

**By Chris E. Wittstruck, Esq.**



Chris  
Wittstruck

For many, the dirtiest word in the English language is, “change.”

Think about the storied American institution of Major League Baseball. For decades, two leagues played independent of one another, with the respective top two teams of the season meeting for a World Series. Everybody who played the field got up at bat. Then, regional divisions and “wild cards” were adopted; then, the designated hitter rule appeared; then in-season, interleague play was introduced. Eventually, ardent adherents to tradition found themselves on the outside looking in, their comfort levels forever shattered.

In our industry, change is also associated with controversy and discord. When earlier this year Yonkers Raceway renewed its experiment of contesting overnight races at the non-standard distance of 1 and 1/16 miles, divergent opinions abounded. Assuredly, when something new is tried, or for that matter simply suggested, there is bound to be friction. Don’t dare mention issues surrounding things like race day medication or whipping rules unless you are prepared to tolerate fervent debate.

To change or to stay the same; that is the question. Now comes a threat to a traditional claiming rule and, while the case involves Kentucky Thoroughbreds, the possible ramifications on the nationwide harness industry are apparent.

Major California Thoroughbred owner Jerry Jamgotchian brings the challenge. This is not Mr. Jamgotchian’s first crusade against the status quo in racing. Earlier this year, he won a victory in Federal Court in Kentucky in a matter involving commission payments in a dual agency horse syndicate transaction. Reportedly, the owner is also seeking to get major breeding syndicates to be more accountable to shareholders.

In the more recent matter, Mr. Jamgotchian is disputing the legality of the Kentucky rule that prohibits a claimed horse from racing at any track other than the one at which it is claimed, until that track takes entries for the final race card of the meet. In essence, the rule forces a claimed horse to stay at the track where it was acquired until that track shuts down for the meet. Jamgotchian wanted a horse he claimed during the Churchill Downs meet to race at Penn National Race Course and Presque Isle Downs, both in Pennsylvania, before the close of entries for the final race card at Churchill took place.

This type of rule is not unique, and its justification is more pronounced in Thoroughbred racing, where virtually all of the entries in overnight races emanate from the collection of horses stabled on the track’s backstretch. Theoretically, if claimed horses were liberally allowed to leave the grounds, such a circumstance would deplete the racing secretary’s available inventory, making it harder to fill races as the meet drags on. Of course, that theory doesn’t contemplate the potential for additional horses entering that particular facility after being claimed at other venues.

In any event, the thrust of Jamgotchian’s argument is that he has a property right in his horse, and that the Kentucky claiming rule illegally restricts his ability to utilize his property, and that the rule is otherwise unconstitutional in light of the Federal Interstate Commerce Clause.

The Interstate Commerce Clause has been construed to mean that only Congress can regulate commerce among the several states. The clause has been expansively interpreted. Thus, while it's obvious that elevator operators in a commercial building never leave the state during working hours, they are nonetheless protected under federal wage and labor statutes because they carry mail, freight and salesmen, and are thus engaged in the stream of interstate commerce. Similarly, the clause was used during the civil rights movement to find that hotels and restaurants were subjected to federal anti-discrimination laws as they serviced folks who were engaged in interstate commerce. Jamgotchian's point is that by restricting horse movement not just to other tracks in Kentucky, but to other tracks anywhere, Kentucky's rule is an impermissible restraint on interstate commerce, as its intended effect reaches beyond that state's borders.

Two things bolster plaintiff's case. First, in a challenge to a similar rule in California two years ago, Jamgotchian actually succeeded, as an opinion of that state's Attorney General suggested that the rule was not legally sustainable. Second, Penn National Race Course actually accepted Jamgotchian's entry, saying that it was up to Kentucky to enforce its own rules. The horse was scratched, however, allegedly due to enforcement by way of threats to Jamgotchian and his trainer received from the Kentucky Commission.

The outcome of this litigation will certainly have a distinct impact on harness racing in this country. For example, consider New York State Racing and Wagering Board Harness Rule 4109.3 (k):

Indiana has a similar rule, but with exceptions for stakes races and early and late closers:

Indiana Harness Racing Rule 71 IAC 6-1-3 (u) No horse claimed out of a claiming race shall race outside the state of Indiana for the earlier to occur of:

- (1) a period of sixty (60) days; or
  - (2) the conclusion of the last standardbred race meet under the jurisdiction of the Indiana horse racing commission in that year.
- (v) Notwithstanding the provisions of subsection (u), a claimed horse shall be allowed to compete out of state while on the sixty (60) day hold period in any stake, or early and late closer, it is listed as being paid prior to the claim

Not all challenges work. Not all changes are good. We will keep an eye on this quest for change and keep our readers posted. Yet, just like Major League Baseball franchise owners, horse owners have a significant interest in the sport in which they so heavily invest. They, too, have a right to advance their interests so as to enhance their respective investments. Whether or not this particular claiming rule is upheld, rest assured that attempts to modify, alter and adjust those things that are ingrained and deep-rooted will never stop. Such is the nature of a vibrant industry!

**Chris E. Wittstruck is an attorney, a director of the Standardbred Owners Association of New York and a charter member of the Albany Law School Racing and Gaming Law Network.**