sup> See, e.g., Paige Chretien, *Discretion Bites: The Current State of Animal Emergency Planning*, 8 SAN DIEGO J. CLIMATE & ENERGY L. 249, 265–68 (2016-17). See also Debra Squires-Lee, *In Defense of Floyd: Appropriately Valuing Companion Animals in Tort*, 70 N.Y.U. L. REV. 1059 (1995) (arguing that animals are more than property and that the law must recognize and compensate emotional loss resulting from the tortious death of a companion animal); Larissa Parker, *Reconciling Discrepancies Between Emotional Value of Companion Animals and the Insufficient Legal Remedies for Their Loss*, 43 W. ST. U. L. REV. 105 (2015) (proposing a state statutory change to allow emotional distress damages for intentional infliction cases and gross negligence, as well as negligence).

<sup>157</sup> RESTATEMENT (THIRD) OF TORTS § 46 (AM. LAW INST. 2012).

<sup>158</sup> *Id.* § 46 cmt. d.

<sup>159</sup> Andrew K. Lizotte, “*The Enormous Radio*”: *Expanding Intentional Infliction of Emotional Distress Causes of Action under the Theory of the Commodity Fetish*, 59 SYRACUSE L. REV. 501, 515–17 (2009); Huss, *supra* note 150, at 93–97. See also, e.g., *Womack v. Von Rardon*, 135 P.3d 542 (Wash. App. 2006) (awarding emotional distress damages to an owner whose pet had been intentionally set on fire); *La Porte v. Associated Independents, Inc.*, 163 So.2d 267 (Fla.1964)

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such damages for gross negligence.<sup>160</sup> Such situations also may be appropriate for exemplary or punitive damages for the defendant's egregious conduct.<sup>161</sup> These decisions are encouraging – courts should not exclude pet owners from receiving non-economic damages when outrageous conduct precipitates a loss simply because,

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(awarding damages is appropriate for the malicious destruction of a pet whatever the animal's value); *Brown v. Crocker*, 139 So.2d 779 (La. App. 1962) (permitting recovery of damages for shock and mental anguish experienced for animal's shooting); *Gill v. Brown*, 695 P.2d 1276 (Idaho Ct. App. 1985) (allowing damages for mental anguish and trauma for pet that was negligently and recklessly shot and killed under an intentional infliction of emotional distress cause of action); *Plotnik v. Meihaus*, 208 Cal. App. 4th 1590, 146 Cal. Rptr. 3d 585 (2012) (allowing damages economic and emotional distress damages plaintiffs for intentional infliction but not negligent infliction); *Burgess v. Taylor*, 44 S.W.3d 806 (Ky. Ct. App. 2001) (allowing damages for the intentional infliction of emotional distress for the conversion and slaughter of pet horses).

<sup>160</sup> *Knowles Animal Hosp. Inc. v. Wills*, 360 So.2d 37 (Fla. App. 1978) (allowing owner to collect emotional damages for gross negligence in a veterinary malpractice case). *See also* *Richardson v. Fairbanks N. Star Borough*, 705 P.2d 454 (Alaska 1985) (indicating a willingness to recognize a cause of action for intentional infliction of emotional distress for the intentional or reckless killing of a pet animal in an appropriate case).

<sup>161</sup> Punitive damages are recoverable in cases in which the defendant engaged in willful, wanton, and reckless behavior resulting in the pet's injury or loss. In contrast, emotional distress damages compensate for the effect the outrageous conduct has on the plaintiff. 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, 44 (2001).

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historically, animals were viewed as being no different from furniture.<sup>162</sup>

Nonetheless, non-economic damage awards for egregious conduct do not provide precedential support for non-egregious situations in which the loss was the result of negligence. In other words, the awarding of damages for either the intentional or the negligent infliction of emotional distress would not apply to a simple negligent action, for example, if a boarding establishment or medical facility causes the loss of the animal in the absence of any outrageous conduct. Without intentional or wanton conduct by the defendant, exemplary damages would not be forthcoming either. Even with circumstances supporting a punitive damage award, if the pet's actual value is insubstantial, then due process limitations could constrain an award of punitive damages that bears no relationship to actual loss, resulting in an award that is not the effective deterrent generally associated with an exemplary damage award.<sup>163</sup>

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<sup>162</sup> See Marcella S. Roukas, *Determining the Value of Companion Animals in Wrongful Harm or Death Claims: A Survey of U.S. Decisions and an Argument for the Authorization to Recover for Loss of Companionship in Such Cases*, ANIMAL LEGAL & HIST. CTR., MICH. ST. UNIV. (2011) (providing a comprehensive list of federal and state decisions in cases dealing with the issue of damages for harm to companion animals and arguing for change); see also Peter Barton & Frances Hill, *How Much Will You Receive in Damages from the Negligent or Intentional Killing of Your Pet Dog or Cat?*, 34 N.Y. L. SCH. L. REV. 411 (1989) (examining valuation methods under case law and arguing that the market value approach should be abandoned because it treats pets as fungible when they are not).

<sup>163</sup> Reppy, *supra* note 7, at 47–52. Factors to be considered in aligning punitive damages awards within the constraints of the Due Process Clause include the degree of the defendant's reprehensibility, the ratio of the punitive damage award to the actual harm inflicted, and the severity of civil or criminal

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Although the Hawaii Supreme Court permitted damages for negligent conduct resulting in an animal's destruction,<sup>164</sup> that recovery remains an exception to the typical gap in remedy for wrongful conduct. The Restatement treats the negligent loss of an animal as a loss of property with the commensurate emotional harm "insufficiently infrequent or significant to justify a tort remedy. While pets are often quite different from other chattels in terms of emotional attachment, an actor who negligently injures another's pet is not liable for emotional harm suffered by the pet's owner."<sup>165</sup> Although admitting the "real and serious" existence of actual emotional harm, the comment to the Restatement justifies the rule against "liability for emotional harm secondary to [the pet's] injury" because it limits the liability of veterinarians for malpractice in order to make services more readily available.<sup>166</sup> The comment creates an incongruity of recognizing harm yet denying relief based upon potential costs and a perceived, yet unsubstantiated, outcome. However, costs can be controlled contractually by the parties in appropriate circumstances without denying the existence of actual emotional harm.<sup>167</sup>

Compensatory economic damages, on the other hand, may be forthcoming for more than the market value approach in some cases. Historically, animals were

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penalties that could be imposed for comparable misconduct. *Id.* *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996) (concluding that an excessive punitive damages award in a consumer fraud case violated the Due Process Clause of the Constitution).

<sup>164</sup> *Campbell v. Animal Quarantine Station*, 632 P.2d 1066 (Haw. 1981) (awarding damages for emotional distress brought about by the negligence of the Animal Quarantine Station).

<sup>165</sup> RESTATEMENT (THIRD) OF TORTS § 47 cmt. m (AM. LAW INST. 2012).

<sup>166</sup> *Id.*

<sup>167</sup> *See infra* notes 220–46 and accompanying text.

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of value aside from their role as a pet; for example, dogs were used in hunting, retrieving, and herding.<sup>168</sup> By analogy, for a trained service animal, or recognized ESA, damages presumably should be greater either because of the investment in their training or because of the loss of their emotional service function.<sup>169</sup> Moreover, any costs associated with unsuccessful medical treatment should be awarded as economic damages, as well.<sup>170</sup> However, there are situations in which neither of those economic

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<sup>168</sup> The dog groups recognized by the American Kennel Club are organized by the original work that each breed was developed to do. Five of the seven groups perform functions designed to assist humans: working dogs, herding dogs, hounds, sporting dogs and terriers. *The 7 AKC Dog Breed Groups Explained*, AM. KENNEL CLUB, <https://www.akc.org/expert-advice/lifestyle/7-akc-dog-breed-groups-explained/>. See also GINO PUGNETTI, SIMON & SCHUSTER'S GUIDE TO DOGS (Elizabeth Meriwether Schuler, ed., 1980).

<sup>169</sup> See *McDonald v. Ohio State Univ. Veterinary Hosp.*, 644 N.E.2d 750 (1994). In *McDonald*, a German shepherd pedigree was paralyzed as the result of malpractice by the state veterinary hospital. The court allowed “the dog’s unique pedigree and the time invested in specialized, rigorous training” to be considered in awarding damages, but not sentimentality. For a comprehensive analysis of the economic valuation of animals, including the minority view in states that apply some sort of measure of special damages where a companion animal has little or no market value. See Geordie Duckler, *The Animal As an Object of Value*, RECENT DEVELOPMENTS IN ANIMAL LAW: LEADING LAWYERS ON COMPLYING WITH EVOLVING REGULATIONS AND OVERCOMING ANIMAL RIGHTS CHALLENGES, ASPATORE (Jan. 2015), 2015 WL 832413, at \*8–\*21 (asserting that a term change is ineffectual and may produce adverse consequences in cases in which an animal causes harm).

<sup>170</sup> See *Burgess v. Shampooch Pet Indus.*, 131 P.3d 1248, 1252–53 (Kan. Ct. App. 2006) (allowing reimbursement for reasonable veterinary treatment); *Leith v. Frost*, 899 N.E.2d 635, 641 (Ill. Ct. App. 2008) (allowing compensation for veterinary costs, rather than only market value).

injuries would occur. For example, in the last decade *rescue adoption* has grown in popularity, as more and more people have opened their hearts and their homes to rescue animals.<sup>171</sup> With rescue animals, there is no market value or enhanced value resulting from the animal's contribution; out-of-pocket medical expenses associated with the loss may be nonexistent as well, depending on the circumstances. Further, the incident which caused the pet's demise may not involve any kind of outrageous conduct, either intentional or negligent, for which emotional distress damages should be awarded.

In such situations, nominal damages are all that may be forthcoming for their tortious loss, even if the owner experiences real emotional loss.<sup>172</sup> In *Jankoski v. Preiser Animal Hospital, Ltd.*, an Illinois appeals court recognized that compensatory damages should be measured by the animal's value to the owner as established "by such proof as the circumstances admit"

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<sup>171</sup> Alicia Parlapiano, *Why Euthanasia Rates at Animal Shelters Have Plummeted*, N.Y. TIMES (Sept 3, 2019), <https://www.nytimes.com/2019/09/03/upshot/why-euthanasia-rates-at-animal-shelters-have-plummeted.html>. Animals have even been transported from places with no spay or neuter restrictions to those who have a reduced rescue population because of effective spay-neuter laws, but not without some critics. Kate Murphy, *Everyone Wants a Rescue Dog. Not Everyone Can Have One.*, N.Y. TIMES (June 29, 2019), <https://www.nytimes.com/2019/06/29/sunday-review/adopt-rescue-dog-south.html>.

<sup>172</sup> For example, an Ohio appeals court reiterated that, as personal property, damages for loss of a pet are limited to the difference between the property's fair market value before and immediately after the loss. The court further noted that, because of this standard, damages are seldom awarded for the loss of a family pet, because they have little or no market value. *Sokolovic v. Hamilton*, 195 Ohio App.3d 406, 410 (Ct. App. Ohio 2011). Nominal damages are awarded if there is legal harm but no recognized loss. 22 AM. JUR. 2d *Damages* § 8.

which may include “some element of sentimental value in order to avoid limiting the [owner] to merely nominal damages.”<sup>173</sup> Some courts seem willing to recognize that the proper measure of damages should be the value of the pet to the owner, which may include an intrinsic valuation or loss of companionship measure.<sup>174</sup> Unfortunately, there is little consistency in their evaluation.<sup>175</sup> Presumably, courts that allow recovery for

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<sup>173</sup> *Jankoski v. Preiser Animal Hosp.*, 510 N.E.2d 1084, 1087 (1987). This reasoning is contrary to most jurisprudence. *See, e.g., Shera v. N.C. State Univ. Veterinary Teaching Hosp.*, 723 S.E.2d 352 (N.C. App. 2012) (holding that the market value measure of damages applies in cases involving the negligent destruction of personal property, such as pets, whether sentient or not); *Kaufman v. Langhofer*, 222 P.3d 272 (Ariz. Ct. App. 2009) (holding that emotional distress damages arising out of tortious loss of personal property were not recoverable).

<sup>174</sup> *See, e.g., Anzalone v. Kragness*, 826 N.E.2d 472 (2005) (suggesting that damages could be based on the pet’s value to the owner rather than the pet’s fair market value); *Rabideau v. City of Racine*, 627 N.W.2d 795, 798 (Wis. 2001) (“Labeling a dog ‘property’ fails to describe the value human beings place upon the companionship that they enjoy with a dog.”); *See also Jankoski v. Preiser Animal Hosp.*, 510 N.E.2d 1084 (1987) (allowing damages based on the value of the pet to the owner, including an element of sentimental value, but not an independent cause of action for loss of companionship). For a discussion of the *Anzalone* case, see Kelly Wilson, Note, *Catching the Unique Rabbit: Why Pets Should Be Reclassified as Inimitable Property Under the Law*, 57 CLEV. ST. L. REV. 167, 190–92 (2009).

<sup>175</sup> Jason R. Scott, *Death to Poochy: A Comparison of Historical and Modern Frustrations Faced by Owners of Injured or Killed Pet Dogs*, 75 UMKC L. REV. 569, 574–82 (2006); see also Katelyn Cook, *Fighting for Fido: An Analysis of Arizona Animal Cruelty Laws and the Legal Status of Animals*, 8 ARIZ. SUMMIT L. REV. 179, 202 (2014) (advocating for a value to owner theory). For a critique of a valuation approach that includes an intrinsic or unique value see Goldberg, *supra* note 1, at 53–56.

emotional or sentimental value do so through a legal fiction that the value to the owner includes an element of the owner's feelings for the pet.<sup>176</sup> However, while an heirloom may have sentimental value, it is still inanimate with no potential for any mutuality of sentiment, so the analogy to that category of property is somewhat flawed. "Animals are not humans and are not inanimate objects,"<sup>177</sup> and there are significant consequences flowing from that characterization.

### **B. Property Plus: Recognition of the Animate/ Inanimate Distinction**

There is a distinct difference between animate and inanimate property.<sup>178</sup> Scientists determined that animals are capable of learning, remembering, and feeling emotion, including pain, fear, suffering, and empathy—all of which are impossible cognition or

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<sup>176</sup> *Anzalone v. Kragness*, 826 N.E.2d 472, 477–78 (2005) (citation omitted). For an overview of the *Anzalone* case, see Jason Krause, *Pet Owner Can Sue for Sentimental Value*, THE NAT'L PULSE: ABA J. E-REPORT (March 25, 2005), <http://animallawonline.blogspot.com/2005/03/pet-owner-can-sue-for-sentimental.html>. See also *Brousseau v. Rosenthal*, 443 N.Y.S.2d 285, 286–87 (1980) (considering the loss of companionship as an element of damages in the negligent death of a pet). For a discussion of this approach, see Huss, *supra* note 150, at 89–93 (2002).

<sup>177</sup> David Favre, *Equitable Self-Ownership for Animals*, 50 DUKE L.J. 473, 502 (2000); see also *Corso v. Crawford Dog and Cat Hosp., Inc.*, 415 N.Y.S.2d 182, 183 (N.Y. City Civ. Ct. 1979) (holding "that a pet is not just a thing but occupies a special place somewhere in between a person and a piece of personal property").

<sup>178</sup> For example, unlike inanimate objects, the actions of an animate object may not always be predicted with certainty nor be subject to control. *State v. Williams*, 449 So.2d 744, 747 (1984).



emotional characteristics of inanimate objects.<sup>179</sup> It follows then, that the owner's empathy or sympathy associated with the animal's pain, fear, and suffering, in addition to the emotional loss experienced by the owner, should be compensable. Damages may not be for any distress stemming from outrage associated with an independent tort, but from emotional harm flowing from the negligent act that resulted in the pet's loss. The loss of a pet due to a negligent act is more than a property loss, more than a loss of companionship; it is also the emotional cost of grief, sorrow, heartache and the void resulting from the loss.<sup>180</sup> It is a harm to the human owner beyond the economic loss of property. As animate beings, there is a depth, uniqueness, and multi-dimensional quality of the human-pet relationship.<sup>181</sup> Many owners consider their pets to be part of the family and their behavior bears that premise out.<sup>182</sup>

One commentator suggests that pets should still be considered property, but a loss of companionship measure should be a component that attaches to a pet injury compensatory claim.<sup>183</sup> Other commentators suggest a unique classification for compensation of loss that would differentiate the traditional property classification and provide adequate compensatory

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<sup>179</sup> Cook, *supra* note 173, at 182–87 (discussing research on animal cognition) (citations omitted).

<sup>180</sup> Margit Livingston, *The Calculus of Animal Valuation: Crafting a Viable Remedy*, 82 NEB. L. REV. 783, 793 (2004).

<sup>181</sup> *Id.* at 811.

<sup>182</sup> Elizabeth Paek, *Fido Seeks Full Membership in the Family: Dismantling the Property Classification of Companion Animals by Statute*, 25 U. HAW. L. REV. 481, 484–90 (2003). Courts may not agree. *See, e.g.*, Bennett v. Bennett, 655 So.2d 109, 110 (Fla.App. 1 Dist. 1995) (“While a dog may be considered by many to be a member of the family, under Florida law, animals are considered to be personal property.”).

<sup>183</sup> Epstein, *supra* note 159, at 46–48.

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damages.<sup>184</sup> Yet another commentator argues that there is a need to assign monetary worth to animals like companion pets and a need to refine the concept of special value in this context.<sup>185</sup> Other commentators advocate for improving the legal status of animals so that they are not misclassified as generic property, plagued by constraints that follow such classification.<sup>186</sup>

In addition to the pet's economic value, compensation for the loss of the animal's companionship, and punitive damages when the defendant's wrongful act was intentional or malicious, the legal system should compensate for the intangible elements of the human-animal relationship because of the mental anguish that an owner experiences upon the wrongful death of a pet.<sup>187</sup> The ultimate goal should be to compensate owners, or "guardians,"<sup>188</sup> for the loss of companionship as well as

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<sup>184</sup> Susan J. Hankin, *Not a Living Room Sofa: Changing the Legal Status of Companion Animals*, 4 RUTGERS J.L. & PUB. POL'Y 314, 376–88 (2007); Lauren M. Sirois, *Recovering for the Loss of A Beloved Pet: Rethinking the Legal Classification of Companion Animals and the Requirements for Loss of Companionship Tort Damages*, 163 U. PA. L. REV. 1199, 1227–30 (2015) (supporting the creation of a unique semi-property classification); Wilson, *supra* note 172, at 183–96 (arguing for a classification of inimitable property).

<sup>185</sup> Geordie Duckler, *The Economic Value of Companion Animals: A Legal and Anthropological Argument for Special Valuation*, 8 ANIMAL L. 199 (2002).

<sup>186</sup> See Cook, *supra* note 173, at 199–200 (favoring such a change to expand permissible damage awards in appropriate circumstances); Favre, *supra* note 175, at 502 (suggesting the construction of "a new paradigm that gives animals the status of juristic persons without entirely severing the concept of property ownership").

<sup>187</sup> Livingston, *supra* note 178, at 823–34.

<sup>188</sup> Some observers suggest that the use of the term "guardian" instead of "owner" better characterizes the relationship of humans to animals. See, e.g., Susan J. Hankin, *Making Decisions About Our Animals' Health Care: Does It Matter*

the price of the mental anguish associated with that loss in both egregious and negligent circumstances based upon the innate characterization of pets as living beings, and, depending on both the human and the animal, the potential to form an emotional bond.

### C. Objections to Reform and Responses

There are concerns about recognizing a property-plus categorization of animals based on any distinction,<sup>189</sup> such as between animate and inanimate property. One is that damages would cascade out of control without any means of ensuring fairness in the financial burden placed upon a negligent defendant,<sup>190</sup> or perpetrate fraudulent claims.<sup>191</sup> It is argued that the potential adverse economic impact on veterinary providers and pet-related services, including boarding, grooming, and training, could have the unfortunate effect

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*Whether We Are Owners or Guardians?*, 2 STAN. J. ANIMAL L. & POL'Y 1, 5–19 (2009); Plass, *supra* note 52, at 416–17; Wilde, *supra* note 47, at 276–77. *But see* Duckler, *supra* note 167, at \*1, \*6–\*8 (asserting that a term change is ineffectual and may produce adverse consequences in cases in which an animal causes harm).

<sup>189</sup> For example, the court in *Harabes v. The Barkery, Inc.* refused to depart from the traditional remedy for several reasons. The court feared that it might be difficult to define who may be entitled to recover, difficult to ensure the fairness of the financial burden placed upon a negligent defendant, and difficult to control the predicted onslaught of future litigation. *Harabes v. Barkery, Inc.*, 791 A.2d 1142, 1145–46 (N.J. Super. Ct. 2001).

<sup>190</sup> Scott, *supra* note 173, at 586–87. Interestingly, in a Hawaii case where emotional distress damages were awarded to multiple family members for the negligent loss of a pet, the total amount, \$1000, was not astronomical. *See Campbell v. Animal Quarantine Station*, 632 P.2d 1066, 1067 (Haw. 1981).

<sup>191</sup> Wilde, *supra* note 47, at 279–80 (refuting such contentions).

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of making affordable care less available to pet owners.<sup>192</sup> However, plaintiffs always bear the burden of proof and must establish, not only the value of the pet, but also emotional distress damages resulting from the loss.<sup>193</sup> Also, the remittitur is a judicial control that can be utilized if the damages award bears no relationship to the evidence presented.<sup>194</sup> Moreover, sufficient insurance helps to mitigate any onerous financial burden on the defendant, and can be purchased by the party in a better position to avoid the loss. Additionally, for professional providers of veterinary and other pet services, there are contractual protections available to mitigate any Draconian result in compensating an emotional injury.<sup>195</sup>

Conversely, even assuming that there currently is affordable care for most owners, there is very little incentive for quality control in the provision of services unless the animal is an expensive pedigree. For pets with little or no market value, providers are virtually immune from any financial penalty for the negligent performance of their duties.<sup>196</sup> Worst case scenario, it may be difficult

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<sup>192</sup> *Goldberg, supra* note 1, at 67–79; see also *Strickland v. Medlen*, 397 S.W.3d 184, 193–96 (Tex. 2013). *But see* *Hankin, supra* note 182, at 393–410 (2007) (suggesting that veterinary groups will benefit from clarifying legal parameters and any change in the legal status of companion animals).

<sup>193</sup> *Root, supra* note 54, at 446–47; see also *State v. M'Duffie*, 34 N.H. 523, 526 (1857) (asserting that pecuniary value need not be established to maintain an action for the killing of an animal because it is for the jury or judge to determine value based on the evidence).

<sup>194</sup> 58 AM. JUR. 2D *New Trial* § 401 (2019).

<sup>195</sup> See *infra* notes 220–46 and accompanying text.

<sup>196</sup> “Most animals kept for companionship have no calculable market value beyond the subjective value of the animal to its owner, and that value arises purely as the result of their relationship and the length and strength of the owner’s attachment to the animal.” *Hyland v. Borrás*, 316 N.J. Super. 22, 25, 719 A.2d 662, 664 (App. Div. 1998). In the absence of

for providers to collect any amount owed for services resulting in the pet's death, but that would be the only financial penalty. Moreover, the financial burden argument sets a poor precedent. If a poorly designed jet aircraft causes millions in damages, should the legal system ignore the harm in part because of the substantial financial burden, perhaps even a threat of bankruptcy, to a negligent defendant?

Another concern is that the accurate valuation of animals in a property-plus category may be complex;<sup>197</sup> however, complexity should not dictate that a falsity persist, i.e., that there is no harm, because compensation for loss suffered is an underlying value in the tort system.<sup>198</sup> An additional concern is a moral one concerning the humanizing of dogs and the commensurate potential devaluation of humanity.<sup>199</sup> However, the recognition by the legal system that an animal is animate, not inanimate, property, and that there is a difference in ownership, in fact validates human owners who have an emotional attachment and recognizes their bond. "Companion animals, to the extent that they have a social 'purpose' created by humans, are most emphatically non-commercial objects valued

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market value there is no claim for damages because damages for property loss are typically limited to the "fair market value of the property at the time of its destruction." *Gill v. Brown*, 107 Idaho 1137, 1138, 695 P.2d 1276, 1277 (Ct. App. 1985). Thus, there would be no damages recoverable for causing the negligent loss of property if the property had no market value.<sup>197</sup> See Duckler, *supra* note 167, at \*8–\*23 (considering animals as objects of economic value in both the justice system and the animal rights community).

<sup>198</sup> Squires-Lee, *supra* note 154, at 1080–96.

<sup>199</sup> Richard L. Cupp, Jr., *Moving Beyond Animal Rights: A Legal/Contractualist Critique*, 46 SAN DIEGO L. REV. 27 (2009); Richard L. Cupp, Jr., *A Dubious Grail: Seeking Tort Law Expansion and Limited Personhood as Stepping Stones Toward Abolishing Animals' Property Status*, 60 SMU L. REV. 3 (2007).

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entirely for the comfort and well-being they impart to their owners as a benefit of ownership.”<sup>200</sup>

In other words, damages may be greater if the owner’s emotional need was greater, but the recognition of the psychological support function of the companion pet can be generalized to owners without a medically recognized need. At the same time, only a subset of owners may be entitled to damages for emotional harm. Not all owners have an emotional connection to their animals. The atrocious conditions under which some owners keep their animals illustrates this proposition.<sup>201</sup> Further, some animals are possessed only as they were historically, to perform specific functions, such as hunting, and not for companionship. Therefore, only some owners would be able to state a claim for damages for emotional harm, based upon evidence that there was harm resulting from the loss, with indicia of how the animal was treated during its life as supporting evidence of the claim.<sup>202</sup>

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<sup>200</sup> Duckler, *supra* note 183, at 221.

<sup>201</sup> See, e.g., Emileigh Forrester, *Terrell Co. Animal Control searches for owner of dog left tied up without food, water*, WALB NEWS 10 (Jan. 3, 2020), <https://www.walb.com/2020/01/03/terrell-co-animal-control-searches-owner-dog-left-tied-up-without-food-water/>; Kathryn Varn, *Owner arrested after dog left in car for five hours dies in Clearwater*, TAMPA BAY TIMES (Dec. 31, 2019), <https://www.tampabay.com/news/crime/2019/12/31/owner-arrested-after-dog-left-in-car-for-five-hours-dies-in-clearwater/>; Sarah Martinez, *San Antonio Woman Charged with Animal Cruelty After Leaving Dogs in Cages Without Enough Food or Water*, SAN ANTONIO CURRENT (Jan. 3, 2020), <https://www.sacurrent.com/the-daily/archives/2020/01/03/san-antonio-woman-charged-with-animal-cruelty-after-leaving-dogs-in-cages-without-enough-food-or-water>.

<sup>202</sup> Examples could include testimony as to the care the animal received, the attention typically given to the pet by the owner, and time spent in activities together.

## D. Effecting Change

Either state legislatures or judges are capable of effecting reform in the availability of damages for the loss of a pet.<sup>203</sup> Some legislatures have tackled the compensation issue, at least in part.<sup>204</sup> For example, a provision of the Illinois Humane Care for Animals Act, which became effective in 2008, provides a civil cause of action for damages sustained by owners whose animals have been the victim of aggravated cruelty or torture.<sup>205</sup> The statute provides that such damages “may include, but are not limited to, the monetary value of the animal, veterinary expenses incurred on behalf of the animal, any other expenses incurred by the owner in rectifying the effects of the cruelty, pain, and suffering of the animal, and emotional distress suffered by the owner.”<sup>206</sup> The legislation also permits “punitive or exemplary damages of not less than \$500 but not more than \$25,000 for each act of abuse or neglect to which the animal was subjected,” in addition to “reasonable attorney’s fees and costs actually incurred by the owner” in pursuing the claim.<sup>207</sup> Therefore, the statute recognizes an owner’s entitlement to emotional distress, within the limited circumstances presumably aligned with the tort of outrageous conduct.<sup>208</sup>

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<sup>203</sup> See Root, *supra* note 54, at 446–49 (discussing legislative and judicial approaches); see also Vasiliki Agorianitis, Comment, *Being Daphne’s Mom: An Argument for Valuing Companion Animals as Companions*, 39 J. MARSHALL L. REV. 1453, 1469–72 (2006) (suggesting that judicial and legislative involvement is required).

<sup>204</sup> Scott, *supra* note 173, at 588–90 (discussing Tennessee and Illinois initiatives).

<sup>205</sup> 510 ILL. COMP. STAT. 70/16.3 (2019).

<sup>206</sup> *Id.* (emphasis added).

<sup>207</sup> *Id.*

<sup>208</sup> See *supra* notes 155–59 and accompanying text.

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The Tennessee statute is more expansive. That law allows an owner up to \$5,000 in the recovery of noneconomic damages if “a person’s pet is killed or sustains injuries that result in death caused by the unlawful and intentional, *or negligent*, act of another or the animal of another,” providing that the death or fatal injury occurs “on the property of the deceased pet’s owner or caretaker, or while under the control and supervision of the deceased pet’s owner or caretaker.”<sup>209</sup> Such noneconomic damages are recognized as “compensation for the loss of the reasonably expected society, companionship, love and affection of the pet.”<sup>210</sup> The definition of pet is limited to domesticated dogs and cats.<sup>211</sup> Further, the limitation of noneconomic damages does not apply to causes of action for intentional infliction of emotional distress.<sup>212</sup> The provision exempts an action for professional negligence against a licensed veterinarian for noneconomic damages, as well as nonprofit and governmental agencies which act on the behalf of public health or animal welfare.<sup>213</sup>

Some supporters of change advocate a legislative solution, <sup>214</sup> but legislative action has some drawbacks. First, statutes may be too specific to address every situation that could arise, and courts could be reluctant

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<sup>209</sup> TENN. CODE ANN. § 44-17-403(a)(1) (2019) (emphasis added).

<sup>210</sup> *Id.* § 44-17-403(d).

<sup>211</sup> *Id.* § 44-17-403(b).

<sup>212</sup> *Id.* § 44-17-403(c).

<sup>213</sup> *Id.* § 44-17-403(e).

<sup>214</sup> Hankin, *supra* note 182, at 388–90; Logan Martin, Comment, *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); Sirois, *supra* note 182, at 1226; Wilde, *supra* note 47, at 276–79; see also *Strickland v. Medlen*, 397 S.W.3d 184, 196–98 (Tex. 2013) (suggesting that the legislature is the best avenue for reform efforts, if reform is needed).

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to employ an expansive contextual interpretation.<sup>215</sup> Second, definitions may be appropriate in one context, but less suited in other contexts. For example, the Illinois statute defines an animal as “every living creature, other than man, which may be affected by rabies,”<sup>216</sup> which could be appropriate under some provisions but problematic others.<sup>217</sup> Third, advocates in legislative bodies may be sparse, and lawmakers’ attitudes generally indifferent. The Tennessee statute, the “T-Bo Act” was passed after the legislator who introduced it lost his Shih Tzu to a large, aggressive dog not properly contained.<sup>218</sup> Not every state has a legislator with a personal story who is sympathetic to the plight of pet owners who lose their companions to negligence or outrageous circumstances. On the other hand, legislation could expressly provide for attorneys’ fees, like the Illinois statute,<sup>219</sup> which would allow litigation to be maintained even in the absence of large damage awards.

Of course, it is the common law that classified pets simply as property, and common law judges uniquely can respond to the need to clarify and qualify common law classifications and doctrines as situations emerge.<sup>220</sup> The organic evolution of the common law is well-suited to incremental distinctions as various fact driven cases present themselves for resolution, and litigants can drive that change. Unfortunately, common law judges often

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<sup>215</sup> See, e.g., 510 ILL. COMP. STAT. 5/2.02 (2019) (employing an expansive definition of “animal”).

<sup>216</sup> 510 ILL. COMP. STAT. 70/16.3 (2019).

<sup>217</sup> For example, the criminalization of the intentional destruction of all animals under that definition would prohibit killing animals for food. Duckler, *supra* note 167, at \*61.

<sup>218</sup> Wilde, *supra* note 47, at 272.

<sup>219</sup> 510 ILL. COMP. STAT. 70/16.3 (2019).

<sup>220</sup> “Because the doctrine was judicially created, it is not exclusively a legislative issue and it may be judicially qualified.” Hurst v. Capitell, 539 So. 2d 264, 266 (1989) (discussing partial abrogation of the parental immunity common law doctrine).

punt and point to the legislature to effectuate change so that they are not seen as legislating from the bench.<sup>221</sup> Nevertheless, the precedent is judicially created and can be qualified judicially and morphed in reaction to changing social circumstances. To date, more inroads into the antiquated property classification have been made by courts, than by legislatures.<sup>222</sup>

## VI. Agreements to Limit Liability

One concern that is voiced for legally recognizing the emotional harm caused by the negligent or intentional loss of a pet is that the potential liability that would result for professional pet caretakers and medical personnel.<sup>223</sup> However, in the majority of cases in which the loss is caused by simple professional negligence, appropriately drafted contract classes can limit risk exposure, leaving only the most egregious acts of negligence and intentional conduct subject to damages.

### A. Exculpatory Clause

An exculpatory clause in a contract immunizes parties from their negligence and denies an injured party the right to recover damages from the tortfeasor.<sup>224</sup> Although such clauses are included in contracts, they may not always be enforced.<sup>225</sup> Under contract law, an

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<sup>221</sup> *Strickland*, 397 S.W.3d at 195–97; *Hendrickson*, 312 P.3d at 57.

<sup>222</sup> *See supra* notes 157–161 and accompanying text.

<sup>223</sup> *See supra* notes 188–190 and accompanying text.

<sup>224</sup> 57A AM. JUR. 2d *Negligence* § 47 (2019).

<sup>225</sup> Three states refuse to enforce them: Louisiana, Montana, and Virginia. Other states have varying standards or rigor or leniency. *Exculpatory Agreements and Liability Waivers in All 50 States*, MATTHIESEN, WICKERT & LEHRER, <https://www.mwl-law.com/wp-content/uploads/2018/05/EXCULPATORY->

exculpatory clause may be subject to a claim of unconscionability and rendered unenforceable.<sup>226</sup> Moreover, exculpatory clauses do not insulate acts of gross negligence or willful conduct, with clauses purporting to exclude liability for such conduct being unenforceable.<sup>227</sup> Typically, courts evaluate exculpatory clauses to determine if the clause was the result of free choice or instead part of an adhesion contract for which there was little or no free bargaining.<sup>228</sup> An exculpatory clause is more likely to be considered valid if there was a degree of freedom of choice in the person, facility or service seeking exculpation.<sup>229</sup> Further, if a facility or service seeking exculpation is one of convenience rather than necessity, then it is less likely unequal bargaining power will be of importance and the clause is more likely to be enforced.<sup>230</sup>

The court in *Tunkle v. Regents of University of California* enumerated the criteria generally cited in

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AGREEMENTS-AND-LIABILITY-WAIVERS-CHART-00214377x9EBBF.pdf.

<sup>226</sup> For an overview of the doctrine of unconscionability and exculpatory clauses generally, see James F. Hogg, *Consumer Beware: The Varied Application of Unconscionability Doctrine to Exculpation and Indemnification Clauses in Michigan, Minnesota, and Washington*, 2006 MICH. ST. L. REV. 1011, 1012–1020 (2006).

<sup>227</sup> RESTATEMENT (SECOND) OF CONTRACTS § 195 (1) (1979). See also *Barnes v. Birmingham Int'l Raceway, Inc.*, 551 So. 2d 929, 933 (Ala. 1989) (concluding that pre-race releases are valid and consistent with public policy as to negligent conduct but are invalid and contrary to public policy as to wanton or willful conduct).

<sup>228</sup> 57A AM. JUR. 2d *Negligence* § 62 (2019). A critical evaluation is justified in this context to discourage negligence and to protect parties who need goods or services from being exploited by persons with greater bargaining power. *Id.*

<sup>229</sup> 57A AM. JUR. 2d *Negligence* § 64 (2019).

<sup>230</sup> *Id.*

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evaluating the legitimacy of an exculpatory clause.<sup>231</sup> In evaluating an exculpatory clause, courts will determine whether or not the agreement: 1) affects a public interest, 2) concerns a business of a type generally suitable for public regulation, 3) touches a service of great importance to the public, 4) involves a service offered to any qualified member of the public who seeks it, 5) confronts the public with a standardized adhesion contract without any provision for paying additional reasonable fees to obtain protection, and 6) requires the person or property to be placed under the control of the party seeking exculpation, subject to a risk of carelessness.<sup>232</sup>

So, for example, applying the *Tunkle* criteria, an exculpatory clause would be more likely to be enforced in contracts involving leisure activities, such as scuba diving or horseback riding, or as opposed to crucial services, such as childcare or medical procedures.<sup>233</sup> In essence, the *Tunkle* criteria examine the validity of the function of an exculpatory clause and its effectiveness as an enforceable assumption of risk agreement.<sup>234</sup> To be an enforceable exculpatory agreement, risks should be clearly and unambiguously disclosed with language that is reasonably understandable to the ordinary person.<sup>235</sup>

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<sup>231</sup> 383 P.2d 441 (1963).

<sup>232</sup> *Id.* at 444–46.

<sup>233</sup> 57A AM. JUR. 2d *Negligence* § 61 (2019).

<sup>234</sup> See Russ VerSteeg, *Negligence in the Air: Safety, Legal Liability, and the Pole Vault*, 4 TEX. REV. ENT. & SPORTS L. 109, 156–58 (2003) (discussing express assumption of risk).

<sup>235</sup> Patricia C. Kussmann, *Validity, Construction, and Effect of Agreement Exempting Operator of Fitness or Health Club or Gym from Liability for Personal Injury or Death of Patron*, 61 A.L.R.6th § 12 (Originally published in 2011). See also *Jordan v. Diamond Equip. & Supply Co.*, 207 S.W.3d 525, 530 (2005) (requiring that the contract “clearly set out what negligent liability is to be avoided.”); *Monitronics Int’l, Inc. v. Veasely*, 323 Ga. App. 126, 135 (2013) (reasoning that because these

In sum, it is less likely to be against public policy to exculpate from simple negligence than gross negligence or willful malfeasance, from recreational or optional activities than necessary services, and from property loss than human loss or personal injury.<sup>236</sup> For these reasons, recognizing a property-plus category would be important to pet owners seeking to invalidate a clause. Arguably, it might be harder for providers of pet services to limit liability contractually for service animals or ESAs because of their functionality in rendering an important service to the owner, as recognized under federal antidiscrimination law, as well.

Applying the *Tunkle* criteria to providers of pet services, such as groomers, boarding kennels and veterinarians, there is probably a degree of choice. These activities may not be of great public importance as compared to, for example, public transportation; however, the pet would undoubtedly be under the control of the party seeking exculpation, subject to the risk of carelessness with the owner having little or no opportunity to take independent protections, and that factor is a significant consideration.

Nevertheless, in appropriate circumstances, at least for service providers, contractual provisions could put the brakes on runaway damage awards. Revisiting the scenarios at the beginning of this paper may prove helpful. In *Barking Hound Village, LLC v. Monyak*, “Lola,” died from acute renal failure because she “was administered toxic doses of the medication prescribed for Callie, a much larger dog.”<sup>237</sup> In *Harabes v. Barkery, Inc.*, “Gabby,” died of medical complications after she was subjected to extreme heat for an extended period of time

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clauses must be explicit, prominent, clear and unambiguous because they extinguish future claims).

<sup>236</sup> *But see* *Hyatt v. Mini Storage on Green*, 236 N.C. App. 278, 284, 763 S.E.2d 166, 171 (2014) (upholding an exculpatory clause for resulting personal injury).

<sup>237</sup> *Barking Hound Village, LLC*, 787 S.E.2d at 191–93.

at a dog grooming business.<sup>238</sup> It is unlikely that in either of those cases an exculpatory clause would have insulated the proprietor. Arguably, the conduct in *Harabes* amounted to gross negligence for which the exculpatory clause would have been held invalid. Moreover, no detailed warning of risks would have covered that situation. Pets may be cut while grooming, they may wiggle free and be injured jumping from the grooming table but being subjected to extreme heat is not a common, anticipated risk about which a warning would be given. Similarly, in *Barking Hound Village*, even if the conduct was simple negligence, no detailed warning of risks would have covered a situation where the medicines would be mixed. Warnings more likely would address reasonably anticipated risks, such as contracting a social disease like influenza, or, in doggy day care environments, an injury from rough play.

However, in *Hendrickson* an exculpatory clause likely would be enforced. In that case, “Bear” developed a foreseeable complication after surgery for which a successful post-operative intervention was not made, resulting in his death.<sup>239</sup> Providing such risks of surgery were adequately disclosed, an exculpatory clause should insulate the provider and limit liability.<sup>240</sup> These four cases illustrate four situations in which risks are disclosed and the emotional and physical harm caused by simple negligence, providers should be covered with a proper disclosure of risk. Only in more egregious situations, in which the risk is beyond the realm of possibilities, would damages be recoverable, including those for mental anguish, resulting in a fair outcome.

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<sup>238</sup> *Harabes*, 791 A.2d at 1143–44.

<sup>239</sup> *Hendrickson*, 312 P.3d at 53–57.

<sup>240</sup> On the other hand, because there was an additional failure to diagnosis the condition after the operation, arguably the clause may not be effective.

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Of course, if a neighbor or a stranger caused the destruction of the pet, it is unlikely that there would be opportunity for a contractual limitation of liability. Likewise, in *Strickland v. Medlen*, “Avery,” an escaped family pet, was picked up by animal control and euthanized, even though the family had requested a hold be put on their pet until they could get the money to pay the release fees.<sup>241</sup> An exculpatory clause would not work in this situation either because there is no contractual relationship. However, there may be some governmental immunity for municipal animal control units that would provide some protection from liability.<sup>242</sup> In addition to exculpatory clauses, which if enforceable, exonerate future wrongful conduct, other contractual provisions can limit risk exposure for professional caregivers in appropriate circumstances, such as liquidated damages or caps on damage awards.

## **B. Limitation of Liability for Damages**

Both recent legislative initiatives mentioned previously limit damages in those cases in which damages are recoverable.<sup>243</sup> Contractual provisions also can limit liability for damages in the event of a breach. The services provided by veterinarians, groomers, and boarders are all based in contract. In addition to including an exculpatory clause accompanied by a comprehensive list of risks outlined in plain language, contracts can include a clause agreeing upon damages in

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<sup>241</sup> *Strickland*, 397 S.W.3d at 186.

<sup>242</sup> The Tennessee statute exempts an action for noneconomic damages for nonprofit and governmental agencies which act on the behalf of public health or animal welfare. TENN. CODE ANN. § 44-17-403(e) (2019). A comprehensive discussion about the recovery of damages in the context of governmental immunity, however, is beyond the scope of the paper.

<sup>243</sup> See *supra* notes 201–210 and accompanying text.

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advance of a breach,<sup>244</sup> as well as limit liability for damages to an established cap, as well. A limitation of liability clause limits the maximum amount of damages that may be recovered for the negligent acts of a party to an amount set forth in the contract. Such provisions may be challenged as being against public policy;<sup>245</sup> however, courts are willing to enforce them if they are clear and

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<sup>244</sup> In some agreements, such as construction contracts, the parties may agree upon damages in advance of a breach. These liquidated damages clauses attempt to estimate damages in advance of a breach, and are typically enforceable without proof of actual damages, providing the clause was not intended as a penalty. 22 AM. JUR. 2d *Damages* § 509 (2019). *See also* In re Dow Corning Corp., 419 F.3d 543 (6th Cir. 2005) (concluding that the liquidated damages clause at issue was a penalty clause unenforceable under Texas law for reasons of public policy); Goldblatt v. C.P. Motion, Inc., 77 So. 3d 798, 801 (Fla. Dist. Ct. App. 2011) (concluding that the liquidated damages clause was unenforceable as a penalty because the damages were readily ascertainable). As long as the amount is a reasonable estimate of anticipated loss, it is enforceable, particularly if damages would be difficult to measure accurately, and the contractual attempt bears a reasonable relationship to the expected harm. Arctic Contractors v. State, 564 P.2d 30, 49 (Alaska 1977).

<sup>245</sup> Some states disfavor limitations of liability. *See, e.g.*, Witt v. La Gorce Country Club, Inc., 35 So. 3d 1033, 1037 (Fla. Dist. Ct. App. 2010) (indicating a reluctance to enforce provision for professional service considering statute establishing responsibility for negligence); Lucier v. Williams, 366 N.J. Super. 485, 493, 841 A.2d 907, 912 (App. Div. 2004) (finding the limitation of liability provision unconscionable because of the parties' unequal bargaining status and the stipulated damages nominal); City of Dillingham v. CH2M Hill Nw., Inc., 873 P.2d 1271 (Alaska 1994) (limitation of liability clause for professional services unenforceable under indemnification statute).



unambiguous, not in violation of any statute, and the result of an arm's length transaction.<sup>246</sup>

Presumably, a clear and reasonable contractual limitation of noneconomic damages, such as for the mental anguish stemming from the loss of a pet, would not be against public policy and would be enforceable, even if in some cases the parties may not be on equal footing. There are no statutes disfavoring such a provision, damages for personal injury are not being limited, and the actual economic loss would still be compensable, if proven. As such, the emotional harm would be properly recognized and compensated, while being appropriately contained by the parties' contract.<sup>247</sup> Therefore, in the cases discussed previously for which an exculpatory clause would not afford protection,<sup>248</sup> a limitation of liability clause could successfully cap any noneconomic damages award, at least resulting from negligent conduct.<sup>249</sup>

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<sup>246</sup> See, e.g., *Blaylock Grading Co., LLP v. Smith*, 189 N.C. App. 508, 658 S.E.2d 680 (2008) (limitation of liability did not implicate the public health or safety and was enforceable); *1800 Ocotillo, LLC v. WLB Grp., Inc.*, 219 Ariz. 200, 201, 196 P.3d 222, 223 (2008) (holding that limitation of liability for surveyor's negligence to surveyor's fees is not contrary to public policy); *Marbro, Inc. v. Borough of Tinton Falls*, 297 N.J. Super. 411, 688 A.2d 159 (Law. Div. 1996) (upholding limitation of liability provisions in contract for professional services); *Fort Knox Self Storage, Inc. v. W. Techs., Inc.*, 142 P.3d 1 (2006) (upholding limitation of liability clause for professional services).

<sup>247</sup> A contractual limitation analogous to the \$1000 award in *Campbell v. Animal Quarantine Station*, 632 P.2d 1066, 1066 (Haw. 1981) would likely be enforced. The two statutes also offer guidance for reasonable limitations. See *supra* notes 201–210 and accompanying text.

<sup>248</sup> See *supra* notes 234–235 and accompanying text.

<sup>249</sup> A limitation of liability for gross negligence or willful and wanton conduct arguable would be against public policy and unconscionable. See *U.S. Fire Ins. Co. v. Sonitrol Mgmt. Corp.*,

## VII. Conclusion

The relationship between humans and animals is a complex one.<sup>250</sup> In his book, *Some We Love, Some We Hate, Some We Eat: Why It's So Hard to Think Straight About Animals*, a researcher explored that complex relationship which seemingly permits such diverse treatment of animals by humans.<sup>251</sup> However, the recognition based on evidence in appropriate circumstances that some animals should be considered more than mere tangible property to their owners does not mean that *all* animals enjoy that consideration. Nevertheless, if public policy is reflected in statutes, then clearly the public policy in federal antidiscrimination laws recognizes the possibility of a property-plus argument for some animals.<sup>252</sup> The plaintiffs in *Strickland* detected the oddity that Texas law would permit sentimental damages for loss of an heirloom but not a pet, to which the Texas Supreme Court replied that the “law is no stranger to incongruity.”<sup>253</sup> That statement is certainly true for a legal system which concurrently requires accommodation for ESAs, but does not compensate for any emotional bond in assessing personal

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192 P.3d 543, 550 (Colo. App. 2008) (suggesting that conduct that is willful and wanton may not be covered by a limitation of liability clause).

<sup>250</sup> For a thorough examination of how the field of animal law has developed, including key litigation, see Joyce Tischler, *A Brief History of Animal Law, Part I (1972 - 1987)*, 1 STAN. J. ANIMAL L. & POL'Y 1 (2008); Joyce Tischler, *A Brief History of Animal Law, Part II (1985 - 2011)*, 5 STAN. J. ANIMAL L. & POL'Y 27 (2012).

<sup>251</sup> HAL HERZOG, *SOME WE LOVE, SOME WE HATE, SOME WE EAT: WHY IT'S SO HARD TO THINK STRAIGHT ABOUT ANIMALS* (P.S. 2011).

<sup>252</sup> See *supra* notes 75–149 and accompanying text.

<sup>253</sup> *Strickland*, 397 S.W.3d at 192.

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injury damages for guardians. Incongruity may be familiar to the law, but it is not ideal.

There are numerous examples of the emotional attachment between some owners to their pets that underscore the reality that to at least some owners, pets are not mere property.<sup>254</sup> Even Eggsy couldn't shoot the pug.<sup>255</sup> The emotional harm caused by wrongful loss of a pet through either a negligent or intentional tort should be compensated. Certainly, the emotional harm, and the resulting damages for that injury, would be greater if the loss was occasioned by gross negligence, intentional conduct, or willful, wanton and outrageous conduct.<sup>256</sup> Nevertheless, a negligent loss that causes what the Restatement recognizes can be "real and serious" emotional harm should be compensated, as well. By recognizing some pets as being in a property plus category that harm can be compensated, providing the plaintiff carries their burden of proof in establishing the emotional harm suffered.

In the absence of legislation, such recognition would require a shift in the current common law classification of animals as mere personal property. But that type of shift is not unprecedented. Some humans, most notably slaves and women, were previously classified as property, as well.<sup>257</sup> Although commentators worry about a slippery slope, professionals who contract for pet services can significantly reduce their risk exposure though the use of reasonably constructed contractual provisions.<sup>258</sup> As such, plaintiffs bringing cases most deserving of a mental anguish award would be the most likely recipients of damage awards.

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<sup>254</sup> See *supra* notes 38–68 and accompanying text.

<sup>255</sup> KINGSMAN: THE SECRET SERVICE (Twentieth Century Fox 2014).

<sup>256</sup> RESTATEMENT (THIRD) OF TORTS § 47 cmt. m (AM. LAW INST. 2012).

<sup>257</sup> Paek, *supra* note 180, at 492–494.

<sup>258</sup> See *supra* notes 221–246 and accompanying text.

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