

*The following are remarks from USTA President Russell Williams regarding HISA from the USTA Special Board of Directors meeting on April 16, 2021.*

Mr. Chairman, fellow board members, I am now at liberty to announce that the State of Oklahoma will be challenging the constitutionality of HISA in federal court along with Hanover Shoe Farms in the very near future and both plaintiffs are very interested in having the United States Trotting Association join the suit as a co-plaintiff.

Concerning the costs of litigation, as a co-client with the USTA Hanover Shoe Farms has engaged Gibson Dunn and negotiated a flat fee for the federal district court proceedings, and has formally committed to pay the entire amount of that fee. The USTA will not be at risk for any portion of the cost of the district court proceedings.

The State of Oklahoma is in talks with other states that may also join the suit. You can readily see that states challenging constitutionality of a federal law identifies a case as being of the highest importance. Moreover, several tribal-owned racetracks might also join, underlining the nonpartisan nature of the case and providing the important track perspective. To me, having the USTA as a plaintiff is of the greatest importance so the entire harness racing sport is represented.

Don Brey has examined the USTA and Hanover Shoe Farms plaintiff roles and found no conflict of interest.

It is a rare honor to have a state express interest in joining forces in the fight to protect shared rights founded in our Constitution. I believe that this came about in part because of the USTA's leadership over the past four years. Today I ask this board to continue that leadership by voting to join forces with the State of Oklahoma and Hanover Shoe Farms in this lawsuit seeking to overturn HISA.

In a case like this, the plaintiffs go into federal district court and file a complaint seeking a declaratory judgment. Federal district court is the trial court, the first step and, in many cases, the last step in the progress of a constitutional case. A United States District Court judge has the power to declare HISA unconstitutional, and that is the relief we will ask for. I do not know at this point which federal court the case will be filed in.

Sometimes plaintiffs ask for a preliminary injunction to halt unconstitutional activity while the case progresses. For anyone who might not know, several Thoroughbred horsemen's groups have filed a constitutional challenge against HISA in federal court in the Northern District of Texas. There is a motion for a preliminary injunction in the Texas case, but I don't know whether counsel will decide to seek injunctive relief in our case.

What we're up against is a combination of an elite private club mentality and an effort to disguise a public relations campaign as regulatory reform. Both are bad foundations for a federal statutory scheme affecting hundreds of thousands of horses and people.

The cavalier way in which the question of funding has been handled shows the elite private club mentality. HISA gets no federal appropriation, so the states or racing participants in the states will have to pay for it. But for HISA to require payment of its expenses in this way is unconstitutional because private clubs don't get to tax the public.

HISA has been hanging over our heads in one form or another for six years. Back in 2015 some members of Congress got worried about this legislation and sent it to the Congressional Research Service, known as CRS, for analysis. For over 100 years, CRS has been Congress's think tank providing research and analysis under the requirements of balance, nonpartisanship, and accuracy. The CRS report on this legislation said, in effect, "Whoa, guys, a per-start fee looks like it would be unconstitutional because the Constitution does not permit private entities to impose fees on the states or on the citizens in the states." Here we are, six years later, after the law has been enacted, and the HISA supporters have failed to come up with any solution to that problem. Even Jeff Gural is commenting about the need to figure out how this new regulatory unit will be paid for.

This is unacceptable. We don't just race for silver cups. We make our living in the racing industry. We are already paying for state racing commissions to regulate the sport, and those commissions are answerable to our elected officials if improvements need to be made. We shouldn't have to wait six years for our elite overlords to decide how we are going to pay for a whole new, federal-level regulatory structure.

The funding problem is more serious than most people realize. There is no upper limit to what the HISA Authority can spend and borrow. The Association of Racing Commissioners International, ARCI, analyzed the HISA legislation and called attention to the disruption that this "blank check" would cause in racing economics. Smaller and mid-sized racing entities and those with no gaming revenue sources could face insurmountable difficulties after struggling for years in a highly competitive environment for the entertainment dollar. Some tracks may be unable to absorb additional regulatory fees, and ARCI even developed a "watch list" of specific tracks in this category. The analysis also points out that reduced live racing means reduced simulcasting, further pressuring track margins.

HISA threatens not just economic disruption, but also destabilization. We are heading for a situation in which a private entity masquerading as the federal government regulates the racing side of the gaming companies while the states regulate the casino side. Thus the racing divisions will be subject to a regulatory start-up involving the expected amount of glitches and corrections. When the racing divisions of certain gaming companies start to show the effects of these economic and regulatory pressures, the gaming companies will have a huge business incentive to go back to the state legislatures and seek decoupling, ridding themselves of what they will describe as unproductive assets. I'm not talking about just Florida. I'm talking about Ohio, Pennsylvania, New York, Delaware: the whole business model that we've turned into an economic productivity engine for the public, for government, and for agriculture over the past decade. Relegating harness racing to the level of a club sport would not greatly alter the picture for the elites that support HISA. But for those of us who make our living in the sport, it would change everything.

We are hearing the term "optics" more and more often, especially from members of the Racing Medication and Testing Consortium, a Thoroughbred organization that has fought for years to prevent Standardbred horses from getting medication regulations appropriate to their specific racing performance model. However, we're not talking about the science of optics. We're talking about a term used in the public relations profession to assess public opinion. The optics people don't want a medication rule change that might appear more permissive to the public, even when veterinary science tells us the health and welfare of the horse requires it. In the case of Lasix, the optics people are seeking to make the rules even more restrictive because of optics, since Lasix must be administered on race day. From this perspective, HISA is just a public

relations campaign disguised as medication reform. The objective is to hypnotize the animal rights groups.

Lasix is the only medication that helps exercise-induced pulmonary hemorrhage. Now look at what HISA does with it. Banned. Then HISA goes on to say we'll have an advisory committee that will have three years to do a study and issue a report. To modify or lift the ban, there must be a unanimous vote of the Authority board making the following findings:

- The modification is warranted,
- The modification is in the best interests of horse racing,
- That Lasix has no performance enhancing effect on individual horses, and
- That public confidence in the integrity and safety of racing would not be adversely affected by the modification.

The third one is a question of science to which we already know the answer: it doesn't. The other three? They are all questions of optics. Each member of the Authority board is given a cheap and easy veto based on nothing more than their own opinion that the optics of Lasix are not good.

What happens when you allow optics to triumph over science? On Saturday, April 3, Keeneland held some major races and they applied their new "no Lasix in stakes events" policy. A 9 to 5 favorite came back bleeding from both nostrils after finishing second, and in another race a 2 to 1 second choice had to be eased through the stretch while also bleeding from both nostrils. (I know that the 9 to 5 horse was found to have hit his face on the gate. He was also scoped after race and found to have been bleeding.)

We're hearing the optics people repeating their new political slogan "we have to do right by the horse." What they really mean is, "we have to walk right on by the horse and court public opinion." Meanwhile the veterinarians, who are trained to medically care for the horse, and who are the only people in the industry who take an oath to protect the horse's welfare, are ignored for the sake of optics. And the horse always pays the price.

For the past four years, the USTA has advocated for the harness racing sport. Mike Tanner has taken over 300 meetings on Capitol Hill. At these meetings, we did not

spout negative propaganda. We explained the issues and addressed HISA's glaring defects. After all the work involved in getting our message across to Congress, what happened? Mitch McConnell sneaked HISA through in the middle of a 5,500-page must-pass funding measure without debate and without the stand-alone vote he promised to his own colleagues. The HISA legislative process was a fixed race, but they won't be able to fix the next heat, which takes place in the federal courts.

We've thought about this legislation so much that we've come up with a federal bill of our own. It's titled The Racehorse Health and Safety Act because it puts the horse first. The National Association of Racetrack Veterinarians gave birth to it, so it started life based on veterinary science, not optics. The HBPA was involved in its development, so we know that the Thoroughbred people who are racing for a living – not just for silver cups – are good with it. Representatives of ARCI have looked at it, so we know that it would not be rejected by the state regulators, which is very important because it is essentially an interstate medication regulatory compact. Our own Don Brey really rang the bell, though, because he structured it under the Compact Clause of the U.S. Constitution. It will therefore have federal oversight, which will keep the states cooperating and moving in the right direction. It will also have another big advantage over HISA: it's not unconstitutional.

Someone said that all this commotion is because Russell Williams is upset at losing because HISA was passed into law. This is not about winning or losing for me, because I can afford to retire, and our 3,000 acres could become the Hanover Shoe Farms Housing Development. But forty families live on that acreage now and apply their efforts to keeping the farm going. They could find work somewhere else, but why should they have to? Our horse population averages about 900 through the year. We presently have about 140 retired horses living on the farm, almost all of which were our broodmares at one time. Where would they go if Hanover Shoe Farms shut down? Who would want them? So I'm fighting for something much bigger than just myself.

We USTA directors are also fighting for something much bigger than ourselves. As directors, we're obligated to fight for the rights and interests of our members. And so I ask you to continue the leadership that the USTA has displayed over the past four years and join the lawsuit that will soon be filed. Join the State of Oklahoma and the Hanover Shoe Farms in fighting for the people and the horses that make racing what we love.

