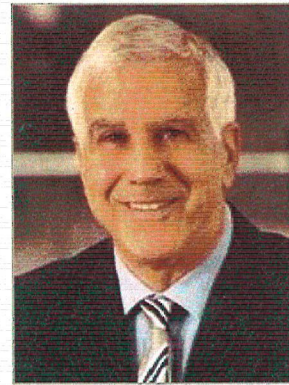


OPINION: Level The Chemical Playing Field

Law360, New York (September 28, 2016, 5:42 PM EDT) -- The continuous stream of performance-enhancing doping news plaguing international sport was headlined recently with an acronym that will be new to probably well over 99 percent of the public: TUE — therapeutic use exemptions. Indeed, that newness illustrates the primary problem with TUEs: They are not at all transparent. Without transparency, it is impossible to analyze other likely ethical problems that TUEs raise.



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The idea of a TUE is deceptively simple. An athlete with a medical condition requiring a drug on the [World Anti-Doping Agency's list of prohibited substances](#) may apply to that agency for permission to use that drug. What was publicized recently, as a result of hacked WADA emails, is that well-known athletes, like Olympic gold medalist Simone Biles, were taking these otherwise prohibited drugs with WADA's permission.

What illustrates the total lack of transparency is that, although millions of words were written and spoken about Biles during the Olympics, none revealed her TUE. Also not revealed was (1) how she got the TUE, whether it was on the word of her personal doctor only or whether additional, independent medical opinions were required, and (2) what effect use of the performance-enhancing drug had on her performance.

The question of transparency is complicated by privacy issues. Or is it? Competing in the Olympics is not a right, nor is taking performance-enhancing drugs. If one wants to compete, the price should be disclosure, at least to competitors, of what drugs are being used and why.

A reasonable rule balancing privacy and competition would disclose, on a confidential basis, to competitors — not the public — that an individual in the competition is taking a drug on the banned list pursuant to the approval of a neutral physician retained by the sports governing body responsible for the sport in question, for example the International Association of Athletics Federation in the case of track and field. The competitor without the TUE would then have a right to challenge that TUE before the sports governing body, which would make the final determination.

The reason for such a rule is not trivial. The primary point of international athletic competitions like the Olympics is to see who is the best athlete on a level playing field. It is indisputable that a competitor using performance-enhancing drugs is not competing on a level playing field.

This state of affairs is obviously unfair to the athletes not eligible for TUEs. They are competing against a performance-enhanced competitor.

It is also unfair to the athlete receiving the TUE. Was Biles really the best in her events? We will never know because we will never know what role performance-enhancing drugs played in her success, which is clouded by her TUE.

For that reason, WADA should supplement its list of banned substances with an explanation of how and how much performance is enhanced by the banned substance. Such a listing may result in the removal of some substances from the banned list, which includes, for example, caffeine and marijuana.

Aside from providing more transparency, international sporting authorities must adjust this situation to level the playing field. If a drug is truly performance-enhancing, its use should not be permitted to anyone. A reasonable exception to this rule would be permitted in the highly unlikely event that it can be demonstrated scientifically that the drug merely compensates for the medical condition of the athlete rather than enhancing performance.

Level playing fields no longer relate only to topography. Chemically level playing fields are also now crucial to the purpose of sport.

—By Ron Katz, [Manatt Phelps & Phillips LLP](#)

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