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NOTES

Putting the Cart Before the Horse

BARRIERS TO ENFORCING A CODE OF ETHICS FOR THOROUGHBRED AUCTIONS IN THE UNITED STATES

I. INTRODUCTION

In today's thoroughbred racing world, sometimes what you see is not at all what you get. Even veteran horsemen will admit that "[t]here is a fine line between the showmanship of showing a horse at its fullest and fraud."¹ Most surprisingly, this deception often begins long before a thoroughbred has even run its first race. Sales practices that may appear fraudulent to horse racing outsiders are tolerated, or even accepted as customary practice, at thoroughbred auctions.² For example, before being sold, horses are sometimes injected with steroids to make their chests appear stronger.³ Agents, hired to bid for prospective owners, have been caught defrauding their principals by colluding with sellers and accepting undisclosed commissions.⁴ Sellers even use agents to bid on their own

¹ Joe Drape, *No Gift Horses Here, So Look in Their Mouths*, N.Y. TIMES, Aug. 14, 2005, §1, at 1 [hereinafter Drape, *No Gift Horses Here*] (quoting John Ward, trainer of 2001 Kentucky Derby winner, Monarchos).

² For example, sellers are generally not permitted to bid on their own goods at public auction. See U.C.C. § 2-328(4) (1977). However, the Conditions of Sale at the major public thoroughbred auctions all expressly permit owners to bid on their own horses to run up the purchase price, a practice known as "bi-bidding." See, e.g., BARRETTS, JANUARY MIXED SALE 2007, CONDITIONS OF SALE, available at <http://barretts.com/CATALOG/catjan07/conditon.htm> (last visited Apr. 20, 2007); KEENELAND THOROUGHBRED RACING & SALES, CONDITIONS OF SALE, available at <http://ww2.keeneland.com/sales/lists/copy/conditions.aspx> (last visited Apr. 20, 2007). For a discussion of the Conditions of Sale at public auctions and their legal implications, see *infra* Part II.B.

³ See Drape, *No Gift Horses Here*, *supra* note 1; see also *infra* note 123 (providing more information on the presale use of anabolic steroids).

⁴ See, e.g., *Gussin v. Shockey*, 725 F. Supp. 271, 273 (D. Md. 1989); Ryan Conley, Leslie Deckard & Dan Liebman, *McIngvale Suit Charges Kickbacks to Trainer*

horses at public auctions, resulting in artificially inflated purchase prices.⁵ As in other competitive markets, “the boundary between acceptable sporting behavior and unacceptable misrepresentation” at thoroughbred auctions “is blurred.”⁶ Even the term “horse trading” has become synonymous with deception.⁷ To restore public confidence, the industry itself needs to establish clear standards of what constitutes acceptable thoroughbred auction practices.

The Thoroughbred Owners and Breeders Association (“TOBA”) attempted to do just that in December of 2004, when it released the *Code of Ethics for Thoroughbred Auctions* (“*Code of Ethics*”).⁸ Founded over forty years ago, TOBA is a non-profit trade organization “dedicated solely to promoting the interests of Thoroughbred owners and breeders.”⁹ TOBA’s *Code of Ethics* was inspired by a similar code adopted by the British Jockey Club¹⁰ in the summer of 2004.¹¹ The American

and Agents, BLOODHORSE.COM, Sept. 8, 2006, http://news.bloodhorse.com/viewstory_plain.asp?id=35240; Joe Drape, *A Horseman’s Lawsuit Puts Trading Practices in the Spotlight*, N.Y. TIMES, May 3, 2006, at D1 [hereinafter Drape, *A Horseman’s Lawsuit*] (detailing recent lawsuit filed by Jess Jackson, owner of Kendall-Jackson Vineyard Estates, alleging that his agents defrauded him in connection with thoroughbred purchases).

⁵ See Robert S. Miller, *America Singing: The Role of Custom and Usage in the Thoroughbred Horse Business*, 74 KY. L.J. 781, 788 (1986) (explaining the use of “bi-bidding” at public thoroughbred auctions); see also Glenye Cain, *Sanan Devotes Himself to Task Force*, DAILY RACING FORM, Sept. 17, 2004 [hereinafter Cain, *Sanan Devotes Himself*].

⁶ Susan Rogers Finneran, *Knowing Silence of Nonentrepreneurial Information Is Not Sporting*, 59 ALB. L. REV. 511, 514 (1996).

⁷ See Drew L. Kershen, *Horse-Tradin’: Legal Implications of Livestock Auction Bidding Practices*, 37 ARK. L. REV. 119, 120 (1983). When the FBI began investigating a particular fraudulent horse transaction, and “someone mentioned the case involved cheating and fraud, the FBI’s response was something to the effect of ‘isn’t that what horse traders do?’” KC Reynolds, *Commission Conundrum Part 3: Ethics and Pressure in the Industry . . . Is “Buyer Beware” Becoming a Thing of the Past?*, EQUINE CHRON., available at http://www.equinechronicle.com/Features/Reynolds/reynoldsCONUNDRUM_pt3.html (last visited Apr. 20, 2007) (quoting equine appraiser Dave Johnson, who assisted in the case).

⁸ Press Release, Thoroughbred Owners and Breeders Ass’n, Sales Integrity Task Force Issues Code of Ethics for Horse Auctions (Dec. 17, 2004), available at <http://keeneland.com/news/pressdetail.asp?PID=1678>.

⁹ Thoroughbred Owners and Breeders Ass’n, TOBA Membership, <http://www.toba.org/membership> (last visited Apr. 20, 2007).

¹⁰ THE JOCKEY CLUB, THE BLOODSTOCK INDUSTRY CODE OF PRACTICE, available at http://www.britishhorseracing.com/images/owning_breeding/The_Bloodstock_Industry_Code_of_Practice.pdf [hereinafter THE JOCKEY CLUB, CODE OF PRACTICE] (last visited Apr. 20, 2007).

¹¹ Press Release, The Jockey Club, Landmark Code of Practice Published by Bloodstock Industry (July 6, 2004), available at <http://thehra.org/doc.php?id=28610> [hereinafter Press Release, The Jockey Club, Landmark Code]. For more information on the Jockey Club’s *Code of Practice*, see *infra* Part III. In April of 2006, the Jockey

Code, like its British predecessor, aims to minimize deceptive auction practices by increasing transparency at thoroughbred sales.

The *Code of Ethics* articulates required disclosures for thoroughbred sales at public auctions.¹² It is particularly concerned with issues related to bloodstock agents,¹³ since they are so commonly utilized at public auctions, especially by novice buyers, who are most in need of veterans' expertise. Under the *Code*, bloodstock agents must disclose if they are representing both the purchaser and the seller in a transaction, because "dual agency (without disclosure to all parties) is inherently fraudulent."¹⁴ The *Code of Ethics* also encourages full disclosure of owners' identities, while at the same time recognizing owners' privacy interests.¹⁵ A potential purchaser may inquire into the identity of a horse's owner, but if the owner's agent denies this request for information, the potential purchaser's only recourse is to delete this horse from consideration.¹⁶

This Note will examine fraudulent thoroughbred auction practices, focusing specifically on the barriers to enforcing TOBA's *Code of Ethics for Thoroughbred Auctions*. Part II of this Note will provide an introduction to thoroughbred auctions and a short summary of the legal issues they implicate, addressing the limited forms of relief available to dissatisfied purchasers. Part III will briefly describe the British Jockey Club's *Bloodstock Industry Code of Practice*,¹⁷ which served as the model for the American thoroughbred

Club turned over its horse racing regulatory responsibilities to the Horseracing Regulatory Authority ("HRA"). Press releases issued by the Jockey Club are now hosted on the HRA's Web site. See *infra* note 68; text accompanying notes 94-99 (providing further explanation of this transition).

¹² See THOROUGHBRED OWNERS AND BREEDERS ASS'N, CODE OF ETHICS FOR THOROUGHBRED AUCTIONS arts. I & II, http://www.salesintegrity.org/downloads/Code_of_Ethics2.pdf [hereinafter TOBA, CODE OF ETHICS] (last visited Apr. 20, 2007).

¹³ Bloodstock agents act as intermediaries in the purchase or sale of a horse. Robert S. Miller, *The Sale of Horses and Horse Interests: A Transactional Approach*, 78 KY. L.J. 517, 556 (1989). They are paid a commission, typically five percent of the sale price, as compensation for their success in locating a buyer or seller and negotiating the deal. BLOOD-HORSE PUBL'NS, THE BLOOD-HORSE AUTHORITATIVE GUIDE TO AUCTIONS 69 (2004) [hereinafter AUTHORITATIVE GUIDE TO AUCTIONS]. Bloodstock agents are common in thoroughbred sales, where sellers and potential buyers often lack the necessary time or experience to effectuate the most successful equine transactions. See *infra* Part V.A.

¹⁴ TOBA, CODE OF ETHICS, *supra* note 12, art. II.

¹⁵ *Id.* art. I.

¹⁶ *Id.*

¹⁷ THE JOCKEY CLUB, CODE OF PRACTICE, *supra* note 10.

industry's *Code of Ethics*.¹⁸ Part IV of this Note will explain the various provisions of the American *Code of Ethics for Thoroughbred Auctions* and the industry concerns it reflects. Part V will compare enforcement powers under the British and American codes, focusing on how the different regulatory structures of these countries' horse racing industries affect the enforcement of their respective codes. This Part will argue that the United States' decentralized regulatory system presents greater enforcement problems than those faced in the United Kingdom. Although the *Code of Ethics for Thoroughbred Auctions* is a step in the right direction for the American thoroughbred industry, Part VI will argue that the *Code of Ethics*' drafters failed to give it any real "teeth,"¹⁹ rendering its provisions little more than discretionary guidelines. The *Code* is not completely meaningless, however, as Part VI will contend, for it brings important issues to the forefront of discussion in the industry. This Note will conclude, however, that the American thoroughbred industry has gotten way ahead of itself and should consider implementing a centralized regulatory body to enforce the *Code of Ethics* if it truly wants to improve auction practices.

II. THOROUGHBRED AUCTIONS

A. Introduction

One of the first major decisions a thoroughbred owner must face is where to purchase his first racehorse. Although many racehorses are traded in private transactions or purchased at claiming races,²⁰ a large percentage of

¹⁸ TOBA, CODE OF ETHICS, *supra* note 12.

¹⁹ See, e.g., Glenye Cain, *Ethics Code Encourages Disclosure, Lacks Teeth*, DAILY RACING FORM, Dec. 16, 2004 [hereinafter Cain, *Ethics Code*] ("The code does not set forth penalties for infractions or offer specific recourse for aggrieved parties . . ."); Cot Campbell, *Integrity No Easy Task*, BLOODHORSE.COM, Jan. 12, 2005, <http://www.bloodhorse.com/articleindex/article.asp?id=26173> (reporting that critics have questioned "Where are the teeth? No penalties, no disciplinary provisions for violating the Code."); Ray Paulick, *Cot To Be Good*, BLOODHORSE.COM, Dec. 21, 2004, <http://www.bloodhorse.com/articleindex/article.asp?id=25891> ("I wish the Sales Integrity Task Force had come up with a way to enforce the new code of ethics and penalize known violators.") [hereinafter Paulick, *Cot To Be Good*].

²⁰ Each horse that runs in a claiming race is available for sale. Owners enter their thoroughbreds into races, designated by the price value of the horse. Horses entered in these races must be sold to any owner who "claims" the horse for its designated value before the race is run. Each state has its own rules about what conditions potential owners must meet before they are permitted to submit a claim. See *The Racing Game, Frequently Asked Questions*, <http://www.theracinggame.com/>

thoroughbreds are bought and sold at public auctions each year.²¹ In 2006 alone, thoroughbred buyers spent over one billion dollars at public auctions in North America.²² Purchasing a horse at auction may be a particularly attractive option for newcomers, since this forum offers the widest selection of horses for sale and “often assure[s] fair market value.”²³

Thoroughbred auctions take place all around the United States, but the most well-known sales companies are based in Kentucky (Keeneland and Fasig-Tipton), Florida (Ocala Breeders’ Sales Company), and California (Barretts).²⁴ These auctions are typically organized by the horses’ ages and intended use.²⁵ For example, Keeneland holds separate auctions each year for two-year-olds-in-training, yearlings,²⁶ breeding stock,²⁷ and a mixed sale with horses of various ages and purposes.²⁸ Purchasing a yearling is often the least expensive option for a novice owner looking to break into the horse racing business.²⁹ However, because these young

lists/faq/allitemsalt.aspx (last visited Apr. 20, 2007). Many new owners choose to “claim” their first thoroughbreds because these horses are ready to race almost immediately. Additionally, claiming races provide one of the least expensive ways to purchase a racehorse. THOROUGHBRED OWNERS AND BREEDERS ASS’N, NEW THOROUGHBRED OWNERS HANDBOOK: AN ESSENTIAL GUIDE TO THOROUGHBRED OWNERSHIP 56 (Laura Proctor ed., 2d ed. 2004) [hereinafter NEW THOROUGHBRED OWNERS HANDBOOK].

²¹ In 2006, there were approximately 21,247 thoroughbreds sold at public auctions in North America. This figure includes sales of stallion seasons and stallion shares. THE JOCKEY CLUB (U.S.), *Auction Sales in North America, in 2007 ONLINE FACT BOOK*, <http://www.jockeyclub.com/factbook.asp?section=13> (last visited Apr. 20, 2007). A stallion season is the right to mate a mare with a specific stallion for one breeding season, while a stallion share is a proprietary interest in a specific stallion that gives the owner the right to breed a mare with that stallion every breeding season. AUTHORITATIVE GUIDE TO AUCTIONS, *supra* note 13, at 103.

²² THE JOCKEY CLUB (U.S.), *supra* note 21. The exact figure of \$1,266,684,292 includes sales of stallion seasons and stallion shares. *Id.* For an explanation of stallion seasons and stallion shares, see *supra* note 21.

²³ NEW THOROUGHBRED OWNERS HANDBOOK, *supra* note 20, at 61.

²⁴ AUTHORITATIVE GUIDE TO AUCTIONS, *supra* note 13, at 19.

²⁵ NEW THOROUGHBRED OWNERS HANDBOOK, *supra* note 20, at 61.

²⁶ A thoroughbred’s official “birthday” is January 1 of the year it was born. Once a horse enters its second *calendar* year, it is considered a “yearling,” regardless of when the horse was actually born. See *id.* at 70. Therefore, a two-year-old thoroughbred is one that has entered its third calendar year.

²⁷ As the name implies, horses sold at “breeding stock” auctions are primarily intended for breeding purposes, rather than racing. See AUTHORITATIVE GUIDE TO AUCTIONS, *supra* note 13, at 15.

²⁸ Keeneland Thoroughbred Racing & Sales, Sales Calendar, <http://ww2.keeneland.com/sales/Events/calendar.aspx> (last visited Apr. 20, 2007) (listing Keeneland’s upcoming thoroughbred auctions).

²⁹ See NEW THOROUGHBRED OWNERS HANDBOOK, *supra* note 20, at 68.

thoroughbreds are entirely unproven, with no racing experience or training, investing in a yearling is also the biggest gamble for a new owner.³⁰ For some owners, this gamble pays off. Funny Cide, winner of the 2003 Kentucky Derby and Preakness Stakes, was purchased as a yearling for just \$22,000.³¹ Of course, for every Funny Cide, there are countless yearlings destined for the anonymity of “also rans.” For this reason, many new buyers choose to bid on more established thoroughbreds at the two-year-olds-in-training auctions or mixed sales.

Before arriving at the auction, potential purchasers are encouraged to thoroughly review the auction’s sales catalog. The sales catalog lists information about all of the horses for sale, including their pedigrees and hip numbers.³² Most importantly, the sales catalog contains the auction’s Conditions of Sale, which lists the contractual terms governing all sales at the auction.³³ Most potential owners narrow down the field of available horses with the assistance of a bloodstock agent, who also bids on their behalf.³⁴ Bloodstock agents may be especially valuable to new owners, who often lack the knowledge and personal experience necessary to select the most promising horses.

The horses’ medical records are usually available for viewing in the auction’s repository.³⁵ Some sales companies restrict access to the repository to medical professionals, so potential owners are encouraged to hire an equine veterinarian to review the medical records and provide insight into the horses’ health and fitness.³⁶ This veterinarian should also physically examine a horse before his client bids on it, looking for any potential problem areas.³⁷ Auction participants and their agents should investigate the horses as much as possible

³⁰ *Id.* at 68, 70.

³¹ AUTHORITATIVE GUIDE TO AUCTIONS, *supra* note 13, at 74.

³² Every horse for sale at an auction is identified by a number affixed to its hip. This “hip number” also reflects the order in which the horse will be brought into the auction ring. *Id.* at 101.

³³ The Conditions of Sale are discussed in greater detail *infra* Part II.B.

³⁴ For more information about bloodstock agents and the legal issues they present, see *infra* Part V.A.

³⁵ AUTHORITATIVE GUIDE TO AUCTIONS, *supra* note 13, at 54-55. Sellers have the option of whether or not to submit medical records to the repository, so x-rays and other information may not be available for every horse being sold at the auction. See *id.* at 55.

³⁶ *Id.* at 95; NEW THOROUGHBRED OWNERS HANDBOOK, *supra* note 20, at 31.

³⁷ AUTHORITATIVE GUIDE TO AUCTIONS, *supra* note 13, at 70-71.

before purchasing, because once the hammer falls, a dissatisfied buyer has very limited remedies.

B. *Legal Implications*

Horses are considered “goods” under the Uniform Commercial Code (“U.C.C.”), so thoroughbred transactions fall under the governance of Article 2 of the U.C.C.³⁸ Sale by auction is also covered by the U.C.C.,³⁹ but state auction laws supplement its provisions.⁴⁰ If a buyer feels he has been “duped” in his purchase of a thoroughbred, the U.C.C. offers him two forms of relief.⁴¹ The buyer may attempt to rescind his purchase by rejecting the horse or revoking his acceptance.⁴² He can also sue for damages based on breach of warranty.⁴³

Most purchasers in this situation choose to rescind the purchase rather than sue for damages.⁴⁴ A dissatisfied buyer would not want to keep and maintain a horse that is unfit for racing or breeding due to some undisclosed defect. If a buyer purchases a thoroughbred for breeding purposes and then discovers that, despite representations to the contrary, the horse is castrated, the buyer is unlikely to keep the animal because it is no longer of any value to him.⁴⁵ It would be more

³⁸ N. Ridge Farms, Inc. v. Trimble, No. 82-CA-1305-MR, 1983 Ky. App. LEXIS 364, at *9 (Ky. Ct. App. Dec. 2, 1983); Anne I. Bandes, *Saddled with a Lame Horse? Why State Consumer Protection Laws Can Be the Best Protection for Duped Horse Purchasers*, 44 B.C. L. REV. 789, 792 (2003); John 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, 666-67 (1985); John J. Kropp, J. Jeffrey Landen & Daniel C. Heyd, *Horse Sense and the UCC: The Purchase of Racehorses*, 1 MARQ. SPORTS L.J. 171, 174 (1991); Cary Robertson, *Thoroughbred Certificate Law: A Proposal*, 78 KY. L.J. 659, 672 (1990).

³⁹ U.C.C. § 2-328 (1998).

⁴⁰ Kropp, Landen & Heyd, *supra* note 38, at 177-78. “[U]nless displaced by the particular provisions of this Act, the principles of law and equity, including the law merchant and the law relative to capacity to contract, principal and agent, estoppel, fraud, misrepresentation, duress, coercion, mistake, bankruptcy, or other validating or invalidating cause shall supplement its provisions.” *Id.* at 178 n.36 (quoting U.C.C. § 1-103 (1972)).

⁴¹ Bandes, *supra* note 38, at 795.

⁴² *Id.*

⁴³ The purchaser may seek damages in the amount of the difference between what he paid for the horse and what the horse would have been worth if it had been as warranted, unless special circumstances exist which lead to a different amount of damages. *Id.* at 802 (citing U.C.C. § 2-714(2)).

⁴⁴ *Id.* at 795 (citing Miller, *supra* note 13, at 547).

⁴⁵ See *Brodsky v. Nerud*, 414 N.Y.S.2d 38, 40 (App. Div. 1979). In *Brodsky v. Nerud*, a castrated horse was incorrectly listed as a colt in the program at a claiming race. The buyer only discovered the horse was castrated once he took it home. Because

appropriate for this particular buyer to rescind the purchase by rejecting the horse or revoking acceptance. A buyer's ability to rescind his thoroughbred purchase is severely limited, however, as most public auctions disclaim warranties as part of their Conditions of Sale.⁴⁶ An auction's Conditions of Sale, usually printed in the sales catalog, include the contract terms for all horses being sold at that auction.⁴⁷ The buyer, seller, and sales company are all bound to these terms.⁴⁸

As a general rule, a horse is sold "as is" at a public auction.⁴⁹ Of course, there are exceptions. Certain physical conditions,⁵⁰ which are expressly named in an auction's catalog,⁵¹ must be announced to potential purchasers before

he purchased the horse for breeding, it was "useless to him." *Id.* For an explanation of claiming races, see *supra* note 20.

⁴⁶ See *Cohen v. N. Ridge Farms, Inc.*, 712 F. Supp. 1265 (E.D. Ky. 1989). In this case, a buyer at the Keeneland auction brought an action against the seller and auctioneer to rescind his purchase of a colt because he later discovered that the horse suffered from a displaced soft palate, a condition that could affect its racing ability. The buyer's claim for rescission failed because the Conditions of Sale, as documented in the auction catalog, expressly disclaimed all warranties. *Id.* at 1269. The Conditions of Sale read in part: "THERE IS NO WARRANTY IMPLIED BY AUCTIONEER OR CONSIGNOR, EXCEPT AS SET FORTH HEREIN, AS TO THE MERCHANTABILITY OR FITNESS FOR ANY PARTICULAR PURPOSE OF ANY ANIMAL OFFERED IN THIS SALE, ALL SALES ARE MADE ON AN AS IS BASIS, WITH ALL FAULTS." *Id.* at 1267; see also *Keeneland Ass'n, Inc. v. Eamer*, 830 F. Supp. 974, 986 (E.D. Ky. 1993) (finding that Keeneland's use of disclaimers waiving all warranties was proper and enforceable, so buyer could not rescind his purchase after discovering the horse suffered from leg problems). See generally U.C.C. § 2-316 (1998) (dealing with exclusion of warranties). Even a contract that excludes *all* warranties may still be enforceable. See *Greg Coats Cars, Inc. v. Kasey*, 576 S.W.2d 251, 252 (Ky. Ct. App. 1978).

⁴⁷ *Bandes, supra* note 38, at 794.

⁴⁸ AUTHORITY GUIDE TO AUCTIONS, *supra* note 13, at 44-45.

⁴⁹ *Id.* at 47.

⁵⁰ Cribbing, wobbler syndrome, and eye defects are among the conditions that must be disclosed to potential buyers under the Conditions of Sale. *Id.* A "cribber" is a horse that digs its teeth into an object (often a fence), arches its neck, and then sucks air into its stomach. Cribbing is considered a controllable behavior, not a disease. NEW THOROUGHBRED OWNERS HANDBOOK, *supra* note 20, at 204. Wobbler syndrome is "a neurological disease associated with incoordination and weakness." *Id.* at 211. In order to rescind his purchase of an undisclosed "cribber" or "wobbler," a buyer must be able to prove that the behavior or condition existed at the time of sale. This can be quite difficult to prove. See, e.g., *Keeneland*, 830 F. Supp. at 988. The buyer in *Keeneland* was unable to rescind his purchase of an allegedly undisclosed cribber because he could not prove that the horse was a cribber at the time of purchase. Eamer, the purchaser, produced no evidence that this particular horse exhibited cribbing behavior prior to the sale, and a veterinarian explained in an affidavit that horses do not typically develop cribbing behavior until they are over one year old. This horse was only seven months old when Eamer purchased it. *Id.*

⁵¹ The auction catalog contains information about the horses that are for sale and also lists the Conditions of Sale. It is usually available weeks before the auction so that prospective bidders can familiarize themselves with the process and plan on which thoroughbreds to bid. See *Thoroughbred Owners and Breeders Ass'n, Before the*

bidding begins or must otherwise be disclosed by veterinary certificates on file in the auction's repository.⁵² Under the Conditions of Sale at public thoroughbred auctions, potential buyers have a duty to review a horse's veterinary certificates, x-rays, and any other medical information that is on file in the repository before deciding whether to buy the animal.⁵³

Buyers are also encouraged to physically examine the thoroughbreds themselves and hire veterinarians to examine the horses prior to purchase.⁵⁴ Although the Conditions of Sale do not *require* these physical examinations, a buyer cannot rescind his thoroughbred purchase if he later discovers a defect in the horse that he would have discovered at the auction if he had conducted the customary examination.⁵⁵ However, if an owner later discovers that the horse he purchased at a public auction suffers from one of the conditions that fall under the exceptions to the warranty disclaimer, and this condition was not disclosed at the auction, he may attempt to rescind the purchase based on breach of warranty.⁵⁶ A purchaser's ability to rescind is further restricted, however, as he must notify the sales company in writing within the limited "right to return" time frame recorded in the auction's Conditions of Sale.⁵⁷ Sales companies give the buyer a very limited amount of time to rescind his purchase, often just forty-eight hours after the auction ends,⁵⁸ because a horse's physical condition is subject to change very quickly.⁵⁹

Auction: Preliminary Work, <http://www.toba.org/owner-education/before-the-auction.aspx> (last visited Apr. 20, 2007).

⁵² AUTHORITATIVE GUIDE TO AUCTIONS, *supra* note 13, at 47.

⁵³ *Id.* at 54.

⁵⁴ *See, e.g.,* BARRETTTS, *supra* note 2 ("Buyer acknowledges that he/she has had the opportunity to inspect and examine, by veterinarian or otherwise, each horse he/she has purchased and accepts any horse he/she purchases with all conditions and defects except those which are specifically warranted in these Conditions."); KEENELAND THOROUGHBRED RACING & SALES, *supra* note 2 ("All prospective buyers are urged to carefully examine horses in which they may be interested personally and/or by agents or veterinarians of their choosing BEFORE bidding as they are accepting any horse purchased with all faults, including all conditions and defects, except for applicable limited warranties . . .").

⁵⁵ *See* Miron v. Yonkers Raceway, Inc., 400 F.2d 112, 118 (2d Cir. 1968) (holding that a buyer could not rescind his purchase of a horse because he passed up the "reasonable opportunity to inspect it" before purchasing, so his rejection was therefore not effectuated in a reasonable time); *see also* U.C.C. § 2-602 (1998); Cohan, *supra* note 38, at 685.

⁵⁶ AUTHORITATIVE GUIDE TO AUCTIONS, *supra* note 13, at 47.

⁵⁷ *Id.*

⁵⁸ *See* KEENELAND THOROUGHBRED RACING & SALES, *supra* note 2.

⁵⁹ *See id.*

In some situations, a purchaser may even be able to rescind a sale based on an undisclosed defect that does *not* fall under the exceptions to the auction's warranty disclaimers.⁶⁰ In *Travis v. Washington Horse Breeders Ass'n, Inc.*, the plaintiff successfully rescinded his purchase of a thoroughbred after discovering the horse had a heart murmur which precluded it from safely carrying a rider.⁶¹ Although the auction's Conditions of Sale had a clear disclaimer waiving warranties, this blanket waiver did not waive the seller's express warranties because he made an affirmative, material misrepresentation about the horse. The court held that the defendant's statement to the purchaser that the thoroughbred was "healthy and fit for racing and breeding purposes" was an express warranty.⁶² As such, the catalog's waiver of warranties could not disclaim the seller's express warranty about the horse's condition.⁶³

Courts may consider thoroughbred industry customs when interpreting a sales contract.⁶⁴ Individuals who are new to horse racing, however, cannot be bound by industry customs unless they knew of these customs or the customs were so widespread and well-known that newcomers are presumed to be aware of their existence.⁶⁵ Trade codes like TOBA's *Code of Ethics* can assist courts in interpreting industry contracts⁶⁶ by helping to establish the existence of a specific custom.

⁶⁰ If the seller has made affirmative, material representations about the horse, his statements will constitute an express warranty, which cannot be waived by a general disclaimer waiving all warranties. *Travis v. Wash. Horse Breeders Ass'n, Inc.*, 759 P.2d 418, 422 (Wash. 1988).

⁶¹ *Id.* at 419-20.

⁶² *Id.* at 422.

⁶³ *Id.* at 421-22.

⁶⁴ See U.C.C. § 1-205(2) (2004) (defining usage of trade as "any practice or method of dealing having such regularity of observance in a place, vocation or trade as to justify an expectation that it will be observed with respect to the transaction in question"); see also Kropp, Landen & Heyd, *supra* note 38, at 183. For a detailed account of the role of trade customs in the thoroughbred industry, see Miller, *supra* note 5.

⁶⁵ Miller, *supra* note 5, at 812.

⁶⁶ See U.C.C. § 1-205(2) (2004) (showing that a written trade code can help prove the existence of a usage of trade, but the court has the power to interpret the provisions of the writing).

III. THE UNITED KINGDOM RESPONDS TO THOROUGHBRED SALES FRAUD: *THE BLOODSTOCK INDUSTRY CODE OF PRACTICE*

From 1752 to April of 2006, horse racing conduct in the United Kingdom was regulated by the Jockey Club, an organization which also owned and operated thirteen racetracks.⁶⁷ The Jockey Club's power as British horse racing's regulatory authority gave the organization a great deal of control over the conduct of racing participants.⁶⁸ All jockeys and trainers who worked in the United Kingdom were required to be licensed by the Jockey Club, and all owners of racehorses had to be registered with the Club.⁶⁹ As a result, these groups were bound by the Club's Rules of Racing.⁷⁰

The British Jockey Club proposed its *Bloodstock Industry Code of Practice*⁷² on July 6, 2004,⁷³ in response to a highly publicized case⁷⁴ involving agent bribery. In this case,

⁶⁷ The Jockey Club, History and Background, <http://www.thejockeyclub.co.uk/doc.php?id=41557> (last visited Apr. 20, 2007).

⁶⁸ See Horseracing Regulatory Authority, Powers of the HRA, <http://thehra.org/doc.php?id=9> (last visited Apr. 20, 2007) (explaining the HRA's regulatory powers, powers that were previously held by the Jockey Club) [hereinafter Powers of the HRA]. As explained *infra* text accompanying notes 94-99, the Jockey Club is no longer the regulatory authority for British horse racing. The Horseracing Regulatory Authority ("HRA") assumed this responsibility in April of 2006. The Jockey Club thereafter removed from its Web site all information relating to its previous responsibilities. Printouts from earlier versions of the Jockey Club Web site are on file with the *Brooklyn Law Review*. All of the regulatory and disciplinary information once maintained on the Jockey Club's Web site is now located on the HRA's Web site. Therefore, information about duties and powers once held by the Jockey Club, but now maintained by the HRA, is referenced to the HRA's Web site.

⁶⁹ See *id.*

⁷⁰ *Id.*

⁷¹ The term "bloodstock" describes thoroughbreds that are "bred for racing." Equisearch.com, Glossary of Equine Terms, <http://equisearch.com/advice/glossary/glossaryB> (last visited Apr. 20, 2007).

⁷² THE JOCKEY CLUB, CODE OF PRACTICE, *supra* note 10.

⁷³ See Press Release, The Jockey Club, Landmark Code, *supra* note 11.

⁷⁴ The original dispute in this lawsuit was not about a bloodstock agent's undisclosed profits. The lawsuit dealt with which party in a thoroughbred transaction should bear the costs when the horse was injured shortly after a verbal agreement of sale. Young thoroughbred Foodbroker Fancy was injured a few days after the parties agreed to the sale and the deal subsequently fell through. The filly was eventually sold to another party and this case dealt with who should be held responsible for paying Foodbroker Fancy's veterinary bills from the time that the original sale fell through to the time when the horse was sold to the third party. Details of the undisclosed "sweetener" emerged at trial, leading to strong criticism from the presiding judge and, ultimately, a settlement. Richard Evans, *Horsetrading Scandal Puts Sport of Kings Back in Dock*, DAILY TELEGRAPH (London), Jan. 27, 2004, Sport, at 4 [hereinafter Evans, *Horsetrading Scandal*].

leading thoroughbred trainer David Elsworth was offered a £10,000 “sweetener” by one of Britain’s most successful bloodstock agents, Charlie Gordon-Watson, to ensure that promising filly Foodbroker Fancy would be sold to an American client.⁷⁵ The filly’s owners, Foodbrokers Ltd., were already paying Elsworth a five percent commission⁷⁶ and were unaware that the trainer would also receive this additional £10,000 in connection with the sale.⁷⁷

Judge Michael Dean Q.C. of Central London County Court criticized this practice of bloodstock agents accepting undisclosed “sweeteners.”⁷⁸ Calling these secret commissions “quite illegal,” Judge Dean urged the bloodstock industry to stop this practice.⁷⁹ Despite the accusations of impropriety, Gordon-Watson maintained that the additional £10,000 was simply compensation for the loss of training fees that Elsworth would have accrued had the filly not been sold.⁸⁰ The bloodstock agent further claimed that such payment is customary in thoroughbred transactions.⁸¹ Even though Gordon-Watson denied any wrongdoing, the parties eventually settled the claim, with Gordon-Watson paying a total of £50,000 in damages and costs to the aggrieved parties.⁸²

Due to the involvement of such high-profile players in the thoroughbred industry,⁸³ this scandal caught the attention of the British media. London’s *Daily Telegraph* conducted an investigation into these horse transactions, speaking with many industry insiders to determine exactly how prevalent this

⁷⁵ Richard Evans, *Jockey Club Probe Bloodstock ‘Fraud,’* DAILY TELEGRAPH (London), Jan. 27, 2004, Sport, at 1 [hereinafter Evans, *Jockey Club Probe*]. Gordon-Watson was working as an agent for Richard Duggan, a California agent who wanted to acquire Foodbroker Fancy for his own American principal. Ray Paulick, *Ethics Update*, BLOODHORSE.COM, June 17, 2004, <http://www.bloodhorse.com/articleindex/article.asp?id=23015> [hereinafter Paulick, *Ethics Update*].

⁷⁶ Trainers often serve as agents in horse transactions, and are themselves paid the customary five percent commission. Miller, *supra* note 5, at 781.

⁷⁷ Evans, *Jockey Club Probe*, *supra* note 75.

⁷⁸ *Id.*

⁷⁹ See Evans, *Horsetrading Scandal*, *supra* note 74.

⁸⁰ *Id.*

⁸¹ Paulick, *Ethics Update*, *supra* note 75.

⁸² Gordon-Watson paid £40,000 in costs and fees to Foodbrokers Ltd. and £10,000 to Richard Duggan, his American principal. Evans, *Jockey Club Probe*, *supra* note 75; Paulick, *Ethics Update*, *supra* note 75.

⁸³ Gordon-Watson purchased the 2003 Epsom Derby winner as a yearling, and David Elsworth trained a Cheltenham Gold Cup winner. Evans, *Horsetrading Scandal*, *supra* note 74; Evans, *Jockey Club Probe*, *supra* note 75.

kind of deception is in the world of racehorse sales.⁸⁴ The newspaper concluded that not only are these fraudulent sales practices widespread within the racing world,⁸⁵ but this behavior is accepted as a customary trait of the industry.⁸⁶ Shortly after newspaper reports exposed the industry's "dirty little secret," the Jockey Club announced a summit of various horse racing organizations and the Federation of Bloodstock Agents to discuss ways "to increase transparency in sales transactions."⁸⁷ The parties ultimately concluded that developing a code of practice governing these sales would be the necessary first step in this process.⁸⁸

Following this recommendation, the Club published its *Bloodstock Industry Code of Practice* in July of 2004.⁸⁹ An agent's duty of loyalty was central to its focus. The *Code of Practice* states that an agent should not place himself in a position where his personal interests might conflict with his duty to his principal, and an "[a]gent shall not use his position to obtain a secret profit."⁹⁰ It also requires an agent to disclose if he is working for more than one principal in a transaction.⁹¹ If a vendor offers an agent "Luck Money,"⁹² the *Code of Practice*

⁸⁴ See, e.g., Richard Evans, *Foodbroker Case Is Just "Tip of Rotten Iceberg": A Lawyer Specialising in Racing Says that Some Cases Amount to Nothing but Theft*, DAILY TELEGRAPH (London), Jan. 27, 2004, Sport, at 5 [hereinafter Evans, *Foodbroker Case*]; Evans, *Horsetrading Scandal*, *supra* note 74; Evans, *Jockey Club Probe*, *supra* note 75.

⁸⁵ A similar case of agent impropriety occurred in 1999, when trainers Paul Webber and Oliver Sherwood were accused of colluding to run up the price of a horse that was purchased for Webber's principal. A British court found that the parties were guilty of fraud and awarded the principal £51,480 in damages. See *Exterior Profiles, Ltd. v. Curragh Bloodstock Agency, Ltd.*, 1999 WL 1611280 (Q.B.D. Nov. 12, 1999); see also Marcus Armytage, *Sherwood and Webber Fined*, DAILY TELEGRAPH (London), Mar. 10, 2000, available at <http://telegraph.co.uk/htmlContent.jhtml?html=/archive/2000/03/10/soarmy10.html>.

⁸⁶ Evans, *Horsetrading Scandal*, *supra* note 74 (noting that some fraudulent practices are "not regarded as anything untoward" by many British horsemen).

⁸⁷ Richard Evans, *Jockey Club Call Summit on Corruption*, DAILY TELEGRAPH (London), Jan. 28, 2004, Sport, at 1 [hereinafter Evans, *Jockey Club Call Summit*].

⁸⁸ Press Release, The Jockey Club, Working Group Established to Develop Bloodstock [sic] Industry Code of Practice (Apr. 1, 2004), available at <http://thehra.org/doc.php?id=28614> [hereinafter Press Release, The Jockey Club, Working Group Established].

⁸⁹ Press Release, The Jockey Club, Landmark Code, *supra* note 11.

⁹⁰ THE JOCKEY CLUB, CODE OF PRACTICE, *supra* note 10, § 2.

⁹¹ *Id.* § 4.

⁹² The Code of Practice defines "Luck Money" as "any financial payment or payment in kind made by or on behalf of a vendor to a Purchaser or his Agent, after the sale of a horse has been concluded." *Id.* § 6.

requires the agent to report this to his principal and possibly account for this money.⁹³

On April 3, 2006, the Jockey Club transferred its regulatory responsibilities to the Horseracing Regulatory Authority (“HRA”).⁹⁴ The goal was to separate the Jockey Club’s commercial activity from its regulatory, licensing, and disciplinary responsibilities.⁹⁵ The HRA is not entirely autonomous, however.⁹⁶ Most of its employees worked for the Jockey Club up until the switch, and the HRA is now technically a division of the Club.⁹⁷ The Jockey Club maintains that this is just a temporary arrangement, necessary until disputes over transferring pension entitlements are resolved.⁹⁸ The United Kingdom aims to have a truly “independent, professional system of regulation”⁹⁹ once these disputes are resolved and the HRA is able to split from the Jockey Club.

As the central regulatory body for British horse racing conduct,¹⁰⁰ the HRA is now responsible for enforcing the *Code of Practice*.¹⁰¹ Complainants must report alleged breaches of the *Code of Practice* to the HRA.¹⁰² If the Authority considers the

⁹³ *Id.*

⁹⁴ Press Release, Horseracing Regulatory Authority, An Historic Day for Racing—The HRA Assumes Regulatory Control (Apr. 3, 2006), *available at* <http://thehra.org/doc.php?id=40796>.

⁹⁵ Marcus Armytage, *HRA Takes Reins from Jockey Club*, DAILY TELEGRAPH (London), Apr. 3, 2006, Sport, at 29.

⁹⁶ *Id.*

⁹⁷ Greg Wood, *End of Era as Jockey Club Falls on Own Sword*, GUARDIAN (London), Apr. 3, 2006, Sport, at 17.

⁹⁸ *Id.*

⁹⁹ *Horse Racing: High Stakes*, GUARDIAN (London), July 8, 2006, Leader, at 30.

¹⁰⁰ The HRA is responsible for regulating horse racing conduct, but the British Horseracing Board (“BHB”) is the governing body for British horse racing. *See* British Horseracing Board, What We Do, http://www.britishhorseracing.com/inside_horseracing/about/whatwedo/default.asp (last visited Apr. 20, 2007). They are not affiliated with the British government, though the BHB “lead[s] the industry in dealings with the Government.” British Horseracing Board, What We Do: Government Liaison, http://www.britishhorseracing.com/inside_horseracing/about/whatwedo/government.asp (last visited Apr. 20, 2007). There are reports that the HRA and the BHB will eventually be merged into one governance/regulation body, the British Horseracing Authority (“BHA”). *See, e.g.*, The Jockey Club, History and Background, *supra* note 67; Press Release, Horseracing Regulatory Authority, Nic Coward Assumes Responsibility at the HRA (Feb. 22, 2007), *available at* <http://www.thehra.org/doc.php?id=44530>.

¹⁰¹ E-mail from Owen Byrne, Public Relations Officer, Horseracing Regulatory Authority, to author (Nov. 9, 2006) (on file with the *Brooklyn Law Review*).

¹⁰² THE JOCKEY CLUB, CODE OF PRACTICE, *supra* note 10, § 9. The HRA emphasizes the importance of individuals with information reporting alleged breaches of the *Code of Practice*, and then supplying the Authority with the evidence necessary to support their allegations. *See* E-mail from Owen Byrne, *supra* note 101 (explaining

violation to be “contrary to the integrity, proper conduct or good reputation of horse racing,” the HRA reserves the right to ban the violator from all British racecourses and any other premise that the HRA licenses.¹⁰³ Additionally, if the violator is licensed or registered with the HRA, it has the power to suspend, withdraw, or not renew his license.¹⁰⁴ The Authority can declare a licensed individual to be a “disqualified person,” which “prevent[s] the individual from entering any racecourse or being employed in a training yard,” and it can also fine licensed individuals up to £40,000 for violations.¹⁰⁵ Since the HRA assumed regulation responsibilities, it has investigated several allegations of *Code of Practice* violations, but none of these complaints have resulted in disciplinary action.¹⁰⁶

IV. THE UNITED STATES FOLLOWS THE UNITED KINGDOM’S LEAD: *THE CODE OF ETHICS FOR THOROUGHBRED AUCTIONS*

Fraud in thoroughbred sales was also a problem across the Atlantic. After the Jockey Club released its *Code of Practice*, one of the United States’ most prominent thoroughbred owners, Satish Sanan,¹⁰⁷ called upon the American industry to adopt a similar code of ethics for bloodhorse sales.¹⁰⁸ Sanan stressed the need for a code that would extend beyond the United Kingdom’s *Code of Practice*, including requiring disclosure of any surgeries a horse had undergone to correct conformation¹⁰⁹ defects and disclosure of all medications a horse had taken.¹¹⁰

that such voluntary reporting is necessary because “[w]ith the bloodstock world as it is, much is done by word of mouth rather than being committed to paper, and only microphones on all agents, vendors and trainers or an HRA employee stood at every stable door could enable [the HRA] to pro-actively police [sales],” and the HRA lacks “the resources or inclination to police the sales in such a manner”).

¹⁰³ THE JOCKEY CLUB, *CODE OF PRACTICE*, *supra* note 10, § 9.

¹⁰⁴ *See* Powers of the HRA, *supra* note 68.

¹⁰⁵ *Id.*

¹⁰⁶ E-mail from Owen Byrne, *supra* note 101.

¹⁰⁷ Satish Sanan is one of the world’s top purchasers of yearlings at auction. *See* Glenye Cain, *Signs Point to Sanan Attending Keeneland Sale*, DAILY RACING FORM, Aug. 20, 2004 [hereinafter Cain, *Signs Point to Sanan*].

¹⁰⁸ Glenye Cain, *Sanan Calls for Reforms on Sales of Thoroughbreds*, DAILY RACING FORM, July 3, 2004, available at <http://espn.go.com/horse/news/2004/0703/1833924.html> [hereinafter Cain, *Sanan Calls for Reforms*].

¹⁰⁹ Conformation is the “overall physical appearance of a horse, reflecting the arrangement of muscle, bone, and other body tissues.” UC DAVIS SCH. OF VETERINARY MED., *BOOK OF HORSES: A COMPLETE MEDICAL REFERENCE GUIDE FOR HORSES AND FOALS* (Mordecai Siegal ed., 1996), reprinted in *TheHorse.com*, Glossary of Horse

The Thoroughbred Owners and Breeders Association, whose mission is “to improve the economics, integrity and pleasure of the sport on behalf of owners and breeders,”¹¹¹ responded to Sanan’s pressure by creating the Sales Integrity Task Force¹¹² to investigate auction practices and recommend ways to improve buyer confidence.¹¹³ The Task Force concluded its investigation in December 2004.¹¹⁴ Its recommendations included a new code of ethics and the use of two disclosure forms—a contract for bloodstock agents and a form disclosing surgical procedures undergone by a horse.¹¹⁵ Unveiled by TOBA that same month, the *Code of Ethics for Thoroughbred Auctions* was originally divided into four articles: “Veterinary Practices,” “Disclosure of Ownership,” “The Role of the Agent,” and “The Sale Company.”¹¹⁶

Article I of the *Code* addressed disclosure of medical procedures performed on thoroughbreds. It categorized some medical procedures as “acceptable, but must be disclosed,”¹¹⁷

Health Terms, <http://www.thehorse.com/Glossary.aspx> (last visited Apr. 20, 2007); see also NEW THOROUGHBRED OWNERS HANDBOOK, *supra* note 20, at 89-96 (explaining how to examine a horse’s conformation).

¹¹⁰ See Cain, *Sanan Calls for Reforms*, *supra* note 108.

¹¹¹ Thoroughbred Owners and Breeders Association Home Page, <http://www.toba.org> (last visited Apr. 20, 2007).

¹¹² The Task Force was composed of twenty-two leading thoroughbred owners, breeders, auction representatives, bloodstock agents, and trainers. They were divided into subcommittees on dual agency, veterinary practices, and full disclosure. See Glenye Cain, *Breeders Take Floor in Ethics Debate*, DAILY RACING FORM, Oct. 15, 2004 [hereinafter Cain, *Breeders Take Floor*]; Sales Integrity Program, Member List, <http://www.salesintegrity.org/memberlist.html> (last visited Apr. 20, 2007). Sanan served as an owner representative on the Sales Integrity Task Force. Cain, *Sanan Devotes Himself*, *supra* note 5.

¹¹³ See Sales Integrity Task Force, Mission, <http://www.salesintegrity.org/code.html> (last visited Apr. 20, 2007).

¹¹⁴ Letter from the Thoroughbred Owners and Breeders Association to Thoroughbred Auction Participants as Part of the Sales Integrity Program (on file with the *Brooklyn Law Review*).

¹¹⁵ *Id.*

¹¹⁶ THOROUGHBRED OWNERS AND BREEDERS ASS’N, CODE OF ETHICS FOR THOROUGHBRED AUCTIONS (original version), available at <http://www.bloodhorse.com/PDF/CodeOfEthics.pdf> (last visited Apr. 20, 2007) [hereinafter TOBA, CODE OF ETHICS (original version)].

¹¹⁷ The original *Code of Ethics* required disclosure of the following procedures:

Invasive joint surgeries and other surgeries designed to affect *permanent* changes in a horse’s conformation. These include transphyseal bridges and periosteal transections, manipulations, and elevations. These are procedures adjudged to improve conformation of horses and thus enhance their opportunity to remain sound under the rigors of training and racing. The fact of them having been performed must be disclosed to all potential buyers and buying agents.

while banning the use of other “prohibited, unacceptable practices.”¹¹⁸ For example, procedures that *permanently* altered a horse’s conformation, such as invasive joint surgeries, were deemed acceptable, but the *Code* required that these procedures be disclosed at the sale.¹¹⁹ Procedures that altered a horse’s conformation in order to *temporarily* mask defects for the time necessary to complete the sale were labeled “unacceptable.”¹²⁰ The *Code* forbids sellers from performing these temporary procedures after the horse has arrived at the sale grounds.¹²¹ Additionally, injecting internal blisters¹²² to temporarily alter a horse’s conformation is prohibited within ninety days of the sale. Lastly, the repeated use of anabolic steroids to artificially alter a horse’s appearance¹²³ was overall “discouraged.”¹²⁴

Id. art. I.

¹¹⁸ Article I of the original *Code* maintained that a purchaser would be entitled to full reimbursement if, within fourteen days after the sale, he could establish that the horse he purchased had undergone any of these prohibited practices:

Temporary alterations which may regress and therefore mask a horse’s true conformation or condition, for purposes of sale. These include shock wave therapy, and acupuncture and/or electro-stimulation with the intent of altering laryngeal function. Neither is permissible after a horse has arrived at the sale grounds. Prohibited any time, regardless of the animal’s location, within 90 days of sale is the injection of an internal blister or any other substance designed to alter conformation temporarily.

Id.

¹¹⁹ *Id.* Occasionally, these hidden procedures actually *benefit* the purchaser. In 1996, trainer Bob Baffert bought a colt on behalf of his friend for \$17,000 (a “bargain-basement price”). Drape, *No Gift Horses Here*, *supra* note 1. They later discovered the colt had undergone a transphyseal bridge to straighten its knee (a procedure which the original version of the *Code* categorized as “acceptable, but must be disclosed,” see TOBA, CODE OF ETHICS (original version), *supra* note 116, art. I). Two years later, that horse (Real Quiet) won the Kentucky Derby and the Preakness Stakes, missing the Triple Crown “by a nose” at the Belmont Stakes. Drape, *No Gift Horses Here*, *supra* note 1.

¹²⁰ TOBA, CODE OF ETHICS (original version), *supra* note 116, art. I.

¹²¹ *Id.*

¹²² Blistering is a procedure used to increase blood circulation in a horse’s legs. It can be done externally by applying a caustic agent to the horse’s skin. However, the caustic agent can also be injected beneath the horse’s skin, increasing blood flow to the affected area. NEW THOROUGHBRED OWNERS HANDBOOK, *supra* note 20, at 107. These injections are the “internal blisters” that the original version of the *Code* outlawed within ninety days of sale. TOBA, CODE OF ETHICS (original version), *supra* note 116, art. I.

¹²³ TOBA, CODE OF ETHICS (original version), *supra* note 116, art. I. Anabolic steroids should be distinguished from corticosteroids, which are prescribed for legitimate medical purposes, such as treating inflammation. In contrast, anabolic steroids are primarily used “to keep horses eating and training aggressively” or “to replace hormones lost in male horses after being castrated.” Racing Medication and Testing Consortium, Inc., Questions, <http://www.rmtenet.com/content.asp?whatpage=QUESTIONS> (last visited Apr. 20, 2007). In most other countries, anabolic

Article II of the *Code of Ethics*, which discussed disclosure of a thoroughbred's owner, proved most contentious for the Task Force members. An agent often bids or places horses for sale on behalf of an unidentified principal, with the agent's name documented as the purchaser or seller¹²⁵ and the "true owner" remaining anonymous. Owners may have legitimate reasons for seeking this anonymity. For example, wealthy business executives might not want their purchase history accessible to their clients.¹²⁶ Purchaser and seller anonymity is respected at other kinds of auctions, like art auctions,¹²⁷ so proponents of owner privacy feel the thoroughbred world should be treated no differently.¹²⁸

Despite these justifications, many industry members, like Satish Sanan, persistently lobbied for full disclosure of horse ownership.¹²⁹ They argued that anonymity makes it easier for an owner to conceal arguably unethical activity, such as bidding on one's own horse to run up the price.¹³⁰ When drafting the *Code*, the Task Force balanced owners' privacy

steroids are banned on race day. However, in most of the United States (all states except Iowa), anabolic steroids are permitted for "therapeutic" use at both races and sales. Pete Denk, *Keeneland, Fasig-Tipton Form Committee to Address Steroids at Sales*, THOROUGHBREDTIMES.COM, Jan. 19, 2007, <http://www.thoroughbredtimes.com/sales-news/2007/January/19/Keeneland-Fasig-Tipton-form-committee-to-address-steroids-at-sales.aspx>; Bill Finley, *Horseracing Officials Move Toward Steroid Ban*, N.Y. TIMES, Feb. 28, 2007, at D1. Use of anabolic steroids can significantly impact a horse's appearance. Leading trainer John Ward once purchased promising yearlings at auction, only to find them "shriveled up like raisins" shortly thereafter, due to the presale use of steroids. These horses, and others treated with anabolic steroids before being sold, gradually returned to their "normal state," "[b]ut their appearance was overrepresented when they went through the sales ring." Drape, *No Gift Horses Here*, *supra* note 1 (quoting John Ward). See *infra* notes 237-39 and accompanying text for information about the movement to ban the use of anabolic steroids in horse racing and sales.

¹²⁴ TOBA, CODE OF ETHICS (original version), *supra* note 116, art. I.

¹²⁵ See Glenye Cain, *Question Remains Whether to Disclose Buyers*, DAILY RACING FORM, Sept. 16, 2004 [hereinafter Cain, *Question Remains*]. At the Keeneland auction in September of 2004, a Japanese trainer/bloodstock agent purchased a colt for \$8 million on behalf of a client he declined to identify. Even Keeneland's director of sales was unaware of the buyer's identity. He stated that the auction's credit department employees are "[t]he [only] people who need to know." *Id.* (quoting Geoffrey Russell, Director of Sales at Keeneland).

¹²⁶ Campbell, *supra* note 19.

¹²⁷ See Thane Peterson, *The Art of the Auction*, BUS. WK. ONLINE, Nov. 18, 2003, http://www.businessweek.com/print/bwdaily/dnflash/nov2003/nf20031118_2361_db028.htm?chan=db (noting that most pieces for sale at Sotheby's Contemporary Art auction are listed only as coming "from a private collection").

¹²⁸ See Campbell, *supra* note 19.

¹²⁹ See, e.g., Cain, *Question Remains*, *supra* note 125; Cain, *Sanan Calls for Reforms*, *supra* note 108; Cain, *Sanan Devotes Himself*, *supra* note 5.

¹³⁰ See Cain, *Sanan Devotes Himself*, *supra* note 5.

rights with the value of full disclosure and settled on “encouraging,” but not requiring, agents and consignors¹³¹ to disclose the true owner.¹³² If they refuse to disclose these anonymous owners, the potential purchasers’ only recourse is “deleting the horse from further consideration.”¹³³

Article III of the *Code* detailed the bloodstock agent’s role in thoroughbred auctions.¹³⁴ It emphasized that dual agency without disclosure is “inherently fraudulent.”¹³⁵ In order to remedy this problem, the Task Force encouraged principals to require that their agents sign the Agent Disclosure Agreement,¹³⁶ which is one of the sample forms that the Task Force released along with the *Code of Ethics*. This Agreement clearly articulates what is expected of the parties and delineates the fiduciary duties that the agent owes to his principal, including disclosure of any “adverse interests” that the agent has in the transaction.¹³⁷ Although TOBA lacks the

¹³¹ A consignor is a “person or agency responsible for offering a horse for sale at auction.” AUTHORITATIVE GUIDE TO AUCTIONS, *supra* note 13, at 100.

¹³² TOBA, CODE OF ETHICS (original version), *supra* note 116, art. II; *see also* Cain, *Ethics Code*, *supra* note 19.

The supplying of ownership information is not held to be a requirement under this Code of Ethics. However, all sale companies are requested to encourage consignors and consigning agents to reveal all information about ownership which a prospective buyer or buyer’s agent might seek, both on the catalogue page and verbally. The prospective buyer has every right to ask the consignor anything relative to the horse’s condition and ownership, and if such information is unsatisfactory, he/she has the recourse of deleting the horse from further consideration. Also, prospective buyers, especially those new to the industry, should be informed of the commercial products available which provide some of this information. Following the sale, the sale company will make every effort to provide to the public the most complete and accurate information on buyers and sellers possible, consistent with the above cited protections of privacy.

TOBA, CODE OF ETHICS (original version), *supra* note 116, art. II.

¹³³ TOBA, CODE OF ETHICS (original version), *supra* note 116, art. II.

¹³⁴ *Id.* art. III.

¹³⁵ *Id.*

¹³⁶ *Id.*; Sales Integrity Program, Agent Disclosure Agreement, <http://www.salesintegrity.org/downloads/disclosure.pdf> (last visited Apr. 20, 2007) [hereinafter Agent Disclosure Agreement].

¹³⁷ The Agent Disclosure Agreement reads in part:

AGENT acknowledges that AGENT acts as BUYER’s fiduciary with respect to its obligations under this AGREEMENT. The following acts or omissions, but not limited to these acts and omissions, shall constitute a breach of AGENT’S fiduciary duties to BUYER: (a) communicating any false or misleading information to BUYER regarding any horse under BUYER’S consideration as recommended by AGENT; (b) failing to disclose to BUYER the true price at which any horse under consideration by BUYER has been offered for sale at the auction; (c) arranging with any person or persons to bid

authority to punish an agent who signs the Agent Disclosure Agreement and then violates its provisions, the document would serve as strong evidentiary support for a buyer's breach of fiduciary duty claim against the agent.¹³⁸

Finally, Article IV of the *Code of Ethics* articulated TOBA's plan to have a copy of the *Code* displayed at every auction and to cooperate with sales companies to make information about horse sales more readily available for auction participants.¹³⁹ To ensure that information about the *Code of Ethics* is easily accessible to all interested parties, the Task Force mailed packets of information to registered thoroughbred owners and those who had recently applied for credit at the major auction companies, and also developed public service announcements to run at the auctions.¹⁴⁰ The Task Force also distributed copies of the *Code* and the Agent Disclosure Agreement to the sales companies so that both documents would be available for buyers and their agents at the auctions.¹⁴¹

V. HURDLES TO ENFORCEMENT: LEGAL AND PRACTICAL BARRIERS TO ETHICS OVERHAUL

On August 5, 2005, TOBA announced that it was postponing implementation of Article I: Veterinary Practices.¹⁴²

on a horse for BUYER at an inflated price; (d) entering into any other agreement with any person with respect to any transaction involving the sale of a horse to BUYER, other than an agreement which has been fully disclosed to BUYER and which BUYER has consented to in writing; or, (e) failing to disclose to BUYER any ownership interest of AGENT in any horse BUYER has under consideration; (f) otherwise acting in any manner contrary to the best interests of BUYER.

Agent Disclosure Agreement, *supra* note 136.

¹³⁸ *Sales Integrity Task Force Releases Code of Ethics*, THOROUGHBREDTIMES.COM, Dec. 16, 2004, <http://www.thoroughbredtimes.com/national-news/2004/December/16/Sales-Integrity-Task-Force-releases-code-of-ethics.aspx>. Cot Campbell explains, "We can't put someone in jail, but if someone signs this agreement and breaches it, then legal action can be taken." *Id.*

¹³⁹ TOBA, CODE OF ETHICS (original version), *supra* note 116, art. IV.

¹⁴⁰ See Deirdre B. Biles, *Sales Integrity Program Committee Addresses Concerns over Surgery Disclosure*, BLOODHORSE.COM, Aug. 1, 2005, <http://www.bloodhorse.com/articleindex/article.asp?id=29312> [hereinafter Biles, *Sales Integrity Program*].

¹⁴¹ See Deirdre B. Biles, *Education on Sale Code of Ethics to Start at Fasig-Tipton Calder Sale*, BLOODHORSE.COM, Feb. 25, 2005, <http://auctions.bloodhorse.com/viewstory.asp?id=26872> [hereinafter Biles, *Education on Sale*].

¹⁴² Press Release, Thoroughbred Owners and Breeders Ass'n, Mandatory Disclosure of Vet Practices Postponed (Aug. 5, 2005), available at <http://www.bloodhorse.com/>

The Task Force completely removed this Article (and any mention of it) from the official *Code* on its Web site.¹⁴³ The “postponement” came after consignors voiced their concern with how the thoroughbred auction industry could keep track of so many horses’ medical histories.¹⁴⁴ This surprise announcement seemed to confirm some industry insiders’ criticism that the *Code*’s drafters never really thought through how to enforce its provisions.¹⁴⁵

Although the *Code of Ethics* was largely well-received in the thoroughbred industry,¹⁴⁶ its positive reception was tempered by a pervasive lack of confidence that these new rules could actually change the way bloodstock transactions had always been conducted.¹⁴⁷ Critics questioned what real penalties *Code* violators faced and whether TOBA or its Task Force possessed any legitimate authority to administer these disciplinary provisions.¹⁴⁸ After all, the *Code* never refers to punishment for violations.¹⁴⁹ It does not even mention where to report alleged violations.¹⁵⁰ Since TOBA developed the *Code*, it would be reasonable to assume that complainants should report violations to the Association, just as violations of the British *Code of Practice* are to be reported to the HRA.¹⁵¹ The *Code of Ethics*, however, expressly limits TOBA’s role to “making relevant forms and publications readily

articleindex/article.asp?id=29376 [hereinafter Press Release, TOBA, Mandatory Disclosure].

¹⁴³ Compare TOBA, CODE OF ETHICS, *supra* note 12, with TOBA, CODE OF ETHICS (original version), *supra* note 116 (showing that the veterinary practices provisions from the original *Code of Ethics* are removed in the updated version). Article I of the *Code of Ethics* (original version) has yet to be reinstated, and there is no evidence that TOBA intends to do so in the future.

¹⁴⁴ Biles, *Sales Integrity Program*, *supra* note 140. “Issues and concerns raised include development of an effective record-keeping process at veterinary clinics, and development of a centralized database to capture and maintain the information.” Press Release, TOBA, Mandatory Disclosure, *supra* note 142.

¹⁴⁵ See Campbell, *supra* note 19.

¹⁴⁶ See, e.g., Marcus Green, *Fasig-Tipton Sale Puts Ethics Code to Test*, COURIER-J. (Louisville, Ky.), July 19, 2005, at 1D (noting that the *Code of Ethics* “appears to be working”).

¹⁴⁷ See, e.g., Rachel Pagonis, *Bloodstock Desk: Ethics Code a Long Time Coming, but Will It Work?*, RACING POST, Dec. 17, 2004, Sport, at 17 (pointing out that “ethical people will already be abiding by [these] guidelines”).

¹⁴⁸ See *supra* note 19.

¹⁴⁹ See TOBA, CODE OF ETHICS, *supra* note 12.

¹⁵⁰ See *id.*

¹⁵¹ See THE JOCKEY CLUB, CODE OF PRACTICE, *supra* note 10 (explaining the procedure for reporting breaches of the *Code of Practice*); see also E-mail from Owen Byrne, *supra* note 101 (confirming that individuals with information should now report violations of the *Code of Practice* to the HRA).

available . . . and providing other guidance to facilitate an owner's due diligence and successful participation in an auction."¹⁵² With no official body to investigate *Code* violations, and no stated penalties for these violations, critics were left wondering how the *Code* could possibly correct fraudulent auction practices.¹⁵³

The Task Force's decision to "encourage,"¹⁵⁴ but not require, full ownership disclosure was another major point of contention for the detractors, especially horse sellers. As one consignor explained, "They want the sellers to reveal everything that has been done to a horse, but the buyers get to conduct their business under a veil of secrecy."¹⁵⁵ Privacy rights ultimately prevailed over the need for full ownership disclosure, but it is clear that the problems Satish Sanan articulated about anonymous sellers¹⁵⁶ are not based on abstract fear, but rather, an informed sense of how unethical bidding has become customary auction practice. Since the *Code of Ethics* does not require full ownership disclosure, an agent can easily bid on his principal's horse to run up the purchase price without being detected. Even though the Conditions of Sale expressly permit bi-bidding,¹⁵⁷ the buyer bidding against the seller's agent might be interested to know that the other "bidder" only intends to run up the price.

One article entitled *A Beginner's Guide to Selling Thoroughbred Horses in a Public Auction Setting* actually encourages new owners to bid on their own horse to run up the price.¹⁵⁸ This article explains that "some people view consigned

¹⁵² TOBA, CODE OF ETHICS, *supra* note 12.

¹⁵³ See, e.g., Tom LaMarra, *Sanan: Regulation of Sales Business Needs 'Teeth,'* BLOODHORSE.COM, July 4, 2004, <http://news.bloodhorse.com/viewstory.asp?id=23256> (arguing that, without enforcement provisions, the *Code of Ethics* is just a set of conditions that will go unread and unenforced).

¹⁵⁴ TOBA, CODE OF ETHICS (original version), *supra* note 116, art. I.

¹⁵⁵ Deirdre B. Biles, *Code of Ethics Follow-Through Called Critical*, BLOODHORSE.COM, Dec. 27, 2004, <http://www.bloodhorse.com/articleindex/article.asp?id=25948> [hereinafter Biles, *Code of Ethics*]. Note that this statement was made before TOBA announced it was postponing mandatory disclosure of medical procedures. See *supra* notes 142-45 and accompanying text.

¹⁵⁶ See *supra* text accompanying notes 129-30.

¹⁵⁷ See *supra* note 2.

¹⁵⁸ See Jonathan F. Wallace & Allen F. Wysocki, *A Beginner's Guide to Selling Thoroughbred Horses in a Public Auction Setting* 3 (Inst. of Food & Agric. Sci., Univ. of Fla., 2000), available at <http://edis.ifas.ufl.edu/pdffiles/SN/SN00500.pdf>. It is worth noting that one of only two sources cited by Wallace and Wysocki is *Lightning in a Jar* by Cot Campbell, Chairman of the Sales Integrity Task Force. See *id.* at 4.

bidding as unethical, even though the rules clearly permit it.”¹⁵⁹ This is precisely the problem. The “rules” do not address the fraud that pervades many equine sales. It seems hypocritical for the industry to discourage misrepresentation of horses at public auction,¹⁶⁰ yet allow owners to artificially manipulate the horses’ market value in other ways. By allowing fraud to become custom,¹⁶¹ the thoroughbred industry has perpetuated its own flaws, rather than acknowledging and extinguishing them. The *Code of Ethics* is a step in the right direction, but the American horse racing community has a long way to go before it has a truly effective system of auction regulation.

A. Agency and Thoroughbred Auctions

By its very nature, agency raises ethical issues.¹⁶² An agent is a fiduciary of his principal; therefore, he has a duty of loyalty to his principal which requires that he act solely in his principal’s best interest.¹⁶³ Although agents are obligated to work exclusively for their principals’ interests, they may have their own countervailing interests in these transactions.¹⁶⁴ An agent breaches his fiduciary duty to his principal when he places these personal interests above those of his principal.¹⁶⁵

¹⁵⁹ *Id.* at 3.

¹⁶⁰ See TOBA, CODE OF ETHICS (original version), *supra* note 116, art. I.

¹⁶¹ In *Bexwell v. Christie*, (1776) 1 Cowp. 395, a dispute over the sale of a gelding at auction, Lord Mansfield spoke out against sellers hiring “puffers” to run up the purchase price of the goods for sale:

The matter in question is in itself of small value; but in respect of the principles by which it must be governed, it is a matter of great importance. . . . [T]ricks and practices of this kind daily increase, and grow so frequent that good men give into the ways of the bad and dishonest in their own defence. But such a practice was never openly avowed. An owner of goods set up to sale at an auction never yet bid in the room for himself. If such a practice were allowed, no one would bid. *It is a fraud upon the sale and upon the public.* . . . [I]t is no argument to say it is a frequent custom.

2 SAMUEL LIVERMORE, A TREATISE ON THE LAW OF PRINCIPAL AND AGENT AND OF SALES BY AUCTION 337-38 (1818) (emphasis added) (quoting *Bexwell*, 1 Cowp. at 395).

¹⁶² See Ronald F. Dushka, *Why Be a Loyal Agent? A Systemic Ethical Analysis*, in ETHICS AND AGENCY THEORY 143, 143 (Norman E. Bowie & R. Edward Freeman eds., 1992).

¹⁶³ Jeswald W. Salacuse, *Law and Power in Agency Relationships*, in NEGOTIATING ON BEHALF OF OTHERS: ADVICE TO LAWYERS, BUSINESS EXECUTIVES, SPORTS AGENTS, DIPLOMATS, POLITICIANS, AND EVERYBODY ELSE 157, 158-59 (Robert H. Mnookin & Lawrence E. Susskind eds., 1999).

¹⁶⁴ *Id.*

¹⁶⁵ See RESTATEMENT (SECOND) OF AGENCY § 387 (1958) (“Unless otherwise agreed, an agent is subject to a duty to his principal to act solely for the benefit of the principal in all matters connected with his agency.”).

An agent's duty of loyalty is particularly complicated by the reality of American thoroughbred auctions. In the United States, bloodstock agents are typically involved in more than one sale at an auction.¹⁶⁶ Although an agent may be bidding on behalf of one client, "more than likely [he] also has horses [at the auction] to sell."¹⁶⁷ For example, one owner's purchasing agent might also be employed as the selling agent for another thoroughbred owner, or this agent might even be selling his own horses at the auction. This situation is not inherently fraudulent, but it creates a conflict of interest which the agent is obligated to disclose to his principal.¹⁶⁸ This conflict is the "paradox of agency in the market system."¹⁶⁹ Society needs agents to operate on others' behalf,¹⁷⁰ yet the very structure of the principal/agent relationship fosters self-interested behavior.¹⁷¹

This "paradox" proves especially relevant in the world of thoroughbred sales. "The role of bloodstock agent is based on trust. However, it also is a highly ambiguous role. It is associated with a degree of skullduggery and chicanery. It is not quite criminal (although in some cases it has been), but it takes place at the margins of acceptable behavior."¹⁷² Many of the purchasers at today's auctions are new to the industry.¹⁷³ Therefore, they often lack the auction experience and equine knowledge necessary to effectuate the most advantageous purchases.¹⁷⁴ At the very least, novice buyers, many of whom are successful in other business ventures,¹⁷⁵ probably lack the

¹⁶⁶ See AUTHORITATIVE GUIDE TO AUCTIONS, *supra* note 13, at 69.

¹⁶⁷ *Id.*

¹⁶⁸ RESTATEMENT (SECOND) OF AGENCY § 387.

¹⁶⁹ Dushka, *supra* note 162, at 144.

¹⁷⁰ "Agency makes it possible for . . . actors to expand the range of their economic activities by increasing the number of transactions that they can complete within a given time." *Id.* (quoting BUSINESS LAW AND THE REGULATORY ENVIRONMENT 334 (Michael J. Metzger et al. eds., 6th ed. 1986)).

¹⁷¹ *Id.*

¹⁷² Rebecca Cassidy, *Falling in Love with Horses: The International Thoroughbred Auction*, 13 SOC'Y & ANIMALS 51, 53 (2005) (comparing bloodstock agents to the "trickster" figures in anthropology).

¹⁷³ See Miller, *supra* note 5, at 789; see also Paul Pringle, *To Race, She Had to Pony Up*, L.A. TIMES, May 6, 2006, at 1 (referring to horse racing as "a \$26-billion-a-year industry that depends on drawing fresh ranks of amateurs to auction stables").

¹⁷⁴ See Bades, *supra* note 38, at 789 (citing Dennis Tilton, *Fraud in the Sale of a Show Horse*, 39 AM. JUR. TRIALS 527, 541 (1989)).

¹⁷⁵ Miller, *supra* note 5, at 789. Thoroughbred owner Jess Jackson, now pursuing a lawsuit in California based on his agents' secret commissions, see *infra* text accompanying notes 188-96, made billions of dollars in the wine business before entering the thoroughbred industry. See Drape, *A Horseman's Lawsuit*, *supra* note 4.

time to fully educate themselves about horses and the thoroughbred market.¹⁷⁶ To combat their equine ignorance, most new buyers seek the assistance of knowledgeable, experienced horsemen, a practice that seems to be recommended by every “new buyer” guide available.¹⁷⁷ These new buyers typically hire bloodstock agents to select horses and do the actual bidding for them at auction. The agents’ experience, knowledge, and time make up for what their novice clients lack.

What many of these new buyers *do not* lack, however, is dispensable income with which to purchase their first racehorses.¹⁷⁸ The temptation to exploit wealthy, novice principals’ inexperience can prove to be too great for some unscrupulous bloodstock agents.¹⁷⁹ In one illustrative case, experienced horseman Richard Shockey approached Paul Gussin and his son Frederic and suggested that they purchase a thoroughbred.¹⁸⁰ Neither of the Gussins had any experience with horses or racing, but Shockey offered to advise them on details such as which racehorses to buy, how to care for them,

Another prominent owner bringing fraud claims against his former agents, James McIngvale, known as “Mattress Mac,” first made his fortune as a furniture retailer. See Ray Paulick, *Strange Bedfellows*, BLOODHORSE.COM, Sept. 12, 2006, <http://opinions.bloodhorse.com/viewstory.asp?id=35285>.

¹⁷⁶ As one veteran horse owner observed, “You see it over and over . . . People who are successful in other businesses come in with ‘victim’ written across their foreheads.” Tom LaMarra, *Panel: Ethics Code for Horse Sales Needs Teeth*, BLOODHORSE.COM, Dec. 9, 2004, <http://www.bloodhorse.com/articleindex/article.asp?id=25743> (quoting Joe Harper, President of the Del Mar Thoroughbred Club).

¹⁷⁷ See, e.g., AUTHORITATIVE GUIDE TO AUCTIONS, *supra* note 13, at 67 (“Your mantra should be simply: Don’t go it alone.”); BRIT. HORSERACING BD., THE THRILL OF OWNERSHIP: A PRACTICAL GUIDE TO OWNING A RACEHORSE 13, http://www.britishhorseracing.com/owning_breeding/ownership/BHB_Practical_Guide.pdf (last visited Apr. 20, 2007) (advising novice owners that “it is important to enlist the support of a trainer or bloodstock agent” when purchasing a racehorse, because “[t]he quality of advice you receive at this stage is likely to have a major influence in your future success”); Keeneland Thoroughbred Racing & Sales, *How to Bid at the Sale*, <http://www2.keeneland.com/sales/lists/copy/bid.aspx> (last visited Apr. 20, 2007) (encouraging potential bidders “to find a qualified bloodstock advisor” before undertaking the “unique task” of buying a horse at auction); ARNOLD KIRKPATRICK, *INVESTING IN THOROUGHBREDS* 47 (2001) (“You may be Albert Einstein in the building business or the rag trade, but you’re going to need help in the Thoroughbred Business.”); NEW THOROUGHBRED OWNERS HANDBOOK, *supra* note 20, at 21 (warning newcomers to overcome the urge to select their horses without assistance, because “novice owners who go it alone risk setbacks and even failure”).

¹⁷⁸ See *supra* note 175 and accompanying text.

¹⁷⁹ See AUTHORITATIVE GUIDE TO AUCTIONS, *supra* note 13, at 56 (“Many an eager newcomer has fallen victim to unscrupulous characters sometimes acting on their own or in concert with sellers.”).

¹⁸⁰ *Gussin v. Shockey*, 725 F. Supp. 271, 272-73 (D. Md. 1989).

and how to go about selling them.¹⁸¹ In exchange for the services provided by his twenty years of experience in the thoroughbred industry,¹⁸² Shockey was to receive five percent of the net profits from these horse transactions.¹⁸³ Unbeknownst to the Gussins, Shockey made arrangements with the sellers wherein he kept all money paid by the Gussins that was above a set price determined by the seller and Shockey.¹⁸⁴ The Gussins eventually discovered Shockey's secret profits and sued him for breach of fiduciary duty and fraud.¹⁸⁵ Although Shockey maintained that he was not acting as the Gussins' "formal" agent,¹⁸⁶ the U.S. District Court for the District of Maryland disagreed, finding that he violated his fiduciary duty to the Gussins by failing to disclose the "kickbacks" he received.¹⁸⁷

An agent's secret commissions are also at the forefront of a high-profile lawsuit now pending in California Superior Court in San Diego.¹⁸⁸ Billionaire Jess Jackson,¹⁸⁹ owner of Kendall-Jackson Vineyard Estates, sued his three bloodstock agents/advisors for fraudulent misrepresentation, breach of fiduciary duty, and unjust enrichment in connection with the purchase of several racehorses.¹⁹⁰ Jackson, who has spent tens of millions of dollars on thoroughbreds since entering the industry in 2003,¹⁹¹ alleges that his advisors "obtained secret

¹⁸¹ *Id.*

¹⁸² *Id.* at 272.

¹⁸³ *Id.* at 273.

¹⁸⁴ *Id.*

¹⁸⁵ *Id.* at 272. The Gussins also alleged that Shockey violated the Racketeer Influenced and Corrupt Organizations Act ("RICO"), based on a partnership that Paul and Frederic Gussin had formed to handle their horse business. Shockey had only a tenuous association with this partnership, however, since he purchased horses for the Gussins as individuals, not for their partnership. The court granted Shockey's motion for summary judgment on the RICO claim, concluding that the Gussins' partnership was "neither the object nor the tool" of the alleged illegal conduct, as required for a RICO violation. *Id.* at 276-77.

¹⁸⁶ *Gussin*, 725 F. Supp. at 273.

¹⁸⁷ *Id.* at 275.

¹⁸⁸ Bessie Gregory, *Bloodstock Desk: US Owner Files Law Suit Against Former Advisors*, RACING POST, Oct. 10, 2005, Sport, at 19.

¹⁸⁹ *Forbes* has listed Jackson as one of the world's richest people for the past several years. The magazine recently estimated his wealth at \$2.2 billion. Luisa Kroll & Allison Fass, *The World's Billionaires*, FORBES, Mar. 7, 2007, available at http://www.forbes.com/lists/2007/10/07billionaires_The-Worlds-Billionaires_Name.HTML.html.

¹⁹⁰ Gregory, *supra* note 188; Ray Paulick, *Owner Jackson Files Suit Against Ex-Advisors*, BLOODHORSE.COM, Oct. 5, 2005, <http://www.bloodhorse.com/articleindex/article.asp?id=30354> [hereinafter Paulick, *Owner Jackson Files Suit*].

¹⁹¹ Paulick, *Owner Jackson Files Suit*, *supra* note 190.

commissions, payments, or profits or other things of value from consignors, sellers, or other agents in return for assuring that [he] would purchase their horses or interests in horses at inflated prices.”¹⁹² Jackson claims that his bloodstock agents reported inflated purchase prices for thoroughbreds they bought on his behalf,¹⁹³ pocketing the difference between the amount Jackson paid and the actual sale prices.¹⁹⁴ In some of these transactions, the seller allegedly colluded with Jackson’s agents to artificially inflate the purchase price.¹⁹⁵ These “secret commissions” totaled approximately \$3.2 million,¹⁹⁶ according to the complaint.

With his case still pending, Jackson backed a bill filed on January 24, 2006 in the Kentucky House of Representatives by Representative Denver Butler of Louisville.¹⁹⁷ This bill focused on preventing fraud by agents involved in the purchase and sale of horses.¹⁹⁸ Similar to TOBA’s *Code of Ethics*, the bill prohibits agents from taking secret commissions and makes it illegal for an agent to represent both the buyer and the seller without their knowledge and written consent.¹⁹⁹ Kentucky Governor Ernie Fletcher signed the bill into law on March 28, 2006.²⁰⁰

¹⁹² *Id.*

¹⁹³ The alleged violations of fiduciary duty dealt with purchases both at public auction and private sales. *Id.*

¹⁹⁴ See Gregory, *supra* note 188; Paulick, *Owner Jackson Files Suit*, *supra* note 190. In one transaction, bloodstock agent Emmanuel de Seroux told Jackson that he purchased a colt for \$850,000; however, the seller only received \$675,000. *Id.*

¹⁹⁵ At the Keeneland auction in September of 2004, Jackson paid \$450,000 for a yearling, but his suit alleges that his agent, trainer Bruce Headley, received an undisclosed commission from the thoroughbred’s consignor. Paulick, *Owner Jackson Files Suit*, *supra* note 190.

¹⁹⁶ *Id.*

¹⁹⁷ Ray Paulick, *Bill Would Seek to Protect Kentucky Horse Buyers*, BLOODHORSE.COM, Jan. 25, 2006, <http://news.bloodhorse.com/viewstory.asp?id=31915> [hereinafter Paulick, *Bill Would Seek to Protect*]. The legislation applies not only to thoroughbreds, but to all breeds of horses, as long as the horse in question is “used for racing or showing.” KY. REV. STAT. ANN. § 230.357(1) (West 2006).

¹⁹⁸ See H.R. 446 (Ky. 2006), available at <http://www.lrc.ky.gov/record/06RS/ HB446/bill.doc>; Paulick, *Bill Would Seek to Protect*, *supra* note 197.

¹⁹⁹ See H.R. 446, *supra* note 198.

²⁰⁰ *Dual Agency Bill Signed by Kentucky Governor*, BLOODHORSE.COM, Mar. 28, 2006, <http://www.bloodhorse.com/articleindex/article.asp?id=32772>.

Unlike insurance²⁰¹ and real estate agents,²⁰² bloodstock agents do not have to be licensed by the state, or even a specific organization, to purchase and sell horses for their clients.²⁰³ Bloodstock agents do not even need written agreements with their principals that expressly authorize them to bid or sell on the owners' behalf.²⁰⁴ Since essentially anyone can become a bloodstock agent,²⁰⁵ new buyers have no assurance that the agents they choose are as experienced or successful as they claim. Reputation is crucial to this industry, but these novices usually lack sufficient industry contacts to fully investigate the agent's credibility in the racing world. As a result, it is not uncommon for new horse owners to be taken advantage of by their agents. The *Code of Ethics for Thoroughbred Auctions* spotlights the risk of bloodstock agent fraud, but the *Code* has no provisions to punish agents or compensate owners once this fraud has occurred.

B. *Who Is in Charge?: How the Structure of the American Thoroughbred Industry Cripples Its Attempts at Regulation*

1. The British System of Regulation

In the United Kingdom, the HRA has a great deal of authority over the conduct of trainers and owners, whom the HRA must license and register, respectively.²⁰⁶ Upon licensing

²⁰¹ BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, *Insurance Sales Agents*, in OCCUPATIONAL OUTLOOK HANDBOOK, 2006-07 EDITION, available at <http://www.bls.gov/oco/ocos118.htm> (showing that insurance agents "must obtain a license in the States where they plan to do their selling").

²⁰² BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, *Real Estate Brokers and Sales Agents*, in OCCUPATIONAL OUTLOOK HANDBOOK, 2006-07 EDITION, available at <http://www.bls.gov/oco/ocos120.htm> (showing that a real estate license "is required in every State and the District of Columbia").

²⁰³ AUTHORITATIVE GUIDE TO AUCTIONS, *supra* note 13, at 50.

²⁰⁴ In *Gussin v. Shockey*, Shockey "was reluctant to characterize his role as that of a formal agent of the Gussins." *Gussin*, 725 F. Supp. at 273. However, based on the services he provided for the Gussins and the documents he executed on their behalf, the U.S. District Court for the District of Maryland held that Shockey was operating as an agent for the Gussins. *Id.*

²⁰⁵ See Miller, *supra* note 5, at 825 (noting that in order to be considered a bloodstock agent, "[o]ne need only declare himself or herself to be a bloodstock agent").

²⁰⁶ See Powers of the HRA, *supra* note 68. British lawyer Justin Wadham, who specializes in horsetrading issues, explains: "With trainers, [the *Code of Practice*] has everything it needs. Not only is there a code of conduct but every trainer has to apply for a new licence annually. There's every opportunity for the Jockey Club repeatedly to warn trainers of the dire consequences of financial impropriety." Evans, *Foodbroker Case*, *supra* note 84.

or registration, these trainers and owners agree to be bound by the HRA's Rules of Racing.²⁰⁷ However, British bloodstock agents are not licensed or registered, so they cannot be bound by the Rules of Racing.²⁰⁸ Unlike the disciplinary measures the HRA can take against unscrupulous trainers or owners, such as imposing fines and revoking licenses, the British horse racing industry's ability to directly penalize bloodstock agents is somewhat limited.²⁰⁹ The Federation of Bloodstock Agents itself has a *Code of Working Ethics* banning such practices;²¹⁰ however, much like TOBA, membership in the Federation is optional. Many of the most successful agents are not even members;²¹¹ thus, they cannot be charged with violations of the Federation's *Code*.

Although the HRA lacks direct authority over agents (assuming the agents are not licensed as trainers) and other unlicensed individuals, violating the *Code of Practice* could still prove disastrous for their careers since the HRA licenses all British racecourses.²¹² Rule 2(v) of the Rules of Racing empowers the HRA to exclude any person from any of the HRA's licensed premises, even those people whom the HRA does not license or register.²¹³ Thus, even though the HRA cannot directly bar these unlicensed violators from working as bloodstock agents in the future, it can banish them from all British racecourses, making it nearly impossible for these violators to ever again obtain employment in horse racing.²¹⁴

²⁰⁷ See Powers of the HRA, *supra* note 68.

²⁰⁸ See *id.*

²⁰⁹ See *id.*

²¹⁰ FED'N OF BLOODSTOCK AGENTS, CODE OF WORKING ETHICS (2006), available at http://www.race-horses.com/agents/fba/fba_guidelines.htm.

²¹¹ For example, Charlie Gordon-Watson, the bloodstock agent accused of accepting kickbacks in the sale of Foodbroker Fancy, see *supra* notes 74-83 and accompanying text, is not a member of the Federation of Bloodstock Agents. Evans, *Horsetrading Scandal*, *supra* note 74.

²¹² See Horseracing Regulatory Authority, About the Horseracing Regulatory Authority, <http://www.thehra.org/doc.php?id=2> (last visited Apr. 20, 2007).

²¹³ RULES OF RACING R. 2(v) (2006), available at http://www.thehra.org/pdf.php?id=44657&filename=orders_and_rules_of_racing; Powers of the HRA, *supra* note 68.

²¹⁴ Richard Evans, *Bloodstock Crackdown*, DAILY TELEGRAPH (London), Mar. 22, 2004 (noting that, although the Jockey Club could not actually prevent violators from attending the auctions and purchasing horses, the publicity surrounding their punishment in the racing world and in news media would "render them pariahs in racing circles"). It is important to note that individuals may also be excluded from racetracks in the United States. However, American thoroughbred racetracks are licensed by the state, not TOBA. Therefore, unlike violations of the *Code of Practice* in the United Kingdom, *Code of Ethics* violations are unlikely to result in exclusion. For a

2. The American System of Regulation

The American thoroughbred industry lacks a regulatory body comparable to the United Kingdom's HRA or its predecessor, the Jockey Club. TOBA is a well-respected association with great influence, but it is merely a trade association²¹⁵ without licensing or registration authority. Membership in TOBA is purely optional for owners and breeders and bestows no special benefits,²¹⁶ the loss of which might deter the fraudulent activity prohibited by the *Code of Ethics*. The United States has its own Jockey Club, but the American Jockey Club does not serve the regulatory purpose once maintained by its United Kingdom counterpart.²¹⁷ Although it did, at one time, police thoroughbred racing,²¹⁸ the U.S. Jockey Club is now mainly responsible for maintaining *The American Stud Book*, a thoroughbred registry.²¹⁹

Although "secret commissions" and "kickbacks" are themselves prohibited by law,²²⁰ with the court usually ordering the unscrupulous agent to hand over the illegal profits to his principal,²²¹ simple mathematics show why even the law cannot

detailed account of racetrack exclusion in the United States, see John J. Kropp, J. Jeffrey Landen & Monica A. Donath, *Exclusion of Patrons and Horsemen from Racetracks: A Legal, Practical and Constitutional Dilemma*, 74 KY. L.J. 739 (1986).

²¹⁵ Thoroughbred Owners and Breeders Association, TOBA Membership, <http://www.toba.org/membership> (last visited Apr. 20, 2007).

²¹⁶ The benefits of TOBA membership include a membership directory, discounts on seminars, free admission to certain racetrack clubhouses, and a free magazine subscription. Thoroughbred Owners and Breeders Ass'n, Member Benefits, <http://www.toba.org/membership/benefits.aspx> (last visited Apr. 20, 2007).

²¹⁷ See The Jockey Club (U.S.), About the Jockey Club, http://www.jockeyclub.com/about_TJC.asp [hereinafter The Jockey Club (U.S.), About the Jockey Club] (last visited Apr. 20, 2007).

²¹⁸ BARNEY NAGLER, *THE AMERICAN HORSE* 106 (1966).

²¹⁹ This registry documents all thoroughbred foals born in the United States, Canada, and Puerto Rico, as well as some horses imported into these countries. The Jockey Club (U.S.), About the Jockey Club, *supra* note 217.

²²⁰ See RESTATEMENT (SECOND) OF AGENCY § 388 (explaining that agents have a duty to give their principals any profits arising from their agency, unless the parties have agreed otherwise). There may also be criminal repercussions for offering or accepting a secret commission. For example, New York's misdemeanor "commercial bribery" statutes prohibit an individual from offering a benefit to an agent without the principal's consent, and prohibit an agent from soliciting or accepting such benefit, with the intent to influence the agent's conduct in regards to his principal's affairs. N.Y. PENAL LAW §§ 180.00, 180.05 (McKinney 2006). If the benefit conferred on or offered to the agent exceeds \$1,000 and causes the principal at least \$250 in economic harm, the bribery becomes a felony. *Id.* §§ 180.03, 180.08; Miller, *supra* note 5, at 827.

²²¹ "If an agent receives anything as a result of his violation of a duty of loyalty to the principal, he is subject to a liability to deliver it, its value, or its proceeds, to the principal." RESTATEMENT (SECOND) OF AGENCY § 403 (1958).

effectively deter these deceptive practices. If a bloodstock agent takes a “kickback” in several or all of his thoroughbred transactions, he is unlikely to be caught for each one. Therefore, even if his fraud was detected and prosecuted in a few of those transactions, requiring him to disgorge these profits to his principal, the deceptive agent is still likely to come out on top.²²²

Without a regulatory body like the Horseracing Regulatory Authority to implement and enforce its provisions, TOBA’s *Code of Ethics* is more of an empty promise than an assurance of fairness. A code of ethics without a means of enforcement is essentially meaningless.²²³ In order to be effective, codes of ethics must be clear and detailed, with carefully delineated repercussions.²²⁴ The process of reporting the complaint and the steps taken to investigate the complaint must be explicitly conveyed in the code,²²⁵ or else its provisions are little more than a statement of ideals to which industry members claim to aspire.²²⁶

If the overt penalties for contravention of codes are minimalist, the appearance can be given of the codes being window-dressing, intended to promote . . . rhetoric . . . but not in a meaningful sense to address professional abuses. . . . [T]he absence of effective sanctions for non-compliance with ethical prescriptions significantly detracts from their value. Inherent in this interpretation is the

²²² Agents who breach their fiduciary duties not only have to turn over any “kickbacks” or otherwise illegal profits, they also lose the commission originally agreed upon with their principal.

An agent is entitled to no compensation for conduct which is disobedient or which is a breach of his duty of loyalty; if such conduct constitutes a wilful and deliberate breach of his contract of service, he is not entitled to compensation even for properly performed services for which no compensation is apportioned.

Id. § 469.

²²³ “A code is merely a piece of paper with words if penalties for non-compliance are not applied.” Margaret M. Coady, *The Moral Domain of Professionals*, in *CODES OF ETHICS AND THE PROFESSIONS* 28, 48 (Margaret Coady & Sidney Bloch eds., 1996) (quoting JACK M. BEHRMAN, *ESSAYS ON ETHICS IN BUSINESS AND THE PROFESSIONS* 155 (1988)); see also NAT’L CONSUMER COUNCIL (U.K.), *MODELS OF SELF-REGULATION: AN OVERVIEW OF MODELS IN BUSINESS AND THE PROFESSIONS* 16 (2000), available at http://www.ncc.org.uk/regulation/models_self_regulation.pdf (identifying the three elements common to most forms of regulation: rules, “monitoring and enforcement of the rules,” and a redress system, and noting that “unless all three [elements] are covered somehow, the regulation is unlikely to be effective”).

²²⁴ See Judith Lichtenberg, *What Are Codes of Ethics For?*, in *CODES OF ETHICS AND THE PROFESSIONS*, *supra* note 223, at 13, 27.

²²⁵ See Loane Skene, *A Legal Perspective on Codes of Ethics*, in *CODES OF ETHICS AND THE PROFESSIONS*, *supra* note 223, at 111, 115.

²²⁶ See *id.* at 129.

instrumentalist notion that the value of codes lies not so much in their articulation of ideal standards of conduct but in their capacity to regulate unsatisfactory conduct.²²⁷

It is very easy for the thoroughbred industry to speak out against the fraudulent activity occurring at its auctions. The real test of a firm commitment to improvement lies in implementation of these asserted ideals.²²⁸

VI. IS THERE ANY HOPE FOR TOBA'S "TOOTHLESS TIGER?"

If all TOBA sought to achieve by developing the *Code* was improving the horse racing industry's public image, then arguably, it has achieved that minor aspiration. At the very least, the *Code of Ethics* makes it clear that the American thoroughbred industry (at least those members represented in TOBA) is aware of fraud in horse sales and has asserted its disapproval.²²⁹ Novice owners might feel more confident entering the intimidating world of thoroughbred auctions if they feel that someone is looking out for their best interests by spotlighting potential problem areas. TOBA is clearly concerned with the effect that this fraud could have on novice horsemen,²³⁰ whose inexperience already places them at a disadvantage when entering the competitive world of thoroughbred racing. If TOBA just hopes to quell new owners' fears about an inherently unfair thoroughbred market, to assure that these novices will continue to invest, then the *Code* is, arguably, sufficient. Just as in the stock market, no one would invest in thoroughbred racing if the market was unfair.²³¹ There must be some assurance, some way of guaranteeing that what is for sale is being accurately represented. For some new owners, perhaps TOBA's *Code of*

²²⁷ Ian Freckelton, *Enforcement of Ethics, in* CODES OF ETHICS AND THE PROFESSIONS, *supra* note 223, at 130, 143-44 (footnote omitted) (describing what Freckelton refers to as the "legalistic" approach to codes of ethics).

²²⁸ *See id.*

²²⁹ *See generally* TOBA, CODE OF ETHICS, *supra* note 12.

²³⁰ *See* Sales Integrity Task Force, Mission, *supra* note 113 ("The project was specifically geared to the needs of new investors . . ."); *see also* Dan Liebman & Deirdre B. Biles, *Code of Ethics for Auctions Announced*, BLOODHORSE.COM, Dec. 17, 2004 ("Our mission in all of this was . . . to create a road map for the new buyer and let him know what he should expect and what is not acceptable." (quoting Cot Campbell)).

²³¹ *See, e.g.*, 2 LIVERMORE, *supra* note 161, at 337-38 (warning that if public auctions tolerated fraudulent bidding practices, "no one would bid" (quoting Bexwell v. Christie, (1776) 1 Cowp. 395)).

Ethics provides that necessary reassurance that the racehorse industry will not stand for a fraudulent marketplace.

This assurance is necessary for the industry to maintain its allure of elusive victory, the promise that every individual has a full and fair opportunity to participate and win.²³² This is what lures new investors to both the thoroughbred market and the stock market. In each industry, however, the odds are not in the newcomer's favor. There will always be players with more information, more experience, and more skill. Investing in any competitive market brings no assurance of success.²³³ No investor can be guaranteed that his stock is going to increase in value, just as no thoroughbred buyer can be certain that his colt will be the next Secretariat.²³⁴ If the *Code* convinces these new owners, however, that they will at least have a fair chance of "getting what they paid for," then it has successfully improved the industry's reputation and restored newcomers' faith.

Of course, if TOBA has no intention of actually enforcing its *Code of Ethics*, the *Code* is really only giving these newcomers false hope. False hope might lure new investors into the market, but it cannot keep them there.²³⁵ If, however, TOBA released the *Code of Ethics for Thoroughbred Auctions* to actually improve auction practices or at least make the

²³² See, e.g., NEW THOROUGHBRED OWNERS HANDBOOK, *supra* note 20, at 7 ("What thrill can match the sight of your horse, bearing a jockey in the colors and design you have chosen, blazing through the last furlong of a race and snatching victory at the finish line? Life doesn't get much better."). Romanticized tales of "rags to riches" victories proliferate this elusive dream. "The thing about this game is you can get in it. You don't need a million dollars. We did it. The small guys can do it. Anybody can do it." Thoroughbred Owners and Breeders Ass'n, Thoroughbred Ownership (quoting Mike Goetz, co-owner of a Grade 1 winner) (on file with the *Brooklyn Law Review*); see, e.g., FUNNY CIDE TEAM WITH SALLY JENKINS, FUNNY CIDE: HOW A HORSE, A TRAINER, A JOCKEY, AND A BUNCH OF HIGH SCHOOL BUDDIES TOOK ON THE SHEIKS AND BLUEBLOODS . . . AND WON (2004) (detailing the "out of nowhere" success of Funny Cide, the 2003 Kentucky Derby and Preakness Stakes winner).

²³³ Thoroughbred ownership is arguably an even riskier investment for a novice than the typical stock investment. "The speed of an animal and its ability to run a distance are variables not subject to market surveys, not influenced by advertising and sales techniques, and not obviously subject to rational analysis." Miller, *supra* note 5, at 783.

²³⁴ Secretariat won the Triple Crown (Kentucky Derby, Preakness Stakes, and Belmont Stakes) in 1973, the first horse to do so in twenty-five years. Secretariat was inducted into the National Thoroughbred Racing Hall of Fame in 1974. National Museum of Racing and Hall of Fame, Secretariat, <http://www.racingmuseum.org/hall/horse.asp?ID=135> (last visited Apr. 20, 2007).

²³⁵ Like so many novice owners before them, many of these newcomers who fall victim to a fraudulent horse deal will "disappear" from the thoroughbred industry with only bad memories. See Paulick, *Cot To Be Good*, *supra* note 19.

playing field a bit more level, then the *Code* has fallen short of these aspirations in two glaring ways. First, by bowing to consignor pressure and removing medication and surgery disclosures from its *Code of Ethics*,²³⁶ TOBA has failed to address one of the most pressing issues in racing today, the use of anabolic steroids.²³⁷ This issue is most certainly on the minds of auction participants. In May of 2006, as part of its Sales Integrity Program, TOBA conducted a survey of owners who had recently purchased thoroughbreds at auction.²³⁸ The responses, particularly where research participants were able to enter their own comments, clearly indicate that most thoroughbred purchasers want full disclosure of surgeries and medications, particularly anabolic steroids.²³⁹

Second, and most problematic, the *Code* completely lacks enforcement provisions.²⁴⁰ Although TOBA is a respected and influential association, it carries no direct authority over anyone but its own members. Even among its own members, the only punishment that TOBA could impose would be to strip the violator of his membership. Assuming this information is publicized in some way (which it probably is not), losing one's

²³⁶ See *supra* notes 142-44 and accompanying text.

²³⁷ See, e.g., AM. ASS'N OF EQUINE PRACTITIONERS, RECOMMENDATIONS CONCERNING MEDICATION IN HORSES PRESENTED FOR SALE AT PUBLIC AUCTION 3, available at <https://www.aaep.org/pdfs/pressroom/Medication%20in%20Horses%20Presented%20for%20Sale%20at%20Public%20Auction.pdf> (showing recommendations of the American Association of Equine Practitioners' Task Force on Medication Issues at Public Auction, who concluded that "detectable level[s]" of anabolic steroids should not be permitted at auctions); Denk, *supra* note 123 (reporting that officials from Keeneland and Fasig-Tipton have formed a committee with various horse racing and veterinary professionals in order to develop a standardized policy for anabolic steroid testing at auctions); Finley, *supra* note 123 (noting that "the racing industry, concerned about public perception and safety and integrity issues, may be about to join other major sports in banning the use of steroids"); Rachel Pagonis, Amy Bennett & Nancy Sexton, *Horse Racing: Steroid Policy Rethink in US*, RACING POST, Jan. 22, 2007, Sport, at 18.

²³⁸ THOROUGHBRED OWNERS AND BREEDERS ASS'N, SALES INTEGRITY PROGRAM BUYER SURVEY 1 (2006), <http://www.salesintegrity.org/downloads/TOBA%20Report.pdf>.

²³⁹ Among the comments from research participants: "Anabolic steroids should have a total ban—zero tolerance;" "Any sellers/consignors involved in this practice [giving horses steroids to improve their appearance for sale] should be banned for life from the industry;" "Worse than the dishonesty among agents is the drug situation. Something must be done to stop the drugging of horses;" "I have purchased numerous horses at auction that actually deflated within a week of the sale. The use of steroids and other masking drugs is a larger problem, in my opinion, than the non-disclosure of corrective surgery." *Id.* at 19-28 (showing all comments).

²⁴⁰ See *supra* note 223; see also NAT'L CONSUMER COUNCIL (U.K.), *supra* note 223, at 51 (noting that in order to have an effective system of regulation, "[t]here must be clear, accessible and well-publicised complaints procedures where breach of the code is alleged;" and "[t]here must be adequate, meaningful and commercially significant sanctions for non-observance").

TOBA membership would result in little more than embarrassment. Unlike the British HRA,²⁴¹ TOBA has no influence on trainers' licenses, which the states issue. Stripping a trainer of his TOBA membership for a *Code of Ethics* violation has absolutely no direct effect on his ability to continue working as a trainer. The threat of revoking TOBA membership is furthered weakened by the fact that only a small percentage of *Code* violators would even be TOBA members. Since TOBA focuses only on thoroughbred owners and breeders,²⁴² and membership is purely voluntary, many of the most common violators, such as bloodstock agents and trainers, might not even fit into one of these groups.

In spite of its shortcomings, the *Code of Ethics* does have some value. Reputation has always been an integral part of the horse racing industry.²⁴³ Traditionally, horse deals were transacted "between people who knew each other, who had dealt with each other before and who would deal with each other again."²⁴⁴ The industry was based on reputation, mutual experience, and continued relationships. Over the years, however, "new money" has infiltrated horse racing, dramatically shifting the nature of the business from a closed-in community insulated from risk by expertise and trust based on long-lasting relationships, to an open market saturated with novice buyers lacking knowledge about thoroughbreds and racing industry custom.²⁴⁵

By spotlighting unscrupulous conduct, the *Code* has reinforced the necessity of owners' due diligence. The *Code* itself states that its mission is "to improve the opportunity for buyers at auction sales to feel informed, understand the various aspects of the process, and be confident they were being fairly treated."²⁴⁶ Novice owners were at a great disadvantage when faced with the daunting task of breaking into the thoroughbred industry, partly because they were unaware of

²⁴¹ Horseracing Regulatory Authority, Licensing Procedure, <http://thehra.org/doc.php?id=27295> (last visited Apr. 20, 2007).

²⁴² "TOBA's mission is to improve the economics, integrity and pleasure of the sport on behalf of Thoroughbred owners and breeders." Thoroughbred Owners and Breeders Ass'n, About TOBA, <https://www.toba.org/about> (last visited Apr. 20, 2007).

²⁴³ See Miller, *supra* note 5, at 786.

²⁴⁴ *Id.*

²⁴⁵ *Id.* at 789; see also Cassidy, *supra* note 172, at 53 (explaining that "[a]s the market for bloodstock grew—particularly during the boom of the 1970s and 1980s, . . . [t]he cozy intimacy of the bloodstock world was lost").

²⁴⁶ See Sales Integrity Task Force, Mission, *supra* note 113.

the fraud lurking behind these “trade customs.” Now, at the very least, new owners know that “kickbacks” and concealed physical defects exist at public auctions. Armed with this knowledge, new owners are better prepared to investigate agents before allowing them to bid on their behalf, inquire into the ownership of horses they are interested in purchasing, and hire veterinarians to thoroughly examine the horses for masked defects.

As in every business transaction, due diligence is crucial when one is buying a thoroughbred or choosing a bloodstock agent. “The bottom line, if you’re a buyer, is that you need to do your homework,” advises one thoroughbred owner.²⁴⁷ Although this owner is correct that buyers should “do [their] homework,”²⁴⁸ this idealized emphasis on due diligence fails to fully take into account the reality of the thoroughbred racing industry. Many new buyers, particularly those for whom thoroughbred racing is just a hobby or a side venture, choose to employ bloodstock agents to save themselves the time of researching all the thoroughbreds for sale, attending the auctions, and following through on the transaction. These agents are hired precisely so that owners do not have to do the requisite “homework” themselves. Even if their blind trust is not advisable, these owners are paying for a service and they deserve to get what they paid for.

The thoroughbred market, like the stock market, is most efficient when transactions are promoted in a setting where the costs are as low as possible to the parties involved. If principals are required to double-check and investigate every move that their agents make, this might prevent the agents from violating their fiduciary duties, but this security comes at the price of productivity.²⁴⁹ The costs of continuing these transactions will eventually become too high, and new buyers will no longer invest.²⁵⁰ Since agents are such a vital part of the thoroughbred industry, the industry must find a better way to police the activity of bloodstock agents and punish those who violate their fiduciary duties. This is not only to protect the interests of individual buyers, but also to protect the efficiency

²⁴⁷ Biles, *Code of Ethics*, *supra* note 155.

²⁴⁸ *Id.*

²⁴⁹ The cost of agency to the principal goes beyond the monetary compensation that he pays his agent. It includes transaction costs associated with planning and monitoring his agent's work. Salacuse, *supra* note 163, at 165.

²⁵⁰ *See id.*

of the market, and ultimately, the survival of the industry itself.

Agency law binds these agents to various duties, but “agency law” cannot police the thoroughbred industry. It is up to the industry itself to ensure that violations of these duties are detected and dealt with accordingly. A code of ethics is an integral part of a unified system of self-regulation, but without anyone or anything to oversee this “regulation,” a code of ethics will never have much of an impact.

There are, of course, some drawbacks to industry self-regulation. Allowing an industry to regulate itself presents the risk that nothing will be done, or that self-regulation is merely a “shield to ward off more meaningful regulation.”²⁵¹ There is also the concern that those in charge of regulation will prevent the industry from modifying its practices because the old system is economically beneficial to them.²⁵² For example, the veteran horsemen who currently lead the industry are in a better position to succeed than new investors, due to the veterans’ years of experience in the business. Even though the current system of regulation is deficient, it is serving them well because they know what to watch out for and who to trust. In contrast, newcomers often have no racing industry experience to draw from when choosing horses or hiring a bloodstock agent. Since newcomers are most likely to be affected by auction fraud, a better-regulated system of fraud prevention, detection, and adjudication best serves their interests. The risk is that a governance system controlled by veteran horsemen might not regulate these problems as diligently as it would if the veterans themselves were most affected by the fraud.²⁵³

Despite the drawbacks of self-regulation, the thoroughbred industry is quite resistant to federal regulation for its auctions²⁵⁴ and it is unlikely that the industry will ever

²⁵¹ Dale A. Oesterle, *Comments on the SEC’s Market 2000 Report: On, Among Other Things, Deference to SROs, the Mirage of Price Improvement, the Arrogation of Property Rights in Order Flow, and SEC Incrementalism*, 19 J. CORP. L. 483, 489 (1994) (quoting SUBCOMM. ON SEC., S. COMM. ON BANKING, HOUS. & URBAN AFFAIRS, SECURITIES INDUSTRY STUDY, S. Doc. No. 13, 93d Cong., 1st Sess. 145 (1973)).

²⁵² *Id.* (quoting SUBCOMM. ON SEC., S. COMM. ON BANKING, HOUS. & URBAN AFFAIRS, *supra* note 251, at 145).

²⁵³ *See id.* (quoting SUBCOMM. ON SEC., S. COMM. ON BANKING, HOUS. & URBAN AFFAIRS, *supra* note 251, at 145).

²⁵⁴ *See, e.g.,* Campbell, *supra* note 19 (“No one in his right mind would entertain this.”); Lucas Marquardt, *A Breath of Fresh Air: Q&A with Satish Sanan*

embrace such government oversight. Excluding government regulation as a possibility, the only viable option for improving auction practices is for the industry to develop a centralized system of regulation. The industry has already modeled its *Code of Ethics* after the British *Code of Practice*, so perhaps the American industry should also modify its regulatory structure (or complete lack thereof) to more closely resemble that of the United Kingdom.²⁵⁵ No system is perfect, but having an official body in charge of regulatory oversight for thoroughbred sales would vastly improve the situation.

Although it remains uncertain exactly how the industry could implement this structural overhaul, its necessity is clear. By developing an official authority within the thoroughbred sales business, the industry can adopt and implement a standardized set of regulations to govern all public auctions. Up to this point, the U.S. thoroughbred industry's focus has been exclusively on fraudulent misrepresentation in the public auction setting, but the success of this system could lead to extending the official agency's authority to include private sales as well.²⁵⁶ It might even be advisable to pursue state licensing of bloodstock agents to ensure greater oversight into their activities and stricter penalties for unscrupulous conduct.²⁵⁷

The *Code of Ethics for Thoroughbred Auctions* successfully brings the industry's focus back onto reputation and due diligence. These had always been vital features of horse racing, long before novice horsemen infiltrated the racing world, bringing "new money," new customs, and new problems.²⁵⁸ Although due diligence is an important consideration in all business transactions, the American thoroughbred industry can do better, and must do better, to maintain its current investors and continue attracting new

("Our game plan is to avoid government agencies if we can," states Sanan.) (on file with the *Brooklyn Law Review*).

²⁵⁵ For a discussion of the regulatory structure of horse racing in the United Kingdom, see *supra* Part V.B.1.

²⁵⁶ Unlike TOBA's *Code of Ethics*, the British *Code of Practice* applies to private sales as well as public auctions. See THE JOCKEY CLUB, CODE OF PRACTICE, *supra* note 10.

²⁵⁷ Many horsemen, including Jess Jackson, have supported this idea of licensing bloodstock agents. However, others have criticized the proposal, citing the impracticability of requiring state licenses in an international business like thoroughbred sales. See Mary Meehan, *Jess Jackson Backs Licensing, Disclosure*, LEXINGTON HERALD-LEADER (Ky.), May 4, 2006, at A1.

²⁵⁸ See Miller, *supra* note 5, at 789.

ones.²⁵⁹ The horse racing industry needs to implement an official body to effectively enforce the *Code of Ethics* and other horse sale regulations.

VII. CONCLUSION

The *Code of Ethics for Thoroughbred Auctions* is an important step in the industry's efforts to improve auction practices, but it probably should not have been its *first* step. TOBA and its supporters adopted the *Code* with the best of intentions. The *Code of Ethics* has tremendous potential to effectuate real change by standardizing approved auction practices, but its proponents have gotten way ahead of themselves. Without a regulatory body similar to the United Kingdom's Horseracing Regulatory Authority to implement the *Code of Ethics*, its provisions are little more than "window-dressing,"²⁶⁰ or "merely a piece of paper with words."²⁶¹

The U.S. thoroughbred industry should develop a centralized regulatory body to, among other duties, enforce the *Code of Ethics for Thoroughbred Auctions*. By implementing this new agency within the industry, the racing world could provide new investors with more than false hope of procedural fairness. Investing in racehorses will always be a risky venture; economic success can never be guaranteed. Adopting an effective system of self-regulation that investigates and punishes instances of dual agency, undisclosed commissions, and artificially represented horses will not safeguard these investments. It will, however, contain the risk to that which has always been a part of horse racing—a risk that new investors have shown they are willing to take.

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²⁵⁹ See *US: Sanan Calls for Sale Reform*, RACING AND SPORTS (Austl.), July 6, 2004, available at <http://www.iskander.com.au/breeding/rsNewsArt.asp?NID=44265> (quoting Satish Sanan, who argues that the thoroughbred industry needs to make major changes in order to maintain its appeal to new owners and also current owners).

²⁶⁰ Freckelton, *supra* note 227, at 143-44.

²⁶¹ Coady, *supra* note 223, at 48.

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