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The State of Racing:
Nobody Knows Nothing Edition

*2007 Warren M. Anderson Legislative
Breakfast Series*

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The 2007
Warren M. Anderson Legislative
Breakfast Seminar Series

THE STATE OF RACING:
Nobody Knows Nothing Edition

March 20, 2007

A Presentation by—

Bennett Liebman, Esq.
Program on Racing and Gaming Law
Government Law Center, Albany Law School

WARREN M. ANDERSON

Warren M. Anderson is a distinguished alumnus of Albany Law School, and an active member of the Government Law Center Advisory Committee. Having served in the New York State Senate for thirty-five years, he is perhaps best known for his leadership during his tenure as President Pro Tem and Majority Leader from 1973 to 1988. Warren Anderson began his legal career as an Assistant County Attorney in Broome. He then joined the law firm of Hinman, Howard & Kattell where he is currently practicing law. Throughout his career he has received numerous honors and awards.

PROGRAM DESCRIPTION

In furtherance of its mission to serve as a resource to government at all levels in the resolution of specific problems, the Government Law Center is pleased to present the sixteenth annual Warren M. Anderson Breakfast Seminar Series. Monthly breakfast programs feature experts who address the legal aspects of a variety of policy issues pending before the Legislature. The seminars are designed to provide access to current legal information on a given topic. The Government Law Center welcomes your suggestions for future programs.

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Program on Racing and Gaming Law

Government Law Center

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There's a famous statement about the movie business that is attributed to the screenwriter William Goldman. The quote is simply "nobody knows anything," meaning that nobody has a clue as to what will work or fail in the movies.

Forget Hollywood. If there was a topic about which we can assuredly say that "nobody knows anything," it has to be the subject of New York horse racing. Nobody – and that obviously includes me – knows anything. If you thought that Albany Law School's Anderson Breakfast was merely an excuse for free CLE and a free breakfast, this morning, you've come to the right place.

I could stand here and give you the same nearly canned speech that I've given too often in recent years. In condensed fashion, it goes much like this.

1. I love horse racing. At its best, or even not at its best, it's the most enjoyable of all sports. I'd then say "yada yada yada blah blah blah"—but let me note, that makes me sound like most everybody in politics. Every elected official always says they're a great friend and supporter of racing, and that translates into zilch.

But racing actually is different. Let's say you go to a track and you bet against a great horse like Forego, Cigar, or John Henry. You'll find that you're no longer a bettor. Down the stretch, you'll be pulling for the big horse against the horse you bet on. You root against your own financial interest. Now there have always been times when civilized New Yorkers might pull for individual players—Stan Musial or Bob Cousy come to mind – but nobody ever rooted against the Dodgers or the Knicks. Only in racing do you end up rooting against yourself. There is nothing like it.

2. There is no media coverage of horse racing, other than the Triple Crown, the Breeders Cup, and in this area, Saratoga. Otherwise, if you want to find horse racing, look at "other sports" on the Internet and you'll find it somewhere between junior hockey and professional lacrosse, although perhaps ahead of bowling and roller derby. If you search for racing, you'll always find NASCAR.

3. The New York horse racing business—apart from Saratoga and Belmont Stakes day—is stagnant and a minimal fraction of what it was 40 and 50 years ago. Let me give you just one for instance. Racing returned to Yonkers after a one and a half year interlude in the fall of 2006, and Yonkers ran its biggest night of racing ever on November 25—\$1.9 million in purses. Glidemaster was going for the Triple Crown of trotting in the \$728,930 Yonkers Trot. There was the half million dollar Messenger Stakes, the Lady Maud Pace, and the Hudson Filly Trot. Total on-track handle was \$82,000 and the total New York State OTB handle was \$127,000.

By contrast in 1996—which was a particularly lousy year for Yonkers—average on-track handle for 294 programs was \$174,000 and average New York State OTB handle was \$385,000. So, we're talking maybe 300-350 people on-track for the biggest ever night of racing at Yonkers.

On a regular day of business, the on-track handle at Yonkers has been \$48,000—so there are probably 200 regular patrons of Yonkers racing.

In 1960, Yonkers averaged \$1.830 million per day in on-track handle. In 2007 dollars, that's \$12.5 million per day. So in real terms, Yonkers now on average does .4% of the on-track business that it did in 1960. That's 1/250th of its 1960 business.

The best story I can tell you is that of a former racing executive in New York State who once told me that he should be put in charge of the State's compulsive gaming programs because he had proven conclusively that no gambling would ever be going on in any place that he ran.

Racing has been out since the heydays of Hai Karate, Bosco, Sanka, Fruit Stripe gum, 8-tracks, and S&H Green Stamps.

4. We would have no live harness racing in New York without a video lottery.

5. VLTs are not converting slot players into horse players. By now, nobody even argues this point. There is no synergy, only subsidy.

6. While I may believe instinctively that many of our problems in horse racing stem from the manner in which we created OTBs in the 1970s, I can't prove this, and the fact is that business for horse racing has turned sour in most every state—regardless of whether or not they have an OTB system resembling that of New York.

7. The regulatory problems of horse racing have changed little over the decades. I looked at the issues covered by the two 1937 meetings of the National Association of Racing Commissioners. Here are the issues: drugs, the need for a national

turf alliance, claiming rules, cheating, lack of state uniformity, jockey weights, 2-year old racing, and reciprocity. Things have changed little over the past 70 years.

8. Just as the regulatory issues haven't changed, and we don't know what to do about them, nobody really knows what to do about racing's overall business stagnation. In short, nobody knows anything.

Let me explain this.

It's easy to blame race tracks for racing's problems, but they have tried to change. Nothing has worked.

The betting action was too slow—so we now have world-wide simulcasting.

There was little televised racing. Now there's endless television in New York on OTB channels and even two dedicated satellite channels of horse racing.

It was difficult to bet. Now you can bet anywhere, phones, TV, cable boxes, the Internet.

It was difficult to find and purchase past performances. Now, you get them in seconds on the Internet.

There was no conclusion to the racing season. Now there's a Breeders Cup—with negligible TV ratings.

Takeout was too high for the major players. Now these players have significant rebates.

There was no central office or a racing commissioner—now there's a National Thoroughbred Racing Association—the NTRA.

Racing attracted few young people. So the NTRA developed a national campaign aimed at young people. Remember "go baby go?" All it did was tick off the older racing fans.

Everybody said: Be like NASCAR. So we had a jockey cam and a virtual finish line.

What complaints remain? Your live races still go off too slowly, your horses don't race enough, and you race when people are working. Sorry, but that sounds exactly like harness racing where most everybody races once a week, the races start quickly, and they race at night. And harness racing might be the most anemic part of the American racing industry.

I went to a racing convention last week where the experts said racing has to be like Apple and not Kodak—but what technology would turn out to be an ipod for racing? Sorry. Nobody knows anything about that.

Without any ideas, who knows what we will see next: *Dancing with the Handicappers*, *America's Next Top Jockey*, *Law and Order: Stewards' Edition*?

That's what we or at least what I think I know about racing.

But any moron can tell you why the sky is falling. The issues is how do you stop the sky from falling? And one problem is that stressing the awful fundamentals of the horse racing business and our overall cluelessness is counterproductive.

First of all, it's a cheap joke. It gives the impression that the few remaining horse racing enthusiasts are elder cousins to trekkies—aging, Caucasian, cigar smoking obsessives. They carry binoculars and daily racing forms rather than spock ears. Initially amusing, but increasingly annoying the more you look back at it.

Secondly, it gets us nowhere. We keep telling people that the sky is falling on horse racing—and maybe the industry gets lucky. It gets video lottery terminals. But the fact is that when we stress how lousy the business is, we turn off legislators. And despite the presence of a number of legislators and staff members here, the fact is that the legislative leaders and the top legislative staff dislike racing legislation intensely. They regard racing—from the tracks, to the horsemen, to the OTBs, and even the

breeders—as schnorers. They're seen as small time beggars looking for handouts from the legislature. How do we as an industry tell the legislature that someone who is wealthy enough to own a stable of race horses or own a band of broodmares merits more money for purses or breeders awards? We are seen as exponents of corporate welfare. Again, stressing the failure of our business model casts us out as losers. We look and sound like Yogi Berra. If the people don't want to come to the racetrack, you can't stop them.

Warren Desantis, for a decade—basically in the 1990's—ran Saratoga Harness. When he showed up in Albany, he'd be doing imitations of Fred Sanford having the big one. You'd see legislative staffers—behind his back—who would be doing imitations of Warren's "they're killing me" sobs.

So why do we insist on this construct that makes people in the racing industry look like losers—and incidentally, no different than a stereotypical horse player?

Partially because we don't know better. We've always done it this way. It's a tradition. Even when business was good we came in to complain that the legislature could make things bad.

And since the legislature truly hates dealing with racing issues, the legislature is always looking for a racing consensus. The leaders will say, "If you guys can agree, we'll give you what you want."

But the sad fact is that, other than issues upon which everyone agrees because we're expanding the racing pie—lower state taxes on racing, internet wagering, VLTs—there have to be disagreements. Tracks and horsemen and OTBs are always going to disagree. Harness tracks and thoroughbred tracks are going to disagree. That's the nature of the game. You can't anticipate consensus and even if there are enough tradeoffs to make for an agreed upon bill for a year, there's clearly no guarantee that the "consensus legislation" is actually going to work. We have "consensused" and "omnibused" ourselves out of business.

How do we emerge into a world of racing where anyone can know anything, and leave the world where nobody knows anything?

I don't know. If I knew, I'd be bidding on the NYRA franchise. But while I don't know what will work for the business of racing, I do have some ideas for what will work for the government side of racing. Clearly the state can take some actions that will benefit people throughout racing.

As simply put as I can see it, we need three things: info, ethics and action.

I think the need for information starts the process, which I further translate into research and transparency.

What happened at NYRA over the past decade? We still really don't know.

The State Comptroller's Office has for years stated that NYRA owes millions in franchise fees, but we never get any finality. We never actually find out

what the Tax Department's decision on NYRA taxation actually is. Was the Comptroller wrong or right? Was the Comptroller right or wrong when he said that NYRA couldn't deduct its accrued but unpaid interest on its loans from the state? We don't know.

Was NYRA right about saying that the Pataki administration had obstructed its efforts to get VLTs at Aqueduct?

What has been the effect on the bottom line of rebates at NYRA? Were any guest simulcasting sites given preferential rates by NYRA?

Are the horsemen right when they say that NYRA has diverted millions of dollars earmarked for purses into operational costs? When NYRA diverted horsemen's moneys in the past, why wasn't this the crime of larceny?

Why are VLTs so seemingly successful at Saratoga and Finger Lakes but are underperforming so much

at Yonkers, Batavia, and Vernon? For once, I'd like to see some answers and not fog. Let's find out.

And information should mean real transparency.

We still find that the bulk of the NYRA monitor's report is sealed under the pretext that it might involve criminal accusations. It should be clear now, twenty months after the report, that no criminal prosecutions are forthcoming, and this report should be available to all.

Ironically, despite the monitor, we only got some measure of transparency at NYRA when NYRA went bankrupt. Now for the first time, we get a monthly statement on NYRA's losses, we find out who NYRA's creditors are, and we find out who NYRA pays its moneys to. Bankruptcy has given us the greatest measure of transparency at NYRA. For example, we now know that NYRA lost another \$2.4 million last month.

Ethics. There are so many issues here, I barely know where to start. I estimated that Jeff Gural,

who now owns interest in two harness tracks—Vernon Downs and Tioga Downs—contributed over \$180,000 to New York elections in the past election cycle. Last week in a speech, Jeff noted that New York politicians were not bashful in seeking contributions.

It's time for some reticence. Clearly, we ought to ban contributions from those seeking the NYRA franchise. We ought to consider limitations on contributions from facilities with VLTs. One of the State Comptroller's responsibilities is to audit NYRA. If we want these audits to look legitimate, the Comptroller and candidates for comptroller should not be taking any contributions from NYRA or its successors.

And the state has to start looking at itself. If you think that the NYRA property is state property, you ought not be holding any fund raisers there. If you're worried about appearances, you need to think about the issues raised by having a governor's box or state agency boxes at the tracks. Is there or was

there ever any reason to allow legislators and staff free passes to the racetracks?

Action. This in concept is easy. Racing is in trouble. We need laws that encourage overall growth in the industry.

That means allowing racetracks to have greater freedom in reducing takeouts, letting racetracks and OTBs develop systems to work jointly to make it easier to place wagers, and making it easier to supply wagering information to bettors. Let us help tracks to invest in equine safety. Let's make sure that legislation stimulates consumer demand for the horse racing product.

I wrote a draft proposal one and a half years ago for the erstwhile Friends of New York Racing under which everybody in New York racing shared in the benefit of a bet on out-of-state tracks. I know the proposal is dead, but we need a structure which rewards added handle on racing.

If there's anything that the government can do to help racing, it may be to actually combat drugs in horse racing. We need strict criminal laws for people who intentionally use drugs to affect the performance of horses. And we need research dollars and investigators to better protect the public. Most everybody inside and outside racing believes that racing is increasingly affected by drugs, and it ought to be obvious that racing commissions lack the resources to stop the problem. We're always two or three steps behind the cheaters. It's time to make government proactive.

Finally, let's hope we see tough but fair questions about the franchise applicants. Look, there clearly is reason to be skeptical about the process. The initial release talked about government experts in racing reviewing the applications. I heard from some of the people whom I considered to be the government experts on racing and even they believe that government expertise in racing is an oxymoron.

There are the generic issues that need to be raised.

The bidders who actually followed the ad hoc process ought to get some credit.

The bidders who have changed their bids need to be asked for their reasoning in changing their bids, and this has to be considered against them.

The new bidders—who all expressed initial interest in the franchise—have to be asked why they didn't bid last August.

Who has actually worked on and prepared the bids?
Who has been paid what by the bidders?

How in the world can you measure Steve Wynn's or the Steinbrenner family's ethics? How do you demarcate whether Steve Wynn has better ethics than Frank Stronach or Steven Duncker or Donald Groth?

Let's ask tough questions of the individual bidders.

On Excelsior, who actually is Richard Fields?
Whatever became of his catch a rising star comedy clubs? What's the status of his litigation with Donald Trump? What will be the role of William Mulrow?

What was Jerry Abbruzzese's role at Empire? Is Empire's coalition still willing? How can Magna Entertainment, with its massive losses and debt, finance anything new? Is Churchill under entirely new management still involved? What's the relationship between Friends of New York and Empire Racing?

Have there been salary increases at NYRA in the midst of its business problems?

Without Bill Nader, is there a soul at NYRA with any significant racing management expertise? In fact, does Don Groth at Catskill OTB have more personal experience in the horse racing business than NYRA management, Steve Wynn, and Capital Play have collectively? What's the attendance and participation of NYRA board members at its

meetings? Why didn't NYRA completely overhaul its board after its scandals? How do NYRA's lawyers have the chutzpah to file a brief alleging a 25-year conspiracy by the state to take away NYRA's properties, when NYRA subsequently hires Stanley Fink as its lobbyist, and now has Mike Del Giudice—the number two in the Cuomo administration—as its vice chairman, and has Brad Race—the number two to Governor Pataki—as one of its lobbyists.

I started this at the beginning with the notion that nobody knows nothing, and I can only hope that government—through legislation, regulation and investigations—starts us on a process where we actually do know something. The fans and the people who earn their living through racing deserve no less. Nobody knows anything might work for the movies. It shouldn't work in horse racing.