Out-Of-Competition Drug Testing:

Good Idea Or Bad Idea?

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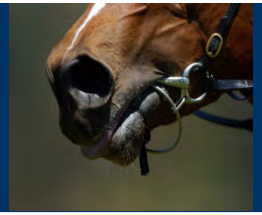
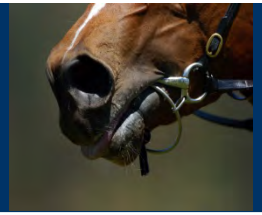


JUSTIFICATION FOR OUT-OF-COMPETITION DRUG TESTING RULES:

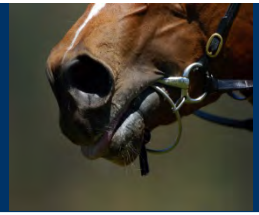
Based primarily on general premise that efficacy period for performance enhancing substances exceeds detection period for such substances.



Out-Of-Competition Drug Testing

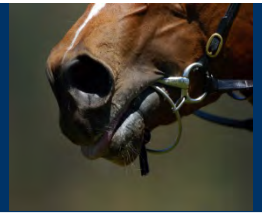
For example, New York's "Regulatory Impact Statement" for out-of-competition testing rule explains:

> "Despite advances in drug testing procedures and equipment, certain drugs and substances are still difficult (if not impossible) to detect, including certain blood doping agents and gene doping agents. In the case of blood doping agents, the time frame for detecting these substances is limited, but the performance-enhancing benefits of the agent remain with the horse long after the detection period has passed. To evade testing, an unscrupulous owner or trainer only needs to stable a horse off of the race track grounds, administer the doping agent, and bring the horse to the track on the day of the race, **well after the time for detection has passed** but well within the time frame for enhancing the horse's performance."



Out-Of-Competition Drug Testing

The **fairness and legality** of specific equine drug testing rules – and not the wisdom of drug testing in general – should determine whether any particular regulatory testing scheme is a “good idea” or a “bad idea.”



Out-Of-Competition Drug Testing

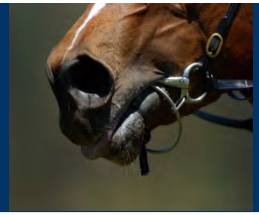
Out-of-competition drug testing rules are creatures of state law and must:

(1) Be consistent with:

(a) the Constitution (Federal and State); and

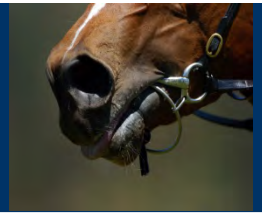
(b) the state's "enabling legislation"

(2) Have a rationale basis and not be arbitrary and capricious.



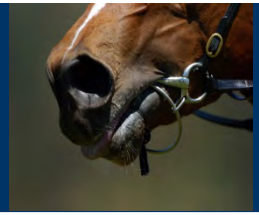
Out-Of-Competition Drug Testing

Constitutional considerations are routinely implicated by unduly invasive regulatory programs and must be considered in evaluating its legal validity.



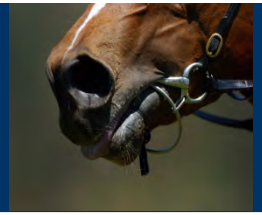
Out-Of-Competition Drug Testing

- The United States Supreme Court has determined that a horseman's state license is a **protected property interest** under the due process clause of the Constitution.
- The Fourth Amendment protects an individual's right to privacy and prohibits the government from engaging in unreasonable searches and seizures **(including administrative searches and seizures).**
- Under the **"Separation of Powers"** Doctrine of the Constitution, the separate branches of government (judicial, legislative, executive) cannot interfere with, encroach on, or exercise powers of, either of the other branches.



Out-Of-Competition Drug Testing

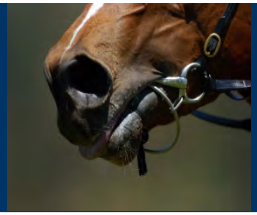
State enabling legislation will typically define the permissible scope of a state agency's authority and New York's out-of-competition rules illustrates important legal issues relating to equine drug testing regulations.



Out-Of-Competition Drug Testing

New York's out-of-competition rules rely on three legislative enabling provisions:

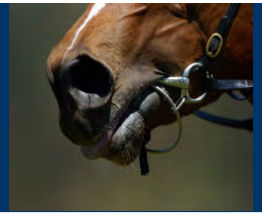
- Racing Law Section 101
  Provides that racing Board shall have "general jurisdiction over all horse racing activities and all pari-mutuel betting activities, both on track and off track . . ."
- Racing Law 301(2)(a)
  Authorizes Board to "prescribe rules and regulations for effectively preventing . . . the administration of drugs or stimulants . . . **for the purpose of affecting the speed of harness horses in races in which they are about to participate."**
- Racing Law Section 902
  Provides that "equine drug testing **at race meetings**" shall be conducted by certain New York land grant universities.



WHAT TO BAN?

To determine validity of out-of competition testing rules, one critical issue focuses on the particular drugs and substances prohibited.

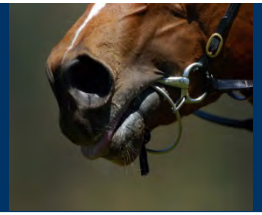
- Rules must provide clear guidance to the horsemen as to what is and is not prohibited.
- Not always an easy task.



Out-Of-Competition Drug Testing

For example, the New York out-of-competition testing rules ban of the following substances again illustrates this point (9 NYCRR § 4120.17(e)):

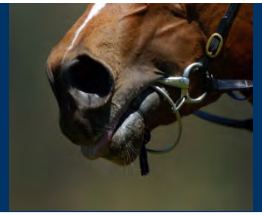
- Subdivision 1: Blood doping Agents.
- Subdivision 2: Gene doping agents.
- Subdivision 3: All “Protein and peptide-based drugs, including toxins and venoms.”



Out-Of-Competition Drug Testing

Subdivision 3's prohibition:

- Includes substances and medications with recognized therapeutic value.
- Is inconsistent with other board regulations specifically permitting use of specified "protein and peptide drugs" (with recognized therapeutic value) within certain time frames.



Out-Of-Competition Drug Testing

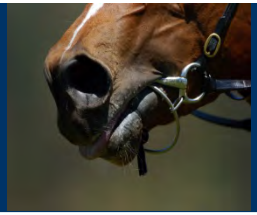
9 NYCRR § 4120.2 entitled “Restricted Use of Drugs, Medications and Other Substances,” permits use of “protein and peptide based substances.”

- Substances permitted under 4120.2 yet banned under 4120.17(e) include:

  - Tetanus antitoxin (24 hours)

  - Chymotrypsin (48 hours)

  - Immuno stimulants (48 hours)



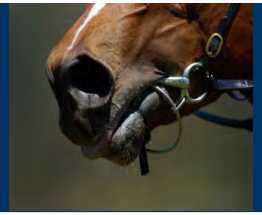
Out-Of-Competition Drug Testing

Both the New York State Supreme Court and the Appellate Division have concluded that this aspect of the rules is not valid:

- Thus, the New York courts holdings confirm that the validity of out-of-competition testing rules in any jurisdiction must consider:

  (1) the scope of banned substances and whether such substances have recognized therapeutic value.

  (2) whether the scope of permitted theraputic use can be reconciled with the nature of the prohibition.

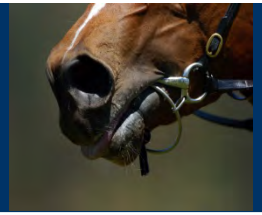


WHAT HORSES TO TEST?

To determine validity of rules, the particular class of the horses that are subject to out-of-competition testing rules must also be considered.

New York's out-of-competition testing rules again, illustrate important legal concerns relating to this issue:

- 9 NYCRR § 4120.17(b) permits testing of any horse among those **"anticipated to compete at New York tracks within 180 days of testing or demand for testing."**



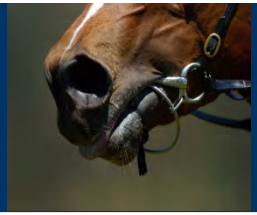
Out-Of-Competition Drug Testing

Problems here are two-fold:

(1) Enabling legislation (Racing Law) 301[2][a] authorizes equine drug testing to be conducted **"for the purpose of affecting the speed of harness horses in races in which they are about to participate."**

- Plain language of enabling legislation
  - **"About to participate"** not reconcilable with 6-month window

(2) No such scientific, rationale basis: while veterinary experts have stated that efficacy period for certain substances can last several weeks or more, no reliable evidence empirical to support 6-month period.



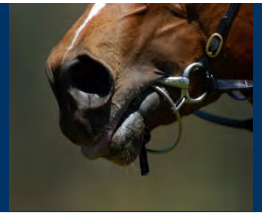
Out-Of-Competition Drug Testing

Thus, the validity of the "180-day" testing window is questionable because it:

(1) is inconsistent with jurisdiction granted by legislature;

(2) is problematic with respect to the Constitution's "separation of powers" doctrine; and

(3) is arbitrary and without a rationale basis.



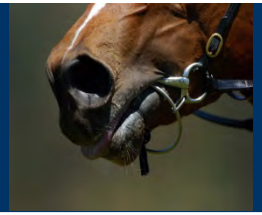
PRIVACY ISSUES

Privacy issues involving the constitutional rights of licensees and private citizens must also be considered when evaluating the validity of out-of-competition regulations.

For example, under New York's out-of-competition testing rules (9 NYCRR § 4120.17(g)):

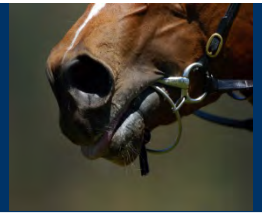
- Both licensees and non-licensees are required to cooperate with the off-track testing of a horse including in assisting to conduct such testing.
- Sanctions imposed on licensees and non-licensees alike for failing to cooperate.

Thus, this provision implicates several constitutional issues.



Out-Of-Competition Drug Testing

Compelled compliance under New York out-of-competition testing rules effectively authorizes agency to subject **both licensees and private (non-licensed) farm owners** to warrantless searches that are not constitutional because the underlying rules neither assure predictability nor "carefully limited in time, place and scope."



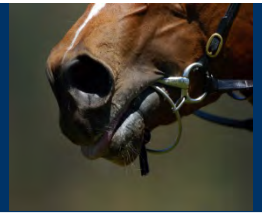
Out-Of-Competition Drug Testing

- **Predictability:** selection of horses is defined only by illusory time frame of those "anticipated to race" within 180 days -- can effectively choose to test any race horse without limitation or factual predicate.

- **Time of search:** no limitations in time of search (in contrast to other jurisdictions such as Indiana, Kentucky and Illinois which each provide for advance notice and/or strict time limitations for such testing).

  - New York provides for "no advance notice" and has no time restrictions.

- **Location:** permits unannounced, warrantless testing of any horse under control of licensed trainers whether located at a racetrack or stabled elsewhere (anywhere in the world) without providing any safeguards to protect an individual's legitimate privacy interest.



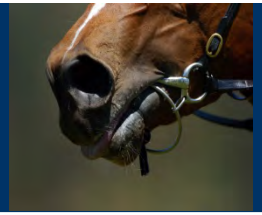
Out-Of-Competition Drug Testing

9 NYCRR § 4120.17(c) -- the “100 mile rule”:

Authorizes Board to compel a horse stabled out of state but within 100 miles of a New York race track to return for testing.

The validity of this rule is dubious for several reasons:

- Encompasses horse farms in a foreign country.
- Exceeds the scope of subpoena powers conferred to the state courts by the state legislature.
- The 100-mile distance is arbitrary.



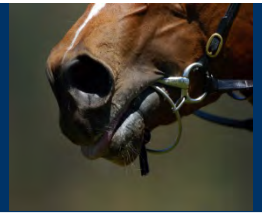
CONCLUSION

No one can seriously question the wisdom of equine drug testing.

BUT

In considering the validity of any out-of competition testing rules (or any regulatory scheme at all), everyone should question whether a regulatory agency has issued a set of regulations that

- fall within the scope of the jurisdiction conferred by the legislature;
- safeguard the constitutional rights of all individuals they affect;
- have a reasonable and rationale basis; and
- ensure fairness to all concerned.



THANK YOU

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