

LEGAL:

Right of First Refusal Clauses: Are They Worth the Paper They're Written On?

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WHAT IS A RIGHT OF FIRST REFUSAL?

Equine-related contracts sometimes include a “right of first refusal” clause that restricts how a horse can be re-sold. Through these clauses, a horse buyer agrees to give the seller an opportunity to buy back the horse later under certain specified conditions.

For example, these clauses sometimes provide that if the buyer (after becoming the horse owner) later receives a legitimate offer to buy the horse and is inclined to sell, the former owner must first receive the opportunity to match that purchase offer and pay within a certain time frame.

RISKS AND OPTIONS FOR ACTION

Right of first refusal clauses sometimes generate disputes in the horse industry. This can happen when horse buyers file away their contracts and, years later, forget the promises they made. Sometimes, these clauses are so unclear or unenforceable as written that the parties don't understand their rights and obligations.

GENERALLY SPEAKING, WHAT RIGHTS DO PEOPLE HAVE IF THEY BELIEVE SOMEONE VIOLATED A RIGHT OF FIRST REFUSAL

- Depending on the contract's language and applicable state law, if the former owner who holds a right of first refusal is denied his or her contractual right to repurchase a horse and learns that a sale is in progress, that party – before the sale – could potentially bring a lawsuit seeking an injunction to stop the sale so that a court can enforce the right of first refusal clause. These types of lawsuits also ask the court to order specific performance to allow the former owner to buy back the horse as the contract terms permit.
- If the right of first refusal was part of a verbal equine sale agreement, with nothing in writing, chances are good that the claimed “right” will not be enforceable based on the state's statute of frauds.
- If the horse has already been sold, in violation of a right of first refusal, the would-be buyer's lawsuit might potentially seek monetary damages.

Proving what those damages are can be especially complex, however, raising numerous questions such as: Did the former owner (who was denied a re-purchase right) lose profits? Are the claimed lost profits too speculative and therefore not recoverable by law? Did (or could) the would-be buyer take reasonable efforts to mitigate his or her claimed losses?

When you include “right of first refusal” clauses in your equine sale contracts, draft the language with great care and consider seeking legal counsel to help in the process. Equine sellers who rely on these clauses might want to remind the buyers about them as time goes on, before the buyer places the horse on the market; this may also help the buyer notify others that all sales will be subject to a right of first refusal.

CONCLUSION

Disputes involving rights of first refusal can be complicated, especially when the parties draft unclear clauses or fail to honor them. When drafting these clauses and when evaluating your rights under them, consider seeking timely advice of knowledgeable counsel.

This article does not constitute legal advice. When questions arise based on specific situations, direct them to a knowledgeable insurance agent or attorney.

About the Author:

Julie Fershtman, a lawyer for 30 years, is one of the nation's most experienced Equine Law practitioners and handles legal matters involving all equine breeds and disciplines. She is a Shareholder with Foster Swift Collins & Smith, PC, based in Michigan, and has handled equine cases nationwide. One of very few lawyers in the country to be named a Fellow of the American College of Equine Attorneys, she is also listed in The Best Lawyers in America. Her speaking engagements on Equine Law span 29 states. For more information, visit www.equinelaw.net.

