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Kentucky Division, Horsemen's Benevolent & Protective Association, Inc. v. Turfway Park Racing Association, Inc.: Controlling the Stake of Kentucky Horseracing

by

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KENTUCKY DIVISION, HORSEMEN'S BENEVOLENT & PROTECTIVE ASSOCIATION, INC. V. TURFWAY PARK RACING ASSOCIATION, INC.: CONTROLLING THE STAKES OF KENTUCKY HORSERACING

by Susan Zeller Dunn[*]

I. INTRODUCTION

On September 14, 1993, Judge William O. Bertelsman of the United States District Court for the Eastern District of Kentucky[1] ruled that the Interstate Horseracing Act of 1978[2] was unconstitutional.[3] This ruling, while limited in scope, created "intense discussion throughout the [horseracing] industry."[4] It was not the power of this decision that disturbed many in the industry, but its impact as legal precedent.[5] At no time in the fifteen year history of the IHA had its constitutionality been overtly challenged in court. However, this decision would not stand.

Seven months later, on April 6, 1994, the United States Court of Appeals for the Sixth Circuit overruled the district court's opinion[6] and upheld the constitutionality of the Interstate Horseracing Act of 1978.[7] In making such a decision, the Sixth Circuit sanctioned the use of the IHA as a powerful bargaining chip in contract negotiations.

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1. Covington Division.

2. Interstate Horseracing Act of 1978, Pub. L. No. 95-515, 92 Stat. 1811 (codified at 15 U.S.C. §§ 3001-3007 (1988)).

3. Kentucky Div., Horsemen's Benevolent & Protective Ass'n, Inc. v. Turfway Park Racing, 832 F. Supp. 1097 (E.D. Ky. 1993), *rev'd*, 20 F.3d 1406 (6th Cir. 1994).

4. Ron Indrisano, *Legal Picture Has Changed; Kentucky Ruling a Signal the Simulcast Law Needs Overhaul; At the Races*, BOSTON GLOBE, Sept. 26, 1993, at 101.

5. *Id.*

6. Kentucky Div., Horsemen's Benevolent & Protective Ass'n, Inc. v. Turfway Park Racing Ass'n, Inc., 20 F.3d 1406 (6th Cir. 1994).

7. *Id.* at 1408.

At the heart of this conflict lay a dispute over purse money. The horsemen, represented by the Kentucky Division of the Horsemen's Benevolent & Protective Association (KHBPA) and the Kentucky Thoroughbred Association (KTA), during negotiations with Turfway Park, demanded a greater share of the intrastate off-track betting revenues for its membership.[8] When Turfway refused to give them what they wanted, the horsemen turned to the Interstate Horseracing Act of 1978 for leverage.[9]

This article addresses the dispute between Turfway Park and its horsemen, as well as the impact of these cases on a statute that is very important to Kentucky's horseracing industry — the Interstate Horseracing Act of 1978.[10]

A. The Business of Interstate Off-Track Wagering

During the 1970s, a very profitable new business developed within the United States horseracing industry:[11] interstate off-track betting.[12] In cities, and more specifically, at many racetracks themselves, off-track betting parlors were springing up where patrons could engage in legal interstate off-track wagering on horseraces.[13]

An interstate off-track wager occurs when a bet is "placed or accepted in one State with respect to the outcome of a horserace taking place in another State."[14] For example, Track A might accept wagers on horseraces scheduled to be run at Track B many miles away in another state.

> [E]mploying telephone and wire linkages, [Track A] effectively places these wagers in [Track B] the host track's parimutuel[15]

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8. Kentucky Div., Horsemen's Benevolent & Protective Ass'n, Inc. v. Turfway Park Racing, 832 F. Supp. 1097, 1099 (E.D. Ky. 1993), *rev'd*, 20 F.3d 1406 (6th Cir. 1994).

9. *Id.*

10. 15 U.S.C. §§ 3001-3007 (1988).

11. *See generally* S. REP. NO. 1117, 95th Cong., 2d Sess. (1978), *reprinted in* 1978 U.S.C.C.A.N. 4144 (Senate Judiciary Committee Report on S. 1185).

12. *Id.*

13. *Id.*

14. 15 U.S.C. § 3002(3) (1988).

15. "Parimutuel" is defined in the IHA as "any system whereby wagers with respect to the outcome of a horserace are placed with, or in, a wagering pool conducted by a person licensed or otherwise permitted to do so under State law, and in which the participants are wagering with each other and not against the operator." *Id.* § 3002(13).

> pool. When a race is run, closed circuit television transmission enables [Track A's] patrons to witness it. [Track A] then settles with the bettors, pays a percentage to the host track [Track B], and retains the balance.[16]

In 1975 "more than 56 million persons attended horseraces in some 30 states."[17] This number represented a thirty-five percent larger attendance figure than major league baseball and professional football combined.[18] Further, at the time of the IHA's passage, the United States horseracing industry employed more than 175,000 people.[19]

> That figure include[d] owners, trainers, jockeys, drivers, racing officials, mutuel clerks, et cetera, but [did] not include [the] many thousands of additional employees, such as grooms on the farms, carpenters, plumbers, electricians, van drivers, fence builders, sales company personnel, insurance people, veterinarians, harness makers, and assorted others who derive[d] their living from the racing and breeding industries. A substantial number of these employees [could] be classified as unskilled or marginally employed, and without the employment opportunities offered by the racing industry, would be contributing to the already overcrowded ranks of the unemployed.[20]

Those in support of interstate off-track betting argued that through proper regulation and management this new business could:

> contribute substantial benefits to the States and the horse racing industry. These benefits would result from expanded market areas that would enable an increased number of fans to participate in racing, from additional media coverage of racing because of those expanded market areas and because of additional interest in racing engendered by the aforementioned two benefits, and from additional employment opportunities and additional revenues to States and the racing industry.[21]

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16. Sterling Suffolk Racecourse Ltd. Partnership v. Burrillville Racing Ass'n, Inc., 989 F.2d 1266, 1267 (1st Cir.), *cert. denied*, 114 S. Ct. 634 (1993).

17. 122 CONG. REC. 31,642 (1976) (remarks of Rep. Rooney from Pennsylvania).

18. *Id.*

19. S. REP. NO. 554, 95th Cong., 2d Sess. 3 (1978), *reprinted in* 1978 U.S.C.C.A.N. 4132, 4134-35 (Senate Commerce, Science and Transportation Committee Report).

20. *Id.*

21. S. REP. NO. 1117, *supra* note 11, at 4, *reprinted in* 1978 U.S.C.C.A.N. at 4147.

Further, proponents asserted that off-track betting would provide the public "with a legal alternative to illegal bookmaking operations, thereby increasing the flow of revenue to legal parimutuel operations and to governments."[22]

Conversely, opponents of interstate off-track betting believed that if allowed to prosper, the parlors would substantially reduce attendance and on-track wagering at racetracks throughout the United States.[23] They viewed the end result being "diminished employment within the industry, severe reductions in the assets of the industry, and serious damage to the smaller circuit tracks that are racing's minor leagues."[24] During these debates, over seventy-five percent of the existing racetracks in the United States were small circuit tracks.[25] These tracks, considered the "backbone of the racing and breeding industry," played a critical role in the development of new talent among both jockeys and horses.[26] In addition, these small racetracks could not survive if they had to compete with the major racetracks for patrons.[27] "Furthermore, not all horses are of the quality to compete at the few major national tracks. Thus, small tracks provide[d] a necessary marketplace and [gave] horse owners an opportunity to receive a return on their investment."[28] Additionally, these tracks provided the "necessary revenue from which bloodstock is developed that produces national champion horses."[29] Eight hundred foals were bred to find the right combination that created one Secretariat.[30] For these reasons, many members of Congress became concerned when testimony in front of the Senate Commerce, Science and Transportation Committee indicated that "the disruptive influence of interstate [off-track betting] and its adverse effects on small racetracks could reduce the number of racetracks in America by as much as 90 percent."[31]

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22. *Id.* at 6, *reprinted in* 1978 U.S.C.C.A.N. at 4149.
23. S. REP. NO. 554, *supra* note 19, at 3, *reprinted in* 1978 U.S.C.C.A.N. at 4134.
24. S. REP. NO. 1117, *supra* note 11, at 6, *reprinted in* 1978 U.S.C.C.A.N. at 4149.
25. *Id.* at 5, *reprinted in* 1978 U.S.C.C.A.N. at 4148.
26. *Id.*
27. *Id.*
28. *Id.*
29. S. REP. NO. 554, *supra* note 19, at 4, *reprinted in* 1978 U.S.C.C.A.N. at 4135.
30. 122 CONG. REC. 31,642 (1976) (remarks of Rep. Rooney from Pennsylvania).
31. S. REP. NO. 554, *supra* note 19, at 4, *reprinted in* 1978 U.S.C.C.A.N. at 4135.

Finally, there were two specific incidents that fueled the opposition's campaign for prohibiting or at least heavily regulating interstate off-track betting. First, there was an announcement by the New York Off-Track Betting Corporation (NYOTB) in September 1976[32] of its plan to convert "at least three movie theaters into so-called teletracks which would feature live telecasts of racing with a seating capacity in excess of 10,000."[33]

Next came an incident involving the Kentucky Derby. NYOTB offered Kentucky a specific percentage of the betting revenue in exchange for its permission to use the Kentucky Derby for off-track wagering.[34] Even though Kentucky declined to enter into the contract, NYOTB took wagers on the race.[35] In 1976, when the IHA was first being discussed in the House of Representatives, NYOTB processed nearly $15 million in pirated bets on the Kentucky Derby.[36] This was more than Churchill Downs itself handled on the race.[37] Neither Churchill Downs nor the Commonwealth received a penny of this money.[38]

B. The History of the Interstate Horseracing Act

On September 21, 1976, House Resolution 14,071[39] was passed by the House of Representatives by a vote of 315 to 86.[40] The bill called for an absolute prohibition of interstate off-track wagering on horseraces.[41] It also provided that any off-track betting operation that accepted such a wager would be liable to the state, the host track, and to the owners of any horses run-

32. 122 CONG. REC. 31,643 (1976) (remarks of Rep. Rooney from Pennsylvania) (citing Steve Cady, *OTB Pushes for Theater Racing: Tracks Skeptical on Fan Impact*, N.Y. TIMES, Sept. 12, 1976, at 85).

33. *Id.*

34. 122 CONG. REC. 31,650 (1976) (remarks of Rep. Carter from Kentucky).

35. *Id.*

36. *Id.*

37. *Id.*

38. 122 CONG. REC. 31,644 (1976) (remarks of Rep. Goodling from Pennsylvania).

39. H.R. 14,071, 94th Cong., 2d Sess. (1976).

40. S. REP. NO. 1117, *supra* note 11, at 4, *reprinted in* 1978 U.S.C.C.A.N. at 4147.

41. *Id.* Prior to its passage, there was a proposal on the House floor by Representative Murphy of New York that instead of an absolute prohibition, the bill should be amended to include a consent provision for those states that felt the benefits of interstate off-track betting outweighed the potential harm to their horseracing industries.

ning in a particular race.[42] House Resolution 14,071 was not considered by the Senate before the 94th Congress closed. Yet, similar legislation was introduced in the Senate as Senate Bill 1185[43] on March 30, 1977.[44]

The bill was sent to the Senate Commerce, Science and Transportation Committee.[45] The committee recommended passage of the bill as amended.[46] This version of Senate Bill 1185 was still based on a total prohibition of interstate off-track parimutuel wagering.[47] Moreover, like the original House bill, Senate Bill 1185 made the off-track betting facility liable to the state, the host track, and the horse owners.[48]

Next, the bill was sent to the Senate Judiciary Committee where it began to take its present form.[49] On July 18, 1978, the Committee adopted its amended version of Senate Bill 1185.[50] This version provided an exception to the absolute prohibition where the off-track betting system[51] obtained the consent of the "host racing association"[52] [host track], who could only act with the consent of its "horsemen's group."[53] Further, the entire transaction was "subject to the approval of the host racing commission and the off-track racing commission."[54] This version of

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42. S. REP. NO. 554, *supra* note 19, at 2, 7, *reprinted in* 1978 U.S.C.C.A.N. at 4133, 4138.

43. S. 1185, 95th Cong., 1st Sess. (1977).

44. S. REP. NO. 1117, *supra* note 11, at 4, *reprinted in* 1978 U.S.C.C.A.N. at 4147.

45. *Id.*

46. *Id.*

47. S. REP. NO. 554, *supra* note 19, at 1-2, *reprinted in* 1978 U.S.C.C.A.N. at 4132-33.

48. *Id.* at 2, *reprinted in* 1978 U.S.C.C.A.N. at 4133.

49. S. REP. NO. 1117, *supra* note 11, at 4, *reprinted in* 1978 U.S.C.C.A.N. at 4147.

50. *Id.*

51. The IHA defines "off-track betting system" as "any group which is in the business of accepting wagers on horseraces at locations other than the place where the horserace is run, which business is conducted by the State or licensed or otherwise permitted by State law." 15 U.S.C. § 3002(7) (1988).

52. The IHA defines "host racing association" as "any person who, pursuant to a license or other permission granted by the host State, conducts the horserace subject to the interstate wager." *Id.* § 3002(9).

53. "Horsemen's group" is described as the organization "which represents the majority of owners and trainers racing at a race meeting at the host track." S. REP. NO. 1117, *supra* note 11, at 7, *reprinted in* 1978 U.S.C.C.A.N. at 4150. *See also* 15 U.S.C. § 3002(12) (1988).

54. S. REP. NO. 1117, *supra* note 11, at 8, *reprinted in* 1978 U.S.C.C.A.N. at 4151.

the bill served as the foundation for the enacted Interstate Horseracing Act of 1978.[55]

C. *The Provisions of the Interstate Horseracing Act of 1978 (IHA)*

The IHA is composed of seven provisions. Section 3001 sets forth the congressional findings and the public policy upon which the IHA is based.[56] These findings focus primarily on improving the relationship between the states in the areas of gambling and horseracing.[57] Section 3001(a)(1) provides that "the States should have the primary responsibility for determining what forms of gambling may legally take place within their borders."[58] Subsections 3001(a)(2) and (3) discuss the areas of horseracing where federal intervention is warranted, such as where one state interferes with another state's gambling policies.[59] Congress then set forth its own broad public policy objective for the IHA which was "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."[60] Section 3002 covers the key definitions.[61] The most troublesome definitions in *Kentucky Division, Horsemen's Benevolent & Protective Association, Inc. v. Turfway Park Racing Association, Inc.* include:

> (12) "horsemen's group" [which] means, with reference to the applicable host racing association, the group which represents the majority of owners and trainers racing there, for the races subject to the interstate off-track wager on any racing day; [and]
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> . . . .

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55. 15 U.S.C. §§ 3001-3007 (1988).
56. *Id.* § 3001.
57. *See id.*
58. *Id.* § 3001(a)(1).
59. *Id.* § 3001(a)(2), (3).

> (a) The Congress finds that . . .
> (2) the Federal Government should prevent interference by one State with the gambling policies of another, and should act to protect identifiable national interests; and
> (3) 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.

Id.

60. *Id.* § 3001(b).
61. *Id.* § 3002.

> (21) "regular contractual process" [which] means those negotiations by which the applicable horsemen's group and host racing association reach agreements on issues regarding the conduct of horseracing by the horsemen's group at that racing association . . . .[62]

Section 3003 institutes the general prohibition of interstate off-track wagering, subject to exceptions.[63] These exceptions are found in section 3004, which contains the consent provisions.[64] Section 3004 states:

> An interstate off-track wager may be accepted by an off-track betting system *only if consent is obtained from—*
> (1) the *host racing association*, except that—
> (A) as a condition precedent to such consent, *said racing association . . . must have a written agreement with the horsemen's group, under which said racing association may give such consent*, setting forth the terms and conditions relating thereto . . .
> (B) . . . *the written agreement* of such horsemen's group *shall . . . be required as such condition precedent and as a part of the regular contractual process*, and may not be withdrawn or varied except in the regular contractual process . . . .
> (2) the host racing commission;
> (3) the off-track racing commission.[65]

Section 3004(b) requires the off-track betting office to obtain consent from "(A) all currently operating tracks within 60 miles of such off-track betting office; and (B) if there are no currently operating tracks within 60 miles then the closest currently operating track in an adjoining State."[66]

Section 3005 details the liabilities and damages[67] and makes any person accepting an interstate off-track wager in violation of the IHA "civilly liable for damages to the host State, the host racing association and the horsemen's group."[68] It also provides a formula for measuring these damages.[69]

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62. *Id.*

63. *Id.* § 3003. "No person may accept an interstate off-track wager except as provided in this Chapter." *Id.*

64. *Id.* § 3004.

65. *Id.* (emphasis added).

66. *Id.* § 3004(b).

67. *Id.* § 3005.

68. *Id.*

69. *Id.*

> Damages for each violation shall be based on the total of off-track wagers as follows:

Section 3006 creates a civil cause of action for the "host State, the host racing association, or the horsemen's group . . . against any person alleged to be in violation of this Act, for injunctive relief to restrain violations and for damages . . . ."[70] Moreover, it allows any of these groups to intervene if not already a party to the action.[71] Finally, section 3007 gives the federal district courts jurisdiction for enforcement of the Act.[72]

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(1) If the interstate off-track wager was of a type accepted at the host racing association, damages shall be in an amount equal to that portion of the takeout which would have been distributed to the host State, host racing association and the horsemen's group, as if each such interstate off-track wager had been placed at the host racing association.

(2) If such interstate off-track wager was of a type not accepted at the host racing association, the amount of damages shall be determined at the rate of takeout prevailing at the off-track betting system for that type of wager and shall be distributed according to the same formulas as in paragraph (1) above.

Id.

70. *Id.* § 3006(a).

71. *Id.* § 3006(b).

72. *Id.* § 3007.

(a) District court jurisdiction

Notwithstanding any other provision of law, the district courts of the United States shall have jurisdiction over any civil action under this chapter, without regard to the citizenship of the parties or the amount in controversy.

(b) Venue; service of process

A civil action under this chapter may be brought in any district court of the United States for a district located in the host State or the off-track State, and all process in any such civil action may be served in any judicial district of the United States.

(c) Concurrent State court jurisdiction

The jurisdiction of the district courts of the United States pursuant to this section shall be concurrent with that of any State court of competent jurisdiction located in the host State or the off-track State.

Id.

II. *KENTUCKY DIVISION, HORSEMEN'S BENEVOLENT & PROTECTIVE ASSOCIATION, INC. V. TURFWAY PARK RACING ASSOCIATION, INC.*

A. Factual Background

"Turfway Park Racing Association, Inc. (Turfway), operates a thoroughbred racetrack in Florence, Kentucky."[73] The horse owners, trainers, and jockeys are not employees of the track.[74] Rather, they represent independent businesses whose interests are promoted by two different horsemen's associations, the KHBPA[75] and the KTA.[76] These parties were referred to as the "Horsemen" throughout the litigation.[77]

For several years, Turfway and the Horsemen controlled their relationship through contractual agreements, with the KHBPA and the KTA acting together for the benefit of all the horsemen racing at the track.[78] These agreements governed the terms and conditions of horseracing at the track.[79] In fact, they resolved a multitude of issues including:

> the amount of Turfway's commission or revenues from on-track wages and from off-track intrastate and interstate wagers to be distributed to the horsemen's purses; the establishment of purse schedules and a horsemen's account by Turfway; the provision of stall and track facilities to horsemen by Turfway, including on-track office facilities for the KHBPA and KTA; and the agreement of KHBPA and KTA not to boycott races at Turfway.[80]

On April 30, 1992, the existing three-year agreement between the track and the Horsemen expired.[81] Soon thereafter Turfway entered into negotiations with the KHBPA and the KTA for a new contract.[82] These negotiations were unsuccessful because

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73. Kentucky Div., Horsemen's Benevolent & Protective Ass'n, Inc. v. Turfway Park Racing, 832 F. Supp. 1097, 1098 (E.D. Ky. 1993), *rev'd*, 20 F.3d 1406 (6th Cir. 1994).

74. *Id.*

75. *Id.* The KHBPA is "a nonprofit Kentucky corporation whose membership consists of thoroughbred owners and trainers." *Id.*

76. *Id.* The KTA is "an organization similar to that of the KHBPA, but its membership includes owners, trainers, and breeders." *Id.*

77. *Id.* at 1099.

78. *Id.*

79. *Id.*

80. *Id.* (citing Doc. #4, Maline Aff., Ex. A).

81. *Id.*

82. *Id.*

Turfway refused to submit to the "[H]orsemen's demands that [it] increase the statutory split on [intrastate] wagers distributed by Turfway to the purses."[83] It was then that the Horsemen turned to the IHA. The Horsemen informed the track that unless they came to a mutual agreement, the Horsemen would withhold their consent to all interstate simulcasting of races from Turfway.[84]

Turfway's racing schedule includes a fall meet, a holiday meet, and a spring meet.[85] The parties failed to reach a new agreement prior to the start of the fall meet but agreed to extend the terms of their existing contract through the fall schedule.[86] The parties attempted to resolve their differences again after the fall meet.[87] By the start of the holiday meet on November 29, 1992, there was still no agreement between Turfway and the Horsemen.[88]

During this time, Turfway made two attempts to get around the "consent" problem.[89] First, using a written consent provision on the back of one of its entry blanks, Turfway attempted to obtain permission directly from the individual horse owners.[90] Following this, Turfway requested the consent of the Kentucky Racing Commission, another requirement of the IHA.[91] The commission conditioned its consent on Turfway's obtainment of all other necessary approvals under the IHA.[92]

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83. *Id.* (citing Doc. #71, at 4-7). Intrastate wagers occur when one Kentucky racetrack accepts wagers for a horserace running at another Kentucky racetrack. The horsemen demanded a 50-50 split of the revenue from these intrastate wagers. Jeanne Houck, *Union to Appeal Simulcast Ruling*, KENTUCKY POST, Sept. 24, 1993. KY. REV. STAT. ANN. § 230.378(3) (Michie/Bobbs-Merrill 1991 & Supp. 1992) provides for the apportionment of betting revenues between the host and receiving tracks. This statutory apportionment may be modified by contract. *Turfway*, 832 F. Supp. at 1099 n.2.

84. *Turfway*, 832 F. Supp. at 1099 (citing Maline Aff., Ex. C; 15 U.S.C. § 3004(a)(1)(A) (1988)).

85. *Id.*

86. *Id.* at 1099.

87. *Id.*

88. *Id.*

89. *Id.*

90. *Id.*

91. *Id. See also* 15 U.S.C. § 3004(a)(2) (1988).

92. *Turfway*, 832 F. Supp. at 1099 (citing Doc. #3, at 59-60; Ex. 1).

In December, without the consent of the horsemen's groups, Turfway began to simulcast its races.[93] The "KHBPA moved for a preliminary injunction to restrain Turfway from simulcasting races."[94] The KHBPA filed an action for damages under the IHA, alleging that Turfway violated that Act when it began to simulcast races without the required consent of the horsemen's groups.[95] The KHBPA argued that the "entry blank consent relied upon by Turfway did not satisfy the consent requirement."[96] Further, the KHBPA maintained that the off-track facilities,[97] by accepting wagers on these simulcasts, also violated the IHA.[98]

The litigation soon turned bitter and became very public.[99] For example, Turfway reacted to the lawsuit by padlocking the KHBPA and the KTA out of their offices located at the track.[100] "To preserve the status quo" until resolution of this matter, the court ordered the offices reopened.[101] The KHBPA also went to court to prevent Turfway from including another consent provision in its stall applications for the 1993 fall meet.[102] Once again, the court granted an injunction, ordering the parties to maintain the "status quo."[103] The court's frustration with these skirmishes was evident. Judge Bertelsman's opinion noted that at a hearing on Turfway's motion for a temporary restraining order, which alleged that the Horsemen were engaged in an illegal boycott of Turfway's races, "about half of the statements made by both sides were for the benefit of the court and the remainder for media consumption."[104]

Ultimately, the case would be decided without a trial.[105] At a pre-trial conference, the parties agreed to submit arguments

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93. *Id.*
94. *Id.* at 1099-100.
95. *Id.* at 1099.
96. *Id.*
97. The off-track facilities included Rockingham Venture, Inc.; Douglas Racing Corp., d/b/a Ak-Sar-Ben; Bensalem Racing Association, d/b/a Philadelphia Park; and Dakota Race Management. For a more thorough discussion of the off-track parties, see *id.* at 1099 n.3.
98. *Id.* at 1099.
99. *Id.* at 1101.
100. *Id.* at 1100.
101. *Id.* (citing Doc. #30).
102. *Id.*
103. *Id.* (citing Doc. #96).
104. *Id.* at 1101.
105. *Id.* at 1100.

solely on the issue of the IHA's constitutionality.[106] The district court entered a partial summary judgment in favor of Turfway on September 20, 1993, determining that the Interstate Horseracing Act of 1978 was unconstitutional.[107]

B. The United States District Court's Reasoning

The United States District Court for the Eastern District of Kentucky found the IHA unconstitutional on two grounds.[108] First, the court held that the IHA was "an invalid restriction on commercial speech in violation of the First Amendment."[109] Second, the court ruled that the IHA was a "fatally vague and irrational statute in violation of substantive due process."[110]

1. "The Act Is An Invalid Restriction on Commercial Speech."[111]

The district court's justification for holding the IHA an invalid restriction of commercial speech was laid out in three parts. First, the district court established that the simulcast of Turfway's races falls within the domain of commercial speech.[112] Next, the court demonstrated how the Act restricts this commercial speech.[113] Finally, the court evaluated the means used versus the ends to be achieved.[114]

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106. *Id.*

107. *Id.* at 1105. Until *Turfway*, only five federal cases and one state case discussed or even mentioned the IHA. *See* Sterling Suffolk Racecourse Ltd. Partnership v. Burrillville Racing Ass'n, 989 F.2d 1266 (1st Cir.), *cert. denied*, 114 S. Ct. 634 (1993); Retail, Wholesale & Dep't Store Union, Local 310 v. NLRB, 745 F.2d 358 (6th Cir. 1984); New York Racing Ass'n v. NLRB, 708 F.2d 46 (2d Cir.), *cert. denied*, 486 U.S. 914 (1983); Alabama Sportservice, Inc. v. National Horsemen's Benevolent & Protective Ass'n, 767 F. Supp. 1573 (M.D. Fla. 1991); New Suffolk Downs Corp. v. Rockingham Venture, Inc., 656 F. Supp. 1190 (D.N.H. 1987); Atlantic City Racing Ass'n v. Attorney Gen. of New Jersey, 461 A.2d 178 (N.J. Super. Ct. Law Div.), *aff'd*, 486 A.2d 1261 (N.J. Super. Ct. App. Div. 1983), *rev'd*, 489 A.2d 165 (N.J. 1985); Rice v. Connolly, 488 N.W.2d 241 (Minn. 1992).

108. *Turfway*, 832 F. Supp. at 1098.

109. *Id.*

110. *Id.*

111. *Id.* at 1100.

112. *Id.*

113. *Id.*

114. *Id.* at 1101-02.

a. Commercial Speech Defined

The district court looked to two fairly recent Supreme Court decisions, *Board of Trustees of State University of New York v. Fox*[115] and *United States v. Edge Broadcasting Company*,[116] for the "test for identifying commercial speech."[117] From these decisions, the court concluded that the basic question was "whether a communication constitutes an invitation to enter into a commercial transaction."[118]

The district court placed Turfway's simulcasts in this category because they invite "patrons of out-of-state tracks to bet on Turfway's races."[119] Therefore, "commercial transactions occur when . . . patrons place such bets."[120] The court also noted that the simulcasts act as "an implied advertisement for the quality of the track and its racing as well as an implied invitation to the viewers to patronize Turfway if they are in the Northern Kentucky/Cincinnati area."[121]

b. The IHA's Restriction of Commercial Speech

Having established that Turfway's simulcasts are commercial speech, the district court determined that the IHA allows this speech "to be prohibited whenever one of the designated parties withholds consent."[122]

c. Finding the IHA's Restriction Invalid

Next, the district court addressed whether the IHA's restriction of this type of commercial speech is invalid.[123] The court began by stating that in order for commercial speech to receive protection under the First Amendment, it "'at least must concern lawful activity and not be misleading.'"[124] The court concluded

115. Board of Trustees of State University v. Fox, 492 U.S. 469, 473-74 (1989).
116. United States v. Edge Broadcasting Co., 113 S. Ct. 2696, 2703 (1993).
117. *Turfway*, 832 F. Supp. at 1100.
118. *Id.*
119. *Id.*
120. *Id.*
121. *Id.*
122. *Id.*
123. *Id.* at 1100-01.
124. *Id.* (citing Board of Trustees of State University v. Fox, 492 U.S. 469, 475 (1989); Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557, 566 (1980); United States v. Edge Broadcasting Co., 113 S. Ct. 2696, 2703-04 (1993)).

that Turfway's simulcasts met these requirements.[125] The court identified the next step as involving the determination of "'whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.'"[126] The district court "reluctantly" held that the "means chosen by Congress [were] not 'narrowly tailored to achieve [the] desired objective[s].'"[127]

While the district court recognized that commercial speech typically receives "less protection under the First Amendment than non-commercial speech,"[128] it found that such expression is still entitled to a "reasonable fit" test.[129] What the court found most unreasonable about the means chosen through the IHA is that it places the power to veto Turfway's simulcasting with two state agencies and the horsemen's organizations.[130] The court characterized the latter group as "bitter enemies of Turfway."[131] Moreover, the court was bothered by the fact that the veto power not only affects Turfway's ability to simulcast its horseraces, but that it is being used as leverage for the parties' on-going contract negotiations.[132]

Additionally, relying on the reasoning of the United States Supreme Court in *City of Lakewood v. Plain Dealer Publishing Company*,[133] the district court declared that a "'statute placing unbridled discretion in the hands of a governmental official or agency [such as the Kentucky racing commission] constitutes a prior restraint' and is anathema."[134]

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125. *Id.* at 1101.
126. *Id.* (citing *Central Hudson*, 447 U.S. at 566).
127. *Id.* (citing *Fox*, 492 U.S. at 480; *Edge*, 113 S. Ct. at 2703-04).
128. *Id.* (citing Outdoor Sys. Inc. v. City of Mesa, 997 F.2d 604, 610 (9th Cir. 1993)).
129. *Id.*
130. *Id.*
131. *Id.* at 1101.
132. *Id.*
133. City of Lakewood v. Plain Dealer Publishing Co., 486 U.S. 750 (1988).
134. *Turfway*, 832 F. Supp. at 1102 (citing *Lakewood*, 486 U.S. at 755-56).

2. "The Act Is A Vague and Irrational Means To Carry Out A Permissible Objective."[135]

The district court's principal objection to the IHA centered around section 3004(a)(1)(A). This consent provision[136] provides an exception to the total ban on interstate off-track wagering where as a "condition precedent" to giving its consent, a host racing association enters into "a written agreement with the horsemen's group, under which said racing association may give such consent, setting forth the terms and conditions thereto."[137]

This exception is controlled in part by the IHA's definition of a "horsemen's group."[138] Within the meaning of the statute, a "horsemen's group" is "'the group which represents the majority of owners and trainers racing there, for the races subject to the interstate off-track wager on any racing day.'"[139]

The district court concluded that while this exception and the connecting definition may have been effective when the IHA was enacted, it is completely ineffective without a pre-racing-day agreement.[140] The court found that the definition was insufficient to handle the situation where "there are two horsemen's groups — rivals of each other and both at loggerheads with the track — and numerous owners and trainers unaffiliated with either group."[141] In support of its conclusion, the court pointed to five flaws in the construction and application of the IHA.[142]

First, the court demonstrated how "the statute is self-contradictory."[143] On one hand, the IHA anticipates that the horsemen's group's consent will be obtained during the "regular contractual process."[144] However, on the other hand, the definition of a horsemen's group involves the "identification of the . . . group representing the majority of owners and trainers *on each racing day*."[145] The most recent contract between

135. *Id.* at 1103.
136. *Id. See also* 15 U.S.C. § 3004(a)(1)(A) (1988).
137. *Turfway*, 832 F. Supp. at 1103 (quoting 15 U.S.C. § 3004(a)(1)(A) (1988)).
138. 15 U.S.C. § 3002(12) (1988).
139. *Turfway*, 832 F. Supp. at 1103 (quoting 15 U.S.C. § 3002(12) (1988)).
140. *Id.* at 1103.
141. *Id.*
142. *Id.*
143. *Id.*
144. *Id.* (citing 15 U.S.C. § 3004(b) (1988)).
145. *Id.* (citing 15 U.S.C. § 3002 (1988)) (emphasis added). The IHA defines "rac-

Turfway Park and the horsemen's group lasted for three years.[146] A "racing day" occurs several times during a given meet.[147]

Second, the Act's definition of an "owner" is unclear.[148] The statute fails to establish whether it is one vote per horse or, in the case of a single horse owned by ten owners, whether it is one vote per partner/owner.[149] The IHA does not indicate whether a trainer is entitled to a vote.[150]

Third, because "the largest horsemen's group [at Turfway Park] represents only [fifty-five percent] of [the] owners eligible to race . . . the possibility exists that on 'any racing day' no horsemen's group will represent a majority of the owners and trainers."[151] The statute does not address this situation or resolve whether in this case anyone's consent is required.[152]

Fourth, although "entries to a race are usually closed [forty-eight] hours in advance . . . emergency scratches are possible up to post time."[153] The court, concerned that an emergency scratch could change the election results for a given racing day,[154] wondered what the parties were to do in this case.[155]

Fifth, the IHA does not clearly define the term "represent."[156] The court questioned whether membership in a specific organization is required or whether Turfway can technically "represent" the majority by soliciting consents to a simulcast (on a given racing day) from the individual horse owners.[157]

While the district court acknowledged its "duty to give every presumption of validity to an Act of Congress," the court also recognized that it could not "rewrite the statute to save it."[158]

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ing day" as "a full program of races at a specified racing association on a specified day." 15 U.S.C. § 3002(16) (1988).

146. *Turfway*, 832 F. Supp. at 1099.

147. The IHA defines "race meeting" as "those scheduled days during the year a racing association is granted permission by the appropriate State racing commission to conduct horseracing." 15 U.S.C. § 3002(15) (1988).

148. *Turfway*, 832 F. Supp. at 1103.

149. *Id.*

150. *Id.*

151. *Id.*

152. *Id.*

153. *Id.*

154. *Id.*

155. *Id.*

156. *Id.*

157. *Id.*

158. *Id.* at 1103-04 (citing United States v. Thirty-Seven Photographs, 402 U.S.

Moreover, the court emphasized that these five problems "[were] not speculative"; these were real problems that the parties addressed in court.[159]

Finally, the district court discussed the unrealistic burden that this provision and definition place on the off-track betting system.[160] The court emphasized that "[t]he receiving tracks must ascertain at their peril from thousands of miles away which, if any, horsemen's group represents a majority of owners and trainers on any racing day."[161]

a. Vagueness

After identifying the potential problem areas within the statute, the district court presented its vagueness analysis.[162] It began by drawing on the following well-accepted legal principle:[163] "'[T]he void for vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement.'"[164] While the court recognized that void for vagueness problems are typically found in criminal or First Amendment cases, "'[v]ague laws in any area suffer a constitutional infirmity.'"[165] Turning again to the five "ambiguities in the statute," the court maintained that this statute, which imposes severe civil penalties, "is impossible to apply with certainty on a day-to-day basis in the context of an ongoing dispute."[166] For this reason, the district court held the Act "void for vagueness."[167]

b. Irrationality

The district court also held that the IHA fails to satisfy the requirement of rationality.[168] First, the court looked to *Pearson*

363, 369 (1971); Blount v. Rizzi, 400 U.S. 410, 419 (1970)).

159. *Id.* at 1104.

160. *Id.*

161. *Id.*

162. *Id.*

163. *Id.*

164. *Id.* (quoting Kolender v. Lawson, 461 U.S. 352, 357 (1983) (citations omitted)).

165. *Id.* (quoting Ashton v. Kentucky, 384 U.S. 195, 200 (1966) (citations omitted)).

166. *Id.* at 1104.

167. *Id.*

168. *Id.* at 1104-05.

v. City of Grand Blanc[169] for the general constitutional principle that "[s]ubstantive due process requires that a statute have a rational relationship to a legitimate legislative goal."[170] The purpose of the IHA is to regulate interstate gambling which Congress has the power to do under the Commerce Clause.[171] Thus, "regulating simulcasting [of horseraces] is rationally related to that end."[172]

The court then turned to the second part of the rational basis test which requires that the means used to "advance a legitimate governmental interest" be reasonable.[173] The court contended that the means used by the IHA are not reasonable and, therefore, not rational.[174] The court based this finding on the fact that the IHA places the absolute power to veto a simulcast in the hands of private parties, gives these parties no standards on which to base their decision, and imposes no requirement that they exercise their veto power to promote Congress' objective of promoting horseracing.[175] In sum, the district court viewed the IHA as "totally counterproductive in, achieving the legislative goal in the present situation, which is not unlikely to occur again, here or elsewhere."[176]

C. The Appeal to the Sixth Circuit

In December 1993, the KHBPA, the KTA, and the United States Department of Justice filed appellate briefs with the Sixth Circuit.[177] Turfway responded in January 1994[178] and the case was heard by Sixth Circuit judges Contie, Kennedy and Guy on February 28, 1994.[179]

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169. Pearson v. City of Grand Blanc, 961 F.2d 1211 (6th Cir. 1992).
170. *Turfway*, 832 F. Supp. at 1104-05 (citing *Pearson*, 961 F.2d at 1223).
171. *Id.* at 1104.
172. *Id.*
173. *Id.*
174. *Id.* at 1105.
175. *Id.*
176. *Id.*
177. *See* Briefs for Plaintiff-Appellant KHBPA, Plaintiff-Intervenor KTA, and Intervenor United States Department of Justice, Kentucky Div., Horsemen's Benevolent & Protective Ass'n, Inc. v. Turfway Park Racing Ass'n, Inc., 20 F.3d 1406 (6th Cir. 1994) (No. 93-6425).
178. *See* Brief for Defendant-Appellee Turfway Park, Kentucky Div., Horsemen's Benevolent & Protective Ass'n, Inc. v. Turfway Park Racing Ass'n, Inc., 20 F.3d 1406 (6th Cir. 1994) (No. 93-6425).
179. Kentucky Div., Horsemen's Benevolent & Protective Ass'n, Inc. v. Turfway

D. The Sixth Circuit's Holding

The Court of Appeals for the Sixth Circuit reversed the district court's decision,[180] holding that:

1) The IHA does not implicate the First Amendment;[181]

2) The IHA is not unconstitutionally vague and, therefore, not in violation of substantive due process;[182]

3) The IHA is rationally related to the furthering of legitimate governmental interests;[183]

4) The IHA does not compel state government to violate the Tenth Amendment by regulating interstate off-track betting;[184]

5) The IHA does not unconstitutionally transfer legislative power into the hands of private parties;[185] and

6) Under the IHA, a host race track "accepts" an interstate off-track wager when it permits wagers from out-of-state, off-track betting facilities to be placed in its pari-mutuel pool.[186]

E. The Sixth Circuit's Reasoning

1. *"[T]he Act does not implicate the First Amendment . . . ."*[187]

The district court subjected the IHA to First Amendment scrutiny because the Horsemen sought not only damages but an injunction that would force Turfway to stop interstate "simulcasting for wagering purposes," an activity the court viewed as commercial speech.[188] Contrary to the district court, the Sixth Circuit found that the IHA does not unlawfully regulate or restrict commercial speech by restricting simulcasting.[189] The Sixth Circuit held that the IHA "regulates interstate wagering,

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Park Racing, 832 F. Supp. 1097 (E.D. Ky. 1993), *appeal docketed*, No. 93-6425 (6th Cir. Feb. 28, 1994).

180. Kentucky Div., Horsemen's Benevolent & Protective Ass'n, Inc. v. Turfway Park Racing Ass'n, Inc., 20 F.3d 1406 (6th Cir. 1994).

181. *Id.* at 1412.

182. *Id.* at 1412-14.

183. *Id.* at 1414-15.

184. *Id.* at 1415-16.

185. *Id.* at 1415-17.

186. *Id.* at 1417.

187. *Id.* at 1412.

188. *Id.*

189. *Id.*

not simulcasting."[190] It noted that "the Act does not even mention simulcasting."[191]

Additionally, the court rejected Turfway's argument that "Congress was implicitly regulating interstate off-track wagering because [according to the court] *interstate off-track wagering may occur without simulcasting, and simulcasting may occur without interstate off-track wagering.*"[192] These activities, in the eyes of the Sixth Circuit, were "not inextricably linked."[193]

2. The Act requires "a 'less strict vagueness test.'"[194]

The Sixth Circuit turned to the United States Supreme Court case *Grayned v. City of Rockford*[195] for the basic test for identifying a vague law.[196] Under *Grayned*, a law is vague if it fails to "give the person of ordinary intelligence a reasonable opportunity to know what is prohibited."[197] Further, vague laws failed to "provide explicit standards for those who apply them" and, therefore, risked "arbitrary and discriminatory enforcement."[198] The court of appeals also noted that "[t]he degree of vagueness that the Constitution tolerates 'depends in part on the nature of the enactment.'"[199] The court specified two areas where the United States Supreme Court has applied a "less strict vagueness test."[200] These areas of law include statutes that rely on "civil rather than criminal penalties" and "economic legislation."[201] The court remarked:

> [e]conomic legislation, in particular, "is subject to a less strict vagueness test because its subject matter is often more narrow,

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190. *Id.*
191. *Id.*
192. *Id.* at 1412 n.10 (emphasis added).
193. *Id.*
194. *Id.* at 1413 (quoting Fleming v. United States Dep't of Agric., 713 F.2d 179, 185 (6th Cir. 1983)).
195. Grayned v. City of Rockford, 408 U.S. 104 (1972).
196. *Turfway*, 20 F.3d at 1412-13.
197. *Grayned*, 408 U.S. at 108.
198. *Id.* The court also cited United States v. Petrillo, 332 U.S. 1 (1947) (explaining that a statute must "mark boundaries sufficiently distinct for judges and juries fairly to administer the law in accordance with the will of Congress").
199. *Turfway*, 20 F.3d at 1413 (quoting Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 498 (1982)).
200. *Id.*
201. *Id.*

> and because businesses, which face economic demands to plan behavior carefully, can be expected to consult relevant legislation in advance of action."[202]

Having laid this groundwork, the Sixth Circuit then conceded that "the language used in the Interstate Horseracing Act of 1978 is imprecise and subject to interpretation."[203] Nevertheless, the court classified the IHA as "economic legislation regulating a very narrow subject matter."[204] On this basis the IHA was subject to a "less strict vagueness test."[205] The court then advanced the wisdom of this less stringent approach by emphasizing the "strong presumptive validity that attaches to an Act of Congress."[206] The Sixth Circuit went even further by stating that interpreting federal statutes "'to reach a conclusion which will avoid serious doubt of their constitutionality'" is, in fact, a "duty" of the federal court.[207]

Next, the Sixth Circuit addressed "difficulty" the district court had "reconciling the Act's provisions."[208] From the IHA's legislative history, the Sixth Circuit identified Congress' intent "to preserve the traditional relationships that existed in the horseracing industry (between the track and horsemen) by limiting the emerging interstate off-track wagering industry."[209] It viewed Turfway's effort to terminate its practice of negotiating with its horsemen through their trade associations, the KHBPA and the KTA, as an attempt to abandon the "traditional relationship."[210] According to the Sixth Circuit, "Congress intended that the Horsemen play a significant role in limiting off-track wagering . . . ."[211] In the court's view, if the Horsemen lost this

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202. *Id.*

203. *Id.* at 1413.

204. *Id.*

205. *Id.* For a general understanding of this approach, the court cited Fleming v. United States Dep't of Agric., 713 F.2d 179, 185 (6th Cir. 1983) (stating that when the entities affected by a statute "are a select group with specialized understanding of the subject being regulated the degree of definiteness required to satisfy due process concerns is measured by the common understanding and commercial knowledge of the group").

206. *Turfway*, 20 F.3d at 1413 (citing United States v. National Dairy Prods. Corp., 372 U.S. 29, 32 (1963)).

207. *Id.* (quoting United States v. Rumely, 345 U.S. 41, 45 (1953) (citations omitted)).

208. *Id.* at 1413.

209. *Id.*

210. *Id.* at 1414.

211. *Id.*

ability, they would have serious problems protecting their interests.[212]

3. "[T]he Act is rationally related to advancing Congress' legitimate federal interests . . . ."[213]

The Sixth Circuit determined that the IHA "regulates interstate horserace wagering by balancing the interests of the horseracing industry against those of the interstate off-track wagering industry."[214] Further, because the IHA is an example of a legislative act which "adjust[s] the burdens and benefits of economic life[,]" entitling it to a "presumption of constitutionality,"[215] it will be upheld as long as it promotes a "legitimate legislative purpose furthered by rational means."[216] The bottom line is that the IHA must be "'rational and not arbitrary.'"[217] As observed by the Sixth Circuit, "[T]he district court found the Act irrational (and therefore unconstitutional) because the horsemen may withhold their consent to further their own 'selfish motives' . . . ."[218] The Sixth Circuit did not agree with this analysis. The court ruled that:

> [t]hough appealing to the horsemen's self-interest may not be the best or most logical method for promoting the horseracing and interstate off-track wagering industries, it is not irrational to believe that the horsemen would refrain from using their veto power to destroy an industry that provides them with additional revenues.[219]

The court went on to point out that the Horsemen's veto power also fosters the horseracing industry's goal of controlling the growth of interstate off-track wagering.[220] Through the use of

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212. *Id.*
213. *Id.* at 1415.
214. *Id.* at 1414.
215. *Id.* (quoting Usery v. Turner Elkhorn Mining Co., 428 U.S. 1, 15 (1976)).
216. *Id.* (quoting Pension Benefit Guarantee Corp. v. R.A. Gray & Co., 467 U.S. 717, 729 (1984)).
217. *Id.* (quoting National R.R. Passenger Corp. v. Atchison, Topeka & Santa Fe Ry. Co., 470 U.S. 451, 477 (1985)).
218. *Id.* at 1414.
219. *Id.* at 1415 (citing Williamson v. Lee Optical of Oklahoma, Inc., 348 U.S. 483, 487-88 (1955) ("[T]he law need not be in every respect logically consistent with its aims to be constitutional.")).
220. *Id.* at 1415.

their veto power, the Horsemen can continue to protect the demand for their services as well as the sport of horseracing overall.[221] On these grounds, the Sixth Circuit ruled that the IHA was "rationally related to advancing Congress' legitimate federal interests notwithstanding the horsemen's veto power."[222]

4. The Act Does Not Violate the Tenth Amendment[223]

In its appellate brief, Turfway argued that the IHA "compels the States to regulate off-track betting, in violation of the Tenth Amendment."[224] Turfway relied on the United States Supreme Court case *New York v. United States*[225] for the rule that "the Constitution simply does not give Congress the authority to require the States to regulate."[226] The Sixth Circuit held, however, that the IHA "does not require a State to do *anything* when presented with a request for its consent to off-track betting."[227] "Regulation," the court ruled, "is an affirmative act."[228] Conversely, "[t]he Act merely gives the States a limited power to preempt the general federal prohibition of interstate off-track wagering."[229] Because the state may always ignore the request to consent, the court ruled that the Tenth Amendment was not violated.[230]

5. "The Act . . . does not delegate legislative power to private parties."[231]

Turfway argued that through the Horsemen's veto the IHA unconstitutionally delegated power to private parties.[232] To support its argument, Turfway cited the United States Supreme Court cases of *Eubank v. City of Richmond*[233] and *Washington*

221. *Id.*
222. *Id.*
223. *Id.* at 1415-16.
224. *Id.* at 1415.
225. New York v. United States, 112 S. Ct. 2408 (1992).
226. *Id.* at 2429.
227. *Turfway*, 20 F.3d at 1415.
228. *Id.* (citing *New York*, 112 S. Ct. at 2420).
229. *Id.* at 1416.
230. *Id.* at 1415.
231. *Id.* at 1417.
232. *Id.* at 1416.
233. Eubank v. City of Richmond, 226 U.S. 137 (1912).

ex rel. Seattle Title & Trust Company v. Roberge.[234] In *Eubank*, a city ordinance that allowed two-thirds of the property owners on a given street to vote on and establish building set bank lines was held unconstitutional.[235] In *Roberge*, a city ordinance was invalidated that only allowed the establishment of "philanthropic homes for the aged in residential areas" after two-thirds of the property owners located within four hundred feet of the home consented.[236]

The Sixth Circuit determined, however, that the controlling precedents in this case were *Thomas Cusack Company v. City of Chicago*[237] and *Currin v. Wallace*.[238] In *Cusack*, the United States Supreme Court "upheld a provision that waived, upon the consent of one-half of the affected property owners, a municipal prohibition on the erection of billboards."[239] In *Currin*, "the Court upheld a provision that made the effect of certain tobacco regulations contingent upon the approval of two-thirds of the tobacco growers voting in a prescribed referendum."[240] The Sixth Circuit interpreted these cases as being acceptable because they did not "allow a private party to make the law and force it upon a minority."[241] These ordinances gave the citizens the opportunity to waive enforcement of a legislative prohibition.[242] Similarly, the IHA "affords the Horsemen a limited power to waive a restriction created by Congress."[243]

Additionally, the court of appeals rejected Turfway's argument that the IHA violates the "nondelegation doctrine"[244] by delegating legislative power to the states without clear standards to guide them.[245] The court reminded the appellees that the nondelegation doctrine protected against a violation of the separation of powers principle by prohibiting delegation of legislative

234. Washington *ex rel.* Seattle Title & Trust Co. v. Roberge, 278 U.S. 116 (1928).
235. *Turfway*, 20 F.3d at 1416 (quoting City of Eastlake v. Forest City Enter., Inc., 426 U.S. 668, 677 (1976)).
236. *Id.*
237. Thomas Cusack Co. v. City of Chicago, 242 U.S. 526 (1917).
238. Currin v. Wallace, 306 U.S. 1 (1939).
239. *Turfway*, 20 F.3d at 1416.
240. *Id.*
241. *Id.*
242. *Id.* (quotations omitted).
243. *Id.*
244. This principle is described in Mistretta v. United States, 488 U.S. 361 (1989).
245. *Turfway*, 20 F.3d at 1417.

power to the judicial or executive branches.[246] A delegation to the states simply does not implicate this doctrine.[247] In fact, such a delegation actually promotes another important principle — federalism.[248]

6. "Turfway Park accepted an interstate off-track wager . . . ."[249]

Finally, in its appeal Turfway argued that as a mere simulcaster, as opposed to an actual off-track betting parlor, its conduct fell outside the prohibition of the IHA and, therefore, the federal court had no subject matter jurisdiction.[250] The Sixth Circuit found a simple solution to this problem. The court determined that Turfway had technically accepted an interstate off-track wager under the Act because in an off-track wagering arrangement the off-track wagers eventually become part of the host track's pari-mutuel pool.[251]

III. THE IHA: LOSING SIGHT OF THE OBJECTIVE

Beyond the resolution of the dispute between Turfway and the Horsemen, these decisions have focused much needed attention on the weaknesses in the IHA. Essentially, these cases demonstrate the great potential for manipulation and misuse of the IHA, and why the dispute between Turfway and the Horsemen should have been settled by state law.

It is clear that somewhere between ascertaining the needs of the horseracing industry[252] and designing the tools to serve those needs, Congress lost sight of its objectives. Congress declared three problems that would be solved by the IHA.[253] First, the states needed to take "primary responsibility for determining what forms of gambling [should] legally take place within their borders."[254] Second, because of the unsavory activities of some parties during the mid-seventies, Congress stepped in to "prevent interference by one State with the gambling policies of

246. *Id.*
247. *Id.*
248. *Id.*
249. *Id.*
250. *Id.*
251. *Id.*
252. *See* 15 U.S.C. § 3001 (1988).
253. *Id.* § 3001(a)(1)-(3).
254. *Id.*

another."[255] Finally, there was "a need for Federal action to ensure States [would] continue to cooperate with one another in the acceptance of legal interstate wagers."[256] While these findings seem very clear, the riddle is "how does granting the horsemen an unfettered, unregulated, unaccountable veto over interstate wagering further these goals?"[257]

The horsemen in this case were not acting because of a desire to protect the interests of a small track. Nor were they using their veto power to prevent Turfway, or any off-track betting facility, from reducing the demand for their services by transmitting in races from out of state tracks. Here, the Horsemen refused to give their consent to interstate off-track betting because Turfway refused to give them a bigger slice of *intrastate* off-track betting. This dispute had nothing to do with interstate off-track wagering. The IHA was just a wedge used by the Horsemen in an attempt to force through another money provision of their contract. By upholding the constitutionality of the IHA under these circumstances, the Sixth Circuit has regrettably sanctioned such misapplication of the statute. In this jurisdiction, arguably, any contract dispute between horsemen and tracks can be tied to interstate off-track wagering. The horsemen could demand a larger cut of the local purse or even new stables and condition their consent on the track's agreement. Furthermore, consideration must be given to the fact that while the IHA was designed to protect small racetracks, it gives them no direct cause of action against an off-track betting system that runs races, without their consent, during their racing meets. In two separate cases, neighboring racetracks have attempted, unsuccessfully, to establish a cause of action against off-track betting systems that were infringing on their markets.[258] The legislative history of the IHA repeatedly makes reference to the possible extinction of these small tracks if they cannot protect themselves from a

255. *Id.*

256. *Id.*

257. Brief for Appellee at 37, Kentucky Div., Horsemen's Benevolent & Protective Ass'n, Inc. v. Turfway Park Racing Ass'n, Inc., 20 F.3d 1406 (6th Cir. 1994) (No. 93-6425).

258. *See, e.g.*, Sterling Suffolk Racecourse Ltd. Partnership v. Burrillville Racing Ass'n, Inc., 989 F.2d 1266 (1st Cir.), *cert. denied*, 114 S. Ct. 634 (1993); New Suffolk Downs Corp. v. Rockingham Venture, Inc., 656 F. Supp. 1190 (D.N.H. 1987).

growing and indiscriminate off-track betting industry.[259] Nevertheless, the IHA fails in this regard. Tracks located within a sixty-mile radius of an off-track betting parlor are offered veto power but no means of enforcement.[260]

The IHA was intended to serve the needs of the states and the horseracing industry as a whole. However, the Act places private parties with private agendas on equal footing with state racing commissions. This is counter-productive because the state is in the best position to ascertain the overall costs and benefits of a given decision to its internal horseracing industry. The horse owners and the tracks simply have too great a personal stake in these decisions to exercise even-handed judgment. Lou Raffetto, vice president of racing at Suffolk Downs in Massachusetts, probably described the situation best.

> The law doesn't always make sense . . . . It has so many inconsistencies. It is vague. But we need certain protections within this industry. I'm not bureaucratic, and I don't like to see laws set in stone, but this industry is not one that pulls together. When push comes to shove, people do what's best for them and not what's good overall. So the industry does need to establish guidelines so that tracks can't do what's good for them, meanwhile leading to the demise of another track. But the simulcasting has changed in just the last two years, let alone . . . the last [fifteen]. We need a law that reflects the way the game is played now, not the way it was played [fifteen] years ago.[261]

IV. CONCLUSION

Turfway demonstrates that the IHA is no longer effective in its present form. It is not a practical tool in light of modern horseracing and interstate off-track betting practices. Of course, the IHA has not completely lost its usefulness. There still exists today the potential threat that large off-track betting systems could destroy the market for small racetracks. Further, these small racetracks continue to be as important to the stability of the horseracing industry today as they were twenty years ago.

Nevertheless, the IHA is in serious need of refurbishment. For example, Congress could make the following amendments. First,

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259. *See supra* notes 23-31 and accompanying text.

260. *See* 15 U.S.C. § 3004 (1988).

261. Indrisano, *supra* note 4 (quoting Lou Raffetto, vice-president of racing at Suffolk Downs).

it could create specific guidelines that a plaintiff must satisfy in order to demonstrate that it is using IHA for its intended purpose — to limit the potentially damaging impact of interstate off-track wagering. Second, Congress could clean up the definitions provision, section 3002, and remove the obvious ambiguities. Third, it could require a simple consent registration system through the state racing commissions so an off-track betting system could ascertain from an objective source whether all of the necessary approvals had been obtained. Fourth, Congress could return to its original course and establish a cause of action for the small, neighboring racetrack whose market may still be in danger of being consumed by the off-track betting parlor.

Just a few days before the district court's ruling, Mel Bowman, national president of the Horsemen's Benevolent & Protective Association, predicted that a decision by the court holding the IHA unconstitutional would create "chaos."[262] Instead, what it created was not chaos, but cooperation between two immoveable opponents. Even though the Horsemen were to appeal the decision and eventually win, one day after Judge Bertelsman's ruling, members of the KHBPA voted overwhelmingly to give up their demand for a fifty-fifty split of the revenues from intrastate wagering.[263] Instead, they agreed to accept forty-seven percent, with a fifty percent share above a certain threshold.[264] For its trouble, the Horsemen received nearly $300,000 more per year.[265] The races are on again at Turfway Park.

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262. Jacalyn Carfagno, *Turfway Dispute Could Alter Racing*, LEXINGTON HERALD-LEADER, Sept. 11, 1993, at C11.

263. *See* Paul A. Long, *Simulcast Law Unconstitutional*, KENTUCKY POST, Sept. 15, 1993, at 1K; Monica Dias, *Vote Puts Turfway Back on Track*, KENTUCKY POST, Sept. 16, 1993, at 3K.

264. Dias, *supra* note 263.

265. *Id.*