THE FUTURE OF THE EQUINE INDUSTRY IN KENTUCKY: ANTITRUST CONCERNS AND THE AUSTRALIAN CASE

I. Introduction and Overview

II. Australia

A. Section 45 of the Competition and Consumer Act 2010: Contracts, arrangements or understandings that restrict dealings or affect competition.

1. "A corporation shall not give effect to a provision of a contract, arrangement or understanding, whether the contract or arrangement was made, or the understanding was arrived at, before or after the commencement of this section, if that provision has the purpose, or has or is likely to have the effect, of substantially lessening competition."[1]

2. "For the purposes of the application of this section in relation to a particular corporation, a provision of a contract, arrangement or understanding or of a proposed contract, arrangement or understanding shall be deemed to have or to be likely to have the effect of substantially lessening competition if that provision and any one or more of the following provisions, namely the other provisions of that contract, arrangement or understanding or proposed contract, arrangement or understanding; and the provisions of any other contract, arrangement or understanding or proposed contract, arrangement or understanding to which the corporation or a body corporate related to the corporation is or would be a party together have or are likely to have that effect."[2]

B. *McHugh v. Australian Jockey Club Ltd., et al*.[3]

1. Bruce McHugh, a commercial Thoroughbred breeder, former chairman of the Sydney Turf Club, and bookmaker, brought suit against the Australian Jockey Club, the Victoria Racing Club, and the Australian Turf Club challenging a ban on registering the foals of Thoroughbred horses produced through artificial insemination.

2. The Australian Stud Book is an unincorporated body jointly owned by the Australian Jockey Club and the Sydney Turf Club which maintains, publishers, and ensures the accuracy of Thoroughbred bloodlines in Australia. The Australian Stud Book promulgates rules regarding the registering of Thoroughbred foals

[1] Competition and Consumer Act 2010 § 45(2)(b)(ii).
[2] *Id*. at § 45(4).
[3] No. NSD 1187 of 2009, Federal Court of Australia, New South Wales District Registry, General Division.

through the Rules of the Australian Stud Book. Relevant provisions of the Rules of the Australian Stud Book provide:

> a. "A foal is only eligible for inclusion in the Australian Stud Book [. . .] if it is the product of a natural service, which is the physical mounting of a mare by a stallion, and unless a natural gestation takes places in and delivery is from the body of the mare in which the foal is conceived. [. . .] No semen obtained from a stallion by any artificial means may be used to reinforce a service."[4]
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> b. "The products of artificial breeding are not eligible for inclusion in the Australian Stud Book [. . .] and consequently are not eligible to be registered under the Australian Rules of Racing."[5]
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> c. "The Australian Stud Book may not accept a foal born within 385 days from the date its dam was last the subject of any artificial breeding technique."[6]

3. The Australian Racing Board is responsible for developing, managing, and promoting Thoroughbred horse racing in Australia, and administers rules known as the Australian Rules of Racing. Relevant provisions of the Australian Rules of Racing provide:

> a. "No horse if in Australia shall be entered for and no horse shall run in any race or official trial unless it has been registered with Registrar of Racehorses. . ."[7]
>
> b. "A horse [. . .] cannot be registered unless it has been [a]ccepted for inclusion as a foal in the Australian Stud Book or the Stud Book of a recognised turf authority."[8]

4. McHugh argued that a foal cannot be registered with the Australian Stud Book if it was the product of artificial insemination, and therefore cannot be registered with the Registrar of Racehorses. As a result, a foal that is the product of artificial insemination cannot race in any race sanctioned by the Australian Racing Board.

5. McHugh also argued that such restrictions have, or are likely to have, the effect of substantially lessening competition in the

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[4] Rules of the Australian Stud Book, General Rules, Terms and Conditions, Rules ix and ix(2).
[5] *Id*. at Rule xi.
[6] *Id*. at Rule xiii.
[7] Australian Rules of Racing, Rule 14.
[8] *Id*. at Rule 15.A.

Thoroughbred breeding market or in one or more of the regional Thoroughbred breeding markets by:[9]

a. Increasing the costs and risks of breeding services, including the costs of transport, agistment and other fees, and costs as a consequence of injuries sustained by Thoroughbred horses and handlers;

b. Contracting breeding activities;

c. Inflating service fees charged for breeding services;

d. Creating barriers to entry to the Thoroughbred acquisition market by inflating the prices of Thoroughbred racehorses;

e. Reducing the selection of stallions;

f. Restricting access to interstate and international stallions;

g. Restricting the Thoroughbred gene pool;

h. Inflating the market power of breeders and owners of stallions in the Thoroughbred breeding market;

i. Reducing the number of breedings in any one breeding season;

j. Reducing the productivity of stallions;

k. Reducing the productivity of low fertility, low libido, and older stallions;

l. Increasing stallion injury and stallion over-use;

m. Reducing the conception rates and productivity of mares;

n. Reducing the number, quality, and genetic diversity of Thoroughbreds produced in Australia;

o. Reducing economic efficiency in the Thoroughbred breeding market by limiting the number, quality, and genetic

[9] Third Amended Statement of Claim, *McHugh v. Australian Jockey Club Ltd., et al*, No. NSD 1187 of 2009, Federal Court of Australia, New South Wales District Registry, General Division (Jul. 15, 2011), at ¶¶ 42-43.

diversity of Thoroughbreds, and by increasing the cost of production of Thoroughbred horses.

6. The Australian Jockey Club, Victoria Racing Club, and Australian Turf Club defended McHugh's allegations, in part, with the following arguments:[10]

a. McHugh incorrectly defined the relevant market, because Thoroughbred breeding services occur within a regional, national, and international market.

b. The restraint of trade alleged is purely hypothetical because McHugh did not allege that he actually tried to register a foal produced from artificial insemination.

c. The ban on registering a foal produced from artificial insemination does not prevent McHugh from creating a foal of Thoroughbred parentage using artificial insemination.

d. Thoroughbred breeding is a trade that requires regulations as it is an intrinsic activity of equestrian sporting.

e. The ban on registration of a foal produced by artificial insemination is but one rule of many. For example, breeds other than Thoroughbreds are not accepted for registration in the *Australian Stud Book*.

f. A restraint of trade which was initially enforceable cannot become unenforceable merely because it is perceived to be unfair in changed circumstances.

g. If the ban is a restraint, then it is reasonable and in the interest of the public.

h. Australia is one of 72 countries that are signatories to the Federation Agreement. According to the Federation Agreement, a Thoroughbred is defined as a horse recorded in an approved stud book, and approved stud books must reflect the requirements of the Federation Agreement, including the requirement that foals produced from artificial insemination may not be registered.

i. If the Australian Jockey Club and the *Australian Stud Book* did not have the ban, then Australia would have to

[10] Defence of First, Second and Sixth Respondents to Third Further Statement of Claim, *McHugh v. Australian Jockey Club, et al*., No. NSD 1187 of 2009, Federal Court of Australia, New South Wales District Registry, General Division (Aug. 1, 2011), at ¶¶ 38A, 39-43.

withdraw from the Federation Agreement. This would adversely impact the demand for Australian Thoroughbreds internationally. It would also adversely impact the number of Thoroughbreds imported from countries that are members of the Federation Agreement to compete in Australian races.

j. There would also be a reduction in the number of Thoroughbred horses from Australia that would be permitted to compete internationally in countries that are members of the Federation Agreement.

k. The available prize money for racing would be reduced, and an aggregate decrease in competition would result in the market for Thoroughbred breeding services.

l. If the productivity of high quality Thoroughbred stallions increased without a corresponding demand for covers, the number of Thoroughbred stallions participating in the market would decrease.

m. If removing the ban on artificial insemination was to substantially increase the breeding productivity of Thoroughbred stallions, but there was no corresponding increase in demand, then the number of Thoroughbred stallions participating in the market would fall and higher quality, higher cost Thoroughbred stallions would cover fewer mares than would lower quality, lower cost Thoroughbred stallions.

7. The case was submitted to the court in December 2011, and a decision is expected in late spring or summer 2012.

III. The United States

A. The Sherman Antitrust Act: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal."[11]

B. The Jockey Club maintains the *American Stud Book*, the breed registry for Thoroughbred horses in the United States, Canada, and Puerto Rico. The Principal Rules and Requirements of the *American Stud Book* provide in relevant part:

1. "To be eligible for registration, a foal must by the result of a stallion's Breeding with a broodmare (which is the physical

[11] 15 U.S.C. § 1.

mounting of a broodmare by a stallion with intromission of the penis and ejaculation of semen into the reproductive tract). [. . .] Without limiting the above, any foal resulting from or produced by the processes of Artificial Insemination, Embryo Transfer or Transplant, Cloning or any other form of genetic manipulation not herein specified, shall not be eligible for registration."[12]

2. "Horses bred outside of the United States, Puerto Rico or Canada must satisfy the eligibility requirements of Rules 1(C) and 1(D) [natural cover requirement]. . ."[13]

C. Pursuant to Kentucky law, a Thoroughbred horse "shall not be entered or raced in this state unless" it has been "[d]uly registered in The Jockey Club breed registry."[14] Other jurisdictions have similar laws.[15]

IV. Viability of a Challenge to The Jockey Club's Ban on Registration of Foals Produced by Artificial Insemination in the United States

A. Is there a "contract, combination in the form of trust or otherwise, or conspiracy?"

1. Section 1 of the Sherman Act does not prohibit "independent action of a single entity, regardless of its purpose or effect on competition."[16] Instead, it "reaches unreasonable restraints of trade effected by a 'contract, combination . . . or conspiracy' between separate entities. It does not reach conduct that is 'wholly unilateral."[17]

2. The Jockey Club appears to be a single entity, and there does not appear to be a contract, combination, or conspiracy with any other entity involved. Further, The Jockey Club does not compete with breeders of Thoroughbred horses, and is not an association of breeders that compete against each other. Instead, the ban on registration of foals produced by artificial insemination appears to be the wholly unilateral conduct of a single entity.

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[12] The American Stud Book, Principal Rules and Requirements, Rule 1(D).
[13] *Id*. at Rule 11(A).
[14] 810 Ky. Admin. Regs. 1:012. *See also* Ky. Rev. Stat. § 230.012 (20) (defining "Thoroughbred race" and "Thoroughbred racing" as "a form of horse racing in which each horse participating in the race is a Thoroughbred (i.e., meeting the requirements of and registered with The Jockey Club of New York). .)."
[15] *See, e.g.*, California: Cal. Bus. & Prof. Code § 19416; Florida: Fla. Stat. § 550.002(35); New York: N.Y. Rac. Pari-Mut. Wag. & Breed. § 225; Texas: Tex. Rev. Civ. Stat. art. 179e, § 1.03(7).
[16] *ABA Section of Antitrust, Antitrust Law Developments* 3 (6th ed. 2007) (citing, e.g., *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 761 (1984)).
[17] *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 767-68 (1984) (citations and footnote omitted).

B. If a court were to find that the ban on registration of foals produced by artificial insemination was a contract, combination, or conspiracy, does the restriction constitute an unreasonable restraint of trade?

1. By its literal terms, the Sherman Act prohibits any contract, combination, or conspiracy in restraint of trade or commerce. Courts have consistently held, however, that in practice the Sherman Act only prohibits unreasonable restraints.[18]

2. The analysis of whether a restraint on trade or commerce is unreasonable depends on whether it is a horizontal or vertical restraint.

a. Horizontal restraints are "restrictions established by agreements among actual or potential competitors."[19]

b. Vertical restraints are "restrictions imposed by a firm at one level of the supply chain on firms at a different level (e.g., restrictions imposed by a manufacturer on its distributors)."[20]

c. A plaintiff might argue that the ban on registration of foals produced by artificial insemination is a contract, combination, or conspiracy and not the unilateral action of a single entity by alleging that The Jockey Club conspired with breeders that utilize the registry. Therefore, the question of whether the ban constitutes an unreasonable restraint of trade would likely be analyzed as a horizontal restraint.

d. A potential plaintiff would probably challenge the restriction by arguing that it constitutes an illegal group boycott of breeders that want to register, and race, foals produced by artificial insemination.

C. Would a court analyze the ban on registration of foals produced by artificial insemination under the *per se* rule or the rule of reason analysis?

1. *Per se*: Courts analyze potentially anticompetitive practices under the *per se* rule when "'the practice facially appears to be one that would always or almost always tend to restrict competition and decrease output.' In such circumstances a restraint is presumed unreasonable without inquiry into the particular market context in

[18] *See, e.g., Northwest Wholesale Stationers v. Pacific Stationery & Printing Co.*, 472 U.S. 284, 289 (1985).
[19] *Antitrust Law Developments* at 78.
[20] *Id*.

which it is found."[21] "Per se rules are invoked when surrounding circumstances make the likelihood of anticompetitive conduct so great as to render unjustified further examination of the challenged conduct."[22]

2. Rule of reason: "[M]ost antitrust claims are analyzed under a 'rule of reason,' according to which the finder of fact must decide whether the questioned practice imposes an unreasonable restraint on competition, taking into account a variety of factors, including specific information about the relevant business, its condition before and after the restraint was imposed, and the restraint's history, nature, and effect."[23]

3. A court would most likely analyze the ban on artificial insemination under a rule of reason analysis. Courts have recognized that in the context of sports and certain other industries, "horizontal restraints are essential if the product is to be available at all."[24] For example, courts have rejected the *per se* rule in the context of professional tennis,[25] auto racing,[26] professional football,[27] professional soccer,[28] and professional hockey.[29] Further, the ban on the registration of foals produced by artificial insemination is not one that facially appears to restrict competition and decrease output. Rather, while a plaintiff may argue that the ban results in increased breeding fees and less breeding, the very arguments made in *McHugh,* such arguments are probably insufficient to warrant *per se* treatment.

D. How would a court analyze the ban on registration of foals produced by artificial insemination under the rule of reason analysis?

1. A restraint of trade may be found unreasonable "based either (1) on the nature or character of the contracts, or (2) on surrounding circumstances giving rise to the inference or

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[21] *NCAA v. Board of Regents of the University of Oklahoma*, 468 U.S. 85, 100 (1984) (quoting *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*, 441 U.S. 1, 19-20 (1979)).
[22] *Id*. at 103-04 (citations omitted).
[23] *State Oil Co. v. Khan*, 522 U.S. 3, 10 (1997).
[24] *NCAA*, 468 U.S. at 101.
[25] *Deutscher Tennis Bund v. ATP Tour, Inc.*, 610 F.3d 820 (3rd Cir. 2010).
[26] *M&H Tire Company, Inc. v. Hoosier Racing Tire Corp.*, 733 F.2d 973 (1st Cir. 1984).
[27] *VKK Corp. v. National Football League*, 244 F.3d 114 (2d Cir. 2001); *Smith v. Pro Football, Inc.*, 593 F.2d 1173 (D.C. Cir. 1979).
[28] *Fraser v. Major League Soccer, L.L.C.*, 284 F.3d 47 (1st Cir. 2002).
[29] *National Hockey League Players' Association v. Plymouth Whalers Hockey Club*, 325 F.3d 712 (6th Cir. 2003).

presumption that they were intended to restrain trade and enhance prices."[30]

2. Under the rule of reason analysis, "the plaintiff bears the burden of establishing that the conduct complained of 'produces significant anticompetitive effects within the relevant product and geographic markets.'"[31]

a. A plaintiff must show that "the effect upon competition in the marketplace is substantially adverse."[32] "Restraints that produce only an 'insignificant,' 'de minimis,' 'trivial,' or 'insubstantial' restriction of competition are not unlawful."[33]

b. There are three methods by which a plaintiff can show anticompetitive effect: (1) "proof of a restraint with adverse competitive impact so obvious that only a quick look rule of reason analysis is necessary, (2) proof of actual anticompetitive effect, and (3) market analysis indicating that the restraint will create or facilitate the exercise of market power."[34]

c. It is unlikely that a plaintiff would be able to show that the ban on registration of foals produced by artificial insemination is an obvious restraint with anticompetitive impact, and therefore would have to come forward to proof of actual anticompetitive effect or market analysis. This would also require a plaintiff to accurately define a relevant geographic and product market, which may prove difficult because of the international implications of Thoroughbred breeding. This was one defense raised in the *McHugh* case.

3. If a plaintiff can show that a restraint on trade has had or is likely to have a substantially adverse effect on competition, then the burden shifts to the defendant to "provide evidence to establish that the restraint complained of has procompetitive effects sufficient to justify the injury resulting from the anticompetitive effects of the restraint."[35]

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[30] *NCAA*, 468 U.S. at 103.

[31] *Worldwide Basketball and Sport Tours, Inc. v. NCAA*, 388 F.3d 955, 959 (6th Cir. 2004) (quoting *National Hockey League*, 325 F.3d at 718).

[32] *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365, 375 (1967), overruled on other grounds by *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 58-59 (1977).

[33] *Antitrust Law Developments* at 59 (citing, e.g., *United States v. Topco Assocs.*, 405 U.S. 596, 606 (1972)).

[34] *Id*.

[35] *World Wide Basketball*, 388 F.3d at 959 (quoting *National Hockey League*, 325 F.3d at 719).

a. The types of procompetitive justifications that can be asserted are limited.[36] The rule of reason inquiry "focuses exclusively on the challenged restraint's impact on competitive conditions."[37] Justifications for a challenged restraint "unrelated to the restraint's effect on competition are generally irrelevant to the analysis."[38]

b. Therefore, justifications related to the public interest or the integrity of the industry are generally insufficient without an economically procompetitive relation.[39] Indeed, the rule of reason "is not designed to protect the convenience or financial benefits of the conspirators or even other entities involved in the industry."[40] Instead, the purpose of antitrust analysis is "to form a judgment about the competitive significance of the restraint; it is not to decide whether a policy favouring competition is in the public interest, or in the interest of the members of an industry."[41]

c. Here, therefore, in order to meet its burden, The Jockey Club would have to put forth procompetitive justifications for the ban on registration of foals produced by artificial insemination that go beyond the argument that the ban serves to protect the integrity of the Thoroughbred industry. Some of the procompetitive justifications raised in the *McHugh* case would be similarly applicable in the United States.

4. If the defendant can justify a restraint on trade with procompetitive effects, then the burden shifts back to the plaintiff "to prove that the legitimate procompetitive objectives can be achieved in a substantially less restrictive manner."[42]

5. Even if a plaintiff can prove a violation of the antitrust laws, it cannot prevail unless it also proves (1) injury in fact, or causation, and (2) antitrust injury.

a. Injury in fact: A plaintiff must "establish the existence of 'injury' to itself. . ."[43] The existence of an underlying injury

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[36] *See, e.g., General Cinema Corp. v. Buena Vista Distribution Co., Inc.*, 532 F. Supp. 1244, 1267-68 (D. C. Cal. 1982).
[37] *Id*. at 1267 (citing *National Society of Professional Engineers v. U.S.*, 435 U.S. 679, 688 (1978)).
[38] *Antitrust Law Developments* at 72.
[39] *See, e.g., National Society of Professional Engineers*, 435 U.S. at 695; *FTC v. Indiana Federation of Dentists*, 476 U.S. 447, 462 (1986).
[40] *General Cinema Corp.*, 532 F. Supp. at 1267.
[41] *National Society of Professional Engineers*, 435 U.S. at 692.
[42] *World Wide Basketball*, 388 F.3d at 959 (citing *National Hockey League*, 325 F.3d at 718).
[43] *Antitrust Law Developments* at 814 (citations omitted).

must be shown "with a 'reasonable degree of certainty.'"[44] Further, while "a plaintiff need not exhaust all possible alternative sources of injury," a plaintiff does have to prove "that the illegality is shown to be a material cause of the injury."[45]

b. Antitrust injury: In addition to proving injury with a causal link to the alleged violation, a plaintiff must also prove "injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful."[46] A plaintiff cannot prevail by merely showing "injury due to an illegal presence in the marketplace."[47] It must "link its alleged injury proximately to the purpose of the antitrust laws."[48]

V. Have there been challenges in the United States to rules similar to The Jockey Club's ban on the registration of foals produced by artificial insemination?

A. *Floyd v. American Quarter Horse Association*.[49]

1. At the time the lawsuit was filed, the American Quarter Horse Association's ("AQHA") rules permitted the registration of only one genetic foal per year.[50]

2. Kay Floyd, a breeder, bred a quarter horse stallion to a quarter horse mare. She transferred an embryo to another quarter horse mare, and then bred the original two horses again. Two foals were born, one as a result of the natural cover, and one as a result of the embryo transfer. Pursuant to the AQHA rule, Ms. Floyd could not register both foals. Ms. Floyd registered the foal born as a result of natural cover, but did not initially register the foal born as a result of the embryo transfer. Subsequently, Ms. Floyd sought to register the embryo transfer resultant foal, and offered to surrender the registration papers for the natural cover resultant foal in exchange, but the AQHA refused.[51]

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[44] *Id*. at 815 (citations omitted).
[45] *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 114 n. 9 (1969).
[46] *Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 334 (1990) (quoting *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977)).
[47] *Antitrust Law Developments* at 818.
[48] *Id*. (citations omitted).
[49] No. 87-589-C (Tex. Dist. Ct. 251st Dist.).
[50] *AQHA Releases Statement of Position on "Embryo Transfer Lawsuit Settlement,"* http://www.texashorsemen.com/news/news_Embryo.asp.
[51] Mary W. Craig, *A Horse of a Different Color: A Study of Color Bias, Anti-trust, and Restraint of Trade Violations in the Equine Industry* § III, *at* http://works.bepress.com/mary_craig/2 (Aug. 2009) (citations omitted).

3. Ms. Floyd and a number of other breeders sued the AQHA alleging a horizontal restraint of trade that adversely affected consumers. She also alleged that the restraint was facially anticompetitive and therefore was a *per se* violation of the Texas antitrust laws.

4. The AQHA argued that the rule "placed smaller breeders in the same position as larger breeders with greater financial resources, thereby protecting the smaller breeders."

5. The court rejected the argument because the rule's effect was to limit the number of registered quarter horses and reduce the competition of supply. The court held that while the rule was not a *per se* violation, it was an unreasonable restraint of trade.[52]

6. After the court's ruling, the AQHA settled with the plaintiffs and amended its registration rules to allow registration of all foals resulting from embryonic transfer. The court dismissed the case and vacated all previous orders, meaning that its finding of an unreasonable restraint of trade would carry no weight in subsequent cases.

7. *Floyd* is instructive in that a potential challenge to The Jockey Club's ban on the registration of foals produced by artificial insemination would in all likelihood include an argument that the ban limits the number of registered Thoroughbreds and reduces the competition of supply.

8. There are significant factual distinctions between *Floyd* and a challenge to The Jockey Club's restriction.

   a. The Jockey Club is a single entity. Its primary function is to maintain the *American Stud Book*. In contrast, the AQHA, in addition to maintaining a registry, also serves as a membership association of quarter horse owners and breeders that sanctions horse shows and special events.[53] It was much easier to allege concerted action against the AQHA in *Floyd* that it would be against The Jockey Club.

   b. The AQHA rule explicitly limited the number of foals that could be registered as a result of the breeding between a pair of horses. The Jockey Club ban contains no such explicit limitation. Instead, it bans the registration of ***any*** foal produced as the result of artificial insemination. Any alleged decrease in supply (or other effect on competition) that may

[52] *Id*. (citations omitted).
[53] *Id*. (citations omitted).

result from the ban is much more attenuated that the clear effect in *Floyd*.

c. A potential challenge to The Jockey Club ban, as in the *McHugh* case, would turn on whether the ban on artificial insemination violates the antitrust laws. By contract, even prior to *Floyd*, the AQHA rules permitted the registration of a horse produced by embryonic transfer. At issue in *Floyd* was whether the limit on the ***number*** of foals produced from embryonic transfer that could be registered violated the antitrust laws.

d. The AQHA ultimately settled the matter, instead of continuing to litigate and pursuing an appeal. Interestingly, the court never struck down the AQHA rule, only finding it an unreasonable restraint of trade which potentially entitled the plaintiffs to damages.[54] The issue of whether the AQHA should have been enjoined from enforcing the rule was never decided as a result of the settlement. Further, because of the settlement, no appellate court will ever have the opportunity to decide if the trial court was correct in its analysis.

B. *Efford v. The Jockey Club*.[55]

1. Plaintiffs Robert and Lauren Efford were breeders of palomino Thoroughbred horses. In 2001, after learning that the Effords had registered four foals produced by artificial insemination, The Jockey Club revoked the foals' registration papers. The Effords sued The Jockey Club in Pennsylvania state court alleging that the revocation without a hearing violated due process and that the ban on registration of foals produced by artificial insemination violated the Sherman Antitrust Act.

2. The Jockey Club moved to dismiss the action on numerous grounds, including that the Pennsylvania court lacked jurisdiction over it. The court dismissed the action, and the Effords appealed. The Superior Court of Pennsylvania affirmed the trial court's dismissal on jurisdictional grounds.[56] There is no indication that the Effords attempted to bring the same lawsuit in another jurisdiction, such as Kentucky or New York.

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[54] *AQHA Lifts Embryo Transfer Registration Ban Entirely*, The Blood-Horse (Jun. 13, 2002), *available at* http://www.bloodhorse.com/horse-racing/articles/10055/aqha-lifts-embryo-transfer-registration-ban-entirely.

[55] No. 01-02081 (Pa. Ct. Common Pleas, Civil Division).

[56] *Efford v. The Jockey Club*, 796 A.2d 370 (Pa. Sup. Ct. 2002).

3. *Efford* appears to be the only case in the United States where a plaintiff sought to challenge The Jockey Club's ban on the registration of foals produced by artificial insemination. The case provides little guidance, however, because it was dismissed at a very early stage on jurisdictional grounds.

VI. Conclusion

A. The Australian court's decision in *McHugh* is highly anticipated by the Thoroughbred industry. It will likely be the first opinion of any court that examines the merits of an antitrust challenge to an artificial insemination ban similar to that of The Jockey Club in the United States. While the decision would not be binding on an American court, an outcome favorable to McHugh could certainly prompt challenges in other jurisdictions, including the United States.

B. While no American court has analyzed The Jockey Club's restriction, existing antitrust law provides some guidance.

1. The primary hurdle a potential plaintiff would have to clear would be to show that The Jockey Club's restriction constitutes a contract, combination, or conspiracy with other parties, as opposed to the unilateral action of a single entity.

2. Assuming for the sake of argument that a plaintiff could clear this substantial hurdle, it would then have to show that the restriction is an unreasonable restraint of trade. A court would most likely analyze this under the rule of reason analysis. A plaintiff would therefore have to show that the restriction substantially restrains commerce, another difficult hurdle.

3. If a plaintiff could meet these difficult standards, the burden would shift to The Jockey Club to show that the restriction has procompetitive benefits that go beyond protecting the integrity of the industry.

4. A plaintiff would then have the opportunity to try to prove that the procompetitive justifications put forth by The Jockey Club could be achieved by less restrictive means.

5. Although unlikely, if a plaintiff could show that the ban was concerted action that constituted an unreasonable restraint of trade, it would still have to prove injury in fact and antitrust injury before it could recover damages.

C. While it is difficult to predict with any certainty, especially based on the lack of relevant case law on related issues, it seems unlikely that a

plaintiff would be able to successfully challenge The Jockey Club's ban on the registration of foals produced by artificial insemination.