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Supreme Court Vindicates Racehorse Trainer Convicted Of Doping

Things were looking bleak for Thoroughbred racehorse trainer Murray Rojas after a jury convicted her of federal charges of misbranding animal drugs and she was sentenced to 27 months in prison for what prosecutors characterized as a far flung "doping" scheme to enhance the performance of horses competing at Penn National Race Track in Pennsylvania. Although she was allowed to remain free on bond pending resolution of her appeal, the prospect of relief was not looking great after the United States Court of Appeals for the Third Circuit affirmed her conviction and rejected all the assignments of error that she raised. From the outset, Rojas had argued that the government's theory of prosecution was entirely misplaced and while she may have violated state rules of racing, the way veterinarians administer drugs to horses does not create criminal liability for the trainer.

The prosecution used the charging documents in the case to characterize Rojas as a major player in an illegal doping scheme, and initially charged her with six counts of wire fraud, one count of conspiracy to commit wire fraud, thirteen counts of felony misbranding of animal drugs, and one count of conspiracy to commit misbranding of animal drugs. While some individuals facing similar charges pled guilty, Rojas took her case to a jury, despite the threat of significant prison time if convicted.

But a jury mostly agreed with Rojas' defense and acquitted her on all the wire fraud charges. At trial the government had introduced no evidence that Rojas had "dispensed" animal drugs by selling, transferring, or delivering them to another person. Instead, the government rested its entire case against Rojas on evidence that she had administered or directed veterinarians to administer veterinary drugs to horses in her care.

Rojas maintained that "administration" of the drugs to the animals was not the same thing as "dispensing" them, but the prosecution was consumed by the absence of a veterinarian's "prescription" and made the lack thereof the crux of its argument in favor of conviction. Both the trial court and the Third Circuit Court of Appeals sided with the prosecution and held that under federal law, a veterinarian personally administering a drug was "dispensing" it, and that doing so without an accompanying "prescription" violated federal law.

Rojas, her attorneys, and many familiar with the management of performance horses steadfastly maintained that the theory of prosecution illustrated a basic misunderstanding of how trainers and veterinarians interact when caring for the equine athlete. Indeed, in taking her case to the United States Supreme Court, her petition for review began with the statement: "This is the latest in a line of federal criminal prosecutions that should have never been brought." Rojas argued that the federal law was not intended to regulate the practice of veterinary medicine and that nearly 80 years of precedent established that when Congress used the term "dispensing" in the context of regulating commerce in drugs, it did not mean to "sweep in the act of administering drugs to patients." Simply put, Rojas argued that it is no crime for a licensed veterinarian to personally inject a horse with drugs without issuing an accompanying prescription.

Thankfully, but somewhat miraculously, the government conceded the error. In its response brief filed with the United States Supreme Court, the Solicitor General's office formally agreed with Rojas' argument and asked the Court to grant Rojas' petition for review and vacate the judgment below. "The government now acknowledges that a veterinarian who personally injects a drug into an animal under her direct care in the course of her professional practice, without first issuing a written or oral order, has not engaged in misbranding under [federal law]." The government stipulated the error committed by both the trial court and the Third Circuit Court of Appeals.

Faced with the government's concession of error, the United States Supreme Court granted Rojas' petition and sent the case back to the lower court for further proceedings. In the final analysis, Rojas will not go to prison for something that was never a crime to begin with. *Rojas v. United States, No. 20-1594 (Supreme Court of the United States) (11/1/21)*

Further Laboratory Testing Of "Medina Spirit" Sample Appears To Vindicate Baffert

Litigation inevitably followed the announcement that the winner of the 2021 Kentucky Derby, Medina Spirit, failed a postrace drug test that revealed the presence of betamethasone, a corticosteroid commonly found in all kinds of compounded medications used to treat horses. But it is also a substance that can be injected into the joints of horses with the purpose of reducing inflammation and pain response. For this reason, it is highly regulated in racing. But when racing officials suspended Medina's Spirit's trainer, Bob Baffert, he steadfastly maintained that the horse's exposure to the substance was not due to a prohibited joint injection, but due to a topical application of "Otomax" to treat a skin infection.

Litigation ensued in both state and federal courts after other racing jurisdictions afforded reciprocity to the Kentucky suspension. Baffert's lawyers negotiated for the samples taken from Medina Spirit to undergo further testing to determine the exact substance detected therein: what kind of betamethasone was it? Baffert's lawyers confidently argued that the samples would show the presence of betamethasone valerate (from the topical ointment), and not betamethasone acetate (from the injectable form). Recent public announcements indicate that their confidence was justified.

Baffert's lawyers further argue that the presence of betamethasone valerate is not a rules violation because that specific substance is not regulated in Kentucky's rules of racing. Whether this argument will resolve the matter remains to be seen.

What Rights Are Afforded By An "Owner's" License?

In an unpublished opinion, the United States Court of Appeals for the Tenth Circuit has weighed in on the rights attendant with an owner's license granted by the New Mexico Racing Commission ("Commission").

The case arose when the Commission suspended a horse trainer after one of his horses tested positive for a controlled substance. Typically, horses trained by individuals suspected of illegally drugging their horses are ineligible to be transferred to other trainers, but in this case the Commission's executive director allowed the transfer of the trainer's horses to other trainers "in the spirit of fairness." Two of those transferred horses then competed in a qualifying race and placed well enough to qualify for the All American Futurity Race. But their participation and placings meant that other lower placing horses in the field did not qualify for the Futurity. The owners of one of the non-qualifying horses filed a lawsuit in federal court, alleging due-process and equal-protection violations.

The owners argued that the Commission's decision to allow the transfer of the horses to other trainers, thus enabling the transferred horses to compete in the qualifier, caused their horse to be "kicked out of the top five" because, had the Commission barred the transferred horses from racing, their horse would have placed in the top five (and thus qualified for the Futurity with its $3 million purse). The owners argued that the Commission's decision thereby impacted their "ability to earn a living." The trial court dismissed the lawsuit, and the owners appealed.

On appeal, the Tenth Circuit considered the trial court's ruling that the owners had not articulated what "clearly established constitutional right" they held by virtue of their owner's license.

The owners framed the right at issue as their "right to engage fairly in one's profession," relying on Supreme Court precedent that a horse owner has a constitutionally protected property interest in their racing license of which they cannot be denied without due process of law. But the Tenth Circuit explained that they had not been deprived of their right to own horses or engage in racing. "They competed in the qualifying race for the Futurity—they simply failed to place" well enough to qualify.

Holding that there is no "clearly established" right to race in, or win, a specific race, the appellate court affirmed the lower court's dismissal of the owners' lawsuit.

The appellate court's decision does not address what would logically be the underlying due process challenge: that the denial of due process resulted from the Commission excluding the owners from participating in the decisional process that resulted in allowing the transferred horses to participate in the race. *Gotovac v. Trejo, No. 20-2143 (10th Cir.) (10/20/2021)*

Trainer Denied Stay Of 60-Day Suspension

Is a 60-day suspension too short to warrant a stay?

Yes, was the basic message from a court in Delaware.

A racehorse trainer licensed in Delaware was surreptitiously videoed by an employee while resorting to some unorthodox training methods on an "extremely unruly" horse. According to the court, the video shows the trainer prodding the horse with a rake, causing the horse to flip over. The horse was not injured, but when the trainer and employee had a "falling out," the (now former) employee turned the video over the Stewards at Delaware Park who "obviously took a dimmer view of what happened" and imposed a "substantial" suspension on the trainer's Delaware license. The trainer appealed and the state Racing Commission reduced the sanctions to a suspension term of two months. But because racing jurisdictions afford reciprocity to sanctions imposed extra-jurisdictionally, the trainer was effectively suspended from racing in every state. She sued the Delaware Racing Commission seeking court review of the suspension and an emergency stay.

Cobb v. Del Thoroughbred Racing Comm'n, No. N21A-07– 005 (Superior Court of Delaware, New Castle) (8/17/21)

The court noted that to prevail on her application for a stay the trainer would have to show that the stay would prevent her from suffering some otherwise "irreparable harm." The court held "suspension or loss of licensure is not, standing alone, an irreparable harm," and observed that the "unflattering" video was likely to cause more harm to the trainer's reputation than the fact of a license suspension. Noting that it had no authority to prevent the dissemination of the video via social media, the court denied the stay application, commenting: "She is already 30 days into a 60-day suspension. It is difficult to perceive what more harm will be visited upon [her] by an additional 30 days' suspension."

Similar Facts, Same Result: Court Denies Trainer Relief From 60-Day Suspension

Given the court's posture in *Cobb v. Delaware Thoroughbred Racing Commission* (reported above), it is unsurprising that less than ten days later the court took exactly the same position when a different trainer came before the court seeking a stay of a 60-day suspension: stay denied. The court just couldn't get excited about the trainer enduring a forced two-month vacation.

In *Spanabel v. Delaware Thoroughbred Racing Commission*, the trainer was set down by track stewards for 60 days after they determined the trainer had submitted a falsified power of attorney. The Commission held a hearing on the matter and affirmed the term of suspension imposed by the stewards. The trainer then appealed to court and sought a stay of the suspension, contending that "without a stay, she will be forced to leave where she is currently residing, and she and her horses will have nowhere to go. . . . Her business will be destroyed, and her employees will be 'denied a living' [and] she will never be able to work again."

The court rejected the trainer's cataclysmic view of her situation, finding "the loss of a license alone does not amount to irreparable harm" and that the trainer would be free to resume training with her license after two months. The court was unmoved by the trainer's claim and even pointed out that the original suspension was set to begin in June, and had been stayed by the Commission for almost two months: "it appears that [she] took no action to prepare for the possibility that the Commission would uphold the suspension." *No. N21A-08-002 (Superior Court of Delaware, New Castle) (8/26/21)*

Horse Breeder Lacks Standing To Challenge Unadopted Gaming Rule

Few people like change. And, when bulldozers get involved, lawsuits get filed. And so it was that horsemen were up in arms when the grandstand at Florida's Calder Race Course was demolished.

But the demolition was symbolic of an even larger shift in racing. Calder Race Course opened with much fanfare in 1971, but its popularity and that of horse racing as a spectator draw waned in the decades that followed. By the time the new century rolled around, ownership and management of the racecourse had changed hands and slot machines were not only "all the rage," but became the profit centers for racetrack operators.

Around 2010, Churchill Downs, Inc. (then the owner of Calder), introduced casino gaming at the track, but the state gaming license required them to offer 40 days of live racing. This requirement gave horsemen hope that Calder would continue to operate horse races, even though Gulfstream Park was operating nearby. By 2014, both tracks shared the same management, with Churchill Downs, Inc. leasing Calder to the Stronach Group and rechristening Calder as "Gulfstream West."

But the track operator believed it found a loophole in the law that would let it keep the slot machines and dump the horses: video livestreaming.

So, down came the Grandstand — the seven-story structure from which patrons watched live horse racing. Now Calder had no facility to support in-person spectating. "Post-demolition, Calder's primary viewing (and betting) area is located in front of the final stretch of the racetrack, at a location called the 'apron.' The apron is an open-air area with outdoor seating, wagering machines, video screens, and a collapsible canopy tent. A concrete walkway connects the apron to Calder's slot machine building; patrons need not step on grass; cross a parking lot, street, or waterway; or leave Calder's property to reach to slot machine." And nary a live horse in sight.

The Florida Horsemen's Benevolent and Protective Association, which represents licensed horse trainers and owners, joined by another Florida corporation in the business of breeding thoroughbred racehorses ("the breeder"), filed a lawsuit in Florida state court challenging the state's slot machine gaming license. The gist of the claim was that in the absence of the Grandstand, Calder no longer had a live gaming facility that was contiguous and connected to its slot machine gaming area. In essence, the lawsuit challenged the legitimacy of the loophole track operators believed justified their decision to raze the Grandstand.

After losing the argument in 2019, the Florida Horsemen's Benevolent and Protective Association dropped out of the litigation and left the fight to the breeder to pursue.

The breeder went back to court, filing a petition alleging that the state should not have renewed Calder's slot machine gaming license for the 2019-2020 fiscal year in the absence of live racing at the track. Although the breeder's challenge initially seemed to have gained traction, all headway was lost by the time the matter got before a state appellate court. On appeal, the court ruled that the breeder lacked standing to sue. In short, the court rejected the breeder's interest and motivation, finding its claim that it would suffer an "indeterminate degree" financial injury without live racing at Calder was insufficient to give it a path to court. "The statutory framework at issue here — governing the structures and geographic relationships between live gaming facilities and slot machine gaming areas — was not set up to provide economic inducements for Florida breeders like [the petitioner]." *Calder Race Course, Inc. v. SCF, Inc., No. 1D20-1185, 1D20-1189 (Court of Appeal of Florida, First District) (8/19/21)*

"Business Interruption" Coverage Does Not Apply To Economic Losses Caused By Pandemic Closures Of Live Racing

The company that operates a thoroughbred race track in Phoenix, Arizona, called "Turf Paradise," failed in its attempt to claim insurance coverage for the financial losses it suffered as a result of COVID-19 pandemic related closures.

The company had operated the racetrack without interruption since 1956. Prior to the fall of 2019, it had purchased an insurance policy which afforded coverage during the time period including the pandemic. The policy provided limited coverage for business interruption losses. The pandemic and the resulting Governor's Executive Order forced the closure of the track and the company's off-track betting parlors for many months, with capacity restrictions in place for more than a year. It is no surprise that the company lost income and looked to insurance to cover its losses.

TP Racing, LLLP v. Am. Home Assur. Co.,
No. CV-21-00118-PHX-SRB
(USDC, Arizona) (10/13/21)

But the insurer denied the company's claim, taking the position that without any "direct physical loss or damage," the business interruption coverage was not triggered. In other words, the coverage was intended to compensate for business interruption caused by natural disasters (like storms) that resulted in physical damage to the premises.

The company argued that "because COVID-19 particles are 'difficult to eliminate' and physically alter property by their presence, rendering the property unsafe for occupants, the particles cause direct physical damage." The court disagreed, holding that "the physical presence of COVID-19 droplets on business premises does not, without more, qualify as direct physical loss or damage to that business." In affirming the insurer's denial of the claim, the court pointed out that Arizona caselaw distinguishes circumstantial loss of use from "direct physical loss or damage," and commented that the cases relied upon by the company were "unpersuasive outliers." While expressing sympathy for the difficult situation faced by the thousands of businesses affected by the COVID-19 pandemic, the court found the insurance policy simply did not cover the losses incurred by the company.

Racing Commission Can Consider Expunged Conviction

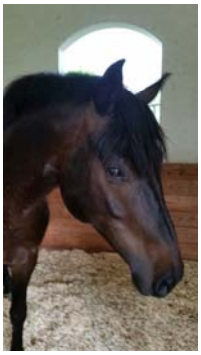
A New Jersey court has decided that an expunged conviction is relevant to the racing commission's assessment of a licensee's "integrity" and "character."

A trainer was convicted in the 1990's of conspiracy to promote gambling, which conviction was expunged in 2010. In 2003 and 2004 — before the conviction was expunged — the trainer submitted applications to the New Jersey Racing Commission to be licensed as an owner and driver/trainer. Those applications required him to disclose that he had been convicted of a crime, but the trainer failed to identify his gambling conviction on either license application. He was granted a license in 2003, but when a background check revealed the conviction, the 2003 license was revoked and his application for a 2004 license was denied.

According to the court, the trainer then operated at his mother's farm and the track without a license of any kind until he got caught up in a routine inspection in 2018. After refusing to provide his last name to a commission investigator, he was cited with numerous violations. After a hearing, he was suspended for two years and fined. He appealed, but while the appeal was pending he applied for a groom's license — which application was denied, at least in part, on the basis of the now expunged criminal conviction.

The court found no error in the denial of the groom's license, noting "we do not believe a licensing agency is categorically precluded from considering an expunged conviction." *Colasanti v. N.J. Racing Comm'n, No. A-2795-19, A-3291-19 (Superior Court of New Jersey, Appellate Division) (8/31/21)*

Zoetis Can't Escape Lawsuits For Injectable Antibiotic, "Excede"



With one federal lawsuit pending in Virginia, another products liability lawsuit has been filed in Pennsylvania alleging that the injectable antibiotic "Excede" is dangerous. The Pennsylvania lawsuit against pharmaceutical giant Zoetis Inc. alleges that injections of Excede caused the sudden death of a racehorse filly who was treated with the antibiotic to "address a minor puncture wound." The filly's owners filed a ten count complaint, raising claims for negligence, strict liability, breach of express warranty, breach of the implied warranty of merchantability, fraudulent misrepresentation and concealment, and negligent misrepresentation. The filly's owners claim they sustained damages exceeding $1.8 million.

According to the pleadings, the filly's owners claim Zoetis was aware of horses having similar adverse reactions to Excede injections, but "willfully, intentionally, maliciously and negligently ignored the risks associated with injections of the drug and failed to adequately warn of those dangers." Specifically, the owners alleged that nearly 600 adverse reactions, including some with fatal outcomes, had been reported to Zoetis between 2012 and 2020. Despite having this information available to it, the lawsuit claims that Zoetis has failed to make any changes to its labeling "to adequately warn consumers of the dangers of Excede," and that it "continues to extensively market the product as being superior to traditional courses of antibiotic treatment for injured horses.

Zoetis responded to the lawsuit by filing a motion to dismiss.

The court held that under Pennsylvania law, strict liability claims are not cognizable against a prescription drug manufacturer. Accordingly, it dismissed with prejudice the owners' strict liability claims for failure to warn, defective design, and manufacturing defect. The court also dismissed with prejudice the breach of implied warranty of merchantability claim on the grounds that this claim was "essentially the same" as the strict liability claims that it was dismissing.

The court agreed with Zoetis that the remaining counts suffered from "pleading inadequacies," and while dismissing the remaining claims it did so "without prejudice" and afforded the owners leave to amend their complaint to conform to the legal requirements outlined by the court in its decision.

Foge v. Zoetis Inc., No. 2:20-cv-01462-RJC (United States District Court for the Western District of Pennsylvania) (9/30/21)

Creditor Has No Claims Against Purchasers Of Equine Collateral

Sometimes, a "secured" creditor's interest ends up being not so secure. When a debtor disposes of collateral in violation of a financing agreement, the creditor isn't always willing to accept the blame for losing track of the horse after watching it walk out the open barn door.

In 2016, an investment group loaned Zayat Stables $30 million pursuant to a financing agreement which secured the loan with all of Zayat's "equine collateral" — defined as expansively as lawyerly possible. Under the financing agreement, Zayat was obliged to report to the investment group ("creditor") any sale of "equine collateral," and was also obliged to use some of the proceeds of any sale to pay down the loan balance.

Zayat defaulted on the loan in 2019, and had engaged in a pattern of selling ownership interests in stallions and breeding rights it owned without giving notice to its creditor, and without using the proceeds from those sales to pay down the loan balance.

In addition to suing Zayat, the creditor sued the purchasers of the "equine collateral." In their defense, the purchasers argued that they were buyers "in the ordinary course of business" and lawfully took the horses or breeding rights free of the creditor's security interest. The trial court sided with the purchasers and dismissed the creditor's claims. The creditor appealed.

The Court of Appeals of Kentucky affirmed the dismissal of the creditor's claims against the purchasers, explaining that the horses and breeding rights were "considered farm products," despite the fact that the animals in question were thoroughbred racehorses and not workhorses that pulled a plow. The court held that federal law shifted the "potential burden of loss in cases of the sale of farm products to the lenders who finance farm operations, rather than have that burden imposed upon buyers." The court chastised the creditor, pointing out that had it "exercised reasonable diligence, it would have discovered" what Zayat was doing: "[the creditor's] failure to exercise the inspection rights [it reserved in the financing agreement] is fatal to any claim that the injury it suffered was 'inherently unknowable'." *MGG Inv. Group, LP v. Mull Enters., No. 2020-CA-0478 etc. (Court of Appeals of Kentucky) (11/12/21)*

Courts Can't Reach Horses Located Out-Of-State

A federal trial court in Texas has ruled that it cannot issue a writ of execution to seize horses located in New Hampshire.

The case involved a judgment creditor who had secured a judgment from the Texas court in excess of $135,000 that, after more than a year, had not been satisfied. The creditor went back to the court to get its assistance in seizing the debtor's assets that it intended to apply to satisfy the judgment. Among the debtor's assets the creditor hoped to seize were two horses located in New Hampshire.

The parties focused their respective arguments on what state's law applied to determining whether the horses were or were not subject to execution. Resolving this question involved considering whether or not the particular horses were being "used as farm animals."

But the court found these arguments to be a red-herring and refused to be distracted from the more essential question of whether Texas law permits a court to issue a writ of execution extraterritorially. The court explained that if the court lacked the authority to issue the writ, then whether or not the horses were exempt from execution "does not matter."

The court held that because a writ of execution is a "creature" of statutory law, and "statutes of a state have no extraterritorial force," a writ of attachment to any officer outside of the state would be void. The court relied on the background principle that "*in rem* actions do not extend beyond state borders" and "attachment proceedings are essentially *in rem* actions because they result in control of property. This logic applies as well to writs of execution." The horses are safe in their stalls for now. *Carmack v. Park Cities Healthcare, LLC, No. 3:16-CV-3500-D (USDC, N.D. Texas, Dallas Division) (9/10/21)*

Appellate Court Reinstates Personal Injury Lawsuit Against Dude Ranch

The Court of Appeals of Arizona recently reinstated the personal injury lawsuit of a woman who sued a dude ranch for injuries she suffered after being kicked by another rider's horse while on a guided trail ride.

According to the court, the woman and her husband went to a dude ranch in Arizona a signed up for a guided 90-minute trail ride. Prior to participating on the ride, they signed a liability release agreeing not to sue if they were injured.

"In all, the riding party had nine guests and a wrangler named Flint, who had over 30 years experience with horses and wild animals but lacked formal training as a wrangler. [The husband] heard a second wrangler should have been present, but he called in sick. The guests received basic safety instructions on how to make directional use of the reins and how to turn or stop a horse, but they received no instruction on the proper distance to maintain between horses. After mounting her horse, [the wife] complained it would not stay in line. Flint said not to 'worry about that [because] they'll fall in line when we start going.' The horses and guests then ambled onto the trail in single file behind Flint. During the ride, the horses drifted apart, creating gaps between them. About an hour in, [the husband] lost his stirrup, and a horse bit his leg. Flint paused the trail ride to respond. As the horses slowed to a halt, the horse in front of [the wife] kicked her shin and broke her tibia." Husband and wife sued, asserting claims of negligence, gross negligence, loss of consortium and punitive damages.

The dude ranch asked the trial court to dismiss all of the couple's claims, relying on the liability release and arguing that there was no evidence to support the claim of gross negligence. The trial court agreed and dismissed the case. The couple appealed.

The appellate court reversed the lower court's ruling and reinstated the case. In sending the case back to the trial court, the appellate court observed that the liability release didn't quite say exactly what the dude ranch thought it did. The court found that the document relied upon by the dude ranch did not meet the requirements of a "release" as defined by Arizona's equine activity liability act, and that the plain terms of the document released the dude ranch only from claims resulting from the participant's own negligence, and preserved the participant's right to sue the dude ranch for damage or injury that was due to its negligence.

The appellate court went on to find that the trial court was flat wrong about there being no evidence that the dude ranch had been negligent or grossly negligent. The appellate court noted that the couple's expert witness was prepared to testify that the dude ranch had deviated from industry standards when it allowed just one wrangler to lead and supervise nine riders. The expert was prepared to testify that the wife "probably" would not have been injured if the dude ranch had met the standard of care. The appellate court concluded that even the evidence of gross negligence was more than conjecture, and Flint's deposition testimony that "he could not recall the last time he had looked back at the line before the accident and . . . was unaware of developments behind him" created a question that was properly decided by a jury.

The case was sent back to the trial court for further proceedings. *Gruver v. Wild Western Horseback Adventures, LLC, No. 1 CA-CV-20-0566 (Court of Appeals of Arizona, Division One) (8/17/21)*

Passenger Injured On "Shore Excursion" Trail Ride Cannot Sue Cruiseline and Trail Ride Operators In Same Action

If a passenger on a cruise gets hurt on a shore excursion trail ride, where to sue? The cruise operator's business was based in Florida, and so it made sense to sue there. But the ill-fated trail ride occurred in Alaska, and a federal court has held that the Alaskan trail ride operator could not be sued alongside the cruise operator in Florida.

The passenger was a New York resident who embarked on a cruise operated by a foreign company with its principal place of business in Florida. While docked in Alaska, the passenger booked and paid for a horseback riding "shore excursion" through the cruise operator's app. While on the trail ride, the horse the passenger was riding began "fighting" with another horse in the group. The passenger was thrown off the horse and landed on the ground, resulting in severe injuries including several nondisplaced fractures. The passenger's injuries were allegedly worsened by the lack of appropriate medical care from the ship doctor on board. The passenger filed suit against both the trail ride operator and the cruise operator in federal court in Florida.

The trail ride operator asked the court to dismiss it from the lawsuit on the grounds that the Florida court lacked jurisdiction over it. The trail ride operator argued that though it accepted bookings through the cruise operator's app, this was not enough "contact" with the state of Florida to allow it to be sued there.

The court considered the service agreement between the trail ride operator and the cruise line, in which the parties to that contract consented to submit to the exclusive jurisdiction of the United States District Court for the Southern District of Florida. The court determined that since the contract did not give rise to the injury sustained by the passenger on the trail ride, neither did it confer specific personal jurisdiction over the trail ride operator generally. Likewise, the court held that the trail ride operator's "indirect contacts with the state of Florida through its relationship" with the cruise line operator were insufficient to confer general personal jurisdiction over the trail ride operator.

The injured passenger's claims against the trail ride operator were dismissed for lack of jurisdiction. *Giuliani v. NCL (Bah.) Ltd., No. 1:20-cv-22006 (USDC, S.D. Florida) (9/8/21)*

Communications With Equine Lawyer Not Privileged

It is not unusual for lawyers specializing in equine law to be actively involved in equestrian sport, and as a result they are likely to be called on to lend their expertise on matters involving the sport. But one group learned the perils of asking for advice without paying for it. A federal court in Florida was recently asked to consider whether communications with an equine lawyer, outside the scope of a formal engagement, were privileged. The answer: they were not.

The lawyer was heavily involved in equestrian sport and joined the board of a company that was developing and planning to launch professional horse jumping league. At one point, the lawyer presented the company principals with a representation agreement that set forth the terms under which the company would retain his law firm. The company never signed the agreement and never formally retained the law firm, although the lawyer remained on the board and was allegedly heavily involved in the company's jumping league project, providing not only "legal advice with respect to franchise law requirements, securities laws, disability compliance and potential litigation positions and strategies," but utilizing his firm's resources to provide research support and draft legal documents." When the company sued a competitor for allegedly stealing its jumping league concept, the defendants issued a non-party subpoena to the lawyer. The lawyer and the company objected to the lawyer's production of certain documents, claiming attorney-client privilege.

The court considered federal common law governing the attorney-client privilege to determine whether the company had a "reasonable" belief that it had "consulted the attorney with the manifested intention of retaining him for legal services." The court held that the company's failure to sign any version of a written fee agreement, after one had been submitted to it by the lawyer's firm, was proof that no one had any reason to think an attorney-client relationship had been formed. "Plaintiffs cannot have secretly and privately retained" the lawyer and his firm. The court noted that "non-legal business advice is not privileged" and "an attorney who acts as his client's business advisor . . . is not acting in a legal capacity, and records of such transactions are not privileged." *Nat'l Equestrian League v. White, No. 20-21746 (USDC, S.D. Fl., Miami) (10/17/21)*

How Tall Is That Pony?

Size doesn't matter. Or does it?

In the world of show hunter ponies, the exact height at which the pony measures is important for competition purposes because classes are divided by size designation, "small," "medium," and "large." And because each size division jumps increasingly larger obstacles, a larger animal within a size division is more valuable than a smaller one: a large-small being more desirable than a small-medium, etc.

But this doesn't mean that size is important to every buyer, so long as the animal measures as a pony (and not as a horse). To some, it is the suitability of the particular animal to the rider that is the most important factor, and as long as the pony is capable of jumping the obstacles for its height division, the exact measurement is not important.

In a lawsuit pending in federal court in California, a father is suing the sellers of a pony for which he paid $190,000 for his daughter. The father alleges that sellers and their agents fraudulently concealed from him that the pony was truly a "medium" pony, and not a "small," and that he wouldn't have purchased it had he known its true size.

Problematic to the father's claims, however, is his own trainer's testimony that whether the pony measured as a small or a medium would not have mattered to him or changed his recommendation to the father. Further problematic to the father's claim is that the pony transferred to him with an "official" small pony measurement card issued by the United States Equestrian Federation ("USEF"), and his daughter competed the pony in forty-five USEF small pony classes without protest from USEF officials.

From the complaint filed in the case, it appears that the source of the father's unhappiness was the pony's tendency to refuse jumps in competition and buck his daughter off. Upon investigating the pony's history with greater diligence after these performance issues arose, the father discovered that it had previously been registered with USEF under a different name, that it was older than he'd been led to believe, and that it measured as a "medium" even though it had a permanent measurement card allowing it to compete as a "small." The father also allegedly discovered that, unbeknownst to him, another trainer was involved in the transaction and received an undisclosed commission in excess of $500. The father relied on these revelations to argue that the sellers had engaged in a fraudulent scheme to sell him a worthless animal.

The father asked the court to decide the fraudulent concealment claim his favor in advance of trial, arguing that the sellers "were under a duty to disclose" the pony's correct age, size and former name to him prior to the sale. The court disagreed and held that there were too many facts in dispute to take any part of the father's claims away from the jury. The case is set for trial in May, 2022.

The sellers succeeded in having several of the father's claims dismissed, proving to the court's satisfaction that the father had no proof that any "undisclosed commission" was paid to any undisclosed agent.

Arroyo Escondido, LLC v. Balmoral Farm, Inc., No. 2:19-cv-08464 (USDC, C.D. California) (8/19/21)

No Fiduciary Duty Between Buyer and Seller

The United States Court of Appeals for the Ninth Circuit has reversed a lower court's ruling in a horse sales case and clarified that no part of the buyer's recovery could be based on a theory of breach of fiduciary duty because there was insufficient evidence that the longstanding relationship between the buyer and seller had ever had any "fiduciary" aspect to it.

Although the Ninth Circuit sent the case back to the trial court for further proceedings, it noted that reversal of this portion of the district court's judgment had no effect on the award of compensatory or punitive damages in favor of the buyer because the buyer had rightfully prevailed on other claims it had raised. In short, the damage award survived the seller's appellate challenge.

Ajman Stud v. Cains, Nos. 19-16779, 20-16648 (United States Court of Appeals for the 9th Cir.) (9/16/21)

While much of the seller's appellate argument was dismissed by the court as meritless, the court considered the seller's objection to the lower court's ruling on the breach of fiduciary duty claim to be "well-taken." Although the appellate court's decision is unpublished, the court's articulation of Arizona law is instructive for practitioners. The court explained that "whether a fiduciary relationship exists as a matter of fact is governed by an analysis of multiple factors, including health, age, relative sophistication of the parties, the length and nature of the relationship between the parties, and the degree of influence by one party over the other." The appellate court held that although the buyer and seller in this case "had a long-standing relationship that was a mix of personal and professional [t]here was no evidence that one party had any degree of influence over the other, or evidence that [the seller was] more sophisticated than [the buyer]."

The trial court's disposition of this case was previously reported in the Autumn 2019 issue of *Equine Law & Business Letter*.

Kentucky Law On Conversion, "Unsettled"

A federal court sitting in Tennessee applied Kentucky law in analyzing a conversion claim arising from a dispute over the possession of a broodmare. The court found that Kentucky law applied to the conversion claim because the transfer of possession from one party to the other took place in Kentucky. The court held that the claim for conversion of the mare's foal would also be governed by Kentucky law, since the broodmare was pregnant with the foal at the time the custody transfer occurred.

The case arose from verbal agreement for the custody transfer of a pregnant broodmare, and the owner's subsequent proposal to amend its terms. When the transferee did not agree to the new deal, the original owner filed a police report against the transferee claiming she had stolen the mare. Although the criminal case was never prosecuted, the transferee filed suit against the original owner, seeking to enforce the terms of the original verbal agreement. The original owner countersued for breach of contract and conversion. The transferee asked the court to dismiss the conversion counterclaims.

In this published opinion, the trial court explained that "the elements of conversion remain unsettled under Kentucky law" but that "modern courts employ a seven-factor test, examining whether "(1) the plaintiff had legal title to the converted property; (2) the plaintiff had possession of the property or the right to possess it at the time of the conversion; (3) the defendant exercised dominion over the property in a manner which denied plaintiff's right to use and enjoy the property and which was to defendant's own use and beneficial enjoyment; (4) the defendant intended to interfere with the plaintiff's possession; (5) the plaintiff made some demand for the property's return which the defendant refused; (6) the defendant's act was the legal cause of the plaintiff's loss of the property; and (7) the plaintiff suffered damage by the loss of the property." In denying the motion to dismiss the conversion counterclaim, the court held that each element of the conversion claim had been adequately pled. *Selby v. Schroeder, No. 2:20-cv-00016 (USDC, M.D. Tennessee, Northeastern Division) (10/18/21)*

Notable Changes to Minor Athlete Abuse Prevention Policies, Effective January 1, 2022

Press Release From US Equestrian

Press Release by US Equestrian Communications Department | November 9, 2021

Dear USEF Members,

Thank you all for supporting USEF's efforts to ensure a safe environment for all our athletes and participants. We all have an important role to play. To this end, we want to take a moment to inform you about changes to the Minor Athlete Abuse Prevention Policies (MAAPP) that go into effect January 1, 2022.

As a reminder, the MAAPP were developed to limit on-on-one interactions between minor athletes and adults as a strategy to minimize opportunities for grooming behaviors and abuse. As participants in equestrian sport, we are all bound by the MAAPP and are duty bound to report any violations.

The most notable change to the MAAPP is that the limits regarding one-on-one interactions between minor athletes and adults will now apply at both USEF sanctioned events AND for in-program contact that occurs outside of USEF sanctioned events such as practices, training sessions, clinics, pre/post-competition outings, travel, team building and celebrations.

Please take a moment to read the full revised MAAPP and the 2022 USEF Safe Sport Policy. The U.S. Center for SafeSport has also made free training available for parents, coaches, athletes and other stakeholder groups introducing the new elements for the 2022 MAAPP. Preregister for all two-hour trainings (times are Mountain) and check back monthly for more training dates.

✦ **Parents**
Nov 8, 2021 05:00 p.m. MT
Dec 13th, 2021 5:00 p.m. MT

✦ **Adult Athletes**
Nov 19, 2021 11:00 a.m. MT
Dec 2, 2021 5:00 p.m. MT

✦ **Coaches**
Dec 9th, 2021 4:00 p.m. MT

✦ **Administrators**
Nov 30, 2021 3:00 p.m. MT
Dec 16th, 2021 11:00 a.m. MT

As a reminder, members are required by law to report any allegations of child abuse, including child sexual abuse, to the authorities and then to the U.S. Center for SafeSport. Allegations of non-sexual abuse and MAAPP violations should be reported to USEF. Details about how to report allegations can be found [on USEF's website].

Thank you again for all you do to support all aspects of USEF Safe Sport program and the safety of all equestrians. If you have any questions about the program, or requirements, please contact Sarah Gilbert at safesport@usef.org.

Sincerely,

Thomas F.X. O'Mara, President
William J. Moroney, CEO

FEI Tribunal Accepts Explanation, "My Groom Peed In The Stall"

When a sport horse tests positive for a prohibited substance, it is not that unusual for the offered explanation of contamination to assert that a groom taking a prescription medication urinated in the horse's stall.

What is more surprising is that the scientific experts in the employ of a governing body would agree that any "pee theory" of contamination is plausible.

But that's exactly what happened in the case of the horse Spootnick Davril (FEI ID 104YN31/BEL), ridden by Raoul Ronsmans (FEI ID 10014170/BEL). The horse tested positive for the Banned Substance O-desmethylvenlafaxine, following samples taken at the CEI2*70 + (2) Monpazier (FRA), on 27-29 August 2021.

The athlete explained that the positive test result probably came from the actions of his groom, who had urinated in the stall of the horse during the above mentioned Event, while taking an anti-depressant medication containing the Banned Substance.

In its Final Decision, the FEI Tribunal noted that the FEI's own scientific experts agreed that the athlete's explanation was plausible, particularly given that the medication dose taken by the groom was high, and the level of the substance detected in the horse was quite low. The FEI's experts noted that it was possible that the substance had entered the horse's system after it had consumed hay or straw on which the groom had urinated.

The Tribunal also noted that it had had similar cases and plausible urination explanations over the years, and that it typically did not impose sanctions in these situations. It accepted the agreement reached between the FEI and the athlete, according to which the athlete bears no fault or negligence for the Rule Violation and therefore would not serve any period of ineligibility nor incur any fines.

FEI Announces Tribunal Decisions In Two Horse Abuse Cases

Press Release: 25 October 2021 Author: FEI
The FEI Tribunal has issued its Final Decision in the case against Ahmed Ali Mohammed Allay Al-Naqbi (FEI ID 10114817/UAE) for alleged abuse of the horse F S Don Juan FEI ID 104SN64/UAE) at the CEI1* 100km at Al Wathba (UAE) on 8 December 2018. The case was opened by the FEI following a protest lodged by a third person. Video footage showed the athlete repeatedly kicking the horse and flicking the reins from one side of the neck to the other. As this caused the horse unnecessary mental and physical discomfort, this constituted an Abuse of the Horse as per Article 142 of the FEI General Regulations.

The athlete has been suspended for six months from the date of the decision (22 October 2021) and was also fined CHF 1.500 and asked to pay costs of CHF 500. The results of the athlete/horse combination at the event have been disqualified. The parties can appeal to the Court of Arbitration for Sport (CAS) within 21 days of receipt of the decision. The full Decision is available on FEI's website.

Press Release: 04 October 2021 Author: FEI
The FEI Tribunal has issued its Final Decision in a case of Abuse of Horse and Breach of the FEI Code of Conduct on the Welfare of the Horse. The abuse case involved the horse Allegro (FEI ID 104QY43 /GER), ridden by Andre Schröder (FEI ID 10022310 /UKR), at the CSI1* in Samorin, Slovakia 6 -9 May 2021.

FEI Officials reported to the FEI, that prior to the Grand Prix competition, the athlete used hind boots with sharp pressure points on his horse. Upon further inspection of the boots by the Chief Steward, it became visible that there were holes on the inside of the hind boots, containing sharp spikes. The athlete changed his statement a number of times and was ultimately issued a Yellow Warning Card onsite for Abuse of Horse. Further to a detailed review of the FEI Officials' Reports, the FEI deemed that the seriousness of the offence warranted additional sanctions in accordance with the FEI General Regulations.

In its Final Decision, the FEI Tribunal disqualified the horse and athlete from the competition in question, and imposed a one-year suspension on the athlete starting from the date of this decision, 29 September 2021. The athlete was also fined CHF 5,000 and asked to pay costs of CHF 2,000.

The parties can appeal to the Court of Arbitration for Sport (CAS) within 21 days of receipt of the decision. The full Decision is available on FEI's website.

Equine Doping Cases Decided By The FEI Tribunal In November, 2021

Press Release: 08 November 2021 Author: FEI
The FEI Tribunal has issued its Final Decision in an equine anti-doping case involving a Banned Substance. In this case, the horse Easy Boy 23 (FEI ID 105AF89 / ESA), owned by Andrea Alvaro (FEI ID 10114776/ ARG), tested positive for the Banned Substances Boldenone, Boldienone and Boldenone Undecylenate, following samples taken at the CSIO4* Wellington (USA), on 25 February to 1 March 2020.

The owner admitted having administered the product Anabolde to the horse, containing the Banned Substance Boldenone Undecylenate, which is prohibited at all times. She consequently admitted the violation.

The owner accepted a six months reduction of the ineligibility period. Consequently, in its Final Decision, the FEI Tribunal imposed an 18-month ineligibility period on the owner, starting the date of the decision (3 November 2021). She was also fined CHF 5,000.

The parties can appeal to the Court of Arbitration for Sport (CAS) within 21 days of receipt of the decision.

The full Decision is available on the FEI's website.

Press Release: 03 November 2021 Author: FEI
The FEI Tribunal has issued a Consent Award in an equine anti-doping case involving a Banned Substance.

In this case, a horse trained by Maria Esperanza Alonso Calero (FEI ID 10150176/ESP), tested positive for the Banned Substance Nimesulide following samples taken at the CEI1*100 Badajoz (ESP), on 22 May 2021.

The trainer admitted the rule violation and accepted the consequences. In its final decision the FEI Tribunal imposed an 18-month ineligibility period on the trainer starting from the date of the Consent Award (2 November), the provisional suspension already served shall be credited against the imposed ineligibility period. She was also fined CHF 5,000.

The full Decision is available on the FEI's website.

Press Release: 01 November 2021 Author: FEI
The FEI Tribunal has issued its Final Decision in an equine anti-doping case involving a Banned Substance.

In this case, the horse Giselle III Parisol (FEI ID 106PY18/POR), ridden by Rafael Dinis Rocha (FEI ID 10046681/POR), and treated by veterinarian Pedro Pinto Bravo (FEI ID 10091271/POR), tested positive for the Banned Substance Nandrolone, following samples taken at the CSIO3* Vilamoura (POR), 16-19 November 2020.

The veterinarian administered a product called Myodine containing the Banned Substance Nandrolone, a substance prohibited at all times for FEI registered horses. Both the athlete and the veterinarian admitted that they were at fault and had committed the violation, and accepted a six-month reduction of the suspension.

In its Final Decision, the FEI Tribunal imposed an 18-month suspension on the athlete, starting from the date of notification (12 January 2021) until 11 July 2022. The results achieved by the horse and athlete at the event were disqualified and the athlete was also fined CHF 5,000. An 18-month suspension was also imposed on the veterinarian, starting on the date of the notification (9 March 2021) until 8 September 2022. He was also fined CHF 5,000.

The parties can appeal to the Court of Arbitration for Sport (CAS) within 21 days of receipt of the decision.

The full Decision is available on the FEI's website.

FEI PRESS RELEASES ANNOUNCE TRIBUNAL'S FINAL DECISIONS IN EQUINE ANTI-DOPING CASES FOR OCTOBER, 2021

Press Release: 19 October 2021 Author: FEI
The FEI Tribunal has issued its Final Decision in two equine anti-doping cases involving a Banned Substance.

Two horses trained by Khldoon Mohd Al Sayed (FEI ID 10014556/JOR), tested positive for the Banned Substance Strychnine following samples taken at the CEI1*80 – Wadi Rum (JOR), on 14 November 2019.

The trainer was not able to establish how the Banned Substance entered the system of each horse.

In its Final Decision, the FEI Tribunal imposed a three -year suspension on the trainer, deeming that, the same trainer having two horses testing positive at the same event, constituted aggravating circumstances. The period of the provisional suspension of the trainer, which came into effect on 13 January 2020, shall be credited against the period of ineligibility, meaning he will be ineligible until 12 January 2023. The trainer was also fined CHF 7,500 and asked to pay costs of CHF 2,000. The FEI Tribunal also disqualified both athlete and horse combinations from the event.

The parties can appeal to the Court of Arbitration for Sport (CAS) within 21 days of receipt of the decision

The full Decision is available on the FEI's website.

Press Release: 12 October 2021 Author: FEI
The FEI Tribunal has issued its Final Decision in an equine anti-doping case involving a Banned Substance. The horse Bouzarika (FEI ID 106RJ34/JOR), ridden by Sameh Faris Mohammad Said (FEI ID 10040466/JOR), tested positive for the Banned Substance Strychnine following samples taken at the CEI1*80 – Wadi Rum (JOR), on 14 November 2019. The athlete was not able to provide any explanation as to how the Banned Substances entered the horse's system.

In its Final Decision, the FEI Tribunal disqualified the horse and athlete from the event, and imposed a two-year suspension on the athlete. The period of the provisional suspension of the athlete, which came into effect on 13 January 2020, shall be credited against the period of ineligibility, meaning he will be ineligible until 12 January 2022. The athlete was also fined CHF 3,750 and asked to pay costs of CHF 2,000.

The parties can appeal to the Court of Arbitration for Sport (CAS) within 21 days of receipt of the decision

The full Decision is available on the FEI's website.

Press Release: 06 October 2021 Author: FEI
The FEI Tribunal has issued its Final Decision in an equine anti-doping case involving a Banned Substance.

The horse Kassidy de Jansavis (FEI ID 104QP93/UAE), ridden by Omar Ibrahim AL Marzooqi (FEI ID 10137894/UAE) and trained by Abdul Kader Abdul Sattar (FEI ID 10032531/UAE), tested positive for the Banned Substance Diisopropylamine following samples taken at the CEI2*120 – Bou Thib (UAE), on 1-2 November 2019.

The athlete and trainer opened an investigation in order to discover the source of the banned substance found in the horse. The investigation revealed that the horse had been receiving supplement injections and that there had been a mix-up with the products administered, which led to the horse testing positive.

In its Final Decision, the FEI Tribunal disqualified the horse and athlete from the event, and imposed a two-year suspension on the athlete. The period of the provisional suspension of the athlete, which came into effect on 2 December 2019, shall be credited against the period of ineligibility, meaning he will be ineligible until 1 December 2021. The athlete was also fined CHF 5,000 and asked to pay costs of CHF 2,000.

The FEI Tribunal also imposed a four-year suspension on the trainer as this was his second equine anti-doping rule violation committed within the ten years span. The period of the provisional suspension of the trainer, which came into effect on 2 December 2019, shall be credited against the period of ineligibility, meaning he will be ineligible until 1 December 2023. The trainer was also fined CHF 12,000 and asked to pay costs of CHF 3,000.

The parties can appeal to the Court of Arbitration for Sport (CAS) within 21 days of receipt of the decision

The full Decision is available on the FEI's website.

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Equine Activity Legislation

48 STATES HAVE SOME FORM OF EQUINE ACTIVITY LAW limiting the liability of equine activity sponsors for accidents resulting from risks inherent to the sport.

The only two states with no such law are California and Maryland.

The Current List:

Alabama, Alaska, Arizona, Arkansas, Colorado, Connecticut, Delaware, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, Washington, West Virginia, Wisconsin, Wyoming.

Passage of equine activity liability acts gained momentum in the 1990's

Most, but not all, states require very specific language to be included in contracts or on signs that must be posted in visible locations where equine activities are occurring. It is important to know what the requirements are for states in which you engage in equine activities.