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# Churchill Downs, Inc. v. Thoroughbred Horsemen's Group, LLC "Antitrust Liability and the Horse Racing Industry"

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*CHURCHILL DOWNS, INC. v.*  
*THOROUGHBRED HORSEMEN'S GROUP, LLC*  
“ANTITRUST LIABILITY AND THE HORSE RACING INDUSTRY”

TARA N. HESTER\*

I. INTRODUCTION

The horseracing industry is vital to many states' economies and cultures, but none so much as to Kentucky.<sup>1</sup> Wagering on horse races, in the form of off-track betting, provides significant revenue for the racing industry. In *Churchill Downs, Inc. v. Thoroughbred Horsemen's Group, LLC*, the United States District Court for the Western District of Kentucky discussed a potential antitrust violation by horse owners and trainers in connection with off-track betting. Section II of this Comment discusses the legal background of the current dispute. Section III analyzes the court's holding and reasoning, and section IV addresses the potential implications for horse owners, trainers, racetracks, and jockeys in Kentucky and across the nation.

II. LEGAL BACKGROUND

*A. The Sherman Act*

The Sherman Act (hereinafter, the “Act”), which governs antitrust claims, states that it is illegal to make a contract or conspire to restrain trade or commerce.<sup>2</sup> Only unreasonable restraints on trade are banned by the Act, and courts determine if “a restraint is unreasonable using either the *per se* rule or the rule of reason” test, depending on the facts of the case.<sup>3</sup> When asserting an antitrust violation, plaintiffs have a heightened standing requirement, and must show the traditional Article III requirements of injury-in-fact, causation, and redressability, and also that the injury was an antitrust injury.<sup>4</sup>

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<sup>1</sup> GOVERNOR'S TASK FORCE ON THE FUTURE OF HORSE RACING, REPORT OF THE GOVERNOR'S TASK FORCE ON THE FUTURE OF HORSE RACING (2008), <http://www.horseswork.com/pdf/FinalGovernorsTaskForceReportonHorseRacing121508.pdf>.

<sup>2</sup> *Churchill Downs, Inc. v. Thoroughbred Horsemen's Group, LLC*, 605 F. Supp. 2d 870, 877 (W.D. Ky. 2009) (citing 15 U.S.C. §1).

<sup>3</sup> *Churchill Downs, Inc.*, 605 F. Supp. 2d at 877 (citing *State Oil Co. v. Khan*, 522 U.S. 3, 10 (1997); *Bassett v. Nat'l Collegiate Athletic Ass'n*, 528 F.3d 426, 432 (6th Cir. 2008)).

<sup>4</sup> *Id.* at 878 (citing *NicSand, Inc. v 3M Co.*, 507 F.3d 442, 449 (6th Cir. 2007)).

*B. The Interstate Horseracing Act*

"In 1978, Congress enacted the Interstate Horseracing Act (hereinafter, "IHA"), 15 U.S.C. § 3001–3007, . . . to protect . . . smaller racetracks and horsemen's groups" from off-track betting abuse at the hands of larger tracks.<sup>5</sup> As defined in the IHA, a horsemen's group is "the group which represents the majority of owners and trainers racing there, for the races subject to the interstate off-track wager on any racing day."<sup>6</sup> Churchill Downs and many other racetracks earn a significant amount of revenue from off-track betting (hereinafter, "OTB") and Advanced Deposit Wagering (hereinafter, "ADW").<sup>7</sup> ADWs operate by allowing individuals to deposit money with an operator and then wager by telephone or over the internet on races across the country.<sup>8</sup> In order for OTB and ADW establishments to obtain the right to accept wagers on a given race and receive a simulcast of the race, they must contract with the host track to purchase the track's "signal."<sup>9</sup> The tracks must then contract with the horsemen's groups regarding the percentage of the revenue from the signal's sale that will be paid to the horsemen.<sup>10</sup>

Typically, eighty percent of the pool from the OTB, ADW, and track betting is paid to winning bettors.<sup>11</sup> The remaining twenty percent, the "takeout," is the profit divided between the tracks, OTB, ADW, and the horsemen's groups.<sup>12</sup> In order for the host track to be able to sell its signal to the OTBs and ADWs, the track must obtain the consent of the authorized horsemen's groups, who have the ability to veto the sale of a signal.<sup>13</sup> There are two horsemen's groups at the Churchill Downs racetrack: Kentucky Horsemen's Benevolent and Protective Association (hereinafter, "Kentucky HBPA") and Kentucky Thoroughbred Association (hereinafter, "KTA").<sup>14</sup> Until recently, these two groups would give their consent to Churchill Downs to sell signals and then Churchill Downs would subsequently negotiate contracts for the price of the signals with the OTBs and ADWs.<sup>15</sup>

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<sup>5</sup> *Id.* at 875.

<sup>6</sup> 15 U.S.C.A. §3002 (12) (West, Westlaw through Feb. 16, 2010).

<sup>7</sup> *Churchill Downs, Inc.*, 605 F. Supp. 2d at 874.

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

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

<sup>10</sup> *Id.* at 874–75.

<sup>11</sup> *Id.* at 874.

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

<sup>13</sup> *Churchill Downs, Inc.*, 605 F. Supp. 2d at 875.

<sup>14</sup> *Id.* at 873, 875.

<sup>15</sup> *Id.* at 875.

### III. CASE HISTORY

The Plaintiffs, Churchill Downs; Calder Race Course, Inc.; and Churchill Downs Technology Initiatives Company (hereinafter, "Plaintiffs"), alleged antitrust violations under the Sherman Act by the Defendants, KTA and Kentucky HBPA, at Churchill Downs on the theory of "price fixing perpetuated by a group boycott" in an effort to increase the Defendants' profits.<sup>16</sup>

In 2007, several horsemen's groups from various racetracks around the country formed the Thoroughbred Horsemen's Group (hereinafter, "THG") to negotiate a separate licensing agreement with all ADWs that required the ADWs to pay the THG a license fee equal to at least one-third of the takeout.<sup>17</sup> This agreement did not allow the ADWs to buy a signal for less than one-third of the takeout; therefore, the ADWs would be forced to pay a higher price for the signal than they currently paid, thereby increasing the profits of the horsemen's groups.<sup>18</sup> The THG, acting as representative for the horsemen's groups, stated that if the ADWs refused to sign the licensing agreement then the individual horsemen's groups would use their veto power under the IHA to stop the sale of the host track's signal to the ADWs.<sup>19</sup> Based on the THG statements, the Plaintiffs claimed that the ADWs were no longer able to negotiate the price they paid for signals because the horsemen's groups continued to veto the sale of the signals until the ADWs agreed to sign the licensing agreement.<sup>20</sup> The Plaintiffs claimed that the actions of the Defendants raised prices and limited competition.<sup>21</sup>

From October 2006 until April 2008, when this suit was filed, the Kentucky HBPA and KTA consistently exercised their horsemen's veto on the sale of Churchill Downs' signal because none of the ADWs agreed to sign the Licensing Agreement.<sup>22</sup>

### IV. ANALYSIS

As previously mentioned, the Sherman Act, which governs anti-trust claims, states that it is illegal to make a contract or participate in a conspiracy which restrains trade or commerce.<sup>23</sup> In evaluating the

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<sup>16</sup> *Id.* at 877.

<sup>17</sup> *Id.* at 875-76. This agreement was in lieu of the agreement that the tracks negotiated with the ADWs. *Id.*

<sup>18</sup> *Id.* at 876.

<sup>19</sup> *Churchill Downs, Inc.*, 605 F. Supp. 2d at 878.

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> *Id.* at 876.

<sup>23</sup> *Id.* at 877.

Plaintiff's antitrust claim, the court looked at four elements: (1) standing to bring antitrust cause of action, (2) immunity from antitrust laws, (3) the pleading standard for an antitrust complaint, and (4) the elements of an antitrust cause of action.<sup>24</sup>

#### A. *Standing in Antitrust*

In evaluating the Plaintiffs' antitrust allegations, first, the court addressed the issue of standing. When asserting an antitrust violation, plaintiffs have a heightened standing requirement and must show that the injury is an antitrust injury, in addition to the traditional Article III requirements of injury-in-fact, causation, and redressability.<sup>25</sup> To qualify for antitrust standing, the Sixth Circuit requires that the violation reduce competition in the market and that the plaintiff's injury result from that decrease in competition.<sup>26</sup> The first element in evaluating standing for an antitrust violation is the nature of the injury; namely, the complaint must allege an anticompetitive effect on the market as a whole and not just on the plaintiffs.<sup>27</sup> Plaintiffs alleged there was a group boycott by the defendant horsemen's groups through the use of their agreement to veto the sale of signals until the ADWs signed the license agreement.<sup>28</sup> The alleged boycott resulted in fewer wagering opportunities because fewer signals were sold; with fewer signals sold, the price of signals was inflated.<sup>29</sup> The court concluded that the inflated price harmed competition; therefore, the allegations satisfied "the first element of antitrust standing."<sup>30</sup>

The second element of antitrust standing requires the plaintiff demonstrate that the antitrust violation is the *only* cause of the plaintiff's injury.<sup>31</sup> The complaint will be dismissed if it is shown that the injury would have occurred in the absence of the antitrust violation.<sup>32</sup> The Plaintiffs alleged that they were injured because they were unable to sell their signals while the horsemen's groups continued to exercise their veto.<sup>33</sup> The court reasoned that although individual horsemen's groups could veto

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<sup>24</sup> See *id.* at 878–92.

<sup>25</sup> *Churchill Downs, Inc.*, 605 F. Supp. 2d at 878 (citing *NicSand, Inc. v. 3M Co.*, 507 F.3d 442, 449 (6th Cir. 2007)).

<sup>26</sup> *Id.* at 879 (quoting *Tennessean Truckstop, Inc. v. NTS, Inc.*, 875 F.2d 86, 88 (6th Cir. 1989)).

<sup>27</sup> *Id.* at 879 (citing *Bassett v. National Collegiate Athletic Ass'n*, 528 F.3d 426, 434 (6th Cir. 2008)).

<sup>28</sup> *Id.* at 880.

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

<sup>30</sup> *Id.*

<sup>31</sup> *Churchill Downs, Inc.*, 605 F. Supp. 2d at 880 (quoting *In re Cardizem CD Antitrust Litig.*, 332 F.3d 896, 900 (6th Cir. 2003)).

<sup>32</sup> *Id.* (quoting *In re Cardizem CD Antitrust Litig.*, 332 F.3d 896, 914 (6th Cir. 2003)).

<sup>33</sup> *Id.*

signal sales without the concerted action of the THG and cause similar injuries to the tracks and the ADWs, the second element was nevertheless satisfied because no “independent lawful cause of the injury can be identified[.]”<sup>34</sup>

### B. Antitrust Immunity

Having established that the Plaintiffs met the requirements for antitrust standing, the court next determined if the IHA created immunity for the Defendants from antitrust liability. The court noted that Congress can provide immunity from antitrust liability by either explicitly stating that immunity exists in a statute or by regulating the substantive area in such a way that antitrust immunity is implied.<sup>35</sup> However, courts are reluctant to find implied immunity unless there is a “clear repugnancy between the antitrust laws” and the statute.<sup>36</sup> The *Churchill* court first concluded, with both parties agreeing, that the IHA did not explicitly give immunity from antitrust liability.<sup>37</sup> Next, the court considered whether the statute provided implied immunity.<sup>38</sup>

#### 1. Implied Immunity

The principals of *Credit Suisse Securities (USA), LLC v. Billing* are instructive in cases regarding implied immunity.<sup>39</sup> In *Credit Suisse*, the court found that Congress created a comprehensive regulatory scheme that controlled the behavior of participants in a substantive area,<sup>40</sup> and “the comprehensive regulatory scheme was deemed a substitute for antitrust regulation.”<sup>41</sup> In *Credit Suisse*, antitrust immunity was implied because Congress provided an alternative method in the statute for regulating antitrust activity, thus eliminating the need for antitrust laws.<sup>42</sup> However, the provisions of the IHA do not state any alternative scheme for regulating antitrust activity and, therefore, there is no implied immunity in the IHA’s legislative framework for antitrust liability.<sup>43</sup>

Next, the court looked to see if implied immunity was present in the IHA despite the fact that supervision via a regulatory scheme was not present. The court discussed *McCarthy v. Middle Tennessee Electric*

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<sup>34</sup> *Id.* at 881.

<sup>35</sup> *Id.* (citing *Credit Suisse Sec. (USA), LLC v. Billing*, 551 U.S. 264 (2007)).

<sup>36</sup> *Id.* (quoting *United States v. Nat’l Ass’n of Sec. Dealers*, 422 U.S. 694, 719 (1975)).

<sup>37</sup> *Churchill Downs, Inc.*, 605 F. Supp. 2d at 881.

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

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

<sup>42</sup> *Id.* at 881–82.

<sup>43</sup> *Churchill Downs, Inc.*, 605 F. Supp. 2d at 882.

*Membership Corp.*, where implied immunity was found in a situation that was less regulated than *Credit Suisse*.<sup>44</sup> The case involved the Tennessee Valley Authority (hereinafter “TVA”), which was charged under 16 U.S.C. § 831 with “maintaining and operating the properties now owned by the United States.”<sup>45</sup> In *McCarthy*, “[e]lectrical cooperative members challenged the legality of contracts between the TVA and the electrical cooperatives.”<sup>46</sup> The *McCarthy* court held that the “TVA was immune from antitrust liability . . . because the statute created municipal monopolies for electrical power, which was at odds with concerns about competition.”<sup>47</sup> Additionally, state law regulated the TVA’s rates.<sup>48</sup> Because a regulatory scheme created by state and federal law was in the statute and antitrust provisions would conflict with this existing scheme, implied immunity was necessary in order for the statute to serve its intended purpose.<sup>49</sup>

The IHA is distinguishable from the TVA because the purpose of the IHA was to ensure fair compensation of horsemen in the off-track betting market and, more importantly, the IHA did not provide standards of regulation for the horsemen’s veto.<sup>50</sup> The court declined to extend the implied immunity doctrine to the IHA because there was not an alternative regulatory scheme in the IHA that conflicted with the antitrust laws; consequently, no immunity was required in order for the statute to function as Congress intended.<sup>51</sup>

## 2. *Extended Immunity*

The court next evaluated the Defendant’s final argument for antitrust immunity based on the theory of extended immunity. This theory states that if “a group is immune from antitrust laws, acts by a group of individuals must also be immune as well.”<sup>52</sup> The Defendants stated that it is impossible for individual horsemen to comply with both the IHA and the antitrust statutes, and, therefore, implied immunity should be extended under the IHA for the horsemen’s groups.<sup>53</sup>

The Defendants offered three cases in support of their proposition to extend individual immunity to a group, all of which the court ultimately

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

<sup>45</sup> *Id.* (quoting 16 U.S.C.A. § 831 (West, Westlaw through Feb. 16, 2010)).

<sup>46</sup> *Id.* (citing *McCarthy v. Middle Tenn. Elec. Membership Corp.*, 466 F.3d 399, 403 (6th Cir. 2006)).

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

<sup>48</sup> *Id.* at 883 (citing *McCarthy v. Middle Tenn. Elec. Membership Corp.*, 466 F.3d 399, 414 (6th Cir. 2006)).

<sup>49</sup> *Churchill Downs, Inc.*, 605 F. Supp. 2d at 883.

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

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

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

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

distinguished on factual differences.<sup>54</sup> The court stated that the Capper-Volstead Act, the subject of *Sunkist Growers, Inc. v. Winckler & Smith Citrus Products Co.* and *Treasure Valley Potato Bargaining Ass'n v. Ore-Ida Foods, Inc.*, is unlike the IHA in that it provides express immunity from antitrust liability in agricultural situations.<sup>55</sup> Although the third relevant case, *Brown v. Pro Football, Inc.*, dealt with implied immunity, the court in *Brown* did not extend the doctrine of implied immunity but, rather, stated that the doctrine “applied equally to employees and employers.”<sup>56</sup> Ultimately, “none of these cases support[ed] the proposition that implied immunity” given to an individual “extends to a group of immune individuals.”<sup>57</sup>

The *Churchill* court stated that “immunity is to be implied narrowly and only to the minimum extent necessary[,]”<sup>58</sup> indicating that only in very limited circumstances would the court grant immunity for antitrust violations where Congress had not specifically provided for it in the statute. The court reasoned further that individual horsemen under the IHA do not need implied immunity to be extended because a veto can only be exercised by a horsemen’s group, not by an individual.<sup>59</sup> More importantly, neither an individual nor a horsemen’s group can be liable for *independently* exercising a veto under the IHA and, therefore, neither require antitrust immunity for their actions under the IHA.<sup>60</sup> The court only discussed individual horsemen’s groups acting independent of one another, not the THG groups acting together to veto the sale of signals, which could have different implications. The court stated that “[m]ere incompatibility [with the antitrust laws], as opposed to clear repugnancy, is insufficient to find

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<sup>54</sup>*Id.* at 883–84 (The first two cases articulated by defendants, *Sunkist Growers, Inc. v. Winckler & Smith Citrus Products Co.*, 370 U.S. 19 (1962) and *Treasure Valley Potato Bargaining Ass'n v. Ore-Ida Foods, Inc.*, 497 F.2d 203 (9th Cir. 1974), involved the Capper-Volstead Act, regulating agricultural cooperatives. In *Sunkist Growers*, citrus growers, which joined Sunkist and formed two separate cooperatives, were found to be not independent parties in regard to the antitrust acts because the Capper-Volstead Act anticipated a cooperative of this size. Therefore, the organizations were in practical effect one organization. In *Treasure Valley*, potato growers, which joined larger associations to have better bargaining power with potato buyers, were protected from antitrust liability as cooperatives acting together as one association. In the third case, *Brown v. Pro Football, Inc.*, 518 U.S. 231 (1996) the NFL Players Association challenged an action by the NFL Clubs in relation to salary floors agreed upon by the Clubs for developmental squad players. This case was governed by the federal labor laws and the Supreme Court said that implied antitrust immunity was necessary here to make the authorized bargaining process effective. However, the Court said this was just a “multi-employer bargaining” and did not involve “groups joining together into larger groups” as was the case with the horsemen’s groups.).

<sup>55</sup> *Churchill Downs, Inc.*, 605 F. Supp. 2d at 884 (citing *Sunkist Growers, Inc. v. Winckler & Smith Citrus Products Co.*, 370 U.S. 19 (1962); *Treasure Valley Potato Bargaining Ass'n v. Ore-Ida Foods, Inc.*, 497 F.2d 203, 217 (9th Cir. 1974)).

<sup>56</sup> *Id.* at 885 (citing *Brown v. Pro Football, Inc.*, 518 U.S. 231 (1996)).

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

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

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



implied immunity.”<sup>61</sup> Although implied immunity from antitrust violations did not exist in the IHA, the court left the door open for Defendants to demonstrate that without implied immunity the rights granted under the IHA could not be properly exercised, in which case a grant of implied immunity would be necessary.<sup>62</sup>

### C. Pleading Standard for an Antitrust Complaint

Defendants argued that the plaintiffs’ claim should be dismissed under *Bell Atlantic Corp. v. Twombly* for failure to state a claim of relief.<sup>63</sup> *Twombly* states that a heightened pleading standard applies to antitrust complaints, requiring a plausible, not just conceivable, complaint.<sup>64</sup> A plaintiff must plead sufficient facts to lead to a reasonable expectation that after the discovery process, evidence of an illegal agreement will be revealed.<sup>65</sup> An antitrust complaint cannot just state the elements of the cause of action but must also give facts to support the elements, although the facts need not be detailed.<sup>66</sup> The facts, however, must give rise “to a plausible finding of an agreement that unreasonably restrains trade.”<sup>67</sup> There are two ways to find that a cause of action is plausible: a *per se* violation, or a violation under the *rule of reason* approach.<sup>68</sup> The Plaintiffs alleged a *per se* antitrust violation with their theory that the Defendants are “in a group boycott for the purpose of price fixing”<sup>69</sup> because the boycott has a “predictable . . . anticompetitive effect.”<sup>70</sup>

### D. Elements of an Antitrust Cause of Action

There are three elements needed to sustain an antitrust cause of action: “(1) the existence of a contract, combination, or conspiracy (2) affecting interstate commerce (3) that imposes an unreasonable restraint on trade.”<sup>71</sup> To satisfy the first element, a plaintiff must show evidence of “the terms of membership of the conspiracy and the method adopted to effectuate its ends.”<sup>72</sup> The Kentucky HBPA joined the THG, which represented horsemen’s groups from 40 other racetracks in addition to

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<sup>61</sup> *Churchill Downs, Inc.*, 605 F. Supp. 2d at 886.

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> *Id.* (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)).

<sup>65</sup> *Id.* (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 554, 556 (2007)).

<sup>66</sup> *Id.* at 887.

<sup>67</sup> *Churchill Downs, Inc.*, 605 F. Supp. 2d at 887.

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

<sup>69</sup> *Id.*

<sup>70</sup> *Id.* (quoting *Bassett v. Nat’l Collegiate Athletic Ass’n*, 528 F.3d 426 (6th Cir. 2008)).

<sup>71</sup> *Id.* at 887–88.

<sup>72</sup> *Id.* at 888 (citation omitted).

Churchill Downs in November 2007.<sup>73</sup> As evidenced by the licensing agreement, the THG proposed to the ADWs that the groups represented by the THG wanted signals to be sold for a higher price, thereby increasing the amount of money the groups received.<sup>74</sup> The licensing agreement set a minimum price for which the ADWs could purchase a racetrack signal, and the presence of this agreement led the court to conclude that a conspiracy between the horsemen was plausible, thus satisfying the first element.<sup>75</sup>

The second element requires a plaintiff to define the relevant product and geographic markets for the defendant's actions.<sup>76</sup> The Plaintiffs met this burden by defining the geographic market as the United States, which was appropriate because individuals nation-wide were able to place wagers on races using the off-track betting system.<sup>77</sup> The Plaintiffs defined the product market as the right to receive signals and accept wagers at other locations besides the host track; therefore, the court found that Plaintiffs satisfied the second element.<sup>78</sup>

The third element is satisfied if it can be proven that "the agreement had an anticompetitive effect."<sup>79</sup> The Plaintiffs asserted that the Defendants' concerted use of their veto and the licensing agreement provided evidence of a group boycott, with the ultimate goal being to increase the profits the horsemen's groups received from the sale of signals.<sup>80</sup> "These facts . . . illustrate[d] a plausible finding of a group boycott to raise prices, which shows an anti-competitive effect."<sup>81</sup> Therefore, the court found that all three elements of an antitrust claim were supported by the facts alleged in the complaint.<sup>82</sup>

Even though the elements of the cause of action were satisfied, there was still a question as to whether or not there was an antitrust violation under either the *per se* or *rule of reason* approach. The court chose to focus on the *per se* approach because it applies to "practices [that] by their nature have a 'substantial potential for impact on competition[.]'"<sup>83</sup> such as the group boycott alleged by the Plaintiffs in the present case. A *per se* violation requires proof of: "(1) two or more entities engaged in a conspiracy, combination or contract, (2) to effect a restraint or combination prohibited *per se* . . . , (3) that was the proximate cause of the plaintiffs

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<sup>73</sup> *Churchill Downs, Inc.*, 605 F. Supp. 2d at 888.

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

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

<sup>79</sup> *Churchill Downs, Inc.*, 605 F. Supp. 2d at 888.

<sup>80</sup> *Id.* at 888–89.

<sup>81</sup> *Id.* at 889.

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

<sup>83</sup> *Id.* at 890 (quoting *F.T.C. v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411, 433

antitrust injury.”<sup>84</sup> These elements are similar to the elements needed to sustain an antitrust cause of action; “[c]ommercially motivated group boycotts are *per se* violations because ‘the likelihood of anticompetitive effects is clear and the possibility of countervailing procompetitive effects is remote.’”<sup>85</sup>

Traditionally, boycotts with the purpose of price-fixing (which the Plaintiffs alleged occurred when the horsemen’s groups joined the THG and used a concerted veto) have been held to be *per se* antitrust violations.<sup>86</sup> The court did not explicitly say if the Defendants’ actions in the present case were a violation under the *per se* approach; however, the court elected to only perform a *per se* analysis at this time. If this analysis proves to be unviable following discovery and the presentation of additional information by the Plaintiffs, the court will then perform a rule of reason analysis.<sup>87</sup>

Under the IHA, tracks and horsemen’s groups are joint sellers of the signal, for which tracks compete to get the best price from ADWs.<sup>88</sup> Although the horsemen are not the actual sellers of the signal, their actions may, through the rights granted to them by the IHA, influence or increase the price of the signal “in a way that restrains commerce.”<sup>89</sup> If the ADWs choose not to accept the terms of the agreement set forth by the horsemen’s groups, they will be unable to purchase signals, which is “synonymous” with *per se* violations.<sup>90</sup> The court ultimately declined to rule on whether or not the Defendants’ actions were an antitrust violation, stating that many factors could influence the outcome.<sup>91</sup> At a later date, when the Plaintiffs have completed discovery and presented all of their evidence, the court will decide if an antitrust violation has actually occurred.<sup>92</sup> Following the aforementioned discussion, the court evaluated the Plaintiffs other claims, which are not relevant to this Comment.<sup>93</sup>

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<sup>84</sup> *Id.* (citations omitted).

<sup>85</sup> *Churchill Downs, Inc.*, 605 F. Supp. 2d at 890. (quoting *Nw. Wholesale Stationers, Inc. v. Pac. Stationery and Printing Co.*, 472 U.S. 284, 294 (1985)).

<sup>86</sup> *Id.* at 891 n.26.

<sup>87</sup> *Id.*

<sup>88</sup> *Id.* at 891.

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

<sup>90</sup> *Id.*

<sup>91</sup> *Churchill Downs, Inc.*, 605 F. Supp. 2d at 891.

<sup>92</sup> *Id.* at 891–92.

<sup>93</sup> Defendants moved for dismissal of count II of the Plaintiffs’ Amended Complaint, which “alleges breach of both (1) the contract’s anti-assignment provisions and (2) its exclusive representation provision.” *Churchill Downs, Inc.*, 605 F. Supp. 2d at 892. Plaintiffs said that appointing THG to negotiate on behalf of the horsemen’s groups conflicted with the horsemen’s groups’ “obligation to serve as exclusive representative for purposes of the IHA.” *Id.* The court dismissed this claim because the Plaintiffs admitted in their response brief that Defendants did not violate this provision. *Id.* at 892 n.28. With regard to the exclusive representation provision, both parties agreed it “does not prohibit the horsemen’s group from appointing an agent [THG] to negotiate on its behalf.” *Id.* at 892. The court focused its attention on whether the actions of TGH constituted an agency relationship, which is permissible under the IHA, or something more. *Id.* The court held that THG was not exercising a veto

## V. IMPLICATIONS

The court in *Churchill* did not explicitly say whether the defendants committed an antitrust violation but left the issue open for a decision following discovery. If, after further discovery, the court concludes that Defendants' actions constitute an antitrust violation, there could be far-reaching consequences for horse owners, trainers, race tracks, and jockeys. Horsemen's groups would be prevented from uniting to negotiate prices if their intended purpose would have an anti-competitive effect on the market. This would mean that horsemen's groups would not have much leverage to negotiate if they felt the price that the racetracks were demanding was not satisfactory for their signal and, in turn, not paying the horsemen's groups enough. If the defendants' actions are found to be an antitrust violation, this would leave racetracks in control of the price the horsemen are paid for their contribution to the off-track betting market. Horsemen's groups would not be able to organize in any boycott by exercising their veto in a concerted matter, and their power would be limited because one horsemen's group acting alone has little influence.

It is also possible that the defendants' actions will not be found to violate antitrust laws. This outcome would give horsemen's groups tremendous power within the industry. Revenues from off-track betting are essential to the racing industry. This result would allow horsemen to set their own price for their share of the takeout, and could have a disastrous consequence if the horsemen's groups became greedy. If horsemen's groups began using their veto power to demand larger amounts of the takeout, the race tracks and off-track betting sites would lose vast sums of money, forcing many to close. The horsemen could, in a large part, control the future of the racing industry, and the racetracks would have no choice but to give the horsemen the price they demanded or else they would be unable to sell their signal at all.

Neither one of these alternatives would provide an optimal result, and perhaps the best solution would be for Congress to amend the text of the IHA to ensure that neither of these harsh results becomes a reality.

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on Kentucky HBPA's behalf and that it was clear that THG was representing Kentucky HBPA's interests and not their own. Therefore, the court concluded that THG was merely acting as an agent for Kentucky HBPA, which is permissible under the IHA, and the exclusive representation provision was not violated. *Id.*

## VI. CONCLUSION

Off-track betting within the horse racing industry will have continued significance. The court in *Churchill* declined to rule if the defendants' actions were an antitrust violation, stating that there were many factors which could influence the outcome. At a later date following discovery, the court will decide if an antitrust violation has occurred. The court's final ruling in *Churchill*, determining if the defendants' actions are an antitrust violation, will have far reaching implications and will influence the future success of the racing industry, particularly because of the importance of OTBs and ADWs. Regardless of how the court rules, either the tracks or the horsemen will be left with very little power, while the other side will have nearly complete control. If the defendants' actions are found to be an antitrust violation, tracks and off-track betting organizations will have the power to set the price of signals and determine the share given to horsemen. If the defendants' actions are found not to be an antitrust violation, horsemen's groups will have nearly unlimited capability to set a price for their share of the takeout, and will have the option to use their veto under the IHA if not given the price demanded.