

A Summertime Snapshot

By Chris Wittstruck



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While summer is a time for long-awaited excursions and some fun in the sun, the courts never go on vacation. Over the course of the last few weeks, aspects of several lawsuits affecting our sport and industry have been determined. Some of these judicial pronouncements deal only with a phase of a particular litigation, most involving whether certain claims brought are viable enough to proceed to trial. Others provide closure and finality to certain legal questions. Here's a rundown of some of the more important matters recently decided by courts that impact racing:

Cloverleaf Enterprises v. Maryland Thoroughbred Horsemen's Association: Cloverleaf, a conglomeration of Maryland Standardbred owners, is the proprietor of Rosecroft Raceway, the now-defunct 5/8ths harness oval located in the suburban Washington D.C. area. As in the case in the capitals of New Jersey and Massachusetts, the issue of alternative gaming at the tracks has been a political football in the Annapolis statehouse for several years. By 2008, Cloverleaf could no longer afford to conduct live racing at Rosecroft. The track then tried to survive solely as a simulcast center in the hopeful anticipation that slots and/or table games would soon be approved.

Even before live racing ended, Cloverleaf's business was completely dependent upon its ability to import a full complement of Thoroughbred simulcast signals. Pursuant to the Interstate Horseracing Act of 1978, Cloverleaf could not import any out of state signals without the permission of, among others, the Maryland Racing Commission and all tracks within 60 miles of Rosecroft. Pursuant to Maryland law, the track could not import in-state signals either without permission. To this end, in 2006 Cloverleaf entered into a "Cross-Breed Agreement" with the Maryland Jockey Club, the entity representing the Pimlico and Laurel Thoroughbred tracks close to Rosecroft, as well as the state's Thoroughbred horsemen and breeders. The agreement called for Rosecroft to make \$5.9 million in annual payments to the Thoroughbred industry in exchange for the required consent for interstate imports, as well as the right to import in-state Thoroughbred racing conducted at the two Maryland tracks.

By August 2008, Cloverleaf could no longer come up with the money necessary to make payments under the agreement. The parties negotiated for a period, but attempts to finally resolve the breach ended in Spring 2009. On April 29, 2009, just days before the Kentucky Derby, the Maryland Jockey Club and Thoroughbred horsemen petitioned the Maryland Racing Commission to revoke Cloverleaf's right to import out of state signals at Rosecroft based upon the breach. The Commission revoked Rosecroft's simulcasting privileges over the strenuous objection of Cloverleaf that the action violated applicable state statutes involving notice and opportunity to be heard regarding the Commission's action.

Cloverleaf immediately filed a lawsuit, and on the day before the Kentucky Derby received a "temporary restraining order (TRO);" a judge's ruling stating that until a hearing on Cloverleaf's objections was held, it could continue to import simulcast signals from out of state. Still, the Thoroughbred interests were successful in blocking Rosecroft's right to receive the in-state signal from Pimlico of the Preakness Stakes, Maryland's premier race, on May 16. Two weeks later, Cloverleaf filed for Chapter 11 Bankruptcy protection.

The allegation in a subsequently filed lawsuit is that both during the period before and possibly after the TRO's issuance, the Maryland Jockey Club and the Thoroughbred horsemen individually or collectively conspired to violate federal antitrust laws by encouraging out-of-state racetracks, horsemen and advance deposit wagering entities to stop sending their signals to Rosecroft before and after the Kentucky Derby, causing extreme financial detriment to Cloverleaf. Among other allegations, the harness oval's operators alleged that the Thoroughbred groups were attempting to take over all racehorse wagering in the state of Maryland, and thus engaged in an illegal restraint of trade and unlawfully interfered with Cloverleaf's contracts with its simulcast partners. In fact, Cloverleaf lost many of their important Thoroughbred simulcast partners in the wake of the Commission's ruling and the defendants' alleged actions. The defendants moved to dismiss Cloverleaf's complaint.

In a decision rendered on August 6, 2010, the United States District Court in Maryland ruled on the motion to dismiss. The court found that the Thoroughbred defendants were within their contractual rights when they withdrew their consent for Rosecroft's simulcasting of races held at the Maryland Thoroughbred tracks pursuant to the breached agreement. It also, however, refused to dismiss the complaint insofar as it alleges an attempt by the defendants to illegally monopolize simulcasting in Maryland by conspiring to put Cloverleaf out of business through the urging of out-of-state racing venues to sever their relationships with Cloverleaf.

It is important to note that the court did not find either the Maryland Jockey Club or the Thoroughbred horsemen liable for Cloverleaf's antitrust claims. Rather, the decision merely permits the lawsuit to proceed to discovery and trial phases on the remaining valid claims asserted. Still, this preliminary decision is important in that it provides insight as to the interaction between federal antitrust laws and the federal interstate horseracing act. While it would appear that individually acting racetracks and horsemen's groups may exercise their contractual or statutory rights to withhold or withdraw simulcast consent with unfettered discretion, encouraging others to follow suit and join a particular track or association in blocking simulcast signals to a recipient might be considered a group boycott and an unwarranted restraint of trade, among other things. Bolstering Cloverleaf's claims in this regard is that it ceased all operations at Rosecroft on July 1 of this year and is now effectively out of business.

Maryland developer Mark Vogel has been attempting to purchase Rosecroft out of the bankruptcy proceedings for more than a year. If he is eventually successful, final decisions in both the antitrust lawsuit and in the statehouse regarding racino legislation

might well determine if Maryland's oldest harness track experiences a renaissance or a demolition. A hearing has been scheduled for October 7 to determine if the Chapter 11 reorganization filed should be converted to a Chapter 7 liquidation case. Clearly, Rosecroft is running out of time.

New York Racing Association, Inc. v. Nassau Regional Off-Track Betting Corp.: In yet another action involving simulcasting, a New York State judge has upheld a racetrack's right to sue an off-track betting entity for unauthorized use of its live signal.

The New York Racing Association (NYRA) maintains racing at the state's three main Thoroughbred tracks. It alleges in a lawsuit that during a 53 day period in 2009 the regional off-track betting corporation in Nassau County, New York (OTB) displayed live audio-visual transmissions of NYRA's races on OTB's website without either the permission of NYRA or the state's racing board. OTB has maintained that the live web-based simulcasts were totally unintended accidents committed without its knowledge by its third-party webmaster.

In a July 29th ruling denying OTB's motion to dismiss portions of the complaint involving signal use, the Honorable Stephen A. Bucaria of the Nassau County Supreme Court dealt with the issue of whether OTB actually "converted" or stole the simulcast signal when, in fact, NYRA still had control over its signal, and thus was never excluded from its ownership. In effect, OTB argued that NYRA, unlike the victim of the theft of an automobile or wallet, still had possession and control of its property. The judge, however, found that simulcast signals are in the nature of electronically stored data, and thus have an "intrinsic value" as opposed to value of simply a physical nature. Thus, the court ruled that even though NYRA was never excluded from access to its signal, it could still maintain an action for conversion of the signal.

Again, while the decision does not finally determine the case and only allows NYRA to proceed on its claim, the ruling is important in that it provides strong judicial recognition of the proprietary rights and interests respective racetracks maintain in the audio-visual simulcasts of their races. It is important to note that during the period in question, OTB did, in fact, have NYRA's permission to show live telecasts of races, but only in their parlors and over their in-home television network. Inasmuch as the pirating of signals by competitors is problematic on a number of levels, a ruling that allows the industry to protect not only the economic value of a simulcast signal, but also how and to what extent even an authorized recipient may use the signal is very welcome, irrespective of the final outcome of the instant lawsuit.

Gloria Hubner v. Spring Valley Equestrian Center: In the October, 2009 installment of this column, [Watch Your Cavaletti! Inherent Risk, Barn Liability, and Release Clash in a New Jersey Lawsuit - Harness Racing Newsroom - USTA](#), we took issue with the ruling of a New Jersey appeals court that upheld the right of a novice rider to sue an equestrian facility for injuries sustained when she was thrown from a horse. The rider had not only signed a waiver and release agreement promising not to sue before she got on the horse, but she was also subject to the New Jersey Equine Activities Liability Act which

recognizes the inherent danger involved when interacting with horses and, with few exceptions, renders participants as having assumed the risk of injury. The appellate division found that because the injuries were caused when the horse tripped over cavaletti, or ground poles used for training, that the poles were "defective" and their positioning constituted a negligent disregard for the rider's safety.

On July 28, 2010, the New Jersey Supreme Court, the state's highest judicial body, unanimously reversed the appellate division and dismissed the plaintiff Hubner's complaint against the equestrian center with finality. While not addressing the validity of the release Hubner signed, the court concluded that the legislature intended that the Equine Activities Liability Act's language defining risk assumed by a rider should be read broadly, while the exceptions should be construed narrowly. Considering the matter otherwise, the court suggested, would permit the exceptions to extinguish the statute's broad protective scope. Employing this approach, the court ruled that the cavaletti did not fall with the statute's defective equipment exception, were normal training items in plain view and were not positioned in negligent disregard of Hubner's safety.

The ruling is a relief to equine activity operators in New Jersey and beyond. As was suggested in this column last October, a contrary decision would have presented broad liability insurance implications for farm owners and operators. Like New Jersey, most states with equine activity statutes require the conspicuous posting of a warning sign. Operators should check the relevant laws in their particular jurisdiction and comply with all requirements necessary to ensure they benefit from the important safeguards afforded by their state's statute.

United States of America v. David H. Brooks: As was reported in this column in July, <http://xwebapp.ustrotting.com/absolutenm/templates/?a=37801&z=29>, and as most in the industry are aware, prolific Standardbred owner and breeder Brooks is on trial in federal court on Long Island, New York on charges involving massive security fraud violations concerning the former publicly traded bulletproof vest manufacturer, DHB Industries. The criminal trial, now spanning nine months, was finally placed in the hands of the jury about a month ago. Since that time, the possibility of jury tampering has been insinuated; there are complaints from inside the jury room of refusal by some jurors to deliberate; and as of late last week, jurors are asking to be excused for various reasons. In a more bizarre development, a juror has apparently asked for a three-day respite from deliberations so as to prepare for his own incarceration later this month. The likelihood of a mistrial on some or all of the counts charged in the indictment increases by the day. How a mistrial would affect David H. Brooks, his brother Jeffrey, and the Brooks' family racing and breeding operation remains to be seen.

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