

DOLLARS AND HORSE SENSE: WHY PRUDENT BUYERS AND SELLERS SHOULD ACCOUNT FOR ARTICLE 2 OF THE UNIFORM COMMERCIAL CODE IN THEIR EQUINE SALES CONTRACTS

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In 1951, the National Conference of Commissioners on Uniform State Laws and the American Law Institute promulgated the Uniform Commercial Code (U.C.C.).¹ Since that time, the U.C.C. underwent periodic revision,² and today, virtually every American jurisdiction, in whole or in part, recognizes the U.C.C.³ Article 2 of the U.C.C. provides consistent, pragmatic, and effective rules governing transactions for the sale of goods.⁴ As part of this scheme, the drafters developed a series of default rules that apply when parties to a sales transaction fail to specify their own alternative rules.⁵ The drafters intended the U.C.C.'s default rules to reflect modern business realities and to apply to a variety of sales settings.⁶ Although the drafters of the U.C.C. intended these default rules to be dynamic and adaptable, challenges can arise when the U.C.C.'s default rules are applied to specific industries.⁷ This is especially true when the

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Commercial Law Research Guide, GEORGETOWN L., <http://www.law.georgetown.edu/library/research/guides/commerciallaw.cfm> (last visited Mar. 25, 2013)

² Haider Ala Hamoudi, *The American Commercial Religion*, 10 DEPAUL BUS. & COM. L.J. 107, 127-28 (2012).

³ Robert L. Masterson, *Converting Obsolete Musical Media to Current Formats: A Copyright Infringement Defense Arising from the Right to Repair and Implied Warranty of Fitness*, 82 TEMP. L. REV. 281, 298 (2009) (noting that Article 2 of the U.C.C. has not only been adopted in every state except Louisiana but that Article 2 has also been adopted in the District of Columbia and the Virgin Islands).

⁴ Allen R. Kamp, *Downtown Code: A History of the Uniform Commercial Code 1949-1954*, 49 BUFF. L. REV. 359, 371 (2001).

⁵ *Id.* at 475.

⁶ Jeanne L. Schroeder, *Death and Transfiguration: The Myth that the U.C.C. Killed "Property"*, 69 TEMP. L. REV. 1281, 1293 (1996); Michael D. Sousa, *Lien on Me: The Jurisprudential Underpinnings of the Uniform Commercial Code: A Reflection of the Realist Theorists*, 26 AM. BANKR. INST. J. 44, 87 (2007).

⁷ Emmie West, *Construction Contracting: Building Better Law with the Uniform Commercial Code*, 52 CASE W. RES. L. REV. 1067, 1067 (2007) (noting the challenges inherent in applying the U.C.C. to the construction industry).

default rules are applied to an industry with its own norms, which may conflict with the U.C.C.'s default rules.

Indeed, the equine industry has a rich culture and tradition that includes a variety of unique circumstances in sales transactions.⁸ As a whole, the equine industry is not homogeneous. Buyers and sellers in the equine industry are highly divergent. Age demographics range from children on ponies,⁹ to high-profile investors on six-figure, dressage horses,¹⁰ to multi-million-dollar racehorse syndicators.¹¹ Certain norms may apply uniformly across the broad equestrian community while others apply only to a sub-community of equestrians. Despite the divergence of equestrians and the existence of industry-specific norms, courts have generally concluded that the default rules in Article 2 of the U.C.C. apply to horse sales.¹² Application of these default rules are critical because these rules provide warranty remedies separate and distinct from those provided under contract law.¹³ In certain circumstances, these warranty remedies provide recovery where no contract remedy exists.¹⁴

Notwithstanding the importance of understanding the interplay between the U.C.C. and general principles of contract law, many parties buying and selling horses are uneducated about the U.C.C. Buyers and sellers routinely fail to account for the application of the U.C.C.'s default rules when drafting equine sale contracts. Even equine attorneys may focus on contractual remedies and overlook state consumer protection and U.C.C.

⁸ Joan S. Howland, Let's Not "Spit the Bit" in Defense of "The Law of the Horse": The Historical and Legal Development of American Thoroughbred Racing, 14 MARQ. SPORTS L. REV. 473 (2004) (arguing there is law unique to the equine industry and providing historical background to frame these norms).

⁹ Anne I. Bandes, Saddled with a Lame Horse? Why State Consumer Protection Laws Can Be the Best Protection for Duped Horse Purchasers, 44 B.C. L. REV. 789, 789-90 (2003).

¹⁰ Jan Ebeling, *Road to the Olympics: Jan Ebeling, Part 3*, CHRON. HORSE (June 28, 2012), <http://www.chronofhorse.com/article/road-olympics-jan-ebeling-part-3?page=2> (stating that the horse Rafalca was owned by Anne Romney, wife of then presidential candidate Mitt Romney).

¹¹ Howland, *supra* note 8, at 506; Ben Wright, *Horse Trading: Racehorse Syndicates Gain in Popularity*, WALL ST. J. (Sept. 19, 2010, 4:49 PM), <http://online.wsj.com/article/SB10001424052748704206804575467113342171690.html> (noting that racing syndicates can be a multi-million dollar commodity).

¹² See, e.g., *Cohen v. North Ridge Farms, Inc.*, 712 F. Supp. 1265, 1269 (E.D. Ky. 1989) (referencing adispute over a thoroughbred horse purchased at the Keeneland auction); *Sessa v. Riegler*, 427 F. Supp. 760, 764 (E.D. Pa. 1977) (referencing a breach of warranty case for sale of a standard bred horse); *Keck v. Wacker*, 413 F. Supp. 1377, 1382 (E.D. Ky. 1976) (referencing a revocation of acceptance for purchase of thoroughbred broodmare); *Rowland v. Scarborough Farms, LLC*, 648 S.E.2d 151, 152 (Ga. Ct. App. 2007) (referencing a breach of contract arising from an oral agreement for the sale of a colt); *Claxton v. Boothe*, 790 P.2d 1201, 1202 (Or. Ct. App. 1990) (referencing an action for rescission where seller could not produce registration papers for Arabian horses); *Keller v. Merrick*, 955 P.2d 876, 879 (Wyo. 1998) (referencing a breach of warranty claim following injury caused by horse sold by dealer).

¹³ See *Cohen*, 712 F. Supp. at 1269 (noting that "where an express provision of the UCC addresses an issue, the express Code provision controls rather than legal and equitable principles.").

¹⁴ *Id.*

remedies. To complicate matters further, courts apply numerous U.C.C. default rules and definitions when interpreting equine sales contracts. These default rules and definitions often conflict with equine industry norms in ways that can affect the outcome of a dispute.¹⁵ Prudent buyers and sellers should, therefore, consider and expressly account for these distinctions when entering an equine sales contract.

I. THE U.C.C.'S DEFINITION OF A MERCHANT SELLER MAY NOT
PRECISELY DOVETAIL WITH THE PARTIES' UNDERSTANDING OF THEIR
RESPECTIVE BARGAINING POSITIONS

As previously noted, the parties to equine sale transactions are highly varied. Many of the U.C.C.'s default rules utilize the concept of a merchant seller. Section 2-104 defines a merchant as:

[A] person that deals in goods of the kind or otherwise holds itself out by occupation as having knowledge or skill peculiar to the practices or goods involved in the transaction or to which the knowledge or skill may be attributed by the person's employment of an agent or broker or other intermediary that holds itself out by occupation as having the knowledge or skill.¹⁶

Pursuant to this definition, a seller is a merchant if he or she meets one of the following three definitions: (1) he or she a professional in the equine industry; (2) he or she, by occupation, holds himself or herself out as having specialized equine knowledge; or (3) he or she employs a professional equine sales agent.¹⁷ In straightforward cases, courts have little difficulty determining that a seller is a merchant.¹⁸ These straightforward cases typically involve the first category of merchants—equine professionals.¹⁹ A seller whose sole profession is to buy, race, and sell racehorses is a merchant.²⁰ A seller whose occupation is the management of a hunter-jumper “sale barn” where horses are taken on consignment,

¹⁵ See, e.g., *Kazmaier v. Connelly*, 2 Mass. L. Rptr. 233, 233 (1994) (emphasizing defendant's position as an “amateur” in determining how to apply the UCC, despite amateur having a different meaning in the context of dressage).

¹⁶ U.C.C. § 2-104.

¹⁷ *Id.*

¹⁸ See, e.g., *Calloway v. Manion*, 572 F.2d 1033, 1035 (5th Cir. 1978) (noting that a seller who was a “a professional horse dealer” was a merchant with respect to horse sales).

¹⁹ *Id.*

²⁰ See, e.g., *Id.*; *Sessa v. Riegle*, 427 F. Supp. 760, 764 (E.D. Pa. 1977) (holding that a seller who owned and raced standard bred horses was unquestionably a merchant).

trained, and re-sold is a merchant.²¹ A seller who breeds Arabian horses for a living is a merchant.²² A seller who has sold over a hundred horses throughout his lifetime is a merchant.²³ Similarly, courts have little trouble applying the third category, determining that a professional equine sales agent is a merchant seller.²⁴

With respect to application of the first and third definitions of a merchant, the equine industry does not pose any unique challenges. Difficulty arises when courts attempt to apply the second definition. This definition has two key elements: (1) a seller must have specialized knowledge and skill; and, (2) that skill must be as a result of the seller's employment.²⁵ Meeting this definition of a merchant is where the U.C.C. sometimes fails to adequately apply to the equine industry. In the equine industry, unlike many others, sellers may have in-depth knowledge and experience but may be employed in an unrelated field.²⁶ For many sellers, riding and owning horses is a hobby rather than a profession.²⁷ For example, a seller buying and selling horses her entire life may contemporaneously work for a living in a wholly unrelated field such as law, medicine, or engineering.²⁸ In the equine industry, experience and employment do not always go hand-in-hand.

How the equine industry defines a professional versus an amateur rider for the purposes of competition also perplexes the courts.²⁹ Since 1917, the United States Equestrian Federation (U.S.E.F.) and its

²¹ See *Nelson v. Heuckeroth*, No. 74 Civ. 2354-CSH, 1978 U.S. Dist. LEXIS 14996, at *35-36 (S.D.N.Y. Dec. 1, 1978) (finding a breach of implied warranties, and therefore that the seller was a merchant, where the seller was in the regular business of buying and reselling horses in the hunter/jumper industry).

²² See *Alpert v. Thomas*, 643 F. Supp. 1406, 1415-16 (D. Vt. 1986) (classifying an Arabian horse seller as a merchant where the seller dealt in Arabian purebred horses, had specialized knowledge of the Arabian horse business, and employed agents having similarly specialized knowledge); see also *Nelson*, 1978 U.S. Dist. LEXIS 14996, at *35-36 (holding that a seller who showed and trained horses was a merchant with respect to horse sales).

²³ *Randazzo v. McCarthy*, No. CV040083688S, 2005 Conn. Super. Ct. LEXIS 2284, at *5-6 (Conn. Super. Ct. Aug. 28, 2005) (holding a person that sells a hundred horses qualifies as a merchant).

²⁴ See, e.g., *Travis v. Wash. Horse Breeders Ass'n*, 759 P.2d 418, 420-21 (Wash. 1988) (holding that an equine auctioneer is a merchant).

²⁵ U.C.C. § 2-104(1) (2011).

²⁶ See generally *Blackwell v. Comm'r of Int'l Revenue*, 102 T.C.M. (CCH) 137 (2011) (indicating that petitioner was an experienced horse breeder, but was employed as a rehabilitation nurse counselor).

²⁷ See, e.g., *Keating v. Comm'r*, 544 F.3d 900, 901-02 (8th Cir. 2008) (holding petitioner's horse breeding activity a hobby rather than a profession).

²⁸ Cf. *id.* (discussing how petitioners' years of horse breeding coincided with their employment in the medical field).

²⁹ See generally *Kazmaier v. Connelly*, No. 917494, 1994 WL 879527, at *1 (Mass. Super. Ct. June 8, 1994) (attempting to determine whether a horse qualified as a "consumer good" as defined by the Uniform Commercial Code). As part of its reasoning, the Court focused on whether the horse was purchased by a farm for business purposes as opposed to whether the horse was purchased for "amateur dressage competition." *Id.*

predecessor organization have governed equestrian competition in the United States.³⁰ The U.S.E.F. promulgates rules, which, among other things, define individuals as either amateurs or professionals for competition purposes.³¹ There are incentives for riders to maintain their amateur status for purposes of competition.³² Many sellers have years of experience with horses, yet choose to maintain amateur status.³³ A seller may have spent twenty years as a professional horse seller, but then, provided she follows the necessary rules, may later regain amateur status. As defined by the U.S.E.F., amateur status is not correlated with experience. Pursuant to U.S.E.F. General Rules 1306 and 1307, a person is presumptively an amateur unless that person engages in a specific list of behavior defined by the rules as being the conduct of professionals, regardless of that person's equestrian skills and accomplishments.³⁴ Notably, a rider who buys and sells his or her own horses, even if on a significant scale, is not a professional. Therefore, a seller may have years of experience with horse sales, and in fact, may have knowledge in the area that exceeds the knowledge of many equine professionals. Regardless, this seller may be classified by the U.S.E.F. as an amateur. In short, an amateur for competition purposes may have significant experience with horse sales, while a professional for competition purposes may have none.

Accordingly, the U.S.E.F.'s definition of a professional is not consistent with the U.C.C.'s definition of a merchant. The U.C.C.'s definition of a merchant does not easily fit the reality of the equine industry, and the industry's own definitions may prove misleading to a court that is not well-versed in the U.S.E.F. rules. A seller with U.S.E.F. amateur status, employment in a non-equine field, and deep experience in selling his or her own horses poses a quandary for a court tasked with determining whether this seller is a merchant. On one hand, the U.S.E.F. expressly labels this seller as a non-professional. Yet, for all practical purposes, this seller may possess the very skills, knowledge, and experience that prompted the

³⁰ See generally *Jes Props. v. USA Equestrian, Inc.*, 458 F.3d 1224 (11th Cir. 2006) (discussing the history and application of U.S.E.F. rules in the context of antitrust litigation relating to the U.S.E.F. mileage rule which prevents multiple sanctioned competition from being simultaneously held within the same geographic area); see also Jacob L. Kahn, *From Borden to Billing: Identifying a Uniform Approach to Implied Antitrust Immunity from the Supreme Court's Precedents*, 83 CHI.-KENT L. REV. 1439, 1465 (2008) (noting the U.S.E.F.'s "monolithic control" over equestrian sports).

³¹ U.S. EQUESTRIAN FED'N, 2013 RULE BOOK: GENERAL RULES FOR COMPETITION PARTICIPANTS 26-29 (2012), available at <http://www.usef.org/documents/ruleBook/2013/GeneralRules/13-CompetitionParticipants.pdf>.

³² See, e.g., U.S. EQUESTRIAN FED'N, 2013 RULE BOOK: JUMPER DIVISION 13 (2013), available at <http://www.usef.org/documents/ruleBook/2013/18-JP.pdf> (designating amateurs are entitled to show in restricted classes where they need not compete against professionals).

³³ Cf. *id.* (indicating that some competitors, though experienced, may prefer to compete in restricted classes).

³⁴ U.S. EQUESTRIAN FED'N, *supra* note 31, at 26-31.

U.C.C. drafters to create higher merchant-seller standards. The buyer may in fact assume, based on the seller's expertise, they are indeed a merchant seller. The U.C.C.'s definition, which requires both equine experience and employment in the equine industry, may lead a court to conclude even the most experienced seller is not a merchant simply because they compete as an amateur.

Complicating the problem, a seller may have deep experience in one equestrian sub-community but no experience in another area.³⁵ Generally, to be deemed a merchant for U.C.C. purposes, a seller must have experience in the particular type of sale at issue.³⁶ Courts found it difficult to determine whether experience with the animal sales for one purpose renders a seller a merchant when those same animals are sold for a different purpose.³⁷ Under the U.C.C. definition, it remains unclear whether a seller who competes in reining would be considered a merchant when they sell a young horse as a showjumping prospect rather than as a reining prospect.

As a result, an equine transaction need not be between two inexperienced participants for a court to find the transaction does not involve a merchant seller. Even a very experienced equestrian may be deemed a non-merchant if their employment field is unrelated or even if their equine experience is limited to a particular subset of the equine industry. Buyers should not automatically expect a seller to be deemed a merchant, even if the seller's equine experience is significant. A wise buyer should demand that a seller expressly state in the equine sales contract that the seller is a merchant as defined by the U.C.C. Conversely, where a seller is truly not a merchant, that seller may wish to state so in the sales contract to avoid later confusion.

³⁵ Compare *What is Reining?*, EQUESTRIAN AUSTL., <http://www.equestrian.org.au/?Page=25622&MenuID=Sports%2F11757%2F0%2CReining%2F11740%2F37> (last visited Jan. 27, 2013) ("Reining is a Western riding discipline where a rider guides a horse through a pre-determined pattern of circles, spins, and stops."), with Katherine Blocksdorf, *What are the Olympic Equestrian Sports?*, ABOUT.COM, <http://horses.about.com/od/horsesportsexplained/a/whatisolysequis.htm> (last visited Jan. 27, 2013) ("Show jumping tests the ability of horse and rider to jump over a series of obstacles inside a riding ring.").

³⁶ See, e.g., *Sand Seed Service, Inc. v. Poeckes*, 249 N.W.2d 663, 666 (Iowa 1977) (holding that a farmer who grew and sold his own crops was not a merchant seller because his professional experience was in farming rather than in sales).

³⁷ See *Fear Ranches, Inc. v. Berry*, 470 F.2d 905, 907-08 (10th Cir. 1972) (remanding for a determination of whether a seller farmer who usually sold cattle for slaughter was a merchant seller when his cattle were instead sold for breeding purposes).

II. THE U.C.C.'S IMPLIED WARRANTY OF MERCHANTABILITY MAY NOT BE APPLIED IN A MANNER THAT IS CONSISTENT WITH EQUINE INDUSTRY EXPECTATIONS

The determination of whether a seller is a merchant is critical because the U.C.C.'s implied warranty of merchantability set forth in Section 2-314 only applies where the seller is a merchant.³⁸ The implied warranty of merchantability provides that "[u]nless excluded or modified . . . a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind."³⁹ Section 2-314 also defines specific minimum standards of merchantability, including the goods be "fit for the ordinary purposes for which such goods are used."⁴⁰ The U.C.C.'s implied warranty of merchantability arises by operation of law and acts as a form of strict liability,⁴¹ providing the buyer a powerful remedy. If the warranty applies, the buyer is entitled to a horse fit for ordinary use, regardless of any representation by the seller.

This definition of fitness presents unique challenges in the realm of equine sales because determining the ordinary use of a horse can prove difficult, especially when asking whether a particular horse is fit for a specific use. Certainly, one basic quality of a merchantable horse suitable for ordinary use is physical soundness. A horse that is sound is understood to be free from serious physical maladies.⁴² The U.C.C. and its predecessor, the Uniform Sales Act, deem horses unfit for ordinary purposes due to serious physical maladies such as blindness,⁴³ deafness,⁴⁴ significant limb deformity,⁴⁵ soft tissue injury,⁴⁶ lameness,⁴⁷ gait irregularity,⁴⁸ degenerative

³⁸ John Alan Cohan, Agriculture Law Symposium: The Uniform Commercial Code as Applied to Implied Warranties of "Merchantability" and "Fitness" in the Sale of Horses, 73 KY. L.J. 665, 667 (1984).

³⁹ U.C.C. § 2-314(1) (2011).

⁴⁰ U.C.C. § 2-314(2)(c) (2011).

⁴¹ Cohan, *supra* note 38, at 673; *see also* Overstreet v. Norden Labs., Inc., 669 F.2d 1286, 1289 (6th Cir. 1982) ("The implied warranty of merchantability arises by operation of law.").

⁴² *See* Kenner v. Harding, 85 Ill. 264, 269 (Ill. 1877) (citations omitted) (internal quotation marks omitted) ("[A] horse warranted sound, must be taken as buying him for immediate use, and has a right to expect one capable of that use, and of being immediately put to any fair work the owner chooses."); *cf.* O'Connell v. Kennedy, 101 N.E. 2d 892, 894-95 (Mass. 1951) (citations omitted) (internal quotation marks omitted) (indicating a horse is "unsound" if it has any disease that diminishes the "natural usefulness of the animal").

⁴³ Brown v. Jones, 24 Ala. 463, 465 (Ala. 1854); Bartholomew v. Bushnell, 20 Conn. 271, 271 (Conn. 1850); Randazzo v. McCarthy, No. CV040083688S, 2005 Conn. Super. LEXIS 2284, at *5-6 (Conn. Super. Ct. 2005); Shannon v. Abel, 155 S.W. 62, 63 (Mo. Ct. App. 1913).

⁴⁴ Hoffman v. Oates, 77 Ga. 701, 705 (Ga. 1886).

⁴⁵ Kenner v. Harding, 85 Ill. 264, 269 (Ill. 1877); Bank of Bushnell v. Buck Bros., 142 N.W. 1004, 1006 (Iowa 1913); Fulwiler Elec. Co. v. Jinks McGee & Co., 211 S.W. 480, 480-81 (Tex. Civ. App. 1919).

⁴⁶ Hull v. Dannen, 157 N.W. 188, 189 (Iowa 1916).

⁴⁷ Nelson v. Heuckeroth, 1978 U.S. Dist. LEXIS 14996, at *47 (S.D.N.Y. Dec. 1, 1978); Leal v. Holtvogt, 123 Ohio App. 3d 51, 68-69 (Ohio Ct. App. 1998).

disease,⁴⁹ and breathing dysfunction.⁵⁰ Clearly, pursuant to the U.C.C., a physically unsound horse is unfit for ordinary purpose. For example, in *Nelson v. Heuckeroth*, the trial court readily concluded a horse that underwent a surgical procedure known as a neurectomy⁵¹ to deaden the nerves in his hoof and mask a degenerative condition causing lameness, was not fit for ordinary purposes, including riding.⁵² Even with the absence of evidence the seller was aware of the horse's prior neurectomy, the court concluded that the merchant seller was liable for breach of the implied warranty of merchantability.⁵³ In a form of strict liability, the merchant seller owed the buyer a sound horse, and the court concluded a horse with that type of surgical intervention unsound for the ordinary use of riding.⁵⁴

Courts are willing to expand the definition of soundness when applying the implied warranty of merchantability. In the case of a horse intended for breeding rather than riding, courts conclude the implied warranty of merchantability extends beyond physical soundness to cover fertility as well. For example, the court in *Alpert v. Thomas* concluded where a merchant seller was involved, the implied warranty of merchantability for a breeding stallion assured the buyer that the purchased stallion was capable of impregnating a mare.⁵⁵ In this context, the implied warranty of merchantability extended to cover the horse's breeding soundness in addition to the horse's physical condition. Logically, the intended purpose of a breeding stallion is breeding, so soundness includes a component of fertility.

In contexts straying further from physical soundness, courts are more reluctant to extend the implied warranty of merchantability. The application of the implied warranty of merchantability becomes especially difficult when the seller asserts a horse is unfit because of a behavioral or performance problem. Some courts refuse to extend the warranty to cover such problems. For example, in *O'Connor v. Judith B. & Roger C. Young, Inc.*, the court expressly held the implied warranty of merchantability applies only to physical conditions.⁵⁶ The merchant seller in *O'Connor* sold "Big Foot" and represented the horse was suitable for the buyer's daughter

⁴⁸ *Overbeck v. Hayes*, 1993 Mont. Dist. LEXIS 635, at *21-22 (Mont. Dist. Ct. 1993).

⁴⁹ *Putt v. Duncan*, 2 Ill. App. 461, 463 (Ill. 1877).

⁵⁰ *Commonwealth v. Watson*, 142 S.W. 200, 201 (Ky. 1912); *Siegel v. Riebolt*, 125 N.W. 582, 582 (Minn. 1910); *Overhulser v. Peacock*, 128 S.W. 526, 527 (Mo. Ct. App. 1910); *Roberts v. Jenkins*, 21 N.H. 116, 119 (1850); *Clearwater v. Forrest*, 72 Ore. 312, 316 (1914).

⁵¹ See *Mires v. Evans*, No. 82-4436, 1986 U.S. Dist. LEXIS 22524, at *11-12 (E.D. Pa. July 21, 1986).

⁵² *Nelson*, 1978 U.S. Dist. LEXIS 14996, at *43-44.

⁵³ *Id.* at *44.

⁵⁴ *Id.*

⁵⁵ *Alpert v. Thomas*, 643 F. Supp. 1406, 1415 (D. Vt. 1986).

⁵⁶ *O'Connor v. Judith B. & Roger C. Young Inc.*, No. C-93-4547, 1995 U.S. Dist. LEXIS 21111, at *11 (N. D. Cal. June 30, 1995).

to ride in jumping competitions.⁵⁷ A few weeks after receiving the horse, the buyer reported Big Foot was “behaving erratically and refusing fences.”⁵⁸ The trial court granted summary judgment in favor of the seller, noting Big Foot’s behavior did not render the horse unfit for ordinary purposes.⁵⁹

This outcome may seem utterly at odds with the holding in *Nelson*. Just as the horse in *Nelson* was rendered incapable of competition due to physical limitation,⁶⁰ the horse in *O’Connor* was rendered incapable of competition due to behavioral limitation.⁶¹ Neither horse seems fit for ordinary riding purposes. The different outcome in these two cases may derive from the reluctance to acknowledge a major difference between horses and other goods in *O’Connor*: horses as living, animate objects. In this way, horses and other animals are radically different from most consumer goods.

The court’s conclusion in *O’Connor* may surprise the average equine buyer. It behooves a wise buyer to realize a court called upon to interpret an equine sales contract may not have in-depth equine knowledge. Any person familiar with showjumping recognizes a horse behaving erratically will be all but impossible to use for ordinary riding and showing purposes, but such a conclusion may not be evident to a judge tasked with finding the four corners of a contract. As such, buyers intending to use a horse for a specific purpose are well advised to request, in writing, specific representations of the horse’s ability and willingness to perform.⁶² The sales contract should address not only physical performance, but also behavioral performance. Then the buyer will not be limited to an implied warranty claim, which may fail in the absence of evidence of physical unsoundness.

III. THE U.C.C.’S EXPRESS WARRANTY DEFAULT RULES MAY RESULT IN PARTIES BEING HELD TO REPRESENTATIONS THEY DID NOT ANTICIPATE WOULD BE LEGALLY ENFORCEABLE

In addition to the implied warranty of merchantability and other implied warranties, a seller may also be bound to express warranties if that seller makes an affirmative statement relating to the quality, condition, description, or performance potential of the horse.⁶³ Pursuant to U.C.C.

⁵⁷ *Id.* at *1-3.

⁵⁸ *Id.* at *4.

⁵⁹ *Id.* at *11-13.

⁶⁰ *Nelson v. Heuckeroth*, No. 74 Civ. 2354-CSH, 1978 U.S. Dist. LEXIS 14996, at *44 (S.D.N.Y. Dec. 1, 1978).

⁶¹ See *O’Connor*, 1995 U.S. Dist. LEXIS 21111, at *14.

⁶² *E.g.*, *Sessa v. Riegle*, 427 F.Supp. 760, 765 (E.D.Pa. 1977) (holding that a statement by the seller during a telephone conversation that a horse was sound was not an express warranty).

⁶³ Adam Epstein, *Sales and Sports Law*, 18 J. LEGAL ASPECTS SPORT 67, 76 (2008).

Section 2-313, any affirmation of fact or promise made by the seller to the buyer relating to the goods becomes a part of the basis of the bargain and creates an express warranty that the goods shall conform to the affirmation or promise.⁶⁴ Sellers, making representations regarding a sale horse's age, pedigree, past performance, or condition, have been sued under a breach of express warranty theory.⁶⁵ In the case of straightforward representations, such as pedigree or breed registration status, the express warranty may be easy to enforce.⁶⁶

In express warranty cases relating to a horse's quality, these warranties become difficult to enforce. A horse is not fungible; each horse is unique unlike other mass-produced goods. Riders, and their quality assessments, are also unique. What one rider might consider an ideal equine trait might be a flaw, or vice, for another rider. For example, a horse with a propensity to gallop quickly might be a valuable racehorse, but an unsuitable western pleasure mount.⁶⁷ A horse with a breathing problem causing it to make an audible sound may be deemed valueless as a show hunter but may serve as an appropriate field hunt mount.⁶⁸ Beauty is in the eye of the rider. Despite this fact, sellers regularly make quality representations as though such representations are not subjective.⁶⁹ Despite obvious limitations on the ability to truly describe a horse's quality, it is very common in the equine industry for sellers to make representations regarding quality as part of a sale transaction. Even a cursory scan of horse sale advertisements reveals sellers routinely use words like "bombproof" to induce buyers to purchase.⁷⁰ These terms are used frequently to suggest that they are uniformly understood. These representations are critical because they may become part of the parties' bargain. Quality statements may be considered to constitute express warranties when they go beyond

⁶⁴ U.C.C. § 2-313 (2011).

⁶⁵ See, e.g., *Morningstar v. Hallett*, 858 A.2d 125, 131 (Pa. Super. Ct. 2004).

⁶⁶ See, e.g., *Yost v. Millhouse*, 373 N.W.2d 826, 828-830 (Minn. Ct. App. 1985) (holding that an express warranty had been breached when a seller represented that a horse was registered with the American Quarter Horse Association when, in fact, the horse was unregistered).

⁶⁷ *Western Pleasure, BEGINNING HORSEMANSHIP*, http://www.beginninghorsemanship.com/?page_id=213 (last visited Mar. 16, 2013) ("Western Pleasure is a western competition that judges horses on their manners, the horse having a relaxed soft collected gait and being calm and responsive and responding with little rein contact. . . . Horses that are calm, have smooth collected soft gaits and have nice musculature that can handle the slow, controlled movements are the most competitive.").

⁶⁸ *Id.*

⁶⁹ See, e.g., *Miron v. Yonkers Raceway, Inc.*, 400 F.2d 112, 114 (2d Cir. 1968) (indicating that where an express warranty was created when the auctioneer stated that the horse 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 and you're way off on the price of this horse.").

⁷⁰ *Dictionary of Horse Terms, HORSES & HORSE INFO.*, <http://www.horses-and-horse-information.com/horstdictionary.shtml#b> (last visited Mar. 16, 2013) (defining a bombproof horse as one that will not spook).

mere puffery.⁷¹ Determining whether a statement constitutes an express warranty or mere puffery is a question of fact, and the decision may vary widely based on the circumstances.⁷²

Ultimately, courts are willing to find a seller's horse-quality representation constitutes an express warranty. For example, in *Key v. Bagen*, the court held a buyer could proceed on a breach of warranty theory where a horse was represented as "well behaved," "safe," and "suitable [on which] to learn equitation."⁷³ Similarly, in *O'Shea v. Hatch*, the court found a breach of express warranty where the seller represented the horse as a gentle gelding suitable for use by children, but the horse was later discovered to be a ridgling after it exhibited dangerous behavior.⁷⁴ In both cases, the courts concluded the quality statements made by the seller became part of the bargain and could form a basis for recovery by the buyer if the horse was not as represented.⁷⁵ In other words, the buyers in *Key* and *O'Shea* were entitled to rely on the representations made about the safety of the purchased horses because these statements were not mere puffery and were part of the parties' bargain.⁷⁶

A buyer should not be lulled into a false sense of security by *Key* and *O'Shea* because courts in similar contexts are less willing to find express warranties. In a seemingly similar case, the court in *Schmitt v. Salit* held that a statement that a horse was a "good kid's horse" constituted an express warranty but found no breach of that warranty when the horse later displayed difficulty cantering.⁷⁷ In so concluding, the court reasoned that a "good kid's horse" was a safe horse but not necessarily a safe show horse.⁷⁸ In other words, without an express statement as to the horse's ability to show, the seller's representation could not be interpreted to extend to a warranty for a show-worthy horse. A comparison of the *Key*, *O'Shea*, and *Schmitt* decisions reveals how fact-sensitive breach-of-express-warranty cases are. In each case, the seller made a representation regarding the horse's suitability for a child rider.⁷⁹ Although the representations were similar, the buyer in *Schmitt* asserted the horse was unsuitable but in a

⁷¹ *La Trace v. Webster*, 17 So.3d 1210, 1217 (Ala. Civ. App. 2008); *Arlandson v. Hartz Mt. Corp.*, 792 F. Supp. 2d 691, 706 (D.N.J. 2011).

⁷² *Snyder v. Farnam Cos., Inc.*, 792 F.Supp.2d 712, 721-722 (D.N.J. 2011).

⁷³ *Key v. Bagen*, 221 S.E.2d 234, 235-36 (Ga. Ct. App. 1975); *see also Yuzwak v. Dygert*, 144 A.D.2d 938, 939-40 (N.Y. App. Div. 1988) (permitting a warranty case to proceed to trial where a seller represented a horse to be "quiet" and a "fine show horse for children" reasoning that these representations could be construed by the fact-finder to constitute express warranties).

⁷⁴ *O'Shea v. Hatch*, 640 P.2d 515, 518 (N.M. Ct. App. 1982).

⁷⁵ *Key*, 221 S.E.2d at 235; *O'Shea*, 640 P.2d at 518.

⁷⁶ *Key*, 221 S.E.2d at 235; *O'Shea*, 640 P.2d at 518.

⁷⁷ *Schmitt v. Salit*, CA85-10-069, 1986 Ohio App. LEXIS 7824, at *3-4 (Aug. 11, 1986).

⁷⁸ *Id.* at *4.

⁷⁹ *Key*, 221 S.E.2d at 235; *O'Shea*, 640 P.2d at 518; *Schmitt*, 1986 Ohio App. LEXIS 7824, at

manner slightly different than the seller had represented.⁸⁰ The *Schmitt* court refused to liberally interpret the warranty in order to apply to the seller's representation.⁸¹

Even more troubling, a court may decide a seller should be held to her intended representation rather than her express representation. For example, the buyer in *Simpson v. Widger* learned the seller's express warranty actually meant something different than was stated.⁸² In *Simpson*, the seller represented "Mighty Quinn" was a sound horse.⁸³ At the time of representation, the seller knew the horse had been diagnosed with ringbone, a condition dramatically reducing the horse's long-term prognosis for soundness.⁸⁴ The buyer sued for breach of warranty but the court found for the seller reasoning the seller's warranty was actually a warranty for the horse's "serviceable soundness," not actual soundness.⁸⁵ The court in *Simpson* noted the concept of soundness is a complex one, and a horse could be presently sound while having radiographic changes suggesting future unsoundness.⁸⁶ The court concluded the seller's soundness representation was actually a representation that the horse was capable of doing the job at the time of the sale.⁸⁷

Departing from the aforementioned express warranty cases, the court in *Sheffield v. Darby* held a seller's statement asserting a horse had no problems and "would make a good show horse" were not express warranties but instead were mere puffery on which the buyer had no basis to rely.⁸⁸ The court issued its holding despite a cursory pre-purchase examination that revealed straight pasterns, short movement, and that the horse was shod in corrective shoes.⁸⁹ The court, in its reasoning, likened the horse to a car:

Statements that a horse has no problems and would make a good show horse are very similar to the following statements that have been held unactionable [sic] as mere opinions, commendations, or puffing: defendant had the experience and qualifications to run a paint and body shop; a building was maintained in good condition and was

⁸⁰ *Schmitt*, 1986 Ohio App. LEXIS 7824, at *3-4.

⁸¹ *Id.* at *4.

⁸² *Simpson v. Widger*, 709 A.2d 1366, 1371 (N.J. Sup. Ct. App. Div. 1998).

⁸³ *Id.* at 1370-71.

⁸⁴ *Id.* at 1373.

⁸⁵ *Id.* at 1371; see also, *Norton v. Lindsay*, 350 F.2d 46, 48-49 (10th Cir. 1965) (finding that "sound" implies "the absence of any defect or disease which... will impair the animal's natural usefulness for the purpose for which it is purchased").

⁸⁶ *Simpson*, 709 A.2d at 1371-72.

⁸⁷ *Id.*

⁸⁸ *Sheffield v. Darby*, 535 S.E.2d 776, 779 (Ga. Ct. App. 2000).

⁸⁹ *Id.* at 778-79.

suitable for use as a chiropractic clinic; a car was “bug-free”; a building was sound, of excellent construction, and well maintained; farm machinery was in good condition and would satisfactorily pick cotton; a car was in “A-1 condition”; and a car was in good condition and suitable for driving.⁹⁰

The court further likened a veterinary pre-purchase exam to a structural engineering examination of a building, noting failure to require a comprehensive examination precluded reliance on any of the seller’s statements.⁹¹ Even more troubling, the court conceded the buyers presented sworn statements that a previous owner told the sellers the horse was unsound to show and, in fact, had significant latent lameness.⁹² In *Sessa v. Riegle*, the court held a soundness representation did not constitute a warranty since horses are “fragile creatures” likely to fall prey to illness and disease.⁹³

The *Sheffield* and *Sessa* decisions highlight the difficulties courts face when applying U.C.C. rules on express warranties in the context of equine sales. Unlike a car, which in most cases is a fungible good identical to thousands of other cars that are the same make, model, and year, a horse is unique, living, and ever evolving. Horses are far less static than cars. As any horse owner would attest, a horse can be sound one minute and lame the next — often with nary an explanation. A mechanic can often conclusively determine if a car is in functional, working-condition, and will continue to function for a predictable period of time. A structural engineer can likely predict a building’s structural integrity not only on the day of examination, but also into the future, barring unexpected circumstances. A veterinarian, on the other hand, can only attest to a horse’s physical presentation for the day of the veterinary examination. Whether the horse will make a suitable show horse, or whether his condition will allow him to remain sound for a specific use, is difficult, and sometimes impossible, to predict.

Complicating this issue is the fact that not all equine defects are easily diagnosed, though some are easily detected. If a horse has a fractured bone, the fracture should be visible on radiograph.⁹⁴ Other physical defects may be latent. A soft tissue injury, for example, may be present even if it

⁹⁰ *Id.* at 779.

⁹¹ *Id.*

⁹² *Id.* at 778.

⁹³ *Sessa v. Riegle*, 427 F.Supp. 760, 766 (E.D. Pa. 1977).

⁹⁴ Robert S. Miller, *The Sale of Horses and Horse Interests: A Transactional Approach*, 78 Ky. L.J. 517, 570-71 (1990).

cannot be visualized by ultrasound.⁹⁵ Physical conditions may go undiagnosed for years, and it may be impossible to definitively determine whether those conditions were present at the time of sale. Even more difficult to assess are behavioral qualities and personality. A horse may appear quiet and biddable during a trial ride at the seller's barn, but may turn into an entirely different behaving animal when transported to the buyer's barn or to a show. A horse that performs well for a tactful, experienced rider may begin to rear and buck when ridden by a rough or inexperienced rider. A horse's ability to perform or overall quality may not be readily discoverable.⁹⁶

As *Sheffield* and *Sessa* illustrate, if a quality representation is important to the buyer, the buyer should seek a specific warranty of quality from the seller. If the seller makes a general representation, a wise buyer will probe the parameters of the representation, confirm it is not mere puffery, ensure the specific representation becomes incorporated into the written sales contract, and identify the express warranty on which the buyer can rely. A prudent seller will seriously consider whether statements made about a sale horse can be verified. The wise seller clarifies in the written sales contract that specific representations, including those made in any sale advertisements, are not intended to constitute warranties of quality.

IV. THOSE IN THE EQUINE INDUSTRY FACE UNIQUE CHALLENGES IN COMPLYING WITH THE U.C.C.'S NOTICE REQUIREMENTS

If a buyer believes a horse has been misrepresented, the buyer has two alternate forms of relief under the U.C.C. The buyer may attempt to rescind his purchase by rejecting the horse or revoking acceptance of the horse,⁹⁷ or the buyer may sue for damages based on breach of warranty.⁹⁸ Even assuming a warranty action may lie, an additional complication in meeting the U.C.C.'s notice requirements arises in the equine industry. Under the U.C.C., a buyer must provide the seller with notice of a breach of warranty within a reasonable time after the buyer discovers or should have discovered a defect in the goods.⁹⁹ As previously noted, equine maladies

⁹⁵ See, Heather S. Thomas, *MRI—Aid To Diagnosis In Foot Problems*, CAL. THOROUGHBRED, Dec. 2009, at 67.

⁹⁶ Miller, *supra* note 94, at 571.

⁹⁷ Catherine Altier, Putting the Cart Before the Horse: Barriers to Enforcing a Code of Ethics for Thoroughbred Auctions in the United States, 72 BROOK. L. REV. 1061, 1067 (2007).

⁹⁸ Id.

⁹⁹ See U.C.C. §§ 2-607(3)(a), 2-714(1) (2012). Similarly, a seller must notify the buyer of revocation of acceptance within a reasonable period of time. See *Heller v. Sullivan*, 372 N.E.2d 1036, 1040 (Ill. App. Ct. 1978) (holding that a genuine issue of material fact existed as to timely notice of revocation where a buyer retained a horse and exhibited it in shows for nine months after sale before complaining about the seller's failure to provide "papers" for the horse).

may lie dormant and may not immediately surface post-sale. As such, timely notification may be difficult or impossible.

In some cases, buyers successfully proceeded on a breach of warranty claim, even when time had lapsed between the buyer's discovery of a horse's defect and notification to the seller. For example, in *Nelson v. Heuckeroth*, the court awarded damages for breach of warranty even when the buyer failed to request radiographs during the veterinary exam at the time the horse was purchased.¹⁰⁰ Three years later, after the horse became lame, radiographs revealed bone deformities indicating the horse had developed navicular disease before the sale.¹⁰¹ Even though the court found radiographs at the time of sale would have revealed the disease, the court held, as a matter of fact, the navicular disease did not develop post-sale.¹⁰² Here, a three-year lapse between the sale and notice did not defeat the buyer's breach of warranty claim.¹⁰³

Similarly, in *Schneider v. Person* the court permitted a buyer to proceed on a theory of breach of warranty where the buyer waited over six months to notify the seller that the purchased horse had splints at the time of sale.¹⁰⁴ The court indicated the buyer was a non-merchant, a reasonable time is to be calculated based on the specific facts of the case, and the delay might be found reasonable in light of the buyer's limited equine experience.¹⁰⁵ Even though the defect in this case was clearly visible, it may be that the buyer's inexperience persuaded the court to leniently apply the U.C.C.'s notice requirements.

In both *Nelson* and *Schneider*, the holdings conceded the defects at issue existed at the time of sale.¹⁰⁶ Such a conclusion is not always easily made. A soft-tissue injury can appear almost instantaneously after a horse has been sold.¹⁰⁷ Proving a horse's defect existed at the time of sale, as opposed to a later-developed defect, can be challenging. For this reason, a buyer should seek a veterinarian to perform a pre-purchase examination prior to the buyer's acceptance of the horse.¹⁰⁸

¹⁰⁰ *Nelson v. Heuckeroth*, No. 74-2354, 1978 U.S. Dist. LEXIS 14996, at *58 (S.D.N.Y. Dec. 1, 1978).

¹⁰¹ *Id.* at *12.

¹⁰² *Id.* at *16.

¹⁰³ *Id.* at *44.

¹⁰⁴ *Schneider v. Person*, 34 Pa. D. & C.2d 10, 11 (1964). A splint is a hard body growth that develops on a horse's leg due to trauma or concussion. Frank Santos, *Splints and Splint-Bone Fractures in Horses*, Equisearch, http://www.equisearch.com/horses_riding_training/splints-and-splint-bone-fractures-horses/ (last visited Mar. 25, 2013).

¹⁰⁵ *Schneider*, 34 Pa. D. & C.2d at 12-13.

¹⁰⁶ See *Nelson*, 1978 U.S. Dist. LEXIS 14996, at *5-7; see also *Schneider* at 11.

¹⁰⁷ Miller, *supra* note 94, at 576-77.

¹⁰⁸ Some courts have even held failure to conduct a pre-purchase exam results in the buyer's waiver of implied warranties. See *Ladner v. Jordan*, 848 So. 2d 870, 873 (Miss. Ct. App. 2002) ("Under the U.C.C., when a buyer refuses to examine the goods prior to use under circumstances where the defect complained of would have been revealed through examination, the implied warranty of fitness for

Courts suggest in certain equine sub-communities, including the racing industry, such exams are the norm.¹⁰⁹ In other sub-communities, however, pre-purchase exams are not routinely performed or would be impossible to perform. For example, horses are commonly purchased at auction.¹¹⁰ More informal auctions provide neither adequate time nor the facilities for a complete pre-purchase exam.¹¹¹ A buyer at such an auction may have means to document the horse's veterinary condition prior to sale. In these cases, a buyer may find himself without a U.C.C. remedy due to the buyer's inability to prove a defect existed at the time of sale. For example, in *Miron v. Yonkers Raceway, Inc.*, the buyer purchased "Red Carpet" at auction and failed to conduct a pre-purchase examination.¹¹² The next morning, after the horse presented lameness, the buyer notified the auction sponsor.¹¹³ Subsequent radiography revealed a broken splint bone.¹¹⁴ The trial court denied the buyer's breach of warranty claim and held the buyer failed to prove the fracture occurred prior to sale.¹¹⁵ On appeal, the court affirmed the trial court's decision, holding the buyer should have more thoroughly inspected the horse at the time of auction.¹¹⁶ The appellate court affirmed the buyer could not prove any breach of warranty where the evidence did not indicate the injury was present at the time of auction.¹¹⁷

Similarly, in *Gilbert v. Caffee*, the court affirmed the trial court's dismissal of the buyer's warranty claims where the buyer agreed to purchase a horse on an installment contract and repeatedly competed on the horse before notifying the seller of intent to withhold installment payments because the horse had been misrepresented.¹¹⁸ The court noted the "longer a buyer keeps and uses [a horse], the greater becomes the likelihood that some conduct on his part caused or contributed to the defect."¹¹⁹ In *Gilbert*, the court concluded the passage of fourteen months between taking

a particular purpose can be deemed waived." In other circumstances, courts have not penalized a buyer for delay in performing a veterinary examination. See, e.g., *White Devon Farm v. Stahl*, 88 Misc. 2d 961, 965-67 (N.Y. Sup. Ct. 1976) (justifying the delay in performance of a breeding soundness examination on the fact that the stallion was initially racing and the parties both contemplated that the examination would occur only after the stallion retired from racing).

¹⁰⁹ *Miron v. Yonkers Raceway, Inc.*, 400 F.2d 112, 118 (2d Cir. 1968).

¹¹⁰ *Id.* at 114.

¹¹¹ *Id.* at 115.

¹¹² *Id.* at 114-15.

¹¹³ *Id.* at 115.

¹¹⁴ *Id.*

¹¹⁵ *Id.* at 116.

¹¹⁶ *Id.* at 119; cf. *Chick v. Brimm*, No. 01-02-0106, 2002 Del. C.P. LEXIS 44, at *8 (Sept. 30 2002) (finding no obligation to perform radiographs at a "small local horse sale," even if such practice was common at major annual sales).

¹¹⁷ *Miron*, 400 F.2d at 119.

¹¹⁸ *Gilbert v. Caffee*, 293 N.W.2d 893, 896 (S.D. 1980).

¹¹⁹ *Id.*

possession of the horse and communicating that the horse was purportedly unfit was simply too lengthy of a time period to afford the buyer relief.¹²⁰

V. CONCLUSION

As these cases illustrate, buyers are well advised to conduct a thorough examination of a sale horse before the horse leaves the seller's possession. The more a buyer documents the horse's condition at the time of the sale, the more likely the buyer will be able to timely notify the seller and comply with the U.C.C.'s notice requirements if a problem later arises. Pre-sale issue identification also benefits the seller because she is then less likely to be blind-sided by issues after the horse has left her custody. All pre-existing conditions should be noted in the sales contract at the time of purchase. The buyer should immediately notify the seller, in writing, if the buyer discovers a condition the buyer believes constitutes a breach of warranty.

Whether the purchase of a horse is intended as a business transaction or to add a beloved companion to the household, buyers and sellers should familiarize themselves with their legal rights and remedies regarding the purchase. One persistent norm in the equine industry is that legal advice is often sought only after a dispute arises.¹²¹ Too often, horses are bought and sold without the involvement of attorneys—even six-figure horses may be sold through informal, handshake deals.¹²² Buyers and sellers benefit from an attorney's early pre-dispute involvement, especially one well versed in the nuances of the U.C.C. Such an attorney can assist the parties in crafting a sales contract that works in tandem with the U.C.C. default rules. Such a well-drafted contract adequately reflects the parties' agreement and ensures both parties get the full benefit of their bargain.

¹²⁰ *Id.* at 895-96.

¹²¹ Kathleen J.P. Tabor, *Mediation and Arbitration Clauses in Equine Contracts: The Importance of Resolving Conflicts While Maintaining Mutually Beneficial Relationships*, 22 ENT. & SPORTS LAW. 18, 18 (2004).

¹²² *Dimario v. Coppola*, 10 F. Supp. 2d 213, 216 (E.D.N.Y. 1998) (noting the prevalence of "gentlemen's agreements" in the racing industry).

