

## Lest We Lease: The Problems That Arise When Racehorses Are Shared

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In New York City alone, hundreds of attorneys make their living practicing exclusively in the area of landlord and tenant law. The complexities of issues presented in housing and commercial leasing matters, as well as the sheer volume of cases involving dissatisfied litigants possessing conflicting claims, renders this field quite lucrative for lawyers with the strong stomachs and lots of time on their hands.

In the equine realm, leasing matters present similar difficulties and complications. This is especially true in the areas of racehorse and breeding stock leasing. Without resort to objective data, suffice it to say that leasing agreements in our industry quite often terminate in breach rather than in successful conclusion. This article discusses the concerns participants should raise before establishing a leasing affiliation, and what to do in order to best protect their respective interests during the term of the undertaking.

Role of the U.S.T.A.: There are a myriad of reasons why things go so awfully wrong between racehorse owners and their lessees in these arrangements. The common denominator, however, is the failure to unambiguously articulate and memorialize the parties' various rights and obligations in written form at the outset of the relationship. In other words, be as specific as possible. In this regard, the U.S.T.A. is proactive only so far as requiring that leases of racehorses and breeding stock be recorded with the Association (U.S.T.A. Rule 7, Section 1; Rule 9, Sections 3(b) and 3(c); Rule 26, Section 4). Having the written lease on file is important, inasmuch as horses under lease race in the name of the lessee, not the owner (U.S.T.A. Rule 7, Section 1; Rule 9, Section 3(c)) and electronic eligibility is afforded to a leased horse only if the Association has the lease on file (U.S.T.A. Rule 9, Section 3(c)). Similarly, our Association's rules define the breeder of a horse to be the lessee of the dam, and not the dam's owner, and a mating certificate is executed by the mare's lessee, provided, of course, that the lease has been filed (U.S.T.A. Rule 26, Section 4 and 5). The fee for lease filing depends upon the term (length) of the relationship.

Consider, however, that other than the merely ministerial deed of accepting written items for filing, the USTA has no role in the leasing arena. The Association does not dictate or assist in the development of, nor does it enforce in any way, the content of the document. Outside of recognizing the commencement and termination dates (assuming the lease has them), the U.S.T.A. acts as nothing more than a repository for whatever writing the parties choose to formulate. Thus, the first rule in leasing is to recognize that the breed registry in Columbus cannot be of help to lease participants once there is a dispute. In light of this recognition, the second rule is to carefully draft the agreement with the knowledge that the U.S.T.A. will not relieve parties of their obligations therein, no matter how onerous they may be; nor will the Association arbitrate or interpret the verbiage contained in the lease. The third rule is to file with the Association in timely fashion whatever lease agreement is formulated.

Length of the lease term: If a specified end date is not established in the document, the length of the arrangement will be dictated by the laws of the applicable jurisdiction. The question then arises as to which jurisdiction is applicable: The owner's residence; lessee's residence; horse's residence or where the agreement was executed? In any event, if the parties wish to avoid litigation it is wise to establish a definite termination date in the lease, on which date possession of the horse will be returned to the owner. Who bears the responsibility and cost for such transfer should also be explicitly spelled out.

(Non)Payment: The typical racehorse leasing arrangement involves the lessee's obligation to pay all expenses involving the horse's care and to pay the owner a percentage of the purses earned by the horse during the term. While those provisions are easily stated, what are not so effortlessly set forth are the owner's remedies when bills aren't being paid or earnings percentages aren't being forwarded. Unfortunately, in this circumstance possession truly can be 9/10s of the law. It is difficult to ensure in writing that the horse's owner can retake possession if a recalcitrant lessee refuses to voluntarily return the horse. Legal remedies to recover possession are always time consuming, and not always cost effective. The owner is often left with a money judgment against an empty-pocketed lessee.

Condition and Use: The owner's expectations regarding how the animal will be cared for and placed into service must be declared in detail. At a minimum, the lease should include a clause requiring the lessee to maintain the horse in good physical condition, subject to periodic verification by a veterinarian of the owner's choosing. Moreover, regular entry of the horse at competitive levels should be accepted by the lessee as his prime obligation. This would require the lessee to keep the horse in active training, and trigger return of the horse if this responsibility is not met.

Additionally, certain matters that go to the very essence of the leasing arrangement must be addressed. These include a prohibition against entering the horse in a claiming race; exposing the horse to major, non-emergency medical procedures, including gelding the animal; campaigning of the horse out of the country, etc., without the express prior permission of the owner. By its very nature, leasing involves the expectation that the owner will one day regain possession and control of his or her horse in the condition it was given to the lessee, reasonable wear and tear excepted. Allowing a horse to be claimed or altered without permission is inherently contradictory to the premise upon which leasing is founded.

Of course, there are few remedies in the event poor choices are made by a lessee. Since clauses dictating the right to immediate lease termination and repossession may be of dubious usefulness, the owner should consider requesting that a liquidated damage provision, meaning a clause establishing a set monetary penalty in the event of breach, be contained in the lease. This provision would institute a definite amount of money damages in the event that an objective, indisputable action, such as losing the horse in a claim or gelding it,

is taken by the lessee. The effectiveness of such provision is clearly dictated by the financial wherewithal of the lessee at the time of breach occurs.

Deposit: While a security deposit is standard in real estate leasing arrangements, it is virtually unheard of in the equine leasing realm. The reality of the leasing marketplace is that identified champions are seldom leased. Inasmuch as owners are normally looking for a way, any way, to get the expenses for an underperforming horse consistently paid, it is their mindset to make leasing as attractive as possible to the lessee. Requiring an upfront deposit is clearly a disincentive. Still, an owner leery of the ethics and intentions of an unknown lessee might astutely require an upfront sum as either a deposit or an advance against future purse earnings. Short of this, the owner should require verification of the proposed lessee's creditworthiness via review of a rating issued by a national reporting service.

Licensing: Several jurisdictions require that both the owner and lessee of a racehorse be fully licensed. If the owner fails to be licensed in particular states, the lessee's ability to use the horse is significantly hampered. The more common problem, however, is when the lessee, often though not always a trainer, has his or her license suspended or revoked. At that juncture, neither lease participant has the prospect of income from the animal. The lease must state that failure of either party to be continuously licensed in those jurisdictions where campaigning of the horse is anticipated is a termination trigger requiring return of the horse to the owner.

Insurance: While the insurance products offered to racehorse owners are limited, full mortality and fire, lightning and/or transportation ("FLT") insurance are obtainable. A policy should be identified by the parties and the cost of premiums allocated in accordance with the parties' wishes. If the horse is not to be insured, the owner should acknowledge this as a risk of loss in the lease. Optimally, each party should independently secure liability insurance as well.

Arbitration: Obtaining quick, inexpensive and enforceable resolutions to disputes is accomplished by the parties' mutual assent to a broad arbitration clause. Submitting differences of opinion to an arbitrator is always superior to clashes in court, even for the so-called "victorious" party. Quite often, the amount in controversy pales in comparison to legal fees, court costs and the attendant fees and charges that litigation brings. Arbitration is binding, making it a good substitute for the courthouse.

Conclusion: While a written lease is important, it won't prevent a lessee from acting against the interests of an owner, and vice-versa. All a lease does is give each party rights and provide a mechanism to enforce these rights. No lease in the world ever prevented a horse from being abandoned by a lessee. The best protection for owners and lessees is to get to know the party to be dealt with in an exhaustive a manner as possible before entering into the leasing arrangement. Who is this person? Why does he want my horse? Why should I take on the responsibility of his horse? How long as she been in the industry? Does he have a licensing history? Who is she associated with? Can he provide

any references? In sum, a racehorse lease has little to do with the racehorse and everything to do with the character, fitness and reputation of the human participants in the endeavor. Choose the horse, and the other lease participant, wisely.

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