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A WIN FOR THE AGENTS

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A Win for the Agents

In June of 2002, several jockey agents sued the New York Racing Association [NYRA] seeking to change the number of jockeys that can be represented by each agent.

The New York State Racing and Wagering Board's rules are silent on the number of riders that can be represented by agents. That has, by default, left the decision on the number of agents up to each individual racetrack. At Finger Lakes, agents are not restricted in the number of riders they can represent. At NYRA, by longstanding tradition and per NYRA's in-house rules, agents have been restricted to representing one journeyman and one apprentice. [This will hereinafter be referred to as the "single journeyman" rule.]

When the case was initially brought, NYRA Chairman Barry Schwartz was dismissive of the lawsuit and the work of the agents themselves. He was quoted in the Daily Racing Form of June 14, 2002 as saying, "They're the part of the industry that puts the least amount up. Their contribution is about zero. We'll see how much stomach they have. They've come to the right place if they want a fight. They're not going to dictate to me how racing is run here."

Chairman Schwartz has gotten his wish. He got his fight, but the problem is that the federal court decision in Anderson v. New York Racing Association, Inc., 2004 U.S. Dist. LEXIS 319 (SDNY 2004) may not be the result that he envisioned.

The initial case was brought only against the three stewards in state court. The stewards prevailed. In Anderson v. Hill, State Supreme Court Justice Omansky ruled against the agents. He found that the Equal Protection Clause the Commerce Clause did not apply to the "single journeyman" rule. Since the Racing and Wagering Board was not a named defendant, Justice Omansky also dismissed the charge that the Racing Board had granted excess authority to the stewards. He found that the State Racing and Wagering Board was an indispensable party and he granted the plaintiffs leave to refile against the Racing and Wagering Board. See "Decision of Interest Justice Omansky," New York Law Journal, June 23, 2003.

Undeterred, the plaintiffs proceeded to federal court suing only NYRA. The plaintiffs alleged "that only the Board has the power to regulate licensed jockey agents and that the New York legislature did not grant NYRA -- a private organization -- any rulemaking or licensing authority or any power to regulate the commercial activity of jockey agents." Anderson v. NYRA supra at 5-6.

NYRA moved to dismiss the complaint for failure to state a cause of action. District Court Judge Denny Chin, however, ruled against NYRA. NYRA had claimed that since it was a private actor it basically had carte blanche - as long as it complied with applicable human rights laws - to establish policies governing the jockey agents. The judge found that the case law allowing exclusions of licensees was inapplicable. The issue was not the exclusion of individuals but whether NYRA possessed "the authority to

issue a rule that limits the ability of an entire class of individuals to conduct business when those individuals by law are licensed and regulated by a governmental body -- the Board.” Id. at 7-8. Since Judge Chin found that NYRA’s line of cases was distinguishable, he ruled against NYRA’s motion to dismiss on this issue.

NYRA also argued that the plaintiffs articulated no legal theory upon which relief could be granted. Judge Chin quickly dismissed this argument. He found that two previous cases involving thoroughbred racing in New York had made the point that the licensing powers of the State could not be delegated to private persons and bodies. In Fink v. Cole, 302 NY 216 (1951), the New York Court of Appeals ruled that the private Jockey Club could not license participants in racing. In Halpern v. Lo menzo, 81 Misc. 2d 467 Sup Ct. N.Y. Co. 1975), a lower court found that the three stewards considered as a whole in New York could not suspend licenses since two of the three stewards were not State officials. Judge Chin thus found that “a fair issue exists as to whether NYRA has the power to create a rule that impacts on a jockey agent's ability to conduct business, when that agent otherwise meets the licensing requirements set forth by the Board. A fair issue also exists as to whether the Board has explicitly or implicitly abdicated a portion of its licensing authority to NYRA.” Id. at 11

Judge Chin thus ruled against NYRA’s motion to dismiss the agents’ claims. Judge Chin stressed that this decision was not a final ruling in favor of the agents. He noted that since the parties had “not fully briefed these arguments, and because there may be some factual questions (albeit limited ones), the issues are more appropriately addressed following the completion of discovery...” Id. at 12. Nonetheless, given the absence of any significant factual issues presented in this case, it will likely be difficult for NYRA to prevail before Judge Chin on the “single journeyman” rule.

Judge Chin’s decision contains some serious implications for all of racing. After this case, the question will be what house rules of a racetrack are valid. The standard apparently set out by Judge Chin – **whether a house rule impacts or regulates a licensee’s ability to conduct business** – is a most amorphous one. (Emphasis added) Nearly every house rule to some degree affects a licensee’s ability to conduct business. For example, NYRA and most racetracks set out some limitations on what kinds of shoes a horse can wear on a tracks’ turf and dirt courses. These rules surely affect the way that trainers and owners wish to conduct their business. They might wish to use shoes that are otherwise banned by a racetrack. Are a racetrack’s in-house shoe rules now questionable under Judge Chin’s theory?

There are numerous times in New York where the rules of the New York State Racing and Wagering Board specifically delegate to a licensed racetrack certain authority over the conduct of a meeting. Weights placed on horses are set at a certain scale except when they are stated in the condition of the race. (§4029.1). Racetracks can determine whether to divide overnight races or handicaps (§4021.4), who can be given special permission to be in the paddock (§4003.40), who can utilize telephones (§4004.4) and who can transmit information from the racetrack (§4004.1). The track’s handicapper determines the weight assigned to horses in handicap races, (§4020.3(k)) In these

instances, the State has specifically granted authority to the racetrack to exercise some aspect of its licensing authority. Can these delegations survive Judge Chin's standard of whether a house rule impacts a licensee's ability to conduct business?

Perhaps most problematical for New York State will be the issue of what powers can still be exercised by the stewards in New York State who are not State officials. In New York thoroughbred racing, two of the three stewards are private employees. One is selected by the Jockey Club, and one is selected by the racetrack. See §212 Racing, Pari-Mutuel Wagering and Breeding Law. Since the case of Halpern v. Lomenzo, supra, the two non-State stewards no longer formally take any action against a person's license. Only the State steward can fine or suspend a licensee. See §§4022.12, 4022.13. Yet, the stewards as a whole possess power over entries, scratches, and control over all officials and licensees. §§4022.10, 4022.11 They determine all fouls. §4035.2. The private stewards certainly impact and regulate a licensee's ability to conduct business at racetracks. Can this possibly be legal under Judge Chin's rationale?

It might be appropriate for Judge Chin to give serious thought to reconsidering his decision. If a racetrack can exclude a specific licensee for no reason, how can it not have the power to exclude a class of licensees for specific reasons? The power to exclude ought to include by reasonable implication the power to place general rules in place governing exclusions, and isn't that what NYRA has done with its "single journeyman" rule? Even under Judge Chin's rationale, couldn't NYRA accomplish its goal of restricting jockey agents under a different rubric. Couldn't NYRA repeal its house rule and simply proceed on an individual basis to exclude all jockey agents who represent two journeymen? Wouldn't that be acceptable to Judge Chin given his apparent acknowledgement of the general right of private racetracks to exclude individuals.

Moreover, the cases cited by Judge Chin on delegation of the licensing power involve cases where private individuals directly exercised the right to license, suspend, revoke, and fine licensees. In Fink, the private Jockey Club denied Fink a license. In Halpern, the private stewards collectively had the right to suspend and/or fine licensees. These were cases where the private entities controlled the actual workings of a State-issued license. They were not cases where a racetrack put in place general rules governing a licensee's conduct that were not otherwise contrary to the State's rules. NYRA's house rule in no way affect the rights of jockey agents to hold their licenses.

Why isn't this case seen in the way we look at a hospital? The hospital has a right to promulgate general rules governing the conduct of its licensed nurses, pharmacists, residents, and interns. It can determine whether to accredit individual doctors. These are certainly actions which impact the ability of professional licensees to conduct their business. Why aren't these hospital rules similarly suspect under Judge Chin's standard? What distinguishes NYRA's actions from that of a private hospital?

Even if you that there may be occasions in racing where the State's licensing power is being exercised by a racetrack, the central problem with Judge Chin's decision is the standard he has adduced for determining the validity of a racetrack's house rules.

Most any house rule - short of banning spitting or smoking - will impact or regulate a licensee's ability to conduct business. That ought not to be sufficient to declare them unconstitutional. Even if Judge Chin is right that these house rules are subject to scrutiny, the standard he has suggested does not work. It simply can't be the case that virtually all racetrack house rules are vulnerable to attack in federal court. Instead, at the very minimum, there needs to be some weighing of the interests involved. How significantly does the house rule affect the licensing process? What effect does the house rule have on the licensee's ability to earn a living? What interests are served by the house rule? Does the house rule impact on the integrity of racing? Does it serve a significant safety interest? Does it supplement existing State rules or policy?

Some reconsideration of this decision is needed, for as the Anderson case is written, racing has surely taken it on the chin.