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Casenote

GRAY AREA: COURT OF ARBITRATION FOR SPORT SAYS NEIGH TO RECONSIDERING STRICT LIABILITY IN EQUESTRIAN SPORT

I. INTRODUCTION

Lance Armstrong, Alex Rodriguez, Marion Jones, and Barry Bonds are some of the most famous names in sport; however, their notoriety is partially due to a willingness to dope to win.¹ Yet, doping is not limited to human athletes.² The 2008 Summer Games in Beijing, China showcased incredible athletic talent. In the equestrian world, six equine doping cases and the revocation of one medal tarnished the achievements of 2008 Summer Games.³ Each incident warranted a Fédération Equestre Internationale (FEI) Tribunal Decision, and several were appealed to the Court of Arbitration for Sport (CAS).⁴

Capsaicin was at the center of the debate, associated with four of the six disciplinary proceedings.⁵ Capsaicin is “a chili pepper extract with analgesic properties” but it is used topically for pain relief.⁶ The popular product, Equi-Block introduced the substance to the equestrian world.⁷

1. See generally Mark Curriden, *The Lawyer Who Took Down Lance Armstrong is on a Mission to End the Culture of Cheating*, ABA J. (Oct. 1, 2014, 5:30 AM), http://www.abajournal.com/magazine/article/thou_shalt_not_cheat_the_lawyer_who_took_down_lance_armstrong_is_on_a_mission (listing athletes featured in power points condemning cheating).

2. See Jess Hallas-Kilcoyne, *Equine Doping - A Global Epidemic?*, HORSEJOURNALS.COM (July 30, 2013), <http://www.horsejournals.com/equine-doping> (detailing recent equine doping cases).

3. See *2008 Equine Anti-Doping Decisions*, FEI.ORG, <http://www.fei.org/fei/your-role/athletes/fei-tribunal/2008-decisions> (last visited Oct. 29, 2015) [hereinafter *Decisions*] (listing Tribunal decisions).

4. See *id.* (noting that decisions involving horses Camiro, Cöster, Lantinus 3, Chupa Chup and Rufus were appealed to CAS).

5. See *id.* (listing Capsaicin as “substance(s)”).

6. *Capsaicin*, NAT'L CTR. FOR BIOTECHNOLOGY INFO., <http://pubchem.ncbi.nlm.nih.gov/compound/Capsaicin#section=top> (last visited Oct. 29, 2015) (providing Capsaicin background information).

7. See John T. Wendt, *The Crisis of Doping in Equestrian Sport*, 27 ENT. & SPORTS LAW. 10, 11 (2009) (“‘Capsaicin cases’ all have similar attributes—the use of Equi-Block, a topical pain reliever that contains Capsaicin.”).

The FEI is the international governing body for equestrian sport.⁸ Following the infractions at the 2008 Olympic Games, the FEI launched the Clean Sport Campaign “in response to the high-profile doping cases from the Beijing 2008 Olympic Games”⁹ Aimed at education, the FEI endeavored to “establish the best possible system to prevent the use of methods or substances that influence the performance of a competition horse, while ensuring horse welfare at all times.”¹⁰

Section II of this Note establishes the relevant facts of *Deutsche Reiterliche Vereinigung e.V. v. FEI & Christian Ahlmann and Christian Ahlmann v. FEI*, beginning with a summary of the initial infraction, subsequent FEI Tribunal decision, and finally the CAS decision.¹¹ Section III provides a background of law and governing bodies relevant to the decision, starting in sub-part (A) with an overview of doping in American thoroughbred racing and its regulatory scheme.¹² Sub-section (B) delivers a review of the significant governing bodies in international equestrian sport.¹³ Section IV summarizes the reasoning of the Tribunal Decision in Sub-part (A), and *Ahlmann’s* legal reasoning in Sub-part (B).¹⁴ Section V discusses the inconsistency of the Tribunal’s holding with established FEI rules.¹⁵ It then examines the ambiguities of the FEI Prohibited Substance List (“List”) and its relation to the strict liability standard.¹⁶ Finally, it compares the legal consequences of equine dop-

8. See Arbitration CAS 2008/A/1700–1710, *Deutsche Reiterliche Vereinigung e.V. v. FEI & Christian Ahlmann and Christian Ahlmann v. FEI*, award of 30 April 2009, available at http://www.centrostudisport.it/PDF/TAS_CAS_ULTIMO/24.pdf. [hereinafter *Ahlmann*]. See also *Structure*, FEI.ORG, <http://www.fei.org/fei/about-fei/structure> (last visited Oct. 29, 2015) (describing FEI as “sole controlling authority for all international events in Dressage & Para-Equestrian Dressage, Jumping, Eventing, Driving & Para-Equestrian Driving, Endurance, Vaulting and Reining”).

9. *History of the Clean Sport Campaign*, FEI.ORG, <http://www.fei.org/fei/clean-sport/h-resources/history> (last visited Jan. 4, 2016) [hereinafter *History*] (describing history of Clean Sport Campaign). Requests from competitors to clarify doping regulations were cited as an additional reason for the campaign. *Id.*

10. See *id.* (explaining Commission’s objective).

11. For a discussion of *Ahlmann’s* factual background, see *infra* notes 19–49 and accompanying text.

12. For a discussion of the American thoroughbred horse racing industry’s response to equine doping, see *infra* notes 50–62 and accompanying text.

13. For a discussion of the relevant governing bodies in international equestrian sport, see *infra* notes 63–82 and accompanying text.

14. For a discussion of both the Tribunal and *Ahlmann’s* reasoning, see *infra* notes 83–133 and accompanying text.

15. For a critical analysis of the reasoning of the Tribunal Decision, see *infra* notes 134–140 and accompanying text.

16. For a continued critical analysis of the Tribunal Decision and *Ahlmann’s* legal reasoning, see *infra* notes 141–155 and accompanying text.

ing in American thoroughbred horse racing and the international FEI context.¹⁷ Lastly, Section VI predicts the impact of the CAS ruling in *Ahlmann* and comments on the durability of the strict liability standard for equine doping in the world of equestrian sport.¹⁸

II. FACTS: HORSING AROUND HAS CONSEQUENCES

The original rule violation dispute arose at the 2008 Summer Games in Beijing, China.¹⁹ Mr. Christian Ahlmann competed in the Show Jumping competition with his horse, Cöster.²⁰ One of Germany's top riders, Mr. Ahlmann was to represent Germany in both the team and individual show jumping competitions.²¹ Following Mr. Ahlmann's disqualification, the German team's fifth place finish was deemed ineligible.²² Additionally, Mr. Ahlmann was scheduled to compete in the individual final the following week before the positive test and subsequent disqualification.²³

Under FEI rules, Mr. Ahlmann was the person responsible (PR) for Cöster during competition.²⁴ On August 17, 2008 Cöster was

17. For a continued critical analysis of the Tribunal Decision and *Ahlmann's* legal reasoning, see *infra* notes 157–167 and accompanying text.

18. For a discussion of the impact of the decision in *Ahlmann*, see *infra* notes 168–190.

19. See *Ahlman*, *supra* note 8 at para. 2 (recounting equestrian competition took place in Hong Kong).

20. See *id.* (acknowledging Mr. Ahlmann was member of 2004 German Show Jumping team in Athens whose medals were revoked due to prohibited substance violation).

21. See *Doped Horses Mar Olympic Equestrian Competition*, DW.COM (Aug. 21, 2008), <http://dw.com/p/F29n> (lamenting effects of equine doping on 2008 Olympic games).

22. See *Ahlmann Among Five Riders Banned*, ESPN.COM (Aug. 14, 2009), <http://sports.espn.go.com/oly/news/story?id=4399442> (reporting effect of Mr. Ahlmann's disqualification).

23. See *Doped Horses Mar Olympic Equestrian Competition*, *supra* note 21 (noting Mr. Ahlmann's ineligibility for individual final).

24. See *Ahlmann*, *supra* note 8, para. 2. See also Fédération Equestre Internationale, *Decision of the FEI Tribunal – Coster*, at 2, 2008 [hereinafter *Tribunal Decision*], available at <http://www.fei.org/system/files/2020-20COSTER%20-%20Tribunal%20Decision%20-%2022%20October%202008.pdf> (explaining Mr. Ahlmann was person responsible (“PR”) because he was rider at event); FÉDÉRATION EQUESTRE INTERNATIONALE, *Equine Anti-Doping and Controlled Medication Regulations*, Preface, 1 (2d ed. 2016) [hereinafter *EADCM Regulations*], available at https://www.fei.org/sites/default/files/2016%20EADCMRs%20-%20Effective%201%20January%202016%20-%20Clean%20Version_0.pdf (indicating persons responsible “remain[] ultimately . . . liable, for EADCM violations”). The person responsible is “responsible for any [b]anned [s]ubstance found to be present in their [sic] [h]orse’s [s]amples.” FÉDÉRATION EQUESTRE INTERNATIONALE, *Equine Controlled Medication Rules*, art. 2.1, at 4 (2d ed. 2016) [hereinafter *ECM Rules*] (emphasis omitted).

tested by FEI officials after the Team Final.²⁵ The laboratory tested Cöster's blood and urine the following day; both tested positive for Capsaicin.²⁶ The FEI prohibits Capsaicin because of its pain relieving and hypersensitizing effects.²⁷ The FEI "provisionally suspended" Mr. Ahlmann following the notification of a positive test.²⁸ Provisional suspensions are temporary bans from competition following an Equine Anti-Doping and Controlled Medication ("EADCM") Regulation violation.²⁹ On August 21, 2008, a preliminary panel of the FEI Tribunal found the positive test results sufficient in light of Mr. Ahlmann's inability to explain the presence of the prohibited substance and did not alter his suspension.³⁰ The FEI then tested the B sample to confirm results.³¹ On August 22, 2008, the B sample test confirmed the existence of Capsaicin in Cöster's samples.³² On August 24, 2008, Mr. Ahlmann explained in a press release that he had been treating Cöster's back pain by applying Equi-Block during the summer.³³ Mr. Ahlmann treated Cöster without researching the product or consulting the team

25. See *Ahlmann*, *supra* note 8, para. 2 (reporting test).

26. See *id.* (reporting results). Cöster's veterinarian submitted two forms requesting authorization for use of saline and emergency treatments with prohibited substances, both of which were granted. *Id.* Capsaicin was not mentioned on either of these forms. *Id.* at paras. 3–4.

27. See *id.* para. 21 (explaining ban). Capsaicin has both pain relieving and hypersensitizing properties, which make it subject to FEI regulation. *Id.*

28. See *id.* para. 3 (suspending Mr. Ahlmann for prohibited substance in Cöster's A sample).

29. See EADCM Regulations, *supra* note 24, Preface, at 1 (defining provisional suspension). A provisional suspension is

a consequence of an EADCM Regulation violation or admission whereby the [p]erson [r]esponsible and/or member of the [s]upport [p]ersonnel and/or a [h]orse is barred temporarily from participating in any capacity in a [c]ompetition or activity or being present at an [e]vent (other than as a spectator) that is authorised or organised by the FEI or any National Federation or at [c]ompetitions authorised or organised by any international- or national-level [e]vent organisation prior to the final [d]ecision at a hearing conducted under Article 8 (Right to a Fair Hearing).

Id. See also *id.* art. 7.4.1, at 12 (detailing when provisional suspensions are warranted).

30. See *Ahlmann*, *supra* note 8, para. 3 (reporting sufficiency of test and refusing to lift provisional suspension).

31. See EADCM Regulations, *supra* note 24, art. 2.1, at 1 (explaining procedure for B sample analysis).

32. See *Ahlmann*, *supra* note 8, para. 3 (reporting sample B positive test). See also EADCM Regulations, *supra* note 24, art. 2.1, at 2 (explaining the person responsible may request to have B sample analyzed).

33. See *Ahlmann*, *supra* note 8, at para. 6 (describing Mr. Ahlmann's explanation). See also Tribunal Decision, *supra* note 24, at 12 (describing press release).

veterinarian.³⁴ Equi-Block's packaging explicitly warns that the product contains Capsaicin.³⁵ Equi-Block is a topical pain reliever widely used in the competitive equestrian world despite its prohibited status.³⁶

Following a hearing on September 26, 2008, the FEI Tribunal found that Mr. Ahlmann committed a Medication Class A offense.³⁷ First, the Tribunal accepted the positive results reported by the Hong Kong Jockey Club Racing Laboratory.³⁸ Finding sufficient proof of an offense under the EADCM Regulations in Article 3, the Tribunal next considered whether the offense was an anti-doping or medication control violation.³⁹ In finding a medication control violation, the Tribunal rejected the FEI's contention that the violation was both an anti-doping and a medication control violation.⁴⁰ The Tribunal reasoned that the language of the rules stipulated that only one of the violations may occur in a single incident.⁴¹ Additionally, the FEI must prove that the substance was used to "influence performance" beyond its "mere existence."⁴² However, "Dr. Farrington clearly stated that there was no proof of a hypersensitization of the [h]orse's legs"⁴³

Next, the Tribunal explained that the strict liability standard applicable to medication control rule violations, citing fairness as a

34. See *Ahlmann*, *supra* note 8, para. 22 (suggesting Mr. Ahlmann should have consulted a veterinarian). See also Tribunal Decision, *supra* note 24, at 15 ("[Mr. Ahlmann] was negligent to a material extent in using Equi-Block on the [h]orse's back . . . apparently without seeking veterinary advice.").

35. See *Ahlmann*, *supra* note 8, para. 3 ("It is undisputed that [Equi-Block] contains Capsaicin.").

36. See Tribunal Decision, *supra* note 24, at 13 (reporting Equi-Block is "commonly available").

37. See *Ahlmann*, *supra* note 8, paras. 1, 3–4 (reporting findings). See also EADCM Regulations, *supra* note 24, art. 2.1.3, at 2 ("[T]he presence of any quantity of any [b]anned [s]ubstance . . . in a [h]orse's [s]ample shall constitute an EAD [Equine Anti-Doping] rule violation." (emphasis omitted)).

38. See Tribunal Decision, *supra* note 24, at 7 (accepting lab results). "The Tribunal is satisfied that the laboratory reports relating to both the A-Sample and B-Sample reflect that the analytical tests were accurately performed in an acceptable method and that the findings of HKJC are accurate." *Id.* Further, the Tribunal dismissed Mr. Ahlmann's methodology objections. *Id.* at 7–8.

39. See *id.* at 8–9 (accepting objective elements of offense and deciding type of offense committed).

40. See *id.* at 9 ("The Tribunal does not accept the FEI's position on this point . . .").

41. See *id.* (noting text "uses the word 'OR' and not 'AND'"). The FEI was not able to meet its burden of proof for an anti-doping violation under EADCM Regulations Art. 3.1 because the language indicates a single offense may only qualify as either a medication control rule violation or an anti-doping violation. See *id.*

42. See *id.* at 10 (describing burden of proof).

43. *Id.* (reporting no proof of hypersensitivity).

key consideration for strict liability in equestrian sport.⁴⁴ Finally, the Tribunal suspended Mr. Ahlmann for four months, fined him CHF (“Swiss Franc”) 2,000, and ordered his contribution of 1,500 Swiss Franc for “legal costs.”⁴⁵ Mr. Ahlmann completed his four-month suspension from competition on December 19, 2008.⁴⁶

On November 13, 2008, the *Deutsche Reiterliche Vereinigung* (German National Federation) appealed to the CAS seeking to increase Mr. Ahlmann’s penalty.⁴⁷ Ultimately, the CAS found that Mr. Ahlmann committed an anti-doping rule violation.⁴⁸ The CAS imposed an eight-month period of ineligibility and a fine of 2,000 Swiss Franc.⁴⁹

III. BACKGROUND: HORSE SENSE IN GOVERNING EQUINE SPORT

A. A Horse of a Different Color: Doping in Thoroughbred Racing

According to a *New York Times* report, twenty-four horses die on racetracks every week in America.⁵⁰ In an investigative series, enti-

44. *See id.* at 11 (arguing that “strict liability regime has been confirmed on numerous occasions”). “The FEI has a strict liability policy in regard to competing with prohibited substances present in the horse’s system at international events.” *Id.* Further, the Tribunal found “the substance is part of the [M]edication A list . . . assumptions regarding the meaning of the concentration detected and its effects on the [h]orse are irrelevant as to the decision that there has been a rule violation by the PR.” *Id.* at 12. *See also* EADCM Regulations, *supra* note 24, art 2.1.1, at 2 (establishing strict liability for FEI Equine Anti-Doping Rules). “It is not necessary that intent, [f]ault, negligence or knowing [u]se be demonstrated in order to establish an EAD [Equine Anti-Doping] Rule violation under Article 2.1.” *Id.* (emphasis omitted).

45. *See* Ahlmann, *supra* note 8, para. 4 (detailing Tribunal ruling).

46. *See id.* (describing Mr. Ahlmann’s suspension service).

47. *See id.* para. 5 (reporting relief sought). The German National Federation requested the following penalty increase:

(1) The PR shall be declared ineligible for a period which the Panel deems appropriate for [d]oping [p]rohibited [s]ubstances but no less than eight (8) months, which period shall commence on the date of the application of the provisional suspension, 21 August 2008;

(2) The PR shall be fined CHF 2000; and

(3) The PR shall contribute CHF 1500 towards the legal costs of the judicial procedure (of the FEI Tribunal).

(4) The FEI and the PR shall jointly and severally bear the costs of this arbitral proceeding and contribute an amount to the legal costs of the FN according to article R64.5 of the Code of Sports-related Arbitration

Id.

48. *See id.* para. 21 (reporting CAS findings).

49. *See id.* paras. 22–23 (announcing ineligibility and fines).

50. *See* Walt Bogdanich, Joe Drape, Dara L. Miles & Griffin Palmer, *Mangled Horses, Maimed Jockeys*, N.Y. TIMES (Mar. 24, 2012), <http://www.nytimes.com/2012/03/25/us/death-and-disarray-at-americas-racetracks.html?pagewanted=all> (reporting prevalence of drug use in U.S. racing industry). *See also* Joe Drape, *Lawsuit*

tled “Breakdown: Death and Disarray at America’s Racetracks,” the *Times* chronicled the declining thoroughbred racing industry in the United States, revealing shocking facts about equine drugging, lax enforcement, and deadly consequences.⁵¹ Scholarly articles have echoed similar concerns, blaming widespread equine doping in thoroughbred racing on inconsistent regulation and skewed economic incentives.⁵² Legal inconsistency and careless enforcement characterize the regulatory scheme.⁵³ Governed by individual states, trainers and others tasked with the well-being of equine athletes are subject to a dizzying array of laws and enforcement policies.⁵⁴

The media spotlight beamed directly on the issues of equine safety and doping on the racetrack in 2008 when a filly, Eight

Sheds Light in Use of Legal Medications in Horses, N.Y. TIMES (Oct. 5, 2009), <http://www.nytimes.com/2009/10/06/sports/06horse.html> (“[T]he United States has the world’s worst mortality rate for thoroughbreds.”).

51. See Megan Louttit, John Niedermeyer & Josh Williams, *Breakdown: Death and Disarray at America’s Racetracks*, N.Y. TIMES, <http://www.nytimes.com/interactive/2012/04/30/us/breakdown-horses-series.html> (last updated Dec. 28, 2012) (describing current state of overmedication and doping in thoroughbred racing). The series explores the economic, scientific, personal, and societal factors contributing and arising out of the decline of thoroughbred racing in America. See *id.* One story hypothesizes that the combination of lax enforcement and economic downturn has increased prevalence of illegal drug use in equines at the racetrack. See Bogdanic, Drape, Miles & Palmer, *supra* note 50.

52. See, e.g., Amy L. Kluesner, *And They’re Off: Eliminating Drug Use in Thoroughbred Racing*, 3 HARV. J. SPORTS & ENT. L. 297, 300–02 (2012) (discussing commonness of doping and inconsistency of state regulation); Luke P. Breslin, *Reclaiming the Glory in the “Sport of Kings”—Uniformity is the Answer*, 20 SETON HALL J. SPORTS & ENT. L. 297, 299–300 (2010) (citing medication abuse and state-by-state regulation as key issues). “The influx of money has caused many stakeholders and other members of the industry to compromise the health and safety of the racehorse by supplementing the typical hay and oats diet with performance-enhancing drugs and abuse of medications.” *Id.* at 299 (footnote omitted); Bradley S. Friedman, *Oats, Water, Hay, and Everything Else: The Regulation of Anabolic Steroids in Thoroughbred Horse Racing*, 16 ANIMAL L. 123, 140–51 (2009) (discussing anabolic steroid doping and citing betting profits, regulation difficulties, and enforcement complications as reasons for doping prevalence); Kimberli Gasparon, *The Dark Horse of Drug Abuse: Legal Issues of Administering Performance-Enhancing Drugs to Racehorses*, 16 VILL. SPORTS & ENT. L.J. 199, 201–03 (2009) (describing multiple agencies involved in regulation and lamenting low penalties that fail to deter money-hungry trainers and veterinarians).

53. See Kluesner, *supra* note 52, at 302 (noting “lax enforcement” and inconsistent penalties). See also Alexandra D. Logsdon, *Unbridled “Spirits”: An Integrated Analysis of the Law, the Science, and the Future of Thoroughbred Medication*, 6 KY. J. EQUINE, AGRIC. & NAT. RES. L. 141, 149 (2014) (pinpointing lack of centralized regulatory body as “major source of the doping problem in the United States”).

54. See Gasparon, *supra* note 52, at 204 (considering second offenses where a Kentucky trainer could receive three to five year suspensions, while Maryland trainer could receive number of potential sanctions based on discretion). See also *supra* note 53 and accompanying text.

Belles, had to be euthanized on live television after sustaining two broken legs in the Kentucky Derby.⁵⁵ Shortly after the tragedy, the trainer of the winning horse bragged about administering steroids to his horse before the race to enhance his performance.⁵⁶ In response to recent media attention from high profile equine deaths, various stakeholders have gathered to prioritize equine health.⁵⁷

In the legal realm, courts have consistently held that trainers are responsible for any positive drug test, applying strict liability.⁵⁸ Also called the absolute insurer rule, the trainer responsibility rule has been consistently upheld as constitutional, barring one exception.⁵⁹ However, at least one commenter has argued the rule is not just “occasionally . . . harsh and unfair . . . [but it] is very under inclusive [sic].”⁶⁰ Accordingly, the commenter advocates for a more flexible rebuttable presumption rule, implemented in several states, that allows trainers to present evidence of innocence after a positive test.⁶¹

55. See Friedman, *supra* note 52, at 123 (detailing horrific incident which highlighted devastating effects of doping in horseracing).

56. See *id.* at 123 (describing trainer’s claim). See also Jennifer M. Jabroski, *Reining in the Horse Racing Industry: A Proposal for Federal Regulation of Steroid Use in Racehorses*, 1 KY. J. EQUINE, AGRIC. & NAT. RES. L. 67, 67–68 (2009) (noting steroid use was legal). This finding promoted public discussion on safety and medication use in horseracing. *Id.*

57. See Kluesner, *supra* note 52, at 306 (identifying genetics and over-medication as oversight priorities). The Welfare and Safety of the Racehorse Summit, held in 2008, recommended eight improvements including “establish uniform regulation,” “reduce catastrophic injuries,” and “encourage responsible thoroughbred ownership.” *Id.* See also Breslin, *supra* note 52, at 317–18 (arguing concern for equine health and safety should be paramount).

58. See Bennett Liebman, *The Trainer Responsibility Rule in Horse Racing*, 7 VA. SPORTS & ENT. L.J. 1, 2–5 (2007) (citing *Hudson v. Tex. Racing Comm’n*, 455 F.3d 597, 601 (5th Cir. 2006)) (holding rule reasonable to promote state interest in ensuring equine health, promoting integrity of sport and protecting public). The trainer responsibility rule originated with the Florida Racing Commission in the mid-1930s. *Id.* at 6–10.

59. See Liebman, *supra* note 58, at 10–21 (detailing cases challenging absolute insurer rule’s constitutionality). Only one court found the rule unconstitutional, holding that the rule was “arbitrary and unreasonable.” *Id.* at 19. However, *Hudson v. Tex. Racing Comm’n* declined to follow the reasoning of this court. *Id.* at 4.

60. See Liebman, *supra* note 58, at 36 (arguing that rule should be eliminated). For further discussion of this argument, see *infra* note 61 and accompanying text.

61. See Liebman, *supra* note 58, at 21 (detailing several cases applying rule). Courts in New York, Kentucky, Colorado, Oklahoma, Pennsylvania and Illinois have upheld the rebuttable presumption rule as constitutional. *Id.* at 21–23. This rule would place the burden of proof upon the trainers, however he or she would remain liable if the evidence is not sufficient. *Id.* Additionally, this rule allows the possibility of finding of innocence, unlike the imposition of strict liability. *Id.* at 24. See also *Barchi v. Sarafan*, 436 F. Supp. 775, 783–85 (S.D.N.Y. 1977), *rev’d in part sub nom. Barry v. Barchi*, 443 U.S. 55 (1978) (holding New York rebuttable presumption rule constitutional); *Wetzel v. N.Y. State Racing & Wagering Bd.*, 487

Additionally, it seems the endorsement of strict liability for horse trainers is inconsistent with traditional applications of strict liability.⁶²

B. Unbridled Authority: Regulation of International Equestrian Sport

The European Sports model is based on a pyramid structure.⁶³ The International Olympic Committee (“IOC”) is the governing body of the Olympic games pursuant to the Olympic Charter.⁶⁴ International Federations (“IFs”) regulate individual sports under Olympic Committee standards.⁶⁵ The FEI is the international governing body of equestrian sport.⁶⁶ Operating under the IFs are the National Federations (“NFs”), which regulate a particular sport within one country.⁶⁷ In the world of equestrian sport, the FEI exercises complete authority over its national federations.⁶⁸ The FEI

N.Y.S.2d 218, 219–20 (N.Y. App. Div. 1985) (annulling trainer responsibility for doping offense).

62. See Liebman, *supra* note 58, at 24–33 (detailing areas of law where courts have embraced strict liability). Strict liability is applied in tort law under ultrahazardous activities, strict product liability, and “dram shop laws,” or laws imposing strict liability on tavern keepers for serving alcohol to minors or the over imbibed. *Id.* at 27–30. Additionally, courts have endorsed strict liability in limited criminal cases such as public welfare offenses or morality crimes. *Id.* at 30–33. However, these endorsements lack commonality with the absolute insurer rule. *Id.* at 33. The absolute insurer rule does not broadly protect safety like the tort laws nor does it protect public morals like the criminal laws. *Id.*

63. See James A. R. Nafziger, *European and North American Models of Sports Organization*, in HANDBOOK ON INT’L SPORTS LAW 88, 90 (James A. R. Nafziger & Stephen F. Ross eds., 2011).

64. See James A. R. Nafziger, *International Sports Law*, in HANDBOOK ON INT’L SPORTS LAW 1, 7 (James A. R. Nafziger & Stephen F. Ross eds., 2011) (describing governing body).

65. See Holly Rudolph, Note, *Horse Sense and High Competition: Procedural Concerns in Equestrian Doping Arbitration*, 2 Ky. J. EQUINE, AGRIC. & NATURAL RES. L. 47, 49 (2010) (explaining FEI is IF for equestrian sport).

66. See Ahlmann, *supra* note 8, at paras. 2, 4 (recognizing FEI as chief governing body). See also *Structure*, *supra* note 8 (describing FEI as “sole controlling authority for all international events in Dressage & Para-Equestrian Dressage, Jumping, Eventing, Driving & Para-Equestrian Driving, Endurance, Vaulting and Reining”) (emphasis omitted).

67. See Nafziger, *supra* note 63, at 91 (describing international sports model).

68. See FÉDÉRATION EQUESTRE INTERNATIONALE, STATUTES, art. 2.6 (23d ed. 2014), [hereinafter Statutes], available at http://www.fei.org/sites/default/files/Statutes%2029%20April%202014%20-%20clean_NEW%20FORMAT_FLI_4May14.pdf. The Statute explains:

The National Federations agree to comply with, and be bound by, the Statutes, General Regulations, Sport Rules and any [d]ecision issued by the authorised bodies of the FEI in relation to the conduct of international equestrian [e]vents, all of which shall also bind [o]rganising [c]ommittees, [o]fficials, [h]orse [o]wners, [p]ersons [r]esponsible,

Tribunal decides cases involving violations of FEI rules.⁶⁹ Following a Tribunal decision, disputes may be appealed to the CAS.⁷⁰

1. *The CAS*

The CAS is an independent arbitration body exclusively devoted to resolving disputes in sport.⁷¹ Established by the International Olympic Committee in 1983, CAS has since become a completely independent organization.⁷² As a result of the World Anti-Doping Agency (“WADA”) Code, the CAS has become the premier venue for resolving doping disputes.⁷³ The CAS is subject to review by the Swiss Federal Tribunal, but only in limited circumstances.⁷⁴ The

[a]thletes, team officials and other individuals and bodies involved in FEI Events.

Id.

69. *See* Statutes, *supra* note 68, art. 38.1 (explaining Tribunal decision-making factors). The Tribunal decides cases on:

- (i) [a]ny infringement of the Statutes, General Regulations, Sport Rules, or Procedural Regulations of a General Assembly or of violation of the common principles of behavior, fairness, and accepted standards of sportsmanship, whether or not arising during an FEI meeting or [e]vent;
- (ii) [a]ny issue of interpretation of the Statutes, General Regulations, and Sport Rules

Id.

70. *See* Statutes, *supra* note 68, art. 39.1 (“The Court of Arbitration for Sport (CAS) shall judge all [a]ppeals properly submitted to it against [d]ecisions of the FEI Tribunal, as provided in the Statutes and General Regulations.”).

71. *See* Richard H. McLaren, *The Court of Arbitration for Sport*, in HANDBOOK ON INT’L SPORTS LAW 32 (James A. R. Nafziger & Stephen F. Ross eds., 2011) (defining CAS).

72. *See id.* at 32–33 (explaining independence of CAS). The Tribunal held that the CAS was sufficiently independent and impartial to meet Swiss Arbitration standards. *Id.* This landmark case initiated reform in the CAS, including the creation of the International Council for the Arbitration of Sport (ICAS) to organize the financial and administrative obligations of the CAS. *Id.* The case solidified the independence of the CAS from its founding sponsor, the IOC. *Id.* *See also History of the CAS*, TAS/CAS, <http://www.tas-cas.org/en/general-information/history-of-the-cas.html> (last visited Mar. 29, 2016) (describing Gundel’s appeal as impetus for change causing CAS reform).

73. *See* McLaren, *supra* note 71, at 34 n.11 (“WADA Code makes CAS the appeals body for all international doping relegated disputes.”).

74. *See id.* at 34 (stating CAS is “subject only to the oversight of the Swiss Federal Tribunal under Switzerland’s Federal Code on Private International Law”). *See also Frequently Asked Questions*, TAS/CAS, <http://www.tas-cas.org/en/general-information/frequently-asked-questions.html> (last visited Oct. 9, 2015) (“Judicial recourse to the Swiss Federal Tribunal is allowed on a very limited number of grounds, such as lack of jurisdiction, violation of elementary procedural rules (e.g. violation of the right to a fair hearing) or incompatibility with public policy.”).

Swiss Tribunal has only overturned a handful of CAS decisions since it began hearing cases in 1984.⁷⁵

The CAS Code, which governs the Tribunal, explains the CAS has jurisdiction where “parties have agreed to refer a sports-related dispute to CAS . . . [which] may arise out of an arbitration clause contained in a contract[,] . . . ordinary arbitration proceedings . . . [or] an appeal against a decision rendered by a federation”⁷⁶ In addition to offering both ordinary arbitration and appeals arbitration, the CAS also issues advisory opinions and offers mediation.⁷⁷

2. FEI’s Clean Sport Campaign

The FEI launched the Clean Sport Campaign in November 2008 in response to a number of doping cases at the Beijing Olympics.⁷⁸ In an attempt to clarify and harmonize doping rules, the Clean Sport Commission (“Commission”) and later, the Stevens Commission, focused on specific and broad doping issues respectively.⁷⁹ The Commission chaired by Arne Ljungqvist, the sitting Vice President of the WADA, produced Prohibited Substance Lists for human and equine athletes as well as EADCM Regulations.⁸⁰ Under Ljungqvist’s leadership, the Clean Sport campaign sought to bring the FEI “in line with the WADA Code.”⁸¹ Launched as an educational campaign, the Commission “represented a united effort of all stakeholders . . . to clarify doping protocols in equestrian sport.”⁸²

75. See McLaren, *supra* note 71, at 38 n.42 (reporting first overturned CAS decision). See also MARK JAMES, SPORTS LAW 63-66 (2d ed. 2013) (detailing cases where CAS was overturned).

76. TAS/CAS, Code: Procedural Rules, at R27 (2013), available at http://www.tas-cas.org/fileadmin/user_upload/CAS_Code_2013_en.pdf (explaining application of procedural rules).

77. See McLaren, *supra* note 71, at 39.

78. See *History of the Clean Sport Campaign*, FEI CLEAN SPORT CAMPAIGN, <http://www.feicleansport.org/history.html> (last visited Mar. 27, 2016) (detailing history of clean sport campaign).

79. See *id.* (describing Clean Sport Campaign history). Several working groups were created: Laboratory, Legal, List, and Communications & Education. See *id.*

80. See *id.* (noting Commission was set up in November 2008 and reporting documents produced).

81. *Independent Commission Urges New Measures to Clean Up Equestrian Sport*, DRESSAGE-NEWS.COM (Sept. 2, 2009), <http://www.dressage-news.com/?p=3202> (describing new leadership direction).

82. See Wendt, *supra* note 7, at 12 (discussing FEI response to Beijing doping cases).

IV. NARRATIVE ANALYSIS: THE MANE EVENT

A. FEI Tribunal

In the FEI Tribunal Hearing, the panel underwent a three-step analysis when sanctioning Mr. Ahlmann.⁸³ The Tribunal spent a significant portion of the opinion discussing the legitimacy of the strict liability standard.⁸⁴ The following subsections will focus on the three steps addressed by the panel: positive findings, type of rule violation, and sanctions.

1. *Positive Findings*

Both Cöster's A-sample and B-sample tested positive for Capsaicin, satisfying the panel's proof standard.⁸⁵ Mr. Ahlmann argued that the laboratory's Capsaicin sample, used as a reference point, was expired and therefore void.⁸⁶ Despite the laboratory methodology protests from Mr. Ahlmann, the panel ultimately accepted the test results.⁸⁷

2. *Type of Rule Violation*

Next, the panel analyzed whether Mr. Ahlmann committed a doping or medication rule violation.⁸⁸ First, it determined that Capsai-

83. See Tribunal Decision, *supra* note 24, at 11 (reporting panel's sanctioning analysis).

84. See *id.* at 11–12 (advocating strict liability standard in sport).

85. See *id.* at 7–8. See also EADCM Regulations, *supra* note 24, art. 3.1, at 4. The section entitled "Proof of EAD Rule Violations, Burdens and Standards of Proof" provides:

The FEI shall have the burden of establishing that an EAD Rule violation has occurred. The standard of proof shall be whether the FEI has established an EAD Rule violation to the comfortable satisfaction of the [h]earing [p]anel bearing in mind the seriousness of the allegation which is made. This standard of proof in all cases is greater than a mere balance of probability but less than proof beyond a reasonable doubt. Where these EAD Rules place the burden of proof upon the [p]erson [r]esponsible . . . to rebut a presumption or establish specified facts or circumstances, the standard of proof shall be by a balance of probability, except where a different standard of proof is specifically identified.

Id.

The EADCM Regulations provide an identical Burden and Standard for proof for ECM (Equine Controlled Medication) violations. *Id.*

86. See Tribunal Decision, *supra* note 24, at 7 (describing use of expired Capsaicin sample may discredit laboratory).

87. See *id.* at 8 (accepting Dr. Wan's response that expired Capsaicin claim was meritless). Under EADCM Regulations Article 3.2.1, FEI Laboratories "are presumed to have conducted [s]ample analysis and custodial procedures in accordance with the FEI Standard for Laboratories." *Id.* at 7.

88. See *id.* at 8–9 (internal quotation marks omitted) (discussing possible violations).

cin is “not a normal nutrient for the horse” and thus may have been used medicinally.⁸⁹ The Veterinarian Report offered three hypotheses for how Capsaicin could be used topically, two of which would have resulted in a medication rule violation and one that would result in a doping violation.⁹⁰ The FEI argued that the use of Capsaicin constituted both a doping violation and a prohibited substance violation.⁹¹ The panel rejected the doping violation argument, stating that “[t]here is no indication [in the rules] that the presence of the substance already implies the use as a hypersensitizing agent.”⁹² The Panel focused on the wording of the EADCM Regulations, arguing that regulatory language limited FEI to establishing a doping violation *or* a medication control violation, not both.⁹³ Further, a doping substance is defined as a substance “likely to have been applied to body parts or to tack to influence performance.”⁹⁴

The Tribunal dismissed the possibility of categorizing Capsaicin as a medication class B substance without significant explanation.⁹⁵

89. *See id.* at 8 (describing reasons why Capsaicin would appear in equine drug test).

90. *See id.* at 8–9 (explaining Capsaicin use theories). The three theories of Capsaicin use offered by the Veterinarian Report were:

[Capsaicin] may be used medicinally by topical application in three ways: 1) to reduce the pain of arthritic joints and soft tissues; 2) on the digital nerves into the foot to desensitize those nerves in horses with foot pain; 3) to the front of the legs, “to produce a burning sensation to unduly sensitise the limb(s) to touching poles to make the horse more careful in its jumping efforts thus improving performance.”

Id. at 8. Under use one or two, the person responsible could have requested permission to continue application with a medication form. If the proper form were not filed, either of these uses would be under Prohibited Substances Medication Class A. Under use three, this application would constitute an anti-doping offense. *Id.*

91. *See id.* at 9 (explaining Capsaicin may qualify as either type of offense because it has both hypersensitizing and pain relieving properties).

92. *Id.* at 10 (explaining rejection of doping violation argument). The FEI was not able to prove hypersensitization. *See id.* The panel noted that “there was no proof of a hypersensitization of the [h]orse’s legs, even though the legs of all horses including the [h]orse [Cöster] had been checked by the [e]vent officials after each competition round.” *Id.*

93. *See id.* at 9–10 (determining EADCM Regulations Article 3.1 only permits establishment of one violation). EADCM Regulations Article 3.1 provides that “[t]he FEI shall have the burden of establishing that an anti-doping rule violation *or* medication control violation has occurred.” *Id.* at 9 (emphasis added) (internal quotation marks emitted).

94. *Id.* at 10 (defining doping substance).

95. *See id.* (stating Tribunal could not “accept that Capsaicin can also be considered as a medication B substance.”). The Tribunal did not elaborate. *See id.*

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Thus, the violation constituted a Medication Class A violation because the FEI was unable to prove a doping offense.⁹⁶

3. Sanctions

The panel considered a variety of factors when sanctioning Mr. Ahlmann.⁹⁷ In an effort to maintain fairness, the FEI considered both mitigating and aggravating factors.⁹⁸ Although Mr. Ahlmann had no prior rule violations and had already been punished by disqualification from the event, the Tribunal in contrast evaluated his status at the top of the sport and the nature of the substance.⁹⁹ Ultimately, the panel sanctioned Mr. Ahlmann for four months and imposed two fines.¹⁰⁰

B. The CAS

In *Ahlmann*,¹⁰¹ the CAS upheld the appeal of the German NF against the FEI Tribunal and modified Mr. Ahlmann's sanctions, increasing his period of ineligibility.¹⁰² The CAS spent a significant portion of the opinion on explaining and evaluating the merits of the violation.¹⁰³ The following subsections will focus on the CAS decision-making process: procedural matters, merits, and sanctions.

1. Procedural Matters

First, the CAS established jurisdiction under the FEI Statutes.¹⁰⁴ The German NF has standing to file an appeal under both the EADCM Regulations and the FEI General Regulations by explicit endorsement.¹⁰⁵ Next, the CAS approved the standing of the Ger-

96. *See id.* at 12 (describing violation type). Medication class A is a class of Prohibited Substances on the Equine Prohibited Substances List. *See id.*

97. *See id.* at 16–17 (discussing fairness, welfare, event profile, nature of substance, negligence, hardship, and no prior violations).

98. *See id.* (citing both types as crucial to sanctioning decisions).

99. *See id.* at 16–17 (describing factors weighed by Tribunal).

100. *See id.* at 17 (detailing fines). Mr. Ahlmann was fined CHF 2,000 and was ordered to pay CHF 1500 for the costs of the legal proceedings. *Id.*

101. *See Ahlmann, supra* note 8, para. 2 (explaining results of CAS decision).

102. *See Ahlmann, supra* note 8, para. 24 (upholding NF appeal and increasing Mr. Ahlmann's period of ineligibility).

103. For a discussion of the merits of the CAS decision, see *infra* notes 114–29.

104. *See Ahlmann, supra* note 8, at para. 10 (noting jurisdiction is justified by Article 35 of FEI Statutes, Article 170.1.3 of FEI General Regulations, Article 12.2 of EADCM Regulations, Article R47 of CAS Code, and “order of procedure . . . signed by parties”).

105. *See id.* para. 12 (explaining standing). *See also* EADCM Regulations, *supra* note 24, art. 12.2, at 26–27 (specifying what parties may appeal decisions to CAS, including National Federation of athlete whose decision is being appealed); FÉDÉR-

man NF, citing protection of German NF's public image and its inability to participate in Tribunal proceedings as supplemental grounds for a legitimate appeal.¹⁰⁶

The CAS next consolidated the two appeals, CAS 2008/A/1700, the German NF v. FEI & Christian Ahlmann and CAS 2008/A/1710, Christian Ahlmann v. FEI.¹⁰⁷ The first appeal before the CAS, filed by the German NF, requested an extended period of ineligibility for Mr. Ahlmann and the shift of cost to the FEI and Mr. Ahlmann equally.¹⁰⁸ The second appeal, filed by Mr. Ahlmann, requested a reduced suspension and the burden of arbitration costs wholly on the German NF.¹⁰⁹

Additionally, the CAS considered the admissibility of new evidence and new arguments by Mr. Ahlmann.¹¹⁰ First, the CAS rejected Mr. Ahlmann's claim that the CAS may not consider evidence not presented to the Tribunal.¹¹¹ Likewise, the CAS rejected the FEI's argument that Mr. Ahlmann's answer was inadmissible because it contained novel arguments.¹¹² Having established jurisdiction, standing, and other procedural matters, the CAS proceeded to the merits of the case.¹¹³

ATION EQUESTRE INTERNATIONALE, GENERAL REGULATIONS, art. 165, at 40 (23d ed. 2009) [hereinafter FEI Gen. Regulations], available at <https://www.fei.org/sites/default/files/GENERAL%20REGULATIONS%20%20Effective%201%20January%202015.pdf> (“[A]ppeal may be lodged by any person or body with a legitimate interest against any [d]ecision made by any person or body authorized under the Statutes, General Regulations or Sport Rules, provided it is admissible.”). *But see Ahlmann, supra* note 8, para. 12 (arguing that German NF has no legitimate interest in filing appeal).

106. *See Ahlmann, supra* note 8, para. 13 (finding German NF standing).

107. *See id.* para. 14 (noting parties' unanimous consent and rendering of single award).

108. *See id.* para. 5 (requesting relief of increased suspension).

109. *See id.* para. 6 (requesting relief of decreased suspension and shifting of costs).

110. *See id.* paras. 14–15 (discussing two procedural motions).

111. *See id.* (determining CAS Code “supersedes” EADCM Regulations). The CAS has an “unrestricted” scope of review. *Id.* at 15. *See also* Arbitration CAS 2004/A/607, B. v. Int'l Weightlifting Fed'n, award of 6 Dec. 2009, available at <http://jurisprudence.tas-cas.org/sites/CaseLaw/Shared%20Documents/607.pdf>; Arbitration CAS 2006/A/1153, WADA v. Portuguese Football Fed. & Nuno Assis Lopes de Almeida, award of 4 Jan. 2007, available at <http://www.adop.pt/media/3064/TAD%20Nuno%20Assis.pdf> (establishing CAS's ability to decide cases based on internal organizational rules in addition to whether disciplinary decision was correct).

112. *See Ahlmann, supra* note 8, para. 15–16 (explaining CAS Code does not provide limitations on substance of answers). Further, the Panel determined that “Mr. Christian Ahlmann had the right to file an [a]nswer to the [a]ppeal [b]rief of the German NF containing new argument.” *Id.* para. 15.

113. *See id.* paras. 10–16 (discussing jurisdiction, applicable law, admissibility, standing, joinder, and procedural motions).

2. *Merits*

The parties stipulated that Cöster’s blood and urine tested positive for Capsaicin.¹¹⁴ The CAS sought to determine whether the violation by Mr. Ahlmann was a doping violation or a Medication Class A violation under EADCM Regulations.¹¹⁵ The German NF and the FEI argued that the presence of Capsaicin constitutes an anti-doping violation.¹¹⁶ However, Mr. Ahlmann contended the positive test is not a violation at all, but rather a Medication Class A offense.¹¹⁷

a. *Strict Liability*

First, the CAS determined that FEI Rules and the disciplinary system prohibiting particular substances comport with Swiss Law because strict liability is appropriate in equestrian sport.¹¹⁸ The FEI Rules support a system in which “the mere presence of a prohibited substance in the horse’s body constitutes a rule violation regardless of its concentration”¹¹⁹ The CAS determined that the “FEI disciplinary system is indeed compatible with the principles and statutes of Swiss law” because strict liability promotes objectives “unanimously recognised by sports organisations and government institutions.”¹²⁰

114. *See id.* para. 16 (reporting “undisputed” positive test).

115. *See id.* (describing three classes of substances under EADCM Regulations: Doping, Medication class A, and Medication class B). Medication class B was not at issue here. *Id.*

116. *See id.* (reporting contention of German NF and FEI).

117. *See id.* (arguing low concentration of Capsaicin in Equi-Block dilutes any therapeutic effect).

118. *See id.* paras. 16–18 (citing interests such as fairness, health, breeding quality, and integrity). The Panel examined FEI General Regulations and EADCM Regulations. *Id.* Mr. Ahlmann argues FEI regulations run afoul of Swiss Cartel Law; however, this was promptly discredited. *Id.* para. 18.

119. *See id.* para. 18. The EADCM Regulations govern prohibited substances and medication controls. *Id.* para. 17. *See also* Fédération Equestre Internationale, *Decision of the FEI Tribunal – King-Dye*, at 10–11, 2008, available at <http://www.fei.org/system/files/24%20-%20MYTHILUS%20-%20Tribunal%20-%20Decision%20-%20Final%20-%2022%20Sept%202008.pdf> (affirming strict liability in environmental contamination claim).

120. *See Ahlmann, supra* note 8, para. 18 (listing endorsements of strict liability). *See also* Arbitration CAS 2008/A/1569, *Kürten v. FEI*, award of 12 Dec. 2008, available at http://www.centrostudisport.it/PDF/TAS_CAS_ULTIMO/15.pdf CAS (endorsing strict liability standard); Arbitration CAS 2008/A/1654, *B. Alves v. FEI*, award of 6 Mar. 2009, available at <http://www.fei.org/system/files/CHUPA%20CHUP%20-%20Final%20CAS%20decision%20dated%206%20March%202009.pdf> (endorsing strict liability standard).

b. Capsaicin Effect

Next, the CAS concluded that Capsaicin, a prohibited substance, has a hypersensitizing effect and thus must be considered a doping substance.¹²¹ Expert witness testimony by professors and veterinarians explained the two-fold effect of Capsaicin when applied topically: 1) burning sensation (hypersensitization), and 2) desensitization (analgesic).¹²² The Panel stressed that these steps occur consecutively and are inseparable.¹²³ Accordingly, the Panel found that the presence of Capsaicin in Cöster's system proves hypersensitization occurred at some point, constituting a doping violation under FEI rules.¹²⁴

Furthermore, the CAS panel disagreed with the FEI Tribunal finding that "the FEI has to prove more than the mere existence of the substance" because this would impose a heavy burden on the FEI.¹²⁵ This burden would be exceedingly difficult for the FEI, considering topical Capsaicin is practically untraceable on the skin.¹²⁶

Subsequently, the CAS found the following issues irrelevant under the strict liability standard: state law, common usage, concentration, and drug alternatives.¹²⁷ However, the CAS engaged in a brief discussion of the less contentious issues, including the conflicting expert opinions concerning Capsaicin's benign nature in low concentrations and its common usage by equestrians.¹²⁸ Concluding its deliberation, the CAS dismissed these issues but encouraged the FEI to harmonize its List of prohibited substances in light of this discussion of Capsaicin.¹²⁹

121. See *Ahlmann*, *supra* note 8, paras. 18–20 (deciding hypersensitizing effect of Capsaicin meets doping standard under FEI Rules). The panel dismissed the argument that Capsaicin also has a pain relieving effect when applied topically. *Id.*

122. See *id.* paras. 18–19 (explaining dual effects of topical Capsaicin application). For a full list of expert witnesses, see *Ahlmann*, *supra* note 8, paras. 9–10.

123. See *id.* para. 19 (describing Capsaicin's hypersensitizing and subsequent analgesic effects).

124. See *id.* (determining doping offense has "effectively occurred").

125. See *id.* (quoting FEI Tribunal Decision that would create practically impossible standard requiring FEI to prove intent). See also *id.* (agreeing with FEI that effect would "make the fight against doping illusory" because competitors could claim alternative use to avoid violation).

126. See *id.* (considering practical difficulties of evidentiary burden). The Panel also notes the Swedish National Equestrian Team adopted a strict no-competition rule within ninety-six hours of topical Capsaicin application. *Id.*

127. See *id.* para. 20 (determining issues irrelevant in light of strict liability standard).

128. See *id.* (considering low concentration of Capsaicin in Equi-Block and common usage of Capsaicin).

129. See *id.* (deciding issues irrelevant but expressing concern for harmonization of FEI rules regarding Capsaicin).

3. Sanctions

Finally, the CAS determined the sanction for Mr. Ahlmann's anti-doping rule violation.¹³⁰ Pursuant to the FEI General Regulations,

[t]he CAS has the power to impose the same scale of penalties as the FEI Tribunal The CAS may impose more severe penalties than those imposed in the first instance, provided they are within the limits of the penalty jurisdiction of the body from which the [a]ppeal to the CAS is brought.¹³¹

The CAS considered a number of aggravating and mitigating factors when determining Mr. Ahlmann's sanction.¹³² Ultimately, the CAS imposed an eight-month period of ineligibility and a fine.¹³³

V. CRITICAL ANALYSIS: STRICT LIABILITY IS NO DARK HORSE

In upholding the appeal of the German NF, the CAS focused on the burden of proof under the List.¹³⁴ Under FEI rules, there is a strict liability standard for doping.¹³⁵ The Tribunal's determination that the FEI had to prove "more than the mere existence" of the substance ultimately prevented the Tribunal from finding a more serious rule violation.¹³⁶ In light of the established strict liability standard in equine sport, the CAS decision illuminates why the Tribunal's holding was misguided.¹³⁷ The List requires that a prohibited substance must be "used to hypersensitise or desensitise the

130. See *id.* at 21 (finding Mr. Ahlmann "guilty of an anti-doping rule violation").

131. See FEI Gen. Regulations, *supra* note 105, art. 162 (outlining authority of CAS to sanction and impose penalties).

132. See Ahlmann, *supra* note 8, paras. 21–22 (aggravating: level of competition, 2004 team medal revocation, image of German NF damage, German NF general warnings, lack of consultation) (mitigating: general definitions on prohibited substances list, admission of mistake).

133. See Ahlmann, *supra* note 8, paras. 22–23 (explaining eight-month period of ineligibility is one third of maximum for a doping offense).

134. See *id.* para. 18–19 (explaining FEI should not have to "demonstrate the wrongful act itself"). *Id.* para. 19.

135. See *id.* para. 18 (confirming strict liability standard). Strict liability is integral to protecting integrity in sport. See *id.* See also *supra* notes 118–120 and accompanying text.

136. See Ahlmann, *supra* note 8, paras. 10–12 (discussing strict liability and deciding proper rule category).

137. See generally Ahlmann, *supra* note 8, paras. 104–34 (detailing CAS decision regarding Mr. Ahlmann); *Id.* at 19 (rejecting FEI contention that FEI must prove intent along with presence of prohibited substance).

limbs or body parts” to constitute a violation.¹³⁸ The FEI Tribunal stressed the importance of the List’s wording, emphasizing that the language gives “no indication. . .that the presence of the substance already implies the use as a hypersensitizing agent.”¹³⁹ However, the Tribunal neglected to consider the practical fact that the mere presence of the prohibited substance in the horse’s body produces a hypersensitizing effect (hypersensitization), constituting a rule violation.¹⁴⁰

Likewise, the CAS found that “at some phase, some part of the horse’s body had necessarily been hypersensitized . . .”¹⁴¹ Reading FEI Rules in light of the strict liability standard, the CAS also indicated a myriad of practical issues with proving intent—concerns unanswered by the Tribunal.¹⁴² Unlike the FEI Tribunal’s standard requiring proof beyond mere existence, the CAS questioned the practicability of proving the intent to dope and determined presence of a prohibited substance is equivalent to a violation.¹⁴³ As such, the CAS correctly classified Mr. Ahlmann’s rule violation as doping by noting that presence of a prohibited substance is indicative of a performance enhancing effect, regardless of intent.¹⁴⁴

Further, a key argument of Mr. Ahlmann that was largely ignored by the CAS argues that the FEI List is “unclear, misleading and has not been adapted to scientific and technical progress.”¹⁴⁵ Mr. Ahlmann argued that the illustrative rather than specific nature of the List creates ambiguity.¹⁴⁶ This ambiguity is relevant to the fairness of the application of the strict liability standard to equestrian

138. See Tribunal Decision, *supra* note 24, at 10 (reporting Equine Prohibited List wording).

139. See *id.* (describing reasoning).

140. See *Ahlmann*, *supra* note 8, para 17–18 (explaining presence constitutes violation). See also *supra* notes 122–24 and accompanying text (describing inseparable, two-fold effect of Capsaicin).

141. *Ahlmann*, *supra* note 8, para. 17–18.

142. See *supra* notes 125–26 and accompanying text (detailing practical issues of proving intent). But see Tribunal Decision, *supra* note 24, at 10 (neglecting to address practical issues of proving intent).

143. See *Ahlmann*, *supra* note 8, para. 19 (noting hypersensitization occurred at some point). “[S]uch an evidentiary burden would be nearly impossible to meet.” *Id.*

144. See *id.* para. 19 (explaining presence of substance means hypersensitization occurred). See also *supra* notes 121–29 and accompanying text (describing effect of Capsaicin).

145. See *Ahlmann*, *supra* note 8, para. 7 (arguing List is “misleading”). See also *id.* para. 16 (calling List “ambiguous and unclear”).

146. See *id.* (contending List does not properly define doping).

athletes.¹⁴⁷ Unlike the United States Equestrian Federation (USEF), which “expressly mention[s] Capsaicin among the ‘Forbidden substances,’” the FEI List is merely “illustrative.”¹⁴⁸ Strengthening Mr. Ahlmann’s argument, Capsaicin is “not expressly mentioned on the FEI Prohibited Substances List.”¹⁴⁹

However, the CAS swiftly rejected this argument by confirming the endorsement of strict liability in equestrian sport.¹⁵⁰ The CAS found Mr. Ahlmann’s argument unconvincing because the illustrative List focuses on the *effect* of prohibited substances rather than providing an inventory of every individual illegal substance.¹⁵¹ While Mr. Ahlmann argued that the List “leave[s] gray areas between medication and doping and between medication and between legal and illegal practices,” the CAS properly invoked the strict liability standard to reject Mr. Ahlmann’s argument.¹⁵² If the CAS had accepted Mr. Ahlmann’s argument that the List was fundamentally unfair, the violation would likely have been reduced to a minor sanction.¹⁵³

Overall, the CAS made a proper decision to sanction Mr. Ahlmann for the doping violation.¹⁵⁴ The reasoning reflects proper application of the strict liability standard required under FEI regulations.¹⁵⁵ However, the CAS erred in ignoring Mr. Ahlmann’s argument regarding the vagueness of the List.¹⁵⁶ The American horseracing industry, handling its own doping issues, has implemented a disorderly and disjointed regulatory scheme in the

147. *See id.* (arguing List is unclear and merely illustrative). *See also infra* notes 148–49 and accompanying text (describing List).

148. *See* Tribunal Decision, *supra* note 24, at 15 (describing Drugs and Medications Guidelines of USEF). *See also Ahlmann, supra* note 8, para. 7 (suggesting illustrative nature of List is detrimental to athlete’s ability to comply).

149. *See Ahlmann, supra* note 8, para. 8 (reporting Capsaicin does not appear on List).

150. *See id.* para. 18 (confirming strict liability standard). *See also supra* notes 118–20 (describing strict liability standard).

151. *See Ahlmann, supra* note 8, para. 7 (citing EADCM Regulations providing “and other substances with a similar chemical structure or similar biological effect(s)”).

152. *Id.* para. 8 (describing gray area); *id.* para. 18 (supporting strict liability).

153. *See id.* (describing Mr. Ahlmann’s position that gray areas in rules should be interpreted in favor of competitor).

154. *See supra* notes 101–33 and accompanying text (detailing reasons why CAS made proper decision to sanction Mr. Ahlmann).

155. *See supra* notes 118–20 and accompanying text (describing strict liability standard).

156. *See supra* notes 145–55 and accompanying text (explaining Mr. Ahlmann’s argument and reasoning for CAS dismissal).

United States.¹⁵⁷ In contrast to the orderly, consistent endorsement of strict liability implemented by the FEI, horseracing is struggling to control doping under its disorderly regulatory scheme.¹⁵⁸

Despite divergent strategies in the fight against doping, both Olympic equestrian sport and horseracing apply a version of strict liability.¹⁵⁹ However, the CAS failed to acknowledge any alternative to strict liability, such as a rebuttable presumption rule that exists in the United States.¹⁶⁰ Although the Tribunal waived momentarily, it eventually gave proper deference to the strict liability standard set by the FEI.¹⁶¹

Unfortunately, neither the Tribunal nor the CAS considered an alternative to strict liability.¹⁶² This approach disregards consideration of an alternative—the rebuttable presumption rule.¹⁶³ This rule provides an opportunity for presentation of evidence to refute a positive test.¹⁶⁴ However, in the defending strict liability standard, the CAS example is illustrative: “any PR could simply declare that he used the substance for its original—e.g. therapeutic—purposes to escape any charge of doping.”¹⁶⁵ This argument also relates to application of the rebuttable presumption rule in doping because the rebuttable presumption rule would likely allow the person responsible to escape liability if the substance has multiple effects (doping and therapeutic).¹⁶⁶ The Tribunal and the CAS appropriately declined to consider this rule, or other strict liability alternatives, be-

157. *See supra* note 52 and accompanying text (detailing thoughts on regulatory system). *See also supra* notes 50–62 and accompanying text for a further discussion of doping and regulatory scheme in the American horseracing arena.

158. *See supra* notes 118–20 and accompanying text (describing strict liability standard in equestrian sport).

159. *See supra* notes 58–62, 118–20 and accompanying text (detailing strict liability in horseracing and Olympic equestrian sport).

160. *See Ahlmann, supra* note 8, para. 18 (upholding strict liability and ignoring “unfairness” argument).

161. *See* Tribunal Decision, *supra* note 24, at 10–12 (describing strict liability standard in Olympic equestrian sport).

162. *See supra* notes 83–133 and accompanying text (detailing the reasoning of each decision-making body).

163. *See supra* note 61 and accompanying text (describing rebuttable presumption rule in horseracing). The rebuttable presumption is supported by those who disfavor the harshness of strict liability. *See id.*

164. *See supra* note 61 and accompanying text (describing application of rule).

165. *See Ahlmann, supra* note 8, para. 19 (cautioning against danger of greater burden than mere existence).

166. *See id.* (arguing any standard less than strict liability is unacceptable). The CAS argues that the evidentiary burden proving intent to dope is too high. *See id.* In light of this and the need to protect the integrity of sport, strict liability is appropriate. *See id.*

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cause any standard other than strict liability could impose an impossible evidentiary burden on the FEI.¹⁶⁷

VI. IMPACT: STRICT LIABILITY CONFIRMED WITH STABLE PRECEDENT

The CAS decision in *Ahlmann* created additional precedent for upholding the strict liability standard in equestrian sport.¹⁶⁸ Much has changed in the equestrian world since the six doping cases at the 2008 Summer Games.¹⁶⁹ The Clean Sport campaign and its working committees, launched after the confusion and scandals of 2008, have produced numerous publications, including updated prohibited substance Lists, EADCM Regulations, and Anti-Doping Rules for Human and Equine Athletes.¹⁷⁰ In the fall of 2010, the FEI launched both iPhone and Android applications that provide easy access to the Equine Prohibited Substance List.¹⁷¹

The FEI praised its Clean Sport campaign in August 2012 after a clean London Games that summer.¹⁷² FEI President, Princess Haya, remarked that the clean games “demonstrate[d] the success of the FEI Clean Sport campaign, which has resulted in a major reduction in the number of positives in the Olympic disciplines over the past two and a half years.”¹⁷³ Additionally, the FEI boasted that the 2012 London games were subject to the most testing of “any previous Olympic Games.”¹⁷⁴

In a 2014 decision, *Sheikh Hazza Bin Sultan Zayed Al Nahyan v. FEI*,¹⁷⁵ the CAS struck down a direct challenge to the strict liability

167. See *id.* at 19 (explaining evidentiary burden). For a further discussion of the evidentiary burden by the Tribunal and the CAS, see *supra* notes 91–94, 125–126 and accompanying text.

168. See *Ahlmann*, *supra* note 8, para. 18 (upholding strict liability). See also Wendt, *supra* note 7, at 11–12 (arguing CAS support of strict liability spurred FEI action).

169. See *supra* note 3 and accompanying text (listing 2008 doping cases).

170. See *FEI Clean Sport*, FEI.ORG, <http://www.fei.org/fei/cleansport>, (last visited Sept. 14, 2015) (listing documents produced); Wendt, *supra* note 7, at 13 (indicating Commission was created in response to 2008 Capsaicin cases).

171. See *Official FEI Clean Sport App extended to Android Phones*, FEI CLEAN SPORT CAMPAIGN (Dec. 1, 2010), http://prohibitedsubstancesdatabase.feicleansport.org/list_news.php?id=24; *FEI unveils iPhone App for Equine Prohibited Substances List*, FEI CLEAN SPORT CAMPAIGN (Nov. 1, 2010), <http://fei.org/news/fei-unveils-iphone-app-equine-prohibited-substances-list> (describing capabilities of new app).

172. See *FEI President Celebrates London 2012 Clean Games in Equestrian Sports*, FEI.ORG (Aug. 16, 2012), <http://www.fei.org/news/fei-president-celebrates-london-2012-clean-games-equestrian-sports> (reporting success of 2012 games).

173. See *supra* note 172 (reporting fewer positives).

174. See *supra* note 172 (describing frequency of testing).

175. Arbitration CAS 2014/A/3591, *Sheikh Hazza Bin Sultan Zayed Al Nahyan v. FEI*, award of 8 June 2015 [hereinafter *Al Nahyan*], available at <http://>

standard in equine sport.¹⁷⁶ Rejecting the argument that strict liability is fundamentally unfair, the CAS affirmed that the standard is “justified by the public interest against doping in the sport.”¹⁷⁷ Moreover, the CAS concluded imposing strict liability is “well within the margin of appreciation permitted to the FEI in making rules for the sport.”¹⁷⁸

The recent precedent of *Al Nahyan* demonstrates the continued commitment to the strict liability standard in equestrian sport.¹⁷⁹ Looking forward, the FEI has announced a January 2016 launch of a global Anti-Doping and Controlled Medication Programme.¹⁸⁰ Aiming to promote education and awareness, the FEI hopes to “protect horse welfare and maintain a level playing field.”¹⁸¹ However, the regime is not without critics.¹⁸² Strict liability in equestrian sport has been challenged in Tribunal hearings and before the CAS without significant headway.¹⁸³

In contrast, one equine sports law practitioner supports flexibility because of the unique relationship between horse and rider in equestrian sport.¹⁸⁴ Unlike human athletes who have total control over their own bodies, a rider cannot practically exercise complete

www.fei.org/system/files/Final%20CAS%20Decision%20-%20%208%20June%202015_0.pdf (rejecting strict liability challenge).

176. See *id.* para. 31 (finding strict liability “justified” to prevent doping). It should be noted the CAS partially amended the Tribunal’s decision on other grounds. *Id.* paras. 32–34.

177. See *id.* at 30–31 (affirming strict liability). See also *Sheikh challenges standing of FEI’s strict liability principle in anti-doping cases*, HORSETALK.COM (June 24, 2015, 5:38 PM), <http://horsetalk.co.nz/2015/06/24/sheikh-fei-strict-liability-principle-anti-doping/#axzz3iRqPRUpX> (“The strict liability principle had been a cornerstone of the FEI’s regulatory framework since 1982.”).

178. See *Al Nahyan*, *supra* note 175, para. 31 (describing reasoning).

179. See *supra* notes 175–78 and accompanying text (describing CAS upholding strict liability).

180. See *FEI President Pushes Clean Sport Message*, EVENTINGCONNECT.COM (Sept. 1, 2015), <http://eventingconnect.today/2015/09/01/fei-president-pushes-clean-sport-message/> (announcing new program).

181. See *id.* (justifying new, updated rules).

182. See generally Neil Clarkson, *Bar Set Too High in FEI Doping Cases, Lawyer Believes*, HORSETALK.COM (Sept. 9, 2014, 6:50 PM), <http://horsetalk.co.nz/2014/09/09/bar-set-too-high-fei-doping-cases-lawyer-believes/#axzz3o1HXWdni> (arguing no fault, no negligence standard too burdensome for inadvertent doping). See also *supra* notes 175–80 and accompanying text (challenging strict liability standard).

183. See *supra* notes 83–133 and accompanying text (detailing one particular challenge to standard). See also *supra* notes 175–78 and accompanying text (describing another failed challenge).

184. See Clarkson, *supra* note 182 (describing difference between human doping and equine doping).

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control over his or her mount.¹⁸⁵ Accordingly, the attorney advocates a subjective test for *inadvertent doping*.¹⁸⁶ However, riders would need to prove contamination to utilize this more subjective and flexible standard of review.¹⁸⁷

Despite occasional protests from equestrian athletes, it seems strict liability in equine sport is here to stay.¹⁸⁸ Although commenters and competitors alike have criticized the strict liability standard, no CAS decision has reconsidered strict liability for doping in international equestrian sport.¹⁸⁹ FEI communication and educational campaigns have had positive impact in decreasing violations, with the FEI reporting steady decreases in positive tests under EADCM Regulations with a yearly increase of horses being tested.¹⁹⁰

With strict liability as the cornerstone of doping regulation, accountability, health, and safety will remain top priorities. This system encourages disclosure by veterinarians, athletes, grooms, and others involved in the care of equine athletes. Even putting aside health and safety issues, doping in sport compromises the integrity of the game. The FEI should be lauded for its efforts to eradicate equine doping through its Clean Sport campaign and its endorsement of a strict liability standard. Ultimately, the combination of a strict liability standard coupled with a rigorous educational campaign is the best way to maintain the integrity of equestrian sport while protecting both human and equine athletes.

Mary Zoeller*

185. *See id.* (explaining difference between human doping and equine doping).

186. *See id.* (arguing for flexibility in inadvertent doping cases).

187. *See id.* (advocating for “sliding scale”).

188. *See* EADCM Regulations, *supra* note 24, art. 2.1.1 at 1 (containing language that creates strict liability standard). *See also supra* note 44 (describing strict liability standard for Equine Anti-Doping offenses).

189. For a discussion of the most recent challenge to strict liability in the CAS, see *supra* notes 175–82 and accompanying text.

190. *See* Fédération Equestre Internationale, REPORT OF THE FEI EQUINE ANTI-DOPING AND CONTROLLED MEDICATION PROGRAMME 2014 (2014), available at <https://www.fei.org/system/files/Annual%20Report%202014.pdf> (last visited Oct. 29, 2015) (reporting statistics).

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