Part 2: T. Randolph Catanese, Esq.

VII. CONSUMER PROTECTION LAWS (REQUIREMENT TO DISCLOSE AGENCY AND DISCLOSURE OF COMMISSIONS)

A. General Background and the Need for Consumer Protection.

The ancient doctrine of *caveat emptor* – let the buyer beware – was generally prevalent and active as the law applicable to horse transactions throughout U.S. history until the advent of the modern view related to sale transactions of goods and products (i.e., advent of consumer protection laws and Uniform Commercial Code express and implied warranties). The rationale behind the *caveat emptor* doctrine was that a purchaser should examine, judge, and test for himself the good or product to be purchased. The rule was based on the notion that a buyer was in a position to adequately inspect, examine, and determine the condition of a "horse" before the buyer acquired the animal. *This doctrine encouraged equine sellers to commit fraud on equine buyers by intentional misrepresentations or by concealment of material facts related to the equine sale.*[1]

U.S. law addressed the need for *consumer protection* in connection with the sale of goods and products by implementing a national statute for consumer protection in 1914, the Federal Trade Commission Act (15 U.S.C. §§ 41 – 58, as amended). The statute established the creation of the *Federal Trade Commission.* Section 45 of Title 15 of the U.S. Code, entitled "Unfair methods of competition unlawful; prevention by Commission," declares that "(u)nfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful."

Generally, the FTC is the governing body to enforce this law and the rules and regulations thereunder. Accordingly, there is no private right of action based on this federal consumer protection statute; however, as will be discussed below, many state consumer protection laws incorporate by reference and adopt all of the rights and remedies of a consumer under federal consumer protection laws. States which do so offer broad and comprehensive remedies and rights to a state consumer by reason thereof.

B. Overview of State Consumer Protection Laws Applicable to Equine Sale Transactions and Their Application to "Agency" Relationships.

Prior to the enactment of federal and state consumer protection statutes, buyers had legal rights and remedies established under the common law or by other state statutes involving the sale of goods and products. The cases which address the common law rights of a buyer are

[1] *See Flood v. Ande* (1910) 140 A.D. 140 (Supreme Court of New York – Appellate Division) (where there is no warranty on the sale of a horse, the rule of *caveat emptor* applies and the sale is valid although the animal is diseased).

helpful to a plaintiff even when a claim is made under a state consumer protection statute. Complaints for relief often include complementary causes of action based upon the consumer protection statute, other state statutes, and common law claims for relief.

Over the last fifty years, many cases have been litigated in state and federal courts over disputes in the sale of horses. In the majority of cases, issues related to agency have predominated. Typically, when the seller of a horse is sued by a disgruntled buyer the buyer also sues those persons surrounding the seller when the sale occurred. *See Chernick v. Fasig-Tipton Kentucky, Inc.* (Ky. App. 1986) 703 S.W.2d 885 (this case established the duty to exercise ordinary care in connection with horses sold at auction and it expanded the application of the negligent misrepresentation doctrine in Kentucky).

The normal claims against the seller will include: fraud in the inducement of the sale contract, fraud against the principals of the seller if the seller is an entity (this allows for individual liability of the persons even if a corporate entity was the seller), breach of contract (for violations of written provisions such as express warranties or factual data related to the equine in question), breach of the covenant of good faith and fair dealing (this is an implied covenant by operation of law in many states such as California), violations of the Uniform Commercial Code (as enacted in the jurisdiction where the sale took place), negligent misrepresentation of fact (many times this is a substitute for a separate negligence claim or is combined with a negligence claim), and rescission (restitution).

In most sale transactions of horses, third parties will be involved other than the actual seller and buyer of the horses. Usually, the third party may include an actual or implied "partner," a trainer, a bloodstock agent, a veterinarian (usually in the context of a pre-purchase examination), an equine transportation agent or the nebulous person who is part of the particular equine breed industry who is a "facilitator" of the transaction (in most cases when the facilitator is involved, a secret commission is being paid to the facilitator by the seller or someone involved in the sale on behalf of the seller).

State consumer protection statutes apply to the seller as well as those who have concomitant responsibility or liability in connection with the sale of the equine to the buyer. Therefore, it is important to carefully analyze the facts of an equine dispute to determine the identity of the participants in the transaction. If you are seller's counsel you should identify third parties who may have vicarious liability or direct liability to the buyer in the transaction. This analysis should also include the identification of acts by a third party which may have contributed to the claimed injuries of the buyer or which may provide the basis for a claim of indemnity and contribution to protect the seller against the buyer's claims. Sometimes, the acts of a third party may be a superseding intervening cause which may provide a complete defense to the buyer's claims. On the other hand, if you are representing the buyer it is critically important to identify the third parties who may, by their statements or actions involving the buyer, establish or enhance the liability of the seller based upon partnership and agency principles.

When counsel first identifies the facts of the equine dispute it is paramount to identify those facts and circumstances which may establish the presence of a third party agent or partner. The presence of an "agent" or "partner" and their acts or omissions will oftentimes determine the outcome of an equine sale dispute.[2]

C. *Examples of State Consumer Protection Statutes Regarding Equine Sales and Disclosure of Agency Relationships.*

Kentucky, California and Florida have each enacted state consumer protection statutes in the last several years which are directed to equine sale transactions. These statutes require the disclosure of an agency relationship, a disclosure of a commission, and the disclosure of whether the agent is a "dual" agent. These statutes also require written bills of sale for equine sale transactions. If the statutes are violated, they provide substantial remedies to the injured party (generally, the buyer in the transaction).

i. Kentucky

The Kentucky equine consumer protection statute is found at KRS § 230.357, enacted in 2006. The statute defines "equine" as a horse of any breed used for racing or showing, including prospective race horses, breeding prospects, stallions, stallion seasons, broodmares, yearlings, or weanlings, or any interest therein. There are special rules related to syndications and public auction sales. Moreover, the statute expressly makes it unlawful for any *person* to act as an agent for both the purchaser and the seller (defined as a dual agent) in the equine sale unless both purchaser and buyer have knowledge of the dual agency and written consent is given by both the purchaser and the seller to the disclosed dual agency. In addition, the statute makes it unlawful for an agent to receive compensation, fees, a gratuity or any other item of value in excess of $500 related directly or indirectly to the equine sale unless the agent discloses in writing the commission amount to both purchaser and seller and the purchaser and seller consent in writing to the payment. *The statute does not apply to the sale, purchase or transfer of an equine used for "showing" if the amount in question does not exceed $10,000. Moreover, the statute requires "actual knowledge" by the person of the conduct constituting a violation if that person is to be held liable under the statute.*[3]

The Kentucky statute gives the injured person the right to recover *treble damages* from persons or entities who violate the law. And, the prevailing party in litigation involving the statute is entitled to an award of their costs of suit and reasonable litigation expenses which

---

[2] *See also* R. Kelley Rosenbaum, Note, *Mucking Out the Stalls: How KRS § 230.357 Promises to Change Custom and Facilitate Economic Efficiency in the Horse Industry,* 95 Ky. L.J. 997 (2006-2007)

[3] *The requirement that a person have "actual knowledge" of the conduct which creates liability under the statute is vague and will likely create the need for appellate review. This caveat appears to be a windfall for defense counsel faced with a plaintiff's claim originating under this statute.*

includes attorney's fees. Treble damages is defined as three times the difference between the price paid for the equine and the actual value of the equine at the time of sale and any undisclosed commission received by an agent.

ii. Florida

The Florida version of a consumer protection statute is identified as *The Florida Deceptive and Unfair Trade Practices Act.* The law is set forth in Florida Statutes, Title 33, §§501.201 *et seq.*

Section 501.203(3)(c) states that a violation of the statute means any violation of the act or the rules adopted under this act, including any law, statute, rule, regulation, or ordinance which proscribes unfair methods of competition, or unfair, deceptive, or unconscionable acts or practices. *Section 501.203(3)(a), (b) states that a violation of the law may be based upon any rules promulgated by the Federal Trade Commission Act (including the standards of unfairness and deception set forth and interpreted by the FTC or the federal courts). Section 501.204(2) states that due consideration and great weight shall be given to interpretations of unfair or deceptive trade acts or practices under the Federal Trade Commission or federal courts.*

A corollary rule exists under Florida Statute Title 33, Chapter 535.16, enacted in 2007. Section 535.16 is entitled "Sale and purchase of horses; unfair or deceptive trade practices." Subpart 1 of Section 535.16 states that the Florida Department of Agriculture and Consumer Services "shall adopt rules . . . to prevent unfair or deceptive trade practices." Moreover, Section 535.16 further states that the rules should include the following: "the disclosure of the legal owner and buyer of the horse and any dual agency to the buyer and seller; the disclosure of relevant medical conditions, defects, and surgeries; the conduct or alterations that could affect the performance of a horse; and the need for a written bill of sale or similar documentation."

The Florida Administrative Code at Chapter 5H-26, rules 5H-26.001 through 5H-26.004 addresses the legislative directive found in Section 535.16. Rule 5H-26.003(13) states "[a] violation of any provision of Chapter 5H-26, F.A.C., resulting in actual damages to a person, shall be considered an unfair and deceptive trade practice pursuant to Chapter 501. Part II, F.S."

Rule 5H-26.003 states that "(a) a person shall not act as a dual agent in a transaction involving the sale or purchase of an interest in a horse without . . . (t)he prior knowledge of both the Purchaser and the Owner . . . and (w)ritten consent of both the Purchaser and the Owner." Furthermore, the rule tracks the language of the Kentucky statute by stating that no person acting as an agent (or dual agent) in a transaction involving an equine sale or purchase or any interest therein may receive consideration, compensation, fees, a gratuity, or any other item of value in excess of $500 related directly or indirectly to the transaction unless the agent discloses the commission in writing to both the purchaser and owner and "(e)ach principal for whom the agent is acting consents in writing to the payment." Additionally, the rule requires that an *agent* or *trainer* is prohibited from purchasing or recommending the purchase of a horse for a principal if

the agent or trainer has a legal or equitable ownership interest in the horse without the prior knowledge of the principal and the principal's written consent *if practicable.*

Like the Kentucky statute, the Florida statute has special rules in connection with equine sales at public auction.

Rule 5H-26.003(13) provides that "[a] violation of any provision of Chapter 5H-26, F.A.C., resulting in actual damages to a person, shall be considered an unfair and deceptive trade practice pursuant to Chapter 501, Part II, F.S." Thus, remedies for violations of the Florida Administrative Code Rules governing equine sales are provided for under the Florida Deceptive and Unfair Trade Practices Act itself. Notably, the Florida Deceptive and Unfair Trade Practices Act at §501.2015 allows for recovery of reasonable attorney's fees and costs by the *prevailing party* in any civil litigation resulting from an act or practice involving violations of the Act, after judgment at trial and exhaustion of all appeals, if any. Furthermore, §501.211 provides that "anyone aggrieved by a violation of this part may bring an action to obtain declaratory judgment that an act or practice violates this part" and that anyone suffering a loss "in violation of this part . . . may recover actual damages . . . ." Section 501.213 explicitly provides that "the remedies of this part are in addition to remedies otherwise available for the same conduct under state or local law."[4]

iii. California

California enacted its equine consumer protection statute at §19525 of its Business and Professions Code. Former §19525 dealing with equine consumer protection was enacted in 1994 and repealed in 2010. It was replaced with the current version of the section following the Kentucky law addressed above.[5]

Currently, §19525 of the California Business and Professions Code expands on its former law and adopts the further developments to equine sale protection adopted in the state of Kentucky. The California statute uses the same definition of "equine" as does the Kentucky and Florida statutes. Again, there are special rules regarding the sale of horses at public auction. The statute also makes it unlawful for a person to act as a "dual agent" in an equine transaction unless the person obtains the prior written consent of both the purchaser and seller acknowledging the dual agency. The statute also adopts the limitation that an agent may not collect a commission in excess of $500 absent disclosure to the principals of the agent and the written consent of the principals to the agent's commission. (As is the case in Kentucky and Florida, the California

[4] Importantly, §501.211 also provides that if the party against whom the action is filed files a motion alleging that the action is "frivolous, without legal or factual merit, or brought for the purposes of harassment," the court (after hearing evidence) may require the plaintiff to post a bond "in the amount which the court finds reasonable to indemnify the defendant for any damages incurred, including reasonable attorney's fees."

[5] Prior to the current law's enactment, the California law did prohibit a person from receiving compensation in connection with the sale or purchase of a racehorse, prospective racehorse, stallion, or broodmare without the purchaser and seller agreeing in writing to the payment of that compensation. Violators receiving such compensation could be subject to treble damages to the purchaser or seller. Furthermore, under the previous law, a transfer of interest in a racehorse, prospective racehorse, stallion, or broodmare had to be accompanied by a written bill of sale setting forth the purchase price.

statute also requires an agent to provide the principal with copies of any financial records in their possession pertaining to the equine transaction. Financial records include the work product of the agent or the owner of the horse regarding their evaluation of the horse.)[6]

Like the Kentucky statute, California provides for *treble* damages for persons who are injured by a violation of the statute. Yet, unlike the Kentucky statute, California's statute does not define how treble damages are to be calculated. Furthermore, unlike Kentucky and Florida, there is no remedy for the recovery of reasonable attorney's fees and costs by statute.[7] *These deficiencies in the California statute are the product of legislative fiat and in many ways reflect competing interests when the legislation was under consideration by the legislature.*

VIII. CONSUMER PROTECTION LAWS (REQUIREMENT OF WRITTEN BILL OF SALE)

The requirement of a written bill of sale with certain information within the document is a direct result of numerous lawsuits between sellers and buyers in connection with equine sale transactions. Wealthy and influential buyers who felt mislead in equine sale transactions lobbied heavily for state laws which would require written contracts with written disclosures regarding equine sales. The hope was to protect the integrity of the equine industry for purposes of equine pricing and to reduce the specter of litigation especially involving high-priced horses. As discussed hereafter, Florida has the most comprehensive law and interpretive rules regarding the equine bill of sale. Kentucky and California have requirements for a written bill of sale, but their requirements are less comprehensive than those in the state of Florida.

A. Kentucky.

KRS § 230.357 requires that in connection with any equine sale, purchase or transfer a *written bill of sale or acknowledgment of purchase and security agreement setting forth the purchase price* must be signed by both the purchaser and the seller (or their duly authorized agent). The Kentucky statute requires that the purchase price be stated. No other specific information is required in the bill of sale excepting in cases involving public auctions. (Arguably, the bill of sale should include the written disclosures regarding dual agency and commissions, but the statute does not require the same in the bill of sale, only that the agent have confirmation of the disclosure and the consent of the parties in a "writing.")

---

[6] If a violation of the statute occurs, the California Horse Racing Board may suspend or revoke the license of any person (applicable to racehorses of any breed).

[7] Section 1717 of the California Civil Code allows the prevailing party to recover their attorney's fees where authorized by statute or by written agreement of the parties. *This omission in the California statute greatly reduces its benefit to an injured party with rights under the statute.*

B. Florida.

Florida Statute Title 33, Chapter 535.16 requires the Florida Department of Agriculture and Consumer Services to adopt rules pertaining to the "need for a written bill of sale or similar documentation." Fla. Stat. §535.16(1).

This legislative directive is addressed in The Florida Administrative Code at Chapter 5H-26, at Rule 5H-26.004, entitled "Bill of Sale." This rule requires and mandates that the following information be stated in the written bill of sale in connection with the sale or purchase of a horse or any interest therein in the state of Florida:

1) The name, address and signature of the Purchaser, the Owner, or their duly authorized agents;
2) The name of the horse and its sire and dam if known;
3) The breed and registry status of the horse, if applicable and if known;
4) The age of the horse, if known;
5) The date of the sale;
6) The purchase price of the horse;
7) The following statement: "As the person signing below on behalf of the Owner, I hereby confirm that I am the lawful Owner of this horse or the Owner's duly authorized agent, and I am authorized to convey legal title to the horse pursuant to this bill of sale"; and,
8) The following statement: "As the person signing below on behalf of the Purchaser, I understand that any warranties or representations from the Owner or the Owner's agent that I am relying upon in acquiring this horse, including warranties or representations with respect to the horse's age, medical condition, prior medical treatments, and the existence of any liens or encumbrances, should be stated in writing as part of this bill of sale."

The Florida law, as discussed above, provides a great deal of protection for the equine buyer. Besides the general information regarding the identity of the equine, the statute requires that the seller affirm their ownership of the horse being sold (or the authorized agent of the owner to do so) and that any warranties or representations being made by the seller to the buyer which are relied upon by the buyer in purchasing the horse be in writing and made part of the bill of sale. This includes warranties or representations regarding the horse's age, medical condition, prior medical treatments, and the existence of any liens or encumbrances. *These requirements go far in fulfilling the stated policy of the Florida legislature when it enacted its equine consumer protection laws.*

C. California.

Section 19525 of the California Business and Professions Code states that in any sale, purchase, or transfer of an equine there shall be a written bill of sale or acknowledgement of purchase setting forth the purchase price and the same shall be signed by both the purchaser and the seller (or their duly authorized agents). The California statute does not require the bill of sale to set forth any other information. Likewise, any disclosure of agency or agency commission is not required to be part of the bill of sale, but may be addressed through a separate written document.

Presumptively, the bill of sale requirement applies to *sellers* of equines; however, the author is currently engaged in California state litigation wherein the seller has argued to the state court that the requirement is reciprocal and should likewise apply to the buyer of the horse.[8] It seems apparent that either the seller or the buyer may proceed under California's statute against a person who was an agent and violated the statute.

IX. PROVING AGENCY IN THE EQUINE CASE (TYPICAL FACTUAL ISSUES, LIABILITY ISSUES AND INSTRUCTIONS TO JURY PANELS)

Equine sale transactions between private parties will involve a seller and a buyer. Normally, an agent of some type will also be involved. The agent may be a trainer, a business partner, a veterinarian, a bloodstock agent, or the "facilitator." In the usual equine sale dispute the defense will argue that the "deep pocket" target – usually the apparent seller of the horse – has no liability because of acts or omissions of the buyer's agent. The defense will argue that the agent for the buyer has sole responsibility for the buyer's injuries and the buyer should look to their own agent for relief. On occasion, the apparent seller of the horse will argue that they were representing a *disclosed principal* and as such they are not liable to the buyer for problems with the purchased horse. Great care by plaintiff's counsel must be undertaken at the outset of informal fact finding and actual formal discovery once the litigation starts to avoid admissions by the plaintiff/buyer which would support a motion for summary judgment by the defendant or an adverse trial award based upon admissions by the plaintiff/buyer related to the acts or omissions of an "agent" for the buyer.

In addition, when a dispute arises in the sale and purchase of a horse, the equine lawyer should be sure to understand the actual instructions to be given to a jury if a jury trial will be requested by any party to the dispute. Knowledge of the jury instruction in the particular jurisdiction where the dispute will be litigated is important when developing a discovery plan and when considering pre-trial motions which may terminate the litigation (i.e., motion for summary judgment). Even where the dispute may be before a trial judge, knowledge of the law

[8] This issue will likely be the subject of an appeal once the state court trial judge makes a determination on whether a reciprocal claim is available to the seller under the statute.

set forth in jury instructions is helpful to the equine lawyer especially since law cited in support of court approved jury instructions is controlling authority over a trial judge.[9]

In most jurisdictions, any approved jury instructions will be scarce related to the definition of agency. Most jurisdictions have no court-approved jury instructions regarding the definition of "dual" agency. Therefore, special jury instructions will need to be drafted regarding applicable agency questions to a particular case.

X. CONCLUSION

When advising a client who will be starting a new equine business or hobby or has an existing equine business or hobby, the equine lawyer should be careful to consider agency issues and consumer protection laws. Failure to do so may result in negative outcomes for a client. As this area is evolving, the authors recommend that any lawyer providing counsel to the equine client continue to monitor the area of equine consumer protection laws.[10]

---

[9] California has a series of jury instructions approved by its judicial counsel found in rules known as CACI. Copies of various CACI jury instructions on vicarious liability and agency are appended to this outline.

[10] The USEF was presented with a proposed change to its rules in late 2013 related to a requirement that a bill of sale and agency agreement be written and distributed to all parties involving any equine sale or lease. The proposed rule required the bill of sale to identify the full sale or lease price of the horse, the names and addresses of the principals as well as any authorized agent, and a disclosure of any commissions to agents in excess of $500. In essence, the proposed rule change tracked the consumer protection statutes adopted by various states. *This proposed rule was vigorously opposed by certain members of the USEF – in most cases by trainers and sellers of horses. Ultimately, the rule was withdrawn. If the rule had been adopted, it would have subjected any member found in violation to the penalties of the USEF found in Chapter 7 of the USEF Rule Book.*