EQUINE CLONING – HISTORY AND A CRYSTAL BALL

Introduction

This paper will offer some highlights from the relatively short history of equine cloning. It will then review responses of the National Breed Associations and prominent Performance Associations which are not sponsored by the Breed Associations. Finally, the paper will provide an overview of legal issues that face the American Quarter Horse Association in particular, as the AQHA has long been at the forefront of dealing with advanced equine reproductive techniques.

I. HIGHLIGHTS OF EQUINE CLONING HISTORY

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 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.\(^1\) 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,\(^2\) 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. In 2006, the process resulted in the foaling of five Smart Little Lena clones.\(^3\) Cutting horse breeders were enthusiastic about the prospect of cloning, and 2006 also saw the foaling of clones of other prominent cutting horses,\(^4\) including:

- Doc’s Serendipity
- Playboys Ruby

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\(^3\) Rebecca Overton, *It’s A First!*, QUARTER HORSE NEWS, Feb. 15, 2007, at 76.
Other cloning milestones and attention-grabbing equine clones included the following:

- The Prometea clone had a foal in April 2008 by Haflinger stallion Abendfurst.\(^5\)

- In January 2007, a clone was foaled of the great mare Lynx Melody, winner of the National Cutting Horse Association Open Futurity in 1978 as well as the 1979 NCHA Derby.\(^6\) In 1980, Lynx Melody was also named the NCHA World Champion Mare.\(^7\) Lynx Melody died in 2004, so the clone was obtained from frozen tissue of the deceased mare.\(^8\)

- In 2007, two clones of Jae Bar Fletch were born.\(^9\)

- The cutting horse world was not alone in the pursuit of clones, and the following list of champion performance horses that were cloned gives an idea of the breadth of cloning activity:
  
  Scamper – champion barrel racer\(^10\)
  
  Califa – 10 goal polo gelding\(^11\)
  
  Gem Twist – champion jumper\(^12\)
  
  Pieraz – endurance champion\(^13\)
  
  Cuartetera – polo mare\(^14\)
  
  Che Mr. Wiseguy – eventing horse\(^15\)


\(^6\) Overton, *It’s A First!*, *supra* note 3.


\(^9\) Overton, *Clone Update, supra* note 4.


\(^12\) Animal Science Blog, *supra* note 10.


• There are also reports of clones of reining horses and pony hunters.\textsuperscript{16}

• By one estimate, 50 clones were born in 2009.\textsuperscript{17}

II. CURRENT STATUS OF CLONES IN BREED ASSOCIATIONS

The enthusiasm of certain horse owners and breeders for cloning has not been matched by the general world of horse owners and breeders, and certainly not by the National Breed Associations. The following Breed Associations have adopted rules prohibiting the registration of clones or have registration rules in place that do not allow for clones:

• Appaloosas: Appaloosa Horse Club\textsuperscript{18}

• Arabians: World Arabian Horse Organization\textsuperscript{19}

• Friesians: The Friesian Horse Society\textsuperscript{20}

• Haflingers: American Haflinger Registry\textsuperscript{21}

• Lipizzans: Lipizzan Federation\textsuperscript{22}

• Morgans: American Morgan Horse Association\textsuperscript{23}


\textsuperscript{17} Dietrich, Equine Cloning, supra note 2.


\textsuperscript{21} 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.

\textsuperscript{22} 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 http://www.uslr.org/wordpress/uslf-information/registration-guide/ (last visited Mar. 31, 2012).
• Paints: American Paint Horse Association

• Quarter Horses: American Quarter Horse Association

• Thoroughbreds: The Jockey Club

The Jockey Club requirement of live cover for registered Thoroughbreds is a prominent example of a rule which forecloses the issue of registering clones.

A number of other Breed Associations have either not ruled on the issue of cloning directly or have not clarified their registration rules for clones. With limited exceptions, these Associations do require a foal to be the get of a registered stallion and a registered dam. Most Associations now require some form of DNA test to verify parentage. The following Breed Associations, however, have not gone beyond the parentage rules specifically to prohibit registration of clones:

• Andalusians: International Andalusian & Lusitano Horse Association

• Belgians: Belgian Draft Horse Association of America

• Clydesdales: Clydesdale Breeders of the USA

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/home/faqs/ (last visited Mar. 27, 2012).


In 2004, the AQHA adopted Rule 227(a) which prohibits the registration of clones. R. 227(a), Am. Quarter Horse Ass’n 2012 Official Handbook of Rules and Regulations; The Journal Staff, Pure Genetics, THE AM. QUARTER HORSE J., Feb. 2009 at 47, available at http://allaboutcutting.com/images/glo-images/PDFs/Cloning%20pdfs/3-Pure-Genetics-QHJrnl.pdf. The issue of registering clones was presented to the AQHA at its Annual Convention in 2008 and was considered by the Stud Book & Registration Committee (SBRC). The SBRC deferred the decision for more study and met with representatives from ViaGen, Colorado State University and Texas A&M University in October 2008. Glory Ann Kurtz, Cloning Forum Will Undoubtedly Highlight AQHA Convention, Feb. 13, 2009, available at http://allaboutcutting.com/equine-industry-misc.html. Registration of clones was considered and rejected by the SBRC in 2009 and again in 2010. To date, the AQHA has not registered any clones, nor has there been a legal challenge to the Rule.


• Hackneys: American Hackney Horse Society\textsuperscript{30}

• Hanoverians: The American Hanoverian Society\textsuperscript{31}

• Miniatures: American Miniature Horse Association\textsuperscript{32}

• Percherons: Percheron Horse Association of America\textsuperscript{33}

• Tennessee Walkers: Tennessee Walker Horse Breeders’ and Exhibitors’ Association\textsuperscript{34}

III. CURRENT STATUS OF CLONES IN PERFORMANCE ASSOCIATIONS

Generally, performance events fall into two categories -- those sponsored by Breed Associations to promote the breed, and those focused specifically on the particular event. The Breed Associations require horses to be registered with the association in order to compete in the sponsored events. The associations who sponsor particular events often have no requirement for a particular breed to qualify for competition. Unlike the Breed Associations, these Performance Associations either allow clones to compete by specific rulings, or do not have rules which would prohibit a clone from competing. Examples of Performance Associations which promote specific events follow.

A. National Barrel Horse Association

The National Barrel Horse Association does not require a horse to be registered with any breed association in order to compete.\textsuperscript{35} This is important for the get of Clayton, the clone of Scamper. Scamper was an 11-time world champion barrel horse ridden by Charmayne James.\textsuperscript{36} Clayton himself experienced some training, but was never shown. Clayton was available for breeding in

\textsuperscript{33} No. 10, Percheron Horse Ass’n of Am. Application for Registration, available at http://www.percheronhorse.org/forms/Registration.pdf.
2008/2009 and again in 2011. We did not find an explanation for the 2010 breeding season, nor have we found reports of the performance records of the get of Clayton.

B. National Cutting Horse Association

The National Cutting Horse Association’s (“NCHA”) Executive Committee voted on September 9, 2009, to allow clones to be shown in the Futurity scheduled for November and December of that year. The issue was presented because at least three clones were slated to compete: clones of Doc’s Serendipity, Playboys Ruby and Tap O Lena. I was appointed as legal counsel to advise the Executive Committee. The basic turning point for the Executive Committee’s decision was that the NCHA was a performance association that did not require any specific breed registration, or any registration at all, for the entrants. The only limitations for the Futurity are age (the horse must be three years old) and lack of prior formal show experience. The horse cannot have been shown in a scheduled event prior to the Futurity. In fact, no clones were shown in the 2009 Futurity. The clone of Doc’s Serendipity developed a spot on one eye that hindered her ability to see a cow. The clone of Playboys Ruby (Playboys Ruby Too) was sore and the clone of Tap O Lena simply did not prove up, even though she was trained by the same rider as Tap O Lena herself. Playboys Ruby and Playboys Ruby Too were sold to the Waco Bend Ranch. Ray Baldwin of the Waco Bend Ranch showed Playboys Ruby Too at the Augusta Futurity in January of 2010. The mare marked a 203 in the first round of the Open division and a 207 in the first round of the Non-Pro division. Neither score was high enough to advance or earn any money. Two clones of Jae Bar Fletch (Two Socks and Three Socks) have been shown, but neither has earned any money.

The first get of a cutting horse clone is currently scheduled to be shown in the 2012 NCHA Futurity. The get is a gelding by High Brown Cat out of the clone of Doc’s Serendipity and is currently being trained by Tim Smith from Southern California.

C. Polo Horses

In the United States, polo horses need not be registered with any breed association. In fact, there is an effort underway in California to register polo horses so that the genetics can be available.

40 Conversation with David Brown, owner of Doc’s Serendipity on Feb. 18, 2012.
D. Racing In Oklahoma

Although not a performance association itself, an exception to this hands-off approach is horse racing in Oklahoma. Oklahoma legislatively prohibited clones from racing on Oklahoma tracks, regardless of whether they are registered with a national breed registry. 43

E. Breed Association Performance Events

Performance events sponsored by Breed Associations do require equine competitors to be horses registered with that Breed Association. See, e.g., Section IV of The American Quarter Horse Association 2012 Official Handbook of Rules and Regulations.

IV LEGAL IMPLICATIONS FOR THE AQHA AND REGISTRATION

A. Framework

Understanding the issue of clone registration for the AQHA starts with recognizing how far the AQHA has gone, voluntarily and in response to litigation, to recognize new technology in equine reproduction. It should be noted at the outset that the real issue for the AQHA will be the registration of the get of clones. At this point, the AQHA’s denial of registration for clones has not been challenged in a court.

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.

Current rules allow breeders to use artificial insemination of mares, 44 including by use of frozen semen 45 and cooled semen transported to a location other than where the semen was collected. 46 The use of frozen semen is not limited to living stallions; frozen semen of deceased stallions is currently being used for breeding. 47 For mares, the AQHA permits the use of frozen embryos 48 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. 49 Additionally, the AQHA permits a separation of the ownership of the stallion and the semen of the stallion. 50 For mares, a breeder may own or lease a mare, 51 or own a frozen embryo. 52

44 Am. Quarter Horse Ass’n 2012 Official Handbook of Rules and Regulations, R. 209.
45 Id.
46 Id. at R. 208.
47 Katie Tims, Smart Little Lena: The Future, QUARTER HORSE NEWS, Jan. 15, 2007 144-151.
49 Id.
50 Id. at Rs. 208, 208(e), 209, 209(b).
51 Id. at Rs. 211(a), 212(e).
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. The breeding report must distinguish mares bred by cooled, transported semen or frozen semen. 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. The owners of a retained semen rights permit must file the same report by the same date.

This process is subject to a number of notices and certificates. A stallion owner must obtain a collection/insemination certificate and a cooled, transported semen certificate. If a mare is bred by means of cooled, transported semen or frozen semen, upon receipt of the semen and the certificate, the mare owner or lessee has to complete the cooled, transported semen or frozen semen certificate when the mare is bred, including the date of insemination. The lessee of a mare must provide notice to the AQHA of the mare lease. Every mare owner or lessee who intends to obtain embryo transfer foals must provide notice to the AQHA before collecting a fertilized egg. The owner of a stallion’s semen, but not the stallion, must obtain a retained semen rights permit. Finally, a breeder wishing to use a frozen embryo must obtain a permit. The rules do not limit the issuance of a frozen embryo permit to the owner of the mare.

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

To facilitate the genetic testing, stallion owners must provide the AQHA with a test result showing the genetic type for any stallion exposed to mares after January 1, 1998, and mare owners must provide the same test for genetic type of mares foaled after January 1, 1989.

B. 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:

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52 Id. at R. 212.
53 Id. at R. 208(a).
54 Id. at R. 208(b).
55 Id. at R. 209(a).
56 Id. at R. 209(c).
57 Id.
58 Id. at R. 211(a).
59 Id. at R. 212(a)(1).
60 Id. at R. 209(b).
61 Id. at R. 212(e).
62 Id. at R. 202(i).
63 Id. at R. 212(a)(2).
64 Id. at Rs. 210(b) and (c).
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 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 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).


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.


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 ….”65 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

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65 *Hatley*, 552 F.2d at 648.
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:

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. Id. at 654. 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 conformation. Mr. Hatley applied for a hardship ruling after filing the litigation, but withdrew it during the case. Id. at 657. 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.” Id. at 655, 656. 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. Id. at 657. 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. Burge, 782 S.W.2d at 354.

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 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
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.”66

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.67

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.68

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.69

The Judge granted plaintiffs’ 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.” 70 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-competitive restraint adopted for the purposes of limiting the supply of registered quarter horses.”71 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.

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68 Dietrich, Equine Cloning, supra note 2 at 19.
69 Posting of Kay Floyd, supra note 67.
71 Id.
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. 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.

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.

The personalities were also important. Robert Garner, the attorney for the plaintiffs, was a master in front of the jury. During the jury trial, Steve Stevens, then a member of the Executive Committee of the AQHA, attended the proceedings. Mr. Stevens met privately with Ms. Floyd one morning before Court and the settlement was announced, to the surprise of trial counsel for both parties.

So, in the Hatley case, the Fifth Circuit found no federal anti-trust violation, and paid homage to the non-intervention rule, but used the due process exception to the non-intervention rule to reach its result. The Burge case was decided based on the non-intervention rule. In the Floyd case, however, the Court was not deterred by the non-intervention rule and found a violation of the Texas anti-trust law.

The holdings of these cases do not provide a compelling legal conclusion. Rather, the precedent highlights the importance of the facts and how the litigants posture the potential litigation.

V. THE CRYSTAL BALL

The issue of AQHA registration of clones themselves is not likely to be litigated. Quarter Horse clones have been on the ground since at least 2006; none have been registered and no litigation has been filed. One possible explanation for this result is the way the AQHA dealt with the issue. The AQHA followed a public process in declining to amend Rule 227(a) to allow registration of clones. The Stud Book & Registration Committee met with representatives of ViaGen, Colorado State University and Texas A&M. The issue was discussed during at least

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72 Kurtz, Embryo Transfer, supra note 67.
73 Id.
74 Posting of Kay Floyd, supra note 67.
75 Kurtz, Cloning Forum, supra note 25.
two annual meetings, and members’ views were aired in places like the Quarter Horse Journal and on web sites.\textsuperscript{76}

One additional, significant factor was the issue of mitochondrial DNA.\textsuperscript{77} Dr. Bulla, a molecular biologist from the University of Texas at Dallas, provided a guest editorial to the Quarter Horse News, opining that the oocytes of the slaughterhouse mares that were used to inject the nuclear DNA of the clone and create the embryo carried the mitochondrial DNA of the slaughterhouse mare.\textsuperscript{78} This process of creating the embryo created some gene sequencing issues that were from the mitochondrial DNA of the slaughterhouse mare, not the nuclear DNA of the clone. There was some discussion at the time that, at a minimum, the oocytes of registered Quarter Horses would be required for any Quarter Horse clone.\textsuperscript{79}

The issue of registering the get of clones, however, presents new and different issues. To date, the Stud Book & Registration Committee has declined overtures to register the get of clones, and rumors of potential litigation continue to circulate. Even though the get of clones have been around since at least 2009, the number is relatively small. The number will inevitably increase. For example, the clone of Smart Little Lena now standing at stud in Texas is in his first breeding year.\textsuperscript{80} As the number of the get of clones increases, so will the number of people affected. Before the AQHA changed its embryo transfer rule after the Floyd case, one report had 100 embryo transfer offspring of cutting horses registered with a DNA registry in Oklahoma, showing NCHA earnings of $3.7 million.\textsuperscript{81} By the time of the Floyd litigation, the embryo transfer issue had reached substantial thresholds for breeders and competitors. If the get of clones develop successful show records, unlike the clones themselves, the economic consequences may also become more important.

The genetic issues for the AQHA to consider for registering the get of clones are also different. The mitochondrial DNA issue of a clone is cured in the next generation.\textsuperscript{82} Obviously, this scientific rationale to deny registration of the clone will not apply with equal force to the registration of the get. Additionally, allowing the use of frozen semen from deceased stallions obscures the argument of preserving or protecting the genetics of the Quarter Horse breed. The genetic testing of foals required by the AQHA will not distinguish between a foal conceived with frozen semen and a foal conceived with the semen of a clone. The same would be true for a foal conceived with a frozen embryo of a mare as opposed to the foal of a clone of that mare.

\textsuperscript{76} Id.; Memo from Sherri Brunzell to General Membership/Public, 2008 AQHA Executive Committee, Stud Book & Reg. Committee Members 2006-2010, Feb. 12, 2009.


\textsuperscript{79} Brunzell Memo, supra note 76; Kurtz, Cloning Forum, supra note 25.

\textsuperscript{80} Tims, supra note 47.

\textsuperscript{81} Kurtz, Embryo Transfer, supra note 67.

\textsuperscript{82} Kurtz, Cloning Forum, supra note 25; Glory Ann Kurtz, Registration of Cloned Horses to be Brought Up at AQHA Convention: Stud Book and Registration Committee Will Discuss Amending Registration Rules on Saturday, March 6 During Convention in Kissimme, Fla., March 5, 2010; Bulla, supra note 78.
The litigation precedent certainly does not provide a clear answer. Anti-trust law may hold sway, as in *Floyd*, or it may not, as in *Hatley*. The non-intervention rule may control, as in *Burge*, or a court may find an exception, as in *Hatley*.

If it is accurate that the facts of a particular case and how the parties posture their potential claims will influence the outcome of potential litigation, there are some clear markers to observe. Factors that would favor the AQHA’s stance, whatever that may be, would include public airing of the issues with members as was done in the 2008 through 2010 period. Such an airing bolsters the argument that the stance is not arbitrary. While the due process exception to the non-intervention rule applies to individuals, the more issues are discussed in Annual Meetings with member participation, the better the argument that the members have had the opportunity to air their concerns and the rule reflects a considered view.

Similarly, if the AQHA develops sound evidence of a scientific rationale, as with the mitochondrial DNA analysis, there would be additional, perhaps compelling support for denying registration of the get of clones. Any credible evidence which clearly supports the long-standing mission of the AQHA to preserve pedigrees and maintain the integrity of the breed will support the Texas Court’s inclination to rely on the non-intervention rule.

On the other hand, the AQHA will have to confront the issue of allowing the registration of foals obtained through frozen semen and frozen embryos while denying registration of the get of clones where the current rule requiring genetic testing will not distinguish the foals themselves. As the matter currently stands, that may be the most difficult issue for the AQHA and the most compelling issue for those advocating the registration of the get of clones.

If the non-intervention rule holds, as in *Burge*, so will Rule 227(a). If the Rule is challenged as being arbitrary or a violation of Texas anti-trust law, as occurred in the *Floyd* case, it may fail. If the AQHA follows the same process of seeking views of members, affording hearings and basing its decision on reasonably sound science, neither the *Floyd* nor the *Hatley* precedent may apply.

Whatever the issues and however they are presented, the bottom line for cloning may well be economic. Cloning a horse costs in the range of $150,000. Sales prices of clones have not generally come anywhere near recovering that cost. The clone of Doc’s Serendipity sold for $14,000. Of the five clones of Smart Little Lena, one died, two were sterile, one sold for $28,000 and is standing in Texas, and the other sold for $27,000 and is now standing in Australia.83 The one notable exception is the polo mare, Cuartetera, which brought $800,000 at an auction in Buenos Aires.84

The breed fees for the clones seem to offer a better chance of being economic. Clayton, the clone of Scamper, was reportedly commanding a breed fee of $4,000, which would recover the

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cloning cost with less than 40 breeds. The Smart Little Lena clone in Texas was being offered at an introductory rate of $1,000,\(^\text{85}\) which would cover the $28,000 purchase price relatively easily.

Another marker will be the High Brow Cat gelding out of the clone of Doc’s Serendipity. It is still early in the year to make an assessment of whether this three-year-old will make it to the NCHA Futurity come November. If the horse makes it to the finals, meaning out of the approximately 650 horses in the Open division it survives to the final 24, the interest will be very high.

Equine cloning may become something of a passing fad that dies of its own economic weight, or it may prove so economically and competitively successful that differing factions will more aggressively promote their position.

So, when the novelty and furor over cloning subsides, the use of this breeding technology for horses will most likely be an issue of economics.

\(^{85}\) Private letter to breeders from the W.T. Waggoner Ranch.