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HORSE SENSE AND THE UCC: THE PURCHASE OF RACEHORSES

JOHN J. KROPP*
J. JEFFREY LANDEN**
DANIEL C. HEYD***

INTRODUCTION

Less than two percent of all horses ultimately become stakes winners.\(^1\) Forty percent of the thoroughbreds ultimately win at least one race,\(^2\) and sixty-five percent of the thoroughbreds at least make it to the starting gate.\(^3\) But approximately thirty-five percent of each year’s crop of thoroughbred foals never make it to the track.\(^4\) Therefore, the purchase of a horse for racing purposes is a transaction that involves significant financial risk.

Those who compete in the sport of horse racing as owners must either breed or buy their equine athletes.\(^5\) For those who choose to try to breed a
winner, the acquisition of the proper combination of interests in stallions\textsuperscript{6} and broodmares\textsuperscript{7} is a subtle blend of art, science and alchemy. Others attempt a more direct approach: the purchase of a future champion at a public\textsuperscript{8} or private sale.\textsuperscript{9} In either event, the peculiarities and customs of the

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6. A "stallion" is a "male horse used for the purpose of breeding." J. Lohman & A. Kirkpatrick, supra note 1, at 220. The term has a meaning distinct from the word "colt," which refers to "[a] male thoroughbred horse (other than a gelding or ridgeling) which has not reached its fifth birth date or has not been bred." Id. at 212. A gelding is a male horse that has been castrated, and a ridgeling is a male horse with only one descended testicle. Id. at 214, 218.

7. A "broodmare" is "a [female thoroughbred used for breeding." Id. at 211. A "mare" is a "[female thoroughbred five years old or older, or younger if she has been bred." Id. at 216. Conversely, a female horse that is not yet five years old, and which has not been bred, is a "filly." Id. at 213.

8. The terms "public sale" and "public proceedings" have specific legal meanings under the UCC and under the body of commercial law that developed before the advent of the UCC. See, e.g., UCC § 9-504(3) ("public proceedings"); UCC § 9-504 comment 1 (describing the use of the terms "public" and "private" sale under the Uniform Trust Receipts Act and the Uniform Conditional Sales Act). The legal meaning of "public sale" in some states is similar to, but not necessarily synonymous with, the term "auction." For example, in Ohio a "public sale" requires publicity, competitive bidding, and an invitation to the public. See Liberty National Bank of Fremont v. Greiner, 62 Ohio App. 2d 125, 405 N.E.2d 317 (1978). The term "auction" is statutorily defined in Ohio as:

   a sale of real or personal property, goods or chattels by means of verbal exchange or physical gesture between an auctioneer or apprentice auctioneer and members of his audience, the exchanges and gestures consisting of a series of invitations for offers made by the auctioneer and offers by the members of the audience, with the right to acceptance of offers with the auctioneer or apprentice auctioneer.

   OHIO REV. CODE Ann. § 4707.01(A)(Page 1987). These definitions are similar, but not necessarily coextensive.

   In the horse business, the term "public sale" has a specific meaning as a matter of custom and usage, distinct from its legal meaning. The industry uses a series of public sales, usually conducted at given times of year, by given sales companies, in given locations, as a recognized market for the sale of weanlings, yearlings, two-year-olds and broodmares. For example, in 1990 there were over 95 such sales in North America. See Auctions of 1990, THE BLOOD-HORSE 22 (Special Issue, Jan. 12, 1991) [hereinafter referred to as AUCTIONS OF 1990]. These events are often referred to by those in the business as "public sales" or, simply "the sales." These sales are usually conducted pursuant to a set of published "terms and conditions of sale," which can have a profound influence on the outcome of any dispute between the seller and the buyer. For a discussion of the purchase of horses at public sales, see infra notes 34-40 and accompanying text.

   In light of the differences between the legal and customary definitions, the context of its use may be the only way to determine if a term such as "public sale" is being used in its legal sense or in its customary sense within the horse industry. As used in this article, unless the context otherwise requires, the term "public sale" is used in its customary sense in the horse business.

9. Although roughly one fifth to one quarter of each year's foal crop may go through a public sale as yearlings in any given year, race horse sales transactions are face to face negotiations between sellers and buyers. See J. Lohman & A. Kirkpatrick, supra note 1, at 78; AUCTIONS OF 1990, supra note 8, at 11. Horses can also be purchased by "claiming" them at the track, when they run in claiming races.
horse business, when combined with the amounts of money involved in these transactions, can result in complex legal issues and hard fought disputes.\textsuperscript{10}

The days of handshake deals in the horse business are rapidly coming to an end. This article is an introduction to the legal rights and liabilities that arise in the purchase and sale of what many consider to be the fastest competitors\textsuperscript{11} in sports: thoroughbred and standardbred racehorses.\textsuperscript{12}

II. THE SALES TRANSACTION: APPLICATION OF UCC ARTICLE 2

A. Does Article 2 Apply?

Article 2 of the UCC applies only to "transactions in goods."\textsuperscript{13} As a threshold matter, it is necessary to determine whether the items sold in the

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\textsuperscript{10} Custom and usage play a "varied and powerful" role in the horse industry. Miller, \textit{America Singing: The Role of Custom and Usage in the Thoroughbred Horse Business}, 74 Ky. L.J. 781 (1985-86). Miller's thought-provoking article asks the question: "Is there a meaningful, identifiable body of American 'equine law'—a separate voice, apart from all of the others, singing different words and tunes?" \textit{Id.} at 781. As Miller concludes, "there are some areas of law in which the court has no choice but to look to the customs and usages that surround the transaction before it. . . . [I]n a broad range of fact situations, there is no reason that society cannot permit a colorful business to indulge its fanciful habits, recognizing the common acceptance of bizarre risks with consistent expressions of honor." \textit{Id.} at 837.

\textsuperscript{11} On March 5, 1983, Cris Collinsworth, the All-Pro wide receiver of the Cincinnati Bengals, ran a race at Latonia Race Course (now known as Turfway Park) against a 7-year-old thoroughbred race horse called MR. HURRY. \textit{See} Cincinnati Enquirer, March 6, 1983, at D-14, col. 2. MR. HURRY had not made it to the winner's circle at Latonia in 108 tries, so the crowd hoped for a good race between an excellent human athlete and a thoroughbred that had "signed a futures contract with the glue factory." \textit{Id.} But MR. HURRY beat Collinsworth by three lengths, and was pulling away. In Collinsworth's own words, "Even with my nose I couldn't win by a nose." \textit{Id.} A superior human athlete can run 100 meters in a little less than 10 seconds, at a speed of approximately 22 1/2 miles per hour (m.p.h.). See 1990-91 Guinness Sports Record Book 207 (1990). At a distance of a mile, the fastest human time is in the range of 3 minutes and 47 seconds, or about 16 m.p.h. \textit{See id.} The winning time in the Kentucky Derby, a run of 1 1/4 miles (a little over 2000 meters), averages about 2 minutes and 2 seconds, which works out to a speed of almost 37 m.p.h. \textit{See}, e.g., Cincinnati Enquirer, May 6, 1990, at C-13 (results of 1990 Kentucky Derby). Thus, the outcome of the 41 yard race between Collinsworth and MR. HURRY was neither surprising, nor a negative reflection on Collinsworth's considerable abilities.

\textsuperscript{12} This article focuses on thoroughbred and standardbred horses, but many of the legal principles described apply with equal force to the purchase and sale of other breeds of horse, such as Arabians. Although Arabian racing is a growing sport, thoroughbreds and standardbreds are still perceived by the public as "racehorses" and Arabians are still usually considered "show horses." The breed of a horse may have an impact on the "ordinary purpose" and the "particular purpose" for which it is purchased, within the meaning of UCC § 2-315. For a discussion of ordinary and particular purposes, see \textit{infra} notes 106-20 and accompanying text.

\textsuperscript{13} UCC § 2-102. When reference is made to the Uniform Commerical Code (UCC), the reference is to the 1972 version unless otherwise noted.
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horse business are considered “goods” thus triggering application of Article 2 of the UCC.

The purchase and sale of any item at prices in excess of $1,000,000 quickly captures the public’s attention. This attention is only heightened when the sale involves a beautiful commodity such as a thoroughbred racehorse, which has a potential for earning millions of dollars at the track. While the excitement of a horse sale provides a glamorous image of the items being sold, it is important to remember that horses, from the moment of birth, are clearly “goods” within the meaning of the UCC. Therefore, from foaling to death and beyond, the sale of horses is governed by Article 2 of the UCC.

It is also common in the horse industry to sell partial interests (commonly referred to as “shares”) in a horse to a number of parties pursuant to a syndicate arrangement.

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14. The top 16 yearling prices at the sales in 1990 were a million dollars or more. *Auctions of 1990, supra* note 8, at 13. A colt by SEATTLE SLEW out of WEEKEND SUPRISE, sold for $2,900,000. *Id.* at 16.

15. The price structure of the industry would be very difficult to justify absent the promise of tremendous potential racing purses. The purse distribution for 1989 was approximately $750,000,000. *Auctions of 1989, The Blood-House 15* (Special Issue, Jan. 13, 1990). Purses rose dramatically during the 1980s (from $451,195,968 at the beginning of the decade). *Id.* This was led in part by the Breeders Cup program and various state programs which enhance the purses for races restricted to horses bred in that state. *See, e.g.*, J. LOHMAN & A. KIRKPATRICK, *supra* note 1, at 167-83 (a description of various types of state-bred programs).

16. *See, e.g.*, Presti v. Wilson, 348 F. Supp. 543, 545 (E.D.N.Y. 1972)("The sale of a horse is governed by the Uniform Commercial Code covering the sales of goods."). Goods are defined in § 2-105 of the UCC as “all things (including specially manufactured goods) which are movable at the time of identification to the contract for sale other than the money in which the price is to be paid, investment securities (Article 8) and things in action.” For a discussion of the classification of various types of interests in horses for Article 9 purposes, see *infra* notes 187-97 and accompanying text.


Under UCC § 2-105 “young of animals are also included expressly in this definition since they, too, are frequently intended for sale and may be contracted for before birth. The period of gestation of domestic animals is such that the provisions of the section on identification can apply as in the case of crops to be planted.” UCC § 2-105 comment 1. Thus, from the moment of conception, foals are also goods within the scope of Article 2 of the UCC.

18. In *Stratmore v. Goodbody*, 866 R.2d 189, 190 (6th Cir. 1989), investors purchased forty undivided shares of Shareef Dancer, a thoroughbred stallion, for $1,000,000 per share under a syndication agreement. “Each share entitles a member of the syndicate to breed a mare with Shareef Dancer every season over the stallion’s life.” *Id.* UCC § 2-105(3) provides that “[i]
example, the owner of the thoroughbred stallion AFFIRMED, the last Triple Crown winner, divided and sold the horse in thirty-six equal and undivided shares. In order to resolve the competing claims of secured creditors in one of the fractional shares of the horse, the North Ridge court held that each fractional interest in the horse qualified as a good for UCC purposes. The fact that the syndicate arrangement for AFFIRMED conveyed undivided interests in the horse and categorized the owners of the fractional shares as tenants in common satisfied the North Ridge court that each of the fractional interests constituted goods for UCC purposes.

The horse industry deals not only in the sale of horses, shares and foals in utero, but also in the sale of breeding rights or seasons. The manner in which the sale of a breeding right is accomplished often dictates the applicability of Article 2 to the transaction. Depending on the nature of the transaction, a breeding right may be characterized as a good or a general intangible for UCC purposes. Moreover, a breeding season could be a sale of a part interest in existing identified goods. Courts typically recognize, but do not completely rely upon, UCC § 2-105(3) when analyzing fractional interests in horses sold pursuant to a syndicate arrangement. See, e.g., North Ridge Farms, Inc., v. Trimble, 37 U.C.C. Rep. Serv. 1280, 1286 (Ky. Ct. App. 1983) (officially unreported), aff’d, 700 S.W.2d 396 (Ky. 1985) (without comment on the lower court’s classification of the collateral).


20. Id. at 1283. Each fractional share sold for $400,000. Id. The purchase and sale of fractional interests also gives rise to a host of securities issues. See Campbell, Stallion Syndicates as Securities, 70 Ky. L.J. 1131 (1981-82).


22. North Ridge, 37 U.C.C. Rep. Serv. at 1287. The court cautioned, however, that “every syndicate agreement must be considered individually when analyzing Code definitions.” Id. at 1288. If additional rights in excess of and separate from the undivided interests in the horse are transferred in a syndicate arrangement, the interest conveyed may be considered goods, contract rights, general intangibles or a combination thereof. Id. For a further discussion of the characterization of syndicate shares for Article 9 purposes, see infra notes 193-96 and accompanying text.

23. In the case of non-thoroughbred breeds, the term “breeding right” is more frequently used. A breeding right is “the right to breed one mare to one stallion for one or more breeding seasons, generally not including an ownership interest in the stallion.” J. LOHMAN & A. KIRKPATRICK, supra note 1, at 211. In the thoroughbred business, a “season” or “stallion season” is a one time, non-recurring right to breed a mare to a particular stallion. Id. at 220.

24. See generally Kropp, Landen and Donath, supra note 5, at 718.


26. See, e.g., Kwik-Lok Corp. v. Pulse, 41 Wash. App. 142, 702 P.2d 1226, 1228 (1985) (noting that “[s]perm inside a stallion . . . is not readily separable, nor able to be packaged,” and that breeding rights are therefore not goods).

27. Currently, many of the decisions impacting and discussing this area seem to be arising under Article 9 of the UCC, without direct comment on the potentially far-reaching implications of their decisions on the treatment of the sales of breeding seasons under Article 2 or under the
considered, at least theoretically, a "mixed bag" transaction of goods and services: The semen itself as goods and the use of the horse incident to the breeding as services. Courts generally determine the applicability of Article 2 to transactions involving a mixed bag of goods and services by determining which factor predominates.\textsuperscript{28}

\section*{B. Offer and Acceptance: Private Sales and Auctions}

The principles of offer and acceptance under the UCC, as set forth in Part 2 of Article 2, apply to all sales of "goods" within the horse industry.\textsuperscript{29} Given the nature of the goods in the horse industry, however, the statute of frauds provisions are frequently encountered and are particularly worthy of discussion. All significant equine transactions obviously exceed the \$500.00 minimum threshold and thus such transactions are subject to the statute of frauds requirement under the UCC.\textsuperscript{30} Unless the equine transaction falls within one of the exceptions noted within section 2-201 of the UCC, a contract for the sale of a horse will be enforceable only if it is in writing and signed by the party against whom the enforcement is sought.

Section 2-201(2) of the UCC provides that a confirmatory memorandum or letter without the signature of the party against whom enforcement is sought will satisfy the statute of frauds requirements if the transaction is between "merchants" and the memorandum or letter is not timely objected to in writing.\textsuperscript{31} Although a seller or purchaser of horses could theoretically

\begin{footnotes}
\footnotetext{29}{For a discussion of which types of interests in horses are considered to be goods, see supra notes 13-28 and accompanying text.}
\footnotetext{30}{UCC § 2-201(1) provides that "a contract for the sale of goods for the price of \$500.00 or more is not enforceable . . . 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 . . . ."}
\footnotetext{31}{UCC § 2-104 defines "merchant" as a person who deals in goods of the kind or otherwise by his occupation holds himself out as having knowledge or skill peculiar to the practices or goods involved in the transaction or to whom such knowledge or skill may be attributed by his employment of an agent or broker or other intermediary who by his occupation holds himself out as having such knowledge or skill."

In addition to formal discovery, there are several published sources that may be of assistance in determining if someone is a merchant in horses. See, e.g., Auctions of 1990, supra note 8, at 14 (listing approximately 150 "leading yearling buyers" and how many horses they bought in 1990). See generally Annotation, Farmers As "Merchants" Within Provisions of UCC Article 2, Dealing with Sales, 95 A.L.R.3d 484 (1979 & Supp. 1989). Note that it is theoretically possible to be a
be a non-merchant if his or her equine transactions are few and far between, most people active in the horse industry will be considered to be merchants as defined in the UCC.\textsuperscript{32}

Section 2-201(3) of the UCC contains several other exceptions to the general requirement that a contract for the sale of goods in excess of $500.00 must be in writing; however, the exception that is usually most relevant to horse transactions is provided under UCC section 2-201(3)(c). Under this exception, a contract that otherwise violates the statute of frauds provisions will nevertheless be enforceable if either the payment or the goods have been received and accepted by a party to the transaction. Thus, although a purely oral contract for the sale of a horse generally will not be enforceable before delivery or payment, both the seller and the purchaser will be bound after one of them performs without the other’s objection.\textsuperscript{33}

Public sales are an important part of the horse industry and typically involve the transfer of very valuable horses.\textsuperscript{34} Public sales are Article 2 sales of goods just like privately negotiated sales; however public sales use an auction format.\textsuperscript{35} Therefore, at public sales, the provisions of the UCC are supplemented by the laws of auctions in each state because the UCC does not specifically displace separate bodies of law such as the law applica-

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\item \textsuperscript{32} See, e.g., Alpert, 643 F. Supp. at 1415-16 (seller a merchant of Russian-Arabian horses); Sessa, 427 F. Supp. at 769 (seller of racehorse was a merchant).
\item \textsuperscript{33} See UCC § 2-20 comment 2. It is common for courts to enforce oral contracts that would otherwise violate the statute of frauds, by citing the UCC § 2-201(3)(a) exception, but without a specific discussion of the issue. See, e.g., Sessa, 427 F. Supp. at 764; Strauss v. West, 100 R.I. 388, 216 A.2d 366, 367 (R.I. 1966). But see Presti, 348 F. Supp. at 543 (unsuccessful attempt by a party to enforce an oral contract for purchase of a horse because of failure to prove acceptance of the check).
\item \textsuperscript{34} The sales gross for thoroughbred yearlings sold at public sales in 1989 was $257,342,967, with an average price of $29,377. Auctions of 1990, supra note 8, at 11. The peak year for thoroughbred yearlings at “the sales” was 1984, when the sales gross was $383,659,326 with an average price of $41,396. Id. The average prices at the “summer sales,” where some of the best yearlings are sold, are usually substantially higher than the average. In 1989, the “summer sales” for yearlings averaged $344,846 for each of the 383 yearlings sold. Id. Although public sale yearling prices are a commonly used barometer for the thoroughbred industry, they are only a part of the thoroughbred public sale market. See, e.g., id. at 145 (in 1990, 3,789 two-year-olds sold for an average of $20,315); id. at 122 (in 1989, 1,565 weanlings sold for an average of $18,151).
\item \textsuperscript{35} For a general discussion of public sales and auctions, see supra note 8 and accompanying text.
\end{itemize}
ble to auctions. Thus, one must look at both the special UCC provision pertaining to auctions and the applicable state law outside of the UCC to resolve many of the issues concerning contract formation at an auction sale.

An auction sale of a horse is also different from a private sale because the seller and buyer do not necessarily meet, the price is set by competitive bidding and the terms and conditions of the contract between the parties are customarily established by the auction company in its "Conditions of Sale" printed in the sales catalog. The Conditions of Sale typically supply all of the terms and conditions that would otherwise be included in a written sales contract, including but not limited to the warranty and warranty disclaimer provisions.

As a final point about horse auctions, it should be noted that a third party is introduced into the sales transaction: the auctioneer. An auctioneer, although generally not considered a party to the sales contract, may be liable for any negligent or fraudulent acts that he or she commits or facilitates.

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36. UCC § 1-103 provides that "[u]nless displaced by the particular provisions of this Act, the principles of law and equity, including the law merchant and the law relative to capacity to contract, principal and agent, estoppel, fraud, misrepresentation, duress, coercion, mistake, bankruptcy, or other validating or invalidating cause shall supplement its provisions."

37. The UCC Article 2 provision that specifically addresses auctions is § 2-328. A key provision within this section provides that a sale by auction is complete when the auctioneer so announces by the fall of the hammer or in any other customary manner. Where a bid is made while the hammer is falling in acceptance of a prior bid the auctioneer may in his discretion reopen the bidding or declare the goods sold under the bid on which the hammer was falling. UCC § 2-328(2). The balance of the subsections of UCC § 2-328 deal with certain aspects of reserved bidding and the like.

38. For a discussion of some of the legal and practical factors that distinguish equine auctions from privately negotiated sales transaction, see Miller, The Auction, Exchange and Non-Private Sale of Horses and Interests in Horses, Seminar on Equine Law, May 1, 1986, University of Kentucky College of Law.

39. The "conditions of sale" printed in the sales catalog are incorporated by reference into the contract formed by the bidding. The conditions of sale are usually quite lengthy.

40. But see Travis v. Washington Horse Breeders Ass'n, 47 Wash. App. 361, 734 P.2d 956, 958 (1987), aff'd in part & rev'd in part, 111 Wash. 2d 396, 759 P.2d 418 (1988)(finding that "[t]he disclaimer of implied warranties in the sales catalog was invalid because it was not explicitly negotiated between the buyer and the seller"). The Washington Supreme Court allayed the fears of many in the horse industry by reversing part of the lower court's analysis that could have been devastating to the use of public sales.

41. See Chernick v. Fasig-Tipton Kentucky, Inc., 703 S.W.2d 885, 889-90 (Ky. Ct. App. 1986)(the Kentucky Court of Appeals suggests that even though the auctioneer was not a party to the sales contract, he or she may be liable if negligent or a participant in a fraud). For a discussion of the Chernick case, see Reynolds, supra note 17, at 904-18.
C. Terms of the Sales Agreement

Once the existence of a valid and binding contract for the sale of a horse is established, the terms and conditions of the relevant sales documentation can be interpreted under UCC principles. As in any contract situation, ideally the parties will agree to all of the terms of the sale and will clearly express their agreement in writing. In a privately negotiated sales transaction for a horse, the terms and conditions of the sale are typically contained in two or three documents: a purchase and sales agreement, a promissory note and a security agreement. To help avoid future conflicts between the buyer and seller, certain information should be included, at an absolute minimum, within the purchase agreement. The name and address of both the seller and the buyer and a description of the horse should be included. In addition, the price, time of payment, manner of payment and, if applicable, the interest rate on any outstanding balance should be detailed. The agreement should, of course, be signed by both parties. Most horsemen who negotiate private contracts seem to accomplish all of the foregoing without difficulty; unfortunately, they often stop there and do not include other clauses that could be the source of significant friction later.

For example, the purchase contract should also provide a description of the location and time of delivery of the horse, including a specific description of the transportation method and payment responsibilities. A variety of other important clauses are also frequently omitted, such as allocation of the risk of loss, insurance obligations, representations regarding the horse’s lien status, an integration clause, and a choice of law provision. The other

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42. If a single writing contains all of the terms and conditions relied upon by both parties, it is easier for the court to find a meeting of the minds. UCC § 2-207, however, deals with the problem of conflicting written terms, as where the buyer’s purchase order contains one set of terms and the seller’s confirmation contains another set of terms. This scenario is also known as the “battle of the forms.” The purchase order/confirmation scenario is not common in the horse industry. Nevertheless, UCC § 2-207 can be very significant in those cases where there are a series of letters leading up to a privately negotiated sale. In analyzing a deal after the fact, when there is apparently no written contract, one must pay particular attention to the contents of any pre-sale correspondence. The letters and notes between the parties may, when taken together, constitute a “hidden” contract. For a very good explanation of the battle of the forms and UCC § 2-207, see WHITE & SUMMERS, supra note 28, at § 1-3.

43. For a discussion of security agreements in the horse business, see infra notes 173-84 and accompanying text.

44. The description of a horse should be as complete as possible and include its breed, sire, dam, sire of dam, year of birth, name (if any), gender, color, and registration number (e.g., Jockey Club Certificate Number for thoroughbreds and AHRA number for Arabians). For a discussion of the proper method of describing a horse for Article 9 purposes, see infra notes 175-79 and accompanying text.
terms that are frequently omitted, or poorly phrased, are the warranty and disclaimer of warranty provisions.45

Because the purchase price for a horse is often quite high,46 it is common for private sales transactions to involve payment of the purchase price partly in cash with the balance paid by a promissory note.47 To secure the note, the seller typically does, and should, obtain a security agreement and file the appropriate financing statement(s).48 The note and security agreement in a horse sale transaction should contain such standard clauses as the complete name and address of the parties,49 an unconditional promise to pay, a description of the horse,50 a covenant as to where the horse will be kept,51 a list of events of default, and a clause that incorporates the terms of the purchase and sales agreement.52

Questions about the interpretation and enforcement of the written purchase contract for a horse must be viewed in light of UCC section 2-202, which identifies the written contract as the main source for determining the actual terms of the sale. UCC section 2-202 provides that the written terms may not be contradicted by evidence of any prior agreement or of a contemporaneous oral agreement but may be explained or supple-

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45. For a discussion of warranties and disclaimer provisions, see infra notes 72-145 and accompanying text.
46. For information about the purchase prices paid for thoroughbred yearlings, weanlings and two-year-olds at public sales in 1989, see supra note 34. Obviously, such data on private sales is not available because of the private nature of those transactions.
47. See, e.g., Jacobs v. Lancaster, 526 F. Supp. 767 (W.D. Okla. 1981) ($25,000 note as part payment of purchase price). The public sales are usually handled on a "cash" basis, with the purchaser arranging his own financing through a financial institution. Private sales have greater flexibility, and the seller is often asked to take back a note for part of the price.
48. For a more extensive discussion of the perfection of security interest in horses under UCC Article 9, see infra notes 185-97 and accompanying text.
49. The failure to get the proper name and address of the debtor exactly right can be fatal to the validity of the security interest. See, e.g., In re Beaver Dam Grain, Inc., 39 U.C.C. Rep. Serv. (Callaghan) 1845 (Bankr. W.D. Ky. 1984) (a financing statement signed by "B.C. Christopher Co. dba Beaver Dam Grain" was not sufficient as to Beaver Dam Grain, Inc.).
50. For a suggested minimum standard for describing a horses, see supra note 44. This is an especially important matter in Kentucky, where the standards for description of collateral are, at least arguably, exceptionally strict. For a discussion of descriptions for security agreement purposes in Kentucky and elsewhere, see infra notes 175-79 and accompanying text.
51. It is also advisable for the seller to prohibit the buyer from moving the horse elsewhere, other than on a temporary basis, without the seller's prior written consent. Such a prohibition helps protect the seller's security interest and helps to eliminate the need for "shot-gun" filing of financing statements. See UCC § 9-103; UCC § 9-401. For a discussion of the need to file financing statements in connection with racehorse and other horse sales, infra notes 185-97 and accompanying text.
52. For a more complete discussion of the impact of Article 9 of the UCC, the classification of the collateral, and the filing of the financing statements, see infra notes 171-98 and accompanying text.
mented by evidence of consistent additional terms unless the court finds the writing to have been intended also as a complete or exclusive statement of the terms of the agreement. 53

In light of this contract interpretation rule, the use of a merger clause 54 in racehorse sales contracts is particularly appropriate. Such a clause is especially important to the seller because it severely limits the purchaser’s ability to introduce evidence of additional terms or warranties. The inclusion of such a merger clause also makes it more difficult for a court to invoke the “explanation” or “supplementation” rationale of UCC section 2-202 for admitting oral statements and prior agreements. Accordingly, a purchase contract, with a merger clause, may be looked to by both parties and by the court for all of the terms and conditions of the agreement between the parties, without the need or the ability to use any additional terms outside of the written contract to help explain or supplement the contract. 55

The failure to include a merger clause within the written contract for the sale of a horse had significant consequences for the seller in Alpert v. Thomas. 56 Despite the existence of a written sales contract, the Alpert court found that oral statements made by the seller’s agent prior to the execution of the contract constituted an express warranty as to the horse’s breeding abilities. 57 More specifically, the court held that the doctrine of contract merger could not be applied to exclude the oral express warranty because

53. UCC § 2-202(b). Note that by negative implication, and absent anything to the contrary, a written agreement may theoretically be contradicted by evidence of a subsequent oral agreement. More importantly, however, the explanation and supplementation loopholes provide a way for a court to allow the admissibility of evidence of oral warranties and other oral contract terms, if the court is otherwise inclined to do so. Theoretically, this parol evidence rule of the UCC excludes evidence of oral warranties or other oral terms of a contract, but courts will frequently go to great lengths to get such evidence admitted if they feel that one party or the other has taken unfair advantage. See White & Summers, supra note 28, at Chapter 2.

54. A typical merger clause reads as follows:

THIS AGREEMENT SIGNED BY BOTH PARTIES AND SO INITIALED BY BOTH PARITIES IN THE MARGIN OPPOSITE THIS PARAGRAPH CONSTITUTES A FINAL WRITTEN EXPRESSION OF ALL THE TERMS OF THIS AGREEMENT AND IS A COMPLETE AND EXCLUSIVE STATEMENT OF THOSE TERMS AND ANY AND ALL REPRESENTATIONS, PROMISES, WARRANTIES OR STATEMENTS BY SELLER’S AGENT THAT DIFFER IN ANY WAY FROM THE TERMS OF THIS WRITTEN AGREEMENT SHALL BE GIVEN NO FORCE OR EFFECT.

White & Summers, supra note 28, at § 2-12 (emphasis original).


57. Id. at 1415.
the contract did not contain a merger clause.\textsuperscript{58} In reliance on \textit{Alpert}, the purchaser of a racehorse could accuse the seller of having orally stated, and thus warranted, that the horse would be a winner absent an effective merger clause.\textsuperscript{59}

Even though a purchase contract may contain detailed and complete terms and conditions, including a merger clause, a court may need to look to factors outside of the contract to resolve an interpretation dispute between the parties. UCC section 2-202(a) provides that the written terms of a contract may be “explained or supplemented by course of dealing or usage of trade (section 1-205) or by course of performance (section 2-208).”\textsuperscript{60} When applying these principles, the express terms of the contract take precedence over all other factors. If the expressed terms are ambiguous, courts next examine course of performance, then course of dealing and finally usage of trade.\textsuperscript{61}

If the parties have a different interpretation of an express term of the purchase contract, the most persuasive evidence of what the term should mean is any evidence as to how the parties have interpreted the term. However, this course of performance interpretation tool has limited applicability in the horse industry because a single sales contract rarely “involves repeated occasions for performance” to be “accepted or acquiesced” in by both parties.\textsuperscript{62} The next UCC principle to be applied by a court to interpret a disputed express term of an agreement is course of dealing. Under this principle the court searches for “a sequence of previous conduct between the parties to a particular transaction which is fairly to be regarded as establishing a common basis of understanding for interpreting their expressions and other conduct.”\textsuperscript{63} A series of horse sales and purchases between the same parties is not uncommon, and thus unclear or disputed terms in a

\textsuperscript{58} \textit{Id.}

\textsuperscript{59} An express warranty may be made by “any affirmation of fact or promise,” regardless of any intention to give a warranty, UCC § 2-313(1)(a).

\textsuperscript{60} \textit{See also} UCC § 1-102(2)(b) (one of the stated purposes and policies of the UCC is to “permit the continued expansion of commercial practices through custom, usage and agreement of the parties . . .”); \textit{Miller, supra note 10, at 781.}

\textsuperscript{61} \textit{See} UCC §§ 1-205(4), 2-208(2).

\textsuperscript{62} \textit{See, e.g.,} Lockwood Corp. v. Black, 501 F. Supp. 261 (N.D. Tex. 1980) \textit{aff’d}, 669 F.2d 324 (5th Cir. 1982) (course of performance supplied interest charge term); T.J. Stevenson & Co., Inc. v. 81,193 Bags of Flour, 629 F.2d 338 (5th Cir. 1980) \textit{reh’g denied}, 651 F.2d 779 (5th Cir. 1981). (Express notice provisions waived by course of performance). \textit{See generally} \textit{WHITE & SUMMERS, supra note 28, at § 1-6.}

\textsuperscript{63} UCC § 1-205(1).
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sales contract could be interpreted in light of the prior sales transactions between the parties.64

The final UCC interpretation tool for contract terms is the usage of trade principle. Section 1-205(2) defines a usage of trade as "any practice or method of dealing having such regularity of observance in a place, vocation or trade as to justify an expectation that it will be observed with respect to the transaction in question." The horse business has a very well-developed set of trade customs and usages that are peculiar to the equine industry. In deciding equine cases, courts should, whenever possible, conform their decisions to the reasonable expectations of the buyers and sellers. Those expectations are reflected in the trade usages of the equine industry.65

Keck v. Wacker66 provides a good example of a court's application of the usage of trade principle to resolve a dispute between a buyer and a seller of a horse. The controversy in Keck centered around the proper description of the horse sold. More specifically, the dispute focused on the correct listing of a mare sold at auction. This mare previously was bred and found to be in foal, but on a subsequent examination was found to be "empty" with no signs of a fetus.67 The seller asserted that the mare was properly listed as "barren," while the purchaser argued that the mare should have been listed as "slipped."68 The court and the parties agreed that "barren" meant "bred and did not conceive" while "slipped" meant "bred, conceived and then aborts its foal."69

Both parties offered expert testimony in an attempt to demonstrate that, under the usage of trade principle, their description of the horse was proper.70 After considering the expert testimony, the court held for the

65. See, e.g., Torstenson v. Melcher, 195 Neb. 764, 241 N.W.2d 103 (1976)(usage of trade excluded implied warranty in sale of bull). For a detailed discussion of the application of the trade usage principle to the horse industry, see Miller, supra note 10, at 781-838. As Mr. Miller notes, "there are some areas of law in which the court has no choice but to look to the customs and usages that surround the transaction before it." Id. at 837. This is especially true where the parties have left a term open, or ambiguous, in the written expression of their contract. See id. Moreover, sometimes a contract term that appears ambiguous to someone outside the industry is perfectly clear to someone familiar with the customs and usages of horsemen.
67. Id. at 1381.
68. Id.
69. Id. See generally J. LOHMAN & A. KIRKPATRICK, supra note 1, at 210, 219.
70. The seller's expert testimony was provided by a representative of Claiborne Farms, the seller's agent, and a representative of C.V. Whitney Farm. The purchaser's expert testimony was provided by a veterinarian, the general manager of the California Thoroughbred Breeder's Associ-
purchaser and stated that the seller’s listing of the mare as barren “was not in accordance with a usage of trade in the thoroughbred horse industry.”

D. Express and Implied Warranties

A purchaser of an expensive thoroughbred horse typically has high expectations for the animal. At a minimum, the purchaser expects the horse to be healthy and suitable for the purposes (i.e., racing and/or breeding) for which the horse was purchased. If the purchaser’s expectations are not satisfied, a dispute is likely to result. The focus of such a dispute typically centers around whether the seller breached an expressed and/or implied warranty.

1. Express Warranties

An express warranty in the horse industry is created by any affirmation of fact about the horse or the description of the horse which becomes part of the basis of the bargain. A seller of a horse may give an expressed warranty either in writing or orally. In Keck, the description of a horse as “barren” within an auction sales catalog was held to be an express warranty of description. Even though the seller may have had no intention of warranting the horse’s breeding status, he is deemed to have made such a warranty because the affirmation of fact or description was made to the buyer.

Most astute horse sellers are, or should be, generally aware that they will be held accountable for any written descriptions or affirmations made concerning their horse up for sale. However, a horse seller can uninten-
tionally provide an express warranty to a buyer through oral statements made to the buyer in connection with the sale. Mere "puffing" or "trade talk" does not create a warranty. On the other hand, specific statements of fact or descriptions do create express warranties, regardless of the absence of any specific intention on the seller's part to make a warranty. In Miron v. Yonkers Raceway, Inc., the United States Court of Appeals for the Second Circuit held that a purchaser of a horse received an express warranty from the seller when the auctioneer, during a lull in the bidding, stated that the horse up for bid, and ultimately purchased by the plaintiff, was "as sound — as, as gutty a horse as you want to find anywhere. He'll race a good mile for you every time. He's got loads of heart.

As one might expect, it is not always easy to determine whether statements made by a seller constitute an express warranty or merely the seller's opinion or commendation of the horse. Accordingly, the particular facts and circumstances involved and the specific statements made, as well as the predilections of the court, must be carefully examined in each situation. The cases in this area involving racehorses are not altogether consistent in their holdings, and a variety of holdings have also been made in somewhat analogous cases involving other animals. For example, consider two cases involving an action brought by an unhappy purchaser of a breeding bull. In Adrian v. Elmer, the court found an express warranty within the seller's assertions that the bull was "guaranteed to be a good breeder . . . [and] one hundred percent sound." In Frederickson v. Hackney, however, the court found that the seller's assertions that the bull would put the purchaser "on the map" and that the bull's sire was the "greatest living dairy bull"

77. Frederickson v. Hackney, 159 Minn. 234, 198 N.W. 806, 806 (1924). For a discussion of the Frederickson case, see infra 85-86 and accompanying text.

78. UCC § 2-313(2) provides that "an affirmation merely of the value of the goods or a statement purporting to be merely the seller's opinion or commendation of the goods does not create a warranty." In Forbis v. Reilly, 684 F.Supp. 1317, 1320-22 (W.D. Pa. 1988), for example, the following statements by an Arabian horse breeder were held to be "no more than puffing" and not a warranty: "a good mare to start a breeding program with"; "one of her [breeder's] top 3 colts, or that he [the colt] was active and graceful."

79. UCC § 2-313(2), comment 3.

80. 400 F.2d 112 (2d Cir. 1968).

81. Id. at 114. Although an express warranty was found to exist, the court held that the purchaser failed to prove a breach of warranty. Id. at 116.

82. Compare Norton v. Lindsay, 350 F.2d 46, 49 (10th Cir. 1965)(oral statement that a horse was "sound" created an express warranty that seller breached) with Sessa, 427 F. Supp. at 765 (oral statement that horse was "sound" held to be an opinion or commendation, not an express warranty).


84. Id. at 602.

85. 159 Minn. 234, 198 N.W. 806 (Minn. 1924).
constituted "trade talk" and not an express warranty. This uncertainty suggests that sellers should exercise extraordinary caution.

2. **Implied Warranties**

   In addition to the express warranties that may be created, unintentionally or intentionally, by a seller's statements, there are also three very significant "implied warranties" that often arise in the horse industry by operation of law. First, the seller of a horse warrants that "[t]he title conveyed shall be good, and its transfer rightful..." and that the horse "shall be delivered free from any security interest or other lien or encumbrance..." that the buyer does not know about. Given the multitude of security interests, agister's liens and stallion service liens that can be attached to horses, the implied warranty of title should be considered in connection with each sales transaction.

   The next implied warranty to consider is the warranty of merchantability, as provided under UCC section 2-314. Unless excluded or modified, the purchase contract between a merchant seller and any purchaser includes an implied warranty that the horse is merchantable. UCC section 2-314(2) provides six conjunctive standards for determining whether the goods involved in any transaction are merchantable. However,

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86. *Id.* at 806. The decision whether certain words constitute an opinion or commendation rather than an express warranty is a question for the trier of fact. See UCC § 2-313 comment 3; see also *Yuzwak v. Dygert*, 354 N.Y.S. 2d 35, 36 (1988); *Sessa*, 427 F. Supp. at 765.

87. UCC § 2-312(1)(a).

88. UCC § 2-312(1)(b).


90. UCC § 2-314 only applies to sellers who are considered to be "merchants." Most horse sellers will turn out to be merchants. See *supra* notes 31-32 and accompanying text.

91. For a discussion of UCC 2-316 and of the ability to modify and exclude implied warranties, see *infra* notes 123-45 and accompanying text.

92. UCC § 2-314. Liability under the UCC's implied warranties of merchantability and fitness for a particular purpose can be viewed as a form of strict liability, with the concepts of fault and failure to use reasonable care irrelevant as to the determination of liability. See, e.g., *Pudwill v. Brown*, 294 N.W.2d 790, 793 (S.D. 1980)(seller's good faith and lack of negligence in providing pigs he believed to be fit and healthy is no defense to an action for the breach of an implied warranty of fitness for a particular purpose)(this case was later superseded by S.D. CODIFIED LAWS ANN. § 57A-2-316, see *Bennett v. Jansma*, 329 N.W. 2d 134 (1984)); *Vlases v. Montgomery Ward & Co.*, 377 F.2d 846 (3d Cir. 1967)(seller's inability to discover and cure defects in chicks is no bar to liability in an action for breaches of the implied warranty of merchantability and the implied warranty of fitness for a particular purpose).
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given the special nature of the goods sold in the horse industry, only two of the standards can practically be applied to the sale of horses. First, the horse sold must “pass without objection” in the horse business under the contract description.93 Next, the horse sold must be “fit for the ordinary purposes” for which it is used.94

In Sessa v. Riegle,95 a dissatisfied purchaser of a standardbred horse brought an action against the seller to recover damages for a breach of both expressed and implied warranties. Included within the purchaser’s action was a claim that the seller breached the implied warranty of merchantability.96 After purchasing the racehorse from the defendant, the plaintiff discovered that the horse suffered both tendonitis and intermittent claudication.97 Despite the problems that the purchaser experienced with the horse, the court held that the seller did not breach the implied warranty of merchantability.98

In its interpretation of the merchantability standards of UCC section 2-314(2), the Sessa court stated that “[t]he standard established does not require that goods be outstanding or superior. It is only necessary that they be of reasonable quality within expected variations and fit for the ordinary purposes for which they are used.”99 The court then applied this standard to the facts at issue and held that

[e]ven with tendinitis [sic] and intermittent claudication Tarport Conaway met this standard. The tendinitis [sic] was merely temporary and of no long term effect. The intermittent claudication did not prevent him from becoming a creditable if unspectacular race horse. After rest and recuperation, he won three races in thirteen starts in 1975. Certainly he did not live up to Sessa’s hopes for a preferred pacer, but such disappointments are an age old story in the horse racing business. Anyone who dares to deal in standardbreds

93. UCC § 2-314(2)(a).
94. UCC § 2-314(2)(c). The other standards are not helpful in the context of the horse business because horses are not “fungible,” see UCC § 2-314(b), do not come in multiple “units,” see UCC § 2-314(d), and are not “contained, packaged, and labeled,” see UCC § 2-314(e)-(f).
96. Id. at 769. The court held that the seller was a merchant and thus an implied warranty of merchantability could be established by the buyer. Id.
97. Id. at 767. The tendonitis was described as swelling of the tendons of both front legs of the horse. Id. at 763. The horse, however, recovered from the condition within two days after diagnosis by the veterinarian. Id. The intermittent claudication was described as a “thrombosis or blockage of the arteries supplying fresh blood” to the horse’s hind legs. Id. After giving the horse approximately two years of rest, the plaintiff put the horse back in training and raced it 13 times. Id. at 764. The horse won three races. Id.
98. Id. at 769-70.
99. Id. at 769.
knows that whether you pay $2500.00 or $250,000.00, a given horse may prove to be a second Hambletonian or a humble hayburner. Consequently, since Tarport Conaway was able to hold his own with other standardbreds, he was reasonably fit for the ordinary purposes for which race horses are used, and was merchantable.\textsuperscript{100}

To the extent that other courts follow \textit{Sessa}, the implied warranty of merchantability in the racehorse context becomes a warranty of the ability to race at the time of sale, not the ability to win.

The third and final implied warranty created under the UCC and applicable to the horse industry is the implied warranty of fitness for a particular purpose.\textsuperscript{101} The implied warranty of fitness for a particular purpose is narrower, more specific and not as common as the implied warranty of merchantability. An unsatisfied horse purchaser must prove the following four elements to establish the existence of an implied warranty of fitness for a particular purpose:

(a) The horse was purchased for a particular purpose other than its ordinary purpose;\textsuperscript{102}
(b) The seller had reason to know the buyer's particular purpose;\textsuperscript{103}
(c) The seller had reason to know that the buyer was relying on the seller's skill or judgment to select or furnish the horse;\textsuperscript{104} and
(d) The buyer actually relied upon the seller's skill or judgment.\textsuperscript{105}

In the racehorse context, each of these elements takes on a certain ambiguity that is not necessarily present when other types of goods are involved.

Although it is clear that a sales transaction may include both an implied warranty of merchantability and an implied warranty for a particular purpose,\textsuperscript{106} it is not uncommon for the two warranties to be confused and/or combined in their application to a given fact pattern, especially when the sale involves horses or other animals.\textsuperscript{107} In \textit{Vlases v. Montgomery Ward &
Co.,\textsuperscript{108} for example, the United States Court of Appeals for the Third Circuit found that the seller of one day old chicks breached both the implied warranties of merchantability and fitness for a particular purpose because the chicks purchased by the plaintiff were afflicted with avian leukosis or “bird cancer.” Without examining the necessary elements to establish the implied warranties, the \textit{Viases} court merely stated that the chicks did not “conform to the normal commercial standards” and that they did not meet the “buyer’s particular purpose, a condition upon which he had the right to rely.”\textsuperscript{109}

The case law applying the implied warranty of fitness for a particular purpose to the horse industry and to animals in general, is sparse. Moreover, in the animal context, there has been some confusion regarding what constitutes an “ordinary purpose” and what constitutes a “particular purpose.”\textsuperscript{110} The courts’ application of this warranty has provided little help in reducing this confusion for participants in the horse industry. For example, consider a stallion purchased for breeding purposes that proves to be defective. The horse appears to be healthy in all respects except for its breeding abilities. Does the ability to breed constitute an ordinary purpose or a particular purpose? In \textit{Alpert}, the court stated that the “custom and usage in the horse trade indicates that the implied warranty of merchantability includes the warranty that the stallion is fertile and capable of getting a mare in foal.”\textsuperscript{111} In several decisions concerning pigs purchased for breeding (called “gilts”), courts have addressed this issue. In the majority of these cases the courts have characterized the ability to breed

\textsuperscript{108} 377 F.2d 846 (3d Cir. 1967).

\textsuperscript{109} Id. at 849. A sympathetic plaintiff obviously made it much easier for the court to make its decision. The plaintiff was a Greek immigrant who worked alone on the construction of his chicken coops “twelve hours a day, fifty-two weeks a year” for three years. Id. at 848. The court also noted that the plaintiff slept in the coop with the new chicks for the first six months “in order to give the new chicks his undivided attention.” Id.; see also \textit{Travis}, 734 P.2d at 958 (seller of horse breached implied warranty of merchantability and fitness for a particular purpose).

\textsuperscript{110} See Cohan, \textit{The Uniform Commercial Code as Applied to Implied Warranties of “Merchantability” and “Fitness” in the Sale of Horses}, 73 Ky. L.J. 665, 679 (1984-85)(author implies that racehorse’s ability to race and stallion’s ability to breed are ordinary purposes and not particular purposes); Eftink, \textit{Implied Warranties in Livestock Sales: Case History and Recent Developments}, 4 AGRIC. L.J. 207, 213 (1982-83)(“A seller might ask, what is the ordinary purpose of these animals, in view of the admonition of § 2-315 comment (2) that an ordinary purpose is not a particular purpose for this section.”); S. Favre & M. Loring, \textit{Animal Law} § 6.13, at 93 (1983)(gilt’s ability to breed constitutes ordinary purpose).

\textsuperscript{111} 643 F. Supp. at 1415. In O’Shea v. Hatch, 97 N.M. 409, 640 P.2d 515, 519-790 (Ct. App. 1982), a breach of the implied warranty of fitness for a particular purpose was found in the sale of a show horse to a purchaser who purchased the horse for use by children. It turned out the horse was not a gelding of gentle disposition as represented by the seller but, rather, a ridgeling, which is a colt that was improperly castrated so that only one testicle was removed. Id.
as a particular purpose and, thus, they have applied the implied warranty of fitness for a particular purpose. Under a similar line of cases, defects in feeder pigs were held to violate the implied warranty of fitness for a particular purpose.

When examining the implied warranty of fitness for a particular purpose, it is also common for a court to avoid or circumvent the ordinary purpose versus particular purpose inquiry by finding that the purchaser did not satisfy one of the other necessary elements to establish the implied warranty. In Sessa, for example, the court examined a claim for the breach of an implied warranty of fitness for a particular purpose in connection with the purchase and sale of a standardbred. The Sessa court held that the seller did not create an implied warranty of fitness for a particular purpose because the purchaser did not rely on the seller to select the horse. More specifically, the court found that the purchaser relied on his own agent to select the horse.

The decision to either apply the implied warranty of merchantability or the implied warranty of fitness for a particular purpose to the exclusion of the other does have significance to buyers and sellers. In addition to the more narrow scope of the implied warranty of fitness for a particular purpose, two other significant differences exist between the two implied warranties. First, the implied warranty of fitness for a particular purpose applies to all sellers, whereas the implied warranty of merchantability only applies to sellers who are merchants. Accordingly, a purchaser of a defective horse from a non-merchant is precluded from establishing an action.

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113. See Pudwill, 294 N.W.2d at 792 (salt poisoning in feeder pigs); W & W Livestock Enterprises, Inc. v. Dennler, 179 N.W.2d 484, 491 (Iowa 1970)(pneumonia and bloody scours in feeder pigs).

114. For a more complete discussion of the Sessa decision, see supra notes 95-100 and accompanying text.


116. Id.; see also Two Rivers Co. v. Curtiss Breeding Serv., 624 F.2d 1242, 1252 (5th Cir. 1980)(no implied warranty of fitness for a particular purpose because purchaser of bull semen relied on his agent, not the seller).

117. For a definition of a merchant for UCC purposes, see UCC § 2-104(1). For a discussion of the application of the merchant definition to horse traders, see supra notes 31-32 and accompanying text.
for breach of the implied warranty of merchantability. A second important difference between the two implied warranties is the UCC section 2-316 requirement that an exclusion of the implied warranty of fitness for a particular purpose must usually be in writing, whereas the seller can orally exclude an implied warranty of merchantability.

In applying the implied warranties of merchantability and fitness for a particular purpose to the sale of a racehorse or any other kind of horse, courts seem to construe the UCC provisions liberally to find that implied warranties have been created, especially when either the conduct of the seller or the circumstances of the buyer suggest a special need for judicial assistance.

Even if the purchaser of the horse can establish that an implied warranty has been created, however, the purchaser still must prove that the warranty was breached. Moreover, even if a breach of an implied warranty is proven, the seller may have successfully excluded or modified the implied warranties by following the straightforward requirements of UCC section 2-316. In addition, even if neither of the implied warranties apply to a given horse sales transaction, one should not forget the possibility that an express warranty of description may have been provided by the seller. For example, a purchaser of a horse described as a stallion might argue that the seller’s description provided an express warranty that the horse would be suitable for breeding purposes. Finally, the purchaser can try to introduce evidence of usage of trade to support his assertion that the seller’s description of the horse as a stallion is recognized in the industry as a warranty that the horse would be suitable for breeding purposes.

118. When the seller is not a merchant, the debate over the ordinary versus particular purpose of the horse is extremely important. If breeding and/or racing is considered to be an ordinary purpose, the purchaser will be unable to establish either an implied warranty of merchantability or the implied warranty of fitness for a particular purpose. In Alpert, for example the sellers unsuccessfully tried to escape the application of the implied warranty of merchantability by arguing that they were not merchants. 643 F. Supp. at 1415-16.

119. For a discussion of warranty disclaimers under UCC § 2-316, see infra notes 129-30 and accompanying text.

120. See, e.g., Sessa, 427 F. Supp. at 769-70 (implied warranty of merchantability applied, but no breach was found).

121. For a discussion of the ability to exclude the implied warranties, see infra notes 124-45 and accompanying text.

122. For a discussion of UCC § 2-202 and the usage of trade principle as applied to the horse industry, see supra notes 53-71 and accompanying text.
3. Exclusion of Warranties

Despite the possible existence of an implied warranty of merchantability or fitness for a particular purpose in a horse sales transaction, it is important to note and understand that such warranties may not be available to help a dissatisfied purchaser. Many state legislatures have enacted laws which limit the scope of these implied warranties in the sale of livestock. At least ten states have enacted special statutes that govern or limit UCC warranties as applied to the sale of horses, while another eight states have statutes that apply to livestock other than horses. A Kentucky statute provides, for example, that a seller does not give an implied warranty that the horse is free from disease or sickness unless the seller knows that the horse is diseased or sick. The California Agricultural Code excludes the applicability of the implied warranty of fitness for a particular purpose in the case of livestock sales, but not the implied warranty of merchantability. Accordingly, in California, a dissatisfied purchaser of a horse is not precluded by statute from bringing an action for a breach of the implied warranty of merchantability. Due to the variations contained within the special state statutes that cover horses, each state's statute and interpretive case law should be reviewed. As a general observation, however, most of the special livestock statutes excluding implied warranties are generally enacted as state variations of UCC section 2-316.

For those states in which the implied warranties are not excluded by statute, a seller may still be able to modify or exclude the implied warranties using a variety of methods provided in UCC section 2-316. Under UCC section 2-316(2), a seller can modify or exclude the implied warranty of merchantability in a conspicuous writing that includes the term


127. The discussion and resolution of the ordinary versus particular purpose of a horse becomes even more important in light of the California statute. For a discussion of identifying the "ordinary" and "particular" purposes in the purchase of a horse, see supra notes 101-23 and accompanying text.
"merchantability." Similarly, a seller can exclude or modify the implied warranty of fitness for a particular purpose through the use of a conspicuous writing.

Although the ability to exclude the implied warranties under UCC section 2-316(2) appears to be rather straightforward, the application of this section, especially the requirement of a conspicuous disclaimer, often leads to inconsistent results. In Two Rivers Co. v. Curtiss Breeding Service, the Fifth Circuit found that a seller of bull semen properly and conspicuously disclaimed the implied warranty of merchantability. The seller included a lengthy disclaimer on the back of each invoice that the purchaser received. Included within the seller's disclaimer was the following language: "[SELLER] MAKES NO OTHER WARRANTY OF ANY KIND AND HEREBY DISCLAIMS ALL WARRANTIES, BOTH EXPRESS AND IMPLIED, OF MERCHANTABILITY AND FITNESS FOR A PARTICULAR PURPOSE."

In Anderson v. Farmers Hybrid Companies, however, the court held that the seller's disclaimer language on the back of the order confirmation slip for the purchase and sale of breeding pigs, nearly identical to the language successfully used by the seller in Two Rivers Co., was not conspicuous, and therefore did not effectively disclaim the implied warranty of

128. UCC § 2-316(2). Although a written disclaimer of the implied warranty of merchantability is clearly preferable, the disclaimer may be made orally. Such an oral disclaimer, however, must withstand the prohibitions and challenges of admissibility under the parol evidence rule of UCC § 2-202. For a discussion of UCC § 2-202 and the parol evidence rule, see supra notes 53-59 and accompanying text.

129. UCC § 2-316(2). This section further states that "[l]anguage to exclude all implied warranties of fitness is sufficient if it states, for example, that '[t]here are no warranties which extend beyond the description on the face hereof.' " UCC § 2-316(2).

130. UCC § 1-201(10) describes "conspicuous" in the following manner:

A term or clause is conspicuous when it is so written that a reasonable person against whom it is to operate ought to have noticed it. A printed heading in capitals (as: NON-NEGOTIABLE BILL OF LADING) is conspicuous. Language in the body of a form is 'conspicuous' if it is in larger or other contrasting type or color. But in a telegram any stated term is 'conspicuous.' Whether a term or clause is 'conspicuous' or not is for decision by the court.

131. 624 F.2d 1242, 1252 (5th Cir. 1980), cert. denied, 450 U.S. 920 (1981). The court found that the purchaser failed to establish the existence of the implied warranty of fitness for a particular purpose, and therefore did not apply the disclaimer to it. Id.

132. Id. The court also noted that the seller conveyed the disclaimer to the purchaser at the time of purchase and that the disclaimer was also included within the seller's Breeding Guide which had been previously examined by the purchaser. Id. See also Cohen v. North Ridge Farms, Inc., 712 F.Supp. 1265, 1269 (E.D. Ky 1989) (seller of horse at auction successfully disclaimed implied warranties in auction catalog's conditions of sale).

133. 87 Ill. App. 3d 493, 501-02, 408 N.E.2d 1194, 1200 (1980)(overruling trial court's finding on this matter).
merchandability. According to the Anderson court, the seller’s disclaimer was not conspicuous, despite the use of capital letters, because the inclusion of the disclaimer on the reverse side of the order slip was not conspicuous "from the general appearance of the slip or from any conspicuous language on the front side of the slip." Although the Anderson court strained a bit to get to its desired result, the decision does provide practical advice for the seller of any goods, including horses, who wishes to disclaim the implied warranties. A seller should take great pains to make the disclaimer so conspicuous that a court will have no choice but to find that it is effective under UCC section 2-316(2). For example, whenever possible, the seller of a horse should include the disclaimer in bold face capital letters on the first page of any multi-page document or in a section immediately next to the purchaser's signature. The seller in Anderson might have successfully disclaimed the implied warranty of merchantability if the seller had made the following sentence on the bottom of the first page of the order slip more conspicuous (i.e., put it in capital, bold-face letters): "This order subject to conditions on reverse side hereof and subject to acceptance by the company."

UCC section 2-316 provides a few other methods for sellers to extinguish an implied warranty of merchantability or fitness for a particular purpose in connection with the sale of a horse. Of particular importance to the horse industry is UCC section 2-316(3)(b), which provides that "when the buyer before entering into the contract has examined the goods . . . as

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134. The seller’s disclaimer included the following language: "[SELLER] MAKES NO REPRESENTATION OR WARRANTY OF ANY KIND, EXPRESS OR IMPLIED, AS TO MERCHANTABILITY FITNESS FOR A PARTICULAR PURPOSE OR ANY OTHER MATTER WITH RESPECT TO THE GILTS." Id. at 496, 408 N.E.2d at 1196.

135. Id. at 502, 408 N.E.2d at 1200. The court supported its decision by stating that under the circumstances little was contained on the front of the slip "to bring to a reasonable person's attention and notice the existence of express disclaimers on the reverse side of the slip." Id.

136. Id.; see also Travis, 734 P.2d at 958. In Travis, an otherwise valid disclaimer of implied warranties contained within a horse auction sales catalog was held by an intermediate appellate court to be invalid because it was not explicitly negotiated between the seller and the buyer. Id. Although many of the court's conclusions in Travis were reversed by the Supreme Court of Washington, it is highly recommended that, from a seller's viewpoint, the disclaimers typically contained within auction sales catalogs be conspicuously repeated on the documents to be signed by the purchaser to confirm the sale. But see Cohen, 712 F.Supp. at 1269 (warranty disclaimer in auction sales catalog enforced by court).

137. UCC § 2-316(3)(a) provides an alternative method for a seller to exclude all implied warranties, either in writing or orally, through the use of certain expressions. UCC § 2-316(3)(a) provides that "all implied warranties are excluded by expressions like 'as is,' 'with all faults' or other language which in common understanding calls the buyer's attention to the exclusion of warranties and makes plain that there is no implied warranty." Obviously, it is best if the seller conspicuously includes this language in a writing; however, a mere oral statement may be enough to exclude the implied warranties. See supra notes 53-59 and accompanying text.
fully as he desired or has refused to examine the goods there is no implied warranty with regard to defects which an examination ought in the circumstances to have revealed to him . . . .” Even though a purchaser of a horse may be able to discover many problems with the horse in a routine soundness exam, such a routine exam typically will not reveal latent defects such as respiratory abnormalities, the existence of prior orthoscopic surgery to remove bone chips, and the like. Thus, the “examination” exception will be of only limited value to a seller unless the seller demands that the buyer have a veterinarian conduct a complete examination of the horse.

In *Calloway v. Manion*, the plaintiff traded a gelding horse in exchange for the defendant’s mare. The defendant successfully excluded the implied warranties because he proved that he had demanded that the plaintiff have the horse examined by a veterinarian prior to the trade, but the plaintiff had refused. In *Alpert*, however, the seller of an Arabian horse for breeding purposes was not able to exclude the implied warranties under the examination exception because the seller agreed to examine the horse, the seller did not demand an examination by the purchaser, and the purchaser “did not have the necessary skills or equipment to perform such an exam herself when she looked at the horse.”

UCC section 2-316(3)(c) provides yet another way for a seller to exclude or modify the implied warranties. UCC section 2-316(3)(c) provides that “an implied warranty can also be excluded or modified by course of dealing or course of performance or usage of trade.” In *Torstenson v. Melcher*, for example, a seller of a breeding bull produced sufficient usage of trade evidence to exclude the applicability of any implied warranties of fitness for a particular purpose.

Finally, a discussion of a seller’s ability to exclude or modify implied warranties would not be complete without at least mentioning the possible application of the federal Magnuson-Moss Warranty Act. The Magnuson-Moss Act and its regulations impose certain restrictions and language requirements upon sellers who seek to exclude or modify warranties

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138. 572 F.2d 1033 (5th Cir. 1978).
139. *Id.* at 1035 n.2, 1036. The jury determined that the examination would have revealed the presence of the defect, an incipient ovary. *Id.*
140. 643 F. Supp. at 1417 (due to low sperm count, horse was unsatisfactory as a prospective breeder); see also *Young & Cooper, Inc. v. Vestring*, 241 Kan. 311, 521 P.2d 281 (1974).
141. For a discussion of course of dealing, course of performance and usage of trade, see * supra* notes 60-65 and accompanying text.
in a consumer sales transaction.\textsuperscript{144} If a horse is being sold to a purchaser for “personal, family or household purposes,” such as the sale of a pleasure horse, the seller should be aware of the Magnuson-Moss provisions.\textsuperscript{145}

E. Buyer’s Remedies Upon Learning of a Defect

1. Rejection and Revocation of Acceptance

The UCC provides a limited number of potential remedies for a dissatisfied horse purchaser. Basically, the purchaser can (i) try to unwind the sale by either rejecting the horse;\textsuperscript{146} or revoking acceptance of the horse.\textsuperscript{147} and/or (ii) seek damages for the seller’s breach of a warranty.\textsuperscript{148} If a buyer somehow learns of a material and undisclosed defect in the horse after the purchase contract is entered into but before the seller takes delivery or contemporaneously with delivery, the buyer can reject the horse under UCC sections 2-601 and 2-602 on the grounds that the horse fails to conform to the contract. Any such rejection must be “within a reasonable time after [the horse’s] delivery or tender.”\textsuperscript{149} If the horse is effectively rejected, the burden of proving conformity to the contract “presumably remains on the seller, whereas upon acceptance the buyer has the burden to establish any breach.”\textsuperscript{150}

After a purchaser “accepts” the horse it can no longer be rejected by the purchaser.\textsuperscript{151} Acceptance of a horse occurs when, after a reasonable opportunity to inspect the horse, the buyer: (1) Signifies to the seller that the horse either conforms to the contract or is acceptable despite its nonconformity; or (2) fails to reject the horse; or (3) generally performs any act inconsistent with the seller’s ownership of the horse.\textsuperscript{152} The fact that the purchaser has accepted the horse, however, does not necessarily preclude

\textsuperscript{144.} Id.
\textsuperscript{145.} Basically, the Magnuson-Moss Act and its regulations apply to written warranties of consumer products. It includes various disclosure requirements, and prohibits warranty disclaimers and remedy limitations in some circumstances. Id.
\textsuperscript{146.} See UCC §§ 2-601(a), 2-602.
\textsuperscript{147.} See UCC § 2-608.
\textsuperscript{148.} See UCC §§ 2-601(a), 2-602. A seller may be able to limit the remedies available to a purchaser as provided under UCC §§ 2-316, 2-719. If it is clear that the limitation agreed to by the parties was meant to be exclusive of all other remedies and that the remedy does not cause any warranties to fail of their essential purpose, such limitations would generally be upheld. See, e.g., Calloway, 572 F.2d at 1037-38 (remedy limited to exchange of horse for another horse).
\textsuperscript{149.} UCC § 2-602(1), see, e.g., Miron, 400 F.2d at 118 (attempted rejection of horse on day after auction sale was not within a reasonable time for a rejection).
\textsuperscript{150.} Miron, 400 F.2d at 119.
\textsuperscript{151.} UCC § 2-607(2)(“[a]cceptance of goods by the buyer precludes rejection of the goods accepted . . .”).
\textsuperscript{152.} UCC § 2-606.
the purchaser from unwinding the sale. For UCC purposes, a post-acceptance unwinding of a sale is referred to as a revocation of acceptance.153

For a horse purchaser to revoke acceptance of the animal under UCC section 2-608, he or she must prove: (1) The horse does not conform to the contract and that nonconformity substantially impairs the value to the buyer; (2) the buyer accepted the horse either on the reasonable assumption that the discovered nonconformity would be cured or without discovery of the nonconformity due to the seller’s assurances and/or due to the difficulty of discovery of the nonconformity; (3) the buyer has revoked acceptance within a reasonable time after the nonconformity was discovered or should have been discovered;154 (4) the revocation occurred before any substantial change in the condition of the horse not caused by its own defects; and (5) the buyer notified the seller of the revocation.155 A buyer who properly revokes acceptance of a horse has the same rights and duties to the horse as if the buyer had rejected it.156 Accordingly, a revocation of acceptance may be viewed as a late rejection of the horse, but with a good excuse for the delay.157

2. Breach of Warranty

After a buyer has accepted a horse and the time for revocation has passed, the buyer still may bring an action against the seller on the basis of

153. UCC § 2-608.

154. “Whether an acceptance is revoked within a reasonable time is a question of fact to be determined by the circumstances of each particular case.” Heller v. Sullivan, 57 Ill. App. 3d 190, 195, 372 N.E.2d 1036, 1040 (1978)(whether acceptance of horse was timely revoked is a material issue of fact that could not be resolved as a matter of law by summary judgment). But see Chernick v. Casares, 759 S.W.2d 832 (Ky. Ct. App. 1988)(revocation as to mare untimely as a matter of law).

155. See generally WHITE & SUMMERS, supra note 28, at § 8-4 (a good discussion of a buyer’s right to revoke acceptance under UCC § 2-608). The tough issues involving the revocation of acceptance of racehorses usually arise from tension between and among the following factors: (a) some defects in a racehorse can be, at least to some degree, latent; (b) those defects sometimes could be revealed by a careful veterinary examination, even though they would not show up in a casual inspection by a layperson; (c) a horse is a living creature that will always have some defects, in the sense that it is not perfect; and (d) a racehorse is very fragile and can suddenly become injured, with no advance warning, at any time. Where the alleged defect is an injury, the allocation of the burden of proof is very important: Once acceptance has occurred, the burden is on the buyer to establish that the horse was already injured at the time of delivery. UCC § 2-607(4), see Miron, 400 F.2d at 120.

156. See UCC § 2-608(3).

157. Compare Gilbert v. Caffee, 293 N.W.2d 893, 895-96 (S.D. 1980)(written revocation of acceptance of show horse 14 months after purchase, and only after buyer learned that he was being sued for late payment, not a timely revocation) with Alpert, 643 F. Supp. at 1417-19 (revocation of Russian-Arabian stallion effective under UCC § 2-608).
the seller's breach of one of the express or implied warranties.” To be successful in such an action for damages, however, the buyer must give the seller timely notice of the defect and carry the burden of proof that the seller breached either an express or implied warranty.

The measure of damages when a dissatisfied purchaser of a racehorse brings a breach of warranty claim “is the difference at the time and place of acceptance between the value of the [horse] accepted and the value [the horse] would have had if [it] had been as warranted.” The purchaser may also be entitled to certain incidental and consequential damages flowing from the seller's breach, such as the costs of transportation, insurance, care, stud fees, and/or training for the horse purchased.

A proper application of the UCC measure of damages principles to a breach of warranty claim in a horse sales transaction is provided in Schleicher v. Gentry. In Schleicher, the purchaser paid $50,000.00 for a thoroughbred mare identified by the seller to be MISS CAESAR, a valuable mare that had previously delivered a foal that became a “big money winner.” Eight months after the sale, the purchaser discovered that the horse was not MISS CAESAR, but rather DOUBLE CHOCOLATE, a horse valued at $2,700. The seller previously owned both horses, got them mixed up, and sold them under the wrong identity. Accordingly, the purchaser was awarded $47,300, which equaled the difference between what he paid for the horse ($50,000) less the actual value of the horse that he

158. See UCC § 2-714. From a pleading standpoint, it is important to note that the UCC has eliminated the election of remedies doctrine and that a dissatisfied purchaser may seek revocation of acceptance and damages within a single cause of action. See UCC § 2-608 comment 1 (“[T]he buyer is no longer required to elect between revocation of acceptance and recovery of damages for breach. Both are now available to him.”); see also UCC § 2-721 (buyer can also include a claim for damages for fraud).

159. UCC § 2-607(3)(a) provides that “the buyer must within a reasonable time after he discovers or should have discovered any breach notify the seller of breach or be barred . . . .” Thus, for example, a purchaser who buys a stallion for breeding purposes and within a few weeks discovers that the horse is not as fertile as warranted by the seller, but who continues to breed the stallion without notifying the seller, may be unable to maintain an action for breach of warranty. While this notice requirement may provide an opportunity to cure, it is often of little or no practical value. The seller may have an early opportunity to examine the evidence of the alleged defect, but there is usually little or nothing he or she can do to “fix” it.

160. UCC § 2-607(4) provides that “[t]he burden is on the buyer to establish any breach with respect to the goods accepted.”

161. UCC § 2-714(2).

162. See UCC §§ 2-714(3), 2-715.

163. 554 S.W.2d 884 (Ky. Ct. App. 1977).

164. Id. at 885. The court noted that the purchaser was Thomas Gentry who, “without question, is one of the outstanding thoroughbred breeders in the country.” Id.

165. Id. The value was determined by the prior sale of the horse under the mistaken identity. Id.
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actually received ($2,700). In addition, while still under the mistaken idea that he owned MISS CAESAR, the purchaser paid a $35,000 stud fee for the breeding services of a good stallion.\textsuperscript{166} As consequential damages, the purchaser was also awarded $35,000 as a reimbursement for this stud fee.\textsuperscript{167} The Schleicher court, however, did not allow the purchaser to receive any amounts to compensate him for the potential lost profits from the sale of foals in the future.\textsuperscript{168}

One final note about the remedies available to purchasers of defective horses: The possible applicability of state consumer protection legislation should not be overlooked. Over the last decade or so, many states have adopted legislation that permits a buyer of goods to rescind the sale upon a showing of an unfair or deceptive practice in a consumer purchase.\textsuperscript{169} Because such legislation varies greatly from state to state, it is difficult to make any general statements as to the impact of such statutes on the horse industry. Nevertheless, a newcomer to the horse industry may be able to characterize the purchase of a horse as a "consumer" transaction and invoke not only the UCC protections, but also the state consumer protection statutes.\textsuperscript{170}

III. ARTICLE 9 AND EQUINE COLLATERAL

A. Introduction

Given the often high prices of equine assets, the industry relies on credit to run smoothly. The typical sources of credit in the horse industry, as in any other sales transaction, are either directly from the seller or from a third party, such as a bank.\textsuperscript{171} Therefore, execution of promissory notes

\textsuperscript{166} Id.
\textsuperscript{167} Id. The court stated that the seller "could have reasonably foreseen that MISS CAESAR would have been purchased by a person such as Mr. Gentry for breeding to a good stallion such as Graustark, and that a substantial fee would be paid for this service." Id.
\textsuperscript{168} Id. at 886. The court noted:
[W]e do not believe that the law imposed upon [the seller] the duty to guarantee to a purchaser of his mare at an auction sale that the purchaser would receive a premium price or any price for that matter, for a foal conceived in the future, born in the future, and sold in the future.

\textsuperscript{169} See, e.g., OHIO REV. CODE ANN. §§ 4165.01-.04 (1989); WASH. REV. CODE ANN. § 19.86.040 (1989).
\textsuperscript{170} See, e.g., Travis, 734 P.2d at 958-61 (Washington Consumer Protection Act applied to purchase and sale of a racehorse); But see Cohen 712 F.Supp. at 1271-72 (Kentucky Consumer Protection Act does not apply to purchase and sale of racehorse).
\textsuperscript{171} This section will focus on granting and obtaining security interests in connection with equine purchase and sale transactions. For a discussion of bank-related financing in the horse industry, as well as such other vital topics as the priority battles among security interests and...
and the granting of security interests to the lender under Article 9 of the UCC in connection with equine purchase and sales transactions are both quite common. The nature of the collateral involved in an equine sales transaction often calls for a unique and special application of UCC principles.

At the outset, it is of particular significance to note that, although Article 2 of the UCC only applies to transactions in "goods," Article 9 applies to many kinds of collateral other than goods, including accounts, chattel paper, contract rights, general intangibles, documents and instruments. Therefore, even if the argument were to prevail in a given situation that a share or season should not be considered a "good" for Article 2 purposes, it could still fall within the scope of Article 9.

The prerequisites for obtaining a valid security interest in racehorses and other equine assets are contained in UCC section 9-203. Unless the seller or lender actually retains possession of the collateral as a secured party, he or she must obtain a written security agreement that is signed by the purchaser/debtor, that includes a description of the collateral, and that grants a security interest to the seller/secured party. In addition, the debtor must receive value and have rights in the collateral. Obtaining a valid security interest in equine assets is much easier than perfecting the security interest once it is obtained.

B. Description of Collateral

The description of collateral requirement under UCC section 9-203(1) is of particular interest to the horse industry. As a general matter of good

between security interests and other types of liens, such as agister's liens and stallion service liens (e.g., UCC § 9-301; UCC § 9-310); the effect of such security interests on buyers in the ordinary course (UCC § 9-307); the coordination of security agreements with the terms of the existing syndicate agreements, and share and season transactions; the practical requirement that the secured party police the collateral and keep track of any changes in its location or use; the secured party's foreclosure rights (UCC § 9-501); and the secured party's disposition of the horse, share or season (UCC § 9-504; UCC § 9-505), see Keeton, Security Interests and Horses, Seminar on Equine Law, May 1, 1986, University of Kentucky College of Law; Lester, supra note 89, at 1065; Vance, supra note 89, at a447; Miller, Borrowing and Lending on Equine Assets, Seminar on Equine Law, April 30, 1987, University of Kentucky College of Law.

172. See UCC § 9-102(1). For a discussion of the application of Article 2 to shares and seasons, see supra notes 18-28 and accompanying text.

173. See UCC § 9-203(1)(a). Although no particular formality is necessary, a mere memorandum containing these elements should be effective.

174. See UCC § 9-203(1)(b)-(c). Again, given the nature of equine sales transactions, these requirements should not pose a problem. Although it is not a requirement under Article 9, it is a good idea for a secured party to include an express representation and warranty from the debtor that there are no other security interests or liens on the collateral.
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common sense and prudent business practice, it is best to be specific in the description of the equine collateral involved. However, UCC section 9-110 provides that "any description of personal property . . . is sufficient whether or not it is specific if it reasonably identifies what is described." Thus, in light of the UCC section 9-110, one could argue that a description of the collateral as "my stallion, 'Black Beauty'" is, or should be, sufficient. 175 However, in light of questionable case law in Kentucky and other jurisdictions, 176 it would be much better to describe the horse by breed, sire, dam, sire of dam, year of birth, name (if any), gender, color, and registration number. 177 Likewise, in the case of shares or seasons, the secured party should describe the collateral as fully as possible. 178

To be sure that, in the event of foreclosure on the collateral, all of the value of the equine collateral will be available to satisfy the security interest, it is suggested that the secured party also take a security interest in such "additional" collateral as: the offspring and young of the horse, whether born or unborn; all contract rights and general intangibles of the debtor pertaining to the horse; stallion seasons or other rights under breeding agreements or under stallion syndication agreements; racing income, breeder’s awards, income from the sale of stallion seasons, and other income related to the horse; breeder’s certificates pertaining to the horse; policies of insurance on the equine interest being held as collateral; accounts, accounts receivable, chattel paper, and other rights to payment related to

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176. See Mammoth Cave Prod. Credit Ass’n v. York, 429 S.W.2d 26 (Ky. Ct. App. 1968)(description “all farm equipment” construed as too vague to be given effect in a security agreement). Although Mammoth Cave has been called into question by subsequent decisions, see, e.g., Nolan Prod. Credit Ass’n v. Canmer Deposit Bank, 726 S.W.2d 693, 697 (Ky. Ct. App. 1987) (“serious questions exist as to what, if any, continuing vitality Mammoth Cave currently holds”), and criticized by legal commentators, see, e.g., Note, Agricultural Financing Under the U.C.C., 12 ARIZ. L.REV. 391, 194 (1970); Note, Description of Collateral in a Financing Statement: Should It Be Required? 4 VALPARISO U.L. REV. 205, 216 (1969), the decision continues to be a reminder to secured parties that their collateral descriptions should be as specific as possible.

177. For a discussion of the use of registration numbers, see infra notes 180-81 and accompanying text.

178. For example, descriptions pertaining to the interests in a syndicated stallion might include language such as: “Fractional interest No. 1 in 1982 bay thoroughbred stallion BLACK BEAUTY by X out of Y by Z” or “The 1990 breeding season pertaining to fractional interest No. 1 in the 1982 bay thoroughbred stallion BLACK BEAUTY by X out of Y by Z.”
the horse; and all other proceeds and products of the horse for any of the foregoing "additional" collateral.\textsuperscript{179}

As a final note on the issue of collateral description, the significance of the Jockey Club certificate for a thoroughbred horse and the United States Trotting Association certificate for a standardbred horse should not be overlooked.\textsuperscript{180} As mentioned previously, the secured party should at the very least include any registration numbers from these certificates as a part of the description of the collateral. In addition, given the importance of the certificate, it is best for the secured party to actually obtain possession of the certificate whenever possible. Yet it is sometimes impractical for a secured party to obtain possession of the certificate, because, for example, the certificate must be used by the debtor or the debtor’s trainer to enter the horse into races.\textsuperscript{181}

Even if the secured party has actual possession of the certificate, the secured party should also expressly take a security interest in the registration papers of the horse by describing them as part of the collateral. The separate listing of the registration certificate as separate collateral is especially important in light of the court’s decision in \textit{Lee v. Cox}.\textsuperscript{182} In \textit{Lee}, the court drew a distinction between the horse and the registration certificate, and found that the registration papers of a horse can be an item of collateral separate and apart from the horse itself.\textsuperscript{183} Therefore, under the \textit{Lee} court’s analysis, the possession of the registration certificate constitutes a perfected security interest in those papers, but not in the horse itself.\textsuperscript{184}

\textsuperscript{179} The use of such a "laundry list" is a common practice in the secured lending industry. Most banks that lend against equine collateral extensively have their own version of a "laundry list" of equine assets in which they will take a security interest when they make a loan.

\textsuperscript{180} The Jockey Club acts as the breed registry for thoroughbreds in the United States and Canada and as such promulgates rules and regulations governing the registration of thoroughbreds. The United States Trotting Association similarly registers standardbreds pursuant to its own rules and regulations.

\textsuperscript{181} Many states require that the original Jockey Club certificate be in the physical possession of the person entering the horse in a race. This leads to an obvious conflict with a lender which wants to keep the certificate in its own possession as additional security.

\textsuperscript{182} 18 U.C.C. Rep. Serv. (Callaghan) 807 (M.D. Tenn. 1976). The horse involved was an Arabian and as such it was apparently registered with the Arabian Horse Registry of America (AHRA).

\textsuperscript{183} \textit{Id.} at 810. \textit{See also In re Wildlife Center, Inc.}, 102 B.R. 321, 325-26 (Bankruptcy E.D.N.Y. 1989) (cites and follows \textit{Lee} decision).

\textsuperscript{184} \textit{Id.} at 810-11. The \textit{Lee} decision, if followed, leads to a bizarre situation in which the debtor could end up owning the horse free and clear of any encumbrance, but with the secured party simultaneously owning the ownership papers on the horse. As a practical matter, both the horse and the registration certificate are almost worthless unless they are owned or controlled by a single person, so a standoff is created. In that situation, the secured party could try to use the
C. Characterization of the Collateral

After the creation of a valid security agreement, the secured party generally must file financing statements that evidence the security interest in order to make the security interest effective against the claims of third parties. UCC section 9-402 describes the requirements for a valid financing statement. Essentially, the financing statement must contain the name and address of the debtor and secured party, the signature of the debtor and a description of the collateral.

As applied to the horse industry, the preparation of financing statements does not pose any significant problems. But where the financing statements are to be filed, and in some cases whether financing statements must be filed at all, will depend on the characterization of the equine collateral under the UCC. Characterizing equine collateral under the UCC, however, is like trying to cram a square peg into a round hole. The categories simply do not "fit."

The characterization of equine collateral generally depends on its use and the party who will be using it. A horse that is held, without racing, breeding or any other use, might be characterized as "inventory" awaiting resale. If the same horse is held by a consumer, it might be characterized as a "consumer good." If the horse is held for racing purposes, it might be characterized as "equipment." A mare or stallion acquired for breeding ownership papers as leverage to obtain payment from the debtor if the debtor wanted to run the horse in a race or sell it.

185. See UCC § 9-302(1).
186. See UCC § 9-402(1). "A copy of the security agreement is sufficient as a financing statement if it contains the above information and is signed by the debtor." Id. Pre-printed forms, commonly referred to as "UCC-1" forms, are often filled out to create valid financing statements.
187. UCC §§ 9-103, 9-401 govern the proper location to file financing statements based upon the characterization of the collateral. The characterization of the collateral may also be important for purchase money security interest priority issues, pursuant to UCC § 9-312.
188. See In re Butcher, 43 Bankr. Rptr. 513, 520 (E.D. Tenn. 1984)("The better and generally accepted rule is that the debtor's stated, intended use at the time of attachment of the security interests defines the nature of the goods [a stallion] for purposes of ascertaining the proper place for perfecting the security interest.").
189. UCC § 9-109(4) defines inventory as goods:
  held by a person who holds them for sale or lease or to be furnished under contracts of services or if he has so furnished them, or if they are raw materials, work in process or materials used or consumed in the business. Inventory of a person is not to be classified as his equipment."
190. UCC § 9-109(1) defines consumer goods as goods "used or bought for use primarily for personal, family or household purposes . . . ."
191. UCC § 9-109(2) defines equipment as goods "used or bought for use primarily in business (including farming or a profession) or by a debtor who is a non-profit organization or a governmental subdivision or agency or if the goods are not included in the definitions of inven-
ing purposes might be characterized as a "farm product." Fortunately, a strong argument can be made for any of several different classifications based on a single set of facts.

In a similar manner, a share or season might be characterized as inventory, equipment, consumer goods or a farm product depending on its use and the debtor who uses it. Given the unique nature of shares and seasons, however, such an equine interest could also conceivably be characterized as a "contract right," a "general intangible" or even as an "account." In addition, if the secured party takes a security interest not only in the horse, share or season, but also in the various rights pertaining to that underlying equine interest, a single financing statement may represent several different categories of collateral.

The result is a "shotgun" approach to the filing of financing statements. Because it is difficult to classify equine collateral under the UCC, the secured party must file financing statements in every possible location based on almost every possible characterization of the collateral. This phenomenon, the movement of racehorses from state to state, and the overall need for a more effective means of encumbering equine collateral has led to proposals that a nationwide registry be established. Such an approach to the

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192. UCC § 9-109(3) defines farm products as:

crops or livestock or supplies used or produced in farming operations or if they are products of crops or livestock in their unmanufactured states (such as ginned cotton, wool-clip, maple syrup, milk and eggs), and if they are in the possession of a debtor engaged in raising, fattening, grazing or other farming operations. If goods are farm products they are neither equipment nor inventory . . . .

See, e.g., Trimble v. North Ridge Farms, Inc., 700 S.W.2d 396 (Ky. 1985)(syndicated fractional interest in stallion constitutes a farm product). But see In re Butcher, 43 Bankr. at 521 (stallion used to provide stud services for other horse owner's mares is not a farm product).

193. UCC § 9-106 (1962) defined contract as "any right to payment under a contract not yet earned by performance and not evidenced by an instrument or chattel paper." The term has been eliminated from the 1972 text of the UCC as "unnecessary" and "troublesome." See UCC § 9-106 & comment on "Reasons for 1972 Change."

194. UCC § 9-106 defines general intangibles as "any personal property (including things in action) other than goods, accounts, chattel paper, documents, instruments, and money."

195. UCC § 9-106 defines an account as "any right to payment for goods sold or leased or for services rendered which is not evidenced by an instrument or chattel paper, whether or not it has been earned by performance."

196. For a discussion of the various underlying equine interests that may be part of the security interest, see supra 175-84 notes and accompanying text.

197. Such a shotgun approach at attempting to comply with the filing location requirements of the UCC may be inconvenient but it provides a secured creditor with a much better chance of having its security interest enforced.
perfection of security interests in unusual types of collateral would not be unprecedented, and is long overdue.\textsuperscript{198}

\section*{CONCLUSION}

The purchase and sale of racehorses and other interests in horses are governed by the Uniform Commercial Code, but a distinct body of law has grown up around the application of the Code to these equine transactions. To the extent that the unusual nature of equine "goods" calls for special interpretations of the text of the UCC, the body of case law dealing with the sale of horses can be considered a mere gloss on the language of the statute. On the other hand, to the extent that the courts have liberally (and quite properly) heeded the customs and usages of the horse industry in order to make the outcomes of the cases conform to the reasonable expectations of the parties, the law governing the purchase and sale of horses takes on a character all its own.
