

## Week 4 – Interstate Horse Racing<sup>1</sup>

### Introduction

Without Off-track betting, horse racing may not exist today as an industry. From the 1940s and through the early 1980s, horse racing was experiencing its golden era. On-track attendance in 1972 was 72 million persons, nearly twice that of baseball, America's favorite pastime. But then, the walls began tumbling down. From the forerunner of the American gaming industry with 28 percent market share in 1982, its influence dwindled to a mere 5.2 percent in 2000.<sup>2</sup> It was the victim of consumer preference as the American gambling dollar flowed from the track windows to the slot machine.

In total dollars, however, horse-racing wagering actually increased. In 1982, Americans legally wagered about \$11.7 billion on horse races. In the ensuing 18 years, this total increased a modest 35.5 percent to about \$15.856 billion.<sup>3</sup> But, these figures tell only half the story. On-track wagering decreased by about 72 percent during the same period from about \$9.9 to \$2.8 billion.<sup>4</sup> The equalizing force was the growth of off-track betting (OTB). These are licensed premises where a person can place wagers on the outcome of races being held at racetracks throughout the country. Inter-track wagering (ITW) is a form of off-track betting where bets are

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<sup>1</sup> Most of these materials are from a document drafted by J\*\*\* R\*\*\* who has consented to their use for this class.

<sup>2</sup> 2000 Gross Annual Wager of the United States, Eugene Christiansen And Sebastian Sinclair.

<sup>3</sup> Id.

<sup>4</sup> Id.

accepted by a track on races being run at other tracks. The handle on ITW was about \$6 billion in 2000, while the remaining OTB handle was about \$7.0 billion.<sup>5</sup>

Off-track betting has come a long way from the old smoke-filled wire rooms of the 1940s. The war era race books had to rely on information supplied by a wire service and received over telephone lines and printed on ticker tape. The wire services were controlled by organized crime, including the notorious Bugsy Siegel.

The OTB operator would use the wire information to learn the winning horses, the track payouts and other critical information about the race, such as scratches and jockey changes. There were no tote boards displaying current odds or television monitors to watch the race. An employee at the OTB facility also would use the ticker information to “call” the race. This lost art required the announcer to generate a level of excitement that would allow the bettors to feel as if they were at the track.

Modern OTB facilities in both casinos and stand alone facilities across the United States are far different. Patrons have all the luxuries of being at the track. Television monitors simulcast the race and all events leading up to it. Many OTB facilities have luxury accommodations including fine restaurants and entertainment. Electronic tote boards display the same information the patron receives at the track. A tote board is basically the scoreboard that is prominently displayed opposite the grandstands at the track. Tote boards typically display:

1. Time of day, post time to the next race
2. Approximate odds of each horse in last race
3. Results and payoffs of last race
4. Approximate odds of each horse in the next race

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<sup>5</sup> Id.

Tote boards also may include weather conditions, track condition, equipment or jockey changes and pools or potential payoffs for exotic bets. Information on the tote is tied directly to the computers that keep track of the money that is bet.

Today, the tracks acknowledge the importance of the OTBs. This was not always the case. The OTBs and racetracks grew out of a stormy relationship. The racetrack industry's financial security became threatened in 1970 when New York passed legislation allowing a public benefit company to open OTB facilities in New York City. By 1974, New York OTB had over 100 branches operating within city limits. At the same time, Yonkers and Roosevelt, the city's two major tracks, sued the OTB operator and blamed it for losses in revenue and declining attendance.

The racetracks and the horse owners saw the OTB facilities and their potential national growth as a threat. While Nevada has had OTB facilities since 1931, they drew no ire from the racetracks because Las Vegas and Reno are far from the nearest track.<sup>6</sup> Therefore, the potential for these facilities to steal customers from the track was remote.

The tracks and horse owners were concerned that the consumer appeal of OTBs in major cities would harm the on-track attendance and jeopardize racetrack employment. Proponents of off-track betting, however, argued that the developing off-track market would increase, not redistribute the market. This increased market would benefit the overall health of the industry. They claimed that much of this market could come from persons who previously gambled with illegal bookies. Besides cutting the flow of funds to criminal elements, government could receive new tax revenues.

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<sup>6</sup> The Interstate Horseracing Act still exempts traditional bookmaking activities in the state of Nevada.

After several years of debate in the late 1970s, these concerns resulted in the passage of federal legislation. The Interstate Horseracing Act (IHRA) now governs the relationship between the OTB operators, the tracks, the horse owners and trainers and the state racing commissions concerning wagers placed in one state on the outcome of races being held in another state.<sup>7</sup> All other aspects of horse racing, such as licensing and policing, are left to the discretion of the various state racing or gaming commissions.<sup>8</sup>

## Major Groups

Before discussing the legal relationships between the various groups involved in horse racing, an understanding of the groups and their interrelationships is necessary.

## The Track

A racetrack is a physical facility at which horse racing is conducted. The host racing association is the owner and organizer of the racing program at that racetrack. This is somewhat confusing because in common parlance, the host racing association is simply referred to as the “track.” In fact, some racetracks may have more than one host racing association. For example, one association may operate

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<sup>7</sup> See 15 U.S.C. §§ 3001—07 (2000)

<sup>8</sup> See, e.g., *Atlantic City Racing Ass’n v. Attorney General*, 189 N.J. Super. 549, 461 A.2d 178 (1983)(holding that the IHRA did not preempt state law that prohibited interstate pari-mutuel wagering.)

the fall meet<sup>9</sup> and another the spring meet, or separate associations may run different types of racing, such as thoroughbreds, harness or quarter horses.

### **The Horsemen's Association**

This is the association that represents a majority of the owners and trainers racing in a particular meet. As their names imply, owners are those persons that own the racehorses and trainers are those persons that train the racehorses.

In the case of mixed racing, such as thoroughbreds and quarter horses, during the same meet at a host track, the horsemen's group that represents the breed subject to the interstate wagers is the party whose consent is required for acceptance of those wagers.<sup>10</sup>

The definition of a horseman's association, however, includes only the owners and trainers. A group not covered by the IHRA is the jockeys, who ride the racehorses.

### **The Off-Track Betting Operator**

An OTB facility is the actual place where patrons assemble to place wagers on the races being conducted at another location. An OTB facility can be a racetrack that accepts wagers on races being run at other tracks. The OTB operator is the person or company that operates the OTB facilities.<sup>11</sup>

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<sup>9</sup> A meet or race meet is a series of race dates, each featuring several races that are sponsored by a host racing association. Meets are often identified by the time of the year in which they are conducted.

<sup>10</sup> H.R. Rep. No. 95-1733, at. 7 (1978).

<sup>11</sup> Under the IHRA, OTB operators are called off-track betting systems.

## The Disseminator

OTB facilities need certain information to operate their facility. This information includes post positions, starting times, track odds, race information, order of finish, and track payouts. A disseminator collects this information and transmits it for a fee to the OTB facility.

A disseminator also may be involved in the transmission of the live broadcast, often called a simulcast, of the race from the track to the OTB operator or facility. The video portion of the broadcast usually includes the post parade, the track totalizator board showing the race odds and the time until post at the track, the race, the track totalizator board showing the official order of finish and the resulting payoffs, the track's name or logo, and a digital display of the date and time of day at the track where the live broadcast races are run.

The audio portion of every live broadcast usually includes post time, an announcement of the start of the race and the call of the race. The purpose of these requirements is to assure the integrity of the signal.

The broadcast signal usually is scrambled at the track. Typically, a private transmission company then transmits the scrambled signal to a satellite. The signal reflects off the satellite to various points across the United States where OTB facilities with satellite antennas receive the scrambled signals. By use of a decoder, the OTB operator unscrambles the signal and shows it to its patrons through its own closed circuit television system.

## The Systems Operator

Usually, a third party operates between the OTBs and the tracks. The systems operator collects the information from all the pari-mutuel books in its system and

transmits it to the track for inclusion in the track pari-mutuel pool. It also provides a reconciliation of the pari-mutuel pools and transfers funds between the tracks and the pari-mutuel books or among the books.

## **Pari-Mutuel Wagering**

Pari-mutuel wagering is important to the success of on-track wagering. It was a critical element in the growth of off-track betting because it eliminates the OTB operator's risk of loss as the result of the race. Theoretically, an OTB operator can offer three types of wagering opportunities. First, it can play "track odds." In other words, it could accept a wager and pay winning tickets based on what the patron placing the same bet at the track would receive on the same wager. Second, the OTB operator could offer "fixed odds." In this case, the OTB operator and the patron would agree at the time that the bet was made what the payout would be if the patron won. For example, if the patron bet a particular horse to win at 5/1, he would receive \$5 in winnings for each dollar bet regardless of whether a patron at the track received 10/1 or 2/1 for the same bet. Third, the OTB operator could offer pari-mutuel wagering.

Pierre Oller invented the Paris mutuel system of wagering in 1865. The popularity of the system is that it assures that the operator will have a gross profit. This is because the track or OTB operator takes a commission from each wager "off the top" and places the remaining amounts into pools to be divided among winning bettors. The commission retained by the operator is called the "takeout." Takeouts vary between states and tracks, and are often set by law or regulation. Often the

takeout on win, place and show bets is about 15 percent and is slightly higher on “exotic” bets.

A single race can have literally dozens of pools riding on its outcome. The most common are win, place and show. A person wins a “win” bet if he correctly chooses the horse that finishes first. Those bets on horses to “win” form a single pool. A person wins a “place” bet if he correctly chooses the horse that places first or second. Similarly, a person wins a “show” bet if the horse he chooses finishes either first, second or third. Besides win, place and show wagers, there are a variety of exotic bets with exotic names like quinellas,<sup>12</sup> exactas<sup>13</sup> and trifectas.<sup>14</sup>

After the conclusion of the race, those persons holding winning tickets in each pool are entitled to receive their proportionate share of the pool. Technically, an OTB operator and the track could keep separate pools, but almost without exception the pools are “merged.” In practice, the pools are never physically “merged.” For example, suppose an OTB facility accepts \$20 on Horse One in a two-horse race and the track accepts \$80 on Horse Two in the same race. If the takeout was 18 percent, the OTB facility would retain \$3.60 (18 percent of \$20) and the track would retain \$14.40 (18 percent of \$80). Now suppose Horse One won the race. Here the pool would be \$82 to be divided among the holders of winning tickets (\$20) or pay \$4.10 for each dollar bet. Because all the winning bets were made at the OTB facility, it would pay all the winning wagers. The track, however, collected on all the losing bets and would have to transfer funds to the OTB facility to make it whole. In this case, the track did not have to pay any winning wagers and, therefore, would

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<sup>12</sup> Picking two horses that finish first and second regardless of order.

<sup>13</sup> Picking the two horses that finish first and second in the order of their finish.

<sup>14</sup> Picking the three horses that finish first, second and third in the order of their finish.

transfer the full amount of the pool that it was holding to pay the winning bets. In practice, the calculations are more complicated and the reconciliation only occurs periodically and not after every race.

Pari-mutuel wagering limits the OTB operator's exposure. Merging wagers made at the OTB facility with those bet at the tracks assures that the OTB operator could not fall victim to race fixers or persons with inside information. The insider or race fixer would gain no advantage by wagering at an OTB facility instead of at the track because in both instances his wager would be merged in the same pool.

Before 1980, however, many OTB operators were in the gambling business, swimming among sharks. Suppose a horse named "Loser" was running at Boondocks Downs. The handicappers knew little about Loser and projected him as a 25-1 long shot. Suppose further that a person fixes the race so that Loser would win or that an insider has information that Loser was a quality horse and had an excellent chance of winning. Both were better off betting at the OTB facility than at the track.

If Mr. Insider bet on Loser to win at the track, his wager would go into a pool with all the other wagers by other bettors that bet a horse to win in the same race. If the insider bet at a non pari-mutuel OTB facility, his bet would not affect the pool at the track.

If Loser won and there was \$100 in the "win" pool at the track, the track would retain the takeout and leave the remaining money to be split between the bettors choosing the horse that won according to the amount bet on the winning horse. If there was only \$28 bet on Loser and the takeout was 16 percent, the winning bettors at the track would receive \$3 for each dollar bet.

If Mr. Insider bet at the track, his money also would go into the track pari-mutuel pool. Suppose he bet \$100 on Loser to win. Instead of \$100, the track pool now has \$200 in it. Loser, of course, wins. The track may deduct a takeout of 16 percent off the top, leaving \$168 in the pool to be divided among those who bet on Loser to win. Now, however, instead of \$28 being bet on Loser, there is \$128. Those bets on Loser will be paid \$1.30 (after breakage) for each dollar bet. The insider experiences a significantly less rewarding payback.

Suppose that Mr. Insider bet at a non-pari-mutuel OTB facility instead of at the track. The OTB facility would pay track odds. In other words, whatever the track paid to those having winning tickets at the track, the OTB operator would pay to their winning patrons. But, the OTB operator would not put the money they received from patrons into a pari-mutuel pool with the wagers placed at the track. Let's go back to the math. Mr. Insider's bet of \$100 at an OTB facility would not affect the pool at the track, which would remain at \$100. Those bets at the track would be paid \$3 for every \$1 bet. Mr. Insider, who bet \$100 at the OTB facility, would receive \$300, instead of \$130 if he made the same bet at the track. Moreover, if the OTB operator only booked \$200 in "win" bets on that race, it would have lost \$100.

Exotic wagers, such as trifectas, pose additional risks because the track payouts could be enormous. If the track paid 500-1 because only \$100 was bet on the winning combination, it would be paying out a total of \$50,000. If an OTB operator accepted a \$1000 bet on the same wager, it would have to pay \$500,000 to the winner.

This situation posed substantial risk to OTB operators, particularly for bets on races run at smaller tracks where unknown but quality horses could be entered or fixing races was easier. Insiders or race fixers could attempt to bet these horses

heavily at the OTB facilities. To counter this situation, OTB operators had to reduce their exposure by placing limits on the amount that patrons could bet on a horse or a type of wager. They would also carefully monitor betting activities. If patrons were placing too much money on one bet or horse, they would cease accepting further wagers on that bet or that horse. In some instances, the OTB operator would refuse to accept wagers from some tracks that were small or plagued by allegations of race fixing.

The only winners in this scenario were the fixers and insiders. The typical horse player was limited in the amount of his wagers by the OTB operator's limits and might even be closed out of wagering at a particular track, or on a particular horse or bet. The OTB operator always faced the possibility of losing money on a race if it did not carefully monitor and limit wagers on certain horses and types of bets.

In contrast, the OTB operator and the typical horse player would receive advantages from interstate pari-mutuel wagering. The OTB operator would be out of the gambling business. Instead of betting with its patrons, it would act just like the track and receive a commission on every wager placed at its OTB facilities. Personnel at the OTB facilities can then concentrate on servicing the patron and promoting the sport rather than worrying about whether to book certain bets.

The typical OTB player also benefits. Because his bet goes into the common pari-mutuel pool and is paid from that pool, the OTB operator faces no risk if he were to book a large wager. Therefore, the patrons can place any size wager on any horse or bet that they want, and at a wider range of tracks. The tracks also benefit by increased handles at the OTB facilities that result in higher track fees.

## Breakage

For every dollar bet made at the track or an OTB facility, about 82 percent is returned to the players. Almost all of the remaining 18 percent comes from the takeout. Still, the track/OTB facility receives about 2 percent of each bet from “breakage.”

Breakage is the difference between the true pari-mutuel odds and the amount actually paid to the winning patrons after their winning totals are rounded down to the next lowest nickel, dime or other set denomination or level. Suppose \$100 is bet on a race. After the track deducts its take out of 17 percent, \$83 is left in the pool. Now suppose \$25 was bet on the winning horse. Using simple mathematics, each dollar bet would receive  $83/25$  or \$3.32. As pari-mutuel payouts are expressed in terms of each \$2 bet, the amount of the payout would be \$6.64. Suppose that track pays the pari-mutuel bets in numbers rounded to the next lowest dime. So, instead of paying \$6.64 on a \$2 bet, the track would pay \$6.60. The four cents difference, *i.e.* the breakage, is retained by the track.

## The Economics

To understand the genesis of the Interstate Horseracing Act and the relationships between the major groups today, one must understand the economics of the industry.

## Purses and Taxes

For on-track wagers, the takeout and breakage is divided between the track and the horsemen. This amount is also split with another partner, the government, in the form of taxes. Most state governments levy a tax on the handle. Practically the horsemen's entire share goes to fund purses. The horse owners, trainers and jockeys can earn the purses by winning their respective races.

Almost all money used to fund purses comes from a percentage of each pari-mutuel bet. The exact percentage varies between states. In some states, the amount is set by statute, while in others the amount is negotiated between horsemen's associations and the track during regular contractual negotiations.

The issues negotiated between the horsemen and tracks include:

- Amount of commission and revenues from all wagers including on-track and off-track wagers to be used for purses.
- Purse schedules.
- Arrangements for stall and track facilities.<sup>15</sup>

Generally, the amount set aside for purses ranges from 3 percent to 7 percent on win, place and show and a slightly higher amount on exotic wagers. The horsemen's association and the track also negotiate how the monies set aside for purses are distributed between races and between finishes in each race. For example, stakes races generally receive a higher percentage of purse money than claiming races. From the purse set aside for a particular race, the horsemen and the track negotiate how much is distributed to the winning horse (usually about 55

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<sup>15</sup> The track provides the use of its facilities and, in almost all cases, stalls for horses that run during each meet.

percent to 60 percent), the place horse (about 20 percent), the show horse (about 10 percent to 15 percent) and on down. Some tracks reward horses up to a sixth place finish.

Jockeys generally are independent agents that negotiate with horse owners to ride a particular horse. The compensation paid to jockeys is usually set according to a fee schedule at the track. A winning jockey receives a percentage of the purse (about 10 percent), while receiving a fixed fee for lower finishes depending on the finish and the purse value.

### **Track Fees And Off-Track Betting**

Tracks have two important products that they can sell to the OTB operator. The first is the simulcast of the racing program at its racetrack. The value of the race signal to the OTB facility is enormous. In a competitive market, an OTB facility without simulcasting would soon close. Even in a monopoly, the ability to show the race greatly increases patron interest and play. Because the simulcast is proprietary, the OTB operator must purchase the rights to display the races from the track. The second product is the right to conduct interstate pari-mutuel wagering. For the reasons stated above, this right is valuable because it allows the OTB operator to protect its assets and increase its revenues.

To secure the rights to the simulcast and for pari-mutuel wagering, the OTB operator typically negotiates with the track. This fee can either be a fixed fee or a percentage of each wager. If the OTB operator is pari-mutuel, the track fees must come out of its takeout. Additionally, the OTB operators must pay all operating costs and taxes out of this amount before it can realize a profit.

On the other side, the track also has costs. It must divide any monies it receives from track fees with the horsemen according to its agreement and must pay the cost of simulcasting and taxes.

Despite this, there is still room for both parties to profit. Typically, OTB operators pay between 4 percent and 14 percent of each wager for track fees.

The horsemen have two distinct interests in off-track betting. The first interest is to maximize their percentage of every dollar received in track fees for the simulcast and pari-mutuel rights. This is done in negotiations with the track. The second is to maximize the amount of the track fees received from the OTB operators.

## The Interstate Horseracing Act

**While the majority of the act is set forth below, for this class just review section 3004.**

15 USC. § 3001. Congressional findings and policy

(a) The Congress finds that—

(1) the States should have the primary responsibility for determining what forms of gambling may legally take place within their borders; (2) the Federal Government should prevent interference by one State with the gambling policies of another, and should act to protect identifiable national interests; and (3) in the limited area of interstate off-track wagering on horseraces, there is a need for Federal action to ensure States will continue to cooperate with one another in the acceptance of legal interstate wagers.

(b) It is the policy of the Congress in this chapter to regulate interstate commerce with respect to wagering on horseracing, in order to further the horseracing and legal off-track betting industries in the United States.

15 U.S.C. § 3002. Definitions

For the purposes of this chapter the term— (1) “**person**” means any individual, association, partnership, joint venture, corporation, State or political subdivision thereof, department, agency, or instrumentality of a State or political subdivision thereof, or any other organization or entity; (2) “**State**” means each State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession of the United States; (3) “**interstate off-track wager**” means a legal wager placed or accepted in one State with respect to the outcome of a horserace taking place in another State and includes pari-mutuel wagers, where lawful in each State involved, placed or transmitted by an individual in one State via telephone or other electronic media and accepted by an off-track betting system in the same or another State, as well as the

combination of any pari-mutuel wagering pools; (4) **“on-track wager”** means a wager with respect to the outcome of a horserace which is placed at the racetrack at which such horse- race takes place; (5) **“host State”** means the State in which the horserace subject to the interstate wager takes place; (6) **“off-track State”** means the State in which an interstate off-track wager is accepted; (7) **“off-track betting system”** means any group which is in the business of accepting wagers on horseraces at locations other than the place where the horserace is run, which business is conducted by the State or licensed or otherwise permitted by State law; (8) **“off-track betting office”** means any location within an off-track State at which off-track wagers are accepted; (9) **“host racing association”** means any person who, pursuant to a license or other permission granted by the host State, conducts the horserace subject to the interstate wager; (10) **“host racing commission”** means that person designated by State statute or, in the absence of statute, by regulation, with jurisdiction to regulate the conduct of racing within the host State; (11) **“off-track racing commission”** means that person designated by State statute or, in the absence of statute, by regulation, with jurisdiction to regulate off-track betting in that State; (12) **“horsemen’s group”** means, with reference to the applicable host racing association, the group which represents the majority of owners and trainers racing there, for the races subject to the interstate off-track wager on any racing day; (13) **“parimutuel”** means any system whereby wagers with respect to the outcome of a horserace are placed with, or in, a wagering pool conducted by a person licensed or otherwise permitted to do so under State law, and in which the participants are wagering with each other and not against the operator; (14) **“currently operating tracks”** means racing associations conducting parimutuel horseracing at the same time of day (afternoon against afternoon; nighttime against nighttime) as the racing association conducting the horseracing which is the subject of the interstate off-track wager; (15) **“race meeting”** means those scheduled days during the year a racing association is granted permission by the appropriate State racing commission to conduct horseracing; (16) **“racing day”** means a full program of races at a specified racing association on a specified day; (17) **“special event”** means the specific individual horserace which is deemed by the off-track betting system to be of sufficient national significance and interest to warrant interstate off-track wagering on that event or events; (18) **“dark days”** means those days when racing of the same type does not occur in an off-track State within 60 miles of an off-track betting office during a race meeting, including, but not limited to, a dark weekday when such racing association or associations run on Sunday, and days when a racing program is scheduled but does not take place, or cannot be completed due to weather, strikes and other factors not within the control of the off-track betting system; (19) **“year”** means calendar year; (20) **“takeout”** means that portion of a wager which is deducted from or not included in the parimutuel pool, and which is distributed to persons other than those placing wagers; (21) **“regular contractual process”** means those negotiations by which the applicable horsemen’s group and host racing association reach agreements on issues regarding the conduct of horseracing by the horsemen’s group at that racing association; (22) **“terms and conditions”** includes, but is not limited to, the percentage which is paid by the off-track betting system to the host racing association, the percentage which is paid by the host racing association to the horsemen’s group, as well as any arrangements as to the exclusivity between the host racing association and the off-track betting system.

15 U.S.C. § 3003. Acceptance of interstate off-track wager  
No person may accept an interstate off-track wager except as provided in this chapter.

15 U.S.C. § 3004. Regulation of interstate off-track wagering

**(a) Consent of host racing association, host racing commission, and off-track racing commission as prerequisite to acceptance of wager** An interstate off-track wager may be accepted by an off-track betting system only if consent is obtained from—

(1) the host racing association, except that—

(A) as a condition precedent to such consent, said racing association (except a not-for-profit racing association in a State where the distribution of off-track betting revenues in that State is set forth by law) must have a written agreement with the horsemen's group, under which said racing association may give such consent, setting forth the terms and conditions relating thereto; provided, (B) that where the host racing association has a contract with a horsemen's group at the time of enactment of this chapter which contains no provisions referring to interstate off-track betting, the terms and conditions of said then-existing contract shall be deemed to apply to the interstate off-track wagers and no additional written agreement need be entered into unless the parties to such then-existing contract agree otherwise. Where such provisions exist in such existing contract, such contract shall govern. Where written consents exist at the time of enactment of this chapter between an off-track betting system and the host racing association providing for interstate off-track wagers, or such written consents are executed by these parties prior to the expiration of such then-existing contract, upon the expiration of such then-existing contract the written agreement of such horsemen's group shall thereafter be required as such condition precedent and as a part of the regular contractual process, and may not be withdrawn or varied except in the regular contractual process. Where no such written consent exists, and where such written agreement occurs at a racing association which has a regular contractual process with such horsemen's group, said agreement by the horsemen's group may not be withdrawn or varied except in the regular contractual process;

(2) the host racing commission; (3) the off-track racing commission. **(b) Approval of tracks as prerequisite to acceptance of wager; exceptions** (1) In addition to the requirement of subsection (a) of this section, any off-track betting office shall obtain the approval of—

(A) all currently operating tracks within 60 miles of such off-track betting office; and (B) if there are no currently operating tracks within 60 miles then the closest currently operating track in an adjoining State.

(2) Notwithstanding the provisions of paragraph (1) of this subsection, any off-track betting office in a State with at least 250 days of on-track parimutuel horseracing a year, may accept interstate off-track wagers for a total of 60 racing days and 25 special events a year without the approval required by paragraph (1), if with respect to such 60 racing days, there is no racing of the same type at the same time of day being conducted within the off-track betting State within 60 miles of the off-track betting office accepting the wager, or such racing program cannot be completed. Excluded from such 60 days and from the consent required by subsection (b)(1) of this section may be dark days which occur during a regularly scheduled race meeting in said off-track betting State. In order to accept any interstate off-track wager under the terms of the preceding sentence the off-track betting office shall make identical offers to any racing association described in subparagraph (A) of subsection (b)(1) of this section. Nothing in this subparagraph shall be construed to reduce or eliminate the necessity of obtaining all the approvals required by subsection (a) of this section.

**(c) Takeout amount**

No parimutuel off-track betting system may employ a takeout for an interstate wager which is greater than the takeout for corresponding wagering pools of off-track wagers on races run within the off-track State except where such greater takeout is authorized by State law in the off-track State.

#### 15 U.S.C. § 3005. Liability and damages

Any person accepting any interstate off-track wager in violation of this chapter shall be civilly liable for damages to the host State, the host racing association and the horsemen's group. Damages for each violation shall be based on the total of off-track wagers as follows:

(1) If the interstate off-track wager was of a type accepted at the host racing association, damages shall be in an amount equal to that portion of the takeout which would have been distributed to the host State, host racing association and the horsemen's group, as if each such interstate off-track wager had been placed at the host racing association.

(2) If such interstate off-track wager was of a type not accepted at the host racing association, the amount of damages shall be determined at the rate of takeout prevailing at the off-track betting system for that type of wager and shall be distributed according to the same formulas as in paragraph (1) above.

#### 15 U.S.C. § 3006. Civil action

**(a) Parties; remedies** The host State, the host racing association, or the horsemen's group may commence a civil action against any person alleged to be in violation of this chapter, for injunctive relief to restrain violations and for damages in accordance with section 3005 of this title. **(b) Intervention** In any civil action under this section, the host State, the host racing association and horsemen's group, if not a party, shall be permitted to intervene as a matter of right. **(c) Limitations** A civil action may not be commenced pursuant to this section more than 3 years after the discovery of the alleged violation upon which such civil action is based. **(d) State as defendant** Nothing in this chapter shall be construed to permit a State to be sued under this section other than in accordance with its applicable laws.

## Discussion

In 1976, Congress passed comprehensive legislation intended to regulate the conduct of interstate on-track wagering.<sup>16</sup> Of particular concern during congressional debates were the effects of off-track wagering on minor tracks, which were called the "backbone of the racing and breeding industry." According to the Senate Committee on Commerce, Science and Transportation, the motivation for the IHRA was the fear that interstate wagering would "eventually result in a decline in attendance and wagering at racetracks throughout the country."<sup>17</sup> The resulting loss of revenues

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<sup>16</sup> Codified as 15 U.S.C. §§ 3001-3007.

<sup>17</sup> S. Rep. No. 95-554 at 3 (1977).

would then “force the closing of a number of small racetracks.”<sup>18</sup> These tracks were viewed as the essential backbone of the racing and breeding industry because:

These small tracks play an important role with respect to the development and opportunity of both jockeys and horses [and] provide a necessary marketplace and give horse owners an opportunity to receive a return on their investment. They also provide the necessary revenue from which bloodstock is developed that produces national champion horses.<sup>19</sup>

Supporters of the IHRA argued that as much as 90 percent of the small tracks would close if interstate horse racing wagering were permitted. Their case in point was New York City OTBs, whose existence has allegedly caused a 50 percent decrease in on-track attendance in New York State.

Besides the growing number of off-track facilities, certain members of Congress were troubled by the New York OTB Corporations' acceptance of wagers without compensating the respective racetracks. For example, the company accepted about \$15 million in wagers on the Kentucky Derby without paying Churchill Downs for the rights to accept the wagers.

The initial thought behind the Interstate Horseracing Act was to prohibit interstate wagering entirely. Shortly after Congress broke for its Christmas 1977 recess, several major associations came together to craft a compromise between the interested parties. They included the National Association of Off-Track Betting, the American Horse Council, the National Association of Racing Commissioners, the Thoroughbred Racing Association, the Harness Tracks of America, the United

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<sup>18</sup> Id. at 4.

<sup>19</sup> Id. at 3.

States Trotting Association, the Horsemen's Benevolent and Protective Association, and the Harness Horsemen's International.

The starting point for the negotiations was a proposal by the National Association of Racing Commissioners to allow interstate wagering only after receiving certain consents. The concept was that before an OTB operator could accept an interstate wager, it had to obtain the consent of the host track and the respective racing commission of the host state and the OTB state. The proposal also would give currently operating tracks a protected area wherein they would be required to give consent allowing the OTB operator to accept interstate wagers.

While the theory behind the proposal was widely supported, two issues created controversy. These were the role of the horsemen in the consent process and the definition of a track's protected market area. The horsemen wanted some voice in the process, while the OTB operators, the racing commissioners and the tracks did not want the horsemen involved in the negotiations of off-track rights. The issue of protected market areas concerned defining the physical area to be protected and the number of exempted days that the OTB operators could offer betting without the track's consent.

Sensing the need to resolve these issues, the respective partners eventually compromised and collectively sponsored the proposal. Congress thereafter amended the bill to allow interstate wagering provided consent was obtained from the track that hosts the races on which the bets were accepted. In turn, the track had to obtain the consent of the horse group that represented a majority of its owners and trainers before it could give consent. The consent provisions forced the OTB operators to negotiate a fair price with the track for the right to accept wagers on that track's races. But, before the track could conclude those negotiations, it had to reach

agreement with the horse owners and trainers on how the off-track money would be distributed.

### Major Provisions of the IHRA

The IHRA has two major provisions. The first requires the OTB operator to effectively negotiate a fee for conducting interstate wagering with each track on which it accepts wagers. The second allows racetracks to protect their “national market area” by giving them the right to refuse to give consent to the OTB (within a specified distance from their track) to conduct interstate wagering. These provisions are discussed below.

### Consent Requirements

Before an OTB operator can accept an interstate off-track wager, *i.e.*, a wager with respect to the outcome of a horse race taking place in another state, consent must be obtained from:

- The host racing association;
- The host racing commission; and
- The off-track racing commission.

The use of the words “consent” should not mask the true intent of the Act. Consent comes with a price either in the form of an agreement to provide wire information, a simulcast or to conduct pari-mutuel wagering.<sup>20</sup> As a practical matter, the OTB operator will negotiate a contract with the track to conduct wagering on the

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<sup>20</sup> The IHRA does not, however, regulate wire information, disseminators or simulcasts. As the federal appellate court noted in *Turfway*: “We reject the appellee’s claim that Congress was implicitly regulating the simulcasting of horse races by regulating interstate off-track wagering because interstate off-track wagering may occur without simulcasting, and simulcasting may occur without interstate off-track wagering.” 20 F.3d 1406, 1412 fn. 10.

track's races. This usually involves provisions for the merging of pari-mutuel pools and the receipt by the OTB operator of the race simulcast and instantaneous transmission of all tote and other track information. Under these contracts, the OTB operator generally has the responsibility to obtain consent from its racing commission and the track has the responsibility to obtain the consent of its racing commission.

The IHRA has met its original intent of assuring that the tracks receive a fair share of interstate wagers on races conducted at its track. The respective rights of the OTB operator and the track are well defined under the IHRA. Once forced to the bargaining table, both parties have relatively equal bargaining power because both need the other to maximize profits. It is in regards to other relationships, principally involving the horse owners, that the IHRA has created the greatest controversy.

The intent of the IHRA was not to involve the horsemen in the negotiation of Interstate contracts between the tracks and the OTB operators. According to the Congressional Report:

It is anticipated that ... the primary agreement will be negotiated directly by the host racing association (the track), without the direct participation of any third party, and that upon the successful conclusion of such negotiations the completed agreement will be presented to the racing commission of the host state and the off-track state for final approval.<sup>21</sup>

The IHRA does, however, envision that before entering any agreement to sell interstate wagering rights, the track will first enter into an agreement with its horsemen's association concerning the sale of the interstate rights. In essence, this

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<sup>21</sup> H.R. Rep. No. 95-1733 at 8 (1978).

gives the horsemen's association the leverage to negotiate a fair split of the off-track fees with the track. Congress envisioned that these negotiations would be part of the regular contractual process between the track and the horsemen's association:

The bill provides for this condition precedent to be exercised in a particular manner, depending upon the existence of a contract and its terms between the track and its horsemen and horsewomen. It is intended that under certain circumstances, specified in the Act, such consent by the horsemen's group will be an issue to be considered as part of the regular contractual process, concurrent with other issues concerning the conduct of racing at the track, and not as an isolated issue.<sup>22</sup>

According to the Congressional Report:

This role is meant to place the issue of interstate off-track betting into the pool of other items which are regularly negotiated as part of the regular contractual process between racetracks and horsemen and horse owners concerning the conduct of racing. It is these relationships that . . . this Act attempts to preserve.<sup>23</sup>

Whether intentional or not, the IHRA provides the horsemen's group with powerful leverage in disputes with tracks. Section 3005 allows the horseman's group, the track or the host state to obtain damages against "any person accepting any interstate off-track wager in violation of the Act."

The simplest case is where an OTB operator accepts interstate wagers without the consent of the track, the host racing commission or its racing commission. In this scenario, either the host state, the track, or the horsemen's group may obtain an

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<sup>22</sup> Id. at 2.

<sup>23</sup> Id. at 8.

injunction or damages against the OTB operator.<sup>24</sup> An OTB operator, however, is unlikely to violate federal law in this manner.

More likely, the dispute will arise out of failed negotiations between the track and the horsemen's group. In the simplest example, the track fails to obtain the consent of the horsemen's group before entering into an agreement to conduct pari-mutuel wagering with an OTB operator. After that, the horsemen may threaten suit against both the track and OTB operator. More likely, the track and the horsemen's group fail to reach agreement and a rival horsemen's group emerges, perhaps with the assistance of the track. The track could then obtain the agreement of one horsemen's group, but the old horsemen's group sues and claims to represent a majority of the owners and trainers.

When these disputes occur between the horsemen's group and the track, the horsemen's group can leverage their bargaining power by threatening damages under the IHRA. This threat can be directed at the OTB operators that accept the wagers, or the track itself. The track is subject to being sued by the horsemen's group for damages. According to one federal case, by conducting pari-mutuel wagering with the OTB operator, the track is "accepting" interstate wagers into its pari-mutuel pool.

Some question exists as to whether the OTB operator is liable to the horsemen's group if it has obtained the requisite consents from the track, the host racing commission and its racing commission, but the Track has failed to get the agreement of the horsemen's group. Here again, the IHRA was ill conceived. Under the IHRA, the track must have an agreement with the horsemen's group that sets out the terms

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<sup>24</sup> 15 U.S.C. § 3006(a).

and conditions under which the track may give consent. If the track does not have such an agreement, the question arises as to the impact that failure has on the OTB operator.<sup>25</sup> Clearly, the track has violated the IHRA by granting consent without first entering an agreement with the horsemen's group. But, does the track's failure to obtain agreement result in the OTB operator violating the IHRA or only the track? No court has decided this issue and the answer is not obvious. While the IHRA anticipates that the track and the horsemen's group will negotiate interstate wagering issues during the "regular contractual process," it maintains no requirement that either party negotiate in good faith. One court, however, has determined that the horsemen's group has no cause of action against the track for "taking an excessive takeout" or "refusing to bargain in the regular contract process."<sup>26</sup>

## Constitutional Challenges

**Kentucky Div., Horsemen's Benev. & Protective Ass'n, Inc.**  
**v.**  
**Turfway Park Racing Ass'n, Inc.**

**Argued Feb. 28, 1994.**  
**Decided April 6, 1994.**

**I.**

**Plaintiff-appellant Kentucky Division, Horsemen's Benevolent & Protective Association, Inc. ("KHBPA"), is a not-for-profit trade association of thoroughbred racehorse owners and trainers that race in Kentucky. Intervenor Kentucky Thoroughbred Association, Inc. ("KTA"), serves a similar function. The KHBPA and the KTA (collectively "the Horsemen") represent their members at Kentucky racetracks by, inter alia, negotiating racing contracts.**

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<sup>25</sup> Another scenario is where the track entered into such an agreement with the horsemen's group, but then breached its terms. In this case, however, the horsemen's remedy would appear limited to a breach of contract.

<sup>26</sup> *Hialeah, Inc. v. Florida Horsemen's Benevolent & Protective Ass'n., Inc.*, 899 F. Supp. 616, 624 (S.D. Fla. 1995).

Defendant-appellee Turfway Park Racing Association, Inc. ("Turfway Park"), operates a thoroughbred racetrack in Kentucky. Though Turfway Park and the Horsemen attempted to negotiate the terms and conditions governing racing at Turfway Park, their most recent contract (a three-year agreement) expired on April 30, 1992 when Turfway Park refused to increase the percentage of revenues derived from interstate off-track wagering to be distributed to the Horsemen's "purses." The Horsemen, in turn, sought to strengthen their bargaining position by refusing to consent to interstate off-track wagering on races being run at Turfway Park as required by the Interstate Horseracing Act of 1978 (the "Act"), 15 U.S.C. §§ 3001-3007, FN2 which governs interstate wagering on horseracing. Turfway Park, in retaliation, sought to obtain the required consent directly from the individual racehorse owners by inserting a paragraph in its entry form which conditioned entry in a race on the racehorse owner's consent to interstate off-track wagering. Turfway Park's races were then broadcast to several out-of-state facilities where off-track wagers were placed.

FN2. Congress enacted the Act "to regulate interstate commerce with respect to wagering on horseracing ... to further the horseracing and legal off-track betting industries in the United States." 15 U.S.C. § 3001(b). See also 15 U.S.C. § 3001(a)(3) ("The Congress finds that in the limited area of interstate off-track wagering on horseraces, there is a need for Federal action to ensure States will continue to cooperate with one another in the acceptance of legal interstate wagers."). To further this policy, 15 U.S.C. § 3003 provides that "[n]o person may accept an interstate off-track wager except as provided in this chapter."

The Act provides (in relevant part):

(a) An interstate off-track wager may be accepted by an off-track betting system only if consent is obtained from

(1) the host racing association, except that-

(A) as a condition precedent to such consent, said racing association ... must have a written agreement with the horsemen's group, under which said racing association may give such consent, setting forth the terms and conditions relating thereto; provided,

(B) [w]here written consents exist at the time of enactment of this chapter between an off-track betting system and the host racing association providing for interstate off-track wagers, or such written consents are executed by these parties prior to the expiration of such then-existing contract, upon the expiration of such then-existing contract the written agreement of such horsemen's group shall thereafter be required as such condition precedent and as a part of the regular contractual process, and may not be withdrawn or varied except in the regular contractual process. Where no such written consent exists, and where such written agreement occurs at a racing association which has a regular contractual process with such horsemen's group, said agreement by the horsemen's group may not be withdrawn or varied except in the regular contractual process;

(2) the host racing commission;

(3) the off-track racing commission.

15 U.S.C. § 3004.

The KHBPA thereafter initiated this action seeking damages and injunctive relief against Turfway Park and several out-of-state entities FN3 that had received the simulcasts and had accepted wagers on Turfway Park's races. The KHBPA, citing 15 U.S.C. §§ 3005FN4 and 3006FN5, claimed that Turfway Park and the other defendants had violated the Act by accepting interstate off-track wagers on Turfway Park's races without the KHBPA's consent. The KTA subsequently intervened pursuant to 15 U.S.C. § 3006(b) ( "In any civil action under this section, the host State, the host racing association and horsemen's group, if not a party, shall be permitted to intervene as a matter of right.").

FN3. In addition to Turfway Park, the KHBPA named the following defendants in its amended complaint: Rockingham Venture, Inc.; Douglas Racing Corporation d/b/a Ak-Sar-Ben; Bensalem Racing Association, Inc., d/b/a Philadelphia Park; and, Dakota Race Management.

FN4. 15 U.S.C. § 3005 provides (in its entirety):

Any person accepting any interstate off-track wager in violation of this chapter shall be civilly liable for damages to the host State, the host racing association and the horsemen's group. Damages for each violation shall be based on the total of off-track wagers as follows:

(1) If the interstate off-track wager was of a type accepted at the host racing association, damages shall be in an amount equal to that portion of the takeout which would have been distributed to the host State, host racing association and the horsemen's group, as if each such interstate off-track wager had been placed at the host racing association.

(2) If such interstate off-track wager was of a type not accepted at the host racing association, the amount of damages shall be determined at the rate of takeout prevailing at the off-track betting system for that type of wager and shall be distributed according to the same formulas as in paragraph (1) above.

FN5. 15 U.S.C. § 3006 provides (in relevant part):

(a) The host State, the host racing association, or the horsemen's group may commence a civil action against any person alleged to be in violation of this chapter, for injunctive relief to restrain violations and for damages in accordance with section 3005 of this title.

Turfway Park, in turn, filed a counterclaim against the Horsemen and a third party complaint against various associations claiming, inter alia, that the conduct of these entities "restrain[ed] competition in the presentation of thoroughbred horseracing and wagering" in violation of the Sherman Antitrust Act, 15U.S.C. § 1et seq., and tortiously interfered with its business relations. Turfway Park also challenged the constitutionality of the Act.

On September 20, 1993, the district court found the Act to be "an invalid restriction on commercial speech in violation of the First Amendment, as well as fatally vague and irrational ... in violation of substantive due process." 832 F.Supp. at 1098. Specifically, the district court found that:

Turfway's simulcasting of its races invites patrons of out-of-state tracks to bet on Turfway's races. Commercial transactions occur when these patrons place such bets. The simulcasts also act as an implied advertisement for the

quality of the track and its racing as well as an implied invitation to the viewers to patronize Turfway if they are in the Northern Kentucky/Cincinnati area. Therefore, the simulcasts constitute commercial speech, and the Act allows it to be prohibited whenever one of the designated parties withholds consent.

....  
This court must, albeit reluctantly, hold that the means chosen by Congress are not “narrowly tailored to achieve [the] desired objective[s].” Therefore, the Act is an invalid restriction on commercial speech.

....  
The statutory scheme prohibits interstate simulcasting unless the track at which the race is being run (the “host” track) has “a written agreement with the horsemen's group....” 15 U.S.C. § 3004(a)(1)(A). This seems fairly straightforward. The trouble arises when one looks to the definition of “horsemen's group”: “[T]he group which represents the majority of owners and trainers racing there, for the races subject to the interstate off-track wager on any racing day.” 15 U.S.C. § 3002(12).

This definition may be workable in a situation where, as apparently presumed by Congress, a horsemen's association has reached an agreement with the host track in advance of the racing meet. It falls apart, however, when the unhappy scenario exists, as it does here, that there are two horsemen's groups-rivals of each other and both at loggerheads with the track-and numerous owners and trainers unaffiliated with either group....

First, the statute is self-contradictory in that § 3004(b) contemplates, as does the legislative history, that the consent of the horsemen's group will be obtained in the regular contractual process. However, § 3002 requires the identification of the relevant horsemen's group representing the majority of owners and trainers on each racing day.

Second, the statute is vague as to what it means by “owner.” Some horses have many owners-some of which are partnerships, corporations or unincorporated consortia....

Third, the largest horsemen's group represents only 55% of owners eligible to race. Therefore, the possibility exists that on “any racing day” no horsemen's group will represent a majority of the owners and trainers....

Fourth, the parties have stipulated that entries to a race are usually closed 48 hours in advance. Scratches usually occur by 4 p.m. of the day prior to the race; however, emergency scratches are possible up to post time. What if a scratch changes the election result for that racing day?

Lastly, what is the meaning of “represent?” It seems like a simple word, but it has already caused the court considerable difficulty in trying to preside over this dispute. The statute gives a veto to the horsemen's group which “represents the majority of owners and trainers” on “any racing day.” 15 U.S.C. § 3002(12). Does this mean owners and trainers who merely belong to a horsemen's group? Or can Turfway, as it has tried to do by various means, solicit proxies or consents [directly] from a horsemen's group's members....

The difficulties listed are not speculative. The parties have already argued in open court about who is “represented” by the horsemen's associations who are the plaintiffs in this matter. Turfway has already solicited owners and trainers for individual consents to simulcasting. It has also attempted to insert in its race entries and stall applications consents to simulcasting, as a kind of contract of adhesion.

....

The above list of ambiguities in the statute shows that neither the court nor the parties have any way of knowing how the statute should be applied in the context of an ongoing dispute between Turfway and the Horsemen, which is essentially an acrimonious strike. The statute does not inform ordinary people (or even experts) what conduct is required or prohibited although they are exposed to heavy penalties for violating it. In the present context it leads to continuing litigation and, since its enforcement has been given over to private parties, to arbitrary enforcement. Furthermore, the statutes are not designed for application in a situation where a track does not have an agreement with a horsemen's group in advance of the meet. The statute is impossible to apply with certainty on a day-to-day basis in the context of an ongoing dispute. To try to make it more definite by interpretation is pure guesswork. Accordingly, the court must hold that it is void for vagueness.

Substantive due process requires that a statute have a rational relationship to a legitimate legislative goal....

....

Here, Congress' announced goal is the promotion of horseracing, especially the preservation of small tracks, while protecting the interests of horsemen and the public. Providing a private party with an absolute veto over the simulcasting, without any standards to guide it, virtually assures that the statute will be applied, not to achieve Congress' goal, but for selfish motives. The conduct of the parties in this matter amply demonstrates that they favor selfish interests over public ones. Furthermore, there is no review of the Horsemen's reasons for exercising their veto power. Indeed, there is no requirement in the Act that the Horsemen exercise their veto power to promote Congress' goal rather than their own short-term economic interest, which may be contrary to Congress' objectives.

....

Because the Act is vague and an irrational means of carrying out a permissible objective, the statute must be declared unconstitutional on substantive due process grounds as well.

832 F.Supp. at 1100-05 (brackets in original).

After finding the Act unconstitutional, the district court granted Turfway Park's motion for partial summary judgment without expressing an opinion on the other issues raised in KHBPA's claim or in Turfway Park's counterclaim and third party complaint. The KHBPA timely appealed.

## II.

### Standard of Review

Summary judgment is appropriate where "there is no genuine issue as to any material fact and ... the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). A district court's grant of summary judgment is reviewed de novo. *Pinney Dock & Transp. Co. v. Penn Cent. Corp.*, 838 F.2d 1445, 1472 (6th Cir.), cert. denied, 488 U.S. 880, 109 S.Ct. 196, 102 L.Ed.2d 166 (1988). In its review, this court must view the facts and all inferences drawn therefrom in the

light most favorable to the nonmoving party. 60 Ivy St. Corp. v. Alexander, 822 F.2d 1432, 1435 (6th Cir.1987).

The moving party has the burden of conclusively establishing that no genuine issue of material fact exists. *Id.* Nevertheless, in the face of a summary judgment motion, the nonmoving party cannot rest on its pleadings but must come forward with some probative evidence to support its claim. *Celotex Corp. v. Catrett*, 477 U.S. 317, 324, 106 S.Ct. 2548, 2553, 91 L.Ed.2d 265 (1986).

By its very terms, this standard provides that the mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202 (1986) (emphasis in original). The dispute must be genuine and the facts must be such that if they were proven at trial, a reasonable jury could return a verdict for the nonmoving party. 60 Ivy St. Corp., 822 F.2d at 1435. If the disputed evidence “is merely colorable or is not significantly probative, summary judgment may be granted.” *Anderson*, 477 U.S. at 249-50, 106 S.Ct. at 2511 (citations omitted).

#### First Amendment Claim

In its complaint, the KHBPA claimed that Turfway Park: “failed to meet the condition precedent set out in 15 U.S.C. § 3004(a)(1), as host racing association, so as to give its valid, legal consent to interstate off-track wagering in accordance with the Interstate Horseracing Act of 1978”; “acted in violation of the Interstate Horseracing Act, 15 U.S.C. § 3003, by transmitting interstate off-track telecasts for wagering purposes”; and, “violated the Interstate Horseracing Act, 15 U.S.C. § 3003, by failing to obtain the appropriate consent of the host racing commission, pursuant to 15 U.S.C. § 3004(a)(2).” KHBPA's March 31, 1993 First Amended and Restated Complaint at 4-5. KHBPA requested damages and injunctive relief “to prevent Defendant Turfway from ever again transmitting interstate horseracing signals for the purpose of interstate off-track wagering without the [KHBPA's] consent.” *Id.* at 7. The district court entered a modified preliminary injunction allowing interstate simulcasting and off-track wagering provided that all interstate simulcasting revenues be placed in an escrow account pending resolution of the action.

Because the Horsemen sought an injunction prohibiting further “simulcasting for wagering purposes,” the district court subjected the Act to First Amendment scrutiny. Though the district court found that the Act unlawfully restricts commercial speech, we conclude that the Act does not regulate commercial speech. Contrary to the district court's findings, the Act regulates interstate wagering, not simulcasting. In fact, the Act does not even mention simulcasting.

In its first regulatory provision, the Act provides that “[n]o person may accept an interstate off-track wager except as provided in this Act.” 15 U.S.C. § 3003. The Act allows interstate off-track wagering if, and only if, specified groups

consent: the “host racing association” FN6; the “horsemen's group” FN7; the “host racing commission” FN8; and, the “off-track racing commission.” FN9

FN6. The Act defines “host racing association” as “any person who, pursuant to a license or other permission granted by the host State, conducts the horserace subject to the interstate wager.” 15 U.S.C. § 3002(9).

FN7. The Act defines “horsemen's group” as “the group which represents the majority of owners and trainers racing [at the applicable host racing association] for the races subject to the interstate off-track wager on any racing day.” 15 U.S.C. § 3002(12).

FN8. The Act defines the “host racing commission” as “that person designated by State statute or, in the absence of statute, by regulation, with jurisdiction to regulate the conduct of racing within the host State.” 15 U.S.C. § 3002(10).

FN9. The Act defines the “off-track racing commission” as “that person designated by State statute or, in the absence of statute, by regulation, with jurisdiction to regulate off-track betting in that State.” 15 U.S.C. § 3002(11).

The Act warns that any person who accepts an interstate off-track wager in violation of the Act “shall be civilly liable for damages to the host State, the host racing association and the horsemen's group,” 15 U.S.C. § 3005, and provides that “[t]he host State, the host racing association, or the horsemen's group may commence a civil action against any person alleged to be in violation of [the Act] for injunctive relief to restrain violations and for damages....” 15 U.S.C. § 3006(a).

Because the Act does not implicate the First Amendment by regulating interstate horserace wagering, FN10 see *United States v. Edge Broadcasting Co.*, 509 U.S. 418, ---, 113 S.Ct. 2696, 2703, 125 L.Ed.2d 345 (1993) (“the activity underlying the relevant advertising-gambling-implicates no constitutionally protected right; rather, it falls into a category of ‘vice’ activity that could be, and frequently has been, banned altogether”), we reverse the district court's decision invalidating the Act as violative of the First Amendment.

FN10. We reject the appellees' claim that Congress was implicitly regulating the simulcasting of horseraces by regulating interstate off-track wagering because interstate off-track wagering may occur without simulcasting, and simulcasting may occur without interstate off-track wagering. Accordingly, because simulcasting and off-track wagering are not inextricably linked, it is irrelevant to our decision that races conducted at Turfway Park are simulcast across state lines.

## Substantive Due Process Claim

### A. Vagueness

In *Grayned v. City of Rockford*, 408 U.S. 104, 92 S.Ct. 2294, 33 L.Ed.2d 222 (1972), the Supreme Court enunciated the standards for evaluating vagueness:

Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory applications.

*Id.* at 108-09, 92 S.Ct. at 2298-99 (footnotes omitted). See also *United States v. Petrillo*, 332 U.S. 1, 7, 67 S.Ct. 1538, 1542, 91 L.Ed. 1877 (1947) (a statute must “mark boundaries sufficiently distinct for judges and juries fairly to administer the law in accordance with the will of Congress”).

The degree of vagueness that the Constitution tolerates “depends in part on the nature of the enactment.” *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 498, 102 S.Ct. 1186, 1193, 71 L.Ed.2d 362 (1982). In fact, the Supreme Court has “expressed greater tolerance of enactments with civil rather than criminal penalties because the consequences of imprecision are qualitatively less severe.” *Id.* at 498-99, 102 S.Ct. at 1193 (footnote omitted). Economic legislation, in particular, “is subject to a less strict vagueness test because its subject matter is often more narrow, and because businesses, which face economic demands to plan behavior carefully, can be expected to consult relevant legislation in advance of action.” *Id.* at 498, 102 S.Ct. at 1193 (footnotes omitted).

Though the language used in the Interstate Horseracing Act of 1978 is imprecise and subject to interpretation,<sup>FN11</sup> the Act constitutes economic legislation regulating a very narrow subject matter. Accordingly, we must apply a “less strict vagueness test” to the Act’s provisions. See generally *Fleming v. United States Dep’t of Agric.*, 713 F.2d 179, 185 (6th Cir.1983) (When the entities affected by a statute “are a select group with specialized understanding of the subject being regulated the degree of definiteness required to satisfy due process concerns is measured by the common understanding and commercial knowledge of the group.”).

<sup>FN11</sup>. For example, 15 U.S.C. § 3004 directs the host racetrack to obtain consent to off-track wagering from the “horsemen’s group” during the “regular contractual process,” and 15 U.S.C. § 3002(12) defines a “horsemen’s group” as the group representing “the majority of owners and trainers ... on any racing day.” The district court found these two provisions contradictory because the horsemen’s group involved in the regular contractual process with the racetrack may not represent the majority of horsemen racing on a given day.

Though the district court properly noted imprecision in the Act, “[t]he strong presumptive validity that attaches to an Act of Congress has led this Court to hold many times that statutes are not automatically invalidated as vague simply

because difficulty is found in determining whether certain marginal offenses fall within their language.” *United States v. National Dairy Prods. Corp.*, 372 U.S. 29, 32, 83 S.Ct. 594, 597, 9 L.Ed.2d 561 (1963). In fact, “ ‘[i]t is our duty in the interpretation of federal statutes to reach a conclusion which will avoid serious doubt of their constitutionality.’ ” *United States v. Rumely*, 345 U.S. 41, 45, 73 S.Ct. 543, 545, 97 L.Ed. 770 (1953) (brackets in original) (quoting *Richmond Screw Anchor Co. v. United States*, 275 U.S. 331, 346, 48 S.Ct. 194, 198, 72 L.Ed. 303 (1928)).

The district court found the Act unconstitutionally vague because the court had difficulty reconciling the Act's provisions. The Act's legislative history reveals that Congress intended to preserve the traditional relationships that existed in the horseracing industry (between the track and horsemen) by limiting the emerging interstate off-track wagering industry. Accordingly, one permissible interpretation of the Act suggests that a racetrack obtain the horsemen's consent during regular contract negotiations with the trade association that the horsemen choose to represent them; if a racetrack did not previously negotiate with a representative trade association, the racetrack would be required to obtain the consent directly from the owners.

[10] A racetrack that routinely negotiates racing contracts with horsemen's associations may not abandon this practice when contract negotiations stall because: Congress intended to preserve the traditional relationships between the parties in the horseracing industry; Congress intended that the horsemen play a significant role in limiting off-track wagering; and, it would severely curtail the horsemen's ability to protect their own interests. Accordingly, we reverse the district court's vagueness determination.

## B. Rationality

The Act regulates interstate horserace wagering by balancing the interests of the horseracing industry against those of the interstate off-track wagering industry. Because “legislative Acts adjusting the burdens and benefits of economic life come to the Court with a presumption of constitutionality,” *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 15, 96 S.Ct. 2882, 2892, 49 L.Ed.2d 752 (1976), “judgments about the wisdom of such legislation remain within the exclusive province of the legislative and executive branches,” *Pension Benefit Guaranty Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 729, 104 S.Ct. 2709, 2718, 81 L.Ed.2d 601 (1984), if the “statute is supported by a legitimate legislative purpose furthered by rational means.” *Id.* In fact, Congress has “absolutely no obligation to select the scheme that a court later would find to be the fairest, but simply one that was rational and not arbitrary.” *National R.R. Passenger Corp. v. Atchison, Topeka & Santa Fe Ry. Co.*, 470 U.S. 451, 477, 105 S.Ct. 1441, 1458, 84 L.Ed.2d 432 (1985).

Though the Supreme Court has “never insisted that a legislative body articulate its reasons for enacting a statute,” *United States R.R. Retirement Bd. v. Fritz*, 449 U.S. 166, 179, 101 S.Ct. 453, 461, 66 L.Ed.2d 368 (1980), Congress noted that it enacted the Act to further both the horseracing and interstate off-track wagering industries, 15 U.S.C. § 3001(b), and to ensure that each state be

empowered to control the gambling within its own borders. 15 U.S.C. § 3001(a). Given the size and impact of the horseracing and off-track betting industries on interstate commerce, Congress clearly has the power to regulate these industries. See, e.g., *Champion v. Ames*, 188 U.S. 321, 23 S.Ct. 321, 47 L.Ed. 492 (1903) (Congress may exercise its Commerce Clause powers to regulate interstate gambling). Though the district court agreed that there were legitimate goals underlying the Act, the court found that the Act's self-regulatory scheme was not rationally related to achieving the desired ends.

When Congress enacted the Act, off-track wagering was already in place as a legal alternative to betting at the track where the race was being run. Congress recognized that the unrestricted proliferation of off-track wagering would hurt the horseracing industry by decreasing attendance at racetracks which, in turn, would reduce the number of horses needed to compete and the number of individuals employed in the industry. Moreover, unrestricted off-track wagering threatened the viability of small racetracks which provide a marketplace for horses of lesser quality and aspiring jockeys.

Though the bills first introduced in Congress sought to eliminate interstate off-track wagering in its entirety, Congress soon recognized that horseracing and off-track wagering could coexist if regulated. Congress therefore opted for the compromise found at 15 U.S.C. § 3004(a) which allows interstate off-track wagering if, and only if, the interested parties consent.

Under the Act, each state may prohibit interstate off-track wagering within its borders, and may prohibit a resident racetrack from contracting with an off-track wagering facility in another state. Though the district court found the Act irrational (and therefore unconstitutional) because the horsemen may withhold their consent to further their own “selfish motives,” FN12 the horsemen's veto differs little from the racetrack owner's veto—both the horsemen and the racetrack owner may reduce off-track wagering revenue without government intervention. Though the horsemen's veto could frustrate Congress' goal of furthering the growth of the off-track wagering industry, the horsemen have a vested interest in the added revenue that off-track wagering provides. Though appealing to the horsemen's self-interest may not be the best or most logical method for promoting the horseracing and interstate off-track wagering industries, it is not irrational to believe that the horsemen would refrain from using their veto power to destroy an industry that provides them with additional revenues. See *Williamson v. Lee Optical of Oklahoma, Inc.*, 348 U.S. 483, 487-88, 75 S.Ct. 461, 464, 99 L.Ed. 563 (1955) (“the law need not be in every respect logically consistent with its aims to be constitutional”).

FN12. The district court held (in relevant part):

Providing a private party with an absolute veto over the simulcasting without any standards to guide it, virtually assures that the statute will be applied, not to achieve Congress' goal, but for selfish motives. The conduct of the parties in this matter amply demonstrates that they favor selfish interests over public ones. Furthermore, there is no review of the Horsemen's reasons for exercising their veto power. Indeed, there is no requirement in the Act that the Horsemen

exercise their veto power to promote Congress' goal rather than their own short-term economic interest, which may be contrary to Congress' objectives.

Kentucky Div., Horsemen's Benevolent & Protective Ass'n, Inc., 832 F.Supp. at 1105.

The horsemen's veto is also rationally related to the horseracing industry's desire to avoid the harmful effects of unrestricted interstate off-track wagering. Whereas individual racetracks benefit by contracting with numerous off-track wagering facilities, the horsemen have a strong interest in limiting off-track betting to ensure continued demand for their services. Accordingly, the horsemen's veto affords the horsemen an important means of protecting the entire sport of horseracing. Without the veto power, the horsemen's ability to protect their interests would be severely impaired.

We conclude that the Act is rationally related to advancing Congress' legitimate federal interests notwithstanding the horsemen's veto power. The horsemen, more than any other affected group, have a substantial interest in maintaining the balance that Congress sought to achieve—the horsemen want the additional money that off-track wagering provides while preserving the horseracing industry. It is this interest that will prevent the horse owners from using their consent power in an arbitrary or capricious manner. We therefore reverse the district court's substantive due process determination. We now consider several of the appellees' other constitutional arguments.FN13

FN13. Though the district court found it unnecessary to consider these arguments, they were extensively briefed by the parties to this appeal.

#### Tenth Amendment Claim

The appellees argue that the Act compels the States to regulate off-track betting, in violation of the Tenth Amendment as interpreted in *New York v. United States*, 505 U.S. 144, 112 S.Ct. 2408, 120 L.Ed.2d 120 (1992). In *New York*, the Supreme Court held that “the Constitution simply does not give Congress the authority to require the States to regulate.” *Id.* at ---, 112 S.Ct. at 2429. The appellees maintain that the Act forces the States to regulate because, “[w]hen faced with a facility's request to participate in interstate wagering,” a State “must exercise [its] regulatory responsibilities to approve or disapprove the request.” Appellees' Brief at 15.

The Act, however, does not require a State to do anything when presented with a request for its consent to off-track betting. Under the Act, the State remains free to ignore such a request. It is true that the State's inaction will preserve the general federal prohibition of interstate off-track betting set forth in 15 U.S.C. § 3003, but that effect does not amount to “regulation” as that term was used by the Court in *New York*. The *New York* Court adhered to the common-sense view that “regulation” is an affirmative act by the State. See *New York v. United States*, 505 U.S. at ---, 112 S.Ct. at 2420 (“this Court never has sanctioned explicitly a federal command to the States to promulgate and enforce laws and regulations”), 2429 (“no Member of the Court has ever suggested that such a federal interest would enable Congress to command a state government to enact state regulation”), 2430 (no “constitutional provision authorizes

Congress to command state legislatures to legislate.”). Indeed, a contrary conception of “regulation” would yield absurd results. The Act merely gives the States a limited power to preempt the general federal prohibition of interstate off-track wagering. If the provision of that power forces the States to regulate, so too is the federal government forced to regulate whenever a State passes a law that may be preempted by Congress. The appellees’ argument is without merit.

### Unlawful Delegation Claims

The appellees next argue that the Act unconstitutionally delegates power to private parties, by means of the “horsemen’s veto.” The appellees assert that this veto allows a group such as the Horsemen to determine “what the law will be,” because such a group can determine whether interstate off-track betting on races involving their horses will be prohibited. The appellees rely primarily upon *Eubank v. City of Richmond*, 226 U.S. 137, 33 S.Ct. 76, 57 L.Ed. 156 (1912). In *Eubank*, the Court “invalidated a city ordinance which conferred the power to establish building setback lines upon the owners of two-thirds of the property abutting any street.” *City of Eastlake v. Forest City Enter., Inc.*, 426 U.S. 668, 677, 96 S.Ct. 2358, 2364, 49 L.Ed.2d 132 (1976). The appellees also cite *Washington ex rel. Seattle Title & Trust Co. v. Roberge*, 278 U.S. 116, 49 S.Ct. 50, 73 L.Ed. 210 (1928), in which the Court “struck down an ordinance which permitted the establishment of philanthropic homes for the aged in residential areas, but only upon the written consent of the owners of two-thirds of the property within 400 feet of the proposed facility.” *Eastlake*, 426 U.S. at 677, 96 S.Ct. at 2364.

The constitutionality of the horsemen’s veto, however, is governed by Supreme Court precedent other than *Eubank* and *Roberge*. In *Thomas Cusack Co. v. City of Chicago*, 242 U.S. 526, 37 S.Ct. 190, 61 L.Ed. 472 (1917), the Court upheld a provision that waived, upon the consent of one-half of the affected property owners, a municipal prohibition on the erection of billboards. The Court easily distinguished this provision from that at issue in *Eubank*:

The [*Eubank*] ordinance permits two-thirds of the lot owners to impose restrictions upon the other property in the block, while the [billboard provision] permits one-half of the lot owners to remove a restriction from the other property owners. This is not a delegation of legislative power, but is ... a familiar provision affecting the enforcement of laws and ordinances.

*Thomas Cusack*, 242 U.S. at 531, 37 S.Ct. at 192. Similarly, in *Currin v. Wallace*, 306 U.S. 1, 59 S.Ct. 379, 83 L.Ed. 441 (1939), the Court upheld a provision that made the effect of certain tobacco regulations contingent upon the approval of two-thirds of the tobacco growers voting in a prescribed referendum. The Court concluded that the referendum provision “does not involve any delegation of legislative authority[.]” because Congress has merely placed a restriction upon its own regulation by withholding its operation as to a given market “unless two-thirds of the growers voting favor it.” ... This is not a case where a group of producers may make the law and force it upon a minority or where a prohibition of an inoffensive and legitimate use of property is imposed not by the legislature but by other property owners. Here it is Congress that

exercises its legislative authority in making the regulation and in prescribing the conditions of its application.

*Id.* at 15-16, 59 S.Ct. at 387 (citations omitted).

Like the provisions at issue in *Thomas Cusack and Currin*, the horsemen's veto provision does not allow a private party to “make the law and force it upon a minority”; rather, the veto is merely a condition established by Congress upon the application of Congress' general prohibition of interstate off-track betting. Thus, the Act merely affords the Horsemen a limited power to waive a restriction created by Congress, just as the ordinance in *Thomas Cusack* provided one-half of the property owners with the power to waive the billboard restriction. And since the property owners in *Thomas Cusack* were not empowered to “make the law and force it upon” others by the fact that the billboard prohibition remained in effect if they chose not to exercise their waiver power, neither are the Horsemen so empowered by the fact that Congress' restriction remains in effect if they choose not to exercise their limited waiver power. The Act therefore does not delegate legislative power to private parties.

The appellees further argue that the Act delegates legislative power to the States without intelligible standards to guide the exercise of that power, in violation of the “nondelegation doctrine” described in *Mistretta v. United States*, 488 U.S. 361, 109 S.Ct. 647, 102 L.Ed.2d 714 (1989).FN14 This argument overlooks the foundation upon which the nondelegation doctrine rests. The Supreme Court has repeatedly explained that “[t]he nondelegation doctrine is rooted in the principle of separation of powers that underlies our tripartite system of Government.” *Id.* at 371, 109 S.Ct. at 654. The nondelegation doctrine thus ensures that Congress does not delegate its legislative power to either of the “coordinate Branches,” although it does permit Congress to obtain the “assistance” of those Branches. *Id.* at 372, 109 S.Ct. at 654-55. When Congress affords the States the option of regulating a particular activity, however, there is no danger that the federal legislative power will be exercised by the executive or judicial Branches of the federal government; instead, if the State accepts the invitation extended to it by Congress, the federal legislative power is not exercised at all. Thus, the separation of powers principle and, a fortiori, the nondelegation doctrine, simply are not implicated by Congress' “delegation” of power to the States. Rather than violate the separation of powers principle, such a delegation in fact furthers another core constitutional value—that of federalism. Hence, without regard to whether the Act effects a “delegation” of legislative power to the States, the appellees' argument is meritless.

FN14. Appellees also argue that the Act delegates legislative power to private parties without intelligible standards to guide the exercise of that power, but, as just explained, the Act does not delegate any legislative power to private parties.

#### Subject Matter Jurisdiction

Turfway Park argues that the district court lacked subject matter jurisdiction over this action because the Act creates civil liability for those who accept

interstate wagers in contravention of the Act, not those who merely simulcast the races that are the subject of such wagers.FN15 Because off-track wagers are placed in the host racetrack's pari-mutuel pool when the track enters into an agreement to simulcast races to an off-track facility, we conclude that Turfway Park accepted an interstate off-track wager for purposes of the Act.FN16

FN15. The Act provides that “[a]ny person accepting any interstate off-track wager in violation of this chapter shall be civilly liable for damages to the host State, the host racing association and the horsemen's group.” 15 U.S.C. § 3005.

FN16. Kentucky law statutorily apportions wagers received by an out-of-state off-track betting facility: 22% to the host track; 22% to the purse program at the host track; 22% to the betting facility; 22% to the purse program at the betting facility; and, the remaining 12% is allocated evenly between the track and betting facility to cover the cost of simulcasting. Ky.Rev.Stat. § 230.378(3). The statutory apportionment may be modified by contract as it was by the 1989 contract between the KHBPA and Turfway Park.

### III.

We REVERSE the district court's September 14, 1993 Opinion and Order finding the Interstate Horseracing Act of 1978 unconstitutional and REMAND this action to the district court to resolve the issues that remain.

#### Discussion

The most well known case in connection with such disputes was *Kentucky Division, Horsemen's Benevolent & Protective Ass'n, Inc. v. Turfway Racing Ass'n*.<sup>27</sup>

In that case, the track and the horsemen could not agree on the percent of revenue from interstate wagering that would be used for the horsemen's purses. The horsemen, therefore, refused to give approval for Turfway to negotiate with OTB operators. The track then attempted to circumvent the horsemen's association by seeking consent directly from the horse owners. The horsemen responded by suing Turfway and several OTB operators that accepted wagers on races conducted at Turfway Park. The track counterclaimed alleging the horsemen and others violated the Sherman Anti-Trust Act by restraining competition and illegally interfering with its

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<sup>27</sup> *Kentucky Division, Horsemen's Benevolent & Protective Ass'n, Inc. v. Turfway Racing Ass'n*, 20 F.3d 1406 (6th Cir. 1994).

business relations. More importantly, the track also claimed that the IHRA was unconstitutional.

Upon its initial consideration of the Turfway case, a federal district court in the Eastern District of Kentucky found the IHRA was unconstitutional as an “invalid restriction on commercial speech in violation of the First Amendment as well as fatally vague and irrational . . . in violation of substantive due process.”<sup>28</sup>

The Sixth Circuit Court of Appeals reversed the district court and upheld the constitutionality of the Act. The appellate court first dismissed the First Amendment claim based on the Supreme Court’s decision in *United States v. Edge Broadcasting Co.*<sup>29</sup> The appellate court relied on a notion, since rejected by the Supreme Court, that gambling is a vice and as such the government can permit it, but ban its advertisement altogether without violating the First Amendment.<sup>30</sup>

The appellate court spent much more time refining the ambiguities in the IHRA. As the federal district court noted in *Turfway Park*, the IHRA has several ambiguities, including the definition of horsemen’s group. This definition is important when the track and representative horse owners cannot reach agreement. The track may seek to certify a new group or leadership of horse owners to initiate new negotiations. One potential issue is whether representation in the horsemen’s group should be based on one person, one vote or one horse, one vote. For example, if ten people co-owned one horse and one person owns ten horses, do all eleven get one vote, or if the ten co-owners get one vote, does the multi-owner get one vote or ten votes?

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<sup>28</sup> Kentucky Division, Horsemen’s Benevolent & Protective Ass’n, Inc., v. Turfway Racing Assn., 832 F. Supp. 1097, 1098 (E.D. Ky. 1993).

<sup>29</sup> *United States v. Edge Broadcasting Co.*, 509 U.S. 418, 113 S. Ct. 2696 (1993). See note 168, and accompanying text.

<sup>30</sup> This decision is now subject to re-examination in light of the Supreme Court’s decision in *44 Liquormart v. Rhode Island*, as discussed in chapter 4

Another ambiguity is how to decide which of the competing horsemen groups represent a majority. If two competing horsemen groups represent about 50 percent each, based on which horses are running on a given day, one or the other might represent a majority on that day. Moreover, if some owners refuse to join either group, neither may have a majority.

While the Sixth Circuit agreed that the IHRA was imprecise, it was willing to interpret its meaning in lieu of holding it to be unconstitutional. It came to the following conclusions:

- The track must “obtain the horsemen’s consent during regular contract negotiations with the trade association that the horsemen choose to represent them.”
- If the track “did not previously negotiate with a representative trade association, [it] would be required to obtain the consent directly from the owners.”
- A track “that routinely negotiates racing contracts with a horsemen’s association may not abandon this practice when contract negotiations stall.”

The Sixth Circuit also sanctioned the horsemen’s right to use their consent authority as a negotiating tool with the track to protect their self-interests in obtaining a larger percentage of the revenues from interstate wagering. The court acknowledged that the “horsemen’s veto could frustrate Congress’ goal of furthering the growth of the off-track wagering industry.” It felt, however, that Congress could rationally believe that “the horsemen would refrain from using their veto power to destroy an industry that provides them with additional revenues.”

## The IHRA And Federal Anti-Trust Law

While the IHRA grants the horsemen substantial power in negotiating with the track, the horsemen must be careful not to abuse this power. The IHRA does not provide the horsemen's group with protection from state or federal anti-trust claims.<sup>31</sup> As one court noted, the IHRA does anticipate the horsemen having some collective bargaining power. This power, however, appears limited to the negotiations with the tracks during the "regular contractual process." Collective activities outside this process, however, expose the horsemen to possible anti-trust liability.<sup>32</sup>

For example, a basis for an antitrust suit could include the harm done by the horsemen's concerted refusal to deal with the tracks through denying OTB consent or refusing to send horses to the track for racing purposes.

A horsemen's group also may attempt to leverage their agreement rights as a vehicle to control negotiations over track fees with the OTB operators. For example, the horsemen's group may claim to have the power to withdraw their consent at any time or to reserve the right to approve OTB contracts on a periodic or a case-by-case basis. This is contrary to the intent of the IHRA, which anticipated that the horsemen would have no role in the negotiations for track fees. One court has held that the power of consent, once given, can be "withdrawn or varied *only* within the regular contractual process."<sup>33</sup>

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<sup>31</sup> See *Alabama Sports Service, Inc. v. National Horsemen's Benevolent & Protective Ass'n.*, 767 F. Supp. 1573, 1579 (M.D. Fla. 1991); *Florida Horsemen's Benevolent & Protective Ass'n, Inc., v. Hialeah, Inc.*, 889 F. Supp. 616, 621-622 (1995).

<sup>32</sup> *Saratoga Harness Racing, Inc. v. Peter Veneglia*, 1997 W.L. 135946 (March 1997).

<sup>33</sup> *Alabama Sports Service*, 767 F. Supp. 1578.

## Damages

The calculations for damages also give the horsemen's group substantial leverage. Typically, the OTB operator will pay the track a percentage of its handle for the right to conduct pari-mutuel wagering and receive the live broadcast of the races. Typically, the fee is about 3 to 4 percent. If the track takeout is 16 percent, the economics are that the OTB retains 12 to 13 percent of each wager and the track receives 3 to 4 percent, which it splits with the horsemen's group. If it is an even split, the horsemen effectively receive about 1.5 to 2 percent of each wager placed at the OTB facility.

Damages under the IHRA, however, are not based on what the horsemen's group would have received under the pari-mutuel agreement, but instead on what it would have received had the bet been placed at the track. Calculation of damages under the IHRA is based on the on-track economics, not the interstate economics.

The IHRA provides:

If the interstate off-track wager was of a type accepted at the host racing association, damages shall be in an amount equal to that portion of the takeout which would have been distributed to the host, host racing association and the horsemen's group, as if each such off-track wager had been placed at the host racing association.

The economics of an on-track bet are much different than an off-track bet. For example, of the 16 percent takeout, 6 percent may go to the state for taxes, with the remainder split between the horsemen and the track. If it is an even split, the horsemen receive 5 percent.

Under this damages provision, if the horsemen's group sued the track OTB operator, it would be entitled to damages (at least) equal to the portion of the takeout it would have been entitled to as an on-track wager.<sup>34</sup> This amount can be more than triple what the horsemen would have been entitled to under typical interstate economics.

### Natural "Market" Protection

The second major provision of the IHRA is the requirement that OTB operators obtain the approval of all operating tracks within 60 miles of the OTB facility.<sup>35</sup> If there is no track within 60 miles, then the operator of the OTB facility must obtain the approval of the closest "currently operating track in an adjoining state."<sup>36</sup> This definition is not well drafted and could lead to absurd results. For example, suppose an OTB facility is 65 miles from the nearest track in its own state, but 265 miles from the nearest track in an adjoining state. Under this provision, the operator of the OTB facility must obtain the approval of a track that is 265 miles away, but not the track that is 65 miles away in the same state.

Moreover, the identity of the "currently operating track" that must approve the acceptance of the wager can change from hour to hour. Under statutory definitions,

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<sup>34</sup> The horsemen could argue that the damages could equal the total of the amount that the horsemen's group, the track and the host state would have received from the wager had it been placed at the track, which for practical purposes is the entire takeout. This position, however, is inconsistent with the intent of the provision, as the OTB facility would be liable to the host state, the track and the horsemen's group for the same amount. According to the congressional report, the intent of the damages provision is "to give these parties the amounts they would have received had the wager been placed on-track." H.R. Rep. No. 95-1733 at 3 (1978). The intent of the Act also is indicated in subsection (2), which deals with bets of a type not accepted at the track. These damages shall be determined at the prevailing takeout rates and "distributed according to the same formulas as in paragraph (1) above."

<sup>35</sup> As part of the compromise process that led to the IHRA, a major exception to the "natural market" protection was included. It provides that OTB facilities in states that have over 250 racing dates do not have to obtain approvals of the "within 60-mile track" to conduct interstate wagering for up to 85 days (60 regular and 25 special events). 15 U.S.C. § 3004(b)(2).

<sup>36</sup> 15 U.S.C. § 3004(b).

the “currently operating track” is the track conducting *pari-mutuel* wagering at the same time as the race is being run which is the subject of the interstate wager.

Such issues of interpretation, however, are unlikely to occur because the provision has no effective method for judicial enforcement. Failure of an OTB operator to obtain the consent of a “within 60-mile track,” however, has limited consequences. The IHRA envisions only three groups having the right to seek damages or obtain an injunction. They are the host racing association, the host state, and the horsemen’s group. The IHRA does not create a private right of action that would allow the “within 60-mile track” or any other private party from obtaining an injunction against or damages from the offending OTB operator.<sup>37</sup> A “within 60-mile track” lacks standing, either by statute or implication, to enjoin an OTB operator that accepts interstate wagers without first obtaining the track’s consent.<sup>38</sup>

The offending OTB operator, nevertheless, would be violating federal law which may provide a defense if other tracks decide to cancel interstate contracts or refuse to do business with the offending OTB operator.<sup>39</sup>

The failure to obtain approval also may be grounds for the off-track racing commission to discipline the OTB operator, particularly where the “within 60-mile track” and the OTB operator are within the same state. The “within 60-mile track” also may use the failure of the OTB operator to obtain consent in other ways. Examples would include convincing other tracks not to provide simulcasting to the

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<sup>37</sup> Sterling Suffolk Racecourse Limited Partnership v. Burrillville Racing Ass’n, Inc., 989 F.2d 1266 (1st Cir. 1993).

<sup>38</sup> Sterling Suffolk Racecourse Limited Partnership v. Burrillville Racing Ass’n, Inc., 802 F. Supp. 662 (D. R.I. 1992).

<sup>39</sup> Alabama Sports Service, Inc., v. National Horsemen’s Benevolent Protective Ass’n., 767 F. Supp. 1573, 1579-80 (MD Fla. 1991).

OTB facility, or to bring such violation to the attention of the state racing commission for appropriate action.<sup>40</sup>

### Restrictions On Takeout By OTB operators

The IHRA requires that the takeout at the OTB facilities be the same as the takeout at the track unless a different takeout is authorized by the off-track racing commission. The stated reason for this provision is “to insure that the bettor is not overburdened by a potentially higher cost for interstate wagering.”<sup>41</sup> This is an unlikely motivation for the restriction. Instead, this is a form of price restriction that protects the tracks from OTB operators that might undercut the track takeout. Like most commercial enterprises, the patron must pay for the goods or services. A track or OTB patron “pays” for services provided through the takeout. The lower the takeout, the lower the purse. OTB operators with lower overhead than the track may consider lowering the takeout to attract more customers. This is an unwanted form of competition to the tracks and is eliminated by requiring the same takeout at the track and the OTB facility

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<sup>40</sup> Sterling Suffolk Racecourse Limited Partnership v. Burrillville Racing Ass’n, Inc., 802 F. Supp. 662 (D. R.I. 1992).

<sup>41</sup> H.R. Rep. No. 95-1733 at 3 (1978).

## The DOJ View

### The 1999 View

June 9, 1999

The Honorable Patrick J. Leahy Ranking Minority Member Committee on the Judiciary United States Senate Washington, DC 20510

Dear Senator Leahy:

Thank you for the opportunity to present the views of the Department of Justice on S. 692, the "Internet Gambling Prohibition Act of 1999."

As you know, current law prohibits the use of the Internet to engage in gambling activities related to sports betting. Under 18 U.S.C. § 1084 it is illegal to use a wire communication facility to transmit in interstate or foreign commerce bets or wagers, or information assisting in the placement of bets or wagers, on any sporting event or contest. The Internet is a "wire communication facility," as defined in 18 U.S.C. § 1081. Indeed, even in those instances where the Internet travels over non-traditional communication facilities (*i.e.*, microwave or satellite), the "wire communication facility" definition generally applies, because it includes facilities other than wire and cable that can aid in the transmission of data between "the points of origin and reception of such transmission."

We do recognize, however, that the Internet has allowed for new types of electronic gambling, including interactive games such as poker and blackjack, that may not clearly be included within the types of gambling currently made illegal by section 1084. As a result, we strongly support your efforts to amend federal gambling statutes to ensure that new types of gambling activities made possible by emerging technologies are prohibited.

That said, we also believe that any legislation concerning gambling activities should have three important characteristics. First, the legislation should treat physical activity and cyberactivity in the same way. If an activity is prohibited in the physical world but not on the Internet, then the Internet becomes a safe haven for that criminal activity. Similarly, conduct that is not a federal crime in the physical world should not be subject to federal criminal sanction when committed in cyberspace. Second, legislation should be technology-neutral. Legislation tied to a particular technology may quickly become obsolete and require further amendment. Last, it is critical that the law recognize that the Internet is different from prior modes of communication in that it is a multi-faceted communications medium that allows not only point-to-point transmission between two parties (like the telephone), but also the widespread dissemination of information to a vast audience (like a newspaper). As a result, any prohibitions that are designed to prohibit criminal activity on the Internet must be carefully drafted to accomplish the legislation's objectives without stifling the growth of the Internet or chilling its use as a communication medium.

With these overarching principles in mind, the Department of Justice is troubled by the proposal in S. 692 to create a new section 1085 of title 18, United States Code, to address the legality of Internet gambling. We appreciate the efforts that have been made to address some of the concerns raised by the Department of Justice about S. 474, a bill introduced in the 105<sup>th</sup> Congress in the Senate to address Internet gambling. We believe, however, that if section 1085 is

enacted it would substantially overlap and be inconsistent with existing federal gambling laws. We therefore strongly recommend that Congress address the objective of this legislation through amending existing gambling laws, rather than creating new laws that specifically govern the Internet. Indeed, the Department of Justice believes that an amendment to section 1084 of title 18 could satisfy many of the concerns addressed in S. 692, as well as ensure that the same laws apply to gambling businesses, whether they operate over the Internet, the telephone, or some other instrumentality of interstate commerce.

An amendment to section 1084 should address the following:

- (1) to clarify that section 1084 applies to all betting or wagering (not merely betting or wagering on sports events) and includes the sending and receiving of bets and wagers over wireless communication facilities;
- (2) to require interactive computer service providers to cooperate with law enforcement agencies in the same manner as is currently required of common carriers and to grant such providers the same shield from liability that is currently provided to common carriers; and (3) to explain that section 1084 applies to those engaged in the business of betting or wagering who are located outside the territorial jurisdiction of the United States, when those individuals knowingly facilitate or aid in unlawful betting and wagering by sending or receiving a bet or wager, or information assisting in the placing of a bet or wager, from an individual located within the United States.

The following summarizes our suggestions for amending section 1084, both to cover Internet gambling explicitly and to eliminate possible ambiguities that currently exist in the law.

Some concern has been expressed that section 1084 does not include certain communication facilities, such as microwave or satellite. While we believe that these types of facilities are included within the definition of "wire communication facility," we recommend that references to "wire communication facility" be replaced with "wire or wireless communication facility" to remove any doubt as to whether microwave or satellite facilities are covered by this section. In addition, a definition of "wireless communication facility" that includes microwave and satellite services should be placed in section 1081.

Another ambiguity can be eliminated from section 1084 through the inclusion of the words "or receipt" after "transmission" in subsections (a) and (b). This change would confirm the interpretation of many courts that section 1084 applies to those individuals in the business of betting or wagering who "receive" bets or wagers, or information assisting in the placing of bets or wagers, from others. See e.g., United States v. Pezzino, 535 F.2d 483, 484 (9th Cir.) (per curiam), cert. denied, 429 U.S. 839 (1976) (finding that section 1084 forbids "the use of interstate facilities for sending or receiving wagering information").

The addition of "receipt" to paragraphs 1084(a) and (b) would make it explicit that it is not only illegal for gambling businesses to send or receive bets or wagers, but it is also illegal for them to send or receive information assisting in the placing of bets or wagers. The Department of Justice believes that this clarification is necessary to ensure that federal gambling laws are read comprehensively. We realize, however, that the information provisions in section 1084 may need to be reviewed to ensure that the statute is constitutional, as well as consistent with other laws. We also believe that a definition of "information assisting the placement of bets or wagers" must be added to the statute. The Department of Justice is not proposing a specific definition for "information assisting the placement of bets or wagers" at this time, however, as we believe it prudent to await the Supreme Court's decision, expected later this month, in Greater New Orleans Broadcasting Ass'n v. United States, No. 98-387, a case that will likely affect the legality of restrictions on "commercial speech," including gambling advertising.

In addition, it is important that 1084(a), along with the exceptions in 1084(b), be expanded to include all forms of betting and wagering, not only betting and wagering on sports events. These

changes would only affect those in the business of betting and wagering and would leave primary enforcement of gambling laws, including those that apply to end bettors, to the states.

Currently, section 1084(a) includes gambling activities that involve interstate or foreign commerce. However, we believe that it is necessary to expand this coverage to include the transmission or receipt of bets or wagers to or from U.S. residents and gambling businesses on the high seas or in other locations not covered by interstate or foreign commerce. We suggest revising section 1084(a) to include knowingly facilitating the transmission or receipt to or from an individual or gambling business located in the United States of bets or wagers, or information assisting in the placing of bets or wagers:

- (1) in interstate or foreign commerce;
- (2) within the special maritime and territorial jurisdiction of the United States; or
- (3) any place outside the jurisdiction of any nation.

This amendment would make unlawful those actions taken outside the United States that knowingly aid or facilitate unlawful betting and wagering by sending or receiving a bet or wager, or information assisting in the placing of a bet or wager, from an individual located within the United States.

It is also important from an enforcement standpoint that Congress amend section 1084 to require interactive computer service providers, like the common carriers already subject to the statute, to remove or disable access to materials residing on their online sites when notified in writing by a law enforcement agency of a violation of the federal gambling laws. These providers, like the common carriers currently controlled by the section, would not be liable for the removal or disabling of materials if they do so in compliance with any notice received from a law enforcement agency. If an interactive computer service provider receives notice but is not the proper recipient of the notice, the provider should be required by the amended section 1084 to cooperate, as required by law, with law enforcement agencies to identify the person or persons who control the site. In addition, a definition of "interactive computer service provider" should be added to section 1081.

As we noted previously, the Department of Justice believes that amending section 1084 as proposed could address the concerns that led to the introduction of S. 692. At the same time, it would avoid creating overlapping and inconsistent federal gambling laws, which we believe would result if S. 692 were enacted in its current form. While it is difficult for the Department to accurately assess all of the potential legal problems with S. 692, we nonetheless offer comments that identify some of our specific concerns. We stress, however, that even if all of these concerns were addressed, the Department of Justice still would have reservations regarding the creation of section 1085. If, however, Congress chooses to enact section 1085 specifically to regulate Internet gambling, we strongly urge that our suggested revisions to section 1084 be made simultaneously to minimize the ambiguities and inconsistencies among the federal gambling statutes that will result from separate legislation addressing Internet gambling.

The Department of Justice's first concern with S. 692 is its exemption of certain forms of gambling from the ban on Internet gambling. Specifically, the Department of Justice opposes the exemptions for parimutuel wagering and fantasy sports leagues, because there is no legitimate reason why bets or wagers sent or received by gambling businesses on these activities should be exempted from the ban while bets and wagers on other activities are not. The Department of Justice is especially troubled by the broad exemptions given to parimutuel wagering, which essentially would make legal on the Internet types of parimutuel wagering that are not legal in the physical world. The Department of Justice notes that S. 692 may incorrectly imply that the Interstate Horse Racing Act of 1978, 15 U.S.C. § 3001 *et seq.*, allows for the legal transmission and receipt of interstate parimutuel bets or wagers. The Interstate Horse Racing Act does not allow for such gambling, and if a parimutuel wagering business currently transmits or receives interstate bets or wagers (as opposed to intrastate bets and wagers on the outcome of a race occurring in another state), it is violating federal gambling laws.

The Department of Justice is also of the opinion that there should be no special exemption for bets or wagers on fantasy sports leagues and contests, as we can think of no reason why bets or wagers on fantasy sports leagues placed or accepted by gambling businesses should be allowed on the Internet when bets or wagers on sporting events and games of chance are not. If activities related to fantasy sports leagues and contests fall within section 1085's definition of "bets and wagers," they should be prohibited on the Internet. If Congress intends by this provision to exempt activities related to fantasy sports leagues and contests, other than betting or wagering on such contests, we suggest that S. 692 be revised to permit these non-betting and wagering activities. However, we do urge Congress to craft carefully legislation to ensure that gambling on fantasy sports leagues and contests is not legalized on the Internet, when all other gambling is banned.

### **The 2006 View**

**STATEMENT OF TESTIMONY OF BRUCE G. OHR CHIEF  
ORGANIZED CRIME AND RACKETEERING SECTION CRIMINAL  
DIVISION UNITED STATES DEPARTMENT OF JUSTICE BEFORE  
THE COMMITTEE ON THE JUDICIARY SUBCOMMITTEE ON CRIME,  
TERRORISM, AND HOMELAND SECURITY UNITED STATES HOUSE  
OF REPRESENTATIVES CONCERNING H.R. 4777, THE "INTERNET  
GAMBLING PROHIBITION ACT" PRESENTED ON APRIL 5, 2006**

Good morning, Mr. Chairman, Ranking Member Scott, and Honorable Members of the Subcommittee. Thank you for inviting me to testify today. My name is Bruce G. Ohr and I am the Chief of the Organized Crime and Racketeering Section in the Criminal Division of the Department of Justice. I would like to commend Congressman Goodlatte, as well as Congressman Leach and Senator Kyl, for their tireless efforts and longstanding commitment to provide law enforcement with additional tools to combat Internet gambling. Today, I am pleased to offer the views of the Department of Justice on H.R. 4777, the Internet Gambling Prohibition Act.

Since the Department of Justice last appeared before you on this topic, we have continued investigating and prosecuting illegal Internet gambling. For example, in January 2006, the United States Attorney's Office in St. Louis announced a \$7.2 million settlement with the Sporting News to resolve claims that the Sporting News promoted illegal gambling from early 2000 through December 2003 by accepting fees in exchange for advertising illegal gambling. As part of this settlement, the Sporting News will conduct a public service campaign to advise the public of the illegality of commercial Internet and telephonic gambling. On April 11, 2005, the United States Attorney's Office of the District of Massachusetts indicted 13 individuals on racketeering charges, which included allegations that the enterprise used an offshore gambling office in San Jose, Costa Rica and

that customers of the enterprise's sports betting business were able to place bets over the Internet and through the use of a toll-free telephone number. The operator of the offshore gambling office was Todd Westerman, who pled guilty on January 10, 2006. Two other defendants have also entered guilty pleas. The trial date for the remaining defendants has not yet been set by the court.

The Department of Justice generally supports the efforts of the drafters of H.R. 4777 because this legislation amends an existing criminal statute and it applies equally to wagering over the Internet and over the telephone. While the Department believes that 18 U.S.C. § 1084 already encompasses both types of wagering, the proposed amendments in H.R. 4777 strengthen our position and assure the continued viability of Section 1084 into the future. Further, the Department also supports the proposals to increase the penalty for a violation of Section 1084, to prohibit the acceptance of certain forms of payment, such as credit cards, for Internet gambling, and to provide for civil enforcement action against such activity. Finally, H.R. 4777 also provides law enforcement with a method to cut off the transfer of funds to and from illegal Internet gambling businesses.

The Department of Justice, however, has concerns regarding some of the provisions of H.R. 4777, including that sections of this proposal may weaken current law and standards and that it would also permit gambling over the Internet from the home and favor certain industries over others.

The Department of Justice views the existing criminal statutes as prohibiting the interstate transmission of bets or wagers, including wagers on horse races. The Department is currently undertaking a civil investigation relating to a potential violation of law regarding this activity. We have previously stated that we do not believe that the Interstate Horse Racing Act, 15 U.S.C. §§ 3001-3007, amended the existing criminal statutes. H.R. 4777, however, would change current law and amend Section 1084 to permit the interstate transmission of bets and wagers on horse races. H.R. 4777 also permits "intrastate" wagering over the Internet without examining the actual routing of the transmission to determine if the wagering is "intrastate" versus "interstate." Under current law, the actual routing of the transmission is of great importance in deciding if the transmission is in interstate commerce. The Department is concerned that these two proposals would weaken existing law.

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## Discussion

1. The materials point out that the original intent of the IHRA was to prohibit interstate horse race wagering, what was argument that permitted such activities despite the wire act?
2. The position of the DOJ is that the IHRA does not alter the Federal Wire Act, therefore, interstate horse race wagering is still illegal under the Federal Wire Act, what is the counter argument?