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HORSE CENTS: Turning Your Equine Claim into Recovery Dollars

*by Suzanne C. Radcliff, Esquire and Equestrienne **

Cozen O'Connor
2300 Bank One Center
1717 Main Street
Dallas, TX 75201
Phone: 214.462.3023 Fax: 866.433.4003
E-mail: SCRadcliff@cozen.com



Horse racing is called the Sport of Kings. But you don't have to be royalty to be mesmerized by the power, grace and beauty of these animals. In 2006, the world was captivated by the thoroughbred Barbaro. One minute, he was the Kentucky Derby champion and a triple crown contender, the next he was suffering from a career ending and life threatening injury when he broke his leg in the Preakness Stakes. Sadly, Barbaro's story came to a tragic conclusion this week when he was euthanized due to a series of complications. Although most people were only concerned with Barbaro's recovery, his story touches on many of the issues that arise in equine claims. The purpose of this article is to focus on some of those issues and provide the adjuster and subrogation professional with a framework to properly and fully analyze subrogation potential in equine claims.

* Suzanne started riding hunter/jumper horses competitively at age ten. She played polo for the University of Oklahoma and was a starter on the women's team for all four years.

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UNDERSTANDING THE POLICY AND ENDORSEMENTS

The first step in adjusting and analyzing an equine loss is to review the policy. The standard policy purchased for horses is the equine mortality policy. As expected, the “loss” occurs when the insured horse dies. The equine mortality policy is either an “agreed value policy” or “a fair market value policy”. At the time the policy is underwritten, the underwriter generally requests documentation or proof of the value of the horse, or requests a current appraisal be performed. Under the agreed value policy, the stated value of the horse can not be questioned by the carrier after a loss occurs. The carrier must pay the stated amount in the policy regardless if the horse’s current value is much lower. Likewise, the policy holder only receives the stated value even if the horse’s value has increased or is greater than the stated amount. Under the fair market value policy, the carrier has an opportunity to question or reassess the value of the horse at the time of the loss. When pursuing subrogation, remember that the recoverable damages are limited to the fair market value of the horse at the time of death, regardless of the stated value in the policy.



In addition to purchasing the standard equine mortality policy, the owner may purchase a variety of endorsements, including loss of use, major medical and stallion infertility. The loss of use endorsement covers an injury that renders the horse permanently incapable of performing its specific stated purpose. For instance, a loss of use endorsement for a show-jumping horse whose stated purpose is competing in show-jumping events will cover the horse only if a qualified veterinarian determines the horse to be permanently unable to jump. At the time of purchasing the endorsement, the policy holder must list the specific stated purpose - such as breeding, show jumping, thoroughbred racing, barrel racing, or trail riding.

The adjuster handling a loss of use claim need not consider whether the horse has residual value for another purpose, such as breeding, but only that the horse can not perform its stated purpose. The loss of use endorsement often only covers some percentage of the stated value of the horse, never 100%. This is because the horse may still have some residual value to the policy holder. In litigation against a potentially liable third party, any residual value will be taken into consideration as a part of the horse’s fair market value and may greatly impact recoverable damages. For example, Barbaro had race earnings of over \$2.3 million and a Kentucky Derby win. Had he survived and been able to breed, he would have had considerable residual value.

The major medical endorsement functions like health insurance for the horse in question. The endorsement will cover certain veterinary expenses. In litigation, veterinary bills are typically recoverable with the proper documentation to prove that the services were reasonable and necessary. An infertility claim is self-explanatory, but still requires the proper documentation from a qualified veterinarian.

THEORIES OF RECOVERY

There are many potential third parties to look to for a recovery in an equine loss. If the horse is injured or killed, the question is what caused the injury or death. Assuming the stable owner is not the owner of the horse, the stable owner may be a potential target. If the barn or the grounds presented a dangerous condition that caused the injury or death, a premises liability case may exist. Before going too far down this road, the boarding agreement must be obtained and examined for any waivers of liability or waivers of subrogation. The stable will often carry a care, custody and control policy, or “CCC policy” that covers any horses that are injured while in the care of the stable. Be sure to check policy limits, however, because some policies only pay a limited amount per horse – such as \$100,000, and may have a low aggregated limit.



Another potential target is the treating veterinarian. If the treating veterinarian fails to properly treat or diagnose a condition that leads to the deterioration of that condition and permanent lameness or injury, a subrogation claim may be viable. Likewise, trainers may also be potential targets for failing to recognize a problem or failing to timely seek veterinary assistance. If the trainer does not address an injury, or disregards a veterinarian’s advice, the horse could suffer additional injury or permanent lameness if pushed to exercise and work. It is critical to have an equine veterinarian and trainer that can render the opinion that the treating veterinarian and/or the trainer failed to meet the standard of care which was the proximate cause of the injury.

Product manufacturers, including drug companies, are another potential target. There can be any number of ways a defective product could kill or injure a horse - from a heater or defective light causing a barn fire, to a horse-trailer tire blowing out and causing an accident. In a fire situation, local codes should be reviewed to determine whether any fire suppression system should have been installed and maintained by the stable manager. Thinking creatively about possible theories of recovery in the early stages is invaluable to know what parties to place on notice and what evidence and documentation should be retained.

HIRING THE RIGHT EXPERTS AND AVOIDING SPOILIATION

Just like property damage claims, it is vital to hire the right experts and conduct a thorough and timely investigation. But unlike the typical property damage claim, with equine mortality claims it is often impractical and difficult to maintain the deceased horse for days or weeks in order to allow for all interested parties to retain experts and examine the horse.

Many times, the board of health will not allow the horse to be retained. Nonetheless, immediate notice should be given in writing to any potentially responsible third parties. DNA samples should be collected and preserved to prove that the deceased horse is in fact the insured horse. If it is believed that a third party caused the death, it is also recommended that a full post mortem examination be conducted at either a university or a diagnostic laboratory in order to conclusively establish the cause of death. Photographic documentation and the appropriate records from an equine veterinarian are also helpful in combating any claims of spoliation.

In a loss of use situation, a veterinary expert will be necessary to establish that the horse can no longer perform its stated purpose. Similar to a personal injury case, the right medical experts and records are needed to support such a claim. The insurance company will require a qualified veterinarian's report before paying the claim, but the subrogation representative may wish to consult with the veterinarian to make sure the report is thorough and easily understood by an opposing adjuster, expert or even a jury.

Consideration should also be given to whether the treating veterinarian is qualified to serve as a litigation consultant and testify at trial. Many veterinarians, like medical doctors, may be hesitant to testify against others in their industry. When there is a potential malpractice claim against a veterinarian, this issue should be addressed up front with the current treating veterinarian. If a new expert is needed, it is best to give him or her an opportunity to examine the horse in question as close as possible to the time of the injury. Often times the insurance company will hire a separate veterinarian to avoid any conflict of interest for the insured's veterinarian, which gives the subrogation representative a choice of experts.



MEASURE OF DAMAGES

A critical part of any subrogation analysis is the determination of what damages are legally recoverable from a potentially liable third party. With an equine claim, this step is of particular importance because the insured value rarely, if ever, equals what is legally recoverable. In most jurisdictions, the fair market value of the horse is the proper measure of damages. This is because the owner of the horse may choose to insure the horse for less than its true value to avoid higher premiums. To prove fair market value at trial, there must be a well supported opinion given by a qualified expert in the field. Consideration should be given to the value of future breeding rights or the ability of the horse to perform some other function. In today's climate of frequent expert challenges, choosing the right expert is essential. The important thing to note is that although a third party may be liable for injuring the horse and rendering it incapable of performing its stated purpose, the horse may still have a significant residual value.

In addition to seeking the value of the horse, a policy holder often asks whether they may seek pain and suffering or emotional distress damages for their loss. In the vast majority of jurisdictions, these types of damages are not recoverable because there is no physical manifestation of an injury to the policy holder. The insured will be limited to economic damages, which may include a claim for business interruption or loss of future breeding rights.

FIRST DOLLAR OUT

With many horses being underinsured, first dollar out questions typically arise in equine subrogation claims. It is important to be aware of the policy language and any first dollar out rules in your jurisdiction. In addition, there is no penalty for underinsuring a horse. A proration agreement is one way to effectively handle what could be a sticky situation with the insured after litigation begins. Such an agreement also provides a platform for the carrier and the policy holder to discuss what the actual recoverable damages are before litigation ensues. Having these discussions up front helps to manage the sometimes unreasonable expectations of the policy holder who is devastated by the loss of their equine companion.

CONCLUSION

As always, Cozen O'Connor is prepared to share its knowledge and experience in handling unique and difficult claims. Equine claims is just another area in which Cozen O'Connor stands at the forefront. With some forethought and early retention of the right experts, an equine claim can present a viable subrogation opportunity.