

# UNIFORM DRUG REFORM IN HORSERACING

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## INTRODUCTION

Horseracing creates hundreds of thousands of jobs across the nation and is a multibillion-dollar industry.<sup>1</sup> It not only encompasses racing, but also breeding, sales, training, gaming, veterinary medicine, and entertainment. In horseracing, getting to the winner's circle is everything, and many will use whatever means necessary to get there. The most common tactic people use to cheat their way into the winner's circle is through the administration of illegal drugs, such as performance enhancing drugs, numbing medication, or even drugs that slow horses down.

Doping horses is very common, and despite state-led efforts, illegal drug admiration remains prevalent in today's horseracing industry. Uniform rules concerning drug use should be adopted for all states that participate in the sport.

## I. DRUGGING RACEHORSES

Cheating in horseracing by virtue of drug use can be traced back to the 1500s.<sup>2</sup> Since then, trainers have tried everything from cocaine, to Viagra, to cobra venom to get their horses into the

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<sup>1</sup> *Medication and Performance-Enhancing Drugs in Horse Racing: Hearing Before the Comm. on Commerce, Sci., and Transp. U.S. Senate*, 112<sup>th</sup> Cong. 2 (2012) [hereinafter *Hearing*] (statement of Sen. Tom Udall, N.M.).

<sup>2</sup> Steve Haskin, *The History of Drugs in America*, Blood Horse (July 1, 2012), <http://cs.bloodhorse.com/blogs/horse-racing-steve-haskin/archive/2012/07/01/the-history-of-drugs-in-america.aspx>

winner's circle.<sup>3</sup> Drugging can be divided into four types: to win, to lose, for therapeutic reasons, and accidental drugging.<sup>4</sup>

#### A. *To Win; To Lose*

There are three different types of drugs one can administer to increase the chance of winning. The most common is administering a stimulant to increase the horse's energy. Another is administering medication to numb pain so a horse can run despite an injury. Certain drugs will both energize and mask pain. The third form of drugging to win is through the administration of tranquilizers. This may seem counterproductive, but if a horse is overexcited at the starting gate a tranquilizer may refocus him.<sup>5</sup>

Doping to lose involves drugs that will slow a horse down. The strategy involves doping multiple horses and betting on the one that has not been medicated.<sup>6</sup> The drugging to lose scheme is most often used when placing a wager on a long shot.<sup>7</sup> The faster competitors are slow due to the drugs, so the non-medicated horse has a better chance of winning.<sup>8</sup> If the non-medicated horse has the least favorable odds it will grant the bettor the biggest payout.<sup>9</sup>

#### B. *Examples of Therapeutic Drugs and Types*

Many of the allowed medications have side effects that can improve a horse's performance.<sup>10</sup> Thus, trainers and/or owners will claim their horse has a legitimate need for the drug, but the claim disguises the motive of the drug's advantageous side effects.<sup>11</sup> A common example of this is Clenbuterol, a bronchodilator that is used to treat respiratory infections and inflammation. However,

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<sup>3</sup> Rebecca R. Ruiz & Matthew Orr, *Mangled Horses, Maimed Jockeys*, The N.Y. TIMES (March 25, 2012), [http://www.nytimes.com/2012/03/25/us/death-and-disarray-at-americas-racetracks.html?\\_r=3&hp](http://www.nytimes.com/2012/03/25/us/death-and-disarray-at-americas-racetracks.html?_r=3&hp)

<sup>4</sup> Joan S. Howland, Roger F. Noreen, & Michael J. Hannon, LEGAL RESEARCH GUIDE TO AMERICAN THOROUGHBRED RACING LAW FOR SCHOLARS, PRACTITIONERS, AND PARTICIPANTS 23 (William S. Hein & Co., Inc. 1998).

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> Charles A. Palmer & Robert J. Palmer, *The Little Book of Horse Racing Law*, 34 (2015).

<sup>8</sup> *Id.*

<sup>9</sup> Howland, *supra* note 4.

<sup>10</sup> Palmer & Palmer, *supra* note 7, at 35.

<sup>11</sup> *Id.*

Clenbuterol also increases aerobic capacity and burns fat while building muscle, similar to a steroid.<sup>12</sup>

Clenbuterol has different withdrawal periods in different racing jurisdictions.<sup>13</sup> In other words, the amount of time allowed to administer the drug before a horse races is different in different jurisdictions.<sup>14</sup> Arizona, Arkansas, Texas, and Kentucky do not allow Clenbuterol to be given less than fourteen days before a race, but Colorado and Oregon do not allow it to be given within thirty days of racing.<sup>15</sup>

The second type of therapeutic drug use, is administering drugs that have known benefits, but are outlawed in the jurisdiction in which the horse is racing.<sup>16</sup> For example, Dermorphin can numb pain, which can help an injured horse; however, it is illegal in all of the racing jurisdictions.

Accidental drugging can happen in various ways. The most typical is through feed contamination.<sup>17</sup> In 1989 in Ohio, a trainer was fined after his horse tested positive for drugs during the post-race test.<sup>18</sup> However, after further investigation, it was discovered that the grain elevator was contaminating the feed, causing the positive test result.<sup>19</sup> The fines were then dropped.<sup>20</sup>

### *C. Preventive Measures and Testing*

Although football, basketball, and all other professional and amateur sports have a centrally regulating body, horseracing does not. There are 38 states that hold horse races and each individual state determines its own rules and regulations. Each state recognizes its duty to keep horseracing honest; however, states clearly realize that more trainers will want to run their horses in the more lenient states.<sup>21</sup>

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<sup>12</sup> *Id.*

<sup>13</sup> Telephone Interview with Heather Cutbirth D.V.M. (March 20, 2016) [hereinafter Interview].

<sup>14</sup> *Id.*

<sup>15</sup> Racing Medication & Testing Consortium Database <http://rmtcnet.com/withdrawal-times-database-table/> (Last Visited April 24, 2016).

<sup>16</sup> Howland, *supra* note 4.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> *Id.* at 24.

<sup>21</sup> Palmer & Palmer, *supra* note 7, at 36.

Every state requires some form of testing to be done after a race to determine whether the winning horse was illegally medicated. Some states have implemented pre-race testing as well as post-race testing.<sup>22</sup> Post-race tests began in the early 1930's with saliva testing.<sup>23</sup> Although saliva testing detected all orally administered drugs, it rarely detected drugs administered intravenously. As a result, tracks began testing horses' urine.<sup>24</sup> Urine testing "not only detected the presence of drugs in both methods of administration, but also in cases where the dosage was as minute as one-tenth of a grain."<sup>25</sup> However, a urine sample is not as easily accessed as saliva. In some cases, grooms (stable boys) waited over 9 hours to collect a sample.<sup>26</sup> Today, horses give both blood and urine samples for post-race tests.<sup>27</sup>

Once samples are collected, there are three types of testing. Each of these tests varies in cost and efficiency; because many states value cost-reduction over effectiveness, state agencies often implement the cheapest test, which saves money but fails to provide adequate detection.<sup>28</sup> Multiple states do not even delineate which drugs need to remain in the testing rotation—therefore, there is no mandated uniformity even within the single state as to what samples are tested for. With samples being analyzed with such great degrees of variation it is impossible to get consistent, accurate results.<sup>29</sup>

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<sup>22</sup> Howland et al., *supra* note 4, at 30.

<sup>23</sup> E.G. Clarke & M.S. Moss, *A Brief History of Dope Detection in Racehorses* BRIT. J. SPORTS MED. 100 (1976).

<sup>24</sup> *Id.*

<sup>25</sup> Steve Haskin, *The History of Drugs in America*, Blood Horse (July 1, 2012), <http://cs.bloodhorse.com/blogs/horse-racing-steve-haskin/archive/2012/07/01/the-history-of-drugs-in-america.aspx>.

<sup>26</sup> *Id.*

<sup>27</sup> Interview *supra* note 13.

<sup>28</sup> Natalie Voss, *Testing, Testing: How Strong are Racing's Drug Testing Programs?*, PAULICK REPORT (April, 16, 2014). <http://www.paulickreport.com/news/ray-s-paddock/testing-testing-how-strong-are-racings-drug-testing-programs/>.

<sup>29</sup> *Id.*

## II. CURRENT MEASURES TOWARDS STANDARDIZATION

A. *Trainer Insurer's Rule*

Trainer insurer's rules are the regulations that hold the trainer responsible for the horse's condition. Thus, if a horse tests positive for drugs, the trainer is held accountable.<sup>30</sup> The first known application of the rule is in *Carroll v. Cal. Horse Racing Bd.*, a case involving a drugged racehorse. The case is understood as the origin of the trainer insurer rule when the court states, "the trainer is responsible for the condition of a horse in his charge."<sup>31</sup> Since then the rule has become more defined. Today's racing jurisdictions use one of two trainer responsibility rules: absolute strict liability rule or rebuttable presumption rule.<sup>32</sup>

B. *Modern Trainer Responsibility Rules*

The absolute strict liability rule is the most common throughout the 38 racing jurisdictions. The rule states that the trainer is strictly liable for the condition of the horses in his custody.<sup>33</sup> The reasoning behind the rule is outlined in *Fioravanti v. State Racing Com.*:<sup>34</sup> "[h]orse racing accompanied by gambling is particularly susceptible to fraud and corruption."<sup>35</sup> The absolute insurer's rule "is designed to provide maximum protection against the illicit administration of drugs to race horses. The rule may do injustice to a trainer innocent of wrongdoing; but it serves to protect the public."<sup>36</sup> For example, the New Jersey regulations state that "[a] trainer shall be the absolute insurer of and is responsible for the condition of a horse within his care and custody."<sup>37</sup>

In contrast, rebuttable presumption rule places the burden of proof on the trainer to verify that he or she did not give the racehorse the illegal substance.<sup>38</sup> For example, Colorado law states

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<sup>30</sup> Palmer & Palmer, *supra* note 7, at 41-42.

<sup>31</sup> *Carroll v. Cal. Horse Racing Bd.*, 16 Cal. 2d 164, 165, 105 P.2d 110, 111(1940).

<sup>32</sup> Palmer & Palmer, *supra* note 7, at 42.

<sup>33</sup> *Id.*

<sup>34</sup> *Fioravanti v. State Racing Com.*, 6 Mass. App. Ct. 299, 305, 375 N.E.2d 722, 727 (1978).

<sup>35</sup> *Id.* at 727

<sup>36</sup> *Id.*

<sup>37</sup> N.J.A.C. 13:70-14A.6

<sup>38</sup> Palmer & Palmer, *supra* note 7, at 43.

that when drugs are found in a horse's system it "create[s] a presumption that the drug was administered either by [the trainer] or with his knowledge and consent. When the presumption has arisen, it is incumbent upon plaintiff to produce evidence to rebut this presumption."<sup>39</sup>

### C. Criminal Prosecution

Some states have authorized criminal statutes for behavior that threatens the integrity of horseracing and the pari-mutuel system.<sup>40</sup> If the betting public believes the races are fixed because of doping, it will lose faith in the system and revenue will drop; therefore, the state has a high interest in maintaining the integrity of the sport, so penalties may be severe.<sup>41</sup> For example, the statute in Oklahoma outlines the criminal violation:

Any person who violates the provisions of this section or who knowingly enters in a race a horse to which any drug or medication has been administered in violation of this section shall be guilty, upon conviction, of a felony and shall be fined not more than Ten Thousand Dollars (\$10,000.00) or be imprisoned for a period of not more than ten (10) years, or by both said fine and imprisonment. The Commission shall suspend or revoke the license of any such guilty party.<sup>42</sup>

And in California, anyone who is connected with doping a racehorse "is punishable by a fine not exceeding five thousand dollars (\$5,000), or by imprisonment in a county jail not exceeding one year, or by imprisonment pursuant to subdivision (h) of Section 1170, or by both that fine and imprisonment."<sup>43</sup>

### D. Connection of Drugs to Gambling and the Interstate Horseracing Act of 1978

Drug use in horseracing affects the outcome of the race, therefore, it is directly related to the pari-mutuel system. Horseracing is unique because it is the only form of gambling in the

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<sup>39</sup> *Harbour v. Colo. State Racing Com.*, 32 Colo. App. 1, 7, 505 P.2d 22, 24 (1973).

<sup>40</sup> Howland et al., *supra* note 4, at 41.

<sup>41</sup> *Id.*

<sup>42</sup> 3A Okl.St. Ann. § 208.11.

<sup>43</sup> Cal. Penal Code § 337f (2011).

United States where out of state wagers are allowed.<sup>44</sup> It is also granted a special exemption from laws banning telephone and Internet wagering.<sup>45</sup> Each year roughly \$130 billion is wagered on horseraces; of that \$11 billion, 90 percent is from off-track betting.<sup>46</sup> In order to regulate this type of gambling more effectively, the federal government passed the Interstate Horseracing Act of 1978 (IHA).<sup>47</sup>

The IHA acknowledges that generally, individual states should oversee gambling within each state,<sup>48</sup> but, the federal government must ensure that one state does not interfere with gambling in another state, and also ensure that each state remains cooperative in accepting interstate bets.<sup>49</sup>

The IHA establishes a Congressional duty to “regulate interstate commerce with respect to wagering on horseracing in order to further the horseracing and legal off-track betting industries.”<sup>50</sup> The IHA also outlines the types of organizations allowed to accept interstate off-track wagers.<sup>51</sup> Based on the IHA, the federal government can regulate horseracing as it relates to wagering on races.<sup>52</sup>

### III. BENEFITS OF CENTRALIZED REFORMS AND MISSTEPS DURING PROGRESS

Unlike other sports, horseracing lacks a centralized authority to impose and enforce uniform rules.<sup>53</sup> For an industry that deals with such a tremendous amount of money, there is very little

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<sup>44</sup> *Breeding Drugs and Breakdowns: The State of Thoroughbred Horseracing and the Welfare of the Thoroughbred Racehorse: Hearing Before the Subcomm. On Commerce, Trade, and Consumer Protection of the Comm. on Energy and Commerce. H.R.s, 110<sup>th</sup> Cong. 4 (2008) [hereinafter *Breakdowns*] (statement of Rep. Jan Schakowsky, III).*

<sup>45</sup> *Hearing, supra* note 1, at 2.

<sup>46</sup> *Id.*

<sup>47</sup> *Hearing, supra* note 1, at 1.

<sup>48</sup> 15 U.S.C. §3001(a)(1) (1978).

<sup>49</sup> 15 U.S.C. § 3001(a)(2)-(3).

<sup>50</sup> 15 U.S.C. § 3001(b).

<sup>51</sup> 15 U.S.C. § 3003 (1978).

<sup>52</sup> Katie Elizabeth Bartek, *What Ails America's Racetracks: Drugging in Horse Racing* (2013). *Student Scholarship*. Paper 183 20. [http://erepository.law.shu.edu/student\\_scholarship/183](http://erepository.law.shu.edu/student_scholarship/183).

<sup>53</sup> *Hearing, supra* note 1, at 1.

accountability.<sup>54</sup> Illegal drug use and cheating should not be tolerated, especially because the sport has been granted the privilege of off-track betting.<sup>55</sup> Most people in the horseracing industry do not want the federal government involved, and believe that horseracing should remain as it is.<sup>56</sup> In recent years, there have been different movements to clean up the sport; however, the efforts are either not widely adopted, or destructive.

#### A. *Mid-Atlantic Uniform Medication Program*

In January of 2014, New York, New Jersey, Massachusetts, Delaware, Maryland, Virginia, West Virginia, and Pennsylvania implemented the Mid-Atlantic Uniform Medication Program.<sup>57</sup> The program divides medications into two categories: therapeutic and prohibited.<sup>58</sup> There are 24 substances on the allowed list of drugs.<sup>59</sup> Anything else found in a horse's system will disqualify it from the race.<sup>60</sup> Lasix (furosemide) is the only drug allowed on race day; however, it must be administered uniformly and by designated persons.<sup>61</sup> The Racing Medication and Testing Consortium (RMTC) must accredit the various states' laboratories used for testing in order to ensure uniform testing.<sup>62</sup> Only 8 of the 38 racing jurisdictions have put the program into effect, and no new jurisdictions have joined since 2014.

#### B. *Water Hay Oats Alliance*

The Water Hay Oats Alliance (WHOA) is a group of "like-minded Owners, Breeders, Trainers, Jockeys, Equine Practitioners, Industry Professionals, Handicappers and Racing Fans who stand

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<sup>54</sup> *Breakdowns*, *supra* note 44, at 6.

<sup>55</sup> *Hearing*, *supra* note 1, at 2.

<sup>56</sup> *Id.*

<sup>57</sup> Bloodhorse Staff, *Eight States Commit to Uniform Drug Rules, Blood Horse* (March 12, 2013) [hereinafter *Eight*]. <http://www.bloodhorse.com/horse-racing/articles/76824/eight-states-commit-to-uniform-drug-rules>.

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> Palmer & Palmer, *supra* note 7, at 38.

<sup>61</sup> *Eight*, *supra* note 57.

<sup>62</sup> *Id.*

against the permissive use of race day drugs.”<sup>63</sup> The goal of this movement is to have federal legislation enacted that will appoint the United State Anti-Doping Agency (USADA) to police horseracing and enforce an anti-doping program, which would ban all race day drugs.<sup>64</sup>

Although WHOA may seem like the most obvious solution to some, it may not be the best choice. According to Dr. Heather Cutbirth, an equine veterinarian from Lafayette, Louisiana, WHOA’s philosophy is unrealistic for many reasons. First and foremost, a diet of purely water, oats, and hay is insufficient because it does not take care of an equine athlete’s nutritional needs.<sup>65</sup> Second, doing away with all pre-race drugs is not good for the horses’ health.<sup>66</sup> Some drugs are used unnecessarily, but many have legitimate therapeutic value.<sup>67</sup>

Finally, from a purely business perspective, if all drug use is taken out of horseracing, it will severely hurt the lower echelon of horses and possibly wipe out the racing industry:<sup>68</sup> “[t]here are a lot of great stakes races, but the majority of races run everyday, that keep the sport going throughout the year, are claiming races.”<sup>69</sup> It is the lower level racehorses that are running in these claiming races, and the lower level racehorses that are most in need of vitamins, supplements, and legal therapeutic drugs.

Many horses running at the claiming race level will break down or be unable to keep up in racing if they are limited to water, hay, and oats.<sup>70</sup> Without them the sport could not exist, thus the WHOA philosophy is an unrealistic direction for the sport to take.

## CONCLUSION

It is obvious that the horseracing industry needs tighter regulations concerning the administration of medication. Currently, each state implements its own rules of drug use at their

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<sup>63</sup> Water Hay Oats Alliance, <http://www.waterhayoatsalliance.com> (last visited April 5, 2016).

<sup>64</sup> *Id.*

<sup>65</sup> Interview, *supra* note 13.

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

<sup>68</sup> Interview, *supra* note 13.

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

racetracks; however, their policies are ineffective, and illegal doping remains a problem in horseracing. Prerace and post-race testing vary between states because some states use more effective tests, while other states forego testing to conserve resources. Additionally, there remains a lack of uniformity in the types of drugs tested for, and also, no single standard classification between states as to the legality of drugs and results in scenarios where a horse on a legal, therapeutic drug may win in State A, but the same horse's win in State B may be disqualified because of State B's classification of the therapeutic drug.

Testing, trainer insurer's rules, and even criminal prosecution do not seem to be adequate preventative measures. To eliminate the drug culture in horseracing, Congress should create a uniform drug policy. The Interstate Horseracing Act of 1978 gives the federal government the authority to regulate horseracing as it relates to gaming. When a racehorse runs with illegal drugs in its system the betting public is defrauded, and the outcome of the race is altered; therefore, drugging racehorses directly affects wagering and thus Congress could implement a uniform drug policy.

Over the past few years there have been various movements within the racing community to try and enact reform however, these movements are either not widely adopted or are unrealistic for the industry. The federal government should step in and create and enforce uniform rules in order to ensure the integrity of the sport as well as champion the safety of the horses.