

Reining in the Use of Performance Enhancing Drugs in Horseracing: Why a Federal Regulation is Needed

*Kyle Cassidy**

INTRODUCTION	122
I. CURRENT REGULATION OF PERFORMANCE-ENHANCING DRUGS AND HOW THE SYSTEM FOSTERS TRAINER MISCONDUCT	124
A. The History of Thoroughbred Horseracing and its Regulatory Scheme	124
B. Why Horseracing’s Current Regulatory Scheme is Problematic	128
C. Specific Issues that Arise Under the Current Regulatory Scheme	129
1. The Current Regulatory Scheme’s Inability to Effectively Regulate Performance-enhancing Drugs	129
2. The Current Regulatory Scheme’s Inability to Effectively Regulate Trainer Suspensions	132
3. The Current Regulatory Scheme’s Inability to Reciprocally Enforce Suspensions Given by Other Racing Jurisdictions	133
4. The Current Regulatory Scheme’s Inability to Prevent Suspended Trainers from giving their Horses to their Assistant During the Length of their Suspension	135
II. PROPOSED AND CURRENT REGULATIONS THAT COULD BE APPLIED TO HORSERACING NATIONALLY	136
A. Interstate Horseracing Improvement Act of 2011 ...	137
B. Jockey Club Reformed Racing Medication Rules	138
C. State Regulations	140
D. Licensing Regulation in other Fields	141

* Juris Doctor Candidate, May 2014, Seton Hall University School of Law; Bachelor of Arts in Political Science, May 2010, Providence College. Special thanks to Professor Ronald Riccio for helping me research this comment and to my family and friends who supported me throughout law school.

III. ARGUMENT FOR A FEDERAL REGULATION OF	
HORSERACING	145
A. Industry support for a Federal Regulation	145
B. Ways of Achieving a Federal Regulation	146
C. Proposed Regulation	147
1. Implement Uniform Drug Regulations.....	147
2. Ensure Reciprocity.....	148
3. Impede Recidivism.....	148
4. Disallow Suspended Trainers from Transferring their Horses to their Assistants ...	149
IV. CONCLUSION.....	150

INTRODUCTION

On August 25, 2012, a little known gelding¹ named Willy Beamin won the highly prestigious Kings Bishop Stakes at the famous Saratoga Racecourse.² Receiving lukewarm support, the eleven-to-one shot had just won his second race in four days, a rare feat in modern horseracing.³ Notably absent from the winner's circle was the gelding's trainer, Rick Dutrow.⁴ Instead of hoisting the trophy, Dutrow watched the celebrations from a Chinese restaurant in Greenvale, New York.⁵ At the time of the race, Dutrow had accrued seventy violations throughout fifteen racetracks in nine states over the course of his career.⁶ Most recently, Dutrow was issued a ten-year ban from racing horses in New York after hypodermic needles were found in his barn and one of his horses tested positive for a powerful painkilling drug.⁷ Dutrow was allowed to continue training in New York only after a lower court granted a stay of his suspension while he

1. A gelding is a castrated male horse. See *Gelding Definition*, MERRIAM-WEBSTER.COM, <http://www.merriam-webster.com/dictionary/gelding> (last visited Mar. 6, 2013).

2. Jack Shinar, *Willy Beamin Shoots to King's Bishop Surprise*, BLOOD-HORSE (Aug. 28, 2012), <http://www.bloodhorse.com/horse-racing/articles/72342/willy-beamin-shoots-to-kings-bishop-surprise>.

3. *Id.*

4. Joe Drape, *Shadows and Victories Follow Trainer*, N.Y. TIMES (Aug. 29, 2012), <http://www.nytimes.com/2012/08/30/sports/trainer-richard-dutrow-keeps-winning-even-after-suspension.html>.

5. *Id.*

6. *Id.*

7. *Id.*

appealed.⁸ One year prior, Dutrow was also banned from running horses in Kentucky after he was denied a racing license.⁹ Considering Dutrow's scandalous reputation, it is no surprise that he rarely attends races at Saratoga, choosing instead to stay "out of the public eye."¹⁰ Unfortunately, horseracing cannot hide the fact that its current regulatory structure allows trainers to compete and win in some states, despite being banned from racing in others.

One of the primary reasons for trainer suspensions is the use of performance-enhancing drugs. In 2009, only one of the top ten trainers by earnings did not have at least one drug related suspension.¹¹ However, these trainers' businesses suffered little while they served their suspensions. This is because each suspended trainer's stable of horses is allowed to compete under the name of the suspended trainer's assistant.¹² Christophe Clement, a highly successful trainer, stated "[t]en years ago, you were embarrassed to get a medication suspension . . . [n]ow trainers get suspended and go away, and when they come back they get more horses and more owners than they had before they left."¹³ If the horse racing industry continues to allow trainers to circumvent their suspensions through this practice, the performance-enhancing drugs problem will never be resolved.

This article addresses the issue of performance-enhancing drug use in the sport of horseracing. Specifically, it considers the currently fragmented regulatory scheme that allows each individual state to regulate itself, and contemplates the possibility of a federal regulatory alternative. In doing so, this article highlights the inadequacy of disciplinary

8. *Gaming Commission Rulings Database*, NEW YORK STATE GAMING COMMISSION, <http://rulings.gaming.ny.gov/searchrulings.detail.php?ID=30726>.

9. Drape, *supra* note 4 (Dutrow's license was denied for "misrepresentations on his application" and "conduct against the best interest of racing.").

10. *Id.*

11. Joe Drape, *Barred for Drugs, Horse Trainers Return to Track*, N.Y. TIMES (Nov. 4, 2009), http://www.nytimes.com/2009/11/05/sports/05horses.html?_r=1.

12. *Id.* (In 2006, trainer "Steve Asmussen was suspended by Louisiana authorities when a filly he trained tested 750 times over the legal limit for the local anesthetic mepivacaine, which can deaden pain in a horse's legs, he turned his horses over to Scott Blasi, his longtime assistant. Blasi won 198 races in 2006 as the Asmussen stable finished the year with more than \$14 million in earnings.").

13. *Id.* After serving his 2006 suspension, Asmussen was given two highly prominent horses to train. The first was two time Horse of the Year, Curlin, who won the Preakness in 2007. Asmussen was also given Rachel Alexandra, who had an undefeated season winning the Preakness, Woodward, and Haskell in 2009.

measures for the sport's trainers. Under the current regime, recidivism is tolerated and reciprocity is not always enforced. Part I discusses current regulation of performance-enhancing drugs in horse racing and how it fosters trainer misconduct. Part II analyzes proposed and current state regulations and considers their ability to more effectively discipline trainers nationally. Finally, Part III argues for a stand-alone federal regulation that ensures medication uniformity, reciprocity, and a more stringent disciplinary system for repeat offenders and trainers who are suspended.

I. CURRENT REGULATION OF PERFORMANCE-ENHANCING DRUGS AND HOW THE SYSTEM FOSTERS TRAINER MISCONDUCT

The following section introduces horseracing's current regulatory regime and how it fosters trainer misconduct. First, it takes a historical look at the rise of horseracing in America and how the current regulatory scheme was established. Next, it discusses the inherent problems that arise under the current regulatory format. This section will discuss four specific issues in detail: namely, the current regulatory scheme's inability to effectively (1) regulate performance-enhancing drugs; (2) enforce trainer suspensions; (3) reciprocally enforce other jurisdiction's suspensions; and (4) prevent suspended trainers from transferring their horses to an assistant during the length of their suspension. This section will focus on the problems with horseracing's current regulatory scheme and what specifically needs to be fixed.

A. The History of Thoroughbred Horseracing and its Regulatory Scheme

American horseracing dates back to the sixteenth century and the settlement of the English colonies.¹⁴ The sport emerged as a popular recreational activity that occurred in both rural pastures and major city streets.¹⁵ By the late seventeenth century, the sport became more organized when

14. JOAN S. HOWLAND & MICHAEL J. HANNON, A LEGAL RESEARCH GUIDE TO AMERICAN THOROUGHBRED RACING LAW FOR SCHOLARS, PRACTITIONERS AND PARTICIPANTS 1 (1998).

15. *Id.* (noting that so many races occurred on Sassafra Street in Philadelphia that it became known as "Race Street.").

official race courses were created in New York and Virginia.¹⁶ As racing's popularity grew, participants sought to breed horses that were stronger and faster.¹⁷ The increased popularity of the sport was the impetus for importation of the Thoroughbred from England in 1730.¹⁸

The Thoroughbred's lineage originated more than three hundred years ago from three "foundation stallions – the Darley Arabian, the Godolphin Arabian and the Byerly Turk."¹⁹ These three stallions were bred to slower, yet physically stronger mares native to England.²⁰ A new breed of horse resulted from these pairings that could support weight and maintain speed over long distances.²¹ This was due in large part to the progeny's physical makeup. In terms of structure, the Thoroughbred's legs are "clean and long" consisting of strong bones, muscles and tendons.²² While the horse is running, its rear legs "act as springs [when] they bend and straighten," propelling the horse forward.²³ The front legs then continue this motion as they help pull the horse forward.²⁴ Thoroughbreds also have a long neck which moves in rhythm with their legs.²⁵ This rhythm helps extend the stride fully, allowing the horse to reach and sustain speeds surpassing forty miles per hour.²⁶ Combined, all of these characteristics made the Thoroughbred the perfect breed of horse for racing.²⁷ By the 1750s, Thoroughbred racing was organized to allow only "pedigreed horses" to participate.²⁸

The rise of Thoroughbred racing in America coincided with

16. *Id.* at 2.

17. *Id.*

18. *Id.*

19. *Thoroughly Thoroughbred, An Informational Guide to the Thoroughbred Industry*, THE JOCKEY CLUB, (2006), http://www.jockeyclub.com/pdfs/thoroughly_thoroughbred.pdf [hereinafter JOCKEY CLUB].

20. *Id.*

21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.*

25. JOCKEY CLUB, *supra* note 19, at 3.

26. *Id.*

27. *Id.*

28. Howland & Hannon, *supra* note 14, at 1-2. A "pedigreed horse" is one whose lineage traces back to the stallions which originated the Thoroughbred breed: the Byerly Turk, the Darley Arabian, and the Godolphin Arabian.

the growth of the country.²⁹ By 1860, racing was legalized in almost every state and racetracks were being built throughout the country.³⁰ However, by 1890, racetracks became synonymous with corruption and dishonesty. Trainers and jockeys were accused of cheating while illegal bookmaking was rampant.³¹ Distrust of the horseracing industry was so prevalent that “between 1897 and 1908 the number of racetracks in the United States decreased from 314 to a mere 25.”³²

By 1930, the public’s distrust towards the horseracing industry began to dissipate. During this time, President Franklin D. Roosevelt oversaw a growth in regulatory agencies that led to an increase in the allocation of power to state governments.³³ Seeing a need to safeguard the horseracing industry, states adopted rules to protect the “trainers, jockeys, owners, spectators, and the horses themselves.”³⁴ In order to formulate and enforce these rules, state racing commissions were formed.³⁵ These commissions, charged with protecting the integrity and fairness of the sport, adopted local rules to be followed by participants in their jurisdiction.³⁶ This resulted in a fragmented governing structure as each state maintained its own set of rules.³⁷

The fragmented nature of the sport was furthered when the New York Court of Appeals decided *Fink v. Cole*³⁸ making it “unconstitutional for state government to delegate licensing power to any private organization.”³⁹ This decision substantially diminished the authority retained by private racing authorities and gave even more power to the state racing commissions.⁴⁰ Each racing commission then became responsible for issuing licenses to participants, promulgating

29. *Id.*

30. *Id.* at 3.

31. *Id.* at 7.

32. *Id.*

33. Alexander M. Waldrop, Jarl M. Nobert & John W. Polonis, *Horse Racing Regulatory Reform Through Constructive Engagement by Industry Stakeholders with State Regulators*, 4 KY. J. EQUINE, AGRIC. & NAT. RESOURCES L. 389, 393 (2012).

34. *Id.*

35. *Id.*

36. *Id.*

37. *Id.*

38. *Fink v. Cole*, 97 N.E.2d 873, 876 (N.Y. 1951).

39. HOWLAND & HANNON, *supra* note 14, at 10–11.

40. *Id.*

2014] *Reining in the Use of Performance Enhancing Drugs* 127

rules governing the sport, enforcing these rules, and administering penalties for any rules violation.⁴¹

In 1978, Congress exerted some federal control over the industry when it passed the Interstate Horseracing Act of 1978 (IHA).⁴² This legislation granted the federal government authority to regulate “interstate off-track-wagering on horseraces.”⁴³ The IHA established that

(1) the States should have the primary responsibility for determining what forms of gambling may legally take place within their borders; (2) the Federal Government should prevent interference by one State with the gambling policies of another, and should act to protect identifiable national interests; and (3) in the limited area of interstate off-track wagering on horseraces, there is a need for Federal action to ensure States will continue to cooperate with one another in the acceptance of legal interstate wagers.⁴⁴

Today, the United States horseracing industry remains decentralized and each of its thirty-eight racing jurisdictions continues to maintain individual authority to regulate the sport as it deems fit.⁴⁵

While state racing commissions maintain legal regulatory control of horseracing, the Jockey Club is a private organization with some influence in the industry. The Jockey Club was founded in 1894 in order to preserve the integrity of the Thoroughbred breed of horses.⁴⁶ Prior to the decision in *Fink v. Cole*, the Jockey Club was the regulatory agency that

41. Waldrop, *supra* note 33, at 392.

42. Interstate Horseracing Act of 1978, 15 U.S.C. § 3001 (1978) (“Congress finds that – (1) the States should have the primary responsibility for determining what forms of gambling may legally take place within their borders; (2) the Federal Government should prevent interference by one State with the gambling policies of another and should act to protect identifiable national interests;”).

43. *Id.*; an “off track wager” is one that is made and accepted at one state’s betting facility, on a race that is being run in another state. *See Interstate Horseracing Act: Hearing on S.1185 Before the Comm. On Commerce, Science, & Transportation*, 94th Cong. 1 (1977) (statement of Sen. Wendell H. Ford) (This regulation was made due to the state racing commission’s fear that these off-track wagering facilities would cause attendance at their racetracks to drop).

44. Interstate Horseracing Act of 1978, 15 U.S.C. § 3001 (1978).

45. Waldrop, *supra* note 33, at 392-93.

46. *Medication and Performance Enhancing Drugs in Horse Racing: Hearing Before the U.S. Senate Comm. on Commerce, Science, and Transportation*, 112th Cong. 26 (2012) [hereinafter *Medication Hearings*] (statement of James Gagliano, President and C.E.O of the Jockey Club), available at <http://www.gpo.gov/fdsys/pkg/CHRG-112shrg76248/pdf/CHRG-112shrg76248.pdf>.

governed racing.⁴⁷ However, today the organization serves as the breed registry.⁴⁸ Essentially, the Jockey Club ensures that each foal is a descendant of a registered male and female Thoroughbred.⁴⁹ Beyond this responsibility, the Jockey Club has also expended substantial resources and convened conferences in order to protect the integrity, safety and welfare of the sport.⁵⁰ Recently the Jockey Club has concerned itself with the growing problem of performance-enhancing drugs.⁵¹ Specifically, the organization has funded a drug detection system, studied the use of drugs in the industry, and issued recommendations to state racing commissions on how to test for and regulate the use of drugs.⁵² While these initiatives can be helpful, the organization has no actual authority to enforce them.⁵³ Thus, the Jockey Club uniformly regulates the breed of horses that participate in the sport, but has no actual authority to enact regulation governing the sport itself.

B. Why Horseracing's Current Regulatory Scheme is Problematic

Because each of the thirty-eight racing jurisdictions operates separately, they are inherently in competition with one another.⁵⁴ Specifically, each racing jurisdiction wants owners and trainers to run their horses at its racetracks.⁵⁵ When a racetrack features races with more horses, this typically leads to an increase in the "handle."⁵⁶ Any increase in handle leads to an increase in tax revenue generated for

47. HOWLAND & HANNON, *supra* note 14, at 6.

48. *About the Registry*, THE JOCKEY CLUB, <http://www.jockeyclub.com/default.asp?section=About&area=0> (last visited Jan. 23, 2014).

49. *Id.*

50. *Id.*; *Round Table*, THE JOCKEY CLUB, <http://www.jockeyclub.com/ROUNDTABLE.asp> (last visited Jan. 17, 2013).

51. *See generally Medication Hearings*, *supra* note 46, at 24.

52. *Id.*

53. HOWLAND & HANNON, *supra* note 14, at 10-11.

54. Waldrop, *supra* note 33, at 397.

55. *Id.*

56. Mac McBride, *Record Purses, Big Fields, Handle Increases Highlight 2012 Del Mar Meeting*, DEL MAR THOROUGHBRED CLUB (Sept. 5, 2012), http://www.dmtc.com/upload/2012eosrelease_updated.pdf; *Handle Definition*, MERRIAM-WEBSTER.COM, <http://www.merriam-webster.com/dictionary/handle> (last visited Jan. 26, 2013) (Definition of "handle" as "the total amount of money bet on a race, game or event.").

the state.⁵⁷ Ultimately, this incentivizes state racing commissions to implement more lenient regulations in order to attract more horses.⁵⁸ Barry Irwin,⁵⁹ prominent racehorse owner and CEO of Team Valor International, characterized this situation when he testified before Congress that: “states are in competition with each other. Racetracks are in direct competition with racetracks in other states for top horses. So trainers place states against one another, lobbying for more lax drug rules. States that appease trainers get the horses. The other states don’t.”⁶⁰ This ultimately leads to a system that is disjointed and lacking in control and accountability.⁶¹ Without uniformity, the system will continue to under-enforce its regulations and the problems that face the industry will persist.

C. Specific Issues that Arise Under the Current Regulatory Scheme

1. The Current Regulatory Scheme’s Inability to Effectively Regulate Performance-enhancing Drugs

Unlike Europe and most of the rest of the world, the United States allows horses to run on race-day medications. Specifically, horses are permitted to compete while using furosemide (Lasix), a drug that is believed to prevent exercise-induced pulmonary hemorrhaging of the lungs and phenylbutazone (Bute), an anti-inflammatory.⁶² While Lasix and Bute are permitted on race-day, hundreds of other drugs

57. *Gale Encyclopedia of US History: Horse Racing and Showing*, ANSWERS.COM, <http://www.answers.com/topic/horse-racing-and-showing>. (last visited Jan. 24, 2013).

58. See *Medication Hearings*, *supra* note 46 at 5 (statement of Barry Irwin, CEO of Team Valor Int’l).

59. *The Team*, TEAMVALOR.COM, <http://www.teamvalor.com/team.asp> (last visited Jan. 17, 2013).

60. *Medication Hearings supra* note 46, at 5.

61. William Rhoden, *Uncontrolled Sport May Not Merit Triple Crown Glory*, N.Y. TIMES (May 27, 2012), <http://www.nytimes.com/2012/05/28/sports/horse-racing-may-not-deserve-triple-crown-glory.html?adxnml=1&ref=tomudall&adxnmlx=1348668021-SC+dh6BGh1iHRC+S0VKgUw>.

62. Kimberli Gasparon, Comment, *The Dark Horse of Drug Abuse: Legal Issues of Administering Performance-Enhancing Drugs to Racehorses*, 16 VILL. SPORTS & ENT. L.J. 199, 206 (2009); see also Joe Drape, *A Promise to Avoid Race-Day Drugs*, N.Y. TIMES (July 19, 2012), <http://www.nytimes.com/2012/07/20/sports/court-upholds-10-year-ban-for-horse-trainer-dutrow.html>.

are not.⁶³ Jurisdictions draw distinctions between various drugs and the performance-enhancing effect that they have on the horse.⁶⁴ Those drugs that have a primarily therapeutic effect receive a lower classification, and thereby a less serious punishment.⁶⁵ Drugs that have a primarily performance-enhancing effect receive a higher classification and a higher level of punishment.⁶⁶ For example, drugs that possess stimulant or depressant qualities or affect the nervous or neuromuscular system tend to have a high potential performance-enhancing effect.⁶⁷ Such drugs “mask a horse’s nervous system so that it can run harder and feel little pain.”⁶⁸ This creates a great danger to the horse and jockey. The horse will not recognize the physiological warnings that its body is trying to send and the potential for a catastrophic injury is greatly exacerbated.⁶⁹ If the horse does breakdown, then the jockey is likely to fall off the horse and suffer injury.⁷⁰ Administration of one of these drugs has the potential for a suspension of at least fifteen days, and in some cases multiple years.⁷¹

Drugs that have a therapeutic effect with a limited potential performance-enhancing effect such as diuretics, antihistamines and skeletal muscle relaxants receive lesser punishment.⁷² This is because these drugs are administered “to treat injuries and infirmities” and are generally considered “necessary to keep a horse healthy.”⁷³ Trainers are allowed to administer these therapeutic medications but only

63. Gasporon, *supra* note 63, at 206.

64. See generally *Uniform Classification Guidelines for Foreign Substances and Recommended Penalties and Model Rule*, ASS’N OF RACING COMM’RS INT’L, Inc., iii-vii (Dec. 2012) [hereinafter *Guidelines*], available at <http://www.arci.com/druglisting.pdf>.

65. See generally *id.* at 38-40.

66. *Id.*

67. *Id.* at iv.

68. Daniel Stone, *Should Congress Police Horseracing?*, THE DAILY BEAST (Jul. 12, 2012, 9:50 PM), <http://www.thedailybeast.com/articles/2012/07/12/should-congress-police-horseracing.html>.

69. *Id.*

70. Jennie Rees, *Jockey safety no sure bet, dangerous sport seeks improvements*, THE COURIER-JOURNAL (Apr. 24, 2010), <http://www.courier-journal.com/article/20100426/SPORTS08/4260307/Jockey-safety-no-sure-bet-dangerous-sport-seeks-improvements>.

71. *Guidelines*, *supra* note 65, at 38-39.

72. *Id.* at iv.

73. *Medication Hearings*, *supra* 46 note, at 14.

2014] *Reining in the Use of Performance Enhancing Drugs* 131

up to an allowable amount.⁷⁴ A violation connected to the excessive use of such necessary therapeutic drugs might result in a monetary fine or written warning.⁷⁵

The classifications given to the various available drugs are determined by the Association of Racing Commissioners International (RCI). RCI is a “not-for profit trade association with no regulatory authority. Its members individually possess regulatory authority within their jurisdictions and solely determine whether to adopt RCI recommendations on policies and rules or not.”⁷⁶ While many racing jurisdictions use RCI’s model rules, they maintain a right to use discretion to modify the rules in order to favor their particular circumstances.⁷⁷

In some instances, state racing commissions allow certain therapeutic drugs to be administered at different time periods prior to a race. This form of regulation is called a “withdrawal time.”⁷⁸ For example, Pennsylvania previously provided that a medication called clenbuterol could not be administered within the forty-eight hours immediately preceding a race.⁷⁹ In New York, clenbuterol could not be administered within ninety-six hours prior to a race.⁸⁰ Given the choice, trainers and owners favored the regulation imposed by Pennsylvania. This is because it permitted the horse to be trained on clenbuterol closer to the time of the race, allowing for a stronger residual effect from the drug.⁸¹

74. See *Guidelines*, *supra* note 64, at 40.

75. *Id.*

76. RACING COMMISSIONERS INTERNATIONAL, http://www.arci.com/Racing_Commissioners_International/About.html (last visited Jan. 1, 2013).

77. Waldrop, *supra* note 33, at 396.

78. Fernanda Camargo et al, *Equine Drugs, Medication and Performance Altering Substances: Their Performance Effects, Detection, and Regulation* (Oct. 21, 2005), available at <http://thomastobin.com/drugsmeds/drugsmeds.htm>.

79. Administrative Policy Notice SHRC – 2008 – 02, Clenbuterol – Suggested Withdrawal Time Prior to Race Day (Sept. 24, 2008), PENNSYLVANIA DEPARTMENT OF AGRICULTURE STATE HORSE RACING COMMISSION, http://www.agriculture.state.pa.us/portal/server.pt/gateway/PTARGS_6_2_75292_10297_0_43/AgWebsite/Files/Publications/Clenbuterol_Policy.pdf.

80. N.Y. COMP. CODES R. & REGS. tit. 9, § 4043.2 (2012).

81. Clenbuterol is a drug used to treat respiratory diseases but it can also act as a muscle builder and stimulant. Some claim that it can improve a horses running time by one second. Additionally, horses can remain “muscled up for weeks afterward,” despite no longer being treated with the drug. Walt Bogdanich et al., *Racing Economics Collide with Veterinarians Oath*, N.Y. TIMES (Sept. 21, 2012), <http://www.nytimes.com/2012/09/22/us/at-the-track-racing-economics-collide-with->

2. The Current Regulatory Scheme's Inability to Effectively Regulate Trainer Suspensions

When a state racing commission suspends a trainer, it must have the ability to enforce that suspension. Dutrow's recent ten-year suspension from training horses in New York stipulates the following:

Richard E. Dutrow, Jr. shall not directly or indirectly participate in New York pari-mutuel horse racing, he is denied the privileges and use of the grounds of all racetracks, and he is forbidden to participate in any share of purses or other payment. Every horse is denied the privileges of the grounds and shall not participate in pari-mutuel racing in New York, further, that is (a) owned or trained by him, or any individual who serves as his agent or employee, during his revocation or (b) for which he, during his revocation, is involved, directly or indirectly, with its training, including by not limited to any arrangements made to care for, train, enter, race, invoice, collect fees or payments, manage funds, employ or insure workers, provide advice or information, or otherwise assist with any aspect of the training of the horse.⁸²

However, Dutrow has openly admitted to violating the terms of his previous suspensions.⁸³ For example, in 2005, while serving a sixty-day suspension, Dutrow continued to train his horses St. Liam and Wild Desert.⁸⁴ Dutrow also admitted to fabricating a workout for Wild Desert prior to running him in Canada⁸⁵ "under the name of Bobby Frankel."⁸⁶ Throughout his suspension, Dutrow billed the owners of St. Liam and Wild Desert for training costs and also received his share of each horse's winnings.⁸⁷ Dutrow's

veterinarians-oath.html?pagewanted=all&_r=0.

82. *Rulings: Richard E. Dutrow Jr.*, NEW YORK STATE GAMING COMMISSION (Jan. 1, 2013), <http://rulings.racing.ny.gov/searchrulings.detail.php?ID=30726>.

83. Ray Paulick, *Hearing Officer: Dutrow Acts 'Corrupt Even in the Olden Days of the Wild West,'* PAULICK REPORT (Feb. 4, 2013), <http://www.paulickreport.com/news/ray-s-paddock/hearing-officer-dutrow-acts-corrupt-even-in-the-olden-days-of-the-wild-west/>.

84. Finding of Fact, Conclusions of Law and Recommended Order, *Dutrow v. Kentucky Horse Racing Commission*, available at <http://blogs.courier-journal.com/horsebiz/files/2013/02/Dutrow-ruling1.pdf>.

85. The Queen's Plate is "the first jewel in Canada's Triple Crown of Thoroughbred Racing and the longest continuously run stakes race in North America" *2013 Queen's Plate - Event Details*, WOODBINE ENTERTAINMENT, <http://www.woodbineentertainment.com/Queensplate/Pages/EventDetails.aspx>.

86. *Id.*

87. *Id.*

actions demonstrate that trainers will sometimes be able to train their horses while they are suspended. Therefore, racing commissions must implement policies and procedures that prevent suspended trainers from doing so.

3. The Current Regulatory Scheme's Inability to Reciprocally Enforce Suspensions Given by Other Racing Jurisdictions

Reciprocity is “a mutual exchange of privileges, specifically, a recognition by one of two countries or institutions of the validity of licenses or privileges granted by the other.”⁸⁸ One particular problem facing the regulation of drugs in horseracing is that not every jurisdiction reciprocally enforces the suspensions or license denials imposed on violating trainers by other states. Recall Dutrow’s denial of a trainer’s license in the State of Kentucky during April 2011.⁸⁹ The Kentucky Horse Racing Commission (KHRC) denied the license after it found that Dutrow “ha[d] shown a consistent disregard for the rules of racing.”⁹⁰ Under the cited regulation, the KHRC had the power to deny a license when it would be in the public’s best interest, where the trainer fraudulently falsified application documents or where the trainer was previously suspended in Kentucky or other racing jurisdictions.⁹¹ At the time of his application, Dutrow had amassed nearly seventy prior violations and was in the process of appealing a suspension issued in New York.⁹² Ultimately, the KHRC reviewed Dutrow’s long history of prior indiscretions and deemed him unfit to receive a Kentucky racing license.

After Kentucky denied Dutrow’s license application, his barn continued to flourish. In 2012, Dutrow competed in 520 races, winning 131 times and totaling earnings of \$7,232,708.⁹³ Additionally, Dutrow “was the leading trainer

88. *Reciprocity Definition*, MERRIAM-WEBSTER.COM, <http://www.merriam-webster.com/dictionary/reciprocity> (last visited Jan. 18, 2013).

89. Frank Angst, *Trainer Dutrow Denied Racing License*, THOROUGHBRED TIMES (Apr. 13, 2011), <http://www.thoroughbredtimes.com/national-news/2011/04/13/trainer-dutrow-denied-racing-license.aspx>.

90. *Id.*

91. *Id.*

92. Drape, *supra* note 4.

93. *Trainer Profile Page Richard E. Dutrow, Jr.*, EQUIBASE.COM, <http://www.equibase.com/profiles/Results.cfm?type=People&searchType=T&eID=11086>

at the Belmont spring/summer meet⁹⁴ and earned an additional \$1,023,609 at prestigious Saratoga Racecourse.⁹⁵ Aside from New York, Dutrow has also started horses in other states such as Florida and Pennsylvania.⁹⁶ Certainly, Kentucky's denial of a trainer's license did not impact Dutrow's ability to win elsewhere.

In order to understand why Dutrow was not precluded from running elsewhere, one must first look at the types of regulations drafted by each state racing commission. In New York for example, "the board may refuse to issue or revoke a license if it shall find that the applicant. . .has violated or attempted to violate any law with respect to racing in any jurisdiction . . ."⁹⁷ Under this regulation, New York is not bound by the suspensions imposed by other racing jurisdictions. Rather, the racing commission is afforded discretion as it *may*, as opposed to *must*, refuse a license when another jurisdiction has done so.⁹⁸ Other prominent states that allow discretion include Kentucky, Pennsylvania and Florida.⁹⁹ Ultimately, it is this discretion that allowed Dutrow to race elsewhere despite being denied a license in Kentucky.

While many states afford their racing commissions discretion in enforcing other state's disciplinary measures, there are some states that mandate reciprocity. For instance, New Jersey's regulation stipulates that "full force and effect

5 (last visited Jan. 18, 2013).

94. Jenny Kellner, *Dominguez, Dutrow, Ramseys win Belmont Meet Titles*, N.Y. RACING ASSOC. (July 15, 2012), <http://www.nyra.com/belmont/dominguez-dutrow-ramseys-win-belmont-meet-titles/>.

95. *Leading Trainers at Saratoga*, EQUIBASE.COM, <http://www.equibase.com/premium/eqbTopLeadersByTrackDisplay.cfm?TRK=SAR&CY=USA&STAT=T&STYLS=SAR> (last visited Jan. 18, 2013).

96. *See generally* Tom LaMarra, *Redeemed Posts Record Greenwood Cup Victory*, BLOOD-HORSE (July 17, 2012), <http://www.bloodhorse.com/horse-racing/articles/71255/redeemed-posts-record-greenwood-cup-victory>; Blood-Horse Staff, *Boys at Tosconova Takes Gulfstream Allowance*, BLOOD-HORSE (Jan. 31 2012), <https://www.bloodhorse.com/horse-racing/articles/67191/boys-at-tosconova-takes-gulfstream-allowance>; David Grening, *Rick Dutrow Looking at Busy Week with Preakness Longshot, Court Date*, THE DAILY RACING FORM (May 17, 2012), <http://www.drf.com/news/rick-dutrow-looking-busy-week-preakness-longshot-court-date>.

97. N.Y. COMP. CODES R. & REGS. tit. 9, § 4002.9.

98. *Id.*

99. 58 PA. CODE § 165.35; KY. ADMIN. REGS. 1:025; FLA. ADMIN. CODE ANN. r. 61D-2.021 (silent on other jurisdictions).

shall be given to the denial, revocation or suspension of any license by any other racing commission or turf governing body.”¹⁰⁰ Similarly, Ohio mandates that:

If a person or horse is *suspended*, expelled, ruled off, or otherwise ineligible, or if a person’s license is revoked, *or application for a license has been denied* or if a person or horse us under any other current penalty pursuant to the rules of a racing authority of any other state or country, such person and/or horse shall stand suspended, expelled, ruled off or denied a license at all tracks operating under permit from the Ohio state racing commission until the ruling be withdrawn by the originating authority.¹⁰¹

In both of these regulations, the state’s racing commissions are afforded no discretion whatsoever. Both Ohio and New Jersey are obligated to enforce other racing commission’s licensing denials or suspensions.

In practice, the discretionary regulations allowed Mr. Dutrow to compete in New York, Pennsylvania, Maryland and Florida, while the mandatory regulations precluded him from running horses in New Jersey and Ohio.¹⁰² Certainly, the sport’s integrity is compromised when a trainer is permitted to compete in races in one venue while he or she is simultaneously suspended or denied a license in a different venue. Onlookers perceive that state racing commissions inconsistently enforce prohibitions on the use of performance-enhancing drugs.

4. The Current Regulatory Scheme’s Inability to Prevent Suspended Trainers from giving their Horses to their Assistant During the Length of their Suspension

When a trainer is ultimately suspended, the disciplinary effect of the suspension is minimized as the suspended trainer is often permitted to transfer his or her horses to their assistant trainer.¹⁰³ On September 22, 2012, a colt named Handsome Mike won the \$1 million Pennsylvania Derby for listed trainer Leandro Mora.¹⁰⁴ Handsome Mike had

100. N.J. ADMIN. CODE § 13:70-1.29 (1982).

101. OHIO ADMIN. CODE 3769-7-43 (2012)(emphasis added).

102. Grening, *supra* note 96.

103. Drape, *supra* note 11.

104. Claire Novak, *Handsome Mike Wins Pennsylvania Derby*, BLOOD-HORSE (Sept. 26, 2012), <http://www.bloodhorse.com/horse-racing/articles/72999/handsome-mike-wins-pennsylvania-derby>.

previously raced for trainer Doug O'Neill.¹⁰⁵ However, O'Neill was serving a forty-five-day suspension imposed by the California Horse Racing Board for "elevated carbon-dioxide levels" in the blood of one his horses.¹⁰⁶ It is believed that this is a result of a procedure known as "milkshaking," whereby a "bicarbonate of soda, sugar and electrolytes" is fed to a horse through a tube.¹⁰⁷ This prohibited practice is believed to negate the buildup of lactic acid and prevent fatigue.¹⁰⁸ Despite serving the suspension for this infraction, O'Neill was permitted to assign Handsome Mike and the other horses in his barn to his assistant Mora.¹⁰⁹ When asked about his suspension and Mora assuming his position, O'Neill said, "Leandro will keep it as consistent and smooth sailing as possible."¹¹⁰ While stepping in for O'Neill, Mora did just that. Mora entered horses in eighty- nine races, winning fifteen and accumulating \$1,332,137 in purse money.¹¹¹ Ultimately, state racing commissions issue licensing suspensions as one of their most heavy-handed disciplinary measures. When a suspended trainer's operation is able to uninterruptedly persist, the disciplinary effect of this measure is diminished and onlookers perceive the punishment as a farce.

II. PROPOSED AND CURRENT REGULATIONS THAT COULD BE APPLIED TO HORSERACING NATIONALLY

This section of the paper will describe proposed and current regulations that the horseracing industry could use to effectively correct the issues discussed above. Specifically, this section will describe the Interstate Horseracing Improvement Act of 2011; the Jockey Club Reformed Medication Rules; specific state regulations that have been implemented by individual racing commissions; and licensing

105. *Id.*

106. Associated Press, *Doug O'Neill Not The Only Trainer With History Of Drugging Horses*, SPORTS ILLUSTRATED (June 8, 2012), <http://sportsillustrated.cnn.com/more/news/20120608/belmont-stakes-trainers-drugs/>.

107. *Id.*

108. *Id.*

109. Ron Mitchell, *Doug O'Neill to Serve Suspension*, ESPN (July 11, 2012), http://espn.go.com/horse-racing/story/_/id/8157510/doug-oneill-serve-suspension.

110. *Id.*

111. *Trainer Profile Page Leandro Mora*, EQUIBASE.COM, <http://equibase.com/profiles/Results.cfm?type=People&searchType=T&eID=1290> (last visited Jan. 27, 2013).

regulations in the medical and legal fields. From this section, it should be clear that there are ways in which the horseracing industry can address the problems it faces.

A. Interstate Horseracing Improvement Act of 2011

Currently, the IHA stipulates that the Federal Government has the ability to regulate only inter-state wagering.¹¹² However, in 2011, Senator Tom Udall proposed an amendment to the IHA that would provide Federal oversight to the entire industry.¹¹³ The Interstate Horseracing Improvement Act of 2011 (IHIA)¹¹⁴ calls for a uniform ban on all race-day medications, implements a “three strikes and you’re out penalty” for all participants, and “requires drug testing of race horses by independent, accredited labs.”¹¹⁵ Ultimately, the IHIA would leave the enforcement of performance-enhancing drugs to state racing commissions.¹¹⁶ The IHIA would then allow for the Federal Trade Commission to shut down off-track wagering in states that do not adequately enforce the regulation.¹¹⁷ To date, the IHIA has not been up for vote and has been referred to committee.¹¹⁸ The IHIA must therefore be reintroduced in order for it to have any possibility of enactment.

Despite the failure to enact the IHIA, an analysis of its goals and how it achieves them can provide helpful insight into the remedial needs of the industry. Primarily, the IHIA would provide uniformity through its blanket prohibition on the use of performance-enhancing drugs.¹¹⁹ The legislation defines a performance-enhancing drug as “any substance capable of affecting the performance of a horse at any

112. 15 U.S.C. § 3001 (1978).

113. Tom LaMarra, *Federal Regulation Gets Push with Caveats*, BLOOD-HORSE (July 13, 2012), <http://www.bloodhorse.com/horse-racing/articles/71210/federal-regulation-gets-push-with-caveats>.

114. Interstate Horseracing Improvement Act 2011, H.R. 1733, 112th Cong. (2011) available at <http://thomas.loc.gov/cgi-bin/query/z?c112:S.886>.

115. *Fact vs. Fiction: Ending Race Horse Doping*, TOMUDALL.SENATE.GOV (April 5, 2012), http://www.tomudall.senate.gov/?p=press_release&id=1051.

116. *Id.*

117. *Id.*

118. GOVTRACK.US, H.R. 1733 (112TH): INTERSTATE HORSERACING IMPROVEMENT ACT OF 2011, <http://www.govtrack.us/congress/bills/112/hr1733> (last visited Jan. 27, 2013).

119. Interstate Horseracing Improvement Act 2011, *supra* note 114, at § 9(b).

time. . .” including those drugs listed by the RCI “Uniform Classification Guidelines for Foreign Substances.”¹²⁰ The bill would also mandate that each racing jurisdiction reciprocally enforce the disciplinary measures given by other jurisdictions.¹²¹ Concerning discipline, the proposed bill stated that “a person that provides a horse with a performance-enhancing drug. . .shall be . . .suspended for a period of not less than 180 days from all activities relating to any horserace that is the subject of an interstate off-track wager.”¹²² Therefore, this suspension would apply in all states that allow interstate wagering and prevent trainers suspended in one jurisdiction from competing in another. Lastly, this proposed bill’s punitive measures were far more stringent than those that currently exist. Under the bill, a first time offender would receive a 180 day suspension and \$5000 fine; a second time offender would receive at least a one year suspension and \$20,000 fine; and a third time offender would be permanently banned from horseracing and subject to a \$50,000 fine.¹²³ Certainly these measures would pose a significant threat to the trainer if they were violated.

B. Jockey Club Reformed Racing Medication Rules

Similar to the IHIA, the Jockey Club has put forth its own reformed rules that address the problem of performance-enhancing drugs in horseracing. These rules were formulated by the Jockey Club after it commissioned a study of the sport in 2001.¹²⁴ This study determined that “animal safety, welfare and medication” were the major factors that were contributing to the sport’s overall public decline in popularity.¹²⁵ The Jockey Club’s Reformed Racing Medication Rules were thereby announced in 2012 “in order to clean up racing” and restore popularity.¹²⁶ The Jockey Club does not have regulatory authority to implement the rules themselves, but has advocated strongly that these rules be adopted by the

120. *Id.* §9(a)(2)(A-B).

121. *Id.* § (d)(1)(A)(ii).

122. *Id.*

123. *Id.* § (d)(A)(i-iii).

124. *Medication Hearings supra* note 46, at 24.

125. *Id.*

126. *Id.*

2014] *Reining in the Use of Performance Enhancing Drugs* 139

state racing commissions and other industry agencies.¹²⁷ Under this model, uniformity could be achieved only if every state racing commission adopts the Jockey Club's rules.

Among its goals, the rules put forth a uniform medication policy,¹²⁸ ensure a system of reciprocity, prevent suspended trainers from transferring their horses to their assistants, implement policies that allow suspensions to be enforced, and more stringently punish recidivists.¹²⁹ The proposed rules accomplish uniformity through implementation of a list of prohibited substances and allowable limits of "controlled therapeutic medications."¹³⁰ Each state would no longer have discretion to manipulate withdrawal times or allow higher levels of certain therapeutic drugs on race day. Next, the rules ensure reciprocity by mandating that "all racing regulatory authorities . . . mutually and reciprocally enforce all points and penalties assessed against trainers. . ."¹³¹ Therefore, any state racing commission's disciplinary measure would be reciprocally enforced in every other jurisdiction. Furthermore, the proposed rules state that "any penalty which includes suspension of 30 days or more shall require the transfer of all horses in training to unassociated persons subject to approval of the relevant regulatory authority."¹³² This would prevent trainers from supposedly transferring their horses to their assistants while they are suspended.

Concerning enforcement, the rules expand the racing commission's jurisdiction to include "any location that conducts, records, and/or submits official timed workout information under jurisdiction of the relevant racing regulatory authority."¹³³ This broader language would bring a vast number of training centers¹³⁴ under each racing commission's authority. Therefore, racing commissions would have the authority to look beyond the racetracks themselves and ensure that suspended trainers are not continuing to

127. *Id.*

128. REFORMED RACING MEDICATION RULES at 3 (August 12, 2012) available at http://www.jockeyclub.com/pdfs/reformed_rules.pdf.

129. *Id.* at 4.

130. *Id.* at 8-9.

131. *Id.* at 11.

132. *Id.* at 10.

133. *Id.* at 4, 8.

134. *Official Training Centers*, EQUIBASE.COM, <http://www.equibase.com/tracks/training.cfm>.

train their horses in secrecy at an off-track training facility. Lastly, the rules more stringently punish recidivists through use of a points system. The system has seven different levels of punishment, whereby the number of points that a trainer accumulates mandates the level of punishment that the trainer receives.¹³⁵ This helps impede recidivism as those who are repeat offenders will be treated more harshly than first-time offenders. Furthermore, recidivism would not be limited to one jurisdiction, but would instead apply in all prior offenses in any racing state.¹³⁶

C. State Regulations

A number of states have implemented regulations that can better control the use of performance-enhancing drugs in the industry. For instance, an Indiana regulation explicitly prohibits “a trainer suspended for more than fifteen days” from transferring his or her horses “to a spouse, member of the immediate family, assistant, employee, or household member of the trainer.”¹³⁷ This regulation ultimately would prevent the practice that allows suspended trainers to assign their horses to their assistants. Such a measure would be an effective deterrent to using performance-enhancing drugs because a suspension could cause permanent relocation of the trainer’s horses.

Concerning enforcement, Texas maintains a regulation that allows its state racing commission to audit suspended trainers,¹³⁸ which would permit the racing commission to prevent money from being funneled by the assistant to the suspended trainer. This promotes enforcement because the suspended trainer will not be allowed to benefit from the continued efforts of their assistant.

State regulations have also managed to achieve some level of uniformity. On March 12, 2013, New York, New Jersey, Pennsylvania, Delaware, Maryland, West Virginia, Virginia, and Massachusetts all agreed to implement uniform medication and disciplinary regulations.¹³⁹ This agreement

135. *Id.* at 10-11.

136. REFORMED RACING MEDICATION RULES, *supra* note 128, at 10-11.

137. 71 IND. ADMIN. CODE 10-2-8 (2012).

138. 16 TEX. ADMIN. CODE § 311.104 (2012).

139. *Eight States Commit to Uniform Drug Rules*, BLOOD-HORSE (March 13, 2012), <http://www.bloodhorse.com/horse-racing/articles/76824/eight-states-commit-to-uniform->

2014] *Reining in the Use of Performance Enhancing Drugs* 141

brings uniformity to “the largest concentration of racing in the United States” comprising eighteen racetracks within a two hundred mile radius.¹⁴⁰ The coalition consulted numerous industry groups, including the RCI, when it developed its medication regulation.¹⁴¹ It specifies twenty four therapeutic medications that trainers will be allowed to use along with each medication’s mandatory withdrawal time.¹⁴² The states also agreed to use the same “state-of-the-art technology” in their properly accredited testing laboratories.¹⁴³ Concerning disciplinary measures, the states are in the process of developing “a new penalty system that will discourage initial and repeat violators and identify repeat offenders who fail to comply with medication regulations.”¹⁴⁴ The states agreed to implement these medication and disciplinary rules on January 1, 2014.¹⁴⁵ Other states now have a model of uniformity to look towards and potentially join. Ultimately, this model may be the impetus towards the total uniformity that horseracing needs.

D. Licensing Regulation in other Fields

The horseracing industry and its members can also learn about licensing regulation by looking at disciplines in other fields. For instance, when a lawyer is suspended in one jurisdiction, other jurisdictions where the lawyer is licensed will typically levy the same sanction.¹⁴⁶ In order to reciprocally enforce another state’s disciplinary measures, a disciplined lawyer is required to give notice of his or her sanction to each state where the lawyer is licensed.¹⁴⁷ This allows each jurisdiction to consider the appropriateness of the

drug-rules.

140. *Id.*

141. *Id.*

142. *Id.*

143. *Id.*

144. *Id.*

145. *Eight States Commit to Uniform Drug Rules*, BLOOD-HORSE (March 13, 2012), <http://www.bloodhorse.com/horse-racing/articles/76824/eight-states-commit-to-uniform-drug-rules>.

146. LISA G. LERMAN & PHILIP G. SCHRAG, *ETHICAL PROBLEMS IN THE PRACTICE OF LAW*, 95 (Vicki Breen et. al. eds., 3rd ed. 2012).

147. JOHN DZIENKOWSKI & RONALD ROTUNDA, *LEGAL ETHICS: THE LAWYER’S DESKBOOK ON PROFESSIONAL RESPONSIBILITY*, § 8.5-1 (2012, 2013 ed).

reciprocal discipline.¹⁴⁸ In Massachusetts, for example, another jurisdiction's findings of misconduct "may be treated as establishing the misconduct for purposes of a disciplinary proceeding."¹⁴⁹ The courts in Massachusetts will ultimately grant reciprocal enforcement of the other jurisdiction's disciplinary measure: "unless (a) the procedure in the other jurisdiction did not provide reasonable notice or opportunity to be heard; (b) there was significant infirmity of proof establishing the misconduct; (c) imposition of the same discipline would result in grave injustice; or (d) the misconduct established does not justify the same discipline."¹⁵⁰

While Massachusetts courts typically enforce other jurisdictions disciplinary measures,¹⁵¹ this four factor analysis ensures that reciprocal discipline is not unfair to the attorney.¹⁵² For example, it would be wholly unfair for an attorney to be reciprocally punished in State A for an offense that occurred in State B, when the offense that occurred in State B is not an offense in State A. Factor (d) of the analysis serves as a check on this potential problem. Aside from Massachusetts, other states such as Wisconsin and North Dakota employ a similar fact-based analysis that preserves fairness.¹⁵³ Ultimately, the use of these factors not only favors reciprocal discipline but also ensures the protection of attorneys from unfair reciprocal disciplinary holdings.

Similar to attorneys, physicians can also have their licenses revoked for conduct that occurs in a different jurisdiction. In one case, when a physician made willful misrepresentations on his license application to practice in Maryland, the Maryland State Board of Physicians denied his application.¹⁵⁴ Prior to filing the Maryland application, the physician had been licensed to practice in New York.¹⁵⁵ In response to the Maryland license denial, the New York State Board for Professional Medical Conduct levied a one year

148. *Id.*

149. *In re Mitrano*, 906 N.E.2d 340, 342 (Mass. 2009).

150. Alan M. Colvin, *Reciprocal Discipline: Double Jeopardy or A State's Right to Protect Its Citizens?*, 25 J. LEGAL PROF. 143, 146 (2001).

151. *Id.*

152. *Id.*

153. *Id.* at 144-45.

154. *Bursztyn v. Novello*, 838 N.Y.S.2d 733, 734 (N.Y. Sup. Ct. 2007).

155. *Id.*

suspension pursuant to Education Laws sections 6530(9)(b) and 6530(9)(d).¹⁵⁶ Both laws mandate New York to punish conduct that occurred in another state if that same conduct would have constituted misconduct in New York.¹⁵⁷ Ultimately, the physician's willful misrepresentation on his license application would have constituted professional misconduct in New York. Under New York's Education Law section 6530(21), professional misconduct occurs when a physician "willfully mak[es] or fil[es] a false report. . ." ¹⁵⁸ On appeal, the New York Supreme Court concluded that the one year suspension was valid.¹⁵⁹ First, the court reasoned that the physician received a proper hearing in Maryland.¹⁶⁰ The physician received proper notice, a full evidentiary hearing, an opportunity to be heard, and representation by counsel.¹⁶¹ Second, the court determined that the one-year suspension was not arbitrary, capricious, or unsupported by the record.¹⁶² This case demonstrates that a physician can have his or her license suspended in one state for reasons associated with the denial of a license application in another state.

Applying Dutrow's violations to the regulation's governing attorneys, it is likely that his 2011 Kentucky license denial would have been reciprocally enforced. In regards to notice and an opportunity to be heard, Dutrow met with the licensing committee and was granted an opportunity to speak on his behalf.¹⁶³ Concerning proof of misconduct, Dutrow had

156. *Id.*

157. N.Y. EDUC. LAW § 6530(9)(b) (McKinney 2008) (Having been found guilty of improper professional misconduct by a duly authorized professional disciplinary agency or another state where the conduct upon which the finding was based would, if committed in New York state, constitute professional misconduct under the laws of New York state. . .); N.Y. EDUC. LAW § 6530(9)(d) (2008) (stating that "Having his or her license to practice medicine revoked, suspended or having other disciplinary action taken, or having his or her application for a license refused, revoked or suspended or having voluntarily or otherwise surrendered his or her license after a disciplinary action was instituted by a duly authorized professional disciplinary agency of another state, where the conduct resulting in the revocation, suspension or other disciplinary action involving the license or refusal, revocation or suspension of an application for a license or the surrender of the license would, if committed in New York state, constitute professional misconduct under the laws of New York state . . .").

158. N.Y. EDUC. LAW § 6530(21) (McKinney) (2008).

159. *Bursztyn*, 838 N.Y.S.2d at 735.

160. *Id.*

161. *Id.*

162. *Id.*

163. Angst, *supra* note 89.

been given a suspension in New York for possessing of hypodermic needles and administering a powerful painkiller to one of his horses.¹⁶⁴ Furthermore, Kentucky suspended Dutrow in 2008 and determined that he made misrepresentations on his 2011 license application.¹⁶⁵ Regarding any “grave injustice” that reciprocal discipline could perpetuate, each state maintains the ability to reciprocally enforce the license denials imposed by other states.¹⁶⁶ Therefore, the courts would be acting well within their power to discipline Dutrow for his Kentucky racing license denial. Lastly, Dutrow’s prior possession of a hypodermic needles and misrepresentations on his trainer’s application would have been punishable in Maryland, a state where Dutrow was permitted to compete in 2012.¹⁶⁷ Accordingly, an application of these factors would have likely resulted in Dutrow’s reciprocal suspension by the state of Maryland.

Similarly, Dutrow’s 2011 Kentucky license denial would likely have resulted in a suspension under New York’s regulations governing physicians. The physician in *Bursztyn* was denied a Maryland physician’s license after he made willful misrepresentations on his application.¹⁶⁸ Because this conduct also constituted misconduct in New York, the New York State Board of Professional Medical Conduct suspended the physician’s license for one year.¹⁶⁹ Like the physician in *Bursztyn*, Dutrow also made misrepresentations on his Kentucky license application.¹⁷⁰ Furthermore, Maryland – a state where Dutrow was previously licensed – prohibits making false or misleading statements to a racing official.¹⁷¹

164. *Id.*

165. *Id.*

166. *See generally supra* note 97; *supra* note 99; *supra* note 100; *supra* note 101.

167. *See* MD. CODE REGS. 09.10.03.03 (2013 (“The following acts are prohibited if committed on the grounds of a facility under the jurisdiction of the Commission . . . using or possessing, actually or constructively, any of the following items:(a) A drug, or(b) A hypodermic needle, hypodermic syringe, or other device which could be used for injection;”) MD. CODE REGS. 09.10.03.03 (“The following acts are prohibited if committed on the grounds of a facility under the jurisdiction of the Commission. . .making false or misleading statements to a racing official or submitting false or misleading statements on a license.”).

168. *Bursztyn v. Novello*, 838 N.Y.S.2d 733, 734 (N.Y. Sup. Ct. 2007).

169. *Id.*

170. Angst, *supra* note 89.

171. *See* MD. CODE REGS. 09.10.03.03.

2014] *Reining in the Use of Performance Enhancing Drugs* 145

However, unlike in *Bursztyn*, Maryland did not levy any sort of sanction against Dutrow for his misrepresentation to the KHRC.¹⁷²

Taken together, an application of Dutrow's violations to the regulations imposed on the medical and legal fields demonstrates that they should have been reciprocally disciplined. Additionally, both analyses highlight the extent to which the horseracing industry's rules are inferior when compared to others.

III. ARGUMENT FOR A FEDERAL REGULATION OF HORSERACING

This final section will argue for a federal regulation governing the horseracing industry. First, this section will discuss the growing support by industry leaders for a federal regulation. Next, it will discuss how the federal regulation can be achieved. Lastly, it will propose a federal regulation that addresses each of the issues previously discussed.

A. Industry support for a Federal Regulation

In order for the horseracing industry to better regulate the use of performance-enhancing drugs, the sport must have a uniform system of medication standards and maintain uniformity of enforcement and discipline. The best way to ensure this change is through the federal regulation. While it has been argued that the industry would accept federal regulation only "as a last resort,"¹⁷³ the racing community appears to have warmed up to the idea. For example, the Water Hay Oats Alliance (WHOA), "a grassroots organization that opposes use of medication on race day" has voiced its support for a federal regulation.¹⁷⁴ This group consists of prominent owners, Arthur and Staci Hancock, Gretchen and Roy Jackson, George Strawbridge, Barry Irwin, and Charlotte C. Weber.¹⁷⁵ Arthur Hancock accentuated the group's support

172. Grening, *supra* note 96.

173. Drape, *supra* note 11.

174. Tom LaMarra, *Group Wants Racing Act to Regulate Medication*, BLOOD-HORSE (Aug. 2, 2012, 12:42 PM), <http://www.bloodhorse.com/horse-racing/articles/71698/group-wants-racing-act-to-regulate-medication>

175. *Id.* Arthur Hancock III is the founder of Stone Farm in Kentucky and the grandson of Arthur Hancock Sr., the founder of Claiborne Farms, *History/; See A Brief Family History*, STONE FARM, <http://stonefarm.com/history-family.shtml> (last visited Jan. 27, 2013); The farm featured many preeminent stallions including Mr. Prospector,

declaring that “the time has come to accept the federal government’s offer to help us clean up our sport. We need to work with them, not against them, if we are serious.”¹⁷⁶ Another prominent owner, Satish Sanan, also sees federal intervention as an immediate way to cure the ills that face racing.¹⁷⁷ Sanan voiced his support stating that “[t]he last thing you want is to be told how to run your business . . . but because of the nonexistent leadership in this sport it will happen We could solve all of our issues with federal intervention right now.”¹⁷⁸ Thus, it appears that industry leaders are recognizing the dire need for a remedy to the sport and now see federal regulation as a welcomed measure.

B. Ways of Achieving a Federal Regulation

Ultimately, federal regulation can be achieved through a stand-alone bill or an amendment to the IHA.¹⁷⁹ Currently, the Jockey Club favors a stand-alone federal bill as opposed to amending the IHA. Jockey Club CEO James Gagliano stated the organization’s position, citing fear that “the crucial medication issue could get lost should lawmakers decide to add other provisions” to the IHA.¹⁸⁰ Ultimately, the Jockey Club would support a federal law “with a comprehensive

Bold Ruler and Secretariat, *See History*, CLAIBORNE FARMS, <http://www.claibornefarm.com/history/> (last visited Jan. 27, 2013). Roy and Gretchen Jackson are the owners of Lael Stables who famously raced Barbaro, the winner of the 2006 Kentucky Derby who tragically broke his rear leg in the Preakness. Tom Pedulla, *Five Years After Barbaro, Pains and Gains*, USA TODAY (May 10, 2011, 3:06 AM), http://usatoday30.usatoday.com/sports/horses/2011-06-08-race-day-drug-ban-barbaro_n.htm. George Strawbridge is the owner of Augustin Stables, “the most successful steeplechase operation of all time.” *Augustin Stables Bio*, NATIONAL STEEPLECHASE, <http://www.nationalsteeplechase.com/owners/augustin-stables/> (last visited Jan. 25, 2013). Charlotte C. Weber is the granddaughter of John Dorrance, the founder of Campbell Soup Co., and owner of Live Oak Plantation, a farm in Ocala Florida. *Charlotte Weber*, THOROUGHBRED TIMES (Jun. 30, 2010, 11:05 AM), <http://www.thoroughbredtimes.com/women-of-influence/profiles/charlotte-weber.aspx>.

176. LaMarra, *supra* note 174.

177. Jerry Bossert, *Satish Sanan, Owner of Curlin and Other Winners, Eyes Reform in Thoroughbred Racing*, THE DAILY NEWS (Apr. 29, 2012, 2:33 PM), http://articles.nydailynews.com/2012-04-29/news/31480624_1_ntra-horses-and-jockeys-horse-farms. Satish Sanan was part owner in Curlin, winner of the 2007 Horse of the Year and Breeders Cup Classic winner, Curlin.

178. *Id.*

179. Luke P. Breslin, *Reclaiming the Glory in the “Sport of Kings” - Uniformity is the Answer*, 20 SETON HALL J. SPORTS & ENT. L. 297, 324 (2010).

180. *Medication Hearings*, *supra* note 46, at 25.

funding solution and a coordinated prosecution structure” modeled after its Reformed Racing Medication Rules.¹⁸¹

Alternatively, an amendment to the IHA would create a uniform set of rules that would govern every facet of the sport.¹⁸² If a state fails to enforce these uniform rules, then the federal government would have the authority to suspend wagering in that state.¹⁸³ Principally, the difference between the two methods is in enforcement. While a stand-alone bill would establish its own enforcement and regulatory regime, an amendment of the IHA would use the threat of suspending interstate wagering as leverage to enact its regulations.

C. Proposed Regulation

In order to draft an effective federal regulation, its drafters should focus on implementing uniform drug regulations, ensuring reciprocity, punishing recidivism, allowing enforcement and disallowing suspended trainers from assigning their horses to their assistants. The most effective way to meet these goals is to consider the IHIA, the Jockey Club Reformed Medication Rules, current state regulations and regulatory methods of other fields.

1. Implement Uniform Drug Regulations

Regulatory drafters should look to the Jockey Club’s Reformed Racing Medication Rules to achieve a uniform drug policy. These rules specifically layout which performance-enhancing substances are prohibited and which therapeutic medications are permitted.¹⁸⁴ Furthermore, the Reformed Racing Medication Rules establish uniform withdrawal times for each of the permitted therapeutic medications.¹⁸⁵ In contrast, the IHIA entirely prohibits the general use of performance-enhancing drugs.¹⁸⁶ The IHIA broadly defines performance-enhancing drugs to include, “any substance capable of affecting the performance of a horse at any

181. Breslin, *supra* note 179, at 324.

182. *Id.* at 325.

183. *Id.*

184. REFORMED RACING MEDICATION RULES, *supra* note 128, at 8-10.

185. *Id.* at 9-10.

186. Interstate Horseracing Improvement Act of 2011, *supra* note 114, at § 9 (2).

time. . .”¹⁸⁷ Such general language could preclude the use of valuable therapeutic drugs that assist the horse’s welfare and allow the horse to compete safely. Furthermore, such a broad definition fails to prevent confusion regarding which medications are prohibited. This confusion could cause trainers who believe they are administering legal medications to their horses to suffer penalties due to the regulation’s imprecise definitions. Therefore, due to its specificity and allowance of certain levels of therapeutic medications, regulation drafters should use the Jockey Club’s Reformed Rules as their model.

2. Ensure Reciprocity

One major benefit to passing a federal legislation is that it could require reciprocal enforcement. Because every trainer would then have to abide by the same rules, each trainer’s violation, regardless of the state that it occurred, would violate every other jurisdictions’ rules. Racing commissions would no longer have to consider whether the underlying offense would be an offense in its jurisdiction. Instead reciprocal discipline would flow logically across each and every racing jurisdiction.

In order to ensure that states comply with this practice, the legislation should be drafted to mandate disclosure of a trainer’s violation to every racing jurisdiction, as is done in the reciprocal disciplinary process of lawyers. Once a violating trainer begins serving his or her suspension, every other state will be expected to provide similar force and effect to the underlying state’s suspension. Any state that receives disclosure but allows a suspended trainer to compete would be subject to having its inter-state wagering suspended. Through the enactment of a system that mandates reciprocity, trainers will not be permitted to avoid punishment by competing elsewhere, and the integrity of the sport will be preserved.

3. Impede Recidivism

To effectively reduce recidivism, regulators should look to the structure proposed by the Jockey Club’s Reformed Racing Medication Rules. These rules establish a points system that

187. *Id.*

2014] *Reining in the Use of Performance Enhancing Drugs* 149

takes all violations into account, irrespective of jurisdiction.¹⁸⁸ For each violation, there is an attached point value.¹⁸⁹ The system therefore calls for heavier punishments for those who accrue enough points to surpass the next threshold. For example, if a trainer commits enough violations to amass seventy five points, that trainer would be subject to a sixty day suspension.¹⁹⁰ If that same trainer accumulates an additional twenty five points, thereby graduating to the next level of punishment, then the suspension would be lengthened to 180 days.¹⁹¹ This system would effectively impede recidivism because each offense would not be viewed in a stand-alone fashion. Rather, every additional offense could lead to more serious punishment. As a result, trainers such as Dutrow, who amass a multitude of violations in their careers, will no longer be allowed to compete.

4. Disallow Suspended Trainers from Transferring their Horses to their Assistants

In order to effectively punish a suspended trainer, regulators must ensure that a suspended trainer will not be permitted to give his or her horses to an assistant throughout the duration of their suspension. Regulators should therefore draft language similar to Indiana's, which prohibits "a trainer suspended for more than fifteen days" from transferring his or her horses "to a spouse, member of the immediate family, assistant, employee, or household member of the trainer."¹⁹² Such language has been included in the Jockey Club's Reformed Racing Medication Rules for trainers suspended for more than 30 days.¹⁹³ Ultimately regulators must draft language that prevents a suspended trainer from giving his or her horses to an assistant during the duration of his or her suspension.

188. REFORMED RACING MEDICATION RULES, *supra* note 128, at 11 (§ 6c).

189. *Id.*

190. *Id.* at (6)(c)(4).

191. *Id.* at (6)(c)(5).

192. 71 IND. ADMIN CODE 10-2-8 (2012), *supra* note 137.

193. REFORMED RACING MEDICATION RULES, *supra* note 128, at 10 §6 (b)(iii).

IV. CONCLUSION

Ultimately, the horseracing industry must uniformly regulate performance-enhancing drugs to preserve the sport's integrity. While some uniformity has been achieved, there is no guarantee that it will spread to every racing jurisdiction. Therefore, the best way to achieve this goal is to remove state discretion in drafting and enforcing medication regulations. The federal government must impose a set of standard medication rules that will be reciprocally followed and strictly enforced. In addition, trainers should not be permitted to assign their horses to an assistant while they are serving a suspension. This allows trainers to avoid the negative consequences, such as losing their horses to another trainer, that a suspension is designed to impose. If the sport of horseracing imposes these regulations, it can begin to restore integrity and fairness.