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Saddled With a Lame Horse? Why State Consumer Protection Laws Can Be the Best Protection for Duped Horse Purchasers

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SADDLED WITH A LAME HORSE? WHY STATE CONSUMER PROTECTION LAWS CAN BE THE BEST PROTECTION FOR DUPED HORSE PURCHASERS

Abstract: Many first-time horse purchasers have little experience with the equine industry and are thus vulnerable to the use of deceptive and unfair practices by the more knowledgeable seller. In situations where inexperienced horse purchasers are duped into buying ill or otherwise defective horses, there are two potential claims that purchasers can make for relief: U.C.C. claims or state consumer protection act claims ("CPAs"). Because courts in U.C.C. claims cases tend to focus on the contractual relationship between the parties, inexperienced horse purchasers' relief through the U.C.C. is often limited. Indeed, the goal of the U.C.C. is to regulate relationships between buyers and sellers and to encourage thier freedom to contract. The goal of CPAs, on the other hand, is to address unfair and deceptive trade practices. This Note will argue that duped purchasers should always file CPA claims rather than U.C.C. claims against unscrupulous horse sellers because of the greater protection and broader relief CPAs have to offer.

Introduction

Contrary to popular opinion, not all horse owners are wealthy businesspeople with experience in the equine industry.[1] In reality, many horse purchasers are first-time buyers with little or no such experience.[2] Often, they seek a reliable horse for recreation or occasional showing, not a million-dollar racehorse or grand prix winner.[3] Novice horse purchasers typically do not know how to select a suitable horse and instead rely on a horse seller's advice when making a purchase.[4] Serious legal problems can arise when unscrupulous horse sellers take advantage of these inexperienced purchasers by selling them defective horses.[5]

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[1] *See* Dennis Tilton, *Fraud in the Sale of a Show Horse*, 39 Am. Jur. Trials 527, 541 (1989).

[2] *Id.*

[3] *See id.* at 540.

[4] *Id.* at 541.

[5] *See id.*

Consider the following hypothetical: Abigail Miller is a ten-year-old girl with dreams of one day becoming a famous Olympic equestrienne.[6] Her parents have no prior experience with horses but encourage her dream by funding riding lessons twice a week at a local stable. For Abigail's eleventh birthday, her parents decide to buy her a show pony that requires little training and can win at jumping events. The Millers learn about a local stable from its advertisement in a newspaper stating that it specializes in selling show jumping ponies for children of all riding capabilities.

Abigail and her parents go to the stable and see Buttercup—an adorable palomino pony—and instantly fall in love with him. When Mr. Johnson, the owner of the stable, tells the Millers that Buttercup is the son of two very successful show ponies and is an impressive jumper, Abigail's parents know they have found the perfect pony and buy him for $10,000.

Soon after the pony arrives at the Millers' stable, however, he becomes lame and unrideable. The Millers' veterinarian informs them that Buttercup has weak tendons and should not be used for jumping but could be a nice trail horse. Devastated, the Millers attempt to return Buttercup to the stable. Mr. Johnson acknowledges that he was aware of the pony's tendon problems, but refuses to return their money, showing the Millers a copy of the contract they signed. The contract contains several bold-typed disclaimers against all warranties, stating that the pony was sold "as is." In addition, Mr. Johnson denies making any guarantees about the pony's capabilities and argues that he did not say anything false—it is literally true that Buttercup is an impressive jumper.

Horse purchasers in the Millers' situation, stuck with an undesirable equine, might have some legal remedies against sellers like Mr. Johnson.[7] Like the Millers, a growing number of horse owners in the United States want to own a successful competitor; yet, many of these people are not active in the equine industry, lack basic horsemanship skills, and do not have the ability to select a prospective champion.[8] These new horse purchasers are likely to rely on sellers' representations and therefore are particularly susceptible to deception and unfair practices throughout an equine sales transaction.[9]

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[6] The author created this fictitious hypothetical.

[7] *See* Tilton, *supra* note 1, at 541.

[8] *See id.*

[9] *See id.*

Crooked horse dealers have existed for hundreds of years, from a time when people used horses for transportation and farming, to the present, when people primarily use horses for recreation and competition.[10] It is not uncommon for an unscrupulous horse seller to take advantage of inexperienced, first-time horse purchasers like the Millers by convincing them to purchase a horse with a latent, undisclosed physical defect that will make the horse unable to meet the purchaser's expectations.[11]

Traditionally, courts applied the doctrine of caveat emptor—let the buyer beware—in equine sales, leaving both experienced and inexperienced purchasers with unwanted, defective horses.[12] Most modern courts find more equitable solutions for purchasers in claims brought under the Uniform Commercial Code ("U.C.C.") or common law.[13] Recently, courts have begun to consider whether state consumer protection acts ("CPAs") apply in equine sale disputes.[14]

Although CPAs often provide a viable cause of action for deceived horse purchasers, practitioners in equine-related disputes typically have avoided analyzing the application of CPAs and instead have focused on claims under the U.C.C.[15] Courts interpreting the U.C.C., however, fail to protect unsophisticated horse purchasers in many situations by focusing on the contractual relationship between purchaser and seller and assuming that both parties are knowledgeable of the equine industry.[16] Courts applying CPAs, on the other hand, protect purchasers more broadly and flexibly than those applying the

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[10] JULIE I. FERSHTMAN, EQUINE LAW & HORSE SENSE 41 (1996).

[11] *See id.*

[12] *See* John Alan Cohan, *The Uniform Commercial Code as Applied to Implied Warranties of "Merchantability" and "Fitness" in the Sale of Horses*, 73 KY. L.J. 665, 681 (1984); Robert S. Miller, *The Sale of Horses and Horse Interests: A Transactional Approach*, 78 KY. L.J. 517, 576 (1989/1990).

[13] *See* Miller, *supra* note 12, at 521–23; *see also* FERSHTMAN, *supra* note 10, at 45 (stating that aggrieved horse purchasers can sue sellers for common-law claims such as breach of contract or fraud). Horse purchasers can also pursue claims under other federal and state statutes, such as the Magnuson-Moss Warranty Act, which regulates warranties and remedies. 15 U.S.C. §§ 2301–2312 (2000); Miller, *supra* note 12, at 551.

[14] *See, e.g.*, FERSHTMAN, *supra* note 10, at 45 (discussing the potential application of CPAs in such transactions).

[15] *See id.*; *see also* John J. Kropp et al., *Horse Sense and the UCC: The Purchase of Racehorses*, 1 MARQ. SPORTS L.J. 171, 199 (1991) (stating that the possible applicability of state consumer protection statutes should not be overlooked, but because such statutes vary from state to state, it is difficult to determine how they generally impact the equine industry); Miller, *supra* note 12, at 551 (noting that legislative declarations of policies, such as consumer protection acts, have potential importance to equine sales transactions).

[16] *See* Miller, *supra* note 12, at 533 n.117.

U.C.C. by focusing on standards of unfairness and deception, rather than the contractual relationship.[17] Thus, CPAs are more likely to help novice horse purchasers who, like the Millers, unwittingly contract away their rights.[18]

To understand how CPAs can better protect novice horse purchasers than the U.C.C., this Note examines the application of both types of statutes and their available remedies in equine sales transactions.[19] Part I explains the application of the U.C.C. to equine sales transactions and analyzes particular aspects of the U.C.C. that deal with deceived horse purchasers' possible rights and remedies.[20] Part II examines the application of CPAs to equine sales transactions and discusses the rights and remedies CPAs provide deceived horse purchasers.[21] Part III compares how the U.C.C. and CPAs protect horse purchasers and argues that CPAs provide more thorough protection and relief for novice horse purchasers than the U.C.C.[22] This leads to the conclusion that deceived, novice horse purchasers should always consider filing a CPA claim against a deceptive horse seller.[23]

I. The U.C.C. and Its Application to Equine Sales

A. *General Application of the U.C.C. to Equine Sales*

The U.C.C. regulates relationships between purchasers and sellers to encourage freedom of contract and the continued expansion of commercial transactions.[24] Article 2 of the U.C.C., which applies to transactions in goods, is the most relevant article dealing with contractual matters such as horse sales.[25] The U.C.C. characterizes sales of horses and unborn or future foals as transactions in goods.[26] Consequently, the doctrines laid out in Article 2 apply to equine sales.[27]

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[17] *See* Jonathan Sheldon & Carolyn L. Carter, Unfair and Deceptive Acts and Practices 31 (3d ed. 1991).

[18] *See id.*

[19] *See infra* notes 24–261 and accompanying text.

[20] *See infra* notes 24–129 and accompanying text.

[21] *See infra* notes 130–261 and accompanying text.

[22] *See infra* notes 262–329 and accompanying text.

[23] *See infra* note 330 and accompanying text.

[24] U.C.C. § 1-102(2) (2000); *see* Jonathan Sheldon & Carolyn L. Carter, Consumer Warranty Law 52 (1997).

[25] *See* U.C.C. § 2 (2000); Cohan, *supra* note 12, at 666–67. Every state except Louisiana has adopted Article 2 of the U.C.C. Cohan, *supra* note 12, at 665.

[26] Kropp, *supra* note 15, at 174. For example, Vermont's U.C.C. defines "goods" as "all things . . . which are movable at the time of identification to the contract for sale. . . .

One of the most basic of these doctrines is the Statute of Frauds, which requires that contracts for sales of goods in excess of $500 be in writing.[28] Accordingly, a contract for the sale of a horse for more than $500 is enforceable if it is in writing and is signed by the party against whom enforcement is sought.[29] One exception to the Statute of Frauds requirement is if there is a written memorandum confirming the agreement, the transaction is between merchants, and neither party objects in writing to the memorandum in a timely manner.[30] A merchant in the equine industry has, or is perceived to have, knowledge or skills particular to the type of horse he or she is buying or selling.[31] Many people in the equine industry fall into this category.[32] Furthermore, courts will impute merchant status to non-merchants if a broker or knowledgeable friend helps with the purchase, which is a common practice.[33]

Other exceptions to the Statute of Frauds requirement do exist.[34] Among them, section 2-201(3)(c) of the U.C.C. is particularly relevant to equine sales.[35] Under this section, if a party to the transaction has received and accepted either payment or the horse, a court can enforce the contract regardless of a violation of the Statute of Frauds.[36] Thus, even oral agreements, or those in which neither party is a merchant, bind the parties after one performs without the other's

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'Goods' also includes the unborn young of animals . . . ." VT. STAT. ANN. tit. 9A, § 2-105 (1994).

[27] *See* Kropp, *supra* note 15, at 176.

[28] *See* U.C.C. § 2-201(1); Kropp, *supra* note 15, at 176.

[29] U.C.C. § 2-201(1); Kropp, *supra* note 15, at 176; *see, e.g.*, McClure v. Duggan, 674 F. Supp. 211, 218-19 (N.D. Tex. 1987) (concluding that a breach of contract cause of action was unsupportable because the plaintiff, who sued the defendant for failure to sell the plaintiff a racehorse for $600,000, failed to establish that a signed, written memorandum existed; thus, any contract that may have existed was unenforceable because it failed to comply with the Statute of Frauds).

[30] U.C.C. § 2-201(2); Kropp, *supra* note 15, at 176.

[31] Kropp, *supra* note 15, at 176-77 n.31. For example, a court would consider someone who professionally sells Appaloosa western trail horses a merchant of that type of horse but not a merchant of Thoroughbred racehorses, unless he or she also has knowledge particular to the Thoroughbred industry. Cohan, *supra* note 12, at 670.

[32] *See* Cohan, *supra* note 12, at 669. Courts likely would not consider an inexperienced or casual seller of a horse a merchant for the purposes of the implied warranty of merchantability, while a person who buys and sells horses for profit is a merchant for these purposes, whether or not this is his or her first sale. *Id.* at 669-70.

[33] *Id.* at 671.

[34] *See* U.C.C. § 2-201(3); Kropp, *supra* note 15, at 177.

[35] *See* U.C.C. § 2-201(3)(c); Kropp, *supra* note 15, at 177.

[36] *See* U.C.C. § 2-201(3)(c); Kropp, *supra* note 15, at 177.

objection.[37] This is critical in equine sales, which are often completed by a handshake in private verbal negotiations or a nod of the head at a public auction.[38]

A written contract, however, is always preferable in equine sales.[39] The U.C.C. provides that the written contract is the primary source for determining the terms of a sale.[40] Written terms may be explained or supplemented by evidence of consistent additional terms; consequently, evidence of prior or contemporaneous oral agreements between the horse purchaser and seller can be admitted into evidence should a subsequent dispute arise, as long as they do not contradict the written contract.[41] In addition, course of dealing, customs in the equine industry, or course of performance can explain or supplement written terms of a contract.[42] For example, if the parties have dealt with one another during prior equine sales transactions, courts can interpret unclear or disputed terms in light of those prior transactions.[43]

The rules regarding written contracts apply not only to private equine sales but also to public horse auctions.[44] Most auction houses require horse purchasers to sign an acknowledgment of purchase soon after the completion of any sale.[45] Sellers also sign consignment contracts, which make sales contingent upon receipt of final bids.[46] Yet, auction sales of horses differ from private sales in several respects.[47] For example, auctions employ a competitive bidding format, so purchasers and sellers rarely meet.[48] The most significant difference, however, is that an auction company typically establishes the terms of the contract between the parties in its Conditions of Sale, printed in its sales catalog.[49] The Conditions of Sale include the warranties and warranty disclaimer provisions included in the terms and conditions of most purchase contracts.[50]

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[37] Kropp, *supra* note 15, at 177.
[38] *See* Miller, *supra* note 12, at 537.
[39] *See* Kropp, *supra* note 15, at 179.
[40] *See* U.C.C. § 2-202; Kropp, *supra* note 15, at 180.
[41] U.C.C. § 2-202; Kropp, *supra* note 15, at 180–81.
[42] *See* U.C.C. § 2-202(a).
[43] *See id.*; Kropp, *supra* note 15, at 182–83.
[44] *See* Kropp, *supra* note 15, at 177.
[45] Miller, *supra* note 12, at 538.
[46] *Id.*
[47] *See* Kropp, *supra* note 15, at 177–78.
[48] *Id.* at 178.
[49] *Id.*
[50] *Id.*

In private equine sales, however, purchase contracts occasionally do not contain any warranty or disclaimer of warranty provisions.[51] The existence of such warranties is crucial in determining whether an unsatisfied purchaser can obtain relief upon discovering that a horse is unhealthy or unsuitable for the purposes for which it was purchased.[52] Many disputes between purchasers and sellers revolve around whether an express or implied warranty exists, and if so, whether a breach has occurred.[53] Thus, determining whether a duped horse purchaser should file a U.C.C. claim requires an understanding of the available warranties under the U.C.C. and the remedies they provide in equine sales disputes.[54]

B. *Warranties and Remedies for Horse Purchasers Under the U.C.C.*

Upon discovering a defect, unsatisfied horse purchasers have two main methods of relief under the U.C.C.[55] A purchaser can try to rescind a purchase by either rejecting the horse or revoking acceptance of the horse.[56] Rescission by either method requires the seller to return the purchase price to the purchaser in exchange for the return of the defective horse.[57] Alternatively, a purchaser can seek damages for breach of warranty.[58]

Most unsatisfied horse purchasers prefer rescission because they do not want to continue paying for a horse that has failed to meet their expectations.[59] Rescission can be an insufficient remedy, however, because it has severe time constraints and therefore often does not apply.[60] For example, a purchaser can reject a horse for failure to conform to the contract only if the purchaser does so prior to acceptance of the horse and within a reasonable time after the horse's delivery.[61] Once the purchaser accepts the horse, the purchaser can only revoke acceptance within a reasonable time after the purchaser discovers, or should have discovered, the nonconformity.[62]

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[51] *Id.* at 179–80.

[52] *See* Kropp, *supra* note 15, at 184.

[53] *See id.*

[54] *See infra* notes 55–129 and accompanying text.

[55] *See* U.C.C. §§ 2–601(a), 2–608 (2000); Kropp, *supra* note 15, at 196.

[56] *See* U.C.C. §§ 2–601(a), 2–608; Kropp, *supra* note 15, at 196.

[57] *See* U.C.C. § 2–711; Kropp, *supra* note 15, at 196.

[58] *See* U.C.C. § 2–714; Kropp, *supra* note 15, at 196.

[59] Miller, *supra* note 12, at 547.

[60] *See* Kropp, *supra* note 15, at 196–97.

[61] U.C.C. §§ 2–601, 2–602; Kropp, *supra* note 15, at 196.

[62] U.C.C. § 2–608(2); Kropp, *supra* note 15, at 196.

After the time of revocation has passed—usually a very brief window of opportunity[63]—a horse purchaser who learns of a defect can still obtain relief in an action for damages against the seller for breach of express or implied warranties.[64] In pursuing such an action, the purchaser must notify the seller of the defect in a timely manner and must be able to establish the existence and breach of such warranties.[65] This notice allows the seller to mitigate damages or correct the problem and protects the seller from old claims.[66]

To prove that the horse seller created an express warranty, the purchaser must show that the seller promised or represented, either orally or in writing, that the horse possessed certain desired qualities.[67] Such representations are significant because they often induce a purchaser to buy a horse.[68] For example, in 1986, in *Alpert v. Thomas,* the United States District Court for the District of Vermont concluded that the seller created an express warranty that induced the purchaser to buy a stallion for breeding purposes by stating that the farm would conduct a breeding soundness evaluation and by assuring the purchaser that the stallion was "breeding sound."[69] When the stallion failed to impregnate mares, the purchaser successfully revoked acceptance, and the court awarded the purchaser the return of the purchase price already paid plus interest, as well as over $25,000 in expenses incurred in transportation, care, custody, and insurance of the stallion.[70]

Frequently horse sellers unintentionally create express warranties when they make oral statements in connection with the sale of a horse.[71] In such instances, courts must distinguish between mere puffing—exaggerating in an entertaining manner—or trade talk, nei-

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[63] *See* Miron v. Yonkers Raceway, Inc., 400 F.2d 112, 118–19 (2d Cir. 1968) (concluding that the purchaser could not revoke acceptance one day following the purchase of the horse). *But see* Alpert v. Thomas, 643 F. Supp. 1406, 1409, 1412 (D. Vt. 1986) (concluding that the purchaser's revocation of the contract more than one year after the horse purchase was within a reasonable time because the seller had repeatedly assured the purchaser to follow the doctor's "wait-and-see" advice).

[64] Kropp, *supra* note 15, at 197–98; *see* U.C.C. § 2–714.

[65] Kropp, *supra* note 15, at 198; *see* U.C.C. § 2–714.

[66] Cohan, *supra* note 12, at 682. Also to prevent old claims, the statute of limitations imposed by the U.C.C. requires that a party commence a breach of warranty claim within four years after accrual of the cause of action. U.C.C. § 2–725(1).

[67] *See* U.C.C. § 2–313; Cohan, *supra* note 12, at 688.

[68] *See* Miller, *supra* note 12, at 594.

[69] 643 F. Supp. at 1414–15.

[70] *Id.* at 1412, 1420.

[71] Kropp, *supra* note 15, at 184–85.

ther of which creates express warranties, and an affirmation of a fact about the horse, which does create an express warranty.[72] This distinction is subjective and depends on the specific circumstances in each case and the preferences of the court.[73] For example, in 1977, in *Sessa v. Riegle*, the United States District Court for the Eastern District of Pennsylvania found that the seller's statement, "the horse is sound,"[74] spoken to the purchaser during a telephone conversation, constituted an opinion rather than an express warranty.[75] On the other hand, in 1965, in *Norton v. Lindsay*, the United States Court of Appeals for the Tenth Circuit concluded that a statement regarding a horse's soundness was an express warranty because it implied that the horse had no defects that would frustrate the purposes for which the purchaser bought it.[76] Courts frequently determine that predictions about a horse's future are mere puffing because such statements by their nature are purely speculative and therefore cannot create express warranties.[77]

When a seller induces a purchaser to buy a horse by stating or affirming that the horse has certain desirable characteristics that it does not have, and the court does not consider such statements mere puffing, the purchaser can sue for a breach of express warranty.[78] For example, in 1988, in *Travis v. Washington Horse Breeders Ass'n*, the Supreme Court of Washington upheld such a claim.[79] In *Travis*, the sellers assured the purchaser of the horse's health and its fitness for racing and breeding, yet one week after the sale, the purchaser learned that the horse had a heart murmur and thus could not carry a rider.[80] The court concluded that the horse sellers' statement constituted an express warranty that induced the purchaser to buy the horse; there-

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[72] *See id.* at 185.

[73] *See id.*

[74] In the equine industry, a horse with no physical problems related to its performance ability is referred to as "sound," while a horse with problems is "unsound." *See* Cohan, *supra* note 12, at 675.

[75] *See* 427 F. Supp. 760, 765 (E.D. Pa. 1977).

[76] *See* 350 F.2d 46, 49 (10th Cir. 1965).

[77] *See, e.g.*, Frederickson v. Hackney, 198 N.W. 806, 807 (Minn. 1924) (concluding that it was impossible to create an implied warranty regarding an immature bull's future breeding capacity because such a characteristic was impossible to predict).

[78] *See* Kropp, *supra* note 15, at 184.

[79] *See* 759 P.2d 418, 422 (Wash. 1988).

[80] *Id.* at 419.

fore, the court upheld the purchaser's breach of express warranty claim.[81]

In addition to express warranties, three types of implied warranties under the U.C.C. frequently arise in equine sales disputes.[82] The first applicable implied warranty is that the title conveyed is good, its transfer is rightful, and the horse is free of any encumbrance.[83] This warranty is relevant to equine sales because liens and security interests often attach to expensive horses.[84] Also, sellers occasionally sell horses that they do not actually own, and questions of title emerge.[85]

A more commonly disputed implied warranty in equine transactions is the warranty of merchantability.[86] As applied to equine sales, barters, or exchanges, this warranty provides that the purchased horse must conform to its contract description and must be fit for the ordinary purposes for which it is used.[87] Frequently there is a breach of the implied warranty of merchantability in equine sales if the horse has a physical problem making it unsuitable for its intended commercial purpose and therefore unmerchantable.[88]

The implied warranty of merchantability demands strict liability, so courts will hold horse sellers liable regardless of their lack of knowledge or inability to discover the defect upon reasonable inspection.[89] Sellers must be merchants, however, for a warranty of mer-

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[81] *See id.* at 422. The defendant argued that the express warranty had been disclaimed by the Conditions of Sale of the auction, but the court determined that it would be unreasonable to allow a disclaimer for the express warranty in this case. *See id.*

[82] *See* U.C.C. §§ 2-312(1), 2-314, 2-315 (2000); Kropp, *supra* note 15, at 186–87. Implied warranties are not always available to dissatisfied horse purchasers, as many states limit their scope in livestock sales. Cohan, *supra* note 12, at 686; Kropp, *supra* note 15, at 192. These states are: Arkansas, California, Florida, Georgia, Illinois, Indiana, Iowa, Kansas, Kentucky, Michigan, Mississippi, Missouri, Montana, Nebraska, North Dakota, Oklahoma, Oregon, South Dakota, Tennessee, and Texas. *See* Cohan, *supra* note 12, at 686 n.131; Kropp, *supra* note 15, at 192 nn.123–24.

[83] *See* U.C.C. § 2-312(1); Kropp, *supra* note 15, at 186.

[84] Kropp, *supra* note 15, at 186.

[85] *See* Miller, *supra* note 12, at 524.

[86] *See* U.C.C. § 2-314; Kropp, *supra* note 15, at 186–88.

[87] Cohan, *supra* note 12, at 673; *see* U.C.C. § 2-314. When the seller knows that the purchaser wants to use the horse for breeding, courts will find an implied warranty of merchantability that a stallion has the capability of impregnating a mare or that a mare has the capability of giving birth to a live foal. Cohan, *supra* note 12, at 677.

[88] *See* Cohan, *supra* note 12, at 673. Such physical problems include, but are not limited to: "blindness, deafness, one leg being shorter than another, lameness, and infection with a contagious disease." *Id.* at 675. If the horse can be restored to its usual and reasonable use, then a court will not consider it unmerchantable, even if it ultimately cannot meet the purchaser's expectations. *Id.* at 676.

[89] *See id.* at 673.

chantability to apply.[90] Sellers also can modify or exclude this warranty by oral statement or a conspicuous writing that includes the term "merchantability."[91] Moreover, purchasers are deemed to have waived the warranty of merchantability if they know of a defect at the time of purchase.[92]

The third type of implied warranty—guaranteeing fitness for a particular purpose—does not require that the seller be a merchant.[93] To establish a claim for this warranty, a purchaser must demonstrate a seller's awareness that the purchaser bought the horse for a particular purpose other than its ordinary purpose and did so in reliance on the seller's skill and knowledge in choosing an appropriate horse for that particular purpose.[94] The purchaser's reliance on the seller is the most important element in determining whether an implied warranty of fitness for a particular purpose exists.[95] There is, however, no uniform standard of deciding whether the purchaser reasonably relied on the seller.[96] In some cases, courts have found an implied warranty of fitness for a particular purpose even though the purchaser should have recognized the unreasonableness of relying on the seller.[97] In other cases, in which a purchaser could have reasonably relied on a seller's statements but instead mainly relied on statements by the purchaser's own agent, courts have found no such warranty.[98] Finally,

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[90] *Id.* at 667. See *supra* notes 31–33 and accompanying text for a discussion of the term "merchant." For example, in *Alpert v. Thomas*, the United States District Court for the District of Vermont concluded that the sellers were merchants for purposes of the implied warranty of merchantability because they held themselves out "as having knowledge and skills peculiar to the practices and goods involved in the Arabian horse business." 643 F. Supp. at 1415–16.

[91] Cohan, *supra* note 12, at 683–84.

[92] *Id.* at 676.

[93] *Id.* at 678; *see* U.C.C. § 2-315.

[94] Cohan, *supra* note 12, at 678–79; *see* U.C.C. § 2-315. For example, a Thoroughbred used for racing is an ordinary purpose, but a Thoroughbred used for western-style trail riding is a particular purpose. *See* Cohan, *supra* note 12, at 679.

[95] Cohan, *supra* note 12, at 679.

[96] *Id.*

[97] *Id.* at 680; *see, e.g.*, Woodruff v. Clark County Farm Bureau Co-op. Ass'n, 286 N.E.2d 188, 190, 195 (Ind. Ct. App. 1972) (concluding that a material issue of fact existed as to the possible violations of the implied warranty of fitness for a particular purpose when the purchaser relied on the seller's statements of the chickens' good health, despite the purchaser's observations on two occasions that the chickens he intended to purchase were underfed and looked unhealthy).

[98] *See, e.g.*, *Sessa*, 427 F. Supp. at 766, 770 (concluding that the purchaser's reliance on his agent overrode any reasonable reliance on the seller, who knew the purchaser intended to use the horse for racing and told the purchaser that the horse was sound when in fact he was not).

some courts, reasoning that a seller is in no better position to know the fitness of the horse than a purchaser, occasionally will apply the doctrine of caveat emptor rather than find sufficient reliance.[99]

Like the implied warranty of merchantability, the implied warranty of fitness for a particular purpose bears strict liability that a seller can disclaim.[100] For example, in *Travis*, the Supreme Court of Washington declined to find either an implied warranty of merchantability or an implied warranty of fitness for a particular purpose because the Conditions of Sale in the auction catalog effectively disclaimed all implied warranties by making the warranties available for all purchasers to read.[101] Although such disclaimers extinguish implied warranties most directly, other ways to extinguish them do exist.[102] In the equine industry, a purchaser's examination of a horse to the purchaser's satisfaction negates any implied warranties.[103] This examination exception often applies in situations such as auctions, where purchasers or their veterinarians customarily examine horses prior to purchase.[104] For example, in 1989, in *Cohen v. North Ridge Farms, Inc.*, the United States District Court for the Eastern District of Kentucky concluded that the purchaser assumed the risk of loss because he acted in conscious ignorance by electing to purchase the horse without requesting a pre-sale examination, which would have shown the horse's respiratory problems.[105]

Similarly, a refusal of a seller's invitation to examine a horse prior to entering a contract is another type of examination exception.[106] If a purchaser refuses to conduct an examination that would not have revealed the defect at issue, however, a court may still grant the pur-

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99 Cohan, *supra* note 12, at 681.

100 *See id.*

101 759 P.2d at 422; *see also* Cohen v. North Ridge Farms, Inc., 712 F. Supp. 1265, 1269 (E.D. Ky. 1989) (declining to allow the plaintiff's request for rescission because the Conditions of Sale in the auction catalog "put plaintiff on notice that (1) this yearling was sold with no warranty, express or implied, and (2) there was no guarantee as to the 'soundness, condition, wind or other quality' of the yearling, and (3) the yearling was being sold 'as-is' . . . .").

102 *See* Kropp, *supra* note 15, at 194.

103 *Id.*; *see* U.C.C. § 2–316(3)(b) (2000).

104 *See* Cohan, *supra* note 12, at 685.

105 712 F. Supp. at 1274.

106 Cohan, *supra* note 12, at 685; *see* U.C.C. § 2–316(3)(b); *see, e.g.*, Calloway v. Manion, 572 F.2d 1033, 1035 & n.2 (5th Cir. 1978) (finding that the purchaser refused the seller's demand that he inspect the horse prior to the sale and, consequently, that refusal was sufficient to bar recovery for any defect that an examination would have revealed—in this case, the presence of an imperfectly formed ovary).

chaser relief.[107] Moreover, if the seller actively conceals a defect that one could normally observe upon inspection, the implied warranty applies.[108]

In addition to disclaimers and the examination exception, horse sellers can limit potential remedies for purchasers within the contract.[109] A limitation on remedies restricts the purchaser's available remedies even when there could be a valid breach of warranty claim.[110] For example, in 1978, in *Calloway v. Manion*, the United States Court of Appeals for the Fifth Circuit upheld a jury finding that the plaintiff had contractually limited his remedy for a breach of express warranty and thus could not receive relief under Texas's U.C.C.[111] In *Calloway*, the plaintiff and defendant swapped horses and orally agreed that if the mare the plaintiff received in exchange for a gelding[112] was unsatisfactory, his sole remedy would be to return the mare in exchange for a $10,000 credit on another, higher-priced horse.[113] The court rejected the plaintiff's U.C.C. claim, concluding that a jury could reasonably find that the plaintiff's failure to pursue this limited remedy was enough to invalidate the breach of express warranty claim.[114]

Occasionally, courts will find such remedy limitations or disclaimers unconscionable and therefore may not enforce them.[115] A horse purchaser can argue the unconscionability of a contract based on inadequate consideration or unequal bargaining power.[116] In an equine sales transaction, however, courts rarely strike contractual provisions to which both parties have agreed.[117] Courts impute a high level of understanding and sophistication to parties involved in these sales transactions; therefore, they usually find that the parties willingly agreed to all the terms of a contract, even those that may seem unfair.[118]

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[107] Cohan, *supra* note 12, at 685.

[108] *Id.* at 686. A hypothetical example of this active concealment is if, prior to the examination, the seller injects a chronically lame horse with a drug to lessen the visual signs of unsoundness, thereby deceiving the purchaser.

[109] *See* U.C.C. § 2-719(1)(a).

[110] *See Calloway*, 572 F.2d at 1035, 1038.

[111] *See id.*

[112] A gelding is a male horse that has been castrated.

[113] *See* 572 F.2d at 1035, 1037.

[114] *See id.* at 1035, 1038.

[115] *See* Miller, *supra* note 12, at 531.

[116] *See id.* at 529–30.

[117] *See id.* at 530.

[118] *See id.* at 530–31.

When remedies are not limited, and disclaimers do not prevent relief, a successful horse purchaser can receive damages for a breach of warranty.[119] Courts typically calculate damages for breach of express or implied warranties by determining the difference, at the time and place of acceptance, between the value of the horse as is and the value the horse would have had in its warranted condition.[120] Occasionally the purchaser can also receive consequential damages for transportation, insurance, stud fees, care, and training costs.[121] The U.C.C., however, provides no recovery of attorney's fees.[122]

The contract-based remedies available under the U.C.C. reflect the main purposes of the U.C.C., which include simplifying, clarifying, and modernizing the law governing commercial transactions and permitting the continued expansion of commercial practices through custom, usage, and agreement between the parties.[123] These purposes show that the U.C.C. protects the relationship between purchasers and sellers by encouraging freedom of contract.[124] Encouraging freedom of contract, however, fails to protect unsophisticated horse purchasers who unwittingly agree to contracts with unfavorable terms.[125] Consequently, the U.C.C. does not always provide adequate protection for novice horse purchasers.[126]

Whereas state legislatures have enacted the U.C.C. to protect freedom of contract, state legislatures have enacted CPAs to prevent deception and abuses against consumers in the marketplace.[127] Thus, CPAs often provide unsophisticated horse purchasers better remedies

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[119] *See* U.C.C. § 2-714 (2000); Kropp, *supra* note 15, at 197–99.

[120] U.C.C. § 2-714(2); Kropp, *supra* note 15, at 198. *Compare* Cronin v. Bacon, 837 S.W.2d 265, 269–70 (Tex. Ct. App. 1992) (calculating breach of warranty damages based on the difference in value between a prospective foal sired by the stallion to whom the purchaser believed his mare was being bred and the value of a prospective foal sired by the stallion to whom the purchaser's mare actually was bred), *with* Yost v. Millhouse, 373 N.W.2d 826, 830–31 (Minn. Ct. App. 1985) (calculating breach of warranty damages based on minority "out-of-pocket" rule, which measures damages by the difference between what the defrauded person paid and what she received; in this case, because the purchaser eventually sold the horse for fifty dollars less than what she initially paid, the court awarded her only fifty dollars).

[121] Kropp, *supra* note 15, at 198; *see also Alpert*, 643 F. Supp. at 1420 (awarding plaintiff $25,000 in consequential damages for expenses reasonably incurred in transportation, care, custody, and insurance of the horse).

[122] SHELDON & CARTER, *supra* note 24, at 382; *see* U.C.C. §§ 2-701–725.

[123] U.C.C. § 1-102(2).

[124] *See id.*

[125] *See id.*; FERSHTMAN, *supra* note 10, at 41.

[126] *See* U.C.C. § 1-102(2); SHELDON & CARTER, *supra* note 24, at 384.

[127] *See* SHELDON & CARTER, *supra* note 17, at 31.

than the U.C.C.[128] Moreover, novice horse purchasers may find themselves in situations in which the U.C.C. will not protect them, but CPAs will.[129]

II. Consumer Protection Acts and Their Application to Equine Sales

A. *General Application of Consumer Protection Acts to Equine Sales*

Every state has enacted at least one statute to protect consumers from deception and abuse in the marketplace.[130] State legislatures have patterned many of these statutes, applicable to most consumer transactions, including equine sales, after section 5(a)(1) of the Federal Trade Commission Act ("FTCA"), which prohibits unfair or deceptive acts or practices.[131] This Note refers to these state statutes collectively as Consumer Protection Acts ("CPAs").

CPAs, like the FTCA, limit the caveat emptor doctrine by providing flexible and practical state and private remedies for consumers whom sellers deceive or abuse.[132] Serious consumer abuses of almost any form are likely constitute CPA violations because legislatures have passed these statutes to remedy marketplace imbalances, thereby protecting the public.[133] CPAs also protect the public by creating strict penalties against deceptive sellers, such as payment of attorney's fees and punitive, treble, or minimum damage awards for prevailing consumers.[134] In addition, CPAs protect sellers to some degree, as many states require that a consumer planning to file a CPA cause of action send notice or a demand letter to the seller, providing the seller an opportunity to remedy the situation out of court.[135] Legislatures and courts generally read CPAs broadly and flexibly, often prohibiting un-

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[128] See *infra* notes 267–313 and accompanying text for a discussion of how CPAs provide better remedies for unsophisticated horse purchasers than the U.C.C.

[129] See *infra* notes 303–313 and accompanying text for a discussion of when CPAs protect purchasers and the U.C.C. does not.

[130] Sheldon & Carter, *supra* note 17, at 31.

[131] *Id.* at 31; *see* 15 U.S.C. § 45(a)(1) (2000).

[132] Sheldon & Carter, *supra* note 17, at 31; *see* 15 U.S.C. § 45(a)(1).

[133] Sheldon & Carter, *supra* note 17, at 31; *see, e.g.*, Fancher v. Benson, 580 A.2d 51, 53 (Vt. 1990) ("The purpose of the Vermont Consumer Fraud Act is to protect the public and is remedial in nature.").

[134] Sheldon & Carter, *supra* note 17, at 31.

[135] *Id.* at 391. Sellers are also protected by a relatively short statute of limitations period of one or two years, which runs from the time the purchaser knows or should know of the violation. Sheldon & Carter, *supra* note 24, at 385.

fair and deceptive practices generally rather than specifically prohibiting enumerated practices; consequently, CPAs often provide a very useful cause of action in equine sales disputes.[136]

Another benefit of CPA claims in equine sales is that they are not contract claims, so "as is" clauses, remedy limitations, disclaimers of warranties, failure to inspect horses prior to purchase, and other contract defenses do not prevent recovery.[137] Courts will even find an equine sales contract that violates the Statute of Frauds violative of a CPA if the deceptive practices do not relate to the contract itself.[138] For example, in 1987, in *McClure v. Duggan*, the United States District Court for the Northern District of Texas upheld such a claim.[139] In *McClure*, the plaintiff claimed that he orally agreed to buy the defendant's horse for $600,000, but then decided not to buy the horse based on the defendant's statement that it would not pass the veterinary inspection.[140] The plaintiff later learned that the defendant had sold the horse to a different purchaser and that the horse had won $175,000 in a race.[141] The plaintiff sued on several claims, including breach of contract and violation of the state's CPA, the Texas Deceptive Trade Practices Act.[142] The court refused to acknowledge the existence of a contract because the alleged agreement violated the Statute of Frauds.[143] The court found, however, that the defendant's misrepresentation that the horse would not pass the veterinary inspection was separate from the underlying contract.[144] Therefore, the court refused to grant the defendant summary judgment on the CPA claim, concluding that the Statute of Frauds did not insulate him from CPA liability for his alleged fraudulent misrepresentations.[145]

Deceptive acts such as the misrepresentation and fraud in *McClure* are examples of how unsatisfied horse purchasers can prove

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[136] *See* SHELDON & CARTER, *supra* note 17, at 31. For example, Washington's CPA simply provides: "Unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful." WASH. REV. CODE § 19.86.020 (1999).

[137] *See* SHELDON & CARTER, *supra* note 24, at 384.

[138] *See* SHELDON & CARTER, *supra* note 17, at 124.

[139] 674 F. Supp. 211, 224 (N.D. Tex. 1987).

[140] *Id.* at 214.

[141] *Id.* at 215.

[142] *Id.* at 213–14; *see* TEX. BUS. & COM. CODE ANN. § 17 (Vernon 2002).

[143] *McClure*, 674 F. Supp. at 219.

[144] *Id.* at 224.

[145] *Id.*

CPA violations.[146] Sellers often violate CPAs if they mislead consumers in any way and at any point during a sales transaction.[147] In determining whether a seller misled a consumer, some courts consider the consumer's level of sophistication and will provide more relief for novice purchasers than for experienced purchasers.[148] Frequently, the consumer need not show knowledge, intent, or even actual reliance to prove a deceptive act.[149] In addition, courts often consider failure to disclose just as deceptive as actual misrepresentation.[150]

Although CPAs may broadly prohibit deceptive practices in trade or commerce, they occasionally limit the scope of private actions or remedies by narrowly defining terms such as "consumer," "supplier," "consumer transaction," "sale," or "goods and services."[151] Consequently, the applicability of CPAs in equine sales often depends on a court's interpretation of such terms.[152] For example, courts may find that isolated sales by non-merchants do not fall within a CPA's definition of trade or commerce.[153] Also, a CPA itself often does not contain a definition of "goods."[154] In such cases, courts frequently refer to definitions in the U.C.C. for clarity.[155]

Many states characterize living property like horses as "goods" within the definition of the CPA.[156] In Texas, horses are tangible chattels and therefore subject to the state's CPA, which defines goods as tangible chattel or real property purchased or leased for use.[157] Similarly, the Supreme Court of Vermont has determined that the Ver-

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[146] *See id.*; see also *infra* notes 160–242 and accompanying text for a discussion of these violations.

[147] SHELDON & CARTER, *supra* note 17, at 34.

[148] *See id.* For example, in 1981, in *Musil v. Hendrich*, the Kansas Court of Appeals considered the level of sophistication of the parties involved to determine whether there was a CPA violation. *See* 627 P.2d 367, 371 (Kan. Ct. App. 1981). The court concluded that both parties were experienced in the pig farming industry; therefore, the purchaser was on equal bargaining ground with the seller, and the plaintiff could not establish a deceptive practice or unconscionable act under the Kansas Consumer Protection Act. *See id.*

[149] *See infra* notes 184–201 and accompanying text.

[150] *See infra* notes 202–212 and accompanying text.

[151] SHELDON & CARTER, *supra* note 17, at 37.

[152] *See id.*

[153] *Id.* at 39. The New Mexico Unfair Practices Act, for example, requires that the deceptive practice occur in the defendant's regular course of trade or commerce; therefore, the Act does not apply to isolated occurrences. *In re Klein*, 39 B.R. 20, 22 (Bankr. D. N.M. 1984).

[154] SHELDON & CARTER, *supra* note 17, at 39.

[155] *Id.*

[156] *Id.*

[157] *See* TEX. BUS. & COM. CODE ANN. § 17.45(1) (Vernon 2002); Scholtz v. Sigel, 601 S.W.2d 516, 519 (Tex. App. 1980).

mont Consumer Fraud Act covers horses under its definition of "goods."[158] Kentucky's CPA, however, does not define consumer goods to include Thoroughbred horses; consequently, no private cause of action exists for a dissatisfied Thoroughbred purchaser because the CPA requires that goods be for personal, family, or household purposes.[159]

B. *Violations of Consumer Protection Acts in Equine Sales Transactions and Remedies for Horse Purchasers*

Dissatisfied horse purchasers can argue two different types of CPA violations—automatic violations and violations because the practice is generally unfair or deceptive.[160] A violation is automatic if the CPA specifically prohibits the practice at issue.[161] Such a claim can easily procure relief because the court does not have to consider whether deception or unfairness occurred.[162] For example, some courts find that a breach of warranty under the U.C.C. automatically violates a state's CPA; in these states, if horse purchasers can prove breach of express or implied warranty, they also can satisfy a CPA claim without demonstrating a deceptive or unfair practice.[163] Some common-law torts, such as fraud, also are automatic CPA violations.[164] For example, in *McClure*, the United States District Court for the Northern District of Texas implicitly concluded that the defendant was not entitled to summary judgment on the plaintiff's CPA claim because the plaintiff sufficiently plead a common-law tort of fraud.[165]

Practices that do not violate a specific, CPA-enumerated prohibition, however, are not automatic violations.[166] Yet, a horse purchaser

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[158] *See* VT. STAT. ANN. tit. 9 § 2451(b) (1985); *Fancher*, 580 A.2d at 53.

[159] *See* KY. REV. STAT. ANN. § 367.220 (Michie 2002); Cohen v. North Ridge Farms, Inc., 712 F. Supp. 1265, 1272 (E.D. Ky. 1989). It is possible a court in Kentucky could limit the holding in *Cohen* to apply only to Thoroughbred horses, thereby finding a violation of the state CPA for an equine sales transaction involving a horse other than a Thoroughbred; however, the court's failure to explain why a Thoroughbred horse in particular was not a consumer good indicates that courts in Kentucky would be unsympathetic toward purchasers of any horse breed. *See* 712 F. Supp. at 1272. Moreover, after *Cohen*, there appear to be no other cases involving a CPA claim for an equine sales transaction, indicating that such a claim likely would prove unsuccessful. *See id.*

[160] *See* SHELDON & CARTER, *supra* note 17, at 83.

[161] *Id.*

[162] *Id.*

[163] *See id.* at 88.

[164] *See id.* at 91.

[165] *See* 674 F. Supp. at 223.

[166] SHELDON & CARTER, *supra* note 17, at 91.

still can prove a CPA violation by demonstrating a deceptive or unfair practice.[167] Some CPAs only apply to deceptive practices, whereas others apply to both deceptive and unfair practices.[168] To see how unfair or deceptive practice claims work under CPAs, it is important first to understand the standards of deception, unfairness, and unconscionability, and then to look at the remedies available to deceived horse purchasers.[169]

1. The Standard of Deception

Instead of looking at precedent to determine whether a practice is deceptive, courts look at whether the sales activity or representation at issue could mislead or deceive even a handful of unsophisticated consumers.[170] For example, in 1984, in *Appleby v. Hendrix,* the Texas Court of Appeals determined that the defendant's advertisement in a horse breeders' magazine stating that "these horses need a home where their excellent bloodlines can be effectively used" represented that the horse the plaintiff ultimately purchased was a fertile stud.[171] In reality, the stallion lacked the ability to impregnate the plaintiff's mares.[172] Thus, the court implicitly determined there could be a CPA violation because the defendant's advertisement had the tendency to mislead purchasers such as the plaintiff.[173]

One straightforward way to show the potential deceptiveness of a practice involves demonstrating that the defendant seller actually deceived the plaintiff.[174] For example, in 2002, in *Back Bay Farm, LLC v. Collucio,* the United States District Court for the District of Massachusetts implicitly found that the plaintiff might be able to prove a violation of the state CPA by showing that the defendant had knowingly

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[167] *See id.*; *see, e.g.*, *Scholtz*, 601 S.W.2d at 519 (upholding the trial court's finding of deceptive practices, and therefore a CPA violation, based on the defendants' misrepresentations that the horse was good for show purposes and the plaintiff's reliance on the defendants' judgment).

[168] *See* SHELDON & CARTER, *supra* note 17, at 94.

[169] See *infra* notes 170–261 and accompanying text for a discussion of these standards and remedies.

[170] *See, e.g.*, Travis v. Washington Horse Breeders Ass'n, 759 P.2d 418, 423 (Wash. 1988) (finding a CPA violation because the seller's advertisements and statements were likely to mislead other purchasers).

[171] *See* 673 S.W.2d 295, 298 (Tex. App. 1984).

[172] *See id.* at 297.

[173] *See id.* at 298–99.

[174] *See* Back Bay Farm, LLC v. Collucio, 230 F. Supp. 2d 176, 181 (D. Mass. 2002).

used false and deceitful tactics when selling the plaintiff a horse.[175] The court determined that the plaintiff might be able to establish that the defendant's misrepresentation of the horse's suitability for an average rider actually deceived the plaintiff.[176] The court found that the misrepresentations, in conjunction with the defendant's agreement and subsequent refusal to return the plaintiff's purchase price of $60,000, could satisfy the CPA's definition of unfair acts and practices.[177]

The standard of deception under most CPAs, however, does not require actual deception, and instead only requires that a practice have the capacity or tendency to deceive potential purchasers.[178] Accordingly, courts have found practices deceptive under CPAs despite the truthfulness of statements, the subsequent clarification of statements, and the existence of contract defenses such as warranty disclaimers.[179] Moreover, courts characterize silence or failure to disclose a material fact as deceptive, even when the seller's actual representations did not mislead the purchaser.[180] A seller's state of mind is unimportant—courts find a practice deceptive if it has a tendency to mislead unsophisticated and vulnerable consumers.[181] Based on Minnesota's CPA, for example, courts enjoin any fraud or misrepresentation committed with the intent that others rely on it in connection with the sale of any goods—including horses—even if the fraud or misrepresentation did not in fact mislead, deceive, or damage any person.[182] In addition, most CPAs prohibit the defense that the entire industry engages in the challenged practice or that the practice is customary business conduct.[183]

Moreover, CPAs typically do not require proof of intent to deceive.[184] Courts in the State of Washington have determined that a purchaser of a defective horse need not show that the seller intended

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[175] *See id.* In *Back Bay*, the court considered the defendant's motion to dismiss for failure to state a claim, lack of venue, and lack of personal jurisdiction. *Id.* at 179. Thus, the court upheld the plaintiff's claim only to the extent that she adequately pled a violation of the Massachusetts CPA, chapter 93A, to withstand a motion to dismiss. *See id.*

[176] *See id.*

[177] *See id.* at 179, 181.

[178] Sheldon & Carter, *supra* note 17, at 93.

[179] *Id.* at 93–94.

[180] *Id.* at 94.

[181] *Id.*

[182] *See* Minn. Stat. § 325F.69 (1995); Yost v. Millhouse, 373 N.W.2d 826, 831 (Minn. Ct. App. 1985).

[183] Sheldon & Carter, *supra* note 17, at 112.

[184] *See id.* at 109.

to deceive the purchaser.[185] Similar to the discussion above regarding actual deception,[186] a purchaser need only show that the alleged act had the capacity to deceive a substantial portion of the public.[187] This focus on a capacity to deceive rather than intent to deceive helps deter future deceptive conduct, thereby preventing harm to other purchasers.[188] Some CPAs, however, require that the seller intended for the horse purchaser to rely on the deceptive act or statement.[189] The few states that require reliance generally apply the requirement broadly; thus, in cases in which a pattern of misrepresentations occurs, a court likely would find such a practice deceptive.[190] For example, in 1992, in *Cronin v. Bacon,* the Texas Court of Appeals upheld the jury's finding that the defendant farm had engaged in deceptive practices by representing on several occasions that the farm had bred the plaintiff's mare to a particularly well-known stallion, when in fact the farm had bred the mare to a lesser-known stallion.[191]

Like intent to deceive, most CPAs do not require that sellers know that their statements are false.[192] For example, in 1985, in *Yost v. Millhouse,* the Minnesota Court of Appeals found the defendant horse seller liable even though he did not know his statements were false.[193] In *Yost,* the plaintiff purchased the defendant's yearling for $400, relying on the defendant's repeated statements that the horse was registered with the American Quarter Horse Association, when, in fact, unknown to the defendant, the horse was actually not registered.[194] Despite lack of evidence that the defendant had intended to deceive the plaintiff, the court found the defendant liable for misrepresentation—which constituted an automatic violation of the CPA—because he continuously represented that he knew that the horse was regis-

[185] *See, e.g., Travis,* 759 P.2d at 423 ("To establish that there was an unfair or deceptive act, [a] plaintiff need not show that the act in question was *intended* to deceive, but that the alleged act had the *capacity* to deceive a substantial portion of the public." (citing Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co., 719 P.2d 531 (Wash. 1986))).

[186] *See supra* note 178 and accompanying text.

[187] *See* SHELDON & CARTER, *supra* note 17, at 113.

[188] *See Hangman,* 719 P.2d at 535 ("The purpose of the capacity-to-deceive test is to deter deceptive conduct *before* injury occurs.").

[189] *See* SHELDON & CARTER, *supra* note 17, at 110. Examples of such states include Delaware, Illinois, and Oregon. *Id.* nn.25–26.

[190] *See id.*

[191] *See* 837 S.W.2d 265, 268 (Tex. App. 1992).

[192] *See* SHELDON & CARTER, *supra* note 17, at 110.

[193] *See* 373 N.W.2d at 830.

[194] *See id.* at 828, 829, 830.

tered without actually having such knowledge.[195] Even courts that require knowledge on the part of the seller often apply the requirement broadly; thus, courts will characterize a seller's definitive statement made without knowledge, such as the seller's in *Yost,* as a knowing, false statement.[196]

Reliance on a seller's misrepresentation is another factor courts consider in a CPA violation claim.[197] Some courts require that a purchaser demonstrate actual reliance on the seller's misrepresentation, whereas other courts merely consider whether a reasonable person would have relied on the misrepresentation.[198] For example, in 1980, in *Scholtz v. Sigel,* the Texas Court of Appeals implicitly concluded that the trial court could have found that the plaintiff relied on the defendants' misrepresentation that the horse she purchased from them was good for show purposes.[199] The sellers knew the horse had poor bone structure and was not suitable for showing; yet, they induced the plaintiff to purchase the horse by representing that the horse was of a higher quality than it actually was.[200] The court implicitly concluded that the purchaser's reliance on the sellers' misrepresentations could constitute a violation of the CPA.[201]

A seller can also deceive a horse purchaser by failing to disclose material facts about a horse.[202] Some CPAs expressly prohibit a seller's failure to disclose such facts, whereas other states find a CPA violation based on the deceptiveness of such a failure.[203] For example, in 1990, in *Fancher v. Benson,* the Supreme Court of Vermont found that the jury could have concluded that the seller's intentional delay in disclosing the horse's heart defect to the purchaser violated the state's CPA because the delay was deceptive.[204] Similarly, some courts will find a CPA violation when a seller should have learned of a defect but did not and therefore failed to disclose the defect to the purchaser.[205] For example, in 1988, in *Travis v. Washington Horse Breeders Ass'n,* the

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[195] *See id.* at 829–30.

[196] *See id.* at 829, 830; SHELDON & CARTER, *supra* note 17, at 111.

[197] SHELDON & CARTER, *supra* note 17, at 116–17.

[198] *See id.*

[199] 601 S.W.2d at 518.

[200] *Id.* at 518, 519.

[201] *See id.* at 519.

[202] *See* SHELDON & CARTER, *supra* note 17, at 118.

[203] *See id.*

[204] 580 A.2d at 54–55. Interestingly, the jury returned verdicts in favor of the defendant on the breach of express and implied warranty claims. *See id.* at 54 n.2.

[205] SHELDON & CARTER, *supra* note 17, at 122–23.

Supreme Court of Washington implicitly concluded that, because the auction house never examined sale horses even though examinations were customary in the auction industry, the seller should have known of the colt's defect by examining it before the sale and should have disclosed the information to the purchaser.[206] The court concluded that the failure to routinely inspect horses prior to their sale, while making representations about their ability to race, sufficiently proved that those acts had the capacity to deceive a substantial portion of the public.[207]

Although some courts find CPA violations when sellers fail to disclose unknown but discoverable defects, other courts do not require sellers to disclose information they do not or should not have known.[208] For example, in 1989, in *Cohen v. North Ridge Farms, Inc.*, the United States District Court for the Eastern District of Kentucky concluded that the seller had no duty to discover and disclose any defects in the horse because the horse was sold "as is;" therefore, the seller's failure to disclose the horse's respiratory problems was not a misrepresentation.[209] Similarly, in 2002, in *Hurwitz v. Strain*, the Appeals Court of Massachusetts found the defendant not liable under the state's CPA when a beginner rider died after being thrown from her horse several days after purchasing it from the defendant.[210] Although the rider purchased the horse based on the defendant's assurances of the horse's mild disposition and suitability for a novice rider, the court concluded that the plaintiff did not establish that at the time of the sale the defendant knew of the horse's unsuitability for a beginning rider.[211] Consequently, the court determined that no violation of the CPA existed.[212]

2. The Standards of Unfairness and Unconscionability

Courts consider unfairness to be a broader concept than deception.[213] Consequently, if a CPA prohibits unfair practices, and not just deceptive practices, courts generally find most state statutory viola-

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[206] *See* 759 P.2d at 423.
[207] *See id.*
[208] SHELDON & CARTER, *supra* note 17, at 123.
[209] *See* 712 F. Supp. at 1272.
[210] *See* No. 00-P-868, 2002 WL 1924835, at *1 (Mass. App. Ct. Aug. 19, 2002).
[211] *See id.* at *1, 2.
[212] *See id.* at *2.
[213] SHELDON & CARTER, *supra* note 17, at 94.

tions to be per se unfair.[214] In determining unfairness, courts consider whether a practice is immoral, unethical, oppressive, unscrupulous, unconscionable, offends public policy, or causes substantial injury to consumers.[215] In equine sales transactions, courts commonly consider unconscionability issues and public policy concerns when determining the possible unfairness of a practice.[216]

Many courts characterize a seller's taking unfair advantage of a purchaser's inexperience or capacity as unconscionable.[217] Courts frequently apply a particularly high standard for unconscionability in equine sales transactions, assuming that most participants in such transactions have significant experience in the equine industry.[218] Often, a court hesitates in striking seemingly unfair contractual clauses unless they are clearly unconscionable on their face or violative of public policy.[219] For example, in *Cohen*, the plaintiff argued that his $575,000 purchase of a Thoroughbred yearling, which he later discovered had respiratory problems making the horse unable to race, was unconscionable for failure of consideration.[220] In refusing to uphold the claim, the United States District Court for the Eastern District of Kentucky emphasized that the plaintiff had significant experience in the horse business and had gotten exactly what he bargained for: a yearling "as is."[221]

Some courts, however, find a practice unconscionable if a gross disparity exists between the value received and the consideration paid.[222] For example, in 1990, in *Teague v. Bandy*, the Texas Court of Appeals found a CPA violation because the plaintiffs purchased an

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[214] *Id.* at 89.

[215] *Id.* at 94.

[216] *See, e.g.*, *Cohen*, 712 F. Supp. at 1270 (discussing unconscionability issues such as failure of consideration); *Travis*, 759 P.2d at 423 (discussing public policy concerns).

[217] SHELDON & CARTER, *supra* note 17, at 94.

[218] *See* Miller, *supra* note 12, at 530–31.

[219] *See id.* at 530.

[220] *See* 712 F. Supp. at 1270.

[221] *See id.* at 1270, 1272. The court further stated, "The only way there could be a failure of consideration would be if plaintiff had received (1) nothing, (2) a dead yearling, or (3) a live yearling different from the one on which he bid." *Id.* at 1270; *see also* Schweizer v. Dekalb Swine Breeders, Inc., 954 F. Supp. 1495, 1503 (D. Kan. 1997) (concluding that plaintiffs, who purchased diseased pigs from the defendant, could not receive relief under the Kansas CPA because the plaintiffs did not demonstrate that the defendant enjoyed an unfair advantage over them, the plaintiffs had experience in the hog production business, and neither plaintiff had identified anything in the sales contracts as "confusing, misleading or deceptive;" consequently, the transaction was not unconscionable).

[222] *See* SHELDON & CARTER, *supra* note 17, at 94; *infra* notes 223–224 and accompanying text.

interest in a cow's future calves for $75,000 but received nothing of value in return for their payment and later learned that the cow could not produce embryos.[223] The court found that the purchase was unconscionable because a gross disparity existed between what had been delivered—$75,000—and what had been received—a barren cow.[224]

Courts may be more willing to consider a practice unfair if the horse purchaser is new to the equine industry and lacks experience in equine sales transactions or if the practice has the capacity to deceive a substantial portion of the public.[225] For example, some CPAs require that the practice affect the public interest for a violation to occur.[226] Courts hesitate to find that private transactions between a seller and purchaser have the capacity to deceive a large number of people; therefore, in states with a public interest requirement, a purchaser will find it difficult to obtain relief under the state's CPA.[227] Under South Carolina's Unfair Trade Practices Act, courts require that an unfair or deceptive act or practice have an impact upon the public interest to be actionable; a mere breach of contract will not constitute a violation of the statute.[228] For example, in 1993, in *Perry v. Green*, the South Carolina Court of Appeals found no such impact on the public interest.[229] In *Perry*, the defendant sold the plaintiff a registered Arabian mare for breeding purposes.[230] The purchase contract required the defendant to transfer the horse's registration papers when he received the last payment.[231] He refused, however, and then actively thwarted the plaintiff's attempts to prove full payment and ownership to the Arabian Horse Registry of America, thereby significantly decreasing the value of the horse and its future offspring.[232] The court found for the plaintiff on her breach of contract claim, but refused to find a violation of the state's CPA because it was unlikely the seller would repeat such conduct to the point where it negatively affected the public interest.[233]

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[223] 793 S.W.2d 50, 53 (Tex. App. 1990).

[224] *See id.* at 54.

[225] *See, e.g.*, *Travis*, 759 P.2d at 423 (finding a CPA violation because the practice had the capacity to deceive the public).

[226] *See id.*; Perry v. Green, 437 S.E.2d 150, 154 (S.C. Ct. App. 1993).

[227] *See* SHELDON & CARTER, *supra* note 17, at 388.

[228] *See* S.C. CODE ANN. § 39–5 (Law. Co-op. 1985); *Perry*, 437 S.E.2d at 154.

[229] *See* 437 S.E.2d at 154.

[230] *Id.* at 151.

[231] *Id.*

[232] *Id.*

[233] *Id.* at 153–54.

Unlike private transactions between two parties, auctions are particularly susceptible to unfairness claims because they affect the public on a broader scale.[234] Consequently, courts often scrutinize auction sales more closely than private transactions.[235] For example, in *Travis*, the Supreme Court of Washington determined whether the seller's deceptive acts affected the public interest by considering whether repetition of the practice could potentially occur.[236] The court concluded that other people could suffer injuries similar to the plaintiff's because the auction house's practices were longstanding and therefore unlikely to change.[237] The court harbored particular concern about the effect that such practices would have on new purchasers inexperienced with both horse auctions and the equine industry generally.[238]

Disclaimers of warranties may also raise public policy or unconscionability concerns.[239] If such disclaimers are in large, bold type in a printed auction catalog or are legible and easy to read in a purchase contract, courts have enforced the disclaimers.[240] Some courts, however, have found it unreasonable to allow disclaimers of express warranties because they are inherently inconsistent with the idea of an express warranty.[241] Therefore, in *Travis*, the court implicitly concluded that disclaimers of express warranties contravened public policy.[242]

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[234] *See* Miller, *supra* note 12, at 534–35.

[235] *Id.* at 535.

[236] *See* 759 P.2d at 423.

[237] *See id.*

[238] *See id.* Indeed, the lower court's opinion emphasized that the plaintiff was a relative newcomer to the sport of horse racing. *See* Travis v. Washington Horse Breeders Ass'n, 734 P.2d 956, 958 (Wash. Ct. App. 1987). The court stated, "it seems incredible that an examination was not uniformly given to horses rated as the best before they were placed in the auction for sale. [The plaintiff] believed the horse was sound and healthy; under these circumstances, any prospective consumer reasonably could have had the same understanding." *Id.* at 959.

[239] Miller, *supra* note 12, at 529.

[240] *See Schweizer*, 954 F. Supp. at 1499–1500; *Cohen*, 712 F. Supp. at 1267–68; *Travis*, 759 P.2d at 421–22.

[241] *See, e.g.*, *Travis*, 759 P.2d at 422 ("*If the factfinder determines that a seller's statement created an express warranty, words purportedly disclaiming that warranty will have no effect,* for the disclaiming language is inherently inconsistent." (citing WHITE & SUMMERS, UNIFORM COMMERCIAL CODE 430 (2d ed. 1980))).

[242] *See id.* at 423.

3. Remedies for Horse Purchasers with Valid CPA Claims

Once a court determines that a horse seller's actions were deceptive or unfair and therefore constitute a CPA violation, a purchaser can obtain various remedies.[243] These remedies vary from state to state, but most horse purchasers seek damages.[244] Courts determine damages in a number of ways depending on the CPA.[245] Out-of-pocket damages are calculated as the difference between the amount the purchaser paid for the horse and the horse's actual value.[246] Loss-of-bargain damages, which are larger than out-of-pocket damages, are calculated as the difference between what the purchaser expected the horse to be worth and what the horse actually is worth.[247] In addition, most CPAs also allow purchasers to receive proximate damages for additional costs related to the CPA violation.[248] Moreover, some CPAs award purchasers multiple damages, such as treble damages, to deter future seller misconduct and award the purchaser for pursuing a claim.[249] Typically courts interpreting these statutes award multiple damages only in cases in which a plaintiff sustains actual damages and a seller acted willfully or in bad faith.[250]

Some states also allow punitive damages for CPA claims.[251] Like multiple damage awards, courts typically award punitive damages in cases in which the seller acted maliciously, willfully, or with reckless indifference to the interests of others.[252] For example, the Supreme Court of Vermont in *Fancher* upheld a jury award of punitive damages based on the seller's intentional delay in disclosing the horse's heart defect to the purchaser, which the court considered deceptive and

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[243] *See* SHELDON & CARTER, *supra* note 17, at 415–32.

[244] *See, e.g.*, *Cronin*, 837 S.W.2d at 267 (horse purchaser sought damages). Some CPAs, such as those of Ohio and Texas, allow rescission as a remedy. SHELDON & CARTER, *supra* note 17, at 441–42.

[245] SHELDON & CARTER, *supra* note 17, at 416.

[246] *See id.*; *see, e.g.*, *Yost*, 373 N.W.2d at 830–31 (awarding the plaintiff only fifty dollars because she eventually sold the horse for fifty dollars less than what she initially paid).

[247] SHELDON & CARTER, *supra* note 17, at 416; *see, e.g.*, *Cronin*, 837 S.W.2d at 269–70 (awarding damages based on the difference in value between a prospective foal sired by the stallion to whom the purchaser believed his mare was being bred and the value of a prospective foal sired by the stallion to whom the purchaser's mare actually was bred).

[248] SHELDON & CARTER, *supra* note 17, at 418.

[249] *Id.* at 423.

[250] *See id.* at 424.

[251] *See id.* at 428.

[252] *See id.* at 429; *see, e.g.*, *Yost*, 373 N.W.2d at 832 (concluding that the purchaser was not entitled to punitive damages because the seller did not show a willful indifference to her rights by mistakenly misrepresenting that the horse was not registered).

therefore a violation of Vermont's CPA.[253] The court found sufficient evidence of malice, which the court defined as the use of sharp selling tactics, to support the jury award of punitive damages.[254] According to the court, the jury could find such sharp selling tactics based on the following facts: the seller intentionally delayed disclosure, lied to the plaintiff about the medical report's contents, and deceived the plaintiff's agent into not immediately notifying the plaintiff of the medical report's contents.[255]

Some states occasionally allow damages based on mental anguish; however, most require a showing of physical harm or a high degree of mental pain and distress before doing so.[256] For example, in *Cronin*, the Texas jury awarded $20,000 in damages to the plaintiff for mental anguish under the CPA, based on his extreme anger at the defendant for breeding the plaintiff's mare to one stallion while representing that she had been bred to another.[257] The Texas Court of Appeals overruled the jury award because the plaintiff's feelings of anger and frustration were not sufficient to recover mental anguish damages.[258]

Finally, most CPAs allow a successful plaintiff to recover attorney's fees.[259] For example, the court in *Cronin* upheld the trial court's award of attorney's fees because the Texas CPA allowed for reasonable and necessary attorney's fees.[260] Similarly, the Supreme Court of Washington in *Travis* upheld payment of attorney's fees for the CPA claim, but it specifically limited the award to only those services related to the CPA cause of action.[261]

III. How CPA Claims Provide a Better Avenue of Redress for Unsophisticated Horse Purchasers Than U.C.C. Claims

Most people, including many judges, believe that horse owners are wealthy businesspeople with experience in the equine industry.[262]

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253 *See* 580 A.2d at 54–55.

254 *See id.* at 55.

255 *See id.* at 54–55.

256 Sheldon & Carter, *supra* note 17, at 420–21.

257 837 S.W.2d at 268, 269.

258 *See id.* at 269.

259 Sheldon & Carter, *supra* note 24, at 383.

260 *See* 837 S.W.2d at 268.

261 *See* 759 P.2d at 425.

262 *See, e.g.*, Cohen v. North Ridge Farms, Inc., 712 F. Supp. 1265, 1272 (E.D. Ky. 1989) (the court's view that Thoroughbred horses are not consumer goods indicates that the court believes that most horse purchasers are not average consumers); Miller, *supra* note

A large number of horse purchasers, however, are first-time purchasers, like the Millers in the hypothetical above,[263] and therefore are unfamiliar with the equine industry.[264] Unlike knowledgeable businesspeople, these novices are particularly susceptible to unfair and deceptive sales practices throughout an equine sales transaction and deserve protection under state law.[265] Both the U.C.C. and CPAs provide such protection.[266] CPAs, however, provide more protection to deceived, unsophisticated horse purchasers because they have broader, more flexible standards that apply on a case by case basis.[267]

Obtaining relief under CPAs can be easier than under the U.C.C.[268] Relief under either type of statute often depends on the different policies and purposes of the statutes.[269] The main purpose of the U.C.C. is to protect the relationship between purchasers and sellers, thereby encouraging freedom of contract.[270] Thus, in equine sales disputes, courts typically base their determination of a U.C.C. claim solely on the terms of the contract and assume that both parties were on equal footing during negotiations.[271] These assumptions are fair if both parties are sophisticated and experienced in the equine industry and are in equal bargaining positions.[272] The same assumptions, however, can prevent unsophisticated horse purchasers, who often know

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12, at 533 ("The author suspects that there are very few inexperienced consumers in the horse business.").

[263] See *supra* note 6 and accompanying text to review the hypothetical.

[264] *See* Tilton, *supra* note 1, at 541.

[265] *See id.* Experienced and sophisticated horse purchasers arguably do not require protection because they are knowledgeable of the equine industry and therefore more likely to be on equal bargaining ground with the seller. *See, e.g.*, Musil v. Hendrich, 627 P.2d 367, 371 (Kan. Ct. App. 1981) (concluding that because both parties were experienced in the pig farming industry, the purchaser and seller were on equal bargaining ground; therefore, the plaintiff could not establish a deceptive practice or unconscionable act under the Kansas Consumer Protection Act).

[266] See *supra* notes 24–261 and accompanying text for a detailed discussion of the protections the U.C.C. and CPAs provide.

[267] *See* U.C.C. § 1-102 (2000); SHELDON & CARTER, *supra* note 17, at 31.

[268] SHELDON & CARTER, *supra* note 17, at 31.

[269] See *supra* notes 123–126, 132–136 and accompanying text for a discussion of U.C.C. and CPA policies and purposes.

[270] *See* SHELDON & CARTER, *supra* note 24, at 52.

[271] *See, e.g.*, *Cohen*, 712 F. Supp. at 1272 (concluding that the contract was valid because the plaintiff was a man experienced in the horse business, who willingly purchased a yearling "as is" with no express or implied warranties).

[272] *See, e.g.*, *id.*; *Musil*, 627 P.2d at 371 (concluding that the contract was fair because both parties were experienced in the pig farming industry; therefore, the purchaser was on equal bargaining ground with the seller).

far less about the equine industry than the seller, from receiving relief.[273]

The purpose of CPAs, unlike the contract-based goals of the U.C.C., is to prevent deception and abuses against consumers in the marketplace.[274] Courts considering a CPA claim look for whether the practice at issue had a tendency to mislead even the smallest group of unsophisticated consumers.[275] CPAs, therefore, generally protect consumers, whereas the U.C.C. protects commercial transactions and contracts.[276] In equine sales disputes, courts usually favor freedom of contract to protecting horse purchasers; thus, U.C.C. claims, which are always contract-specific, often fail.[277] Courts can be more sympathetic, however, to horse purchasers who raise CPA claims based on deceptive and unfair practices.[278] Therefore, unsophisticated horse purchasers are more likely to obtain relief under a CPA claim than a U.C.C. claim.[279] Indeed, even sophisticated horse purchasers can receive relief under a CPA claim in many states, particularly if they can show that the practice at issue had the capacity to deceive unsophisticated purchasers.[280]

CPAs also protect unsophisticated horse purchasers more thoroughly than the U.C.C. by providing more extensive monetary remedies.[281] Although both the U.C.C. and CPAs allow horse purchasers to receive damages for breaches of warranty, CPAs also allow purchasers to recover for the deceptive practice at issue.[282] Moreover, most CPAs,

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[273] *See* FERSHTMAN, *supra* note 10, at 41.

[274] *See* SHELDON & CARTER, *supra* note 17, at 31.

[275] *See, e.g.*, Travis v. Washington Horse Breeders Ass'n, 759 P.2d 418, 423 (Wash. 1988) (finding a CPA violation because the seller's advertisements and statements were likely to mislead other purchasers).

[276] *See* U.C.C. § 1–102 (2000); SHELDON & CARTER, *supra* note 17, at 31.

[277] *See, e.g.*, McClure v. Duggan, 674 F. Supp. 211, 219 (N.D. Tex. 1987) (concluding implicitly that there was no valid U.C.C. claim because no contract existed).

[278] *See, e.g.*, Fancher v. Benson, 580 A.2d 51, 54 & n.2, 55 (Vt. 1990) (upholding jury finding that the seller's intentional delay in disclosing the horse's heart defect violated the Vermont CPA, but noting that the jury failed to find for the plaintiff on her breach of warranty claims).

[279] *See id.*

[280] *See Travis*, 759 P.2d at 423. When a sophisticated purchaser can demonstrate that a seller's actions might affect unsophisticated purchasers, a CPA claim works to deter such deceptive practices in the future. *See id.* Thus, to encourage deterrence, many CPAs also protect sophisticated horse purchasers. *See id.*

[281] See *supra* notes 243–261 and accompanying text for a discussion of these remedies.

[282] See *supra* notes 119–122, 243–261 and accompanying text for a discussion of damages under the U.C.C. and CPAs.

unlike the U.C.C., provide recovery of attorney's fees.[283] Consequently, deceived horse purchasers can receive greater monetary remedies under a successful CPA claim than a U.C.C. claim.[284]

These greater CPA remedies exist to promote important public policy concerns, unlike U.C.C. remedies, which exist to regulate commercial relationships.[285] Requiring deceptive horse sellers to pay attorney's fees encourages purchasers to bring lawsuits when they could not otherwise afford litigation.[286] Enabling more lawsuits against deceptive sellers deters sellers from continuing their deceptive practices in the equine industry.[287] In addition, awarding attorney's fees encourages sellers to settle quickly, thereby relieving courts of a drain on resources.[288] Thus, awarding attorney's fees not only achieves the goal of most CPAs by protecting horse purchasers from deception and abuses, but also conserves precious judicial resources.[289]

Based on these policy considerations, deceived horse purchasers also should obtain relief more easily under CPAs than under the U.C.C. in cases in which they can prove the unconscionability of a transaction.[290] Because the U.C.C. favors the contractual relationship between purchaser and seller, courts considering a U.C.C. claim assume that parties to an equine sales transaction are sophisticated and willingly agreed to all the terms of the contract, even those that may seem unfair.[291] In contrast, CPAs focus not on the contractual relationship, but instead on whether the practice at issue had the capacity to deceive unsophisticated purchasers.[292] Even in private equine sales

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[283] SHELDON & CARTER, *supra* note 24, at 383.

[284] *See id.*

[285] See *supra* notes 123–126 and accompanying text for a discussion of U.C.C. policies.

[286] *See* SHELDON & CARTER, *supra* note 17, at 442.

[287] *See id.* For example, in 1985, in *Yost v. Millhouse*, the Minnesota Court of Appeals followed this deterrence theory by upholding a CPA-based award of attorney's fees, stating, "[t]he Consumer Fraud Act is designed to encourage persons to take action to stop the fraudulent activity covered by the act, even though the amount actually lost may be small." *See* 373 N.W.2d 826, 832 (Minn. Ct. App. 1985).

[288] *See* SHELDON & CARTER, *supra* note 17, at 442.

[289] *See id.*

[290] See *supra* notes 213–242 and accompanying text for a discussion of unconscionability claims under CPAs.

[291] *See* Miller, *supra* note 12, at 530–31. For example, in *Cohen*, the court emphasized that the plaintiff was a man experienced in the horse business, who willingly purchased a yearling "as is" with no express or implied warranties. *See* 712 F. Supp. at 1272.

[292] SHELDON & CARTER, *supra* note 17, at 93.

transactions, courts often find a CPA violation if the practice has the capacity to deceive other horse purchasers.[293]

Another way CPAs provide more thorough protection for deceived horse purchasers is their more flexible approach to reliance.[294] Reliance is both less flexible and more important to a successful claim under the U.C.C. because, under the U.C.C., courts only look at the two parties to the contract and their understanding of its contents.[295] For example, the most important element of a breach of implied warranty of fitness for a particular purpose claim under the U.C.C. is the horse purchaser's reliance on the seller's judgment in recommending the horse for that particular purpose.[296] Although some CPAs apply a similar standard, many do not consider whether the purchaser actually relied on the seller's misrepresentation but instead only consider whether a reasonable person would have relied on the misrepresentation.[297] This view of reliance shifts the focus from the contractual relationship to the deceptive practices that could potentially injure purchasers beyond the purchaser in the case at hand.[298] In the equine industry, in which horse sellers usually have knowledge of the abilities and health of their horses, sellers can and do easily take advantage of new horse purchasers unfamiliar with industry practices.[299] Even if a new purchaser in one instance does not rely on a deceptive act, allowing that act to go unpunished encourages sellers to deceive other purchasers.[300] Consequently, the broader, more flexible interpretation of reliance under the CPA allows for greater deterrence of deceptive practices than does the interpretation of reliance under the U.C.C.[301]

This flexibility of CPAs emphasizes perhaps the most important advantage of a CPA claim.[302] Unlike the U.C.C., which relies on con-

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[293] *See, e.g.*, *Travis*, 759 P.2d at 423 (concluding the practice was deceptive and therefore violated the state CPA because it had the capacity to deceive other horse purchasers).

[294] See *supra* notes 189–191 and accompanying text for a discussion of reliance under CPAs.

[295] *See* Miller, *supra* note 12, at 530, 587.

[296] Cohan, *supra* note 12, at 679.

[297] *See* SHELDON & CARTER, *supra* note 17, at 116–17.

[298] *See id.*

[299] *See, e.g.*, Scholtz v. Sigel, 601 S.W.2d 516, 518, 519 (Tex. App. 1980) (concluding the sellers knew the horse had poor bone structure and was not suitable for showing, and therefore took advantage of the purchaser by misrepresenting that the horse was of a higher quality than it actually was).

[300] *See supra* note 188 and accompanying text.

[301] *See* SHELDON & CARTER, *supra* note 17, at 117; *supra* note 188 and accompanying text.

[302] *See* SHELDON & CARTER, *supra* note 24, at 384.

tract principles, CPA claims rely on the broader concepts of deception and unfairness.[303] Contract laws do not apply to CPA claims, so disclaimers or extinguishment of warranties, which prevent relief under the U.C.C., do not prevent relief under a CPA.[304] For example, in the hypothetical above, the Millers unwittingly disclaimed all warranties by signing the contract, so they could not sue the seller for breach of warranty under the U.C.C.[305] A court could determine, however, that the seller's statement about Buttercup's impressive jumping abilities, combined with his failure to disclose the pony's chronic lameness, was deceptive and therefore violated the state's CPA.[306]

Similarly, contract doctrines such as the Statute of Frauds, which often bar U.C.C. claims, do not bar CPA claims.[307] Even the examination exception does not apply to CPA claims.[308] Knowledge of a custom such as a pre-purchase examination requires experience in the equine industry that many newcomers lack.[309] Because the examination exception does not apply under CPAs, CPAs would protect new purchasers more effectively than the U.C.C. in these situations.[310] For example, in the hypothetical above, if the Millers had employed a veterinarian prior to the purchase, they likely would have learned of Buttercup's lameness.[311] It is not equitable, however, to punish newcomers to the equine industry while businesspeople such as the seller actively withhold material information regarding the horse's health.[312] Therefore, CPAs protect horse purchasers from such inequities in the equine industry by looking at the level of sophistication of any potential purchaser.[313]

This consideration of any potential purchaser's level of sophistication is yet another example of how deceived horse purchasers can

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[303] *See id.*

[304] See *supra* notes 91–92, 100–114 and accompanying text for a discussion of disclaimers and limitations of remedies under the U.C.C.

[305] *See supra* note 6 and accompanying text.

[306] See *supra* notes 170–212 and accompanying text for a discussion of the standard of deception.

[307] See *supra* notes 137–145 and accompanying text for a discussion of how contract principles do not apply to CPA claims.

[308] See *supra* notes 103–108 and accompanying text for a discussion of the examination exception.

[309] *See* Tilton, *supra* note 1, at 541.

[310] *See* SHELDON & CARTER, *supra* note 24, at 384; Tilton, *supra* note 1, at 541.

[311] *See supra* note 6 and accompanying text.

[312] *See* SHELDON & CARTER, *supra* note 24, at 384; Tilton, *supra* note 1, at 541.

[313] SHELDON & CARTER, *supra* note 17, at 34.

obtain superior relief under CPAs than the U.C.C.[314] Some states, such as Kentucky, however, do not focus on the level of sophistication of horse purchasers in CPA claims.[315] Kentucky's CPA, which does not apply to the purchase of Thoroughbred horses because they are not considered goods for personal purposes, fails to protect deceived horse purchasers from inequities in the equine industry.[316] This view of horse ownership places unsophisticated horse purchasers like the Millers in the same category as the savvy owners of potential sweepstakes winners—professional businesspeople who should know better than to agree to unfavorable contract terms.[317] The United States District Court for the Eastern District of Kentucky's failure to apply Kentucky's CPA to Thoroughbred sales in *Cohen v. North Ridge Farms, Inc.* overlooks the general purpose of CPAs—protecting purchasers from marketplace abuses.[318] Although the plaintiff in *Cohen* likely did not deserve protection because he was experienced in the equine industry, the court's interpretation of the CPA adversely affects unsophisticated horse purchasers.[319] If courts in Kentucky are particularly concerned about sophisticated horse purchasers taking advantage of the state's CPA, the courts could allow CPA claims on a case by case basis, depending on the level of sophistication of the horse purchaser.[320] Thus, the experienced horse purchaser in *Cohen* still would not receive relief, but unsophisticated purchasers like the Millers could, even if they purchased a Thoroughbred.[321]

The interpretation of Kentucky's CPA in *Cohen* is not the only example of limits to CPA claims.[322] Like the warranty of merchantability, which only applies to transactions between a merchant and purchaser, some CPAs do not include isolated sales by one-time merchants in the definition of trade or commerce.[323] Consequently, in such states, if the seller is a one-time merchant, the purchaser cannot recover under either the CPA or a breach of implied warranty of merchantability.[324] The purchaser can potentially recover, however, under the U.C.C.

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314 *See id.*
315 *See Cohen*, 712 F. Supp. at 1272.
316 *See id.*
317 *See* Miller, *supra* note 12, at 530–31; Tilton, *supra* note 1, at 541.
318 *See* 712 F. Supp. at 1272; SHELDON & CARTER, *supra* note 17, at 31.
319 *See* 712 F. Supp. at 1272.
320 *See id.*; *supra* note 148 and accompanying text.
321 *See* 712 F. Supp. at 1272.
322 *See id.*; SHELDON & CARTER, *supra* note 17, at 35.
323 *See* SHELDON & CARTER, *supra* note 17, at 38; Cohan, *supra* note 12, at 667.
324 *See* SHELDON & CARTER, *supra* note 17, at 38; Cohan, *supra* note 12, at 667.

with a breach of express warranty or implied warranty for a particular purpose claim, which do not depend on the seller's merchant status.[325] Most importantly, however, because CPAs vary from state to state, a transaction actionable under one state's CPA is not necessarily actionable under another state's CPA.[326] Thus, before a deceived horse purchaser files a CPA claim, the purchaser must first determine whether the particular state's CPA applies.[327] These limits demonstrate that there are a small number of instances where U.C.C. claims are better than CPA claims.[328] Overall, however, for the various reasons discussed above, CPA claims provide greater protection for unsophisticated horse purchasers whom sellers have deceived.[329] Therefore, duped purchasers should always attempt to file a CPA claim against a deceptive horse seller.[330]

Conclusion

Many horse purchasers, like the Millers, are first-time purchasers with little experience in the equine industry. These unsophisticated horse purchasers often defer to the judgment of a more knowledgeable seller, and thus are highly susceptible to deceptive and unfair sales practices. In situations in which unscrupulous horse sellers take advantage of these purchasers by inducing them to purchase a defective horse, the purchasers often cannot receive relief through contract-based U.C.C. claims. CPA claims, however, address this inequity by providing duped horse purchasers another source of relief that is not dependent on contract principles. Therefore, the flexible standards of CPAs, based on protecting consumers from market inequities, allow unsophisticated horse purchasers to obtain relief even when the U.C.C. does not. Additionally, CPA claims often provide more extensive monetary remedies than U.C.C. claims. Consequently, CPAs can often provide the best avenue of redress for duped horse purchasers saddled with a lame horse.

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[325] See *supra* notes 67–81, 93–99 and accompanying text for a discussion of breach of express and implied warranty for a particular purpose claims.

[326] *See* Sheldon & Carter, *supra* note 17, at 37.

[327] *See id.*

[328] *See* Sheldon & Carter, *supra* note 24, at 385.

[329] See *supra* notes 262–313 and accompanying text for a discussion of how CPAs provide greater protection.

[330] *See supra* notes 262–313 and accompanying text.