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# Antitrust Boycott Analysis Applied to a Harness Racing Association

BY A. VERNON CARNAHAN\* AND DAVID S. VERSFELT\*\*

## INTRODUCTION

For many centuries,<sup>1</sup> harness racing was a polite diversion for European gentlemen willing to test their horses in loosely-arranged contests of speed and endurance.<sup>2</sup> With its spread to the New World, the sport attained a more formal structure and entered a period marked by organized races at agricultural and county fairs.<sup>3</sup> In present-century harness racing, the sport has matured into a major international activity involving hundreds of racetracks, thousands of breeders, trainers and horse owners, many thousands of races each year, and millions of spectators.<sup>4</sup>

In the early years of this modern development, a number of factors tended to keep the antitrust laws from having a major impact upon the sport. Although the financial aspects of the sport have gained significance over the years, they did not match the

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<sup>1</sup> Harness racing is one of the oldest sports. During the 1930s, archaeological excavations in present-day Turkey uncovered records of the training of harness racehorses dating from as early as 1350 B.C. The stone tablets contain descriptions confirming that the trotting horse held an honored position in the Assyro-Babylonian Empire. 8 *ENCYCLOPEDIA BRITANNICA* 1101 (1977).

<sup>2</sup> For example, the Norfolk Trotter breed, which emerged in England around 1750, was typically road-raced as entertainment for its owners. *Id.*

<sup>3</sup> There were trotting racetracks in regular use in the United States by 1810. The American Standardbred horse was formally established in 1879, and the Quadrilateral Trotting Combination, now known as the Grand Circuit of American harness racing, was formed in 1871. See generally, J. HERVEY, *THE AMERICAN TROTTER* (1947).

<sup>4</sup> Several events occurred around 1940 to propel harness racing into its present, flourishing condition. In 1939, a broadly based coalition of interested individuals established The United States Trotting Association as a parent organization to formulate national rules of racing competition and to maintain comprehensive and accurate records for the sport. The next year, Roosevelt Raceway in New York City commenced regularly scheduled parimutuel night harness racing, and the mobile starting gate was introduced a few years later. With the end of World War II, the sport was poised for rapid growth. *Id.*

economic breadth of an oil or tobacco trust.<sup>5</sup> In addition, decisions of the United States Supreme Court declaring baseball to be exempt from antitrust scrutiny left unclear the antitrust status of other sporting activities.<sup>6</sup> For decades, amicable resolutions of disputes arising in harness racing operations were typically reached without resort to litigation.

Now the sport is a major financial enterprise offering substantial commercial opportunities. Attendance at American harness tracks rose from fewer than 6 million spectators in 1948 to a fluctuating level of more than 25 million per year during the 1970s.<sup>7</sup> The number of horses starting races increased from 9,300

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<sup>5</sup> As early as 1899, the oil empire established by John D. Rockefeller was worth hundreds of millions of dollars and included more than 70 corporations. The United States Supreme Court found that combination to be unlawful in *Standard Oil Co. of New Jersey v. United States*, 221 U.S. 1 (1911). In *United States v. American Tobacco Co.*, 221 U.S. 106 (1911), a nationwide tobacco trust was found to constitute an unreasonable restraint of trade.

<sup>6</sup> The Supreme Court first addressed the question of baseball's status under the anti-trust laws in *Federal Baseball Club of Baltimore, Inc. v. National League of Professional Baseball Clubs*, 259 U.S. 200 (1922), *aff'g*, 269 F. 681 (D.C. Cir. 1920). The case was brought by the only remaining team in the Federal League, which alleged that the National and American Leagues had violated the Sherman Antitrust Act of July 2, 1890 ch. 647, § 7, 26 Stat. 209, 210, by buying some Federal League teams and otherwise inducing others to abandon that league. 259 U.S. at 207. The Supreme Court found that although the defendants' activities did involve interstate travel to play games, that "personal effort, not related to production, is not a subject of [interstate] commerce." *Id.* at 209. Further, the Court held that this transportation and interstate play was "a mere incident, not the essential thing." *Id.* (citing *Hooper v. California*, 155 U.S. 648, 655 (1895)).

In the following decades, the interstate commerce basis for its reasoning was substantially undermined. See *Apex Hosiery Co. v. Leader*, 310 U.S. 469 (1940); *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937); *Neville, Baseball and the Antitrust Laws*, 16 *FORDHAM L. REV.* 208 (1947). Despite the change of the Supreme Court's rationale concerning the interstate commerce clause, the Court continued to exempt the sport from antitrust law. See *Flood v. Kuhn*, 407 U.S. 258 (1972); *Toolson v. New York Yankees, Inc.*, 346 U.S. 356 (1953). In any event, it was not until 1955 that the Court began to clarify that the baseball exemption did not encompass all sports in which the interstate commerce aspects could be characterized as "incidental." See *United States v. International Boxing Club of New York, Inc.*, 348 U.S. 236 (1955) (boxing is interstate trade for purposes of the Sherman Act); *United States v. Shubert*, 348 U.S. 222 (1955) (ownership of 40 theatres in eight states held affecting interstate commerce for purposes of the Sherman Act). In those cases, the Court for the first time made clear that its prior baseball decisions had created a special exemption, not a general standard. See generally J. WEISTART & C. LOWELL, *THE LAW OF SPORTS* § 5.02 (1979).

<sup>7</sup> Figures are from data compiled and preserved by the United States Trotting Association (USTA). See *THE YEAR BOOK* (published annually by USTA); 1982 USTA TROT-

to more than 50,000 per year by 1981.<sup>8</sup> Total purses soared from less than \$10 million to more than \$247 million from 1948 to 1981, an increase of more than twenty-three fold.<sup>9</sup> Economic inducements include ever-increasing awards of prize money for successful competitors,<sup>10</sup> substantial purchase and stud prices for promising horses,<sup>11</sup> and burgeoning returns for racetracks, particularly organizations that sponsor pari-mutuel race meetings.<sup>12</sup>

The financial development of the sport has brought challenges against racing associations by parties alleging that association conduct restrains competition in violation of the antitrust laws. Such challenges have compelled the courts to determine whether a sporting enterprise should be evaluated under the same antitrust doctrines that govern the conduct of commercial corporations, or whether different doctrines should apply. In order to illuminate an emerging variation of antitrust doctrine, this Article will address the recent application of antitrust boycott analysis in the context of a challenge to rules of a non-profit harness racing association. The authors believe that this discussion, while primarily focused on selected litigation involving harness racing, can provide principles to guide antitrust analysis for associations and other group entities in the area of equine and other sports.

## I. THE RULE OF PER SE ILLEGALITY AND THE CONCEPT OF A BOYCOTT

Section 1 of the Sherman Act proscribes "[e]very contract, combination . . . or conspiracy, in restraint of trade or com-

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TING AND PACING GUIDE [hereinafter cited as 1982 GUIDE] (also published annually by USTA).

<sup>8</sup> 1982 GUIDE, *supra* note 7, at 53.

<sup>9</sup> *Id.*

<sup>10</sup> The purse earned by the winner of the prestigious Hambletonian race for three-year-old trotters in DuQuoin, Illinois, rose from \$46,267 in 1947 (won by Hoot Mon) to \$838,000 in 1981 (won by Shiaway St. Pat). Winning purses for the Meadowlands, New Jersey pace for three-year-olds have risen to \$1 million in the five years the race has been run. *Id.* at 171, 181. See N.Y. Times, July 18, 1981, at 19, col. 2.

<sup>11</sup> In recent years, leading yearlings have been auctioned for between \$200,000 and \$425,000. 1982 GUIDE, *supra* note 7, at 158.

<sup>12</sup> While it is difficult to obtain financial operating data for non-public racetracks, the record amounts of pari-mutuel wagering for the largest of them amount to more than \$1 million per day. See *id.* at 5-18.

merce among the several States."<sup>13</sup> Early United States Supreme Court cases interpreting this provision held that it required a determination of the "reasonableness" of the conduct challenged in each case,<sup>14</sup> an approach long labeled the "rule of reason."<sup>15</sup> For certain types of conduct, however, the Court has applied a rule of per se illegality that precludes inquiry into the reasonableness of conduct considered to be a plainly anticompetitive restraint of trade.<sup>16</sup> Boycotts, often called concerted refusals to deal, are one form of conduct that has been condemned as per se unlawful.<sup>17</sup>

Loosely defined, a boycott exists when a group of actors in a market seek to protect themselves from the competition of non-group actors in that market. The means employed is some sort of concerted action, typically a threat, intended to deprive the non-group actors of trade relationships or opportunities which they

<sup>13</sup> 15 U.S.C. § 1 (1976).

<sup>14</sup> See, e.g., *Chicago Bd. of Trade v. United States*, 246 U.S. 231 (1918); *Standard Oil Co. of New Jersey v. United States*, 221 U.S. at 1 (1911).

<sup>15</sup> See 246 U.S. at 231; *United States v. American Tobacco Co.*, 221 U.S. at 106. In *Chicago Bd. of Trade v. United States*, in evaluating a market restriction imposed by a commodities exchange, the Court suggested that a determination under the rule of reason would

[c]onsider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts.

246 U.S. at 238. For a current description of relevant considerations, see *National Soc'y of Professional Eng'rs v. United States*, 435 U.S. 679 (1978).

<sup>16</sup> In other words, if the Court finds that the conduct falls within the definition of conduct proscribed as per se unlawful, it makes no further findings and does not consider any asserted justifications for the conduct. See, e.g., *Catalano, Inc. v. Target Sales, Inc.*, 446 U.S. 643 (1980) (per curiam); 435 U.S. at 692; *United States v. Topco Assoc.*, 405 U.S. 596 (1972); *Northern Pac. Ry. v. United States*, 356 U.S. 1, 5 (1958); *General Cinema Corp. v. Buena Vista Distrib. Co.*, 532 F. Supp. 1244, 1256-61 (C.D. Cal. 1982). If the conduct is not per se unlawful, the Court proceeds to evaluate the alleged antitrust violations under the traditional rule of reason. See *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36 (1977). Determining whether the conduct at issue is a type proscribed as per se unlawful is often a difficult task. See *Broadcast Music, Inc. v. CBS*, 441 U.S. 1, 8 (1979) ("easy labels do not always supply ready answers").

<sup>17</sup> See 446 U.S. at 643 (horizontal price fixing); *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. at 97 (1980) (vertical price fixing); 405 U.S. at 596 (horizontal territorial restraints and horizontal customer restraints); 356 U.S. at 1 (tying arrangements). The Supreme Court recently overruled application of the per se rule to vertical territorial and customer restraints. See 433 U.S. at 36 (overruling *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365 (1967)).

need to compete.<sup>18</sup> Determining whether challenged conduct constitutes an unlawful boycott is often a difficult task, however, and applying a per se rule in this context has led to uneven holdings by courts and widespread criticism by legal commentators.<sup>19</sup> As one scholar notes, "there is more confusion about the scope and operation of the per se rule against group boycotts than in reference to any other aspect of the per se doctrine."<sup>20</sup>

## II. THE SUPREME COURT'S EXPANSIVE LANGUAGE

In 1914, the United States Supreme Court offered its first<sup>21</sup> evaluation of a concerted refusal to deal in *Eastern States Retail Lumber Dealers' Association v. United States*.<sup>22</sup> A group of re-

<sup>18</sup> Professor Sullivan, using for his example the "wholesale" level as the level of trade in which the restraint takes place, describes a typical boycott:

[T]he boycotting wholesalers may concertedly ask manufacturers not to sell to the excluded wholesalers and expressly or impliedly threaten that if the manufacturers do sell to the excluded wholesalers, the boycotting wholesalers will withhold patronage. Alternatively, the boycotting wholesalers may concertedly ask retailers not to buy from the excluded wholesalers, expressly or impliedly threatening that if the retailers do not comply the boycotting wholesalers will stop selling to them.

L. SULLIVAN, HANDBOOK OF THE LAW OF ANTITRUST § 83 (1977). Recently, the United States Supreme Court explained that the group boycott concept "refers to a method of pressuring a party with whom one has a dispute by withholding, or enlisting others to withhold, patronage or services from the target." *St. Paul Fire & Marine Ins. Co. v. Barry*, 438 U.S. 531, 541 (1978) (footnote omitted).

<sup>19</sup> There are many scholarly reviews of the rule that boycotts are per se unlawful. See, e.g., Bauer, *Per Se Illegality of Concerted Refusals to Deal: A Rule Ripe for Reexamination*, 79 COLUM. L. REV. 685 (1979); Horsley, *Per Se Illegality and Concerted Refusals to Deal*, 13 B.C. INDUS. & COM. L. REV. 484 (1971-72); McCormick, *Group Boycotts—Per Se or Not Per Se, That is the Question*, 7 SETON HALL L. REV. 703 (1976); Woolley, *Is a Boycott a Per Se Violation of the Antitrust Laws?*, 27 RUTGERS L. REV. 773 (1973-74). Of these, the Bauer article is the most encompassing because it was written after the Supreme Court's decision in *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36 (1977), and therefore reflects that case's guidance as to application of per se rules. See the text accompanying notes 68-80 *infra* for a discussion of the Supreme Court's current approach to per se illegality.

<sup>20</sup> L. SULLIVAN, *supra* note 18, at § 83.

<sup>21</sup> In *Montague & Co. v. Lowry*, 193 U.S. 38 (1904), the Court found unlawful an agreement of an association of wholesalers and manufacturers that provided for expulsion of any association member which sold to nonmembers. *Id.* at 47-48. While the Court condemned the agreement under § 1 of the Sherman Act, its decision did not make clear whether the agreement constituted a boycott or what standard was used to find it unlawful.

<sup>22</sup> 234 U.S. 600 (1914).

tailers had agreed not to purchase from wholesalers who made direct sales to consumers. In condemning the retailers' agreement under the rule of reason, the Court explained the impropriety of a boycott in terms of the increased anticompetitive market strength that arises with concerted action. That market power—lawful if arising from unilateral decisions—is unlawful where it is used in a joint effort to coerce wholesalers to conform to the retailers' desired conduct.<sup>23</sup> The agreement found unlawful in *Eastern States* constituted a relatively narrow refusal to deal: an attempt by a group of competitors at one market level to protect themselves from competition from non-group members who sought to compete at that level.<sup>24</sup>

In 1941, the Supreme Court first suggested that a per se rule might apply to boycotts. In *Fashion Originators' Guild of America, Inc. v. Federal Trade Commission*,<sup>25</sup> a group of designers and manufacturers of women's garments and related textiles instituted through the Guild a joint "protective" program to stop certain of their competitors from "pirating" their clothing styles. Under the program, clothing and textile manufacturers who were Guild members agreed not to supply manufacturers or stores that dealt in "pirated" products.<sup>26</sup> Acting on complaints from the affected competitors, the Federal Trade Commission challenged the Guild program as an unfair method of competition.

The Guild members asserted that their program was a reasonable means of protecting against the unfair tactic of style pirating. The Court, however, emphasized two aspects of the Guild's program as evidence of its anticompetitive nature. First, it effectively excluded from competition in the garment industry any manufacturers or distributors which did not conform to

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<sup>23</sup> *Id.* at 614.

<sup>24</sup> During the decade of the 1920's, the Supreme Court reviewed at least one case involving a boycott. In *Duplex Printing Press Co. v. Deering*, 254 U.S. 443 (1921), a manufacturer sought to restrain labor union members who had established a "secondary boycott" of his factory in an attempt to compel unionization. *Id.* at 446-47. In reversing denial of injunctive relief, the Court found that the proscriptions of the Sherman Act applied to the boycott regardless of its having arisen in the context of a labor dispute. *Id.* at 475-79. There was no suggestion in the case that the per se rule might apply to boycotts.

<sup>25</sup> 312 U.S. 457 (1941).

<sup>26</sup> *Id.* at 462-63.

Guild rules, thereby tending toward a "monopoly" of the industry by Guild members.<sup>27</sup> Second, the program established the Guild as "an extra-governmental agency, which prescribes rules for the regulation and restraint of interstate commerce . . . ."<sup>28</sup> In finding the Guild program to constitute an unlawful boycott, the Court rejected the Guild's justifications: "Under these circumstances . . . the reasonableness of the methods pursued by the combination to accomplish its unlawful object is no more material than would be the reasonableness of the prices fixed by unlawful combination."<sup>29</sup> Given the Court's limiting reference to "these circumstances," its rejection of the Guild's purported justifications did not establish a per se rule. However, the Court appears to have meant that once the conduct had been characterized as constituting an anticompetitive boycott, no business justifications could preclude a finding of unreasonable restraint.

Any question of whether or not the per se rule applied to boycotts was affirmatively answered in *Klor's, Inc. v. Broadway-Hale Stores, Inc.*<sup>30</sup> In *Klor's*, a large retailer of appliances, Broadway-Hale, convinced several appliance manufacturers to stop supplying Klor's, an appliance retailer which employed discounting techniques in order to compete more effectively with Broadway-Hale. Klor's sued, alleging that the joint refusal to deal by Broadway-Hale and the suppliers constituted an unlawful boycott. The defendants asserted, *inter alia*,<sup>31</sup> that their conduct was not unreasonable because it had had no appreciable effect on competition.

The United States Supreme Court reversed the court of appeals' affirmation of the district court's dismissal of the complaint. In a directive of seemingly unlimited scope, the Court declared that group boycotts were always unlawful, regardless of their circumstances or their actual effect:

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<sup>27</sup> *Id.* at 465.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.* at 468.

<sup>30</sup> 359 U.S. 207 (1959).

<sup>31</sup> The threshold argument of the defendants was that their conduct did not give rise to a cause of action in antitrust because there had been no public injury. *Id.* at 209-10. In their view, even after the cessation of supplies to Klor's, there remained many stores in the area selling their appliances or appliances of like quality and price. *Id.*



Group boycotts, or concerted refusals by traders to deal with other traders, have long been held to be in the forbidden category. They have not been saved by allegations that they were reasonable in the specific circumstances . . . . Even when they operated to lower prices or temporarily to stimulate competition they were banned.<sup>32</sup>

The Court emphasized the consequences to the boycotted party of the defendants' agreement not to deal, particularly the fact that Klor's was deprived of the freedom to bid for appliances from all suppliers. Also, as in *Fashion Originators' Guild*, the Court noted the risk that termination of small businesses like Klor's would create a tendency toward monopoly.<sup>33</sup>

The *Klor's* decision significantly broadened the apparent scope for reliance on a per se rule in the boycott context. Unlike *Eastern States*<sup>34</sup> and *Fashion Originators' Guild*,<sup>35</sup> the challenged agreement was not an attempt by a group of competitors at one market level to insulate itself against competition from non-group members at that same market level. Rather, the *Klor's* boycott was induced by a single retail competitor and might have been accepted by the participating suppliers for a variety of reasons relating to valid vertical distribution arrangements.<sup>36</sup>

Although the language in *Klor's* is dictum, the decision suggests that any combination that deprives a potential participant of the ability to participate in a market must be condemned under the per se rule as manifestly anticompetitive conduct, regardless of the intent of the actors or the purported justifications for the conduct. The Court failed to establish a limiting principle to that apparently boundless axiom.

### III. LIMITATIONS ON THE SUPREME COURT'S EXPANSIVE LANGUAGE

Since *Klor's*, the United States Supreme Court has often reaf-

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<sup>32</sup> *Id.* at 212 (footnote and citations omitted).

<sup>33</sup> *Id.* at 213-14.

<sup>34</sup> See the text accompanying notes 22-24 *supra* for a discussion of *Eastern States*.

<sup>35</sup> See the text accompanying notes 25-29 *supra* for a discussion of *Fashion Originators' Guild*.

<sup>36</sup> See generally *Continental T. V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. at 36; Pitofsky, *The Sylvania Case: Antitrust Analysis of Non-Price Vertical Restrictions*, 78 COLUM. L. REV. 1 (1978).

firmed the principle that boycotts are per se unlawful.<sup>37</sup> Nevertheless, subsequent decisions by lower federal courts—and even the Supreme Court—demonstrate a reluctance to afford the *Klor's* rule its broadest possible reading.

#### A. *The Non-Commercial Context of the Restraint*

Barely a year after *Klor's* was decided, a federal district court considered whether the per se rule should apply in the context of a challenge to the by-laws of a non-profit association dedicated to regulating and improving the conduct of harness racing. In *United States v. United States Trotting Association*,<sup>38</sup> the government contended that the operation of the rules and regulations governing the United States Trotting Association (USTA)<sup>39</sup> effec-

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<sup>37</sup> See, e.g., *United States v. National Ass'n of Sec. Dealers, Inc.*, 422 U.S. 694, 729 (1975); *Federal Maritime Comm'n v. Aktiebolaget Svenska Amerika Linien*, 390 U.S. 238, 250 (1968); *United States v. Sealy, Inc.*, 388 U.S. 350, 357 n.5 (1967); *United States v. General Motors Corp.*, 384 U.S. 127 (1966); *Silver v. New York Stock Exch.*, 373 U.S. 341 (1963); *White Motor Co. v. United States*, 372 U.S. 253, 259-60, 263 (1963); *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 708 (1962); *Radiant Burners, Inc. v. Peoples Gas Light & Coke Co.*, 364 U.S. 656 (1961) (*per curiam*). In addition, there is dicta from non-boycott cases decided prior to *Klor's*. See, e.g., *Northern Pac. Ry. v. United States*, 356 U.S. at 5; *Times-Picayune Publishing Co. v. United States*, 345 U.S. 594, 625 (1953); *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc.*, 340 U.S. 211, 214 (1951); *United States v. Columbia Steel Co.*, 334 U.S. 495, 522-23 (1948). In its most recent comments the Court has hinted that it might be prepared to reexamine whether all boycotts are per se unlawful. See *National Gerimedical Hosp. v. Blue Cross*, 452 U.S. 378 (1981); *St. Paul Fire & Marine Ins. Co. v. Barry*, 438 U.S. at 531. See the text accompanying notes 73-80 *infra* for a discussion of the Court's possible reexamination of the per se doctrine as applied to boycotts.

<sup>38</sup> 1960 Trade Cas. (CCH) ¶ 69,761 (S.D. Ohio 1960).

<sup>39</sup> Since its founding in 1939, USTA had been the only national, non-profit membership corporation dedicated to the promotion and furtherance of the sport of harness racing. It maintained a comprehensive system of records and services for the sport, collecting and compiling extensive breeding and performance data for standardbred horses. See the text accompanying notes 84-101 *infra* for a more extensive discussion of USTA's record-keeping system.

Its membership was open not only to racetracks and other entities involved in the sport, but also to all individual horse persons who acted as horse owners, drivers, breeders or race officials. USTA's by-laws provided for membership on a nondiscriminatory basis for three classes of members: Track members (those who sponsor and conduct harness race meetings); Active members (others who are active in the sport as owners, breeders, race officials, etc.); and Associate members (anyone interested in the sport but not qualified as a Track or Active member). 1960 Trade Cas. (CCH) ¶ 69,761, at 76,959. Indeed, USTA's membership, which today comprises more than 40,000, includes virtually every individual and organization interested in the sport. *Id.* at ¶ 76,960.

tuated a boycott that, under *Klor's*, was per se unlawful.

Track members of USTA agree to admit only drivers and officials licensed by the association, and to enter only those horses certified as "eligible" by USTA.<sup>40</sup> In turn, only USTA members can obtain an eligibility certificate, so the membership standards for horse owners augment the restrictions placed upon participating racetracks.<sup>41</sup> Thus, as a practical matter, horsemen who refuse to join USTA might not be eligible for some opportunities to participate in the sport. Although there was no evidence in *Trotting Association* that USTA had permanently excluded any applicant for membership,<sup>42</sup> the government alleged that the association's membership provisions and a host of other rules and regulations constituted a boycott that, under *Klor's*, was unlawful regardless of their purposes.<sup>43</sup>

The district court rejected that contention, ruling that the particular measures used by USTA to achieve its goals were "reasonable restraints that merely regulate and standardize harness racing, promote competition in harness racing, and generally enable U.S.T.A. to attain its main and not unlawful purposes."<sup>44</sup> The district court rejected an excessive reliance on the dicta contained in the United States Supreme Court's boycott decisions:

Present in all the . . . cases was the common evil of coercive action against parties outside the group . . . .

The construction for which the Government contends holds the *dicta* [of the decisions] to be an unqualified condemnation of all group refusals to deal, irrespective of their intent and effect and the means employed to accomplish the purposes of the combination. Within the all-embracing compass of the construction a group refusal to deal motivated by legitimate business reasons, exerting no coercion upon outsiders and resulting in no unreasonable restraint of trade, would nevertheless be a violation of the antitrust act.<sup>45</sup>

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<sup>40</sup> CHARTER, BY-LAWS AND RULES AND REGULATIONS OF UNITED STATES TROTTING ASSOCIATION Rule 9 (1981) [hereinafter cited as USTA RULE].

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

<sup>42</sup> 1960 Trade Cas. (CCH) ¶ 69,761, at 76,961.

<sup>43</sup> *Id.* at 76,957.

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

<sup>45</sup> *Id.* at 76,955 (quoting *United States v. Insurance Bd. of Cleveland*, 144 F. Supp. 684, 698 (N.D. Ohio 1956)).

Avoiding these consequences of excessive reliance on per se prescription, the court found that USTA's rules and regulations, "insofar as they may be called group boycotts or concerted refusals to deal, are not such commercial boycotts as have been stricken down in previous cases as unlawful per se."<sup>46</sup> To the district court, a restriction not animated at least in part by an anticompetitive purpose did not warrant application of a per se rule.

Since *United States v. United States Trotting Association*, other courts have refused to apply a per se rule where the challenged restriction occurred in a non-commercial context absent an anticompetitive purpose.<sup>47</sup> Courts evaluating conduct in sports contexts have announced a variety of formulations with which to measure the requisite commercial anticompetitiveness.<sup>48</sup> But all of the formulations reflect the interpretation of the law first set forth in the equine context in *Trotting Association*.

#### B. *The Self-Regulatory Needs of the Enterprise*

The United States Supreme Court suggested another means of limiting the scope of *Klor's* in *Silver v. New York Stock Exchange*.<sup>49</sup> In *Silver*, a direct competitor of exchange members was denied telephone and tickertape connections with exchange members pursuant to an exchange by-law.<sup>50</sup> As in *Eastern States and Fashion Originators' Guild*, the challenged combination was implemented to restrict a horizontal competitor, a type of conduct falling well within the scope of the per se language contained in *Klor's*. However, while the Court characterized the conduct as unlawful under the Sherman Act,<sup>51</sup> it delineated an

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<sup>46</sup> *Id.* at 76,955.

<sup>47</sup> *See, e.g.,* Neeld v. National Hockey League, 594 F.2d 1297 (9th Cir. 1979); Smith v. Pro Football, Inc., 593 F.2d 1173 (D.C. Cir. 1978); Feminist Women's Health Center, Inc. v. Mohammad, 586 F.2d 530 (5th Cir. 1978), *cert. denied*, 444 U.S. 924 (1979); Deesen v. Professional Golfers' Ass'n of Am., 358 F.2d 165 (9th Cir.), *cert. denied*, 385 U.S. 846 (1966).

<sup>48</sup> *See* 594 F.2d at 1298-99 n.3 ("arguably demonstrable anticompetitiveness"); Hatley v. American Quarter Horse Ass'n, 552 F.2d 646, 653 (5th Cir. 1977) ("minimal indicia of anticompetitive purpose or effect"); Florists' Nationwide Tel. Delivery Network, America's Phone-Order Florists, Inc. v. Florists' Tel. Delivery Ass'n, 371 F.2d 263, 268 (7th Cir.), *cert. denied*, 387 U.S. 909 (1967) (practices "on their face unduly restrictive").

<sup>49</sup> 373 U.S. 341 (1963).

<sup>50</sup> *Id.* at 344.

<sup>51</sup> Clearly condemning the conduct under the antitrust laws, the Court stated the ap-

"exception" to such invalidation where the conduct rested on a "justification derived from the policy of another statute or otherwise."<sup>52</sup> Applying the exception to *Silver*, the Court found that the policies underlying the Securities Exchange Act of 1934<sup>53</sup> mandated that private exchanges be permitted to regulate themselves, by means of appropriate procedures, without application of the full restrictions of the antitrust laws.<sup>54</sup> Because the exchange rule in issue had been enforced without appropriate procedural safeguards, the Court found it invalid,<sup>55</sup> but not without endorsing the principle that an industry's need for a limited degree of self-regulation may prevent application of the per se rule.

In 1977, the United States Court of Appeals for the Fifth Circuit relied on *Silver* to exempt from per se review a quarter horse association's rules for registering members of the breed. In *Hatley v. American Quarter Horse Association*,<sup>56</sup> the association refused to register a colt as a quarter horse because the extent of its white markings indicated that it was arguably a pinto, or paint, horse.<sup>57</sup> The horse owner challenged the decision as arbitrary and sought judicial relief. He alleged that the association's refusal to register the colt constituted a boycott illegal per se and included as a pendant claim a denial of due process under state law.<sup>58</sup> The trial court dismissed the antitrust claim, but judgment was entered for the plaintiff on the ground that the association's action was violative of due process under Texas law.<sup>59</sup>

The court of appeals affirmed dismissal of the antitrust claim after rejecting application of the per se rule. Noting that the *Sil-*

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plicable principle in a formulation as broad as that of *Klor's*: "A valuable service germane to petitioners' business and important to their effective competition with others was withheld from them by collective action. That is enough to create a violation of the Sherman Act." *Id.* at 348-49 n.5.

<sup>52</sup> *Id.* at 348-49.

<sup>53</sup> 15 U.S.C. §§ 78a-78kk (1976 & Supp. III 1979).

<sup>54</sup> 373 U.S. at 357-61.

<sup>55</sup> *Id.* at 364-67.

<sup>56</sup> 552 F.2d 646 (5th Cir. 1977).

<sup>57</sup> The quarter horse is distinguished from other horses by performance, conformation and coloring. The quarter horse is typically a solid color except for occasional white on the lower legs and part of the face. Such factors distinguish it from pinto (paint) and appaloosa horses, which have distinctive, irregular white markings. *Id.* at 649 and n.5.

<sup>58</sup> *Id.* at 648-49, 651.

<sup>59</sup> *Id.* at 648-49.

ver decision appeared to allow reliance on the rule of reason where a boycott might possess a "justification derived from the policy of another statute or otherwise,"<sup>60</sup> the court reasoned that

[i]n an industry which necessarily requires some interdependence and cooperation, the *per se* rule should not be applied indiscriminately. In some sporting enterprises a few rules are essential to survival . . . . If the inquiry [of the association into the definition of a quarter horse] is anti-competitive, the rule of reason can be utilized to attack it.<sup>61</sup>

Furthermore, the court reasoned, the *per se* rule should not be invoked "without at least minimal indicia of anti-competitive purpose or effect," which the court found absent in *Hatley*.<sup>62</sup> The court went on to find the association's rules acceptable under the rule of reason, although it affirmed the award of injunctive relief based on the "procedural lapse" in the particular claim.<sup>63</sup>

Since the *Silver* and *Hatley* decisions, a number of courts have recognized that in certain self-regulatory contexts rules must be developed to ensure the viability of the enterprise, and that application of a *per se* rule is improper.<sup>64</sup> Particularly in the context of professional sports, courts have maintained that interdependent activities should be judged under the rule of reason.<sup>65</sup>

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<sup>60</sup> *Id.* at 652 (quoting *Silver v. New York Stock Exch.*, 373 U.S. at 348-49) (emphasis added by the court in *Hatley*).

<sup>61</sup> *Id.* at 652-53. The court noted that "[p]rofessional sports operations have occasionally benefited from judicial reluctance to apply the *per se* doctrine, although the reasoning may not have been explicit." *Id.* at 652 (citing *Bridge Corp. of Am. v. American Contract Bridge League, Inc.*, 428 F.2d 1365 (9th Cir. 1970), *cert. denied*, 401 U.S. 940 (1971); *Deesen v. Professional Golfers' Ass'n of Am.*, 358 F.2d at 165).

<sup>62</sup> 552 F.2d at 653.

<sup>63</sup> *Id.* at 657-58.

<sup>64</sup> *E.g.*, *Ackerman-Chillingsworth, Div. of Marsh & McLennan, Inc. v. Pacific Elec. Contractors Ass'n*, 579 F.2d 484 (9th Cir. 1978), *cert. denied*, 439 U.S. 1089 (1979); *Worthen Bank & Trust Co. v. National BankAmericard, Inc.*, 485 F.2d 119 (8th Cir. 1973), *cert. denied*, 415 U.S. 918 (1974); *Marjorie Webster Junior College, Inc. v. Middle States Ass'n of Colleges & Secondary Schools, Inc.*, 432 F.2d 650 (D.C. Cir.), *cert. denied*, 400 U.S. 965 (1970).

<sup>65</sup> *E.g.*, *Neeld v. National Hockey League*, 594 F.2d at 1299 n.4; *Smith v. Pro Football, Inc.*, 593 F.2d at 1182; *Hennessey v. National Collegiate Athletic Ass'n*, 564 F.2d 1136, 1151-54 (5th Cir. 1977); *Mackey v. National Football League*, 543 F.2d 606, 618-20 (8th Cir. 1976), *cert. dismissed*, 434 U.S. 801 (1977); *Bridge Corp. of Am. v. American Contract Bridge League*, 428 F.2d at 1369; *Deesen v. Professional Golfers' Ass'n of Am.*,

Of notable relevance to the equine sports is the district court's decision in *Cooney v. American Horse Shows Association*.<sup>66</sup> The court declined to apply the per se standard to an association disciplinary rule that acted to exclude the plaintiff from horse shows sanctioned by the defendant association. In dicta, the court referred to *Silver* and noted that "there is an exception from the per se rule for reasonably self-regulated industries."<sup>67</sup>

### C. *The Supreme Court Re-evaluation*

Recently, the Supreme Court has indicated a willingness to reconsider, even abandon, certain per se rules. Its attitude may provide encouragement for lower courts reluctant to apply a per se rule for boycotts. In *Continental T.V., Inc. v. GTE Sylvania, Inc.*,<sup>68</sup> the Court overruled an established doctrine of per se analysis in the context of territorial confinement and customer allocation.<sup>69</sup> In doing so, the Court offered some general guidelines for application of per se rules, all of which urge restraint in their use: "Per se rules of illegality are appropriate only when they relate to conduct that is manifestly anticompetitive."<sup>70</sup> Echoing the district court's view set forth in *Trotting Association*,<sup>71</sup> the Court suggested a role for per se rules where the restraint in issue has a "pernicious effect on competition" and "lack[s] . . . any redeeming virtue."<sup>72</sup>

358 F.2d at 171-72; *Gunter Harz Sports, Inc. v. United States Tennis Ass'n*, 511 F. Supp. 1103, 1115 (D. Neb.), *aff'd*, 665 F.2d 222 (8th Cir. 1981); *College Athletic Placement Serv., Inc. v. NCAA*, 1975-1 Trade Cas. (CCH) ¶ 60,117 (D.N.J.), *aff'd*, 506 F.2d 1050 (3d Cir. 1974); *Philadelphia World Hockey Club, Inc. v. Philadelphia Hockey Club, Inc.*, 351 F. Supp. 462, 503 (E.D. Pa. 1972).

<sup>66</sup> 495 F. Supp. 424 (S.D.N.Y. 1980).

<sup>67</sup> *Id.* at 430 n.3.

<sup>68</sup> 433 U.S. 36 (1977).

<sup>69</sup> In *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365 (1967), the Court had held vertical territorial and customer restraints on the sale of goods illegal per se where the title to the goods passes to the purchaser. That doctrine had been frequently criticized by courts and commentators, a factor considered by the Court in overturning the rule in *Continental*. 433 U.S. at 48-49 nn.13-14.

<sup>70</sup> *Id.* at 49-50.

<sup>71</sup> 1960 Trade Cas. (CCH) ¶ 69,761 (S.D. Ohio 1960). See the text accompanying notes 38-48 *supra* for a discussion of this case.

<sup>72</sup> 433 U.S. at 50 (quoting *Northern Pac. Ry. v. United States*, 365 U.S. at 5). See also *Broadcast Music, Inc. v. CBS*, 441 U.S. 1 (1979).

Indeed, in its most recent cases involving group boycotts, *St. Paul Fire & Marine Insurance Co. v. Barry*<sup>73</sup> and *National Gerimedical Hospital v. Blue Cross*,<sup>74</sup> the Court hinted that it might explicitly curtail the scope of the per se rule for boycotts. At issue in *Barry* was the antitrust exemption for insurance companies codified in the McCarren-Ferguson Act.<sup>75</sup> The Court had to decide whether the term "boycott" in that Act had its "ordinary Sherman Act meaning" as a concerted refusal to deal.<sup>76</sup> The Court discussed some early group boycott cases, emphasizing the various terms that had at times been used to describe the challenged conduct, and noting that commentators had attempted "to develop a test for distinguishing the types of restraints that warrant per se invalidation from *other concerted refusals to deal that are not inherently destructive of competition.*"<sup>77</sup> The Court declined to express an opinion as to the merits of any particular approach,<sup>78</sup> but its comment suggests a willingness to recognize that *Klor's* rule of per se invalidity does not apply to all joint refusals to deal.

In *National Gerimedical Hospital*, the issue before the Court was whether a federal health planning statute<sup>79</sup> exempted Blue Cross's conduct from antitrust scrutiny. The Court found no exemption and remanded for a determination on the merits. In doing so, it reminded the court on remand to "give attention to the particular economic context in which the alleged conspiracy and 'refusal to deal' took place."<sup>80</sup> As in *Barry*, the Court's comment suggests that it agrees with lower federal courts' attempts to establish reasonable bounds for the per se rule outlined in prior Court dicta.

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<sup>73</sup> 438 U.S. 531 (1978).

<sup>74</sup> 452 U.S. 378 (1981).

<sup>75</sup> 15 U.S.C. §§ 1011-15 (1976).

<sup>76</sup> 438 U.S. at 542.

<sup>77</sup> *Id.* at 542 (emphasis added) (footnote omitted).

<sup>78</sup> After presenting its lengthy dictum regarding the per se boycott rule, the Court retreated from expressly limiting it: "But the issue before us is whether the conduct in question involves a boycott, not whether it is per se unreasonable." *Id.* at 542.

<sup>79</sup> The statute was the National Health Planning and Resources Development Act of 1974, Pub. L. No. 93-641, 88 Stat. 2225 (codified as amended in scattered sections of 42 U.S.C.); the section at issue in *National Gerimedical Hospital* was 42 U.S.C. 3001 (1976 & Supp. IV 1980).

<sup>80</sup> 452 U.S. at 393 n.19.



#### IV. *USTA v. CHICAGO DOWNS ASSOCIATION*<sup>81</sup>

The most authoritative pronouncement for the proposition that a per se rule is inappropriate in the context of a sports association's regulatory rules is the 1981 decision of the United States Court of Appeals for the Seventh Circuit, in *The United States Trotting Association v. Chicago Downs Association*.<sup>82</sup> The issue arose out of a dispute over use of records and services at Sportsman's Park, a harness racetrack in Cicero, Illinois. Chicago Downs Association ("Chicago Downs") and its co-defendant, Fox Valley Trotting Club, Inc. ("Fox Valley") were both Illinois corporations which, during a number of weeks each year, operated pari-mutuel harness races at Sportsman's Park racetrack.<sup>83</sup>

##### A. *The Records and Services in Dispute in Chicago Downs*

USTA maintains a nationwide system of records and services for the promotion of harness racing. It is the only organization that gathers pertinent breeding information about every standardbred horse foaled in the United States in order to identify conclusively every harness horse in the nation.<sup>84</sup> The means used to fix and maintain horse identities include lip tattoos<sup>85</sup> and registration certificates,<sup>86</sup> which are intended to remain with the horse's owner. When a horse is sold, the registration certificate must be endorsed on the back by the seller showing the sale date

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<sup>81</sup> 665 F.2d 781 (7th Cir. 1981) (en banc). The authors represented USTA in the litigation.

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

<sup>83</sup> *Id.* at 782-84. Chicago Downs and Fox Valley are in fact management organizations which sponsor race meetings at the racetrack, but such entities are customarily referred to as "tracks." An additional defendant, Illinois Harness Horseman's Association, was joined over the objection of USTA in one of the three consolidated cases in the litigation. *Id.* at 783 n.1.

<sup>84</sup> By registering foals, USTA not only obtains early evidence of the foal's description, pedigree and date of birth, but it also prevents duplication of names. *Id.* at 784. See USTA RULE 26 §§ 8, 10.

<sup>85</sup> USTA RULE 7 § 8. In 1981, USTA supervised the lip tattooing of 13,866 horses, bringing the total number of horses tattooed by USTA to 192,344. See 1982 GUIDE, *supra* note 7, at 1-53.

<sup>86</sup> 665 F.2d at 784. Registration certificates contain a statement of the horse's pedigree, a description of its color, markings and sex, and the name and address of its breeder and owner. USTA RULE 26 § 8.

and the buyer's name and address, and then must be returned to USTA to allow updating of USTA's files.<sup>87</sup>

Also, USTA supervises compilation of records on every harness race run in this country, with detailed information about each standardbred horse's performance. The certificates used for this purpose, called eligibility certificates, record the horse's current ownership and past performance, including such data as year-to-date and life earnings and year-to-date and previous year's race performances.<sup>88</sup> The certificate accompanies the horse from track to track during the racing season so that the horse's current data is always available to track racing secretaries, who rely on the certificate to determine the horse's eligibility and to classify it properly for racing.<sup>89</sup> After every day of racing, updated information is entered on the eligibility certificates and is also sent to USTA's headquarters for addition to the horse's permanent file.<sup>90</sup>

USTA provides a number of other services for promotion of the sport. It certifies drivers<sup>91</sup> and trainers<sup>92</sup> and publishes a weekly list of drivers who have been suspended or fined because of infractions of racing rules,<sup>93</sup> and it certifies racing officials em-

<sup>87</sup> 665 F.2d at 784. See USTA RULE 9(3)(b). In an attempt to maintain the comprehensive accuracy of its registration system, USTA's Rules provide a schedule of monetary fines to be paid by horseowners who fail to return the certificates to USTA for updating promptly after a horse's change in ownership. USTA RULE 22, & 26 § 20.

<sup>88</sup> USTA RULE 9. Eligibility certificates also contain a "Steward's Listing" reflecting the horse's unmanageability, illness or injuries affecting its qualification to race. USTA RULE 9, 14 & 20 § 14.

<sup>89</sup> 665 F.2d at 784-85. See USTA RULE 9 § 1. Tracks typically prepare their program sheets from the information contained on eligibility certificates. If any questions arise regarding particular information, the data on the certificate can be verified by checking it with data on file at USTA's headquarters. 665 F.2d at 784-85. See USTA RULE 9.

<sup>90</sup> USTA RULE 9 § 1. Track racing secretaries, who must be licensed by the USTA, send all race data directly to USTA on forms known as Judge's Sheets. USTA RULE 9 & 20. Keeping all current data centrally filed with USTA provides an effective protection for the integrity of the sport's racing information. As a consequence, such practices as fraudulent substitution of horses ("ringing") and fraudulent race performance records ("prepping"), both of which were widespread prior to formation of USTA in 1939, have all but disappeared from the sport. See *United States v. United States Trotting Ass'n*, 1960 Trade Cas. (CCH) ¶ 69,761.

<sup>91</sup> USTA RULE 17.

<sup>92</sup> *Id.*

<sup>93</sup> USTA RULE 22 § 2. Without such a published listing, a driver could effectively escape major consequences of his racing misconduct by transferring his base of operations to a different geographic area or racing circuit.

ployed by racetracks to attest to their competence and knowledge of racing rules.<sup>94</sup> In addition, USTA offers public relations assistance and promotional aids to assist tracks in fostering interest in the sport.<sup>95</sup>

USTA is funded by dues from its members and fees from others who contract to use its services. Because they rely heavily upon the racing information contained on USTA's certificates, the approximately seventy pari-mutuel racetracks around the country have traditionally contributed financially to USTA for the continued maintenance of the records system.<sup>96</sup> If a pari-mutuel track intends to use USTA's records and services but does not choose to become a member paying membership dues, it must support the system of records and services as a "contract track" and annually pay a graduated fee.<sup>97</sup>

In light of the sport's extensive reliance on its data base, USTA has established a number of restrictions intended to protect the integrity of the system. Its certificates, particularly the eligibility certificates, note USTA's interest and make clear the intended scope of the data to be gathered.<sup>98</sup> Its rules require that all individuals responsible for handling USTA data at racetracks be licensed by USTA, even if they are employees of the racetrack.<sup>99</sup> In addition, Rule 5 of USTA's rules prohibits submission of USTA eligibility certificates to tracks which have refused to

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<sup>94</sup> USTA RULE 6 § 23.

<sup>95</sup> USTA RULE BY-LAWS, ART. I, § 4.

<sup>96</sup> USTA's present system of dues and fees was most recently modified in 1975 as part of a review process in which parimutuel track members of the association participated.

<sup>97</sup> USTA RULE 4 § 37. For Chicago Downs and Fox Valley, which operate with average gross betting receipts of more than \$1 million per day during their race meetings, the contract track fee to USTA would be \$330 per racing day, or between \$10,000-\$20,000 per year.

<sup>98</sup> See 665 F.2d at 785. Eligibility certificates contain the following legend:

This eligibility certificate and the information contained on it are the property of USTA and all rights to its use and reproduction are reserved by it. Use of this certificate and the information contained hereon is restricted to members of USTA and tracks contracting with the Association and only for the purposes of entering, classifying and identifying the horse named hereon and for recording its performances. Permission for any other use of this certificate and the information contained on it or for its use by any other person or organization must be obtained from USTA.

*Id.* at 785; *see id.* at 785-86 n.6.

<sup>99</sup> USTA RULE 6.

support the records system either by joining USTA as a member or by paying the contract track fee. If, after due notice from USTA of a track's refusal to participate in the system, a member nonetheless chooses to race his horse there, the horse is thereafter ineligible for entry in any race at a USTA-affiliated track requiring a current and verified eligibility certificate.<sup>100</sup> A somewhat similar restriction in Rule 17 applies to drivers licensed by USTA; they can be fined for racing at a non-participating track.<sup>101</sup> The avowed purpose of these requirements is to prevent horses and drivers from competing at tracks at which USTA has no control over recordkeeping and thus no assurance of care in handling the data required for eligibility and registration certificates. Application of such restrictions, as a practical matter, is the only method available to a sports association such as USTA; it can supervise only the conduct of those who have agreed to abide by its rules of governance. Nonetheless, invocation of Rules 5 and 17 isolates non-participants from access to USTA's system of records and services and promotes a collective refusal-to-deal among USTA participants against nonparticipants.

### B. *Proceedings in the District Court*

Chicago Downs and Fox Valley had utilized USTA's records and services during the years prior to 1977, and they continued to do so thereafter under the protection of a court order.<sup>102</sup> But since

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<sup>100</sup> In relevant part, USTA RULE 5 provides:

Horses racing after January 1, 1940, upon due notice (at least 45 days wherever possible) to members on tracks which are not in contract or which are not in membership with The United States Trotting Association . . . shall from the date of the first such race be ineligible to race in anything but a free-for-all, and he is barred from classified and claiming and conditioned races and no eligibility certificate will be issued on that horse in the future.

<sup>101</sup> In relevant part, USTA RULE 17 § 5 provides:

Any licensed driver who shall participate in a meeting or drive a horse at a meeting not in membership with this Association . . . shall be fined not to exceed \$100 for each such offense: PROVIDED HOWEVER, that nothing herein contained shall prevent any person from driving at a contract track or from participating in a meeting conducted at such a track.

<sup>102</sup> 665 F.2d at 784. Early in the litigation, USTA was enjoined from attempting to prevent Chicago Downs or Fox Valley from relying on and benefiting from its records

1977, they had refused to pay for the services through either annual membership dues or the contract track fee. In 1977, they announced their intention to utilize USTA's certificates and services without payment of any fees at all and to "free ride" on the efforts of USTA and the financial support of USTA members and contract tracks.<sup>103</sup> As a result, USTA brought complaints against the tracks in the Northern District of Illinois in an attempt to prevent them from using its records and services without reimbursement.<sup>104</sup>

On four occasions during 1977, 1978 and 1979, USTA informed its members by letter of the tracks' refusal to pay dues or fees and reminded them of the terms of Rules 5 and 17.<sup>105</sup> The April 6, 1978 letter from William Hilliard, then executive vice president of USTA, explained that USTA's "records and services, collected and maintained at great expense . . . should not be misappropriated and used without payment," and that its records and services "will become impossible" if Fox Valley or other tracks could use them without otherwise participating in USTA's data-collection system.<sup>106</sup>

On May 1, 1978, Fox Valley responded by interposing a counterclaim seeking injunctive relief and charging USTA with instigation of a group boycott with respect to Fox Valley's 1978 race meeting.<sup>107</sup> Fox Valley alleged that the letters from Mr. Hilliard constituted concerted action to boycott the track in violation of section 1 of the Sherman Act.<sup>108</sup>

On September 1, 1978, Fox Valley and Chicago Downs moved for summary judgment dismissing USTA's complaints. In response, on October 5, 1978, USTA moved for summary judgment on the issue of liability for misappropriation. Later, while those motions were still pending, Fox Valley moved for summary judgment on its counterclaim, and USTA cross-moved for sum-

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and services. In return, the tracks were ordered to pay into court the applicable amounts of contract track fees. *Id.* at 784 n.4.

<sup>103</sup> *Id.* at 784.

<sup>104</sup> *Id.* at 782-83.

<sup>105</sup> *Id.* at 784-85.

<sup>106</sup> *Id.* at 785 n.6.

<sup>107</sup> The counterclaim was interposed by Fox Valley in case no. 78C-1258. 665 F.2d at 783.

<sup>108</sup> *Id.* at 787.

mary judgment dismissing the counterclaim.<sup>109</sup>

On March 18, 1980, the Illinois Federal District Court granted both of the racetracks' two motions for summary judgment.<sup>110</sup> Regarding the antitrust counterclaim, the court relied on *Fashion Originators' Guild* and what it characterized as "strong language" in *Klor's* to use the *per se* rule in evaluating USTA's invocation of Rules 5 and 17. As the district court explained those cases,

[I]n interpreting the meaning and scope of Section 1, the Supreme Court has ruled that certain kinds of restraints are so inherently unreasonable and anticompetitive in nature that they are illegal *per se*. Included in the *per se* category are group boycotts which generally arise when one party convinces or coerces another party to refrain from dealing with a third party.<sup>111</sup>

The court agreed with Fox Valley that "the facts of the instant case clearly indicate that a boycott exists . . . USTA has combined with member horse owners to boycott non-USTA affiliated tracks."<sup>112</sup> Without reference to the evidentiary record, and without consideration of the self-regulatory purposes underlying USTA's procedures, the court labeled the challenged conduct a group boycott and considered it unlawful *per se*:

Fox Valley and Chicago Downs refused to join USTA or pay a specified fee for services. As a result, member horsemen were warned by USTA that they faced the imposition of USTA sanctions if they continued to race at Fox Valley. Under these circumstances, it is clear that the purpose of USTA's actions is to

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<sup>109</sup> *Id.* at 783.

<sup>110</sup> 487 F. Supp. 1008 (N.D. Ill. 1980), *rev'd*, 665 F.2d 781 (7th Cir. 1981) (en banc). On the misappropriation count, the district court relied on the fact that registration and eligibility certificates travel with the horse to conclude that USTA's interest in them was insufficient to rebut the "prima facie evidence of ownership of the certificates by the horse owners." 487 F. Supp. at 1012. The express declaration of USTA's ownership that appears on the eligibility certificates was dismissed by the district court as being of no merit because of the "adhesive nature" of the relationship of horse owners to the association. *Id.* at 1013-14. Thus, the court dismissed USTA's complaints. See note 98 *supra* for the text of an eligibility certificate.

<sup>111</sup> 487 F. Supp. at 1014 (footnotes omitted).

<sup>112</sup> *Id.* at 1015.

effectuate a group boycott against tracks which do not abide by its terms and conditions.<sup>113</sup>

The district court recognized that "there are circumstances" when the rule of reason test is applicable rather than the per se rule.<sup>114</sup> Yet it considered the exception set forth in *Silver v. New York Stock Exchange* to be exclusive. Adopting the view of *Silver* set forth in a district court case arising in an unrelated sport, *Denver Rockets v. All-Pro Management, Inc.*,<sup>115</sup> the court set forth its standards for the exception:

*Silver* reaffirms the application of the *per se* rule to group boycotts with one narrow exception. The cases falling into this category would be governed by the rule of reason. To qualify, several prerequisites must be demonstrated:

- (1) There is a legislative mandate for self-regulation or otherwise . . . .
- (2) The collective action is intended to (a) accomplish an end consistent with the policy justifying self-regulation, (b) is reasonably related to that goal, and (c) is no more extensive than necessary.
- (3) The association provides procedural safeguards which assure that the restraint is not arbitrary and which furnish a basis for judicial review.<sup>116</sup>

The court found that USTA could not qualify for this exception because its self-regulatory conduct was "more extensive than necessary" and not reasonably related to the goal of "maintaining integrity in racing."<sup>117</sup>

In essence, the district court relied almost exclusively on the

<sup>113</sup> *Id.* (footnote omitted).

<sup>114</sup> *Id.*

<sup>115</sup> 325 F. Supp. 1049 (C.D. Cal. 1971) (cited in 487 F. Supp. at 1015-16). *Denver Rockets* predated recent pronouncements of the Supreme Court and other courts regarding the appropriate scope of per se rules. See, e.g., *Broadcast Music, Inc. v. CBS*, 441 U.S. at 8; *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. at 47-48. See the text accompanying notes 72-80 *supra* for a discussion of the Supreme Court's reevaluation of the per se rules. In addition, recent decisions of the Ninth Circuit have cast doubt on the validity of the holding in *Denver Rockets*. See *Neeld v. National Hockey League*, 594 F.2d at 1297; *Gough v. Rossmoor Corp.*, 585 F.2d 381 (9th Cir. 1978), cert. denied, 440 U.S. 936 (1979).

<sup>116</sup> 325 F. Supp. at 1064-65.

<sup>117</sup> 487 F. Supp. at 1016 (footnote omitted).

sweeping dictum of *Klor's* to condemn the conduct undertaken by USTA to protect its complex records system. The court offered little or no discussion of the purposes or effects of USTA's conduct, in relation to either the record system, the racetracks or the sport as a whole. While the court acknowledged the holding in *Silver* as having created an "exception" to per se proscription, it interpreted the "exception" narrowly and did not refer to any of the several cases arising in non-commercial and sports contexts in which self-regulation untainted by anticompetitiveness had been evaluated under the rule of reason.<sup>118</sup>

### C. *The Decision of the Court of Appeals*

With one judge dissenting and one concurring,<sup>119</sup> the Seventh Circuit Court of Appeals, en banc, reversed the judgment of the district court in all respects.<sup>120</sup> The court of appeals began its analysis of the antitrust issue by noting that the rule of reason is the traditional standard applied for the majority of anticompetitive practices challenged under section 1 of the Sherman Act. Indeed, the court characterized the per se rule as one best applied "only after courts have had considerable experience with the type of conduct challenged and application of the Rule of Reason has

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<sup>118</sup> *Id.* See the text accompanying notes 38-48 *supra* for a review of these cases.

<sup>119</sup> Judge Bauer dissented from the judgment of the court, arguing to uphold the judgment of the district court on all grounds. 665 F.2d at 792-95 (Bauer, J., dissenting). Judge Cudahy concurred in the reversal of the judgment of the district court, but dissented from the court's entry of judgment in USTA's favor with regard to eligibility certificates. *Id.* at 791-92 (Cudahy, J., concurring).

<sup>120</sup> In regard to the non-antitrust issues in the appeal, the court reversed the district court's summary judgment for the two racetracks and entered partial summary judgment for USTA. *Id.* at 787. It pointed out that the defendants and the district court had left unanswered USTA's affidavits and documentary materials demonstrating that the eligibility certificates, and possibly the registration certificates, are its property. Of particular significance to the court was the legend contained on the eligibility certificates, which the district court had discounted because of their "adhesive nature." 487 F. Supp. at 1013-14. The court of appeals declined to find adhesion because of the "institutional means available [to USTA members] through which the horseowners collectively can modify or eliminate any terms in the eligibility certificates with which they disagree." 655 F.2d at 786. On the record in the case, that legend was sufficient to support USTA's claim of ownership of eligibility certificates. However, the record was found insufficient to find on summary judgment that USTA owned registration certificates, so USTA was directed on remand to submit further evidence to show that it had sufficient ownership rights to ground a misappropriation claim as to those certificates. *Id.* at 787.



inevitably resulted in a finding of anticompetitive effects."<sup>121</sup> While recognizing that the Supreme Court relied on a *per se* rule in *Fashion Originators' Guild* and *Klor's, Inc.*, the court pre-saged its recognition of limits to that rule by emphasizing that "[t]he danger of rote application of the *per se* rule to all conduct that can be called a 'group boycott' is that the sound teachings of experience will be extended into new and unfamiliar areas where they have no proper application."<sup>122</sup>

The district court's application of the *per se* rule was found improper for two reasons, each of which reflected one of the limitations on the *per se* rule presented in cases decided since *Klor's*. First, the challenged restraints were not the type traditionally characterized as commercial, and there was nothing in USTA's conduct suggesting a purpose to exclude commercial competitors.

At the most obvious level, Fox Valley had no intention of setting up an organization to rival USTA, and USTA was not Fox Valley's competitor in the business of organizing harness race meetings. There is no indication either of any subtler scheme, as for example groups of drivers or owners using USTA as a means to eliminate other drivers or owners, or certain tracks combining behind the facade of USTA to drive Fox Valley out of business. There is a strong showing, to the contrary, that USTA was organized to ensure honest harness racing rather than to impose a "naked restraint of trade with no purpose except stifling of competition."<sup>123</sup>

In the absence of some showing of anticompetitiveness, application of the *per se* rule would be inappropriate.

Second, the court endorsed the principle, "derived more or less proximately from *Silver*," that "in certain self-regulatory

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<sup>121</sup> *Id.* at 788 (quoting *Havoco of Am., Ltd. v. Shell Oil Co.*, 626 F.2d 549, 555 (7th Cir. 1980)).

<sup>122</sup> 655 F.2d at 788.

<sup>123</sup> *Id.* at 788-89 (quoting *White Motor Co. v. United States*, 372 U.S. at 263). The court noted the extent to which USTA RULE 5 & 17 address the association's "free-rider" problems, a consideration which the Supreme Court considered worthy of "serious attention" in *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. at 54-57. Cf. Posner, *The Rule of Reason and the Economic Approach: Reflections on the Sylvania Decision*, 45 U. CHI. L. REV. 1, 6-10 (1977).

contexts binding rules must be developed to safeguard the enterprise's viability, and that application of a per se standard of illegality to such endeavors is improper."<sup>124</sup> Relying on decisions of lower courts in the context of league or other organized sports, the court declared that formalistic labels such as "group boycott" and "per se" should not preclude inquiry into the business necessity for particular rules and practices where the nature of the enterprise requires some degree of self-regulation.<sup>125</sup>

Relying on these two considerations, the court concluded that the rule of reason should apply to test USTA Rules 5<sup>126</sup> and 17.<sup>127</sup> According to the court, the rule of reason is the proper test "either because sporting activities and organizations are entitled to a fuller form of antitrust analysis in recognition of their need for self-regulation, or because the conduct at issue here is not within the undeniably anticompetitive per se boycott paradigm."<sup>128</sup> The court remanded the issue to the district court to determine whether the challenged conduct went beyond the level of restraint reasonably necessary to accomplish whatever legitimate business purpose might be asserted for it.<sup>129</sup>

### CONCLUSION

The decision of the Seventh Circuit in *Chicago Downs* firmly rejects the unbounded boycott *dicta* contained in *Fashion Originators' Guild* and *Klor's*. At least in regard to conduct occurring in the context of a sports association's rules and regulations, the decision clarifies the dual analytical approaches used in prior

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<sup>124</sup> 665 F.2d at 789.

<sup>125</sup> *Id.* at 790. The court referred with approval to *Hatley v. American Quarter Horse Ass'n*, 552 F.2d 646, as well as to several similar holdings from non-equine sports. See, e.g., *Bridge Corp. of Am. v. American Contract Bridge League, Inc.*, 428 F.2d at 1365 (per se rule inapplicable to Bridge League's refusal to sanction a local tournament); *Deesen v. Professional Golfers' Ass'n of Am.*, 358 F.2d 165 (golf tournament entry restrictions evaluated under rule of reason).

<sup>126</sup> For the text of USTA RULE 5, see note 100 *supra*.

<sup>127</sup> For the text of USTA RULE 17, see note 101 *supra*.

<sup>128</sup> 665 F.2d at 790.

<sup>129</sup> *Id.* Following remand to the district court, by order dated July 21, 1982, the litigation was dismissed pursuant to a Stipulation of Dismissal and Final Judgment which provides that the racetracks will apply for membership in USTA after paying a monetary amount representing dues and fees (plus interest) owed to USTA for the years 1975 through 1981.

equine cases to limit the sweep of the per se boycott rule. The decision endorses both the analysis of non-commercial context contained in *Trotting Association*<sup>130</sup> and the analysis of boycott purpose relied upon in *Hailey*.<sup>131</sup>

Thus, the court of appeals reasoned that a finding either (1) that the challenged conduct arose from non-commercial needs in a self-regulatory context or (2) that the challenged conduct does not reveal an undeniably anticompetitive purpose will be sufficient grounds for rejecting per se analysis in favor of the weighing of circumstances mandated by the rule of reason. In other words, courts should undertake an initial consideration of the context in which a boycott takes place and the purpose which it is intended to serve. If either the context or the purpose would make per se condemnation inadvisable, a full balancing of applicable considerations under the rule of reason must be undertaken. The underlying principle of the *Chicago Downs* decision is that certain types of regulations in the context of a sports association, while initially restricting the participation of certain individuals or entities, ultimately serve to promote the sport's integrity, effective operation, and economic opportunities as a whole. For such restrictions per se condemnation is inappropriate.

Of course, a finding that a particular boycott should not be condemned under the per se rule is not tantamount to a decision that the exclusion is sanctioned by the antitrust laws. As the court in *Chicago Downs* was careful to point out, the trial court on remand would face the question of whether USTA's conduct "went beyond the level of restraint reasonably necessary to accomplish whatever legitimate business purpose might be asserted for it."<sup>132</sup> Thus, a court's determination not to apply the per se rule does not constitute a finding that the antitrust laws sanction the conduct. Rather, it is a finding that the evaluation of the conduct's competitive effects be undertaken according to the traditional standards of the rule of reason.

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<sup>130</sup> See the text accompanying notes 38-48 *supra* for a discussion of the case.

<sup>131</sup> See the text accompanying notes 56-63 *supra* for a discussion of the case.

<sup>132</sup> 665 F.2d at 790 (quoting *Smith v. Pro Football, Inc.*, 593 F.2d at 1183).