

2014 NATIONAL HBPA WINTER CONVENTION EQUINE LAW & ORDER



Movement To Adopt Uniform Rules Continues To Gain Support

November 11, 2013

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GENERAL OVERVIEW

Authorities having jurisdiction over horseracing have for over a century promulgated rules and regulations that prohibit anyone from dosing or tampering with racehorses. Starting in approximately 1896, rules were enacted in the United States that provided for the expulsion of anyone found guilty of administering, or causing to be administered, for purposes of affecting the speed of a horse, drugs or stimulants internally, by hypodermic or other methods.

A chronological report on the development and progression of rules affecting thoroughbred racing reveals that a major concern has long been the detection and punishment of anyone who attempts to artificially stimulate a horse with drugs prior to a race or the use of electrical appliances or other devices. The rules initially gave the stewards the ultimate and final power to control the conduct of all officials, trainers, jockeys, grooms and other persons attending the horses. The rules over time provided for a sharing or a transfer of select powers to the State Racing Commissions. The rules covering corrupt practices, the use of stimulants, narcotics, appliances, the possession of such, vary in description and provide for an extensive array of punishments from state to state.

The evolution of the rules in the majority of jurisdictions more strictly defines the responsibility and duty of the trainer to that of strict liability for medication violations and prohibited the possession of hypodermic syringes, needles, or other devices by a trainer or others have care or custody of the horse within the racing association grounds which could be used for the injection or other infusion into a horse of a drug without first securing the permission from the Stewards. In addition, the rules in the 1950 began to address the employment and use of only licensed veterinarians by owners and trainers of thoroughbreds. The rules in most jurisdictions were further developed to require written notification by the vet to the stewards where medication or treatments contains a drug which is of such a character that could affect the racing condition of the horse in a race.

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TESTING FOR DRUGS AND MEDICATIONS

The history of testing racehorses for drugs and medications dates back to about 1903, just subsequent to the time where rules were being promulgated against the use of stimulants in racing. As Dr. Thomas Tobin noted in his 2005 address to the Kentucky Bar Association Equine Law, “Racehorse testing is thus by far the longest established, broadest in scope and most sensitive drug testing performed on earth. Racehorse testing is also performed within an extremely stringent regulatory context, ... Racehorse testing is also remarkably ‘clean’ and the incidence of deliberate use of performance affecting substances seems to be very small indeed.”

When the rules in Kentucky on medication were established, there were no thresholds or regulatory limits and few quantitative methods. The rules were clear and simple; you could not run on stimulants, depressants, local anesthetics, tranquilizers or narcotic analgesics – those substances generally held to be performance altering. Therapeutic substances were permitted, with the goal being to protect the health and welfare of the horse. Zero-tolerance policies continue to be the norm for performance altering substances and prohibited practices that have little or no therapeutic value.

But therapeutic medications are substances used to maintain the health of horses. In order to determine whether doses of such medications continue to have pharmacological effect, scientific testing is done to determine the “No Effect Thresholds” for the specific medication.

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While the “No Effect Threshold” is a measure for the chemist and scientist, it has little value to the horseman who cannot see 10 parts per billion of anything in the horses urine. What the horseman needs are clear transparent “withdrawal time guidelines” telling him/her when to stop administering the medication prior or post race so that the urine or blood reading comes in below the threshold for that particular medication. There are many factors that can affect withdrawal times and thus make a lock certain determination unrealistic but the goal is to provide times that make the risk of positive test over threshold level a minimal risk.

For horsemen to comply with the regulatory thresholds for these permitted therapeutic medications, it is absolutely necessary to have “withdrawal time guidelines” that are scientifically supported. Obviously, the ongoing development of new and improved therapeutic medications requires the addition of medications as well as providing that any such testing and threshold considerations to be flexible and allowed to evolve with new and improved scientific and medical veterinary developments.

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RECOMMENDED

Therapeutic Substance Withdrawal Times and Thresholds



Substance	Restricted Admin Time	Threshold*	Route of Admin
Acetaminophen	48 hours	10 ng/mL of urine	Intravenous
Betamethasone	7 days	10 pg/mL in plasma or serum	Intra-articular
Butorphanol	48 hours	Free butorphanol – 2 ng/mL of plasma, or Total butorphanol – 300 ng/mL of urine	Intravenous
Clenbuterol	14 days	140 pg/mL in urine or LOD in plasma	Orally
Dantrolene	48 hours	5-OH dantrolene – 0.1 ng/mL of plasma or serum	Orally
Delmidine	72 hours	1 ng/mL of carboxydelmidine in urine	Sublingual (Domosedan gel)
Dexamethasone	72 hours	5 pg/mL in plasma or serum	Oral, Intravenous, IM
Diclofenac	48 hours	5 ng/mL of serum or plasma	Topically
DMSO	48 hours	10 mcg/mL of plasma or serum	Topical
Firocoxib	14 days	20 ng/mL in plasma or serum	Orally
Flunixin	24 hours	20 ng/mL of serum or plasma	Intravenous
Furosemide	4 hours	100 ng/mL in blood and urine specific gravity < 1.010	Intravenous
Glycopyrrolate	48 hours	3 pg/mL of serum or plasma	Intravenous
Ketoprofen	24 hours	10 ng/mL of serum or plasma	Intravenous
Lidocaine	72 hours	20 pg/mL of total 3OH-lidocaine in plasma	Subcutaneous – distal limb
Mepivacaine	72 hours	OH-mepivacaine – 10 ng/mL in urine or mepivacaine at LOD in plasma	Subcutaneous – distal limb
Methocarbamol	48 hours	1 ng/mL of serum or plasma	Orally
Methylprednisolone	7 days	100 pg/mL in plasma or serum	Intra-articular
Omeprazole	24 hours	omeprazole sulfide – 1 ng/mL in urine	Orally
Phenylbutazone	24 hours	2 mcg/mL of serum or plasma	Intravenous
Prednisolone	48 hours	1 ng/mL of plasma or serum	Orally
Procaine penicillin	Time of entry	25 ng/mL of plasma	Intra-muscular (IM)
Triamcinolone acetonide	7 days	100 pg/mL of plasma or serum	Intra-articular
Xylazine	48 hours	0.01 ng/mL of plasma	Intravenous

*Threshold concentrations are as follows: mcg-micrograms (1 millionth of a gram); ng-nanograms (1 billionth of a gram); pg-piograms (1 trillionth of a gram)
LOD, means any level of detection.

Rules effective as of April 29, 2013

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Dr. Steven Baker, Distinguished Professor in Veterinary Medicine at LSU and Chemist for Louisiana State Racing Commission, during the June, 2013 Convention of the National HBPA held in Minnesota, gave a presentation entitled:

“Clenbuterol: Blood and urine clearance as a function of dose and time and its relevance to the RMTC recommended threshold”

Dr. Baker raised a number of questions concerning the process, protocols and secrecy surrounding the above thresholds recommended by the ARIC and RMTC. The following two areas summarize his some of his concerns with the thresholds and withdrawal times.

- 1.) The ARCI/RMTC must produce the documents, discussions and final basis for the decisions made in order for racing jurisdictions to defend against arguments that these thresholds are arbitrary and capricious, as well as other cogent arguments.
- 2.) The ARCI/RMTC must produce the scientific basis for these thresholds (pharmacology, pharmacodynamics) and explain how these decisions meet the standard mandated by the various States of protecting the horses, race participants and the betting public.

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Dr. Baker concluded his remarks in June 2013 with the following observation:

“Medication regulations should be based on the science of pharmacology, not hysteria, political agendas, financial considerations or technology. The RMTC has failed to follow its own charter of providing the industry with scientifically based thresholds. “

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Exhibit B

Multiple Medication Violations Penalty System (MMV) **ARCI Model Rule: ARCI-011-020 Section B (13) (a)-(j)**

- (1) Multiple Medication Violations (MMV)
- (a) A trainer who receives a penalty for a medication violation based upon a horse testing positive for a Class 1-5 medication with Penalty Class A-D, as provided in the ARCI Uniform Classification for Foreign Substances, shall be assigned points based upon the medication's ARCI Penalty Guideline as follows:

Class	Points If Controlled Therapeutic Substance	Points If Non-Controlled Substance
Class A ¹	N/A	6
Class B	2	4
Class C	1	2
Class D	½	1

- (b) The points assigned to a medication violation shall be included in the Stewards' or Commission Ruling. Such Ruling shall determine, in the case of multiple positive tests as described in paragraph (d), whether they shall thereafter constitute a single violation. The Stewards' or Commission Ruling shall be posted on the official website of the Commission and the official website of the Association of Racing Commissioners International. If an appeal is pending, that fact shall be noted in such Ruling. No points shall be applied until a final adjudication of the enforcement of any such violation.
- (c) A trainer's cumulative points for violations in all racing jurisdictions shall be maintained and certified by the Association of Racing Commissioners International. Once all appeals are waived or exhausted, the points shall immediately become part of the trainer's official ARCI record and shall then subject the trainer to the mandatory enhanced penalties by the Stewards or Commission as provided in this regulation.
- (d) Multiple positive tests for the same medication incurred by a trainer prior to delivery of official notice by the commission may be treated as a single violation.

¹ Except for Class 1 and 2 environmental contaminants, e.g., cocaine which shall be determined by the stewards based upon the facts of the case.

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- (e) The official ARCI record shall constitute prima facie evidence of a trainer's past record of violations and cumulative points. Nothing in this administrative regulation shall be construed to confer upon a licensed trainer the right to appeal a violation for which all remedies have been exhausted or for which the appeal time has expired as provided by applicable law.
- (f) The Stewards or Commission shall include all points for violations in all racing jurisdictions as contained in the trainer's official ARCI record when determining whether the mandatory enhancements provided in this regulation shall be imposed.
- (g) In addition to the penalty for the underlying offense, the following enhancements shall be imposed upon a licensed trainer based upon the cumulative points contained in his/her official ARCI record:

Points	Suspension in days
3-5.5	30
6-8.5	60
9-10.5	180
11 or more	360

MMP's are not a substitute for the current penalty system and are intended to be an additional uniform penalty when the licensee:

- (i) Has more than one violation for the relevant time period, and
- (ii) Exceeds the permissible number of points.
- (h) The suspension periods as provided above, shall run consecutive to any suspension imposed for the underlying offense.
- (i) The Stewards' or Commission Ruling shall distinguish between the penalty for the underlying offense and the enhancement based upon the trainer's cumulative points.
- (j) Any trainer who has received a medication violation may petition the ARCI to expunge the points received for the violation for the purpose of the MMV system only. The points shall be expunged as follows:

Penalty Classification	Time to Expungement
A	Permanent
B	3 years
C	2 years
D	1 year

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NEW ENHANCED PENALTIES FOR MULTIPLE VIOLATIONS

The new penalty system is intended to create an effective deterrent against intentional and repeated violations of medication rules to gain an unfair advantage in racing.

Under the new system set forth in the above Model Rule, scheduled to become effective in 2014, violations of the medication rules for substances not included on the RCI Schedule of Controlled Therapeutic Substances would earn 1 to 6 points, depending on its official classification determined by potential to affect performance with overages of medications on the RCI Schedule assessed half as many point depending on the classification. The enhanced penalties will be in addition to the penalty for the underlying offense and run consecutive with any suspension for the underlying offense. The enhance penalty is in the form of additional suspension days from 30 to 360 days.

During its July, 2013 meeting, the RCI also voted to require a ten (10) year suspension and a \$100,000.00 fine for anyone found guilty of the administration of blood doping agents like EPO.

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Drug Classification Scheme

- **Class 1:** Opiates, opium derivatives, synthetic opioids, psychoactive drugs, amphetamines, and all DEA Schedule I substances (see <http://www.usdoj.gov/dea/pubs/scheduling.html>), and many DEA Schedule II drugs. Also found in this class are drugs that are potent stimulants of the CNS. Drugs in this class have no generally accepted medical use in the racing horse and their pharmacologic potential for altering the performance of a racing horse is very high.
- **Class 2:** Drugs placed in this category have a high potential for affecting the outcome of a race. Most are not generally accepted as therapeutic agents in the racing horse. Many are products intended to alter consciousness or the psychic state of humans, and have no approved or indicated use in the horse. Some, such as injectable local anesthetics, have legitimate use in equine medicine, but should not be found in a racing horse. The following groups of drugs are placed in this class:
 - A. Opiate partial agonists, or agonist-antagonists.
 - B. Non-opiate psychotropic drugs. These drugs may have stimulant, depressant, analgesic or neuroleptic effects.
 - C. Miscellaneous drugs, which might have a stimulant effect on the CNS.
 - D. Drugs with prominent CNS depressant action.
 - E. Anti-depressant and antipsychotic drugs, with or without prominent CNS stimulatory or depressant effects.
 - F. Muscle blocking drugs - those that have a direct neuromuscular blocking action.
 - G. Local anesthetics that have a reasonable potential for use as nerve-blocking agents (except procaine).
 - H. Snake venoms and other biologic substances that may be used as nerve-blocking agents.
- **Class 3:** Drugs placed in this class may or may not have an accepted therapeutic use in the horse. Many are drugs that affect the cardiovascular, pulmonary and autonomic nervous systems. They all have the potential of affecting the performance of a racing horse. The following groups of drugs are placed in this class:
 - A. Drugs affecting the autonomic nervous system that do not have prominent CNS effects, but which do have prominent cardiovascular or respiratory system effects. Bronchodilators are included in this class.
 - B. A local anesthetic that has nerve-blocking potential but also has a high potential for producing urine residue levels from a method of use not related to the anesthetic effect of the drug (procaine).
 - C. Miscellaneous drugs with mild sedative action, such as the sleep-inducing antihistamines.
 - D. Primary vasodilating/hypotensive agents.
 - E. Potent diuretics affecting renal function and body fluid composition.
 - F. Anabolic and/or androgenic steroids and other drugs.

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- **Class 4:** Drugs in this category comprise primarily therapeutic medications routinely used in racehorses. These may influence performance, but generally have a more limited ability to do so. Groups of drugs assigned to this category include the following:
 - A. Non-opiate drugs that have a mild central antipyretic effect.
 - B. Drugs affecting the autonomic nervous system that do not have prominent CNS, cardiovascular, or respiratory effects:
 - 1. Drugs used solely as topical vasoconstrictors or decongestants.
 - 2. Drugs used as gastrointestinal antispasmodics.
 - 3. Drugs used to void the urinary bladder.
 - 4. Drugs with a major effect on CNS vasculature or smooth muscle of visceral organs.
 - C. Antihistamines that do not have a significant CNS depressant effect. This does not include the H₂ blocking agents, which are in Class 5.
 - D. Mineralocorticoid drugs.
 - E. Skeletal muscle relaxants.
 - F. Anti-inflammatory drugs. These drugs may reduce pain as a consequence of their anti-inflammatory action.
 - 1. Non-steroidal anti-inflammatory drugs (NSAIDs). (Aspirin-like drugs).
 - 2. Corticosteroids (glucocorticoids).
 - 3. Miscellaneous anti-inflammatory agents.
 - G. Less potent diuretics.
 - H. Cardiac glycosides and antiarrhythmic agents.
 - 1. Cardiac glycosides.
 - 2. Antiarrhythmic agents (exclusive of lidocaine, bretylium, and propranolol).
 - 3. Miscellaneous cardiotonic drugs.
 - I. Topical Anesthetics - agents not available in injectable formulations.
 - J. Antidiarrheal drugs.
 - K. Miscellaneous drugs:
 - 1. Expectorants with little or no other pharmacologic action.
 - 2. Stomachics.
 - 3. Mucolytic agents.
- **Class 5:** Drugs in this category are therapeutic medications for which concentration limits have been established by the racing jurisdictions as well as certain miscellaneous agents. Included specifically are agents that have very localized actions only, such as anti-ulcer drugs, and certain antiallergic drugs. The anticoagulant drugs are also included.

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PERCEPTION OF HORSE RACING AND MEDICATIONS

During the Jockey Club Round Table held in August, 2013 at Saratoga Spring, NY, officers of the Jockey Club announced the need for medication reform in horse racing and that the Jockey Club would provide up to \$500,000 in 2014-15 to some racing jurisdictions to step up out of competition drug testing for graded stakes races. The Chairman, Ogden Mills “Dinny” Phipps, stated that the Jockey Club would support federal oversight of racing in the absence of further medication reform.

But the perception of the sport of horse racing as being infested with illegal drugs, under current required medication testing protocols, appears overstated and based upon faulty and biased representations made by both the press and some industry organizations. This improper portrayal of the racing industry was noted by a variety of panelists during the Saratoga Institute on Racing and Gaming Law sponsored by the Albany Law School in Saratoga Springs, NY just days after the Jockey Club Round Table. Most all participants expressed the desire to implement a national uniform medication policy and to eliminate cheaters from the sport. Acknowledging the power of public perception, they pointed out that progress involves not creating policy as a response to what are inaccurate perceptions, but educating the public and enacting sensible change.

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RACING COMMISSIONERS INTERNATIONAL

Press Release

Wednesday, August 14, 2013
Contact: Ed Martin (859) 224-7070

Horse Racing's Drug Testing by the Numbers

SARATOGA SPRINGS, NY - Racing Commissioners International (RCI) President Ed Martin said today that all professional sports are challenged by those who would cheat by using performance enhancing substances. But Martin said horse racing "gets a bum rap" from those who ignore the numbers and overlook the fact that the sport does not permit athletes to compete under the influence of a prohibited substance with permission from a medical professional as other sports do.

"Horse racing has the most expansive drug testing program of any professional sport," he noted. "Racing tests for more substances at deeper levels than anyone else. And we do not permit therapeutic use exemptions for stimulants, opiates, hormones, narcotics and a host of other substances as is the practice in a number of other sports."

"This does not mean there is not a problem in racing or other sports. We all have the same challenges," he said. "But those who consistently promote the concept that horse racing has a bigger problem than other sports are doing do a disservice and potentially damage racing's efforts to compete in the marketplace."

At the annual Albany Law School Saratoga Institute on Racing and Gaming Law, Martin said that the appearance to some that racing has more of a drug problem than other sports may result from the fact that there are over 96,000 individual horse race contests each year compared to approximately 2,475 MLB games, 1,275 NBA games, 1,275 NHL games, and 275 NFL games.

"There's a lot more activity in racing and a lot more drug testing going on," he said.

Martin noted that drug test results in horse racing are in line with results from testing done by the United States Anti-Doping Agency (USADA).

"Based on information in USADA's 2011 annual report, 8,204 USADA tests were conducted and 99.65%¹ of the results were ultimately determined to be without violation," he noted.

Racing commissions in the U.S. conducted over 21 times more drug tests than the USADA in 2011. An RCI survey of the 301,769 samples tested conducted that year revealed a similar result: 99.59% were found to have no violation.

¹ United States Anti-Doping Agency 2011 Annual Report. Out of 8,204 drug tests, there were 61 adverse findings of which 11 were referred to the international federation leaving 50 US cases. 29 resulted in sanctions and 21 resulted in a finding of no violation.

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RCI Press Release
Wednesday, August 14, 2013

Of the samples tested, there were 1,244 "positive" findings. Of those 75% were for substances deemed to have the lowest possible effect on performance according to the RCI Uniform Classification Guidelines (i.e. Class 4 and 5), but violations nonetheless.

"Of all the horse races conducted in 2011, no horse was found to have run with a Class 1, 2 or 3 substance in its system 99.68% of the time. People can believe whatever they want, but these are facts," Martin said, noting "that's not to say we don't have cheaters, every sport does."

Martin said that horse racing, like other sports, is challenged by emerging substances used by some to cheat as well as unscrupulous efforts to circumvent the lab. "Focusing our efforts on intelligence and research is essential," he said, noting that in the high profile sport-doping cases like BALCO and cyclist Lance Armstrong the lab had been initially circumvented and human intelligence and tipsters were essential.

"Even though our standards are tougher, the challenge is the same regardless of sport. There always will be some people who will break the rules to try to get ahead," he said.

Horse racing does not grant Therapeutic Use Exemptions (TUE) as are allowed by the USADA program. The only substance RCI permits to be given on race day is furosemide and its use is disclosed to the public in the racing program.

By comparison, the USADA's 2011 annual report indicates that 422 requests for therapeutic use exemptions were made and the agency granted 43% of them. Specific information - name of athlete, competition, and substance allowed - is not disclosed by the USADA.

The RCI statistics are based on information provided the association by individual state racing regulatory entities. The 2011 numbers break out as follows:

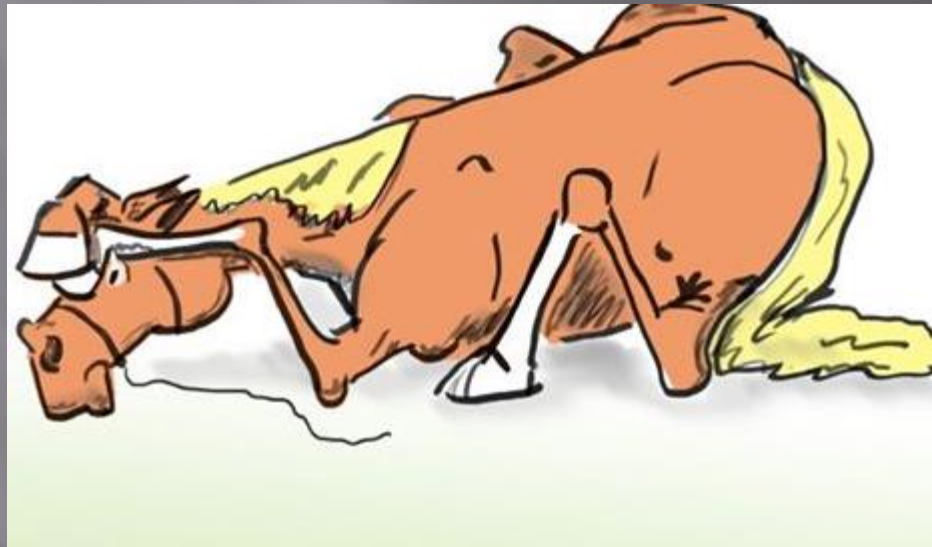
- There were 24 Class 1 violations -19 in flat racing² and 5 in harness racing
- There were 50 Class 2 violations - 28 in flat racing and 22 in harness racing
- There were 233 Class 3 violations - 174 in flat racing and 59 in harness racing
- The overwhelming majority (834) of violations involved Class 4 substances - 562 in flat racing and 272 in harness racing
- There were 103 Class 5 positives - 85 in flat racing and 18 in harness racing

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² Flat racing statistics include results for thoroughbred and quarter horse races

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*It is not as bad as the press tries to make it
-- Stay positive and proactive .*



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But then it's not as positive as we wish it were:



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OUT OF COMPETITION TESTING

There are a number of states that already have in place statutory/regulatory authority and procedures that permit the state's racing authority to conduct out of competition tests on race horses for drugs.

These states include: Kentucky (810 KAR 1:110); New York (9 NYCRR Section 4043.12); Indiana (71 IAC 8-3-5); New Jersey (N.J.A.C. Section 13:70-14A.13); Delaware (DHRC Rule 8.7.1.3) and California (4 CCR 1867). The regulations are designed to target drugs that are hard to detect and generally classified as blood doping agents or gene doping agents that may not be detectable the day of the race but can only be identified by testing at some time out from the time of the race.

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Kentucky:

The Kentucky out of competition regulations have not been tested in the courts but the Kentucky Attorney General has opined that the warrantless administrative searches comprehended in the regulations is valid to the extent that it is conducted within certain limits.

Opinion 2010 OAG 10-009 provides that in the opinion of the AG the Racing Commission may make a reasonable warrantless administrative search of any property of a licensee on association grounds this includes vehicles but excepts private dwelling areas and may make such searches of the property of a licensee for any items deemed relevant to a potential violation of a Commission regulation to include drugs, syringes and related items. Finally, the AG finds the clause in the license application consenting to reasonable warrantless administrative search for items relevant to an investigation is valid except for the private dwelling areas.

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Kentucky (con't):

The Kentucky OCT regulation prohibits the presence in a horse tissue or possession of any blood doping agents and any other substance that enhances the oxygenation of the body tissue as well as nontherapeutic administration of whole blood or packed red blood cells, venoms, or growth hormones. Samples may be taken in Kentucky or any other jurisdiction. If the horse is not produced for testing in the time specified, then it is not eligible to race for 180 days and the question arises whether non-cooperation applies. Split sampling available at the trainer/owner's expense and chain of custody protocols.

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The penalty section of the regulation is extremely onerous. It provides that first offense carries the revocation of license for 5 to 10 years and a fine of up to \$50,000. Second offense carries permanent revocation of license. This becomes very problematic when the offense subject to such drastic penalties includes the failure to cooperate.

Indiana:

Any horse eligible to race in Indiana is subject to testing without advance notice for prohibited substances, practices, and procedures for blood doping, EPO, darbepoetin, Oxyglobin, Hemopure, Aransep, or gene doping agents. The testing may take place while the horse is located on the grounds of the racetrack under jurisdiction of the commission, or stabled off association grounds while under the care or control of a trainer or owner licensed by the commission. The owner or trainer may be order to transport the horse to the racetrack for testing.

Indiana has been out of competition testing since 2007. Per Joe Gorajec, Executive Director of Indiana Horse Racing Commission, about 40 percent of sample for out of competition come from training centers and private farms. In 2012 four Quarter Horses earned the notorious distinction of becoming the only out of competition sample to test positive for a banned drug. Two trainers were responsible for the Quarter Horses in question. The one who had 3 horses received a 3 ½ year suspension and the other received an 18 month suspension

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New Jersey:

The New Jersey regulations covering out of competition testing also went into effect in 2007 prior to the Breeders Cup championships coming to Monmouth Park. All horses tested came up clean for illegal blood doping agents. The NJ Racing Commission may test at an off track stabling facility or it may compel production of a horse at the trainer's expense within 48 hours. NJ does not provide for split sample testing

California:

The California rule looks to detect blood doping agents. The regulation is relatively short as it states: "Board may require any horse entered to race to submit to any blood or other pre-race test, and no horse is eligible to start in a race until the owner or trainer complies with any required testing procedure.

Delaware:

The Delaware regulations test for EPO, DPO, Oxyglobin, Hemopure and other substances that abnormally enhance the oxygenation of the equine tissue. The time frame is within 60 days of the entry and/or race. The minimum penalty in Delaware is \$10,000 and/or 10 year suspension.

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New York:

The New York out of competition regulations have received the most attention because harness horse owners challenged the regulations in court. In August, 2011, the New York Supreme Court in Schenectady, N.Y. in the case of Ford, et al. v. The New York State Racing and Wagering Board (Doc. No. 2011-2086) held that the out of competition testing regulations were unconstitutional, devoid of due process, were arbitrary and capricious and so lacking in reason as to require nullification in their entirety.

In June, 2013 the Appellate Division of the N.Y. State Supreme Court revised the earlier decision. Then on October 22, 2013, the New York State Court of Appeals, the state's highest court, agreed to hear the appeal challenging the New York out of competition testing regulations for harness horse racing.

The decision of the Appellate Division did not find that the NYS Racing & Wagering Board exceeded its statutory authority by adopting out of competition regulations. The higher court found that the Board had general jurisdiction over all horse racing activities both on and off the track.

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Finding that the Board had authority to adopt such a regulation, the Appellate Court then reviewed the substance of the regulation to determine whether it was unreasonable, arbitrary, or capricious.

While the lower court found that the 180 day testing window was wholly arbitrary, the Board introduced evidence that such time frame was necessary to detect some types of blood doping that was not able to be detected on race day. This time frame also would allow trainer/owner to identify horses not anticipated to race within the 180 days.

The Appellate Court also found that the provision requiring an owner/trainer to bring horse to track for testing that was stabled within 100 miles of the track was reasonable especially considering that some jurisdiction (IN and NJ) do not have a maximum distance provision.

The issue of infringement of the privacy rights of a horse farm owner who was merely boarding a racehorse was also addressed and the court found that those who board a racehorse should have a reduced expectation of privacy due to fact of the highly regulated nature of horse racing. Court also did not find the list of prohibited substances to be vague as the lower court had ruled.

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Issues for consideration involving OCT regulations are:

Procedure for a horse owner to designate a horse ineligible for a stated period,

Regulations often provide that if licensee fails to cooperate subject to very severe penalty- failure to cooperate is a vague term.

When off grounds of association some advanced notice period needed,

Conflict with rules of jurisdiction where horse is located and test to be performed,

Owner/trainer representative present for test,

Presumption that horse is eligible but no mechanism to rebut this presumption.

Split samples for testing by owner/trainer.

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CASES

- Agilar v. Louisiana State Racing Commission, 116 So. 1029 (La.App 3 Cir. 2013)

Louisiana like most states makes the trainer the “absolute insurer” of the horse’s condition. In this case the horse tested positive for a Class 1 substance that carried 1 to 5 year suspension and up to \$5,000 fine. Primary issue alleged by trainer was that error by racing commission because it failed to allow him to choose the lab to conduct the split sample test. Court concluded that within the discretion of commission to choose the lab even where only one lab deemed competent.

- Stewart v. Kentucky Horse Racing Commission, 2010 CA 1929 (Ky. App. 2013)

Unpublished decision but contains important language concerning vagueness of regulation and the due process protections of federal and state constitutions in situation where regulation is vague. Veterinarian was charged with possession of snake venom and suspended for four years by stewards. Court found regulation was void for vagueness.

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- Allen v. Kentucky Horse Racing Authority, 136 S.W. 54 (Ky. App. 2004)

Trainer of a harness racehorse that tested positive for banned substance. While court affirms lower court order that upheld the Commission, the case does give perspective on type of issues that can and should be raised in such a case. As the issue of chain of custody with respect to blood or urine samples.

- Deaton v. Kentucky Horse Racing Authority, 172 S.W. 3d 803 (Ky. App. 2004),

Thoroughbred trainer and his horse tested positive for prosac. Challenged the Commission ruling on grounds that penalty was unreasonable. Court sided with the Commission.

- Stall v. Kentucky Horse Racing Commission, (Adm. Action KHRC 13 – TB-002)

Albert Stall trainer of Sign who won the Pocahontas (a grade 2 race). Sign tested positive for methocarbamol. Trainer testified at two day hearing in late May, 2013 before the Kentucky Racing Commission that he never administered the drug and produced veterinary records that did not show the drug was administered. The Commission found that the regulations addressing the situation of a positive drug test were discretionary and held that the disqualification of Sign as the winner of the Pocahontas was not mandatory and reinstated the win.

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Equine Law & ORDER

- Dudtrow v. New York Racing and Wagering Board, 949 NYS 2d 241 (NY App. 2012) Trainer brought action to review determination of Board's decision to suspend his license for 10 years. Court held evidence sufficient to support Board's decision that trainer had given a restricted drug to a horse less than 96 hours before race and for possession of syringes. Court held expert testimony about possible cross contamination was speculative.

- Clark v. Louisiana State Racing Commission, 104 So.3d 820 (La.App. 2013)

Jockey appealed his suspension of six months by racing stewards for allegedly failing to submit a valid urine sample. Testing found that the sample was inconsistent with human urine. Commission upheld ruling and extended suspension to 5 years based on some prior violations. Court held that notice to jockey complied with due process. Jockey failed to call witnesses, have an attorney present, etc because he alleged notice was not sufficient, Court did not agree.

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Equine Law & ORDER

- New Jersey Thoroughbred Horsemen's Assn. v. AlpenHouse, 2013 WL 1831883 (D.N.J. 2013) Racehorse owners and association brought action for strict liability and negligence against owner of training facility that allegedly was source of out break of Equine Herpes Virus that caused quarantine. Court held that horse trainer's absolute liability rule did not create a private right against the trainer for strict liability claims. Rule was promulgated to protect integrity of horse racing not to create a private right of action against trainer.
- Family Trust Foundation v. Kentucky Horse Racing Commission, 2012 WL 2160190 (Ky App. 2011) (to be published) discretionary review granted.

Court considered whether gaming product whereby parties may wager on "historical" races by means of a device that looks like a slot machine violates the Kentucky statutes that apply to gaming.

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Equine Law & ORDER

- Lewis v. New York Racing and Wagering Board, 954 N.Y.S. 2d 263 (NY Sup Ct. 2012). Substantial evidence supported Board's finding that applicant for license to participate in harness racing lacked character and general fitness so as to be consistent with the public interest. At an administrative hearing regarding the denial of prior application, the applicant became so enraged that he shattered a glass table top with his hand then confronted the hearing officer and informing the Board's investigator that he wished she would die a slow and horrible death.