ANIMAL LAW FOR INSURANCE LAWYERS

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I. INTRODUCTION

Insurance law practitioners recognize the diversity of coverages and issues impacting coverage, but many are unaware of how insurance law intersects with animals, such as house pets or livestock, and animal-related claims. In some instances, coverage issues have emerged from common policies such as commercial general liability insurance, automobile insurance, and homeowners insurance. Coverages also may exist that apply solely to animals and to people who own or work with them. Of necessity, damage issues intersect with insurance when insurers evaluate claims involving injury to or loss of an animal. This article explores unique coverage and damage issues that arise in animal-related claims.

II. RECOVERY OF DAMAGES

A. *Introduction*

Damages are a substantial aspect of animal law recovery; thus, a party should always consider the animal's meaning and the timing of the suit. For instance, owners must make the determination of whether to pursue a claim. If an attorney is retained to pursue a claim, a significant aspect of an owner's determination is advising the client of expected recoverable damages. Similarly, the alleged wrongdoer must assess the exposure calculation if an insurer is involved. The insurer must determine its obligation to defend and indemnify a claim. The insurer will consider settlement evaluations and settlement reserves, among other factors, before bringing or

defending a claim. A significant aspect of this determination is the recoverable damages in the animal owner's state. To that end, this article will discuss the leading approaches for determining damage awards for injured animals and the rare instances when emotional damages may be recovered for loss of a pet.

B. *Fair Market Value: Is There One or Isn't There?*

Throughout the nation fair market value is the predominate measure used to determine damage awards in relation to animals as property.[1] The fair market value approach allows owners to recover damages for the value of the animal at the time of loss, plus interest, and any reasonable medical costs or expenses incurred in treating the animal for its injuries.[2] Courts initially consider an animal's purchase price when determining fair market value. Subsequently, a fair-market-value analysis features a consideration of the animal's qualities, commercial value, and loss of services.[3] During this valuation, courts generally consider qualities such as the animal's training, value as a show competitor, life expectancy of breed, usefulness, desirable traits, and breeding potential.[4] However, "this method of computing damages does not account for the instances where the pet has no market value."[5] This analysis fits the legal standard in the majority of states that consider animals as merely property.[6] As a result, the determination of damages for the death or injury of an animal is "limited to loss of value, not loss of relationship."[7]

1. Actual Value

Despite the majority of courts adopting the fair-market-value approach, many jurisdictions, including Illinois, have chosen to award damages based on "'actual value' . . . when market value for the animal (1) is nonexistent, (2) cannot be ascertained, or (3) is not a true measure of its worth."[8] This approach is more lenient as it allows courts to award damages when an animal has no market value.[9] The "actual value" analysis does not merely consider the animal as property, so "damages are not restricted to nominal damages; rather, damages must be ascertained in some rational way from

1. *See*, *e.g.*, Strickland v. Medlen, 397 S.W.3d 184, 193 n.57 (Tex. 2013).
2. Barking Hound Vill., LLC v. Monyak, 787 S.E.2d 191, 193 (Ga. 2016); Brooks v. City of Huntington, 768 S.E.2d 97, 103 (W. Va. 2014).
3. Anzalone v. Kragness, 826 N.E.2d 472, 477 (Ill. Ct. App. 2005).
4. *Strickland*, 397 S.W.3d at n.58; Nichols v. Sukaro Kennels, 555 N.W.2d 689, 692 (Iowa 1996).
5. *Anzalone*, 826 N.E.2d at 476.
6. *Strickland*, 397 S.W.3d at 186.
7. *Id*.
8. *Strickland*, 397 S.W.3d at 192 n.57 (gathering cases); Jankoski v. Preiser Animal Hosp., Ltd., 510 N.E.2d 1084, 1086 (Ill. Ct. App. 1987).
9. *Anzalone*, 826 N.E.2d at 477.

such elements as are attainable."[10] The restatement and most jurisdictions use the "actual value" approach to calculate damages based on the animal's value to the owner.[11] Courts use "actual value" to calculate damages in instances when it would be unjust to limit damages to fair market value.[12] This principal allows the owner to demonstrate an animal's value in terms of the animal's value to the owner.[13] In effect, the manner in which the owner demonstrates that the animal cannot be replaced "is left largely to the discretion of the trier of fact."[14] For that reason, a plaintiff is permitted to demonstrate an animal's "value by such proof as the circumstances admit."[15] Consequently, "these damages may include some element of sentimental value in order to avoid limiting the plaintiff to merely nominal damages"[16]

Courts that follow this approach do so because many of the damages associated with an injured animal are considered foreseeable. "It is common knowledge that people are prepared to make great sacrifices for the well-being and continued existence of their household pets."[17] Thus, pet owners "feel a moral obligation toward these animals" and are willing to incur substantial expenses to treat their injuries.[18]

2. Distinguishing Approaches

Further, a damages award for "actual value," rather than "fair market value," will likely result in a significantly better outcome for a plaintiff. Many courts that follow the fair-market-value approach do not permit damage awards to exceed the value of the animal, even if the owner has incurred exceeding veterinary expenses.[19]

However, courts that follow the actual-value approach tend to be more tolerant when awarding damages. For instance, in *Leith v. Frost*,[20] appellant's dachshund was attacked by the appellee neighbor's Siberian huskie.

10. *Jankoski*, 510 N.E.2d at 1086.
11. *Anzalone*, 826 N.E.2d at 477 (citing Restatement (Second) of Torts § 911 cmt. e).
12. *Id.* (citing Restatement (Second) of Torts § 911 cmt. e).
13. *Id.*
14. *Id.* (citing *Jankoski*, 510 N.E.2d at 1086 (quoting Long v. Arthur Rubloff & Co., 327 N.E.2d 346, 355 (Ill. Ct. App. 1975))); *see also* Restatement (Second) of Torts § 912, cmt. c.
15. *Jankoski*, 510 N.E.2d at 1086.
16. *Id*. at 1087.
17. Leith v. Frost, 899 N.E.2d 635, 641 (Ill. Ct. App. 2008).
18. *Id.*
19. *Nichols*, 555 N.W.2d 689, 692 (Iowa 1996); Naples v. Miller, No. 08C-01-093 PLA, 2009 Del. Super. LEXIS 173, at *4 (Apr. 30, 2009) ("[T]here is no recovery under Delaware law for injured pets' veterinary expenses to the extent they exceed a pet's value."); *see also* Brooks v. Jenkins, 220 104 A.3d 899, 914 (Md. Ct. Spec. App. 2014) (decreasing award for veterinary bills from the original $20,000 award to the total of $7,500 pursuant to statute). *But see* Barking Hound Vill., LLC v. Monyak, 787 S.E.2d 191, 196 (Ga. 2016) (holding that no cap exists on recoverable damages associated with the animal's treatment and recovery).
20. *Leith*, 899 N.E.2d at 641.

The trial court ordered $200 in damages for fair market value. The appellate court awarded the appellant an additional $4,784 in damages for veterinary expenses.[21] The court reasoned that this amount was not a windfall because the damages were reasonably foreseeable and the appellant actually incurred these expenses.[22] That said, a plaintiff is required to provide expert testimony when alleging veterinary negligence.[23] Therefore, courts will measure damages for an animal "with no discernible market value" in terms of the "reasonable and customary cost of necessary veterinary care" to restore the animal to its previous health.[24]

Even jurisdictions that have adopted the actual-value approach are less thoughtful when considering damage awards for animals for hire. For instance, in *Burgess v. Shampooch Pet Industries, Inc.*, the court supported awarding damages exceeding market value for a pet dog, but not a horse.[25] The court stated that its determination not to award damages exceeding the animal's value made sense in relation to a horse for hire, but "is certainly problematic in the case of a pet dog whose value is typically noneconomic."[26] Ohio has taken a similar position when considering damage awards for pet dogs and equines. In *McDonald v. Ohio State University Veterinary Hospital*, a veterinary hospital performed surgery on a pedigreed dog that resulted in paralysis and the eventual euthanization of the animal.[27]The court awarded $5,000 for loss of the dog and potential stud fees because the dog received significant training and won several awards at dog shows. The court reasoned that the years of training demonstrated an "exceptional circumstance" when value to the owner was the proper basis of recovery.[28]

By comparison, the court failed to find these exceptional circumstances in *White v. Ohio State University College of Veterinary Medicine*.[29] The *White* plaintiff, who was in the business of breeding and racing horses, sought damages for a veterinary facility's negligent sterilization of a racehorse. The plaintiff intended to use the horse for racing and breeding. The plaintiff alleged that the horse would be bred fifteen to twenty times yearly for

21. *Id.*

22. *Id.*; *see also* Hyland v. Borras, 719 A.2dd 662, 664 (N.J. Super. Ct. App. Div. 1998) (holding that the plaintiff was permitted to recover damages exceeding the value of the pet because they arose "purely as the result of their relationship and the length and strength of the owner's attachment to the animal").

23. Zimmerman v. Robertson, 854 P.2d 338 (Mont. 1993).

24. *Leith*, 899 N.E.2d at 641.

25. Burgess v. Shampooch Pet Indus., Inc., 131 P.3d 1248, 1252 (Kan. Ct. App. 2006).

26. *Id.*; *see also* Monroe v. Lattin, 25 Kan. 351, 356, 1881 WL 827, at **2 (1881) (holding the entire damage award should not exceed the value of the horse).

27. McDonald v. Ohio State Univ. Veterinary Hosp., 644 N.E.2d 750, 751 (Ohio Ct. Cl. 1994).

28. *Id.* at 752.

29. White v. Ohio State Univ. College of Veterinary Med., 2009-Ohio-7034, ¶ 17 (Ct. Cl.).

a stud fee of $750.[30] Despite the plaintiff's allegation, the court refused to award for loss of stud fees because the damages were considered to be too speculative and not reasonably certain to exist.[31] Notably, the pet dog in *McDonald* had already derived earnings from stud fees, compared to the horse in *White*.[32] Therefore, a plaintiff may be more likely to receive damages for loss of stud fees if the animal has already engaged in the activity.

Similarly, a plaintiff is not permitted to recover damages for loss of libido related to his animls.[33] In *Winingham v. Anheuser-Busch, Inc.*, the plaintiff sought to recover damages by alleging that two ostriches he was attempting to breed lost their libido after being frightened by a passing airplane.[34] The court refused to award damages for loss of libido and the value of unborn offspring because the damages were deemed too speculative.[35] The court further reasoned that there was no actual loss or injury because the ostriches recovered from any fright.[36]

3. Emotional Distress

Damages can be significantly limited in incidents that result in the loss of a pet, unfortunately. These claims involve a significant emotional increment that is only recognized by courts in extraordinary circumstances. At least one jurisdiction has even limited damages in the instance that the animal dies or does not recover.[37] In *Atlanta Cotton Seed Oil-Mill v. Coffey*, the court stated that an animal owner is not entitled to recover damages for loss of hire "during the sickness of the [animal] in case the [animal] dies."[38]

At the same time, many jurisdictions make an exception for considering sentimental value when an animal dies due to malicious conduct.[39] This type of incident also commonly allows the plaintiff to recover punitive damages. *Id*. For example, in Illinois, no statute permits the negligent wrongful death of a pet, but the Humane Care for Animals Act permits damages for the death of a pet due to intentional actions of aggravated cruelty or torture.[40] Similar to damages based on actual value, these damages must factor in the significant bond a pet owner has to the animal.

30. *Id*.
31. *Id*. ¶ 18.
32. *McDonald*, 644 N.E.2d at 752; *White*, 2009-Ohio-7034, ¶ 17.
33. Winingham v. Anheuser-Busch, Inc., 859 F. Supp. 1019 (N.D. Tex. 1994).
34. *Id.*
35. *Id.*
36. *Id*.
37. Atlanta Cotton Seed Oil-Mills v. Coffey, 4 S.E. 759, 760 (Ga. 1887).
38. *Id.* at 761.
39. Strickland v. Medlen, 397 S.W.3d 184, 192 n.57 (Tex. 2013) (gathering cases); Wilson v. Eagan, 297 N.W.2d 146 (Minn. 1980).
40. 510 Ill. Comp. Stat. 70/16.3 (2002). Illinois also permits recovery of damages for an animal trained to assist a physically impaired person, pursuant to the Assistance Animal Damages Act. 740 Ill. Comp. Stat. 13/1–13/10 (2002).

Several states consider these damages in relation to claims for emotional distress. For example, Washington, like most states, does not permit emotional distress damages for loss of a pet. "Nevertheless, [in Washington] recovery for emotional distress is possible for malicious or intentional injury to a pet."[41] This is not, however, the consensus view, as Vermont recently refused to recognize emotional distress when the plaintiff's animal was intentionally shot.[42] The court noted that it was not blind to the sentimental value of pets, but that it would continue to uphold the traditional view that animals are property.[43]

Along those lines, whether an individual's conduct is sufficiently malicious to warrant punitive damages is a question of fact reserved for a jury.[44] For that reason, courts may consider several factors when determining reasonable punitive damages for loss of a pet, such as the degree of malice, intent or willful disregard, the type of interest invaded, the amount needed to truly deter such conduct in the future, and the cost of bringing the suit.[45]

C. *Conclusion as to Damages in Animal Cases*

Regardless of which damages evaluation courts employ, recovery of emotional distress damages for loss of a pet only occur in rare circumstances. Several jurisdictions have begun to expand the types of recoverable damages for a loss of or injury to a pet under the actual-value approach. Nevertheless, fair market value remains the predominant approach when assessing these types of damages.

III. INSURANCE COVERAGE DISPUTES INVOLVING ANIMALS UNDER ANIMAL-RELATED COVERAGES OR PROVISIONS

Unique animal-specific coverages, which apply unique policy forms and common policy forms applicable to property and inland marine, include livestock mortality, major medical and surgical, loss of use, stallion fertility, and limited perils. Over the years, a recurring coverage issue that courts have faced is whether the insureds' violations of the policy's "notice" conditions precedent defeat coverage. The overwhelming majority view is

41. Repin v. State, 392 P.3d 1174, 1185 (Wash. Ct. App. 2017); *see also* La Porte v. Associated Indeps., Inc., 163 So. 2d 267, 269 (Fla. 1964) (limiting damages for emotional distress for the death of a pet to "intentional, willful, malicious, or reckless conduct").
42. Scheele v. Dustin, 998 A.2d 697, ¶ 1 (Vt. 2010).
43. *Id.* ¶ 16.
44. State v. Coleman, 82 P. 465 (Utah 1905).
45. Wilson v. Eagan, 297 N.W.2d 146, 151 (Minn. 1980).

that policies of insurance applicable to the lives of animals do not require insurers to prove actual prejudice when an insured animal owner violates a policy's requirement of "notice" of an insured animal's illness, injury, or death.

A. *Livestock Mortality Insurance Disputes*

1. Late Notice Under an Equine Insurance Policy

The policy provision that has generated, by far, the most litigation is notice. Notice requirements vary among insurers. One example of a notice requirement is the following:

> Insured's responsibility
>
> 1. Immediately notify US or YOUR agent by telephone or telegraph;
> 2. Employ a licensed veterinarian, at YOUR expense, to treat the animal;
> 3. Secure proper care and, if required, allow the animal to be removed for treatment at YOUR expense.
>
> * * *
>
> We reserve the right to deny a claim if YOU do not comply with these conditions.

Another mortality policy set forth the notice requirement in this manner:

> It is a condition precedent to any liability of the Company hereunder that:
>
> (a) the Insured shall at all times provide proper care and attention for each animal hereby insured, and
> (b) in addition, in the event of any illness, disease, lameness, injury, accident, or physical disability whatsoever of or to an insured animal the insured shall immediately at his own expense employ a qualified Veterinary Surgeon and shall, if required by the Company, allow removal for treatment, and
> (c) in the event of the death of an insured animal the Insured shall immediately at his own expense arrange for a post-mortem and autopsy examination to be made by a qualified Veterinary Surgeon, and
> (d) in either event the insured shall immediately give notice by telephone or telegram to the person or persons specified on the policy who will instruct a Veterinary Surgeon on the Company's behalf if deemed necessary.
>
> And any failure by the Insured to do so shall render the Insured's claim null and void and release the Company from all liability in connection therewith, whether the Insured has personal knowledge of such events or such knowledge is confined to the representatives of the Insured or other persons who have care, custody or control of the animal(s).

The prevailing view, recognized almost universally within the last fifty years, is that an insured's violation of the notice requirement within equine mortality coverage forfeits coverage. [46] A fifty-year-old precedent recognized the inapplicability of the requirement that an insurer prove "prejudice" from late notice to avoid coverage in *Underwriters at Lloyd's, London v. Harkin*s, [47] There, the Court not only explained the importance of compliance with the policy's "immediate notice" requirement but also recognized the "unique" nature of equine insurance as compared to other coverages:

> Only through immediate notice can the insurer investigate the causes of illness or death that are certainly unique to livestock policies. Only through immediate notice can the insurer know, or have an opportunity to know, that the animal will receive proper attention and treatment. Only through immediate notice can the insurer protect itself from the unusual hazards that accompany the insuring of animal life, as contrasted to the insuring of human life.[48]

In *Circle 4 Stables, Inc. v. National Surety Corp*., a Texas court emphasized the perils of the insured violating the mortality policy's notice condition because the insurer's right to intervene in the insured horse's care is jeopardized, if not destroyed:

> We think, however, that whereas herein, an insured takes it upon himself to determine whether or not the condition of the animal warrants the giving of notice to the insurer, as required by the policy, he does so at the risk of foregoing a claim for liability against the insurer for the death of the animal as a result of the condition or illness. The notice provision obviously is for the benefit of the insurer in that the company may have the opportunity of securing its own chosen veterinarian to attend to the animal. [49]

A fairly recent equine mortality insurance case, which illustrated that the decades-old precedent remains good law, is *Hauser v. Great American Assurance Co*.[50] In *Hauser*, the court enforced an equine mortality policy's "immediate notice" condition precedent. There, a hunter/jumper mare was insured under an Equine Mortality Broad Form Insurance policy. During

46. Cases involving violations of "notice" conditions precedent in equine insurance coverage include the following cases: Hauser v. Great Am. Assurance Co., 2013 U.S. Dist. LEXIS 140380 (N.D. Ill. Sept. 30, 2013); Jahn v. Great Am. Assurance Co., 2004 WL 765240 (N.D. Ill. Apr. 6, 2004) (this author was defense counsel on this case); Hiscox Dedicated Corp. Member, Ltd. v. Wilson, 246 F. Supp. 2d 684, 693–94 (E.D. Ky. 2003); Arigato Stables v. Am. Live Stock Ins. Co., 493 A.2d 584 (N.J. App. 1985); Patti v. Monarch Ins. Co. of Ohio, 401 N.Y.S.2d 682 (Sup. Ct. 1977); Circle 4 Stables, Inc. v. Nat. Sur. Corp., 451 S.W.2d 564. 567 (Tex. Ct. App. 1970); Menard v. Citizens Ins. Co., 134 So.2d 85, 87 (La. Ct. App. 1966); Hartford Live Stock Ins. Co. v. Henning, 266 S.W. 912 (Ky. 1924); Hough v. Kaskaskia Live Stock Ins. Co., 1923 WL 3381 (Ill. Ct. App. 1923).

47. Underwriters at Lloyds', London v. Harkins, 427 S.W.2d 659 (Tex. Ct. App. 1968).

48. *Id.* at 664.

49. *Circle 4 Stables, Inc.*, 451 S.W.2d at 567.

50. Hauser v. Great Am. Assurance Co., 971 F. Supp. 2d 824 (N.D. Ill. 2013).

the policy period, the mare was allegedly found to be "severely lame," but fifteen days passed before the insurer received notice. The court granted the insurer's motion for summary judgment because the owner violated the policy's general condition of "immediate notice" and the fifteen-day delay was "not immediate."[51] The *Hauser* court noted that "Illinois law strictly interprets notice provisions in equine insurance policies." [52] As to whether the delay prejudiced the insurer, the court explained that "an insurer does not have to show prejudice where a notice provision requires immediate notice."[53] Rejecting the plaintiff's allegation that he lacked personal knowledge of the horse's lameness because the insured mare was under lease when the injury was allegedly sustained, the court cited policy language extending knowledge of adverse conditions to "your family members, representatives, agents, veterinarians, employees, bailees, co-owners, or other persons who have custody or control" of the insured horse."[54]

2. "Proper Care & Attention" Conditions in Mortality Policies

Livestock mortality policies typically require the owner to give, or arrange to give, "proper care and attention" to the insured equine. One such policy provides:

> Insured's responsibility
>
> 1. Immediately notify US or YOUR agent by telephone or telegraph;
> 2. Employ a licensed veterinarian, at YOUR expense, to treat the animal;
> 3. Secure proper care and, if required, allow the animal to be removed for treatment at YOUR expense.
>
> * * *
>
> We reserve the right to deny a claim if YOU do not comply with these conditions.

In *North American Specialty Insurance Co. v. Pucek*,[55] the plaintiffs insured their thoroughbred race horse "Off Duty." While in race training, the horse became lame. Questions centered on whether the horse was a candidate for humane destruction, as the owners wanted, or should undergo a fetlock arthrodesis surgery, as a veterinarian recommended. The insurer

51. *Id.* at 832.
52. *Id.* at 831.
53. *Id.*
54. *Id.* at 832. The Great American Policy provided: "H. Notice. Any breach in any respect of any of the Conditions Precedent set forth in VI.A. through G. above, and/or of any one or more of the additional conditions precedent set forth in any endorsement to this policy, whether you have personal knowledge of such circumstances or events or such knowledge is confined to your family members, representatives, agents, veterinarians, employees, bailees, co-owners or other persons who have care, custody or control of a 'horse' at any point in time, will render your claim null and void and release us from liability." *Id.* at 828.
55. N. Am. Specialty Ins. Co. v. Pucek, 709 F.3d 1179 (6th Cir. 2013).

offered to pay for the surgery, but the owners instead euthanized their horse and submitted a claim. At issue was whether the owners' refusal to consent to the surgery violated the policy's condition of "proper care."[56] Although the owners argued that the horse was suffering[57] and that the arthrodesis exceeded "proper care," the court agreed with the insurer's position that euthanasia was inconsistent with "proper care." The court also found that euthanasia violated the exclusion for "intentional destruction," even though this exclusion contained an exception that would allow coverage if the euthanasia qualified as "humane destruction." The owners' intentional destruction failed to meet the "humane destruction" exception to the exclusion[58] because no veterinarian's statement supported a need for "humane destruction" under the policy's definition, which required that the insured horse be "incurable and in extreme pain."[59]

3. "Sound Health" Conditions in Mortality Policies

Livestock insurance policies usually include the general condition that "at the commencement of this insurance each animal hereby insured is in sound health and free from any illness, disease, lameness, injury or physical disability whatsoever." In *Lasma Corp. v. Monarch Insurance Co. of Ohio*,[60] the insureds bought an Arabian mare at auction for $580,000 and received a binder for "fall of the hammer" equine mortality insurance coverage. The policy included a "sound health" condition. Shortly after the sale, the mare was diagnosed with "shipping fever" (an upper respiratory infection), from which she allegedly recovered. The horse later developed and died from a serious respiratory infection, however. The mare also had a prior diagnosis of displaced soft palate (unrelated to her demise) and had equine strangles earlier in the year of the sale. None of this was known to the insurer, as it received a veterinary statement that the mare was in good health on the

56. The policy language set forth an owner's obligations in the event that the insured horse sustains an injury, illness, or disease during the policy. It stated, in part, that the insured is required to "[s]ecure proper care, and, if necessary, allow the horse to be removed at [the insurer's] direction for treatment at [the owners'] expense." *Id.* at 1182.

57. In support, the owners videotaped the horse in that stall and gathered footage that they believed showed the horse's condition. *Id.* By comparison, veterinary records generated roughly around the same time reflected that the horse's heart and breathing rates were within normal limits and that the horse was "ambulating well around the stall." *Id.* at 1181.

58. The policy defined "humane destruction" as "[t]he intentional slaughter of a horse: a. When the horse suffers an injury or is afflicted with an excessively painful disease and a veterinarian appointed by [the insurer's] Managing Underwriter certifies in writing that the horse is incurable and in constant pain, or presents a hazard to itself or its handlers; or b. when the horse suffers an injury and [the owners'] appointed veterinarian certifies in writing that the horse is incurable and in extreme pain, and that immediate destruction is imperative for these reasons without waiting for the appointment of a veterinarian by [the insurer's] Managing Underwriter." *Id.* at 1183.

59. *Id.*

60. Lasma Corp. v. Monarch Ins. Co., 764 P.2d 1118 (Ariz. 1988).

day of the sale. The insurer denied coverage because of the horse's prior non-disclosed problems, citing the policy's "sound health" condition. At trial, the jury was instructed that the "sound health" condition would be satisfied if the insureds subjectively and "reasonably believed" that their insured mare was in sound health (as opposed to applying an *objective* standard). Adding to the problem, an executive of the insurance agency testified that if the insured party had no knowledge a health problem and if the agent had no knowledge of a health problem, the "sound health" condition within the policy cannot be applied to defeat coverage if the facts suggested otherwise later on. The jury rendered a verdict in the insureds' favor.

4. Value Disputes [Insured Value—"Agreed Value" v. "Actual Cash Value"]

Mortality policies are issued as either "agreed value" or "actual cash value" policies. An example of an Agreed Value Endorsement is:

> In the event of any misrepresentation of the horse's value or if the horse's fair market value during the coverage period was never equal to the stated limit of liability, the Company will only offer payment for the maximum fair market value attained by the horse during the time this endorsement is in effect, such offer not to exceed the maximum limit stated in the declarations or endorsements for the horse to which this coverage applies.

5. Euthanasia/Humane Destruction Disputes in Mortality Policies

In *Bunch v. Underwriters at Lloyd's London*,[61] the Louisiana Supreme Court ruled that the plaintiff violated an "intentional slaughter" exclusion when he euthanized his horse, barring him from recovery of benefits under an equine mortality policy. The plaintiff in *Bunch* had veterinary support for the euthanasia decision. He never sought advance approval from the insurer, however. The court held that the plaintiff violated the policy's "intentional slaughter" exclusion and that he failed to show—even with the veterinary support—that the animal was "suffering" from a disease that was "incurable and so excessive that immediate destruction is necessary for humane reasons."[62]

Finally, an interesting 1884 case, *Tripp v. Northwestern Live-Stock Insurance Co.* involved an insured allegedly "hastening the death of the horse" and then seeking payment under an equine mortality policy.[63] The *Tripp* plaintiff owned a horse that was insured under an equine mortality insurance policy; he euthanized the horse two hours before the policy was scheduled to lapse. The insurer denied the claim, alleging that the insured

61. Bunch v. Underwriters at Lloyd's London, 343 So. 2d 994 (La. 1977).
62. *Id.* at 995.
63. Tripp v. Nw. Live-Stock Ins. Co., 59 N.W. 1 (Iowa 1884).

violated the policy's "intentional slaughter" exclusion. Ruling in favor of the insurer, the Iowa Supreme Court determined:

> The entire contract of insurance shows that it was not intended that defendant should be liable for any willful act which tended to hasten the death of the horse insured, but that it should be relieved from liability by such act.
>
> * * *
>
> The burden was on the plaintiff to show that the disease from which the horse suffered was the cause of, and not merely a pretext for, his death during the life of the policy and that he has wholly failed to show. We conclude that the district court rightly directed a verdict for the defendant and its judgment is affirmed.[64]

6. Designated Use Disputes in Mortality Policies

In *Harrison v. Great American Assurance Co.*,[65] the plaintiffs sued their insurer for breach of contract after the insurer denied coverage for the death of a thoroughbred filly. Under the policy, the filly was classified as a "pleasure horse" instead of a "racehorse," the switch having been made at the request of one of the co-owners in an attempt to reduce the premium while the filly recuperated from surgery.

When the filly resumed race training, however, the insureds failed to change back the classification. The filly was injured in race training and was euthanized. The insurer denied the mortality claim because the filly was in race training at the time of the loss and was not a "pleasure horse." Litigation followed, and the insureds asserted that the terms "pleasure horse" and "racehorse" were not defined in the policy and thus were ambiguous. The insureds also argued that because the filly had not yet entered a race, she was not a "racehorse." The trial court granted the insurer's motion for summary judgment, and the appellate court affirmed. Utilizing dictionary definitions, the appellate court found that the policy terms were unambiguous. To accept the plaintiffs' position that the filly gave the owners "pleasure," even though it was race training would render the policy's classifications meaningless.

7. Mysterious Disappearance

The Iowa Supreme Court ruled in *Steinbach v. Continental Western Insurance Co.* that a forged check given for fifty head of cattle constituted theft under the defendant insurer's policy—a policy that covered for "theft" *but excluded* "mysterious disappearance, inventory shortage, wrongful conversion, embezzlement, and escape."[66]

64. *Id.* at 2.
65. Harrison v. Great Am. Assurance Co., 227 S.W.3d 890 (Tex. Ct. App. 2007).
66. Steinbach v. Cont'l W. Ins. Co., 237 N.W.2d 780 (Iowa 1976).

Rejecting the insurer's position that the insured's hogs and heifers "mysteriously disappeared" and therefore fell within an exclusion in a livestock mortality policy, the court in *Wiley v United Fire & Casualty Co.*,[67] found in favor of coverage. The policy insured the plaintiff against loss of livestock by theft. But what caused the loss? In determining that a jury verdict was supported by evidence, the court focused on key facts that included the following: the fencing was in good condition; a loading chute could be reached from the road without opening any gates or fences; neighbors never saw any of plaintiff's animals loose; plaintiff visited the premises daily to inspect and feed the animals; and a neighbor testified that after dark in late April she saw a large unfamiliar truck coming out of the plaintiff's building site.

B. *Limited Perils Policies*

1. Cause of Death Not Fitting Within a "Covered Cause of Loss"

In *Donovan v. Hartford Fire Insurance Co.*,[68] a limited perils mortality policy restricted coverage to death resulting from certain "Covered Causes of Loss" that included "(a) Explosion; (b) Smoke; (c) Windstorm; (d) Riot or civil commotion; (e) Aircraft; (f) Theft; and (g) Physical attack by dogs or wild animals." The insured horse, named "Duke," was found dead, and a veterinarian determined the cause to be a piece of wood shaped like a stake, possibly from a fence board, piercing the horse's chest cavity. Because the insured failed to connect the cause of death to any of the listed "Covered Causes," but merely relied on his own speculation, the insurer denied his claim. The trial court granted the insurer's motion for summary judgment, reasoning that the insured had the burden to prove that Duke's death was a covered loss under the policy, but failed to offer evidence as to the conditions that existed at the time Duke and the piece of wood came into contact, and the appellate court affirmed.

2. Owner's Intentional Shooting of Horse Not Covered "Shooting"

In *Benassi v. Cincinnati Insurance Co.*,[69] the homeowner's policy provided for coverage of livestock against death or destruction directly resulting from or made necessary by, among other things, fire, lightning, windstorm, theft, flood, earthquake, collapse of buildings or other structures, drowning, shooting, or attack by dogs or wild beasts. The insured's horse suffered a broken hind leg during a cattle cutting training session, and the insured shot the horse soon after, killing the horse, and then sued for policy benefits. The court ruled in the insurer's favor, explaining that the term

67. Wiley v. United Fire & Cas. Co., 220 N.W.2d 635 (Iowa 1974).
68. Donovan v. Hartford Fire Ins. Co., 2002 WL 31866249 (Neb. Ct. App. 2002).
69. Benassi v. Cincinnati Ins. Co., 388 N.E.2d 280 (Ill. App. Ct. 1979).

"shooting" was intended to be read in conjunction with the other accidental perils enumerated in the provision, but here the shooting was intentional, not accidental.

3. Limited Perils Policy Covering Death or Injury from "Wild Animals"

A limited perils policy was at issue in *Greene v. Truck Insurance Exch*ange.[70] Farmers Insurance Group issued a policy containing the following endorsement:

> Death or Injury by Wild Animals. Insurance provided hereunder on cattle is extended to include loss resulting from attack by wild animals or dogs (except dogs owned by the insured and dogs on the premises with the knowledge and consent of the insured or an employee of the insured).

Even though the plaintiffs never saw a wild animal attacking their livestock herd, they discovered a number of indications that wild animals attacked the farm animals: the dairy cows were outside the corral and were "so upset we couldn't do anything with them" one evening. The next morning, the plaintiff discovered that a section of barbed wire fence, supported by five "railroad tie" fence posts, had been flattened; some of the herd had been "cut up bad" with damage to their udders, chests, and bellies; and the plaintiff found one of his colts, clearly having been attacked, lying dead in a nearby pasture. The plaintiff sought coverage under the "Wild Animal" endorsement, but the insurer denied coverage, noting that the evidence of an attack was circumstantial and indirect. In response, the plaintiffs produced expert testimony that the facts correlated with a possible *cougar or other wild animal*. The appellate court ultimately found that the insurer had wrongly denied coverage, but refused to hold the insurer in "bad faith" because the claim was "fairly debatable."[71]

In *Qualls v. Farm Bureau Mutual Insurance Co*.,[72] when the plaintiff farmer's heifers died of pseudorabies,[73] the court found that the loss was covered under the defendant insurer's policy that extended coverage to loss of livestock resulting from "attack by dogs or wild animals." The insured contended that the heifers' disease was proximately caused by a diseased wild animal's bite. Agreeing with the insured, the court noted that where the peril insured against set other causes in motion which, in an unbroken sequence and connection between the act and final loss, produced the result for which recovery was sought, the insured peril was regarded as

70. Greene v. Truck Ins. Exch., 753 P.2d 274 (Idaho Ct. App. 1988).
71. *Id.* at 279.
72. Quails v. Farm Bur. Mut. Ins. Co., 184 N.W.2d 710 (Iowa 1971).
73. "Pseudorabies" is an infectious herpesvirus disease of the central nervous system in domestic animals that causes convulsions and intense itching and is usually fatal.

the proximate cause of the entire loss. The deaths of the plaintiff's heifers, therefore, if they were shown to have resulted from an infection incurred by a bite or attack by a wild animal, was a loss contemplated by the policy. Even though the physical condition of the heifers did not present strong evidence of a "wild animal" attack, the court noted that the plaintiff's veterinarian who treated them testified that this disease was generally transmitted through a bite from a wild animal or from a hog infected by a wild animal suffering from the disease.

IV. INSURANCE COVERAGE DISPUTES INVOLVING ANIMALS UNDER COMMON POLICIES

A. *Liability Insurance Policies—Homeowners Insurance*

1. Multiple Dog Bites—Multiple Occurrences

The insureds in *Allstate Property & Casualty Insurance Co. v. McBee*,[74] owned and kept a dog at their residence. The dog escaped and attacked the claimants, who were, at the time, jogging along the nearby road. Allstate's policy had a $100,000 limit of liability for "each occurrence."[75] Arguing that only one occurrence had taken place, resulting in the need for two claimants to share the $100,000 per-occurrence policy limit, Allstate sought a declaratory judgment that the injuries sustained by two third-party claimants constituted a single occurrence. The court rejected the claimants' position that the term "occurrence" in Allstate's policy was ambiguous, but acknowledged that two possible approaches governed whether the successive dog bite attacks on the two claimants could be interpreted as a single act or multiple acts. One approach, the "cause" approach," would deem the insured party's dog's bite as a single act and "the source from which all claims flow." The other approach was the "effect" approach, "where each claim resulting from an insured's act is considered a separate occurrence." The court ultimately adopted the the "cause" approach because the dog bites generated injuries to the two individual claimants that resulted from "continuous exposure to substantially the same harmful conditions" and the insured parties' alleged failure to control the dog constituted a single act.

74. Allstate Prop. & Cas. Ins. Co. v. McBee, No. 08-05 34CVWHFS, 2009 U.S. Dist. LEXIS 35158 (W.D. Mo. Apr. 27, 2009).

75. The policy provided: "Regardless of the number of insured persons, injured persons, claims, claimants, or policies involved, our total liability . . . for damages resulting from one occurrence will not exceed the limit of liability shown on the Policy Declarations [which amount was $100,000] . . . ." *Id.* at *2.

2. "Non-Licensed" Dog Exclusion

At issue in *Nationwide Mutual Fire Insurance Co. v. Creech*[76] was a "non-licensed dog" exclusion[77] in a homeowner's insurance policy. The insureds' German shepherd, "Jake," bit their three-year-old niece when "Jake" had an expired license. In response to the claim, Nationwide filed a declaratory judgment action, arguing that it should be relieved of liability for the claim based on the policy's "non-licensed dog exclusion." A Clark County, Kentucky ordinance required "Jake" to have current vaccinations and to be licensed every year. However, the insureds allowed "Jake's" license to lapse, and at the time of the incident he had not received his yearly rabies vaccination. Though the insureds argued that the policy's "non-licensed dog" exclusion was ambiguous because it could be interpreted to mean that any dog license, even the expired one "Jake" had, would still allow coverage, the court disagreed. The court found that the ordinance plainly required yearly vaccinations and license renewals, of which "Jake" had neither.[78]

3. Exclusion for "Any Dog Owned or Kept by You"

When a family-owned Rottweiler bit a visiting child in *American Strategic Insurance Co. v. Lucas-Solomon*, and the homeowner's policy excluded coverage for "any dog owned or kept by you," the issue turned on whether the dog's true owner was a named insured under the policy.[79] American Strategic Insurance Company insured the Kennedys, who kept the dog, under a homeowner's insurance policy. The policy defined "you" as "the named insured on the declarations page and spouse, if resident in the house." Evidence was presented that the Rottweiler was owned jointly between the parents and the minor child.

The coverage dispute focused on whether the exclusion barred coverage if the Kennedys' nine-year-old daughter, who was not listed as a named insured under the policy, owned and kept the dog. In recognizing that a nine-year-old child in the family could not receive expanded or different coverage than her parents could under the same policy and ultimately ruling that coverage should be denied based on the exclusion, the court stated:

> It is a strained reading to suggest that American Strategic intended to exclude the named insured and his or her spouse from coverage for injuries resulting

76. Nationwide Mut. Fire Ins. Co. v. Creech, 431 F. Supp. 2d 710 (E.D. Ky. 2006).

77. The "non-licensed dog exclusion" within Nationwide's policy stated that coverages for personal liability and medical payments to others "do not apply to bodily injury or property damage . . . caused by any of the following animals owned by or in the care of an insured: . . . (6) any non-licensed dog." *Id.* at 714.

78. Kentucky courts had recognized that "vaccination and licensing are intertwined." *Id.* at 718 (citing Bluegrass Boarding & Training Kennels v. Jefferson Cnty. Fiscal Ct., 26 S.W.3d 801, 804 (Ky. Ct. App. 2000)).

79. Am. Strategic Ins. Co. v. Lucas-Solomon, 927 So.2d 184 (Fla. Ct. App. 2006).

> from an incident involving their dog, while at the same time intending to provide coverage for the named insured's nine-year old daughter who owns the dog with them jointly. . . . To suggest the nine-year old "owned and kept" a dog as separate and distinct from the ownership of her parents is contrary to the understanding of an "ordinary person." In our society, a nine-year-old's "ownership" of a pet is ordinarily understood to be dependent upon the parent's ownership of the pet. To make the finding that the trial court made here is to grant the daughter, an additional insured, more coverage than the policy grants to the named insureds.[80]

4. "Dangerous or Vicious Dog" Exclusions

Choby v. Aylsworth,[81] involved an exclusion in a homeowner's insurance policy that prevented coverage "arising out of the actions of a dangerous or vicious dog" as defined under Ohio's dangerous dog statute.[82] The insured's dalmation, which was not leashed and was not fenced in, bit a visitor on the lip. Evidence indicated that the dog previously bit another person and another dog. Citing the exclusion, the insurer denied coverage for the dog bite and moved for summary judgment, which the trial court granted and the appellate court affirmed, finding that the policy was not ambiguous when it derived its definition of "vicious dog" or "dangerous dog" from the Ohio statutes. The court also cited evidence in the record supporting the trial court's conclusion that the dog, based on his prior behavior, did, in fact, qualify as a "dangerous dog."

5. Dog Bite Sustained by a "Resident" in the Home From Homeowner's Dog

In *McGlothlin v. Steinmetz*,[83] State Farm issued a policy of homeowner's insurance to the defendant Steinmetz. At the Steinmetz residence, their dog attacked and bit the claimant on the nose. When the dog bite occurred, the claimant was living in the basement of the Steinmetz home on a part-time basis and paid a rental fee. State Farm denied liability, claiming that the injured party was a "resident" in the Steinmetz's home and therefore qualified as an "insured" who could not bring a claim under the homeowner's policy. [84] The trial court ruled in favor of State Farm, but the Court of Appeals reversed. The Minnesota Supreme Court agreed with the appellate court, finding that issues of fact existed as to whether the claimant was a "resident" of the insured's home based on several factors. For example,

80. *Id.* at 186–87.

81. Choby v. Aylsworth, No. 2006-L-144, 2007 WL 1881503 (Ohio Ct. App. June 29, 2007).

82. *Id.* at *2 (citing Ohio Rev. Code Ann. § 955.11).

83. McGlothlin v. Steinmetz, 751 N.W.2d 75 (Minn. 2008).

84. *Id.* at 77. The policy defined "insured" as "you and, if residents of your household . . . your relatives." *Id.*

the claimant did not interact socially with the insured parties, and they did not eat meals together, and they rarely interacted while together in the home.

6. Dog Bite From a Dog *Owned* by a "Temporary Resident"

When someone in temporary custody of an insured home brings a dog to the premises, and if a dog bite occurs, does the temporary visitor benefit from the homeowner's insurance policy? In two cases where this issue arose, the temporary residents lost.

First, in *Grimes v. Smith*,[85] coverage hinged on whether the dog owner qualified as living in the same "household" as her mother, who owned the home and procured the liability coverage. The homeowner Mrs. Tincher, owned two residences but only lived at one of them. She insured the other home through Nationwide Mutual Insurance Company and allowed her adult daughter, Ms. Smith, to live there. Her daughter, in turn, brought her dog, "Fred," and some friends to live with her in the home. "Fred" bit a visitor at the home, and a personal injury claim followed. Nationwide sought to deny coverage, asserting that Mrs. Tincher's daughter did not qualify as an "insured" under her mother's homeowner's policy. The policy stated: "Insured: means you and the following who live in your household: (a) 'your relatives.'" Ms. Smith, the daughter, argued that Nationwide insured her because she lived in her mother's "household" though not under the same roof. The court found that Ms. Smith could not receive coverage under Ms. Tincher's liability policy because she did not meet the policy's requirement of living in the same "household."[86]

Second, in *Felton v. Nationwide Mutual Fire Insurance Co.*,[87] the insured's adult son was a temporary house-sitter at his parents' home while they were vacationing and helped care for their pets. The son's own dog bit Felton, who was walking her dog near the home. She sued the homeowners and their visiting son and received a $35,000 judgment at trial. Disputing coverage for the dog bite, Nationwide argued that the insureds' house-sitting son was not an "insured" under his parent's homeowner's policy because the policy defined an "insured" as someone "liv[ing] in [the policy holder's] household."

85. Grimes v. Smith, No. 2004-CA-001756-MR, 2005 Ky. App. Unpub. LEXIS 1131 (Dec. 16, 2005).

86. The *Grimes* court relied on an earlier Kentucky state court case, *Sutton v. Shelter Mutual Insurance Co.*, 971 S.W.2d 807, 808–09 (Ky. Ct. App. 1997), involving a similar question of whether the policyholder's twenty-six-year-old son, who lived in a separate mobile home, qualified as living in the "household" for purposes of coverage under a different policy. There, the court reasoned, inter alia, that the term "household" means "persons dwelling under the same roof." *Id.* at 808–09.

87. Felton v. Nationwide Mut. Fire Ins. Co., 839 N.E.2d 34 (Ohio Ct. App. 2005).

The appellate court was not persuaded by Felton's argument that Nationwide's policy contemplated coverage for temporary house-sitters. First, the court was not convinced that Felton, a third-party claimant and not an insured under Nationwide's policy, was appropriately situated to argue for strict construction of the policy against the insurer. In addition, the court recognized that a temporary house-sitter who resided elsewhere did not "live in the policy holder's household" because he merely "lived at" the house. Accordingly, Nationwide was not obligated to pay the judgment.

7. "Business Pursuit" Exclusion When Dog Bites Guest at Home-Based Day Care

In *Argent v. Brady*, [88] the insured, Brady, operated a day care business out of her home. An infant at her day care was bitten by a dog on the property. Raising the "business pursuits" exclusion in plaintiff's homeowner's insurance policy,[89] the insurer denied coverage. Brady filed a declaratory judgment action against the insurer seeking coverage.

At issue was whether the "business pursuits exclusion" in Brady's policy precluded coverage when the dog bite may have originated from a dog owned by the insured's son who was not involved in childcare on the premises. The trial court found the exclusion inapplicable to the underlying dog bite claim because the facts were in dispute as to whether Brady was being paid for the service of watching the injured minor child when the bite occurred. The trial court also found the "business pursuits" exclusion inapplicable to Brady's son, Michael, who may have owned the dog but was not involved in the childcare business, due to the policy's severability clause.[90] The appellate court reversed, finding that Brady's policy did not offer coverage for the dog bite claim based on the "business pursuits exclusion," despite the policy's "severability clause." The court followed the view adopted by "the majority of courts" that "the existence of a severability clause does not affect a clearly worded exclusion" and reasoned that "if a severability clause is given effect, despite an exclusion of coverage, for specifically described conduct by 'an insured,' . . . then the language of the exclusion as it relates to 'an insured' or 'any insured' is robbed of any meaning." The court also examined whether the severability clause, when combined with the policy's "business pursuits" exclusion, rendered the policy ambiguous and concluded that it did not. Brady's daycare center, as a home-based business, could reasonably foresee risks to visitors and

88. Argent v. Brady, 901 A.2d 419 (N.J. Super. App. Div. 2006).

89. The homeowner's policy at issue had an exclusion preventing prevented coverage "[a] rising out of or in connection with a business engaged in by an insured." *Id.* at 422.

90. The policy's severability clause stated: "Severability of Insurance. This insurance applies separately to each insured. This condition will not increase our limit of liability for any one occurrence." *Id.* at 423.

customers created by other family members who reside in the home; Brady could have purchased business insurance to protect herself against these risks, but she did not. [91]

8. Mandatory Liability Insurance for Pit Bulls

In *City of Cleveland v. Johnson*,[92] the constitutionality of a city's ordinance requiring proof of minimum insurance coverage for "vicious" dogs, and particularly pit bulls, was challenged as depriving a dog owner's right to due process. Cleveland Codified Ordinance § 604.04(a) ("Control of Vicious and Dangerous Dogs") provides, in part:

> All owners, keepers or harborers of vicious dog shall obtain a policy of liability insurance with an insurer authorized to write liability insurance in this state providing coverage in each occurrence, subject to a limit, exclusive of interest and costs, of not less than one hundred thousand dollars ($100,000) because of damage or bodily injury to or death of a person caused by the vicious dog. All owners, keepers, harborers of vicious dogs shall provide a copy of the policy for liability insurance to the Animal Warden on a yearly basis.

Johnson's pit bull ran loose, but Johnson was unable to furnish proof of insurance. After being charged with violation of the ordinance, he challenged its constitutionality, claiming that it deprived him of due process. In support, he cited a Cleveland animal control regulation that the Ohio Supreme Court previously declared unconstitutional. Ruling in favor of the municipality, the court recognized that it is within the municipality's inherent police powers to "permit dogs to be destroyed or otherwise regulated for the safety and protection of citizens." The court held that the "inherently dangerous" nature of the pit bull dog breed made the ordinance a "proper and reasonable" exercise of Cleveland's police powers to regulate the dogs as they were deemed "clearly vicious by nature."

B. *Automobile Insurance Policies*

1. Dog Bite Arising From "Ownership, Maintenance or Use" of Motor Vehicle

In *Mayer v. Avery*,[93] dogs belonging to the insured escaped from her parked car, ran loose and bit a bystander who thereafter made a claim. The automobile insurer filed a declaratory judgment action, arguing the policy only

91. Comparing this case to others where co-insureds caused the loss and courts found coverage, this court noted that the insured's son, Michael Brady, was not an innocent co-insured because he would be subject to strict liability, as owner of the dog, pursuant to New Jersey's dog bite statute, N.J. Stat. Ann. § 4:19-16. Also, it was Linda Brady's arguable "business pursuit" that brought the minor child to the property. *Argent*, 901 A.2d at 428.

92. City of Cleveland v. Johnson, 825 N.E.2d 700 (Ohio Mun. Ct. 2005).

93. Mayer v. Avery, No. MER-L-546-05, 2007 N.J. Super. Unpub. LEXIS 592 (Super. Ct. App. Div. July 20, 2007).

provided coverage for "bodily injury to others" caused by "accident resulting from the ownership, maintenance, or use of your private passenger auto," and here the dogs escaped when the car was parked. The trial court ruled against the insurer. The appellate court agreed, finding that the dogs' escape from a parked car was still "a natural and foreseeable consequence of the use of the vehicle." The court stated: "It is self-evident that cars are used to transport dogs, and that dogs are ubiquitous throughout our state, and accepted as part of many households. It is thus entirely foreseeable that, despite a driver's best efforts, or even in a moment of inattention, a rambunctious dog could evade his owner's attempts to keep them in a vehicle."[94]

In *State Farm Mutual Automobile Insurance Co. v. Grisham*,[95] when the insured left his dogs in a parked pickup truck, one of them escaped and bit the plaintiff on the leg. The plaintiff was twenty to twenty-five yards away from the truck when he was bitten. After a claim was made, State Farm denied coverage, arguing the policy obligated it to pay bodily injury damage only if an injury is "caused by accident resulting from the ownership, maintenance or use" of an insured vehicle. Whether the dog bite resulted from the "use" of the pickup truck became the key issue. The trial court ruled in favor of State Farm, and the Court of Appeals affirmed, finding that "coverage based on 'use' must encompass an event that reasonably could have been contemplated as falling within the insurance." Examining the connection between the vehicle's "use" and the dog bite, the court refused to apply a "but for" test in which the connection would be somewhat loose, in favor of a "predominating cause/substantial factor test"[96] where the operation, movement, maintenance, loading, or unloading of the vehicle must contribute in some way to the injury. The automobile policy afforded no coverage for the dog bite claim because the truck merely transported the dog near the injury site; its operation was insufficiently linked to the dog bite.

2. Uninsured Motorist Benefits From Collision With Horse-Drawn Buggy

In *Ferguson v. Gateway Insurance Co.*,[97] the issue was whether a *horse-drawn buggy* qualified as a "motor vehicle" for purposes of uninsured motorist

94. *Id.* at *2.

95. State Farm Mut. Auto. Ins. Co. v. Grisham, 18 Cal. Rptr. 3d 809 (Ct. App. 2004).

96. The court concluded that applying any test other than a "predominating cause/substantial factor" test would impermissibly "convert auto liability policies into general liability policies." *Id.* (citing Acceptance Ins. Co. v. Syufy Enters., 81 Cal. Rptr. 2d 557 (Ct. App. 1999)) ("The automobile is so much a part of American life that there are a few activities in which the 'use of an automobile' does not play a part somewhere in the chain of events.").

97. Ferguson v. Gateway Ins. Co., 151 S.W.3d 911 (Mo. Ct. App. 2004).

benefits. There, a sixteen-year-old drove a horse-drawn buggy on a public highway into the path of the plaintiff's automobile, forcing the horse through the windshield and killing one of the automobile's occupants. The driver's family sought coverage under the uninsured motorist provisions of their Gateway insurance policy.

Gateway's policy obligated it to pay "compensatory damages which [claimant was] legally entitled to recover from the owner or operator of an 'uninsured motor vehicle.'" The policy defined "uninsured motor vehicle" as a "land motor vehicle or 'trailer' of any type" that was not insured." Nowhere did the policy define "motor vehicle." Applying dictionary definitions, the court concluded that a horse-drawn buggy was not self-propelled and therefore not a "motor vehicle" within a plain and ordinary definition.[98]

3. Dog Bite Caused by Car Door Closing on Dog's Tail

In *Wilson v. Progressive Northern Insurance Co.*,[99] the plaintiff's dog bit him in the face when a taxi cab driver shut the car door on the dog's tail. The cab driver, after dropping off the plaintiff at a nearby hospital, left the scene quickly and provided no contact information. Five weeks later, the plaintiff reported the incident to the police to try to identify the driver, but was unsuccessful in identifying the driver. Eight months after the incident, the plaintiff made a claim against her own automobile insurer, Progressive, seeking uninsured motorist benefits. The company denied the claim on the basis that the delay in reporting the incident caused it actual prejudice.[100]

Although the trial court agreed with Progressive on the issue of prejudice, the New Hampshire Supreme Court reversed, finding insufficient evidence of prejudice to the insurer and no connection between the plaintiff's failure to timely report the accident and Progressive's alleged inability to investigate it. Also at issue was whether the taxicab that fled the scene after causing the harm was a "hit and run" vehicle within the policy's definition of "uninsured motor vehicle." Progressive's insurance policy defined "uninsured motor vehicle" to include a "land motor vehicle . . . that is a hit

98. *Id*. at 913–14. The court recognized that Missouri's Vehicle Responsibility Law, Mo. Rev. Stat. § 303.020(5)(2000), defined "motor vehicle" as a "self-propelled vehicle" and noted that "self propulsion" was "the key ingredient to a motor vehicle." *Ferguson*, 151 S.W.3d at 913 (citing, among others, Killian v. State Farm Fire & Cas. Co., 903 S.W.2d 215, 218 (Mo. Ct. App. 1995) (analyzing a moped); State *ex. rel.* Toastmaster, Inc. v. Mummert, 857 S.W.2d 869, 871 (Mo. Ct. App. 1993) (analyzing a forklift).

99. Wilson v. Progressive N. Ins. Co., 868 A.2d 268 (N.H. 2005).

100. *Id*. at 272–73. The court noted that an assessment of whether the insured has sufficiently complied with the requirement to give notice "as soon as practicable" requires the trial court to weigh factors including the length of the delay, reasons for the delay and whether the delay prejudiced the insurer. *Id.* at 271–72 (citing Commercial Union Assurance Cos. v. Monadnock Reg'l Sch. Dist., 428 A.2d 894 (N.H. 1981); Dover Mills Partnership v. Commercial Union Ins. Cos., 740 A.2d 1064 (N.H. 1999)).

and run vehicle and whose operator or owner cannot be identified." The New Hampshire Supreme Court found that these provisions were reasonably susceptible to different interpretations and, interpreted most favorably to the policyholder, should support coverage. The court also rejected Progressive's argument that the injuries did not "arise out of" the use of an uninsured motor vehicle.

C. *Liability Insurance Policies—Commercial General Liability ("CGL") Coverage*

1. Which Insurance Policy Covers a Dog Bite at a Business?

When a dog bite occurs on a business location, which policy provides coverage: a commercial liability insurance policy **or** a homeowner's policy? In *Hartford Casualty Insurance Co. v. Litchfield Mutual Fire Insurance Co.*,[101] the Connecticut Supreme Court considered this exact question. The insured, Wylie, brought his dog to his motorcycle store on a regular basis. At the store, the dog bit a two-year-old girl, and her representative filed a complaint that included claims against Wylie personally, as well as his business. Litchfield Mutual insured Wylie under a commercial premises liability policy, while Hartford Casualty Insurance Company provided Wylie with homeowner's insurance coverage. Litchfield defended the business claims, while Hartford defended the personal claims. Eventually Hartford settled all claims, and then sued Litchfield for indemnity, claiming Hartford's personal liability policy was merely excess coverage.[102] In ruling for Hartford, the court found the dog bite incident to be sufficiently related to Wylie's business operations because Wylie was conducting his business when the dog bite occurred.[103] Also, the court took note of the connection between the dog and the business. Wylie brought the dog to work each day, customers were known to enter the store to see the dog, and a portrait of the dog hung "prominently" outside the business establishment.

2. Do Emotional Distress and "Damaged Puppy" Claims Trigger "Bodily Injury" or "Property Damage" for CGL Coverage?

GE Aquarium, Inc. v. Harleysville Mutual Insurance Co.[104] involved an underlying class-action suit against the insured, GE Aquarium (doing business as "Zoos Pet Stores"), a pet and pet supply store chain. The plaintiffs asserted that GE Aquarium sold unhealthy puppies and sought economic

101. Hartford Cas. Ins. Co. v. Litchfield Mut. Fire Ins. Co., 876 A.2d 1139 (Conn. 2005).

102. *Id.* at 462. Litchfield alleged that the lawsuit was based only on Wylie's personal ownership of the dog. *Id.*

103. *Id.* at 468–69. The commercial policy that Litchfield issued to the shop insured "your employees, for acts within the scope of their employment by you." *Id.* at 466.

104. GE Aquarium, Inc. v. Harleysville Mut. Ins. Co., Nos. 000038, 3375, 074314, 2004 Phila. Ct. Com. Pl. LEXIS 48 (Pa. C.P. Dec. 27, 2004).

and non-economic losses. Seeking a legal defense or indemnity against its insurer to respond to the litigation, GE Aquarium sued three of its insurance companies. Each insurer denied the claim.

The Pennsylvania Common Pleas Court ruled in favor of the insurers. First, the court held that claims for emotional distress and "damaged" puppies did not qualify as covered claims for "bodily injury" or "property damage" within the policies' definitions. The policies defined "bodily injury" as a sickness or disease sustained by a person.[105] In addition, the court noted that because no claims in the underlying litigation pled physical injury to humans, themselves, but rather involved economic losses, no "bodily injury" or "physical injury" would exist to trigger coverage. The court also noted that the claims sought only economic losses, mostly composed of the plaintiffs' veterinary expenses incurred for the puppies. These out-of-pocket expenses and losses were "intangible economic loss," which did not qualify as "property damage" under the policies. GE Aquarium also had a special business owner policy issued by Merchants & Businessmen's Insurance Co., but the court upheld denial of coverage under that policy because the warranty, consumer fraud, and intentional misconduct claims did not qualify as an "occurrence" under the policy.[106]

3. "Care, Custody, or Control" Exclusion in Commercial General Liability Policy

In *Great American Insurance Co. v. Potter*,[107] the insured operated a horse boarding farm. It contended that it asked its insurance agent to add coverage for horse boarding and training activities. Later, the farm was sued by a customer who alleged that it was negligent when a horse at the stable became injured and died. The parties settled the case, and the insurance company sought a declaratory judgment that it had no duty to defend or provide indemnity for the stable or its trainer in the suit based on the policy's "care, custody, or control" exclusion.[108] The defendants, in turn, sued their insurance agent for alleged failure to procure proper coverage. The plaintiff insurer moved for summary judgment, but the court declined to grant it. It noted that the stable's insurance policy was entitled "Horse Boarding and Training" and identified as uses of the insured property "Stables-Training/Breeding/Racing." Also, the policy provided in its Farm Property Coverage Form: "Additional Coverage—Personal Property of Others: We

105. *Id.*, slip op. at 2.

106. *Id.*, slip op. at 5. "Occurrence," as defined in that policy, was "an accident, including continuous or repeated exposure to substantially the same generally harmful conditions." *Id.*

107. Great Am. Ins. Co. v. Potter, 2006 U.S. Dist. LEXIS 72263 (E.D. Tenn. Oct. 3, 2006).

108. This exclusion stated that the policy excluded coverage for "Damage to Property. Property Damage to: . . . (3) Property loaned to you; (4) Personal property in your care, custody, or control." *Id.* at *2.

will pay up to "$2,500 for loss or damage to personal property of others in your care, custody, or control." The court noted that "if there is any doubt as to whether the complaint states a cause of action within the coverage of liability of the policy sufficient to compel the insured to defend, those doubts will be resolved in favor of the insured." The court also found issues of fact preventing summary judgment in favor of the agent.

D. *Various Policies—Pollution Exclusions*

1. Trucking Policy—Pollution Exclusion From Tainted Cattle Feed

In *Judd Ranch, Inc. v. Glaser Trucking Service, Inc.*,[109] the insured alleged that it received a shipment of cattle feed pellets that were mixed with fragments of aluminum that had been left in the delivery truck from a prior shipment of scrap metal. After cattle ingested the metal fragments, causing damages and impairing their marketability, the plaintiff brought a claim against the trucking company. The trucking company's insurance company denied coverage on the basis that the aluminum particles constituted pollutants, expressly excluded by endorsement. The court agreed, holding that the exclusion was not ambiguous and that the aluminum scrap metal was a pollutant because it was a "solid contaminant" that, once mixed with the cattle feed pellets, became harmful to the cattle.[110]

2. Commercial Liability Policy—Hog Farm Carbon Monoxide as "Pollution"

In *Bituminous Casualty Corp. v. Sand Livestock Systems, Inc.*,[111] an employee of a hog farm in Iowa died from carbon monoxide poisoning from an allegedly improperly installed propane power washer in the facility's washroom. His estate's representative brought a wrongful death lawsuit against the employer and the employer sought coverage from its insurer under its commercial liability insurance and commercial umbrella policies, both of which were issued by the same insurer. Both policies had total pollution exclusion endorsements, and the insurer maintained that these endorsements precluded coverage for the carbon monoxide leakage.[112] Because this coverage issue was one of first impression in Iowa, the trial court certified the question to the Iowa Supreme Court, which held that the carbon monoxide gas at the farm triggered the exclusion. However, the doctrine

109. Judd Ranch, Inc. v. Glaser Trucking Serv., Inc., No. 06-1245-WEB, 2007 U.S. Dist. LEXIS 37628 (D. Kan. May 22, 2007).

110. *Id.* at *5. The exclusion stated that it did not apply to: "'Bodily Injury' or 'Property Damage' arising out of the actual, alleged, or threatened discharge of . . . 'pollutants.'" *Id.* at *2.

111. Bituminous Cas. Corp. v. Sand Livestock Sys., *Inc.*, 728 N.W.2d 216 (Iowa 2007).

112. *Id.* at 220. The insurer argued that the exclusion endorsements applied because carbon monoxide was a "pollutant" as defined in the policy, and the decedent's death resulted from "dispersal," "release," or "escape" of the "pollutant." *Id.*

of reasonable expectations needed to be addressed by the trial court as it raised questions of fact.

3. Homeowner's Policy—Bat Guano in Home's Attic as Excluded "Pollution"

Does bat guano inside the plaintiff homeowners' roof trigger the "pollution exclusion" within their homeowner's policy? In *Hirschhorn v. Auto-Owners Insurance Co.*, the Wisconsin Supreme Court found that property damage resulting from bat guano contamination *was* excluded under the pollution exclusion in plaintiff's homeowner's insurance policy.[113]

In that case, the policy excluded coverage for a "discharge, release, escape, seepage, migration or dispersal of pollutants." The term "pollutants" was defined by the policy as "any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals, liquids, gases and waste. Waste includes materials to be recycled, reconditioned or reclaimed." The Supreme Court of Wisconsin held that "[b]at guano, composed of bat feces and urine, is or threatens to be a solid, liquid, gaseous irritant or contaminant. That is, bat guano and its attendant odor 'make impure or unclean' the surrounding ground and air space . . . and can cause 'inflammation, soreness, or irritability' of a person's lungs and skin."[114]

E. *Property Insurance*

1. Collapse of a Barn Structure Caused by the "Weight of Animals"

Gibson v. Farmers Insurance Co. of Washington,[115] involved a horse tied to a support beam in the insured parties' barn. The horse reared and continuously pulled back on the beam, eventually causing other support poles to fall and the barn roof to collapse. The insureds sought coverage from the insurer under a provision of the policy that covers collapse of a structure caused by "the weight of . . . animals." The plaintiffs argued that their barn's collapse was caused by the "weight" of their horse. The trial court denied coverage, however, claiming that the policy did not cover losses to a building that were caused by the force of a horse pulling against the barn structure. The appellate court agreed, finding that the policy covered collapse of buildings only where the *weight of an animal* caused the loss. Where the *animal's force* caused the collapse, the exclusion would apply to preventing coverage for direct or indirect losses from domestic animals.[116]

113. Hirschhorn v. Auto-Owners Ins. Co., 809 N.W.2d 529 (Wis. 2012).

114. *Id.* at 537 (citations omitted).

115. Gibson v. Farmers Ins. Co., No. 58363-8-I, 2007 Wash. App. LEXIS 793 (Apr. 23, 2007).

116. *Id.* at *4 (citing the policy's exclusion through which the policy did not cover "direct or indirect loss from . . . domestic animals").

F. *Liability Insurance Policies—Farmowner's Insurance*

1. "Business Pursuit" Exclusion and Non-Farming Activity

Farm Bureau v. Latting raised the question of whether a business-pursuit exclusion in a farm owner's policy extended to farming activities.[117] The insureds filed a claim when a third party on their premises was injured while attaching a wagon to a tractor for the purpose of collecting baled hay from the field. The appellate court held that this was directly related to the insureds' business of horse boarding and therefore the claim arose out of an excluded "business pursuit." Reversing the appellate court, however, the Michigan Supreme Court found that the policy's "business pursuit" exclusion *did not* apply because the injury occurred while the insureds were engaged in "farming" at the time of the incident. In addition, the policy's motor vehicle exclusion was inapplicable to farm tractors under the policy's terms.

G. *Worker's Compensation*

1. Worker's Compensation Exclusive Remedy for Dog Bites

Pale v. Coble, [118] raised the issue of whether California's dog bite statute[119] exempted an employee from the exclusivity provision of the workers' compensation statute.[120] The plaintiff worked as the defendant's housekeeper and was injured when the defendant's dog attacked her. She filed a worker's compensation claim and brought a civil lawsuit against the defendant under the dog-bite statute. The trial court granted the defendant's motion for summary disposition, dismissing the civil suit. The appellate court affirmed, holding that workers' compensation was the plaintiff's exclusive remedy because she was injured in the course of her employment; the dog-bite statute was not meant to give employees an additional remedy against their employers.

2. Coverage for Employee Running After Loose Dogs From Vet Clinic

In *Town & Country Animal Hospital v. Deardorff*,[121] the claimant worked as a kennel assistant at a veterinary hospital. When one of the customer's dogs escaped from the kennel and ran across a busy highway, the claimant ran after it, allegedly against the shouted demands of his supervisor to leave the dog alone. The claimant was injured when struck by two vehicles. He sought workers' compensation benefits. The Workers' Compensation

117. Farm Bureau v. Latting, 720 N.W.2d 741 (Mich. 2006).
118. Pale v. Coble, No. D048283, 2006 Cal. App. Unpub. LEXIS 10054 (Nov. 3, 2006).
119. Cal. Civil Code § 3342.
120. California Workers' Compensation Act, Cal. Civ. Code §§ 3200–6002 (West 2006).
121. Town & Country Animal Hosp. v. Deardorff, No. 0047-08-4, 2008 Va. App. LEXIS 278 (Va. Ct. App. June 10, 2008).

Commission awarded claimant total and temporary partial disability and medical benefits. The veterinary hospital and its insurer appealed, arguing that the claimant, by pursuing the dog against orders, was not acting "in the course and scope of his employment" and therefore not entitled to benefits. The Appellate Court affirmed the claimant's entitlement to benefits; it cited evidence that employees at the veterinary hospital had, in the past, tried to retrieve loose animals across the highway and supervisors even encouraged it. The claimant's injuries, therefore, "indubitably flowed from that employment related danger." Finally, the court found, the incident occurred within the "course of employment" because it happened "within the period of employment, at a place where the employee reasonably expected to be, and while he is reasonably fulfilling the duties of his employment or is doing something which is reasonably incident thereto."