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Could the threat of preemption herald a state crackdown on horse trainers who don't follow the rules? (/full-blog/2012/01/could-threat-of-preemption-herald-state.html)



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By: Peter Rottgers, Senior Staff Member

Thoroughbred racing is a lot like Ozzy Osbourne. They both did their best work before 1985, in their post prime years both have maintained small but loyal followings, and they both have a tendency to engender conversations about drug use (whether or not that ought to be the case). It's the later similarity that has garnered the most attention lately. While criticism over performance enhancing drugs and race-day medication has been ongoing for decades, outrage from both the industry and the general public reached its zenith in the aftermath of the Eight

Bells tragedy at the 2008 Kentucky Derby. [1] Everyone agreed that something must be done to clean up the sport, but because thoroughbred racing has no central authority to mandate industry wide change, progress has not been as swift enough for some.[2]

To be fair, the states, which promulgate and enforce their own drug and medication rules, have made some progress in reforming the industry.[3] The use of anabolic steroids, blood doping agents like EPO, and “milkshakes” (a mixture of baking soda, sugar and electrolytes usually force fed to a horse via feeding tube [4]) have been effectively eliminated through new regulations and stricter testing.[5] However, even though the states have made some headway on drug and medication reform, the hard issues to be resolved still loom large. While the states should be commended for banning a practice as reprehensible as “milkshaking”, the issue seems to be a relative softball when compared to medications like Lasix. Lasix, a diuretic used to prevent pulmonary bleeding caused by the extreme exertion of a race, is legal in every thoroughbred-racing jurisdiction in North America.[6] Lasix also has performance enhancing qualities and is reputed to mask the presence of other performance enhancing drugs.[7] Yet, swift and uniform change by the states on hard cases like Lasix is probably nothing more than wishful thinking.

The states have also failed to create an effective system of penalizing violators of banned substance rules. As of October 2010, only two of racing’s top 20 trainers by purses won had never committed a drug or medication violation.[8] At least five of those 20 trainers had in excess of 20 drug or medication violations, yet all were still actively training at the time.[9] When compared to the three strike rules in other major American sports [10], thoroughbred racing’s rule enforcement seems laughable.

Two individuals who are not chuckling are Kentucky Representative Edward Whitfield and New Mexico Senator Tom Udall. In May of 2011, Whitfield and Udall presented legislation that called for a federal cleanup of the horse racing industry.[11] The bill seeks to expand Congressional authority over horse racing through amendments to the Interstate Horse Wagering Act of 1978, which gave Congress the power to regulate interstate via phone or other electronic devise.[12] If the Whitfield-Udall bill is anything, it’s bold. It calls for zero tolerance policies for most drugs on race days, and institutes a nationwide three strikes program.[13] The program has received a fair amount of criticism,[14] but the prospect of federal preemption may be just the push the states need to get serious about rule enforcement.

The last thing states want is for the federal government to amend the Interstate Horse Wagering Act. If Congress adopts rules and enforcement procedures, it could also adopt new taxes on the interstate wagers they regulate to pay for rule enforcement, which could explain Rick Dutrow Jr.’s recent headlines. Dutrow, trainer of 2008 Kentucky Derby winner Big Brown, has racked up over 60 drug or medication violations in his career.[15] He is also one of the most successful trainers in the thoroughbred racing industry.[16] Earlier this year, the Kentucky Racing Commission finally revoked Dutrow’s trainer’s license.[17] Last week, the New York Racing and Wagering Board fined Dutrow \$50,000 and revoked his trainer license for 10 years [18]. After years of rule breaking, Dutrow is now out of business in two of the country’s most prestigious thoroughbred racing states. This might become the trend with drug and medication rule violators. In order to show Congress that the states are capable of handling horse racing on their own, we could see a crack down on violators in the near future. Maybe federal preemption isn’t the answer, but the threat of federal preemption might prove to be catalyst that gets racing back on track.

[1] Posting of Steve Zorn to The Rail: The New York Times Horse Racing Blogg,<http://therail.blogs.nytimes.com/2011/05/14/racings-drug-problem-more-complicated-than-it-looks/> (<http://therail.blogs.nytimes.com/2011/05/14/racings-drug-problem-more-complicated-than-it-looks/>) (May 14, 2011, 9:23 EST).

[2] *Id.*

[3] *Id.*

[4] Joe Drape, *At Breeders' Cup, a Volatile Mix of Speed and Drugs*, N.Y. Times, Nov. 3, 2010, at B16, available at <http://www.nytimes.com/2010/11/04/sports/04racing.html> (<http://www.nytimes.com/2010/11/04/sports/04racing.html>).

[5] Zorn, *supra* note 1.

[6] *Id.*

[7] *Id.*

[8] Drape, *supra* note 4.

[9] *Id.*

[10] Deborah Charles and Paul Grant, Factbook: Rules About Steroid Use in U.S. Sport, <http://www.reuters.com/article/2008/01/11/us-steroids-rules-idUSN0433166620080111> (<http://www.reuters.com/article/2008/01/11/us-steroids-rules-idUSN0433166620080111>) (last visited Oct. 25, 2011).

[11] Zorn, *supra* note 1.

[12] *Id.*

[13] *Id.*

[14] *Id.*

[15] Joe Drape, *3 Years After Triple Crown Bid, Trainer Is Given a 10-Year Ban*, N.Y. Times, Oct. 12 2011, at A1, available at <http://www.nytimes.com/2011/10/13/sports/dutrow-barred-from-training-horses-in-new-york-for-10-years.html?pagewanted=all> (<http://www.nytimes.com/2011/10/13/sports/dutrow-barred-from-training-horses-in-new-york-for-10-years.html?pagewanted=all>).

[16] Drape, *supra* note 4.

[17] Zorn, *supra* note 1.

[18] 2 Drape, *supra* note 15.

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