

COMMENTS

VALUING COMPANION ANIMALS IN WRONGFUL DEATH CASES: A SURVEY OF CURRENT COURT AND LEGISLATIVE ACTION AND A SUGGESTION FOR VALUING PECUNIARY LOSS OF COMPANIONSHIP

By
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Because it is exceedingly difficult to measure the value of “companionship” in determining damages for the loss of a companion animal in wrongful death cases, courts and legislatures have struggled to come up with a realistic method of assessment. This article suggests a straightforward “investment approach” to estimate the minimum pecuniary value, including companionship value, that human guardians place on their companion animals. Significantly, the investment approach provides a more accurate assessment of companion animal value, which serves tort system goals of efficient compensation for loss and deterrence of future harm to companion animals.

I. INTRODUCTION	216	R
II. CURRENT VALUATION CONCEPTS IN THE COURTS	217	R
A. Fair Market Value and Consequential Damages	217	R
B. Actual or Intrinsic Value	218	R
C. Punitive Damages	219	R
D. Intentional Infliction of Emotional Distress	220	R
E. Negligent Infliction of Emotional Distress	222	R
F. Loss of Companionship	223	R
G. Courts Suggest State Legislative Action is the Answer	224	R
III. RECENT LEGISLATIVE ACTION PROVIDING FOR DAMAGES FOR THE LOSS OF A COMPANION ANIMAL .	225	R
A. T-Bo Act of 2000 in Tennessee	225	R
B. Proposed Legislation in Other States	226	R
1. California	226	R

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2. Colorado	226	R
3. Massachusetts	227	R
4. Mississippi	227	R
5. New Jersey	227	R
6. New York	228	R
7. Rhode Island	228	R
8. Failed Bills in Maryland, Oregon, and Connecticut ...	229	R
C. The Veterinary Opposition	230	R
IV. HOW DO COURTS AND LEGISLATURES DERIVE DAMAGE FIGURES?	231	R
V. DETERRENCE REQUIRES ACCURATE NUMBERS EX- ANTE	232	R
VI. AN ECONOMIC APPROACH TO VALUING PECUNIARY LOSS OF COMPANIONSHIP	233	R
A. The Michigan Supreme Court Introduces the Idea	233	R
B. Applying Loss of Investment Theory in the Companion Animal Context	234	R
C. Inadequacy of the Loss of Investment Theory	236	R
D. The Ireland-Ward Investment Approach Provides the Minimum Estimation of Entire Pecuniary Loss	236	R
VII. CONCLUSION	240	R

I. INTRODUCTION

Many legal commentators¹ have written about the bond that human guardians² share with their companion animals and the law's failure to adequately appreciate and protect that relationship. Surveys have shown that approximately seventy percent of guardians celebrate their companion animals' birthdays,³ yet when companion animals are wrongfully killed, courts usually value them as they would a trampled birthday toy.⁴ Studies show that the grief responses following the

¹ Pamela D. Frasch et al., *Animal Law* 175–214 (Carolina Academic Press 2000); 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); David S. Favre & Peter L. Borchelt, *Animal Law and Dog Behavior* 52–64 (Laws. & Judges Publ. Co. 1999); William C. Root, Student Author, *'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 (2002); Debra Squires-Lee, Student Author, *In Defense of Floyd: Appropriately Valuing Companion Animals in Tort*, 70 N.Y.U. L. Rev. 1059 (1995); Sonia S. Waisman & Barbara R. Newell, *Recovery of "Non-Economic" Damages for Wrongful Killing or Injury of Companion Animals: A Judicial and Legislative Trend*, 7 *Animal L.* 45 (2001); Steven M. Wise, *Recovery of Common Law Damages for Emotional Distress, Loss of Society, and Loss of Companionship for the Wrongful Death of a Companion Animal*, 4 *Animal L.* 33 (1998).

² Out of respect for the unique relationships that many humans share with nonhuman animals, for descriptive accuracy I will refer not to "owners" of "pets" or "property" but to "human guardians" of "companion animals."

³ Peggy Noonan, *New Tricks for Old Cats and Dogs, Too. Amazing Advances Prolonging Your Life Now Also Help Your Beloved Pet*, USA Weekend 6 (May 15, 2001).

⁴ See *infra* pt. II (A) (discussing the standard fair market valuation of companion animals).

death of a companion animal are comparable to those experienced upon the loss of a spouse, parent, or child,⁵ yet courts compensate guardians as though they had lost fungible consumer items rather than unique companions.⁶ This failure to value companion animals at more than market value not only fails to compensate guardians sufficiently, but it also results in underestimation of accident costs. Consequently, mere market value inadequately deters the intentional and negligent killing of companion animals.⁷

This paper begins with a review of the various valuation concepts that American courts currently employ and that American legislatures are currently considering. It then highlights the importance of identifying accurate damage amounts before making decisions regarding the treatment of companion animals. Finally, this paper suggests an investment approach for estimating the minimum pecuniary value of companion animals—including their companionship.

II. CURRENT VALUATION CONCEPTS IN THE COURTS

A. Fair Market Value and Consequential Damages

Historically, to return an “owner” to her financial position prior to the loss of her “pet,” courts have based damage awards on the fair market value of the fungible “property” at the time of its death, though courts vary in how expansively they view fair market value.⁸ In *Richardson v. Fairbanks N. Star Borough*,⁹ a case famous for its frustrating facts, the Alaska Supreme Court reiterated the traditional award of fair market value for the wrongful death of a companion animal.¹⁰ After an unsuccessful search for their missing dog, the *Richardson* plaintiffs called the pound and were delighted to discover that Wizzard was there. The pound told the Richardsons they could pick up Wizzard before 5:00; the Richardsons arrived at 4:50 and saw Wizzard chained in the back of the pound, but employees told them that they had closed the pound. The next day the Richardsons left work early and arrived earlier, only to find out that the pound had killed their dog, in violation of a local ordinance that required pounds to hold animals for seventy-two hours.¹¹ The employee in charge of the pound admitted liability caused by inaccurate record keeping. Thus, the sole issue at trial was

⁵ John Archer, *Why Do People Love Their Pets?*, 18 *Evolution & Hum. Behavior* 240 (1997).

⁶ See Root, *supra* n. 1, at 438.

⁷ *Infra* pt. V.

⁸ See *Green v. Leckington*, 236 P.2d 335, 340 (Or. 1951) (setting aside a jury verdict of \$700 and entering a judgment for the plaintiff in the amount of \$250, where witness indicated that the fair market value of the plaintiff's dog was \$250 and the plaintiff testified that he valued his dog at \$1000); Robin C. Miller, *Damages for Killing or Injuring Dog*, 61 A.L.R.5th 635 (1998); Jay M. Zitter, *Recovery of Damages for Emotional Distress Due to Treatment of Pets and Animals*, 91 A.L.R.5th 545 (2001).

⁹ 705 P.2d 454 (Alaska 1985).

¹⁰ *Id.* at 546.

¹¹ *Id.*

Wizzard's value. Affirming the lower court's ruling concerning what the jury could consider when formulating damages, the Alaska Supreme Court held that the appropriate value was the market value of the dog at the time of death and not the owner's subjective estimation of the animal's value as a pet.¹²

The *Richardson* decision, however, did suggest that the pedigree and utility of a companion animal could inform the determination of the pet's fair market value.¹³ And other courts have allowed consideration of the animal's "age, health, breed, training, usefulness, and any special traits or characteristics of value," in addition to the purchase price, to blunt the harsh effect of strict reliance on fair market value.¹⁴ Indeed, one court treated age positively, in contrast to the notion of depreciation for other types of property, because "manifestly, a good dog's value increases rather than falls with age and training."¹⁵ Courts also have allowed recovery of normal and foreseeable consequential damages arising from an injury to a companion animal, such as veterinary expenses.¹⁶ Such veterinary expenses, however, must be reasonable, and some courts have held that the expenses cannot exceed the fair market value of the companion animal.¹⁷

B. Actual or Intrinsic Value

When a companion animal has no ascertainable market value, some courts have attempted to "assess the dog's actual value" to avoid limiting the damages to a nominal amount.¹⁸ For example, in *Brousseau v. Rosenthal*,¹⁹ though the plaintiff's dog was a gift and was of mixed breed, a New York Civil Court "assess[ed] the dog's actual value to the owner." The court assessed both companionship value and protective value in its award of damages against the defendant veterina-

¹² *Id.*

¹³ *Id.*

¹⁴ *Stettner v. Graubard*, 368 N.Y.S.2d 683, 685 (N.Y. Town Ct. 1975); see *Demeo v. Manville*, 386 N.E.2d 917, 918 (Ill. App. Ct. 1979); *Animal Hosp. of Elmont, Inc. v. Gianfrancisco*, 418 N.Y.S.2d 992, 994-995 (Dist. Ct. 1979); *McDonald v. Ohio St. U. Veterinary Hosp.*, 644 N.E.2d 750, 752 (Ohio Ct. Claims 1994); Barton & Hill, *supra* n. 1, at 414.

¹⁵ *Brousseau v. Rosenthal*, 443 N.Y.S.2d 285, 287 (N.Y. Civ. Ct. 1980) (quoting *Stettner*, 368 N.Y.S.2d at 685).

¹⁶ *Kaiser v. U.S.*, 761 F. Supp. 150, 156 (D.D.C. 1991); *Nichols v. Sukaro Kennels*, 555 N.W.2d 689, 692 (Iowa 1996); *Goldberg v. Ruckstuhl*, 408 S.2d 374, 374 (La. App. 1981); *Kurash v. Layton*, 598 A.2d 535, 537 (N.J. Super. L. Div. 1991); *Zager v. Dimilia*, 524 N.Y.S.2d 968, 970-971 (N.Y. Village Ct. 1988); Favre & Borchelt, *supra* n. 1, at 56-57.

¹⁷ *Altieri v. Nanavati*, 573 A.2d 359, 361 (Conn. Super. Ct. 1989) ("Damages are generally limited to the market value of the dog, although other damages are sometimes allowed."); *Nichols*, 555 N.W.2d at 692; *Stettner*, 368 N.Y.S.2d at 684.

¹⁸ *Brousseau*, 443 N.Y.S.2d at 286; *Jankoski v. Preiser Animal Hosp.*, 510 N.E.2d 1084, 1087 (Ill. App. 1987) (holding that the "concept of actual value to the owner may include some element of sentimental value in order to avoid limiting the plaintiff to merely nominal damages").

¹⁹ 443 N.Y.S.2d 285 (N.Y. Civ. Ct. 1980).

rian, who could not explain how the healthy dog had died while boarding at his kennel.²⁰

In *Bueckner v. Hamel*,²¹ Justice Andell of the Texas Appellate Court wrote a separate opinion because he considered “the intrinsic or special value of domestic animals as companions and beloved pets” a more substantial basis than market value for affirming the plaintiff’s recovery of damages from a hunter who had killed the plaintiff’s dogs.²² Justice Andell explained that a bereaved pet owner should have the option of accepting either the market value or the special value (*i.e.*, the intrinsic value) of a beloved pet. He deemed the market value “inadequate for assessing the damages for the loss of domestic pets” as they “belong to a unique category of ‘property’ that neither statutory law nor caselaw has yet recognized.”²³ Justice Andell based his analysis on the reality of current society:

Society has long since moved beyond the untenable Cartesian view that animals are unfeeling automatons and, hence, *mere* property. The law should reflect society’s recognition that animals are sentient and emotive beings that are capable of providing companionship to the humans with whom they live. In doing so, courts should not hesitate to acknowledge that a great number of people in this country today treat their pets as family members. Indeed, for many people, pets are the *only* family members they have.²⁴

Justice Andell’s opinion recognizes that companion animals are worth more than their mere market value.

C. Punitive Damages

When destructive treatment to a companion animal is malicious or outrageous, both statutes and caselaw allow for exemplary damages.²⁵ In *La Porte v. Associated Independents, Inc.*, the Florida Supreme Court decided that it could properly consider a pet owner’s mental suffering as an element of the punitive damages award.²⁶ The *La Porte* plaintiff had tethered her miniature dachshund, Heidi, in the front yard when a garbage collector hurled an empty garbage can at the dog, laughed, and left.²⁷ Heidi died as a result.²⁸ The court found

²⁰ *Id.* at 286.

²¹ 886 S.W.2d 368 (Tex. Ct. App. 1994).

²² *Id.* at 373 (Andell, J., concurring).

²³ *Id.* at 373, 377; *Corso v. Crawford Dog and Cat Hosp.*, 415 N.Y.S.2d 182, 183 (N.Y. 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.”).

²⁴ *Bueckner*, 886 S.W.2d at 377–378. (emphasis in original).

²⁵ Cal. Civ. Code § 3340 (West 1997); *Mitchell v. Heinrichs*, 27 P.3d 309, 312 (Alaska 2001) (recognizing that a plaintiff can recover punitive damages for the death of a companion animal but finding that the facts did not support such an action); *Richardson v. Fairbanks N. Star Borough*, 705 P.2d 454, 456 n. 1 (Alaska 1985) (same); *La Porte v. Associated Indeps., Inc.*, 163 S.2d 267, 269 (Fla. 1964).

²⁶ *La Porte*, 163 S.2d at 268.

²⁷ *Id.* at 267–268.

²⁸ *Id.* at 268.

that “the affection of a master for his dog is a very real thing and that the malicious destruction of the pet provides an element of damage for which the owner should recover, irrespective of the value of the animal.”²⁹ The court upheld an award of two thousand dollars in compensatory damages and one thousand dollars in punitive damages.³⁰ The court’s holding recognized that companion animals do have special value, unlike traditional “property,” based on the value their guardians appropriately place on them.

D. *Intentional Infliction of Emotional Distress*

The variety of ways with which courts have dealt with allegations of emotional distress caused by the loss of a companion animal reflect the tremendous variation in the states in their development of this cause of action more generally. In cases involving intentional harm, courts have not displayed the usual discomfort regarding the genuineness of emotional distress claims.³¹ Instead, some courts have ascribed additional value to companion animals and recognized the ability of companion animals to invoke legitimate emotional responses from their guardians, albeit as “property.”³² Unfortunately, other courts have refused to recognize claims for intentional infliction of emotional distress, when harm to companion animals is the source of the distress.³³

Two recent appellate level decisions recognized claims for intentional infliction of emotional distress based on harm to companion animals. In *Brown v. Muhlenberg*,³⁴ the Third Circuit decided that Pennsylvania courts would recognize a claim for intentional infliction

²⁹ *Id.* at 269.

³⁰ *Id.*

³¹ Wise, *supra* n. 1, at 63.

³² *Mitchell v. Heinrichs*, 27 P.3d 309, 312 (Alaska 2001); *Richardson v. Fairbanks N. Star Borough*, 705 P.2d 454, 456 n. 1 (Alaska 1985); *La Porte*, 163 S.2d at 269; *Gill v. Brown*, 695 P.2d 1276, 1277–1278 (Idaho Ct. App. 1985) (allowing damages for intentional infliction of emotional distress caused by defendant shooting and killing the plaintiffs’ pet donkey).

³³ *Johnson v. Douglas*, 734 N.Y.S.2d 847, slip op. at 847 (N.Y. 2001) (affirming the lower court’s decision that because a dog is personal property, “[i]t is well established that a pet owner in New York cannot recover damages for emotional distress caused by the negligent killing of a dog” though the lower court repeatedly referred to negligent or malicious destruction of a dog) (emphasis added) (citing *Gluckman v. Am. Airlines, Inc.*, 844 F. Supp. 151, 157 (S.D.N.Y. 1994) (dismissing action for intentional infliction of emotional distress because there was no evidence that American Airlines, in causing the death of the plaintiff’s dog, directed such conduct intentionally at the plaintiff; but not dismissing the notion of intentional infliction of emotional distress based on harm to a companion animal). *But see Brown v. Muhlenberg Township*, 269 F.3d 205, 218–219 (3d Cir. 2001) (deciding that Pennsylvania courts recognize a claim for intentional infliction of emotional distress based upon the killing of a pet and distinguishing *Miller v. Peraino*, 626 A.2d 637, 640 (Pa. Super. 1993) (no intent to inflict emotional distress on dog’s owners).

³⁴ 269 F.3d 205 (3d Cir. 2001).

of emotional distress based on the killing of a companion animal.³⁵ The defendant police officer, who had shot the plaintiff's Rottweiler after it had strayed from the plaintiff owner's yard, argued "[that] the killing of a pet under any circumstances would not be recognized by Pennsylvania courts as extreme or outrageous."³⁶ But the Third Circuit rejected that contention and held that owners can suffer severe emotional distress when their pets are ill treated:

Given the strength of community sentiment against at least extreme forms of animal abuse and the substantial emotional investment that pet owners frequently make in their pets, we would not expect the Supreme Court of Pennsylvania to rule out all liability predicated on the killing of a pet. More specifically, we predict that the Pennsylvania courts would permit a trier of fact to return a verdict for the plaintiff in an intentional infliction of emotional distress case where it is shown that a police officer's attention was called to the severe emotional distress of the pet's owner, he hesitated before shooting, and he then attempted to fire five bullets into the pet within the owner's view and without justification. In such cases, the malicious behavior is directed to the owner as well as to the pet, with the potential for serious emotional injury to the owner being readily apparent.³⁷

Recognizing that "malicious behavior is directed to the owner" when a pet is shot, the court acknowledged that pet owners make a "substantial emotional investment" in their pets.³⁸

While the *Brown* court focused on human impact, the court in *Burgess v. Taylor*³⁹ focused on the conduct of the offender in defining the parameters of intentional infliction of emotional distress.⁴⁰ In *Burgess*, the Kentucky Court of Appeals held that the tort of intentional infliction of emotional distress applied to the conversion and slaughter of pet horses, reasoning that "the conduct of the offender rather than the subject of the conduct determine[d] whether the conduct was outrageous."⁴¹ In *Burgess*, the plaintiff had owned her horses, P.J. and Poco, for thirteen and fourteen years, respectively. Because of medical problems, it became difficult for the plaintiff physically to care for her horses. The defendants, who had a farm with horses of their own, said they were willing to take care of the horses in exchange for the enjoyment of having them; the plaintiff would retain ownership and could visit whenever she liked.⁴² But within days, the defendants sold the horses for slaughter and then lied to the plaintiff about the horses' whereabouts. The jury awarded the plaintiff \$1,000 representing the fair market value of her pet horses, \$50,000 in compensatory damages for the intentional infliction of emotional distress, and \$75,000 in puni-

³⁵ *Id.* at 218–219.

³⁶ *Id.* at 218.

³⁷ *Id.* at 218–219.

³⁸ *Id.*

³⁹ 44 S.W.3d 806 (Ky. App. 2001).

⁴⁰ *Id.* at 809.

⁴¹ *Id.*

⁴² *Id.*

tive damages, for a total of \$126,000.⁴³ On appeal, the defendants contended that damages should have been limited to the market value of the horses and emotional damages excluded.⁴⁴ The Kentucky Court of Appeals disagreed and affirmed the original award, holding that “the tort of the intentional infliction of emotional distress depends on the facts of the case as to the offender’s conduct and not to the subject of said conduct.”⁴⁵ Thus, both the *Brown* and *Burgess* courts fashioned rules for intentional infliction of emotional distress that allowed recovery for the mistreatment of companion animals. These rules extend recovery for the loss of a companion animal beyond the traditionally applied fair market value, at least where the harm was intentional.

E. Negligent Infliction of Emotional Distress

When a companion animal is harmed by negligence, the responses of courts in various jurisdictions fall on a wide spectrum. Some foreclose destruction of property from serving as the basis for an emotional distress claim at all.⁴⁶ Others condition recovery on certain factors, including the following: (1) the plaintiff suffered physical injuries as well;⁴⁷ (2) the plaintiff was in the zone of danger;⁴⁸ (3) the plaintiff observed the accident or injury;⁴⁹ (4) the plaintiff manifested physical injuries from the emotional distress;⁵⁰ and/or (5) the plaintiff shared a certain familial relationship with those injured.⁵¹ Finally, some courts simply require reasonableness and foreseeability when allowing a claim for negligent infliction of emotional distress, as the Hawaii Supreme Court did in *Campbell v. Animal Quarantine Station*.⁵²

In *Campbell*, a state agency transported Princess, the family dog of nine years, to a private hospital on a hot day. The agency put Princess in an unventilated van with direct exposure to the sun. She died of

⁴³ *Id.* at 810.

⁴⁴ *Id.* at 812.

⁴⁵ *Id.* at 813.

⁴⁶ *Roman v. Carrol*, 621 P.2d 307, 308 (Ariz. App. 1980) (affirming denial of recovery for emotional distress plaintiff experienced from witnessing St. Bernard attack her poodle); *Fackler v. Genetzky*, 595 N.W.2d 884, 892 (Neb. 1999); *Johnson v. Douglas*, 734 N.Y.S.2d 847, slip op. at 847 (N.Y. 2001); *Rabideau*, 627 N.W.2d at 798.

⁴⁷ *Fowler v. Ticonderoga*, 131 A.D.2d 919, 921 (N.Y. App. Div. 1987) (denying recovery for mental distress to guardian of dog who was shot and killed by dog control officer).

⁴⁸ *Id.*

⁴⁹ *Nichols v. Sukaro Kennels*, 555 N.W.2d 689, 691 (Iowa 1996) (denying recovery for emotional distress to guardians of poodle whose left front leg and shoulder blade were torn off by kennel owner’s dog).

⁵⁰ *Gill v. Brown*, 695 P.2d 1276, 1277 (Idaho Ct. App. 1985) (denying recovery for negligent infliction of emotional distress to guardians of a donkey who was shot and killed by defendant).

⁵¹ *Nichols*, 555 N.W.2d at 691; *Harabes v. Barkery, Inc.*, 791 A.2d 1142, 1146 (N.J. Super. L. Div. 2001); *Fowler*, 131 A.D.2d at 921; *Rabideau v. City of Racine*, 627 N.W.2d 795, 798 (Wis. 2001).

⁵² 632 P.2d 1066, 1068 (Haw. 1981); see also *Knowles Animal Hosp. v. Wills*, 360 S.2d 37, 39 (Fla. Dist. App. 1978).

heat prostration shortly after arriving at the pet hospital. Though plaintiffs did not substantiate their claims with expert medical testimony, they presented evidence about their relationship with Princess, including her role in the family's daily routine. The trial court also heard evidence that the family cried upon hearing the news of Princess's death and was preoccupied with her death for weeks.⁵³ The Hawaii Supreme Court upheld the one thousand dollar emotional distress award based on the foreseeability of Princess's death and the unreasonableness of the state agency's actions.⁵⁴

F. Loss of Companionship

The idea of awarding loss of companionship for the loss of a pet originated from consideration of the "intrinsic"⁵⁵ financial value of a companion animal. For example, when awarding damages for the actual value of the dog in *Brousseau*, the judge admonished that it "would be wrong not to acknowledge the *companionship* and protection that Ms. Brousseau lost with the death of her canine companion of eight years."⁵⁶ The court went on to note that "[t]he difficulty of pecuniarily measuring this loss does not absolve defendant of his obligation to compensate plaintiff for that loss, at least to the meager extent that money can make her whole."⁵⁷ Some animal advocates believe that the concept of loss of companionship for the death of a companion animal has the potential to evolve into a separate cause of action for noneconomic damages.⁵⁸ Even the Vermont Supreme Court commented that a pet's "worth is not primarily financial, but emotional; its value derives from the animal's *relationship* with its human companions."⁵⁹ While this language focuses on the relationship between companion animals and their guardians, courts have rejected loss of companionship as an independent cause of action.⁶⁰ Courts have based

⁵³ *Campbell*, 632 P.2d at 1067.

⁵⁴ *Id.* at 1068.

⁵⁵ *See supra* pt. II (B) (discussing cases that address an animal's actual or intrinsic value).

⁵⁶ *Brousseau v. Rosenthal*, 443 N.Y.S.2d 285, 286–287 (N.Y. Civ. Ct. 1980) (emphasis added).

⁵⁷ *Id.* at 287.

⁵⁸ Wise, *supra* n. 1, at 61–62; Favre & Borchelt, *supra* n. 1, at 56–57.

⁵⁹ *Morgan v. Kroupa*, 702 A.2d 630, 633 (Vt. 1997) (emphasis in original) (noting that modern courts have recognized that "pets generally do not fit neatly within traditional property law principles" because "a pet is not just a thing but occupies a special place somewhere in between a person and a piece of personal property") (quoting *Corso v. Crawford Dog and Cat Hosp.*, 415 N.Y.S.2d 182, 183 (N.Y. Civ. Ct. 1979)).

⁶⁰ *But see* In Defense of Animals, *Court Allows Family to Pursue Arguments That View Animals as Having Value Beyond That of Mere Property and Commodities* <http://www.idausa.org/news/newsarchives/news_brock012601.html> (accessed Apr. 5, 2003) (indicating that ex-NFL player Stan Brock and his family have filed \$300,000 civil suit seeking damages for a loss of companionship due to the killing of their two companion animals); Geordie L. Duckler & Dana M. Campbell, *Nature of the Beast: Is Animal Law Nipping at Your Heels?*, 61 Or. St. B. Bull. 15, 17 (June 2001) (reporting that the loss of companionship "tort was given its first official imprimatur of approval" by Washington

their rejections on either the companion animal as property syllogism, which *ergo* prevents recovery for loss of companionship,⁶¹ or because a state wrongful death statute prevents recovery of emotional distress and loss of companionship for the loss of child or spouse, so *a fortiori* there is no recovery for an animal.⁶²

G. Courts Suggest State Legislative Action is the Answer

Courts that have heard cases involving companion animal loss have been sympathetic, even when refusing to recognize certain claims. For example, the Wisconsin Supreme Court in *Rabideau* noted that it was “uncomfortable with the law’s cold characterization of a dog . . . as mere ‘property’”:

Labeling a dog “property” fails to describe the value human beings place upon the companionship that they enjoy with a dog. A companion dog is not a fungible item, equivalent to other items of personal property. A companion dog is not a living room sofa or dining room furniture. This term inadequately and inaccurately describes the relationship between a human and a dog.⁶³

In her concurring opinion, Chief Justice Shirley Abrahamson suggested that a state statute allowing for noneconomic damages “allows the legislature to make a considered policy judgment regarding the societal value of pets as companions and to specify the nature of the damages to be awarded in a lawsuit.”⁶⁴ Similarly, in *Koester*, the Michigan Court of Appeals “recognized that domesticated pets have value and sentimentality associated with them which may not compare with that of other personal property,” but said they could not “create for pet owners an independent cause of action for loss of companionship. . . . Al-

County Circuit Court in Oregon in a pending civil case when Judge Marco Hernandez allowed the claim to go forward to trial for the first time anywhere in the nation; *Brock v. Rowe*, No. C002535CV (Wash. Co. Cir. Ct., Or., filed Sept. 9, 2000) (finding support for the claim in dicta from *Norwest v. Presbyterian Intercommunity Hosp.*, 652 P.2d 318, 327 (Or. 1982), where the court explained that “a child might well have a cause of action for solely emotional distress if someone, in order to cause that distress, injured not the child’s parents but a favorite family pet”).

⁶¹ *Gluckman v. Am. Airlines, Inc.*, 844 F. Supp. 151, 158 (S.D.N.Y. 1994) (explaining that loss of companionship in New York is a “means for assessing the ‘intrinsic’ value of the lost pet when the market value cannot be determined,” but is not an independent cause of action); *Soto v. U.S.*, 2001 U.S. Dist. LEXIS 10743 at *8 (W.D. Mich. July 23, 2001); *Koester v. VCA Animal Hosp.*, 624 N.W.2d 209, 211 (Mich. App. 2000); *Jankoski v. Preiser Animal Hosp.*, 510 N.E.2d 1084, 1086–1087 (Ill. App. 1987); *Daughen v. Fox*, 539 A.2d 858, 865 (Pa. Super. 1988) (“Under no circumstances, under the law of Pennsylvania, may there be recovery for loss of companionship due to the death of an animal.”).

⁶² *Harabes v. Barkery, Inc.*, 791 A.2d 1142, 1146 (N.J. Super. L. Div. 2001) (explaining that New Jersey’s wrongful death statute did allow for nonemotional, pecuniary loss of companionship of a child damages, such as the price paid for the services of “companions” hired by the aged or infirm; assuming that companion animals have only emotional and not pecuniary value in an analogous context).

⁶³ *Rabideau v. City of Racine*, 627 N.W.2d 795, 798 (Wis. 2001).

⁶⁴ *Id.* at 807 (Abrahamson, C.J., concurring).

though this Court is sympathetic to plaintiff's position, we defer to the legislature to create such a remedy."⁶⁵ Moreover, the court provided insight as to why the legislature should so act:

[P]laintiff and others are free to urge the Legislature to visit this issue in light of public policy considerations, including societal sentiment and treatment of pets, and the prospect of public perception that Michigan law does not provide a just and fair remedy to pet owners who pay veterinarians to perform specialized services for their pets with the legitimate expectation that their pets will receive the appropriate treatment, but instead suffer when their pets are further or fatally injured because of a veterinarian's negligence.⁶⁶

Frustrated by court awards limited to fair market value—though some sympathetic courts have pushed such limits—guardians of companion animals are seeking relief from their legislatures.

III. LEGISLATIVE ACTION PROVIDING FOR DAMAGES FOR THE LOSS OF A COMPANION ANIMAL

A. *Tennessee's T-Bo Act of 2000*

Tennessee was the first state to pass a statute allowing noneconomic damages to compensate an owner for the loss of a pet, whether caused by intentional or negligent acts.⁶⁷ The statute allows recovery for the "reasonably expected society, companionship, love and affection of the pet."⁶⁸ Senator Steve Cohen sponsored the bill after a dog killed his Shih Tzu named T-Bo in August 1999. Senator Cohen explained that without such a statute damage awards are insufficient:

[T]he only damages you get for your losses are for your repairs, as if it were a clock or desk, or replacement, a new dog. If you have a mutt, you collect nothing. . . . It's a great loss if you've lost a pet, and that . . . should be compensated in the law.⁶⁹

The Tennessee statute, however, limits damages to four thousand dollars for the death of a pet,⁷⁰ does not include any companion animals other than cats and dogs in the definition of "pet,"⁷¹ and provides exemptions for nonprofit entities, government agencies, veterinarians, and rural areas.⁷² Legal commentators have noted the lack of explicit

⁶⁵ *Koester*, 624 N.W.2d at 211 (explaining, "[t]here is no Michigan precedent that permits the recovery of damages for emotional injuries allegedly suffered as a consequence of property damage").

⁶⁶ *Id.*

⁶⁷ Tenn. Code Ann. § 44-17-403 (2000); 2000 Tenn. Pub. Acts, ch. 762, §1.

⁶⁸ Tenn. Code Ann. § 44-17-403 (2000); 2000 Tenn. Pub. Acts, ch. 762, §1.

⁶⁹ Waisman & Newell, *supra* n. 1, at 69–70 (citing Bonna M. De La Cruz, *Bill May Boost Damage Claims for Owners of Deceased Pets*, *The Tennessean* B5 (Feb. 10, 2000)).

⁷⁰ Tenn. Code Ann. § 44-17-403(c) (explicating that limits on noneconomic damages in § 44-17-403(a) "shall not apply to causes of action for intentional infliction of emotional distress or any other civil action other than the direct and sole loss of a pet").

⁷¹ *Id.* § 44-17-403(b).

⁷² *Id.* § 44-17-403(e)–(f).

authorization for other reasonable damages, such as burial expenses, punitive damages, or for the recovery of attorney's fees and costs.⁷³

B. Proposed Legislation in Other States

1. California

The proposed California bill, introduced on February 13, 2003, would also allow up to four thousand dollars in noneconomic damages as "compensation for the loss of the reasonably expected society, companionship, love, and affection of the pet."⁷⁴ But the bill contains significant limitations. Damages resulting from negligence "may be awarded only if the death or fatal injury occurred 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."⁷⁵ The bill would not apply in rural areas or to nonprofit entities or government agencies "acting on behalf of public health or welfare or animal welfare."⁷⁶ It would exempt anyone who killed "a dog or other animal that has killed, worried, or wounded any animal."⁷⁷ And it would not apply in "[a]ctions against a licensed veterinarian for professional negligence."⁷⁸

2. Colorado

On January 31, 2003, the Colorado legislature introduced a unique bill that applies only to "companion cats and dogs" but allows noneconomic damages of up to one hundred thousand dollars.⁷⁹ In stark contrast to the states that have specifically exempted veterinary malpractice from their legislation, Colorado's bill explicitly applies both to any person "who tortures, needlessly torments, or needlessly kills a companion dog or cat" and to any veterinarian whose negligence "causes injury or death to a companion dog or cat."⁸⁰ Recognizing "society's favorable attitude toward companion dogs and cats," the bill declares that "[c]ompanion dogs and cats often are treated as members of a family, and an injury to or the death of a companion dog or cat is psychologically significant and often devastating to the owner."⁸¹ The drafters designed the bill to deter such harm by providing adequate compensation to people whose companion cats or dogs are injured or killed.⁸²

⁷³ Waisman & Newell, *supra* n. 1, at 70.

⁷⁴ Cal. Sen. 225, 2003–2004 Leg., Reg. Sess. (Feb. 13, 2003).

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ Colo. H. 1260, 64th Gen. Assembly, 1st Reg. Sess. (Jan. 31, 2003).

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.*

3. *Massachusetts*

On July 12, 2001, Massachusetts State Senator James P. Jajuga introduced a bill providing for companion animal damages.⁸³ After introduction to the Joint Committee on Criminal Justice on July 12, 2001, the bill was discharged to the Joint Committee on Judiciary on January 14, 2002.⁸⁴ The drafters formulated the bill differently from other proposed legislation in that it does not refer to noneconomic damages. Instead, it includes in the fair monetary value of a deceased companion animal “damages for the loss of the reasonably expected society, companionship, comfort, protection and services of the deceased animal to his or her human companions.”⁸⁵ The bill places no dollar limit on the amount of damages and a minimum punitive damages award of two thousand five hundred dollars applies when “willful, wanton, or reckless act[s] or omission[s]” cause the injury or death.⁸⁶ The bill also provides for burial expenses, attorney’s fees and court costs, and other reasonable expenses.⁸⁷ State Senator Steven A. Badour reintroduced the bill in the 2003 legislative session as Senate Bill 932.⁸⁸

4. *Mississippi*

Originally introduced in the 2002 legislative session as Mississippi House Bill 220,⁸⁹ House Bill 84⁹⁰ was reintroduced on January 7, 2003. It would impose up to five thousand dollars in liability upon one who negligently or intentionally kills a “domesticated pet.” The damages are intended to compensate “for the owner’s loss of companionship and affection of the pet.”⁹¹

5. *New Jersey*

New Jersey’s Assembly Bill 3339, introduced February 13, 2003, would allow the owner of a domesticated companion animal “to recover damages against anyone who commits “an act of cruelty” to the animal.⁹² A court can award damages for “loss of companionship” or “emotional distress,” but it must cap the damages for loss of companionship at five hundred dollars.⁹³

⁸³ Mass. Sen. 462, 183rd Gen. Ct., 2001 Reg. Sess. (July 12, 2001).

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ This bill follows a format similar to proposed legislation suggested by Waisman & Newell, *supra* n. 1, at 70–73.

⁸⁷ Mass. Sen. 462, 183rd Gen. Ct., 2001 Reg. Sess.

⁸⁸ Mass. Sen. 932, 183rd Gen. Ct., 2003 Reg. Sess. (Jan. 1, 2003).

⁸⁹ Miss. H. 220, 2002 Leg., Reg. Sess. (Jan. 8, 2002).

⁹⁰ Miss. H. 84, 2003 Leg., Reg. Sess. (Jan. 7, 2003).

⁹¹ *Id.*

⁹² N.J. Assembly 3339, 210th Leg., 2d Reg. Sess. (Feb. 13, 2003).

⁹³ *Id.*

6. *New York*

Assemblyman Pat Manning introduced a bill similar to the T-Bo Act in the New York State Assembly. The 2001–2002 legislature adjourned without passing the bill, but it was reintroduced on February 19, 2003.⁹⁴ The bill would allow for up to five thousand dollars in noneconomic recovery against a person who intentionally, recklessly, or negligently causes the death or serious injury of a companion animal. The bill's language is similar to that of the T-Bo Act in that it provides for the "loss of reasonably expected society, companionship, love and affection of the companion animal."⁹⁵ The companion animal, however, must have been on the premises of its owner, unlawfully removed from the premises of its owner, or under the direct control and supervision of its owner.⁹⁶

The New York bill summary cites compensation and deterrence as justifications for the bill, and it gives examples of two publicized incidents of animal death.⁹⁷ One involved a golden retriever named Dougall who was shot to death in his backyard while playing fetch with his guardian, and another involved a German shorthaired pointer who was snatched from her Yorktown pen and purposefully drowned in a nearby lake.⁹⁸ A final overall justification was that "[m]ost pet owners consider a companion animal to be a beloved member of the family and suffer great emotional distress at the death of their pet, particularly if the loss results from the unlawful act of another person, whether intentional, reckless or accidental."⁹⁹ The need for deterrence and desire to provide compensation demonstrate the legislature's response to societal desire to recognize the emotional value of the loss of a pet.

7. *Rhode Island*

In Rhode Island, during the 2001–2002 legislative session, sponsors in the House and Senate introduced companion bills, known as the "Amadeus Act," permitting up to ten thousand dollars in noneconomic damages for intentional or negligent acts causing the deaths of companion animals.¹⁰⁰ There are, however, exemptions, for nonprofit entities, government agencies, and licensed veterinarians.¹⁰¹ And like the proposed bill in New York, the companion animal must have been on the property of its owner or caretaker, or under the con-

⁹⁴ N.Y. A.B. 4545, 2003–2004 Reg. Sess. (Feb. 19, 2003).

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ N.Y. St. Assembly, *Bill Summary A4545* <<http://assembly.state.ny.us/leg/?bn=A04545>> (accessed Apr. 5, 2003).

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ R.I. H. 7020, 2001–2002 Leg., Reg. Sess. (Jan. 29, 2002) (originally introduced as R.I. H. 6056 on Feb. 6, 2001); R.I. Sen. 2357, 2001–2002 Leg., Reg. Sess. (Jan. 30, 2002).

¹⁰¹ R.I. H. 7020, 2001–2002 Leg., Reg. Sess. (Jan. 29, 2002) (originally introduced as R.I. H. 6056 on Feb. 6, 2001); R.I. Sen. 2357, 2001–2002 Leg., Reg. Sess. (Jan. 30, 2002).

trol and supervision of its owner or caretaker.¹⁰² The legislature did not pass the Amadeus Act during the 2001–2002 legislative session, but it was reintroduced as Senate Bill 159 and House Bill 5817 on January 28, 2003, and February 11, 2003, respectively.¹⁰³

8. *Failed Bills in Maryland, Oregon, and Connecticut*

Maryland House Bill 221 would have allowed for up to twenty-five thousand dollars in noneconomic damages, for intentional acts only, but the Judiciary Committee gave it an unfavorable report on February 11, 2002.¹⁰⁴

Similarly, Oregon's Senate introduced a bill during the 2001 Session that proposed up to two hundred fifty thousand dollars in noneconomic damages. It included the following evidentiary instructions:

[T]he finder of fact shall consider all evidence of the relationship between the keeper and the companion animal, including but not limited to the length of the relationship, unique characteristics of the companion animal, special needs or characteristics of the keeper and events or occurrences demonstrating the bond of friendship, trust, loyalty or closeness between the keeper and the companion animal.¹⁰⁵

Although Oregon's governor eventually signed the comprehensive bill,¹⁰⁶ a Judiciary Committee amendment deleted the provisions regarding damages for a companion animal's death before the bill got out of committee.¹⁰⁷

In 2002, Connecticut had a bill pending in the House, but it was somewhat unremarkable in that it simply permitted economic and punitive damages for the intentional killing or injuring of a pet,¹⁰⁸ and it contained the usual exceptions for licensed veterinarians, state government employees, and nonprofit organizations.¹⁰⁹ While the economic damages did include expenses for veterinary care, fair monetary value of the deceased companion animal, and burial expenses,¹¹⁰ the

¹⁰² N.Y. A.B. 4545, 2003–2004 Reg. Sess.

¹⁰³ R.I. Sen. 159, 2003–2004 Leg., Reg. Sess. (Jan. 28, 2003); R.I. H. 5817, 2003–2004 Leg., Reg. Sess. (Feb. 11, 2003).

¹⁰⁴ Md. H. 221, 416th Gen. Assembly, 2002 Reg. Sess. (Jan. 18, 2002); A similar bill, H. 907, was introduced in the 2001 session, but it also received an unfavorable report from the Judiciary Committee. It had proposed \$25,000 in noneconomic damages, without the intent requirement, and with exceptions for nonprofit organizations, government entities, and licensed veterinarians.

¹⁰⁵ Or. Sen. 166, 71st Leg. Assembly, 2001 Reg. Sess. 1(2)(b) (Jan. 11, 2001).

¹⁰⁶ Or. Sen. 166, 71st Leg. Assembly, 2001 Reg. Sess.

¹⁰⁷ 71st Or. Leg. Assembly, *Senate Amendments to Senate Bill 166 by Committee on Judiciary* <<http://www.leg.state.or.us/01reg/measures/sb0100.dir/sb0166.1sa.html>> (accessed Apr. 5, 2003).

¹⁰⁸ Cal. Civ. Code § 3340 (West 1993) and Mont. Code Ann. § 27-1-222 (2001) have allowed exemplary damages for intentionally injuring an animal since their enactments in 1872 and 1895, respectively.

¹⁰⁹ Conn. H. 5571, 2002 Reg. Sess. § 1(d)(1)–(3) (Feb. 26, 2002).

¹¹⁰ *Id.* § 1(b).

punitive damages were not to exceed the small claims court jurisdictional limit of three thousand five hundred dollars plus attorney's fees.¹¹¹ The Joint Judiciary Committee reported House Bill 5571 with a substitute on March 25, 2002. Unfortunately, the bill died due to lack of action on the house floor.¹¹²

C. *The Veterinary Opposition*

Veterinarians comprise the strongest constituency opposed to legislation that would allow noneconomic damages for a companion animal's injury or death. The main reason voiced for their opposition is that they are worried about hikes in malpractice insurance and concerned that consumers of veterinary services will get priced out of the market.¹¹³ But these concerns are not morally or economically sound. First, "Professor Tannenbaum has pointed out the hypocrisy of a small animal veterinarian earning his living from the strength of the bond between humans and companion animals, then denying its importance when he kills his patient," by insisting that the companion animal guardian cannot collect for emotional damages because the animal is mere property.¹¹⁴ Companion animal veterinarians are "in business precisely because human companions do not treat their animal companions like property—they do not routinely throw them out when they become damaged."¹¹⁵ And Professor Wise has observed that as companion animals age, guardians do not replace them with newer, younger, or healthier animals because guardians do not value their companion animals monetarily.¹¹⁶ Thus, when veterinarians negligently kill companion animals, they deprive human companions "of the very emotional attachment that caused them to bring their companion animals to the veterinarians in the first place."¹¹⁷ Because veterinarians make their living from the relationship between human guardians and their companion animals, it is morally bankrupt for veterinarians to insist that companion animals be valued as mere property.

Second, if courts do not value companion animals correctly, inappropriate levels of safety and consumption result.¹¹⁸ Veterinarians will not have the pecuniary incentive to engage in safe practices and provide veterinary services at prices that reflect the risks involved. And guardians may consent to practices because they are unable to accurately assess whether the risk of harm to their companion animal is worth engaging the veterinary services.¹¹⁹ Thus, pricing some peo-

¹¹¹ *Id.*

¹¹² Conn. Jt. Comm. on Jud. 5571, 2002 Reg. Sess. (Mar. 25, 2002).

¹¹³ Root, *supra* n. 1, at 443.

¹¹⁴ Wise, *supra* n. 1, at 47 (citing Jerrold Tannenbaum, *Veterinary Ethics* 124 (Lippincott, Williams, & Wilkins 1989)).

¹¹⁵ Waisman & Newell, *supra* n. 1, at 70.

¹¹⁶ Wise, *supra* n. 1, at 47.

¹¹⁷ *Id.* at 80.

¹¹⁸ Squires-Lee, *supra* n. 1, at 1084–1085.

¹¹⁹ *Id.*

ple out of the market is useful to reduce inefficient activity levels.¹²⁰ Nonetheless, passing the cost of malpractice insurance premiums from veterinarians to consumers will not price guardians out of the market altogether, because guardians may purchase health insurance for their companion animals just as they do for their family members.¹²¹ A few companies, for example AT&T, already offer veterinary health insurance to their employees.¹²² Thus, veterinarians should support legislation for noneconomic damages, because it will allow the tort system to appropriately compensate and deter companion animal loss. Moreover, such compensation and deterrence will increase market efficiency and decrease future harm to companion animals.

IV. HOW DO COURTS AND LEGISLATURES DERIVE DAMAGE FIGURES?

Judges and legislators, through their court decisions and proposed bills, seem to be searching for the appropriate method of assigning a dollar amount to the value of companion animals. In court, guardians plead various damages and causes of action: fair market value, consequential damages, intrinsic value, intentional infliction of emotional distress, negligent infliction of emotional distress, and loss of companionship.¹²³ Yet historically, courts have been exceedingly reluctant to allow any claims except those to which a dollar figure can be readily assigned.¹²⁴ Fair market value might not seem fair, but at least it is relatively easy to ascertain. Similarly, courts have determined consequential damages, such as veterinary fees for injured animals, from veterinarian bills. But courts are unsure of how to value the intrinsic worth of companion animals or their companionship; therefore they have hesitated to permit such damages and instead have deferred to state legislatures. Legislatures, however, have proposed damage caps ranging from \$4,000 to \$250,000—where do these figures come from? The answer: these dollar figures are arbitrary and so will prove unsatisfactory in either compensating for loss or deterring future harm to

¹²⁰ *Id.* at 1087.

¹²¹ Root, *supra* n. 1, at 445.

¹²² *Id.* (citing Mary Bridgman, *Now You Can Buy Insurance for Fido, Fluffy*, Columbus Dispatch 1C (July 15, 2001)). Veterinary Pet Insurance, a provider of veterinary health insurance, states that “more than 400 companies [are] offering VPI policies through various benefits packages,” including eBay, Miller Brewing Company and Metropolitan Life Insurance Company. Veterinary Pet Ins., *Press Room, Veterinary Pet Insurance Emerges as Valuable Work Perk* <http://press.petinsurance.com/press_release.cfm?prid=46&js=1&> (accessed Apr. 5, 2003).

¹²³ See *Kaiser v. U.S.*, 761 F. Supp. 150, 156 (D.D.C. 1991) (consequential damages); *La Porte v. Associated Independents, Inc.*, 163 S.2d 267, 269 (Fla. 1964) (intentional infliction of emotional distress); *Campbell v. Animal Quarantine Station*, 632 P.2d 1066, 1068 (Haw. 1981) (negligent infliction of emotional distress); *Koester v. VCA Animal Hosp.*, 624 N.W.2d 209, 211 (Mich. App. 2000) (loss of companionship); *Bueckner v. Hamer*, 886 S.W.2d 368, 373, 377 (Tex. Ct. App. 1994) (intrinsic value).

¹²⁴ See e.g. *Nichols v. Sukaro Kennels*, 555 N.W.2d 689, 692 (Iowa 1996); *Daughen v. Fox*, 539 A.2d 858, 865 (Pa. Super. 1988).

companion animals. If companion animal advocates present sound figures for valuing their companions, however, courts and legislatures should utilize such damage figures as well.¹²⁵

V. DETERRENCE REQUIRES ACCURATE NUMBERS EX-ANTE

It is a well-known postulate of law-and-economics deterrence theory that information regarding ex-post damages must be available to the relevant actors ex-ante, so that they can make risk-money-tradeoff decisions accordingly in the pre-accident world.¹²⁶ In other words, deterrence depends upon individuals being fully aware of the costs of their actions before they act. Moreover, damages must include the full extent of loss—the amount needed to make the plaintiff whole—or potential tortfeasors will underestimate accident costs, resulting in inefficient deterrence levels.¹²⁷

Richard Epstein, law professor at the University of Chicago, has pointed out that “damages . . . meant to cover not only the market value of the animal, but the loss of companionship to the owner . . . is good law and solid economics, because it recognizes that when these non-monetary elements are included, the *actual* losses to the owner exceed the market value.”¹²⁸ Limiting damages to market value, on the other hand, results in gross underestimation of accident costs by veterinarians, groomers, trainers, kennels, shelters, airlines, and others responsible for the lives of companion animals. Therefore, these caretakers predictably fail to take efficient levels of safety precautions in caring for companion animals. Moreover, prices remain artificially low, inducing people to pay for services where lower levels of activity may be more efficient for guardians who desire to keep their companion animals unharmed. The failure to value the full extent of loss predictably results in less than optimal investments in safety precautions and greater than optimal use of services. Thus, it is crucial that courts accurately value accident costs ex-ante, which means accurately valu-

¹²⁵ To the extent that the proposed bills allow for economic damages, this paper suggests a method to calculate the minimum pecuniary value for loss of companionship. To the extent that the bills allow noneconomic damages or emotional damages, the values are inherently arbitrary, and the legislature is certainly an appropriate body to make estimates about the emotional value their constituents derive from their companion animals.

¹²⁶ *U.S. v. Carroll Towing Co.*, 159 F.2d 169, 173 (2d Cir. 1947) (L. Hand, J.) (defining negligence as when B, the burden or cost of preventing the accident, is less than P, the probability or risk of the accident occurring, multiplied by L, the gravity of the resulting injury); Richard A. Posner, *Economic Analysis of Law* (5th ed., Aspen 1998); Squires-Lee, *supra* n. 1, at 1086–1087 (providing examples of the $B < PL$ formula at work in the companion animal context).

¹²⁷ The extent to which nonpecuniary damages result in excessive insurance compensation has been challenged. See Steven P. Croley & Jon D. Hanson, *The Nonpecuniary Costs Of Accidents: Pain-and-Suffering Damages In Tort Law*, 108 Harv. L. Rev. 1785 (1995).

¹²⁸ Richard A. Epstein, *The Next Rights Revolution?*, 51 Natl. Rev. 44, 45–46 (Nov. 8, 1999) (emphasis in original); Waisman & Newell, *supra* n. 1, at 68.

ing companion animals ex-ante, so that courts will optimally deter rational economic actors.

VI. AN ECONOMIC APPROACH TO VALUING PECUNIARY LOSS OF COMPANIONSHIP

A. *The Michigan Supreme Court Introduces the Idea*

The “loss of investment” approach was first adopted in a child wrongful death suit by the Michigan Supreme Court in *Wycko v. Gnodtke*.¹²⁹ In determining damages for the life of a negligently killed child, the court was aware of the prevailing sentiment that the pecuniary value of life was impossible to quantify. But the Court declared, “we cannot shirk from this difficult problem of valuation.”¹³⁰ Instead, the Court considered the expenses of birth, food, clothing, health care, education, nurture, and shelter as part of the pecuniary value of the child, as these expenses comprise the lost investment in child rearing costs.¹³¹ Moreover, courts also consider loss of companionship as an ascertainable pecuniary loss to the parents, because “an individual member of a family has a value to others as part of a functioning social and economic unit.”¹³² Pecuniary loss, therefore, offered a new theory of valuing a child wrongfully killed.

The court rejected the previous methodology used for valuing children, which earlier courts had based on a child’s ability to generate income.¹³³ Many courts had interpreted American wrongful death statutes, derived from England’s Lord Campbell Act, as limiting damages to a simple calculation.¹³⁴ Courts would subtract child rearing costs from the earnings—sometimes hypothetical—of the child prior to her majority.¹³⁵ This calculation, however, was a remnant from the days when the “employment of children of tender years [in factories and mills] was the accepted practice and their pecuniary contributions to the family both substantial and provable.”¹³⁶ Accordingly, the court rejected the historical theory, stating that “[t]he bloodless bookkeeping imposed upon our juries by the savage exploitations of the last century must no longer be perpetuated by our courts.”¹³⁷ The court concluded that the child was no longer considered a breadwinner by society, but

¹²⁹ 105 N.W.2d 118, 122–123 (Mich. 1960). The doubt cast on this holding by the Michigan Supreme Court’s decision in *Breckon v Franklin Fuel Co.*, 174 N.W.2d 836 (Mich. 1970), was dispelled in *Smith v. Detroit*, 202 N.W.2d 300, 303 (Mich. 1972). There, the court overruled the *Breckon* decision and reaffirmed the holding in the *Wycko* case.

¹³⁰ *Wycko*, 105 N.W.2d at 122.

¹³¹ *Id.*

¹³² *Id.*

¹³³ *Id.* at 121.

¹³⁴ *Id.* at 119.

¹³⁵ *Id.* at 121.

¹³⁶ *Id.*

¹³⁷ *Id.* at 124.

an expense—"[a] blessed expense, it is true, but nevertheless an expense."¹³⁸

Thus, the Michigan Supreme Court valued the life of a child by adding the loss of investment costs of child rearing, the expected pecuniary value of lost companionship, and any expected profit production by the child.¹³⁹ The loss of investment costs is based on the theory that the "funds spent in bringing a child into the world and raising him represent an investment, which is lost by the parents on the death of the child and which should be recoverable."¹⁴⁰ Accordingly, *Wycko* is a "core case for the development of the investment approach for assessing parental loss resulting from the death of a child and has been widely cited in cases in other states."¹⁴¹ And Richard Posner also has reviewed the loss of investment theory favorably.¹⁴²

*B. Applying the Loss of Investment Theory in the Companion
Animal Context*

The loss of investment theory should also apply to valuing the investment guardians forego when companion animals are killed. Like children of today, companion animals are a "blessed expense." Indeed, most companion animals have limited ability to generate net income at any point in their lives, but guardians are willing to invest in food, shelter, nurture, training, grooming, and medical expenses for their companion animals.¹⁴³ Moreover, people, especially childless couples and older married couples, often consider their companion animals

¹³⁸ *Id.* at 123 (where a child has profit capability, *Wycko* held that courts should include it in the damage calculation: "the loss of such expectation should not be disregarded as one of the pecuniary losses suffered").

¹³⁹ States with "loss to survivors" statutes usually employ theories such as expected monetary contributions during or after minority as alternatives to the loss of investment approach for measuring pecuniary loss, while states with "loss to decedent or estate" statutes usually calculate expected net earnings over a lifetime, as done in the adult wrongful death context. See 65 Am. Jur. 2d *Trials* § 261 (2001). In addition, many states specifically allow parents to recover for the lost society and companionship of a child, or courts interpret pecuniary loss to include the loss of society and companionship, as the *Wycko* court did. *Wycko*, 105 N.W.2d at 123.

¹⁴⁰ *Wycko*, 105 N.W.2d at 123.

¹⁴¹ Thomas R. Ireland, *Compensable Nonmarket Services in Wrongful Death Litigation: Legal Definitions and Measurement Standards*, 7 J. Leg. Econ. 15, 21 (Fall 1997).

¹⁴² See Richard A. Posner, *Economic Analysis of Law* 198 (4th ed., Aspen 1992); Richard A. Posner, *Economic Analysis of Law* 183 (2d ed., Aspen 1977) (explaining that a "minimum estimate of the parents' loss, which could be the basis for the award of damage to them, is their investment (of both money and time, the latter monetizable on the basis of market opportunity costs) in the rearing of the child up to the date of its death").

¹⁴³ See *supra* n. 3, Peggy Noonan, *New Tricks for Old Cats and Dogs, Too. Amazing Advances Prolonging Your Life Now Also Help Your Beloved Pet*, USA Weekend 6 (May 15, 2001); Americans spent an estimated \$28.5 billion on their companion animals in 2001, according to the American Pet Products Manufacturers Association, up 24 percent since 1998. Am. Pet Products Mfrs. Assn., *Fact Sheets, Pet Industry Facts* <http://www.appma.org/press/fact_sheets/fact_sheet_03.asp> (accessed Apr. 5, 2003).

“children.”¹⁴⁴ In fact, seventy percent of surveyed individuals responded that they thought of their companion animals as children,¹⁴⁵ eighty-four percent refer to themselves as a companion animal’s “mom” or “dad,”¹⁴⁶ and ninety-nine percent consider their companion animals to be family members.¹⁴⁷ Companion animals are “spoken to in a higher voice than the consumer would normally use, and the cadence of speech is slower and more rhythmic—the voice usually adopted when talking to a child.”¹⁴⁸ In essence, “companion animals provide ‘the kind of uncomplicated affection that parents exchange with young children’ and draw from us ‘the loving intimacy that is appropriate to children.’”¹⁴⁹ Studies like these support the application of the loss of investment theory to companion animals who guardians consider “children”.

It is not surprising then, that judges have used loss of investment to value companion animals. In *Quave v. Bardwell*,¹⁵⁰ the defendant shot the plaintiff’s dog, Kilo, just because he was barking, and the Louisiana Court of Appeals affirmed an award of two thousand five hundred dollars in market value damages.¹⁵¹ The court justified the damages award based in part on loss of investment theory:

[B]ecause of the shooting of Kilo, Quave lost her original investment, her expenses incurred in taking care of Kilo until he was killed, the money she could have made with Kilo at stud, and additionally, she is faced with replacement costs should she choose to buy another dog. Given the difficulties involved in obtaining an exact measure of damages, if indeed one is at all possible, we do not think the trial court abused the much discretion afforded it when determining damages.¹⁵²

In the more recent case of *Mitchell v. Heinrichs*,¹⁵³ the Alaska Supreme Court explained that it based the damages for the tortious killing of a companion animal on the actual value to the owner “where, as here, there may not be any fair market value for an adult dog.”¹⁵⁴ Ac-

¹⁴⁴ Elizabeth C. Hirschman, *Consumers and Their Animal Companions*, 20 J. Consumer Research 616, 621 (1994); see Squires-Lee, *supra* n. 1, at 1059.

¹⁴⁵ Wise, *supra* n. 1, at 46 (citing Am. Animal Hosp. Assn., *The 1995 AAHA Report: A Study of the Companion Animal Veterinary Services Market* 81, 84 (1995)).

¹⁴⁶ Cindy Hall & Elizabeth Wing, *Pets Are Part of the Family*, USA Today D9 (Mar. 1, 2000); Waisman & Newell, *supra* n. 1, at 60.

¹⁴⁷ Waisman & Newell, *supra* n. 1, at 59 (citing Victoria L. Voith, *Attachment of People to Companion Animals*, 15 Veterinary Clinics of N. Am. 289, 290 (1985)). This percentage is at the high end of survey results on this issue. See Root, *supra* n. 1, at 436 (other studies report results in the range from 70% to 93%).

¹⁴⁸ See Elizabeth C. Hirschman, *Consumers and Their Animal Companions*, 20 J. Consumer Research 616, 622 (1994).

¹⁴⁹ Wise, *supra* n. 1, at 45 (quoting Alan Beck et al., *Between Pets and People: The Importance of Animal Companionship* 41–43 (rev. ed., Purdue U. Press 1996)).

¹⁵⁰ 449 S.2d 81(La. Ct. App. 1984).

¹⁵¹ *Id.* at 84; Barton & Hill, *supra* n. 1, at 414–15.

¹⁵² *Quave*, 449 S.2d at 84 (emphasis added).

¹⁵³ 27 P.3d 309 (Alaska 2001).

¹⁵⁴ *Id.* at 313.

cordingly, “an owner may seek to recover the original cost of the dog, including the purchase price and . . . such investments as immunization, neutering, and training.”¹⁵⁵ Thus, at least two courts have used the loss of investment idea to define more precisely the damages owed for the death of a companion animal.

C. *Inadequacy of the Loss of Investment Theory*

The loss of investment theory, however, is inadequate to capture the entire pecuniary value of a companion animal, because it does not include the value of the loss of companionship. And companionship is often the major motivation for becoming a companion animal guardian! Indeed, when the *Wycko* court valued a child’s life, it added to the parents’ lost investment expenses the expected pecuniary value of the loss of the child’s companionship.¹⁵⁶ Thus, the question remains: how is the loss of companionship valued, or how is pecuniary loss of life, including companionship value, calculated?

D. *The Ireland-Ward “Investment Approach” Provides the Minimum Estimation of Entire Pecuniary Loss, Including Loss of Companionship*

Forensic economists Thomas R. Ireland and John O. Ward refined the loss of investment formula for child wrongful death suits, after Ireland pointed out a fundamental incongruity in the theory.¹⁵⁷ Parental loss is not greater for an older child than a younger child—parents do not lose three times less with a five-year-old than a fifteen-year-old—even though the parents have had less time to invest money in the

¹⁵⁵ *Id.* (emphasis added). Unlike in *Quave*, where the court seemed to double count, the *Mitchell* court held that the owner could alternatively seek replacement costs, “including such items as the cost of purchasing a puppy of the same breed, the cost of immunization, the cost of neutering the pet, and the cost of comparable training.” *Id.* Thus, the court seemed to take into account the time value of money, as the original investment would cost more in current dollars, thereby allowing the costs of a new companion. Furthermore, the court said it was “appropriate to consider the breeding potential of the animal, and whether the dog was purchased for the purpose of breeding with other purebreds and selling the puppies.” *Id.*

¹⁵⁶ See Wise, *supra* n. 1, at 62. Professor Wise discussed in detail that companion animals have never been subject of the types of restrictive wrongful death statutes that have applied to humans, whom the common law deemed to have incommensurable worth. . . Therefore, the logic goes, wrongful death statutes, or judicial interpretations thereof, do not limit recovery in companion animal wrongful death suits. But even assuming the historical argument is correct, courts would not be willing to allow recovery for companion animal loss under a theory not available to humans. See *Harabes v. Barkery, Inc.*, 791 A.2d 1142, 1146 (N.J. Super. L. Div. 2001) (explaining that as a matter of public policy, “[m]ost significantly, there is no reason to believe that emotional distress and loss of companionship damages, which are unavailable for the loss of child or spouse, should be recoverable for the loss of a pet dog”).

¹⁵⁷ Thomas R. Ireland & John O. Ward, *Family Loss Assessment: Conceptual Issues of the Investment Approach*, in *Valuing Children in Litigation: Family and Individual Loss Assessment* 5, 11 (Thomas R. Ireland & John O. Ward eds., Laws. & Judges Publ. Co. 1995).

younger child.¹⁵⁸ Ireland and Ward, instead, step back to the time when the parents made the economic choice to have a child, knowing that the choice would involve significant flows of future expenditures.¹⁵⁹ Accordingly, ex-ante parental preference is revealed: “Logically, if the parents decided to have the child, *the value of having the child must be greater than or equal to the cost of having the child.*”¹⁶⁰ The actual investment made by the parents until the child’s death does not measure their loss, rather the “entire *intended* expenditure flow” does.¹⁶¹ Of course, a fundamental transformation takes place between the time parents think of a child as an “economic decision” and the time when the child is born, because at birth the emotional value of a child to her parents becomes immeasurable.¹⁶² Indeed, many parents would give up everything they have to save a child, so the pre-birth economic investment decision represents the *minimum* value parents place on the life of a child.¹⁶³ A child’s pecuniary value, then, is equal to “at least the flow of expenditures the parents have already made plus the value of the flow of expenditures on the child the parents would have been willing to make in the future.”¹⁶⁴ Thus, such a shift

¹⁵⁸ *Id.* at 11.

¹⁵⁹ *Id.* at 5.

¹⁶⁰ *Id.* at 8 (emphasis added).

¹⁶¹ Thomas R. Ireland & John O. Ward, *Loss in the Death of a Child: An Extension of the Ward Analysis*, in *Valuing Children in Litigation: Family and Individual Loss Assessment* 37, 39 (Thomas R. Ireland & John O. Ward eds., Laws. & Judges Publ. Co. 1995) (emphasis in original).

¹⁶² Ireland & Ward, *supra* n. 157, at 15 (“One of the virtues of the investment approach is that it separates ‘economic’ from ‘emotional’ components in the value of the child.”); see Thomas R. Ireland & John O. Ward, *Valuing the Life of a Child: Broadening the Investment Approach*, in *Valuing Children in Litigation: Family and Individual Loss Assessment* 55, 60 (Thomas R. Ireland & John O. Ward eds., Laws. & Judges Publ. Co. 1995) [hereinafter Ireland & Ward, *Valuing the Life of a Child*].

¹⁶³ Ireland & Ward, *supra* n. 157, at 15.

¹⁶⁴ Ireland & Ward, *Valuing the Life of a Child*, *supra* n. 162, at 56. The pecuniary value can be expressed in mathematical terms as follows:

$$N B_i M I_i$$

$$\sum_{i=0}^{\infty} \frac{B_i}{(1+d)^{(i-p)}} \geq \sum_{i=0}^{\infty} \frac{I_i}{(1+d)^{(i-p)}}$$

where

B_i = parental benefit from the child in year i ,

I_i = parental investment in the child in year i ,

i_p = the present year,

d = the rate of discount for past and future,

N = an index of the life expectancies of the parents, and

M = the year in which parental investment ends. See *id.* at 56.

Note that the investment value changes over time due to the time value of money:

[a]t any given time, the investment value of a child is an estimate of the present value in a given year of the expenditures parents have made on the child in the past and the present value of the expenditures they would have made continuing to raise and educate the child if the child had not been killed.

See Ireland & Ward, *supra* n. 157, at 16. Additionally,

there may well be a past offset in the form of benefits up to the point of death of the child. However, how these benefits may be affected by the child’s death and

in the starting point of valuation reflects the potential costs involved in deciding to become a parent. And at the moment of choice, the child's entire pecuniary value, including companionship, to the parent must have been at least equal to those potential costs.

Courts could also use the "investment approach" to identify the minimum, yet comprehensive, pecuniary value people place on their companion animals.¹⁶⁵ Ireland and Ward point out that "many of the issues involved with investments in pets are similar to those with children."¹⁶⁶ As a practical matter, this valuation approach would require an estimation of the average amount of money a guardian spends over the life of a companion animal. The Humane Society of the United States, for example, estimates that a guardian spends an average of \$11,580 over the course of a dog's life.¹⁶⁷ More specifically, this method entails multiplying the average annual expense of owning a companion animal with the average number of years a companion animal lives. For example, the American Pet Products Manufacturing Association reported recent survey results showing the following average amounts dog guardians spend per year:¹⁶⁸

Surgical veterinarian visits	\$310
Food	\$141
Routine veterinarian visits (vaccines, well visits)	\$133
Groomer/grooming aids/brushes	\$75
Cages/crates	\$50
Other supplies	\$78
Food treats	\$43
Vitamins/nutritional supplements/wormers	\$47
Medicated flea/tick control products (med. collars, sprays, dips, powders, shampoos)	\$35
Beds	\$33
Carriers	\$29
All toys	\$26
Rawhide chews	\$27
Shampoo/conditioner (nonmedicated)	\$21

how evenly benefits might have been distributed through various stages of the child's lifetime relationship with parents lies outside the realm of economics. Therefore, we feel that any offsets should be determined by juries and not economic experts. . . . It is, however, the responsibility of economic experts to be clear that no allowance for such offsets have been made when presenting the investment approach.

See Ireland & Ward, *Valuing the Life of a Child*, *supra* n. 162, at 59–60; Thomas R. Ireland & John O. Ward, *Sample Case Development*, in *Valuing Children in Litigation: Family and Individual Loss Assessment* 373 (Thomas R. Ireland & John O. Ward eds., Laws. & Judges Publ. Co. 1995) (providing a hypothetical appraisal of economic loss).

¹⁶⁵ *Supra* pt. VI (B).

¹⁶⁶ Ireland & Ward, *Valuing the Life of a Child*, *supra* n. 162, at 61.

¹⁶⁷ Leslie Eaton, *Hey Big Spenders*, N.Y. Times 3-1 (Sept. 11, 1994).

¹⁶⁸ Am. Pet Products Mfrs. Assn., *supra* n. 143. These numbers are probably artificially high, as the APPMA indicates that in calculating the average answer to question 36b, the "average amount excludes 'zero.'"

Collars	\$27
Harnesses/halters	\$14
Books/pamphlets/videos on care/training	\$18
Nonmedicated collars/decorative collars (jeweled)	\$14
Leashes	\$17
Total	\$1,138

Multiplying this total yearly amount spent on dogs by eleven, the average lifespan of a dog,¹⁶⁹ means that the average investment a guardian is willing to make when she decides to have a dog is \$12,518. This figure represents the minimum amount that courts should equate with entire pecuniary loss, including loss of companionship, for a dog. Just as the value a parent places on a child is equal to at least the amount the parent anticipates it will cost the parent to care for the child, the value of a companion dog to its guardian is at least the amount it will cost the guardian to care for the dog.

The American Pet Products Manufacturing Association also reported recent survey results showing the amount cat guardians spent per year:¹⁷⁰

Surgical veterinarian visits	\$257
Food	\$170
Routine veterinary visits (vaccines)	\$115
Other supplies	\$60
Medicated flea/tick control products	\$47
Cages/crates	\$38
Vitamins/nutritional supplements/wormers	\$33
Food treats	\$26
Carriers	\$24
Harnesses/halters	\$22
Collars	\$21
All toys	\$20
Books/pamphlets/videos on care/training	\$19
Beds	\$19
Groomer/grooming aids/brushes	\$17
Nonmedicated collars/decorative collars	\$15
Shampoo/conditioner (nonmedicated)	\$15
Leashes	\$12
Total	\$930

¹⁶⁹ A.R. Michell, *Longevity of British Breeds of Dog and Its Relationships with Sex, Size, Cardiovascular Variables and Disease*, 145 *Veterinary Rec.* 625, 625 (1999).

¹⁷⁰ Am. Pet Products Mfrs. Assn., *supra* n. 143. These numbers are probably artificially high, as the APPMA indicates that in calculating the average answer to question 41b, the “average amount *excludes* ‘zero.’” Also, unlike the dog owner survey results, which showed average spending on a single dog, the cat owner survey results seem to group owners of one or of two or more cats together.

Multiplying the total annual amount by 12.5, the average lifespan of a cat,¹⁷¹ results in an average investment of \$11,625 for a person who decides to care for a kitten.

These examples demonstrate application of the investment approach to derive a more accurate, *minimum* estimation of entire pecuniary loss, including loss of companionship endured by guardians upon the wrongful deaths of their companion animals. Because the investment approach focuses on the average investment guardians are willing to make, it provides a straightforward way to value the entire pecuniary loss that guardians face upon the deaths of their companion animals. That is, when a person decides to become a guardian to a companion animal, the value she places on her companion animal is at least equal to the financial expenditures she expects to make over the lifetime of the animal. With this economic postulate in mind, courts and legislatures can use the investment approach to accurately value loss of companion animals, which will promote efficient levels of compensation and deterrence. In short, because it is exceedingly difficult to measure the value of "companionship" in wrongful death cases, courts and legislatures have struggled to come up with a realistic method of assessment. The investment approach provides an answer.

VII. Conclusion

In approximately fifty-nine percent of American households, human guardians share their lives with companion animals.¹⁷² Though guardians place great value on these relationships, courts have traditionally treated companion animals as fungible property upon their wrongful death, attempting to compensate the loss and deter future harm with nothing more than damages equal to fair market value. While guardians occasionally invoke various damages theories and causes of action such as consequential damages, intrinsic value, intentional infliction of emotional distress, negligent infliction of emotional distress, and loss of companionship, success with such theories is not the norm. Valuing companion animals at fair market value, however, poorly serves tort goals of efficient compensation for loss and deterrence of future harm.

Due to the difficulty of accurately valuing companion animals, courts and legislatures have not responded appropriately to wrongful deaths of companion animals. The suggested investment approach, however, provides a solution that will enable courts and legislatures to determine the minimum, comprehensive pecuniary loss that guardians face upon deaths of companion animals. In theory, a person who decides to care for a companion animal knows that the care will entail

¹⁷¹ Irene Rochlitz et al., *University of Cambridge, A Pilot Study on the Longevity and Causes of Death of Cats in Britain* (abstract) <<http://www.vetmed.ucdavis.edu/ccab/isaz2001.htm#Abstracts>> (accessed Feb. 26, 2002).

¹⁷² Am. Veterinary Med. Assoc. Ctr. for Info. Management, *U.S. Pet Ownership & Demographics Sourcebook 1* (1997).

2003]

VALUING COMPANION ANIMALS

241

significant costs. Thus, the pecuniary value of having the companion animal must be at least equal to or greater than the expected cost of care. In practice, this involves multiplying the average annual costs of caring for a companion animal by the animal's life expectancy. This method will provide courts and legislatures with an accurate, concrete way to calculate damages. Moreover, it recognizes that the majority of Americans have companion animals, share significant relational bonds with them, and appropriately value their companion animals at much more than fair market value.

