

Sixth Circuit Ruling Muddies HISA Waters

The constitutionality of the Horseracing Integrity and Safety Act (HISA) became less certain March 3 when the U.S. Court of Appeals for the 6th Circuit ruled the 2022 legislative amendment to HISA cured its unconstitutional defect. In contrast to the 5th U.S. Circuit Court of Appeals decision on November 18, 2022, that held HISA unconstitutional on its face due to its violation of the nondelegation doctrine, the 6th Circuit held that HISA is constitutional, finding no violation of either the nondelegation doctrine or the anti-commandeering doctrine.

With the addition of HISA, the Association of Racing Commissioners International/Racing Medication and Testing Consortium rulemaking process results in not one but two private, unregulated entities engaging in medication rulemaking. Arguably this is a double nondelegation doctrine violation. The lack of transparency, scientific data and industry input is also of serious concern to horsemen.

Assuming the “legislative fix” proves convincing on appeal to the nine justices of the U.S. Supreme Court, the covered person alleged to have violated an Anti-Doping and Medication Control rule under HISA remains entitled to due process.

It is unclear how that covered person will receive substantive due process when they are prohibited from obtaining or presenting evidence of the laboratory data package, the scientific basis for the alleged violation, the minimal level of detection or other criteria. Also unclear is how the covered person will be afforded the right of due process when they are not guaranteed a right of review by the Federal Trade Commission and, absent such a review, face a direct appeal to the U.S. Court of Appeals. The estimated cost of appealing a matter to the U.S. Court of Appeals is approximately \$30,000 to \$50,000. That is pricey due process to say the least.

Peter Sacopulos



COADY PHOTOGRAPHY

ALL EYES ARE ON THE OUTCOME OF COURT CASES—NOT UNLIKE THE ATTENTION FOCUSED ON KEY WORKOUTS BEFORE MAJOR STAKES RACES AROUND THE COUNTRY—INVOLVING THE CONTROVERSIAL HORSE RACING INTEGRITY AND SAFETY ACT.

amount that could have a pharmacological effect. This has doubled the number of positive tests reported over the time frame in which these RMTC-driven regulations have been in effect.

On the other hand, as evidenced by the 2020 round of federal indictments that included trainers Jason Servis and Jorge Navarro and other trainers and veterinarians, the substances used by those who pled guilty to doping escaped detection by the same exquisitely sensitive testing methods. Routine testing for growth hormone, erythropoietin and a mélange of growth factors purported to be in sheep placenta extract (aka SGF-1000) simply does not occur.

The rallying cry that brought HISA from the backrooms of congressional subcommittees onto the front burner and ultimately led to its passage stemmed both from the injuries at Santa Anita and the federal indictments of trainers and veterinarians for what was heralded as a “vast doping conspiracy.”

Other than the vague understanding that horses were doped with substances on raceday, little is widely understood about what happened, and HISA was clearly put in place to prevent this from happening again.

Much of the chatter was about a little-understood product derived from sheep placenta called SGF-1000 and alleged to contain any number of performance-enhancing growth and cellular factors. This allegation was despite repeated laboratory analyses that determined the product contained no banned substances. There is nothing in any of the HISA regulations that could have prevented this chapter in horse racing any better than the system in place at the time.

Medication Regulations by HISA

HISA's supporters have heralded its debut by proclaiming that the long-awaited uniformity of medication regulation is finally here. Many racing participants have welcomed the idea of HISA because surely it will fix both the overzealous prosecution of inadvertent environmental transfer and the overt failure to identify the real threats to the integrity of racing. However, a closer look at HISA's proposed Anti-Doping and Medication Control (ADMC) regulations should dash all hopes that this represents an improvement over the existing program.