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NO CONTEST? AN ANALYSIS OF THE LEGALITY OF THOROUGHBRED HANDICAPPING CONTESTS UNDER CONFLICTING STATE LAW REGIMES

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The traditional gaming market-share held by thoroughbred horse race wagering has significantly eroded over the past several years due to the increased availability of mainstream gambling alternatives (i.e. land-based casinos and internet poker rooms). The popularity and availability of alternative gambling options has forced racing facilities and industry groups to initiate new and innovative methods to maintain customer loyalty and to improve overall marketability. Arguably, the most successful of these initiatives to date has been the establishment and continued growth of the Daily Racing Form/NTRA National Handicapping Championship. The National Handicapping Championship (“NHC”) is the final event in a year-long series of National Thoroughbred Racing Association (“NTRA”) sanctioned handicapping contests and tournaments conducted by numerous “racetracks, casino racebooks, off-track betting facilities and horse racing” websites across North America. In 2008 alone, more than 100,000 contestants participated in 93 regional qualifying events to earn the opportunity to secure one of approximately 300 qualifying spots in the NHC national finals. The nationwide appeal of this contest is not without its attendant complications however. Gambling is an area of substantial state regulation, and as such, the legal viability of a given gambling-related activity may differ significantly from state to state—a handicapping contest that is specifically tailored to comply with the laws of one state may constitute a violation of the criminal laws of another. The purpose of this Article, therefore, is to examine the legality of a standard format handicapping contest in Kentucky and Florida, two states with important thoroughbred racing industries and divergent gambling law regimes. This paper concludes that the significance of handicapping contests to the thoroughbred industry, when contrasted with the diversity and inconsistency of state gambling laws, requires a concerted effort by industry leadership to encourage the enactment of state-specific regulation (at the administrative or legislative level) expressly authorizing such handicapping contests.

I. HANDICAPPING CONTESTS

A. *Rules and Format*

A handicapping contest, in its most rudimentary form, is a competitive event in which horseplayers attempt to compile the largest total bankroll by wagering set amounts on a predetermined slate of thoroughbred horse races. It is impractical to provide a more detailed description of a typical event, as the formats of individual contests tend to vary depending upon the preferences and goals of the host facility. The NHC, for instance, does not require that its qualifying events abide by any particular format to maintain their status as NTRA-sanctioned contests and/or NHC Tour events. For purposes of this article, however, any subsequent reference to a handicapping contest, absent a statement to the contrary, will be a reference to a contest with the following basic format, which will hereinafter be described as the “standard handicapping contest:”

- the contest consists of twelve (12) races
- six (6) races are “mandatory” and six (6) races are “optional”
- players must place a “fictional” \$2 win wager and \$2 place wager on each race

- odds on a given horse are “capped” at 20-1 for win wagers and 10-1 for place wagers
- the contest winner is the player with the highest earnings at the conclusion of the contest
- each player pays an entry fee to compete in the contest and all entry fees paid are returned to the players by way of prize money and
- in addition to prize money, the overall winner receives an all-expense paid entry to the DRF/NTRA National Handicapping Championship

This structure is based upon many of the features that are common to some of the more popular handicapping contests and provides a sufficient template for subsequent analysis.

B. *Industry Significance*

In response to declining pari-mutuel handle and general customer malaise, the thoroughbred industry has consistently sought out new and unique opportunities to diversify and strengthen its fan base. The NTRA and other industry groups have taken an active role in conducting the grassroots research necessary to evaluate the success or failure of these various undertakings. While most of these initiatives have experienced mixed reviews, handicapping contests (specifically the DRF/NTRA National Handicapping Championship) have received universally favorable feedback, as evidenced by the popularity and growth of such contests. This broad-based support is not a particularly unexpected result to industry insiders, given the incredible growth and cultural prominence of fantasy sports leagues in recent years – the standard handicapping contest is, for all intents and purposes, a race-driven variation of this very same format.

i. *Popularity with Horseplayers*

The appeal of handicapping contests to the average horseplayer is multi-dimensional. As an initial matter, handicapping contests provide participants with a far greater level of “value” than traditional wagering formats. In the typical pari-mutuel scenario, both the racing facility and the state regulatory authority are entitled to a percentage of the total funds wagered prior to their distribution to winning bettors (the “takeout”). In the standard handicapping contest, however, all entry fees received by the host facility are returned to the contestants in the form of cash prizes. Thus, a handicapping contest offers horseplayers the chance at a significant monetary reward accompanied by a zero percent takeout. Directly connected to this takeout reduction is the size of the contest prize pools—the 2009 DRF/NTRA National Handicapping Championship, as one prominent example, offers a first prize of \$500,000. As such, contest players are able to compete for a sizeable return on the basis of a fixed minimum investment. In addition, the typical pari-mutuel horseplayer must consistently place his or her winnings in jeopardy in order to establish a working bankroll. In contrast, a handicapping contest eliminates this element of risk because the player’s potential losses are capped at the amount of the entry fee, while still maintaining this same upside potential. It is this same concept that has contributed to the popularity of large poker tournaments as opposed to ‘cash games’ and pick-six or other exotic wagers in lieu of standard win, place and show betting.

Beyond the scope of these tangible fiscal returns, handicapping contests offer “new respect and new recognition for handicappers.” The placement of a typical pari-mutuel wager is an entirely faceless and impersonal endeavor. Handicapping contests, by contrast, personalize the betting process and magnify the level of competition present in each wager. The action now occurs in a venue that contains easily identifiable players, both friends and adversaries; the play is essentially head to head and the thrill of victory is far more tangible. Furthermore, the ultimate winner of the DRF/NTRA National Handicapping Championship does not only receive the adulation of those individuals present, but is also awarded the title of “Handicapper of the Year” at the thoroughbred industry’s prestigious Eclipse Awards ceremony—an honor in and of itself.

ii. *Popularity with Host Facilities*

From the perspective of the host racing facility, the appeal of a handicapping contest is readily apparent given the desires of its customer base. A properly structured and marketed contest is an effective tool to introduce and attract new players to the host facility and to reward regular customers for their patronage. Two of the primary issues facing racetracks today are the flow of bettors to off-track wagering facilities and the growth of account and online wagering. By staging a handicapping contest, these off-site bettors are compelled to return to the track to both compete in the contest itself and, as a fortunate byproduct, place their other daily wagers. Even if a contest fails to boost a facility's long-term business prospects (which is certainly the desired goal), it necessarily provides a "noticeable short-term shot in the arm" for the on-track handle during the contest period. This is true whether a tournament is conducted through the pari-mutuel system or not. In sum, facilities that have conducted handicapping contests have experienced a net benefit from their relatively modest expenditures and have pledged significant portions of their marketing budgets to the facilitation of subsequent contests. It is this fact that has led the NTRA to establish the NHC Tour as an added incentive for broad-based contest participation.

For these reasons, it is crucial that industry leadership take proactive measures to ensure the continued feasibility of these important handicapping events. To achieve this, the first step must be an evaluation of the legality of handicapping contests under the gambling laws of the various contest states. One cannot be concerned with the fiscal and marketing repercussions of different contest formats until one is assured of the legal foundations upon which they are grounded.

II. KENTUCKY

A. *Gambling Law Basics*

Under Chapter 528 of the Kentucky Revised Statutes, promoting and/or permitting gambling activity constitutes a criminal offense. "Gambling," for purposes of the statute, is defined as:

[S]taking or risking something of value upon the outcome of a contest, game, gaming scheme, or gaming device which is based upon an element of chance, in accord with an agreement or understanding that someone will receive something of value in the event of a certain outcome.

This definition, like that in most states, consists of three distinct elements: (1) the payment of consideration (typically money) (2) to participate in a game of chance (3) for the opportunity to win a prize (typically more money). Any activity that satisfies these three criteria, absent some express statutory exemption, constitutes an act of prohibited gambling in Kentucky. As such, for a handicapping contest to operate in compliance with Kentucky's general gambling prohibition it must either (a) be the subject of an express exemption from liability or (b) fail to satisfy one of the three definitional elements of "gambling."

i. *Gambling Exemptions*

The Commonwealth of Kentucky has carved out statutory and/

or constitutional exemptions for the following wagering-related activities: licensed charitable gaming, pari-mutuel wagering on horse racing, state lottery, and social gaming. Despite the facial appeal of the statutory exemption for pari-mutuel wagering on horse racing, none of the aforementioned exemptions are readily applicable to thoroughbred handicapping contests. The standard format handicapping contest, although technically a form of horse race wagering, is not conducted through the pari-mutuel system and funds paid to winning contestant(s) are not derived from the pari-mutuel pool. Although this may appear to be an overly formalistic distinction, the Kentucky Horse Racing Authority is explicit in its rejection of all forms of wagering at racing facilities other than those conducted by means of the pari-mutuel system, and requires regulatory pre-approval of all non-standard pari-mutuel wagers. This is not to say that a method for conducting handicapping contests through the pari-mutuel system cannot be devised or that the Kentucky Horse Racing Authority does not have the power under its broad legislative mandate to explicitly permit handicapping contests if it so chooses, but merely that as of the present date, the standard handicapping contest is not exempt from the state's gambling prohibition as a result of the pari-mutuel wagering exception. As such, if a handicapping contest is to be "legal" under Kentucky law, it must be because it is not "gambling" in the statutory sense of the term, rather than because there is an applicable statutory out that removes it from the scope of liability.

ii. *Gambling Definition*

The statutory definition of gambling in Kentucky consists of three elements: (1) consideration, (2) chance, and (3) prize. In the case of a standard handicapping contest there can be no dispute that the elements of consideration and prize are satisfied by the payment of entry fees and the receipt of cash prizes by the contestants. Therefore, the critical determination under Kentucky law, as is typical in most instances, is whether a handicapping contest is "based upon an element of chance" or stated more generically, whether it is considered a "game of chance" or a "game of skill." To answer this question, one must determine both the common law test utilized by Kentucky courts to distinguish skill from chance and the level of skill or chance implicit in a standard thoroughbred handicapping contest.

B. *The Skill-Chance Distinction in Kentucky*

i. *Generally*

The judicially-mandated distinction between skill and chance is not an exercise that is readily amenable to strict classification. All human endeavors, no matter how skill-laden, necessarily contain some element of chance (and vice versa). The crucial question, therefore, is not whether a given activity contains an element of chance, but whether it contains a sufficient level of chance to constitute a prohibited "game of chance" under the applicable statute. The particular level of chance that must be present to constitute a statutory violation is solely dependent upon the common law test utilized by that jurisdiction. In general, state courts have utilized one of five approaches to assess the degree of chance in a particular activity: (1) the Dominant Factor or Predominance Test; (2) the Pure Chance Rule; (3) the Any Chance Test; (4) the Material Element Test; or (5) the Gambling Instinct Test. At present, it is uncertain whether a Kentucky court, if presented with this issue, would choose to utilize the Predominance/Dominant Factor Test or the Any Chance Test to gauge the level of chance implicit in a handicapping contest.

The Predominance/Dominant Factor Test is the standard utilized by the majority of states and the federal government to assess the existence of the gambling element of chance. In applying this test, a court asks whether "player skill" or "uncontrollable chance" is the factor most likely to influence the outcome of a given contest. "The test is not whether the game contains an element of chance or an element of skill, but which one of them is the dominating factor in determining the result." Simply stated, a game of chance is

one in which the chance element “predominates” over the skill element, and a game of skill is one in which the skill element “predominates” over the chance element.

In contrast to the above approach, a limited number of states have examined the element of chance by determining whether a particular game contains any element of chance at all (the “Any Chance Test”). Under this formulation, if a contest game contains any element of chance, no matter how minimal, wagering on such a contest is prohibited as gambling. As every game contains some element of chance, a literal application of the Any Chance Test would result in an absolute prohibition on wagering. Thus, the test is only applied in those states whose statutory language is explicit in stating that the presence of a mere scintilla of chance is sufficient to constitute a gambling violation.

ii. *The Skill-Chance Distinction in Kentucky*

The Office of the Kentucky Attorney General has consistently asserted that “the dominant factor test is in effect in Kentucky.” Although no Kentucky court has affirmatively supported or denied this position, the opinion of the Attorney General is based upon the language and mode of analysis utilized by the Kentucky Supreme Court in *Commonwealth v. Allen* and *Steely v. Commonwealth*. Notwithstanding this persuasive authority, however, there is case law which could be used to support the contention that Kentucky is one of a minority of states to adopt the Any Chance Test. The Kentucky Court of Appeals’ recent decision in *Fall v. Commonwealth* is one such case. All of these decisions, however, are simply conclusory; they provide no mention of the actual test utilized by the court or the rationale dictating the choice of that particular approach. Given this judicial stalemate and the lack of a well-reasoned opinion, the most prudent tack seems to be a direct examination of the plain language of Kentucky’s statutory gambling definition.

“Gambling,” as stated previously, is defined by KRS § 528.010(3) as “staking something of value upon the outcome of a contest . . . which is *based upon an element of chance*” The critical part of this definition, for purposes of quantifying the required level of chance, is the modifying phrase, “based upon.” The American Heritage Dictionary states that a given event is “based” upon some thing or some factor if that factor is “the fundamental ingredient or chief concept” of the event. Under this definition, a game “based” upon chance is a game in which chance is the “fundamental principle or underlying concept.” A requirement that a specific element be “fundamental” is a requirement that that element “predominate” over all other elements. Therefore, in the context of KRS § 528.010(3), the term “based upon” means more than merely “contains” or “has present,” it means that the element of chance must actually predominate.

Given the above statutory interpretation and the nationwide preference for adoption of the Dominant Factor Test, it is reasonable to conclude that a Kentucky court, if presented with this issue, would choose to assess the legality of a handicapping contest through application of the predominance standard. The analysis that follows will proceed on the basis of that assumption. It is important to recognize, however, that one cannot guarantee such an outcome, especially at the trial court level, as there is sufficient authority to justify a contrary finding. The test that is ultimately selected by the court will likely be determinative of the actual result, and thus without certainty as to the test to be applied, there can be no certainty as to the court’s ultimate finding.

C. *Skill vs. Chance in Handicapping Contests*

i. *Methodology*

Despite the widespread judicial acceptance of the Dominant Factor Test and its conceptual simplicity, there is little to no consensus among courts as to the proper methodology by which to determine whether skill or chance predominates in a given activity. In the context of games such as chess (clearly a game of skill) or roulette (clearly a game of chance), the lack of a prescribed analytical approach is not problematic. As to the multitude of games that exist in the morass between these two poles, courts are left to resolve this fact-specific inquiry without much-needed substantive guidance. To state that a game containing 51% chance and 49% skill is a “game of chance” for purposes of the Predominance Test is a rather simple matter; to determine the actual percentage of chance and skill contained in a given activity, such that one can make the foregoing declaration, is another problem entirely. As such, courts have essentially resorted to a de facto subjective analysis, whereby they examine the “nature” of a particular activity and determine on the basis of anecdotal evidence, statistical analysis, and sheer instinct whether the element of skill or chance is the one that predominates in that particular activity. This paper will evaluate the skill inherent in handicapping contests in this same informal manner—focusing first on horse race wagering generally, followed by a contest-specific analysis.

ii. *Horse Race Wagering Generally*

The majority of courts that have examined pari-mutuel horse race wagering, including the Kentucky Supreme Court, have determined that it is a “game of skill.” This assertion is far less conclusive than it would initially appear, however, as most of these decisions were made in the context of constitutional lottery prohibitions and thus according to a “pure chance” rather than “predominance” analysis. Notwithstanding this contextual inconsistency, these cases do set forth a common theme that bears repetition in the context of this discussion. “Skill,” according to this case law, entails the ability to exercise one’s reason, judgment, and acquired knowledge in response to specific information. An experienced handicapper, in selecting a horse upon which to wager, is engaging in this exact same exercise and thus would seem to be engaging in a skill-based activity.

The derivation of knowledge from statistical data is, in fact, the core component of successful thoroughbred handicapping. In advance of every race, a handicapper who chooses to avail himself of only the most basic racing program is provided with the following statistical information, the significance of which is explained in the corresponding footnotes: (1) the number of previous starts by the horse; (2) its wins and purses earned; (3) its order of finish in recent races; (4) its pedigree; (5) its age and sex; (6) the distance covered in recent races; (7) its fractional times in those races; (8) the condition of the track; (9) the track surface; (10) the weight carried; (11) the class of the race; (12) the jockey and trainer and their respective records; (13) its recent workouts; (14) medications; (15) equipment; and sometimes more. It is the task of a given handicapper to process this wealth of information and to determine, based upon the interaction of these various factors, the most likely outcome in a particular race. Once the handicapper has made this critical initial determination, his analysis is still not complete. He must then examine the fluctuations of the pari-mutuel odds to determine which wager, or series of wagers, provides the greatest expected value in light of the player’s predicted outcome and his confidence in that assessment.

Beyond this mere paper-based analysis, there is also an observational element to handicapping that can be best described as the element of “horsemanship.” “Skill,” in addition to the definitional aspect cited earlier, has also been described as “keenness of discernment with soundness of judgment.” This is an apt description of “horsemanship”—the ability to draw inferences about the condition of a given horse (and thus its potential performance) based upon a cursory examination of that horse prior to, during, or after a race. Handicappers in possession of this skill (whether innate or learned) can watch a horse “scoring down” and gauge whether he is anxious or irritable, whether he is showing signs of lameness or illness, whether he has expended

unnecessary energy, etc. These are all factors which can have a critical impact on the performance of that particular horse and thus the potential outcome of the race in which he is set to compete. A handicapper is able to utilize this same skill-set (with additional refinement) in the analysis of video replays of a horse's past performances. The ability to effectively watch a race and isolate and decipher the true skill level of a particular horse based upon the specific circumstances under which it ran are crucial to a meaningful understanding of the past performance information provided in the standard program. The fact that a horse may have finished first or last in his most recent race is not necessarily indicative of his level of performance in that race—only a critical analysis of that race in its entirety can provide this information.

Notwithstanding the above analysis, there are still those who contend that wagering on horse racing is necessarily a game of chance because unforeseen events can (and do) occur before or during the course of a race, which may be determinative of the race's outcome and can defeat even the most well-reasoned analysis. The flaw in this contention, however, is that this same possibility exists in almost every human endeavor and the impossibility of eliminating this aspect of uncertainty is the very basis upon which the Dominant Factor Test gained prominence: "In any game there is a possibility that some oversight or unexpected incident may affect the result, and if these incidents are sufficient to make a game in which it may occur one of chance, there is no such thing as a game of skill." The proper question, therefore, for purposes of the skill/chance distinction, is not whether an expert handicapper is ever wrong (he unquestionably is) but whether he is right sufficiently more often than the average horseplayer. The continual success and profitability of particular players serves as ample justification for this assertion. In fact, it is the ability to understand and profit from these seemingly anomalous events (*i.e.*, the ability to predict the unpredictable) that distinguishes a good handicapper from a truly great handicapper. The manner in which one responds to the presence of chance in a given activity is an element of skill in and of itself.

iii. *Skill Implicit in Contest Format*

Even if a court were to hold that pari-mutuel wagering on horse racing constitutes a game of chance under the Predominance Test, it is still conceivable (although far less likely) that a handicapping contest may be deemed a game of skill as a result of the additional skill components present in such contests. As an initial matter, the payment of an entry fee to participate in a handicapping contest is, technically speaking, not a wager on horse racing, but rather, a wager on one's own ability to wager on horse racing. Courts have frequently drawn a distinction between betting on the outcome of a contingent event outside the scope of one's own control and a scenario in which an individual is an actual participant in the activity wagered upon (*i.e.* wagering on one's own performance). In the latter case, the element of chance implicit in relying upon the performance of a third party is eliminated and, thus, courts have been more willing to declare that the elements necessary to constitute gambling are not satisfied. Contest participation is ubiquitous in our society (from bake-offs to spelling bees) and such activities are typically not viewed as gambling, despite the presence of both consideration and prize. Handicapping contests bear a striking similarity to these other entry-fee based activities and should, in fairness, be treated in a similar manner.

Another factor contributing to the predominance of skill in handicapping contests is the fact that the outcome of a standard handicapping contest is predicated, not upon the result of a single race, but upon the cumulative results of twelve independent races. As the number of instances where a participant must exercise skill in a given contest increases, the likelihood that the most skilled of the participants will ultimately succeed increases at the same rate. If the number of trials is very small (*i.e.*, a single race), the element of chance will necessarily play a more substantial role in that outcome. This is a simplistic expression of the "law of large numbers" or the notion of "variance," both of which explain that "as the numbers of trials of a process increase, the percentage difference between the expected value and the actual value [of that process] descends to zero." The more races included in a given contest, the greater the predominance of

skill in that contest. The reduction in variance resulting from this multi-race format is also strengthened by the inclusion of an odds-cap on each contest wager. This cap ensures that an anomalous result in any one trial does not unduly skew the results of the process as a whole, and it reinforces the necessity of consistent performance. The fact that this proposition can be easily proven through mathematical equation is likely beneficial due to the greater weight it may hold with the potential finder-of-fact, especially in the face of what is otherwise a largely anecdotal analysis.

Lastly, a participant in a handicapping contest will not be successful, regardless of his handicapping prowess, without an in-depth understanding of the strategy necessary to compete in a tournament format. Merely picking winners is not enough. One must consistently evaluate his or her position relative to other competitors and place wagers on that basis. The appropriate time for utilizing one's optional wagers as well as the odds range from which one will make this selection entirely depends upon external factors. The goal in a handicapping contest is not just to earn a profit over the course of the contest, but to earn a more substantial profit than any other competitor. As such, one must utilize a strategy that ensures the continued feasibility of this outcome given the changing circumstances of the contest environment and the relative size of one's bankroll. In sum, an effective tournament strategy is essential to handicapping contest success. The ability to devise and consistently revise one's strategy on the basis of the rules of a particular contest and the wagers already made is an element of skill that is not present in a typical pari-mutuel wagering.

It would seem from the previous discussion that a Kentucky court, if presented with this issue, would likely conclude that a handicapping contest is a game of skill. As also noted previously, however, there is a level of uncertainty inherent in this declaration. The skill/chance determination is a fact specific inquiry and thus is dependent upon the quality of the evidence presented, the skill and experience of counsel, and the prudence and/or bias of the finder-of-fact. Furthermore, one cannot be certain that a Kentucky court will necessarily utilize the Predominance Test to make this determination and, even if it does, one cannot predict the methodology by which the court will attempt to reach its conclusion. Thus, handicapping contests likely do not fall within the scope of Kentucky's gambling prohibition, but given the possibility of criminal repercussions for an incorrect assessment of their legality, one would typically prefer a greater level of assurance than exists at present.

III. FLORIDA

A. *Gambling Law Basics*

Under Chapter 849 of the Florida statutes, permitting or encouraging gambling activity constitutes a criminal offense. Section 849.08 sets forth the state's basic gambling prohibition:

Whoever plays or engages in any game at cards, keno, roulette, faro or other game of chance, at any place, by any device whatever, for money or other thing of value, shall be guilty of a misdemeanor of the second degree

This statutory language, according to the Florida Supreme Court, represents the traditional three-element definition of "gambling": (1) consideration, (2) chance, and (3) prize. The inclusion of the chance element in this formulation is somewhat misleading, however, as Section 849.14 of the Florida statutes explicitly prohibits wagering on games or contests of skill. As such, a judicial finding that a handicapping contest is a game of skill would not, in and of itself, remove said contest from the scope of Florida's gambling prohibition; it would merely alter the character of that violation and the severity of the potential reprimand. Combining these two statutory sections (§ 849.08 and § 849.14), the definition of prohibited

gambling in Florida can be more accurately described as follows: (1) payment of consideration (2) to participate in a game of chance *or skill* (3) for the opportunity to win a prize. The standard handicapping contest, as discussed previously, unquestionably satisfies elements (1) and (3), and given the impossibility of compliance with element (2), would necessarily constitute an act of prohibited gambling under Florida law, absent a statutory exemption to the contrary.

B. *Alternate Approach*

The primary issue with the breadth of Florida's gambling prohibition is its inclusion of activities that were clearly not within the contemplation of the legislature at the time the statute was enacted. If the mere combination of a prize and an entry fee equals "gambling," then "golf tournaments, bridge tournaments, local and state rodeos or fair contests, and even literary or essay competitions are all illegal gambling operations" under § 849.14. To avoid the absurdity of this result, a line of cases has developed which purport to draw a distinction between bona fide entry fees for a "purse, prize, or premium" and "stakes, bets, or wagers." Under this formulation, the payment of an entry fee (1) to participate in a contest of skill, (2) in which the sponsor does not participate, and (3) where the prizes offered are not derived from the entry fees, does not constitute a "stake, bet, or wager" and thus does not fall under the prohibition of wagering on games of skill under § 849.14.

i. *Pooling of Entry Fees*

The critical component of the previous distinction is the notion that the "prize pool" for which the contestants compete, must not be funded by the contestants themselves. The rationale behind this requirement is that when entry fees are unconditional and prizes are guaranteed, the element of risk necessary to constitute "betting" or "wagering" is missing. As stated by the court in *Humphrey v. Viacom, Inc.*:

A bet is a situation in which the money or prize belongs to the person posting it, each of whom has a chance to win it. Prize money, on the other hand, is found where the money or other prize belongs to the person offering it, who has no chance to win it and who is unconditionally obligated to pay it to the successful contestant. Therefore, where all entry fees are unconditional and the prizes are guaranteed, reasonable entrance fees charged by the sponsor of a contest to participants competing for prizes are not bets or wagers.

In the standard handicapping contest, all entry fees received by the host facility are returned to the winning participants in the form of cash prizes. Thus, if a handicapping contest is to fit under this "exemption," the host facility must amend its contest's payment structure to eliminate the "pooling of entry fees" for prize purposes. The most straightforward method to do so, at least from a legal perspective, would be to eliminate the entry fee requirement entirely and merely offer the DRF/NTRA National Handicapping Championship seat as the sole prize component. This structure is clearly in compliance with the above judicial requirements, but from an operational perspective, would likely act as a significant disincentive to contest participation as it eliminates many of the favorable attributes which have contributed to the popularity of handicapping contests to date. A riskier approach (which may, conceivably, solve the operational issue to a certain extent) would be for a host facility to offer cash prizes funded from their general operating account that would be guaranteed notwithstanding the number of entry fees ultimately received by the host. If the sum of the entry fees received exceeds the guaranteed prize pool, the facility makes a profit. If not, it takes a loss. This approach removes much of the disincentive contained in the previous method. Nevertheless, it comes with the attendant risk that a host facility may suffer significant fiscal repercussions if the level of participation in a given contest does not meet its prior expectations. Additionally, the viability of the second approach has not been expressly validated by the Florida courts. The Supreme Courts of Arizona

and Nevada, however, have permitted such a scheme in the context of this same analysis, and thus, a similar adoption by Florida courts is a foreseeable outcome.

ii. *Skill vs. Chance*

Assuming that a racing facility was to adopt one of the above amendments to its contest's payment structure, the next issue is whether, under Florida law, a handicapping contest constitutes a game of skill or a game of chance. The entire "purse, prize or premium" analysis is predicated on the negation of the "stake, bet or wager" language in § 849.08. As a result, if a handicapping contest is deemed to be a game of chance, rather than a game of skill, this potential "exemption" is likely not available. The manner in which the skill-chance determination is to be made in this instance is the same as under Kentucky law: (i) determine the common law test utilized by the Florida courts and (ii) examine the level of skill and chance implicit in a handicapping contest. Given the fact that Florida prohibits wagering on both games of chance and games of skill, there is understandably little case law discussing the appropriate test to be utilized to distinguish between these two classes. The Office of the Florida Attorney General has opined, however, that any such distinction must be made on the basis of the predominance standard. Obviously, such an opinion is not binding on courts, but given the lack of precedential authority, it seems reasonable to proceed on that basis, at least for purposes of this analysis. Despite the fact that both Kentucky and Florida arguably utilize the Dominant Factor Test, it is entirely conceivable that different results may be reached by the courts in these respective states. The primary reason for this perceived differential, besides the lack of certainty inherent in any judicial decision, is that Florida, unlike Kentucky, is one of a minority of states that have explicitly ruled that pari-mutuel wagering on horse racing is a game of chance. Therefore, to convince a Florida court that a handicapping contest is a game of skill, one must prove that either: (1) the Florida Supreme Court's decision in *Pompano Horse Club* was in error or (2) that handicapping contests contain additional skill elements not present in standard pari-mutuel wagering, such that a handicapping contest is a game of skill notwithstanding the fact that pari-mutuel wagering has been deemed otherwise. In either event, it is clear that the proponent of this argument will be facing an uphill battle and will need to bear significant expense in presenting evidence to the court to dispel any judicial preconceptions.

In sum, conducting a handicapping contest is not a violation of Florida's gambling laws if and only if: (1) the Florida Supreme Court continues to recognize the judicial distinction between "stakes, bets, or wagers" and "purses, prizes, or premiums," (2) the host facility amends the standard contest format to eliminate the pooling of entry fees for prize purposes, and (3) the particular contest is deemed a game of skill. As such, the potential existence of a "purse, prize, or premium" exception for handicapping contests is highly contingent. It is far from prudent for these authors (or any other attorney) to advise a host facility to proceed with a handicapping contest on the basis of the certainty (or perhaps more appropriately, the lack of certainty), provided by this line of cases. This possible exception is, for all intents and purposes, more theoretical than practical, as it would require a racing facility to risk criminal sanction (and thus its pari-mutuel license) merely to take advantage of a niche marketing opportunity. Potential host facilities are better served by working toward a legislative or regulatory solution, as described below, rather than engaging in the judicial equivalent of a true game of chance.

IV. A REGULATORY SOLUTION IS REQUIRED

As a result of intensive state regulation, there is little consistency in the gambling laws of the various states. The determination of whether a given activity constitutes prohibited gambling in a particular state is dependent upon that state's constitutional, statutory and regulatory text and the judicial interpretation of that text. This determination is further complicated by the advanced age of most relevant gambling decisions and the fact-specific nature of the examination. One cannot assert with great confidence, with four notable

exceptions, that conducting a handicapping contest is an entirely legal endeavor in a particular jurisdiction. In some states, such as Florida, the State Attorney General and/or regulators have, in fact, taken a strong position that such contests are not permitted.

The thoroughbred industry is, therefore, left with three primary options: (1) discontinue the operation of handicapping contests in their entirety; (2) proceed in the current manner, notwithstanding the risk of liability; or (3) take proactive steps to eliminate this specter of illegality. The last option is clearly the most palatable and is already the approach selected by four states that are heavily invested in racing and/or wagering.

New York, New Jersey, Oregon and Washington have enacted legislation, under the auspices of their state's pari-mutuel laws, expressly authorizing handicapping contests. New York's law is the most detailed of the four and addresses many of the pertinent arguments found in this paper. Section 906 of the New York Statutes states, in pertinent part, as follows:

(1) Notwithstanding any other provision of law . . . a thoroughbred racing corporation . . . may operate a handicapping tournament at which the participants may be charged an entry fee if the tournament is conducted in accordance with this section.

(2) (a) The operator of a handicapping tournament shall distribute all of the entry fees as prizes to the winners of the tournament. Nothing herein shall preclude an operator from providing additional prizes or promotions.

(b)

(c)

(3) A handicapping tournament operated in accordance with the provisions of this section shall be considered *a contest of skill* and shall *not be considered gambling* (emphasis added).

This formulation expressly exempts a handicapping contest from the gambling statutes, and contemplates that the legality of a handicapping contest in New York, absent the existence of this statutory section, would be determined on the basis of the skill-chance distinction discussed earlier in this paper. New York regulators recognized the importance of handicapping contests to the state's racing industry and the uncertainty inherent in that determination at the judicial level. A simpler approach is taken by Oregon and Washington in their respective racing rules.

A model rule, based upon the New York format (specifically addressing each of the essential characteristics of a handicapping contest including entry fees, prizes, skill and an exemption from gambling) should be promulgated by industry leadership and adopted by each racing jurisdiction that does not have an express authorization for handicapping contests. Such a rule would benefit the racing industry by reassuring operators and permitting the growth of handicapping contests in such jurisdictions. It would also protect the betting or playing public by facilitating a state's oversight of racing and wagering.