

**SUPPLEMENT TO ORAL PRESENTATION MADE BEFORE THE  
ARKANSAS RACING COMMISSION'S HEARING REGARDING  
THE INSTANT RACING MACHINE RULES**

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(This presentation, although made in the context of the relevant rules promulgated for wagering on the instant racing machines at Oaklawn Park, is intended to apply equally to the same rules as adopted for Southland Greyhound Park's instant racing machines. Emphasis added where underlining occurs within quoted material.)

**I. Objection to the approval of the Electronic 1-2-3 wagering rules and amended rules adopted January 13, 2000, as emergency rules.**

Under the Administrative Procedure Act (APA), Arkansas Code 25-15-101, et seq., an agency may adopt an emergency rule without the requisite 20 day notice only if the agency finds that the rule is necessary because there is "imminent peril to the public health, safety, or welfare" and states in writing its reasons for that finding. (Arkansas Code 25-15-204 (b))

A Freedom of Information request made to the commission seeking all records regarding the instant racing machines yielded no indication in the commission's minutes of meetings or elsewhere that the commission either gave the required notice or made the findings regarding the public's peril.

For that reason, the commission should rescind its previous approval of the invalid rules and commence the procedure as set out in the APA by giving the necessary notice of the proposed rule and setting a hearing at which the matter may be fully aired.

**II. Objections to the propriety and applicability of the Electronic 1-2-3 wagering rules and amended rules and their adoption as permanent rules.**

A. The instant racing machines are not horse racing.

Relevant provisions of the Arkansas Horse Racing Law (AHRL), Arkansas Code 23-110-101, et seq., delegate authority to the commission to oversee and direct horse racing in Arkansas.

"Subject to the limitations and conditions as provided in this chapter or other applicable law, the commission shall have sole jurisdiction over the business and the sport of horse racing in this state ...." (Arkansas Code 23-110-204 (a))

"The commission shall have full, complete, and sole power and authority to promulgate rules, regulations, and orders and prescribe conditions, under which horse racing shall be conducted ...." (Arkansas Code 23-110-204 (b)) "However, the commission may by rule require all officers, employees, or agents of the franchise holder who are in charge of, or whose duties relate directly to, the running of races ... to be approved by the commission. (Arkansas Code 23-110-204 (b))

The intent and purpose of the law is to allow a franchise holder to present a live horse race. Notwithstanding the modification of the law (Arkansas Code 23-110-405 (b)(1)) in 1999's session of the legislature which states in relevant part -- "... a franchise holder may enter into agreements and arrangements with other parties pursuant to which its patrons may wager on races run at other race tracks which are shown live or otherwise ...." -- the video clips provided on the small screens on the instant racing machines violates the spirit and the letter of the law.

By the way, when the proponents of this change in the AHRL were lobbying for its passage, they were stating that the purpose of the change was to allow the tracks to show the conclusion of a simulcast race if for some reason transmission of the broadcast signal was temporarily interrupted. That was just more subterfuge and obfuscation from those who carry the tracks' water. We now know that the justification given was only the ostensible reason. The real reason the tracks desired this modification of AHRL was so that they could squeeze slot machines into their operation with the aid of a compliant racing commission.

One must keep in mind that the law requires the commission to exercise its power and authority "in a reasonable manner." (Arkansas Code 23-101-204 (b)) Permitting a franchise holder to put a small video screen on what is otherwise a slot machine and show the final second or two of a race (up to twelve times a minute on the same machine) is not, even with a great stretch, the showing of a horse race, "live or otherwise."

The patent for the random number generator (RNG) or the "brains" of the instant racing machines make the very case for this a number of times. Paragraph 10 of the "Claims" section of U.S. Patent number 5,888,136 states, "The method of wagering according to claim 1 includes the steps of providing an input wagering terminal and at the input wagering terminal producing at least one of an audio and visual signal to ... simulate a live race environment." Paragraph 18 of that same section of the patent says virtually the same thing.

In the patent's subsection entitled "Summary of the Invention" the following is found: "To give the location around the input wagering terminal a more realistic feel, an audio and/or visual signal can be produced to ... simulate a live race environment." In the section that describes the drawings attached to the patent, it is explained in a similar fashion. "... an audio signal generator

... and/or a visual signal generator can be used to produce effects that ... simulate a live race environment ... or otherwise add to the excitement or authenticity of the system ....”

Why must you simulate that which you profess to be real? Because it's not real. In short, it's smoke and mirrors. It's not horse racing. It's not live horse racing and neither is it horse racing presented otherwise. It is a simulated event and its intent is to try to add authenticity to what is otherwise nothing more than an elaborate ruse, a charade, and a not-so clever way to sneak slot machines in under the radar. As such, it is beyond the scope and authority of the commission to allow a franchise holder to operate the instant racing machines.

B. The wagering on the instant racing machines is not pari-mutuel.

At the outset it should be conceded that there is no hard and fast definition of pari-mutuel wagering in Arkansas law. However, there are several key factors that are given in any application of pari-mutuel style wagering. If these factors are missing from any particular scheme of wagering, then it is safe to conclude that the method of betting is not pari-mutuel. Such an analysis renders that very result in an examination of the so-called pari-mutuel wagering that is conducted with the instant racing machines.

On January 13, 2000, the commission adopted Rule 1060 as an emergency rule. It states in pertinent part, “ ‘Pari-mutuel wagering’ shall include any method of wagering approved by the Racing Commission ....” That attempted grant of authority bestowed by the commission on itself is breathtaking in scope and a virtual usurpation of power otherwise reserved by the people. Such self-aggrandizement should not be permitted.

Pari-mutuel wagering has always involved a betting pool that is comprised of wagers placed by bettors on a given race or set of races. The pools for instant racing are not tied to a particular race or event. They are made of money wagered on the machines during some predetermined time period. The pools bear no relation at all to any particular race. Instead of the wagering period on a given race being the time preceding that race, the patent for the RNG states in paragraph 10 of the Claims section that “the input wagering terminal producing at least one of an audio and visual signal to ... identify the beginning of a wagering period [and] identify the end of a wagering period ....”

The commission knew this new notion of a wagering pool not being tied to a specific event or set of events was a serious problem for the instant racing machines. That's why rule 1060 was adopted in a hasty manner. It was tacked onto the emergency rules adopted on January 13, 2000. A full reading of that rule finds the commission explicitly saying that wagers do not have to be placed “with respect to the same race ....” This represents such a dramatic departure from traditional pari-mutuel wagering, that the commission knew it had to reinvent pari-mutuel wagering.

The wager placed by a bettor in a pari-mutuel system has a bearing on the odds of the horses in a race. The wagers in an instant racing machine have no effect on the odds of the "race" the machine has selected. The race has already been run and the odds were "frozen." Again, the patent is the best evidence. In the section discussing the drawings accompanying the patent this statement is found: "Preferably, the odds are substantially the same for the outcomes in the random number generator ... as the corresponding outcome in the actual race from which the outcomes were taken." Preferably? Substantially? No, there's not much likelihood that the odds will be the same, and that is simply not pari-mutuel.

In a traditional pari-mutuel wagering system, the outcome of the race is the wagering base. In the subsection Background of the Invention, the patent says, "This invention relates ... to a method of wagering using the outcome of horse/dog races ... as at least a part of the wagering base." Again, a dramatic departure from what pari-mutuel clearly is. Put another way, the patent's section on the description of the drawings states, "The wagering base ... does not have to include exclusively outcomes of races." Well, if the race's outcome does not determine the wagering base, how can it be pari-mutuel betting on a horse race?

In summary, one must ask the following question. If the instant racing machine's wagering scheme is truly pari-mutuel, if pari-mutuel involves a bet on a given race or set of races that in turn sets the odds, and if the payouts are determined by those odds and the amount of the bet (all easily determined factors), then why must the heart of the machine be a "random number generator." The answer is simple. The machines do not employ a pari-mutuel wagering system. It is, in fact, a pseudo-pari-mutuel wagering system.

Since the wagering and the results thereof on the instant racing machines are determined by the random number generator (whose very name defies the essence of pari-mutuel), and since there are so many differences in the machines' "pari-mutuel" scheme and traditional pari-mutuel wagering, the commission is not entitled to deem the machines pari-mutuel devices, and, thereby, authorize their operation. The commission is not empowered to call pari-mutuel that which is not pari-mutuel.

C. The wagering on the instant racing machines is a lottery.

If the operation of the instant racing machine constitutes a lottery, then the commission is powerless to permit it. Is the instant racing machine a slot machine and, therefore, a lottery under Arkansas law? The patent again is illuminating. In the section describing the patent's drawings, the following statement is found: "The invention contemplates that pari-mutuel betting can be carried out in a 'slot machine' format." Later in that same section the patent says, "Once the selector [quick pick] ... is chosen and set, and the input wager is made, the .... outcome is then determined solely by chance ...."

That "chance" factor is a critical one for this analysis. One of the ways in which a wager can be conducted is by selecting the "quick pick" option on the instant racing machine. In this mode, the machine chooses the horses on which the wager is made. It is, therefore, a pure chance bet.

That, in effect, makes that kind of wager a lottery. A lottery is clearly not permitted by our state constitution.

The controlling Supreme Court cases are Longstreth v. Cook, 215 Ark. 72 (1949) and Scott v. Dunaway, 228 Ark. 943 (1958), cases involving challenges to the legality of pari-mutuel wagering on horse racing and dog racing, respectively. The court in Longstreth set out the governing principle. It said, "The use of the pari-mutuel machine does not make the betting a lottery, if it is not otherwise so, as it makes no determination of what horses are winners .... We conclude, therefore, that while the element of chance no doubt enters into these races, it does not control them, and that there is therefore no lottery."

Under this analysis, the instant racing machines are a lottery and, therefore, not permitted. The Longstreth court said that the pari-mutuel system didn't make that type of betting a lottery, unless it already was one. That is the case with the instant racing machines. Even if it is said the wagering on the machines is pari-mutuel, they still are not permissible because when operated with the quick pick option they are pure games of chance and, therefore, lotteries.

In other words, any examination of a gambling scheme involves first the threshold question of whether it is a lottery. If it is a lottery, then it is irrelevant whether a case can be made for its pari-mutuel nature. If it is a lottery, the inquiry ends and it is not allowed.

In upholding the legality of pari-mutuel wagering on dog racing the Scott court made a similar finding to the one in Longstreth. It held that in regard to pari-mutuel wagering on dog racing "it is clear that this form of legalized gambling affords an opportunity for the exercise of judgment and therefore cannot be classified as a lottery, where chance alone must rule." Under the court's rationale, instant racing using the quick pick option is a lottery because it permits no opportunity for the exercise of judgment. It is a pure chance gamble and nothing more than a slot machine made to look like a racing device.

The commission cannot authorize that which the state constitution forbids. The instant racing machines are clearly lotteries, slot machines, and prohibited by law. Nothing the commission can do can change that fact.

### III. Conclusion

It is conceded that the commission has been granted broad and sweeping powers in the delegation of authority to it in overseeing horse and dog racing in Arkansas. However, that grant of authority does not confer on the commission the power to act in an extra-constitutional

manner. The state constitution allows only pari-mutuel wagering on horse and dog racing. It explicitly prohibits lotteries, which are essentially described as games of chance. The commission may not circumvent constitutional law.

The instant racing machines are, in fact, lotteries; this is especially so under the quick pick method of wagering. Neither is the wagering on the instant racing machines pari-mutuel. However, for argument purposes, even if they were truly pari-mutuel wagering devices, they would be excluded as lotteries.

For ample reasons set out above, it has been demonstrated that the instant racing machines involve something other than pari-mutuel wagering. The commission has attempted to deem them pari-mutuel wagering devices by granting to itself the authority to call anything it wishes pari-mutuel. The people of Arkansas have not granted that kind of discretion to the commission, nor should they.

In short, instant racing machines are not horse races, not pari-mutuel wagering devices, and, by operation, they are games of chance or lotteries. Therefore, the commission should rescind the temporary rules adopted January 13, 2000, and order forthwith the removal of the instant racing machines from Oaklawn Park and Southland Greyhound Park.