

THE JOCKEY CLUBS SEARCH FOR LEGAL STANDING TO UTILIZE MICROCHIP TECHNOLOGY TO PREVENT THE SHIPMENT OF EQUINES FOR SLAUGHTER

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I. INTRODUCTION

The intense training and race schedule of Thoroughbred horses leads to a tendency for the development of musculoskeletal injuries.¹ These injuries require the use of non-steroidal anti-inflammatory drugs, of which phenylbutazone (“PBZ”) is the most commonly used.² Though originally created for the treatment of rheumatoid arthritis in humans, it was soon banned for its negative side effects.³ The drug was thereafter banned for use in any horse slaughtered for human consumption because the Federal Drug Administration (“FDA”) has no knowledge of safe levels of PBZ in animals intended for human consumption.⁴

By August 2007, all horse slaughter plants in the United States had closed.⁵ The closing of slaughter plants led to an increase in the practice of shipping horses to other countries for slaughter.⁶ There are no current statistics that show the number of horses, who have been treated with PBZ, that end up in the slaughter pipeline. A recent study, however, conducted in 2010, determined that of sixty-eight Thoroughbreds were rescued from

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¹ Nicholas Dodman et al., *Association of phenylbutazone usage with horses bought for slaughter: A public health risk*, 48 FOOD & CHEM. TOXICOLOGY 1270, 1270 (2010).

² *Id.*

³ *Id.*

⁴ *Id.*

⁵ *Horse Slaughter Statistics*, ANIMAL WELFARE INST., <https://awionline.org/content/horse-slaughter-statistics> (last visited Oct. 28, 2016) [<https://perma.cc/R4FZ-4TYQ>].

⁶ *See id.*

or known to have been killed in slaughter houses; thirty-four of them had sufficient records to conclude that they had been treated with PBZ prior to slaughter.⁷

The difficulty in keeping these horses out of the slaughter pipeline stems from the haphazard system of maintaining a horse's medical records. In California, veterinarians are required to turn in treatment records through hard copy.⁸ This process can make it difficult to maintain and track equine medical records. Additionally, when a horse is shipped to another country, such as for slaughter, it must be accompanied by proper identification documentation. For example, Canada requires all horses shipped for slaughter are accompanied by an "equine information document", which lists the drugs with which the horse has been treated.⁹ However, these records are susceptible to a large amount of forgery.¹⁰

In response to this issue, the European Union implemented a system of microchipping in 2009.¹¹ The original system was to use the microchip as an identifier, whereby each horse, identified by its own microchip, would be linked to a paper passport.¹² This passport would be used to record all medications the horse had been given in hopes of keeping horses treated with dangerous medications out of the slaughter pipeline.¹³ Unfortunately, the passports, like the aforementioned equine information documents, were open to similar fraudulent modification.¹⁴ In response, the European Union amended the

⁷ Dodman, *supra* note 1, at 1271.

⁸ Natalie Voss, *Jockey Club Researches The Untapped Power Of The Microchip*, PAULICK REPORT (Feb. 17, 2016, 10:46 AM), <http://www.paulickreport.com/news/ray-s-paddock/jockey-club-researches-the-untapped-power-of-the-microchip/> [<https://perma.cc/8VDD-EQHR>].

⁹ Jack Rodolico, *The shady trade in American horsemeat*, LATITUDE NEWS, <http://www.latitudenews.com/story/the-shady-trade-in-american-horsemeat/> (last visited Oct. 28, 2016) [<https://perma.cc/69BE-RLNT>].

¹⁰ *Id.*

¹¹ *European Union to Require Horse Passports, Microchips*, THE HORSE, (June 10, 2008), <http://www.thehorse.com/articles/21290/european-union-to-require-horse-passports-microchips> [<https://perma.cc/VWZ5-LDD9>].

¹² *Id.*

¹³ See Voss, *supra* note 8.

¹⁴ See *British Group Says Horse Passports Aren't Working*, PAULICK REPORT (Mar. 9, 2013, 7:32 PM), <http://www.paulickreport.com/news/the-biz/british-group-says-horse-passports-arent-working/> [<https://perma.cc/N5NA-NQ2A>].

system and now requires all member nations to have an online database for all equine passports.¹⁵

As recently as January 1, 2017, the Jockey Club of America implemented a similar microchip regulation. The initial purpose of the regulation was to alleviate issues of identification that are created by relying on general markings or tattoos.¹⁶ However, the long-term goal of the organization is to implement a multi-state medical database. This database would make it easy for veterinarians to update a horse's treatment information, as well as provide organizations easy access to medication information that would keep unsanctioned horses out of the slaughter pipeline.¹⁷

Unfortunately, this new multi-state database is destined to run into a legal hurdle. There are a variety of state regulations that require veterinarians to abide by confidentiality requirements.¹⁸ These would prevent veterinarians from sharing their treatment of equine animals with other organizations, without the written permission of the owner.¹⁹ This Note will argue that the definition of confidentiality, created by the American Veterinarian Medical Association ("AVMA"), grants the Jockey Club of America proper legal standing through a "public health" exception. In addition, the AVMA should mandate that all state confidentiality regulations be amended to allow for this exception.

This Note will explore the effect the veterinarian confidentiality requirement will have on the plans for an online multi-state medical database and how the issue can be alleviated. Section II of this Note will analyze the microchip system implemented by the European Union ("EU"). It will explore the negatives of the original system, which was implemented in 2009, and will explore how the adoption of an online system solves those issues. Section III of this Note will examine the current American system for monitoring equine medical treatment, as

¹⁵ *Animal Health: EU to tighten rules on horse passports*, EUROPEAN COMMISSION (Sept. 12, 2014), http://europa.eu/rapid/press-release_IP-14-1000_en.htm [<https://perma.cc/6FX2-CGLN>].

¹⁶ Voss, *supra* note 8.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

well as explain the failures of this system. Additionally, it will look at the new microchip database system and the ways in which these issues would be alleviated. Furthermore, it will explain the issue of creating the new multi-state database and how the Jockey Club can look to a legal remedy to solve this issue.

Section IV will explore the legal standing that the Jockey Club can pursue in its efforts to institute the multi-state database. The section will explore the different state regulations and the discrepancies in their confidentiality requirements. Furthermore, this section will explore the ways in which the AVMA recommends states should define confidentiality. Section V will explore case law that explains how "public health" has been defined in the court system. This section will also explain the ways in which the slaughter of horses treated with PBZ satisfies this exception. Finally, Section VI will conclude with a discussion on the need for the American Veterinary Medical Society to mandate the "public health" exception in all state statutes. This will allow the implementation of the multi-state medical database that the Jockey Club desires.

II. EUROPEAN EQUINE IDENTIFICATION SYSTEM.

A. Background

In 1990, the European Union passed legislation that established rules for the movement of equine animals for breeding and for slaughter. The legislation explained that all equine animals must be accompanied by an identification document during transportation.²⁰ A member country could individually create this document. In 1993, the EU decided to amend this regulation. In this provision, a "passport" was assigned to all equine animals involved in transportation. The "passport" was a universal identification document that all member states needed to use.²¹ Additionally, to go along with the passport, the EU decided to assign every equine animal a life

²⁰ See Council Directive 90/426, art. 4, 1990 O.J. (L 224) 42, 54 (EC).

²¹ See Commission Decision 93/623, art. 1, 1993 O.J. (L 298) 45, 55 (EC).

number that would make these horses easier to identify over time.²²

In 2000, the EU decided to make another amendment to these regulations. The commission included a section on a horse's passport that listed the dangerous drugs that had been given to the horse during its life.²³ This was done to make the drugs the horse had been treated with easily identifiable to authorities during transportation or at a slaughterhouse. If the horse had been treated with a harmful drug, such as phenylbutanol,²⁴ it could easily be kept out of the human food supply.

In 2008, the EU took another major step in their attempt to properly regulate the transportation of equine animals. The new legislation required that all equine animals be microchipped, which would be linked to the passport and stored in an online database.²⁵ In addition, each member state was given the option of creating their own national database or utilizing a database system that they currently had in place.²⁶ Another key aspect of the legislation was that all equine animals that were transported for slaughter were to be accompanied with their passport to the slaughterhouse.²⁷ The purpose of this was to monitor horses that had been treated with drugs, similar to phenylbutazone, that are banned from human consumption.²⁸ This would make it easy for a slaughterhouse to view a horse's medical information and keep tainted meat out of the food supply.

²² See Commission Decision 2000/68, art. 1, 2000 O.J. (L 23) 72, 73 (EC).

²³ See *id.*

²⁴ Dodman, *supra* note 1.

²⁵ *European Union to Require Horse Passport, Microchips*, THE HORSE (June 10, 2008), <http://www.thehorse.com/articles/21290/european-union-to-require-horse-passports-microchips> [<https://perma.cc/LB65-ZW8V>].

²⁶ *Commission Adopts Single Passport and Matching Chip for Horses and other Equidae*, EUROPEAN COMM'N (June 9, 2008), http://europa.eu/rapid/press-release_IP-08-905_en.htm?locale=en [<https://perma.cc/8GUD-LJPH>].

²⁷ *Id.*

²⁸ *Europe Agrees to Revamp of Horse Passport System*, HORSETALK (Sept. 15, 2014), <http://www.horsetalk.co.nz/2014/09/15/europe-revamp-horse-passports/#axzz4O1kzRVsx> [<https://perma.cc/YU33-M7HT>].

B. Issues with Fraud

Unfortunately, the addition of microchipping did not alleviate the issues associated with the use of fraudulent passports. In 2013, the Royal Society for the Prevention of Cruelty to Animals (“RSPCA”), located in Great Britain, reported that the current system was not working.²⁹ They felt that many of the horses that they had encountered were not accompanied by their passports or had not been microchipped at all.³⁰ This issue can be related to the small amount of money that changes hands when some horses are sold, which can lead to irresponsible owners not taking the necessary steps to properly care for the horses or abandoning them altogether.³¹ Without the mandated passport, it can be difficult for legal authorities to pursue action against these irresponsible owners and take proper care of the horses.³²

Authorities also ran into problems with properly identifying horses that had a passport. This is due to the wide array of database systems that countries utilized. Great Britain, for example, shut down their national database, the National Equine Database, in 2012.³³ Following its closure, there were nearly seventy-five different regulatory agencies that were attempting to track the identity of equine animals in Great Britain.³⁴

Along with the report conducted by the RSPCA, 2013 saw Europe struck with another scandal, due, in part, to their equine identification system. The issue began when several Irish food inspectors discovered horsemeat in frozen hamburgers.³⁵ Following the discovery, several supermarket chains across

²⁹ See generally *British Group Says Horse Passports Aren't Working*, PAULICK REPORT (Mar. 9, 2013), <http://www.paulickreport.com/news/the-biz/british-group-says-horse-passports-arent-working/> [<https://perma.cc/D7JJ-PVP2>].

³⁰ See *id.*

³¹ *Id.*

³² *Id.*

³³ *Britain to Get New Centralized Equine Database*, HORSETALK (Sept. 16, 2014), <http://www.horsetalk.co.nz/2014/09/16/britain-new-centralised-equine-database/#axzz4O1kzRVsx> [<https://perma.cc/ACA7-6MJM>].

³⁴ *Id.*

³⁵ See *Q&A: Horsemeat scandal*, BBC (Apr. 10, 2013), <http://www.bbc.com/news/uk-21335872> [<https://perma.cc/5SMN-9VR6>].

Europe began to recall meat products.³⁶ It has been estimated that the scandal caused millions of euros worth of meat products to be recalled from the European food chain.³⁷ This occurrence led the EU to conduct their own study, which found traces of horse meat in beef products found in twenty-seven different countries; also, of the over 7,000 samples taken for testing, nearly 5 percent of them contained horse DNA.³⁸

Although, the EU commission termed this scandal as an issue of “food fraud”, the tests also revealed an underlying problem with the usage of horsemeat in the human food supply.³⁹ About .5 percent of the 7,259 tests, conducted by an independent commission, found positive traces of the harmful painkiller phenylbutazone.⁴⁰ Specifically, Great Britain found the most samples of the harmful drug, with fourteen of 836 samples containing the drug.⁴¹ This problem highlighted some of the failings of the newly instituted equine identification system. The presence of this dangerous painkiller in horse meat revealed that, despite the advances in the passport system, it was still possible for fraud to occur.

C. Current Equine Identification System

In response to these scandals, the European Commission passed new legislation that created stricter regulations on the equine passport system. The new regulations mandated that all member states maintain a single centralized database, which would contain all equine identification passport information.⁴² This new regulation went into effect January 1, 2016; however,

³⁶ *Id.*

³⁷ Stephen Castle, *Europe Says Tests Show Horse Meat Scandal is 'Food Fraud'*, N.Y. TIMES (Apr. 16, 2013), <http://www.nytimes.com/2013/04/17/business/global/european-study-affirms-role-of-fraud-in-horsemeat-scandal.html> [https://perma.cc/LM9C-KAAD].

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *See id.*

⁴¹ *See id.*

⁴² *Animal Health: EU to Tighten Rules on Horse Passports*, EUROPEAN COMM'N (Sept. 12, 2014), http://europa.eu/rapid/press-release_IP-14-1000_en.htm [https://perma.cc/XSY4-QZ7C].

any nation that did not have a centralized database had until July 1, 2016 to set up their database system.⁴³

This regulation was implemented due to the issues that were presented to authorities by allowing member states the option of having a single online database or utilizing a database system of their own choosing.⁴⁴ The movement to create a centralized database could create two positive side effects for regulatory authorities. The first would be its ability to limit the use of fraudulent passports, due to a horse's identification being easily found. The second side effect was that authorities would be better able to regulate the use of equine animals for slaughter, due to having more reliable access to a horse's medical information.

The European Union has avoided issues of confidentiality by passing legislation that mandates veterinarians to record medicines given to horses in specific situations. This is likely because the legislation characterizes horses as food-producing animals.⁴⁵ On a horse's passport, it must be stipulated whether the horse is intended to serve as a food-producing or non-food-producing animal.⁴⁶ If the horse is considered a food-producing animal, a veterinarian must keep a record of all substances with which the horse has been treated.⁴⁷ If a horse is treated with a substance the European Union has found may be dangerous for human consumption, that substance must be listed on the horse's passport.⁴⁸ The European Union has also determined that, due to its danger to humans, phenylbutazone cannot be given to any food-producing animal.⁴⁹ If a horse has been treated with the drug, it must be marked on its passport and declared that the horse is a non-food producing animal.⁵⁰

⁴³ *Id.*

⁴⁴ European Union to Require Horse Passport, Microchips, *supra* note 25.

⁴⁵ *Horse Medicines and Record Keeping Requirement*, UK GOV'T (June 1, 2015), <https://www.gov.uk/guidance/horse-medicines-and-recording-keeping-requirements#record-keeping-requirements-for-vets-retailers-and-horse-owners-or-keepers> [https://perma.cc/G8PK-ZP48].

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.*

III. AMERICAN EQUINE IDENTIFICATION SYSTEM

A. *Current Identification System*

In the past, the equine industry in North America has used a primitive form of identification. Officials would attempt to match a horse to pictures of their markings or their “night eye”; also, they could attempt to identify a horse through the matching of a lip tattoo.⁵¹ However, these old forms of identification can lead to difficulties. The use of markings can be inefficient if pictures of the horse’s markings are not available to an official.⁵² Additionally, lip tattoos tend to fade over time, which can make identification difficult without a horse’s Jockey Club papers.⁵³ These types of identification documents are not always available at the time a horse is sold to a new owner or transported for slaughter.

Currently, several states, including Kentucky, require veterinarians to report therapeutic drugs that have been given to horses.⁵⁴ However, this presents major administrative issues for regulatory agencies. This is because these records are reported through a hard copy.⁵⁵ This makes it almost impossible for state agencies to inspect all the treatments that horses receive.⁵⁶ Instead, agencies must limit their analysis to specific situations, such as positive drug tests.⁵⁷ The reporting of these records through a hard copy also creates an issue of storage space. Dr. Rick Arthur, the equine medical director of the California Horse Racing Board stated that the lack of storage space causes many records to be discarded after about a year.⁵⁸ This would make it

⁵¹ *Identifier Relies on Horse Hair and ‘Night Eyes’*, PAULICK REPORT (Aug. 21, 2013), <http://www.paulickreport.com/news/people/identifier-relies-on-horse-hair-and-night-eyes/> [<https://perma.cc/YHU9-H5YR>]; *Chestnut: Not Just a Coat Color*, EQUINEWS (Mar. 9, 2011), <http://www.equinews.com/article/chestnut-not-just-a-coat-color> [<https://perma.cc/JH8H-AWNW>].

⁵² *Id.*

⁵³ Voss, *supra* note 8.

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.*

almost impossible to track all of the treatments a horse may receive throughout its life.

This type of reporting system also creates hurdles for the veterinarians that are reporting the treatments. Veterinarians, at times, have difficulty identifying the correct horse to treat.⁵⁹ Further, the reporting paperwork to be turned into regulatory authorities must be filled out by the veterinarian conducting the treatment. This can be time-consuming and inefficient.⁶⁰

The haphazard system of reporting a horse's medical treatment also leaves an opening for fraud to occur in the slaughter industry. In Canada, any horse that has been shipped for slaughter must be accompanied by an equine information document, which lists the medications that a horse has been given.⁶¹ Any horse that has been administered phenylbutazone is not allowed to enter the slaughter pipeline.⁶² These documents are easily forged due to lack of control over the honesty of the documents.⁶³ In addition, a source close to a Canadian slaughterhouse admitted that American horses present a problem for the EID system.⁶⁴

B. Goals of New Microchip System

In August 2015, the Jockey Club board of stewards voted to make major changes to the equine identification system. These changes included the mandatory microchipping of all foals born in 2017 and later.⁶⁵ Along with the use of official markings, the Jockey Club felt this would greatly improve the industry's ability to properly identify and manage their horses.⁶⁶ The Jockey Club

⁵⁹ *See id.*

⁶⁰ *See id.*

⁶¹ Rodolico, *supra* note 9.

⁶² *Annex E: Equine Identification Document*, CANADIAN FOOD INSPECTION AGENCY, <http://www.inspection.gc.ca/food/meat-and-poultry-products/manual-of-procedures/chapter-17/annex-e/eng/1370023131206/1370023203607#e1> (last visited Jan. 8, 2017) [<https://perma.cc/QY3W-B4KY>].

⁶³ Rodolico, *supra* note 9.

⁶⁴ *Id.*

⁶⁵ *The Jockey Club to Require Microchips in 2017*, BLOOD HORSE (Aug. 9, 2015), <http://www.bloodhorse.com/horse-racing/articles/105822/the-jockey-club-to-require-microchips-in-2017> [<https://perma.cc/SR96-YWQQ>].

⁶⁶ *Id.*

also highlighted the many other functions for which microchips can be utilized. These uses include software that is available, which can display data that includes the horse's pedigree, racing performance information, and health records.⁶⁷

An aspect of this change that excites the equine community is the potential to develop an online database that can record a horse's medical information, similar to the system found in Europe.⁶⁸ This type of system would have several benefits for the equine industry. The first would be the efficiency it would provide veterinarians. It would help clear up issues on identifying the horse that needs to be treated, as well as could send treatment records to their offices or to regulatory agencies.⁶⁹ The second major benefit the database would offer is the ability to keep horses treated with medications, dangerous to humans, out of the slaughter pipeline.⁷⁰ A singular online database would allow regulatory authorities the ability to easily access the medication history of horses as with the European system.

C. Confidentiality Issues

Before an online medical database can come to fruition it must overcome a potential legal hurdle. This hurdle concerns potential confidentiality issues that may arise.⁷¹ It is possible that if collecting medical history is allowed, some regulatory agencies already have the authority to collect medical treatment information.⁷² However, the ability to share that information with multiple parties, across state lines, could be greatly hampered. This is due to current veterinarian confidentiality regulations.⁷³

A major concern that owners and veterinarians may have with a medical database system is the integrity of the records.⁷⁴ An online medical database would make information available to several different authorities. It may be difficult to ensure the

⁶⁷ *Id.*

⁶⁸ Voss, *supra* note 8.

⁶⁹ *See generally id.*

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.*

information is only viewed by approved agencies. For this reason, owners and veterinarians may want to maintain their confidentiality of treatment.

The difficulty with determining how confidentiality will affect a singular online medical database is due to the differing state statutes that are currently in existence. Many states do not allow the sharing of medical information without the individual owner's consent.⁷⁵ Some states do allow a waiver of confidentiality for extenuating circumstances. For instance, in Kentucky, confidentiality is waived in regard to the reporting requirements of the Kentucky Horse Racing Commission.⁷⁶ However, not all states have requirements that allow this and there could be friction between differing state laws.

For this online medical database to come to fruition, the Jockey Club must resolve the issue of confidentiality. It could pursue an avenue similar to the approach seen in Europe. To do so, the federal government would need to enact legislation. Also, each state would need to change their confidentiality laws to allow an exception in regard to equine medical information. However, this approach would delay the adoption of the database, which the Jockey Club hopes will begin operating towards the end of the year.⁷⁷ The other approach the Jockey Club may take is to find proper legal standing to circumvent the confidentiality requirements.⁷⁸ Legal standing would allow the Jockey Club to properly implement the medical database in their desired time frame.

⁷⁵ See generally *Confidentiality of veterinary patient records*, AVMA, <https://www.avma.org/Advocacy/StateAndLocal/Pages/sr-confidentiality-patient-records.aspx> (last visited Jan. 8, 2017) [<https://perma.cc/8VUH-JMWS>].

⁷⁶ *Id.*

⁷⁷ Voss, *supra* note 8.

⁷⁸ *Id.*

IV. LEGAL STANDING FOR IMPLEMENTATION OF ONLINE MEDICAL DATABASE

A. *Common Law*

To grasp the issue that legal standing presents the Jockey Club it is important to understand how common law has treated veterinarian-patient confidentiality. Veterinarian-patient confidentiality has not always been a recognized right. Although there are several cases in which people have tried to invoke the right of veterinary-client privilege, courts have been reluctant to extend this right to veterinary practice.⁷⁹

In the case of *Tucker v. John R. Steele & Associates*, the court denied the plaintiff the right of veterinary-patient confidentiality.⁸⁰ A veterinarian treated the plaintiff's horse; subsequently, the horse developed complications. The plaintiff sued and filed a motion to prevent the veterinarian from giving testimony due to the veterinarian-client privilege.⁸¹ The plaintiff attempted to invoke this right through the physician-patient privilege.⁸² The court disagreed, they felt that, unlike attorney-client privilege, which was implied, veterinary-patient privilege was not an implied right but a statutory construction determined through legislation.⁸³ Furthermore, because the difference in circumstances between a human receiving care and an animal receiving care, the court declined to extend veterinarian-patient confidentiality under the state's current patient-client privilege statute.⁸⁴

In the years following *Tucker*, courts have begun to recognize a veterinary-client privilege, due to its development in state law. In *Sims v. Humane Soc. of St. Joseph County Indiana Inc.*, the court was presented with a similar issue in regard to determining if there was a veterinary-patient privilege owed.

⁷⁹ Rebecca J. Huss, *Valuation in Veterinary Malpractice*, 35 LOY. U. CHI. L.J. 479, 489 (2004).

⁸⁰ *Tucker v. John R. Steele & Assocs.*, 1994 U.S. Dist. LEXIS 4600, at 9 (N.D. Ill. Apr. 1, 1994).

⁸¹ *Id.* at 5.

⁸² *Id.*

⁸³ *Id.* at 7.

⁸⁴ *Id.* at 10.

Like in *Tucker*, the court determined that the treatment of an animal could not be properly compared to that of the treatment of a human.⁸⁵ However, the court then invoked state law. Because the state had passed legislation creating veterinary-patient confidentiality, the court decided to recognize it because it was clearly recognized from what the state intended.⁸⁶

These two cases highlight the approach that common law has taken in regard to determining if a veterinary-patient confidentiality privilege exists. Courts have been reluctant to recognize a right to veterinary-client confidentiality without the development of it in state statutory law.⁸⁷ Unfortunately for the Jockey Club, this would mean that it is unlikely that they would be able to argue for legal standing under common law. Their next step would be to find an exception, under state law, to veterinary-patient confidentiality that would allow them to share a horse's medical information in a multistate database.

B. State Statutory Law

Up to this point, the federal government has not passed any legislation that would grant veterinary-patient privilege. For this reason, it has been up to each individual state to determine the confidentiality regulations and the exceptions that will be allowed to accompany these regulations. These state statutes do have some similarities, such as the waiver of confidentiality with written authorization from the owner.⁸⁸ States have differed on the exceptions allowed for veterinary-patient confidentiality, which has created a large variety of differing state statutes. Some states have adopted a more liberal interpretation of confidentiality while others have responded with a more conservative approach.⁸⁹ The vast array of differences in state statutory law on veterinary-patient confidentiality has created a

⁸⁵*Sims v. Humane Soc. Of St. Joseph County Indiana Inc.*, 758 F. Supp. 2d 737, 752 (N.D. Ind. 2010).

⁸⁶ *Id.*

⁸⁷ Huss, *supra* note 79.

⁸⁸ See generally *supra* note 75.

⁸⁹ *Id.*

significant hurdle for the Jockey Club's multistate medical database.

Several states have included exceptions in their laws that allow for the waiver of confidentiality in situations that affect public health. Kansas made several amendments to their veterinarian confidentiality law in 2006.⁹⁰ Included was an exception that allowed for disclosure in situations where public health may be endangered.⁹¹ However, this exception was limited to cases in which vaccinations had been administered.⁹² This limitation on the exception would likely hamper the ability of the online database to properly function because many drugs, such as PBZ, are not considered vaccines.⁹³ Similarly, Indiana has included an exception for public health issues. However, this exception allows for disbursement of information in the event a regulatory or health authority requests it to investigate a danger to public health.⁹⁴ Lastly, Illinois provides an exception for public health, but only if laws that deal with maintaining public health are affected.⁹⁵

In contrast, Kentucky has passed its own veterinary confidentiality law that differs in several ways from these other states. The first difference is the fact that the Kentucky statute offers no confidentiality exception under any circumstance that would affect public health.⁹⁶ The other major difference is the exception granted to veterinarians in relation to reporting information to the Kentucky Horse Racing Commission ("KHRC").⁹⁷ This allows the KHRC to investigate and supervise tracks around the state without putting the veterinarians at risk of breaking the confidentiality law. However, this exception only allows for reporting medications to the KHRC. It does not allow

⁹⁰ KAN. STAT. ANN. § 47-839.

⁹¹ *Id.*

⁹² *Id.*

⁹³ See generally, *Vaccinations for Adult Horses*, AM. ASS'N OF EQUINE PRACTITIONERS, http://www.aaep.org/custdocs/Adult%20Vaccination%20Chart_8.12.16.pdf (last visited Jan. 20, 2017) [<https://perma.cc/B2BH-82KL>].

⁹⁴ IND. CODE ANN. § 25-38.1-4-5.5.

⁹⁵ 225 ILL. COMP. STAT. ANN. 115 / 25.17.

⁹⁶ KY. REV. STAT. ANN. § 321.185.

⁹⁷ *Id.*

for the dissemination of that information to other state agencies or for Kentucky to look at information found in other states.

There are several states that have chosen to completely exclude any form of the public health or regulatory exception from their veterinary confidentiality law. For example, Georgia has excluded any sort of exceptions from their legislation, excluding the general client waiver most states allow.⁹⁸ Likewise, Florida and California, ranked as two of the highest equine producing states in the country for the year of 2014, do not provide any exception for the reporting of equine information to regulatory authorities or for protection of the public good.⁹⁹ The vast array of differences found across state statutes makes it difficult for the Jockey Club to find legal standing to support their goal of an online medical database.

C. AVMA's Exceptions to Confidentiality

Since the early 1960's, the AVMA has created a Model Veterinary Practice Act ("MVPA").¹⁰⁰ This act is designed to guide states as they develop legislation that will affect the veterinary practice found within their borders.¹⁰¹ The AVMA opted to revise the MVPA every few years to reflect professional, technological, and societal changes.¹⁰² In 2010, the AVMA recognized the need to make additional revisions to the MVPA, and created a task force whose job it was to determine these necessary changes.¹⁰³ The revised MVPA was approved in January 2012 and published in January 2013.¹⁰⁴

The latest revision of the MVPA contained a section that solely dealt with veterinarian-patient confidentiality.¹⁰⁵ This

⁹⁸ GA. CODE ANN. § 24-12-31.

⁹⁹ CAL. BUS. & PROF. CODE § 4857; *Distribution of Registered U.S. Foal Crop By State*, THE JOCKEY CLUB, <http://www.jockeyclub.com/default.asp?section=FB&area=4> (last visited Jan 20, 2017) [<https://perma.cc/FH4X-848Y>]; FLA. STAT. ANN. § 474.2165.

¹⁰⁰ *Model Veterinary Practice Act*, AM. VETERINARY MED. FOUND., <https://www.avma.org/KB/Policies/Pages/Model-Veterinary-Practice-Act.aspx> (last visited Jan. 23, 2017) [<https://perma.cc/VH5X-BNUE>].

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

section listed the exceptions that the AVMA felt should be included in veterinarian-patient legislation. Clause two of this section provided the exception:

Copies of or information from veterinary records shall be provided without the owner's consent to the Board or public health, animal health, animal welfare, wildlife, or agriculture authorities employed by federal, state, or local governmental agencies who have a legal or regulatory interest in the contents of said records for the protection of animal or public health.¹⁰⁶

This exception, if implemented in every state, may allow the Jockey Club to circumvent current confidentiality requirements.

The exception found in the MVPA would help the Jockey Club find legal standing to circumvent state confidentiality laws. This is because it would allow public health or animal health officials to search the medical database prior to a horse being transferred to another country for slaughter. However, to be able to push for the acceptance of this confidentiality exception, the Jockey Club will not only need states to adopt the specific provision but also show that public health needs to be protected.

V. HOW IS "PUBLIC HEALTH" DEFINED?

A. Legal Commentary

The term public health has been a debated term in the legal community for a long period of time. Parties on one side of the argument feel public health should be defined narrowly, which would limit public health to specific government intervention in areas of concern.¹⁰⁷ Parties on the other side favor a broad definition placing the focus on the general health of the population with laws, which would be utilized to prevent

¹⁰⁶ *Id.*

¹⁰⁷ Joshua Joel, *A Compelling Interest? Using Old Conceptions of Public Health Law To Challenge the Affordable Care Act's Contraceptive Mandate*, 31 GA. ST. U. L. REV. 613, 624–625 (2015).

potential health risks.¹⁰⁸ Additionally, several health organizations have developed their own definitions to push their own health initiatives. These competing concepts create a convoluted conception of public health.

The World Health Organization (“WHO”) has chosen to utilize a very expansive definition of health.¹⁰⁹ The definition in its constitution states, “Health is a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity.”¹¹⁰ This would allow public health to encompass any initiative that would advocate human happiness.¹¹¹ Similarly, the Institute of Medicine (“IOM”) has defined its own definition of public health. Its definition defines public health as “what we, as a society do collectively to assure the conditions to be healthy.”¹¹² This definition promotes a collective action towards health, which focuses on the ways in which health affects people rather than individuals.¹¹³

The AVMA has also tried to develop its own conception of public health. The description provides, “Public health focuses on disease prevention, prolonging life and promoting health in our society”.¹¹⁴ In connection with this definition, the AVMA has developed several programs, including “One Health”, which focuses on the interdependency of human and animal health and how they affect each other.¹¹⁵ This conception allows the AVMA to become involved in the development of not only animal health, but human health as well.

Legal scholars have also debated amongst themselves what the appropriate definition of public health should be. Some

¹⁰⁸ *Id.* at 624.

¹⁰⁹ *See generally id.* at 625.

¹¹⁰ *Constitution of the World Health Organization*, WHO, http://www.who.int/governance/eb/who_constitution_en.pdf (last visited Jan. 23, 2017) [<https://perma.cc/QRP8-NCYS>].

¹¹¹ Joel, *supra* note 107, at 625.

¹¹² Micah L. Berman, *Defining the Field of Public Health Law*, 15 DEPAUL J. HEALTH CARE L. 45, 61 (2013).

¹¹³ *See id.*

¹¹⁴ *Veterinarians and Public Health*, AM. VETERINARY MED. FOUND., <https://www.avma.org/public/health/pages/default.aspx> (last visited Jan. 23, 2013) [<https://perma.cc/7H5G-6SQV>].

¹¹⁵ *One Health – It’s All Connected*, AM. VETERINARY MED. FOUND., <https://www.avma.org/KB/Resources/Reference/Pages/One-Health.aspx> (last visited Jan. 23, 2013) [<https://perma.cc/3W93-AVF3>].

scholars have adopted a narrow definition of public health. Scholars, such as Mark Rothstein, feel that public health should be defined narrowly to prevent government intervention in society.¹¹⁶ This type of theory would have public health focus more on the government's appropriate response to health issues rather than the proactive prevention of future health problems.¹¹⁷ In response, other scholars have developed a broad interpretation of public health. This type of definition, described by Dan Beauchamp, called for public health to be defined in a way that would "advocate for political and social change, including more expansive government authority".¹¹⁸ This would allow the government to be proactive in addressing issues and risk factors that have the potential to affect the general health of society.¹¹⁹

These different interpretations of the definition of public health could have a significant impact on the ability to implement a multi-state online medical database for equines. If a narrow definition is to be adopted, it would likely prevent the utilization of the database. This is primarily because Americans do not eat horse meat, and the potential danger of tainted meat would not be an immediate health issue for Americans.¹²⁰ However, if a broader interpretation were to be adopted, the multi-state database may be allowed under the public health exception. This is due to the expansive role government agencies would be allowed to play in policing potential health risks.

B. Interpretation by U.S. Courts

For the Jockey Club to be able to utilize the public health exception, they are going to need to support their legal standing with legal authority. State courts have generally been reluctant to define public health. However, the Supreme Court has ruled that terms with multiple meanings are given content by the

¹¹⁶ Berman, *supra* note 112, at 65.

¹¹⁷ *Id.*

¹¹⁸ *Id.* at 65–66.

¹¹⁹ *See generally id.*

¹²⁰ *See generally* Susanna Kim, *The Strange World of U.S. Horse Meat Regulation*, ABC NEWS (Feb. 26, 2013), <http://abcnews.go.com/Business/find-horse-meat-us/story?id=18598602> [<https://perma.cc/8HJZ-4HLV>].

words that surround them.¹²¹ This allowed the Court to give the term a broad meaning in regards to defining federal legislation.¹²²

In the attempt to interpret a statute, the Supreme Court ruled that the statutory construction must be read in the context of the words around it. This is highlighted in the case of *Food and Drug Admin. V. Brown & Williamson Tobacco Corp.*¹²³ In this case, the FDA was attempting to regulate tobacco products through the Food, Drug, and Cosmetic Act.¹²⁴ Tobacco companies opposed this, arguing that this interpretation of the act allowed the FDA to overstep its regulatory power.¹²⁵ The Court agreed, determining that interpretation of a statute must be in conjunction with the overall statutory scheme.¹²⁶

In defining public health, the Supreme Court determined that public health would be given a broad definition. In the case of *Whitman v. American Trucking Assoc's., Inc.*, the Environmental Protection Agency ("EPA") was being challenged in regards to whether the Clean Air Act gave the EPA power to regulate air emissions.¹²⁷ One of the foundations of the argument against this power was that the regulation did not fall into the realm of public health.¹²⁸ *American Trucking* applied a more specific definition of public health, which restricted it to a description that only allowed for responsive measures, similarly described by Rothstein.¹²⁹ The Supreme Court disagreed with this assertion relying on the concept that the interpretation of words with multiple meanings are to be determined by the surrounding context within the sentence.¹³⁰ In the end, the Court adopted the broad definition of public health, which is "the health of the public".¹³¹

¹²¹ *Whitman v. Am. Trucking Ass'n*, 531 U.S. 457, 466 (2001) (citing *Food and Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132-33 (2000)).

¹²² *See generally id.* at 465-66.

¹²³ *See generally Food and Drug Admin.*, 529 U.S. at 132-33.

¹²⁴ *See id.* at 125.

¹²⁵ *See generally id.* at 132.

¹²⁶ *Id.* at 133.

¹²⁷ *Whitman*, 531 U.S. at 462.

¹²⁸ *Id.* at 465.

¹²⁹ *See generally id.* at 465-66.

¹³⁰ *Id.* at 466.

¹³¹ *Id.*

This broad interpretation of public health provides an opening for regulatory agencies to take a proactive approach in taking on issues that influence the overall public health. The utilization of horse meat in the global food system and the fear of similar meat fraud scenarios, as seen in Europe in 2013, could create a situation in which the public health would need protection. It is possible that this broad interpretation would allow federal or state agencies to monitor equines treated with drugs harmful to humans, through the multi-state medical database.

VI. CONCLUSION

A. Does the Jockey Club Have Legal Standing?

In 2017, the Jockey Club of America mandated that all foals needed to be microchipped for identification purposes. One of the goals of the microchip system is to create a multistate medical database. Without having proper legal standing, it will be difficult for the Jockey Club to implement this database, as seen in Europe. The best avenue for the Jockey Club would be to pursue legal standing through the public health exception.

The public health exception can be found in several state statutes, as well as the AVMA's Model Veterinarian Practitioner's Act.¹³² The goal of it is to allow the dissemination of confidential information if there is a situation in which public health may be affected.¹³³ Critics of the use of this exception will argue that horse meat is not consistently consumed in the United States.¹³⁴ This would mean that the public health is not in danger of receiving horse meat that may be tainted with dangerous medications. However, this argument would rely on a narrow interpretation of the definition of public health.¹³⁵ As seen by the Supreme Court decision in *Whitman*, the Court decided to utilize

¹³² See generally KAN. STAT. ANN. § 47-839; IND. CODE ANN. § 25-38.1-4-5.5; 225 ILL. COMP. STAT. ANN. 115 / 25.17; KY. REV. STAT. ANN. § 321.185; GA. CODE ANN. § 24-12-31; FLA. STAT. ANN. § 474.2165; AM. VETERINARY MED. FOUND., *supra* note 100.

¹³³ See *id.*

¹³⁴ See Kim, *supra* note 120.

¹³⁵ *Id.*

a broad definition of public health.¹³⁶ This allows regulatory agencies the power to determine how best to protect public health. Even though the opinion is not mandatory on the state level, it would provide protection for the use of the public health exception.

However, the ability to utilize the public health exception does not clear a path for a multi-state database. This is because the federal government has not passed legislation that would implement veterinary-patient confidentiality nationwide. Therefore, it has been left to the states to each determine their own confidentiality laws.¹³⁷ Unfortunately for the Jockey Club, the differences in the state laws are wide ranging and not all of them have included a public health exception in their legislation.¹³⁸ Therefore, even though the Jockey Club has legal standing to utilize an exception to veterinary-patient confidentiality they will have difficulty utilizing due to the vast array of legislation.

B. Possible Solution

The lack of uniformity of exceptions to veterinary-patient confidentiality in state law presents several issues for the Jockey Club's implementation of an equine multi-state medical database. In response to these issues, the Jockey Club should utilize the AVMA. The AVMA has recently introduced the MVPA, which expanded the exceptions allowed for veterinary-patient confidentiality, including the public health exception.¹³⁹ The Jockey Club should partner with the AVMA and work towards increasing the number of states to adopt the utilization of the public health exception, as seen in the Indiana statute published in 2014 or passing legislation on the federal level.¹⁴⁰ This would allow for the sharing of veterinary medical information across state lines, as well as allow authorities to properly supervise the horses that are transferred for slaughter. If this lack of

¹³⁶ See Whitman, *supra* note 122, at 466.

¹³⁷ See generally *supra* note 75.

¹³⁸ See generally *id.*

¹³⁹ See AM. VETERINARY MED. FOUND., *supra* note 100.

¹⁴⁰ See generally *supra* note 94.

uniformity is not addressed, it is unlikely that the Jockey Club's medical database will come to fruition.

