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The Sale of Horses and Horse Interests: A Transactional Approach

BY ROBERT S. MILLER*

INTRODUCTION

This Article addresses many issues involved in the sale of horses and horse interests.¹ The term “transactional approach” is borrowed from David Lester’s original article on security interests,² but is used in a different sense. Unlike topics related to encumbrances, the usual sales issues do not conveniently group themselves like the several typical debtor-creditor relationships. While there are unique problems involved in agister’s liens and possessory security interests, the interesting problems of sales cut across discrete boundaries. Thus, the concepts of reliance, notice, and conscionability characterize the problems presented by the behavior of buyers and sellers—whether the issue before the court is one of contract-formation or warranty or agency. This Article attempts, therefore, to draw attention to the shared characteristics of common transactions. This approach allows litigators or contract-makers to plan their client’s course of action for a particular business transaction, or for a transaction that has fallen apart.

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¹ This Article does not presume to be exhaustive. It excludes, for example, any serious discussion of the security interests granted in connection with most horse purchases, a subject covered in detail elsewhere in this symposium. See Lester, *The Priority Race: Winner Takes the Horse*, 78 Ky. L.J. 615 (1989-90). Among the other obvious exclusions are the tax effects of sales, and application of the United Nations Convention on Contracts for the International Sale of Goods. Even among the areas discussed, the basis of the selection here is limiting: it attempts to focus on the issues that typically arise in the sales of horses, as reflected in the author’s experience—and in reported cases. To a substantial degree, important subjects in the areas discussed here have been analyzed in great detail in prior symposia in the *Kentucky Law Journal (Journal)*; and those are cited appropriately, and used as a point of reference for this Article. Reference is also made to lectures collected by the University of Kentucky’s annual equine law seminar, which to some degree produced the seminal analysis for this approach.

² See Lester, *Secured Interests in Thoroughbred and Standardbred Horses: A Transactional Approach*, 70 Ky. L.J. 1065 (1981-82).

The Article is divided into three sections. The first section leads the reader through typical contracting and conveying issues that arise across the spectrum of horse sales. The second section analyzes issues that arise in a business that typically is conducted by agents for buyers and sellers, including at the venue of the agent-auctioneer. The final section focuses on the predominant problem for the owners of one of nature's most fragile assets: the breeding, racing, and performing qualities of the equine animal.

The author has participated in transactions only in the thoroughbred, standardbred, and Arabian businesses; thus an important caveat is that these materials need to be used with the appropriate sensitivity for the practices and needs of particular horse industries. Nonetheless, horses of all breeds have more in common than in contrast. Almost without exception, the same common law and statutes (particularly the Uniform Commercial Code) were developed and apply to automobiles and horses alike; but no article about cars would select its topics, nor its organization, like this one.

I. SOME GENERAL PRINCIPLES

A. *Goods and the Type of Goods*

It is well settled that horses are "goods" under the Uniform Commercial Code (U.C.C.), and the general principles of U.C.C. article two are ordinarily the starting point for a discussion of the sale of horses and interests in horses.³ Once removed beyond the whole live animal, however, the classification becomes more interesting. U.C.C. section 2-105 includes "the unborn young of ani-

³ See Cohan, *The Uniform Commercial Code as Applied to Implied Warranties and "Merchantability" and "Fitness" in the Sale of Horses*, 73 Ky. L.J. 665 (1984-85) and the cases cited in footnote thirteen of that article. See also *In re Rex Group, Inc. v. Amvest Funding Co.*, 80 Bankr. 774, 783 (Bankr. E.D. Va. 1987) ("[H]orses classified as equipment that are mobile goods."); *Alpert v. Thomas*, 643 F. Supp. 1406 (D.Vt. 1986) (U.C.C. provisions apply to the sale of stallions); *Sessa v. Riegle*, 427 F. Supp. 760 (E.D. Pa. 1977); *Keck v. Wacker*, 413 F. Supp. 1377 (E.D. Ky. 1976) (U.C.C. applicable to sale of a mare); *Grandi v. LeSage*, 399 P.2d 285 (N.M. 1965); *Kropp, Landen, & Donath, The Prevention and Treatment of Breeding Contract Controversies*, 74 Ky. L.J. 715, 718 (1985-86); Note, *Chernick v. Fasig-Tipton: A Caveat to the Horse Trader*, 74 Ky. L.J. 889, 890 n.7 (1985-86); *Kropp & Landen, Sale and Other Exchanges of Horses, Seasons and Other Equine Interests*, ANNUAL EQUINE LAW SEMINAR, Univ. of Ky. (1988). But a horse is held not to be a "product" for strict liability purposes. See *Kaplan v. C Lazy U. Ranch*, 615 F. Supp. 234 (D. Colo. 1985).

mals.” These are “future goods,” subject to special treatment as to title and insurable interest.⁴ A cattle case suggests that the sale of sperm is the sale of goods;⁵ but *Kwik-Lok Corp. v. Pulse*⁶ indicates that a mere sale of breeding rights, when the sperm is inside a stallion, does not amount to a sale of goods.⁷ Therefore, the Washington court in *Kwik-Lok* held that the Uniform Commercial Code does not apply in this situation at all—a *non sequitur* of great proportions.⁸

On the other hand, *In re Blankenship-Cooper*⁹ adopted the view of an unreported intermediate appellate court opinion in Kentucky,¹⁰ that the sale of an undivided one-fortieth (1/40th) fractional interest in a stallion (which by contract was nothing but a series of annual breeding rights and seldom-used rights to vote to move the stallion) is equivalent to a sale of goods. *In re Blankenship-Cooper* also adopts the view that the sale of a single breeding right (a nomination or season) is not the same as a sale of goods, which raises a host of problems for secured lenders—problems that are beyond the scope of this Article. That result is by no means inevitable; there is authority under the Uniform Commercial Code of Illinois for establishing a classification of whether the particular asset is an “interest in” the underlying property in accordance with its traditional classification.¹¹ The Illinois court was required to determine whether a right to trust income for a time was an interest in the real estate that was the subject of the trust, or whether it was merely a general intangible—and thus governed by the Uniform Commercial Code. By analogy, the holding of this case indicates that if it is reasonable to consider a season as an interest in the stallion (stallions are considered to be goods), then the season itself should be considered to be goods.

In the area of taxation, the same analysis can be undertaken to determine whether the taxpayer is an owner of an asset, de-

⁴ U.C.C. § 2-105(2) (1988).

⁵ *Meuse-Rhine-Ijssel Cattle Breeders LTD. v. Y-Tex Corp.*, 590 P.2d 1306, 1309 n.6, 7 (Wyo. 1979).

⁶ 702 P.2d 1226 (Wash. App. 1985).

⁷ *Id.* at 1228 n.1.

⁸ *See J.S. McHugh, Inc. v. Capolino*, 21 U.C.C. Rep. Serv. (Callaghan) 35 (N.Y. App. Div. 1977).

⁹ 43 Bankr. 231 (Bankr. N.D. Tex. 1984).

¹⁰ *North Ridge Farms v. Trimble*, 37 U.C.C. Rep. Serv. (Callaghan) 1280 (Ky. Ct. App. 1983). The Supreme Court of Kentucky agreed that the share was good, but was silent as to the breeding right. *Trimble v. North Ridge Farms, Ky.* 700 S.W.2d 396 (1985).

¹¹ *Levine v. Pascal*, 236 N.E.2d 425 (Ill. App. Ct. 1968).

pending on whether he or she has an interest in it.¹² There would, of course, be some point at which the partial interest would be so insignificant that it would not be truly an interest in the goods. If the syndicate manager allowed a child to have a horseback ride, there would be no interest conveyed in the stallion.

The loss of U.C.C. coverage by the subdivision of rights in horses creates problems in the sale of horses and interests in horses. For example, in a contract for the sale of a nomination to a stallion, where the horse dies—and the contract is silent on the contingency of death—the result would differ depending on whether the transaction is considered to be (a) a completed sale of a property interest (as goods), or (b) the right to take one's mare to a stallion to be serviced (not goods). While not focusing on this issue, the result of *Green v. McGrath*¹³ was implicitly determined on the basis of such a distinction. The court in *Green* understood (but did not acknowledge) that the sale of a nomination was complete for risk of loss purposes when it was made,¹⁴ a sale under which there was no guarantee that a live foal would be born—or even that the breeding would occur. The general doctrine of contract law, to the effect that a contract is to be rescinded and the purchase price returned when performance under the contract becomes impossible,¹⁵ is inapplicable where a completed sale has taken place.¹⁶

It is possible that a standard foal sharing agreement¹⁷ involves the transfer of some sort of interest in the stallion to the owner of the mare, and in the mare to the owner of the stallion. The

¹² Blair v. Commissioner, 300 U.S. 5 (1937) held that an assigned right to receive trust income for a very short time "was a present property . . . like any other"; and thus the assignee of that "interest" was an owner of an equitable interest in the corpus. *Id.* at 13. Guggenheim v. Commissioner, 46 T.C. 559 (1966) the classic application of tax law to shares, does not reach this more difficult question. A related sales tax question in Kentucky has been briefed to the Kentucky Court of Appeals. The trial court in Calumet Farm v. Revenue Cabinet, Fayette Circuit Court action 87-CI-3435, held that a lifetime breeding right in an otherwise undivided stallion (Alydar) is a season and not a share for sales tax purposes.

¹³ 662 F. Supp. 337 (E.D. Ky. 1986).

¹⁴ See U.C.C. 2-509(2) (1988).

¹⁵ With perfect consistency, the Code deals with the impossibility defense in U.C.C. § 2-615 only as a pre-delivery matter. See 4 R. ANDERSON, UNIFORM COMMERCIAL CODE § 2-615:26-39 (3d ed. 1983).

¹⁶ A similar distinction exists in the law of bailment, which is applied in the horse case of Gould v. Holwitz, 113 A. 323 (N.J. 1921).

¹⁷ These are described in Miller, *America Singing: The Role of Custom and Usage in the Thoroughbred Horse Business*, 74 Ky. L.J. 781, 786 (1985-86).

classification of such interests will be developed by the courts largely in accordance with the equities of the specific cases that arise; and neither courts nor law journal articles should take too rigid a view of the abstract question. This view is supported by the extraordinary quarterhorse stallion case of *Gary v. Peckham*,¹⁸ where the right to possession of a co-owned stallion¹⁹ was said to depend on whether the animal was acquired for speculation purposes or breeding purposes.²⁰ So, too, is such an analysis determinative in *Keyes v. Scharer*,²¹ a mare lease case, where the Michigan court wanders back and forth between contract law and property law.²²

B. Contract Formation and Terms

Opinions in horse cases²³ as well as the U.C.C.²⁴ establish that the formation of a contract depends principally on the expressed intention of the contract's parties. In the context of an auction, a contract is said to be formed when the hammer falls, "the same as the acceptance of any other offer."²⁵ U.C.C. section 2-206 creates presumptions based on various expressions of the parties, the general inclination of which (along with U.C.C. section 2-204) is to encourage contract formation. It should be noted that the formation of the contract may or may not give rise to a right to require performance or obtain damages, depending on such matters as the statute of frauds.²⁶ The existence of a *potentially* unenforceable "contract" is an analysis that stands on its own.²⁷

¹⁸ 468 F.2d 1241 (10th Cir. 1972).

¹⁹ The value of the possession derives from the fact that a substantial amount of income flows from housing and caring for the mares which are serviced by GO MAN GO. In addition, the horse enjoys a unique and famous standing in horse breeding circles so as to give the owners and their premises a degree of distinction, whereby the profits of their remaining horse breeding operation become more valuable and the general public is drawn to the premises for the purpose of viewing this famous animal.

Id. at 1242.

²⁰ *Id.* at 1244.

²¹ 165 N.W.2d 498 (Mich. Ct. App. 1968).

²² As to the U.C.C. and leases in general, see 1 R. ANDERSON, *supra* note 15, at § 1-101:19 and 2-102:11. A few states have adopted a new § 2A of the U.C.C. which applies to the lease of goods.

²³ See *Courtin v. Sharp*, 280 F.2d 345 (5th Cir. 1960) (where a verbal agreement of sale of a colt takes immediate effect as a complete contract is a matter of intention).

²⁴ U.C.C. § 2-206.

²⁵ *Richardson v. Landreth*, 260 S.W. 128 (Mo. Ct. App. 1924). See *infra* notes 120-40 and accompanying text.

²⁶ See *infra* notes 141-67 and accompanying text.

²⁷ See, e.g., *Bennett v. Horton*, 592 S.W.2d 460 (Ky. 1979).

Along with contracts created by expressions of the parties, rights based upon performance²⁸ and trade usage²⁹ continue to be enforceable under the U.C.C. as in any common law implied contract. In addition, the U.C.C. dramatically departs from traditional contract law by establishing contracts in circumstances where there is not a traditional meeting of the minds. U.C.C. section 2-207 was designed to give effect to business transactions in industries that engage in "the battle of the forms"—where buyers and sellers exchange orders and confirmations covered with conflicting provisions in small print, and where offer never meets acceptance in traditional terms. The U.C.C.'s provisions equally cover an exchange of drafts by facsimile that include the appropriate expressions of conditional offers and acceptance. The U.C.C.'s provisions allow an acceptance that purports to change the terms of the deal to create a contract in a variety of circumstances.³⁰

Once a contract is formed, the U.C.C. also supplies terms for it, every bit as much as the common law did. Discretions of parties are limited and controlled³¹; implied warranties of matters other than quality are continued³²; and absent terms (gap fillers) are supplied, as for delivery³³ and time of performance.³⁴ The Code outlines general obligations with respect to mutuality, conditions precedent, and the like.³⁵

In addition, non-U.C.C. contract law remains in effect, preserving analogs of traditional contract doctrines not covered by the Code. Common law doctrines such as waiver and estoppel,³⁶ and ratification³⁷ apply in horse cases, as they do elsewhere in the

²⁸ U.C.C. § 2-208.

²⁹ U.C.C. § 2-202(a).

³⁰ See Consolidated Aluminum Corp. v. Krieger, 710 S.W.2d 869 (Ky. Ct. App. 1986); see also 2 R. ANDERSON, *supra* note 15, at 2-207:1-51. Although the author usually relies on Anderson for general matters, White & Summers give the most thoughtful treatment of the "battle of the forms." 1 J. WHITE & R. SUMMERS, UNIFORM COMMERCIAL CODE § 1-3 (3d ed. 1988).

³¹ U.C.C. § 2-311 (1988).

³² See, for example, the warranty of title provisions under U.C.C. § 2-312 (1988).

³³ U.C.C. § 2-208. Terms regarding price are also supplied under U.C.C. § 2-305.

³⁴ U.C.C. § 2-309.

³⁵ U.C.C. § 2-301.

³⁶ Sagner v. Glenangus Farms, Inc., 198 A.2d 277 (Md. 1964) (court considered whether defendant waived his right to cancel horse syndication or was estopped from doing so).

³⁷ O'Shea v. Hatch, 640 P.2d 515 (N.M. Ct. App. 1982) (surgical repair of a horse by buyers at suggestion of the sellers did not amount to a ratification of the original acceptance).

Code.³⁸ Impossibility of performance is continued under U.C.C. section 2-615. The first to breach a contract cannot insist on its strict performance,³⁹ and a fixed contract can be abandoned and a new one put in its place by parol evidence and by performance.⁴⁰

The U.C.C. also carries forward by its terms⁴¹ the rule that parties to an agreement impliedly agree to act in good faith with each other.⁴² And contracts violating public policy are still unenforceable.⁴³ Some of these points recur in later sections of this Article, though a complete analysis of contract formation and terms is beyond its scope. For now, the point is simply that a horse contract is a contract like any other, until the circumstances underlying it require special treatment.

C. Title

Title is not all that it used to be. Under the U.C.C.,⁴⁴ title is a residual concept, applicable only to matters not otherwise addressed by the U.C.C. Most notably, the retention of title does not affect the passing of risk of loss.⁴⁵ Title is also a rigid concept. For example, title as lawyers ordinarily think of it cannot be retained by the seller in a horse he or she has delivered.⁴⁶ Irrespective of the agreement, the seller retains only a security interest governed by U.C.C. article nine.

The U.C.C. does provide that subject to certain limitations, "title to goods passes . . . in any manner . . . explicitly agreed on by the parties."⁴⁷ As much freedom as that sentence seems to

³⁸ See generally R. ANDERSON, *supra* note 15, at § 1-103: 32 - 69; § 2-721:20, 37 (delay may affect the remedy of rescission); and §§ 2-711:7, 45, 2-715:12.

³⁹ Scarborough v. Richter, 274 So. 2d 399 (La. Ct. App. 1973).

⁴⁰ See Arine v. McAmis, 603 P.2d 1130 (Okl. 1979). But see U.C.C. §§ 2-209, 2-720.

⁴¹ U.C.C. § 1-203.

⁴² Such a doctrine will undoubtedly be applied someday to the standard rights of first refusal that are traditionally granted in stallion syndications in several breeds. Those simply drafted clauses are easily avoidable (if narrowly read), but the "defeat of the right of refusal should not be allowed by use of special, peculiar terms or conditions not made in good faith." Brownies Creek Collieries, Inc. v. Asher Coal Min. Co., 417 S.W.2d 249 (Ky. 1967). 1 R. ANDERSON, *supra* note 15, at § 1-103: 24, lists general principals of contract, conversion, and equity that continue in effect.

⁴³ Occhuizzo v. Perlmutter, 426 So. 2d 1060 (Fla. Dist. Ct. App. 1983) (contract based in part on consideration of buyer's agreement to not report seller's illegal racing activities held to violate public policy rendering it unenforceable).

⁴⁴ See U.C.C. § 2-401; R. ANDERSON, *supra* note 15, at § 4-401:12 (a contract must exist before title passes).

⁴⁵ See *infra* notes 65-77 and accompanying text.

⁴⁶ U.C.C. § 2-401(1).

⁴⁷ *Id.*

allow, however, one should focus on the word "explicit," which is repeated in the converse statement of the rule in the next sentence.⁴⁸ Any control by the parties over the passing of title must be explicit, that is, not by implication through trade usage or past performance. Years of interesting discussion about the use of registration papers in strictly title matters⁴⁹ may be beside the point. A horse's papers may be narrowly a "certificate of interest in property"⁵⁰ and can certainly control the ability of a horse to compete in many situations⁵¹—but unless the parties explicitly refer to them, they do not pass title.

Indeed, the U.C.C. makes the practice of some breeding associations irrelevant to title, mandating that title passes "even though a document of title is to be delivered at a different time or place."⁵² The rigid rule of the U.C.C. passes title "at the time and place at which the seller completes his performance with reference to physical delivery."⁵³ In the situation where a horse remains in the possession of a bailee (including a fractional interest or share of a stallion), the U.C.C.'s title section refers to the final act of *the seller*—whereas the U.C.C.'s provision on risk of loss⁵⁴ postpones the operative moment until the bailee's acknowledgment.⁵⁵

Because of the horse industry's reputation for sharp practices, it is not unheard of that individuals sell horses when they do not own them, or sell them more than once. Various common law principles continue to control the title of purchasers in such events. It is well settled that:

An owner is never divested of his property by theft, and therefore a sale by a thief, or by any person claiming under a thief, does not vest title in the purchaser as against the owner though the sale was made in good faith and in the ordinary course of trade.⁵⁶

⁴⁸ U.C.C. § 2-401(2); R. ANDERSON, *supra* note 15, at § 2-401:12 ("explicit" and "express" are the same).

⁴⁹ See, e.g., Miller, *supra* note 17, at 820-25.

⁵⁰ United States v. Bowers, 739 F.2d 1050, 1057 (6th Cir.), *cert. denied*, 469 U.S. 861 (1984).

⁵¹ See Morgan v. New York Racing Ass'n, 421 N.Y.S.2d 249 (N.Y. App. Div. 1979) (improperly registered horse not allowed to race); see also Jockey Club v. United States, 137 F. Supp. 419 (Ct. Cl. 1956) (registration important for breeding purposes).

⁵² U.C.C. § 2-401(2).

⁵³ *Id.*

⁵⁴ See *infra* notes 65-77 and accompanying text.

⁵⁵ See R. ANDERSON, *supra* note 15, at § 2-401:58.

⁵⁶ Bozeman Mortuary Ass'n v. Fairchild, 68 S.W.2d 756, 759 (Ky. 1934); see also Hentz v. The Idaho, 93 U.S. 575 (1876) (bailee not liable when he delivered goods to the true owner rather than the bailor).

If an owner's conscious conduct, however, gives the thief the power to cause a loss, the owner may be equitably estopped from asserting his or her title;⁵⁷ this is the same rule as agency by estoppel.⁵⁸ In either case there must be a purposeful and voluntary action on the part of the original owner, even if it was done under some mistaken belief or deception.⁵⁹ Also, reliance is a separate element that must be shown in estoppel.⁶⁰

A crook who fraudulently obtains title by inducing a conveyance from someone else is said to have a "voidable" title, as opposed to a crook who helps himself without inducing a conveyance at all. This equitable distinction is relevant under U.C.C. section 2-403(1): "A person with voidable title has power to transfer a good title to a good faith purchaser for value." Whether a person has voidable title depends upon whether the original owner assented to a transfer.⁶¹

An owner entrusts possession to the crook by delivery of the horse. Likewise, if a crooked seller sells the horse twice, and the first buyer leaves the horse in the possession of the crook or his or her agent, then the first buyer has entrusted possession to the wrongdoer. In either case, the test is only slightly different than that applicable to voidable title: title can be transferred to a buyer in ordinary course of business. A "buyer in ordinary course of business" under U.C.C. section 1-201(9) must also act "in good faith and without knowledge that the sale to him is in violation of the ownership rights" of another.

Most horse buyers are likely to be merchants as defined in U.C.C. section 2-104(1); and so they will have under U.C.C. section 2-103(1)(b) somewhat extended obligations of good faith. In exercising their duty to be honest, they are "chargeable with

⁵⁷ *E.g.*, *Kimberly & European Diamonds, Inc. v. Burbank*, 684 F.2d 363 (6th Cir. 1982).

⁵⁸ *See infra* notes 349-69 and accompanying text.

⁵⁹ *Cf.* *Anderson Contracting Co. v. Zurich Ins. Co.*, 448 So. 2d 37 (Fla. Dist. Ct. App. 1984) (no estoppel where owner does not voluntarily part with property).

⁶⁰ *J.C. Acree v. E.I.F.C., Inc.*, 502 S.W.2d 43, 48 (Ky. 1973); *Kentucky Home Mut. Life Ins. Co. v. Leitner*, 196 S.W.2d 421, 423 (Ky. 1946).

⁶¹ *See* U.C.C. § 2-403(1)(a)-(d); *see also* *American Standard Credit, Inc. v. National Cement Co.*, 643 F.2d 248, 268 (5th Cir. 1981); *Schrier v. Home Indemnity Co.*, 273 A.2d 248, 250 (D.C. 1971) ("A possessor of stolen goods, no matter how innocently acquired, can never convey a good title."); *Olin Corp. v. Cargo Carriers, Inc.*, 673 S.W.2d 211, 216 (Tex. Ct. App. 1984) (status as bona fide purchaser immaterial in determining original owner's right to recover value of its stolen goods); *J. T. Marvin v. Connelly*, 252 S.E.2d 562, 563 (S.C. 1979). *See generally* R. ANDERSON, *supra* note 15, at § 2-403:19; J. WHITE & R. SUMMERS, *supra* note 30, at § 3.11.

the knowledge or skill of merchants.”⁶² When these obligations are combined,⁶³ a horse merchant is precluded from buying a horse when the seller is known to have only a voidable title.⁶⁴

D. Risk of Loss

The U.C.C. clearly places the risk of loss with respect to goods not sent by carrier or held by a bailee on the buyer at the time of “receipt” (in the case of a merchant seller) or “tender of delivery” (in the case of a non-merchant seller)—all subject to a “contrary agreement.”⁶⁵ As previously noted, the transfer of possession of an animal with a delicate, risky physique is ordinarily the appropriate time to place the burden of ownership on the person who now controls the animal’s destiny.⁶⁶ The term “contrary agreement” appears often in the statute. Unlike the parallel provisions with respect to title under the Code, this agreement need not be express.⁶⁷ Risk of loss may pass well after title has passed,⁶⁸ and surely will often pass after the buyer has obtained an insurable interest in the horse.⁶⁹ Risk of loss is flexible, allowing for the possibility of shifting back the risk of loss in the event that there has been a failure to conform to the contract in a context giving rise to a right of rejection.⁷⁰ A well-reasoned Arkansas horse case⁷¹ gives some insight into the permutations available under those provisions.

An interesting variation on the passage of risk with possession involves the sale of a fractional interest in a stallion. The typical case is where there is never a change of possession—rather, the

⁶² U.C.C. § 2-104(3) (1972).

⁶³ See *Kimberly v. European Diamonds*, 684 F.2d at 366; *Sherrock v. Commercial Credit Corp.*, 277 A.2d 708 (Del. 1971); *Porter v. Wertz*, 439 N.Y.S.2d 105 (N.Y. 1981); *Bank of Utica v. Castle Ford, Inc.*, 317 N.Y.S.2d 542 (N.Y. App. Div. 1971); *Mattek v. Malofsky*, 1165 N.W.2d 406 (Wis. 1969).

⁶⁴ See, e.g., *Dempsey v. D.B. & M. Oil & Gas Co.*, 112 F. Supp. 408, 411 (E.D. Ky. 1953).

⁶⁵ U.C.C. § 2-509. R. ANDERSON, *supra* note 15, at § 2-401:12 states that there must be a contract before risk of loss passes.

⁶⁶ *Madaus v. November Hill Farm, Inc.*, 630 F. Supp. 1246 (W.D. Va. 1986).

⁶⁷ See U.C.C. § 1-201(3), which makes clear that various agreements may be implied. Acts which may not be sufficient to establish a contract for statute of frauds purposes (see, e.g., *infra* note 145) may imply this term of an established contract.

⁶⁸ See *supra* notes 44-64 and accompanying text.

⁶⁹ U.C.C. § 2-501.

⁷⁰ U.C.C. § 2-510.

⁷¹ *McKnight v. Bellamy*, 449 S.W.2d 706 (Ark. 1970).

horse is kept perpetually in the hands of a syndicate manager (the bailee). In this situation, absent a contrary agreement, risk of loss depends on the transfer of papers, or (as is usually the case) recognition by the syndicate manager that "right to possession of the goods" has been transferred.⁷² Extraordinary emphasis must therefore be placed on the syndicate agreement and the practices of the syndicate manager.

Even in the case of the sale of a whole animal, it may not be contemplated that the last act in the sale is the transfer of possession of the horse. Risk of loss may well pass where the appropriate intention is express or implied, even if the seller retains possession.⁷³ A further variation on the risk of loss involves situations where there is to be a continuing relationship between the parties to the transaction. In the case of newly syndicated stallions, the seller to the syndicate will ordinarily retain an interest in the horse and involve himself or herself in its promotion.

The Eighth Circuit in a recent case involving an Arabian stallion⁷⁴ focused on the risk of loss issue (under the rubric of impossibility of performance) in the context of a continuing relationship between the parties. It held, as would seem appropriate, that when the buyer "assumes the risk" of the stallion's death, the impossibility of continuing performance is irrelevant.⁷⁵ The court also wisely explained why the parties might enter into a contract "to promote a dead horse."⁷⁶ At least one court has explained the

⁷² U.C.C. § 2-509(2). There usually are no "negotiable" title papers under subsection (a), and store owners probably are never entitled to "possession" in any meaningful sense, unless use of a nomination in possession of "the goods." See *supra* notes 3-22 and accompanying text. For subsection (3), dealing with "non-negotiable" title papers, see U.C.C. §§ 2-503(4)(b) and 2-509(4).

⁷³ *Courtin*, 280 F.2d 345.

⁷⁴ *Arabian Score v. Lasma Arabian Ltd.*, 814 F.2d 529 (8th Cir. 1987).

⁷⁵ *Id.* at 531.

⁷⁶ *Arabian* argues that the decision to promote a dead horse is *per se* arbitrary. As indicated above, however, *Lasma's* un rebutted evidence shows that *Lasma Star Stallion, Inc.* and *Lasma* regularly promote deceased horses. This is done to enhance the owning entity's reputation and to increase the value of the stallion's progeny. Further, the language of paragraph 4 was not intended to cover the risk of death but of ineligibility for other reasons, such as infertility or substandard offspring

The parties to this agreement were sophisticated and, we assume, well-heeled business persons, however, and that which we find to be somewhat unusual may be commonplace to those who inhabit the wealthy world of the horsey set.

Id. at 532.

relationship between frustration of purpose, impossibility of performance, and warranty.⁷⁷

E. Unconscionability

Definitions of unconscionability vary depending upon the particular facts of each case. Because this topic has been broadly and intelligently discussed elsewhere,⁷⁸ the following analysis concentrates solely on the troubling nature of the unconscionability cases as applied to the horse business.

That task begins by suggesting that unconscionability is to be discussed across the boundaries of a particular cause of action or defense. U.C.C. section 2-302, after all, provides broadly that "[i]f the court as a matter of law finds the contract or any clause of the contract to have been unconscionable," appropriate relief is always available, adopting close to the same terms as the U.C.C.'s specific relief from implied warranty disclaimers.⁷⁹ This reflects the general rule of the Restatement of Contracts as well.⁸⁰

The U.C.C. treats disclaimers of ordinary Code remedies under a separate paragraph.⁸¹ Insofar as unconscionability relates to limitation of damages, its relationship to the issue of liquidated damage provisions should be noted.⁸² The Fifth Circuit in a non-horse case⁸³ wisely made many of the following points, but the court also accused other courts of "a misunderstanding of the difference between a warranty disclaimer and a limitation on consequential damage remedies."⁸⁴ While the U.C.C.'s treatment of remedy limitations establishes a different verbal standard—whether they preserve their "essential purpose"⁸⁵—this Article contends that it is

⁷⁷ *United States v. General Douglas MacArthur Senior Village, Inc.*, 508 F.2d 377 (2nd Cir. 1974).

⁷⁸ Cohan, *supra* note 3, at 683-86; Kropp & Landen, *supra* note 3; Scott, *Exculpatory Language in Horse Contracts: Ability to Control the Risk*, ANNUAL EQUINE LAW SEMINAR, Univ. of Ky. (1987); see also 3 R. ANDERSON, *supra* note 15, at § 2-313:113-19; Miller, *Auction, Exchange and Non-Private Sale of Horses and Interests in Horses*, SEMINAR ON EQUINE LAW, Univ. of Ky. (1986); Annotation, *Construction and Effect of Affirmative Provisions in Contract of Sale by Which Purchaser Agrees to Take Article "As Is," in the Condition in Which It Is, or Equivalent Term*, 24 A.L.R.3d 465 (1969).

⁷⁹ U.C.C. § 2-316.

⁸⁰ RESTATEMENT (SECOND) CONTRACTS § 208 (1979).

⁸¹ U.C.C. § 2-719(2).

⁸² See U.C.C. § 2-718; see also *Mattingly Bridge Co. v. Holloway & Son Const. Co.*, 694 S.W.2d 702 (Ky. 1985).

⁸³ *FMC Fin. Corp. v. Murphree*, 632 F.2d 413 (5th Cir. 1980).

⁸⁴ *Id.* at 420.

⁸⁵ U.C.C. § 2-719(2) (1972).

appropriate to consider both issues as part of the same analysis. Preventing unfairness and preserving the essential transaction are the same goals, and they are analyzed by considering the same facts. There is no misunderstanding at all. Typical non-horse cases refer to the analysis as being "substantially identical"—and a part of the same body of law as disclaimers of tort liability.⁸⁶ This approach is amply supported.⁸⁷

One separate provision, however, does set the U.C.C. apart from the common law. The U.C.C. mandates that express warranties and their disclaimers be construed as consistent when possible, but that limitations on such warranties shall not be effective when inconsistent with the express warranties themselves.⁸⁸ This presumption in favor of express warranties applies only to the express warranty cause of action. There is, nevertheless, a tendency by some courts to lean on such a presumption more generally, even in horse cases.⁸⁹

1. *Traditional Factors: Willfulness, Total Failure, and Public Policies*

One quite different approach to unconscionability issues has traditionally been to suggest that certain clauses, or clauses with certain effects, are unconscionable on their face. It has been held that when an "extraneous representation amounting to fraud" has been made, but the written contract clearly requires the buyer to assume the risk of the very problem about which the representation was made, the provision for exculpation will not be enforced.⁹⁰ Certain non-warranty categories of warranty-type claims are sometimes held to be facially unreasonable. Thus, some courts treat a total failure of consideration⁹¹ and fraud generally.⁹² "Total failure

⁸⁶ *E.g.*, *K-Lines, Inc. v. Roberts Motor Co.*, 541 P.2d 1378 (Or. 1975).

⁸⁷ R. ANDERSON, *supra* note 15, at §§ 2-302:32, 2-316:25; Roberts, "Unconscionability, Under U.C.C. § 2-302 or § 2-719(3), of Disclaimer of Warranties or Limitation or Exclusion of Damages in Contract Subject to U.C.C. Article 2 (Sales)", 38 A.L.R. 4th 25 (1983). Many of the common factors are set out in comment d to § 208 of RESTATEMENT (SECOND) OF CONTRACTS.

⁸⁸ U.C.C. § 2-316.

⁸⁹ *Caravello v. Pine Hollow Stud Farm, Inc.*, 402 N.Y.S.2d 451 (N.Y. App. Div. 1978).

⁹⁰ *Ferguson v. Cussins*, 713 S.W.2d 5, 6 (Ky. Ct. App. 1986).

⁹¹ *Vlases v. Montgomery Ward & Co.*, 377 F.2d 846, 850 (3rd Cir. 1967).

⁹² *Select Pork, Inc. v. Babcock Swine, Inc.*, 640 F.2d 147 (8th Cir. 1981) (seller failed to deliver breeds of pigs described in agreement so the limitation-of-remedies clause failed

of consideration" is close, even verbally, to "failure of essential purpose" in the remedy limitation statute, which suggests that this Article's right of rescission analysis⁹³ is also applicable.⁹⁴ The per se unconscionable cases reflect the common doctrine in tort law that one cannot by a contract disclaim one's liability for gross negligence or willful or wanton conduct.⁹⁵

It is not generally the modern rule, however, to take so rigid a view in striking contractual provisions to which parties have purposely agreed. For example, the Restatement (Second) of Torts⁹⁶ sets out a modern rule that is much more vague. Express assumptions of risks are stricken only when "contrary to public policy," such as in the case of public duties and disparities of bargaining power,⁹⁷ matters not so different from the horse contract considerations discussed in the Restatement (Second) of Contracts⁹⁸ and in the cause of action sections of this Article.⁹⁹ The rigid cases are sometimes distinguished by courts as evidencing situations "pregnant with evil," as in the horse case of *Rutter v. Arlington Park Jockey Club*,¹⁰⁰ or as reflecting some "element of a willful intent" to defraud.¹⁰¹

of its essential purpose and was unenforceable); *Sanfillipo v. Rarden*, 493 N.E.2d 991 (Ohio Ct. App. 1985) (clause limiting liability of real estate agent unenforceable when agent misrepresented the availability of utility services); *George Robberecht Seafood, Inc. v. Maitland Bros. Co.*, 255 S.E.2d 682 (Va. 1979) (covenants waiving warranties on disclaiming or limiting liabilities ineffective when contract was fraudulently induced); *Butcher v. Garrett-Enumclaw Co.*, 581 P.2d 1352 (Wash. Ct. App. 1978) (where misrepresentations were made as to sawmill's capabilities, contract clause disclaiming all warranties was unreasonable and unconscionable).

⁹³ See *infra* notes 434-78 and accompanying text.

⁹⁴ R. ANDERSON, *supra* note 15, at § 2-719:81, suggests it is closer to "substantial" on the spectrum than any other term.

⁹⁵ *Shelby Mut. Ins. v. Grand Rapids*, 148 N.W.2d 260 (Mich. Ct. App. 1967) (fire protection contract limiting liability for failure to provide adequate protection did not include failure to provide any protection); *Tessler & Son, Inc. v. Sonitrol Sec. Sys. Inc.*, 497 A.2d 530 (N.J. Super. Ct. App. Div. 1985) (court would enforce contract clause limiting liability for negligent conduct even in case of gross negligence, but not in case of willful and wanton misconduct); *Kalisch-Jarcho, Inc. v. City of New York*, 461 N.Y.S.2d 746, 749 (N.Y. 1983) ("[A]n exculpatory agreement . . . will not apply to exemption of willful or grossly negligent acts.").

⁹⁶ RESTATEMENT (SECOND) OF TORTS § 496B (1964).

⁹⁷ *Id.* at comments g, j.

⁹⁸ RESTATEMENT (SECOND) OF CONTRACTS § 208 comments c, d.

⁹⁹ See *infra* notes 392-98, 408-09, 421, 444, 501, 504, 524, 531, 549-50, 564-68, 567, 587 and accompanying text. See especially *infra* note 596 and accompanying text.

¹⁰⁰ 510 F.2d 1065, 1069 (7th Cir. 1975) (quoting *Schnackenberg v. Towle*, 123 N.E.2d 817, 819 (Ill. 1954)).

¹⁰¹ *Weisz v. Parke-Bernet Galleries, Inc.*, 351 N.Y.S.2d 911, 912 (N.Y. App. Div. 1974).

This Article cites dozens of cases below that recall the “banditry” history of the horse business,¹⁰² and so we would expect a somewhat higher tolerance here for the threshold of conscionability. Even in the case of what would otherwise seem the most basic fraud, in a horse case it can be held that “a merger clause containing a specific disclaimer of the very representations upon which a cause of action in fraud is predicated will preclude inquiry into the alleged representations.”¹⁰³ As a fraud case, *Fasig-Tipton Co. v. Jaffe* does not come within the U.C.C.’s express warranty presumption against remedy limitations—but, as a general notion, should not the burden be higher in a fraud case than in a mere warranty case? This theoretical conflict—the freedom to contract *versus* the urge to protect consumers—is a very deep one. It is one this Article will often pose, and not comfortably resolve.

No matter where along a spectrum a case falls, no rigid, unanalyzed cases can be ignored. In advising a client entering into a transaction, or when a transaction has come apart, one must keep in mind that there are certain situations that will strike a court as being unconscionable without engaging in lengthy analysis; *Alpert v. Thomas* is such a case.¹⁰⁴ The court implicitly held that where an express warranty has been made, an implied warranty cannot be disclaimed. The true teaching of the case is that the court was so shocked by the result of the transaction that it was set aside.

While most courts, even in horse cases, would not condone an actual, conscious fraud, it would be common to recognize that caveat emptor “is a commercial reality in respect of the transfer of used cars”¹⁰⁵ and horses. The relationship between a new and a used car is apt.¹⁰⁶ In each, the lemon feature may not be the seller’s fault. With a new car, it is at least the manufacturer’s fault, regardless of whether anyone else in the short chain of title knew anything about the defect. Cases about manufactured products are always distinguishable.

2. *Procedural Factors: Trade Usage, Power, and Form*

Another approach to conscionability with an equally distinct application to horses is procedural unconscionability—referring to

¹⁰² See *infra* notes 417-22 and accompanying text; see also, Miller, *supra* note 17, at 789.

¹⁰³ *Fasig-Tipton Co. v. Jaffe*, 449 N.Y.S.2d 268, 269 (N.Y. App. Div. 1982).

¹⁰⁴ 643 F. Supp. 1406 (D. Vt. 1986).

¹⁰⁵ *Greg Coats Cars, Inc. v. Kasey*, 576 S.W.2d 251 (Ky. Ct. App. 1978).

¹⁰⁶ See *infra* note 412 and accompanying text.

the general characteristics of the business, and the relations between the parties.¹⁰⁷ Some cases hold that the fact that all similar sellers disclaim warranties tends to make them seem "reasonable".¹⁰⁸ That is the usual reason to prove a custom.¹⁰⁹ Some cases make the more reasonable assumption that such generality (especially in an oligopolistic industry) is evidence that the purchasers are not in a position to bargain freely.¹¹⁰ The former principle is usually applied in animal cases.¹¹¹

The opposite should be the result if there *in fact* is "an absence of meaningful choice" and no "availability of alternative forms" of doing the business.¹¹² Thus, if farmers cannot remain in business without buying certain pesticides, and if all pesticide companies disclaim meaningful responsibility, unconscionability may be found.¹¹³ Otherwise, the growing of corn may end to the detriment of the public. Absence of meaningful choice is one procedural example of unequal bargaining power, which requires an individualized analysis, and is the usual formulation in unconscionability matters in both tort and contract.¹¹⁴

Does either sort of procedural context exist in any transaction involving horses? Does either (a) familiarity with common practices suggest reasonability or (b) does uniformity of practices exclude real choices? These are the tantalizing questions raised by *Travis*

¹⁰⁷ See J. WHITE & R. SUMMERS, *supra* note 30, at 204.

¹⁰⁸ See *Posttape Assoc. v. Eastman Kodak Co.*, 450 F. Supp. 407, 409 (E.D. Pa. 1978) (limitation of remedies common in sale of motion picture film).

¹⁰⁹ Miller, *supra* note 17, at 800-01.

¹¹⁰ *Durham v. CIBA-Geigy Corp.*, 315 N.W.2d 696, 700 (S.D. 1982) ("[P]urchasers of pesticides are not in position to bargain with chemical manufacturers for contract terms.").

¹¹¹ *Sessa*, 427 F. Supp. at 766 (Guarantee of horses "not a common thing."), *aff'd*, 568 F.2d 770 (3d Cir. 1978); *Torstenson v. Melcher*, 241 N.W.2d 103 (Neb. 1976) (catalog guarantee is only expected warranty in cattle business); *Kincheloe v. Gledmeier*, 619 S.W.2d 272 (Tex. Civ. App. 1981) (local custom of as is sales at cattle auctions sufficient to exclude or modify warranty of merchantability).

¹¹² *Block v. Ford Motor Credit Co.*, 286 A.2d 228, 233 (D.C. 1971) (lack of alternatives in consumer credit).

¹¹³ *CIBA-Geigy Corp.*, 315 N.W.2d at 700. *But see* *Fleischmann Distilling Corp. v. Distillers Co.*, 395 F. Supp. 221, 232 (S.D.N.Y. 1975) (New York law will find unconscionability only where lack of meaningful choice is combined with contract terms favorable to one party); *Architectural Aluminum Corp. v. Macarr, Inc.*, 333 N.Y.S.2d 818, 823 (N.Y. Sup. Ct. 1972) (common industry practice of limiting remedy not unconscionable). As to the "business-practices-of-the-community" test, see *Tulowitzki v. Atlantic Richfield Co.*, 396 A.2d 956, 960 (Del. 1978) (inquiring is comparison with contemporary local business practice).

¹¹⁴ RESTATEMENT (SECOND) OF TORTS, *supra* note 96; RESTATEMENT (SECOND) OF CONTRACTS, *supra* note 98.

v. *Washington Horse Breeders Association, Inc.*¹¹⁵ Is there really an innocent, oppressed “new buyer,”¹¹⁶ as the Washington Court of Appeals thought? The author suspects that there are very few inexperienced consumers in the horse business.¹¹⁷ Buyers of race-horses, serious show horses and breeding animals ordinarily are not neophytes—or if they are neophytes they are ordinarily represented by experienced bloodstock agents and/or veterinarians.

Procedural unconscionability can focus as well on the form in which the potentially offending paragraph appears in the contract. With respect to disclaimers of implied warranties, conspicuous display of the disclaimer is specifically required by U.C.C.¹¹⁸ The clarity with which the purchaser (presumably especially the new buyer) actually understands what he or she is facing will alter the likelihood that the clause will be upheld under the general notion of “absence (or presence) of meaningful choice.”¹¹⁹

F. Auctions

One of the recurring themes in this Article is that the venue of the horse sale will influence the results of many controversies. Horses are often sold at auctions, and those auctions carry with them unique practices that vary widely among the breeds.

1. *Common Characteristics: Public Functions*

All auctions have distinct characteristics. One characteristic in the horse business is that all auctions are for the most part governed by similar legislation—generally embodied in the venue’s Uniform

¹¹⁵ 759 P.2d 418 (Wash. 1988). For a detailed discussion of this case, see *infra* notes 214-18 and accompanying text.

¹¹⁶ *Travis v. Washington Horse Breeders Association, Inc.*, 734 P.2d 956 (Wash. Ct. App. 1987).

¹¹⁷ In another context *Forbis v. Reilly*, 684 F. Supp. 1317 (W.D. Pa. 1988) analyzes such a claim. *Id.* at 1323. It is clear that where deals are between business persons, involving purely a commercial transaction, there will be a greater likelihood to approve the terms of an agreement. *See, e.g.*, *FMC Finance Corp. v. Murphree*, 632 F.2d 413 (5th Cir. 1980). The opposite rule applies “to contracts between consumers and skilled corporate sellers.” *Id.* at 420. As the law develops, cases are sometimes decided that involve such disparities of position, and general rules are stated—without suggesting that they may not apply between business people. Such a case is *Ford Motor Company v. Mayes*, 575 S.W.2d 480 (Ky. Ct. App. 1979), which has excessively influenced the development of equine law (because the opinion was written by a respected judge in Kentucky where so many equine cases are decided).

¹¹⁸ U.C.C. § 2-316.

¹¹⁹ *Block*, 286 A.2d at 233.

Commercial Code. The Code provisions are more or less clear, and have recently been annotated.¹²⁰

On a deeper level, all auctions bear the common characteristic that they involve sales "in which the price is determined by the competition of bidders."¹²¹ That is, a market-driven price is assured by the simultaneous presence of many sellers and many buyers—including non-breeders and non-racers. They share this characteristic with securities trading markets¹²² and commodity futures trading markets.¹²³

Auctions create liquidity for sellers and an open price-setting mechanism, which in turn helps set the price of horses sold off the markets, and collateral appraisals for loans made from day to day. Horse auctions differ from the organized markets for the sale of securities and commodities futures in that sales of horses occur privately to a far larger degree; private trades in these other two industries are relatively rare. Nonetheless, auctions provide a focus for participants in each horse industry (and prospective partici-

¹²⁰ Annotation, *Auction Sales Under U.C.C. Section 2-328*, 44 A.L.R. 4th 110 (1986); see also R. ANDERSON, *supra* note 15, at § 2-328:5.

¹²¹ A. CORBIN, *CORBIN ON CONTRACTS* § 108 (1963); see also *Backus v. MacLaury*, 106 N.Y.S.2d 401, 404 (N.Y. App. Div. 1951) ("The purchase was made at an auction sale and not by negotiation between the parties. At such sale the price is determined by competitive bidding."), *appeal denied*, 107 N.Y.S.2d 568 (N.Y. App. Div. 1951).

¹²² The economic function of the trading markets is to create liquidity—a market characteristic that enables investors to dispose of or purchase securities at a price reasonably related to the preceding price. For the sale of a new issue of securities to succeed, prospective purchasers must have a reasonable assurance of liquidity in the market for the security. Thus, the success of new-issue markets is dependent on the effectiveness of trading markets. In addition, since trading markets are a price setting mechanism, they facilitate the use of securities as collateral for loans, determine the price at which a company is able to issue additional securities, and establish a basis for the valuation of securities for taxation and other purposes.

T. LOSS, *FUNDAMENTALS OF SECURITIES REGULATION* 667-68 (1983).

¹²³ A central purpose of futures markets, based upon Congressional and regulatory policy, is to provide a means for commercial enterprises to hedge or price their business transactions. And yet, it is highly unlikely that the commercial world's need for futures contracts at any given time will be exactly balanced . . . Commodity investors are admitted access to these markets in order to fill the demand for futures contracts even when no commercial firm has an interest in doing so, and to "make a market" when the *commercial* users are, for one reason or another, on the sidelines. [A user or seller of a product] cannot realistically expect that another commercial firm will always be ready, willing, and able to assume the other side [of a sale, and so a seller] welcomes the constant presence in the market of commodity investors who can fulfill its needs quickly and efficiently.

P. JOHNSON, *COMMODITIES REGULATION* § 1.116 (1982).

pants) even if they are not personally present at the auction. In short, the auctions have a public function that deeply affects broader segments of the economy.

Such considerations were recognized early.¹²⁴ Because of an auction's public function, "sharp practice" is not permitted at the public auction—that is, any practice that "could not have been done except to deceive somebody—if nobody else, the other bidders at the sale."¹²⁵ Similarly, the creation of an atmosphere not favorable to spirited bidding can cause a sale to be set aside.¹²⁶ Only because of the standard U.C.C. provision permitting it is the owner of the horse entitled to bid on the horse.¹²⁷ The common law rule was that "the purchaser has the right to repudiate" his or her bid at auction where the owners of property had "buy-bid" at the auction.¹²⁸ Thus, auction sales are often held to a higher standard than face-to-face transactions. The fall of the hammer does not create a contract precisely "the same as the acceptance of any other offer."¹²⁹

2. *The Auctioneer: Public Duties*

Another undeniable fact is that every auction introduces a new actor into the transaction, viz., the auctioneer. This has two effects. First, the auctioneer can create implied liabilities for the seller.¹³⁰ And second, there is the possibility of a second defendant.¹³¹

¹²⁴ As in *Robenson v. Yann*, 5 S.W.2d 271, 274 (Ky. 1928) ("Auction sales are of public concern, and the law will not tolerate any . . . unfair . . . conduct in such sales.").

¹²⁵ *Id.* at 273.

¹²⁶ *Kellerman v. Dedman*, 411 S.W.2d 315 (Ky. 1967) (assault and battery committed upon auctioneer).

¹²⁷ U.C.C. § 2-328(4).

¹²⁸ *Burdon v. Seitz*, 267 S.W. 219, 220 (Ky. 1924).

¹²⁹ *Richardson*, 260 S.W. at 129.

¹³⁰ Annotation, *Implied or Apparent Authority of Agent Selling Personal Property to Make Warranties*, 40 A.L.R. 2d 285 (1955) (particularly at § 10); see also *infra* notes 347-69 and accompanying text; cf. *Belmont's Ex'r v. Talbot*, 51 S.W. 588, 588 (Ky. 1899) ("There being no custom to warrant at this public sale, it may be that a warranty by the auctioneer would not bind Mr. Belmont.").

¹³¹ The auctioneer may incur personal liability. See *infra* notes 287-346 and 417-22 and accompanying text; Annotation, *Liability of Auctioneer or Clerk to Buyer as to Title, Condition, or Quality of Property Sold*, 80 A.L.R. 2d 1239 (1961); Annotation, *Personal Liability of Auctioneer to Owner or Mortgagee for Conversion*, 96 A.L.R. 2d 208 (1964); *McElroy v. Long*, 170 F.2d 345, 347 (5th Cir. 1948) ("The fact that he is known to a bidder to be an auctioneer, by profession selling as an agent for others, is of no import and is no notice that he may not be selling his own property."); *Barrett v. Rumeliote*, 126 N.W.2d 322 (Iowa 1964) (factor held liable is sale of pigs); *Universal C.I.T. Credit Corp.*

It is perhaps due to a convergence of the public function of an auction and the introduction of a third party in the form of the auctioneer that auctioneers are an exception to the general rule that one person cannot serve as the agent of competing parties.¹³² While the acceptance of dual agency can be attributed to the imputed consent of the parties, it can also be seen as the auctioneer's performance of a public function.¹³³ Justice Cardozo said that partners have the highest fiduciary duties known to the law.¹³⁴ He did not consider auctioneers.

3. *Variations: Usages of Trade*

The common public characteristic of all auctions must be contrasted with the equally important fact that auctions vary, both as to the published conditions of the sale and as to the unwritten practices that occur. Both types of variations fit into the language of the U.C.C., which provides for passage of title to occur at the fall of the hammer "or in [any] other customary manner."¹³⁵ A written custom in one Tennessee horse auction was to allow all sellers to refuse the highest bid if that option was exercised before the horse was led out of the ring.¹³⁶ In that case, even the improper depression of the purchase price by the auctioneer was waived when the seller did not object promptly, but let the horse walk out of the ring. In an older Iowa case, the bidders (rather than the seller) were given the option to purchase either the horse they bid on, or two horses of a team at twice the "knock down" price.¹³⁷ According to custom, only after the hammer had fallen, and after the option was exercised, was there a binding deal. In that case, after the two-horse option was elected, a breach of warranty as to

v. State Farm Mut. Auto. Ins. Co., 493 S.W.2d 385 (Mo. 1973) (auctioneer liable for breach of warranty of title in automobile sale); Itoh v. Kimi Sales, Ltd., 345 N.Y.Supp.2d 416, 420 (N.Y. Civ. Ct. 1973) ("There may be circumstances . . . where the auctioneer may be liable for a breach of warranty."), *overruled on other grounds*, 494 N.Y.S.2d 598, 600 (N.Y. App. Div. 1985); Gessler v. Winton, 145 S.W.2d 789 (Tenn. Ct. App. 1940) (auctioneer liable for breach of warranty of title in sale of mules). See sections II(A) and III(C) of this Article.

¹³² R. ANDERSON, *supra* note 15, at § 2-201:88.

¹³³ For a discussion of the unique treatment given to auctioneers as a result, see *infra* notes 221-49 and 296-316 and accompanying text.

¹³⁴ Meinhard v. Salmon, 164 N.E. 545, 546 (N.Y. 1928).

¹³⁵ U.C.C. § 2-328(2) (1972).

¹³⁶ Bradshaw v. Thompson, 454 F.2d 75 (6th Cir. 1972), *cert. denied*, 409 U.S. 878 (1972).

¹³⁷ Lahiff v. Keville, 169 N.W. 751, 752 (Iowa 1918).

one of the horses was discovered. Rescission of the entire transaction was allowed, because the custom adopted by that auction allowed the purchaser's "intention" to be a fact that "dominated the question of severability."¹³⁸

More important customs at particular auctions vary as to the question of warranties. It is apparently the custom in Ontario that purchasers have the absolute right to reject horses purchased at auction based on warranty-type defects, irrespective of the warranties given.¹³⁹ This rule can be contrasted with the old-time Kentucky custom-based rule that, even if an auctioneer tried to make a warranty, it was ineffective.¹⁴⁰

G. *Statute of Frauds*

The typical horse sale transaction raises statute of frauds questions. Horses are often sold (in a face-to-face transaction) with a shake of hands, and (at auction) with a nod of the head and a fall of the hammer. U.C.C. section 2-201 provides that contracts for the sale of goods for a price of five hundred dollars or more are not enforceable, but for listed exceptions, "unless there is some writing sufficient to indicate that a contract for sale has been made between the parties and signed by the party against whom enforcement is sought or by his authorized agent or broker."¹⁴¹

Much case law has developed with respect to the adequacy of the writing. Standard concepts suggest that almost any memorandum that acknowledges the existence of a contract will suffice, including one that intends to terminate contractual relations.¹⁴² An interesting question arises as to whether the execution of horse registration papers satisfies the statute of frauds. It has been suggested elsewhere that the "acid test" of the efficacy of registration papers, apart from their use in breeding and racing, is their usefulness as a "memorandum" within the statute of frauds.¹⁴³ A recent case in the standardbred industry suggests that execution of

¹³⁸ *Id.* at 752.

¹³⁹ *Gallant v. Hobbs*, 37 O.R.2d 1 (1982).

¹⁴⁰ *Belmont's Ex'r*, 51 S.W. at 588 ("There being no custom to warrant at this public sale, it may be that a warranty by the auctioneer would not bind Mr. Belmont.").

¹⁴¹ U.C.C. § 2-201(1).

¹⁴² *Angle v. Haas*, 251 S.W.2d 290, 294 (Ky. 1952); see also R. ANDERSON, *supra* note 15, at §§ 2-201:59 - 78 and :95.

¹⁴³ *Miller*, *supra* note 17, at 825. It is submitted that the efficacy will depend on the custom of the particular horse business as to the meaning of registration papers.

the registration papers is adequate under the statute.¹⁴⁴ On the other hand, a recent horse case has held that the execution of a conditional application for mortality insurance does not adequately indicate that the sale has occurred.¹⁴⁵

U.C.C. section 2-201(2) allows the statute to be avoided by a writing of the party claiming under the contract, if the other party who is a merchant does not object. U.C.C. section 2-201(3)(c) recognizes an exception that solves most problems in the horse business: once the horse has been paid for and accepted, or received and accepted, the statute of frauds no longer provides a bar to enforcement of the oral contract. This might include any "act or conduct by the buyer manifesting his assent to becoming the owner of specific goods."¹⁴⁶ Authorities vary on whether post payment of the purchase price removes the contract from the statute,¹⁴⁷ apparently depending on whether the judge or writer shares the policy views underlying its adoption. One pre-U.C.C. horse case¹⁴⁸ holds that "a delivery of a part of the goods satisfies the statute" of frauds.¹⁴⁹ A more recent horse case rejects a host of proposed exceptions and memoranda, including holding (but not endorsing) a check.¹⁵⁰

Ordinary "acceptance" under the U.C.C. requires far more than is required to satisfy the statute of frauds.¹⁵¹ For that reason, most auction houses require that buyers sign an acknowledgment of purchase before much time elapses. As to sellers at auction, there are usually consignment contracts that make a sale contingent only upon the receipt of a final bid—which the auction company is allowed to receive as the seller's agent. In many auction sales,

¹⁴⁴ *Muslin v. Frelinghuysen Livestock Managers*, 777 F.2d 1230, 1232 (7th Cir. 1985).

¹⁴⁵ *McClure v. Duggan*, 674 F. Supp. 211, 218 (N.D. Tex. 1987).

¹⁴⁶ *Hanson v. Linley*, 470 P.2d 78 (Colo. Ct. App. 1970), *rev'd on other grounds*, 477 P.2d 453 (Colo. 1970); *see also Norton v. Lindsay*, 350 F.2d 46 (10th Cir. 1965) (oral contract valid in sale of horse); *Greer v. Williams*, 375 So. 2d 333 (Fla. Dist. Ct. App. 1979) (damages on oral contract in horse sale); *Strauss v. West*, 216 A.2d 366 (R.I. 1966).

¹⁴⁷ R. ANDERSON, *supra* note 15, at § 2-201:192; J. WHITE & R. SUMMERS, *supra* note 30, at § 2-5. *See also* *In re Flying W Airways, Inc.*, 341 F. Supp. 26 (E.D. Pa. 1972) and *Presti v. Wilson*, 348 F. Supp. 543 (E.D.N.Y. 1972) for further complication on this issue: *where* performance will count?—and does the payment refer adequately to the contract terms?

¹⁴⁸ *Kendrick v. Hochradel*, 132 N.W. 521 (Mich. 1911).

¹⁴⁹ *Id.* at 522.

¹⁵⁰ *Presti v. Wilson*, 348 F. Supp. 543 (E.D. N.Y. 1972).

¹⁵¹ *See infra* notes 433-78 and accompanying text. For a general treatment of "receipt and acceptance" under the statute of frauds, *see* R. ANDERSON, *supra* note 15, at § 2-201:173-:189.

the conditions of sale provide that the auctioneer is the agent of both parties for the execution of the memorandum of purchase. This is recognized as an exception to the general prohibition against agents acting for both parties.¹⁵²

In the ordinary case, the appointment of an agent is done orally,¹⁵³ and yet the statute gives such an agent the right to sign the confirmatory writing.¹⁵⁴ The role of the agent is particularly interesting with respect to a further exception listed in the U.C.C. allowing the enforceability of the writing where "the party against whom enforcement is sought admits in his pleading, testimony or otherwise in court that a contract for sale was made."¹⁵⁵ It is correctly held that the judicial admission of the agent acting in the transaction is the equivalent of the party's admission.¹⁵⁶ Persons who seek to hide behind the statute of frauds need to beware of honest agents.¹⁵⁷

In addition, there are many common law exceptions to the statute of frauds. U.C.C. section 2-202 provides that the exceptions are those "otherwise provided *in this section*;" but courts often go beyond the statute. The statute of frauds has never been a barrier to causes of action for fraud (i.e., a knowing false representation that is relied on) or equitable estoppel (a commitment made apart from the contract).¹⁵⁸

McClure v. Duggan,¹⁵⁹ for example, holds that the statute of frauds does not bar a claim sounding in fraud when the related oral contract was unenforceable under the statute and where the false statement was not purely promissory. In this case, a statement

¹⁵² *Id.* at § 2-201:88; see also *supra* notes 120-39 and accompanying text.

¹⁵³ In some jurisdictions, however, the agent's authority must also be in writing. See, e.g., *Wilcher v. McGuire*, 537 S.W.2d 844, 847 (Mo. Ct. App. 1976) (auctioneer's insertion of seller's name on sale contract did not satisfy statute of frauds requirement that authorization to make contract be in writing).

¹⁵⁴ See R. ANDERSON, *supra* note 15, at § 2-201:86; see also CAL. COM. CODE § 2210(1) (West 1964); KY. REV. STAT. ANN. § 371.010 (Michie/Bobbs-Merrill 1987) [hereinafter K.R.S.]. But see *Wilcher*, 537 S.W.2d at 847.

¹⁵⁵ U.C.C. § 2-201(3)(b).

¹⁵⁶ *Roth Steel Products v. Sharon Steel Corp.*, 705 F.2d 134, 142 (6th Cir. 1983) (admission in deposition by sales manager); *Alter & Sons, Inc. v. United Eng's & Constructors*, 366 F. Supp. 959 (S.D. Ill. 1973) (admission through testimony of sales representative and project superintendent).

¹⁵⁷ See generally R. ANDERSON, *supra* note 15, at §§ 2-201:208-223.

¹⁵⁸ J. WHITE & R. SUMMERS, *supra* note 30, at 56; R. ANDERSON, *supra* note 15, at § 201:233; RESTATEMENT (SECOND) TORTS § 530 comment c (1976); see also *Duval v. Steele*, 453 S.W.2d 14 (Ky. 1970).

¹⁵⁹ 674 F. Supp. 211 (N.D. Tex. 1987).

induced the purchaser to abandon the contract, which was contingent on approval by the buyer's veterinarian. The contrary result, said the court, would be reached in the event that the plaintiff "merely alleged that the seller made an oral promise without the intention of performing it."¹⁶⁰ The defense of promissory estoppel (an oral contract plus reliance) is more problematic.¹⁶¹

Finally, it should be noted that the U.C.C.'s statute of frauds, like the traditional statute of frauds, provides solely a defense for persons seeking to avoid an oral contract. The "contract" is still in existence, but simply may or may not be enforceable.¹⁶² Any number of consequences can arise in this situation. The tort of interference with contractual relations¹⁶³ may be available under proper circumstances, though "the greater definiteness of the other's expectancy" is one of the factors weighing against enforcement of the tort.¹⁶⁴ In addition, where ordinary contract remedies may not be available, appropriate circumstances may dictate the enforcement of a "constructive trust."¹⁶⁵ The court in *In re Perret*¹⁶⁶ must have considered equitable principles when it enforced an oral contract for the purchase of four stallion nominations, with no writing whatever.¹⁶⁷

H. Parol Evidence Rule

In the horse business, application of the parol evidence rule is often a serious matter. Its application is frequently related to the

¹⁶⁰ *Id.* at 221. *But see* RESTATEMENT (SECOND) TORTS § 530; RESTATEMENT (SECOND) CONTRACTS § 166 comment c (1981). As to mistake, see RESTATEMENT (SECOND) CONTRACTS § 156 (1981).

¹⁶¹ *Compare* Finney Co. Ins. v. Monarch Const. Co., 670 S.W.2d 857 (Ky. 1984) (acceptance of bid in construction setting did not create enforceable contractual relationship) and C.G. Campbell & Son, Inc. v. Comdeg Corp., 586 S.W.2d 40 (Ky. Ct. App. 1979) (statute of frauds bars enforcement of oral agreement to use construction bid) with Meade Const. Co. v. Mansfield Commercial Elec. Inc., 579 S.W.2d 105 (Ky. 1979) (fairness and equity should enforce bid agreement). See generally R. ANDERSON, *supra* note 15, at §§ 2-201:36-37; Roeder, *Commercial Law*, 69 Ky. L.J. 517, 518 (1980-81) (*Campbell* decision "makes no sense.").

¹⁶² *Calloway v. Calloway*, 707 S.W.2d 789 (Ky. 1986) (agreement regarding property in divorce proceedings).

¹⁶³ RESTATEMENT (SECOND) OF TORTS § 766a (1979).

¹⁶⁴ *Id.* at § 767 comment e.

¹⁶⁵ *Langford v. Sigmon*, 167 S.W.2d 820 (Ky. 1943); see also *May v. May*, 223 S.W.2d 3612 (Ky. 1949) (constructive trust growing out of an oral agreement).

¹⁶⁶ 67 Bankr. 757 (Bankr. N.D.N.Y. 1986).

¹⁶⁷ *Id.* at 767, 777. An alternative explanation may be that the sale of a nomination was not a sale at all, but some other form of transaction not covered by the statute of frauds.

enforceability of written disclaimers of liability.¹⁶⁸ In a typical transaction, the written contract or the conditions of sale of the auction will provide that all implied warranties (and sometimes all express warranties outside the writing) are disclaimed. But at the time of or before the execution of the contract, or in the stable area where buyers and sellers meet before the auction, the seller or his or her agent has made what might be construed to be an express warranty: Another typical fact pattern involves the auctioneer making statements during the course of the auction, either "over the loudspeaker before the sale,"¹⁶⁹ or during a lull in the bidding.¹⁷⁰ In another scenario, printed materials circulate to prospective bidders.¹⁷¹ In other transactions, less typical but not unheard of, sellers of horses will make promises as to further performance after the auction or sale that are not reduced to writing. In each case, the writing is either silent on the subject of the oral warranty or promise—or explicitly disclaims or contradicts it.

In the horse business, as elsewhere, judicial opinions in this area are not consistent. Oral statements are enforced from time to time despite apparently complete writings reflecting the deal.¹⁷² On the other hand, the parol evidence rule has been rigidly enforced to prevent the enforcement of promises, even those that might be stretched to be called fraud, where the buyer was not "misled as to the actual words and terms of the agreement he executed, even though he himself could not read them, or even [though the seller] misled him as to his existing intentions."¹⁷³ While this result may find support in some instances,¹⁷⁴ usually it does not. Ordinarily, conscious fraud is an exception to the parol evidence rule,¹⁷⁵ at least where the fraud is "collateral," and not merely "promissory."¹⁷⁶ The same rule applies to "mistake."¹⁷⁷

¹⁶⁸ See *supra* notes 78-119 and accompanying text.

¹⁶⁹ *Slyman v. Pickwick Farms*, 472 N.E. 2d 380, 383 (Ohio Ct. App. 1984).

¹⁷⁰ *Miron v. Yonkers Raceway*, 400 F.2d 112, 114 (2d Cir. 1968).

¹⁷¹ *McKnight*, 449 S.W.2d 706.

¹⁷² See *id.* at 706-707; *Slyman*, 472 N.E.2d at 382; *Arine v. McAmis*, 603 P.2d 1130 (Okla. 1979) (oral representations of mare's fertility).

¹⁷³ *Feinberg v. Leach*, 243 F.2d 64, 67 (5th Cir. 1957).

¹⁷⁴ See, e.g., *Dreyer-Whitehead & Goedecke, Inc. v. Land*, 216 S.W.2d 413 (Ky. 1948) (sale of heavy equipment to knowledgeable buyer). This case also notes the fairly obvious point that implied warranties are also excluded by an "as is" clause. *Id.* at 414.

¹⁷⁵ R. ANDERSON, *supra* note 15, at § 2-202:55; see also RESTATEMENT (SECOND) OF CONTRACTS § 214(d) (1981).

¹⁷⁶ Cf. *McClure*, 674 F. Supp. at 245.

¹⁷⁷ R. ANDERSON, *supra* note 15, at § 2-202:59. Professor Anderson says that except for "partial" modifications under U.C.C. § 2-202, parol evidence rules remain intact. *Id.* at § 1-103:34. See also RESTATEMENT (SECOND) OF CONTRACTS § 214(d).

In addition, it is always the rule that if a word or expression is indefinite or ambiguous, the surrounding circumstances (including conversations) are admissible to construe it.¹⁷⁸ Parol evidence can be used to tie a particular word to an express warranty.¹⁷⁹ For example, in *Lundberg v. Church Farm, Inc.*,¹⁸⁰ the statement that a stallion "stands" at a particular farm was explained by conversations among the parties to amount to a representation that there was a binding commitment to keep the horse at the specified farm. The opinion is probably wrong in its interpretation of the word, but the application of the parol evidence rule is undoubtedly correct. Even the existence of an ambiguity, or the meaning of an apparently unambiguous expression, may call for extraneous evidence for interpretation.¹⁸¹ These rules cannot be stretched to "contradict" an explicit term.¹⁸²

The parol evidence rule is inapplicable as well where the testimony is offered to show whether the parties intended to form a contract.¹⁸³ Even more obviously, proof of custom¹⁸⁴ and any other facts that give rise to an implication of a term or contract¹⁸⁵ are outside the rule.¹⁸⁶ In the case of *Sagner v. Glenangus Farms*,

¹⁷⁸ R. ANDERSON, *supra* note 15, at § 2-202:61; *see also* *Rudd-Melikian, Inc. v. Merritt*, 282 F.2d 924, 928 (6th Cir. 1960) (contract to be considered as a whole and circumstances of execution can be considered without violating parole evidence rule); *Billips v. Hughes*, 259 S.W.2d 6, 7 (Ky. 1953) (parties' intent given great weight in determining meaning of ambiguous contract); *Stubblefield v. Farmer*, 165 S.W.2d 556, 557 (Ky. 1942) ("[A]mbiguities may be explained by parol evidence."), *opinion supplemented*, 180 S.W.2d 405 (Ky. 1944); *Lincoln Nat'l Life Ins. v. Means*, 95 S.W.2d 264, 268 (Ky. 1936) (consider contract language in light of all circumstances), *cert. denied*, 299 U.S. 578 (1936).

¹⁷⁹ *See* R. ANDERSON, *supra* note 15, at § 2-313:27. Obviously, parol evidence is usually necessary in showing the knowledge of the seller of a buyer's needs. *Id.* at § 2-315:66.

¹⁸⁰ 502 N.E.2d 806 (Ill. App. Ct. 1986), *appeal denied*, 508 N.E.2d 729 (Ill. 1987).

¹⁸¹ *See* *A.L. Pickens Co. v. Youngstown Sheet & Tube Co.*, 650 F.2d 118, 120 (6th Cir. 1981) (Extraneous evidence used if term is "reasonably subject to more than one interpretation."); *Belcher v. Elliott*, 312 F.2d 245, 247 (6th Cir. 1962) (Extraneous evidence used if a contract term does not "clearly express" parties' intent.); RESTATEMENT (SECOND) OF CONTRACTS § 212 comments b and c (1981).

¹⁸² *KFC Corp. v. Darsam Corp.*, 543 F. Supp. 222 (W.D. Ky. 1982) (parol evidence may not vary or contradict writing); *Anderson v. Britt*, 375 S.W.2d 258 (Ky. 1963) ("[P]arol evidence may not be admissible to contradict or vary provisions of writing."); *Goldstein v. McDonald*, 3 S.W.2d 200 (Ky. 1928) (terms of written contract expressing parties' intent cannot be varied by parole evidence). *See generally* R. ANDERSON, *supra* note 15, at § 2-202:48.

¹⁸³ R. ANDERSON, *supra* note 15, at § 2-202:47.

¹⁸⁴ *Id.* at § 2-202:67.

¹⁸⁵ *Id.* at § 2-202:53.

¹⁸⁶ The RESTATEMENT (SECOND) OF CONTRACTS § 214, *supra* note 175, discusses these and the related rules.

Inc.,¹⁸⁷ proof of custom, and the meaning of a provision in the syndicate agreement that was copied verbatim from the syndicate agreements of other stallions, were used to give meaning to the syndicate agreement under consideration.

The more important inquiry in the horse business is whether the parol evidence rule applies at all. It must be determined whether the contract involved is an "integrated agreement" or an integration intended to express all the terms of the agreement between the parties.¹⁸⁸ If "the parties did not assent to the writing as a complete and accurate integration of their contractual relations," the parol evidence rule does not apply.¹⁸⁹ In determining whether an integrated agreement has been made, the parol evidence rule does not apply and "any competent evidence is admissible."¹⁹⁰ The otherwise unsatisfactory case of *Alpert*¹⁹¹ properly applied these rules to the case of a stallion that would not breed.¹⁹²

The doctrine would seem particularly applicable in the context of auctions, where there is much conversation in the stable area before the auction occurs, and where the auctioneer "puffs" before or during the bidding.¹⁹³ Apparently most conditions of sale at auctions do not explicitly prohibit deals apart from their own terms. After all, the bidder only impliedly accepts the conditions of sale by entering his or her bid.¹⁹⁴ To the contrary, however, is the rule stated in *Travis*:¹⁹⁵

While we need not rule on the vitality of *Berg v. Stromme* in other contexts we decline to extend it to auctions. There are in

¹⁸⁷ 198 A.2d 277 (Md. 1964).

¹⁸⁸ See RESTATEMENT (SECOND) OF CONTRACTS § 213 (1981); R. ANDERSON, *supra* note 15, at § 2-202:36.

¹⁸⁹ *Johnson v. Dalton*, 318 S.W.2d 415, 417 (Ky. 1958).

¹⁹⁰ *Murphy v. Torstrick*, 309 S.W.2d 767 (Ky. 1958).

¹⁹¹ 643 F. Supp. 1406 (D. Vt. 1986).

¹⁹² *Id.* at 1415.

¹⁹³ See cases cited *infra* notes 514-61.

¹⁹⁴ RESTATEMENT (SECOND) OF CONTRACTS § 28, comment e (1981):

The terms on which goods are to be sold at auction are often made known in advertisements or catalogues or posted at the place where the auction is to be held. When the goods are put up, the auctioneer commonly refers to such terms, and sometimes he announces a modification of the published terms. Ordinarily bidders are or should be aware of terms so published or announced. A bid need not repeat such terms; it is understood as embodying them. Hence the bidder is held to the published or announced terms, even though he may have neglected to read them or may have arrived at the auction after the announcement was made. Theoretically, a bidder could make an offer on terms different from those announced, but bidders seldom or never do so.

¹⁹⁵ 759 P.2d 418 (Wash. 1988)

auctions no negotiations As sellers state, part of the economic rationale of an auction is to avoid face-to-face negotiations. It is a cost-saving device in which face-to-face negotiations, except as to price, are not engaged in by the parties.¹⁹⁶

The author of this Article believes that the "true economic rationale of an auction" is not that suggested by the Washington court,¹⁹⁷ although it is a close question. Private oral deals undoubtedly create some dislocation leading to an imperfect market, quite different than the markets for securities and commodities where all buyers and sellers are operating on the same assumptions. Nonetheless, a horse auction is only one type of sale in any horse industry, one part of a broader market for the sale of eminently non-fungible goods. A different result is made essential by a combination of (a) the uniqueness of the equine asset (and the decision-making process of individual buyers and sellers), and (b) the need to establish public integrity for the horse business by enforcing fully proven oral deals. The president of America's most wide-ranging horse auction company agrees: "If the consignor wants to make a private treaty (warranty) outside our conditions, that is fine. The ultimate deal is between seller and buyer."¹⁹⁸

Finally, it should be noted that a typical merger clause¹⁹⁹ in a written contract falls within this body of law and simply provides an agreement or evidence of an agreement to be bound solely by the writing. The parties have agreed that the parol evidence rule will apply in full force to the fully integrated agreement. Such clauses are on the borderline between the parol evidence rule and the rules applied to disclaimers, both as to conscionability and rules of construction. Thus, a merger clause may operate even as an effective disclaimer of fraud.²⁰⁰ On the other hand, the sale of worthless property, whose worthlessness is based upon an "inherent, non-observable defect," may be un rebuttably unconscionable despite the "principle of merger."²⁰¹

¹⁹⁶ *Id.* at 422.

¹⁹⁷ See *supra* notes 120-34 and accompanying text.

¹⁹⁸ Bowen, *Setting Out to Conduct a "Squeaky Clean" Sale*, THE BLOOD-HORSE (August 19, 1989) (quoting Fasig-Tipton President Timothy Cone).

¹⁹⁹ No prior or contemporaneous agreements shall be binding on either party.

²⁰⁰ See *supra* notes 78-119 and *infra* notes 514-61 and accompanying text. See I J. WHITE & R. SUMMERS, *supra* note 30, at 124 *et seq.* for "ways around" a merger clause.

²⁰¹ *Borden v. Litchford*, 619 S.W.2d 715, 717 (Ky. Ct. App. 1981).

I. Custom

Custom and usage will be given effect in a particular context, or given effect in a particular way, largely because of the public policy considerations a court views as being important in the particular transaction. Thus, the partially expressed and partially unexpressed reason for determining the "reasonable" time of inspection in *Miron v. Yonkers*²⁰² is that the custom adopted by that court presents an easy and straightforward way of promoting contractual rights. Custom tends to place the burden of investigation only where it can fairly be discharged; this is an area of law where custom has operated effectively for a long period of time without the intervention of competing statutory policy.²⁰³

Public policy considerations can be the only explanation for the almost wholly unsatisfactory opinion in *Alpert*.²⁰⁴ The court found it to be "customary in the industry to have a breeding soundness guarantee" where an Arabian horse is sold for commercial breeding.²⁰⁵ The court properly enforced an oral guarantee, made contemporaneously with an "as is" written sale.²⁰⁶

Despite immediate breeding problems, however, the buyers waited five months to advise the sellers that there was a problem and to perform the first medical examination on the unsuccessful stallion. In order to determine that the buyers spent the five month period under the "reasonable assumption" that the problem would be cured, and that the buyer was "reasonably induced" by the seller to postpone further action,²⁰⁷ the court cited assurances and discussions held after the five months had run.²⁰⁸

The court was quite correct²⁰⁹ in saying that the buyer did not refuse to conduct its own investigation prior to sale so as to exclude an implied warranty of merchantability.²¹⁰ Indeed, the court correctly refers to *Miron* to provide the correct test on the question of reasonableness.²¹¹ The court, however, did not rely on the cus-

²⁰² 400 F.2d 112 (2d Cir. 1968). See *infra* notes 551-61 and accompanying text.

²⁰³ See Miller, *supra* note 17, at 817-18.

²⁰⁴ 643 F. Supp. 1406 (D. Vt. 1986).

²⁰⁵ *Id.* at 1409.

²⁰⁶ See *supra* notes 168-201 and accompanying text.

²⁰⁷ These factors are made dispositive by U.C.C. § 2-608 (1988).

²⁰⁸ *Alpert*, 643 F. Supp. at 1418. Contrast such facts with those in *O'Shea v. Hatch*, 640 P.2d 515 (N.M. Ct. App. 1982), where the buyer's actions were patently more reasonable.

²⁰⁹ 643 F. Supp. at 1417.

²¹⁰ U.C.C. § 2-316(3)(b) comment 8.

²¹¹ 643 F. Supp. at 1418.

tom in the industry to determine reasonable behavior.²¹² Surely there would have been no proof of a custom to ignore perfectly patent infertility for five months. The court's support comes only from the notion that "injustice can be avoided only by rescission of the contract."²¹³ A Vermont purchaser was thus protected by a Vermont court from what the court must have believed to be a disreputable Arizona seller. Certainly the horse industry would be better served if courts were forthright about using public policy considerations to decide questions of reasonableness rather than using custom as pretext.

Though the Washington Supreme Court in *Travis* overruled the state Court of Appeals only on the issue of disclaimers of implied warranties, an interesting difference between the cases involves their analysis of the custom.²¹⁴ The Court of Appeals criticized the seller's pre-sale activities with respect to the horse in question, which "was touted as one of the best yearlings in the state, with great prospects to win, even though there had been no physical examination required or administered."²¹⁵ The lower appellate court said that "representations such as these were standard practice with the Washington Horse Breeders; its annual Summer Yearling Sale had been conducted the same way for many years," and a jury could find a great "impact on the public interest" by such improper behavior.²¹⁶ It was, held the intermediate court, a perfect case to find unconscionability—presumably because buyers in the locale had no choice but to come to that sale.²¹⁷

Washington's highest court, noting the same practice, its influence on new buyers, and the fact that such selling practices were the custom and usage of the trade, stated the more modest conclusion that the practices had a "capacity to deceive a substantial portion of the public" under Washington's unfair trade practice act.²¹⁸ Would that more limited conclusion provide a reason to support conscionability if an implied warranty disclaimer were involved? The impact on the public interest was a statutory prerequisite under the specific consumer protection statute, and could

²¹² The court in *Forbis v. Reilly* 684 F. Supp at 1321, did so..

²¹³ *Alpert*, 643 F. Supp. at 1420.

²¹⁴ *Travis v. Washington Horse Breeders Ass'n, Inc.*, 734 P.2d 956 (Wash. Ct. App. 1987).

²¹⁵ *Id.* at 959.

²¹⁶ *Id.*

²¹⁷ See *supra* notes 78-119 and accompanying text.

²¹⁸ 759 P.2d at 423.

not be used offensively by the seller in that case—especially when many new buyers were included at the sale.²¹⁹ Without such a statute, however, and if predominantly experienced horsemen (who are expected to know the custom of puffing) are involved, the result might be different.

J. Proof of Damages

In horse cases, most dissatisfied buyers attempt to void the transaction rather than to seek damages. Buyers do not want half the horse they bargained for—at any price.²²⁰ The threshold question, whose answer will vary depending on the jurisdiction whose law applies to the subject, would be whether to ask for only rescission-type relief in the initial complaint—under the threat of having elected only one remedy.²²¹

The law of damages and the fashioning of remedies generally is a body of law unto itself and requires more than a paragraph in a law journal article. Special attention is frequently given to the fact that quality horses have at least two values—a value for racing or performance, and a value for breeding.²²² As with other property, proof of damages must be made with reasonable certainty.²²³ As elsewhere in the law, proof of such technical questions will be placed by courts in the hands of experts.²²⁴

What impresses one most often in horse cases is reading the bizarre assumptions that courts sometimes make. An Oklahoma

²¹⁹ *Id.*

²²⁰ This is the converse of the rules about specific performance, for which see Laycock, *The Death of the Irreparable Injury Rule*, 103 HARV. L. REV. 687 (1990), especially pages 691 and 706 (“fungible goods . . . livestock”).

²²¹ See, e.g., Annotation, *Conclusive Election of Remedies as Predicated on Commencement of Action, or its Prosecution Short of Judgment on the Merits*, 6 A.L.R. 2d 10 (1949); U.C.C. § 2-721 (remedies for fraud); R. ANDERSON, *supra* note 15, at § 2-711:9. It may be that the second sentence of U.C.C. § 2-721 applies to more than fraud, though the section’s title suggests it is limited to fraud. See also U.C.C. § 2-720.

²²² *White Devon Farm v. Stahl*, 389 N.Y.S.2d 724, 728 (N.Y. Sup. Ct. 1976). See *infra* notes 391-605 and accompanying text.

²²³ See *Kahl v. Frederick*, 397 N.W.2d 46 (Neb. 1986). See generally R. ANDERSON, *supra* note 15, at § 2-715:11 (speculative damages) and :33 (damages for animals).

²²⁴ See *Strauss v. West*, 216 A.2d 366 (R.I. 1966) (great weight was given to the plaintiff’s trainer’s testimony regarding the condition of the horse at time of sale). See generally *Watjen v. Louisville Tobacco Warehouse Co.*, 29 F.2d 801, 802 (6th Cir. 1928) (market value is a matter of personal knowledge to be proven by witnesses acquainted with the facts); *Erwin v. TriState Plumbing & Heating Corp.*, 267 S.W.2d 946, 947 (Ky. 1954) (testimony by expert witness as to fair charge for materials and labor was given considerable weight); Annotation, *Elements and Measure of Damages for Breach of Warranty in Sale of Horse*, 91 A.L.R. 3d 419 (1979).

court, for example, in *Denton v. Winner Communications, Inc.*,²²⁵ punishes a breeder for not supplying the plaintiff with four breedings to his stallion—"depriving him of four colts for the year, each of which would have been worth around \$29,000."²²⁶ Needless to say, the court received no proof that four conceptions would have occurred, nor that four foals would have been born, nor that all would have been colts, nor that the live colts would have had straight legs—much less (absent even proof as to who their mothers would have been) that each would have been worth the same amount of money. Again, an Illinois court in *Lundberg*²²⁷ allowed "plaintiffs' expert [to] value five foals" that were never born or conceived,²²⁸ and upheld the jury "in accepting one witness's valuation of damage over another's."²²⁹ In neither case could one say that the value of unconceived foals had any reasonable certainty. The correct rule is set out in *Schleicher v. Gentry*,²³⁰ where the damages were held to be the value of the lost breeding right, not of some speculative Derby winner.

In the case of warranties, the general measure of damages under the U.C.C.²³¹ and prior law²³² "is the difference at the time and place of acceptance between the value of the goods accepted and the value they would have had if they had been as warranted" plus special damages in special circumstances.²³³ This is always the rule where "expectation interest" is based on "value."²³⁴ *McClure*,²³⁵ for example, holds that where a horse is transferred as a result of a misrepresentation, the "pecuniary loss is measured by the difference between the value of the thing received and the purchase price."²³⁶ Where the property was not received, "special or consequential damages" must be proven.²³⁷

Perhaps the most interesting horse case that departs from this rule is *Mizan Arabians v. Pyramid Society*.²³⁸ *Mizan Arabians* is

²²⁵ 726 P.2d 911 (Okla. Ct. App. 1986).

²²⁶ *Id.* at 916.

²²⁷ 502 N.E.2d 806 (Ill. App. Ct. 1986).

²²⁸ *Id.* at 810.

²²⁹ *Id.* at 814.

²³⁰ 554 S.W.2d 884 (Ky. Ct. App. 1977).

²³¹ U.C.C. § 2-714(2).

²³² *Wood v. Ross*, 26 S.W. 148 (Tex. 1894).

²³³ U.C.C. § 2-714(2) (1972).

²³⁴ RESTATEMENT (SECOND) OF CONTRACTS § 347 (1981).

²³⁵ 674 F. Supp. 211 (N.D. Tex. 1987).

²³⁶ *Id.* at 222.

²³⁷ *Id.*

²³⁸ 821 F.2d 357 (6th Cir. 1987).

undoubtedly an expression of the principle that auctioneers have duties higher than other parties. In that case, the auction company accidentally "knocked down" an Arabian horse at a price lower than its "reserve."²³⁹ That is, a consignor's animal was sold at a price lower than was authorized. The trial court and the Sixth Circuit rejected expert testimony as to the actual value of the horse, and awarded the consignor damages based upon the reserve price—as if it had some relationship to value. The consignor cited a general treatise²⁴⁰ that supported the court's result, but the pertinent part of the treatise was based on a misinterpretation of relevant cases. Under general agency law, and in accordance with the "expectation" interest rule cited above,²⁴¹ the Restatement (Second) of Agency also measures damage in such a situation as "the difference between the amount received and the value of the property sold at the time of sale."²⁴² The Sixth Circuit explicitly determined, however, that "the integrity of . . . [Kentucky's] leading industry" required a more punitive rule.²⁴³

The permutations of possible special damages²⁴⁴ and the issue of "cover"²⁴⁵ are beyond the scope of this Article. The U.C.C. supplies detailed rules as to what a buyer must do after he or she has rejected goods in order to protect the goods before they are returned to the seller.²⁴⁶ The duty to mitigate damages is covered by the common law and U.C.C. section 1-103.²⁴⁷ A typical dilemma for a dissatisfied horse buyer is explained and resolved by *Broglie v. MacKay-Smith*:²⁴⁸

Defendants argue that we must conclude that plaintiffs unreasonably let damages accumulate for the purpose of reaching the

²³⁹ *Id.* at 358.

²⁴⁰ 7 AM. JUR. 2D, *Auctions and Auctioneers* § 65 n.23 (1980).

²⁴¹ See *supra* note 234.

²⁴² RESTATEMENT (SECOND) OF AGENCY § 424 comment g (1958). It also gives an alternative as "the amount which the agent would have received if he had obeyed the principal," but that would seem to require proof that the agent would have received a higher price, a conclusion that cannot be drawn from the fact that the seller placed an unrealistic "reserve" on the horse.

²⁴³ 821 F.2d at 360 (citing *Chernick v. Fasig-Tipton of Kentucky, Inc.*, 703 S.W.2d 885, 890 (Ky. Ct. App. 1986)).

²⁴⁴ *E.g.*, R. ANDERSON, *supra* note 15, at §§ 2-710:9, 2-715:34.

²⁴⁵ *Id.* at § 2-712, et seq.

²⁴⁶ U.C.C. §§ 2-603, -604.

²⁴⁷ See R. ANDERSON, *supra* note 15, at §§ 2-714:20, 2-715:27-28 (with a special note on animal cases).

²⁴⁸ 541 F.2d 453 (4th Cir. 1976).

jurisdictional amount, by continuing to keep and care for the horse instead of mitigating damages by selling it. Plaintiffs contend that there is no market for a lame horse.

We note that had plaintiffs not provided the animal "necessary sustenance, food, drink, or shelter," they could have been subject to prosecution under [U.C.C. § 2-392]. Plaintiffs had a right to sell the horse to mitigate damages only "in commercially reasonable manner," [U.C.C. § 2-706(1)], and what is a commercially reasonable manner in which to sell a lame horse is not self-evident. Short of sale, plaintiffs can recover reasonable costs of handling defective goods. [U.C.C. § 715(1)]. In sum, mitigation of damages is an issue for trial; plaintiff's dereliction, if any, has not been sufficiently demonstrated to compel the inference that their claim was not made in good faith.²⁴⁹

K. *Declarations of Public Policy*

The public duties of participants in horse deals create higher responsibilities than would ordinarily be charged to participants in transactions that do not involve an obvious public interest. The attribution of public duties to major actors in the horse business is not unique to thoroughbred auction houses, nor limited to the form in which it has appeared in the recent cases cited elsewhere in this Article.²⁵⁰

Nor does public policy create additional duties only by judicial fiat. *Marsh v. Gentry*²⁵¹ is an example of an extra duty created by the law of partnerships; but the court in that case had a statute to guide it, not merely the common law. Similarly, legislative policies will emphasize or even skew the duties imposed on actors in the sales of horses and horse interests. The duties imposed on the sale of a security under federal and state law, for example, create substantial additional burdens on certain sellers. Although *Kefalas v. Bonnie Braes Farms, Inc.*²⁵² seems to have put to rest the notion that the most common form of a stallion breeding syndicate is a security, that case stands on its particular documentation. To the

²⁴⁹ *Id.* at 455.

²⁵⁰ For example, a draft horse registry has duties "not merely to those who present horses for registry, but also to the public," which denies to such a party "the right to show there was no intent to defraud." *Howard v. National French Draft Horse Ass'n*, 151 N.W. 1056, 1060 (Iowa 1915).

²⁵¹ 642 S.W.2d 574 (Ky. 1982). For a more detailed discussion of this case, see *infra* notes 321-24 and accompanying text.

²⁵² 630 F. Supp. 6 (E.D. Ky. 1985).

extent that syndicates have as a major component the sharing of common profits, *Kefalas* will not be of help to a seller who does not comply with federal and state securities laws.²⁵³ Similarly, only to the extent that such stallion shares are purchased for use in a business will their markets not be subject to commodities regulation.²⁵⁴

Other legislative declarations of policies also have potential importance. The antitrust laws impact numerous types of horse sales,²⁵⁵ though *Stratmore v. Goodbody*²⁵⁶ determined on its unique facts that a popular form of restriction on the open sale of syndicate shares did not violate federal antitrust laws. More important, almost every state has a consumer protection act; some of them apply to business transactions,²⁵⁷ and some of them do not.²⁵⁸ The Magnuson-Moss Warranty Act,²⁵⁹ the major federal "consumer" legislation in this field, must also be kept in mind. It is a common theme of this Article that public policy concerns appear often—but are called a hundred different things.

L. Where Suit is Filed and What Law Applies

In interstate and international businesses like most branches of the horse industry, choices of forum and choices of law are often

²⁵³ See, e.g., Campbell, *Racing Syndicates as Securities*, 74 Ky. L.J. 691 (1985); Campbell, *Stallion Syndicates as Securities*, 70 Ky. L.J. 113 (1982); Note, *Horse Syndicates as Securities Under Blue Sky Laws*, 74 Ky. L.J. 863 (1986); Comment, *Equine Syndicates: Are They Securities?*, 6 N.Ky. L.R. 361 (1979); Campbell, *The Impact of State and Federal Securities Laws on Horse Syndicates*, UNIV. OF KY. EQUINE LAW SEMINAR (1986); Kegley, "The Use of Regulation D in Horse Deals," University of Kentucky Equine Law Seminar (1986).

²⁵⁴ Cf. *C.F.T.C. v. Petro Marketing Group, Inc.*, 680 F.2d 573, 579 (9th Cir. 1982) (The distinction of a commodity "futures contract" depends on whether the contract is entered into "merely for speculative purposes and . . . are not predicated upon the expectation that delivery of the actual commodity by the seller to the original contracting buyer will occur in the future.').

²⁵⁵ See generally Finklestein, *Anti-trust Law Revisited to the Horse Industry*, UNIV. OF KY. EQUINE LAW SEMINAR (1987).

²⁵⁶ 866 F.2d 189 (6th Cir. 1989).

²⁵⁷ TEX. BUS. & CODE ANN. § 17.45(4) (Vernon 1987) exempts businesses with more than \$25,000,000 in assets.

²⁵⁸ Commonwealth *ex rel. Stephens v. North American Van Lines, Inc.*, 600 S.W.2d 459 (Ky. 1970). See generally Cohan, *The Uniform Commercial Code as Applied to Implied Warranties of "Merchantability" and "Fitness" in the Sale of Horses*, 73 Ky. L.J. 665, 686 (1984-85); Annotation, *Right to Private Action Under State Consumer Protection Act*, 62 A.L.R. 3d 169 (1975).

²⁵⁹ 15 U.S.C. § 2301-2312 (1983); Interpretations of Magnuson-Moss Warranty Act, 16 C.F.R. §§ 700, 701.1(b) (1989).

dispositive. They should be considered at the planning stage of difficult, complex transactions. A detailed examination of such matters is beyond the scope of this Article, but no discussion of horse transactions can avoid the flavor of their broad geographic scope. Especially excluded but nonetheless important in many situations is the United Nations Convention on Contracts for the International Sale of Goods, except to say that if each of the two parties to a contract lives in a different contracting country, the convention automatically applies. The convention, however, does not apply to auctions, can easily be avoided by an express agreement, and has been well and fully treated elsewhere.²⁶⁰

One must, at the outset, be in a position to file a lawsuit against a proposed defendant. The United States Constitution requires some minimum contact between a proposed defendant and the chosen forum.²⁶¹ Most states have long arm statutes that go to the breadth of their constitutionally-permitted jurisdiction; and federal as well as state courts base the reach of their personal jurisdiction on local statutory authority.²⁶² Typically most local courts will "exercise personal jurisdiction over a person who acts directly or by an agent, as to a claim arising from the persons . . . transacting any business" in the jurisdiction.²⁶³

The second, more complex, hurdle for a plaintiff is to show that the forum that exercises personal jurisdiction is nonetheless the correct venue for the action to proceed, an inquiry that may involve the statutes of several states, and *Erie Railroad Co. v. Tompkins*²⁶⁴ questions when the action is filed in federal court. In addition, the documentation in horse transactions (e.g., the sale contract or the auction's conditions of sale) will often include a forum selection clause.²⁶⁵ The modern rule, applicable in arms length business transactions, allowing (in fact encouraging) the

²⁶⁰ Beck, *Purchase and Sale of Equine Assets Under United Nations Convention on Contracts for the International Sale of Goods*, Univ. of Ky. Equine Law Seminar (1989).

²⁶¹ *International Shoe Co. v. Washington*, 326 U.S. 310 (1945). A recent horse case that sets out the burdens of showing personal jurisdiction over the parties is *Ammon v. Kaplow*, 468 F. Supp. 1304 (D. Kan. 1979).

²⁶² See, e.g., *Perkins v. Benguet Consol. Mining*, 342 U.S. 437 (1952).

²⁶³ K.R.S. § 454.210; see also *In re Air Crash Disaster*, 660 F. Supp. 1202, 1210 (W.D. Ky. 1987) (jurisdiction may be exercised as to claims arising out of or relating to a person's purposeful activities or where the suit has a substantial connection).

²⁶⁴ 304 U.S. 64 (1938).

²⁶⁵ See *G. A. Taylor v. Titan Midwest Constr. Corp.*, 474 F. Supp. 145, 149 (N.D. Tex. 1979) (contractual venue provision was enforceable where there was equal bargaining power, forum was reasonable, and no fraud or undue influence).

parties to agree on an appropriate forum is particularly appropriate to the horse business, and is clearly enforceable in federal courts.²⁶⁶ In order to uphold the forum selection clause, its enforceability can be characterized either as a procedural or a contract law question for choice of law purposes—if the forum jurisdiction allows enforceability of choice of law selection by contract.²⁶⁷ Even if there is a potential for a lawsuit in an unfavorable jurisdiction that will not allow the parties to choose their forum, the parties can arrange the substance of the transaction to force venue in a chosen forum. For example, the parties can provide for payment of the purchase obligation by a note payable in the jurisdiction of their choice, and thus allow themselves to choose a venue for an action on the note.²⁶⁸

*Moyglare Stud Farm, Ltd. v. Due Process Stable, Inc.*²⁶⁹ is a horse case applying the federal venue statute to diversity actions. It sets out the various possibilities and typical authorities. In addition, one must recall the statutes under which state-filed cases are removed to federal courts²⁷⁰ and under which federal diversity suits are transferred to other federal courts.²⁷¹

Choice of substantive law is a subject with even more permutations. The modern rule suggests that in the sale of horses and other chattels, the presumptive choice is the place where the chattel is delivered—but that a choice of law provision in the contract will control if the jurisdiction whose law is chosen has a substantial interest in the question involved.²⁷² Some states, however, do not give effect to the contract's choice of law provision,²⁷³ analyzing

²⁶⁶ See *Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972). See generally Gilbert, *Choice of Form Clauses in International and Interstate Contracts*, 65 Ky. L.J. 1 (1976-77).

²⁶⁷ See *Taylor*, 474 F. Supp. at 147 n.2.

²⁶⁸ *Fidelity Union Life Ins. v. Evans*, 477 S.W.2d 535, 536 (Tex. 1972). See also *Wade v. Darring*, 511 S.W.2d 320 (Tex. 1974). See generally RESTATEMENT (SECOND) CONFLICT OF LAW §§ 53-55, 80 (1971) ("The parties' agreement as to the place of the action will be given effect unless it is unfair or unreasonable.").

²⁶⁹ 569 F. Supp. 1565 (S.D.N.Y. 1983).

²⁷⁰ 28 U.S.C. §§ 1441-1451 (1982).

²⁷¹ 28 U.S.C. § 1404 (1982).

²⁷² See RESTATEMENT (SECOND) CONFLICT OF LAW § 191 (1971); see also *First Commerce Realty Investors v. K-F Land Co.*, 617 S.W.2d 806 (Tex. Civ. App. 1981) (express agreement that the laws of a particular state will govern will be given effect if the contract bears a reasonable relation to the chosen state).

²⁷³ *Harris Corp. v. Comair, Inc.*, 712 F.2d 1069 (6th Cir. 1983); *Breeding v. Massachusetts Indemnity & Life Ins.*, 633 S.W.2d 717 (Ky. 1982); *Paine v. La Quinta Motor Inns*, 736 S.W.2d 335 (Ky. Ct. App. 1987).

every situation in accordance with the "most significant relationship" to the question to be addressed.²⁷⁴

Several important horse cases have focused on these questions. In a recent federal case in Virginia, *Madaus v. November Hill Farm, Inc.*,²⁷⁵ the importance of delivery of possession of the horse was recognized. Delivery generally is a solid point in the course of performance, a moment at which it is appropriate to transfer title and/or the risk of loss—and consequentially to determine the place where the rights between the parties should be fixed.²⁷⁶ The Restatement (Second) of Conflicts of Law recognizes that if there is contemplated by the contract a continuing relationship between the parties, the place of that continuing relationship can be more dominant than the usually-conclusive place of initial delivery.²⁷⁷ A recent horse case in the federal court in Vermont, *Alpert*, stretched that continuing relationship to (or beyond) its limits by including not only the continuing relationship contemplated by the contract but also the continuing relationship occasioned by the dispute that gave rise to the litigation.²⁷⁸

*McClure*²⁷⁹ held that choice of law in contract situations is based on contacts, and that there are several listed factors that mandated the application of California law. The court noted²⁸⁰ that there was no question but that Texas law applied to a related fraud claim—based on telephone conversations, both sides of which were in Texas.²⁸¹

II. SPECIAL PROBLEMS OF AGENCY—INTRODUCTION

It is a rare transaction in any branch of the horse business that does not involve the intervention of agents for one or both parties. Agency matters, therefore, deserve to be treated separately, though they reflect and carry forward many of the general points made in

²⁷⁴ See generally R. ANDERSON, *supra* note 15, at § 3-101:38-:43, :74 and §§ 2-101:19, 2-316:16.

²⁷⁵ 630 F. Supp. 1246 (W.D. Va. 1986) (forum selection clause in a towing contract is binding unless it is shown to be unreasonably unfair, or unjust).

²⁷⁶ *Id.* at 1248. See *supra* notes 44-77 and accompanying text.

²⁷⁷ See RESTATEMENT (SECOND) CONFLICT OF LAW, § 191 comment f.

²⁷⁸ See also *Moyglare Stud Farm, Ltd. v. Due Process Stable, Inc.*, 569 F. Supp. 1565, 1567 (S.D.N.Y. 1983) (Federal courts need not "blindly apply an overly-restrictive state statute.").

²⁷⁹ 674 F. Supp. 211, 215 (N.D. Tex. 1987).

²⁸⁰ *Id.* at 215-16.

²⁸¹ *Id.* at 219 n.2.

other sections of this Article. It is not surprising that many of the cases cited heretofore, and many of the cases involving the quality of horses discussed hereafter, are also cited in these sections.

The Restatement (Second) of Agency²⁸² defines the agency relationship as "the fiduciary relation which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control and consent by the other so to act."²⁸³ Agency is thus a consensual matter that is governed internally by the terms of the parties' agreement if there is one. Often, however, the consent arises by implication, arising out of the acts of the parties, as is common in the horse business.²⁸⁴ As the succeeding sections note, an agent has enormous power to subject his or her principal to personal liability on a contract, or to create liability in tort; and the agent can also divest the principal of an interest in a horse, or acquire a horse for the principal.²⁸⁵ This exposure is warranted because of both the giving of consent and agency's second essential characteristic, viz., that the principal has the right to control the agent's conduct with respect to matters falling within the scope of the agency relationship.²⁸⁶

A. Relation Between Principal and Agent

The fiduciary relationship imposes upon an agent the duty to act solely for the benefit of the principal in all matters connected with his or her agency.²⁸⁷ Thus, together with the principal's right to control the acts of the agent, the paramount and universally enforced duties of loyalty and good faith of an agent dominate their relationship. Those two duties include the duty to account for any personal profits arising from the relationship, the duty not to act as (or for) an adverse party, and the duty not to compete. The U.C.C., which governs many aspects of horse sales, has not displaced common law agency concepts; indeed, they are expressly recognized by U.C.C. section 1-103.²⁸⁸ The U.C.C. of course does not control the agency contract itself.²⁸⁹

²⁸² RESTATEMENT (SECOND) OF AGENCIES § 1(1) (1958).

²⁸³ *Id.*

²⁸⁴ Smith, *Implied and Conditional Consent in the Sale of Horse Shares or Seasons*, 74 Ky. L.J. 839 (1985-86); Miller, *supra* note 17.

²⁸⁵ RESTATEMENT (SECOND) OF AGENCY § 12 comment c (1958).

²⁸⁶ *Id.* at §§ 13-14.

²⁸⁷ *Id.* at §§ 13, 387.

²⁸⁸ See generally, J. WHITE & R. SUMMERS, *supra* note 30, at § 2.

²⁸⁹ R. ANDERSON, *supra* note 15, at § 2-201:48.

It is appropriate to give a sense of the breadth of agency relationships in the horse business by describing some of the principal ones. In many transactions, two or three types of agents will be involved. Although agency relationships tend to give rise to the same sorts of rights and liabilities, there are some distinctions that can be drawn.

One common characteristic of agents and principals in the horse business is the inconsistency of their positions. In respect to some horses and some transactions, a party may act as the agent of another party with whom he or she does a different sort of business at different times. Thus, a syndicate manager acts as a fiduciary for people with whom he or she competes as a breeder. Each owns his or her own mares, and shares in other stallions. Bloodstock agents may regularly act for a buyer, and yet sell horses to that buyer for other principals (or for themselves) on as many occasions. The fluidity of the horse business creates a problem for its participants: they forget that agency relationships are different. High fiduciary duties change the fundamental nature of their responsibilities to each other from transaction to transaction. Though it is difficult for competitors to shift gears, courts clearly will require them to do so, at the risk of enormous liabilities.

1. *Bloodstock Agent*

A bloodstock agent typically acts as an intermediary in the purchase or sale of a horse or horse interest, acting on behalf of either a buyer or seller. Customarily, a bloodstock agent is paid a commission as compensation for his or her skill in the evaluation and marketing of the horse or horse interest, and for his or her efforts in finding the willing buyer or seller. Due to ongoing or previous relationships and transactions, it is at times difficult to ascertain for whose benefit an agent is acting, but an agent cannot purport to act for both the buyer and seller unless both the buyer and seller know and consent to the dual role. This general rule, as applied specifically to bloodstock agents, is made clear in *Beasley v. Trontz*.²⁹⁰ In *Beasley*, a bloodstock agent had an ongoing relationship with Trontz involving co-ownership of interests in thoroughbreds. Beasley contacted the agent to package and sell a mare and filly. Both the agent and Trontz inspected the mare and filly, after which the agent memorialized his agency contract with Beasley

²⁹⁰ 677 S.W.2d 891 (Ky. Ct. App. 1984).

in a letter, including provision for his five percent commission. The letter was signed by Beasley. Beasley decided not to consummate the deal and Trontz and the agent sued for specific performance.

The agent explained in his deposition that he was acting as agent for both buyer and seller. The court held that if he acted for both without the consent of both, the seller could rescind the sale even if no bad faith was exercised.²⁹¹ The agent would also be required to forfeit his commission.

As stated earlier, a principal may be deemed to have the knowledge of, and may be held liable for the actions of his agent. For example, in *Keck v. Wacker*,²⁹² an innocent principal was held liable for the misstatement placed by his agent in the catalog for the sale of a horse at auction. If the two principles in *Beasley* had consented to the dual representation, each would be bound by the agent's knowledge and acts;²⁹³ and in the appropriate case, consent could be supplied by custom.²⁹⁴

2. Auctioneer

The auctioneer prepares the catalog, extends credit to purchasers, creates the rules of the sale, and administers many facets of the relationships among the parties. In an auction sale, the seller and buyer frequently do not meet except through the agency of the auctioneer.²⁹⁵ Initially, an auctioneer is considered the agent for the seller.²⁹⁶ Following the sale, the auctioneer, now holding the purchase price, becomes the agent of both parties.²⁹⁷ As agent, the auctioneer is subject to all the fiduciary obligations owed by agents to principals generally.²⁹⁸ The auctioneer is an exception to the *Beasley* rule against dual agency.²⁹⁹

²⁹¹ *Id.* at 894.

²⁹² 413 F. Supp. 1377 (E.D. Ky. 1976).

²⁹³ *Newsom v. Watson*, 177 P.2d 109 (Okla. 1947); *Union Bank v. National Surety Co.*, 243 S.W. 13 (Ky. 1972).

²⁹⁴ *Miller*, *supra* note 17, at 825-32.

²⁹⁵ See *supra* notes 120-39 and accompanying text.

²⁹⁶ *E.g.*, *United States v. Sommerville*, 211 F. Supp. 843 (W.D. Pa. 1962); *Becker v. Crabbe*, 4 S.W.2d 370 (Ky. 1928); *Faultersack v. Clintonville Sales Corp.*, 34 N.W.2d 682 (Wis. 1948). See generally 7 AM JUR 2D *Auctions and Auctioneers* § 60 (1980); R. ANDERSON, *supra* note 15, at § 2-313:112.

²⁹⁷ *Gossage v. Waddle*, 18 S.W.2d 975 (Ky. 1929).

²⁹⁸ *State ex rel. Jay Bee Stores, Inc. v. Edwards*, 636 S.W.2d 61 (Mo. 1982).

²⁹⁹ See *supra* notes 141-67 and 202-18 and accompanying text.

Auction sales are also a matter of public concern, apart from the private contractual relationship.³⁰⁰ The auctioneer's control of the sale makes him or her a super-fiduciary. *Castille v. Folck*³⁰¹ held that where the horse auctioneer is "the party who makes the rules of the game," he "expressly . . . pledges his own responsibility."³⁰² This notion is perhaps a part of the line of authority that recognizes extra-contractual duties where gross disparity in bargaining power exists.³⁰³

Auctioneers can also be liable for losses occasioned by their mere negligence to a bidder, such as failure to ascertain or communicate accurate information. In *Brodsky v. Nerud*,³⁰⁴ the New York Racing Association failed to ascertain or properly list the sex of a horse and failed to correct inaccurate information published about a horse in a claiming race. It was noted in *Brodsky* that the purchaser places much reliance on printed material.³⁰⁵

These notions—the duty to the buyer to make accurate listings and the super-fiduciary role of the auctioneer—were extended further in *Chernick v. Fasig-Tipton Kentucky, Inc.*³⁰⁶ The Kentucky court held that the auctioneer, which was "one of the Commonwealth's foremost consignors of breeding stock," had a fiduciary duty to the purchaser and to the equine industry as a whole to use ordinary care to ensure that its catalog information was accurate and as comprehensive as possible.³⁰⁷ Clearly, Fasig-Tipton did not consciously undertake such duties; they were imposed as a matter of public policy in view of the equine industry's preeminence in Kentucky.³⁰⁸ The *Chernick* court, like the *Brodsky* court, noted

³⁰⁰ *Id.*

³⁰¹ 338 So. 2d 328 (La. Ct. App. 1976).

³⁰² *Id.* at 333. See *In re Martin Fein & Co.*, 34 Bankr. 333 (Bankr. S.D.N.Y. 1983) (the status is imposed as a matter of law and not by contract); see also *Cruikshank v. Horn*, 386 N.W.2d 134, 137 (Iowa Ct. App. 1986) (auctioneer has one set of duties that is contractual and one set of duties imposed based upon agency principles). See generally 7 AM JUR 2D *Auctions and Auctioneers*, § 63 (1980).

³⁰³ See, e.g., *Bd. of Educ. of Berkeley v. W. Harley Miller, Inc.*, 221 S.E.2d 882 (W. Va. 1975) (monopolistic or oligopolistic position of one party); *General Elec. Co. v. Martin*, 574 S.W.2d 313 (Ky. Ct. App. 1978) (adhesion contract); see also *supra* notes 78-119 and accompanying text.

³⁰⁴ 414 N.Y.S.2d 38 (N.Y. App. Div. 1979).

³⁰⁵ *Id.* at 40; *supra* notes 260-81; see also *Cruikshank*, 386 N.W.2d at 136.

³⁰⁶ 703 S.W.2d 885 (Ky. Ct. App. 1986).

³⁰⁷ *Id.* at 890.

³⁰⁸ Protecting the public's confidence in an institution is akin to the decisions imposing fiduciary obligations on banking institutions; see, e.g., *Henkin, Inc. v. Berea Bank & Trust Co.*, 566 S.W.2d 420 (Ky. Ct. App. 1978).

that a high degree of reliance is placed by a purchaser upon the accuracy of Fasig-Tipton's sale catalog information.³⁰⁹

In a subsequent case, a federal court, sitting in Kentucky, agreed that a horse auction company is required to use ordinary care to ensure that information contained in its catalog is as accurate and comprehensive as possible.³¹⁰ According to that court, however, a correct and complete reflection of the available records is where the auctioneer's duty "begins and ends;"³¹¹ and the court held that the horse auction company had no fiduciary duty to the buyer either (a) to inspect and examine a yearling for internal defects prior to sale or (b) to require the seller to inspect a yearling for internal defects prior to sale.³¹²

In *Mizan Arabians v. Pyramid Society*,³¹³ the ordinary rule of damages is altered for the super-fiduciary to advance the goal of "maintaining the integrity of Kentucky's leading industry."³¹⁴ A contrary ruling "would tend to undermine the confidence of owners who seek to protect their investment by placing reserve bids."³¹⁵ This extraordinary rule does not apply to "mere" fiduciaries.³¹⁶

3. *Partners, Co-owners, and Joint Venturers*

Partnership is a form of mutual agency, and is governed by statute in many states.³¹⁷ The partnership relation is governed by the same general principles that apply to every fiduciary. The U.C.C., which governs many horse transactions, does not displace the laws governing the partnership relationship.³¹⁸ The fiduciary relationship among partners is a mixture of (a) a consensual undertaking and (b) the status arising out of the contract. A partner is bound by the fraud or breach of trust of the other. In *Eppes v. Snowden*,³¹⁹ for example, one partner's fraud on the court in an

³⁰⁹ 703 S.W.2d at 890.

³¹⁰ *Cohen v. North Ridge Farms, Inc.*, 712 F. Supp. 1265, 1273 (E.D. Ky. 1989).

³¹¹ *Id.*

³¹² *Id.*

³¹³ 821 F.2d 357 (6th Cir. 1987).

³¹⁴ *Id.* at 360. See *supra* notes 221-49 and accompanying text.

³¹⁵ *Mizan Arabians v. Pyramid Soc.*, 821 F.2d 357, 360 (6th Cir. 1987).

³¹⁶ See *supra* note 242.

³¹⁷ *E.g.*, K.R.S. 362.165(3), .190.

³¹⁸ *E.g.*, U.C.C. § 1-103 (1988).

³¹⁹ 656 F. Supp. 1267 (E.D. Ky. 1986).

action on a horse mortality insurance policy was imputed to the other partner, whose counterclaim was dismissed.³²⁰

The duty of loyalty, and the strictness with which a partner's conduct will be scrutinized, are demonstrated in the leading case of *Marsh v. Gentry*.³²¹ In that case, one partner purchased the partnership's thoroughbred mare (by the bid of a secret agent) at auction, and purchased a partnership filly through a private sale to himself without the knowledge and consent of his partner. A judgment in favor of the purchasing partner was reversed by the Kentucky Supreme Court, relying on Uniform Partnership Act section 250(1), which requires every partner to account for any profit derived without the consent of other partners in a transaction related to the partnership.³²² The court rejected the defense that secret bidding was an accepted practice in the industry.³²³ The importance of Kentucky's horse industry was invoked by a concurring justice, just as it was in *Chernick*.³²⁴

A joint venture is a form of partnership.³²⁵ The duties of those involved are the same as partners.³²⁶ Even co-owners may have the same duties as partners³²⁷ and those possibilities should be explored in the appropriate case.

4. *Syndicate Manager/Farm Manager/Trainer*

Some agents work in the interest of the principal on a long-term basis. In the context of the horse business, a syndicate manager's typical duties, for example, include maintaining the stallions' books, accounting for expenses and income, selection of veterinar-

³²⁰ *But see* *Elcomb Coal Co. v. Hall Land & Mining Co.*, 115 S.W.2d 360, 365 (Ky. 1938) (the law will not create a partnership between parties merely as a consequence of conduct and dealing that arises out of an existing situation).

³²¹ 642 S.W.2d 574 (Ky. 1982).

³²² *Id.* at 576.

³²³ *Id.*

³²⁴ *Id.* at 577 (Palmore, J., concurring). *But see* *Bradshaw v. Thompson*, 454 F.2d 75, 80 (6th Cir. 1972) (rule that a sales agent cannot purchase is not applicable where agency terminated prior to agent's acquisition of interest in property).

³²⁵ *Jones v. Nickell*, 179 S.W.2d 195, 196 (Ky. 1944).

³²⁶ *In re Perret*, 67 Bankr. 757 (Bankr. N.D.N.Y. 1986) (attorney for a creditor went beyond his status as agent to become joint venturer and was jointly and severally liable with creditor).

³²⁷ *Cf.* *Mason v. Barrett*, 174 S.W.2d 702 (Ky. 1943) (the title of land purchased for one of several joint owners did not vest in one, but title was taken for the benefit of all joint owners); *Hammonds v. Risner*, 132 S.W.2d 533 (Ky. 1939); *Chapman v. Aldridge*, 15 S.W.2d 454, 455 (Ky. 1929) (possession of one joint owner inures to the benefit of all joint owners).

ians, organization of first refusal notices and draws, advertising, and fixing a farm price stud fee. Sometimes the syndicate manager sells one or more nominations to pay for syndicate expenses; and some syndicates, under the control of the syndicate manager, sell nominations for the profit of all. Above all, the syndicate manager keeps contact with everyone interested in a particular stallion, obtaining all sorts of information about prospective buyers and sellers of shares and seasons, and possible foal sharing partners.

A syndicate manager (like a farm manager) is involved in many of the day-to-day operations and transactions on behalf of the owners of the horse or horse interest. The syndicate manager ordinarily assumes an agency relationship by contract. More often than not, such an understanding is recognized by the document whether the contract calls him or her an agent or a fiduciary. The document is often prepared under the direction of the syndicate manager.³²⁸ Most syndicate managers include an exculpatory provision that purports to relieve them of their implied fiduciary duties in some or many respects.

The syndicate manager's mere possession of the horse alone does not create the agency relationship;³²⁹ and possession alone will not grant the authority to take actions that affect a principal's interest. "[M]ere possession carries no indication of any right to engage in transactions of serious consequences to the owner of the chattel. Possession is as consistent with tortious acquisition as with full ownership."³³⁰ However, the syndicate manager generally undertakes acts of much greater significance that concretely affect the principal's interest in the horse.

It is clear that syndicate managers are the agents and, thus, the fiduciaries of the owners to an extent consistent with their contractual undertakings; they also have the same duties as all agents.³³¹

³²⁸ Ordinarily, syndicate managers see to it that super-majorities are required to remove them from their position. If not, ordinary employment law will apply, both as to the power of the syndicate to remove its leader, and as to the damages available on removal. *But see* Marks v. Goff, 253 So. 2d 146, 148 (Fla. 1971) (in appropriate circumstances such doctrines as powers coupled with an interest would apply). *See generally* RESTATEMENT (SECOND) OF AGENCY § 138 comment d (1958).

³²⁹ The same is true if the farm manager or the trainer has possession of the animal.

³³⁰ *See* Lux Art Van Service, Inc. v. Pollard, 344 F.2d 883, 888 (9th Cir. 1965); *see also* RESTATEMENT (SECOND) AGENCY § 200 (1958).

³³¹ *Robinson v. Ralph G. Smith, Inc.*, 735 F.2d 186 (6th Cir. 1984) (employee, who was not agent, could not have his negligence imputed to his employer); *Fuller v. Peabody*, 1 F.2d 965 (6th Cir. 1924) (title of land was vested in trustee along with power of management and sale; therefore sale was valid and equitable); *see also* *Adrian v. Elmer*,

Each one of the duties assumed by the syndicate manager in the contract or in practice will give rise to a correlative fiduciary obligation. Such agents receive enormous amounts of information about the horse whose possession they keep, and whose activities they manage, creating duties of disclosure to the principals.³³² Fortunately, in practice there has not been a need to litigate, at least at the appellate level, the limits of these duties.

The extent of a farm manager's role has been litigated in the context of a third party's reliance on his or her authority. In *Lundberg v. Church Farm, Inc.*,³³³ the parties' respective "experts" are mentioned—witnesses who gave conflicting testimony as to the extent of the authority of the manager.³³⁴ Similar to the farm manager and the syndicate manager, a trainer may not start out intending to be a general agent, according to the terms of his or her original undertaking. It is clear, however, that a trainer may assume a broader agency, as in *Clearwater Farms, Inc. v. Roosevelt Raceway, Inc.*³³⁵

5. Summary of Remedies

In all sorts of fiduciary contexts, fiduciaries are liable in contract or tort for any harm suffered by the principal as a result of a breach.³³⁶ The fiduciary relationship that exists between principal and agent is so jealously guarded that a breach of trust by the agent entitles a principal to void a transaction, even in the absence of subjective bad faith or actual harm.³³⁷ A principal is entitled to

284 P.2d 599 (Kan. 1955) (warranty of bull's siring ability made by farm manager of livestock farm binding his owner who accepted consideration for sale). See generally Bishop & Pendorf, *Breeding Syndicate Agreements and Strategies*, UNIV. OF KY. EQUINE LAW SEMINAR (1987) (syndicate manager is a fiduciary).

³³² Any agent "is subject to a duty to use reasonable efforts to give his principal information which is relevant to affairs entrusted to him." RESTATEMENT (SECOND) OF AGENCY § 381 (1958). The fact that a fiduciary "remained silent", standing alone, is sufficient evidence that he or she "did not act with the confidence and trust required as fiduciary." *San Pedro State Bank v. Engle*, 643 S.W.2d 450, 453 (Tex. Ct. App. 1982).

³³³ 502 N.E.2d 806, 813 (Ill. App. Ct. 1986).

³³⁴ *Id.* at 810.

³³⁵ 500 N.Y.S.2d 311, 312 (1986).

³³⁶ See RESTATEMENT (SECOND) OF AGENCY §§ 399, 401, 401 comment a (1958); RESTATEMENT (SECOND) OF TORTS § 874 (1979).

³³⁷ See *Beasley v. Trontz*, 677 S.W.2d 891, 894 (Ky. Ct. App. 1984) ("[A]ll transactions in which the agent has either acted for himself or for a party whose interest is adverse to his principal are voidable by the principal and may be repudiated by the principal without a showing that he was injured."); *Faultersack*, 34 N.W.2d at 683.

an accounting from his or her agent as a matter of right.³³⁸

The agent who breaches his or her fiduciary duty will forfeit the right to compensation from that transaction, and will be disgorged of any profit received by reason of the offending transaction.³³⁹ The agent will also be responsible to the principal by way of indemnity for any loss suffered by the principal as a result of the breach.³⁴⁰

As a general rule, punitive damages are recoverable for outrageous acts in order to punish a wrongdoer and to deter others from engaging in similar conduct. Superlatives such as maliciousness, willfulness, wantonness, and fraudulent are typically used to describe the conduct that exposes the ordinary actor to such punishment. A breach of fiduciary duty alone, however, may be sufficient to impose punitive damages.³⁴¹

All this being said, agents may nonetheless act for themselves when a conflict of interest exists, if two requirements are satisfied: full disclosure and consent. Both requirements must be met. A principal's apparent acquiescence in an agent's transaction will not defeat the usual remedies.³⁴² Frequently, both requirements are met by exculpatory agreements in the document creating the agency undertaking. As with any trustee, the technical duties of an agent-fiduciary may be waived—to a degree. Such clauses will be strictly

³³⁸ *Deaton v. Hale*, 592 S.W.2d 127 (Ky. 1979) (“[R]ight of principal to require an accounting is elementary.”).

³³⁹ See *R. K. Ray Sales v. Genova*, 478 N.E.2d 616 (Ill. App. 1985) (agent is not entitled to compensation for work done during period of willful and deliberate breach); *Swinebroad v. Hester*, 289 S.W.233 (Ky. 1926) (auctioneer/agent cannot recover for his services when he closed sale using a contract materially different from what he represented to principal); *Douglas v. Aztec Petroleum*, 695 S.W.2d 312, 319 (Tex. App. 1985) (“It is a fundamental principle of our law that an agent who acts adversely to his principal or otherwise breaches his fiduciary obligation is not entitled to compensation for his services.”); *Faultersack*, 34 N.W.2d at 684 (“In absence of full disclosure of the facts to the principal he can refuse to pay the commission or recover a commission already paid.”). *But cf. Mizan Arabians*, 821 F.2d 357 (agent who breached contract by selling horse for less than bid price entitled to commission as a setoff since denial would amount to punitive damages and no bad faith or fraud was shown). RESTATEMENT (SECOND) AGENCY § 456 sets out one approach to the problem of apportioning compensation in a complicated relationship.

³⁴⁰ RESTATEMENT (SECOND) AGENCY § 401 comment d (1958).

³⁴¹ One must examine the jurisdiction's rules about punitive damages on “contract” claims, and its view of fiduciary duties as a contract matter. See, e.g., *Brown v. Coates*, 253 F.2d 36 (CA D.C. Cir. 1958); *Fordson Coal Co. v. Kentucky River Coal Corp.*, 69 F.2d 131 (6th Cir. 1934).

³⁴² *Maxwell v. Bates*, 40 S.W.2d 304 (Ky. 1931) (sale disallowed when realtor/agent failed to disclose his intentions to purchase owner/principal's home).

construed,³⁴³ and cannot, according to the general rule, be extended to allow acts done in bad faith.³⁴⁴

The same sorts of tests applicable to unconscionability in general³⁴⁵ ought to be applicable here as well³⁴⁶—with the added feature that the fiduciary relationship makes the burden higher on the apparently exculpated party. Indeed, it may be that in states where stallion syndicates are particularly important, the syndicate manager may be a super-fiduciary like an auctioneer.

B. Relation To Third Parties

Acts of an agent can satisfy the statute of frauds so as to make obligations binding on the principal.³⁴⁷ As a general proposition, acts of an agent are binding on the principal vis-a-vis third parties if they are done with the actual authority of the principal, express or implied, or if they are done with the apparent, but not actual, authority of the principal.³⁴⁸

Apparent authority arises when the principal knowingly or negligently permits another to assume the agent's role. In such cases, a principal is bound by a contract made by the agent, even if the deal conflicts with the principal's express instructions.³⁴⁹ In addition, there is the related rule that the principal cannot accept "the fruit of the agent's [unauthorized] work . . . without taking it subject to its infirmities."³⁵⁰ This rule applies more narrowly to

³⁴³ 3 W. FRATCHER, SCOTT ON TRUSTS § 222.2 (1986).

³⁴⁴ *Id.*

³⁴⁵ See *supra* notes 79-119 and accompanying text.

³⁴⁶ The inability to bargain for the terms of an agreement will be especially important in this situation. One can only obtain a breeding right to a particular stallion from an established syndicate agreement.

³⁴⁷ See *supra* notes 141-67 and accompanying text.

³⁴⁸ These are the functions that most directly impact the general principles of sales of horses or horse interests, and the provisions regarding the quality of the horse. See *supra* notes 3-281 and *infra* notes 392-605 and accompanying text.

³⁴⁹ See *Lundberg v. Church Farm, Inc.*, 502 N.E.2d 806 (Ill. App. 1986) (terms of live foal contract signed by farm manager were binding on owner/seller where the owner held agent out to prospective buyers as possessing such authority).

³⁵⁰ *Western Mfg. Co. v. Cotton & Long*, 104 S.W. 758 (Ky. 1907); see also *Adrian*, 284 P.2d at 603 (having accepted and retained consideration for sale of bull, farm manager's warranty of siring ability binding upon seller whether authorized or not on theory of ratification). Compare *Robinson*, 735 F.2d at 191 (jury issue existed as to whether groom of horse owner had apparent authority to sign bill of lading limiting carrier's liability when horse injured in transit) with *Lux Art Van Service*, 344 F.2d 888 (possession of mare by operator of stud farm, with owner's consent, did not give operator apparent authority to ship mare back to owner; therefore, the limitation of liability in bill of lading signed by operator's employee was not binding on owner).

partnerships,³⁵¹ presumably because of the unauthorized partner's personal interest in the enterprise.

Apparent authority, requiring both (a) the principal's knowledge of the agent's activities or position and (b) reliance by the third party on the activities or position, is also referred to as agency by estoppel. Agency by estoppel is an extension of the equitable maxim that where one of two innocent persons must suffer from the wrongful act of another, the party who put the wrongdoer in the position to commit the act is chargeable with its consequences.³⁵² However, aside from instances where fraud is practiced by an agent upon a third party (in which case the third party's negligence is said to be less objectionable than the fraud),³⁵³ the third party cannot close his or her eyes to known or apparent limitations on an agent's authority. The reliance element of estoppel would be missing.

The scope of actual authority is not always simple to determine. An agent hired for one purpose, for example, does not have implied (or even apparent) authority to bind his or her principal in matters unconnected with the scope of the initial agency.³⁵⁴ The limits of actual agency are the limits of the consensual relationship between the parties. Thus, the court in the important horse case of *McClure v. Duggan*³⁵⁵ dismissed out of hand the notion that an insurance agent could bind his principal to a purported contract for the sale of a thoroughbred race horse.³⁵⁶ Custom may also define the limits of authority granted by a principal.³⁵⁷

An agent who is hired to consign and sell a horse makes warranties or representations to a buyer that are binding on the

³⁵¹ A partner who accepts a benefit individually does not necessarily bind the partnership, even if the partnership benefits from the transaction. *George Bohon Co. v. Moren & Sipple*, 152 S.W. 944 (Ky. 1913); *see also* *Ogallala Fertilizer Co. v. Salsbery*, 184 N.W.2d 729 (Neb. 1971); *Brewer v. Elks*, 133 S.E.2d 159 (N.C. 1963); *First State Bank of Riesel v. Dyer*, 254 S.W.2d 92 (Tex. 1953). The preceding cases, together with *Mitchell v. Whaley*, 92 S.W. 556 (Ky. 1906), establish a presumption: when a deal is made in the name of an individual partner, it is presumed that it is solely his or her contract, and not that of the partnership.

³⁵² *See* *Gordon v. Pettingill*, 96 P.2d 416, 418 (Colo. 1939); *Kentucky-Pennsylvania Oil & Gas Corp. v. Clark*, 57 S.W.2d 65, 70 (Ky. 1933).

³⁵³ *Western Mfg. Co.*, 104 S.W. at 760.

³⁵⁴ *But see* *Clearwater Farms, Inc. v. Roosevelt Raceway, Inc.*, 500 N.Y.S.2d 311 (1986).

³⁵⁵ 674 F. Supp. 211 (N.D. Tex. 1987).

³⁵⁶ *Id.* at 217.

³⁵⁷ *Occhuizzo v. Perlmutter*, 426 So. 2d 1060, 1062 (Fla. Dist. Ct. App. 1983).

seller.³⁵⁸ For example, information erroneously printed by the New York Racing Association in the track's racing program regarding the sex of the horse in a claiming race constituted an express warranty of the seller.³⁵⁹ Extra-Code law will govern issues related to an agent's authority to make warranties.³⁶⁰ In dicta, one court noted that if the agent had been guilty of fraud, the horse owner would be liable, "even though he did not know of the misrepresentation."³⁶¹ Note that the knowledge possessed by the agent of matters falling within the scope of the agency is also imputed to the principal;³⁶² but the attribution of knowledge to the principal is not (and should not be) without limit.

As a general rule, it has been held that an agent's purchase or sale of goods on account of his or her principal is binding and effective to pass title to the horse, as in *Grandi v. Thomas*.³⁶³ That case, however, combines the Code's rules on passage of title with the rules of implied and apparent agency: while the agent's purchase was binding on the principal, the agent did not hold title or the apparent power to sell—so the agent's unauthorized agreement to pass title back to seller was ineffective.³⁶⁴ Moreover, a person who receives a principal's goods from an agent with notice that the agent has breached a fiduciary duty holds the property as constructive trustee.³⁶⁵

An agent, including an auctioneer, "is under a duty to turn over proceeds of a sale to the principal and to account for them

³⁵⁸ *Keck v. Wacker*, 413 F. Supp. 1377, 1383 (E.D. Ky. 1976).

³⁵⁹ *Brodsky v. Nerud*, 414 N.Y.S.2d 38, 41 (1979); see also *Alpert v. Thomas*, 643 F. Supp. 1406 (D. Vt. 1986) (seller's agent's assurances concerning a stallion's breeding soundness constituted express warranties binding on the seller, the breach of which entitled buyer to rescind sale); *Slyman v. Pickwick Farms*, 472 N.E.2d 380 (Ohio Ct. App. 1984) (statements by agent for seller concerning yearling's condition constitute warranties binding on seller).

³⁶⁰ R. ANDERSON, *supra* note 15, at § 2-313:99-112. See generally, Annotation, *Implied or Apparent Authority of Agent Selling Personal Property to Make Warranties*, 40 A.L.R. 2d 285.

³⁶¹ 413 F. Supp. at 1383.

³⁶² See *infra* notes 599-605 and accompanying text; *Key v. Bagen*, 221 S.E.2d 234 (Ga. Ct. App. 1975) (claim stated against principal on breach of warranty theory when agent knew the horse was unsuitable for recreational use); see also RESTATEMENT (SECOND) OF AGENCY §§ 268-283 (1958).

³⁶³ 391 P.2d 35 (Kan. 1964).

³⁶⁴ *Id.* at 38; see also *In re Martin Fein*, 34 Bankr. at 336 (auctioneer-agent does not possess title to principal's goods); *Cruikshank*, 386 N.W.2d 134 (auctioneer holds funds of seller-principal as trustee and title rests only in principal).

³⁶⁵ RESTATEMENT (SECOND) OF AGENCY § 314 (1958).

in full.”³⁶⁶ An agent must comply with his or her principal’s instructions in the disposition of proceeds or risk responsibility for payment.³⁶⁷ If there are no instructions, the agent must obtain express consent. In the absence of particular instructions, the duty to remit proceeds is held to be an absolute one.³⁶⁸ In *C.T. Fuller v. Fasig-Tipton Co.*,³⁶⁹ an agent sold a yearling for an owner whose name was disclosed. Fasig-Tipton deducted from the principal’s sale proceeds amounts owed to Fasig-Tipton by the agent—as well as amounts owed by another seller for whom the same agent had sold horses at an earlier Fasig-Tipton sale. Fasig-Tipton was required by the courts to return the amounts deducted.

C. *Rights of Third Party v. Agent*

“[O]ne who deals with an agent does so at his own peril, and must discover the actual scope of his authority,”³⁷⁰ but an agent for a disclosed principal is not personally liable for the principal’s debt, absent evidence of his intent “to substitute or add his personal liability for, or to, that of his principal.”³⁷¹ That is the logical consequence of the rule that agents for disclosed principals have the power to bind their principals to a contract as if the third party had contracted directly with the principal.³⁷² Any rights or liabilities that exist between the third party and the agent do not effect that relationship.³⁷³

An exception to this rule is an agreed practice (including a custom) of a running account of set-offs among many parties,

³⁶⁶ *In re Martin Fein*, 34 Bankr. at 336 (An auctioneer is “primarily” the seller’s agent and a fiduciary obligation exists as a matter of law.); see also *Cruikshank*, 386 N.W.2d 134; RESTATEMENT (SECOND) OF AGENCY § 427 (1958).

³⁶⁷ *Cruikshank*, 386 N.W.2d at 134; see also *Bank of British N. America v. Cooper*, 137 U.S. 473, 479 (1890) (“If positive instructions are disobeyed and loss results, *prima facie* liability for that loss ensues . . . [S]trict compliances by . . . [the agent] with the instructions of the . . . [principal] is an unvarying condition of exemption from liability.”).

³⁶⁸ For example, in *Cruikshank*, 386 N.W.2d 134, an auctioneer deposited the seller’s proceeds in a bank account. Subsequently, the bank failed. The agent was held liable for the full proceeds since by failing to obtain the consent of the seller to have the proceeds deposited in a bank account. The court’s holding was irrespective of any negligence by the auctioneer. See also *Miron v. Yonkers Raceway, Inc.*, 400 F.2d 112 (2d Cir. 1968) (auctioneer who delivers horse prior to receipt of purchase price in violation of conditions of sale is liable to seller for purchase price).

³⁶⁹ 587 F.2d 103 (2d Cir. 1978).

³⁷⁰ *In re Perret*, 67 Bankr. at 775 (quoting *Ford v. Unity Hospital*, 299 N.E.2d 659, 664 (N.Y. 1973)).

³⁷¹ *Id.* at 774 (quoting *Meucher v. Weiss*, 114 N.E.2d 177 (N.Y. 1953)).

³⁷² RESTATEMENT (SECOND) OF AGENCY § 292 (1958).

³⁷³ *Id.* at § 299.

which can even allow setoffs against the principal.³⁷⁴ There is an estoppel caveat here as well: if the principal misleads the third party, such as by putting goods into the possession of the agent, the third party may set off any claim he or she has against the agent.³⁷⁵

*Castille*³⁷⁶ provides another rule contrary to the usual non-liability of the agent to third parties—for the super-fiduciary auctioneer. In that case, a purchaser brought suit against an auctioneer who represented prior to sale that a broodmare had been “Coggins Tested”.³⁷⁷ The auctioneer made repeated honest (but false) representations that a Coggins test certificate would be provided upon sale, even though no certificate had been provided by owner. The appellate court held that the buyer would ordinarily have no cause of action against the auctioneer, which it knew was acting as a mere agent.³⁷⁸ The court held, however, the auctioneer could be personally liable in this case as “the party who ‘makes the rules of the game’.”³⁷⁹ Under those circumstances, the auctioneer had a duty to ensure the horse met the requirements that the auctioneer represented.³⁸⁰

Where an agent contracts with a third party who is unaware that the agent is acting for a principal (undisclosed agency), the principal is liable to the third party—but the third party may look to the agent as well.³⁸¹ The third party’s election to charge the agent does not discharge the principal from liability, even if a judgment is obtained against the agent.³⁸² There may be only one

³⁷⁴ *Id.* at §§ 299 275 (such a custom is discussed at § 299, comment a).

³⁷⁵ *Id.* at § 306(2).

³⁷⁶ 338 So. 2d 328 (La. Ct. App. 1976).

³⁷⁷ *Id.* at 331.

³⁷⁸ *Id.* at 332.

³⁷⁹ *Id.* at 333 (quoting trial judge who is quoting an unnamed source).

³⁸⁰ *Id.*; see also *Susi v. Belle Acton Stables, Inc.*, 360 F.2d 704, 714 (2nd Cir. 1986) (agent’s conversion renders principal liable); *United States v. Sommerville*, 211 F. Supp. 843 (W.D. Pa. 1962) (agent-auctioneer’s sale of cows that were subject to recorded security interest constitutes conversion for which agent is liable); *Schulze v. Price*, 213 S.W.2d 365, 366-67 (Ark. 1948) (agent not personally liable to third party upon contract for sale of horse made for disclosed principal); *Small v. Ciao Stables, Inc.*, 425 A.2d 1030, 1032 n.6 (Md. 1981) (in action brought by seller against buyer’s agent, agent entitled to summary judgment since he acted for fully disclosed principal and made no personal contractual agreement); *Slyman v. Pickwick Farms*, 472 N.E.2d 380 (Ohio Ct. App. 1984) (agent who made warranties concerning yearling’s condition at request of known seller not personally liable for breach).

³⁸¹ RESTATEMENT (SECOND) OF AGENCY § 322 (1958).

³⁸² *Id.* at §§ 209, 210.

satisfaction.³⁸³ In another contrast to a disclosed principal pattern, where an agent is authorized to conceal the principal's existence, the third party may set off a claim against the agent as against any liability to the undisclosed principal until the existence of the principal becomes known.³⁸⁴

An agent may also be liable to a third party even when such party knows the agent is an agent—but the principal's identity is unknown.³⁸⁵ The principal is considered "partially disclosed," since his or her existence, but not identity, is known.³⁸⁶ Absent a custom or agreement to the contrary, the third person has no affirmative duty to discover the identity of the principal.³⁸⁷ This is an important variation in the context of horse sales. Often a consignor is asked to consign a horse under its name, to make use of the consignor's favorable reputation in the industry. An owner may believe that the owner's price can be maximized if a consignor with more experience is involved, albeit disclosing its agency role. The consigning agent risks personal liability, as is appropriate.³⁸⁸

The converse of this rule is that an agent for a partially disclosed principal may enforce the contract and the principal may be bound by a judgment between the other two, as in *Small v. Ciao Stables, Inc.*³⁸⁹ In *Small*, a seller consigned a filly at Fasig-Tipton's select two-year-old sale in the name of Thomas Bowman, D.V.M., Agent. Fasig-Tipton was the agent for the agent; and the filly was purchased by the buyer's agent. The buyer sued Fasig-Tipton in New York, skipping over three links in the chain of agency, obtaining a judgment for rescission. The sellers had knowledge of the suit but made no attempt to intervene. Subsequently,

³⁸³ *Id.* at §§ 209 comment a, 211. See *Schulze*, 213 S.W.2d at 366-67 (stating general rule that agent may be personally liable if principal is not disclosed and third party may elect to hold agent liable even upon disclosure of principal).

³⁸⁴ RESTATEMENT (SECOND) OF AGENCY § 306 (1958).

³⁸⁵ *Id.* at § 321.

³⁸⁶ *Orient Mid-East Lines v. Albert E. Bowen, Inc.*, 458 F.2d 572 (2d Cir. 1972) (rule was imposed despite evidence that a freight forwarder always acted exclusively for others).

³⁸⁷ *Id.* at 577.

³⁸⁸ *Id.* Theoretically, the consigning agent may be able to establish proof of a custom in the industry that would impose a duty to ascertain the identity of the principal, but *Orient Mid-East Lines* establishes that mere knowledge that an agent is acting for another will not relieve the agent of liability to a third party; see also *McElroy v. Long*, 170 F.2d 345, 347 (5th Cir. 1948) ("The fact that he is known to be an auctioneer, by profession selling as an agent for others, is of no import and is no notice that he may not be selling his own property"). See generally Annotation, *Liability of Auctioneer or Clerk to Buyer as to Title, Condition or Quality of Property Sold*, 80 A.L.R.2d 1237, 1241 (1961).

³⁸⁹ 425 A.2d 1030 (Md. 1981).

the sellers sued Fasig-Tipton for the purchase price in Maryland and obtained a summary judgment. A third action (the reported case) was filed by the sellers against the purchaser, who also obtained summary judgment—on grounds of *res judicata*.³⁹⁰

D. Regulation by Government

Currently, the usual agent's participation in the sale of horses and interests in horses (bloodstock agents, auctioneers, and exchanges) is not regulated in the same manner as real estate agents and brokers, with the exception of statutes applicable to livestock auctioneers. However, aside from the civil remedies of the principal against a defalcating agent, an agent is subject to criminal liability under some circumstances.³⁹¹

III. PROVISIONS AS TO QUALITY OF THE HORSE—INTRODUCTION

For horses of racing and performing age, matters of confirmation are observable, and matters of pedigree are generally available from the records of breed registries. Defects of bone, and, in

³⁹⁰ The court found that as agent for a partially disclosed principal, Fasig-Tipton was authorized to sue on the contract. *Id.* at 1037-38. See RESTATEMENT (SECOND) OF AGENCY § 364 (1958). In fact, the consignment contract authorized Fasig-Tipton to sue on the sales contract. 425 A.2d at 1037. A consignor could argue that by virtue of the consignment contract, Fasig-Tipton had a *duty* to sue and enforce its conditions of sale (or, in this case, defend). *Accord* Hewitt v. New York, N.H. & H.R.R. Co., 1 N.Y.S.2d 292 (1937).

³⁹¹ Under K.R.S. § 514.070,

a person is guilty of theft by failure to make required disposition of property received when: (a) He obtains property upon agreement or subject to a known legal obligation to make specified payment or other disposition whether from such property or its proceeds or from his own property to be reserved in equivalent amount; and (b) He intentionally deals with the property as his own and fails to make the required payment or disposition.

Under K.R.S. § 518.030,

a person is guilty of receiving a commercial bribe when: (a) As an employee or agent, and without the consent of his employer or principal, he knowingly solicits, accepts or agrees to accept any benefit from another person upon an agreement or understanding that the benefit will influence his conduct contrary to his employer's or principal's best interest; or (b) As a fiduciary, and without the consent of his beneficiary, he knowingly solicits, accepts or agrees to accept any benefit from another person upon an agreement or understanding that the benefit will influence his conduct contrary to his fiduciary obligation.

Additionally, under K.R.S. § 517.110,

a person is guilty of misapplication of entrusted property when he applies or disposes of property that has been entrusted to him as a fiduciary . . . in a manner which he knows is unauthorized and involves substantial risk of loss or detriment to the owner of the property or to a person for whose benefit the property was entrusted.

racing breeds, of wind, are usually not observable to the naked eye. They are discoverable to a large degree by X-rays and endoscopic examinations, with more defects being discoverable with more detailed and lengthy veterinary examinations. As to breeding animals, a superficial examination can determine whether a horse is a stallion prospect, or a gelding or ridgeling (a male without descended testicles in varying degrees), while laboratory examinations can give much (but not complete) information about the animal's fertility. Libido is determined only in the breeding shed. As to female breeding animals, the standard physical examination determines much as to capacities of the reproductive system; and a long breeding history can suggest the mare's capacity to conceive and carry a foal to term.

It is readily observed that the racing, performance, and breeding qualities of a horse vary widely as to their discoverability. Some defects are patent, some latent, and most lay on the wide spectrum between the two.

The same is true of the sources of information available to the buyer and seller. Sellers, for example, typically have access to the animal's medical history, which may, but often will not, reveal a bone break or chip, a history of failures of conception or abortion, and the results of a lifetime of examinations. Sellers have broad discretion regarding whether to make this information available to buyers. Equally varied are the standard practices among breeds and locales, and among private and public sales, as to the inspection practices of buyers, and the depth of disclosure made by sellers.

In order to predict the result of any case coming before a court, it is important for a lawyer to absorb and weigh all the different pieces of this puzzle in the particular transaction—far more important than analyzing each separate cause of action that may be available in a case involving the sale of goods. It is believed that this result is supported by many cases cited hereafter, and is in fact the proper outcome—an outcome determined by the nature of the horse sale transaction. In the discussion that follows, separate causes of action are isolated and separate elements and defenses are discussed; but it is hoped that this leads the reader through the horse sale transaction in a way that makes it understandable.

A. Mutual Mistake: The Blending of Cause of Action and Reliance

Since warranties have been discussed at length by other commentators, this Article concentrates on select elements of the war-

ranty cause of action. We extract the buyer reliance and seller knowledge elements of all of those and related causes of action, leaving only bits and pieces for general discussion of the individual claims. A claim for rescission due to mistake is the purest case of a buyer-reliance claim and a seller-knowledge circumstance. Mistake, after all, is a matter of what is in the minds of the two parties.

In *Cohen v. North Ridge Farms, Inc.*,³⁹² the specific matter before the court was the effect of a warranty disclaimer, but the analysis goes much further. The buyer purchased a thoroughbred yearling colt, which he thought was a racehorse without wind problems. He soon discovered that the yearling had an undiagnosed, potentially harmful wind problem. The court held that because of an unambiguous disclaimer of wind warranties, the auction's "Conditions of Sale operated to shift the burden of responsibility for any fortuitous conditions which might arise upon the buyer."³⁹³ *Cohen* itself cites cases applying this principle to any situation where the parties have "agreed among themselves,"³⁹⁴ and the principle applies to any circumstance where the buyer is aware that he or she is taking a risk. *Beecher v. Able*³⁹⁵ quotes Professor Williston: "[I]n determining whether rescission is warranted in a given circumstance, 'there must be excluded from consideration mistakes as to matters which the contracting parties had in mind as possibilities and as to the existence of which they took the risk'."³⁹⁶ The commentator to Restatement (Second) of Contracts agrees:

c. *Conscious ignorance.* Even though the mistaken party did not agree to bear the risk, he may have been aware when he made the contract that his knowledge with respect to the facts to which the mistake relates was limited. If he was only so aware that his knowledge was limited but undertook to perform in the face of that awareness, he bears the risk of the mistake. It is sometimes said in such a situation that, in a sense, there was not mistake but "conscious ignorance."³⁹⁷

³⁹² 712 F. Supp. 1265 (E.D. Ky. 1989).

³⁹³ *Id.* at 1270 (quoting from *United States v. Hathaway*, 242 F.2d 897, 900 (9th Cir. 1957)).

³⁹⁴ *Id.*

³⁹⁵ 575 F.2d 1010 (2d Cir. 1978).

³⁹⁶ *Id.* at 1015 (quoting 13 S. WILLISTON, CONTRACTS § 1543 (1970)).

³⁹⁷ RESTATEMENT (SECOND) OF CONTRACTS § 154 comment c (1981).

The commentator notes the "close relationship" of mistake claims to claims of breach of warranty³⁹⁸—a useful connection that sets the theme of the next few sections of this Article. The separate causes of action are discussed below without reference to reliance and intent, and, with that background, the concept of conscious ignorance will be revisited.

B. *Express Warranties*

Despite the limitation of its title to "implied warranties," an earlier article in the *Journal* serves as the basis for an analysis of express warranties in horse cases.³⁹⁹ Thus, the following analysis is limited in its scope, culminating in a discussion of the warranty of description, which serves as an express warranty in the horse industry; however, its effect is similar to that of the implied warranty in other fields.

*Sessa v. Riegle*⁴⁰⁰ and *Yuzwak v. Dygert*⁴⁰¹ bring into the modern context the always difficult line between mere puffing and statements that are "warranties, and therefore, a part of the bargain."⁴⁰² The cases are, unfortunately, absolutely correct in stating that these issues are almost always questions of fact and are intimately related to the extent to which the buyer relied on the representations.⁴⁰³ Those cases are also accurate (and very modest) in saying that the older cases "are not always similarly treated under warranty law."⁴⁰⁴

Significantly, *Frederickson v. Hackney*⁴⁰⁵ and *Appleby v. Hendrix*⁴⁰⁶ illustrate that there is a thin line separating the causes of action stated in horse transactions involving breeding stock. Indeed, it is arguable that these cases should be cited as implied warranty or warranty of description cases. In the older Minnesota case of *Frederickson*, a bull was sold because of his bloodlines, and in the Texas case, *Appleby*, a stallion was sold because of his bloodlines. There was no apparent evidence suggesting that either

³⁹⁸ *Id.*

³⁹⁹ See Cohan, *supra* note 3, at 687-93.

⁴⁰⁰ 427 F. Supp. 760 (E.D. Pa. 1977).

⁴⁰¹ 534 N.Y.S.2d 35 (N.Y. App. Div. 1988).

⁴⁰² *Id.* at 36.

⁴⁰³ See *infra* notes 514-61 and accompanying text; see also R. ANDERSON, *supra* note 15, at §§ 2-313:120-:130.

⁴⁰⁴ *Sessa v. Riegle*, 427 F. Supp. 760, 765 (E.D. Pa. 1977).

⁴⁰⁵ 198 N.W. 806 (Minn. 1924).

⁴⁰⁶ 673 S.W.2d 295 (Tex. Ct. App. 1984).

seller knew the young animal was sterile; but the sales pitches in both cases made it clear that the seller knew the purchaser wanted the animal solely for breeding purposes.

In *Frederickson*, the court brushed aside any notion of an express warranty, whereas in *Appleby*, the court found an express warranty of fertility. The *Frederickson* case expressed considerable wisdom on the subject.⁴⁰⁷ Showing how this body of law blends into implied warranty law, and fraud law, the Minnesota court in *Frederickson* cites an older case that notes that the law “does not impute to the seller knowledge as to qualities or fitness which no human foresight or skill can attain.”⁴⁰⁸ The court continues by stating that:

[w]hile that statement may not sufficiently emphasize the seller’s knowledge that the article will be valueless to the purchaser unless fit for a particular purpose, it shows the utter impossibility, in reason, of creating an implied warranty in a case of this kind, where neither party can know anything about what the future will prove concerning the particular qualifications expected and desired in the subject-matter of the sale.⁴⁰⁹

The only apparent factual difference between the cases is that in the Texas case the stallion was expected to go directly into breeding, whereas in the older Minnesota case the bull was apparently a year or so too young to be a breeding animal. Without attempting to resolve that difficulty, it arguably should not be analyzed as a *pure* express warranty of fact.⁴¹⁰ As the Judge in *Cohen* noted, as long as a horse is alive, it is a horse.⁴¹¹ In fact, perhaps a dead horse is literally a horse. A horse ordinarily breathes; and a stallion ordinarily breeds—just as a car ordinarily drives passengers down the street. However, such facts are usually given

⁴⁰⁷ There can be no more appropriate occasion for the adoption of the rule of ‘caveat emptor’ than the sale of an immature animal, the principal value of which depends upon its later becoming a breeder. Sterility is the exception. Still there are many contingencies attending the adolescence even of brutes that would make it an anomalous thing to impose upon a vendor, who parts with the possession and responsibility for the rearing of the animal, the liability of having the sale rescinded in the event that, at maturity, the animal proves to be sterile.

Frederickson v. Hackney, 198 N.W. 806, 806 (Minn. 1924).

⁴⁰⁸ *Id.* at 807 (quoting *McQuaid v. Ross*, 55 N.W. 705, 706 (Wisc. 1893)).

⁴⁰⁹ *Id.*

⁴¹⁰ A warranty of description is of course one sort of express warranty. U.C.C. § 2-313(b).

⁴¹¹ *Cohen v. North Ridge Farms, Inc.*, 712 F. Supp. 1265, 1270 (E.D. Ky. 1989).

legal effect by virtue of implied warranties (even if the car is not designated as such).⁴¹² If it is established that both parties had full knowledge and intent that the horse was headed to the breeding shed, does the word "stallion" in the contract really add anything? Probably so; but if it does, then there is a warranty of description.

To the contrary, some warranties often described as warranties of description (as in the leading case of *Keck v. Wacker*)⁴¹³ should be viewed as pure express warranties. A statement that a mare did not conceive (as opposed to having conceived a fetus and aborted) is a statement of fact, pure and simple. Or rather, pure—and not so simple. If characterizing a horse as sound means there are no broken bones, then describing a horse as barren should mean (to horsemen in that business) there was no aborted foal. Similarly, if there is "a custom in the horse auction business . . . that when a mare is sold under the representation that she has been bred, such representation conveys a reasonable assumption that the mare is pregnant or in foal," then custom has been used to describe that existing fact.⁴¹⁴

However subtle and complex, these statements are still statements of fact, and the implication is of a fact—not of a new warranty of quality. The horse has not been described; a fact about it has been stated. The mare either had been bred or it had not; and it is the same mare described in the catalog, the pregnancy condition being no different than a statement about the condition of bones or wind.

This point becomes important when considering cases such as *Travis v. Washington Horse Breeders Association*.⁴¹⁵ The intermediate appellate court confused express and implied warranties, striking *all* disclaimers of warranty. The final appellate court in Washington held, to the contrary, that express warranties are to be "construed" to be consistent with disclaimers and vice versa—and that is all.⁴¹⁶ The point here is that a pure express warranty is to be treated as nothing more or less than that—neither an excuse to analyze an implied warranty, nor as a description that is subject to conformity analysis under the U.C.C.

⁴¹² Apparently this transition is not much litigated as to used cars either. Burnham, *Remedies Available to the Purchaser of a Defective Used Car*, 47 MONT. L. REV. 273, 284 (1986).

⁴¹³ 413 F. Supp. 1377 (E.D. Ky. 1976).

⁴¹⁴ McKnight v. Bellamy, 449 S.W.2d 706, 706 (Ark. 1970).

⁴¹⁵ 734 P.2d 956 (Wash. App. 1987), *rev'd in part*, 759 P.2d 418 (Wash. 1988).

⁴¹⁶ 759 P.2d 418, 422 (Wash. 1988).

C. *Implied Warranties*

As with respect to express warranties, a full analysis of the law of implied warranties begins with an article published heretofore by the *Journal*.⁴¹⁷ The distinctions and applications of the two implied warranties of the U.C.C.—those of merchantability, and that of fitness for a particular purpose—are there described. Similarly, the merchant or non-merchant status of the parties, distinctions between ordinary and particular purposes, and other technical requirements of the doctrines are there discussed.

Matters of reliance and knowledge in this cause of action are discussed along with similar matters and other causes of action later in this Article.⁴¹⁸ For now, this section serves as a transition between express warranties and warranties of description. The implied warranties of merchantability and fitness for a particular purpose, taken together, stand for the proposition that, in ordinary circumstances, a seller of goods should provide some assurance to the buyer that the goods will actually function. Implied warranties of merchantability and fitness for a particular purpose are gap fillers under the U.C.C. On the face of it, they seem eminently fair: if a car is sold, it ought to have an engine that fires up when the key is turned. If a pesticide is sold, it should kill some insects.

The only other point to be made is that implied warranties of quality (as opposed to title) are a radical departure from tradition in horse cases, where *caveat emptor* was the familiar rule.⁴¹⁹ Kentucky still carves some defects of horses out of the U.C.C.'s implied warranties.⁴²⁰ Why is it that implied warranties were not usual with horses? The inherent fragility of the equine animal, and the inherent unknowability of its future, makes anyone in the horse business (and any non-merchant user of a horse for any purpose) keenly aware of the riskiness of the venture.⁴²¹ A bowed tendon, for

⁴¹⁷ Cohan, *supra* note 3, at 672.

⁴¹⁸ See *infra* notes 514-81 and accompanying text.

⁴¹⁹ See *Egan v. Call*, 34 Pa. 236, 238 (1859) ("Certainly, there is no such engagement in the sale of such an article as a horse."); *Wood v. Ross*, 26 S.W. 148, 149 (Tex. Civ. App. 1894) ("In a general sale of a horse the seller only warrants it to be an animal of the description it appears to be, and nothing more."); see also *Merchants' & Mechanics' Sav. Bank v. Frazee*, 36 N.E. 378, 380 (Ind. 1894) ("If a man sells a horse generally, he warrants no more than that it is a horse."); *Moore v. Miller*, 100 S.W.2d 331 (Mo. 1936); Annotation, *Implied Warranty of Fitness on Sale of Livestock*, 55 A.L.R. 2d 892 (1957). But see *Tarulli v. Birds in Paradise*, 417 N.Y.S.2d 854, 898 (1979).

⁴²⁰ K.R.S. § 355.2-316(3)(d).

⁴²¹ See *Miller*, *supra* note 17, at 738.

example, can appear almost instantaneously after the sale.⁴²² This inherent riskiness must be part of any analysis of implied warranties, even if the U.C.C. requires that that analysis start with the implied grant of such an assurance. Can any disclaimer of mere implied warranties be unconscionable? Perhaps it can if certain facts are present, such as the knowledge of the seller and the latency of the defect facing a buyer. Surely the final court in *Travis* had some such point in mind.

D. *Warranty of Description*

Several classic horse cases involve expansive readings of descriptions of breeding animals⁴²³ where statements of fact about a mare's breeding history are understood by people in the business to show important tendencies in the mare's ability to conceive and carry a foal to term. These cases are best analyzed as regarding express warranties of fact.⁴²⁴ It would be more accurate to label a statement that the horse is a mare as a warranty of description and claim a breach of that warranty if she has no reasonable prospect to conceive and bear a foal. However, in most breeds, it is understood that a mare could well be a racehorse or a showhorse, fully in accordance with her description, even if she is entirely sterile. That would be a matter of proof of common linguistic usage.

This sort of analysis applies more comfortably to male horses. As suggested earlier,⁴²⁵ a stallion is a breeding animal. It stretches the description a bit, but it is at least arguable that when one describes a colt one is indicating "his sex to be that of a stallion."⁴²⁶ Certainly a castrated male is not a stallion.⁴²⁷ It is also held that an animal "with one undescended testicle" is not merchantable as a breeding animal.⁴²⁸

This progression of cases takes us, step by step, back to the proposition that even in a body of law where implied warranties

⁴²² *Strauss v. West*, 216 A.2d 366 (R.I. 1966).

⁴²³ See *Keck v. Wacker*, 413 F. Supp. 1377 (E.D. Ky. 1976); *Chernick v. Fasig-Tipton*, 703 S.W.2d 885 (Ky. Ct. App. 1986).

⁴²⁴ See *supra* notes 347-69 and accompanying text.

⁴²⁵ See *supra* notes 399-416 and accompanying text.

⁴²⁶ *Grandi v. LeSage*, 399 P.2d 285, 288-89 (N.M. 1965).

⁴²⁷ *Brodsky v. Nerud*, 414 N.Y.S.2d 38 (N.Y. 1979). Incidentally, for purposes of obtaining a gentle saddle horse, a description as a gelding is much better, and is a cause of breach if not true. *O'Shea v. Hatch*, 640 P.2d 515 (N.M. App. 1982).

⁴²⁸ *Dempsey v. Rosenthal*, 468 N.Y.S.2d 441, 444 (N.Y. Civ. Ct. 1983) (a dog case citing horse law).

are not traditional, the description of an animal as a breeding animal can be construed to promise the ability to perform the breeding function. *Alpert v. Thomas*⁴²⁹ holds that a warranty of merchantability of a stallion guarantees a high level of fertility. That case goes too far; but it is not unusual in non-animal cases for merchantability and fitness warranties to be imported into description warranties.⁴³⁰ Other cases attempt to distinguish between the two.⁴³¹ Professor Anderson notes the "undesirable confusion" of warranties of description with implied warranties, noting that the warranty of description is by definition an "express" warranty.⁴³² An appropriate resolution of the problem is to realize that merchantability and fitness analysis and understanding can be brought to bear on matters of construction of express warranties.

It is worth noting finally that the plaintiff in *Cohen* attempted to stretch the description of the horse as a yearling to mean that it was a racehorse⁴³³—which, of course, it is not. In a different case, however, this form of analysis will be useful.

E. Acceptance/Failure of Consideration

In this paragraph, this Article addresses two rights of rescission, one covered concretely by two sections of the U.C.C., and another growing out of many contradictory common law cases. The U.C.C. rights allow a purchaser to "reject" a horse (a) if "the tender of delivery fail[s] in any respect to conform to the contract,"⁴³⁴ and (b) if at a later time a later-discovered "non-conformity substantially impairs [the horse's] value to him."⁴³⁵ The Code's several requirements of inspection are later discussed, as they relate to and reflect reliance;⁴³⁶ and the U.C.C.'s general requirements on the buyer to discover a non-conformity promptly was analyzed above, when this Article discussed the role of custom.⁴³⁷ In this paragraph, the difference between two U.C.C. rescission rights is significant: (a) an early failure "in any respect" (for the right to "reject") as

⁴²⁹ 643 F. Supp. 1406 (D.Vt. 1986).

⁴³⁰ See *Agricultural Serv. Ass'n, Inc. v. Ferry-Morse Seed Co.*, 551 F.2d 1057 (6th Cir. 1977); *Granite Equip. Leasing Corp. v. Folds*, 212 S.E.2d 490 (Ga. 1975).

⁴³¹ *Kennedy v. Cornhusker Hybrid Co.*, 19 N.W.2d 51 (Neb. 1945).

⁴³² R. ANDERSON, *supra* note 15, at § 2-313:76.

⁴³³ *Cohen*, 712 F. Supp. 1265.

⁴³⁴ R. ANDERSON, *supra* note 15, at §§ 2-601, -602.

⁴³⁵ *Id.* at -608.

⁴³⁶ See *infra* notes 514-61 and accompanying text.

⁴³⁷ See *supra* notes 202-19 and accompanying text.

opposed to (b) a later failure that "substantially impairs" the horse's value (for a right to "revoke acceptance".)⁴³⁸

The former rule (involving early discovery) has sometimes been called the rule of *perfect tender*.⁴³⁹ The latter (involving later discovery) variously focuses on the *relative size of the damage* "by objective evidence rather than the buyer's personal position" or proof of "a special devaluing effect on him."⁴⁴⁰ More accurately, the latter issue is determined by whether there is an objective detriment, based on the personalized purpose of the purchaser:

It would appear that the sound view is that a personalized objective determination is to be made, personalized in the sense that the circumstances must be viewed from the viewpoint and the circumstances of the buyer, objective in the sense that even though personalized, the criterion is what a reasonable person would have believed if in the same position as the buyer.⁴⁴¹

The common law notion of failure of consideration provides an analog to these Code issues.⁴⁴² Rescission at common law is available if the property purchased is "wholly unsuitable for the use or purpose to which it is known by the seller that the buyer intends to" apply the property.⁴⁴³ Apart from the issue of what "is known by the seller,"⁴⁴⁴ the notion of "wholly unsuitable" is (as one might expect) not always rigidly applied. In view of the history of horse law, with its emphasis on *caveat emptor*, a rigid rule might be considered the usual one. For example, *Pidcock v. J. Crouch & Son*⁴⁴⁵ holds that the proof of damages does not have to "establish the damage with arithmetical accuracy; but there must be such proof as to furnish a reasonable basis for the action of the jury when it comes to the question of abating the purchase."⁴⁴⁶

⁴³⁸ See U.C.C. §§ 2-601, -602, -608.

⁴³⁹ *Capitol Dodge Sales, Inc. v. Northern Concrete Pipe, Inc.*, 346 N.W.2d 535, 539 (Mich. Ct. App. 1983); R. ANDERSON, *supra* note 15, at § 2-601:5.

⁴⁴⁰ *Colonial Dodge, Inc. v. Miller*, 362 N.W.2d 704, 706 (Mich. 1984) (failure to include a spare tire constituted a substantial impairment in value of automobile entitling buyer to revoke acceptance).

⁴⁴¹ R. ANDERSON, *supra* note 15, at § 2-608:23.

⁴⁴² This relationship is noted in *Freeman Oldsmobile Mazda Co. v. Pinson*, 580 S.W.2d 112, 113 (Tex. Civ. App. 1979).

⁴⁴³ *Id.*

⁴⁴⁴ See *infra* notes 562-81 and accompanying text.

⁴⁴⁵ 66 S.E. 971 (Ga. 1910).

⁴⁴⁶ *Id.* at 972. *Cf. Egan*, 34 Pa. at 655 ("Mere inadequacy of consideration, without warranty or fraud, is no defense.").

Other cases rely on substantial or material failures. Thus, “[a] *substantial* failure of consideration ordinarily justifies rescission”⁴⁴⁷ or “[p]roof of a *material* failure of consideration may excuse a party from performing its duties under a contract.”⁴⁴⁸ The common law cause of action is to be distinguished from the notion that there is no “valid consideration,” that is, no consideration at all.⁴⁴⁹ This distinction would better be made by calling this latter defense failure of performance rather than failure of consideration, but it is not done so traditionally at law. The terminology is made more clear in the Restatement (Second) of Contracts.⁴⁵⁰

The U.C.C. and common law defenses/claims are treated together because the fact patterns or transactions of each are so similar. It has been suggested that the U.C.C. provisions have displaced the common law defense/claim,⁴⁵¹ but it is equally arguable that non-Code defenses/claims survived the adoption of the Code.⁴⁵²

These defenses/claims are related to, but distinct from claims of breach of warranty. Particularly where the goods have been accepted, “the right to revoke acceptance . . . does not arise from every breach of warranty.”⁴⁵³ This is notably true in horse cases. Specifically, the buyer’s burden of proof is far higher in a “non-conformity” case than in a warranty damage case.⁴⁵⁴ The case of *White Devon Farm v. Stahl*⁴⁵⁵ makes a jumble of the Code provisions, but makes the central point of noting that “substantial” must take into account the peculiar facts applicable to most horses: “A horse has at least two separate and disparate values—his value for racing, and his value for breeding.”⁴⁵⁶

⁴⁴⁷ O.P. Link Handle Co. v. Wright, 429 S.W.2d 842, 845 (Ky. 1968) (emphasis added).

⁴⁴⁸ Converse v. Zinke, 635 P.2d 882, 887 (Colo. 1981) (emphasis added).

⁴⁴⁹ See, e.g., Campbell v. Campbell, 377 S.W.2d 93 (Ky. 1964).

⁴⁵⁰ RESTATEMENT (SECOND) OF CONTRACTS § 237 comment a (1981) (“What is sometimes referred to as ‘failure of consideration’ by courts and statutes (e.g., Uniform Commercial Code § 3-408) is referred to in this Restatement as ‘failure of performance’ to avoid confusion with the absence of consideration”).

⁴⁵¹ *Freeman Oldsmobile*, 580 S.W.2d 112.

⁴⁵² See U.C.C. § 1-103 (1977); see also R. ANDERSON, *supra* note 15, at § 2-608:21 (“[F]raud or some similar non-Code ground.”) and § 2-711:46. *Cohen*, 712 F. Supp. 1265, treats the common law defense as remaining.

⁴⁵³ *Collum v. Fred Tuch Buick*, 285 N.E.2d 532, 535 (Ill. App. Ct. 1972).

⁴⁵⁴ *Coyle Chevrolet Co. v. Carrier*, 397 N.E.2d 1283 (Ind. Ct. App. 1979).

⁴⁵⁵ 389 N.Y.S.2d 724 (N.Y. App. Div. 1976).

⁴⁵⁶ *Id.* at 728.

Two cases from the same Kentucky federal trial court, *Keck v. Wacker*⁴⁵⁷ and *Cohen v. North Ridge Farms, Inc.*,⁴⁵⁸ put these matters into perspective. In *Keck*, a mare was found not to fit its description in an auction catalogue.⁴⁵⁹ It had aborted its most recent fetus rather than having failed to get in foal in that breeding season.⁴⁶⁰

The court correctly noted the effect under the U.C.C.:

When the sale and auction was made at Keeneland, title to the mare passed to Mrs. Wacker, and through her agents, Wacker and Hirsch, she accepted the mare under KRS 355.2-606. . . Then pursuant to KRS 355.2-608(3), the buyer, Mrs. Wacker, who revoked, had the same right and duties with regard to the goods involved as if she had rejected them.⁴⁶¹

But the court then made a mistake in its analysis. It held that when "the burden [is] placed on the buyer to establish any breach with respect to the goods accepted, K.R.S. § 355.2-607(4) does not apply."⁴⁶² This reasoning was entirely circular. If the buyer has already met her burden to show a substantially impairing non-conformity, why is there any need thereafter to show anything about conformity at all? The *Keck* court cites *Miron v. Yonkers Raceway, Inc.*⁴⁶³ for this proposition. *Miron* states that a late revocation places the burden on the buyer to prove non-conformity.⁴⁶⁴ It does not state the converse. Although it is not relevant in the *Keck* case, *Keck's* circular reasoning is treated as being dispositive in *Alpert*,⁴⁶⁵ where the seller had possession of the horse for many months before any inspections were made.⁴⁶⁶

On the other hand, *Keck* does dramatize the difference between a mere warranty case and a non-conformity case.⁴⁶⁷ Because the

⁴⁵⁷ 413 F. Supp. 1377 (E.D. Ky. 1976).

⁴⁵⁸ 712 F. Supp. 1265 (E.D. Ky. 1989).

⁴⁵⁹ *Keck*, 413 F. Supp. at 1380.

⁴⁶⁰ *Id.*

⁴⁶¹ *Id.* at 1382.

⁴⁶² *Id.* at 1382-83.

⁴⁶³ 400 F.2d 112 (2d Cir. 1968).

⁴⁶⁴ *Id.* at 120.

⁴⁶⁵ 643 F. Supp. at 1419.

⁴⁶⁶ Burdens of proof are entitled to a law journal article of their own. See, for example, the confusion in R. ANDERSON, *supra* note 15, at §§ 2-313:25, 2-315:64. Burdens are particularly important in horse cases, which must often be submitted very quickly for summary judgment because of the importance of every day and month in the life of a horse. See, e.g., Norton v. Lindsay, 350 F.2d 46 (10th Cir. 1965).

⁴⁶⁷ *Keck*, 413 F. Supp. at 1382-83.

Keck opinion involved the warranty of a fact in the mare's breeding record, its importance to equine law tends to obscure its application in the more usual case of warranties of quality. No inspection by the buyer prior to the sale in *Keck* would have made a difference.⁴⁶⁸ The court made no distinction in *Keck* between a rejection and a revocation of acceptance. The *Keck* opinion further obscures this difference by relying on *Miron*—which might as well have been in an entirely different body of law.⁴⁶⁹ *Keck* is in fact in the line of *Schleicher v. Gentry*,⁴⁷⁰ which purports to apply a "warranty of identification,"⁴⁷¹ a common law parallel to the U.C.C.'s treatment of non-conformity with description.⁴⁷²

Similarly, the court in *Cohen* treated a claim of failure of consideration as if it were the same as a warranty.⁴⁷³ In that case, the seller had noted the ancient authority that warranties are not expansively read in the horse business.⁴⁷⁴ The Court in *Cohen* continued:

In plaintiff's response thereto, he argues that there was a failure of consideration because the horse cannot fulfill the sole purpose for which it was purchased. Obviously, plaintiff is arguing warranty, and since all warranties were disclaimed, his argument is without merit. The only way there could be a failure of consideration would be if plaintiff had received (1) nothing, (2) a dead yearling, or (3) a live yearling different from the one on which he bid. None of these contingencies are present herein.⁴⁷⁵

⁴⁶⁸ *Id.* at 1381.

⁴⁶⁹ See *supra* notes 463-64 and accompanying text.

⁴⁷⁰ 554 S.W.2d 884 (Ky. Ct. App. 1977).

⁴⁷¹ *Id.* at 885.

⁴⁷² U.C.C. § 2-608 (1988). Like *Miron v. Yonkers Raceway*, 400 F.2d 112 (2d Cir. 1968), in the area of warranties of quality, *Schleicher* applies the context and practices of the horse industry to determine reasonableness in the timing of discovery and rescission. 554 S.W.2d at 885-86.

⁴⁷³ 712 F. Supp. 1265 (E.D. Ky. 1989).

⁴⁷⁴ *Id.* at 1269. *Merchants' & Mechanics' Savings Bank*, 36 N.E. at 380 ("If a man says a horse generally, he warrants no more than it is a horse."); *Wood v. Ross*, 26 S.W. 148, 149 (Tex. Civ. App. 1894) ("[I]n a general sale of a horse the seller only warrants it to be an animal of the description it appears to be, and nothing more.").

⁴⁷⁵ *Cohen*, 712 F. Supp. at 1270. Here is the point at which the Court began to stray: it was not true to say that all warranties were disclaimed. Warranties of description are sometimes found in apparently innocent description language, and such express warranties were not disclaimed. Furthermore, conformity with the contract goes beyond matters of warranty. If there is a perfect tender rule that requires the delivery of a perfect yearling, and if (as in *Cohen*) there is a rejection (as opposed to a revocation of acceptance), then one need not meet all the tests required for relief from a breach of warranty. Compare U.C.C. § 2-602 (1988) (rejection) with U.C.C. § 2-608 (revocation of acceptance). After all,

In so holding, the court was supported by ample authority, viz., by the general rule that "if a seller properly disclaims all warranties the item cannot be non-conforming and revocation is not in order."⁴⁷⁶

What, however, if the conditions of sale of the auction in *Cohen* had not only specifically disclaimed unexpressed warranties, but had also provided that no non-warranted condition would be considered a substantial non-conformity with the contract?⁴⁷⁷—thus referring to the revocation of acceptance rules but *not* the rejection rules. There would then be an interesting question: since the buyer had not inspected the horse, nor had he refused a demand for inspection (thus not having accepted the horse), was he then entitled to perfect tender under U.C.C. section 2-201? Would the conditions' *explicit* distinction between unexpressed warranties (which were disclaimed) and conformity with the contract (which was disclaimed only as to substantial matters) require a different result?

Of course, in *Keck* and *Cohen* that issue is purely theoretical. In *Keck* there was a warranty and a non-conformity shown. In *Cohen* there was neither a warranty nor a non-conformity alleged. Had there been a genuine claim of non-conformity—if the colt had a reproductive defect, which made it something less than a colt but not quite a ridgeling or gelding⁴⁷⁸—would the buyer have been entitled to a perfectly tendered colt?

F. Fraud

As noted previously,⁴⁷⁹ common law fraud (at least in some forms) constitutes an exception to the parol evidence rule and to the statute of frauds; it is a special case with respect to disclaimers.⁴⁸⁰ In fact, common law fraud is specifically retained by the terms of the Code.⁴⁸¹ In some cases, in the horse business and

the standard remedy for a breach of warranty is damages, even if damages are not ordinarily sought in horse cases. See generally U.C.C. § 2-313. The ordinary disclaimer does not disclaim warranties of description and conformity goes beyond the law of warranty. It is possible to write a contract or a condition that solves these problems: "buyer agrees he has no remedies even if the horse turns out to be a dog, and even if the dog is dead."

⁴⁷⁶ D. LIEBSON & R. NOWKA, *THE UNIFORM COMMERCIAL CODE OF KENTUCKY* 146 (1983) (citing *Clark v. Ford Motor*, 612 P.2d 316 (Or. Ct. App. 1989)).

⁴⁷⁷ Keeneland's conditions of sale included such language at one time.

⁴⁷⁸ See *supra* notes 399-433 and accompanying text.

⁴⁷⁹ See *supra* notes 141-202 and accompanying text.

⁴⁸⁰ See *supra* notes 78-119 and accompanying text.

⁴⁸¹ U.C.C. § 1-103.

elsewhere, the results are simple: if the seller tells an absolute, knowing, material lie about the condition of his or her animal, the buyer reasonably relied on the representation,⁴⁸² and the buyer is thereby substantially injured, a cause of action arises.⁴⁸³

Transactions involving active concealment where an action (other than speaking a word) would "prevent another from learning a fact" are the equivalent of false statements.⁴⁸⁴ So, too, are the related cases where the seller is merely silent, but would have to speak to correct some previous assertion.⁴⁸⁵

The more typical situation in the horse business, however, is where there is a defect known to the seller and not discoverable by an ordinary inspection of the buyer. This is a truly latent defect. As would seem likely in so perplexing a situation, animal cases hold both that silence in such a situation is actionable⁴⁸⁶ and not actionable.⁴⁸⁷ It is the author's opinion that whatever the rule in a pure case of that sort, a cause of action ought to arise *at least* where there is some *substantial* additional (silence-"plus") factor in the surrounding circumstances. One such factor might be the fact that the undisclosed latent defect amounts to total worthlessness—which additional fact is sometimes held to convert this fact pattern into fraud.⁴⁸⁸ Such a cause of action might equally well be

⁴⁸² It is clear that "mere silence" in a circumstance "where means of information are as accessible to one party as the other" will not constitute fraud. *Bryant v. Troutman*, 287 S.W.2d 918, 920 (Ky. 1956).

⁴⁸³ RESTATEMENT (SECOND) OF TORTS §§ 525-548a. Cases containing all the elements are too numerous to cite. *See, e.g., Chernick*, 703 S.W.2d 885.

⁴⁸⁴ RESTATEMENT (SECOND) OF CONTRACTS § 160 (1981); *see also* RESTATEMENT (SECOND) OF TORTS §§ 550-551 (1977).

⁴⁸⁵ RESTATEMENT (SECOND) OF CONTRACTS § 161(a) (1981); *see also* RESTATEMENT (SECOND) OF TORTS § 528, 550-551 (1977).

⁴⁸⁶ *Cantrell v. Owen*, 13 N.W.2d 408, 410 (Neb. 1944) ("In this connection it holds only that the seller of cattle for breeding purposes who knows that they are infected with a disease which is not discoverable by inspection and keeps silent is guilty of fraud and that under such circumstances the rule of caveat emptor does not apply.").

⁴⁸⁷ *Court v. Snyder*, 28 N.E. 718, 719 (Ind. App. 1891) ("The mere fact that the seller is aware of a latent defect in the animal will not amount to fraud").

⁴⁸⁸ *Thompson v. Miser*, 92 N.E. 420 (Ohio 1910):

Where the evidence tended to show that a cow had been sold and purchased for a breeder, and to improve the plaintiff's herd of cattle, that there was a latent defect which would greatly impair, if not destroy, her capacity to breed, that this was known to the vendors, and unknown to the vendees, and was not disclosed at the time of sale, and a charge was asked that, if these facts were found by the jury, then, and in that case, the defendants would be guilty of practicing fraud.

Id. at 422; *see also* *Burnett v. Hensley*, 92 N.W. 678 (Iowa 1902). The spectrum of possibilities as to "totality" is discussed in the Kentucky real estate case of *Kaye v.*

called a total failure of consideration case, i.e., one bordering on fraud.⁴⁸⁹ Courts could choose where along the spectrum from total to substantial to material they wish to draw this line.⁴⁹⁰

The view of the contracts and torts Restatements is quite similar. Apart from the obvious cases, and one additional situation where a party in its silence fails to "correct a mistake of the other party as to the contents or effect" of the agreement,⁴⁹¹ the Restatements create two residual categories that bear analysis.⁴⁹²

The Restatements treat a non-disclosure as the equivalent of a lie, where there is "a relation of trust and confidence"⁴⁹³ or "a fiduciary or other similar relation of trust and confidence."⁴⁹⁴ A typical duty of a fiduciary is well-recognized as a silence-"plus" factor.⁴⁹⁵ Silence here, however, could very well be analyzed as breach of a fiduciary's duty of disclosure, a subset of the duty of loyalty.⁴⁹⁶ The case need not be analyzed then as a fraud at all, just as the total worthlessness case can be moved out of the fraud context. Other confidential relations in the context of the horse business might be those between parent and child, and among siblings, but these are not likely to arise very often unless the general public duties of industry institutions are included in this category. It certainly will not do simply to plead in some general way that there is a duty, and expect to get past even a motion to dismiss.⁴⁹⁷

In *Cohen*, the court noted that the plaintiff had suggested that there was some duty both to "discover and disclose any defects."⁴⁹⁸ The court held that neither duty existed.⁴⁹⁹ The seller and the buyer

Compton, 283 S.W.2d 204 (Ky. 1955), where even a "potential" serious problem is held actionable. *Id.* at 208.

⁴⁸⁹ See *supra* notes 392-488 and accompanying text; see *infra* notes 490-605 and accompanying text.

⁴⁹⁰ *Hughes v. Robertson*, 17 Ky. (1 T.B. Mon.) 215 (1824) is a good example of such a choice—which would not be made the same way today.

⁴⁹¹ RESTATEMENT (SECOND) OF CONTRACTS § 161 (1981).

⁴⁹² *Id.*; RESTATEMENT (SECOND) OF TORTS § 551 (1977).

⁴⁹³ RESTATEMENT (SECOND) CONTRACTS § 161(d).

⁴⁹⁴ RESTATEMENT (SECOND) TORTS § 551(2)(a).

⁴⁹⁵ *Anderson v. Tway*, 143 F.2d 95 (6th Cir. 1944) (duty of bank director as fiduciary), *cert. denied*, 324 U.S. 861 (1945).

⁴⁹⁶ See *supra* notes 287-346 and accompanying text.

⁴⁹⁷ *Walton v. Morgan Stanley & Co.*, 623 F.2d 796, 799 (2d Cir. 1980) ("In sum, the appellants have failed to state a claim upon which relief may be granted, for the complaint, although it alleges a breach of fiduciary duty, fails to state facts from which a fiduciary relationship arises.").

⁴⁹⁸ 712 F. Supp. 1265, 1267 (E.D. Ky. 1989).

⁴⁹⁹ *Id.*

had never even met, and their agents had barely exchanged greetings.⁵⁰⁰ Any duty to discover would be the subject of the rules relating to the seller's special knowledge,⁵⁰¹ and a duty to disclose under *Cohen* must rest on some "plus" in the transaction.⁵⁰²

The second residual category of the Restatements is variously formulated. Section 161(b) of the Restatement (Second) of Contracts requires disclosure if the statement would "correct a mistake of the other party as to a basic assumption on which that party is making the contract and if non-disclosure of the fact amounts to a failure to act in good faith and in accordance with reasonable standards of fair dealing."⁵⁰³ Note in particular the word "and." The necessity of a mistake relates to the earlier discussion of mutual mistake,⁵⁰⁴ allowing for the possibility that a standard warranty disclaimer would ordinarily absolve a seller.⁵⁰⁵

Section 551(2)(e) of the Restatement (Second) of Torts phrases the equivalent category as involving only those circumstances where the other party is acting under a mistake as to the undisclosed facts, and that this person, "because of the relationship between them, the customs of the trade or other objective circumstances, would reasonably expect a disclosure of those facts."⁵⁰⁶ Once more the formulation requires a mistake, and once more there may be no actionable mistake if a proper disclaimer is included. As in the contract Restatement, the tort claim leaves open a window to fit varying circumstances.

There is one unmistakable thread running through many of the cases cited, whether they are fraud cases or not—courts apply a "smell test" to the transaction. Insofar as this can be reduced to a principle of law, it is probably that courts recognize in some transactions what are known as "badges of fraud."⁵⁰⁷ These badges at least have the important effect of shifting burdens of proof.⁵⁰⁸ In a non-auction context, probably the most frequent badge of

⁵⁰⁰ *Id.* at 1266-67.

⁵⁰¹ See *infra* notes 562-81 and accompanying text.

⁵⁰² 712 F. Supp. at 1266-67.

⁵⁰³ RESTATEMENT (SECOND) OF CONTRACTS § 161b (1981) (emphasis added).

⁵⁰⁴ See *supra* notes 392-97 and accompanying text.

⁵⁰⁵ See *supra* notes 434-78 and accompanying text.

⁵⁰⁶ RESTATEMENT (SECOND) OF TORTS § 551(2)(e) (1977).

⁵⁰⁷ See, e.g., *Hayes v. Rodgers*, 447 S.W.2d 597 (Ky. 1969).

⁵⁰⁸ A badge of fraud may act to prevent a directed verdict, *Russell County Feed Mill, Inc. v. Kimbler*, 520 S.W.2d 309 (Ky. 1975), or a summary judgment, *Hayes v. Rodgers*, 447 S.W.2d 597 (Ky. 1969); *Trent v. Carroll*, 380 S.W.2d 87 (Ky. 1964).

fraud is the general tenor of secrecy surrounding the transaction.⁵⁰⁹ Similarly, peculiar alterations in the deal after it is made are "badges of fraud".⁵¹⁰ This is a particular expression of the general notion that "[a]ny transaction conducted in a manner differing from customary methods may be fraudulent."⁵¹¹

It is likely that as horse law develops, more will be known about the scope of the factors required to brand as fraudulent the non-disclosure of a latent defect. This author believes that all the conscionability issues of general law will play an important role.⁵¹² It is also believed that conscionability can remove the Restatements' mistake limitations.⁵¹³

G. *Reliance and Inspection*

It is a principal thesis of this Article that the horse transaction almost always involves in one form or another the buyer's degree of reliance on statements made or implied by the seller, and the related issue of whether the buyer inspected (or might have inspected) the horse prior to the sale. The threads of reliance and inspection run through all the causes of action with respect to the quality of the horse.⁵¹⁴ This discussion is organized in accordance with the various causes of action, but recognizing that they all relate to each other.

1. *Express Warranty Cases*

The Fifth Circuit in *Calloway v. Manion*⁵¹⁵ notes that Texas courts cannot decide whether "buyer reliance is unnecessary to

⁵⁰⁹ *Rose v. St. Louis Union Trust Co.*, 241 N.E.2d 16, 20 (Ill. App. Ct. 1968) ("The lack of courage to submit a matter involving mutual interest to mutual consideration is an index to the state of mind of the grantor to which the maxim that secrecy is a badge of fraud has peculiar application."); *see also* *Nelson v. Nelson*, 512 S.W.2d 455 (Mo. Ct. App. 1974).

⁵¹⁰ *See* *United States v. Leggett*, 292 F.2d 423 (6th Cir. 1961), *cert. denied*, 368 U.S. 914 (1961); *Bolling v. Adams*, 296 S.W.2d 696 (Ky. 1956); *Campbell v. First National Bank of Barbourville*, 27 S.W.2d 975 (Ky. 1930); *Johnson v. Cormney*, 596 S.W.2d 23 (Ky. Ct. App. 1980).

⁵¹¹ *Arnold v. Dirrim*, 398 N.E.2d 442 (Ind. Ct. App. 1979); *see also* *Credit Union of America v. Myers*, 676 P.2d 99 (Kan. 1984); *Montana Nat'l Bank v. Michaels*, 631 P.2d 1260 (Mont. 1981).

⁵¹² *See supra* notes 120-40 and accompanying text.

⁵¹³ *See infra* notes 584-90 and accompanying text.

⁵¹⁴ *See, e.g., Calloway v. Manion*, 572 F.2d 1033 (5th Cir. 1988); *Sessa*, 427 F. Supp. 760 (E.D. Pa. 1977).

⁵¹⁵ 572 F.2d 1033 (1978).

support an express warranty cause of action"; this type of confusion is especially prevalent in the horse cases.⁵¹⁶ There can be no doubt but that the U.C.C. drafters intended to remove reliance as part of the express warranty cause of action,⁵¹⁷ but the issue creeps back in under the U.C.C.'s requirement that a warranty be a "part of the bargain," which is merely a "less stringent" reliance requirement⁵¹⁸—but the meaning of this is unclear.⁵¹⁹ *McClure v. Duggan*⁵²⁰ formulates the test as a contextual question, turning on "whether negotiations had progressed to such a point that the statement could be considered a condition precedent to the sale. . . ."⁵²¹

The same ambivalence is to be found in the traditional horse cases. Whether a statement is an actionable warranty has always been based on "the circumstances surrounding the sale, the reasonableness of the buyer in believing the seller, and the reliance placed on the seller's statement by the buyer."⁵²² In actuality, warranty claims require less reliance when they appear to be "a flagrant breach of an express warranty bordering on fraud," in which case what "buyers would assume" takes the place of reliance in fact.⁵²³

Where the full facts of the case are taken into account, one key element in express warranty cases is the nature of the inspection made by or available to the buyer—an issue to which we shall shortly return. Thus, what "could be expected . . . merely from a personal inspection of the horse" is a central issue.⁵²⁴ As to express warranties, and every other cause of action, it should always be recalled that under U.C.C. section 2-513 the buyer has "a right . . . to inspect" before payment.⁵²⁵

The overlap among the causes of action based on the overall fact pattern is also seen in the leading Tenth Circuit case, *Norton*

⁵¹⁶ *Id.* at 1037 n.6.

⁵¹⁷ R. ANDERSON, *supra* note 15, at § 2-313:48.

⁵¹⁸ *Id.*

⁵¹⁹ The court in *Sessa* suggests that when the warranty about a horse is a "part of the basis of the bargain" it is a separate issue; and that "this is essentially a reliance requirement and is inextricably intertwined with the initial determination as to whether given language may constitute an express warranty." 427 F. Supp. at 766. The court states that it was not the intention of the drafters of the U.C.C. "to require a strong showing of reliance." *Id.*

⁵²⁰ 674 F. Supp. 211 (N.D. Tex. 1987).

⁵²¹ *Id.* at 222.

⁵²² *Slyman v. Pickwick Farms*, 472 N.E.2d 380, 384 (Ohio Ct. App. 1984).

⁵²³ *McKnight*, 449 S.W.2d at 709.

⁵²⁴ *Slyman*, 472 N.E.2 at 384.

⁵²⁵ U.C.C. § 2-513 (1988).

v. Lindsay.⁵²⁶ In *Norton*, the court assumed that the horse was entirely worthless—treating racing qualities as the sole measure of value, despite having noted in passing that the breeding qualities of the horse had been discussed by the parties.⁵²⁷ In *Norton*, too, the seller knew of the defect.⁵²⁸ In such a case, one would again expect a court to apply the most modest requirement of reliance. Thus, the court stated:

The fact that appellee's trainer did inspect the horse but did not detect is of no importance for the facts conclusively show the defect was not ascertainable by a layman. Investigation is compatible with the giving of an express warranty. Only where the buyer clearly relies only upon his own investigation and waives the warranty will it be rendered inoperative.

. . . .

There is danger of giving greater effect to the requirement of reliance than it is entitled to . . . and as a general rule no evidence of reliance by the buyer is necessary other than the seller's statements were of a kind which naturally would induce the buyer to purchase the goods and that he did purchase the goods. . . . If a representation was evidently made for the purpose of inducing a sale, and was of a kind appropriate for that purpose and a sale followed, this should be enough.⁵²⁹

Clearly, the existence of total worthlessness and the seller's knowledge influenced the court in determining that a statement that the horse was sound is an express warranty—going far beyond the necessary construction of that word.⁵³⁰ Neither is supposed to matter for express warranties, but both do, of course.

In *O'Connell v. Kennedy*,⁵³¹ where there was no apparent knowledge on the part of the seller, a somewhat more rigid test was suggested. "To support an action for breach of warranty it must appear that the affirmation or statement relied upon was made under such circumstances as to warrant the inference that it entered into the contract of sale as finally made."⁵³² Unaccountably, however, the court slipped away from this point, brushing aside a thorough investigation made by the buyer's veterinarian.

⁵²⁶ 350 F.2d 46 (10th Cir. 1965).

⁵²⁷ *Id.* at 47.

⁵²⁸ *Id.*

⁵²⁹ *Id.* at 49 (quoting 1 WILLISTON, WILLISTON ON SALES § 206 (1973)).

⁵³⁰ See Cohan, *supra* note 3, at 675.

⁵³¹ 101 N.E.2d 892 (Mass. 1951).

⁵³² *Id.* at 895.

“There is no evidence that Dr. Terry found evidence of disease and, if he should have, the right of the plaintiff to rely on the defendant’s affirmation would not be affected.”⁵³³

The court further held that it is not necessary that the buyer have an expert examination made of the horse before purchase.⁵³⁴ The court in *O’Connell* stated what this author believes to be the correct rule in the case of mere breaches of express warranty, but misapplied the general principle because of a misunderstanding of the importance of expert advice at horse sales. The lapse is all the more unfortunate because the court was not faced with a total failure of quality. It involved a case where only the seeds of the disease were in the horse. The horse would have had a period of time of considerable usefulness.⁵³⁵

2. *The Fraud Cases*

The traditional fraud cases are much more clear, but they make no sense when compared to the warranty rule. In *Fasig-Tipton Co. v. Jaffe*,⁵³⁶ it was stated that a defrauded horse purchaser must prove that he or she actually relied upon the representations made in entering into the agreement to purchase horses.⁵³⁷ The general law of fraud, both under the common law reflected in the original torts Restatement⁵³⁸ and the modern Restatement (Second),⁵³⁹ developed detailed rules as to the justifiable level of reliance.⁵⁴⁰ The more modern rule requires the buyer to show “good faith and . . . reasonable standards of fair dealing,”⁵⁴¹ which is a good distance from the older rules, which punished “negligence” in having “trusted him.”⁵⁴² The latter rule destroyed a cause of action where a buyer had “made personal examinations [with] opportunity to discover the truth.”⁵⁴³ A more modern practice will certainly make reliance no greater a burden on a defrauded buyer than on one

⁵³³ *Id.*

⁵³⁴ *Id.*

⁵³⁵ See Cohan, *supra* note 3, at 676. See generally *Young & Cooper, Inc. v. Vestring*, 521 P.2d 281, 291 (Kan. 1974).

⁵³⁶ 449 N.Y.S.2d 268, 269 (N.Y. App. Div. 1982).

⁵³⁷ *Id.*

⁵³⁸ See *Johnson v. Lowery*, 270 S.W.2d 943 (Ky. 1954).

⁵³⁹ RESTATEMENT (SECOND) OF TORTS §§ 537-545A (1977).

⁵⁴⁰ See also *Forbis v. Reilly*, 684 F. Supp. at 1323 (burden to show “justified” reliance).

⁵⁴¹ RESTATEMENT (SECOND) OF CONTRACTS § 170-172 (1981).

⁵⁴² *Great A. & P. Tea Co. v. City of Lexington*, 76 S.W.2d 894, 896 (Ky. 1934).

⁵⁴³ *O’Brien v. Marvin*, 387 S.W.2d 282 (Ky. 1965).

for whom a mere warranty has been breached, and certainly will not punish a buyer for failing to make an independent investigation in circumstances where it is not customary to do so.⁵⁴⁴ Finally, there is a body of law developing in securities law which distinguishes between the reliance required in face to face transactions, and the non-conclusive presumption of reliance in public market purchases,⁵⁴⁵ which provides a useful analysis for horse cases.

3. *The Implied Warranties*

In the field of implied warranties, it is certainly true that the U.C.C. drafters initially intended to create in the merchantability warranty "a form of strict liability [where] failures to use reasonable care [are] not relevant to a determination of liability."⁵⁴⁶ With respect to the implied warranty of fitness for a particular purpose,⁵⁴⁷ the Code expressly requires that buyers rely on the skill of sellers to select the horse for them, which is taken to mean (though it does not say) that buyers actually do so rely.⁵⁴⁸ But the reality intrudes on both implied warranties to focus on what the buyer could "reasonably have anticipated."⁵⁴⁹ Under U.C.C. section 2-316, which covers both implied warranties, there is a waiver of any defect that examination "ought in the circumstances to have revealed to him" where the buyer "has examined the goods . . . as fully as he desired," or where he "has refused to examine the goods."⁵⁵⁰ It will not go without notice that to avoid these implied warranties, the seller of a horse need only demand that prospective buyers make a thorough inspection, though in the context of horse auctions this may not be easily accomplished in all circumstances.

4. *The Rescission Causes of Action*

The issue of buyer inspection in horse cases most frequently arises in the context of the rescission causes of action—rejection,

⁵⁴⁴ Compare *Johnson*, 596 S.W.2d 23 with *Grant v. Wrona*, 662 S.W.2d 227 (Ky. Ct. App. 1983). See also *Hughes v. Robertson*, *supra* note 490, at 215 and 217 ("nobody could keep the animal long, without discovering its blindness, although it might not be discovered on the first view . . . might take some time and nicety of observation to discover.").

⁵⁴⁵ See *Basic Incorporated v. Levinson*, 485 U.S. 980 (1988) and its progeny.

⁵⁴⁶ *Cohan*, *supra* note 3, at 673; see also R. ANDERSON, *supra* note 15, at § 2-314:55.

⁵⁴⁷ U.C.C. § 2-315 (1988).

⁵⁴⁸ R. ANDERSON, *supra* note 15, at §§ 2-315:50-:54.

⁵⁴⁹ *Cohan*, *supra* note 3, at 676.

⁵⁵⁰ See R. ANDERSON, *supra* note 15, at §§ 2-314:161-:162, -315:60-:61.

revocation of acceptance, and failure of consideration. *Miron*⁵⁵¹ is such a case, but is cited as authoritative on the subject of the need to inspect even when implied warranties are discussed,⁵⁵² as well it should be. The rescission causes of action themselves are now deeply rooted in U.C.C. sections 2-602 and 2-608. Acceptance comes only after a "reasonable opportunity to inspect;"⁵⁵³ and revocation of acceptance can be made only within a reasonable time after "the buyer discovers or should have discovered the ground" for the rejection.⁵⁵⁴ *Miron* adds to this mixture the correct view that inspection prior to sale, which is customary in the circumstances, will foreclose both remedies.⁵⁵⁵ The court noted that:

As the trial judge rightly pointed out, "The fact that the subject matter of the sale in this case was a live animal . . . bears on what is a reasonable time to inspect and reject." Finkelstein's own testimony showed that it is customary, when buying a racehorse, to have a veterinarian or trainer examine the horse's legs, and we agree that the existence of this custom is very important in determining whether there was a reasonable opportunity to inspect the horse. See Official Comment to U.C.C. §1-204, para. 2. We gather from the record that the reason it is customary to examine a racehorse's legs at the time of sale is that a splint bone is rather easily fractured (there was testimony that a fracture could result from the horse kicking itself), and although the judge made no specific findings as to this, we assume that is generally what he had in mind when he pointed out that "a live animal is more prone to rapid change in condition and to injury than is an inanimate object." As we have said, Finkelstein did not have the horse examined either at the place of sale or at his barn later the day of the sale. He thus passed up a reasonable opportunity to inspect Red Carpet.⁵⁵⁶

The question of reasonableness will always be dependent on the nature of the transaction. No set number of hours or months would suffice. There are, however, sufficient horse cases relating to various breaches of warranty to give a practitioner and the court

⁵⁵¹ 400 F.2d 112 (2d Cir. 1968).

⁵⁵² See, e.g., Cohan, *supra* note 3, at 685.

⁵⁵³ U.C.C. § 2-606.

⁵⁵⁴ U.C.C. § 2-608.

⁵⁵⁵ *Miron*, 400 F.2d at 118.

⁵⁵⁶ *Id.*

an understanding of the way this problem should be handled. The extreme cases, of course, are easy.⁵⁵⁷

Gilbert v. Caffee,⁵⁵⁸ for example, implicitly emphasizes and *Schleicher*⁵⁵⁹ holds explicitly that the time of year when the breeding season occurs is critical. The four months of the breeding season matter infinitely more than the eight months when breeding does not take place.⁵⁶⁰ Even more critical would be the standard training months for a two-year-old of a racing breed—when the trade ordinarily does not accept a three-year-old or older horse that has not been trained to race. Similarly, as especially emphasized in *Miron*,⁵⁶¹ the likelihood of injury to the horse after delivery to the purchaser will affect how the question of reasonableness should be handled.

H. Seller's "Knowledge" (And a Reprise on Auctions)

One sort of knowledge involved across the spectrum of causes of action flows the seller's knowledge of the buyer's reliance. This is part of the precise question determined under U.C.C. section 2-315⁵⁶² of whether a fitness warranty is implied. Professor Anderson suggests that sellers have a "duty to inquire" as to the buyer's needs, and a good reason to disclaim this implied warranty, particularly at auction sales.⁵⁶³

The question, however, goes further than implied warranties. Thus, in *McKnight v. Bellamy*⁵⁶⁴ where the breach of the express warranty "bordered on fraud", the seller had "full knowledge and intent that buyers would assume" a certain state of facts with respect to his statements about the horse.⁵⁶⁵ Again, in *Norton*⁵⁶⁶ the seller's statement was "made for the purpose of inducing a sale."⁵⁶⁷ The *Norton* court, quoting from Professor Williston, tac-

⁵⁵⁷ See, e.g., *Chernick v. Casares*, 759 S.W.2d 832 (Ky. Ct. App. 1988) (five years is too long to determine fertility).

⁵⁵⁸ 293 N.W.2d 893 (S.D. 1980).

⁵⁵⁹ 554 S.W.2d 884 (Ky. Ct. App. 1977).

⁵⁶⁰ *Id.* at 885.

⁵⁶¹ 400 F.2d 112 (2d Cir. 1968).

⁵⁶² U.C.C. § 2-315.

⁵⁶³ R. ANDERSON, *supra* note 15, at § 2-315:48. As to the rule on this matter in fraud cases, see RESTATEMENT (SECOND) OF TORTS § 531-36 (1977).

⁵⁶⁴ 449 S.W.2d 706, 709 (Ark. 1970).

⁵⁶⁵ *Id.*

⁵⁶⁶ 350 F.2d 46, 49 (10th Cir. 1965).

⁵⁶⁷ *Id.*

itly admitted that the seller's knowledge is not essential to an express warranty claim, but suggested that a central issue was the fact that the warranty was "of a kind which naturally would induce the buyer to purchase the goods."⁵⁶⁸

Perhaps the U.C.C. has made the seller's attitude directly relevant by requiring express warranties to be a "part of the basis of the bargain."⁵⁶⁹ A bargain, after all, is bilateral.⁵⁷⁰ Logically, the U.C.C. has made reliance a more difficult requirement. The matter is resolved, however, by the use of the *Norton* standard (i.e., what is "natural[?]") as the central semi-objective test *both* as to reliance and knowledge of reliance.⁵⁷¹

The same test is appropriate (and not so far from *Miron*) to trigger a requirement of a prior inspection by the buyer (i.e., would it be natural for a buyer to take a look?), and, conversely, to establish the seller's entitlement to expect the buyer to make an inspection (i.e., would it be natural to suppose that a buyer had looked?). It is helpful that the same test can apply to both situations. For each person, there is a sort of golden rule to be applied: sellers put themselves in the shoes of the buyers—and vice versa.

That analysis, however, does not solve all the problems. It does not help with questions relating to the purpose for which the buyer has bid on or contracted to purchase the horse. What is natural for most people does not help a seller know about the special needs of his or her buyer. This question is almost always relevant (except for merchantability warranties),⁵⁷² and particularly so in the cause of action of fitness for a particular purpose.⁵⁷³

In the breeds of horses that sell for the highest prices, a modest-priced colt is unlikely to have residual breeding value, while a high-priced filly may be principally a breeding prospect. Will the rules be developed with cheap colts or expensive fillies in mind?—or will the rules vary from horse to horse and buyer to buyer? Sellers cannot put themselves in the place of unknown buyers. The problem is exacerbated by the confused nature of the buying public at auction sales. In such instances, one commentator correctly states that the judgment will often have to be made on the basis of "the

⁵⁶⁸ *Id.*

⁵⁶⁹ U.C.C. § 2-313.

⁵⁷⁰ *Id.* at comment 1.

⁵⁷¹ *Norton*, 350 F.2d at 46.

⁵⁷² U.C.C. § 2-314.

⁵⁷³ U.C.C. § 2-315.

court's attitude and . . . public policy."⁵⁷⁴ The court is required first to determine as a matter of factual context and policy what buyers are to be considered the natural parties, and then the *Norton* golden rule can be applied.

Another problem with the general area of the seller's knowledge may be solved by the *Norton* formulation. It involves latent defects about which the seller may have had some knowledge. For example, in *Rand v. Underwriters at Lloyd's*,⁵⁷⁵ Woody Stephens noticed a slight catch in a thoroughbred colt's hind quarters, then diagnosed as a common fracture, which promptly healed to the extent that it was no longer observed.⁵⁷⁶ *Rand* is not a horse sale case—but there are many cases when a modest problem is discovered, and honorably ignored on the basis that it is gone and may never return, only to be rediscovered as a serious problem at some later date by a different owner.

There are many cases in the general body of fraud law where something less than full knowledge is treated as if it were knowledge, as in the case of gross negligence, culpable ignorance, and the like.⁵⁷⁷ In such circumstances, the test to be developed is really not so different. What varies among cases is the differential "opportunity to know."⁵⁷⁸ In each such case, one should ask the question from the perspective of a buyer: if the buyer had all the information available to the seller, is it material to expect the buyer to act? If so, then the seller knows something as well as if he or she knows it for a certainty.

That is not to say that the problem of determining when a seller must speak at the risk of being charged with fraud has been resolved. As noted,⁵⁷⁹ that determination is to be made on the basis of additional factors. On the contrary, it seems that there can exist a common test—whether a normal person in the circumstances would react to the knowledge of the ultimate truth—that can be applied (together with evidence on whether the buyer actually relied

⁵⁷⁴ Cohan, *supra* note 3, at 670.

⁵⁷⁵ *Rand v. Underwriters at Lloyd's*, 295 F.2d 342, 344 (2d Cir. 1960), *cert. denied*, 368 U.S. 988 (1962).

⁵⁷⁶ *Id.*

⁵⁷⁷ *Calloway*, 572 F.2d 1033; *Anderson*, 143 F.2d 95; *Walker v. Glenn*, 400 S.W.2d 223 (Ky. 1966); *Kackler v. Webber*, 220 S.W.2d 587, 589 (Ky. 1949); *Graham v. John R. Watts & Son*, 36 S.W.2d 859, 861 (Ky. 1931); *Commonwealth v. Campbell*, 21 S.W.2d 474 (Ky. 1929).

⁵⁷⁸ 312 *Meyers v. Monroe*, 226 S.W.2d 782, 785 (Ky. 1950).

⁵⁷⁹ See *supra* notes 479-513 and accompanying text.

and the seller actually knew) to determine one piece of the puzzle in several causes of action.

Such considerations, however, are resolved in litigation. A different problem faces any seller at auction, where many buyers come to inspect the horses before the sale, each wanting to perform X-rays on a skittish young animal in an enclosed space, and/or to poke an implement down its throat.⁵⁸⁰ It is easy for the buyers because they need only be sure to request the normal inspections at the particular venue and be sure not to refuse any offer to inspect. Dare the seller refuse when asked? Sellers' refusals of requests for inspection will foreclose their eventual argument that the buyers should have protected themselves, or should have relied on their own devices. The seller is open to a charge of actual concealment if he or she had even a hint of a problem that such an examination might have disclosed.⁵⁸¹

On the other hand, if one or more prospective purchasers decides not to buy the horse apparently (or possibly) because of something seen or suspected in an X-ray or endoscopic examination, the seller now has something more than mere golden rule notice of a defect. The lawyer's problem is that any advice given on the subject is only right or wrong after the examination is complete and the horse is sold. The "correct" answer for the seller is to allow inspections only if he or she has a healthy horse. Clients will not be pleased with such advice. The reader will have to be satisfied with knowing that auction venues change the problems—and perhaps the proper rules.

I. Unilateral Mistake (And a Reprise on Reliance, Knowledge and Conscionability)

The general notion of mistake was discussed earlier,⁵⁸² prior to talking about broad concepts of reliance.⁵⁸³ The typical horse transaction was analyzed without rigidly separating the various causes of action. Mutual mistake was shown to focus on the consciousness of the buyer, even though mutual mistakes involve two people. From a discussion of the buyer's reliance, a transition was made to the consciousness of the seller—especially noting the spectrum

⁵⁸⁰ See the point made at *supra* notes 120-40 and 545 and accompanying text.

⁵⁸¹ See RESTATEMENT (SECOND) OF CONTRACTS § 160 (1981).

⁵⁸² See *supra* notes 391-98 and accompanying text.

⁵⁸³ See *supra* notes 514-61 and accompanying text.

of circumstances where the standard changes from imputed knowledge to actual knowledge.⁵⁸⁴ It is appropriate, finally, to return to mistake—to tie the seller's knowledge with the buyer's reliance, even when the unilateral mistake is made by the buyer. The contract Restatement view of this subject⁵⁸⁵ ties this body of law (a) to the seller's knowledge and buyer's reliance, and (b) back to unconscionability concepts.⁵⁸⁶ All these subjects are found in the same transactions.

Restatement (Second) of Contracts section 153 begins by noting that if the buyer "bears the risk of the mistake," then his or her mistaken impression is no defense or cause for rescissionary relief.⁵⁸⁷ The Restatement adds, however, that a different rule applies if "the other party had reason to know of the mistake or his fault caused the mistake."⁵⁸⁸ This neatly ties back to the rule of *Norton*, which this Article suggests is the correct way to analyze most quality defect situations, at least where the defect comes near to being a "total" one.⁵⁸⁹ A party's reason to know, of course, must be analyzed on the facts of each case.

Finally, the same section of Restatement provides that the buyer wins even if he or she would otherwise "bear the risk of a mistake," if the mistake is such that enforcement of the contract would be "unconscionable."⁵⁹⁰ Unconscionability is more than having reason to know, and is to be analyzed as heretofore suggested.

J. A Provisional Conclusion: a Leading Case

Many cases have suggested, usually implicitly, that the courts do not feel bound by the rigid tests set out in the black letter authorities for determining whether the buyer or seller wins in a horse transaction.⁵⁹¹ But *Calloway v. Manion*⁵⁹² is an extraordinary case, and neatly makes the point about the overlapping of causes of action in horse cases. In *Calloway*, a mare had "an incipient ovary condition"⁵⁹³ that caused her to kick repeatedly and to injure

⁵⁸⁴ *Id.*

⁵⁸⁵ RESTATEMENT (SECOND) OF CONTRACTS § 153 (1981).

⁵⁸⁶ See *supra* notes 78-119 and accompanying text.

⁵⁸⁷ RESTATEMENT (SECOND) OF CONTRACTS § 153 (1981).

⁵⁸⁸ *Id.*

⁵⁸⁹ See *supra* notes 526-30 and accompanying text.

⁵⁹⁰ RESTATEMENT (SECOND) OF CONTRACTS § 153.

⁵⁹¹ See, e.g., *McKnight*, 449 S.W.2d 706; *Norton*, 350 F.2d 46.

⁵⁹² 572 F.2d 1033 (5th Cir. 1978).

⁵⁹³ *Id.* at 1035.

her foot. At the time of the sale, the buyer noted the foot's swelling, but the seller stated that the swelling was "not a problem," and that he would substitute another horse if it became a problem.⁵⁹⁴ The jury had found all the elements of an implied warranty of merchantability, but the buyer could not prevail under that cause of action because of his refusal to inspect, pursuant to U.C.C. section 2-316(c)(2).⁵⁹⁵

The express warranty regarding the animal's foot was also of no avail because "in the context of an oral agreement between two parties knowledgeable in the field," an agreement to substitute horses in the event of the buyer's dissatisfaction would be construed as an agreed limitation of remedies, enforceable against the buyer in the event of the breach of the express warranty.⁵⁹⁶ Recognizing that "a seller attempting to limit his buyer's remedies should do so in the most specific terms possible, we are unwilling to enforce the standards that we might apply to a written contract in this case."⁵⁹⁷

The buyer, then, was left with a fraud claim. Noting that the U.C.C. does not apply to fraud claims, the court nonetheless made "reference to the Code by analogy in determining the balance of the equities in the situation," holding that the buyer's use of the horse, despite his objection to its ovary and foot problems, constituted an "exercise of dominion and control over the mare [such as to] prevent rescission."⁵⁹⁸ Thus, the non-conformity remedies were not available. The mare had been accepted, and the buyer could not revoke his acceptance. Only damages were available, as in the analogous warranty situation.

K. Agency: A Last Reprise

Calloway involved no agents, which is unusual in a horse sale. The nature of the agency relationship involved in many transactions can be considered as one of the factors to be taken into account in determining whether there will be a cause of action for a plaintiff buyer, and whether circumstances surrounding a contested contract clause will be determined to be unconscionable. There is no reason

⁵⁹⁴ *Id.*

⁵⁹⁵ *Id.*

⁵⁹⁶ *Id.* at 1037-38.

⁵⁹⁷ *Id.* at 1038.

⁵⁹⁸ *Id.*

that agency matters need to be treated as rigidly as is traditional,⁵⁹⁹ in certain marginal situations. For example, in *Keck*, the seller actually did not misdescribe the breeding history of the mare whose sale was set aside because it did not conform to the industry's understanding of the catalogue description.⁶⁰⁰ In fact, one of the great thoroughbred establishments had been hired to consign the mare as agent and had reported its breeding history, in perfectly good faith, in language that the court found to be not in accordance with the understanding of buyers in the industry.⁶⁰¹ If the buyer had been a little slower than the buyer in *Keck* to discover the truth, and had returned the mare after its condition had changed for the worse, it is not impossible that a court would find the seller's reasonable reliance on the agent farm to act for him or her to be among all the facts and circumstances to be taken into account when determining whether the buyer could return the mare to the seller.

More direct authority is available with respect to whether the agent's knowledge and notice are binding upon the principal.⁶⁰² Take a hypothetical case where the boarding agent of an entirely inactive limited partnership knew of a slight injury of a weanling in the field. Assume that the injury lasted for one day, and did not appear important until an X-ray revealed a healed bone crack after the colt's sale at auction as a yearling. Did the seller have reason to know what his or her boarding farm knew? An affirmative answer is given with more assurance if the boarding farm also acted as agent to consign the yearling for its owner. The U.C.C.⁶⁰³ and the Restatement (Second) of Agency⁶⁰⁴ open the gates at least so far as the principal's notice and knowledge are concerned to such an analysis. Unfortunately, the U.C.C. limits some of its broadening language to "organizations" that require "two or more

⁵⁹⁹ See, e.g., R. ANDERSON, *supra* note 15, at § 2-315:49.

⁶⁰⁰ *Keck*, 413 F. Supp. at 1382.

⁶⁰¹ *Id.*

⁶⁰² See, e.g., *Jeny Alderman Ford Sales, Inc. v. Bailey*, 291 N.E.2d 92 (Ind. Ct. App. 1972); *Chemico Ind. Applicators Co. v. E.I. DuPont de Nemours & Co.*, 366 F. Supp. 278 (E.D. Mo. 1973).

⁶⁰³ See U.C.C. § 1-201(25)-(28) (1988), which, for example, makes the principal liable for acts of the agent, only if the principal "had not exercised due diligence" in the circumstances.

⁶⁰⁴ RESTATEMENT (SECOND) OF AGENCY §§ 268-283 limit a principal's notice and knowledge according to the "authority" of the agent to receive it, and/or the agent's "duty to give the principal information."

persons having a joint or common interest.”⁶⁰⁵ This definition presumably excludes a single principal and his or her agent. Nonetheless, a broader approach must be taken that takes into account the facts and circumstances of each case.

⁶⁰⁵ U.C.C. § 1-201(28).