EQUINE "LEMON" LAW

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I. INTRODUCTION

"Lemon laws" typically apply to the purchase of a defective motor vehicle.[1] A cause of action for the purchaser of a "lemon" generally arises under a state motor vehicle warranty statute.[2] In a traditional lemon law situation, proof that a motor vehicle suffered substantial warranty nonconformity in violation of

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1. According to *Black's Law Dictionary*, the phrase "lemon law" means "[a] statute designed to protect a consumer who buys a substandard automobile, usu[ally] by requiring the manufacturer or dealer either to replace the vehicle or to refund the full purchase price." BLACK'S LAW DICTIONARY 984 (9th ed. 2009). "By extension," the phrase may refer to "a statute designed to protect a consumer who buys any product of inferior quality." *Id.*

2. *See, e.g.*, CAL. CIV. CODE § 1793.2 (West 2009); FLA. STAT. ANN. § 681.103 (West Supp. 2013); MICH. COMP. LAWS ANN. § 257.1402 (West 2009); TEX. OCC. CODE ANN. § 2301.603 (West 2012).

the state motor vehicle warranty statute entitles the consumer to a refund of the purchase price or a new comparable motor vehicle.[3]

Although some states do have lemon laws for horse purchases, these provisions are rare.[4] Whether an equine purchaser is entitled to recourse for a "defective" horse therefore depends primarily on the court's analysis of the transaction as a protected activity under state equine immunity statutes,[5] as a commodity sale,[6] or as a common law contract for purchase.[7] This Article evaluates each approach in turn, analyzing and drawing conclusions from various representative cases. Generally, if a court treats the equine sale as a protected activity under a state equine immunity statute, the seller will be protected from liability for a defective horse.[8] Conversely, when a court interprets the transaction as a commodity sale and applies the relevant state version of the Uniform Commercial Code (UCC), the purchaser will typically receive some level of compensation for the defective equine.[9] Application of common law contract principles to the sale of a horse leads to a wide variety of fact-specific results, often contingent on whether the relevant court found evidence of fraud or misrepresentation related to the horse's defect.[10]

II. APPLICATION OF EQUINE LEMON LAW PROVISIONS

Florida is one of the states with an equine lemon law regulating the sale of horses. The Florida equine lemon law is a combination of statutory authority[11] and administrative regulation[12] that attempts to limit the trading of defective horses while also providing a remedy when a defective horse is sold. Section 535.16 of the Florida Statutes Chapter 535—the statutory component of the Florida equine lemon law—is designed "to prevent unfair or deceptive trade practices" in the sale and purchase of horses.[13] Specifically, that statute charges the Florida Department of Agriculture and Consumer Services (FDACS) with evalu-

3. *See, e.g.*, CAL. CIV. CODE § 1793.2(d); FLA. STAT. ANN. § 681.104(1)(a); MICH. COMP. LAWS ANN. § 257.1403; TEX. OCC. CODE. ANN. § 2301.604 (demonstrating that state lemon law statutes often present the seller with an opportunity to cure the nonconformity).

4. *See infra* Part II.

5. *See infra* Part III.

6. *See infra* Part IV.

7. *See infra* Part V.

8. *See, e.g.*, Barritt v. Lowe, 669 N.W.2d 189 (Wis. Ct. App. 2003); Adams v. Hare, 536 S.E.2d 284 (Ga. Ct. App. 2000); Patrick v. Sferra, 855 P.2d 320 (Wash. Ct. App. 1993).

9. *See infra* Part IV discussion.

10. *See infra* Part V discussion.

11. FLA. STAT. ANN. § 535.16 (West Supp. 2013).

12. FLA. ADMIN. CODE ANN. ch. 5H-26 (2013).

13. FLA. STAT. ANN. § 535.16.

ating "the conditions surrounding the sale and purchase of horses," including "the disclosure of relevant medical conditions, defects, and surgeries[, and] the conduct or alterations that could affect the performance of a horse."[14] The statute further provides that the FDACS "shall adopt rules . . . to prevent unfair or deceptive trade practices."[15] Because the statutory component of the lemon law is a designation of policy and authority rather than regulation, the elements governing the sale of horses are in the Florida Administrative Code.[16]

Like traditional automobile lemon laws, the regulations of the Florida equine lemon law "enhance[] consumer protection by implementation of minimum requirements relating to the sale and purchase of horses."[17] The first, and arguably most important, regulation is the requirement that the sale or purchase of a horse be done through a written bill of sale.[18] This requirement is important in protecting both buyers and sellers because the bill of sale must include any stated information as to a horse's quality upon which the buyer is relying, such as "warranties or representations with respect to the horse's age, medical condition, prior medical treatments, and the existence of any liens or encumbrances."[19] Similarly, when a prospective purchaser asks a seller about a horse's medical history, the seller must "accurately disclose all information within its knowledge that is responsive to the inquiry."[20]

One important exemption to Florida's equine lemon law is purchases made through "claiming races at licensed pari-mutuel facilities."[21] For those unfamiliar with horse racing, this exemption sounds foreign. A pari-mutuel facility is a place where pari-mutuel betting—a system of betting in which the winners divide the total amount bet in proportion to the sums they have wagered individually and with regard to the odds assigned to particular outcomes—is allowed to occur.[22] Most commonly, this simply means a racetrack where horse racing and betting occurs. A "claiming race" is a particular type of horse race in which all the horses in a particular race are offered for sale at the same price up until the start of the race.[23] Regardless of the outcome of the race, a horse sold before the

14. *Id.*
15. *Id.*
16. *See* FLA. ADMIN. CODE ANN. ch. 5H-26.
17. *Id.* at r. 5H-26.001.
18. *Id.* at r. 5H-26.003(1).
19. *Id.* at r. 5H-26.004(8).
20. *Id.* at r. 5H-26.003(12).
21. FLA. STAT. ANN. § 535.16(2) (West Supp. 2013).
22. FLA. STAT. ANN. §§ 550.002(22)–(24).
23. *See e.g.*, 811 KY. ADMIN. REGS. 1:035 (2013); *Claiming Race Basics*, TROPHY HORSE, http://www.trophyhorse.com/help/topic.aspx?id=109 (last updated Feb. 24, 2011).

race is transferred to the new owner as soon as the race is concluded.[24] Unfortunately, this rule applies even if a horse that was sold perfectly sound before the race is injured during the race.[25] There are a variety of reasons for entering a horse in a claiming race, but buying a horse at a claiming race is generally regarded as a "value" purchase.[26] However, the claiming race exemption is important because claiming races are far more common than the "maiden" or "stakes" races in which the horses are not offered for sale as a condition to racing.[27]

III. ANALYSIS OF DEFECTIVE EQUINE PURCHASE AGREEMENTS UNDER STATE EQUINE IMMUNITY STATUTES

In states without a statutory guideline for resolving horse purchase disputes, courts have sometimes ruled in favor of the seller based on the relevant state's equine immunity statutes.[28] Equine immunity statutes are designed to protect an equine activity provider from tort liability for certain injuries sustained during riding.[29] Such a statute protects an equine activity provider from the common law duty of reasonable care that is owed to a licensee or invitee—categories that could otherwise apply to a rider at an equine facility.[30] Operating any form of equine activity can create liability, which leads to restricted levels of activity; states that have passed limited liability statutes did so to encourage equine activity providers to stay open for recreation.[31]

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24. *Claiming*, THOROUGHBRED OWNERS & BREEDERS ASS'N, http://toba.org/owner-education/claiming.aspx (last visited Aug. 4, 2013).

25. *See, e.g.*, 811 KY. ADMIN. REGS. 1:035.

26. *Claiming Race Basics*, *supra* note 23.

27. *See* RICHARD ENG, BETTING ON HORSE RACING FOR DUMMIES 22–28 (2005).

28. *See, e.g.*, Barritt v. Lowe, 669 N.W.2d 189 (Wis. Ct. App. 2003); Adams v. Hare, 536 S.E.2d 284 (Ga. Ct. App. 2000).

29. Terrence [*sic*] J. Centner, *Tort Liability for Sports and Recreational Activities: Expanding Statutory Immunity for Protected Classes and Activities*, 26 J. LEGIS. 1, 14 (2000) [hereinafter *Tort Liability for Sports*].

30. *Id.* at 1 n.3 (An "invitee" is "[a] person who enters premises in response to an express or implied invitation by the landowner for the mutual benefit of the landowner and himself"); *Id.* at 1 n.4 (A "licensee" is a "[p]erson[] who enter[s] premises as [a] social guest[] or for the benefit of the landowners"); *see also* RESTATEMENT (SECOND) OF TORTS § 332 (1965) (defining "invitee"); RESTATEMENT (SECOND) OF TORTS § 330 (defining "licensee").

31. Terence J. Centner, *Liability Concerns: Agritourism Operators Seek A Defense Against Damages Resulting From Inherent Risks*, 19 KAN. J.L. & PUB. POL'Y 102, 106 (2009) [hereinafter *Liability Concerns*]; Tina Coker Jordan, *Allison v. Johnson: Ohio Interprets Its Equine Activity Liability Act*, 25 AM. J. TRIAL ADVOC. 435, 435 (2001); John O. Spengler & Brian P. Burket, *Sport Safety Statutes And Inherent Risk: A Comparison Study of Sport Specific Legislation*, 11 J. LEGAL ASPECTS SPORT 135, 161–62 (2001); *Tort Liability for Sports*, *supra* note 29, at 14–15.

Generally, an equine liability statute establishes that a qualifying equine activity provider "shall not be liable for an injury to or the death of a participant" that results from the dangers inherent to an equine activity.[32] Inherent dangers are those potential risks that are a matter of reality when working with horses, including equine behavior "that may result in injury, harm[,] or death to persons on or around them" and unpredictable reactions to "sounds, sudden movement, and unfamiliar objects, persons, or other animals."[33] However, some equine liability statutes are qualified, so that the activity operator can still be liable for certain injuries caused by horses.[34] Commonly, a statute may still impose liability for negligence on an operator whose failure to exercise due care played a role in the injury.[35]

Equine immunity statutes are fundamental to equine lemon law analysis because many sales disputes are based on a horse that injures the new purchaser. In *Adams v. Hare*, for example, a horse buyer[36] sued the seller when the horse previously owned by the seller kicked the buyer.[37] The buyer claimed that she asked a "series of questions" about the horse before buying it, although she had never specifically asked "whether [the horse] kicked or inquired about his 'mental condition.'"[38] In response to the questioning, the seller affirmed that the horse had "no problems."[39] After an incident in which the horse pinned the buyer against the wall of a stall and repeatedly kicked her, the buyer asserted that the seller "intentionally and maliciously misrepresented that [the horse] had no problems."[40]

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32. *Tort Liability for Sports*, *supra* note 29, at 14.

33. Spengler & Burket, *supra* note 31, at 161–162; FLA. STAT. ANN. § 773.01(6) (West 2011); HAW. REV. STAT. § 663B-1 (2007); IND. CODE ANN. § 34-6-2-69 (LexisNexis 2008); MASS. GEN. LAWS ANN. ch. 128, § 2D (West 2002); MISS. CODE ANN. § 95-11-3(g) (West 2007); MO. ANN. STAT. § 537.325(6) (2008); NEB. REV. STAT. § 25-21,250 (2004); N.H. REV. STAT. ANN. § 508:19 (LexisNexis 2009); OHIO REV. CODE ANN. § 2305.321 (LexisNexis 2010); R.I. GEN. LAWS § 4-21-1 (1998); WIS. STAT. ANN. § 895.481 (West 2006); *see also Tort Liability for Sports*, *supra* note 29, at 14.

34. *See* ARK. CODE ANN. § 16-120-202 (2006); DEL. CODE ANN. tit. 10, § 8140 (1999); HAW. REV. STAT. § 663B-2.

35. *See* FLA. STAT. ANN. § 773.03(2)(d); *Tort Liability for Sports*, *supra* note 29, at 15.

36. More accurately, the plaintiff (Adams) acted as a sales agent between the seller of the horse and one of Adams' clients. Adams v. Hare, 536 S.E.2d 284, 286 (Ga. Ct. App. 2000). After Adams' client purchased the horse, Adams continued to interact with the animal and cared for it on a regular basis. *Id.*

37. *Id.* at 285.

38. *Id.* at 286.

39. *Id.*

40. *Id.*

The Georgia Court of Appeals held that "this case fall[s] squarely within the terms of the Equine Activities Act."[41] The Court noted that the act defined "inherent risks of equine activities as those dangers or conditions which are an integral part of equine activities . . . including, but not limited to . . . [t]he propensity of the animal to behave in ways that may result in injury, harm, or death to persons on or around them."[42] Thus, statutory immunity protected the seller from liability for the buyer's injury, even though the seller had misrepresented the horse's disposition to the buyer.[43]

Similarly, a Wisconsin court found that its state equine immunity statute controlled a horse purchase dispute premised on injury to the purchaser.[44] In *Barritt v. Lowe*, a student at an equine riding academy purchased a horse from the riding academy.[45] Several weeks after purchasing the horse, the student was injured while leading the horse from a pen on the riding academy premises.[46] When the student sued the riding academy, the academy claimed protection from liability under the equine immunity statute.[47] The student claimed, however, that the Wisconsin equine immunity statute did not apply to a person who "provides an equine," and the sale of the horse was providing an equine.[48]

The Wisconsin Court of Appeals ruled, however, that to "provide an equine" within the meaning of the statute required making available for use an equine that the provider either owned or controlled.[49] According to the court, this language did *not* include an equine that had previously been sold to the individual claiming damages.[50] "Because a sale is a transfer of ownership, and provide is not," the Wisconsin court held that "'provides' does not include a sale" under Wisconsin's equine immunity statute.[51]

In reaching that conclusion, the *Barritt* court relied in part on a similar case decided ten years earlier by the Washington Court of Appeals. In *Patrick v. Sferra*, Patrick had received a retired racehorse as a gift in exchange for assuming responsibility for the horse's board and care.[52] After falling from the horse and sustaining serious injuries, Patrick sued both the stable owner and the former

41. *Id.* at 287.
42. *Id.* (quoting GA. CODE ANN. § 4-12-2(7)(A) (2003)) (internal quotation marks omitted).
43. *Id.* at 287–88.
44. Barritt v. Lowe, 669 N.W.2d 189 (Wis. Ct. App. 2003).
45. *Id.* at 190.
46. *Id.*
47. *Id.*
48. *Id.* at 192.
49. *Id.* at 192–93.
50. *Id.* at 193.
51. *Id.* at 192.
52. Patrick v. Sferra, 855 P.2d. 320, 321 (Wash. Ct. App. 1993).

owner of the horse, seeking damages for negligence under the state equine activities statute.[53] The Washington court found no liability, explaining: "'Provide' within the context of the statute means to make available for use a horse that the sponsor either owns or controls. It does not encompass a horse that has previously been given or sold to the individual claiming damages."[54] While the former owner might "possibly have 'provided' [the horse] prior to the transfer of title, she clearly did not do so afterward."[55] According to the court, any responsibility that the stable owner or the horse's former owner might have had under the equine activities statute "terminated when Patrick accepted title to [the horse]."[56]

Cases like *Barritt* and *Patrick* are relevant to the equine lemon law discussion because they indicate that this exception to immunity will not apply when a buyer sues a seller for an injury caused by the purchased horse. This scenario is likely to recur; buyers often purchase a horse from a seller and choose to board the horse on the seller's premises. *Barritt* and *Patrick* indicate that the "provides an equine" immunity exception is inapplicable in these circumstances, and that sellers will likely incur no liability for injuries sustained by a buyer due to interaction with the purchased horse on the seller's premises. Notably, neither case involved any misrepresentation or omission by the seller regarding the horse's disposition.[57]

The court's application of an equine immunity statute to an "equine lemon" circumstance unquestionably disadvantages the buyer–plaintiff. Simply stated, equine immunity statutes carry a presumption of equine-owner immunity for injuries arising from equine activities. If a court determines that such a statute governs the sale of an equine, the seller will enjoy a presumption of immunity from liability. Although there is no "bright line" test for when an equine immunity statute ceases to protect the equine seller, the factual pattern indicates that an equine immunity statute is only applicable when the purchaser is on the seller's property inspecting or interacting with the horse, either before or after the sale, usually in a boarding relationship.

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53. *Id.* at 322; *see also* WASH. REV. CODE ANN. § 4.24.540(2)(b)(i)(B) (West 2005). Like the Wisconsin statute at issue in *Barritt*, the Washington equine activities statute allowed no immunity for those who provided an equine. *Id.*

54. *Id.* at 323.

55. *Id.*

56. *Id.* at 324.

57. *See* Barritt v. Lowe, 669 N.W.2d 189 (Wis. Ct. App. 2003); Patrick, 855 P.2d 320, 325.

IV. ANALYSIS OF DEFECTIVE EQUINE PURCHASE AGREEMENTS UNDER STATE UNIFORM COMMERCIAL CODE PROVISIONS

The Uniform Commercial Code (UCC), as enacted by each state that has adopted it, provides certain rights and protections for both buyers and sellers in contracts for the sale of "goods."[58] In secured transactions—another realm of contract law governed by the UCC—horses are routinely treated as "goods," and contracts related to horse sales are interpreted according to the UCC.[59] The UCC is a valuable tool for the purchaser of an equine lemon because of the remedies available for the receipt of a defective product.[60]

In *Key v. Bagen*, for example, a Georgia court determined that the provisions of the UCC applied to a transaction for the purchase of a horse intended for recreational use.[61] In that case, the buyer indicated to the agents of a horse's seller that he required a horse suitable for his young daughter to ride and learn equitation.[62] Knowing these requirements—and knowing that the horse was not suitable for the buyer's daughter—the seller's agents falsely represented to the buyer that the horse was safe, well-behaved, appropriate for a novice rider, and suitable to learn equitation.[63] Because the UCC applied to the transaction, "[a]ny 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] Moreover, under the facts presented, "where false representations have been made and relied upon,"

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58. *See* U.C.C. §§ 2-105(1), (2) (2012) ("'Goods' means all things . . . which are movable at the time of identification to the contract for sale." The term also includes future goods, "the unborn young of animals[,] growing crops[,] and other identified things attached to realty. . . ."). *See, e.g.*, CAL. COM. CODE § 2105 (West 2002); FLA. STAT. ANN. § 672.105 (West 2004); N.Y. U.C.C. LAW § 2-105(1) (McKinney 2013); TEX. BUS. & COM. CODE ANN. § 2.105 (West 2009) (all demonstrating the definition of "goods" varying slightly among the states that have adopted the UCC).

59. *See* Anne I. Bandes, Note, *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, 792 (2003); John J. Kropp, et al., *Horse Sense and the UCC: The Purchase of Racehorses*, 1 MARQ. SPORTS L. J. 171, 173–74 (1991) ("[F]rom foaling to death and beyond, the sale of horses is governed by Article 2 of the UCC."); Katherine Simpson Allen, *A Horse is a Horse (of Course): Equine Collateral*, BUS. LAW TODAY (Sept./Oct. 2008), http://apps.americanbar.org/buslaw/blt/2008-09-10/allen.shmtl ("Horses (even bad ones) clearly constitute goods.").

60. Although this Part addresses the UCC and equine sales in light of equine lemons, this discussion is by no means an exhaustive analysis of the UCC's impact on horse sales.

61. Key v. Bagen, 221 S.E.2d 234 (Ga. Ct. App. 1975).

62. *Id.* at 235.

63. *Id.*

64. *Id.* (quoting GA. CODE ANN. § 109A-2-313, moved to GA. CODE ANN. § 11-2-313(1)(a) (2003) and Hill Aircraft & Corp. v. Simon, 177 S.E.2d 803 (Ga. Ct. App. 1970)).

the court concluded that the elements required to prove fraud and deceit were present.[65]

A. *Implied Warranty of Fitness for a Particular Purpose*

For the purchaser of an equine lemon, the most important UCC provision is the implied warranty of the good's "fitness for a particular purpose." Under the UCC,

> [w]here the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods, there is unless excluded or modified . . . an implied warranty that the goods shall be fit for such purpose.[66]

Buyers generally purchase horses for specific functions, such as trail riding, show jumping, racing, or hauling loads. A horse that is perfectly suited for one equine task, such as trail riding, could be worthless to a buyer intent on using the same horse for a different task, such as racing. The level of specificity in use for an equine is critical to maintaining an action for breach of implied warranty, as "[a] 'particular purpose' differs from an ordinary purpose in that it envisages a specific use by the buyer which is peculiar to the nature of his business."[67] Therefore, a horse buyer who informs the seller of the intended use for the horse, and receives assurances of fitness for that purpose, can obtain a remedy under the UCC if the horse proves defective for that particular purpose.

An important caveat, however, is that the buyer must be relying on the seller's "skill or judgment" in the selection of the horse.[68] There are two notable situations in which this limitation is applicable to the purchase of a defective horse. First, if the horse's defect is noticeable at the time of purchase—such as a potential racehorse limping during showing or a child's potential horse rearing uncontrollably—then the buyer was as capable as the seller to take note of the defect.[69] Second, if the buyer is as knowledgeable as the seller about the particu-

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65. *Id.* at 236.

66. U.C.C. § 2-315 (2012); *see, e.g.*, CAL. COM. CODE § 2315 (West 2002); FLA. STAT. ANN. § 672.315 (West 2004); N.Y. U.C.C. LAW § 2-315 (McKinney 2002); TEX. BUS. & COM. CODE ANN. § 2.315 (West 2009) (all demonstrating this implied warranty is available to buyers in states that have adopted the UCC).

67. U.C.C. § 2-315 cmt. 2; Royal Typewriter Co. v. Xerographic Supplies Corp., 719 F.2d 1092, 1100 (11th Cir. 1983).

68. U.C.C. § 2-315; *see, e.g.*, CAL. COM. CODE § 2315; FLA. STAT. ANN. § 672.315; N.Y. U.C.C. LAW § 2-315; TEX. BUS. & COM. CODE ANN. § 2.315.

69. *See, e.g.*, Whitehouse v. Lange, 910 P.2d 801, 807 (Idaho Ct. App. 1996) ("[A]n examination will be effective to exclude warranties only if it occurred before the contract was made

lar horse's suitability, or lack thereof, for the purpose—reviewing a young thoroughbred racehorse for gentle trail riding, for example—then there is no action when the horse proves unsuitable.[70]

A New Mexico case provides a good representative analysis of the UCC implied warranty of fitness for a particular purpose as applied to an equine lemon. In *O'Shea v. Hatch*, the buyers of a supposedly gentle gelding demanded return of their purchase money after noticing that the horse was "aggressive and uncontrollable" and "exhibited stallion-like characteristics" because the animal had not been properly gelded.[71] The sellers offered to pay for the costs to have the horse properly gelded, but "refused to rescind the sales agreement."[72] After the buyers took the horse to a veterinarian for proper gelding, the horse still lacked the qualities the buyers had specified when purchasing the animal—namely, that the horse "could be used as a show horse, which could be ridden by their teen-age daughter and which would be suitable and safe around children."[73] Thus, the buyers sued the sellers, alleging breach of implied warranty.[74] The defendant–seller argued that the buyers' actions in "having the horse operated upon and engaging in the continued use of the horse and exhibition of it at several horse shows . . . after making demand for revocation . . . amounted to acts of dominion and ownership, which bar revocation of [the buyers'] prior acceptance" under the UCC.[75] However, the New Mexico Court of Appeals reasoned that "where [the sellers] refused to take the animal back after [the buyers] demanded rescission, [the buyers] should not be penalized for their apparent good faith efforts to attempt to correct the defects in the animal and to follow [the sellers'] suggestions."[76] Thus, the court unambiguously ruled that the UCC was determinative of the legal issues in this case and resolved that the sellers had "breached an implied warranty of fitness under the [UCC]."[77]

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and only if it is of such a nature that it ought to reveal the defects of which the buyer subsequently complains."); Light v. Weldarc Co., 569 So. 2d 1302, 1305 (Fla. Dist. Ct. App. 1990).

70. *See* Whitehouse, 910 P.2d at 807; *see also* Light, 569 So. 2d at 1305.

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

72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.* at 519.

76. *Id.* at 522.

77. U.C.C. § 2-105 (2012). The term 'goods' as used in the UCC includes livestock since they are frequently intended for commercial sale. *Id.* One particular UCC provision that might influence the outcome of "equine lemon" litigation is the requirement that after a buyer has determined that there has been a breach of warranty relating to the property sold, the buyer must give notice to the seller "within a reasonable time after he discovers or should have discovered" the breach, to avoid liability for sale. U.C.C. § 2-607(3)(a); *see also*, Chernick v. Casares, 759 S.W.2d 832, 835 (Ky. Ct. App. 1988) (concluding that a three-year period between the purchase of a

Clearly, judicial application of the UCC to "equine lemon" circumstances will typically result in buyer-friendly outcomes, due in large part to the implied warranty of fitness for a particular purpose. However, the UCC is not completely in a buyer's favor. As noted, the implied warranty of fitness for a particular purpose is limited by the purchaser's relevant knowledge.[78] In addition, implied warranties can be limited in the terms of the written contract.[79] Therefore, an equine seller can negotiate an agreement with the buyer in which warranties become another element of the price discussion; in other words, a seller can choose to sacrifice price for additional protection from liability for an animal that proves defective. The UCC also requires that the buyer notify the seller "within a reasonable time after he discovers or should have discovered any breach" to avoid liability for the sale.[80] This provision imposes a duty upon the buyer to act quickly in both examining the equine to ensure it conforms to the buyer's expressed needs and notifying the seller upon the discovery of a problem. The buyer's level of equine experience, however, will likely influence the court's determination of what constitutes a "reasonable time" within which the buyer discovered or should have discovered an anomaly, just as the purchaser's knowledge is determinative to whether the buyer can invoke the implied warranty of fitness.

In *Miron v. Yonkers Raceway, Inc.*, for example, the buyer purchased a horse at auction under a warranty that the horse was "sound," but discovered a fractured bone in the horse's leg the day after the sale.[81] The court explained that the buyer had accepted the horse under New York's state UCC provisions because, "having had a reasonable opportunity to inspect it, he did not reject it within a reasonable time."[82] Because the buyer did not follow the customary practice—having the racehorse examined by a veterinarian or trainer either at the place of sale or at his barn later on the same day—the court concluded that he had "[t]hus passed up a reasonable opportunity to inspect [the horse]."[83] There-

broodmare and attempted revocation "was clearly unreasonable"). The appellate court in O'Shea accordingly affirmed the judgment awarding damages against the sellers in the amount of $4,196.10. O'Shea, 640 P.2d at 517, 522.

78. *See infra* note 58 (noting sellers incur liability for injuries sustained on their property when the injury involved no misrepresentation or omission on their part).

79. *See* U.C.C. § 2-316; *see also*, CAL. COM. CODE §§ 2315–2316 (West 2002); FLA. STAT. ANN. §§ 672.315–.316 (West 2004); N.Y. U.C.C. LAW §§ 2-315 to -316 (McKinney 2002); TEX. BUS. & COM. CODE ANN. §§ 2.315–.316 (West 2009).

80. U.C.C. § 2-607(3)(a); *see also*, CAL. COM. CODE § 2607(3)(A); FLA. STAT. ANN. § 672.607(3)(a); N.Y. U.C.C. LAW § 2-607(3)(a); TEX. BUS. & COM. CODE ANN. § 2.607(c)(1).

81. Miron v. Yonkers Raceway, Inc., 400 F. 2d 112, 113 (2d Cir. 1968).

82. *Id.* at 118 (citing U.C.C. § 2-602(1) (2012)).

83. *Id.*; *see also* Robert S. Miller, *The Sale of Horses and Horse Interests: A Transactional Approach*, 78 KY. L.J. 517, 545 (1990) (discussing the role custom plays in equine law:

fore, the buyer's attempted rejection of the horse on the following day did not occur within a reasonable time.[84] Under state law, this meant that the buyer had accepted the horse and consequently bore the burden of proving any breach of warranty.[85] With insufficient evidence to prove the date of the horse's leg fracture, however, the court ruled that the buyer had not met his burden.[86]

Similarly, in *Ladner v. Jordan*, a Mississippi court held that a buyer who refused to examine the horse prior to sale had waived the implied warranty of fitness for a particular purpose.[87] The buyer in that case did not have a veterinarian examine the thirteen-year-old horse and "refused to ride the horse herself" prior to the sale.[88] The day after the sale, the buyer "rode the horse for the first time, and immediately detected that the horse was partly lame."[89] A veterinarian examined the horse and diagnosed both lameness and developing arthritis.[90] Concluding that the buyers had waived the implied warranty of fitness for a particular purpose, the Mississippi Court of Appeals noted that the seller had sold the horse "as is," and that both the buyer and her husband had experience with horses and were present at the point of sale.[91] "Under the UCC," the court explained, "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 a particular purpose can be deemed waived."[92]

The buyer fared no better in *Sheffield v. Darby*.[93] Ashley Sheffield purchased a horse from the Darbys, who "assured her that the horse had no problems and would make a good show horse for use in competition."[94] Within three weeks after the sale, Sheffield discovered that the horse was lame.[95] She filed suit against the Darbys, alleging fraud and breach of express and implied warran-

"Custom tends to place the burden of investigation only where it can fairly be discharged; this is an area of law where custom has operated effectively for a long period of time without the intervention of competing statutory policy.").

84. Miron, 400 F.2d at 118.

85. *Id*. at 120.

86. *Id.*; *see also id.* at n.18. The court explained that if the buyer, "[having] accepted the horse, had met his burden of proof, he would have been entitled to damages for non-conformity." *Id.* at n.18 (citing U.C.C. § 2-714).

87. Ladner v. Jordan, 848 So. 2d 870, 873 (Miss. Ct. App. 2002).

88. *Id.* at 871.

89. *Id.*

90. *Id.*

91. *Id.* at 872–73.

92. *Id.* at 873.

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

94. *Id.* at 778.

95. *Id.*

ties.[96] The Georgia Court of Appeals began by setting out the five elements required to maintain an action for fraud: "a false representation by [the] defendant, scienter, intent to induce plaintiff to act or refrain from acting, justifiable reliance by plaintiff, and damage to plaintiff."[97] Finding no evidence to support the first and fourth elements—false representation by the defendant and justifiable reliance by the plaintiff—the court rejected Sheffield's allegation of fraud.[98] Sheffield's warranty claims also failed.[99] The court explained, "Since the Darbys' statements were mere opinions, commendations, or puffing, Sheffield's express warranty claim cannot stand."[100] The court then rejected Sheffield's claim that the Darbys had breached an implied warranty that the horse would make a good show horse.[101] The court explained, "[T]he undisputed evidence shows that at the time of the sale, this representation was true; thus, no breach of implied warranty can be shown."[102]

B. *Damages*

Notably, the UCC allows the buyer of any good to reject or revoke acceptance of a defective good.[103] More importantly in equine cases, the UCC also allows the purchaser of a defective horse to seek certain incidental and consequential damages related to the seller's breach of contract, including breach of the above-referenced implied warranty.[104] These damages can be significant in a defective equine case, especially the incidental damages.

Under the UCC, "[i]ncidental damages resulting from the seller's breach include expenses reasonably incurred in inspection, receipt, transportation[,] and care and custody of goods rightfully rejected[;] any commercially reasonable charges, expenses[,] or commissions in connection with effecting cover[;] and any other reasonable expense incident to the delay or other breach."[105] The purchase of any horse can often involve significant transportation and care expenses

96. *Id.*
97. *Id.* (citing GA. CODE ANN. § 51-6-2 (2003)).
98. *Id.*
99. *Id.* at 779.
100. *Id.* ("[A] statement purporting to be merely the seller's opinion or commendation of the goods does not create a warranty." *Id.* (quoting GA. CODE ANN. § 11-2-313(2)).
101. *Id.*
102. *Id.* (citing Jones v. Marcus, 457 S.E.2d 271 (Ga. Ct. App. 1995)).
103. *See* U.C.C. § 2-608 (2012).
104. *See id.*; *see also, e.g.*, CAL. COM. CODE § 2715 (West 2002); FLA. STAT. ANN. § 672.715 (West 2004); N.Y. U.C.C. LAW § 2-715 (McKinney 2002); TEX. BUS. & COM. CODE ANN. § 2.715 (West 2009).
105. U.C.C. § 2-715(1) (2012); *see e.g.*, CAL. COM. CODE § 2715(1); FLA. STAT. § 672.715(1); N.Y. U.C.C. LAW § 2-715(1); TEX. BUS. & COM. CODE ANN. § 2.715(a).

for the purchaser, but for many equine professionals, recovering these incidentals can be critical to maintaining business viability. For the buyer of a thoroughbred racehorse, for example, such incidental damages could include inspection by multiple veterinarians, the costs of transporting the horse from one of the major auction houses, boarding and feed costs, commissions for each equine professional involved in the sale, registration fees, and more.

Consequential damages, especially the ability to recover damages from "injury to person or property proximately resulting from any breach of warranty,"[106] are also important to both equine professionals and casual equine purchasers. As noted throughout this Article, most equine lemon litigation results from damages to the purchaser in attempting to ride or transport the purchased horse, and those damages can often be significant. For equine professionals, consequential damages are also significant because the purchaser can recover "any loss resulting from general or particular requirements and needs of which the seller at the time of contracting had reason to know and which could not reasonably be prevented by cover or otherwise."[107] Therefore, a thoroughbred farm in the business of buying and selling broodmares, for example, could arguably recover the damages from a lost sale if a mare purchased for a potential client proved unsuitable for breeding, and the seller knew such a prospective sale was at issue.

In *Manula v. Wheat*, for example, the U.S. District Court for the Eastern District of Arkansas awarded a buyer both incidental and consequential damages resulting from the seller's breach of a contract for the sale of thirty horses.[108] Kym Manula, the buyer in that case, operated a trail riding business primarily for adults and children with little to no horse riding experience.[109] After visiting the ranch owned by Rick Wheat, Manula contracted to purchase "30 (Geldings) trail riding horses" from Wheat at a total price of $30,000.[110] Although Wheat delivered thirty horses to Manula's ranch, the court found that he had "failed to perform under the contract in several respects . . . [m]ost importantly, Wheat breached the implied warranty of fitness for a particular purpose by sending horses that were not sufficiently mature, calm, gentle, docile, and well trained to

106. U.C.C. § 2-715(2)(b) (2012); *see also, e.g.*, CAL. COM. CODE § 2715(2)(b); FLA. STAT. ANN § 672.715(2)(b); N.Y. U.C.C. LAW § 2-715(2)(b); TEX. BUS. & COM. CODE ANN. § 2.715(b)(2).

107. U.C.C. § 2-715(2)(a) (2012); *see also, e.g.*, CAL. COM. CODE § 2715(2)(a); FLA. STAT. ANN § 672.715(2)(a); N.Y. U.C.C. LAW § 2-715(2)(a); TEX. BUS. & COM. CODE ANN. § 2.715(b)(1).

108. Manula v. Wheat, No. 4:06CV01107JLH, 2007 WL 2926211 at *1, *10 (E.D. Ark. Oct. 5, 2007).

109. *Id.* at *1.

110. *Id.* at *2.

be ridden by novice riders on mountain trails in Colorado."[111] The court also found that Manula had accepted the horses and had notified Wheat of the breach within a reasonable amount of time.[112]

The court awarded both incidental and consequential damages under the UCC as enacted in Arkansas.[113] The incidental damages, totaling $3,276.60, were incurred by Manula for transportation costs, worming, dental work, and veterinary expenses.[114] The court also awarded Manula $9,914.61, representing "the difference . . . between the actual value of the horses and the value that they would have had if they had been as warranted."[115] Finally, the court awarded consequential damages to Manula's company, Lil' Outlaws Pony Camp, LLC, totaling $71,700 for profits lost "as a result of the fact that approximately [twenty-six] of the horses delivered by Wheat were not fit for the particular purpose for which they were required."[116] The profits generated by a trail riding business, the court explained, depends on the number of rides that can be sold, which in turn depends in part on how many horses are available to be ridden.[117] Because very few of the horses delivered by Wheat could be used in her trail riding business during the 2004 season, Manula was forced to turn business away.[118] Altogether, the damages awarded to Manula totaled $84,891.21.[119]

C. *Inapplicability of Equine Immunity Statutes*

A Wyoming case represents another important aspect of applying the UCC to defective equine litigation. In *Keller v. Merrick*,[120] the Supreme Court of Wyoming explicitly held that when the UCC is applicable, an equine seller cannot use the state equine immunity statute.[121] Fred Merrick was in the business of buying and selling horses, and the Kellers approached Merrick to purchase a "gentle and stable" horse for their son, Bryan.[122] After discussing the Kellers' criteria, Merrick showed the Kellers a horse that Merrick claimed was "gentle

111. *Id.* at *7.
112. *Id.*
113. *See id.* at *7–8 (quoting ARK. CODE ANN. § 4-2-715(2001)).
114. *Id.* at *8.
115. *Id.*
116. *Id.* at *9.
117. *Id.* (The court noted that lost profits could be awarded for the 2004 trail riding season because it was too late for Manula to cover (buy replacement horses) by the time Wheat delivered the horses.).
118. *Id.*
119. *Id.* at *10.
120. Keller v. Merrick, 955 P.2d 876 (Wyo. 1998).
121. *See id.* at 879.
122. *Id.* at 877.

and trained," and they eventually agreed to buy this horse from him for $5,000.[123] The day after the purchase, Bryan mounted the horse and it immediately began to move sideways.[124] The horse ran away with Bryan, and he "jumped or fell from the runaway horse and severely fractured his leg."[125] The Kellers returned the horse and Merrick refunded the Kellers their money.[126] The Kellers "later learned that Merrick had previously sold [the] same horse to an [experienced] team roper, who [had] paid only $2,700 for the horse" and had returned it to Merrick due to its bad behavior.[127] The Kellers sued for breach of express and implied warranties, breach of contract, and negligence.[128]

The trial court granted summary judgment to Merrick under the Wyoming Recreational Safety Act, but the Supreme Court of Wyoming reversed, reasoning that "[a]lthough the Act's definition of an equine activity extends to injuries received while evaluating the horse in contemplation of a sale, it plainly does not extend to a breach of warranty action arising from the sale and, therefore, does not apply to these facts."[129] Instead, the Supreme Court determined that "[i]n Wyoming, the UCC creates and limits express and implied warranties," and, particularly, that "[t]he UCC applies to the sale of a horse."[130] Although the Wyoming Supreme Court did not expressly rule as to the impact of the UCC warranties on the equine lemon, the key for an equine buyer is the determination that the UCC applied to the transaction and eliminated the equine immunity shield for the seller.

The theme of consumer protection is readily apparent where the court applies the UCC to "equine lemon" circumstances. *O'Shea*, *Manula*, and *Keller* all resulted in buyer-favorable outcomes.

V. ANALYSIS OF DEFECTIVE EQUINE PURCHASE AGREEMENTS UNDER STATE COMMON LAW THEORIES

As can be expected, much equine lemon litigation has been resolved under common law contract and tort theories. Generally, disputes over defective horse purchases fall into one of three categories: (1) duty to warn, (2) warranties

123. *Id.* at 878.
124. *Id.*
125. *Id.*
126. *Id.*
127. *Id.*
128. *Id.*
129. *Id*. at 879.
130. *Id*.

and disclaimers or waivers thereof, or (3) fraudulent misrepresentation.[131] Regardless of the category of analysis, the national trend indicates that a buyer will not be successful in setting aside an equine sale when the buyer is at least as knowledgeable as the seller, the buyer was given an opportunity to examine the horse, and the seller did not engage in any sort of misrepresentation.[132]

A. *Duty to Warn*

The level of a buyer's equine knowledge can be especially relevant to whether a court is willing to set aside the sale of a defective horse for failure to warn of the defect. One representative case is *Swido v. Lafayette Insurance Co.*, in which a Louisiana court held that the prior seller of a horse had no duty to warn prospective buyers not to ride a green-broke horse.[133] According to the court, the record "establishe[d] that the [buyers were] knowledgeable of horses," in light of the fact that the buyers owned horses and participated in trail rides and other equestrian events.[134] The buyers' knowledge of horses was critical because "persons knowledgeable of horses know that a green-broke horse is not completely trained and is not ready to be ridden."[135] Although *Swido* was a tort case, the similarity in analysis is clear. Essentially, a seller making a similar statement can satisfy any duty to warn a buyer of a horse's temperament based on the buyer's knowledge of horses, because he should have known exactly the type of product being purchased.

B. *Warranties and Disclaimers or Waivers Thereof*

In the same way that a buyer's knowledge can prevent him from setting aside a defective horse sale, a buyer's ability to examine the horse prior to the sale can also preclude rescission—especially when the buyer takes subject to warranty disclaimers or waivers. In *Cohen v. North Ridge Farms, Inc.*, for example, the U.S. District Court for the Eastern District of Kentucky held that the buyer of a yearling intended for use as a racehorse was not entitled to rescission due to the "as is" conditions of the sale.[136] The buyer had purchased the yearling

131. *See Products Liability*, LEGAL INFO. INST., CORNELL UNIV. LAW SCH. (Aug. 19, 2010), http://www.law.cornell.edu/wex/products_liability (explaining basic premise of products liability legal doctrine).

132. Keller, 955 P.2d at 879 (holding that the UCC express and implied warranties did apply, and summary judgment was inappropriate on the issue).

133. Swido v. Lafayette Ins. Co., 916 So. 2d 399, 405–06 (La. Ct. App. 2005).

134. *Id.* at 405.

135. *Id.*

136. Cohen v. N. Ridge Farms, Inc., 712 F. Supp. 1265, 1272 (E.D. Ky. 1989).

for $575,000 although no presale veterinary examination had been requested or conducted.[137] Subsequent to the sale, the buyer hired several veterinarians to examine the yearling, each of whom confirmed that the yearling had a "displaced soft palate, which may or may not affect the yearling's respiratory functioning and training, which, in turn, may or may not affect the yearling's racing ability."[138] Immediately after learning of these diagnoses, the buyer attempted to rescind the sale of the yearling.[139] The seller refused, citing the written conditions of the auction sale, which stated that "unless otherwise expressly announced at time of sale, there is no guarantee of any kind express or implied as to the soundness, condition, wind[,] or other quality of any animal sold in this sale."[140] The buyer sued the seller–owner and the corporate consignee who sold the horse at the auction, seeking to rescind the sale and advancing numerous claims for relief grounded in both contract and tort law.[141]

The court determined that the buyer had assumed the risk of loss, because the Conditions of Sale had expressly disclaimed all warranties and guarantees as to soundness and wind, and because the buyer had acted with "conscious ignorance" by electing to purchase the horse without requesting a presale endoscopic examination, which is routine at high-end horse auctions.[142] The court held that the defendants were entitled to summary judgment in light of the buyer's conscious assumption of risk.[143] Although the buyer's level of knowledge again played a factor in the court's analysis, the key was that the buyer had purchased a horse "as is," without taking the time to examine the animal he was purchasing. In similar equine lemon situations, it is likely that a "consciously ignorant" purchaser will have no recourse.

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137. *Id*. at 1266.

138. *Id*. at 1266–67.

139. *Id*. at 1267.

140. *Id*.

141. *Id*. at 1268 (The plaintiff's seven causes of action included: (1) failure of consideration, (2) mutual mistake, (3) unilateral mistake, (4) violation of the Kentucky Consumer Protection Act, (5) misrepresentation, (6) fraud, and (7) breach of fiduciary duty).

142. *Id*. at 1274.

143. *Id*. Importantly, the court noted that "discovery revealed that [the buyer], who did not actively participate in the bidding at the sale, assembled a team of three experts to represent his interests at this sale." *Id.* This team included (1) an experienced horseman and general manager of a thoroughbred breeding farm, (2) a trainer of thoroughbred horses, and (3) a licensed veterinarian with a specialty in equine medicine. *Id.* The court noted that this team had previously represented the buyer at several other thoroughbred sales, and that the team's veterinarian specifically "recommended that each yearling on their list be given an endoscopic throat examination prior to the sale." *Id.* The court seemed to weigh the collective experience of the buyer's team of experts against the buyer, reasoning that an experienced buyer should have fully appreciated the risks of purchasing a yearling for racing without conducting an endoscopic examination. *Id.*

C. *Fraudulent Misrepresentation*

Although a knowledgeable buyer who takes subject to warranty disclaimers or waivers is often limited in remedies available, a seller's affirmative statements about a horse may allow the buyer to invoke breach of the duty to warn as a basis for relief. In *Smith v. Roussel*, for example, a Louisiana court held that the seller had a duty to warn the buyers about a horse's temperament.[144] In that case, the buyers alleged that the seller had "represented [the horse] as having a calm and gentle nature, but, shortly after the sale, [the horse] was discovered to be a spooky and skittish beast."[145] The court noted that the seller had a duty "'to avoid acts and omissions which engender an unreasonable risk of harm to others.'"[146] The seller in this case knew of the horse's skittish nature and "acknowledged her fears that someone could be hurt by such a horse. She [also] knew [the horse] had needed to be tranquilized at times."[147] The court held that the sellers had a duty to warn[148] the buyers about the horse's nature, the sellers had breached that duty by failing to provide the correct information to the buyers, and the breach was a cause-in-fact of the buyer's injuries; therefore, the seller was liable to the buyers.[149]

While this was a tort case, rather than a true contract dispute, the analysis is applicable. If a seller knows that a horse has a potential defect at the time of the sale, and affirmatively tells the buyer there is no defect, then the buyer will likely be entitled to some form of remedy. In addition, the analysis in *Roussel* indicates that even when the seller's statements to a buyer do not rise to the level of fraudulent misrepresentation, a court will likely still "punish" the seller and will not allow the seller to benefit from the transaction.[150] The importance of an affirmative misrepresentation cannot be overstated. In *Swido*, also a Louisiana case, the court denied the equine purchaser a remedy despite the horse's defective temperament and unsuitability to riding, while the court in *Roussel* found in favor of the purchaser for a similar defect.[151] Facially, the key difference is that

144. Smith v. Roussel, 809 So. 2d 159, 166 (La. Ct. App. 2001).

145. *Id.* at 162.

146. *Id.* at 165 (quoting Stephens v. State, 440 So. 2d 920, 925 (La. Ct. App. 1983), *writ denied*, 443 So. 2d 1119 (La. 1984)).

147. *Id.*

148. *Id.* at 166 ("The duty to warn applies to 'any danger inherent in the normal use of the product which is not within the knowledge of an ordinary user.'" (quoting Simeon v. Doe, 618 So. 2d 848, 852 (La. 1993))).

149. *Id.* at 165–66.

150. *See id*. at 166 (holding that there was no fraudulent misrepresentation but still finding liability).

151. *See generally id.*; *see also* Swido v. Lafayette Ins. Co., 916 So. 2d 399 (La. Ct. App. 2005).

the seller in *Swido* told the buyer of the horse's potential problem of being "green-broke," while the seller in *Roussel* affirmatively misrepresented that the horse was gentle.[152]

Like other common law contract disputes, the best opportunity for the buyer of an equine lemon to succeed is when the seller has committed fraudulent misrepresentation. Although a buyer's knowledge or opportunity to examine the horse can be fatal to a remedy, especially when coupled with warranty disclaimers or waivers, a seller who uses fraud to complete the sale will almost never win.

In *Hayes v. Equine Equities, Inc*., the Nebraska Supreme Court held that the buyer of a horse was entitled to rescission based on the seller's misrepresentation of the horse's value.[153] In that case, the defendant (Chudy) told a potential buyer (Hayes) that Equine Equities, Inc. had purchased a particular horse for $50,000, when Chudy knew that the corporation had actually paid only $1,300 for the horse.[154] According to Hayes, Chudy suggested—since Chudy already had a buyer lined up to purchase the horse for $75,000—that Hayes and Chudy should purchase the horse from Equine Equities for $50,000, aiming to resell the equine for $75,000 and split the profits.[155] In reality, there was no purchaser.[156] To finance the deal, Hayes contributed $22,000 in cash and traded in his interest in another horse worth $7,500.[157] A few months later, the horse began limping and was no longer showable.[158] After the horse began limping, a buyer offered to purchase the animal for $2,000.[159] At that time, Hayes realized the value of the horse was nowhere near $50,000, and demanded his money back from Chudy.[160] In the litigation that followed, Hayes argued he was entitled to rescission of the contract.[161] The trial court granted the rescission, finding that Hayes had alleged and proven all necessary elements.[162]

In affirming the trial court's grant of rescission, the Nebraska Supreme Court explained that "[a] person is justified in relying on a representation made to him or her in all cases where the representation is a positive statement of fact

152. *Compare* Roussel, 809 So. 2d 159, *with* Swido, 916 So. 2d 399.
153. Hayes v. Equine Equities, Inc., 480 N.W.2d 178, 182 (Neb. 1992).
154. *Id*. at 180.
155. *Id*.
156. *Id*.
157. *Id*.
158. *Id*. at 181.
159. *Id*.
160. *Id*.
161. *Id*. at 179.
162. *Id*. at 181–82. "The party seeking to rescind a contract must allege and prove (1) the material representation of fact that was made, (2) that it was false, (3) that the aggrieved party believed the representation to be true, (4) that he relied and acted upon it, and (5) that he was thereby injured." *Id.*

and where an investigation would be required to discover the truth," and that the defendant's statements "were positive representations of fact upon which Hayes could rely, and the statements did not constitute sales talk or puffing in the sense which the law implies."[163] This case is important to equine lemon analysis because it emphasizes the significance of fraudulent misrepresentation in a court's willingness to give the horse buyer a remedy. Although the buyer in *Hayes* could have discovered the horse's true value by investigation—a fatal flaw in other equine lemon litigation—the fact that the seller affirmatively represented that value to the buyer obviated the knowledge and opportunity for examination analyses.[164]

Similarly, in *Leal v. Holtvogt*, an Ohio court held that a horse seller committed fraud by failing to disclose the lameness of a stallion.[165] In *Leal*, the Holtvogts offered the Leals a one-half interest in an Arabian stallion they owned.[166] Before the Leals agreed to invest in the stallion, Mr. Holtvogt made several statements regarding the horse, including that "[the stallion] was a national top-ten champion in three categories; he was an all-around winning stallion; he earn[ed] $20,000 per year in stud fees; he [was] capable of attaining national show titles again; and his foals were selling for $6,000 to $10,000 each."[167] The Leals and Holtvogts subsequently entered into a contract of sale for a one-half interest in the stallion for $16,000.[168]

The Leals based their allegation of fraud on the fact that, prior to entering the contract for a one-half interest in the stallion, "[the stallion] had been treated for lameness and was suffering a chronic lameness condition in his right rear and fore fetlocks. Mr. Holtvogt testified that he had taken the stallion for lameness treatments numerous times. He also stated that he did not disclose this information to the Leals" prior to entering the contract.[169] Within six months of entering the contract, the Leals indicated to the Holtvogts that they were "dissatisfied with the partnership and . . . that they wanted either a refund of their money or a remedy for their concerns."[170] The appellate court found that the Holtvogts' fail-

163. *Id.* at 182.
164. *Id.*
165. Leal v. Holtvogt, 702 N.E.2d 1246, 1261 (Ohio Ct. App. 1998).
166. *Id.* at 1252.
167. *Id.*
168. *Id.*
169. *Id.*
170. *Id.* Furthermore, eight months after the Leals voiced their concerns, the mortality insurance on the stallion lapsed because neither the Leals nor the Holtvogts paid the insurance premium. *Id.* The uninsured stallion died from stomach ulcer complications ten months later. *Id.*

ure to disclose the stallion's chronic lameness constituted fraud and awarded compensatory damages to the Leals.[171]

Not all claims of fraudulent misrepresentation are successful. In *Tribe v. Peterson*, for example, the buyer purchased his first horse from the sellers "on his belief that he had been guaranteed that the horse would never buck."[172] According to the buyer, the written description of the horse in the sale brochure and verbal representations made by the sellers "created an express warranty that [the horse] was a calm and gentle horse which would never buck."[173] Ten days after the sale, the horse threw the buyer to the ground.[174] The buyer then filed suit against the sellers, "alleging that [they had] breached an express warranty . . . [and had] negligently and fraudulently misrepresented [the horse's] nature."[175]

"'An express warranty,'" the Wyoming Supreme Court explained, "is created by any affirmation of fact made by the seller to the buyer which relates to the goods and becomes a part of the basis of the bargain."[176] By contrast, "[a] representation which expresses the seller's opinion, belief, judgment[,] or estimate does not constitute an express warranty."[177] The court found sufficient evidence to support a finding that the written sale brochure had been based on the sellers' "well-founded opinion regarding [the horse's] disposition."[178] Even if the sale brochure had created an express warranty, the evidence supported the conclusion that the horse was in fact calm and gentle, and the warranty had not been breached.[179]

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171. *Id.* at 1251. The Court explained the difference between fraud and negligent misrepresentation in the context of the Holtvogts' failure to disclose the stallion's lameness:

> "As we found earlier, an action for negligent misrepresentation is actionable only when an affirmative false statement has been made; it is not actionable for omissions. A claim of fraud, however, is maintainable not only as a result of affirmative misrepresentations, but also for negative ones, such as the failure of a party to a transaction to fully disclose facts of a material nature where there exists a duty to speak."

Id. at 1261–62 (quoting Textron Fin. Corp. v. Nationwide Mut. Ins. Co., 684 N.E.2d 1261, 1272 (Ohio Ct. App. 1996)) (internal quotation marks omitted).

172. Tribe v. Peterson, 964 P.2d 1238, 1240 (Wyo. 1998).

173. *Id.* at 1241.

174. *Id.* at 1240–41.

175. *Id.* at 1241.

176. *Id.* (quoting Garriffa v. Taylor, 675 P.2d 1284, 1286 (Wyo. 1984)).

177. *Id.* (citing Garriffa, 675 P.2d at 1286).

178. *Id.* at 1242.

179. *Id.* According to one court, "[w]hether representations made by a seller are warranties and, therefore, a part of the bargain, or merely expressions of the seller's opinion, or mere 'puffing,' is almost always a question of fact for a jury's resolution." Yuzwak v. Dygert, 144 A.D.2d 938, 939 (N.Y. App. Div. 1988) (citing Opera v. Hyva, Inc., 86 A.D.2d 373, 379 (N.Y. App. Div. 1982).

The court also rejected the buyer's allegation that the sellers had negligently and fraudulently misrepresented the horse's nature.[180] According to the court, the sellers had presented "overwhelming evidence" indicating that the information they provided to the buyer had not misrepresented the horse's disposition.[181] The court, unconvinced of the buyer's "alleged naiveté," found no "cogent argument or case law" supporting the buyer's claim that the sellers "had a duty to inform [him] that all horses . . . have a propensity to buck."[182]

The key to equine lemon litigation is that courts are generally unwilling to allow a knowledgeable buyer, who takes subject to warranty disclaimers or waivers, to avoid a "bad bargain" simply because the horse was defective, but improper statements by a seller to induce the transaction will take paramount importance. A court's determination that a seller engaged in fraud or intentional misrepresentation relating to the sale of a horse strongly favors a buyer-friendly outcome. This analysis is similar to the position taken by the Florida Supreme Court in *Besett v. Basnett*, in which the court stated that "[a] person guilty of fraudulent misrepresentation should not be permitted to hide behind the doctrine of caveat emptor."[183] Although *Besett* was not an equine lemon suit, the court in that case relevantly held:

> Although the recipient of a fraudulent misrepresentation is not barred from recovery because he could have discovered its falsity if he had shown his distrust of the maker's honesty by investigating its truth, he is nonetheless required to use his senses, and cannot recover if he blindly relies upon a misrepresentation the falsity of which would be patent to him if he had utilized his opportunity to make a cursory examination or investigation. *Thus, if one induces another to buy a horse by representing it to be sound, the purchaser cannot recover even though the horse has but one eye, if the horse is shown to the purchaser before he buys it and the slightest inspection would have disclosed the defect*. On the other hand, [this rule] applies only when the recipient of the misrepresentation is capable of appreciating its falsity at the time by the use of his senses. Thus a defect that any experienced horseman would at once recognize at first glance may not be patent to a person who has had no experience with horses.[184]

Unlike cars or other traditional "lemon law" products, horses inherently have hidden behaviors or defects that can radically change their value. As the cases discussed above indicate, things such as a horse's temperament can be critical to a buyer's perception that he has received a defective product, but temper-

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180. *Id.*
181. *Id.*
182. *Id.*
183. Besett v. Basnett, So. 2d 995, 997 (Fla. 1980).
184. *Id.* (emphasis added) (quoting RESTATEMENT (SECOND) OF TORTS § 541 cmt. a (1976)).

ament would likely not be readily discoverable during a routine sales examination. Like the equine immunity statutes, the underlying policy considerations of encouraging good-faith buyers to participate in commerce and discouraging dishonest sellers from taking advantage of unsuspecting buyers likely drive the buyer-oriented outcomes of equine lemon cases involving seller misrepresentation.

VI. CONCLUSION

The specific legal theory a court chooses to apply to an equine lemon case strongly influences whether the outcome is buyer- or seller-friendly. From a buyer's perspective, the circumstances most favorable to recovery in an equine lemon situation would involve the seller's misrepresentation of a horse's temperament, lineage, or health. Ideally, the seller would make this misrepresentation to an inexperienced buyer, as courts tend to weigh a lack of expertise in favor of the good-faith buyer rather than the seemingly conniving seller. From a seller's perspective, an ideal scenario in equine lemon litigation would be the court's application of the state equine immunity statute, as in *Adams*.[185] If a court determines that the buyer's harm is simply an "inherent risk of equine activities"[186] and that the statute should operate to shield the defendant–seller from liability, the buyer will not recover despite his lemon-like circumstances. Across the board, however, applying the UCC seems the most equitable and appropriate analysis. The UCC includes the common law distaste for fraudulent misrepresentation and protects the "uninitiated" purchaser with implied warranties. The UCC also protects the equine seller, however, and more appropriately, allows both parties to succeed or fail based on the parties' agreement.

185. *See, e.g.*, Adams v. Hare, 536 S.E.2d 284 (Ga. Ct. App. 2000).
186. *See, e.g.*, GA. CODE ANN. § 4-12-2(7) (West 2003).