

RECLAIMING THE GLORY IN THE “SPORT OF KINGS” – UNIFORMITY IS THE ANSWER

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INTRODUCTION

The long and storied history of thoroughbred horse racing in the United States dates back to the mid-1700s. The allure of horse racing has captured the attention of the American public and developed into a pillar of American sport. Although the development and growth of this sport in the United States has not always been smooth, the *Sport of Kings*¹ has stood the test of time and will continue to flourish, despite the many issues that continue to plague it.

Horse racing has become a national pastime in the United States, despite the considerable and well-known stigmas attached to the sport.² The significant growth of the sport is attributable to a variety of factors, including that it is a venue for legalized gambling, which has helped facilitate the sport's

1. Michael Russell, *Horse Racing – The Sport of Kings*, available at <http://ezinearticles.com/?Horse-Racing--The-Sport-of-Kings&id=170027> (last visited April 11, 2010) (discussing the origins of the term “Sport of Kings.”).

2. For example, since thoroughbred horse racing is a venue for legal gambling, gambling addictions/problems sometimes develop among some fans of the sport. As evidence of this, most, if not all racetracks throughout the country have signs and posters explaining where help can be obtained for those who believe they have a gambling problem; *See also Whipping in horse racing's sore point*, available at <http://www.horsetalk.co.nz/features/whipping-137.shtml> (last visited April 11, 2010) (animal welfare activists believe horse racing is cruel because of the way the whip is used on the racehorse.)

development, while simultaneously contributing to a majority of the problems that exist in horse racing today.

The influx of money has caused many stakeholders³ and other members of the industry to compromise the health and safety of the racehorse by supplementing the typical hay and oats diet with performance-enhancing drugs and abuse of medications. As technology has developed, these problems have ballooned into an issue that currently threatens the well being of horses and the overall integrity of the sport.

In the United States, horse racing is governed on a state level, through state racing commissions, which allows each state to regulate the sport as it deems fit. The resultant lack of uniformity in regulating horse racing has allowed the use of performance-enhancing drugs and abuse of medications to spiral out of control. Recent negative publicity, including the breakdown of several horses in recent high profile races,⁴ and trainer, Rick Dutrow Jr. acknowledging the use of steroids on Big Brown, has further tarnished the sport's image.⁵

The current state of regulation in horse racing perpetuates the negative perception of the sport, and allows the racehorse to suffer the harmful consequences of an illogical system. Further, the current regulatory structure has caused the funding of laboratories to be stretched thin, thereby compromising the development of testing methods and procedures. While the public perception of horse racing is an important consideration, the health and well being of the horses and overall integrity of the sport should be the paramount motivation for change.

This Comment will analyze the current relationship between the use of performance-enhancing drugs and medication in horse racing in America. Section I will discuss the history of horse racing, and factors that have lead to it becoming a popular sport. Section II recounts the history of performance-enhancing drugs and medications, and the

3. The terms "horsemen" and "stakeholders" include, but is not limited to, owners, trainers and jockeys.

4. See George Washington (horse) -- Biography, available at <http://www.breederscup.com/bio.aspx?id=20398> (last visited Apr. 11, 2010); See also Barbaro (horse) - Biography, available at <http://www.breederscup.com/bio.aspx?id=17274> (last visited Apr. 11, 2010).

5. Big Brown trainer admits giving horse steroids: report, http://afp.google.com/article/ALEqM5j1CWGSMLUY_q0ssCPD8hgDfiOmNw (last visited Apr. 20, 2010).

development of testing procedures. Section III then treats in greater detail performance-enhancing drugs and medications, and the problems associated their use. Sections IV & V will analyze the lack of uniformity of the current regulatory systems in the United States, as compared to some more comprehensive international programs. Section VI highlights how the lack of a uniform regulatory structure has affected the public perception of horse racing. Section VII then analyzes several proposed rules currently being developed among entities affiliated with the United States horse racing industry. Finally, Section VIII proposes three ways in which a uniform regulatory structure, which includes establishing a uniform testing model, may be effectuated.

The use of performance-enhancing drugs and abuse of medication in horse racing poses serious problems, but it can be remedied quite easily with the cooperation of industry leaders. The sport is at a crossroad, and it is apparent that the majority of stakeholders recognize the need for a change.⁶ Horse racing can overcome this hurdle and reestablish itself, with cooperation and patience, as a pillar of American sport.

I. HISTORY OF HORSE RACING

A. Introduction

The sport of horse racing is one of the oldest in the world, with records of its origin dating as far back as 4500 BC.⁷ The development of organized horse racing dates back as far as 638 BC as an event in the ancient Greek Olympics.⁸ Modern horse racing originated around the 12th century, when English knights returned home from the Crusades with Arabian horses, which were known for their speed.⁹ In the early days, kings and nobility primarily enjoyed the sport. Over time, however, people of all classes have come to enjoy horse racing

6. *See Breeding, Drugs, and Breakdowns: The State of Thoroughbred Horseracing and the Welfare of the Thoroughbred Racehorse: Hearing Before Subcomm. On Commerce, Trade, and Consumer Protection*, 110th Cong. (2008).

7. *The History of Horse Racing*, <http://www.mrmike.com/explore/hrhist.htm> (last visited Oct. 23, 2008) (hereinafter "History of Horse Racing").

8. *Id.*; *See also* JORDAN CURNUTT, ANIMALS AND THE LAW: A SOURCEBOOK 258 (ABC-CLIO 2001) (stating that the Thirty-Third Olympiad was held in 644 B.C.).

9. History of Horse Racing, *supra* note 7; *See also* Curnutt 258, *supra* note 8.

and contributed to its development.¹⁰ Although there are a variety of explanations for its growth, the advent of legalized gambling in horse racing is likely the most important factor.¹¹

B. Development of Thoroughbreds

The history of thoroughbred horse racing can be traced back to England in the late 1600s, when three stallions, Darley Arabian, the Godolphin Arabian, and the Byerley Turk were bred with English mares to create a “thoroughbred.”¹² As a result of this breeding, these thoroughbreds could “carry weight with sustained speed over extended distances, qualities that brought a new dimension to the burgeoning sport of horse racing.”¹³

C. Thoroughbred Horse Racing in America

Thoroughbred horse racing in the United States reportedly dates back to 1745 in Annapolis, Maryland, when Governor Samuel Oige “first staged a Thoroughbred race ‘in English Style.’”¹⁴ This meant a race of thoroughbred horses, with mounted jockeys, running a dirt or grass racecourse at distances ranging from three-quarters of a mile to two miles.¹⁵

As the economy grew during the industrial revolution, gambling on horse racing increased significantly, concomitantly increasing the sport’s popularity.¹⁶ By 1890, over three hundred racetracks were operating in the United States.¹⁷ During the early 1900s, racing experienced a period of significant decline due to anti-gambling legislation, which was enacted in almost all states.¹⁸ In 1908, however, pari-

10. *Id.*

11. Wes Wiseman, *Arbitrage Betting Horse Racing Part 1 – Advantages*, available at <http://ezinearticles.com/?Arbitrage-Betting-Horse-Racing-Part-1---Advantages&id=1381024> (last visited Apr. 20, 2010).

12. JockeyClub.com, *Thoroughly Thoroughbred*, http://www.jockeyclub.com/pdfs/thoroughly_thoroughbred.pdf (last visited Oct. 23, 2008) (hereinafter “Thoroughly Thoroughbred”); *See also* wikipedia.com, English Riding, available at http://en.wikipedia.org/wiki/English_riding (last visited Apr. 11, 2010) (describing “English style” riding).

13. *Id.*

14. *Id.*

15. *See* History of Horse Racing, *supra* note 7.

16. *Id.*

17. *Id.*

18. *Id.*

mutuel betting was legalized for the Kentucky Derby, which prompted many other states to follow Kentucky's lead.¹⁹ State legislatures agreed to legalize pari-mutuel wagering in exchange for a percentage of the total money wagered.²⁰

Following World War I, horse racing in the United States experienced great prosperity due to the popularity of horses such as Man o' War and Seabiscuit.²¹ This success lasted until World War II, when the industry suffered through another period of decline.²² However, in the 1970's, horse racing again recaptured the public's attention with American horse racing's Triple Crown winners: Secretariat, Seattle Slew, and Affirmed.²³ Track attendance from 1946 to 1973 increased from 26 million to 53.3 million.²⁴ Although over the past few decades the sport has experienced a significant period of decline, it has continued to garner public interest through the American Triple Crown and the Breeder's Cup.²⁵

D. Gambling and Horse Racing

A major factor in the development of horse racing is the fact that the sport provides a legalized venue for gambling. Gambling on horse racing in America is called pari-mutuel wagering,²⁶ a system in which the track receives a fixed percentage of the total amount wagered in order to cover expenses, such as operating costs, racing purses²⁷, and state and local taxes.²⁸ Once these expenses are subtracted from the total amount, the balance is returned to a pool and shared among all winning bets.²⁹

19. *Grinstead v. Kirby*, 110 S.W. 247, 248 (Ky. App. 1908); *See also* History of Horse Racing, *supra* note 7; *See also* Horse Racing and Showing, *infra* note 24.

20. History of Horse Racing, *supra* note 7; *See also* Curnutt 259, *supra* note 8.

21. *Id.*

22. History of Horse Racing, *supra* note 7.

23. *Id.*; *See also* *Thoroughly Thoroughbred*, *supra* note 11 (The Triple Crown consists of the Kentucky Derby, the Preakness, and the Belmont Stakes.).

24. Encyclopedia of American History, *Horse racing and showing*, <http://www.answers.com/topic/horse-racing-and-showing> (last visited Oct. 23, 2008) (hereinafter "Horse racing and showing").

25. *Id.*

26. *Id.*

27. Drf.com, Glossary of Horse Racing Terms -- Purse, available at http://www.drf.com/help/help_glossary.html (last visited Apr. 20, 2010) ("A prize of money to which owners do not contribute").

28. *See* Horse Racing and showing, *supra* note 24.

29. *Id.*

From the late 1980s to 2001, the gross amount wagered increased from \$9.385 billion to \$14.550 billion.³⁰ With this increase, purses for each race have climbed from \$700 million to over \$1 billion from 1990 to 2001.³¹ As a result, horse racing has increasingly become a sport in which stakeholders can make significant financial gains from their investment, whether in racetracks, ownership of horses, or other activities relating to the day-to-day operations of the industry. Additionally, state and local governments see an increase in revenue through taxes.³²

E. Breeding in Horse Racing

Owners, trainers, and breeders have developed breeding programs, which have proved to increase the probability of producing a successful racehorse. The general concept is to mate a successful stallion (male thoroughbred) with a successful mare (female).³³ The basic principles of breeding are that “horses with certain pedigrees are more likely to pass along their racing ability to their offspring.”³⁴ Therefore, “[t]horoughbreds with superior racing ability are more likely to produce offspring with superior racing ability.”³⁵ This is often referred to as “Breed the Best to the Best, and Hope for the Best.”³⁶

When a stallion is bred to a mare, horsemen often sell the foal,³⁷ which has become a very lucrative business. The most common type of sale is the *yearlings*’ sale, which is the sale of one-year old horses.³⁸ From 1990 to 2001, the average price for a yearling has increased by 100%, up to \$52,549.³⁹ Today,

30. *Id.*

31. *Id.*

32. *Id.*

33. See History of Horse Racing, *supra* note 7.

34. *Id.*

35. *Id.*

36. *Luck Plays Key Role in Successful Horse Breeding*, <http://www.linkroll.com/horses/luck-plays-key-role-in-successful-horse-breeding.php> (last visited Mar. 15, 2009).

37. Drf.com, *Glossary of Terms – “Foal”*, http://www.drf.com/help/help_glossary.html (last visited Apr. 20, 2010) (“Newly born Thoroughbred, or until weaned. Male or female”).

38. See Horse racing and showing, *supra* note 24.

39. *Id.*

many yearlings are sold for well over \$1 million.⁴⁰ Another major aspect of the breeding and sale of horses is sending the horse to *stud*, which occurs when an owner will end a horse's racing career to breed the horse, in order to generate stud fees.⁴¹ For example, the great Secretariat earned \$1.3 million in racing during 1972-1973 until he was syndicated⁴² as a stallion for \$6 million in 1973.⁴³ Due to the increase in the breeding value of horses, many investors have developed breeding syndicates that allow investors to buy a share of the horse.⁴⁴ Even people who are not interested in horse racing have turned to investing in syndicates as part of their financial portfolios.⁴⁵

The obvious goal of all horsemen is to produce a champion racehorse, and, in turn, make money. The prospect of great profits has led many people to put much time, effort, and money into the industry and their own particular horses. Over time, breeding has become more complex, and in turn has led to dangerous practices that compromise the horse's health.⁴⁶

Although breeding remains a major issue, horsemen who have not been successful in breeding a champion have looked to gain unfair competitive advantages in hopes of increasing the probability of their horses crossing the finish line first. One major issue, which this Comment will analyze, is the use

40. *Id.*

41. Jockeyclub.com, The American Stud Book Principal Rules and Regulations, available at <http://www.jockeyclub.com/registry.asp?section=3#glossary> (last visited July 7, 2010) (description of breeding practices, and rules and regulations).

42. Championthoroughbreds.com, *About Horse Syndication*, available at <http://www.championthoroughbreds.com.au/about-horse-syndication.aspx> (last visited Apr. 20, 2010) ("Syndication involves having up to 20 owners in a horse, where people can purchase a percentage share which fits the dollar outlay they are looking to invest.").

43. Horse Racing and showing, *supra* note 24.

44. History of Horse Racing, *supra* note 7.

45. Patrick J. Hurley, *Broodmare Syndications*, available at http://www.pleasurehorse.com/taxes/BROODMARE_SYNDICATIONS.html (last visited Apr. 20, 2010) ("There is today a very marked increase in the number of sophisticated investors and portfolio advisers who are turning to broodmare syndicates as a marvelous investment vehicle. Conservative investors find that the broodmare syndicate combines the best advantages of a tax shelter with optimum likelihood of handsome returns in the end.").

46. ESPN.com, *Barbaro's injury fuels debate over breeding methods*, <http://sports.espn.go.com/sports/horse/triplecrown06/news/story?id=2454421> (last visited Apr. 20, 2010).

of performance-enhancing drugs and the abuse of medications on racehorses.

II. HISTORY OF PERFORMANCE-ENHANCING DRUGS AND MEDICATIONS IN HORSE RACING

A. Introduction

The use of performance-enhancing drugs and the abuse of medication on racehorses can be traced to the 1800s.⁴⁷ During this period, the purification of cocaine and morphine was developed and used as an acute stimulant on racehorses.⁴⁸ In the early 1900s, several American trainers traveled to Europe with these “new American medications.”⁴⁹ These trainers administered these “medications” and, in turn, enjoyed great success in the European racing circuits.⁵⁰ Over time, this group of trainers became known as “Yankee Alchemists.”⁵¹ After this practice became well known throughout Europe, the English Jockey Club in 1903 banned the use of these medications on racehorses.⁵²

B. Testing Development

At about the same time, an American trainer, James Keene, enjoyed great success racing in the Russian circuits.⁵³ One day, while in the paddock, Keene was approached by a Russian racing official and a chemist, who were equipped with a basket of frogs.⁵⁴ After taking a sample of saliva from

47. Fernanda Camargo, Charlie Hughes, Wojciech Karpiesiuk, Andreas Lehner, and Thomas Tobin, *Equine Drugs, Medications, and Performance Altering Substances: Their Performance Effects, Detection, and Regulation* (Oct 21, 2005), available at <http://thomastobin.com/drugsmeds/drugsmeds.htm> (hereinafter “Equine Drugs”).

48. *Id.*

49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.*; See also *TOD SLOAN HOPES TO RIDE IN ENGLAND; Once Famous Jockey's Application for a License Is Likely to be Granted*, N.Y. TIMES, Feb. 28, 1909, available at http://query.nytimes.com/mem/archive-free/pdf?_r=1&res=9B03E2D91439E733A2575BC2A9649C946897D6CF (discussing the suspicion of many horseman in England that a once famous jockey, Todd Sloan had used drugs and/or electricity to aid his horses' performances).

53. *Id.*

54. Equine Drugs, *supra* note 47.

the horse, and feeding it to a frog, the frog exhibited abnormal behavior.⁵⁵ From this, the racing official and chemist deduced that Mr. Keene's horse tested "positive."⁵⁶ Following this incident, Keene left Russian racing and returned to Kentucky, where he founded the well-known Keeneland Racecourse.⁵⁷

Early forms of analytical drug testing of horses began in France in the early 1900s.⁵⁸ One of the early drug testing labs in America was established in 1935, when Dr. Catlett, a veterinarian, and Dr. Morgan, a chemist, went to France to learn about French drug testing.⁵⁹ Upon their return to the United States, they set up the first drug-testing lab in Florida.⁶⁰ Shortly thereafter, the New York Racing Commission opened a chemistry lab in Manhattan, which was followed in 1947 with the formation of the Association of Official Racing Chemists.⁶¹

C. Modern Day Testing Procedures for Performance-Enhancing Drugs and Medications

Modern day testing on racehorses is based on the Enzyme Linked Immuno Sorbent Assay ("ELISA") method, which "allows highly sensitive detection of trace amounts (tail ends) of therapeutic medications, environmental, and dietary substances."⁶² ELISA "requires a drop of urine; it can be performed relatively rapidly, it is highly sensitive and can be read by the eye."⁶³ The ELISA method is very sensitive, sometimes setting off positive tests, despite the absence of illegal activity.⁶⁴ This fact has led many racing authorities to stray from the former "zero tolerance" policy in favor of regulatory limits and thresholds.⁶⁵ ELISA still serves as the "backbone of drug screening worldwide today."⁶⁶

There are over 10 million known chemical substances and

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.*

61. *Equine Drugs, supra* note 47.

62. *Id.*

63. *Id.*

64. *Id.*

65. *Id.*

66. *Id.*

over 4,000 prescription medications today.⁶⁷ Regulators have classified these in two groups: performance-enhancing substances and therapeutic medications.⁶⁸ Performance-enhancing drugs pose the greatest concern to regulators in the American horse racing industry.⁶⁹ According to the Association of Racing Commissioners International (“ARCI”), there are over 850 substances categorized as “performance-enhancing drugs.”⁷⁰ In some jurisdictions, these substances are tested under the “zero-tolerance” policy, although most jurisdictions set “threshold limits.”⁷¹ According to the ARCI, approximately 50 substances are categorized as “therapeutic medications.”⁷² When testing for these substances, individual jurisdictions establish their own limits.⁷³ This has led to claims of unfair advantages of horses racing in one jurisdiction versus another.⁷⁴

Another major issue in testing racehorses relates to “[w]ithdrawal times,” which is the amount of time that a horseman “should stop administering the medication prior to post (beginning of race) so that the blood or urine ‘reading’ comes in below the stipulated threshold, whatever that particular threshold may be.”⁷⁵ Without a zero-tolerance policy, withdrawal times are extremely difficult to determine.⁷⁶ Various factors affect withdrawal times, including dosage, testing procedures, sensitivity, route of administration, frequency of use, and other environmental

67. Equine Drugs, *supra* note 47.

68. *Id.*

69. CBSsports.com, *Steroid Probe Targets Four-Legged Athletes: Horse Racing Is Latest Sport Under The Microscope For Performance Enhancing Drug Use*, <http://www.cbsnews.com/stories/2008/02/15/sports/main3839559.shtml> (Feb. 15, 2008) (discussing growing concern of federal government and National Thoroughbred Racing Association over the use of performance-enhancing drugs and its effect on safety of racehorse).

70. Association of Racing Commissioners International, Inc., *Uniform Classification Guidelines for Foreign Substances* (August 2008), available at <http://www.arci.com/druglisting.pdf>.

71. Equine Drugs, *supra* note 47.

72. *Id.*

73. *Id.*

74. A horse may be permitted to race in certain jurisdictions despite having higher traces of “therapeutic medications” or “performance enhancing drugs” than what is permitted in other jurisdictions.

75. Equine Drugs, *supra* note 47.

76. *Id.*

factors.⁷⁷ According to Thomas Tobin, “there are no guarantees in life, and that most certainly includes ‘withdrawal time’ estimates.”⁷⁸

Further, with the plethora of drugs and medications available, it is difficult for testing to keep up with scientific developments. As the executive director of the Racing Medications and Testing Consortium pointed out, “[l]abs cannot detect all the illegal drugs out there, of which there ‘could be thousands.’”⁷⁹ Without proper testing techniques and devices, horsemen are using new and innovative drugs, which cannot now be detected by any test.⁸⁰

Although testing racehorses has made considerable advances over the years, it is clear that there is always room for improvement. There are great difficulties in developing effective techniques for a variety of reasons, including the lack of funding, the continued development of state of the art, undetectable drugs, and the lack of uniform thresholds and/or regulations.

III. EFFECTS AND CONCERNS OF PERFORMANCE-ENHANCING DRUGS AND MEDICATIONS IN MODERN DAY HORSE RACING

A. Introduction

Many horsemen use performance-enhancing drugs and medications in order to give their horse an advantage over the competition. This is not a new concept:

As long as horses have been racing, some trainers have sought advantages. Sometimes, it has been as primitive as using a battery-powered device to shock a horse during a race; recently it is believed to have become as exotic as using injections of the venom of the cone snail, which is found in the ocean and is prized for the joint-numbing qualities of its venom.⁸¹

77. National Horseman’s Benevolent and Protective Association, Inc, *Proposed National Policy on Drug Testing and Therapeutic Medication*, 62-65 (2008), available at <http://hbpa.org/resources/medicationpolicy.pdf>.

78. Equine Drugs, *supra* note 47.

79. John Scheinman, *Horses, Drugs Are Racing’s Daily Double; No Uniform Policy in Industry*, WASH. POST Apr. 27, 2003.

80. *See generally Id.*

81. John Drape, *Horse Racing: Amid the Run for the Roses, a new race to curb drug use*, N.Y. TIMES, May 5, 2005; *See also* Sloan, *supra* note 52.

The wide array of techniques and substances used to generate positive performances in horses is ever changing, difficult to detect, and harmful to the health and well being of the horse.

Prior to the start of a race, horsemen often administer an “acute stimulant medication” on their horses.⁸² The most common forms of acute stimulant medication are opiates and amphetamines.⁸³ One common amphetamine is methylphenidate, which is more commonly called Ritalin.⁸⁴ As testing procedures have improved, horsemen began using more potent opiates, which were more difficult to detect since there were no tests available for some of these substances. One example of this type of opiate is Etorphine, also known as elephant juice, which was very popular in the early 1980s because there was no test available to detect it.⁸⁵

On the other hand, horsemen have used drugs to relax their horse, which has proved to be successful in getting horses to run their best.⁸⁶ One of the most popular forms of such medications is the tranquilizer, Acepromazine.⁸⁷ Another popular way of maximizing the horse’s endurance and speed is bronchodilators, which are used to improve the horse’s “wind” by opening its airways.⁸⁸

As John Scheinman pointed out, “[f]inding an American racehorse trained on the traditional hay, oats, and water probably would be impossible.”⁸⁹ Horsemen are willing to do anything to make their horse run faster, so in many cases trainers are “pumping horses full of illegal drugs every day.”⁹⁰

The effect of drugs on horses undoubtedly affects the outcome of a race.⁹¹ The problem is that it is very difficult to “scientifically demonstrate performance effects of drugs”⁹² on horses because the horse must “produce a positive performance effect of about the same magnitude as Secretariat’s win at Belmont to meet the lowest level of

82. Equine Drugs, *supra* note 47.

83. *Id.*

84. *Id.*

85. *Id.*

86. *Id.*

87. *Id.*

88. *Id.*

89. Scheinman, *supra* note 79.

90. PETA.org, Animals Used for Entertainment FAQs, available at <http://www.peta.org/ABOUT/faq-ent.asp> (last visited Apr. 20, 2010).

91. Equine Drugs, *supra* note 47

92. *Id.*

statistical significance.”⁹³ It is clear, however, that successful trainers make “subtle and discriminating judgments” so their horse will not have a positive test but will still have an unfair advantage over the other horses.⁹⁴ Further, drugs can affect the horse’s attitude and behavior, which can possibly affect the “ultimate performance analysis, the outcome of the race.”⁹⁵

B. Medications in Horse Racing

Because horse racing can be such a lucrative sport, horses are raced at younger ages,⁹⁶ making injuries extremely common.⁹⁷ According to one study, one in every twenty-two horses sustains some sort of injury on the racetrack.⁹⁸ Due to the fact that racehorses have become such expensive investments, “simply sending one to pasture, injured or not, is not an option all owners are willing to consider.”⁹⁹

In American horse racing, many legal medications are over-prescribed or used primarily for performance objectives rather than for health concerns. As the *New York Sun* pointed out, as “thoroughbreds are bred for flashy speed. . .the animal itself has become more fragile.”¹⁰⁰ In order to keep the horses going, trainers give horses Lasix (which controls bleeding in the lungs), phenylbutazone (an anti-inflammatory), and corticosteroids (for pain).¹⁰¹ It is very common for horsemen to “race their horses when they shouldn’t be, using drugs to mask pain and unsoundness. Some people will do anything to get in the money.”¹⁰² According to Dr. Manual Gilman, New York racing steward, “[a]ny fair-minded person would say horses would be better off if they ran without medication. But

93. *Id.*

94. *Id.*

95. *Id.*

96. *See, supra* note 46.

97. *Id.*

98. Bill Finley, *Sadly, No Way to Stop Deaths*, N.Y. DAILY NEWS, July 10, 1992

99. Tim Reynolds, *Technology Can't Prevent Horse Injuries*, LEXINGTON HERALD-LEADER, Aug. 30, 2001.

100. Max Watman, *So Far, So Good For Barbaro*, N.Y. SUN, May 21, 2006.

101. *Id.*

102. Jamie Newell, *Sabotaged: The Underbelly of Steroids in Horse Racing*, available at <http://www.smilepolitely.com/sports/2008/07/sabotaged.php> (July 3, 2008) (discussing trainer, Larry Jones, who is known for his success while never using performance-enhancing drugs or abusing medications).

these horses are constantly medicated between races to treat minor wounds and to keep them at their best. But it's not natural. Any medication has side effects."¹⁰³

C. Steroids in Horse Racing

Steroids have been part of horse racing for many decades, much longer than their use in other major sports.¹⁰⁴ Hall of Fame trainer, Elliot Burch, began hearing about steroids in horse racing around the mid-1960s.¹⁰⁵ Steroids are used to "build up a horse's muscle tissue and make the animal stronger."¹⁰⁶ They are extremely detrimental to the health and safety of the horse because "[t]he use of anabolic steroids puts extra muscle on the horses, forcing them to carry more weight."¹⁰⁷ On the other hand, proponents of using steroids in horse racing argue they "provided a boost for horses who were not eating well or were listless...drugs help with minor problems like appetite."¹⁰⁸ As Dr. Gregory Bennett, Big Brown's veterinarian, pointed out, "[w]e're always under pressure to keep these horses going and to try and make races. Without steroids, they'd lose some horses that can't keep up the pace and race every three weeks or every month."¹⁰⁹ In addition, Larry Bramlage, a track veterinarian and member of the Jockey Club's Thoroughbred Safety Committee, stated, "steroids are 'a useful tool' for thoroughbreds because they help them withstand the wear and tear of racing. They keep their appetite up and help them recover from races."¹¹⁰ He said, however, "most all' trainers

103. Joseph Durso, *Horse Racing: Thoughts from The Glass Booth*, N.Y. TIMES, Dec. 5, 1991.

104. Bill Finley, *In Horse Racing, Test of Beefed-Up Champions*, N.Y. TIMES, June 2, 2008 ("[s]teroids have been part of hose racing long before they became part of the sports world's lexicon").

105. *Id.*

106. *Id.* ("They're performance-enhancing," said the trainer Graham Motion, who said his Belmont starter Icabad Crane was not given steroids. "Isn't that why all the athletes use it? What do they do? They build up a horse's muscle tissue and make the animal stronger. To me that's performance-enhancing.")

107. Andrew Beyer, *Horse Racing | Sport is addicted to drugs*, SEATTLE TIMES, May 13, 2008.

108. Finley, *supra* note 104.

109. *Id.*

110. Pat Forde, *Veterinarian: Horse racing will ban steroid use*, June 6, 2008, <http://sports.espn.go.com/sports/horse/news/story?id=3429781>.

use them...a small percentage abuse them,”¹¹¹ and “[i]t’s difficult to know when it’s use and when it’s abuse, so we’ll ban them all.”¹¹²

The use of steroids has been so prevalent in horse racing that many horses have tested positive for racing on them. Pennsylvania, which recently banned steroids, “tested 998 horses and found that 61.7 percent were positive for steroids and 17.3 percent had been treated with two steroids or more.”¹¹³

As of June 2008, steroids were legal in 28 out of 38 racing jurisdictions.¹¹⁴ Until recently, “Iowa was the only state that banned steroid use in racehorses,”¹¹⁵ while, “[m]ost other racing jurisdictions seemed to ignore the issue, or perhaps, decided steroids were not a problem.”¹¹⁶ This sentiment has seemed to change among the horsemen. Larry Bramlage “anticipates unanimous agreement,”¹¹⁷ regarding the ban on the use of steroids in the near future.

The racing industry is already seeing major strides with respect to the use of steroids. For the first time, the Breeder’s Cup, the richest day in American horse racing, placed a complete ban on the use of steroids in 2008.¹¹⁸ Further, the American Graded Stakes Committee announced that all states must ban steroids by January 1, 2009, or races will lose its graded status.¹¹⁹

111. *Id.*

112. *Id.*

113. Finley, *supra* note 104.

114. *Id.*

115. *Id.*

116. *Id.*

117. Forde, *supra* note 110 (“[Larry] Bramlage said he anticipates unanimous agreement in the 28 states that currently allow steroid use in racehorses. ‘I don’t think you’ll see it next year (2009)...It’ll be illegal nationwide.’”)

118. Press Release, Breeders Cup Ltd., Breeders’ Cup New Policy Bans Steroids in all Breeders’ Cup Affiliated Races, (Aug. 1, 2008), *available at* <http://www.jockeyclub.com/tsc.asp?section=4#action04> (“Trainers of horses that test positive for anabolic steroids at [the 2008] Breeders’ Cup World Championships at Santa Anita Park (Oct. 24-25) will face a one-year suspension from the event; and trainers who violate steroid regulations three times will face a lifetime ban from participating in Thoroughbred racing’s season-ending championships according to the new policy announced [on Aug. 1, 2008] by the Breeders’ Cup.”).

119. Press Release, Thoroughbred Owners and Breeders Association, American Graded Stakes Expands Grade Eligibility Requirements, (Aug. 8, 2008) (“States or racetracks through house rules must adopt, at a minimum, the Association of Racing Commissioners International (ARCI) model rule on androgenic anabolic steroids by January 1, 2009 or the date of a state or racetrack’s first graded race in 2009,

With this in mind, it is clear that the horse racing industry recognizes that steroids are a major problem in the sport. In fact, on January 1, 2009, a steroid ban went into effect “in almost every racing jurisdiction.”¹²⁰ For these reasons, this Comment will not analyze the use of steroids in greater detail. This, however, is a prime example of how the horse racing industry can work to achieve uniformity across all racing jurisdictions.

IV. THE CURRENT STATE OF AMERICAN HORSE RACING REGULATIONS, TESTING, AND PENALTIES

In the United States, thirty-eight jurisdictions conduct pari-mutuel wagering on horse racing, each of which is governed by the individual state’s racing commission.¹²¹ Each state has the right to control the horse racing industry in that state, resulting in various testing regimes.¹²² Aside from its regulation of pari-mutuel wagering, the federal government has limited control over the industry.¹²³ According to the Interstate Horseracing Act, “[i]t is the policy of the Congress in this Act to regulate interstate commerce with respect to wagering on horse racing, in order to further the horse racing and legal off-track betting industries in the United States.”¹²⁴ This statute limits Congress’ involvement in regulating racing and relates only to wagering.¹²⁵ Each state is permitted to

whichever is later. If a state or racetrack does not adopt the model rule, then their races will lose their graded status. Those races will not be eligible again for grading until the rule is adopted.”)

120. Larry Bossert, *Racing’s on right track with safety as Kentucky Derby approaching*, N.Y. DAILY NEWS, Apr. 27, 2009, http://www.nydailynews.com/sports/more_sports/2009/04/27/2009-04-27_racings_on_right_track_html.

121. Racing Medication and Testing Consortium (RMTC), Frequently Asked Questions, available at http://www.rmtcnet.com/Content_Faq.asp (last visited Apr. 20, 2010); *See also* Fink v. Cole, 97 N.E.2d 873, 876 (N.Y. 1951) (“striking down the private regulation of horse racing in the state, which led to the modern state regulation structure”).

122. RMTC, *supra* note 121; *See also, e.g.*, N.J. Stat. Ann. 5:5-30 (stating that that New Jersey Racing Commission “shall have full power to prescribe rules, regulations and conditions under which all horse races shall be conducted in the State of New Jersey under the provisions of this act, and may alter, amend, repeal and publish the same from time to time.”)

123. Interstate Horseracing Act, 15 U.S.C. § 3001, et seq. (2007).

124. 15 U.S.C. § 3001(b)

125. *See* RMTC, *supra* note 121.

draft its own regulations.¹²⁶

As a result of the lack of a centralized governing body in horse racing, the regulations in horse racing are drafted according to the specific state's own interest. According to Dr. Greg Ferraro, "[h]orse racing is one of the most highly regulated sports"; however, "it seems to continually generate an aura of moral deprivation because of the continued controversy within the industry on the issue of medication."¹²⁷ Richard Shapiro, Chairman of the California Horse Racing Board, stated, "[o]ur structure is dysfunctional and needs to be functional."¹²⁸ Although the racing industry recognizes the need for a uniform set of rules and regulations, it would only accept federal involvement "as a last resort."¹²⁹ Although the racing industry recognizes the need for change, there is substantial disagreement over the way change should be implemented.

The federal government recently acknowledged the need for reform in horse racing. On June 19, 2008, the Subcommittee on Commerce, Trade, and Consumer Protection held a hearing called *Breeding, Drugs, and Breakdowns: The State of Thoroughbred Horseracing and the Welfare of the Thoroughbred Racehorse*,¹³⁰ which considered the current state of horse racing and the involvement of performance-enhancing drugs and medications. The committee called for a uniform set of rules to govern horseracing at a national level, similar to the National Football League, National Basketball Association, and Major League Baseball.¹³¹ During this subcommittee hearing, ESPN and ABC horse racing analyst,

126. *Id.*

127. Dr. Greg Ferraro, *Drugs in Racing*, available at <http://www.indiarace.com/Archives/drugracing/drugsinracing.htm>, (last visited Apr. 20, 2010) ("Perhaps we should undertake a serious review of our handling of these medication issues and follow that with a comprehensive retooling of our approach to regulation. One would hope that we could find a way to control medication that would prevent these repeated public embarrassments and at the same time protect the integrity of the sport and the well being of the horse.").

128. John Scheinman, *Governing Body Urged for Racing Industry*, WASH. POST, June 20, 2008.

129. *Id.*

130. *Breeding, Drugs, and Breakdowns: The State of Thoroughbred Horseracing and the Welfare of the Thoroughbred Racehorse: Hearing Before Subcomm. On Commerce, Trade, and Consumer Protection*, 110th Cong. (2008) (hereinafter "Subcommittee Hearing").

131. *See generally*, Subcommittee Hearing, *supra* note 130.

Randy Moss, discussed the development of the current regulatory scheme:

Racing's lack of a powerful central authority is also a primary reason for medication controversies currently engulfing the sport. In the 1970s, American horsemen began convincing state authorities that legalization of raceday medications would help them run horses more frequently in support of racetracks that were scheduling ever-longer racing seasons. Because longer racing seasons pitted tracks against each other in intense competition for horses, every state eventually conceded to the easing of medication restrictions so as not to be at a competitive disadvantage with other states. Thus America became the only racing country in the world to permit raceday use of drugs such as analgesic Butazolidin and diuretic Lasix, which lowers blood pressure and is believed by many to reduce the occurrence and severity of the EIPH (exercise-induced pulmonary hemorrhaging) that hampers the breathing of some racehorses. . . . Included among accepted raceday medications were anabolic steroids such as Winstrol, which is still legal in 28 racing states. Steroids would eventually gain widespread use as an appetite stimulant and to help horses recover more quickly from the effects of exercise and put on muscle mass.¹³²

Current regulations of American horse racing are far too lenient. The lack of a national uniform regulatory structure allows for a patchwork of rules, which has led to a decline in the health and safety of the horse, as well as competitive disadvantages among racing jurisdictions. As the NEW YORK TIMES noted,

[t]he industry has no national standards, the way professional sports leagues like Major League Baseball or the National Football League do. States set their own policies and Kentucky, home of the thoroughbred breeding industry and the most famous two minutes in sports, is among the most permissive when it comes to drug policy.¹³³

Additionally, the policies and regulations in America are starkly different from international rules of racing. For example, "[e]very jurisdiction in . . . the United States permits the use of powerful drugs, such as diuretic furosemide (Lasix) and the analgesic phenylbutazone (Bute), when no other country in the world permits similar drugs for racing purposes."¹³⁴ Further, with respect to testing for total carbon

132. See Subcommittee Hearing, *supra* note 130 (statement by Randy Moss, pg. 5)

133. See Drape, *supra* note 81.

134. Steve Davidowitz, *American Racing's Biggest Problem*, July 18, 2007, available

dioxide levels (TCO₂), Australia and the majority of international jurisdictions set a threshold level at 36mm/l, while most U.S. jurisdictions use 37mm/l and some even use 39mm/l as a threshold level.¹³⁵ This one example demonstrates how the lack of a uniform regulatory structure allows for racehorses to race at higher chemical levels than similarly situated horses in other international and domestic racing jurisdictions. This distortion leads to competitive advantages over other horses and between racing jurisdictions, and it compromises the health, safety, and well being of the racehorse.

V. INTERNATIONAL HORSE RACING REGULATIONS AND PENALTIES

The international horse racing community has adopted the *International Agreement on Breeding, Racing and Wagering*, which is intended to serve as a basis for uniform regulations for horse racing jurisdictions throughout the world.¹³⁶ This agreement sets forth recommendations for all international racing jurisdictions to use in drafting their own regulations.¹³⁷ The United States, as noted in the agreement, agreed to only certain sections in Article 6 (Prohibited Substances), and has not agreed to section 5 (dealing with sanctions), section 10 (dealing with specific prohibited substances), and section 14

at <http://www.bodoglife.com/horse-betting/analysis/07182007-american-racings-biggest-problem.jsp>.

135. Jockeyclub.com, The Jockey Club Annual Round Table Conference, Commentary by Dr. Rick Arthur, available at http://www.jockeyclub.com/roundtable_08.asp?section=9 (last visited Apr. 20, 2010) (Dr. Rick Arthur discusses the practice of "milkshaking" or "bicarbonate loading." This practice "can be monitored [or tested] by measuring total carbon dioxide, or TCO₂, in blood." The results of a recent study show, "if one plots TCO₂ against the top 3 finishers, the relationship is clear. TCO₂ is related to performance and the relationship is statistically significant. The higher the TCO₂, the better the chance of hitting the board. The same can be shown for winning...") (hereinafter "Jockey Club Roundtable").

136. International Federation of Horseracing Authorities, *International Agreement on Breeding, Racing and Wagering*, May 2008, available at http://www.horseracingintfed.com/resources/2008_choose_eng.pdf. (last visited Apr. 20, 2010) (This agreement "makes an inventory of desirable practices and states general clauses which are common to most of the Horseracing Authorities. It represents an exhaustive compendium of ideal principles meant to help Horseracing Authorities define their own requirements.")

137. See *Id.* at 5 (Introduction).

(dealing with threshold amounts).¹³⁸

As opposed to American horse racing regulations, international horse racing regulations are more strict and comprehensive.¹³⁹ For example, “[i]nternationally, anabolic steroids have been regulated for many years; from the international perspective, anabolic steroids are simply performance enhancing drugs and are banned.”¹⁴⁰ In the United States, however, the process to ban anabolic steroids is only now beginning.¹⁴¹ Further evidence of the leniency of American regulations is that “most drugs allowed in U.S. racing are illegal in much of the rest of the world, and most countries have a zero-tolerance policy on race-day medication.”¹⁴² Additionally, according to Rick Arthur, the equine medical director for the California Horse Racing Board, “[i]nternationally, North America is looked down upon because of our use of drugs. . . [y]ou never see drug cheating in England. They don’t tolerate it.”¹⁴³

VI. PUBLIC PERCEPTION AND OVERALL INTEGRITY OF AMERICAN HORSE RACING

A. Lack of Concern for Health and Safety of the Horse

The current regulatory structure of horse racing in the United States has allowed for a decline in the overall safety of the racehorse, which has tarnished the public perception of the sport.¹⁴⁴ The ideal perception for many racing enthusiasts, and much of the general public alike is that horse racing consists of natural athletes pitted against one another with little or no outside influences. Presently, however, the public perception has been tarnished by the media focus on dangerous breeding techniques and over-medication, and the lack of a uniform regulatory structure. These factors have exposed the ills of the horse racing industry to the general

138. *Id.* at Art. 6, §§ 5, 10, 14.

139. See Scheinman, *supra* note 79.

140. Jockey Club Roundtable, *supra* note 135.

141. See Scheinman, *supra* note 79.

142. See Drape, *supra* note 81.

143. Bill Dwyre, *Racing Can’t Run from it*, L.A. TIMES, May 15, 2008, at 3.

144. Dan Liebman, *Medication Issues Top Jockey Club Round Table*, Aug. 24, 2009, available at <http://www.horseracingofficials.com/default.asp?id=8.2&article=375>.

public.¹⁴⁵ Although public perception is important for the sport to remain commercially viable, the health and safety of the horses should remain the most important consideration for stakeholders.

According to several studies, the thoroughbred fatality rate is somewhere between 1.8 to 2.03 deaths per 1,000 starts.¹⁴⁶ In addressing the durability of thoroughbred racehorses, the NEW YORK TIMES stated, “in 1960, thoroughbreds made an average of 11.3 racing starts in their career. [In 2007], that average was 6.3.”¹⁴⁷ Although the reason for this shift is not entirely clear, it is clear that the combination of greed, unhealthy competition, and a lax regulatory system has led to a failure by industry leaders to consider the health and well being of the horse as the paramount concern. According to Tom Bowman, general manager and partner of Northview Stallion Station in Chesapeake City, Maryland, “[f]or a long time, the thoroughbred was bred as a horse that can go the distance and take your breath away... We are starting to sacrifice some of those qualities for a short racing career and cheap speed overall.”¹⁴⁸

In addition to unhealthy breeding techniques, doping has led to the decline in the safety of race horses in the United States, as evidenced by the fact that “[h]orses may run at North American tracks 24 hours after being given therapeutic drugs such as Lasix or Butazolidin. Critics say these drugs can mask injuries and contribute to breakdowns.”¹⁴⁹ According to Randy Moss, “[a]fter the one-two punches of Barbaro in 2006 and [Eight Belles in the 2008] Kentucky Derby, mainstream media began a closer examination of thoroughbred racing. The public was concerned about the

145. See Tom Lamarra, *Officials: Negative Perception in Racing Must Be Addressed*, Dec. 12, 2003, available at <http://www.bloodhorse.com/horse-racing/articles/19589/officials-negative-perception-in-racing-must-be-addressed> (discussing how the lack of regulation in horse racing is creating a negative perception of the sport); See also Michael Veitch, *On horse racing: Playing by the rules*, SARATOGIAN, Apr. 21, 2010 (discussing how public perception has been tarnished because of overmedication of horses. One trainer stated, “I believe people are of the impression that horses are dumb animals that are over-medicated and forced to perform by money-hungry owners and trainers...”).

146. Dwyre, *supra* note 143, at 1.

147. *Id.* at 2.

148. *Id.*

149. *Id.*

humaneness of the sport, and too often were appalled at what they were seeing.”¹⁵⁰

B. Trainers Suspensions Damage Integrity of Sport

Another alarming, and often under-estimated problem that plagues horse racing in the United States is the illegal conduct of horsemen, specifically trainers.¹⁵¹ The high stakes world of horse racing in the United States causes many trainers to do anything to get their horses on the track, including administering performance-enhancing drugs and overmedicating injured horses just to ensure that their horses will make their next start.¹⁵² According to Rick Arthur, many trainers administer illegal analgesic Mepivacaine, which “deadens the injured area, allows horses to run, but takes away the pain that is the best warning to both horse and trainer that something is wrong.”¹⁵³ The use of this drug and many others is so prevalent that most top trainers in the United States have been suspended at some point in their careers for doping violations. In fact, “[the 2008] Triple Crown races feature at least three trainers who have served suspensions for having horses test positive for Mepivacaine: Steve Asmussen, who trained Curlin, [2007] Preakness champion; Todd Pletcher, whose Rags To Riches won the [2007] Belmont Stakes; and Rick Dutrow Jr., whose Big Brown won [the 2008] Kentucky Derby.”¹⁵⁴ This is just one example of the inhumane and illegal activity that some trainers in the United States engage in on a regular basis.

Equally alarming are the lenient punishments handed down for these types of violations, as evidenced by the fact

150. *Supra* note 130 (statement by Randy Moss at 9).

151. *See* Veitch, *supra* note 145.

152. *See* John Severance, *Commentary: Sport needs policing; ending it goes too far*, PALM BEACH POST, May 5, 2008 (“Trainers use a variety of other drugs, legal and illegal, to keep their horses ready to race.”); *See also* Dwyre, *supra* note 143, at 2 (arguing that Lasix or Butazolidin [may] mask injuries and contribute to breakdowns); *See also* Jack Shinar, CHRB Tables ‘Heel Nerving’ Ban, *available at* <http://www.bloodhorse.com/horse-racing/articles/39846/chrb-tables-heel-nerving-ban> (last visited Apr. 21, 2010) (detailing a meeting of the California Horse Racing Board regarding a possible “action banning horses that have undergone “heel nerving” surgery from being raced or sold in the state...[some say this practice of] desensitizing the foot is dangerous and possibly fatal in the event of a fall to horses and jockeys.”).

153. Dwyre, *supra* note 143, at 3.

154. *Id.*

that Rick Dutrow Jr. “has been fined every year since 2000 for a horse doping situation. In 2003, one of his horses tested positive for Mepivacaine. He has served various suspension times, ranging from 14 to 60 days, for these violations.”¹⁵⁵ Such punishments handed down by racing commissions are far too lenient and do not discourage trainers from repeating this inhumane and illegal activity.¹⁵⁶ This type of conduct and penalties would not be acceptable in any other racing jurisdiction around the world. According to Rick Arthur, “[i]f a trainer is caught [in England], his picture is in the papers the next day. Above the child molesters.”¹⁵⁷ The racing industry must deal with this issue in a prompt and harsh manner, and, if no strong regulatory measures are taken, the overall integrity of horse racing will continue down its current unfortunate path.

VII. PROPOSED UNIFORM REGULATIONS & PENALTIES

A. Introduction

Throughout the past few years, the American horseracing industry has recognized the need for change. With this in mind, several organizations are working towards implementing uniform regulations.

B. *The Racing Medication and Testing Consortium (RMTC)*

The RMTC was organized with the mission to “develop, promote and coordinate, at the national level, policies,

155. *Id.*

156. See Associated Press, *Ky. Regulators Ban Doping For Race Horses: Commission Outlaws More Types Of Steroids, But Adopts Lenient Penalties For Trainers Who Cheat*, available at <http://www.cbsnews.com/stories/2008/08/25/national/main4383493.shtml> (last visited Apr. 20, 2010) (arguing that punishments for rule violations are too lenient); See also N.Y. State Racing Thoroughbred Rules, Ch.1, Sub.A, Art. 1, Sec. 4022.12 (detailing penalties ranging from a possible 60 day and/or \$5000 fine. These penalties, however are all discretionary).

157. Dwyre, *supra* note 143, at 3; See also *Panorama puts racing under spotlight: One year ago, the BBC's flagship current affairs programme Panorama exposed what it called “the corruption of racing,”* available at http://news.bbc.co.uk/sport2/hi/other_sports/horse_racing/3148218.stm (last visited Apr. 21, 2010) (The UK Jockey Club has imposed must stricter penalties, including a 10-year ban from racing for jockeys and trainers who violate their rules.)

research, and educational programs that seek to ensure the fairness and integrity of racing and the health and welfare of racehorses and participants, and to protect the interests of the racing public.”¹⁵⁸ The RMTC’s *Goals and Objectives* include to:

- Develop and recommend uniform model policies, prohibited practices, disciplinary procedures and penalties regarding the use of medications and methods in connection with selling, training and racing horses, while respecting the autonomy and authority of individual state racing commissions and the work of national regulatory organizations;
- Stimulate, foster and seek proposals for new research into substances and methods being used to enhance or diminish athletic performance and devise appropriate analytical techniques for their detection;
- Clearly define the legitimate, therapeutic use of medications and/or methods and draw up reasonable guidelines for their use;
- Establish one or more working laboratories as “reference laboratories” for the purpose of overseeing the above-mentioned standards, validating new analytical techniques, developing reference samples, and ensuring quality control and good laboratory practice.¹⁵⁹

The RMTC has drafted model rules regarding “Equine Veterinary Practices and Medications,” which have been adopted by the ARCI.¹⁶⁰

Chapter 11 of these rules proposes regulations with respect to Veterinarian Practices, Prohibited Practices, Medications and Prohibited Substances.¹⁶¹ Under ARCI-011-020 Medications and Prohibited Substances, section A discusses Uniform Classification Guidelines, which provides a classification system for the use of drugs and medication in

158. Racing Medication & Testing Consortium, *Goals and Objectives: RMTC Mission Statement* http://www.rmtcnet.com/content_goals.asp (last visited Apr. 20, 2010).

159. *Id.*

160. Racing Medication and Testing Consortium, *Model Rules*, http://www.rmtcnet.com/content_modelrules.asp (last visited Apr. 21, 2010); See also Association of Racing Commissioners International, *Model Rules of Racing*, ARCI-011, et. seq. (2009), available at <http://www.arci.com/modelrules.html> (hereinafter “ARCI rules”).

161. See ARCI rules, *supra* note 160, at ARCI-011-020.

horse racing.¹⁶² Class 1 drugs “have no generally accepted medical use in the racehorse and their pharmacological potential for altering the performance of a race is very high.”¹⁶³ Class 2 drugs, “have a high potential for affecting the outcome of a race. Most are not generally accepted as therapeutic agents in the racehorse.”¹⁶⁴ Class 3 drugs, “may or may not have an accepted therapeutic use in the horse.”¹⁶⁵ Class 4 relates to, “therapeutic medications routinely used in racehorses. These may influence performance, but generally have a more limited ability to do so.”¹⁶⁶ Class 5 relates to drugs that “are therapeutic medications for which concentration limits have been established as well as certain miscellaneous agents.”¹⁶⁷ ARCI-011-015 Prohibited Practices proposes uniform penalties related to the use of Medication and Prohibited Substances.¹⁶⁸ These penalties are broken down according to a first, second and third offense structure.¹⁶⁹ These penalties are likely to be more effective in deterring violations of the rules, as they include lengthier suspensions and higher monetary fines; however, the scheme still permits for the consideration of mitigating circumstances which should not be factor in determining penalties.¹⁷⁰

C. The Welfare and Safety of the Racehorse Summit

The Grayson-Jockey Club Research Foundation has been created in order to raise funds for organizations in the horse racing industry to conduct research and development.¹⁷¹ Recently, the Grayson-Jockey Club held the *Welfare and Safety of Racehorse Summit*, which laid out recommendations to promote the health and safety of racehorses. Among the various recommendations, *Recommendation 5* discusses the establishment of uniform regulation of medication and

162. *Id.* at ARCI-011-020(A).

163. *Id.* at ARCI-011-020(A)(1).

164. *Id.* at ARCI-011-020(A)(2).

165. *Id.* at ARCI-011-020(A)(3).

166. *Id.* at ARCI-011-020(A)(4).

167. *Id.* at ARCI-011-020(A)(5).

168. See *Id.* at ARCI-011-015.

169. See *Id.* at ARCI-011-020(B).

170. *Id.*

171. See Grayson-Jockey Club Research Foundation, Inc., History, available at <http://www.grayson-jockeyclub.org/aboutDisplay.asp?section=2> (last visited Apr. 20, 2010).

integrity issues.¹⁷² A related objective was to “create a national regulatory structure.”¹⁷³ *Recommendation 3* proposes the development of a first-class drug-testing infrastructure in the United States.¹⁷⁴ Under this recommendation, related objectives are, “[d]evelop an accreditation program for equine drug testing laboratories in the U.S [and] develop a research and development program for US drug testing...[and] [r]egulation of medication usage in sale horses.”¹⁷⁵

D. Thoroughbred Safety Committee

In May 2008, the Jockey Club created the Thoroughbred Safety Committee, which was designed to “review every facet of equine health and to recommend actions the industry can take to improve the health and safety of Thoroughbreds.”¹⁷⁶ In June and August 2008, the Thoroughbred Safety Committee offered several recommendations relating to the use of drugs and medication, penalties, and drug testing and research.¹⁷⁷ The majority of these recommendations call for the implementation of the ARCI model rules.

VIII. HOW TO FACILITATE CHANGE?

A. Introduction

The American horse racing industry is at a crossroad and is in serious need of change. The current structure of American horse racing is extremely unorganized, which allows for the problem with drugs and medications to continue to harm horses and the overall integrity of the sport. There are many things that can be done to improve the horse’s health and safety while advancing the overall state of American horse racing. The way in which these changes can be effectuated is through collaboration and cooperation of all

172. Grayson-jockeyclub.org, *Welfare and Safety of the Racehorse Summit*, Recommendation 5 (2008), available at <http://www.grayson-jockeyclub.org/resources/recommendations.pdf> (last visited Apr. 21, 2010).

173. *Id.*

174. *Id.* at Recommendation 3.

175. *Id.*

176. Jockeyclub.com, *Thoroughbred Safety Committee*, <http://www.jockeyclub.com/tsc.asp> (last visited Apr. 20, 2010).

177. *Id.*

stakeholders in the racing industry. As the industry currently stands, there are thirty-eight different racing jurisdictions that need to come together and develop a strategy so that all racing jurisdictions operate under the same rules and regulations. There are three potential ways to facilitate this change: (1) federal intervention; (2) develop a national governing body; and/or (3) establish uniform rules and regulations among all racing jurisdictions.

B. Federal Intervention

During the hearing of the Subcommittee on Commerce, Trade, and Consumer Protection's on the "Current State of Thoroughbred Racing," members suggested that the federal government step in to fix the current state of horse racing.¹⁷⁸ Several individuals who were called to testify stated that they would consider federal intervention only if it was the last option.¹⁷⁹ This may be a viable option; however, many stakeholders are extremely reluctant to accept this model. The common sentiment of the stakeholders opposed to federal intervention is that there are many competent and effective organizations within the racing community capable bringing about change in the industry.¹⁸⁰ Several subcommittee members and stakeholders who are in favor of federal intervention believe that if a uniform structure has not already been established, it never will be.¹⁸¹

Under the federal intervention model, Congress would amend the Interstate Horseracing Act to grant the federal government authority over the entire horse racing industry.¹⁸²

178. Subcommittee Hearing, *supra* note 130 (statements by Kentucky Congressman Ed Whitfield) ("Just when Congress looks at the horse racing act as a vehicle to improve the sport, you run away and say, 'The federal government shouldn't be involved,'" Whitfield said. "We have a responsibility to set minimum standards.").

179. *Id.* (statement by Alex Waldrop, president and chief executive officer of the National Thoroughbred Racing Association) ("last thing this industry needs is another level of bureaucracy.").

180. *Id.* (statement by Alan Marzelli, President and CEO of Jockey Club and Jess Jackson, breeder/owner) (stating that a unified structure within the industry would be more beneficial than federal intervention. Marzelli stated "I have seen a lot of support for our recommendations. I would like to see if we can get them implemented." Jackson stated, "I do not favor more federal regulation or bureaucracy.").

181. *Id.* (statements by Congressman Ed Whitfield & Arthur Hancock, Breeder) (Hancock stated "only a federal racing commission or commissioner can save us from ourselves.")

182. *Id.* (statement by Jess Jackson, owner/breeder) ("The IHA needs to be

According to the Interstate Horseracing Act, the federal government has interstate commerce authority over wagering and off-track betting.¹⁸³ In order for the federal government to regulate the entire horse racing industry, the government would amend the Interstate Horseracing Act to include language establishing a uniform regulatory structure, and uniform laws with respect to all aspects of the horse racing industry. If a particular state does not comply, the federal government would have the right to suspend all wagering on horse racing in that state.¹⁸⁴

As previously stated, this is an option for the racing industry to consider; however it is unlikely a federal intervention framework would work in American horse racing. There are too many stakeholders and horsemen in the industry who oppose this structure, which makes this model extremely difficult to implement. As the California Horse Racing Board's Commissioner, Robert Shapiro said, the industry would accept "federal regulation only 'as a last resort' but agreed racing . . . needed a national commission."¹⁸⁵

C. Develop a National Governing Body (non-federalized)

Many stakeholders in the horse racing industry believe that, in order to effectuate change in racing, the industry must establish a national governing body, which would resemble the organizational structure of the NFL, NBA, or MLB. This option would likely be the most comprehensive and effective approach to ensure the health and well being of horses and the overall integrity of the sport.

The horse racing industry, through its various organizations already has an infrastructure in place, which could be used in developing a national governing body. First, the Jockey Club already controls the breeding and licensing of

amended. Trainers are under the thumb of the racetracks. We need a national organization to represent owners. Owners will unite themselves as a group and come together voluntarily and cure problems if you just let them."); *See generally* Interstate Horseracing Act, *supra* note 123.

183. Interstate Horseracing Act, *supra* note 123.

184. *Id.*

185. *Congressional Hearing On Horse Racing Calls For Governing Body*, SPORTS BUSINESS DAILY, <http://www.sportsbusinessdaily.com/article/121775> (last visited Oct. 30, 2008).

racehorses.¹⁸⁶ Next, there is the National Thoroughbred Racing Association (NTRA), which is “both league office for a big sport and trade association for a big industry, including related businesses like breeding.”¹⁸⁷ There are also other organizations in the industry performing various other operations relating to horse racing that could contribute to the development of a uniform and national governing body.¹⁸⁸ Finally, there are various other organizations, such as the Daily Racing Form and Equibase, which track and monitor horse racing statistics on a national level.¹⁸⁹

Ideally, a national governing body would be one organizational structure, similar to a corporation. This approach however may not be feasible due to the large number of conflicting organizations and interests in the industry. It is possible that all the currently existing organizations could continue to operate as they presently do. As a national organization, however, these organizations could act as subsidiaries to a centralized governing body, whose only responsibility would be to provide oversight. Additionally, states would still oversee the industry, and collect revenue from the operations; however, states would delegate operational power to this national organization. This framework could be effectuated either by cooperation from industry leaders, or through the federal intervention approach discussed above.

This national governing body may provide the best framework to ensure that the horse racing industry is run in the most efficient, effective, and safest manner. Before this national organization can come to fruition, individual racing jurisdictions and organizations need to reach an agreement. This approach would provide one organization with the power

186. Jockeyclub.com, About the Jockey Club, http://www.jockeyclub.com/about_tjc.asp (last visited Apr. 20, 2010).

187. NTRA.com, *A letter from the CEO*, available at <http://www.ntra.com/industry.aspx> (last visited October 30, 2008).

188. See, e.g., Thoroughbred Owners and Breeders Association, <http://www.toba.org/> (last visited Apr. 20, 2010) (“a national trade organization for Thoroughbred owners and breeders. TOBA’s mission is to improve the economics, integrity and pleasure of the sport on behalf of Thoroughbred owners and breeders.”); Horsemen Benevolence & Protective Association, <http://www.hbpa.org/> (last visited Apr. 20, 2010) (a leader in developing marketing and research policy initiatives within the horseracing industry).

189. See, e.g., DAILY RACING FORM, DRF.com (last visited Apr. 20, 2010); Equibase, <http://Equibase.com> (last visited Apr. 20, 2010).

to serve as the “central regulatory body.”¹⁹⁰

Further, this approach would call for many organizations to relinquish certain levels of control, and possibly become regional subsidiaries rather than national organizations as they currently stand. As many organizations presently operate in only certain areas of the country¹⁹¹ like Kentucky and New York, it would require each subsidiary be delegated certain regions of the country, which the umbrella organization would then monitor. Horseracing is a national sport, and there are opportunities for growth all over the United States, so while these subsidiaries might relinquish control in one region, others will grow in other regions. The sport is obviously most popular in states such as Kentucky and New York; however with the correct approach and strategy, it is possible to garner increased interest in other regions of the country. As stated, many entities and jurisdictions may have to give up some level of control; however, some sacrifices must be made in order to improve the current state of American horse racing.

D. Establishing Uniform Rules

The framework for establishing uniform rules and regulations in horse racing has been set in place by organizations such as the RMTC, ARCI, and the Thoroughbred Safety Committee. These rules are a good starting point to effectuate change in the industry. Uniform rules and regulations will ensure that health and safety is not compromised, the integrity of American racing is upheld, and that all horses and racing jurisdictions are operating on an even playing field.

The proposed rules have received optimistic responses from stakeholders and horsemen.¹⁹² All members of the

190. Subcommittee Hearing, *supra* note 130 (statement of Jess Jackson, at 12) (“It is clear to me that most of the industry’s present ills stem from the fact that we are a national, or international, sport, that has no competent central regulating body or federal authority mandating uniformity in the United States.” He further stated “A national organization would also overcome the most common objection to reform at the state level —namely, that reform in any one state will simply drive owners, breeders and business to other more lenient state jurisdictions.”).

191. Currently the NTRA and Jockey Club have their main offices in New York and Kentucky. TOBA and HBPA are headquartered in Kentucky.

192. Subcommittee Hearing, *supra* note 130 (statement of Alan Marzelli, at 12) (the recommendations by the Jockey Club and the RMTC “have been endorsed and

industry recognize the need for change, and these model rules are the best option. While these model rules serve as a good starting point, they need to go a step further. In order to completely clean up horse racing, these rules need to do two things. First, they need to establish a zero-tolerance policy for the use of all drugs and medications on racehorses. If a horse requires medications due to a particular ailment, the rules must state that that particular horse is not fit to race. The rules may permit the use of medication while the horse is rehabilitating from an injury, but it must end once the injury has healed. Once the horse's ailment is corrected and the medications are no longer in the horse's system, then, and only then, may that horse be permitted to race. No horse, however, should be permitted to race with any level of drugs or medications in its system. Second, the model rules must establish stricter penalties for violations. As they stand, the penalties are far too lenient, often discretionary, and do not deter trainers, veterinarians, and other horsemen from engaging in illegal and inhumane activities.

These model rules are an effective starting point for bringing about change. Although these rules need to be improved and expanded, they are better than the current system, and will provide racing the change it desperately needs.

E. Establish Uniform Super-Labs

In addition to the issues of uniform rules and regulation, the American horse racing industry must also work together to develop the most innovative and effective testing procedures. The development of appropriate testing labs is a necessary component for developing the best testing procedures. Currently, in the United States racehorses' test samples are submitted to one of a number of labs, both privately and state funded. It is difficult for the various states and private organizations to develop the best testing procedures, primarily due to insufficient funding. The horse

supported by a wide cross-section of over 15 leading industry organizations. We are confident, with this unified support these initial recommendations will be implemented in a timely fashion."); *See also* Subcommittee Hearing, *supra* note 130 (statement by Randy Moss, at 7) ("Owners and trainers have become frustrated and confused at the different medication guidelines for various states, and they have gradually begun to embrace uniform rules suggestions developed by the RMTC...").

racing industry must develop a super lab that can coordinate testing on a national level.

Recently, Kentucky looked into the possibility of establishing a state of the art testing facility in the state, but the racing commission would have to double the work force in order to “meet licensing and regulatory requirements.”¹⁹³ The general counsel for the governor’s office stated, “there is almost no chance that the commission will get more money from the state’s general fund.”¹⁹⁴ This sentiment is far too common within the racing industry with respect to testing racehorses. One viable alternative to the separate and individual testing lab approach is the creation of one central, super-lab, which would be responsible for testing all the racehorses throughout the country.

The *Thoroughbred Safety Committee* recommended that the horse racing industry develop a “world-class testing infrastructure in the United States.”¹⁹⁵ The recommendations included research on international testing techniques “in order to develop a business plan for the most efficient and cost-effective infrastructure for equine drug testing and research...[and] [d]evelop strict laboratory standards.”¹⁹⁶ These recommendations provide a solid framework for the development of more innovative and efficient testing procedures in the United States.

While the recommendations of the *Thoroughbred Safety Committee* are a good starting point, the horse racing industry must work to develop a uniform set of labs, which would operate as a super-lab. If there were one lab responsible for all the testing in the United States, the issues of lack of funding and competing opinions would be minimized. As previously mentioned, if the major stakeholders in the horse racing industry work together to create a super-lab, the money which previously went to a number of different labs, will be pooled together and will facilitate the most innovative and effective testing procedures.

193. Janet Patton, *Horse-racing task force discusses a Ky.-owned lab*, LEXINGTON HERALD-LEADER, Sept. 4, 2008.

194. *Id.*

195. Jockeyclub.com, *Thoroughbred Safety Committee Recommendations* (Aug. 17, 2008) available at http://www.jockeyclub.com/resources/drug_testing.pdf. (last visited Apr. 20, 2010).

196. *Id.*

CONCLUSION

The issues and controversies surrounding performance-enhancing drugs and the abuse of medications in horseracing are not new. Most recently, however following the tragic deaths of Eight Belles in the 2008 Kentucky Derby¹⁹⁷ and George Washington in the Breeder's Cup Classic¹⁹⁸ the horseracing industry has come under scrutiny from many organizations, such as People for the Ethical Treatment of Animals (PETA) and the Humane Society,¹⁹⁹ as well as the general public. This negative publicity has exposed problems that have existed in thoroughbred horse racing for years regarding the health, safety and well being of racehorses. According to the Associated Press, "[t]horoughbred racetracks in the U.S. reported more than three horse deaths a day [in 2007] and 5,000 since 2003."²⁰⁰ Although not all the deaths of thoroughbred horses can be attributed to drugs and medication, the use of these drugs and medications contributes to a large number of deaths of thoroughbred horse races in America.

The lack of uniform regulation in horse racing is a huge problem within the industry and has tarnished the image of horse racing in American society. According to Randy Moss, "[t]he way I see it, the single biggest dilemma facing this sport is the haphazard and dysfunctional manner in which racing is scheduled and administrated."²⁰¹ This issue will not be easily corrected, but it must be. There is no time "for the head-in-sand approach."²⁰² In order for horse racing to regain its stature as the *Sport of Kings*, members of the industry "have a fiduciary responsibility,"²⁰³ to work together to improve the state of the sport.

197. Note Eight Belles tested negative for steroids following 2008 Kentucky Derby, in which she finished second.

198. See *Breeders' Cup tragedy as George Washington is put down*, Oct. 28, 2007, available at <http://www.guardian.co.uk/sport/2007/oct/28/horseracing> (last visited Apr. 23, 2010).

199. Tom Lamarra, *Animal Rights Groups Target Eight Belles' Injury*, May 8, 2008, available at <http://www.thehorse.com/ViewArticle.aspx?ID=11813>.

200. Associated Press, *AP survey finds 5,000 racehorse deaths since 03*, June 17, 2008, available at <http://tuesdayshorse.wordpress.com/2008/06/17/ap-survey-finds-5000-horse-deaths-since-03>.

201. Subcommittee Hearing, *supra* note 130 (statement by Randy Moss, at 2).

202. *Id.*

203. *Id.* (statement of Congressman Cliff Stearns).

