

Third Time's The Charm?

The Horseracing Integrity Act of 2019

John T. Wendt

Horseracing in the United States may be in serious trouble. Thirty-four horses have died at the Santa Anita Racetrack. There have been calls to suspend racing or to ban horseracing all together.¹ The Los Angeles District Attorney has announced an investigation into the tragedies at Santa Anita² and there have already been petitions to ban racing from Santa Anita and throughout California.³ There have also been numerous cases where horses have been disqualified for doping violations. On top of it all, on September 13, 2019, the New York Times alleged that Justify, who won the Triple Crown in 2018, failed a drug test after the Santa Anita Derby, which would mean that the horse should have been banned from the Kentucky Derby and hence ineligible for the Triple Crown.⁴ Pat Forde, the sports columnist stated,

Go ahead and mark down 2019 as the beginning of the end for horse racing... North American horse racing has been a floating pharmacy of medication for decades, the vast majority of it tolerated at a much higher level than in Europe and other locales. Much of it (too much) has been legal to administer. Plenty of other drugs are covertly injected, ingested and topically applied. From cobra venom to cocaine, the sport has found a dizzying array of methods to try to make slow horses faster or injured horses able to run. Efforts have been made to change that, but a public suspicion that everything on four legs at a track has been doped is hard to shake. This is why the Justify news is such a big blow—not just the positive test to one of only two horses to win the Triple Crown in the last 40 years, but perhaps more so the way it was handled by the CHRB [California Horse Racing Board].⁵

Reforms are needed for harmonization, safety, and integrity for the sport to survive. In the midst of this chaos comes the Horseracing Integrity Act (HIA), a rare, bipartisan bill in Congress sponsored by Representatives Andy Barr (R-KY) and Paul Tonko (D-NY), who are Co-chairs of the Congressional Horse Caucus. This is the third iteration of legislation that Barr and Tonko have proposed. Will the third time be the charm for passage?

Barr and Tonko originally introduced similar legislation in 2015 and 2017. While the 2015 HIA never made it to the Congressional subcommittee level, the 2017 HIA garnered 131 co-sponsors (81 Democrats and 50 Republicans) and did at least have hearings. Perhaps this bodes well for the future. Barr and Tonko learned from the previous two iterations and reintroduced a revised Horseracing Integrity Act of 2019 as HR1754 with a companion bill companion in the Senate (SB 1820) co-sponsored by Senator Kirsten

Gillibrand (D-N.Y.) and Martha McSally (R-Ariz.). At the time this article was being written, there was already 179 co-sponsors of the bill in the House.

WHAT'S IN THE HORSERACING INTEGRITY ACT OF 2019

The HIA would create the Horseracing Anti-Doping and Medication Control Authority (the Authority) as an “independent, private non-profit corporation with responsibility for developing and administering an anti-doping and medication control program.”⁶ Among other duties, the Authority would create a uniform set of anti-doping and medication control rules, and develop a list of permitted and prohibited substances.⁷ In effect, horse racing would then have one set of anti-doping and medication rules across all U.S. racing jurisdictions for the first time.

This is similar to the work done by the World Anti-Doping Agency (WADA) and U.S. Anti-Doping Agency (USADA). WADA was established in 1999 under an initiative of the International Olympic Committee to promote and coordinate the fight against doping in sports internationally. To harmonize anti-doping policies in all sports and all countries in the Olympic Movement, WADA developed the World Anti-Doping Code (the Code).⁸ The Code is the document that harmonizes anti-doping policies, rules, and regulations within sport organizations and public authorities around the world.⁹ On the national level, USADA is recognized as the official anti-doping organization for all US Olympic, Paralympic, Pan American and Parapan sports in the United States. USADA is a signatory to the Code.¹⁰

In fact, USADA has a major role in the make-up of the proposed Authority Board under the HIA. The bill proposes that USADA appoint a thirteen-member board composed of six individuals from USADA, the chief executive officer of USADA as chairman of the board, and six individuals who have demonstrated expertise in a variety of horse-racing areas including equine anti-doping, medication control regulation, and breeding of racehorses. There would also be at least one member with a degree in veterinary medicine, with either an expertise in equine veterinary practice with regard to race horses or in veterinary research in matters affecting race horses, and at least one member is to have expertise in riding covered horses as a jockey.¹¹ Finally, to avoid conflicts of interest, no members of the Authority Board will be allowed to have financial interests, industry governance, policymaking, consulting, vendor, or employment relationships within the pari-mutuel horse racing industry.¹²

OPPOSITION TO THE HIA OF 2019

Opponents to the HIA have two basic arguments. The first argument is that this bill would create a federal bureau

with no representatives from the industry and that regulation would be better left to the states. The second argument revolves around the administration of same day medication, notably Lasix. As Chris Wittstruck, a columnist for the United States Trotting Association put it, “Read the bill and it is clear that the true intent is to create a federal bureaucracy these same interests can influence and ban currently legal and beneficial medication.”¹³

The United States Trotting Association (USTA) opposes the HIA legislation arguing that “the proposed legislation would federalize horse racing and place it under the control of the Federal Trade Commission (FTC), adding an unnecessary layer of oversight to the current state-based system. It would create an unelected, national board that specifically prohibits current owners, trainers, drivers, and practicing veterinarians from serving on it.”¹⁴ The USTA also believes that the bill would also create unnecessary regulations, costs, and fees.

The National Horsemen’s Benevolent and Protective Association (HBPA) is also opposed to the HIA. Eric Hamelback, CEO of the HBPA, believes that the bill is more than misguided, it is wrongheaded and will add additional regulations, costs, and fees that would cause jobs to be lost. Regarding same day medication, especially Lasix, Hamelback said:

Banning race day Lasix will cause more equine deaths, and additional regulations will cause jobs to be lost... [In fact] [i]f Lasix is completely banned the number of fatalities on racetracks throughout the country will increase. While we are committed to finding answers that will prevent, reduce, and solve the occurrence of any fatality for our thoroughbred athletes, this bill is NOT the answer.¹⁵

Not surprisingly, the USTA echoed almost the same words as the HBPA saying that:

The legislation seeks to ban the use of a race-day, therapeutic medication called Lasix. Lasix is endorsed by veterinarians as the only known treatment for Exercise Induced Pulmonary Hemorrhage (EIPH), a disease that causes bleeding in the lungs of a racehorse. Both the American Association of Equine Practitioners and North American Association of Racetrack Veterinarians support the use of Lasix and oppose the legislation.¹⁶

And as USTA President Russell Williams said, “At a time in which the industry is focused on preventing deaths, this legislation will have the opposite effect, and more horses will die.”¹⁷

SUPPORTERS OF THE HIA OF 2019

The Jockey Club was established over 125 years ago. It is the breed registry for Thoroughbreds in North America and is “dedicated to the improvement of Thoroughbred breeding and racing, focusing on improvements to the integrity, health, and safety of the sport.”¹⁸ James L. Gagliano, President and Chief Operating Officer said:

For far too long, cheaters have been abusing the system and the horses are most often the ones to suffer... It is particularly disturbing that there is little out-of-competition drug testing in the United States. U.S. horse racing lags far behind international standards. It’s time we joined the rest of the world in putting in place the best measures to protect the health and safety of our equine athletes...A key to this change is the requirement of full transparency into the medical treatment, injuries, and health of all racehorses. Today, we can’t fully see what is going on with a horse because of differing state and track practices, antiquated practices, and purposeful deceit about what drugs are given to horses at what times.¹⁹

The Coalition for Horse Racing Integrity (CHRI) is a broad-based diverse group of owner and breeder associations, racetracks, racing organizations, and even animal welfare groups. Its members include The Jockey Club, The Kentucky Thoroughbred Association, The Kentucky Thoroughbred Owners & Breeders, The International Federation of Horseracing Authorities, Meadowlands Racetrack, Tioga Downs, Vernon Downs, The Breeders’ Cup, and The Humane Society Veterinary Medical Association, among others. Shawn Smeallie, Executive Director of the CHRI, directly addressed the major concerns of the opponents of the HIA stating:

The bill doesn’t create a new ‘Department of Horse Racing,’ but rather sets up an independent board with broad representation from the industry...We are currently operating under a patchwork quilt of state regulations with little consistency across jurisdictions. Inconsistent rules mean that the health of horses suffers, with injuries and deaths that could have been prevented.²⁰

Water Hay Oats Alliance (WHOA) is a group of “Owners, Breeders, Trainers, Jockeys, Equine Practitioners, Industry Professionals, Handicappers and Racing Fans who stand against the permissive use of performance enhancing drugs in American horse racing.”²¹ A March 14, 2019 WHOA press release stated, “It is obvious that after years of committee review and discussion, America’s racing industry cannot police itself by eliminating the proliferation of performance-enhancing drugs in our sport, nor does it possess the power to adequately punish the purveyors of these drugs.”²² WHOA also stated, “The appointment of an independent anti-doping program run by USADA will resolve the problem of widespread drug use in American racing and put U.S. racing jurisdictions in step with international standards.”²³

COMPARABLE HARMONIZATION EFFORTS?

The opposition to the HIA ignores the fact that we already have both national and international organizations that regulation anti-doping efforts—the WADA and the USADA—and there have not been major upheavals in the world of sport. To give a perspective in the United

States alone, USA Swimming, the national governing body for swimming in the United States has over 400,000 members.²⁴ Every athlete, coach, and support member is required to abide by the rules and regulations of the USADA and the WADA Code.²⁵ USA Track and Field has over 130,000 members.²⁶ Again, each and every athlete, coach, and support member is required to abide by the WADA Code and USADA rules and regulations.²⁷ There are uniform drugs policies and all the stakeholders abide by them.

On the international level, there is the World Anti-Doping Agency, of which USADA is a member. Some of the HIA critics argue that it is just too hard to harmonize thirty-eight different jurisdictions in the United States. Yet, in 1999, in response to a series of high-profile doping cases in the Tour de France, and track and field and swimming having damaged the credibility of sports, over 200 different nations, over 200 Olympic Committees, and 35 international sports federations came together to establish the WADA.²⁸

Many do not remember that, similar to the HIA, there was initial opposition to the WADA.²⁹ Yet, the advocates of a harmonized anti-doping approach knew that time was of the essence and a harmonized effort was necessary to save sport. David Howman, then Director of WADA said, “Values such as fair play; a respect for your opponent and the officials; healthy regard for the rules of sport; honesty over dishonesty; ethical behaviour (sic) from athletes – doing what is *right*. Ethics in sport help us distinguish what is right from what is wrong.”³⁰

THE LASIX DEBATE

The use of drugs in sports is just one of the ethical, legal, and medical issues in sport. All stakeholders in horseracing want a level playing field. The illegal use of drugs threatens that level playing field. However, there is a blurred line between therapeutic use of drugs versus performance enhancement drugs. There is a role for therapeutic medication for both human and equine athletes. This is at the heart of the debate for the use and administration of Lasix. Lasix or Salix belongs to a group of medicines called loop diuretics. In humans, Lasix is given to help treat fluid retention and swelling that is caused by congestive heart failure, liver disease, kidney disease, or other medical conditions. Lasix works by acting on the kidneys to increase the flow of urine and allows the salt to instead be passed in your urine.³¹

In horseracing, the issue becomes more contentious. It becomes a greater problem because the horse does not have a choice in its use. Both the American Veterinary Medical Association and the American Association of Equine Practitioners agree on a therapeutic policy that is “aimed at providing the best health care possible for the racehorses competing while ensuring the integrity of the sport.”³²

In horses, Lasix is used to reduce the effects of a respiratory condition called Exercise Induced Pulmonary Hemorrhage (EIPH), which is noted by bleeding that occurs from the lungs of horses during exercise and is often seen in racehorses. Some commentators note that most, if not all, racehorses may bleed at some time during their careers.³³ Horses can also lose up to 20 pounds of fluid on Lasix, making them lighter and a lot faster.³⁴

The opponents of the HIA argue that Lasix is administered for therapeutic use and can be administered on race day. Currently, in most jurisdictions in the United States, Lasix may usually be administered up to four hours pre-race.³⁵ According to the National Horsemen’s Benevolent and Protective Association (National HBPA) almost 1,000 stakeholders from the racing industry signed a public letter in support of protecting Lasix as a choice on race-day. The National HBPA quoted Steve Crist, retired Daily Racing Form Chairman, as saying the current system works well and should be maintained:

Lasix has proven to be an effective and benign therapeutic remedy for bleeding and is more humane than taking away a horse’s access to water. The current, well-regulated system of administration and disclosure works well for horses, horsemen and horseplayers alike. Criminalizing its use would be a huge step backwards for American racing and its customers.³⁶

Staci Hancock is the recipient of the 2019 Equine Advocate Award. She and her husband, Arthur Hancock III, own Stone Farm. Stone Farm has produced 161 Stakes Winners, 57 Graded Stakes Winners, 21 Grade 1 Winners, 3 Kentucky Derby Winners, 2 Preakness Winners, and 1 Belmont Winner. Hancock said, “Horses should train and race free from drugs that can mask injuries and lead to more serious injuries...We need one, nationwide rulebook that the whole industry can rely on for direction—and we believe the Horseracing Integrity Act is the best path forward.”³⁷ Hancock also stated, “We support International Federation of Horseracing Authorities rules [the international standard that prohibit(s) race-day Lasix]. We want to compete on the same level playing field as the rest of the world, and none of them allow race-day medication. We’re an outcast.”³⁸

On April 18, 2019, a coalition of thoroughbred racing organizations that represents over 85% of graded or listed stakes races announced plans to phase out the use of race-day medication. That coalition includes tracks owned by Churchill Downs, Inc., the Stronach Group (Pimlico, Laurel Park, Santa Anita), Del Mar, and Tampa Bay Downs. Under the new plan, starting in 2020, 2-year-old horses will not be allowed to be treated with Lasix within 24 hours of racing. Then, in 2021, that ban would apply to all horses listed at stakes races at coalition tracks. Because the coalition includes tracks where the Triple Crown is run, the 2021 Triple Crown would be run for the first time under the new medication rules.³⁹

Lost in the heated conversation is what the bill actually states. As Congressman Barr stated:

But again, we’re not proposing an anti-doping authority that would ban all medications, including all therapeutic medications, at all times. We’re just saying, let’s have uniform medication rules. Let’s have bright lines between permissible therapeutics and impermissible performance-enhancing drugs and doping. And let’s let the experts, a diverse cross-section of the industry, on what the rules should actually be.⁴⁰

And contrary to Steve Crist's assertion, the Authority does not have the power to impose criminal sanctions.⁴¹

CONCLUSION

Currently, horseracing in the United States has a fundamentally flawed system that creates problems. There are thirty-eight different racing jurisdictions, each with their own rules, regulations, testing protocols, and sanctions. The opportunity to cheat is easy. There is little to no uniform out-of-competition testing and no national investigative arm. The rules and regulations on medications are not in line with the International Federation of Horseracing Authorities, which makes it difficult for horses to race outside of the United States.

As the Jockey Club noted:

Racing's current state-by-state structure for rule promulgation, passage and enforcement makes it impossible for a level playing field to exist across the country and too easy for Thoroughbreds to be subject to the nefarious actions of cheaters who are trying to beat the systems in each state and stay a step ahead of regulators and laboratories. From every angle, racing is failing to regulate itself.⁴²

Industry groups and state commissions have promised reform for decades. Yet, the rule-making process is slow and nothing of substance has been achieved.

Opponents of the bill argue for the status quo. However, the status quo is not sustainable. It is dangerous for horses and jockeys. The American public is losing faith and confidence in racing. The Horseracing Integrity Act of 2019 addresses the problem. It creates an independent, private, non-profit, self-regulatory authority that is not part of the government and has industry representation. It will not be funded by taxpayers, but rather be funded entirely by the horse racing industry. It will create a harmonized set of nationwide rules that are clear and consistent. And it is gaining momentum. At the time that this article was being written, 167 members, more than a third of the House of Representatives have signed on as co-sponsors of the bill. Over 53,000 people have signed a petition from the Coalition for Horse Racing Integrity calling for passage of the bill and 135 of horseracing's leading trainers support the bill. The HIA is needed to protect the health and the welfare of the horses. And it may be the last best chance. ■

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