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the Implied Warranties of “Merchantability”
and “Fitness” in the Sale of Horses**

by

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The Uniform Commercial Code as Applied to Implied Warranties of "Merchantability" and "Fitness" in the Sale of Horses

BY JOHN ALAN COHAN*

INTRODUCTION

The availability of implied warranties in connection with the sale of livestock generally, and horses in particular, is of significant concern because of recurring problems concerning horses: their state of health; their ability to breed; their capabilities as performing athletes in racing, jumping and driving;¹ their ability to perform tasks, such as with cutting horses;² and their general "soundness."³ Since the sale of horses frequently occurs without mention of whether or to what extent the seller warrants the soundness or particular fitness of a horse, the availability of implied warranties under the Uniform Commercial Code (hereinafter U.C.C.) can in many situations serve as a remedy for a horse deal gone sour.

The U.C.C. is now the law in every state except Louisiana.⁴ In some states there have been minor changes deemed necessary

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¹ "Driving" here refers to the collection and herding of livestock.

² A *cutting horse* is "a quick light saddle horse trained for use in separating cattle from a herd." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 562 (1966).

³ "Soundness" as used in this Article is a term of art which has particular meaning when referring to the condition of horses or other livestock. See notes 57-72 *infra* and accompanying text.

⁴ Forty-nine states have enacted either the 1962 or the 1972 Official Text of the Uniform Commercial Code [hereinafter cited as U.C.C.]. The 1972 Official Text contains modifications of importance to transactions involving secured financing. Louisiana has adopted only Articles One, Three, Four, Five, Seven and Eight of the U.C.C. See LA. REV. STAT. ANN. §§ 10:1-101 to 5-117, 10:7-101 to 7-701, and 10:8-101 to 8-501 (West 1968 & Supp. 1984). Significantly, Article Two has not been adopted in Louisiana. Article Two deals with transactions in goods and involves the issue discussed in Part I *infra* concerning whether a farmer or a rancher is a "merchant" for purposes of the U.C.C.'s implied warranty of merchantability (§ 2-314).

to meet local conditions or to satisfy local doctrines of public policy and, as noted elsewhere in this Article, some provisions of the U.C.C. pertaining to implied warranties have been significantly modified in several states.⁵

The first part of this Article will explore the concept of implied warranty of merchantability in the sale of horses⁶ as applied under the U.C.C.⁷ The second part will analyze the distinct concept of the U.C.C.'s implied warranty of fitness for a particular purpose in the sale of horses.⁸ The Article will then discuss affirmative defenses available to defeat or diminish the application of the U.C.C.'s implied warranties,⁹ and legislative enactments in some states that, for varying reasons, have modified or removed the U.C.C.'s implied warranties in the sale of horses.¹⁰ Finally, the Article will discuss the most common alternative to implied warranties—express warranties in the sale of horses.¹¹

I. PRELIMINARY CONSIDERATIONS: ARE HORSES "GOODS" UNDER THE U.C.C., AND WHO IS A "MERCHANT"?

A. *Horses as "Goods" under the U.C.C.*

Article Two of the U.C.C. "applies to transactions in goods."¹² It is well settled that animals as well as their unborn young constitute "goods" under the U.C.C.¹³ Article Two's

⁵ See Part VI *infra* for a discussion of legislative changes affecting the U.C.C.'s implied warranties.

⁶ Section 2-314(1) contains the implied warranty of merchantability which applies to transactions that are sales as well as exchanges, barter and trades of horses. Therefore, the term "sales" as used in this Article includes all of the above transactions. See note 43 *infra*.

⁷ See Part II *infra*.

⁸ See U.C.C. § 2-315. See also Part III *infra*.

⁹ See Part V *infra*.

¹⁰ See Part VI *infra*.

¹¹ See Part VII *infra*.

¹² U.C.C. § 2-102.

¹³ See U.C.C. § 2-105(1). See also *Presti v. Wilson*, 348 F. Supp. 543 (E.D.N.Y. 1972) (applying New York law to a racehorse); *Key v. Bagen*, 221 S.E.2d 234, 235 (Ga. Ct. App. 1975) (horse); *Keck v. Wacker*, 413 F. Supp. 1377 (E.D. Ky. 1976) (applying Kentucky law to a mare); Purcell, *What Warranties Do Farmers Give When They Sell Their Livestock?*, 2 AGRIC. L.J. 117 (1980-81) (all livestock); Soorholtz, *The Iowa Livestock Warranty Exemption: Illusory Protection for the Buyer*, 67 IOWA L. REV. 133, 140 n.60 (1981) (all livestock); Annot., 4 A.L.R.4th 912, 920-21 (1981) (horses, ewes, cattle).

The UNIFORM SALES ACT also drew no distinction between animals and nonliving goods. See 67 AM.JUR. 2d *Sales* § 2 (1973).

implied warranties of merchantability and fitness for a particular purpose, thus, apply to sales of horses.

B. "Merchant" under the U.C.C.

The implied warranty of merchantability under the U.C.C.¹⁴ is imposed upon merchants and is not applicable to other sellers of goods.¹⁵ The issue of whether a seller of horses is a merchant under the U.C.C. is a difficult question which has given rise to substantial comment.¹⁶

The term "merchant" has a variety of uses in the U.C.C.,¹⁷ but for purposes of this discussion the term will be considered solely in connection with the U.C.C.'s imposition of the implied warranty of merchantability. Section 2-314(1) of the U.C.C., in setting forth this implied warranty, limits its application to a seller who is a merchant.¹⁸

"Merchant" is defined as:

a person who deals in goods of the kind or otherwise by his occupation holds himself out as having knowledge or skill peculiar to the practices or goods involved in the transaction

¹⁴ U.C.C. § 2-314(1).

¹⁵ As discussed in Part III *infra*, the "merchant" requirement in the sale of horses is not applicable when the buyer invokes the U.C.C.'s implied warranty of fitness for a particular purpose, providing that the other elements of that warranty are met. See U.C.C. § 2-315; see also Eftink, *Implied Warranties in Livestock Sales: Case History and Recent Developments*, 4 AGRIC. L.J. 207, 212, 219 n.35 (1982-83).

¹⁶ See Newell, *The Merchant of Article 2*, 7 VAL. U.L. REV. 307 (1973); Squillante, *Is He or Isn't He a Merchant?—The Farmer*, 82 COM. L.J. 155, 367, 430 (1977); Comment, *A Farmer Marketing His Crops is a Merchant Within the Uniform Commercial Code Statute of Frauds*, 63 ILL. B.J. 271 (1975); Comment, *A Farmer is Not a Merchant Under the Uniform Commercial Code*, 65 MICH. L. REV. 345 (1966); Comment, *The Farmer as Merchant Under the U.C.C.*, 53 N.D.L. REV. 587 (1977); Comment, *The Farmer in the Sales Article of the U.C.C.: 'Merchant' or 'Tiller of the Soil'*, 1976 So. ILL. U.L. REV. 237; Comment, *Lish v. Compton—Is the Farmer a Merchant Under the U.C.C.?*, 1976 UTAH L. REV. 558.

¹⁷ There are three separate areas in which the term "merchant" has application in the U.C.C. The first concerns the application of the statute of frauds to an oral contract under U.C.C. §§ 2-201(1) and (2). The second concerns what is often referred to as the "battle of the forms," where certain printed provisions in the buyer's confirming memorandum or other written confirmation of an oral contract may tend to vary the understanding between the parties. See U.C.C. § 2-207. The third area is the implied warranty of merchantability contained in U.C.C. § 2-314(1).

¹⁸ U.C.C. § 2-314(1) provides: "Unless excluded or modified (Section 2-316), 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."

or to whom such knowledge or skill may be attributed by his employment of an agent or broker or other intermediary who by his occupation holds himself out as having such knowledge or skill.¹⁹

There has been a substantial amount of litigation—resulting in sharply divergent holdings—as to whether the merchant status applies to farmers and ranchers in various circumstances surrounding the sale of livestock. It has been observed that the outcome of the application of the term hinges to a great extent on the jurisdiction's bias for or against the farmer, rather than on sound legal principles.²⁰

The definition of “merchant” has likewise been criticized as being ambiguous and difficult to construe.²¹ Nevertheless, the definition can be logically divided into four categories. If a person satisfies the criteria of any category, he is deemed a merchant.²² A person is a merchant if he (1) deals in goods of

¹⁹ U.C.C. § 2-104(1).

²⁰ See, e.g., Squillante, *supra* note 16 at 369, in which the author states, “It is apparent . . . that whether or not any court will reach a determination regarding the status of the farmer as a merchant will depend in great part upon the court's attitudes and the jurisdiction's public policy in such matters.” Squillante further observes:

Judicial decisions are hopelessly split. The opinions of the courts are of no comfort in setting up any general rules to assist us in making a determination as to whether or not a farmer is a merchant. . . . [T]he divergent opinions rest on the court's perceptions. . . . How else can any commentator explain the variety of thoughts regarding what would seem on its face to be relatively simple?—whether or not a farmer is a merchant.

Id. at 433-34.

²¹ See, e.g., *Pecker Iron Works v. Sturdy Concrete Co.*, 410 N.Y.S.2d 251 (N.Y. Civ. Ct. 1978), where the court stated:

Statutory definitions are supposed to give the reader a sense of confidence by supplying apparently precise meaning. However, nowhere are the difficulties of definition more apparent than in subsections (1) and (3) of 2-104 of the U.C.C. The language in these definitions of a ‘merchant’ and ‘between merchants’ has been variously described as ambiguous, awkward, odd, difficult to construe, and leading to conclusions which do not make much sense.

Id. at 254 (footnotes omitted).

²² The term “merchant” applies to any individual or virtually any type of legal entity or organization. Section 2-104(1), which defines “merchant,” uses the term “person” in the scope of the definition. U.C.C. § 1-201(30) defines “person” to include “a corporation, government or governmental subdivision or agency, business trust, estate, trust, partnership or association, two or more persons having a joint or common interest, or any other legal or commercial entity.” This appears to cover every conceivable legal entity.

the kind (for example, horses); (2) by his occupation holds himself out as having knowledge or skill peculiar to the *practices* involved in the transaction; (3) by his occupation holds himself out as having knowledge or skill peculiar to the *goods* involved in the transaction; or (4) employs an agent, broker or other intermediary who by his occupation holds himself out as having such knowledge or skill, such that the knowledge or skill may be attributed to the person whose status is in question.²³ If the facts show that a person satisfies any one of the above criteria, a court of law is likely to hold that person to be a merchant.²⁴

The official comments to the definition of "merchant," while not binding upon the courts,²⁵ emphasize that a merchant is a "professional" in business—someone who uses "specialized knowledge" concerning the goods and/or business practices involved in the transaction in question.²⁶ On the other hand, a "casual or inexperienced seller" is not a merchant.²⁷

Thus, an occasional or one-time seller of a horse who is involved in the horse business, but who is casual or inexperienced in the selling of horses, might not be a merchant for purposes of the U.C.C.'s implied warranty of merchantability.²⁸ Conversely, one who buys and sells horses as a source of income is unquestionably a merchant.²⁹ Merchant status would normally be conferred upon the latter, whether he sells horses occasionally

²³ See U.C.C. § 2-104(1).

²⁴ See, e.g., *Nelson v. Union Equity Co-operative Exchange*, 548 S.W.2d 352, 355 (Tex. 1977) (wheat farmer who raised and sold one wheat crop each year held to be a merchant).

²⁵ "Official Comments to the Uniform Commercial Code are not binding upon the courts but they are persuasive in matters of interpretation and their counsel may help make the Uniform Commercial Code a truly national law. . . ." *Thompson v. United States*, 408 F.2d 1075, 1084 n.15 (8th Cir. 1969) (citations omitted).

²⁶ U.C.C. § 2-104 comment 2.

²⁷ U.C.C. § 2-104 comment 1. See also *Pecker Iron Works v. Sturdy Concrete Co.*, 410 N.Y.S.2d at 254 (contractor knowledgeable in commercial and business practices in a particular industry was deemed a merchant, as distinguished from the "casual or inexperienced seller").

²⁸ See, e.g., *Bevard v. Ajax Manufacturing Co.*, 473 F. Supp. 35 (E.D. Mich. 1979). *Bevard* involved the sale of a used press by an occasional one-time seller and is nevertheless persuasive authority on the question of merchant status under the U.C.C.

²⁹ See U.C.C. § 2-104 comment 2. See also *Sessa v. Riegel*, 427 F. Supp. 760, 769 (E.D. Pa. 1977), *aff'd*, 568 F.2d 770 (3d Cir. 1978) (one who races and deals with racehorses as a source of income falls into the category of merchant for purposes of U.C.C.'s implied warranty of merchantability).

or is selling for the first time, because he presumably uses specialized knowledge about horses or horse dealing in his occupational activities.³⁰

This brings us to another facet of the chameleon-like definition of merchant—the requirement that the person be one who deals “in goods of the kind.”³¹ One who breeds and markets Appaloosa horses, for example, would not necessarily be a merchant with regard to the sale of thoroughbred horses unless he has, or holds himself out as having, knowledge peculiar to the thoroughbred business. In other words, in the sale of a horse, as in the sale of other goods, the goods must be categorized in order to determine whether the seller has merchant status. Furthermore, before one can definitively conclude that the seller is a merchant, the horse buyer’s intended use for the horse must coincide with the horse classification with which the seller deals or has knowledge. For example, in *Fear Ranches Inc. v. Berry*,³² a leading case involving the sale of cattle, the facts revealed that the seller was an experienced rancher who regularly sold cattle as a source of income—thus meeting one aspect of the merchant definition. The rancher, however, had always sold cattle to meat packers, and the buyer intended to use them for breeding.³³ The cattle were allegedly diseased, and the buyer sued for breach of the U.C.C.’s implied warranty of merchantability.³⁴ Holding for the rancher-seller, the court recognized the need to classify the goods according to the buyer’s intended use.³⁵

Some commentators might assert that this case was determined in part by the court’s attitude and Wyoming public pol-

³⁰ See authorities cited *supra* note 29.

³¹ See U.C.C. § 2-104(1).

³² 470 F.2d 905 (10th Cir. 1972), *aff’d*, 503 F.2d 953 (10th Cir. 1974).

³³ *Id.* at 906, 907.

³⁴ *Id.* at 906.

³⁵ See *id.* at 907. The court stated:

The record shows . . . that . . . [the rancher] had theretofore sold all cattle . . . [he] raised or fed to packers; that the sale . . . was the first sale to a non-packer, and “was forced by financial difficulties”. Thus this sale was the dealing in a different classification of stock than this cow and calf sale for resale. This was a sufficiently different type of business and type of goods than theretofore sold. . . . It is not sufficient to say that . . . [the rancher] had always dealt in “cattle,” as such a category includes too many entirely different “goods.”

Id.

icy.³⁶ Nevertheless, *Fear Ranches* is a sound application of the U.C.C. definition of merchant, and makes it imperative for the buyer to determine whether the horse-seller is a merchant in the particular *classification* of horses.³⁷

Fear Ranches is also important for another aspect of the merchant definition: sales where the seller employs an intermediary "who by his occupation holds himself out as having such knowledge or skill" peculiar to the goods involved in the transaction.³⁸ Merchant status will be imputed to the seller, even when he is not knowledgeable with respect to that classification of horses, if he employs an intermediary such as a broker, bloodstock agent or even a knowledgeable friend to make the sale.

Thus, the question of merchant status is not an open-and-shut case and may depend on the jurisdiction involved. In Alabama, for example, a farmer is not usually a merchant unless he employs an auctioneer who is in the business of selling livestock and who holds himself out as having the knowledge and skill to make such sales.³⁹ Moreover, merchant status can be conferred on a horse seller for one category of sales, yet not applied when the seller departs from his normal dealings—such as when selling his regular breed for a marketing purpose with which the seller is not familiar.

Even where merchant status is determined to exist, various defenses may be interposed to prevent the application of the U.C.C.'s implied warranties of merchantability and fitness for a particular purpose.⁴⁰

³⁶ See note 20 *supra*.

³⁷ 13 N. HARL, AGRICULTURAL LAW § 116.05 (1980). *But see* Woodruff v. Clark County Farm Bureau Coop. Ass'n, 286 N.E.2d 188, 195 (Ind. Ct. App. 1972) (farmer who sold chickens as a source of income, but did not ordinarily sell to purchasers who used chickens for egg production, deemed to be merchant even though sale was to purchaser who intended to use chickens for egg production).

³⁸ See U.C.C. § 2-104(1).

³⁹ See Bradford v. Northwest Alabama Livestock Ass'n, 379 So. 2d 609, 611 (Ala. Civ. App. 1980). See also Loeb and Company, Inc. v. Schreiner, 321 So. 2d 199, 201, 202 (Ala. 1975) (framers of U.C.C. did not contemplate farmer as merchant); Sand Seed Service v. Poekes, 249 N.W.2d 663, 666 (Iowa 1977) (farmer who sold crops he grew not a merchant for purposes of U.C.C.'s implied warranty of merchantability); Decatur Coop. Ass'n v. Urban, 547 P.2d 323, 328 (Kan. 1976) (wheat farmer not "professional" within the meaning of U.C.C. "merchant").

⁴⁰ See Part V *infra* for a discussion of these defenses.

II. THE U.C.C.'S IMPLIED WARRANTY OF MERCHANTABILITY

There are two types of implied warranties under the U.C.C.: the implied warranty of merchantability and the implied warranty of fitness for a particular purpose.⁴¹ Notwithstanding some reported opinions which fail to make a distinction, these two types of warranties are neither interchangeable nor overlapping.⁴²

U.C.C. section 2-314 applies to horse sales as well as to other kinds of horse transactions such as barter or exchanges.⁴³ It does not apply to the gift of a horse, nor to a transfer of a limited interest in a horse; however, the transfer of a "free foal" or similar "free gift" tendered in conjunction with the sale of a horse would be deemed a sale.⁴⁴

Section 2-314(1) states: "Unless excluded or modified (Section 2-316), 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." The key word in the implied warranty is "merchantable." Section 2-314(2) sets forth six minimal standards which are stated in the conjunctive.⁴⁵ However,

⁴¹ The U.C.C.'s implied warranty of fitness for a particular purpose can be imposed irrespective of whether the vendor is a "merchant." See Part III *infra*.

⁴² See S. FAVRE & M. LORING, ANIMAL LAW § 6.3, at 91 (1983).

⁴³ Article Two applies to transactions in goods that are deemed to be a sale. See U.C.C. § 2-102. As used in the statute, "sale" has numerous meanings. A sale is generally defined in § 2-106(1) as the passing of title from the seller to the buyer for a price. U.C.C. § 2-304(1) provides that the price may be payable "in money or otherwise," and this operates to include barter and exchanges of horses. See Annot., 4 A.L.R. 4th 85, 93-95 (1981). See also U.C.C. § 2-102 which provides:

Unless the context otherwise requires, this Article applies to *transactions in goods*; it does not apply to any transactions which although in the form of an unconditional contract to sell or present sale is intended to operate only as a security transaction nor does this Article impair or repeal any statute regulating sales to consumers, farmers or other specified classes of buyers.

(emphasis added).

⁴⁴ Normally a gift is not a sale for purposes of the U.C.C. because of the necessity for a valuable consideration to change hands. 67 AM. JUR. 2D Sales § 27 (1973). However, where a free gift is offered to the purchaser in addition to the item purchased, both items are part of the sale. 67 AM. JUR. 2D Sales § 7 (1973).

⁴⁵ U.C.C. § 2-314(2) states:

Goods to be merchantable must be at least such as
 (a) pass without objection in the trade under the contract description;
 and
 (b) in the case of fungible goods, are of their average quality within

in the sale of horses the only standard having practical application which has been construed in the case law is that the horse be "fit for the ordinary purposes" for which it is used.⁴⁶ The most common ground for breach of the implied warranty of merchantability in the sale of livestock is that the animals, because of disease or infection, are not suitable for their intended, ordinary commercial purpose.⁴⁷

A more detailed analysis of the parameters of merchantable horses is necessary, but it should be noted that liability under the U.C.C.'s implied warranty of merchantability is a form of strict liability, and the concepts of fault and failure to use reasonable care are not relevant to a determination of liability.⁴⁸ Defects that are not discoverable by the merchant's reasonable inspection—even latent defects which no human skill, knowledge or foresight can prevent or detect—are nevertheless grounds for liability under the U.C.C.'s implied warranty of merchantability.⁴⁹ In circumstances where the seller of a horse cannot be deemed a merchant for purposes of triggering the U.C.C.'s implied warranty of merchantability, one should consider whether an alternative cause of action exists for negligent liability based on the seller's failure to exercise due care.

the description; and

(c) are fit for the ordinary purposes for which such goods are used; and

(d) run, within the variations permitted by the agreement, of even kind, quality and quantity within each unit and among all units used; and

(e) are adequately contained, packaged, and labeled as the agreement may require; and

(f) conform to the promises or affirmations of fact made on the container or label if any.

U.C.C. § 2-314(3) states: "Unless excluded or modified (Section 2-316) other implied warranties may arise from course of dealing or usage of trade." See also *Henningsen v. Bloomfield Motors*, 161 A.2d 69 (N.J. 1960).

⁴⁶ See, e.g., *Sessa v. Riegle*, 427 F. Supp. 760, 769 (E.D. Pa. 1977) (sale of a racehorse), *aff'd*, 568 F.2d 770 (3d Cir. 1978).

⁴⁷ See *id.* See also *Vlases v. Montgomery Ward & Co.*, 377 F.2d 846, 849 (3d Cir. 1967) (similarly construing U.C.C.'s implied warranty of merchantability in connection with sale of 2,000 one-day-old diseased chicks).

⁴⁸ See *George v. Willman*, 379 P.2d 103, 105 (Alaska 1963); *Picker X-Ray Corp. v. General Motors*, 185 A.2d 919, 922 (D.C. 1962).

⁴⁹ See 377 F.2d at 849-50. See also *Canadian Fire Insurance Co. v. Wild*, 304 P.2d 390, 391 (Ariz. 1956) (latent defect in refrigeration unit does not eliminate seller's liability); *Breitenkamp v. Community Cooperative Ass'n*, 114 N.W.2d 323 (Iowa 1962) (buyer need not show seller's negligence or knowledge in breach of warranty claim).

The rationale behind the strict liability of U.C.C. section 2-314, as well as the U.C.C.'s implied warranty of fitness for a particular purpose, is that the purchaser should be protected from bearing the burden of loss where the goods do not conform to normal commercial standards, even though there is no express promise that the goods (horses) will conform to any particular standard.⁵⁰

A. *Specific Definitions of the Term "Merchantable" in Horse Sales*

The most important construction in the definition of "merchantable" for purposes of the U.C.C.'s implied warranty of merchantability is the phrase "fit for the ordinary purposes."⁵¹ There are very few modern cases that squarely confront the definition of "merchantable" as applied to horses or, for that matter, livestock generally. Prior to the enactment of the U.C.C., the majority of states had adopted the Uniform Sales Act, which was based upon the English Sale of Goods Act.⁵² Many cases have been reported in connection with the sale of horses and other livestock under the Uniform Sales Act,⁵³ and the definition of "merchantability" under the former Act is not materially different from that of the U.C.C.⁵⁴

The standard encompassed by merchantability with regard to the sale of a horse only requires that the horse "be of reasonable quality within expected variations and fit for the

⁵⁰ 377 F.2d at 850. The court stated:

The entire purpose behind the implied warranty sections of the [U.C.C.] is to hold the seller responsible when inferior goods are passed along to the unsuspecting buyer. What the [U.C.C.] requires is not evidence that the defects should or could have been uncovered by the seller but only that the goods upon delivery were not of merchantable quality. . . .

Id. See also 2 N. HARR, *supra* note 37, at § 7.04(1)(b).

⁵¹ See U.C.C. § 2-314(2)(c).

⁵² 67 AM. JUR. 2D Sales § 2 (1973).

⁵³ See, e.g., Annot., 53 A.L.R.2D 892 (1957) (discussion of cases involving question of implied warranties under Uniform Sales Act).

⁵⁴ 67 AM. JUR. 2D Sales § 465 (1973). Moreover, the definition of "merchantable" under the U.C.C. is not intended to be exhaustive, nor is it intended to be mutually exclusive from definitions that arise by usage of trade or by case law. The intention is to leave open other possible attributes of merchantability. See U.C.C. § 2-314 comment 6.

ordinary purposes for which [it] is used.”⁵⁵ A horse which merely fails to live up to the hopes or expectations of the buyer does not constitute an unmerchantable animal.⁵⁶

Many of the cases under the Uniform Sales Act, in construing the term “merchantable,” speak of an implied warranty of “soundness.”⁵⁷ “Soundness” has always been regarded as a term of the trade that has a special and particular connotation with regard to horses and other livestock.⁵⁸ Both modern and older cases use “soundness” in construing the implied warranty of merchantability, and the term appears to be used interchangeably with “merchantable.”⁵⁹ “Soundness” has been variously defined as the absence of any organic defect which renders the horse unfit for use and convenience,⁶⁰ and as “the absence of any defect or disease which . . . will impair the animal’s natural usefulness for the purpose for which it is purchased.”⁶¹

Many older cases, in discussing whether an implied warranty existed in the sale of horses and other livestock, spoke of an implied warranty of soundness and set forth specific infirmities considered to constitute unsoundness. Such defects as blindness,⁶² deafness,⁶³ one leg being shorter than another,⁶⁴ lameness,⁶⁵ and infection with a contagious disease,⁶⁶ have been deemed to constitute unsoundness. These conditions today would provide

⁵⁵ *Sessa v. Riegle*, 427 F. Supp. at 769.

⁵⁶ *Id.* at 770. In *Sessa*, the existence of tendonitis and intermittent claudication were found not to breach the implied warranty of merchantability under the U.C.C. Tendonitis was held to be a mere temporary condition. The existence of intermittent claudication was held not to prevent a horse from becoming a “credible if unspectacular racehorse.” *Id.* at 770. The court noted: “[S]uch disappointments are an age old story in the horse racing business.” *Id.*

⁵⁷ See generally Annot., *supra* note 53; 67 AM. JUR. 2D *Sales* § 512.

⁵⁸ *Norton v. Lindsay*, 350 F.2d 46, 49 (10th Cir. 1965).

⁵⁹ See Annot., *supra* note 53, at § 3[a].

⁶⁰ *Andrews v. Peck*, 78 A. 445 (Conn. 1910).

⁶¹ 350 F.2d at 49 (quoting 77 C.J.S. *Sales* § 330 (1952)).

⁶² *Hoffman v. Oates*, 77 Ga. 701 (1886) (sale of horses); *Shannon v. Abel*, 155 S.W. 62 (Mo. Ct. App. 1913) (sale of horse).

⁶³ 77 Ga. 701.

⁶⁴ *Fulwiler Electric Co. v. Jinks McGee & Co.*, 211 S.W. 480 (Tex. Civ. App. 1919) (sale of mule that had one leg shorter than the others).

⁶⁵ *Moore v. Miller*, 100 S.W.2d 331 (Mo. Ct. App. 1936).

⁶⁶ *King v. Gaver*, 3 A.2d 863 (Md. 1939) (Bang’s disease in sale of cattle); *Cantrell v. Owen*, 13 N.W.2d 408 (Neb. 1944) (Bang’s disease in cows); *Pyott v. Baltz*, 38 Pa. Super. 608 (1909) (tuberculosis in cows).

a prima facie showing that the implied warranty of merchantability had been breached.

Not every disease in a horse will in fact constitute a breach of the implied warranty of merchantability. Generally, only such diseases that "actually . . . diminish the natural usefulness of the horse" so as to render it less capable of meeting its "ordinary purposes" can withstand judicial scrutiny.⁶⁷ Only such organic defects or infirmities which render the horse "unfit for use and convenience" will constitute a breach of the warranty.⁶⁸ A common cold or a mere temporary and curable injury that existed at the time of sale will not breach the implied warranty of merchantability if the horse is not rendered less fit for its ordinary, reasonable and usual use.⁶⁹ Even more serious conditions such as tendonitis or intermittent claudication⁷⁰ will not breach the implied warranty of merchantability, as long as the condition does not prevent the horse from becoming "creditable if unspectacular"⁷¹ in its usefulness, or as long as rest and recuperation will restore the horse to its usual and reasonable use, whether or not it actually lives up to the buyer's hopes and expectations.⁷²

In some instances a defect may exist and be known to the buyer at the time of the purchase. This generally results in a waiver of the implied warranty of merchantability.⁷³ Although case law is scarce, the outcome may be different where the defect later escalates into a more serious condition. In one case where the buyer knew that the horse had been injured and the injury later led to blindness, the court held that the implied warranty of merchantability was breached because the buyer could not reasonably have anticipated the consequences.⁷⁴ To some extent this case is sui generis, and the realities of equine related com-

⁶⁷ See 78 A. at 446.

⁶⁸ *Id.*

⁶⁹ See *Sessa v. Riegle*, 427 F. Supp. at 770. See also *Kenner v. Harding*, 85 Ill. 264 (1877); *Roberts v. Jenkins*, 21 N.H. 116 (1850).

⁷⁰ "Claudication" is defined as the quality or state of being lame. See WEBSTER'S NEW COLLEGIATE DICTIONARY 153 (7th ed. 1971).

⁷¹ *Sessa v. Riegle*, 427 F. Supp. at 770.

⁷² See note 56 *supra* and accompanying text.

⁷³ See Part V *infra* for a discussion of affirmative defense.

⁷⁴ See *Fisher v. Pollard*, 39 Tenn. (2 Head) 314 (1859). See also Annot., *supra* note 53, at 892.

merce would make it very difficult for a buyer to prevail when he initially waives an apparent defect in the horse which later escalates into a debilitating condition.⁷⁵

The existence of an alteration in a horse's anatomical structure, or conformation, due to disease or accident, will not necessarily constitute a breach of the implied warranty of merchantability, unless there is a showing that the condition will actually diminish the natural usefulness of the animal.⁷⁶ Moreover, a question arises as to the availability of the implied warranty when the defect is known to the buyer or is discoverable by the exercise of reasonable care.⁷⁷

In situations where the merchant knows that the horse is being purchased for the purpose of breeding, the courts will apply the theory of an implied warranty of merchantability: a stallion should be fertile and capable of getting a mare in foal and a mare should be in sound breeding condition.⁷⁸ However, the seller must know or should have known that the buyer intends to use the horse for breeding purposes. Otherwise, the mere sale of a stallion, for example, does not give rise to an implied warranty that the animal is fit for breeding purposes.⁷⁹

Certain other conditions—such as the general unmanageability of a horse, bad habits arising from temperamental characteristics, an unpleasant disposition, and even situations where a horse has the habit of “cribbing” or “crib-biting”—do not

⁷⁵ Cf. *Miron v. Yonkers Raceway, Inc.*, 400 F.2d 112, 118 (2d Cir. 1968) (horse business has its own customs and realities).

⁷⁶ 78 A. at 446. But compare the situation where the purchaser is in the market for an Arabian show horse or, for that matter, any breed of show horse: the existence of even a minor alteration in the horse's normal anatomical structure or conformation could render the horse unmerchantable because the horse is not fit for the ordinary purposes for which it is used—namely, show horse competition. See Part III *infra* for a discussion of implied warranty of fitness for a particular purpose.

⁷⁷ See notes 112-30 *infra* and accompanying text.

⁷⁸ See, e.g., *Pidcock v. Crouch & Son*, 66 S.E. 971, 972 (Ga. Ct. App. 1910). See also *Willig v. Brethauer*, 274 P.2d 202, 203 (Cal. Dist. Ct. App. 1954) (sale of a bull for breeding purposes under a statute that provided a warranty of fitness for a particular purpose); *Trousdale v. Burkhardt*, 224 N.W. 93, 94 (Iowa 1929) (construing the Uniform Sales Act in connection with the sale of cows for breeding).

⁷⁹ See, e.g., *Burnett v. Hensley*, 92 N.W. 678 (Iowa 1902) (sale of mare); *Thompson & McDonald v. Miser*, 92 N.E. 420 (Ohio 1910) (sale of stallion); *Wood v. Ross*, 26 S.W. 148 (Tex. Civ. App. 1894) (sale of stallion).

normally constitute a breach of the implied warranty of merchantability.⁸⁰

Thus, the U.C.C.'s implied warranty of merchantability has significant application to the sale of horses, and the courts will construe some infirmities or defects, and indeed some defects of a serious category, to be within the standards of merchantability contemplated by the U.C.C.

III. THE U.C.C.'S IMPLIED WARRANTY OF FITNESS FOR A PARTICULAR PURPOSE

The second type of implied warranty provided under the U.C.C. is the implied warranty of fitness for a particular purpose, which is set forth in section 2-315:

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

This warranty is more narrow than the implied warranty of merchantability discussed above, and, significantly, it applies to *any* sale of horses, not just instances where the seller is a merchant.⁸¹ Both implied warranties may be applied in the same sale.⁸²

The elements of an implied warranty of fitness are: (1) the horses are to be used for a particular purpose other than their ordinary purpose;⁸³ (2) the seller is aware of the particular purpose; and (3) the buyer relies upon the seller's skill or judgment

⁸⁰ *Andrews v. Peck*, 78 A. at 446; *Hunt v. Gray*, 35 N.J.L. 227, 234 (N.J. 1871). But see Annot., *supra* note 53, at 907, in which cases are cited that construe an implied warranty in the purchase of horses to be used for work or driving that such horses are free from temperamental characteristics. On the question of "cribbers," and horses that are unsound as to eyes or of wind, it is customary at public auctions to announce if a horse has such characteristics or, in the failure of such an announcement, to refund the purchase price. See text accompanying notes 163-65 *infra*.

⁸¹ S. FAVRE & M. LORING, *supra* note 42, at 92; Eftink, *Implied Warranties in Livestock Sales: Case History and Recent Developments*, 4 AGRIC. L.J. 207, 212 (1982-83).

⁸² *Gallagher v. Viking Supply Corp.*, 411 P.2d 814, 816 (Ariz. Ct. App. 1966).

⁸³ See U.C.C. § 2-315 comment 2 (1978).

to select the horses. The first requirement causes some confusion with regard to the sale of horses because a distinction is made between horses used for a "particular purpose" and those to be sold for their "ordinary purpose."⁸⁴ In view of this distinction, just what is the ordinary purpose for a horse that is sold, as distinguished from the particular purpose for which the protection of this section is sought? Comment two to section 2-315 distinguishes a particular purpose from an ordinary purpose by noting that the former contemplates a specific use by the purchaser which is peculiar to his business purposes, whereas the latter envisages the concept of merchantability and points towards the usage that is customarily made of the goods in question.

If a racehorse is sold, its ordinary purpose would be the activity of racing, as opposed to fox hunting, jumping, drafting or trail riding. If, however, the purchaser informs the seller that he wants to use the horse for fox hunting, not racing, and he relies upon the seller's skill or judgment in making the particular selection, the implied warranty of fitness for a particular purpose would be triggered. If later the buyer discovers that the horse is unwilling to jump fences or streams, the warranty of fitness for a particular purpose would be breached.⁸⁵

The initial showing is that the seller "has reason to know" the particular purpose for which the horse is being purchased by the buyer.⁸⁶ This provision does not require scienter, but points to the lesser standard by which a reasonable person under the particular circumstances would have "reason to know."⁸⁷

The key element is that the buyer relies on the seller's skill or judgment that the horse is fit for the particular purpose intended. If the buyer does not in fact rely upon the seller's skill or judgment, the implied warranty of fitness will not be actionable.⁸⁸ The cases have divergent opinions on the reliance issue, and there is no uniformity by which to glean an exact measure of the quantum of reliance necessitated by this statute.

⁸⁴ *Id.*

⁸⁵ S. FAVRE & M. LORING, *supra* note 42, at 93.

⁸⁶ See U.C.C. § 2-315.

⁸⁷ Eftink, *supra* note 81, at 219 n.36.

⁸⁸ *Id.* at 212-14.

On one end of the spectrum the existence of the warranty will be found with little or no regard to the reasonableness of the reliance upon the seller's skill or judgment. For example, in one case the buyer recovered on the theory of implied warranty of fitness despite the fact that he saw the unhealthful condition of the animals prior to the sale, and a prudent person would not have relied upon the seller's skill or judgment that the animals were fit for the particular purpose intended.⁸⁹

In a leading case involving the sale of a standardbred racehorse, the seller stated to the buyer over the telephone that the horse was "sound," "was a good one," and that the buyer would like the horse.⁹⁰ The seller was aware of the buyer's intention to race the horse.⁹¹ The actual purchase, however, was effected by an intermediary whom the court regarded as an agent.⁹² The agent was empowered to deliver payment for the horse and complete the transaction, and he also spoke by telephone to the purchaser, stating that he liked the horse.⁹³ Although the scope of the agent's authority was not clear, the court concluded that the purchaser did not rely upon the seller's skill or judgment because of the supervening reliance upon the agent.⁹⁴

Another aspect of the standard of reliance necessary in order to invoke the implied warranty of fitness can be seen if the seller attempts to diminish his own reliability by injecting uncertainties into the transaction. In a case involving the purchase of cattle for the particular purpose of breeding, the buyer relied upon the seller to select them and the seller stated that the cattle had not been tested for brucellosis.⁹⁵ The buyer nonetheless bought them and subsequently brucellosis broke out.⁹⁶ The buyer sued under the implied warranty of fitness for a particular purpose, and the court held that there was sufficient reliance upon the skill and

⁸⁹ Woodruff v. Clark County Farm Bureau, 286 N.E.2d 188 (Ind. Ct. App. 1972) (sale of flock of chickens).

⁹⁰ Sessa v. Riegler, 427 F. Supp. 760, 763, *aff'd*, 568 F.2d 770 (3d Cir. 1978).

⁹¹ *Id.*

⁹² *Id.* at 762-63.

⁹³ *Id.*

⁹⁴ *Id.* at 770.

⁹⁵ Young and Cooper, Inc. v. Vestring, 521 P.2d 281 (Kan. 1974).

⁹⁶ *Id.* at 286.

judgment of the seller, albeit an unreasonable reliance, to sell animals that were fit for breeding purposes.⁹⁷

An older line of cases, still having significant authority, is loathe to find sufficient reliance, instead applying the doctrine of caveat emptor. Several older cases find that there is no implied warranty of fitness for a particular purpose such as breeding, even though the buyer relied upon the seller's judgment, on the rationale that the seller was in no better position to know the fitness of the animal than was the buyer.⁹⁸ But even the older cases, notwithstanding the difficult standard of reliance imposed, uphold an implied warranty of fitness for a particular purpose where the seller knew that the buyer desired to purchase a horse suitable for breeding purposes.⁹⁹

As with the implied warranty of merchantability, the U.C.C.'s implied warranty of fitness for a particular purpose is also a form of strict liability, and the plaintiff must merely prove that the horses failed to meet the particular standard of fitness called for under the circumstances, along with the other required elements, in order to prove his case.¹⁰⁰

IV. PRELIMINARY REQUIREMENTS TO SUSTAIN A BREACH OF IMPLIED WARRANTY ACTION

Under the U.C.C. there is a requirement that a notice of breach of warranty be given to the seller within a reasonable time after the buyer discovers or should have discovered the defect that constitutes the breach.¹⁰¹ This notice requirement is not to be confused with the separate U.C.C. principle that permits the buyer to reject goods which do not conform to the contract.¹⁰² Rather, the formal notice requirement makes it clear that the buyer's formal acceptance of the horse within the meaning of the U.C.C. does not discharge the seller from liability for damages for breach of an implied warranty, and it contemplates

⁹⁷ *Id.* at 294.

⁹⁸ *See, e.g.*, *Scott v. Renick*, 40 Ky. (1 B. Mon.) 63 (Ky. 1840); *Thompson & McDonald v. Miser*, 92 N.E. 420 (Ohio 1910).

⁹⁹ *Pidcock v. Crouch & Son*, 66 S.E. 971 (Ga. Ct. App. 1910); *Merchants' & M. Savings Bank v. Frazee*, 36 N.E. 378 (Ind. Ct. App. 1894).

¹⁰⁰ 2 N. HARL, *supra* note 37, at § 7.04(1)(b) (1980).

¹⁰¹ *See* U.C.C. §§ 2-607(3)(a), 2-714(1) (1978).

¹⁰² *See* U.C.C. § 2-601 (1978).

that discovery of the defect is likely to occur after the buyer accepts the goods.¹⁰³

The purpose of this notice requirement is twofold—(1) to enable the seller to mitigate damages, correct the defect or take other remedial action and (2) to protect the seller against stale claims.¹⁰⁴ Courts have uniformly held that failure to give notice in a timely fashion will bar the buyer from any remedy.¹⁰⁵ The content of the notice need not be in any particular form, but must be sufficient to inform the seller that the transaction is claimed to involve a breach.¹⁰⁶

Since a horse is “more prone to rapid change in condition and to injury than is an inanimate object,”¹⁰⁷ the common practice is to examine the horse on the day of the sale in an effort to discover whether there are any apparent defects. With racehorses it is customary to have a veterinarian or trainer examine the horse’s legs at the place of sale or at one’s barn later in the day.¹⁰⁸ This custom is very important in determining the time in which the buyer “should have discovered” the defect that constitutes the breach.¹⁰⁹ The implied warranties of merchantability and of fitness for a particular purpose are intended to be applied with respect to the condition of the horse at the time of sale, and not to unsoundness that develops in the future unless it is a logical progression of a disease.¹¹⁰ In cases where the breach is claimed on account of an injury—for example, to a splint bone or other delicate bones—the failure to detect the defect on the day of sale will give rise to the defense that the horse injured itself in its barn after delivery.¹¹¹

¹⁰³ See U.C.C. § 2-607(3)(a); 67 AM. JUR. 2D *Sales* § 728 (1973). “Acceptance” of goods under the U.C.C. means that the buyer takes the particular goods as his own, whether by words, action or silence, fails to make an effective rejection of the goods within a reasonable time after their delivery or tender, or does any act inconsistent with the seller’s ownership. See U.C.C. § 2-606(1) (1978).

¹⁰⁴ *Cotner v. International Harvester Co.*, 545 S.W.2d 627, 630 (Ark. 1977).

¹⁰⁵ See Annot., 17 A.L.R.3d 1010 (1968). See also U.C.C. § 2-607(3)(a).

¹⁰⁶ See U.C.C. § 2-607 comment 4.

¹⁰⁷ *Miron v. Yonkers Raceway, Inc.*, 400 F.2d 112, 118 (2d Cir. 1968).

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ See *Andrews v. Peck*, 78 A. 445, 445 (Conn. 1910).

¹¹¹ See 400 F.2d at 118.

V. AFFIRMATIVE DEFENSES: DISCLAIMERS, WAIVERS AND EXCLUSIONS

Once the existence of a breach of implied warranty of merchantability or implied warranty of fitness for a particular purpose is established, there are several affirmative defenses that can be interposed by the seller. Particularly, the defenses of disclaimer of warranty,¹¹² waivers, and exclusions are commonly invoked.

Under the U.C.C., a disclaimer is a modification, limitation or exclusion of an implied warranty, and it can be made by the seller by following certain provisions in section 2-316.¹¹³ In order

¹¹² For example, the Keeneland Sale Catalog states: "*THERE IS NO WARRANTY IMPLIED BY AUCTIONEER OR CONSIGNOR EXCEPT AS SET FORTH HEREIN, AS TO THE MERCHANTABILITY OR FITNESS FOR ANY PARTICULAR PURPOSE OF ANY ANIMAL OFFERED IN THIS SALE.*" Keeneland Selected Yearling Sale Catalog, Conditions of Sale 10 (July 23-24, 1984). This language closely follows the U.C.C.'s structure in setting forth the language required to effectively negate an implied warranty. See note 113 *infra* for the text of U.C.C. § 2-316.

¹¹³ U.C.C. § 2-316 provides:

(1) Words or conduct relevant to the creation of an express warranty and words or conduct tending to negate or limit warranty shall be construed wherever reasonable as consistent with each other; but subject to the provisions of this Article on parol or extrinsic evidence (Section 2-202) negation or limitation is inoperative to the extent that such construction is unreasonable.

(2) Subject to subsection (3), to exclude or modify the implied warranty of merchantability or any part of it the language must mention merchantability and in case of a writing must be conspicuous, and to exclude or modify any implied warranty of fitness the exclusion must be by a writing and conspicuous. Language to exclude all implied warranties of fitness is sufficient if it states, for example, that "There are no warranties which extend beyond the description of the face hereof."

(3) Notwithstanding subsection (2)

(a) unless the circumstances indicate otherwise, all implied warranties are excluded by expressions like "as is", "with all faults" or other language which in common understanding calls the buyer's attention to the exclusion of warranties and makes plain that there is no implied warranty; and

(b) when the buyer before entering into the contract has examined the goods or the sample or model as fully as he desired or has refused to examine the goods there is no implied warranty with regard to defects which an examination ought in the circumstances to have revealed to him; and

(c) an implied warranty can also be excluded or modified by course of dealing or course of performance or usage of trade.

(4) Remedies for breach of warranty can be limited in accordance with the provisions of this Article on liquidation or limitation of damages and on contractual modification of remedy (Sections 2-718 and 2-719).

to effectively negate the implied warranty of merchantability, the seller must use the word "merchantability" either orally or in the written contract, and its use "must be conspicuous."¹¹⁴ An exclusion or modification of the implied warranty of fitness for a particular purpose, on the other hand, must in all cases be in writing.¹¹⁵

Generally, the courts disfavor written or oral disclaimers.¹¹⁶ The Third Circuit has gone so far as to suggest, albeit in dictum, that disclaimers should be per se invalid when diseased animals are sold.¹¹⁷ Other courts have tried to negate the effectiveness of disclaimers by requiring that, for a disclaimer to be effective, it must be given to the buyer early in the sales transaction, and certainly not so late as the time of delivery.¹¹⁸

A disclaimer can be designed to limit the buyer's remedy in the event of a breach of warranty. For example, the buyer's remedy could be limited to replacement of the horse or credit toward the purchase of another one. In a leading case involving the sale of a horse, the court held valid a disclaimer that contractually limited the buyer's remedy to the return of the horse in exchange for credit on another, higher-priced horse.¹¹⁹ The U.C.C. itself permits modification, short of outright exclusion, of the implied warranty.¹²⁰

Another defense specifically provided for in the U.C.C. is based upon the buyer's inspection of the horse.¹²¹ As a general rule, if the buyer inspects the horse prior to the sale or delivery, the implied warranties are effectively waived with regard to those defects that a reasonable inspection would reveal, whether or not the defects are actually discovered by the buyer.¹²²

¹¹⁴ U.C.C. § 2-316(2). For a definition of "conspicuous," see *Anderson v. Farmers Hybrid Cos.*, 408 N.E.2d 1194 (Ill. App. Ct. 1980).

¹¹⁵ U.C.C. § 2-316(2).

¹¹⁶ See *Eftink*, *supra* note 81, at 214.

¹¹⁷ *Flases v. Montgomery Ward & Co.*, 377 F.2d 846, 850 (3d Cir. 1967).

¹¹⁸ See *Vorthman v. Myers*, 296 N.W.2d 772, 772 (Iowa 1980) (no disclaimer made to pig buyer until delivery of all 511 animals, all of which were diseased and some dead).

¹¹⁹ See *Calloway v. Manion*, 572 F.2d 1033 (5th Cir. 1978) (plaintiff refused to inspect lame mare).

¹²⁰ See U.C.C. § 2-316(2).

¹²¹ See U.C.C. § 2-316(3)(b).

¹²² See *id.* See also *Holm v. Hansen*, 248 N.W.2d 503, 504 (Iowa 1976).

This is especially true if the seller demands that the buyer inspect the horse prior to the sale. For example, in a case where the merchant's demand that the buyer inspect the horse was refused even though the merchant had pointed out that there was some degree of swelling around the hock of the horse, and notwithstanding the merchant's affirmation that the swelling was "not a problem," the court denied recovery under an implied warranty of merchantability.¹²³ The court said that the buyer's refusal to inspect, after the merchant's insistence that he do so, "was sufficient to bar recovery for any defect which an examination ought to have revealed."¹²⁴

In another noteworthy case, the merchant told the buyer that the horse was afflicted with heaves and, although getting better, was not fit for sale.¹²⁵ The implied warranty of merchantability was held to have been waived when the buyer subsequently thoroughly tested the animal before the sale.¹²⁶

Moreover, even where the merchant does not expressly ask the buyer to inspect the horse, the implied warranty of merchantability or of fitness for a particular purpose does not protect against discoverable defects in sales where it is customary for the buyer to inspect the horse prior to the sale.¹²⁷ This is the case in many horse sales, especially those at auctions.¹²⁸

A different problem arises where, at the time of the sale, the horse has a latent and unknown disease which is not discoverable by ordinary inspection. The modern cases on this point differ from the older ones and hold that, in sales where the condition of unsoundness is unknown to the buyer and cannot be discovered by the exercise of reasonable care, the implied warranty will protect the buyer against defects in the animal.¹²⁹ Addition-

¹²³ See 572 F.2d at 1035.

¹²⁴ *Id.*

¹²⁵ See *Overhulser v. Peacock*, 128 S.W. 526, 527 (Mo. Ct. App. 1910).

¹²⁶ *Id.* at 528.

¹²⁷ *Miron v. Yonkers Raceway, Inc.*, 400 F.2d 112, 112 (2d Cir. 1968).

¹²⁸ *Id.*

¹²⁹ See, e.g., *Vlases v. Montgomery Ward & Co.*, 377 F.2d at 848-49. A line of earlier cases held that where a latent and unknown disease existed at the time of the sale, and was not discoverable by ordinary inspection, there would be no implied warranty of merchantability. See, e.g., *Puls v. Hornbeck*, 103 P. 665, 666 (Okla. 1909) (sale of diseased cattle); *King v. Gaver*, 3 A.2d 863, 865 (Md. 1939) (sale of heifers with Bang's disease). See also *Court v. Snyder*, 28 N.E. 718, 719 (Ind. Ct. App. 1891). *Court* involved the sale of a horse at auction where the court stated: "While the rule [of caveat emptor] may in individual cases result in hardships, and give designing men an apparent advantage over the unwary, its opposite would lead to endless litigation and injustice." *Id.* at 719.

ally, if the merchant conceals a condition of unsoundness that would otherwise be detected upon reasonable inspection, the implied warranty will prevail because the merchant's wrongdoing prevented the buyer from observing the defect.¹³⁰

Thus, although courts may generally disfavor disclaimers, and the U.C.C. imposes fairly strict standards in order to create a disclaimer, the law will bar recovery when the elements of the disclaimer are met. Moreover, courts will consider customary trade practices and will bar or limit a buyer's remedy where a defect should have been discovered under the particular facts of a sale.

VI. LEGISLATIVE CHANGES AFFECTING APPLICATION OF THE U.C.C.'S IMPLIED WARRANTIES IN THE SALE OF HORSES

In several states where the livestock industry is important to the state's economy, laws have been enacted to limit the application of the implied warranty of merchantability in the sale of livestock, including horses. At least thirteen states have enacted laws that eliminate or modify, in whole or in part, all implied warranties in the sale of livestock.¹³¹

In Iowa the law eliminates all implied warranties under sections 2-314 and 2-315 in the sale of horses and other livestock if certain specified information is disclosed to the prospective buyer or his agent prior to the sale, and if the information is "confirmed in writing at or before the time of acceptance of the livestock when confirmation is requested by the buyer or the buyer's agent."¹³² The information to be disclosed must state that "the animals to be sold have been inspected in accordance with existing federal and state animal health regulations and

¹³⁰ *E.g.*, *Kenner v. Harding*, 85 Ill. 264, 264 (Ill. 1877).

¹³¹ The 13 state enactments are as follows: CAL. AGRIC. CODE § 18501 (West 1968); FLA. STAT. ANN. §§ 672.2-316(3)(d) (West 1983); GA. CODE ANN. § 109A-2-316(3)(d) (1982); IND. CODE ANN. § 26-1-2-316(3)(d) (Burns 1984); IOWA CODE § 554.2316 (West 1967); KRS § 355.2-316(3)(d) (1984); MO. ANN. STAT. § 400.2-316(5) (Vernon 1980); MONT. REV. CODE ANN. § 30-2-316(1)(3)(d) (1983); NEB. REV. STAT. § 2-316(3)(d) (1980 Cum. Supp.); N.D. CENT. CODE § 41-02-33(3)(c) (1983); OR. REV. STAT. § 72.3160(3)(d) (1981); S.D. COMP. L. ANN. § 57A-2-316.1 (1982); TEX. BUS. & COM. CODE ANN. § 2.316(f) (Vernon 1984 & Supp. 1985).

¹³² *See* IOWA CODE § 554.2316.

found apparently free from any infectious, contagious or communicable disease."¹³³

In the most far-reaching state enactment, Missouri repealed the section of Article Two that deals with the exclusion and modification of warranties.¹³⁴ Unless there is an affirmative written provision to the contrary contained in the sales contract, the statute completely absolves a seller of livestock from liability for damages for breach of the implied warranty of either merchantability or fitness for a particular purpose.¹³⁵

Among the other states, the law in Nebraska simply provides that there is no implied warranty that certain specified animals—cattle, hogs and sheep—are free from disease at the time of sale, but apparently horses are not subject to the limitations contained in this law.¹³⁶ Texas has a provision which states that the "implied warranties of merchantability and fitness do not apply to the sale or barter of livestock or its unborn young."¹³⁷ In California the legislature has modified the U.C.C.'s implied warranty of fitness for a particular purpose by providing that, in the absence of an express warranty, the mere sale of livestock does not imply a warranty "for any particular purpose."¹³⁸

Because the enactments in the various states contain widely dissimilar provisions, it is necessary to check local law as it pertains to individual horse transactions.

VII. THE NEED FOR EXPRESS WARRANTIES IN THE SALE OF HORSES

The inevitable conclusion is that in many jurisdictions the U.C.C. implied warranties of merchantability and fitness for a particular purpose will have limited application or will be difficult to invoke. This is particularly so both with regard to proving merchant status of the seller when seeking recovery under an implied warranty of merchantability and with regard to proving the requisite quantum of reliance and the particular purpose necessary to demonstrate an implied warranty of fitness for a

¹³³ *Id.*

¹³⁴ See MO. ANN. STAT. § 400.2-316 (1980).

¹³⁵ See *id.*

¹³⁶ NEB. REV. STAT. § 2.316(3)(d) (Cum. Supp. 1980).

¹³⁷ TEX. BUS. & COM. CODE ANN. § 2.316(f).

¹³⁸ See CAL. AGRIC. CODE § 18501.

particular purpose. As a result—in the sale, barter or exchange of horses—it is a good practice for buyers to obtain express warranties from the seller in a written sales contract.

A warranty is “express” where the seller makes representations or promises that the horse sold possesses certain desirable characteristics and the buyer purchases the horse in reliance thereon.¹³⁹ The seller’s representations in an express warranty may be in any degree of formality, from casual conversation—which is to be distinguished from sales talk or “puffing”—to written warranties.¹⁴⁰

Many cases have dealt with oral representations that were deemed to constitute express warranties in the sale of horses, but oral statements of the same tenor receive varying treatment depending on the surrounding circumstances and the predilections of the particular jurisdiction. In *Miron v. Yonkers Raceway*,¹⁴¹ an express warranty was said to exist because, during a lull in the bidding, the auctioneer announced, “[This horse] is 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.”¹⁴² The auction catalog’s ‘Terms and Conditions of Sale’ provided, inter alia: that unless otherwise expressly announced at the time of sale, there is no guarantee of any kind as to the soundness or condition or other quality of any horse sold in this Sale.¹⁴³ Consequently, the court held the auctioneer’s statement to be a warranty of soundness.¹⁴⁴

In *Norton v. Lindsay*¹⁴⁵ the seller stated that the horse was “sound” and that the horse had been “heel nerved,” as distinguished from “high nerved.”¹⁴⁶ When the track veterinarian later disqualified the horse from racing because it had been “high nerved,” the buyer sued for breach of express warranty of

¹³⁹ See *Miron v. Yonkers Raceway, Inc.*, 400 F.2d 112, 114 (2d Cir. 1968); *Norton v. Lindsay*, 350 F.2d 46, 47 (10th Cir. 1965).

¹⁴⁰ See 400 F.2d at 114; 350 F.2d at 48-49.

¹⁴¹ 400 F.2d at 112.

¹⁴² *Id.* at 114.

¹⁴³ See *id.* Although an express warranty was found to exist, the purchaser failed to meet his burden of proving breach of the warranty. *Id.* at 116.

¹⁴⁴ *Id.* at 116.

¹⁴⁵ 350 F.2d 46.

¹⁴⁶ *Id.* at 47. The term “high nerved” refers to an operation which is performed upon a horse, severing the main nerve before it enters the horse’s foot, which can disqualify a horse from racing in many states. *Id.*

soundness and prevailed on a motion for summary judgment. The court, in construing Colorado's Uniform Sales Act definition of express warranty, found merit in the buyer's contention that no special form of words is necessary in order to constitute a warranty and held that the representation that the horse was "sound" was an express warranty that had been breached.¹⁴⁷ The court further noted that the warranty could be invoked notwithstanding the fact that the buyer's trainer had thoroughly inspected the horse prior to the sale and had not detected the defect.¹⁴⁸ The court stated that the defect was not ascertainable by a careful inspection and that "[i]nvestigation is compatible with the giving of an express warranty. Only where the buyer clearly relies only upon his own investigation and waives the warranty will it be rendered inoperative."¹⁴⁹

Many older cases have dealt with the question of express warranties and have construed a wide range of oral representations to constitute an express warranty of soundness. There is no apparent uniformity among the older cases, some of which hold for strict standards while others find an express warranty in the weakest of circumstances. Where a seller had promised that the horse was "sound as a dollar," the court found breach of an express oral warranty when the horse turned out to be lame.¹⁵⁰ Similarly, where a seller promised that a horse was "solid and sound" in response to the buyer's statement that he "did not know anything at all about a horse and that he did not want [the seller] to make a mean deal with him," the court found an express warranty of soundness.¹⁵¹

On the other hand, the statement that a horse "was solid and sound and would work any place" was held not to constitute an express warranty.¹⁵² The statement that "[t]his mare is sound and all right and a good worker double" was also found not to be an express warranty.¹⁵³

¹⁴⁷ See *id.* at 48-49.

¹⁴⁸ See *id.* at 49.

¹⁴⁹ *Id.*

¹⁵⁰ See *Horn v. Buck*, 48 Md. 358, 358, 371 (1878).

¹⁵¹ See *Flood v. Yeager*, 52 Pa. Super. 637, 638-39 (1912).

¹⁵² See *Wilkinson v. Stettler*, 46 Pa. Super. 407, 408 (1911).

¹⁵³ *Walker v. Kirk*, 72 Pa. Super. 534, 535 (1919).

Express warranties can be particularly important when a horse is purchased with a particular purpose in mind. For example, where a horse was purchased for jumping competition, an express warranty was made by the seller's statement that the horse—which was later found to be congenitally lame—would make “a top junior jumper or junior hunter.”¹⁵⁴ Similarly, where a horse was purchased with a view toward entering it into show competitions, an express warranty was found from the seller's general comments that the horse was clever, well-trained, sound, and a fine horse, worth the money.¹⁵⁵ The court noted that in creating an express warranty the word “warrant” need not be used, but that expressions and affirmations made by the seller during the time of sale can amount to a warranty.¹⁵⁶ Once a warranty is found to have been given, it is breached if “at the time of sale the horse has any disease, which either actually does diminish the natural usefulness of the animal, so as to make him less capable of work of any description, or which in its ordinary progress will diminish the natural usefulness of the animal.”¹⁵⁷

In a case where a buyer purchased a bull for the purpose of breeding to registered cows and the bull later produced only one calf out of twenty breedings, the court found an express warranty in the seller's assertions that the bull was “one hundred percent sound” and “[y]ou fellows don't have anything to worry about; this bull is a good settler; a bull like this is guaranteed to be a good breeder.”¹⁵⁸ However, in another case involving the sale of Holstein cattle for breeding purposes, the court found that certain language used by the seller was “trade talk of the conventional and permissible type and cannot be expanded into a warranty.”¹⁵⁹ In that case, the seller advised the buyer to “‘buy this bull and keep him’ for breeding purposes; that he would be a wonderful asset and would put him ‘on the map,’ ” and that the relatives of the bull had great records and his sire was the “greatest living dairy bull.”¹⁶⁰

¹⁵⁴ See *Brogie v. MacKay-Smith*, 541 F.2d 453, 454 (4th Cir. 1976).

¹⁵⁵ See *O'Connell v. Kennedy*, 101 N.E.2d 892, 894 (Mass. 1951).

¹⁵⁶ *Id.*

¹⁵⁷ *Id.* (quoting *Kiddell v. Burnard*, 9 M. & W. 666, 669-70 (1841)).

¹⁵⁸ See *Adrian v. Elmer*, 284 P.2d 599, 602 (Kan. 1955).

¹⁵⁹ See *Frederickson v. Hackney*, 198 N.W. 806, 806 (Minn. 1924).

¹⁶⁰ *Id.*

As with implied warranties, an express warranty can be subject to disclaimers under certain circumstances.¹⁶¹ Courts are called upon to construe disclaimers in contract language and in some instances under local law can reject such clauses as being “unconscionable,” particularly if there is an attempt to limit damages to the amount of the purchase price in the case of diseased animals.¹⁶²

One final area of concern with regard to express warranties involves auction sale catalog descriptions. Generally, a horse may be returned for a refund of the purchase price if it is described at the time of sale as a colt, but at such time is a ridgeling or gelding, or if it is described as a gelding, but is in fact a colt or ridgeling.¹⁶³ Disputes have arisen over whether a horse sold at auction was a colt or a ridgeling.¹⁶⁴

A related issue involves the sale of broodmares described as being “in foal,” or as “*barren* . . . and in sound breeding condition.” These descriptions constitute express warranties the breach of which entitles the purchaser to a refund.¹⁶⁵ In a leading case, *Keck v. Wacker*,¹⁶⁶ the court held that where an auction sale catalog represented a broodmare as “barren,” the sale can be rescinded if, in fact, the broodmare had been bred and had conceived but aborted its foal.¹⁶⁷ The court noted that “[i]t is customary for buyers to rely entirely upon the catalog data when purchasing a horse at these auctions.”¹⁶⁸ The court defined a “slipped” broodmare as one that having been “bred, conceived and then aborts the foal.”¹⁶⁹ The broodmare must be listed

¹⁶¹ See U.C.C. § 2-316(1).

¹⁶² See, e.g., *Select Pork, Inc. v. Babcock Swine, Inc.*, 640 F.2d 147, 149 (8th Cir. 1981) (sale of hogs contract that contained limitation of damages clause, limiting any remedy for breach to the amount of the purchase, void because “unconscionable”).

¹⁶³ See, e.g., Keeneland, *supra* note 112, ¶ Fifth, at 12.

¹⁶⁴ Hollingsworth, *Sales, and Accountability*, THE BLOOD-HORSE 943 (1984). A “ridgeling” is “[a] male horse in which one or both testes have failed to descend into the scrotum; a cryptorchid.” *STEDMAN'S MEDICAL DICTIONARY* 1239 (5th Lawyers' Ed. 1982). If the testicles fail to descend normally, a relatively common condition in male horses, the horse may be rendered sterile; also nervousness, irritability and an increased libido are commonly exhibited. Hollingsworth, *supra*, at 945.

¹⁶⁵ See Keeneland, *supra* note 112, at ¶ Sixth. See also Hollingsworth, *supra* note 164, at 943-46.

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

¹⁶⁷ *Id.* at 1383.

¹⁶⁸ *Id.* at 1380.

¹⁶⁹ *Id.* at 1381.

accordingly in the catalog since the value of such a horse would be significantly less than if the horse were listed as "barren," which the court defined as "bred and did not conceive."¹⁷⁰

¹⁷⁰ *Id.* at 1381-82.

This "slipped"/"barren" distinction has received additional attention in a precedent-setting trial court decision, *Chernick v. Fasig-Tipton Kentucky*, No. 83-CI-1365 (Fayette Co., Ky., Cir. Ct. Apr. 5, 1984). In that case the sellers consigned a broodmare to Fasig-Tipton Kentucky, a well-known auctioneer, and a dispute arose after the sale concerning whether the mare was in sound breeding condition as represented in the veterinarian certificate provided by the consignor. A separate issue in the case was whether the consignor and the sales company had misrepresented the produce record of the horse in several respects. The sellers, in executing the sales company's form consignment contract, reported that the mare had "slipped" in a previous breeding season, whereas in fact the horse had slipped *twins*, which is a significant distinction, and that at the time of sale the mare was "barren," whereas in fact she had just slipped again within a few weeks prior to the sale.

After the fall of the hammer the purchaser authorized a veterinarian to examine the mare, and the horse was reported to be unsound. The buyer declined to accept the animal because it was not in the condition warranted. The consignor then requested the sales company to appoint another veterinarian to examine the mare. This latter examination resulted in a report which, according to the court, supported the initial veterinarian's finding of unsoundness. Then the sales company appointed a referee veterinarian who reported that the mare was in a normal condition. The court severely criticized the sales company for appointing a referee veterinarian to examine the mare after the two other veterinarians found the horse to be unsound, and the court said that the referee veterinarian's testimony regarding his examination and his report were "incredible and without probative value." *Id.* slip op. at 12. Moreover, the court held that the sales company would be liable for the negligent examination of the horse by the veterinarian it had appointed and that the company had the responsibility "of seeing that those veterinarians who are appointed are fully qualified and understand the nature and purpose of the examination to be made by them." *Id.* slip op. at 13-14.

The court also said that it is the legislative public policy in the Commonwealth of Kentucky to foster and to encourage the thoroughbred horse industry within the Commonwealth, and that Fasig-Tipton Kentucky, along with "the few other major thoroughbred horse auction companies, are affected with a public interest and therefore should be held to a higher standard of honesty, integrity and performance than an ordinary private corporation." *Id.* slip op. at 22-23 (citing KRS § 230.215 (1982)). The court said that it was "the duty of . . . Fasig-Tipton . . . to void the sale and declare the mare to be the property of the seller. [Fasig-Tipton]'s failure to do so constituted a breach of fiduciary duty and was negligence which clearly caused injury to the buyer and the buyer is entitled to recover its damages caused by that injury." *Id.* slip op. at 16.

On the question of the inaccurate and incomplete produce record, the court said that the sellers, although relative novices in the thoroughbred horse breeding business, had sufficient knowledge and experience to recognize the great importance of a full disclosure of all facts regarding the produce record of mares offered for sale as breeding stock. . . .

It is clear from the evidence that [the sellers] knew the significance of a mare conceiving twins. They knew the fact [the mare] has aborted twins

As can be gleaned from the above discussion on express warranties and auction sales, some statements are capable of specific legal interpretation and qualify for express warranties, while many other statements lie in a gray area between "trade talk" and clear warranties, and there is want of uniformity in interpretation. In the final analysis the best form of an express warranty is that which is written into the sales contract and is clear and precise in stating the specific qualities of soundness that are intended to be warranted.

CONCLUSION

The foregoing discussion is intended to present some of the salient aspects that circumscribe the U.C.C.'s implied warranties of merchantability and fitness for a particular purpose in connection with the sale of horses. Despite the conflict of authorities in interpreting the U.C.C.'s implied warranties, and notwithstanding the curtailment of these warranties by legislation in a number of states, there is general agreement that the implied warranties can and do serve to preserve integrity and fair dealing in the sale of horses. The specific discussions concerning the implied warranties in this Article are intended not only for legal study, but also as checkpoints for planning both complex and

would depreciate her value to a greater extent than if she had aborted a single foal.

Id. slip op. at 17. The court also stated that the sellers had a duty under the consignment contract to review the catalogue and report any inaccuracies or omissions which might be material: "It is customary for buyers in Kentucky to rely upon the accuracy of the sales catalogue together with the announcements made at sale and honesty and integrity of the thoroughbred industry in Kentucky will suffer unless such reliance is justified."

Id. slip op. at 19. In addition, the court noted that, although the seller is clearly responsible for the accuracy of the information provided in the catalogue, the sales company has the duty to exercise ordinary care to see that its catalogue and announcements are accurate. *Id.* slip op. at 23.

The court assessed punitive damages against the sellers in addition to ordinary compensatory damages, for knowingly misrepresenting the produce record of the mare catalogued for sale and for knowingly offering a mare unsound for breeding purposes at public auction with a warranty as to her soundness for breeding. *Id.* slip op. at 19-20.

Finally, there is dictum in the case indicating that the catalogue sales condition time limitations for buyer rejection of a purchase—48 hours or prior to the horse leaving the sales grounds—would be unreasonable and could not be interposed as a defense where there is evidence of fraud and misrepresentation, and that the "purchaser would be entitled to the remedies provided by the [U.C.C.] upon the giving of reasonable notice, which was given in this case." *Id.* slip op. at 22.

simple sales transactions for buyers and sellers of horses so that uncertainties in today's widespread commerce in horses can be minimized and clarified.