

# Regulation of Bute and Lasix in New York State

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The horse racing community in the United States has been fighting over issues relating to phenylbutazone or butazolidin [hereinafter referred to as Bute] for more than 55 years and furosemide/salix [hereinafter referred to as Lasix] for more than 40 years. Over this period of time, the same questions have been asked by both supporters and opponents of administration of these drugs. The questions have been asked, but the questions have remained largely unanswered. After decades, the United States racing industry has been unable to come up with a clear consistent position on the proper utilization of these drugs.

The purpose of this memorandum is to supply an overview for the members of the Gaming Commission of New York State's involvement with drug testing issues and more specifically with the history of New York's regulation of the two drugs most often associated with permissive medication: Bute and Lasix. Much of the focus of this memorandum is on thoroughbred racing, but it is important to understand that the analysis and the issues (and therefore the focus of the Commission) also must be applied to harness racing, which constitutes the vast majority of the pari-mutuel racing conducted in New York State. While some of the statements in this memorandum may be controversial, this memorandum is intended to be historical and not an advocacy piece.

## Historical New York Drug Testing Questions and Issues

New York State, like most North American racing jurisdictions, uses the trainer responsibility rule.<sup>1</sup> Under the New York version of this rule, a trainer is responsible for a drug positive unless the trainer is able to demonstrate by substantial evidence that he or she was not responsible for the administration of the drug.<sup>2</sup> While New York State allows trainers to assert non-responsibility as an affirmative defense, other states have an even tougher version of the trainer responsibility rule. In these states, there is strict liability for trainers. A trainer is unable to escape responsibility for a drug positive. Thus, a trainer is generally liable for a drug violation even if the trainer did not intend, did not know of or was not negligent about the drug administration. Even in states like New York which allow trainers to assert non-responsibility as an affirmative

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<sup>1</sup> See generally Liebman, "The Trainer Responsibility Rule in Horse Racing," 7 *Va. Sports & Ent. L.J.* 1 (2007).

<sup>2</sup> See 9 NYCRR §§ 4043.4, 4120.4 and 4236.4.

defense, in recent years, there have been few occasions when a trainer has escaped responsibility for a drug violation.<sup>3</sup>

Drug testing initially came to the United States in the mid-1930's. North American racing had been overspread by the utilization of narcotics in that decade – including cocaine and heroin<sup>4</sup> – to stimulate horses. There were federal indictments of major racing licensees in 1933 in Chicago (including Ivan Parke, Hal Price Headley and A.A. Baroni. The Federal Bureau of Narcotics claimed that in the Chicago case that 250 horses had been injected.) and in Detroit for using narcotics.<sup>5</sup> Saliva testing –which had been used in Europe to combat drug use – was soon introduced in the United States to detect and prevent the stimulation of horses. While questions always existed over the efficacy of saliva testing, it appears that the widespread use of narcotics in United State racing tailed off after the introduction of these tests.<sup>6</sup> Again, however, in the 1940's and 1950's, given the rudimentary nature of the saliva test, (and the initial urine testing that was added several years after the saliva test) it is likely that many drugs that were administered to racehorses during those years eluded official detection. Saliva testing was not phased out in New York until the early 1970's and replaced by blood testing.

Besides the limitations of drug testing, for many years from the 1940's through the early 1970's, trainers at the NYRA tracks whose horses tested positive for drugs generally escaped penalties.<sup>7</sup> The three stewards at the NYRA tracks – who effectively controlled the drug penalties up until 1975 - regularly found that the trainers were not responsible for the drugs found in their horses. While the purse money for the race was redistributed, these trainers received no penalties.<sup>8</sup>

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<sup>3</sup> This, however, was generally not the case at the principal New York thoroughbred tracks from approximately 1945 -1975 where the stewards rarely imposed sanctions on trainers with drug positives. As long time State steward Francis Dunne said, "We have more leeway here...We would have to find that a trainer was negligent or a party to the wrongdoing before we would suspend him." Steve Cady, "Justice in the Paddock," *New York Times*, April 11, 1969.

<sup>4</sup> One rumor is that the name "horse" as slang for heroin comes from the frequency with which heroin was administered to racehorses. The first wide scale drug/doping issues appeared in England at the turn of the 20<sup>th</sup> century, as a number of American trainers who had come to England apparently regularly administered cocaine to their racehorses. These trainers became known collectively as the "Yankee alchemists."

<sup>5</sup> After a finding that evidence in the Chicago cases had been obtained impermissibly, the indictments were eventually dismissed. For a partial explanation of what occurred, see *Headley v. Commissioner*, 37 B.T.A. 738 (B.T.A. 1938).

<sup>6</sup> See e.g. "The Horse and the Bluegrass," *Lexington Herald*, January 30, 1936, citing "the virtual elimination of doping," "Doping Stopped at Race Tracks," Associated Press, *Austin Statesman*, April 2, 1936. The Federal Bureau of Narcotics would occasionally state that federal congressional action would be sought if the individual states failed to take appropriate action against drug offenders.."

<sup>7</sup> The one major exception to that was Tom Smith who had been the trainer of Seabiscuit. Smith's license was suspended upon a finding that his stable had administered the drug ephedrine to one of his horses. Smith served a year's suspension and resumed training in 1947. See *Smith v. Cole*, 270 A.D. 675 (1<sup>st</sup> Dept., 1946).

<sup>8</sup> The State Commission on Investigation criticized the State steward at NYRA for his lack of action on drug violations. See State of New York, Commission of Investigation, *The State Racing and Wagering Board and Related Matters Including a Review of the Financial Condition of the New York Racing Association*, 2<sup>nd</sup> report (1976).

These trainers who escaped penalties included some of the major trainers in the history of twentieth century American horse racing including Hirsch Jacobs, Eddie Neloy, Allen Jerkens and Bill Winfrey. Other than certain Bute penalties, little significant action was ever taken by the stewards against drug violators at the NYRA tracks for many years. Of the 13 drug positives reported at NYRA from 1971-1975, the stewards at NYRA imposed a total of only one suspension and one fine.<sup>9</sup>

Compounding these problems in New York State were issues with the quality of its drug testing laboratory. Numerous questions were raised over the years as to the ability of the state's drug testing lab in Jamaica, Queens. The harness tracks even put in a provision in the law so that their drug testing starting in the early 1970's would be undertaken by Cornell University and not at Jamaica. NYRA started using Cornell in the early 1970's so that for a time NYRA samples were tested both at Cornell and Jamaica. In the mid 1970's, the State Commission of Investigation<sup>10</sup> and an internal report of the State Racing and Wagering Board criticized the Jamaica laboratory. This led to all drug testing taking place at Cornell. One state veterinarian in the early 1970's commented that the NYRA tracks seemed to average about one drug positive a year. After Cornell took over for the Jamaica laboratory, it appears that more drug positives were called in New York State. This increase in positives also seemed to occur when blood testing replaced the saliva test, and most especially when urinalysis became more sophisticated.

Starting approximately six years ago, the former Cornell laboratory began running under the aegis of SUNY Morrisville. The lab remains in Ithaca. The Cornell/ Morrisville laboratory has been run for decades by veterinarian and chemist Dr. George Maylin. While Dr. Maylin was for many years acknowledged as the leading drug tester in America,<sup>11</sup> he has increasingly been subject to attack in recent years by other racing chemists, the media, and equine veterinary practitioners. It should also be noted that the budget for equine drug testing is subject to the vicissitudes of the overall State budget process. The State Division of the Budget has often regarded the State's spending on equine drug testing to be excessive, and the laboratory has seen its funding reduced in recessionary times.

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<sup>9</sup> *Id.* at p. 23.

<sup>10</sup> *Id.* at 29-30. Racing and Wagering Board member Joseph Boyd once wrote to the State Division of the Budget, "For years positive drug medication results were either not found in the testing process used by the State lab, or if reported were swept under the rug by various commissions." Boyd in a 1976 report wrote that the Jamaica State lab was "largely discredited in the eyes of the racing industry in this state." William H. Rudy, "More Research," *Blood-Horse*, August 10, 1976.

<sup>11</sup> See for example, Sherry Ross, "NYRA Pulls 'Net Plug Drops Betting Sites in Wake of Shake," *New York Daily News*, January 29, 2005. Maylin is "known as one of the world's leading experts in equine drug testing and pharmacology." In 1981, *Newsday* wrote that the Cornell lab was "generally considered to be the best in the country." Ed Comerford, "Big Row over Three Little Words," *Newsday*, October 13, 1981. See also, Manny Topol, "A Drug Scandal in Racing," *Newsday*, November 13, 1983.

The other regular issue facing the Commission is what kind of penalty can be effective when any attorney can significantly delay the imposition of sanctions taken by the Commission/ stewards against a trainer. These cases can and do go on for many years. (For a current example, one can assume that the Commission's case with harness trainer Lou Pena is likely to consume many years.) A wealthy trainer can tie up the system for many years while a poorer trainer is forced to take the assigned penalty. How do you establish a penalty system that treats all trainers and all participants fairly? Should suspensions and/or fines be the basis for most penalties? How should you make a decision on how to compromise a case that has been appealed, and how can you speed up a process that has been mired in delays? Who makes the initial penalty determination – the Commission which is in the best position to assure uniformity among tracks – or the stewards/judges who should theoretically have the best knowledge of the accused parties?

### Bute

Bute was first synthesized in 1948 and was readied for human use in 1949. It was an analgesic intended to prevent inflammation. It was generally used in humans to combat arthritis and gout. It is a nonsteroidal anti-inflammatory drug [NSAID] like aspirin and ibuprofen. For many years, Bute was frequently used by athletes to control arthritis and inflammation. Baseball pitchers Sandy Koufax, Whitey Ford and Bert Blyleven were regular users of Bute. It was similarly used regularly in the National Football League. Due to its side effects in contributing to the causation of anemia, ulcers and liver damage, it is now banned for human use in the United State.

In 1957, Bute became available for horse racing. By all accounts, its acceptance and usage in horse racing was almost immediate. It has been regularly been stated that Hall of Fame trainer Sunny Jim Fitzsimmons used Bute in 1957 on Wheatley Stable's horse of the year, Bold Ruler. (Not only was Fitzsimmons among the most beloved people in American racing, but Bold Ruler was a tremendously successful race horse and sire producing 11 champion horses including Secretariat.) It was used more or less freely throughout 1959 although a urine test for Bute was developed in some states (including New York) in 1960.

Horsemen liked Bute. Hall of Fame trainer Eddie Neloy in the 1960's commented, "It is probably the greatest drugs [sic] that we've ever encountered... It's a wonder drug, a panacea. It has dramatic anti-inflammatory properties. While almost all horsemen use it, we also know that it can remain in the horse's system for a number of days."<sup>12</sup> Sunny Jim Fitzsimmons said, "I favor the use of Butazolidin because it is up to the trainer to send a horse out in the best condition he can. He'll be more likely to run to form if he is given Butazolidin."<sup>13</sup> Lucien Laurin, the trainer of Secretariat said, "I like Bute, always did...It doesn't hurt a horse and you'd be

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<sup>12</sup> Stan Isaacs, "Derby Really Wasn't All That Stimulating," *Newsday*, May 8, 1968.

<sup>13</sup> Art Grace, "The Commission Said No," *Blood-Horse*, December 7, 1961.

surprised how much it helps him, if used the right way. It's a lot of help to a horse that's a little stiff or rheumatic or track-sore."<sup>14</sup>

In 1960, Kentucky had no prohibition against Bute use. The Kentucky Derby that year was won by Venetian Way, and there was little question that Venetian Way was using Bute.<sup>15</sup> When Venetian Way finished fifth in the Preakness without using Bute, questions were raised about the validity of the horse's Derby performance.

Similarly in 1961, questions were raised as to whether the Derby and Preakness winner Carry Back had been administered Bute before those races. At the time, Bute had been legalized in both Kentucky and Maryland. The question arose after Carry Back without Bute finished seventh as the even money favorite in the Belmont Stakes.

Before the racing season began in 1960, the New York Racing Commission announced that there was a general ban against Bute use. In the first race conducted in 1960, a horse trained by Frank Cundall tested positive for Bute. The stewards at NYRA suspended Cundall for 60 days. That suspension was upheld by the Racing Commission. Later that year, trainer Danny Perlsweig received a 60 day suspension from the NYRA stewards for the use of Bute.

While New York was enforcing a ban against Bute, other states were loosening the prohibitions. Colorado had legalized Bute in 1959. In 1960, Illinois followed Kentucky and legalized Bute. Maryland, Florida and Louisiana legalized Bute for 1961. The New York Racing Commission even terminated its veterinarian who had taken a stand in support of allowing veterinarians to determine whether to use Bute.

Bute came on the scene at a time when drug testing in racing was focused almost exclusively on preventing depressant and stimulants. The stimulants had generally been narcotics. The sport was uncertain as to how to deal with a medication that was not a stimulant or a depressant, and arguably was providing a restorative health benefit to a horse. The argument was made that Bute did not improve equine performance but simply enabled a horse to run up to his or her capacity.

By the mid 1960's, most states had instituted or reinstated a ban on Bute.<sup>16</sup> This prohibition came to a head when in the 1968 Kentucky Derby, Dancer's Image, who finished first, tested

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<sup>14</sup> Ed Comerford, "State Is Waiting for More Research on Horse Drugs, *Newsday*, October 10, 1976.

<sup>15</sup> See Red Smith, "Prescription Counter," *New York Herald Tribune*, May 23, 1960. Over the years, there have been regular allegations that Sir Barton, America's first Triple Crown winner in 1919, raced on drugs. "It is accepted as gospel today that Sir Barton was a giggling hophead, carrying a charge big enough to blow up the Pentagon." Red Smith, "Red Smith's Views of Sport," *Baltimore Sun*, December 4, 1960. See also Ed Comerford, "Triple Crown: Information, Please," *Newsday*, June 9, 1973.

<sup>16</sup> See J.A. Estes, "The Triumph Over Butazolidin," *Blood-Horse*, March 17, 1962.

positive for Bute. The stewards disqualified Dancer's Image, and after nearly a five year period of appeal, the disqualification was upheld by the Kentucky Supreme Court.<sup>17</sup>

After the Dancer's Image incident, states began easing up on Bute restrictions. California authorized Bute in 1972, Kentucky authorized Bute usage in 1974 before the Kentucky Derby. By 1975, 22 states had allowed Bute usage. While there was a movement in the late 1970's to limit Bute and other permissive medication, by the early 1980's, that movement had ended.

Many states allowed Bute to be administered the day before race day. Kentucky for many years went further and allowed Bute – and other NSAID's - to be given on race day. The Kentucky policy was tightened to allow administration the day before a race. In New York, Bute usage had traditionally been banned within 48 hours before a race. In 2006, the New York requirement was changed to a 24 hour requirement, but changed back to 48 hours.

Since a time-based administration of Bute is difficult to regulate, it is generally enforced through blood testing which can quantify the amount of Bute present in a horse. Currently in New York the threshold for Bute positive is at the two micrograms per milliliter of blood plasma level. Bute amounts above this level are called positives.

The Bute positives came into issue in New York in 1974 with the improvement of testing procedures, including the introduction of blood testing<sup>18</sup> and the replacement of the Thoroughbred Racing Commission by the State Racing and Wagering Board. The NYRA stewards gave New Jersey-based trainer Wilfred Lewis a 30 day suspension in November of 1974 for a Bute positive. The next month, the stewards at NYRA gave Frank Martin – who was the leading trainer in New York – a 60 day suspension for a Bute and a Lasix positive (30 days for each violation).<sup>19</sup> Martin claimed that he had followed veterinary guidelines in his administration of drugs. Martin eventually settled by paying a fine of \$6,000. In early 1975, trainer David Vance received a Bute positive and was given a 30 day suspension. This was reduced to a \$5,000 fine.

The 30 day suspension policy was generally applied by the stewards at NYRA for Bute positives in the mid 1970's. However, in the case of trainer Jim Maloney in 1976, no penalty was given to the trainer for the Bute positive.<sup>20</sup> Trainer John Veitch was given a 30 day penalty for a Bute

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<sup>17</sup> *Kentucky State Racing Com. v. Fuller*, 481 S.W.2d 298 (Ky. 1972). Prior to the 1968 Kentucky Derby, the major Bute incident in a stakes race came when Crimson Satan, the first place finisher in the Leonard Richards Stakes at Delaware Park in 1962 was disqualified.

<sup>18</sup> While the initial blood tests did not find the presence of many drugs the blood tests could generally detect Bute.

<sup>19</sup> Turf writer Bill Nack termed the 60 day Martin penalty "one of the stiffest of its kind given out in the post- World War II era of racing in New York." William Nack, "Rules vs. Rights," *Thoroughbred Record*, December 14, 1974.

<sup>20</sup> The absence of a penalty for Maloney may have largely been due to the composition of the board of stewards at NYRA which made the decision on the penalty question. See Bill Nack, "Shotgun Justice at the Track," *Newsday*, February 22, 1977. Technically, under the State's rules only the State steward can make the decision on suspensions since the other thoroughbred stewards are not State officers and cannot take any official action against a State license. See 9 NYCRR §§ 4022.12 and 4022.13. In practice, however, the stewards tend to act as a body, and the State steward rarely exercises plenary power.

positive on championship filly Our Mims, but the penalty was reduced to a seven day suspension after a hearing before the Racing and Wagering Board.

The 30 day penalty policy was replaced in the late 1970's by the Racing and Wagering Board issuing 60 day suspensions for Bute positives. If the trainer did not appeal the penalty, the penalty was reduced to a 45 day suspension. This was part of an overall effort by the Racing and Wagering Board to promote uniformity throughout the New York racing industry. Almost all non-narcotic drug violators were given 60 day suspensions with the penalty reduced to 45 days if the violator did not appeal the penalty. Also, Bute was one of the very limited number of drugs that could be detected by the pre-race blood drug tests employed at the New York tracks from the late 1970's to the early 1990's. (These pre-race tests had a superficial appeal but were not at all efficacious. They cost a considerable amount of money, identified few drugs and gave the illusion that drugs in racing were under control. They were eliminated by State budgets adopted in the early 1990's due to the recession of that era. ) A horse found to have a Bute positive in a pre-race test was scratched from the race, but the trainer was not penalized.

New York's penalties for Bute positives were considerably higher than those imposed by other states. Starting in 1995, the 60 day penalty was replaced by penalties to be determined by the severity of the offense and the overall record of the trainer. Generally, this has amounted to a combination of a fine and a suspension of less than 20 days. This general penalty has similarly been applied to other NSAID violations.

### Bute Questions

These questions have not really changed since 1960. These questions now apply not just to Bute but to other NSAIDs as well. The drug most frequently used with the same effect as Bute is flunixin/banamine. Many of the questions posed here are also applicable to the questions surrounding the use of Lasix.

Is Bute needed to keep horses in racing during a time when racing has become a year round sport?

Does Bute improve horse performance or just allow horses to perform to the best of their abilities? Is there a way to determine what "performance to the best of their abilities" means?

Why is Bute use banned in horses while human athletes can compete using analogous products aspirin or Advil?

Does Bute use increase the frequency of horse breakdowns?

Does the use of Bute impede the ability of racetrack veterinarians to determine whether a horse is sore or physically fit to be able to compete in a race?

Does Bute use harm overall horse health? Is Bute use contributing to horses having shorter racing careers?

How should the public be informed about horses using Bute?

How accurate is the quantification of the amount of Bute found in the horse's blood? Do laboratories make allowances when their analysis establishes a Bute level that is slightly above the permissible levels?

Is a legalized regulated Bute program better than horses using NSAID's, or other analgesics, without any government regulation?

Does Bute use interfere with other drug detection in horses?

Should not veterinarians be able to determine what treatments are the most efficacious for horses without government interference?

How do you determine the penalties to be imposed on trainers using NSAID's?

Should Bute be used in combination with other NSAID's?

How do you assure that trainers and veterinarians are consistent in their administration of Bute so that the performance of a horse is not affected or manipulated by changes in the administration of the drug?

Does regular use of Bute weaken the overall future breed of thoroughbred horses? What effect had Bute use had on harness horses? On quarter horses?

Should the same regimen that governs Bute usage in thoroughbred racing also apply to harness racing and to quarter horse racing?

What effect does the legalization of Bute have on the public perception of horse racing as a sport?

Are there any statistics on the percentage of thoroughbred races horses that use NSAID's in training? Are there any statistics on the percentage of thoroughbreds that race in Europe and Asia using NSAID's in training? Are there numbers on the use of NSAID's in training for harness horses and quarter horses?

Does the use of Bute contribute to the need for horses to use Lasix?

Does the use of Bute in training make it more difficult for regulatory veterinarians to assess the physical condition of a horse?

What can be learned from the European and Asian experience with NSAID's? Are horses in these jurisdictions making fewer starts? Are they using NSAID's for training? Are there de facto threshold levels for calling NSAID positives in these jurisdictions?

### Lasix

Lasix is a powerful diuretic. It has traditionally been the principal drug utilized to combat heart failure in humans and is often used to control high blood pressure. Based on the dates of early medical studies, it appears that 1964 was the first year that Lasix came into regular medical usage in humans.<sup>21</sup>

Controversial Kentucky veterinarian Alex Harthill claimed that before the Kentucky Derby in 1964 he treated race winner Northern Dancer with Lasix.<sup>22</sup> Northern Dancer also won the Preakness, is a member of the Thoroughbred Hall of Fame, and was one of the most successful thoroughbred sires of all time.

Despite this claim of 1964 usage, Lasix did not appear to make its general entry into horse racing until 1973. The point of Lasix use was that in thoroughbreds Lasix served to prevent or lessen the incidence of bleeding (exercise-induced pulmonary hemorrhage) in horses. Horses seemed to bleed less after receiving Lasix.

Maryland seemed to set the stage for the Lasix issue by allowing Lasix to be used in 1973 if the trainer could demonstrate to the state veterinarian that a horse had bled. This reputedly led to major form reversals in Maryland as certain trainers were sufficiently skilled to get their horses on Lasix. In 1974, the Maryland Racing Commission allowed the general use of Lasix. The public was not advised as to which horses were using Lasix, and many commentators were convinced that Lasix significantly improved horse performance. Eventually, Maryland found a way to advise the public of Lasix administrations.

In New York State, Lasix was forbidden, but no positives were called on the drug until a positive was called on trainer John Lipari at Belmont in September of 1974. As was the custom of the time, Lipari denied any involvement, and the stewards at Belmont exonerated him from any punishment. One racing columnist mentioned that trainers at NYRA had regularly been using Lasix, but they all stopped after the Lipari positive.<sup>23</sup>

The first time that a New York trainer was penalized for a Lasix positive was Frank Martin in December of 1974 who received a combined 60 day suspension which also included a penalty for a Bute positive. (Basically, this was 30 days for Bute and 30 days for Lasix.) Trainer Frank Tufariello received a 30 day suspension for a Lasix violation in 1977.

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<sup>21</sup> Wilfred Stokes and L. C. A. Nunn, "A New Effective Diuretic—Lasix," *Br Med J.* 1964 Oct 10; 2(5414): 910–914.

<sup>22</sup> "Readers' Forum," *Louisville Courier-Journal*, October 10, 2003. See also Jennie Rees, "Dr. Alex Harthill 1925-2005," *Louisville Courier-Journal*, July 17, 2005.

<sup>23</sup> Bill Nack, "Strict Drug Rules Worrying Trainers," *Newsday*, October 1, 1974.

Eventually, the 30 day suspensions for Lasix in New York morphed into New York's 60 day penalty which would be reduced to 45 days in the event that no appeal was undertaken. The most significant Lasix penalty was issued in 1987 to trainer Peter Ferriola who was suspended for 120 days for four Lasix positives. The penalty was upheld unanimously by an appellate court.<sup>24</sup>

In other states, the Lasix policy in many ways followed the arc of the Bute debate. Most states initially allowed Lasix and tried to work their way through issues of: public disclosure of Lasix use, how to determine whether a horse was in fact a bleeder who would be eligible for Lasix administration, what times Lasix could be administered, how much Lasix could be administered, and how would a horse get off the Lasix list.

In the late 1970's, after a number of well-publicized horse injuries, an adverse story on racehorse drug use on CBS's *60 Minutes* and the threat of Congressional action, there was a significant movement towards severely restricting Lasix use. A number of states such as Maryland, New Jersey, and Pennsylvania imposed restrictions on Lasix use. For example, Maryland in 1980 limited Lasix use to horses seen bleeding on the track after a race by the State veterinarian. These State restrictions on Lasix use did not last for a long period of time, and by the early 1980's most states, after lobbying by horsemen, had begun to re-permit Lasix under differing sets of rules.

The differences among states that had legalized Lasix culminated in the 1983 Preakness when the owner of the horse Desert Wine - who had finished second in the Kentucky Derby - went to court to successfully gain the right to use Lasix in the Preakness. Both Desert Wine and the horse Marfa had raced on Lasix in California and in the Kentucky Derby, but Maryland employed a different Lasix certification system under which the track veterinarian had to be present to observe the bleeding. A court ruled against the Maryland certification system and allowed the horses to race on Lasix.

By 1985, in the United States, only New York and Arkansas prohibited Lasix. Arkansas legalized Lasix in 1986, and by 1990, the only significant holdouts against Lasix legalization in North America were New York State and the province of Ontario.

Also in 1990, a Jockey Club study found that Lasix improved race horse performance but was not effective in controlling bleeding. The study had no effect on any regulations in any jurisdiction. In 1991, Ontario legalized Lasix leaving New York as the last non-Lasix jurisdiction standing. In New York, the case against legalized Lasix was weakened by the fact that several significant horses, such as the 1990 Preakness winner Summer Squall, the 1992 Derby winner Lil. E. Tee and the 1992 Preakness runner-up Alydeed, would not race in New York, and by a disastrous winter racing season in 1995 where it became difficult to find sufficient horses to support a credible racing program.

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<sup>24</sup> *Ferriola v. Corbisiero*, 148 A.D.2d 1015 (1st Dep't., 1989). Interestingly, almost no decided equine case in a New York State court mentions the term "Lasix." It is only mentioned in the case of *Matter of Czermann v. New York State Racing & Wagering Bd.*, 68 A.D.3d 1580, 1583 (3d Dep't., 2009) in a footnote which states, "Lasix is a permitted, therapeutic alkalizing agent."

With New York State Senate Majority leader Joseph Bruno, and incoming NYRA president Kenny Noe advocating in support of Lasix, the Racing Board voted to authorize Lasix effective with the Belmont fall meet in 1995. Opposition to Lasix legalization was largely muted.<sup>25</sup> Almost no organized racing group in 1995 vigorously supported the continuation of New York's ban on Lasix.<sup>26</sup> In 1996, the Racing Board informally asked the Governor's Office of Regulatory Reform whether it could ban two year olds from racing with Lasix. The Office advised that it would not support a change. The Office suggested that all the arguments in support of authorizing Lasix similarly applied to two year old horses.

Lasix eligibility in New York can be obtained through a practicing veterinarian finding blood in a horse's lungs after a workout or race. The Lasix must be administered through an IV injection given between four and four and one half hours before post time. A range was established by the Commission governing the size of the permissible dosage of Lasix.

In recent years proposals have been floated - especially by the Jockey Club - suggesting limiting Lasix use in the United States. They have largely been unsuccessful, especially with most horsemen's groups fervently opposed to any Lasix limitations. These proposals have included phasing in Lasix limitation in stakes races over a period of time. While the Jockey Club had in the past been reluctant to support federal legislation to govern race day medication, in recent years, it has begun to push for greater federal control over drugs in racing. Thus far, hearings have occasionally been held in Congress but no action taken.

On the study front, there are dozens, if not hundreds, of studies that have been undertaken on Lasix in racing. Each side can point to a number of studies that support their respective positions. The likelihood of establishing a definitive study on Lasix use is close to zero. This is an issue where further research is not about to create any consensus.

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<sup>25</sup> One of the few consistent opponents of Lasix use was racing writer Bill Finley, then writing for the Daily News. See Bill Finley, "Just Say Neigh to These Drugs," *New York Daily News*, March 30, 1995.

<sup>26</sup> Some racing writers who had initially opposed Lasix legalization had also altered their views. *Newsday* racing writer Paul Moran wrote, "Unfortunately, the sport is choking on New York's regulatory nobility." Paul Moran, "Surrender, NY: Fall Into Line and Allow Lasix," *Newsday*, May 28, 1992. *Newsday's* John Pricci had previously noted his support for Lasix, writing, "I'm not pro Lasix. Just pro reality. I want to see the best horses race live in New York. So does the public. With the exception of a handful of breeders and elitists who are more interested in causes than effects, no one gets bent out of shape when Bute and Lasix appear on the track program next to the names of their favorite horses." John Pricci, "Preakness May Be Wild," *Newsday*, "May 15, 1988. Steven Crist stated about the Racing and Wagering Board's decision, "This was progress toward reality. There is a national horse shortage in this country, and it's more important for us to put on a respectable product than cling to a philosophical position. Besides, this is no longer a debatable point in the rest of the country, and it's important to have some uniformity." Andrew Beyer, "Legalization of Lasix Is an Ethical Band-Aid," *Washington Post*, May 27, 1995.

## Lasix Questions

Is Lasix needed to keep horses in racing during a time when racing has become a year round sport?

Does Lasix increase the length of time that horses are able to race?

Does Lasix improve horse performance or just allow horses to perform to the best of their abilities? As with Bute, what does “performance to the best of their abilities” mean?

Is Lasix effective in controlling and/or limiting bleeding in race horses?

Are there any treatments or medications that would be equally as effective as Lasix in controlling and/or limiting bleeding in race horses?

Is Lasix use contributing to the weakening of the breed of thoroughbred racehorses?

Can racing be conducted in the United States without Lasix?

How can racing be held in other countries without race day Lasix? What do trainers in these non-Lasix jurisdictions do to limit or control bleeding?

If nearly all horses bleed, and Lasix is a humanitarian drug that supports horse health, is there any reason to ban it?

Do horses need extra time between starts because of the use of Lasix? Why do horses seem to generally need more time between races than they did several decades ago?

How has Lasix use affected the running and breeding of harness horses? Of quarter horses?

Should the same regimen govern Lasix usage in harness racing and in quarter horse racing?

Why have horses made fewer starts since North American racing began to authorize Lasix?

Does Lasix improve the performance of horses that do not bleed?

Does Lasix administration interfere with the testing of other drugs? Please note that this question has been raised about Lasix since Lasix made its first appearance in racing, and Lasix opponents have regularly stated that Lasix use would flush out the ability to detect other drugs.

What percentage of horses bleed so badly that racehorse performance is affected without the use of Lasix?

Is a legalized regulated Lasix program better than horses using other methods to avoid bleeding? Are these other “legal” methods more or less humane than the use of Lasix? (During the time

period that New York was alone in banning Lasix use, there was constant criticism that New York's rule was hypocritical and that New York trainers employed techniques – far less humanitarian than Lasix administration – to control equine bleeding. It was also pointed out that despite the Lasix ban, many of the trainers most often accused by fans and racing writers of drug use were regularly working in New York.)

Does Lasix contribute to horse breakdowns? Have any breakdowns ever been attributed to bone weaknesses, muscular deficiencies, or mineral deficiencies caused by Lasix administrations?

What effect has the legalization race day of Lasix had on the public perception of horse racing as a competitive sport? Given the fact that Lasix has largely been legalized in most of the United States for over thirty years, is the public concerned about legalized race day Lasix?

What do informed handicappers think about the general usage of Lasix?<sup>27</sup>

Who should be administering the Lasix injection?

Are foreign buyers less interested in American bred horses because of the regular use of Lasix in America? Are prices for American bred horses reduced because of the American use of Lasix?

Are there any statistics on the percentage of thoroughbred races horses that use Lasix in training? Are there any statistics on the percentage of thoroughbreds that race in Europe and Asia using Lasix in training? Are there numbers on the use of Lasix in training for harness horses and quarter horses?

Should stricter standards be put in place to determine which horses should be eligible for Lasix administration?

Is there any need for two year olds to be given Lasix? Conversely, is there any reason to deny two year olds that bleed the right to utilize Lasix?

Can a Lasix program that allows Lasix usage in general, but not for certain major stakes races, be effective?

How might a program restricting Lasix usage be phased in?

How effective would a single state's actions be in changing national Lasix policy? Would a state's unilateral action simply add to the overall confusion governing the nation's regulation of Lasix use?

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<sup>27</sup> See for example, Jerry Brown, "An Immodest Proposal," *Thoroughbred Daily News*, October 3, 2014. "I can tell you for a fact that we make it our business to understand Lasix as it applies to handicapping, and that not a single horseplayer I have talked to will bet MORE if Lasix is banned. It would add an extra unhandicappable variable to each horse in every race, and more confusion. In contrast, see Barry Irwin, "Racing: Sport or Business?," *Thoroughbred Daily News*, October 4, 2014. "Jerry's singular focus has blinded him to the fact that all evidence points to the introduction and proliferation of so-called therapeutic or permissible medication as the cause for the demise of the American racehorse and the downward spiral of the gambling dollar."

## Conclusion

This is a briefing (This is not a comprehensive thesis. It is approximately 6,500 words.) for the members of the New York State Gaming Commission on the issues of Bute and Lasix. Again, this briefing makes no recommendations and takes no policy positions, but is designed to provide the commissioners with some historical background on these particular equine drug issues and how they have affected the regulation of New York pari-mutuel racing.

If anyone wishes added information on any particular topic or wants more particular citations, I would be only too glad to provide that information.