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DERBY**

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80 New Scotland Avenue
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WINNING THE LOGO BATTLE AT THE DERBY

**Bennett Liebman, Esq.
Coordinator/Staff Attorney
Racing and Gaming Law Program**

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Winning the Logo Battle at the Derby

Judge John G. Heyburn II, the chief judge of the United States District Court for the Western District of Kentucky, two days before the Kentucky Derby, in a significant ruling found that jockeys would be allowed to ride in the Kentucky Derby with a patch displaying the logo of the Jockeys' Guild and that certain riders would be able to ride in the Kentucky Derby with corporate logos.

The case of Albarado v. Kentucky Racing Commission http://www.kywd.uscourts.gov/pdf/case_ruling.pdf actually involved two sets of plaintiffs. One set (denominated by the court as the "Albarado plaintiffs") sought the right to wear as part of their breeches the official patch of the Jockeys' Guild, which the court described as the "labor organization" of the jockeys. The other plaintiffs (the "Bailey plaintiffs") sought to wear corporate logo advertising on their breeches and their turtlenecks. Both challenged the constitutionality of Kentucky regulation, 810 KAR 1:009, Section 14 (3). This regulation strictly limits advertisements that jockeys can display in Kentucky. "Advertising, promotional, or cartoon symbols or wording which in the opinion of the commission are not in keeping with the traditions of the turf shall be prohibited." The jockeys sought a declaration that the regulation was unconstitutional and an injunction against enforcement of the regulation.

Pursuant to this provision, the racing stewards in Kentucky assessed fines of \$500 against those jockeys who wore the Jockeys' Guild patch during the Kentucky Derby of 2003. These fines were affirmed by the Racing Commission (which has been succeeded by the Horse Racing Authority), and these fines are till the subject of appeals in the state courts in Kentucky. In 2004, plaintiff Bailey was denied the right to wear a corporate logo during a previous race meeting, and on April 19, 2004 the Kentucky Horse Racing Authority advised jockeys that they would not be allowed to wear the Jockeys' Guild patch at Churchill Downs.

Preliminary Issues

The strongest arguments of the defendant were probably its procedural ones. The State argued that the federal court should abstain from ruling on these so long as with the 2003 fine cases were still pending in state court. The State took the position that the plaintiffs could adequately raise their First Amendment concerns in state court. Judge Heyburn disagreed with the State. He found that the instant action involved only a prospective declaration and did "not directly undermine the existing regulatory proceedings or the validity of the Authority's continuing regulation of thoroughbred racing." Therefore, federal abstention was not required.

Judge Heyburn also found that this was not a case warranting discretionary abstention. The federal issues predominated over the State's regulatory concerns. A federal decision would not "upset some delicate or intricate regulatory process," and the court would decide only the isolated First Amendment issue that was before it.

Kentucky also argued that there were other indispensable parties who had not been served as defendants in the case. The State argued that the case should not go forward without joining horse owners, horse trainers, and owners of racetracks as defendants. The court found little of merit in the State's argument. Any decision would only have a minimal impact on horse owners, horse trainers and racetracks. Most importantly, the specific regulation affected only jockeys. Nobody else's rights were at issue. Therefore, there was no reason to join additional parties.

The Substantive Complaint

The court found that as long as the plaintiffs demonstrated a valid First Amendment claim, then the injunction would be granted.

It viewed the Albarado plaintiffs slightly differently than the Bailey plaintiffs. The Bailey plaintiffs were engaged in commercial speech while the Albarado plaintiffs were private protected speech, not of a commercial character. Commercial speech was generally to be accorded less protection. Nonetheless, because, the Kentucky regulation as applied to the Albarado plaintiffs was content-neutral, both claims would be subject to the same general standard of intermediate scrutiny by the court. Basically, this amounted to application of a four point test.

The court would consider: (a) whether the speech was lawful and not misleading, (b) the government must assert a substantial interest in the regulation of speech, (c) the regulation must directly advance the interest of the government, and (d) the regulation must be no more extensive than required to serve the government interest.

Application of these standards made for a clear finding of unconstitutionality. Certainly, both the Albarado and Bailey plaintiffs were engaged in lawful and not misleading speech. While the court found that there might be a substantial interest in regulating the sport of horse racing pursuant to the "traditions of the turf" in order to avoid overcommercialization, the State offered no evidence that explained in any manner the "traditions of the turf."

Instead, the State argued that the regulation was necessary to protect the integrity of horse racing. The court found that while the integrity of racing was certainly a substantial interest, the actual regulation did not directly advance the interest of the government. The State posited that the regulation of logos would ensure that the racing stewards enjoyed an unobstructed view of the race. However, the evidence did not support this contention. The State's sole witness, Churchill Downs' steward Rick Leigh "could not describe a single incident in the last sixteen years there the regulation may

have served that purpose.” The court characterized Mr. Leigh’s testimony as that of a witness “who had no knowledge of matters so vital to the resolution of this action.”

The State also argued that the limitation on logos would prevent corporate corruption since it would preclude collusion among jockeys sponsored by the same advertiser. Again, nobody testified “that this regulation was intended to prevent corporate corruption.” The court found that while it was not supposed to second guess the agency’s judgment on the proper interpretation of the rule, the state “has provided no evidence to which the Court might accord any deference.”

Since the State’s regulation did not directly advance the interest of the government in protecting the integrity of horse racing, the court granted the preliminary injunction. The court however was cautious as to the scope of the equitable relief granted. All jockeys were permitted to wear the Jockeys’ Guild patch, but only the Bailey plaintiffs could wear corporate logos. Moreover, the court was to hold a further hearing to determine whether the relief granted to the jockeys would be expanded or made final. The State would also be given “an opportunity to consider the true purpose ad future of the regulation.”

The Future

Three points should be made about this case. First, the battle over the particular Kentucky regulation is not over. While Judge Heyburn ridiculed the State’s argument that the regulation helped to protect the integrity of racing, he nonetheless, suggested at various times that the regulation might legitimately protect the aesthetics of racing. Judge Heyburn noted that the “traditions of the turf” could involve the traditions that preserve a pristine appearance for the sport of kings. He suggested that the state” might establish a nexus between the state interest in preserving these ‘traditions’ and a regulation that limits speech to that in keeping with the ‘traditions.’” At the conclusion of his decision, he gave the state an opportunity to consider the true purposes of the regulation. Certainly, Judge Heyburn has given the state an opportunity to argue that aesthetics support the limitation on logos.

Two, while this decision is framed in terms of jockeys in Kentucky, there are serious implications for many other licensees in racing. A variety of state regulations precludes or limits advertising by owners of horses. For example, California has a rule which reads, “No colors may bear any symbols or markings which could be interpreted as for advertising purposes.” 4 CCR 1780. Other states have similar restrictions which limit but do not totally ban advertising through the use of logos or other marks on colors. CDR13-402-001 (2004) Section 6.06 (b)2; LAC 35:VII.8507 Additionally in California, “No stable name registration may be used for advertising purposes.” 4 CCR 1783. See also Mont. Admin. R. 32.28.707; N.H. Admin. Rules, Pari 321.05; N.J.A.C. § 13:70-5.11; 58 Pa. Code § 163.493; WAC § 260-28-020 006 06; CARR 003,§2156. In Massachusetts harness racing, the names of harness horses cannot be claimed for advertising purposes under 205 CMR 2.26. The United States Trotting Association’s rules allow for corporate logos on the colors of drivers, but the use of a logo or other

advertising insignia by a driver, although specifically allowed by these rules, shall nevertheless always be subject to scrutiny and evaluation by the judges of a meeting in determining whether said driver is properly dressed.” Rule 17 §12.(c). Indiana strictly bans jockeys from wearing logos. 71 IAC 7.5-6-3. In New York, a rider needs permission of the stewards and the owner of the horse before he and she can wear promotional material. 9 NYCRR §4041.6. Similarly, in New York, the Jockey Club is authorized to deny use of a stable name which is “contrary to the best interests of racing.” 9 NYCRR § 4026.15.

In short, if the First Amendment opens up the advertising floodgates, there are additional issues beyond those of jockey logos. There are issues about stable names, owner’s colors, horse’s names, and driver’s colors. Are broad regulations delegating advertising approval to stewards or the Jockey Club, without any standards, constitutional? Non-deceptive advertising restrictions in all of horse racing now are of questionable validity under the Albarado decision.

Third and finally, Judge Heyburn believed that authorizing jockeys to utilize advertising logos would not have a significant effect on the relationships between jockeys, and owners, trainers, and racetracks. He claimed that “whatever the decision . . . those relationships will not change so that the parties cannot easily adjust.” Despite these learned beliefs, Judge Heyburn, however, may have been looking at racing through rose colored binoculars.

Numerous relationship questions in Kentucky are already up in the air. The colors worn by a jockey in thoroughbred racing are, by tradition and rule, those of the owner of the horse the jockey is riding. While a specific State rule on this subject might fix this relationship, will an owner be able to have veto power over a jockey’s logo? What if a rider uses a logo that is a competitor of the owner’s business? In some states an owner is not allowed to use his colors to advertise his business, but could the owner get around this restriction by having the jockey utilize a logo advertising the owner’s business?

Similar issues will occur with the racetrack. Again, while a State rule could fix everyone’s rights, what happens when the State rule on logos is silent on the issue of what house rules can be put in place limiting the time, place, or manner of the logos? Can a racetrack limit ads to only those products it approves of? Could Churchill Downs ban a rider from wearing a Magna Entertainment patch? Could NYRA ban a rider from wearing an OTB patch? Could tracks ban a rider from wearing a logo for a tout service or an on-line casino? If Budweiser sponsors a race, can the riders be prohibited from wearing advertising from Miller? Is any house rule limiting the ability of jockeys to wear logos an improper private limitation on a State-issued license?

Thus, three major points need to be stressed. The Albarado case is far from over. The State of Kentucky could conceivably uphold its logo restrictions based on an appeal to the aesthetics of horse racing. The decision in Albarado has serious implications for licensees other than jockeys, and there likely will be many significant battles between

racetracks, riders, owners, and drivers over who can control what advertising can be worn at the racetrack.