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Message from the Chair

James F. Horan

As this issue of the *Government, Law and Policy Journal* goes to print, there are notable developments to discuss concerning the subject matter for this issue, concerning a problem that the Committee on Attorneys in Public Service (CAPS) has been addressing for the past few years and concerning a new project that CAPS has undertaken. Those developments relate to: a major court decision that came down concerning legalized gambling in New York, legislation that has gained momentum to assist public sector attorneys in repaying student loan debt, and the immediate need for volunteer legal assistance for New York National Guard members recently called to active duty and facing deployment in Iraq.

Gaming and the Law: New Yorkers are engaged in an intense debate on legalized gambling in this state. Proponents argue that legalizing casino gambling in New York will provide the state with much needed tax revenues and provide jobs in economically distressed regions. Other persons oppose gambling for moral and religious reasons, or due to the devastating effects that addiction to gambling can cause in people's lives, or because relying on tax revenue from gambling constitutes a most regressive form of taxation. This *Journal* issue on Gaming and the Law could hardly have come at a more appropriate time in the course of this debate.

"This Journal *issue on Gaming and the Law could hardly have come at a more appropriate time in the course of this debate."*

For many years, New York has allowed legalized gambling and has enjoyed tax revenues from pari-mutuel wagering at racetracks, off-track betting sites and state lottery games.[1] The state has also allowed churches and other charities to do fund-raising by conducting certain gambling contests, such as bingo.[2] In the harsh economic climate following the September 11, 2001 terrorist attacks, New York State looked to increase tax revenue from legalized gambling by entering compacts with New York Indian tribes to operate casinos, by participating in the multi-state lottery (Mega Millions) and by licensing the operation of video lottery terminals (VLTs) at certain pari-mutuel racetracks.[3] Last year, the Court of Appeals found that the current public school funding system failed to provide a sound basic education for children in New York City public schools, and the Court ordered the legislature and the Governor to reform the funding mechanism.[4] Both the Governor and the State Senate Majority have proposed using VLT revenue as a major source for the new funding mechanism.[5] As I write this column in early July, the Albany *Times Union* just reported that the revenue from the Seneca Casino in Niagara Falls, New York has contributed toward a notable increase in tribal gaming revenue nationwide and that the Seneca Niagara Casino has generated higher-than-expected revenue for New York State.[6] That same morning, the Appellate Division for the Third Department invalidated as unconstitutional the statutory provisions legalizing VLTs, but the court upheld provisions authorizing the Governor to enter into four Indian casino compacts and authorizing Mega Millions.[7] As that case heads now to the Court of Appeals, this *Journal* issue provides information on the legal issues before the Court of Appeals and the legal and policy issues that face the Governor and the legislature.

I will leave it to the editors to introduce the authors and the articles for this Issue. I do wish to thank Bennett Liebman from the Government Law Center at Albany Law School for his work in conceiving and assembling the issue, and I thank all the authors who contributed to this very timely effort.

Student Loan Assistance Legislation: In my column in the last *Journal*, I discussed the ongoing problem in recruiting and retaining young attorneys in lower-paying public sector legal positions, at a time when recent law school graduates face overwhelming student loan debt. Proposed legislation could address that problem, but the method to fund the legislation has caused concern and garnered partial opposition from NYSBA.

The proposed legislation from Assemblyman Brian McLaughlin and Senator Serphin Maltese[8] would create a special fund (Fund) to reimburse attorneys in public sector positions for loan debts the attorneys incurred for their legal educations. After three years in a public sector position, an "eligible attorney" could apply for annual grants of up to $6,000 for the next six years to cover costs of their law-related student loans. The Office of Court Administration would administer the Fund, with the Office of the State Comptroller to play a role in

verifying eligibility for Fund grants. The legislation would provide money for the Fund by raising the state bar exam fee by $150 and increasing by $100 the fee for the admittance of out-of-state attorneys to the New York courts. The *New York Law Journal* (*NYLJ*) reported that lawmakers expected the fee increases in the legislation to generate about $2.8 million, or about half the money the Fund may need to provide full grants to eligible attorneys.[9]

The Fund bill has received support from Chief Administrative Judge Lippman, the Attorney General's Office, several District Attorneys, the New York City Corporation Counsel and the Legal Aid Society of New York.[10] Due to the fee increases, however, NYSBA has taken a position supporting the bill in part and opposing the bill in part.[11] Although NYSBA supports the effort to assist young public service attorneys in repaying student loan debt, NYSBA opposes making attorneys alone pay to fund a program that will benefit society as a whole.

The *NYLJ* article on the Fund bill reported that Assemblyman McLaughlin believes that the Bill stands a good chance to pass this year, but that a spokesperson for Senator Maltese felt less optimistic about passage this year. The Senate spokesperson noted that the proposed fee increases would provide only half the necessary funding and that legislators would want all funding in place prior to passage. As I write this column in early July, the legislature has adjourned without acting on the Fund bill. If and when the Fund bill does pass, CAPS expects to play an active role in commenting on any regulations to implement the Fund.

Guard Pro Bono Project: The Mission Statement for CAPS provides that we exist to bring public service attorneys together to further our common interests and the public welfare and that we should advocate for public service attorneys in our quest for excellence, fairness and justice. Recently, CAPS has received a request for assistance from a very dedicated and committed group of public service attorneys: those who serve part-time as Judge Advocate Generals (JAGs) in the New York National Guard.

Currently, 1,500 New York National Guard men and women have entered active duty, with 1,200 now training for deployment to Iraq this fall. The JAG officers anticipate that the deployed Guardsmen, or their families, will experience legal problems and require legal services during the deployment in areas such as landlord/tenant, creditor problems and custody/support, among others. Guard JAG Officers can provide some aid to the Guardsmen or Guard families, but limitations exist because:

- Guard JAG Officers can make no appearances in civil courts,
- one-third of the New York Guard JAG officers have themselves been called to active duty in the Iraq deployment,
- only one JAG officer serves now full-time to provide assistance, with other non-deployed officers serving only part-time, and,
- unlike regular Army units that go overseas from a single post such as Fort Drum, the deployed Guardsmen come from all areas of the state, with about 900 from the New York City area.

The Guard JAG have been able to handle some of their increased caseload by obtaining outside volunteer legal services from retired JAG officers, but the Guard anticipates that the caseload will increase substantially as the deployment continues.

We at CAPS became aware of the problems facing the Guard in June and we are working now, in early July, with Cynthia Feathers, the NYSBA Pro-Bono Director, and Audrey Osterlitz at the Lawyer Referral and Information Service (LRIS) on plans to recruit attorneys to provide volunteer legal services to the Guardsmen and their families. I hope that by the time you read this that such plans will be in place, with information about the plans available at the CAPS or the NYSBA Websites.

Endnotes

1. *Dalton v. Pataki*, No. 94493 (3d Dep't, July 7, 2004).
2. *Dalton v. Pataki, supra*.
3. 2001 Laws of New York, Chapter 383.
4. *Campaign for Fiscal Equity v. State of New York*, 100 N.Y.2d 893 (2003).
5. Senate Republican Majority Press Release, May 25, 2004, *available at* www.senate.state.ny.us.
6. Albany Times Union, July 7, 2004, p. 1.
7. *Dalton v. Pataki, supra.*
8. Senate 6670-A/Assembly 7463-B.
9. New York Law Journal, June 25, 2004, p. 16.
10. Press Release from Assemblyman McLaughlin's Office, June 21, 2004.
11. Legislation Report No. 100, June 22, 2004.

Hon. James F. Horan, Chair of the NYSBA Committee on Attorneys in Public Service, serves as an Administrative Law Judge with the New York State Department of Health. He is the immediate past President of the New York State Administrative Law Judges Association.

Editor's Foreword

By Vincent Martin Bonventre

Vincent M. Bonventre

It is either a revenue-generating, entertainment-providing, taxpayer-saving, state-of-the-art answer to budget woes. Or it is a morally corrupt, scandal-ridden, addiction-exploiting reflection of political unwillingness to confront difficult fiscal questions. Whichever it is, gambling—state-authorized, -sponsored and -promoted gambling—is a modern American reality.

Gambling, gaming, wagering, lotteries, lotto, racing, casinos, racinos, VLTs and, of course, bingo. Gambling, whatever its name or face, is no longer confined to the backrooms or traveling carnivals, or to Vegas and Atlantic City and the neighborhood church auditorium. It now dots the American landscape. Cross-country travelers, even on remote and seemingly desolate stretches of the interstate, are beset with garishly lit billboards and flashing, glaring neon proclaiming the thrill of gambling—a casino—in an approaching town, on an Indian reservation, or aboard some riverboat. So too, in the legislative halls coast to coast, gambling—with its promise of untold revenue riches—is touted as a cure for dying communities and broken state budgets. In the courtrooms as well, gambling—with its legal, constitutional, and moral and ethical ambiguities—is increasingly the subject of complex, heated litigation. To be sure, none of this would be happening if gambling were not so much fun for so many people.

"Gambling, whatever its name or face, is no longer confined to the backrooms or traveling carnivals, or to Vegas and Atlantic City and the neighborhood church auditorium."

This issue of the *GLP Journal* is devoted to the legal questions surrounding gambling—non-criminal, government-sanctioned gambling; nationally relevant, but with a New York emphasis. Fortunately, we were able to draw directly upon some special resources and expertise of Albany Law School's Government Law Center. Particularly, we relied upon Bennett Liebman, the coordinator of the GLC's Racing and Wagering Law Program. He personally identified potential authors and topics and solicited their manuscripts. Indeed, he assembled a fascinating and diverse collection of articles which our readers will surely find illuminating, provocative, and helpful.

Dana L. Salazar

Appropriately, the collection begins with an introduction by Ben, highlighting the history of gambling in New York. The first three articles then deal with Indian gaming. Robert Williams, Assistant Counsel to the New York State Racing and Wagering Board, tackles the complexities of federal and state Indian gaming laws, their interrelationships, and recent state constitutional litigation in New York courts. Examining legislation, tribal-state compacts and case law, he provides an overview of developments including recent legal and constitutional controversies. Cornelius Murray, who successfully argued against a tribal-state casino compact in the 2003 New York Court of Appeals' case of *Saratoga County Chamber of Commerce v. Pataki*, outlines major constitutional issues raised by state-authorized commercial gambling in New York. From Indian gaming compacts to video lottery terminals to legislative prerogative and executive power, the resolutions of the identified issues have ramifications for the state economy, public policy, and governance. Randy Mastro, formerly New York City's Deputy Mayor for Operations in the Giuliani administration, and Anthony Mahajan, his associate at Gibson, Dunn & Crutcher, which has litigated in support of Indian gaming, critiques the legal challenges in New York to casinos on Indian lands. The authors contend that the statutory and constitutional claims are meritless.

Two additional legal controversies, one a matter of New York law and one a federal constitutional question, are examined in a pair of articles by Ben Liebman. In the first, he argues that New York's law governing telephone wagering violates the dormant commerce clause. By effectively restricting so-called account wagering to New York entities, state legislation runs afoul of the federal constitutional proscription against state impediments to interstate commerce. In his second contribution, Liebman and co-author Abigail Nitka, an

Albany Law student who served an internship with the state's Racing and Wagering Board, address the unresolved and sometimes heated dispute over the ownership of thoroughbred racetracks in New York. Legislative history provides some answers, but the recurring, highly political issue which has pitted the New York Racing Association against legislative and executive leaders is unlikely to be resolved with any finality.

Continuing with racetracks and, particularly, with the horses that race there, the next three articles deal with the use of performance-enhancing substances. Cheryl Ritchko-Buley, a member of the New York State Racing and Wagering Board, examines the efforts—in New York and elsewhere—to eliminate such abuse. Historic "interventions" in several states may represent the beginning of significant strides in stanching an industry-threatening problem. Sara LeCain, a 2004 graduate of Albany Law School who worked with the GLC's Racing and Wagering Law Program, explores rules adopted in various states imposing liability directly on trainers for illegal substances found in their horses' systems. These trainer responsibility rules take three general forms in the case law and regulations of different jurisdictions. Chris Wittstruck, founder and coordinator of the Racehorse Ownership Institute at Hofstra University, criticizes the unequal treatment given different racing breeds in medication regulations. The more stringent rules applicable to "trots" than for "flats" reflect, in the author's view, an unfounded and invidious discrimination against harness racing.

The next two articles take a look at a couple of perennial human problems associated with gambling. Daniel Clemente, an Albany Law student who was a star athlete at Harvard, surveys some of the most infamous game-fixing scandals in American sports. Gambling on professional and collegiate sports is neither a new nor fading phenomenon, and it will likely always be subject to attempts to fix a sure bet. James Maney, the Executive Director of the New York Council on Problem Gambling, and Mariangela Milea, the Council's Assistant Executive Director, review the initiatives taken in New York State for assisting those afflicted by compulsive gambling and other gambling-related problems. The authors urge a comprehensive state plan to address a worsening public health problem that threatens individuals, families and, ultimately, the economy of the state itself.

Finally, on a lighter and immediately useful note, Heather Bennett, a former counsel to the New York State Senate's Racing, Gaming and Wagering Committee, provides a primer on the laws governing charitable organizations that sponsor bingo and other games of chance. She outlines such legal requirements and privileges as the steps to apply for a bingo license to the recent developments permitting the use of "electronic bingo aids."

This issue of the *GLP Journal* was born at the good suggestion, *cum* urging, of GLC Director and *GLP* Associate Editor Patty Salkin. The critical yeoman's work of planning and assembling the contents of the issue was then assumed entirely by Ben Liebman who, as already noted, heads the GLC's Racing and Wagering Law Program. He was truly the co-Editor-in-Chief for this project. The Albany Law School student editorial staff, under the extremely expeditious and meticulous direction of this academic year's Executive Editor, Dana Salazar, performed all the subediting, cite-checking, authority-finding, technical and tedious nitty-gritties that are essential to insuring that the pages of this journal are professional and scholarly in both appearance and substance. Ben Liebman and I are grateful to Dana and her staff for their extraordinary work—especially since they were supposedly on school break working at their summer jobs. A special thanks is also due, as always, to the staff at the Bar Association, especially Pat Wood, whose ombudsman-like efforts and oversight are invaluable, and to the folks at publications—specifically Wendy Pike for this issue—who are responsible for transforming the mass of manuscripts and lists of technical requests into a magnificent, beautiful, professional package.

Of course, any flaws, mistakes, shortcomings, oversights, errors of any editorial nature are exclusively mine. Any reader reaction or other input may be addressed to me.

Vincent Martin Bonventre, Editor-in-Chief of the *Government, Law and Policy Journal*, is a Professor of Law at Albany Law School. He received his law degree from Brooklyn Law School and his Ph.D. in government from the University of Virginia. He is also the Editor of the annual *State Constitutional Commentary* and Director of The Center for Judicial Process.

Dana L. Salazar, Albany Law School class of 2005, is the Executive Editor of the *GLP Journal* for the 2004-2005 academic year. She worked for 15 years in business management prior to law school, where she is an Associate Editor of the *Albany Law Review*.

Introduction

By Bennett Liebman

The people of New York State have always gambled. Regardless of the technical content of the laws concerning gambling, New Yorkers have traditionally been on the front lines of the gambling experience. The first organized horse races in the New World were run on the Hempstead Plain on Long Island in 1665.

As was said at that time:

> Toward the middle of Long Island, lieth a plain sixteen miles longs and four broad, upon which plain grows very fine grass that makes exceeding good hay; where you shall find neither stick nor stone to hinder the horse-heels or endanger them in their races, and once a year the best horses in the Island are brought hither to try their swiftness, and the swiftest are rewarded with a silver cup, two being annually provided for that purpose.[1]

The gambling activity proceeded throughout the colonial period. Public lotteries in New York were a regular feature of colonial government. By 1746, a lottery bill to fortify New York City was passed "and created a precedent that would be repeated for almost two decades."[2] *Lincoln's Constitutional History of New York* states, " Lotteries for the purpose of raising funds for various public purposes was authorized by numerous statutes beginning in 1746 and continuing through seventy-five years until the adoption of the State Constitution of 1821."[3] Columbia University, Union College, and Hamilton College were the beneficiaries of early state lotteries.[4] "Lotteries were favorite means of raising money for educational purposes."[5] Forty-four lottery bills were passed between the independence of the colonies and the enactment of the state Constitution in 1821 which banned all lotteries.[6]

"Regardless of the technical content of the laws concerning gambling, New Yorkers have traditionally been on the front lines of the gambling experience."

Even after lotteries were banned, there was continued gambling in New York State. A crowd of 60,000 gathered at the Union Course on Long Island in 1823 to see the match race between American Eclipse and Sir Henry.[7] The first major American stadiums—Jerome Park, Saratoga, Sheepshead Bay, Brighton Beach, Gravesend—were built after the Civil War to accommodate the crowds for horse racing. Saratoga, which had its origins at its current location in 1864,[8] was named by *Sports Illustrated* as one of the top ten sporting venues of the 20th century.[9] The Canfield Casino in Saratoga Springs was the "most famous gambling house in America"[10] during the latter part of the 19th century.[11]

The 20th century saw the continuation of this gambling activity. While horse racing was closed down briefly in 1910–1913 by anti-gambling legislation, New York has remained the leader among the states in parimutuel activity, with $2.8 billion bet on horse racing in 2002.[12] New York was the first state with an OTB system,[13] and its OTB system is by far the most expansive system in the nation.[14] New York was the second state (after New Hampshire) to establish a state lottery,[15] and the lottery in New York State now has sales in excess of $5.84 billion, which makes it the most successful lottery system in North America in terms of sales.[16] There are four active Indian casinos, and a vigorous charitable gaming industry. New York also is the home of Wall Street, which might be the largest casino of them all.

Yet with all this gambling activity, New York may have seen its largest expansion as a result of legislation passed in the wake of September 11. The legislature in October of 2001 passed Chapter 383 of the Laws of 2001, which authorized New York's participation in a multi-state lottery, six Indian casinos, and video lottery terminals at most of the state's racetracks. As a result of this expansion, Christiansen Capital Advisors has estimated that consumer spending on gambling in New York State will increase from $4 billion in 2004 to $6.8 billion in 2008.[17]

Yet, at a time when Americans "lose more gambling than they spend on movie tickets, theme parks, spectator sports and videogames combined,"[18] very little serious literature has been devoted to the public policy and legal effects of gambling. While the stakes are a lot higher in New York than the silver cup that was offered as a prize in 1665, gambling still tends to be treated in

anecdotal form, much like a Damon Runyan short story. It has turned into a morality play. There are stories about people whose lives have been plagued by gambling and towns that have been revived by the jobs offered by gambling. The tales are told in black and white without any hint of the ambiguities involved in the process. Gambling is neither all good nor all bad, and it needs to be studied fully, with all its subtleties and nebulousness brought to the forefront.

"Gambling is neither all good nor all bad, and it needs to be studied fully, with all its subtleties and nebulousness brought to the forefront."

This issue of the *Government, Law and Policy Journal* is an attempt to look seriously at gambling in New York. Is the 2001 expansion of gaming legal under a state constitutional provision[19] which purports to ban all gambling? How is Indian gambling regulated? How is charitable gaming regulated? How do we best regulate the gambling industries? How do we deal with drug use in horse racing? How do we better treat people victimized by gambling? Until we start treating gambling issues seriously, we will not be able to deal with the issues presented by New York's current round of gambling expansion. We will always have gambling with us in New York. The question should be, how can we get gambling to work for us?

Endnotes

1. Daniel Denton, quoted in William H.P. Robertson, The History of Thoroughbred Racing in America, p. 9 (1964).
2. Kammen, Colonial New York—A History 288 (1975).
3. III Lincoln's Constitutional History of New York, p. 34 (1906).
4. *Id*. at 35–37.
5. *In re Dwyer*, 14 Misc. 204, 205 (N.Y. Misc. 1894).
6. *Id*.
7. *See* http://hall.racingmuseum.org/horse.asp?ID=12 viewed on July 7, 2004.
8. Robertson, *supra* note 1 at 103.
9. Richard Hoffer, *Our Favorite Venues*, Sports Illustrated, p. 94 (June 7, 1999).
10. Karen Torme Olson, *New York's 4-H Town*, Chicago Tribune, November 8, 1998.
11. *See generally* Henry Chafetz, Play the Devil, pp. 318–339 (1960).
12. 2002 Annual Report and Simulcast Report of the New York State Racing and Wagering Board, at 5, *available at* http://www.racing.state.ny.us/pdf/2002%20Annual%20Report_final.pdf.
13. Chapters 143, 144, and 145, L. 1970.
14. Racing and Wagering Board, *supra* note 12.
15. Chapter 278, L. 1967.
16. Greg Livadas, *State's lottery sales go up 8.2%*, Rochester Democrat and Chronicle, 1B, May 8, 2004.
17. http://grossannualwager.com/NY%20State%20Gaming%20June%2023,%202004.ppt viewed July 7, 2004. Considering the fact that more than $850 million of the $4 billion 2004 figure comes from VLTs and Indian gaming, it is more than likely that consumer spending on gambling in New York State will have doubled from 2002 to 2008.
18. Richard C. Morais, *Casino Junkies*, Forbes, April 29, 2002, quoting Christiansen Capital Advisors.
19. N.Y. Const. art. 1, § 9.

Bennett Liebman is the first Coordinator of the Government Law Center's Program on Racing and Wagering Law at Albany Law School. He served as a commissioner at the New York State Racing and Wagering Board in 1988–2000 and is a cum laude graduate of New York University School of Law.

Indian Gaming Law in New York, Federal and State

By Robert Williams

Federal Developments

In its 1987 decision in *California v. Cabazon Band of Mission Indians*,[1] the United States Supreme Court clarified the criminal-prohibitory/civil-regulatory distinction. California law permitted bingo and card games when operated by designated charitable organizations, placing significant limitations on both the prizes allowed and use of funds derived from the card games. The Cabazon Band, however, operated high-stakes bingo games and a card club on reservation lands near Palm Springs without adhering to the state restrictions. California claimed it had authority, under Public Law 280, to enforce the state's bingo laws on Indian lands, arguing that enforcement of the bingo law on Indian land was within state authority because violators of the bingo law were subject to criminal penalties. Additionally, California argued that it did not merely regulate bingo, but prohibited high-stakes games. Thus it had the legal authority to prohibit activities on Indian lands located within the state that were prohibited elsewhere in the state.[2]

"After Cabazon, *the passage of a regulatory structure was urgent since there were no controls for gambling on reservation lands. The resulting legislation passed by Congress became the Indian Gaming Regulatory Act, or IGRA, as it is more commonly known."*

The Court enunciated a two-pronged test to determine whether a state law is criminal-prohibitory or civil-regulatory. A state law is prohibitory if the gaming activities are contrary to state public policy, and the state interest in regulating gaming outweighs the tribal benefits received through gaming. Specific to the case, the Court held that California's level of gambling activities, which included a state lottery and pari-mutuel wagering on horse racing, was clearly sufficient to rule out the possibility of the Indian games being contrary to public policy. When balancing the state interest in regulating gaming in relation to tribal benefit, the Court held that California did not present sufficient evidence to demonstrate that the difference in prizes or pots and wagers between statutorily restricted games and high-stakes Indian games would result in the infiltration of organized crime into Indian gambling operations, especially in comparison to the economic benefits the tribe could gain. Using a balancing test between federal, state and tribal interests, the Court found that tribes in states that otherwise allow gaming have a right to conduct gaming on Indian lands unhindered by state regulation.

Prior to the Supreme Court's decision in *Cabazon*, Congress began work to remedy what was then an uncertain legal situation. After *Cabazon*, the passage of a regulatory structure was urgent since there were no controls for gambling on reservation lands. The resulting legislation passed by Congress became the Indian Gaming Regulatory Act, or IGRA, as it is more commonly known.

A. The Indian Gaming Regulatory Act of 1988

Codified at Title 25, §§ 2701–2721, and Title 18, §§ 1166–1168, the Indian Gaming Regulatory Act contains a regulatory scheme designed to provide different levels of jurisdiction depending upon the type of gambling occurring on Indian lands. In developing the legislation, Congress defined the issue as "how best to preserve the right of tribes to self-government while, at the same time, to protect both the tribes and the gaming public from unscrupulous persons."[3] These concerns were expressed by law enforcement officials, who indicated a need for federal and/or state regulation of gaming, in addition to, instead of, tribal regulation.[4] The authors of the legislation took the view that

> it is the responsibility of the Congress, consistent with its plenary power over Indian affairs, to balance competing policy interests and to adjust, where appropriate, the jurisdictional framework for regulation of gaming on Indian lands. [The legislation] recognizes primary tribal jurisdiction over bingo and card parlor operations although oversight and certain other powers are vested in a federally established National Indian Gaming Commission. For Class III casino, pari-mutuel and slot machine gaming, the bill authorizes tribal governments and State governments to enter into tribal-State compacts to address regulatory and jurisdictional issues.[5]

The jurisdictional framework for the regulation was the subject of a great deal of negotiation, with IGRA ultimately being written to provide "that in the exercise of its sovereign rights, unless a tribe affirmatively elects to have State laws and State jurisdiction extend to tribal lands, the Congress will not unilaterally [sic] impose or allow State jurisdiction on Indian lands for the regulation of Indian gaming activities."[6]

1. Classifications

IGRA divides types of games subject to the Act into three groups and establishes a regulatory scheme for each. Class I gaming is described as "social games played solely for prizes of minimal value or traditional forms of Indian gaming engaged in as part of, or in connection with, tribal ceremonies or celebrations."[7] Class II gaming is defined as "the game of chance commonly known as bingo . . . including (if played at the same location) pull-tabs, lotto, punch boards, tip jars, instant bingo and other games similar to bingo."[8] Bingo games may also be conducted with electronic, computer or other technologic aids, but IGRA specifically excludes "electronic or electromechanical facsimiles of any game of chance or slot machine of any kind" from Class II gaming. Non-banking card games are permissible under Class II gaming unless they are specifically prohibited by state law. Class III gaming is defined as all other types of gambling, including banked card games (e.g., roulette, craps and blackjack), slot machines, parimutuel wagering and jai alai. Electronic games of chance, such as video poker, are considered Class III.[9]

The classification of the gaming activity is paramount because each classification has different regulatory provisions.

2. Jurisdiction by Classification

Class I games are under the exclusive jurisdiction of the Indian tribes and are not subject to the regulatory provisions of IGRA.[10]

Class II gaming is only subject to tribal jurisdiction but may be regulated in accordance with section 2710(b). An Indian tribe may engage in, or license and regulate, Class II gaming on Indian lands within such tribe's jurisdiction, if—

> such Indian gaming is located within a State that permits such gaming for any purpose by any person, organization or entity (and such gaming is not otherwise specifically prohibited on Indian lands by Federal law), and the governing body of the Indian tribe adopts an ordinance or resolution [concerning the conduct or regulation of Class II gaming.]

Class III gaming is governed by section 2710(d). In relevant part, that section provides that Class III gaming activities shall be lawful on Indian lands only if such activities are—

> authorized by an ordinance or resolution of the governing body of the Indian tribe, located in a State that permits such gaming for any purpose by any person, organization, or entity, and conducted in conformance with a Tribal-State compact entered into by the Indian tribe and the State that is in effect. Negotiation for a gaming compact is triggered when an Indian tribe having jurisdiction over the Indian lands upon which a Class III gaming activity is to be conducted, requests the State in which such lands are located to enter into negotiations for the purpose of entering into a Tribal-State compact governing the conduct of gaming activities. Upon receiving such a request, the State shall negotiate with the Indian tribe in good faith to enter into such a compact.

3. Limitations on Negotiation

IGRA contains a variety of limitations on the contents of a gaming compact. Specifically, a tribal-state compact may include provisions relating to the application of the criminal and civil laws and regulations of the Indian tribe or the state that are directly related to, and necessary for, the licensing and regulation of such activity; the allocation of criminal and civil jurisdiction between the state and the Indian tribe necessary for the enforcement of such laws and regulations; the assessment by the state of such activities in such amounts as are necessary to defray the costs of regulating such activity; taxation by the Indian tribe of such activity in amounts comparable to amounts assessed by the state for comparable activities; remedies for breach of contract; standards for the operation of such activity and maintenance of the gaming facility, including licensing; and any other subjects that are directly related to the operation of gaming activities.[11]

Additionally, IGRA limits the activities upon which net revenues from any tribal gaming can be used, restricting the money to be used to fund tribal government operations or programs; to provide for the general welfare of the Indian tribe and its members; to promote tribal economic development; to donate to charitable organizations; or to help fund operations of local government agencies.

IGRA does not confer upon a state or a political subdivision of the state the authority to impose taxes, fees, charges, or other assessments upon tribes which seek to operate Class III gaming and it prohibits a state from refusing to negotiate "based upon the lack of authority in such state, or its political subdivisions, to impose such a tax, fee, charge, or other assessment."[12]

Development of Indian Gaming Law in New York

A. Generally

In August 1989, the Saint Regis Mohawk Tribe was the first tribe in New York to request that the state enter into negotiations to conclude a Class III gaming compact. The negotiations proceeded, with a number of stops and starts, until August 22, 1990. Believing the negotiations to be at an impasse, the Tribe filed suit the next day in federal court alleging a failure on the part of the state to negotiate in good faith. The Mohawks asked that the court declare that slot machines, poker, video games of chance, betting on jai alai, horse-race simulcasting, sports betting, lottery games, keno, chemin de fer and pai gow should be included in a negotiated agreement on gambling. New York had refused to allow those games, arguing they were illegal in the state. The lawsuit also asked the judge to rule that the compact requires no approval from the state legislature, an issue that would later be of importance.

During the pendency of the motions and hearings in the Mohawk case, the Oneida Indian Nation of New York also sought compact negotiations with the state. After a long series of negotiations, the Oneida Nation was the first to complete a compact. On April 16, 1993, Governor Mario M. Cuomo signed the Oneida Indian Nation of New York's Compact (the "Oneida Compact") on behalf of the state of New York. The Oneida Compact was subsequently approved by the Bureau of Indian Affairs on June 4, 1993. The Mohawk Compact was signed by Mohawk Chiefs L. David Jacobs and John S. Loran on June 9, 1993, and by Governor Mario M. Cuomo on October 15, 1993. The Mohawk Compact was approved by the Assistant Secretary of the Interior, Indian Affairs on December 4, 1993, and published in the *Federal Register* on December 13, 1993. The Mohawk Compact was amended on May 27, 1999 to allow for the operation of certain electronic gaming devices. The amendment, which was deemed approved by the Department of the Interior and published in the *Federal Register* on August 13, 1999, expired on May 27, 2000.

1. The IGRA and Early State Goals

The theory of regulation under IGRA is framed by section 2702. That section sets forth language stating that the purpose of IGRA is:

1. to provide a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments;
2. to provide a statutory basis for the regulation of gaming by an Indian tribe adequate to shield it from organized crime and other corrupting influences;
3. to ensure that the Indian tribe is the primary beneficiary of the gaming operation; and
4. to assure that gaming is conducted fairly and honestly by both the operator and players.

According to press releases, the state's negotiating team for the Oneida and Mohawk Compacts focused on three primary goals:

1. to ensure public order and safety;
2. to protect the integrity of the games authorized; and
3. to gain agreement on a sound system of fiscal and auditing controls.

The first two goals aimed toward protecting the gaming public. The third goal aimed toward ensuring that casino operators did not engage in fiscal manipulation that would deprive the nations of their full share of casino revenues.

2. Meeting the Goals

In each of the state's compacts, the New York State Racing and Wagering Board (the "Board") has been designated as the state's agency responsible for either the co-regulation or direct oversight of gaming activities. The Board maintains a constant presence within each gaming facility, which are 24-hour-per-day operations. The Board and the New York State Police are provided unfettered access to all areas of all casinos, including the restricted areas such as the surveillance room. Board gaming inspectors ensure that gaming operations, such as dealing procedures, internal accounting and other controls, strictly conform to the applicable provisions of the compact and its appendices. Casino patrons may seek state gaming inspectors to clarify rules of a game and for recourse after filing a complaint.

Under each compact, no person may commence or continue employment as a gaming employee unless he or she is the holder of a valid gaming employee certification or finding of suitability and license issued by the Board and the relevant Indian gaming commission, respectively.[13] Certification of suitability is initially determined through a review of a completed license application,[14] and a New York State Division of Criminal Justice Services fingerprint check. Under each com-

pact, Federal Bureau of Investigation fingerprints and, if relevant, Royal Canadian Mounted Police fingerprints are also checked, and all applicants undergo a New York State Police background investigation. The State Police ultimately report the results of its investigation to the Board which reviews the fingerprint returns and applicant background investigation report and evaluates them using compact-enumerated criteria to determine eligibility for certification or suitability.[15]

Each compact contains a section where the Indian gaming commissions may request that the Board temporarily certify an applicant for gaming employee certification or suitability. Temporary approval affords an individual the ability to commence employment prior to the conduct of a full background investigation. The Board is required to award temporary certification for any applicant whose application discloses no grounds reasonably sufficient to disqualify him or her in the judgment of the Board and for whom the Board's fingerprint check with the Division does not disclose grounds for denial.[16]

Not only are employees of the casinos required to undergo a form of suitability determination prior to commencing employment, all enterprises that provide gaming services, gaming supplies or gaming equipment to the casinos are not permitted to do so until they have first been approved by the Board.[17]

Each applicant for a gaming service registration submits a completed registration, and principals of the enterprises, as identified by the Board, are required to submit a completed informational form and fingerprint cards.[18] In general, the term "Principal" means (i) each of its officers and directors; (ii) each of its principal management employees, including any chief executive officer, chief financial officer, chief operating officer, or general manager; (iii) each of its owners or partners if an unincorporated business; (iv) each of its shareholders who owns more than ten percent of the shares of the corporation if a corporation; and (v) each person other than a banking institution who has provided financing for the enterprise constituting more than ten percent of the total financing of the enterprise.[19] A review similar to that conducted for gaming employees commences.

3. Evolution of State Goals

The 1999 amendment to the Mohawk Compact had one further goal: to permit the Mohawk Tribe to conduct electronic gaming devices in exchange for establishing the precedent within New York that rights for the operation of such games and devices had to be purchased.

Since that initial flurry of negotiations in the early 1990s, various state economic and political factors have altered or warped the initial goals of the early negotiations. While the early goals remain important, economic factors, such as unemployment and the need for regional economic stimulus, have become prime motivators for recent gaming negotiations.

B. Instant Multi-Game and the Decade-Long Lawsuit

The Oneidas' Turning Stone Casino was opened in Verona, Oneida County, on July 27, 1993. Things moved fairly smoothly until late 1994. The Nation-State Compact between the Oneida Indian Nation of New York (the "Nation") and the state of New York contains a list of "approved" games in its Appendix A. By the terms of the Compact, the Nation may request that additional games or activities, or new specifications for existing games or activities, be added to Appendix A by submitting written specifications to the state. The state is required, within fifteen (15) days, to notify the Nation that it accepts or rejects the game or activity. If the state accepts the game or activity, the game or activity and its specifications shall be added to Appendix A effective as of the date of the state's acceptance of that game or activity.

The Nation made a written request to the Board dated November 22, 1994, to amend Appendix A to include "Instant Multi-Game" and its specifications. With mercurial speed, on November 23, 1994, the Board sent written approval of the requested amendment adding Instant Multi-Game to appendix A to the Nation. The Nation then began offering Instant Multi-Game at Turning Stone on March 10, 1995. On that day, the Secretary to the Governor of New York, Bradford J. Race, Jr., sent a letter to Nation Representative Ray Halbritter stating that Instant Multi-Game was not authorized under Appendix A.

The Nation continued to operate Instant Multi-Game at Turning Stone Casino and the state subsequently sued. Brought before the United States District Court for the Northern District of New York, the state sought a declaration that the Nation was violating the Compact and an injunction prohibiting the Nation from operating Instant Multi-Game. The state's complaint alleged, in pertinent part, that the Oneida Nation's written request for an amendment to Appendix A of the Compact to add Instant Multi-Game failed to comply with the terms of section 15 of the Compact, which requires that all amendments and modifications must be approved by the Governor or his authorized representative. The state alleged that by commencing Instant Multi-Game at its Turning Stone Casino on and after March 10, 1995, the Oneida Nation violated terms of the Compact because Instant Multi-Game had not been approved by the state of New York.[20] The state's theory was that the Board did not have the authority to amend Appendix A, and thus the appendix was not properly amended.

The Nation raised a number of defenses in a motion to dismiss, one of which was that the Compact's mandatory arbitration clause controlled the dispute. The state argued that the issue belonged in federal court and not before an arbitrator, alleging its claim was excluded from mandatory arbitration by the exclusionary clause covering "claims by the State that the Nation is conducting a Class III gaming activity not authorized by this Compact." The Nation disagreed, arguing that the state's claim did not fall within the exclusionary clause because Instant Multi-Game was "added" to the Compact by the Board.

The United States District Court for the Northern District of New York held that it lacked subject matter jurisdiction over the dispute on the ground that the plaintiffs' claim was subject to mandatory arbitration. The District Court believed that subscribing to the state's theory inevitably would necessitate an analysis of the Compact's provisions, namely, the provisions defining which person or agency had the authority to act for the state. Thus, quoting from the arbitration clause, the District Court ruled that the arbitration clause applied because the claim concerned "compliance with and interpretation of any provisions of the Compact." The District Court stated that, in its view, the exclusionary clause was "inapplicable" because the face of the state's complaint did not claim that Instant Multi-Game was not authorized by the Compact; the claim was arbitrable.[21]

The state subsequently appealed the dismissal to the United States Court of Appeals for the Second Circuit. Judge John Meskill, writing for a unanimous panel, reversed the judgment of the District Court and remanded the case for further proceedings, holding that the state's claim was not subject to mandatory arbitration because the parties specifically excluded it from the general arbitration clause.[22] The Court of Appeals determined that the District Court's analysis was incomplete, failing to recognize the applicability of the exclusionary clause. While admitting the general rule was that exclusionary clauses should not be given expansive readings, Judge Meskill wrote that the language excluding a certain class of disputes from arbitration was clear and unambiguous. As such, the District Court was obliged to give effect to the exclusionary clause, and only then could the District Court divine the intent of the parties as reflected by the general arbitration clause *and* the exception. According to the court, the parties attempted to exclude a type of claim from mandatory arbitration with the Oneida Compact: specifically, claims that the Nation is operating a game not authorized under the Compact. If the state's claim fell into that category, then the state could not be compelled to arbitrate.[23] The Court of Appeals determined that the arbitration clause, read as a whole, evinced the parties' intent to exclude the type of claim brought by the state from mandatory arbitration. The exclusionary clause, according to the court, applies to "claims by the State that the Nation is conducting [a game] not authorized by th[e] Compact." In its complaint, the state alleged that the request for an amendment adding Instant Multi-Game "failed to comply with the terms of . . . the Compact." The state also alleged that the amendment "has not been approved by the State pursuant to the terms of the Compact." Although these allegations did not fit word for word under the exclusionary clause, the Court of Appeals wrote that they could not avoid their obvious meaning and thwart the reasonable expectations of the parties to the Compact. Meskill wrote that "No other reading of the arbitration clause is tenable. The natural import of these allegations is that the Compact was never amended to authorize Instant Multi-Game, the type of claim excluded from arbitration."[24] The court reversed the dismissal and remanded the case back to the Northern District.

The case has started and stopped a number of times during the past decade. Discovery has been started and depositions have been taken, yet as both the state and the Oneida Nation have requested continuous stays of the renewal of the motion to dismiss, the case remains no further now than when it was started nine years ago. A lack of speedy resolution is not uncommon in New York Indian-related cases.

C. The Mohawks' Contribution to Indian Gaming Development

After years of false starts, the Mohawks opened the Akwesasne Mohawk Casino in Hogansburg, Franklin County, on April 12, 1999. Knowing that a gaming facility that did not include any electronic gaming devices would likely fail, on or about November 25, 1998, the St. Regis Mohawk Tribe began negotiating with the state for electronic gaming devices. These negotiations culminated in the 1999 amendment signed on behalf of the state by Deputy Counsel to the Governor Judith Hard and on behalf of the tribe by Chief Executive Officer Edward Smoke on May 27, 1999. The amendment was deemed approved by the Department of the Interior, with such notice being published in the *Federal Register* on August 13, 1999. The casino commenced playing these electronic gaming devices on May 28, 1999. This amendment expired on May 27, 2000.

On or about April 12, 2000, the St. Regis Mohawk Tribe began negotiating with the state for a second electronic gaming devices amendment to replace the expiring amendment. These negotiations culminated in June 2000 with the amendment being signed on behalf of the state by Governor George E. Pataki and on behalf of the tribe by Chiefs Hilda Smoke, Alma Ransom and Paul Thompson and Sub-Chiefs Harry Benedict and Richard Terrance on or about May 25, 2000. Approval of this amendment was rejected by the Department of the Inte-

rior by letter dated July 26, 2000. In August 2000 the St. Regis Mohawk Tribe began negotiating with the state for an electronic gaming devices amendment to submit as replacement for the rejected amendment. These negotiations culminated in October 2000 with the amendment being signed on behalf of the state by Governor George E. Pataki and on behalf of the Tribe by Chiefs Hilda Smoke, Alma Ransom and Paul Thompson and Sub-Chiefs Harry Benedict, John Bigtree, Jr. and Richard Terrance on or about October 13, 2000. Approval of this amendment was rejected by the Department of the Interior by letter dated December 7, 2000.

These amendments led to the first major Indian gaming case in New York.

D. *Saratoga Chamber v. Pataki*

Shortly after the 1999 amendment took effect, a variety of individuals and organizations brought suit alleging that the 1993 compact and the 1999 amendment violated the separation of powers and the constitutional gambling prohibition. The plaintiffs sought a declaration that the 1993 compact and the 1999 amendment were unconstitutional, and also sought an injunction prohibiting the state from expending any money in furtherance of the agreements. They also asked the court to enjoin the Governor from taking any further unilateral action, such as signing a successor to the 1999 amendment that would extend gambling in the state. By judgment dated March 10, 2000, state Supreme Court dismissed the action for plaintiffs' failure to join the Tribe as an indispensable party. On appeal, the Appellate Division reversed, concluding that the Tribe was not an indispensable party. The court noted that a contrary ruling would put Indian gaming compacts beyond constitutional challenge or review.[25]

While the Appellate Division acknowledged that the Tribe's interests would be affected by the suit, it determined that, on balance, the Tribe's absence should not prevent the suit from going forward. The court also rejected the state's statute of limitations, standing and laches defenses. On remand, by order dated April 12, 2001, state Supreme Court granted plaintiffs summary judgment. The court declared the 1999 amendment and the 1993 compact void and unenforceable, and enjoined the Governor from taking any further action to reenact an electronic gaming amendment without legislative approval. The Appellate Division affirmed, holding that the Governor's unilateral action deprived the legislature of its policymaking authority in such areas as "the location of the casino, the gaming that could be carried on there, the extent of State involvement in providing regulation . . . and the fees to be exacted for that regulation."[26] The state appealed.

On June 12, 2003, the New York Court of Appeals, in a 4-3 decision, upheld the judgment of the Appellate Division.[27] The four-judge majority in a decision by Judge Rosenblatt found that: (a) the issue presented by Governor Pataki's 1999 amendment to the St. Regis Mohawk Indian gaming compact was moot; (b) Governor Cuomo's approval of the 1993 compact was not a moot issue; (c) the plaintiffs had standing to pursue the case; (d) the statute of limitations did not preclude the suit; (e) the doctrine of laches did not prevent the suit; (f) the St. Regis Mohawk tribe was not an indispensable party; (g) the governor lacked authority to enter into compacts; and (h) the legislature did not ratify the compact.[28] In his opinion, writing only for himself and two other judges, Judge Rosenblatt refused to reach the ultimate question: whether the casinos were unlawful under Article 1, § 9 of the state Constitution. He found that "it is better for this Court not to resolve constitutional questions unaddressed by the lower courts."

This will set up an interesting showdown. Judge Smith, in a separate decision, concurred with Judge Rosenblatt on all issues other than the decision not to decide the ultimate constitutionality of Indian casinos in New York State. He found that the issue of Article 1, § 9 should have been decided by the court and that the "State Constitution clearly forbids the gambling permitted by the 1993 Compact." Writing for a three-judge dissent, Judge Read took issue with many of the findings of Judge Rosenblatt. She suggested that laches should have applied and found that the tribe was an indispensable party. In the absence of a dismissal, she suggested that the legislature had *de facto* ratified the compacts. She found that the governor did not act improperly when he signed this Compact since he "was merely implementing pre-existing federal and state policy choices" and that the compact did not violate Article 1, § 9 of the Constitution.

A similar case in Madison County challenging the Oneida Compact for failure to obtain proper legislative ratification is pending.[29]

E. The State/Seneca Nation Memorandum of Understanding

The state of New York and the Seneca Nation of Indians had been negotiating a Class III gaming compact for a period of years when, on June 20, 2001, the parties reached agreement on the framework for a compact. That framework, which took the form of a Memorandum of Understanding (MOU), provided that the Seneca Nation could open up Class III gaming facilities—one in downtown Niagara Falls, one in Erie County and, should the Nation "at some point in the future decide to pursue such a facility," facilities on Seneca Nation reservation territory. The parcels in Niagara Falls and Erie County were to be acquired and funded pursuant to the provisions and procedures set forth in

the Seneca Land Claims Settlement Act, which allows the Seneca Nation to acquire "[l]and within its aboriginal area in the State or situated within or near proximity to former reservation land."[30]

The MOU further provided that the Seneca Nation would be authorized to conduct those games already included in existing gaming compacts with two other New York tribes, as well as "electronic gaming devices, including 'slot machines.'" In exchange and consideration for the state's grant of a limited exclusive franchise for electronic gaming devices within a defined area of Western New York, the Seneca Nation agreed to share with the state a portion (between 18% in years 1–4, 22% in years 5–7 and 25% in years 8–14) of the proceeds from the devices, based on the "net drop" of such machines.

The MOU contains several other requirements commonly found in tribal-state compacts including: establishment by the Seneca Nation of a tort claims act to provide due process and an impartial forum for bringing private tort claims; procurement by the Nation of adequate tort liability insurance; availability of law enforcement "pursuant to applicable law governing law enforcement jurisdiction on Indian lands"; and standards for screening gaming and Nation commission employees and all companies that conduct business with the Nation's gaming facilities to ensure that persons or entities with any evidence of criminal histories and criminal associations are not permitted to work in or be associated with the Nation's gaming facilities.

Because of the uncertainties caused by the then-pending *Saratoga Chamber of Commerce v. Pataki*, and further because both parties desired an expedited time line for development with as much certainty as possible, it was agreed that each party would jointly seek timely legislative authorization for the Governor to execute a tribal-state compact with the Seneca Nation consistent with the Memorandum of Understanding and ratification of the Compact by the enrolled members of the Nation and the United States Department of the Interior.[31]

The opportunity for the Governor to obtain such legislative authorization came during the aftermath of September 11th.

F. Chapter 383, Laws of 2001 and Tribal-State Compacts

In October 2001, the New York legislature returned to Albany to enact Chapter 383 of the Laws of 2001, a multi-faceted bill with 27 separate parts providing assistance to businesses affected by the attack on the World Trade Center (Parts A, K, AA); promoting renewed programmatic reforms designed to conserve limited state financial resources (Parts F and I); extending important health care, housing, and revenue-raising laws that would otherwise have expired (Parts M, N and O); and seeking to increase state revenues by authorizing specific new lotteries and up to six new Indian gaming establishments (Parts B, C, and D).

Both the Senate and the Assembly approved the bill at the request of their respective leaders, and the Governor agreed to provide a message certifying the necessity of an immediate vote on the bill (Message of Necessity).[32] Section 1 of the law establishes the necessity of the legislation: "This act enacts into law major components of legislation relating to issues deemed necessary for the state. Each component is wholly contained within a Part identified as Parts A through AA." The Governor's Message of Necessity similarly states: "These bills are necessary to enact certain provisions of law."

The legislature enacted the bill in response to the anticipated economic hardship caused by the World Trade Center attack of September 11, 2001 and a number of other pressing and important matters. Although both of the legislative plaintiffs in this case spoke and voted against the legislation, neither raised objections to the Message of Necessity or declined to vote on the bill because of objections to the Message of Necessity or unfamiliarity with the legislation.

Under Part B of Chapter 383, the legislature authorizes the Governor, on behalf of the state, to execute up to four tribal-state compacts pursuant to IGRA. The law contemplates that one compact will be with the Seneca Nation of Indians, consistent with a Memorandum of Understanding (MOU)[33] signed by Governor George E. Pataki and Cyrus M. Schindler, as president of the Seneca Nation of Indians, on June 20, 2001.[34] The provision stipulates that a Seneca Nation-State Compact would be deemed ratified upon the Governor's certification that, through a compact or some other agreement between the parties, the Seneca Nation commits to provide:

(i) reasonable access to gaming facilities for labor union organizers who are soliciting support for labor union representation;

(ii) permission for labor union organizers to distribute labor union authorization cards on site for the purpose of soliciting employee support for labor union representatives;

(iii) recognition of labor unions as the exclusive collective bargaining representatives based upon a demonstration of majority employee support;

(iv) an adequate civil recovery system which guarantees fundamental due process to visitors and guests of the facility and related facilities; and

(v) sufficient liability insurance to assure that visitors and guests will be compensated for their injuries.[35]

Part B also authorizes the Governor, on behalf of the state, to execute tribal-state compacts for up to three additional Class III gaming facilities in Sullivan and Ulster counties.[36] Those compacts are also deemed ratified by the legislature upon the Governor's certification that the compact or some other agreement between the state and the compacting Indian Nation provides labor and tort system assurances similar to those that must be included in the agreement with the Seneca Nation.[37]

In addition, Part B authorizes the Governor to include provisions that allow tribes to operate slot machines authorized by a negotiated compact, provided the state receives a negotiated percentage of the "net drop" (defined as gross money wagered after payout, but before expenses).[38] The law also removes the prohibition on the New York State Racing and Wagering Board against permitting charitable organizations to play slot machines as an approved game of chance under Article 9 of the General Municipal Law.[39]

Finally, Part B creates a tribal-state compact revenue account for all revenues resulting from these compacts. Monies in the account, following appropriation by the legislature, will be available to reimburse or pay municipal governments that host tribal gaming facilities for their added costs and economic development and job expansion programs, as well as for support and services of treatment programs for persons suffering from gaming addictions.[40]

G. *Dalton v. Pataki*

Joseph Dalton, President of the Saratoga Chamber of Commerce, and several other concerned individuals, filed a few lawsuits against New York State on January 29, 2002. The suits, which were later consolidated, asserted that Parts B, C and D of Chapter 383 of the Laws of 2001 were illegal because the Message of Necessity that accompanied the bill purportedly did not comply with the requirements set forth in state Constitution article III, § 14. The plaintiffs further claimed that Part B is unlawful because it improperly delegates authority to the Governor and authorizes the Governor to set policy in violation of the separation-of-powers doctrine and also asserted that (1) any Class III tribal gaming in New York is illegal because it violates New York's public policy against commercial gaming and requires an amendment to the state constitution; (2) revenue sharing constitutes a tax on Indian tribes that is prohibited by the federal and state constitutions and by federal law; (3) the state has no authority to grant Indian tribes an exclusive franchise with respect to the operation of slot machines; (4) the state has no authority to require tribes to guarantee organized labor certain rights and provide certain recovery systems for injuries to patrons and other parties; (5) the state is not authorized by article I, § 9 of the state Constitution to obtain any revenues from casinos; and (6) the Governor is prohibited from agreeing to take any land into trust to be used by an Indian Tribe to conduct Class III gaming. The plaintiffs also attacked the validity of video lottery terminals (VLTs), alleging that they are illegal because a portion of the vendor fee is earmarked for the horse racing industry and because VLTs are slot machines, not lotteries. They also raised an equal protection challenge, claiming that VLTs have improperly been authorized for certain localities but not others. Finally, the plaintiffs alleged that Part D is illegal because the multi-state lottery would not be operated by the state and proceeds from the sale of lottery tickets would not be used exclusively to aid or support education in New York State.

After some procedural motions were dismissed, the plaintiffs moved, in December 2002, for summary judgment seeking an order declaring Parts B, C, and D unconstitutional and permanently enjoining defendants from taking any steps to implement the challenged legislation. The state cross-moved for summary judgment declaring the statute to be constitutional and in conformance with federal law and dismissing the complaints. The court denied plaintiffs' motions, granted defendants' cross-motions and dismissed the complaints. The court first determined that the Governor's Message of Necessity satisfied the requirements of article III, § 14 of the Constitution. It noted that the bill was passed by the Senate and Assembly after their leaders so requested, and that the Governor provided a Message of Necessity. The reason given by the Governor—that "these bills are necessary to enact certain provisions of law"—conformed "literally and reasonably" with the constitutional requirements.

Second, the court rejected plaintiffs' contention that Part B violated the prohibition against gambling set forth in article I, § 9 of the New York Constitution. The court based its determination, in part, on the reasoning set forth by the three dissenting Court of Appeals judges in *Saratoga County Chamber of Commerce v. Pataki*.[41] In *Saratoga*, the judges joining in the majority opinion expressly declined to reach this issue, and only one judge, Judge Smith, in a concurrence, expressed a belief that Indian gaming would violate the state Constitution. The three dissenting judges—a majority of the judges who reached the issue—concluded that under IGRA, if a state allows any Class III gaming for any person, a tribe may seek to conduct the same games on its lands, and that article I, § 9 of the state Constitution does not prohibit the Governor from entering into a compact to allow an Indian tribe to conduct such gaming on Indian lands. Relying on the reasoning of these

three judges, the court below determined that Part B was constitutional.

Third, the court rejected plaintiffs' challenge to Part C because the record demonstrates "that VLTs are indeed true video lotteries and therefore are a constitutionally permissible lottery game . . . similar to the instant scratch off tickets available daily 24/7 throughout New York." Although the outward appearances of a VLT and slot machine are similar, the court found the internal workings, method of play, and multiple player participation of VLTs distinguish them and bring VLTs within the definition of a lottery. The court noted that Part C directs that the "net proceeds" from VLTs be used to support education as constitutionally mandated and concluded that it was not irrational or unconstitutional for the legislature to authorize the payment of a vendor fee to the licensed VLT vendors.

Fourth, the court upheld Part D's authorization of New York's participation in the Mega Millions lottery. As with VLTs, it concluded that the "net proceeds" generated by the state's operation of the multi-state lottery are directed to education, as constitutionally required. The court concluded further that the state "indeed operates the multi-state lottery within this state and retains sufficient control of all aspects under the Mega Millions Agreement to make this agreement consistent with Article 1, § 9 of the New York State Constitution."

Accordingly, the court found the legislation constitutional and dismissed the complaints. The plaintiffs appealed, and oral arguments before the Appellate Division, Third Department were heard in early 2004. [*Editor's Note: The Appellate Division rendered its decision while publication of this article was pending (*Dalton v. Pataki, *780 N.Y.S.2d 47 [3d Dept. 2004]). In its unanimous decision, that court upheld the state constitutionality of VLTs, as well as of the state's participation in multi-state lotteries; but the appeals court agreed with the challengers that the legislation was invalid insofar as it failed to satisfy the state constitutional requirement that the net proceeds of state-run lotteries—which includes VLTs—be applied to education.*]

Endnotes

1. 480 U.S. 202 (1987).
2. *Id*. at 206–207.
3. Indian Gaming Regulatory Act, S. Rep. No. 446, 100th Cong., 2d Sess. 10, reprinted in 1988 U.S. Code Cong. & Admin. News 3071.
4. *Id*.
5. *Id*. at 3073.
6. *Id*. at 3075.
7. 25 U.S.C. § 2703(6).
8. 25 U.S.C. § 2703(7).
9. 25 U.S.C. § 2703(8).
10. 25 U.S.C. § 2710(a)(1).
11. 25 U.S.C. § 2710(d)(3)(C)(iii-iv).
12. 25 U.S.C. § 2710(d)(4).
13. Nation-State Compact between the Oneida Indian Nation and the State of N. Y. § 6(a); Tribal-State Compact between the St. Regis Mohawk Tribe and the State of N. Y. § 5(a); Nation-State Gaming Compact between the Seneca Nation of Indians and the State of N. Y., Appendix C.
14. The scope and breadth of the application is determined by the position applied for and access to gaming areas.
15. Nation-State Compact between the Oneida Indian Nation and the State of N. Y. § 6(d) and 8(f); Tribal-State Compact between the St. Regis Mohawk Tribe and the State of N. Y. § 5(d) and (e); Nation-State Gaming Compact between the Seneca Nation of Indians and the State of N. Y., Appendix C.
16. Nation-State Compact between the Oneida Indian Nation and the State of N. Y. § 6(g); Tribal-State Compact between the St. Regis Mohawk Tribe and the State of N. Y. § 5(f); Nation-State Gaming Compact between the Seneca Nation of Indians and the State of N. Y., Appendix C.
17. Nation-State Compact between the Oneida Indian Nation and the State of N. Y. § 7(a). Nation entities which it wholly owns and operates to provide gaming services, gaming supplies or gaming equipment to the gaming facility are not required to file. The Nation needs only to notify the Board and certify that the entity is wholly owned and operated by the Nation. Nation-State Compact between the Oneida Indian Nation and the State of N. Y. § 7(k). No such enterprises yet conduct such business although the Board has been informally notified that Standing Stone Gaming, an Oneida-owned and operated enterprise, will eventually open a manufacturing facility and construct and supply "Instant Multi-Game" machines to the gaming facility. There is no similar provision in the Mohawk Compact.
18. Nation-State Compact between the Oneida Indian Nation and the State of N. Y. § 7(b); Tribal-State Compact between the St. Regis Mohawk Tribe and the State of N. Y. § 6(b); Nation-State Gaming Compact between the Seneca Nation of Indians and the State of N. Y., Appendix D.
19. Nation-State Compact between the Oneida Indian Nation and the State of N. Y. § 1(q); Tribal-State Compact between the St. Regis Mohawk Tribe and the State of N. Y. § 2(n); Nation-State Gaming Compact between the Seneca Nation of Indians and the State of N. Y., Appendix D.
20. *New York v. Oneida Indian Nation of New York*, 90 F.3d 58, 61 (U.S.C.A. 2, 1996).
21. *Id.* The District Court stated that the state's claim fell outside the exclusionary clause on its face because the game was contained within the Oneida Nation's Compact. Thus, according to the District Court, even without looking to the factual allegations behind the state's claim, the exclusion did not apply.
22. *Id*. at 60.
23. *Id*. at 62.
24. *Id*. at 63.
25. *Saratoga County Chamber of Commerce v. Pataki*, 275 A.D.2d 145, 151–154 (2000).
26. Citing *Saratoga County Chamber of Commerce, Inc. v. Pataki*, 293 A.D.2d 20, 26 (2002) ("*Saratoga II*").
27. *Saratoga County Chamber of Commerce v. Pataki*, 100 N.Y.2d 801 (2003).
28. The issue of the Mohawk Compact's legitimacy may have been resolved. On June 23, 2004, the state Assembly passed legislation to amend and ratify the Mohawk Compact to ensure the enforcement of all rights, benefits, responsibilities and privileges of all parties under the Compact to the same extent as if the legislature had approved or ratified such Compact as of December

3, 1993. The bill also permits the Mohawks to enter into a compact amendment permitting the conduct of slot machines gaming, so long as the state receives a portion of the gaming proceeds. As the Senate has already passed the measure, it next heads to the Governor for review.

29. *Peterman v. Pataki*, Sup. Ct., Oneida Co., July 17, 2002, McCarthy, J., Index No. 99-533.

30. 25 U.S.C. § 1774f.

31. The Governor's execution of the MOU itself has been challenged. One issue in *City of Buffalo v. Pataki*, Sup. Ct., Erie Co., May __, 2004, Makowski, J., Index No. 2004-4425, regarded the MOU, which provided that the Seneca Nation could open up Class III gaming facilities at locations in Niagara County in the city of Niagara Falls and in Erie County in the city of Buffalo, is contradicted by the Compact's language permitting the establishment of a gaming facility "in Erie County, at a location in the City of Buffalo to be determined by the Nation, or at such other site as may be determined by the Nation in the event a site in the City of Buffalo is rejected by the Nation for any reason." Despite a footnote in the MOU providing that in "the event a site in the City of Buffalo site is not available for any reason, the Nation would propose an alternate site," on June 16, 2004, Justice Makowski severed a portion of the 2002 Compact, permanently enjoining the state from releasing funds for the project and prohibited the owner of a 57-acre parcel near the Buffalo-Niagara International Airport in Cheektowaga from selling to the Seneca Nation. Litigation challenging the establishment of the Erie county casino abounds. *See also Warren v. Pataki*, Sup. Ct., Erie Co., May 28, 2004, Index No. 2004-5270; *Concern, Inc. v. Pataki*, Sup. Ct., Erie Co., May 28, 2004, Makowski, J., Index No. 2004-5014.

32. Article III, § 14 of the state Constitution postpones the enactment of bills for at least three days after copies are in their final printed form on legislative desks, but that time period may be reduced, and the bills considered by the legislature, if the Governor certifies to the legislature the facts that in his opinion necessitate an immediate vote.

33. The MOU referred to in the 2001 legislation provides that the Seneca Nation may open up to three Class III gaming facilities. Thus, the legislation provides for up to six total Class III gaming facilities, three of the potential facilities being with the Seneca Nation pursuant to the June 2001 MOU.

34. Exec. L. § 12(a).

35. *Id.*

36. Exec. L. § 12(b).

37. Exec. L. § 12(b)(i)-(iii).

38. Penal Law § 225.30(3)(b).

39. General Municipal Law § 186(3).

40. State Finance Law § 99-h.

41. 100 N.Y.2d 801 (2003).

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Constitutionality of Gambling in New York

By Cornelius D. Murray

Introduction

A great deal of New York's' reliance on gambling revenues to fund governmental operations hinges upon the ultimate resolution of the issues raised in *Dalton v. Pataki*—a case which, at the time of this writing, was pending before the state's intermediate appeals court.[1] *Dalton* concerns the constitutionality of portions of Chapter 383 of the Laws of 2001, which purport to authorize the Governor to enter into Indian casino gaming compacts, permit the installation of video lottery terminals ("VLTs") at racetracks, and allow state participation in a multi-state lottery. The case raises fundamental questions about gambling in general, Indian gambling in particular, federalism, and the separation of powers in New York, and the outcome is likely to have sweeping economic and policy implications for the state and the region. At the heart of the matter are four questions.

"The case raises fundamental questions about gambling in general, Indian gambling in particular, federalism, and the separation of powers in New York, and the outcome is likely to have sweeping economic and policy implications for the state and the region."

First, given the prohibitions against commercialized gambling in Article I, § 9 of the New York State Constitution, does the legislature have the power to authorize the Governor to enter into compacts with Native American tribes, permitting them to operate Las Vegas-style gambling casinos in New York? Second, can the legislature, consistent with the state Constitution, provide for the installation of video lottery terminals at racetracks? Third, is New York's participation in a multi-state lottery constitutional? And fourth, was the manner in which the legislature passed Chapter 383 a violation of Article III, § 14 of the New York State Constitution?

Indian Casino Gaming Compacts

Article I, § 9 of the New York State Constitution generally prohibits all forms of gambling, with narrow exceptions for pari-mutuel betting on horse races, lotteries operated by the state, and specified games of chance conducted by religious, charitable, or non-profit groups.[2] Section 9(2) of Article I specifically prohibits commercial gambling and directs the legislature to effectuate legislation to ensure that "games are rigidly regulated to prevent commercialized gambling."[3]

Despite this obvious constitutional proscription, Chapter 383 of the Laws of 2001 was signed into law by Governor Pataki on October 29, 2001. Part B of Chapter 383 purports to empower the Governor to enter into compacts permitting Indian tribes to operate commercial gambling casinos in New York. Supporters of the law contend that the federal Indian Gaming Regulatory Act ("IGRA") authorizes, if not requires, states to enter into such compacts and thus the federal act preempts state law and provides the basis for passing what would otherwise be a facially unconstitutional state law.[4]

If the IGRA is interpreted to require states to enter into compacts with tribes, however, serious problems of federalism arise. *New York v. United States*, for example, made it unequivocally clear that "no matter how powerful the federal interest involved, the [U.S.] Constitution does not give Congress the authority to require the states to regulate" in order to carry out a federal policy.[5]

If, in the alternative, the IGRA is read to simply allow states to enter into compacts with tribes, there remains the obvious problem that the New York State Constitution does not permit commercial gambling. Plaintiffs contend that regardless of federal permission the legislature does not have the power to authorize the Governor to enter into an agreement that would violate the state's Constitution.

Video Lottery Terminals

Part C of Chapter 383 authorizes the state Division of the Lottery to license racetracks to install video lottery terminals at their facilities.[6] This authorization raises several contentious issues. First, there is a serious question as to whether VLTs are properly characterized as lotteries or slot machines. As noted above, state-operated lotteries fall under an exception to the general New York State ban on gambling. Slot machines, however, do not. In order to determine the constitutionality of VLTs, therefore, it is essential to decide whether they are slots or lotteries. The difficulty in doing so arises because VLTs look and act like slot machines to a player, but the state has designed VLTs so that the selection

of a winner resembles a lottery drawing system done electronically.

Even if, *arguendo,* VLTs are considered to be lotteries, Part C of Chapter 383 may nonetheless be unconstitutional because the net proceeds derived from the VLTs in question do not appear to be used *exclusively* to support education, as required by Article I, § 9(1) of the New York Constitution (emphasis added). Instead, approximately 29% of the revenue derived from VLTs goes directly to racetracks.[7] The legislative record shows that VLTs appear to have been viewed as a way to assist the struggling New York horse racing industry rather than as a way to support education. While assisting the racing industry may be an admirable goal, the New York State Constitution does not recognize it as a constitutionally acceptable use of funds derived from a state-operated lottery.

Further, Part C of Chapter 383 allows some racetracks to install VLTs without local legislative authorization, while others can do so only with such approval.[8] This scheme raises a troubling equal protection question involving the fundamental right to vote, which may be another salient factor in determining the constitutionality of VLTs under 383 Part C.

Participation in a Multi-State Lottery

As touched on above, Article I, § 9(1) of the New York Constitution permits lotteries to be conducted as an exception to the general prohibition against gambling.[9] This exception is limited by two requirements: one, the lottery must be operated by New York State, and two, the net proceeds from the lottery must be used exclusively to support education in the state.[10] It is unclear whether New York's participation in the Mega Millions multi-state lottery game fulfills either of these requirements.

First, it is unclear whether New York can fairly be said to "operate" a multi-state lottery which involves nine other states and requires the votes of six of those states in order to take any action. Indeed, the Supreme Court has held that when a state participates in a multi-state agreement or compact, it has necessarily yielded an essential element of its own sovereignty and control.[11]

Second, funds derived from the multi-state lottery go toward supporting the centralized lottery operation which serves other lotteries besides New York's, and the proceeds of those lotteries go elsewhere besides New York State's education system. Plaintiffs argue that this revenue sharing runs afoul of the strict constitutional requirement that the proceeds from a lottery be "exclusively" devoted to education in New York.

Legislative Approval and Messages of Necessity

Even if Chapter 383 were otherwise found to be valid, the hasty manner in which the law was passed may render it unconstitutional under Article III, § 14. Article III, § 14 of the New York Constitution provides that a bill must be given to legislators at least three legislative calendar days before its final passage, unless the governor certifies "facts which in his or her opinion necessitate an immediate vote."[12] Here, the bill that became Chapter 383 of the Laws of 2001 was not before the legislature for the requisite three days prior to its final passage. Further, the governor's perfunctory assurance that the bill was necessary failed to offer any supporting facts explaining why it was that the bill was necessary and required an immediate vote. Plaintiffs, therefore, argue that the Governor's Message of Necessity was constitutionally inadequate.

"The efforts of the legislature and the Governor to permit commercial gambling, video lottery terminals, and multi-state lotteries in Chapter 383 of the Laws of 2001 raise serious constitutional questions."

The rushed, under-the-table manner in which Chapter 383 was pushed through the legislature was actually quite remarkable, even for a state whose legislative process is well known for its dysfunction. Legislators were given virtually no time to review the bill. In fact, this extremely important piece of legislation was passed in the middle of the night, without any meaningful debate.[13]

Conclusion

The efforts of the legislature and the Governor to permit commercial gambling, video lottery terminals, and multi-state lotteries in Chapter 383 of the Laws of 2001 raise serious constitutional questions. The resolution of these questions in our court system is likely to have a profound effect on New York's economy, public policy, and even perhaps the process by which bills are enacted by the legislature.

Endnotes

1. *Editor's Note: The Appellate Division rendered its decision while publication of this article was pending* (Dalton v. Pataki, *780 N.Y.S.2d 47 (3d Dept. 2004)). The decision of that intermediate appeals court does not affect the identification of issues in this article or the authors' outline of the opposing arguments.*
2. N.Y. Const. art. I, § 9.

3. N.Y. Const. art. I, § 9(2).
4. 25 U.S.C. § 2710(d)
5. *New York v. United States*, 505 U.S. 144, 178 (1992).
6. Chapter 383, Laws of 2001, Part C.
7. Tax Law § 1612(b).
8. Chapter 383, Laws of 2001, Part C.
9. N.Y. Const. art. I, § 9(1).
10. *Id.*
11. *Hess & Walsh v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 40 (1994).
12. N.Y. Const. art. I, § 14.
13. J. Gallagher, *Gambling Deal Marks Flawed Process*, Albany Times Union, October 29, 2001.

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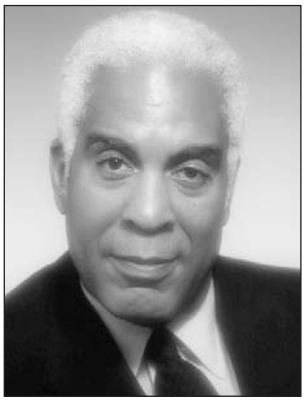
Washington, D.C. Judge Tyrone T. Butler Recently Appointed to The National Judicial College Board of Trustees



Reno, NV - The National Judicial College is pleased to announce the appointment of the Honorable Tyrone T. Butler to its 18-member national board of trustees.

Judge Butler, former vice chair of NYSBA's Committee on Attorneys in Public Service, presently serves as chief administrative law judge of the District of Columbia, Office of Administrative Hearings. Prior to his appointment, he served as chief administrative law judge/director of the Bureau of Adjudication, Division of Legal Affairs of the New York State Department of Health.

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The Battle Over Indian Casino Gaming in New York: A War Opponents Cannot Win

By Randy M. Mastro and Anthony J. Mahajan

Randy M. Mastro

Anthony J. Mahajan

Indian casino gaming is now common throughout the United States, yet it remains the subject of an intense legal battle in New York.

When, in late 2001, the state legislature overwhelmingly authorized Governor Pataki to enter into compacts with Indian tribes to operate casinos on their lands in certain depressed areas of the state,[1] New York finally appeared ready to join the two dozen other states that have recognized their legal obligations under federal law to permit such gaming.[2] The fight did not end there, though; it simply shifted to the courtroom. However, this is a legal battle that opponents of Indian casino gaming cannot win.

By expressly approving Indian gaming and delegating to the Governor the authority to enter into gaming compacts with Indian tribes, the state legislature brought New York into compliance with the Indian Gaming Regulatory Act ("IGRA").[3] That federal law provides that each state "shall negotiate with the Indian tribe in good faith to enter into such a compact" whenever the state "permits such gaming for any purpose by any person, organization, or entity."[4] New York permits a wide variety of gambling within the state, including state-sponsored lotteries, pari-mutuel betting on horse racing, and "games of chance" conducted by "charitable or non-profit organizations."[5] Accordingly, federal law requires New York to permit Indian tribes to conduct casino-style gaming because it permits other parties to conduct casino-style gaming within the state.

It is no barrier to Indian gaming for opponents to argue, as their "centerpiece" claim, that New York's State Constitution bars commercial gambling.[6] At the same time, the State Constitution also expressly permits charities to conduct casino-style "games of chance."[7] The law is crystal clear that where, as here, a state "permits the conduct at issue, subject to regulation," rather than "prohibits" it altogether, IGRA requires the state to afford Indian tribes that same opportunity.[8]

At bottom, this legal challenge is based on the false assumption that state law controls here. It does not. As the U.S. Supreme Court has repeatedly held, "tribal sovereignty is dependent on, and subordinate to, only the Federal Government, not the States."[9] Thus, "the regulation of Indian commerce" is "under the exclusive control of the Federal Government," and states "have been divested of virtually all authority over Indian commerce and Indian tribes."[10]

Opponents of Indian casino gaming feign shock at the notion that a court could compel New York to negotiate a gaming compact with Indian tribes if the state wished to have any role in regulating such conduct on sovereign Indian territory. However, there is nothing shocking about that proposition: It is the law. Indeed, absent a negotiated compact, New York State would have no right to regulate gaming on Indian land. Only the federal government would.[11] Therefore, in passing IGRA, Congress actually afforded the states a potential role in Indian gaming regulation that they would not otherwise have had, so long as they negotiated that role for themselves through Indian gaming compacts. Nevertheless, IGRA protects Indian tribes' rights to conduct gaming within a state to the same extent as "any person, organization, or entity" is permitted to conduct "such gaming for any purpose."[12]

"[F]ederal law requires New York to permit Indian tribes to conduct casino-style gaming because it permits other parties to conduct casino-style gaming within the state."

That explains why no court has ever held that a state may prevent Indian tribes from conducting types of gaming that it permits any other party within the state to conduct, even if that other party's gaming is "highly regulated."[13] New York permits "charitable or non-profit organizations" to conduct casino-style "games of chance."[14] Hence, it "must" also permit Indian tribes to conduct "such gaming."[15]

I. Indian Tribes Are Sovereign Entities Not Subject to State Regulation

Since the days of Chief Justice Marshall, it has been well-established law that Indian tribes possess powers of inherent sovereignty in our federal system.[16] "Indian tribes are unique aggregations possessing attributes of sovereignty over both their members and their territory."[17] Thus, Indian tribes retain certain "inherent sovereign powers" and, except as withdrawn, limited, or modified by treaty or federal statute, have inherent authority over tribal members within their territories.[18]

The U.S. Supreme Court "has consistently recognized that Indian tribes retain attributes of sovereignty over both their members and their territory," and that "tribal sovereignty is dependent on, and subordinate to, only the Federal Government, not the State."[19] Thus, the only way that "state laws may be applied to tribal Indians on their reservations [is] if Congress has expressly so provided."[20]

Over the last few decades, gaming on Indian lands has become a multi-billion dollar industry.[21] Until the late 1980s, however, the law was unclear as to the degree to which these gaming activities could be regulated by the states. In 1987, the U.S. Supreme Court squarely addressed this issue in *California v. Cabazon Band of Mission Indians*.[22]

In *Cabazon*, the Court analyzed the sovereignty of Indian tribes in the context of California's regulations over gambling activities conducted within the state. There, pursuant to ordinances approved by the U.S. Secretary of the Interior, two federally recognized Indian tribes conducted bingo and card games on their California reservations.[23] The State of California objected to these gaming operations and sought to enforce a California statute that imposed prize limits and limited bingo operators to unpaid members of charities. California argued that it had jurisdiction over the tribes pursuant to Public Law 280, which granted states limited criminal jurisdiction over offenses committed on tribal lands.[24]

The U.S. Supreme Court held that whether a state could enforce its law on an Indian reservation depended on whether the law was "criminal/prohibitory" or "civil/regulatory."[25] The Court determined that if a state law "generally" were to "prohibit certain conduct," it would fall within Public Law 280's grant of jurisdiction and be considered "criminal/prohibitory."[26] However, "if the state law generally permits the conduct at issue, subject to regulation, it must be classified as civil/regulatory" and cannot be enforced on Indian land.[27] Applying this analysis to the Indian tribes' activities in California, the Court found that California law permitted a wide variety of gaming activities, including the state lottery, certain card games, pari-mutuel betting on horse races, and bingo.[28] Therefore, the Court ruled that because the state "regulates rather than prohibits gambling in general and bingo in particular," the Indian tribes were entitled to engage in such gaming activities on their lands, unconstrained by California's gaming regulations.[29]

II. IGRA Provides States with a Role in the Regulation of Indian Gambling They Would Not Otherwise Have

The U.S. Supreme Court's decision in *Cabazon* prompted Congress in 1988 to enact IGRA, which incorporated *Cabazon*'s "prohibitory/regulatory" distinction. The primary purpose of IGRA was to provide "a statutory basis for the operation of gaming by Indian tribes" because "existing Federal law d[id] not provide clear standards or regulations for [this] conduct."[30] To accomplish this goal, Congress has devised an elaborate scheme subjecting different "classes" of gaming to varying degrees of regulation.[31]

Pursuant to IGRA, a state must permit Indian tribes to conduct Class III casino-style gambling on Indian lands if the state "permits such gaming for any purpose by any person, organization, or entity," and such gambling is "conducted in conformance with a Tribal-State compact entered into by the Indian tribe and the State."[32] In other words:

> The mechanism for facilitating the unusual relationship in which a tribe might affirmatively seek the extension of State jurisdiction and the application of state laws to activities conducted on Indian land is a tribal-State compact. In no instance, does [IGRA] contemplate the extension of State jurisdiction or the application of State laws for any other purpose.[33]

Therefore, so long as a state does not completely prohibit Class III casino-style gaming, the state must allow Indian tribes to conduct the same types of Class III gaming that any other party is permitted to conduct within the state.[34] However, IGRA affords states a potential role in the regulation of Indian gaming that they would not otherwise have had, so long as states negotiate that role for themselves through Indian gaming compacts.

III. New York Law Permits Charities to Conduct Casino-Style Gaming

Although the New York State Constitution generally restricts commercial gambling activities, it was amended in 1975 to permit "bona fide religious, charitable or non-profit organizations" to conduct "games of chance," upon receiving city, town or village approval.[35] Section 186 of the General Municipal Law defines "games of chance" as "the games known as merchandise wheels, coin boards, merchandise boards, seal cards, raffles, and

bell jars and such other specific games as may be authorized by the [Racing and Wagering] board," including craps, roulette, poker and blackjack, among others.[36] In 2001, the state legislature amended the Municipal Law to include "slot machines" within the definition of permissible "games of chance."[37]

IV. IGRA Requires that New York Permit Indian Casino Gambling Because New York Permits Extensive, Casino-Style Charitable Gambling

IGRA mandates that so long as a state "permits [casino-style] gaming for *any* purpose by *any* person, organization, or entity," it "*shall* negotiate" a compact to permit Indian tribes to conduct such gaming.[38] The New York State Constitution permits "charitable or non-profit organizations" to conduct "games of chance" (and otherwise authorizes state-sponsored lotteries and pari-mutuel betting on horse racing).[39] Indeed, in 2002, according to statistics maintained by the New York State Racing and Wagering Board, more than $460 million was wagered on charitable gaming activities permitted of some 16,149 registered New York charitable organizations.[40] Of that total, Class III gaming accounted for $328 million, including 2,300 licensed "Las Vegas Nights" conducted by New York charities.[41] Similarly, in 2003, $412 million was wagered on charitable gambling in New York, $296 million of it on Class III gaming, and New York charities held more than 500 "Las Vegas Nights."[42] Thus, because New York allows charities to conduct casino-style gambling, IGRA requires New York to negotiate with Indian tribes to permit them to do the same.[43]

Three of the seven judges of the New York Court of Appeals have already so held. In *Saratoga County Chamber of Commerce, Inc. v. Pataki*, the Court of Appeals, by a 4-3 vote, held that the Governor needed the state legislature's approval to enter into tribal-state compacts on behalf of the state.[44] Noting that "[n]either the trial court nor the Appellate Division addressed the anti-gambling provision" of the State Constitution, the *Saratoga* majority declined to address whether New York's prohibition on "commercial" gambling bars Indian gaming because, "inasmuch as the separation of powers point is an independent ground for invalidating the compact," any discussion of New York's public policy "would be dictum."[45]

However, Judge Read, joined in dissent by Judges Wesley and Graffeo, concluded that Article I, Section 9 of the State Constitution poses no barrier to Indian gambling. Significantly, these three judges found that "New York has not outlawed all gambling for more than six decades," and now "gambling is commonplace in New York notwithstanding Article I, Section 9's general condemnation of it."[46] Thus, states such as New York "that allow charities to conduct class III gaming must negotiate in good faith with a Tribe wishing to do the same."[47] The three dissenters further reasoned that the Governor, in executing tribal-state compacts, did not violate separation of powers by engaging in "policy making" because "Indian gaming is mandated in New York by federal law, given policy choices embodied in the New York Constitution and State law."[48]

When the New York State legislature responded to *Saratoga* by authorizing the Governor to enter into Indian gaming compacts, many of the same *Saratoga* litigants went back to court to challenge this legislation, which eliminated the separation of powers question raised in *Saratoga* because the state legislature "deemed ratified" specific tribal-state compacts executed by the Governor.[49] As the New York Court of Appeals noted in affirming *Saratoga*, this subsequent case "squarely addresses the question of the applicability of the State Constitution's anti-gambling provision" to Indian gaming under IGRA.[50] Since then, the lower courts have unanimously ruled in favor of Indian casino gaming, and the issue is now poised for review by the state's highest court.

In July 2003, New York State Supreme Court Justice Joseph C. Teresi, who also issued the *Saratoga* decision that the New York Court of Appeals affirmed, rejected this latest constitutional challenge based on the reasoning of the *Saratoga* dissent and dismissed all claims. Then, on July 7, 2004, the Appellate Division, Third Department, affirmed that ruling as it applied to Indian casino gaming. Justice Thomas E. Mercure, writing for a unanimous five-judge panel, reasoned that:

> [D]espite a ban on commercialized gambling . . . New York now constitutionally permits a substantial amount of gambling. . . . Inasmuch as the state permits, subject to heavy regulation and various restrictions, others to engage in the type of gaming activities at issue here, it merely regulates, as opposed to completely bars, those gaming activities. For purposes of IGRA, then, the state 'permits such gaming for any purpose by any person, organization or entity.' Accordingly, the class III gaming at issue is properly the subject of a tribal-state compact and part B of chapter 383 of the Laws of 2001 authorizing the Governor to enter into such compacts is consistent with both IGRA and NY Constitution, article I, § 9.[51]

As these many New York judges have now all recognized, the New York State Constitution's proscription on certain "commercial" gaming poses no bar to Indian gambling because IGRA "makes no distinction between state laws that allow" casino-type "gaming for charitable, commercial, or governmental purposes."[52] IGRA

mandates Indian gaming within a state to the same extent as "any person, organization, or entity" is permitted to conduct gaming "for *any* purpose," regardless of whether Indian gaming is for the same purpose.[53] Put simply, were New York to refuse to negotiate a tribal-state compact to permit a federally recognized Indian tribe to conduct Class III gaming, "under Cabazon, the tribe could continue to operate a casino *without any state regulation*."[54]

"In sum, IGRA empowers 'tribal governments and state governments to enter into tribal-State compacts to address regulatory and jurisdictional issues.'"

That was precisely the situation the State of Connecticut confronted in *Mashantucket Pequot Tribe v. Connecticut*.[55] Connecticut, like New York, barred commercial gambling but permitted other gaming, such as state-sponsored lotteries, pari-mutuel betting, and "Las Vegas nights" for charities.[56] Moreover, Connecticut, like New York, imposed strict "wager and prize limits" on such charitable gaming and required the "operation of the games" to "be conducted only by members of the group on a voluntary, nonremunerative basis."[57]

In *Mashantucket*, the State of Connecticut, trying to prevent Indian casino gaming, argued that its limited authorization of charitable "Las Vegas nights" did not amount to a general allowance of "such gaming" within the meaning of IGRA.[58] Consequently, the state argued that it was not obligated to negotiate with the tribe to allow such Class III gaming on tribal lands.[59] The state also made the fallback argument that "even where a state does not prohibit Class III gaming as a matter of criminal law and public policy, an Indian tribe could nonetheless conduct such gaming only in accordance with, and by acceptance of, the entire state corpus of laws and regulations governing such gaming."[60]

The U.S. Court of Appeals for the Second Circuit flatly rejected both arguments, unanimously holding that because Connecticut "permits games of chance, albeit in a highly regulated form," it "must" permit Indian tribes to conduct these games because "such gaming is not totally repugnant to the State's public policy."[61] The Second Circuit further held that the strictures imposed by regulation in Connecticut over charitable gaming (such as wager limits, price limits, and proceed restrictions) could not be applied to Indian gambling; otherwise, IGRA would be rendered "a dead letter."[62] Accordingly, the Second Circuit ruled that the "State must negotiate with the Tribe concerning the conduct of casino-type games of chance at the Reservation."[63] *A fortiori*, New York, like Connecticut, "must negotiate" with Indian tribes to conduct "casino-type games of chance," just as it permits others to do throughout the state.

As courts around the country have repeatedly acknowledged, under IGRA, "Congress intended to permit a particular gaming activity, even if conducted in a manner inconsistent with state law, if state law merely regulated, as opposed to completely barred, that particular gaming activity."[64] Indeed, of the 24 states that have entered into Indian gaming compacts, most, like New York, prohibit gambling, except charitable gaming;[65] and several, like New York, have express provisions in their state constitutions to that effect.[66] Another constant among these states is that they, like New York, impose rigid restrictions on charitable organizations conducting gaming, such as wager limits, prize limits, proceed restrictions, and operational controls.[67] Nevertheless, these states permit Indian tribes to conduct such gaming on their lands unencumbered by state restrictions on charitable gaming, other than those explicitly agreed to between states and Indian tribes through the compacting process.[68]

In sum, IGRA empowers "tribal governments and state governments to enter into tribal-State compacts to address regulatory and jurisdictional issues."[69] Fulfilling IGRA's mandate, the state legislature has now brought New York into compliance with controlling federal law by authorizing the Governor to enter into a limited number of such Indian gaming compacts. State law can pose no obstacle to that course because federal law requires no less of New York if the state wishes to play any role in regulating gambling on sovereign Indian territory.

Endnotes

1. Act of Oct. 29, 2001, ch. 383, pt. B, 2001 N.Y. Laws 752.
2. U.S. Dep't of the Interior, Bureau of Indian Affairs, Tribal-State Compact List, updated May 1, 2003.
3. *See* 25 U.S.C. §§ 2701 *et seq.* (2004).
4. 25 U.S.C. § 2710(d)(1)(B) & (3)(A).
5. N.Y. Const. art. I, § 9(2).
6. *See id*.
7. *Id*.
8. *Mashantucket Pequot Tribe v. Connecticut*, 913 F.2d 1024, 1029 (2d Cir. 1990) (quoting *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 209 (1987)).
9. *Cabazon*, 480 U.S. at 207.
10. *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 72, 62 (1996).
11. *See* U.S. Const. art. I, § 8, cl. 3.
12. 25 U.S.C. § 2710(d)(1)(B).
13. *Mashantucket*, 913 F.2d at 1031–32.
14. N.Y. Const. art. I, § 9(2).
15. *Mashantucket*, 913 F.2d at 1031–32; 25 U.S.C. § 2710(d)(1)(B).
16. *See Johnson v. McIntosh*, 21 U.S. 543, 574 (1823); *Cherokee Nation v. Georgia*, 30 U.S. 1, 17 (1831).
17. *United States v. Wheeler*, 435 U.S. 313, 323 (1978) (quoting *United States v. Mazurie*, 419 U.S. 544, 557 (1975)).

18. *Montana v. United States*, 450 U.S. 544, 564–65 (1981); *Wheeler*, 435 U.S. at 323.

19. *Cabazon*, 480 U.S. at 207 (citation omitted).

20. *Id.*

21. According to statistics compiled by the National Indian Gaming Commission ("NIGC"), in 2002 alone, the Indian gaming industry generated $14.5 billion in revenue throughout the nation. *See* National Indian Gaming Commission, Tribal Gaming Revenues By Region, *at* http://www.nigc.gov/nigc/tribes/revenue-02-01.jsp.

22. 480 U.S. 202 (1987).

23. *Id.* at 204–205.

24. *Id.* at 204–208.

25. *Id.* at 209.

26. *Id.*

27. *Id.* As the Court explained, the fact that a regulatory law is enforceable by both civil and criminal penalties does not make it a criminal law for purposes of jurisdiction. *See id.* at 209, 211.

28. *Id.* at 210–11.

29. *Id.* at 211.

30. 25 U.S.C. §§ 2702(1), 2701(3).

31. IGRA divides gaming into three classes. Class I gaming is limited to social games for nominal prizes and traditional tribal ceremonial games, which are subject only to tribal regulation. *See id.* § 2703(6). Class II gaming includes bingo and certain non-banking card games, but not banking card games such as blackjack, electronic games of chance and slot machines, and is subject to tribal regulation and oversight by the NIGC. *See id.* §§ 2703(7)(A), (B), 2710(a)-(c). All other gaming, including casino-type gambling, is classified as Class III gaming. *See id.* § 2703(8).

32. *Id.* § 2710(d)(1).

33. S. Rep. No. 100-446, at 6 (1988), *reprinted in* 1988 U.S.C.C.A.N. 3071, 3075–76.

34. Any Indian tribe within a state that allows Class III casino-style gaming activity may request the state to enter into negotiations for a tribal-state compact. Upon receiving this request, the state "shall negotiate" with the tribe in good faith. 25 U.S.C. § 2710(d)(3)(A). If the state then fails to negotiate in good faith, the tribe may bring an action in federal district court seeking an order compelling the state to conclude a compact. *See id.* § 2701(d)(7)(A)(i). If such an order is issued but the state and tribe then fail to conclude a compact, the Secretary of the Interior may promulgate procedures, consistent with IGRA, for the conduct of Class III gaming by the tribe on Indian lands. *See id.* § 2701(d)(7)(A)(iv), (vii). If, instead, the state asserts Eleventh Amendment sovereign immunity to block such a lawsuit (*see Seminole Tribe of Fla. v. Florida*, 517 U.S. 44 (1996)), after mediation, the Secretary of the Interior may promulgate "rules for the conduct of Class III Indian gaming" in that state. 25 C.F.R. §§ 291 *et seq.*; *see also* 25 U.S.C. § 2710(d)(7)(B)(iv).

35. N.Y. Const. art. I, § 9(2). The New York State Constitution defines "games of chance" as "games in which prizes are awarded on the basis of a winning number or numbers, color or colors, or symbol or symbols determined by chance from among those previously selected or played, whether determined as the result of the spinning of a wheel, a drawing *or otherwise by chance*." *Id.* (emphasis added).

36. N.Y. Gen. Mun. Law § 186(3) (McKinney 2004). The games of chance which have been approved in writing by the Racing and Wagering Board as legal "games of chance" include craps, roulette, blackjack, Big Six, Money Wheel, Chuck-A-Luck, Hazard, Under and Over Seven, Beat the Dealer, Big Nine, Color Wheel, Bang, Joker Seven, Horse Race Wheel and Best Poker Hand. 9 N.Y. Comp. Codes R. & Regs. tit. 9, § 5620.1 (2004).

37. N.Y. Gen. Mun. Law § 186(3). Moreover, the state legislature repealed the Penal Law's prohibition of slot machines to permit their possession and use "pursuant to a gaming compact, duly executed by the governor and an Indian tribe or Nation, under the Indian Gaming Regulatory Act . . . where the use of such slot machine or machines is consistent with such gaming compact and where the state received a negotiated percentage of the net drop (defined as gross money wagered after payout, but before expenses) from any such slot machine or machines." N.Y. Penal Law § 225.30 (McKinney 2004).

38. 25 U.S.C. § 2710(d)(1)(B) & (3)(A) (emphasis added).

39. N.Y. Const. art. I, § 9.

40. New York State Racing and Wagering Board, 2002 Annual Report and Simulcast Report, Cover Letter to Governor and State Legislature, *at* http://www.racing.state.ny.us/about/annual.htm.

41. *Id.* at 37–38.

42. New York State Racing and Wagering Board, 2003 Annual Report and Simulcast Report 26–27, *at* http://www.racing.state.ny.us/about/annual.htm.

43. *See* 25 U.S.C. § 2710(d)(1)(B) & 3(A).

44. 100 N.Y.2d 801, 822–24 (2003).

45. *Id.* at 824–25.

46. *Id.* at 842, 844.

47. *Id.* at 842.

48. *Id.* at 844. Only Judge Smith, concurring in part and dissenting in part, would have found that the New York State Constitution "clearly forbids [Indian] gambling," even though he conceded that "exceptions" to New York's anti-gambling policy exist, such as for example "games of chance." *Id.* at 825, 826. Judge Smith thus refused to heed IGRA's clear command that "Class III gaming activities shall be lawful on Indian lands" if a state "permits such gaming for any purpose by *any* person, organization, or entity." 25 U.S.C. § 2710(d)(1) & (1)(B) (emphasis added).

49. N.Y. Exec. Law § 12(b) (McKinney 2004); *Dalton v. Pataki*, No. 719-02 (N.Y. Sup. Ct., Albany Co. Jan. 29, 2002); *Karr v. Pataki*, No. 718-02 (N.Y. Sup. Ct., Albany Co. Jan. 29, 2002). The challengers included New York State legislators and advocates opposed to gambling as a matter of policy, but, ironically, their cases were argued by the long-time counsel of casino magnate Donald Trump, who is himself desperate to stop Indian gaming in New York to protect his Atlantic City empire from competition.

50. 100 N.Y.2d at 825.

51. *Dalton v. Pataki*, No. 94493, slip op. at 22-23 (3d Dep't July 7, 2004) (citations omitted).

52. N.Y. Const. art. I, § 9(2); S. Rep. No. 100-446, at 12 (1988), *reprinted in* 1988 U.S.C.C.A.N. 3071, 3082.

53. 25 U.S.C. § 2710(d)(1)(B) (emphasis added). Indeed, the purpose of Indian gaming is to "promot[e] tribal economic development, self-sufficiency, and strong tribal governments." *Id.* § 2702(1). Therefore, "it is far from obvious that if a charitable/commercial line were drawn, tribes would fall on the commercial side." *American Greyhound Racing, Inc. v. Hull*, 146 F. Supp. 2d 1012, 1062–63 (D. Ariz. 2001), *vacated on other grounds*, 305 F.3d 1015 (9th Cir. 2002).

54. *Willis v. Fordice*, 850 F. Supp. 523, 530 (S.D. Miss. 1994) (emphasis added), *aff'd*, 55 F.3d 633 (5th Cir. 1995). Conversely, IGRA does not force states to regulate Indian gambling, and thus does not violate state sovereignty under the Tenth Amendment of the U.S. Constitution. If a state that permitted some casino-type gaming—and, therefore, had to allow such gaming to be conducted by Indian tribes under IGRA—declined to regulate Indian gaming, it would not be compelled by IGRA to do so. The federal government would do so instead. *See* 25 U.S.C. §

2710(d)(7)(B)(vii); 25 C.F.R. §§ 291.1 *et seq.*; *see also Ponca Tribe*, 37 F.3d at 1434; *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Engler*, 304 F.3d 616, 617 (6th Cir. 2002); *Fordice*, 850 F. Supp. at 527. Here, of course, New York is not being compelled to do anything against its will: With the recent passage of this legislation, the Governor and legislature have affirmed that they want Indian casino gaming in New York State.

55. 737 F. Supp. 169 (D. Conn.), *aff'd*, 913 F.2d 1024 (2d Cir. 1990).

56. 913 F.2d at 1029, 1031.

57. 737 F. Supp. at 175; N.Y. Const. art. I, § 9(2) (establishing restrictions applicable to charitable "games of chance").

58. 25 U.S.C. § 2710(d)(1)(B).

59. 913 F.2d at 1029.

60. *Id.* at 1030–31.

61. *Id.* at 1031–32.

62. *Id.* at 1031; *accord United States v. Sisseton-Wahpeton Sioux Tribe*, 897 F.2d 358, 364–67 (8th Cir. 1990) (requiring Indian gaming where South Dakota permitted limited card games where nothing of value "is wagered upon the outcome" because it "conflicts with Congressional intent" to permit a state "to apply its substantive law" over Indian gaming); *Fordice*, 850 F. Supp. at 531 (holding that an Indian tribe could conduct gaming on its reservation in Mississippi, despite Mississippi's law allowing gaming only on navigable waters, because "[e]ven if a state only allows a limited amount of gaming subject to strict regulations on time, manner and place, that state may not prohibit or even regulate gaming on Indian lands within the state," and "[b]ecause Mississippi allows such gaming as a matter of public policy, it may not prohibit Class III gaming by the Choctaw Indian tribe on tribal lands"); *Lac du Flambeau Band of Lake Superior Chippewa Indians v. Wisconsin*, 770 F. Supp. 480, 485–87 (D. Wis. 1991) (requiring Indian gaming where the Wisconsin State Constitution was amended to authorize charitable organizations to conduct limited casino-type gaming because "if the state allows some forms of gambling, even subject to extensive regulation, its policy is deemed to be civil-regulatory and it is barred from enforcing its gambling laws on the reservation").

63. 913 F.2d at 1031–32.

64. *Sisseton-Wahpeton*, 897 F.2d at 365. *See, e.g., supra*, note 62.

65. These states include Arizona, Connecticut, Idaho, Kansas, Minnesota, Nebraska, New Mexico, New York, North Carolina, North Dakota, Oregon, South Dakota and Wisconsin.

66. These states include Idaho, Nebraska, North Dakota, Oregon, South Dakota, and Wisconsin. For example, the Idaho State Constitution expressly provides that gambling is "contrary to public policy and is strictly prohibited," yet permits "qualified charitable organizations" to conduct bingo and raffle games solely for "charitable purposes." Idaho Const. art. III, § 20(1) (2002). Idaho law also imposes a maximum prize per bingo session of $10,000, among other rigid restrictions. *See* Idaho Code § 67-7708 (2002); Idaho Admin. Code § 52.01.02.113 (2002). Nevertheless, Indian tribes in Idaho conduct such gaming unencumbered by the rigid restrictions Idaho law imposes on charitable gaming. Furthermore, the Nebraska State Constitution provides that "the Legislature shall not authorize any game of chance." Neb. Const. art. III, § 24 (2002). Nevertheless, Nebraska law expressly provides that, upon the request of an Indian tribe, the governor shall negotiate a tribal-state compact for Class III Indian gaming, and Indian casinos in Nebraska currently offer numerous "games of chance," pursuant to tribal-state compacts. Neb. Rev. Stat. § 9-1,106 (2002). Moreover, the North Dakota State Constitution provides that the "legislative assembly shall not authorize any game of chance" "for any purpose whatever," but permits charitable organizations to conduct games of chance if the entire net proceeds are devoted to charitable purposes and the organizations comply with other rigid restrictions. N.D. Const. art XI, § 25 (2002); N.D. Cent. Code §§ 53-06.1-01 *et seq.* (2002). Nevertheless, Indian tribes in North Dakota operate casinos that offer many more games of chance than those permitted of charities, unencumbered by the same restrictions imposed on charitable gaming. Similarly, the Oregon State Constitution expressly provides: "The Legislative Assembly has no power to authorize, and shall prohibit, casinos from operation in the State of Oregon." Or. Const. art. XV, § 4(10) (2002). Nevertheless, today, many Indian tribes operate casinos in Oregon. Likewise, the South Dakota State Constitution prohibits the legislature from authorizing any "game of chance," except those conducted by charities "when the entire net proceeds of such games of chance" are devoted to charitable purposes, and "limited card games and slot machines within the city limits of Deadwood." S.D. Const. art. III, § 25 (2002). Nevertheless, Indian casinos in South Dakota offer games of chance unconstrained by the limits applicable to charities, and outside the city of Deadwood. Finally, the Wisconsin State Constitution provides that "the legislature may not authorize gambling in any form," except "bingo" and "raffles" by charitable organizations. Wis. Const. art. IV, § 24 (2002). Nevertheless, pursuant to tribal-state compacts, Indian tribes in Wisconsin operate casinos offering electronic games of chance, blackjack, pull-tab games, craps and roulette.

67. *See, e.g., supra,* note 66. A compendium of each state's relevant laws and permitted Indian gambling was filed by the authors in the *Dalton/Karr* case.

68. In fact, many of these states, including Arizona, Kansas, Minnesota, Nebraska, New Mexico, North Carolina, North Dakota, South Dakota and Wisconsin, have permitted tribes by compact to conduct types of gaming not permitted of any others in the state. For example, in Nebraska, North Dakota, and South Dakota, Indian tribes conduct "games of chance," even though state law bars everyone from engaging in "games of chance," regardless of their purpose. Thus, IGRA simply sets the floor for negotiation. It requires that a state negotiating in good faith must at least permit the tribe to engage in "such gaming" as the state permits "for any purpose by any person, organization or entity." 25 U.S.C. § 2710(d)(1)(B). However, a state is not required by IGRA to permit Indian tribes to conduct types of Class III gaming prohibited to *all* within the state. *See, e.g., Rumsey Indian Rancheria of Wintun Indians v. Wilson*, 64 F.3d 1250, 1259 n.5, 1260 (9th Cir. 1994) (holding that California was not obligated to negotiate over prohibited types of Class III games, but that the court in *Mashantucket* "reached the correct result" because Connecticut permitted charitable gaming and therefore "had to negotiate with the tribe over these games"), *amended*, 99 F.3d 321 (9th Cir. 1996); *Citizen Band Potawatomi Indian Tribe v. Green*, 995 F.2d 179, 181 (10th Cir. 1993) (holding Indian tribes could not operate video lottery terminals because "Oklahoma is not a state 'in which [such] gambling devices are legal'").

69. S. Rep. 100-446 at 3 (1988), *reprinted in* 1988 U.S.C.C.A.N. 3071, 3073.

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Account Wagering in New York and the Dormant Commerce Clause

By Bennett Liebman

While this subject more than merits a formal law review piece, it should be fairly clear that New York's law permitting only in-state racing entities to maintain telephone wagering accounts should be viewed as unconstitutional. The dormant Commerce Clause of the federal Constitution prevents states from placing tariffs or barriers on interstate commerce, and New York has done this with phone account wagering.

New York's Account Wagering Law

Section 1012 of the Racing, Pari-Mutuel Wagering and Breeding Law ("Section 1012," or "Racing Law") establishes the framework for telephone wagering accounts. While the substance of section 1012 dates from 1990,[1] the reality is that telephone wagering started in New York even before specific legislative authorization. When the first authorization for off-track wagering was given in 1970, the Governor's Bill Jacket reveals a side agreement between the Rockefeller Administration and the city of New York under which permission was given generally to the city to have telephone wagering as part of its OTB authorization.[2] The New York State Racing and Wagering Board promulgated several minimally evasive rules in the mid-1970s that recognized that OTBs had the right to have telephone wagering accounts.[3]

In 1985, the legislature finally placed a law addressing telephone accounts into the statute books.[4] The legislature did not specifically authorize telephone wagering accounts. Instead, it passed a provision authorizing OTBs with telephone wagering to establish accounts with minimum balances in excess of $500 on which a surcharge would not be paid by the bettors.[5] There was no specific authorization for racetracks to have telephone wagering accounts.

That was changed by Chapter 346 of the Laws of 1990. All racing entities were authorized to have telephone wagering accounts. Harness tracks and for-profit thoroughbred tracks could have telephone accounts as long as there was a minimum account balance of $500.[6] The one non-profit racing association[7] could have a telephone wagering account as long as the minimum was $1,000, although this balance was only $100 for residents of non-contiguous states. Additionally, the city of New York was authorized to end its surcharge on telephone wagering accounts.

Two years later, the amount of minimum balance required was reduced. At harness tracks and the for-profit thoroughbred tracks, the minimum was now $300. At NYRA, the minimum was now $450. Additionally, the minimum balance at which OTBs (other than the OTB corporation situated in New York City) could have surcharge-free telephone wagering accounts was reduced to $300.[8] Since 1992, the life of the telephone wagering provision has been continually extended by the state legislature.

"The dormant Commerce Clause of the federal Constitution prevents states from placing tariffs or barriers on interstate commerce, and New York has done this with phone account wagering."

There was little change in telephone wagering until May 2003. In that month, the legislature (over Governor Pataki's veto) passed A. 2106-b and drastically changed the telephone wagering account system.[9] No longer are there state-mandated minimum balance requirements at any of the state's racetracks, and the OTBs are given the opportunity to alter the levels at which they will charge a surcharge on winning bets. This raises the issue of whether out-of-state telephone wagering account suppliers can be prevented from doing business with New York residents. Additionally, the law has authorized nearly universal simulcasting of racing from outside New York State. This provision has greatly increased the potential for tracks to establish telephone wagering accounts. With no minimum balance requirements, they can take bets on most everything. In the past, the law had been balanced overwhelmingly in favor of the OTBs, and consequently only NYRA and Vernon Downs used telephone wagering accounts.

Section 1012 by its terms limits telephone accounts to off-track betting corporations and to racetracks "licensed to conduct pari-mutuel racing." This means that only New York-based entities can offer pari-mutuel telephone wagering to New York domiciliaries. A for-

eign corporation or association would be banned from offering wagering to New Yorkers. Assuming that this is the law, a foreign corporation that offers a telephone wagering account to a New Yorker would be violating section 225.05 of the Penal Law: promoting gambling in the second degree, a Class A misdemeanor to advance or profit from unlawful gambling. If total wagers exceed more than five bets and total more than $5,000, it is a felony: promoting gambling in the first degree. This is a Class E felony currently punishable with a maximum of five years in prison.

Thus, the New York law, on its face, effectively shuts out foreign entities engaged in taking telephone account wagers. Back in 1990, telephone wagering was largely a New York phenomenon; that is no longer the case. There are a growing number of entities in the United States and abroad engaged in conducting wagering on pari-mutuel events through telephone and Internet wagering accounts. Some are maintained by individual racetrack corporations, such as Magna Entertainment,[10] Philadelphia Park,[11] and Penn National.[12] Others are maintained by consortiums of racetracks such as America Tab[13] and US Off-Track.[14] Still others are separate organizations which do not run racetracks but are engaged in taking account wagers. These include the Television Games Network,[15] Autotote,[16] and Youbet.[17] During 2003, $315.3 million was wagered through the account wagering providers with licensed hubs in California,[18] and approximately $825 million was wagered through account wagering providers with hubs licensed through Oregon in the 2003 calendar year.[19] All of these organizations are blocked by New York law from offering account wagering to New Yorkers.

But the greater issue is whether New York can block these foreign account wagering providers. In a unified, capitalist society, national markets are a necessity, and a single state should not have the ability to block out foreign competition. Yet, the regulation of gambling is traditionally a police power that is relegated to the states. Indeed, Congress in the Interstate Horse Racing Act (IHRA) has said "the states should have the primary responsibility for determining what forms of gambling may legally take place within their borders"[20] and the "federal government should prevent interference by one state with the gambling policies of another."[21] The issue is whether the police powers and the federal recognition of these police powers should trump the obvious discrimination in the Racing Law.

The Dormant Commerce Clause

The framework for analysis is the federal Commerce Clause of the United States Constitution. The Commerce Clause provides that "Congress shall have power to . . . regulate commerce with foreign Nations and among the several States and with the Indian Tribes."[22] The clause has, for most of two centuries,[23] been understood to have an implicit negative or dormant effect. Under the dormant aspect of the Commerce Clause, there is the understanding that the Commerce Clause "immediately effected a curtailment of state power."[24] States are forbidden to discriminate against out-of-state economic interests through local economic protectionism.[25]

Under dormant Commerce Clause jurisprudence, there is a per se rule which largely bans discrimination against interstate commerce. However, if the state action does not violate the per se rule, it is judged under a less strict balancing test.[26] "Discrimination against interstate commerce in favor of local business or investment is per se invalid, save in a narrow class of cases in which the municipality can demonstrate, under rigorous scrutiny, that it has no other means to advance a legitimate local interest."[27]

"This is an extremely difficult burden, "so heavy that 'facial discrimination by itself may be a fatal defect.'"[28] "Thus, where simple economic protectionism is effected by state legislation, a virtually per se rule of invalidity has been erected."[29]

Section 1012 of the Racing Law would clearly be subject to the per se test. It discriminates against out-of-state account wagering providers. It simply forbids a New York resident from placing wagers with these out-of-state entities. Laws that block the flow of interstate commerce at a state's borders are clear examples of discriminatory legislation,[30] and section 1012 blocks the flow of interstate wagers. It establishes a local processing requirement for New York residents wishing to place account wagers, and the Supreme Court has consistently found such local processing requirements unconstitutional.[31]

Nor is it likely that the state of New York could mount any defense that it has no other means to advance a legitimate state interest. Local interests arguably served by section 1012 would include the notion of: (a) making certain that New Yorkers are only allowed to deal with legitimate account wagering operators, (b) insuring that the state receives revenue form pari-mutuel wagers,[32] and (c) limiting pari-mutuel wagering by restricting the number of servers that could offer account wagering to New Yorkers. The first and second goals would be achieved by the state licensing and taxing account wagering providers located outside the state. The third goal is not one of the true goals of section 1012. It is likely that by allowing state residents access to fourteen entities (six OTBs and eight racetrack operators) that provide account wagering, the current law does nothing to ensure that New Yorkers wager in moderation. Section 1012 would clearly fail under the rigorous scrutiny of the per se test. Section

1012 should be found unconstitutional under the Commerce Clause.

Horse Racing as Commerce

While there are arguments that could be raised as a defense against a dormant Commerce Clause challenge, it is doubtful that any of these would be successful. The state, for instance, might argue that horse racing is not an object of interstate commerce. This is close to an argument that the National Labor Relations Board (NLRB, or the "Board") raised decades ago in *Walter A. Kelley*.[33] In declining to exercise jurisdiction over horse racing, the NLRB stated, "The Board's limited resources can be better devoted to industries and operations where labor disputes are likely to have a more substantial impact on commerce than disputes in the racing industry."[34] It is the Board's belief "that a unique and close relationship has developed between the states and this industry so that the operation of horseracing is essentially local in character and that a labor dispute there is not likely to disrupt interstate commerce."[35]

The difficulty with this argument is that even the NLRB in 1962 recognized that horse racing affected commerce.[36] The reason for not taking jurisdiction was not that racing has no effect on interstate commerce, but rather that the commerce interest was not substantial enough when one considered the state's relationship to horse racing. *Kelley* was decided at a time when all wagering was conducted at a track. There were no interstate bets. That time has changed considerably at racetracks throughout the nation. Now 87.5% of wagers are placed away from the racetrack.[37] For instance on July 8, 2004, $7,961,553 was wagered on races at Belmont Park. Of this amount, only 9.25% was bet at the track, and fully 60.1% was wagered at locations outside New York State.[38]

Even before this change in the nature of wagering, courts were concluding that horse racing was part of interstate commerce. In *Pari Mutuel Clerks Union, Local 328 v. Fair Grounds Corp.*,[39] the Fifth Circuit determined that horse racing was an industry affecting commerce when you considered out-of-state patrons, out-of-state owners, the food products sold, and the pari-mutuel equipment at a racetrack. The court stated, "Clearly Fair Grounds and the Union are engaged in an 'industry affecting commerce . . .'"[40]

A similar conclusion was reached in *The New York Racing Association, Inc., v. National Labor Relations Board*.[41] There, the court stated, "There is no dispute that the Racing Association's activities affect interstate commerce and generate hundreds of millions of dollars of gross income."[42] Even the NLRB acknowledged that NYRA's operations "as a part of the horseracing industry are related to interstate commerce."[43] As stated previously, given the massive move to off-track wagering, the understanding that horse racing affects interstate commerce has only increased over the twenty years since the *NYRA v. NLRB* decision. Based on the court cases, a New York State claim that horse racing does not affect inter-state commerce has little ability to succeed.

Congressional Authorization for Discriminatory Treatment

A second potential defense is that horse racing is an industry which does not need state uniformity and is, in fact, subject to strict state regulation. Congress can authorize states to engage in conduct that the Commerce Clause would otherwise forbid.[44] It could be argued that Congress, by enacting the IHRA, has authorized states to engage in activities that would in the absence of the IHRA violate the Commerce Clause. Congress set forth that states "should have the primary responsibility for determining what forms of gambling may legally take place within their borders"[45] and that federal action should be left to "the limited area of interstate off-track wagering on horseraces."[46]

The difficulty with this analysis is that for Congress to enable a state to pass legislation that would otherwise violate the Commerce Clause, the intent of Congress has to be "unmistakably clear."[47] "For a state regulation to be removed from the reach of the dormant Commerce Clause, congressional intent must be unmistakably clear. The requirement that Congress affirmatively contemplate otherwise invalid state legislation is mandated by the policies underlying dormant Commerce Clause doctrine."[48] The intent to immunize state action in the IHRA is not unmistakably clear. While leaving horse racing regulation primarily to the states, the Act states that this primary responsibility is restricted to "determining what forms of gambling may legally take place within their borders"[49] That would mean that a state could decide whether to have account wagering, but once having made this choice it is subject to the restrictions of the dormant Commerce Clause. Instead, the IHRA makes clear that federal involvement is needed for horse racing. The federal government "should act to protect identifiable national interests; and . . . in the limited area of interstate off-track wagering on horseraces, there is a need for Federal action to ensure States will continue to cooperate with one another in the acceptance of legal interstate wagers."[50] Indeed, the IHRA finds, "It is the policy of the Congress in this chapter to regulate interstate commerce with respect to wagering on horseracing, in order to further the horseracing and legal off-track betting industries in the United States."[51]

The possibility that state action on horse racing is immunized by the IHRA is made further unlikely by the recent cases dealing with importation of liquor. Many states have banned out-of-state wineries from shipping wines directly into their state while allowing in-state wineries to ship wines directly to consumers.

Such legislation has been challenged by out-of-state wineries, and the states have countered by raising section 2 of the Twenty-First Amendment, which states, "The transportation or importation of into any State, Territory or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited." The Twenty-First Amendment gives the states significant power to regulate liquor sales. "Within the area of its jurisdiction, the State has 'virtually complete control' over the importation and sale of liquor and the structure of the liquor distribution system."[52] "A state is totally unconfined by traditional Commerce Clause limitations when it restricts the importation of intoxicants destined for use, distribution, or consumption within its borders."[53] Even in the face of the Twenty-First Amendment, most courts have found that the ban on the mail-order sale of imported wines is not exempted from Commerce Clause scrutiny.[54] The amendment is a direct grant of authority to the states—in comparison, there is little chance that the IHRA exempts horse racing from Commerce Clause scrutiny.

The State as Market Participant

Under dormant Commerce Clause jurisprudence, "where a State acts as a participant in the private market, it may prefer the goods or services of its own citizens, even though it could not do so while acting as a market regulator."[55] In *Hughes v. Alexandria Scrap Corp*., the court said, "Nothing in the purposes animating the Commerce Clause prohibits a State, in the absence of congressional action, from participating in the market and exercising the right to favor its own citizens over others."[56]

New York State could certainly make the case that it is a market participant in the account wagering battle and thus should be immune from dormant Commerce Clause scrutiny. The off-track betting corporations in New York are all government agencies under the law. The five regional off-track betting corporations are described by law as "a body corporate and politic constituting a public benefit corporation."[57] New York City OTB is similarly a "body corporate and politic constituting a public benefit corporation."[58] Thus, there is little doubt that New York State is participating in the account wagering market.

The difficulty is that the state is also serving as a market regulator as well. It regulates competition in the account wagering market from the in-state racetracks. All the harness tracks except Batavia Downs are private enterprises.[59] The one for-profit thoroughbred racetrack, Finger Lakes, is a private business. The New York Racing Association (NYRA) is described as a private nonprofit racing association,[60] and it is somewhat unlikely that action by the NYRA would be viewed as state action.[61] Thus, the problem for section 1012 is that the state is both functioning as a market participant and as a market regulator. If the state only allowed the OTBs to conduct telephone wagering, that would not be a violation of the dormant Commerce Clause. However, by regulating the in-state private tracks and keeping out foreign competition, the state is violating the dormant Commerce Clause.

What Is to Be Done?

Once you reach the conclusion that the statute is unconstitutional, what is the correct course of action? The first step is to recognize that the Racing and Wagering Board is not in a position to change its view of the law. It cannot find that its own operating law is unconstitutional. A state agency does not have the authority to find rules or laws unconstitutional.[62] The Racing and Wagering Board could, however, be in the position of interpreting the law in a way to reduce the threat of a constitutional challenge. Thus if Yonkers Raceway wished to partner a telephone account wagering program with U.S. Off-Track or if NYRA wished to partner with TVG, the Racing Board could accept these foreign companies' participation in New York State wagering in order to avoid a constitutional battle. While this interpretation would in no way make section 1012 legal, it could reduce the possibility of litigation.

The next issue is that any licensing of out-of-state operators is dependent on the state receiving some revenue from the wager. The New York State constitutional provision authorizing pari-mutuel betting requires that from such betting "the state shall derive a reasonable revenue for the support of government."[63] In the absence of such revenue, the wagering is certainly not authorized, and is arguably criminal conduct under the state's penal laws.[64] This will cause some conflict as to which state has the right to tax the wager—the domicile of the bettor and/or the state where the account wagering hub is located. This may also pose a situation similar to that imposed by states using a sales tax and a corresponding use tax; but it ultimately should be resolved.

What happens if a court finds section 1012 unconstitutional? The state might simply open its doors to all account wagering providers by licensing them and placing a tax on their bets from New Yorkers. The legislature could legitimately restrict account wagering to OTBs, or it could take the truly unlikely step of ending all account wagering. The existing non-New York State account-wagering providers have held off on a constitutional challenge to section 1012.[65] However, since the simulcasting law has been changed in New York to authorize nearly unlimited simulcasting of out-of-state races, New York State has become a much more desirable market for these out-of-state account wagering firms, and it is likely that someone will start the challenge of section 1012.

Finally, there is the potential that the dormant Commerce Clause might affect other provisions of racing laws and rules. The subsidies paid through state breeding funds are likely to be found constitutional based on decisions upholding general subsidies to in-state organizations and individuals.[66] There are, nevertheless, provisions, which limit taking claimed horses outside the state,[67] which limit the people who can claim horses,[68] and which give preferences in starting to local horses.[69] These all could become subjects for challenges under the dormant Commerce Clause.

Endnotes

1. Ch. 346, L. 1990.
2. Bill Jacket, Ch. 144, L. 1970, "Memorandum of Understanding with Regard to Off-Track Betting Program Introduced in New York State Legislature, April 18, 1970," § 4 (stating "There shall be no restrictions on accepting wagers by telephone against deposit accounts.").
3. *See* 9 N.Y.C.R.R. §§ 5200.1(j), 5204.11, 5206.1, 5211.2. There are six OTB corporations. They are Suffolk, Nassau, New York City, Catskill, Capital, and Western.
4. Ch. 286, L. 1985.
5. The legislature has authorized a surcharge to be paid on winning wagers at OTB pursuant to § 532 of the Racing Law. *See* Ch. 439, L. 1974.
6. The current harness tracks are Yonkers Raceway, Monticello Raceway, Saratoga Gaming and Raceway, Vernon Downs, Batavia Downs and Buffalo Raceway. Additionally, Vernon Downs and Buffalo Raceway combine to run a small parimutuel meeting at the Syracuse Fair. The sole for-profit thoroughbred track is Finger Lakes.
7. The only non-profit racing association is the New York Racing Association (NYRA), which conducts thoroughbred racing at Aqueduct, Belmont Park and Saratoga Race Courses.
8. Ch. 503, L. 1992.
9. Ch. 62, Pt. F3, L. 2003. This was not a provision that was the cause of the Governor's veto. In fact, the language of the provision is the same as that proposed by Governor Pataki in his budget bill, A. 2109.
10. *See* http://www.xpressbet.com.
11. *See* http://www.philadelphiapark.com/fastbet/index.html.
12. *See* http://www.ebetusa.com.
13. *See* http://www.winticket.com.
14. *See* http://www.usofftrack.com.
15. *See* http://www.tvgnetwork.com/iefive/default.asp.
16. *See* http://www.jaialai.com.
17. *See* http://www.youbet.com.
18. *See* http://www.chrb.ca.gov/board_packages/Jan-2004.pdf, Item 4.
19. *See* the Oregon Racing Commission's website *available at* http://www.oregonvos.net/~orc.
20. 15 U.S.C. § 3001.(a)(1).
21. 15 U.S.C. § 3001.(a)(2).
22. Art. 1, § 8, cl. 3.
23. *See Gibbons v. Ogden*, 22 U.S. 1 (1824).
24. *Camps Newfound/Owatonna v. Town of Harrison*, 520 U.S. 564, 571 (1997).
25. *C & A Carbone v. Town of Clarkstown*, 511 U.S. 383, 390 (1994).
26. *See Pike v. Bruce Church Inc.*, 397 U.S. 137 (1970).
27. *Id*.
28. *Oregon Waste*, 511 U.S. at 101 (quoting *Hughes*, 441 U.S. at 337); *see Chemical Waste Management, Inc. v. Hunt*, 504 U.S. 334 (1992) ("Once a state tax is found to discriminate against out-of-state commerce, it is typically struck down without further inquiry."); *Camp Newfound*, *supra* note 24 at 582.
29. *Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978).
30. *Id*.
31. *See Carbone*, *supra* note 25 at 391.
32. This is a requirement under Art. 1, § 9 of the N. Y. State Constitution.
33. 139 NLRB 744 (1962); *See also* Jurisdictional Standards, 28 C.F.R. 1, http://www.lexis.com/research.
34. *Id*. at 747.
35. *San Juan Racing Ass'n v. Labor Relations Bd.*, 532 F. Supp. 51, 54 (1982).
36. *Kelley*, 139 NLRB at 747.
37. 2004 Jockey Club Fact Book, *available at* http://www.jockeyclub.com/factbook.asp?section=8.
38. Statistics are available at http://www.equibase.com.
39. 703 F.2d 913 (5th Cir. 1983).
40. *Id*. at 920.
41. 708 F.2d 746 (2d Cir. 1983), *cert. denied*, 464 U.S. 914 (1983).
42. *Id.* at 47–48.
43. *Id.* at 48.
44. *See Maine v. Taylor*, 477 U.S. 131, 138 (1986).
45. *See* note 7 *supra*.
46. 15 U.S.C. § 3001.(a)(3).
47. *Maine v. Taylor*, *supra* note 44 at 138–139.
48. *South-Central Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82, 91 (1984).
49. 15 U.S.C. § 3001.(a)(1).
50. 15 U.S.C. § 3001.(a)(2) and (3).
51. 15 U.S.C. § 3001.(b).
52. *North Dakota v. United States*, 495 U.S. 423, 430, 431 (1990) (citing *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 110 (1980)); *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 712 (1984); *California Board of Equalization v. Young's Market Co.*, 299 U.S. 59 (1936).
53. *Hostetter v. Idlewild Liquor Corp.*, 377 U.S. 324, 330 (1966).
54. *See Heald v. Engler*, 342 F.3d 517 (6th Cir. 2003); *Beskind v. Easley*, 325 F.3rd 506 (4th Cir. 2003); *Dickerson v. Bailey*, 336 F.3d 388 (5th Cir. 2003); *Bainbridge v. Turner*, 311 F.3d 1104 (11th Cir. 2002); *Mt. Hood Bev. Co. v. Constellation Brands*, 63 P.3d 779 (Wash. 2003), *reconsideration denied*, 2003 Wash. LEXIS 359 (Wash 2003). These cases find that this discrimination against out-of-state wineries is treated as a per se violation of the Commerce Clause. These decisions bolster the belief that the total ban on out-of-state account wagering providers will also be held to be per se violations. In the *Beskind* case the court stated, "The virtually per se rule of invalidity provides the proper legal standard here . . . [And the discriminatory scheme] must be invalidated unless [the State] can 'show that it advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives.' *Oregon Waste Systems*, 511 U.S. at 100–101 (quoting *New Energy Co. v. Limbach*, 486 U.S. 269, 278, 100 L. Ed. 2d 302, 108 S. Ct. 1803 (1988))"; *Beskind* at 515. *But see Swedenburg v. Kelly*, 358 F.3d 223 (2d Cir. 2004), *cert. granted*, 158 L. Ed 2d 962 (U.S. 2004) (exempting state liquor regulation from dormant Commerce Clause scrutiny).

55. *College Sav. Bank v. Fla. Prepaidpostsecondary Educ. Expense Bd.*, 527 U.S. 666, 685 (1999) (citing *White v. Massachusetts Council of Constr. Employers, Inc.*, 460 U.S. 204 (1983)); *Reeves, Inc. v. Stake*, 447 U.S. 429 (1980); *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794 (1976).

56. 426 U.S. 794 at 810.

57. Racing Law § 502.1.

58. Racing Law § 603.1. *See also* Racing Law § 601.3.

59. Batavia Downs, formerly a private racetrack but reopened in 2002 by the Western Regional Off-Track Betting Corporation, determined to run no live racing meets in the 2004 calendar year.

60. *See* Racing Law §§ 202, 208, 224. *See Perez v. Hoblock*, 248 F. Supp. 2d 189 (S.D.N.Y. 2003), *aff'd*, 368 F.3d 166 (2d Cir. 2004); *Saumell v. New York Racing Ass'n*, 58 N.Y.2d 231, 247 (1983), Judge Cook dissenting in part.

61. *Murphy v. New York Racing Ass'n*, 76 F. Supp. 2d 489 (S.D.N.Y. 1999). *But cf. Stevens v. New York Racing Ass'n, Inc.*, 665 F. Supp. 164 (E.D.N.Y. 1987).

62. *See Perrotta v. N.Y.*, 107 A.D.2d 320, 324 (1st Dep't 1985); *aff'd*, 66 N.Y. 2d 859 (1985); *Hurlbut v. Whalen*, 58 A.D.2d 311, 317 (4th Dept. 1977), *app. denied*, 43 N.Y.2d 643 (1977); *cf. Finnerty v. Cowen*, 508 F.2d 979 (2d Cir. 1974).

63. N.Y. Const. art. 1, § 9.1.

64. *See* Penal Law, §§ 225.05, 225.10.

65. This is likely due to a political calculus under which the non-New York wagering providers have determined that it is not worth the political risk of alienating New York's policy makers by challenging § 1012.

66. *West Lynn Creamery v. Healy*, 512 U.S. 186, 199 n.15 (1994).

67. *See* 9 N.Y.C.R.R. § 4038.4, which prevents a claimed horse to race elsewhere until the end of the race meeting.

68. *See* 9 N.Y.C.R.R. § 4038.1(a), which has been interpreted to limit the right to claim horses to those stables that are located on the grounds of the racetrack.

69. For example, the NYRA has at times given a three-pound break in the weights to be carried to registered New York-bred horses. If the state had authored such a rule giving its own horses a preference in competition, it would very likely face significant constitutional problems under the Commerce Clause.

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Legislative Intent and the NYRA Racing Properties

By Bennett Liebman and Abigail Nitka

Bennett Liebman

Introduction

In August 2003, Barry K. Schwartz, the chairman of the New York Racing Association ("NYRA")[1] definitively stated that his non-profit organization owned the Belmont, Saratoga and Aqueduct thoroughbred racetracks.[2] "No one is using this land besides NYRA," Schwartz said during an interview with CNBC.[3] "They'd have to build their own racetracks to hold races here."[4]

Schwartz's statements were simply the most recent in a series of public stands on the issue of thoroughbred racetrack ownership in New York. It is an issue that has been repeatedly raised by both state officials and the NYRA, but one which has never actually been resolved.

In fact, Schwartz's words were an echo of statements from 22 years earlier made by former NYRA President James P. Heffernan.[5] "[NYRA] as a private corporation, owns its land and buildings, and there is no legal or practical way the state can acquire them without proper compensation," Heffernan said at a press conference from the Aqueduct racetrack in 1981.[6]

Former New York State Assembly Speaker Stanley Fink would have likely disagreed vehemently. In 1981, Assembly Speaker Fink asserted that the people of New York were the actual owners of the tracks, not NYRA.[7] The "tracks were bought and maintained solely with public monies. . . . Thus, basic equity requires that title to the properties be held by the people of New York."[8]

In 2003, Governor George Pataki and Attorney General Eliot Spitzer reiterated much of the Fink belief.[9] Pataki has said that the ownership issue is "a very complicated legal question."[10] He was supported by Spitzer's office, which has maintained that NYRA will lose its right to the racetracks if it ever loses its franchise to conduct thoroughbred horse racing.[11]

The purpose of this article is to explore the legislative history of the NYRA franchise revisions that were made to the Racing, Pari-Mutuel Wagering and Breeding Law in 1983 to determine what the intent of the legislature was on the ownership of the racetracks operated by NYRA.

Abigail Nitka

Speaker Fink and the NYRA

It was Speaker Fink's position "that NYRA is an instrumentality of the State of New York, and if it ever gets to that point, and the Attorney General would permit me to argue that case before the Court of Appeals, I would be delighted to do it. And once you are an instrumentality of the State of New York, there are a host of decisions indicating that the State of New York can do with its instrumentalities that which it wishes. . . . I believe that there are other reasons why we think that NYRA has no vested properties right [sic] in the race tracks which would require compensation."[12]

Fink further stated, "NYRA was an instrumentality of the State which we created by statute which we gave power to do certain things. We diverted and had a stream of revenue coming in that we created to them. We created that stream of revenue for them . . . . We believe that title to Belmont Park, Aqueduct and Saratoga Racetracks ought to be vested and our bill vests title in that new public benefit corporation."[13]

Speaker Fink's contentions on the ownership of the NYRA racetracks were rejected by NYRA President James Heffernan. Heffernan took the position that NYRA "had the right to sell our properties just as any profit corporation does encumbered only by the mortgage commitments and the loans we had made."[14]

As to the contention that the state would take over NYRA in the event that NYRA lost its franchise to conduct racing, Heffernan replied that the law "only outlines the disposition of our properties on dissolution of the corporation. The dissolution of the corporation and the end of the franchise are not coextensive."[15]

Speaker Fink, to emphasize his point, even asked the Attorney General's office for an opinion on the constitutionality of his views on NYRA. Attorney General Robert Abrams responded with a curious, three-page, unpublished opinion to the legislative chairs of the Joint Legislative Task Force to Study and Evaluate the Pari-Mutuel Racing and Breeding Industry. While not indicating that the state owned the racetracks, the Attorney

General gave a *carte blanche* to the legislature to amend the law to force NYRA to change the class of beneficiaries who would assume the property if NYRA were to be dissolved.[16]

The Attorney General found that the "Legislature has the constitutional power to amend a statute governing the formation of corporations. It is equally clear that the Legislature has reserved the power to amend the certificate of incorporation of any domestic corporation."[17]

Therefore, "under its reserved power to amend the certificate of incorporation of any domestic corporation, the Legislature may direct NYRA to divest the class of exempt organizations of rights, if any, they may now enjoy upon dissolution, under the corporate charter."[18]

Speaker Fink took the position that the Attorney General confirmed "the legality of a key element in my proposal that the state acquire the property of the New York Racing Association."[19]

According to Speaker Fink, "[t]his opinion of the attorney general dispels any notion that the state would have to spend hundreds of millions of dollars to acquire these properties. I now see no legal or financial roadblocks to the state's acquiring the tracks on behalf of the people and for the betterment of the thoroughbred racing industry."[20]

The 1983 Legislation

Despite the opinion of the Attorney General, legislation to renew the NYRA franchise and to make the state the ultimate owner of the racetracks did not progress in either 1981 or 1982. In fact, no legislation on this subject was even formally introduced in the legislature in either 1981 or 1982. Nor was any legislation on this subject introduced until the last days of the regular legislative session in 1983. Shortly before the legislative session was to conclude in 1983, the Assembly, the Senate, and the Executive Chamber reached agreement on the NYRA legislation.[21] The legislation extended NYRA's franchise for fifteen years until 2000. It provided for a capital investment fund to lend money to NYRA to help fund NYRA's capital needs. The revenue from expanded simulcasting of NYRA races would provide the initial revenue which the capital investment fund would use to provide loan funds to NYRA.[22] On the issue of who owned the racetracks, the legislature agreed not to make a decision on who owned the tracks as of 1983. Instead, they established a system for future bidding of the tracks after NYRA's franchise expired in 2000.[23] Should NYRA lose its franchise, "the existence of such association shall terminate at any time that such franchise expires."[24] Once NYRA was dissolved, the assets "after payment of or provision for its liabilities will be assigned, transferred and conveyed and distributed by the governor then in office in accordance with applicable provisions of law."[25]

The legislation, S.6969, sailed through the legislature. It passed the Senate on June 26, the same day that it was introduced.[26] Explaining the bill, Senator John Dunne stated that it was the "product of literally years of discussion."[27] "It seems to be finally the piece of legislation that everyone is in agreement on."[28] The few objections to the bill were that it had been passed in haste, gave excessive power to the capital investment fund and whether NYRA should be reauthorized to run the tracks.[29]

The bill similarly had no trouble moving through the Assembly the next day. In that house, Assemblyman Arthur Kremer, the chairman of the Ways and Means Committee, explained and argued for the bill. Assemblyman Kremer stated:

> [a]bout two years ago, Speaker Stanley Fink made it clear that he had no intent of being part of any type of extension of NYRA as a franchise unless and until there was an agreement that eventually the tracks would belong to the people of the State of New York and that NYRA would give them up. . . . In the year 2000, when the charter of the Racing Association and the franchise expires, all of the tracks presently used by NYRA and covered by their franchise will be turned over to the people of the State of New York for the people of the State of New York to own as their property.[30]

The legislation accomplished this by making "NYRA's franchise and their charter both terminate in the year 2000."[31] Kremer added, "[t]he Speaker of this House is to be congratulated for putting together a package which takes away ownership and control of these tracks and puts it in the hands of the people of the State of New York."[32]

The basic argument over the bill in the Assembly was the question of whether local governments could exercise zoning powers over NYRA. Assemblyman Madison, representing the Belmont Park area, and Assemblyman Seminerio, representing the Aqueduct area, complained that NYRA had not been a good neighbor. Their effort to amend the bill to apply local zoning laws to NYRA was voted down,[33] and the bill passed by a vote of 141 to 2.

Because the main bill had been passed in such extreme haste, there was a need for an additional bill to make technical corrections in S.6969.[34] The Assembly,

also on June 27th, passed A.8212, which was designed to be a chapter amendment to S.6969 and which made technical and conforming changes in S.6969. Since the Senate had adjourned, the technical amendments bill did not pass the Senate until July 12, 1983, when the Senate returned to Albany.

The passage off these bills placed the management of NYRA in somewhat of a bind. The legislature had aided NYRA by providing for a lengthy franchise extension and by providing funding for needed capital improvements, but it had also significantly limited NYRA's ownership rights over racetrack properties. The NYRA trustees met on July 13, 1983 to discuss their position on the legislation. After the meeting, NYRA officers announced that they would make a formal statement of their position on July 14.[35] On July 14, however, NYRA took no position on the legislation.[36] "The New York Racing Association which operates Aqueduct, Belmont Park, and Saratoga finally may have conceded that these three tracks belong to the state of New York and its people, not to the N.Y.R.A."[37]

According to the *New York Times*, the NYRA "had been expected to take a public stand against the bill if only to make its familiar argument that it, rather than the state, actually owns the tracks . . . [s]itting still for the bill does mean acknowledging that the state owns the tracks, but many trustees have believed this was an inevitable conclusion anyway."[38]

Passage of the legislation was termed "an unprecedented victory for Assemblyman Fink."[39] The editor of the racing trade publication, the *Blood-Horse*, on the other hand, complained, "[n]ow we have the Fink Legislation so named not because it is so preposterous but after House Speaker Stanley Fink who somehow thinks that New York has always owned the NYRA properties."[40]

The NYRA's so-called surrender, however, did not end the battling over the legislation. The Racing and Wagering Board raised a host of technical questions,[41] and NYRA raised questions about some issues involving the capital investment fund. Based on these questions, Governor Cuomo had the bills recalled by the legislature.[42]

Nonetheless, in August of 1983, all parties agreed on necessary amendments to the law.[43] NYRA Chairman Thomas Bancroft endorsed the bill "finding that the legislative package when enacted into law will form the foundation for the physical revitalization of our three racetracks."[44]

The legislature returned in September of 1983 and quickly passed the chapter amendment that had been agreed to in August.[45] There was no debate in either house of the legislature. A.8224 /S.6987 passed the Assembly by a unanimous vote of 144-0 and by a 56-2 vote in the Senate. In urging approval of the chapter amendment, Senator Dunne, who was one of the sponsors of the chapter amendment, noted, "NYRA's franchise and charter are made coterminous. The assets of the corporation upon dissolution will be distributed by the Governor in accordance with applicable provisions of law rather than being distributed to charities."[46] After passage, the original bill (S.6969) and the September chapter amendment (A.8224/S.6987) were both sent to the Governor for signature. The initial chapter amendment (A.8212), which had been recalled by the legislature was abandoned.[47] Governor Cuomo signed both bills on September 27. In approving the bills, he wrote, "[b]ecause NYRA has successfully operated the tracks and no other group has shown a willingness or capability to operate the tracks, NYRA's franchises are extended to the year 2000. Thereafter, the bills establish a competitive bidding process for the franchises to insure the selection of the most qualified future operator of the thoroughbred tracks."[48] At a public bill signing ceremony the next week, NYRA Chairman Bancroft said, "It is an excellent bill, . . . and we are delighted with it. We accept the challenge of the next 17 years and want you to know that the NYRA will be competitive after the year 2000 in seeking to continue our operation of the New York tracks."[49]

So the clear implication of the 1983 NYRA franchise extension legislation was to grant NYRA a life estate in the racetrack properties. Once NYRA lost its franchise and/or was dissolved, the remainder interest of the properties would fall to the State of New York.

The Constitutional Issues

So was Barry Schwartz out of line when he argued that the racetrack properties belonged to NYRA? Maybe, under section 202.2 of the Racing Law, he was. Yet, he and NYRA could certainly present a series of colorable claims that the 1983 legislation was unconstitutional as applied to NYRA's racing properties.

First of all, it should be noted that the 1983 legislation is not a model of consistency. While it is reasonably clear what will happen if NYRA loses the franchise, there are a host of other provisions adding ambiguities to the issue of how the property will be disposed of if NYRA does not own the property. There are, in fact, five sections of the law that deal specifically with the disposition of the racetracks, each mandating a different protocol. In addition to section 202.2, there are sections 202-b(3), 208(8)(i), 208-a, and 209-a of the Racing Law, all of which provide variations on how the NYRA racetrack properties are to be distributed. These provisions were not all written in synchronization with each other and provide the opportunity for considerable ambiguity.

But apart from these obscurities, the major question is whether the legislature was empowered to do what it did in 1983. A full analysis of the legal arguments for and against the state's takeover of the NYRA properties is beyond the scope of this article. Did the legislature—as suggested by Attorney General Abrams—have the authority to revise NYRA's corporate charter and force NYRA to divest itself of the racetracks when it lost its franchise?[50] Was the forced divestiture of the racetrack properties a regulatory taking which would require the state to pay compensation to NYRA under the Just Compensation Clause of the Fifth Amendment?[51] Even if this was a regulatory taking , would NYRA, which could itself suffer no pecuniary loss, be entitled to compensation?[52] Finally is NYRA, as claimed by Speaker Fink, an "instrumentality of the State?"[53] If NYRA is an instrumentality of the state, could it have any claim to compensation? Could the state impose a claim of laches against any NYRA assertion that the 1983 laws were unconstitutional?[54]

"[T]he legislature clearly intended in 1983 that if NYRA were to lose its franchise to conduct racing, its racetrack properties would become the property of the state."

Conclusion

Horse racing in New York has always been highly politicized. For this reason, the constitutionality of chapters 1006 and 1007 of the Laws of 1983 and their effect on the disposition of the racetrack properties may never be litigated. When the next controversy over thoroughbred racetrack ownership arises, it is likely that there will simply be different legislation enacted to deal with the issues at hand at the time. Any new legislation could modify the law already in place, or it may be repealed altogether. Much of that will depend on the goals of NYRA, the interests of the legislature, and the potential interests of individuals or corporations wishing to operate the NYRA tracks.

Within this nebulous framework, there are two certainties. The first is that the legislature clearly intended in 1983 that if NYRA were to lose its franchise to conduct racing, its racetrack properties would become the property of the state. Second, it is certain that this racetrack ownership issue will resurface, although it may never be fully resolved.

Endnotes

1. The New York Racing Association (NYRA) is a private nonprofit racing corporation which was founded in 1955 to run the thoroughbred racetracks in New York. *See* Chapters 812 and 813, L. 1955. Prior to 1955, the thoroughbred tracks in New York (Saratoga, Jamaica, Aqueduct and Belmont) were all owned by separate, small for-profit corporations. These racetracks were all antiquated, and these small corporations were incapable of making needed capital improvements. The NYRA was formed through an initiative of the Jockey Club to improve the racing facilities in New York while providing maximum revenue to the state. NYRA (which until 1958 was known as the Greater New York Association) was given a 25-year franchise to operate the tracks. It sold Jamaica, rebuilt Aqueduct, and refurbished Belmont and Saratoga. The NYRA franchise was extended to 1985 by ch. 757, L. 1970 and until 2000 by Ch. 1006, L. 1983. It currently is scheduled to expire on December 31, 2007, pursuant to ch. 445, L. 1997.
2. Erin Duggan, *NYRA Warns of Track Seizure*, Albany Times Union, Aug. 23, 2003, at A1.
3. *Id*.
4. *Id*. Schwartz was likely referring to Magna Entertainment Corporation, which had expressed interest in operating the NYRA tracks.
5. Dorothy J. Gaiter, *Assembly Speaker Urges State Takeover of Race Tracks*, Albany Times Union, March 15, 1981, at 40. *See also*, Lena Williams, *N.Y.R.A. Franchise Renewal Questioned*, N.Y. Times, May 8, 1981, at A22.
6. Gaiter, *supra* note 5.
7. Gaiter, *supra* note 5.
8. *Id*. Somewhat ironically, Speaker Fink, after he left the legislature, served for a period of time as a lobbyist for NYRA. *See 1993 Registered Lobbyists, September Update*, New York Temporary State Commission on Lobbying, Clients of Bower & Gardner at 11.
9. Duggan, *supra* note 2.
10. *Id*.
11. *Id*.
12. *In re Public Hearing on Thoroughbred Racing in New York State*, before the Joint Legislative Task Force to Study and Evaluate the Joint Pari-Mutuel Racing and Breeding Industry, May 7, 1981, at 22.
13. *Id*. at 34.
14. *Id*. at 80.
15. *Id*. at 82.
16. June 16, 1981, Opinion of Attorney General Robert Abrams, to Hon. John R. Dunne and Hon. William B. Finneran., N.Y. State Archives, Papers of Stanley Fink.
17. *Id*. at 2.
18. *Id*.
19. Assembly Speaker Stanley Fink, Statement on Attorney General's Finding Regarding Constitutionality of Speaker's Racing Legislation, June 17, 1981, N.Y. State Archives, Papers of Stanley Fink. *See also* Lena Williams, *State Racing Told: Prove Need for Aid*, N.Y. Times, June 18, 1981 at B17.
20. *Id*.
21. Senate Bill No. 6969 (Rules Committee); Assembly Bill No. 8209 (Rules Committee).

22. For an explanation of the legislation, see Governor's Approval Memorandum for chs. 1006 and 1007, L. 1983, 1983 N.Y. State Leg. Annual, at 416–17.

23. John Caher & Edward Fitzpatrick, *NYRA Remains Beholden to Politics,* Albany Times Union, August 24, 1997, at A13.

24. Racing, Pari-Mutuel Wagering and Breeding Law § 202.5 ("Racing Law"). *See also* Governor's Bill Jacket for Ch. 1006, L. 1983, July 26, 1983 Budget Report on Bills. Section 202 would "provide that upon the expiration of the NYRA's franchise its existence also terminates."

25. Racing Law § 202.2. This replaced a provision which had originally been enacted by ch. 1006, L. 1955, § 1 under which NYRA's certificate of incorporation had to contain "the provision that all of its assets . . . will be assigned . . . to or among one or more 'exempt organizations' . . . as may be designated by the governor then in office upon termination of the existence or earlier liquidation of such association."

26. Governor Cuomo submitted a message of necessity to secure its passage. *See* 1983 Public Papers of Governor Cuomo at 436.

27. Senate Debate on S.6969, June 26, 1983 at 10479.

28. *Id.*

29. *Id.* at 10481–10484. Most of the complaints about the bill were raised by Senators Leichter and Ruiz.

30. Assembly Debate on S.6969, June 27, 1983 at 267–268.

31. *Id.* at 269.

32. *Id.* at 270.

33. *Id.* at 266–67.

34. Assembly Bill No. 8212 (Rules Committee).

35. Steven Crist, *Vasquez Appeal Bid Is Rejected,* N.Y. Times, July 14, 1983 at B11.

36. Steven Crist, *N.Y.R.A. Chooses Silent Surrender*, N.Y. Times, July 15, 1983 at A16.

37. *Id.*

38. *Id.* Also, according to Blood-Horse, NYRA was expected to fight the provisions on ownership of the tracks. "Lengthy legal proceedings are foreseen if the state attempts to change the rules." William H. Rudy, *NYRA Franchise Extended*, Blood-Horse, July 16, 1983 at 4770.

39. *NYRA Franchise Extension Bill Gains Senate Support*, Daily Racing Form, June 29, 1983.

40. *What's Going on Here*, Blood-Horse, August 6, 1983 at 5391.

41. Governor's Bill Jacket for ch. 1006, *supra* note 24. Letter of July 12, 1983 from John Van Lindt to Michael J. Del Giudice.

42. *Extension of NYRA Franchise, Construction Fund 'Dead Issues,'* Daily Racing Form, July 30, 1983. NYRA had suggested limits on the operating expenses of the capital investment fund as well as some authorization to defer payments on its loans to the capital investment fund. These issues were handled through ch. 1007, L. 1983 §§ 12 and 16.

43. Joe Hirsch, *Will Extend NYRA's Operating Franchise Through Year 2000,* Daily Racing Form, August 6, 1983.

44. *Id.*

45. Assembly Bill No. 8224 (Rules Committee at Request of Fink, Kremer, Walsh, Hinchey, Ruggiero, Sears); Senate Bill No. 6987 (Dunne, Fink, Kehoe.)

46. Governor's Bill Jacket for ch. 1007, L. 1983, September 22, 1983 letter of John R. Dunne to Alice Daniel. The language seems in clear contrast to the language of John Heffernan in note 15.

47. This was well prior to *Campaign for Fiscal Equity v. Marino*, 87 N.Y. 2d 235 (1995) which found that the practice of the legislature recalling bills that had passed both houses of the legislature was unconstitutional.

48. *See* Governor's Approval Memorandum, *supra* note 22.

49. Joe Hirsch, *Gov. Cuomo Signs Racing Aid Bill to NYRA Tracks*, Daily Racing Form, October 8, 1983.

50. *See* N.Y. Const. art. X, § 1. *Cf. In re Mount Sinai Hospital*, 250 N.Y. 103 (1928)

51. *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978). There would also be a substantial state constitutional law question presented under Article 1, § 7(a) of the New York State Constitution which states that "private property shall not be taken for public use without just compensation."

52. *See Brown & Hayes v. Legal Found. of Washington*, 538 U.S. 216 (2003).

53. There are a series of cases which deal with the complex relationship between the state and the NYRA. *Cf. especially Stevens v. New York Racing Ass'n, Inc.*, 665 F. Supp. 164 (E.D.N.Y. 1987) *with Murphy v. New York Racing Ass'n, Inc.*, 76 F. Supp. 2d 498 (1999).

54. For a detailed treatment of the laches issue, *see Saratoga Chamber of Commerce Inc. v. Pataki*, 100 N.Y.2d 801, 816–19 (2003).

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Attention, Enablers: Racing Drug Intervention Imminent

By Cheryl Ritchko-Buley

Like any substance abuse problem, recognizing that there is a problem is often the first step toward recovery. Identifying those who enable the problem is also integral to any recovery. "Enablers" are people who, whether they mean to or not, help the user or addict to continue on a destructive path. In some ways, the entire horse racing industry has enabled "users" or "juicers" by being too passive and only helping racing continue in a direction that serves to damage, if not destroy, the sport.

The Chairman of the Thoroughbred Owners and Breeders Association offered these remarks regarding drug use in racing: "There are those who say that racing should address these [drug use] problems behind closed doors, and for most of our history we have. But we believe that we have to clearly demonstrate that we're facing these issues straight on and dealing with them. Otherwise someone else eventually will."[1]

"For the first time in the history of racing, there are a growing number of people and organizations working in an industry-wide effort to improve and implement uniform testing procedures."

It is apparent that this problem is not racing's alone; high-profile athletes competing in other sports are willing to risk their reputations and careers by using performance-enhancing substances as well. It is an issue that is no longer emerging; it has emerged. It is very much out in the open, and to protect the integrity of sports, a firm and swift solution is in order. "The world's fastest man could face a lifetime ban for alleged doping. Baseball's home run king is dogged almost daily with questions about whether he's used performance-enhancing drugs. The world's greatest cyclist has come under suspicion. And America's golden girl, Marion Jones, could be the next to face drug charges."[2]

For years, many people in horse racing have suggested that unchecked cheating is occurring, and many believe that horses are being given performance-enhancing drugs and winning at unusually high percentages. However, a major obstacle in producing evidence to support this speculation has been that some drugs are not detectable.

For the first time in the history of racing, there are a growing number of people and organizations working in an industry-wide effort to improve and implement uniform testing procedures. Perhaps this is racing's equivalent to an "intervention" for substance abuse, where all the affected parties confront the person with the habit and tell them how destructive it is. It's a collective wake-up call to encourage recognition of the habit and pursuit of help. A grassroots campaign is evolving whereby racing's participants are not enabling anymore—they are seeking to eliminate, to the extent possible, the use of performance enhancing substances in racehorses.

Elements of racing's intervention are contained in four main points:

1. National Uniform Testing Procedures Supported by National Uniform Drug Rules

The Supreme Court of Appeals of West Virginia stated that in horse racing, it is the state racing commissions who have the power to make rules governing the conduct of racing as well as the rules to effectually guard against fraud and deception in racing, which may be effected through administering drugs or narcotics, or by any other means. The danger that such practices exist cannot be denied, and the need to eliminate such practices, as far as possible, in order to save racing must be obvious to everyone.[3]

No one will deny that this power is vested with the state racing commissions, but the power is diminished by inconsistency among the states, differences in scientific opinions on the effects of certain substances, and a fragmented horse racing constituency. For decades, getting all the racing states to agree on the basic elements of racing regulation, including those related to drugs and penalties, has been fraught with a series of non-starters. The horses would leave the gate, but never quite finish the race. The National Association of Racing Commissioners (NARC), Association of Racing Commissioners International (ARCI), and the North American Pari-Mutuel Regulators' Association (NAPRA) have made earnest attempts to categorize drugs and medications and offer recommendations for penalties. These guidelines are loosely referenced or adhered to by state

commissioners, but not strictly and uniformly adopted or enforced as regulations. Part of the conundrum is tied to economics.

> Drug testing expenditures show wide variance state by state. Some states simply cannot afford to test for as many drugs as better-funded labs situated in different states. Furthermore, high levels of spending do not necessarily guarantee excellent testing results depending on the methodology and the expertise of the laboratory.[4]

The result is a labyrinth of testing methods and procedures as well as inconsistent enforcement of varying drug rules from state to state.

Meanwhile, even if the states had uniformity in testing, the chemists and scientists interpreting the test results are not necessarily in agreement as to what constitutes an actionable drug finding—when to call a positive. The linchpin to consistency is the need for scientists consulted for opinions on substances in racehorses to agree. Perhaps this will only happen with more sound research. Adequate financing of the scientific community responsible for researching drugs and medications in racing is necessary so that science will be a more reliable basis for meaningful regulatory judgments. One funding source discussed by industry leaders is an additional per-start fee per horse entered in certain types of races. States that adopt these model drug rules may well be the only states which benefit from this nationally administered funding stream—an incentive worth consideration.

"While recognizing that medication rules were the responsibility of the individual states, the NTRA showed a wish to do its part to maintain public confidence in the integrity of the sport which it had been charged to promote and market."[5] The National Thoroughbred Racing Association's Drug Testing and Integrity Task Force (the "Task Force"), established in 1998, is working to make drug testing in horse racing world class. It is operating on the foundation established by the Jockey Club that commissioned the 1991 McKinsey Report, a blueprint for a better testing program. A decade later, the Task Force has established a foundation from which to build and house the solution.

> The Task Force has engaged in three studies: the first report "Equine Drug Testing: An Assessment of Current Practices and Recommendations for Improvements." Dr. Mel Koch, former worldwide director of analytical chemistry for Dow Chemical Company, and a committee of other analysts outside the racing industry, prepared that report, which guided the activities of the Task Force. Second, the Task Force engaged in a benchmark survey of testing practices in the United States. Thirty of the 32 states responded, the most comprehensive result ever undertaken. Third, the Task Force began a study of post-race samples as a broad-scale assessment of testing for the industry as a whole. The samples were subjected to a "Supertest" a sophisticated drug-testing regimen used in some racing states, but not in the majority. The "Supertest" employed an array of ELISA (Enzyme-Linked Immunosorbant Assay) tests that was far more extensive than most states use. It also relied on instrumental screening instead of the Thin Layer Chromatography used by most states. Samples were submitted anonymously by 28 states . . .[6]

The samples submitted for the "Supertest" had already been screened by the participating state labs and deemed free of prohibited substances. As expected, given the more comprehensive screening of the "Supertest," substances were detected that were not caught at most of the state labs. The labs employed for the "Supertest" were the two leading labs in the country: Cornell University in New York and the U.C. Davis Kenneth L. Maddy Laboratory in California. This may have been an expensive and time-consuming way to verify what most people in the industry commonly accepted: most state laboratories need to be testing for more drugs.

The Task Force is collectively working to not only create better testing, but to have the testing supported by consistent state drug and medication rules in racing. The first step in this process included broad support by the Association of Racing Commissioners International as well as the North American Pari-Mutuel Regulators' Association, which both adopted national model drug rules in April 2004 at a joint convention. The new policy calls for voluntary use of Lasix/Salix on race days and use of one of three non-steroidal anti-inflammatory drugs no later than 24 hours before a race. Only time will prove whether state commissions across the country will agree to adopt these rules. Some states may not see the need for perceived stricter standards and others may not see the need for perceived reduced standards.

Neither the ARCI, NAPRA nor the NTRA were designed to change the rules in a given state, though they may aim to assist states in enforcing their rules. This critical need was recognized in a keynote speech made in 1962 at the Thirty-First Annual Dinner of the Thoroughbred Club of America, where Joe Estes, the

editor-in-chief of a highly respected trade journal, *The Blood-Horse*, said:

> Racing in the United States is now so big an operation that it may be endangered by its own size. It sprawls and grows bigger and bigger, and there is no possibility of intelligent centralized control of its growth or of its lesser problems. The challenge now is to make possible, through access to information, intelligent decisions at the state and local levels. With adequate knowledge at hand, we should be able to salvage the best of our traditions and discard the worst of them.[7]

2. Higher Security Standards on the Backstretch Whether It Involves Cameras or Use of Detention Barns

A group of trainers signed a petition in November, 2003, asking the California Horse Racing Board (CHRB) for a rule establishing detention barns into which horses entered would be sequestered for as long as 24 hours prior to competition. "The point is to protect themselves from other trainers who may not be operating within the parameters of medication rules by placing all entered horses under surveillance. This is unprecedented. Trainers hate detention facilities, but about 80 percent of those working in Southern California have signed the petition."[8] This outcry led the CHRB to form a research committee to make recommendations on increased surveillance measures for potential adoption by the board. The committee is focusing on a camera security program and certain trainers are currently participating in a test program. Cameras have been set up in their barns for monitoring. A cost-benefit analysis will likely be conducted comparing the use of detention barns with and without camera surveillance.

The Illinois Racing Board (IRB) in February 2004 started enforcing

> a [harness] rule that was on the books for more than two decades. Back when the rule was written, almost all horses trained at the track. Surely the intent of the rule was to give the state greater control over a few horses shipping into town for stakes races, and never was meant to apply to the entire horse population. Nonetheless, Barmoral Park president Johnny Johnson defended the stricter detention, calling it a necessary step in detention as a catch-all for all of the various substances and medications that are being abused."[9]

This dormant rule has been activated and detains all harness horses racing on the circuit in Illinois subject to a 4:00 p.m. state-monitored detention barn. IRB Executive Director Mark Laino reported that the detention barn program has revealed that the win records of the smaller trainers have improved. Trainers who were being unfairly beaten by drug users enjoy a more level playing field with the deterrent effect of the detention facility.

New Jersey is recognized for state-of-the-art detention barn facilities even absent state regulations requiring them. The Sports Exposition Authority (SEA), however, requires these detention facilities. At Meadowlands, an entire race card of horses is held prior to racing from 12 to 24 hours before the race, depending on the type of race and purse level. Surveillance cameras with manned central monitoring and taped back-up are provided. New Jersey conducts blood gas testing for a practice known as "milkshaking"[10] and when this test was challenged in court, the New Jersey Racing Commission prevailed.[11]

New York does not have rules on the books requiring detention barns; however, the New York State Racing and Wagering Board is exploring this initiative in conjunction with industry representatives. Historically, New York's emphasis has been in the strength of its drug-testing program. New York's drug-testing program tests for more drugs than any other equine drug-testing program in the world. The Equine Drug Testing Program (EDTP) for all thoroughbred and harness racing within New York State is performed by the New York State College of Veterinary Medicine at Cornell University under contract with the Board. Equine drug testing is mandated by Chapter 47-A of the Consolidated Laws of the State of New York, The Racing, Pari-Mutuel Wagering and Breeding Law, in section 902.

Again, there are different approaches in the different racing jurisdictions. National efforts are underway by various associations, including the NTRA and the National Horsemen's Benevolent and Protective Association, to advance pre-race security measures to deter illicit or accidental administrations of substances to race horses.

3. Treating Veterinarians with a Vested Interest in the Horse's Performance Must Not Have Access to His or Her Horses on Race Day, Even to Administer Lasix

Most racing states allow only an anti-bleeding medication, Lasix, now known as Salix, to be administered on race day. When Lasix was approved, some in the scientific community convinced regulators and the industry that this increased medication usage would increase field size, allow horses to race longer, and make more starts per year. However, the facts today show the

reverse. "Horses make 50 percent fewer starts per year today than 30 years ago. Jockey Club statistics show that the average horse races for only two years today, compared to four years 30 years ago."[12] Field sizes have diminished; tracks struggle to fill the races. The breed may be weakening. The average distance of all races is continually shortening. The racing life of the horse is half what it used to be—two years instead of four.

Gasper Moschera, formerly the leading trainer of the New York Racing Association's circuit from 1993 through 1998, quit the game in 2003 after 25 years. He said that the decline in his business as a trainer began when New York became the last racing jurisdiction in the country to permit Lasix.[13] Veterinarians who have a vested interest in the horses' performance should not be administering Lasix/Salix to horses "in to race," as is the case in many racing jurisdictions, including New York State. Lasix/Salix veterinarians have ample access and opportunity to mix drugs other than Lasix/Salix into the syringe and administer substances in addition to Lasix/Salix on race day. Furthermore, Lasix/Salix is a powerful diuretic and it has been argued that it can help to mask illegal medications.

According to a book *Run Baby Run*, written by Bill Heller, an astonishing 92 percent of thoroughbreds in this country raced on Lasix in 2001.[14] This near-universal use of race-day Lasix presents the argument that two years after New York approved Lasix, more than two-thirds of New York's thoroughbred population began to bleed. The United States is one of a small group of countries worldwide that allows race-day Lasix; others include Canada, Saudi Arabia, and five South and Central American countries. Great Britain, France, Japan, Australia, and New Zealand do not permit its use and are apparently conducting racing perfectly well without it, or any other race-day medication. Here in the United States, Lasix/Salix is being used preventively, just in case the horse *might* bleed, not necessarily for proven bleeders.

Canada has developed a noteworthy initiative, commonly called the "Vet-tech" program, whereby treating veterinarians are not permitted to administer Lasix/Salix on race day; instead a laboratory is used to provide "vet-techs" to administer the medication. This way, treating veterinarians are not tempted by access or opportunity to commit a wrongful administration.

Many states use Lasix barns where horses are brought to a secured barn for the administration of Lasix. Pre-loaded Lasix syringes are used in some jurisdictions so that treating veterinarians cannot mix any other medication or substance into the vial.

Illinois, for thoroughbreds, enforces a security stall program, and treating veterinarians are not permitted access to his or her horse entered in a race for four hours prior to the start of the given race. Signs making this abundantly clear are posted on the stalls. If the treating veterinarian must see his or her horse, he or she must contact the racing board and must be accompanied by a commission representative and/or the state veterinarian employed at the track. This system removes the veterinarian's potential defense that he or she did not know which horse was going to race and therefore administered a substance to a horse that he or she thought was not racing. This concept was used at Finger Lakes Racetrack recently with considerable success, and this signage program may be advanced by the New York Racing Association (NYRA).

"This near-universal use of race-day Lasix presents the argument that two years after New York approved Lasix, more than two-thirds of New York's thoroughbred population began to bleed."

Recently in New York, the New York State Racing and Wagering Board disciplined a trainer, assistant trainer, and veterinarian for two tranquilizers found in the system of the thoroughbred racehorse Vagabond Saint following a second-place finish at Aqueduct in April 2004. "Investigators were told by the trainer's assistant that the drugs were administered when a groom took out the wrong horse the day of the race and the drugs remained in the horse's system. Vagabond Saint was disqualified and placed last in the order of finish."[15]

4. Greater Accountability of Veterinarians and Trainers for the Submission of Records Prior to Racing

Many racing jurisdictions require the submission of treatment records of their patients, the horses, by veterinarians or trainers prior to the horses' races. For obvious reasons, this practice does not allow veterinarians to revise their records after a race if a positive occurs. In some circumstances, treatment records will be a mitigating factor for a veterinarian or trainer during a legal proceeding. If the commission questions the administration of the Lasix/Salix, the records may be offered as proof of administration timing.

A new rule is being considered by the New York State Racing and Wagering Board to amend 9 N.Y.C.R.R. §§ 4120.9 and 4043.9 in order to require the submission of written records no later than 24 hours after treatment, or, if it is within 24 hours of post time (the time at which the race begins), no later than one

hour prior to post time. Presently, the veterinarians are required to maintain these records and submit them upon the request of the Board. The records are often submitted late, are inadequate in detail, and the time of their creation is often questioned. The submission of contemporaneous records may facilitate the prompt and proper investigations concerning the use of equine drugs in racehorses. Comparison of these records to reported drug testing findings, and the details of the training and veterinary care, may be valuable in proving or disproving facts and circumstances of treatment. Currently, there is no practicable way to obtain these records from veterinarians who are not licensed by the Board. This requirement would make all relevant treatment records available without imposing the requirement only for treatment by Board-licensed veterinarians, since the records are required under the trainer's responsibility.

> Under New York State Racing and Wagering Board procedures, when the Equine Drug Testing Program at Cornell University detects and confirms the presence of a prohibited substance, the laboratory immediately informs the Board's Chief of Racing Operations and its Chief Counsel. Immediately thereafter, the Chief of Racing Operations informs the state steward or presiding judge at the racetrack where the horse's sample originated, along with other appropriate board personnel. Investigation into the matter is begun after the horse and its trainer are identified by the steward or presiding judge. The sample identifying numbers are matched by the steward or presiding judge to his previously locked documentation of collected samples. After identification, investigation into the circumstances, including interviews with all involved parties, begins. The responsible trainer[16] [under 9 E NYRCC 4043.4] is afforded the option of having a "split" sample of the original tested at an approved laboratory of his/her choice at his/her expense. After investigation is completed and all other information gathered and studied, the licensee if necessary, is assessed a penalty from the state steward or presiding judge. Should the licensee not agree with the penalty given, there is an appeals process that affords the licensee a full hearing before a board-appointed hearing officer. Upon receipt of the hearing officer's report, the three-member racing board renders a decision. A listing of the most commonly used substances and medicines in the equine racing world is contained within the Board's rules. Also contained is the number of hours "out" (before race day) that these listed drugs may be administered.[17]

At the Jockey Club's Annual Round Table Conference in 2002, Gary Biszantz, then chairman of the National Thoroughbred Owners and Breeders Association, passionately shared his philosophy. He characterized his position on equine drugs as "less is better than more." He asserted, "Economic decisions outweigh the horse's health, fairness, and safety for both the horse and the rider. I grew up believing the horse was first, the trainer was in charge, and the veterinarian was there if we had injury or illness" and expressed his hope that "we can go back to thinking that the horse, safety, and fairness are more important (than getting an edge)."

Another outspoken critic of drugs in racing is Barry Irwin, president of Team Valor, a thoroughbred racing syndicate.

> This season, Team Valor has won 40 races from 155 starts and employing 21 different trainers for 44 runners. Recently, Team Valor immediately terminated its employment contract with a prominent trainer, who took over training for the Kentucky-based stable of syndicated runners in January. The trainer and veterinarian were suspended and fined after the vet was caught injecting a Team Valor entrant in the receiving barn at Belmont Park [in New York]. In explaining why the trainer was fired, stable president Barry Irwin said "Team Valor has a zero-tolerance policy with regard to drugs. We had no choice other than to do what we did."[18]

Irwin authored an opinion column in the *Blood-Horse* entitled "Break the Habit," where he espoused:

> The only answer is hay, oats and water. A policy of hay, oats and water would place everybody on a level playing field. It would save the expense-plagued owner thousands of dollars every year on every horse in the barn. . . . The game is running out of players willing to pay the bucks to support a drug habit that is being pushed by the very guardians of our sport. Who is going to step up to the leadership position and take a stand to roll back the current medication policies?[19]

Leadership has to come from entities that have the statutory authority to regulate racing, the state racing commissions, and the responsibility and integrity of those who are participating in a sport loved and adored by so many. "Like steroid-fueled Olympic athletes or bicyclists supercharged with illegal oxygen carriers, drug-using horses undermine the public's faith in sports."[20] The only difference is that more money is at stake in racing. Fair play is essential to the game's success. People sometimes forget that horse racing is not only a sport; it's a pari-mutuel game in which people trust billions in wagering dollars on an annual basis.

"If there is an equivalent to lameness, or some other reason or excuse as to why uniformity cannot be achieved among racing states, an act of the U.S. Congress may be the only means to force the states to take cognizance."

Interventions in substance abuse situations are often the catalyst for a new beginning. Horse racing is making real strides, but more gains are required. Historic change appears to be in the works, but appearances do not count. It's time for racing regulators to use the information and research the industry has brought to bear on drugs in racing and finally finish the race . . . with a clean post-race report. Some states will require legislative approval, while others will require administrative approval. Either way, it is a lengthy and unpredictable process.

If there is an equivalent to lameness, or some other reason or excuse as to why uniformity cannot be achieved among racing states, an act of the U.S. Congress may be the only means to force the states to take cognizance. Whether Congress amends the Interstate Horseracing Act, or proposes a national anti-doping statute, racing states would then be required by federal law to promulgate uniform rules. While the doping issue in sports remains a "hot-button" issue, this may be the most immediate way to mandate uniformity. Certainly, however, it is a bitter pill for some states to swallow.

Endnotes

1. Stuart S. Janney III, Chairman of the Thoroughbred Owners and Breeders Association, The Jockey Club, Remarks at the Forty-Eighth Round Table Conference, On Matters Pertaining to Racing (August 13, 2000).
2. *Steroid Targets Narrow*, Albany Times Union, June 25, 2004.
3. *State ex rel. Morris v. West Va. Racing Comm'n*, 133 W. Va. 179 (1949).
4. A. Gary Lavin, VMD, The Jockey Club, Remarks at the Forty-Ninth Annual Round Table Conference (August 19, 2001).
5. Ogden Mills Phipps, The Jockey Club, Remarks at the Forty-Ninth Annual Round Table Conference (August 19, 2001).
6. James Gallagher, The Jockey Club, Remarks at the Forty-Ninth Annual Round Table Conference (August 19, 2001).
7. Ann Hagedorn Auerbach, Wild Ride (1994).
8. Paul Moran, *The Inside Track*, Newsday, November 26, 2003.
9. Larry Hamel, *Harness Racing*, Chicago Sun-Times, February 27, 2004.
10. "Milkshaking" is the administration of a substance that has as its base bicarbonate of soda (baking soda) and sugar. The "milkshake" is intended to neutralize the build-up of lactic acid in a horse's muscles that may cause a horse to tire during a race.
11. *Campbell v. N.J. Racing Comm'n*, 781 A.2d 1035 (2002).
12. NYTHA Newsletter, vol. 5, Sept., 2002.
13. David Grening, *at* http://www.DRF.com (January 2, 2003).
14. *Run Baby Run: What Every Owner, Breeder & Handicapper Should Know About Lasix in Racehorses*, p. 11 (2002).
15. Blood-Horse, June 21, 2004.
16. 4043.4 Trainer's responsibility.

    > A trainer shall be responsible at all times for the condition of all horses trained by him. No trainer shall start or permit a horse in his custody, care or control to be started if he knows, or he might have known or have cause to believe, that the horse has received any drug or other restricted substance that could result in a positive test. The trainer shall be held responsible for any positive test unless he can show by substantial evidence that neither he nor any employee nor agent was responsible for the administration of the drug or other restricted substance. Every trainer must guard each horse trained by him in such manner and for such period of time prior to racing the horse so as to prevent any person, whether or not employed by or connected with the owner or trainer, from administrating any drug or other restricted substance to such horse contrary to this Part.

17. 2001 New York State Racing and Wagering Board Annual Report.
18. Barry Irwin, *Team Valor release*, *at* http://www.Bloodhorse.com (June 20, 2004).
19. Barry Irwin, *Breaking the Habit*, Blood-Horse, July 1, 2003.
20. Ed Newton, Miami New Times, May 29, 2003.

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A Review of Trainer Responsibility Rules

By Sara LeCain

While regulating drug use among thoroughbreds is still a state-run venture, nearly a quarter-century ago there was a movement to federalize the regulation under the Corrupt Horse Racing Practices Act of 1980.[1] The movement failed because industry representatives opposed it and because of the difficulty of finding a compromise suitable to the differing interests of individual states.[2] Therefore, trainer responsibility rules, which emerged in the early part of the 20th century as state racing boards and commissions began regulating the system, have become increasingly popular across the industry. The hope is that by holding trainers strictly liable for the care and protection of their horses, there will be fewer instances of illegal drug use.

In essence, a trainer responsibility rule holds the trainer liable for any traces of illegal drugs found in a horse's system in either a pre-race or post-race blood or urine test.[3] These rules take three main forms: the absolute insurer, the failure to guard, and the rebuttable presumption. This article sets out the three forms of trainer responsibility rules and how each state has applied them.

Absolute Insurer

The "absolute insurer" rule states that the trainer is the absolute insurer of, and responsible for, the condition of any horses entered in a race.[4] Third-party responsibilities are irrelevant because the trainer should ensure his or her horses' safety.[5] If there are traces of a "foreign" substance found in a horse's system the trainer is subjected to a number of penalties, including suspension, revocation of license, being ruled off, fines, or disbursement of the purse.[6] Examples of this rule can be found in Arizona, California, Louisiana, Maryland, Massachusetts, New Jersey, New Mexico, Ohio and West Virginia.[7]

The absolute insurer rules have survived constitutional attacks. In their article, "Horse Drugging—The New Jersey Trainer Absolute Insurer Rule: Burning Down the House to Roast the Pig," Luke Iovine and John Keefe detail the constitutional issues raised in cases that appeal decisions based on trainer responsibility rules.[8] The authors believe that most of the issues can be placed into two categories: some of the rules are too vague, while others are too arbitrary.[9]

Sandstrom v. California Racing Board was one of the first cases to touch on the constitutionality of the absolute insurer rule.[10] In *Sandstrom*, a trainer sought a writ of mandamus to overturn his suspension under the California version of the rule by asserting that the rule was unconstitutional.[11] At that time, section 1930 of the California Administrative Code stated: "The Trainer shall be the absolute insurer of and responsible for the condition of the horses entered in a race, regardless of the acts of third parties. Should the chemical, or other analysis of saliva, or urine samples, or other tests, prove positive, showing the presence of any narcotic, stimulant, chemical, or drug of any kind or description, the Trainer of the horse may be suspended or ruled off . . ."[12] The rule also provided for the penalization of third parties in addition to trainers, not instead of them.[13] The California Court of Appeal held the rule was appropriate because its purpose was to protect the public and ensure fair racing.[14] It found that this was a legitimate goal to which the rule rationally applied.[15] Therefore, the California rule was not arbitrary or capricious because the trainer was in the best possible position to ensure the condition of his horses.[16]

"The hope is that by holding trainers strictly liable for the care and protection of their horses, there will be fewer instances of illegal drug use."

In New Jersey the rule names the trainer as absolute insurer of the condition of a horse under his care.[17] It states that the trainer must be "familiar with the medication rules of the commission and with any drug or substances foreign to the natural horse administered to said horse at his direction or while in his care and custody."[18] Any ". . . trainer, owner, veterinarian, groom or other person charged with the custody, care and responsibility of a horse are all obligated to protect and guard the horse against administration of any drug . . ." unless the drug is authorized by the proper authorities.[19]

The case most noted for testing the New Jersey absolute insurer rule is *Dare v. New Jersey Racing Commission*, which raised the issue of due process rights.[20] In upholding the New Jersey rule, the court stated that the rule was appropriate because it served its intent.[21] In creating this law, the legislature hoped to curb illegal drug use among horses by holding accountable the person most responsible for its care, the trainer.[22] Therefore, the court found the law aptly written because the trainer was specifically named in the law and penalized as the person responsible for the care and condition of his horses.[23]

As in *Dare*, most courts have upheld the absolute insurer rules because they focus on one player and set out penalties according to the seriousness of the offense. For instance, in the case of *Fogt v. Ohio Racing Commission*, the Racing Commission appealed a decision that reversed the conviction of a trainer who raced a horse with drugs in its system.[24] The Ohio law states that a trainer is "the absolute insurer of, responsible for, the condition of the horses entered in a race regardless of the acts of third parties."[25] The lower court determined that this law was unreasonable.[26] Yet, the Ohio Court of Appeals noted that the rule was not unconstitutional because it sought to prevent further instances of drug use where attempting to prove a guilty intent would be futile.[27]

On the other hand, in *Brennan v. Illinois Racing Board*, the Supreme Court of Illinois affirmed the lower court's decision declaring the state's absolute insurer rule unconstitutional.[28] In *Brennan*, a trainer alleged that the rule revoking his license was arbitrary and unreasonable, depriving him of his due process rights.[29] The rule in question held the trainer responsible if any tests showed that a horse had been administered prohibited drugs.[30] The court found that this rule was not a legitimate exercise of a state interest because trainers were penalized without proof of negligence on their part.[31] The court believed that responsibility is personal and therefore, a trainer should not be held liable for the acts of a third party.[32] However, the *Brennan* court based its opinion on two cases that have since been either overruled or distinguished.[33]

In Maryland, the absolute insurer rule provides that no drug may be given to a horse within 48 hours before the start of the race.[34] If the horse tests positive for drugs and it is determined they were administered within the crucial 48 hours, then the trainer is held responsible whether or not he administered the drugs.[35] Byers appealed his suspension by the Maryland Racing Commission when his horse tested positive for drugs after winning a steeplechase at Pimlico and claimed the rule was invalid because the paragraph establishing the trainer's responsibility created an irrebuttable presumption.[36] The lower court agreed and granted a writ of mandamus, but the Commission argued that the paragraph actually established a *prima facie* evidence scenario.[37] The Maryland Court of Appeals followed the opinion of the lower court and found that the rule did establish an irrebuttable presumption and not an absolute insurer or *prima facie* scenario.[38] In its decision, the court stated that the rule was capricious and arbitrary because it allowed the accused no way to raise a defense, which is a due process violation.[39]

In 1999, the Maryland Court of Appeals distinguished this case in *Owens v. State*, where it found that *Byers* was premised on a rule that allowed for the penalization of a trainer despite his knowledge and made no requirement that trainers keep watch over their horses for the crucial 48-hour period, but presumed to hold them responsible for that period nonetheless.[40] Owens focused on a rule regarding statutory rape, which made no presumption as to the decision-making ability of minors, but rather attempted to protect minors from sexual misconduct.[41]

In Florida, the courts did not like the absolute insurer rule, but recently the District Court of Appeal recognized the importance of the rule.[42] In *State ex rel. Paoli v. Baldwin*, a trainer sought to overturn his penalization by the state racing board for racing a horse with drugs in its system.[43] Under the law, once a horse tests positive for drugs, the trainer is held strictly liable and his license is automatically revoked.[44] The *Paoli* court found this to be a gross infringement on a trainer's rights because the accused party is given no method to raise a defense and prove his or her innocence.[45] The court struck down the law as unconstitutional because it violated a trainer's due process rights.[46]

In later years, Florida established a new rule with specific procedures for drug infractions. In *Solimena v. Florida Dep't of Business Regulation*, three trainers sought to reverse their suspensions claiming that the rule, which held them strictly liable for racing a horse with narcotics, was unconstitutional.[47] In affirming the conviction, the Court of Appeals found that the absolute insurer rule was appropriate because it stated that a trainer was the absolute insurer of the condition of any horse entered and that as a licensee in the state every trainer is responsible for knowing the rules of the state.[48] Therefore, the rule was constitutional because any licensed trainer was on notice and was provided a method for asserting his or her innocence.[49] The court also held that the rule was an appropriate use of power because the Commission had been granted the ability to regulate at its discretion by the legislature.[50]

However, *Solimena* was recently overturned by *Hennessey v. Florida Division of Pari-Mutuel Wagering*, which

found the Florida absolute insurer rule constitutional.[51] This case arose when two trainers appealed their penalties and claimed that the rule was an improper use of the delegated legislative power.[52] The court found that the rule, which states that a trainer is responsible for the condition of any horse he enters, is in fact a proper use of the power granted to the Department by the legislature.[53] The court held that the trainer is in the best position to ensure the condition of his horse because he will either be with his horse at all times or a member of his staff will be with the horse.[54] This case differs from *Solimena* because the rule applied here is a stricter version of that rule, which had been legislatively overruled.[55]

Recently, Delaware has seen challenges to its absolute insurer rule, which provides: "The trainer is responsible for the condition of horses entered in an official workout or race and is responsible for the presence of any prohibited drug, medication or other substance, including permitted medication in excess of the maximum allowable level, in such horses."[56] The rule states further that any positive result to a drug test is *prima facie* evidence that a trainer has violated the rule.[57] In *Givens v. Delaware Harness Racing Commission*, a trainer sought to appeal two Racing Commission decisions, which penalized him for racing horses with foreign substances in their systems.[58] Givens contended that the rule was unjust because it deprived him of due process and equal protection.[59] However, the court found that the determination of the Commission was appropriate because it was based on substantial evidence and Givens was on notice of the prohibition and the penalties because he was licensed in the state.[60]

However, in *Dugan v. Delaware Harness Racing Commission*, the Court once again upheld the Delaware law, but relieved the trainer from his responsibility under the law.[61] In this case, Dugan was penalized for racing a horse that tested positive for drugs.[62] He appealed the decision by the Commission, asserting that the determination was invalid because the Commission had not established specific procedures for dealing with drug cases.[63] The Supreme Court of Delaware agreed, holding that while Dugan was guilty under the law, his penalty should be overturned because the appropriate procedures had not been established in order to properly conduct the investigation.[64]

Failure to Guard

The second version of the rule is "failure to guard," which holds that every trainer must either guard, or provide a guard for each horse he or she is training, in order to prevent anyone from administering any foreign substance that would violate the rules.[65] This rule forces the trainer to ensure that all precautions are taken to guarantee the condition of each and every horse entered in a race.[66]

The failure to guard rule is similar to the absolute insurer rule in that they both hold the trainer strictly liable for the condition of any horse they enter in a race. However the two differ in practice. Absolute insurer rules hold the trainer responsible for any foreign substance found in a horse's system; a trainer is responsible for the care and protection of the horses in his or her care regardless of the acts of third parties. On the other hand, the failure to guard rule holds a trainer responsible for not providing adequate protection; a trainer will be suspended if a court determines that he or she did not take appropriate precautions to ensure a horse's safety and care. The role of third parties only comes into play when it is determined that the trainer did provide appropriate guards and protection, but the guards themselves were negligent. However, a trainer must have substantial evidence to support such a claim.

Like the absolute insurer rules, failure to guard rules are continually attacked on constitutional grounds. In *Belluci v. Commonwealth State Horse Racing Commission*, the petitioner, who had been suspended for a drug violation, challenged the Pennsylvania Code (the "Code").[67] The Code provided that, "[t]he owner, trainer, groom or any other person who is charged with the custody, care and responsibility of the horse, are all obligated to protect and guard the horse against the administration . . . of any drug to the horse."[68] Belluci claimed the law violated both his due process rights and his equal protection rights because it permitted "the arbitrary imposition of suspension and/or fines without any prior notice to the individuals affected as to what punishment may result from infractions of the rules."[69] The court disagreed, finding that the trainers were put on notice that any violation of the laws set out by the Racing Commission could result in suspension or revocation of license; therefore their due process rights were served.[70] As to the equal protection argument, the court found that the rule was applied equally to all parties who violated the rule.[71]

Following the example set out in *Belluci*, Pennsylvania courts have continued to uphold the law. In *Brown v. Pennsylvania Horse Racing Commission*, trainer Steven Brown appealed his suspension for racing a horse under the influence of a prohibited substance.[72] The court found no evidence that Brown knew the drug had been administered, but found that the horse was left unattended for a couple of hours each day.[73] The Horse Racing Commission found that even though Brown had entered evidence that he had no knowledge of the horse drugging, he could not show who had administered the drug and therefore could not escape responsibility.[74] The court upheld the conviction because the horse had been left unattended.[75]

Rebuttable Presumption

Finally, the "rebuttable presumption" rule holds that a trainer is responsible if any tests show the presence of a "foreign" substance in a horse's system.[76] This presumption stands unless the trainer can show with sufficient evidence that he or she is not at fault.[77] If the evidence substantially shows that the trainer was not involved or had taken all precautions available to protect the horse, then the Stewards or Commissioners will exonerate the trainer.[78] Examples of this rule can be found in Colorado, New York and Pennsylvania.[79]

Following in the same path as the two previous rules, the rebuttable presumption has also seen its share of constitutional questions. In *Brown*, the Pennsylvania code presumed that a positive drug test was *prima facie* evidence that the trainer failed to fulfill his duty to protect his horse.[80] The Horse Racing Commission presumed his negligence even though Brown entered evidence to show that he had hired a night watchman.[81] The court held that this was not substantial enough to exonerate him because the horse was still left unattended each day.[82]

In New York the rebuttable presumption rule found at section 4043.4 of title 9 of the Official Compilation of Codes, Rules and Regulations of the State of New York has come under fire several times, but has survived each challenge.[83] According to this rule, the trainer is the sole person responsible for the custody, care or condition for all horses trained by him.[84] *Casse v. New York Racing and Wagering Board* is perhaps one of the most important cases attacking the trainer responsibility rule in New York.[85] In this case, a trainer sought to overturn the decision of the Racing Board holding him responsible for the presence of procaine, a prohibited drug in his horse's system.[86] Casse protested the determination, claiming that the responsibility rule in New York violates his due process rights and that the evidence used to convict him did not support the charge.[87] However, the Court of Appeals affirmed the decisions of both the Board and the Supreme Court, stating that the rule places strict liability on the trainer, but allows for the trainer to overcome the responsibility by presenting substantial evidence.[88] The evidence must show that neither the trainer nor any of his employees were guilty.[89] The Court held that this establishes a duty for a trainer to protect his or her horse and creates a presumption that the trainer was been negligent whenever a horse tests positive for drugs, but also allows the trainer to rebut the presumption by entering substantial evidence[90] The Court found that the burden placed on the trainer is appropriate in order to maintain the state interest in ensuring the fairness and integrity of the industry.[91]

In a similar case, *Mosher v. New York Racing and Wagering Board*, the Court of Appeals once again upheld New York's rebuttable presumption rule.[92] Mosher was a trainer whose horse tested positive for a drug called prednisolone.[93] Upon further investigation, it was determined that the horse had received the medication within 48 hours of a race, which is prohibited by the state's racing rules.[94] The Board suspended the trainer's license and he appealed, claiming that the suspension was unjustified because he had presented evidence that the horse had not received the medication within the prohibited time period established by the rule.[95] The decision was affirmed, but on further appeal the Appellate Division reversed the Board's determination, stating that the trainer had raised substantial evidence to establish the time the drug was administered.[96] However, the Court of Appeals found that the Appellate Division had misapplied the rule and reinstated the Board's original determination.[97] The Court found that the trainer had not presented substantial evidence to rebut the claim that he was responsible for the horse because he did not give proof that the horse was not in his "care, control or custody" during the 48-hour period.[98]

"Trainer responsibility rules are still evolving in the racing industry as one regulation is replaced by a newer, often stricter version."

Conclusion

Trainer responsibility rules are still evolving in the racing industry as one regulation is replaced by a newer, often stricter version. They have been accepted across the nation as a rational means of ensuring the integrity of the racing industry and protecting the wagering public, which are legitimate state interests. In each of their forms the rules will continually be plagued by constitutional issues, but will overcome any obstacles while they are still protected by the broad reach given to administrative agencies to create and pass regulations that best aid in control of their jurisdiction.

Endnotes

1. Edward S. Bonnie, *Corrupt Horse Racing Practices Act of 1980: A Threat to State Control of Horse Racing*, 70 Ky. L.J. 1159 (1982).
2. *Id.* at 1179.
3. Luke P. Iovine, III & John E. Keefe, Jr., *Horse Drugging—The New Jersey Trainer Absolute Insurer Rule: Burning Down the House to Roast the Pig*, 1 Seton Hall J. Sport L. 61, 62 (1991).
4. *Id.* at 63.
5. *Id.*
6. *Id.*
7. *Id.*
8. Iovine & Keefe, *supra* note 3.

9. *Id.* at 83.
10. *Sandstrom v. Cal. Racing Board*, 189 P.2d 17 (1948).
11. *Id.* at 17–18.
12. *Id.* at 17, 19–20.
13. *Id.*
14. *Id.* at 17, 21.
15. *Sandstrom,* at 17, 22.
16. *Id.* at 17, 18.
17 N.J. Stat. Ann. § 13:70-20.7.
18. Iovine & Keefe, *supra* note 3 at 64.
19. *Id.*
20. *Dare v. N.J. Racing Comm'n*, 388 A.2d 984 (N.J. Super. Ct. App. Div., 1978).
21. *Id.* at 984, 986.
22. *Id.* at 984, 985.
23. *Id.* at 984, 986.
24. *Fogt v. Oh. Racing Comm*'n, 210 N.E.2d 730 (1965).
25. *Id.* at 733.
26. *Id.*
27. *Id.*
28. *Brennan v. Ill. Racing Board*, 247 N.E.2d 881 (Ill. 1969).
29. *Id.* at 882.
30. *Id.*
31. *Id.* at 883.
32. *Id.*
33. *See* Ray H. Garrison & Jewel N. Klein, *Brennan Revisited: Trainer's Responsibility for Race Horse Drugging*, 70 Ky. L.J. 1103, 1121 (1982); *State ex rel. Paoli v. Baldwin*, 31 So. 2d 627 (1947); *Mahoney v. Byers*. 48 A.2d 600 (Md. 1946).
34. *Mahoney*, 48 A.2d at 602.
35. *Id.*
36. *Id.* at 603.
37. *Id.*
38. *Id.* at 604.
39. *Id.*
40. *Owens v. State,* 724 A.2d 43, 48 (Md. 1999).
41. *Id.* at 56.
42. *Hennesy v. Fla. Div. of Pari-Mutuel Wagering*, 818 So. 2d 697 (Fla. Dist. Ct. App. 2002).
43. *Paoli*, 31 So. 2d 627.
44. *Id.* at 630; Fla. Racing Comm'n Rule No. 117.
45. *Paoli*, 31 So. 2d at 630.
46. *Id.* at 627.
47. *Solimena v. Fla. Dept. of Bus. Reg.*, 402 So. 2d 1240 (Fla. 1981).
48. *Id.* at 1244.
49. *Id.*
50. *Id.* at 1247.
51. *Hennesy*, 818 So. 2d 697.
52. *Id.*
53. *Id.* at 698.
54. *Id.* at 699.
55. *Id.* at 700.
56. *Givens v. Del. Harness Racing Comm'n*, 1999 WL 169400, 2 (Del. Super. Ct. 1999).
57. *Id.*
58. *Id.* at 1.
59. *Id.*
60. *Id.* at 4.
61. *Dugan v. Del. Harness Racing Comm'n*, 752 A.2d 529, 532 (Del. 2000).
62. *Id.* at 529.
63. *Id.*
64. *Id.* at 532.
65. Iovine & Keefe, *supra* note 3 at 63.
66. *Id.*
67. *Belluci v. Commonwealth*, 445 A.2d 865 (1982).
68. *Id.* at 868.
69. *Id.* at 869.
70. *Id.*
71. *Id.*
72. *Brown v. Penn.*, 499 A.2d 1132 (1985).
73. *Id.* at 1133.
74. *Id.*
75. *Id.*
76. Iovine & Keefe, *supra* note 3 at 63.
77. *Id.*
78. *Id.*
79. *Id.*
80. *Brown*, 499 A.2d at 1132.
81. *Id.*
82. *Id.*
83. N.Y. Comp. Codes R. & Regs. tit. 9, § 4043.4 (2002).
84. *Id.*
85. *Casse v. N.Y. Racing and Wagering Board,* 517 N.E.2d 1309 (N.Y. 1987).
86. *Id.* at 1310.
87. *Id.* at 1309.
88. *Id.*
89. *Id.*
90. *Casse,* 517 N.E.2d at 1309.
91. *Id.*
92. *Mosher v. N.Y. Racing and Wagering Board*, 541 N.E.2d 403 (N.Y. 1989).
93. *Id.* at 404.
94. *Id.*
95. *Id.*
96. *Id.*
97. *Mosher*, 541 N.E.2d at 404.
98. *Id.* at 405.

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What's Good for the Goose, Is Good for the Trotter?

By Chris E. Wittstruck

In 1979, the United States Supreme Court was asked to determine whether a particular state's horse racing administrative review scheme was constitutional, notwithstanding the procedural differences in the regulations applied to thoroughbred and standardbred racing. Twenty-five years later, a question has been raised regarding the legitimacy of the substantive differences in the medication regulations applied to the two racing breeds. Arguably, there is scant justification for regulatory deviation between the breeds in the medication field when employing the accepted standard of review.

The 1979 case, *Barry v. Barchi*,[1] dealt with the suspension of a harness racing trainer by the New York State Racing and Wagering Board because of a positive post-race drug in violation of the "trainer responsibility rule."[2] Trainer Barchi argued the unconstitutionality of the trainer responsibility rule and purported Due Process Clause violations.[3] He also contended that he was deprived equal protection under the Fourteenth Amendment of the U.S. Constitution. Inasmuch as then-existing New York rules allowed for pre-hearing suspension stays for thoroughbred trainers, but not harness trainers, Barchi reasoned that the New York scheme was discriminatory on its face.

In rejecting Barchi's Equal Protection Clause position, the Court applied a "reasonable basis" test, articulated as follows:

> Put another way, a statutory classification such as this should not be overturned "unless the varying treatment of different groups or persons is so unrelated to the achievement of any combination of legitimate purposes that we can only conclude that the legislature's actions were irrational."[4]

The Court found that the rationale for stricter regulation in harness racing was legitimate based upon the legislative history surrounding the provision in question.[5] In 1954, in response to the slaying of a union official who represented employees at a harness track and the resulting disclosure of "a pattern of activities . . . clearly inimical to the public interest," then Governor Thomas E. Dewey appointed a commission to inquire into the general regulation of harness tracks.[6] The investigation disclosed that harness racing had become "a lush and attractive field for every kind of abuse."[7] Based upon the report, the commission recommended major changes in harness racing laws, including enactment of the provision challenged by Barchi.[8]

A statement by the highest court in the land that harness racing in New York is somehow fertile for "abuse" is harsh. A harder pill to swallow is the implicit comparison with thoroughbred racing and the concomitant conclusion that "stricter" regulation of harness racing is justified, and thus constitutional. Clearly, had such a finding been anticipated by the litigants in *Barry v. Barchi*, it is assumed that one, or even both sides might have put forth positions to counter such a result.[9]

"A statement by the highest court in the land that harness racing in New York is somehow fertile for 'abuse' is harsh."

The debate regarding which sport is "dirtier, Flats or Trots" is guttural, unfortunate, counterproductive and one to be avoided. It involves an unsubstantiated premise: that either sport is "dirty." Suffice to say that the 1979 Supreme Court Term ignored some very unfortunate, albeit isolated, thoroughbred history when it looked warily at harness racing history in comparison.[10]

The question presented in 2004 requires comparison not of the purported inherent skulduggery in the racing industries, but rather of veterinary science theories as they relate to the thoroughbred and standardbred breeds. In 1998, legendary harness trainer and breeder Carl Allen[11] forfeited two harness race purses to the Kentucky Racing Commission[12] when his horse tested positive for the banned non-steroidal anti-inflammatory drug (NSAID) flunixin (banamine®). Losing at the administrative and circuit court levels, Allen appealed to the Kentucky Court of Appeals.

In *Allen v. KHRA*,[13] the Kentucky appeals court affirmed, rejecting a plethora of arguments set forth by appellant Allen, including the unconstitutionality of the trainer responsibility rule, lack of due process, double jeopardy, and intentional destruction of evidence.

Allen's final argument was that Kentucky's scheme of prohibiting banamine® in harness racing—but not in

thoroughbred racing—deprived him of his Fourteenth Amendment constitutional guarantee of equal protection under the law.[14] Kentucky has been considered a very liberal state when it comes to medication of thoroughbreds, allowing race-day NSAIDs, and combinations thereof.[15] In citing the United States Supreme Court decisions in *Barry v. Barchi* and *Nordlinger v. Hahn*,[16] the court set forth a "rational basis" test, similar to the "reasonable basis" test adopted in *Barchi*.[17]

"The Racing Medication and Testing Consortium, Inc. is a charitable organization with both scientific and educational purposes, whose goals and objectives are to achieve uniformity in policies, practices, procedures and penalties regarding the use of medications."

In applying the test and rejecting the equal protection argument, the court relied heavily upon the administrative hearing testimony of Kentucky state veterinarian Dr. Nancy Davis. That portion of the court's opinion is as follows:

> Dr. Nancy Davis, veterinarian at the KHRA, testified at the administrative hearing that harness racing and thoroughbred racing are different industries. She noted that a harness horse doesn't have the agility that a thoroughbred has because the harness horse is hooked to a racing bike and is unable to step sideways quickly in order to avoid an accident. She also noted that a harness horse does not have the ability to jump over a down horse due to being hooked to the bike. Dr. Davis concluded that the harness industry had to be careful that it did not allow a sore horse or a lame horse to mask its pain in a race because of the possibility of hurting other horses in the field in the event of an accident. She also opined that a less than sound horse in a harness race is more likely to break its gait and probably lose the race. She stated that in fairness to the betters (sic) on the race, there should be no masking of lameness in a horse because lame horses will likely break their gait and lose the race.[18]

It is respectfully proffered that the statements of Dr. Davis, as summarized by the court, are wholly ridiculous. The gravamen of the testimony is that harness horses are less "agile" than thoroughbreds because they are hooked up to a race bike, can't move sideways, and can't jump over downed horses. Additionally, since standardbreds can break stride (gait), it would not be fair to bettors to run a lame horse. Moreover, it is intimated that banamine® masks pain and lameness, and that the bettors and other participants in harness races must be protected.

The logical extension of Dr. Davis' ridiculous statements are that thoroughbreds are permitted to use banamine® because they are permitted to have their pain and lameness "masked," since they can move sideways and jump over objects. Also, since they gallop as opposed to trot or pace, they can be permitted to run sore or lame with absolutely no physical threat to other participants or economic detriment to bettors. Can such pronouncements on the part of the state of Kentucky truly be termed "rational" or "reasonable"?

While the two industries are clearly "different," there appears to be little justification for state-mandated differences in medication rules between the breeds. Hyacotherium or eohippus (dawn horse) first appeared on earth about 55 million years ago.[19] Messenger, the English stallion who is the foundation sire for both the thoroughbred and standardbred breeds, was imported to the United States in 1788.[20] From the standpoint of evolution, two centuries is but the blink of an eye. Whether we saddle or hitch, we are dealing with the same animals, two exclusive, closed breeds, but assuredly kissing cousins at the farthest outside parameter.

Thus, while height at the withers, neck conformation, gait training and equipment may be different, it is impossible to sustain an argument that either animal is "safer" in competition when forced to perform lame or sore. Differences in gait or equipment have no significance from the frame of reference of medication. While industry practice might be different, this, too, provides no justification for differing restrictions between the breeds.[21]

The Racing Medication and Testing Consortium, Inc. is a charitable organization with both scientific and educational purposes, whose goals and objectives are to achieve uniformity in policies, practices, procedures and penalties regarding the use of medications.[22] The Board of Directors of this organization is made up of breed registries and high-profile entities representing the thoroughbred, standardbred and quarter horse racing industries.[23] The task is Herculean: convince the state regulators of over thirty (30) separate jurisdictions to adopt uniform equine racing medication rules.

Clearly, such uniformity involves not only establishing identity of regulations among the states, but among the racing breeds as well. Can a "uniform" statute or regulation treat thoroughbreds and standardbreds differently, as in Kentucky? The *Allen* decision notwithstanding, it would appear not, unless significant scientific research discloses how a particular substance or procedure affects a certain racing breed differently. Without such rationale or reason, any "uniform" statutory scheme establishing a "Flats/Trots" dichotomy would appear headed for eventual constitutional review, with the outcome tenuous at best.

"Without such rationale or reason, any 'uniform' statutory scheme establishing a 'Flats/Trots' dichotomy would appear headed for eventual constitutional review, with the outcome tenuous at best."

Endnotes

1. 443 U.S. 55 (1979).
2. Presently codified at N.Y. Comp. Codes R. & Regs. tit. 9, § 4120.4 (2004).
3. Trainer Barchi argued that since the regulations provided for no pre-suspension hearing, the regulation was unconstitutional. The Court rejected that argument, but agreed that the trainer had been deprived of due process, since by virtue of the statute then in effect (McKinney's New York Unconsolidated Laws § 8022) , the trainer ". . . was not assured a sufficiently timely postsuspension hearing . . ." 443 U.S. 55, 63 (1979).
4. *Id.* (citing *Vance v. Bradley*, http://caselaw.lp.findlaw.com/cgi-bin/getcase.pl?navby=case&court=us&vol=440&invol=93 (1979)).
5. *Id.* n.12.
6. N. Y. Legis. Doc. No. 86, 177th Sess., 3 (1954).
7. *Id.* at 4; *see* Report of the N.Y. State Commission, *reprinted in* Public Papers of Governor Thomas E. Dewey 505 (1954).
8. *See* 1954 N. Y. Laws 510; Report of the N.Y. State Commission, *reprinted in* Public Papers of Governor Thomas E. Dewey 505, 512 (1954).
9. ". . . neither Barchi nor the District Court has demonstrated that the acute problems attending harness racing also plague the thoroughbred racing industry. Barchi has not shown that the two industries should be identically regulated in all respects; he has not convinced us that 'the legislative facts on which the classification is apparently based could not reasonably be conceived to be true by the governmental decisionmaker.'" (citations omitted) *Barchi*, 433 U.S. 55, 67–68 (1979).
10. Consider that the drugging disqualification of Dancers Image from the Kentucky Derby took place in 1968; that by 1979, Tony Cuilla had already been "outed" as a notorious race fixer at New England thoroughbred tracks; and that a notorious insurance fraud/"ringer" scandal involving thoroughbreds Cinzano and LeBon occurred at Belmont Park, New York, in 1977.
11. Mr. Allen passed away on May 24, 2004 at the age of 74. He has been nominated for enshrinement to the National Hall of Fame of the Trotter in Goshen, New York, by various chapters of the United States Harness Writers Association.
12. The Kentucky Horse Racing Authority (KHRA) has succeeded the Kentucky Racing Commission.
13. __ S.W.3d __, 2004 WL 1098935 (May 14, 2004).
14. Kentucky thoroughbred racing medication rules are found at 810 KAR 1:018. Kentucky standardbred racing medication rules are found at 811 KAR 1:090, *available at* http://krc.ppr.ky.gov/RulesAndRegulations.htm (last visited June 22, 2004).
15. Matt Hegarty, *Proposed New Drug Rules Would Set National Policy*, Daily Racing Form, April 2, 2004, *available at* http://drf.com/drfNewsArticle.do?NID=54488&subs=0&arc=1 (last visited June 22, 2004).
16. 505 U.S. 1 (1992).
17. "[t]he appropriate standard of review is whether the difference in treatment . . . rationally furthers a legitimate state interest." 2004 WL 1098935 at *7 (citations omitted).
18. __ S.W.3d __, 2004 WL 1098935 (May 14, 2004).
19. The International Museum of the Horse, *The Legacy of the Horse, The First Horses*, *available at* http://www.imh.org/imh/kyhpl1a.html#xtocid224361 (last visited June 22, 2004).
20. Foundation Sires of the Thoroughbred, *available at* http://www.tbheritage.com/HistoricSires/FoundationSires/FoundSiresM.html (last visited June 22, 2004).
21. While over 98% of the thoroughbreds racing on 2004 Belmont Stakes Day in New York were treated with race day Lasix® (Salix®) (information derived from official NYRA program, June 5, 2004), use of the drug is virtually non-existent by some top harness trainers. *See* Dean A. Hoffman, *The "L" Factor: Trainers Vary Widely in Lasix Use*, Hoof Beats Magazine, Nov. 2003 (official publication of the United States Trotting Association).
22. *Available at* http://www.rmtcnet.com/mission.asp (last visited June 22, 2004).
23. *Available at* http://www.rmtcnet.com/aboutus.asp (last visited June 22, 2004).

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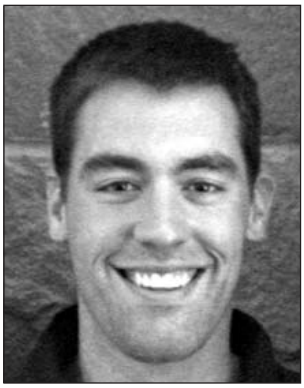
Game-Fixing Scandals in American Sports

By Daniel K. Clemente

He was a perfect player. He was a savvy player with great timing, and his extra edge was his phenomenal hook shot, the best hook shot ever. There was nothing Jack Molinas couldn't do on a basketball court.

-Hubie Brown, longtime NBA coach and analyst



Jack who? There have been many great basketball players—great, but ultimately unknown. Some players just do not make it. Grades, injuries, bad timing, drugs and alcohol, or a lack of desire are some of the more common reasons. For Jack Molinas, it might have been that he was too smart. Or was it just that he was too evil? People who have heard of Molinas most likely know him for his actions off the court rather than for those on it. He is widely blamed for single-handedly corrupting both the National Basketball Association (NBA) and college basketball.[1] From his college days at Columbia University to his days as a lawyer and stockbroker, Molinas was involved in dozens of point-shaving incidents at the college level. He ruined the lives of many young athletes with bright futures and ended the careers of other accomplished players.

This article will examine the history and current state of game-fixing in American sports through the life of Jack Molinas. Part I begins by giving a history of sports gambling in America and describes how it has steadily increased over the past few decades. Part II focuses on two of the most famous sports scandals in United States history. These did not necessarily involve the largest transfers of money but received national attention for more important reasons. Part III narrows the scope further to look at several of the most well-known college basketball scandals. This background will provide a basis for understanding the extent of Molinas's influence on college basketball. Part IV is a brief look at Molinas in his childhood and college days, evincing how his gambling addiction was nurtured at a young age. Part V discusses Molinas's ban from the NBA and his leading role in the college basketball scandals in 1957–61.

I. The History of Sports Gambling

Estimates of how much money people bet each year on professional and collegiate sports vary wildly because no one knows how much is actually wagered. There are numbers as low as $85 billion and as high as $400 billion.[2] Because most sports betting is done illegally, there is no way to measure the amount of these bets. Whether the actual number is on the low or high end of these figures, one thing is for certain: sports gambling has become a dominant part of American culture.[3] Even though betting on sports is essentially illegal in every state except Nevada, sports wagers are placed every day in offices, bars, and schools around the country.[4]

Las Vegas first authorized sports betting in casinos in 1931. This was basically just a lure to bring people into the casinos to spend money on other games that had a much higher return for the house.[5] Then, in the late 1960s, came probably the most influential event in the history of sports gambling: the institution of the point spread. Although people disagree over who invented the system, Bob Martin is widely celebrated as the "genius" who started it.[6] Instead of betting on a team that is a ten-to-one favorite, one now chooses based on a spread of, for example, seventeen points. If one thinks that the underdog will lose by less than seventeen points (or win the game), then one bets the underdog. Otherwise, one bets the favorite.

"Even though betting on sports is essentially illegal in every state except Nevada, sports wagers are placed every day in offices, bars, and schools around the country."

There are two main reasons why Martin's spread was so effective. First, he was incredibly good at setting these spreads.[7] Martin used to say that he would try to determine a number that was so exact that he could not choose which side to play himself.[8] Peter Ruchman, general manager at Gambler's Book Club, recalls, "[t]hat was the genius of Bob Martin, he put out number[s] like that day after day, so the bookies didn't have to move their numbers. And I do not use the term lightly; it takes genius to do that."[9] Second, Martin was incorruptible.[10] His numbers could be trusted by everyone across the country.[11]

Around the same time, states started to tie their lottery products to professional sports.[12] In 1976, Delaware introduced a "Scoreboard" lottery, in which a bettor picked the seven winners in seven National Football League (NFL) games.[13] The NFL brought suit against the state claiming that the lottery violated various federal and state trademark and unfair competition laws.[14] The court held that, as long as the information necessary to conduct the lottery came from public sources after the NFL had distributed it to the public, there was no violation.[15]

Although the Delaware lottery was eventually discontinued, by the end of the 1980s a number of states had considered some form of sports wagering.[16] In response to this Congress eventually passed the Professional and Amateur Sports Protection Act (PAPSA) in 1992.[17] PAPSA prohibits the expansion of state-sanctioned, authorized or licensed gambling on amateur and professional sporting events in the United States.[18] One of the most outspoken opponents to state-sanctioned gambling is former NBA star Senator Bill Bradley. One author clearly states the fear:

> Bradley and others also were concerned that the proliferation of sports wagering might harm both the integrity of sports through game-fixing, as well as the fans' perception of that integrity. For example, a player might miss an easy opportunity to score at the end of a game. Even if this did not affect the game's outcome, it could impact who won certain wagers because of the point spread. Fans might then question whether the player was rigging the game, instead of taking fatigue or other legitimate factors into account. Senator Bradley deemed legal, state-sponsored sports wagering to be the most objectionable form of sports wagering because it created the perception that the government approved of wagering on sporting events.[19]

PAPSA was a step in the right direction, but it was not enough. In a Gallup poll taken in May 1999, twenty-seven percent of teenagers reported that they had bet on a professional sporting event in the past year.[20] Furthermore, since the adoption of PAPSA, law enforcement efforts have declined dramatically.[21] In 1960, almost 123,000 arrests were made for illegal gambling.[22] In 1995, that number had decreased to 15,000.[23]

Sports betting is an ever-growing problem in America. Discussed below are two of the most famous examples of how gamblers like Jack Molinas can lure people into their schemes and infect them with the sickness of greed.

II. Famous Sports Scandals

Arguably the most shocking and influential sports scandal in United States history is the one involving the 1919 Black Sox.[24] Eight members of the heavily favored 1919 Chicago White Sox were bribed—allegedly by gambler Arnold Rothstein[25]—to dump the World Series to the Cincinnati Reds.[26] Although the Black Sox became the first major scandal in professional baseball, there had already been a long history of players intermingling with gamblers.[27] In 1877, four members of the Louisville Grays were exiled from baseball for throwing games.[28] This punishment was, however, the exception to the rule. Generally, professional baseball management chose to ignore what they saw as such minor transgressions, and game-fixing continued.[29] But the infamous Black Sox scandal opened everyone's eyes.

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This was probably due to the enormity of the event. In a sense, those involved in the scandal were playing with the faith of fifty million people.[30] Rothstein was a former pool shark who eventually became known as "America's most notorious gambler."[31] The scandal was very complex and to this day no one really knows exactly how it happened.[32] After a newspaper article was printed with rumors of wrongdoing, three of the players testified about the fix before a grand jury.[33] In the end, eight players were implicated in the scheme. Although they were acquitted of conspiracy charges, they were banished from the game by the Commissioner of baseball, Judge Kenesaw Mountain Landis.[34]

The second most notorious gambling scandal in America is undoubtedly that of Pete Rose betting on his own team. Rose was a compulsive gambler, and his million-dollar annual salaries were not enough to sustain his living standards and meet his gambling debts.[35] Although Rose denied ever betting on baseball or the Cincinnati Reds, the team for which he played and later managed, there is significant evidence to the contrary.[36] Rose was never accused of affecting the outcome of any games that he managed, and most people still believe that "Charlie Hustle" would never have purposefully kept his team from winning. But this event garnered national attention because of Rose's stature as a baseball player, as well as the tainted past of sports gambling and particularly baseball after 1919. One author eloquently writes,

> This account reveals the ultimate irony of the Pete Rose saga: Rose's place in

> baseball's pantheon of heroes seemed assured after he had surpassed the all-time hits record set by Ty Cobb. But Rose lost his place in the Hall and became baseball's most notorious outcast because of his violation of the anti-gambling rule that Cobb had helped generate, which is still posted in every MLB clubhouse.[37]

The Pete Rose scandal alerted the general public that sports gambling was still a problem. What they did not know, and what those connected to the gambling world did, is that gambling was occurring not only on the professional level, but perhaps even more so at the collegiate level.

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III. College Basketball Point-Shaving Scandals

The first major point-shaving scandal in college basketball occurred in the late 1940s and early 1950s.[38] Less than a year after the City College of New York (CCNY) won both the National Invitational Tournament (NIT) and National Collegiate Athletic Association (NCAA) tournament, seven members of the team and eleven from other colleges were arrested for taking money to fix games.[39] Investigations by the New York District Attorney's office revealed that between 1947 and 1951, eighty-six games had been fixed by thirty-two players from seven colleges.[40] CCNY had company: Long Island University, New York University, Manhattan, Toledo, Bradley, and even Kentucky (which was playing for the national championship at the time) were all implicated.[41]

Recently, federal authorities have acknowledged that point-shaving is more likely to occur in college sports, especially basketball. Because most players can recognize their chances of playing professionally early in their college careers,[42] those who will most likely not reach the NBA may cash in while they can. Moreover, because only five players are on the court for a team at one time, it is much easier for only one or two players to change the outcome of a game.[43] In 1998, a study of Southeastern Conference students reported that "athletes were almost twice as likely to be problem gamblers as non-athletes."[44] In response to this dilemma, the NCAA adopted Bylaw 10.3. It states that athletic department staff members of a member institution and student-athletes shall not knowingly:

a. Provide information to individuals involved in organized gambling activities concerning intercollegiate athletics competition;

b. Solicit a bet on any intercollegiate team;

c. Accept a bet on any team representing the institution;

d. Solicit or accept a bet on an intercollegiate competition for any item (e.g., cash, shirt, dinner) that has tangible value; or

e. Participate in any gambling activity that involves intercollegiate athletics or professional athletics, through a bookmaker, a parlay card or any other method employed by organized gambling.[45]

In general, professional athletes are paid too much money to be tempted by bribes.[46] Thus, the major threat of game-fixing comes at the collegiate level.

Ten years after the CCNY scandal, Jack Molinas led another college basketball gambling conspiracy that was more than twice as large. Altogether, 476 players and forty-three games were controlled by players from twenty-seven different schools.[47] Then, in the 1970s, three Boston College (BC) basketball players agreed to fix games during the 1978–79 season.[48]

Small-time gamblers Rocco and Tony Perla recruited high school friend Richard Kuhn, who was entering his senior year at BC and was expected to be a key member of the basketball team. The plan was to select certain games where the point spread was so large that Kuhn could ensure that BC would fall short of the spread.[49] The Perla brothers organized a betting syndicate to maximize their winnings that eventually included well known Mafia figure Henry Hill.[50] Their first attempt failed, as BC routed Providence in December 1978. The Perla brothers responded by approaching two more players on the team to ensure that there were no more mishaps.[51] Over the course of the season the plan worked a few times and did not work other times.[52] The conspiracy was eventually discovered when Henry Hill revealed to authorities his participation in the point-shaving scheme in return for immunity.[53]

Hill later related to *Sports Illustrated*'s Douglas Looney that he had made between $75,000 and $100,000 and that his partners had made $250,000 in the BC scandal.[54] The players themselves probably made around $10,000 each.[55] The Perla brothers and Kuhn were convicted on charges under the Racketeer Influenced & Corrupt Organizations (RICO) statute, namely conspiracy, conspiracy to commit sports bribery,[56] and interstate travel with the intent to commit bribery.[57] Rick Kuhn's sentence was the heaviest ever imposed on a college player convicted of point–shaving (ten years in prison) though it was later reduced to twenty-eight months.[58] The other two players were not charged.[59]

Three other college basketball scandals in the past twenty years clearly show that point-shaving is still a problem. In 1985, the story broke that five players on the Tulane University basketball team had accepted over $25,000 to shave points in two basketball games.[60] One of the players, John "Hot Rod" Williams, who later starred in the NBA, was indicted on two counts of sports bribery and three counts of conspiracy. However, the judge ruled that Williams had suffered a mistrial and the charges were dropped.[61] In 1997, two players for Arizona State University pled guilty to charges of conspiracy to commit sports bribery in a point-shaving plan.[62] A year later, two players for Northwestern University were implicated in a point-shaving plan and were charged with bribery.[63] One of the players was sentenced to one month in prison and two years probation.[64]

This only scratches the surface of the gambling incidents in American sports. There have been a number of minor problems, where college or professional athletes have been caught gambling, while not necessarily betting on their own games, but rather on different sports or sometimes other games within their own sport. Unfortunately, there may have been many more that have gone undetected, or at the very least unknown to most. A perfect example of this is the story of Jack Molinas. The amazing part is that Molinas—even as one of the greatest basketball players of his time—was so heavily involved in gambling on basketball and in the downfall of so many other great players.

IV. Jack Molinas: The Early Years

Jack Molinas started betting on baseball games when he was twelve years old, and he never looked back.[65] A bookmaker named Joe Hacken first introduced Molinas to gambling.[66] By the time he was fifteen, Molinas played on the Hacken All-Stars, an area high school all-star basketball team, from which Hacken would attempt to recruit "dumpers" once they moved onto college.[67] There are accounts from former high school friends relating stories of Molinas throwing games even in high school. Even worse, he would sometimes tell people that he was going to do so before the game.[68] For Molinas, shaving points in a basketball game was an art. In his biography, Charley Rosen writes of Molinas:

> To Molinas, playing in a rigged ball game was more exhilarating than playing it straight. He had to be mindful of the score, the game clock, the point spread, and even the substitutions. Every sequence called for a quick decision. Should he make or miss his next free throw? Should he play all-out on defense and risk a foul? Was it time to kick a pass out of bounds, or get called for a three second violation? Or should he go on a scoring binge to make his own statistics respectable? . . . He loved the idea of playing so many secret games at the same time.[69]

Molinas was recruited heavily out of high school and ultimately chose Columbia behind the urging of his father.[70] Although no one really knows how many games Jack Molinas may have fixed at Columbia, if any, his collegiate career was nothing less than remarkable. He was chosen by the Fort Wayne Pistons with the fifth pick in the 1953 NBA college draft.[71]

V. In the Courtroom

The first half of Molinas's rookie season with the Pistons went extremely well. He was chosen to play in the NBA All-Star game at Madison Square Garden in his hometown. For a rookie, this was a real honor and accomplishment. But in January of the 1953–54 season, the Fort Wayne police conducted an inquiry into gambling on the Pistons.[72] Subsequently, Molinas reluctantly signed a written statement that he had bet on the Pistons, but only that they would win games.[73] As a result, NBA President Maurice Podoloff suspended Molinas from the league indefinitely.[74]

Molinas brought an action in New York seeking a permanent injunction to set aside his suspension.[75] He contended that there had been no notice of a hearing and that the charges had not been given to him as required by his contract and the NBA constitution.[76] The court explained that to void the suspension and to grant Molinas a hearing that would ultimately end in his expulsion anyway, "would be a mere futile gesture."[77] Furthermore, the court noted the "unfavorable attention" that certain amateur and professional sports were receiving at the time.[78] The court explained that when scandal hits one sport, suspicion is cast on all other sports as well. Thus, "[t]o maintain basketball competition in the N.B.A., to have open competitive sport, the public confidence and attendance, every effort had to be made to eliminate the slightest suspicion that competition was not on an honest, competitive basis."[79] Molinas's days in the NBA were over.

Molinas returned to New York City where he attended classes at Brooklyn Law School. He eventually earned his law degree[80] while continuing to play basketball in the Eastern Basketball League (EBL).[81] Molinas again attempted legal action and filed a complaint in U.S. District Court for the Southern District of New York alleging that the NBA had entered into a conspiracy with other teams to restrain trade in violation of antitrust law.[82] He sought treble damages in the amount of $3 million, an injunction against the conspiracies alleged, and reinstatement into the league.[83] Here, the

District Court judge took a more insightful look at Molinas's actions than the previous court had, stating:

> Plaintiff was wagering on games in which he was to play, and some of these bets were made on the basis of a "point spread" system. Plaintiff insists that since he bet only on his own team to win, his conduct, while admittedly improper, was not immoral. But I do not find this distinction to be a meaningful one in the context of the present case. The vice inherent in the plaintiff's conduct is that each time he placed a bet or refused to place a bet, this operated inevitably to inform bookmakers of an insider's opinion as to the adequacy or inadequacy of the point-spread or his team's ability to win. Thus, for example, when he chose to place a bet, this would indicate to the bookmakers that a member of the Fort Wayne team believed that his team would exceed its expected performance. Similarly, when he chose not to bet, bookmakers thus would be informed of his opinion that the Pistons would not perform according to its expectations.[84]

In 1957 and even during his lawsuit against the NBA, Molinas had begun his most infamous gambling plot.[85] Along with three associates, Joe Hacken, Aaron Wagman, and Joe Green, Molinas had developed an organization he dubbed "Fixers Incorporated."[86] From 1957 to 1961, Molinas and his associates were involved in an intricate system of scouting and recruiting players to dump college games.[87] At its peak, this number was said to have reached up to 476 players from twenty-seven different schools across the country.[88] And that was only the half of it. Molinas also had a network of almost fifty bookmakers in Philadelphia, New York, Boston, and Baltimore, and had bookmakers backed by the five Mafia families in New York City.[89] Fixers Inc. even held "board of directors" meetings before every season to plot their strategy for the upcoming year.[90] Eventually, Fixers Inc. had gained such notoriety in the basketball underworld that players began approaching them.[91]

Things started to unravel in 1960 when Molinas's co-conspirator, Aaron Wagman, was arrested in Florida for trying to bribe a University of Florida football player.[92] Molinas, however, was always very careful and was rarely involved directly with players. But as suspicions started to grow over Molinas's involvement, he was finally caught.[93]

Dennis Reed was a college player who had accepted bribes, and was called to New York to testify before a grand jury.[94] After receiving a grant of immunity, Reed was equipped with a concealed tape recorder and met with Molinas. Reed elicited statements from Molinas about certain activities of Fixers Inc.,[95] and Molinas even attempted to persuade Reed to lie to the grand jury.[96]

In addition to being disbarred, Molinas was sentenced to serve consecutive five to seven-and-a-half year prison terms.[97] He ended up spending a total of fifty months in prison, before being granted parole in 1968.[98] After jail Molinas moved to Hollywood where be became a regular in the Las Vegas casinos.[99] He also became involved in businesses such as pornography and loan-sharking.[100] He was eventually gunned down on August 3, 1975, on the patio of his home in the Hollywood Hills.[101]

VI. A Few Notables

The tragedy of Jack Molinas was more than just the self-destruction of one man. Fixers Inc. was said to have included 476 players. Some of these players may have been inclined to dump games on their own, but more often than not it was Molinas and his accomplices who persuaded them. They influenced these athletes at a young age and essentially locked them in afterward. While there is no telling how many bright futures Molinas may have ruined, there are a few notable stories.

Connie "The Hawk" Hawkins was a freshman at the University of Iowa on his way home to New York City for Christmas vacation.[102] His coach gave him $200 to pay his dormitory fees for the spring semester.[103] As soon as Hawkins got to New York, however, he spent the money on Christmas presents for his family.[104] Molinas was always offering to "help" college basketball players if they needed money (obviously expecting a favor in return), and Hawkins asked Molinas for a loan.[105] Hawkins's association with Molinas ruined his collegiate career.[106] He never played a game for Iowa,[107] and Commissioner Walter Kennedy banned him from the NBA. Hawkins eventually filed an antitrust suit to enter the NBA. It was almost six years before the ban was lifted and Hawkins was allowed to play.[108] Even though he was never as good as he had been in his prime, Hawkins went on to play in four NBA All-Star games.[109] Connie Hawkins really did nothing wrong, but his brief connection with Jack Molinas altered the course of his life and tarnished what could have been an even more successful career.

There are a few other notable players whose connections with Molinas affected their lives and careers. Roger Brown had been paid $250 for "good offices," but never was in a position to fix games.[110] He eventually

filed a lawsuit—which he won—but never appeared in an NBA game. Instead, he chose to stay with the Indiana Pacers in the American Basketball League (ABL).[111] Doug Moe was a star at North Carolina and accepted a gift of seventy-five dollars from a teammate's friend with gambling connections.[112] Moe was never involved in any type of game-fixing, but was nonetheless tainted by his connection to Molinas. He played overseas before becoming an assistant coach and eventually a head coach in the NBA.[113] Finally, there was Tony Jackson, the Most Valuable Player of the NIT in his sophomore season at St. John's University. Jackson was never accused of accepting bribes; he was simply accused of not reporting one that a teammate had accepted. Jackson was drafted by the Knicks and agreed to contract terms, but Commissioner Podoloff ruled that anyone named in the Molinas scandal would not be permitted to play. Jackson went on to a successful career in the ABL, but because of Molinas no one knows what Jackson would have done in the NBA.

"Players generate millions of dollars for their schools and the NCAA but under the rules of the NCAA are not allowed to keep even their sneakers at the end of the season."

Conclusion

Gambling in sports is not a recent phenomenon. It has been around for well over fifty years and continues to grow with increased television coverage of sports and the rise of the Internet.[114] As discussed above, the biggest problem is still with the college athlete. At this point, professional athletes generally make too much money to be bribed. But college is a different story.

A possible solution to this problem is the controversial idea of compensating collegiate athletes.[115] But will this really decrease gambling in the college game? It very well might. Players generate millions of dollars for their schools and the NCAA but under the rules of the NCAA are not allowed to keep even their sneakers at the end of the season. A rule allowing student athletes to receive a stipend every month on which to live is reasonable and perhaps even justified.

Either way, gambling will likely continue. There will always be a Jack Molinas out there trying to fix the sure bet, and there will always be athletes out there naïve and greedy enough to oblige.

Endnotes

1. *See generally* Charley Rosen, The Wizard of Odds: How Jack Molinas Almost Destroyed the Game of Basketball (2001).
2. John Lyman Mason & Michael Nelson, Governing Gambling 85 (2001). In 1997, Nevada casinos, otherwise known as "sports books," brought in $2.4 billion in wagers, which constitutes no more than three percent of the estimated amount Americans bet on sports for the year. *Id*.
3. There are five major reasons for the emergence of sports gambling: 1) the social perception of gambling has changed considerably, 2) the rise of Indian casinos throughout the country, 3) a growing market for activities that combine risk, excitement, and chance, 4) the increase in sports broadcasting, and 5) the Internet. Cathryn L. Claussen, *Online Sports Gaming—Regulation or Prohibition*? 11 J. Legal Aspects Sport 99, 101–102 (2001).
4. The most obvious example of this is the NCAA tournament brackets. In March, there are not many people who do not fill out a tournament bracket, whether they are sports fans or non-sports fans. According to the Nevada State Gaming Commission, $172.4 million was legally wagered on basketball in the state of Nevada in March 2000. In April, after the NCAA tournament was completed, the amount wagered fell to $53.1 million, indicating the popularity of betting on college basketball.
5. Mason & Nelson, *supra* note 2, at 86.
6. A.D. Hopkins, *A Line in the Desert,* Las Vegas Rev. J. (1999), *at* http://www.1st100 .com/part3/martin.html.
7. *Id.*
8. *Id.*
9. *Id.*
10. *Id.*
11. *Id.*
12. Anthony N. Cabot, Federal Gambling Law 164 (1999).
13. *Id.*
14. *Id. See also NFL v. Governor of Del*., 435 F. Supp. 1372 (D. Del. 1977).
15. *Id.*
16. *Id.* at 165.
17. 28 U.S.C. §§ 3701–3704 (2000). The text of the Act reads:

    It shall be unlawful for—

    (1) a government entity to sponsor, operate, advertise, promote, license, or authorize by law or compact, or

    (2) a person to sponsor, operate, advertise, or promote, pursuant to the law or compact of a governmental entity, a lottery, sweepstakes, or other betting, gambling, or wagering scheme based, directly or indirectly (through the use of geographical references or otherwise), on one or more competitive games in which amateur or professional athletes participate, or are intended to participate, or on one or more performances of such athletes in such games.
18. *Id.*
19. Cabot, *supra* note 12, at 6. *See also* Hearings on H.R. 474 Before the Senate Subcommittee on Patents, Copyrights and Trademarks, 102d Cong. 1 (1991) (where Commissioner of the NBA David Stern echoes Bradley's sentiments on the issue, stating that "sports betting places athletes and games under a cloud of suspicion, as normal incidents of the game give rise to unfounded speculation of game-fixing and point-shaving.").
20. Mason & Nelson, *supra* note 2, at 88.
21. Anthony N. Cabot & Robert D. Faiss, *Sports Gambling in the Cyberspace Era*, 5 Chapt. L. Rev. 1, 8 (2002).
22. *Id.*
23. *Id.*
24. *See* Daniel A. Nathan, *The Big Fix*, Apr. Leg. Aff. 52 (2004).

25. In *The Godfather, Part II*, Michael Corleone says, "I loved baseball ever since Rothstein fixed the World Series."
26. Nathan, *supra* note 24.
27. *Id.* at 54.
28. *Id.*
29. *Id.*
30. *Id.*
31. *See generally* David Pietrusza, Rothstein: The Life, Times, and Murder of the Criminal Genius Who Fixed the 1919 World Series (2003).
32. Nathan, *supra* note 24, at 53.
33. *Id.*
34. The Black Sox scandal caused the creation of a commissioner in baseball. The in-place commission of three people was abolished and an agreement was drafted giving federal Judge Landis a variety of powers, including the right to hear and determine any disputes between leagues, clubs, and players and to impose appropriate punishment to anyone engaging in conduct that was "detrimental to baseball." Landis was well respected, and his decisions were rarely challenged in court. *Sportslaw History: The Top Legal Events of the Century*, *available at* http://www.sportslawnews.com/archive/history/TopSportsEvents.htm.
35. Paul C. Weiler, Leveling the Playing Field: How the Law Can Make Sports Better for Fans 32 (2000).
36. *The Dowd Report*, 68 MSLJ 915 (1999).
37. Weiler, *supra* note 35, at 39.
38. Joe Goldstein, *Explosion: 1951 Scandals Threaten College Hoops* (Nov. 10, 2003), *at* http://espn.go.com/classic/s/basketball_scandals_explosion.html. *See also* "City Dump: The 1951 CCNY Basketball Scandal" (Home Box Office 1999).
39. *Id.*
40. *Id.*
41. *Id.*
42. Ante Z. Udovicic, *Special Report: Sports and Gambling a Good Mix? I Wouldn't Bet On It*, 8 Marq. Sports L.J. 401, 413 (1998).
43. *Id.*
44. John Warren Kindt & Thomas Asmar, *College and Amateur Sports Gambling: Gambling Away Our Youth*, 8 Vill. Sports & Ent. L.J. 221 (2002).
45. *Available at* http://www1.ncaa.org/membership/enforcement/gambling/index.html (last visited May 16, 2004).
46. Udovicic, *supra* note 42, at 413. It is not only college athletes who are tempted to gamble; it is the average student as well. Florida State Law School professor Bill Minnix asked his sports-law class the question, "How many of you don't think you could leave this room and place a bet somewhere around this campus in 10 minutes?" Minnix recalled that in a class of fifty students, only ten hands went up. Jeff Shain et al., *Campus Gambling? You Can Bet On It*, Miami Herald (Dec. 22, 2002).
47. Molinas was the lead conspirator. This incident will be discussed *infra*.
48. *United States v. Burke*, 700 F.2d 70 (2d Cir. 1983).
49. *Id.* at 73–74.
50. *Id.*
51. *Id.* at 74–75.
52. *Id.*
53. *Id.* at 75.
54. Joe Goldstein, *Recent Scandals: BC, Tulane, and Northwestern* (Nov. 19, 2003), *at* http://espn.go.com/classic/s/basketball_scandals_recent.html.
55. Burke, 700 F.2d at 75.
56. Bribery in sporting contests:

    > (a) Whoever carries into effect, attempts to carry into effect, or conspires with any other person to carry into effect any scheme in commerce to influence, in any way, by bribery and sporting contest, with knowledge that the purpose of such scheme is to influence by bribery that contest, shall be fined under this title, or imprisoned not more than 5 years, or both. 18 U.S.C.S. § 224.

57. Goldstein, *supra* note 54, at 75.
58. *Id.*
59. *Id.*
60. Mike Littwin, *The Tulane Scandal*, L.A. Times, April 29, 1985, 1985 WL 2188950.
61. *Id.*
62. *ASU Pair Confess in Scandal*, Arizona Daily Star, Dec. 5, 1997, 1997 WL 16298940.
63. Goldstein, *supra* note 38.
64. *Id.*
65. Rosen, *supra* note 1, at 35.
66. *Id.* at 34.
67. *Id.* at 35.
68. *Id.* at 48.
69. *Id.* at 47.
70. *Id.* at 51.
71. *Id.* at 93.
72. *Molinas v. Podoloff*, 133 N.Y.S.2d 743, 744 (1954).
73. Rosen, *supra* note 1, at 17. Molinas said later that he did not think it was a big deal that he made some bets, even on his own team. There were players in the NBA that he knew of who were dumping games outright, and so he figured he was in the clear.
74. *Molinas*, 133 N.Y.S.2d 743. at 745.
75. *Id.* at 744.
76. *Id.* at 745.
77. *Id.* at 746.
78. *Id.*
79. *Id.* Section 15 of all N.B.A player contracts at the time stated: "It is severally and mutually agreed that any player of a Club, who directly or indirectly bets money or anything of value on the outcome of any game played for any N.B.A. Club, shall be expelled from the N.B.A. by the President after due notice and hearing and the President's decision shall be final, binding, conclusive, and unappealable."
80. Molinas was also eventually admitted to the New York State Bar, which many people found amazing given his history.
81. *Molinas v. Nat'l Basketball Assoc.*, 190 F. Supp. 241, 242 (1961). Basketball was considered a major morale-boosting activity during World War II, as every military base had its own team. When the veterans returned home, they brought with them an interest in watching and playing the game, and as a result a number of minor leagues were created. The EBL was one of them, and it included the Allentown Rockets, Hazleton Mountaineers, Lancaster Red Roses, Reading Keys, Wilkes-Barre Barons, and Binghamton Triplets. Rosen, *supra* note 1, at 147.
82. *Molinas*, 190 F. Supp at 242.
83. *Id.*
84. *Id.* at 244. The judge also made a reference to the fact that the confidence of the public in basketball had been shattered due to a series of gambling incidents.

85. Rosen, *supra* note 1, at 181.
86. *Id.*
87. *Id.*
88. Goldstein, *supra* note 38.
89. Rosen, *supra* note 1, at 181.
90. *Id.* at 200.
91. *Id.* at 215.
92. *Id.* at 244.
93. *United States ex rel. Molinas v. Mancusi*, 370 F.2d 601, 602 (2d Cir. 1967).
94. *Id.*
95. *Id.*
96. *Id.*
97. Joe Gergen, *He Never Got A Chance,* Newsday (New York, N.Y.) (Aug. 4, 2002).
98. *Id.*
99. *Id.*
100. *Id.*
101. Phil Berger & Stu Black, *Who Killed Jack Molinas?* New York Post, 1-8 (Aug. 1977).
102. Rosen, *supra* note 1, at 248.
103. *Id.*
104. *Id.*
105. *Id.*
106. Goldstein, *supra* note 38.
107. *Id.*
108. *See generally Hawkins v. Nat'l Basketball Ass'n*, 295 F. Supp. 103 (1969).
109. Goldstein, *supra* note 38. *See generally* Dave Wolf, Foul! The Connie Hawkins Story (1972).
110. Gergen, *supra* note 97.
111. *Id.*
112. *Id.*
113. *Id.*
114. *See generally* Lori K. Miller & Cathryn L. Claussen, *Online Sports Gambling—Regulation or Prohibition?* 11 J. Legal Aspects Sport 99 (2001). *See also* Kindt & Asmar, *supra* note 44, at 234.
115. Wallace Mathews, *Bracket Racket,* N.Y. Times (Mar. 16, 2004).

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Problem Gambling in New York: The Need for Greater Commitment to Compulsive Gambling Programs

By James Maney and Mariangela Milea

One of the greatest challenges New York faces is the increased competition for the shrinking pool of state resources at a time when New Yorkers face the greatest proliferation of gambling opportunities. Clearly, heightened state vigilance must be paralleled by vigilant attention to all New Yorkers who are adversely affected by problem gambling.

James Maney

The Governor's 2004–2005 Budget has the Office of Alcohol and Substance Abuse Services (OASAS) assuming administration of the state's $1.3 million Compulsive Gambling Education and Treatment Program from the Office of Mental Health (OMH) in FY 2004–05. This consolidates programs dedicated to the treatment and prevention of addictive disorders within a single state agency. The 2004–05 Executive Budget further strengthens this program by providing an additional $2 million in funding over two years.

Throughout New York's rich history of gambling, the challenge lawmakers have continually been faced with is the proper balancing of increased proliferation of gambling opportunities with increased proliferation of problem gambling.[1] As early as 1777, lawmakers realized the dangers of problem gambling. William Tryon, appointed Captain General and Governor-in Chief of the province of New York by King George III, was ordered to not approve any public or private lotteries without Royal Court approval because the King was concerned that lotteries were affecting the spirit of industry and drawing attention from a person's proper calling and occupation.[2] Today, New York lawmakers and New York residents must also consider the dangers and risks of gambling and minimize the adverse impact of problem gambling.

In 1972, the Board of Trustees of Gamblers Anonymous (GA) in the New York City area did just that by requesting their Spiritual Advisor, Monsignor Joseph A. Dunne, to establish a Council on Compulsive Gambling, now known as the National Council on Problem Gambling (NCPG). NCPG was to do what GA could not do because of anonymity—call national attention to the increasing problem of compulsive gambling in the United States. The NCPG received support from members of GA, medical practitioners such as Dr. Robert L. Custer, pioneer of treatment services, a few influential citizens, foundations, and a small paying membership.

Mariangela Milea

After the NCPG relocated from New York to Washington, D.C., in 1994, a network of providers and concerned individuals believed that it was important to have a Council that would focus on problem gambling advocacy, education and treatment at the New York State level and established The New York Council on Problem Gambling, Inc. (NYCPG).

Initially, the Council was an all-volunteer organization and board members were responsible for all activities of the Council. Most board members were also service providers. In 1995, the Council hired its first Executive Director, incorporated itself, established an office based in Albany, secured stable funding under contract with the Office of Mental Health, and provided a focus for statewide initiatives "to increase public awareness about problem and compulsive gambling and advocate for support services and treatment for persons adversely affected by gambling."

In the following year, as lawmakers contemplated the authorization of casino gambling and the possibility of off-reservation Indian gaming, Governor Pataki commissioned the New York State Task Force on Casino Gambling to assess the potential affects of casino gambling throughout New York State, including problem gambling. The Task Force concluded that educational programs related to prevention of gambling-related problems and interventional and treatment programs to assist those who are problem or pathological gamblers should be authorized. Further, the funding of problem gambling awareness and treatment organizations was to be continuous rather than experiencing year-to-year uncertainty. The Task Force also reported that funding should not be limited to the treatment of pathological gamblers, but should be extended to provide for research.[3]

Additionally, the Task Force recommended that an enabling or implementing legislation governing the reg-

ulation of legalized casino gambling should include a self-exclusion statute in the nature of that proposed in Missouri.[4] In 2002, Senate Bill S. 4137-B by Senator Larkin in the Senate and by Members Gromack and Canestrari in the Assembly made provision for the voluntary exclusion of persons by amending the Racing, Pari-Mutuel Wagering and Breeding Law as well as the Mental Hygiene Law in relation to compulsive gambling assistance, and became law.[5]

In 2000, as the controversy over the issue of gambling heightened, then-comptroller Carl McCall issued his agency's report, *New York State Gambling Policies*. He outlined the state's actions on gambling from all aspects and called for a moratorium on gambling by the Governor and the legislature, until establishment of a comprehensive plan of action that addressed policy implications and associated matters (e.g., problem gambling).

As the state's economy plummeted following the attacks on our nation on September 11, 2001, Mr. McCall's recommendation for a moratorium was dismissed, and six new Indian-run casinos, the installation of video lottery terminals at racetracks and the entry of New York into the multi-state lottery game known as MegaMillions were adopted into state law. Steeped in economical development ideas, lawmakers assembled to determine how to disburse gambling revenues, but failed to address the growing issue of problem gambling even though the 2001 legislation explicitly provided for the setting aside of funding for the prevention and treatment of problem gambling.

The new Seneca Niagara Casino in Niagara Falls and lottery games including MegaMillions are generating large sums of gambling revenues for the state, with Seneca Niagara providing $39 million and the lottery $1.8 billion this year alone. Moreover, after all video lottery terminal (VLT) venues are opened, the VLT industry is estimated to bring in in excess of $2.5 billion per year. State lawmakers continue to approve gambling expansion options as the panacea for New York's budget shortfall woes. Unfortunately, there are not enough problem gambling treatment, prevention and education services in New York to deal with the insurgence of this serious public health issue.

The New York Council on Problem Gambling maintains a neutral stance on gambling, and is well aware of and exceedingly concerned about the impacts of gambling expansion on problem and compulsive gambling. According to the National Gambling Impact Study Commission's Final Report, the presence of a gambling facility within 50 miles roughly doubles the prevalence of problem and pathological gambling within that area. Since the opening of the new casino in Niagara Falls, the number of people seeking counseling for gambling problems in that area was 53 percent above the previous year. In addition to this significant rise, a 15 percent increase in bankruptcy filings in the region was also recorded. The area's bankruptcy judge, Judge Bucki, shared that the increased availability of legalized gambling is a major factor.[6]

Creighton University has released a study confirming that problem gamblers are more susceptible to problems when they have convenient access to casinos. The study compared roughly 250 counties across the country with commercial or tribal casinos with non-casino counties with similar demographics. It found the cumulative growth rate on personal bankruptcies in casino counties to be more than 100 percent higher than the non-casino counties between 1990 and 1999.

Unless addressed, the compulsive gambler's betting activity will reach the point where it compromises, disrupts and destroys his or her personal life, family relationships, professional pursuits and economic security. Neglect or abuses of children, spouse or partner; divorce; poverty; arrest and/or imprisonment; mental breakdown or suicide are all likely outcomes of gambling addiction. With more than three-quarter million adult residents having experienced problems due to gambling, this under-recognized public health issue is in need of proper attention immediately.

"Unless addressed, the compulsive gambler's betting activity will reach the point where it compromises, disrupts and destroys his or her personal life, family relationships, professional pursuits and economic security."

In July 1996, *Gambling and Problem Gambling in New York—A 10-Year Replication Survey, 1986 to 1996*, was published. This report was developed under contract between OMH and the NYCPG. The survey was conducted by Dr. Rachel Volberg, now of Gemini Research.

The main purpose of the 1996 survey was to examine changes in the prevalence of gambling-related problems among adults in New York in the last decade. The study was to also identify the types of gambling causing the greatest difficulties for the citizens of New York. A large sample of New York adults (1,829) was interviewed in April 1996 about the types of gambling they have tried, the amounts of money they spend on gambling, and about gambling-related difficulties.

In summary, the 1996 study revealed that New York State experienced a 74% increase in problem gambling prevalence from the 1986 study. In the 1996 study, data indicated New York State has the highest prevalence of lifetime problem gambling (7.3%) and the third-largest

percentage of current prevalence (3.6%) in the nation, in comparison to states that have conducted similar studies. This data suggests that there are more than three-quarter million residents who have had problems due to gambling at some point during their lives and at least an additional one-quarter million New Yorkers who are currently experiencing serious to severe difficulties. The three forms of gambling that present the greatest risk to New York's adult population are casino gambling, state-sponsored lottery games, and sports betting. This data does not include adolescents or the millions of New Yorkers adversely affected by the problem gambler's activities.

During 1997, NYCPG conducted a prevalence study of adolescent problem gambling through a contract with Gemini Research. The study, *Gambling and Problem Gambling among Adolescents in New York State*, released in March 1998, was supported by a one-time appropriation from OMH. It documented that despite a legal gambling age of 18, gambling has become a pervasive problem among thousands of children in New York and is growing at a rapid pace. It revealed that 14% of New York's youth are at risk of developing problems due to gambling and an additional 2.4% are currently experiencing severe difficulties.

"New York is clearly falling short in the fight against problem gambling."

Since the last prevalence study was conducted, the legislature has introduced new forms of gambling and expanded existing forms beyond record levels. Bearing in mind that increased gambling expansion begets increased problem gambling, a new prevalence study must be conducted to determine the rate of increased prevalence and to enable lawmakers to craft appropriate policy and legislation.

High prevalence plus new gambling initiatives equals a need for more treatment services. We must strengthen our efforts to close the gaps in treatment, education and prevention. Without adequate funding for problem gambling, New York will not be ready to address the adverse impacts of this "hidden disorder." Delays in addressing this need will only exacerbate an already severe situation.

One of the most powerful conclusions drawn during the Council's forum on the impact of problem gambling on our community, held in Saratoga, New York, in May 2004, was that additional gambling treatment programs are needed throughout our state. Helpline statistics show that the number of calls received in 2003 from throughout the state stands at 58,250; nearly 20 times more than in 1996 when 3,200 calls were received. Additionally, approximately 1,900 persons received outpatient treatment from the six state-funded treatment providers in 2003, a figure six times more than in 1996 when there were only 300.

Local efforts to link those in need to support services for problem gamblers and their families are coordinated statewide by the NYCPG. The state's 24-hour toll-free Problem Gambling Helpline, which provides the supportive intervention, information about gambling addiction and referrals for local treatment to professional problem gambling provider programs and self-help (Gamblers Anonymous and Gam-Anon) can be found on the back of all lottery tickets, on pari-mutuel tickets, on VLT machines at casinos, and on signage in OTB parlors and race tracks.

Regrettably, interviews conducted by Zogby International reveal only nine percent of respondents were aware of a Problem Gambling Treatment Center in their area. This while one-fourth of respondents said they knew someone who has run into debt problems, job problems, legal problems or family problems because of gambling or betting too much.[7]

When problem gambling strikes, the outcome is unmistakably tragic and devastating for the problem gambler who can feel deep guilt and deeper panic, wondering how he got himself into such a mess. This year's Council's forum in Saratoga looked at raising awareness about problem gambling, engaging concerned residents and community leaders in meaningful dialogue to address the impact of problem gambling, and gaining knowledge about the services available for all those affected by problem gambling. Though daunting, reaching these objectives is vital to those who are suffering from the adverse impacts of problem gambling in our communities and will require unprecedented levels of commitment on our part. New York is clearly falling short in the fight against problem gambling.

To aid in this battle, the NYCPG certified New York State's first group of Gambling Treatment Counselors and Approved Supervisors in 2001. It is the goal of the Council to expand and diversify the New York State network of qualified problem gambling treatment providers. The Council's New York State Certification Program establishes standards for practitioners in the field, and ensures that an applicant is qualified to provide direct counseling or therapy for individuals and/or family members who have been adversely affected by problem and pathological gambling. The New York Certified Gambling Treatment Counselors and New York State Approved Supervisor certification processes make certain that all problem and pathological gamblers and their loved ones receive the best treatment available.

The Council has been gratified by the response shown by the professional community to its certifica-

tion program, and is pleased to say that to date there are nearly 30 qualified counselors and supervisors. While efforts such as this help to mitigate the impacts of problem gambling, the state's plan to accelerate the movement to increase opportunities for New Yorkers to gamble creates a ripple effect requiring additional support to stop the spread of problem gambling throughout the state.

Currently underway is a multi-faceted approach by the state to expand gambling to generate revenues to solve the state's fiscal woes. This year the Governor proposed eight new racinos be put out for bid. Advances such as the tentative settlement with the Seneca-Cayuga Tribe of Oklahoma for a downtown Rochester casino, and tentative agreement between the Cayuga Indian Nation and the state to build a casino at Monticello Raceway in the Catskills have been reached. The newly approved measure to allow video lottery terminals on the high-speed ferry between Rochester and Toronto will be addressed by the legislature when it reconvenes to approve the 2004–05 budget.

Funds for problem gambling services have not increased in proportion to the proliferation. In fact, it was not until 1981 that the public health issue of problem gambling even registered on the Richter scale with legislation, when $200,000 was authorized for education, prevention, treatment, training and research.[8] Even under the state's greatest expansion of gambling in 2001, funding for problem gambling was underresourced with a bewildering reduction in funds. As more and more gambling opportunities throughout New York unfold, lawmakers must carefully examine the ramification.

Studies, surveys and data gathered regarding problem gambling are adding up to a volume of information that is enough to supply the necessary impetus for lawmakers to not only confirm the presence of problem gambling, but move to do something about it. The Council recommends developing a comprehensive plan that addresses the impact and needs of New Yorkers regarding this public health issue. This plan should include the development of a Public Health Awareness Initiative; access to prevention and treatment services for all New Yorkers; new research addressing and thoroughly examining the impact of problem gambling, special populations (teens, seniors, minorities and substance abusers), and the effectiveness of prevention and treatment; establishment of residential problem gambling treatment programs; and implementation of a school-based problem gambling prevention curriculum.

Over the years, gambling and the funding of problem gambling services experienced a disproportionate relationship. As New York moves into the future, this relationship must be amended to reflect the ever-changing landscape and plans must be made to curb the disparities. All New Yorkers deserve access to the services they so desperately need. A sound and healthy financial future of our state requires it.

"Over the years, gambling and the funding of problem gambling services experienced a disproportionate relationship."

Timeline One

NEW YORK STATE FUNDING FOR PROBLEM GAMBLING

1981	legislation authorized the Office of Mental Health $200,000 for education, prevention, treatment, training, and research
1982	additional $500,000
1988	funding cut to $598,000
1991	funding cut to $396,000
1996	appropriation of $1.5 million for problem gambling education and treatment program
2001	funding reduced to $1.3 million
2003	established the Problem and Compulsive Gambling Education, Prevention and Treatment Fund
	no additional funding
2004	Executive Budget provides an additional $2 million in funding over two years

Timeline Two

SIGNIFICANT EVENTS IN THE FIELD OF PROBLEM GAMBLING

1949	Gamblers Anonymous started on West Coast
1957	Jim W. & Sam J. found modern Gamblers Anonymous on Friday the 13th
1960	Gam-Anon founded
1972	National Council on Problem Gambling founded
1980	DSM III criteria for pathological gambling published and adopted by American Psychiatric Association (APA)
1985	first National Conference on Problem Gambling held in N.Y.

1986 first Problem Gambling Prevalence Survey conducted in N.Y.

1987 DSM III-R criteria for pathological gambling developed and published

1994 DSM IV criteria for pathological gambling published by APA

1995 New York Council on Problem Gambling founded

1996 Gambling and Problem Gambling in N.Y.—10-year Replication Survey, 1986 to 1996 published; first NYCPG Conference held

N.Y.S. Task Force on Casino Gambling National Gambling Impact (NGISC) Study Commission formed by Congress

1999 first study of Gambling & Problem Gambling Among Adolescents in N.Y.

NGISC Final Report contains 76 recommendations—36 of which directly address problem and pathological gambling

2004 administrative transfer from N.Y.S. Office of Mental Health to N.Y.S. Office of Alcohol & Substance Abuse

Timeline Three

NEW YORK STATE AND GAMBLING

1656 Ordinance of October 26, 1656 prohibited gambling during church hours on the Sabbath

1721 prohibited unauthorized lotteries

1741 imposed penalties on inn and tavern owners who permitted billiards, truck or shuffleboard on premises.

1746–1774 authorized more than one dozen public lotteries for diverse causes

1772 anti-lottery law passed

1777 N.Y.S. Constitution passed without provisions related to gambling

1821 N.Y.S. Constitution adopted first reference to gambling

1846 NYS Constitution amended; lottery language prohibited all lotteries

1894 other forms of gambling were addressed constitutionally

1939 pari-mutuel betting on horse racing authorized

1957 religious, charitable and certain non-profit groups authorized to conduct bingo

1966 state lottery for education amendment approved

1975 the religious, charitable and certain non-profit exception expanded to include games of chance

1988 Federal Indian Gaming Regulatory Act allowed federally recognized Indian tribes to petition the Governor of their state for a compact allowing Class III gambling

1995 authorized QuickDraw

2001 authorized six Indian-run casinos, VLTs and state entry into multi-state lottery

Endnotes

1. *See* New York State and Gambling Historical Timelines, attached as Timelines One through Three.
2. *See* The New York State Task Force on Casino Gambling (1996).
3. *See id.*
4. *See* Missouri Title 11, Dept. of Public Safety, Div. 45-Missouri Gaming comm., Ch. 17, Voluntary Exclusions: 11 CSR 45-17.010-Duty to Exclude-Standard of Care.
5. Ch. 434.
6. *Betting on Bankruptcy*, Buffalo News, January 6, 2004.
7. Zogby International, Polling/Marketing Research Public Relation Services Marketing Strategies, Utica, NY, March 2004.
8. *See* New York State Funding of Problem Gambling Historical Timeline.

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Advising the Charitable Client: Bingo and Games of Chance

By Heather Bennett

New York State authorizes specific types of gaming activities for a defined class of charitable organizations. The list of organizations authorized to operate either Bingo or Games of Chance can be found in section 432(4) of the Executive Law and section 186(4) of the General Municipal Law, respectively. Both of the definitions of "authorized organizations" include "any bona fide religious or charitable organization or bona fide educational, fraternal, civic or service organization" or "bona fide organization of veterans [or] volunteer firefighters . . ." which "shall have as its dominant purpose one or more of the lawful purposes" as defined in these statutes.[1]

Organizations in New York State that typically have qualified to operate Bingo and Games of Chance activities include Veterans of Foreign Wars; American Legions; Eagle, Elk, and Moose clubs; churches; synagogues; temples; and volunteer fire companies.

The operation of Bingo and Games of Chance is strictly limited to the members of the licensed organization.[2] Additionally, all time, effort and energy dedicated to operating the games must be performed on a volunteer basis.[3] No one may receive a stipend, gift, free play, or other incentive in exchange for their efforts on behalf of the organization. Assistance in operating the games, however, may be provided by members of the organization's auxiliary or affiliate as long as the auxiliary or affiliate has obtained its own separate registration and identification number from the New York State Racing and Wagering Board.[4] Suppliers and manufacturers specifically cannot participate in the operation of games, and violations are punishable as a Class E felony.[5]

Laws and regulations governing Bingo and Games of Chance are contained in article I, § 9 of the New York Constitution, article 19-B of the Executive Law governing the State Bingo Control Commission, articles 9-A and 14-H of the General Municipal Law governing the local option for conduct of bingo and games of chance by certain organizations, and chapters IV and V of Title 9 of the Official Compilation of the Codes, Rules and Regulations of the State of New York ("N.Y.C.R.R.") governing games of chance. In accord with the applicable provisions, an organization may apply for a Bingo license as follows:

1. Determine that the desired gaming activity is authorized by the local municipality;[6]
2. Conduct a duly constituted meeting of the organization and record the following items in the Minutes:

i. Affirmative determination by the organization to commence Bingo activities;

ii. Appointment of the Member in Charge of operating the Bingo activities; and

iii. Authorization for the Member in Charge to file all necessary applications with the New York State Racing and Wagering Board

3. Apply to the New York State Racing and Wagering Board for a Registration and Identification Number;[7]
4. File the Bingo license application (Racing and Wagering Board form BC-2 with Schedules 1-7) in triplicate with the local municipality. One form will be retained by the municipality, the second will be filed with local law enforcement authorities and the third will be forwarded to the New York State Racing and Wagering Board;[8]
5. The municipality shall review the application and, following the review process, shall issue its "Finding and Determinations" which shall be directive as to approval or denial of the application;[9] and
6. Upon a favorable recommendation in the municipality's finding and determination, the organization may conduct its first Bingo game.

Bingo licenses are effective for a period of one year from the date of issuance.[10] Rules regarding the conduct of the games may be found at chapter V of Title 9 of the N.Y.C.R.R.

If, in addition to a Bingo license or, in the alternative, the organization is interested in applying for a Games of Chance license, the applicant organization must follow the same steps as outlined for Bingo above. The Games of Chance license application is on Racing and Wagering Board forms GC-2, GC-2A and GC-2B.

Once an organization is in possession of its Bingo license, the conduct of games is very specifically prescribed, including the duties of the members in charge,[11] responsibility for children,[12] restriction on participation,[13] badges,[14] designation of officer responsible for utilization of bingo monies,[15] prohibition on payments to game operators,[16] compensation of bookkeepers and accountants,[17] admission charges,[18] premises availability to inspections,[19] ownership of equipment,[20] prohibition on the sale of merchandise,[21] how to sell the bingo cards,[22] when to sell the bingo cards,[23] price of bingo cards,[24] kind of equipment that can be used for games,[25] how to draw numbers,[26] permissible winning combinations and notification to the players,[27] bonus prizes,[28] verification of winning numbers,[29] maximum number of games that can be played,[30] provisions regarding the sale of raffle tickets, bell jar tickets and lottery tickets,[31] maximum value and overall regulation of prizes which may be offered,[32] merchandise prizes,[33] multiple winners,[34] prohibition on gifts,[35] unapproved buildings,[36] rental payments due,[37] qualifications of person calling the game,[38] use and report of net proceeds,[39] accommodations to be furnished to players,[40] transportation of patrons,[41] purchase and sale of bingo supplies,[42] conduct of the games,[43] prohibition on cashing checks,[44] conduct and use of limited period bingo,[45] advertising of bingo games,[46] supercard games,[47] early bird games,[48] and leasing of bingo equipment.[49]

"Regulations provide that raffle tickets may be sold by authorized organizations at their respective licensed Bingo occasions if raffles are approved for sale in that municipality."

Alternately, once an organization is in possession of their Games of Chance license, the conduct of games is very specifically prescribed as well, including the duties of the member in charge,[50] participation by minors,[51] restrictions of participation,[52] designation of officer responsible for utilization of games of chance monies,[53] prohibition of payments, gifts and donations to persons conducting games,[54] compensation of bookkeepers and accountants,[55] admission of general public,[56] premises open to inspection,[57] ownership of devices and equipment,[58] prohibition on the sale of merchandise,[59] sale of New York State Lottery tickets,[60] minimum value of prizes offered,[61] value of merchandise prizes,[62] prohibition on gifts,[63] prohibition on admission charges,[64] prohibition on property as prizes,[65] unapproved buildings,[66] rental payments,[67] badges,[68] persons prohibited as players,[69] cashing of checks prohibited,[70] operation of bank,[71] sale and consumption of alcoholic beverages,[72] rules and bulletins available at games,[73] qualifications of members in charge and assistants,[74] and advertising games of chance.[75]

Special consideration should be paid to the extraordinary privileges available to veterans organizations under the 1997 Laws of New York, chapter 190.[76] Under this provision, veteran organizations are exempt from the requirement that the licensed organization donate one-third of their Games of Chance proceeds to charities by allowing these organizations to pay for any expense approved at a general membership meeting of the organization. If an expense is approved, the organization must attach a copy of the minutes of their meeting authorizing the expense to the quarterly report filed with the New York State Racing and Wagering Board.[77] Expenses such as mortgages, blacktop paving, roof repairs and bar liquor stocking are qualified expenses under this provision if approved according to the appropriate method.

While these provisions have been in place since Games of Chance laws were substantially amended in 1995,[78] several legislative changes have been adopted since that time that impact the charitable gaming operations of qualified organizations, including raffle reform and the introduction of electronic bingo aids to the play of the Bingo games.

The conduct of raffle games in relation to Bingo was substantially amended in 1998.[79] Regulations provide that raffle tickets may be sold by authorized organizations at their respective licensed Bingo occasions if raffles are approved for sale in that municipality. Authorization is contained under Games of Chance in section 5620.22(b)(5) of the N.Y.C.R.R. Organizations are cautioned to make sure that they use the correct style of ticket when conducting games. Specifically:

1. Admission-style tickets (also referred to as "50/50" style tickets) may be used to raffle off merchandise as long as only one item of merchandise is raffled off during that occasion of Bingo. These tickets may be sold throughout the evening and one winner must be drawn prior to the conclusion of the Bingo occasion.

2. If an organization would like to raffle numerous items during one Bingo occasion, the tickets must be printed according to the long-form requirements set forth in law. Information which must be printed on these tickets includes the name and identification number of the authorized organization; the location, date and time of the drawing; tickets must be numbered consecutively; state the price of the ticket; list the prizes to be awarded; state "ticket holders need not be present to win"; and have ticket stubs with the

name, address and phone number of the purchaser, and the serial number of the ticket sold.

3. 50/50 raffles may be played throughout the Bingo occasion with the admission-style ticket when cash is the prize offered for the game.

"Charitable gaming techniques, games, devices and the laws and regulations governing them will change. Organizations that engage in these activities should strictly monitor their games and reports."

Please note: Organizations located in a municipality that has authorized raffles may conduct such fundraisers subject to certain limitations. For raffles conducted for a one-year period with a total amount of prizes of $30,000 or less, the organization must file a Verified Statement (on a form provided by the Board and available on the Board's website at www.racing.state.ny.us). The Verified Statement must be filed with the New York Racing and Wagering Board and the local municipality. Additionally, at the end of the calendar year, organizations must file a statement detailing raffle activity with the municipality. Organizations hosting raffles with $30,000 in prizes or greater must obtain a license from the Board and maintain a separate special raffle bank account. These provisions are governed by sections 186 and 190 of the General Municipal Law, and sections 5620.22 and 5624.8 of Title 9 of the N.Y.C.R.R.

One additional recent development is authorization of the use of electronic bingo aids by regulation of the New York State Racing and Wagering Board. Use of these machines in the operation of traditional Bingo games is contained in sections 5823.1 through 5823.7 of Title 9 of the N.Y.C.R.R.

Charitable gaming techniques, games, devices and the laws and regulations governing them will change. Organizations that engage in these activities should strictly monitor their games and reports. Updated information is available at www.racing.state.ny.us.

Endnotes

1. N.Y. Exec. Law § 432(4); N.Y. Gen. Mun. Law § 186(4) (McKinney 1999).
2. N.Y. Comp. Codes R. & Regs. tit. 9, §§ 5820.3, 5622.3 (2001) ("N.Y.C.R.R.").
3. 9 N.Y.C.R.R. §§ 5820.6, 5622.5.
4. 9 N.Y.C.R.R. § 5820.3.
5. *Id.* at § 5608.5(c).
6. N.Y. Gen. Mun. Law § 187.
7. 9 N.Y.C.R.R. § 5810.1.
8. 9 N.Y.C.R.R. § 5811.4.
9. 9 N.Y.C.R.R. § 5812.3.
10. 9 N.Y.C.R.R. § 2812.7.
11. 9 N.Y.C.R.R. § 5820.1.
12. 9 N.Y.C.R.R. § 5820.2.
13. 9 N.Y.C.R.R. §§ 5820.3, 5820.34.
14. 9 N.Y.C.R.R. § 5820.4.
15. 9 N.Y.C.R.R. § 5820.5.
16. 9 N.Y.C.R.R. § 5820.6.
17. 9 N.Y.C.R.R. § 5820.7.
18. 9 N.Y.C.R.R. §§ 5820.8, 5820.30.
19. 9 N.Y.C.R.R. § 5820.9.
20. 9 N.Y.C.R.R. § 5820.10.
21. 9 N.Y.C.R.R. § 5820.11.
22. 9 N.Y.C.R.R. § 5820.12.
23. 9 N.Y.C.R.R. § 5820.13.
24. 9 N.Y.C.R.R. § 5820.14.
25. 9 N.Y.C.R.R. § 5820.15.
26. 9 N.Y.C.R.R. §§ 5820.16, 5820.17.
27. 9 N.Y.C.R.R. §§ 5820.18, 5820.19.
28. 9 N.Y.C.R.R. § 5820.20.
29. 9 N.Y.C.R.R. §§ 5820.21, 5820.22.
30. 9 N.Y.C.R.R. § 5820.23.
31. 9 N.Y.C.R.R. §§ 5820.24.
32. 9 N.Y.C.R.R. §§ 5820.25, 5820.28, 5820.31.
33. 9 N.Y.C.R.R. § 5820.26.
34. 9 N.Y.C.R.R. § 5820.27.
35. 9 N.Y.C.R.R. § 5820.29.
36. 9 N.Y.C.R.R. § 5820.32.
37. 9 N.Y.C.R.R. § 5820.33.
38. 9 N.Y.C.R.R. § 5820.35.
39. 9 N.Y.C.R.R. §§ 5820.36, 5820.37.
40. 9 N.Y.C.R.R. § 5820.39.
41. 9 N.Y.C.R.R. § 5820.40.
42. 9 N.Y.C.R.R. §§ 5820.41, 5820.42.
43. 9 N.Y.C.R.R. § 5820.43.
44. 9 N.Y.C.R.R. § 5820.44.
45. 9 N.Y.C.R.R. §§ 5820.45, 5820.46.
46. 9 N.Y.C.R.R. § 5820.47.
47. 9 N.Y.C.R.R. § 5820.48.
48. 9 N.Y.C.R.R. § 5820.50.
49. 9 N.Y.C.R.R. § 5820.55. Note also that the lease of electronic bingo aids is separately regulated in section 5823.
50. 9 N.Y.C.R.R. § 5622.1.
51. 9 N.Y.C.R.R. § 5622.2.
52. 9 N.Y.C.R.R. § 5622.3.
53. 9 N.Y.C.R.R. § 5622.4.
54. 9 N.Y.C.R.R. § 5622.5.
55. 9 N.Y.C.R.R. § 5622.6.
56. 9 N.Y.C.R.R. § 5622.7.

57. 9 N.Y.C.R.R. § 5622.8.
58. 9 N.Y.C.R.R. § 5622.9.
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67. 9 N.Y.C.R.R. § 5622.18.
68. 9 N.Y.C.R.R. § 5622.19.
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70. 9 N.Y.C.R.R. § 5622.21.
71. 9 N.Y.C.R.R. § 5622.22.
72. 9 N.Y.C.R.R. § 5622.23.
73. 9 N.Y.C.R.R. § 5622.24.
74. 9 N.Y.C.R.R. § 5622.25.
75. 9 N.Y.C.R.R. § 5622.26.
76. *See also* N.Y. Gen. Mun. Law §§ 186(5)(d), 476 (6)(c); 9 N.Y.C.R.R. § 5624.21(d).
77. *Id*.
78. L. 1996, ch. 309.
79. L. 1998, ch. 252.

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GLC Endnote

Patricia E. Salkin

This issue of the *Government, Law and Policy Journal* is particularly meaningful to the Government Law Center. In 2001 when Albany Law School provided the Government Law Center with seed funding to start the nation's first Racing and Wagering Law Program, we knew we would be off and running with a winner. What we did not predict was the magnitude of the legal issues that would confront this area of law and public policy. The articles that appear in this issue of the *Government, Law and Policy Journal* just begin to scratch the surface with some of the current issues facing the state legislature and the courts.

Many readers of the *GLP Journal* will undoubtedly be pleasantly surprised to see an issue devoted to sports and entertainment. For some readers, they may enjoy spending a day at the track, going to a casino, playing bingo or buying a lottery ticket. Gaming is big business in New York and across the country. Government plays an increasingly important role in regulating gaming in this state. Whether it is the racetracks, the churches or the non-profits who run charitable games of chance, the state Lottery, the Indian casinos, or off-track betting parlors, each is subject to certain governmental controls through legislation and regulation. There are constitutional issues, federalism debates, interstate commerce questions, tax issues, environmental and agricultural concerns, public health issues and even homeland security implications in parts of this industry. Even Congress has a "House Horse Caucus" to advance the significance of this industry to economic development.

What started out as a "fun idea," to tie a Law School program into a regional asset, has blossomed into an unbelievable resource for the state and for the country. Our Racing and Wagering Law Program hosts a popular website updated daily with current trends and information to assist lawyers, advocates and practitioners involved in all aspects of racing and wagering. We invite you to visit the site and get a first-hand view of the interesting legal and policy challenges that confront government lawyers in this field. (http://www.als.edu/glc/wagering). The site also contains our recent studies and reports, links to legal resources on racing and wagering law, and information about the annual Saratoga Institute on Racing and Wagering Law.

Rose Mary K. Bailly

"Government plays an increasingly important role in regulating gaming in this state."

As always, we invite your feedback on the *Government, Law and Policy Journal*, and welcome your suggestions for future topics.

Patricia E. Salkin
Director, Government Law Center
Associate Dean and Professor of Government Law
Albany Law School

Rose Mary K. Bailly
Associate Editor, *GLP Journal*
Special Counsel, Government Law Center

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