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Down the Stretch: Reining in State Approaches Toward a Universal Medication Rule for Racehorses

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DOWN THE STRETCH:
REINING IN STATE APPROACHES TOWARD A UNIVERSAL MEDICATION RULE FOR RACEHORSES

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I. INTRODUCTION

In 2009, the American Association of Equine Practitioners (AAEP) released a document put together by the AAEP Racing Task Force. Within this document, the AAEP called for the adoption of universal medication rules because "U.S. racing jurisdictions impose medication regulations that vary from one jurisdiction to the next."* "This disparity in medication rules presents significant challenges to owners and trainers who race horses in more than one jurisdiction, and often leads to confusion about how to best implement appropriate therapeutic regimens."\(^2\) The fact that there is no universal governing body in America leads to horse owners and trainers sometimes racing at the track with the most lax guidelines, a result that is potentially damaging to both the horse and the reputation of the industry as a whole. This has been the subject of recent Congressional hearings, and many equine groups are concerned over the lack of universal rules or a universal governing body to provide guidance.

This note will evaluate the existing state guidelines in states containing major racetracks in order to evaluate the potential roadblocks that could present themselves in the move to universal rules. It is important to know how states are currently handling the issue in order to see how to best proceed. While all horse racing states have attempted to confront this issue on their own, the most effective way to truly combat the problem of equine medication regulation is through a universal authority or by having each of the major horse racing states work together to adopt a uniform set of rules.

This note will proceed by examining what constitutes horse doping generally, identifying the distinction between therapeutic medications that

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2 Id.
are allowed generally and those which are allowed on race days or allowed in the days leading up to a race. From there, it will move to a state-by-state review, focusing on who has been granted the authority in that state to regulate race day medication, what the state law currently is regarding race day medication, whether the state has considered moving to a more uniform system, as well as some of the impacts of the current state rule. It will then analyze how the existing state laws and external horse racing organizations can help or hinder the move into universal medication rules. Finally, the analysis concludes that the clearest path to implementation of universal rules will require the establishment of an overarching authority.

II. BACKGROUND

Horse racing is a unique sport in two very important ways. First, there is no overarching governing body, as most other sports have, to set rules and maintain standards that all in the sport must follow. Second, unlike other sports, steroids are not strictly prohibited in horse racing and are sometimes approved as a therapeutic medication. To differentiate when steroids may be used, racing regulators have divided drugs into two distinct categories: performance enhancing and therapeutic. "[T]he largest group of concern to regulators [are] the 'performance-enhancing substances,' whose identification in a horse is viewed with great regulatory concern. Testing for these substances usually proceeds at the highest level of sensitivity possible; so-called 'zero-tolerance' testing." These substances have been labeled into "about 900 or so substances [as] classified by the Association of Racing Commissioners International (ARCI) Uniform Classification System for Foreign Substances." The second group of roughly fifty medications is classified as "'therapeutic medications,' [as] recognized by the American Association of Equine Practitioners [AAEP] and the Racing Medication and Testing Consortium [RMTC]." Problems arise with regard to therapeutic medications because some drugs that are allowed in the barn are not allowed on the track.

There are many ways in which medication can change a horse's ability to perform. Acute stimulant medication, which has been widely used for hundreds of years, "is the administration of a stimulant substance

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4 Id.
5 Id.
to a horse shortly before post. Among the especially useful agents in this area are the opiates, which have long been used in racing horses, and also the amphetamine-like stimulants, and most especially methylphenidate (Ritalin)."7 "Horses can also be medicated to win by relaxing them and allowing the horse to run its best possible race. The widely used tranquilizer acepromazine, and any number of related or equivalent agents, have reportedly been used in this way."8 Another way to impact a horse’s performance is by “improving a horse’s ‘wind’ by opening its airways through the use of bronchodilators… especially [for] a horse that is sub-clinically broncho-constricted."9

Just because a medication changes a horse’s ability to perform does not make it illegal. There is an important distinction even beyond whether a drug is classified as legal or illegal — both place and time of administration are considered. Some commentators point to the “seeming hypocrisy that medications that are legal in the barn and during training are banned on race day.”10 Further, public misperception has an important role here that cannot be understated. According to Steven Crist, the publisher and a columnist for Daily Racing Form:

Much of the current debate over drugs and horse racing stems from a failure by the general news media to distinguish between two very different things: 1) disturbing but infrequent attempts to cheat with illegal, dangerous substances and, more commonly, 2) the routine and legal administration of therapeutic medications, which are open to debate but by no stretch of the imagination amount to animal abuse.11

The rare attempts to cheat with illegal substances seem to get the most media coverage, even though they are not the biggest issue facing the sport. Moreover, even for the actions that are aboveboard, “it is this perception of lawlessness — at a time when casual and hard-core fans are questioning whether horse racing is both on the square and has the best interests of its horses at heart” that is damaging the sport.12

Interestingly, the rest of the world does not follow the U.S. approach:

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7 Tobin, supra note 3.
8 Id.
9 Id.
10 Marlene Smith-Baranzini, supra note 6.
Horse racing in most other jurisdictions throughout the world operates under the medication rules of the International Federation of Horseracing Associations (IFHA). The principal difference in the medication regulations of the United States and the IFHA is the permitted use of anti-bleeder medication furosemide (Salix® and adjunctive anti-bleeder medications in some racing jurisdictions) and permitted levels of non-steroidal anti-inflammatory drugs (NSAIDS). With anabolic steroid regulation now in place in the United States, most other difference are largely semantic and are primarily a function of the state regulatory structure of U.S. racing.  

The IFHA proves it is possible for a group to regulate this issue of medication rules in horse racing. The matter now turns to how this can be accomplished here in the United States. For that, it is imperative to look at what states are currently doing, and what laws are in place that could be prohibitive toward moving to a uniform authority.

III. STATE-BY-STATE REVIEW

While horse racing exists in many states across the country, the major thoroughbred racetracks are mainly located within the states of New York, Maryland, Florida, California, Illinois and Kentucky. Each state has their own laws and regulations pertaining to horse racing, and some racetracks further impose more stringent requirements, either as a consequence of wanting to host a particular race or to preserve their own propriety.  

Each of these states will be examined in turn.

A. New York

In New York, the New York State Racing and Wagering Board governs horse racing. Originally, “the State had several Commissions that were charged with the regulation and oversight of legalized gambling that governed Thoroughbred Racing, Harness Racing, Quarter Horse Racing, Off-Track Betting and the Lottery . . . [U]nder the new legislation, all these Commissions, except for the Lottery, were consolidated”  

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13 AM. ASS’N OF EQUINE PRACTITIONERS RACING TASK FORCE, supra note 1 at 6.
consolidated Board was given “jurisdiction over all horse racing activities and all pari-mutuel betting activities, both on-track and off-track, in the state and over the corporations, associations, and persons engaged therein.”

While the New York State Racing and Wagering Board governs racing in the state in general, the tracks themselves have sometimes adopted stricter rules. In New York, the New York Racing Association owns the major tracks in the state and thus is in a position to establish rules that are more stringent than those handed down by the state board. In fact, the New York Racing Association has handed down stricter punishments than the state board. For example, “trainer Jeff Mullins... medicated one of his horses in the Aqueduct monitoring barn hours before a race in April and repeatedly [lied] about it.” The New York State Racing and Wagering Board only “suspended Mullins for seven days and fined him $2,500 [but] the New York Racing Association... decided it needed to send a more aggressive message.” It barred Jeff Mullins for six months. However, “no other racing jurisdiction has agreed to honor that penalty, which is not the case when punishment is meted out by state regulators.” This should serve to show that there is a push for stricter regulations, even at the track level. According to C. Steven Duncker, the New York Racing Association’s chairman, “everyone knows we have a problem where the punishments do not fit the crimes. We wanted to go farther than that. We all need to go farther.”

The general rule in New York concerning drugs and drug testing allows for certain substances to be used up until race time. Both “topical applications (such as antiseptics, ointments, salves, DMSO, leg rubs, leg paints and liniments) which may contain antibiotics but do not contain benzocaine, steroids or other drugs” as well as “antibiotics, vitamins, electrolytes, and other food supplements as long as they are administered orally and as long as they do not contain any other drug or by their nature, exhibit drug-like actions or properties” are permissible. The statute goes on to limit how many days and hours before a race these specific drugs can be administered. The testing policy in place allows that “every horse that is entered to race on any day shall be examined by an official veterinarian employed by the association conducting the meeting reasonably in advance

16 N.Y. RAC. PARI-MUT. WAG. & BREED. LAW § 101 (McKinney 2000).
17 Drape, supra note 12.
18 Id.
19 Id.
20 Id.
21 Id.
22 Id.
24 See id.
of post time for the race in which the horse is entered to run." The official veterinarian “shall report to the stewards... [if] any horse is, in his opinion, not in fit condition to race, [and] said stewards may exclude said horse there from whether or not it has already been brought into the paddock.”

In recent years, however, there has been a push for states to have control beyond just drug testing on race days. The New York State Legislature has recently passed laws concerning out-of-competition testing in order to achieve this goal. This type of testing provides that:

[A]ny horse on the grounds of a racetrack under the jurisdiction of the Board or stabled off track grounds is subject to testing without advance notice for blood doping, gene doping, protein and peptide-based drugs, including toxins and venoms, and other drugs and substances while under the care or control of a trainer or owner licensed by the Board.

The statute goes on to list the prohibited substances, which include:

(1) blood doping agents including, but not limited to, erythropoietin (EPO), darbepoetin, Oxyglobin, Hemopure, Aranesp, or any substance that abnormally enhances the oxygenation of body tissues;

(2) gene doping agents or the nontherapeutic use of genes, genetic elements, and/or cells that have the capacity to enhance athletic performance or produce analgesia;

(3) protein and peptide-based drugs, including toxins and venoms.

Moreover, “the presence of any substance at anytime described in subsections (1), (2) or (3) ... is a violation of this rule for which the horse may be declared ineligible to participate until the horse has tested negative for the identified substance, and for which the trainer shall be responsible.” Perhaps more importantly, “in the absence of extraordinary mitigating circumstances, a minimum penalty of a ten (10) year suspension will be assessed for any violation set forth” in the subsections above.

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26 Id.
27 Id. at § 4120.17.
28 Id. at § 4120.17(e)(1)-(3).
29 Id. at § 4120.17(f).
30 Id. at § 4120.17(i).
penalty, and the very existence of a law that gives New York Board greater control over when they can test the horses that will be racing, shows a move toward a harsher regime. This is a positive sign that the state of New York may also be interested in universal medication rules, or the installment of a singular racing authority to regulate horse racing across the country.

B. Maryland

In Maryland, “the Maryland and Racing Commission oversees and regulates both the harness and thoroughbred horse racing industry.” The relevant statutes do not provide a full view of the scope and limits of this commission’s authority, but the law has been more clearly articulated by judges, who have stated that “the racing commission is a creature of the Legislature.” The racing commission has been given “power and authority to promulgate reasonable rules to govern the racing of horses. It may make such rules regulating the conduct of trainers, jockeys, owners and generally regulate all matters in order that [races] may be conducted fairly, decently and clean but may not revoke a license except for cause.”

Maryland’s drug prohibition laws is straightforward, and simply states:

An individual may not administer, cause to be administered, participate, or attempt to participate in any way in the administration of a drug to a horse: (1) During the 24-hour period before the scheduled post time for the first race of the program in which the horse is to participate; and (2) Until after the race in which the horse is programmed to participate is run.

The prohibition further states that “a horse participating in a race may not carry a drug in its body” and that the “presence of a drug in the post-race urine, blood, or other sample taken from a horse is prima facie evidence that the ... [h]orse was administered a drug and carried the drug in its body during the race” and as well that the “[d]rug was administered by the person or persons having control, care, or custody of the horse.” While Maryland does not currently have a rule regarding out-of-competition testing, recently “[t]he [Maryland Jockey Club] petitioned the Maryland Racing

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32 Mahoney v. Byers, 48 A.2d 600, 603 (Md. 1946).
33 Id. at 602.
34 MD. CODE REGS. 09.10.03.04A.(1)-(2) (2010).
35 Id. at 09.10.03.04C.-D(2).
Commission to adopt a rule allowing for out-of-competition testing, which is currently in the rule-making process in Maryland.\textsuperscript{36} Since similar pushes for rule changes by the Maryland Jockey Club have proved successful, it is entirely possible Maryland will pass such legislation soon.\textsuperscript{37}

At the time of this writing, however, racing in Maryland is declining. A deal was recently brokered between the Maryland Jockey Club and the Maryland Racing Commission to allow for 146 days of racing in 2011, which “not only keeps Maryland’s treasured Preakness Stakes... where it belong, but it helps protect the thousands of jobs that depend on [the] rich history of horse racing.”\textsuperscript{38} Maryland Jockey Club President Tom Chuckas highlights that “this discussion provides a foundation for continuing efforts to create a long-term solution to restoring Maryland racing to prominence.”\textsuperscript{39} This acknowledges that the future is still very undecided, but it is clear that the responsible parties are working together to try to salvage the horse racing industry in Maryland.

\textbf{C. Florida}

In Florida, horse racing is governed by the Florida Pari-mutuel Wagering Act instead of by a commission or board.\textsuperscript{40} The rule with regard to drug testing is amid an assortment of other penalties, and only states that:

\begin{quote}
Any person who attempts to affect the outcome of a horserace or dograce through administration of medication or drugs to a race animal as prohibited by law; who administers any medication or drugs prohibited by law to a race animal for the purpose of affecting the outcome of a horserace or dograce; or who conspires to administer or to attempt to administer such medication or drugs is guilty of a felony in the third degree.\textsuperscript{41}
\end{quote}

Florida rules are not nearly as strict or as nuanced as those of other states. “Generally, horses are not allowed to receive either type of steroids within


\textsuperscript{37} Id.

\textsuperscript{38} LaMarra, supra note 14. (The Preakness Stakes is an incredibly important thoroughbred race, both as one of the legs of the Triple Crown and in general. It is considered to be “a sporting event of historical and cultural importance to the State of Maryland.” See Theo Emory, Bankruptcy Fuels Fear Over Preakness, N.Y. TIMES, April 14, 2009, at A13 available at http://www.nytimes.com/2009/04/14/sports/othersports/14pimlico.html).

\textsuperscript{39} Id.

\textsuperscript{40} FLA. STAT. ANN. § 550.001 (West 2010).

\textsuperscript{41} Id. at § 550.235(2).
24 hours of a race . . . the one exception is in Florida, where horses can receive prednisolone (a corticosteroid) on the day of the race.\textsuperscript{42} In contrast, the vast majority of other American states adopted the Racing Medication and Testing Consortium’s “model rule on anabolic steroids, which eliminates those medications from racing competition.”\textsuperscript{43} This rule “has been adopted or is in the process of being adopted in every major racing state (representing approximately 99.98% of the total Thoroughbred parimutuel [sic] handle in 2009).”\textsuperscript{44} Florida has not yet considered out-of-competition testing, but that does not mean they would not consider such a regime. As it stands, the biggest issue facing a move to a nationwide universal governing body for the state of Florida is the lack of a state governing body.

\textit{D. California}

In California “[j]urisdiction and supervision over... where horse races with wagering on their results are held or conducted, and over all persons or things having to do with the operation of such meetings, is vested in the California Horse Racing Board.”\textsuperscript{45} The Board itself has been given a fair amount of leeway in determining how to go about regulating the industry. Pursuant to statute, “the board shall adopt regulations to establish policies, guidelines, and penalties relating to equine medication in order to preserve and enhance the integrity of horse racing in the state. Those policies, guidelines, and penalties shall include, at a minimum, the provisions set forth in this article.”\textsuperscript{46} Regarding the intent of the California Legislature:

\begin{quote}
It is the intent of the Legislature that the board, in its testing efforts to determine illegal or excessive use of substances, recognize the greater importance of conducting complete and thorough testing of a lesser number of samples in preference to conducting less thorough testing on a greater number of samples.\textsuperscript{47}
\end{quote}

This may seem to be overly broad, but in fact, California’s drug testing scheme is considered by the National Thoroughbred Racing Association to

\begin{footnotes}
\item[43] \textit{Id.}
\item[44] \textit{Id.}
\item[45] \textit{Cal. Bus. & Prof. Code § 19420 (West 2011).}
\item[46] \textit{Id. at § 19580(a).}
\item[47] \textit{Id. at § 19580(b).}
\end{footnotes}
be the “envy of the nation.” This is likely because “California’s drug-testing requirements in many ways are stricter than those for any human athletic endeavor. Most Little Leaguers and Olympic competitors couldn’t pass the state’s post-race testing. Yet day in and day out, Thoroughbred racehorses successfully pass this rigorous testing procedure.”

More specifically, California defines prohibited drug substances as:

Any drug substance, medication, or chemical, whether natural or synthetic, or a metabolite or analogue thereof, foreign to the horse, whose use is not expressly authorized by the board. This includes, but is not limited to, any substance determined to be a stimulant, depressant, local anesthetic, or narcotic, or any drug, regardless of how harmless or innocuous it might otherwise be, which could interfere with the detection of any prohibited drug.

Further, “no substance of any kind shall be administered by any means to a horse after it has been entered to race in a horse race, unless the board has, by regulation, specifically authorized the use of the substance and the quantity and composition thereof.” To illustrate how stringent these laws are, consider this statement from Dr. Rick Arthur, California’s equine medical director:

We’re almost at the point where if you had a cup of coffee at Starbucks three days before the race, you could test positive for caffeine at a level that would be a violation in horse racing... I can’t get a cup of coffee even from Starbucks to keep me awake for three days. In the Olympics, the threshold level for caffeine is 12,000 nanograms (parts per billion). In the ‘90s California horse racing called a positive at two nanograms.

Some people may consider California law to be too stringent, but some in the state pride themselves on this. “We err on the side of caution... If anything, we over-regulate horse racing for two reasons—1) to protect the

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49 Id.
50 CAL. BUS. & PROF. CODE § 19413.1 (West 2011).
51 Id. at § 19581.
52 Id.
integrity of the competition and 2) to protect the welfare of the horse and jockey.”

Another way California law has led the way for the industry was in their “landmark decision to test for milkshakes—the process of administering sodium bicarbonate (TCO2) in the hopes that the horse will run faster because his muscles don’t build up as much lactic acid—virtually eliminated the problem.”

In fact the “last violation was in August of 2008... In the last two years in California [there have been] only two violations out of over 50,000 samples.”

California also “conducts out-of-competition testing, where a horse is tested after training, but well before it is scheduled to race. The reason for that is that some substances, primarily blood-doping agents, can cause an effect over long periods of time but wouldn’t be detectable in the standard post-race sample.”

When considering drug violations nationwide, note that:

Most drug violations are mistakes... inadvertent administrations of legitimate medications that were prescribed to the horse with no intent to influence the outcome of a race... drugs that one would even suspect are being administered to try to beat the system are few and far between.

However, when laws are as strict as they are in California, it behooves owners and trainers to be extra cautious when administering drugs to their horses.

Another way California is setting the pace is by testing for anabolic steroids. Since 2008, “a ban on most major anabolic steroids was phased in, with the CHRB giving trainers notice of when positives would begin to be called. Once anabolic steroids were re-classified as Class 3 drugs in September of 2008, [there have been] no positives.”

The true acknowledgement of how the country is considering moving toward the standards established by California comes as “the national Racing and Medication Testing Consortium [has adopted] standards first implemented in California.” If the rest of the country would follow suit, either by adopting the rules promulgated by California or those proposed by the national Racing and Medication Testing Consortium, there would be no need for an overarching authority.

53 Id.
54 Id.
55 Id.
56 Id.
57 California Takes its Drug Testing Seriously, supra note 47.
58 Id.
59 Id.
E. Illinois

In Illinois, the party responsible for regulating horse racing is the Illinois Racing Board. The statutory rule in place governing drugs as they are administered to horses states:

Whoever administers or conspires to administer to any horse a hypnotic, narcotic, stimulant, depressant or any chemical substance which may affect the speed of a horse at any time, except those chemical substances permitted by ruling of the Board, internally, externally or by hypodermic method in a race or prior thereto, or whoever knowingly enters a horse in any race within a period of 24 hours after any hypnotic, narcotic, stimulant, depressant or any other chemical substance which may affect the speed of a horse at any time, except those chemical substances permitted by ruling of the Board, has been administered to such horse either internally or externally or by hypodermic method for the purpose of increasing or retarding the speed of such horse shall be guilty of a Class 4 felony. The Board shall suspend or revoke such violator’s license.

This rule obviously focuses more on the person administering the drug than the drugs themselves. The statute does, however, go on to clarify that “the term ‘hypnotic’ as used in this Section includes all barbituric acid preparations and derivatives” and that “the term ‘narcotic’ as used in this Section includes opium and all its alkaloids, salts, preparations and derivatives, cocaine and all its salts, preparations and derivatives and substitutes.” Illinois also forbids the use of anabolic steroids.

Finally, Illinois has approved out-of-competition testing, stating that:

Any horse on the grounds of a racetrack under the jurisdiction of the Board, or stabled off-track, while under the care or control of a trainer or owner licensed by the Board, is subject to testing for blood and/or gene doping agents, with reasonable notice. This Section does not

60 230 ILL. COMP. STAT. ANN. 5/2 (West 2011).
61 230 ILL. COMP. STAT. ANN. 5/36(a) (West 2010).
62 Id. at 5/36(a)-(b).
63 ILL. ADMIN. CODE tit. 11, § 603.210(a) (2010).
apply to therapeutic medications approved by the FDA for use in the horse.\textsuperscript{64}

This rule further states: “horses to be tested may be selected at random, with probable cause, or as determined by the Board for out of competition testing. The trainer is responsible to have the horse or horses available at a designated time and location (racetrack).”\textsuperscript{65} The statute defines prohibited substances, practices and procedures as “blood doping agents including, but not limited to, erythropoietin (EPO), darbepoetin, oxyglobin, hemopure, aranesp, or any substance that abnormally enhances the oxygenation of body tissues” and “gene doping agents or the non-therapeutic use of genes, genetic elements, and/or cells that have the capacity to enhance athletic performance or produce analgesia.”\textsuperscript{66} In May 2011, the Illinois Racing Board amended its rules and expanded “the Board’s Medication rule governing anabolic steroids in racehorses” as well as the list of prohibited substances.\textsuperscript{67}

Consider the following example regarding the impact of more stringent drug testing: Illinois recently changed the testing regime for the drug Etodolac. Following this change, there were eight positive drug tests for the drug.\textsuperscript{68} Illinois had “adopted an ELISA [enzyme-linked immunosorbert assay] test specifically targeting etodolac in 2010 . . . and if a drug is subject to a specific ELISA test, a positive can be generated at lower concentrations. Illinois has a zero tolerance policy for Etodolac.”\textsuperscript{69} The veterinarian implicated in the positive drug tests has protested the change in classification for Etodolac. According to the veterinarian, Dr. James Gilman: “It is described to the general public as an ‘aspirin-like’ drug, and that’s exactly what it is . . . [it] is strictly used therapeutically in conjunction with training regimens and not as a race-day medication. It has never been used as a pre-race painkiller.”\textsuperscript{70}

Etodolac is classified “as a Class 3 medication on its five-tiered scale (Class 1 drugs are strongest, Class 5 the most benign), but Gilman argues that the drug should fall into Class 4.”\textsuperscript{71} The Association of Racing Commissioners International classification system includes among Class 3 drugs “bronchodilators, anabolic steroids, and other drugs with primary

\textsuperscript{64} Id. at § 603.200(a).
\textsuperscript{65} Id. at § 603.200(b) (citations omitted).
\textsuperscript{66} Id. at § 600.200(d)(1)-(2).
\textsuperscript{69} Id.
\textsuperscript{70} Id.
\textsuperscript{71} Id.
effects on the autonomic nervous system, procaine, antihistamines with sedative properties, and the high-ceiling diuretics.\textsuperscript{7} Other Class 4 drugs include "the non-steroidal anti-inflammatory drugs, at concentrations greater than established limits."\textsuperscript{7} The purpose of this note is not to examine whether these levels are appropriate but rather to look at the potential implications of zero tolerance policies, especially in drugs that are fully acceptable in the barn, even routinely used, but then banned on race day.

\textit{F. Kentucky}

In Kentucky, the Kentucky Horse Racing Commission has the authority to regulate horse racing.\textsuperscript{74} The specific statute dealing with the administration of medication to a horse states that:

\begin{quote}
Therapeutic measures and medication necessary to improve or protect the health of a horse shall be administered to a horse in training under the direction of a licensed veterinarian. (2) Except as otherwise provided in Sections 4, 5, 6, and 8 of this administrative regulation, while participating in a race, a horse shall not carry in its body any drug, medication, substance, or metabolic derivative, that: (a) Is a narcotic; (b) Could serve as an anesthetic or tranquilizer; (c) Could stimulate, depress, or affect the circulatory, respiratory, cardiovascular, musculoskeletal, or central nervous system of a horse; or (d) Might mask or screen the presence of a prohibited drug, or prevent or delay testing procedures.\textsuperscript{75}
\end{quote}

Further restrictions state that "therapeutic medications shall not be present in excess of established threshold concentrations set forth in this administrative regulation. The threshold for furosemide is set forth in Section 6 of this administrative regulation. The thresholds for permitted NSAIDs are set forth in Section 8 of this administrated regulation.\textsuperscript{76}

Kentucky has also recently pushed through an emergency regulation requiring out-of-competition testing.\textsuperscript{77} The push for emergency

\textsuperscript{72} Id.
\textsuperscript{73} Id. at § 2(3).
\textsuperscript{74} KY. REV. STAT. ANN. § 230.260 (West 2010).
\textsuperscript{75} 810 KY. ADMIN. REGS. 1:018 § 2(1)-(2) (2010).
\textsuperscript{76} Id. at § 2(3).
regulation arose when Churchill Downs signed a contract to host the Breeders Cup in November of 2010. However, “because out-of-competition testing isn’t performed on race day, and samples often are taken at facilities other than racetracks, the process is more complicated. It is, however, considered a strong deterrent when regulations are on the books.”

While Churchill Downs could have enacted the rule just for that particular track, they “did not want to enact just a house rule, and the KHRC wanted to have it permanently on the books, but in order to do that they had to draft it as an emergency regulation, which has the benefit of going into effect immediately” The rule was fast tracked “as an emergency regulation because of concerns about equine welfare and safety as well as for the protection of the betting public.”

The biggest discussion point concerning the out-of-competition testing was “centered on the level of punishment. In the final rule... the commission recommended a five-to-ten year license suspension for the owner and/or trainer of the horse, a fine of up to $50,000, and a forfeiture of purse money.”

The Kentucky Horse Racing Commission has also recently adopted for its post-race testing the “McKinsey” method which “calls for stewards to collect a sample from the winner plus at least one other horse from each race, even though they will not necessarily test all samples. The stewards will designate at least one sample as “gold,” which means it has a 100% chance of being tested . . . and others as “red,” which means they will have a 50% chance of being tested.”

While Kentucky may not be at the forefront of this movement toward more stringent drug testing, they are certainly trying to keep up, an important trait in an industry that cannot afford to lose credibility at this point.

IV. ANALYSIS OF CURRENT DRUG TESTING REGIMES

The previously mentioned regulations demonstrate that there is no uniform medication rule that governs horseracing in all states. There are a few possible explanations for this, but it boils down to the fact that “racing is regulated by each state . . . to have uniform rules, all 38 states that regulate racing would have to adopt the same rule.” The problem is that

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78 LaMarra, supra note 14.
79 Id.
80 Id.
82 Id.
83 Id.
84 Frequently Asked Questions, supra note 41.
“each state is most concerned with what is happening in its own jurisdiction and that makes achieving uniform rules for anything in racing difficult.”  

However, there are organizations working to change this.

The Racing Medication and Testing Consortium (RMTC) “has worked diligently on a uniform medication policy since its inception. The RMTC Board examines the best available science to develop model rule language that each commission can adopt. This is an admittedly slow process, but it has been very successful to date.” The RMTC has created a Model Policy that “covers all aspects medication and testing, including race-day medications, penalties, testing and prohibited practices.” The RMTC Model Policy rules are far reaching: As of August 1, 2010, 31 of 34 states currently conducting horse racing have adopted the model rules, and no state has indicated to the RMTC that they do not wish to participate. The process for adopting rules varies from state to state and can be quite lengthy, depending on the number of steps a state must go through to adopt rules of any sort.

The RMTC is not the only organization establishing guidelines. The National Thoroughbred Racing Association (NTRA) Safety and Integrity Alliance, “a standing organization whose purpose is to establish standards and practices to promote safety and integrity in horseracing and to secure their implementation,” has also released a Code of Standards. The Code of Standards focuses on many categories including “specific standards [for] [p]re- and post-race veterinary examinations, Anabolic Steroids, Alkalizing agents (TCO2), Out-of-competition testing and Freezing and retrospective testing of post-race samples.” Nick Nicholson, Keeneland Racetrack’s President and CEO, reports that Keeneland has “been complying with the Alliance’s wagering security standards since the beginning of our current meeting, and those very protocols were followed during a recent wagering incident... Integrity and transparency go hand in hand, and both are essential to protect and advance the public’s confidence in our wagering product.”

This issue hit the national stage in 2008 when a Congressional hearing was held before the House Subcommittee on Commerce, Trade and Consumer Protection, which put the racing industry “on notice to bring
about serious reforms or look for Congress to do so.”92 The hearing, entitled “Breeding, Drugs, and Breakdowns: The State of Thoroughbred Horseracing and the Welfare of the Thoroughbred Racehorse” followed the breakdown and subsequent euthanasia of Eight Belles after her second-place finish in the Kentucky Derby.”93 A released subcommittee statement said that “recent deaths point to a persistent and widespread problem, raising significant questions about the sport and its governance.”94 Some at the hearing pointed to the success of nongovernmental groups in promoting the sport, such as the Jockey Club committee, but Rep. Ed. Whitfield (R-Ky.) “questioned the groups’ enforcement capability, pointing to the fact that racing doesn’t have a central governing association or agency like other major sports.”95 It is still unclear, however, whether unilateral state action “will satisfy the House Subcommittee on Commerce, Trade and Consumer Protection that the industry can uniformly regulate itself.”96 While testifying before the Subcommittee, National Thoroughbred Racing Association President Alex Waldrop reported that NTRA will “address the committee members concerning the way in which the industry manages Thoroughbred safety and health via organizations like the Racing Medication and Testing Consortium, the Welfare and Safety of the Horse Summit, and all the organizations that exist on a state and national level.”97

The issue was raised again two years later, with the focus shifted to the number of horses badly injured in races every year.98 Lawmakers reported that:

Painkillers and other drugs can mask horses’ pain that would otherwise signal impending harm on the track. National statistics on numbers of horse racing injuries, deaths and trainers’ drug-penalty violations are hard to come by . . . because, like boxing, the industry has no central governing body. Rather, states have varying

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94 Id (quotations omitted).
95 Lewis, supra note 91.
96 Id.
97 Bailey, supra note 92.
resources and philosophies on drug testing and enforcement.99

According to Congressman Whitfield, “many people in the racing industry [are] supportive of a [national governing] body that would have the authority and enforcement mechanism to make significant changes in the industry, and I don’t believe anyone believes the Jockey Club or the NTRA alone can do it, because they don’t have the authority.”100 Though these organizations have tried, it is not clear whether their efforts will be enough to sustain the kind of changes they are striving to procure.

These pushes for reform and uniformity come at a critical time in the horse racing industry. The decline has been stiff; “[t]horoughbred racing declined nationally in [total amount wagered] by 7.3% in 2008, by 9.8% in 2009, and by 8.4% in the first four months of 2010.”101 It is widely believed that “the sport has not been able to prevent the use of drugs and the belief that many of the sport’s leading trainers have regularly chemically enhanced the performances of their horses.”102 Unfortunately, this has “contributed to the public perception that horse racing is a cruel sport which has little concern for the health or the safety of the horse.”103 This is a hard misperception to overcome, and while some would suggest uniform rules including a strict zero-tolerance stance on drugs could help battle this perception, nothing is guaranteed at this point.

V. CONCLUSION

It is fairly obvious that where horseracing laws are concerned, not all states are created equal. In the wake of Congressional hearings and nationwide pushes for more stringent rules concerning anabolic steroid use and out-of-competition testing, it becomes clear that preserving the integrity of the sport is a major issue for states across the country. A new way of regulating horse doping may be necessary to save the sport from its own demise. Major horseracing states have traditionally viewed two options as available at this point if they hope to move forward: to either adopt more stringent uniform rules on their own (or with some prodding by external organization such as the National Thoroughbred Racing Association or the Racing Medication and Testing Consortium) or create and submit to rules adopted by a national overarching organization. Both options come with

99 Id.
100 Id.
102 Id.
103 Id.
their own benefits. Conforming to an unofficial rule gives states a lot more flexibility because the rule they are following is not binding upon them as law. This is also the main drawback of an unofficial organizational rule.

There is another option, though it too comes with drawbacks. In some cases, racetracks themselves are taking the law into their own hands, as it were, by imposing strict regulations and sanctions at their tracks. Unfortunately, these sanctions are not binding beyond that specific track, which in turn strongly limits the effectiveness of such action.\textsuperscript{104} Having “uniform medication standards at every racetrack would be the first step and setting a standard to differentiate between types of drugs is paramount.

There is a big difference [between the different drugs currently disallowed on the track].”\textsuperscript{105} This important distinction between drugs available and widely used in the barn, which are subsequently banned on race day, and those drugs which trainers are using to purposefully dope a horse to win a race cannot be understated. The lack of a clear distinction between permissible and impermissible drugs throughout the horseracing industry is a large part of the public’s misperception about drugs and horses, and without clearing this confusion up the industry is only hurting itself.\textsuperscript{106}

Overall, it seems that a national authority is the most effective way to implement strict regulations because it would have the authority to create rules, binding upon all pari-mutual racetracks in the country. Such an organization would also eliminate the problems of trainers being banned from one racetrack or state and subsequently moving on to the next. Other countries already rely on an overarching regulatory body to govern the horse racing industry. For instance, “horse racing in most other jurisdictions operates under the medication rules of the International Federation of Horseracing Associations (IFHA) . . . most [differences between IFHA rule and American rules] are largely semantic and are primarily a function of the state regulatory structure of U.S. racing.”\textsuperscript{107}

If nothing else, states should aim to model their rules after California’s. California “err[s] on the side of caution . . . if anything, [it] over-regulate[s] horse racing for two reasons—1) to protect the integrity of the competition and 2) to protect the welfare of the horse and jockey.”\textsuperscript{108}

Protecting the integrity of the competition, as well as protecting the welfare of both the horse and jockey may seem like lofty goals, but this is being

\textsuperscript{104} Drape, \textit{supra} note 12.


\textsuperscript{106} Liebman, \textit{supra} note 100 (stating that the lack of a clear distinction between permissible and impermissible drugs has “contributed to the public perception that horse racing is a cruel sport which has little concern for the health or the safety of the horse.”).

\textsuperscript{107} AM. ASS’N OF EQUINE PRACTITIONERS RACING TASK FORCE, \textit{supra} note 1 at 6.

\textsuperscript{108} \textit{California Takes its Drug Testing Seriously}, \textit{supra} note 47.
accomplished in horse racing states everyday. Getting on board with that move to more stringent guidelines may mean saving an industry. It seems well worth the restrictions.