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3 No. 209
In the Matter of Suffolk Regional
Off-Track Betting Corporation,
 Petitioner-Cross Appellant,
 v.
New York State Racing and
Wagering Board, et al.,
 Respondents-Appellants.
(And Four Other Related
Proceedings.)

 Victor Paladino and Frederick J. Martin, for
respondents-appellants.
 Thomas J. Garry, Susan Choi-Hausman and Michael Hutter,
for petitioners-cross appellants.

KAYE, Chief Judge:

 At the core of this litigation -- with the Off-Track
Betting Corporations (OTBs) on one side, and the State Racing and
Wagering Board and state harness racing tracks on the other
side -- are questions of statutory interpretation. We begin with
a brief history of the relevant sections of the Racing, Pari-

Mutuel Wagering and Breeding Law (the Racing Law), and the present controversy.

Prior to 1970, New York permitted wagering on horse racing only at its thoroughbred and harness tracks, leaving (as Supreme Court observed) "a lucrative and illegal niche for local bookies, who took bets from those individuals who wished to gamble on horse racing but who were unable or unwilling to travel to the race track to place their wagers." When off-track betting was thereafter authorized, its popularity depleted attendance at the tracks and threatened their viability. To redress the situation, the Legislature in 1973 created seven regional OTBs¹ to administer off-track wagering and required them to pay a "state tax," a portion of which went to the regional harness tracks and nonprofit racing associations (L 1973, ch 346, as amd). The intention of the Legislature was:

"to derive from such betting . . . a reasonable revenue for the support of government, and to prevent and curb unlawful bookmaking and illegal wagering on horse races. It is also the intention of this article to ensure that off-track betting is conducted in a manner compatible with the well-being of the horse racing and breeding industries in this state, which industries are and should continue to be major sources of revenue to state and local government and sources of employment for thousands of state residents." (Racing Law § 518).

¹ Currently, there are six regional OTBs: New York City, Suffolk, Nassau, Capital, Catskill and Western.

In 1984, the Legislature authorized the simulcasting, or telecasting, of horse races conducted in the State for the purposes of pari-mutuel wagering (Racing Law § 1001 [a]). That again was a perceived threat to the financial stability of the regional harness tracks, leading to new legislation requiring OTBs to pay them commissions on the simulcast wagers placed at OTB facilities.

Between 1984 and 2003, simulcasting of thoroughbred races was prohibited between 7:30 p.m. and midnight -- evenings were traditionally reserved for harness racing. In 2003, however, the Legislature allowed simulcast licensees to broadcast, and accept bets on, thoroughbred races conducted after 7:30 p.m. from anywhere in the world. Again perceiving an adverse impact on nighttime harness racing, the Legislature provided for "maintenance of effort" payments, requiring OTBs that simulcast nighttime thoroughbred racing, every year after 2002, to guarantee to their regional harness tracks minimum payments based upon the commissions those tracks received before the nighttime thoroughbred simulcasts were permitted.

That requirement engendered two of the statutory questions now before us: first, can the OTBs credit commissions derived from daytime harness racing against the maintenance of effort payments and second, are those payments to be made on a regional, or track-by-track, basis.

The third statutory issue before us involves so-called "dark day" payments. "Dark days" occur when the State Racing Association is not conducting a thoroughbred race meeting, and no licensed harness track is accepting wagers on or displaying the signal of any thoroughbred track. On dark days, simulcast licensees can broadcast out-of-state thoroughbred races, but they must make payments to the harness tracks (which are not open for business that day) in accordance with a statutory formula (Racing Law § 1017).² From 1997 through 2003, all OTBs made dark day payments to their respective regional harness tracks, but in 2004 New York City OTB (NYC OTB) stopped payment on the ground that the statute required the tracks, not OTBs, to make such payments to one another.

Seeking clarification on maintenance of effort and dark day payments, the OTBs brought their claims to the State Racing and Wagering Board, which in February 2005 rejected their arguments. The Board concluded that OTBs cannot credit commissions derived from daytime harness racing against the maintenance of effort payment; that Racing Law § 1017-a required calculation of the maintenance of effort payment on a track-by-track (not regional) basis; and that Racing Law § 1017 required OTBs to make dark day payments to their respective regional

² While the Legislature recently renumbered relevant sections of the Racing Law, to maintain consistency we adhere to the statutory numbering used by Supreme Court and the Appellate Division in this case.

harness tracks. Five of the State's six regional OTBs (Western did not join) brought article 78 proceedings challenging the Board's determinations. After consolidating the proceedings, Supreme Court dismissed the petitions, including a new claim that the Board's determinations were rules not properly promulgated under the State Administrative Procedure Act. On appeal, the Appellate Division modified Supreme Court's dismissal: while affirming the separate payment distribution and SAPA determinations, the court reversed on the maintenance of effort and dark day payments issues. The Board and the harness tracks moved for leave to appeal, the OTBs cross-moved, and we granted leave to appeal to all parties. We now conclude that the Board and harness tracks, not the OTBs, were correct in their reading of the relevant statutory sections.

Analysis

Given the growth in codification of the law over recent decades, the principles governing the Court's statutory review have by now been extensively articulated. First and foremost, it is our role to implement the intent of the Legislature (Matter of DaimlerChrysler Corp. v Spitzer, 7 NY3d 653, 660 [2006]). Deference to administrative agencies charged with enforcing a statute is not required when an issue is one of pure statutory analysis (Matter of Astoria Gas Turbine Power, LLC v Tax Commn. of City of N.Y., 7 NY3d 451, 455 [2006]). Even if no deference is owed to an agency's reading of a statute, a court can

nevertheless defer to an agency's definition of a term of art contained within a statute (Matter of Trump-Equitable Fifth Ave. Co. v Gliedman, 57 NY2d 588, 595 [1982]). Against this backdrop, we turn to the specific issues in controversy.

Maintenance of Effort Payments. Starting May 2003, when OTBs were permitted to accept wagers on simulcast nighttime out-of-state thoroughbred races, Racing Law § 1017-a (2) (a) required them to make maintenance of effort payments to their regional harness tracks, to hold the tracks harmless from the new competition.

Section 1017-a (2) (a) provides:

"Any off track betting corporation which engages in accepting wagers on the simulcasts of thoroughbred races from out-of-state or out-of-country as permitted under subdivision one of this section shall submit to the board, for its approval, a schedule of payments to be made in any year or portion thereof, that such off track corporation engages in nighttime thoroughbred simulcasting. In order to be approved by the board, the payment schedule shall be identical to the actual payments and distributions of such payments to tracks and purses made by such off track corporation pursuant to the provisions of [§ 1016] of this article during the year [2002], as derived from out-of-state harness races displayed after 6:00 p.m. If approved by the board, such scheduled payments shall be made from revenues derived from any simulcasting conducted pursuant to this section and [§ 1016] of this article."

The apparent tension between the final two sentences of this subsection gives rise to the present dispute. The Board and the tracks rely on the penultimate sentence in urging that OTBs

cannot credit commissions from daytime harness racing against their maintenance of effort payments, and that payment must be identical to actual payments during 2002 as derived from out-of-state harness races displayed after 6:00 p.m. The OTBs, in urging that they can credit commissions from daytime racing, rely on the last sentence, directing that scheduled payments be made from revenues derived from any simulcasting conducted pursuant to this section and section 1016 of this article.

Here, the trial court and Appellate Division understandably divided, each pointing to the plain language of the statute.³ Reading the provision as a whole, however, and taking into account the Legislature's purpose in requiring maintenance of effort payments, we conclude that the correct interpretation of this less-than-perfectly-clear subsection is that given by the trial court.

The penultimate sentence establishes the baseline, or minimum, amounts that OTBs must pay to harness tracks for the privilege of simulcasting evening thoroughbred racing: at least the same level of payments received in 2002 from evening simulcasting. The final sentence must then be read to concern only the total pool of dollars from which the mandated amounts

³ The trial court additionally accorded deference to the Board's reading of the statute it is empowered to oversee. What is at issue, however, is a matter of statutory interpretation, not deference to the operational expertise of the administrative agency.

can be paid. The amount of daytime harness racing commissions OTBs pay to a harness track is irrelevant to determine whether the OTB met its promised nighttime revenues threshold; allowing OTBs to credit daytime harness racing commissions against the mandated maintenance of effort payments would satisfy neither the words nor the objective of the statute.

"Separate Payment" Distribution. The OTBs urge that the maintenance of effort payments are to be made on a regional, rather than track-by-track, basis. They argue that Racing Law § 1017-a (2) (a) incorporates the payment scheme of § 1016, which distributes commissions from harness racing simulcasting on a regional basis. The Board and the tracks, by contrast, contend that the maintenance of effort payment should be on a track-by-track basis because § 1017-a requires that the payment be "identical to the actual payments and distributions of such payments to tracks and purses made by such off track corporation" (emphasis supplied).

We agree with the Board and the tracks that the plain text requires that the maintenance of effort payments be distributed on a track-by-track basis. As the Appellate Division noted, had the Legislature intended that the maintenance of effort payment be made on a regional basis, it could have used the same language as that used in the very next subsection:

"During each calendar year, to the extent, and at such time in the event, that aggregate statewide wagering handle after 7:30 p.m. on out-of-state and out-of-country thoroughbred

races exceeds [\$100,000,000], each off track betting corporation conducting such simulcasting shall pay to its regional harness track or tracks, an amount equal to [2%] of its proportionate share of such excess handle. In any region where there are two or more regional harness tracks, such [2%] shall be divided between or among the tracks in a proportion equal to the proportion of handle on live harness races conducted at such tracks during the preceding calendar year" (Racing Law § 1017-a [2] [b]).

Track-by-track payments thus are required by the explicit language of the statute. That conclusion is underscored by the contrasting language of the immediately ensuing section and indeed by the very purpose of the statute -- to hold each track harmless from the potentially negative impact of permitting OTBs to simulcast nighttime out-of-state thoroughbred races.

Dark Day Payments. As the foregoing discussion demonstrates, the Racing Law remains "an imbroglio, born out of the union of diverse racing industry interests and legislative compromise" (Finger Lakes Racing Assn. v New York State Racing & Wagering Bd., 45 NY2d 471, 476 [1978]). That observation is nowhere more evident than in Racing Law § 1017, which governs distribution of wagers placed on dark days at facilities that simulcast out-of-state races.

Section 1017 itself contains one subsection, two paragraphs, six subparagraphs, 22 clauses, six subdivisions, and six tables listing percentages due for State payments (with varying percentages depending on the type of bet, race and

facility). Racing Law §§ 1017 (1) (b) (5) (E), (6) (F) provide in relevant part:

"On days when a non-profit racing association is not conducting a race meeting and when a licensed harness track is neither accepting wagers nor displaying the signal from an in-state thoroughbred corporation or association or an out-of-state thoroughbred track:

"(i) Such licensed regional harness track shall receive in lieu of any other payments on wagers placed at off-track betting facilities outside the special betting district on races conducted by an in-state thoroughbred racing corporation, two and eight-tenths percent on regular and multiple bets during a regional meeting and one and nine-tenths percent of such bets if there is no regional meeting and four and eight-tenths percent on exotic bets on days on which there is a regional meeting and three and four-tenths percent of such bets if there is no regional meeting.

"(ii) Such licensed regional harness track shall receive one and one-half per centum on total regional handle on races conducted at out-of-state or out-of-country thoroughbred tracks."

From 1997 through 2003, without apparent problem, OTBs made payments to tracks in their region that did not open for business on dark days. Then in 2004, NYC OTB stopped making such payments. It claimed that the heading of §§ 1017 (1) (b) (5) and (1) (b) (6) required dark day payments only of "facilities licensed in accordance with [§ 1007] of this article," and OTBs do not operate facilities under § 1007. Racing Law § 1007 indeed does provide for simulcast licenses from track to track, not off-track branch offices or simulcast theaters.

Those headings, however, stand in marked contrast to the headings of §§ 1017 (1) (b) (3) and (1) (b) (4) that govern the distribution of wagers placed at "facilities licensed in accordance with [§§ 1008 and 1009]" -- meaning OTB branch offices and simulcast theaters. According to the OTBs, the statutory headers of (5) and (6) dictate that the tracks must simply pay one another. The Board and tracks claim that the body of the text, not the statutory headings, determines the meaning. Again, we agree with the Board and the tracks because the text's unambiguous language requires OTBs to make the dark day payments, as they apparently also believed for several years.

While a statute's heading may help in ascertaining the intent of an otherwise ambiguous statute, a heading cannot trump the clear language of the statute (see McKinney's Cons Laws of NY, Book 1, Statutes § 123 [b]). Here, § 1017 specifies that dark day payments are a percentage of "total regional handle" -- a term of art which the Board explained is used in the Racing Law in relation to the concept of payments by off-track betting corporations to tracks; harness tracks do not have regions but rather are located for defined purposes within established off-track betting regions. Under the OTBs' reading, if a region has only one track and it remains closed on the dark day, it will not receive any commissions because only tracks can contribute to regional handle. We conclude that, applying the Board's definition of regional handle (meaning an OTBs' commissions), the

statute makes sense: if a track remains closed on a dark day, then it will receive 1.5% of the total regional handle made by the OTB.

Additionally, the statute directs "off-track betting facilities" -- a term used elsewhere in the Racing Law to apply only to OTBs (see Racing Law §§ 520 [1], 532 [1], 532 [3-a], 901 [2] [b], 907 [1] [e], and 1016 [3] [b]) -- to make dark day payments to regional harness tracks. Finally, the purpose of dark day payments is to compensate harness tracks when the OTBs -- competitors to harness tracks -- simulcast out-of-state thoroughbred races. Requiring OTBs to pay the 1.5% of regional handle to harness tracks in their region that remain closed on the dark day implements that statutory purpose.

SAPA. The State Constitution, as well as the State Administrative Procedure Act (SAPA), mandate the procedures that must be followed for promulgation of rules and regulations. Excluded from these requirements are "interpretive statements and statements of general policy which in themselves have no legal effect but are merely explanatory" (SAPA § 102 [2] [b] [iv]). A rule or regulation, by contrast, is "a fixed, general principle to be applied by an administrative agency without regard to other facts and circumstances relevant to the regulatory scheme of the statute it administers constitutes a rule or regulation" (Roman Catholic Diocese of Albany v New York State Dept. of Health, 66 NY2d 948, 951 [1985]).

The OTBs argue that the Board's maintenance of effort, separate payment distribution and dark day payment determinations were fixed, general principles to be applied without regard to other facts and circumstances relevant to the regulatory scheme of the Racing Law by imposing financial obligations upon the OTBs. We agree with both Supreme Court and the Appellate Division that the Board here promulgated no rules or regulations, but rather interpreted the requirements of the statute in issue, which we have now independently construed.

Accordingly, the order of the Appellate Division should be modified, with costs to respondents-appellants, by reinstating the judgment of Supreme Court, and, as so modified, affirmed.

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Order modified, with costs to respondents-appellants, by reinstating the judgment of Supreme Court, Albany County, and, as so modified, affirmed. Opinion by Chief Judge Kaye. Judges Ciparick, Graffeo, Read, Smith, Pigott and Jones concur.

Decided December 17, 2008