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March 30, 2022
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Indiana Continuing Legal Education Forum (ICLEF)
230 East Ohio Street, Suite 300
Indianapolis, Indiana 46204
Ph: 317-637-9102 // Fax: 317-633-8780 // email: iclef@iclef.org
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EQUINE LAW: A STATE & FEDERAL UPDATE

March 30, 2022

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EQUINE LAW: A STATE & FEDERAL UPDATE

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8:30 A.M. Registration and Coffee

8:55 A.M. Welcome and Introduction

9:00 A.M. **The Indiana Equine Activity Statute**: I.C. 34-31-5, et seq.
- A. I.C. 34-31-5-1 Activity Sponsor or Professional
- B. Definitions for the Indiana Equine Activity Statute
- C. Exclusions to the Indiana Equine Activity Statute
- D. Mandatory Prerequisites for the Indiana Equine Activity Statute
- E. The Indiana Equine Activity Statute is a Starting Point

Gregg S. Gordon

9:45 A.M. **Indiana Equine Case Law: An Overview and Update**
- A. Equine Case Law: Personal Injury Decisions
- B. Equine Case Law: The Indiana Workers Compensation Act and Decisions Regarding the Status of Laborers Working in the Equine Field
- C. Indiana Equine Case Law Review of Decisions Involving Abuse or Neglect of, or Injury to Horses
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- E. Overview of the Administrative Process of Representing a Client Before the IHRC.

Peter J. Sacopulos

10:30 A.M. Coffee Break

EQUINE LAW: A STATE & FEDERAL UPDATE

Agenda Continued

10:45 A.M. **Equine Liens: An Overview of Indiana's Liveryman Lien**
Codified at I.C. 32-33-8-1 & I.C. 32-33-9
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11:30 A.M. **Horseracing Integrity and Safety Act (HISA)**: A New Era for Thoroughbred Racing in Indiana and Nationally: Status/Review/Analysis and Concern:

A. HISA: Legislative History
B. HISA: Organization and Structure of HISA
C. HISA: The Disciplinary Process
D. HISA: Constitutional Concerns and Challenges
E. HISA: A New Era of Thoroughbred Racing Without Any Rade-Day Medications Including Furosemide
F. HISA: USADA, the Center Piece of Federal Testing and Enforcement That Has Left The Negotiation Table—What's Next?
G. HISA/Inclusion of Thoroughbreds but what about other breeds?

Peter J. Sacopulos

12:15 P.M. Adjourn

March 30, 2022

EQUINE LAW: A STATE & FEDERAL UPDATE

Faculty

Mr. Gregg S. Gordon
Nickloy, Albright & Gordon, LLP
5540 Pebble Village Lane, Suite 300
Noblesville, IN 46062
ph: (317) 773-3030
e-mail: ggordon@geistlaw.com

Mr. Peter J. Sacopulos
Sacopulos, Johnson & Sacopulos
676 Ohio Street
Terre Haute, IN 47807
ph: (812) 238-2565
e-mail: pete_sacopulos@sacopulos.com

GREGG S. GORDON is a partner with the Noblesville, Indiana law firm of NICKLOY ALBRIGHT & GORDON, LLP. While Mr. Gordon's practice is focused largely on litigation involving wills and trusts, he also has extensive experience in general business litigation. Mr. Gordon is a military veteran having served in the United States Air Force from 1980 through 1989 first with the Air Force Security Police and then as a Special Agent with the Air Force Office of Special Investigations. Mr. Gordon earned his B.S. *With Highest Distinction*, from Indiana University – Indianapolis in 1993 and his J.D. *Cum Laude* from the Indiana University School of Law – Indianapolis in 1996. Admitted to the Indiana Bar in 1996, Mr. Gordon completed the Indiana Trial Advocacy College in 2003 and civil mediation training in 2008.

While Mr. Gordon is a trial lawyer, he is also an avid horseman with a passion to serve the equine community. Mr. Gordon's practice includes professional legal services in the area of equine law. Using his experience from litigating cases for over twenty-five years, Mr. Gordon assists his clients who own and/or operate equine facilities on how to comply with Indiana law and minimize the risk of litigation – all with the goal of providing a safe environment for both the people and the horses at those facilities.

These seminar materials and the seminar presentation are intended to stimulate thought and discussion, and to provide those attending the seminar with useful ideas and guidance in the areas of equine law. The materials and the comments of the author does not constitute, and should not be treated as, legal advice or other legal technique, device or suggestion, or any of the consequences associated with them. Although every effort is made to ensure the accuracy of these materials and the seminar presentation, neither the author nor his law firm assume any responsibility for any individual's reliance on the written or oral information presented during the seminar. Each seminar attendee should verify independently all statements made in the materials and during the seminar presentation before applying them to a particular fact pattern, and should determine independently the consequences of using any particular device, technique or suggestion before recommending the same to a client or implementing the same on their own behalf and/or on behalf client.

EQUINE LAW

PETER J. SACOPULOS-ATTORNEY AT LAW

SACOPULOS, JOHNSON & SACOPULOS

Peter J. Sacopulos, ESQ. is a partner in the law firm of Sacopulos, Johnson & Sacopulos in Terre Haute, Indiana. Mr. Sacopulos serves as Legal Editor for *Trainer* magazine and has been featured in Blood Horse Magazine. He is a member and past president of the Terre Haute Bar Association, a member of the Indiana Thoroughbred Owners and Breeders Association, and is a member of the American College of Equine Attorneys. Mr. Sacopulos has written extensively on equine law issues in numerous publications, including *Trainer* magazine, *The Horsemen's Journal,* and *Equus.* He has presented at the National Equine Law Seminar in Lexington, Kentucky, the National HBPA Convention, and The Racing and Gaming Conference and Saratoga. His equine practice includes representing licensees before state regulatory agencies including the Indiana Horse Racing Commission and the Illinois Racing Board. Mr. Sacopulos received a B.A., *cum laude*, from Tulane University and a J.D. from Indiana University School of Law—Indianapolis.

Bar Association Memberships
Indiana, and Federal Bar Associations, Terre Haute Bar Association, President of the Terre Haute Bar Association (1999-2000), admitted to the State Bar of Indiana, the Federal District Courts for the Northern District of Indiana, the Federal District Courts for the Southern District of Indiana and United Court of Appeals for the Seventh Circuit, and the Illinois Bar Association.

He was appointed to and served on the Indiana Thoroughbred Breed Development Advisory Committee from 2015 to 2019 and served as a Board Member of the Indiana Thoroughbred Owners and Breeders Association from 2012 to 2022.

Education
Tulane University, Bachelor of Arts degree, cum laude, in International Relations, December 1984
Indiana University School of Law – Indianapolis, Doctor of Jurisprudence, 1988

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PowerPoint Presentation

Section One

EQUINE LAW:
A State & Federal Update

By

Gregg S. Gordon

Presented: March 30, 2022
ICLEF Conference Facility
230 E. Ohio Street, 5th Floor
Indianapolis, IN 46204

CONTACT INFORMATION:

GREGG S. GORDON
NICKLOY ALBRIGHT & GORDON, LLP
5540 Pebble Village Lane, Suite 300
Noblesville, IN 46062
OFFICE: (317) 773-3030
FAX: (317) 219-0545
DIRECT DIAL: (317) 523-6668
EMAIL: Gregg@Nickloylaw.com

GREGG S. GORDON is a partner with the Noblesville, Indiana law firm of NICKLOY ALBRIGHT & GORDON, LLP. While Mr. Gordon's practice is focused largely on litigation involving wills and trusts, he also has extensive experience in general business litigation. Mr. Gordon is a military veteran having served in the United States Air Force from 1980 through 1989 first with the Air Force Security Police and then as a Special Agent with the Air Force Office of Special Investigations. Mr. Gordon earned his B.S. *With Highest Distinction*, from Indiana University – Indianapolis in 1993 and his J.D. *Cum Laude* from the Indiana University School of Law – Indianapolis in 1996. Admitted to the Indiana Bar in 1996, Mr. Gordon completed the Indiana Trial Advocacy College in 2003 and civil mediation training in 2008.

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II. INTRODUCTION

So why talk about equine law? According to the American Horse Counsel Foundation's 2017 Economic Impact Study of the U.S. Horse Industry, the equine industry in the United States generates some $50 billion dollars in direct economic impact and some $122 billion dollars when direct and indirect impacts are combined. This report also indicated that some 30.5% (or 38 million) of households contain a horse enthusiast.

In Indiana, a 2011 study entitled *Indiana Equine Industry Economic Impact and Health Study* was conducted by Purdue University and that study reported that "Many small equine operations do not perceive themselves as business activities but only as horse owners."[1] In a publication released by the Purdue University School of Veterinary Medicine, it was pointed out that:

> Revenues and expenses aside, the study shows that many equine operations do not perceive that they are businesses. Although most respondents have a high opinion of being an entrepreneur, they feel that they lack the resources required to run a business. Almost 60 percent of respondents who were in business reported not to have completed a business plan, while almost a third of respondents who already had their own business listed it as their primary source of income.[2]

This conclusion should cause legal practitioners to take notice and ask questions. Do they have clients involved in the equine community? Do their clients operate businesses (formally or informally) which involve equines? If so, what steps have these clients taken to address the potential legal ramifications that may arise? This is particularly true given the propensity of the equine community to rely either on oral agreements or written agreements drafted by someone other than an Indiana attorney (think Google, Esq.).

---

[1] Susan E. Conners, Ph.D., Laurent Couetil, DVM, Jonathan M. Furdek, Ph.D., Mark A. Russell, Ph.D, *Indiana Equine Industry Economic Impact and Heath Study,* (September 2011) at p. 16.

[2]

The purpose of this paper is to provide practitioners with practical information so that they can assist their clients with equine related matters. But the information provided in this paper is only a starting point. Almost every facet of Indiana law can touch upon equine related matters. From contracts for the purchase or sell of an equine, to comprehensive business planning for an equine business, to estate planning involving equines, to substantive litigation over an equine caused accident, practitioners can easily find themselves involved in an equine related legal matter. If (and when) such matters arise, practitioners should be cognitive of the fact that equine legal matters oftentimes provide unique legal and/or factual issues.

III. THE INDIANA EQUINE ACTIVITY STATUTE – IND. CODE § 34-31-5 *ET SEQ*.

One such unique legal issue is Indiana's Equine Activity Statute. Many persons involved in the equine community harbor the belief that this statute provides the owner/operator of an equine business complete immunity to any horse related liability so long as an "equine warning sign" is posted somewhere on the premises. This is simply not the case, and a review of the Indiana Equine Activity Statute demonstrates the fallacies of this belief.

A. IND. CODE § 34-31-5-1 ACTIVITY SPONSOR OR PROFESSIONAL

The Indiana Equine Activity Statute is found in the Indiana Code at § 34-31-5-1 through 5. The primary limitation on liability is found at Ind. Code § 34-31-5-1 which provides that:

> (a) Subject to section 2 of this chapter, an ***equine activity sponsor or equine professional*** is not liable for:
>
> (1) an injury to a ***participant***; or
>
> (2) the death of a ***participant***;
>
> resulting from an ***inherent risk of equine activities***; and

(b) Subject to section 2 of this chapter, a ***participant*** or ***participant*'s** representative may not:

(1) make a claim against;

(2) maintain an action against; or

(3) recover from;

an ***equine activity sponsor*** or ***equine professional*** for injury, loss, damage, or death of the ***participant*** resulting from an ***inherent risk of equine activities***.

Three aspects of this statute must be noted.

First, this statute is an immunity statute. It does more than simply insulate an equine activity sponsor or equine professional from liability: It specifically precludes an aggrieved person from suing based on actions covered by the statute. The fact that the statute does not speak in express "immunity" terms is not controlling. *See KS&E Sports v. Runnels,* 72 N.E.3d 892, 900 (Ind. 2017). From a litigation perspective, this point is important because it can preclude a lawsuit from being filed or force a quick resolution of a lawsuit filed against a person/entity protected by the statute and avoid the expense of full-blown litigation. This code provision, however, is not as all-encompassing as it may appear to be at first blush. This is because of two other aspects of this statute: the definitions and the exclusions.

Buried in Ind. Code § 34-31-5-1 are several terms of art (bold and italicized above) that are not specifically defined within the Indiana Equine Activity Statute. Instead, these terms are defined elsewhere in the Indiana Code under Article 6 of Title 34. Knowing these definitions is critical because they establish who is and who is *not* – covered by the statute.

B. <u>DEFINITIONS FOR THE INDIANA EQUINE ACTIVITY STATUTE</u>

1) Equine Activity

Ind. Code § 34-6-2-41(a) defines "Equine activity", for purposes of Ind. Code § 34-31-5, as:

- Equine shows, fairs, competitions, performances, or parades that involve equines and any of the equine disciplines, including dressage, hunter and jumper horse shows, grand prix jumping, three (3) day events, combined training, rodeos, driving, pulling, cutting, polo, steeplechasing, English and western performance riding, endurance trail riding and western games, and hunting.

- Equine training or teaching activities.

- Boarding equines.

- Riding, driving, inspecting, or evaluating an equine, whether or not monetary consideration or anything of value is exchanged.

- Rides, trips, hunts, or other equine activities of any type (even if informal or impromptu) that are sponsored by an equine activity sponsor.

- Placing or replacing horseshoes on an equine.

In *Burdick v. Romano,* 148 N.E.3d 335, 342 (In. Ct. App. 2020), the Court of Appeals held that "the statutory definition of equine activity does *not* preclude sporting activities." (emphasis added). In reaching this conclusion, the Court of Appeals pointed out that "The activities listed by the statute as equine activities is not exhaustive, evinced by the words, "'Equine activity,' for purposes of IC 34-31-5, *includes* the following." *See Med. & Prof'l Collection Servs., Inc. v. Bush,* 734 N.E.2d 626, 629 n.4 (Ind. Ct. App. 2000) ("We note that 'includes,' rather than being a limiting term, implies a non-exhaustive list[.]") This nuance is important because, as discussed *infra*, it may permit a court to conclude that an equine participant was engaged in a sporting activity which then requires a showing of recklessness rather than mere negligence. In other

words, if the immunity afforded by Ind. Code § 34-31-5-1 is fount not to be applicable, then a plaintiff may still have an increased burden of proving liability against an equine defendant.

Ind. Code § 34-6-2-41(b) also specifically *excludes* "being a spectator at an equine activity." Ind. Code § 34-6-2 does not contain a definition of spectator and the line between being a "spectator" and a "participant" (which is defined by Ind. Code §34-6-2-95(a)), in the context of equine activities, is not always easy to discern. For example, a person enters your client's property to simply observe someone else riding a horse. During their visit, they elect to walk back into the area where horses are being readied for riding. And while in that area, they are injured when a horse kicks out. Or the person enters a riding arena and holds a horse so that the rider can dismount in order to adjust the saddle. While holding the horse, the person is stuck by an uncontrolled horse and injured. In these scenarios, is the person injured a spectator or a participant? And, unless steps have been taken to clearly delineate the distinction before an incident occurs, this may be a question that can only be answered at trial.

2) Participant

Ind. Code §34-6-2-95(a) define a "participant" as "a person, whether an amateur or a professional, *who engages in an equine activity*, whether or not a fee is paid to participate in the equine activity." (emphasis added). It is the author's opinion that this definition is expansive and should cover *anyone* who engages in an *equine activity* (also an inclusive rather than exclusive term pursuant to *Burdick,* 148 N.E.3d at 335) and regardless of whether they are a paying student or someone who is simply taking a test ride prior to deciding to take formal lessons. This definition should also include persons who may not be riding a horse but who still "participate" in an equine activity such as by entering a riding area to assist a rider or who holds a horse for a rider. But again, given the specific exclusion of a spectator in the definition of

"equine activity," there is no bright line which delineates at what point a person ceases to be a spectator and becomes a participant.

In *Einhorn v. Johnson,* 996 N.E.2d 823 (Ind. Ct. App. 2013), an unpaid volunteer was injured by a runaway horse. The trial court granted summary judgment based on the Equine Activity Statute and on appeal, the Court of Appeals held that it was undisputed that the injured party "was a 'participant' as defined by Indiana Code Section 34-6-2-95." *Id.* at 829. There is no indication in the opinion of exactly why it was undisputed that the injured party was a "participant", but the facts stated in the opinion suggest this conclusion was appropriate in that case.

The incident in *Einhorn* occurred at the Marshall County 4-H Fairgrounds and the unpaid volunteer was serving as the President of 4–H Marshall County Horse & Pony Advisory Committee. *Id.* at 825-6. At the time of the incident, the injured party "was riding in an off-road vehicle with his son around the fairgrounds." *Id.* at 826. When he heard someone yell "Loose horse!" he existed his vehicle presumably with the intent to assist in getting the horse under control. In fact, the injured party ended up in the path of the horse who ignored the injured party's up raised arms and verbal "Whoa" commands. As a result, the injured party was trampled.

The facts that the injured party was the president of an organization tasked with the supervision of "horses on the fairgrounds and providing safety at the Fair" and was actively engaged in that activity when he was injured certainly suggests that he was a "participant" pursuant to Ind. Code. §34-6-2-95(a). However, the question that must be asked is whether this conclusion would have been reached if the injured party had simply been someone who on the

premises to watch the activity (i.e., a spectator) and decided to lend a hand to help catch a loose horse? (and thus becoming a participant).

Returning to *Burdick*, one of the issues on appeal was whether the trial court properly refused to give jury instructions on negligence, duty, and reasonable care. In *Burdick*, a rider was allegedly kicked off her horse by another horse which was known to have the dangerous propensity of kicking other horses. The injured rider asked the trial court to give negligence jury instructions and the trial declined to do so finding that *Einhorn* did not apply because "it did not does not involve *a sports participant or spectator* but, instead, a *bystander* attempting to corral a loose horse." *Burdick,* 148 N.E.3d at 341. (emphasis added). *Cf. Einhorn*, 996 N.E.2d at 829.

This language suggests there may be a distinction between a person who is injured while actively engaging in equine activity (i.e., in the saddle and thus a "sports participant") as compared to someone who engages in an equine activity by chance (who still nevertheless a participant). Both would be covered by the Indiana Equine Activity Statute if it applied, but if it didn't, then an injured sports participant would have to prove that the injury was caused by the defendant's reckless behavior and not that the defendant was merely negligent. *Burdick*, 148 N.E.3rd at 343.

3) Inherent Risks of Equine Activities

Ind. Code § 34-6-2-69 defines "Inherent risks of equine activities", for purposes of Ind. Code § 34-31-5, as

- the dangers or conditions that are an integral part of equine activities, including:
    - The propensity of an equine to behave in ways that may result in injury, harm, or death to persons on or around the equine;
    - The unpredictability of an equine's reaction to such things as sound, sudden movement, unfamiliar objects, people, or other animals;

- Hazards such as surface and subsurface conditions;
- Collisions with other equines or objects; and
- The potential of a ***participant*** to act in a negligent manner that may contribute to injury to the ***participant*** or others, such as failing to maintain control over the animal or not acting within the ***participant's*** ability.

There is little question that this definition covers the spectrum of accidents and incidents that can occur with horses. Bucks, rears, kicks, spooks, slips and lack of steering/attention by a rider all appear to be covered within this definition. In short, if the horse and/or rider can do it (or fail to do it), then it is probably included as "inherent risk of equine activities."

Returning to *Einhorn*, the injured party attempted to argue that conduct of the horse which injured him was not encompassed in the five risks identified by this provision. The Court of Appeals, however, made short work of that argument:

> Assuming for purposes of summary judgment that [the injured party] was merely standing still and that [the horse] ran into him and trampled him while running loose, we hold that [the horse's] behavior falls into more than one category of inherent risks under the statute, namely: the propensity of an equine to behave in ways that may result in injury, harm, or death to persons on or around the equine; the unpredictability of an equine's reaction to such things as sound, sudden movement, unfamiliar objects, people, or other animals; and the potential of a participant to act in a negligent manner that may contribute to injury to the participant or others, such as failing to maintain control over the animal or not acting within the participant's ability.

Einhorn, 996 N.E.2d at 830. In *Burdick*, instructing the jury on the inherent risks of equine activity was also found to be proper even when the proposed instruction "omitted language from the statute about inherent risks arising from hazards such as surface and subsurface conditions and collisions with other equines or objects . . ." *Burdick*, 148 N.E.3d at 344. This was true because "This omission was appropriate to make the instruction conform to the facts of the case."

4) Equine Professional

The fourth definition that needs to be examined is "equine professional." This term is defined by Indiana Code § 34-6-2-43 as someone who, *for compensation*:

- Instructs a participant on riding, driving, or being a passenger upon an equine;
- Rents to a participant an equine for the purpose of riding, driving, or being a passenger upon the equine; or
- Rents equipment or tack to a participant.[3]

The "for compensation" requirement must be noted. In most instances, this qualification is easily satisfied such as where a student pays an instructor for lessons. The "equine professional" is being paid for providing a particular service to the "participant". However, in some instances, this requirement may *not* exist.

For example, a person who is boarding a horse at an equine facility elects to sell their horse and meets with a prospective buyer at the facility. The prospective buyer has no relationship with the owner/operator of the equine facility. The prospective buyer test rides the horse, the horse spooks and the prospective buyer is thrown and injured. In that instance, the definition of an "equine professional" has *not* been satisfied as to the seller and therefore the immunity afforded by Ind. Code § 34-31-5-1 will not bar an action against the seller. The owner of the facility, however, is an "equine activity sponsor" as discussed *infra*, so the immunity would be available to the owner *provided* that the owner has otherwise complied with the other provisions of the Indiana Equine Activity Statue.

5) Equine Activity Sponsor

The fifth and last definition that needs to be examined for purposes of the Indiana Equine Activity Statute is the term "equine activity sponsor." This term is defined by Ind. Code § 34-6-

[3] Indiana Code § 34-6-2-43 (emphasis added).

2-42 as a person "who sponsors, organizes, or provides facilities for an equine activity." Since the definition of "equine activity" is very broad (and includes "boarding equines") this definition will more than likely cover all owners and operators of equine facilities. In the example discussed in the prior section, the owner of the facility should be included in this definition since the owner is providing a facility where "riding, driving, inspecting, or evaluating an equine, whether or not monetary consideration or anything of value is exchanged" *See* Ind. Code § 34-6-2-41(a) (4).

While the immunity afforded by Indiana Equine Activity Statute is quite broad, these definitions demonstrate that there are several potential gaps in the immunity. Returning a final time to *Einhorn*, it should be noted that the owners of the horse at issue were also sued by the injured party for negligence. There is no mention in the opinion of the possibility that the horse's owners were immune under the Indiana Equine Activity Statute nor does such a contention seem viable given that no facts were identified which suggested that the owners were either equine professionals or equine activity sponsors. Instead, they were simply the owners of a horse that injured someone and, as a result, were forced to incur the time and expense to defend themselves in a lawsuit because they were not included in the definitions used in the Indiana Equine Activity Statute. Moreover, additional gaps exist by virtue of the exclusions found at Ind. Code § 34-31-5-2.

C. EXCLUSIONS TO THE INDIANA EQUINE ACTIVITY STATUTE

Ind. Code § 34-31-5-2 provides that:

(a) This section does not apply to the horse racing industry.

(b) Section 1 of this chapter does not prevent or limit the liability of an **equine activity sponsor** or an **equine professional**:

(1) who:

(A) provided equipment or tack that was faulty and that caused the injury; and

(B) knew or should have known that the equipment or tack was faulty;

(2) who provided the equine and failed to make reasonable and prudent efforts based on the participant's representations of the participant's ability to:

(A) determine the ability of the participant to engage safely in the equine activity; and

(C) determine the ability of the participant to safely manage the particular equine;

(3) who:

(A) was in lawful possession and control of the land or facilities on which the participant sustained injuries; and

(B) knew or should have known of the dangerous latent condition that caused the injuries;

if warning signs concerning the dangerous latent condition were not conspicuously posted on the land or in the facilities;

(4) who committed an act or omission that:

(A) constitutes reckless disregard for the safety of the participant; and

(B) caused the injury; or

(5) who intentionally injured the participant.

(c) Section 1 of this chapter does not prevent or limit the liability of an equine activity sponsor or an equine professional under the product liability laws.

These exceptions are significant. Thus, even if a client falls within the definitions of an "equine professional" or "equine activity sponsor", there is no immunity if one of these exceptions are involved. And in instances where the client provided either the horse or the tack (or both), it is not difficult to envision allegations by which the exceptions will immediately negate the immunity against claims and maintaining an action.

Nor do the definitions and exceptions form the only limitations on the immunity afforded by the Indiana Equine Activity Statute. In order to qualify for such immunity, the statute also requires notice be given to participants.

D. MANDATORY PREREQUISITES FOR THE INDIANA EQUINE ACTIVITY STATUTE

Before "an equine activity sponsor" or "equine professional" can qualify for protection under the Indiana Equine Activity Statute, two (2) steps must be taken. First, appropriate warning signs must be posted and maintained:

> (a) This chapter does not apply unless an equine activity sponsor or an equine professional posts and maintains in at least one (1) location on the grounds or in the building that is the site of an equine activity a sign on which is printed the warning notice set forth in section 5 of this chapter.

Ind. Code § 34-31-5-3(a). Ind. Code § 34-31-5-5 identifies that warning notice that *must* be printed on a sign under Ind. Code § 34-31-5-3 is as follows:

WARNING

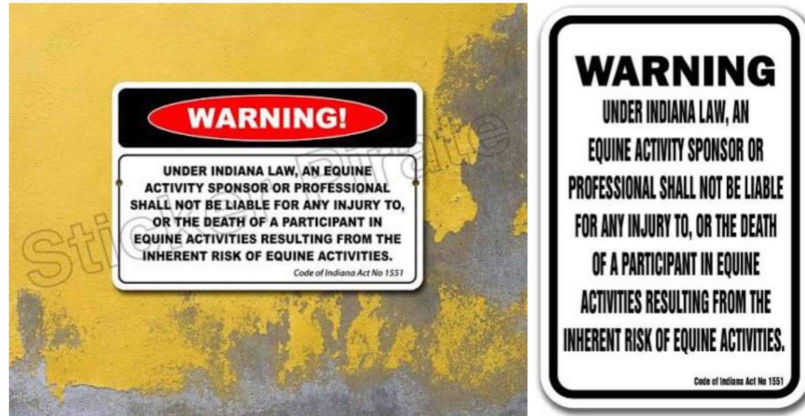
> **UNDER INDIANA LAW, AN EQUINE PROFESSIONAL IS NOT LIABLE FOR AN INJURY TO, OR THE DEATH OF, A PARTICIPANT IN EQUINE ACTIVITIES RESULTING FROM THE INHERENT RISKS OF EQUINE ACTIVITIES.**

The warning sign must also meet two (2) additional requirements. First, the sign must be placed *in a clearly visible location in proximity to the equine activity*. Ind. Code § 34-41-5-3(b).

Second, the warning notice on the sign must be printed in *black* letters and each letter must be at least one (1) inch in height. *Id.* at (c). If a sign does not meet these requirements, then the sign may not be sufficient to invoke the statutory protection of the Indiana Equine Activity Statute.

As a practical matter, the commercially available signs vary, and many do *not* comply with the Indiana Equine Activity Statute. For example:

Others come close but do not actually use the wording required by Ind. Code § 34-31-5-5:



In *Burdick*, there is no indication why the trial court denied the defendant's motions for summary judgement. The facts of the opinion suggest that the defendant was either an "equine professional" and/or "equine activity sponsor" since the defendant was renting and living on certain property where plaintiff took her horse for boarding and training and which included an arena "specifically and exclusively designed for horse riding and training. . . . It was not designed or used for any other purpose, such as providing a venue for cattle shows." *Burdick,* 148 N.E.3d at 337.) The question that is unanswered by the opinion is whether the defendant had complied with Ind. Code § 34-31-5-3(a).

Some of these signs also attempt to address the issue of whether a person is a spectator or participant by attempting to make anyone on the premises a participant: "This is Not a Spectator Area." Ind Code § 34-31-5-5 does not identify that this language is (or can be) included in the warning notice. But the concept appears to be viable, as discussed *infra*, if done properly.

The other step which must be taken for "an equine activity sponsor" or "equine professional" to qualify for protection under the Indiana Equine Activity Statute involves the use of written contracts. If there is a written contract entered into by an "equine professional" for:

- the providing of professional services;
- the providing of instruction; or
- the rental of equipment or tack or an equine;

to a "participant" then the contract must:

- contain in clearly readable print the warning notice that:

WARNING

UNDER INDIANA LAW, AN EQUINE PROFESSIONAL IS NOT LIABLE FOR AN INJURY TO, OR THE DEATH OF, A PARTICIPANT IN EQUINE ACTIVITIES RESULTING FROM THE INHERENT RISKS OF EQUINE ACTIVITIES.

This warning notice must be included in a written contract whether the contract involves equine activities on or off the location or site of the equine professional's business. Ind. Code § 34-31-5-4(b)

E. THE INDIANA EQUINE ACTIVITY STATUTE IS A STARTING POINT

While the Indiana Equine Activity Statute is a good starting point and compliance with its terms and provisions is highly recommended, there are simple too many exclusions for the statute to be the sole means to limit liability for an equine activity. The other problem with relying exclusively on the Indiana Equine Activity Statute is that the statute simply does not educate people on how to conduct themselves around horses. This is particularly true when persons with little or no experience around horses are involved. It is far better, in the opinion of the author, to help educate these people so that when they come on to the premises, they avoid engaging in actions which can place them – and others – at risk. Both goals, liability protection and education, can be accomplished using a well drafted equine activity release, waiver of liability and assumption of risk. And, in the author's opinion, this is where a bright line can be established as to who is (and who isn't) a participant.

It is the author's practice to include this language in an equine client's *Equine Activity Release and Waiver of Liability, Assumption Of All Risk and Agreement To Indemnify* which is to be signed by every person entering an equine client's facilities:

> **<u>Inherent Risks of Equine Activities</u>.** The undersigned expressly understands that certain conditions are an integral and inherent part of Equine Activities including (1) The ability of an equine to behave in ways that can result in injury or death to persons on or around the equine, (2) the unpredictability of an equine's reaction to things such as sound, sudden movement, unfamiliar objects, people, and/or other animals, (3) Hazards such as surface/subsurface conditions (including objects on or about the ground such as equipment, jumps, ground poles, fences, and gates); (4) Collisions with equines or objects; and (5) The potential of a person engaging in Equine Activities to act in a manner that may cause or contribute to the injury or death of that person as well as other persons such as by failing to maintain control over an equine, failing to act within the person's ability to ride or handle an equine, acting in an inappropriate manner on or around equines, and/or failing to exercise awareness of other persons, equines, and/or surface/subsurface conditions and objects. **The undersigned expressly understands and agrees that such conditions exist whether a person is: (A) personally engaged in Equine Activities, (B) a spectator of Equine Activities or (C) entering, departing or being on the Premises or Locations where Equine Activities are taking place and that by doing (A), (B) or (C), such a person is knowingly and voluntarily becoming an "Equine Participant."**

To date, this language has not been tested by a court. But the intent is to render anyone who comes into, or upon the property of, an equine operation to be deemed a participant for the Indiana Equine Activity Statute.

IV. EQUINE LIENS

A common issue that can arise when a client operates an equine boarding facility is what the client's remedies are when the owner of a boarded horse fails to pay for the boarding. The client is simply not at liberty to stop caring for the horse. To do so, would expose the client to potential criminal liability. *See* Ind. Code 35-46-3-7 ("A person having a vertebrate animal in the person's custody who recklessly, knowingly, or intentionally abandons or neglects the animal

commits cruelty to an animal, a Class A misdemeanor.") *See Lykins v. State*, 726 N.E.2d 1265 (Ind.Ct.App. 2000). This is not to say that the client is without a legal remedy.

Ind. Code § 32-33-8-1 provides that:

> The keeper of a livery stable or a person engaged in feeding horses, cattle, hogs, and other livestock:
>
> (1) has a lien upon the livestock for the feed and care bestowed by the keeper upon the livestock; and
>
> (2) has the same rights and remedies as are provided for those persons having, before July 24, 1853, by law, a lien under IC 32-33-9.

See also Ind. Code § 32-33-9-4 ("this chapter applies to all cases of personal property on which the bailee or keeper has, by law, a lien for any feed or care by the bailee or keeper provided on the property.") This type of lien is typically referred to as an agister lien and provides the equine business owner a legal remedy provided that the equine business owner complies with the statutory requirements to enforce the lien.

Ind. Code § 32-33-9-1 provides that:

> If a person entrusts to a mechanic or tradesman materials to construct, alter, or repair an article of value, the mechanic or tradesman, if the construction, alteration, or repair is completed and not taken away and the mechanic's or tradesman's fair and reasonable charges not paid, may, **after sixty (60) days after the charges became due:**
>
> (1) sell the article of value; or
>
> (2) If the article of value is susceptible of division, without injury, may sell as much of the article of value as is necessary to pay the charges.

(emphasis added). Ind. Code § 32-33-9-2 then provides that:

> Before a sale under section 1 of this chapter, the mechanic or tradesman must give notice of the amount due and the time and place of the sale by mailing a certified or registered letter, return receipt requested, to the last known address of the entrusting person or owner **at least thirty (30) days** before the date of the sale.

(emphasis added). Ind. Code § 32-33-9-3(b) further provides that:

> If the entrusting person or owner does not:
>
> (1) claim the article within the thirty (30) days before the date of the sale;
>
> (2) pay for the construction, alteration, or repair; and
>
> (3) provide reimbursement for the expenses of notification;
>
> the mechanic or tradesman may proceed with the sale according to the terms of the notice.

Ind. Code § 32-33-9-4, however, provides:

> Except as provided in section 5 of this chapter, *this chapter applies to all cases of personal property on which the bailee or keeper has, by law, a lien for any feed or care by the bailee or keeper provided on the property.* However, in cases where the person liable dies before the expiration of sixty (60) days after the charges accrued, the sale may not be made until at least sixty (60) days after the date of the person's death. (emphasis added)

Lastly, Ind. Code § 32-33-9-8 states that:

> All mechanics, tradesmen, or bailees taking advantage of this chapter, at the time of the entrusting, must issue a receipt to the person entrusting the article to them. The receipt must conspicuously state, "All articles left on the premises after work is completed may be sold for charges."

Juxtaposed against these provisions, however, is Ind. Code § 32-33-9-5:

> For personal property described in section 4 of this chapter, if the property bailed or kept is:
>
> (1) **horses**;
>
> (2) cattle;
>
> (3) hogs;
>
> (4) other livestock; or
>
> (5) other property covered in this chapter that is of a perishable nature and will be greatly injured by delay;

> the person to whom the charges may be due may, **after the expiration of thirty (30) days after the charges become due**, proceed to dispose of as much of the property as may be necessary, as provided in this chapter (emphasis added).

With this language in mind, a client involved in an equine boarding business should include in their boarding agreement an express provision that complies with Ind. Code § 32-33-9-8 ("All articles left on the premises after work is completed may be sold for charges"). While the author is unaware of any Indiana case law regarding this provision in the context of an equine boarding agreement, it is suggested that this language could be integrated into a boarding agreement by using a provision such as this:

> Right of Lien: **ALL ARTICLES LEFT ON THE PREMISES AFTER WORK IS COMPLETED MAY BE SOLD FOR CHARGES.** Boarder understand and agrees that [Equine Business Owner] has and will assert a lien on the Horse pursuant to Ind. Code §§ 32-33-8-1 and 32-33-9-5 for all amounts incurred for the feed and care of the Horse which are not timely paid within thirty (30) days after the charges for such feed and care become due. IF THE CHARGES FOR FEED AND CARE OF THE HORSE ARE NOT PAID WITHIN THIRTY (30) DAYS AFTER THE CHARGES ARE DUE, THE HORSE MAY BE SOLD TO PAY SUCH CHARGES.

Second, the equine business owner should ensure that a copy of the boarding agreement is given to the boarder at the time the horse itself is delivered to the equine business owner's facility. By including such language and providing the boarder a copy of the boarding agreement at the time the horse is delivered, the equine business owner can then utilize the provisions of Ind. Code § 32-33-9 *et seq.* to legally sell the horse and recoup the costs incurred if the owner of the horse should stop paying for the feeding and care of the horse.

EQUINE LAW: A State & Federal Update

Gregg S. Gordon

NICKLOY ALBRIGHT & GORDON, LLP
5540 Pebble Village Lane, Suite 300
Noblesville, IN 46062
OFFICE: (317) 773-3030
FAX: (317) 219-0545
DIRECT DIAL: (317) 523-6668
EMAIL: Gregg@Nickloylaw.com

INDIANA'S EQUINE COMMUNITY

2002 Indiana Equine Survey, Indiana's horse population in 2001 consisted of 160,000 equines on 34,000 operations.

2005 Study Conducted for the American Horse Council: Indiana horse population had arisen to 203,000 (placing Indiana ninth among the other states in horse population) and the study reported that 90,000 people in Indiana were involved in the equine industry as horse owners, service providers, employees and volunteers.

2011 Indiana Equine Industry Economic Impact and Health Study:

"Many small equine operations do not perceive themselves as business activities but only as horse owners."

American Horse Counsel Foundation’s 2017 Economic Impact Study of the U.S. Horse Industry:

The equine industry in the United States generates some $50 billion dollars in direct economic impact and some $122 billion dollars when direct and indirect impacts are combined. This report also indicated that some 30.5% (or 38 million) of households contain a horse enthusiast.

INDIANA EQUINE ACTIVITY STATUTE

Indiana Code § 34-31-5 *et seq.*

Ind. Code § 34-31-5-1 Activity sponsor or professional

(a) Subject to section 2 of this chapter, an equine activity sponsor or equine professional is not liable for:

(1) an injury to a participant; or

(2) the death of a participant;

resulting from an inherent risk of equine activities.

(b) Subject to section 2 of this chapter, a participant or participant's representative may not:

(1) make a claim against;

(2) maintain an action against; or

(3) recover from;

an equine activity sponsor or equine professional for injury, loss, damage, or death of the participant resulting from an inherent risk of equine activities.

Ind. Code § 34-31-5-1 Activity sponsor or professional

(a) Subject to section 2 of this chapter, an equine activity sponsor or equine professional is not liable for:

(1) an injury to a participant; or

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resulting from an inherent risk of equine activities.

(b) Subject to section 2 of this chapter, a participant or participant's representative may not:

(1) make a claim against;

(2) maintain an action against; or

(3) recover from;

an equine activity sponsor or equine professional for injury, loss, damage, or death of the participant resulting from an inherent risk of equine activities.

Ind. Code § 34-6-2-41 “Equine activity”

(a) “Equine activity”, for purposes of IC 34-31-5, includes the following:

(1) Equine shows, fairs, competitions, performances, or parades that involve equines and any of the equine disciplines, including dressage, hunter and jumper horse shows, grand prix jumping, three (3) day events, combined training, rodeos, driving, pulling, cutting, polo, steeplechasing, English and western performance riding, endurance trail riding and western games, and hunting.

(2) Equine training or teaching activities.

(3) Boarding equines.

(4) Riding, driving, inspecting, or evaluating an equine, whether or not monetary consideration or anything of value is exchanged.

(5) Rides, trips, hunts, or other equine activities of any type (even if informal or impromptu) that are sponsored by an equine activity sponsor.

(6) Placing or replacing horseshoes on an equine.

(b) The term does not include being a spectator at an equine activity.

Ind. Code § 34-6-2-41 "Equine activity"

(a) "Equine activity", for purposes of IC 34-31-5, includes the following:

(1) Equine shows, fairs, competitions, performances, or parades that involve equines and any of the equine disciplines, including dressage, hunter and jumper horse shows, grand prix jumping, three (3) day events, combined training, rodeos, driving, pulling, cutting, polo, steeplechasing, English and western performance riding, endurance trail riding and western games, and hunting.

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(6) Placing or replacing horseshoes on an equine.

(b) The term does not include being a spectator at an equine activity.

Ind. Code § 34-6-2-95 "Participant"

"Participant", for purposes of IC 34-31-5, means a person, whether an amateur or a professional, who engages in an equine activity, whether or not a fee is paid to participate in the equine activity.

Ind. Code § 34-6-2-69 "Inherent risks of equine activities"

"Inherent risks of equine activities", for purposes of IC 34-31-5, means the dangers or conditions that are an integral part of equine activities, including the following:

(1) The propensity of an equine to behave in ways that may result in injury, harm, or death to persons on or around the equine.

(2) The unpredictability of an equine's reaction to such things as sound, sudden movement, unfamiliar objects, people, or other animals.

(3) Hazards such as surface and subsurface conditions.

(4) Collisions with other equines or objects.

(5) The potential of a participant to act in a negligent manner that may contribute to injury to the participant or others, such as failing to maintain control over the animal or not acting within the participant's ability.

Ind. Code § 34-6-2-43 “Equine professional”

“Equine professional”, for purposes of IC 34-31-5, means a person who, for compensation:

(1) instructs a participant on riding, driving, or being a passenger upon an equine;

(2) rents to a participant an equine for the purpose of riding, driving, or being a passenger upon the equine; or

(3) rents equipment or tack to a participant.

Ind. Code § 34-6-2-43 “Equine professional”

“Equine professional”, for purposes of IC 34-31-5, means a person who, for compensation:

(1) instructs a participant on riding, driving, or being a passenger upon an equine;

(2) rents to a participant an equine for the purpose of riding, driving, or being a passenger upon the equine; or

(3) rents equipment or tack to a participant.

Ind. Code § 34-6-2-42 "Equine activity sponsor"

"Equine activity sponsor", for purposes of IC 34-31-5, means a person who sponsors, organizes, or provides facilities for an equine activity.

INDIANA EQUINE ACTIVITY STATUTE

EXCLUSIONS TO THE INDIANA EQUINE ACTIVITY STATUTE

Ind. Code § 34-31-5-2 Exceptions

(a) This section does not apply to the horse racing industry.

Ind. Code § 34-31-5-2 Exceptions

(b) Section 1 of this chapter does not prevent or limit the liability of an equine activity sponsor or an equine professional:

(1) who:

(A) provided equipment or tack that was faulty and that caused the injury; and

(B) knew or should have known that the equipment or tack was faulty;

Ind. Code § 34-31-5-2 Exceptions

(b) Section 1 of this chapter does not prevent or limit the liability of an equine activity sponsor or an equine professional:

(1) who:

(A) provided equipment or tack that was faulty and that caused the injury; and

(B) knew or should have known that the equipment or tack was faulty;

Ind. Code § 34-31-5-2 Exceptions

(b) Section 1 of this chapter does not prevent or limit the liability of an equine activity sponsor or an equine professional:

(2) who provided the equine and failed to make reasonable and prudent efforts based on the participant's representations of the participant's ability to:

(A) determine the ability of the participant to engage safely in the equine activity; and

(B) determine the ability of the participant to safely manage the particular equine;

Ind. Code § 34-31-5-2 Exceptions

(b) Section 1 of this chapter does not prevent or limit the liability of an equine activity sponsor or an equine professional:

(2) who provided the equine and failed to make reasonable and prudent efforts based on the participant's representations of the participant's ability to:

(A) determine the ability of the participant to engage safely in the equine activity; and

(B) determine the ability of the participant to safely manage the particular equine;

Ind. Code § 34-31-5-2 Exceptions

(b) Section 1 of this chapter does not prevent or limit the liability of an equine activity sponsor or an equine professional:

(3) who:

(A) was in lawful possession and control of the land or facilities on which the participant sustained injuries; and

(B) knew or should have known of the dangerous latent condition that caused the injuries;

if warning signs concerning the dangerous latent condition were not conspicuously posted on the land or in the facilities;

Ind. Code § 34-31-5-2 Exceptions

(b) Section 1 of this chapter does not prevent or limit the liability of an equine activity sponsor or an equine professional:

(3) who:

(A) was in lawful possession and control of the land or facilities on which the participant sustained injuries; and

(B) knew or should have known of the dangerous latent condition that caused the injuries;

if warning signs concerning the dangerous latent condition were not conspicuously posted on the land or in the facilities;

Ind. Code § 34-31-5-2 Exceptions

(b) Section 1 of this chapter does not prevent or limit the liability of an equine activity sponsor or an equine professional:

(4) who committed an act or omission that:

> (A) constitutes reckless disregard for the safety of the participant; and
>
> (B) caused the injury; or

(5) who intentionally injured the participant.

Ind. Code § 34-31-5-2 Exceptions

(b) Section 1 of this chapter does not prevent or limit the liability of an equine activity sponsor or an equine professional:

(4) who committed an act or omission that:

> **(A) constitutes reckless disregard for the safety of the participant; and**
>
> **(B) caused the injury; or**

(5) who intentionally injured the participant.

Ind. Code § 34-31-5-2 Exceptions

(c) Section 1 of this chapter does not prevent or limit the liability of an equine activity sponsor or an equine professional under the product liability laws.

INDIANA EQUINE ACTIVITY STATUTE

MANDATORY PREREQUISITES FOR THE INDIANA EQUINE ACTIVITY STATUTE

Ind. Code § 34-31-5-3 Posting and maintenance of warning notice sign

(a) This chapter does not apply unless an equine activity sponsor or an equine professional posts and maintains in at least one (1) location on the grounds or in the building that is the site of an equine activity a sign on which is printed the warning notice set forth in section 5 of this chapter.

(b) A sign referred to in subsection (a) must be placed in a clearly visible location in proximity to the equine activity.

(c) The warning notice on a sign referred to in subsection (a) must be printed in black letters, and each letter must be at least one (1) inch in height.

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(c) The warning notice on a sign referred to in subsection (a) must be printed in black letters, and each letter must be at least one (1) inch in height.

Improper Signs:

WARNING
PARTICIPANTS WHO
ENGAGE IN EQUINE
ACTIVITIES ASSUME
THE RISKS OF
ENGAGING IN AND
LEGAL RESPONSIBILITY
FOR INJURY, LOSS, OR
DAMAGE TO PERSON
OR PROPERTY
RESULTING
FROM THE INHERENT
RISKS OF EQUINE
ACTIVITIES

Improper Signs:

Improper Signs:

Ind. Code § 34-31-5-5 Contents of warning notice

The warning notice that must be printed on a sign under section 3 of this chapter and included in a written contract under section 4 of this chapter is as follows:

WARNING

Under Indiana law, an equine professional is not liable for an injury to, or the death of, a participant in equine activities resulting from the inherent risks of equine activities.

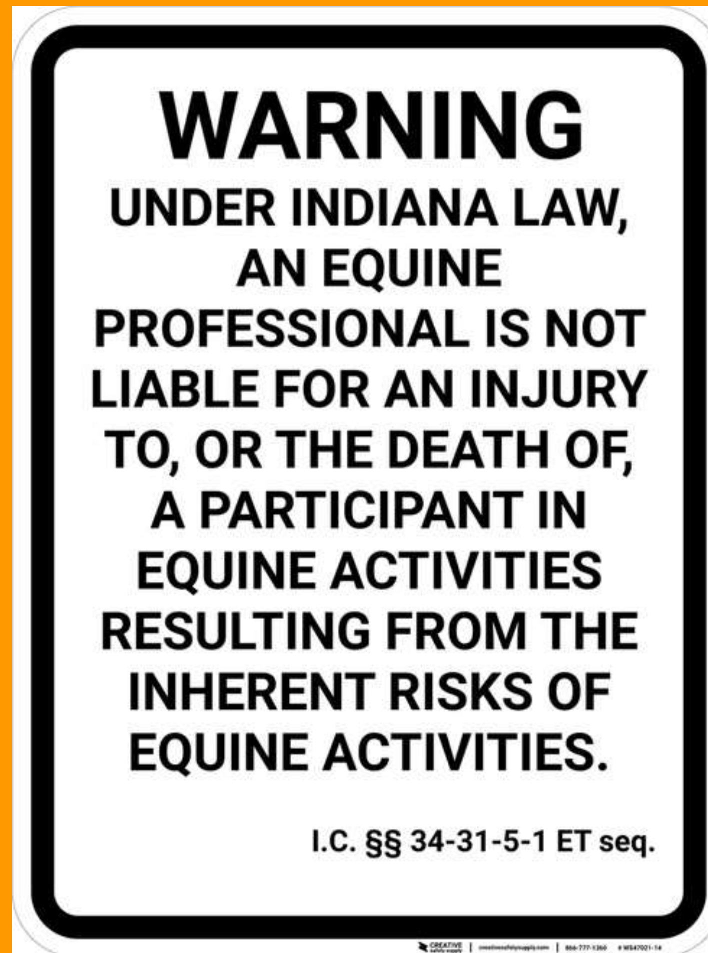
Ind. Code § 34-31-5-5 Contents of warning notice

The warning notice that must be printed on a sign under section 3 of this chapter and included in a written contract under section 4 of this chapter is as follows:

WARNING

Under Indiana law, an equine professional is not liable for an injury to, or the death of, a participant in equine activities resulting from the inherent risks of equine activities.

Proper Sign:



Ind. Code § 34-31-5-4 Written contract

(a) If there is a written contract, this chapter does not apply unless the written contract entered into by an equine professional for:

(1) the providing of professional services;

(2) the providing of instruction; or

(3) the rental of:

(A) equipment or tack; or

(B) an equine;

to a participant contains in clearly readable print the warning notice set forth in section 5 of this chapter.

(b) The warning notice required by subsection (a) must be included in a written contract described in subsection (a) whether or not the contract involves equine activities on or off the location or site of the equine professional's business.

Ind. Code § 34-31-5-4 Written contract

(a) If there is a written contract, this chapter does not apply unless the written contract entered into by an equine professional for:

(1) the providing of professional services;

(2) the providing of instruction; or

(3) the rental of:

(A) equipment or tack; or

(B) an equine;

to a participant contains in clearly readable print the warning notice set forth in section 5 of this chapter.

(b) The warning notice required by subsection (a) must be included in a written contract described in subsection (a) whether or not the contract involves equine activities on or off the location or site of the equine professional's business.

Suggested Contract Provision

- **Inherent Risks of Equine Activities.** The undersigned expressly understands that certain conditions are an integral and inherent part of Equine Activities including (1) The ability of an equine to behave in ways that can result in injury or death to persons on or around the equine, (2) the unpredictability of an equine's reaction to things such as sound, sudden movement, unfamiliar objects, people, and/or other animals, (3) Hazards such as surface/subsurface conditions (including objects on or about the ground such as equipment, jumps, ground poles, fences, and gates); (4) Collisions with equines or objects; and (5) The potential of a person engaging in Equine Activities to act in a manner that may cause or contribute to the injury or death of that person as well as other persons such as by failing to maintain control over an equine, failing to act within the person's ability to ride or handle an equine, acting in an inappropriate manner on or around equines, and/or failing to exercise awareness of other persons, equines, and/or surface/subsurface conditions and objects. **The undersigned expressly understands and agrees that such conditions exist whether a person is: (A) personally engaged in Equine Activities, (B) a spectator of Equine Activities or (C) entering, departing or being on the Premises or Locations where Equine Activities are taking place and that by doing (A), (B) or (C), such a person is knowingly and voluntarily becoming an "Equine Participant."**

Equine Liens

Ind. Code § 32-33-8-1 Feed and care bestowed upon livestock; mechanic's and tradesman lien

The keeper of a livery stable or a person engaged in feeding horses, cattle, hogs, and other livestock:

(1) has a lien upon the livestock for the feed and care bestowed by the keeper upon the livestock; and

(2) has the same rights and remedies as are provided for those persons having, before July 24, 1853, by law, a lien under IC 32-33-9.

Ind. Code § 32-33-9-1 Sale of property to satisfy unpaid charges

If a person entrusts to a mechanic or tradesman materials to construct, alter, or repair an article of value, the mechanic or tradesman, if the construction, alteration, or repair is completed and not taken away and the mechanic's or tradesman's fair and reasonable charges not paid, may, after sixty (60) days after the charges became due:

(1) sell the article of value; or

(2) if the article of value is susceptible of division, without injury, may sell as much of the article of value as is necessary to pay the charges.

Ind. Code § 32-33-9-2 Notice of sale

Before a sale under section 1 of this chapter, the mechanic or tradesman must give notice of the amount due and the time and place of the sale by mailing a certified or registered letter, return receipt requested, to the last known address of the entrusting person or owner at least thirty (30) days before the date of the sale.

Ind. Code § 32-33-9-3 Proceeds of sale; failure to claim article and pay expenses

(a) The proceeds of a sale that takes place under section 1 of this chapter, after payment of charges for construction or repair and for giving notice by registered or certified mail, shall be:

(1) returned to the entrusting person or owner if the identity and mailing address of the entrusting person or owner are known; or

(2) deposited with the treasurer of the county in which the construction or repair work was performed.

(b) If the entrusting person or owner does not:

(1) claim the article within the thirty (30) days before the date of the sale;

(2) pay for the construction, alteration, or repair; and

(3) provide reimbursement for the expenses of notification;

the mechanic or tradesman may proceed with the sale according to the terms of the notice.

Ind. Code § 32-33-9-4 Application of chapter

Except as provided in section 5 of this chapter, this chapter applies to all cases of personal property on which the bailee or keeper has, by law, a lien for any feed or care by the bailee or keeper provided on the property. However, in cases where the person liable dies before the expiration of sixty (60) days after the charges accrued, the sale may not be made until at least sixty (60) days after the date of the person's death.

Ind. Code § 32-33-9-4 Application of chapter

For personal property described in section 4 of this chapter, if the property bailed or kept is:

(1) horses;

(2) cattle;

(3) hogs;

(4) other livestock; or

(5) other property covered in this chapter that is of a perishable nature and will be greatly injured by delay;

the person to whom the charges may be due may, after the expiration of thirty (30) days after the charges become due, proceed to dispose of as much of the property as may be necessary, as provided in this chapter.

Equine Liens: Suggested Contract Provision

- Right of Lien: **ALL ARTICLES LEFT ON THE PREMISES AFTER WORK IS COMPLETED MAY BE SOLD FOR CHARGES.** Boarder understand and agrees that [Equine Business Owner] has and will assert a lien on the Horse pursuant to Ind. Code § 32-33-8-1 for all amounts incurred for the feed and care of the Horse which are not timely paid within thirty (30) days after the charges for such feed and care become due. IF THE CHARGES FOR FEED AND CARE OF THE HORSE ARE NOT PAID WITHIN THIRTY (30) DAYS AFTER THE CHARGES ARE DUE, THE HORSE MAY BE SOLD TO PAY SUCH CHARGES.

Section Two

EQUINE LAW 2022:

A State and Federal Update

By

Peter J. Sacopulos

Presented: March 30, 2022
ICLEF Conference Facility
230 E. Ohio Street, 5th Floor
Indianapolis, IN 46204

CONTACT INFORMATION:

MAILING ADDRESS: 676 Ohio Street, Terre Haute, IN 47807
TELEPHONE: (812) 238-2565
CELL: (812) 249-4268
FAX: (812) 238-1945
EMAIL: pete_sacopulos@sacopulos.com

Section Two

Equine Law 2022: A State and Federal Update……..Peter J. Sacopulos

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EQUINE LAW

PETER J. SACOPULOS-ATTORNEY AT LAW

SACOPULOS, JOHNSON & SACOPULOS

Peter J. Sacopulos, ESQ. is a partner in the law firm of Sacopulos, Johnson & Sacopulos in Terre Haute, Indiana. Mr. Sacopulos serves as Legal Editor for *Trainer* magazine and has been featured in Blood Horse Magazine. He is a member and past president of the Terre Haute Bar Association, a member of the Indiana Thoroughbred Owners and Breeders Association, and is a member of the American College of Equine Attorneys. Mr. Sacopulos has written extensively on equine law issues in numerous publications, including *Trainer* magazine, *The Horsemen's Journal,* and *Equus.* He has presented at the National Equine Law Seminar in Lexington, Kentucky, the National HBPA Convention, and The Racing and Gaming Conference and Saratoga. His equine practice includes representing licensees before state regulatory agencies including the Indiana Horse Racing Commission and the Illinois Racing Board. Mr. Sacopulos received a B.A., *cum laude*, from Tulane University and a J.D. from Indiana University School of Law—Indianapolis.

Bar Association Memberships

Indiana, and Federal Bar Associations, Terre Haute Bar Association, President of the Terre Haute Bar Association (1999-2000), admitted to the State Bar of Indiana, the Federal District Courts for the Northern District of Indiana, the Federal District Courts for the Southern District of Indiana and United Court of Appeals for the Seventh Circuit, and the Illinois Bar Association.

He was appointed to and served on the Indiana Thoroughbred Breed Development Advisory Committee from 2015 to 2019 and served as a Board Member of the Indiana Thoroughbred Owners and Breeders Association from 2012 to 2022.

Education

Tulane University, Bachelor of Arts degree, cum laude, in International Relations, December 1984

Indiana University School of Law – Indianapolis, Doctor of Jurisprudence, 1988

INDIANA EQUINE CASE LAW: AN OVERVIEW AND UPDATE

The practice of equine law is one that incorporates and involves the principles of contract law, and tort law as well as the principle of equity. Disputes involving the sale/purchase of a horse, the boarding of a horse, the leasing of a horse, the syndication of a stallion, the terms and conditions for breeding a brood mare, and the ownership or shared ownership of the resulting foal are all examples of areas of practice and potential dispute that exemplify the need for an understanding of the principles of contract and tort law. These disputes, if not otherwise negotiated to resolution are ultimately resolved in the Indiana trial courts. However, if the matter involves a horse registered with the IHRC, a Thoroughbred or Quarter Horse or Standardbred, the disputed issue is governed by Administrative Law and all administrative remedies must be exhausted prior to appeal for review to the Indiana Court of Appeals.

In reviewing Indiana trial court and appellate court equine law decisions, there are four (4) general categories in which those decisions may be placed. For purposes of this review of Indiana Equine Case Law, these categories are: (1) personal injury cases; (2) disputes involving workers compensation claims and coverage; (3) abuse or neglect of or injury to horses; and (4) taxation issues including hobby loss versus business deductions. This presentation will examine current Indiana trial and appellate court decisions, provide a brief overview of the administrative process of representing a client before the IHRC, and conclude with a discussion of the recently enacted Horseracing Integrity and Safety Act.

I. Equine Case Law: Personal Injury Decisions

Indiana Trial Courts and Indiana Court of Appeals decisions addressing cases involving personal injuries caused by horses typically involve one of several issues. Those issues include,

equine facility liability waivers, liability issues involving horses that have escaped and cause injury and/or property damage, cases advancing a negligence theory either as to the dangerous propensity of an equine and even a decision interpreting the Federal Tort Claim Act. In short, recent equine decisions by the Indiana Courts have covered diverse theories and circumstances. The following decisions are illustrated:

Einhorn v. Johnson, 996 N.E.2d 823 (Ind.App.2013).

While a young rider was riding in a practice ring at the state fair, the horse she was riding became spooked as a result of truck back-up alarm. When the horse was being taken back to its stall, the agitated horse got free, ran through the barn and trampled John Einhorn, a fair volunteer. He was severely injured and the fair's workers compensation paid the medical bills.

Einhorn sued the fair and the family of the rider of the agitated horse. The fair moved to dismiss for lack of jurisdiction because of the workers compensation immunity. The court denied the motion because acceptance of workers compensation benefits, which Einhorn had not applied for, did not mean he was an employee under the act. The court, however, granted summary judgment to the fair on the basis of the Indiana Equine Activity Statute. The court of appeals affirmed on the basis running uncontrollably was an inherent risk of equine activity.

The trial court had also granted summary judgment to the family of the young rider. The court of appeals affirmed. It held that for liability for negligence to be imposed, there must be a showing of a known dangerous propensity. The horse's agitated behavior before the accident is not evidence of a dangerous propensity as a matter of law.

Willis v. Holder, 2011 WL 240111 (Ind.Ct.App. 2011)

A driver was injured when his vehicle collided with an escaped horse. The driver sued the owner of the horse. The owner of the horse moved for and was granted summary judgment. Summary judgment was affirmed on appeal because the evidence showed that the owner had a proper fence and had never had a horse escape in twenty years. The court empathized that: ". . . the escape of an animal is not negligence per se. . ." The Court further held that a plaintiff had to prove that the confinement was ineffective and that the escape was reasonably foreseeable. It noted that although the fence was in good condition: ". . . the horse escaped anyway, but sometimes, accidents happen . . . "

Park v. Eckhart, 948 N.E.2d 871, 2011 WL 1878096 (Ind.Ct.App. 2011)

In this case a mounted police officer was injured when he was thrown by his horse. The officer alleged his horse had been struck by a motorist. The officer sued the driver of the vehicle he claimed hit the horse. The trial court granted summary judgment to the defendant. The Court of Appeals reversed, finding that conflicting testimony regarding causation justified a trial.

Perry v. Whitley County 4-H Clubs Inc., 931 N.E.2d 933 (Ind.2010)

In Perry, supra, a child was injured as a participant in a horse competition held in a barn, when kicked in the leg by a horse. The child's parents sued alleging that the organizers were negligent in holding the competition in a barn that was too small and required the horses to be too close together, exacerbating the chance that one might kick. The trial court granted summary judgment to the organizers on the basis of the Indiana Equine Activity Statute.

The appeals court affirmed. The Indiana Court of Appeals held that even though Indiana's Equine Activity Statutes did not mention that it provided immunity for negligence, the Act should be construed to mean that immunity exists were negligence increases the risk of an inherent risk of equine activity. That is, a claim of negligence that exacerbates the chance of an inherent risk could not survive the immunity provided by the statute.

Anderson v. Four Seasons Equestrian Ctr., Inc., 852 N.E.2d 576 (Ind.Ct.App.2006)

In this case, a rider who had been taken riding lessons at an equestrian center was injured when mounting her own horse. She sued the equestrian center for negligence in training the horse. The trial court granted summary judgment to the equestrian center on the basis of the Indiana Equine Activity Statute and the waiver signed by the rider. The Indiana Court of Appeals upheld the trial court's decision based on the language set forth in the waiver signed by the Plaintiff. The waiver purported to release the center from:". . . . all tort and civil liability arising from or relating to participation in equine activity . . . ." The waiver was effective, the court ruled, despite not mentioning negligence specifically. The court was influenced by the fact that the waiver stated that risks were inherent in riding.

Del Raso v. U.S., 244 F.3d 567 (7th Cir.2001)

In this case, the plaintiff, Del Raso was injured when he fell off a horse he was riding at a military base recreational riding facility. He claimed the facility

failed to secure the saddle. He sued under the Federal Tort Claims Act. The trial court granted the U.S. summary judgment based on the release Mr. Del Raso signed prior to riding. Mr. Del Raso maintained the release was invalid as having been fraudulently induced, as the instructor referred to it as a "waiting list." The Court of Appeals rejected Plaintiff's argument, holding that there was no evidence of fraudulent intent, nor was reliance on the "waiting list" statement reasonable as Del Raso had ample time to read the document he signed. The 7th Circuit Court of Appeals affirmed the lower court's granting of summary judgment in favor of the Defendant.

Burdick v. Romano, 148 N.E.3d 335 (Ind. Ct. App. 2020); 152 N.E.3d 1061 (Ind. 2020) (Denying Petition to Transfer).

The Court of Appeals of Indiana recently affirmed a jury verdict in favor of a horse owner whose horse allegedly kicked a mounted rider in the head. The appellate court ruled the trial court had correctly instructed the jury on the law applicable to inherent risks of equine activities, sporting event injuries, and incurred risk.

According to the appellate court's opinion, the injured rider was riding her horse in the arena at the farm where she boarded when the barn manager rode into the arena on her own horse. The two women began riding their horses around poles that were set up and demonstrated to each other various "tricks" they had trained their horses to perform. The injured rider alleged the barn manager dismounted her house and walked away from it without tying it up. As the barn manager walked back towards her horse, the horse allegedly spooked and ran backwards into the other horse and kicked out. The horse's kick made contact with the injured rider's chin, causing her to black out and fall from her horse. She was in the hospital for almost a month, recovering from a broken shoulder and traumatic brain injury. Once released from the hospital, she underwent eight months of outpatient therapies but was ultimately deemed "permanently disabled." She sued the barn manager alleging negligence, gross negligence, and recklessness, arguing that the barn manager knew her horse had a dangerous propensity to kick and had "failed to use reasonable care" to protect the injured rider.

The barn manager argued in defense that she and the injured rider were both sports participants engaged in a "sporting event" at the time of the incident, and that the injured rider had incurred the risk of injury. The barn manager also testified that the accident didn't quite happen the way the injured rider described. The barn manager claimed that she never let go of horse's reins and that the injured rider's horse was at least forty feet away from her when she saw it turn suddenly and stop, causing the injured rider to lose her balance and fall off.

The case was tried by a jury. The trial court refused to read the injured rider's proposed instructions on premises liability, negligence, duty, and reasonable care. The trial court instead read the barn manager's proposed instructions on incurred risk, inherent risks of

equine activities, and sport event injuries. The jury found in the barn manager's favor. The injured rider appealed.

The appellate court affirmed the jury's verdict, holding the trial court correctly found the riders were engaged in a sporting activity, even though they were not participating in any organized competition. Accordingly, in order to establish liability, the plaintiff was required to show that the barn manager was reckless, and "not merely negligent." The appellate court explained that the evidence supported the instruction on the inherent risks of equine activity and incurred risk and that the risk "at issue" was the tendency of the barn manager's horse to kick other horses. The injured rider testified that "before the incident she had observed [the barn manager's horse] act aggressively toward other horses and attempt to kick other horses [and] she also admitted that being kicked by a horse was a risk of the sport and conceded that as a horse expert she knew all the risks associated with horse-related sporting activities.

The case was appealed to the Indiana Supreme Court. The Justices of that court declined to exercise discretionary review. One of the Justices who would have reviewed the case filed a dissenting opinion in which he explained that he believed that "while certainly horses are used in sporting events, the two parties here were riding for leisure in a private arena," which in the justice's opinion made the case more like a "classic dog bite case" than a "sporting event" case. "There were no sponsored events taking place and there were no classes being taught. To me, these factors indicate the [injured parties'] remedy lies in ordinary negligence similar to a dog bite case and not a heightened sports activity standard. Therefore, I believe the trial court erred when it refused to give [the plaintiffs'] tendered instruction on reasonable care."

Gacsy v. Reinhart, 142 N.E.3d 518 (Ind. Ct. App. 2020).

When you hear of someone being injured by a horse, you don't imagine them getting run down by a random loose horse trespassing through their own backyard. Slapstick comedy occasionally features suburbanites being run down in their backyards by errant deer, but that's not the kind of thing anyone expects to happen in real life.

But it was no laughing matter for an Indiana man who did in fact get run over, and injured, when his neighbor's horse got loose. Adding insult to injury was the fact that the neighbor's fences were in very poor shape and the horses frequently got loose. Once someone got hurt, it is not surprising the horse owner ended up being taken to court.

At trial, the court ruled that the jury should not hear any evidence related to the alleged prior escapes of the horses. When the injured man let slip with a comment that the horses had escaped previously, the court declared a mistrial and dismissed the case with prejudice. The injured man appealed.

The appellate court reversed the trial court's ruling and reinstated the case with

instructions that evidence related to the alleged prior escapes of the horses was admissible and proper for the jury to hear. The appellate court explained that a history of escape was directly relevant to the question of whether the owner's confinement of his horses had been negligent.

II. Equine Case Law: The Indiana Workers Compensation Act and Decisions Regarding the Status of Laborers Working in the Equine Field

If your client owns or operates a farm that has horses and/or an equine facility, your client will most likely need labor to assist in the day to day care of animals and operation of the facility. If laborers work exclusively for a farming or agricultural business then, pursuant to I.C. 22-3-2-9(a)(2), workers compensation coverage is not required. In short, farm workers are excluded under Indiana Workers Compensation Act. However, if laborers assist with the equine operation or work as both farm employees and equine business employees, workers compensation coverage is most likely necessary.

If the laborer works in the equine business the next issue is whether he or she qualifies as an employee or is, alternatively, an independent contractor.

The key case in Indiana that sets forth the test to determine whether a laborer is an independent contractor or an employee is the decision of Moberly v. Day 757 NE 2d 1007 (2001). In Moberly, the Indiana Supreme Court established a ten (10) factor analysis to determine whether the injured person qualifies as an employee and is therefore entitled to benefits under the Indiana Workers Compensation Act or, alternatively, is an independent contractor and required to pursue an action for recovery outside of the Indiana Workers Compensation Act in an Indiana court of law.

The test set forth in Moberly, supra, involves an analysis of ten factors. Those ten factors are:

1. The extent of control which, by agreement, the principal may exercise over the

details of the work.

2. Whether or not the agent (i.e., the independent contractor or employee) is engaged in a distinct occupation or business;

3. The kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of any employer or by a specialist without supervision;

4. Skill level required by the occupation performed by the agent;

5. Who supplied the instrumentalities, tools, or place of work;

6. The length of time the agent worked for the principal;

7. Method of payment, whether by time or by job;

8. Whether the work performed by the agent is part of the principal's regular business;

9. Whether the parties believe they are creating an employer-employee relationship;

10. Whether the principal is or is not in business.

Key to understanding and applying the factors is the definition, pursuant to the Indiana Workers Compensation Act of an employee. The Act defines an employee as:

> "Employee" means every person, including a minor, in the service of another, under any contract of hire or apprenticeship, written or implied, except one whose employment is both casual and not in the usual course of the trade, business, occupation, or profession of the employer." I.C. 22-3-6-1(b)

The Indiana Workers Compensation Act defines an independent contractor at I.C. 22-3-6-1(b)(7):

> "A person is an independent contract and not an **employee** under IC 22-3-2 through IC 22-3-6 if the person is an independent contractor under the guidelines of the United States Internal Revenue Service."

If the worker does only farm work then no workers compensation coverage is not needed.

If the worker is involved and works on the equine side of the business, then workers

compensation coverage is required. The requirement for the Employer to provide coverage is found at I.C. 22-3-2-5.

Finally, if an individual working in the equine field is injured, determined to be an employee and satisfies the test set forth in Moberly, supra, and if the employer does not have the required workers compensation insurance, then the employer is subject to a penalty as set forth in I.C. 22-3-4-13.

An example of the fine line of determination between one being an employee and one being an independent contractor is seen in the case of Mavro Cano Gonzalez vs. R. Gary Patrick, Before the Indiana Workers Compensation Board, Application No. C-211480. In this matter the Plaintiff worked as an exercise rider for several trainers of race horses. He would solicit exercise rides from these trainers and was compensated ten dollars per ride or work. Significantly, he rode/exercised horses for multiple trainers. Mr. Gonzalez exercised horses for Mr. Patrick, a prominent Indiana trainer. Mr. Patrick would write the stall numbers on a chalkboard in his barn indicating the horses to be ridden that morning. Mr. Gonzalez was free to exercise Mr. Patrick's horses anytime between daylight and 10:00. He used his own equipment and worked for multiple trainers at the same time he exercised Mr. Patrick's horses. Early one morning, while exercising one of Mr. Patrick's horses, the horse he was riding fell resulting in Mr. Gonzalez falling and fracturing his right femur. A motion for summary judgment was filed on behalf of Mr. Patrick and the case ultimately was resolved the day of hearing on an agreed entry.

The following decisions illustrate the complexity of this issue.

County of Riverside v. The Workers' Compensation Appeals Board, 2012 WL 6217634 (Cal.Ct.App. 2012)

Member of “posse comitatus” group that assisted the local sheriff was injured during training. The Workers’ Compensation Board held she was a covered employee. The Court reversed, holding that members of such volunteer groups are not covered employees.

McCutcheon v. Workers’Compensation Bd., 2003 WL 1851510 (Cal.Ct.App. 2003)

A groom was injured while holding a horse for her farrier-husband during a shoeing. The groom typically worked for her husband, and was paid a portion of his fee by him for the work. The court upheld the Worker’s Compensation Board’s determination that she was an employee of the trainer who hired the farrier. The court noted that she was not an independent contractor because she was “directed by a specialist, could be discharged at will, was not engaged in a distinct occupation or business, did not provide her own specialized tools, and the task required little skill.

Goetzinger v. Wheeler, 2002 WL 663678 (Iowa Ct.App. 2002)

Nancy Wheeler worked part-time for Goetzinger training and showing horses. Wheeler was injured while showing Goetzinger’s horse at a county fair. She made a workers’ compensation claim. Goetzinger resisted this claim partially on the basis that Wheeler was not acting in the scope of her employment when she was showing a horse. The court disagreed stating that at the time she was showing the horse, she was an employee, not an independent contractor. The court was not persuaded by the fact that she was not compensated on an hourly basis for her weekend work in showing horses.

III. Indiana Equine Case Law Review of Decisions Involving Abuse Or Neglect Of, Or Injury to Horses.

Unfortunately, Indiana Courts have been presented with multiple cases involving neglect and abuse of horses. Several of the decisions involve a review of I.C. 35-46-3-7 “Abandonment Or Neglect of Vertebrate Animal.” That statutory provision states:

(a) A person who:

(1) has a vertebrate animal in the person's custody; and
(2) recklessly, knowingly, or intentionally abandons or neglects the animal; commits cruelty to an animal, a Class A misdemeanor.

However, except for a conviction under section 1 of this chapter, the offense is a Level 6 felony if the person has a prior unrelated conviction under this chapter.

(b) It is a defense to a prosecution for abandoning a vertebrate animal under this section that the person who had the animal in the person's custody reasonably believed that the vertebrate animal was capable of surviving on its own.
(c) For purposes of this section, an animal that is feral is not in a person's custody."

These decisions also include claims of neglect to adequately and safely maintain facilities free of disease as well as neglect of horses, and seizure of horses in distress.

Following are Indiana Trial Court and Appellate Court decisions on this disturbing subject:

Bickford vs. State, 25 NE 3d 1275 WL 630456 Ind. App. 2015

In this case Bickford had several horses that were determined to be malnourished. Bickford voluntarily surrendered the horses to an Indiana rescue facility and pled guilty to charges of animal cruelty. The Court ordered him to pay restitution and Bickford challenged the restitution arguing that his horses were surrendered and therefore, not "impounded." See I.C. 35-46-3-6. The Indiana Court of Appeals agreed with the Appellee regarding the surrendering of the horses but held that Indiana statute generally authorizes restitution.

Harnish v. Liberty Farm Equine Reproduction Center, LLC, 2013 WL 3233243 (N.D. (Ind.), 2013 WL 440182 (N.D. Ind. 2013)

In this matter, Plaintiffs were four individuals who owned several stallions used for breeding. Defendants included a horse breeding facility held as an LLC by a single member who managed the facility along with several employees. The same sole member owned two other similar companies including a corporation and an LLC. Plaintiffs sent several of their stallions to Defendants' facilities for breeding purposes, specifically semen collection. Unbeknownst to Plaintiffs, at the time their stallions were undergoing collection, another stallion from a non-party was also present at the facility for the same purpose. Said stallion was infected with Contagious Equine Metritis, a sexually transmitted disease. Through a chain of events the infection spread to Plaintiffs' stallions thereby reducing their market value. Plaintiffs sued the Defendants' collecting facility where the horses acquired the infection and sought to pierce the corporate veil with respect to the liability of the sole owner and member of the facility.

The court determined that the issue was a matter of equity rather than law for the court to decide, and deferred the determination until after a jury trial on the merits. Summary judgement was granted in favor of the Defendants with respect to claims of negligent supervision and hiring, and violation of privacy. In the later ruling, the Court excluded the Kentucky Department of Agriculture official as a witness because Plaintiffs failed to disclose the witness in their Rule 26 disclosures.

Martin v. Gorajec, 2013 WL 319783 (S.D. Ind. 2013)

Martin was a horse breeder who became executive director of the Indiana Thoroughbred Owners and Breeders Association (ITOBA). An acrimonious relationship developed between Martin and members of the Indiana Racing Commission. An investigation was launched into Martin's alleged mistreatment of horses he owned and that were located in the State of Florida. He was absolved of wrongdoing. Mr. Martin then brought a complaint for conspiracy and defamation against the Indiana Horse Racing Commission. The court granted summary judgment on the claims.

Duncan v. State, 975 N.E. 2d 838 (Ind.Ct.App. 2012)

Mr. Duncan was charged with violating I.C. 35-46-3-7. He was convicted of animal cruelty after a bench trial. On appeal, he challenged the constitutionality of Indiana's statute, claiming it was vague. The court upheld the conviction and rejected the challenge. The court held that not only is the Indiana statutory law on animal cruelty and neglect clear, so too it was clear that Mr. Duncan had grossly neglected his horses.

Miller v. State, 952 N.E.2d 292 (Ind. Ct.App.2011)

Mr. Miller's horses were seized when they were observed to be malnourished. He was tried and was subsequently convicted of animal abuse. On appeal, he challenged his conviction on the basis of insufficiency of evidence, maintaining that skinny horses are not necessarily abused or neglected horses. The court upheld the conviction based on the jury's right to weigh conflicting evidence.

Baxter v. State, 891 N.E. 2d 110 (Ind.Ct. App. 2008)

Based on a tip that four horses were dead and left rotting in the mud, animal control officials went to the Baxter residence. When they arrived, they saw several other horses in very poor condition. The officials notified the local humane society to have the surviving horses confiscated and placed in foster care. Mr. Baxter was later convicted for failing to dispose of dead animals and for animal neglect.

On appeal, Baxter argued that the law requiring disposal of dead animals was unconstitutionally vague. The appeals court rejected that argument. Mr. Baxter also argued that the seizure of animals, and the refusal to return them while charges were pending, was wrongful. The court rejected that argument because the authorities followed the procedure in the Indiana statute. The Court also rejected the claim that evidence should have been suppressed because the search and seizure were conducted without a warrant. Finally, the court held that there was sufficient evidence of neglect to support the convictions for neglect, except with regard to the dead horses because there was no evidence of the cause of their deaths.

Lykins v. State, 726 N.E.2d 1265 (Ind.Ct.App. 2000)

In this case, the horse owner was charged with neglect. The owner defended on the basis he could not obtain hay and therefore thus could not have had the requisite intent. The jury rejected the defense and convicted him, which verdict was upheld on appeal.

IV. Equine Case Law Review: Deductibility of Equine Related Expenses – Or Not: Business Expense or Hobby Loss

An ongoing and recurring issue for horse owners and those operating equine facilities is whether claimed business deductions incurred in connection with breeding, boarding, training, sales and/or racing should be allowed as ordinary and necessary business expenses. For an expense to be deductible the owner or equine entity must have had an actual and honest objective of making a profit from the equine activity(ies). To make this determination, the Courts as well as the Internal Revenue Service consider several key factors.

The factors courts consider in determining whether an expense qualifies as a business expense or hobby loss are:

1) the manner in which the taxpayers carry on the activity;
2) the expertise of the taxpayers or their advisors;
3) the time and effort expended by the taxpayers in carrying on the activity;
4) the expectation that the assets used in the activity may appreciate in value;
5) the success of the taxpayers in carrying on similar or dissimilar activities;

6) the taxpayers' history of income or loss with respect to the activity;
7) the amount of occasional profit;
8) the financial status of the taxpayers; and
9) whether elements of pleasure or recreation are involved. (See Internal Revenue Code §183 as well as Income Tax Regs. § 1.183-2(b)).

Whether the taxpayer carries on the equine activity as a business or as a hobby is a fact sensitive and fact-driven determination. A key factor in determining whether a deduction is allowable is whether the taxpayer has detailed business records and other documentation, such as a business plan, that indicates a bona fide business.

A review of recent Tax Court decisions examining the deductibility of Equine Related Expenses follows:

Merrill C. Roberts v. Commissioner of Internal Revenue, 820 F.3d 247, 254 (7th Cir. 2016)

M.C. Roberts was a prominent owner of restaurants, bars, and nightclubs in the Indianapolis area in the mid-1990s. In 1999, Mr. Roberts became involved in Indiana horse racing, buying his first two horses for $1,000 each. Bitten by the racing bug, he quickly increased his stable to ten (10) racehorses and a breeding stallion and built a small track to be used to train his racehorses. In 2005, Mr. Roberts decided to increase his involvement in Indiana racing and, in doing so, decided to build a bigger and better horse training facility.

The Internal Revenue Service conducted an audit/investigation of M.C. Roberts horseracing venture and determined that Roberts, in 2005 and 2006, improperly deducted expenses for those years. In fact, Roberts' expenses for 2005 were $153,420 and $30,604 in 2006. The matter was initially tried to the United States Tax Court. M.C. Roberts had deducted expenses for his horseracing enterprise on his federal tax returns claiming the same were business expenses for those years. The IRS took exception claiming Roberts' "expenses" were, in fact, hobby losses. The Tax Court found the IRS' position persuasive and Roberts was hit with a tax bill together with penalties and interest. He appealed.

The Tax Court's analysis utilized a nine-point test to determine whether Roberts' deductions were in fact, business related, pursuant to §162 of the Internal Revenue Code or, alternatively, a hobby loss, pursuant to Internal Revenue Code 183.

It should be noted, that the Internal Revenue Code allows a taxpayer to deduct "all the ordinary and necessary expenses paid or incurred during a taxable year in carrying on any

trade or business." 26 U.S.C. § 162(a). However, if the activity giving rise to the expense "is not engaged in for profit," §183 of the Internal Revenue Code permits deduction of the expenses incurred in the activity: "only to the extent that the gross income derived from such activity for the taxable year exceeds the deductions." 26 U.S.C. § 183(a), (b)(2). The activities governed by section 183 are usually referred to as "hobbies" and Internal Revenue Code Section 183 allows for hobby losses to be deducted from hobby profits but not from any other income that the taxpayer may have.

A provision specific to horseracing states that: "in the case of any activity which consists in major part of breeding, training, or racing of horses," "if the gross income derived from an activity for [2] or more of the taxable years in the period of [7] consecutive taxable years which ends with the taxable year exceeds the deductions attributable to such activity, then…such activity shall be presumed…for such taxable year to be an activity engaged in for profit."

In Mr. Roberts' case, Judge Posner of the Seventh Circuit Court of Appeals held that the trial court got it wrong and that M.C. Roberts' deductions were proper and that the 2005 and 2006 assessed tax deficiencies were not. The Seventh Circuit Court of Appeals reversed the Tax Court's decision with instructions to void the deficiencies.

Romanowski v. Comm'r, T.C.M. 2013-55, 2013 WL 627018 (T.C. 2013)

Mr. Romanowski is a former professional football player. He played as a linebacker for the Philadelphia Eagles, the San Francisco 49ers, the Denver Broncos, and the Oakland Raiders. He participated in the Classic Star mare-lease program. His deductions were disallowed by the IRS. The Tax Court analyzed the factors set forth above to determine if a profit motive existed to permit deductions under §183 of the Code. The Court concluded that most factors favored the IRS. The court particularly noted that with regard to an expectation that the assets would appreciate in value, the scheme largely involved a "circular transaction" because the foals produced from the breeding were contributed to "PowerFoal," which was an affiliate of Classic Star. In addition, the scheme never generated a profit.

Craig v. Comm'r, 2013 WL 3791135 (U.S. TaxCt. 2013)

This decision involves a married couple that sought to deduct their equine expenses. Mr. Craig was an electrical engineer and his wife was a real estate agent. They purchased 10 acres and acquired several horses. In the tax years at issue, Mrs. Craig worked 25 to 30 hours a week on her horse activity, although she continued to work 25 to 40 hours a week as a real estate agent. No separate records were kept of the horse activity. The IRS disallowed deductions of the expenses. The Tax Court affirmed. The Tax Court held that the factors in determining whether an activity is engaged in for profit did not support Ms. Craig.

Significant were a lack of a budget, her other income from real estate agency, and her failure to modify the horse activity when it did not make a profit, and failure to ever make a profit.

Rodriguez v. Comm'r, 2013 WL 5272771 (U.S. Tax Court 2013).

Ms. Rodriguez, a state "investigator," and her daughter, a part-time "vendor rep," started a Swedish warm-blood breeding operation. The operation never made a profit. In the 15 years it operated, it incurred $1.8 million in losses, enough to offset her entire income. The IRS disallowed the deductions as incurred in an activity not engaged in for profit. The Tax Court upheld this determination. The Court noted that business plan was perfunctory, little advertising was done, insurance was not obtained, and little effort was made to make the business profitable. Thus, the breeding activity was not carried on in a business-like manner. Further, the other factors weighed in favor of the IRS. However, the accuracy penalties were not allowed, as the taxpayers "made a reasonable and good faith error in applying the law to the facts of this case."

Bronson v. Comm'r, T.C.M. 2012-17, 2012 WL 129803 (T.C. 2012)

In this case, the taxpayer husband was a bankruptcy attorney. His wife had a Ph.D in consumer finance. They started a Welsh pony venture in which the wife worked full-time. Their children occasionally rode the horses. In the eleven years at issue they experienced a net loss of $837,752. The revenue in that period was insignificant, with only one horse having been "sold" to a charity for a nominal amount.

The IRS disallowed the deduction of the losses because the venture was not engaged in with a profit motive. The Tax Court affirmed. Particularly significant were the lack of any income, the failure to keep records on a per-horse basis, and the significant income of the taxpayer husband. The court upheld the penalties because the taxpayers did not have reasonable cause to make the deductions.

Helmick v. Comm'r, T.C.M. 2009-220, 2009 WL 3012725 (T.C.2009)

The Helmicks ran a horse-breeding and boarding operation at their farm. Significantly, their farm was also their residence. They largely boarded horses for others, and bred Arabians they purchased for that purpose. They did all the work themselves, and suffered significant losses. The husband was a county employee. Specifically, he worked as a land use planner for Boulder. Although the taxpayers were considered amateurs in the horse business, had no business plan, and their intention to make a profit was "objectively unreasonable," the Tax Court held that they engaged in the venture with a profit motive. The losses were allowed to be deducted. The fact that they could not produce certain

receipts was not deemed fatal, as they were lost in a contentious divorce. The Court noted:

> "The stereotypical abusive scenario involving horse breeding is the wealthy businessman who runs a real business during the week-with business records, income projections, accountability to banks and investors, and so on-and owns a "gentleman's farm" as a weekend retreat where he keeps horses for the recreation of himself and his family and friends. He dabbles in breeding horses, with no expectation of ever making a profit, so that he can deduct the expenses of his horses and thereby have Uncle Sam subsidize the weekend farm. However, some horse-related operations are actually engaged in for profit. *See, e.g. Miller v. Comm'r*, T.C.M. 2008-224. The Helmicks' [taxpayers here] horse activity does not fit the stereotypical abusive scenario; instead they engaged in the horse activity with a motive to make a profit, and they are therefore entitled to deduct their losses."

<u>Schmuecker v. Commissioner</u>, 2009 WL 588660 (T.C. 2009)

Mr. Schmuecker owned racehorses trained and raced by others. He deducted the expenses and losses against his income. Mr. Schmuecker worked full time as a salesman. The IRS disallowed the deduction on the basis that the race horse business was a passive activity under § 469(c) of the Internal Revenue Code.

The Tax Court upheld the disallowance. It recited the seven regulatory tests, including the test of participation in the activity for more than 500 hours. Taxpayer argued that he met this test because he: ". . . would say he spent 500 hours a year in his horse-racing business, which consisted of 250 hours surfing the web for horses to buy, and 250 hours. . ..going to races, reading the racing form, visiting people, going to horse sales, watching live races. . . ." That did not sway the Tax Court, which, interestingly, noted that Taxpayer: ". . .did not even ride horses. . . ."

<u>Miller v. Commissioner</u>, TC Memo 2008-224, 2008 WL 4449526 (T.C. 2008)

The appellant, Mr. Miller was a successful business man. He had purchased a small electric pump business and grown it to a large profitable operation. During this time, he bought some Paso Fino horses and began breeding them as a business. He lost several thousands of dollars, except for one year, in this endeavor. The IRS disallowed the deductions as related to an endeavor not engaged in with a profit motive.

The Tax Court sided with Miller. It reviewed each of the nine regulatory factors,

and determined that only one of the factors was adverse to Mr. Miller. That factor was the availability of income from other sources. But that factor was outweighed by the others, which were in Miller's favor. Significantly, Mr. Miller had a business plan, although it was not in writing. Also significant was the fact that he had a top trainer, and was able to show that many losses were a result of unforeseen setbacks. The Trial Court also noted that: ". . .the startup phase of a horse breeding activity is 5 to 10 years. . . ." Also important was Miller's personal involvement in the activity, the court noting that: ". . . .Miller participated in all aspects of the breeding activity except cleaning the stalls. . . ."

Topping v. Comm'r, 93 T.C.M. (CCH) 1120 (T.C. 2007)

In Topping, supra, the taxpayer had a profitable interior design business. Mrs. Topping also engaged in horse shows, an occupation that resulted in substantial losses. The IRS denied Mrs. Topping's deductions for her equestrian endeavors because those endeavors were not engaged in for profit. On appeal to the Tax Court, taxpayer argued that the equestrian business and the interior design business was one endeavor, which if combined showed a net profit. Her argument centered on the notion that she designed horse barns as part of her business and recruited clients from equestrian shows. The Tax Court agreed, holding, in part:

> "We find petitioner's characterization of the equestrian and design undertakings as a single activity for purposes of §183 to be supported by the facts of this case. A close organizational and economic relationship exists between the equestrian and design undertakings. Petitioner's success as an equestrian competitor creates goodwill that benefits her design business. Petitioner formed the equestrian and design undertakings as a single integrated business. Petitioner had been a competitor for most of her adult life, and she transformed this sport experience into an avenue to establish goodwill as an interior designer of horse barns and second homes. She had a plan for an integrated equestrian-based design business. Petitioner and her assistant manage and oversee both undertakings and their assets and also use the same books and records to track both undertakings.
>
> Further, Petitioner's equestrian activities significantly benefit her design business, and we find a significant business purpose for the combination of these undertakings. Her prominence as a competitor has gained respect among her peers and causes them to seek her out when they are in need of a designer for their horse barns and recreational homes."

Huff v. Commissioner of Internal Revenue, T.C. Memo 2021-140 (12/21/21)

Petitioners, William R. Huff and Cathy Markey Huff, are an extremely wealth couple who wanted to supplement the income of their adult daughter. To do so, the Hubbs began breeding miniature donkeys through Ecotone Farm, LLC, a wholly owned entity. During 2013 and 2014 the breeding activity produced losses of $87,236 and $47,039, respectively, which piqued the interest of the IRS. The IRS issued a notice of deficiency that disallowed deductions for these losses and determined deficiencies for their 2013 and 2014 tax years of $37,022 and $19,615, respectively, as well as accuracy-related penalties under section 6662(a). The Tax Court found that the Huffs engaged in the breeding activity with an actual and honest objective of making a profit and concluded that the 2013 and 2014 loss deductions were allowable and that the Huffs were not liable for penalties.

V. Overview of the Administrative Process of Representing A Client Before the IHRC.

Indiana has two (2) tracks. Indiana Grand located in Shelbyville, Indiana and Hoosier Park in Anderson, Indiana. Both tracks are RACINOS, meaning each track is paired with a casino. All Indiana Standardbred racing is conducted at Hoosier Park and all Thoroughbred and Quarter Horse racing takes place at Indiana Grand.

To participate in Indiana horseracing as an owner, groom, trainer, jockey or backside veterinarian, you must be licensed by the State of Indiana and specifically by the Indiana Horse Racing Commission. If your client has a dispute with the Indiana Horse Racing Commission, e.g., being accused of wrongdoing, then that dispute is initially an administrative proceeding and locally governed by AOPA from the initial hearing before the stewards/judges through review and decision of the 5 member Indiana Horse Racing Commission. If a decision rendered by the Indiana Horse Racing Commission is not satisfactory to your client then he or she may appeal, having exhausted their administrative remedies, to the Indiana trial courts.

I. STEWARD'S HEARING

a. Informal
b. Formal

II. RACING COMMISSION

a. Formal, *de novo* hearing before hearing officer or administrative law judge (ALJ) selected, approved and paid by the IHRC or commission staff, written report and recommendations issued following such a hearing;
b. Hearing and vote by entire commission membership on recommendations of hearing officer or ALJ
c. Commission may elect to skip hearing officer or ALJ level and hear matter itself
d. A decision by the Indiana Horse Racing Commission represents the exhausting of a parties' administrative remedies.

III. APPEAL TO INDIANA TRIAL COURTS

a. Matter of right
b. Case decided by a Trial Judge

IV. APPEAL TO INDIANA COURT OF APPEALS

V. APPEAL TO INDIANA SUPREME COURT

VI. APPEAL TO U.S. SUPREME COURT on writ of certiorari (rarely granted)

a. Possible only if lower state or federal court rulings impact a federal or constitutional issue.

HORSERACING INTEGRITY AND SAFETY ACT (HISA):
A NEW ERA FOR THOROUGHBRED RACING IN INDIANA AND NATIONALLY:
STATUS/REVIEW/ANALYSIS AND CONCERN

I. Legislative History

- 2011: Interstate Horseracing Improvement Act is introduced by Senator Udall (D-NM).

- 2015: The First—HISA is introduced by Representative Joe Pitt (R PA). That same year Representatives Barr/Tonko introduce the Thoroughbred Horseracing Integrity Act of 2015.

- 2017: Representatives Barr & Tonko introduce The Horseracing Integrity and Safety Act of 2017

- 2020: Fast Forward to 2020: The Horseracing Integrity and Safety Act, introduced by Representatives Barr/Tonko, passed in the U.S. House of Representatives on September 29, 2020.

- The HISA introduced in the US Senate by Senator Mitch McConnell (R KY) on September 9, 2020.

- On December 28, 2020, President Trump signed into law the Consolidated Appropriations Act, 2021. Tucked away in this 2,000-page legislation is the Horseracing Integrity and Safety Act.

A. Thoroughbreds or All Breeds

This bill is currently restricted to Thoroughbred racing but allows the established Authority to include both Standardbreds and Quarter Horses, if requested by the State Racing Commission. This would create a patchwork of medication rules for different breeds of racing, where horsemen competing across state lines could have widely varied rules. There is no provision in HISA for the different requirements of different breeds.

B. Industry Support

Supporters include The Jockey Club, Water Hay Oats Alliance (WHOA), and the Thoroughbred Owners and Breeders Association (TOBA).

The opposition includes the National Horsemen's Benevolent and Protective Association (HBPA), the North American Association of Racetrack Veterinarians (NAARV), and the American Quarter Horse Association (AQHA).

II. Organization and Structure of HISA

The Horseracing Integrity and Safety Authority has a nine-member Board of Directors. Five members are from outside of the Thoroughbred industry and four members are industry representatives. The present Board of Directors includes:

1. Steve Beshear
    a. an independent director from Kentucky who was elected to serve as vice-chair at the board of directors' inaugural meeting. He served two terms as the 61st governor of Kentucky. An attorney by trade, Beshear has an extensive background in public service in Kentucky, including terms as Lieutenant Governor, Attorney General and a member of the Kentucky House of Representatives.

2. Adolpho Birch
    a. an independent director from Tennessee who chairs the Anti-Doping and Medication Control Standing Committee of the Authority. Birch is senior vice president of business affairs and chief legal officer for the Tennessee Titans. Prior to joining the Titans, he spent 23 years at the National Football League's headquarters, with responsibilities that included administration and enforcement of the NFL's policies related to the integrity of the game, substance abuse, performance-enhancing drugs, gambling and criminal misconduct.

3. Leonard Coleman
    a. an independent director from Florida. Coleman is the former president of the National League of Professional Baseball Clubs. He joined Major League Baseball in 1992 as the executive director of market development. Previously, Coleman was a municipal finance banker for Kidder, Peabody and Company and served as commissioner of both the New Jersey Department of Community Affairs and Department of Energy. Coleman is also a former board member of Churchill Downs.

4. Ellen McClain
    a. an independent director from New York. McClain serves as the chief financial officer for Year UP, a nonprofit organization dedicated to closing the opportunity divide by ensuring that young adults gain the skills, experience and support that will empower them through careers and higher education. From 2009-2013, she served in various leadership roles with the New York Racing Association (NYRA), including as its president.

5. Charles Scheeler
    a. an independent director from Maryland who was elected chair of the board during the inaugural board meeting. Scheeler is a retired partner at DLA Piper.

He has an extensive legal career in the private and public sector. Prior to joining DLA Piper, Scheeler was a federal prosecutor in the US Attorney's Office and served as lead counsel to former Senator George Mitchell in his investigation of performance-enhancing substance use in Major League Baseball. Scheeler also has extensive experience investigating and monitoring Division I athletics programs' compliance with the National College Athletics Association.

6. Joseph DeFrancis
    a. an industry director from Maryland. De Francis is the managing partner of Gainesville Associates, LLC. Prior to this role, he was a senior executive for various Thoroughbred racing entities including the Maryland Jockey Club and Magna Entertainment Corporation. De Francis has served on several industry and charitable organization boards, including the National Thoroughbred Racing Association (NTRA) and the Johns Hopkins Heart Institute, among others.

7. Susan Stover
    a. an industry director from California who chairs the Racetrack Safety Standing Committee of the Authority. Stover is a professor of surgical and radiological science and the University of California, Davis and an expert in clinical equine surgery and lameness. Her research investigates the prevalence, distribution and morphology of equine stress fractures, risk factors and injury prevention, as well as the impact of equine injuries on human welfare.

8. Bill Thomason
    a. an industry director from Kentucky. Thomason is the immediate past president of Keeneland, a role he served in from 2012 to 2020. Throughout his career, Thomason has been engaged with several industry organizations, including the NTRA and American Horse Council, as well as several civic and corporate boards, including the Kentucky Chamber of Commerce and the University of Kentucky Gluck Equine Research Foundation.

9. DG Van Clief
    a. an industry director from Virginia. Van Clief retired in 2006 from serving as president of the Breeders' Cup since 1996. A long-time racing executive, Van Clief was chairman of the Fasig-Tipton Company and a trustee of the Jockey Club Foundation. For several generations, his family operated Nydrie Stud in Virginia, and his grandmother bred 1947 Kentucky Derby winner Jet Pilot.

The Authority has three standing committees. The first standing committee is the Anti-Doping and Medication Control Standing Committee. This committee is comprised of four independent members and three industry members. The present members of this committee are:

1. Adolpho Birch
    a. chair and independent director (see “Board of Directors”)

2. Jeff Novitzky
    a. an independent member from Nevada. Novitzky is Ultimate Fighting Championship’s (UFC) vice president of athlete health and performance. In this role, he partnered with the United States Anti-Doping Agency to implement UFC’s anti-doping program. Prior to the UFC, Novitzky was a federal agent for the Food and Drug Administration and an investigator for the Internal Revenue Service.

3. Kathleen Stroig
    a. an independent member from Florida. Stroia is senior vice president of sport sciences and medicine and transitions for the Women’s Tennis Association (WTA) and the WTA’s representative on the board of the Society for Tennis Medicine and Science. Stroia has served on various committees related to her sport, including the International Tennis Federation Medical Commission, the Tennis Anti-doping Committee and the U.S. Tennis Association Sport Science Committee, among others.

4. Jerry Yon
    a. an independent member from Florida. Yon is a retired gastroenterologist and previous member of the Kentucky Horse Racing Commission (KHRC), where he helped establish the Kentucky Equine Medical Director position, and is a past chair of the Equine Drug Research Council, which advises the KHRC on drug testing, regulations and penalties.

5. Jeff Blea
    a. an industry member from California. Blea is equine medical director at the University of California, Davis School of Veterinary Medicine. He is also a partner/owner in Von Bluecher, Blea, Hunkin, Inc., an equine veterinary medicine and surgery practice. Blea has served on and led several equine industry organizations including the American Association of Equine Practitioners (AAEP), Southern California Equine Foundation and the NTRA’s Safety and Integrity Alliance.

6. Mary Scollay
    a. an industry member from Kentucky. Scollay is the executive director and chief operating officer of the Racing Medication and Testing Consortium (RMTC), one of the industry’s foremost scientific authorities on performance enhancing drugs, therapeutic medications and laboratory testing. She has served as a racing regulator since 1987 and is an active member in several industry and professional practice organizations including the AAEP and the International Group of Specialist Racing Veterinarians.

7. Scott Stanley
    a. an industry member from Kentucky. Stanley is a professor of analytical chemistry at the University of Kentucky's Maxwell H. Gluck Equine Research Center and director of the Equine Analytical Chemistry Laboratory. A research scientist with more than 30 years of regulatory drug testing experience, his work focuses on developing new anti-doping approaches and the establishment of the Equine Biological Passport project.

The second standing committee is the Racetrack Safety Standing Committee. This committee is comprised of four independent members and three industry members. The present members of this committee are:

1. Susan Stover
    a. chair and industry director (see "Board of Directors")

2. Lisa Fortier
    a. an independent member from New York. Fortier is the James Law Professor of Surgery, Equine Park Faculty Director and associate chair for Graduate Education and Research at the Cornell University College of Veterinary Medicine. Her primary clinical and translational research interests are in equine orthopedic surgery, tendonitis, arthritis and regenerative medicine.

3. Peter Hester
    a. an independent member from Kentucky. Hester is an orthopedic surgeon specializing in sports medicine and previously worked for equine veterinary surgeon William Reed at Belmont Park. While in medical school, he was a night watchman at Ballindaggin Farm and has maintained a passion for the sport and rider safety.

4. Noah Cohen
    a. an independent member from Texas. Cohen is a University Distinguished Professor and the Patsy Link Chair in Equine Research at Texas A&M University's College of Veterinary Medicine and Biomedical Sciences. Dr. Cohen has dedicated his career to equine health and safety, serving as an equine veterinary practitioner before entering academia. He has served on five editorial boards and contributed to several hundred scholarly research publications.

5. Paul Lunn
    a. an independent member from North Carolina. Lunn is dean of the College of Veterinary Medicine at North Carolina State University. Previously he was a professor and administrator at Colorado State University and the University of Wisconsin-Madison. Lunn's scholarly interests are in equine immunology and infectious disease.

6. Carl Mattacola
    a. an independent member from North Carolina. Mattacola is dean of the University of North Carolina, Greensboro School of Health and Human Sciences. Prior to this, he was associate dean of academic and faculty affairs for the College of Health Sciences at the University of Kentucky. Mattacola's research has focused on neuromuscular, postural and functional considerations in the treatment and rehabilitation of lower extremity injury.

7. Glen Kozak
    a. an industry member from New York. Kozak is senior vice president of operations and capital projects for the New York Racing Association's (NYRA) facility and track operations, which include Belmont Park, Saratoga Race Course, Aqueduct Racetrack and others. Prior to joining NYRA, Kozak worked for the Maryland Jockey Club as vice president of facilities and racing surfaces.

8. John Velazquez
    a. an industry member from New York. Velazquez is one of the most accomplished and respected jockeys in the history of horse racing, having won almost 6,250 races. He is North America's all-time leading money-earning jockey and holds the record for most graded stakes wins. He is a board member of the Permanently Disabled Jockeys' Fund and co-chairman of the Jockeys' Guild. He was inducted into the National Museum of Racing and Hall of Fame in 2012.

The third standing committee is the Nominating Committee. This committee is comprised of seven independent members. These members are responsible for establishing the membership of the Authority's Board of Directors as well as the Anti-Doping and Medication Control and Racetrack Safety Standing Committees. The members of this committee are:

1. Leonard Coleman
    a. former president of the National League of Professional Baseball Clubs. Coleman joined Major League Baseball in 1992 as the executive director of market development. Previously, Coleman was a municipal finance banker for Kidder, Peabody & Company and served as commissioner of both the New Jersey Department of Community Affairs and Department of Energy.

2. Dr. Nancy Cox
    a. the vice president for Land-Grant Engagement and the dean of the College of Agriculture, Food and Environment at the University of Kentucky. Prior to that, she served as associate dean for research and director of the Experiment Station at the University of Kentucky. Cox championed the formation of the UK Equine Initiative (now UK Ag Equine Programs), recognizing the importance of the horse industry and its significance to Kentucky.

3. Katrina Adams
    a. the immediate past president of the United States Tennis Association (USTA), following two consecutive terms as the USTA's chairman and president. A successful professional tennis player, Adams was elected vice president of the International Tennis Federation in 2015 and was appointed as chairman of the Fed Cup Committee in 2016.

4. Dr. Jerry Black
    a. a visiting professor at Texas Tech School of Veterinary Medicine and is an emeritus professor and Wagonhound Land and Livestock chair in Equine Sciences at Colorado State University. He is the former president of the American Association of Equine Practitioners and former chair of the board of trustees of the American Horse Council.

5. General Joseph Dunford
    a. the former chairman of the Joint Chiefs of Staff, the nation's highest-ranking military officer, and was the principal military advisor to the president, Secretary of Defense, and National Security Council from Oct. 1, 2015, through Sept. 30, 2019. Prior to becoming chairman, General Dunford served as the 36th Commandant of the Marine Corps.

6. Frank Keating
    a. the former governor of Oklahoma. Prior to that role, his career in law enforcement and public service included time as a Federal Bureau of Investigation agent, U.S. Attorney and state prosecutor, and Oklahoma House and Senate member. He served as assistant secretary of the U.S. Treasury, associate U.S. attorney general, and general counsel for the U.S. Department of Housing and Urban Development.

7. Ken Schanzer
    a. served as president of NBC Sports from June 1998 until his retirement in September 2011. He also served as chief operating officer. During Schanzer's tenure, he secured the television rights to the Triple Crown races and Breeders' Cup for NBC. Before joining NBC Sports, he served as senior vice president of government relations for the National Association of Broadcasters.

III. The Disciplinary Process

A. Before most state regulators/commissions there are four steps in the adjudication process. The first step is a hearing before the Stewards/Judges. If a licensee is not satisfied with the decision of the Stewards/Judges, the next step is for the licensee to appeal that decision to the state racing commission. At this stage, the state racing commission will appoint an Administrative Law Judge to conduct a hearing on the

merits. The licensee is allowed to present witnesses and evidence in their defense. At the conclusion of this hearing, the Administrative Law Judge will issue his or her Findings of Fact, Conclusions of Law, and Recommended Order. If the decision rendered by the Administrative Law Judge is not favorable to the licensee, he or she may then appeal that decision directly to the state racing commission. The state racing commission may vote to accept, modify, or reject the Administrative Law Judge's Findings of Fact, Conclusions of Law, and Recommended Order. If the state commission's decision is not acceptable to the licensee, the final step in the adjudication process is for the licensee to seek judicial review of the state racing commission's final decision in a state trial court.

B. HISA is unclear whether the Authority or its standing or subcommittees will conduct the initial hearings. The initial hearings will replace the Stewards/Judges hearing. HISA is further unclear as to whether or not the initial hearing will be a merits hearing that allows for the presentation of evidence and the testimony of witnesses. It is important to note that the hearings before the Authority will be limited to medication and safety violations. All over violations such as security, equipment, wagering, standard of behavior, etc., will be overseen by the state racing officials.

C. If a timely appeal of the decision issued by the Authority is taken, then the dispute is submitted to an Administrative Law Judge. The Administrative Law Judge is to be an impartial hearing officer. The Administrative Law Judge will be appointed from the Office of the Administrative Law Judge of the Federal Trade Commission. However, HISA does not specify how the Administrative Law Judges are to be selected and compensated. There is no specific provision that allows for mediation but alternative dispute resolution has been recommended.

D. If a licensee is dissatisfied with the final decision issued by the Authority's appointed Administrative Law Judge, the licensee/covered person may submit an Application for Review to the Federal Trade Commission. The Federal Trade Commission may accept or deny the Application for Review. If the Federal Trade Commission refuses the Application for Review, then the Administrative Law Judge's decision constitutes the final decision of the Authority without further proceedings. HISA does not provide a right to review by the Federal Trade Commission. In the event that the Federal Trade Commission denies the Application for Review, the licensee must then appeal to the United States Federal Court of Appeals. The average cost of an appeal is $20,000 to $50,000.

IV. Constitutional Concerns and Challenges

A. Constitutional Challenges In Their Entirety

a. HISA violates the Non-Delegation Doctrine of the United States Constitution:

i. The Non-Delegation Doctrine, set forth in Article 1, Section of the U.S. Constitution which provides that Congress is prevented from delegating legislative authority to any other entity

b. HISA violates the Appointment Clause of the U.S. Constitution:

i. The Appointment Clause requires that appointments to public agencies be made only by the Executive Branch as set forth in Article II of the Constitution.

c. HISA violates rules prohibiting Anti-Commandeering:

i. The U.S. Supreme Court has held that Congress "may not issue direct orders to the governments of the states." Congress may not commandeer the State's offices or those of their political subdivisions to administer or enforce a federal regulatory program.

d. HISA violates the Due Process Clause of the Constitution:

i. The fourteenth amendment of the U.S. Constitution guarantees both procedural and substantive due process.

1. Procedural due process requires the right to reasonable notice and an opportunity to be heard at a meaningful time and in a meaningful manner

2. Substantive due process requires that there must be a rational relationship between a legitimate governmental purpose of a regulation (such as protecting the integrity of racing) and the means chosen for that desired end (the rules governing racing).

3. The licensee/protected person's due process rights under HISA are truncated.

ii. The Due Process Clause of the Constitution prohibits an economically self-interested private actor from wielding regulatory power over private parties.

B. Constitutional Arguments Advanced by the National HBPA and Amicii on February 16, 2022.

a. HISA violates the Non-Delegation Doctrine of the United States Constitution

i. The Non-Delegation Doctrine provides that Congress is prevented

from delegating legislative authority to any other entity

b. HISA violates the Due Process Clause of the Constitution

i. The fourteenth amendment of the U.S. Constitution guarantees both procedural and substantive due process.

1. Procedural due process requires the right to reasonable notice and an opportunity to be heard at a meaningful time and in a meaningful manner

2. Substantive due process requires that there must be a rational relationship between a legitimate governmental purpose of a regulation (such as protecting the integrity of racing) and the means chosen for that desired end (the rules governing racing).

3. The licensee/protected person's due process rights under HISA are truncated

ii. The Due Process Clause of the Constitution prohibits an economically self-interested private actor from wielding regulatory power over private parties.

C. Parties/Players to the Pending Constitutional Challenge in the U.S. District Court, Northern District of Texas

a. Plaintiffs

i. National HBPA;
ii. Arizona HBPA;
iii. Arkansas HBPA;
iv. Indiana HBPA;
v. Illinois HBPA;
vi. Louisiana HBPA;
vii. Mountaineer Park HBPA;
viii. Nebraska HBPA;
ix. Oklahoma HBPA;
x. Oregon HBPA;
xi. Pennsylvania HBPA;
xii. Tampa Bay HBPA; and
xiii. Washington HBPA
xiv. State of Texas
xv. Texas Racing Commission

b. Amicus Curiae

    i. The North American Assoc. of Racetrack Vets
    ii. American Quarter Horse Association

c. Defendants

    i. Horseracing Integrity and Safety Authority, Inc.

        1. Jerry Black, Katrina Adams, Leonard Coleman, Jr., Nancy Cox, Joseph Dunford, Frank Keating, and Kenneth Schanzer

    ii. Federal Trade Commission

        1. Rebecca Kelly Slaughter, in her official capacity as Acting Chair of the Federal Trade Commission;
        2. Rohit Chopra, in his official capacity as Commissioner of the Federal Trade Commission;
        3. Noah Joshua Phillips, in his official capacity as Commissioner of the Federal Trade Commission; and
        4. Christine S. Wilson, her official capacity as Commissioner of the Federal Trade Commission

d. Amicus Curiae

    i. Senator Mitch McConnell and Representatives Tonko and Barr

D. A similar case is pending before the United States Federal District Court, Eastern District of Kentucky.

a. Plaintiffs

    i. State of Oklahoma
    ii. Oklahoma Horse Racing Commission
    iii. State of West Virginia
    iv. West Virginia Racing Commission
    v. Hanover Shoe Farms, Inc.
    vi. United States Trotting Association
    vii. Oklahoma Quarter Horse Racing Association
    viii. Tulsa County Public Facilities Authority d/b/a Fair Meadows Racing and Sports Bar
    ix. Global Gaming RP, LLC d/b/a Remington Park, and
    x. Will Rogers Downs LLC

b. Amicus Curiae

    i. Ohio
    ii. Alaska
    iii. Arkansas
    iv. Idaho
    v. Mississippi
    vi. Nebraska

c. Defendants

    i. The United States of America,
    ii. Horseracing Integrity and Safety Authority, Inc.
    iii. Leonard S. Coleman, Jr.
    iv. Nancy M. Cox
    v. Federal Trade Commission, and
    vi. Rebecca Kelly Slaughter, in her official capacity as Acting Chair of the Federal Trade Commission

d. Amicus Curiae

    i. Robert M. Beck, Jr., Tracy W. Farmer, and John W. Phillips, all former members of the Kentucky Horse Racing Commission
    ii. William Koester, former commissioner and chairman of the Ohio State Racing Commission and former Chairman of the ARCI.
    iii. Joe Gorajec, former Executive Director of the Indiana Horse Racing Commission and former member and Chairman of the Board of Directors of ARCI
    iv. Senator Mitch McConnell and Representative Paul Tonko and Andy Barr

V. A New Era of Thoroughbred Racing Without Any Race Day Medications Including Furosemide

HISA eliminates Furosemide on race day in: (1) Two-Year-Olds and (2) Stakes Thoroughbreds for the first three (3) years after its enactment and ultimately for all Thoroughbreds after that. The banning of Furosemide will likely result in HIGHER COST and reduced profit margins. Why? The average cost of Lasix is $20 to $25 a dose. The average cost to replace Lasix with antibiotics is $90+ a week. The average cost to replace Lasix with bronchodilators is $100+ a week. The average cost to replace Lasix with hyperbaric oxygen treatment is $100 a treatment. There will likely be more days the horse will be unable to train or race. There will also likely be an increase in “horse wastage”—horses unable to race because of EIPH that will require new homes.

VI. USADA, the Center Piece of Federal Testing and Enforcement That Has Left the Negotiation Table. What's Next?

HISA is in negotiations with the United States Anti-Doping Association (USADA) to head the Anti-Doping and Medication Control Authority. USADA would be charged with developing a uniform program for regulations related to medication, testing and enforcement. If this deal is reached, it will also establish laboratory standards and an accreditation program to determine which drug testing laboratories will be utilized.

There are approximately 260,000 post race/out-of-competition drug tests performed in horse racing annually. Annual testing, to be governed and overseen by USADA, would result in costs of nearly ¾ of a billion dollars. HISA would add this amount as a charge to state racing commissions as a per starter fee. There are approximately 600,000 starts per year which could result in approximately $1,300 in fees per start. The average horse only earns $2,250 per start. The per start fee could potentially reduce a horse's earnings by more than half.

The USADA has an annual budget of 20 million dollars. It administers approximately 7,500 drug tests a year at a cost of $2,998.90 per drug test. This leads one to a very important question: Is the United States Anti-Doping Association (USADA) up to the task and are racing industry participants up to the cost?

On December 23, 2021, Travis Tygart, the CEO of USADA, issued a statement that USADA had been unable to enter into an agreement with HISA. The question now is what entity or entities will be responsible for overseeing HISA's laboratory accreditation, drug testing and enforcement program. This also caused a delay in the submission of the Anti-Doping and Medication Control draft rules to the Federal Trade Commission as a new agency has to be identified and an agreement entered into to oversee the Anti-Doping and Medication Control Authority.

As of July 1st of this year, individual states will continue to conduct race-day testing and sample collection. USADA was to manage the out-of-competition testing.

VII. Inclusion of Thoroughbreds But What About Other Breeds?

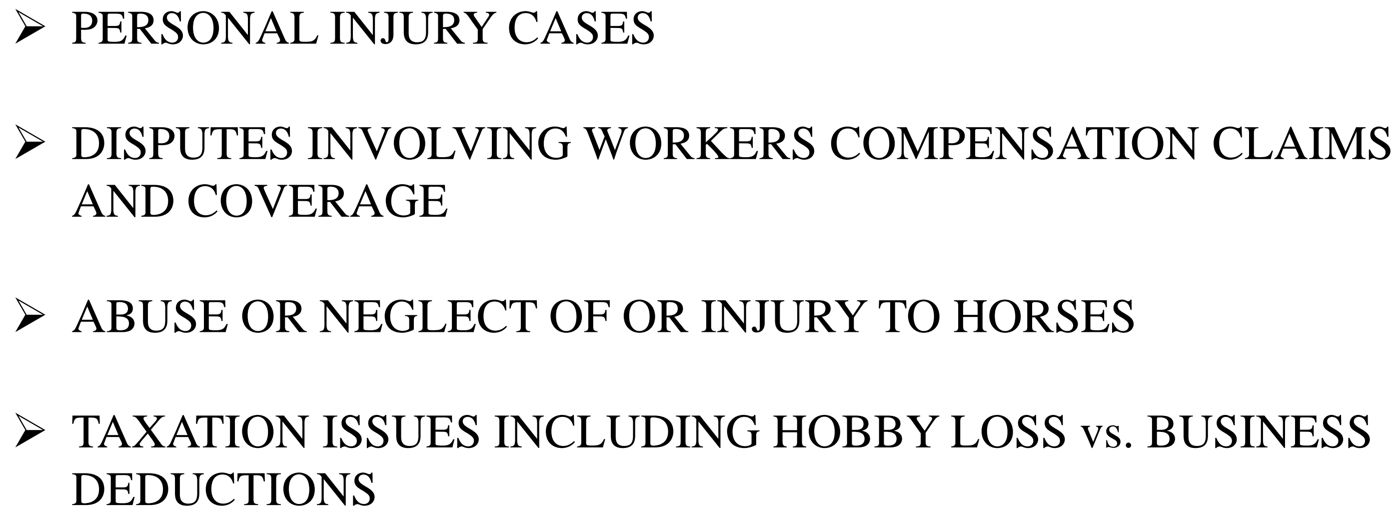
VIII. Where is HISA and its challenges now?

EQUINE LAW:
A State and Federal Update

March 30, 2022

INDIANA EQUINE CASE LAW: AN OVERVIEW AND UPDATE

CATEGORIES OF DECISIONS



I. Equine Case Law: Personal Injury Decisions

Decisions

- Einhorn v. Johnson, 996 N.E.2d 823 (Ind.App.2013)
  - "In this case, an agitated horse got spooked in a practice ring at the state fair, got free, ran through the barn and trampled John Einhorn, a fair volunteer. He was severely injured and the fair's workers compensation paid the medical bills. Einhorn sued the fair and the family of the rider of the agitated horse.
  - It held that for liability for negligence to be imposed, there must be a showing of a known dangerous propensity. The horse's agitated behavior before the accident: '"…is not evidence of a dangerous propensity as a matter of law…."

- Willis v. Holder, 2011 WL 240111 (Ind. Ct. App. 2011)
  - Here a driver was injured when vehicle collided with escaped horse. The court empathized that: "…the escape of an animal is not negligence per se…." It noted that although the fence was in good condition: "…the horse escaped anyway, but sometimes, accidents happen…."

P.I. Decisions cont.

- Park v. Eckhart, 948 N.E.2d 871, 2011 WL 1878096 (Ind. Ct. App. 2011)
  - In this case, a mounted police officer was injured when thrown by his horse. The officer sued the driver of the vehicle he claimed hit the horse. The trial court granted summary judgment to the defendant. The Court of Appeals reversed, finding that conflicting testimony regarding causation justified a trial.
- Perry v. Whitley County 4-H Clubs Inc., 931 N.E.2d 933 (Ind. 2010)
  - Child was injured as a participant in a horse competition held in a barn, when kicked in the leg by a horse. The parents of the minor child sued alleging that the organizers were negligent in holding the competition in a barn that was too small and required the horses to be too close together, exacerbating the chance that one might kick."

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SACOPULOS, JOHNSON & SACOPULOS

P.I. Decisions cont.

- Anderson v. Four Seasons Equestrian Ctr., Inc., 852 N.E.2d 576 (Ind. Ct. App. 2006)
  - "Rider who had been taken riding lessons from equestrian center, signed a waiver of release, was injured when mounting her own horse. The Court of Appeals upheld the summary judgment influenced by the fact that the waiver stated that risks were inherent in riding."

- Del Raso v. U.S., 244 F.3d 567 (7th Cir. 2001)
  - "Del Raso sued under the Federal Tort Claims Act after he was injured after he fell off a horse he was riding at a military base recreational riding facility. Del Raso signed a release prior to riding and claimed the release was invalid as having been fraudulently induced, as the instructor referred to it as a 'waiting list.'"

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P.I. Decisions cont.

- Burdick v. Romano, 148 N.E.3d 335 (Ind. Ct. App. 2020); 152 N.E.3d 1061 (Ind. 2020) (Denying Petition to Transfer)

The Court of Appeals of Indiana recently affirmed a jury verdict in favor of a horse owner whose horse allegedly kicked a mounted rider in the head. The appellate court ruled the trial court had correctly instructed the jury on the law applicable to inherent risks of equine activities, sporting event injuries, and incurred risk.

- Gacsy v. Reinhart, 142 N.E.3d 518 (Ind. Ct. App. 2020)

Defendant's horses escaped their confinement and ran over an Indiana man causing injury. At trial, the court ruled that jury should not hear evidence related to alleged prior escapes of the horse. Appellate court reversed the trial court's ruling and reinstated the case with instructions that evidence related to the alleged prior escapes of the horses were admissible and proper for the jury to hear.

EQUINE LAW

Peter J. Sacopulos-Attorney at Law

Sacopulos, Johnson & Sacopulos

II. Equine Case Law:
The Indiana Workers Compensation Act.

Indiana Worker's Compensation Decisions

- Moberly v. Day

  Ten Factor Analysis Test

- Munoz v. Industrial Comm'n
  - "Workers compensation claimant sought to have income earned from horse training and rehabilitation included in average monthly income."

- Gaines Gentry Thoroughbreds v. Mandujano
  - "While returning to Kentucky from horse sales in Saratoga, New York, employee of horse farm was injured in an automobile wreck. He sought workers' compensation coverage."

Indiana Workers Compensation cont.

- County of Riverside v. The Workers' Compensation Appeals Board
  - "Member of "posse comitatus" group (volunteer) that assisted the local sheriff was injured during training."

- McCutcheon v. Workers' Compensation Bd.
  - "A groom was injured while holding a horse for her farrier-husband during a shoeing…The court noted that she was not an independent contractor because she was "directed by a specialist, could be discharged at will, was not engaged in a distinct occupation or business, did not provide her own specialized tools, and the task required little skill."

- Goetzinger v. Wheeler
  - "Nancy Wheeler worked part-time for Goetzinger training and showing horses. Wheeler was injured while showing Goetzinger's horse at a county fair."

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III. Equine Case Law: Decisions Involving Abuse Or Neglect Of, Or Injury to Horses

Decisions Involving Abuse Or Neglect Of, Or Injury to Horses.

- Harnish v. Liberty Farm Equine Reproduction Center, LLC
  - "Owners of mares infected with CEM sued farm that collected the semen, where the infection resulted."

- Martin v. Gorajec
  - "Martin was a horse breeder who became executive director of the Indiana Thoroughbred Breeders Association. An acrimonious relationship developed between Martin and members of the Indiana Racing Commission. An investigation was launched into Martin's alleged mistreatment of horses."

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Decisions Involving Abuse, Neglect, Injury cont.

- Duncan v. State
  - "Horse owner was convicted of animal cruelty after a bench trial. On appeal, he challenged the unconstitutionality of Indiana's statute, claiming it was vague. The court upheld the conviction and rejected the challenge because it was clear that the horses had been neglected."

- Miller v. State
  - "Miller's horses were seized when they were observed to be too skinny, and he was subsequently convicted of animal abuse. The court upheld the conviction based on the jury's right to weigh conflicting evidence."

- Baxter v. State
  - "Based on a tip that four horses were dead and left rotting in the mud, animal control offers went to Baxter's residence. Baxter was later convicted for failing to dispose of dead animals and for animal neglect of several other horses, whom were confiscated and placed in foster care.

  On appeal, Baxter argued that the law requiring disposal of dead animals was unconstitutionally vague and that the seizure of animals, and the refusal to return them while charges were pending, was wrongful."

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SACOPULOS, JOHNSON & SACOPULOS

Decisions Involving Abuse, Neglect, Injury cont.

- Lykins v. State
  - "Horse owner was charged with neglect, and defended on the basis he could not obtain hay; thus could not have the requisite intent. The jury rejected the defense and convicted him, which verdict was upheld on appeal."

IV. Equine Case Law: Deductibility of Equine Related Expenses - Or Not: Business Expense or Hobby Loss

Equine Related Expenses

“An ongoing and recurring issue for those in the equine industry is whether claimed business deductions incurred in connection with breeding, boarding, training, sales and/or racing should be allowed as ordinary and necessary business expenses.

1) the manner in which the taxpayers carry on the activity;
2) the expertise of the taxpayers or their advisors;
3) the time and effort expended by the taxpayers in carrying on the activity;
4) the expectation that the assets used in the activity may appreciate in value;
5) the success of the taxpayers in carrying on similar or dissimilar activities;
6) the taxpayers’ history of income or loss with respect to the activity;
7) the amount of occasional profit;
8) the financial status of the taxpayers; and
9) whether elements of pleasure or recreation are involved.

Decisions on Equine Related Expenses

- <u>Roberts v. Commissioner</u>
  - M.C. Roberts became involved in Indiana horse racing in the late 1990s. He purchased two racehorses to start and soon thereafter purchased more as well as broodmares and a stallion. He even built his own track. Roberts deducted the associated expenses for the tax years 2005 and 2006.
  - The Internal Revenue Service took a different view of Mr. Roberts' operation. The IRS took the position that Roberts' "business expenses" were actually hobby losses.
  - The case was tried to the United State Tax Court and Judge Elizabeth Paris found for the IRS and against Mr. Roberts. Roberts faced tax deficiencies for 2005 of $89,710 and $116,475 for 2006. M.C. Roberts appealed to the 7th Circuit Court of Appeals.
  - In April of 2016, Judge Posner of the 7th Circuit Federal Court of Appeals ruled in favor of Mr. Roberts thereby reversing the Tax Court's decision and instructing that all deficiencies be voided.
  - Why did the 7th Circuit Court of Appeals reverse the tax court's decision?
    - Roberts testified that he was "contemplating a career change"
    - Roberts testified that he was pursuing "the financial prospect of horse racing"
    - Taxpayer investment
    - Years of commitment vs. Years as startup
    - Action taken by taxpayer including joining of organizations, obtaining Indiana's trainer's license, etc.

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Peter J. Sacopulos-Attorney at Law
Sacopulos, Johnson & Sacopulos

Decisions on Equine Related Expenses cont.

- <u>Romanowski v. Commissioner</u>
  - "Former NFL player participated in the Classic Star mare-lease program. His deductions were disallowed by the IRS."

- <u>Craig v. Commissioner</u>
  - "Mr. Craig, electrical engineer, and Ms. Craig, real estate agent, purchased 10 acres and acquired several horses. In the tax years at issue, Ms. Craig worked 25 to 30 hours a week on her horse activity, and 25 to 40 hours a week as a real estate agent, with no separate records kept of the horse activity. The IRS disallowed deductions of the expenses. Significant were a lack of a budget, her other income from real estate agency, and her failure to modify the horse activity when it did not make a profit, and failure to ever make a profit."

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SACOPULOS, JOHNSON & SACOPULOS

Decisions on Equine Related Expenses cont.

- Rodriguez v. Commissioner
  - "Ms. Rodriguez, a state "investigator", and her daughter, a part-time "vendor rep", started a Swedish warm-blood breeding operation, for 15 years it incurred $1.8 million in losses. The Court noted that business plan was perfunctory, little advertising was done, insurance was not obtained, and little effort was made to make the business profitable."

- Bronson v. Commissioner
  - "Taxpayer husband, bankruptcy attorney, and wife, PhD in consumer finance, started a Welsh pony venture, in which the wife worked full-time. In the eleven years at issue they experienced a net loss of $837,752. The revenue in that period was insignificant, with only one horse having been "sold" to a charity for a nominal amount.

Decisions on Equine Related Expenses cont.

- Helmick v. Commissioner
  - "Husband, county employee and amateur horse-breeder and boarding operator, resided on the farm while boarding horses for others and breeding Arabians. With no business plan and could not produce certain receipts, their intention to make a profit was "objectively unreasonable", the Tax Court held that they engaged in the venture with a profit motive, and thus the losses were allowed to be deducted. The Helmicks' [taxpayers here] horse activity does not fit the stereotypical abusive scenario; instead they engaged in the horse activity with a motive to make a profit, and they are therefore entitled to deduct their losses.

- Schmuecker v. Commissioner
  - "Taxpayer owned racehorses trained and raced by others, deducted the expenses and losses against his income as a salesman. It recited the seven regulatory tests, including the test of participation in the activity for more than 500 hours. Taxpayer argued that he met this test because he "would say" he spent 500 hours a year in his horse-racing business, which consisted of 250 hours surfing the web for horses to buy, and 250 hours "going to races, reading the racing form, visiting people, going to horse sales, watching live races." That did not sway the Tax Court, which also noted that Taxpayer 'did not even ride horses.'"

Decisions on Equine Related Expenses cont.

- <u>Miller v. Commissioner</u>
  - "Miller was a successful business man, lost several thousands of dollars after buying some Paso Fino horses, and began breeding them as a business. The Court, reviewed each of the nine regulatory factors, noted that "the startup phase of a horse breeding activity is 5 to 10 years." Also important was Miller's personal involvement in the activity, the court noting that 'Miller participated in all aspects of the breeding activity except cleaning the stalls.'"

- <u>Topping v. Commissioner</u>
  - "Taxpayer had a profitable interior design business, also designing horse barns, and engaged in horse shows, an occupation that resulted in substantial losses."

- <u>Huff v Commissioner</u>
  - Petitioners were breeders of miniature donkeys for the purpose of providing additional income to their adult daughter. Losses produced for the tax years of 2013 and 2014 piqued the interest of the IRS who disallowed deductions and determined that there were deficiencies. Court held the deductions were allowable and the Huffs were not liable for penalties.

EQUINE LAW

PETER J. SACOPULOS-ATTORNEY AT LAW

SACOPULOS, JOHNSON & SACOPULOS

V. Equine Case Law:
Overview of the Administrative Process of Representing a Client

HORSERACING INTEGRITY AND SAFETY ACT (HISA):

A NEW ERA FOR THROUGHBRED RACING IN INDIANA AND NATIONALLY:

STATUS/REVIEW/ANALYSIS AND CONCERN

I. Legislative History

LEGISLATIVE HISTORY

- 2011: Interstate Horseracing Improvement Act is introduced by Senator Udall (D-NM).
- 2015: The First—HISA is introduced by Representative Joe Pitt (R PA). That same year Representatives Barr/Tonko introduce the Thoroughbred Horseracing Integrity Act of 2015.
- 2017: Representatives Barr & Tonko introduce The Horseracing Integrity and Safety Act of 2017
- 2020: Fast Forward to 2020: The Horseracing Integrity and Safety Act, introduced by Representatives Barr/Tonko, passed in the U.S. House of Representatives on September 29, 2020.
- The HISA introduced in the US Senate by Senator Mitch McConnell (R KY) on September 9, 2020.
- On December 28, 2020, President Trump signed into law the Consolidated Appropriations Act, 2021. Tucked away in this 2,000-page legislation is the Horseracing Integrity and Safety Act.

EQUINE LAW

Peter J. Sacopulos-Attorney at Law

Sacopulos, Johnson & Sacopulos

THOROUGHBREDS/OR ALL BREEDS

This bill is currently restricted to Thoroughbred racing but allows the established Authority to include both Standardbreds and Quarter Horses, if requested by the State Racing Commission. This would create a patchwork of medication rules for different breeds of racing, where horsemen competing across state lines could have widely varied rules. There is no provision in HISA for the different requirements of different breeds.

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PETER J. SACOPULOS-ATTORNEY AT LAW
SACOPULOS, JOHNSON & SACOPULOS

HISA:
INDUSTRY SUPPORT/INDUSTRY OPPOSITION

SUPPORTERS	OPPOSITION
Jockey Club	HBPA
Water Hay Oats Alliance (WHOA)	NAARV
TOBA	American Quarter Horse Association

II. Organization and Structure of HISA

ORGANIZATION AND STRUCTURE OF THE ORGANIZATION WILL BE:

Horseracing Integrity and Safety Authority Board of Directors

Chairperson: This person is to be selected from outside the equine industry

Persons/Directors selected from outside the industry

THREE STANDING COMMITTEES

Standing Committee #1: Anti-Doping and Medication Control

Standing Committee #2: Racetrack Safety

Standing Committee #3: Nominating

III. The Disciplinary Process

Disciplinary Process Before Most State Regulators/Commissions

Step 1

(A) Stewards/Judges Hearing

Step 2

(B) Timely right to appeal for review hearing before an appointed Administrative Law Judge for a hearing on the merits (witnesses/evidence)

Step 3

(C) Timely right to Appeal the ALJ'S Recommended Ruling/Penalty to the State Regulatory Commission

Step 4

(D) Right to seek Judicial Review of Regulator's/Commission's final decision by a state court

Compare State Disciplinary Process with that of HISA

Step 1

- Right to a hearing before the Authority
  - HISA is unclear whether "the Authority" or a standing or sub-committee of the Authority will conduct initial hearings—this appears to replace the Stewards/Judges hearing.
  - Also unclear is whether the hearing before the Authority is or is not a merits hearing necessitating the presentation of evidence and testimony of witnesses.
  - Note: the hearing before the Authority will be limited to alleged medication and safety violations. All other violations e.g., security, equipment, wagering, standard of behavior, etc., will be overseen by state officials

Compare State Disciplinary Process with that of HISA

Step 2

- If a timely appeal is taken, then the dispute is submitted to an Administrative Law Judge.
- The ALJ, pursuant to Section 8, is to be an "impartial hearing officer."
- However, HISA is silent as to how these ALJs are to be selected and compensated.
- No consideration for mediation although ADR has been recommended.

Compare State Disciplinary Process with that of HISA cont.

Step 3

- The Authority and/or the Covered Person, if dissatisfied with the ALJ's decision, may then submit an Application for Review to the Federal Trade Commission.

- Key Point: The Federal Trade Commission may accept or deny the Application for Review.

- If the Federal Trade Commission refuses the application for review, then:

  - The ALJ decision shall constitute the final decision without further proceedings;

  - Unlike the current administrative/judicial process, HISA provides no right to review;

  - As such, HISA represents a serious restriction, or evisceration, to licensees' due process rights.

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SACOPULOS, JOHNSON & SACOPULOS

Compare State Disciplinary Process with that of HISA cont.

- Here is where the horsemen's due process rights are truncated and violated.

- This is because the overseeing agency, the FTC, is not required to grant a request for review. In the event a request for review is not granted or acted upon, the covered person's next stop is the U.S. Federal Court of Appeals.

- This lack of a guarantee of a right to review by the agency is a violation of the covered person's due process rights.

- Example: Alleged violation of a covered person at Hipodromo Camarero in Puerto Rico being required to seek judicial review in Boston where the U.S. Court of Appeals, First District, sits.

- Average cost of an appeal $20,000 to $50,000

IV. Constitutional Concerns and Challenges

Constitutional Challenges In Their Entirety

- HISA violates the Non-Delegation Doctrine of the United States Constitution
  - The Non-Delegation Doctrine provides that Congress is prevented from delegating legislative authority to any other entity

- HISA violates the Appointment Clause of the U.S. Constitution
  - The Appointment Clause requires that appointments to public agencies be made only by the Executive Branch as set forth in Article II of the Constitution.

- HISA violates rules prohibiting Anti-Commandeering
  - The U.S. Supreme Court has held that Congress "may not issue direct orders to the governments of the states." Congress may not commandeer the State's offices or those of their political subdivisions to administer or enforce a federal regulatory program.

- HISA violates the Due Process Clause of the Constitution
  - The fourteenth amendment of the U.S. Constitution guarantees both procedural and substantive due process.
    - Procedural due process requires the right to reasonable notice and an opportunity to be heard at a meaningful time and in a meaningful manner
    - Substantive due process requires that there must be a rational relationship between a legitimate governmental purpose of a regulation (such as protecting the integrity of racing) and the means chosen for that desired end (the rules governing racing).
    - The licensee/protected person's due process rights under HISA are truncated

  - The Due Process Clause of the Constitution prohibits an economically self-interested private actor from wielding regulatory power over private parties.

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Peter J. Sacopulos-Attorney at Law

Sacopulos, Johnson & Sacopulos

Constitutional Arguments Advanced By the National HBPA and Amicii on February 16, 2022

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Peter J. Sacopulos-Attorney at Law
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Parties/Players to the Pending Constitutional Challenge in the U.S. District Court, Northern District of Texas

PLAINTIFFS:

- National HBPA;
- Arizona HBPA;
- Arkansas HBPA;
- Indiana HBPA;
- Illinois HBPA;
- Louisiana HBPA;
- Mountaineer Park HBPA;
- Nebraska HBPA;
- Oklahoma HBPA;
- Oregon HBPA;
- Pennsylvania HBPA;
- Tampa Bay HBPA; and
- Washington HBPA
- State of Texas
- Texas Racing Commission

AMICUS CURIAE

- The North American Assoc. of Racetrack Vets;
- American Quarter Horse Association

Parties/Players to the Pending Constitutional Challenge in the U.S. District Court, Northern District of Texas cont.

DEFENDANTS:

Horseracing Integrity and Safety Authority, Inc.

Jerry Black, Katrina Adams, Leonard Coleman, Jr., Nancy Cox, Joseph Dunford, Frank Keating, and Kenneth Schanzer

Federal Trade Commission

Rebecca Kelly Slaughter, in her official capacity as Acting Chair of the Federal Trade Commission;

Rohit Chopra, in his official capacity as Commissioner of the Federal Trade Commission;

Noah Joshua Phillips, in his official capacity as Commissioner of the Federal Trade Commission; and

Christine S. Wilson, her official capacity as Commissioner of the Federal Trade Commission

AMICUS CURIAE

Senator Mitch McConnell and Representatives Tonko and Barr

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V. A New Era of Thoroughbred Racing Without Any Race Day Medications Including Furosemide

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NO FUROSEMIDE EQUALS HIGHER COSTS

HISA eliminates Furosemide on race day in: (1) Two-Year-Olds and (2) Stakes Thoroughbreds for the first three (3) years after its enactment and ultimately for all Thoroughbreds after that

Banning Furosemide will likely result in HIGHER COST and reduced profit margins. Why?

- Average cost of Lasix is $20 to $25 a dose.
- Average cost to replace Lasix with antibiotics is $90+ a week.
- Average cost to replace Lasix with bronchodilators is $100+ a week.
- Average cost to replace Lasix with hyperbaric oxygen treatment is $100 a treatment.
- There will likely be more days the horse will be unable to train or race.
- Increase in “horse wastage”—horses unable to race because of EIPH that will require new homes.

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VI. USADA, the Center Piece of Federal Testing and Enforcement That Has Left The Negotiation Table
What's Next?

IS THE UNITED STATES ANTI-DOPING ASSOCIATION (USADA) UP TO TASK AND ARE THE PARTICIPANTS UP TO THE COST?

- HISA places USADA at the head of the Anti-Doping and Medication Control Authority
- USADA: Key Points
    - Annual budget of 20 million
    - Annual administration of approximately 7500 drug tests
    - USADA drug tests cost $2,998.90 per test

RACING INDUSTRY COMPARISON OF PTS

- There are approximately 260,000 post race/out of competition tests performed in horse racing annually.
- Annual testing , governed and overseen by usada, would result in costs of nearly ¾ of a billion dollars annually.
- Hisa would to add this amount as a charge to state racing commissions as a per starter fee.
- There are approximately 600,000 starts per year (2018 statistics). This could result in approximately $1,300 per start.
- The average horse earns $2,250 per start. Therefore, this fee could reduce by more than half a horse's potential earnings.
- Potential result is a massive contraction of our sport.

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SACOPULOS, JOHNSON & SACOPULOS

VII. Inclusion of Thoroughbreds But What About Other Breeds?

VIII. Where is HISA and its Challenges Now?

Questions?

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