

## NYRA and Bankruptcy: Preliminary Thoughts

Since the New York Racing Association [NYRA] has filed for bankruptcy protection on November 2, 2006, how will this impact New York racing, and what conclusions can we draw from this event? I can say with certainty that I have no idea what the future will bring for New York racing. I also have a most limited grasp of bankruptcy procedures but I do have some preliminary thoughts on what happened.

1. Bankruptcy hardly means the end for racing in downstate New York or NYRA. Finger Lakes Race Track ran as a licensed track for years through much of the late 1960's when it was bankrupt.

2. What became of transparency? I personally get tired of focusing on this issue, but the facts are that (despite all the talk of transparency between 2003 and 2005) transparency in New York racing is non-existent. We have never learned what was contained in the sealed reports of federal monitor Neil Getnick on NYRA even though the asserted basis of such confidentiality – that the reports might be used in future criminal cases – is no longer remotely creditable. It is manifest that these reports will never be the subject of any criminal actions.

Similarly, we still know no little of the way that the NYRA board conducts business. We don't have access to NYRA salaries and whether they have been raised even when NYRA has been in financial distress. (See generally [http://www.governmentlaw.org/files/saving\\_NYRA.pdf](http://www.governmentlaw.org/files/saving_NYRA.pdf) on how I thought in 2005 that NYRA should proceed and just how little there is in the public record on NYRA issues. Will we ever learn what happened with the horsemen's funds? Also from 2004 there is [http://www.governmentlaw.org/files/transparency\\_now.pdf](http://www.governmentlaw.org/files/transparency_now.pdf))

We know from the NYRA bankruptcy petition that the NYRA trustees voted for the bankruptcy filing at its October 11 meeting leaving the timing of the filing to a committee of NYRA officials. We don't know the vote on this resolution. We don't know if any alternatives to this resolution were discussed or voted on at this meeting. Given the harsh criticisms issued by NYRA at Governor Pataki, wouldn't it be interesting to know how the Pataki appointed trustees at NYRA (Heffernan, Broman, Fried, Cornacchia, Subotnick et. al.) voted? What about the votes of the trustees closest to Senator Bruno (Hettinger and McGinn)? Why wasn't the bankruptcy vote disclosed to the public immediately after the 10/11 meeting? Had there even been a previous vote by the trustees on bankruptcy?

3. Charlie Hayward's bankruptcy affidavit takes incredible shots against Governor Pataki's administration, the agencies under the governor's control, and against Carole Stone, the chair of the NYRA Oversight Board in particular. Organizations that have been created by and often dependent on the State do not generally make these kinds of attacks at anyone, even against a lame duck administration. <http://www.timesunion.com/capitol/content/nyraaffadavit.pdf>

Here are the major shots:

A. NYRA's Chapter 11 filing was caused in part by "an inability or object failure ... to take appropriate actions in a timely manner." Pg.2.

B. NYRA's filing was also caused in part by "interference by the State Agencies in NYRA's business activities and the thwarting of NYRA's efforts to efficiently operate." Pg. 2.

C. Despite the best efforts of NYRA and MGM, as of the date hereof, the project remains stalled because, despite repeated promises to the contrary, State Agencies have failed to grant the initial necessary approvals and, in a blatant attempt to stall the process, have continued to heap additional requirements on NYRA and MGM, each of which has been met." Pg. 12.

D. "This delay and ongoing presentation of meaningless hurdles is difficult to comprehend ..." Pg. 12.

E. On or about September 21, 2005, as the Sale RFP Process was getting underway, and arguably without having authority to do so, the Oversight Board sent NYRA a letter in which it asserted that NYRA could not proceed with the sale of the Ancillary Property without regulatory approval and demanded, on an expedited basis, numerous documents and other information from NYRA purportedly related to the potential sale. The Chairman of the Oversight Board also made statements to the media in which she asserted that NYRA could not sell the Ancillary Property without the approval of the Oversight Board, the Racing and Wagering Board, and possibly the State Legislature." Pg. 13.

F. "NYRA determined to place the sale on hold as the uncertainty caused by the Oversight Board's arbitrary action would certainly reduce the proceeds of any sale, if not make a sale impossible. Indeed, due to the arbitrary and capricious steps undertaken by the Oversight Board, only one broker responded to the Sale RFP Process." Pg. 14.

G. "The Racing and Wagering Board advised Sotheby's that it objected to the sale of the Sporting Art and threatened legal action against Sotheby's if it did not remove the Sporting Art from the auction. That same day, in response to the Board Letter to Sotheby's, Sotheby's withdrew the Sporting Art from the auction. Once again, NYRA's efforts to avoid bankruptcy were frustrated by a State Agency." Pg. 14 -15.

H. "On February 1, 2006, NYRA requested a deferral of all principal payments until January 1, 2007. As of the Commencement Date, the ESDC had not responded to this request." Pg. 16.

I As set forth below, it is this condition that has become the bottleneck for NYRA's financial viability. For, with each condition or commitment satisfied, in order to withhold funds that have been legislatively appropriated, the Chairman conjures up additional requirements." Pg. 17. referring to Carole Stone

I. "The First Amendment (to the MGM lottery agreement) reflected changes in the permanent financing documents increasing the project cost to account for inflationary increases caused by the State's delay, and also clarified the formula that is the basis for MGM's management fee." Pg. 18.

J." More than three years after NYRA and MGM entered into the Consulting and Management Agreement to develop and manage the VLT Facility, nearly one year after the State beseeched and persuaded NYRA not to file chapter 11, and a month before the VLT Facility was proposed to come online, construction of the VLT Facility remains stalled in the bureaucracies of the State Agencies." Pp 19 – 20.

K. "Unfortunately, notwithstanding such limitations, the Oversight Board has attempted to, and in certain circumstances, successfully exercised authority over NYRA's financial operations and, as discussed below, has arbitrarily caused funds that had been appropriated to NYRA to be withheld." Footnote 3 at Pg. 4.

L. "The Subordination Agreement was submitted to the Oversight Board for approval in June 2006. The Oversight Board has failed to address the Subordination Agreement." Footnote 11 at P. 9.

M. On October 30, 2006, the Oversight Board passed a resolution affirming its prior obligation to release the \$19 million agreed to in the MOU and previously appropriated by the State legislature. Unfortunately, in doing so, and consistent with its prior efforts to arbitrarily inject itself into NYRA's operations, the Oversight Board again layered such release with numerous conditions and the Oversight Board's prior approval." Footnote 21 at Pg. 19.

4. New York City OTB received one potshot in the Hayward petition with the NYRA president stating "As a result, NYRA has been unable to collect approximately \$11,500,000 from New York City OTB for NYRA's share of the Takeouts and use of NYRA's simulcast signals. This failure to pay is one of the very reasons that NYRA was forced to commence this chapter 11 case." Pg. 9

5. How did NYRA make its decisions on what local creditors to pay? On real property taxes, there are no debts to Saratoga County governments, but there are \$17.9 million in debts to the Town of Hempstead for Belmont Park. There is also a \$3.3 million debt owed for real property taxes to the City of New York? On Belmont Park, did NYRA elect to pay property taxes to the County of Nassau and the local school districts but not pay the Town of Hempstead? When were the real property taxes paid? Did the trustees decide to pay the Saratoga communities (where NYRA has significant public support)

and not the metropolitan New York governments which have little concern over NYRA's existence?

6. What is the story with Lien Gaming? NYRA owes the rebating firm of Lien Gaming \$1.4 million as a trade debt. Lien Gaming is the off-track wagering firm out of North Dakota that is the successor to Racing Services Inc. which was convicted of operating an illegal gambling operation. 34% of Lien Gaming is owned by famed horse racing bettor Ernie Dahlman who has been a friend of former NYRA Chairman Barry Schwartz. How was the decision made not to pay Lien Gaming? (There must be other simulcast purchasers that NYRA has negative settlements with. There are often negative settlements with Nevada simulcast sites.) Why are there no NYRA debts remotely like Lien Gaming's debts?

7. NYRA owes \$360,000 to Sports Publication Productions at the 7<sup>th</sup> floor of 100 Broadway. This appears to be the Daily Racing Form which has the same address. What was this business activity? NYRA President Hayward was formerly the CEO of the Racing Form. How does this affect Racing Form coverage of NYRA issues?

8. The consulting firm of Safir Rosetti is still owed money by NYRA. Safir Rosetti's work seemed to have been performed in 2003. Yet, there are no debts listed to NYRA's monitor. (It may be that the monitor's is still owed moneys as part of NYRA's debt to the federal prosecutorial offices.) Was the monitor paid in preference to Safir Rosetti?

9. Will we ever learn what really happened at the Lottery Division? NYRA's lottery story is always at variance with the Lottery's own version of the facts. Is there some way to actually learn what happened and whether political forces played a role in what should not have been a political decision?

Who is right when you have a conflict that reads like this: The Lottery states, "Contrary to statements made by NYRA, the Lottery Division received NYRA's restated and amended MGM Management Agreement during the second week of August. Since then, the Division has met with the parties on numerous occasions to attempt to resolve the remaining issues that have been caused by NYRA's past and current fiscal problems - the same problems that have led NYRA to state that it may file bankruptcy. In light of the current situation, the Division cannot proceed until these issues have been resolved and the State's interests have been protected." Without Lottery approval, construction cannot resume on the Racino, meaning no Racino for NYRA. The NYRA responded, saying it had submitted the amendment back in April and that if it got the VLT license it wouldn't have to file for bankruptcy. "Once the Lottery approves the MGM management agreement, which will allow the Oversight Board to release funds from the already-approved state loan, bankruptcy talks disappear," "The Day At The Races," New York Daily News, October 7, 2006

10. NYRA's early statements on its pension obligations were totally off base. NYRA, according to its filing, owes \$12.4 million to the Pension Benefit Guaranty Corporation. Yet a NYRA spokesman in 2005 said the association "'will have made all of the payments necessary for 2004,' as well as the \$1.3 million contribution for the second quarter. He added that the association received a deferral for its contributions to the PBGC, and that its pension plan is not in default." "A Slight Handicap: NY Racing Falls A Little Behind," Pensions and Investments August 22, 2005.

"'We did get a deferral,' ... We are not in default.' ... The failure to pay the pension funds is "standard operating procedure," and that NYRA is making regular payments to reduce the liability." "NYRA Faces New Lien Over Pension Funding," Albany Times Union August 13, 2005.

A NYRA spokesperson said, "We intend to have the pension fully funded no later than September of this year... It's just a cash-flow issue." "NYRA Faces Pension Deficit," Albany Times Union, May 25, 2005.

11. Why are there so few racetracks as creditors? Apart from Lien Games – which is an OTB purchaser of NYRA's signal – no racetracks are among NYRA's major creditors. Beyond that, only a small number of tracks - Portland Meadows and Wyoming Downs - are even listed as creditors.

12. Does the State have a game plan? NYRA has been threatening bankruptcy for a long time, and it may be that the State is playing the Claude Rains/Casablanca game. They are shocked – shocked – that NYRA is going into bankruptcy. While NYRA blames the State for its current problems, it seems reasonably clear that the State has by and large carried NYRA for years. Wouldn't a private creditor have taken some action to collect on NYRA's debts (now amounting to close to \$100 million to a variety of State agencies)? Isn't this especially true in the case of the former Thoroughbred Racing Capital Investment Fund which is owed \$76 million by NYRA and has probably received relatively nothing from NYRA over the past decade? State inaction on NYRA's debt has made the State an enabler of NYRA's victimization.

13. How ironic is it that the current Pataki administration and the former Cuomo administration end up in the same spot after 12 years each getting blamed for NYRA's problems? Both administrations entered office as being considered particularly helpful to NYRA. The Cuomo administration extended the NYRA franchise and got NYRA a funding source through the Capital Investment Fund. The Pataki administration gave NYRA lower taxes, a higher takeout rate in 1995 that was then desired by NYRA, and it eventually approved NYRA's franchise extension. NYRA's trustees lavished campaign funds on the Pataki administration. Yet after three terms, each governor gets blamed for causing NYRA's financial problems.

14. Under the bankruptcy code, a debtor in possession (in this case NYRA) can go back and avoid preferences made in the 90 days before the bankruptcy filing. These preferences were payments based on antecedent debts made by NYRA in the past 90

days. Were there any preferences given, and will NYRA use its powers to avoid these preferences?

15. Does anyone know what regulatory powers the State still retains over NYRA? Valid non-revenue related laws of the state apply to the debtor in bankruptcy, and housing codes, consumer protection laws, and environmental laws still apply to NYRA. Thus, NYRA could not lose its franchise for a financial failure such as its inability to pay funds to the State breeding fund. But what would happen if the Racing Board, used its powers to assign dates in such a manner that it would make it financially unfeasible for NYRA to operate (i.e. You have to race 7 days a week at Aqueduct throughout the winter.) Would that be permissible as part of the regulatory authority of the State? Given NYRA's ability to hire the highest priced legal talent (for example Weil, Gotshal and Manges (with \$1.05 billion in gross revenue last year) for the bankruptcy petition and a debt listed for Wachtell, Lipton, Rosen and Katz which had \$3.8 million in profits per partner last year) – regardless of its financial condition – NYRA's attorneys surely have an answer to this question. The State may still be waiting to get into the game.

16. NYRA filed its bankruptcy petition on the Thursday evening before the Breeders Cup. When the executive director of the State Commission on Racing in the 21<sup>st</sup> Century (in I recollect 1993) suggested that it would release its report on Belmont week to take NYRA off the lead story in the sports pages, he was severely criticized. When the Racing Hall of Fame used to name its incoming inductees during the week before the Kentucky Derby, it was criticized for drawing attention away from the Derby. The Hall of Fame ended up changing the timing of its induction announcement. Here, NYRA announced Chapter 11 on perhaps the busiest non-Kentucky Derby horse racing news day of the year. Couldn't NYRA have waited until Monday November 6? Was there a reason – other than to try to limit media coverage of the story – for the timing of the NYRA bankruptcy petition?