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Betrayal of Trust

Introduction

Ben Johnson, Richard Virenque, and Man O' War each have something in common.

In their era, these athletes competed at the highest level of their respective sports: track and field, cycling, and horse racing. The first two are best known for their use of performance-enhancing substances to gain an edge on their competition. Ben Johnson used steroids.¹ Richard Virenque and his Festina teammates used performance-enhancing drugs, including erythropoietin (EPO).² Perhaps not as well known is the fact that Man O'War was given heroin to help his performance.³

Alas, using foreign substances in competitive athletic events is not a recent phenomenon.

Olympic athletes looked for a chemical advantage long before Ben Johnson competed at the 1988 Olympic games in Seoul, Korea. During the ancient games in Greece, athletes relied upon various concoctions to enhance their performance.⁴ Then,

¹ *Witness: Dying to Win* (CBC television Broadcast, Mar. 30, 2000); <http://tv.cbc.ca/witness/doping/dopmain.htm>. In 1988, at the Seoul Olympic Games, Canadian Ben Johnson ran the 100 meters in 9.79 seconds. He also tested positive for steroid use. He lost his gold medal. He was the first superstar to lose a medal. Doping in sports became a public issue all over the world.

² *Festina Affair: A timeline*, BBC Sport Online: Oct. 24, 2000: Results of a 23 July medical exam show that eight of the nine Festina cyclists, including Virenque, used the banned substance EPO and four used amphetamines. Note: Virenque, riding for Quickstep won stage seven from Lyon to Morzine-Avoriaz and finished the 2003 Tour de France in the polka dot jersey, as the King of the Mountains. *Virenque takes yellow jersey*, BBC Sport Online: Jul 12, 2000; Le Tour de France Official Web Site: <http://www.letour.fr/2003/us/index.html>; EPO works in the bone marrow increasing the production of red blood cells. Greg Garber, *ITF doing EPO testing for first season*, ESPN.com, May 29, 2003. EPO is used to treat anemia for individuals suffering from kidney disease, HIV, and certain cancers. *EPO: Treating Anemia in Chronic Renal Failure*, <http://www.kidney.org/general/atoz/content/epo.html>; Australian Sports Drug Agency, Fact Sheet: Erythropoietin, http://www.asda.org.au/media/fact_sheets/erythropoietin.htm

³ BILL SURFACE, *THE TRACK* 108-09 (1976).

⁴ *Witness: Dying to Win* (CBC television Broadcast, Mar. 30, 2000);

athletes looked to special mushrooms and plant seeds.⁵ Some consumed dog testicles.⁶

Today, modern athletes are not strangers to the promise of improved performance through biochemistry. Rather than special mushrooms, modern athletes may try ephedrine, EPO, or Nandrolone. Performance-enhancing substances are also being administered to equine athletes.

The first section of this paper reviews the current legal and regulatory structure for limiting the use of performance-enhancing substances in Thoroughbred racing. The second section addresses several fundamental weaknesses in the current system. The third section of this paper discusses alternative regulatory structures designed to more effectively prevent the use of performance-enhancing drugs in racing. Finally, this paper concludes with a call for a shift in policy from concerns about unfair advantage in competition to concerns for the long-term welfare of racehorses.

U.S. Regulatory Structure

There are very few federal statutes related to horse racing. The few federal statutes that do exist are concerned with regulating interstate wagering and levying income taxes. Traditionally, state legislatures have the authority to regulate matters that affect the health, safety, and morals of their citizens.⁷ Given the association between horse racing and wagering, states may strictly regulate racing as an activity that impacts the morals of its citizens.

State legislatures can directly regulate horse racing via statute. However, with the advent of administrative agencies, most state legislatures elect to draft an enabling

<http://tv.cbc.ca/witness/doping/dopmain.htm>.

⁵ *Id.*

⁶ *Id.*

⁷ These powers are collectively referred to as the Police Powers

statute. This statute creates an administrative agency, charges the agency to regulate horse racing within the state, and establishes the parameters of the agency's authority to regulate racing related activities.

Once created, these agencies are responsible for drafting and enforcing regulations that satisfy the goals of the enabling statute. For example, the California enabling statute states, “[J]urisdiction and supervision over meetings in this State 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.”⁸ In a subsequent section, the statute states, “The board shall have all powers necessary and proper to enable it to carry out fully and effectually the purposes of this chapter. Responsibilities of the board shall include, but not be limited to all of the following:

(1) Adopting rules and regulations for the protection of the public and the control of horse racing and parimutuel wagering.

(2) Administration and enforcement of all laws, rules, and regulations affecting horse racing and parimutuel wagering.

(3) Adjudication of controversies arising from the enforcement of those laws and regulations dealing with horse racing and parimutuel wagering.

(4) Licensing of each racing association and all persons, other than the public at large, who participates in a horse racing meeting with parimutuel wagering.

(5) Allocation of racing dates to qualified associations in accordance with law.”

Thus, the California legislature via the enabling statute grants the California Horse Racing Board broad authority to regulate horse racing.

⁸ CAL BUS. & PROF. CODE §19420 (2003).

Note, the legislative authority to delegate authority to administrative agencies has been regularly and thoroughly challenged. Thus, the legitimacy of agencies created for the regulation of horse racing has also been challenged. Courts have routinely upheld the legislative acts creating state agencies to regulate racing.⁹ Furthermore, courts have generally allowed for the granting of broad powers to these agencies.¹⁰

Like other administrative agencies, Racing Boards and Commissions (agencies) are authorized rule making authority.¹¹ Under this authority, agencies may create rules regulating the actions of persons engaged in conducting public horse racing meets involving wagering.¹² Racing agencies generally start off by prohibiting the types of substances that can be in a horse's system while participating in a race. For example, the Kentucky regulations state, "While participating in a race, a horse shall not carry in its body any medication, drug, substance, or metabolic derivative, that (a) Is a narcotic; (b) Could serve as a local anesthetic; or (c) Could stimulate or depress the circulatory, respiratory, or central nervous system of a horse, thereby affecting its speed."¹³ The regulation further prohibits, "A medication, drug, substance, or metabolic derivative thereof that might mask or screen the presence of prohibited drugs, or prevent or delay testing procedures. . ."¹⁴ Other racing agencies employ regulations with similar broad language prohibiting the presence of substances that affect the biological systems of horses. However, there are other approaches. For example, California prohibits the use

⁹ *Sandstrom v. California Horse Racing Board*, 189 P.2d 17 (1948).

¹⁰ *Jamison v. State Racing Commission*, 507 P.2d 426, (1973). The obvious intent of the legislature was to confer broad powers upon the commission in order to properly protect the public safety, morals, and general welfare in an area of activity wherein potentially dishonest practices and other evils often arise, unless the activity is carefully regulated and controlled.

¹¹ *Sandstrom v. California Horse Racing Board*, 189 P.2d 17 (1948).

¹² *Id.*

¹³ 810 KY. ADMIN. REGS. 1:018 (2003).

¹⁴ *Id.*

of any substance not specifically authorized by agency regulations.¹⁵

Within a certain window of time prior to a race, racing agencies prohibit the administration of any substance to a horse. These periods of time vary greatly between agencies. California prohibits the administration of most medications forty-eight hours prior to post time.¹⁶ The use of all medications is prohibited within twenty-four hours of post time.¹⁷ Kentucky specifies that no medications may be administered within four hours of post time.¹⁸

Regulations provide for both pre-race and post-race testing of horses. New York mandates pre-race testing of all horses entered to race.¹⁹ With regard to pre-race testing, most other states authorize stewards to take samples for testing from any horse entered in a race.²⁰ Racing agencies require post-race testing of all horses that win a race. Other horses that participated in the race may also be subject to post-race testing.²¹

Samples of urine, blood, or saliva may be authorized for collection for testing purposes. These samples are forwarded to designated laboratories. Frequently, the samples are split. One portion of the sample is used to conduct initial testing.²² The remaining portion is preserved for confirmation testing of positive results. Some labs do confirmation testing to corroborate positive results. Otherwise, the sample may be made available to the trainer or owner of the horse to conduct his or her own confirmation

¹⁵ CHRB Rule No. 1843

¹⁶ CHRB Rule No. 1843.5

¹⁷ *Id.*

¹⁸ 810 KY. ADMIN. REGS. 1:018 §2(2) (2003).

¹⁹ N.Y. COMP. CODES R. & REGS. Tit. 9, §4012.3 (2003).

²⁰ 810 KY. ADMIN. REGS. 1:018 § 7 (2003).

²¹ *Id.* In Kentucky, testing is based on performance and a randomly selected horse; NY requires that at least one horse other than the winner of a race be tested. N.Y. COMP. CODES R. & REGS. Tit. 9, §4012.3 (2003); See CHRB Rule No. 1858 for the rule in California.

²² 810 KY. ADMIN. REGS. 1:018 § 8 (2003); CHRB Rule No. 1859.25

testing.²³

Liability for positive results is placed firmly on the shoulders of trainers. A policy argument, that trainers are in the best position to protect the integrity of the sport and the interests of bettors, is advanced for making trainers responsible for the condition of the horse.²⁴ Most agencies have a regulation that implements some variant of what has become known as the trainer-insurer rule.

Under the trainer-insurer rule, the trainer is the absolute insurer for the condition of the horse.²⁵ Thus, trainers are strictly liable for any horse found to be in violation of a prohibited substance regulation.

Some states follow a slight variation of the rule. This variation creates a situation similar to a statutory presumption.²⁶ The evidentiary burden with regard to the element of fault shifts. Rather than the agency having to prove fault, fault is presumed. However, the trainer then has the opportunity to rebut this presumption. Failure to rebut the presumption results in a finding of a violation.²⁷

Agencies have adjudicative powers. Therefore, these controversies are initially decided at the administrative level.²⁸ However, a trainer, who exhausts his administrative remedies, may seek judicial review of an agency decision.²⁹ Generally, the standard for judicial review of an agency's final decision is the "substantial evidence" test.³⁰ Under this rule of review, an agency's final decision will only be set aside if it is not supported

²³ *Id.*

²⁴ *Arrington v. Louisiana State Racing Commission*, 482 So.2d 200, 201 (1986).

²⁵ CHRB Rule No. 1887.

²⁶ 810 KY. ADMIN. REGS. 1:018 § 3 (2003). **** ALR Section 23b

²⁷ *Id.*

²⁸ *See e.g.* CAL BUS. & PROF. CODE §19440(3) (2003). Responsibilities of the board shall include, but not be limited to. . .adjudication of controversies arising from the enforcement of those laws and regulations dealing with horse racing and parimutuel wagering.

²⁹ *See, Roush v. The Pari-mutuel Commission of the State of Wyoming*, 917 P.2d 1133 (1996).

³⁰ *Id.* Note: In some states licensees may be entitled to a trial de novo.

by substantial evidence.³¹ Substantial evidence is relevant evidence that a reasonable mind might accept in support of the conclusions of the agency.³²

When deciding these cases, the agencies have substantial disciplinary authority. The California enabling statutes specifically discuss the agency's authority to establish and enforce penalties. Section 19580 of the Business Code states, "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." At Section 19581, the California legislature mandates that, "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, by regulation, specifically authorized the use of the substance and the quantity and composition thereof." Section, 19582, provides, "Violations of section 19581, as determined by the board, are punishable as set forth in regulations adopted by the board."

The California legislature provides outer parameters for the penalties that the agency may impose for such violations.³³ The maximum penalty authorized for an offense is a three-year license suspension and a monetary penalty of fifty-thousand dollars.³⁴ Each subsequent offense must receive a greater penalty than the one provided for the previous offense.³⁵ For a third violation for a class I or class II substance revocation of an individual's license is authorized.³⁶

Reciprocal enforcement of penalties by other racing agencies is not usually a problem. For example, California Horse Racing Board Rule No. 1484, makes suspension

³¹ *Id. citing Devous v. Wyoming State Board of Medical Examiners*, 845 P.2d 408 (1993).

³² *Id.*

³³ See CAL BUS. & PROF. CODE §19582 (2003).

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

of an individual's license by another racing activity prima facie evidence that the individual is unfit to be granted or hold a California license during the term of the suspension. Additionally, an interstate compact exists for the licensure of individuals involved in horse racing.³⁷ International compacts also exist, providing reciprocity on an international level as well.

The regulatory structure for horse racing follows the standard model for administrative agencies. State legislatures create the agency authorized to regulate horse racing. The agency generates the regulations, enforces the regulations, and adjudicates violations of the regulations. Other states and even other countries agree by compact to give full faith and credit to administrative adjudicative decisions from other jurisdictions.

Ineffectiveness of this Regulatory System

Thus, in the United States, the use of performance-enhancing drugs in horse racing is an area regulated by each individual state agency. Each agency sets its own standards for the use of performance-enhancing substances. Each agency determines the best method for enforcing its regulations. Each agency independently adjudicates and sets penalties for violations.

The lack of uniform standards between the states poses a primary concern. States independently add different substances to their prohibited lists. They also set different cut off levels for positive results. In an age where interstate shipping of racehorses is an extremely common practice, lack of uniformity is a source for criticism.

³⁷INTERSTATE COMPACT ON LICENSURE OF PARTICIPANTS IN LIVE RACING WITH PARI-MUTUEL WAGERING. The primary purpose of the compact is to: Establish uniform requirements among the party states for the licensing of participants in live racing with pari-mutuel wagering, and ensure that all such participants who are licensed pursuant to this compact meet a uniform minimum standard of honesty and integrity.

Earlier this summer, Bob Baffert drew attention to this issue. The Baffert trained Kafwain finished second in the Louisiana Derby.³⁸ A post race urinalysis returned a sixteen nanogram per milliliter result for clenbuterol³⁹. The cut off level in Louisiana for clenbuterol was ten nanograms per milliliter.⁴⁰ The purse was forfeited and Baffert was fined one-thousand dollars.

Rather than call for a complete ban of clenbuterol, Baffert stated, “The deal is, clenbuterol is legal in every state, but almost all of them have different levels and withdrawal times.” “In this case, we did everything we could to comply with the rules, cutting off a week in advance, as our records show.” Baffert went on to say, “We’ll take our lumps on this, but we look forward to the day when the sport has uniform medication rules and uniform testing in every state.” “I, for one would be happy to contribute a percentage of earnings to fund uniform testing. I challenge the rest of the industry to join me.”

Baffert primarily trains horses in Southern California.⁴¹ The cut off level for clenbuterol in California is five nanograms per milliliter.⁴² Thus, while racing in Louisiana, Kafwain tested at three times the level of clenbuterol authorized by California.

The trainer’s argument that everything was done to comply with the rules is tenuous. In order to comply with the California regulation, levels of clenbuterol in his horses must be at half of the level authorized by Louisiana. Therefore, Baffert should

³⁸ *Kafwain loses second place money*, Associated Press, March 28, 2003.

³⁹ Clenbuterol is used for treating respiratory problems in horses. Lianne Wong, *Clenbuterol in Horse Racing* . . . Clenbuterol is also used for weight loss and also has muscle growth effects that can be compared to anabolic steroids. *Clenbuterol and Sports*, <http://www.clenbuterol.com/sports.htm>. Clenbuterol also has a stimulant effect. Australian Sports Drug Agency, Fact Sheet: Clenbuterol, http://www.asda.org.au/media/fact_sheets/clenbuterol%20.htm

⁴⁰ *Id.*

⁴¹In fact, Kafwain ran back in the Santa Anita Handicap. Steve Andersen, *Kafwain’s racing career over*, DAILY RACING FORM, July 10, 2003.

⁴² CHRB Rule No. 1844

have significant experience in stopping treatment with clenbuterol in time to reach this low level.

A more plausible view is that Baffert was trying to keep Kafwain at the higher levels authorized by Louisiana. The result was that Kafwain⁴³ exceeded the more liberal Louisiana standard for clenbuterol. However, Baffert's point remains that there would be no confusion if a uniform level for the use of clenbuterol existed. Similarly, there would be no confusion if agencies uniformly banned the use of clenbuterol.

Uniform standards are not the only obstacle to overcome. The ability of agencies to detect violations of their regulations is also suspect. The use of performance-enhancing substances that are not tested for and the use of agents to mask the presence of substances that are tested for compromise the ability of agencies to enforce their regulations.

Sports fans across the world recognize that regulatory agencies cannot test for new or unknown performance-enhancing substances. During the period prior to a substance being added to a list of banned substances, a window of opportunity exists for use of the substance in competition or training. Having each individual agency in the United States adjust their regulations is an inefficient method for dealing with this problem. Furthermore, not all agencies will simultaneously possess the resources necessary to begin testing for a newly prohibited substance.

Horse racing is no stranger to this phenomenon. The most recent example is the use of EPO. This is the same performance-enhancing drug used by world class cyclists in the 1990's.

⁴³Kafwain was retired in July with a tendon injury that prevented him from further racing. Steve Andersen, *Kafwain's racing career over*, DAILY RACING FORM, July 10, 2003.

In 2000, cycling's regulatory bodies finally caught up with the athletes and their doctors by implementing testing for EPO. The results scandalized the Tour de France, the Festina team, and Richard Virenque. New York and Texas recently added the Maylin-McKeever test for EPO in horses to their repertoire. The agencies in these two states were the first to start testing for EPO. Use of the test revealed that EPO was being used in racehorses in both jurisdictions.⁴⁴

Once a substance is added to the banned list, a possible method for getting around the prohibition exists. This method is known as masking. Masking involves using authorized substances to distort the results of tests examining the use of prohibited substances.

In racing, masking is frequently associated with the authorized use of furosemide.⁴⁵ The stress of a race may result in horses suffering pulmonary bleeding. Furosemide, is used to prevent bleeding.

Furosemide is also a powerful diuretic. Urinalysis is the most common method of testing for the use of prohibited substances. The use of a diuretic generates an increase in the production of urine, thereby diluting the proportion of prohibited substance found in the horse's urine.⁴⁶ The goal is to reduce the ratio to a level below the cut off point set for positive results.⁴⁷

Use of furosemide can result in the excretion of twenty pounds of urine by the

⁴⁴ Bergstein 27 Feb 03 and 17 April 03(DRF) EPO use may still be hard to detect in the future, because the drug can be used during heavy training to create results and then withdrawn from the system well in advance of a race. This fact has led to concerns that testing should be conducted on racehorses on a regular basis; not just when they are racing. The ITF added EPO testing for tennis players this year also.

⁴⁵ Bill Heller, *RUN BABY RUN* pp.48-58; 155-56 (2002).

⁴⁶ *Id.*; Stephanie L. Church, *Rules on the Road to Victory*, THE HORSE INTERACTIVE, February 2001. <http://thehorse.com>

⁴⁷ *Id.*

horse.⁴⁸ Obviously, when tests are based on results of nanograms per liter twenty pounds of urine can result in a significant dilution of the system. This diuretic effect, can also be used to flush traces of prohibited substances from the horse.

In the past, other substances have been used for masking. Dipyrone, a non-steroidal anti-inflammatory drug used for colic relief was associated with masking in the 1970's.⁴⁹ Since then, dipyrone has been banned in the United States and the United Kingdom.⁵⁰ However, the drug is still readily available in other countries.⁵¹

Finally, penalties for violations are neither severe nor swift. Racing agencies demonstrate far too much leniency in the penalties imposed for the use of prohibited substances. For example, on September 8, 2003 the California Horse Racing Commission fined trainer Wesley Ward thirty-thousand dollars after four of his horses tested positive for an excessive amount of clenbuterol. There was no suspension. This penalty was reached by agreement between the trainer and the agency. According to the *Daily Racing Form*, "The fine is the largest issued by the CHRB in recent years, and may be a record."⁵²

Most fines are significantly less.⁵³ However, a thirty-thousand dollar fine is not likely to strike fear in the hearts of potential violators. Three of the horses won their races and the other placed second. Their combined purse earnings were sixty-thousand

⁴⁸ Bill Heller, *RUN BABY RUN* (2002).

⁴⁹ Stephanie L. Church, *Rules on the Road to Victory*, THE HORSE INTERACTIVE, February 2001. <http://thehorse.com>

⁵⁰ *Id.*

⁵¹ J.E. Edwards, F. Messeguer, C. Faura, R.A. Moore, H.J. McQuay, *Single dose dipyrone for acute renal colic pain*, THE COCHRANE LIBRARY, Issue No. 3 (2003).

⁵² Note: The previous record was a \$12,000 fine and a ninety day suspension after eight horses from Ted West's barn tested positive for clenbuterol. Steve Andersen, *Wesley Ward fined \$30,000*, DAILY RACING FORM, September 8, 2003.

⁵³ Searching the News Archives of Thoroughbred Times for the most severe recent penalties revealed a \$5,000 fine and 20d suspension of Gary Contessa for the use of ephedrine and pseudoephedrine in his horses and a \$3,000 fine and 45d suspension of Richard Dutrow for a Mepivacaine positive.

and four hundred dollars.⁵⁴ Although the purses were redistributed, the entire incident begs the question: How many purses were won before the excessive use of clenbuterol was detected? Also, keep in mind that winnings from the wagers were not redistributed.

Given that a \$30,000 fine is an anomaly, the risk to reward ratio may be seen as favoring the use of performance-enhancing substances.

Delay in implementing penalties poses another enforcement problem. The offenses occurred on January 4, 5, 9, and 11, 2003.⁵⁵ One of the benefits of a plea agreement is the conservation of time and resources by the prosecuting agency. Eight months seems to be an unusual amount of time expended for the benefit of a fine with no suspension.

However, eight months is a relatively short period of time compared to the three year meandering of another case involving Bob Baffert.⁵⁶ Baffert was the trainer of record for Nautical Look. Nautical Look was stabled at Hollywood Park. The horse was under the direct care of one of Baffert's assistant trainers. On May 3, 2000, Nautical Look won a race at Hollywood Park. Post-race urine and blood samples were secured by the California Horse Racing Board.

The samples were split. One set was used for initial testing. The other set was to be preserved for confirmation testing. Nautical Look's initial urinalysis came back positive for morphine. The confirmation urine sample was tested. This sample also came back positive for morphine.

⁵⁴ Steve Andersen, *Wesley Ward fined \$30,000*, DAILY RACING FORM, September 8, 2003.

⁵⁵ *Id.*

⁵⁶ Rather than repeatedly footnote this section, I have listed sources used in this footnote. *Baffert v. California Horse Racing Board*, 332 F.3d 613 (9th Cir. 2003); *Trainer Bob Baffert suspended for 60 days*, Associated Press, June 17, 2001; Richard Eng, *Dubious evidence makes suspension of Baffert baffling*, LAS VEGAS REVIEW-JOURNAL, June 22, 2001; *Court Overturns Ruling that Racing Board Violated Horse Trainer's Due Process Rights in Doping Case*, METROPOLITAN NEWS-ENTERPRISE, JUNE 9, 2003.

During the course of an eight-day administrative hearing⁵⁷, the evidence demonstrated that the California Horse Racing Board had not tested either of the blood samples. In fact both blood samples had been destroyed. The testing sample was destroyed as a result of a laboratory policy of destroying one-third of all blood samples submitted in order to preserve space at the laboratory. The confirmation or split sample was destroyed after the 45-day period allotted to trainers and owners to request testing expired.

Proceeding on the results of the urinalysis, in June of 2001, the three steward panel issued a sixty-day suspension. Baffert appealed the decision to the Board. He was granted a stay of execution pending the appeal.

While the appeal was pending, Baffert filed a 42 U.S.C. §1983 claim alleging that by failing to preserve the blood samples the state of California violated his right to due process. Perversely, the district court agreed with Baffert. The district court granted a preliminary injunction forbidding the state from enforcing the penalty. Then, the district court granted summary judgment in favor of Baffert, issued a permanent injunction, and awarded \$102,780 dollars in attorney's fees.

The state prevailed on its appeal to the Ninth Circuit. The Ninth Circuit found that the district court should have abstained from hearing the case.⁵⁸ Because the court should have abstained, the injunction was removed and the award of attorney's fees was reversed. Thus, on June 6, 2003, the California Horse Racing Board was authorized to proceed with the original administrative appeal of a decision issued in June of 2001 for a

⁵⁷ Ironically, Stephen A. Barker, a state chemist for the Louisiana Racing Commission testified as an expert witness on Baffert's behalf.

⁵⁸ *Younger v. Harris* 401 U.S. 37 (1971).

violation that occurred in May 2000.⁵⁹

Ultimately, the penalties meted out by agencies must be indicative of an underlying zero tolerance policy. Additionally, the process for reviewing an agency decision must be streamlined.⁶⁰

Proposing a Model System

There is a veritable alphabet soup of agencies and organizations involved in the sport of horse racing in the United States. Although these organizations recognize that the use of performance-enhancing substances should be a concern for the industry, little more than meeting, studying, and discussing the issue actually occurs.⁶¹ The one notable exception is the Thoroughbred Owner's and Breeder's Association (TOBA).

TOBA is the parent organization for the American Graded Stakes Committee. The Stakes Committee annually reviews and grades all of the U.S. stakes races. The most prestigious stakes races are Grade 1 races. Stakes races decrease in prestige to Grade 2, Grade 3, and ungraded races. In addition to the increased value of the purses in graded stakes races, the quality of races won by a horse increases the value of their offspring.

The committee announced that the status of a race will be affected by the quality

⁵⁹ As of 19 Sep 03 the CHRB had not completed the administrative review of this case. E-mail, Subj: Bob Baffert, From Sharyn Jolly of CHRB to Adam Stoffa, Sep. 19, 2003.

⁶⁰ Nick Zito recently relented and agreed to accept the consequences for a lidocaine positive on one of his horses. This case had pending for almost three years as well. Mike Kane, *Zito Files \$8 Million Federal Suit in New York*, THE BLOOD-HORSE, May 29, 2003; *Zito to accept consequences of drug positive*, THOROUGHBRED TIMES, June, 18, 2003. Trainers regularly appeal decisions and have stays granted to allow them to keep training. E.g. David Grening, *Dutrow appealing drug ban*, DAILY RACING FORM, June 24, 2003.

⁶¹ NTRA, TOBA, ARCI, The Jockey Club, etc.

Matt Hegarty, *Group Working on drug rules*, DAILY RACING FORM, Sep. 26, 2003; *Drug consortium meets privately, refuses to release details on Tuesday*, THOROUGHBRED TIMES, July, 15, 2003; Bill Finley, *Baby steps are better than no steps*, ESPN.com, July 3, 2003; Matt Hegarty, *Drugs remain the hot topic*, DAILY RACING FORM, Nov. 30, 2001 TOBA presidents Comments in Baby Steps Article

of post race testing. In order to maintain graded stakes status, starting in 2004, the committee requires that all horses participating in a graded stakes race be tested.⁶² Furthermore, each sample is to be tested for a designated 140 different performance-enhancing substances.⁶³ Failure to comply with these requirements will result in the race losing its graded status for the next year. Hopefully, the committee will set strict standards defying the tremendous resistance that this policy will likely encounter within the industry. In American racing, strict standards have a history of failure.

In 1995, New York was the lone jurisdiction prohibiting the race day use of furosemide (Lasix, Salex).⁶⁴ That year, a New York track, Belmont Park, was scheduled to host the Breeder's Cup. Concerns surfaced that top horses would not participate, because of the regulation. Simultaneously, horsemen pressed for the right to use furosemide. When faced with what was perceived as a serious threat to keep top contenders away from the Breeder's Cup, the last regulatory agency to hold out against the race day use of furosemide caved in to the pressure.

Any serious proposal for a new policy dealing with the problem of performance-enhancing substances must be strong enough to withstand political pressure, address the weaknesses of the current system, and be flexible enough to adapt to future problems.

First, the regulatory structure for prohibiting the use of performance-enhancing substances in thoroughbred horse racing must be standardized. Standardization needs to occur at the national level. Two realistic methods present themselves for implementing a national regulatory structure. The stronger method is federal legislation and regulation.

⁶² Unfortunately, because these policies will only apply to graded stakes, the vast majority of horses racing in North America will not benefit from this policy.

⁶³ Bill Finley, *Baby steps are better than no steps*, ESPN.com, July 3, 2003. Presumably, the committee intends to modify the testing protocol as they become aware of the use of new performance-enhancing or masking substances.

⁶⁴ Bill Heller, *RUN BABY RUN* pp. 103-113, (2002).

The second method relies on an interstate compact. Because states may elect to participate, not participate, or withdraw from interstate compacts, there is a far greater risk of an interstate compact falling apart.

A third approach is presently being pursued by an industry consortium.⁶⁵ The Racing Medication and Testing Consortium is supported by horsemen's groups, racing organizations, and industry officials. The consortium is working on generating a set of model rules for drug use.⁶⁶ They hope to present the uniform rules on December 10, 2003.⁶⁷ They intend to have a model policy by the end of the first quarter of 2004.⁶⁸

Then, they propose to lobby state regulatory agencies to adopt these standards.⁶⁹ If the consortium can convince a majority of agencies to adopt the model policy without implementing any changes, then they will have accomplished the same level of success that could be achieved via an interstate compact. However, if regulatory agencies are persuaded to consider the model policy, there is no guarantee that they will adopt the policy as it is written. Similarly, if a regulatory agency should adopt the policy as written, they still have the ability to modify the rules within their jurisdiction in the future. Over time, the end result is likely to be a return to varied rules between different jurisdictions.

A more substantial criticism involves the source of this, yet to be proposed, model policy. The industry is proposing standards by which it is willing to be regulated. The industry itself seems to be a dubious source for serious reform.⁷⁰

⁶⁵ *Drug Consortium meets privately, refuses to release details on Tuesday*, THOROUGHBRED TIMES, July, 15, 2003; Matt Hegarty, *Group Working on drug rules*, DAILY RACING FORM, Sep. 26, 2003.

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ There recent concern with the use of performance enhancing substances begs the question of how did they let it get so out of hand in the first place.

Federal legislation would be the strongest method for addressing the problem.⁷¹ Furthermore, similar legislation and regulation already exists in another area of equine competition.

In 1970, Congress passed the Horse Protection Act.⁷² This Act made soring of horses illegal.

Soring involves applying an irritating substance or device to the lower part of a horse's forelegs or front feet. The horse suffers pain as it walks. The horse reacts to the pain by drawing its legs up high to attempt to escape the painful sensation. Soring is designed to exaggerate the gait of horses to enhance their performance when being shown.

The United States Department of Agriculture has regulatory authority for enforcement of the Horse Protection Act.⁷³ The Horse Protection Act prohibits the showing, exhibition, transportation, and sale of “sore” horses.⁷⁴ The federal agency has authority to generate, implement, and enforce regulations for carrying out this Congressional mandate.⁷⁵

Prior to the Horse Protection Act, soring was a significant problem in the showing of Tennessee Walking Horses.⁷⁶ Within ten years of the implementation of this legislation, the Department of Agriculture achieved significant success in limiting soring of these horses. By 1980 agency figures indicated that ninety-eight to ninety-nine percent

⁷¹ Federal legislation has been proposed in this area in the past. See *The Corrupt Horse Racing Practices Act of 1980* proposed May 16, 1981 in the House of Representatives. Bill Heller, *RUN BABY RUN*, p. 49, (2002).

⁷² 15 USC 1821-1831

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *RRR Farms, Ltd. v. American Horse Protection Association*, 957 SW2d 121 (1997). Tennessee Walking horses are well-known for their quick high-stepping gait. They are prized as saddle horses.

of all Tennessee Walkers were free from any soring at the time of show or sale.⁷⁷

The Horse Protection Act proves that federal legislation and federal agency regulation prohibiting the use of performance-enhancing measures in equine competition can be achieved with success.

A model system of federal regulation can be broken down into three elements. The first element is the list of prohibited substances. A standardized list of prohibited substances eliminates the current problem of different substances or different levels of use being authorized in different racing jurisdictions. Because new substances can be introduced into the sport, the prohibited substance list must be reviewed and updated every six months.

The second element of the model system addresses testing procedures. The testing procedures must create a comprehensive testing program. A comprehensive program means that all horses that are in competition or in training for competition will be subject to testing.

To eliminate the use of medications on race day, the testing program will require the use of holding barns. At least twenty-four hours prior to a race, all horses that intend to race will be presented to the holding barn. The agency will provide strict security at the holding barn. Visits to the horses will be limited and highly supervised.

There will be no medications administered to horses admitted to a holding barn. If a determination is made that the horse requires medication, the horse will be eliminated from the race and permitted to return to a training barn. Prior to releasing a horse from the holding barn to the track to compete in a race, a urine sample⁷⁸ will be collected for

⁷⁷ *Id.*

⁷⁸ A blood sample could be required as well. Also, samples could be taken upon admission to the holding barn.

testing purposes.

To prevent the use of performance-enhancing substances that are most effective during the training cycle, out of competition testing will be required. Out of competition testing will be conducted through a random urinalysis program. Under this system, to be eligible to compete, a horse must be registered for random testing. To qualify as eligible for racing, a horse must have been registered for at least six months prior to the date of the race.

Random tests will be conducted with no prior notice. On the day of testing, a trainer will be notified that his horse has been randomly selected. After notification is made, the horse must be presented to a designated collection facility within four hours. Failure to present the horse or failure to collect a sample will result in the horse being barred from competition for six months. After the six-month period expires, the horse must complete a successful screening before regaining eligibility for competition.

The third and final element of the model system is strict enforcement of penalties. A table of penalties with set guidelines for application of the penalties will be established. Discretion for deviating from the guidelines will be extremely limited. The penalties must reflect an overall goal of zero tolerance for drug use within the sport of horse racing. Like the Horse Protection Act, both civil and criminal penalties must be authorized.⁷⁹

Both owners and trainers will be subject to punishment for violations. Although trainers are responsible for the day-to-day care of the animals, the owner is ultimately responsible for his horse. Furthermore, given their position owners may encourage or

⁷⁹ And the Corrupt Horse Racing Practices Act of 1980.

discourage the methods employed by a trainer.⁸⁰ An owner that contracts a trainer or veterinarian without adequately conducting a background check is a liability to his horse and to the sport. An owner that intentionally seeks out trainers and veterinarians that will help him in his efforts to use performance-enhancing drugs is as guilty as the trainer or veterinarian that administers the drug.

This very accusation has been attached to owner Michael Gill. Gill is the leading owner in the country. His horses have raced 1,475 times so far this year.⁸¹ His horses have won over six and a half million dollars in purses.⁸² Gill also has a questionable past as an owner and trainer.⁸³

Previously, the New Hampshire regulatory agency barred Gill from participating in the sport for three years for a drug violation. The controversy surrounding Gill came to a peak on February 3, 2003 at Gulfstream Park. Casual Conflict, a nine-year old gelding owned by Gill broke down. The horse had made 19 starts in the previous twelve months. His right front leg was seriously injured. Consequently, Casual Conflict was euthanized. Without authorization from track officials, Philip Aleong, a veterinarian associated with Gill, amputated the leg.

Gill explained that the action was taken to discover the cause of the breakdown.

Both Gill and Shuman indicated that taking legs off of broken down horses was a

⁸⁰ Owners such as George Steinbrenner in baseball and Jerry Jones in football serve as popular examples of the level of influence that can be exerted by an owner.

⁸¹ Equibase Statistics as of Sep. 15, 2003.

⁸² *Id.*

⁸³ Rather than repeatedly footnote this section, I have listed sources used in this footnote. *U.S. v. Patrick*, 985 F.Supp. 543 (1997); Owner Standings NTRA; Andrew Beyer, *Gill's style runs Delaware wrong way*, DAILY RACING FORM, Feb. 7, 2003; Matt Hegarty, *Gill: Vet Took leg to find the cause of breakdown*, DAILY RACING FORM; Andrew Beyer, *A Disappearance and Other Miracles*, WASHINGTON POST, Feb. 12, 2003; Veterinarian *Patrick stripped of privileges at Gulfstream*, THOROUGHbred TIMES, Feb. 13, 2003; *Leading owner Gill banned from Delaware Park*, THOROUGHbred TIMES, Apr. 3, 2003; Stan Bergstein, *Right of exclusion still paramount*, DAILY RACING FORM, reprinted by Harness Tracks of America, May 8, 2003; Tom Keyser, *Gill has second thoughts, says he's in game to stay*, BALTIMORE SUN, Sep. 14, 2003; *Controversial Gill shuns Monmouth owner title*, THOROUGHbred TIMES, Sep. 28, 2003

common practice. Gill stated that Aleong had explained to him that he had two other legs in his freezer.

The director of the Florida agency disagreed. He did not think that the taking of a leg from a broken down horse was a common practice. He stated that the track vet was very concerned about the unauthorized amputation. The state veterinarian told the director that this was not something he had ever seen. The leg was recovered and forwarded to the University of Florida for testing. The synovial fluid tested only revealed the euthanasia agents and phenylbutazone.⁸⁴

The incident led to further investigation. Another of Gill's veterinarians, Leonard Patrick had his privileges to Gulfstream Park revoked. Patrick was found to have failed to comply with proper storage requirements for Class 3 and Class 4 drugs.

Patrick has a problematic past.⁸⁵

In 1997, he was accused of conspiring with the owner/trainer Robert Deo to intentionally kill the racehorse Oblige. Allegedly, Patrick injected a knee joint of the horse with E. Coli bacteria soon after another vet had tapped the knee. The ensuing infection resulted in the horse having to be euthanized. Deo attributed the ensuing infection and the death of his horse to malpractice by the veterinarian that had tapped the knee and made a claim for a \$75,000.00 insurance payment.

On February 28, 1997, in the United States District Court for the Eastern District of Pennsylvania, Patrick was convicted of conspiracy to commit mail fraud and two counts of false declarations. As a result of the conviction, Pennsylvania revoked Patrick's license to practice veterinary medicine. On October 1, 1997, due to the

⁸⁴ The effect on testing of freezing the leg must be considered. Also, the quality of results from testing synovial fluid should be analyzed as well.

⁸⁵ *U.S. v. Patrick*, 985 F.Supp. 543 (1997).

government's failure to provide the defense with potentially helpful documents, Patrick's request for a new trial was granted. Ultimately, in 2001, Pennsylvania reinstated Patrick's license.

On March 29, 2003, Gill received a letter indicating that he was not welcome on the grounds of Delaware Park. Furthermore, Delaware Park would not accept entries from his stable. Many other tracks refused to give Gill stall space.

During the spring and summer, Gill indicated that he was interested in selling his racing stock and getting out of the sport. But, Gill purchased a private training facility in Southeastern Pennsylvania. He found barn space in Maryland. Recently, he stated, "I am coming back bigger and badder." "The ultimate goal is to go as far as my ego can take me."⁸⁶

In some cases, punishing the trainer alone may not resolve the problem. If the owner is the source of the problem, then the owner merely replaces the trainer. The problem will continue, unless the owner is punished.

Ultimately, federal legislation enabling the Department of Agriculture to regulate the use of performance-enhancing substances in horse racing would present a standardized method for dealing with this problem with a reasonable likelihood of success. Such a program would create uniformity in the three key areas of banned substances, testing procedures, and enforcement measures.

But, this solution is not being proposed or seriously considered. Two key reasons exist for this state of affairs. First, horse racing is not just a sport, it is an industry made up of interrelated businesses. No industry seeks federal regulation on its own. In fact,

⁸⁶ *Gill has second thoughts, says he's in game to stay*, BALTIMORE SUN, Sep. 14, 2003

when similar legislation, the Corrupt Horse Racing Practices Act of 1980⁸⁷, was proposed the industry lobbied against it and state agencies stiffened their regulations in an effort diminish the need for federal regulation.⁸⁸

Second, horse racing generates capital and revenue. Simulcasting and account wagering have spurred revenue growth over the last ten years. Now, slot machines and video poker have been piggy backed onto racing operations. As a result, tracks generate greater amounts of capital for their owners and additional revenue for their states.

A portion of the slot machine revenue and simulcasting revenue is designated for increased purses. Since 1992, the average purse per race has nearly doubled from \$10,080 to \$19,782.⁸⁹ The larger purses entice horsemen to enter their horses in competition.

There are other interesting numbers to consider. In 1950, 22,388 horses started in 26, 932 races in North America.⁹⁰ Each horse averaged 10.91 starts during the course of the year.⁹¹ In 2002, 72,825 horses started in 59,896 races.⁹² Each horse averaged 6.80 starts per year.⁹³ In 1950 fewer horses were running more frequently. In 2002, more horses were running less frequently.

Given the vast increase in the number of races conducted, 26,932 in 1950 and 59,896 in 2002, one interpretation of this data is that a greater number of races are being run with lower quality horses. Arguably, these second tier horses are not capable of

⁸⁷ This was a grass roots effort to reform racing started in Illinois by Donna Ewing of the Hooved Animal Rescue and Protection Society and Robert Baker, an owner. The Justice Department's Drug Enforcement Agency was proposed as the regulatory agency. Civil and Criminal penalties were included in the proposed legislation. Bill Heller, *RUN BABY RUN*, p. 49, (2002).

⁸⁸ *Id.*

⁸⁹ *Relationship of US Races, Purses And Foal Crops*, JOCKEY CLUB FACT BOOK (2003).

⁹⁰ *Size of Field and Starts per Horse*, JOCKEY CLUB FACT BOOK (2003).

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.*

enduring the hardship of racing. Without drugs, these horses cannot get to the track. With less horses on the track there are less races. Fewer races generate less revenue, less profit, and smaller purses. There is no incentive or support for deciding that a horse is not meant to race. Rather, substantial motivations exist to get horses onto the track.

Change of Focus: Protect the Horses

At this point, a change of focus needs to take place. Performance-enhancing substances should be banned from racing not merely because an unfair advantage in competition may result. Performance-enhancing substances must be banned from racing, because they pose a substantial risk to the health and safety of the horses.

Pain and swelling are symptoms of an injury. Masking these symptoms is not the same as treating the injury.⁹⁴ A horse running at full speed without feeling the pain still stresses the underlying injury. In some cases, the horse runs the risk of stressing the injury to the point of structural failure.

Drug interactions pose another serious risk. Concerns have been raised about the concurrent use of clenbuterol and furosemide.⁹⁵ Potential injuries include overheating and dehydration. Similar concerns have recently been raised about the use of furosemide and EPO.⁹⁶

EPO, which has been used to treat anemia, acts to thicken blood.⁹⁷ Abnormally, thickened blood can lead to stroke.⁹⁸ Dehydration adds to this risk. Strenuous exercise

⁹⁴ In racing, the drug most criticized for having this effect is phenylbutazone (Bute). Phenylbutazone is a Non-steroidal anti-inflammatory drug. It also has an analgesic effect. *The Use of Phenylbutazone (Bute) in Horses*, http://horseproducts.com.stablemade.com/_Articles/Phenylbutazone.htm

⁹⁵ Bill Heller, *RUN BABY RUN*, p. 158, (2002).

⁹⁶ Stan Bergstein, *Texans see EPO as potential killer*, *DAILY RACING FORM*, Apr. 17, 2003.

⁹⁷ *Id.* and *EPO: Treating Anemia in Chronic Renal Failure*, <http://www.kidney.org/general/atoz/content/epo.html>; Australian Sports Drug Agency, Fact Sheet: Erythropoietin.

⁹⁸ Stan Bergstein, *Texans see EPO as potential killer*, *DAILY RACING FORM*, Apr. 17, 2003; Stan Bergstein,

such as training for or running in a race increases the risk of dehydration. Furosemide is a diuretic. Use of a diuretic in combination with strenuous exercise increases the risk of dehydration. Thus, using a combination of these two drugs would seem to unreasonably amplify the risk of a horse suffering a debilitating stroke.

Long term effects from exposure to performance-enhancing substances must also be considered.⁹⁹ Negative developmental, behavioral, and physiological effects may result from the use of these substances. The use of these substances in juvenile horses may worsen the risk of long term side effects. Failure to consider the long-term effects means that many horses may suffer unforeseen consequences after their racing career is over.

In 1995, John Van Lindt, the former Chairman of the New York agency wrote a letter warning against the proposal to allow race day furosemide.¹⁰⁰ Today, in confronting the use of performance-enhancing substances, Mr. Van Lindt's words still ring true, "I have always believed that the widespread and often indiscriminate use of medication has the capacity of debasing this magnificent sport. Comparisons with other 'big league sports' are obvious. But, at least, there, the participant can make a cognizant, if often irrational decision on the use of a drug to enhance his or her performance or alleviate the pain associated with it. As a backstretch employee once told me, horses are very trusting animals. They put their trust in us to care for and protect them. That is a very awesome responsibility ..."

Conclusion

A Scenario for Tragedy, USTA. <http://www.ustrotting.com/hoofbeats/stan-ma.htm>.

⁹⁹ One concern is the effects of Lasix, clenbuterol, and NSAIDs on kidneys.

¹⁰⁰ Bill Heller, *RUN BABY RUN*, p. 109-10, (2002).

The use of performance-enhancing drugs in sports is a problem that will never be fully resolved. However, a program can be put in place that would make the use of performance-enhancing substances the exception rather than the rule. Unfortunately, today, in racing in the United States, the opposite appears to be true. The ongoing failure to resolve this issue is best described as a betrayal of trust.

-Adam Paul Stoffa

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