

Industry faces unique challenges in regulating use of drugs



ROBERT
DARWELL

Horse racing goes hand and hoof with gambling. While it used to be the primary outlet for betting, the sport now competes with various forms of gambling for the entertainment dollar. Unsurprisingly, this competition, together with the creation of many legal gambling forums, results in more races and lengthened racing seasons.

As stakes increased, so did pressure to perform. Horse doping is the illegal application of a substance to improve the horse's natural capacities prior to a race. Whether horse doping has always been a serious problem kept hidden or whether the issue has recently peaked because of the increased performance pressure characteristic to athletes in other sports, the industry now faces federal demands to curb the sport's drug use.

On the eve of this year's Kentucky Derby, thoroughbred industry leaders received letters from U.S. Sen. Tom Udall, D-N.M., and U.S. Rep. Ed Whitfield, R-Ky., demanding answers pertaining to the uniformity of medication rules, current practices of enforcement, and the industry's efforts to collect injury data.

Recent major events spawned controversy over questionable enforcement practices in the racing industry. In the 2006 Preakness Stakes, Barbaro suffered severe injuries and a breakdown, which eventually led to his euthanization. Then, in the 2008 Kentucky Derby, there was the dramatic breakdown of the filly Eight Belles. She was euthanized on the track soon after finishing second to Big Brown, shocking the viewing public.

In 2008 and 2009 alone the following headlines appeared in articles: "New Jersey Race Horses Test Positive for Doping," "Horse Trainer Steve Asmussen Suspended After Horse Tests Positive," "Big Brown Trainer Admits Giving Horse Steroids: Report," "Dubai Prince Banned Over Steroids For Horse," and "Queen in Doping Scandal: Royal Racehorse Fails Drugs Test." Clearly horse doping wasn't just a national issue, but a global one. Yet the racing industry lags behind other major sporting bodies in effectively confronting the drug problem.

Since 2008, most states have revised their laws to prohibit use of anabolic steroids (already banned by most other major sporting bodies, including the International Olympic Committee, FIFA, UEFA, all major professional golf tours, the NFL, NHL, NBA, Major League Baseball and the European Athletic Association), but some states still allow for greater threshold amounts of substances than others. Before Pennsylvania banned anabolic steroids in April 2008, it conducted anonymous tests. The results were astounding, showing nearly two-thirds of horses tested positive.

Clearly, deterrence of drug use was not a priority until recently. Regardless of the timing or reasons behind



High-profile injuries and breakdowns, such as Barbaro's at the 2006 Preakness, led to increased scrutiny of horse racing.

doping, it was time for more effective regulation. The industry changed almost overnight, though apparently not enough to appease federal overseers. At the time of the 2008 Kentucky Derby, only 12 of 38 racing states had banned steroids. Today 35 states have, representing more than 99 percent of the races involved in betting.

The Racing Medication and Testing Consortium has been a front-runner in trying to unify horse racing regulations. In 2008, the consortium adopted model rules regulating racehorse anabolic steroid use. The rule established certain thresholds of four anabolic steroids and completely banned the use of all others. The four steroids — stanozolol, boldenone, mesterolone, and testosterone — are tracked through testing urine and blood levels. All states have not identically "adopted" the language from the model rule, however. For example:

- Kentucky doesn't include stanozolol on its list; only the other three anabolic steroids are listed with specified permissible concentration levels.

- The California Horse Racing Board sets allowable threshold levels of all four anabolic steroids. California is more stringent in its therapeutic treatment allowance for stanozolol. The steroid's use is subject to board approval. Even after approval, other administrative thresholds must still be satisfied.

- Maryland, home to the Preakness, the second leg of the Triple Crown, also sets threshold permissible levels for all four anabolic steroids, including stanozolol.

- New York, like Maryland and Kentucky, has incen-

tive to regulate anabolic steroid use because there is more focus and pressure on these states as each hosts a Triple Crown race. In May 2008, New York passed its own steroid regulation and set threshold levels for all four substances.

Recently, a new Racing Medication and Testing Consortium movement in the industry looks to increase restrictions on nonsteroidal, anti-inflammatory drugs (NSAIDs). Where should legislators draw the finish line for future regulation? If regulations tighten too much, some trainers and owners will not adhere to the rules, and the sport could falter as more trainers would likely suffer heavy sanctions.

One important consideration in comparing horse doping regulations with those of other professional sports is the separable nature of horse from trainer. Often horses cross state lines, are apart from their trainers, or are susceptible to acts committed by an independent owner. Such lack of control, as compared with athletes, who generally manage substances entering their bodies, raises fairness questions in the sanctioning process.

Nevertheless, the model rules hold a trainer "responsible for the condition of horses entered in an official workout or race and ... for the presence of any prohibited drug, medication, or other substance." Unless the trainer is in the unique position of working with a talking horse like Mr. Ed, it is almost impossible to know everything. If the trainers are not familiar with various allowances of therapeutic treatment for horses among different states this oversight can be challenging, making strict compliance with the rules extraordinarily difficult.

Another major distinction between other professional sports and horse racing is the heightened expense resulting from suspension. A suspended equestrian's horse still requires care when subsidies can't be received. Costs can easily exceed \$25,000 a year when considering expenses for horse feed, veterinary care, hoof care and shoeing services, and dietary supplements. Thus, additional sanctions should be carefully enacted, especially in an industry facing the financial challenges characteristic of today's economy.

While it is certain that the industry is preserving the decision-making power of each state's horse racing commission and responding to federal pressure, whether new regulations of NSAIDs at the urging of the Racing Medication and Testing Consortium will swiftly spread through state horse racing law remains to be seen. The potential impact of such regulations would be a large stride toward creating rule uniformity and bringing integrity to a sport too often marred by negative speculation and uncertainty. ■

Robert Darwell (rdarwell@sheppardmullin.com) heads the transactional entertainment, media and technology practice group at Sheppard Mullin. Law clerks Hilary St. Jean and Jay Fragus assisted with this article.