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By: Matt Hassen, Staff Member

There is something exciting about ejections in sports. It is amusing to watch a referee or umpire give the dramatic heave-ho — crowds get riled up and it gives the fans something to talk about. [1] Ejections or exclusions in horse racing may be less visible than in other sports, but they do have an interesting legal history dating back to a Supreme Court decision in 1913, which was authored by none other than Justice Oliver Wendell Holmes. The case established a principle of total management discretion in excluding racetrack patrons.[2] Recently, the West Virginia Supreme Court considered an extension of that rule when it took up the question of “whether a West Virginia horse racetrack has an unrestricted common law right to eject a jockey from its premises.”[3]

In what the Jockeys' Guild called a "major victory for jockeys,"[4] The West Virginia court found a property interest in the permit issued by the state's Racing Commission and also a statutory right to appeal ejections to the Racing Commission (subject to judicial review).[5] The West Virginia statute was read as necessarily restricting the right of a racing association to exclude permit holders because "if the Legislature intended for a racing association to have an unfettered right to eject the permit holder there would have been no reason for the Legislature to add the language" granting a right of appeal to the Racing Commission.[6] There is a certain undertone, as well, that the "greater includes the lesser" because horse racing cannot occur at all unless licensed by the Racing Commission.[7]

While it is clear that the legislature may abolish the common law right of a private entity to exclude whoever it wishes, courts are split on whether the common law rule should apply to jockeys at all. Federal courts in New Jersey and Florida, as well as the Ohio Supreme Court, have extended the common law exclusion right to allow racetracks to exclude permit holders such as jockeys.[8] However, courts in Illinois and New York have refused to do so.[9]

The best justification for not extending the right of exclusion to jockeys appears in the Illinois case, which explains that with "the benefit of receiving a quasi-monopoly comes corresponding obligations one of which is not to arbitrarily exclude a jockey." [10] Horse racing is different from the traditional business and industrial setting. Thus, while it may make sense for a department store to be free to transact with whomever it wants, there are only a limited number of race tracks operating at one time.[11] Because the potential deprivation to a jockey as a result of exclusion is so great, that decision should be reviewable.[12] On the other hand, in the West Virginia case, the jockey allegedly committed fraud in the weigh out process.[13] If anything, shouldn't the law err on the side of exclusion in order to maintain the appearance and fact of integrity in races?

[1] See, e.g., Aaron Smith, *UK wins 85-60, Calipari ejected*, Kentucky Kernel (Dec. 18, 2010), <http://kykernel.com/2010/12/18/uk-wins-85-60/> ("John Calipari's two technical fouls and ejection from the game that dominated talk after the game... [t]he ejection overshadowed the rest of the game").

[2] Bennett Liebman, *The Supreme Court and Exclusions by Racetracks*, 17 Vill. Sports & Ent. L.J. 421 (2010) (citing *Marrone v. Washington Jockey Club*, 227 U.S. 633, 636 (1913)).

[3] *PNGI Charles Town Gaming, LLC v. Reynolds*, 2011 W. Va. LEXIS 323 (Nov. 18, 2011).

[4] Press Release, Jockeys' Guild, West Virginia Supreme Court Decision Upholds Jockeys Rights to Racing Commission Review Following Racetrack Decision (November 21, 2011) <http://www.jockeysguild.com/pressreleases.html>

[5] *PNGI Charles Town Gaming*, 2011 W. Va. LEXIS 323 at 27-28.

[6] *Id.* at 30.

[7] *Id.* at 20.

[8] *Id.* at 24 n.23 (citing *Calder Race Course v. Gaitan*, 393 So. 2d 15 (Fla. Dist. Ct. App. 1980); *Martin v. Monmouth Park Jockey Club*, 145 F. Supp. 439 (D.N.J. 1956); *Bresnik v. Beulah Park Ltd. Partnership, Inc.*, 617 N.E.2d 1096 (Ohio 1993)).

[9] *Id.* at 24 n.23 (citing *Cox v. National Jockey Club*, 323 N.E.2d 104 (Ill. App. Ct. 1974); *Jacobson v. New York Racing Assn.*, 305 N.E.2d 765 (N.Y. 1973)).

[10] *Cox v. National Jockey Club*, 323 N.E.2d 104, 111 (Ill. App. Ct. 1974).

[11] *Id.* at 12 (citing *Greenberg v. Hollywood Turf Club*, 7 Cal.App.3d 968, 976 (1970)).


[12] *Id.*

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