

# From Beginning to End

Overreach of Horseracing Integrity and Safety Act permeates horsemen's gathering

By Tom Law and Jennie Rees; photos by Denis Blake



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he agenda laid it out, and the panels and speakers delivered at the 2023 National HBPA Conference with in-depth discussions offering critiques and alternatives to costly federal regulations wreaking havoc throughout the Thoroughbred industry.

The controversial Horseracing Integrity and Safety Act (HISA) figured to dominate the conference held March 7-9 in conjunction for the first time with the Association of Racing Commissioners International (ARCI) meeting at The Hotel Monteleone in the historic French Quarter of New Orleans, Louisiana.

The topic came up—either on purpose or because of its underlying overreach—time and again during panel discussions and presentations from the conference's start to its finish. The critiques came from lawmakers, horsemen, regulators and scientists, particularly during the conference's opening and closing panels and the keynote address.

"The whole thing is a façade; it's been all smoke and mirrors," said trainer Bret Calhoun, a member of the Louisiana HBPA board who also maintains strings in Kentucky and Texas, during the closing "Trainer's Talk" panel. "They sold this thing as the safety of the horse. It's absolutely not about safety of the horse. It's a few people with self-interest, and they have their own personal agenda.

"If it was all about the horse, we'd be spending a lot more time on racing

surfaces," Calhoun continued. "We could probably cure about 50 to 75 percent of the injuries if we had somebody overseeing surfaces on a daily, weekly basis, not somebody taking soil samples before the meet and at the end of the meet and calling it good. They've been taking away certain medications, therapy machines, things that are truly beneficial. They're having the opposite effect of what they're saying ... safety of the horse and rider. They're doing absolutely the opposite. Like I said, it's all a façade."

"I could go on for days about these horses."

**Morgan Vaughn, program facility manager and trainer for New Vocations, on success stories of retired racehorses**

"Uniformity should exist across jurisdictions, but uniformity should also exist across time."

**Daniel Suhr, managing attorney of the Liberty Justice Center**

Calhoun, Ron Faucheux and Jason Barkley participated in the panel and pulled no punches questioning the need, validity and overreach of the legislation pitched as the savior of racing while the industry heads into a challenging economic and logistical future.

Faucheux, also a member of the Louisiana HBPA board and in the hunt to top Fair Grounds' trainer's list that he also led for the 2021–2022 meeting, conditions a stable of about 60 horses and hasn't left his native state since HISA rules went into effect last summer.

"I haven't signed up, and I won't sign up; I'll get out of training if I have to sign up," Faucheux said. "A stable like mine, 55-to-60-horse-stable, I couldn't afford the cost of having to hire somebody to do the paperwork for me. The added expenses of it all, it wouldn't work financially for me. It's a struggle to get by the last couple years. Feed costs have gone up 50 percent, hay, shavings. It doesn't make financial sense for a trainer in Louisiana year-round to sign up and have to take on all those added fees because right now we're barely making it as it is."

Barkley maintains a stable of about 30 horses based at Fair Grounds and Oaklawn Park in the winter and in Kentucky the majority of the year. A member of the Kentucky HBPA board and a third-generation horseman, Barkley said he feels the impact of the regulations already and only sees them as potential obstacles for trainers hoping to grow their stables.

"A lot of my smaller clients, they don't want to pay the added cost of a per-start fee, the extra vet checks and all the added fees they want to put on us," Barkley said. "There's added costs and the time to do all the work. Between me and my main assistant, who is my wife, Shelbi, we do the extra paperwork, keeping track of everything. We already kept track of what every horse got every day, but to then have to put it into files, that doubles the workload. That is time taken away from actually working with your horses, which is what you should really be focused on."

The trio also talked about everything from challenges facing small to midsize stables, finding and keeping help and what gives them motivation in spite of all of racing's uncertainties. Even when the topic went in a different direction, HISA seemed to return one way or another.

"What is HISA's ultimate goal?" Faucheux asked. "I'm sure there is one. To me it looks like about half the racetracks to close down and about half the people to get out of it. And I think that's what will eventually happen if it's implemented across the country, over the span of several years."

"These are people sitting in offices and coming up with these rules and regulations that really aren't for the benefit of the horse, the riders, the owner, the industry as a whole," Calhoun said. "It's not good for the industry. ... To get this bill, to attach it to a COVID-19 bill, an emergency bill, that's something that should be stopped with every instance. No emergency bill should ever have anything attached to it. That's how they got this going. ... That's how Congress works, unfortunately."

## Opening Predictions

Louisiana Attorney General Jeff Landry and Daniel Suhr, managing attorney for the Liberty Justice Center, told an assembly of racehorse owners, trainers and racing regulators during the conference's opening day that they expect HISA to wind up before the U.S. Supreme Court—and they also believe America's highest court will strike down the legislation as unconstitutional.

Landry and Suhr said the four legal challenges before the appellate courts for the 5th and 6th circuits have much broader implications for the country. HISA, originally passed by Congress when slipped into the 2020 COVID-19 relief bill, sets up a private corporation, also known as the Authority, with broad powers to create, implement and enforce safety rules and drug and medication



"When I realized quite early that I wasn't going to be the quarterback for the New Orleans Saints, I said I want to do this. This is probably second to that. But all jokes aside, I

love it. I love being a trainer. I love my horses, the staff and I love the lifestyle. ... There's a lot that goes along with it that can sour you up. Recently, with HISA brought about, and the price increases of everything, it makes it hard to go on and do it the way you want to do it."

**Trainer Ron Faucheux**

"I've traveled across the country, and it's a great sacrifice to be on stage with an LSU grad."

**Attorney and Tulane University graduate Pete Sacopulos joking with National HBPA CEO Eric Hamelback**



"The bedrock concept of what curbs regulators is the fact that there's transparency, there's accountability. And HISA lacks that."

**Attorney Daniel Marquez, joining pharmacology experts on the medication panel**

"There's not a racing regulator who is not concerned about how this is going to play out. ... HISA is learning about how complicated and hard it is to regulate this sport. You can't sit in an ivory tower and think you've got all the answers, because you don't. Then when you go out and start implementing, you start affecting real-life people. And you start impacting the economics of an industry that was fragile to begin with in many corners."

**ARCI President and CEO Ed Martin**



DR. THOMAS TOBIN SHARES INFORMATION ON UNUSUAL CASES THAT SHOW HOW MINUTE LEVELS OF SUBSTANCES CAN TRANSFER TO A HORSE WITHOUT DIRECT ADMINISTRATION.

policies with the Federal Trade Commission (FTC) providing some measure of oversight.

Landry, who brought suit against HISA in the U.S. District Court for the Western District of Louisiana, was the conference's keynote speaker.

"If we don't get this thing struck down, you better have this meeting in probably the dining room—and I mean the small dining room here at the Monteleone," Landry said. "It will be a bunch of folks who have more money in their pockets than they know what to do with. And they're going to control the tracks and horse racing, and the rest of us really won't be able to enjoy the sport. . . . This law is actually designed to eliminate the very fabric of horse racing.

"I said, 'We are going to keep filing suits, and we're going to find a way to bring this thing to the U.S. Supreme Court if we have to,'" Landry continued. "Guess what? We are there. And I'm glad we're there. I know the 6th Circuit decision [upholding HISA, in contrast to the 5th Circuit's ruling] was not all that great for us. But quite frankly, I think it was. Because it is going to absolutely force this case before the United States Supreme Court. This, in my opinion outside of horse racing, is actually one of the most important cases that will go before the Court this century. If this law is upheld, there is nothing that is out of reach of the federal government. There is no industry. There is no activity. There is nothing those boys in Washington can't lay their hands on."

The nonprofit Liberty Justice Center represented the National HBPA pro bono in what became the first challenge to HISA's constitutionality filed in the 5th Circuit, whose Court of Appeals ruled 3-0 in favor of the horsemen. Those judges remanded the case back to the lower district court for reconsideration.

"I believe this case is important not just for this industry," Suhr said. "I know it is. But I'm here because I believe it's important for our country and our democracy, and I don't say that lightly. Because fundamentally what we're fighting about is accountability, transparency and fairness, which are core guarantees of our Constitution to all of us as citizens. When the government exercises power in our lives, when it comes into our business, our families, it is accountable to voters, it is transparent to the stakeholder community, to the news media and to all of us as citizens. And it is neutral. It is independent and it is fair when it exercises that power."

Suhr said he believes there are enough justices who will vote to strike down HISA.

"There's no such thing as a slam dunk in my business," he said. "It's a lot like yours. Everything is a little bit of a gamble. But I do this for a living, and I can tell you, we brought this case because we believe when it gets to the Supreme Court, those fundamental principles we've been talking about are actually going



THE PANEL "STATUS REPORT ON HISA," WITH PETE SACOPULOS, JOHN DUVIEILH, DANIEL SUHR AND PETER ECABERT, OPENED THE 2023 NATIONAL HBPA CONFERENCE IN NEW ORLEANS.

to decide the day. I think we have a really great shot at this."

Joining Suhr on a Tuesday morning panel updating the audience about the four court cases were attorneys John Duvieilh, Pete Sacopolos and National HBPA General Counsel Peter Ecabert, who all represent plaintiffs in the HISA cases.

Suhr said proponents of HISA incorrectly compare having the Authority regulating horse racing to the Financial Industry Regulatory Authority (FINRA) regulating the financial services industry under the Securities and Exchange Commission (SEC).

"You'll hear this line, 'Well, we're just doing for horse racing what Congress has already done for the financial services industry,' that there's this self-regulatory industry organization and the SEC will oversee them and it's the exact same model," he said. "It is not the exact same model. Everybody who is licensed by FINRA gets to vote as to who sits on the board. HISA, the Authority, is a self-perpetuating oligarchy. They pick themselves, and they pick their successors. Does anybody in this room think if there were an open election . . . on who would sit on the board of HISA, that we'd have the same board we have today? Not going to happen. The second big difference is that if enough people didn't like FINRA, the law allows them to set up their own alternative."

Another difference, Suhr said, is that the SEC is composed of experts in that industry, which is not the case with the FTC and horse racing.

"They're just going to rubber-stamp it," he said of the rules. "That's very different from the SEC model, where you have truly independent, truly expert checks and balances on FINRA."

## Alternatives to HISA

Another panel offered concepts that could lead to uniformity without vesting so much control and power in one entity and still utilize the existing racing commissions.

"As we all look through a different lens now, something has to be established for uniformity," said National HBPA CEO Eric Hamelback. "We want to make it constitutional, and we want to make sure the right participants are helping to make the decisions. I see it as the right participants are in this room. . . . We want uniformity based on science. We want it based on peer-reviewed research. We feel the way the [HISA] legislation was drafted, it doesn't lean toward being based on science. I think there's a lot of opinion in there."

One alternative path forward is adopting an interstate compact, in which states opt in to agree to the same rules. The National HBPA's Ecabert said



“The horse is what makes you want to get up every morning and do it.”

**Trainer Bret Calhoun**



“I just love the action. It’s all fun to me. I heard Mike Maker say, ‘They’ll run out of stalls before I run out of horses,’ and that’s kind of how I think. Bring them on. We’ll fight the fight as well

as we can for as long as we can.”

**Trainer Jason Barkley**

“The 6th Circuit pretty much diminished HISA. The [6th Circuit] court believed the regulator is the [Federal Trade Commission (FTC)]. That ruling pretty much said that HISA enforcement action is not final. It’s the FTC that makes it final. The Federal Trade Commission all of a sudden getting a lot of clenbuterol positives is not something that is going to go over very well in the internal staff meetings. So that kind of weakens that whole adjudication, arbitration system that HISA hopes to create for themselves. The other thing I got out of reading that thing is that HISA is just advisory, and if you don’t like a rule, you can go directly to the FTC.”

**Ed Martin**



“He has done everything.”

**Kevin Delahoussaye introducing Don Stemmans during the Living Legends Luncheon**



DOUG MILLER ACCEPTS KITODAN’S NATIONAL HBPA CLAIMING HORSE OF THE YEAR TITLE ON BEHALF OF TRAINER ERIC FOSTER AND OWNERS FOSTER FAMILY RACING AND BILL WARGEL.

compacts are “basically a vehicle where states get together and agree to act cooperatively. It allows for responsive and quick resolution.”

Ed Martin, the president and CEO of the ARCI, said a compact could be a workable alternative “so as not to bankrupt an industry by replicating things already in place. . . . ARCI has proposed interstate compacts in the past as a way to avoid the federal government getting into something that has been handled by the states. It’s welcome that the HBPA now has interest in this.”

Equine veterinarian Dr. Connie McNabb, vice chair of the Texas Racing Commission and a career military officer in the U.S. Air Force and Texas Air National Guard, said uniformity could be achieved using existing state structures through master cooperative agreements between federal agencies and states. In the case of the National Guard, the federal government provides funding and equipment to the states, which in turn must meet the same strict standards and a high level of accountability.

“Uniform national standards are also highly attainable by another mechanism,” McNabb said. “Our state statute specifically does not allow us to relinquish our responsibility and control over racing, even though we do agree that national standards, more integrity, all of that is very good. But state control and state sovereignty are not on the table and don’t have to be. Why are we inventing a whole new mechanism, when something has been very well road-tested? . . . This is not rocket science. It does not have to be an independent group that, as the lawyers put out there, very well might be trampling on our rights under the Constitution.”

Hamelback said there are several congressmen “bipartisan and bicameral, that are very interested in a repeal of HISA. But they also are just as interested in moving something forward that is driven from the ground up, utilizing the state commission infrastructure.

“Basically, what we are considering is an example of the federal interstate compact,” Hamelback continued. “The suggestion is a board of directors made up of nine individuals, five of them set by the states that have the most racing dates. It doesn’t matter what breed. The members of the compact would then elect the other four. From there we’ve also suggested emphatically that there be three scientific advisory committees—one for each major racing breed—and a fourth committee, a safety committee. Looking at some of the same sort of structures that we’ve seen with HISA, we think there is a model there. We have recommended that there be funding from the government, funneled through the United States Department of Agriculture and they be involved with equine research. . . . The ultimate enforcement, we feel like it still comes from the racing commissions and the structure we have now. We don’t have to reinvent the wheel.”



DR. STEVEN BARKER OUTLINES HOW A POSITIVE TEST OF A SUBSTANCE WEIGHING THE SAME AS A FLEA COULD COME FROM NEW TESTING PROTOCOLS MANDATED BY FEDERAL LEGISLATION.



LOUISIANA ATTORNEY GENERAL AND GUBERNATORIAL CANDIDATE JEFF LANDRY DELIVERS THE CONFERENCE'S KEYNOTE ADDRESS.

## 'Just Trust Me. I Know What I'm Doing'

The importance of screening levels based on science for post-race testing and the integrity of the horse racing industry—along with fleas and dogs—were a major part of the discussion during the Kent Stirling Memorial Medication Panel on the second day of the conference.

The National HBPA has long advocated for using scientifically developed screening and threshold levels to determine if a positive finding is a legitimate rules violation or if a negligible amount was inadvertently transferred to a horse or contacted by contamination with no pharmacological impact on the animal's performance. The topic has added urgency with HISA expected to take over control of equine testing policy and enforcement as early as March 27.

HISA CEO Lisa Lazarus has said trainers will not be penalized nor horses disqualified for irrelevant trace levels of substances readily found in the environment. However, there is nothing in HISA's proposed medication and drug rules that state that. Lazarus' comments also seem at odds with what has been said by Dr. Mary Scollay, chief of science for the organization contracted to implement and enforce HISA's rules.

"The scariest thing for me is when somebody who is in a position of authority—a regulator, a prosecutor—says, 'Just trust me. I know what I'm doing. Just trust what I'm doing,'" said El Paso attorney Daniel Marquez, whose law practice represents horsemen in the Southwest. "OK. I've been there, been that person. I don't trust me. There needs to be accountability."

Bringing sensitivity into sharper focus, drug testing and toxicology expert Dr. Steven Barker, now a professor emeritus at Louisiana State University after retiring following years as head of the state's equine drug testing lab, used an example of bufotenine, which can be detected in horses' post-race tests if (among other things) they ate hay with reed canary grass in it, and a flea.

First, a couple of explanations about metric measurements: Barker said a small paper clip weighs a gram. A microgram is a unit of mass equal to one-millionth of a gram. A picogram is equal to one-trillionth of a gram.

Barker cited three horses in the mid-Atlantic in whom bufotenine was detected at the extremely low levels of between 34.5 and 56.6 picograms per milliliter in blood and between 731.5 and 1,964.5 picograms per milliliter in urine. If those sound like big numbers, Barker said to consider that "the weight of a newborn female flea, prior to its first blood meal, is 450 micrograms. The blood volume of a horse is approximately 50,000 milliliters.

"So if a horse has 56 picograms per milliliter of bufotenine in a sample, the total amount of bufotenine in the entire horse is 2.8 micrograms, which would

be 0.62 percent of a female flea," Barker said. "So you imagine a 500-kilogram animal that has 0.62 percent of a female flea distributed throughout its entire body, what do you think the drug effect would be? Zero to nothing. And this is the case in a lot of the positives being called now. If HISA is going to do its job, these kinds of positives have to be given scientific consideration. Not 'Oh, we found it, we confirmed it, you're guilty.' I've seen that way too much. Are they going to worry about the integrity of the industry, worry about giving the industry a black eye for all these positives? When really the more important thing is the integrity and reputation of trainers, owners and the horses affected.

"What if it had been a horse that won the Kentucky Derby?" Barker added mischievously, having been an expert witness for trainer Bob Baffert in the appeal of Medina Spirit's disqualification of his 2021 Kentucky Derby victory for a medication overage. "So, using science, coming up with reasonable levels to call positives that really do meet their mandate, is what HISA should be doing. I don't know that they will. I certainly hope they do."

Dr. Clara Fenger, a Central Kentucky-based veterinarian and racehorse owner with additional degrees in internal medicine and equine exercise physiology, started off the panel with some statistics. She said in 2021, the World Anti-Doping Agency reported 0.77 percent positive tests out of the 241,430 athletes tested worldwide, with 40 percent of the violations being for illegal anabolic steroids. A very small amount were from inadvertent environmental contamination, she said.

In the United States in 2020, out of 243,627 racehorse tests, only 0.43 percent were declared post-race positives. Of those, 28 percent were for Class 1 substances, and most of those could reasonably be considered inadvertent environmental transfer, such as with methamphetamine and morphine, she said.

But while violations in human sports were down 1.19 percent from 2013, U.S. horse racing rose to that 0.43 percent of positive findings from 0.34 percent in 2013, Fenger said. While that still reflects few "true" attempts to cheat, in her words, she said the bump in horse racing is explained by labs using their increased sensitivity to find irrelevant minuscule levels of substances that would not be called positives in human testing.

Dr. Thomas Tobin—longtime National HBPA consultant, veterinarian and renowned expert in equine pharmacology and toxicology at the University of Kentucky's Gluck Equine Research Center—shared a couple of unusual cases that illustrate how minute levels of substances can transfer to a horse without direct administration.

One came amid a rash of positive findings for the seizure and shingles drug gabapentin in Ohio, which has an "in-house" screening level of 8 nanograms (parts per billion) per milliliter of plasma, Tobin said. The finding of 89.4 nanograms per milliliter in a horse's post-race test was traced to the groom,

who had a prescription for gabapentin and urinated in the horse's stall. Three other drugs prescribed for the groom were found in the horse—the largest known number of human prescription medications transferred together to a horse to date, Tobin said.

In another case, the urinating culprit was ... a dog.

*The Irish Times* reported that a racehorse owned by a veterinarian was disqualified from a victory after the post-race test revealed the presence of gabapentin. That result was determined to have come from the family dog, who was being treated with gabapentin and had access to the horse stalls.

"It's now official in the published domain that you can dose a dog with gabapentin and it can turn up in a racehorse," Tobin said.

Tobin said he was asked to work on a plasma cutoff for fentanyl for equine testing, below which there would be no pharmacological effect, because of the street drug's widespread availability. (He said he's in the process of publishing a recommended screening level of 50 picograms per milliliter of plasma.)

## American Fixed-Odds Betting

Two executives from major horse racing content distributors and two executive directors of horsemen's associations encouraged horsemen to embrace the entry of fixed-odds wagering on racing in America. Participants in the panel "Fixed Odds and the Positive Swing in U.S. Wagering" addressed both the growth of American tracks sending their race product to legal bookmakers overseas and the possibilities and challenges of introducing bookmaker-style fixed odds as a wagering option at U.S. tracks, whether at the actual track, another brick-and-mortar facility or online.

Panel moderator Michele Fischer said \$44.3 billion globally was wagered in 2022 through legalized fixed odds on horse racing. That's led by Australia at \$19.1 billion and the United Kingdom at \$12.9 billion. Sports betting in the United States is predicted to gross \$10.2 billion this year and hit \$16 billion in 2026, according to Fischer's research. The point is that fixed-odds wagering on horse racing is popular around the world, and American tracks need to get into the sportsbook action igniting around the country.

Sports betting is now being offered in some form in 36 states and Washington, D.C., with the enabling legislation in place in several other states and before lawmakers in a few more. Presently only New Jersey and Colorado have implemented fixed-odds wagering on horse racing.

Offering the same structure as sports betting, with its fixed odds, has the potential to grow horse racing's market, the panelists agreed. But they stressed it will take some time for the industry to reap the full benefits, with the betting public potentially reacting in unexpected ways.

"There are ways in which a low-percentage margin can turn into huge amounts of profitability, but to believe you're going to know exactly what is happening from Day 1 is completely unrealistic," advised Richard Ames, CEO of the British-based Sports Information Services and president of SIS Content Services, the largest horse racing content supplier to global bookmakers/sportsbooks. "Starting is important. Transparency of the data is important, and then move forward. Not having long-term deals on Day 1 or having some flexibility to adapt to the way consumers want to play, that's the way to approach this challenge."

The risk of cannibalizing the existing pari-mutuel pools if fixed odds are also offered was discussed.

"Everybody in this room agrees we want to get our racing product in front of the sportsbook customers," said Scott Daruty, president of U.S.-based Monarch



THE PRESENTATION "FIXED ODDS AND THE POSITIVE SWING IN U.S. WAGERING" LED BY MICHELE FISCHER SPARKED PLENTY OF LIVELY CONVERSATION FROM PANELISTS (FROM LEFT) DAVE BASLER, OHIO HBPA EXECUTIVE DIRECTOR; ED FENASCI, LOUISIANA HBPA EXECUTIVE DIRECTOR; SCOTT DARUTY, PRESIDENT OF U.S.-BASED MONARCH CONTENT MANAGEMENT; AND RICHARD AMES, CEO OF THE BRITISH-BASED SPORTS INFORMATION SERVICES AND PRESIDENT OF SIS CONTENT SERVICES.

Content Management, the simulcast purchase and sales agent for more than a dozen premier North American tracks. "But it's important that we introduce it in a way that doesn't hurt our pari-mutuel pools. We have some pretty definitive thoughts on what that means. First and foremost, we believe fixed-odds wagering should be offered on a win and place basis only."

That brought pushback from Ames.

"Going in [saying] we're going to restrict what you can do misses the point in terms of the sportsbooks' attitude to horse racing," Ames said. "We have to remember these sportsbooks are generating huge amounts of revenue, and horse racing comes in late to the party. Those sportsbooks need to want to do it. ... It will cost them money to get ready to be able to bring these props into the market, and those props will be competing against other sports. I do recognize the challenge around cannibalization. But I think going into sportsbooks with the attitude 'we'll restrict you from the beginning' is not going to get them to buy into the production and do it in a way that will maximize the profitability for all."

Ohio HBPA Executive Director Dave Basler and Louisiana HBPA Executive Director Ed Fenasci stressed that horsemen need to be informed and part of the decision-making process.

"There's a strong possibility [fixed odds] could bring a lot more volume in, and any cannibalization is minimal because it brings additional pari-mutuel wagering in through the new volume," Basler said. "But I don't know ... If you're doing \$250,000 a day in total handle, you don't have a lot of downside to trying fixed odds. It's going to be a different equation to what deal you approve than a [track such as] Santa Anita that's betting \$10-\$12 million a day, a lot of it on track."

Fenasci said he was surprised to find out last summer that Louisiana Downs' best overseas outlet was Spain, saying, "When I'm looking at these contracts, it was very important for horsemen to get the feedback exactly where the product is going and what is the volume that is being generated in those markets, so that you can continually evaluate and make good decisions."

The Ohio and Louisiana horsemen have been at the forefront of ensuring their purses benefit from overseas betting on their races.

"It is imperative that your product get into as many bookshops as you can," Fenasci said. "When you're dealing with distribution, you want to work with reputable companies that have the relationships around the world to get your content the widest distribution. We've had long-term agreements with our racetracks that our purses will share in revenue generated directly from horse racing." **HJ**