UPDATE ON ANTITRUST and THE LEGAL ISSUES SURROUNDING CLONING IN THE EQUINE WORLD

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. (*Abraham & Veneklasen Joint Venture v. Am. Quarter Horse Ass'n*, No. 12 Civ. 00103 (N.D. Tex. April 23, 2012). Just over a year later, on August 22, 2013, 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. Judge Robinson also enjoined the AQHA from enforcing Rule 227(a),[1] and ordering the AQHA to amend specific rules to permit registration of the get of clones. *Abraham & Veneklasen Joint Venture v. Am. Quarter Horse Ass'n*, No. 12 Civ. 00103 (N.D. Tex. Aug. 22, 2013). On January 15, 2015, the Fifth Circuit Court of Appeals reversed the District Court and entered judgment in favor of the AQHA. *Abraham & Veneklasen Joint Venture v. Am. Quarter Horse Ass'n*, 776 F.3d 321 (5th Cir. 2015). The Fifth Circuit also denied petitions for a rehearing and a rehearing *en banc*.

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.

I. 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 world-wide headlines in July of 1996 with the birth of Dolly, perhaps history's most famous sheep. In the spirit of the race to the Moon, other

[1] In the AQHA Official Handbook of Rules and Regulations for 2013, REG106.1 specifically made a foal produced by any cloning process ineligible for registration. Currently, REG104.1 requires 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.

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 14 of the embryos. 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.[2] 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,[3] ignited the interest in equine cloning.

Texas A&M was prominent in early research and worked with the private company ViaGen. One of their early efforts was the cloning of Smart Little Lena, the winner of the Cutting Horse Triple Crown in 1983 and a prominent breeding stallion. Once again, the process started with the implantation of a number of embryos, in this case, 14.

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.[4] Currently, there are clones of accomplished horses in numerous disciplines, with clones of polo ponies finding particular success.[5]

Many breed registry associations have prohibitions similar to the AQHA. By way of example, the Appaloosa,[6] Arabian,[7] Friesian,[8] Haflinger,[9] Lippizan,[10] Morgan,[11] Paint Horse,[12] and Paso

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[2] Wikipedia, http://en.wikipedia.org/wiki/Prometea (last visited Mar. 14, 2016).

[3] Michaella Dietrich, *Equine Cloning: The Legal and Scientific Implications,* Nov. 23, 2009, at 5, citing 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 (2004) (on file with author).

[4] Rebecca Overton, *It's a First!*, QUARTER HORSE NEWS, Feb. 15, 2007 at 76-80; Rebecca Overton, *Clone Update, The Whole Story*, QUARTER HORSE NEWS, *available at* http://quarterhorsenews.com/index.php/news/industry-news/69-clone-update-the-whole-story.html; Marsha Brown, *About Those Clones – Identical Twins Separated By Time,* PARKER COUNTY TODAY, Nov. 2011, 24, 26.

[5] Posting of SavvyExacta toAnimal Science Blog, http://cr4.globalspec.com/blogentry/15452, "Equine Cloning: The Goal is Breeding Not Performance" (Jan. 12, 2011, 12:01 AM); Press Release, ViaGen, Cloned Foal of Legendary Polo Pony Califa Arrives (Apr. 27, 2010), *available at* http://www.viagen.com/news/cloned-foal-of-legendary-polo-pony-califa-arrives/; Rebecca Overton, *Clone Produces First Foal*, QUARTER HORSE NEWS, Jan. 16, 2009, *available at* http://www.quarterhorsenews.com/index.php/news/industry-news/6381-clone-produces-first-foal.html; Rory Carroll, *Argentinian polo readies itself for attack of the clones,* THE GUARDIAN, June 5, 2011, *available at* http://www.guardian.co.uk/world/2011/jun/05/argentinian-polo-clones-player/print; Posting of John to http://eventingnation.com/home/2011/06/first-event-horse-cloned.html (June 16, 2011, 3:25 PM); Lauren Giannini, *Duplicating Greatness? Clones and Sport Horse Breeding,* Dec. 23, 2011, *available at* http://www.sidelinesnews.com/wp/weekly-featured/duplicating-greatness-clones-and-sport-horse-breeding.html.

[6] "No horse that is produced from cloning shall be registered with the ApHC." R. 205.F., 2016 Appaloosa Horse Club Official Handbook, *available at* http://www.appaloosa.com/pdfs/rulebook16.pdf.

[7] Delegates of the World Arabian Horse Organization voted at the 2011 WAHO Conference to re-confirm Rule 19: "… that any Arabian of any age produced by cloning and that the foals of any Arabian which was produced by

Fino[13] 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.[14]

Most breed associations require that a foal at least be the get of a registered stallion and a registered dam, and, in certain circumstances, with 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

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cloning must not be registered under any circumstances." Sharon Meyers, Report of the WAHO Conference 2011, Doha, State of Qatar (2011), *available at* http://www.waho.org/waho-2011-conference.html. *See also* Makin' Babies: The Influence of Breeding Technologies, Part III, http://ilovehorses.net/blog/history-2/makin%e2%80%99-babies-the-influence-of-breeding-technologies-part-iii/ (July 17, 2011).

[8] The Friesian Horse society has ruled that "Cloning will not be allowed." Reg. 2.13 2016 Friesian Horse Society Breeding Book Regulations, *available at* http://www.friesianhorsesociety.citymaker.com/f/2016_FHS_BBR.pdf (last visited Mar. 22, 2016).

[9] At a meeting on December 3, 2008, the Pedigree Committee of the American Haflinger Registry Board of Directors passed a rule that "No Haflinger born as the result of cloning will be registered with the American Haflinger Registry." Minutes of the Dec. 3, 2008, Am. Haflinger Registry Board of Director's Meeting, *available at* http://www.haflingerhorse.com/documents/Minutes08/Minutes08Dec3.pdf.

[10] The Lipizzan Association of North America has a rule that "[t]o be eligible for registration, natural service or artificial insemination must beget a foal." Rs. & Regs. For Lipizzan Horse Registration with LANA, *available at* http://www.lipizzan.org/rules.html (last visited Mar. 11, 2016). The United States Lipizzan Federation has a rule that "Horses with a USLF number containing the letters 'NT' are recorded Clones. A Recorded Clone is not a registered Lipizzan, but has been conceived by nuclear transfer technique from cells obtained from a purebred Lipizzan registered with the USLF." R. III.4. U. S. Lipizzan Federation Registration Guide, *available at* https://static1.squarespace.com/static/533f079fe4b01599cd0de2f5/t/563a7f21e4b06abdb145736d/1446674209062/uslf-registration-guide.pdf (last visited Mar. 11, 2016).

[11] In 2003, The American Morgan Horse Association Board of Directors adopted a statement disallowing registration of clones until the membership of the AMHA and the Board of Directors have been sufficiently assured as to the technical, moral and legal aspects thereof. The Am. Morgan Horse Ass'n Frequently Asked Questions, *available at* http://www.morganhorse.com/about_morgan/faqs/ (last visited Mar. 22, 2016).

[12] The American Paint Horse Association has a rule stating: "Horses produced by any cloning process are not eligible for registration." R. RG-123. Cloning, 2016 Official APHA Rule Book, *available at* http://apha.com/docs/default-source/rule-books/2016rulebook.pdf?sfvrsn=2 (last visited Mar. 11, 2016).

[13] The Paso Fino Registration Form for a Foal requires that an owner specify breeding by one of only three methods: natural (hand service), pasture coverage, or artificial insemination. Horse Registration Application for use with the Paso Fino Horse Association, *available at* http://www.pfha.org/registry/registering-a-paso-fino (last visited Mar. 11, 2016).

[14] Only foals conceived by live cover are eligible for registration. Press Release, The Jockey Club, *Jockey Club Stewards Approve Changes to Clarify Registration Eligibility* (July 2, 2002), *available at* http://www.jockeyclub.com/mediaCenter.asp?story=19; *see also* The Jockey Club, *The Am. Stud Book Principal Rules and Requirements*, Section III Glossary of Terms, Breeding Practices Not Approved by The Jockey Club; Michaella Dietrich, *Equine Cloning: The Legal and Scientific Implications*, Nov. 23, 2009, at 5, citing E.L. Squires, *Changes in Equine Reproduction: Have They Been Good or Bad for the Horse Industry?*, 29 J. EQUINE VETERINARY SCIENCE, 268, 272 (2009).

registry of Andalusians,[15] Belgian Draft Horses,[16] Clydesdales,[17] Hanoverians,[18] Percherons,[19] Tennessee Walkers,[20] Hackneys,[21] and Miniature Horses.[22]

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.[23]

Clones are now being registered by the American DNA Registry located in Texas.[24]

II. 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.[25]

III. 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, uses genetic testing.

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[15] Arts. of Incorporation and Bylaws, Int'l Andalusian & Lusitano Horse Ass'n, *available at* http://www.ialha.org/?page_id=323 (last visited Mar. 11, 2016).

[16] By-Laws of The Belgian Draft Horse Corp. of Am., *available at* http://www.belgiancorp.com/docs/2015%20By-Laws_00461.pdf (last visited Mar. 11, 2016).

[17] Application for Registry, Clydesdale Breeders of the U.S.A., *available at* http://www.clydesusa.com/resources/register-clydesdale/ (last visited Mar. 11, 2016).

[18] Am. Hanoverian Society Corporate ByLaws and Rules of Registration, *available at* http://hanoverian.org/ahs-corporate-bylaws-and-rules-of-registration/ (last visited Mar. 11, 2016).

[19] No. 10, Percheron Horse Ass'n of Am. Application for Registration, *available at* http://www.percheronhorse.org/forms/Registration.pdf (last visited Mar. 11, 2016).

[20] R. 1.01, Tennessee Walker Horse Breeders' and Exhibitors' Ass'n Corporate Rules, *available at* http://www.twhbea.com/association/corprules.php (last visited Mar. 11, 2016).

[21] *Horse cloning: what's the breed reaction?* The Breeder's Guide: Topics and Opinions, *available at* http://www.breedersguide.com/topics.htm#cloning (last visited Mar. 11, 2016).

[22] How To Register Your American Miniature Horse, *available at* http://www.amha.org/pdf/reg/index.html (last visited Mar. 11, 2016).

[23] E-mail from Gregg Veneklasen, D.V.M. to the author (Mar. 14, 2016, 2:53 p.m.) (on file with author).

[24] Telephone interview with Gregg Veneklasen, D.V.M. (Mar. 14, 2016).

[25] Ollie Williams, *Battle of the clones: when will a replica horse win Olympic gold?* (Feb. 20, 2015), *available at* http://edition.cnn.com/2015/02/20/equestrian/horse-cloning-olympics/. *See also* Ryan Bell, *Game of Clones Argentine polo player rides cloned horse to win national championship* (Dec. 10, 2013), *available at* http://www.outsideonline.com/1800376/game-clones.

Current rules allow breeders to use artificial insemination of mares,[26] including by use of frozen semen[27] and cooled semen transported to a location other than where the semen was collected.[28] The use of frozen semen is not limited to living stallions; frozen semen of deceased stallions is currently being used for breeding.[29] For mares, the AQHA permits the use of frozen embryos[30] and 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.[31] Additionally, the AQHA permits a separation of the ownership of the stallion and the semen of the stallion.[32] For mares, a breeder may own or lease a mare,[33] or own a frozen embryo.[34]

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.[35] The breeding report must distinguish mares bred by cooled, transported semen or frozen semen.[36] 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 mare lessee.[37] The owners of a retained semen rights permit must file the same breeding report by November 30th.[38]

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.[39] Every mare owner or lessee who intends to obtain embryo transfer foals must provide notice to the AQHA before collecting a fertilized egg.[40] The lessee of a mare must provide notice to the AQHA of the mare lease.[41] The

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[26] AQHA Official Handbook of Rules and Regulations 2016, R. REG111 *available at https://www.aqha.com/membership/resources/rulebook/* (last visited Mar. 11, 2016).

[27] *Id*.

[28] *Id.* at Rs. REG102.8.3 and REG111.

[29] Katie Tims, *Smart Little Lena: The Future*, QUARTER HORSE NEWS, Jan. 15, 2007 at 144-151.

[30] AQHA Official Handbook of Rules and Regulations 2016, *supra* note 26 at R. REG112.5 *available at* https://www.aqha.com/membership/resources/rulebook/ (last visited Mar. 11, 2016).

[31] *Id*. at R. 112.

[32] *Id.* at R. REG111.2.

[33] *Id.* at R. REG112.1.1.

[34] *Id.* at R. REG112.5.

[35] *Id.* at R. REG110.1.

[36] *Id.* at R. REG111.1.

[37] *Id.* at R. REG110.3.

[38] *Id.* at R. REG110.2.

[39] *Id.* at R. REG113.2.

[40] *Id.* at R. REG112.1.1.

[41] *Id.* at R. REG125.1.

owner of a stallion's semen, but not the stallion, must obtain a retained semen rights permit.[42] Finally, a breeder wishing to retain the right to use a frozen embryo upon sale of a mare must obtain a permit.[43] For a mare foaled in 2015 or after, the frozen embryos or oocyetes must be used within two calendar years of the death or spaying of the mare.[44]

After all of these procedural steps, the AQHA requires genetic testing of foals obtained by cooled, transported semen or frozen semen[45] or foals obtained by embryo transfers or the use of frozen embryos.[46]

To facilitate the genetic testing, stallion owners must provide the AQHA with a test result showing the genetic type for every stallion, and mare owners must provide the same test for genetic type of mares foaled after January 1, 1989.[47]

IV. Texas Law and AQHA Litigation History

The AQHA is a private association located in Amarillo, Texas. As a private association, the AQHA enjoys the benefits of what the Texas Courts call the non-intervention rule. The basic rule dates back at least to 1890 and the Texas Supreme Court case of *Screwman's Benevolent Association v. Joe Benson*. 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 … . By 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.

Screwman's Benevolent Ass'n v. Benson, 13 S.W. 379, 380 (Tex. 1890). 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:

> … courts 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

[42] Id. at R. REG111.2.

[43] *Id.* at R. REG112.5.

[44] *Id*. at R. REG112.9.

[45] *Id.* at R. REG111.3.

[46] *Id.* at R. REG112.

[47] *Id.* at Rs. REG108.2 and REG108.3.

> 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.

Tex. Thoroughbred Breeders Ass'n v. Donnan, 202 S.W.3d 213, 224 (Tex. App. – Tyler 2006). The matter involved a Thoroughbred owner's efforts to qualify his horse for incentive purses available to horses accredited as Texas-bred. The Texas Thoroughbred Breeders Association denied the accreditation. 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 dispute as a member of a private association where the non-intervention doctrine applied.

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 p. 4.

- 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), no pet. h.

- The non-intervention rule will not apply to arbitrariness, fraud or collusion. *Dal-Tech*, 1999 Tex. App. LEXIS 5785 at p. 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 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*, 552 F.2d 646 (5th Cir. 1977) over the "white rule," and *Floyd v. Am. Quarter Horse Ass'n*, No. 87,589-C, interlocutory judg. (Tex. Dist. Ct. 251st Dist. Jan. 19, 2001), brought in 2000 over the issue of registering multiple embryos obtained from a single mare in the same breeding year.

The *Hatley* decision opens with the comment, "Melvin E. Hatley owned some magnificent horseflesh … ."[48] 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. Both the stallion and mare were registered Quarter Horses and both had records as performers. Mr. Jet Moore died after one season at stud, and Mr. Hatley obviously had high expectations for another colt from that blood line. 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. AQHA Rule 92, in force from 1972 to 1975, prohibited registration of a Quarter Horse with excessive white markings. 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. The AQHA said its intent was to enhance and preserve the genetics of Quarter Horses, which they considered to be solid colored horses.

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

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

> 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.

Hatley, 552 F.2d at 651, 653.

Mr. Hatley had also appended a claim for violation of due process under Texas law. The District Court issued an injunction prohibiting the AQHA from denying registration of Naturally High on the grounds the AQHA had not afforded a Mr. Hatley a hearing.[49] 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. Mr. Hatley applied for a hardship ruling after filing the litigation, but withdrew it during the case.[50] 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."[51] 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.[52] The end result was that Naturally High obtained registration certificate number 1160915.

The AQHA successfully defended a subsequent application of a newer version of the white rule in 1990. The Court of Appeals for the Seventh District in Amarillo, Texas, affirmed a summary judgment in favor of the AQHA over cancellation of a registration certificate for a stallion later determined to have excessive white markings. The AQHA afforded a hearing on the issue and the Court relied on the non-intervention rule to affirm the AQHA's actions.[53]

The AQHA was understandably confident that the Texas non-intervention rule made it possible to defend successfully 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 case with a member. While saying the question was an

[49] *Id.* at 654.

[50] *Id.* at 657.

[51] *Id.* at 655, 656.

[52] *Id.* at 657.

[53] *Burge*, 782 S.W.2d at 354.

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."[54]

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. 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. Kay Floyd owned a prominent stallion named Freckles Playboy. She implanted an embryo from her mare, Havealena in a recipient mare, and then bred Havealena a second time to Freckles Playboy. Havealena carried the second foal to maturity. The embryo resulted in a colt born in February 1996, and the second foal was a filly born in May of the same year. Previously, Havealena had foaled five stud colts by Freckles Playboy. All were cryptorchid. Ms. Floyd elected to register the filly. 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. The AQHA refused, based on Rule 212(a) allowing only one foal from a mare to be registered in a breeding year.[55]

Ms. Floyd brought an action against the AQHA and was joined by, among others, Moncrief Quarter Horses. Moncrief had bred their mare, Roseanna Duel, to Freckles Playboy, and the ovum split. The resulting flush provided two embryos which were placed in two recipient mares, and resulted in twins.[56]

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. Ms. Floyd also alleged the AQHA's actions were arbitrary.[57]

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."[58] 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-

[54] Glory Ann Kurtz, *AQHA rejects settlement offer on multiple embryo lawsuit,* QUARTER HORSE NEWS, Oct. 15, 2000, at 55.

[55] Glory Ann Kurtz, *Embryo Transfer Registration Controversy*, QUARTER HORSE NEWS, Feb. 29, 2000, at 43; Posting of Kay Floyd to Editor of ALL ABOUT CUTTING HORSE NEWS, http://www.allaboutcutting.com/letters-to-editor.htm (Mar. 20, 2012).

[56] Dietrich, *Equine Cloning*, *supra* note 3 at 19.

[57] Posting of Kay Floyd, *supra* note 55.

[58] *Floyd v. Am. Quarter Horse Ass'n*, No. 87-589-C, interlocutory judg. (Tex. Dist. Ct. 251st Dist. Jan. 19, 2001).

competitive restraint adopted for the purposes of limiting the supply of registered quarter horses."[59] 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, with some justifiable concern that a State Court in Amarillo might favor the home town defendant, the *Floyd* case was tried in Amarillo in the State Court. The State Court was not deterred by the non-intervention rule.

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. Coincidentally, both foals were sired by Ms. Floyd's stallion, Freckles Playboy. 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. After the embryo had been flushed, Miss Silver Pistol was sold to Keith Goett. Mr. Goett then bred the mare and she carried the foal. 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.[60] Unlike the exercise of its power to revoke a registration as the AQHA successfully did in the *Burge* matter, 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.[61]

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

V. 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:

> 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

[59] *Id.*

[60] Kurtz, *Embryo Transfer*, *supra* note 55.

[61] *Id.*

> allocation of our economic resources, the lowest prices, the highest quality, and the greatest material progress.[62]

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."[63] 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. This issue was addressed by the AQHA in a motion for summary judgment and is featured prominently in the AQHA's Appellate Brief filed with the Fifth Circuit.[64] The question is also the first and most prominent issue raised in a Brief of Amici Curiae filed by, among others, the American Kennel Club, The Jockey Club, The Cat Fanciers' Association and several breed registry associations.[65]

Justice Stevens, writing relatively recently 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.[66]

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[62] Charge to the Jury at 6, *Abraham & Veneklasen Joint Venture v. Am. Quarter Horse Ass'n*, No. 12 Civ. 00103 (N.D. Tex. Aug. 22, 2013), *available at* www.pacer.gov.

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

[64] Memorandum and Order Regarding Defendant's Motion for Summary Judgment at 5, *Abraham & Veneklasen Joint Venture v. Am. Quarter Horse Ass'n*, No. 12 Civ. 00103 (N.D. Tex. Aug. 22, 2013), *available at* www.pacer.gov; Brief of Appellant at 9-13, *Abraham & Veneklasen Joint Venture v. Am. Quarter Horse Ass'n*, No. 13-11043 (5th Cir.), *available at* www.pacer.gov.

[65] Brief of Amici Curiae, *Abraham & Veneklasen Joint Venture v. Am. Quarter Horse Ass'n*, No. 13-11043 (5th Cir.), *available at* www.pacer.gov.

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

As opposed to subjecting all contracts to Section 1 scrutiny, the Courts focus on concerted action because " '[c]oncerted activity inherently is fraught with anticompetitive risk.' "[67]

American Needle v. NFL, is a fundamental case cited in all of the Appellate Briefs. The unanimous Supreme Court reversed the decision of the District Court and the Seventh Circuit, the lower Courts having granted 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"). All of the teams assigned certain intellectual property to the NFLP. Between 1963 and 2000, the NFLP granted non-exclusive licenses to a number of vendors permitting them to manufacture such things as caps and jerseys with team logos. In 2000, the NFLP changed its non-exclusive licenses to an exclusive license. American Needle brought the case when its license to continue manufacturing the team logo items was not renewed. 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 … ."[68] The Seventh Circuit affirmed, observing that "in some contexts, a league seems more aptly described as a single entity immune from antitrust scrutiny … ."[69] Justice Stevens noted that the teams contributed most of the NFLP revenues to charities and shared the NFLP profits equally.[70]

The Supreme Court said that "the inquiry is one of competitive reality." It was not determinative whether there were legally distinct entities or entities operating under a single umbrella. The issue was whether the exclusive licensing agreement "joins together 'independent centers of decisionmaking.' "[71] The Court noted that the teams cooperated to produce NFL events but competed for players, coaches and other resources. Consequently, the NFLP did not possess the unitary decisionmaking quality or the single aggregation of economic power that would characterize independent action.[72]

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 an "unreasonable" restraint of trade. The Courts have treated some agreements as per se violations of Section 1. One example is a horizontal price fixing agreement.[73] Other concerted actions, however, are reviewed

[67] *Id.* at 190, quoting *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 768-769 (1984).

[68] *Am. Needle,* 560 U.S. at 188.

[69] *Id.*

[70] *Id*. at 187.

[71] *Id.* at 196, citing *Copperweld* at 769.

[72] *Am. Needle,* 560 U.S. at 196.

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

for reasonableness under the principle of the Rule of Reason.[74] 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.[75]

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.

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

VI. The Jury Trial

The Plaintiffs and the AQHA both must have felt reasonable confidence starting the trial. The Plaintiffs had the precedent of the *Floyd* case, where summary judgment was entered in favor of Floyd on the grounds that not registering embryo transfer foals was arbitrary and violated the Texas State law companion of the Sherman Act. 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.[76] 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.

The AQHA also had a reasonable basis to believe they would succeed. They were in Federal Court on their home turf of Amarillo. The AQHA had scored far more victories than it had suffered defeats, and the defeats had led to corrective changes. The AQHA also had a record of doing due diligence on the cloning issue, having studied it since 2004, meeting with authorities in the field and providing educational materials and discussions on the topic to members.

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

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

[76] *Hatley*, 552 F.2d at 655, 656.

A. The Sherman Act Section 1 Arguments

To establish a violation of Section 1 of the Sherman Act, the Plaintiffs had to prove a "contract, combination or conspiracy" to establish a violation. In simple terms, the Plaintiffs had to prove there were multiple actors working together for an anticompetitive purpose. 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 overseeing the registration rules, had meet in March of 2012, shortly before the AQHA Annual Meeting, and agreed to defeat registration of the get of clones.[77] These members then controlled the SBRC meeting and defeated a rule change. 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.

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.[78]

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. The AQHA argued the vote to keep the existing rule was not a conspiracy but parallel action.[79]

Of equal importance 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.[80] 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.[81]

Judge Robinson signaled her view on the issue in denying the AQHA's motion for summary judgment on Section 1, stating that:

> [W]here the AQHA stops defining its breed and starts restricting breeding, it can run afoul of antitrust law. … Reproductive

[77] Brief of Appellees at 28, *Abraham & Veneklasen Joint Venture v. Am. Quarter Horse Ass'n*, No. 13-11043 (5th Cir.), *available at* www.pacer.gov.

[78] Glory Ann Kurtz, *Who's Running the QH Industry?*, ALL ABOUT CUTTING, January 19, 2014, *available at* http://allaboutcutting.net/?p=4134.

[79] Brief of Appellant, *supra* note 64 at 14-15.

[80] *Id.* at 48.

[81] *Id.*

> 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.[82]

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.[83] 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. As stated by the Fifth Circuit, defining the relevant market "provides the framework against which economic power can be measured."[84]

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.

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 … ."[85]

Pretty clearly, the AQHA's status as the definitive Quarter Horse breed registry gave it a form of monopoly power. 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).

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[82] Memorandum and Order Regarding Defendant's Motion for Summary Judgment, *supra* note 64 at 12.

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

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

[85] Memorandum and Order Regarding Defendant's Motion for Summary Judgment, *supra* note 64 at 10.

Plaintiffs' expert, Christopher Pflaum, testified that "elite" was an adjective meaning such things as high quality and the best of the best.[86] Pflaum estimated about 35,000 horses, or five percent of the registered Quarter Horses, would qualify as elite.[87]

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 she gave. The Jury returned a unanimous verdict in favor of Plaintiffs and awarded legal fees to each of them, but did not award damages.

Judge Robinson entered a final judgment based on the verdict and enjoined enforcement of the rule rejecting clone registration as well as an order to change certain rules. Both the injunction and the rule changes were stayed based on agreement of the Parties.[88]

VII. The Appeal

From my perspective, Plaintiffs/Appellees must have thought they had the upper hand on appeal given a unanimous verdict from a properly-instructed Jury. They did not have to wrangle over Jury Instructions, just 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.[89]

The key argument for Plaintiffs' failure to establish a violation of Sherman 1 was that Plaintiffs had not submitted evidence sufficient to establish a contract, combination or conspiracy of multiple actors.[90] Plaintiffs submitted evidence that certain members of the Stud Book & Registration Committee 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.[91]

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[86] Brief of Appellant, *supra* note 64 at 30.

[87] *Id.* at 32-33.

[88] Final Judgment, *Abraham & Veneklasen Joint Venture v. Am. Quarter Horse Ass'n*, No. 13-11043 (5th Cir.), *available at* www.pacer.gov.

[89] Brief of Appellant, *supra* note 64 at 18, 25.

[90] *Id.* at 27.

[91] *Id.* at 28.

Similarly, the AQHA argued that the evidence did not establish concerted action among the members of the SBRC.[92] 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.[93]

For both Section 1 and Section 2, the AQHA attacked Plaintiffs' evidence of the "elite Quarter Horse market."[94] The AQHA argued, among other deficiencies, that the "elite" Quarter Horse boundaries were fluid and could not be defined.[95] The brief noted that yearlings were "elite" based on proven parents, but an elite horse could fall out of the category if it did not compete successfully or produce competitive offspring.[96] The AQHA argued: "Because 'eliteness' is an impermanent status, horses - and entire bloodlines - fall in and out of favor constantly."[97]

B. Plaintiffs/Appellees' Argument

Plaintiffs' principal argument, of course, 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.[98]

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,[99] that every member of the SBRC who spoke in opposition to registration of clones was a breeder of elite Quarter Horses[100] and that the sale of one-half of the top selling horses came from or went to members of the SBRC.[101]

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[92] *Id.* at 31.

[93] *Id.* at 35 – 37.

[94] *Id.* at 18, 39 – 50.

[95] *Id.* at 48.

[96] *Id.* at 48 – 49.

[97] *Id.* at 49.

[98] *Id.* at 21.

[99] *Id.* at 28.

[100] *Id.* at 30.

[101] *Id.* at 34.

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.[102].

Plaintiffs also argued that the exclusion of clones had no justification sufficient to justify its anticompetitive effect.[103] 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.[104]

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.[105]

As for accurate pedigrees, Plaintiffs argued 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.[106]

Plaintiffs countered the genetic disease argument, noting that "all veterinary witnesses testified that cloning can be used to *improve* genetics and increase genetic diversity."[107]

C. The Fifth Circuit Opinion

The Fifth Circuit opinion is dated January 14, 2015. Petitions for Rehearing and Rehearing En Banc were denied October 26, 2015.[108] 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 conclusion is likely shared by academics and practioners alike,

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[102] *Id.* at 25.

[103] *Id.* at 45.

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

[105] Brief of Appellant, *supra* note 64 at 62.

[106] *Id.* at 48, 49.

[107] *Id.* at 47.

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

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' 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. v. National Football League*, 560 U.S. 183 (2010). As detailed above, *American Needle* arose out of the NFL's decision to grant an exclusive license to manufacture such things as caps and jerseys to an entity formed by the 32 teams of the League called National Football League Properties. The decision by Justice Stevens considered whether the NFL was a single entity, therefore not capable of conspiring, or whether the teams were independent decision makers. The Court held the teams comprising the NFLP licensing entity were independent decision makers and reversed the Seventh Circuit decision in favor of the NFL and its licensing entity.

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.[109]

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."[110]

The standard of tending "to exclude independent conduct" became the foundation for determining Plaintiffs' evidence did not exclude other explanations, but were one-sided complaints.[111] The evidence did not support inferences that five members meeting in secret controlled the vote of the 30 or so members of the SBRC.[112]

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, let alone 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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[109] *Id.* at 330.

[110] *Id.* at 331.

[111] *Id.* at 332.

[112] *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.[113]

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.

Another explanation is the basic reason the fact finding by a jury is given great deference. To pick an example from the record, we can look at the testimony of Frank Merrill. 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.

The Panel characterized Mr. Merrill's testimony as "outspoken" opposition to the registration of clones and comments on "thirty-member committee's official votes on the subject." Plaintiffs argued that Mr. Merrill's testimony was an admission the SBRC had agreed to exclude clones. Judge Jones dismissed Plaintiffs' argument as a "mischaracterization."[114]

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.[115]

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. His motion was seconded and the motion carried.

The Jury evaluated witness demeanor and heard full testimony, whereas the Panel considered the black and white transcripts of the Appellate Record.

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[113] *Abraham & Veneklasen Joint Venture v. Am. Quarter Horse Ass'n*, 776 F.3d 321, 329 (5th Cir. 2015).

[114] *Id.* at 333.

[115] Brief of Appellant, *supra* note 64 at 17.

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 of the AQHA, it is unlikely that any of the other registries would suffer a different legal result.

The Jockey Club and one or more of its affiliates and related entities would face a different legal challenge. The long-standing requirement of live cover forecloses the slippery slope argument of additional breeding techniques that added to the AQHA vulnerability. The process of cloning is arguably an advanced breeding technique with similar techniques recognized by the AQHA rules. Not so for the Jockey Club.

The Sherman 1 requirement of multiple actors, however, would likely find a lower hurdle for the Jockey Club. The Thoroughbred Racing Association and the Thoroughbred Breeders and Owners Association, to name two organizations, might be argued as actors in concerted activity with the Jockey Club.

The hurdle, however, of defining a relevant market remains difficult at best, as does proof that there is no legitimate justification for the current breeding and registration rules.

Again, it is unlikely that the Sherman Act would be an effective tool for change.

VIII. 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.[116] Roughly 75% of cloning procedures are kept confidential, meaning they are not disclosed beyond ViaGen and the breeder.[117] The cost of cloning is coming down. At the time of the AQHA appeal, the cost of a clone was $165,000.[118] Currently, there is a promotional program pricing a cloning procedure at $85,000.[119] Advances in cloning technology, as with other 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.

[116] Interview with Blake Russell in Weatherford, Texas (Feb. 18, 2016).

[117] *Id.*

[118] Brief of Appellant, *supra* note 64 at 1.

[119] Interview with Blake Russell, *supra* note 116.

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.[120]

Genetic editing, by contrast, is treated more like a drug therapy and is regulated by the FDA.[121]

ViaGen has a team of talented people who are researching ways to edit or silence equine genes to eliminate such genetic diseases as HERDA and HYPP.

The HERDA genetic disease originated from a gene mutation in the great cutting horse Poco Bueno.[122] As with many great performers, prolific breeding resulted in spreading the mutation. Approximately 350,000 horses carry at least one negative HERDA gene today.[123] Great sires that carry one negative gene include Smart Little Lena, High Brow Cat and Metallic Cat.[124] 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.[125] On the other side, many believe that one negative gene results in more body flexibility.[126]

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

Similarly, the hyperkalemic periodic paralysis (HYPP) gene is a mutation that traces back to the stallion, Impressive.[127] 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.[128] In extreme

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[120] *Id.*

[121] *Id.*

[122] Statistics provided by Gregg Veneklasen, D.V.M., as of August 21, 2013.

[123] *Id*.

[124] *Id*.

[125] *Id*.

[126] *Id*.

[127] *Id*.

[128] *Id*.

cases, HYPP can cause muscle weakness, dog sitting, or even death.[129] Approximately 700,000 horses are believed to carry the HYPP gene.[130]

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. DNA testing is required for embryo transfers, use of frozen semen and similar techniques. Since 2000, approximately 50% of the horses registered with the AQHA were registered by means of these forms.[131] Since 2000, the other approximately 50% of the horses registered with the AQHA were DNA-verified.[132]

DNA testing, however, will not distinguish the foal sired by a stallion from the foal sired by a clone of that stallion. With the use of frozen semen, particularly from a deceased or sterile stallion, there is a prospect for 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 no doubt 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.[133] The great Argentinian polo player, Adolfo Cambiaso, is part of the company founded by Meeker, Crestview Genetics.[134] Together with others, Meeker and Cambiaso have produced a five-year-old clone of Cambiaso's renowned

[129] *Id*.

[130] *Id*.

[131] Statistics provided by Gregg Veneklasen, D.V.M., as of August 21, 2013.

[132] *Id*.

[133] Haley Cohen, *How Champion-Pony Clones Have Transformed the Game of Polo*, VANITY FAIR, August 2015, *available at http://www.vanityfair.com/news/2015/07/polo-horse-cloning-adolfo-cambiaso.*

[134] *Id*.

stallion, Aiken Cura.[135] Currently, there are reportedly 200 foals of clones involved with the Crestview Genetics program.[136]

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.[137]

Cambiaso later rode a clone of his polo horse, Sage, named Show Me, and scored two of his nine goes in the 2014 Argentine National Open aboard that horse.[138] In 2015, Cambiaso also rode a clone of Cuartetera and scored even more goals on the Cuartetera clone.[139] Cambiaso has stated that his dream is to ride an entire polo match on clones of his great horses.[140]

Crestview Genetics is currently involved in breeding jumping horses, champion Arabians and thoroughbreds, to name a few.[141] They envision an expanded world-wide program and exponential growth.[142]

Other examples of champions influencing the proliferation of clones include Tamarillo, a gelding that won the 2004 Olympics. His clone is named Tomatillo.[143] The famous barrel horse sire, Frenchmans Guy, has two clones.[144] A gelding, Tailor Fit, a two-time AQHA World Champion, has been cloned and his clone is now used in breeding programs.[145]

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

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[135] *Id.*

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

[137] *See* Cohen, *How Champion-Pony Clones Have Transformed the Game of Polo*, *supra* note 133.

[138] *See* Bell, *Game of Clones*, *supra* note 25.

[139] Telephone interview with Alan Meeker, *supra* note 136.

[140] *Id.*

[141] *Id.*

[142] *Id.*

[143] *See* Williams, *Battle of the clones, supra* note 25.

[144] *Top Barrel Racing Sire Frenchmans Guy Cloned*, Barrel Horse News; *available at* http://www.barrelhorsenews.com/articles/industry-news/3545-top-barrel-racing-sire-frenchmans-guy-cloned.html (last visited Mar. 11, 2016).

[145] Aegerter, Gil & Mike Brunker, *Cleared to race? Cloned quarter horses get victory in federal court*, NBC News, (Jul. 30, 2013) *available at* http://www.nbcnews.com/news/other/cleared-race-cloned-quarter-horses-get-victory-federal-court-f6C10798726.; Interview with Blake Russell, *supra* note 116.

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.[146] Some care is taken to have the clones trained and handled by the same people involved in the original horse training.[147]

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.

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, improving technology, lower costs and increased understanding of the cloning technique are among factors that will 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.

[146] Telephone interview with Alan Meeker, *supra* note 116.

[147] *Id.*