

RECENT DEVELOPMENTS IN ANIMAL TORT
AND INSURANCE LAW

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I. INTRODUCTION

Decisions regarding animal tort and insurance law between October 2009 and October 2010 covered a broad range of disparate cases, including the definition of *business day* for a life-and-death decision of when the stray animal hold expires; whether sovereign and statutory immunity applies to the Society for the Prevention of Cruelty to Animals; a dispute between naturopathic and allopathic veterinarians at a major veterinary college; cattle rustling in Texas; dog bite claims; equine liability; and other cases noted below.

II. ANIMAL TORT LAW

A. *Government and Humane Society Defendants*

In *Maldonado v. Municipality of Barceloneta*,¹ twenty-seven families, all residents of three public housing complexes, sued under 42 U.S.C. §§ 1983, 1985, and 1986 for the summary seizure and cruel killings of their pet cats and dogs, asserting violations of their Fourth, Fifth, and Fourteenth Amendment rights.²

At issue was whether occupants of public housing may keep pets in their homes. In 1999, Congress passed 42 U.S.C. § 437z-3, allowing public housing residents to have one or more household pets in their dwelling.³ However, the Municipality of Barceloneta in 2000 passed an ordinance that did not allow residents to keep pets “in urbanizations, the town center, and [] housing developments.”⁴ In 2007, the Puerto Rico Public Housing Authority approved a pet policy consistent with federal regulations.⁵ Yet shortly after the municipality began managing the three public housing complexes where plaintiffs resided, they received a letter saying they had to remove all pets or be in breach of their lease contracts.⁶ Five days later, the mayor visited each complex and executed an operation to seize pets owned by the residents. On October 8, 2007, in a scene reminiscent of the movie *District 9*, the mayor and municipal staff knocked on residents’ doors, brutally seized between fifty and eighty animals, inhumanely killed them, and disposed of the bodies.⁷ Two days later, another pet seizure took place.⁸

1. 682 F. Supp. 2d 109 (D.P.R. 2010).

2. *Id.* at 119.

3. Pub. L. No. 105-276, tit. V, 112 Stat. 2568.

4. *Maldonado*, 682 F. Supp. 2d at 120.

5. *Id.*

6. *Id.*

7. *Id.* at 121.

8. *Id.*

The federal district court for Puerto Rico found that some of the plaintiffs were entitled to a predeprivation hearing under the Fourteenth Amendment, the pets were “effects” protected against unreasonable seizure under the Fourth Amendment, and the mayor’s conversations preceding “consensual” relinquishment of the pets was a “trial-worthy issue.”⁹ The method of killing the seized animals and *Monell* liability also remained triable issues with respect to some of the families.¹⁰

In *Purifoy v. Howell*,¹¹ a dog owner and an animal rights organization sued the operator of a county animal shelter for damages and declaratory and injunctive relief for violating a four-business-day stray hold on killing or adopting out impounded animals.¹² The plaintiffs also sought a writ of mandamus to compel the shelter to comply with California Food and Agriculture Code § 31108(a), which states that a public or private shelter must hold stray impounded dogs for “six business days, not including the day of impoundment.”¹³ Under § 31108(a)(1), if the shelter “has made the dog available for owner redemption on one weekday evening until at least 7:00 P.M. or one weekend day, the holding period shall be four business days, not including the day of impoundment.”¹⁴ Animal control impounded Purifoy’s dog Duke on Thursday, October 5, 2006, and adopted him out on Wednesday, October 11, 2006, the equivalent of three full business days (if Saturday is not counted).¹⁵ The trial court granted summary judgment to defendants, concluding that § 31108(a), as incorporated into the Contra Costa County Code, properly counted Saturday as a business day.¹⁶ The California Court of Appeal reversed, finding that the term *business days* does not include Saturdays, even though the shelters operating in Contra Costa are closed Sundays and Mondays, but open on Saturdays.¹⁷

In *Skinner v. Chapman*,¹⁸ an animal control officer issued a noncustodial appearance ticket to David Skinner for obstructing governmental administration because of Skinner’s refusal to surrender his dog for a rabies quarantine. After the trial court dismissed the criminal charge against Skinner, he sued the animal control officer and a police officer under 42 U.S.C. § 1983 (2006) for false arrest, malicious prosecution, unreasonable seizure, and retaliation under the First Amendment.¹⁹ Skinner had repeatedly asked the

9. *Id.*

10. *Id.* at 134 (citing *Monell v. NYC Dep’t of Soc. Servs.*, 436 U.S. 658 (1978)).

11. Cal. Rptr. 3d 213 (Ct. App. 2010).

12. *Id.* at 215.

13. *Id.* (quoting CAL. FOOD & AGRIC. § 31108(a)).

14. *Id.* (quoting CAL. FOOD & AGRIC. § 31108 (a)(1)).

15. *Id.*

16. *Id.* at 217.

17. *Id.* at 226.

18. 680 F. Supp. 2d 470 (W.D.N.Y. 2010).

19. *Id.* at 473.

animal control officer to produce a warrant before entering his home and removing the unvaccinated and unlicensed dog, which allegedly had bitten a child.²⁰ In the absence of a warrant, Skinner eventually surrendered custody of the dog, at which point the officer cited him for obstruction. The dog was subsequently held for eleven days and released.²¹ A jury convicted Skinner for obstruction, and the trial court sentenced him to a year in jail. The state appellate court overturned his conviction on the grounds that the officer was not engaged in “authorized conduct” when she ordered the dog’s confinement and seizure and because Skinner did not “physically interfere[] with [defendants’] efforts to take custody of the dog.”²² The federal judge dismissed the case at issue on grounds of qualified immunity, noting that defendants had probable cause to arrest plaintiff even though the conviction was ultimately vacated.²³

In *Smith v. City of New York*, the New York Appellate Division reversed a trial court decision that had found a police officer strictly liable for dog bites sustained by several infants.²⁴ The court noted that in the “very brief time” that Officer Smith spent with the abandoned dog, he observed “the dog was friendly, playful, and ‘rambunctious.’”²⁵ A statement by the plaintiff’s husband to the trial court that the dog needed additional restraint while inside his car was not enough to support the conclusion that the police officer “knew or should have known of the dog’s vicious propensities.”²⁶

In *Young v. City of Visalia*,²⁷ officers from the Visalia (California) Police Department allegedly exceeded the scope of a search warrant by entering and searching an adjacent shop that was occupied by Nathan Young “without exigent circumstances.”²⁸ The officers escorted Young out of his shop at gunpoint, denied him access to his medications and the bathroom for hours, compelled him to sign a document that he could not read without his glasses, required him to forfeit \$2,000 that had been found during the search, and pepper sprayed his dogs over his protests.²⁹

Although the case was not fundamentally related to animals, the federal district court for the District of Eastern California dismissed the Youngs’ claims that the officers violated an implied civil cause of action under two

20. *Id.* at 474.

21. *Id.*

22. *Id.* at 474–75.

23. *Id.* at 478.

24. 889 N.Y.S.2d 187 (N.Y. App. Div. 2009).

25. *Id.*

26. *Id.*

27. 687 F. Supp. 2d 1155 (E.D. Cal. 2010).

28. *Id.* at 1162.

29. *Id.* at 1159.

provisions of the California Penal Code that concerned animals.³⁰ The decision turned on the inapplicability of the prima facie tort doctrine, which sought to circumvent the statutory immunity of public officials by proving intentional harm arising from generally culpable conduct, even if not within the traditional arc of tort liability.³¹ Instead, the court allowed the Youngs to proceed on the established torts of trespass to chattels and conversion.³²

In a case more directly related to animals, the Eastern District of California denied defendants' motion for summary judgment, holding that plaintiffs' allegations, if proven, established a violation of the Fourth Amendment, based on the use of excessive force.³³ In *Bailey v. County of San Joaquin*, parents and their five-year-old daughter sued a deputy sheriff for discharging his firearm at the family dog without provocation.³⁴ His shots hit the dog's paw, causing bullet fragments to ricochet and hit the mother and her child.³⁵

The circumstances surrounding the shooting can be described as confusing at best. Responding to a citizen complaint of possible drug use, the deputy and his fellow officers approached the wrong address, i.e., the Baileys', without making a visual inspection of the property or confirming the address on the complaint prior to arrival.³⁶ However, the officers were aware that another court had issued an arrest warrant for Eddie Bailey for failure to comply with community service terms of a misdemeanor traffic violation. Bailey was not at home at the time, but officers saw a family friend taking out the trash through the back door and feared someone might escape.³⁷ As other officers secured the rear, the deputy went to the front door alone, navigating through piles of children's toys. Kari Bailey, with her five-year-old daughter and the dog in tow, opened the front door, and the dog started to leave.³⁸ Startled, the deputy shot the dog, who had posed no threat to him, and in the process wounded Mrs. Bailey and her child. The Baileys unfortunately had to take out a loan to pay for the dog's veterinary fees, and the deputy received no discipline or training.³⁹

30. CAL. PENAL CODE § 596 (1941) (willfully poisoning an animal); *id.* § 597 (1998) (malicious wounding of an animal).

31. *Young*, 687 F. Supp. 2d at 1166 (citing CAL. GOV'T CODE § 820.4 (1963) (excuses acts or omissions, where due care is exercised, in enforcing any law)).

32. *Id.* at 1168 n.11.

33. *Bailey v. County of San Joaquin*, 671 F. Supp. 2d 1167 (E.D. Cal. 2009).

34. *Id.* at 1170.

35. *Id.*

36. *Id.*

37. *Id.* at 1171.

38. *Id.*

39. *Id.*

The court first denied defendants' motion for summary judgment, noting that a reasonable jury would find that the deputy's actions were unreasonable and violated plaintiffs' rights under the Fourth Amendment.⁴⁰ Further, the court also refused to dismiss the substantive due process claim based on the officer's actions. Qualified immunity was not applicable in this case because "no reasonable officer in [the officer's] position could believe that his actions were constitutional."⁴¹ Finally, the court also considered the state tort claim of conversion arising from shooting the dog, taking her to the veterinarian without the Baileys' consent, and refusing to pay the veterinary bill.⁴² The conversion claim survived based on the court's finding that a reasonable jury could conclude that the deputy took the dog to the veterinarian, a decision that Mrs. Bailey did not ratify.⁴³ The absence of her husband at the time was irrelevant.⁴⁴

In *Snead v. Society for the Prevention of Cruelty to Animals of Pennsylvania*,⁴⁵ the Superior Court of Pennsylvania noted that "this court clearly recognizes that dogs as pets hold a unique place in many people's lives as friend, companion, and family member,"⁴⁶ even though they are treated as property under Pennsylvania law. In *Snead*, animal control officers seized several dogs from plaintiff's residence as evidence pending resolution of dogfighting charges against her.⁴⁷ When the charges were dropped, plaintiff attempted to recover her dogs from the shelter.⁴⁸ Although staff at the shelter told her that they euthanized the animals because she failed to claim them within the forty-eight-hour hold period, euthanasia in fact occurred three days after she inquired.⁴⁹ A jury found the defendant shelter liable in the sum of \$154,926.37, \$100,000 of which constituted exemplary damages.⁵⁰

On appeal, the court found that the facts established a due process violation and affirmed the jury's finding of conversion, agreeing with the trial court that defendant deprived plaintiff of the use and possession of her dogs by euthanizing them without providing an opportunity for her to retrieve them.⁵¹ Further, the SPCA could not claim sovereign immunity as a Commonwealth agency even though it exercised a governmental function

40. *Id.* at 1173.

41. *Id.* at 1174.

42. *Id.* at 1178.

43. *Id.* at 1178–79.

44. *Id.* at 1179.

45. 929 A.2d 1169 (Pa. Super. Ct. 2007), *aff'd*, 985 A.2d 909 (Pa. 2009).

46. *Id.* at 1174.

47. *Id.* at 1175.

48. *Id.*

49. *Id.*

50. *Id.* at 1174.

51. *Id.* at 1181.

(i.e., enforcement of animal control laws),⁵² or as a local agency immune under the Political Subdivision Tort Claims Act.⁵³

B. *Private Individual Defendants*

The Vermont Supreme Court held that under state common law, dog owners could not recover noneconomic damages for emotional distress caused by defendant's intentional shooting of their dog.⁵⁴ In *Scheele v. Dustin*,⁵⁵ the Scheeles had stopped in a parking lot at a church in Northfield, Vermont, while on a trip from their home in Maryland and unleashed their dog for some exercise.⁵⁶ The dog, posing no threat, wandered onto the adjacent property, only to be shot and killed by Lewis Dustin, who was preparing his pellet gun to shoot squirrels.⁵⁷ The case was tried on stipulated facts, and the Scheeles expressly waived any right to punitive damages.⁵⁸ Refusing to award any noneconomic and loss of companionship damages, the trial court limited economic damages to \$155 market value, an amount that was not disputed at trial.⁵⁹

On appeal, the Scheeles sought reversal, in one of "a growing string of cases pushing for recognition of special damages for pet owners where a pet is injured or dies."⁶⁰ The Vermont Supreme Court affirmed the lower court decision, based in part on its ruling in *Goodby v. Vetpharm*,⁶¹ noting that

[p]laintiffs fail to demonstrate a compelling reason why, as a matter of public policy, the law should offer broader compensation for the loss of a pet than would be available for the loss of a friend, relative, work animal, heirloom or memento—all of which can be prized beyond measure, but for which this state's law does not recognize recovery for sentimental loss.⁶²

Plaintiffs also cited decisions from other jurisdictions to support their position that "noneconomic damages can be awarded following the wrongful death of a pet, even though [they are] considered property,"⁶³ notably a decision by the Washington Court of Appeals, *Womack v. von Rardon*,⁶⁴

52. *Id.*

53. *Id.* at 1179 (citing 42 PA. CONS. STAT. § 8501 (2000)).

54. *Scheele v. Dustin*, 998 A.2d 697 (Vt. 2010).

55. *Id.*

56. *Id.* at 698–99.

57. *Id.* at 699.

58. *Id.* at 698.

59. *Id.*

60. AM. VETERINARY MED. LAW ASS'N, <http://www.avmla.org/displaycommon.cfm?an=1&subarticlenbr=92>.

61. 974 A.2d 1269 (Vt. 2009).

62. *Scheele*, 998 A.2d at 703.

63. *Id.* at 702.

64. 135 P.3d 542, 546 (Wash. Ct. App. 2006). Mr. Karp represented the appellant in this case.

which created the “common law cause of action of malicious injury to a pet.”⁶⁵ The Vermont high court dismissed the Washington State case, stating that “[w]ith little analysis or coherence, and citing no authority supporting their spontaneous creation of this unique cause of action, *Womack* provides us with little legal reasoning to follow.”⁶⁶ The *Scheele* court held that the slaying of a nonvicious dog with a pellet gun, though intentional, does not give rise to emotional damages under intentional or malicious tort theories.⁶⁷ It also disallowed loss of companionship.⁶⁸

In *Ashburn v. Caviness*,⁶⁹ Spencer Caviness sued Steve Ashburn for allegedly shooting and killing his Labrador retriever. A jury found Ashburn liable for having “unlawfully appropriated property of Spencer Caviness, to wit: a dog, with the intent to deprive Spencer Caviness of said property, without the effective consent of Spencer Caviness, the owner.”⁷⁰ Caviness appealed, challenging the verdict form’s failure to use the definition of “appropriate” as construed in criminal cases.⁷¹ In affirming, the appeals court held that “one who kills an animal belonging to another, without removing the animal, unlawfully appropriates the animal so as to commit theft.”⁷²

C. Custody-Related Claims

*Mireles v. Morman*⁷³ involved a custody dispute over a Bullmastiff puppy who had wandered away from its owner’s property during a storm and was “adopted” by a neighbor. The appellant sought reversal of a lower-court decision that required her either to pay \$800 or return the puppy, plus \$6,800 in damages and \$3,500 in fees. Mireles had agreed to pay \$800 pursuant to a promissory note.⁷⁴ When she failed to pay or return the puppy, Morman sued under the theory of conversion and statutory theft under the Texas Theft Liability Act (TTLA).⁷⁵ Mireles counterclaimed for emotional distress damages.⁷⁶ Morman then filed a motion for summary judgment based on Mireles’s admissions.⁷⁷

65. *Scheele*, 998 A.2d at 700.

66. *Id.* at 703.

67. *Id.* at 701.

68. *Id.*

69. 298 S.W.3d 401 (Tex. App. 2009).

70. *Id.* at 402.

71. *Id.*

72. *Id.* at 401.

73. 2010 WL 3059241 (Tex. App. Aug. 6, 2010) (not reported).

74. *Id.* at *1.

75. *Id.* at *2 (citing TEX. CIV. PRAC. & REM. CODE ANN. § 134.005 (West 2005) (“[A] person who has sustained damages resulting from theft may recover . . . the amount of actual damages found by the trier of fact and, in addition to actual damages, damages awarded by the trier of fact in a sum not to exceed \$1,000,” plus court costs and reasonable and necessary attorney fees)).

76. *Id.*

77. *Id.*

The court resolved the errors raised by the appellant as follows: (1) a pro se defendant's deemed admissions, arising from her failure to respond to requests for admissions on a timely basis, did not violate due process where she failed to show the required good cause and undue prejudice;⁷⁸ (2) the deemed admissions established summary judgment liability, except as to the TTLA claim, which Morman never pleaded and was not tried by consent;⁷⁹ (3) the summary judgment of \$6,800 in damages wrongly included the \$1,000 TTLA penalty and \$4,800 in double recovery for the alleged market value of the dog;⁸⁰ (4) the court reversed the attorney fees award as not viable, except under the TTLA;⁸¹ and (5) the court reinstated Mireles's counterclaims after finding that they were not foreclosed by procedural irregularity.⁸²

D. *Veterinary Malpractice*

In a case more notable for showing the rift between naturopathic and allopathic veterinary medicine than for its legal analysis, naturopathic veterinarian Margo Ronan sued Tufts University as well as two faculty and one staff member at its Cummings School of Veterinary Medicine, asserting claims for defamation, violations of the Massachusetts Civil Rights Act (MCRA), emotional distress, negligence, and breach of contract.⁸³ Ronan unsuccessfully treated her horse for a pin-sized lesion with homeopathy. The lesion grew to the point where Ronan took him to Tufts for evaluation of a possible enucleation of the eye. The Tufts veterinarian diagnosed metastasized squamous cell carcinoma in the left eye and recommended euthanasia.⁸⁴

During her visit, Ronan allegedly heard a number of derogatory comments regarding holistic treatment methods. Infuriated, she refused to pay for the services rendered, and Tufts advised that until the debt was paid, she could not benefit from any of Tufts' services, including continuing education. She subsequently was denied access to a lecture that was "open to the public."⁸⁵

After noting that "the nonmoving party cannot defeat a motion for summary judgment by merely asserting that facts are disputed," the court proceeded to analyze each of Ronan's assertions, essentially concluding that

78. *Id.* at *4.

79. *Id.* at *5.

80. *Id.* at *9.

81. *Id.*

82. *Id.*

83. Ronan v. Trs. of Tufts Univ., 2009 WL 4894318 (Mass. Super. Ct. Oct. 26, 2009) (not reported).

84. *Id.* at *1.

85. *Id.* at *2.

none of them was substantiated by evidence.⁸⁶ The defendants' motion for summary judgment was allowed.⁸⁷

In *Reed v. Vickery*,⁸⁸ the Reeds, residents of Colorado, sued veterinarians and a veterinary hospital in Ohio for an allegedly fraudulent presale examination of a horse and concealment of records showing that the horse had been treated for lameness.⁸⁹ They bought the horse for \$25,000 and spent \$20,000 on veterinary bills for treatment of chronic lameness.⁹⁰

The defendants filed a motion for judgment on the pleadings that was granted in part and denied in part.⁹¹ The federal court for the Southern District of Ohio rejected the statute of limitations defense, noting that the two-year period may have been tolled until discovery of the undisclosed prior treatment.⁹² It also refused to dismiss the fraud and negligence claims.⁹³ The court overruled the defendants' objection to the demand for \$20,000 in veterinary bills, given that animals are personalty under Ohio law and damages are limited to the difference in market value before and after loss.⁹⁴ Pointedly noting that the market value rule applies to family pets, the court observed that the animal in this case was a show horse whose lameness markedly reduced its value.⁹⁵ Further, "[e]ven if Ohio law would cap economic damages at the horse's market value," the vet bills do not exceed the amount paid for the horse.⁹⁶ The court also refused to dismiss punitive damages as a matter of law, acknowledging that they exist for sufficiently egregious, intentionally false representations.⁹⁷

One of the veterinarians was dismissed from suit due to lack of facts to prove he intended to mislead the Reeds by administering injections to mask chronic lameness symptoms or concealing records of that treatment.⁹⁸ Of interest was the veterinarian's claim that he was legally and ethically prohibited from disclosing prior treatment records to the Reeds, a point apparently ultimately rejected by the court but that is likely to arise in future veterinary disputes.⁹⁹ The other defendants did not succeed in gaining dismissal of fraud and negligence.

86. *Id.* at *3 (quoting Mass. R. Civ. P. 56(e)).

87. *Id.* at *1.

88. 2009 WL 3276648 (S.D. Ohio Oct. 9, 2009).

89. *Id.* at *1-2.

90. *Id.* at *2.

91. *Id.* at *1.

92. *Id.* at *2-3.

93. *Id.* at *7.

94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.* at *8.

98. *Id.* at *5.

99. *Id.* at *5-6.

In *Newman v. Washington Veterinary Board of Governors*,¹⁰⁰ after the death of their Pekingese, the Newmans filed complaints with the Washington Veterinary Board of Governors against Drs. Michael Harrington and Kobi Johnson for a series of alleged licensing violations, including, but not limited to, malpractice, recordkeeping deficiencies, and misrepresentation.¹⁰¹ After completing its investigation, the board closed the complaints, reporting to the Newmans that “to take disciplinary action, the Board must be able to prove, by clear and convincing (highly likely) evidence that unprofessional conduct occurred.”¹⁰² The Newmans submitted a petition for reconsideration that introduced expert testimony, challenged the standard of review used by the board, emphasized recordkeeping omissions, and reasserted the grounds in their original complaint.¹⁰³ The board rejected the reconsideration request.

As the result of misleading statements from board staff, the Newmans did not file an appeal under the Washington Administrative Procedure Act (WAPA),¹⁰⁴ but instead filed a motion for a statutory writ of review and constitutional writ of certiorari with the Thurston County Superior Court.¹⁰⁵ The attorney general argued that the Newmans should have sought judicial review under the WAPA, rendering the request for a writ meritless.¹⁰⁶ The two veterinarians intervened, arguing that the Newmans had no right to judicial review, whether under the WAPA or by writ.¹⁰⁷ The trial court found standing under WAPA but noted that the petition was untimely.¹⁰⁸ It also denied both writs, thereby terminating the case.¹⁰⁹ The appellate court affirmed the trial court’s decision due to lack of standing.¹¹⁰

Kaufman v. Langhofer,¹¹¹ a veterinary malpractice case about the death of a scarlet macaw named Salty, involved an appeal of a jury verdict that found the veterinarian to be thirty percent liable and the owner seventy percent liable.¹¹² No damages were awarded.¹¹³ The owner claimed error in not allowing the jury to consider emotional distress and loss of consortium damages.¹¹⁴ The Arizona Court of Appeals rejected these sums when

100. 231 P.3d 840 (Wash. Ct. App. 2010).

101. *Id.* at 843.

102. *Id.*

103. *Id.*

104. WASH. REV. CODE § 34.05.

105. *Newman*, 231 P.3d at 844.

106. *Id.* at 847.

107. *Id.* at 844.

108. *Id.* at 849.

109. *Id.*

110. *Id.*

111. 222 P.3d 272 (Ariz. Ct. App. 2009).

112. *Id.* at 274.

113. *Id.*

114. *Id.* at 277–78.

arising from negligent injury or death to a companion animal.¹¹⁵ It further found no requirement to decide whether Kaufman was entitled to “value to owner” or sentimental value (as opposed to market value) as Kaufman did not pursue either theory at trial.¹¹⁶

In *Smith v. University Animal Clinic, Inc.*,¹¹⁷ an animal clinic inadvertently switched name tags on one of the Smiths’ hospitalized cats and released the cat to another clinic client.¹¹⁸ The cat subsequently escaped and was never found. The trial court ruled that plaintiffs could recover emotional damages but awarded none, after finding that damages would not exceed \$800 in boarding and other charges that the clinic waived.¹¹⁹ The appellate court reversed in part, finding that statutory emotional damages apply only

- (1) when the property was damaged by an intentional or illegal act; (2) when the property was damaged by acts giving rise to strict or absolute liability; (3) when the property was damaged by activities amounting to a continuous nuisance; and (4) under circumstances where the owner was present or nearby at the time the damage occurred and suffered psychic trauma in the nature of or similar to a physical injury as a direct result of the incident itself.¹²⁰

Although the court found that plaintiffs satisfied none of these criteria, it did agree with their argument that the 2004 revisions to the Louisiana Civil Code created a fifth category, i.e., a depositary in breach of what amounts to be a nonpecuniary contract.¹²¹ Deeming a cat to be “corporeal movable property,” the court agreed that the Smiths had a contract of deposit with the clinic for the safekeeping and return of their cats.¹²² Significantly, the court found the contract of deposit was to gratify a nonpecuniary interest and the clinic knew or should have known that failure to perform would cause a nonpecuniary loss.¹²³ However, the court did not disturb the trial court’s finding that \$800 was “in line with awards made for similar losses in this state as well as nationally.”¹²⁴

E. Dog Bite Litigation

In *Miletich v. Kopp*,¹²⁵ the victim of a dog bite appealed dismissal on summary judgment on the basis that triable issues of fact existed with respect

115. *Id.* at 278–79.

116. *Id.* at 277.

117. 30 So. 3d 1154 (La. Ct. App. 2010).

118. *Id.* at 1155–56.

119. *Id.* at 1156.

120. *Id.* (citing FRANK L. MARAIST & THOMAS C. GALLIGAN JR., LOUISIANA TORT LAW § 7.02[6] (2d ed. 2004)).

121. *Id.* (citing LA. CIV. CODE ANN. arts. 2926, 2930 (2004)).

122. *Id.* at 1157.

123. *Id.*

124. *Id.* at 1158.

125. 895 N.Y.S.2d 557 (N.Y. App. Div. 2010).

to scienter.¹²⁶ After the owners established prima facie entitlement to judgment as a matter of law, plaintiff failed to create a material factual dispute, despite offering evidence that (1) the owners routinely restrained the dog to keep him from running away; (2) the dog was “nippy” or “territorial” when he was several weeks old (the dog was about four at the time of the bite); (3) one of defendants had seen that the Chow Chow breed was identified as potentially aggressive and was aware of incidents of aggressiveness involving that breed; and (4) the manner of the bite in question was aggressive.¹²⁷

In *Underhill v. Hobelman*,¹²⁸ the parties were friends. Dinner plans were foiled, however, when a dog belonging to Hobelman’s mother playfully ran up to Underhill and knocked her over, resulting in injury requiring surgery.¹²⁹ Underhill sued Hobelman for strict liability under Nebraska Revised Statute § 54-601 and negligence.¹³⁰ After dismissal of the negligence claim, the only remaining issue was strict liability arising from the legislature’s 1992 insertion of the word “injuring” in the following provision:

[T]he owner or owners of any dog or dogs shall be liable for any and all damages that may accrue (1) to any person . . . by reason of having been bitten by any such dog or dogs and (2) to any person . . . by reason of such dog or dogs killing, wounding, injuring, worrying, or chasing any person or persons.¹³¹

Relying on its 1975 decision in *Donner v. Plymate*,¹³² the court recalled its statutory interpretation of § 54-601 and found that it excluded strict liability for damages caused by “playful and mischievous acts of dogs.”¹³³ At issue was whether the legislature intended to abrogate *Donner* through the 1992 amendment. The amendment’s legislative history strongly indicated that it arose in response to a court decision where an injured person failed to recover from a broken hip because it was not deemed a “wound” within the meaning of § 54-601.¹³⁴ With a lengthy dissent by two justices, the court found Hobelman not liable for the dog’s mischievous run to Underhill.¹³⁵

In *Tatman v. Space Coast Kennel Club, Inc.*,¹³⁶ a spectator at a dog show in which her own dog participated received a severe bite from a competitor’s

126. *Id.*

127. *Id.* at 558.

128. 776 N.W.2d 786 (Neb. 2009).

129. *Id.*

130. *Id.*

131. *Id.* at 787.

132. 228 N.W.2d 612 (Neb. 1975).

133. *Underhill*, 776 N.W.2d at 788.

134. *Id.* at 787–88.

135. *Id.* at 789.

136. 27 So. 3d 108 (Fla. Dist. Ct. App. 2010).

dog. The trial court dismissed her suit against the kennel club on summary judgment by enforcing the exculpatory clause she signed at entry.¹³⁷ The Florida District Court of Appeal reversed, finding the clause to be ambiguous and, therefore, unenforceable. The phrase in question—"I agree to not hold [defendant kennel club] or Brevard County Parks & Rec. Dept. liable for any accident or injury"—was "actually most easily understood to be a release from liability for injury to a dog entered in the show, as opposed to the dog's owner."¹³⁸ The court apparently found significant the fact that the owner, but not handlers, spectators, groomers, or anyone else in attendance at the show, signed the form.¹³⁹

Courts defined the terms *keeper* and *harborer* in *Waters v. Powell*¹⁴⁰ and *Pawlowski v. American Family Mutual Insurance Co.*¹⁴¹ In *Waters*, the Utah Court of Appeals deemed a dog kennel manager to be the dog's keeper under a strict liability statute, resulting in dismissal of suit by the manager against the owner for dog bite injuries.¹⁴² In *Pawlowski*, the Wisconsin Supreme Court held a homeowner strictly liable as a statutory owner (satisfying the role of harborer) as defined in Wisconsin Statute § 174.02 (2000).¹⁴³ *Owner* is defined as including "any person who owns, harbors or keeps a dog."¹⁴⁴ A homeowner who allows the dog to stay in the household as a favor to the dog's owner may constitute an "owner" in the sense of a keeper or harborer.¹⁴⁵ The court defined each term differently, with "keeper" as one "exercising some measure of care, custody or control over the dog" and "harborer" as one "sheltering or giving refuge to a dog."¹⁴⁶ Harboring required "something more than a meal of mercy to a stray dog or the casual presence of a dog on someone's premises. Harboring means to afford lodging, to shelter or to give refuge to a dog."¹⁴⁷ According to the court, such an expansion of liability did not violate public policy.¹⁴⁸

In *Dougan v. Nunes*,¹⁴⁹ when defendants left their dog, Einstein, at plaintiffs' residence to mate with the plaintiffs' Rottweiler, Einstein bit the female plaintiff on her face. Finding liability under New Jersey's strict liability statute, the court rejected defendants' arguments that plaintiffs

137. *Id.* at 109.

138. *Id.*

139. *Id.* at 111.

140. 232 P.3d 1086 (Utah Ct. App. 2010).

141. 777 N.W.2d 67 (Wis. 2009).

142. *Waters*, 232 P.3d at 1087.

143. *Pawlowski*, 777 N.W.2d at 69.

144. *Id.* at 72 (quoting Wis. STAT. § 174.001(5)).

145. Wis. STAT. ANN. § 174.02.

146. *Pawlowski*, 777 N.W.2d at 73.

147. *Id.*

148. *Id.* at 81.

149. 645 F. Supp. 2d 319 (D.N.J. 2009).

were independent contractors who had assumed the risk of being bitten by Einstein.¹⁵⁰

F. *Miscellaneous Claims*

In *Lucas v. Riverside Park Condominiums Unit Owners Association*,¹⁵¹ unit owner A. William Lucas sued the association under the federal Fair Housing Act¹⁵² and the North Dakota Housing Discrimination Act,¹⁵³ alleging failure to reasonably accommodate his therapy dog and intentional infliction of emotional distress. On appeal from summary judgment dismissal, the North Dakota Supreme Court reversed and affirmed in part.¹⁵⁴

The saga began when the association sued Lucas for violating a prohibition against domestic animals after his ex-wife periodically visited with her dog. Lucas counterclaimed, expressly not requesting a reasonable accommodation but reserving the right to do so if the court upheld the ban.¹⁵⁵ The court held that Lucas had voluntarily waived any fair housing act claim, and that unless his health deteriorated, the association was under no obligation to honor his future requests for accommodation.¹⁵⁶ The North Dakota Supreme Court affirmed the decision in *Lucas I*.¹⁵⁷ While *Lucas I* was pending, Lucas continued to make requests for reasonable accommodation of an “assistive therapeutic companion animal” and included a psychologist’s recommendation.¹⁵⁸ The psychologist did not report a significant change in Lucas’s mental health, and the association refused the request three times.¹⁵⁹

In 2007, Lucas again sued the association for violating his rights under federal and state law.¹⁶⁰ The association moved to dismiss and sought Rule 11 sanctions.¹⁶¹ A few months after filing *Lucas II*, Lucas made a fourth accommodation request, and when the association’s attorney asked for additional information, Lucas imposed what the attorney viewed as unacceptable conditions.¹⁶² The court dismissed the case and awarded over \$22,000 in sanctions.¹⁶³

150. *Id.*

151. 776 N.W.2d 801 (N.D. 2010) (*Lucas II*), *reb’g denied* (Feb. 10, 2010).

152. 42 U.S.C. § 3601 *et seq.*

153. N.D. CENT. CODE. § 14-02-.5-06 *et seq.* (1999).

154. *Lucas II*, 776 N.W.2d at 804.

155. *Id.*

156. *Id.*

157. *Lucas v. Riverside Park Condos. Unit Owners Ass’n*, 691 N.W.2d 862 (N.D. 2005) (*Lucas I*).

158. *Lucas II*, 776 N.W.2d at 804.

159. *Id.*

160. *Id.* at 805.

161. *Id.*

162. *Id.* at 805–06.

163. *Id.* at 806–07.

In *Lucas II*, court clarified its earlier decision, holding that (1) a plaintiff's failure to respond to a reasonable request for additional information by a defendant can lead to dismissal on the basis that the latter cannot know the plaintiff's disability and need for a service animal, and that awaiting additional information is not, in fact, a denial of the request; (2) the certifications submitted in 2007 failed to sufficiently raise genuine issues of material fact due to their conclusory and ambiguous nature; (3) defendant reasonably rejected plaintiff's added conditions for review of its request for additional medical information; and (4) the sanctions pertaining to the fourth request for accommodation were untenable and reversed.¹⁶⁴

In *Friedman v. Intervet Inc.*,¹⁶⁵ Lawrence Friedman, asserting liability under the Ohio and New Jersey product liability statutes,¹⁶⁶ claimed that veterinary insulin produced by Intervet killed his companion animal. The federal district court for Northern Ohio rejected defendant's motion to dismiss the Ohio claim for failing to follow the strict Rule 12(b)(6) tests of *Bell Atlantic Corp. v. Twombly* and *Ashcroft v. Iqbal*.¹⁶⁷ The court found that Friedman asserted sufficient factual allegations to state a claim of manufacturing defect.¹⁶⁸ That he relied upon FDA statements that issued a warning concerning the drug's safety prompted the court to respond:

So? What matters is that plaintiff has asserted facts, not conclusions or theories. Nothing in *Twombly* or *Iqbal* casts a shadow over the sources of factual allegations. Indeed, facts derived from an authoritative governmental source and formally published by that source as part would appear to be a solid, hefty basis on which to rest a complaint.¹⁶⁹

As to the Ohio design defect claim, the court similarly denied the motion, premised on the FDA warning and subsequent halt of the drug's production as enough "at this stage to give rise to a plausible inference that the foreseeable risks associated with the design or formulation of the [product] outweighed its benefits."¹⁷⁰

Turning to the New Jersey Product Liability Act, the court found that the Ohio law does not preempt product liability claims brought under another state's statute and that Friedman, not a New Jersey resident, nonetheless had standing to pursue the NJPLA claim.¹⁷¹ The court next looked

164. *Id.* at 801.

165. 2010 WL 2817257 (N.D. Ohio July 16, 2010).

166. OHIO REV. CODE §§ 2307.74, 2307.75; N.J. STAT. ANN. § 2A:58C-2.

167. *Friedman*, 2010 WL 2817257 (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007), and *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009)).

168. *Id.*

169. *Id.* at *4.

170. *Id.* at *5 (citing *Redinger v. Stryker Corp.*, 2010 WL 1995829 (N.D. Ohio 2010)).

171. *Id.* at *6.

at which law governed Friedman's attempted class action. Finding more contacts in Ohio than New Jersey, Ohio law applied.¹⁷²

That "the Lone Star State [] looks unkindly on cattle theft" is a fact of life that Thomas O. Bennett Jr. learned to his detriment in *Bennett v. Reynolds*.¹⁷³ At trial, defendants Bennett and James B. Bonham Corp. were acquitted of felony theft charges, but a jury did find them liable for conversion with malice of thirteen bovines that wandered onto the corporation's land.¹⁷⁴ The award of \$5,327.11 in actual damages raised no eyebrows, but even the Texas Supreme Court balked at exemplary damages that were forty-seven and 188 times over the compensatory award. The court found that the ratio analysis must be "assiduously followed," notwithstanding the evidence of malicious cattle rustling and furtive acts of concealment, and remanded for remittitur.¹⁷⁵

III. EQUINE-RELATED CLAIMS

A. Negligence

In *Everett v. State Farm Fire & Casualty Insurance Co.*,¹⁷⁶ plaintiff was injured when he fell from a horse owned by defendants. The jury found in favor of defendants and plaintiff appealed, alleging that the court improperly instructed the jury on the standard applicable to an injury caused by a domesticated animal.¹⁷⁷ Applying the standard provided by the Louisiana Civil Code,¹⁷⁸ the jury instruction in part stated that in order to recover, plaintiff must prove that

- (a) the animal in question was owned by the defendant; (b) the animal presented an unreasonable risk of harm; (c) the defendant knew or in the exercise of reasonable care, should have known, the risk of harm; (d) the damage could have been prevented by the exercise of reasonable care, and defendant failed to exercise such reasonable care; and (e) he was damaged as a result of the animal's behavior.¹⁷⁹

Applying this strict liability standard, the jury found in favor of defendants, concluding that the horse involved did not present an unreasonable risk of harm.¹⁸⁰ On appeal, plaintiff argued that the jury instruction was erroneous and that the trial court erred: (1) in not instructing the jury on

172. *Id.* at *7–8.

173. 315 S.W.3d 867, 868 (Tex. 2009).

174. *Id.* at 869.

175. *Id.* at 877, 880.

176. 37 So. 3d 456 (La. Ct. App. 2010).

177. *Id.* at 460–61.

178. *Id.* at 459–60 (citing LA. CIV. CODE art. 2321).

179. *Id.* at 460.

180. *Id.*

the legal definition of unreasonable risk of harm, (2) in requiring plaintiff to prove the horse presented an unreasonable risk of harm, and (3) by not including the ordinary negligence standard on the verdict form.¹⁸¹

The appellate court agreed, finding the trial court erred in failing to reference the duty/risk analysis, or the five elements necessary in order for liability to attach in an ordinary negligence claim—i.e., duty, breach of duty, cause and fact, legal cause, and actual damages.¹⁸² Because this case did not involve a dog, which is specifically exempted by Louisiana Civil Code, the appellate court concluded that the trial court erred by requiring a finding that the animal in question posed an unreasonable risk of harm. The instructions given tainted the jury's verdict, which the court set aside.¹⁸³

The court next examined the case de novo.¹⁸⁴ Plaintiff had the burden of proving that defendants knew or, in the exercise of reasonable care, should have known that the horse's behavior would cause damage, that the damage could have been prevented with the exercise of reasonable care, and that defendants failed to exercise that reasonable care.¹⁸⁵ Stating that plaintiff failed to meet this burden, the court found nothing in the record to indicate that the horse was anything but a gentle animal.¹⁸⁶ Furthermore, an expert veterinarian, after examining the horse and watching a rider take it through a number of moves, testified that the horse, which had a prior history of barrel racing, was similar to other barrel racing horses used by his association in therapy sessions with mentally and physically disabled children.¹⁸⁷

At the time of the incident, the horse was in the control of plaintiff, who had an opportunity to stop and dismount. None of the evidence suggested that defendants had knowledge of the horse's alleged previous and vicious temperament. Therefore, there was no breach of duty under a duty/risk analysis. Although the appellate court applied a different standard than that of the jury in the trial court, namely duty/risk analysis rather than strict liability, it affirmed the judgment of the trial court and assessed cost of the appeal against plaintiff.¹⁸⁸

In a pair of decisions issued by New York courts, *Stanislav v. Papp*¹⁸⁹ and *Johnson v. City of New York*,¹⁹⁰ the injured plaintiffs sued the owner of the

181. *Id.*

182. *Id.* at 463–64.

183. *Id.* at 463.

184. *Id.*

185. *Id.* at 464.

186. *Id.* at 465–66.

187. *Id.*

188. *Id.*

189. 2009 WL 2929772 (N.Y. Sup. Ct. Sept. 9, 2009) (unreported).

190. 2009 WL 4282859 (N.Y. Sup. Ct. Nov. 30, 2009) (unreported).

horses they were riding for injuries suffered while on a trail ride.¹⁹¹ Both plaintiffs, who were experienced riders, claimed they fell when their horses were spooked and moved unexpectedly.¹⁹² The court in both cases granted summary judgment for defendants on the basis that plaintiffs were riding voluntarily and assumed the known risks of injury. In *Johnson*, the court further found that defendant had no duty of care to prevent plaintiff from the risks associated with horseback riding.¹⁹³

The New York courts also addressed the issue of duties owed by operators of hansom cabs. In *Figueroa v. Tornabene*,¹⁹⁴ a runaway horse pulling a hansom cab struck another vehicle. The driver and passenger of the vehicle brought an action against the hansom cab operator for personal injuries.¹⁹⁵ The appellate court reversed the trial court's decision and found that the operator of the hansom cab exercised reasonable diligence in its care and operation. Defendant established a prima facie case that he was entitled to judgment as a matter of law by submitting testimony that the operator did not drive the hansom cab negligently at the time of the accident.¹⁹⁶ The court further stated that no rule of law compels a person driving a horse on a highway to keep the horse under absolute control; the driver is bound to exercise a reasonable degree of diligence and care.¹⁹⁷

In *Phillips v. North Carolina State*,¹⁹⁸ plaintiff's rare broodmare died due to the negligence of the defendant's horse breeding management facility. The Industrial Commission awarded damages to plaintiff for the value of the horse, \$50,000, and compensatory damages in the amount of the profit for a single breeding cycle, \$9,000, for a total of \$59,000. Plaintiff appealed, claiming that the proper measure for compensatory damages was the lost profits from the future opportunity to breed the mare over her remaining reproductive years, not just a single cycle.¹⁹⁹ The defendant cross-appealed arguing that plaintiff was not entitled to any compensatory damages.²⁰⁰

The court reiterated that the proper measure for consequential damages for reproducing livestock is (1) the value of the animal under North Carolina law at the time of death and (2) the consequential damages, if any, that a plaintiff may incur between the time of the death of the animal until such time that a replacement of the like kind and quality can be found

191. *Stanislav*, 2009 WL 2929772, at *2; *Johnson*, 2009 WL 4282859, at *1.

192. *Stanislav*, 2009 WL 2929772, at *2; *Johnson*, 2009 WL 4282859, at *1.

193. *Johnson*, 2009 WL 4282859, at *2.

194. 902 N.Y.S.2d 637 (N.Y. App. Div. 2010).

195. *Id.* at 638.

196. *Id.* at 639.

197. *Id.*

198. 697 S.E.2d 433 (N.C. Ct. App. 2010).

199. *Id.* at 435.

200. *Id.* at 434–35.

and purchased.²⁰¹ The court found that the evidence in the case demonstrated that the mare likely could have produced one foal during the year of replacement and therefore plaintiff was entitled to loss of profits for one breeding cycle in addition to the value of the mare.²⁰² Plaintiff has a duty to mitigate damages and therefore must exercise reasonable care and diligence to avoid or lessen the consequences of the defendant's wrong. Under this principle, plaintiff proved that he was entitled to the value of one breeding cycle, but not to the value of her lost breeding.²⁰³

Finally, in *Morrissey v. Arlington Park Racecourse*,²⁰⁴ plaintiff, a professional thoroughbred exercise rider, sued defendant, alleging the defendant negligently maintained the premises. Plaintiff argued that the defendant permitted standing water and soap to accumulate on the asphalt next to a training track exit, and plaintiff was injured when the horse slipped on the soapy asphalt.²⁰⁵ Defendant moved for summary judgment, arguing that the soapy area was obvious to jockeys traversing the area and that plaintiff assumed the risks riding the horse on defendant's premises. The motion was granted and plaintiff appealed.²⁰⁶ On appeal, plaintiff argued that (1) the trial court erred when it refused to apply the deliberate encounter exception to the open and obvious rule and (2) as a professional jockey, plaintiff assumed the inherent risks of riding his horse under these conditions.²⁰⁷

The deliberate encounter exception allows liability where a landowner should reasonably expect that his invitees will proceed in the face of open and obvious dangers when the advantages of doing so would outweigh the apparent risks.²⁰⁸ The defendant argued that the deliberate encounter exception did not apply because reasonable alternative routes around the soapy asphalt were available. The court rejected this argument, finding a question of fact on the issue because the question was not whether alternative routes existed but rather whether a landowner could reasonably foresee that plaintiff would nevertheless have chosen to encounter that condition. In reaching this holding, the court noted that track employee witnesses testified that numerous horses had to be moved quickly back and forth through this area throughout the day to exercise the horses on the training track.²⁰⁹

The court also rejected defendant's arguments that plaintiff assumed the risk of injury. The court noted that a plaintiff did not assume risk of injury

201. *Id.* at 438.

202. *Id.*

203. *Id.* at 437.

204. 935 N.E.2d 644 (Ill. Ct. App. 2010).

205. *Id.* at 646-48.

206. *Id.*

207. *Id.*

208. *Id.* at 657.

209. *Id.* at 658-60.

that was created by defendant's negligence as opposed to the nature of the activity itself.²¹⁰ The court also concluded that plaintiff's assumption of risks associated with riding a horse would not necessarily escape the application of the deliberate encounter exception. Accordingly, the court reversed the trial court's granting of summary judgment, finding that there were legitimate questions of fact to present to a jury.²¹¹

B. *Equine Activity Liability Statutes*

The Tennessee Court of Appeals recently interpreted the scope of the Tennessee Equine Activities Act (TEAA).²¹² In *Smith v. Phillips*,²¹³ on an informal trail ride with other friends, plaintiff was bitten by defendant's horse when plaintiff dismounted and walked his horse close to defendant's horse.²¹⁴ The trial court granted defendant's motion for summary judgment. Plaintiff appealed, contending that the trial court improperly ruled that the TEAA provided defendant immunity from liability.

Defendant would have immunity under the TEAA if plaintiff was a "participant" whose injury resulted from risks inherent in an "equine activity."²¹⁵ The court, therefore, addressed whether the TEAA applied to injuries arising out of a "completely informal, social recreational activit[y] involving horses or other equines."²¹⁶ The TEAA defines an equine activity as "rides, trips, hunts or other equine activities of any type however formal or impromptu 'that are sponsored by an equine activity sponsor.'"²¹⁷ Relying upon the sponsorship portion of the definition, the court found that the TEAA did not cover plaintiff's trail ride because neither of the parties was an equine activity sponsor under the TEAA.²¹⁸ The trial court judgment was reversed and the case remanded for further proceedings.²¹⁹

In a case of first impression, the court in *Perry v. Whitley County 4H Club, Inc.*²²⁰ interpreted provisions of the Indiana Equine Act (IEA).²²¹ Plaintiff was unexpectedly kicked by a horse while assisting children during a competition sponsored by the local 4H club at its facilities.²²² Plaintiff sued the 4H club for negligence in "allowing horse activities to be conducted on

210. *Id.* at 661–62.

211. *Id.*

212. TENN. CODE ANN. §§ 44-20-101–05 (1992).

213. 2010 WL 1221436 (Tenn. Ct. App. Mar. 29, 2010).

214. *Id.* at *1.

215. *Id.* at *4 (citing TENN. CODE ANN. § 44-20-102(3)).

216. *Id.*

217. *Id.* at *4–5.

218. *Id.*

219. *Id.* at *6.

220. 931 N.E.2d 933 (Ind. Ct. App. 2010).

221. IND. CODE § 34-31-5-5 (1998).

222. *Perry*, 931 N.E.2d at 934–35.

premises unsuitable for such activities.”²²³ The court found that the club was a sponsor of an equine activity; plaintiff was a participant in the equine activity; and the cause of plaintiff’s injury, being kicked by a horse, is an inherent risk of an equine activity. The trial court granted summary judgment in favor of defendants based on the IEA.²²⁴

As a threshold issue, the appellate court noted that IEA immunities apply only if a warning sign was properly posted and maintained in at least one location on the grounds or in the building where the equine activity occurred.²²⁵ The sign must be clearly visible, printed in black letters at least one inch in height, and in proximity to the equine activity. The appellate court found undisputed evidence, namely the affidavit of the 4H club board president, that the club maintained the equine activity warning signs, and therefore the IEA applied.²²⁶

As in other state equine activity liability acts, an equine sponsor in Indiana is not liable for injury or death of a participant from the inherent risk of equine activities.²²⁷ The IEA identifies liability exceptions²²⁸ but is silent on the issue of sponsor negligence in the overall scheme of equine liability. The court opined that the IEA was not intended to abrogate causes of action for common law negligence of an equine activity sponsor.²²⁹ If none of the statute’s liability exceptions apply, a sponsor is not liable for failing to use reasonable care to mitigate an already inherent risk of equine activity that ultimately results in the participant’s injury.²³⁰ The appellate court found no genuine issue of material fact that the 4H club complied with the IEA’s warning sign requirements and that plaintiff’s injury resulted from inherent risks of equine activities. If the club was negligent, it was only for failing to mitigate those inherent risks. Therefore, the IEA barred plaintiff’s claim.²³¹

In *Zuckerman v. Camp Laurel*,²³² plaintiff was injured during her riding lesson at the defendant camp. Plaintiff alleged that her saddle slipped and caused her to fall because her instructor failed to properly tighten the girth.²³³ The camp’s witnesses testified that the saddle did not slip, but rather plaintiff simply lost her balance.²³⁴ The camp filed a motion for sum-

223. *Id.* at 935.

224. *Id.* at 935–36.

225. *Id.* at 936–37.

226. *Id.* at 937–38.

227. IND. CODE § 34-31-5-5.

228. *Id.* at § 34-6-2-69; *Perry*, 931 N.E.2d at 937–40.

229. *Perry*, 931 N.E.2d at 940.

230. *Id.*

231. *Id.* at 940–41.

232. 2010 WL 746049 (D. Me. Mar. 1, 2010).

233. *Id.* at *3.

234. *Id.* at *3–4.

mary judgment claiming immunity under Maine's Equine Activity Statute (MEAS).²³⁵ The camp asserted that plaintiff had actual knowledge of the inherent risks of the activity and that no exception under the MEAS applied to the cause of plaintiff's injury.²³⁶ Plaintiff argued that a question of fact existed as to the application of the statute's faulty tack exception.²³⁷

In a case of first impression, the court examined the MEAS, noting that

[the] statute defines inherent risks with examples that all pertain to the unpredictable nature of equine behavior, the unpredictable conduct of other individuals, and certain natural hazards, rather than the more predictable behavior of sponsors or instructors (such as decisions related to tack, which are elsewhere excluded).²³⁸

The court denied the camp's motion for summary judgment concluding that the record raised a genuine issue of fact concerning faulty tack. Therefore, the MEAS did not preclude the plaintiff's claim.

In *Beattie v. Mickalich*,²³⁹ the plaintiff was injured on a horse that was "green broke." The Michigan Supreme Court majority found that the plaintiff was not required to plead a claim in avoidance of the limitations on liability explicitly provided by the Michigan Equine Activity Liability Act (MEALA).²⁴⁰ The court further stated that the MEALA "abolished strict liability for horse owners" but not negligence actions against them.²⁴¹ The court noted that since plaintiff offered admissible documentary evidence supporting her argument that defendant was negligent, the trial and appellate courts erroneously granted defendant's motion for summary judgment.²⁴² The court reversed the judgment of the appellate court and remanded the case to the trial court for further proceedings.²⁴³

One concurring opinion disagreed that the MEALA permits a negligence claim only when it involves something other than inherently risky equine activity.²⁴⁴ The concurring justice wrote that the appellate court and the dissent ignored the fact that horse owners were strictly liable at common law.²⁴⁵ Although the MEALA signifies that a horse owner is no longer subject to strict liability, it does not immunize a defendant from an action in which a plaintiff alleges a defendant was negligent in failing to warn him

235. *Id.* at *1; ME. REV. STAT. tit.7 §§ 4101-4103-A (1991).

236. *Zuckerman*, 2010 WL 746049, at *7.

237. *Id.* at *8.

238. *Id.* at *9.

239. 784 N.W.2d 38 (Mich. 2010).

240. *Id.* at 39; MICH. COMP. LAWS § 691.1661-67 (1995).

241. *Beattie*, 784 N.W.2d at 39.

242. *Id.*

243. *Id.* at 38.

244. *Id.* at 39 (Markman, J., concurring).

245. *Id.* at 40.

about dangerous propensities of a horse, including its history of throwing other riders.²⁴⁶

The dissenting justices concurred in part and dissented in part. Specifically, they would uphold the portion of the appellate judgment that affirms dismissal based on the MEALA.²⁴⁷ The dissent provides a lengthy explanation of the statutory construction and interpretation of the four limitations on liability enumerated in the Act.²⁴⁸ The dissent found that plaintiff cannot establish that defendant committed a human error, above and beyond the inherent or essential risk of the equine activity, in saddling the “green broke” horse, such that defendant increased the danger involved in the activity.²⁴⁹

The New Jersey Supreme Court interpreted the provision of its New Jersey Equine Activity Liability Act (NJEALA)²⁵⁰ in *Hubner v. Spring Valley Equestrian Center*.²⁵¹ In *Hubner*, plaintiff sued the riding facility, alleging that she was injured when the horse she was riding backed up and tripped over a cavaletti.²⁵² The horse fell and plaintiff was thrown, landing on a portable mounting block that caused her injuries. Plaintiff submitted an expert report that opined that defendant was negligent because the cavaletti was unsecured and set up near a mounting area behind the horse. Plaintiff’s expert also opined that the portable mounting block had been negligently left behind the horse.²⁵³

The trial court granted summary judgment for defendant, concluding that the NJEALA’s faulty tack exception was not applicable because the cavaletti was not faulty, but simply part of the riding ring.²⁵⁴ The appellate court reversed, relying on the NJEALA’s faulty tack exception²⁵⁵ and the plaintiff’s expert opinion, i.e., that placement of equipment in a position that creates an unnecessary risk of personal injury may constitute negligent disregard for the participant’s safety.²⁵⁶

The New Jersey Supreme Court disagreed, stating that the faulty equipment exception does not encompass equipment in good working

246. *Id.*

247. *Id.* at 41 (Young, J., concurring in part and dissenting in part).

248. The exceptions include faulty tack, rider’s ability not matching the horse’s personality, and dangerous latent conditions of the land, and that these are all inherent risks of an equine activity. *Id.* at 40.

249. *Id.* at 42.

250. N.J. STAT. ANN. § 5:15-1-12 (1998).

251. 1 A.3d 618 (N.J. 2010).

252. For nonequestrians, according to merriam-webster.com, a cavaletti is a “series of timber jumps that are adjustable in height for schooling horses.”

253. *Hubner*, 1 A.3d at 622.

254. *Id.*

255. See N.J. STAT. ANN. § 5:15-1(a)(b) (1998).

256. *Hubner*, 1 A.3d at 622.

order.²⁵⁷ Based on the evidence in the case, the court found that the cavaletti was in good condition and was on the ground in the middle of the riding ring where it was part of the equipment intended for rider training and was therefore not faulty under the NJEALA.²⁵⁸ The court concluded that “[t]o the extent that the operator of the facility might be liable based on the manner of [the cavelleti] placement, it would not be because they were faulty, but because the operator acted with negligent disregard for the participant’s safety within the meaning of [the NJEALA].”²⁵⁹

The negligent disregard exception requires the plaintiff to demonstrate that the injury arose not because of one of the inherent dangers of the sport, but because the facility’s operator breached one of the duties it owes to the participant, as defined in the statute’s exceptions.²⁶⁰ The plaintiff in this case was facing the cavaletti before and after she mounted the horse and then the horse turned around and tripped over the cavaletti when backing up.²⁶¹ These undisputed facts are within the defined inherent risks of an equine activity and therefore, according to the court, within the risks that plaintiff assumed.²⁶² Thus, the New Jersey Supreme Court reversed the appellate court and reinstated the trial court’s entry of summary judgment in favor of defendant.

C. Liability Releases

In *Glenn v. Annuzjata*,²⁶³ plaintiff was injured when she fell from a horse during her riding lesson at defendants’ facility. Plaintiff alleged she fell when her horse moved sideways after corrugated metal fell from the roof.²⁶⁴ Defendants alleged that the horse was startled by the squeaking sound of two pieces of metal that rubbed together due to high winds.²⁶⁵ The trial court found the liability release signed by plaintiff released defendants from liability and granted defendants’ motion for summary judgment.²⁶⁶ The appellate court reversed, finding that the liability release did not insulate the stable defendants from liability for their own negligent acts.²⁶⁷ The appellate court also found a question of fact regarding whether the roof was in a defective condition on the date of the accident and whether the stable

257. *Id.* at 632.

258. *Id.*

259. *Id.* at 630–31.

260. *Id.* at 626.

261. *Id.* at 632.

262. *Id.* at 631–32.

263. 898 N.Y.S.2d 265 (N.Y. App. Div. 2010).

264. *Id.* at 266.

265. *Id.*

266. *Id.*

267. *Id.*

defendants were negligent in failing to remedy the defect.²⁶⁸ The court further determined a question of fact remained as to whether plaintiff assumed the risk of falling from the horse. The court observed that “[w]hile the plaintiff assumed the risk that she could be thrown by a frightened horse, the stable defendants offered no evidence that the plaintiff assumed the heightened risk created by the alleged defective condition of the roof of the indoor riding arena.”²⁶⁹ The case was therefore reversed and remanded for further proceedings.²⁷⁰

In *Dow–Westbrook, Inc. v. Candlewood Equine Practice, LLC*,²⁷¹ plaintiff’s horse was boarded at the Candlewood Equine Practice Clinic for breeding by artificial insemination.²⁷² The plaintiff’s witness testified at trial that the clinic was instructed to not turn the horse out with other horses. However, the horse was severely injured by another horse in turnout, rendering it valueless for any use other than a companion animal.²⁷³ Plaintiff sued the clinic for negligently turning the horse out and failing to care for and supervise it in breach of the boarding agreement. The clinic filed a counterclaim seeking indemnification for breach of the agreement’s hold harmless provision.²⁷⁴

The appellate court affirmed the trial court’s finding that the clinic did not violate any standard of care,²⁷⁵ after finding credible the testimony of the clinic’s witness denying that the clinic received any instructions regarding the horse’s turnout.²⁷⁶ Furthermore, the boarding agreement did not include any turnout restrictions in the special instructions section.²⁷⁷

Turning to the defendant’s counterclaim, the court acknowledged that although Connecticut courts generally disfavor hold harmless provisions as against public policy,²⁷⁸ they have recognized the enforceability of these provisions where both parties to the contract are commercial entities and of equal bargaining power.²⁷⁹ In *Dow–Westbrook*, both plaintiff and defendant were commercial entities with similar experience and sophistication.²⁸⁰ Plaintiff required its own riding and horse show clients to sign documents containing similar hold harmless provisions.²⁸¹ Moreover,

268. *Id.*

269. *Id.* at 266–67.

270. *Id.* at 267.

271. 989 A.2d 1075 (Conn. App. Ct. 2010).

272. *Id.* at 1078.

273. *Id.*

274. *Id.*

275. *Id.* at 1075.

276. *Id.* at 1079.

277. *Id.*

278. *Id.* at 1082.

279. *Id.*

280. *Id.*

281. *Id.* at 1083.

plaintiff could have had the horse inseminated at a different stable. These facts led the appellate court to find that the plaintiff and defendant had equal bargaining power and that the hold harmless provision did not violate public policy.²⁸²

In another artificial insemination case, plaintiff was kicked and injured by his stallion while assisting with the semen collection process at defendant's breeding facility.²⁸³ In *Wilson v. Davis*,²⁸⁴ plaintiff sued defendant for negligence, breach of contract, fraud, and misrepresentation. In denying defendant's motion for summary judgment, the court ruled that the liability waiver contained in the breeding contract signed by plaintiff lacked consideration specific to the waiver.²⁸⁵ The court also found that defendant had a duty to exercise reasonable care in breeding the stallion and that a question of fact existed whether he was in fact negligent.²⁸⁶

The California Court of Appeal enforced a liability release in *Pendergrass v. Diamond Bar & Circle K Horse Rentals*.²⁸⁷ In this case, plaintiff sued defendant alleging she broke her right ankle and leg when she was thrown from a horse that she had rented from defendant's commercial riding stable. The appellate court found that the action was barred by the primary assumption of risk doctrine and express assumption of risk based on a written release of liability signed by plaintiff.²⁸⁸

Plaintiff signed a participant agreement acknowledging her assumption of risk prior to her participating in the trail ride.²⁸⁹ She also signed an addendum that stated in essence that she refused to wear a helmet against the advice of defendant and assumed a risk of injury.²⁹⁰ During her deposition, the plaintiff admitted that she read and signed both agreements. She testified that she had informed the staff at the stable that she had never ridden a horse before and that she asked if she could ride her horse with high-heeled sandals.²⁹¹

Plaintiff sued the defendant for negligence and gross negligence. In opposition to defendant's motion for summary judgment, plaintiff submitted expert testimony stating that new riders should be given a demonstration on how to ride and control their horses and that proper riding attire, including well-fitting closed-toe shoes or boots, is essential.²⁹²

282. *Id.* at 1085.

283. *Wilson v. Davis*, 2010 WL 2228262 (W.D. Ky. 2010).

284. *Id.* at *1.

285. *Id.* at *3.

286. *Id.*

287. 2010 WL 3387541 (Cal. Ct. App. Aug. 30, 2010).

288. *Id.* at *1.

289. *Id.*

290. *Id.* at *2.

291. *Id.*

292. *Id.* at *3.

Under California law, the defendant moving for summary judgment has the burden to establish that defendant owes no legal duty to plaintiff to prevent harm in which the plaintiff complains in support of the primary assumption of risk doctrine.²⁹³ The commercial operator of a trail ride business geared toward inexperienced riders has a duty to “ensure the facilities and related services which are provided do not increase the risk of injury above the level of inherent in such a trail ride.”²⁹⁴ The court found that undisputed evidence confirmed that the participant agreement signed by plaintiff stated that saddles may slip and other tack/saddle problems may develop as a result of normal use and wear.²⁹⁵ The court also noted that there is no legal duty to protect a participant from the careless conduct of others who are participating in the sporting activity.²⁹⁶ Plaintiff failed to show that any additional factors substantially contributed to her accident, including the fact that defendant allowed her to wear inappropriate footwear and defendant’s alleged failure to show riders how to lead and control their horses.

D. *Breach of Contract*

In *Dixon v. Herman*,²⁹⁷ after plaintiffs bought a horse from defendants for \$100,000, they requested, among other things, a bill of sale.²⁹⁸ The bill of sale listed the horse’s approximate age as eleven but plaintiffs later learned from the U.S. Equestrian Federation that the horse was actually thirteen years old.²⁹⁹ Plaintiffs brought the age discrepancy to the attention of defendants, who again confirmed the horse was eleven, and the plaintiffs continued to show the horse.³⁰⁰ After learning from a reliable third party that the horse was in fact thirteen years old, plaintiffs demanded a full refund, and defendants refused to return the money. Plaintiffs filed suit for breach of implied warranty, violation of the Texas Deceptive Trade Practices Act, breach of contract, fraud, fraudulent misrepresentation, and rescission.³⁰¹

The trial court granted defendants’ motion for summary judgment, and the appellate court affirmed, on the grounds that the defendants made no representations concerning the horse’s age, health, or history prior to the sale.³⁰² Furthermore, the court pointed out that “the bill of sale was not

293. *Id.* at *4.

294. *Id.*

295. *Id.* at *5.

296. *Id.*

297. 2010 WL 3038598 (Tex. App. Aug. 5, 2010), *reh’g denied* (Oct. 20, 2010).

298. *Id.* at *1.

299. *Id.*

300. *Id.* at *2.

301. *Id.*

302. *Id.* at *2–3.

discussed prior to the sale and was not a condition for the formation of the contract.”³⁰³ The appellate court affirmed summary judgment on the breach of contract claim, claims under the DTPA, and claims of fraud and fraudulent misrepresentation.³⁰⁴ As to the plaintiffs’ breach of warranty claim, the appellate court affirmed summary judgment because there were no representations by the defendants, the bill of sale was not part of the contract, defendants made no warranties to the plaintiffs, and the “as is” provision in the bill of sale was not necessary to defeat the plaintiffs’ breach of warranty claims.³⁰⁵

In *Curry v. Bennett*,³⁰⁶ the Kentucky Court of Appeals allowed testimony showing that defendant reasonably relied on the apparent authority of plaintiff’s trainer to negotiate a breeding contract. The court further found that testimony by the owner and trainer regarding the colt’s lost prize-winning potential as the basis for calculating damages was not “too speculative.”³⁰⁷ The court held that, in Kentucky, evidence of habit or routine practice of an organization is admissible to prove that the conduct of a person on a particular occasion was in conformity with his or her stated habit or routine practice.³⁰⁸

E. Insurance Cases

1. Racetrack Insurance Coverage

In *Giacomelli v. Scottsdale Insurance Co.*,³⁰⁹ the Montana Supreme Court reviewed the applicability of racetrack insurance coverage to injured jockeys. Jockeys who suffered injuries in horse races at a park owned and operated by the county brought a declaratory judgment action seeking a declaration that the commercial general liability (CGL) policy obtained by the track operator covered their negligence claims.³¹⁰

The first issue on appeal was whether the relevant Montana statute mandated liability insurance coverage for jockeys.³¹¹ The jockeys argued that the statute mandated coverage for exhibitors of a race and therefore mandated coverage for them.³¹² After looking at the dictionary definition of *exhibitors*, as well as similar statutes in neighboring jurisdictions, the court determined that the statutory protection afforded exhibitors did

303. *Id.* at *3.

304. *Id.*

305. *Id.*

306. 301 S.W.3d 502 (Ky. Ct. App. 2009).

307. *Id.* at 506.

308. *Id.* at 504–05 (citing KY. R. EVID. 406).

309. 221 P.3d 666 (Mont. 2009).

310. *Id.*

311. *Id.* at 696.

312. *Id.*

not include jockeys but was meant to cover race organizers.³¹³ Although some case law suggested that horse riders could be considered exhibitors, these cases were factually distinguishable because they dealt with displays of horsemanship at county fairs, not pari-mutuel wagering.³¹⁴

Next, the jockeys argued that the athletic or sport participants exclusion in the CGL did not bar coverage because the exclusion itself was ambiguous and should be construed against the insurance company that drafted the clause.³¹⁵ The court disagreed, finding that the language used in the exclusion at issue was not ambiguous and was thus enforceable.³¹⁶ The court declined to accept any other interpretation of the sport and athletic participant exclusion because to do so would “do violence” to the language of the policy.³¹⁷ Even though authorities were split as to the construction of similar provisions, the court determined that this fact, by itself, did not create a conclusive presumption of ambiguity.³¹⁸

Finally, the jockeys argued that the sport and athletic event participant exclusion violated their reasonable expectations of coverage.³¹⁹ The court ultimately dismissed this argument, stating that because the terms of the policy at issue clearly demonstrated the intent to exclude coverage, the reasonable expectations doctrine was inapplicable because expectations contrary to a clear exclusion are not objectively reasonable.³²⁰ Therefore, the jockeys’ claim was barred.

2. Business Pursuit Insurance Exclusion

In *May v. Holzknicht*³²¹ and *Holzknicht v. Kentucky Farm Bureau Mutual Insurance Co.*,³²² the Kentucky Court of Appeals reviewed companion cases addressing tort liability for injuries to a child pursuant to a dog-bite statute and insurance coverage issues relating to a business pursuit. The plaintiff’s mother brought an action against the defendants and their homeowners’ insurer for injuries sustained by her two-year-old daughter from a dog attack at a home-based child care business.

In the first case, the appellate court found the dog owners liable pursuant to the Kentucky dog-bite statute and held that the daycare operator’s husband was liable by virtue of his status as keeper of the dog.³²³ However,

313. *Id.* at 670.

314. *Id.* at 671.

315. *Id.* at 672.

316. *Id.* at 674.

317. *Id.* at 673.

318. *Id.* at 674.

319. *Id.*

320. *Id.*

321. 320 S.W.3d 123 (Ky. Ct. App. 2010).

322. 320 S.W.3d 115 (Ky. Ct. App. 2010).

323. *May*, 320 S.W.3d at 127–28.

the court explained that the dog-bite statute did not impose strict liability on the keepers of the dog, but rather the defendants were liable because neither the two-year-old nor any third party was at fault to exculpate the defendants.³²⁴

In the companion insurance coverage case, decided the same day, the court ruled that the homeowner's insurance policy held by the daycare provider specifically excluded coverage for the child's injuries because they arose out of the daycare business.³²⁵ Further, the court found the insurance policy was not severable with regard to the business pursuit exclusion and thus coverage was not preserved for the daycare provider's husband because he was minimally involved in the business.³²⁶ The court concluded that the only clear protection for the defendants was a business risk endorsement that they chose not to add to their policy.³²⁷

3. Resident-Relative Exclusion

In *Farm Bureau Insurance Co. of Idaho v. Kinsey*,³²⁸ plaintiff was injured when the defendant's dog jumped out of the defendant's truck, ran across the road, and collided with the plaintiff motorcyclist. The accident occurred outside the home of the defendant's grandmother, and the plaintiff sued the defendant for his damages.³²⁹ Plaintiff appealed the trial court's grant of summary judgment, arguing that the court erred in finding the defendant was not covered as a resident under his grandmother's home insurance policy.³³⁰

The Idaho Supreme Court discussed how the facts of the case supported a reasonable inference that the defendant was not a resident of his grandmother's home for policy purposes. The defendant's grandmother paid some of his bills and renewed his vehicle registration, and he received some mail and stored some belongings at his grandmother's, but the defendant lived at his girlfriend's home nearly all of the time.³³¹ As such, the court upheld the district court's determination that the defendant was not a resident of his grandmother's home and was therefore not covered under her home insurance policy for purposes of the dog collision accident.³³²

4. Farm and General Liability Policies

In *Farmers Elevator, Inc. v. Hartford Fire Insurance Co.*,³³³ plaintiff sued Hartford Fire Insurance Co. and Continental Western Insurance Co. for

324. *Id.* at 126-27.

325. *Holzknacht*, 320 S.W.3d at 119.

326. *Id.* at 121-22.

327. *Id.* at 122.

328. 234 P.3d 739, 741 (Idaho 2010).

329. *Id.*

330. *Id.*

331. *Id.* at 745.

332. *Id.* at 746.

333. 2009 WL 3654739 (Neb. Ct. App. 2009) (not reported).

damages incurred from the death of 223 hogs in plaintiff's care. The hogs died from excessive heat after a temperature-sensitive thermostat in the hog barn ruptured and failed to properly regulate air ventilation.³³⁴

Plaintiff's insurance policy with Hartford provided coverage for confined swine lost because of windstorm, explosion, smoke, and collapse. Losses directly caused by mechanical breakdown, electrical breakdown, or malfunction were excluded from coverage. Plaintiff's policy with Continental provided coverage for commercial property and commercial general liability. This policy covered losses due to explosion, windstorm, and smoke while excluding loss or damage caused by mechanical breakdown, unless the mechanical breakdown resulted in a covered cause of loss.³³⁵

The Nebraska Court of Appeals affirmed the lower court's finding that the hot hog death was not a covered loss under either the Hartford or Continental policy.³³⁶ The appellate court reasoned that the loss was not covered by the policies because a "strong wind" on the night in question did not amount to a "windstorm," the metal tubing rupture on the thermostat was not an "explosion," and the thermostat failure was not a "collapse" as defined by the Nebraska Supreme Court.³³⁷ The court also explained that the thermostat failure, was explicitly excluded on the basis of the mechanical breakdown exclusion in both policies.³³⁸

334. *Id.*

335. *Id.*

336. *Id.* at *3, *7.

337. *Id.* at *4-6.

338. *Id.* at *7.