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LIFE IN THE FAST LANE: HORSE RACING'S DRUG ADDICTION

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Ralph Waldo Emerson wisely stated that money often costs too much, and it seems that horse racing profits are no longer justifying the cost to horses, which are being harmed by the rampant abuse of drugs, used both to numb and to enhance a horse's performance. Prevention of such abuse has historically taken the form of urine and blood testing after races, but recently, more and more governing bodies are adopting regulations allowing off-track drug testing at private facilities, raising privacy issues for those affected by the regulations.[i]

The rampancy of drug use in the racing industry is no secret, and privacy concerns raised by increased testing are constantly being balanced with the goal of protecting horse welfare. A former Churchill Downs public relations director has been quoted by the Horse Fund as saying, "There are trainers pumping horses full of illegal drugs every day. With so much money on the line, people will do anything to make their horses run faster."[ii] Some substances are used to increase a horse's speed, while others mask pain in order to keep an injured horse racing and continuing to earn a profit for its owners.[iii] A particularly poignant example of such inappropriate drug use is that of Be My Royal, which was suspected to have been given morphine based on the obvious limp he exhibited while winning a race.[iv] Which drugs are legal varies from state to state, with Kentucky having the reputation for being most lenient.[v]

New York's regulations allowing off-track testing permit a member or representative of the New York State Racing and Wagering Board to enter a private farm in New York without probable cause or a search warrant and test a horse that may or may not actually race at a New York Race Track.[vi] The rule allows for testing of any horse stabled within a 100-mile radius of any New York racetrack, incidentally encompassing other states.[vii] If an out-of-state horse is selected for testing, the owner must ship the horse to the New York track at the owner's expense.[viii] The penalty for the first violation is a mandatory ten year suspension.[ix] Trainers and owners who do not comply with an order to produce a horse for testing are subject to a 120-day suspension of the horse, absent mitigating circumstances, which are not well defined.[x] Horses to be tested are selected from those anticipated to compete at New York tracks within 180 days, but determining whether or not a horse may race in New York and therefore fall under the rule is not an exact science.[xi]

Out-of-competition testing represents the interest of industry professionals in guarding against both drug abuse and cheating the systems already in place.[xii] Unlike post-race tests that look for stimulants, painkillers, tranquilizers, and other drugs that can directly impact performance in the

race, out-of-competition tests look for “designer drugs” like the blood-doper EPO that offers long term boosts to physiological processes, or toxins that can deaden pain for weeks at a time.[xiii] Stuart S. Janney III, vice chairman of the Jockey Club, was quoted by the Daily Racing Form, stating that, “It can be a powerful deterrent, and in our sport, it is a perfect bookend to post-race sampling.”

Legally, such potential invasions of privacy raise concerns that citizens’ constitutional Fourth Amendment right against unreasonable searches and seizures will be violated. The Fourth Amendment provides that, “the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated.”[xiv] This right of personal security “belongs as much to a citizen on the streets of our cities as to the homeowner closeted in his study to dispose of his secret affairs.”[xv] This right protects from restraint or interference of others, unless by clear and unquestionable authority of law.[xvi] The Fourth Amendment protects people, not places, and wherever an individual has a reasonable expectation of privacy, they are entitled to be free from unreasonable governmental intrusion.[xvii] This right is shaped by the context in which it is asserted, as only unreasonable searches and seizures are forbidden.[xviii]

Additionally, regulations like the one at issue must be a valid exercise of agency power. It is well-settled that a state regulation should be upheld if it has a rational basis and is not unreasonable, arbitrary, capricious or contrary to the statute under which it was promulgated.[xix] If a regulation is to be nullified, the challenger must establish that "it is so lacking in reason for its promulgation that it is essentially arbitrary.”[xx] An agency has no authority to create rules and regulations without a statutory predicate, either express or implied.[xxi]

In 2014, a group of professionals in the Standardbred racing industry filed suit against the New York State Racing & Wagering Board, and the court was forced to address the Fourth Amendment and administrative issues involved in out-of-competition testing.[xxii]

The court evaluated the Fourth Amendment claims under the reasonableness standard expressed in *Elkins*.[xxiii] The court held that, due to the fact that horse trainers, owners, and horse farms leasing property to such owners and trainers, have “voluntarily entered a pervasively regulated field… in which suspicionless equine testing has for decades been used as a routine, legally mandated prophylactic,” such racing professionals can claim no privacy expectation that would prevent the testing of horses for illicit substances in accordance with a prescribed testing regimen that meaningfully limits the scope of any intrusion to the sampling procedure.[xxiv]

As to the attack on the regulation itself, the court first outlined the statutory basis for the regulation. Racing, Pari-Mutuel Wagering and Breeding Law § 301(2) provides the state wagering board, without limit, the authority to prescribe rules and regulations preventing administration of drugs or stimulants to affect the speed of horses in races in which they are about to participate. The court reasoned that, while it is true an administrative agency may not engage in policy determinations (such as the protection of racehorse welfare) reserved for the legislature under the guise of rulemaking, it is also true that the legislature has considerable latitude in delegating a reasonable amount of discretion to administrative officials.[xxv]

The court, in reading §301, found that the statute was not intended to limit the respondent’s powers to supervise all harness race meetings and to adopt rules and, in fact, the statute itself provided for the promulgation of regulations to adopt its purposes and to prevent circumvention or evasion thereof.[xxvi] The court held that the respondent’s power effectively to reach off-track activity, such as horse doping, bearing directly on the safety and integrity of pari-mutuel racing, was inarguable. [xxvii]

Although issues of privacy and administrative authority are foundationally interwoven in this new method of testing, the court in *Ford* made it clear that such testing is both constitutional and a valid exercise of administrative power. Based on *Ford*, it seems the racing industry can expect, with increasing frequency, that state racing boards will implement regulations requiring out-of-competition testing. In fact, as of January 23, 2017, New York’s regulations were actually in the

process of expanding.[xxviii] West Virginia launched an out-of-competition testing program in 2016.[xxix] Kentucky has also adopted a similar regulation allowing for out-of-competition testing, utilizing the process during the 2016 Kentucky Derby.[xxx] Kentucky recently enforced its regulation by administering the mandatory penalty to a Kentucky trainer.[xxxi] Otabek Umarov refused to allow one of his horses to be tested and thus received the proscribed ten-year suspension.[xxxii] Testing officials found Umarov to be in possession of hypodermic needles, syringes, and injectable medications.[xxxiii] It seems the system, despite initial privacy and administrative authority concerns, is working effectively to expand protection of horses from harmful substances.

[i] Steve Kallas, *More Court Scrutiny for NY Out-Of-Competition Testing Rule*, Harnessracing.com (Jan. 11, 2010), http://www.harnessracing.com/news/morecourtscrutinyfornyout-of-competitiontestingrule.html.

[ii] *Fact Sheet*, The Horse Fund, http://horsefund.org/horse-racing-fact-sheet.php.

[iii] *Id.*

[iv] *Id.*

[v] *Id.*

[vi] Kallas, *supra* note i..

[vii] *Id.*

[viii] *Id.*

[ix] *Id.*

[x] *Id.*

[xi] Kallas, *supra* note i.

[xii] Matt Hegarty, *Racing Symposium: Out-of-competition Testing Faces Hurdles*, DailyRacingForm.com (Dec. 11, 2013), http://www.drf.com/news/racing-symposium-out-competition-testing-faces-hurdles.

[xiii] *Id.*

[xiv] Terry v. Ohio, 392 U.S. 1, 9 (1968).

[xv] *Id.*

[xvi] Union Pac. R. Co. v. Botsford, 141 U.S. 250, 251 (1891) (holding that a court may not order a party to submit to a surgical examination to ascertain the extent of the injury for which he is suing).

[xvii] Katz v. United States, 389 U.S. 347, 351, 361 (1967) (Harlan, J., concurring).

[xviii] Elkins v. United States, 364 U.S. 202, 222 (1960).

[xix] New York State Assn. of Counties v. Axelrod, 78 N.Y.2d 158, 166 (1991); Bates v. Toia, 45 N.Y.2d 460, 464 (1978); Ostrer v. Schenck, 41 N.Y.2d 782, 786 (1977).

[xx] Marburg v. Cole, 286 N.Y. 202, 212 (1941).

[xxi] *Bates*, 45 N.Y.2d at 464 (1978).

[xxii] *See generally* Matter of Ford v. N.Y. State Racing & Wagering Bd., 24 N.E.3d 1090.

[xxiii] *Matter of Ford*, 24 N.E.3d at 1096; Elkins v. United States, 364 U.S. 202, 222 (1960).

[xxiv] *Matter of Ford*, 24 N.E.3d at 1096

[xxv] *See generally* Rent Stabilization Assn. of N.Y. City v. Higgins, 630 N.E.2d 626 (1993); Brightonian Nursing Home v. Daines, 999 N.E.2d 510 (2013).

[xxvi] Matter of Ford, 24 N.E.3d at 1095.

[xxvii] *Id.*

[xxviii] Tom Precious, *New York Regulators Act on Drug Testing*, Records Rules, BloodHorse.com (Jan. 23, 2017), http://www.bloodhorse.com/horse-racing/articles/219325/new-york-regulators-act-on-drug-testing-records-rules.

[xxix] Frank Angst, *Umarov No Longer Seeking Stay of Suspension*, BloodHorse.com (Aug. 1, 2016), http://www.bloodhorse.com/horse-racing/articles/213812/umarov-no-longer-seeking-stay-of-suspension.

[xxx] Tom LaMarra, *KHRC, Churchill Outline Testing, Security*, BloodHorse.com (April 30, 2016), http://www.bloodhorse.com/horse-racing/articles/211213/khrc-churchill-outline-testing-security.

[xxxi] Angst, *supra* note xxix.

[xxxii] *Id.*

[xxxiii] Frank Angst, *Kentucky Suspends Umarov for 10 Years*, BloodHorse.com (May 27, 2016), http://www.bloodhorse.com/horse-racing/articles/211986/kentucky-suspends-umarov-for-10-years.

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