

# JOCKEY ADVERTISING REGULATIONS IN HORSERACING

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## I. INTRODUCTION

Advertising is ever-present in today's American sports. One need only look to the next basketball, football, or motorsport event to see how pervasive it truly has become. While some advertisers utilize television or radio ads, many leading brand advertisers also sponsor individual athletes. For example, LeBron James, the number one pick in the 2003 NBA draft, signed a record seven-year \$90 million dollar endorsement deal with Nike.<sup>1</sup> Moreover, recent University of Kentucky basketball star John Wall, who was the number one pick in the 2010 NBA draft, signed a \$25 million dollar deal with Reebok.<sup>2</sup> In the horse racing industry, however, it is not individual athletes but rather events, like the Kentucky Derby, that attract sponsors.

The Kentucky Derby, a tradition that began in 1875, is one of the most popular horse racing events in the world.<sup>3</sup> In 2010, nearly 156,000 people attended the 136<sup>th</sup> Derby, despite rainy conditions.<sup>4</sup> According to the Kentucky Derby's official website, Derby Day is a fantastic opportunity to showcase one's brand<sup>5</sup> because it is one of "the world's premier sporting events."<sup>6</sup>

Yum! Brands, the presenting sponsor of the 2010 Kentucky Derby, has sponsored the horse racing event pursuant to a five-year agreement and has stated its hope to continue its sponsorship of the event after the

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<sup>1</sup> Dan Collins, *LeBron James Hits \$90M Jackpot: High School Hoops Star Signs Deal with Nike*, CBS NEWS (May 22, 2003), <http://www.cbsnews.com/stories/2003/05/22/national/main555131.shtml>; *LeBron James Hits Jackpot with Endorsement Deals*, USA TODAY (May 22, 2003, 7:55 AM), [www.usatoday.com/sports/basketball/draft/2003-05-22-james-deals\\_x.htm](http://www.usatoday.com/sports/basketball/draft/2003-05-22-james-deals_x.htm).

<sup>2</sup> Adrian Wojnarowski, *Sources: Wall, Reebok Reach \$25M Deal*, YAHOO! SPORTS (June 9, 2010, 9:23 PM), <http://sports.yahoo.com/nba/news?slug=aw-wallreebok060910>.

<sup>3</sup> *Kentucky Derby – History of Racing*, KENTUCKYDERBY.INFO, <http://www.kentuckyderby.info/kentuckyderby-history1874.php> (last visited Oct. 18, 2010).

<sup>4</sup> *Attendance at 155,804 for Kentucky Derby 2010*, THE COURIER-JOURNAL, (May 1, 2010), <http://www.courier-journal.com/article/20100501/FEATURES/5010374/Attendance-at-155-804-for-Kentucky-Derby-2010>.

<sup>5</sup> *Sponsorship Opportunities*, KENTUCKYDERBY.COM, <http://www.kentuckyderby.com/content/sponsorship-opportunities> (last visited Oct. 18, 2010).

<sup>6</sup> *2011 Kentucky Derby*, KENTUCKYDERBY.INFO, <http://www.kentuckyderby.info/> (last visited Oct. 18, 2010).

expiration the agreement this year.<sup>7</sup> Advertising is a lucrative business, and this is especially true when an event like the Kentucky Derby is involved. However, the Derby, because of advertising regulations placed on its jockey participants, has increasingly found itself involved in legal disputes.

The income of the jockeys involved in the Kentucky Derby is rarely mentioned; however, it stands as a key issue surrounding advertising at the world-renowned horse race. While the winning jockey's pay is substantial, the other jockeys receive little more than meal money.<sup>8</sup> For instance, the jockey who won the 2010 Kentucky Derby earned roughly \$101,531.25, while the second and third place jockeys received five percent of their owner's take.<sup>9</sup> Following this year's Derby, one jockey agent said that for the remaining jockeys, riding in the Run for the Roses "is worth a couple hundred dollars apiece."<sup>10</sup> It should therefore come as no surprise that jockeys desire to earn additional money. Money earning opportunities most frequently arise from advertising. Consequently, many jockeys seek to display advertisements on their racing attire.

The advertising issue concerning jockey attire that surrounds the Derby has sparked controversy in the Thoroughbred industry. Regulations regarding jockey attire differ from state to state.<sup>11</sup> Some states completely prohibit jockeys from wearing advertisements while others place restrictions on attire that accomplish the same or similar results.<sup>12</sup> Jockeys who seek to use advertising as an additional source of income have faced opposition. Traditionalists believe that horse racing needs to follow time-honored customs. Ned Bonnie, a member of the Kentucky Horse Racing Commission, explained in an interview that he has "'learned to live with' advertising," but that he does not want horse racing to become like car racing, where drivers look like walking advertisements.<sup>13</sup>

This Note will begin with a brief background on state racing commissions' authority to regulate advertising in the Thoroughbred industry. Subsequently, it will analyze the ongoing controversy regarding Kentucky's advertising regulations. Next, it will examine how different states have regulated jockey advertising. Finally, this Note will explain the

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<sup>7</sup> Ed DeRosa, *Yum! Brands Wants to Renew Kentucky Derby Partnership*, THOROUGHBRED TIMES (May 24, 2010, 8:29 PM), <http://www.thoroughbredtimes.com/national-news/2010/May/24/Yum-Brands-wants-to-renew-Kentucky-Derby-partnership.aspx>.

<sup>8</sup> Darren Rovell, *Kentucky Derby Doesn't Make Jockeys Rich*, CNBC SPORTSBIZ (Apr. 20, 2010, 10:02 AM), [http://www.cnbc.com/id/36869623/Kentucky\\_Derby\\_Doesn\\_t\\_Make\\_Jockeys\\_Rich](http://www.cnbc.com/id/36869623/Kentucky_Derby_Doesn_t_Make_Jockeys_Rich).

<sup>9</sup> *Id.* (Second and Third place horse owners receive \$400,000 and \$200,000 respectively. Five percent minus the fees and expenses of a jockey (agents, travel, equipment, etc.) leaves them with roughly 7,000-14,000).

<sup>10</sup> *Id.*

<sup>11</sup> See *infra* Part IV.A-C.

<sup>12</sup> *Id.*

<sup>13</sup> Gregory Hall, *Jockey Advertising Stirs up New Issues*, THE COURIER-JOURNAL, June 6, 2010, at D.1 available at <http://proquest.umi.com/pqdlink?did=2052138331&sid=1&Fmt=3&clientId=47297&RQT=309&VName=PQD>.

need for a uniform advertising policy applicable to the American horse racing industry.

## II. STATE AUTHORITY TO REGULATE JOCKEY ADVERTISING

States are responsible for regulating the horse racing industry because the federal government has yet to assert jurisdiction. As the horse racing industry includes matters which “affect commerce,” the federal government, likely through the National Labor Relations Board (“NLRB”), could legally assert regulatory authority;<sup>14</sup> however, in the absence of this assertion, the horse racing industries across the country are governed by state law.

### A. *The NLRB Declination of Jurisdiction over Horse Racing*

On April 17, 1971, in *Centennial Turf Club, Inc.*, the NLRB concluded that it would not assert jurisdiction over the horse racing industry for several reasons.<sup>15</sup> First, the NLRB noted that racetrack operations are local in nature.<sup>16</sup> Next, the NLRB cited an earlier case, *Walter A. Kelley*,<sup>17</sup> which rationalizes the NLRB’s decision not to assert jurisdiction by arguing that state agencies have strong interests in supervising and regulating horse racing and the operation of racetracks.<sup>18</sup> Finally, the NLRB acknowledged that horse racing is a state-created monopoly and is subject to extensive local regulation.<sup>19</sup>

In 1978, Congress enacted the Interstate Horseracing Act<sup>20</sup> which utilized the commerce clause to regulate horse racing wagering across state lines.<sup>21</sup> This kind of statute suggests that, although states currently retain their authority to regulate horse racing,<sup>22</sup> Congress can, if it so chooses, subsume this authority in the future, providing an alternative path to effective regulation.

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<sup>14</sup> NLRB Horseracing and Dog Racing Industries, 29 C.F.R. 103.3 (2010).

<sup>15</sup> *Centennial Turf Club, Inc.*, 192 N.L.R.B. 698, 699 (1971).

<sup>16</sup> *Id.* at 698.

<sup>17</sup> *Walter A. Kelly*, 139 N.L.R.B. 744 (1962).

<sup>18</sup> *Id.* at 747.

<sup>19</sup> *Id.*

<sup>20</sup> Interstate Horseracing Act of 1978, 15 U.S.C. §§3001-3007 (2006).

<sup>21</sup> Interstate Horseracing Act of 1978, 15 U.S.C. § 3001(b) (2006).

<sup>22</sup> Tom LaMarra, *Is Compact Answer to Federal Regulation?*, BLOODHORSE.COM (Mar. 26, 2008, 11:20 PM), <http://www.bloodhorse.com/horse-racing/articles/44264/is-compact-answer-to-federal-regulation>.

### *B. Creation of State Racing Commissions*

In 1894, the Jockey Club, an organization formed “by several prominent Thoroughbred owners and breeders,”<sup>23</sup> was the first central authority in horse racing.<sup>24</sup> It was created to establish “a sense of order to the sport.”<sup>25</sup> However, in 1951, the New York Court of Appeals, in *Fink v. Cole*, limited the Jockey Club’s authority.<sup>26</sup> The court held it unconstitutional for a state government to delegate licensing power to any private organization;<sup>27</sup> this decision resulted in state legislatures granting broad power to state agencies, rather than private organizations, to regulate horse racing.

In California, the state legislature gave the California Horse Racing Board the responsibility to “[adopt] rules and regulations for the protection of the public and the control of the horse racing and pari-mutuel wagering.”<sup>28</sup> Likewise, the Kentucky Legislature authorized the Kentucky Horse Racing Authority to promulgate administrative regulations connected to legitimate horse racing and wagering conducted in the state.<sup>29</sup> Additionally, Kentucky opted to provide its governors with the power to abolish racing commissions and re-appoint new ones.<sup>30</sup> Kentucky Executive Order 2008-668 authorized Governor Steve Beshear to establish the Kentucky Horse Racing Commission (hereinafter “the Commission”), and transfer all authority from the Horse Racing Authority to the Commission.<sup>31</sup>

With each state having the power to regulate horse racing, a uniform set of regulations is almost impossible. Without uniform regulations, each state regulatory scheme regarding advertising risks controversy, legal battles, and forced retraction or elimination of such regulations. Kentucky, in particular, has had difficulty in crafting jockey regulations that have not resulted in legal conflicts.

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<sup>23</sup> *About The Jockey Club*, THE JOCKEY CLUB, [http://www.jockeyclub.com/about\\_tjc.asp](http://www.jockeyclub.com/about_tjc.asp) (last visited Mar. 26, 2010).

<sup>24</sup> *History of Horse Racing*, PRESS.DISCOVERY.COM, ANIMAL PLANET, [http://press.discovery.com/ekits/jockeys-2/media/pdf/JOCKEYS\\_HISTORY\\_OF\\_HORSE\\_RACING.pdf](http://press.discovery.com/ekits/jockeys-2/media/pdf/JOCKEYS_HISTORY_OF_HORSE_RACING.pdf).

<sup>25</sup> THE JOCKEY CLUB, *supra* note 23.

<sup>26</sup> See *Fink v. Cole*, 97 N.E.2d 873, 876 (N.Y. 1951).

<sup>27</sup> *Id.*

<sup>28</sup> CAL. BUS. & PROF. CODE § 19440(a)(1) (West 2009).

<sup>29</sup> KY. REV. STAT. ANN. § 230.215 (West 2010).

<sup>30</sup> *Kentucky Governor Dissolves State’s Horse Racing Authority*, USA TODAY, (July 3, 2008, 7:13 PM), [http://www.usatoday.com/sports/horses/2008-07-03-kentucky-racing-authority\\_N.htm](http://www.usatoday.com/sports/horses/2008-07-03-kentucky-racing-authority_N.htm).

<sup>31</sup> Ky. Exec. Order No. 2008-668 (2008), available at <http://apps.sos.ky.gov/Executive/Journal/ejimages/2008-MISC-2008-0668-196294.pdf>.

## III. KENTUCKY'S CHANGING JOCKEY ADVERTISEMENT REGULATIONS

Kentucky is a visible player in the larger debate regarding jockey advertising. Horse racing is a deeply rooted tradition in the home state of the Kentucky Derby. In 1789, the state's first racetrack opened in Lexington,<sup>32</sup> a city that boasts the nickname "horse capital of the world"<sup>33</sup> and is home to Keeneland racetrack and its annual race, the Blue Grass Stakes.<sup>34</sup> Churchill Downs, another well-known racetrack located in Louisville, Kentucky, features the Kentucky Derby. In light of this tradition, it is no surprise that the Commission, which oversees the activities of storied racetracks like Keeneland and Churchill Downs, strictly enforces a variety of administrative regulations, including advertising regulations, in the interest of the horse health, racing participant safety, and racing public protection.<sup>35</sup>

The Commission's purpose is to ensure that horse racing in Kentucky is "of the highest quality and free of any corrupt, incompetent, dishonest or unprincipled practices and . . . [to] maintain the appearance as well as the fact of complete honesty and integrity of horse racing in the Commonwealth."<sup>36</sup> In keeping with its purpose, the Commission has enacted regulations concerning jockey advertising.<sup>37</sup> These regulations have caused disputes because while some jockeys believe that advertising could boost the sport and pad their pockets,<sup>38</sup> those in support of the regulations believe that horse racing should be kept traditional and free from such advertisements.<sup>39</sup> Kentucky's first jockey advertising regulation stressed adherence to "traditions of the turf," and granted the Commission the authority to determine precisely what that phrase meant.<sup>40</sup>

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<sup>32</sup> *Horse Racing Kentucky – Churchill Downs, Keeneland, Ellis Park, Turfway Park, Kentucky Downs Racing Picks, Tips & Result*, HORSERACINGKENTUCKY.COM, <http://horseracingkentucky.com> (last visited Oct. 19, 2010).

<sup>33</sup> VISITLEX.COM, [visitlex.com](http://visitlex.com) (last visited Oct. 19, 2010).

<sup>34</sup> *Toyota Blue Grass Stakes 2010*, KEENELAND.COM, <http://www.keeneland.com/bluegrassstakes/lists/copy/copy.aspx?Page=Toyota> (last visited Oct. 19, 2010).

<sup>35</sup> *Medication Information*, KENTUCKY HORSE RACING COMMISSION, <http://www.khrc.ky.gov/racing/medication.htm> (last visited Oct. 19, 2010).

<sup>36</sup> KY. REV. STAT. ANN. § 230.215(West 2010).

<sup>37</sup> 810 KY. ADMIN. REGS. 1:009(15) (2008).

<sup>38</sup> Bruce Schreiner, *Jockeys Can Wear Advertising on Uniforms*, USA TODAY (Apr. 29, 2004, 7:49 PM), [http://www.usatoday.com/sports/horses/triple/derby/2004-04-29-jockeys-ads\\_x.htm](http://www.usatoday.com/sports/horses/triple/derby/2004-04-29-jockeys-ads_x.htm).

<sup>39</sup> See Hall, *supra* note 13.

<sup>40</sup> 810 KY. ADMIN. REGS. 1:009(14)(3) (2002).

*A. Traditions of the Turf*

For many years, jockey advertising in Kentucky was governed by an uncontroversial regulation which stated, “[a]dvertising, promotional, or cartoon symbols or wording which in the opinion of the [C]ommission are not in keeping with the traditions of the turf shall be prohibited.”<sup>41</sup> However, in 2004, this regulation gave rise to *Albarado v. Kentucky Racing Commission*.<sup>42</sup>

In *Albarado*, “Jockeys Robby Albarado, Brian Peck, and Shane Sellers (collectively “Albarado Plaintiffs”), and Jockeys Jerry Bailey, John Velazquez, José Santos, Alex Solis, and Shane Sellers (collectively “Bailey Plaintiffs”)...filed separate actions against the Kentucky Racing Commission and the Kentucky Horse Racing Authority (collectively “the Authority”).”<sup>43</sup> The Plaintiffs claimed that one of the Authority’s regulations, 810 KAR 1:009, Section 14(3), violated their First and Fourteenth Amendment rights under the United States Constitution as it prohibited jockeys from wearing advertisements and promotional logos on their racing attire.<sup>44</sup> Additionally, they sought a declaration that the applicable regulation be ruled unconstitutional both on its face and as applied.<sup>45</sup> Finally, they requested “an injunction against the enforcement of the regulation during the ongoing races at Churchill Downs.”<sup>46</sup>

The issues involved in *Albarado* arose from the desire of the Plaintiffs to use their racing attire to display personal and commercial messages while participants in the 2005 Kentucky Derby.<sup>47</sup> The “Albarado Plaintiffs desire[d] to wear a patch on their breeches that [bore] the name of their labor organization, the Jockeys’ Guild.”<sup>48</sup> This patch featured “a picture of a jockey’s boot, the organization’s trademark, and in some cases, the picture of a wheelchair as a symbol of handicapped status.”<sup>49</sup> They wanted to wear this patch to symbolize the Jockeys’ Guild’s efforts to improve the lives of disabled jockeys.<sup>50</sup> The “Bailey Plaintiffs want[ed] to wear ‘tasteful and traditional’ logos advertising corporate sponsors on their breeches and/or their turtlenecks because they [had] an economic interest in attracting personal corporate sponsorship.”<sup>51</sup> As both the patches and logos

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<sup>41</sup> *Id.*

<sup>42</sup> *Albarado v. Ky. Racing Comm’n*, 496 F. Supp. 2d 795, 799 (W.D. Ky. 2004).

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> *Albarado*, 496 F.Supp.2d at 799.

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

would violate the Commission's regulation, the Plaintiffs resorted to judicial action.<sup>52</sup>

On April 29, 2004, two days prior to the Derby, Judge Heyburn granted the injunction to allow the Bailey Plaintiffs to wear commercial advertising logos;<sup>53</sup> the court further determined that all jockeys could wear the Jockeys' Guild patch at their leisure.<sup>54</sup> The court acknowledged that Kentucky's interest in regulating the racing industry was strong: "one cannot deny the importance of the Commonwealth's interests in regulating thoroughbred racing, perhaps its signature industry that embodies so many aspects of its culture and image."<sup>55</sup> As a counterweight to the state's interest, however, the court pointed out that the Bailey Plaintiffs' advertising logos constituted commercial speech, while the Albarado Plaintiffs' possessed a private speech protection concerning the Jockeys' Guild patch.<sup>56</sup>

As the Jockeys' Guild patch was protected speech, the court applied a four factor test of constitutionality to the content-neutral regulation. The court stated that "[p]rotected speech is subject to the highest scrutiny for which the state 'must show that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end.'"<sup>57</sup> The court decided that wearing the Jockeys' Guild patch was protected private speech because its message was not "borne out of an economic motivation or used for a primarily advertising purpose."<sup>58</sup> The court further explained that even though "the Jockeys' Guild provides economic and employment benefits to its members," wearing the patch is not economic in nature and any such impact would be incidental.<sup>59</sup>

Additionally, the court ruled that the Bailey Plaintiffs' commercial speech should be analyzed under an intermediate review standard rather than the higher standard of strict scrutiny applied with respect to private speech.<sup>60</sup> In *Cent Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n.*, the Supreme Court established the legal standard in which to determine "whetherwhether a state's restrictions on commercial speech are unconstitutional."<sup>61</sup> Applying the test from *Central Hudson*, the court weighed the following four factors: "(1) the commercial speech must concern lawful activity and not be misleading; (2) the government must

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<sup>52</sup> *Id.* at 800.

<sup>53</sup> *Id.* at 809.

<sup>54</sup> *Albarado*, 496 F.Supp.2d at 808.

<sup>55</sup> *Id.* at 802.

<sup>56</sup> *Id.* at 804.

<sup>57</sup> *Id.* at 804 (quoting *Widmar v. Vincent*, 454 U.S. 263, 270 (1981)).

<sup>58</sup> *Albarado*, 496 F.Supp.2d at 804.

<sup>59</sup> *Id.*

<sup>60</sup> *Id.* at 805.

<sup>61</sup> *Id.* (citing *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n.*, 447 U.S. 557, 563-66 (1980)).

assert a substantial interest in the regulation of speech; (3) the regulation at issue must directly advance the government's interest; and (4) the regulation must be no more extensive than necessary to serve that interest.”<sup>62</sup> After weighing the *Central Hudson* factors, the *Albarado* court concluded that the Authority's regulatory provision had no direct or material nexus to the legitimate interest that it asserted, and, therefore, a limitation on Plaintiffs' First Amendment rights was unconstitutional.<sup>63</sup>

Following the *Albarado* decision, jockeys participating in horse racing event in Kentucky were granted the right to wear advertisements as the court suspended the state ban on promotional logos worn by jockeys.<sup>64</sup> Absent intervention in the form of another regulation, this ruling would have permitted jockeys to wear advertisements in the 2005 Kentucky Derby the following year.

### *B. Request to Wear*

With the Derby quickly approaching and the previous advertising regulation struck down, the Kentucky Horse Racing Authority (hereinafter “the Authority”) moved to adopt an emergency regulation. It did so because a properly promulgated regulation would not have “taken effect until after that year's Derby due to the state's rulemaking process that allows for public comment and legislative review.”<sup>65</sup> This emergency regulation prompted *Rose v. Kentucky Horse Racing Authority*.<sup>66</sup>

On May 7, 2005, during the 131<sup>st</sup> Kentucky Derby, both Jeremy Rose (“Rose”) and Kent Desormeaux (“Desormeaux”) wore an advertisement their breeches.<sup>67</sup> After the race, stewards ruled against Rose, Desormeaux, and one other jockey for wearing the advertisements during the Derby.<sup>68</sup> All three jockeys were fined \$5,000 and suspended for seven days.<sup>69</sup>

The administrative regulation at issue was 810 KAR 1:009E(15), which the Authority adopted just before the 2005 Kentucky Derby.<sup>70</sup> This regulation was adopted as an emergency regulation pursuant to KRS

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<sup>62</sup> *Albarado*, 496 F.Supp.2d at 805 (citing *Cent. Hudson*, 447 U.S. at 566)).

<sup>63</sup> *Albarado*, 496 F.Supp.2d at 808.

<sup>64</sup> *Id.* at 809.

<sup>65</sup> Blood-Horse Staff, *Ruling Favors Jockeys Over Derby Logos*, BLOODHORSE.COM (Mar. 19, 2009, 10:57 AM), <http://www.bloodhorse.com/horse-racing/articles/49713/ruling-favors-jockeys-over-derby-logos>.

<sup>66</sup> *Rose v. Ky. Horse Racing Auth.*, No. 06-CI-1180 (Franklin Cir. Ky. Mar. 17, 2009) (unpublished opinion on file with author).

<sup>67</sup> Brief for Petitioners at 1, *Rose v. Ky. Horse Racing Auth.*, No. 06-CI-1180 (Franklin Cir. Ky. Mar. 17, 2009).

<sup>68</sup> *Id.*

<sup>69</sup> Blood-Horse Staff, *supra* note 66.

<sup>70</sup> *Rose v. Ky. Horse Racing Auth.*, No. 06-CI-1180, slip op., 2 (Franklin Cir. Ky. Mar. 17, 2009) (unpublished opinion on file with author). See 810 KY. ADMIN. REGS. 1:009E(15) (West 2005).



13A.190;<sup>71</sup> however, the jockeys argued that the regulation was not immediately necessary to meet an imminent threat to public health, safety, or welfare, prevent a loss of federal or state funds, meet a deadline established by law, or protect human health and environment, as required by the statute.<sup>72</sup>

The regulation prohibited jockeys from wearing “advertising or promotional material of any kind on clothing within one (1) hour before or after a race” (exempting recognized logos of entities representing jockeys), unless written approval was evidenced by the completion and the return of the “Request to Wear Advertising and Promotional Materials form;”<sup>73</sup> this form was to be completed and submitted to the stewards no later than two (2) days before the subject race.<sup>74</sup> Additionally, a jockey wishing to advertize must acquire the written approval of the managing owner of the horse the jockey was to ride, the racetrack, and the stewards.<sup>75</sup> The regulation further required the advertiser not be a direct competitor of the racetrack or one of its corporate or marketing partners.<sup>76</sup> Finally, the jockey might then be required to submit the proposed advertisement for review by the track and the horse owner before the time of entry.<sup>77</sup>

As stated earlier, the plaintiff jockeys in *Rose* challenged the emergency nature of the Authority’s action by claiming that the regulation was not immediately necessary as required by the statute.<sup>78</sup> The Authority argued that the emergency regulation was justified.<sup>79</sup> The court first explained that “a prior version of this emergency regulation, which was far less specific in terms of procedure and limitation, was struck down as an unconstitutional prior restraint on free speech in violation of the First Amendment of the United States Constitution.”<sup>80</sup> The court then noted that it took eight months for this emergency regulation to be promulgated, which was adopted as “an attempt to cure the constitutional deficiencies in the earlier regulation.”<sup>81</sup>

The court held that the emergency regulation implemented by the Authority to prevent riders from wearing logos failed to satisfy the state’s requirements for an emergency regulation.<sup>82</sup> To justify unilateral action when promulgating an emergency regulation, the court explained that an

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<sup>71</sup> *Rose*, No. 06-CI-1180 at 3.

<sup>72</sup> *Rose*, No. 06-CI-1180 at 2; *See* KY. REV. STAT. ANN. § 13A.190 (West 2010).

<sup>73</sup> 810 KY. ADMIN. REGS. 1:009E(15) (West 2005).

<sup>74</sup> *Id.*

<sup>75</sup> 810 KY. ADMIN. REGS. 1:009E(15)(1)(a)(c) (West 2005).

<sup>76</sup> 810 KY. ADMIN. REGS. 1:009E(15)(2)(a) (West 2005).

<sup>77</sup> 810 KY. ADMIN. REGS. 1:009E(15)(5) (West 2005).

<sup>78</sup> *Rose*, No. 06-CI-1180 at 2; *See* KY. REV. STAT. ANN. § 13A.190 (West 2010).

<sup>79</sup> *Id.* No. 06-CI-1180 (Franklin Cir. Ky. Mar. 17, 2009).

<sup>80</sup> *Id.* at 2.

<sup>81</sup> *Id.*

<sup>82</sup> *Id.* at 8.

agency must demonstrate that such preemptive administrative action is necessary in order to:

- (1) Meet an imminent threat to public health, safety, or welfare;
- (2) Prevent a loss of federal or state funds;
- (3) Meet a deadline for the promulgation of an administrative regulation that is established by state law, or federal law or regulation; or
- (4) Protect human health and the environment.<sup>83</sup>

The court stated that the emergency regulation implemented by the Authority failed to meet any of the required statutory criteria for emergency regulation action.<sup>84</sup> Even though the Authority's statement of emergency, as required by KRS § 13A.190(6), explained that its regulation satisfied the statutory requirements because of the impending running of the Kentucky Derby,<sup>85</sup> the court noted that the statement did not address any of the above-mentioned statutorily required criterion.<sup>86</sup>

Finally, the court explicitly rejected the Authority's argument that an emergency existed because of the impending running of the Kentucky Derby.<sup>87</sup> The court pointed out that "it was months of delay and inaction on the part of the [Authority] after the federal court ruling that created the so-called emergency in the first place" and simply stated no emergency existed that justified an emergency regulation prior to the 2005 Kentucky Derby.<sup>88</sup> The court also questioned the Authority's position that jockey ads would have a negative effect on the "time-honored traditions and splendor of Thoroughbred racing" when the race itself was sponsored by Yum! Brands.<sup>89</sup>

Following this ruling, a permanent regulation replaced the emergency regulation on July 1, 2005.<sup>90</sup> Because the permanent regulation and the emergency regulation were identical,<sup>91</sup> the emergency regulation likely would not have been challenged had the Commission enacted it pursuant to the standard time table for promulgating new regulations.

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<sup>83</sup> *Id.* at 3 (quoting KY. REV. STAT. ANN. § 13A.190(1)(a) (West 2004)).

<sup>84</sup> *Rose*, No. 06-CI-1180 at 3.

<sup>85</sup> *Id.* at 3-4.

<sup>86</sup> *Id.* at 5.

<sup>87</sup> *Id.* at 5-6.

<sup>88</sup> *Id.* at 7.

<sup>89</sup> *Id.* at 6.

<sup>90</sup> *Rose*, No. 06-CI-1180 at 5.

<sup>91</sup> Compare 810 KY. ADMIN. REGS. 1:009E(15) (West 2005) with, 810 KY. ADMIN. REGS. 1:009(15) (2006).

*C. The 2006 Regulation*

After the *Albarado* and *Rose* decisions, Kentucky crafted a regulation that both jockeys and authorities appeared to agree with.<sup>92</sup> The regulation was in effect from 2006 until June of 2010 and was almost exactly the same as the emergency and permanent regulations promulgated in 2005.<sup>93</sup> However, it was enacted through default, not emergency, procedures.<sup>94</sup> The regulation required that a “Request to Wear Advertising and Promotional Materials” form be submitted, along with approval of the owner of the horse, the racetrack, and stewards.<sup>95</sup> Additionally, the regulation established guidelines for the types of advertisements that could appear on jockeys’ pants.<sup>96</sup> It described the size and type of advertisements and logos that were permitted and required the approval of owners whose horses would carry advertising jockeys.<sup>97</sup>

For Derby week in recent years, the Jockey Guild has entered into advertising agreements with major sponsors.<sup>98</sup> As soon as these agreements were arranged, Guild representatives moved to obtain the necessary permissions for their riders prior to the race.<sup>99</sup> The 2008 Kentucky Derby was sponsored by Yum! Brands; however, NetJets, Inc. (“NetJets”) sponsored each jockey running for the roses.<sup>100</sup> NetJets’ extension sponsorship to every Kentucky Derby jockey was described as both “historic” and “landmark.”<sup>101</sup> As part of the sponsorship, NetJets agreed to donate \$200,000 to NTRA Charities’ Permanently Disabled Jockeys Fund on behalf of the Derby participating jockeys,<sup>102</sup> and made an additional \$100,000 contribution to the fund.<sup>103</sup>

The sponsorship agreement with NetJets seemed like a great step for jockeys and racetracks alike. All segments of the industry were working together to promote the sport. However, the same jockey advertising regulation that worked so well in 2008 was criticized for the confusion it caused two years later during the 2010 Kentucky Derby.

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<sup>92</sup> 810 KY. ADMIN. REGS. 1:009(15) (2010).

<sup>93</sup> Compare 810 KY. ADMIN. REGS. 1:009E(15) (West 2005) and 810 KY. ADMIN. REGS. 1:009(15) (2006) with 810 KY. ADMIN. REGS. 1:009(15) (2010).

<sup>94</sup> See 810 KY. ADMIN. REGS. 1:009(15) (2010) (operating as an administrative regulation over all prevailing circumstances, not only enacted for an emergency situation).

<sup>95</sup> 810 KY. ADMIN. REGS. 1:009(15)(4) (2010).

<sup>96</sup> 810 KY. ADMIN. REGS. 1:009(15)(2)(b)(1) (2010).

<sup>97</sup> 810 KY. ADMIN. REGS. 1:009(15)(2)(b), (4)(a)(1) (2010).

<sup>98</sup> Ron Mitchell, *KHRC Moves Closer to New Jockey Ad Regulation*, BLOODHORSE.COM (Dec. 23, 2009, 2:07 PM), <http://www.bloodhorse.com/horse-racing/articles/54533/khrc-moves-closer-to-new-jockey-ad-regulation>.

<sup>99</sup> *Id.*

<sup>100</sup> *NetJets to Sponsor Derby Jockeys*, BLOODHORSE.COM (May 2, 2008, 11:23 AM), <http://www.bloodhorse.com/horse-racing/articles/45003/netjets-to-sponsor-derby-jockeys>.

<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

Chrysler sponsored the 2010 Kentucky Derby jockeys to promote its Dodge Ram truck line.<sup>104</sup> The advertising deal was worth \$300,000 and was “presented to [the jockeys] by Churchill Downs and coordinated by the Jockeys’ Guild.”<sup>105</sup> Only one jockey decided not to wear the Dodge Ram logo on his pants.<sup>106</sup>

While the 2005 regulation permitted some jockey advertising, no provision addressed the amount of money involved in sponsorship agreements or reporting requirements.<sup>107</sup> In 2010, the “jockeys had an agreement to wear a Dodge Ram logo during the Run for the Roses,” however, complaints arose that “different versions of the contract were being circulated at Churchill Downs just hours before the race.”<sup>108</sup> The Commission “ha[d] a standardized form spelling out requirements of the state’s rules and regulations,” while “the [Jockeys’] Guild and representatives of horseman’s organizations also had contracts they wanted owners to sign.”<sup>109</sup> The contract circulated by the Guild was “signed by an estimated 11-13 of the participating owners and jockeys, [and] called for a split of 40% to the owner, 40% to the jockey, and 20% to charity.”<sup>110</sup> Some owners agreed to sign one version of the Guild contract which gave 100% of the advertisement money to charity, whereas others declined to sign the Guild contract and signed only a commission-approved contract.<sup>111</sup> One owner signed the commission-approved contract that allocated the money between two charities, but because the owner failed to sign the Guild agreement, the jockey riding his horse could not wear the logo on his pants and the money was not sent to charity.<sup>112</sup>

The Jockeys’ Guild defended its contract and its allocation of advertising money, arguing that the Commission did not “have the authority to dictate how revenues from jockey advertising should be distributed.”<sup>113</sup> The Authority decided, yet again, to implement new regulations regarding jockey advertising. This adjustment came about in part due to the confusion surrounding advertising contracts, like that of Chrysler, before the 2010

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<sup>104</sup> Ron Mitchell, *KHRC Panel Puts Finishing Touches on Ad Regs*, BLOODHORSE.COM (June 3, 2010, 6:45 PM), <http://www.bloodhorse.com/horse-racing/articles/57341/khrc-panel-puts-finishing-touches-on-ad-regs>.

<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

<sup>107</sup> See 810 KY. ADMIN. REGS. 1:009(15) (2005).

<sup>108</sup> Jeffrey McMurray, *Ky. Racing officials change jockey ad rules*, USA TODAY (June 8, 2010, 6:26 PM), [http://www.usatoday.com/sports/horses/2010-06-08-1237029213\\_x.htm](http://www.usatoday.com/sports/horses/2010-06-08-1237029213_x.htm) [hereinafter, *Changing Rules*].

<sup>109</sup> Ron Mitchell, *Jockey Derby Advertising Again at Issue*, BLOODHORSE.COM (May 11, 2010, 8:00 PM), <http://www.bloodhorse.com/horse-racing/articles/56967/jockey-derby-advertising-again-at-issue> [hereinafter, *Derby Advertising at Issue*].

<sup>110</sup> *Id.*

<sup>111</sup> *Id.* (stating that many of the jockeys and owners designated their portions of the advertising funds to charity, allocating different percentages to different charities).

<sup>112</sup> *Id.*

<sup>113</sup> *Id.*

Kentucky Derby,<sup>114</sup> and, more importantly, because the regulation itself was confusing.<sup>115</sup> A goal of the new regulation was clarity and peace among the various parties.

#### *D. The 2010 Regulation*

The Commission's new regulation concerning jockey advertising went into effect on June 15, 2010,<sup>116</sup> and was passed as an emergency regulation.<sup>117</sup> This regulation places more stringent requirements on jockey sponsorship and requires that owners agree to the distribution of advertising money.<sup>118</sup> It was implemented to stiffen existing jockey advertising regulations and to avoid annual confusion prior to the Kentucky Derby.<sup>119</sup> Under this new regulation, financial arrangements contained in advertising agreements must be disclosed, jockey sponsorship must be completed by a deadline, and all parties must sign the required forms.<sup>120</sup> The current regulation also added the following language relating to the new reporting requirement:

The party presenting the advertising or promotional opportunity to the owner and jockey (including without limitation, the owner and jockey) shall disclose in writing all material terms, including financial, regarding the advertising or promotional opportunity to the owner, jockey, and the commission.<sup>121</sup>

During its rules committee hearing, the Commission agreed to "redact any proprietary business information before releasing the [financial information contained in an advertising contract] publicly."<sup>122</sup> However, the national manager for the Jockeys' Guild stated that "several aspects of the regulations, including releasing the terms of the agreements to the Commission, would have a negative impact."<sup>123</sup> In particular, "the transparency . . . sought by the [C]ommission regarding financial terms of the advertising agreements could have a negative effect on the ability to

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<sup>114</sup> Changing Rules, *supra* note 108.

<sup>115</sup> Derby Advertising at Issue, *supra* note 109.

<sup>116</sup> Ron Mitchell, *KY Commission Approves Jockey Ad Regulations*, BLOODHORSE.COM (June 8, 2010, 7:18 PM), <http://www.bloodhorse.com/horse-racing/articles/57417/ky-commission-approves-jockey-ad-regulations> [hereinafter *KY Approves Regulations*].

<sup>117</sup> 810 KY. ADMIN. REGS. 1:009E(15) (2010).

<sup>118</sup> 810 KY. ADMIN. REGS. 1:009E(15) (2010).

<sup>119</sup> Ron Mitchell, *KHRC Moves Closer to New Jockey Ad Regulation*, BLOODHORSE.COM (Dec. 23, 2009, 2:07 PM), <http://www.bloodhorse.com/horse-racing/articles/54533/khrc-moves-closer-to-new-jockey-ad-regulation>.

<sup>120</sup> 810 KY. ADMIN. REGS. 1:009E(15) (2010).

<sup>121</sup> 810 KY. ADMIN. REGS. 1:009E (15)(4)(a) (2010).

<sup>122</sup> KY Approves Regulations, *supra* note 116.

<sup>123</sup> *Id.*

attract sponsors”<sup>124</sup> because the terms of those contracts would then be available to competitors.<sup>125</sup>

While advertising regulation of horse racing in Kentucky has created strong disagreement between the interested parties, other states have succeeded in implementing uncontroversial jockey advertising regulations.

#### IV. OTHER STATE JOCKEY ADVERTISING REGULATIONS

Many states have not had the ongoing problems that Kentucky has experienced with regard to jockey advertising. Thus, regulations adopted by other states provide excellent points of reference for analyzing how Kentucky might approach jockey advertising regulation in the future.

##### *A. New Jersey*

The New Jersey Racing Commission is the agency “responsible for regulating the safety and integrity of the horseracing industry” in New Jersey.<sup>126</sup> It “has jurisdiction over New Jersey’s thoroughbred . . . permit holders and the authority to regulate racing at the state’s four racetracks.”<sup>127</sup> Therefore, like Kentucky’s Commission, regulations concerning jockey advertising would be made by this administrative body.

New Jersey’s current jockey advertising regulation is very similar to Kentucky’s first jockey regulation. A New Jersey racetrack “may impose restrictions on jockey advertisements” if a rule is implemented for either of two reasons and approved by the New Jersey Racing Commission.<sup>128</sup> First, a rule can be “imposed to preserve the traditions of the turf,” which are defined as “those traditions which preserve a genteel, pristine appearance and atmosphere at the racetracks and that do not lend themselves to over commercialization.”<sup>129</sup> Second, a rule can be imposed regarding jockey advertising if it is “to promote the safety of race participants.”<sup>130</sup>

New Jersey’s regulation is unlikely to assist Kentucky because the *Albarado* court struck down a similar regulation on First Amendment grounds. Indeed, given Kentucky’s history with *Albarado*, New Jersey might consider adopting a different regulation that allows a broader exercise of jockey free private and commercial speech.

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<sup>124</sup> *Id.*

<sup>125</sup> *Id.*; *Jockey Advertising Rules Amended*, JOCKEYS’ GUILD.COM (Jun. 9, 2010), <http://www.jockeysguild.com/news/2010/06/jockeyadvertisingrulesamended.html>

<sup>126</sup> *Overview*, THE STATE OF NEW JERSEY, DEPT. OF LAW & PUBLIC SAFETY, <http://www.state.nj.us/lps/racing/about.html>, (last visited Sept. 2, 2010).

<sup>127</sup> *Id.*

<sup>128</sup> N.J. ADMIN. CODE § 13:70-9.51(West 2010).

<sup>129</sup> N.J. ADMIN. CODE § 13:70-9.51(West 2010).

<sup>130</sup> N.J. ADMIN. CODE § 13:70-9.51(West 2010).

*B. California*

The California Horse Racing Board (hereinafter “the Board”) was created in 1933 by a state constitutional amendment that “gave complete jurisdiction and supervision over all racing activities” to the Board.<sup>131</sup>

The Board allows advertising “on jockey attire, owner silks, and track saddlecloths.”<sup>132</sup> However, “a copy of the advertisement signage must be submitted for review . . . to the stewards at the track where the advertisement will be worn” to ensure compliance with the California regulation.<sup>133</sup> This regulation specifies that the measurements of the advertisement are “limited to [a] maximum of 32 square inches on each thigh of the pants on the outer sides between the hip and knee and 10 square inches on the rear at the base of the spine . . . [a] maximum of 24 square inches on boots and leggings on the outside of each nearest the top of the boot . . . [and a] maximum of 6 square inches on the front center in the neck area.”<sup>134</sup>

In 2001, the “Board took a major step . . . towards allowing advertising on jockey silks.”<sup>135</sup> The Board allows advertisements on owner silks when limited to less than “32 square inches on the chest area” and “a maximum of 1.5 inches by 4 inches on each collar.”<sup>136</sup>

Therefore, the Board appears more open-minded with respect to jockey advertising than the Commission. This less controversial regulation may be a step in the right direction for Kentucky to produce a regulation that would not be challenged.

*C. Indiana*

In 2004, Indiana jockeys were “granted permission by the Indiana Horse Racing Commission to display the Jockeys’ Guild patch on their riding pants, but corporate advertisements” were prohibited.<sup>137</sup> This was a “proactive measure” designed by Indiana regulators to avoid a situation similar to what had occurred in Kentucky in 2004.<sup>138</sup> The current

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<sup>131</sup> *Mission Statement*, CALIFORNIA HORSE RACING BOARD, [http://chrb.ca.gov/mission\\_statement.htm](http://chrb.ca.gov/mission_statement.htm) (last visited Oct. 21, 2010).

<sup>132</sup> CAL. CODE REGS. tit. 4, §1691(b) (West 2008).

<sup>133</sup> CAL. CODE REGS. tit. 4, §1691(c) (West 2008).

<sup>134</sup> CAL. CODE REGS. tit. 4, §1691(d) (West 2008).

<sup>135</sup> Eric Mitchell, *California to Permit Jockey Advertising*, BLOODHORSE.COM (July 20, 2001, 10:23 AM), <http://www.bloodhorse.com/horse-racing/articles/5070/california-to-permit-jockey-advertising>.

<sup>136</sup> CAL. CODE REGS. tit. 4, §1691(e) (West 2008).

<sup>137</sup> James Platz, *Indiana Panel OKs Guild Patch, Racing Dates*, BLOODHORSE.COM (Sept. 21, 2004, 11:42 AM), <http://www.bloodhorse.com/horse-racing/articles/24400/indiana-panel-oks-guild-patch-racing-dates>.

<sup>138</sup> *Id.*

regulation allows a jockey to wear advertising or promotional material on clothing if the advertisement complies with certain criteria.<sup>139</sup>

The Indiana advertising regulation allows “[a] maximum of 32 square inches [of advertisements] on each thigh of the [jockey’s] pants on the outer side between the hip and knee and 10 square inches on the rear of the pant at the waistline at the base of the spine . . . [a] maximum of 24 square inches on boots and leggings on the outside of each nearest the top of the boot . . . [and a] maximum of 6 square inches on the front center of the neck area.”<sup>140</sup> Furthermore, a jockey must be “in compliance with the track rules regarding apparel advertising” and “such rules are subject to the approval of the commission.”<sup>141</sup> Finally, stewards of the racetrack may then determine if any advertisement is out of compliance with track rules, if it is inappropriate, or if it is simply in poor taste.<sup>142</sup> The regulation still allows jockeys to display “the Jockey Guild emblem on their riding pants.”<sup>143</sup>

#### V. THE NEED FOR A UNIFORM AND UNCONTROVERSIAL ADVERTISING REGULATION

It appears that with every Kentucky Derby comes a dispute over jockey advertisements. A regulation that protects the integrity of horse racing while allowing maximum economic opportunity for all parties would be ideal for Kentucky and the Thoroughbred industry as a whole. California’s jockey advertising regulation, which allows advertisements on jockey silks if they meet the required measurements, has been less controversial than Kentucky’s regulation and it might be worthwhile for Kentucky to consider adopting a similar regulation.

The Thoroughbred industry needs a uniform and uncontroversial jockey advertising regulation to be enacted. When there are varying regulations, it is increasingly difficult for jockeys, owners, and trainers to abide by each state’s laws when riding in multiple states. Horseracing is an interstate business and there is no reason that states with a major horseracing presence cannot agree on a uniform regulation. Further, most state regulations are too restrictive on jockeys’ rights and any uniform regulation should grant jockeys additional rights in advertising.

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<sup>139</sup> 71 IND. ADMIN. CODE 7.5-6-3.5 (West 2010).

<sup>140</sup> 71 IND. ADMIN. CODE 7.5-6-3.5(a)(1) (West 2010).

<sup>141</sup> 71 IND. ADMIN. CODE 7.5-6-3.5(a)(2) (West 2010).

<sup>142</sup> 71 IND. ADMIN. CODE 7.5-6-3.5(b) (West 2010).

<sup>143</sup> 71 IND. ADMIN. CODE 7.5-6-3.5(c) (West 2010).



## VI. CONCLUSION

Kentucky has struggled to promulgate a jockey advertising regulation that meets the needs of both jockeys and racetracks. Since 2004, the Kentucky Horse Racing Commission has enacted several regulations. The first regulation was struck down as unconstitutional, while the next regulation was struck down because the enacting process stipulated by state statute was not followed. In 2010, Kentucky adopted a new regulation hoping to end the disputes regarding jockey advertisements. However, this attempt will likely fail due to its unnecessarily restrictive approach to jockey advertising and the chilling effect that it will create among potential sponsors because of the new financial reporting requirements. Not only does Kentucky need to establish a regulation that meets the needs of the competing interests within the industry, but the Thoroughbred industry as a whole needs to implement a uniform jockey advertising regulation.

Uniformity between racing states would be beneficial to all interests because it would not create confusion when owners and jockeys travel to different states. The Kentucky Derby, along with other races, continues to have corporate sponsors and it seems only fair to allow jockeys, presumably the least paid participants in industry, the same opportunity. Not giving a jockey the same advertising opportunity as a track is arbitrary and unfair, and, according to at least one state court opinion, unconstitutionally restrictive of First Amendment rights guaranteed by the federal constitution. Advertising provides racetracks with the ability to publicize and finance the races for which they operate. Jockeys, key and necessary participants in such races, should not be restricted from similar opportunities to financially support themselves in a job they love and an industry and profession they seek to promote.

