Harness Racing in New York State: A Different Perspective
By Chris E. Wittstruck, Esq.¹
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At the annual Saratoga Institute on Racing and Gaming Law held on August 1², participants were offered attendance at a breakout session entitled, “Harness Racing in New York State.” The highly informative panel consisted of executives from Buffalo and Saratoga Raceways, an equity partner in Tioga Downs and Vernon Downs, as well as a representative from New York’s largest Standardbred breeding operation.³ The offering afforded listeners unique insight into the economics of New York harness racing from the perspective of track operators.⁴

Assuredly, there are other perspectives. Moreover, in the month since the presentation at the Institute, significant events have occurred which will dictate the course of a portion of the industry for at least the next few

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² For coverage of highlights of this year’s Institute, See, Future of NY Racing Franchise Hot Topic at Conference, 8/1/06, Bloodhorse.com, last read online 8/27/06 at http://www.bloodhorse.com/articleindex/article.asp?id=34668; Smith's ties to Empire Racing called out by NYRA, 8/1/06, ThoroughbredTimes.com, last read online 8/27/06 at http://www.thoroughbredtimes.com/search/searchdetail.asp?RecordNo=65468&Section=1; Odato, James M., Racing’s Rehearsal, 8/2/06, Albany Times Union, last read online 8/27/06 at http://www.timesunion.com/AspStories/story.asp?storyID=504848

³ The panelists were James Mango, C.O.O. of the Buffalo Trotting Association; George “Skip” Carlson, V.P. of Racing at Saratoga Harness; Jeffery Gural, a partner with Nevada Gold and Casinos, Inc. of Houston, Texas and others in both Tioga Downs and Vernon Downs and Michael Kimelman, Jr., Pres. of Blue Chip Farms in Wallkill, New York

⁴ The extensive presentation of Mr. Mango was last read online 8/27/06 at http://www.albanylaw.edu/media/user/glc/mango_harness_racing_in_new_york_state.pdf
years. The following is an update regarding the state of New York Harness Racing from the mind’s eye of a horseman.5

Monticello Raceway:

The last horsemen’s agreement between the Management of Monticello Raceway and the certified horsemen’s representative, the Monticello Harness Horsemen’s Association (“MHHA”) was effective as of June 1, 2001, several months before the promulgation of the original video lottery gaming statute.6 Obviously, no reference to alternative gaming was contained in the agreement, save for some cryptic language dealing with the possibility of additional “statutory payments” to horsemen.7 The contract also provided for purse payments of 50% of all racing and simulcasting revenue, with the additional 1.75% state-mandated contribution included therein.8 Under the agreement, MHHA received a direct Management contribution of $20,000 monthly, plus 3.5% of racing revenue allocated to purses, for health insurance and administrative expenses.

Even during the term of the agreement, the relationship between MHHA and Management was somewhat contentious. Various litigations alleged shorting of the purse account, requested injunctive relief regarding continuance of the barn area, claimed misallocation of overnight purse money towards non-overnight events, and a myriad of other concerns. The lawsuits, since consolidated, are still pending.9

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5 In the interest of fairness and objectivity, it is disclosed that the author acted as a “second seat” attorney to Joseph A. Faraldo, Esq. in representation of the horsemen at Monticello Raceway in their arbitration proceeding, as well as for the Vernon Downs’ horsemen in their contract negotiation. In the capacity of director of the New York Standardbred Owners Association, the author was both a plaintiff and a negotiator during the course of the S.O.A.’s 2006 litigation with Yonkers Raceway Management.


7 The relevant portion of Section 2(g-2) of the agreement read, “It is further understood and agreed that in the event the New York State Legislature or any other applicable government or agency provides for additional payments to the Horsemen’s purse account after the date of this agreement which are over and above amounts otherwise contemplated hereunder or otherwise specifically addressed herein, then any and all such statutory payments shall be paid to the Horsemen’s purse account in addition to the provisions set forth in this agreement.”

8 See Racing, Pari-Mutuel Wagering and Breeding Law §318(1)(b)(ii)

9 MHHA v. Monticello Raceway Management, Supreme Court, Sullivan County Index #2624/2003
The 2001 agreement expired on May 31, 2004. Thirty days later, video lottery gaming commenced at Monticello. While no contract was in effect, MHHA at least had the protection of the then once-amended lottery gaming statute\(^\text{10}\) which, like the original legislation, provided for defined percentages of net VLT win to be contributed towards purses. This assurance of a legislatively set allocation of video lottery terminal (“VLT”) revenue towards the horsemen’s racing operations was, however, threatened from the very start.

On July 7, 2004, the Appellate Division, Third Department found the legislature’s video lottery gaming scheme unconstitutional insofar as it provided for reinvestment of lottery revenues to the racing and breeding industries.\(^\text{11}\) The State immediately appealed the decision, thus staying the effectiveness of the Third Department’s ruling. Temporarily, this ensured adherence to the statute by the industry, keeping gaming parlors at Monticello and other facilities open, and the horsemen’s percentage of VLT revenues consistent.\(^\text{12}\)

In April of 2005, while the matter was sub judice before the Court of Appeals, and at the urging of an admittedly united industry, the legislature amended the statute by 1) removing the revenue distribution provisions that required portions of the vendor's fee to be allocated to enhancing purses and an appropriate breeding fund; 2) increasing the vendor’s fee; and 3) establishing a track-beneficial “marketing allowance.”\(^\text{13}\) The theory was simple: The portions of the law found objectionable were removed, thus ensuring the constitutionality of video lottery gaming. The horsemen’s and breeders’ “cuts” would be funded through contractual terms with the respective track managements, which could now well afford to give the horsemen an enhanced percentage of VLT revenue inasmuch as their retained vendor’s fee was both generously inflated and supplemented by a

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\(^{10}\) L 2003, chapter 63, Part W, § 2

\(^{11}\) Dalton v. Pataki, 11 AD3d 62

\(^{12}\) See, Civil Practice Law and Rules §5519(a)(1)

\(^{13}\) The new scheme increased the vendor’s fee from 29% to 32%, and provided an 8% vendors marketing allowance at all tracks with the exception of Yonkers Raceway and Aqueduct Racetrack, which were subjected to a 4% cap purportedly based upon the anticipation of greater revenue streams at these two facilities in relation to the other racino venues. L 2005, chapter 61, Part CC, § 2; codified at Tax Law §1612
marketing fee through the new legislation. Gambling on a VLT was one thing; gambling on a Court of Appeals reversal was quite another. In sum, the industry hedged its bets by urging and obtaining legislative action which rendered the prospective Court of Appeals decision moot, at least insofar as the constitutionality of racing industry reinvestment of lottery revenues.\(^\text{14}\)

The unity that existed between the track Managements and the horsemen lasted only until the ink on the new legislation was dry. Various industry insiders insist that managements had agreed to reward the horsemen for their support of the track-positive legislation by giving the horsemen 9.25% of net VLT win; an increase above the percentages contained in the last statute.\(^\text{15}\) Management at Monticello didn’t agree that this was ever memorialized, and maintained a 7.50% VLT cut to its horsemen, its own significantly enhanced retention of video lottery gaming revenues under the new, horsemen-supported law notwithstanding.\(^\text{16}\)

By September of 2005, the state of negotiations between MHHA and Management, by this time without a horsemen’s agreement for well over one year, significantly degenerated. At this point, Management unilaterally curtailed their $20,000 per month contribution towards administrative and health benefits for their horsemen. Further, they even reduced payments from the horsemen’s own purse account for these purposes from the previously agreed to 3.5% for health insurance and administrative expenses, to a statutorily mandated minimum of 1%.\(^\text{17}\) Then, in late December, the horsemen refused to grant permission to Monticello to export its simulcast signal to venues outside New York State, as is their right under Federal

\(^\text{14}\) The Court of Appeals rendered its decision in \textit{Dalton v. Pataki} on May 3, 2005, finding the entire video lottery gaming scheme originally set by the legislature fully constitutional, including the racing industry reinvestment provisions (5 NY3d 243, 802 NYS 2d 72).

\(^\text{15}\) The 2003 amendment had provided for a 29% vendor fee to the track operator. The portion of the vendor's fee dedicated to enhancing purses was changed by this amendment to 25.9% (7.50% of net win) for the first three years, 26.7% (7.75% of net win) for the next two years and 34.5% (10% of net win) for each year after that. The percentage of the vendor's fee contributed to the breeding fund was also changed to 4.3% (1.25% of net win) for the first five years and 5.2% (1.50% of net win), for each subsequent year (L 2003, chapter 63, Part W, § 2).

\(^\text{16}\) A written agreement executed on November 30, 2004 by a principal of Monticello Management that the horsemen contend granted them a 9.25% VLT cut upon certain conditions they claim were met was repudiated by Management on various grounds.

\(^\text{17}\) See \textit{Racing, Pari-Mutuel Wagering and Breeding Law} §318(1)(b)(iv)
Law. In turn, Management took the position that the new law did not mandate that the horsemen receive anything from video lottery gaming, and reduced VLT net win payments to the purse account to 6.5%; a figure below that set by the prior statute, before the track enjoyed the vendor fee enhancement and the marketing allowance in the new law. Commensurate with this decision, Management cut purses in Monticello races by fifty (50%) percent.

A mediation session before the New York State Racing and Wagering Board (the “Board”) on January 10, 2006 proved fruitless. On January 24, the Board warned both parties that a continued track license, racing dates, or both, were being threatened by the impasse, and that the parties were effectively endangering not only racing, but also continued licensure of the gaming facility at Monticello by the Division of the Lottery. Despite these dire warnings, a further try at Board-sponsored mediation on February 7 was additionally non-productive.

Finally, both sides agreed to submit items in dispute for binding arbitration by the Board. On February 13, the Board indicated that it was “amenable” to serving as an arbitrator, but only upon certain conditions being met pending the arbitration’s outcome: 1) that the VLT purse contribution be immediately restored to 7.5%; 2) that purses be restored to pre-2006 levels; 3) that the administrative and health payments made by Management and from allocated purse funds be restored; 4) that the horsemen consent to out of state simulcasting; and 5) that the arbitration would exclude, “issues that are the subject of litigation between the parties.”

The parties identified several areas of dispute requiring binding decision by the Board. Three of the areas raised by MHHA, that of “cycle periods” requiring the periodic enhancement of purses based upon Management’s purse account underpayments, maintenance of grooms’ quarters, and the issue of stall rent, were contended to be the “subject of litigation” by Management. Upon a finding by the Board that the issues

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18 See, 15 USCA §3001 et seq., commonly referred to as the Federal Interstate Horseracing Act of 1978

19 See, Tax Law §1617-a

20 Correspondence of February 13, 2006 by Robert A. Feuerstein, Esq., counsel to the New York State Racing and Wagering Board.
were, in fact, arbitrable, Management commenced suit seeking to stay so much of the arbitration as allegedly involved these matters.\textsuperscript{21} By memorandum decision and order dated July 31, 2006 of the Honorable Robert A. Sackett of the Supreme Court, Sullivan County, the court found that while the stall rent and grooms’ quarters issues were arbitrable, the “cycle periods” issue was not.\textsuperscript{22} The MHHA has filed a notice of appeal regarding that portion of the decision denying arbitration of the “cycle periods” issue, and Management has cross-appealed.\textsuperscript{23}

On August 24, 2006, the Board issued its arbitration decision. Some of the highlights are:

The Board awarded the horsemen 8.25\% of the first $100,000,000 of annual VLT net win and 9.25\% thereafter.\textsuperscript{24} The payment is retroactive to July 1, 2006.

The term of a new contract will expire on December 31, 2007.

The Board established 200 minimum race dates for 2006 and 2007. Management had requested 144 to be the minimum.

Administrative and health benefit contributions by Management were kept at a $20,000.00 level for the duration of the contract. In 2006, the MHHA receives 3.5\% of purse account revenue from all sources (not just racing revenue). In 2007, the figure increases to 4.5\%.

Simulcast expenses are now limited and defined to only “actual expenses” directly related to providing and receiving; encoding and decoding said signals.

While the grooms’ quarters are to be maintained free of charge to the horsemen, stall rent of $1.00 per day, per stall will be deducted from the

\textsuperscript{21} See, Civil Practice Law and Rules §7503

\textsuperscript{22} Monticello Raceway Management v. MHHA, Supreme Court, Sullivan County Index #1124/2006

\textsuperscript{23} Ibid.

\textsuperscript{24} Monticello’s 2005 net win was reported to be approximately $68,000,000.
purse account based upon Management’s “CAFO” obligations.\textsuperscript{25} While there is a guarantee of unabated harness racing, there is no guarantee as to the continuity of the barn area during the agreement, as that matter is the subject of litigation between the parties.\textsuperscript{26}

In the absence of cycle periods, there is a requirement that the purse account is now to be escrowed. This is a most important mandate, since Management is currently holding a purse money underpayment in a seven-figure sum. Non-escrowed underpayments constitute a real threat to horsemen. On July 18, 1988, Management at Roosevelt Raceway was holding a $1.3 million underpayment of overnight purse money when they closed their doors forever. A subsequent lawsuit by the Standardbred Owners Association, the track’s horsemen’s representative, resulted in the horsemen recouping only a portion of the funds. Management only turned over stakes money to Yonkers Raceway, who then staged those non-overnight events.\textsuperscript{27}

The terms of the arbitration award are to be incorporated in a comprehensive agreement to be executed by the parties. Management’s parent company has publicly stated that it “…continues to review its options and possible avenues of appeal.”\textsuperscript{28} As of September 4, a contract has yet to be executed.

If an agreement is signed, the prospects for a profitable racing operation for both Management and its horsemen loom. The “Mighty M” has maintained a very solid niche in the industry: Year ‘round daytime harness racing. As one noted harness racing journalist recently pointed out:

Only 10 times in the track's (Monticello’s) history has total handle exceeded $1 million on a single day and four of those million-dollar days, including a track-record $1.4 million on

\textsuperscript{25} Concentrated Animal Feeding Operation. For current U.S. E.P.A. rules, see \url{http://cfpub.epa.gov/npdes/afo/cafofinalrule.cfm} last read online August 27, 2006

\textsuperscript{26} See footnote #9, supra

\textsuperscript{27} Discussions with past and present SOA members

\textsuperscript{28} August 25, 2006 Press Release of Empire Resorts, Inc. last read online 8/27/06 at \url{http://biz.yahoo.com/bw/060825/20060825005311.html?v=1}
Aug. 2, have been wagered this year. Wednesday's (8/23/06) handle of $512,063, a figure which has now become routine, was solid when you consider that on that day the track had to compete with Saratoga, Del Mar, Monmouth Park and Freehold at OTBs and simulcast parlors.  

Yonkers Raceway:

After prolonged negotiations, Yonkers Raceway Corporation and the certified horsemen’s representative, Standardbred Owners Association, Inc. (“SOA”), entered into a comprehensive horsemen’s agreement on November 5, 2004. The agreement was retroactive to January 1, 2004 and was for a five-year term, originally due to expire on December 31, 2008.

Inasmuch as the agreement occurred in the Fall of 2004, both parties were well aware of the tenuous nature of video lottery gaming. At that point, the Court of Appeals had yet to hear arguments in Dalton v. Pataki, and the existing racinos were operational only due to the benevolence of a statutory stay. A legislative “fix” was still in the contemplative stages. Against this backdrop, the parties fashioned their agreement with regard to video lottery gaming by inserting numerous provisions contingent upon alternate forms of prospective legislative action. Based upon fortuitous timing and the assistance of then-Board Chairman Michael Hoblock, the parties were able to agree on VLT percentages without the need to rely on either definite curative language or even a high court ruling on alternative gaming. Still, 2005 and 2006 proved problematic for Yonkers’ horsemen.

The agreement provided for the cessation of racing for a period of “up to approximately four months to retrofit its facility for video lottery gaming machines as may be permitted by New York State law.” The track actually curtailed live racing for this purpose at the end of June 2005. Four months

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30 See footnote #14, supra

31 See footnote #12, supra

32 Horsemen’s agreement, paragraph “Thirteenth (B)”
later, on October 29, Belmont Park set an all-sources wagering record while hosting the 2005 Breeders Cup.\textsuperscript{33} They did it without Yonkers Raceway. The facility was in absolute shambles, with the prospect of its reopening to host imported simulcasting, much less live harness racing before patrons, nowhere in sight.

At various negotiating sessions through the winter, SOA attempts were made to persuade Management to host live afternoon racing on NYRA “dark days”\textsuperscript{34} without patrons for the purpose of exporting its signal to generate revenue for a starved horsemen population. Seemingly at every turn, the SOA’s attempts at reasonable resolution were met with procrastination. Finally, by late March 2006, after almost nine (9) months of a four (4) month closure, it became apparent that Yonkers had no prospect of reopening in the foreseeable future.\textsuperscript{35} At this point, the SOA commenced litigation against Management seeking specific performance of the horsemen’s agreement and monetary damages.\textsuperscript{36}

With the intervention and assistance of Senator Nicholas Spano (R – Westchester), as well as, once again, the Board, a stipulation of settlement was eventually fashioned. The stipulation, dated May 23, extends the term of the horsemen’s agreement by three (3) full years, until December 31, 2011. It provides that Management will recommence full card live harness racing with patrons and simulcasting by “on or about September 21, 2006” By its terms, Management agrees to make up all lost racing dates, including lost dates occasioned by a failure to open by the September 21 target date, as well as provide dates over and above those set forth in the present contract. If for some reason the facility does not reopen in calendar year 2006, the stipulation is void, and the SOA can recommence full prosecution of the lawsuit. Hopefully, this drastic measure will be avoided.

\textsuperscript{33} Pierson Dulay, Cindy, “2005 Breeders' Cup Wrap Up”, 10/31/05, About Horse Racing last read online 8/27/06 at http://horseracing.about.com/od/breederscup/a/aa103105a.htm

\textsuperscript{34} Usually Mondays and Tuesdays

\textsuperscript{35} It was learned that Management had informed the New York State Horse Breeders Development Fund that is was “unlikely we would be racing prior to September 20,” and requested that the Sire Stakes and N.Y. Night of Champions, scheduled for early Fall, be moved to another harness oval.

\textsuperscript{36} Standardbred Owners Association, Inc., et al v. Yonkers Raceway Corporation, Supreme Court, Suffolk County, Index #06-09213
As of the August 24, 2006 Board meeting, Yonkers Raceway has not received a license or race dates for 2006. The next regularly scheduled meeting of the Board is on September 21.\textsuperscript{37} Whether the September 21 target date for reopening Yonkers will be met is anyone’s guess, and in Management’s control.

From the horsemen’s perspective, enhancing opportunities to race is always a good thing,\textsuperscript{38} especially when those future opportunities are to be fueled by a defined percentage of video lottery gaming revenue. By providing an additional three (3) years of racing dates, the SOA has provided the horsemen with assurance that harness racing will continue at the 107-year-old “Hilltop Oval” well into the future.

Tioga Downs:

A quarter horse facility shuttered in 1978, the constructed 5/8ths mile harness oval and Racino opened for a 49-day harness meet on June 9, 2006\textsuperscript{39} and opened for video lottery gaming on July 6\textsuperscript{th}.\textsuperscript{40} A consortium similarly structured to the one that purchased Vernon Downs Racetrack purchased the venue.\textsuperscript{41} The common ownership problems present new challenges to the regulatory agency and the horsemen as conflicting issues between Tioga and Vernon have already surfaced.

\textsuperscript{37} The schedule of New York State Racing and Wagering Board meetings can be accessed at, http://www.racing.state.ny.us/bmeetings/board.home.htm Yonkers has formally applied to the Board for a September 26 opening date. If Yonkers is “on target” a special meeting of the Board could be held upon 72 hours notice.

\textsuperscript{38} The stipulation provides for 311 racing dates in 2007, 255 racing dates in 2008, and a minimum of 245 racing dates in each of years 2009, 2010 and 2011


\textsuperscript{40} Nevada Gold and Casinos, Inc. Press Release dated 7/6/06, last read online 8/27/06 at, http://www.irconnect.com/uwn/pages/news_releases.html?d=101703

\textsuperscript{41}Tioga Downs is solely owned by American Racing and Entertainment, LLC (“American Racing”) an entity in which TrackPower, Inc. has a 20% membership interest; Southern Tier Acquisitions II, LLC has a 20% interest, Nevada Gold NY, Inc. (a wholly owned subsidiary of Nevada Gold & Casinos, Inc.) has a 40% interest and Oneida Entertainment, LLC has a 20% interest.
The racing offered at Tioga is top-heavy with stakes and early and late closers. This is primarily because the track’s certified horsemen’s representative, the Southern Tier Harness Horsemen’s Association, Inc. (“STHHA”), poses no objection to the dearth of overnight racing. Moreover, the large amount of non-overnight racing is in no small part due to the transference of state-bred stakes (and other) races previously held at the New York state exhibition, or “Syracuse Mile.” Tioga/Vernon Management directly effectuated this move through lobbying for legislative changes favoring relocation of these events to their facilities.

STHHA’s horsemen’s agreement with the track runs through December 31, 2010. The horsemen receive 8.5% of net VLT win toward purses. The contract does, however, authorize Management to transfer as much as 20% of the earmarked VLT horsemen’s cut to be transferred to purses at Vernon Downs. Additionally, STHHA receives 3.5% of the purse account for administrative and health expenses, with no Management contribution. Moreover, the agreement guarantees STHHA no more than fifty-seven (57) racing days a year, making Tioga a true “summertime” racing oval.

Buffalo Raceway/Batavia Downs:

While the two tracks have different ownership interests, they share a commonality of certified horsemen’s representative in the Western New York Harness Horsemen’s Association (“WNYHHA”).

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42 These terms are defined in Rule 4 of the Rules and Regulations of the United States Trotting Association.

43 Racing, Pari-Mutuel Wagering and Breeding Law §333 was amended in 2006 to provide at that the Syracuse races could be moved by the Horse Breeding Development Fund to “…any licensed pari-mutuel track in New York state, with a preference given to any available licensed pari-mutuel track that is five-eighths of a mile long or larger.” (L. 2006, Chapter 90). Note that the only two harness ovals in New York State larger than ½ mile are Tioga Downs (5/8ths) and Vernon Downs (7/8ths). The breeders’ expressed preference is for these events to be conducted at the larger Vernon Downs facility, a move favored by most horsemen as well.

44 Based upon the contract executed by Vernon Downs and its horsemen, discussed elsewhere in this article, the transfer provision is now moot, and will not occur. These monies are now needed at Tioga to reimburse overpayments to purses not offset in any way by racing revenues or as yet from VLT revenues.

45 Agreement dated March 2006 by and between Nevada Gold N.Y., Inc. and the STHHA

46 The Buffalo Trotting Association, Inc. owns Buffalo Raceway; Western Regional Off Track Betting Corp owns Batavia Downs.
The primary horsemen’s agreement covering Buffalo Raceway was executed on October 21, 2003 and covers the term 1/1/04 through 12/31/08. Inasmuch as the agreement was entered into well before the constitutional problems posed by *Dalton v. Pataki* and the curative legislative that resulted\(^\text{47}\), an amendment to the agreement was made on December 3, 2004, later superseded by a second amendment executed on December 29, 2005. By this last revision, an agreement ten (10) years in length, WHYHHA receives 8.50% of net VLT win towards their purse account, .50% towards capital improvements, and .25% towards marketing of racing events and pari-mutuel activity, as opposed to marketing of strictly the gaming parlor.\(^\text{48}\) Effectively, the horsemen at Buffalo negotiated themselves into receipt or control of 9.25% of net VLT win.

The primary agreement provides for a 4% infusion to WHYHHA of purse revenue from racing and simulcasting towards administrative and benefit expenses of the horsemen. Moreover, the contract provides for a direct payment of $50,000 per year towards WHYHHA Pension Fund payments.

The primary agreement also calls for at least a twenty-four (24) week racing schedule from February through July on a three (3) day a week basis during March and a four (4) day a week basis thereafter.

The primary horsemen’s contract at Batavia Downs is styled as an “Amended Agreement” dated and effective June 13, 2003, running for six (6) years and terminating on June 12, 2009. It is modified by a “Memorandum of Understanding” effective August 29, 2005, as well as a “Corrected Letter” of even date.

At Batavia Downs, WNYHHA originally negotiated a nineteen (19) week racing schedule on a four (4) day a week basis. The Corrected Letter requires a minimum of sixty (60) annual race dates. In any event, the Buffalo/Batavia circuit guarantees the western New York horsemen year

\(^{47}\) See discussion of same at Monticello Raceway portion of this paper.

\(^{48}\) Tax Law §1612 provides, in part, that the vendor marketing fee is, “*...after payout for prizes to be used by the vendor track for the marketing and promotion and associated costs of its video lottery gaming operations, consistent with the customary manner of marketing comparable operations in the industry and subject to the overall supervision of the division.*” The Division of the Lottery has strictly interpreted this language to exclude most “racing” references from marketing fee-qualifying advertising.
‘round racing opportunities, save for the snowiest portion of the Great Lakes’ winter.

The Memorandum of Understanding modifies the primary agreement inasmuch as it provides for an 8.5% net VLT win infusion towards purses. The Memorandum is for a ten (10) year term, thus remaining effective well past the primary Amended Agreement. Additionally, The contract provides for a direct payment of $50,000 per year towards WNYHHA Pension Fund payments.

Saratoga Harness:

The track has recently negotiated a new ten (10) year agreement with the certified horsemen’s representative, the Saratoga Harness Horsepersons Association, Inc. (“SHHA”). The agreement was executed in July of this year. The term is retroactive to 1/1/06, and expires 12/31/15.

Pursuant to the contract, the horsemen get 8.25% of the first $150,000,000 of net VLT win, and 4.25% thereafter. Previously, the horsemen received 7.50%, but also paid a $5,000,000 fee to Management towards racino upstart costs. The net VLT win percentage portion of the agreement is retroactive to April 2005; the time when the curative statute was promulgated.

The SHHA receives 1% of purse money from all sources towards administration, as per statute.49 However, the horsemen at Saratoga are in a unique situation; they participate in a Management-based and managed health insurance program. Additionally, Management has agreed to provide a minimum of 800 stalls for horsemen use, with no stall rent. This number of stalls makes Saratoga Harness a large CAFO under law.50 Moreover, Management has agreed to 160 annual minimum race dates at the oval.

The Saratoga experience fuels both hope and optimism throughout the New York Harness industry. Saratoga was New York’s first racino, opening

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49 See Racing, Pari-Mutuel Wagering and Breeding Law §318(1)(b)(iv)

50 Concentrated Animal Feeding Operation. For current U.S. E.P.A. rules, see http://cfpub.epa.gov/npdes/afофinalrule.cfm last read online August 27, 2006
in January 2004. According to one government committee, Saratoga reported,

...solid increases of purse moneys and on-track handle after the machines were installed. In fact, the raceway reported increases in all types of betting at the track since the 1,324-VLT facility opened to the public.... In 2004, 9.27 million was available for purses, compared to $4.01 million in 2003.\(^{51}\)

More recently, in June 2006, Saratoga was able to negotiate a mutually beneficial agreement with its next-door neighbor, the New York Racing Association (“NYRA”) at Saratoga Race Course. In exchange for barn space during the six (6) week Thoroughbred meet and some other concessions, NYRA for the first time in history agreed to export its signal to the harness track.\(^{52}\) Reportedly, the experience has had a positive impact on attendance and handle at the Harness Racino facility.\(^{53}\) The success is mirrored by the fact that Saratoga increased its race dates to accommodate the influx of horsemen now vying for more lucrative purses.

**Vernon Downs:**

In the over five decades of Vernon’s existence, a virtual rouge’s gallery of “investors” and some associated fakers have permeated the ownership ranks of the ¾ (now 7/8th) mile harness oval. Some stayed, took and left. Others never even made it to the clubhouse.\(^{54}\) By September 2006, the prognosis for Vernon could aptly be described as hopeful, but guarded.

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\(^{54}\) “In New York Harness Racing, a decade ago we had Patrick Bennett: A reputed multi-millionaire who was about to change the face of racing when he purchased Vernon Downs. The problem was, however, that a jury found he was running America’s largest Ponzi scheme, and was sentenced to 22 years in jail. Instead of being the anointed savior of racing, he was the Gonif de Tutti Gonifs.” Remarks of Professor Bennett Liebman before the Albany Law School Saratoga Institute on Racing and Gaming, August 1, 2006, page 3, last read online at, [http://www.albanylaw.edu/media/user/glc/does_the_franchise_matter.pdf](http://www.albanylaw.edu/media/user/glc/does_the_franchise_matter.pdf)
The future of the “Home of the Miracle Mile”\textsuperscript{55} will depend on a variety of factors, not the least of which will be whether the rights and independence of the longstanding certified horsemen’s association are respected.

The recent saga of Vernon begins with Board action in July 2004 that mandated the divestiture of certain stockholders of Mid-State Raceway, Inc., Vernon’s operator, and summarily suspended the track’s license upon its failure to pay purse money to participants who won races.\textsuperscript{56} On August 11, Mid-State filed for Chapter 11 protection in the United States Bankruptcy Court.\textsuperscript{57}

Not only were the Vernon horsemen left without their backyard racing venue; they were also left without the sum of over $384,000.00 in accrued purse reserves which the track was supposedly holding as trustee, $128,000 in bounced purse checks and additional purse account underpayments. While payment was promised, and the horsemen’s then existing agreement was assumed by the debtor-in-possession via stipulation and order dated May 20, 2005,\textsuperscript{58} all the money was not forthcoming. This prompted the Harness Horse Association of Central New York (“HHACNY”), the certified horsemen’s representative at Vernon Downs for over forty years, to file a $9,000,000.00 proof of claim alleging damages due to breach of the horsemen’s agreement and object to confirmation of a reorganization plan put forth by the new investors.\textsuperscript{59} On January 30, 2006, the Bankruptcy Court rejected the horsemen’s claim, but found the May 20, 2005 stipulation and order had, in fact, been breached, and ordered that the $384,000.00 be paid...

\textsuperscript{55} So named when legendary pacer Adios Harry set a 1:55 world record in 1955 at the two-year-old facility, a mark that stood for eighteen (18) years. See, “Horses to run again at Vernon Downs” 8/25/06, theithacajournal.com, last read online 8/27/06 at, \url{http://www.theithacajournal.com/apps/pbcs.dll/article?AID=/20060825/NEWS01/60825004}

\textsuperscript{56} See August 18, 2004 minutes of New York State Racing and Wagering Board, items (C2) and (C4), last Read online 8/27/06 at \url{http://www.racing.state.ny.us/bmeetings/board.home.htm} (Vernon’s last race date occurred in June 2004)

\textsuperscript{57} 6/1/05 Press Release of TrackPower, Inc., last read online 8/27/06 at \url{http://www.trackpower.com/news6.html}

\textsuperscript{58} See, \textit{In re Mid-State Raceway, Inc.}, debtor, United States Bankruptcy Court, Northern District of New York, Case # 04-65746 and 04-65745

\textsuperscript{59} Ibid.
to HHACNY.\textsuperscript{60} In fact, the monies were not paid to HHACNY until the eve of an enforcement proceeding in the nature of contempt.\textsuperscript{61}

During the late Fall of 2005, negotiations with HHACNY and the new investors regarding a comprehensive horsemen’s agreement broke down over the issue of diversion of overnight purse money towards non-overnight events. Then, at a December 16, 2005 confirmation hearing in Bankruptcy Court, one of the new investors, apparently miffed at HHACNY actions contrary to the track’s interests, openly stated that he would no longer negotiate with HHACNY and would form his own horsemen’s group.\textsuperscript{62} In or about the beginning of January 2006, the new investor carried out his threat by encouraging, and apparently funding a rival horsemen’s association, the Vernon Downs Harness Horsemen Association (‘‘VDHHA’’).\textsuperscript{63}

On January 20, 2006, VDHHA sent a letter to the Board, which the Board interpreted as a request by VDHHA to be certified as the Horsemen’s group at Vernon Downs.\textsuperscript{64} After submissions and due consideration, and applying the applicable statutory formula,\textsuperscript{65} on June 7, 2006 the Board rejected the challenge of VDHHA and continued the certification of HHACNY.\textsuperscript{66} VDHHA subsequently filed a proceeding seeking to annul the Board’s determination.\textsuperscript{67}

\begin{footnotesize}
\begin{enumerate}
\item Ibid.
\item Ibid. (See, “Stipulation and Order Resolving Issues under the Stipulation and Order to Assume the Horsemen’s Agreement entered May 20, 2005,” dated March 9, 2006.)
\item Ibid.
\item That VDHHA was encouraged, formed and funded by one of the new Management players is not the matter of much conjecture. The Management individual reportedly said he would, “…cover the costs of forming a new association.” Coin, Glenn, “Rival horsemen’s association forms,” 1/9/06, Syracuse Post Standard. The next day, VDHHA’s president was quoted as saying that Management had provided a lawyer for the group’s use. “Alternative horsemen’s association formed,” 1/10/06, Oneida Daily Dispatch. Moreover, throughout the course of the entire matter, and specifically on April 12 and May 6, the Management individual issued Memoranda address to “Vernon Downs Horsemen” alternately denigrating HHACNY, its president and legal counsel and encouraging horsemen to join VDHHA.
\item See, Racing, Pari-Mutuel Wagering and Breeding Law §318(1)(b)(iv)
\item Ibid.
\item See, Board Decision #138/06
\item See, Civil Practice Law and Rules Article 78; In the Matter of the Application of Vernon Downs Harness Horsemen’s Association, Inc. v. State of New York Racing and Wagering Board, et al, Oneida County Supreme Court Index #CA2006-001340.
\end{enumerate}
\end{footnotesize}
On August 23, 2006, after careful mediation by the Board, Management and HHACNY finally entered into a comprehensive horsemen’s agreement expiring August 2008. The highlights include:

The track will offer an abbreviated thirty (30) day race meet commencing on or about August 31, 2006. There is a guarantee of at least ninety (90) race dates in each of 2007 and 2008. A minimum of three (3) programs per week has been established.

The horsemen will receive 8.25% of video lottery terminal (VLT) revenue. 2006 purses are anticipated to approximately double those raced for in 2004. Purses will increase even more in 2007 and 2008.

In light of previous problems, purse money will be maintained in a secure, segregated account. Moreover, the Association will receive an accounting every two (2) weeks.

The HHACNY will receive 6.5% from all revenue sources to fund the association. Hopefully, this funding mechanism will permit the future establishment of a horsemen’s medical plan.

Curing the dispute that brought the parties to their original impasse, the allocation of purse money towards overnights and stakes will be the subject (and only subject) of future Board arbitration for 2007 and 2008. This will serve to bring stability to Vernon Downs and hopefully a return to the real business at hand – racing.

Additionally, and of highly significant importance, the agreement provides that Management will under no circumstances discriminate against members or directors of HHACNY. Moreover, Management has agreed for the entire term of the agreement not to in any fashion promote or encourage a challenge to HHACNY’s status as the certified horsemen’s group or promote or encourage membership in any group.

By Memo dated August 24, 2006, a Management spokesman publicly agreed to, “…divorce myself from this prolonged dispute over which association should represent the horsemen at Vernon.” While time will tell

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68 In fact, the track received a license and thirty (30) race dates from the Board on August 24, 2006 and opened on schedule.
whether compliance with this self-imposed mandate will be had, full compliance will assuredly put an end to the “dispute,” court action and threats by VDHHA notwithstanding.69

The common ownership of Vernon and Tioga raises various issues of conflict. As previously stated, the horsemen’s agreement at Tioga calls for the possibility of diversion of VLT revenues to Vernon Downs’ purse account, despite the fact that each track is represented by a separate, independent horsemen’s association.70 Thus, Track management was able to persuade the horsemen at one track to permit transfer of purse money from the source where it was generated to another track it owned where a somewhat overlapping, but different group of horsemen compete.

Exacerbating this concern is the very reason the transfer ultimately did not occur. Despite the plain language in the Tioga agreement, Management insisted that it had a “verbal agreement” with Tioga’s STHHA that it would not effectuate the purse money transfer unless the VDHHA, and not the HHACNY, was certified by the Board as the representative horsemen’s group.71 This was but one of many types of leverage Management used in its attempt to garner strength for its handpicked, “house” horsemen’s group over the interests of the group fully independent of Management. The precedent is dangerous, to say the least.

OTBs:

The harness industry continues to be adversely affected by the intransigence of the regional off track betting corporations regarding certain payments mandated by statute and ordered by the Board to be paid.72 Three specific types of payment are at issue:

69 See, “Memo to all VDH members,” posted on or about 8/24/06 on the VDHAA website, last read online 8/27/06 at, http://www.vernondownshha.com/to_all_vernon_members.htm

70 See, footnote #44 and accompanying text.

71 Memorandum to Vernon Downs Horsemen, March 20, 2006

72 See January 25, 2005 minutes of New York State Racing and Wagering Board, items (D2), (D3) and (D4), last Read online 8/27/06 at http://www.racing.state.ny.us/bmeetings/board.home.htm
“Dark day commissions” are payments from off-track betting corporations to licensed harness tracks in their regions based on handle for races conducted at out-of-state/country thoroughbred tracks, on days when the New York Racing Association is not conducting a race meeting (hence “dark day”) and such licensed regional harness tracks are neither accepting wagers nor displaying the signal from either Finger Lakes Race Track or any out-of-state thoroughbred track.\textsuperscript{73}

“Maintenance of effort” payments are mandated when OTBs accept wagers and display the signal of out-of-state or out-of-country thoroughbred tracks after 7:30 P.M.\textsuperscript{74} In exchange for permission to show nighttime thoroughbred racing, the legislature mandated that the OTBs make payments to harness tracks identical to the actual payments and distributions made by the OTBs during 2002 derived from out-of-state harness races displayed after 6:00 P.M.\textsuperscript{75} Further, when and if aggregate statewide wagering handle after 7:30 P.M. of thoroughbred races exceeds one hundred million dollars, each off track betting corporation conducting such simulcasting must pay to its regional harness track or tracks, an amount equal to two percent of its proportionate share of such excess handle.\textsuperscript{76}

These payments were necessary to hold the harness industry harmless when the O.T.B.’s decided that nighttime and dark day thoroughbred signals would attract more handle than harness signals. Given the poor fiscal shape of N.Y.C.\textsuperscript{77} and some of the other OTBs, it would seem that the decision to cut out harness racing signals, or at least make the harness signals compete with thoroughbred tracks like Fort Erie, Yavapai Downs or Mountaineer, was a bad economic idea from the start.

A third mandated payment to the in-state harness ovals is a proportional share of out-of-state harness handle.\textsuperscript{78}

\begin{itemize}
\item \textsuperscript{73} See, Racing, Pari-Mutuel Wagering and Breeding Law §1017
\item \textsuperscript{74} See, Racing, Pari-Mutuel Wagering and Breeding Law §1017-a.1
\item \textsuperscript{75} See, Racing, Pari-Mutuel Wagering and Breeding Law §§1017-a.2 (a); 1016
\item \textsuperscript{76} See, Racing, Pari-Mutuel Wagering and Breeding Law §1017-a.2 (b)
\item \textsuperscript{78} See, Racing, Pari-Mutuel Wagering and Breeding Law §1016 (3)(b)(3)
\end{itemize}
Monticello Raceway alone claims it is owed $1,357,181.92 and counting from N.Y.C.O.T.B. for direct purses and dark day money79 and at least $688,217.25 from Suffolk Regional O.T.B. for unpaid monies and commissions. 80 A C.P.L.R. Article 78 proceeding commenced by the OTBs seeking to annul the determinations of the Board regarding payments is presently pending. 81 The ability of the racetracks to repeal the OTBs’ legal arguments and recover sums due will serve to enhance the purse accounts for horsemen across the state.

When the OTBs tried to transform harness fans into thoroughbred fans, they were required to do it in such a way that did not harm the industry whose signals they were trying to supplant. Obviously, New York State does not favor the destruction of the harness industry, and wasn’t going to allow that to happen when they granted the OTBs liberalized simulcasting rights. Unfortunately, the OTBs have never been able to fully accept the responsibilities that came along with their newfound legislative rights.

Conclusion

Lacking defined statutory percentages for VLT purse contributions and without legislation enhancing the number of minimum race dates and mandatory payments towards health benefits and administrative costs for their respective associations beyond present law, New York harness horsemen are forced into a position of negotiation, mediation and sometimes arbitration regarding matters which should be assumed. The legislature didn’t create video lottery gaming for the purpose of making a handful of racetrack operators fabulously wealthy. Yet, by giving the for-profit racino operators both exclusive control of the gaming parlor and all the economic benefits of net win not earmarked for the state coffers, the racing, breeding and agriculture industries are at a large disadvantage.

79 Notice of Claim of Monticello Raceway Management, Inc., dated May 26, 2006 and served upon New York City Off-Track Betting Corp. on May 30, 2006

80 Notice of Claim of Monticello Raceway Management, Inc., dated May 26, 2006 and served upon Suffolk County Regional Off-Track Betting Corp. on or about May 26, 2006

81 Suffolk Reg. OTB, et al v. NYS Racing and Wagering Board, Supreme Court, Albany County Index # 4402/2005
True, the courts, not the legislature, caused the unfortunate “blip” on the video lottery gaming radar screen in July 2004. Still, the Court of Appeals has recognized the Assembly and Senate’s clear constitutional power to ensure that the highly lucrative alternative gaming it created in 2001 actually supports, rather than annihilates, the opportunities for harness racing.

Horsemen should feed their horses and families; they shouldn’t need to constantly feed lawyers. The New York harness industry needs a unity of interest, not a mechanism that often pits track against horsemen and vice-versa, and then subversively pits horseman against horseman so a track’s interests may be served.

Corrective legislation re-establishing and redefining the interests of the tracks, horsemen and breeders would go far towards removing rancor and acrimony by establishing known, defined rights and obligations, instead of fostering uncertainty, distrust and disputes. It would relieve the Board of its increased, and most often unnecessary role as a mediator and arbitrator of disputes concerning issues such as VLT revenues. On the racing side, all upstate racing revenues now subject to contractual agreements should have percentages of gross handle revenues earmarked for purses, as they are implemented downstate through the advocacy of former SOA President Del Insko and current SOA President Joe Faraldo.

What’s the state of New York harness racing? The answer truly depends upon the person you ask.