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# Burden of Proof

Examination of Specific Cases of Adverse Analytical Findings

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**T**he Horseracing Integrity and Safety Authority (HISA) has been in place since May 2023, and a stark difference in how horsemen are able to defend themselves under the new regime became evident with one of its first cases.

The proof of a violation remains largely the same and is based on two premises: (1) an adverse analytical finding (AAF) from an official laboratory (also known as a positive test) is prima facie evidence that a violation has taken place, and (2) the trainer has strict liability (similar but not identical to the absolute insurer rule) for the presence of the substance in the horse. Unbeknownst to covered persons, and unwritten in the regulations, was the set of rules of evidence upon which the cases were to be adjudicated.

In one of the first cases adjudicated under HISA's rules, attorney Alan Pincus served as counsel for covered person Mario Dominguez, whose horse had a cobalt coverage only two days into the new regulations. Pincus received a communication from Canadian barrister James Bunting as counsel for the Horseracing Integrity and Welfare Unit (HIWU). This was a curious turn of events because a lawyer not admitted to the bar in any jurisdiction in the United States could hardly be well versed in American law.

Evidence was provided to Pincus that exclusively included cases that had been decided before the Court of Arbitration for Sport (CAS).

The casual reader's first knowledge of the CAS likely occurred during the recent Olympic Games in Paris. American gymnast Jordan Chiles was awarded

and subsequently stripped of the bronze medal in the floor exercise in women's gymnastics with the final decision being handed down by the CAS.

The first time that the American horse racing industry became aware that adjudication of its sport was based on the CAS rules was after the regulations had been implemented. Further, the results of any hearing would not be appealed to the CAS, as in the case of Jordan Chiles, but rather to the Federal Trade Commission (FTC) and subsequently to the U.S. Court of Appeals. The adjudication process is based on a set of rules of evidence but cannot even be appealed to the organization that came up with those rules. It's no wonder that the 5th U.S. Circuit Court of Appeals thought this process was unconstitutional.

HISA Regulation 3120 covers the proof of violations. HIWU must have only a positive test or AAF to establish a violation. All laboratory methods, limits and requirements are presumed to be valid. Laboratories are presumed to have conducted analysis and chain of custody according to their standards. In several cases, the horseman has been unable to question anything done by or in the laboratory that led to the AAF, or that information is limited. This is particularly concerning when cases already heard have shown one laboratory failing to meet minimum standards for producing a laboratory report and another losing its accreditation and HIWU contract.

More concerning is the fact that this privately crafted rule results in the covered person being prohibited from mounting a viable defense, which is a clear violation of the covered person's constitutionally guaranteed right of due process.

## Isoxsuprine

Just over a week after the HISA regulations went into effect, trainer John Brown received an AAF for isoxsuprine. His pony, Bucky, had been housed in the barn for five years and had been administered isoxsuprine daily for navicular disease for that entire span of time.

Isoxsuprine has a long history of causing environmental-based positive tests, starting in the 1990s.

In 2000, the International Conference of Racing Analysts and Veterinarians presented a series of studies on the topic of environmental contamination, and one of the papers included isoxsuprine. That study noted that even the cobwebs in the rafters of the stall where a horse was treated with isoxsuprine tested positive for the drug.

The HISA classification of isoxsuprine as an S0, Banned Substance, is based on its lack of approval from the Food and Drug Administration (FDA). Despite this lack of approval, isoxsuprine is expressly permitted by the FDA as a component of a compounded formulation for horses, making its use perfectly legal. The violation for Brown resulted in an 18-month suspension and a fine of \$12,500. Being financially unable to retain counsel to mount and prepare a defense, Brown accepted the penalty.

On June 7—after Brown's race but before the AAF notification—trainer Dennis VanMeter, a disabled Vietnam veteran, shipped his horse Templement to Thistledown racetrack. Given the mile distance at Thistledown between the receiving barn and the paddock, VanMeter routinely shipped his horses to the stalls of his friend Brown, whose stalls were much closer to the paddock. In his usual custom for his friend, Brown moved his pony, removed the feed and water buckets and cleaned the stall before his friend shipped in. Templement entered his "ship-in" stall soon after his arrival at about 9:15 a.m. at Thistledown and remained there until leaving at about 3:45 p.m. for pre-race activities, spending a total of about six and a half hours in the apparently isoxsuprine-contaminated stall.

Templement was selected for post-race drug testing after his last-place finish and tested positive for isoxsuprine at an estimated 471 nanograms per milliliter (ng/mL) in urine, an unusual call for HISA/HIWU, which generally reports plasma identifications. Ohio had an in-place threshold of 1,000 ng/mL in urine only 17 days earlier. The test results for Templement were a clear blood sample and a urinary concentration below the pre-HISA Ohio regulatory threshold for isoxsuprine and a pharmacologically irrelevant trace-level identification.

The case went to a hearing, at which evidence was presented that VanMeter did not and could not have possibly known that the horse previously occupying his "ship-in" stall had been treated with isoxsuprine. The arbitrator agreed that VanMeter bore no fault and issued no penalty for the trainer. The horse was ineligible to race for 60 days for a pharmacologically insignificant amount of a drug transferred from a stall he occupied for only six hours. After managing to prove no fault of his own for the positive test for Templement, VanMeter had a horse he could not race for 60 days and the legal bills from defending himself. There was no burden of proof for HIWU other than a report from the laboratory.

## Mepivacaine

The bar for providing proof that a horseman is not responsible for a positive test from stall contamination is high under the HIWU regime.

Trainer Ron Moquett's story is an unusual variation on this theme involving the local anesthetic mepivacaine. On October 20, 2023, the Mitole colt Atomic was surgically castrated standing under sedation in an assigned racetrack stall at Keeneland Race Course with mepivacaine used as the local anesthetic. Castrating a colt is a nontrivial procedure, so the dose of mepivacaine was

generous: 400 milligrams (mg) administered subcutaneously over the surgical area and 300 mg injected directly into each testicle for a 1,000 mg or so total dose. During the surgical procedure, blood from the surgical site and also the mepivacaine-containing testicles themselves came into significant contact with the stall floor and possibly other areas of the stall. Atomic occupied the stall until October 23.

The stall was thoroughly cleaned and on October 25, a horse named World Fair was placed in the same stall. He raced the following day, finishing fourth, and was not selected for drug testing. The stall was thoroughly cleaned with Pine-Sol, an all-purpose cleaner, and the walls and floor were carefully scrubbed. These processes were performed twice, and the stall was then allowed to dry followed by fresh bedding being placed in the stall.

On the morning of October 28, Moquett trainee Speed Bias arrived at Keeneland to run that afternoon in the Grade 2 Hagyard Fayette Stakes. Speed Bias entered the stall at about 10 a.m. and was held there except for the required veterinary checks and pre-race evaluations. The gelding would have left the stall about 45 minutes prior to the 5:18 p.m. post time, for a total time in or around the stall in question of about six and a half hours.

Given that eight days had elapsed since Atomic's surgical procedure and the stall had undergone a thorough cleaning prior to Speed Bias shipping in, the possibility of a mepivacaine or other contamination event was not even considered by Speed Bias' connections.

Speed Bias finished third in the Fayette Stakes, and post-race urine (6 p.m.) and blood (6:04 p.m.) were taken. To the best of our knowledge, the blood sample tested negative, a critical piece of exculpatory information, but the urine sample tested positive for 3-hydroxymepivacaine, which is the Phase 1 metabolite portion of the 3-hydroxymepivacaine glucuronide molecule, the major Phase 2 urinary mepivacaine metabolite detected in horse urine after exposure to mepivacaine. The HIWU medication rule lists 10 ng/mL of 3-hydroxymepivacaine in urine as the regulatory threshold for mepivacaine. The sample in question tested at 84 ng/mL.

The split sample analysis confirmed the primary analytical report, and Moquett was offered a smaller fine and a shorter period of suspension in exchange for his admitting fault and "wrongdoing."



INTEGRITY IN RACING IS MORE THAN PENALIZING MINUTE QUANTITIES OF ENVIRONMENTAL SUBSTANCES IN RACEHORSES AND MORE ABOUT JUSTICE AND A LEVEL PLAYING FIELD.





HORSES IN BARN AND STALLS AT RACETRACKS CAN COME IN CONTACT WITH CONTAMINANTS EVEN IF ALL THE PROPER STEPS ARE TAKEN.

Moquett declined the offer and elected to defend his integrity and make clear the unexpected environmental origins of this chemical identification. Because his staff had carefully cleaned the stall prior to putting Speed Bias in the stall, Moquett “never imagined that there was a possibility for a contamination positive from that.” Moquett also was able to obtain video evidence from the racetrack of the series of events surrounding the stall in question, including the thorough cleaning of the stall.

At the hearing before HISA’s Internal Adjudication Panel, Moquett’s counsel presented testimony from an expert veterinary toxicologist. Scientific questions presented to this expert concerned whether the mepivacaine metabolite concentrations detected were pharmacologically significant, to which the expert’s answer was no. The expert further testified that the concentration was consistent with inadvertent environmental exposure, and it was also made clear that this reported identification could have resulted from mepivacaine contamination of the stall transferring to the horse in question. It was further presented that the mepivacaine metabolite identification was in no way evidence that the horse had been administered mepivacaine for a competitive benefit. The expert’s evaluations were all accepted by the HIWU adjudicators.

The HIWU authority opted not to fine or suspend Moquett, although Speed Bias was disqualified from his third-place finish in the Fayette and the purse money was ordered returned. The HIWU ruling also noted that “the stall mats used at Keeneland are constructed in a manner that is conducive to trapping and retaining dirt from the stall floor, even when subjected to normal cleaning practices.”

Not every racetrack has cameras that can be used to prove one’s innocence. Not every circumstance is amenable to such thorough cleaning by the horseman. In many cases, a horse is standing on a horse van while the stall is being prepared. If the considerable effort put forth by Moquett and his staff to avoid contamination is not enough to prevent a positive test and the proof must be provided by video documentation, this could happen to anyone. Without the video, the consequences most likely would have been much worse. What about the horseman who ships into a stall without full knowledge of what has happened there before he ships in?

Although Moquett was not penalized, one would think that a simple presentation of the facts to HIWU could have resulted in a similar outcome without the high price tag of the legal fees and expert costs associated with going to the hearing. One would think that, with all of the authority given to HIWU to conduct its own investigation, it could have readily come to the same conclusion.

## Sotalol

Jessica Howell works on a private farm, where she trains her only horse, Levanter.

Levanter finished fourth in his debut in a maiden special weight March 16, 2024, at Turfway Park. A month later, Howell was notified of an AAF for sotalol. The laboratory detected 750 picograms (pg)/mL in Levanter’s blood. Howell qualified for and was appointed a pro bono attorney. No expert was consulted on her behalf.

Sotalol is a beta-blocker used in horses and humans. Atrial fibrillation is the most common cardiac arrhythmia in racehorses, and sotalol is part of the current standard of care for treatment of this condition. It is reasonably well absorbed orally in both humans and horses, having close to 50% oral bioavailability in horses. Following oral administration to horses, sotalol has a mean plasma half-life of about 15 hours, and no adverse effects have been noted following 1 milligram per kilogram (mg/kg) oral doses. Oral doses of 2 to 4 mg/kg/day twice daily are used and expected to produce blood concentrations between 1,000 ng/mL concentrations and 500 ng/mL trough concentrations—concentrations in the range of what is known to be therapeutically effective in humans. Blood concentrations below 1 ng/mL can easily be considered irrelevant.

While atrial fibrillation is common in horses and sotalol is commonly used in these horses, Levanter did not suffer from atrial fibrillation. However, a horse in the adjoining stall was on layup for this condition and was being treated. Based on what we know about isoxsuprine, orally administered drugs can present a high risk for inadvertent environmental transfer.

The expert for HIWU stated in a report that, because the horse that had been treated for atrial fibrillation had left the barn 60 days before Levanter’s race, there was no risk of contamination from that source. So, coincidentally, the only HIWU AAF for sotalol, a beta-blocker with minimal chance of affecting racing performance, happened in a horse stabled next to a horse taking sotalol, and HIWU concluded that contamination could not possibly be the source.

The facts argue against the HIWU expert.

Sotalol has been widely detected in surface water such as lakes and streams and in soil and sludge in worldwide sources. Degradation of sotalol in the environment is mostly by photodegradation, or breakdown by UV light from the sun, a fact overlooked by the HIWU expert. Since stalls are not subjected to sunlight, the degradation of sotalol would be slower than in typical environments such as surface water and soil.

Howell elected to take the penalty. She was already unable to hire her own attorney and was unable to hire an expert. She was unable to mount a defense. She was also unable to pursue an appeal to the FTC or a U.S. Circuit Court of Appeals. In short, Howell was unable to produce a ticket to enter the “Due Process Room.”

To paraphrase the famous “Soup Nazi” character from an episode of *Seinfeld*: “No due process for you.”

## Integrity

HISA and HIWU have taken their mandate very seriously, identifying and penalizing horses and horsemen for even the slightest infraction. What they have missed is that integrity is about more than penalizing picogram quantities of environmental substances transferred to horses. Integrity is about justice and a level playing field, not about random identification and penalization of environmental contamination.

Investigations should be directed toward determining the facts surrounding an AAF, and when the investigation leads the investigators to exoneration of the horsemen, the evidence should be followed. The requirement is that the horsemen must investigate the positive test and provide evidence to exonerate themselves when it is HIWU that has the power of investigation, the power of subpoena and all of the information about what goes on in the laboratories.

In each of the cases outlined above and many others, the positive tests were beyond the control of the horsemen and the levels found in the horses were consistent with inadvertent transfer from the environment.

It’s time that HIWU works for the entire industry and conducts good faith investigations that include all the evidence surrounding an AAF. Proving a horseman’s innocence should be just as important as proving their guilt. **HJ**