HORSES AND DRUGS

Sponsor: Equine Law Section
CLE Credit: 1.0
Friday, June 23, 2017
11:20 a.m. - 12:20 p.m.
East Ballroom A-B
Owensboro Convention Center
Owensboro, Kentucky
A NOTE CONCERNING THE PROGRAM MATERIALS

The materials included in this Kentucky Bar Association Continuing Legal Education handbook are intended to provide current and accurate information about the subject matter covered. No representation or warranty is made concerning the application of the legal or other principles discussed by the instructors to any specific fact situation, nor is any prediction made concerning how any particular judge or jury will interpret or apply such principles. The proper interpretation or application of the principles discussed is a matter for the considered judgment of the individual legal practitioner. The faculty and staff of this Kentucky Bar Association CLE program disclaim liability therefore. Attorneys using these materials, or information otherwise conveyed during the program, in dealing with a specific legal matter have a duty to research original and current sources of authority.

Printed by: Evolution Creative Solutions
7107 Shona Drive
Cincinnati, Ohio 45237

Kentucky Bar Association
# TABLE OF CONTENTS

The Presenters................................................................................................................. i

Navigating U.S. Equestrian Federation's Equine Drugs & Medication Rules ............... 1

Drugs and Racehorses: Testing, Administrative Procedures and Consequences........ 19
THE PRESENTERS

Mindy Coleman
Jockeys’ Guild, Inc.
448 Lewis Hargett Circle, Suite 220
Lexington, Kentucky 40503
(859) 523-5625
mcoleman@jockeysguild.com

MINDY COLEMAN serves as in-house counsel for the Jockeys' Guild, Inc. in Lexington and practices in the areas of labor and equine law. She received her B.S. from Arizona State University and her J.D. from Gonzaga University. Prior to taking her position with the Jockeys' Guild, Ms. Coleman maintained a private practice focusing on bankruptcy and construction litigation. She is an active volunteer for the Permanently Disabled Jockeys Fund and the Brain Injury Alliance of Kentucky.

John L. Forgy
Kentucky Horse Racing Commission
4063 Iron Works Parkway, Building B
Lexington, Kentucky 40511
(859) 246-2040
John.forgy@ky.gov

JOHN L. FORGY serves as general counsel for the Kentucky Horse Racing Commission in Lexington and concentrates his practice in the areas of administrative and equine law. He received his B.A. from Georgetown University and his J.D. from the University of Kentucky College of Law. Mr. Forgy is a member of the Kentucky Bar Association, Kentucky Defense Counsel and Defense Research Institute.
SONJA S. KEATING joined the United States Equestrian Federation (USEF), the national governing body for equestrian sport in the United States, in February 2006. Eighteen months after joining USEF, she was appointed Senior Vice-President and General Counsel. Ms. Keating manages all legal matters for the organization. The USOC appointed her to serve on the USOC Safe Sport NGB Task Force aimed to develop harmonious standards among the forty-seven national governing bodies to address sexual misconduct and related misconduct in sport. This led to Minimum Standards for all USOC member organizations. Subsequently, the USOC appointed her to the USOC Safe Sport Working Group, which collaborated with the USOC on the policies and procedures for a newly formed entity, the U.S. Center for Safe Sport. The Center opened in March 2017 and is the first national non-profit solely dedicated to preserving the safety and well-being of athletes participating in Olympic sports. Ms. Keating is currently working with the FEI on a similar initiative. Prior to joining USEF, she practiced in the litigation department at Dinsmore & Shohl in Lexington. Ms. Keating earned her B.A. from Transylvania University and J.D. from the University of Kentucky College of Law.
I. U.S. EQUESTRIAN FEDERATION'S EQUINE DRUGS & MEDICATIONS PROGRAM

The United States Equestrian Federation's (the "Federation") Equine Drugs & Medications ("D&M") Program ("D&M Program") was established in 1970 and began as a spot test program. At that time, the association had 6,722 individual members. Today the Federation's membership exceeds 100,000. The mission was to cultivate a doping-free sport in order to (i) protect horses from abuse; and (ii) maintain a fair and level playing field so that no competitor could gain an unfair advantage through chemistry. The philosophy was and remains that an effective D&M Program would safeguard the safety and well-being of horses while minimizing the risk of long-term health implications due to inappropriate short-term therapy; discourage attempts to mask performance limiting conditions using drugs; and allow for appropriate treatment when necessary.

Over forty-six years since its inception, the Federation now runs a comprehensive and robust D&M Program. The Federation educates the membership at competitions, online, and through a twenty-four-hour hotline that members can call to inquire about substances and the rules. The Federation collects equine blood and urine samples from approximately 10,000-12,000 horses at competitions around the country each year. Anywhere from 900-1,000 competition days are tested each year. This yields about 14,000-17,000 samples per year. One hundred and fifty veterinarians and over 500 technicians around the country assist with sample collection. The Federation tests the samples and enforces violations of the D&M rules. Anywhere between fifty to 100 horses may test positive for a forbidden substance in a given year; less than 1 percent.

The D&M rules are a rational manifestation of the Federation's mission to rid the sport of improper use of drugs by trainers and others who continue to try to find new and innovative ways to circumvent the testing or detection, and gain an unfair advantage over the majority of its members who compete cleanly and honestly in the horse show ring.

II. KNOW THE RULES

Chapter 4 of the Federation rule book contains the D&M rules that all participants must familiarize themselves with in order to avoid a rule violation. (Federation Rules can be found here https://www.usef.org/compete/resources-forms/rules-regulations/rulebook. Each year, in order to educate and facilitate an easy understanding of the D&M rules, the Federation publishes "Drugs and Medications Guidelines." (2017 Drugs and Medications Guidelines found at https://files.usef.org/assets/FWCTSmGAWQY/2017guidelines.pdf). In addition to this resource, a member can call the twenty-four-hour hotline to inquire about the rules or specific substances.
The Federation classifies drugs as "Forbidden" or "Restricted." "Forbidden" refers to the drugs that are not permitted in any amount because they may affect performance, provide an unfair advantage, have the potential to be dangerous to the health of the horse, or mask the presence of other drugs. However, the Federation recognizes that horses may experience competition stressors that could result in situations where legitimate, therapeutic treatment is warranted near the time of competition. As such, the D&M rules provide specific conditions under which therapeutic administration of certain Forbidden Substances is allowed. All conditions must be satisfied to avoid a rule violation. "Restricted" refers to medications that are permitted but in a quantitatively restricted amount. In other words, only a certain level can be present in the blood and/or urine at the time of competition. The D&M rules permit each of the twenty-nine breeds and disciplines competing under Federation rules to designate whether they are a strict "Prohibited Substance Group" or a "Therapeutic Substance Group." The Prohibited Substance Group follows the FEI rules regarding banned substances. Endurance horses, for example, are included in the strict Prohibited Substance Group and are not afforded the same exceptions as those in the Therapeutic Substance Group.

III. FORBIDDEN SUBSTANCES

Forbidden substances are drugs that may affect performance, give an unfair advantage, pose a danger to the horse or interfere with drug testing by masking the presence of other drugs. Federation General Rule 410 defines a Forbidden Substance as:

A. Any stimulant, depressant, tranquilizer, local anesthetic, psychotropic (mood and/or behavior altering) substance, or drug which might affect the performance of a horse (stimulants and/or depressants are defined as substances which stimulate or depress the cardiovascular, respiratory or central nervous systems), such as such as reserpine or fluphenazine;

B. Any corticosteroid present in the plasma of the horse other than dexamethasone;

C. Any nonsteroidal anti-inflammatory drug in excess of one present in the plasma or urine of the horse, except salicylic acid;

D. Any substance permitted by this rule in excess of the maximum limit or other restrictions;

E. Any substance, regardless of how harmless or innocuous it might be, which might interfere with the detection of any other Forbidden Substance; and

F. Any anabolic steroid.

Some of these drugs can still be detected weeks after the last dose. For example, reserpine and fluphenazine can persist for ninety days. The D&M Guidelines identify detection times for a number of the drugs, and the Federation
Equine Drugs & Medications Department may be able to provide more information than what is published.

IV. RESTRICTED SUBSTANCES

These substances are recognized to have therapeutic value and to protect and improve the health of the horse unless used unnecessarily and for improper purposes. The following non-steroidal anti-inflammatory drugs are permitted at restricted levels so long as no more than one is present at the same time:

A. Diclofenac;
B. Phenylbutazone;
C. Flunixin;
D. Ketoprofen;
E. Meclofenamic; and
F. Naproxen.

Methocarbonal and dexamethasone are two other therapeutic substances that are permitted in restricted amounts. The D&M Guidelines provide withdrawal times for all Restricted Substances. For example, if a horse breaks out in hives and is administered oral dexamethasone at the dosage listed in the D&M Guidelines, his blood levels should be normal within six hours. The times listed in the D&M Guidelines are recommendations not rules. Some drugs can still be detected weeks after the last dose.

V. THERAPEUTIC ADMINISTRATION

The D&M rules permit therapeutic administrations of Forbidden Substances subject to the adherence to conditions detailed in Federation General Rule 411. One requirement is timely submission of a proper Federation Equine Drugs and Medications Report Form. The medication administered must be therapeutic and necessary for the diagnosis or treatment of an existing injury or illness. The medication must be administered by a veterinarian. If a veterinarian is not available, then the trainer can administer the substance at the advice and direction of a veterinarian. Administration of a Forbidden Substance for a non-therapeutic or optional purpose (e.g. shipping, clipping, training, turning out, cleaning teeth, mane pulling, non-emergency shoeing) is not considered therapeutic and is therefore a rule violation.

Following the therapeutic administration of a Forbidden Substance, in addition to filing the required Medication Report Form, the horse must be withdrawn from competition for a period of at least twenty-four hours after the medication is administered.
VI. HERBAL AND OTHER SUPPLEMENTS

Every trainer should be aware that it is not unusual for supplements and herbal remedies marketed within the equine industry or over the internet to contain Forbidden Substances that are not disclosed on the product label. It is also possible that those substances are contained in different amounts in the supplement or herbal remedies than stated on the label, or the product used may have been inadvertently contaminated with a Forbidden Substance. There is no guarantee that the ingredients list on any supplement or herbal remedy is accurate.

Positive tests have occurred from the inadvertent administration of a Forbidden Substance that was ingested by the horse when a supplement was fed to him. A trainer is responsible for what his horses ingest and he is, therefore, responsible for any substance found in a sample provided by his horse. A contaminated supplement will not excuse a positive drug test, and sanctions will be imposed in accordance with the rules.

Every trainer must take all steps to verify the ingredients of any supplements that he gives to his horse. It should be noted that "Natural" does not mean that it is drug-free. Many plants are the source of potent drugs, and some can produce metabolites like those of forbidden substances. For example, the herb rauwolfia (Indian snakeroot) is the source of reserpine.

In order to avoid a positive result, a trainer should never purchase supplements from non-reputable sources. Online resources may be able to help in identifying reputable sources, but not all supplements can be or are checked, and it is well known that product ingredients vary from country to country, and even from batch to batch.

Any trainer who uses supplements or herbal remedies for his horse does so at his own risk of committing a D&M violation. Trainers should always ensure that they exercise extreme caution and judgment in the products that they use.

VII. D&M RULE ENFORCEMENT PROCESS

First and foremost it is important to understand who is responsible and accountable for a positive sample under the D&M rules. The Federation is a New York not-for-profit corporation and all Federation rules are interpreted under New York law.

A. Responsibility and Accountability

The trainer is legally the person responsible for a D&M rule violation. According to the Federation rules, more than one person can be considered a trainer and therefore responsible and accountable for a D&M rule violation.¹ The trainer is the person responsible for the horse's

¹ Federation General Rule 404.1-4.
care, training, custody, condition, or performance of the horse at the competition. An owner, rider, groom, or anyone who meets the definition of "trainer" is responsible and accountable unless he can prove with substantial evidence to the contrary. It is the Hearing Committee's determination who meets the criteria.

The determination of such questions as whose conduct may fit the definition of a trainer at an equestrian competition is properly committed to members of the Federation's Hearing Committee composed of members experienced in all facets of equestrian sport. They are familiar with how horses are trained, guarded, treated, and cared for at competitions. New York courts have held that the expertise of the entire

1. Trainers and other Persons Responsible, in the absence of substantial evidence to the contrary, are responsible and accountable under the penalty provisions of these rules. The trainer and other Persons Responsible are not relieved from such responsibility as a result of the lack or insufficiency of stable security.

2. The Persons Responsible may include the individual who rides, vaults, or drives the horse and/or pony during a competition; the Owner; and/or Support Personnel.

3. Support Personnel is defined to include but is not limited to grooms, handlers, longeurs, and veterinarians may be regarded as additional Persons Responsible if they are present at the competition or have made a relevant decision about the horse and/or pony.

4. A trainer is defined as any adult or adults who has or shares the responsibility for the care, training, custody, condition, or performance of a horse and/or pony. Said person must sign the entry blank of any Licensed Competition whether said person be a trainer, owner, rider, agent and/or coach. Where a minor exhibitor has no trainer, then a parent, guardian or agent or representative thereof must sign the entry blank and assume responsibility as trainer. The name of the trainer must be designated as such on the entry blank. It is the responsibility of trainers as well as competition management to see that entry blanks contain all of the required information. The responsibilities of a trainer include, but are not limited to the following:

a. for the condition of a horse or pony at a Licensed Competition (whether or not they have signed an entry blank),

b. to guard each horse and/or pony at, and sufficiently prior to, a Licensed Competition such as to prevent the administration by anyone of, or its exposure to, any forbidden substance, and

c. to know all of the provisions of this Chapter 4 (including any advisories or interpretations published in equestrian) and all other rules and regulations of the Federation and the penalty provisions of said rules. For purposes of this rule, substantial evidence means affirmative evidence of such a clear and definite nature as to establish that said trainer, or any employee or agent of the trainer, was, in fact, not responsible or accountable for the condition of the horse and/or pony. If any trainer is prevented from performing his or her duties, including responsibility for the condition of the horses and/or ponies in his or her care, by illness or other cause, or is absent from any Licensed Competition where horses and/or ponies under his or her care are entered and stabled, he or she must immediately notify the competition secretary and, at the same time, a substitute must be appointed by the trainer and such substitute must place his or her name on the entry blank forthwith. Such substitution does not relieve the regular trainer of his/her responsibility and accountability under this rule; however, the substitute trainer is equally responsible and accountable for the condition of such horses and/or ponies.
panel in competition and training of show horses as applied to the facts and testimony in a matter before them is entitled to deference in an administrative review in New York court. In Murdock v. American Horse Shows Association, 287 A.D.2d 364, 731 N.Y.S.2d 616 (Pt Dep't 2001) the court held that the Federation's predecessor was entitled to Article 78 deference in the interpretation of its rules "by its voluntary members, as experts in the subject area of sport competition." See also Mercury Bay Boating Club v. San Diego Yacht Club, 76 N.Y.2d 256, 266, 557 N.Y.S.2d 851 (1990) (Club members expert in the sport of sailing entitled to deference in expertise to interpret America's Cup rules to allow multi-hulled vessels to compete in the America's Cup race); Golden Gate Yacht Club v. Societe Nautique De Geneve, 12 N.Y.3d 248, 258, 879 N.Y.S.2d 363 (2009) ("It has been posited that the right to act as trustee of the America's Cup should be decided on the water and not in a courtroom. We wholeheartedly agree."); Crouch v. National Association for Stock Car Auto Racing, Inc., 845 F.2d 397 (2d. Cir. 1988) (courts should defer to NASCAR's expert interpretation of stock car racing rules); Charles O. Finley & Co. v. Kuhn, 569 F.2d 527 (7th Cir. 1978) (rejecting a challenge to professional baseball rules, stating that "certain standards .... are not necessarily familiar to courts and obviously require some expertise in their application").

Courts will give administrative agency determinations "great deference" and may not substitute their judgment for that of the agency. It is well-settled that an agency's interpretation of a statute or regulation that it administers as well as those it implements, is entitled to great weight and judicial deference. Matter of Howard v. Wyman, 28 N.Y.2d 434, 438 (1971).

B. The Ted Stevens Olympic & Amateur Sports Act and Rights Afforded Trainers/Persons Responsible

The Federation is the National Governing Body for equestrian sports in the United States. It derives this designation and recognition from the United States Olympic Committee and as such is bound by the requirements imposed on National Governing Bodies by the Ted Stevens Olympic & Amateur Sports Act, 36 U.S. Code §220501 (1998) (the "Sports Act"). Pursuant to the Federation's Bylaws and the Sports Act, the Federation affords trainers and Persons Responsible rights in connection with an allegation of a rule violation. These rights include:

1. Notice of the charges or alleged violations in writing;
2. An opportunity for a hearing;
3. A reasonable amount of time before the hearing to prepare a defense;
4. A hearing at a time that is practicable for you to be able to attend;
5. Fair notice and impartial hearing;
6. A hearing before a disinterested and impartial body of fact finders;

7. The identity of the Hearing Committee panel members who will be presiding over the hearing;

8. An opportunity to call witnesses and present oral and written evidence and argument;

9. An opportunity to confront and cross-examine adverse witnesses;

10. An opportunity to request that a record be made of the hearing;

11. A reasoned written decision following your hearing; and

12. An opportunity to request a review of the Hearing Committee's decision.

C. Notification

When a positive sample is determined, the Federation notifies the trainer and owner of record. This information is found on the competition entry blank and the sample identification card filled out at the competition at the time that the samples were collected. Along with the notification, the Federation asks for an explanation and encloses a "B Sample Request Form." The respondents have fifteen days to return the form to request testing of the B sample. If they do not submit a request within the allowed timeframe, they waive their right to test the B sample. Substantial confirmation of the laboratory's initial finding is conclusive evidence that the sample is positive for the forbidden substance.

Trainers should take the opportunity to explain the circumstances. Cooperation and transparency work favorably for the respondent. If an inadvertent administration occurred, the Federation may be able to assist with how it happened, all of which could significantly affect the penalty imposed.

D. Administrative Penalty

Many of the Federation's positive cases result from an overage of a restricted medication. The Federation will offer an "Administrative Penalty" in order to expedite the matter and obviate the need for a hearing. The respondent can decide whether the offer is worthy of acceptance. The respondent can accept the offer within a certain timeframe or demand a Charge. When the latter occurs, a written Charge Form is issued describing the alleged violations. Subsequently, the matter is scheduled for a hearing before a panel from the Federation's Hearing Committee.
E. Hearing

The Hearing Committee consists of independent Federation members who are approved by the Federation Board of Directors. The Committee is representative of a geographical balance of Federation members, affiliates, breeds, and disciplines. The members of the Committee are volunteers and therefore are not paid by the Federation for their service. The Committee considers evidence presented by the parties to the matter. They make the decision about whether a rule violation occurred and if so what the appropriate penalty is to impose. The Committee affords respondents fair, impartial, timely, and efficient hearings.

F. Burden of Proof

A blood or urine sample that is positive for a forbidden substance, or if any metabolite or analogue thereof is found present in the sample, is *prima facie* evidence that the forbidden substance was administered in some manner to the horse. Intent is not an element of a D&M rule violation. As mentioned above, the respondent has an opportunity to request testing of the corresponding B sample. If the B sample does not confirm the A sample then the case is dismissed. On the other hand, substantial confirmation of the laboratory's initial finding is conclusive evidence that the sample is positive for the forbidden substance.

G. Penalty

Once a determination is made that a D&M rule was violated, the Hearing Committee Panel must decide what the appropriate penalty is based on the particular circumstances. While Federation General Rule 406 provides some guidance as to penalties, the Federation Board of Directors adopted "Penalty Guidelines" that went into effect January 1, 2016. Ultimately, penalties are left to the discretion of the Panel.

Depending on the facts and circumstances of each case, the Panel may determine that no purpose is served by imposing a penalty within the range provided in the Penalty Guidelines. In some cases, a penalty below the recommended range, or no penalty at all, may be warranted. Conversely, the Panel may determine that the facts and circumstances of a specific case may call for the imposition of penalties above or otherwise outside of a suggested range. Examples of what may enhance a penalty include, but are not limited to, prior rule violations, egregious misconduct, the need for increased deterrence, or certain policy considerations. The Penalty Guidelines categorize forbidden substances into four categories.

All categories below include return for redistribution of all trophies, prizes, ribbons, and monies won at the competition.

1. Category I – Overages of NSAIDs and other quantitatively restricted medications such as Dexamethasone.
a. **First offense** – Censure and $750-$1,000 fine.

b. **Second offense** – Censure and $1,500-$2,500 fine.

c. **Third offense** – Suspension of one month and $3,000 fine.

2. Category II – Positives for forbidden substances that have legitimate therapeutic value in the treatment of horses such as corticosteroids used for joint injections, sedatives, and local anesthetics used for laceration repairs, and those medications commonly used for treatment of colic, etc.

   a. **First offense** – Suspension of one to three months and $1,000-$3,000 fine.

   b. **Second offense** – Suspension of three to six months and $3,000-$6,000 fine.

   c. **Third offense** – Suspension of six to twelve months and $6,000-$12,000 fine.

3. Category III – Forbidden substances that are not indicated for use in horses but are FDA approved and regulated such as some of the opiates and antipsychotic drugs.

   a. **First offense** – Suspension of three to six months and $3,000-$6,000 fine.

   b. **Second offense** – Suspension of six to twelve months and $6,000-$12,000 fine.

   c. **Third offense** – Suspension of twelve months or more and $12,000 or more fine.

4. Category IV – Forbidden substances that may be used to alter the performance of the horse or may be used to avoid detection, and that have not been FDA approved for use in horses. Some examples include but are not limited to GABA and Phenibut.

   a. **First offense** – Suspension of six to twelve months and $6,000-$12,000 fine.

   b. **Second offense** – Suspension of twelve to twenty-four months and $12,000-$24,000 fine.

   c. **Third offense** – Suspension of twenty-four months or more and $24,000 or more fine.
H. Hearing Committee Decision

Following a hearing, the Hearing Committee Panel issues a written, reasoned determination that is distributed to the parties within sixty days following the hearing.

A party who is dissatisfied with the Panel's decision has thirty days from the written determination to request a re-hearing or a review. These requests are within the Panel's discretion and are decided by the Panel that heard the matter in the first instance. Many respondents petition the Panel for a review of the determination but it is rare that the Panel disturbs its original findings.

I. Legal Challenges to Hearing Committee Decisions

The Federation Hearing Committee decisions can be legally challenged in the Supreme Court of the State of New York, County of New York by a respondent(s), under the provisions of CPLR §7803(3). The appropriate role of a Court sitting in Article 78 jurisdiction is limited: to inquire whether decisions made or actions taken by a private organization, such as the Federation, were based upon substantial evidence and were not arbitrary or capricious. Once it has confirmed that they were, that is the end of the judicial inquiry. It is not the role of the Court to substitute its judgment for the Federation in its adoption or interpretation of rules.

The standard of review under CPLR §7803(3) is "whether a determination was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion." The First Department has nevertheless made clear that under CPLR §7803(3), the decisions by the Federation's Hearing Committee will be upheld if they are supported by substantial evidence in the record. Lindemann v. American Horse Shows Association, Inc., 222 A.D.2d 248, 634 N.Y.S.2d 697 (1st Dep't 1995). The decision in Lindemann is the touchstone for review of determinations by the Federation’s Hearing Committee, because the Federation is the successor to the AHSA and adopted its Rule Book, which includes the D&M rules and the Hearing Rules. In Lindemann, the First Department unanimously reversed an IAS decision nulling the Hearing Committee's temporary suspension of a member, after a hearing, for violation of misconduct rules:

In an article 78 proceeding, the court's role is limited to ascertaining whether a determination made after a hearing is supported by substantial evidence. In reviewing the evidence, the court must defer to the fact-finder's assessment of the evidence and the credibility of the witnesses (Matter of Berenhaus v. Ward, 70 N.Y.2d 436, 522 N.Y.S.2d 478, 517 N.E.2d 193 (1987)). It is axiomatic that the court may not weigh the evidence, choose between conflicting proof, or substitute its assessment of the evidence or the credibility of the witnesses for that of
the Administrative Law Judge or hearing panel (Matter of Deitch v. Dole, 159 A.D.2d 311, 552 N.Y.S.2d 590 (1990)).

* * *

In the instant case, the nisi prius court violated these fundamental principles governing the application of article 78. It substituted its judgment for that of the hearing panel.

The role of the Court in review under Article 78 is limited to review of the record of the hearing. The Court's order in Matter of Teguegne v. New York State DHCR, 2013 N.Y. Misc. LEXIS 4590, *13-14, 2013 NY Slip Op 32432(U), 9-10 (Sup. Ct. N.Y. Co., Oct. 9, 2013) (Kern, J.) (where the tenant attempted to submit evidentiary facts and information that were not before the DHCR when it issued its order in his case) is instructive:

The court cannot consider the submission and consideration of evidence outside of the Administrative Record. "The role of a court in reviewing a decision of an administrative agency...is limited with the standard of review being whether the administrative determination was in violation of a lawful procedure or was affected by an error of law or was arbitrary and capricious and without a rational basis in the administrative record." Rowan v. NYC HPD, 31 Misc. 3d 1235(A), 932 N.Y.S.2d 763 (Sup. Ct. N.Y. Ct., 2011); see also Matter of Pell v. Board of Educ., 34 N.Y.2d 222, 231, 313 N.E.2d 321, 356 N.Y.S.2d 833 (1974). "The court cannot conduct a de novo review of the facts and circumstances or substitute the court's judgment for that of the agency's determination" as judicial review of administrative determinations is confined to the facts and record adduced before the agency. Rowan, 31 Misc.3d *3; see also Greystone Management Corp. v. Conciliation and Appeals Bd., 94 A.D.2d 614, 616, 462 N.Y.S.2d 13 (1st Dep't 1983), aff'd. 62 N.Y.2d 763, 465 N.E.2d 1251, 477 N.Y.S.2d 315 (1994).

The court reviews the record, as a whole, to discern whether a rational basis exists to support the findings of the administrative agency. Nelson v. Roberts, 304 A.D.2d 20, 757 N.Y.S.2d 41 (1st Dept. 2003). "If the court finds that the determination is supported by a rational basis, it must sustain the determination even if the court concludes that it would have reached a different result than the one reached by the agency." Peckham v. Calogero, 12 N.Y.3d 424, 431, 883 N.Y.S.2d 751 (2009).

VIII. RECENT CASES AGAINST THE FEDERATION

A. Petitioner Mother

Petitioner was the mother of a seventeen year old junior equestrian competitor. Her daughter had been described as an equestrian prodigy,
who had competed nationally and internationally since the age of fourteen, and won many jumping competitions. The year that the Article 78 proceeding was filed, Petitioner's daughter was soon to turn eighteen, and it would be her last year to compete as a junior rider. Due to the demands of her daughter's competition schedule, Petitioner had not maintained any kind of regular, paid employment since her daughter was a young child. Petitioner had been her daughter's "constant chaperone, cheerleader, team member, chauffeur" and coach throughout her daughter's years of competition.

Petitioner's daughter competed on a horse that had been administered and/or contained in its body a Forbidden Substance, gamma-aminobutyric acid ("GABA"), in excess of normal physiological levels; GABA in excess of normal physiological levels was detected in the subject horse's blood sample. The Hearing Committee held Petitioner responsible and accountable under Federation rules. The question presented in the Article 78 proceeding was whether the Federation could hold Petitioner responsible and accountable under the D&M rules and, as a result, impose penalties. Petitioner disputed the Hearing Committee's finding that based on the evidence at the hearing, including her testimony, she fit the definition of trainer and therefore was accountable for the D&M violation.

The Court held that it would not substitute its judgment for that of the Hearing Committee. The Hearing Committee heard the testimony and could assess the credibility of the witnesses, the judgment of which the Court stated that it must defer to the Hearing Committee. The Hearing Committee's decision was affirmed.

B. Petitioners Archibald Cox Ill and Meredith Mateo (2015)

Petitioners Archibald Cox Ill ("Cox") and Meredith Mateo ("Mateo") filed an Article 78 proceeding against the Federation seeking to vacate a Final Order, issued against them by the Federation Hearing Committee, which found violations of the Federation's anti-doping rules, imposed fines, and suspended Cox's membership and right to participate in, observe, or attend any Federation competitions.

Cox and Mateo exhibited a horse that had been administered and/or contained in its body the Forbidden Substance GABA in excess of normal physiological levels. GABA in excess of normal physiological levels was detected in the subject horse's blood sample.

Cox and Mateo contended that the Final Order was not supported by substantial evidence within the meaning of CPLR 7803(4) and should therefore be vacated. In the alternative, petitioners sought a hearing to determine whether the scientific evidence upon which petitioners' violations were based had attained general acceptance in the relevant scientific community.
The Court ruled in favor of the Federation. In its Order, the Court cited Lindemann for the principal that "the court must defer to the fact-finder's assessment of the evidence and credibility of the witnesses." The Court held that the Petitioners failed to demonstrate that the Hearing Committee's decision was not supported by substantial evidence and that they also failed to demonstrate that the decision was arbitrary and capricious or that it was an abuse of discretion.

C. Petitioners Thomas Wright and John & Stephanie Ingram (Index No. 162129/2015)

Petitioners argued that the D&M rules, which have been in effect for many years, should be revised because drug testing has become more refined over the years, and laboratories have since become able to detect minute amounts of drugs that might not be found before; therefore, in their opinion, the D&M rules have become unfair, and should now require proof that the amount of the substance detected actually affected the performance of the horse. The Hearing Panel determined that it did not have to decide this argument in the context of the Petitioners' case, because the experts for both sides concurred that acepromazine has been essentially detected and reported as positive for some time at the same Federation laboratory threshold, even though detection methods have improved.

The Hearing Panel gave several reasons in its Findings and in the Review Letter why the rules do not and should not impose such a burden of proving that the substance had a particular effect on the horse in the class in question. One significant reason that it gave was:

To place that type of burden on the Federation would be particularly onerous as there is often no way to know with certainty critical factors, such as the time of administration, dose of administration, or method of administration.

Petitioners argued to the Court that because the Federation had not adopted a "zero tolerance" drug program, it followed therefore that any screening limit must be scientifically related to a pharmacological effect, basing this argument upon a mischaracterization of the affidavit of Dr. Allen and the testimony of Dr. Maylin. The Hearing Panel rejected this argument on a number of grounds. However, the panel found that the quotation taken from Dr. Allen's Affidavit did not support the Petitioners' argument. The Panel noted that it merely concerned Dr. Allen's general point that the "international standard for show horse testing is not 'zero tolerance'" and that in such general context, Dr. Allen stated that the "international standard" is "tied to the potential for abuse and the ability of this drug to enhance/alter the performance of a show horse."

The Hearing Panel, based on substantial testimony by Federation witnesses that was either conceded or not controverted by Petitioners' expert, rejected the primary argument made by the Petitioners with respect to the applicability of thresholds for acepromazine recently set by
some racing authorities for horse racing. The Panel held that it "remains unconvinced that thresholds adopted by some horse racing bodies are equally applicable in the show horse context." In particular, the Panel focused on the ways in which tranquilizers such as acepromazine can be used in small doses to subtly change equestrian performance at horse shows, justifying distinctions with horse racing.

The Petitioners argued that the international threshold of 2 ng/ml for horse showing was too low, and urged that the Hearing Committee depart from the standard by recognizing a threshold of no less than 10 ng/ml recommended by a consortium of horse racing investigators.

The Hearing Panel credited the testimony of the Federation's expert witness, Dr. George Maylin, Consultant to the Federation's D&M Program, that there is no scientific study in existence definitively establishing that acepromazine could or could not have pharmacological effects, whether one chose the 2 ng/ml Federation threshold or the 10 mg/ml racing thresholds mentioned by the Petitioners (or racing authorities), and it would be impractical and prohibitively expensive to conduct such a study. Dr. Maylin also testified that the concerns of racing authorities with respect to the misuse of tranquilizers are very different from horse showing, thus justifying the Federation maintaining the lower threshold, and other Federation witnesses agreed. Dr. Maylin testified that the reason for his acepromazine research over many years was that acepromazine was a great problem for horse showing, while it was not (and is not) so much of a problem in horse racing.

Dr. Maylin testified that the reason why acepromazine is a greater concern in horse showing is that acepromazine can achieve subtle changes in behavior and performance in the show ring, and that such subtle changes are of less significance for performance enhancing purposes in racing than in horse showing. He testified: "I don't believe that the objectives [of the regulators for the two sports] are the same.... In racing, they [racing authorities] will tolerate a larger amount of the drug. In show horses, it's a different situation where they want to prevent subtle changes in the horse.... So there are two different disciplines. Two different challenges and objectives. And the USEF was consistent with the international community of horse shows."

2 Dr. Maylin's experience in both horse showing and horse racing has given him unique expert knowledge of different concerns involving the use of performance affecting drugs between the two sports. This Court may take judicial notice that Dr. Maylin (in addition to conducting studies and testing as a consultant and testifying as an expert in show horse drug prosecutions as shown in the Record), has also testified as an expert on behalf of the New York State Racing & Wagering Board in drug violation prosecution hearings against race horse trainers. See, e.g., Mosher v. N. Y. S. Racing & Wagering Bd., 74 N.Y.2d 688, 543 N.Y.S.2d 374 (1989) ("Board's expert witness"); Matter of Dutrow v. N.Y.S. Racing & Wagering Bd., 97 A.D.3d 1034, 949 N.Y.S.2d 241 (3d Dep't 2012); Matter of Shuman v. N.Y.S. Racing & Wagering Bd., 40 A.D.3d 385, 835 N.Y.S.2d 569 (1st Dep't 2007); Matter of Pletcher v. N.Y.S. Racing & Wagering Bd., 35 A.D.3d 920, 826 N.Y.S.2d 468 (3d Dep't 2006). Thus he is familiar with both sports.
Dr. Maylin, who develops drug tests and conducts administration studies of drugs, testified that the cost of attempting to develop such proof would be prohibitive for the Federation. He testified that "there is not enough money in the world" to study all the drugs that could be used to determine a physiological pharmacological effect. Dr. Maylin further testified on cross-examination that there are "new drugs coming along every day" and probably he could "name a hundred." He testified that "to do what [Petitioners] suggested would probably be 50 to $100,000 per drug." Petitioner's expert witness, Dr. Cole, did not dispute his testimony, including his monetary projection.

The Hearing Panel credited Dr. Schumacher's testimony that adopting the Petitioners' position "essentially... would eviscerate, eliminate having a drug rule." The Panel concluded:

The Federation is in a constantly shifting battle against those who would impact the level playing field by improperly medicating horses. Drugging of horses is not a static activity, but instead is ever adapting to the detection efforts of the Federation. The impractical restrictions proposed by Respondents would handcuff the Federation in its efforts to uphold its duty to protect the horse and rider, and to ensure a level playing field without the taint of drug-enhanced performance.

Based on its review of the evidence, the Hearing Panel rejected Respondents' claim that it was arbitrary and capricious for the Federation to rely on the foregoing concerns in setting a 2 ng/ml screening limit in the absence of a definitive normative study demonstrating pharmacological effect at that level.

The test of whether an administrative decision generally is arbitrary or capricious is "determined largely by whether a particular action should have been taken or is justified ... and whether the administrative action is without foundation in fact." Matter of Pell v. Board of Educ., supra, 34 N.Y.2d 222, 232 (1974). Reviewing courts are "not empowered to substitute their own judgment or discretion for that of an administrative agency merely because they are of the opinion that a better solution could thereby be obtained." Peconic Bay Broadcasting Corp. v. Board of App., 99 A.D.2d 773, 774 (2d Dept.1984). The court may not substitute its judgment for that of the agency's determination but shall decide if the determination can be supported on any reasonable basis. Matter of Aronsky v. Board of Educ., 98 A.D.2d 635, 636 (1st Dept.1983). It is a well-settled rule that judicial review of administrative determinations is limited to the grounds invoked by the agency.

Courts have consistently held that private organizations like the Federation (and its predecessor as the national governing body for the sport, the AHSA) that regulate the conduct of a sport have the right to exercise their authority to establish standards of conduct pertaining to the activity of their members, and to enforce those standards with meaningful
and effective mechanisms. This was the case in Cooney v. American Horse Shows Assn., Inc., 495 F.Supp. 424, 430 (S.D.N.Y. 1980) ("It is clear that the AHSA, as a not-for-profit membership organization, may promulgate reasonable rules and regulations to effectuate the purpose for which it was formed, namely to promote the fairness and integrity of competitions recognized by it."). Cooney upheld the reasonableness (under the "Rule of Reason" of the federal antitrust laws) of holding trainers responsible for the condition of their horses under the Federation's Drug Rules. See also, Dennehy v. American Horse Shows Assn., 82 Misc.2d 846, 371 N.Y.S.2d 46 (Sup. Ct. N.Y. Co. 1975) (Article 78 proceeding): "It is clear that the AHSA has the right to promulgate reasonable rules and regulations to effectuate the purposes for which the corporation was formed." (citation omitted). See also, De Leyer v. American Horse Shows Assn., Inc., 27 A.D.2d 655, 276 N.Y.S.2d 909 (1st Dep't 1967) (Article 78 proceeding) (in reviewing penalties imposed for violation of an association's rules, courts generally may not substitute their judgment for that of the association, except in extremely limited situations: "It is the proper policy of the Court to refrain from unnecessarily interfering in the internal affairs of a private, not-for-profit trade association, which is governed by by-laws").

In Crouch v. National Association for Stock Car Auto Racing, 845 F.2d 397 (2d Cir. 1988), the court stated that for a court to interfere with a sports organization's interpretation and application of its own rules (in that case, NASCAR) "would create too great a danger that courts will become mired down in what has been called the 'dismal swamp' – the area of a group's activity concerning which only the group can speak competently." (Id. at 403).


It is axiomatic that credibility determinations are best made by the person who actually sees and hears the witness, and it is basic that the reason that courts are not in a position to review a decision to credit or discredit testimony is because they "are disadvantaged in such matters because their review is confined to a lifeless record." (Berenhaus, supra, 70 N.Y.2d at 443).
Even where the record might possibly have supported a contrary conclusion to that reached by the agency, the determination must still be upheld if the determination is supported by substantial evidence in the record. Matter of Verdell v. Lincoln Amsterdam House, Inc., 27 A.D.3d 388, 390, 813 N.Y.S.2d 68 (1st Dep't 2006): "Where on the whole record the hearing officer's determination is supported by substantial evidence our review is at an end, and it is of no consequence that the record would have also supported a contrary conclusion." Once the Court finds any reasonable basis to support the determination, that should be the end of the matter. Matter of Clancy-Cullen Storage Co., Inc. v. Board of Elections of the City of New York, 98 A.D.2d 635 (1st Dep't 1983) (Held: It was not the function of the reviewing court to weigh the facts and merits de novo and substitute its judgment for that of the board, but only to determine if the action was supported on any reasonable basis.)

The Court never issued a ruling in this case. Petitioners voluntarily dismissed the case before the Court ruled.

**IX. CONCLUSION**

One consistent theme that runs through the drug rules of all the private groups is the constant reevaluation of their positions and the changes made in the rules to accommodate the best thinking of the trainers, owners and veterinarians. As new drugs are developed to treat horses therapeutically and as other drugs are discovered which allow the unscrupulous trainers and veterinarians to take unfair advantage by administering drugs for which there are no effective tests, each association amends its rules to ensure the fairest competition possible for all participants.

The Federation alone cannot create, maintain, and reinforce a clean sporting culture. The sport needs to have ownership of the problem and help with the solutions. We all have a collective duty to do more to keep the sport clean.
I. INTRODUCTION

The concerns regarding the use of drugs in racehorses, whether performance enhancing or for therapeutic purposes, have been much debated in the horse racing industry over the past century. In the United States, this debate has taken place in an environment in which uniformity among racing jurisdictions is lacking. Although horse racing is known to have been conducted in the United States as early as 1664, the first official national body governing the sport was formed in 1894. That year, several prominent patrons of the sport established The American Jockey Club. The Jockey Club’s primary responsibility is the maintenance of The American Stud Book, which registers all thoroughbred horses foaled in the United States, Canada and Puerto Rico. Unlike other sports, however, horseracing lacks one centralized body or authority with the power to establish and enforce uniform rules applicable to racing all over the United States. Instead, the authority to establish and enforce rules and regulations resides with the racing commissions, or similar regulatory authorities, in each of the thirty-eight states that now permit horse racing with pari-mutuel wagering thereon. The rules of racing, therefore, including those pertaining to the use of prohibited and permitted therapeutic medications, vary from state to state. These variations can be significant. As a result, all licensed participants in horse racing (such as trainers, owners, veterinarians, jockeys, and numerous others) are required to be familiar with the rules and regulations governing racing in each state in which they participate in racing.

In a movement towards uniformity in racing, the Association of Racing Commissioners International (ARCI) was created over eighty years ago, and is composed of commissioners and other regulators of racing in the United States, Canada, Mexico, Jamaica, and Trinidad-Tobago. ARCI works with industry participants to develop "Model Rules," which are rules recommended for adoption by the states. However, ARCI is a not-for-profit trade association and does not exercise regulatory or enforcement authority. Individual state racing authorities are at liberty to determine whether to adopt the ARCI recommendations on policies and rules.  

In Kentucky, the Kentucky Horse Racing Commission ("the Commission") is an independent agency of the Commonwealth charged with the responsibility of regulating the conduct of horse racing, and pari-mutuel wagering on horse racing

---

1 John O. Humphreys, Racing Law, at p. 6 (1963).
2 The Jockey Club, 40 East 52nd Street, NY; www.jockeyclub.com.
and related activities within Kentucky. The Commission is granted "plenary power
to promulgate administrative regulations prescribing conditions under which all
legitimate horse racing and wagering thereon is conducted in the
Commonwealth." Furthermore, the Commission, charged with the duty of
maintaining integrity and honesty in racing, has the authority to "promulgate rules
and regulations for effectively preventing the use of improper devices, and
restricting or prohibiting the use and administration of drugs or stimulants or other
improper acts prior to the horse participating in a race." The
Commission is vested with various powers necessary to carry out the duties
imposed upon it by the statutes.

II. SAMPLE COLLECTION, TESTING, AND LEGAL PROCEDURES – FROM
START TO FINISH

Although Standardbred racing occupies a prominent and prestigious role in
Kentucky racing, for the sake of clarity this article will focus primarily on the
regulations and procedures pertaining to thoroughbred racing. While the rules of
Standardbred and thoroughbred racing have much in common, there are
significant variations to which racing participants, and attorneys representing
them, must be attentive.

In order for the Commission to properly carry out its duties, the "racing
commission may employ...stewards, supervisors of mutuels, veterinarians,
inspectors, accountants, security officers, and other employees deemed by the
executive director to be essential at or in connection with any horse race meeting
and in the best interest of racing." The primary actors at thoroughbred
racetracks are the stewards, veterinarians, veterinary technicians, security
officers, and the racing officials who conduct the race. 810 KAR 1:018
establishes in thoroughbred racing the requirements and procedures for the
administration of drugs, medications, and substances to horses, governs certain
prohibited practices, and establishes trainer responsibilities relating to the
medication of horses. 810 KAR 1:130 describes post-race sampling and testing
procedures. 810 KAR 1:028 sets forth the penalty schedule for violation of the
regulations.

The Racing Medication and Testing Consortium ("RMTC") and National
Thoroughbred Racing Association ("NTRA") Safety & Integrity Alliance provide a
"Best Practices" recommendation for the efficient design and operation of test
barn facilities in conjunction with effective chain of custody protocols. It should
be noted, however, that the rules and regulations governing the test barn vary
depending on the jurisdiction of the race and the "Best Practices" document

---

4 KRS 230.215(2).
5 KRS 230.240(1).
6 KRS 230.260.
7 KRS 230.240.
30-2016.pdf.
specifically notes that "[d]eviation from these recommended protocols does not necessarily indicate an operating deficiency or a compromise in the chain of custody." 9

A. The Sample Collection Process

The collection and testing of biological samples is vitally necessary to support the integrity of horse racing, the safety of jockeys, and the health of horses. Medications that enhance performance provide an unfair advantage to horses carrying those medications on race day, and medications that mask or mitigate pain can cause a horse to ignore physical sensations that warn of an impending injury or breakdown.

It is important to remember that many medications that are tested for and detected – and that sometimes result in violations – are legitimate medications approved for use in horses by the FDA. Nevertheless, even legitimate medications can enhance a horse's performance or alter a horse's clinical presentation, and therefore their presence in the horse cannot be permitted on race day. A medication such as clenbuterol, for example, a bronchodilator often used to treat breathing disorders, can have the effect of enhancing a horse's race day performance by increasing aerobic capacity. Therefore, only limited amounts of clenbuterol are permitted to be in a horse on race day. Indeed, a very wide range of legitimate medications are regulated in amount or prohibited on race day. A comprehensive listing of these medications is set forth in the Kentucky Horse Racing Commission's Uniform Drug, Medication, and Substance Classification Schedule.10

The Kentucky Horse Racing Commission has contracted with the United Kingdom's Laboratory of the Government Chemist (LGC) Sports Group to conduct all testing of blood and urine samples collected at Kentucky races. The laboratory that conducts testing on horses racing in Kentucky is located in Lexington, Kentucky. Testing is performed under the direction of Dr. Richard Sams, an expert in pharmacology and toxicology and related fields. Dr. Sams has long experience in the direction of forensic laboratories that test for substances in blood and urine samples.

The collection of blood and urine samples for analysis to detect controlled therapeutic medications and banned substances takes place on every racing day at Kentucky's licensed racetracks. On race day, horses are subject to TCO₂ (total carbon-dioxide) testing. TCO₂ testing involves the pre- or post-race collection of blood samples to detect the illicit practice of "milk-shaking," the administration of bicarbonate agents to delay the onset of fatigue in a horse. Detection of TCO₂ levels in excess of thirty-seven (37.0) millimoles per liter – or in excess of thirty-nine (39.0) millimoles per liter in Standardbred racing if a horse has been treated with

---

9 Id.

furosemide— are reported as violations. The trainer does have the option to have the horse quarantined and re-tested, to determine if an excessively high TCO₂ level is physiologically normal for the horse. This procedure provides a safeguard to the trainer to avoid an undeserved violation.

At the conclusion of all races, additional collection procedures are implemented. The extent of the collection depends upon the nature of the race. In races with purses between $2,500 and $100,000, for example, at least two horses are sent to the test barn for sample collection: the winner of the race, and at least one "special." In races with purses of $100,000 or more, the first three finishing horses, as well as one or more "specials," are sampled at the test barn. A "special" is a horse that is selected at will by the thoroughbred stewards or Standardbred judges. These officials may consider a wide array of information in selecting a particular horse as a "special," including unexpected over- or under-performance by the horse, the trainer's recent statistical performance record as compared to his or her historical performance, betting patterns of the wagering public that might suggest race-fixing, and any intelligence information provided by security personnel at the track.

Upon a horse's arrival at the test barn, blood samples are taken and placed in three separate sealed blood tubes. Urine samples are also taken in approximately 98 percent of cases, except in those instances in which the horse refuses to urinate. The urine is placed in two separate sealed containers. All sampling usually takes place within thirty minutes after a horse's arrival at the test barn. The trainer and his or her designee are permitted to observe the collection and sealing of all tubes and containers. These tubes and containers are then marked with a sample collection ID number specific to the horse from which the samples were obtained. The sample ID number, and the name of the corresponding horse, is recorded on a sample ID card. All sample ID cards are kept secured at the track by the stewards until testing is complete and all testing results are returned to the stewards.

One blood tube and one urine container are kept secure at the test barn, in the event that split samples are required (described below). The remaining two test tubes and the remaining urine container are delivered to LGC for testing, identified only by the sample ID number. The LGC staff members are thereby insulated from any knowledge of the identity of the horse from which the samples are taken; all testing is performed in an anonymous or "blind" manner. Additionally, when the samples arrive at the laboratory, designated laboratory personnel assign separate internal sample ID numbers to the samples. Only the internal numbers are utilized by the LGC technicians who actually test the samples; the technicians are unaware of the sample ID numbers assigned at the track. This adds an additional layer of anonymity and integrity to the sample testing process, preventing anyone who is aware of the sample ID number assigned at the track from calling a lab technician to inquire about the status of a particular numbered sample.
Additionally, in selecting horses for sampling, the chief state steward, in her discretion, designates some samples as "gold" samples, and others as "red" samples. All "gold" samples are tested at the laboratory, and the laboratory chooses at random 50 percent of "red" samples for testing. This "red" sampling procedure affords additional anonymity to the testing process, as no one at the track or the commission can request – or know – which "red" samples are to be tested.

In the event that the commission laboratory reports a finding, trainers and owners are provided an additional safeguard. Either the trainer or the owner may elect to have the split samples – urine and blood samples previously collected and stored at the racetrack – shipped for testing to a laboratory solicited and approved by the Commission. This laboratory performs testing upon the sample entirely independently of the Commission laboratory, and informs the parties of the results of the testing. If the split laboratory does not confirm the finding of the Commission laboratory to a degree that violates the Kentucky medication regulations, no violation against the owner and trainer will be prosecuted by the Commission.11

B. Detection of Medications, Drugs, and Substances

At the commission laboratory, testing proceeds through two phases: initial screening for a wide spectrum of drugs, medications and substances, followed by confirmatory testing if initial screening indicates that a particular drug, medication or substance has possibly been detected. The screening and confirmatory testing processes follow elaborate scientific protocols that are designed to produce accurate and precise results.

In some instances, the use of various drugs is permitted on Kentucky racetracks. To cite a few examples from thoroughbred racing, a single intravenous injection of furosemide (also known as Lasix or Salix) is permitted not less than four hours before post time, in an amount between 150 and 500 milligrams.12 (Furosemide is typically used in horses to treat Exercise Induced Pulmonary Hemorrhage (EIPH), which is bleeding in the lungs due to intense exercise). Additionally, one of three Non-Steroidal Inflammatory Drugs (NSAIDs) – either phenylbutazone, flunixin, or ketoprofen – is permitted in designated quantities up to twenty-four hours prior to post time13. The administration of additional NSAIDs is prohibited beginning forty-eight hours from post time.14 Graduated

---

11 The procedures for split sample collection are set forth in detail in 810 KAR 1:018.

12 810 KAR 1:018 §6.

13 810 KAR 1:018 §8(1).

14 810 KAR 1:018 §8(3).
penalties are set forth in 810 KAR 1:028 for the detection of NSAIDs in violation of these provisions.\textsuperscript{15}

Threshold levels have been determined by the Kentucky Horse Racing Commission for twenty-nine medications. These threshold levels are set forth in the “Kentucky Horse Racing Commission Withdrawal Guidelines – Thoroughbred; Standardbred; Quarter Horse, Appaloosa, and Arabian.” A violation is found for the detection of a threshold medication if the medication is detected in excess of the threshold level. Threshold levels are not determined arbitrarily; instead, they are based upon research performed by the Racing and Medication Testing Consortium (RMTC), and adopted by the Commission only after thorough review by the Commission's Equine Research Drug Council and the Commission Equine Medical Director.

The majority of medications on the Uniform Drug, Medication, and Substance Classification Schedule do not have established threshold levels. A variety of regulatory provisions govern the use and detection of medications in these instances. For example, 810 KAR 1:018 §2(2) imposes the following significant prohibitions:

Except as otherwise provided in [other sections] of this administrative regulation, while participating in a race, a horse shall not carry in its body any drug, medication, substance, or metabolic derivative, that:
(a) Is a narcotic;
(b) Could serve as an anesthetic or tranquilizer;
(c) Could stimulate, depress, or affect the circulatory, respiratory, cardiovascular, musculoskeletal, or central nervous system of a horse; or
(d) Might mask or screen the presence of a prohibited drug, or prevent or delay testing procedures.

The detection of drugs, medications, substances or metabolic derivatives under this provision often requires a significant degree of scientific evaluation by the commission laboratory and the equine medical director. Substances detected found in any amount that are deemed to meet the provisions of this section will result in a violation.

For substances not associated with a pre-determined threshold concentration, the laboratory’s lower limit of detection on a per substance basis establishes the threshold for calling a positive test. This can be problematic, as different laboratories do have differing lower limits of detection. These limits are rarely published and cannot be associated with a specific dose, route of administration and safe withdrawal interval. For this reason, if a horse requires medication close in time to a race, one of the controlled therapeutic substances for which scientifically determined withdrawal guidance exists should, if possible, be selected for use. The lack of uniformity in regulating non-threshold substances

\textsuperscript{15} 810 KAR 1:028 §4.
represents a substantial challenge to the industry as a whole, and has been identified as a priority to be addressed by the RMTC.

C. Environmental Contamination

Concerns have been raised about the possibility of environmental contamination in blood and urine samples taken from horses at Kentucky racetracks. The concern is that certain substances that have not been deliberately administered to a horse, but which could be present in the horse's physical surroundings, might result in detection in blood and urine samples taken from the horse. Contamination could conceivably occur in the trainer's barn or at other locations at the track. Contaminating substances could include cold and flu medications taken by a trainer's barn staff, for example. Additionally, it is possible for contaminants to be accidentally absorbed into horse feed at the point of manufacture of the feed.

The potential for these types of unintentional exposures is being examined by the Kentucky Horse Racing Commission. Commission staff members endeavor to ascertain the facts surrounding all cases, and trainers and owners are entitled to offer evidence in their defense at any stewards' or agency hearing.

Certain realities must, however, be kept in mind in assessing the possible incidence of environmental contamination. While researchers have found evidence of the presence of contaminants in locations in close proximity to the horse, research to date does not establish that exposure can occur in such a way as to result in a positive finding. If absorption into the horse occurred easily and frequently, positive findings from an array of substances – including, for example, caffeine and the frequently-used non-steroidal anti-inflammatory drugs (NSAIDs) – would occur at remarkably higher rates than they in fact do. It must also be remembered that the trainer has a duty to keep the horse's environment free of contaminants. Grooms who are taking medications, for example, must be cautioned to wear protective gloves, and to wash their hands before coming into contact with a horse's mouth or mucous membranes.

D. Out of Competition Testing

The Kentucky Horse Racing Commission also conducts an out-of-competition testing program. This program is specifically designed to collect blood samples and test for the presence of blood-doping agents, whole blood or packed red blood cells, venoms, and growth hormones. These substances have no place in horse racing and their use to gain an unfair advantage in racing threatens the integrity of the entire sport. Any horse eligible to race in Kentucky is subject to out-of-competition testing without advance notice on any day between the hours of 7:00 a.m. and 6:00 p.m. Out of competition testing can be initiated by the Commission

---

16 The thoroughbred regulation for out of competition testing is 811 KAR 1:110; the Standardbred regulation is 811 KAR 1:240.
executive director or the chief state steward at any location in Kentucky, or in any other racing jurisdiction. Upon notification of the intent to conduct testing, the owner or trainer of the horse has a positive obligation to make the horse available at an agreed-upon location. The owner or trainer has the right to be present at the time the blood sample is collected, and split sample testing is available as a safeguard. Penalties for the detection of blood-doping agents and other prohibited substances through out-of-competition testing are severe. A first offense may result in a license revocation from five (5) to (ten) years, and a second offense can result in a lifetime license revocation.

E. The Legal Process

Under the terms of 810 KAR 1:018 §2(5), "shall be prima facie evidence that a horse was administered and carried, while running in a race, a drug, medication, substance, or metabolic derivative thereof prohibited by this section if (a) a biologic specimen from the horse was taken under the supervision of the commission veterinarian promptly after a horse ran in a race; and (b) The commission laboratory presents to the commission a report of a positive finding."

If the positive finding is confirmed for a prohibited substance, the commission is required to notify the owner and trainer, either orally or in writing, within five business days of receipt of notification from the laboratory of the test results. The Stewards then have fourteen calendar days to schedule a hearing before the stewards. The horse is placed on the Veterinarian's List pending a steward's hearing. The owner and/or trainer have the right to split sample analysis, as set forth in 810 KAR 1:018.

An attorney who has a client potentially facing a medication violation must evaluate a number of issues, including the following three principles: trainer responsibility, chain of custody, and split samples.

1. Trainer responsibility rules.

As with many other rules and regulations in horse racing, the "trainer responsibility rule" varies from state to state. However, the rule essentially imposes upon the trainer the obligation to ensure the health and well-being of the horse in his or her care. This includes ensuring that the horse does not carry in its body any medications banned on race day or any permitted therapeutic medications in excess of the maximum threshold level. There are essentially three different variations of the trainer responsibility rule: the rebuttable presumption rule, the failure to guard rule, and the absolute insurer rule.

   a. The Rebuttable Presumption Rule.

The "Rebuttable Presumption Rule" essentially holds that in the event of a positive test for a foreign substance, the
trainer is held responsible unless the trainer can provide sufficient evidence that he or she is not at fault or had taken all necessary precautions to protect the horse from such substances. The ARCI Model Rule regarding "trainer responsibility" – as well as rules in some jurisdictions such as New York – essentially embodies the "rebuttable presumption rule," which holds a trainer responsible for a positive test unless he or she can provide substantial evidence to the contrary. In certain jurisdictions, the trainers are allowed to assert "non-responsibility" as an affirmative defense. Although some states still allow for the rebuttable presumption, a review of published case law would indicate that few trainers are actually able to avoid responsibility in the event of a medication positive.

b. Failure to Guard.

The "Failure to Guard" Rule requires that a trainer must "guard" or provide a "guard" for each horse in order to prevent anyone from administering any foreign substance to the horse which would be in violation of the rules to the horse. In addition to being held strictly liable for the condition of the horse, the trainer is also charged with taking all necessary measures to ensure the horse's safety and care. However, in the event of a positive finding, if there is a determination that the trainer provided the appropriate safeguards, the trainer may be able to provide substantial evidence that it was the third party "guard" who was negligent and therefore liable in place of the trainer.

c. Absolute insurer rule.

The "absolute insurer" rule holds that a trainer is the "absolute insurer" of, and is responsible for, the condition of any horse in his or her care. This is essentially a strict liability rule, which means that a trainer is liable for a drug violation even if the trainer did not intend, did not know of, or was not guilty of negligence concerning the administration of the drug. In the event of a positive test, third party responsibility is irrelevant. Furthermore, the trainer is held liable even if an unauthorized individual administers any prohibited substance without the knowledge of the trainer. The trainer is, however, permitted to offer evidence surrounding the positive test in mitigation of penalty.

The Kentucky rule is similar to the absolute insurer rule. Under 810 KAR 1:018 §15(2), "a trainer shall be responsible for the presence of a prohibited drug, medication, substance, or metabolic derivative, including permitted medications in excess of maximum concen-
trations in horses in his/her care." Additionally, 810 KAR 1:018 §15(3) states that "a trainer shall prevent the administration of a drug, medication, substance, or metabolic derivative that may constitute a violation of this administration."

Over the years, there has been much debate concerning the trainer responsibility rule, and the variations of the rule have received much scholarly attention. Cases have been litigated in many racing jurisdictions in the United States, and the body of published court opinions is extensive. While the concept of trainer responsibility continues to evolve and trainer responsibility rules are becoming stricter in some states, many argue that it is a necessary means to protect the welfare of both the horse and the jockey, to ensure the integrity of the sport, and to protect the betting public. Others firmly believe that the absolute insurer rule exceeds reasonable limits.17

2. Chain of custody.

As in many cases in which forensic science is involved, chain of custody principles require that physical evidence must remain secure without tampering, contamination, alteration, or loss if the evidence is to be admissible in court or – in the case of horse racing – administrative proceedings. Challenges to the chain of custody are sometimes asserted in medication violation cases. In horse racing, most of the testing performed today involves urine or blood samples. Chain of custody principles apply to the preservation and security of the samples.

3. Split samples.

Most jurisdictions have adopted a split sample policy as a safeguard for the trainer and owner in the event of a positive test. In Kentucky, 810 KAR 1:180 §12(2)(a) states "a trainer or owner of a horse receiving notice of a positive finding may request that a split sample corresponding to the portion of the sample tested by the commission laboratory be sent to the split sample laboratory." The owner or trainer shall submit the request for the split sample, in writing, to the stewards within three business days after the trainer or owner of the horse receives oral or written notice of the positive finding by the commission laboratory. The requesting party is responsible for all costs associated with the testing. Once the party has selected a laboratory approved by the commission that can perform the necessary tests and has agreed to provide

the results to the commission, the commission will designate a time for the parties to meet to collect and ship the split sample. Failure of the owner, trainer, or a designee to appear at the time and place designated by the commission veterinarian in connection with securing, maintaining, or shipping the split sample shall constitute a waiver of any right to be present during split sample testing procedures.

An important part of the chain of custody procedure is the completion of the Split Sample Chain of Custody Form, which is specifically addressed in 810 KAR 1:1018 §13. The Commission representative "shall complete the split sample chain of custody form during the retrieval, packaging, and shipment of the sample" to the designated laboratory. The requesting party or party's representative may be present during this time.

4. Administrative proceedings.

a. Stewards' hearings.

In Kentucky, rules governing requirements of the Stewards' hearing are set forth for in 810 KAR 1:029 §2. Once the Commission has been notified by the laboratory of a positive finding, the Stewards have fourteen days to notify the trainer or owner of a hearing. 810 KAR 1:029 §3 requires that the notice must be provided to all parties either personally or by mail. "Notice as provided in this section shall include a statement of:

(a) Time and place of such hearing as designated by the authority and chairman. No hearing shall be less than five (5) days nor more than thirty (30) days after service of notice, unless at the request of a party and in order to provide a fair hearing;
(b) The legal authority and jurisdiction under which the hearing is to be held;
(c) Specific designation of the particular statute or administrative regulation alleged to have been violated; and
(d) A clear and concise factual statement sufficient to inform each party with reasonable definiteness of the type of acts or practices alleged to be in violation of the statute or administrative regulations promulgated thereunder. In fixing the times and places for hearings, due regard shall be had for the convenience of the parties and their representatives.
The Stewards' hearings are closed and a recording will be made of the hearing, either by a tape recording or transcription by a court reporter. Once the hearing has been convened with all parties present, the Stewards will ensure the summoned party is made aware of the specific rule violations, as well as the specific findings. At that time, the Stewards typically offer the positive finding as provided by the Commission approved laboratory, the original sample signed by the trainer or his representative (i.e. assistant trainer, groom, etc.), and any other evidence, such as statements from the state veterinarian, the state investigator, or test barn personnel. Once the Stewards have questioned the summoned party and any other witnesses, the trainer/owner or his or her representative is afforded the opportunity to make a statement and offer mitigating or other evidence. It should be noted that the Stewards' hearings are not bound by any technical rules of evidence. Once the Stewards have made a determination, a written ruling is issued and is to be delivered to the individual, the Commission, the racing secretary of the racetrack in which the violation occurred, as well as ARCI, so that the ruling can be entered into the database to be shared with other jurisdictions. The ruling typically includes a fine and/or suspension and in some cases requires that the purse be returned and redistributed, and the horse disqualified from the race.

In the event a party wishes to appeal the decision of the Stewards, the party must submit a written request for a hearing to the Commission within ten days of the ruling, pursuant to 810 KAR 1:029 §2(10).

b. Commission hearings.

Stewards' rulings appealed to the Commission are assigned to a hearing officer and are conducted under the provisions of KRS Chapter 13B. This hearing provides the owner and/or trainer with the opportunity to fully litigate all matters pertaining to the violation. The hearing often involves formal discovery requests and pre-hearing motions. Witnesses and documentary evidence may be presented by the parties to the hearing. After the conclusion of the hearing, the hearing officer renders a Recommended Order pursuant to KRS 13B.110. The full Commission then considers the Recommended Order, the hearing record, and any exceptions filed by the parties, and then issues a Final Order pursuant to KRS 13B.120. In the Final Order, the Commission may adopt the Recommended Order, or reject or modify it, or remand the case for further proceedings.
5. Judicial review.

KRS 230.330 states that "[a]ny licensee or any applicant aggrieved by any final order of the commission may appeal to the Franklin Circuit Court in accordance with KRS Chapter 13B." The appeal shall be made within ten days after the entry of the order or decision of the Commission and shall be filed in the office of the Franklin Circuit Court Clerk. The appealing party is required to provide a security bond to cover the cost of the action, an attested copy of the appealed decision or order, and an attested copy of the transcript of evidence as provided to the Commission.

KRS 13B.150(2) provides in relevant part that "[t]he court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact." Also, that statute provides that the court may affirm or reverse, in whole or in part, the Final Order of an administrative agency and may remand the case for further proceedings if it finds that the agency's order was in violation of constitutional or statutory provisions, was in excess of the agency's statutory authority, was not supported by substantial evidence, was arbitrary, capricious, or characterized by abuse of discretion, was based on an ex parte communication which substantially prejudiced the rights of any party and likely affected the outcome of the hearing, was prejudiced by a failure of the person conducting a proceeding to be disqualified pursuant to KRS 13B.040(2), or was deficient as otherwise provided by law.\(^{18}\) Further, "[a]ny aggrieved party may appeal any final judgment of the Circuit Court under this chapter to the Court of Appeals in accordance with the Kentucky Rules of Civil Procedure."\(^{19}\)

III. UNINTENDED CONSEQUENCES

A. Owners and Trainers

As a consequence of imposition of the absolute insurer rule, there have been circumstances in which a trainer who did not have any knowledge of the administration of a prohibited substance, or whose horse was never intentionally administered a prohibited substance, nevertheless incurred liability as a result of a positive test. Many argue that this is unfairly damaging to the trainer's reputation and could potentially impact his or her relationship with the owners the trainer works for, and ultimately the trainer's business. Others argue that the trainer responsibility rule is absolutely necessary to promote the greater good of racing.

Furthermore, the owner, who often has no knowledge of the administration of substances, is often required to return the purse monies. While it is understood and recognized that some medications are

---

\(^{18}\) KRS 13B.150(2).

\(^{19}\) KRS 13B.160.
performance enhancing, some argue that not all foreign substances necessarily have an impact on the outcome of the race. Owners in these cases spend considerable amounts of money training a horse to run, and yet they suffer forfeiture of purse as a result of another person's intentional or unintentional actions.

B. Jockeys

One of the most overlooked parties with regard to medication use in race horses are the jockeys. Not only do they risk their lives every time they get a leg up on the horse, they also ride under the assumption that the horse is in good condition and fit to run, free of injuries and medications that could potentially add any additional risks to an already dangerous job. Jockeys perform their duties based on the mounts they have accepted and are paid weekly by the bookkeepers at the tracks where the mount fees and percentages of purses were earned. They are usually unaware if a horse they ride receives a positive test. If the owner and/or trainer of the horse with the positive test appeals the ruling, it could easily be six months or more before the appeal process is exhausted. In many cases, the owners are ultimately required to return the purse money, in addition to any penalty assessed against the trainer or owner. It is the practice at several tracks that as the purse is redistributed, the owners' accounts are amended. This means that the amount the jockey had previously earned from the purse is deducted from his or her current account. In the case of a large stakes race, this can mean that a jockey can go weeks without receiving a paycheck, and the jockey does not necessarily receive prior notice of the legal proceedings or the purse redistribution. This can present a serious problem for the jockey who won the race, as he or she has already paid the agent, the valet, and taxes. In many instances, the jockey may no longer have the same agent, or the valet may no longer be employed at the racetrack. It can be very difficult if not impossible for the jockey to recoup the funds that he or she has paid to those individuals, even though the full amount is garnished from the jockey's paycheck.

On the flip side of this issue, there are jurisdictions in which the purse distributions are held until all tests clear. While this is not an issue for some jockeys, it is burdensome for the average jockey who is making nominal earnings and "living paycheck to paycheck," which contrary to popular belief is the norm. Furthermore, this can vary not only from state to state, but also from track to track.

In the summer of 2016, the Jockeys' Guild presented a proposal to the ARCI Model Rules committee requesting that an amendment be made preventing the jockey from being required to return his or her portion of the funds in the event of a positive test unless the commission finds the jockey partially responsible for the positive test. However, the proposal was unsuccessful and a subcommittee of regulatory members was established to consider addressing the requirement by the commission or authority to provide notice to the jockey of the positive test and the progress of the proceedings in the event of an appeal.
IV. CASE LAW

A. Kentucky State Racing Comm'n v. Fuller, 481 S.W.2d 298 (Ky. 1972)

Summary: On May 4, 1968, Dancer's Image won the Kentucky Derby. After the race, a urine sample was collected under the supervision of the Commission's State Veterinarian and delivered to the mobile laboratory located at Churchill Downs, Inc. Two days later, the chemist for the Commission notified the stewards that Dancer's Image's urine sample "indicated the presence of a medication known as phenylbutazone or one of its derivatives." The stewards found that phenylbutazone or one of its derivatives was in Dancer's Image's urine, and ordered redistribution of the purse and disqualification of the horse. The owner of the horse, Peter Fuller, appealed the stewards' ruling to the Commission, which upheld the order. Fuller then appealed the Commission's order to the Franklin Circuit Court. The Franklin Circuit Court set aside the Commission's order, holding that there was a lack of substantial evidence to support the finding. The Commission appealed to the Court of Appeals. The Court of Appeals reversed, holding that there was sufficient evidence as provided by experts and witnesses to support the Commission's finding.

B. Jacobs v. Kentucky State Racing Comm'n, 562 S.W.2d 641 (Ky. 1977)

Summary: The winning horse was disqualified by the stewards after the Commission laboratory confirmed a prohibited substance was found in the urine sample. A steward's hearing was held in which William Jacobs, the owner of the horse, who was also an attorney, represented the trainer of the horse. The horse was subsequently disqualified, and Mr. Jacobs did not receive the winning owner's share of the purse. (It was distributed accordingly to the remaining horses.) Jacobs appealed the stewards' ruling to the Commission, which upheld the ruling. Jacobs then appealed to the Franklin Circuit Court, which sustained the order of the Commission. Jacobs then sought review from the Court of Appeals, which affirmed. The Court held that the State Racing Commission had the authority to enact and enforce rules to prohibit participation in purse distribution by a horse which tested positive for prohibited medication. The Court of Appeals also held that the owner of a horse was not necessarily entitled to be notified of a hearing concerning a positive test when the trainer was notified, and particularly where the owner had actual notice of the hearing and had participated therein as attorney for the trainer. Additionally, the testing of all winners of horse races without testing other horses was held a valid exercise of the State Racing Commission's enforcement power; such action was a legitimate classification based on long-standing custom and practice in the racing industry. The Court held that the State Racing Commission's rule prohibiting the presence of a medication which is a derivative of phenylbutazone in a horse's urine sample was a legitimate exercise of the Commission's administrative statutory powers. The rule prohibiting purse distribution when a banned medication which is a derivative of phenylbutazone is found in horse's urine was held reasonable.
C. Allen v. Kentucky Horse Racing Authority, 136 S.W.3d 54 (Ky. App. 2004)

Summary: Appellant filed an appeal of the Franklin Circuit Court that had affirmed a decision of Kentucky Horse Racing Authority. After winning two separate races, a horse was given the standard urine test, which returned a positive result of an anti-inflammatory drug, fluxin, in violation of 811 KAR 1.090, §4(1). Allen, owner and trainer of the horse, had a second sample tested from the urine collected after both races, and both tests returned a positive result. The judges (the officials who preside over Standardbred races) held a hearing for Allen, and subsequently ordered Allen to return the purse money in both races and pay a $250 for each race. Allen appealed to the Kentucky Horse Racing Authority ("KHRA"), which heard the case de novo. Based on the recommendations of the hearing officer, the KHRA upheld the judges' ruling. Allen appealed KHRA's decision to the Franklin Circuit Court, which also upheld the ruling. Upon further appeal, the Kentucky Court of Appeals applied the three-part test for determining the arbitrariness of an administrative agency decision: whether the agency's action was within the scope of its granted powers, whether the agency provided procedural due process, and whether the decision was supported by substantial evidence. The Court of Appeals noted that if the decision of the administrative agency fails to meet any of these standards, the agency action must be considered to be arbitrary. The Court of Appeals held that Kentucky's trainer responsibility rule, making the trainer of a racehorse the sole insurer of the horse for any violation including the presence of a prohibited substance, was and is constitutional. The Court rejected the argument that the regulation was unconstitutional because it could hold trainers liable for factors out of their control (such as environmental contamination), stating that the regulation is similar to other regulations throughout the country and is a reasonable means to promote safety in the sport. Additionally, the Court held that Double Jeopardy principles are not applicable to administrative hearings (see opinion for more elaboration).


Summary: After winning a race, a horse tested positive for a prohibited substance. Unbeknownst to the trainer, the horse's owner, a doctor, had given Prozac, a prohibited substance, to the horse before the race. Based on the absolute insurer rule, the trainer was held liable and given a 150 day suspension. The trainer sought review of a Final Order issued by Horse Racing Authority ("Commission"), which affirmed and adopted a hearing officer's recommendation to suspend him. The Franklin Circuit Court affirmed the Commission's order, and the trainer appealed to the Court of Appeals. The trainer argued that: (a) the burden of proving his culpability should fall on the Commission, and not on him, and; (b) the penalty was excessive. The Court rejected both arguments. The Court also held that Kentucky's trainer responsibility rule was a rational means to accomplish the goal of preventing the use of prohibited substances. In so holding, the Court of Appeals stated:
The trainer responsibility rule is a practical and effective means of promoting these State interests – both in deterring violations and in enforcing sanctions. The imposition of strict responsibility compels trainers to exercise a high degree of vigilance in guarding their horses and to report any illicit use of drugs, medications or other restricted substances by other individuals having access to their horses. Additionally, the rebuttable presumption of responsibility facilitates the very difficult enforcement of the restrictions on the use of drugs and other substances in horse racing. Indeed, it would be virtually impossible to regulate the administering of drugs to race horses if the trainers, the individuals primarily responsible for the care and condition of their horses, could not be held accountable for the illicit drugging of their horses or for the failure either to safeguard their horses against such drugging or to identify the person actually at fault. It is not surprising, therefore, that trainer responsibility rules have been upheld, almost without exception, in other jurisdictions. Deaton, 172 S.W.3d 803 at 806.


Summary: The trainer petitioned the Franklin Circuit Court for review of a Final Order of the Commission, which suspended his license for one year, provided for a $5,000 fine, disqualified the horse and ordered purse forfeiture pursuant to 810 KAR 1:028 as a result of the trainer's horse testing positive for Levamisole. Levamisole at the time was a Class A Prohibited Substance, which had been previously classified as a Class B Substance. (The penalties for violations of the two drugs vary substantially). The Court reversed the Commission's Order with regard to the one year suspension of the trainer's license. The Court held that the Commission failed to consider mitigating circumstances, and given the fact that Levamisole is a therapeutic drug approved by the FDA, the Court held that the classification of Levamisole as a Class A substance was arbitrary and capricious. The Court also held that the Commission failed to demonstrate the propriety of the penalty imposed.


Summary: This is a complex and significant case that all practitioners should review and know. The Court considered constitutional challenges based on the vagueness of the regulations at issue. Dr. Stewart, a race track veterinarian, appealed a four-year suspension by the commission for possession of alpha-cobratoxin. The appellant challenged the Commission’s regulatory scheme, arguing that it should be voided because it is unconstitutionally vague. The Court agreed that the regulation was unconstitutionally vague as applied to Dr. Stewart,
reversed and remanded. It should be noted that since the Court issued its opinion, the Commission has amended the regulations in question to provide further clarification.

V. CONCLUSION

Overall, the purposes of the regulations regarding medications is to protect both the equine and human athletes, and to ensure the integrity of the sport for both participants and the betting public. All participants in the ongoing and often contentious debate over equine medication should bear in mind the ultimate good of the time-honored sport of horse racing.