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New way of betting could boost Texas horse racing, but is it legal?

By Tim Eaton, Austin American-Statesman

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Racetrack owners in Texas are looking to inject new life into their struggling industry by turning to a controversial way of gambling that trades live horses for a slot machine-like experience.

Texans in the horse and dog racing industry — the same folks who have failed time after time to attain permission to run slot machines at their properties — now are trying to stretch the definition of pari-mutuel betting as they push for a flashy and innovative form of betting called “historical racing” that they hope complies with the strict regulations outlined in the Texas Racing Act.

The racing folks noticed that nowhere does the state law say that races must be live. So, they are trying to persuade state regulators to grant them the ability to operate historical racing terminals, which electronically display information about already-run races that have been stripped of all identifying markers.

The racetrack owners also are anticipating that they can make the change without having to ask lawmakers for their blessing.

Historical racing terminals look and feel like slot machines — which are illegal in Texas outside of a South Texas Indian reservation — with all the lights, buttons and sounds. But despite their trappings, track owners and horse people say the machines simply offer another way to engage in already-legal horse race wagering. Detractors, however, say the historical racing games are nothing but horse-themed slot machines and should be deemed illegal in Texas.

The Texas Racing Commission is expected to hear about historical racing, which already has been debated in other states with mixed results, at a public meeting Tuesday, with more testimony in the coming weeks.

Robert Schmidt, chair of the Texas Racing Commission since 2011 and an orthopedic surgeon from Fort Worth, said he and his fellow commissioners will scrutinize the proposal and look at it in a “very objective way.”

'Racing-style slot machines'

But as the racing commission prepares for Tuesday's meeting, a debate is growing over whether the commission even has the authority to allow historical racing.

After consulting with lawyers, Schmidt said: "It appears to be clearly within our authority."

But Carey Theil, executive director for Grey2K a Massachusetts-based nonprofit dedicated to phasing out greyhound racing across the U.S., sees it differently.

The commission has no jurisdiction to change the state's pari-mutuel betting rules to allow historical racing terminals, he said. Historical racing doesn't fit into the definition of pari-mutuel betting because bettors aren't wagering on the same races, odds don't fluctuate as bets are made and the terminals have some of the same components as slot machines, he said.

Theil joined Les Bernal, national director of the nonprofit Stop Predatory Gambling, and Rodger Weems, chairman of Stop Predatory Gambling Texas, in writing a letter last week to the commissioners urging them to not consider historical racing. The coalition cited a 2006 ruling by the Wyoming Supreme Court when it equated the push for historical racing to an attempt to expand gambling.

The Wyoming Supreme Court opinion mentioned in the letter said: "(W)e are not dealing with a new technology here, we are dealing with a slot machine that attempts to mimic traditional pari-mutuel wagering. Although it may be a good try, we are not so easily beguiled."

Further, Theil and the others added that "gambling expansion is expressly forbidden by the Texas constitution" without a two-thirds vote of both the Texas House and state Senate and a vote of the electorate.

And since historical racing terminals are just "racing-style slot machines," as Theil said, the commission should reject attempts to put them at tracks without the permission of state lawmakers, many of whom have a record of opposing expanded gambling that spans most of the recent legislative sessions.

"This is clearly an attempt by wealthy racetrack owners to do an end-run around the Legislature because they don't have the votes. That's what this is," Theil told the American-Statesman.

Andrea Young, president of Sam Houston Race Park in Houston, slammed the detractors' claims, calling them predictable and off-base. Historical racing terminals are nothing like slots and are not games of skill, she said.

"We are not interested in doing something that has not been authorized in the state. We're interested in doing something that we believe the commission has the authority to do," she said. "This is a pari-mutuel wager in connection with a horse race."

Legal battles elsewhere

Other states have debated the issue with mixed results. Regulators in Arkansas and Kentucky have approved historical racing, and the terminals have buoyed their troubled race industries.

The Kentucky Supreme Court recently ruled that the racing commission had the authority to sign off on instant racing, but it sent the issue back to a lower court to determine if wagering on historical horse racing violates the gambling provisions of the Kentucky Penal Code.

Meanwhile, track operators in other places have been denied the right to operate the new terminals by their states' regulators who see historical racing as a type of gambling that is something other than pari-mutuel betting. (Pari-mutuel betting is a kind of betting on horse or dog races in which bettors try to pick the top three race finishers and where winners share the total amount bet after management takes its part and some money is set aside for purses.)

Oregon's attorney general in 2007, Hardy Myers, deemed the machines to be in violation of state law. Then, Maryland Attorney General Doug Gansler concluded in 2009 that historical racing isn't permissible under Maryland's Horse Racing Act because it doesn't amount to pari-mutuel betting. And, Jon Bruning, the attorney general in Nebraska, said in 2010 that historical racing "likely does not constitute a form of pari-mutuel wagering."

It is understandable that confusion and disagreement exist around historical racing, especially considering the look of the terminals.

"We wanted it to look like a slot machine," said Louis Cella, vice president of the Oaklawn Jockey Club in Arkansas and a pioneer of historic racing.

Cella — whose business helped create the historical racing concept — learned that tracks need to look like casinos with hands-on customer services and lots of glitz to attract visitors. And turning plain, self-service pari-mutuel betting machines into slot machine-like terminals was a major part of the effort, he said.

Now, struggling track owners in Texas are looking to Arkansas as a model. But they also are putting themselves into the position of having to simultaneously promote the idea of flashy terminals, while, at the same time, trying to downplay the machines' slots-like feel — in order to keep afloat an industry that has fallen on hard times.

An industry on decline

Interviews with horse people paint a dismal picture of their industry, and they always begin with descriptions of a storied sport in Texas that is now barely holding on.

Mary Ruyle, executive director of the Texas Thoroughbred Association, said that from 2000 to 2013, the number of Texas mares bred with Texas stallions dropped from 3,663 to 911, a decrease of 66.3 percent.

Also, she said, Texas races are undesirable for many horse owners and trainers since the purses are much lower than in neighboring states — such as Louisiana, New Mexico and Oklahoma — where tracks have been able to supplement purses with slot machines and other gambling operations.

A racing industry advisory group put together a document in 2011 for commissioners that outlined the state of the business. The “Report on the Current State of Horse and Greyhound Racing In Texas” portrayed an industry in trouble. According to data from all operating racetracks, attendance at Texas races has decreased 12 percent in the five years preceding 2010.

Also, the total amount of money wagered fell more than 23 percent during the same time period. Meanwhile, the amount paid in purses declined by more than 23 percent, while the number of live races diminished from 1,228 in 2005 to just 578 in 2009, the report said.

Rob Werstler, director of racing with the Texas Quarter Horse Association, said the average purse for quarter horses in Texas is \$60,000 a day, spread out over 10 races, and the top three finishers split the winnings. In Oklahoma, by contrast, average purse for quarter horses is \$220,000 a day for 10 races — with more race days a year than in Texas.

Werstler said historical betting terminals would be “a shot in the arm.”

“It could definitely turn our industry around,” he said, though he added he didn’t know of any specific projections.

Young from Sam Houston Race Park said the average purse for thoroughbreds in Texas also has fallen: to about \$140,000 a day, compared with about \$350,000 in Kentucky and approximately \$250,000 in Oklahoma and other neighboring states.

Cella, whose family has operated Oaklawn since 1904, said purses there were \$400,000 a day in this year’s season. And 40 percent of the money was generated from historical racing terminals.

Historical racing made all the difference, he said. “We’d be dead without it,” he said.

Historical racing might never push Texas purses high enough to reach those in neighboring states, Young said, “but we definitely can close the gap.”

Ken Carson, president of Texas Thoroughbred Association, also didn’t have specific projections, but he said historical racing would help the racing industry in Texas by improving purses “anywhere from 40 to 50 to 60 percent.”

If historical racing is allowed in Texas and put into place before January, the tracks could see a boost, but the state’s coffers won’t see any immediate benefit. Members of the Legislature, who reconvene at the beginning of 2015, would have to vote in favor of taxing the terminals.

Young guessed that Texas legislators would follow the example of other states, which have taxed terminals at a rate of 1 percent to 1.25 percent, though she wasn't able to project the possible tax benefit of historical racing in Texas.

What is historical racing?

Historical racing – often known by the trademarked term “Instant Racing” and created by Hot Springs, Ark.-based RaceTech LLC in 2000 – refers to an electronic form of betting on horse races. The terminals, which closely resemble slot machines, provide a place for gamblers to bet on races that have already been run. All identifying markers are removed, and bettors are privy to the same type of information on horses that is normally found on regular racing forms.

Why it matters

The revenue from historical racing terminals could help revitalize the struggling horse racing industry in Texas and add to the state's coffers. Opponents, however, say they are too similar to slot machines and shouldn't be allowed without legislative approval.

Local Impact

The owners of Manor Downs, the shuttered race track 15 miles northeast of downtown Austin, are watching the historical racing debate closely.

Howard Phillips, managing partner at the track, said the official blessing of historical racing by the Texas Racing Commission could have a “real positive effect” on the unused track.

The track, which closed in July 2010, is currently on the market, and with legalized historical racing, prospective buyers might come flocking, Phillips said.

New owners, he said, could come to Manor Downs, “and turn it into something that would fit into the Austin entertainment scene.”

Expert Reporting

American-Statesman Capitol reporter Tim Eaton has covered gambling and the Legislature since 2010.