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## **The Prevention and Treatment of Breeding Contract Controversies**

by

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# The Prevention and Treatment of Breeding Contract Controversies

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## INTRODUCTION

The increasing interest in the equine industry, both nationally and internationally, has dramatically increased the stakes of the game<sup>1</sup> and decreased reliance upon many of the time-honored customs<sup>2</sup> and traditions of the business. The foundation of the industry is breeding. Horsemen spend hour upon hour reviewing pedigrees, performance records, progeny reports, breeding mixes and crosses, as well as the relative conformational merits of the individual animals. Once the horseman has exerted such an effort to determine a promising match, that effort should be preserved in a detailed, written breeding contract, but all too often it is

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<sup>1</sup> The thoroughbred portion of the industry, for example, has experienced dramatic price increases in the past decade with the average yearling auction prices in North America increasing from a mere \$10,943.00 in 1975 to approximately \$41,396.00 in 1984. See *Auctions of 1984*, III THE BLOOD HORSE at 19 (Jan. 12, 1985). Moreover, the pool of potential investors has expanded greatly within that period, with the entry of thousands of newcomers into prominent roles in the thoroughbred industry. See *id.* The funds made available by these new investors are no doubt related to the general pattern of price increases.

<sup>2</sup> For a discussion of the role of custom and usage in the thoroughbred industry, see Miller, *America Singing: The Role of Custom in the Equine Industry*, 74 KY. L.J. 781 (1985-86).

not. This Article discusses how the parties and their attorneys<sup>3</sup> can anticipate and allay the sources of breeding controversies, and how they can deal with disputes that arise.

## I. THE ACQUISITION OF BREEDING RIGHTS

The parties may make various arrangements for breeding a stallion<sup>4</sup> to a mare,<sup>5</sup> but usually a mare owner will purchase a right to breed his mare to a stallion on a one-time, nonrecurring basis. This one-time breeding right is called a "season,"<sup>6</sup> and the agreement to purchase a season is commonly embodied in a breeding contract. Other ways in which the breeding can be handled from a business standpoint include (i) the mare owner's purchase of a partial ownership interest in a syndicated stallion;<sup>7</sup> (ii) the stallion owner's lease of a mare from a mare owner for a specified term so that he can breed the mare to his stallion;<sup>8</sup>

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<sup>3</sup> The greatest difficulty for the attorney may be convincing the client that a formal, written contract is necessary, and that the involvement of an attorney in preparing and/or tailoring such a contract to a specific situation is appropriate.

<sup>4</sup> The term stallion refers to a "male horse used for the purpose of breeding." J. LOHMAN & A. KIRKPATRICK, *SUCCESSFUL THOROUGHBRED INVESTMENT IN A CHANGING MARKET* 220 (1984) [hereinafter referred to as "LOHMAN & KIRKPATRICK"].

<sup>5</sup> The term mare refers to a "[f]emale thoroughbred five years old or older, or younger if she has been bred." *Id.* at 216.

<sup>6</sup> *Id.* at 220.

<sup>7</sup> Typically, the ownership of a stallion may be divided into approximately 40 units, called "shares." The owner of each share is entitled to breed one or more of his mares to the stallion each year, and the terms under which the breeding is conducted are governed by the stallion's syndication agreement. *See, e.g., id.* at 160. Because the syndication agreement is usually very specific, so long as the owner of the share breeds only his own mares to the stallion, there is little need for a separate breeding contract. The nature of the breeding rights provided in such a syndicate agreement is beyond the scope of this Article. For an excellent discussion of stallion syndicates in general, see Campbell, *Stallion Syndicates as Securities*, 70 KY. L.J. 1131 (1981-82); and Campbell, *Racing Syndicates as Securities*, 74 KY. L.J. 691 (1985-86). If the owner of a stallion share decides *not* to breed to his own mares, however, and instead transfers his right to breed to the stallion in a particular year to a third party, a separate breeding contract is once again required. For a discussion of the need to coordinate the terms of such a breeding contract with the terms of the underlying syndication agreement, see text accompanying notes 11-12 *infra*.

<sup>8</sup> When a stallion owner leases a mare, the lease agreement typically provides that any offspring born as a result of the breeding to the lessee's stallion will be the property of the lessee. *See, e.g., LOHMAN & KIRKPATRICK, supra* note 4, at 165-66. Although many of the considerations discussed in this Article are also significant in the leasing context, lease agreements are not generally considered breeding contracts; therefore, lease agreements are outside the scope of this Article.

(iii) foal sharing arrangements,<sup>9</sup> and (iv) the simplest of all, breeding one's own mares to one's own stallions.<sup>10</sup> This Article focuses on the basic transaction in which the mare owner purchases a stallion season.

Before making any decisions about the terms of the breeding contract between a stallion owner and a mare owner, the parties must determine the ownership status of the stallion. If the stallion is owned by a joint venture, partnership or syndicate, the seller of the breeding rights may be restricted by an oral or written agreement. Any agreement reached by the mare owner and the seller of a season that would interfere with the performance of the seller's contract with a stallion syndicate, partnership or joint venture could be unenforceable on grounds of public policy.<sup>11</sup> The seller may also find himself subjected to inconsistent contractual obligations. Thus, it is important that the parties to the transaction recognize and understand any limitations on the seller before drafting the breeding contract.<sup>12</sup>

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<sup>9</sup> Foal sharing usually refers to an arrangement in which a stallion owner and a mare owner agree to breed their respective horses, sharing ownership rights in the offspring "by either owning a one-half interest in each foal or owning every other foal the broodmare produces." *Id.* at 214. Once again, there are similar considerations in the purchase of seasons and in foal sharing arrangements, but the latter is outside the scope of this Article.

<sup>10</sup> Although a stallion is normally bred to approximately 45 mares per year, a stallion can be bred to as many as 70 to 80 mares per year. A mare, however, can be bred to only one stallion per year. Thus, it would be most unusual to find a stallion owner restricting the breeding of the stallion exclusively to his own mares.

<sup>11</sup> See, e.g., *Lehigh v. Pittson Co.*, 456 A.2d 355, 361 (Me. 1983) (a contract which operates to breach a prior contract involving a third party is illegal); RESTATEMENT (SECOND) OF CONTRACTS § 194 (1979) ("A promise that tortiously interferes with performance of a contract with a third person or a tortiously induced promise to commit a breach of contract is unenforceable on grounds of public policy."). See also RESTATEMENT (SECOND) OF TORTS § 766A (1979) (one who intentionally interferes with the performance of a contract between another and a third party may be subject to liability to the other for pecuniary loss suffered by the other).

<sup>12</sup> For example, if the stallion is syndicated, both the syndicate member selling his season and the mare owner should carefully review the syndication agreement to ensure that the proposed breeding contract is consistent with the syndication documents. Many breeding contracts incorporate the syndication agreement by reference into the breeding contract. In doing so, one should consult local law to be sure that no "magic words" are necessary to effect the incorporation. See generally *Hertz Commercial Leasing Corp. v. Joseph*, 641 S.W.2d 753 (Ky. Ct. App. 1982) (where contract language incorporated by reference other "terms and conditions," such provisions were binding). Unless the document being incorporated contains a confidentiality clause prohibiting its public

One other issue deserves attention before turning to the specific issues involved in drafting a breeding contract and litigating the effect of such a contract: What body of substantive law governs breeding contracts—the general contract law of the applicable jurisdiction or the Uniform Commercial Code (U.C.C.)?<sup>13</sup> If a breeding contract involves a sale of goods, article 2 of the U.C.C. governs all disputes<sup>14</sup> and the parties can invoke so-called “gap-filler” provisions of the U.C.C. to supply certain terms that may have been omitted.<sup>15</sup> On the other hand, if the transaction is not a sale of “goods”<sup>16</sup> within the meaning of the U.C.C., the breeding arrangements are subject only to the general contract law of the applicable jurisdiction.<sup>17</sup>

Although the sale of a horse is clearly governed by the U.C.C.,<sup>18</sup> the sale of breeding rights is not so clearly covered. In *Kwik-Lok Corp. v. Pulse*,<sup>19</sup> one appellate court recently held that “[s]perm inside a stallion. . . is not readily separable nor able to be packaged,”<sup>20</sup> and that breeding rights therefore are not goods.<sup>21</sup> The court hedged its decision by noting that artificial insemination was not used in the breeding at issue and suggested that its conclusions would not apply if the sperm has been separated from the stallion and shipped to the mare in an appropriate container.<sup>22</sup>

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disclosure, the safest course is to attach to the breeding contract a copy of any such pre-existing syndicate, partnership or joint venture agreement.

<sup>13</sup> When reference is made to the Uniform Commercial Code (U.C.C.), the reference is to the 1972 version unless otherwise noted.

<sup>14</sup> See U.C.C. § 2-102 (1972).

<sup>15</sup> See, e.g., U.C.C. § 2-202 (1972) (course of dealing, usage of trade); U.C.C. § 2-305 (1972) (price); U.C.C. § 2-306 (1972) (quantity); U.C.C. § 2-308 (1972) (delivery); U.C.C. § 2-309 (1972) (time for performance).

<sup>16</sup> See U.C.C. § 2-105(1) (1972) (“goods” are all things that are moveable at the time of identification to the contract for sale).

<sup>17</sup> Because contract law varies from state to state, reference is made throughout this Article to the general principles of contract law as embodied in the widely followed RESTATEMENT (SECOND) OF CONTRACTS. In considering any specific breeding contract or breeding rights dispute, the law of the particular jurisdiction involved should be consulted.

<sup>18</sup> See *Miron v. Yonkers Raceway, Inc.*, 400 F.2d 112 (2d Cir. 1968); *Keck v. Wacker*, 413 F. Supp. 1377 (E.D. Ky. 1976).

<sup>19</sup> 702 P.2d 1226 (Wash. Ct. App. 1985).

<sup>20</sup> *Id.* at 1228.

<sup>21</sup> *Id.*

<sup>22</sup> *Id.* at 1228 n.1. See also *Meuse-Rhine-Ijssel Cattle Breeders of Canada Ltd. v.*

Artificial insemination is not used in the thoroughbred segment of the horse industry, but it is commonly used in the Arabian, quarter horse, and standardbred segments. Moreover, where breeders employ artificial insemination, it is sometimes used in conjunction with a natural "cover."<sup>23</sup> Thus, if the courts follow the *Kwik-Lok* decision, breeding rights could be goods for one portion of the horse industry but not for another, or even for one portion of a given breeding transaction but not for the other portion of the same transaction. The stallion's semen, once removed from the horse, is in fact a movable physical commodity, and the entire breeding transaction has some characteristics of a "mixed bag" goods and services contract. The problems inherent in these differing characterizations may cause other courts to reject *Kwik-Lok* and attempt to bring all breeding rights, rather than just artificial insemination breeding rights, within the meaning of goods.<sup>24</sup> The Kentucky Court of Appeals, however, in *North Ridge Farms, Inc. v. Trimble*,<sup>25</sup> had no trouble concluding that a stallion season is not goods. In *North Ridge*, the court held that part ownership of a syndicated stallion with the right to breed a mare on a yearly basis is a good,<sup>26</sup> but that a mere right to breed is not a good because it conveys no actual ownership<sup>27</sup> and is not "moveable."<sup>28</sup>

Thus it appears, under current precedents, that breeding rights will be considered goods, and fall within U.C.C. coverage, when attached to an ownership interest in the horse or when artificial insemination is the chosen means of breeding. The right to breed to a stallion for a single season, by natural cover,

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Y Tex Corp., 590 P.2d 1306 (Wyo. 1979) (holding the U.C.C. applicable to contract to sell bull semen for artificial insemination).

<sup>23</sup> "Cover" refers to the "breeding of a mare to a stallion." LOHMAN & KIRKPATRICK, *supra* note 4, at 212.

<sup>24</sup> Despite the *dicta* in *Kwik-Lok*, there may still be considerable doubt about whether breeding rights *should* come within the scope of the U.C.C. For purposes of this Article, the question of whether breeding rights are goods is considered open. Citations to both the RESTATEMENT (SECOND) OF CONTRACTS and to the U.C.C. are therefore supplied where appropriate.

<sup>25</sup> 37 U.C.C. Rep. Serv. (Callaghan) 1280 (Ky. Ct. App. 1983), *aff'd*, 700 S.W.2d 396 (Ky. 1985).

<sup>26</sup> *Id.* at 1286.

<sup>27</sup> *Id.* at 1286-87.

<sup>28</sup> *Id.* at 1291.

severed from any incident of ownership, however, is not a good.

## II. THE CRITICAL ELEMENTS OF A BREEDING CONTRACT

### A. *Price, Payment and Warranties*

The breeding contract must recite what the consideration for the breeding will be, as well as how and when it will be paid.<sup>29</sup> Most breeding contracts provide that the price for the season, the so-called "stud fee,"<sup>30</sup> is due and payable when the mare produces a live foal.<sup>31</sup> In certain segments of the horse industry, a nonrefundable booking<sup>32</sup> fee may be charged. There are, however, many situations that require a total or partial up-front payment of the stud fee. If the stallion is in extremely high demand, its owner is dealing from a strong position and may be able to get the entire fee paid in advance. This situation is rare, but requiring at least part of the fee up front has in recent years become a common practice in the horse industry.

Normally, the up-front fee is not refundable,<sup>33</sup> but the balance of the stud fee is due only if and when the mare produces

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<sup>29</sup> In the absence of specific provisions relating to how and when payment is to be made in a sale of goods, a reasonable manner of payment is implied and payment is due at the time and place at which the buyer is to receive the goods. See U.C.C. § 2-305 (1972); *id.* § 2-310 (1972). Unfortunately, equine industry practice results in expectations of payment that are quite specific but quite unlike the payment expectations of most nonagricultural industries. See text accompanying notes 30-32 *infra*. Therefore, in the absence of a strong argument (supported by expert witnesses) demonstrating the actual trade usage in the equine industry, the payment term implied by a court is not likely to comport with either party's expectations.

<sup>30</sup> The term stud fee refers to "a fee for the right to breed a mare to a stallion during the breeding period." LOHMAN & KIRKPATRICK, *supra* note 4, at 221. The stud fee provision in the breeding contract can specifically provide that the mare owner agrees to pay any sales or use tax. See, e.g., KRS § 139.531(1)(a) (taxes apply to fees paid for breeding a stallion to a mare "in this state").

<sup>31</sup> See text accompanying notes 39-41 *infra* for a discussion of live foal guarantees.

<sup>32</sup> In the horse industry, the term book refers to "the group of mares being bred to a stallion in one given year." LOHMAN & KIRKPATRICK, *supra* note 4, at 210.

<sup>33</sup> The mare owner may argue that such an up-front fee allocable to the booking itself is given without consideration to the extent that a breeding never actually takes place, and that such a fee is "refundable" in any event unless a breeding does take place. See RESTATEMENT (SECOND) OF CONTRACTS § 71 (1979). Nevertheless, the stallion owner can insist that, because the stallion's breeding services are a commodity in high demand, the reservation itself has value distinct from the stallion's breeding services. Because a court generally will look only to whether there is consideration, rather than to its sufficiency, *id.* § 79 (1979), the stallion owner probably has the stronger side of the argument.

a live foal.<sup>34</sup> Many other breeding contracts provide that if the mare is in foal, then the stud fee is due and payable on September 1 of the year of the cover, but that if the mare subsequently slips<sup>35</sup> or dies, then either the stud fee is refunded<sup>36</sup> or the mare owner gets a return season in the following year.<sup>37</sup> Obviously, from the mare owner's viewpoint, breeding on a live foal basis with the fee due only when the foal stands and nurses is preferable.<sup>38</sup>

Although most stallion breeding contracts provide a so-called "live foal guarantee," some consideration should be given to exactly what this guarantee means. Most breeding contracts do not go far enough to ensure that there will not be a controversy if the mare produces a live foal that dies soon after birth. At what point is the guarantee satisfied?<sup>39</sup> A reasonable compromise might provide that the mare must produce a live foal that can stand alone and nurse, and that if the foal fails to do either and subsequently dies, the live foal guarantee is not satisfied. The

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<sup>34</sup> Structuring the deal in this manner makes production of a live foal a condition precedent to the mare owner's duty to perform by making the remainder of the payment contingent upon the production of a live foal. See *id.* § 224 (1979) ("a condition is an event, not certain to occur, which must occur, unless its non-occurrence is excused, before performance under a contract becomes due").

<sup>35</sup> The word slipped, in the context of equine breeding, means "a pregnancy aborted or resorbed spontaneously." LOHMAN & KIRKPATRICK, *supra* note 4, at 219. A mare is said to slip when it has "been bred, conceived, and then aborted." *Id.*

<sup>36</sup> In the case of a September 1 payment date, the production of a live foal becomes a condition subsequent. See RESTATEMENT (SECOND) OF CONTRACTS § 76 (1979) (The nonoccurrence of a condition discharges the duty when the condition can no longer occur.).

<sup>37</sup> A "return season" is the opportunity to rebreed the mare to the stallion. See text accompanying notes 42-49 *infra* for a detailed discussion of rights of refund or return.

<sup>38</sup> The tax consequences of receiving a refundable stud fee are discussed in *Whitaker v. Commissioner of Internal Revenue*, 259 F.2d 379 (5th Cir. 1958). The Fifth Circuit held in *Whitaker* that the receipt of a stud fee is considered income to the stallion owner in the year paid, even if the buyer may be entitled to a refund in a later year. *Id.* at 382-84. The effect of the refund, if any, is a deduction for the amount of the stud fee refunded in the year it is actually refunded. *Id.* at 382. The court's rationale was that the stallion owner has a "claim of right" to the breeding fee in the year it is paid, even if he is required to refund it later. *Id.* at 382-84. Thus, a stallion owner who wants the stud fee up front, or on September 1 in the year of the breeding, must be willing to recognize the income in that year, regardless of the refund or return privileges that he may grant.

<sup>39</sup> Requiring that the foal live for not less than 24 hours is not uncommon.



contract may also include a provision that if a foal is hand-fed for a specified period of time,<sup>40</sup> the stud fee is payable.

The parties must give special consideration to the possibility that the mare may bear twins.<sup>41</sup> One possible resolution of this problem is to consider the live foal guarantee satisfied if either of the twins stands and nurses. The "second" foal is ignored for purposes of the guarantee and the fee provided in the contract is neither increased nor decreased because of its birth. The breeding contract should contain provisions clarifying the amount payable to the stallion owner under these circumstances, because in the absence of such of a clause, the stallion owner's suit to collect the stud fee may become mired in a battle of expert testimony about the merits and disadvantages of twins and a dispute over the use in the breeding contract of the word "foal" in the singular.

Breeding contracts including a live foal guarantee should specifically provide for some method of enforcing the guarantee. Typically, such a provision would require a waiver of the unpaid service fee, refund of a paid service fee, or a right to breed the mare or her substitute in the following season. In using any of these provisions, the stallion owner should insist on a contract provision requiring the immediate submission of a veterinarian's certificate verifying that no foal was produced. Such a provision will ease the stallion owner's burdens of production<sup>42</sup> and persuasion<sup>43</sup> in a suit to collect the stud fee. The primary focus of the action will shift from whether a live foal was produced—a fact possibly within the exclusive knowledge of the mare owner—to whether the buyer has complied with the certificate requirement.

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<sup>40</sup> If the foal cannot stand, as a practical matter, it cannot nurse from its mother. In such circumstances, the foal is commonly hand-fed its mother's milk. Where hand-feeding is contemplated by the breeding contract, a period of 72 hours before the foal can nurse on its own has been provided.

<sup>41</sup> In the equine breeding industry, twins are not usually considered a double blessing. 2 EQUINE MEDICINE AND SURGERY 1349 (R. Mansmann & E. McAllister 3d ed. 1982) [hereinafter referred to as "EQUINE MEDICINE"]. Because of the disadvantages of equine twins, the mare owner may contend that the birth of inferior twins does not satisfy the live foal guarantee. Therefore, mare owners may want to bargain for a clause that requires the birth of "a *single* live foal."

<sup>42</sup> See, e.g., *Garmeada Coal Co. v. Mabe*, 222 S.W.2d 829 (Ky. 1949).

<sup>43</sup> *Id.*

Such a notification provision may be inadvertently waived by the stallion owner. In *Braugh v. Phillips*,<sup>44</sup> the buyer sued for return of the stallion service fee paid under a breeding contract that provided for a refund if a live foal did not result from the mating.<sup>45</sup> The refund was conditioned on written notification by the buyer to the seller within forty-eight hours of an abortion or failure to produce a live foal, followed by a veterinarian's certificate within fourteen days confirming that a live foal was not produced.<sup>46</sup> The appellate court affirmed the trial court's judgment for the buyer, despite the seller's insistence that the buyer had failed to comply with the notification procedures.<sup>47</sup> The court found that the seller had waived the formal notification procedure because he knew that the mare was not in foal as a result of his conversations with the buyer. The court also implied that the seller's acknowledgement that the mare was not in foal was an admission that he did indeed have notice of the mare's condition.<sup>48</sup>

The *Braugh* case was incorrectly decided, at least to the extent that the court construed the seller's informal conversations with the buyer as a waiver of the requirement of a veterinarian's certificate. Those conversations might have constituted substantial performance of the forty-eight hour personal notification from the buyer, but they in no way provided the seller with the independent, professional verification and resulting ease in proof that the provision was intended to provide. In any event, *Braugh* suggests that counsel to stallion owners should advise their clients to insist on strict compliance with all breeding contract notice provisions, even if they obtain actual knowledge of a given situation informally. Furthermore, the attorney should warn against casual admissions that may be introduced as proof of such knowledge.

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<sup>44</sup> 557 S.W.2d 155 (Tex. Civ. App. 1977).

<sup>45</sup> *Id.* at 156.

<sup>46</sup> *Id.*

<sup>47</sup> *Id.* at 157.

<sup>48</sup> *Id.* When the buyer's veterinarian found that the mares were not pregnant, the buyer phoned the seller. *Id.* at 159. The seller requested production of the veterinarian certificates verifying that the mares were not in foal, but before receiving the certificates the seller acknowledged in a letter to the buyer that the mares were not pregnant. *Id.* at 159-60.

If the contract provides for a return breeding, certain additional questions may arise. If there was a booking fee, should a second fee be charged? If there were handling fees, will these fees be required for the next breeding season? Many breeding contracts provide that if the mare remains at the farm where the stallion stands<sup>49</sup> for a specified period of time following the breeding, in good health, properly vaccinated and available for rebreeding through the end of the breeding season, handling fees will not be assessed for the following year.

Not all breeding contracts include the express warranty that the live foal guarantee provides.<sup>50</sup> If the parties do not intend to include a live foal guarantee or other express warranty, the agreement must be carefully drafted to ensure that no unintended express or implied warranties come into play to benefit the mare owner and to surprise the stallion owner. If the U.C.C. applies to the sale of breeding rights,<sup>51</sup> implied warranties of merchantability<sup>52</sup> and fitness for a particular purpose<sup>53</sup> can arise unless properly excluded.<sup>54</sup> Even if U.C.C. implied warranties

<sup>49</sup> A stallion is said to "stand" where it resides and performs its breeding services.

<sup>50</sup> See text accompanying notes 39-41 *supra* for a discussion of live foal guarantees.

<sup>51</sup> See text accompanying notes 13-28 *supra* for a discussion of the applicability of the U.C.C. to the sale of breeding rights.

<sup>52</sup> U.C.C. § 2-314 (1972) provides in pertinent part:

(1) [A] warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind. . .

(2) Goods to be merchantable must be at least such as

(a) pass without objection in the trade under the contract description . . . ; and . . .

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

<sup>53</sup> U.C.C. § 2-315 (1972) provides in pertinent part:

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

<sup>54</sup> Under the U.C.C., the seller must use specific language to negate the creation of implied warranties. U.C.C. § 2-316 (1972) provides in pertinent part:

(2) Subject to subsection (3), to exclude or modify the implied warranty of merchantability or any part of it the language must mention merchantability and in case of a writing must be conspicuous, and to exclude or modify any implied warranty of fitness the exclusion must be by a writing

do not apply to a breeding contract, the *Restatement (Second) of Contracts* may imply a warranty of fitness for a particular purpose.<sup>55</sup>

Courts have been willing to find an unintended express warranty in the sale of a stallion. In *Appleby v. Hendrix*,<sup>56</sup> a stallion owner placed an advertisement for a breeding stallion in *The Arabian Horse World* addressed "Dear Breeder."<sup>57</sup> The plaintiff, relying on the advertisement, bought the horse for breeding purposes.<sup>58</sup> The buyer sued under theories of misrepresentation<sup>59</sup> and breach of express warranty,<sup>60</sup> alleging that the horse was infertile.<sup>61</sup> The court found that the advertisement created an

and conspicuous. Language to exclude all implied warranties of fitness is sufficient if it states, for example, that "There are no warranties which extend beyond the description on the face hereof."

(3) Notwithstanding subsection (2)

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

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

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

Failure to meet the standard of U.C.C. § 2-316 can result in the creation of implied warranties, even where the seller clearly attempted to negate them. *See, e.g.,* *Valley Iron & Steel Co. v. Thorin*, 562 P.2d 1212 (Or. 1977) (attempt to negate warranty for particular purpose failed); *Pearson v. Franklin Laboratories, Inc.*, 254 N.W.2d 133 (S.D. 1977) (attempt to negate warranty of merchantability unsuccessful).

<sup>55</sup> *See* RESTATEMENT (SECOND) OF CONTRACTS § 220 (1979) (The meaning or interpretation given to a term in a contract may vary depending on the usage of that term. If a usage has a particular meaning in that business context and both parties are aware of that meaning, it becomes a part of the contract.).

<sup>56</sup> 673 S.W.2d 295 (Tex. Civ. App. 1984).

<sup>57</sup> *Id.* at 296.

<sup>58</sup> *Id.*

<sup>59</sup> The buyer contended that the seller had misrepresented the stallion as being fit for breeding and that she had relied on that misrepresentation. *Id.* at 297.

<sup>60</sup> *Id.*

<sup>61</sup> The buyer contended that the seller breached his express warranty that the stallion was fit for breeding purposes. *Id.*

express warranty of suitability for breeding<sup>62</sup> and that the seller had breached the warranty.<sup>63</sup>

In *McKnight v. Bellamy*,<sup>64</sup> the seller represented a mare he sold at an auction as having been "bred."<sup>65</sup> The Arkansas Supreme Court found that custom<sup>66</sup> in the horse auction business dictated that, when a mare is represented as having been bred, the buyer's reasonable assumption is that she is in foal and that, if she is not, the buyer is entitled to return privileges for rebreeding to the same stallion or to his choice of another of the seller's stallions.<sup>67</sup> Therefore, the appellate court affirmed the trial court's judgment for return of the purchase price to the buyer.<sup>68</sup> Cases such as *Appleby* and *McKnight*<sup>69</sup> suggest a judicial willingness to transform the parties' "loose" language about the horses being bred into unintended express warranties. For this reason, breeding contracts should expressly negate the existence of any rights of refund or return if none are intended. The stallion owner also runs the risk that, even if the parties do not express or suggest a guarantee verbally, as a matter of law one may be implied. Express negation of all warranties in the breeding contract is thus of great importance to the stallion owner.<sup>70</sup>

In contrast to the mare owner's concerns about fertility, the stallion owner should be concerned about the health and condition of the mare. The stallion owner should require that the mare be healthy and in sound breeding condition, and that the mare's condition be certified by a qualified veterinarian. In light

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<sup>62</sup> *Id.*

<sup>63</sup> *Id.* at 298-99.

<sup>64</sup> 449 S.W.2d 706 (Ark. 1970).

<sup>65</sup> *Id.* at 706.

<sup>66</sup> The RESTATEMENT (SECOND) OF CONTRACTS § 202 (1979) provides that course of performance between the parties, course of dealing and usage of trade may be used to interpret the intent of the parties. RESTATEMENT (SECOND) OF CONTRACTS § 203 (1979) states that express terms will have priority over course of performance, which prevails over course of dealing, which in turn prevails over usage of trade. U.C.C. § 1-205 (1972) provides that course of dealing and usage of trade may be considered to supplement or qualify terms of an agreement. See also U.C.C. § 2-202 (1972) (course of dealing, usage of trade, course of performance); U.C.C. § 2-208 (1972) (course of performance).

<sup>67</sup> 449 S.W.2d at 706-07.

<sup>68</sup> *Id.* at 706.

<sup>69</sup> See also *White Devon Farm v. Stahl*, 389 N.Y.S.2d 724 (N.Y. Sup. Ct. 1976) (allowing buyer to rescind where stallion was unfit for breeding).

<sup>70</sup> See note 54 *supra* for a discussion of the exclusion of warranties.

of the recent outbreak of certain contagious equine diseases,<sup>71</sup> the stallion owner should protect himself by providing a right to refuse service to any mare exposed to such diseases.<sup>72</sup> The breeding contract should also allow the stallion owner to refuse to breed the mare until she is ready.

The mare's condition is particularly important if the mare is to be boarded at the farm where the stallion stands.<sup>73</sup> The stallion owner may require that the mare have all necessary vaccinations and a negative Coggin's test. If clean cultures are necessary, this requirement should be set out in the agreement. Finally, if the mare needs veterinary care, the contract should authorize this treatment and provide that it will be performed at the mare owner's expense.

In addition, the contract should provide for the effect of the death of either the stallion or the mare. Typically, breeding contracts stipulate that if either animal dies, the contract is null and void and each party is thereby released from responsibility.<sup>74</sup> This protection is necessary to limit the stallion owner's liability to all season holders if his horse becomes ill or injured during the breeding season.

### *B. Sale of the Stallion or the Mare*

The parties to a breeding contract should provide for the procedures to be followed if either the stallion or mare is sold during the term of the breeding agreement. The relative strengths and weaknesses of the negotiating parties will determine who

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<sup>71</sup> Herbert, *On Arteritis - Regulations and Recommendations*, 111 THE BLOOD-HORSE 984-87 (Feb. 9, 1985).

<sup>72</sup> The clause should specifically provide that if the stallion owner refuses a mare because of her condition, he is not liable to the mare owner for damages. See note 113 *infra* and accompanying text for a discussion of incidental and consequential damages.

<sup>73</sup> Generally, the mare will be boarded at the farm where the stallion stands for two primary reasons: first, to enable the stallion manager to coordinate the mare's breeding cycle with breedings for other holders of breeding rights; and second, to ensure the best possible conditions for a breeding to avoid the necessity for rebreeding of the mare during the breeding season.

<sup>74</sup> See RESTATEMENT (SECOND) OF CONTRACTS § 261 (1979). If "a party's performance is made impracticable without his fault by the occurrence of an event the non-occurrence of which was a basic assumption on which the contract was made, his duty to render that performance is discharged. . . ." *Id.*

will benefit most from these provisions. The mare owner may wish to provide that if the stallion is sold, it must be sold subject to the terms and conditions of the breeding contract and with a requirement that the new owner will honor the contract.<sup>75</sup> If such a provision is included in the contract, the careful mare owner might also require that if the stallion is removed from a certain location as a result of the sale, the mare owner has either the right to a refund or the right to breed to another stallion owned by the same breeder. This provision eliminates the risk of having to ship the mare a distance that was not originally contemplated by the agreement. On the other hand, because the stallion owner may want to sell the stallion<sup>76</sup> either prior to or during the course of the breeding season, he might resist any suggestion that the contract should carry over to the new owners. The mare owner's remedy may thus be limited to contract damages.<sup>77</sup>

In *Taylor v. Johnston*,<sup>78</sup> the sale of the stallion Fleet Nasrullah gave rise to a breach of contract action by a buyer of breeding services that the stallion was to perform in California

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<sup>75</sup> The mare owner may have a difficult time enforcing his breeding rights against a subsequent buyer who qualifies as a bona fide purchaser for value. See U.C.C. § 2-403 (1972). See also KY. REV. STAT. ANN. § 355.9-307(4) (Bobbs-Merrill Cum. Supp. 1984) [hereinafter cited as KRS] (bona fide purchaser at auction takes clear of all security interests).

<sup>76</sup> The sale of the stallion does not void the contract, and the stallion owner cannot claim that he is discharged because his performance was made impracticable through his own fault. See RESTATEMENT (SECOND) OF CONTRACTS § 261 (1981) (discharge permissible only where performance is made impracticable without fault). See, e.g., *Baumer v. Franklin County Distilling Co.*, 135 F.2d 384, 388 (6th Cir.) (liquor distributing contract breached upon manufacturer's sale of rights to a particular brand rendering delivery to the plaintiff "impossible"), *cert. denied*, 320 U.S. 750 (1943).

<sup>77</sup> The courts will award specific performance for a breach of contract for personal services only when equity requires it and proper relief cannot be obtained otherwise. See, e.g., *Wehen v. Lundgaard*, 107 P.2d 491, 493 (Cal. Ct. App. 1940). The argument against the applicability of such precedents is that the court's unwillingness to order specific performance for human services arises from an unwillingness to compel an individual to perform services against his will. See U.S. CONST. amend. XIII. In the breeding contract context, the services provided are really those of the horse, and only incidentally those of its owner in conducting the breeding, so specific performance may be available. See, e.g., *Johnson v. Stumbo*, 126 S.W.2d 165, 174 (Ky. 1938) (vendors of a hospital could sue buyers for specific performance of agreement to permit physician to bring patients to the hospital).

<sup>78</sup> 539 P.2d 425 (Cal. 1975) (*en banc*).

during 1966. The buyer's contract provided that he could breed two mares to the stallion. In October, 1965, the defendant sold the stallion to buyers in Kentucky who then syndicated him.<sup>79</sup> On the same day, the seller wrote to the plaintiff informing him that the seller was released from his reservation of breeding rights because the stallion was to stand in Kentucky.<sup>80</sup> Despite the seller's letter and the sale of the horse, the mare owner insisted on exercising his breeding rights and shipped his mares to Kentucky.<sup>81</sup> The buyer was told that arrangements had been made with the syndicators to have his mares bred to the stallion.<sup>82</sup> He tried numerous times during the period from April 17, 1966, to June 14, 1966, to have his mares booked to Fleet Nasrullah, but had no success. On June 4 and June 14, before the end of the breeding season, he bred his mares to another stallion.<sup>83</sup> Subsequently, the buyer claimed that the sellers had breached the breeding contract because they had made it impossible for him to arrange his bookings.<sup>84</sup>

The trial court held that, by selling the stallion, the defendants "put it out of their power to perform properly their contracts with plaintiff," and gave judgment to the plaintiff on the theory of anticipatory repudiation.<sup>85</sup> On appeal, however, the Supreme Court of California held that the time for performance had not yet arrived when the plaintiff bred his mares to the other stallion and that no anticipatory breach therefore could be charged against the seller.<sup>86</sup> Furthermore, the supreme court found that an anticipatory breach had indeed occurred when the seller released the buyer from his reservation, but that the buyer had nullified this repudiation by insisting on exerting his breeding rights.<sup>87</sup>

The buyer argued that the breach occurred when the syndicators refused to allow him to breed his mares to Fleet Nasrul-

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<sup>79</sup> *Id.* at 427.

<sup>80</sup> *Id.* at 427-28.

<sup>81</sup> *Id.* at 428.

<sup>82</sup> *Id.* at 428 n.3.

<sup>83</sup> *Id.* at 428.

<sup>84</sup> *Id.* at 429.

<sup>85</sup> *Id.* at 429 n.5.

<sup>86</sup> *Id.* at 433.

<sup>87</sup> *Id.* at 431.



lah.<sup>88</sup> Nevertheless, the court found no evidence of a repudiation once the mares had reached Kentucky, because, although the buyer's breeding right had clearly been subordinated<sup>89</sup> to the rights of the syndicate shareholders, the syndicators had never told the buyer that they would not perform.<sup>90</sup> Even though the actions of the syndicators delayed performance of the contract, the court found that the delay did not amount to a breach and gave judgment to the sellers.<sup>91</sup> Because the timing of breeding is so important,<sup>92</sup> there is a strong argument that the *Taylor* court should have awarded the buyer damages for delay.

The buyer of the season in *Taylor* might have been able to avoid this outcome if he had specified in his breeding contract that the stallion could only be sold subject to the terms of his breeding contract, and that his breeding rights would not be subordinated to the booking rights of later syndicate shareholders.<sup>93</sup>

*Kwik-Lok Corp. v. Pulse*<sup>94</sup> involved the sale of a stallion to which the plaintiff had two free annual breeding rights for an unlimited duration.<sup>95</sup> After he sold the stallion to someone else, the stallion owner notified the plaintiff that he could no longer provide the plaintiff with his breeding rights.<sup>96</sup> Instead of determining whether the seller had actually breached the contract, as did the court in *Taylor*,<sup>97</sup> the *Kwik-Lok* court focused on the grant of breeding rights itself.<sup>98</sup> The stallion owner had granted the breeding rights to the plaintiff in a letter that did not state the duration of the contract.<sup>99</sup> The court held that the failure to

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<sup>88</sup> *Id.* at 429 n.5, 431, 432.

<sup>89</sup> Typically, a syndication agreement does not provide for priority in the exercise of a breeding right by a syndicate shareholder over a nonshareholder with a breeding right.

<sup>90</sup> 539 P.2d at 431 n.11.

<sup>91</sup> *Id.* at 432-33.

<sup>92</sup> See note 106 *infra* for a discussion of the importance of the timing of breeding.

<sup>93</sup> The buyer's contract restrictions may not have been enforceable against a later syndicate shareholder who qualified as a bona fide purchaser for value.

<sup>94</sup> 702 P.2d 1226 (Wash. Ct. App. 1985).

<sup>95</sup> *Id.* at 1227-28.

<sup>96</sup> *Id.* at 1228.

<sup>97</sup> See 539 P.2d at 428, 432-33.

<sup>98</sup> See 702 P.2d at 1228.

<sup>99</sup> *Id.* at 1227.

state the duration of the contract made it ambiguous,<sup>100</sup> and remanded the case to the lower court to determine its "reasonable" duration.<sup>101</sup> The court gave some guidance to the lower court regarding the factors it should consider in determining the reasonable duration of the contract.<sup>102</sup> Those factors included consideration of the lifetime of the horse, the breeding life of the horse, the life of the plaintiff and the time of sale of the horse.<sup>103</sup> As in *Taylor*,<sup>104</sup> the mare owner might have avoided this controversy if he had specifically stated the terms of the contract.

The potential sale of the mare is also cause to insert protective clauses in a live foal guarantee breeding agreement. The stallion owner may require that, if an in-foal mare is sold after the service, the stud fee shall be due and payable. Typically, such a clause also provides that there will be no refund of the stud fee thereafter. This language is important to the stallion owner who has consciously contracted with a mare owner whom he knows has a good track record with respect to the maintenance and care of mares during their pregnancy, because the sale of the mare may change the stallion owner's risk under the live foal guarantee.

### C. *Designation of the Breeding Season and Breeding Priority*

The time period during which the horses are to be bred should be specifically set forth in the agreement to avoid problems such as those experienced by the buyer in *Kwik-Lok*.<sup>105</sup> The thoroughbred industry conducts its breeding season annually

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<sup>100</sup> *Id.* at 1229.

<sup>101</sup> *Id.* at 1232.

<sup>102</sup> *Id.* at 1229.

<sup>103</sup> *Id.* The court was misinformed in suggesting that the lower court could have decided that a reasonable duration of the contract was for any period other than the lifetime of the horse, the norm in the equine industry. See note 29 *supra* for a discussion of custom and usage of trade in the horse industry. See note 106 *infra* for a discussion of the importance of breeding dates.

<sup>104</sup> 539 P.2d at 428, 432-33.

<sup>105</sup> See notes 94-103 *supra* and accompanying text for a discussion of *Kwik-Lok*. The gap filler provided by U.C.C. § 2-309 (1972), which would instruct a court to imply a reasonable breeding time, is not likely to achieve a proper result if applied in the equine breeding context.

from February to July; therefore, it is essential that the mare be able to breed to the stallion during that period.<sup>106</sup>

A problem related both to the pertinent dates of the breeding season and to the sale of the mare or stallion is the issue of the breeding priority on a given day. If two mares are ready to be bred to the stallion at the same time, which one of them should go first? From the mare owner's standpoint, it would be helpful to have a priority system spelled out in the breeding contract, but this is not normally the case. The industry norm is that the stallion manager makes the decision. Can the mare owner protect himself in this situation? It is quite possible that his mare may be skipped and thus he will miss a breeding opportunity, as in *Taylor*.<sup>107</sup> Even if the breeding contract provides access during a designated breeding season, the mare owner may miss a heat cycle because the stallion was booked when the mare was ready.<sup>108</sup>

The parties can draft a breeding contract to set out a breeding priority system. As indicated earlier, priority systems are not common and breeding priorities are traditionally established on a daily basis by the stud manager. At many farms, priorities are determined on a first come, first serve basis.<sup>109</sup> If breeding priority is a concern, the wise mare owner will inquire into the farm's practice and specify priority in the breeding contract.

#### *D. Boarding, Care and Liability*

If necessary, the breeding contract should also contain clauses regarding the boarding of the mare.<sup>110</sup> In many situations, the

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<sup>106</sup> Thoroughbreds are considered one year old on the January 1 following their actual birth date. Because the gestation period of the horse is approximately 335 to 342 days, see 2 EQUINE MEDICINE, *supra* note 41, at 1352, mares bred in January could foal in late December of the same year and the foal could be considered one year old on January 1 of the next year, although it would in fact be less than one month old. Those mares bred in July could foal as late as June, thus forcing the mare owner to miss a breeding year.

<sup>107</sup> See 539 P.2d at 428.

<sup>108</sup> Typically, a mare is receptive to breeding for five to seven days. See 2 EQUINE MEDICINE, *supra* note 41, at 1350. If several mares are ready at the same time, the syndicate manager must choose, because the stallion can provide only a limited service.

<sup>109</sup> Often, when stallion owners and mare owners are in close vicinity, the parties rely on known practice and reputation. Once the parties are separated by greater distances, the need for a formal breeding contract is more compelling.

<sup>110</sup> See note 73 *supra* for a discussion of the advantages of boarding the mare where the stallion stands.

farm charges a per-day fee and the parties do not enter into a specific boarding arrangement.<sup>111</sup> This practice has developed in many areas of the country where there are established boarding procedures and charges. If the mare is to go to an area of the country or to a farm that is not familiar to the mare owner, the mare owner should ensure that the mare will receive adequate treatment.<sup>112</sup> The mare owner should carefully review the farm's practices regarding management of its horses and outline in writing each party's expectations before entering into a boarding agreement.

Boarding arrangements can be included in the breeding contract or in separate agreements. The provisions should cover daily or monthly charges, feeding arrangements, pasture access, stabling, veterinary attention (both routine and emergency), farrier services and any other provisions that are unique to the specific situation.

The breeding contract should also deal with the possibility of accident, injury, disease, or death of the mare or stallion, as well as each party's responsibility therefor.<sup>113</sup> Normally, each

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<sup>111</sup> A written agreement avoids problems with the enforceability of an oral boarding agreement. See KRS § 371.010 (1972).

<sup>112</sup> As the network of horsemen expands, the client may be tempted to rely on the assurance of a "friend of a friend" that the proposed boarding farm gives adequate treatment. The client should be warned that these assurances are not guarantees and that a written contract is necessary.

<sup>113</sup> Unless expressly provided for, accident, injury, disease or death of the mare or stallion could lead to a breach of contract action. The RESTATEMENT (SECOND) OF CONTRACTS § 347 (1981) states that, subject to limitations when the injured party could have avoided damage (§ 350), the loss was unforeseeable (§ 351), the evidence does not establish the damage with reasonable certainty (§ 352), and loss is due to emotional disturbance § 353): [T]he injured party has a right to damages based on his expectation interest as measured by

(a) the loss in value to him of the other party's performance caused by its failure or deficiency, plus

(b) any other loss, including incidental or consequential loss, caused by the breach, less

(c) any cost or other loss that he has avoided by not having to perform.

U.C.C. §§ 2-711 through 2-716 delineate the buyer's remedies for breach of contract. See U.C.C. §§ 2-711 to 2-716 (1972). These entitle the buyer to a refund of the purchase price, cover and, where appropriate, specific performance, see U.C.C. § 2-711, and to incidental and consequential damages, see U.C.C. § 2-715. See, e.g., *Peckham v. Larsen Chevrolet-Buick-Oldsmobile, Inc.*, 587 P.2d 816 (Idaho 1978) (U.C.C. § 2-711 allows

party agrees to waive the other party's liability for such an event, unless caused by one party's negligence. For example, as recognized by the court in *Sheets v. Robin*,<sup>114</sup> normally the stallion owner decides on the type of breeding between the stallion and the mare. Thus, in *Sheets*, the stallion owner was not held liable for his decision not to have the mare halter bred to the stallion, even when the mare allegedly sustained injuries as a result of an alternate method of breeding.<sup>115</sup>

The stallion owner and the mare owner may also want to require that if there is an insurable loss to either of the animals, the respective insurance policies contain provisions waiving rights of subrogation to the respective claims. The stallion owner may want a specific exception to this provision that imposes liability on the mare owner for any loss of the stallion caused by the unhealthy condition of the mare.

Insurance covering the loss of the mare is, of course, available to her owner. The stallion owner normally will not carry that type of insurance on any of the mares boarded on the farm or in attendance for breeding. The breeding contract should recite that the mare owner has the option to purchase such insurance and that the stallion owner has no responsibility to purchase insurance covering any losses relating to the mare.

The stallion owner should seek a clause indemnifying him for any loss resulting from the breeding of the mare. This places the responsibility for the mare's action with its owner. The mare owner may also seek such indemnification from the stallion owner and the farm for any loss he may incur as a result of their actions.

### *E. Breeding Certificates*

The mare owner should include a provision in the breeding contract requiring the stallion owner to provide the mare owner

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cancellation by the buyer if the "seller's delivery is such that it gives the buyer a right to reject or a right to revoke acceptance of the goods").

Thus, for example, if a stallion owner breached his contract, the buyer would be entitled to a return of the purchase price, plus incidental and consequential damages under both the RESTATEMENT (SECOND) OF CONTRACTS and the U.C.C.

<sup>114</sup> 380 So. 2d 137 (La. Ct. App. 1979), *cert. denied*, 382 So. 2d 165 (La. 1980).

<sup>115</sup> *Id.* at 138.

with the necessary breeding certificates. The contract should permit the stallion owner to withhold these certificates if the mare owner has breached the breeding agreement or if his account with the farm is delinquent in any manner, thus providing incentive for the mare owner to abide by the agreement and keep his account current.<sup>116</sup>

### III. SPECIAL ISSUES IF THE STALLION IS SYNDICATED

As previously mentioned, in the case of a syndicated stallion, the breeding contract should reference and incorporate the syndicate agreement and the system of breeding priority in the contract, and should allow for accident and illness insurance coverage. A number of other issues will arise, in the drafting and litigation contexts, if the stallion is syndicated.<sup>117</sup>

#### A. *Liability and Insurance*

Liability insurance is one such issue. Normally, syndicate agreements provide that the syndicate manager will maintain a public liability policy insuring the co-owners and the syndicate manager against loss or liability caused by the syndicate manager or his employees. The existence of such insurance should be verified. Moreover, the parties should make sure that the mare owner has liability insurance above and beyond the liability insurance maintained by the syndicate for injury and damage caused by the mare. Representations from the stallion owner, the syndicate manager, and the mare owner as to the existence of this coverage should be in the breeding contract itself. Ideally,

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<sup>116</sup> See *Underwood v. Williams*, 488 S.W.2d 515, 518, 519 (Tex. Civ. App. 1972) (action for failure to sign breeding certificates that were a prerequisite to the registration of the foal). As an additional means of enforcing payment, cautious stallion owners may demand that the mare owner grant them a security interest in the foal produced from the breeding and/or in the stallion service certificate. Questions about the constitutionality of KRS § 376.420 have made complete reliance on Kentucky's statutory stallion service lien less attractive. For a discussion of the stallion service lien, see Lester, *Secured Interests in Thoroughbred and Standardbred Horses: A Transactional Approach*, 70 Ky. L.J. 1065, 1094-98 (1981-82).

<sup>117</sup> For an example of the difficulties that can befall the purchaser of a season to a syndicated stallion, see *Trimble v. North Ridge Farms, Inc.*, 700 S.W.2d 396 (Ky. 1985).

each party can review the respective insurance policies to assure themselves that the insurance is adequate and in full force and effect.

### *B. Status of Syndicate Members' Account*

Many syndicate agreements provide that if the co-owner is not current in paying charges levied by the syndicate, the syndicate manager can refuse to breed any mare nominated under that co-owner's share. In addition, the agreement may permit the syndicate manager to sell that co-owner's nomination and apply the proceeds to the co-owner's outstanding obligations. Therefore, the breeding contract should recite both that the co-owner's account is current and that he or she has no outstanding obligations to the syndicate at the time of the execution of the contract. The breeding contract should provide that, in the event the co-owner becomes obligated to the syndicate prior to the mare owner's cover, the mare owner may pay those costs, deducting them from the amount owed to the co-owner for the stallion season.<sup>118</sup>

### *C. Notice and Transferability of the Season*

Transferability of the season is another concern. Typically, the syndicate agreement requires the holder of a season to notify the syndicate manager in the event that he or she transfers that right.<sup>119</sup> Nevertheless, a mare owner should specify in the breeding contract that the seller of the season must promptly forward the mare owner's name and address to the syndicate manager, along with the identity of the mare and specifics of the breeding arrangements. Simply requiring the seller to send a copy of the breeding contract to the syndicate manager may be the easiest method. In addition, however, the mare owner should contact the syndicate manager directly, immediately after purchasing a breeding right. This notice should track the information that the syndicate manager receives from the seller of the season and

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<sup>118</sup> The provisions should permit, but not require, the mare owner to pay such charges.

<sup>119</sup> The parties may contract to limit the rights of transferability.

should request that the syndicate manager inform the mare owner of any special forms or procedures that must be completed.<sup>120</sup>

#### D. *Reduced Book*

The typical syndicate agreement makes provisions for either an increased or a decreased number of breedings to the stallion during the breeding season ("book"). If after the commencement of the breeding season the syndicate manager notifies the co-owner that his nomination has been lost because the stallion is to be bred to a reduced book of mares, or no mares at all, then the mare owner may try to sue for damages beyond the contract price.<sup>121</sup> The co-owner should, therefore, protect himself by assuring that, under those circumstances, the mare owner will have no cause of action against him beyond the amount paid for the nomination.

Damages for the loss of a booking are typically in contract, although claims have been made in fraud. In *Kwik-Lok*<sup>122</sup> the court noted that the rule for assessing damages in breach of contract is to award recovery of all damages that naturally accrue from the breach and to put the complaining party into as good a position monetarily as he would have been in had the contract been performed. Thus, in *Kwik-Lok*, it was necessary to determine the market value of the breeding right at the time the losses occurred.<sup>123</sup>

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<sup>120</sup> If the mare owner follows this procedure, he can defuse any argument from the syndicate manager that the manager did not receive notice. See, e.g., *Baldwin v. Fidelity Phenix Fire Ins. Co. of New York*, 260 F.2d 951, 954 (6th Cir. 1958) (Notice is knowledge or information equivalent to knowledge.). Where both the holder of the season and the mare owner contact the syndicate manager, the notice element is more than satisfied. See *id.*

<sup>121</sup> See note 113 *supra* for a discussion of the available remedies.

<sup>122</sup> 702 P.2d at 1230.

<sup>123</sup> *Id.* at 1230-31. Ironically, once the breach has occurred, it is the mare owner who will try to prove a high market value and the stallion owner who will downplay its value. U.C.C. § 2-723 (1972) provides that market price will be that price prevailing within any reasonable time before or after the time of judgment if the prevailing price of such goods when the aggrieved party learned of the breach is not readily available. U.C.C. § 2-724 (1972) permits the admission of prices reported in trade journals as evidence of a market price.



In *Appleby v. Hendrix*,<sup>124</sup> the plaintiffs brought a deceptive trade practices suit for misrepresentation in the sale of a stallion sold for breeding purposes.<sup>125</sup> Although the only issue was whether the suit was properly venued, the court did recognize fraud as a potential cause of action.<sup>126</sup> Because fraud is not dischargeable in bankruptcy, a stallion owner suffering financial reverses should be especially careful about the representations made to the buyers of seasons.

### CONCLUSION

Breeding is the foundation of the horse industry. Although there are issues common to each mating, the parties must be careful to protect their respective interests adequately when the breeding contract is prepared. To prevent breeding contract controversies, each horseowner must draw on his own experience, evaluate his particular needs, and then carefully draft an agreement to ensure that the breeding contract fits his situation. If a dispute arises, however, the principals and their attorneys should be cognizant of the many diverse areas of law that impact on the breeding rights transaction, so that they can utilize all available theories in advancing their cases.

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<sup>124</sup> 673 S.W.2d 295 (Tex. Civ. App. 1984).

<sup>125</sup> *Id.* at 297.

<sup>126</sup> *Id.* at 297-98.