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**THE CALIFORNIA HORSE RACING BOARD
BOOTS HOLLYWOOD PARK**

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The California Racing Board Boots Hollywood Park

Has there ever been a sillier decision made by a racing commission than the California Horse Racing Board's 5-1 vote not to permit Churchill Downs' Hollywood Park to close pari-mutuels at post time rather than at the actual time that the race went off? Speaking as former commissioner who made more than his fair share of bum decisions, I would rank this decision as one of the poorer ones ever made by a commission. It's not that the actual result makes awful public policy. I'm not sure I would favor it if I were running a racetrack, but the decision was properly the racetrack's call. The decision by the California Board represented a ridiculous notion of what the role of a racing commission is supposed to be.

Hollywood had asked the Racing Board to waive Rule No. 1967, which states, "Coincident with the start of the race, the stewards shall lock the pari-mutuel machines and shall close the wagering in the race..." There were alternative ways of handling this waiver request, all of which would have avoided a decision on the merits by the Racing Board. If it wished to rule in favor of Hollywood, the Board could have interpreted the rule as simply mandating that all pools be closed by off time. This view of the rule would have required that pools be closed by off time but would have permitted Hollywood to close the pools at an earlier time. Thus, the Board could have said that as long as the pools were closed by off-time, the rule did not prohibit Hollywood from closing wagering at an earlier time. On an analogous note, the Board might have said that the off-time requirement of the rule applied only to on-track wagering and that the track was authorized to close all off-site pools at an earlier time. Chairman Alan Landsburg of the California Board, in fact, offered this as a compromise but was turned down by the Hollywood Park representatives.¹

The Board could also have tried alternative procedural approaches, which would have summarily denied relief to Hollywood. If the Board assumed that Rule 1967 mandated that an off time pool closure, it could have simply said that its rules may not be waived. There is significant case law that is to the point that an agency is not authorized to waive its own rules, "Once promulgated, the rules made by an agency to govern its activity cannot be violated or waived by that agency. Agencies are bound by the rules they promulgate until they amend or rescind them..."² While there may be waiver of rules when they affect procedural issues, there is no waiver where the waiver affects the substantive rights of individuals.³ Alternatively, if the Board believed that rule waivers were authorized, the California Board could have scrutinized Hollywood's request more intently and determined that Hollywood was not really seeking a waiver. A waiver of a rule would normally involve a one-time or limited time exception, based on

¹ Kevin Modesti, "Odds Choice: Board Says No," Daily News of Los Angeles, p. S 12 (November 22, 2002)

² 2 Am. Jur. 2d Administrative Law, §237 (1994)

³ See 73 C.J.S. Public Administrative Law and Procedure § 101 (1983); cf. Lake Placid Club, Inc. v. Abrams, 6 A.D. 2d 469 (3rd Dept. 1958).

an emergency or other special circumstance. In this instance, Hollywood was seeking at least a month long exception, not based on a special circumstance but based on the general perception that patrons were fearful of past posting. This is not a true waiver of the rule but actually a broad challenge to the rule itself. Under these circumstances, the Board's response could legitimately have been that Hollywood was not actually seeking a waiver but was asking the Board to rescind its rule. Therefore, since Hollywood was not requesting a true waiver, its request for a waiver should be denied.⁴

The point here is that once the Racing Board decided the waiver on the merits its decision was clearly the wrong one. The primary focus of a racing commission ought to be to insure the integrity of racing. If a management decision by a racetrack actually increases integrity or even the appearance of integrity, absent potential harm to horses or riders or unfairness to horseplayers, that decision ought to be applauded. It is hard to imagine a commission acting to block a management decision that might actually increase the perception of integrity.

Hollywood Park presented the Racing Board with evidence from a fan survey that 68% of bettors believed that there are likely to be fraudulent bets after the races start and that 40% of fans believed that it was possible to place a bet after betting was supposedly closed.⁵ In the wake of the Fix Six controversy, it is hard to dispute the belief that racing fans don't currently trust the tote system. In a business where consumer confidence is paramount, Churchill was trying to directly address the consumer confidence issue.⁶

Churchill Downs' tracks, in order to combat this perception of wrongdoing, took the position that in order to end the perception of past posting, and also to eliminate the potential for post-of time cancellations of bets, betting would stop at post-time, which in most cases would be 1 to minutes before the actual race started. This corporate policy was implemented at Churchill Downs, Hoosier Park, and Calder, where an alteration or a waiver of the rules was not necessary. It did not get its way at Hollywood.

While not questioning the fan survey or the idea that fans are distrustful of the tote industry, the commissioners articulated a number of reasons why they believed that there was no reason to change the zero- to post system. Almost all the possible rationales voiced at the Board meeting can be easily dismissed as fatuous, trivial, or poorly conceived.

- 1.) One argument was that there was a need to establish a uniform time for betting to close in the state.⁷ If California were an island, this concept of a uniform non-confusing closing time might make some sense, but where Californians are

⁴ See *Tribune Co. v. F.C.C.*, 133 F. 3d 61 (D.C. Cir. 1998); 1 Pierce, Administrative Law Treatise, §6.6 (2002).

⁵ Modesti, supra at note 1; Bill Christine, "Plan Is Nixed by Racing Board," *Los Angeles Times*, Sports, Part 4, Page 3 (November 22, 2002).

⁶ Jason Ader, "Win, Place, Pick," *Global Gaming Business*, 10 (December 15, 2002)

⁷ "Hollywood Park Loses Bid to Shut Betting Two Minutes Before Start of Race," City News Service, (November 21, 2002); Debbie Arrington, "CHRB Refuses Early Bet Cut-Off Request," *Bloodhorse.com*, November 22, 2002.

betting on New York races – where the betting closes when the first horse reaches the gate and on other Churchill-owned tracks – where betting closes at post time, this perceived need for a uniform wagering closing time is a pipe dream. With interstate simulcasting, a single state cannot enforce a uniform closing time policy.

Even if this argument had any validity, it was undermined by Chairman Landsburg's suggestion which offered Hollywood the compromise of shutting off betting earlier for Hollywood's off-track outlets. Assuming that suggestion would have been a compromise acceptable to the full Racing Board, the notion of a two-tiered closing time meant that the Racing Board was not seriously committed to the need for a uniform closing time for wagers.

- 2.) There was no evidence of actual past posting.⁸ First of all, at this point in time, nobody at this juncture knows for certain whether there has been any past posting. The issue of past posting requires a thorough review of the entire racing industry, and "it is somewhat unclear as to what a wider investigation into racing's electronic wagering systems could bring."⁹

Most importantly, the point here is that perception is reality. If the fans think that past posting is ongoing, the sport needs to address their concerns. To categorically denigrate the past posting issue is to deny the reality of bettor frustration and mistrust. If the bettors think the game isn't on the level, they go somewhere else. There is a long-term risk of a decline in consumer confidence that "the entire industry must confront head-on."¹⁰ Rather than address the consumer confidence issue, the California Board has decreed that since they're confident in the system that should be sufficient for the patrons. It substitutes their perception for the bettors' conception and does nothing to improve the image or integrity of racing.

- 3) It leaves insufficient time for wagering.¹¹ If the Board truly believes this, then it could mandate a certain minimum amount of wagering time between races. But the fact is that the time between races at Hollywood is longer than at most other tracks. If Hollywood betting were shortened by two minutes, the betting time would be on a par with Aqueduct, Hawthorne, or Laurel.¹² Most importantly, if the Board truly believed that betting time was a real issue, it would be increasing the betting time at Los Alamitos and Cal Expo where the time between races is currently far shorter than at Hollywood.¹³ Finally, if the two-tiered earlier off-track closing time suggestion of Chairman Landsburg is the Board's position, then

⁸ Hank Wesch, "Golden Apples Has Running Start at Eclipse," San Diego Union-Tribune, p. D-3 (November 30, 2002); Debbie Arrington, CHRB: Past-Posting Not a Factor in State," Sacramento Bee p. C2 (November 23, 2002).

⁹ Jason Ader, *supra* at note 6.

¹⁰ Id.

¹¹ Hank Wesch, *supra* at note 8; Bill Christine, *supra* at note 5.

¹² This is based on a check of off-time from Equibase.com for December 18, 2002 and other dates.

¹³ The determination of the time between races at Los Alamitos is based on Equibase.com data. The information from Cal Expo is from the Cal Expo website.

the insufficient time for wagering rationale makes no sense since that suggestion would have shortened betting time for approximately 85% of the people who wager on Hollywood Park.

4) The early closing time would penalize fans by making them unable to respond to scratches at the gate or to horses balking or acting unruly at the gate.¹⁴ This is at least a legitimate, real concern, but there is no indication that the commissioners paid careful analysis to the problem. Careful analysis would be to find out how many late bets were made, how often gate events occurred and what percentage of fans took action due to these late gate events. A thoughtful racing commission would weigh whether these events were significant enough to balance off against the perceived gains in consumer confidence that would be achieved by insuring the betting public that there was no possibility of past posting. The one analysis of late wagering which was offered at the Arizona Race Track Industry Symposium earlier this month seemed to indicate that betting right before post was not a big deal in thoroughbred racing, although it did raise significant harness racing issues.¹⁵ Moreover, if the California Board was so concerned about gate issues, it could have taken other actions which would have directly protected fans. It could have followed New York's lead and mandated scratches of the entire entry when one part of the entry was scratched¹⁶ or New York's rule providing for consolation payoffs in Pick 3 wagers – rather than giving the bettors the post time favorite.¹⁷ At the very best, the California Board's notion of protecting horseplayers is totally underinclusive.

Finally, if Chairman Lansburg's compromise of letting wagers close earlier off-track was the majority position of the Board, the idea of protecting bettors falls by the wayside. If the need for late changes is so important for bettors, how can you authorize a compromise that will deny 85% of Hollywood bettors the right to make these late changes? Again, this is a real issue, but there is no indication that the California Racing Board paid anything more than lip service to this issue.

5) The change requested by Hollywood Park had no relation to the Pick Six scandal.¹⁸ This is an absolute non sequitur. Even if it had no relationship, the proper role of a racetrack is to insure consumer confidence in its racing product. If the consumers have major concerns about past posting, it is certainly a significant topic at any time for a racetrack or racing commission.

¹⁴ "CHRB Rejects Hollywood's Request for Early Close of Wagering Pools," Thoroughbred Times (November 22, 2002); Hank Wesch, supra at note 8; Kevin Modesti, supra at note 1; Bill Christine, supra at note 5.

¹⁵ Presentation of Steven Mitchell, Vice President, Wagering Operations, Woodbine Entertainment Group, Wednesday December 11, 2002.

¹⁶ Rule 4009.20.

¹⁷ Rule 4011.24. (g).

¹⁸ Hank Wesch supra at note 8; Thoroughbred Times, supra at note 14.

6) It might hurt handle.¹⁹ Frankly, this is the racetrack's business. They put up the capital. They should have a right to determine whether their investment decisions will be correct. If the racetrack legitimately thinks that this change is needed to protect racing in the long term, then it ought to be okayed. Racing commissions are not supposed to be micro-managing racetracks.

In almost every other context, the Racing Board does not second-guess the decision of a racetrack based on the belief that handle might be adversely affected. The Racing Board does not prevent Hollywood Park from running on Friday night even though out-of-state wagering might be adversely affected. It doesn't review bobble-head promotions to determine whether they're actually cost-effective. It doesn't oversee Hollywood's betting menu to determine whether it could more effectively increase handle. The Board's singling out of the stop betting issue, as the one issue upon which to focus its handle concerns is simply inappropriate.

On all counts, the actions of the California Racing Board fall short of the proper role of a regulator. It didn't help integrity. It didn't protect the bettors, and it interfered with a legitimate management decision to increase integrity. How wrong does it look to the general public for a racing commission to tell a racetrack that it went too far on the integrity issue? Perhaps the only groups looking as bad as the California Racing Board were some of the other California racetracks that stood silent on Hollywood's request despite their previous dedication and allegiance to deregulation.²⁰ Deregulation apparently was okay, so long as it didn't affect them.

¹⁹ Kevin Modesti supra at note 1; Hank Wesch, supra at note 8; Thoroughbred Times, supra at note 14.

²⁰ Debbie Arrington, supra at note 7.