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Update on Antitrust and the Legal Issues Surrounding Cloning in the Equine World

Lewis T. Stevens

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I. INTRODUCTION

On April 23, 2012, after the American Quarter Horse Association declined to change its rules regarding the registration of the get of clones, Abraham & Veneklasen Joint Venture, Abraham Equine, Inc., and Jason Abraham filed a complaint in the United States District Court of the Northern District of Texas, Amarillo Division, against the American Quarter Horse Association ("AQHA").[1] Just over a year later, Judge Mary Lou Robinson entered a final judgment affirming the verdict of a unanimous ten-person jury in favor of Plaintiffs, which awarded attorneys' fees and costs, but no damages.[2] Judge Robinson also enjoined the AQHA from enforcing Rule 227(a),[3] and ordering the AQHA to amend specific rules to permit registration of the get of clones.[4] On January 15, 2015, the Fifth Circuit Court of Appeals reversed the District Court and entered judgment in favor of the AQHA.[5] The Fifth Circuit also denied petitions for a rehearing and a rehearing *en banc*.[6]

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* B.A. from the University of Utah in Economics, 1972, *magna cum laude*. J.D. from Yale Law School, 1975. Note editor for the Yale Law Journal in 1975.

[1] Docket, Abraham & Veneklasen Joint Venture v. Am. Quarter Horse Ass'n, No. 2:12-CV-00103 (N.D. Tex. Apr. 23, 2012); Abraham & Veneklasen Joint Venture v. Am. Quarter Horse Ass'n, 776 F.3d 321, 327, No. 2:12-cv-103-J, 2013 WL 2297104, at *2 (5th Cir. May 24, 2013).

[2] Jury Verdict Form, Abraham & Veneklasen Joint Venture v. Am. Quarter Horse Ass'n, No. 2:12-cv-103-J (N.D. Tex. July 30, 2013).

[3] *AQHA Official Handbook of Rules and Regulations*, AM. QUARTER HORSE ASS'N REG104.1 (2016), https://aqha.com/media/9467/aqha-handbook-2016.pdf [hereinafter *AQHA Regs.*] (requiring a foal to have a Numbered American Quarter Horse sire and a Numbered American Quarter Horse dam, which precludes registration of a foal produced by a cloning process) [https://perma.cc/AS4K-TXE6].

[4] Abraham & Veneklasen Joint Venture v. Am. Quarter Horse Ass'n, 776 F.3d 321, 327 (5th Cir 2015).

[5] *Id.* at 335.

[6] *Id.* at 321.

The first issue this paper will address is how the diametrically opposed decisions of the Jury and the Fifth Circuit could be based on the same factual record. Of course, the possible explanations are purely speculative, but exploring the background of cloning and the litigation helps illuminate both the Jury verdict and the Fifth Circuit Opinion. The second issue this paper will address is the possible future of cloning and whether the Fifth Circuit Opinion has permanently closed the door on the registration of the get of clones. Before addressing those issues, the next sections of this paper summarize the background of cloning.

II. CLONING AND BREED REGISTRY ASSOCIATIONS

The framework for understanding the issues in the Plaintiffs' case against the AQHA begins with a brief history of cloning and the positions of the various equine breed registry associations. The science of cloning mammals grabbed worldwide headlines in July of 1996 with the birth of Dolly, perhaps history's most famous sheep.[7] In the spirit of the race to the Moon, other laboratories pushed their own pursuit of cloning science, analyzing, duplicating, refining and expanding on the results achieved in Scotland.

In 2002, the Laboratory of Reproductive Technology in Cremona, Italy obtained 841 reconstructed embryos of the Haflinger mare, Prometea, and implanted 17 of the embryos.[8] One of the embryos was implanted in Prometea herself, and that embryo resulted in the birth in August of 2003 of the only foal obtained from that process.[9] Much like the pursuit of cloning mammals in general, the birth of the Prometea clone in Italy, and the birth of three cloned mules at the Northwest Equine Reproduction Laboratory at the University of Idaho in Moscow, Idaho,[10] ignited the interest in equine cloning.

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[7] *Prometea Unbound*, THE ECONOMIST (Aug. 7, 3003), http://www.economist.com/node/1174648 [https://perma.cc/4A4C-D39N].

[8] *Id.*

[9] *Id.*

[10] Dirk K. Vanderwall et al., *Present Status of Equine Cloning and Clinical Characterization of Embryonic, Fetal, and Neonatal Development of Three Cloned Mules*, 225 J. AM. VETERINARY MED. ASS'N 1694, 1695 (2004).

Texas A&M was prominent in early research and helped develop the technology used by private Texas company, ViaGen.[11] One of A&M's early efforts was the cloning of Smart Little Lena, the winner of the Cutting Horse Triple Crown in 1983 and a prominent breeding stallion.[12] Once again, the process started with the implantation of a number of embryos, in this case, 17.[13] ViaGen, first in association with Texas A&M and later in association with Dr. Gregg Veneklasen, produced several clones of prominent Quarter Horses, many with accomplishments in the cutting horse world.[14] Currently, there are clones of accomplished horses in numerous disciplines, with clones of polo ponies finding particular success.[15]

Many breed registry associations have prohibitions similar to the AQHA. By way of example, the Appaloosa,[16] Arabian,[17]

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[11] Marcella Peyre-Ferry, *Replicating the Irreplaceable: Equine Cloning Moves from Marvel to Mainstream*, PA. EQUESTRIAN, http://www.pennsylvaniaequestrian.com/news/Equine-Cloning-1208.php (last visited Oct. 20, 2016) [https://perma.cc/6PRS-A3VN].

[12] Rebecca Overton, *Clone Update, The Whole Story*, QUARTER HORSE NEWS (Nov. 16, 2007), http://www.quarterhorsenews.com/indexphp/news/industry-news/69-clone-update-the-whole-story.html [https://perma.cc/QEV8-HPBC].

[13] ECONOMIST, *supra* note 7.

[14] Overton, *supra* note 12.

[15] SavvyExacta, *Equine Cloning: The Goal is Breeding, Not Performance*, ANIMAL SCI. BLOG (Jan. 12, 2011, 12:01 AM), http://cr4.globalspec.com/blogentry/15452[https://perma.cc/QKX4-KKAZ]; Rebecca Overton, *Clone Produces First Foal*, QUARTER HORSE NEWS (Jan. 12, 2009), http://www.quarterhorsenews.com/index.php/news/industry-news/6381-clone-produces-first-foal.html [https://perma.cc/MV6D-L7PW]; Rory Carroll, *Argentinian Polo Readies Itself for Attack of the Clones*, THE GUARDIAN (June 5, 2011, 1:30 PM), https://www.theguardian.com/world/2011/jun/05/argentinian-polo-clones-player [https://perma.cc/DM8P-2L95]; John Their, *First Event Horse Cloned*, EVENTING NATION (June 16, 2011, 3:25 PM), http://eventingnation.com/first-event-horse-cloned/ [https://perma.cc/76K2-YE3J]; Lauren Giannini, *Duplicating Greatness? Clones and Sport Horse Breeding*, SIDELINES NEWS (Dec. 23, 2011), http://sidelinesnews.com/weekly-featured/duplicating-greatness-clones-and-sport-horse-breeding.html [https://perma.cc/36XJ-NS5L].

[16] Terry Brownell, *Appaloosa Horse Club Official Handbook*, 2016 APPALOOSA HORSE CLUB 1, 49 (2016), http://appaloosa.com/pdfs/rulebook16.pdf ("No horse that is produced from cloning shall be registered with the ApHC.") [https://perma.cc/EJ2Q-WK7M].

[17] Sharon Myers, *WAHO Conference*, WORLD ARABIAN HORSE ORG.(Nov. 8, 2011), http://www.waho.org/2011-waho-conference-doha-state-of-qatar-2/ ("[A]ny Arabian of any age produced by cloning and that the foals of any Arabian which was produced by cloning must not be registered under any circumstances.") [https://perma.cc/34YZ-9CTR].

Friesian,[18] Haflinger,[19] Lippizan,[20] Morgan,[21] Paint Horse,[22] and Paso Fino[23] registries have all adopted rules or taken actions to prohibit registration of clones. The Jockey Club excludes clones by requiring live cover for foal registration.[24]

Most breed associations require that a foal at least be the get of a registered stallion and a registered dam, and, in certain circumstances, provide additional DNA verification of parentage. Many, however, have neither ruled on the issue of cloning directly nor clarified registration rules with regard to clones. Included in this group, by way of example, are the associations for registry of Andalusians,[25] Belgian Draft Horses,[26]

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[18] *FHS Breeding Book Regulations*, FRIESIAN HORSE SOC'Y (2016), http://www.friesianhorsesociety.citymakecom/f/2016_FHS_BBpdf ("Cloning will not be allowed.") [https://perma.cc/VB6C-A8VS].

[19] *AHR Board of Director's Meeting*, AM. HAFLINGER REGISTRY (2008), http://www.haflingerhorse.com/documents/Minutes08/Minutes08Dec3.pdf ("No Haflinger born as the result of cloning will be registered with the American Haflinger Registry.") [https://perma.cc/9VVX-CPHW].

[20] *Purebred Rules and Regulations*, LIPIZZAN ASS'N OF NORTH AM., http://www.lipizzan.org/rules.html ("To be eligible for registration, natural service or artificial insemination must beget a foal.") (last visited Oct. 23, 2016) [https://perma.cc/EVA9-XVSD]; *Registration Guide*, U.S. LIPIZZAN FED'N (June 21, 2011), https://static1.squarespace.com/static/533f079fe4b01599cd0de2f5/t/563a7f21e4b06abdb145736d/1446674209062/uslf-registration-guide.pdf ("Horses with a USLF number containing the letters 'NT' are recorded clones. A Recorded Clone is not a registered Lippizzan, but has been conceived by nuclear transfer technique from cells obtained from a purebred Lipizzan registered with the USLF.") [https://perma.cc/J48L-FQAK].

[21] *FAQs – About the Morgan*, AM. MORGAN ASS'N (2016), http://www.morganhorse.com/about_morgan/faqs/ ("A registered Morgan is the result of breeding two registered Morgan horses.") [https://perma.cc/G5GJ-K2L3].

[22] *Official APHA Rule Book*, AM. PAINT HORSE ASS'N 1, 69 (April 2016), http://apha.com/wp-content/uploads/2016/06/2016rulebook.pdf ("Horses produced by any cloning process are not eligible for registration.") [https://perma.cc/A7YU-W43D].

[23] *How Do I Register My Paso Fino Horse?*, PASO FINO HORSE ASS'N (2012), http://www.pfha.org/registry/registering-a-paso-fino (requiring that an owner specify breeding by one of only three methods: natural (hand service), pasture coverage, or artificial insemination) [https://perma.cc/45RH-RG2P].

[24] Bob Curran, *Jockey Club Stewards Approve Changes to Clarify Registration Eligibility*, THE JOCKEY CLUB (July 2, 2002), http://www.jockeyclub.com/default.asp?section=Resources&area=10&archives=show&story=19 [https://perma.cc/X94B-49JZ]; *see also The American Stud Book Principal Rules and Requirements*, THE JOCKEY CLUB (2016), http://www.registry.jockeyclub.com/registry.cfm?Page=tjcRuleBook [https://perma.cc/7T9P-PYZC]; E.L. Squires, *Changes in Equine Reproduction: Have They Been Good or Bad for the Horse Industry?*, 29 J. EQUINE VETERINARY SCI. 268, 272 (2009).

[25] *Arts. of Incorporation and Bylaws*, INT'L ANDALUSIAN & LUSITANO HORSE ASS'N, http://ialha.org/wp-content/uploads/2016/03/IALHA-Articles-of-Incorporation-and-Bylaws-2013.pdf (last visited May 11, 2016) [https://perma.cc/P5V7-97KQ].

Clydesdales,[27] Hanoverians,[28] Percherons,[29] Tennessee Walkers,[30] Hackneys,[31] and Miniature Horses.[32] Within the last few years, a few breed registries have started registering clones. They include Zangershide, Belgian Warmblood, Dutch Warmblood, Angle European Stud Book, Continental Studbook, German Sporthorse Registry and the American Warmblood Registry.[33] The American DNA Registry, located in Texas, is now registering clones.[34]

III. CLONING AND PERFORMANCE ASSOCIATIONS

While the Breed Registry Associations are opposed to registering clones or their get, the Performance Associations are generally open to competition by clones. Examples include the National Barrel Horse Association, the National Cutting Horse Association, Polo events, and, for 2016, Olympic events governed by the Fédération Equestre Internationale, which include dressage, jumping, eventing, and even polo.[35]

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[26] *By-Laws of The Belgian Draft Horse Corp. of Am.*, BELGIAN DRAFT HORSE CORP. OF AM., http://www.belgiancorp.com/docs/2015%20By-Laws_00461.pdf (last visited May 11, 2016) [https://perma.cc/92N6-FDEZ].

[27] *Application for Registry*, CLYDESDALE BREEDERS OF THE U.S.A., http://www.clydesusa.com/resources/register-clydesdale/ (last visited May 11, 2016) [https://perma.cc/4QFC-W44Z].

[28] *American Hanoverian Society Corporate Bylaws and Rules of Registration*, AM. HANOVERIAN SOC., http://hanoverian.org/ahs-corporate-bylaws-and-rules-of-registration/ (last visited May 11, 2016) [https://perma.cc/ZT8Q-JQG9].

[29] *Application for Registration~ Percheron Horse Association of America*, PERCHERON HORSE ASS'N OF AM., http://www.percheronhorse.org/forms/Registrationapp.pdf (last visited May 11, 2016) [https://perma.cc/2R7R-ZCBK].

[30] *Corporation Rules Rule 1: Registration*, TENN. WALKER HORSE BREEDERS' AND EXHIBITORS' ASS'N CORP. RULES R. 1.01, http://www.twhbea.com/association/corprules.php (last visited May 11, 2016) [https://perma.cc/A9HL-JAJB].

[31] *Horse Cloning: What's The Breed Reaction?*, THE BREEDER'S GUIDE: TOPICS AND OPINIONS, http://www.breedersguide.com/topics.htm#cloning (last visited Ma 11, 2016) [https://perma.cc/3DZH-NG8P].

[32] *How to Register Your American Miniature Horse*, AM. MINIATURE HORSE ASS'N, http://www.amha.org/pdf/reg/index.html (last visited May 11, 2016) [https://perma.cc/B5KX-4B6J].

[33] E-mail from Gregg Veneklasen, D.V.M. to author (May 14, 2016, 2:53 PM) (on file with author).

[34] Telephone Interview with Gregg Veneklasen, D.V.M. (May 14, 2016).

[35] Ollie Williams, *Battle of The Clones: When Will a Replica Horse Win Olympic Gold?*, CNN (Feb. 20, 2015), http://edition.cnn.com/2015/02/20/equestrian/horse-cloning-olympics/ [https://perma.cc/LJ7R-J6Y3]; *see also* Ryan Bell, *Game of Clones Argentine Polo Player Rides Cloned Horse to Win National Championship*, OUTSIDE (Dec. 10, 2013), http://www.outsideonline.com/1800376/game-clones [https://perma.cc/T3ZX-5W8X].

IV. FRAMEWORK OF THE AQHA REGISTRATION RULES AND PROCESS

The basic framework for AQHA's registration process improves controls on the stallion and mare owners by means of reports, notices and permits, and, finally, the use of genetic testing. Current rules allow breeders to use artificial insemination of mares,[36] including, by use of frozen semen and cooled semen,[37] transported to a location other than where the semen was collected.[38] The use of frozen semen is not limited to living stallions; frozen semen of deceased stallions is currently being used for breeding.[39] For mares, the AQHA permits the use of frozen embryos,[40] and allows the registration of multiple foals obtained from one mare in a single breeding season by use of embryo transfers to recipient mares that carry the foal to maturity.[41] Additionally, the AQHA permits a separation of the ownership of the stallion and the semen of the stallion.[42] For mares, a breeder may own or lease a mare,[43] or own a frozen embryo.[44]

The first set of basic controls, then, are the rules that apply to stallion owners. By November 30th of a breeding year, the stallion owner must submit a breeding report to the AQHA.[45] The breeding report must distinguish mares bred by cooled transported semen or frozen semen.[46] The breeding report must also list a mare multiple times, with the dates of the breeding, if multiple foals are sought to be registered by the mare owner or

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[36] *AQHA Regs.*, *supra* note 3, at REG111.
[37] *Id.*
[38] *Id.* at REG102.8.3 & REG111.
[39] Katie Tims, *Smart Little Lena: The Future*, QUARTER HORSE NEWS, Jan. 15, 2007 at 144-151.
[40] *AQHA Regs.*, *supra* note 3, at REG112.5.
[41] *Id.* at REG112.
[42] *Id.* at REG111.2.
[43] *Id.* at REG112.1.1.
[44] *Id.* at REG112.5.
[45] *Id.* at REG110.1.
[46] *Id.* at REG111.1.

mare lessee.[47] The owners of a retained semen rights permit must file the same breeding report by November 30th.[48]

This process is subject to a number of notices and certificates. A stallion owner must provide a breeder's certificate to the mare owner when the foal is born.[49] Every mare owner or lessee who intends to obtain embryo-transfer foals must provide notice to the AQHA before collecting a fertilized egg.[50] The lessee of a mare must provide notice to the AQHA of the mare lease.[51] The owner of a stallion's semen, but not the stallion, must obtain a retained semen rights permit.[52] Finally, a breeder wishing to retain the right to use a frozen embryo upon sale of a mare must obtain a permit.[53] For a mare foaled in 2015 or after, the frozen embryos or oocytes must be used within two calendar years of the death or spaying of the mare.[54]

After all of these procedural steps, the AQHA requires genetic testing of foals obtained by cooled transported semen or frozen semen,[55] foals obtained by embryo transfers, or the use of frozen embryos.[56] To facilitate the genetic testing, stallion owners must provide the AQHA with a test result showing the genetic type for every stallion; mare owners must provide the same test for genetic type of mares foaled after January 1, 1989.[57]

V. TEXAS LAW AND AQHA LITIGATION HISTORY

The AQHA is a private association located in Amarillo, Texas.[58] As a private association, the AQHA enjoys the benefits of what the Texas courts call the non-intervention rule.[59] The basic rule dates back at least to 1890 and the Texas Supreme Court

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[47] *Id.* at REG110.3.
[48] *Id.* at REG110.2.
[49] *Id.* at REG113.2.
[50] *Id.* at REG112.1.1.
[51] *Id.* at REG125.1.
[52] *Id.* at REG111.2.
[53] *Id.* at REG112.5.
[54] *Id.* at REG112.9.
[55] *Id.* at REG111.3.
[56] *Id.* at REG112.
[57] *Id.* at REG108.2 & REG108.3.
[58] AM. QUARTER HORSE ASS'N, https://www.aqha.com/ (last visited October 2, 2016) [https://perma.cc/BC7X-PFWQ].
[59] *See* Screwman's Benevolent Ass'n v. Benson, 13 S.W. 379, 380 (Tex. 1890).

case of *Screwman's Benevolent Association v. Joe Benson.*[60] The basic rationale for courts not to intervene in the internal affairs of a voluntary association was stated as follows:

> A member of a voluntary association is bound by a sentence of expulsion against him lawfully rendered by a tribunal created in pursuance of its constitution, and clothed with that power . . . [b]y uniting with the society, the member assents to and accepts the constitution, and impliedly binds himself to abide by the decision of such boards as that instrument may provide, for the determination of disputes arising within the association.[61]

More recently, the non-intervention rule was stated in a case involving the failed attempt to certify a horse as "Accredited Texas Bred" as follows:

> [C]ourts are not disposed to interfere with the internal management of a voluntary association. The right of such an organization to interpret its own organic agreements, its laws and regulations, after they are made and adopted, is not inferior to its right to make and adopt them. And a member, by becoming such, subjects himself, within legal limits, to his organization's power to administer, as well as to its power to make, its own rules.[62]

The matter involved a Thoroughbred owner's efforts to qualify his horse for incentive purses available to horses accredited as Texas-bred.[63] The Texas Thoroughbred Breeders Association denied the accreditation.[64] The Court of Appeals dismissed the case and vacated the judgment of the trial court on the grounds that the plaintiff failed to allege subject matter jurisdiction over his

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[60] *See id.*

[61] *Id.*

[62] Tex. Thoroughbred Breeders Ass'n v. Donnan, 202 S.W.3d 213, 224 (Tex. App. 2006) (quoting Bhd. of Ry. Trainmen v. Price, 108 S.W.2d 239, 241 (Tex. Civ. App. 1937)).

[63] *Id.* at 214-15.

[64] *Id.*

dispute as a member of a private association where the non-intervention doctrine applied.[65]

The non-intervention rule has been applied in a number of circumstances involving a broad range of associations. Examples, in addition to those cited above, follow:

- Member dispute with the Sports Car Club of America over defining classes such that a Porsche 911 competed against a Datsun 300ZX, *Dal-Tech Racing, Inc. v. Sports Car Club of Am., Inc.*, 1999 Tex. App. Lexis 5785 (Tex. App. – Dallas 1999).
- Member dispute with a country club over restricting women for tee times on Saturdays and holidays, *Dickey v. Canyon Creek Country Club*, 12 S.W.3d 172 (Tex. App. – Dallas 2000).
- Member dispute with a voluntary medical association over expulsion of an individual from the Dallas County Medical Society, *Dallas County Medical Society et al. v. Ubinas-Brache*, 68 S.W.3d 31 (Tex. App. – Dallas 2001).
- Member expulsion from a pigeon racing association for filing allegedly fraudulent pigeon racing results, *Rodriguez v. Montagno,* 2008 Tex. App. LEXIS 314 (Tex. App. – Dallas 2008).
- Member dispute with the National Cutting Horse Association over disqualification as a Non-Pro rider and suspension of membership, *Whitmire v. Nat'l Cutting Horse Ass'n*, 2009 Tex. App. LEXIS 5712 (Tex. App. – Fort Worth 2009).

Exceptions to the non-intervention rule are often stated in very broad terms. Again, examples follow:

- The non-intervention rule will not exclude protection of a civil or property right. *Whitmire,* 2009 Tex. App. LEXIS 5712 at *4.

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[65] *Id.* at 225.

- The non-intervention rule will be enforced so long as the action heeds the bounds of reason, common sense and fairness, and does not violate public policy or law. *Burge v. Am. Quarter Horse Ass'n*, 782 S.W.2d 353, 355 (Tex. App. – Amarillo 1990).
- The non-intervention rule will not apply to arbitrariness, fraud or collusion. *Dal-Tech*, 1999 Tex. App. LEXIS 5785 at *2.

While the exceptions to the non-intervention rule are broad enough as stated to eviscerate the rule itself, the courts have often cited these exceptions to acknowledge the allegations of the plaintiff and assure that the allegations were considered, while applying the non-intervention rule to the circumstances presented. This was certainly true in early cases in which members challenged certain rules of the AQHA.

The next fundamental piece of understanding the legal framework confronting the AQHA on the issue of registering the get of clones is a brief review of significant cases involving the AQHA. By many accounts, the AQHA has faced two lawsuits of great significance. While there have been other cases to be certain, perhaps the two most important cases are *Hatley v. Am. Quarter Horse Ass'n*, challenging the "white rule"[66] and *Floyd v. Am. Quarter Horse Ass'n*, brought in 2000 over the issue of registering multiple embryos obtained from a single mare in the same breeding year.[67]

The *Hatley* decision opens with the comment, "Melvin E. Hatley owned some magnificent horseflesh . . . ."[68] The case arose over the registration of a 1974 colt named Naturally High that was sired by Mr. Jet Moore out of the mare Chickamona.[69] Both the stallion and mare were registered Quarter Horses and both had records as performers.[70] Mr. Jet Moore died after one season

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[66] Hatley v. Am. Quarter Horse Ass'n, 552 F.2d 646 (5th Cir. 1977).

[67] *Equine Cloning—History and a Crystal Ball*, ALL ABOUT CUTTING 12, http://www.allaboutcutting.com/images/glo-images/PDFs/Cloning-pdfs/Equine-Cloning-Presentation.pdf (last visited Oct. 23, 2016) [hereinafter *History and a Crystal Ball*] (citing Floyd v. Am. Quarter Horse Ass'n, No. 87-589-C (Tex. Dist. Jan. 19, 2001) (Interlocutory judgment)).

[68] *Hatley*, 552 F.2d at 648.

[69] *Id.*

[70] *Id.* at 649.

at stud,[71] and Mr. Hatley, obviously, had high expectations for another colt from that bloodline. The problem arose when pictures of Naturally High revealed he had white markings on the inside of his left foreleg that went above a line around the center of the knee.[72] AQHA Rule 92, in force from 1972 to 1975, prohibited registration of a Quarter Horse with excessive white markings.[73] Horses with white markings above the center line of the knee were considered to have excessive white and to be carrying genes of Paint Horses.[74] The AQHA stated that its intent was to enhance and preserve the genetics of Quarter Horses, which they considered to be solid colored horses.[75]

Mr. Hatley sued in federal court, alleging a violation of Section 1 of the Sherman Anti-Trust Act.[76] The case was transferred from the Western District of Oklahoma to the Northern District of Texas.[77] The court dealt almost summarily with the Anti-Trust claim, saying:

> With respect to plaintiff's Section 1 claim, we find no activities in restraint of trade. Because nearly all economic activity will restrain someone, Section 1 has been read to outlaw only those unreasonable restraints which have been imposed on the industry. [. . .] We think the denial of registration did not violate the rule of reason. Rule 92, in substance and application, is a legitimate tool in the effort to improve the breed. The district court found that Rule 92 is valid as a substantive dividing line between the Quarter Horse and other breeds.[78]

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[71] *Id.* at 648.
[72] *Id.* at 651.
[73] *Id.* at 650.
[74] *Id.*
[75] *Id.* at 651.
[76] *Id.*
[77] *Id.* at 648.
[78] *Id.* at 653.

Mr. Hatley had also appended a claim for violation of due process under Texas law.[79] The district court issued an injunction prohibiting the AQHA from denying registration of Naturally High on the grounds the AQHA had not afforded Mr. Hatley a hearing.[80] One issue was a hardship exception to Rule 92, which allowed the AQHA to determine a horse was a Quarter Horse despite excessive white markings based on, among other things, pedigree and confirmation.[81] Mr. Hatley applied for a hardship ruling after filing the litigation, but withdrew it during the case.[82] The Fifth Circuit acknowledged that Texas courts "preach and practice" the non-intervention rule, but also noted Mr. Hatley had presented a justiciable issue because the diminution of value caused by not registering the colt "represents a destruction of property."[83] The court relied on the due process exception to the non-intervention rule and remanded the case to the district court for a hearing on whether Naturally High was a Quarter Horse.[84] The end result was that Naturally High obtained registration certificate number 1160915.[85]

The AQHA successfully defended a subsequent application of a newer version of the white rule in 1990.[86] The Court of Appeals for the Seventh District in Amarillo, Texas affirmed a summary judgment in favor of the AQHA over the cancellation of a registration certificate for a stallion later determined to have excessive white markings.[87] The AQHA afforded a hearing on the issue and the court relied on the non-intervention rule to affirm the AQHA's actions.[88]

The AQHA was understandably confident that the Texas non-intervention rule made it possible to successfully defend lawsuits brought by members regarding issues of the AQHA rules. As late as the fall of 2000, Bill Brewer, then Executive Vice President of the AQHA, was asked if the AQHA had ever lost a

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[79] *Id.* at 648.
[80] *Id.* at 654.
[81] *Id.* at 650.
[82] *Id.* at 657.
[83] *Id.* at 655-56.
[84] *Id.* at 657.
[85] *Id.* at appendix fig. 2.
[86] Burge v. Am. Quarter Horse Ass'n, 782 S.W.2d 353, 354 (Tex. App. 1990).
[87] *Id.* at 354.
[88] *Id.*

case with a member.[89] While saying the question was an oversimplification, Mr. Brewer responded that AQHA has prevailed because it is an organization, which has rules in place, under which everyone agrees to operate when they voluntarily join."[90]

Mr. Brewer's comment was made in part as an explanation of the AQHA's rejection of a settlement offer in the second major case affecting the AQHA.[91] The *Floyd* case challenged AQHA Rule 212(a) adopted in 1980, which permitted the registration of only one foal per mare in a breeding year, regardless of how the foal was produced.[92] Kay Floyd owned a prominent stallion named Freckles Playboy.[93] She implanted an embryo from her mare, Havealena, in a recipient mare, and then bred Havealena a second time to Freckles Playboy.[94] Havealena carried the second foal to maturity.[95] The embryo resulted in a colt born in February 1996, and the second foal was a filly born in May of the same year.[96] Previously, Havealena had foaled five stud colts by Freckles Playboy.[97] All were cryptorchid.[98] Ms. Floyd elected to register the filly.[99] About a year later, when the colt evidenced two testicles, Ms. Floyd approached the AQHA and offered to withdraw the registration of the filly in favor of registering the colt.[100] The AQHA refused, based on Rule 212(a) allowing only one foal from a mare to be registered in a breeding year.[101]

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[89] Glory Ann Kurtz, *AQHA Rejects Settlement Offer on Multiple Embryo Lawsuit,* QUARTER HORSE NEWS, Oct. 15, 2000, at 54, 55.

[90] *Id.*

[91] Glory Ann Kurtz, *Embryo Transfer Registration Controversy*, QUARTER HORSE NEWS, Feb. 29, 2000, at 43; Kay Floyd, *I Beg to Differ*, ALL ABOUT CUTTING (Mar. 20, 2012), http://www.allaboutcutting.com/letters-to-editohtm [https://perma.cc/4D92-39MN].

[92] *History and a Crystal Ball, supra* note 67.

[93] *Id.*

[94] *Id.*

[95] *Id.*

[96] *Id.*

[97] *Id.*

[98] *Id.*

[99] *Id.*

[100] *Id.*

[101] *Id.*

Ms. Floyd brought an action against the AQHA, and she was joined by, among others, Moncrief Quarter Horses.[102] Moncrief had bred their mare, Roseanna Duel, to Freckles Playboy, and the ovum split.[103] The resulting flush provided two embryos, which were placed in two recipient mares, and resulted in twins.[104] Ms. Floyd's complaint alleged violations of Section 15 of the Texas Business & Commerce Code, which prohibits contracts, combinations, or conspiracies in restraint of trade and monopolies.[105] Ms. Floyd also alleged that the AQHA's actions were arbitrary.[106]

The judge granted plaintiff's motion for summary judgment on the ground that Rule 212(a) ". . . is a restraint of trade that has an adverse effect upon competition and is, therefore, anti-competitive."[107] The Court also ruled that "Rule 212(a) is not a legitimate rule adopted for the purpose of protecting the reproductive health of the animals in question, but was instead an anti-competitive restraint adopted for the purposes of limiting the supply of registered quarter horses."[108] The case was settled during a jury trial on the issue of damages.

The backstory of this litigation is important to understand its implications as a precedent for future cases. Where the *Hatley* case was brought in federal court,[109] with some justifiable concern that a state court in Amarillo might favor the hometown defendant, the *Floyd* case was tried in Amarillo in state court.[110] The state court was not deterred by the non-intervention rule.[111]

A background fact, not recited by the court, was that the AQHA had previously registered two foals born in the same year from the mare Miss Silver Pistol.[112] Coincidentally, both foals

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[102] *Id.*

[103] *Id.*

[104] Dirk K. Vanderwall et al., *Present Status of Equine Cloning and Clinical Characterization of Embryonic, Fetal, and Neonatal Development of Three Cloned Mules*, 225 J. AM. VETERINARY MED. ASS'N 1694, 1695 (2004).

[105] *History and a Crystal Ball*, *supra* note 67.

[106] Kay Floyd, *supra* note 81.

[107] *History and a Crystal Ball*, *supra* note 67.

[108] *Id.*

[109] *Hatley*, 552 F.2d at 646.

[110] *History and a Crystal Ball*, *supra* note 67.

[111] *Id.*

[112] *See Dam's Produce Report for Miss Silver Pistol*, OFFICIAL NCHA/AQHA RECORDS 3-4 (July 18, 2007),

were sired by Ms. Floyd's stallion, Freckles Playboy.[113] The dual registration resulted from an unusual circumstance where the mare, Miss Silver Pistol, had been leased by Dick and Brenda Pieper to obtain an embryo.[114] After the embryo had been flushed, Miss Silver Pistol was sold to Keith Goett.[115] Mr. Goett then bred the mare, and she carried the foal.[116] To simplify the facts, the AQHA registered Mr. Pieper's foal based on the mare lease authority and then later registered Mr. Goett's foal based on the mare owner's authority.[117] Unlike the exercise of its power to revoke a registration, as the AQHA successfully did in the *Burge* matter,[118] the AQHA defended the dual registration on the ground that both registrations were legal and a court would likely enforce the registration of both foals.[119]

The Amarillo court's reference to the protection of "the reproductive health of the animals" related to an argument that the process of flushing multiple embryos would damage a mare's reproductive health.[120] The expert deposition testimony, however, indicated a mare could be flushed multiple times in a breeding year without damaging her reproductive health.[121]

VI. THE SHERMAN ACT SECTION 1

A. Basic Purpose of the Antitrust Law

The fundamental purpose of the Sherman Act is to foster competition. As stated by Judge Robinson in her Charge to the Jury in the AQHA matter:

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http://www.nchacutting.com/ag/homepix/miss_silver_pistol.pdf [https://perma.cc/2B4T-4HS9].

[113] *Id.*

[114] JRH, *Hotter Than a $2 Pistol!*, QUARTER HORSE NEWS 1 (Sept. 14, 2009), http://www.quarterhorsenews.com/images/stories/QHNInsiderPDFs/sept14.pdf [https://perma.cc/84HS-5QEK].

[115] *Id.*

[116] *Id.*

[117] Kurtz, *Embryo Transfer*, *supra* note 91.

[118] *See Burge*, 782 S.W.2d 353 at 355.

[119] *See* JRH, *supra* note 104.

[120] *History and a Crystal Ball*, *supra* note 67, at 13.

[121] *Id.*

> The purpose of the Sherman Antitrust Act is to preserve free and unfettered competition in the marketplace. The Sherman Act rests on the central premise that competition produces the best allocation of our economic resources, the lowest prices, the highest quality, and the greatest material progress.[122]

The purpose of the Sherman Act is superficially simple, but in the real world marketplace, there are almost as many exceptions as there are applications. Competition in everyday business is restrained in any number of ways, from regulation, to agreements, to natural forces such as access to water, or other natural elements. The question of whether a limitation on competition is illegal has developed over more than 100 years of cases and evolving economic theories.

B. The Contract, Combination, or Conspiracy Element

To find whether a particular limitation on the hypothetical free market of competition, and thus a violation of Section 1 of the Sherman Act, the fact finder must determine whether there was a "contract, combination . . . or conspiracy."[123] In the AQHA case, the specific issue was whether there was a "contract, combination . . . or conspiracy" to exclude clones and their foals from the AQHA registry.[124] This issue was addressed by the AQHA in a motion for summary judgment[125] and is featured prominently in the AQHA's Appellate Brief filed with the Fifth Circuit.[126] The question is also the first and most prominent issue raised in a Brief of Amici Curiae filed by, among others, the

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[122] Judge's Instructions/Charge to the Jury at 6, Abraham & Veneklasen Joint Venture v. Am. Quarter Horse Ass'n, No. 12 Civ. 00103 (N.D. Tex. July 26, 2013).

[123] Am. Needle, Inc. v. Nat'l Football League, 560 U.S. 183, 189 (2010).

[124] Memorandum and Order Regarding Defendant's Motion for Summary Judgment at 3-4, Abraham & Veneklasen Joint Venture v. Am. Quarter Horse Ass'n, No. 12 Civ. 00103 (N.D. Tex. May 24, 2013).

[125] *Id.*

[126] *See* Brief of Appellant at 9-13, Abraham & Veneklasen Joint Venture v. Am. Quarter Horse Ass'n, 776 F.3d 321 (5th Cir. 2015) (No. 13-11043).

American Kennel Club, The Jockey Club, The Cat Fanciers' Association and several breed registry associations.[127]

Relatively recently, Justice Stevens, writing for a unanimous Supreme Court, described the Section 1 framework as follows:

> Taken literally, the applicability of § 1 to "every contract, combination . . . or conspiracy" could be understood to cover every conceivable agreement, whether it be a group of competing firms fixing prices or a single firm's chief executive telling her subordinate how to price their company's product. But even though, "read literally," § 1 would address "the entire body of private contract," that is not what the statute means.[128]

As opposed to subjecting all contracts to Section 1 scrutiny, the Court focused on concerted action because "'[c]oncerted activity inherently is fraught with anticompetitive risk.'"[129]

American Needle v. NFL, is a fundamental case cited in all of the Appellate Briefs.[130] The unanimous Supreme Court reversed the decisions of both the district court and the Seventh Circuit, the lower courts that granted and upheld, respectively, summary judgment to the National Football League and a licensing entity formed by the team members of the NFL called National Football League Properties ("NFLP").[131] All of the teams assigned certain intellectual property to the NFLP.[132] Between 1963 and 2000, the NFLP granted non-exclusive licenses to a number of vendors, permitting them to manufacture such things

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[127] *See* Brief of Amici Curiae, Abraham & Veneklasen Joint Venture v. Am. Quarter Horse Ass'n, 776 F.3d 321 (5th Cir. 2015) (No. 13-11043).

[128] *Am. Needle*, 560 U.S. at 189.

[129] *Id.* at 190 (quoting Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 768-69 (1984)).

[130] *See* Brief of Appellant at 9-13, Abraham & Veneklasen Joint Venture v. Am. Quarter Horse Ass'n, 776 F.3d 321 (5th Cir. 2015) (No. 13-11043); *and see* Brief of Amici Curiae, Abraham & Veneklasen Joint Venture v. Am. Quarter Horse Ass'n, 776 F.3d 321 (5th Cir. 2015) (No. 13-11043).

[131] *Am. Needle*, 560 U.S. at 187.

[132] *Id.*

as caps and jerseys with team logos.[133] In 2000, the NFLP changed its non-exclusive licenses to an exclusive license.[134] American Needle brought the case when its license to continue manufacturing the team logo items was not renewed.[135] The district court granted summary judgment in favor of the NFL and the 32 teams of the NFL, concluding that, in the licensing granted by the NFLP, "they have so integrated their operations that they should be deemed a single entity . . . ."[136]

The Seventh Circuit affirmed, observing that "in some contexts, a league seems more aptly described as a single entity immune from antitrust scrutiny. . . ."[137] Justice Stevens noted that the teams contributed most of the NFLP revenues to charities and shared the NFLP profits equally.[138] The Supreme Court stated, "the inquiry is one of competitive reality."[139] The Court was not determinative whether there were legally distinct entities or multiple entities operating under a single umbrella.[140] The issue was whether the exclusive licensing agreement "joins together 'independent centers of decision-making.'"[141] The Court noted that the teams cooperated to produce NFL events, but competed for players, coaches, and other resources.[142] Consequently, the NFLP did not possess the unitary decision-making quality or the single aggregation of economic power that would characterize independent action.[143]

C. Unreasonable Restraint of Trade

In order to find the AQHA had violated Section 1 of the Sherman Act, the Jury had to find, not only that Rule 227(a) was the result of concerted action, but that it was also an

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[133] *Id.*
[134] *Id.*
[135] *Id.*
[136] *Id.* at 188.
[137] *Id.*
[138] *Id.* at 187.
[139] *Id.* at 196.
[140] *Id.*
[141] *Id.* at 196 (quoting Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 769 (1984)).
[142] *Id.* at 196-97.
[143] *Id.* at 196.

"unreasonable" restraint of trade.[144] The courts have treated some agreements as per se violations of Section 1.[145] One example is a horizontal price fixing agreement.[146] Other concerted actions, however, are reviewed for reasonableness under the principle of the Rule of Reason.[147] The AQHA adoption and enforcement of Rule 227(a) was submitted to the Jury with instructions to consider the issue under the Rule of Reason.[148] Judge Robinson instructed the Jury that:

> [P]eople can join together lawfully to create and control an association for the purpose of promoting legitimate goals. To accomplish its goals, a breed association may legally make and enforce rules and requirements for registration of animals in the association. However, association rules denying registration may constitute a violation of Section 1 of the Sherman Act under certain circumstances. If the association's rules impair competition in a relevant market without a legitimate justification, then the use of those rules to exclude potential competitors, together with the other elements, violates Section 1.[149]

The all-important phrase, "without a legitimate justification," is the soul of the Rule of Reason.[150]

VII. THE JURY TRIAL

Both the Plaintiffs and the AQHA must have felt reasonable confidence starting the trial. The Plaintiffs had the precedenof the *Floyd* case, where summary judgment was entered in favor of Floyd on the grounds that not registering embryo

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[144] *Abraham & Veneklasen Joint Venture*, 776 F.3d at 330.

[145] Catalano, Inc. v. Target Sales, Inc., 446 U.S. 643 (1980).

[146] *Id.*

[147] *Am. Needle*, 560 U.S. at 186.

[148] Judge's Instructions/Charge to the Jury at 10-12, Abraham & Veneklasen Joint Venture v. Am. Quarter Horse Ass'n, No. 12 Civ. 00103 (N.D. Tex. July 26, 2013).

[149] *Id.*

[150] *Id.*

transfer foals was arbitrary and violated the Texas State law companion of the Sherman Act.[151] The Plaintiffs could also take some comfort from the *Hatley* case, where the court was clearly troubled that Mr. Hatley could not register a horse whose pedigree and confirmation met a strict definition of the breed, but was a horse with excessive white markings.[152] Perhaps their key argument was that the get of clones were indistinguishable from the get of the donor sire or donor dam based on the AQHA's most reliable test to verify parentage, DNA testing.[153]

The AQHA also had a reasonable basis to believe they would succeed. They were in federal court on their home turf of Amarillo.[154] The AQHA had scored far more victories than it had suffered defeats, and the defeats had led to corrective changes.[155] The AQHA also had a record of exercising due diligence on the cloning issue. They have studied cloning since 2004, met with authorities in the field and provided educational materials and discussions on the topic to members.[156]

A. The Sherman Act Section 1 Arguments

To establish a violation of Section 1 of the Sherman Act, the Plaintiffs had to prove that a "contract, combination, or conspiracy" existed to establish a violation.[157] In simple terms, the Plaintiffs had to prove there were multiple actors working together for an anticompetitive purpose.[158] The obvious hurdle was that the AQHA itself, one organization, had passed and was enforcing the rule, which prohibited registration of clones. Plaintiffs introduced evidence that a select group of the Stud Book and Registration Committee, the group charged with

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[151] *History and a Crystal Ball, supra* note 67.

[152] *Hatley*, 552 F.2d at 655-56.

[153] Plaintiff's Original Complaint at 16, Abraham & Veneklasen Joint Venture v. Am. Quarter Horse Ass'n, No. 12 Civ. 00103 (N.D. Tex. April 23, 2012).

[154] Memorandum and Order Regarding Defendant's Motion for Summary Judgment at 1, Abraham & Veneklasen Joint Venture v. Am. Quarter Horse Ass'n, No. 12 Civ. 00103 (N.D. Tex. May 24, 2013).

[155] *See supra* Part IV.

[156] *AQHA Cloning Lawsuit*, AM. QUARTER HORSE ASS'N, https://aqha.com/cloninglawsuit (last visited October 7, 2016) [https://perma.cc/5EQ7-N3L3].

[157] *Am. Needle*, 560 U.S. 183 at 189.

[158] *See id.*

overseeing the registration rules, had met in March of 2012, shortly before the AQHA Annual Meeting, and agreed to defeat registration of the get of clones.[159] These same members then controlled the SBRC meeting and defeated a rule change.[160] Plaintiffs argued that the evidence showed agreements between members of the SBRC, members of the SBRC, and the SBRC itself, and the SBRC and the AQHA directors.[161] Plaintiffs offered additional evidence that the select group of SBRC members were involved with successful stallion syndications and breeding programs for the top sires of race-bred quarter horses.[162]

The AQHA called members of its Executive Committee and SBRC members who testified that they opposed registering clones based on differing and personal issues, such as moral concerns, the AQHA mission to protect pedigrees, parentage verification, and genetic disease concerns.[163] The AQHA argued that the vote to keep the existing rule was not a conspiracy, but parallel action.[164]

Equally important, was the issue of whether refusing to register clones was an unreasonable restraint of competition. Judge Robinson instructed the Jury that this element of the Sherman Act, Section 1 was satisfied if the rule impaired competition without a legitimate justification.[165] Plaintiffs argued there could be no legitimate justification, given that DNA testing could not distinguish the foals of clones from the foals of the donor sire or mare.[166] Judge Robinson signaled her view on the issue in denying the AQHA's motion for summary judgment on Section 1, stating that:

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[159] Brief of Appellees at 28, Abraham & Veneklasen Joint Venture v. Am. Quarter Horse Ass'n, 776 F.3d 321 (5th Cir. 2015) (No. 13-11043).

[160] *Id.*

[161] *Id.*

[162] Glory Ann Kurtz, *Who's Running the QH Industry?*, ALL ABOUT CUTTING (Jan. 19, 2014), http://allaboutcutting.net/?p=4134 [https://perma.cc/6PTF-3FAG].

[163] *See* Brief of Appellant at 8, Abraham & Veneklasen Joint Venture v. Am. Quarter Horse Ass'n, 776 F.3d 321 (5th Cir. 2015) (No. 13-11043).

[164] *Id.*

[165] Judge's Instructions/Charge to the Jury at 10, Abraham & Veneklasen Joint Venture v. Am. Quarter Horse Ass'n, No. 12 Civ. 00103 (N.D. Tex. July 26, 2013).

[166] Plaintiffs' Brief in Opposition to Defendant's Motion for Summary Judgment at 13, Abraham & Veneklasen Joint Venture v. Am. Quarter Horse Ass'n, No. 12 Civ. 00103 (N.D. Tex. May 24, 2013).

> [W]here the AQHA stops defining its breed and starts restricting breeding, it can run afoul of antitrust law. [. . .] Reproductive limitations do not on their face promote a clearly-defined breed like many physical limitations. [. . .] Yet, where a breed is already physically and genealogically defined, there may be few justifiable reasons to exclude animals that fit these parameters so perfectly that they are indistinguishable from some of the breed's champions.[167]

B. The Sherman Act Section 2 Arguments

To establish a violation of Section 2, Plaintiffs had to define what "market" or part of commerce the AQHA had either monopolized or in which it maintained a monopoly power by anticompetitive means.[168] Clearly, the AQHA is the only Quarter Horse breed registry and so enjoys a form of monopoly power. Plaintiffs focused on a market they called the "elite" Quarter Horse market and argued the refusal to register the get of clones was anticompetitive and did not have a legitimate purpose.

The analysis of an alleged violation of Section 2 of the Sherman Act, namely, whether a person has monopolized "any part of the trade or commerce among the several States" necessarily begins with a definition of the market,or that part of trade or commerce which has been monopolized.[169] As stated by the Fifth Circuit, defining the relevant market "provides the framework against which economic power can be measured."[170] Plaintiffs' definition of the "relevant market" was a threshold issue. The evidence permitted two possible definitions. The first alternative definition was the Quarter Horse market. The second alternative was the "elite" Quarter Horse market.

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[167] Memorandum and Order Regarding Defendant's Motion for Summary Judgment at 12, Abraham & Veneklasen Joint Venture v. Am. Quarter Horse Ass'n, No. 12 Civ. 00103 (N.D. Tex. May 24, 2013).

[168] Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 597 (1985).

[169] Spectrofuge Corp. v. Beckman Instruments, Inc., 575 F.2d 256, 276 (5th Cir. 1978), cert. denied, 440 U.S. 939 (1979).

[170] *Id.* at 276.

In ruling against the AQHA on its motion for summary judgment for the Section 2 monopolization claim, Judge Robinson noted that, "[a]s to monopoly power, the evidence could support a finding that an economically viable Quarter Horse (including an 'elite' Quarter Horse, however ultimately defined) is whatever the AQHA says it is . . . ."[171] Pretty clearly, the AQHA's status as the definitive Quarter Horse breed registry gave it a form of monopoly power.[172] The Plaintiffs' market theory, however, focused on what Plaintiffs called the "elite" Quarter Horse market. The monopolization claim was that the AQHA was monopolizing that specific market by making and enforcing Rule 227(a).[173]

Plaintiffs' expert, Christopher Pflaum, testified that "elite" was an adjective meaning such things as high quality and the best of the best.[174] Pflaum estimated about 35,000 horses, or 5 percent of the registered Quarter Horses, would qualify as elite.[175] The AQHA basically challenged the credibility of this definition.

C. The Verdict

The Parties submitted their jury instructions to Judge Robinson and neither objected to the instructions given. The jury returned a unanimous verdict in favor of the Plaintiffs and awarded legal fees to each Plaintiff, but awarded no damages. Judge Robinson entered a final judgment based on the jury's verdict and enjoined enforcement of Rule 227(a), the rule rejecting clone registration, and ordered changes to certain registration rules.[176] Both the injunction and the rule changes were stayed based on agreement of the Parties.[177]

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[171] Summary Judgment, *supra* note 124, at 10.

[172] *Id.*

[173] *Id.*

[174] Brief of Appellant, *supra* note 126, at 29.

[175] *Id.* at 47.

[176] Final Judgment at 1, Abraham & Veneklasen Joint Venture v. Am. Quarter Horse Ass'n, No. 2:12-CV-103-J (N.D. Tex. Aug. 22, 2013).

[177] Order, Abraham & Veneklasen Joint Venture v. Am. Quarter Horse Ass'n, No. 2:12-CV-103-J (N.D. Texas Dec. 2, 2013).

VIII. THE APPEAL

From my perspective, Plaintiffs-Appellees must have believed they had an advantage on appeal, due to the unanimous verdict from a properly instructed jury. They did not have to fight over the jury instructions. Rather, they simply had to persuade the Appellate Court that there was sufficient evidence to support the verdict.

A. The AQHA's Appellate Argument

Not surprisingly, the AQHA's first argument on appeal was the District Court erred in not granting the AQHA's motion for a Judgment as a Matter of Law under FRCP 50(a), which it filed at the conclusion of the evidence.[178] The key argument for Plaintiffs' failure to establish a violation of Section 1 of the Sherman Act was that Plaintiffs had not submitted evidence sufficient to establish a contract, combination or conspiracy of multiple actors.[179] Plaintiffs submitted evidence that certain members of the Stud Book & Registration Committee ("SBRC") had conspired with the Committee to continue the rule not to register clones. The AQHA argued the SBRC was a single entity that could not conspire with itself.[180] Similarly, the AQHA argued that the evidence did not establish concerted action among the members of the SBRC.[181] The AQHA quoted testimony from Jason Abraham to the effect that he could not name members of the SBRC who would have voted in favor of registering the get of clones but for the conspiracy.[182]

For both Sections 1 and 2 of the Sherman Act, the AQHA attacked Plaintiffs' evidence of the "elite Quarter Horse market."[183] The AQHA argued, among other deficiencies, that the "elite" Quarter Horse boundaries were fluid and could not be defined.[184] The brief noted that yearlings were "elite" based on

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[178] Brief of Appellant, *supra* note 126, at 11.
[179] *Id.* at 13-14.
[180] *Id.* at 15-19.
[181] *Id.* at 26.
[182] *Id.* at 26-27.
[183] *Id.* at 31- 44.
[184] *Id.* at 44.

proven parents, but an elite horse could fall out of the category if it did not compete successfully or produce competitive offspring.[185] The AQHA argued: "Because 'eliteness' is an impermanent status, horses, and entire bloodlines, fall in and out of favor constantly."[186]

B. Plaintiffs'/Appellees' Argument

Plaintiffs' principal argument was a defense of a unanimous jury verdict. They argued:

> The sole question before the Court on liability is whether evidence supported the properly-instructed jury's finding that the defendant and its SBRC members agreed to exclude plaintiffs from the elite Quarter Horse market and lacked a business justification sufficient to justify the resulting harm to competition.[187]

Among many points of evidence of concerted action, Plaintiffs cited evidence that a "secret" meeting of five influential members of the SBRC occurred just before the AQHA Annual Meeting, out of which an agreement to not register clones was made,[188] that every member of the SBRC who spoke in opposition to registration of clones was a breeder of elite Quarter Horses,[189] and that the sale of one-half of the top selling horses came from or went to members of the SBRC.[190]

Plaintiffs' basic point was that actions with and within the SBRC demonstrated concerted activity to exclude Plaintiffs from the elite Quarter Horse market, and those actions were prompted by economic gain to the actors.[191] Plaintiffs also argued that the exclusion of clones had no justification sufficient to validate its

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[185] *Id.* at 30, 31.
[186] *Id.* at 31.
[187] Brief of Appellee, *supra* note 159, at 21.
[188] *Id.* at 28.
[189] *Id.* at 30.
[190] *Id.* at 34.
[191] *Id.* at 25.

anticompetitive effect.[192] The "justification" argument followed from Judge Robinson's instruction that:

> If the association's rules impair competition in a relevant market without legitimate justification, then the use of those rules to exclude potential competitors, together with the other elements, violates Section 1.[193]

Thus, the Jury was evaluating the AQHA conduct under the parameters of the Rule of Reason, and the issue for the Jury was why the AQHA adopted and enforced the rules excluding clones.

The AQHA argued that maintaining the exclusion rule made it possible to record pedigrees accurately (identify a sire and a dam), and it protected against the rapid spread of known and unknown genetic diseases.[194] Plaintiffs responded that a clone is simply an identical twin separated by time. The AQHA had already registered 166 foals by a twin pair of stallions. The AQHA allows identical twins to be registered and the parentage verification for foals of clones would be the same as that for identical twins.[195] Plaintiffs countered the genetic disease argument, noting that "all veterinary witnesses testified that cloning [could] be used to *improve* genetics and increase genetic diversity."[196]

C. The Fifth Circuit Opinion

The Fifth Circuit opinion is dated January 14, 2015.[197] Petitions for Rehearing and Rehearing En Banc were denied October 26, 2015.[198] The decision was noted by Frank Becker at this Conference in 2015, and his conclusion was the opinion failed to address important issues and was disappointing. I suggest that

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[192] *Id.* at 45.

[193] Charge to the Jury, *supra* note 62, at 10.

[194] Brief of Appellee, *supra* note 159, at 47.

[195] *Id.* at 48-49.

[196] *Id.* at 47.

[197] *Abraham & Veneklasen Joint Venture*, 776 F.3d at 321.

[198] *AQHA Prevails in Cloning Lawsuit*, AMERICAN QUARTER HORSE ASS'N (Oct. 27, 2015), https://aqha.com/news/2015/october/10272015-cloning-lawsuit/ [https://perma.cc/6CXH-YYW8].

conclusion is likely shared by academics and practitioners alike, but the Court of Appeals had a different view. The opinion disposed of the case without further use of judicial resources in a remand to the trial court and also discouraged the prospects of an appeal to the Supreme Court.

Judge Edith Jones, writing for a unanimous Court, adopted the standard of review advocated by the AQHA and undertook a *de novo* review of the grounds for the trial court's denial of a motion for judgment as a matter of law. Judge Jones's analysis began with the issue of multiple actors required for a Section 1 violation. The case cited by both sides as potentially determinative is *American Needle, Inc.*, as detailed above. In the Fifth Circuit case, however, Judge Jones identified and analyzed what she termed "troubling distinctions" between the case on appeal and *American Needle*, and then summarily said the Fifth Circuit decision would not resolve the scope of *American Needle*, but would assume *arguendo* that the AQHA was legally capable of conspiring with members of the SBRC.[199]

The balance of Judge Jones' opinion reviews the evidentiary record of the trial court. She noted that Plaintiffs' evidence of conspiracy was circumstantial, so the standard of proof for Plaintiffs was to show the evidence "both supports an inference of conspiracy and tends to exclude independent conduct."[200] The standard tending "to exclude independent conduct" became the foundation for determining that Plaintiffs' evidence did not exclude other explanations, but rather were one-sided complaints.[201] The evidence did not support inferences that five members meeting in secret controlled the vote of the 30 or so members of the SBRC.[202]

Judge Jones was concerned with the definition of the market. The five percent of Quarter Horses considered "elite" restricted the number of members of the SBRC, to say nothing of the number of members of the AQHA, who would have an economic incentive to exclude clones from registration. Judge Jones stated:

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[199] *Abraham* & Veneklasen Joint Venture, 776 F.3d at 330.
[200] *Id.* at 331.
[201] *Id.* at 332.
[202] *Id.*

> The plaintiff's expert claimed that no more than .5% [sic] of the yearlings sold each year fall within the plaintiffs' proposed sub-market of AQHA-registered elite Quarter Horses. Under such circumstances, it is difficult to draw the conclusion that because a tiny number of economic actors within the AQHA may "pursue their separate economic interests," the organization has conspired with that minority.[203]

D. Opposite Conclusions

The interesting, open question is how a Fifth Circuit panel could review a trial record and come to a conclusion opposite that of a unanimous jury. A real, but perhaps superficial, answer is the panel viewed the record from the standpoint of the legal standard it applied for circumstantial evidence. Although the jury instructions were not contested, the jury did not apply the same standard for circumstantial evidence that was used by the panel.[204]

Another explanation is the basic rule that fact finding by a jury is given great deference.[205] Using an example from the record, one can look at the testimony of Frank Merrill to see a demonstration of that deference. Mr. Merrill is a past president of the AQHA and one of the five members of the SBRC who attended the so-called secret meeting.[206] The panel characterized Mr. Merrill's testimony as "outspoken" opposition to both the registration of clones and to the comments on "thirty-member committee's official votes on the subject."[207] Plaintiffs argued that Mr. Merrill's testimony was an admission that the SBRC had agreed to exclude clones.[208] Judge Jones dismissed Plaintiffs'

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[203] *Abraham & Veneklasen Joint Venture*, 776 F.3d at 329.

[204] *Compare Abraham & Veneklasen Joint Venture*, 776 F.3d at 330 (explaining standards used by panel), *with* Record Excerpts Filed by Appellant at 31, Abraham & Veneklasen Joint Venture v. Am. Quarter Horse Ass'n, 776 F.3d 321, 329 (5th Cir. 2015) (containing jury instructions given for standard of review for circumstantial evidence).

[205] Fed. R. Civ. P. 52(a).

[206] *Abraham & Veneklasen Joint Venture*, 776 F.3d at 333.

[207] *Id.*

[208] *Id.*

argument as a "mischaracterization."[209] By most contemporaneous accounts, Mr. Merrill's time on cross-examination was difficult for him. Plaintiffs cited the Panel to the record testimony: "Merrill has repeatedly stated that the AQHA will allow clones to be registered 'over my dead body,' and that 'no court – no judge will tell our organization how to register a horse'".[210]

By at least one account, when the Chairwoman of the SBRC opened the 2012 SBRC meeting to discussion of the cloning rules, Mr. Merrill stood and moved to reject the proposed change to register clones.[211] His motion was seconded and the motion carried.[212] The jury evaluated witness demeanor and heard full testimony, whereas the panel considered the black and white transcripts of the Appellate Record. Regardless of the reasons, the clear fact is the Fifth Circuit opinion slammed the door, decisively, on the Sherman Act as a tool to force the AQHA to register clones. As many of the other breed registries follow the rules and practices similar to those of the AQHA, it is unlikely that any of the other registries would suffer a different legal result.[213]

The Jockey Club and one or more of its affiliates and related entities would face a different legal challenge. The long-standing requirement by the Jockey Club of live cover forecloses the slippery slope argument of additional breeding techniques that added to the AQHA vulnerability. [214] The process of cloning is arguably an advanced breeding technique that is recognized by the AQHA rules along with similar advanced techniques

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[209] *Id.* at 333.

[210] Brief of Appellee, *supra* note 159, at 26.

[211] Transcript of Civil Trial by Jury Volume II of VIII at 220, Abraham & Veneklasen Joint Venture v. Am. Quarter Horse Ass'n, 776 F.3d 321 (5th Cir. 2015) (No. 2:12-CV-103-J).

[212] *Id.*

[213] *American Warmblood Registry Rulebook Breeding Requirements*, AMERICAN WARMBLOOD REGISTRY, http://americanwarmblood.com/rule_book/rule_book.pdf [https://perma.cc/7QDD-S9RV]; *Rules and Regulations: REG111*, ARABIAN HORSE ASS'N, https://www.arabianhorses.org/registration/rules-regulations/ [https://perma.cc/LH45-WVCC].

[214] *AQHA Regs.*, *supra* note 3 at REG111.5; *The Jockey Club American Stud Book Principal Rules and Requirements Section III*, THE JOCKEY CLUB (Aug. 2015), http://www.registry.jockeyclub.com/RegistryIncludes/pdfs/rule_book.pdf [https://perma.cc/6H7W-6CCP].

recognized by the AQHA rules. This is not so for the Jockey Club.[215]

The Sherman Act, Section 1 requirement of multiple actors, however, would likely find a lower hurdle for the Jockey Club. Two organizations that could be viewed, argumentatively, as actors in concerted activity with the Jockey Club include the Thoroughbred Racing Association and the Thoroughbred Breeders and Owners Association. The hurdle, however, of defining a relevant market remains difficult at best. Likewise, proof that there is no legitimate justification for the current breeding and registration rules remains difficult to find. Again, it is unlikely that the Sherman Act would be an effective tool for change.

IX. WHAT NOW?

Given the seemingly impregnable fortress of the exclusion of clones by many breeding registries, is there a future in the general equine business for cloning? The answer from Blake Russell, the President of ViaGen, is a firm yes. Mr. Russell believes cloning continues at essentially the same pace as before the Fifth Circuit opinion.[216] Roughly 75 percent of cloning procedures are kept confidential, meaning they are not disclosed beyond ViaGen and the breeder.[217] The cost of cloning is also coming down. At the time of the AQHA appeal, the cost of a clone was $165,000.[218] Currently, there is a promotional program pricing a cloning procedure at $85,000.[219] Advances in cloning technology suggest prices will continue to decline. For someone interested in competing and not deterred by a failure to register, a clone for $85,000 might be attractive. There are at least three developments that may prompt breed registries to reconsider the rules excluding clones, and especially the foals of clones.

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[215] Transcript of Civil Trial by Jury Volume V of VIII at 124-125, Abraham & Veneklasen Joint Venture v. Am. Quarter Horse Ass'n, 776 F.3d 321 (5th Cir. 2015) (No. 2:12-CV-103-J)..

[216] Interview with Blake Russell in Weatherford, Tex. (Feb. 18, 2016).

[217] *Id.*

[218] Brief of Appellee, *supra* note 159, at 1.

[219] Interview with Blake Russell, *supra* note 216.

A. Genetic Editing

The FDA considers cloning to be a breeding technique and does not regulate the cloning process. The FDA did investigate clones of meat and milk animals and concluded the clones are no different from animals produced by other breeding processes.[220] Genetic editing, by contrast, is treated more like a drug therapy and is regulated by the FDA.[221]

ViaGen has a team of talented people who are researching ways to edit or silence equine genes to eliminate such genetic diseases as hereditary equine regional dermal asthenia ("HERDA") and hyperkalemic periodic paralysis ("HYPP").[222] The HERDA genetic disease originated from a gene mutation in the great cutting horse Poco Bueno.[223] As with many great performers, prolific breeding resulted in spreading the mutation. Approximately 350,000 horses carry at least one negative HERDA gene today.[224] Great sires that carry one negative gene include Smart Little Lena, High Brow Cat and Metallic Cat.[225] The disastrous consequence of a double negative is that a foal's skin detaches from its body and the foal has to be put down.[226] On the other side, many believe that one negative gene results in more body flexibility.[227]

ViaGen and groups like them are working to silence the negative HERDA gene without leaving a hole or opening for another gene to take its place and without removing other possible benefits. If the work proves successful, great horses with

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[220] *Id.*

[221] *Id.*

[222] *Id.*

[223] Glory Ann Kurtz, *Testimony from AQHA Cloning Case 10-3-13: Interesting Facts that Came Out of AQHA Cloning Case,* ALL ABOUT CUTTING (Oct. 1, 2013), http://allaboutcutting.net/?p=3719 [hereinafter *Testimony from Cloning Case*] [https://perma.cc/7LW4-H6YK].

[224] *Id.*

[225] *Id.*

[226] *Hereditary Equine Regional Dermal Asthenia (HERDA),* ANIMAL GENETICS, http://www.animalgenetics.us/Equine/Genetic_Disease/HERDA.asp, (last visited Sept. 25, 2016) [https://perma.cc/9CLS-FZ8T].

[227] Lindsay Day, *The Gen-ethics of Breeding,* HORSE J. (Mar. 2013), https://www.horsejournals.com/ethical-horse-breeding-equine-genetic-diseases [https://perma.cc/5GGY-LN5X].

one HERDA gene could be replaced by a clone with identical genetics absent the HERDA gene.

Similarly, the HYPP gene is a mutation that traces back to the stallion Impressive.[228] HYPP is a muscular disorder that generally causes muscle tremors, weakness, muscle cramping, yawning, depression, an inability to relax the muscles, sweating, prolapse of the third eyelid, noisy breathing and/or abnormal sounds or whinnies.[229] In extreme cases, HYPP can cause muscle weakness, dog sitting, or even death.[230] Approximately 700,000 horses are believed to carry the HYPP gene.[231] If using clones to eliminate equine genetic disorders works and is approved by the FDA, there may be pressure from breeders and owners to alter the breed registry exclusions.

B. Improved Parentage Verification

The current AQHA rules confirm pedigrees by forms, including the annual breeders reports and the Breeders Certificates sent by the breeder to the mare owner when a foal is born. A Breeders Certificate should cross-reference to the prior year's breeding report established when a mare was exposed to the stallion.[232] DNA testing is required for embryo transfers, use of frozen semen and similar techniques. Since 2000, approximately 50 percent of the horses registered with the AQHA were registered by means of these forms.[233] Since 2000, the other approximately 50 percent of the horses registered with the AQHA were DNA-verified.[234]

DNA testing, however, will not distinguish the foal sired by a stallion from the foal sired by a clone of that stallion. The problem with the use of frozen semen, particularly from a

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[228] Univ. of Cal. Davis, *Hyperkalemic Periodic Paralysis (HYPP)*, VETERINARY GENETICS LABORATORY, https://www.vgl.ucdavis.edu/services/hypp.php (last visited Sept. 26, 2016) [https://perma.cc/N7MU-SSSE].

[229] *Id.*

[230] *Equine Hyperkalemic Periodic Paralysis (HYPP)*, ADM ANIMAL NUTRITION, http://www.admani.com/horse/Equine%20Library/Horse%20Equine%20HYPP.htm (last visited Sept. 26, 2016) [https://perma.cc/8R7Y-Z59V].

[231] *Id.*

[232] Kurtz, *Testimony from Cloning Case*, *supra* note 223.

[233] *Id.*

[234] *Id.*

deceased or sterile stallion, would be the prospect of cheating. A determined breeder could simply substitute a straw of semen from a clone for a frozen straw, as one example. The temptation to cheat would be reduced, if not eliminated, if foals of clones could be registered. DNA testing, Breeders Reports, and Breeders Certificates would still be used but could identify the foal as one from a clone. Again, as cloning becomes more prevalent, there may be pressure to identify foals of clones and allow registration.

C. The Effect of a Champion

Polo ponies are the most successful cloning examples. This success undoubtedly derives from the astute marketing and promotional efforts of Alan Meeker. An article in *Vanity Fair* titled "How Champion-Polo Clones Have Transformed the Game of Polo" summarizes the success attributable in no small part to cloning proven champions.[235] The great Argentinian polo player, Adolfo Cambiaso, is part of the company founded by Meeker, Crestview Genetics.[236] Together with others, Meeker and Cambiaso have produced a five-year-old clone of Cambiaso's renowned stallion, Aiken Cura.[237] Currently, there are reportedly 200 foals of clones involved with the Crestview Genetics program.[238]

Toward the end of 2010, Meeker and Cambiaso decided to enter a clone of the mare Cuartetera in an auction hosted by Cambiaso to sell and promote young horses. Two clones were led into the auction arena and bidders were invited to bid for one of them. The winning bid was $800,000, the most ever paid for a polo pony.[239] Cambiaso later rode a clone of his polo horse Sage, named Show Me, and scored two of his nine goals in the 2014 Argentine National Open.[240] In 2015, Cambiaso also rode a clone

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[235] Haley Cohen, *How Champion-Pony Clones Have Transformed the Game of Polo,* VANITY FAIR (Aug. 2015), http://www.vanityfaicom/news/2015/07/polo-horse-cloning-adolfo-cambiaso [https://perma.cc/VB8W-A7YQ].

[236] *Id.*

[237] *Id.*

[238] Telephone interview with Alan Meeker, Crestview Genetics (Mar. 14, 2016).

[239] *See* Cohen, *supra* note 235.

[240] *See* Bell, *supra* note 35.

of Cuartetera and scored even more goals.[241] Cambiaso has stated that his dream is to ride an entire polo match on clones of his great horses.[242]

Crestview Genetics is currently involved in breeding jumping horses, champion Arabians, thoroughbreds, and others.[243] They envision an expanded worldwide program and exponential growth.[244] Other examples of champions influencing the proliferation of clones include Tamarillo, a gelding that won the 2004 Olympics. His clone is named Tomatillo.[245] The famous barrel horse sire, Frenchmans Guy, has two clones.[246] A gelding, Tailor Fit, a two-time AQHA World Champion, has been cloned, and his clone is now used in breeding programs.[247]

By contrast, cutting horse clones themselves have not performed as hoped. The question of their foals is still being determined. One theory for why the cutting horse clones have not been outstanding competitors is that the confirmation and certain characteristics have changed over time. The older generation, in many cases, would not be competitive today. Nevertheless, the older genetics are still treasured and the interest in clones continues to be high. At least two clone owners intend to train and show them. Other clone owners look to breeding but not training or using the horses in competition.

Another possible explanation of the success of polo ponies contrasted to cutting horses may be cultural. Cambiaso's ponies are highly prized, and those involved in training and showing their clones consider their involvement a great privilege.[248] Some

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[241] Telephone interview with Alan Meeker, *supra* note 238.

[242] *Id.*

[243] *Id.*

[244] *Id.*

[245] *See* Williams, *supra* note 35.

[246] *Top Barrel Racing Sire Frenchmans Guy Cloned*, BARREL HORSE NEWS, http://www.barrelhorsenews.com/articles/industry-news/3545-top-barrel-racing-sire-frenchmans-guy-cloned.html (last visited Mar. 11, 2016) [https://perma.cc/8RGW-RW84].

[247] Gil Aegerter & Mike Brunker, *Cleared to Race? Cloned Quarter Horses Get Victory in Federal Court*, NBC NEWS (Jul. 30, 2013, 2:21pm), http://www.nbcnews.com/news/other/cleared-race-cloned-quarter-horses-get-victory-federal-court-f6C10798726 [https://perma.cc/ZU9F-GYPV]; Interview with Blake Russell, *supra* note 216.

[248] Telephone interview with Alan Meeker, *supra* note 238.

care is taken to have the clones trained and handled by the same people involved in the original horse training.[249]

It is far from clear that the Quarter Horse disciplines, such as cutting, have achieved the same acceptance. If a clone or the foal of a clone makes its mark in the NCHA show arena, and particularly in one of the Triple Crown events such as the Futurity for three-year-olds, it is a safe bet that the horse will not only be valuable and become a breeding animal, but it also may occasion a shift in the culture of cloning.

X. CONCLUSION

"Never say never" is a phrase emphatically applicable to cloning. Currently, the usual legal tools of the Sherman Act and due process, among others, will not force a change in breed registries' exclusions of clones. The continued research and likely use of gene editing to eliminate genetic disease, along with improved technology, lower costs, and increased understanding of the cloning technique will likely encourage cloning and may be the forces of change. One factor continues to be a dominant influence: market acceptance. The example of cloning champion polo ponies may forecast the future. It would be the rare breeder that would resist cloning if the clone sold for $800,000.

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[249] *Id.*