

The Absolute Insurer Rule: An Unconstitutional and Ineffective Means of Mitigating Illegal Equine Drugging in the “Sport of Kings”

Brian Calhoun “Cal” Mundell*

INTRODUCTION

Competitive thoroughbred horse racing has long been referred to by enthusiasts and laymen alike as the “sport of kings.”¹ However, as time has elapsed and as the American thoroughbred horse racing industry has evolved, the term “sport of kings” has been perceived by critics as paradoxical and perhaps, even contradictory in nature.² The negative criticism that currently plagues horse racing can largely be attributed to the staggering number of on-the-track equine fatalities that occur at American racetracks nationwide.³ On average, an estimated twenty-four horses die every week at racetracks.⁴ The Jockey Club recorded 493 fatal equine injuries in 2017, 483 fatal equine injuries in 2016, and 484 fatal equine injuries in 2015.⁵ Many speculate that the illegal drugging of racehorses by their trainers may be the cause of the

*Cal Mundell is an attorney at the law firm of Mounce, Green, Myers, Safi, Paxson & Galatzan, P.C., in El Paso, Texas and a graduate of the University of Houston Law Center, *magna cum laude*, Order of the Coif.

¹ See Michael Kilian, *The Evolution of the Sport of Kings*, CHICAGO TRIBUNE, (May 4, 1988), <http://www.chicagotribune.com/news/ct-xpm-1988-05-04-8803140377-story.html> [<https://perma.cc/2Y77-PU89>].

² See John Swenson, *The Sport of Kings is Full of Scum*, VICE (Dec. 25, 2013, 7:00 PM), https://www.vice.com/en_us/article/exmde7/the-sport-of-kings-is-full-of-scum-0000168-v20n12 [<http://perma.cc/JDG6-CC4M>] (“Cheating is deeply woven into the fabric of horse racing. The sport is a magnet for shady characters and below-the-table dealings.”).

³ See, e.g. Walt Bogdanich et al., *Mangled Horses, Maimed Jockeys*, N.Y. TIMES (Mar. 24, 2012), <https://www.nytimes.com/2012/03/25/us/death-and-disarray-at-americas-racetracks.html> [<https://perma.cc/R6TA-TFU3>].

⁴ *Id.*

⁵ JOCKEY CLUB, *Supplemental Tables of Equine Injury Database Statistics for Thoroughbreds*, http://jockeyclub.com/pdfs/eid_9_year_tables.pdf [<https://perma.cc/G8XP-ZJ9A>]; see also Press Release, Paulick Report, Despite Slight Uptick In Equine Injuries, Overall Trends Remain Positive, (Mar. 19, 2018, 11:31 AM) (on file with author).

high number of fatal equine injuries stated above.⁶ For example, in a study conducted by the New York Times, it was discovered that from 2009 to 2012, “trainers at United States tracks ha[d] been [found guilty of] illegally drugging horses 3,800 times.”⁷

Fatal equine injuries afflict all classes of competitive racehorses, from the four-thousand dollar claimer running at Ruidoso Downs in Ruidoso, New Mexico to Kentucky Derby winners and those competing on racing’s grandest stage.⁸ Arguably, as of late, the two most infamous instances of in-competition injuries resulting in euthanasia and causing immense public uproar, belong to that of Barbaro⁸ and Eight Belles.⁹

Barbaro was a three-year-old colt, trained by Michael Matz, who captured the 2006 running of the Kentucky Derby by a convincing six and one-half lengths at odds of six to one.¹⁰ Just moments after the starting gates had opened in the Preakness Stakes—the second leg of horse racing’s coveted Triple Crown—Barbaro was observed “struggling with his stride during the first eighth of a mile” and was subsequently “pulled up” by veteran jockey, Edgar Prado.¹¹ Barbaro was taken off of the track via equine ambulance, whereupon it was discovered that he “had sustained a broken cannon bone above the ankle, a broken sesamoid bone behind the ankle, a broken long pastern bone below the ankle, and a dislocation of the fetlock joint.”¹² After months of treatment and the performance of many surgeries by top veterinarians, it became apparent that Barbaro would never recover; he was euthanized on January 29, 2007.¹³

⁶ See Bogdanich et al., *supra* note 3.

⁷ *Id.*

⁸ See *id.*

⁹ ASSOCIATED PRESS, *Runner-up Eight Belles breaks front ankles, euthanized on track*, ESPN (May 3, 2008), <http://www.espn.com/horse-racing/triplecrown08/news/story?id=3380100> [<https://perma.cc/YES6-GY84>].

¹⁰ *Racing Chart of the 2006 Kentucky Derby Presented by Yum! Brands*, EQUibase (May 6, 2006), <http://www.equibase.com/premium/chartEmb.cfm?track=CD&raceDate=05/06/2006&cy=USA&rn=10> [<https://perma.cc/VJ8J-E87U>].

¹¹ Joe Drape, *Barbaro Is Euthanized After Struggle With Injury*, N.Y. TIMES (Jan. 29, 2007), <https://www.nytimes.com/2007/01/29/sports/29end-barbaro.html> [<https://perma.cc/YJY9-VKX9>].

¹² See Drape, *supra* note 11.

¹³ Barbaro was primarily treated by Dr. Dean Richardson. After Barbaro developed

Just the next year, in 2008, Eight Belles, a three-year-old filly trained by J. Larry Jones, was entered to run in the Kentucky Derby—a race traditionally dominated by male horses.¹⁴ Eight Belles was strategically held in fifth place for the majority of the race, making a determined surge down the stretch to finish an impressive second-place behind eventual Preakness winner Big Brown.¹⁵ Just strides after crossing the finish line, while being celebrated by the second largest crowd in Kentucky Derby history,¹⁶ Eight Belles collapsed, falling to the ground as a result of two broken ankles; she was immediately euthanized.¹⁷

The deaths of Barbaro and Eight Belles have caused horse racing regulatory organizations such as the National Thoroughbred Racing Association (“NTRA”), the Racing Medication and Testing Consortium (“RMTC”), the Association of Racing Commissioners International (“ARCI”), and a plethora of state racing commissions to review and amend horse racing’s medication policies in an effort to make the sport safer for equine athletes and jockeys alike.¹⁸ Today, amidst much criticism, the overwhelming majority of jurisdictions have implemented, and enforce, the “absolute insurer rule,” which creates an irrebuttable presumption that a trainer is responsible for any drug positives detected in an equine athlete.¹⁹

laminitis—an inflammatory condition—in his front feet, fought to recover from the injury, but it was ultimately insurmountable. *See* Drape, *supra* note 11.

¹⁴ Press Release, CBS News, Eight Belles’ Death Sparks Controversy (May 5, 2008) <https://www.cbsnews.com/news/eight-belles-death-sparks-controversy/> [https://perma.cc/AQ2C-XCHP]; *see also* Christopher Klein, Horse Racing’s Triple Crown: 10 Fast Facts (June 5, 2019), <https://www.history.com/news/horse-racings-triple-crown-10-fast-facts> [https://perma.cc/2S7W-82N5] (stating that only three fillies have won the Derby in 144 runnings).

¹⁵ *Racing Chart of the 2008 Kentucky Derby Presented by Yum! Brands*, EQUIBASE: CHARTS (May 3, 2008) <http://www.equibase.com/premium/chartEmb.cfm?track=CD&raceDate=05/03/2008&cy=USA&rn=10> https://perma.cc/R4D2-MR2D (last viewed Oct. 23, 2018).

¹⁶ *See* Associated Press, *supra* note 99 (noting that the 2008 running of the Kentucky Derby was attended by 157,700 spectators, making the event “the second-largest crowd in [Kentucky] Derby history.”).

¹⁷ ASSOCIATED PRESS, *supra* note 9.

¹⁸ W. Chapman Hopkins, *Procedural Due Process Implications of Kentucky’s Thoroughbred Medication Regulations*, 2 KY. J. EQUINE, AGRIC. & NAT. RESOURCES L. 27, 28 (2010).

¹⁹ *See* Kjirsten Lee, *Transgressing Trainers and Enhanced Equines: Drug Use in Racehorses, Difficulty Assigning Responsibility and the Need for a National Racing*

The statistics indicating the staggering number of fatal equine injuries in American horse racing allow for the following assertion to be confidently made: current rules and regulations designed to prevent and deter trainers from illegally drugging their equine athletes are not effectively mitigating the problem at issue.²⁰ This Article argues that the absolute insurer rule: (1) is unconstitutional in that it denies the accused trainer his or her constitutional right to substantive due process; (2) is irrational in that it is possible that a positive drug result could be the consequence of environmental contamination, rather than intentional drugging; and (3) is ineffective because the current punishment model does not effectively deter trainers from illegally drugging their equine athletes. This Article concludes by proposing that, in order to preserve the substantive due process rights of the accused, the trainer should be afforded an opportunity to rebut the presumption of guilt placed upon him or her by the positive test result, and that the horse, rather than the trainer, should be suspended if, after an opportunity for rebuttal, the presumption of guilt is not overcome.

I. UNDERSTANDING THE AMERICAN HORSE RACING INDUSTRY AND REGULATION

A. An Essential Trio: Owner, Trainer, and Veterinarian

In 2018, NBC reported that approximately fifteen million viewers tuned in to watch the 144th running of the Kentucky Derby,²¹ with an additional 157,000 spectators in live attendance

Commission, 11 J. ANIMAL & NAT. RESOURCES L. 23, 27–28(2015).

²⁰ There is insufficient data to render the assertion absolute, because: (1) the absolute insurer rule has been implemented by jurisdictions for so long that there exists no data revealing the number of fatal equine injuries that occurred prior to the implementation of the rule; and (2) there is no current proper comparison group, because all American racing jurisdictions have adopted at least some form of the absolute insurer rule. However, now that Kentucky has declared the absolute insurer rule unconstitutional, it will be interesting to see if the jurisdiction's replacement rule decreases the number of fatal equine injuries.

²¹ Justin Sayers, *Louisville Tops All Markets as Kentucky Derby Ratings Reach 6-Year Low*, COURIER J. (May 8, 2018, 10:56 AM), <https://www.courier-journal.com/story/sports/horses/triple/derby/2018/05/08/kentucky-derby-televisionratings-viewers-louisville/588094002/> [<https://perma.cc/EYP3-MNDD>] (stating “[i]n a press release,

at Churchill Downs—the home of the Kentucky Derby.²² However, despite the large numbers of both on-track and off-track viewers, it is safe to assume that the vast majority of said patrons merely view the Kentucky Derby—and horse racing in general—in a “social capacity,” and do not truly understand the logistics and divisions of power required to successfully get a racehorse from his or her barn on the backstretch to the starting gate.²³ There are three critical actors essential to the success of any equine athlete: the owner, the trainer, and the veterinarian.²⁴ Their respective roles will be discussed in turn.

1. *The Owner*

“The classic owner-trainer relationship, in its simplest form, is a hierarchical relationship with the owner at the top.”²⁵ If horse racing were to be compared to that of a professional football team, the role of the racehorse owner would closely mirror the role of an NFL general manager. That is, the typical racehorse owner is not the individual tasked with caring for the equine athlete on a daily basis and ensuring that the horse is in a suitable physical

NBC Sports championed the numbers, saying they reached 15.0 million combined viewers on television and digital platforms for the sixth consecutive year despite the head-to-head competition.”).

²² Gabe Hauari, *Over 157,000 people braved the elements at the 2018 Kentucky Derby*, COURIER J. (May 5, 2018), 8:19 PM, www.courier-journal.com/story/sports/horses/triple/derby/2018/05/05/2018-kentucky-derby-attendance/584193002/ [<https://perma.cc/D78U-AT9Q>].

²³ See Martha Claussen, *Claussen: Behind the Scenes with the Starting Gate Crew*, PAULICK REPORT (Mar. 8, 2012, 8:10 AM.), <https://www.paulickreport.com/news/people/claussen-behind-the-scenes-with-the-starting-gate-crew/> [<https://perma.cc/F7AP-Y54B>] (stating “[a]nyone who has ever watched a horserace has seen the familiar routine of horses preparing for competition....It looks so effortless that most spectators take it for granted, but the work of a starter and the starting gate crew is one of the most underrated roles in horseracing”).

²⁴ Ed Kane, *Veterinarian, trainer, owner: Who's looking out for the racehorse's health?*, DVM 360 MAGAZINE (June 20, 2016), <http://veterinarynews.dvm360.com/veterinarian-trainer-owner-who-s-looking-out-racehorse-s-health> [<https://perma.cc/L68Z-YT8H>] (explaining that a jockey is an obvious “essential actor,” but is not impacted by the absolute insurer rule).

²⁵ Tom LaMarra, *AAEP Examines Owner-Trainer-Vet Relationship*, BLOODHORSE (Dec. 15, 2011), <https://www.bloodhorse.com/horse-racing/articles/132704/aaep-examines-owner-trainer-vet-relationship> [<https://perma.cc/9NCJ-A2MX>].

condition to perform competitively on race-day.²⁶ Instead, much like a coach, these duties are reserved for that of the racehorse's trainer.²⁷

The owner or his delegated racing manager, on the other hand, is generally the individual in charge of the administrative aspect of the equine athlete's life.²⁸ Such tasks include: (1) selecting the best trainer for the horse based on the trainer's known strengths and weaknesses; (2) assessing the talent of the horse at the outset and analyzing the potential economic benefits of the investment; (3) conferring with the trainer to determine which type or class of race the horse should be entered in;²⁹ (4) analyzing trends and selecting a strong jockey; and (5) maintaining good communication with the trainer and the veterinarian of the horse.³⁰

Interestingly, because of the owner's distant role in relation to the racehorse, in the majority of jurisdictions, "the owner is not necessarily the person ultimately held responsible for the horse's care, even when illegal drugs are found in the horse's system."³¹ Escaping "ultimate responsibility," however, does not necessarily mean that the owner proceeds wholly unaffected.³² For example, under New Mexico Racing Commission Rules, if the presence of a drug carrying a "Category A" penalty is found in a horse's system post-race, the trainer of said horse is subject to a "minimum one-year suspension" and a "minimum fine of \$10,000.00 or ten percent

²⁶ See Lee *supra* note 19, at 30 (explaining that owners are frequently absent from the horse's day-to-day life or ignorant as to the horse's physical condition and well-being).

²⁷ See LaMarra, *supra* note 25.

²⁸ See *The Role of the Racing Manager in a Thoroughbred Partnership*, WEST POINT THOROUGHBREDS (Jan. 18, 2012), <https://www.westpointtb.com/the-role-of-the-racing-manager-in-a-thoroughbred-partnership/> [<https://perma.cc/NW3V-DEB9>].

²⁹ See Cindy Pierson Dulay, *Understanding the Types and Classes of Horse Races*, THOUGHT CO. (Oct. 13, 2017), https://www.thoughtco.com/understanding-the-types-and-classes-of-horse-races-1880414_ [<https://perma.cc/7VR4-2EPB>] (explaining that a horse can be entered in a maiden, claiming, allowance, stakes, or graded stakes race depending on the level of skill in which the horse possesses with maiden races being restricted to horses that have never before won, and graded stakes being reserved for horse racing's most elite competitors).

³⁰ *Id.*

³¹ Lee, *supra* note 19, at 30.

³² See 15 N.M. Code R. § 15.2.6.9(B) (LexisNexis 2019) (detailing the different sanctions available for both owners and trainers whose horse has tested positive for a prohibited illegal drug post-race).

of the total purse,” whichever is greater.³³ On the contrary, the owner is only subject to “[d]isqualification and loss of purse.”³⁴ Therefore, even though the owner is not apportioned a percentage of liability, he or she is still deprived of the purse he or she would have been entitled to if the horse has a prohibited substance in its system.³⁵ The key distinction between the punishment imposed on owners and trainers is that if the owner/trainer duo’s horse is found to be in violation, the owner can continue racing the horse—perhaps by moving the horse to the care of a different trainer—whereas the trainer must remain inactive until the length of the imposed suspension has been served.³⁶

2. *The Trainer*

Returning to the football team analogy, the role of the trainer of a racehorse is similar to the role of a professional football coach. The trainer is tasked with the day-to-day operations associated with the individual racehorse, such as scheduling morning workouts, ensuring that the horse is in top physical condition, grooming, feeding, and bathing.³⁷ In addition, the trainer also assumes administrative tasks such as examining the condition book,³⁸ selecting the appropriate race for his or her equine athlete,³⁹ and conferring with jockey agents to ensure that the racehorse is equipped with a top jockey.⁴⁰

³³ *Id.* at § 15.2.6.9(B)(1).

³⁴ *Id.* (discussing that winning purses usually are not released into an owner’s account a drug test confirms a negative result).

³⁵ *See id.*

³⁶ *See id.*

³⁷ *See* Sarah Favot, *A Day in the Life of a Horse Racing Trainer at Santa Anita Park*, PASADENA STAR NEWS (Dec. 24, 2014, 5:58 PM), <https://www.pasadenastarnews.com/2014/12/24/a-day-in-the-life-of-a-horse-racing-trainer-at-santa-anita-> [<https://perma.cc/LJ2Q-WE2T>].

³⁸ *See The Condition Book: How It Works and Types of Races for Thoroughbred Racehorses*, WEST POINT THOROUGHBREDS, (Dec. 19, 2016), <https://www.westpointtb.com/the-condition-book-how-it-works-and-types-of-races-for-thoroughbred-racehorses/> [<https://perma.cc/8LPS-MRDV>].

³⁹ *See The Process of Entering Races for Racehorse Owners*, WEST POINT THOROUGHBREDS (Sept. 1, 2013), <https://www.westpointtb.com/the-process-of-entering-races-for-racehorse-owners/> [<https://perma.cc/DXG3-2NBA>].

⁴⁰ Mary Hope Kramer, *What Does a Jockey Agent Do?*, THE BALANCE CAREERS, <https://www.thebalancecareers.com/jockey-agent-125755> [<https://perma.cc/D85B-SWUT>].

The typical trainer charges the owner a daily rate that is intended to cover the general care and upkeep costs associated with an individual racehorse.³⁸ Generally, “[t]rainer rates can range from fifty-dollars at smaller racetracks to as much as one-hundred-and twenty-dollars at major racing venues.”³⁹ The determination of a trainer’s fee is generally dependent on: (1) the level of experience and quality of reputation in which the trainer possesses; (2) the location where the horse is to be trained; and (3) the general purse structure at the circuit where the racehorse will compete.⁴⁰ In addition to charging a daily rate, in most owner-trainer relationships, it is generally agreed upon that the trainer is entitled to a certain percentage—usually ten percent—of any gross purse money that the racehorse collects.⁴¹

Transitioning into the topic of liability associated with drugging violations, the rule implemented in most American racing jurisdictions is as follows: trainers are ultimately responsible for the care of any racehorse in his or her possession and assume total and complete liability if such horse tests positive for a prohibited substance.⁴¹ This rule is one of strict liability, supported by the underlying rationale that it is the trainer’s absolute duty “to ensure that a horse that runs a race while in the care and custody of [himself or herself] is free from all prohibited drugs, chemicals, or other substance[s].”⁴² Some jurisdictions have extended the rule so far as to impose liability on the named trainer of a horse even when the cause of the presence of the prohibited drug in the horse’s system was due to an intentional or unintentional act of a third party, and not the trainer himself.⁴³

⁴¹ See *Richard v. Commonwealth*, 499 A.2d 727, 729 (Pa. Commw. Ct. 1985); *Equine Practitioner’s Ass’n v. N.Y. St. Racing & Wagering Bd.*, 488 N.E.2d 831 (N.Y. 1985); see also *Lee supra* note 19.

⁴² See, e.g., 16 TEX. ADMIN. CODE § 311.104(b)(2) (2018).

⁴³ See IDAHO ADMIN. CODE r. 11.04.14.100 (2013) (stating “[t]he Trainer is the absolute insurer of, and responsible for, the condition of the horses entered in a race regardless of the acts of third parties.”); CAL. CODE REGS. tit. 4, § 1887(a) (stating “[t]he trainer is the absolute insurer of and responsible for the condition of the horses entered in a race, regardless of the acts of third parties . . .”).

3. *The Veterinarian*

Deferring to the professional football team analogy one final time, the veterinarian serves a racehorse in a manner similar to how an athletic trainer serves a professional athlete. That is, the veterinarian is tasked with ensuring that the racehorse is physically sound both internally and externally.⁴⁴ Generally, on a day-to-day basis, racehorse veterinarians are primarily focused on two areas of health: respiratory issues and lameness.⁴⁵

In regard to respiratory issues, the racehorse veterinarian is primarily concerned with ensuring that the equine athlete is free of any airway abnormalities, such to maximize his or her on-the-track performance.⁴⁶ Common airway abnormalities that racehorses most regularly suffer from are exercise-induced pulmonary hemorrhages (“EIPH”) and dorsal displacements of the soft palate.⁴⁷ EIPH occurs when a racehorse is put under the stress of exercise and “the blood pressure leading from the artery on the right side of the heart to the lungs increases from about 25 mm of mercury pressure to about 100 mm of pressure.”⁴⁸ This increase in pulmonary pressure can cause the small capillaries in the horse’s lungs to rupture, and thus, cause internal bleeding.⁴⁹ It is for this reason that EIPH is most regularly referred to by those in the industry as “bleeding.”⁵⁰ EIPH is commonly treated proactively by the intravenous administration of a Lasix (furosemide) injection.⁵¹

⁴⁴ See Kane, *supra* note 24.

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ See Daniel Ross, *Lasix: The Drug Debate which is Bleeding US Horse Racing Dry*, THE GUARDIAN (Aug. 31, 2014), <https://www.theguardian.com/sport/2014/aug/31/lasix-drug-debate-bleeding-horse-racing> [<https://perma.cc/5Q9T-6ZHS>]; Erica Larson, *Respiratory Problems and Poor Performance*, THE HORSE (Sept. 29, 2015), <https://thehorse.com/113155/respiratory-problems-and-poor-performance/> [<https://perma.cc/6BRZ-TAQS>].

⁴⁸ Ross, *supra* note 47.

⁴⁹ See *id.*

⁵⁰ See *id.*

⁵¹ *Id.*

Dorsal displacement of the soft palate occurs “when the horse’s palate becomes displaced on top of the epiglottis and partially obstructs the airway.”⁵² The obstructed airway causes the equine athlete’s air intake to substantially decrease, rendering the horse exhausted prematurely.⁵³ A veterinarian can, in most circumstances, treat a dorsal displacement of the soft palate by performing what is known as “tieback surgery.”⁵⁴ When a horse undergoes a “tieback surgery,” the affected “cartilage is pulled to the side and is sutured to keep [the cartilage] from interfering with the flow of air.”⁵⁵

The racehorse veterinarian is also concerned with the prevention and correction of lameness in the equine athlete.⁵⁶ The veterinarian attempts to prevent lameness by identifying potential warning signs of injury, such as swelling, filling, or heat in a joint, and by conducting an examination on any potentially affected soft tissues; in addition, veterinarians often consult with the exercise rider and the trainer, to better diagnose the horse’s individual condition.⁵⁷

In the vast majority of states, the veterinarian will only become liable for the presence of a prohibited drug in a horse’s system if the veterinarian was a party to, or a facilitator of, the administration of a banned substance to the equine athlete.⁵⁸

⁵²Larson, *supra* note 47; see *Veterinary Spotlight: Breathing Pacemakers*, THOROUGHBRED TIMES (Sept. 4, 2010), <https://mydigitalpublication.com/article/Veterinary+Spotlight%3A+Breathing+Pacemaker/s/486647/45903/article.html> [<https://perma.cc/99UV-5YUE>].

⁵³ See Larson, *supra* note 47.

⁵⁴ See *id.*; see also, *New ‘Toggle Technique’ A Possible Alternative To Tie-Back Surgery*, PAULICK REPORT (May 17, 2018, 9:37 AM), <https://www.paulickreport.com/horse-care-category/new-toggle-technique-a-possible-alternative-to-tie-back-surgery/> [<https://perma.cc/RC4T-58MJ>] (noting that the “tie-back” procedure can be ineffective because of its potential to “fail or lost some of [its] power” over time).

⁵⁵ Ky. Equine Research Staff, *Tie-Back Surgery in Horses*, EQUINEWS (Mar. 23, 2015), <https://ker.com/equinews/tie-back-surgery-horses/> [<https://perma.cc/KHJ2-S7KJ>].

⁵⁶ See Kane, *supra* note 24.

⁵⁷ *Id.*

⁵⁸ *E.g.*, N.M. CODE R. § 16.47.1.16(B)(1) (LexisNexis 2019) (stating “[a]ll practicing veterinarians administering drugs, medications or other substances shall be responsible to see that the drugs, medications or other substances, and the veterinary treatment of horses are administered in accordance with [the required thresholds].”); 810 KY. ADMIN. REGS. 1:028 (stating “[a] veterinarian who administers, is a party to, facilitates, or is found to be responsible for any violation of KRS Chapter 230 or 810 KAR Chapter 1 shall be reported to the Kentucky Board of Veterinary Examiners and the state licensing Board of Veterinary

Thus, liability is only extended to the veterinarian if he or she assumed a substantial level of direct involvement in the prohibited substance.⁵⁹ On the contrary, some racing jurisdictions hold veterinarians liable even when he or she did not administer the prohibited drug personally.⁶⁰ For example, in Pennsylvania, a veterinarian can be liable for the presence of a prohibited substance in a horse's system if the veterinarian was negligent in learning of the administration or presence of such prohibited substance.⁶¹ This rule essentially prevents a veterinarian from escaping liability by simply instructing the trainer, or a member of his or her staff, on how to administer the potentially illegal substance.⁶²

While each member of the essential trio is subject to at least some level of liability and/or negative consequence from the detection of a prohibited substance in a horse's system, it is readily apparent that the trainer of the equine athlete is generally affected in the harshest manner.⁶³ Now that the groundwork has been laid, and the application of the absolute insurer rule has been described as it relates to each member of the essential trio, this Article will continue by focusing on how the rule relates solely to the trainer specifically.

B. The Current Model of Administrative Regulation in Horse Racing

How does a state horse racing commission have the power to regulate itself and impose sanctions against those who violate

Medicine by the stewards.”).

⁵⁹ *E.g.*, 810 KY. ADMIN. REGS. 1:028 (stating “[a] veterinarian who administers, is a party to, facilitates, or is found to be responsible for any violation of KRS Chapter 230 or 810 KAR Chapter 1 shall be reported to the Kentucky Board of Veterinary Examiners and the state licensing Board of Veterinary Medicine by the stewards.”)

⁶⁰ Lee, *supra* at 19.

⁶¹ 58 PA. CODE § 183.356 (1977) (stating “[n]o veterinarian shall permit a horse in his care to be started if he knows or if by the exercise of reasonable care he might have known or have cause to believe, that the horse has received a drug, stimulant, sedative, depressant, medicine or other substance that could result in a positive test”).

⁶² *Id.*

⁶³ *See, e.g.*, Richard v. Commonwealth, 499 A.2d 727, 729 (Pa. Commw. Ct. 1985); Equine Practitioner's Ass'n v. N.Y. St. Racing & Wagering Bd., 488 N.E.2d 831 (N.Y. 1985); Lee *supra* note 19.

its rules? Until 1951, the idea and implementation of a self-governing state horse racing commission was rare.⁶⁴ Prior to then, the sport of horse racing was primarily regulated under the central authority of the Jockey Club.⁶⁵ The Jockey Club assumed the role that most state racing commissions assume today, such as (1) licensing owners, trainers, jockeys, and the like; (2) testing horses for prohibited drugs to ensure a level playing field; and (3) maintaining the integrity of the thoroughbred breed as a whole.⁶⁶

In 1951, Club's traditional role was dramatically altered as a result of the *Fink v. Cole* opinion issued by the New York Court of Appeals.⁶⁷ In *Fink*, the Court analyzed the constitutionality of a statute that gave the Jockey Club, rather than the State, the power to grant and revoke licenses, determine fee requirements for such licenses, and suspend and/or revoke licenses.⁶⁸ The Court ultimately held that any statute delegating a state's licensing power to "[t]he Jockey Club, a private corporation, is such an abdication as to be patently an unconstitutional relinquishment of legislative power in violation of Section 1 of Article III of the Constitution of this State which provides: '[t]he legislative power of this State shall be vested in the Senate and Assembly.'"⁶⁹

The *Fink* holding, accordingly, caused many state horse racing commissions to form throughout the United States, and in turn, assume many of the functions that were traditionally held by the Jockey Club.⁷⁰ The newly formed state horse racing commissions were statutorily granted "broad delegations of power including licensing, rulemaking authority, determining civil penalties, and enforcing rules."⁷¹ For example, the New Mexico Horse Racing Commission is statutorily given the power "to

⁶⁴ Bradley S. Friedman, *Oats, Water, Hay, and Everything Else: The Regulation of Anabolic Steroids in Thoroughbred Horseracing*, 16 ANIMAL L. 123, 132 (2009).

⁶⁵ *Id.* at 131–32.

⁶⁶ *Id.* (citing John S. Howland & Michael J. Hannon, *A Legal Research Guide to American Thoroughbred Racing Law for Scholars, Practitioners and Participants* (William S. Hein & Co. 1998)).

⁶⁷ *See Fink v. Cole*, 97 N.E.2d 873, 874 (N.Y. 1951).

⁶⁸ *Id.* at 873–74.

⁶⁹ *Id.* at 876.

⁷⁰ Friedman, *supra* note 63, at 132 (noting that today, the state racing jurisdiction must be the body issuing licenses).

⁷¹ Friedman, *supra* note 64.

promulgate rules and regulations and carry out the duties of the Act to regulate horse racing” through the Horse Racing Act.⁷² Similarly, the California Horse Racing Board is statutorily given the power by of the California Business and Professions Code to administer and enforce “all laws, rules, and regulations affecting horse racing.”⁷³

Though each state that hosts the sport of horse racing has its own administrative regulation agency, the Jockey Club still serves a fundamental function. Today, the Jockey Club assumes the important tasks of: (1) ensuring that prospective racehorses are properly registered to compete in races; (2) ensuring that each horse is named and that the names approved are not duplicative; and (3) recording vital statistics essential to the betterment of horse racing.⁷⁴

C. Description of Common Prohibited Substances Detected in a Horse’s System

Trainers are often held liable for a drug violation when a horse either is found to have a strictly prohibited drug in his or her system or when a permissible drug is detected in the horse’s system at a level above a predetermined threshold.⁷⁵ The Association of Racing Commissioners International and the Racing Medication and Testing Consortium are the two bodies that have been instrumental in offering guidance to racing commissions on the issue of drug and medication regulation in horse racing.⁷⁶ The

⁷² N.M. CODE § 15.2.1.3 (stating “[s]ections 60-1A-1 through 60-1A-30 NMSA 1978 authorizes the New Mexico Racing Commission to promulgate rules and regulations and carry out the duties of the [Horse Racing] Act to regulate horse racing.”).

⁷³ CAL. BUS. & PROF. CODE ANN. § 19440(a)(2).

⁷⁴ These statistics include the race results of horses, yearly statistics of individual owners and trainer, and the amount of money wagered at a racetrack, among others. *Company Brochure*, THE JOCKEY CLUB http://www.jockeyclub.com/pdfs/company_brochure_17_web.pdf [https://perma.cc/9VW9-455Z].

⁷⁵ See *Richard v. Commonwealth*, 499 A.2d 727, 729 (Pa. Commw. Ct. 1985); *Equine Practitioner’s Ass’n v. State N.Y. St. Racing & Wagering Bd.*, 488 N.E.2d 831 (N.Y. 1985); see also *Lee supra* note 19.

⁷⁶ *Association of Racing Commissioner’s International Resources*, ASS’N OF RACING COMM’RS INT’L, <http://arci.com/about> [https://perma.cc/3BDS-GKV7]; *Racing Medication &*

ARCI, the RMTC, and the interworkings of the two organizations are discussed in further depth below.

1. The ARCI Develops Model Rules Implemented by Racing Commissions

The ARCI was originally formed in 1934 and currently “set[s] international standards for racing regulation, medication policy, drug testing laboratories, totalizator systems, racetrack operation and security, as well as off-track wagering entities.”⁷⁷ The ARCI created, and continues to amend and supplement, Model Rules that are heavily relied on in racing jurisdiction across the United States.⁷⁸ “In some racing jurisdictions, the Model Rules have the force of law as they have been adopted by reference statutorily or through regulatory rule making.⁷⁹ In others, they form the basis upon which rules are written.”⁸⁰

Specifically related to drug regulation in horse racing, the ARCI created a Uniform Classification Guideline for Foreign Substances (“the Guideline”).⁸¹ The Guideline is “intended to assist stewards, hearing officers and racing commissioners in evaluating the seriousness of alleged violations of medication and prohibited substance rules in racing jurisdictions.”⁸² Essentially, the Guideline names a list of drugs that have been, or could potentially be, found in a racehorse and ranks that drug on a scale based on

Testing Consortium FAQ, RMTC, <https://rmtcnet.com/status-report-and-faq/> [<https://perma.cc/33RE-V88E>].

⁷⁷ *Welcome*, ASS’N OF RACING COMM’RS INT’L, <https://www.arci.com> [<https://perma.cc/UY2U-ZF2Y>].

⁷⁸ *See id.* (discussing the ARCI “Model Rules” of racing and wagering, which are recognized worldwide as a standard for the independent and impartial regulation of horse and greyhound racing as well as the conduct of pari-mutuel wagering).

⁷⁹ *Model Rules*, ASS’N OF RACING COMM’RS INT’L, <http://www.arci.com/model-rules-standards/> [<https://perma.cc/37ZY-YQDA>].

⁸⁰ *Id.*

⁸¹ *See* ASS’N OF RACING COMM’RS INT’L., UNIFORM CLASSIFICATION GUIDELINES FOR FOREIGN SUBSTANCES AND RECOMMENDED PENALTIES MODEL RULE V.13.4.1 (Aug. 2018), <http://arci.com/wp-content/uploads/2018/10/2018-08-01-classification-program-v13.4.1.pdf> [<https://perma.cc/SCG9-UR4S>].

⁸² *Id.* at 2.

severity, with a “Class 1” drug being the most severe and a “Class 5” drug being the least severe.⁸³

Furthermore, the Guideline accompanies the class ranking of a drug with a penalty class that recommends a punishment to impose on a trainer whose horse has been detected with a prohibited substance in its system.⁸⁴ The penalty classes range from “Class A” to “Class C,” with a “Class A” penalty being the harshest and a “Class C” penalty being the least harsh.⁸⁵

2. Class 1 Drug Description

Class 1 drugs are reserved for stimulant and depressant drugs that have the greatest potential to affect performance, and that have no generally accepted medical use in racing horses such as “[o]piates, opium derivatives, synthetic opioids and psychoactive drugs, amphetamines and amphetamine-like drugs as well as related drugs, including but not limited to apomorphine, nikethamide, mazindol, pemoline, and pentylenetetrazol.”⁸⁶ All Class 1 drug violations subject the violating trainer to Class A punishment, which for a first-time-offender carries a minimum one-year suspension and a minimum fine of \$10 thousand or ten percent of the total purse earned by the horse, whichever is greater; however, mitigating circumstances are considered when determining a violating trainer’s punishment.⁸⁷

Common Class 1 drugs found in racehorses are those in which carry similar effects as that of morphine. In 2012, the horse racing industry was confronted with a drug that it had

⁸³ *See id.* at 3–4 (stating “[t]he RCI Drug Classification Scheme is based on 1) pharmacology, 2) drug use patterns, and 3) the appropriateness of a drug for use in the racing horse.”).

⁸⁴ *See* MODEL RULES OF RACING § ACRI-025-020 (ACRI 2019).

⁸⁵ *See id.* at 443, 445 (noting that a Class A penalty carries with it a minimum one-year suspension and a minimum \$10,000.00 fine; whereas a Class C penalty carries only a maximum fine of \$500.00).

⁸⁶ ASS’N OF RACING COMM’RS INT’L., *supra* note 76, at 4.

⁸⁷ MODEL RULES OF RACING § ACRI-025-020 (ACRI 2019) (explaining that the range of punishment increases for each subsequent time that a trainer is found to be in violation).

traditionally never been exposed to in the past, dermorphin.⁸⁸ Dermorphin is “a relative of heroin that is [forty] times more powerful than morphine and is commonly referred to as ‘frog juice.’”⁸⁹ The drug was assigned the shorthand name “frog juice” because it is found on the back of the South American monkey tree frog.⁹⁰ Dermorphin blocks pain while increasing feelings of excitation and euphoria, which causes equine athletes—especially those plagued with injuries—to run faster.⁹¹ The drug is a peptide mu receptor antagonist, which means that it takes primary effect when the molecules interact with the mu receptors in the horse’s brain.⁹²

By interfering with mu receptors in the equine athlete’s brain, the horse is neurologically relieved of any symptom of pain, but the physical injury itself remains intact and worsens when the horse continues to place stress on it.⁹³ In essence, the mu receptor is much like a warning bell that is turned off and/or ignored by the presence of dermorphin.⁹⁴ The inability to detect the body’s natural warning of injury can cause a fracture—a fatal injury to a racehorse.⁹⁵

For example, in 2012, Jess A Zoomin—a horse trained by Jeffrey Reed attempting to qualify for the two million dollar All

⁸⁸ See Eliana Docketerman, *Frog Juice: Horse Racing’s New Doping Scandal*, TIME (June 21, 2012), <http://newsfeed.time.com/2012/06/21/frog-juice-horse-racings-new-doping-scandal/> [https://perma.cc/E69U-55DD].

⁸⁹ Natalie Voss, *Chasing the Frog: Keeping Up With Slippery Cheaters*, PAULICK REPORT (Nov. 14, 2013), <https://www.paulickreport.com/news/ray-s-paddock/chasing-the-frog-keeping-up-with-slippery-cheaters/> [https://perma.cc/ZCK6-KQNT].

⁹⁰ Jeanna Bryner, *What is ‘Frog Juice?’*, LIVE SCIENCE (June 20, 2012), <https://www.livescience.com/21064-frog-juice-racehorse-drugs.html> [https://perma.cc/24KG-Q2GW].

⁹¹ See Voss, *supra* note 89.

⁹² Natalie Voss, *Detection Of New Synthetic Drug Disturbing But Less Problematic Than Dermorphin*, PAULICK REPORT (December 2, 2015), <https://www.paulickreport.com/news/ray-s-paddock/detection-of-new-synthetic-drug-disturbing-but-less-problematic-than-dermorphin/> [https://perma.cc/GKB5-RL4N].

⁹³ See John K. Neubert, *Effects of Mu- and Kappa-2 opioid receptor Opioid Receptor Agonists on Pain and rearing Rearing Behaviors*, 3 BEHAV. & BRAIN FUNCTIONS J. 49, 4 (2007).

⁹⁴ See *id.* at 20.

⁹⁵ See Walt Bogdanich, *Horse Given Painkiller Breaks Down at New Mexico Racetrack*, N.Y. TIMES (Aug. 17, 2012), <https://www.nytimes.com/2012/08/18/sports/horse-given-painkiller-breaks-down-at-new-mexico-racetrack.html> [https://perma.cc/AW2M-S8DV].

American Futurity at Ruidoso Downs—broke down while running in his qualifying race and, as a result, was euthanized on the track.⁹⁶ A post-mortem blood sample from Jess A Zoomin was collected for testing; the sample tested positive for dermorphin.⁹⁷ Along with Jess A Zoomin, four additional horses under trainer Jeffrey Reed’s care tested positive for dermorphin; he was handed down a suspension of twenty-one years and a fine of \$23 thousand.⁹⁸ This example illustrates the potential harmful consequences associated with the administration of a level one drug, and shows how harshly racing commissions punish trainers whose horses are detected carrying a Class 1 drug.

Other types of Class 1 drugs that have the same or similar effect on horses as dermorphin are cocaine, fentanyl, heroin, methamphetamine, morphine, various snake venoms, synthetic cannabis, and all DEA Schedule 1 drugs.⁹⁹

3. *Class 2 Drug Descriptions*

Drugs assigned to the Class 2 category are those that: “1) are not generally accepted as therapeutic agents in racing horses, or 2) they are therapeutic agents that have a high potential for abuse.”¹⁰⁰ Drugs in this class include: “psychotropic drugs, certain nervous system and cardiovascular system stimulants, depressants, neuromuscular blocking agents, and injectable local anesthetics.”¹⁰¹ The overwhelming majority of Class 2 designated drugs violations are, similar to Class 1 violations, assigned a Class A penalty if detected above the jurisdictional threshold; however, there are a handful of Class 2 drugs that are subject to punishment

⁹⁶ *See id.* (explaining that the richest race run in the state of New Mexico is “The All-American Futurity”).

⁹⁷ *See id.*

⁹⁸ Ray Paulick, *Reed suspended 21 years for frog juice in New Mexico*, PAULICK REPORT (October 1, 2012), <https://www.paulickreport.com/news/ray-s-paddock/reed-suspended-21-years-for-frog-juice-in-new-mexico/> [<https://perma.cc/AW2M-S8DV>].

⁹⁹ Uniform Classification Guidelines for Foreign Substances And Recommended Penalties Model Rule at 12.

¹⁰⁰ Uniform Classification Guidelines for Foreign Substances And Recommended Penalties Model Rule at 4.

¹⁰¹ *Id.*

under Class B.¹⁰² Class B punishment, for a first time offender, carries the sanction of a minimum fifteen-day suspension and a minimum fine of \$500; mitigating circumstances, however, are taken into account when determining the punishment of a violating trainer.¹⁰³

Lidocaine is a Class 2 drug that subjects a violating trainer to Class B punishment.¹⁰⁴ Unlike dermorphin, the mere presence of lidocaine in a horse's system does not automatically subject a trainer to punishment; instead, a trainer is only in violation if his or her horse is found with an amount of lidocaine in its system that is above the racing jurisdiction's predetermined threshold.¹⁰⁵ The ARCI—based on the recommendation of the RMTC—states that a trainer is in violation for the use of lidocaine if there is more than 20 pg/mL found in the plasma or serum of the horse.¹⁰⁶

Lidocaine is the type of drug that is generally accepted as a therapeutic agent in horse racing, but that also has a high potential for abuse.¹⁰⁷ Generally, the drug is used to repair lacerations, aid in the administration of sutures, and anesthetize the nerves in horses that are lame to prevent the feeling of pain, but the drug can also be used as an epidural to alleviate back issues.¹⁰⁸ Most notably, in 2008, high profile trainer Steven Asmussen was assessed a six-month suspension and a fine of

¹⁰² *Id.* (including examples such as Dibucaine, Ketamine, Levamisole, Mepivacaine, Nitroglycerin, and Resperine).

¹⁰³ Model Rules of Racing and Wagering, ASS'N OF RACING COMM'RS INT'L § ARCI-025-020(B) (explaining that the range of punishment increases for each subsequent time that a trainer is found to be in violation. A second lifetime offense carries a minimum punishment of a thirty-day suspension and fine of \$1,000.00; a third lifetime offense carries a minimum punishment of a sixty-day suspension and fine of \$2,500.00) [<https://perma.cc/GP7E-H2YG>].

¹⁰⁴ ASS'N OF RACING COMM'RS INT'L, UNIFORM CLASSIFICATION GUIDELINES FOR FOREIGN SUBSTANCES AND RECOMMENDED PENALTIES MODEL RULE, at 29 (Jan. 2019).

¹⁰⁵ *RMTC Approved Controlled Therapeutic Medications*, RACING MEDICATION & TESTING CONSORTIUM, <http://rmtc.kinsta.com/wp-content/uploads/2016/02/CTS-List-2-25-2016.pdf> [<https://perma.cc/E2GK-F5K7>].

¹⁰⁶ *Id.*

¹⁰⁷ ASS'N OF RACING COMM'RS INT'L, UNIFORM CLASSIFICATION GUIDELINES FOR FOREIGN SUBSTANCES AND RECOMMENDED PENALTIES MODEL RULE, at 4.

¹⁰⁸ Ray Paulick, *Asmussen, Dutrow Positives: Lidocaine, Clenbuterol Explained*, PAULICK REPORT (Nov. 17, 2020, 12:46 AM), <https://www.paulickreport.com/news/ray-s-paddock/asmussen-dutrow-positives-lidocaine-clenbuterol-explained/> [<https://perma.cc/CR8G-VSB3>].

\$1,500 for racing a horse in his care that tested positive for lidocaine at Lone Star Park in Grand Prairie, Texas.¹⁰⁹ At the time, Texas employed a “zero-tolerance” policy on lidocaine; therefore, the mere presence of the drug would subject the violating trainer to liability.¹¹⁰

3. Class 3 Drug Descriptions

Encompassing Class 3 drugs are those “that may or may not have a generally accepted medical use in the racing horse, but the pharmacology of which suggests less potential to affect performance than drugs in Class 2.”¹¹¹ Drugs in this class include “bronchodilators, anabolic steroids and other drugs with primary effects on the autonomic nervous system, procaine, antihistamines with sedative properties and the high-ceiling diuretics.”¹¹² The vast majority of Class 3 drug violations carry a Class B punishment range; though, there are a handful of Class 3 drugs that still impose Class A punishment if the drug is used impermissibly.¹¹³

Clenbuterol is a Class 3 drug that is consistently and impermissibly used by trainers on their horses in racing commissions across the country.¹¹⁴ The RMTC recommends that a trainer be liable for the use of Clenbuterol in his or her horse only when there is more than 140 pg/mL of the drug found in the horse’s urine and/or plasma.¹¹⁵ However many jurisdictions, such as New Mexico, have disallowed any level of Clenbuterol to be detected in

¹⁰⁹ Karen Johnson, *Asmussen to Fight Six-Month Texas Suspension*, BLOODHORSE (July 17, 2009), <https://www.bloodhorse.com/horse-racing/articles/147603/asmussen-to-fight-six-month-texas-suspension> [https://perma.cc/N9DG-KZQG].

¹¹⁰ *Id.*

¹¹¹ ASS’N OF RACING COMM’RS INT’L, UNIFORM CLASSIFICATION GUIDELINES FOR FOREIGN SUBSTANCES AND RECOMMENDED PENALTIES MODEL RULE, at 4.

¹¹² *Id.* (including various examples of other Class 3 designated drugs are Albuterol, Clonidine, Niflumic Acid, Pindolol, Sotalol, TCO₂, Timolol, Tolmentin, Trenbolone, and Valernic acid).

¹¹³ *See id.* at 14–15, 21, 29 (showing that an example of drugs as such are Arecoline, Bolasterone, Dimeflin, and Lisinopril).

¹¹⁴ *Id.* at 18.

¹¹⁵ RACING MEDICATION & TESTING CONSORTIUM, *supra* note 105.

a horse's system without his or her trainer being subject to liability.¹¹⁶

Clenbuterol is a “beta-2-adrenoceptor agonist and the only FDA-approved medication for horses with reversible bronchospasm, and is commonly used to treat horses with inflammatory airway disease and recurrent airway obstruction.”¹¹⁷ The drug primarily works “by relaxing the smooth muscles surrounding the airways, opening the [airway] passages” of the horse, and loosening excess mucus.¹¹⁸ Thus, many trainers favor the use of Clenbuterol because of its ability to allow a horse with breathing difficulties to perform better on race day.¹¹⁹ Other examples of Class 3 drugs include: flufenamic acid (an anthranilic acid derivative with analgesic, anti-inflammatory, and antipyretic properties), and stanozolol (an anabolic steroid).¹²⁰

4. Class 4 and Class 5 Drug Descriptions

The Class 4 drug list is composed of therapeutic medications that would be expected to have less potential to affect performance than those drugs contained in Class 3, such as: “less potent diuretics, corticosteroids, antihistamines and skeletal muscle relaxants without prominent central nervous system (“CNS”) effects, expectorants and mucolytics, hemostatics, cardiac glycosides and anti-arrhythmics, topical anesthetics, antidiarrheals and mild analgesics.”¹²¹ A trainer whose horse has been found to have a Class 4 drug in its system above the permissible jurisdictional threshold is subject to either a Class B or Class C punishment.¹²² Class C punishment, for a first time

¹¹⁶ Frank Angst, *New Mexico Ramps Up Rules on Clenbuterol*, BLOODHORSE (June 29, 2018), <https://www.bloodhorse.com/horse-racing/articles/228299/new-mexico-ramps-up-rules-on-clenbuterol> [<https://perma.cc/FZ98-G6US>].

¹¹⁷ Natalie DeFee Mendik, *Long-term Clenbuterol Use in Horses Studied*, THE HORSE (Sep. 5, 2012), <https://thehorse.com/118086/long-term-clenbuterol-use-in-horses-studied/> [<https://perma.cc/N2US-QUXX>].

¹¹⁸ *See id.*

¹¹⁹ *See id.*

¹²⁰ ASS'N OF RACING COMM'RS INT'L, UNIFORM CLASSIFICATION GUIDELINES FOR FOREIGN SUBSTANCES AND RECOMMENDED PENALTIES MODEL RULE 26, 45 (JAN. 2018).

¹²¹ *Id.* at 4.

¹²² *See id.* at 57.

offender, carries the minimum sanction of a written warning and the maximum sanction of a \$500.00 fine; mitigating circumstances, however, are taken into account when determining the punishment to impose on a trainer found to be in violation.¹²³

An example of a common Class 4 drug used by trainers is Dexamethasone.¹²⁴ Dexamethasone is “a synthetic corticosteroid hormone used to manage inflammation in diseases or conditions in which the immune system has a significant role.”¹²⁵ “The anti-inflammatory effects of Dexamethasone are about twenty-five times stronger than those of natural cortisol.”¹²⁶ The RMTC allows up to 5 pg/mL of the drug to be detected in the blood or serum of the horse before the presence of the drug become violable.¹²⁷ Other examples of Class 4 drugs include phenylbutazone (“Bute”), flunixin (“Banamine”), and methocarbamol.¹²⁸

Only a brief explanation is needed to describe the Class 5 drug category set. Comprising drugs in the Class 5 category are “therapeutic medications that have very localized actions only, such as anti-ulcer drugs and certain anti-allergic drugs.”¹²⁹ Anticoagulant drugs are also included.¹³⁰ “The recommended penalty for a violation involving a drug that carries a Category ‘D’ penalty is a written warning to the trainer and owner.”¹³¹ Examples of Class 5 drugs include Warfarin (an anticoagulant), Cimetidine (an acid reducer), and Lansoprazole (used to treat the symptoms of gastroesophageal reflux disease).¹³²

¹²³ ASS’N OF RACING COMM’RS INT’L MODEL RULES OF RACING § ARCI-011-020(2018).

¹²⁴ ASS’N OF RACING COMM’RS INT’L, UNIFORM CLASSIFICATION GUIDELINES FOR FOREIGN SUBSTANCES AND RECOMMENDED PENALTIES MODEL RULE at 20.

¹²⁵ Barbara Forney, *Dexamethasone for Horses*, <https://www.wedgewoodpetrx.com/learning-center/medication-information-for-pet-and-horse-owners/dexameth> [<https://perma.cc/MNR3-VKXQ>].

¹²⁶ *Id.*

¹²⁷ *Approve Controlled RMTC Approve Controlled Medications*, <http://rmtc.kinsta.com/wp-content/uploads/2016/02/CTS-List-2-25-2016.pdf> [<https://perma.cc/PR97-XKRQ>].

¹²⁸ *See id.*

¹²⁹ ASS’N OF RACING COMM’RS INT’L, UNIFORM CLASSIFICATION GUIDELINES FOR FOREIGN SUBSTANCES AND RECOMMENDED PENALTIES MODEL RULE at 4.

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *Id.*

C. Racing Commissions and the ARCI Defer to the RMTC to Set Thresholds

In determining the threshold at which permissible drug becomes illegal, the majority of racing commissions in the United States, and even the ARCI, defer to the RMTC's Schedule of Controlled Therapeutic Substances¹³³ created by the RMTC Scientific Advisory Committee.¹³⁴ The RMTC is an organization that seeks to develop and promote "uniform rules, policies and testing standards" at the national level.¹³⁵ It is comprised of twenty-three member organizations that "represent horsemen's groups, breed registries, racetracks, racing regulators industry associations and veterinarians."¹³⁶ Various subcommittees of the RMTC joined forces to create what is known as the National Uniform Medication Program ("NUMP").¹³⁷ The NUMP is a program that essentially prescribes: (1) a schedule of controlled therapeutic substances; (2) a multiple medication violation ("MMV") program; and (3) an RMTC laboratory accreditation process.¹³⁸ The primary goal of the NUMP is to "develop a comprehensive uniform program for the regulation of medications in horseracing" that can be utilized by every horse racing commission across the United States.¹³⁹

¹³³ Press Release, *Three More Laboratories Receive RMTC Accreditation: 23 States Now Using RMTC-Accredited*, RACING MEDICATION & TESTING CONSORTIUM (Apr. 30, 2014) <https://rmtcnet.com/three-more-laboratories-receive-rmtc-accreditation-23-states-now-using-rmtc-accredited-4302014/> [<https://permaarchives.org/warc/20190921173826/https://www.ntra.com/three-more-laboratories-receive-rmtc-accreditation/>].

¹³⁴ *National Uniform Medication Report: FAQ*, RACING MEDICATION & TESTING CONSORTIUM, <https://rmtcnet.com/status-report-and-faq/> [<https://perma.cc/7LSK-3ERQ>] (stating "[t]he RMTC Scientific Advisory Committee (SAC) is a group of experienced and knowledgeable regulatory veterinarians, veterinary pharmacologists, private practice veterinarians, and analytical chemists").

¹³⁵ *Id.*

¹³⁶ *See id.*

¹³⁷ *Id.*

¹³⁸ *See id.* ("Each of these provisions is being used in numerous racing jurisdictions across the country. The goal is uniform implementation of all four aspects of the program in every racing state nationwide.").

¹³⁹ *Id.*

The RMTC, and more specifically, the Scientific Advisory Committee both: choose which drugs are to be placed on the Schedule of Controlled and Therapeutic Substances; and determine at which threshold such drugs become illegal.¹⁴⁰ In deciphering which drugs to place on the Schedule of Controlled and Therapeutic Substances, the RMTC sent a survey to racetrack practitioners to first determine which types of drugs they felt were necessary to practice in a racing environment.¹⁴¹ After receiving the results from the survey, the final list was created by the Scientific Advisory Committee “with further input from ...analytical chemists, veterinary pharmacologists, and regulatory veterinarians in conjunction with the [Association of Racing Commissioners International].”¹⁴²

Once the list of drugs that were to be placed on the Schedule of Controlled and Therapeutic Substances was created, the RMTC was tasked with creating permissible threshold levels for each named drug.¹⁴³ Some threshold levels were simply developed by the utilization of historical data and research.¹⁴⁴ Other “thresholds, however, were developed using research studies funded by the RMTC.”¹⁴⁵

II. THE ABSOLUTE INSURER RULE: UNCONSTITUTIONAL, IRRATIONAL, AND INEFFECTIVE

A. Explanation of the Absolute Insurer Rule

As previously mentioned, the absolute insurer rule “holds a trainer strictly liable for the presence of any prohibited medication

¹⁴⁰ RACING MEDICATION & TESTING CONSORTIUM, *supra* note 134.

¹⁴¹ *See id.* (noting that the drugs placed on the RMTC’s Schedule of Controlled Substances are those drugs that can be found in a horse’s system at a predetermined threshold level. The SAC does not determine threshold levels for Level 1 drugs, because the mere presence of a Level 1 drug would subject the violating trainer to liability regardless of what level the drug was found.)

¹⁴² *Id.*

¹⁴³ *See id.*

¹⁴⁴ *Id.* (suggesting phenylbutazone, flunixin meglumine, and furosemide are all drugs named on the Schedule of Controlled and Therapeutic Substances that had their permissible threshold levels determined by historical data and research.)

¹⁴⁵ *Id.*

or drug in his or her horse's system."¹⁴⁶ Thus, liability "does not depend on fault, just the incidence of a violation."¹⁴⁷ Today, at least some form of the absolute insurer rule described above is implemented in each of the thirty-eight racing jurisdictions across the United States.¹⁴⁸

1. Courts Have Found the Rule to be Unconstitutional in the Past

The constitutionality of the absolute insurer rule has long been a topic of debate amongst horse racing practitioners, officials, and legal scholars alike. The absolute insurer rule has been deemed unconstitutional in the past.¹⁴⁹ For example, in 1946, a Maryland Court of Appeals held that it was unconstitutional for a racing commission to "prevent one from making a defense to a charge brought against him by substituting an irrebuttable presumption for facts."¹⁵⁰ The court went so far as to call the enforcement of the absolute insurer rule as being "worse than applying a regularly adopted rule ex post facto."¹⁵¹

The constitutionality of the absolute insurer rule was again evaluated in 1969 by the Supreme Court of Illinois in *Brennan v. Illinois Racing Board*.¹⁵² The opinion grossly exposed the rule's potential to punish an innocent trainer for the actions of a malicious third party.¹⁵³ In *Brennan*, a trainer's horse was detected with Ritalin, a jurisdictionally prohibited substance, in its urine

¹⁴⁶ Matt Hegarty, *Motion ruling could impact absolute-insurer statute*, DRF, (Aug. 22, 2017), <https://www.drf.com/news/motion-ruling-could-impact-absolute-insurer-statute> [<https://perma.cc/HG4J-RPLY>].

¹⁴⁷ *Motion v. Ky. Horse Racing Comm'n*, No. 16-CI-1195, 2017 WL 6517732, at *7 (Ky. Cir. Ct. Aug. 18, 2017).

¹⁴⁸ Bob Heleringer, *An Abbreviated History of Absolute Insurer Rule*, BLOODHORSE (August 30, 2017), <https://www.bloodhorse.com/horse-racing/articles/223352/an-abbreviated-history-of-absolute-insurer-rule>. [<https://perma.cc/AR5D-PXL3>].

¹⁴⁹ *See, e.g.*, *Mahoney v. Byers*, 48 A.2d 600, 603 (Md. 1946) ("Such a law would be arbitrary, illegal, capricious and hence unconstitutional").

¹⁵⁰ *Id.*

¹⁵¹ *Id.* at 604.

¹⁵² *Brennan v. Ill. Racing Bd.*, 247 N.E.2d 881, 881 (Ill. 1969).

¹⁵³ *See id.* at 882–84.

after winning a race at Hawthorne Race Course.¹⁵⁴ Illinois's absolute insurer rule constrained the court to presume the trainer to be liable.¹⁵⁵ The trainer contended that another employee, fired ten-days prior to the race, actually administered the drug, and that "on the date preceding the race he saw that employee around the premises and told him to stay away from the barn."¹⁵⁶

The Illinois Supreme Court held unconstitutional any application and/or enforcement of the absolute insurer rule, reasoning that: (1) it is a violation of due process to punish a trainer without at least some showing of fault; (2) it is a fundamental principle of Anglo-Saxon justice that responsibility is personal and that penalties may not be inflicted on one person because of another's acts; and (3) there has been no showing that the absolute insurer rule has a real and substantial relation to the protection of racetrack patrons against fraud or deceit.¹⁵⁷ Thus, the Court found the absolute insurer rule to be void in its entirety.¹⁵⁸

2. The Majority of Jurisdictions Currently Find the Rule Constitutional

Though the absolute insurer rule has been held to be unconstitutional in the past, the majority of states today find the rule to be constitutional.¹⁵⁹ The Fifth Circuit Court of Appeals analyzed the constitutionality of the absolute insurer rule—via a Texas state case by way of federal question jurisdiction—as an

¹⁵⁴ *See id.* at 882.

¹⁵⁵ *Id.* at 882–83 ("suggesting that a trainer would be the absolute insurer of and responsible for the horse's condition once it has been entered into a race by him/her despite the acts of a third party).

¹⁵⁶ *Id.* at 882.

¹⁵⁷ *Id.* at 882–84 (explaining that the court focuses on the well-being of patrons, rather than of the horse, because the focus of the constitutionality of the rule depended on whether the rule was the use of police powers).

¹⁵⁸ *Brennan*, 42 N.E.2d at 884.

¹⁵⁹ *See Div. of Pari-Mutuel Wagering v. Caple*, 362 So.2d 1350, 1354–55 (Fla. 1978); *O'Daniel v. Ohio State Racing Comm'n*, 307 N.E.2d 529, 532 (Ohio 1974); *Jamison v. State Racing Comm'n*, 507 P.2d 426, 428 (N.M. 1973); *State v. W. Va. Racing Comm'n*, 55 S.E.2d 263, 272 (W. Va. 1949); *Sandstrom v. Cal. Horse Racing Bd.*, 189 P.2d 17, 19 (Cal. 1948); *DeGroot v. Ariz. Racing Comm'n*, 686 P.2d 1301, 1312 (Ariz. App. 1984); *Briley v. La. State Racing Comm'n*, 410 So.2d 802, 806 (La. App. 1982); *Dare v. State*, 388 A.2d 984, 986 (N.J. Super. App. Div. 1978); *Fioravanti v. State Racing Comm'n*, 375 N.E.2d 722 (Mass. App. 1978).

issue of first impression in 2006.¹⁶⁰ The primary issue before the court was whether the absolute insurer rule, both facially and as applied, violates a trainer's right to substantive due process.¹⁶¹

The Fifth Circuit went on to hold that the rule did not violate federal due process.¹⁶² The Court rested its conclusion on the determination that the rule does not create an irrebuttable presumption of guilt, because "it does not assign fault, but instead, requires the trainer to bear the responsibility of the horse's condition, as a contingency to being licensed as a trainer by the state."¹⁶³ In addition, the Court held that the enforcement of the absolute insurer rule does not violate a trainer's substantive due process rights, because "due process does not require proof of guilty knowledge before punishment may be imposed" in areas of activity requiring strong police regulation to protect public interests.¹⁶⁴

B. The Motion Opinion: The Absolute Insurer Rule is Unconstitutional

On August 15, 2017, Kentucky Circuit Court Judge Thomas D. Wingate sent shockwaves through the horse racing community by issuing an opinion that declared the absolute insurer rule unconstitutional for the first time since the Brennan opinion in 1969.¹⁶⁵ The opinion analyzed the constitutionality of trainer H. Graham Motion's suspension handed down by the Kentucky Horse Racing Commission as a result of a horse in his care testing positive for a prohibited substance post-race.¹⁶⁶

On April 24, 2014, trainer H. Graham Motion's horse Kitten's Point captured the Bewitch Stakes at Keenland Racecourse, earning a purse of \$90 thousand.¹⁶⁷ Following the race, a blood sample was taken from Kitten's Point and sent to a

¹⁶⁰ See *Hudson v. Texas Racing Comm'n*, 455 F.3d 597, 598 (5th Cir. 2006).

¹⁶¹ See *id.* at 599.

¹⁶² *Id.* at 601. ("We agree with the majority of jurisdictions that the absolute insurer rule does not violate [substantive] due process.")

¹⁶³ *Id.* at 600.

¹⁶⁴ *Id.*

¹⁶⁵ See *Motion*, 2017 WL 6517732, No. 16-CI-1195 at *7-8.

¹⁶⁶ See *id.* at *1.

¹⁶⁷ *Id.*

Kentucky testing laboratory, where it was revealed that the horse had 2.9 ng/mL of Methocarbamol¹⁶⁸ in her serum; Kentucky permits a maximum of only 1.0 ng/mL of Methocarbamol to be present in a horse's serum at the time of a race.¹⁶⁹ As a result of the positive test, the Kentucky Horse Racing Commission suspended H. Graham Motion from racing for five days, ordered that he pay a \$500 fine, and ordered that the owner of Kitten's Point forfeit the \$90 thousand purse money that had been won in the Bewitch Stakes.¹⁷⁰

The order was appealed to the Franklin Circuit Court and reversed in its entirety on the grounds that the absolute insurer rule was unconstitutional, because: (1) the setting and formulation of the Methocarbamol threshold level was arbitrary and capricious; and (2) the absolute insurer rule denies the accused of substantive due process.¹⁷¹ Accordingly, the *Motion* opinion provided trainers charged with drug violations in the future, with a groundbreaking and novel defense to attack their presumption of guilt.

1. Drug Thresholds are not Rooted in Scientific Evidence

The first means by which a trainer may now defend his or her drug violation charge is to argue that the specific drug threshold level adopted by a racing commission is arbitrary and capricious in that no link exists between the scientific validity of

¹⁶⁸ Barbara Forney, *Dexamethasone For Horses*, <https://www.wedgewoodpetrx.com/learning-center/medication-information-for-pet-and-horse-owners/dexameth> [<https://perma.cc/MNR3-VKXQ>] ("Methocarbamol is a centrally acting muscle-relaxant that is chemically related to guaifenesin. Methocarbamol diminishes skeletal muscle hyperactivity without altering normal muscle tone.") (suggesting that Methocarbamol interrupts the transmission of abnormal impulses from disturbed muscle but does not affect the contractile mechanism of skeletal muscle and is used to treat muscle spasms associated with back problems and exercise-related muscle problems such as exertional rhabdomyolysis).

¹⁶⁹ *See Motion*, 2017 WL 6517732, No. 16-CI-1195 at *1. (explaining that Kentucky is a jurisdiction that follows the RMTC permissible drug threshold recommendations, and thus, allows no more than 1.0 ng/mL of Methocarbamol to be detected in a horse's serum post-race).

¹⁷⁰ *Id.* at *1.

¹⁷¹ *See id.* at *7.

the effect of the drug and the threshold set by the jurisdiction.¹⁷² Essentially, to overcome his or her charge, the trainer must be able to proficiently show that if the drug were to be allowed at a higher threshold level than what the racing jurisdiction in question allows, there would be no additional negative pharmacological effect on the equine athlete.¹⁷³ The various means by which to achieve this task are more fully described below.

(a) Provide Expert Testimony That Threshold Level is Low

In order for a racing commission to permissibly and constitutionally set a drug threshold regulation, the racing commission must be able to prove that the use of a drug at the set threshold level “would endanger the health or welfare of the horse or the safety of the rider.”¹⁷⁴ Therefore, the primary and most effective means by which to challenge the constitutionality of the drug threshold at issue is to provide expert testimony supporting a finding that the use of the drug at the level in which was detected in the equine athlete post-race would pose no negative pharmacological effect on a horse.¹⁷⁵

For example, in the Motion matter, expert testimony revealed that even though the Kentucky Horse Racing Commission set the threshold level for Methocarbamol at 1.0 ng/mL, the presence of the drug at a threshold level of 2.9 ng/mL—the amount detected in Kitten’s Point post-race—or at levels even higher, would pose no negative pharmacological effect on a racehorse.¹⁷⁶ The defense team proffered the testimony of two respected veterinarians and the head of the Kentucky Horse Racing Commission’s Testing Laboratory to support their argument.¹⁷⁷ Both veterinarians testified that the presence of 2.9 ng/mL of Methocarbamol in a horse’s system “would cause no impact on the

¹⁷² *See id.* at *4.

¹⁷³ *See id.* at *5.

¹⁷⁴ *Stewart v. Ky. Horse Racing Comm’n.*, No. 2010-CA-001929-MR, 2013 WL 1003534, at *6 (Ky. App. Mar. 15, 2013).

¹⁷⁵ *See id.*

¹⁷⁶ *See Motion*, 2017 WL 6517732, No. 16-CI-1195 at *5.

¹⁷⁷ *Id.* at *2.

horse.”¹⁷⁸ One veterinarian went so far as to testify that the presence of even 20 ng/mL of Methocarbamol in a horse’s system would not cause a negative pharmacological effect on the horse.¹⁷⁹ To bolster the argument that the Methocarbamol drug threshold was set far too low, the defense offered, through the testimony of the head of the Kentucky Horse Racing Commission Testing Laboratory, that “he [had] previously recommended that the Ohio Racing Commission set the regulatory threshold for Methocarbamol at [a staggering] 1,000 ng/mL.”¹⁸⁰

The testimony of the aforementioned experts led the Court to hold that the record lacked “substantive evidence to show any rationale for the imposition of a threshold of 1.0 ng/mL of Methocarbamol.”¹⁸¹ Therefore, moving forward, in attacking and defending a drug violation charge brought by a racing commission, the defense should make the utmost effort to secure competent and reliable experts to testify that a current drug threshold is set so low such that use at the regulated level would not endanger the health or welfare of a horse.

(b) Argue Rulemaking Authority was Delegated to Outside Body

As mentioned earlier in the Article, the majority of racing jurisdictions defer to the RMTC’s Uniform Drug Schedule to determine and set permissible drug threshold levels.¹⁸² Accordingly, a second means by which an accused trainer can defend his or her drug charge is to argue that a racing commission, by relying on the RMTC’s drug schedule, has impermissibly and unconstitutionally delegated its rulemaking authority to an outside body.¹⁸³

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

¹⁸¹ *Id.* at *5.

¹⁸² RACING MEDICATION & TESTING CONSORTIUM, *supra* note 134.

¹⁸³ *See* United States v. Mead Corp., 533 U.S. 218, 218 (2001) (holding that Congress can delegate rulemaking authority to an agency, but not going so far as to permit an agency to delegate rulemaking authority to an outside body).

In *Motion*, it was revealed that the Kentucky Horse Racing Commission's Lab Director was also a member of the Scientific Advisory Committee for the RMTC, and that he had substantial involvement in the creation of the RMTC's Uniform Drug Schedule that recommended permissible threshold levels for a broad array of drugs.¹⁸⁴ In regard to the threshold level for Methocarbamol, the lab director recommended a regulatory level of 20 ng/mL; however, the RMTC rejected his proposal and adopted the implemented 1.0 ng/mL threshold level instead.¹⁸⁵

The director, acting as the head of the Kentucky Horse Racing Commission's Testing Laboratories, recommended a higher threshold level for Methocarbamol than what was implemented.¹⁸⁶ The director raised the question as to whether the Kentucky Horse Racing Commission delegated rulemaking authority to an outside body by placing total and absolute deference on the RMTC's Uniform Drug Schedule and ignoring the opinion of their own laboratory director.¹⁸⁷ Ultimately, the Court held that the Commission had improperly delegated its rulemaking authority to the RMTC and thus, that the threshold level for Methocarbamol was not rooted in science, but rather, in the opinion of an outside agency.¹⁸⁸

It is crucial to make clear that the court in *Motion* does not hold that the mere reliance on the RMTC's Uniform Drug Schedule is unconstitutional—that is simply not the case.¹⁸⁹ What the opinion does hold, however, is that racing commissions should investigate the RMTC's drug threshold recommendations and ensure that strong scientific data supports the threshold at issue, rather than blindly implementing the recommendations without independent research.¹⁹⁰ Accordingly, following the Motion opinion—in addition to arguing that the use of a given drug at a higher threshold than what the jurisdiction has adopted would not have a negative pharmacological effect on a racehorse—trainers

¹⁸⁴ See *Motion*, 2017 WL 6517732, at *3.

¹⁸⁵ *Id.*

¹⁸⁶ *Id.*

¹⁸⁷ *Id.* at *4.

¹⁸⁸ *Id.* at *5–6.

¹⁸⁹ See *id.*

¹⁹⁰ See *Motion*, 2017 WL 6517732, at *5–6.

are now able to defend their drug charges by arguing that the racing commission's drug threshold levels are not rooted in scientific evidence since the individual racing commission, itself, has failed to obtain and/or collect strong scientific data to support the threshold.¹⁹¹

2. The Rule Deprives the Accused of Substantive Due Process

The absolute insurer rule is unconstitutional because the drug thresholds assigned in the majority of jurisdictions are not rooted in scientific evidence. Additionally, the application of the rule denies the accused his or her constitutional right to substantive due process.¹⁹² Generally, a racehorse trainer undertakes his or her trade as a means of earning a living.¹⁹³ Therefore, the loss of a trainer's license, or even a suspension of a trainer's license, can be considered the most severe and harshest possible sanction the trainer's ability to generate income, and thus, maintaining a living, will be rendered impossible.

In the context of criminal law, strict liability offenses are generally disfavored for crimes that carry with them a severe punishment.¹⁹⁴ Strict liability is generally associated with civil violations, which incur monetary penalties.¹⁹⁵ In fact, the greater the possible punishment, the more likely that the prosecuting body

¹⁹¹ *See id.* at *4–5 .

¹⁹² *See id.* at *7.

¹⁹³ *See What is a Racehorse Trainer?*, CAREEREXPLORER, <https://www.careerexplorer.com/careers/racehorse-trainer/> [<https://perma.cc/6D7F-RMC5>] (A racehorse trainer is able to earn a substantial amount of money depending on the level of competition and how much prize money is involved in each race, as they take a percentage of the horse's winnings.)

¹⁹⁴ *See Aguirre v. State of Texas*, 22 S.W.3d 463, 472 (Tex. Crim. App. 1999) (“Some commentators insist that strict liability has no place, or should have no place, in the law of crimes.”).

¹⁹⁵ *See id.* (“Strict liability is frequently associated with torts, regulations, and ‘civil offenses’ which impose a penalty but that are not crimes”); *see also State of Texas v. Taylor*, 322 S.W.3d 722, 728 (Tex. Ct. App.— 2010) (finding that prohibitions against water pollution, driving while intoxicated, the sale of horsemeat for human consumption, and speeding are examples of strict liability offenses).

will be required to prove the defendant's culpability in carrying out the crime or violation.¹⁹⁶

A trainer whose horse has tested positive for a prohibited substance is almost always subject to at least some level of suspension as a means of punishment.¹⁹⁷ Similar to how a criminal defendant is deprived of his or her liberty by being incarcerated, a trainer is deprived of his or her liberty by the suspension of a license, and thus, a means of making a living. Accordingly, because of the potential punishment associated with drug violations in horse racing—especially those violations that carry with them “Class A” or “Class B” punishment—a trainer is deprived of substantive due process when his or her license is suspended without affording the trainer an opportunity to rebut the presumption of guilt placed upon him or her.

In *Motion*, the court held that in order to preserve the substantive due process rights of an accused trainer, horse racing commissions must afford the accused trainer the opportunity to “be able to present evidence to rebut their liability in an instance of violation” and “to be heard on the propriety of his actions to challenge liability for a dosing violation.”¹⁹⁸ Therefore, just as a criminal defendant who is charged with a crime carrying a punishment that includes the possibility of incarceration is afforded the opportunity to rebut his charge, a trainer who is charged with a drug violation carrying a punishment that includes the possibility of suspension must be afforded the same; any rule that creates a strict responsibility for trainers in the care for horses must be rebuttable and cannot be absolute.¹⁹⁹

¹⁹⁶ *Aguirre*, 22 S.W.3d at 476–77.

¹⁹⁷ MODEL RULES OF RACING § ACRI-025-020(B) (ACRI 2018) (discussing that the only time that a trainer is not subject to suspension is for a violation of a drug class carrying with it “Class C” punishment).

¹⁹⁸ *See Motion*, 2017 WL 6517732, at *7.

¹⁹⁹ *Id.*

C. Inaccurate Testing Methods Make the Adoption of the Rule Irrational

The absolute insurer rule should be abolished because it is unconstitutional, and because the current state of equine drug testing easily allows for a trainer to be heavily punished as a consequence of an inaccurate lab result. Currently, testing standards for equine athletes vary on a state-by-state basis.²⁰⁰ This leads to a high degree of variance as to what prohibited substances are detected from jurisdiction to jurisdiction.²⁰¹ Furthermore, the cost in which a racing jurisdiction is willing to spend per test varies.²⁰² Thus, the possibility arises for trainers operating in jurisdictions that employ a “cheaper” form of testing to be subject to punishment as the result of an inaccurate and unreliable result.²⁰³ In fact, even those jurisdictions that utilize the most expensive forms of testing risk the possibility of an inaccurate result as a consequence of environmental contamination from substances that are naturally found in nature or that are ingested by the horse as a result of human contamination.²⁰⁴

In total, the horse racing industry spends about forty-four million dollars per year on drug testing and related practices;²⁰⁵ each drug test costs the racing jurisdiction anywhere between fifty-five dollars two-hundred-and-thirty dollars, depending on which type of test the racing jurisdiction wishes to utilize.²⁰⁶ “There are

²⁰⁰ See Daniel Ross, *Standard Issue: Drug Testing Far From Uniform in American Horse Racing*, THE GUARDIAN (Sept. 16, 2015, 5:00 PM), <https://www.theguardian.com/sport/2015/sep/16/standard-issue-drug-testing-far-from-uniform-in-american-horse-racing> [<https://perma.cc/WB7R-FTTB>].

²⁰¹ Tom LaMarra, *Survey: Drug Testing System Has Serious Flaws*, BLOODHORSE, (Oct. 14, 2014), <https://www.bloodhorse.com/horse-racing/articles/111316/survey-drug-testing-system-has-serious-flaws> [perma.cc/R6G5-LT3X].

²⁰² Natalie Voss, *Testing, Testing: How Strong Are Racing's Drug Testing Programs?*, PAULICK REPORT, (Apr. 16, 2014, 8:47 AM), <https://www.paulickreport.com/news/ray-s-paddock-testing-how-strong-are-racings-drug-testing-lab> [perma.cc/U2AQ-JX3R].

²⁰³ *Id.*

²⁰⁴ See, e.g., Kentucky Equine Research Staff, *Molds: Possible Cause of Positive Equine Drug Tests*, EQUINEWS, (Aug. 18, 2016), <https://ker.com/equine/molds-possible-cause-positive-equine-drug-tests/> [perma.cc/5YRZ-CUXG].

²⁰⁵ LaMarra, *supra* note 201.

²⁰⁶ See *id.*

three primary types of testing methods mentioned in most contracts” between the testing laboratory and the racing jurisdiction: “thin-layer chromatography (“TLC”), enzyme-linked immunoassays (“ELISA kits”), and liquid or gas chromatography/mass spectrometry (“LCMS/GCMS”).”²⁰⁷ The various types of tests are each discussed more fully, in turn, below.

1. Types of Drug Testing Methods Used in American Horse Racing

Each method of testing analyzes a sample of either blood or urine taken from the racehorse.²⁰⁸ The sample is usually taken from the equine athlete post-race but can also be taken randomly through a process known as “out-of-competition testing.”²⁰⁹

(a) Thin-Layer Chromatography

TLC is a quick but relatively insensitive means of testing a sample, “and may only detect substances given to a horse within a few days.”²¹⁰ The manner in which a TLC test functions is as follows: “TLC uses a [(1)] stationary phase, typically a silica gel bound to a plastic, glass or aluminum backing[;] and [(2)] a mobile phase, typically common organic solvents such as ethyl acetate or hexane, to separate components of a reaction or sample.”²¹¹ “Advantages of TLC include rapid analysis time, because many samples can be analyzed simultaneously, low solvent usage on a per-sample basis, a high degree of accuracy and precision for

²⁰⁷ Voss, *supra* note 202.

²⁰⁸ PAGE BOUCHARD & JOSE CASTRO, UNIV. OF TENNESSEE COLL. OF VETERINARY MED., EQUINE DRUG TESTING (2015), https://vetmed.tennessee.edu/vmc/EquineHospital/Documents/FactSheet_LACS-EquineDrugTesting.pdf [<https://perma.cc/WCX4-CGTE>].

²⁰⁹ MODEL RULES OF RACING § ACRI-011-022 (ARCI 2019) (“The commission may at a reasonable time on any date take blood, urine or other biologic samples as authorized by commission rules from a horse to enhance the ability of the commission to enforce its medication and anti-doping rules”).

²¹⁰ See Voss, *supra* note 202.

²¹¹ *Thin-Layer Chromatography (TLC)*, EAG LAB., <https://www.eag.com/techniques/chromatography/thin-layer-chromatography-tlc/> [perma.cc/HYK4-RR8Q].

instrumental TLC, and sensitivity in the nanogram or picogram range.”²¹² A disadvantage of TLC testing, however, is that the testing method can sometimes yield inaccurate results surrounding humidity and temperature.²¹³

(b) Enzyme-Linked Immunoassays

ELISA kits are more expensive than TLC tests but generally, yield a more accurate result.²¹⁴ ELISA kits work by “rely[ing] on specific antibodies to bind the target antigen, and [utilizing] a detection system to indicate the presence and quantity of antigen binding.”²¹⁵ The advantage of using an ELISA kit is that the test is highly sensitive, yields a very specific result, and is rather simple to perform.²¹⁶ The disadvantage, however, is that each kit can test for only a limited number of “closely-related drugs, making it expensive to test for a range of possible drugs using ELISA kits alone.”²¹⁷

(c) Liquid or Gas Chromatography/Mass Spectrometry

“LCMS/GCMS is a more recent development in drug testing and has the advantage of being both highly sensitive and efficient,” but is also the most expensive of the testing options available to racing commissions.²¹⁸ LCMS/GCMS “combines two powerful techniques to provide the identification of compounds with low detection limits and the potential for quantitative analysis.”²¹⁹ It

²¹² Joseph Sherma, *ENCYCLOPEDIA OF ANALYTICAL CHEMISTRY: APPLICATIONS, THEORY & INSTRUMENTATION: THIN-LAYER CHROMATOGRAPHY* 11485-86 (Robert A. Myers ed., 2011).

²¹³ *Id.* at 11489.

²¹⁴ Voss, *supra* note 202 (noting that one ELISA kit costs “between \$50 and \$100, [but] can test between 80 and 86 samples” at a single time).

²¹⁵ *ELISA Fundamental Principle, How ELISA Works—Immunoassays*, BOSTER, <https://www.bosterbio.com/protocol-and-troubleshooting/elisa-principle> [perma.cc/WW5U-C22U].

²¹⁶ *Id.*

²¹⁷ Voss, *supra* note 202.

²¹⁸ *Id.*

²¹⁹ *Gas Chromatography—Mass Spectrometry*, EAG LAB., <https://www.eag.com/techniques/mass-spec/gas-chromatography-mass-spectrometry-gc-ms/> [https://perma.cc/4368-8MMC].

is a means of testing that involves two distinct steps. The first phase is the liquid or gas chromatography phase, whereby “a sample is volatilized and carried by an inert gas through a coated glass capillary column.”²²⁰ The second phase is the mass spectrometry phase where “compounds leaving the [gas chromatography] column are fragmented by electron impact[; t]he charged fragments are detected, and the subsequent spectrum obtained can be used to identify the molecule.”²²¹ The next subsection of this article discusses—despite this advanced model of testing—how a positive drug test result could yield an inaccurate result.

2. Environmental Contamination Can Yield False Positives

Holding a trainer strictly liable for the presence of a prohibited substance in his or her horse’s system is irrational because it is possible that the result of the sample could yield a false positive and/or that the positive test result is a consequence of an environmental contaminant, rather than that of an affirmative act by the trainer. In instances as such, when there is even the slightest of possibilities that a trainer will be punished as the result of an inaccurate lab test, the trainer should be allowed to rebut his presumption of guilt and challenge the lab result prior to punishment being imposed.

The possibility that a lab result could yield a false positive is not a far-fetched idea, especially during the early 1990s.²²² For example, in 1991, the California Horse Racing Board revealed that a horse’s post-race urine sample tested at California’s primary testing laboratory came back positive for the presence of cocaine.²²³ The accused trainer was afforded the opportunity to send a split

²²⁰ *Id.*

²²¹ *Id.* (noting that LCMS/GCMS is considered by those in the industry to be the most advanced method of testing that a jurisdiction could use in testing the samples obtained from their equine athletes).

²²² Bill Christine, *Second Opinion Disputes Positive Cocaine Test*, L.A. TIMES (Jan. 10, 1991), 12:00 AM), http://articles.latimes.com/1991-01-10/sports/sp-11189_1_positive-cocaine-test [<https://perma.cc/2GFQ-3A4M>].

²²³ *Id.*

sample of the urine to a laboratory of his choice for confirmation testing; the trainer chose to send the sample to Ohio State University.²²⁴ After the sample was tested, Ohio State University issued a report indicating that no amount of cocaine was detected in the horse's system; due to the inconsistency in test results, the charge against the accused trainer was dropped.²²⁵

As time has progressed, so has the sophistication and reliability of testing methods utilized by racing commissions across the country.²²⁶ Today, the concern is not so much that the test result will yield a *per se* false positive, but rather that—due to the increased sensitivity in testing methods—a positive result will be a consequence of environmental contamination, rather than the result of the intentional administration of a prohibited substance.²²⁷ Environmental contamination can be caused by (1) moldy feed, or (2) a contaminant carried by a different horse, or (3) a contaminant carried by a human.²²⁸

(a) Moldy Feed Causing Environmental Contamination

It is not uncommon for a horse to inadvertently receive mold-contaminated feed.²²⁹ Not only does mold potentially pose a health detriment to a horse, but it has also been linked to causing positive drug test results in samples.²³⁰ Research shows that some types of molds commonly found in racehorse feed can produce “testosterone-like substances from plant-based steroids.”²³¹ The

²²⁴ *Id.*

²²⁵ *Id.*

²²⁶ See Voss, *supra* note 202 (noting that many jurisdictions use liquid or gas Chromatography/Mass Spectrometry to test samples, whereas in the 1970's and 1980's the primary means of testing a sample was through the use of thin-layer chromatography).

²²⁷ Peter Huntington, *Prohibited Substances, Feed, and the Performance Horse*, EQUINEWS (June 22, 2011), <https://ker.com/equineews/prohibited-substances-feed-and-the-performance-horse/> [<https://perma.cc/2AJE-9AJH>] (“It is possible to inadvertently administer a forbidden substance via environmental contaminants of feed, supplements, or natural products.”).

²²⁸ See Kentucky Equine Research Staff, *supra* note 204; see also Huntington, *supra* note 227.

²²⁹ See Kentucky Equine Research Staff, *supra* note 204; see also Huntington, *supra* note 227.

²³⁰ See Kentucky Equine Research Staff, *supra* note 204.

²³¹ *Id.*

mold engages in a type of process called “biotransformation” that results in “the production of steroids or steroid precursors from plant products,” and thus, can result in a positive drug test and subject the non-culpable trainer to liability.²³² This phenomenon is especially alarming considering that most racing jurisdictions have adopted a zero-tolerance policy for steroidal-like substances similar to what the mold produces.²³³

(b) Environmental Contaminant Contracted from a Different Horse

An additional means by which a test can yield a positive result as a consequence of environmental contamination is by the horse eating from a feed bin previously occupied by a different horse carrying a prohibited substance in its system.²³⁴ Most commonly, competitive racehorses are kept in barns located on racetrack property; thus, it is possible that many different horses will rotate in and out of a single stall within a relatively short period, and without proper sanitation before the transition.²³⁵ For example, in the *Motion* matter, the accused trainer argued that he had not affirmatively drugged his horse, but rather, that the horse “consume[d] hay that had trace amounts of Methocarbamol from another horse” who had previously occupied the same stall.²³⁶ Because Methocarbamol is a stable drug, the trainer argued that it has the ability to linger in a feed bin for an extensive period of time, and thus, would remain active until it is ingested by a horse that subsequently occupies the same stall.²³⁷ The Court noted that, because of the advances in modern scientific technology, it is now easier for environmental contaminants to cause inaccurate test

²³² *Id.*

²³³ *Id.*

²³⁴ See *Huntington*, *supra* note 227 (finding in some cases, treatment of the previous stall occupant has led to a positive swab in a subsequent occupant, weeks after the first horse was treated).

²³⁵ See *Keeneland Stable Area Quickly Transforms From Sales To Racing*, KEENELAND, (Sept. 26, 2016), <https://www.keeneland.com/racing/keeneland-stable-area-quickly-transforms-sales-racing> [<https://perma.cc/UR8D-7LGW>].

²³⁶ See *Motion*, 2017 WL 6517732, at *3.

²³⁷ See *id.*

results, and as such, absolute insurer rule should not apply in the horse racing context.²³⁸

(c) Environmental Contaminant Contracted from a Human

A final means by which an environmental contaminant in a horse's feed could lead to a positive drug test result is by contaminants being transferred from the hands of a human—usually the groom of a horse—to the feed prepared for the horse by said human.²³⁹ In 2015, West Virginia's Charles Town Racetrack contracted with Industrial Laboratories, a laboratory with high-sensitivity testing capabilities, to test urine and blood samples for the presence of drugs from selected horses.²⁴⁰ Shortly after Industrial Labs was retained, many samples tested positive for the drug Naproxen—a non-steroidal anti-inflammatory drug often used by humans under brand names like Aleve and Midol²⁴¹—and usually regulated as a Class 4 drug subject to Class C punishment by racing jurisdictions that have adopted ARCI rules.²⁴² Interestingly, a majority of the horses that were yielding positive test results for Naproxen were those shipped in to race at Charles Town, and who were kept in a barn called the “receiving barn.”²⁴³

The fact that mostly shipped-in horses were being detected with Naproxen in their system, despite the accused trainers claiming to have never administered the drug, led racing officials to speculate that the positive results may have been a result of environmental contamination rather than by an affirmative act of the trainer.²⁴⁴ Accordingly, the West Virginia Racing Commission “swabbed the ship-in stalls and sent the samples to Industrial Laboratories for analysis.”²⁴⁵ The results not only revealed that the stalls were contaminated with Naproxen but also with drugs

²³⁸ *See id.* at *7.

²³⁹ Clara Fenger, *An In-Depth Look at Stall Contamination*, NAT'L HORSEMEN'S BENEVOLENT & PROTECTIVE ASS'N, <https://nationalhbpa.com/an-in-depth-look-at-stall-contamination/> [<https://perma.cc/EQ2A-8SLP>].

²⁴⁰ *Id.*

²⁴¹ *Id.*

²⁴² KY. REV. STAT. ANN. § 218A.100 (LexisNexis 2019).

²⁴³ *See* Fenger, *supra* note 239 239.

²⁴⁴ *Id.*

²⁴⁵ *Id.*

widely used by humans as recreational substances like cocaine, methamphetamine, and methylenedioxypropylamphetamine (“MDPV”) or “bath salts.”²⁴⁶ In fact, “a total of fourteen human prescription or over-the-counter medication identifications were found” in the receiving barn stalls tested by the racing commission.²⁴⁷

The study exposed the ease in which a horse could be detected with a prohibited drug in its system as the result of environmental contamination, rather than by intentional administration.²⁴⁸ Analysts suggest that these findings could be the result of a groom—or any other person who comes into contact with a racehorse, for that matter—who (1) is currently using the detected drug urinating in the stall that the horse occupies; (2) is mixing feed with trace amounts of a drug on his hand; or (3) is handling equipment to be used by the horse with contaminated hands and/or body parts.²⁴⁹ As a result of the study, the possibility arose that the Naproxen positives were the result of the contaminated barn; accordingly, the charges of the ship-in trainers were dropped.²⁵⁰

These examples illustrate the ease in which a trainer can be subject to liability as a consequence of an unreliable test result and how a positive test result is not always, in every instance, presumptive evidence of affirmative drugging by a trainer. Additionally, the aforementioned examples demonstrate that providing a trainer with the opportunity to rebut his or her presumption of guilt allows for a more veracious truth-finding process.

²⁴⁶ *Id.*

²⁴⁷ *Id.*

²⁴⁸ *Id.*

²⁴⁹ See Fenger, *supra* note 239 (“[“We have discussed possible transfer from human urine, traces of medication on hay nets, commingling of human prescriptions with tongue ties in pockets or even transferred from the hands of an assistant starter onto the horse’s mucous membranes.”]).

²⁵⁰ Frank Vespe, *WV Racing Commission Rescinds Seven Naproxen Rulings*, RACING BIZ (May 24, 2017), <https://www.theracingbiz.com/2017/05/24/wv-racing-commission-rescinds-seven-naproxen-rulings/> [<https://perma.cc/Z4LR-V95E>].

D. An Ineffective Rule: Instances of Obvious Circumvention

The majority of jurisdictions rationalize the enforcement and implementation of the absolute insurer rule under the theory that it is designed to protect the welfare of the equine athlete and to protect the public's gambling interest.²⁵¹ In reality, however, the rule achieves neither of its goals. In the event that the horse is detected with a prohibited drug in its system, the trainer, rather than the horse, is suspended.²⁵² Because only the trainer, and not the horse, is suspended in the event of a violation, suspended trainers are often observed maintaining their operations—and consequently, their profits—by naming a different individual, usually the trainer's assistant, as the trainer of the racehorse; the owner, however, remains the same.²⁵³ The fictitious individual named as the trainer of the racehorse during the time in which the actual trainer of the racehorse is suspended is more commonly referred to as a “paper trainer.”²⁵⁴ Generally, the “paper trainer” will be named as the horse's trainer until the time in which the actual trainer's suspension has been served.²⁵⁵

For example, in 2014, Kentucky Derby winning and California based trainer, Doug O'Neill, was suspended as the result of a positive test by one of his horses.²⁵⁶ Throughout the

²⁵¹ See, e.g., N.M. CODE R. § 15.2.6.6 (LexisNexis 2019) (“The objective of Part 6 of Chapter 2 is to describe requirements and procedures used to protect the integrity of horse racing, to ensure the health and welfare of race horses and to safeguard the interests of the public and the participants in racing.”).

²⁵² See, e.g., N.M. CODE R. § 15.2.6.9B(1) (LexisNexis 2019) (detailing the penalties for owners and trainers who have a horse testing positive for prohibited drugs).

²⁵³ See Ray Paulick, *States Should Follow California's Crackdown On Program Trainers*, PAULICK REPORT (Feb. 23, 2015, 12:06 PM), <https://www.paulickreport.com/news/ray-s-paddock/states-should-follow-californias-crackdown-on-program-trainers/> [https://perma.cc/TXJ2-WW4G].

²⁵⁴ See, e.g., Ron Mitchell, *Details Offered in “Paper Trainer” Incident*, BLOODHORSE (August 17, 2012), <https://www.bloodhorse.com/horse-racing/articles/127179/details-offered-in-paper-trainer-incident> [https://perma.cc/ZD87-3PKX] (“It was soon revealed that Lay had not actually been training the filly prior to the race, but was listed as trainer on the program, meaning he was a “paper trainer” or “program trainer.”).

²⁵⁵ See *id.* (“I've heard of my friends who have sent a horse to another track, it runs in another trainer's name, and then it comes back.”).

²⁵⁶ *Trainer Doug O'Neill suspended in California*, USA TODAY (October 9, 2014, 8:50 PM), <https://www.usatoday.com/story/sports/horseracing/2014/10/09/trainer-doug-oneill-suspended-in-california-rac/17003365/> [https://perma.cc/T3KQ-UL9T].

course of O'Neill's suspension, all of the horses that were originally recorded as being trained by him were transferred to the name of Leandro Mora—O'Neill's longtime assistant.²⁵⁷ Prior to 2014, Leandro Mora had never been named as the trainer of any other racehorse other than in 2012 during a time in which O'Neill was serving a different suspension.²⁵⁸ Equibase statistics indicate that horses running in Mora's name made \$1.3 million in 2012 and \$1.4 million in 2014.²⁵⁹ All of the horses that were run in Mora's name were transferred back to Doug O'Neill's name at the conclusion of his suspension.²⁶⁰

This example illustrates that the absolute insurer rule is ineffective in mitigating the problem at issue because it allows a suspended trainer to hide behind the name of a "paper trainer" and continue to have their operations run as they were prior to the suspension. Thus, conceivably, the absolute insurer rule does not deter illegal drugging by trainers because, absent a fine, the only hardship that the suspended trainer endures is the inability to physically be present on racetrack premises; in spite of suspension, the aggrieved trainer is still able to instruct the assistant on how to manage his or her stable, bill owners a daily rate, and collect a commission on any winnings that the horse earns.

IV. CONCLUSION & PROPOSAL FOR A SUBSTANTIALLY MORE EFFECTIVE RULE

The absolute insurer rule is an improper vehicle for racing jurisdictions to utilize in deterring illegal equine drugging as it is

²⁵⁷ *Id.* ("O'Neill was not the trainer of record when four horses from his stable ran Thursday at Santa Anita. They ran in the name of his longtime assistant Leandro Mora. Among the four horses, two won and another finished second. Mora is scheduled to have six starters on Friday's card.")

²⁵⁸ *Trainer O'Neill suspended by Calif. racing board*, THE COURIER (May 25, 2012), https://wfcourier.com/sports/trainer-o-neill-suspended-by-calif-racing-board/article_1f0c60a0-a609-11e1-af2b-0019bb2963f4.html [<https://perma.cc/CBM2-BB65>].

²⁵⁹ *Trainer Profile: Leandro Mora*, EQUIBASE, <http://www.equibase.com/profiles/Results.cfm?type=People&searchType=T&eID=1290> [<https://perma.cc/A7NJ-BG2N>].

²⁶⁰ *Compare id.* (showing no statistics that prove Mora had any horses racing after the year 2014), *with Trainer Profile: Doug F. O'Neill*, EQUIBASE <http://www.equibase.com/profiles/Results.cfm?type=People&searchType=T&eID=6363> [<https://perma.cc/E4HR-A8EX>].

unconstitutional, irrational, and ineffective. The rule is unconstitutional in that it denies the accused substantive due process, because the drug thresholds which are recommended by the RMTC and consequently adopted by the majority of racing jurisdictions across the United States are not rooted in scientific evidence.²⁶¹ Furthermore, the majority of racing jurisdictions lack, or have never conducted, independent research to confirm that the RMTC's recommended threshold levels pose a negative pharmacological effect to the racehorse at the prescribed levels.²⁶² Such an omission constitutes an unconstitutional relinquishment and delegation of rulemaking authority to an outside body.²⁶³

Furthermore, the absolute insurer rule's imposition of strict liability on a trainer whose horse tests positive for a prohibited substance is irrational, because the positive test result could very easily be the consequence of environmental contamination, rather than from affirmative drugging by a trainer.²⁶⁴ For example, it is possible that a horse could have ingested a prohibited substance inadvertently by eating feed contaminated with mold, by eating from a feed bin previously used by a horse contaminated with a prohibited substance, or by being exposed to a drug that lingered on the hands or body parts of a human who made contact with the horse.²⁶⁵ Imposing strict liability on a trainer is irrational, because in instances as such, had a trainer been afforded an opportunity rebut the presumption of guilt placed on him or her by the positive drug test, the outcome of the charge would most certainly have differed.

Lastly, the absolute insurer rule is ineffective in truly mitigating illegal drugging in horse racing because, absent the nominal fine imposed by the racing jurisdiction, the trainer is deprived of no additional liberty other than a ban from being physically present on racetrack premises. By using a "paper trainer" the suspended trainer is still able to ensure that his normal operations are carried out properly, and thus, profit from the horses running under the "paper trainer's" name.²⁶⁶

²⁶¹ See, e.g., *Motion*, 2017 WL 6517732, at *4–5.

²⁶² See, e.g., *id.*

²⁶³ See, e.g., *id.* at 7–8.

²⁶⁴ See, e.g., *Huntington*, supra 227; Kentucky Research Staff, supra note 204.

²⁶⁵ See, e.g., *Huntington*, supra 227 227; Kentucky Research Staff, supra note 208.

²⁶⁶ See, e.g., *Mitchell*, supra note 254.

Essentially, the absolute insurer rule creates a procedural penalty that looks pleasant to the eyes of the public but is grossly ineffective in practice.

It is evident, based on the aforementioned shortfalls of the absolute insurer rule, that racing's current model of illegal equine drugging regulation and prevention is in need of reform. First, the issue of constitutionality must be overcome. By holding a trainer strictly liable based solely on a positive drug test result, racing commissions are depriving the accused of his or her constitutional right to substantive due process.²⁶⁷ Instead, a better practice would be to implement a "rebuttable presumption" rule that allows a trainer faced with a positive drug test to attack the evidence against him by offering proof that: (1) the test result was per se inaccurate; or (2) the test result was a consequence of environmental contamination; or (3) any other means that would aid in overcoming the trainer's presumption of guilt. Once the trainer is provided with an opportunity to rebut his presumption of guilt, his ability to enjoy his constitutional right to substantive due process will be restored.

Once the issue of constitutionality is overcome, the focus on creating a substantially more effective rule should turn on how to prevent illegal equine drugging in its entirety. Instead of suspending the trainer and allowing him or her to delegate a "paper trainer" in his or her absence, a more effective—but less economically favorable rule to racetracks—is to suspend the horse that provided a sample yielding a positive test and fine the trainer. By suspending the equine athlete, a trainer who is found guilty of illegally drugging a horse in his care is deprived of the opportunity to profit off of that individual horse for a given period of time.²⁶⁸ During the time in which the horse is suspended, the horse will presumably be kept in training, so that when the suspension is concluded, he or she is prepared to race at the earliest possible date and, and thus, be able to collect earnings once more. The fear of having athletes sidelined due to the manifestation of a positive test

²⁶⁷ See, e.g., *Motion*, 2017 WL 6517732, at *5–6.

²⁶⁸ This article merely proposes the idea of suspending the horse and does not recommend a timeframe and/or punishment model in which the horse should be suspended in the event of testing positive for a prohibited substance.

for a prohibited substance will undoubtedly deter trainers more powerfully from illegally drugging their equine athletes.

Therefore, in order to maintain the integrity of horse racing, while also restoring racehorse trainers accused with drug violations across the country with their constitutional right to substantive due process, racing jurisdictions should: (1) allow a trainer whose horse has tested positive for a prohibited substance with an opportunity to rebut his presumption of guilt; and, (2) if, after rebuttal, the trainer has not demonstrated a defect in the test that would have caused an inaccurate result to be rendered, the horse, rather than the trainer should be suspended, and the trainer should be fined heavily.